NO. 99782-9

SUPREME COURT OF THE STATE OF WASHINGTON

SOEUN AM, a single individual, and
KHEAM CHEAM, a single individual,

Appellants,

v.

THE ESTATE OF DILLON K. O'BRIEN, and the
STATE OF WASHINGTON, its subdivisions and agencies, and
the WASHINGTON STATE PATROL,

Respondents.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

CARL WARRING; WSBA #27164
Assistant Attorney General
Office of the Attorney General
1116 West Riverside Avenue
Suite 100; OID#91106
Spokane, WA 99201-3123
Phone: (509) 456-3123
Fax: (509) 458-3548
Email: carl.warring@atg.wa.gov

TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW 2

III. COUNTERSTATEMENT OF THE CASE 3

A. The O'Brien-Am Collision 3

B. Reports of O'Brien's Driving and the Patrol's Response 3

C. Trial Testimony Regarding WSDOT Variable Message Signs 5

D. Exclusion of Am and Cheam's Theory of Liability Premised Upon Use of WSDOT's Variable Message Signs 6

E. The Jury's Verdict 8

F. The Court of Appeals Unanimously Affirmed 9

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED 10

A. The Court of Appeals' Decision Does Not Conflict with Controlling Authority and Does Not Involve an Issue of Substantial Public Interest 10

B. A Directed Verdict is Proper Where a Plaintiff has Not Met His or Her Burden of Production 12

C. The Court of Appeals Properly Determined That Am and Cheam Failed to Present Sufficient Evidence to Present Their Variable Message Board Theory to a Jury 13

V. CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Am v. O'Brien,
No. 80596-7-I, 2021 WL 1529760
(Wash. Ct. App. Apr. 19, 2021) ..... passim

Cavner v. Continental Motors, Inc.,
8 Wn. App. 2d 1001 (2019) (unpublished) 18

Channel v. Mills,
77 Wn. App. 268, 890 P.2d 535 (1995) 14

Davis v. Microsoft Corp.,
149 Wn.2d 521, 70 P.3d 126 (2003) 12

Estate of Bordon ex rel. Anderson v. Dep't of Corr.,
122 Wn. App. 227, 95 P.3d 764 (2004) 11

Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, PLLC,
177 Wn. App. 828, 313 P.3d 431 (2013) 13

Hartley v. State,
103 Wn.2d 768, 698 P.2d 77 (1985) 14

Helman v. Sacred Heart Hosp.,
62 Wn.2d 136, 381 P.2d 605 (1963) 13

Maltman v. Sauer,
84 Wn.2d 975, 530 P.2d 254 (1975) 13

Mendoza v. State,
No. 18-0350, 2020 WL 85401 (Ariz. App. Jan. 7, 2020) 14

N.L. v. Bethel Sch. Dist.,
186 Wn.2d 422, 378 P.3d 162 (2016) 10

Rikstad v. Holmberg,
76 Wn.2d 265, 456 P.2d 355 (1969) 13

Sheikh v. Choe,
156 Wn.2d 441, 128 P.3d 574 (2006) 12

Sing v. John L. Scott, Inc.,
134 Wn.2d 24, 948 P.2d 816 (1997) 12

Whitchurch v. McBride,
63 Wn. App. 272, 818 P.2d 622 (1991), *review denied*,
118 Wn.2d 1029, 828 P.2d 564 (1992) 11, 13

Other Authorities

6 *Washington Practice: Washington Pattern Jury Instructions: Civil* § 15.01 (7th ed. 2019) 14

Rules

CR 50 11

CR 50 (a)(1) 12

RAP 13.4(b) 10, 11, 14

I. INTRODUCTION

After a full trial on the merits, a King County jury rejected multiple theories of liability put forward by Plaintiffs/Appellants Am and Cheam against the State. While the trial court precluded them from arguing one discrete theory of liability, the Court of Appeals correctly affirmed the trial court's ruling that Am and Cheam had failed to come forward with sufficient evidence to support their theory. Specifically, Am and Cheam failed to establish that the Washington State Department of Transportation could have responded to a request by the Washington State Patrol (WSP) to activate variable message sign warnings in time to prevent the O'Brien-Am collision.

In its unpublished decision, the Court of Appeals carefully considered the record and observed that the only evidence adduced at trial actually precluded Am and Cheam from proving causation. Am and Cheam continue to fail to point to any evidence in the record to demonstrate that the absence of a request by WSP to activate variable message board warnings caused the O'Brien-Am collision. They offer mere speculation.

Am and Cheam's failure to come forward with sufficient evidence does not warrant discretionary review by this Court. This fact-specific question is neither a significant question of constitutional law nor an issue of substantial public interest that should be determined by this Court. Nor

does the Court of Appeals decision conflict with any decision of this Court or the Court of Appeals. This Court should deny discretionary review.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

Did Am and Cheam fail to produce sufficient evidence of proximate cause to submit their "variable message board" theory to a jury, where (1) they failed to present evidence to establish WSDOT would have responded to a WSP request to activate warning messages in time to prevent the O'Brien-Am collision; and (2) the only evidence adduced at trial established WSDOT would not have responded to a request by WSP to activate any warning messages in time to prevent the O'Brien-Am collision?

III. COUNTERSTATEMENT OF THE CASE

A. The O'Brien-Am Collision

On May 17, 2015, at approximately 3:57 a.m., a vehicle driven by Dillon O'Brien collided with a vehicle driven by Soeun Am in the westbound lanes of I-90 near milepost 54. RP 602-03; Ex. 110. O'Brien was driving the wrong way on I-90 (eastbound in the westbound lanes) and had been for approximately 14 minutes before he collided with the vehicle driven by Am. CP 156, 901, 1137; RP 225-26, 253-55; Ex. 3. O'Brien was under the influence of alcohol and marijuana while he was driving, RP 642; Ex. 118, and he died in the collision. CP 197; RP 866, 908. Soeun Am and his mother, Kheam Cheam, were both severely injured.

B. Reports of O'Brien's Driving and the Patrol's Response

Approximately 26 minutes before the O'Brien-Am collision, at 3:31 a.m., a citizen called 9-1-1 and reported a possible erratic/DUI driver on eastbound I-90 at milepost 38. RP 277-80, 378-79, Ex. 2. Patrol Communications Officer Tristan Cody broadcast the report upon receiving the call. RP 589-91, Ex. 2. The reported location of the sighting at milepost 38 fell within Trooper Theodore Hahn's autonomous patrol area. RP 363.

At the time of broadcast, Trooper Hahn was at the Bellevue Detachment near milepost 11, completing a certified technical specialist report of a collision he previously investigated. RP 359-67, 395-96. At that time of

the morning, Hahn was the only trooper on duty in his autonomous patrol area. RP 370, 374-77. Based on the 9-1-1 call, the reported erratic driver (later determined to be O'Brien) was 27 miles east of Trooper Hahn's location at the Bellevue Detachment, and was traveling further away from the detachment. RP 379-86.

Hahn knew that by the time he was able to make it to milepost 38, he would have little chance of locating the suspect vehicle. RP 379-86. He testified, based on his training and experience, "trying to chase down an erratic driver is something that's very, very hard to locate." Trooper Hahn reasoned that, by the time he would have been able to reach the vehicle's location, "there is a number of places it could either turn around or exit." RP 379-80. It would also make him unavailable to respond to calls from the most active section of his autonomous patrol area. RP 368-69, 379-86, 395, 546-47. Weighing the futility of finding the reported vehicle and the necessity of being available in another area, Hahn did not initiate a search. RP 466-67.

Twelve minutes later, at 3:43 a.m., the Patrol received a report of a driver traveling eastbound in the westbound lanes of I-90 near milepost 38. RP 388, Ex. 3. Communications Officer Alyssa Harwick broadcast the report upon receiving it. Ex. 3. Trooper Hahn heard the broadcast and promptly left the Bellevue Detachment to investigate the wrong way driver report. RP 388.

Additional 9-1-1 reports clarified that the wrong way driver (O'Brien) was actually further away than first reported. RP 596-97, Ex. 2. Specifically, a 3:44 a.m. report placed O'Brien at milepost 46; a 3:46 a.m. report placed O'Brien at milepost 47; a 3:47 a.m. report placed O'Brien at milepost 48; and a 3:50 a.m. report placed O'Brien at milepost 50. RP 596-97, Ex. 3. As a result of the distance separating them and O'Brien's direction of travel, Trooper Hahn was unable to catch up to O'Brien before the 3:57 a.m. collision at milepost 54. RP 388-91, Ex. 100. In fact, Trooper Hahn, despite averaging 95 mph, did not arrive at the scene of the collision until 4:13 a.m., approximately 30 minutes after leaving the Bellevue Detachment office. RP 388, 473.

C. Trial Testimony Regarding WSDOT Variable Message Signs

At trial, Am and Cheam asserted a number of discrete theories of liability. They offered the testimony of Donald Van Blaricom at trial. RP 177-273. In relevant part, Van Blaricom opined the WSP should have enlisted WSDOT to activate wrong-way driver warnings on WSDOT variable message signs. However, and importantly, he conceded that he did not know the process WSDOT engages in to activate variable message signs. RP at 269. Further, despite his early attempts to convince the jury that WSDOT could activate variable message signs "immediately," Van Blaricom ultimately also conceded there was no factual basis for his claim. RP at 272. Finally, he was forced to acknowledge that he would have to defer to the available records to

determine how long it actually takes WSDOT to activate a message. RP at 271-72. Evidence presented at trial illustrated that it would have taken WSDOT approximately 40 minutes to program and activate its variable message signs on the morning of the collision.

At 4:34 a.m., the Patrol asked WSDOT to activate its message signs with a message to cue traffic to exit the highway to avoid the collision scene. RP 603-04, Ex. 110. At 4:42 a.m., WSDOT had not yet activated the variable message signs as Trooper Christine White drove towards the scene of the collision. RP 604-05, Ex. 104. In fact, WSDOT did not activate the message signs until 5:20 a.m. RP 605, Ex. 110, approximately 40 minutes after the first request.

D. Exclusion of Am and Cheam's Theory of Liability Premised Upon Use of WSDOT's Variable Message Signs

Immediately before closing arguments, during the State's motion for a judgment as a matter of law, the trial court focused on one of the several theories posited by Am and Cheam during trial: whether the alleged failure of the Patrol to ask WSDOT to activate variable message signs to warn motorists of a wrong way driver was a proximate cause of the collision. RP 657-68. Ultimately, the trial court concluded that insufficient evidence existed to present this specific theory of liability to the jury. RP 667. The trial court explained:

> And in this case, we have the expert Van Blaricom saying that this is the National Traffic Safety Board standard, but we have nothing in the record here that suggests that this is the policy of the State to put in -- when there is a wrong-way driver, put it on reader boards, we don't have any evidence that the State Patrol is responsible for that, other than that one slight fact in the policy about the State Patrol and DOT putting it up on the reader board on inclement weather, *and we don't have any other evidence about whether Mr. Am would have seen the sign, where he was in relation to the sign, where the sign was.*

RP 667 (emphasis added). Accordingly, the trial court precluded any affirmative arguments that the failure to use variable message signs was a proximate cause of the accident:

> Now, you know, there is a little bit of a fine distinction here, but there was evidence that there was a reader board, that there was posting on them. *I'm not going to preclude any mention of the reader board or anything of that sort, you are welcome to do that, but to make that step of connection to the lack of information on the reader board as a cause of this accident is a step too far, and the Court will sustain an objection if we go down that path.*
>
> But on the same token, mentioning the reader boards, that they were there, that the troopers called in or did not call in is fine, *but to try to causally connect that to the accident is legally insufficient.* There is not enough evidence to legally make that – properly make that argument before the jury, and so the Court will sustain any objection related to that.

RP 667-68 (emphasis added).

E. The Jury's Verdict

Am and Cheam argued to the jury their remaining theories – that the State failed to exercise reasonable care because it (1) did not have more troopers on duty, (2) did not have a trooper more centrally located and actively patrolling in the area of the collision, (3) did not immediately respond to the initial 3:31 a.m. report of an erratic/DUI driver, (4) did not properly train troopers about how to respond to wrong-way drivers, (5) did not call for assistance from other law enforcement agencies to respond to the wrong-way driver, and/or (6) did not have a plan for responding to wrong way drivers on I-90. RP 910-22, 932. On August 8, 2019, the 12-person jury returned a verdict completely absolving the State on the issues of negligence, proximate cause, and damages. CP 1369-74. In reaching its conclusions, the jury either rejected liability arguments by Am and Cheam that (1) the State had actual knowledge of a statutory violation, or (2) did not exercise reasonable care – and potentially the jury rejected both arguments. RP 910-12.

The jury also necessarily rejected various theories of causation offered by Am and Cheam, like the collision would not have occurred if a trooper had been in a different location and if emergency lights, flares, spike strips, or a physical closure of the roadway had been attempted. RP 928-31. Instead, the jury concluded that Dillon O'Brien was solely responsible for the injuries suffered by Soeun Am and Kheam Cheam. CP 1369-74.

F. The Court of Appeals Unanimously Affirmed

Following an appeal by Am and Cheam, Division I of the Court of Appeals issued an unpublished decision on April 19, 2021. *Am v. O'Brien*, No. 80596-7-I, 2021 WL 1529760 (Wash. Ct. App. Apr. 19, 2021). The Court of Appeals focused on the single issue of whether the trial court properly precluded Am and Cheam from arguing their "variable message signs" theory to the jury because they lacked sufficient evidence to establish cause-in-fact. *Id.* at *1. The Court of Appeals affirmed the trial court holding:

> Had the jury been permitted to decide the issue of factual proximate cause with regard to the claims advanced by Am and Cheam concerning the Washington State Patrol's failure to ask DOT to activate a warning on the I-90 reader boards, the jury would have been left to *speculate* as to whether the reader boards were even capable of being activated in the time remaining prior to the collision.
>
> The trial court correctly ruled that insufficient evidence was introduced to support a jury finding of factual proximate cause. Accordingly, the motion was properly granted.

Id. at *6 (emphasis added). Because the Court of Appeals affirmed the trial court on this basis, the Court of Appeals did not reach the other issues raised on appeal. *Id.* at *7 n.15.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' Decision Does Not Conflict with Controlling Authority and Does Not Involve an Issue of Substantial Public Interest

As a threshold matter, because Petitioners seek discretionary review of a Court of Appeals decision, they must satisfy one of the requirements of RAP 13.4(b), which provides:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Am and Cheam make two claims: (1) that the Court of Appeals decision below conflicts with a decision of the Supreme Court, and (2) involves an issue of substantial public interest. Pet. for Review 12-13. Neither claim possesses any merit.

In an effort to manufacture a conflict, Am and Cheam cite *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016). Pet. for Review 14. However, *N.L.* supports both the trial court's and Court of Appeals' decisions in this matter. In *N.L.*, this Court held that cause in fact "is *normally* a question for the jury." 186 Wn.2d at 437 (emphasis added). But where a plaintiff fails to meet his or her burden of producing evidence

sufficient to support a finding that the accident would not have occurred but for the allegedly negligent conduct of the defendant, judgment as a matter of law is appropriate. *Whitchurch v. McBride*, 63 Wn. App. 272, 818 P.2d 622 (1991), *review denied*, 118 Wn.2d 1029, 828 P.2d 564 (1992).

In the context of a CR 50 motion, a plaintiff must produce evidence sufficient to support a finding of causation without calling on the jury to speculate. *Estate of Bordon ex rel. Anderson v. Dep't of Corr.,* 122 Wn. App. 227, 243, 95 P.3d 764 (2004). Here both the trial court and Court of Appeals determined that the jury would be required to speculate whether WSDOT could have activated its reader boards in time to prevent the O'Brien-Am collision. RP 666-68; *Am*, 2021 WL 1529760, at *6. Ultimately, Am and Cheam presented their remaining theories to the jury and, in the absence of a conflict with a decision of this Court or a published opinion of the Court of Appeals, they are asking this Court to set aside the jury's verdict and order a new trial. Review is not warranted.

Next, Am and Cheam ask this Court to step far outside the bounds of RAP 13.4(b) to grant review and consider a Court of Appeals opinion that "involves an issue of substantial public interest that should be determined by the Supreme Court." But the Court of Appeals opinion did not address the policy decision of when the message board system should be mandated. Am and Cheam are asking this Court to set aside the verdict

of the jury where the decision of the Court of Appeals neither conflicts with a decision of this Court nor does the petition involve an issue of substantial public interest that should be determined by this Court. Review is not warranted and should be denied.

B. A Directed Verdict is Proper Where a Plaintiff has Not Met His or Her Burden of Production

If this Court were to grant discretionary review, it reviews rulings on motions for judgment as a matter of law de novo, engaging in the same inquiry as the trial court, and may affirm on any ground supported by the record. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006); *Davis v. Microsoft Corp.,* 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). CR 50 (a)(1) provides in relevant part: "If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law . . . ."

A motion for judgment as a matter of law should be granted when "viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). "Substantial evidence is a 'sufficient

quantum to persuade a fair-minded, rational person of the truth of a declared premise.'" *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 861-62, 313 P.3d 431 (2013) (quoting *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963)).

Further, to survive a challenge to the sufficiency of evidence, a plaintiff's evidence must demonstrate a breach of the duty and "a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff." *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969); *see also Whitchurch*, 63 Wn. App. 272 (affirming directed verdict where plaintiff did not produce sufficient evidence to support finding that accident would not have happened but for defendant's negligence).

C. The Court of Appeals Properly Determined That Am and Cheam Failed to Present Sufficient Evidence to Present Their Variable Message Board Theory to a Jury

Judgment as a matter of law was proper where Am and Cheam failed to provide an evidentiary basis for the jury to find that the alleged failure of WSP to ask WSDOT to activate a reader board warning was a proximate cause of the collision. "In a negligence case, the plaintiff has the burden of producing, among other things, evidence sufficient to support a finding of causation." *Whitchurch*, 63 Wn. App. at 275 (citing *Maltman v. Sauer*, 84 Wn.2d 975, 980, 530 P.2d 254 (1975)). The two pillars of proximate

cause are legal cause and cause in fact. *Channel v. Mills*, 77 Wn. App. 268, 272, 890 P.2d 535 (1995). Legal cause "involves a determination of whether liability should attach as a matter of law given the existence of cause in fact;" whereas, "[c]ause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778-79, 698 P.2d 77 (1985). A plaintiff shows "but for" causation where they prove that the defendant's negligence is "a cause which in a direct sequence [unbroken by any new independent cause,] *produces the [injury] complained of and without which such [injury] would not have happened.*" 6 *Washington Practice: Washington Pattern Jury Instructions: Civil* § 15.01 (7th ed. 2019) (emphasis added).[1]

Here, the Court of Appeals correctly concluded that Am and Cheam produced no evidence that the message signs would have been activated by DOT in time to prevent the collision. It explained:

> The evidence in the case is that the Washington State Patrol was not informed of the wrong-way driver in the westbound lanes of I-90 until 14 minutes before the collision was reported. Assuming that Am was driving at a speed of 60 miles per hour, his vehicle would have been located

[1] Where RAP 13.4(b) requires a conflict with a decision of this Court or a published decision of the Court of Appeals, Am and Cheam's reliance on nonbinding authority to support a petition for review is telling. Pet. for Review 16-18. First, *Mendoza v. State*, No. 18-0350, 2020 WL 85401 (Ariz. App. Jan. 7, 2020), is an unpublished Arizona court of appeals opinion. Second, *Mendoza* did not deal with the issue here: a post-trial appeal involving the failure of a plaintiff to present sufficient competent evidence of but-for causation. 2020 WL 85401, at *2-6. Rather, *Mendoza* dealt with a trial court's summary judgment ruling that excluded expert testimony because the proffered testimony failed to meet the requirements of ER 702. 2020 WL 85401, at *2-6.

> somewhere between mileposts 67 and 68 when the Washington State Patrol was initially informed of the wrong-way driver. Moreover, the evidence adduced at trial indicates that the nearest highway reader boards were located at mileposts 54 and 61.
>
> Therefore, in order for Am to have seen any warning on the I-90 reader board located at milepost 61, the DOT would have had to program and activate a message on that reader board in less than 7 minutes from the time of the Washington State Patrol initially being informed of a wrong-way driver. Additionally, in order for Am to have noticed any warning on the reader board located at milepost 54, the DOT would have had to program and activate that message in less than 14 minutes from the time of the initial report of a wrong-way driver being received. Yet there is no evidence in the record demonstrating that a message on the highway reader boards was capable of being programmed and activated in less than either 7 or 14 minutes.

Am, 2021 WL 1529760, at *5-6. The Court of Appeals noted that Am and Cheam's own expert admitted that he did not know the process for activating the signs. *Id.* at 5 n.9. The Court of Appeals also correctly concluded that the only evidence adduced at trial established that it took approximately 40 minutes for WSDOT to activate the variable message signs on the morning of the collision. *Id.* at *6. Specifically, the Patrol asked WSDOT to activate its message signs at 4:34 a.m. to cue traffic to exit the highway. RP 603-04, Ex. 110. However, WSDOT had not yet activated the message signs at 4:42 as Trooper Christine White drove towards the scene of the collision. RP 604-05, Ex. 104. In fact, WSDOT did not activate the

message signs until 5:20 a.m., approximately 40 minutes after the first request was made. RP 605, Ex. 110.

Because O'Brien was driving the wrong way on I-90 for 14 minutes (at the most) before the collision occurred, Exhibits 3 and 110, there is no evidence to support the conclusion that a request by the Patrol would have prevented the collision and without which the collision would not have occurred. Moreover, Am and Cheam never produced any evidence to establish where along the roadway Am would have been, RP 125-26, 131-132 (Am testifying that he did not recall the accident); RP 137 (Cheam testifying she was asleep prior to the accident), assuming the message signs could have been changed in time. Nor did Am and Cheam produce any evidence to establish how any message would have changed Am's driving, RP 123-33, assuming he had been in a position to see the message signs.

Am and Cheam fail to provide any persuasive reason to disturb the trial court's ruling in this regard. Their "list of evidence" does not provide a basis for reversing the trial court, even if this Court assumes the truth of each of the assertions set forth by Am and Cheam. Pet. for Review 15-16. This is true because, as the Court of Appeals noted, *none* of their 10 points overcomes the simple fact that they lack evidence to establish the variable message signs would have been changed during the 14 minutes between the wrong-way driver reports and the collision. Am and Cheam presented *no*

evidence "from which a jury could conclude that the process could be completed, at that time of the day, in any quantifiably quicker time frame." *Am*, 2021 WL 1529760, at *6.

Moreover, the record does not support Am and Cheam's "list" of factual assertions. One example is particularly relevant. Am and Cheam write: "Plaintiffs would have passed the VMS reader boards at mile posts 54 and 61 before the crash and in time to pull over or exit the freeway." Pet. for Review 16. Noticeably absent from their briefing is citation to *any* evidence in the record for this self-serving speculation. In fact, at trial, Am did not testify about his speed or location prior to the accident. RP 122-33 (absence of any testimony by Am as to his speed or location immediately before the accident). Nor could he. He did not remember the accident at all. RP 125-26, 132. Similarly, Cheam did not testify about the speed or location of their vehicle before the accident. RP 133-43. Nor could she. Cheam testified that she was asleep in the third row of their suburban when the accident occurred. RP 137. Accordingly, Am and Cheam impermissibly invite this Court to assume that Am was traveling at 60 mph and to assume where Am was positioned along the roadway.

At the close of evidence, the State moved for judgment as a matter of law noting, in relevant part, that Am and Cheam failed to produce evidence sufficient to support a finding of causation without calling on the

jury to impermissibly speculate. RP 285; *see Cavner v. Continental Motors, Inc.*, 8 Wn. App. 2d 1001 (2019) (unpublished).[2] The trial court correctly applied applicable law relating to proximate cause, and properly determined that Am and Cheam lacked sufficient evidence to argue their "variable message signs" theory to the jury. The Court of Appeals, following well-established law, unanimously affirmed. This Court should deny Am and Cheam's Petition for Review.

V. CONCLUSION

The Court of Appeals correctly affirmed the trial court under well-settled law. The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 11th day of June, 2021.

ROBERT W. FERGUSON
Attorney General

/s Carl Warring
CARL P. WARRING, WSBA No.27164
Assistant Attorneys General; OID#91106
Office of the Attorney General, Torts Division
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
Telephone: (509) 456-3123; Fax: (509) 458-3548
Email: carl.warring@atg.wa.gov

[2] *See* GR 14.1(a). This unpublished decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate

CERTIFICATE OF SERVICE

I certify that on the 11th day of June 2021, I caused a true and correct copy of this Answer to Petition for Review to be served on the following in the manner indicated below:

☑ Electronic Mail by agreement to:

Moberg Rathbone Kearns
Law Offices of Michael E. Blue, PS
Michael@michaelblue.com
nicole@michaelblue.com
sophia@michaelblue.com
jmoberg@mrklawgroup.com
pmoberg@mrklawgroup.com
dseverin@mrklawgroup.com

☑ USPS mail via consolidated mail services to:

Kenneth Greene
PR of the Estate of Dillon K. O'Brien
130 E Street Nw
Ephrata, WA 98823-1658

By: */s Carl Warring*
CARL P. WARRING, WSBA No.27164
Assistant Attorneys General; OID#91106
Office of the Attorney General, Torts Division
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
Telephone: (509) 456-3123; Fax: (509) 458-3548
Email: carl.warring@atg.wa.gov

WASHINGTON ATTORNEY GENERAL SPOKANE TORTS

June 11, 2021 - 12:16 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99782-9
Appellate Court Case Title:	Soeun Am, et ano. v. State of Washington, et al.

The following documents have been uploaded:

- 997829_Answer_Reply_20210611121319SC264054_1610.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2021-06-10_AnswerPetRvw_Final.pdf

A copy of the uploaded files will be sent to:

- Michael@michaelblue.com
- frontdesk@mrklawgroup.com
- jbaker@mrklawgroup.com
- jmoberg@mrklawgroup.com
- nicole@michaelblue.com
- pmoberg@mrklawgroup.com

Comments:

Sender Name: Nikki Gamon - Email: Nikki.Gamon@atg.wa.gov
Filing on Behalf of: Carl Perry Warring - Email: carl.warring@atg.wa.gov (Alternate Email: Nikki.Gamon@atg.wa.gov)

Address:
1116 W Riverside, Suite 100
Spokane, WA, 99205
Phone: (509) 458-3503

Note: The Filing Id is 20210611121319SC264054