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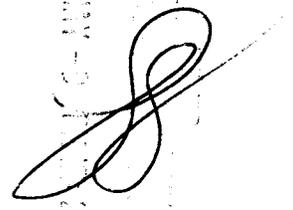
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

TARA JEAN McMANUS,
Appellant,

v.

YONG KUN KIM,
Defendant,

STATE OF WASHINGTON,
Respondent.

2011 MAR - 23
JAMES R. ...


No. 66333-0-1

REPLY BRIEF OF APPELLANT

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ARGUMENT

A. THERE IS NO DESIGN DEFECT CLAIM

The word *design* cannot be found in the amended complaint. (CP 1–4) Plaintiff intended this omission because she makes absolutely no claim of any defect in the design of the SR 99 freeway—only a failure by WSDOT to erect “adequate warnings of the signal” at South Holden Street. (CP 2)

Although a freeway typically ends at an interchange, there may be insufficient space to build one. Minnesota appears to have confronted this dilemma at the northern end of Interstate 35. (aerial image, CP 212) A government’s irreducible duty in this situation is not to redesign the freeway, but to do what Minnesota did: install warnings “commensurate” with the danger posed by a traffic signal at the end of the freeway. (Interstate 35 signs and beacons, CP 213–216, reprinted in Brief of Appellant 41–42) *See Owen v. Burlington Northern & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (“an unusual hazard may require a [government] to exercise greater care than would be sufficient in other settings”).

The state falsely attributed a design defect claim to the plaintiff, then used that false attribution as a platform for opinions by WSDOT employees that SR 99 was not

defectively designed. Brief of State 9, 11, 13. An opinion should be disregarded if it pertains to a matter not at issue in a case. *See, e.g., Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 175–179, 817 P.2d 861 (1991) (reference to “judgment” rather than correct legal standard “capacity” renders opinion inadmissible as to the effects of intoxication).

Upon remand, the state should not be allowed to confuse the jury. There is no quarrel with the design of the freeway, only with the lack of warnings.

**B. THE TRAFFIC CASE HAS NO BEARING
UPON THE CONCURRENT NEGLIGENCE
OF THE STATE**

Inasmuch as plaintiff brought negligence claims against both Mr. Kim and the state (CP 2), it is not immediately apparent why the state filed proof that Mr. Kim had pleaded guilty to a negligent driving charge. (CP 151) The subtext appears to be an assumption that negligence committed by Mr. Kim *ipso facto* discharges the state from liability for its own negligence. But that assumption fails to account for the distinction between concurring negligence and superseding negligence.

There may, of course, be more than one proximate cause of an injury, and the concurring negligence of a third party does not necessarily break the causal chain from original negligence to final

injury....Where a defendant's original negligence continues, and contributes to the injury, the mere fact another's intervening negligent act is a further cause of the accident does not prevent defendant's act from constituting a cause for which he is liable....

The intervening negligent act of another will not supersede the original actor's negligence as a proximate cause of an injury where the original actor should reasonably foresee the occurrence of such an event....Only when the intervening negligence is so highly extraordinary or unexpected that it can be said to fall without the realm of reasonable foreseeability as a matter of law, will it be held to supersede defendant's negligence.

Doyle v. Nor-West Pacific Co., 23 Wn. App. 1, 6-7, 594 P.2d 938 (1979) (citations omitted).

The guilty plea is nothing more than an admission by Mr. Kim that he drove negligently on the SR 99 freeway. It is not possible to determine from that plea whether his negligence superseded or merely concurred with the state's negligent failure to provide a conspicuous warning of the approaching traffic signal. The classification of Mr. Kim's offense is irrelevant. Concurrent liability can even attach to a homicide. Robb v. City of Seattle, 159 Wn. App. 133, 245 P.3d 242 (2010).

It has, moreover, been authoritatively decided that collateral estoppel simply never arises from a traffic case. Hadley v. Maxwell, 144 Wn.2d 306, 308, 27 P.3d 600 (2001).

“Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice.” *Id.* at 315. The plea cannot, even without this exception, be used against Tara Jean McManus. Collateral estoppel requires, among other things, that “the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication.” City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 164 Wn.2d 768, 792, 193 P.3d 1077 (2008) (argument below, RP 22).

The prosecution of a traffic violation is simply “not admissible” in a civil case arising from the same incident. Reynolds v. Donoho, 39 Wn.2d 451, 456, 236 P.2d 553 (1951). The disposition of a traffic charge will often be a matter of convenience to the motorist and therefore be unreliable in another forum. *Id.* Also, to admit evidence that a citation had been issued would be equivalent to allowing the police to express an expert opinion on the ultimate issue of negligence. That issue should remain solely within the province of the jury. Billington v. Schaal, 42 Wn.2d 878, 882, 259 P.2d 634 (1953). There is consistency in the case law insofar as the non-issuance of a traffic citation is likewise held to be inadmissible. Warren v. Hart, 71 Wn.2d 512, 429 P.2d 873 (1967). (argument below, CP 268–269)

**C. WSDOT EMPLOYEES CANNOT TESTIFY
ON MATTERS OF LAW**

It is, of course, the function of the Superior Court to determine the applicable law and the duty of attorneys to assist in that endeavor. The state, however, attempted to delegate that function to its own employees:

[WSDOT employee] Berends declared that the State met or exceeded every *binding* standard and guideline in the design, construction, maintenance and operation of SR 99.

Brief of State 9 (emphasis added).

[WSDOT employee] Leth declared that the State met or exceeded every traffic design, operations, and maintenance standard and guideline *applicable* in 1990.

Brief of State 10 (emphasis added).

What, indeed, are the “binding” and “applicable” standards WSDOT must follow to escape liability in this case? These standards will not always be found among technical manuals because the authors of those manuals lack authority to announce the conditions of their own liability. A claim might even arise because those manuals fail to consider a foreseeable safety issue. The standards, moreover, must be stated in general terms to account for all of the possible disputes that might arise involving WSDOT.

The binding and applicable standards which pertain to this case are, in fact, common-law standards; and there is no dispute regarding their substance: WSDOT must provide safe highways and must, in fulfillment of that duty, correct conditions that are foreseeably misleading or dangerous. *Compare* Brief of Appellant 8 *with* Brief of State 26. Although statutes, regulations, and technical standards might be relevant evidence, they do not dispose of the common-law issues. Even MUTCD recognizes that its contents are “not a substitute for engineering judgment.” MUTCD, § 1A-4 (1988). (CP 260)

WSDOT employees have no authority to define the legal obligations of their employer, just as an electrical inspector has no authority to testify what constitutes a violation of an electrical code, Ball v. Smith, 87 Wn.2d 717, 722-727, 556 P.2d 936 (1976), just as an attorney has no authority to testify whether a defendant in a legal malpractice case committed error, Halvorsen v. Ferguson, 46 Wn. App. 708, 713, 735 P.2d 675 (1986), just as the executive director of the State Board of Pharmacy has no authority to testify that a prescription becomes invalid upon the revocation of the license of the physician who issued it. State v. Clausing, 147 Wn.2d 620, 628-630, 56 P.3d 550 (2002) (construing Wash. Const. art. IV, § 16).

“For an expert to testify...on the law usurps the role of the trial judge.” *Id.* at 628. The testimony of WSDOT employees regarding “binding” or “applicable” law should therefore be disregarded.

**D. THE JURY WILL NOT REQUIRE
AN EXPERT TO FIND DANGER
ON THE SR 99 FREEWAY**

There is no subtlety in the theory that a freeway traffic signal will violate the expectations of motorists and become a “dangerous or misleading condition” in the absence of a conspicuous warning. The jury, upon remand, will be asked, in effect, to assess the subjectivity of a typical freeway motorist. Who is better to perform this assessment than a group of persons summoned, in large part, from a list of licensed drivers?

But the state assumes that licensed drivers are incapable, without assistance, of grasping their own subjectivity. That is the clear implication of its argument that plaintiff must offer an expert opinion in order to submit her claim to a jury. Brief of State 27 n.6.

Whether an expert opinion is *required* is an entirely different issue from whether it is *admissible*. The standard is simple: “If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming

a correct judgment, there is no need for expert opinion.” State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985), *review denied*, 104 Wn.2d 1026 (1985).

There do exist highway cases involving specialized areas of knowledge—cases, for example, where crash worthiness, mechanical failure, or defective materials are at issue. But, in the case presently under review, a high school graduate will be able to make the proper findings. The most technical aspect of plaintiff’s liability case is the mathematical relationship among distance, velocity, and time ($d = v \times t$, or the equivalent expression $v = d/t$). This relationship is (or should be) taught in every introductory algebra class. Even persons who have never studied algebra verbalize this relationship when they describe the velocity of a car in “miles per hour.” To comprehend driving times between landmarks on the road log video, it will also be necessary for the jury to understand the conversion of miles into feet and hours into seconds. It would be unnecessary and, indeed, a waste of time and money to hire an expert witness simply to develop these elementary concepts.

E. THE MOTION TO STRIKE WAS DENIED

When the time came for plaintiff to respond to the motion for summary judgment, the most probative evidence had already been filed—the contemporaneous road log video (sole exhibit) (captured frames, CP 206–209) and the police collision report. (CP 160–163) These exhibits established the geometry of the collision, the sobriety of Mr. Kim, the skid marks upon the highway, the time of day, the weather conditions, the geometry of the freeway, milepost locations, the traffic signal at South Holden Street, and the inventory of signs.

The substantiality of this evidence allowed plaintiff to focus her proof upon the state’s duty to warn. The limit of this duty is measured by the foreseeability of the danger. See Brief of Appellant 8–9.

Some dangers arise purely through happenstance. A government, for example, has no duty to warn of shifting concrete on a sidewalk if it lacks specific prior notice of the danger. But a duty to warn will arise, despite the lack of specific notice, whenever *constructive knowledge* of danger is imputed to the government. See, e.g., McCluskey v. Handorff-Sherman, 125 Wn.2d 1, 6, 882 P.2d 157 (1994) (slippery-when-wet sign); Provins v. Bevis, 70 Wn.2d 131, 138, 422 P.2d 505 (1967) (dead-end sign). That is why duty

is expressed in terms of the *foreseeable* rather than merely the *foreseen*.

The range of foreseeable dangers pertinent to this case can be found in the knowledge base available to WSDOT at the time of the collision. This knowledge base would include, first and foremost, two publications adopted by reference under the rule-making authority of the Federal Highway Administration as uniform standards for states that accept federal contributions for highway projects—*A Policy on Geometric Design of Highways and Streets* (1990) (“AASHTO”) and the *Manual on Uniform Traffic Control Devices for Streets and Highways* (1988) (“MUTCD”). Brief of Appellant 11, 14 (citations to adopting regulations).

AASHTO and MUTCD are hybrid texts of legal authority, legislative facts, and substantive evidence. See Cameron v. Murray, 151 Wn. App. 646, 214 P.3d 150, 157 (2009) (defining “legislative facts” to include background information for extending or restricting a common-law rule). The record contains authenticated excerpts from AASHTO and MUTCD (CP 231–246, 254–267) photocopied from books that were brought to the summary judgment hearing and displayed to the Superior Court. (RP 23) These publications lack jargon and are easily understood. What they say about driver attention; driver expectancy; design speed; decision

sight distance; and the priority, color, shape, and placement of standard warning signs is now, therefore, a matter of record. Brief of Appellant 11–15. Constructive knowledge of these standards should be imputed to WSDOT even if its employees responsible for signage along the SR 99 freeway did not actually take them into account.

Plaintiff also filed images of the northern terminus of Interstate 35 (CP 212–216) and excerpts from a freeway signing handbook published by the Texas Department of Transportation. (CP 219–223) These items were attached to certificates of authenticity (CP 210–211, 217–218) which enabled verification of the documents on the internet. They are relevant because they prove that others have actually foreseen and given careful consideration to the precise danger at issue in this case. The temporal order of these exhibits has no bearing on any proper issue. The rationale for warning signs has not changed in the last twenty years.

What is perhaps most interesting about this body of evidence is that it became the target of 47 consolidated motions to strike filed by the state on short notice after the deadline for its summary judgment reply. There is no present need to unravel this motion, but there is certainly a need to correct 18 false statements, variously phrased,

that the Superior Court “struck” evidence or “granted” the request to do so. Brief of State *passim*.

The actual ruling appears within an interlineation on the second page (CP 306) of the *Order on Defendant State of Washington Motion for Summary Judgment*:

The state’s Motion to Strike to Strike [sic] the evidence was denied, but objections to the evidence of plaintiff goes [sic] to the weight. The court did not consider fact assertions that were not supported by evidence submitted in support of π ’s response.

This interlineation satisfies the requirement of CR 54(a)(1) that “[a] judgment shall be in writing and signed by the judge.” If, instead, the ruling is an order, then the interlineation satisfies the requirement of CR 54(a)(2) that an order be “made or entered in writing.”

The state appears to have taken oral statements from the bench out of context and ascribed to them the authority of an actual judgment or order. Chaos, of course, would ensue if this ever became an acceptable practice.

It must be remembered that a trial judge’s oral decision is no more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment....

[S]tatements contained in a trial court's oral decision..., when at variance with the findings, cannot be used to impeach the findings or judgment. On the other hand, if the trial court's oral decision is consistent with the findings and judgment, it may be used to interpret them.

Ferree v. Doric Co., 62 Wn.2d 561, 566–67, 383 P.2d 900 (1963).

A motion to strike, in any event, is no longer a proper procedure, particularly a voluminous motion filed on short notice after a reply brief:

[M]aterials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus it is misleading to denominate as a “motion to strike” what is actually an objection to admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion.

Cameron, 214 P.3d at 157.

If this court reviews the evidence issue despite the lack of a cross appeal, the ruling of the Superior Court is certainly justifiable. See Ensley v. Mollmann, 155 Wn. App. 744, 752, 230 P.3d 599 (2010) (establishing de novo standard of review).

The motion to strike concerns itself primarily with the authenticity of plaintiff's exhibits. *Authenticity* is

perhaps the simplest concept in law. It refers to the quality of evidence being actual or real, not fabricated or invented.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

ER 901(a). A party should verify its own failed attempt to locate a document by means of information provided in a declaration of authenticity before accusing its adversary of falsifying a published document.

Hearsay is not an issue. The textual materials offered by plaintiff consist entirely of official publications admissible under authority of CR 44(a)(1). Even if CR 44 does not apply, the excerpts from AASHTO and MUTCD were published at least 20 years ago and are therefore admissible hearsay. ER 803(a)(16).

**F. KIM DID NOTHING TO TRIGGER
A LEGAL CAUSATION DEFENSE**

The surviving family members of a fatally injured motorist filed a claim against the state and a county for failing to revoke the license of a habitual traffic offender who caused a collision while driving impaired. Their claim was dismissed for lack of legal causation. Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985).

Legal causation...rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent."

103 Wn.2d at 778 (quoting King v. Seattle, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)). The basis of the decision appears to be the novelty of the theory of liability and the remoteness between driving while intoxicated and deciding whether to revoke a license. Hartley was not a highway negligence case, but an administrative negligence case.

Soon after Hartley legal causation did become an issue in highway negligence cases. Three of those cases have been cited by the state. In Klein v. City of Seattle, 41 Wn. App. 636, 705 P.2d 806 (1985), the responsible motorist was "reckless, careless and drunken" and had crossed the center line. Contrary to the state's assertion, signage was not an issue. In Braegelmann v. Snohomish County, 53 Wn. App. 381, 766 P.2d 1137 (1989), the responsible motorist "had been drinking heavily" and was "in a highly intoxicated condition" as he crossed over the center line. In Medrano v. Schwenderman, 66 Wn. App. 607, 836 P.2d 833 (1992), it was the responsible motorist who filed the injury claim.

He had consumed a large quantity of alcohol prior to driving off the road and striking a utility pole. When he filed his civil case, he had already been convicted by a jury of reckless driving.

There are two common elements in these cases. First, the responsible motorist had been driving while substantially under the influence of alcohol. Second, the responsible motorist either crossed the center line or drove off the road. A government cannot be expected to take corrective action against either of these eventualities. Therefore, it was correct to apply the doctrine of legal causation.

Neither of these fact patterns pertain to the case presently under review. The investigating police officer cleared Mr. Kim of impaired driving. The only blameworthy conduct established by the record is that Mr. Kim, to some degree, was inattentive. The cursory observation of a fellow motorist in transit, who must also pay attention to the freeway in front of him, is too short and slender a scaffold upon which to erect the doctrine of legal causation. The only indisputably unusual activity undertaken by Mr. Kim was to participate in a collision at a freeway traffic signal, which implicates the failure of WSDOT to give a proper warning. WSDOT can do nothing to keep a motorist from drinking

or to keep a car in its proper lane of travel, but there is much it can do to warn motorists of an approaching danger.

G. THE STATE CREATED ITS OWN DISCOVERY RULE WHILE IGNORING PRIVACY RIGHTS

A party who receives a request for production is obligated to produce all listed non-privileged items “which are in the possession, custody or control of the party upon whom the request is served.” CR 34(a)(1). The state did not indicate which materials in its own list plaintiff has withheld. But it did admit receiving photographs and medical records from the plaintiff prior to making its first discovery request. Brief of State 15.

There is only one remaining discovery issue. It has to do with medical information and related materials held by third parties. The state argues, without citing authority, that plaintiff must sign its standard release form or draft and sign a form of her own. Brief of State 44. But the discovery rules make no mention of release forms, and they are excluded from the list of permissible discovery methods. See CR 26(a). This aspect of the discovery rules should not concern the state because it retains the right, after proper notice, to issue document subpoenas. CR 45. But if the state seeks third-party medical information by any other means, it will be resorting to informal discovery, which

is disfavored by the Washington Supreme Court. See Brief of Appellant 34–35.

The state claims a right, under an estoppel theory, to coerce plaintiff's signature on release forms. Plaintiff, however, denies making any promise to sign a form sight unseen. There is, moreover, no justifiable reliance because the state could, at any time, have resorted to document subpoenas. CR 45. A stipulation, moreover, cannot be premised upon an oral statement made outside of open court. CR 2A. The forms ultimately produced by the state called upon plaintiff to surrender her privacy rights, and they invited her to accept unusual procedures at trial.

The entire discovery process has become irregular. The state is attempting to invent its own discovery rule, and it does so without making a single mention of HIPAA or the federal Privacy Rule. By granting the Rule 37 motion, the Superior Court disregarded formal limits to discovery under the civil rules and medical privacy rights established by state and federal law. It applied the wrong legal standard, based its ruling on an erroneous understanding of the law, and thereby abused its discretion. Gildon v. Simon Property Group, Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

CONCLUSION

This case should be remanded for trial by jury with appropriate directions on the discovery issue.

RESPECTFULLY SUBMITTED this 9th day of
May 2011.

A handwritten signature in black ink, appearing to read 'T. Cline', is written above a horizontal line.

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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STATE OF WASHINGTON

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No. 66333-0-I
CERTIFICATE OF MAILING

1 The undersigned attorney for appellant certifies that on
2 May 9, 2011, he mailed one copy of the Reply Brief of Appellant and
3 this certificate to Jon R. Morrone, Assistant Attorney General, 800
4 Fifth Avenue, Suite 2000, Seattle, WA 98104.

DATED this 9th day of May 2011.



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