
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.

RECEIVED
 FEB 15 PM 4:25

No. 66333-0-1

BRIEF OF APPELLANT

Thomas Cline
 Attorney for Appellant
 2502 North 50th Street
 Seattle, Washington 98103
 (206)789-2777

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ASSIGNMENTS OF ERROR.....	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
STATEMENTS OF FACT AND ARGUMENT	4
A. THE NEGLIGENCE ISSUE	4
1. A FREEWAY TRAFFIC SIGNAL IS DANGEROUS AND MISLEADING BECAUSE IT VIOLATES THE EXPECTATIONS OF MOTORISTS.....	8
2. THE STATE SHOULD HAVE ERECTED A YELLOW WARNING SIGN SUFFICIENTLY CONSPICUOUS TO NOTIFY INATTENTIVE DRIVERS OF THE APPROACHING SIGNAL	13
3. LOGIC DICTATES THAT KIM WOULD HAVE PERCEIVED A YELLOW WARNING SIGN AT LEAST AS CONSPICUOUS AS THE TRAFFIC SIGNAL ITSELF.....	18
4. LOGICAL INFERENCE IS NOT SPECULATION	22
B. THE DISCOVERY ISSUE.....	25
1. PLAINTIFF HAD ALREADY WAIVED THE PHYSICIAN-PATIENT PRIVILEGE BY OPERATION OF STATE LAW	31

2. PLAINTIFF NEVERTHELESS RESERVED IMPORTANT PRIVACY RIGHTS	32
3. THE RULE 37 MOTION APPEARS TO BE AN ATTEMPT TO EVADE THESE PRIVACY RIGHTS	35
CONCLUSION.....	37
APPENDIX OF IMAGES.....	38
SR 99 Milepost 25.42 (CP 206).....	38
SR 99 Milepost 25.80 (CP 207).....	38
SR 99 Milepost 25.92 (CP 209).....	39
Approach to end of SR 99 freeway (CP 202).....	40
Interstate 35, first sign	41
Interstate 35, second sign.....	41
Interstate 35, third sign	42
Interstate 35, fourth sign	42
APPENDIX OF AUTHORITIES.....	43
HIPAA § 264	43
45 C.F.R. § 164.512(a), (e)	45
RCW 18.83.110	49
RCW 70.24.105	49

TABLE OF AUTHORITIES

ACTS OF CONGRESS

Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g.....	27
Federal-Aid Highway Act of 1981, 23 U.S.C. § 109(d).....	14
Health Insurance Portability and Accountability Act of 1996, Pub. L. No.104-191, 110 Stat. 2024....	32–36

FEDERAL REGULATIONS

23 C.F.R. § 625.4.....	11
23 C.F.R. § 655.603.....	14
45 C.F.R. § 164.512.....	32–36
Traffic Control Devices on Federal-Aid and Other Streets and Highways, 48 Fed. Reg. 46,775 (Oct. 14, 1983).....	14
Standard for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000).....	35

WASHINGTON SUPREME COURT

<i>Berglund v. Spokane County</i> , 4 Wn.2d 309, 103 P.2d 355 (1940).....	9
<i>Bernethy v. Walt Failor’s, Inc.</i> , 97 Wn.2d 929, 653 P.2d 280 (1982).....	8

<i>Gerard v. Peasley</i> , 66 Wn.2d 449, 403 P.2d 45 (1965).....	24
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2001)	7, 9
<i>Kitt v. Yakima County</i> , 93 Wn.2d 670, 611 P.2d 1234 (1980).....	14
<i>Loudon v. Mhyre</i> , 110 Wn.2d 675, 756 P.2d 138 (1988).....	34–35
<i>Lucas v. Phillips</i> , 34 Wn.2d 591, 209 P.2d 279 (1949).....	9
<i>McCluskey v. Handorff-Sherman</i> , 125 Wn.2d 1, 882 P.2d 157 (1994).....	8, 17
<i>Moyer v. Clark</i> , 75 Wn.2d 800, 454 P.2d 374 (1969).....	22
<i>Owen v. Burlington Northern & Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005)	7, 8, 9, 13, 22
<i>Smith v. Orthopedics International, Ltd., P.S.</i> , No. 83038-0 (Wash. Dec. 16, 2010)	34
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	24
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992).....	18
<i>Taylor v. Stevens County</i> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	8

WASHINGTON COURT OF APPEALS

Amy v. Kmart of Washington LLC,
153 Wn. App. 846, 223 P.3d 1247 (2009) 31

Moore v. Hagge, 158 Wn. App. 137,
241 P.3d 787 (2010)..... 22-23

Wojcik v. Chrysler Corp., 50 Wn. App. 849,
751 P.2d 854 (1988)..... 23

REVISED CODE OF WASHINGTON

RCW 5.40.050..... 13

RCW 5.60.060..... 31

RCW 18.83.110..... 26

RCW 47.17.020..... 3

RCW 47.17.160..... 3

RCW 47.17.808..... 3

RCW 47.36.030..... 14

RCW 47.52.070..... 3

RCW 47.52.110..... 13

RCW 70.02.060..... 28

RCW 70.24.105..... 26

WASHINGTON SUPERIOR COURT CIVIL RULES

CR 2A 29

UTAH SUPREME COURT

Bramel v. Utah State Road Commission,
24 Utah 2d 50, 465 P.2d 534 (1970)..... 17

SECONDARY AUTHORITIES

http://en.wikipedia.org/wiki/Deductive_reasonsing 21

http://en.wikipedia.org/wiki/Inductive_reasonsing 20

INTRODUCTION

Freeways are designed to be “free” of traffic signals. A government that disregards this national standard should be wary of the foreseeable consequences.

The state allowed a freeway to end—abruptly—with a traffic signal and compounded the danger by failing to erect a warning sign. An inattentive motorist who lived in another county saw the signal, but did so too late to avoid striking the car in which two-year old Tara Jean McManus was riding. Neither insobriety, excessive speed, mechanical failure, nor inclement weather can account for the collision. The only logical explanation is a lack of vigilance for freeway traffic signals caused by the standard freeway design itself. This could have been corrected by a conspicuous warning.

ASSIGNMENTS OF ERROR

1. The Superior Court erred when it summarily dismissed the negligence claim against the state.

2. The Superior Court abused its discretion when it ordered plaintiff to sign written waivers of her physician-patient privilege outside of formal discovery, without regard to federal and state privacy rights, and without any dispute from any medical provider.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Can a jury consider the evidence in the record and logical inferences therefrom and make reasonable findings (a) that a dangerous or misleading condition existed upon a state highway, (b) that the state Department of Transportation (WSDOT) failed to undertake adequate corrective measures, and (c) that the collision at issue would not have taken place but for the failure of WSDOT to undertake those measures?

2. Is the Superior Court without authority to order plaintiff to sign waivers of medical privacy, prepared by an adverse party, particularly where those documents would contradict the federal Privacy Rule and cause the plaintiff to surrender privacy rights more extensively than the waiver imposed by operation of law?

3. Is it against public policy to require an injured plaintiff to assist a defendant to obtain medical information from third parties through informal discovery?

4. Should the Superior Court have entered an order compelling discovery when the record otherwise demonstrates that plaintiff had produced all of the records in her possession, custody, or control?

STATEMENTS OF FACT AND ARGUMENT

A. THE NEGLIGENCE ISSUE

According to a national standard established by the American Association of State Highway and Transportation Officials (AASHTO), there is a dichotomy of highway designs consisting of the *freeway* and the *conventional highway*. (CP 234) A defining characteristic of the freeway is the elimination of intersections at grade. All roads must cross a freeway by means of an overpass or underpass, intersect by means of an interchange, or avoid the freeway altogether. (CP 244) *See also* RCW 47.52.070 (granting authority to eliminate intersections at grade). An intended consequence of this design is the elimination of traffic signals from the principal lanes of the freeway. (CP 246)

Interstate 5 is a freeway, a portion of which links the communities of Tacoma and Seattle. RCW 47.17.020. SR 599 is a short freeway that extends from Interstate 5 at Tukwila to SR 99 south of Seattle. RCW 47.17.808. SR 99 is a conventional highway from its point of origin south of Federal Way north to its junction with SR 599. It then becomes a freeway as it extends northwest toward Seattle beyond its junction with SR 599. RCW 47.17.160. A motorist reaching this junction from the southeast along

SR 599 will seamlessly enter the SR 99 freeway without noticing any change in the geometry of the roadway. A motorist reaching this junction from the south, along the conventional segment of SR 99, will enter the freeway by means of an interchange. (aerial image, CP 203)

The SR 599/SR 99 freeway is thus a convenient “spur” of Interstate 5 for Seattle-bound motorists in that it permits northbound traffic a continuous freeway access to the South Park and West Seattle neighborhoods and the First Avenue South Bridge. But the convenience ends when the freeway ends—abruptly—with a traffic signal at the intersection of SR 99 and South Holden Street near the southern approach to the bridge. (aerial image, CP 202) (roadway image, CP 209)

Yong Kun Kim, a man 44 years of age, who resided in the Pierce County community of Lakewood, was driving northwest along the SR 99 freeway, with his wife as passenger, upon dry pavement, on a sunny day in August. (CP 160) He entered the freeway no further northwest than the junction of SR 99 and SR 599. (CP 164) His speed was estimated to be as much as 70 miles per hour in the beginning portion of this freeway segment (CP 164) but was estimated to be as low as 60 miles per hour as he approached South Holden Street. (CP 166) Kim, therefore,

was driving no faster than the *design speed* of the freeway (70 miles per hour), which is “the maximum safe speed that can be maintained over a specified section of highway when conditions are so favorable that the design features of the highway govern.” (definition, CP 239) (value for freeways, CP 240)

At milepost 25.42 Mr. Kim encountered a pair of green directional guide signs mounted upon an overhead truss. Neither sign contained any wording, color, or symbol to alert motorists of the approaching end of the freeway or approaching traffic signal. (image, CP 206)

At milepost 25.77 Mr. Kim drove past white rectangular “speed zone ahead” signs. (road log video, sole exhibit, and attached declaration at 3)

At milepost 25.80, one-fourth of a mile before the end of the freeway, Mr. Kim drove beneath a second truss identical in every respect to the first. (image, CP 207)

At milepost 25.89 and milepost 25.92 Mr. Kim drove over transverse patterns of paint, tape, or thin solid pavement markings. (images, CP 208–09) These patterns were eroded. They provided no sound or vibration either to Mr. Kim or to the WSDOT vehicle that also crossed them during the next filming of a road log video. (sole exhibit) The mileage counter on this video reveals, moreover, that

these patterns are closer to the approaching traffic signal (739 feet and 581 feet) than the *decision sight distance* (1,525 feet) which allows a motorist to recognize an unexpected hazard and complete an appropriate maneuver safely and efficiently on a freeway having a design speed of 70 miles per hour. (definition, CP 241-42) (recommended distance, CP 243 tbl.III-3)

At milepost 25.91 Mr. Kim drove past white rectangular signs informing him of a 35 MPH speed limit. (sole exhibit, declaration at 3) (image, CP 208) These signs are positioned 0.12 miles (634 feet) from the intersection. A car moving at the freeway's design speed will close this remaining distance in 6.17 seconds.

There was no sign of any type over or beside SR 99 to specifically warn Kim of the approaching abrupt end of the freeway or the approaching traffic signal. (road log video)

As Mr. Kim made his final approach to the end of the freeway (milepost 26.03), two motionless cars waited alongside each other for the signal to turn green. (CP 163) Mr. Kim attempted, in a panic, to stop and left a 72-foot skid mark. (CP 161) Although he managed to reduce the speed of his car, a violent collision nevertheless took place. Plaintiff Tara Jean McManus, who was two years of age, sat in the crumpled rear portion of the lead car on the left.

(CP 198) The record contains pro forma proof of the brain injury inflicted upon her by this collision. (CP 196–99)

A patrolman from the Seattle Police Department conducted a field sobriety test of Mr. Kim and noted in his report that “no odor or impairment was detected.” (CP 161)

Plaintiff filed one claim against Mr. Kim for negligent driving and another claim against the State of Washington for the negligent failure to erect warning signs. (CP 1–6) “The elements of negligence are duty, breach, causation, and injury.” Keller v. City of Spokane, 146 Wn.2d 237, 242, 44 P.3d 845 (2001).

The state prevailed on a motion for summary judgment (CP 305–06), and that decision is the principal basis for this appeal. The decision would be error unless evidence in the record and reasonable inferences construed most favorably to the plaintiff establish “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Owen v. Burlington Northern & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (quoting CR 56(c)).

An appellate court will conduct a de novo review of a summary judgment order and engage in the same inquiry as the trial court. *Id.* It should be noted that “issues of negligence and proximate cause are generally not susceptible

to summary judgment.” *Id.* at 788 (quoting Ruff v. King County, 125 Wn.2d 696, 703, 887 P.2d 886 (1995)).

1. **A FREEWAY TRAFFIC SIGNAL IS DANGEROUS AND MISLEADING BECAUSE IT VIOLATES THE EXPECTATIONS OF MOTORISTS**

The existence of a duty is a threshold question in a negligence case, Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988), and a mixed question of law and fact. The court will decide on public policy grounds whether a “legal duty” should attach in the general circumstance, and the jury will make a finding on “the foreseeable range of danger thus limiting the scope of that duty” on the particular facts of the case. Bernethy v. Walt Failor’s, Inc., 97 Wn.2d 929, 933, 653 P.2d 280 (1982).

The public policy aspect of the state’s duty is well established. A government has a “duty to eliminate an inherently dangerous or misleading condition” on a roadway, which “is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon.” Owen, 153 Wn.2d at 788. This duty includes an obligation to post warning signs when required by law or when the government has actual or constructive knowledge of the dangerous or misleading condition. McCluskey v. Handorff-Sherman, 125 Wn.2d 1, 6, 882 P.2d 157 (1994). The duty, moreover, is

owed “to all travelers, whether negligent or fault-free.” Owen, 153 Wn.2d at 786. *Accord* Keller, 146 Wn.2d at 249. It therefore matters not, with respect to the state’s duty to the plaintiff, whether Mr. Kim was negligent, only whether his actions were foreseeable. Keller, 146 Wn.2d at 252; Lucas v. Phillips, 34 Wn.2d 591, 597–98, 209 P.2d 279 (1949). Moreover, it is not the “exact manner” of the incident which must be foreseeable, but rather “the general type of danger.” Berglund v. Spokane County, 4 Wn.2d 309, 319–20, 103 P.2d 355 (1940).

The issue thus becomes whether there is sufficient evidence in the record to support the following two findings of fact: (1) that the traffic signal at South Holden Street, without an adequate warning sign, was an inherently dangerous or misleading condition to motorists approaching it from the SR 99 freeway and (2) that this general danger was foreseeable to WSDOT. *See* Owen, 153 Wn.2d at 788 (“whether a condition is inherently dangerous or misleading is generally a question of fact”).

The traffic signal at South Holden Street is located at a point of discontinuity between SR 99 as a freeway and SR 99 as a conventional highway. It therefore marks an immediate transition from driving without the possibility of cross traffic, stop signs, and traffic signals to driving with

those possibilities ever present. A freeway is purposely designed to be different from a conventional highway in this respect (CP 244–46), and the difference is communicated to the public in official publications. (CP 220 and 224–30)

Although the signal is not hidden from approaching freeway motorists, neither is it conspicuous nor announced. This is demonstrated by a frame from the contemporaneous road log video taken at milepost 25.92, a point 0.11 miles (581 feet) from the intersection—where the median, shoulder, and roadway markings still indicate the presence of a freeway. (CP 209) A car traveling at the freeway’s design speed will close this remaining distance in 5.66 seconds. Allowing for sufficient braking time, there would be little opportunity to stop a car if the driver does not perceive the traffic signal before reaching this point. This, of course, would not be a problem for anyone familiar with the highway or even for anyone driving with a high state of vigilance. But it is foreseeable that hundreds of the 30,400 motorists traveling through this intersection on an average day would not belong to either of these categories. (traffic volume statistics, CP 253)

It would be possible to begin a trip on Interstate 5 in southern California, exit onto the SR 599/SR 99 freeway at Tukwila, and not encounter a single freeway traffic signal

during this entire journey until the South Holden Street intersection. Anyone with minimal driving experience will understand why, therefore, this signal is dangerous. It has to do with a tendency for many drivers to adjust the focus of their attention to a set of expectations created by their driving environment. During freeway driving this can result in a diminished attention for hazards that are common on a conventional highway—a phenomenon commonly known as “highway hypnosis.”

AASHTO was certainly aware of this issue, and gave it the following exposition in its contemporaneous highway design manual, adopted by the Federal Highway Administration at 23 C.F.R. § 625.4 as a national standard (CP 238):

Expectancies are formed by the drivers' experience and training. Situations that generally occur in the same way, and successful responses to these situations, are incorporated into the drivers' stores of knowledge. Expectancy relates to the drivers' readiness to respond to common situations in predictable and successful ways. It affects how drivers perceive and handle information, and modify the speed and accuracy of their responses.

Reinforced expectancies help drivers respond rapidly and correctly. Unusual, unique, or uncommon situations that violate expectancies may cause longer response times, inappropriate responses, or errors.

The organization advised state highway officials to consider unexpected hazards from the driver's point of view (CP 235):

Designs should take reaction times into account. It should be recognized that drivers vary in their response and take longer to respond when decisions are complex or features are unexpected.

It even reported the results of a study comparing "brake reaction time for expected and unexpected signals." (CP 235)

The graphical results of this study show a consistently higher reaction time for unexpected signals. (CP 236–37)

The Texas Department of Transportation (TXDOT) is also aware of this issue (CP 221):

Attention is an important component of the driving task. When a subtask has a low demand, it can be performed with little conscious attention....

Expectation is also very important in the driving task. Drivers need to have a reasonable expectation about how their vehicles will perform, the geometry of the road downstream of their positions, and where to find navigational information. If the expectation of the driver is violated, the performance of the driving task may suffer.

Consistently with this expression of concern, TXDOT devotes an entire section of its freeway signing handbook to proper signage at a freeway end. (CP 222–23)

There is, moreover, a Washington statute that requires "the erection and maintenance of such signs as in

the opinion of the respective authorities may be deemed proper, indicating to drivers of vehicles that they are entering a limited access area and that they are leaving a limited access area.” RCW 47.52.110. Although the violation of a statute no longer compels a finding of negligence per se, it “may be considered by the trier of fact as evidence of negligence.” RCW 5.40.050.

There was indeed a foreseeable danger lurking at the intersection of SR 99 and South Holden Street, a danger posed by lesser attentive motorists who were habituated to freeway driving but not familiar with the intersection.

2. THE STATE SHOULD HAVE ERECTED A YELLOW WARNING SIGN SUFFICIENTLY CONSPICUOUS TO NOTIFY INATTENTIVE DRIVERS OF THE APPROACHING SIGNAL

If a jury did find that the traffic signal created a foreseeably dangerous or misleading condition posed by inattentive motorists on the SR 99 freeway, it would then deliberate whether the state had breached its duty to undertake adequate corrective action “commensurate with” the danger. Owen, 153 Wn.2d at 788. Whether the state had done so “is generally a question of fact.” *Id.*

WSDOT takes the position that it discharged its duty by erecting white rectangular signs to inform motorists

of a reduction in the speed limit and by placing transverse markings upon the roadway.

But the state has not explained why it failed to erect even a single *yellow warning sign*. This has long been the national standard for signifying hazards on conventional highways and freeways. (excerpts from Manual on Uniform Traffic Control Devices, CP 256–67) See 23 U.S.C. § 109(d) (1983) (secretary of transportation to adopt standards regarding “the location, form and character of informational, regulatory and warning signs”); Traffic Control Devices on Federal-Aid and Other Streets and Highways, 48 Fed. Reg. 46,775 (Oct. 14, 1983) (codified at 23 C.F.R. § 655.603); RCW 47.36.030 (1977) (“signs shall conform as nearly as practicable to [MUTCD]”). See also Owen, 153 Wn.2d at 787 (MUTCD “provides at least some evidence” of the state’s duty of care regarding signs).

In order to meet the expectations of motorists and preserve public safety, it is important for governments to consistently use shapes, symbols, colors, and placements in their roadway signage. MUTCD provides the script for this uniformity. When a government strays from this script, it puts the motoring public in danger. See, e.g., Kitt v. Yakima County, 93 Wn.2d 670, 611 P.2d 1234 (1980) (government liable for placement of crossroads sign beside

highway without right-of-way at intersection). The yellow warning sign has become so ubiquitous that a jury could justifiably find that its absence from the SR 99 freeway subconsciously indicated, to many motorists, that there was no particular hazard ahead.

To better evaluate WSDOT's performance, a jury might find it useful to consider how another state highway department did correct an almost identical danger. Although it is rare for a freeway to end except by means of an interchange, another example of an abrupt end can be found at the terminus of Interstate 35 in Duluth, Minnesota.

Just like the SR 99 freeway, Interstate 35 ends with an intersection at grade controlled by a traffic signal. (aerial image, CP 212) Unlike the SR 99 freeway, the approaching end of Interstate 35 is indicated by no fewer than four signs. The first of these is a large yellow warning sign, cantilevered over the lane of travel, three-fourths of a mile from the freeway end, with the specific advice "FREEWAY ENDS—SIGNAL AHEAD—3/4 MILE." (CP 213) The second is a large yellow warning sign, cantilevered over the lane of travel, with two amber warning beacons and the specific advice "SIGNAL AHEAD—1/4 MILE." (CP 214) The third is a large green guide sign, to the right of the roadway, advising that the interstate ends in one-fourth of a mile. (CP 215)

The fourth is a large yellow warning sign, cantilevered over the lane of travel, with two amber warning beacons and the specific advice “SIGNAL AHEAD—500 FEET.” (CP 216)

Particular attention should be paid to the second sign on Interstate 35. (CP 214) The attachment of a white rectangular speed limit sign on the very post which supports a yellow warning sign and two amber beacons provides an ironic visual rebuttal to the argument that informational speed signs are adequate in this situation.

It is unlikely that Mr. Kim, had he been driving on Interstate 35, or any other motorist who was neither somnolent nor intoxicated would disregard this entire series of signs and fail to execute a proper stop. Minnesota did, therefore, adequately foresee and then correct the danger posed by the abrupt end of its freeway.

It might be suggested that Minnesota did more than what is required of a reasonably prudent government and that Washington should be permitted to save its taxpayers the expense of elaborate signage. Government thrift should indeed be encouraged, but that would be a specious argument in this case. WSDOT had already erected two trusses over the northbound lanes of SR 99, the second being only one-fourth of a mile from the end of the freeway. (images, CP 206 and 207) Both of these trusses were

supplied with electrical current. At little or no additional expense, WSDOT could have installed appropriate warning signs and beacons. According to MUTCD a warning sign should be given first priority: “Generally, in case of conflict, regulatory and warning signing whose location is critical should be displayed rather than guide signing.” (CP 261–62) Cost, in any event, is not a permissible defense for the failure to erect warning signs. McCluskey v. Handorff-Sherman, 125 Wn.2d 1, 10, 882 P.2d 157 (1994).

It might also be useful to consider a case from a state where the highway department designated the end of a freeway more effectively than WSDOT, although less effectively than Minnesota, but was nevertheless adjudged to be liable to an injured motorist. In Bramel v. Utah State Road Commission, 24 Utah 2d 50, 465 P.2d 534 (1970), there was an abrupt turn at a temporary end of Interstate 15 in city of Ogden. A truck missed this turn despite its driver having passed a sign reading “Freeway Ends One Mile,” then a sign at the half-mile point reading “All Traffic Must Exit,” followed by two black-on-yellow 25 MPH speed signs at the quarter-mile point. 465 P.2d at 536.

A jury that considers MUTCD and the practices of other states could reasonably find that WSDOT did indeed

breach its duty to adequately correct the danger presented by the end of the SR 99 freeway.

**3. LOGIC DICTATES THAT KIM WOULD
HAVE PERCEIVED A YELLOW WARNING
SIGN AT LEAST AS CONSPICUOUS
AS THE TRAFFIC SIGNAL ITSELF**

If a jury found that the traffic signal did create a foreseeably dangerous or misleading condition and that the state did breach its duty to undertake adequate corrective action, it would then deliberate whether this breach of duty was a cause in fact of the collision. The breach of duty will have been a cause of the collision if—but for the existence of the breach—the collision would not have taken place. Taggart v. State, 118 Wn.2d 195, 226, 822 P.2d 243 (1992).

Causation would be appropriately decided by the jury if record evidence and reasonable inferences sufficiently support the following findings of fact: (1) that the collision took place because Mr. Kim had not been adequately attentive for traffic signals on the SR 99 freeway and (2) that the erection of at least one conspicuous yellow warning sign over the SR 99 freeway would effectively have alerted Mr. Kim to the approaching signal at South Holden Street.

The analysis should begin with a listing of facts absolutely established by the record.

The key physical fact is the presence of skid marks, 72 feet in length, on the approach to the intersection, left by the car that Mr. Kim was driving. (CP 160–63) A jury could—and certainly should—deduce from this physical fact the following additional facts: (1) that the braking system on the Kim vehicle functioned, (2) that Mr. Kim did perceive the traffic signal before reaching the intersection although too late to avoid the collision, (3) that Mr. Kim would have avoided the collision if he had only perceived the traffic signal farther from the intersection than the necessary stopping distance, and (4) that Mr. Kim did not intend to cause the collision.

Other key facts include the field sobriety test, after which the investigating patrolman reported that “no odor or impairment was detected” (CP 161), and the lack of any conclusive evidence that the Kim vehicle exceeded the design speed of the freeway. (CP 240)

Through the process of inductive logic, a jury could reasonably infer from the facts listed above that the collision did indeed take place because Mr. Kim had not been adequately attentive for traffic signals on the SR 99 freeway.

Inductive logic “draws generalized conclusions from a finite collection of specific observations” whereby “the premises...indicate some degree of support (inductive

probability) for the conclusion but do not entail it; that is, they suggest the truth but do not ensure it.” http://en.wikipedia.org/wiki/Inductive_reasoning. Inductive logic can be strong or weak depending upon the likelihood that the conclusion indeed follows from the premises. *Id.*

In this case, the premises supporting inattention as a cause of the collision are indeed strong because the common alternative causes have been ruled out, including perhaps the most common one—intoxication. Speed can likewise be excluded as a cause. The state cannot avoid liability if it designs a freeway that allows safe travel at 70 miles per hour but includes a misleading feature that will pose a danger to motorists traveling at that foreseeable speed. Mr. Kim was alert to some degree because he did respond to the traffic signal by attempting to stop his car. His attempt to stop, moreover, proves the absence of any motive to cause injury; and it also proves the functionality of his car’s braking system. The tardiness of his attempt to stop is more consistent with inattention than with any alternative explanation.

Through the process of deductive logic, a jury could reasonably infer from the facts mentioned above that the erection of at least one conspicuous yellow warning sign over the SR 99 freeway would indeed have alerted Mr. Kim to the

approaching signal at South Holden Street. This deduction would be valid if the jury only inferred that Mr. Kim had been at least as attentive when he drove beneath the second truss as he actually proved to be when he approached the traffic signal approximately 15 seconds later (one-fourth of a mile at 60 miles per hour). Absent contradictory direct evidence, a jury would presume consistency in Mr. Kim's state of mind over a 15-second interval. The jury, moreover, would hypothesize a warning sign at least as conspicuous as the traffic signal itself. Otherwise, the sign would fail to serve its intended purpose.

“A deductive argument is valid if the conclusion does follow necessarily from the premises, i.e., if the conclusion must be true provided the premises are true.”
http://en.wikipedia.org/wiki/Deductive_reasoning.

The effectiveness of a hypothetical warning sign can be deduced through the following syllogism:

PROVED: Mr. Kim perceived the traffic signal.

INFERRED: Mr. Kim was no less attentive when he drove beneath the second truss.

HYPOTHESIS: The second truss contains a yellow warning sign more conspicuous than the traffic signal.

CONCLUSION: Mr. Kim would have perceived the warning sign.

Having perceived the hypothetical warning sign, Mr. Kim would have had adequate time to search for the traffic signal and stop his car—uneventfully—at South Holden Street. But for the lack of this warning sign, the collision would never have taken place.

4. LOGICAL INFERENCE IS NOT SPECULATION

The Washington Supreme Court once rather pointedly expressed its opinion regarding the province of the jury in matters of causation:

Generally speaking, the question of whether or not it was the conduct of the defendant the caused plaintiff's harm is a question for the jury, not the court. It is a question of fact, and a jury is just as able to decide the issue as is any court, no matter how experienced that court may be.

Moyer v. Clark, 75 Wn.2d 800, 804, 454 P.2d 374 (1969).

Accord Owen, 153 Wn.2d at 788.

Washington courts have, nevertheless, on a few reported occasions decided causation as a matter of law, and do so when the proponent of causation advances a “speculative” or “conjectural” theory. *See, e.g., Moore v. Hagge*, 158 Wn. App. 137, 241 P.3d 787, 792 (2010). This is said to occur whenever “it is as likely that [the cause of an accident] happened from one cause as another.” *Id.* (quoting Frescoin v. Puget Sound Traction, Light & Power

Co., 90 Wash. 59, 63, 155 P. 395 (1916)). If *speculation* and *conjecture* describe a state of equipoise, the contrary state would be *preponderance*, which describes evidence from which one conclusion is more likely than another.

Speculation and conjecture are also said to be the result whenever the proponent fails “to provide evidence from which cause in fact could be inferred.” Moore, 241 P.3d at 792. “An inference is a ‘process of reasoning by which a fact or proposition sought to be established is deduced as a *logical consequence* from other facts, or a state of facts, already proved or admitted.’” Wojcik v. Chrysler Corp., 50 Wn. App. 849, 853, 751 P.2d 854 (1988) (quoting Black’s Law Dictionary 917 (4th ed. 1968)).

Plaintiff’s theory of causation relies upon two findings of fact, *supra* Part A.3, evidence in support of which can be tested against these principles.

Plaintiff must first demonstrate why inattention is the preponderant explanation for the collision. Inattention is a state of mind which would typically be difficult to prove except with circumstantial evidence, particularly where the subject of the analysis is an adverse party. In a criminal case the prosecution must often prove the state of mind of the accused. But if the accused neither testifies nor confides in a third party, the prosecution may be relegated to proof

by way of inference. It clearly has the right to do so. See State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Plaintiff should be granted a similar right. Her mode of proving inattention relies not only upon the belated attempt by Mr. Kim to stop (demonstrated by the skid marks and their futility) but also upon disproof of otherwise expected alternative causes. This mode of proof is sufficiently robust to enable fact finding by a jury. Direct evidence is not required. See, e.g., Gerard v. Peasley, 66 Wn.2d 449, 456, 403 P.2d 45 (1965).

Plaintiff has demonstrated even more convincingly the expected consequences of a conspicuous hypothetical warning sign. A jury need only infer that Mr. Kim had been equally or no less attentive 15 seconds before the collision. The sign would then have alerted him to the approaching traffic signal with sufficient extra time to avoid the collision. This proof cannot be fairly characterized as speculative, particularly by a defendant whose very own *failure to act* requires us to consider the road not taken.

B. THE DISCOVERY ISSUE

Plaintiff received her emergency care at Harborview Medical Center and her follow-up treatment at Children's Hospital. She acquired a complete set of her records from both institutions before filing this case. She also acquired photographs of herself, the car in which she was riding, and the car driven by Mr. Kim.

Plaintiff knew that these materials would be the subject of future discovery requests, even though the process had not yet begun on the 259th day after the state received her complaint. Plaintiff therefore took it upon herself to produce the materials. (CP 94) She attached these items, consisting of 20 photographs and 147 pages of medical records, to notices made under authority of ER 904(b). (CP 13–21) The state admits to receiving the materials in this manner. (CP 25–26)

Although plaintiff did occasionally seek medical attention for matters unrelated or marginally related to her brain injury, neither she nor her attorney has ever obtained those records. The state signaled that it wanted to obtain, directly from the providers themselves, a copy of every medical record ever generated about the plaintiff, including

records she had already delivered. One of the targeted providers was a “counseling” clinic. (CP 59)

General assurances may once have been expressed by counsel about cooperation in matters of discovery, but no promise was ever made to sign a stipulation sight unseen. (CP 106) The state nevertheless delivered to plaintiff, without prior consultation, a set of proposed waiver and stipulation forms addressed to medical providers and school districts. (CP 55–67)

The medical waiver form was not satisfactory in that it called upon plaintiff to surrender state and federal privacy rights, including her right to protect information from further dissemination, *infra* Part B.2, her right to a finding of good cause before the state can access information having to do with sexually transmitted diseases, RCW 70.24.105(2)(f), and her right to keep in confidence any communications she might have had with psychologists who she does not plan to call as expert witnesses. *See* RCW 18.83.110. (CP 60) Moreover, the state appended a proposed stipulation that would have required the yet unseen records to be marked as trial exhibits and would also have posed a series of written questions to the records custodian. (CP 61–62)

The proposed waiver form for school records was a modification of the medical release form with inappropriate

terminology borrowed from that form and incorrect statutory references. (CP 63) See Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

Soon thereafter, plaintiff responded to discovery requests in which she identified all of her health care providers, including those not seen for her brain injury. The state does not deny receiving this information, nor does it deny that plaintiff had already produced every medical record in her possession. Furthermore, in two of her responses, plaintiff advised the state that it would have to seek, from the providers themselves, any records she did not already possess:

REQUEST FOR PRODUCTION B: Please produce for inspection and copying any records pertaining to any treatment of injuries [allegedly caused by the collision at issue].

RESPONSE:

The Attorney General's office has already been provided with complete and voluminous records in PDF format from Harborview Medical Center and from Children's Hospital and Medical Center. Other records regarding treatment for these injuries are presently and exclusively in the hands of the providers themselves. If and when my attorney and I obtain these records, we will provide copies as a matter of course....

REQUEST FOR PRODUCTION K: Please produce for inspection and copying all medical and hospital

records which reflect your health care other than that arising from the incident referred to in the Complaint.

RESPONSE:

I do not ask medical providers for records which are unrelated to the collision in August of 1990 and therefore do not possess any such records. This request will have to be made directly to these providers.

(CP 36-37)

Plaintiff did nothing to interfere with the state's right to issue document subpoenas. This process should not have been more burdensome than the solicitation and delivery of proposed stipulations. The state need only have provided prior notice of 14 days. RCW 70.02.060. Plaintiff may have sought a protective order during this interval, depending upon the particular information requested in the subpoena and the particular provider upon whom it was served. The state chose instead to coerce plaintiff's signature on waiver and stipulation forms. (CP 27-28)

During a break in a deposition, the state demanded that plaintiff sign the proposed forms. (CP 29) Plaintiff's counsel had not been notified that this discussion would be held. Accordingly, he did not have all of his relevant files with him. (CP 97) During this discussion the state also demanded copies of educational records which plaintiff had

only recently acquired from her mother, who maintains a separate household. Plaintiff scanned these records and provided them to the state prior to the consideration of any discovery motion. (CP 105) If a discovery conference had been held with due and proper notice, plaintiff would have asked for two days to complete the scanning process. (CP 97)

One day after the deposition, the state received advice by letter that plaintiff would sign a waiver that guaranteed her rights of privacy under federal and state law. (CP 41–43)

The very next day, the state did issue subpoenas to some of the medical providers. (CP 29) However, it also filed a motion—seven days later and before the medical providers could respond to the subpoenas—in which it asked the Superior Court to compel plaintiff to “comply with the rules of discovery” by signing the originally proposed waivers and stipulations. (CP 74)

In her response, plaintiff cited federal privacy rules, state discovery rules, and CR 2A. She argued that “[i]f one party drafts a stipulation without first discussing it with the other party, the drafter assumes the risk that the other party will decline the proposal.” She demonstrated that the state had already received every requested document in her

“possession, custody or control.” (CP 96–97) She requested a “qualified protective order” to preserve her federal privacy rights with respect to the subpoenas which had just been issued by the state. (CP 101–02)

In its reply, the state vigorously opposed the federal privacy rights and accused plaintiff of “patently obstructing the discovery process.” It argued that “it is the *holder* of the documents [that is, the medical provider] who must assert that the release form is inadequate.” The state went even further and argued that plaintiff “does not have standing to assert that the holders of such information might find the State’s standard forms inadequate.” (CP 109)

The Superior Court ordered plaintiff to “release medical, educational, and employment records” within ten days and reserved the issue of sanctions until the conclusion of the litigation. (CP 122) The Superior Court did reconsider its initial refusal to issue a qualified protective order under authority of federal law, but did not otherwise amend the previous order. (CP 141–42) The court ultimately denied sanctions in its order on summary judgment. (CP 306)

Plaintiff could not bring herself to sign any of the forms prepared by the state. (CP 130–31) She therefore relied on forms drafted by her attorney.

A court abuses its discretion in matters of discovery if it bases its decision upon untenable grounds. Amy v. Kmart of Washington LLC, 153 Wn. App. 846, 858, 223 P.3d 1247 (2009).

**1. PLAINTIFF HAD ALREADY WAIVED
THE PHYSICIAN-PATIENT PRIVILEGE
BY OPERATION OF STATE LAW**

The physician-patient privilege is a statutory right. A previous version of the statute required an injured plaintiff “to elect whether or not to waive the physician-patient privilege.” If the privilege was not timely waived, the plaintiff “may not put his or her mental or physical condition...in issue and may not waive the privilege later in the action.” RCW 5.60.060(4)(b) (amended 1987). Before enactment of the current statute, a plaintiff would commonly waive the privilege within the text of a complaint.

The current statute “deems” a waiver to have taken place 90 days after the case is filed:

Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(reference to statute, CP 42)

Plaintiff therefore waived her physician-patient privilege by operation of law on the 90th day after filing her complaint in Superior Court. No statute or rule requires her to perform any additional act for this waiver to occur. It would therefore be an idle act for her to sign a written waiver after the 90th day, and a defendant's right to discover medical records cannot logically be premised upon the existence of a written waiver.

2. PLAINTIFF NEVERTHELESS RESERVED IMPORTANT PRIVACY RIGHTS

This is not to say that all related issues come to an end on the 90th day. A defendant may find third parties recalcitrant in their response to a document subpoena. A plaintiff, moreover, may seek a zone of medical privacy by requesting a protective order. But the most significant change in this area of the law since the 1987 amendment of the physician-patient privilege has been enactment of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 2024, and the Privacy Rule adopted by the Department of Health and Human Services under authority of the Act. 45 C.F.R. § 164.512 (2000). These federal laws preempt all state laws

which are not “more stringent” on the issue of medical privacy. HIPAA § 264(c)(2).

HIPAA leaves undisturbed the automatic waiver of privilege under Washington law. However, the Privacy Rule does preempt state procedures for obtaining “protected health information” from third parties during the course of litigation. *See generally* Privacy Rule, 45 C.F.R. § 164.512(e).

Although the Privacy Rule does preserve the right to issue “a subpoena...not accompanied by an order of a court,” 45 C.F.R. § 164.512(e)(1)(ii), it requires the requesting party to document in writing that it has made a good faith effort to give prior notice to the patient and either that the court has considered objections raised by the patient or the time for doing so has elapsed. 45 C.F.R. § 164.512(e)(1)(ii)(A), (iii). Alternatively, the requesting party may dispense with notice to the patient if it documents in writing that it has obtained either an actual “qualified protective order” from the court or an agreement with the patient equivalent to a qualified protective order. 45 C.F.R. § 164.512(e)(1)(ii)(B), (iv).

A qualified protective order

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Id. The obvious intent of this regulation is to temporarily move the privacy “wall” created by HIPAA to include those with a need to know in litigation, but restore the wall to its original position when the need to know ends. The state can give no explanation why it simply did not agree to plaintiff’s suggestion by letter (CP 41–43) that the proposed stipulation contain this protection. It cannot truthfully argue that it was plaintiff who sought delay or protraction, particularly when it was the state who postponed discovery for over nine months and needed to justify its request for a continuance.

In a case involving *ex parte* contact with treating physicians, the Washington Supreme Court rejected—on public policy grounds—the assertion of a right to obtain medical information outside of formal discovery. Loudon v. Mhyre, 110 Wn.2d 675, 677–78, 756 P.2d 138 (1988). See also Smith v. Orthopedics Int’l, Ltd., P.S., No. 83038-0 (Wash. Dec. 16, 2010) (following Loudon but finding harmless error). The Supreme Court reaffirmed that the automatic waiver “is not absolute,” and it expressed a concern with possible “disclosure of irrelevant, privileged

medical information.” Loudon, 110 Wn.2d at 678. Its reasoning should likewise apply to documents.

Plaintiff is a young adult who suffers the cognitive effects of a brain injury. Her rights to medical privacy are not trivial given her age, the extent of her disability, and the ease with which nefarious persons can now publish this information electronically.

The Department of Health and Human Services finds that privacy is an important concern to the public, Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,465–67 (Dec. 28, 2000), that many individuals will avoid care or provide inaccurate information to their medical providers if they are not assured of privacy, *id.* at 82,467–68, and that over two million United States citizens “did not seek treatment for mental illness [in 1999] due to privacy fears.” *Id.*

3. THE RULE 37 MOTION APPEARS TO BE AN ATTEMPT TO EVADE THESE PRIVACY RIGHTS

The most benign explanation for the Rule 37 motion would be an unwillingness of the Attorney General’s office to change its forms to adapt to the federal Privacy Rule. A less benign explanation would be that the state actually sought to circumvent the rule. The record demonstrates that

the state did issue subpoenas substantially compliant with HIPAA before it filed the motion. The latter explanation for the Rule 37 motion therefore seems to be more plausible.

The state defends its position by arguing that plaintiff “does not have standing to assert that the holders of such information might find the State’s standard forms inadequate.” (CP 109) A corollary of this argument would be that no plaintiff could object to any medical disclosure form that any defendant might proffer. If we assume *arguendo* that the state’s argument and its corollary are true, we must nevertheless conclude that it begs the question whether the Superior Court has authority to force plaintiff to sign any waiver, particularly a waiver that would force her to surrender her privacy rights.

The Privacy Rule allows a medical provider to release information in response to an authorization signed by the patient. If the Superior Court did have authority to compel a signature upon such a document, this process could be used to circumvent the rights granted by the provisions of the Privacy Rule that restrict disclosure of “protected health information without the written authorization of the individual.” 45 C.F.R. § 164.512(e). HIPAA should not be flouted in this manner.

Courts should guard against informal discovery of medical information and preserve a patient's right to demand the issuance of document subpoenas with notice and a meaningful opportunity to seek a protective order particularized to the information being sought. By forcing plaintiff to sign waivers, just after document subpoenas had been issued, in the absence of any actual dispute with a medical provider, and in derogation of the federal Privacy Rule, the Superior Court decided an issue upon untenable grounds and therefore abused its discretion. Upon remand, the state should be ordered to return the waiver forms signed by the plaintiff and to proceed with formal discovery if it wants to acquire medical information from any person not a party in this case.

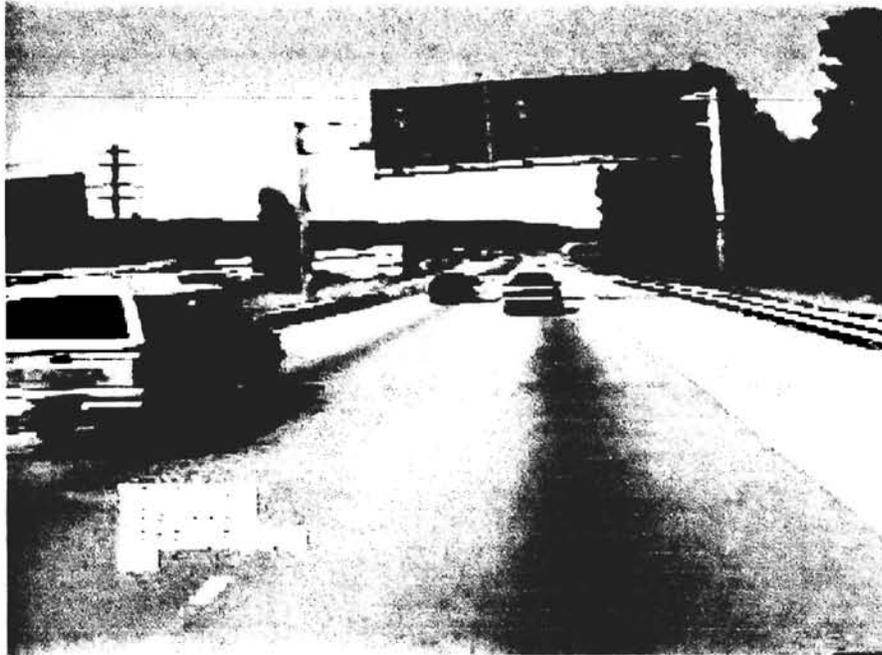
CONCLUSION

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

RESPECTFULLY SUBMITTED this 14th day of February 2011.

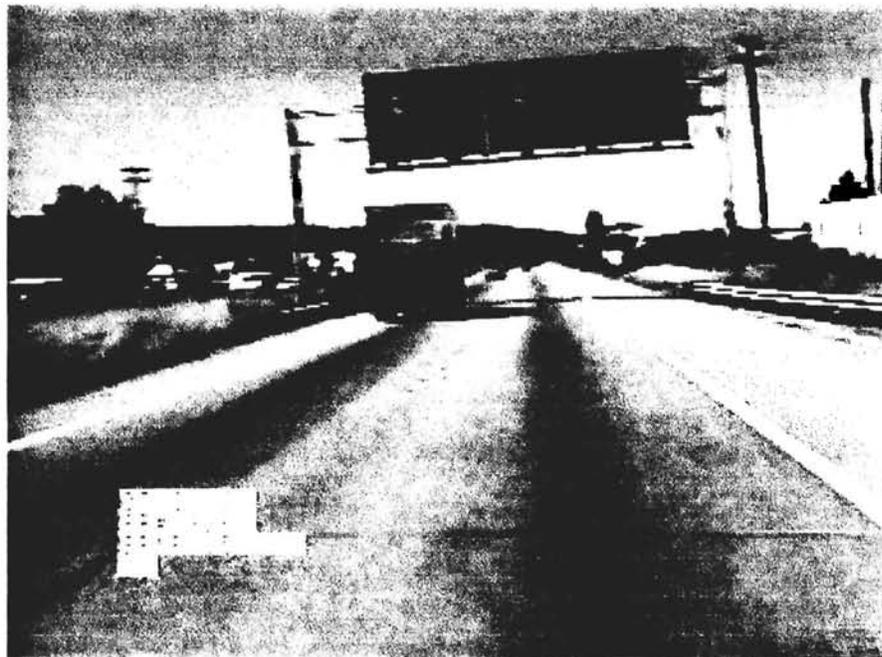


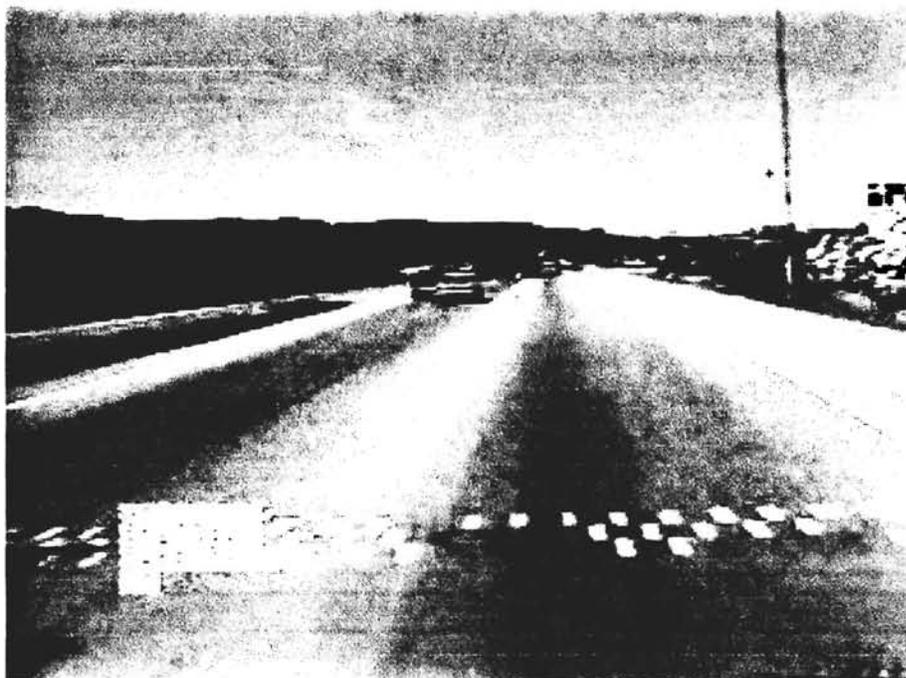
Thomas Cline
Attorney for Appellant
WSBA 11772



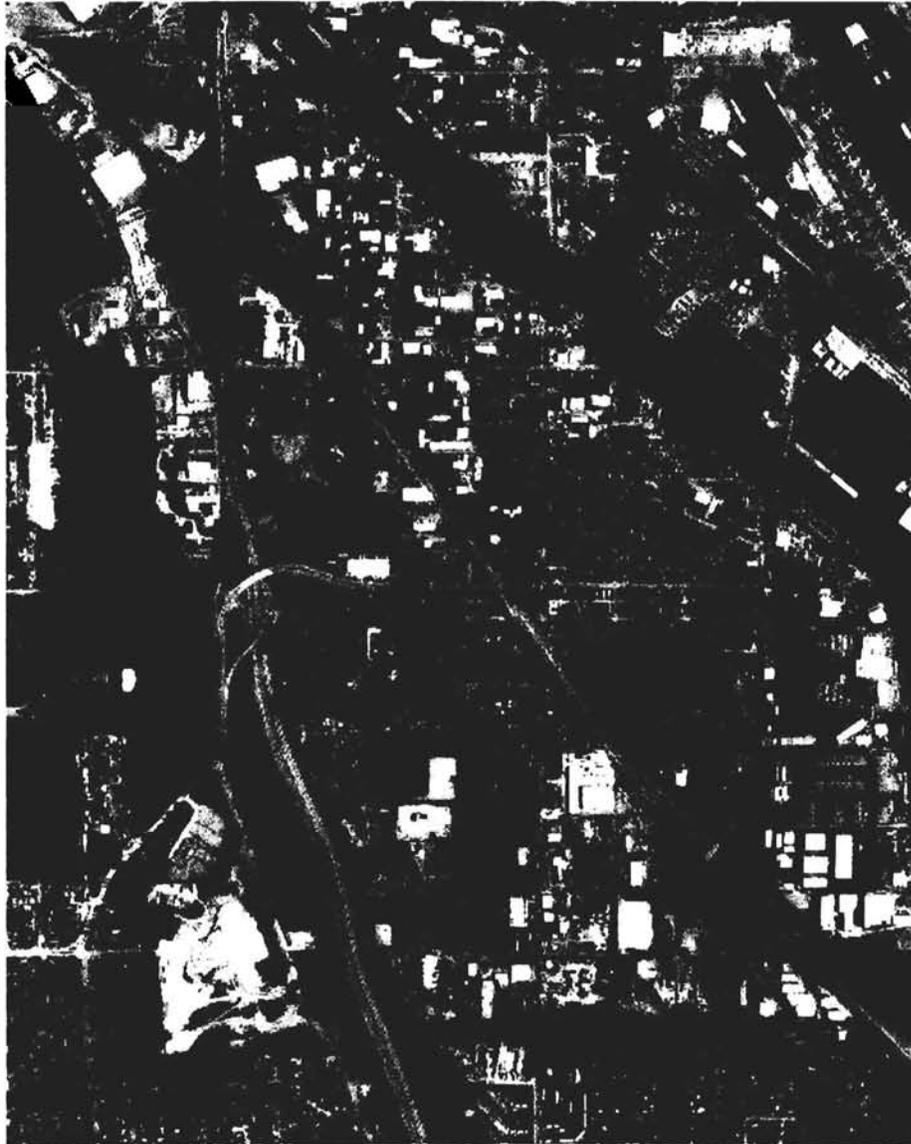
SR 99 Milepost 25.42 (CP 206)

SR 99 Milepost 25.80 (CP 207)





SR 99 Milepost 25.92 (CP 209)



Approach to end of SR 99 freeway (CP 202)



Interstate 35, first sign (CP 213)

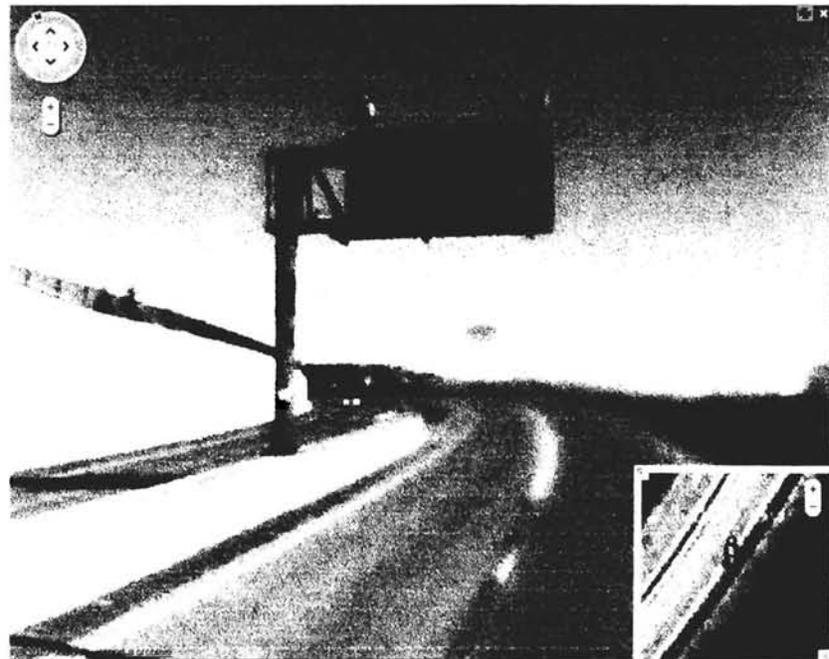
Interstate 35, second sign (CP 214)





Interstate 35, third sign (CP 215)

Interstate 35, fourth sign (CP 216)



HIPAA § 264

Recommendations With Respect to Privacy of Certain Health Information

Pub. L. 104–191, title II, § 264, Aug. 21, 1996, 110 Stat. 2033, provided that:

“(a) In General.—Not later than the date that is 12 months after the date of the enactment of this Act [Aug. 21, 1996], the Secretary of Health and Human Services shall submit to the Committee on Labor and Human Resources and the Committee on Finance of the Senate and the Committee on Commerce and the Committee on Ways and Means of the House of Representatives detailed recommendations on standards with respect to the privacy of individually identifiable health information.

“(b) Subjects for Recommendations.—The recommendations under subsection (a) shall address at least the following:

“(1) The rights that an individual who is a subject of individually identifiable health information should have.

“(2) The procedures that should be established for the exercise of such rights.

“(3) The uses and disclosures of such information that should be authorized or required.

“(c) Regulations.—

“(1) In general.—If legislation governing standards with respect to the privacy of individually identifiable health information transmitted in connection with the transactions described in section 1173(a) of the Social Security Act [subsec. (a) of this section] (as added by section 262) is not enacted by the date that is 36 months after the date

of the enactment of this Act [Aug. 21, 1996], the Secretary of Health and Human Services shall promulgate final regulations containing such standards not later than the date that is 42 months after the date of the enactment of this Act. Such regulations shall address at least the subjects described in subsection (b).

“(2) Preemption.—A regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation.

“(d) Consultation.—In carrying out this section, the Secretary of Health and Human Services shall consult with—

“(1) the National Committee on Vital and Health Statistics established under section 306(k) of the Public Health Service Act (42 U.S.C. 242k (k)); and

“(2) the Attorney General.”

45 C.F.R. § 164.512(a), (e)

[Code of Federal Regulations]
[Title 45, Volume 1]
[Revised as of October 1, 2009]
From the U.S. Government Printing Office via GPO Access
[CITE: 45CFR164.512]

[Page 776-785]

TITLE 45--PUBLIC WELFARE

SUBTITLE A--DEPARTMENT OF HEALTH AND HUMAN
SERVICES

PART 164_SECURITY AND PRIVACY--Table of Contents

Subpart E_Privacy of Individually Identifiable Health
Information

Sec. 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in Sec. 164.508, or the opportunity for the individual to agree or object as described in Sec. 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) Standard: Uses and disclosures required by law.
(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law....

(e) Standard: Disclosures for judicial and administrative proceedings--(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only [[Page 779]] the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

RCW 18.83.110

Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client, but this exception is subject to the limitations under RCW 70.96A.140 and 71.05.360(8) and (9).

RCW 70.24.105

[excerpts]

(1) No person may disclose or be compelled to disclose the identity of any person who has investigated, considered, or requested a test or treatment for a sexually transmitted disease, except as authorized by this chapter.

(2) No person may disclose or be compelled to disclose the identity of any person upon whom an HIV antibody test is performed, or the results of such a test, nor may the result of a test for any other sexually transmitted disease when it is positive be disclosed. This protection against disclosure of test subject, diagnosis, or treatment also applies to any information relating to diagnosis of or treatment for HIV infection and for any other confirmed sexually transmitted disease. The following persons, however, may receive such information: ...

(a) The subject of the test...;

(b) Any person who secures a specific release of test results or information relating to HIV or confirmed diagnosis of or treatment for any other sexually transmitted disease executed by the subject...;

(f) A person allowed access to the record by a court order granted after application showing good cause therefor. In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of the order, the court, in determining the extent to which any disclosure of all or any part of the record of any such test is necessary, shall impose appropriate safeguards against unauthorized disclosure. An order authorizing disclosure shall: (i) Limit disclosure to those parts of the patient's record deemed essential to fulfill the objective for which the order was granted; (ii) limit disclosure to those persons whose need for information is the basis for the order; and (iii) include any other appropriate measures to keep disclosure to a minimum for the protection of the patient, the physician-patient relationship, and the treatment services, including but not limited to the written statement set forth in subsection (5) of this section; ...

(5) Whenever disclosure is made pursuant to this section, except for subsections (2)(a) and (6) of this section, it shall be accompanied by a statement in writing which includes the following or substantially similar language: "This information has been disclosed to you from records whose confidentiality is protected by state law. State law prohibits you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by state law. A general authorization for the release of medical or other information is NOT sufficient for this purpose." An oral disclosure shall be accompanied or followed by such a notice within ten days.

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

TARA JEAN McMANUS,)
)
 Appellant,) No. 66333-0-I
)
 v.) **CERTIFICATE OF MAILING**
)
 YONG KUN KIM,)
)
 Defendant,)
)
 STATE OF WASHINGTON,)
)
 Respondent.)
 _____)

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 FEB 15 PM 4:25

1 The undersigned attorney for appellant certifies that on
2 February 15, 2011, he mailed one copy of the Brief of Appellant
3 and this certificate to Jon R. Morrone, Assistant Attorney General, 800
4 Fifth Avenue, Suite 2000, Seattle, WA 98104.

DATED this 15th day of February 2011.



Thomas Cline
Attorney for Appellant

CERTIFICATE OF MAILING

THOMAS CLINE
ATTORNEY AT LAW
2502 N 50TH ST
SEATTLE WA 98103
(206) 789-2777