

No. 35411-0-II

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

LINDA ANN DOMINGUEZ
and
THE ESTATE OF MICHAEL DOMINGUEZ,
Appellant

v.

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

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. MRS. DOMINGUEZ BROUGHT FORTH SUFFICIENT EVIDENCE ON THE ISSUE OF PROXIMATE CAUSE.

1. Respondents mischaracterize the case law upon which they rely.

Respondents consistently mischaracterize Washington case law, which was the precedent upon which the trial court based its decision on summary judgment:

a. *Kristjanson v. City of Seattle.*

In *Kristjanson*, the plaintiff was seriously injured after the car he was driving collided with an oncoming car. *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 324-25, 606 P.2d 283 (1980). The oncoming driver's car crossed over the center line of the road and collided with the plaintiff's car. 25 Wn. App. 324, 324-25. The collision occurred on a steep, sharply curved 2-lane road in a "wooded area." 25 Wn. App at 324. A sign that would have warned the oncoming driver of the sharp curve was missing at the time of the accident, and an advisory speed sign that faced the oncoming driver was completely obscured by foliage. 25 Wn. App. 326.

The plaintiff claimed that the City's failure to provide adequate signage and visibility in the hilly, wooded area where the accident occurred was a proximate cause of his injuries. 25 Wn. App. 326. An expert also testified for the plaintiff that American Association of State

Highway Officials' standards had not been observed with respect to visibility and signing, so the plaintiff did not have stopping distance sufficient for him to avoid the collision. 25 Wn. App. at 325.

Division One observed that the plaintiff's stopping distance exceeded AASHO guidelines, and that the oncoming driver drove on the same road virtually every day. 25 Wn. App. at 326. Division One affirmed the trial court's conclusion that even if it were to resolve all doubts in favor of the plaintiff, there was no evidence that the City's negligence caused the collision. 25 Wn. App. at 325.

At oral argument on summary judgment in this case (Dominguez), the Respondents argued that Kristjanson is squarely on point with this case. They argued that because Division One had affirmed summary judgment dismissal of Kristjanson's negligence claim against the City (because Kristjanson could not prove the allegedly inadequate road signage was the proximate cause of his injuries), this court should similarly dismiss Mrs. Dominguez's complaint on summary judgment for the same reason.

There are two highly significant distinctions between *Kristjanson* and this case that Respondents fail to point out. First, just before the collision that injured Kristjanson, the oncoming driver had a passenger steer his car while the driver operated the gas and brake pedals. 25 Wn.

App. at 325. Second, the driver of the oncoming car that collided into Kristjanson had an undisputed Breathalyzer reading of .21 just 45 minutes after the collision. 25 Wn. App at 325. Division One quoted the trial judge, who found that “the sole proximate cause of the collision was the oncoming driver’s own “incredibly reckless driving.” 25 Wn. App. at 326. Therefore, that driver’s dangerously high level of intoxication and excessive recklessness were clearly proper bases upon which to conclude the driver’s own recklessness was more likely than not the proximate cause of the accident. Kristjanson is not squarely on point with Dominguez.

b. Johanson v. City of Seattle.

In *Johanson*, the plaintiff was a passenger in a car that collided with another car on Holman Road in King County on a “dark” night in 1938. *Johanson v. City of Seattle*, 7 Wn.2d 111, 118, 109 P.2d 307 (1941). The plaintiff was injured in the collision and his sole allegation was that the county’s negligence was the proximate cause of his injuries. 7 Wn.2d at 112-13. The plaintiff alleged the county had recently widened this area of the road, and had placed new striping to indicate the center line. However, the county had not removed the previous yellow stripe, so there were two sets of stripes on that portion of Holman Road. In addition, no warning signs, lights or barricades were placed in the area.

Although the jury found for the plaintiff, the trial court granted judgment for defendants notwithstanding the verdict. 7 Wn.2d at 114.

On appeal, the plaintiff argued that

a reasonably prudent person, driving an automobile on Holman road, without knowledge of the extraordinary conditions there might, and in all reasonable probability would, be deceived and misled into relying on the existing yellow line, and there was not the slightest evidence upon which the jury could have found that [the other driver] was not deceived, or that he knew the directional stripe he was following and relying upon was misplaced and improperly located.

7 Wn.2d at 121 (emphasis original).

The Washington Supreme Court affirmed the trial court's decision, holding "[I]t would be mere guessing, in view of all the facts, to say that [the other driver] was in any way deceived and misled by the location of the yellow line." 7 Wn.2d at 123. It also stated, "[T]here must be some evidence, either direct or circumstantial, that there was negligence on the one side, an injury resulting in damages on the other, and that the injury and damages followed the negligence, and were produced thereby." 7 Wn.2d at 122 (quoting *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 P. 457 (1903)). In addition, the Supreme Court also noted that there was no statutory duty to paint directional stripes on the highway. 7 Wn.2d at 119.

In this case, Mr. Dominguez presented evidence – eyewitness testimony – regarding the Defendants' failure to properly order and place

warning signs and to properly illuminate the flagger's work station and the work area prior to Mr. Dominguez's accident. (Declaration of Ms. Coleman, herself a certified flagger.) CP 175-76.

The distinction between *Johansen* and this case (Dominguez) is that Johanson produced no direct or circumstantial evidence whatsoever that the other driver was, in fact, confused by the two sets of yellow lines. In this case (Dominguez), "some" evidence, in the form of eyewitness testimony shows the Defendants failed to use proper signage and lighting at the work site. Therefore, on summary judgment Mrs. Dominguez not only showed a dispute as to a material fact, but she also produced an evidentiary fact that directly contradicted the Respondents. Therefore, summary judgment was not proper as to this issue – it is an issue of material fact that must be decided by the trier of fact at trial.

c. Miller v. Likins.

In *Miller*, the plaintiff's primary contention was that the defendant/City's failure to maintain adequate signage and lighting in the area where the plaintiff's son was struck and injured by an 87-year-old motorist was the proximate cause of her son's injuries. The accident occurred at a location where a road in Federal Way curved and converged into another road. The plaintiff claimed that the 87-year-old motorist crossed over an inadequately marked fog line and struck her son on the

shoulder of the road, and that the defendant should have installed clear markings, lowered the speed limit or installed more signage to prevent such accidents. *Miller v. Likins*, 109 Wn. App., 140, 147m 34 P.3d 835 (2001). The plaintiff's own expert had testified on deposition that it was impossible to determine where the point of impact was. 109 Wn. App. at 149. The plaintiff did not allege any violations of any legal requirements for road signage and lighting.

Division One affirmed the trial court's grant of summary judgment dismissal because the plaintiff provided no evidence whatsoever to demonstrate that the City's negligence was the proximate cause of her son's injuries. 109 Wn. App. at 145, 147.

Here (in *Dominguez*), by the Respondents' own admissions, specific regulations and legal requirements for signage were violated. Mrs. Dominguez has provided evidence that the Respondents were negligent, unlike the plaintiff in *Miller*. RCW 5.40.050.

d. Cunningham v. State.

In *Cunningham*, the plaintiff drove his car into a concrete bollard near Bangor Naval Base. *Cunningham v. State*, 61 Wn. App. 562, 564, 811 P.2d 225 (1991). As a result, Cunningham and his passenger were both seriously injured. 61 Wn. App. at 564.

The plaintiff claimed inadequate striping and lighting in the area where the accident occurred were the proximate cause of the accident because they failed to meet minimum state, federal or Navy standards. 61 Wn. App. at 563.

At oral argument in this case (Dominguez), the Respondents argued that in *Cunningham*, the court found that allegedly deficient striping and lighting were not the proximate cause of the plaintiff's injuries, and that Cunningham had failed to produce any evidence that it was a proximate cause of his injuries. The Respondents argued that this court should dismiss Mrs. Dominguez's complaint on similar grounds.

Stated more accurately, the Cunningham trial court dismissed the negligence claim because the plaintiff and his passenger had initially filed suit against the United States in federal court. The United States was granted partial summary judgment because the it was shielded from liability under the Federal Tort Claims Act, 28 U.S.C. §2680. 61 Wn. App. at 564-65.

The Respondents also neglected to mention that the plaintiff then filed suit in King County Superior Court (apparently against the State of Washington). The trial court dismissed that complaint on collateral estoppel grounds. In reviewing the trial court, Division One stated that at the time of the accident, the plaintiff had a blood alcohol level of at least

.22. 61 Wn. App. at 571. In addition, the plaintiff admitted the area where the accident occurred was well lit and he was fully aware of the bollard's placement. 61 Wn. App. at 572. Based upon that, Division One held "the record is devoid of any evidence indicating that proper lighting and striping would have prevented the accident." *Id.* In affirming the trial court, Division One held: "This is clearly the case here, where a highly intoxicated driver drove full speed into an obstruction of which he admits he was at least somewhat aware." 61 Wn. App. 572. Division One cited three similar cases to support this conclusion: *Braegelmann v. County of Snohomish*, 53 Wn. App. 381, 385-86, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989) ("refusing to find legal causation because the County had no duty to foresee the 'extreme negligence' of a speeding and intoxicated driver who crossed the center line and struck another car"); *Kristjanson v. Seattle*, 25 Wn. App. 324, 606 P.2d 283 (1980) ("no legal causation when driver involved in accident was intoxicated, speeding, and had crossed the center line"); and *Cordeiro v. Burns*, 7 Haw. App. 463, 776 P.2d 411 (1989) ("no legal causation when accident involved a drunk driver who was speeding and was inattentive to his driving"). Contrary to what Respondents argue, *Cunningham* is not squarely on point with this case (*Dominguez*).

e. Munson v. State (Idaho Supreme Court).

In *Munson*, the driver of a van died from injuries he sustained after colliding into the rear end of a pickup that had been stopped by a flagger in a section of a state highway that was under repair. *Munson v. State*, 531 P.2d 1174, 1175, 96 Id. 529 (1975). The plaintiffs claimed the defendants failed to adequately warn oncoming drivers of the repair crew and its work area because the repair crew did not continuously move its warning signs to keep up with and follow the crew as it moved along the highway. The plaintiffs claimed this failure to warn oncoming drivers was the proximate cause of the driver's death. 531 P.2d 1174, 1175, 96 Id. 529 (1975). The plaintiffs alleged no violations of any specific legal requirement or regulation pertaining to the repair crew or work area.

The Idaho Supreme Court affirmed the trial court's summary judgment dismissal of the wrongful death claim against the repair crew foreman. It found that the repair site was easily identifiable and visible from a considerable distance. 531 P.2d at 1177.

At oral argument in this case (*Dominguez*) on Respondents' summary judgment motion, the Respondents argued that *Munson* is on point with this case. However, the Respondents failed to mention one very significant factor that distinguishes *Munson* from this case: the accident in *Munson* occurred in full daylight. Visibility was clear, the road was dry, the repair crew was clearly visible from a "considerable

distance,” and the flagger was standing “near the pickup” that was struck by the driver of the van. 531 P.2d at 1176-77. Therefore, *Munson* is not on point with this case. In this case (Dominguez), the accident was at night, the area was not sufficiently lit, the signage was incorrect and misleading, and the flagger was standing in front of the Ford Escort and was thus not likely readily visible to Mr. Dominguez.

Therefore, the Respondents are incorrect when they argue that Washington courts have consistently granted summary judgment on similar facts, and the trial court’s reliance on this interpretation of the case law was error.

2. Proximate cause cannot be determined without considering breach of duty.

Respondents argue that evidence of improper signage, lighting and flagger position goes to breach of duty, not proximate cause. Br. of Resp. at 23. Breach of duty and proximate cause are inextricable elements of negligence. A breach of duty can be a proximate cause of damage. In addition, such questions are normally left for determination by the trier of fact rather than by the judge. *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 868, 82 P.3d 1175 (2003) (citing *Johnson v. State*, 77 Wn. App. 934, 937, 894 P.2d 1366 (1995)) (“Once a duty is established, any issues of fact

regarding breach of duty and whether breach was a proximate cause of plaintiff's injuries are normally left for the fact finder.”)

The Respondents' duty to have proper signage at the repair site is administratively imposed. WAC 468-95-010.

RCW 5.40.050 provides:

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence[.]

This court, the trial court and the trier of fact cannot consider proximate cause without first considering breach of duty. The trial court's failure to do so here was error.

3. The Declaration of Ed Stevens should be considered by a trier of fact.

Respondents argue that an opinion of an expert that is simply a conclusion or based on an assumption is not evidence that will take a case to a jury. Br. of Resp. at 25 (citing *Theonnes v. Hazne*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984)).

Mr. Stevens' testimony supports Mrs. Dominguez's contention that a trier of fact should be allowed to consider the uncontroverted evidence that the Respondents failed to provide adequate lighting, signage and flagging at the repair site.

4. Evidence of breach of duty must be considered by a trier of fact.

Evidence that the Respondents failed to provide proper lighting, signage and flagging does not create an issue of fact. This evidence is undisputed. As such, it is evidence of negligence pursuant to RCW 5.40.050. As such, it should have been considered by a trier of fact. The trial court's grant of summary judgment was error.

5. Respondents misunderstand Mrs. Dominguez's argument as to multiple proximate causes.

The Respondents argue that the trial court's ruling on summary judgment was based on the lack of evidence in the record to establish that their conduct was a proximate cause of the accident. Br. of Resp. at 27. By virtue of the uncontroverted evidence of improper lighting, signage and flagging alone, the trial court's ruling was error.

6. *Breivo* supports Mrs. Dominguez's argument.

Respondents point out that the *Breivo* court held "the manner in which the driver drove his vehicle did not dispose of the issue of whether the city breached its duty to maintain its public highways in a reasonably safe condition." Br. of Resp. at 29 (citing *Breivo v. City of Aberdeen*, 15 Wn. App. 520, 524, 550 P.2d 1164 (1976)). That is the precise argument Mrs. Dominguez makes here.

B. INTOXICATION IS NOT AN ALTERNATIVE BASIS FOR AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT.

The trial court's ruling on summary judgment had nothing to do with the question of Mr. Dominguez's purported intoxication at the time of the accident. Moreover, Mrs. Dominguez did not appeal this issue. Importantly, although it was not referenced in the order on summary judgment, *the trial court stated on the record that Mrs. Dominguez prevailed on the issue of intoxication on summary judgment.* 1 VRP 16. ("Well, [counsel for Mrs. Dominguez,] you win on intoxication, so you can skip that.")

For purposes of this argument only, Mrs. Dominguez will address Respondent's argument with respect to intoxication.

RCW 5.40.060 provides that three requirements be met in order to completely bar any recovery for personal injury. It provides, in part, as follows:

[I]t is a complete defense to an action for damages for personal injury or wrongful death that [1] the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death **and** [2] that such condition was a proximate cause of the injury or death **and** [3] the trier of fact finds such person to have been more than fifty percent at fault.

RCW 5.40.060 (emphasis added).

In addition, evidence of intoxication must be obtained under the standards established by RCW 46.61.502.

1. The trial court could not find, as a matter of law, that Mr. Dominguez was intoxicated at the time of the accident.

The trial court did not find, on summary judgment, that Mr. Dominguez was intoxicated at the time of the accident.

a. The blood alcohol testing performed at Madigan Army hospital is inadmissible.

The Respondents have argued that physicians at Madigan Army hospital observed signs of intoxication in Mr. Dominguez, but did not reference where in the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, such information is found.

In her declaration in support of Respondents' motion for summary judgment, Ann Gordon speculated:

I am *assuming* that Mr. Dominguez was a social drinker. Social drinkers typically reach their peak alcohol level either before their last drink or within 15 minutes of their last drink. This means that Mr. Dominguez was *probably* fully absorptive at the time of the crash. Because Mr. Dominguez's alcohol concentration was decreasing at the time of the accident his alcohol concentration would have been higher at the time of his accident than it was at the Madigan Hospital blood draw.

Declaration of Ann Gordon (emphasis added). CP 31.

Nothing in any of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, shows that the blood alcohol testing performed on Mr. Dominguez conformed with the requirements of WAC 448-14-020. In her declaration, Ann Gordon does not state that she verified these regulations had been complied with. Nor do Respondents cite anything else in the record to verify the propriety of the testing. Therefore, the trial court could not find, as a matter of law, that the blood alcohol testing performed at Madigan Army hospital was properly performed, rendering it admissible at trial.

One and one-half hours after the accident, Mr. Dominguez had a blood alcohol level of 0.05, which is significantly less than the level required by RCW 46.61.502 for a finding of intoxication (“within two hours after driving, an alcohol concentration of 0.08 or higher” must be shown by analysis of the breath or blood).

Dave Predmore, a former Forensic Toxicologist Supervisor for the Washington State Toxicology Laboratory agrees that Mr. Dominguez’s blood alcohol level was 0.05, even though he has concluded that the blood alcohol testing employed by Madigan Army hospital did not comply with WAC 448-14-020. Declaration of Dave Predmore, CP 329.

The trial court did not find, as a matter of law on summary judgment, that Mr. Dominguez was not intoxicated.

b. The trial court could not find, as a matter of law, that Mr. Dominguez was intoxicated by extrapolating from the blood alcohol test results.

Respondents correctly state in their brief that “proximate cause cannot be established through speculation and conjecture.” Br. of Resp. at 13 (citing *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001)). By its own definition, extrapolation is a speculative process. Ann Gordon speculated in her declaration that Mr. Dominguez had a blood alcohol level of 0.08% at the time of the accident by employing retrograde extrapolation. Gordon Declaration; CP 31.

There is a fundamental flaw in Ms. Gordon’s opinion: there is nothing whatsoever in the record to indicate when Mr. Dominguez last consumed any food or alcohol. Using retrograde extrapolation, had Mr. Dominguez consumed an alcoholic beverage immediately before he left for home, it is possible that his blood alcohol would have been continuing to rise, not fall, in the period following the accident.

ER 103(c) seeks to prevent juries from hearing facts that are otherwise inadmissible. Generally, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 2006 WL 1768099, *3 (Wash. App. Div. 2) (citing *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)). Nor can a finding of summary judgment.

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

According to Dave Predmore:

It is not possible to state with any known accuracy what Mr. Dominguez [’s] blood alcohol was at the time of the accident. In other words, one cannot state with certainty that Mr. Dominguez was at or above the statutory limit of 0.08 at the time of the accident. It is at least as, if not more likely, that he was below the 0.08 level when the accident occurred.

Declaration of Dave Predmore, ¶6, at p. 2.

The results of the blood testing performed at Madigan Army Hospital are not conclusive, nor are they admissible at trial by virtue of the fact that the testing did not conform with the requirements of WAC 448-14-020. There is nothing in the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to show when Mr. Dominguez last consumed any alcohol. ***Ann Gordon’s conclusion is therefore based solely on conjecture.*** Therefore, the trial court could not, nor did it, find, as a matter of law, that Mr. Dominguez’s blood alcohol level could be “related back” to the time of the accident with any degree of accuracy. As such, the trial court could not find, as a matter of law, that Mr. Dominguez was intoxicated, and, in turn, that his supposed intoxication contributed to his death.

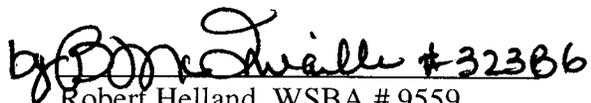
Extrapolation is wholly unnecessary here. The statutes and regulations set out clearly defined procedures that were to have been strictly adhered to in order to determine whether Mr. Dominguez was intoxicated for purposes of this proceeding. The trial record clearly shows that Madigan Army Hospital did not comply with those requirements. The statutes and regulations make no reference to the employment of extrapolation to somehow cure the failure to meet these requirements. On summary judgment, all facts and the reasonable inferences therefrom must be viewed in a light most favorable to Mr. Dominguez. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). The trial court could not, not did it find, as a matter of law, that Mr. Dominguez was intoxicated at the time of the accident.

CONCLUSION

Mrs. Dominguez did bring forth sufficient evidence to show proximate cause, which should have been considered by a trier of fact. It was error for the trial court to dismiss this matter on summary judgment.

DATED the 28th day of July, 2007.

RESPECTFULLY SUBMITTED,

by  #32386
Robert Helland, WSBA # 9559
Attorney for Appellant.

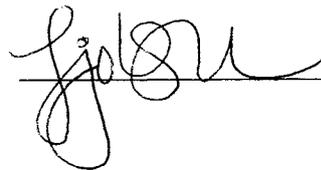
Declaration of Transmittal

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

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

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

Signed at Tacoma, Washington on this 18 day of ~~July~~^{August}, 2007.



A handwritten signature in cursive script, appearing to read "Alan M. Singer", is written over a horizontal line.