

No. 35411-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

LINDA ANN DOMINGUEZ, Personal Representative of
the Estate of Michael Dominguez,

Plaintiff/Appellant

v.

CITY OF TACOMA, a municipal corporation under the laws of the State
of Washington; TACOMA POWER, an entity of the City of Tacoma;
LEEWARD ENTERPRISES, INC., d/b/a TRAFFIC CONTROL
SERVICES,

Defendants/Respondents.

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BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellant Linda Ann Dominguez (“Mrs. Dominguez”) appeals the trial court’s entry of an order granting summary judgment in favor of Respondents City of Tacoma, Tacoma Power and Leeward Enterprises, Inc. d.b.a. Traffic Control Services (collectively “City of Tacoma”). Mrs. Dominguez’s husband, Michael Dominguez, was fatally injured when he drove his Harley Davidson motorcycle at 55 miles per through an emergency repair area. Mr. Dominguez passed four large, highly reflective signs that warned “BE PREPARED TO STOP”, “UTILITY WORK AHEAD”, “LEFT LANE CLOSED AHEAD”, and “FLAGGER AHEAD”. Without slowing, braking or taking any evasive action, Mr. Dominguez slammed into the rear of a white Ford Escort that had been stopped by the flagger directing westbound traffic. Mr. Dominguez was subsequently taken to the hospital where a blood draw established that he was under the influence of alcohol at the time of the accident. Sadly, Mr. Dominguez passed away as a result of his injuries.

Mrs. Dominguez filed suit against the City of Tacoma for failing to use adequate warning signs and traffic control measures. The City of Tacoma moved for summary judgment on two separate bases: (1) lack of evidence concerning proximate cause and (2) the absolute intoxication defense. The trial court granted the City of Tacoma’s summary judgment

motion, concluding that no act or omission of the City of Tacoma proximately caused Mr. Dominguez's accident.

The trial court's summary judgment ruling should be upheld. Mrs. Dominguez failed to come forward with any evidence demonstrating a genuine issue of material fact on the issue of proximate cause. At best, the record evidence establishes that had the City of Tacoma provided different signage, different lighting and different flagger positioning, Mr. Dominguez *might* have detected the warning signs, *might* have detected the work area and *might* have reacted in a way which could have avoided the collision. Evidence of what *might have happened* constitutes speculation and conjecture and cannot provide a basis for recovery. Consequently, the trial court's entry of summary judgment was appropriate.

The intoxication defense provides an alternative basis for affirming the trial court's ruling. The record evidence demonstrates that Mr. Dominguez was under the influence of alcohol at the time of the accident, his intoxication was a proximate cause of the accident, and he was more than fifty percent at fault. These facts provide the City of Tacoma a complete defense to Mrs. Dominguez's negligence action. Accordingly, the trial court's ruling should be affirmed.

II. STATEMENT OF THE ISSUES

1. Did the trial court properly grant the City of Tacoma's motion for summary judgment for failure to establish the essential element of proximate cause where the record evidence, viewed in the light most favorable to Mrs. Dominguez, established nothing more than what *might have happened*?

2. Does the intoxication defense provide an alternative basis for the entry of summary judgment?

III. STATEMENT OF THE CASE

This appeal involves a fatal motorcycle accident that took place at approximately 12:39 a.m. on April 23, 2004. [CP 153] The collision occurred near milepost 6.8 on State Route 702 in Pierce County, Washington. [CP 154] In this particular area, State Route 702 is a well-traveled, asphalt roadway with one westbound lane and one eastbound lane. [CP 154] The lanes are separated from each other by a yellow skip line. [CP 154] The road is flat and straight with about one-half mile of visibility or more in each direction. [CP 151] At the time of the motorcycle accident, the road was dry and visibility was clear. [CP 151, 154]

Approximately seven hours prior to the motorcycle accident, a van had collided with a utility pole in the same vicinity. [CP 151] The City of

Tacoma responded to the scene to repair the damaged pole. [CP 151] To that end, the City of Tacoma closed a portion of the eastbound lane of State Route 702. [CP 154] The City of Tacoma parked its repair trucks, which had flashing amber lights, in the closed portion of the eastbound lane. [CP 151] The lights from the work crew could be seen from more than a mile away. [CP 154, 157, 482-492]

In order to control traffic, the City of Tacoma placed signs east and west of the work area to alert approaching vehicles. [CP 151, 155, 482-492] When traveling westbound on State Route 702, the signs were placed as follows:

- “BE PREPARED TO STOP” (1183 feet east of scene)
- “UTILITY WORK AHEAD” (850 feet east of scene)
- “LEFT LANE CLOSED AHEAD” (531 feet east of scene)
- “FLAGGER AHEAD” (198 feet east of scene)

[CP 155, 205-208, 482-492] The signs were highly reflective and measured approximately four feet by four feet. [CP 155, 205-208, 482-492] For the Court’s convenience, color photographs of these signs, taken by the Washington State Police as part of their investigation of the accident scene, are included in the Appendix to this brief. [CP 482-492]

In addition to placing highly reflective warning signs, the City of Tacoma hired flaggers to direct traffic around the lane closure. [CP 151]

The flaggers were wearing white clothes with reflector vests and white hard hats. [CP 152] They had flashing traffic wands and hand-held “STOP” and “SLOW” paddles. [CP 152, 155] Up until the time of the motorcycle accident, the flagging personnel alternated traffic in the westbound lane without incident. [CP 151, 155]

Shortly before 12:39 a.m., a flagger stopped a white Ford Escort in the westbound lane to allow eastbound traffic to proceed. [CP 155] The driver of the Ford Escort had her foot on the brake and her lights were operational. [CP 129, 158] The flagger was standing near the Ford Escort when she observed a motorcycle, operated by Mr. Dominguez, rapidly approaching her location. [CP 153, 155, 158] Mr. Dominguez was traveling at a speed of 55 miles per hour. [CP 131, 173] The driver and passenger of the Ford Escort also observed Mr. Dominguez coming up rapidly behind them. [CP 158] As he approached the Ford Escort, Mr. Dominguez did not reduce his speed, apply the brakes or take any evasive action. [CP 151, 155, 158, 173] Instead, Mr. Dominguez crashed his motorcycle into the rear of the Ford Escort at freeway speed. [CP 155, 173]

The area where the motorcycle impacted the Ford Escort was consistent with Mr. Dominguez’s travel in the right most wheel track of the roadway. [CP 129] When the motorcycle’s front tire slammed into

the Ford Escort, the momentum of the motorcycle pushed the Ford Escort forward approximately fifteen feet to the west. [CP 129] The motorcycle's front tire embedded at the rear of the Ford Escort, leaving a short tire friction mark on the roadway. [CP 129] Mr. Dominguez and his motorcycle went off the road and came to rest in a grassy area below the westbound shoulder. [CP 154, 155]

A distance of 1,183 feet separated the first of the four reflective warning signs and the scene of the collision. [CP 155, 482-492] Mr. Dominguez drove past all four reflective warning signs without reducing his speed. [CP 151, 155, 158, 173, 482-492] It would take a vehicle traveling at 55 miles per hour 14 ½ seconds to cover a distance of 1,183 feet. [CP 131] A properly operated motorcycle traveling at 55 miles per hour can slow to a stop in as little as 112 feet. [CP 131] There were no skid marks on the roadway from braking, and no skid pads on the tires of the motorcycle, demonstrating that Mr. Dominguez made no effort to slow or stop. [CP 129-130, 151]

Mr. Dominguez was subsequently transported to Madigan Army Hospital. [CP 156] Mr. Dominguez's blood was drawn at 2:03 a.m., just one and a half hours after the accident. [CP 30, 50] At that time, Mr. Dominguez's blood measured 59 mg/dL of alcohol, which corresponds to a blood alcohol level of 0.05 gm/100 mL. [CP 30]

Sadly, Mr. Dominguez suffered an extensive brain injury as a result of the collision. [CP 123] He passed away on April 28, 2004. [CP 123] Mr. Dominguez's physician, Dr. Mullinex, informed the Medical Examiner that Mr. Dominguez was intoxicated at the time of the accident. [CP 123-124] The Washington State Patrol described the causal factors of the accident as follows:

The collision occurred when Dominguez failed to realize that traffic was stopped in his lane and hit the back of vehicle #2 at approximately 55 miles per hour. According to Dr. Mullenix (at Madigan Army Medical Center) Dominguez was intoxicated.

[CP 156]

On or about August 3, 2005, Mrs. Dominguez, as personal representative of Mr. Dominguez's estate, filed suit against the City of Tacoma, Tacoma Power and Leeward Enterprises d.b.a. Traffic Control Services. [CP 117-121] Mrs. Dominguez alleged as follows:

- 4.1 Tacoma Power failed to adequately or properly install warning signs/devices including flaggers to warn oncoming motorists as to the construction zone and roadway dangers. Said failure is the proximate cause of the death of Michael Dominguez.
- 4.2 Defendant Leeward Enterprises, Inc., d.b.a. Traffic Control Services, failed to put appropriate and adequate signage and other warning devices on the roadway to adequately warn oncoming motorists as to the roadway hazard. Said Defendant failed to adequately flag said construction site and failed to

follow established flagging and road hazard marking standards. Said failure is the proximate cause of the accident and death of Michael Dominguez.

[CP119-120]

The City of Tacoma filed a motion for summary judgment arguing that Mrs. Dominguez could not prove the essential element of proximate cause. [CP 51-64] In support of its motion, the City of Tacoma submitted the declaration of John Hunter. [CP 125-212] Mr. Hunter is a certified collision re-constructionist. [CP 125] He served with the Washington State Patrol for twenty-five years as motorcycle sergeant. [CP 125] Mr. Hunter opined as follows:

14. It is my opinion that Mr. Dominguez's collision was caused by his inattention. This opinion is supported by the fact that the collision occurred during dry roadway conditions and in an area with clear visibility. Dominguez failed to detect and identify four large warning signs beginning 1,183 feet prior to the collision site. Given the retroreflective nature of these signs, they would have been highly visible and highly noticeable from a great distance away, particularly given the relative darkness in the surrounding area. Mr. Dominguez failed to detect amber flashing work lights and the lights from the work crew beyond the signs; pedestrians in the roadway, including workers and flaggers with reflective vests and flashing paddles; a stopped white vehicle (the Ford Escort) with illuminated brake lights directly in front of him; and the other associated road work activity taking place...The stopped Ford Escort and the utility trucks would have easily been seen by Mr. Dominguez had he been paying attention to the road.

15. ...In my opinion, Mr. Dominguez's driving under the influence of alcohol and failing to have taken any apparent steps to stop or slow in the face of the conditions that should have been very apparent to him contributed to the collision.

16. It is my understanding that the plaintiff contends that the warning signs were not spaced far enough apart. Even if true, it would make no difference in this case. A properly operated motorcycle could have slowed to a stop in as little as 112 feet. The time it would take a vehicle to travel the 1,183 feet at 55 mph would have been approximately 14 ½ seconds. No other vehicles had difficulty in identifying and detecting the changing traffic conditions. The emergency lights of the Tacoma Power trucks were visible for more than a mile. Even if there were no signs, Mr. Dominguez had adequate warning and sufficient notice to stop in time and avoid the collision. Given the fact the signs were present only strengthens my opinion that the accident was solely caused by Mr. Dominguez's inattention.

[CP130-131]

As an additional basis for its summary judgment motion, the City of Tacoma argued that Mrs. Dominguez's claims were barred by the absolute intoxication defense. [CP 51-64] The City of Tacoma submitted the Declaration of Ann Gordon, a Forensic Toxicologist with the Washington State Toxicology Laboratory. [CP 28] Ms. Gordon testified that most individuals with a blood alcohol level of 0.05 are impaired. [CP 31-32] This testimony was unopposed. [CP 328-329] She also testified that it is possible to reliably estimate Mr. Dominguez's alcohol concentration at the time of the accident on a more probable than not

basis. [CP 31] Applying retrograde extrapolation, Ms. Gordon concluded that Mr. Dominguez's blood alcohol level was approximately 0.08 gm/100 mL at the time of the crash, which exceeds the legal limit for operating a motor vehicle. [CP 28, 31]

In opposition to the City of Tacoma's motion for summary judgment, Mrs. Dominguez submitted the Declaration of Ed Stevens. [CP 213-225] Mr. Stevens, a licensed civil engineer, opined that the signage, lighting and traffic control measures in place at the time of the accident did not conform with industry standards. [CP 217] However, there is no record evidence that different signage, additional lighting or different traffic control measures would have prevented the collision.

Mrs. Dominguez also submitted the Declaration of Dave Predmore. [CP 328-346] Mr. Predmore, a forensic toxicologist, confirmed that Mr. Dominguez's blood alcohol level was 0.05 an entire hour and a half *after* the motorcycle accident. [CP 329]

After hearing oral argument, the trial court stated as follows:

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

[1 VRP 23] The summary judgment order states that "[n]o act or omission of the City of Tacoma, Tacoma Power, or Leeward Enterprises, Inc. d/b/a

Traffic Control Services was a proximate cause of Mr. Dominguez's accident". [CP 423-425]

Mrs. Dominguez subsequently moved for reconsideration. [CP 426-444] Mrs. Dominguez offered no new evidence to establish proximate cause. [CP 426-444, 448-458] The trial court denied Mrs. Dominguez's motion for reconsideration, concluding she had failed to meet her burden of proof. [CP 465-466; 2 VRP 7] In so ruling, the trial court stated:

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

[2 VRP 10] This appeal followed. [CP 469-477]

IV. ARGUMENT

A. Standard of Review

Appellate courts review the entry of summary judgment de novo, engaging in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). This Court is therefore free to affirm the trial court's ruling on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn.App. 424, 426, 878 P.2d 483 (1994); *LaMon v. Butler*, 112 Wash.2d 193, 200-01, 770 P.2d 1027 (1989). Summary judgment is appropriate if there is no

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant moving for summary judgment meets this initial showing, then the burden shifts to the plaintiff. *Id.* If the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-32 (9th Cir.1987)). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53.

B. Summary Judgment Was Proper Because Plaintiff Failed to Establish the Essential Element of Proximate Cause.

In a negligence action, the claimant must prove four elements: (1) existence of a duty; (2) breach of that duty; (3) injury as a result; and (4)

that defendant's actions proximately caused the injury. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). The defendant in a negligence action is entitled to summary judgment when he or she can show an absence of evidence supporting any one of these elements. *Young*, 112 Wn.2d at 225. The mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 377, 972 P.2d 475 (1999). For legal responsibility to attach to negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury. *Id.* at 378. Thus, even if negligence is clearly established, a defendant may not be held liable unless its negligence *caused* the accident. *Id.*

1. Proximate Cause Cannot Be Established Through Speculation and Conjecture.

Washington law recognizes two elements to proximate cause: (1) cause in fact and (2) legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact is the “but for” aspect connecting an act to an injury. *Kim v. Budget Rent a Car Sys.*, 143 Wn.2d 190, 203, 15 1283 (2001). If reasonable minds could not differ, this factual question may be determined as a matter of law. *Id.* Legal causation is a question of law for the court to decide. *Id.* at 204. It is “grounded ‘in policy determinations as to how far the consequences of a defendant’s acts should

extend.’ The focus in legal causation analysis is on ‘whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.’ This inquiry depends upon ‘mixed considerations of logic, common sense, justice, policy, and precedent.’” *Id.* (citations omitted).

To survive summary judgment, the plaintiff’s showing of proximate cause must be based on more than mere conjecture or speculation. *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001). “[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.” *Gardner v. Seymour*, 27 Wn.2d 802, 809-810, 180 P.2d 564 (1947).

2. Washington Courts Have Consistently Granted Summary Judgment on Similar Facts.

Glaringly missing from Mrs. Dominguez’s opening brief is any discussion of the case law upon which the trial court based its ruling. Washington courts have consistently held that summary judgment is warranted where the most a plaintiff can show is that an accident “might not have happened” if the defendant had done something differently. For

example, in *Kristjanson v. City of Seattle*, 25 Wn.App. 324, 606 P.2d 283 (1980), the plaintiff was injured in an automobile accident when he was struck by a drunk driver who crossed the center line while speeding up a steep, curving, two-lane road. *Id.* at 324-25. The plaintiff sued the city for failure to properly maintain, properly design and properly control the use of a road. *Id.* The trial court summarily dismissed the plaintiff's claim, concluding that even resolving all doubts in favor of the plaintiff, there was no substantial evidence which would support a finding that any negligence on the part of the city was a proximate cause of the collision. *Id.* at 325-26.

On appeal, the plaintiff argued that summary judgment was inappropriate because there were questions of fact as to whether the city breached its duty to provide adequate sight distance and adequate signing on the road. *Id.* at 325. The *Kristjanson* court rejected plaintiff's argument. *Id.* at 326. In so ruling, the *Kristjanson* court recognized that, at best, the evidence only demonstrated that if the city had provided additional sight distance, plaintiff "*might* have reacted in a way which could have avoided the collision", and if the city had posted warning signs, the other driver "*might* have heeded those warning signs to drive carefully." *Id.* (emphasis in the original). Because such contentions "can

only be characterized as speculation or conjecture”, the *Kristjanson* court held that they could not provide a basis for recovery. *Id.*

In concluding that recovery cannot be based on what “might have happened”, the *Kristjanson* court relied on the decision in *Johanson v. King County*, 7 Wn.2d 111, 109 P.2d 307 (1941). In *Johanson*, the plaintiff sued King County for injuries he sustained while a passenger in a car involved in an automobile accident. *Id.* at 112. The driver of the plaintiff’s vehicle crossed the center line into oncoming traffic and died as a result of his injuries. *Id.* The plaintiff alleged that King County was negligent in (1) failing to place a yellow traffic stripe down the center of the road after it had been widened, (2) failing to obliterate the previous existing yellow traffic stripe, and (3) failing to place warning signs or take any other measures to warn drivers that the yellow traffic stripe did not constitute the center line. *Id.* at 112-13. The jury ultimately returned a verdict in favor of the plaintiff. *Id.* at 114. In turn, the trial court entered judgment in favor of King County notwithstanding the verdict. *Id.*

The Washington Supreme Court affirmed the trial court’s order of judgment notwithstanding the verdict. *Id.* at 124. In so ruling, the *Johanson* court reasoned that there was no evidence that the driver of plaintiff’s vehicle was relying upon the yellow stripe. *Id.* at 122. To the contrary, the evidence showed that the driver of plaintiff’s vehicle had

been traveling in the first lane to the right of center for at least four hundred feet before he suddenly pulled out into oncoming traffic. *Id.* at 121.

The *Johanson* court rejected the plaintiff's argument that the driver of plaintiff's vehicle "*might have been* and probably was deceived by the yellow line." *Id.* (emphasis in the original). Plaintiff could not recover based on what he claimed might have happened, or because the driver of plaintiff's vehicle might have been misled, or because there was no evidence upon which the jury could have found that the deceased driver was not deceived. *Id.* Indeed, "it would be mere guessing" to say that the driver of the plaintiff's vehicle "was in any way deceived and misled by the location of the yellow line." *Id.* at 123. The burden was on the plaintiff to establish that the location of the yellow line *did in fact* deceive or mislead the driver of plaintiff's vehicle. *Id.* That burden was not met because there was no evidence, or reasonable inference therefrom, that any negligence on the part of King County proximately caused the plaintiff's injuries. *Id.* at 123. *See also Nakamura v. Jeffery*, 6 Wn.App. 274, 492 P.2d 244, *review denied*, 80 Wn.2d 1005 (1972) (affirming dismissal of lawsuit against a municipality for negligent failure to post warning signs where there was no evidence that the driver was deceived or misled by the lack of warning signs).

Division One reached a similar conclusion in *Miller v. Likins*, 109 Wn.App. 140, 34 P.3d 835 (2001). In *Miller*, a vehicle driven by an 87-year-old man struck and injured a 14-year-old boy. *Id.* at 142-43. There were conflicting accounts concerning where the boy was standing at the time of the accident. *Id.* at 143. Two eyewitnesses said he was skateboarding in the middle of the road at the time he was struck, while another said he was outside of the fog line when he got hit. *Id.*

The boy's mother filed suit against numerous defendants, including the city. *Id.* at 143. The mother contended that if the city had taken additional precautions, such as installing raised pavement markings on the fog line, lowering the speed limit, or posting additional road signs, the driver would likely have been more alerted to the possible presence of pedestrians, enabling him to avoid a collision. *Id.* at 147. Unfortunately, the driver of the vehicle died before he could give his sworn account of how the accident happened. *Id.* at 143, 147. The city successfully moved for summary judgment, and the mother appealed. *Id.* at 143-44.

Affirming the trial court's order, the *Miller* court held that the mother could not satisfy her burden of showing that the city's alleged negligence proximately caused the boy's injuries. *Id.* at 145. In so ruling, the *Miller* court relied on the decisions in *Johanson* and *Kristjanson*. *Id.* at 145-46. Like the driver in *Johanson*, the driver in *Miller* passed away

before he could testify concerning whether the things the city could have done differently would have made a difference. *Id.* at 146. Moreover, like the plaintiffs in *Johanson* and *Kristjanson*, the most the boy's mother could show was that the accident *might* not have happened had the city installed additional safeguards. *Id.* at 147. Even if the city breached the duty of care, there could be no recovery where there was no evidence to demonstrate that the breach was the proximate cause of the accident. *Id.* Because the mother's contentions could only be characterized as speculation or conjecture, the *Miller* court held that no jury could reasonably infer that had the city implemented additional precautions, the driver would not have crossed the fog line and hit the boy. *Id.* Summary judgment was therefore appropriate. *Id.*

The decision in *Cunningham v. State of Washington*, 61 Wn.App. 562, 811 P.2d 225 (1991), is likewise instructive. In *Cunningham*, the plaintiff drove into a concrete bollard situated at the Luoto Road gate to the Naval Submarine Base at Bangor. *Id.* at 564. The plaintiff filed suit, claiming that the government was negligent in lighting and striping Luoto Road. *Id.* at 565. The trial court dismissed plaintiff's claims and the *Cunningham* court affirmed, concluding that "neither logic, common sense, justice, nor policy" favored a finding of legal causation." *Id.* at 570-71.

In reaching its conclusion, the *Cunningham* court pointed out that the plaintiff's blood alcohol level was .22 at the time of the accident. *Id.* at 571. The plaintiff also admitted that the gate was sufficiently lit and that he was aware of its presence. *Id.* Despite this awareness, the plaintiff did not significantly lessen the speed at which he traveled and collided with the bollard at 35 miles per hour. *Id.* The plaintiff's own testimony demonstrated that he was driving inattentively. *Id.* More importantly, the record was "devoid of any evidence indicating that proper lighting and striping would have prevented the accident." *Id.* The *Cunningham* court therefore held that the connection between the government's act and plaintiff's injuries was too remote and insubstantial to impose liability. *Id.* at 572.¹

Similar results have also been reached in other jurisdictions. In a case strikingly similar to the one at bar, the Idaho Supreme Court affirmed a summary judgment order dismissing a negligence claim for failure to

¹ See also *Klein v. Seattle*, 41 Wn.App. 636, 639, 705 P.2d 806, review denied, 104 Wn.2d 1025 (1985) (refusing to hold that negligent road design legally caused an accident in which a speeding driver with a blood alcohol level of .04 percent crossed the center line and collided with another vehicle because to do so would be to impose an insurance policy upon those who construct our highways); *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).

establish proximate cause. In *Munson v. State*, 96 Idaho 529, 531 P.2d 1174, 1175 (1975), a van was driven into the rear of a pickup truck resulting in the death of the van's driver and passenger. At the time of the accident, the highway was dry and there was one-quarter to one-half mile of clear visibility. *Id.* at 1176. The truck with which the van collided had been stopped by a flagman of a highway repair crew wearing a fluorescent red vest and holding a red paddle-type stop sign. *Id.* The flagman was standing near the pickup truck when the accident occurred. *Id.* There was no evidence that the van either slowed down or swerved prior to the collision. *Id.*

The driver's surviving heirs filed suit against several parties, including the foreman of the repair crew. *Id.* The complaint alleged that the foreman was negligent in failing to move the appropriate warning signs up the highway as the work progressed. *Id.* The foreman successfully moved for summary judgment and the heirs appealed. *Id.* at 1175. The *Munson* court affirmed the entry of summary judgment, concluding that the record did not support a finding that the foreman was a factor in the driver's death. *Id.* at 1176-77.

In so holding, the *Munson* court recognized that the repair site was identifiable by the flagman, the pickup truck, the repair crew vehicles and the repair crew members. *Id.* at 1177. In fact, all of these things were

visible from a considerable distance. *Id.* The van nonetheless drove directly into the parked truck. *Id.* There was simply no basis for a finding that the erection of yellow, four-foot signs would have provided more notice of the blocked highway than did the obvious blockage itself. *Id.* Consequently, the heirs could not prove that the foreman's conduct was an actual cause of the driver's death. *Id.*

Applying the holdings of *Kristjanson*, *Johanson*, *Miller*, *Cunningham* and *Munson* to the instant facts, the trial court's entry of summary judgment in favor of the City of Tacoma was appropriate. The record evidence demonstrates that during dry roadway conditions in an area with clear visibility, Mr. Dominguez, while under the influence of alcohol, failed to detect four large, highly reflective warning signs beginning 1,183 feet before the collision site. [CP 28-50, 130, 482-492] He also failed to detect amber flashing work lights on the repair trucks, the lights from the work crew beyond the signs, the flaggers in the roadway wearing reflective vests and holding flashing paddles, and the Ford Escort with illuminated brake lights stopped directly in front of him. [CP 130]

Despite the fact that the repair site was identifiable by signs, lights and flaggers in the roadway, Mr. Dominguez did not reduce his speed, apply the brakes or take any evasive action. [CP 151, 155, 158, 173] He crashed his motorcycle into the Ford Escort at approximately 55 miles per

hour. [CP 155, 173] There were no skid marks on the roadway from braking, and no skid pads on the tires of the motorcycle, demonstrating that Mr. Dominguez made no effort to slow or stop. [CP 129-130, 151]

Up until the time of Mr. Dominguez's accident, no other motorists had any problem recognizing the work area and reacting accordingly. [CP 151, 155] Mr. Dominguez had 14 ½ seconds to react after the first of the four warning signs. [CP 131] Traveling at a speed of 55 miles per hour, he could have come to a complete stop in as little as 112 feet. [CP 131] This evidence was unrebutted.

Mrs. Dominguez attempted to overcome the City of Tacoma's summary judgment motion by introducing evidence that the signage, lighting and flagger positioning were not in accordance with industry standard. [CP 213-225] Such evidence goes to the issue of breach of duty, not the issue of proximate cause. *Kristjanson*, 25 Wn.App at 325. Mrs. Dominguez introduced no evidence whatsoever concerning how the accident occurred or demonstrating how different signage, different lighting or different flagger positioning would have prevented the accident. [CP 213-225] Thus, viewing the evidence and inferences in the light most favorable to Mrs. Dominguez, had the City of Tacoma provided different signage, different lighting and different flagger positioning, Mr. Dominguez *might* have detected the warning signs, *might* have detected

the work area and *might* have reacted in a way which could have avoided the collision. [CP 213-225] Washington law makes clear that recovery cannot be based on what *might have happened*. Because Mrs. Dominguez failed to come forward with anything but speculation and conjecture on the issue of proximate cause, the City of Tacoma was entitled to summary judgment as a matter of law. Accordingly, the trial court's ruling should be affirmed.

3. The Declaration of Ed Stevens Did Not Create a Genuine Issue of Material Fact.

Contrary to Appellant's assertion, the evidence submitted in opposition to the City of Tacoma's motion for summary judgment did not create a genuine issue of material fact on the issue of proximate cause. The bulk of Mr. Stevens' declaration sets forth his opinion that the City of Tacoma's traffic control measures were not implemented in accordance with industry standard. [CP 213-217]. Such testimony relates to the issue of breach of duty, not the issue of proximate cause. [CP 213-217] In the final paragraph, Mr. Stevens made the following conclusory statement concerning causation:

Based upon the factors set forth above it is my opinion that the improper signage and lack of lighting combined with flagger position at the time of the incident is more probable than not a contributing facta [sic] to the crash.

[CP 217-218] Notably absent from Mr. Stevens' declaration is any evidence concerning how the accident happened, or how different signage, more lighting, or different flagger positioning would have made a difference. [CP 213-218]

An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury. *Theonnes v. Hazne*, 37 Wn.App. 644, 648, 681 P.2d 1284 (1984) (finding expert's declaration insufficient to avoid summary judgment where there was no evidence to support expert's opinion that collision could have been avoided or that evasive action would have been successful). At best, Mr. Stevens' testimony merely demonstrates that if the City of Tacoma had provided different signage, more lighting, or different flagger positioning, Mr. Dominguez *might* have heeded those warning signs and *might* have reacted in a way which could have avoided the collision. Such contentions amount to nothing more than speculation and conjecture and cannot provide a basis for recovery. *Kristjanson*, 25 Wn.App. at 326; *Johanson*, 7 Wn.2d at 121. Consequently, the trial court's entry of summary judgment was proper.

4. **Evidence of Breach of Duty Did Not Create a Fact Issue as to Proximate Cause.**

The basis of the City of Tacoma's motion for summary judgment, and the ultimate basis for the trial court's order granting same, was Mrs. Dominguez's inability to establish that any act or omission on the part of the City of Tacoma proximately caused Mr. Dominguez's accident. [CP 51-64, 423-425] Nonetheless, Mrs. Dominguez devotes eight pages of her opening brief to a discussion of the City of Tacoma's alleged failure to abide by roadway repair regulations, arguing that evidence of such failure created a genuine issue of material fact sufficient to preclude summary judgment. [Brief of Appellant at pp. 17-24] This argument ignores the basis of the trial court's ruling.

Any evidence that the City of Tacoma violated repair regulations goes to the issue of breach of duty, not to the issue of proximate cause. The issue of breach of duty was not before the trial court in the underlying proceedings. In fact, for the purposes of the summary judgment motion, the City of Tacoma conceded the issues of duty and breach. [CP 58] Thus, in order to defeat the City of Tacoma's motion for summary judgment, Mrs. Dominguez had the burden of coming forward with evidence establishing that the City of Tacoma's claimed breach of duty proximately caused Mr. Dominguez's accident. Mrs. Dominguez failed to

do so. The record is completely devoid of any evidence establishing that different signage, different lighting, or different flagger positioning would have prevented Mr. Dominguez, who was under the influence of alcohol, from slamming into a stopped vehicle at highway speed. Accordingly, the trial court's entry of summary judgment was appropriate.

5. **Mrs. Dominguez Misunderstands the Basis of the Trial Court's Ruling.**

Mrs. Dominguez's argument that there can be more than one proximate cause demonstrates her misunderstanding of the trial court's ruling. The trial court did not base its ruling on the fact that Mr. Dominguez's conduct was the sole proximate cause of the accident. [2 VRP 4] The trial court based its ruling on the lack of evidence in the record to establish that the City of Tacoma's conduct was a proximate cause of the accident. [CP 423-425] By arguing that the trial court erred in taking the issue of contributory negligence away from the jury, Mrs. Dominguez ignores the basic principle that in the absence of proof that the City of Tacoma proximately caused the accident, there can be no issue of contributory negligence for a jury to decide. Because the record evidence was insufficient to establish that any breach of duty on the part of the City of Tacoma proximately caused Mr. Dominguez's accident, the entry of summary judgment was appropriate.

6. **Mrs. Dominguez's Reliance on *Breivo* Is Misplaced.**

Mrs. Dominguez's reliance on *Breivo v. City of Aberdeen*, 15 Wn.App. 520, 550 P.2d 1164 (1976), further demonstrates her confusion of the issues. In *Breivo*, a driver transporting three passengers was traveling between 50 and 80 miles per hour in a 35 mile-per-hour zone. *Id.* at 521. He lost control of the vehicle and collided with a solid barrier erected by the city to protect a breakaway light standard. *Id.* The passengers brought suit against the city, contending that it had been negligent in erecting a solid, immovable barrier only 13 inches from the traveled portion of the roadway. *Id.* At the close of all of the evidence, the trial court directed a verdict for the passengers holding that the city had, as a matter of law, breached its duty to maintain its public highways in a reasonably safe condition. *Id.* The issue of proximate cause was submitted to the jury. *Id.* at 527. The jury ultimately determined that the city's breach of duty proximately caused the passengers injuries and entered a verdict for \$214,000 in damages. *Id.* at 521, 527.

On appeal, the city did not challenge the jury's finding of proximate cause. *Id.* at 527. Instead, it challenged the trial court's directed verdict on the issue of breach of duty. *Id.* at 521. The city argued that the directed verdict was unwarranted because a governmental entity

owes no duty to passengers riding with careless drivers. *Id.* at 523. The *Breivo* court disagreed, concluding that the driver's failure to exercise due care for his own safety had no bearing on the issue of whether the city breached its duty to maintain the highway. *Id.* at 523-524.

In so ruling, the *Breivo* court specifically recognized that the city had confused the elements of duty and proximate cause. *Id.* at 524. 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. *Id.* Whether the breach was the proximate cause of the passengers' injuries, or whether the negligence of the driver superseded the city's negligence, was an entirely separate question which was properly submitted to the jury by the trial court. *Id.* at 524.

The *Breivo* decision is inapplicable to the instant facts because it only addressed the issue of breach of duty—an issue the City of Tacoma conceded for the purposes of summary judgment. [CP 58] By relying on *Breivo*, Mrs. Dominguez fails to recognize that evidence of breach of duty alone is insufficient to take a claim to the jury. A plaintiff must come forward with evidence of each of the essential elements of a negligence claim in order to survive summary judgment. *Young*, 112 Wn.2d at 225. Because Mrs. Dominguez failed to come forward with any evidence

demonstrating that the City of Tacoma's breach of duty proximately caused the accident, the entry of summary judgment was appropriate.

C. **The Intoxication Defense Provides an Alternative Basis for Affirming the Trial Court's Ruling.**

This Court is free to affirm the trial court's ruling on any basis supported by the record. *Redding*, 75 Wn.App. at 426; *LaMon*, 112 Wash.2d at 200-01. In addition to being entitled to summary judgment based on plaintiff's failure to establish the essential element of proximate cause, the City of Tacoma is also entitled to summary judgment based on the absolute intoxication defense. Under RCW 5.40.060, "it is a complete defense" to plaintiff's claims if (a) Mr. Dominguez was under the influence of alcohol at the time of his accident, (b) this was a proximate cause of the accident, and (c) Mr. Dominguez was more than fifty percent at fault. RCW 5.40.060(1). The record evidence establishes each of these elements.

The standard for determining whether a person was under the influence for the purpose of the intoxication defense is the same standard established for criminal convictions under RCW 46.61.052. *See* RCW 5.40.060. RCW 46.61.052 provides that a person is guilty of driving while under the influence if the person has an alcohol concentration of 0.08 or higher within two hours after driving **or if the person drives a**

vehicle “while the person is under the influence of or affected by intoxicating liquor”. See RCW 46.61.052(1).

It is undisputed that Mr. Dominguez was under the influence of alcohol at the time of his accident. Mr. Dominguez’s physician, Dr. Mullinex, informed the Medical Examiner that Mr. Dominguez was intoxicated at the time of the accident. [CP 123-124] Indeed, Mr. Dominguez’s blood was drawn one and a half hours after the accident and measured 59 mg/dL of alcohol. [CP 30, 50] Ann Gordon testified that this measurement corresponds to a blood alcohol level of 0.05 gm/100 mL. [CP 30] Mrs. Dominguez’s expert, Dave Predmore, concurred. [CP 329] Ms. Gordon also testified that most individuals with a blood alcohol level of 0.05 are impaired and unable to safely operate a motor vehicle. [CP 31-32] Mr. Predmore did not contradict this testimony. [CP 328-329]

Applying retrograde extrapolation, Ms. Gordon concluded that Mr. Dominguez’s blood alcohol level was approximately 0.08 gm/100 mL at the time of the crash, which exceeds the legal limit for operating a motor vehicle. [CP 28, 31] Although Mr. Predmore testified that one cannot know Mr. Dominguez’s exact blood alcohol level at the time of the accident “with certainty”, he did not rebut Ms. Gordon’s conclusion that even if Mr. Dominguez’s blood alcohol level measured 0.05 at the time of the accident, he still would have been under the influence. [CP 328-329]

It is also undisputed that Mr. Dominguez's intoxication was a proximate cause of his accident. The Washington State Patrol described the causal factors of the accident as follows:

The collision occurred when Dominguez failed to realize that traffic was stopped in his lane and hit the back of vehicle #2 at approximately 55 miles per hour. According to Dr. Mullenix (at Madigan Army Medical Center) Dominguez was intoxicated.

[CP 156]. Mr. Hunter testified that "Mr. Dominguez's driving under the influence of alcohol and failing to have taken any apparent steps to stop or slow in the face of the conditions that should have been very apparent to him contributed the collision." [CP 131] Similarly, Ms. Gordon testified that "Mr. Dominguez was legally intoxicated and under the influence of alcohol at the time of the accident. He missed adequate warnings which he did not see because he did not expect them to be there. As a result, Mr. Dominguez did not brake, did not slow his speed, and drove directly into the back of a stopped vehicle." [CP 33] Plaintiff submitted no evidence whatsoever to demonstrate that alcohol was not a causal factor in the motorcycle accident. To the contrary, plaintiff's own expert admitted that Mr. Dominguez's blood alcohol level was still as high as 0.05 an entire hour and a half *after* the accident. Moreover, plaintiff's own expert did not contradict Ms. Gordon's testimony that even at 0.05, Mr. Dominguez

was under the influence of alcohol and unable to safely operate a motor vehicle. [CP 31-32].

Finally, reasonable minds could only conclude that Mr. Dominguez was more than fifty percent at fault. Despite the highly reflective warning signs, the amber flashing lights on the repair trucks, the lights from the work crew beyond the signs, the flaggers wearing reflective vests and holding flashing paddles, and the white Ford Escort with illuminated brake lights stopped immediately in front of him, Mr. Dominguez drove his motorcycle into the Ford Escort at 55 miles per hour without slowing down, braking or taking any evasive action. [CP 125-212, 482-492] There is no evidence establishing that spacing the signs differently, adding more lighting, or using different traffic control measures would have prevented the accident from happening. [CP 213-225] Consequently, reasonable minds can only conclude that Mr. Dominguez's conduct was the sole proximate cause of the collision. Because the record evidence unequivocally demonstrates the existence of all three elements of the intoxication defense, the plaintiff's claims are barred and the City of Tacoma is entitled to summary judgment as a matter of law.

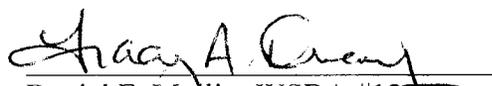
V. CONCLUSION

For the foregoing reasons, the City of Tacoma is entitled to summary judgment as a matter of law. The record is completely devoid of any evidence establishing that the City of Tacoma proximately caused Mr. Dominguez's accident. Evidence concerning what *might have happened* amounts to nothing more than speculation and conjecture and cannot provide a basis for recovery. In addition to failing for want of proximate cause, Mrs. Dominguez's negligence claim was barred by the absolute intoxication defense. Accordingly, the trial court's entry of summary judgment should be affirmed.

DATED this 22nd day of June, 2007.

Respectfully submitted,

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FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 35411-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

LINDA ANN DOMINGUEZ, Personal Representative of
the Estate of Michael Dominguez,

Plaintiff/Appellant

v.

CITY OF TACOMA, a municipal corporation under the laws of the State
of Washington; TACOMA POWER, an entity of the City of Tacoma;
LEEWARD ENTERPRISES, INC., d/b/a TRAFFIC CONTROL
SERVICES,

Defendants/Respondents.

CERTIFICATE OF SERVICE

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The undersigned declares as follows:

1. I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

2. On June 33, 2007, I caused to be delivered a true and correct copy of Respondent's Brief on the following parties by the method indicated:

Robert Helland, WSBA #9559	<input type="checkbox"/>	Via U.S. Mail
Law Offices of Robert Helland	<input type="checkbox"/>	Via Email
960 Market Street	<input checked="" type="checkbox"/>	Via Legal Messenger
Tacoma, WA 98402-3605	<input type="checkbox"/>	Via Fax
Attorneys for Appellant	<input type="checkbox"/>	Via Overnight Delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of June, 2007.

MULLIN LAW GROUP PLLC

Cathy Pettersen

Cathy Pettersen
Paralegal