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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 310175

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

LISA A. VAN LEAR AND KEITH A. VAN LEAR,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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**I. ARGUMENT IN REPLY TO RESPONSE TO CROSS
APPEAL – THE RECORD DOES NOT ESTABLISH
BREACH OF DUTY
OR PROXIMATE CAUSE**

In response to Defendant's Cross Appeal, Plaintiffs primarily rely on the inadmissible speculative conclusions of accident reconstructionist Larry Tompkins. Mr. Tompkins goes beyond his area of expertise, assumes facts not in evidence, then concludes that the accident was caused by "roadway geometrics" that could have been remedied by addition of a right turn deceleration lane. In plain language, unfettered by the engineers' sometimes confusing jargon, the Van Lear's motorcycle was momentarily blocked from Ms. Link's view by a pick up truck that was turning right at Flint Road. This has nothing whatever to do with "the geometric layout of the SR2-Flint Road intersection" and everything to do with Ms. Link's inattention. There is no admissible evidence sufficient to establish breach of duty or proximate cause against WSDOT.

A. The "Geometry" Of The Intersection Is Not Defective

Plaintiffs argue the intersection of Highway 2 and Flint Road is unreasonably dangerous because of the "geometrics" of the intersection. This conclusory statement is not supported by any admissible evidence in the record. The intersection is a flat ninety degree intersection. Brief of Respondent/Cross-Appellant Appendix 1 ("Appendix 1"). A driver like

Ms. Link, stopped at the stop sign for northbound Flint Road traffic waiting to turn left onto Highway 2, has an unobstructed view of the entire roadway, as far as the eye can see in either direction. CP 107, 111 and Appendix 1. *See also* Ms. Link's testimony that she had "a good vantage point" at CP 161-162. Verily, the driver's view of oncoming traffic, at this intersection or any other, can be interrupted or impaired, moment to moment, by cars and trucks on the roadway. The only way to eliminate the fact that cars and trucks on the roadway sometimes block a motorist's view of another vehicle is to eliminate cars and trucks from the roadway. As discussed below, widening the roadway to open up the view as suggested by the Van Lears and their experts is an illusory and ineffective solution and is not supported by evidence, logic or common sense.

B. WSDOT Breached No Duty

Plaintiffs argue that in order to avoid summary judgment a plaintiff need only allege that an intersection is "unreasonably dangerous." However, a bare allegation without evidence sufficient to establish why or how the intersection is unreasonably dangerous, raises no issue of fact. *Ruff v. County of King*, 125 Wn.2d 697, 706-707 (and fn. 5), 887 P.2d 886 (1995). The record here establishes that the roadway was designed and constructed in accordance with the standards applicable at the time it was designed and built. There is no evidence of any defect in the roadway.

There have been accidents at the intersection, but the record establishes that as of the date of the accident in question, the number and severity of accidents, in relation to the amount of traffic using the roadway did not cause this intersection to be singled out as a high accident location or a particularly dangerous intersection.¹ CP 544-546. Importantly, the particular “problem” that Plaintiffs characterize as unreasonably dangerous, is the existence of cars and trucks on the roadway that momentarily block a motorist’s view of vehicles travelling right next to them in an adjacent lane. This condition or circumstance – where one car or truck momentarily blocks a driver’s view -- is one that occurs constantly on every mile of roadway in the state. The fact that a motorist’s view of traffic is sometimes obstructed by other vehicles is an everyday part of ordinary travel on the roadways -- it is not possible to prevent cars and trucks from being an obstacle to the view of another motorist and the state has no duty to construct it’s roadways to eliminate this type of “hazard.” *Ruff v. King County*, 125 Wn.2d at 706.

C. Plaintiffs’ Experts Raise No Issue Of Fact On Proximate Cause

Mr. Stevens and Mr. Tompkins posit that the accident was caused because Ms. Link looked to her left, saw the pickup truck(s) with its signal

¹ In nearly ten years preceding this accident, there had been four accidents involving vehicles turning left from northbound Flint Road. Two of those involved injuries. CP 544.

on slowing to turn right and could not see the Van Lear motorcycle that happened to be in the left lane, right next to the pickup trucks. Mr. Stevens and Mr. Tompkins conclude that if a right turn deceleration lane had been constructed by the state and in place for the use of the pick-up truck(s), the accident would have been avoided because the truck(s) would have been in the turn lane, the right hand lane would have been open and there would have been nothing there to obstruct Ms. Link's view of the Van Lear motorcycle if it was traveling in the left hand lane. The Stevens/Tompkins theory that the accident was caused by lack of a right turn lane is not helpful since the accident could have occurred in the same way even if the turn lane had been available.

As discussed in Cross-Appellant's opening brief and in the trial court, the conclusions reached by Tompkins are speculative, beyond his expertise and beyond the proper scope of expert testimony. Appellants' statement at p.13, footnote 23 of their brief that "Defendant State made no objection to Mr. Tompkins' testimony in the trial court and did not move to strike his declarations" is false. *See* CP 314-326, "STATE OF WASHINGTON'S REPLY TO RESPONSES TO STATE'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE INADMISSIBLE PORTIONS OF THE DECLARATION OF LARRY TOMPKINS." Emphasis added.

The testimony of Tompkins and Stevens is flawed by erroneous assumptions and is, at best, speculative. For example, without citing any design standard, Plaintiffs' experts conclude that the Ms. Link could not have seen the Van Lear motorcycle because the stop bar was located too far back from the edge of Highway 2. See Brief of Appellant at p. 13, footnote 23. Mr. Tompkins and Mr. Stevens assume that Ms. Link stopped at the stop bar, baldly state, without reference to the design manual or any other standard, that the stop bar was not properly located, and conclude that her view was diminished by this. This is not only improper speculation by Mr. Tompkins and/or Mr. Stevens it is patently misleading and contrary to the evidence. In deposition, Ms. Link testified that she did not know where the stop bar was, did not pay attention to it and pulled up and stopped "at" the stop sign. She testified that she had a "good vantage point" and, looking to the left, could see "as far as you can see" down Highway 2. CP 149 and CP 161-162.² "If an expert's opinion assumes the existence of facts not of record, the opinion is not valid and the expert's answer must be stricken." *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 653, 508 P.2d 1370 (1973).

² Ms. Link admitted that she could not see what, if anything, was in the left lane next to the turning truck, because her view of the left lane was "hidden" by the turning trucks. Although her view was blocked, she assumed nothing was there and accelerated into the intersection. CP 165-173.

In addition, the Stevens/Tompkins theory that the accident occurred because there was no right turn lane is conclusory and speculative because it is just as likely the accident would have happened if the turn lane had been in place. See *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010). Washington drivers on a four lane divided highway such as SR 2 at Flint Road, are required by law to “keep right” unless passing. RCW 46.61.100(2). Therefore, if a turn lane had been in place, and if Mr. Van Lear had followed the law, he would have been in the right hand lane, to the immediate left of the pick up truck slowing to turn in the right turn deceleration lane. In addition, because of the addition of the turn lane, Ms. Link would have been a lane width further away from the lane the motorcycle would have been traveling in. CP 543-551. When she looked to her left, Ms. Link would have seen the right turning pickup truck and – if the Van Lear motorcycle was traveling in the right lane as required and was again right next to the truck – Ms. Link’s view of the motorcycle would still have been momentarily blocked. If Ms. Link chose to proceed without knowing what if anything was traveling in the lane beside the truck, the accident would still have occurred. Plaintiffs and their experts cannot establish that a right turn lane would have prevented the accident, because they do not know where the Van Lear motorcycle would have been located in relation to the turning truck. The

Tompkins/Stevens theories are therefore merely inadmissible speculation,³ and their conclusions about how the accident might have happened, or that the accident might have been prevented by a right turn lane on Highway 2 are inadmissible and not sufficient to establish proximate cause or overcome summary judgment. *Garcia v. Washington, Dept. of Transp.*, 161 Wn. App. 1, 16, 270 P.3d 599 (2011); *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001).

II. CONCLUSION

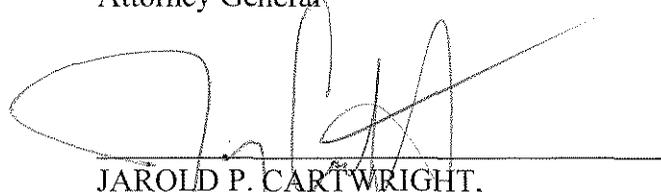
Plaintiff's negligence case is based on Traffic Engineer Stevens' testimony that the installation of a right turn lane might have prevented the accident and reconstructionist Tompkins' theory that there was something wrong with the roadway "geometrics" because a truck momentarily blocked Ms. Link's view of the Van Lear motorcycle. Whether a right turn lane would have prevented the accident or not is speculation as it is as probable as not that a truck slowing to turn from a right turn lane would have momentarily blocked the Van Lear motorcycle if it was traveling in the right lane as required by the traffic code. It is a fact that cars and

³ Mr. Tompkins goes so far as to make conclusions about what Ms. Link may or may not have done under particular circumstances. An accident reconstructionist is qualified to make assumptions using physical evidence, such as skid marks, other marks on the roadway and vehicle damage to make some assumptions to assist an opinion about how vehicles collided. He is not qualified to testify about issues that are outside his expertise, such as what is, was, or might be in Ms. Link's mind or how she would act in various circumstances. See *State v. Farr-Lenzini*, 93 Wn. App. 453, 460-462, 970 P.2d 313 (1999), *superseded by statute on other grounds*.

trucks using the roadways sometimes block a driver's view of other vehicles, signs and other objects. WSDOT has no control of this ordinary driving condition. Because there was no evidence establishing breach of duty or proximate cause, the trial court erred in denying WSDOT's motion for summary judgment.

RESPECTFULLY SUBMITTED this 9th day of May, 2013.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read 'Jarold P. Cartwright', is written over a horizontal line.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of May, 2013, at Spokane, Washington.



NIKKI GAMON