

No. 66352-6-I

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

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MARLA KRESS and JERRY KRESS, husband and wife, and the marital  
community composed thereof,

Appellants,

vs.

THE STATE OF WASHINGTON; TRI-STATE CONSTRUCTION,  
INC., a Washington Corporation, and RICHARD MOBLEY and JANE  
DOE MOBLEY, husband and wife and the marital community composed  
thereof,

Respondents/Cross-Appellants.

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RESPONDENT TRI-STATE CONSTRUCTION, INC.'S OPPOSITION  
TO APPELLANTS' OPENING BRIEF AND TRI-STATE  
CONSTRUCTION, INC.'S OPENING BRIEF IN SUPPORT OF CROSS  
APPEAL

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## I. INTRODUCTION

This case arises out of a head-on collision and illustrates the hazards of talking on a phone while driving. As Appellants' Kress' counsel eloquently stated in trial court: "This is a simple case of somebody got in the wrong lane of traffic and injured my client, and she had no way to avoid the accident."

Co-Respondent Richard Mobley was lost and driving through a construction zone while talking on his cell phone. At some unknown point, Mobley crossed over the double-yellow centerline and began traveling in the lane intended for oncoming traffic. As a result, he crashed head-on with Appellant Marla Kress, who was in a rush to get to work.

The accident occurred within the limits of a construction zone overseen by Respondents State of Washington and general contractor Tri-State Construction, Inc.

In trial court, Mobley was found liable for the accident, with damages to be decided by the jury, post-appeal. The trial court found that no act or omission of the State of Washington or Tri-State Construction ("Tri-State") was a proximate cause of the accident. The trial court further found that Marla Kress was fault free in the accident, despite genuine issues of material fact that she was traveling too fast for conditions.

## **II. RESTATEMENT OF THE ISSUES ON APPEAL**

Whether the trial court properly dismissed all of Kress' claims against Tri-State (after first ruling that Co-Respondent Richard Mobley was fully liable for his head-on collision with Kress) and that no act or omission of Tri-State proximately caused the collision?

Whether the trial court properly dismissed Kress' novel claim for "enhanced injuries" or "increased severity of injuries" when such a theory is not cognizable for negligence cases in Washington?

## **III. ASSIGNMENT OF ERROR ON CROSS APPEAL**

The trial court erred in entering the order of December 3, 2010, granting Kress' Motion for Partial Summary Judgment Striking Tri-State's affirmative defense of Kress' contributory fault.

## **IV. STATEMENT OF THE ISSUE ON CROSS APPEAL**

Whether the trial court erred in ruling that Kress was fault-free for her accident when genuine issues of material fact exist regarding her failure to adhere to the Rules of Road (RCW 46.61) by: (a) driving her vehicle at a speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards; and (b) driving at an appropriate reduced speed when approaching and going around a curve.

## V. RESTATEMENT OF THE CASE ON APPEAL

### A. Respondent Mobley Collided Head-On With Appellant Marla Kress.

On January 23, 2007, at approximately 11:03 p.m., Appellant Marla Kress was driving westbound on State Route 202 in her 2003 Dodge Durango. (CP 5, 77) SR 202 was a two-lane highway located in Redmond. (CP 3) Respondents State of Washington and general contractor Tri-State were widening the highway lanes on the north side of the existing two-lane roadway. (CP 2119) The work occurred only during the day in an area elevated above the existing roadway. (CP 122)<sup>1</sup> The existing roadway was bordered on the north by a Jersey barrier, with an 8-to-10-foot retaining wall behind the barrier. (CP 122). The Jersey barrier and the wall were marked by white retro-reflective markers. (CP 951)

SR 202 was Kress' "main route," and she was fully aware of the ongoing construction work since she traveled through the construction area at least 20 times per week for several months. (CP 1529-31)

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<sup>1</sup> At the time of the accident and in the immediate vicinity of the accident location, Tri-State's work was primarily on the elevated work zone providing grading work for the new lanes of SR 202; not on the existing lanes of traffic. (CP 122) The elevated work zone was separated from the existing SR 202 traffic lanes by a Jersey barrier and a temporary retaining wall.(CP 122) Traffic on SR 202 remained "on the original roadway on the original alignment." (CP 122-23)

On the evening of the collision, Kress was admittedly rushing to work, concerned that she would be late. (CP 1536) To avoid waiting for a red light and risk being late for work, Kress admits (and a witness confirms) that a few seconds before the accident, she made a right turn onto eastbound SR 202, made an illegal U-turn, and then proceeded westbound on SR 202 toward work. (CP 1534-37; CP 1551). Kress quickly accelerated to *at least* 50 m.p.h. before impact. (CP 1538)

As Kress continued westbound on SR 202 in her 2003 Dodge Durango, Respondent Richard Mobley was driving a 2001 Dodge Durango eastbound on SR 202. (CP 78)

Earlier in the evening, Mobley met friends at the Rock Bottom Restaurant and Brewery for dinner and drinks. (CP 87; CP 1817) After leaving the restaurant, Mobley and a friend, David Giroux, set out separately for the Lucky 7 bar in Kirkland. (CP 1818)

Miles from the accident location, Mobley and Giroux were talking to each other on their cell phones. (CP 1780) They were discussing whether to forgo meeting at Lucky 7, make other plans, or just call it a night. (CP 1783-84) At some point later in the conversation, Giroux heard Mobley yell, "Oh shit!" and the cell phone went dead. (CP 86; CP 1784)

For an unknown period of time and distance, Mobley had been driving in the wrong lane of travel along SR 202, resulting in a head-on collision with Kress. The only physical evidence of the collision site establishes that Mobley was positioned further inside and closer to the Jersey barrier than Kress.

As part of the accident investigation, Detective Haake concluded:

Mobley was lost and on his cell phone. He was distracted and by being so crossed the westbound lane and collided head on with Marla Kress's westbound vehicle. Mobley was driving with disregard for the safety of others by being sufficiently distracted that he failed to realize that he was driving in the wrong lane of State Route 202.

(CP 87)

As a result of the head-on collision, both Mobley and Kress sustained severe injuries. (CP 82) Mobley has no memory, whatsoever, of the accident or of the month preceding the accident. (CP 958) Accordingly, there is no evidence to establish why Mobley crossed into the westbound lane, and no evidence to establish how long Mobley was traveling in the wrong lane of travel.

In the area of the accident, there was a 110-foot gap in the double-yellow centerline of the roadway from the former intersection at SR 202 and NE 55<sup>th</sup> Place. (CP 81; CP 109) There is no evidence that Mobley ever saw this gap in the centerline. Throughout the months that Kress drove through the

construction area, she never had any problems driving through the curve in the construction zone, never noticed a gap in the double-yellow centerline, and never had any problem staying in her own lane of travel. (CP 1541-44)

Trooper Bassett, a Certified Technical Specialist with the Washington State Patrol, examined the accident scene on multiple occasions and specifically noted that the “construction zone, signage, and roadway configuration was well defined and easy to read and maneuver.” (CP 82)

**B. Marla and Jerry Kress Filed Suit in 2009.**

On August 4, 2009, Marla and her husband, Jerry Kress, filed suit against Mobley, alleging that he “negligently allowed his vehicle to enter the westbound lane of traffic.” (CP 7) Kress also sued the State of Washington and Tri-State Construction, Inc., alleging, *inter alia*, that the construction area was missing a portion of the double-yellow centerline, the speed limit (posted at 55 m.p.h.) was too fast, and the sight distance was reduced or obstructed by the retaining wall and Jersey barrier when going around the curve. (CP 4-5)

During litigation, Kress also alleged that the State’s and Tri-State’s failure to lower the speed limit in the construction zone proximately caused Kress to sustain more severe (or “enhanced”) injuries than she otherwise would have sustained. (CP 2281-85) Acknowledging that “enhanced injury”

is a theory that only arises in product liability cases, Kress nonetheless argued that the theory applied here because “the issue is the proximate cause of the resulting injury, not the collision itself.” (CP 2283)

In its Answer, Tri-State asserted that: (1) Mobley proximately caused the accident; and (2) Kress was contributorily negligent. (CP 35)

**C. The Trial Court Ruled that Mobley Is Liable and that the State and Tri-State Did Not Commit Any Act or Omission that Was A Proximate Cause of the Accident.**

In November 2010, Kress moved for summary judgment against Mobley on the basis that he was lost and talking on his cell phone, when he crossed into Kress’ lane and hit her vehicle “head-on,” proximately causing the accident. (CP 742) The trial court entered summary judgment against Mobley on the issue of liability only—reserving the issue of damages for trial. (CP 2058-59)

In November 2010, Respondents State and Tri-State moved for summary judgment against Kress, contending that she failed to present sufficient evidence to establish that any act or omission of the State or Tri-State was a proximate cause of the accident. (CP 1008-12; CP 1013-25)

In response, Kress' five litigation experts<sup>2</sup> submitted declarations in support of Kress' "Left Turn Theory." Kress' experts opined that Mobley: (1) intended to turn left; (2) saw the 110-foot gap in the double-yellow centerline; (3) believed there was a side road coming onto the highway from his left; (4) either did not look before he turned, or (a) did not see the Jersey barrier; (b) the 8-to-10-foot high wall; or (c) the retro-reflective markers on the barrier, or 8-to-10-foot wall; (5) proceeded to turn left; (6) and then "may have" made a right steering input in an effort to return to his own lane before colliding head-on with Kress. (CP 993; CP 977)

Larry Tompkins, a mechanical engineer and accident reconstructionist retained by Kress, is solely responsible for the "Left Turn Theory," which he developed with no factual support.

In reconstructing the accident (starting at the point of impact and working back), Mr. Tompkins admits that he made a host of assumptions that are unsupported by any evidence (direct, physical, circumstantial or otherwise).

He answered as follows:

Q. In terms of your actual accident reconstruction, is there any physical evidence that will tell you when the Mobley vehicle crossed from the eastbound lane to the westbound lane?

A. No.

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<sup>2</sup> Three of the five experts failed to present their opinions on a "more probable than not" basis. (CP 1360-66; 1374-80; 1385-87)

(CP 1802)

- Mr. Tompkins testified as follows regarding Mobley's path of travel

before impact:

Q. Okay ... So you are assuming in this scenario right here -- this is the second line, the green line -- that the Mobley vehicle is initiating a turn to the left before it can see the Kress vehicle, correct? Is that correct?

A. It's traveling to the left for whatever reason.

Q. And what is the basis for that? What factual basis do you have for that?

A. The angle at which they collided.

Q. And how can you tell from the angle at which they collided that the Mobley vehicle started to turn left and crossed the centerline before it could see the Kress vehicle?

A. That's a -- that's a turning radius that I -- that I put in that was just consistent with the orientation at impact.

Q. And you assumed that the Mobley vehicle proceeded on that constant radius until impact, correct, with no change in its direction?

A. That's correct.

(CP 1279, 1232) (emphasis added).

- Mr. Tompkins undermined his assumption that Mobley was traveling at a "constant radius until impact" by opining that Mobley "*may have* made a right steering input that reduced his heading angle across Ms. Kress' travel

lane in an attempt to return to his own lane.” (CP 977) His theory is untenable because it is uncontroverted that the *collision was head-on*, with Mobley’s vehicle fully within Kress’ lane of travel and, in fact, having the *inside position* next to the Jersey barrier. (CP 78; CP 81-82; CP 84-87)

- Further, Mr. Tompkins admitted that he did not know why Mobley crossed into the westbound lane:

Q. And you don’t know why he went into the westbound lane to start with, correct? You can’t say why he did that, can you?

A. All I can say is that there’s an approximate area where he crossed into the westbound lane, and it happens to be in the gap in the – in the centerlines.

(CP 1294)

- Mr. Tompkins created an animation of the accident. Mr. Tompkins admitted that his choice of speeds to complete his animation for Mobley was “arbitrary”:

A. Well, I have him -- I have him slowing down from -- and it’s arbitrary, okay?

Q. Okay.

A. I had him slowing down from 40 to 30 and from 30 to impact speed during the turn.

Q. That’s what you’ve assumed in your animation, then, correct?

A. Correct.

(CP 1795) (emphasis added).

On November 12, 2010, the trial court granted the State's and Tri-State's Motion for Summary Judgment on the issue of proximate cause. (CP 2056-57) The Honorable Jean Rietschel stated:

This comes down to is there any actual evidence, direct or circumstantial, showing an attempt for an actual left turn. The Court's conclusion is that there is not direct or circumstantial evidence showing an attempt or actual left turn. There is no direct or circumstantial evidence showing that Mr. Mobley was in fact misled or confused about by conditions of the roadway.

(RP at 52-53 (Nov. 12, 2010))

**D. The Trial Court Ruled That There Is No Cause of Action in Washington for "Increased Severity of Injury."**

Kress proffered a novel theory that the State's and Tri-State's failure to post lower speed limits and increase the sight distance in the construction area caused her to sustain enhanced (or more severe or exacerbated) injuries than she otherwise would have sustained. (CP 2260-66)

Stated differently, Kress contends that if she had been traveling more slowly or had been able to see further ahead, then her injuries would have been less severe when Mobley crossed into her lane and hit her head-on. (CP 2264-65)

Kress' counsel demonstrated the confusing application of this theory. During oral argument, Kress' counsel argued that "but for" the State's and Tri-State's actions "the plaintiff would not be as severely injured[.]" (RP at 14 (Dec. 3, 2010)) Contradicting her position, counsel also argued that "there is no 'but for' test." (RP at 44 (Dec. 3, 2010)) Kress' counsel referred to this new cause of action as "increased severity of the crash," "enhanced injuries," and "exacerbated injuries." (RP at 44-45 (Dec. 3, 2010)) Acknowledging that the cause of action did not exist in Washington, the trial court declined to create it. (RP at 50-51 (Dec. 3, 2010))

## **VI. STATEMENT OF THE CASE ON CROSS APPEAL**

Tri-State preserved the affirmative defense that Marla Kress was comparatively at fault for the accident due to her excessive speed and/or failure to reduce her speed under the conditions. (CP 35)

On the evening of the collision, Kress was admittedly rushing in her car, as she did not want to be late for work. (CP 1536) As a result, Kress, intentionally failed to obey traffic devices through the known construction zone. (CP 1534-87) Mere seconds before the accident, Kress made a right turn onto eastbound SR 202, made an illegal U-turn, and proceeded westbound on SR 202 toward work. (CP 1534-37; CP 1551) She then

quickly accelerated to *at least* 50 m.p.h. before impact of the collision. (CP 1538)

Kress estimates that she was “going 50 – or under 55” m.p.h. prior to the collision; however, she admitted she never looked at her speedometer. (CP 165) Her expert, Mr. Tompkins, admitted that he “arbitrarily” set Kress’ speed at 55 m.p.h. prior to impact and that he was unable to refute the very real possibility that Kress was speeding through the known construction zone. (CP 1554-61)

Mr. Tompkins agreed there was no physical evidence to limit Kress’ pre-braking speed at 55 m.p.h. (CP 1554) In fact, by simply changing Kress’ perception-reaction time from 2 seconds to 1.5 seconds, which is commonly used by accident reconstruction and human factors experts, Mr. Tompkins calculated the same impact speed of 49 m.p.h. had Kress been traveling at 60 m.p.h. prior to braking. (CP 1559-60)

Kress’ transportation engineer, Ed Stevens, opined that due to the alleged “reduced sight distance during construction, the speed limit (or advisory speed on the curve) should have been reduced from 55 mph to 35 mph.” (CP 1575) *At the time of impact, it is undisputed that Kress was traveling at least 15 m.p.h. faster than Mr. Stevens’ recommended advisory speed.*

After the accident, Kress stated that the severity of her injuries would have been prevented if she had been driving more slowly and had more time to react. (CP 1590) Even though Kress traveled through this same area at least 20 times per week, she stated that “I wish I had been warned to drive at a much lower speed.” (CP 1590)

Taken together, the following points establish genuine issues of material fact regarding her comparative fault:

- (1) Marla Kress was in a rush to avoid being late for work (CP 1536);
- (2) A few seconds prior to the collision, Kress disregarded traffic control devices in a known construction area and made an illegal U-turn because she was too impatient for the light to turn green (CP 1534-37; 1551);
- (3) Just after completing an illegal U-turn, Kress quickly accelerated up to highway speeds through a known construction zone (CP 1538);
- (4) Her expert states that she was approaching the accident curve at 55 m.p.h. (CP 1386);
- (5) Kress’ own experts claim that the speed limit should have been reduced from 55 m.p.h. to 35 m.p.h. due to an alleged reduction in sight distance and narrowing of the shoulder as a result of the construction and placement of the Jersey barrier (CP 1575; 1564);
- (6) Kress admits that had she “been driving more slowly and had more time to react, [she] could have done more to slow [her] car and prevent the serious injuries [she] suffered” (CP 1590);
- (7) Kress was involved in a head-on motor vehicle collision in which she only saw the illumination of Mobley’s headlights suddenly enter her lane (CP 5);

- (8) Kress states that she “slammed on the brakes” prior to impact (CP 1389);
- (9) Kress’ speed *at impact* was 49-50 m.p.h. (CP 1740);
- (10) Kress had a duty to drive at a speed no greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing and to reduce her speed when approaching and going around a curve, when traveling upon a narrow or winding roadway, and when special hazards existed due to traffic, weather, or highway conditions (RCW 46.61.400(1) & (3)).

The following facts are unknown:

- (1) How fast Kress was traveling *prior to impact* (CP 1740-47);
- (2) How long Kress braked prior to impact (CP 1740-47); and
- (3) How much Kress’ vehicle slowed due to braking prior to impact (CP 1740-47)

Marla Kress moved for summary judgment dismissal of the State’s and Tri-State affirmative defense that she was comparatively at fault. (CP 1042-47) On December 3, 2010, *after* the Court had already granted the State’s and Tri-State’s motions for summary judgment dismissal on proximate cause, and dismissed Kress’ “enhanced injury” claim, the trial court granted Kress’ motion based on the following rationale:

The only evidence before the Court on this issue is when she’s driving, from the evidence of the experts, she’s driving at 50. The speed limit is 55. What she would have seen is the Jersey barrier. And based on that, I don’t think there’s any showing that she had notice of a hazardous condition such

that the statute cited in the opposing briefs [RCW 46.61.400] are—come into play. So the Court would dismiss the contributory fault defense at this time.

(RP at 55 (Dec. 3, 2010))

On December 16, 2010, Tri-State filed a Notice of Cross Appeal of the trial court's order dismissing its affirmative defense. If the Court of Appeals affirms the trial court's dismissal of Kress' negligence and enhanced injury claims, then the issue of Kress' contributory negligence is moot.

## **VII. LEGAL ARGUMENT IN OPPOSITION TO APPELLANTS' OPENING BRIEF**

As a preliminary matter, Kress has appealed the trial court's rulings that she failed to submit admissible and sufficient evidence that an act or omission by Respondents State of Washington or Tri-State was a *proximate cause* of her accident. However, Kress erroneously directs most of her opening brief to the elements of duty and breach. (*See* Appellants' Opening Brief at 6-7, 18-21, 23, 27-33, 50) Her arguments miss the mark because summary judgment was granted on the element of proximate cause.

### **A. The Standard of Review Is *De Novo*.**

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party, Respondent Tri-State, is entitled to summary judgment as a matter of

law and if there is any genuine issue of material fact requiring a trial. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); Green v. A.P.C., 136 Wn.2d 87, 94, 960 P.2d 912 (1998).

In reviewing the record *de novo*, all facts, and reasonable inferences there from, must be viewed in the light most favorable to Kress, the non-moving party. Even if the facts are undisputed, if reasonable minds could draw different conclusions, then summary judgment is improper. Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 745 P.2d 1 (1997).

Here, Kress, the nonmoving party, failed to present competent and admissible evidence to establish that any act or omission of Tri-State was a proximate cause of the accident. Further, the admittedly speculative nature of Kress' expert opinions do not raise genuine issues of material fact for the jury's consideration. Accordingly, the trial court's summary judgment dismissal of Kress' negligence and "increased severity of injuries" claims should be affirmed.

**B. The Summary Judgment Standard Applies.**

Summary judgment exists to avoid unnecessary trials or unnecessary litigation of issues. Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* CR 56(c). Once the moving party shows the nonmoving

party lacks sufficient evidence to prove their case, the burden shifts to the nonmoving party “to establish the existence of an element essential to [their] case.” Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *affirmed in part, reversed in part by* 130 Wn.2d 160, 922 P.2d 59 (1996). At this point, the nonmoving party may not rest upon mere allegations or denials, whether in general or derived from their pleadings. *See* CR 56(e); Young, 112 Wn.2d at 226-27. The nonmoving party must provide specific facts showing there is a genuine issue for trial. Id. Plaintiffs must prove that a negligent act was the proximate cause of the alleged injuries. Wilson v. Northern Pac. Ry. Co., 44 Wn.2d 122, 265 P.2d 815 (1954). Although proximate cause need not be proved by direct evidence, it nevertheless must be based upon evidence and not speculation or conjecture nor inference upon inference. Id.

**C. Summary Judgment Should Be Affirmed Because Kress’ Sole “Evidence” of Proximate Cause Is Rooted in Layers of Speculation and Conjecture.**

Absent inadmissible speculative expert “opinion,” Kress fails to establish that any act or omission by Tri-State was a proximate cause of the accident. Specifically, without conclusory or speculative opinion regarding Mobley’s

state of mind or unknown intentions, Kress fails to provide any admissible evidence to establish that:

- (1) Any alleged defect caused Mobley to cross over the double-yellow centerline and crash head-on into Kress' vehicle;
- (2) Mobley was able to see the 110' gap in the double-yellow centerline;
- (3) Mobley intended to make any lane change or maneuver within the 110' gap in the double-yellow centerline;
- (4) Mobley made a left turn within the 110' gap in the double-yellow centerline;
- (5) Mobley made any maneuver whatsoever within the 110' gap in the double-yellow centerline;
- (6) Mobley was not able to see the Jersey barrier with his vehicle's headlights;
- (7) Mobley was not able to see the white retro-reflective barrier markers affixed to the Jersey barrier;
- (8) Mobley was not able to see the 8-to-10-foot temporary retaining wall immediately adjacent to the Jersey barrier;
- (9) Mobley was not able to see the high visibility fence installed on and/or above the 8-to-10-foot temporary retaining wall;
- (10) Mobley believed that there was a side road that cut through the Jersey barrier and the 8-to-10-foot temporary retaining wall;
- (11) Mobley was unable to see Kress' vehicle or the headlights' illumination approaching at freeway speeds;
- (12) Mobley's expletive of "Oh shit!" immediately before the phone went dead was due to Mobley recognizing that the

former intersection was closed (versus recognizing he was traveling in the wrong lane as Kress' vehicle rapidly approached); or that

- (13) Any alleged deficiency along SR 202 caused or contributed to the subject accident in any way.

In sum, all of Kress' claims and experts' opinions regarding what Mobley may have been thinking, intending, or attempting to do at the time of the accident is pure speculation given the irrefutable fact that Mobley has no memory of the entire month before the accident, much less the accident itself. Further, there is no physical evidence to support Kress' experts' opinions.

Kress failed to submit evidence, whether by admissible testimony or by tangible evidence, to support her theory of the case against Tri-State that Mobley was deceived, intended to make any lane change or other maneuver, or was otherwise confused by any of the features along SR 202 resulting in the subject automobile accident.

“A person seeking relief in damages for injuries sustained must not only prove a negligent act, but must also prove that such negligent act was the proximate cause of the injuries.” See Wilson v. Northern Pac. Ry. Co., 44 Wn.2d 122, 265 P.2d 815 (1954). “Proximate cause need not be proved by direct evidence.” Id. at 130. “It may be proved by circumstantial evidence.” Id. “But such proof must be upon evidence, not speculation or conjecture,

nor may it be by inference piled upon inference.” Id. It is well settled in the State of Washington that an action will not lie on speculation alone. In Moore v. Hagge, 158 Wn. App. 137, 147, 241 P.3d 787 (2010), Division I stated that “the cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another” (quoting Frescoln v. Puget Sound Traction, Light & Power Co., 90 Wn. 59, 63, 155 P. 395 (1916)). The Moore Court stated:

[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.

Id. (quoting Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947)).

**D. Mr. Giroux’s Testimony Confirms the Speculative Nature of Kress’ Case Against Tri-State.**

Mr. Giroux stated that he and Mobley left Rock Bottom Restaurant and Brewery separately to head to the Lucky 7 bar in Kirkland. (CP 1778-79) He testified that Mobley was not heading in the right direction and that they were discussing on their cell phones whether to simply go home or continue to meet up at the Lucky 7 when Mobley yelled, “Oh Shit.” (CP

1777-78) Although they were discussing what to do, no decision had been made as the “Oh Shit” comment preempted the decision. (CP 1783-84)

Giroux stated that while Mobley was not going in the right direction to Lucky 7, Giroux believed from Mobley’s demeanor on the phone and in the phone conversation that Mobley knew where he was. (CP 1782) Giroux testified that at no time did Mobley state he was lost or say anything to suggest that he did not know where he was. (CP 1781) More importantly, Giroux testified that at no time did Mobley indicate he was looking to make a left-hand turn. (CP 1785)

No evidence exists to support Kress’ left-turn theory. At Mobley’s request, the trial court continued Tri-State’s motion for summary judgment to secure the testimony of Giroux. However, Giroux’s testimony fails to support the speculative conclusions that Mobley was confused or deceived or had even attempted to make a left-hand turn. More importantly, no evidence exists that Mobley observed a gap in the double-yellow centerline, perceived it to be an intersection, or that he was in the process of making a left-hand turn. Kress’ left-turn theory is wholly unsubstantiated.

**E. The Opinions of Kress' Experts Lack Evidentiary Support that Mobley Was Making a Left Turn.**

Kress repeatedly asserts that the evidence shows that Mobley: crossed into the westbound lane at the western end of the gap in the double-yellow "no passing" centerline; was travelling less than 24 m.p.h.; and steered through the gap. While the experts dispute Mobley's speed at time of impact, there is no evidence illustrating where Mobley crossed into the oncoming lanes of traffic or that he "steered" through the gap.

In addition, Kress contends that the alleged sight distance obstruction prevented Mobley from seeing Kress' vehicle. (*See* Appellants' Opening Brief at 10) But again, there is no evidence supporting this assertion. Rather, each of Kress' assertions is based upon the admittedly arbitrary assumptions and speculation of her accident reconstructionist Larry Tompkins.

Mr. Tompkins admitted there was "no physical evidence" indicating when Mobley crossed from the eastbound lane to the westbound lane. (CP 1802) In Mr. Tompkins' opinion, "based on Mr. Mobley's expletive he may have made a steering input that reduced his heading angle across Ms. Kress' travel lane in an attempt to return to his own lane." (CP 1387) However, Mr. Tompkins admitted that it was possible and consistent with his calculated

heading angle for Mobley to have been driving in the wrong lanes of traffic for some period of time and swerving toward the Jersey barrier, although he added that, “some things are more plausible than others” and “your version of the events [swerving toward the Jersey barrier] is considerably more speculative than mine.” (CP 1803-05) However, it is Mr. Tompkins’ speculation that forms the foundation for his opinion that Mobley made a left turn maneuver and “may have made a steering input” to reduce his heading angle prior to impact with Kress.

Mr. Tompkins agreed there was no physical evidence of what Mr. Mobley did prior to impact because the “physical evidence starts when they [the vehicles] collide with each other.” (CP 1803-05) A simple review of the collision evidence establishes that Mobley was fully in Kress’ lane of travel in a head-on collision. There is no evidence to support a left-turn theory and no evidence to suggest Mobley made any right steering input to return to his lane of travel as his vehicle *had the inside position* and was closer to the Jersey barrier than Kress.

Kress’ left-turn theory is only supported by what Kress contends is “evidence” that “shows Mobley crossed over into the westbound lane at the western end of the 110’ gap” and “steered through the gap.” It is a false

construct. No such evidence exists. Mr. Tompkins simply assumed that Mobley initiated the hypothetical left turn before he was able to see Kress' vehicle. This assumption was based on using a curve that represented the largest turning radius possible (a 460' arc) to achieve the angle of impact. (CP 1788-89) Mr. Tompkins' analysis assumes that Mobley traversed a "constant arc from the time [Mr. Tompkins] felt [Mobley] initiated the left turn until impact." (CP 1790) He then assumes that Mobley proceeded along the constant radius until impact, with no change in direction. This assumption directly contradicts his other assumption that Mobley may have made a right steering input when he "realized" there was no intersection. (CP 1791)

Mr. Tompkins' animations and opinions are based upon the "largest turning radius possible" that Mr. Mobley could have possibly followed if he was attempting to turn left. (CP 1799-1801) Not surprisingly, only the "largest turning radius possible" theory actually places Mobley's vehicle outside of the sight distance of Kress. Mr. Tompkins' testified that it is possible that Mobley made "a sharper left turn" which would make Mobley proceeding further through the 110-foot gap and within sight distance of Kress. (CP 1749-50) The bases of Kress' experts' opinions are nothing more

than impermissible inference upon inference, and rooted in layers of speculation.

Moore v. Hagge is directly on point. Division I affirmed the trial court's dismissal of plaintiff's negligence claim against the City of Des Moines because Moore's evidence (his testimony and his expert's opinions) regarding the element of proximate cause was based on speculation. Moore v. Hagge, 158 Wn. App. 137, 139, 241 P.3d 787 (2010). In its reasoning and analysis, the Moore Court relied heavily on Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (2001) (another case directly on point).

Like the instant case involving Richard Mobley and Kress, there was "no evidence to establishing where Moore came from, and no evidence about what he was doing just before or at impact." Moore, 158 Wn. App. at 149. Like Richard Mobley, Moore "cannot give his own account of how the accident happened because he has no recollection of it. Id. Like Marla Kress, Moore contends that if the City had installed certain additional safeguards on the road, "he would have been alerted to the inherently dangerous conditions of the roadway, taken a different course of action, and would not have been struck by Hagge." Id. (internal brackets omitted). However, the Court of Appeals ruled that there was no direct or circumstantial evidence showing

that the City's alleged negligence caused his injuries, or that Moore was misled or confused about the roadway conditions. Id. Here, summary judgment dismissal should be affirmed because there is no direct or circumstantial evidence that Tri-State proximately caused the accident.

**F. Recovery for “Enhanced Injury” Is Only Available Against Manufacturers and in Product Defect Cases or Cases Involving Secondary Collisions.**

Kress' “injury enhancement” theory, also known as the “second accident” theory, is based upon manufacturer's liability in product-defect cases when the injury is caused or enhanced due to a defect in the design or manufacture of a product. See, e.g., Baumgardner v. Am. Motors Corp., 83 Wn.2d 751, 522 P.2d 829 (1974); and see Couch v. Mine Safety Appliances Co., 107 Wn.2d 232, 242, 728 P.2d 585 (1986) (“case law allows for enhanced injury allegations in product liability actions and assigns the burden of proof regarding the nature and extent of such claims to the plaintiff”).

This Court should decline Kress' invitation to create new law and to expand the “injury enhancement” theory to general negligence claims on any case where an expert opines that injuries could have been reduced had the speed limit been reduced. In effect, Kress seeks to make the State and its contractors insurers with endless exposure in any automobile collision by

simply claiming that the injuries would have been less severe had the speed limit been lower. In this case, there is no “injury enhancement” due to the manufacturing or design defect of a product and there is no evidence of a “second accident” which proximately caused Kress’ injuries. The trial court’s summary judgment dismissal of this claim should be affirmed.

**G. No Cause of Action for “Increased Severity of Injury” Was Created in Doherty v. Municipality of Metro. Seattle.**

Appellants rely heavily on the Court of Appeals’ decision in Doherty v. Municipality of Metropolitan Seattle, 83 Wn. App. 464, 921 P.2d 1098 (1996) to support their theory that there is a new cause of action for “increased severity of injury.” (See Appellants’ Opening Brief at 45-49) However, Kress’ interpretation of Doherty is both conflated and confusing. In Doherty, a mother and daughter were involved in a *series of collisions* ending when their car collided into a Metro bus that had failed to yield to oncoming traffic. See Doherty 83 Wn. App. at 465-56. It was undisputed in Doherty that the Metro bus had begun a left turn into the parking lot, paused, and partially blocked the northbound lanes while waiting for traffic to clear. Id. at 466. When the Metro bus driver saw Doherty’s vehicle approaching, he set the parking brake, jumped out of his seat, and ran toward the back of the bus. Id. Doherty’s vehicle slid under the bumper of the bus with such

force that the vehicle compressed and left gouge marks on the pavement. Id. at 466-67.

In Doherty, Metro prevailed on summary judgment by arguing that proximate cause could not be established because: (a) “the accident and resulting injuries would have occurred even if the bus had fully stayed within its left turn pocket,” and (b) “any connection between the placement of the bus and the ultimate tragic result of the accident was too remote to impose legal liability.” Id. at 467.

The Court of Appeals disagreed, noting that “cause-in-fact is a cause but for which the accident would not have happened.” Id. at 469 (citing Channel v. Mills, 77 Wn. App. 268, 272, 890 P.2d 535 (1995)). Plaintiff submitted evidence that the Metro bus failed to yield the right-of-way which resulted in the collision between the Doherty vehicle and the Metro bus. Plaintiff’s accident reconstructionist opined that had the Metro bus not failed to yield the right-of-way and properly stayed within its lane of travel, “it may not have collided with the car at all.” Id. at 471. Plaintiff’s expert further opined that, even if the collision did occur, it would not have been a head-on collision but rather collision at a 15 to 20 degree angle. Id. In other words, there was sufficient evidence to establish a material issue of fact that the

Metro bus' failure to yield the right-of-way was a proximate cause of the collision and the resulting injuries. Whether the “ultimate tragic result of the accident was too remote to impose legal liability” necessarily required an analysis of the proximate cause of all of the collisions – including the collision with the Metro bus – and the severity of impact and resulting injuries.

Unlike Doherty, Kress has not established cause-in-fact because no evidence exists that “but for” any act or omission of Tri-State, the accident between Kress and Mobley would not have occurred. To the contrary, Kress’ counsel have argued in open court and have submitted expert opinion that even if the State of Washington had adopted Kress’ recommended 35 m.p.h. advisory speed limit, *the collision would still have occurred*. Noticeably absent from the record is a single claim or admissible statement from one of Kress’ team of experts that this accident would not have occurred “but for” Kress’ speed. In Doherty, it was undisputed that the Metro bus failed to yield the right-of-way, which partially blocked the oncoming traffic lanes and which resulted in a significant collision between the Metro bus and Doherty’s vehicle. Thus, the Court determined there was a material issue of fact regarding the nature and severity of injuries resulting from the collision with

the Metro bus due to the Metro bus' failure to yield and resulting impact with the Doherty vehicle.

Kress' reliance upon Doherty is unavailing. Doherty does not support Kress' theory that a defendant can be responsible for "enhanced injuries" without first establishing that the defendant's act or omission was a proximate cause of the collision. Unlike Doherty, Kress has failed to establish that any act or omission by Tri-State was a proximate cause of the collision. Accordingly, Kress cannot establish the necessary elements of negligence, and her "enhanced injury" claim was properly dismissed.

**H. Kress Failed to Prove that Any Alleged Act or Omission of Tri-State Was a "Cause In Fact" of the Collision.**

"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, 377-8, 972 P.2d 475 (1999) (citing Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 929 P.3d 1209 (1997)). "In order to prove actionable negligence, a plaintiff must establish the existence of a duty, a breach of this duty, and resulting injury. Id. (citing Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998)). "For legal responsibility to attach to negligent conduct, claimed breach of duty must be a proximate cause of the resulting injury." Id. (citing Pratt v. Thomas, 80 Wn.2d 117, 491 P.2d 1285

(1971); Ferrin v. Donnellefeld, 74 Wn.2d 283, 444 P.2d 701 (1968)). “Even if negligence is clearly established, the respondents may not be held liable unless their negligence *caused* the accident.” Id. (emphasis in original).

“In a negligence case, the plaintiff has the burden of producing, among other things, evidence sufficient to support a finding of causation.” Whitechurch v. McBride, 63 Wn. App. 272, 275, 818 P.2d 622 (1991), review denied 118 Wn.2d 1029 (1992) (citing Maltman v. Sauer, 84 Wn.2d 975, 530 P.2d 554 (1975)). “Causation has two elements, cause in fact and legal (proximate) cause.” Id. (citing Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985)). “A cause in fact is one without which the accident would not have happened.” Id. (emphasis added) (citing Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 656 P.2d 483 (1983), Hartley, 103 Wn.2d at 778). “In a negligence case, then, the plaintiff has the burden of producing evidence sufficient to support a finding that the defendant’s negligent conduct was a cause in fact, which is the same saying that the plaintiff has the burden of producing evidence sufficient to support a finding that the accident would not have occurred but for the negligent conduct of the defendant.” Id. (emphasis added).

In Whitechurch, the Court analyzed a “reasonable person’s hypothetical conduct” to the favored driver’s actual conduct to determine if there was “evidence sufficient to support a verdict that the accident would not have happened but for the favored driver’s negligence.” Id. at 276. The plaintiff offered no evidence to compare to the hypothetical reasonable person and therefore the Court concluded it could not find that the accident would not have occurred but for the defendant’s excessive speed. Id. at 277. As a result, the Court concluded “[i]n short, the plaintiff failed to produce evidence sufficient to support a verdict that the defendant’s speed was a cause in fact of the accident, and the trial court acted properly when it took the case from the jury.” Id.

In this case, Kress’ “enhanced injury” theory is premised on a head-on collision occurring when she was traveling 50 m.p.h. compared to a collision occurring when she is traveling at hypothetical speeds of either 35 m.p.h. and/or 40 m.p.h. (CP 2222; CP 2230-31; CP 2234-52) In each hypothetical, the collision between Mobley and Kress is unavoidable.

Applying the Court’s analysis in Whitechurch above, Kress did not produce evidence sufficient to support a verdict that the collision would not have occurred but for any act or omission by Tri-State for any alleged failure

to suggest that the State perform a speed study or lower the speed limit. In short, Kress fails to establish “cause in fact.”

Similarly, in Kristjanson v. City of Seattle, the Court affirmed the trial court’s dismissal of the City of Seattle on claims that the City breached its duty to provide adequate sight distance and adequate signing on the road when a third party negligently crossed over the centerline and caused a collision. See Kristjanson v. City of Seattle, 25 Wn. App. 324, 606 P.2d 283 (1980). In Kristjanson, the Court stated that the trial court correctly concluded that “any suggestion that the at-fault driver was misled or that plaintiff would have reacted sufficiently to avoid the accident is purely speculative.” Id. at 326. The Court further noted that, “at most,” plaintiff could only say that “he *might* have reacted in a way which could have avoided the collision.” Id. In concluding that “recovery cannot be based upon a claim of what “might have happened,” the Court further held that “‘it would be mere guessing’ to say that the City’s conduct in the maintenance of [the roadway] ‘in any way’ proximately caused the collision which resulted in Kristjanson’s injuries.” Id. at 326-27 (citing Johanson v. King County, , 7 Wn.2d 111, 122, 109 P.2d 307 (1941); Nakamura v. Jeffrey, 6 Wn. App. 274, 492 P.2d 244 (1972), review denied 80 Wn.2d 1005 (1972)).

Unlike Kristjanson, there is no evidence and no allegation that Kress would have reacted sufficiently to avoid the accident. As Kress' counsel argued in open court and as confirmed by Kress' accident reconstruction analysis, the collision would have occurred whether Kress was driving 50 m.p.h. or 35 m.p.h. As such, no evidence exists that Kress could have reacted any differently to avoid the collision.

In addition, it would be pure conjecture to suggest that Kress would have reacted in a manner which *might* have reduced her alleged injuries. It is undisputed that the head-on collision was predominantly passenger compartment-to-passenger compartment. (CP 2255-59) It is pure speculation that Kress and/or Mobley *might* have reacted such that their impact speeds were reduced compared to the actual collision. (CP 2255-59) It is also pure speculation that the impact forces and/or severity of injuries *might* have been reduced due to the reduced speed, increased perception/reaction times, and performance of evasive maneuvers. (CP 2255-59) In fact, an increased perception/reaction time leading to an evasive maneuver could have resulted in a collision with more significant crush and intrusion into the drivers' compartment causing more severe injuries from the impact. (CP 2255-59)

As stated in Kristjanson, “recovery cannot be based upon a claim of what “might have happened.” No evidence exists that Kress could have reacted sufficiently to avoid the collision and no evidence exists that any act or omission of Tri-State “in any way” proximately caused the collision. See Kristjanson, 25 Wn. App. at 326-27.

## **IX. LEGAL ARGUMENTS IN SUPPORT OF CROSS APPEAL**

### **A. The Standard of Review Is *De Novo*.**

A discussion of the standard of review is set forth in section VII.A. In reviewing the record *de novo*, all facts, and reasonable inferences there from, must be viewed most favorably to Tri-State, the non-moving party. Here, Tri-State, the nonmoving party, came forward with evidence to establish Marla Kress’ comparative fault, and presented genuine issues of material fact for the jury’s consideration. Accordingly, the trial court’s ruling granting Kress’ summary judgment dismissal of Tri-State’s affirmative defense of her comparative fault should be reversed.

### **B. Viewing All Evidence and Inferences in the Light Most Favorable to Tri-State Construction, the Trial Court Erred in Striking Tri-State’s Affirmative Defense of Comparative Fault.**

In a summary judgment motion, the burden is on Kress, the moving party, to demonstrate that there is no genuine issue as to a material fact and that, as

a matter of law, summary judgment is proper. Atherton Condo. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990) *citing* Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). “The moving party is held to a strict standard” and “any doubts as to the existence of a genuine issue of material fact is resolved against the moving party.” Atherton Condo., 115 Wn.2d at 515 *citing* Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 38, 785 P.2d 447 (1990). “In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party.” Id.

The Tort Reform Act of 1981 included the term “fault” over the former statutes’ term “negligence” which allows the Court to consider a wide variety of behavior that may make a party liable for their own injuries when conducting a comparative analysis. *See* RCW 4.22.005 and RCW 4.22.101 (repealed). “Under the act, ‘fault’ is defined as ‘acts or omissions . . . that are in any measure negligent or reckless toward the person or property of the actor or others’” and includes an “unreasonable failure to avoid an injury or to mitigate damages.” Christensen v. Royal Sch. Dist., 156 Wn.2d 62, 66, 124 P.3d 283 (2005) *citing* RCW 4.22.015. A claimant’s “negligence relates to a failure to use due care for his [or her] own protection[.]” Christensen,

156 Wn.2d at 66, *citing* Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 238, 588 P.2d 1308 (1978).

In this instance, based upon Kress' own allegations and expert opinion, genuine issues of material of fact exists as to whether Kress failed to adhere to the Rules of Road, drive at a reasonable safe and prudent speed, and appropriately reduce her speed based upon the conditions of the highway. As such, the trial court's ruling should be reversed.

Kress states that the severity of her injuries could have been prevented if she had been driving more slowly and more had time to react. (CP 1590) She states that "I wish I had been warned to drive at a much lower speed." (CP 1590) However, drivers must exercise common sense and judgment under the circumstances and adhere to the Rules of the Road, *i.e.*, traveling at a speed that is reasonable and prudent. Evidence of her failure to do so (by her own admission) creates genuine issues of material of fact with respect to whether she is comparatively at fault.

**C. With Full Knowledge of the Ongoing Construction, Kress Disregarded Traffic Control Devices within the Construction Zone and Was in a Hurry to Get to Work.**

SR 202 was Kress' "main route." She never had any problems driving through the curve of the accident site, never noticed a gap in the double-

yellow centerline, and never had any problem staying in her own lane of travel. (CP 1541-44) She acknowledged that because of the known construction activities, “you need to kind of *slow down*” and “you always have to be careful and attentive.” (CP 1539; CP 1544)

On the evening of the collision, Kress admitted that she was rushing to work and was concerned she would be late. (CP 1536). Mere seconds prior to the collision, she: (a) intentionally failed to obey traffic devices through the known construction zone; (b) made a right turn onto eastbound SR 202; (c) made an illegal U-turn; and (d) quickly accelerated to at least 50 m.p.h. on SR 202 toward work. (CP 1534-37; CP 1551).

**D. There Is No Evidence to Establish that Marla Kress Was Traveling “50 or Under 55” *Prior* to the Collision.**

In a conclusory and self-serving manner, Kress simply asserts that she was driving close to the speed limit, and never left her lane of travel. (*See* Appellants’ Opening Brief at 8) However, RCW 46.61.400 sets the standards for proper speeds on any road or highway in the state of Washington. The testimony of Kress and her own experts demonstrates that there are genuine issues of material fact regarding whether Kress was actually traveling at a reasonable rate of speed at the time of the accident. In fact, the weight of the evidence suggests Kress was traveling too fast for conditions.

Kress estimates that she was “going 50 – or under 55” m.p.h. prior to the collision; however, she admitted she never looked at her speedometer. (CP 165) Her expert, Mr. Tompkins, admitted that he “arbitrarily” set Kress’ speed at 55 m.p.h. prior to impact and that he was unable to refute the very real possibility that Kress was speeding through the known construction zone. (CP 1554-61)

Mr. Tompkins agreed there was no physical evidence to limit Kress’ pre-braking speed at 55 m.p.h. (CP 1554) In fact, by simply changing Kress’ perception-reaction time from 2 seconds to 1.5 seconds, which is commonly used by accident reconstruction and human factors experts, Mr. Tompkins calculated the same impact speed of 49 m.p.h. to Kress speeding at 60 m.p.h. (CP 1559-61) Mr. Tompkins’ only rebuttal to the changes in his assumptions was that it “may vary the impact location.” (CP 1516)

However, just as Mr. Tompkins’ arbitrarily selected a pre-impact speed of 55 m.p.h., the starting location of Kress’ vehicle was also arbitrarily selected by Mr. Tompkins. In other words, the impact location would be exactly the same if Mr. Tompkins placed Kress’ vehicle a few feet further back based upon the higher approach speed. This is incontrovertible.

Based upon the accident reconstruction analysis by both Kress and Tri-State, it is undisputed that she was traveling approximately 49 – 50 m.p.h. at the time of impact. Contrary to the unsupported allegations contained in Appellants' Opening Brief, Kress' speed prior to impact is unknown and could reasonably have been 60 m.p.h. or greater. As noted above, Mr. Tompkins has no factual knowledge to support his opinion that Kress was traveling 55 m.p.h. prior to initiating braking. It is just as likely that she was traveling at 60 m.p.h. and initiated braking 0.5 seconds earlier—all of which a jury is entitled to consider as contributing to her accident.

**E. Washington's Statutory "Rules of the Road" Govern All Drivers, Including Marla Kress.**

Washington's Rules of the Road places specific duties upon all drivers, including Marla Kress. RCW 46.61.400 provides in relevant part:

- (1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.
- (3) The driver of every vehicle shall, consistent with the requirements of subsection (1) of this section, drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest,

when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

RCW 46.61.400(1) & (3) (emphasis added).

“RCW 46.61.400 imposes a duty to drive at a prudent speed, not only for known conditions, but also for ‘potential’ hazards.” Hough v. Ballard, 108 Wn. App. 272, 284, 31 P.3d 6 (2001). In Hough, a collision occurred at an inoperable intersection on a stormy, dark night. Hough was familiar with the area and knew there was a power outage but was unaware he had entered the intersection at the time of the accident. He failed to slow down or stop and did not perceive the traffic lights were out until he saw Ballard’s van in front of his headlights just before impact. Hough filed suit and the trial court granted Hough’s motion for summary judgment, ruling that Ballard was liable for all damages and that Plaintiffs were free of contributory negligence. Id. at 276-77.

The Court of Appeals *reversed* the trial court’s ruling and remanded the case to the trial court to determine the extent of each party’s negligence. Id. at 288. The Court held that plaintiff “had a duty to maintain a safe speed to avoid a collision in the event that (1) the power outage rendered the traffic signals inoperative and darkened the intersection, and (2) his speed might be

too fast to enable him to see another vehicle in his path in time to avoid a collision.” Id. at 284-85. Acknowledging the trial court’s error, the Court of Appeals relied upon Harris v. Burnett, which held:

It is for the jury to decide whether the driver of a vehicle was exceeding the speed limit or exceeding a reasonable speed under the circumstances and whether such excessive speed constituted negligence[.]

Where there is conflicting evidence as to the proper speed on an approach to an intersection, it is for the jury to decide (a) what was a reasonable speed under all of the circumstances, (b) was that speed exceeded by the approaching driver, and (c) if so, was the speed a proximate cause of the accident. Bohnsack v. Kirkham, 72 Wn.2d 183, 432 P.2d 554 (1967); Thomas v. Seattle, 42 Wn.2d 53, 253 P.2d 625 (1953). The operator of a motor vehicle is required to drive at a speed that allows him to observe the roadway ahead and be able to take appropriate action in the event that hazards appear in his path. James v. Edwards, 68 Wn.2d 194, 412 P.2d 123 (1966). Whether a person has driven at a reasonable speed under the existing circumstances and conditions is for the jury. Wolff v. Coast Engine Prods., Inc., 72 Wn.2d 226, 432 P.2d 562 (1967); Ashley v. Ensley, 44 Wn.2d 74, 265 P.2d 829 (1954); Pancoast v. McLean, 6 Wn. App. 592, 494 P.2d 1374 (1972).

Id. (citing Harris v. Burnett, 12 Wn. App. 833, 532 P.2d 1165 (1975)).

Significantly, the Court stated that “[w]hether Hough’s excessive speed was a proximate cause of the accident is a question of fact for the jury and is not to be resolved by the trial court as a matter of law.” Id. 284 (citing Moyer v. Clark, 75 Wn.2d 800, 454 P.2d 374 (1969)). “Even a favored

driver must slow down when approaching an intersection and must exercise reasonable care under the conditions present.” Id. The Court confirmed Hough was aware of the power outage, knew it was dark and difficult to see, and failed to observe he was approaching an intersection. The Court also recognized that a driver may be traveling too fast for conditions *even if they are not exceeding the speed limit*. This is squarely Tri-State’s affirmative defense.

Specifically, the Court noted that although Hough had slowed below the speed limit, he continued to travel 35-40 m.p.h. In viewing the facts in the light most favorable to Ballard, the Court held there was “substantial evidence to raise questions of material fact as to whether Hough failed to exercise due care in driving at a speed appropriate for the existing and potential conditions and hazards.” Id. at 286.

The Court also rejected plaintiff’s argument that he was free of comparative negligence because he was driving at a speed less than the posted speed limit. Id. at 286-87. The Court concluded plaintiff’s argument was “contrary to law” and RCW 46.61.445, which stated:

*Compliance with speed requirements...shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require.*

Id. (citing RCW 46.61.445 (emphasis original)).

“The purpose of this statute is to indicate that, under certain conditions, the lawful speed may be less than the posted speed limit.” Id. (citing Owens v. Seattle, 49 Wn.2d 187, 299 P.2d 560 (1956)). “Posted speed limits merely indicate the maximum speed a person may legally drive a vehicle; but these posted speed limits give way “when a special hazard exists that requires lower speed for compliance with subsection (1).” Id. (citing RCW 46.61.400(2) (referring also to RCW 46.61.445, .400(1)). “A party may be liable for negligently contributing to causing a collision if “he was traveling at a rate of speed greater than reasonable or proper under the conditions existing at a particular point of operation[.]” Id. (citing Shultes v. Halpin, 33 Wn.2d 294, 205 P.2d 1201 (1949)).

The facts of Hough are key and strikingly similar to the facts of the present matter. Like Hough, Kress was familiar with the area and may have been traveling just under the posted maximum speed limit (at least at the time of impact). However, as unequivocally set forth in Hough, simply traveling at or just below the posted maximum speed limit does not exonerate one from contributory fault.

Kress' opening brief relies heavily on the "injury causation" analysis provided by her expert, Carley Ward, Ph.D., to demonstrate that Kress would not have been as severely injured if she had been traveling at a reduced speed. (See Appellants' Opening Brief at 47-48) However, pursuant to RCW 46.61.400, Hough, Harris, and Bohnsack, it is a question for the jury to determine: (1) what was the reasonable speed under all of the circumstances; (2) whether Kress exceeded that speed; and (3) whether Kress' speed was a proximate cause of the accident and her resulting injuries.

Notably, Kress contends that based upon a limited sight distance and the narrowing of the shoulder from the placement of the Jersey barriers, the appropriate advisory speed limit should have been 35 m.p.h. – not 55 m.p.h. (See Appellants' Opening Brief at 11-12) Yet, the facts demonstrate that she disregarded traffic control devices, made an illegal U-turn, and quickly accelerated to *at least* 50 m.p.h. in a construction area where she admitted that it was necessary to "slow down" and to drive "careful and attentive." Kress concluded that had she been "driving more slowly and had more time to react, [she] could have done more to slow [her] car and prevent the serious injuries [she] suffered." (CP 1389)

Pursuant to RCW 46.61.400, Kress was required to drive at a speed that allowed her to observe the roadway ahead and be able to take appropriate action in the event that hazards appeared in her path. Kress owed the same duty as in Hough to maintain a safe speed to avoid a collision due to the highway conditions and to ensure she was not traveling too fast to enable her to see Mobley's vehicle in her path in time to avoid the collision or, with regard to Dr. Ward's opinions, to reduce injuries.

It is a question of fact for the jury to determine whether Kress was driving at a speed that was greater than was reasonable and prudent given the conditions and with regard to the actual and potential hazards on the highway. Similarly, it is a question for the jury to determine whether Kress was driving at an appropriately reduced speed due to the allegedly reduced sight distance, narrowed shoulder from the placement of the Jersey barriers, lack of overhead lighting, and other alleged conditions of the highway resulting from the construction.

Kiemele v. Bryan is instructive. The Court found reversible error when the trial court precluded the plaintiffs' theory that the defendant was driving at an excessive speed under the circumstances. Kiemele v. Bryan, 3 Wn. App. 449, 476 P.2d 141 (1970). In Kiemele, although defendant was driving

at the posted 25 m.p.h. speed limit, Plaintiff alleged that defendant “operated a motor vehicle in excessive speed under the circumstances” when a child suddenly entered the roadway.

The trial court refused to give the plaintiff’s instruction pertaining to speed. Finding error, the Court of Appeals concluded that the plaintiff’s theory of excessive speed under the circumstances was not adequately presented to the jury which resulted in significant prejudice. Id. at 452-53.

As in Kiemele, Tri-State Construction is entitled to have its theories of the case presented to the jury, including whether Kress caused or contributed to the accident (including her novel “injury enhancement” theory) by failing to (a) maintain an appropriate speed given the conditions, and/or (b) properly reduce her speed due to the alleged limited sight distances, reduction in shoulder, and other alleged affects of the construction activities. See Kiemele, 3 Wn. App. At 452; *see also* RCW 4.61.400 (1) & (3). Tri-State will be unfairly prejudiced if the Court does not permit it to present its theory of the case to the jury and instruct the jury on the Rules of the Road. Kress should not be allowed to continue to baldly assert that she “committed no tortious act,” was “lawfully within her lane and within the speed limit,” or was “traveling within the speed limit” when the facts strongly suggest

otherwise. However, if this Court affirms summary judgment dismissal on (1) proximate cause; or (2) enhanced injury, then the issue of comparative fault is moot.

## **IX. CONCLUSION**

This Court should affirm the trial court's ruling dismissing Kress' claims against Tri-State because she failed to submit credible, competent, and admissible evidence to establish that any alleged act or omission was a proximate cause of the collision. As the trial court found, Kress' entire case is premised upon impermissible inference upon inference and layers of speculative opinions advanced by her experts regarding Mobley's subjective state of mind and unknown actions and intentions. After dismissing Kress' claims for negligence and enhanced injuries, the trial court ruled that Kress was free of contributory negligence. If the trial court's decisions, or any part thereof, are reversed, then Tri-State submits that this Court should reverse the trial court's ruling that Kress is fault-free.

Pursuant to RAP 14.1 and RAP 14.2 Respondent Tri-State respectfully requests that it be awarded all expenses and fees provided in RAP 14.3, if it prevails on appeal.

Dated this 31<sup>st</sup> day of May, 2011.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.



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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on the 31<sup>st</sup> day of May, 2011, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

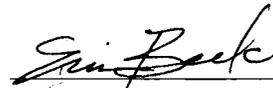
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