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NO. 67201-1-I

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

TABITHA M. TUBBS, a single woman,

Appellant,

vs.

THE ESTATE OF STEVEN L. VAIL, a single man, individually and dba
NORTHWEST VEE DUB, a business entity believed to be a Washington
Sole Proprietorship

and

LARRY E. VAIL and DARLENE E. VAIL, as Co-Administrators of the
Estate of Steven Lyle Vail, and not individually

BRIEF OF APPELLANT

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ORIGINAL

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BRIEF OF APPELLANT

A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding there were no substantial issues of material fact to preclude summary judgment as to Appellant passenger's claim for negligence against Respondent Estate (through co-administrators) based on Steven Vail's driving, operation, and crash of the motorcycle.

2. The trial court erred when it granted Respondent's motion for summary judgment because there were issues of material fact as to whether Respondent negligently operated his motorcycle causing injuries to Appellant passenger.

3. The trial court erred when it granted Respondent's motion for summary judgment based on its finding that the motorcycle wobble was the sole cause of the crash.

Issues Pertaining to Assignments of Error

1. Does a material issue of fact exist as to the negligence of the operator when a vehicle with no known defects is driven off the road in fair weather? (De Novo)
2. Does a material issue of fact exist as to the negligence of the motorcycle operator when he takes his hand off the steering immediately before the crash? (De Novo)
3. Does a material issue of fact exist as to the negligence of the operator when he fails to brake or slow down when the motorcycle wobbles, and then drives the vehicle into the guardrail on the road shoulder? (De Novo)
4. Does a material issue of fact exist as to the negligence of the operator when witness testimony provides that he drove onto the shoulder prior to the crash, and also drove the bike at freeway speeds when warned not to by the owner? (De Novo)
5. Does a material issue of fact exist as to the negligence of the operator in a one vehicle crash when there is no evidence of negligence on the part of an innocent passenger, and there is testimony that the vehicle was not defective? (De Novo)

B. STATEMENT OF THE CASE

1. FACTS AND PROCEDURAL HISTORY

This suit arises from a September 28, 2008 single vehicle crash of a motorcycle in Whatcom County on I-5. Mr. Steven Vail was driving the 1993 Harley Davidson model XL883H motorcycle, and Plaintiff Tabitha Tubbs was his invited passenger, riding on the seat behind him. The motorcycle was owned by Mr. Brad Ableman, who had loaned the motorcycle to Mr. Vail and Ms. Tubbs for purposes of riding in the annual Oyster Run celebration. The vehicle was headed northbound on I-5 near exit 246 when Mr. Vail drove the motorcycle onto the shoulder, lost control of the vehicle, and collided with the guardrail. The crash sent Mr. Vail and Ms. Tubbs flying from the bike. Mr. Vail was killed. Ms. Tubbs was horribly injured. Ms. Tubbs filed suit against Mr. Vail and his estate co-administrators (hereinafter “Respondent”, “Estate”, or “Respondent Estate”), and against Mr. Ableman. The Estate and Mr. Ableman filed separate motions for summary judgment as to liability, which were each granted by the trial court. Appellant challenges the ruling and dismissal as to Respondent Estate (through co-administrators Larry E. and Darlene E. Vail) of Mr. Vail.

2. WEATHER AND ROAD CONDITIONS

It was sunny and in the 70's at the time of the crash. *Plaintiff's Answers to Ableman's First Interrogatories and RFP's, No. 25, at p. 8.* (CP 53).

3. CONDITION OF THE MOTORCYCLE

Steven Vail was aware that the bike needed maintenance prior to being used for the Oyster Run. He was aware that Mr. Ableman was working on the motorcycle carburetor and fuel system the day before, and Mr. Ableman had informed Mr. Vail that the bike could run rough due to sediment collecting in the gas tank. *Decl. Andrews, Ex. 1, Ableman Deposition, p. 26, 32,33.* (CP 53). Mr. Ableman also warned Mr. Vail "not to take the bike on the freeway" because the bike had low gears and freeway speeds might cause a problem. *Decl. Andrews, Ex. 1, Ableman Deposition, p. 55.* (CP 53). Mr. Vail ignored both of these warnings, and drove the bike on the I-5 freeway without warning Ms. Tubbs of these conditions. *Decl. of Plaintiff Tabitha Tubbs.* (CP 54-55). Mr. Ableman testified that despite the above warnings to Mr. Vail, to his knowledge the motorcycle was not defective. *Defendant Ableman's Responses to Plaintiff's First Discovery requests, No. 65, at p. 10, Ex. 4 to Reppart Decl.* (CP 34).

4. MR. VAIL'S OPERATION OF THE MOTORCYCLE

Witness declarations and statements provide the following material facts regarding Mr. Ableman's operation of the motorcycle prior to the accident.

Craig C. Parker states, "...the motorcycle pulled over to the right shoulder but then pulled back into the right lane. A few seconds later the motorcycle pulled back onto the right shoulder and drove into the guardrail. Both of the people on the motorcycle flew into the ditch." *Ex. 2 to Reppart Decl.* (CP 34).

Kevin S. Labree states, "All of a sudden the motorcycle start (*sic*) to wobble. I saw them hit the right side rail and both riders flew over the rail and down the embankment. The motorcycle then shot across the freeway and hit the left guard rail..." *Ex. 2 to Reppart Decl.* (CP 34).

Byrant Engerbretson states, "The motorcycle was travelling in the right lane about (25 yards)? [*sic*] Ahead of me. The conditions seemed normal [and] there was no vehicle in front of or around the motorcycle. I noticed the motorcycle start to wobble [and] the motorcycle veered to the right [and] hit the guard rail sending both passengers off the motorcycle. I did not notice the driver of the motorcycle braking prior to impact." *Ex. 2 to Reppart Decl.* (CP 34).

Ed G. Conley, who was three cars behind in the left lane, “Bike...appeared to loose [sic] control. Driver somersaulted from bike after crossing Rt [sic] lane and hitting guardrail.” *Ex. 2 to Reppart Decl.* (CP 34).

Tarry Choe and Rob Edna signed a joint declaration and stated, “On 9/28/08 around 1700 hours we were driving north on I-5 near Lake Samish when we saw a motorcycle with 2 occupants in the right lane in front of us. The motorcycle appeared to drift over into the guardrail on the right side of the road. The motorcycle struck the guardrail and both occupants flew into the ditch. The motorcycle skid across the roadway and came to rest on the left side of the road.” *Ex. 2 to Reppart Decl.* (CP 34).

a. Wobble and Failure to Brake or Slow

Immediately prior to the crash, Defendant had time to nod his head “yes,” told plaintiff he would always love her, yet he did not brake or decelerate the bike. *Plaintiff’s Answers to Ableman’s First Interrogatories and RFP’s, Nso. 25 and 27, at p. 8, and No. 28 at p.9.* (CP 53). *Decl. of Byrant Engerbretson, Ex. 2 to Reppart Decl.* (CP 34). Mr. Vail’s failure to slow down is evidence of his negligence in operating the motorcycle. Multiple witnesses including plaintiff noted that the bike began to wobble before the crash. *Ex.2 to Reppart Decl.* (CP 34). Mr. Ableman testified

that he was both a certified Harley Davidson Motorcycle mechanic, and a motorcycle rider with 25 years of experience. *Deposition of Brad Ableman, pp 12-13, 17, Decl. of Michael J. Andrews, Ex. 1.* (CP 53). He states that the correct action for a rider to take when experiencing a wobble is to brake and slow down—the very actions that Mr. Vail did not take. *Deposition of Brad Ableman at pp. 28-29. Decl. of Andrews, Ex. 1.* (CP 53).

2 Q Have you ever experienced any sort of a wobble?

3 A No.

4 Q Are you familiar with that phenomena in riding motorcycles?

5 A Yeah.

6 Q What does that mean to you? What's your understanding of
7 what wobbling is?

8 A A wobble is when the -- it is when the handlebars shake
9 uncontrollably.

10 Q Have you ever experienced that on any bike that you were
11 riding?

12 A Springer Soft Tails like to do that. You have to let go of
13 the handlebars in order to get it to do it.

14 Q Wobbling of the -- can that shaking of the handlebars also
15 be caused by other problems on the bike?

16 A A flat rear tire will cause that, the front one to wobble.

17 Q The tire doesn't have to completely go flat? Isn't it true
18 that if the --

19 A It has to be completely --

20 Q -- if it is not correct pressure, isn't it true that that
21 can induce wobbling?

22 A No. It needs to be completely flat.

23 Q Do you have an understanding of if someone is riding a bike
24 and they start to experience that wobble in the front, what
25 is the correct procedure to correct that?

1 MR. THURSTON: Excuse me, Counsel. Are you qualifying
2 my client as an expert witness?

3 MR. ANDREWS: No. I'm not qualifying. I'm asking
4 based on his 25 years of riding a motorcycle.
5 THE WITNESS: Can you repeat the question?
6 Q (By Mr. Andrews) Sure. If you are riding your motorcycle,
7 based upon your experience, and the bike starts to wobble,
8 what is your understanding of what you are supposed to do as
9 a rider to correct the issue?
10 A Slow down, put the brakes on.

Mr. Ableman, a certified Harley Davidson technician, also testified in deposition that there was nothing defective with the bike, and it was operating properly. (CP 34).

b. One Hand off the Handlebars.

Appellant's deposition testimony reveals that Mr. Vail took at least one hand off of the motorcycle handlebars immediately before the crash, as he put his left hand on her left leg. *Dec. of Peter Dworkin, Ex. 6, Deposition of Tabitha Tubbs, p. 113, 114.* (CP 39).

5. DAMAGES AND INJURIES

Ms. Tubbs' life has been changed forever due to the negligence of defendant respondent. As a result of Mr. Vail crashing the motorcycle into the guard rail, she was ejected from the vehicle, collided with the guardrail and ground, and suffered staggeringly severe injuries. She lost consciousness, was hospitalized for an initial period of about thirty days, and nearly had her leg amputated. *Decl. Andrews, Ex. 2, Deposition of Tabitha Tubbs, pp.122-165.* (CP 53). As a result of the crash, she suffered

severe pain, had multiple broken bones in her arm, leg, and ribs. *Id.* She has endured in excess of ten surgeries, skin grafts, and still suffers from limited mobility, residual pain and numbness, disfigurement, emotional trauma, blurred vision and migraines. *Id.* None of these injuries were preexisting, and she is entitled to compensation. *Id.*

C. SUMMARY OF ARGUMENTS

The trial court erred when it granted Respondent's motion for summary judgment because there were genuine issues of material fact as to whether the Respondent's negligence caused the motorcycle crash and injuries to Appellant.

D. ARGUMENT

1. STANDARD OF REVIEW ON SUMMARY JUDGMENT

In reviewing a summary judgment order, the appellate court conducts the same inquiry as the trial court. *Parry v. Windermere*, 102 Wn.App. 920, 10 P.3d 506 (2000). The court reviews questions of law de novo. *Id.* Summary judgment is appropriate when no genuine issue of material fact exists, thus entitling the moving party to judgment as a matter of law. *Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 601, 17 P.3d 626 (2000), review denied, 143 Wn.2d 1023 (2001). The court must consider evidence and all reasonable

inferences therefrom in the light most favorable to the nonmoving party. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

Pursuant to CR 56(c), summary judgment is only available where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The initial burden is on the moving party to show there is no genuine issue of material fact. A material fact is one upon which the outcome of the litigation depends. In making a determination on summary judgment, a court is to consider all facts and reasonable inferences there from in a light most favorable to the nonmoving party. *Cox v. Malcom*, 60 Wn.App. 894, 897, 808 P.2d 758, *rev. den.* 117 Wn.2d 1014, 816 P.2d 1224 (1991). A summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). The purpose of the summary judgment procedure is to avoid a useless trial when there is no genuine issue of material fact. However, a trial is not useless, but is absolutely necessary if there is a genuine issue as to any material fact. *Barber v. Bankers Life & Casualty Co.*, 81 Wn.2d 140, 144, 500 P.2d 88 (1972).

As discussed further below, there are multiple issues of material fact in this case which should have precluded the trial court from granting

summary judgment. In fact, the trial court raised issues of material fact in its holding granting Respondent's motion for summary judgment.

2. STEVEN VAIL (AND THEREFORE RESPONDENT ESTATE) WAS NEGLIGENT IN DRIVING AND OPERATION OF THE MOTORCYCLE.

In a negligence action a plaintiff is required to prove four elements: (1) the defendant had a duty or obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) the defendant breached that duty; (3) the breach was a proximate cause of the plaintiff's injury; and (4) the plaintiff suffered legally compensable damages. See e.g. *Sheikh v. Choe*, 156 Wn.2d 441 (2006); *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 66 (2005).

As to plaintiffs' claims there are significant issues of material fact as to each element which precludes summary judgment.

a. Defendant Owed a Duty to Plaintiff of Reasonable Care and to Safely Operate the Motorcycle and Breached that Duty.

In considering whether there is a duty owed to plaintiffs by defendants the court weighs policy considerations and the balancing of interests. See *Whaley v. State, Dept. of Social and Health Services*, 90 Wash App 658 (1998). "The existence of a legal duty is a question of law and " 'depends on mixed considerations of "logic, common sense, justice,

policy, and precedent.” *Christensen v. Royal School Dist. No. 160*, 156 Wash.2d 62, 67 (2005) (*internal citations omitted*).

Duty may exist in various situations. Here, Tabitha Tubbs was invited by Steven Vail to be a passenger on the motorcycle he drove and operated. Tabitha and Steven were romantically involved, engaged to be married, and as such had a special relationship. *Decl. Andrews, Ex. 2, Deposition of Tabitha Tubbs, pp. 24-28.* (CP 53). Steven Vail had a duty of ordinary care to his passenger to obey the Rules of the Road and safely operate and drive the motorcycle.

The roads were dry, and it was a warm 70 degree day. There are no reports of a sudden road hazard, animal or other emergency which the driver Steven Vail had to avoid. The only reports of eyewitnesses are that he drifted to the right, and that the vehicle wobbled. At least one witness observed him drift to the right shoulder, then back into the lane, and then back again into the shoulder and rail. Craig C. Parker states, “...the motorcycle pulled over to the right shoulder but then pulled back into the right lane. A few seconds later the motorcycle pulled back onto the right shoulder and drove into the guardrail. Both of the people on the motorcycle flew into the ditch.” *Parker Decl, Ex. 2 to Reppart Decl.* (CP 34).

RCW 46.61.140 governs proper lane travel, and requires a vehicle to be driven as nearly as practicable within a single lane.¹ Driving on the shoulder is normally prohibited in its entirety, except under certain circumstances, such as by slow moving vehicles to allow passing. RCW 46.61.428. By deviating from his lane onto the shoulder, Mr. Vail violated a Rule of the Road. Violation of a Rule of the Road is not negligence per se, but is evidence of negligence. RCW 5.40.050.

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances. WPI 10.01. In *Pudmaroff v. Allen*, 138 Wn.2d 55, 1977 P.2d 574 (1999) a bicyclist was hit by a motor vehicle while crossing the street in a pedestrian crosswalk. Explaining the interplay of RCW 5.40.050 with the common law definition of negligence, the court stated:

RCW 5.40.050 permits a defendant shown to have violated the literal requirements of a statute, ordinance, or administrative rule to present evidence of excuse or justification and leaves it to the trier of fact

¹ Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. RCW 46.61.140.

to determine whether the violation should be treated as evidence of negligence. The defendants' efforts at showing excuse or justification failed in this case. This left the trial court no choice but to rule that negligence had been established as a matter of law.

In the instant case, there is evidence that Mr. Vail improperly traveled out of his lane and onto the freeway shoulder immediately preceding the crash. Travel on the shoulder is prohibited because it is not intended for high speed travel; debris or other unsafe conditions can be hazardous, and it is reasonable to conclude that what could be hazardous for a car, could be more so for a motorcycle. The photos of the roadway shoulder show that it is narrow and has warning track treads. *Decl. of Andrews, photos of crash scene from WSP report.* (CP 53). As in *Pudmaroff*, a reasonable trier of fact could determine that Mr. Vail's failure to adhere to a Rule of the Road was proof of his negligence. WPI 60.03. Given that his movement on and off the shoulder was immediately followed by a collision with the guard rail, causation is equally evident, and his straying from the proper lane of travel is not only a breach of a statutory duty, but also a breach of the duty of ordinary care. These facts must be viewed in light most favorable to plaintiff, and are sufficient evidence of negligence for plaintiff's claim to survive summary judgment.

In addition to a statutory duty to execute proper lane travel, Mr. Vail had a duty to obey The Basic Rule, that is to operate the vehicle at a speed that is reasonable and prudent under the conditions conditions and having regard to the actual and potential hazards then existing. RCW 46.61.400.²

Although all witnesses agree that Mr. Vail was not exceeding the posted speed limit of 60 miles per hour on the freeway, the basic rule provides that lesser speeds may be appropriate depending on conditions, and that all drivers have a duty of due care. While Mr. Vail's 55 to 60

² RCW 46.61.400 provides:

(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.

(2) Except when a special hazard exists that requires lower speed for compliance with subsection (1) of this section, the limits specified in this section or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle on a highway at a speed in excess of such maximum limits.

- (a) Twenty-five miles per hour on city and town streets;
- (b) Fifty miles per hour on county roads;
- (c) Sixty miles per hour on state highways.

The maximum speed limits set forth in this section may be altered as authorized in RCW 46.61.405, 46.61.410, and 46.61.415.

(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.

mph speed may have been appropriate for travel on the freeway within his lane, a reasonable trier of fact could certainly find that he violated his duty of care under the basic rule when he left his authorized lane of travel and operated at such speeds on the *shoulder and the highway conditions encountered there*. The witness statement declarations place this issue in evidence and dispute sufficient to withstand summary judgment. It is also significant to this issue that the owner of the motorcycle, Mr. Ableman, warned Mr. Vail to not ride the motorcycle on the freeway or freeway speeds due to his concerns about the low gearing of the bike. *Decl. Andrews, Ex. 1, Ableman Deposition, p. 55. (CP 53).*

Although Respondent Estate would put sole liability for the crash on the possibility of a mechanical failure or wobble, a motorcycle driver exercising reasonable care would have decelerated the motorcycle by braking, and Mr. Vail failed to do so. The trial court erred when it found the wobble caused the accident to the exclusion of other causes, as material issues of fact existed as to that issue. (RP 19). This is particularly so in light of the sworn statement of Mr. Craig Parker, as it excludes any claim of a wobble, and clearly states that Mr. Vail drove onto the freeway shoulder and back into his lane before the crash. (CP 34). This contradicts the wobble as the sole explanation, and also shows that Mr. Vail violated the rules of the road. Mr. Ableman testified that he

is a certified Harley Davidson technician, he rebuilt and maintained the bike, and it was free from defects. (CP 53). From these facts, a jury could find that the wobble was induced by operator error—the negligence of Mr. Vail. In addition, the record is clear from witness accounts that Mr. Vail took no action to brake or slow down, from which facts a jury could also reasonably conclude that Mr. Vail was negligent. At a minimum, these circumstances created genuine issues of material fact that should have been resolved by a jury. The trial court erred in concluding more was needed to survive summary judgment. (RP 15-29).

Mr. Ableman testified that some motorcycles have a tendency to wobble when hands are removed from the handlebars. *Andrews Decl. Ex. 1, Ableman deposition, p. 28.* (CP 53). Mr. Vail took at least one hand off the handlebars immediately preceding the crash, and put it on Ms. Tubbs' leg. *Andrews Decl. Ex. 2, Dep. of Tubbs, p.113.* (CP 53). Such act may reasonably be found negligent, and may also have been a violation of RCW 46.61.665, which prohibits the operator of a motor vehicle from embracing another person if it hampers his ability to freely operate the vehicle.³ His failure to brake and his failure to keep both

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RCW 46.61.665 provides: It shall be unlawful for any person to operate a motor vehicle upon the highways of this state when such person has in his or her embrace another person which prevents

hands on his handlebars are proximate causes of the loss of control; at a minimum they create factual issues concerning negligence sufficient to survive summary judgment. These circumstances created genuine issues of material fact as to negligence that should have been resolved by a jury. The trial court erred in concluding more was needed to survive summary judgment and in introducing the judge's own motorcycle experience in discounting the issues raised. (RP 12-16).

b. Causation and Damages.

In the motion for summary judgment, Respondent did not assert any contributory negligence or other act by Ms. Tubbs that interfered with Mr. Vail's driving or would otherwise bar her recovery. She was not intoxicated, and was therefore an innocent passenger. Innocent Passengers are without fault by definition, and are entitled to the application of joint and several liability to at fault parties. RCW 4.22.015.; See. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992) and *Kottler v. State*, 136 Wn.2d 437, 442-447, 963 P.2d 834 (1998).

As Mr. Vail's passenger, Ms. Tubbs was at the mercy of his judgment and his driving. She could not control steering, throttle, or

the free and unhampered operation of such vehicle. Operation of a motor vehicle in violation of this section is prima facie evidence of reckless driving.

brakes, only Mr. Vail could do those things. The duties of a vehicle passenger in a motor vehicle accident claim were discussed in detail in *Murray v. Amrine*, 28 Wn.App. 650, 626 P.2d 24 (1981). The case clearly establishes that a passenger is: not required to maintain the same degree of attention as the driver; not required to anticipate negligent acts on the part of the driver; not required to keep a constant lookout for dangers or pay attention to road conditions; not subject to comparative fault unless when the accident became imminent, there was something she might have done that she did not do; not required to protest the driver's speed or imprudent act. Id.

Respondent claimed, and the trial court ruled, erroneously that there is not sufficient evidence of Mr. Vail's negligence to permit the case to move forward against his estate and personal representatives. Respondent and the trial court ignored the obvious, which is that vehicles do not go off the road by themselves. Negligence is conduct, not state of mind.⁴ Mr. Vail did not have to respond to an emergent road hazard such as a pot hole, animal, or pedestrian in the roadway. There is no evidence that the right hand lane of the freeway was defective in any way, or that he had to avoid a road hazard, yet Mr. Vail drove onto the freeway shoulder

⁴ Prosser, Law of Torts, 4th Ed., pg.145. "The standard imposed by society is an external one, which is not necessarily based upon any moral fault of the individual; and the failure to conform to it is negligence, even though it may be due to stupidity, forgetfulness, an excitable temperament, or even sheer ignorance."

once and perhaps twice. He removed his left hand from the handlebars, leaving him with only a single hand to steer. He did not brake or decelerate when he went onto the shoulder, or when the motorcycle began to wobble, or at any time before striking the barrier rail. Each of the above actions or failures to act by Mr. Vail in the operation of the motorcycle permits the trier of fact to conclude that as a consequence thereof, the bike crashed, and Ms. Tubbs and Mr. Vail were propelled from the motorcycle. WPI 10.01; WPI 10.02. Ms. Tubbs's injuries are a direct result of that crash and Mr. Vail's operation of the motorcycle. Such a finding is possible and even likely, with or without resorting to the doctrine of *Res Ipsa Loquitur*. Defendants have not established any intervening cause to break the chains of proximate or actual causation, nor that negligent operation of the motorcycle and mechanical defect are mutually exclusive. WPI 15.01.⁵ For the sake of argument, even if it were established at trial that a mechanical defect existed in the motorcycle, such a finding would not prevent a jury from apportioning degrees of comparative fault as between negligent operation and maintenance, or even as between Mr. Vail and Mr. Ableman. RCW 4.22.015; *Murray v. Amrine*, 28 Wn.App. 650, 626 P.2d 24 (1981). This is particularly so

⁵ WPI 15.01 defines Proximate Cause as: A cause which in direct sequence [unbroken by any new independent cause], produces [the injury][event] complained of and without which such [injury][event] would not have happened. [There may be one or more proximate causes of [injury][event]].

where Mr. Vail had knowledge of mechanical limitations of the motorcycle (as opposed to defects), and was told by Mr. Ableman not to drive it on the freeway or in a manner suitable for its known mechanical limitations. All the above facts must be considered in a light most favorable to the Appellant. Accordingly, Respondent could not succeed on summary judgment on the issue of causation, and the trial court should be reversed.

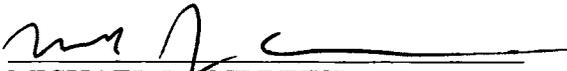
E. CONCLUSION

For the foregoing reasons Plaintiff asks this court to reverse the trial court's grant of summary judgment, and remand for further proceedings.

DATED this 9th day of January, 2012.

Respectfully submitted,

COGDILL NICHOLS REIN
WARTELLE ANDREWS VAIL


MICHAEL J. ANDREWS
WSBA No. 26176

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COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

TABITHA M. TUBBS, a single woman,)
)
) Appellant,)
)
) vs.)
)
) THE ESTATE OF STEVEN L. VAIL, a single)
) man, individually and dba NORTHWEST VEE)
) DUB, a business entity believed to be a)
) Washington Sole Proprietorship)
)
) and)
)
) LARRY E. VAIL and DARLENE E. VAIL, as)
) Co-Administrators of the Estate of Steven Lyle)
) Vail, and not individually)
)
) and)
)
) BRAD ABLEMAN and JANE DOE)
) ABLEMAN, husband and wife and the marital)
) community composed thereof,)
)
) Respondents.)

Case No.: 67201-1-1
CERTIFICATE OF SERVICE - BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN - 9 PM 2: 24

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the date given below, I caused the original **Brief of Appellant** to be filed

ORIGINAL

1 with the clerk of the above captioned court copies served upon the following listed party/counsel
2 of record in the above-captioned matter, as follows:

3 **Counsel for** LARRY E. VAIL and DARLENE E. VAIL, as Co-Administrators of the Estate of
4 Steven Lyle Vail, and not individually

5 Peter R. Dworkin 6 John C. Belcher 7 Belcher Swanson Law Firm, P.L.L.C. 8 900 Dupont Street 9 Bellingham, WA 98225	By: <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email <input checked="" type="checkbox"/> Hand Delivered via Legal Messengers <input type="checkbox"/> Fax: 360-671-0753
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10 DATED this 9 day of January, 2012.

11 
12 Michael J. Andrews
13 Cogdill Nichols Rein Wartelle Andrews
14 3232 Rockefeller Avenue
15 Everett, WA 98201
16 (425) 259-6111
17 Fax (425) 259-6435