70727-2 70727-8

No. 70727-2-I

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

JANE CHO,
Plaintiff, Appellant
vs.

THE CITY OF SEATTLE et. al.,

Defendant/ Respondent

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
CAUSE No.: 12-2-24507-0 SEA
HONORABLE SEAN O'DONNELL, Trial Judge

APPELLANT'S REPLY BRIEF

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I. INTROUDUCTION

For purposes of this appeal and the summary judgment below, the City concedes it failed to maintain 1st Avenue South in a condition reasonably safe for ordinary pedestrian travel. CP 128: 22-23; CP 129: 15-18. The trial court erred when it found the City's conceded failures could not be one of the proximate causes of the collision. This is because Cho presented sufficient evidence for a jury to conclude otherwise.

First, Ms. Cho herself testified that had there been a pedestrian island, no collision would have taken place. "That is, I would have waited at the island until southbound vehicles cleared the intersection and the accident would not have happened." CP 270. The trial court erred when it concluded Ms. Cho's testimony was too speculative to be considered. July 19, 2013 RP at p 30: 1-9. In fact, she is the best person in the world to know how the failure to provide the island affected her behavior.

Not only did Cho produce evidence that the changes in the road would have made a difference because it would have altered her own behavior, but Cho produced additional evidence that the implementation of other safeguards would have changed the behavior of the at fault driver. In this regard, Cho not only produced scientific evidence from a traffic engineer that the proposed treatments would have significantly reduced

"pedestrian-vehicle conflicts,"[1] but Cho's human factors expert, William Vigilante, Ph.D., testified:

> Given that Carpenter successfully navigated through numerous signalized intersections on her way to the incident intersection and displayed performance associated with an attentive driver, it is more likely than not that Carpenter would have successfully responded to the presence of a traffic signal had it been present at the intersection of 1st Avenue South and South Massachusetts Avenue.
>
> ...
>
> Had the City of Seattle provided the proper traffic controls at the incident intersection, including vehicular and pedestrian traffic signals, Carpenter, Cho, and the other pedestrians would have had a positive assignment of right-of-way, and would have been provided with the regulatory direction they needed to successfully negotiate the intersection, avoid potential conflicts with other users of the intersection, and avoid the collision.

CP 315.

Dr. Vigilante spent nearly 20 years studying the effects alcohol has on the visual perceptions and reactions of intoxicated drivers. CP 513-519. Thus, he had the requisite foundation to support his opinion that the traffic improvements would have changed Carpenter's behavior.

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[1] CP 340.

II. OBJECTION TO CITY'S CHARACTERIZATION OF FACTS

The City inserts a number of irrelevant facts in an attempt to prejudice this court; further, it fails to set out the facts in a manner consistent with the rule on summary judgments, which is, they should be construed in the light most favorable to the moving party.[2] So for example, the City mentions Ms. Carpenter acted violently in the days before the collision, "throwing things" and "punching walls." *Page 2 of Respondent's brief.* And that Ms. Carpenter thinks her passengers recently got out of jail. *See footnote 1 at p. 3 of Respondent's brief.* None of those facts are germane to this lawsuit.

The City states at p. 5 of its brief that a construction worker at the scene saw Carpenter's headlights were not illuminated. No such testimony exists. Rather, the City relies on a hearsay statement contained in an investigative report. CP 110. Further, those statement only deals with the witnesses observation of Carpenter's truck at some point *after* the collision occurred and *after* Carpenter parked her vehicle. *Id.* The only reasonable inference is Carpenter had her headlights on because her vehicle could be seen. CP 164- 167.

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[2] *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

Likewise, the City picks and chooses facts from Carpenter's deposition to infer she was on a drunken binge before the collision happened. In reality, Carpenter testified she consumed only 1 beer and "a couple of sips" of another beer before the collision and that she did not feel intoxicated. CP 387: 20-25 and CP 389: 17; CP 294: 18. Further, the City ignores that Carpenter drove from Seattle to Tacoma and back again without incident. CP 175; CP 389: 24. She also stated:

> There was construction going on on both sides of the street at 1st and Massachusetts. There was no stoplight, there was no crosswalk sign or warning signals. There was no flagger. The street was very congested with parked cars and construction equipment. There was a car to my left traveling south. I did not see Ms. Ha or the other pedestrians and accidently struck them with my vehicle.

CP 310; CP 233-234.

III. ARGUMENT

A. Cho produced sufficient facts to show the City's failure to maintain the road in a condition reasonable safe for pedestrian travel was one of the proximate causes of the collision.

This court should reject the City's contention that "Cho's arguments are speculative, and are not supported by facts in evidence." *See page 10 of Respondent's brief.* Cho presented plenty of evidence on causation, including the declaration of Jane Cho, Edward Stevens, Daniel Melcher, Ronald Unger and two separate declarations from William

Vigilante, Ph.D. CP 317-361; CP 271-288; CP 269-270; CP 141-234; CP 289-316, CP 513-519.

The defendant's reliance on *Grimwood v. Univ. of Puget Sound*, 110 Wn. 2d 355, 359, 753 P. 2d 517 (1988) is misplaced. That case had nothing to do with whether a failed road design proximately caused a collision. Rather, it was an age discrimination and wrongful discharge claim. The defendant in *Grimwood* produced evidence describing serious failures of the plaintiff's job performance. The court granted the defendant's summary judgment because the plaintiff did not dispute those facts, all of which justified termination of his employment. Our case is different because Cho's evidence established that the collision would not have happened if the City made the road reasonably safe for pedestrian travel.

In fact, Cho herself testified there was no pedestrian island at the location, and that if there had been one, it would have made a difference. *CP 270.* Contrary to the City's claim, Cho's testimony was proper and sufficient to defeat summary judgment. In this regard, ER 701 permits testimony in the form of opinions or inferences "rationally based on the perception of the witness, helpful to the determination of an issue and not based on specialized knowledge. Nothing in *Moore v. Hagge*, 158 Wn.

App. 137, 241 P. 23d 787 (2010), relied on by the City, supports a different result.

The pedestrian in *Moore* was struck by a car in the middle of the block. Unlike our case, no eye witnesses in *Moore* testified and the injured pedestrian had no recollection of how the collision happened. *Moore.* 158 Wn. App at p. 142, 151, 154. Also unlike our case, there was "no evidence establishing the point of impact, no evidence showing where [the pedestrian] came from, and no evidence about what he was doing just before or at impact." *Moore*, 158 Wn. App. at p. 151. Because the injured pedestrian could not remember how the collision took place, his testimony it would not have occurred had the City widened the road or implemented additional safeguards was purely speculative. *Moore*, 158 Wn. App. at p. 151. As such, the court dismissed the case because it was "equally plausible that Moore incurred his injuries after tripping and falling in front of Hagge's car." *Moore*, 158 Wn. App. 154, f.n. 54.

Our case is different because Ms. Cho remembered how the collision took place. CP 269-270. Further, an eye witness testified how it happened. CP 154: 17- CP 168:19. The collision happened when Ms. Cho and other pedestrians were struck by Ms. Carpenter's southbound vehicle as they crossed to the west in an unmarked crosswalk at an

intersection that had no pedestrian island, no traffic signals and no flagger. Unlike *Moore*, it was not equally plausible that Ms. Cho was injured when she tripped in front of Ms. Carpenter's vehicle. Further, Ms. Cho properly testified the additional safeguards would have made a difference and so did her experts.

Ms. Cho's testimony the pedestrian island would have made a difference for her is in the record at CP 269-270. And Dr. Vigilante's testimony that the additional safeguards would have made a difference for Ms. Carpenter is in the record at CP 289-316 and CP 513-519. Not only did Dr. Vigilante address the probable effect the additional safeguards would have on Ms. Carpenter, but Daniel Melcher, a traffic engineer, also testified about the likely effect roadway changes would have made as follows:

> Had SDOT properly studied this intersection, and made the traffic control and geometry changes warranted, then the risk of pedestrian collisions would have been significantly reduced. Had First Avenue been provided with curb bulbs and a median refuge island, then pedestrians would have had a better opportunity to determine if available gaps in traffic were sufficient for safe crossing, and would have had a refuge area in the median to wait for all vehicles to pass before continuing across the other half of the street. Full Traffic Signals and Pedestrian Half-Signals both provide red lights to main road traffic and designate right of way to crossing pedestrians for sufficient time to safely cross the street (Figures 36 and 37). The peer reviewed Transportation Engineering literature has shown that Pedestrian Half-Signals greatly improve driver yielding

> behavior and dramatically reduce pedestrian crashes. The driver yield rate is in the 90% to 100% range for multilane streets with high ADT, such as First Avenue. The steady red signal provides a clear regulatory message that typically receives a uniform driver response. Total pedestrian crossing crashes are reduced by 69% by these treatments, and a Half Signal can actually reduce vehicle-vehicle crashes as well as pedestrian-vehicle conflicts. Had First Avenue at Massachusetts Street been equipped with either a Full Signal or Pedestrian Half Signal, then a red light would have been provided to First Street traffic while pedestrians were crossing, which most likely would have prevented the subject collision from occurring.

CP 340.

Mr. Melcher was qualified to testify about the likely reduction of vehicle pedestrian conflicts in the road at issue because he is a traffic engineer who studied the effects of engineering roadway safeguards. CP 321-326. As such, his testimony that Ms. Cho's chances of being struck were greatly increased from the lack of safety treatments was enough, by itself, to defeat summary judgment on the causation issue. *E.g., Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wash. App. 828, 313 P.3d 431 (2013) (the loss of a chance to avoid an adverse consequence is a compensable interest in its own right); *See also* Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353,

1363–64, 1376–78 (1981), *cited in Dormaier,* 177 Wn. App. at p. 845 (2013).

At pp. 12-13 of its brief, the City argues its negligence could not be a cause of the collision because studies prove alcohol has an impact on driver behavior. But the fact Carpenter was intoxicated does not mean her negligence was the sole proximate cause of the collision. As previously discussed at "IV D-F" of Appellants Opening Brief, there may be more than one proximate cause of an injury and it is for the jury to apportion the percentages of fault attributable to each entity. *See also* RCW 4.22.070. The City's accountable for its own negligent conduct, as discussed in *Lowman v. Wilbur*, 178 Wn. 2d 165, 309 P. 3d 387 (2013) and progeny,[3] does not change based on the intoxication levels of an at fault driver.

B. A jury could conclude that the City's negligence was a cause of the collision even though Ms. Carpenter testified she was not watching the road immediately before the impact.

The City argues at pp. 14-17 of its brief that there can be no factual causation linking its own negligence to the collision because Ms. Carpenter testified she was not looking where she was going immediately before impact. The problem with this argument is that it ignores the evidence Cho produced: namely, the accident would not have happened if

[3] See cases discussed at "IV D-F" of Appellant's Opening Brief.

the City installed the pedestrian island. CP 269-270. In this regard, none of the cases the City relies on, including *Garcia v. State of Washington*, 161 Wn. App. 1, 270 P. 3d 299 (2011) and *Miller v. Likins*, 109 Wn. App. 140, 34 P. 3d 835 (2001), involved a road improvement designed to alter the behavior of the innocent pedestrian. Nor does any case cited by the City have testimony, like our case, where the innocent pedestrian states that the road improvement at issue would have altered their own behavior and prevented the collision. *Compare the City's cases to CP 269-270.*

Garcia, *Miller* and the other cases cited by the City also have no evidence from a human factors expert. In our case, Dr. Vigilante testified in detail about the road conditions as well as Ms. Carpenter's behavior. CP 308-316. Based on the visual cues that existed on the night of the crash as well as Ms. Carpenter's condition and previous driving history on the night in question, Dr. Vigilante concluded the collision would not have happened if the City had installed a traffic signal. CP 308-316; *see also* CP 513-519. In this regard, our case is like another Division I case: *Stephens v. City of Seattle*, 62 Wn. App. 140, 813 P. 2d 608 (1991), previously discussed at pp. 31-32 of Appellant's opening brief. As stated in Cho's opening brief:

> In [*Stephens*], a motorcycle rider, who had been drinking and greatly exceeding the speed limit, spun out of control rounding a corner. The City argued its failure to place a

> warning sign could not be the legal cause of the collision, but the Court of Appeals disagreed because, as in our case, a human factors expert testified that the dangerous and hazardous condition of the roadway "was the cause of the crash." *See Stephens*, 62 Wn. App. at pp. 143-144; *compare declaration of William Vigilante at CP 289-316; CP 513-519. See also declaration of Daniel Melcher wherein he opines that the City's negligence was a cause of the accident at CP 318: 16-26.*

See pp. 31-32 of Appellant's opening brief.

The City fails to mention, respond or otherwise analyze the *Stephens* case. Our case has even more evidence of causation then *Stephens* and it too should be remanded for jury trial.

C. Unlike *Kristjanson*, Cho proved the collision would not have happened if the City met its obligation to make the road safe for ordinary pedestrian travel. Further, the law does not require that an injured party prove the road was misleading.

At pp. 18-19 of its brief, the City cites *Kristjanson v. City of Seattle,* 25 Wn. App. 324, 606 P. 2d 283 (1980), for the proposition that its own negligent conduct cannot be a proximate cause of the collision unless Cho shows she would have reacted differently or that the condition of the road misled Carpenter. First, unlike *Kristjanson*, Cho did show that the collision would not have happened if the City installed the pedestrian island. Again, Ms. Cho unequivocally testified that if there had been a pedestrian island, she would have used it and waited for Carpenter's car to clear before starting across. CP 270. This is different then *Kristjanson*

because the injured party in that case did not and could not give any such testimony. Rather, in *Kristjanson*, the at fault driver swerved across the center line and struck the innocent party at a high speed when the cars were only about 1 car length away. *Kristjanson*, 25 Wn. App. at p. 325. Because the injured party could not testify he would have reacted differently if there was slightly more site distance, it was only speculative that the failure to provide the additional site distance would have prevented the crash. *Kristjanson*, 25 Wn. App. at p. 326.

The City relies on statements in *Kristjanson v. City of Seattle,* 25 Wn. App. 324, 606 P. 2d 283 (1980) and *Miller v. Likins*, 109 Wn. App. 140, 34 P. 3d 835 (2001) that there was nothing misleading or confusing about the road conditions. *Kristjanson*, 25 Wn. App. at 326, *Miller*, 109 Wn. App. at p. 147. But Washington law does not require a plaintiff prove that the road was misleading or confusing to prevail. In fact this court squarely rejected that argument in *Chen v. City of Seattle*, 153 Wn. App. 890, 894, 901-905, 909, 223 P. 2d 1230 (2009). As stated in *Chen*:

> None of the cases on which the city relies requires a plaintiff to prove that a particular physical defect of the roadway, by itself, made the roadway unsafe. Our Supreme Court has consistently held that consideration of all of the surrounding circumstances is necessary to determine whether a particular roadway presented an unsafe condition. **In determining whether a dangerous condition exists at a roadway and whether a municipality has breached its duty to maintain a**

> **roadway in a safe condition, the trier of fact may infer that a breach has occurred based on the totality of the relevant surrounding circumstances, regardless of whether there is proof that a defective physical characteristic in the roadway rendered the roadway inherently dangerous or inherently misleading. That Chen may not have put forth evidence that the crosswalk itself contained a defective physical characteristic making the crosswalk misleading or dangerous is not dispositive.**

Chen, 153 Wn. App. at p. 909 (2009); emphasis supplied.

D. The reckless conduct of Carpenter does not sever the causal connection between the City's negligence and the collision.

The City argues at pp. 19-21 of its brief that Carpenter's reckless conduct requires a finding, as a matter of law, that no negligence of the City could be a proximate cause of the collision. But the City failed to address or analyze the cases cited in appellant's opening brief that hold otherwise. Not only does the City completely ignore *Stephens v. City of Seattle*, 62 Wn. App. 140, 813 P. 2d 608 (1991), discussed on pp. 31-32 of appellant's opening brief, the City likewise fails to mention, respond or otherwise analyze two other cases cited by Cho: *Tanguma v. Yakima County*, 18 Wash.App. 555, 561–62, 569 P.2d 1225 (1977) and *Wojcik v. Chrysler and Kitsap County*, 50 Wn. App. 849 (1988). *See pp. 24-25, 28, 30-31 of appellant's opening brief.* In all of these other cases, the Court of Appeals held that the conduct of a reckless driver does not sever the causal chain of the road authority's negligent conduct.

The City's attempt to distinguish *Unger v. Cauchon*, 118 Wn. App. 165, 73 P. 3d 1005 (2005) is not convincing. *See pp. 19-21 of Appellant's brief.* In *Unger*, this court decided that it was for a jury to determine whether the road authority's negligent conduct was severed by a reckless driver. In that case, the decedent was trying to outrun another driver that was pursuing him. He ran red lights, swerved erratically around other vehicles, crossed center lines, drove at high rates of speed and turned his headlights off and on. His body was found on the side of a road by another motorist. The decedent's parents sued Island County, claiming there was too much mud and debris on the road. The trial court dismissed the case but this court remanded for trial, stating:

> It is for the jury to decide whether the County's construction or maintenance of Camano Hill Road created a condition that was unsafe for ordinary travel and whether the condition of the road contributed to Unger's accident and death. Genuine issues of material fact exist about the proximate cause of Unger's death, which makes summary judgment improper.

Unger, 118 Wn. App. at p. 176 (2003).

The *Unger* court held as it did even though, like our case, other drivers did not crash on the same road. This is because the plaintiff produced evidence that the faulty road conditions were a proximate cause of the

collision irrespective of the fact that the crash also involved a reckless driver. The same is true in our case.

E. *Keller*, *Chen* and *Lowman* support Cho, not the City.

The City argues its own negligence cannot be a "proximate cause" of the collision, claiming that even if it implemented the safeguards at issue, Ms. Carpenter still would have struck Ms. Cho. That argument not only disregards the evidence, but it is inconsistent with *Chen v. City of Seattle,* 153 Wn. App. 890, 223 P. 3d 1230 (2009), *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) and *Lowman v. Wilbur*, 178 Wn. 2d 165, 309 P.3d 387 (2013). The City contends at p. 21 of its brief that *Keller* and *Chen* has no application to the "causation" issue because those cases only focus on the "duty" element of a negligence claim. But under Washington law, the question of "duty" and "causation" are inextricably intertwined. *Michaels v. CH2M Hill, Inc.*, 171 Wn. 2d 587, 611, 257 P.3d 532 (2011); *Lowman v. Wilbur*, 178 Wn. 2d 165, 169, 309 P. 2d 387 (2013). Thus, under *Keller* and *Chen*, it is clear that a roadway authority's negligence is not cut off simply because other drivers failed to exercise due care and caution. As stated in *Lowman*:

> We held in *Keller v. City of Spokane*, 146 Wash.2d 237, 44 P.3d 845 (2002), that the duty to design and maintain reasonably safe roadways extends "to all persons, whether negligent or fault-free." Id. at 249, 44 P.3d 845. **Today, we hold that the reasoning of Keller equally supports a**

> **determination of legal causation in this context.** Therefore, if the jury finds the negligent placement of the utility pole too close to the roadway was a cause of Lowman's injuries when Wilbur's car left the roadway and struck the pole then it was also a legal cause of Lowman's injuries.

Lowman, 178 Wn. 2d at p. 167 (2013); *emphasis supplied.*

On p. 22 of its brief, the City claims our case is different than *Lowman* because in *Lowman* factual causation existed. *See p. 22 of the City's brief.* But as can be seen from the language of *Lowman* quoted above, that was not the situation. Rather, the *Lowman* court noted that the question of factual causation was an issue for the jury.

Interestingly, the City concedes at pp. 21-22 of its brief that the court in *Keller* stated it was for the "jury" (not the court) to determine the factual causation. *Keller*, 146 Wn. 2d at 252 (2002). Again, the same is true in our case; as such, this court should reverse and remand so that the factual causation issue can be decided by the jury.

F. Legal causation exists because Cho produced substantial evidence on the factual causation question.

Finally, the City argues that there is no "legal causation" because as a matter of policy, the connection between its negligence and the injury is too remote. *See pp. 23-25 of the City's brief.* In making this argument,

the City ignores the fact that the road treatments at issue are directly tied to preventing the exact harm that was caused: a pedestrian collision.

The City also ignores the latest Supreme Court decision on the issue. In *Lowman v. Keller*, 178 Wash.2d 165, 309 P.3d 387 (2013), the court held that if the jury found negligent conduct of the road authority was the factual cause of the plaintiff's injuries, it "cannot be deemed too remote for purposes of legal causation." *Lowman*, 178 Wash.2d at 171, 309 P.3d 387. In other words, if cause in fact is established and the injuries are within the scope of the duty owed, "there is no basis to foreclose liability." *Lowman*, 178 Wash.2d at 172, 309 P.3d 387. Likewise here, if the collision was in fact caused by the failure to install the pedestrian treatments at issue, the City's breach to implement those measures is not too remote for purposes of legal causation.

IV. CONCLUSION

There were hundreds of other people that had to cross 1st Avenue South at Massachusetts late at night whenever a concert ended at the Showbox. CP 273:16- CP 274:9; CP 286-288; CP 340. Besides Ms. Cho, numerous other pedestrians also had trouble crossing at that location because 1st Avenue is a wide, heavily traveled street with no light, no stop sign and no signs warning drivers about pedestrians. CP 269-270; CP 150-151; CP 155-156; CP 226:11-24. The risk of a pedestrian being

struck by a car at that location "was established by national research and Seattle policies to be unacceptably high without traffic control assistance for pedestrian crossings." CP 329.

Ms. Cho's expert testified the City should have installed a traffic signal, a pedestrian island or at least hired personnel to control traffic. CP 329; CP 340. The studies not only proved that the risk of pedestrian/ vehicle collisions would have dropped "dramatically" (CP 340), but Cho's engineering expert testified that had the proposed safeguards been implemented, then the subject collision "most likely" would not have occurred. CP 329; CP 340. And Cho's human factors expert testified that a red light would have stopped Carpenter from striking Ms. Cho, just as Carpenter herself testified she had no problem obeying all of the other lights earlier that evening. CP 315; CP 311-312; CP 173:18- CP 174:25 and CP 175:13. And finally, Jane Cho herself testified that if a pedestrian island had been installed she would have used it and the collision would not have taken place. CP 269-270.

Construing all evidence and inferences from evidence in favor of the non-moving party, which is what is required on the City's summary judgment, Jane Cho's evidence created a material issue of fact for the jury on causation. As such, the court erred when it took that issue from the

jury and dismissed the case on that ground. Consequently, this court should reverse and remand for a jury trial.

Dated this 24th day of April, 2014 at Seattle, Washington.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JANE CHO,	)	
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Plaintiff/Appellant,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
THE CITY OF SEATTLE et. al.,	)	
	)	
Defendant/Respondent.	)	

The undersigned does hereby certify that on this **30th** day of **April**, 2014, she caused a true and correct copy of the following document(s):

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