91215-7

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

APPELLANT JANE CHO'S PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTIY OF PETITIONER

The petitioner is Jane Cho, plaintiff below.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision, *Cho v. City of Seattle,* __ Wn. 2d. __, __ P. 3d __ WL 7140387 (2014), a copy which is attached as exhibit 1 to the Appendix. The decision was filed on October 20, 2014. Then on December 12, 2014, this court granted the respondent City of Seattle's motion to publish. That order is attached as exhibit 3 to the Appendix.

III. ISSUES PRESENTED FOR REVIEW

1, Is a road authority's failure to control pedestrian/ vehicle conflicts at a special event a proximate cause of an injury when a crowd of people at that event are struck by a vehicle that does not stop?

2. Should a jury be permitted to conclude a road authority's failure to control pedestrian/ vehicle conflicts at a special event was a proximate cause of an injury when expert witnesses testify there would have been no accident if the road authority implemented appropriate safeguards?

IV. STATEMENT OF THE CASE

Jane Cho and a crowd of other people leaving a concert at the Showbox had to walk west across 1st Avenue South at South Massachusetts to get to their parked cars. CP 269-270. Numerous

pedestrians had difficulty crossing at that location because 1st Avenue is a wide, heavily traveled street and there was no light, no pedestrian island, no stop sign and no signs warning drivers about pedestrians. *Id.* See also CP 155-156.

After crossing 4 and a half lanes, Ms. Cho and some other pedestrians were struck by a motor vehicle in the southbound curbside lane driven by Juanita Carpenter. CP 269-270; CP CP 161: 20-25. Ms. Cho was seriously injured. According to Ms. Carpenter's statement:

> 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.

Cho sued the City, alleging its negligent conduct was a proximate cause of the accident. CP 1-11. The City moved for summary judgment on the theory insufficient evidence existed to prove its alleged negligent conduct was a "proximate cause" of the collision. CP 128-137. For purposes of its motion, the City admitted it breached the duties asserted by the plaintiff. CP 128::22- CP 129: 2:4 and CP 130:14-16. The plaintiff asserted the City breached the following duties: 1) the City failed to have a police officer stop and control traffic at the subject intersection which

would have prevented the collision; 2) the City failed to install a pedestrian island which, according to Jane Cho's declaration, would have prevented the collision because she would have waited in the island for southbound vehicles; and 3) the City failed to install a traffic signal which would have prevented the collision. CP 246: 10-16. Cho's assertions were based on the analysis of a traffic engineer, Dan Melcher, who had expertise in crowd control at special events. CP 317-361.

After the crash, several traffic engineers found that when there was no event at the Showbox, there were relatively few pedestrians crossing the street, but when an event was taking place at the Showbox, there were hundreds of pedestrians crossing 1st Avenue South. CP 273: 16- CP 274: 9; CP 286- 288; CP 340. Although there were literally hundreds of pedestrians crossing 1st Avenue to get to and from the Showbox, which served alcohol to them, CP 183; CP 188, the City of Seattle failed to implement any safety measure to prevent pedestrian/ vehicle conflicts. CP 182: 11-24; CP 337-CP 341. The intersection had no traffic or pedestrian signal, no stop sign, no pedestrian island, no flashing over-hang warning motorists of pedestrian crossings, nor did the City employ any person to direct or control traffic to assist people crossing the street safely. CP 269-270; CP 182: 13-18; CP 154: 21- CP 155:25 The City failed to implement any of these safety devices, even though they issued a permit to allow the

Showbox to serve alcohol to thousands of people on a regular and frequent basis at concerts in its building at the southeast corner of the intersection. CP 181: 17-20; CP 192: 11-24; CP 187; CP 337- 341.

Traffic engineer Daniel Melcher testified that more likely than not, the employment of law enforcement officers to direct traffic so as to control pedestrian/ vehicle conflicts would have prevented the collision. CP 318:3-26 and CP 340-341. Mr. Melcher further testified that more likely than not additional pedestrian treatments, like a geometric reconfiguration of the roadway as well as the installation of a signal would have also prevented the crash. *Id.* Mr. Melcher's analysis was supported by peer reviewed research which established a significant reduction in pedestrian/ vehicle conflicts had the safeguards been implemented. CP 340. And Jane Cho herself testified the installation of a pedestrian island would have altered her behavior and prevented the crash. CP 269-270. Further, a human factors expert, William Vigilante, PhD, testified that based on Ms. Carpenter's previous driving, "more likely than not" she would have successfully responded to a red traffic signal had there been one at the scene. CP 289.

Notwithstanding the foregoing evidence, the trial court reasoned no jury could conclude that any of the City's failures was a "proximate

cause" of the accident. RP May 31, 2013 at p. 74: 6-17. Division I of the Court of Appeals affirmed. In doing so, the Court of Appeals failed to analyze one of Cho's central arguments: the City's failure to employ personnel to control traffic at this special event was a proximate cause. *Compare* CP 340-341; CP 252:14-16; CP 267:5-7; May 31, 2013 RP 59:2-RP 61:19 and p. 11 of Appellants' Opening Brief. to Court of Appeals opinion which did not address Cho's arguments.

V. ARGUMENT

A. The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals

The City of Seattle concedes that the decision at issue conflicts with at least one prior opinion of the Court of Appeals: *Torgersen v. City of Seattle*, 2014 WL 1287128. *See pp. 3-5 of the City of Seattle's Motion to Publish, attached as exhibit 2 to the Appendix.* The plaintiff in *Torgersen,* was struck by a car traveling 30 mph while crossing a busy street. Like our case, the driver struck the pedestrian because the driver did not see the pedestrian crossing. The plaintiff sued the City of Seattle claiming that the collision would not have happened if the City had simply placed a 20 mph reduced speed limit sign. The City argued the failure to install the sign could not be a legal cause of the collision because a jury could only speculate it would have prevented the collision.

In support of this argument, the City argued no reduced speed would have been required because the sign would only apply if children were present and that was not the case. Division I disagreed and held the issue was for the jury. Certainly, if a jury issue existed in *Torgersen*, a jury issue existed in our case.

Tthe opinion also conflicts with *Unger v. Cauchon*, 118 Wn. App. 165, 73 P. 3d 1005 (2003). In that case, the Estate of a reckless driver brought a cause of action against Island County for negligent highway design. The driver had been speeding, swerving erratically, running red lights and turning his headlights off and on through heavy rain before losing control and crashing. There were no witnesses to the crash. The trial court granted the County's summary judgment, concluding that the "county had no duty to foresee and protect [the decedent] against his extreme reckless driving." *Unger*, 118 Wn. App. at p. 170, 174-175. The Court of Appeals reversed the trial court's summary judgment order. In doing so, the court reasoned issues of proximate cause existed for the jury because it was a question of fact whether a highly negligent driver cut off the causal chain of the alleged breach of duty from the road authority.

> Accordingly, the trial court erred in this case by concluding that because Unger was driving recklessly, the County owed him no duty as a matter of law. Although the jury instruction approved in Keller does not say so, we read the opinion to require the court to determine, or properly

> instruct a jury to determine, that a municipality's duty is independent of the plaintiff's negligence. Thus, the County owed Unger a duty, regardless of his allegedly negligent conduct, to make the road safe for ordinary travel. 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.
> ...
> ...**The extent to which Unger's reckless driving and the County's failure to maintain the road contributed to Unger's death is a question for a jury.**

Unger, 118 Wn. App. at pp. 175-176, 178 (2003); emphasis supplied.

On the other hand, in our case, the Court concluded that even though Cho produced evidence that the road authority failed to implement appropriate pedestrian safeguards, no proximate cause existed because the driver was not paying attention. *See p. 1 and pp. 6-8 of the Court of Appeals opinion.* The *Cho* Court concluded that plaintiff's expert testimony was speculative and conclusory, even thought it was based on careful engineering study and peer-reviewed research. *Compare pp. 8-10 of the Court of Appeals' opinion with CP 340-341.* The evidence in our case was just as compelling as the evidence in *Torgerson v. the City of Seattle or Unger v. Cauchon*, yet in those cases, proximate cause was for a jury. But in our case, the Court of Appeals concluded there was no proximate cause as a matter of law.

The *Cho* decision also conflicts with *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009). In *Chen*, a pedestrian was struck and killed while crossing a busy street late at night. The plaintiff sued the City of Seattle, alleging the collision would not have happened if the City had not installed a marked crosswalk. The trial court dismissed, but the court of appeals reversed because it recognized a jury could conclude a road authority breached its "duty" to install appropriate pedestrian treatments based on the "totality of the circumstances," including how busy and wide the road was. *Chen v. City of Seattle*, 153 Wash.App. 890, 894, 223 P.3d 1230 (2009), *review denied*, 169 Wash.2d 1003, 234 P.3d 1172 (2010). Although *Chen* dealt with the "duty" issue, the question of "proximate cause" is "inextricably "intertwined with the same analysis. *Lowman v. Wilbur*, 178 Wn. 2d 165, 169, 309 P. 2d 387 (2013). If, in *Chen*, an issue of fact existed as to whether the City failed to make the intersection safe for pedestrians, a similar issue exists in our case.

B. The decision of the Court of Appeals is in conflict with a decision of the Supreme Court

Our case also conflicts with *Lowman v. Wilber*, 178 Wn. 2d 165, 309 P. 3d 387 (2013). In that case, an intoxicated and speeding motorist swerved off the road and struck a power pole. Her injured passenger sued the road authority which, like the City of Seattle, also obtained a

summary judgment dismissing the case on the ground that no negligent conduct of the road authority could be a "proximate cause" of the collision. The Court of Appeals affirmed the dismissal, but the Supreme Court reversed because pursuant to *Keller v. City of Spokane*, 146 Wash.2d 237, 44 P.3d 845 (2002), the road authority's negligent conduct is not cut off simply because the negligent conduct of a highly intoxicated motorist also contributed to the collision. In ruling as it did, the *Lowman* specifically disapproved of the line of cases relied on by the City of Seattle in this case, i.e., *Klein v. City of Seattle*, 41 Wn. App. 636, 705 P.2d 806 (1985); *Braegelmann v. County of Snohomish*, 53 Wn. App.. 381, 766 P.2d 1137 (1989); *Cunningham v. State,* 61 Wn. App. 562, 811 P.2d 225 (1991); *Medrano v. Schwendeman*, 66 Wn. App. 607, 836 P.2d 833 (1992). *See Lowman*, 178 Wn. 2d at p. 167, 170-171 (2013) and *compare to CP 133-136.* As stated in *Lowman*:

> Whatever the reasons for a car's departure from a roadway, as a matter of policy we reject the notion that a negligently placed utility pole cannot be the legal cause of resulting injury. As in Schooley, the injury here was not so remote as to preclude liability as a matter of law. If a jury concludes that Lowman suffered injuries within the scope of the duty owed to Lowman—i.e., that his injury was not too remote—then there is no basis to foreclose liability as a matter of legal cause. Of course, this analysis answers only the legal prong of the causation analysis. At trial, a jury could limit or negate liability on any number of theories, including comparative fault or the failure to prove factual causation.

Lowman, 178 Wn. 2d at p. 172 (2013).

In our case, like *Lowman*, the proximate cause of the road authority's negligent conduct was not severed by an intoxicated driver. Just as the jury in *Lowman* was allowed to consider whether an improperly placed pole was the cause of an injury, a jury should be allowed to consider whether the failure to install a pedestrian island or other treatments, such as a traffic signal or the employment of security to direct traffic outside a concert venue, was a cause of Ms. Cho's injuries.

C. The decision should be reviewed because it involves a substantial public interest

The City of Seattle concedes that the issues in this case are of significant public importance. *See pp. 7-8 of the City's Motion to Publish at exhibit 3.* Never before has this court addressed how far the consequences extend for the City's failure to exercise common sense crowd control at special events. In our case, the Showbox concert venue spills hundreds of pedestrians onto the sidewalk, at night, and are left to fend for themselves as they attempt to navigate busy streets to get to their cars. Cho's experts concluded the City should have employed personnel to direct traffic and control the crowd and that if they had, this collision

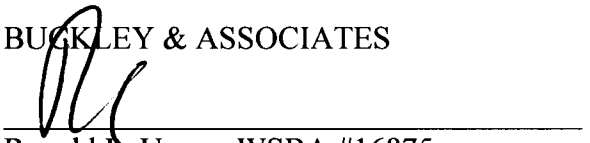
would not have happened. The court should address that issue, as a matter of public safety.

VI. CONCLUSION

For the reasons set out above, this court should accept review of the Court of Appeals decision.

Dated this 5th day of January, 2015 at Seattle, Washington.

BUCKLEY & ASSOCIATES



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VII. APPENDIX

1. Cho v. City of Seattle decision filed on October 20, 2014
2. City of Seattle's Motion to Publish
3. Order Granting Motion to Publish filed on December 12, 2014

EXHIBIT 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JANE CHO, Appellant, v. THE CITY OF SEATTLE, Respondent, JUANITA WRIGHT a/k/a JUANITA L. MARS a/ka JUANITA CARPENTER and JOHN DOE WRIGHT, husband and wife; and SHOWBOX TWO LLC a/k/a "SHOWBOX" and JOHN AND JANE DOES 1-10, Defendants.	)	No. 70727-2-I DIVISION ONE UNPUBLISHED OPINION FILED: October 20, 2014

TRICKEY, J. — A party must provide sufficient competent evidence to establish the essential elements of the action, or at the very least, a genuine issue of material facts as to those elements. Here, an inattentive drunk driver struck the plaintiff and several pedestrians in an unmarked crosswalk. The plaintiff's assertion that had the city of Seattle (City) installed a pedestrian island, she would have stopped and waited for all oncoming traffic to proceed before continuing to cross the street, is speculation that does not establish proximate cause. Further, under the circumstances here, where traffic had already stopped to permit pedestrians to proceed across the street and several were in the process of doing so when defendant's vehicle struck them, an island would not have prevented the accident. Nor would a traffic light have helped since the driver unequivocally stated that she was not looking ahead before she struck the pedestrians. Summary judgment dismissal of the plaintiff's claims against the City was proper.

FACTS

On October 28, 2010, a drunk driver, Juanita Carpenter a/k/a Juanita Mars (Mars), struck and hit Jane Cho and other pedestrians crossing First Avenue South in a lighted, unmarked crosswalk. The complaint stated that Cho was walking westbound on a public street, within an unmarked crosswalk. She had already crossed the northbound lanes and one-half of the southbound lanes of First Avenue South when Mars' vehicle struck her and four other pedestrians.[1]

Mars was charged with multiple felonies as a result of the drunk-driving accident.[2] On February 1, 2011, she signed and filed a statement of defendant on plea of guilty (nonfelony) as to the charge of reckless driving (count IV), stating:

> In King, County, WA on 10/28/10, I drove in willful and wanton disregard for the safety of people and property. I was driving on 1st Avenue downtown after drinking alcohol, to wit: I knew I was drinking to excess and was not focusing on my driving and failed to slow while approaching an intersection with a large group of pedestrians and ignored the waving of a construction worker.[3]

On February 22, 2011, Mars pleaded guilty to multiple criminal counts of vehicular assault-DUI (counts I, II, III). At entry of her plea to these crimes, Mars signed a statement:

> (1) In King County, WA, on 10/28/10, I drove a motor vehicle while under the influence of alcohol and caused substantial bodily harm to Joanne Wegner and Timothy Syverson, when I was driving on 1st Ave. I had consumed alcohol and was driving downtown when I hit Ms. Wegner and Mr. Syverson.
> (2) In the same place and time, in King County, I drove a motor vehicle while under the influence of alcohol and caused substantial bodily harm to Judy Ha. I was drunk and driving on1st Ave, when I hit Ms. Ha.

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[1] Clerk's Papers (CP) at 4, 109.
[2] CP at 107-8.
[3] CP at 75.

> (3) In King County, WA, in the same place and time, I was driving a motor vehicle under the influence of alcohol and caused substantial bodily harm to Jane Cho. I was driving drunk on 1st Avenue, when I hit Ms. Cho.[4]

Mars had a blood-alcohol level of 0.29, three and half times the legal limit.[5]

Showbox employees testified that it was difficult to cross First Avenue South prior to the City's installation of lights at that crossing.[6] However, this difficulty arose during sporting events. There were no sporting events that evening. Showbox has room for 1,600 to 2,000 people.[7] The show was close to sold out if not sold out.[8] A witness testified that the pickup driven by Mars did not slow down until after it struck the pedestrians.[9]

Both Showbox and the City moved for summary judgment. The trial court granted both motions and dismissed the action. Cho appeals only the dismissal of her negligence claims against the City. The City contends that its failure to install a light, pedestrian crossing, or an island did not proximately cause the accident.

ANALYSIS

Standard of Review

A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

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[4] CP at 104-5.
[5] CP at 111.
[6] CP at 150, 226.
[7] CP at 154, 180, 219.
[8] CP at 187, 219 (one Showbox employee stated venue was half full).
[9] CP at 168.

In a motion for summary judgment, the moving party bears the initial burden of showing that no material fact exists. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then moves to the nonmoving party to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In meeting this burden, the nonmoving party cannot rely solely on allegations made in its pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Young, 112 Wn.2d at 225 (quoting CR 56(e)). If the nonmoving party does not meet its burden, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Young, 112 Wn.2d at 225 (internal quotation marks omitted) (quoting Celotex Corp., 477 U.S. at 322-23).

This court reviews summary judgment orders de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. Lowman v. Wilbur, 178 Wn.2d 165, 169, 309 P.3d 387 (2013); Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Issues of negligence and causation in tort actions are questions of fact not usually susceptible to summary judgment, but a question of fact may be determined as a matter of law where reasonable minds can reach only one conclusion. Moore v. Hagge, 158 Wn. App. 137, 147-48, 241 P.3d 787 (2010). "Questions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.'" Owen v. Burlington N. Santa

Fe R.R. Co., 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (quoting Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

Proximate Cause

The fact that an accident occurred does not, by itself, necessarily give rise to an inference of negligence. Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 377, 972 P.2d 475 (1999). In order to prevail on her negligence claim, Cho must prove duty, breach, causation, and injury. Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). The trial court granted the City's motion for summary judgment because it found no genuine issue of material fact as to proximate cause.

Proximate cause contains two separate elements: cause in fact and legal causation. Hartley, 103 Wn.2d at 777. Cause in fact, is, in addition to legal causation, an element of proximate cause. It "refers to 'the physical connection between an act and an injury.'" M.H. v. Corp. of Catholic Archbishop of Seattle, 162 Wn. App. 183, 194, 252 P.3d 914 (20110 (internal quotation marks omitted) (quoting Ang v. Martin, 154 Wn.2d 477, 482, 114 P.3d 637 (2005)). Cause in fact is usually a question for the jury, but it may be decided as a matter of law if the causal connection between the act and the injury is "'so speculative and indirect that reasonable minds could not differ.'" Moore, 158 Wn. App. at 148 (internal quotation marks omitted) (quoting Doherty v. Mun. of Metro. Seattle, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996)). "The cause of [the] accident [is] speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another." Moore, 158 Wn. App. at 148 (internal quotation marks omitted)

(quoting Jankelson v. Sisters of Charity of House of Providence in Territory of Wash., 17 Wn.2d 631, 643, 136 P.2d 720 (1943)).

The situation here is similar to that in Garcia v. State Department of Transportation, 161 Wn. App. 1, 270 P.3d 599 (2011). In Garcia, a driver struck and killed a pedestrian while in the crosswalk. Prior to the accident, the city of Shoreline had conducted a pedestrian safety study. As a result, the city had taken various actions including obtaining a variance to install a roving eyes pedestrian alert device (an overhead Led (light emitting diode) display that flashes when a pedestrian enters the crosswalk). Garcia, 161 Wn. App. at 4-5. At the time of the accident, the roving eyes device was disabled as it was not operating correctly. The driver admitted she was talking to the person in the passenger seat and was not paying attention or looking ahead. As a result, she failed to notice the three cars stopped in the next lane at the crosswalk and did not see the pedestrian. Garcia, 161 Wn. App. at 6. Garcia held it was the driver's inattentiveness that was the proximate cause of the accident and the argument that the roving eyes device would have prevented the accident was too attenuated to impose liability. Garcia, 161 Wn. App. at 16.

An analogy can also be drawn to Tortes v. King County, 119 Wn. App. 1, 84 P.3d 252 (2003). Tortes involved an action by a passenger on a Municipality of Metropolitan Seattle (Metro) bus that plunged off the Aurora Avenue Bridge when another passenger shot and killed the driver. The cause in fact of the accident was the other passenger's shooting the bus driver. There was no claim that Metro was the cause in fact of the accident; "[r]ather, there was only

speculation as to what Metro should have done to prevent the shooting and the accident." Tortes, 119 Wn. App. at 9. This was insufficient to establish cause in fact.

Similarly, here, Cho's theory of liability against the City consists of only speculation as to what the City should have done to prevent the accident. Such speculation does not establish cause in fact. Mars was not paying attention. She stated she was crying and constantly drying her face because of the tears. She was "surprised [she] even saw the road through all the tears and the headache."[10] She stated that she "was not in any shape [and] never should have got[ten] behind the wheel.[11]

Mars further stated that before the point of impact, she was yelling at the front seat passenger and was not looking ahead or paying attention:

> Q. Did you have your head turned towards them just before the accident, or do you know?
> A. Yeah, actually I did, because I told Toni to shut the hell up, because she was in the front seat.
> Q. What was your first indication that you had struck somebody? Did you hear it or feel it?
> A. The thump, I heard it. And I was like what the hell? And they looked at me. So I'm like they didn't say anything, either. And so I just -- I don't think they saw them, either, because nobody said anything.[12]

In addition to not looking at the road, Mars was severely impaired by a blood alcohol level of 0.29 percent.[13]

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[10] CP at 389.
[11] CP at 392.
[12] CP at 397 (Mars Deposition).
[13] CP 111. Cho cites to Mars' testimony that she had no problems driving, stopped at every light, and stayed in her lane.

> I don't know SoDo. So they were irritating me, because when I came up and over the West Seattle Bridge, the big bridge, I meant to just

Specifically, Cho testified that had there been a pedestrian island, she would have used it, stopped, and waited for all the traffic to pass through the crosswalk before continuing.[14] Likewise, Cho asserted that if there had been a signal at the intersection, she would have pushed the button and waited; if no pedestrian signal, she would have waited for a green light before crossing.[15] These statements are speculative and given the circumstances here, where one lane of traffic had already stopped yielding to the pedestrians and multiple pedestrians were crossing the road, it is not reasonable to suppose that under those circumstances, Cho, alone, would have waited for traffic to clear.

Expert Testimony

Cho also argues that but for the City's failure to install a traffic light or personnel to control the traffic, the accident would not have occurred. To support this theory, Cho presented a declaration from Dr. William Vigilante, Jr., a human factors expert, who opined that Mars' successful navigation between her home in West Seattle and the place of impact was evidence of Mars' ability to successfully complete turns, navigate high speed roadways, respond to traffic signals, and

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> take the First Avenue exit. They had me so stressed out and upset with their yakking, I wound up on the viaduct. And I was like great.
>
> So I got off the viaduct, came down First Avenue. No problems driving, stopped at every light, stayed in my lane listening to them yak. And the closer we got, the more I wanted to hurt them. Their arguing was really starting to piss me off to the tune where I was starting to see red. And the only thing I wanted to do was pull my truck over and beat the hell out of them.
>
> So I figured I was somewhere close to wherever they were going. And that's when the accident happened.

CP at 175.

[14] CP at 270 (Cho Declaration).

[15] CP at 270.

negotiate narrow roadways.[16] Therefore, he concluded that Mars was an attentive driver and demonstrated an ability to respond to future traffic controls such as traffic signals, had there been any at the point of impact.[17] This position, however, is clearly contradicted by Mars' only statements that she was not paying attention and was not looking ahead at the road.

Cho also presented a declaration from Daniel Melcher, Armstrong Forensic Engineers, Inc., who opined that a red light would have likely prevented the collision.[18] Melcher's report cites a briefing memo from the Seattle Department of Transportation showing that in 2007, the City planned to make changes to 21 crosswalks, including the removal of a marked crosswalk at First Avenue South and South Massachusetts Street because of little or no public interest.[19] One citizen complained about the removal, but attempts by the City to contact that individual failed and no action was taken on the complaint.[20] The report also noted that installation of a marked crosswalk does not solve pedestrian crossing problems.[21] The report concluded that the City failed to properly study the intersection, and that curb bulbs and a median refuge island might have been a refuge area for pedestrians to determine if there were available gaps in traffic.[22] The conclusion that the presence of an island would have prevented this accident is speculative because it relies on the pedestrian stopping in the circumstances

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[16] CP at 312.
[17] CP at 312-13.
[18] CP at 318.
[19] CP at 334 (Armstrong Report).
[20] CP at 334-35.
[21] CP at 336.
[22] CP at 340.

present at the time. Here, the crowds were crossing the streets and traffic had stopped in the other lane permitting them to do so.

In order to preclude summary judgment, an expert's affidavit must include more than mere speculation or conclusory statements. See Dunlap v. Wayne, 105 Wn.2d 529, 536, 716 P.2d 842 (1986) (affidavits summited in opposition to summary judgment must set forth facts that would be admissible in evidence). Because the experts' declarations contain only conclusory allegations, unsupported by any supporting facts, it does not create an inference that had there been a red light, Mars, who was not looking ahead, would have stopped. Nor is there any evidence to lend credence to the speculation that had there been a pedestrian island, Cho would have waited for all oncoming traffic to pass. Under the circumstances here, such an action is highly speculative.

Cho's arguments are similar to arguments that have been repeatedly rejected in accident cases where the plaintiff seeks to hold a government body liable on the ground of failure to provide a safe roadway. In Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (2001), Johanson v. King County, 7 Wn.2d 111, 109 P.2d 307 (1941), and Kristjanson v. City of Seattle, 25 Wn. App. 324, 606 P.2d 283 (1980), the most that the plaintiff could show was that the accident might not have happened had the governmental body taken certain steps, such as installing raised pavement markings, lowering the speed limit, posting additional road signs, or removing old road lines. In each case, the courts decided that the plaintiff failed to meet his or her burden of showing that the governmental body's negligence was

the cause in fact of the plaintiff's injuries. The same is true with respect to Cho's claims against the City. Her speculation is insufficient to show cause in fact.

Cho argues that the Supreme Court's recent case, Lowman v. Wilber, 178 Wn.2d 165, 309 P.3d 387 (2013), supports her position against summary judgment. Lowman sued Puget Sound Energy and the county for injuries sustained in an automobile accident caused by an alcohol impaired driver who was speeding, lost control of the car, and hit a utility pole. But Lowman is distinguishable. In Lowman, the county stipulated to the fact that the pole was the cause in fact of the injuries sustained. The Lowman court held that if a jury found negligent placement of a utility pole was a cause of the plaintiff's injuries it was not "too remote for purposes of legal causation." 178 Wn.2d at 171. If a cause in fact is established and the injuries fall within the scope of duty owed, "there is no basis to foreclose liability." Lowman, 178 Wn.2d at 172. Unlike Lowman, here, the City disputes the cause in fact.

Cho argues that Unger v. Cauchon, 118 Wn. App. 165, 73 P.3d 1005 (2003), is more similar to this case. Unger held that the county owed a duty to a motorist regardless of his negligent conduct in bad weather. 118 Wn. App. at 175-76. The speed of the vehicle and the reason for Unger's loss of control of that vehicle were disputed. Further, evidence in the record showed that the road was not maintained in a safe condition the night of the accident and on other rainy days. Unger, 118 Wn. App. at 176-77. The driver who discovered Unger's body testified that her car swerved when it hit the wash out. Unger, 118 Wn. App. at 177. Other witnesses stated that the drain culvert had been plugged for several years causing

flooding when heavy rains occurred. Unger, 118 Wn. App. at 177. No such facts are present here. The City was entitled to summary judgment dismissal of Cho's negligence claim.

Affirmed.

Trickey, J

WE CONCUR:

Dwyer, J.

Appelwick, J.

EXHIBIT 2

No. 70727-2-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON, SEATTLE

JANE CHO,

Plaintiff/Appellant,

vs.

CITY OF SEATTLE et al.,

Defendant/Respondent,

APPLICANT CITY OF SEATTLE'S MOTION TO PUBLISH PURSUANT TO RAP 12.3(e)

PETER S. HOLMES
Seattle City Attorney

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A. IDENTITY OF APPLICANT AND STATEMENT OF INTEREST

Applicant City of Seattle (hereinafter "the City") is a governmental entity which through its Department of Transportation, is a road authority. WPI 140.01 imposes upon road authorities the duty to maintain their streets in reasonably safe condition for ordinary travel. The City has an interest in each road design/maintenance opinion filed by the Court of Appeals and the Supreme Court.

B. STATEMENT OF RELIEF SOUGHT

The City seeks an Order of Publication of this Court's opinion in Case No. 70727-21-I, filed on October 20, 2014.

C. FACTS RELEVANT TO MOTION

On October 20, 2014, this court filed its opinion in the above-captioned case and ordered that it be unpublished. In this case, the Court affirmed the trial court's order dismissing this road design case against the City for lack of evidence of proximate cause. This Court held that (1) speculative testimony as to whether additional safeguards would have made either road user more aware of conditions of the roadway was properly excluded and (2) testimony by a road user and her experts was insufficient to create a question of fact as to causation.

This Court distinguished *Lowman v. Wilbur*, 178 Wash.2d 165, 309 P.3d 387 (2013) from the instant case, noting its facts do not apply here, where the cause in fact of the injuries is disputed. Yet, Division I's recent unpublished opinion in *Torgerson v. City of Seattle,* 2014 WL 1287128 (Wash. App. Div. 1) applied *Lowman* where cause in fact *was* disputed. Accordingly, this Court's opinion is essential to the interpretation and proper application of the common law in this area for courts, trial counsel, and municipalities alike.

D. GROUNDS FOR RELIEF AND ARGUMENT

RCW 2.06.040 provides, in pertinent part:

> All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court.

The criteria for determining whether a case has precedential value are set forth in *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), rev. denied, 80 Wn.2d 1003 (1972):

> OPINIONS OF THE COURT OF APPEALS SHOULD BE PUBLISHED:
>
> (1) Where the decision determines an unsettled or new question of law or constitutional principle.

(2) Where the decision modifies, clarifies or reverses an established principle of law.
(3) Where the decision is of general public interest or importance.
(4) Where the case is in conflict with a prior opinion of the Court of Appeals.
(5) Where the decision is not unanimous.

This decision qualifies under grounds (1), (2), (3), and (4).

1. THE CASE DETERMINES A NEW QUESTION OF LAW IN TERMS OF APPLICATION OF *LOWMAN.*

Since publication of the August 8, 2013 Washington Supreme Court opinion in *Lowman,* two different Division I judicial panels discuss application of *Lowman* in the context of legal causation (while three other courts cite *Lowman* in passing for other reasons). Whether or not *Lowman* should apply to countless current and existing municipal civil tort cases, not to mention future tort cases affecting municipalities and utilities is a critical determination for litigants, trial and appellate courts alike. This Court's ruling clarifies that *Lowman* applies where there is no dispute as to the cause in fact of the alleged injury.

2. THE CASE IS IN CONFLICT WITH A PRIOR OPINION OF THE COURT OF APPEALS.

This opinion follows Division I's precedent in affirming that evidence as to the habits of a pedestrian or motorist is insufficient to cure a lack of direct evidence on causation in a case tried under WPI 140.01.

Moore v. Hagge, 158 Wn. App. 137, 147-48, 241 P.3d 787(2010) and *Miller v. Likens*, 109 Wn. App. 140, 34 P.3d 835 (2001). In those cases, expert testimony was excluded as speculation as to how an accident happened or whether additional safeguards would have made road users more aware of roadway conditions and thus, would have prevented the accident. *See Gardner v. Seymour,* 27 Wn.2d 802, 180 P.2d 564 (1947) (evidence sufficient to survive summary judgment must rise above guess, speculation or conjecture); *Craig v. Washington Trust Bank,* 94 Wn. App. 820, 976 P.2d 126 (1999) (speculation, even by an expert, cannot defeat summary judgment). Yet, Division I's opinion and application of *Lowman* in *Torgerson* casts in doubt the fundamental premise of tort law in general that speculation and conjecture is insufficient to establish the element of causation.

3. THE DECISION CLARIFIES AN EXISTING PRINCIPLE OF LAW.

As to legal causation, in *Lowman*, citing *Schooley v. Pinch's Deli Mkt*, 134 Wash.2d 468 at 483, 951 P.2d 749 (1998), the Supreme Court focused on whether "the injury suffered is not so remote as to preclude liability as a matter of law." As this Court noted, "[i]n *Lowman,* the county stipulated to the fact that the pole was the cause in fact of the injuries sustained", holding that if Lowman's injuries were in fact caused by the

placement of the utility pole too close to the roadway, then they cannot be deemed too remote for purposes of legal causation. *Lowman*, 178 Wn.2d at 171. This court noted:

> If a cause in fact is established and the injuries fall within the scope of duty owed, 'there is no basis to foreclose liability.' *Lowman* at 172. **Unlike *Lowman*, here, the City disputes the cause in fact.**

Cho at 11, (emphasis added).

This Court's opinion provides needed guidance as to evidentiary requirements of proximate cause and the application of *Lowman* where there is agreement of the cause in fact (where "cause in fact is established"). This is particularly so where a different panel within Division I (1) applied *Lowman* to facts in which the cause in fact *was* in dispute - where the City had objected to and motioned to strike declarations and evidence as speculation[1], *and* (2) the trial court's reliance on the principles underlying *Moore v. Hagge* and *Miller v. Likens* as the

[1] The Torgerson panel erred in FN 7 of its opinion ("[w]e note the City did not move to strike any of the declarations or evidence Torgerson submitted in opposition to summary judgment", overlooking KCLR 56(e) requiring parties to object within the pleading itself.) Indeed, the City had noted "[u]nder CR 56(e), a court is not permitted to consider on summary judgment evidence that would not be admissible in trial. Pursuant to KCLR 56(e), the City objects and moves to strike inadmissible opinions and evidence herein rather than by separate motion." CP 300.

basis for ruling that such testimony by the driver and her experts as to cause in fact were *inadmissible as speculation*, was reversed.

Moreover, this Court's ruling is consistent with the *Lowman* majority opinion, and with Chief Justice Madsen's concurrence, in which she states:

> I write separately to emphasize, however, that the majority opinion should not be broadly read to mean that whenever duty exists and **cause-in-fact is found**, legal causation exists. Any such interpretation would involve an incorrect statement of law...

Lowman, 178 Wn.2d at 391-92, (emphasis added).

This Court's opinion makes clear that where a road user's (and her experts') theory of liability against a party responsible for design and maintenance of the roadway consists only of speculation as to what that entity could have done to prevent the accident, speculation does not establish cause in fact. *Cho* at 7-11.

4. THE DECISION IS OF GENERAL PUBLIC INTEREST OR IMPORTANCE.

Clarification of the evidentiary requirements to satisfy the element of proximate cause in road design cases is of critical importance both to the road authorities and to trial counsel representing the traveling public, as well as trial and appellate courts who interpret both appellate court published and unpublished decisions. This court's opinion will serve to

clarify such evidentiary issues and case application for countless current existing cases in need of such guidance at this time, not to mention future cases.

E. CONCLUSION

The Court's opinion has substantial precedential value, makes a contribution to the common law, and is of general public interest and import. For these reasons, it should be published.

DATED this 31st day of October, 2014.

Respectfully submitted,

PETER S. HOLMES,
Seattle City Attorney

By: 
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Attorney for the Defendant/Respondent, City of Seattle

PROOF OF SERVICE

BELEN JOHNSON certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

On October 31, 2014, I requested ABC Legal Messengers to serve, by 4:30P.M., a copy of this document upon all parties of record as indicated below:

Original + 1 copy to: Court of Appeals, Division I Clerk's Office 600 University St One Union Square Seattle, WA 98101-1176	☑ By hand-delivery via legal messenger
Copy to: James Buckley, WSBA #8263 Ronald L. Unger, WSBA #16875 BUCKLEY & ASSOCIATES, PS, Inc. 675 S Lane Street, Suite 300 Seattle, WA 98104-2942 ***Attorneys for Plaintiff:***	☑ By hand-delivery via legal messenger

DATED this 31st day of October, 2014.

BELEN JOHNSON, Legal Assistant
E-mail: belen.johnson@seattle.gov

EXHIBIT 3

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

JANE CHO, Appellant, v. THE CITY OF SEATTLE, Respondent, JUANITA WRIGHT a/k/a JUANITA L. MARS a/ka JUANITA CARPENTER and JOHN DOE WRIGHT, husband and wife; and SHOWBOX TWO LLC a/k/a "SHOWBOX" and JOHN AND JANE DOES 1-10, Defendants.	No. 70727-2-I ORDER GRANTING MOTION TO PUBLISH

The respondent, City of Seattle, has filed a motion to publish herein. The court has taken the matter under consideration and has determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that the motion to publish the opinion filed in the above-entitled matter on October 20, 2014, is granted. The opinion shall be published and printed in the Washington Appellate Reports.

Done this 12th day of December, 2014.

FOR THE COURT:

Trickey, J

PUBLISHED OPINION INFORMATION SHEET

Info Sheet No.:136ssd
Cause No: 70727-2-I
Title: Cho v. City of Seattle
Filed Date: October 20, 2014

Written by: Trickey, J.
Concurred by: Appelwick, J., Dwyer, J.

REVIEW OF SUPERIOR COURT DECISION

Superior Court County:	King
Superior Court Cause No:	12-2-24507-0 SEA
Date filed in Superior Court:	May 31, 2013
Superior Court Judge Signing:	Sean O'Donnell

COUNSEL ON APPEAL

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ssd

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
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December 12, 2014

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CASE #: 70727-2-I
Jane Cho, Appellant v. City of Seattle et al, Respondents

Counsel:

Enclosed please find a copy of the Order Granting Motion to Publish entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Reporter of Decisions

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JANE CHO, Appellant, v. THE CITY OF SEATTLE, et. al., Respondent.	)	NO. 70727-2-I CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this **5th** day of **January**, 2015, she caused a true and correct copy of the following document(s):

1. **APPELLANT JANE CHO'S PETITION FOR REVIEW TO THE SUPREME COURT**

to be delivered via the method indicated below to the following parties:

Vanessa Lee
600 4th Ave, 4th Floor
Seattle, WA 98124
Attorney for Respondent
Phone: 206-684-8200

[ ] U.S. Mail
[ ] Federal Express
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