70727-2 70727-2

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 OPENING BRIEF

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I. INTROUDUCTION

As set out below, Jane Cho and a number of other people who left the Showbox after a concert were walking west across 1st Avenue South in an unmarked crosswalk at South Massachusetts to get to where vehicles parked on the other side of the street. 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, a/k/a Juanita Mars. CP 269-270; CP CP 161: 20-25. Ms. Cho was seriously injured. According to Ms. Mars' 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.

According to Ms. Cho, if a light had been installed, she would have pushed the pedestrian button and waited for the pedestrian signal. CP 269-270. As such, if Ms. Cho had a red light and Ms. Mars had a green light, Ms. Cho would not have proceeded into the intersection and the collision would not have happened. In addition, Ms. Mars testified she drove from Seattle to Tacoma and back again and had no problem driving before the collision. CP 173- 175. In addition, she saw and obeyed all traffic lights, she negotiated numerous turns and she appropriately followed all traffic cues without incident before the collision. CP 311-312; CP 173:18- CP 174: 25 and CP 175:13 A human factors expert,

William Vigilante, PhD, testified "more likely than not" Ms. Mars 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 that Cho was unable to create a material issue of fact on causation and therefore granted the City's motion for summary judgment. RP May 31, 2013 at p. 74: 6-17. In doing so, the trial judge reasoned that Dr. Vigilante did not have the requisite qualifications to give an opinion that Mars, who was intoxicated, would have successfully responded to a red light. RP May 31, 2013 at RP 72:18- 73:7. The trial judge also failed to give any proper analysis to Jane Cho's testimony a pedestrian island would have prevented the collision. CP 269-270. For these reasons, Cho brought a motion for reconsideration. CP 507-512. In doing so, Cho submitted a supplemental declaration from Dr. Vigilante which more specifically outlined his qualifications to give opinions on the ability of intoxicated drivers to perceive and obey specific traffic ques. CP 513-519. In addition, Cho argued the trial court failed to give any proper consideration to Cho's testimony an island would have made a difference. CP 510-512. The court heard oral argument on the motion for reconsideration and in doing so, it considered the supplemental declaration of Dr. Vigilante. July 19, 2013 RP at pp. 28: 1- 29:9. But the court held that since Dr.

Vigilante's opinions were not sufficient to defeat causation. heard oral argument on the motion for reconsideration July 19, 2013 RP at p. 31:18-p. 35: 3. The trial court also stated that Jane Cho's testimony, that she would have used a pedestrian island and that it would have avoided the collision, was "too speculative." July 19, 2013 RP at p 30: 1-9.

II. ASSIGNMENTS OF ERROR

The trial court erred when it granted the City's motion for summary judgment. It erred again when it denied Cho's motion for reconsideration. The issue on assignments of error are set out below.

1. Washington law requires the City to install safety treatments at the intersection.[1] Construing all evidence in favor of Jane Cho, did the City's negligent conduct, which it admits for purposes of its summary judgment, "proximately cause" the collision when: 1) the collision would not have happened if the City controlled traffic through manual means, such as by using a traffic officer; 2) according to the declaration of Jane Cho, the collision would not have happened if the City had installed a pedestrian island, and 3) according to a human factors

[1] The duty owed to assist pedestrians was recently articulated in *Chen v. City of Seattle,* 153 Wn. App. 890 at p. 907 and p. 909, 223 P.3d 1230 (2009), which held that on a case with similar facts, the City's duty to eliminate unsafe conditions at an intersection "must be determined with respect to all of the surrounding circumstances" and as the danger increases, the City is "required" to exercise greater caution.

expert, the collision would not have happened if the City had installed a traffic signal.

2. Construing all evidence in favor of Jane Cho, does the negligent conduct of a third party (Ms. Mars) cut off the causal chain of the city's duty to maintain its roadways, including intersections, in a reasonably safe manner? Or rather, should that issue be decided by a trier of fact?

III. STATEMENT OF THE CASE

On March 11, 2012, Jane Cho and some of her friends attended a concert at the Showbox, located at the southeast corner of First and Massachusetts. CP 269-270. The Showbox holds nearly 2,000 people and the concert was either sold out or nearly sold out. CP 180: 15- CP 181: 5; *See also* CP 148: 9-11.

After the show ended, the crowd of people, including Ms. Cho, headed for the exits. CP 269- 270; CP 149: 1-4. The Showbox had two exit doors located within close proximity, and both of those doors funneled people onto the sidewalk east of First Avenue South and just south of Massachusetts. CP 189: 10-20; CP 194: 1-3; CP 214.

Although the Showbox was located on the Southeast side of the intersection, one of its main parking lots was located on the northwest side of the intersection. CP 330; CP 284; CP 193: 10-17. Because of that, the

crowd of people leaving the Showbox would walk west across First Avenue South. CP 149: 1-2; see also CP 195: 3-5.

Ed Stevens, a traffic engineer went to the intersection and counted the number of people who crossed 1st Avenue South. He discovered 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. Another traffic engineer, Daniel Melcher, also went to the intersection on a night the Showbox had an event and counted 166 pedestrian crossings from 7:00 p.m. to 8:00 p.m., 426 pedestrian crossings from 8:00 p.m. to 9:00 p.m. and 289 pedestrian crossings from 9:00 p.m. to 10:00 p.m. CP 340.

1st Avenue was a wide street that had heavy vehicle traffic. CP 204: 15-17; CP 230-231. It had two lanes northbound, two lanes southbound, a two way left turn lane and wide shoulders bordering each outside lane. CP 191: 13-16; CP 286- 288. CP 327-332. And although there were literally hundreds and 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.

Although the Showbox had been operating since September, 2007, it was not until 2009 that the City finally determined event traffic would benefit from a traffic signal. CP 331, 335. The City did not install the signal, nor the marked crosswalks,[2] until after the collision at issue in this case occurred. CP 192L 20; CP 328; CP 150: 13-15. Before the City put the light in, it was difficult for people to cross because of all the traffic on 1st Avenue. As stated by one of the security managers at the Showbox:

> Q. Have you ever seen people having problems getting across 1st Avenue South on foot because of traffic on 1st Avenue?

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[2] Instead of implementing any of the pedestrian safety enhancements described in the foregoing paragraph, the City simply removed the marked crosswalks across 1st Avenue South. That occurred in August, 2007, over the objection of a concerned citizen. CP 334.

A. Yes.

Q. Can you tell me about that?

A. Before the lights came up it was difficult.

A. Yes.

...

Q. And so before they put that light up, were people having problems getting across the road safely because of the traffic on 1st Avenue?

A. Sometimes.

...

Q. And when people were trying to cross the street, did cars have to stop to let pedestrians go across?

A. Yes.

...

Q. OK. Sometimes when people cross a street they will take a couple of steps into the street and try to make sure a car that's coming will stop so that they can finish crossing the street; did you ever see anything like that?

A. Yes.

Q. Was that a common occurrence at 1st Avenue South and South Massachusetts?

A. Yes.

Q. And you saw that before the October 2010 accident, I guess, multiple times?

A. Yes.

Q. Okay, and again that's because of the heavy traffic on 1st Avenue?

MR. SUTHERLAND: Object to the form.

A. Yes.

Q. And that's because there is a lot of pedestrians that are trying to cross 1st Avenue?

A. Yes.

CP 150:3- CP 151: 25.

Similarly, another security person at the Showbox testified:

Q. Have you ever heard of anybody having a problem crossing 1st Avenue South?

A. I have heard of people -- I have seen people have difficult times crossing 1st Avenue South.

Q. Can you tell us what you saw in that respect?

A. Typically after a busy night, people waiting for traffic to die down so that they can cross the street.

Q. At the time of this motor vehicle collision, there was no light at 1st Avenue and Massachusetts; is that correct?

A. I believe so, yes.

Q. After they put the light in, did that difficulty go away?

A. For the most part, yes.

CP226: 11-24.

Ms. Mars stopped immediately after the impact, stopping within 30 feet of the collision. CP165: 3; CP 197- 198 and CP 212-213. One of the security managers at the Showbox who witnessed the collision testified he saw Ms. Mars get out of her car and she did not appear intoxicated. CP 170: 1-12

IV. ARGUMENT

A. Standard of review.

The de novo standard of review applies to this court's review of the trial court's decision granting the summary judgment *Korslund v. DynCorp Tri–Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). But this court defers to the discretion of the trial court's decision to accept the supplemental declaration of Dr. Vigilante on the motion for reconsideration. *Chen v. State,* 86 Wn. App. 183, 192, 937 P.2d 612, review denied, 133 Wash.2d 1020, 948 P.2d 387 (1997).

B. All facts and inferences must be construed in favor of the plaintiffs. When doing so, Ms. Cho has produced evidence beyond speculation that the City's negligence was a proximate cause of the collision.

Summary judgment is appropriate only where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Hearst Communications, Inc. v. Seattle Times Co.*, 154

Wn.2d 493, 501, 115 P.3d 262 (2005). In addition, all facts and inferences from facts must be construed in a light most favorable to the non-moving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Based on the evidence construed in a light most favorable to Cho, the following facts have been established:

1. **Because of the numerous pedestrians trying to cross 1st Avenue South, the City had a duty to control traffic. That duty included the duty to stop vehicles so pedestrians could cross. If the City had stopped vehicles, Jane Cho would not have been struck;**

2. **The City also had a duty to geometrically re-design the road, such as building a pedestrian island, so pedestrians could get across the street without being hit. If that had occurred, Jane Cho would have used the island and the collision would not have happened;**

3. **The City had a duty to install a traffic light. If they had done so, the light would have either been green for Ms. Mars and red for Ms. Cho or red for Ms. Mars and green for Ms. Cho. Either way, the collision would not have taken place.**

C. The question of the City's duty and breach of same was not argued below.

The City did not bring the question of its duty and breach of its duty before the court. CP 128: 22-23; CP 129: 15-18. Per the declaration of Daniel Melcher at CP 317-361, and based on the case law,[3] the City: 1) breached its obligation to control vehicle/ pedestrian conflicts; 2) breached

[3] *See Chen v. City of Seattle,* 153 Wn. App. 890 at p. 907 and p. 909, 223 P.3d 1230 (2009), discussed in footnote 1.

its obligation to install a pedestrian island which would have given Ms. Cho a safe refuge; and 3) breached its obligation to install a traffic or pedestrian half signal. Construing all inferences in favor of Ms. Cho, the evidence is sufficient to allow a trier of fact to conclude the City's breaches proximately caused the collision.

D. Negligent conduct of Ms. Mars did not cut the causal chain of the City's own negligent conduct; rather, a jury could conclude both contributed to the injury.

The City's entire argument was that the chain of causation from its own negligent conduct was cut off because Ms. Mars drove in a negligent fashion while intoxicated. However, in light of the declaration of William Vigilante at CP 289-316 and CP 513-519, the degree of Ms. Mars' negligence is disputed and therefore an issue of fact for the jury. In this regard, Ms. Mars drove just fine all the way from Seattle to Tacoma and back again, and then from her apartment to the West Seattle Bridge and then to the scene of the collision. Unlike the cases relied on by the City of Seattle, discussed below, she did not punch the accelerator and swerve erratically,[4] she was not driving at an unusually fast speed,[5] she was not

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[4] *Medrano v. Schwendeman*, 66 Wn. App. at p. 609 (1992).
[5] *Klein v. City of Seattle*, 41 Wn. App. at p. 637-638 (1985); *Braegelmann v. County of Snohomish*, 53 Wn. App. at p. 382, 385 (1989); *Kristjanson v. City of Seattle*, 25 Wn. App. at p. 325 (1980).

having her passenger steer while she worked the pedals,[6] and she did not turn the wheel and crash into an object outside of her lane.[7] Rather, she remained in her lane, which is where the impact occurred and her only negligence is that she did not see pedestrians cross out from behind an obstruction. CP 335. She stopped immediately, within 30 feet of the collision. And one of the security managers testified he saw no sign of intoxication.

Moreover, even intentional criminal conduct of an intervening actor does not, as a matter of law, cut the causal chain of another actor's negligence. See *Parrilla v. King County*, 138 Wn.App. 427, 437, 157 P.3d 879 (2007) (citing *Bernethy v. Walt Failor's, Inc.*, 97 Wn. 2d 929, 653 P.2d 280). As recently stated by Division III:

> The issue of proximate cause, by contrast, is usually a question for the trier of fact. Levea v. G.A. Gray Corp., 17 Wash.App. 214, 219, 562 P.2d 1276 (1977). Specifically, Washington courts have consistently held that it is for the jury to determine whether the act of a third party is a superseding cause or simply a concurring one. Eckerson v. Ford's Prairie Sch. Dist. No. 11, 3 Wash.2d 475, 483–84, 101 P.2d 345 (1940).

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[6] *Kristjanson v. City of Seattle*, 25 Wn. App. at p. 325 (1980)

[7] *Medrano v. Schwendeman*, 66 Wn. App. at p. 609 (1992). *Klein v. City of Seattle*, 41 Wn. App. at p. 637-638 (1985); *Braegelmann v. County of Snohomish*, 53 Wn. App. at p. 382 (1989); *Miller v. Likins*, 109 Wn. App. at pp. 143-144 (2001); *Cunningham v. State of Washington*, 61 Wn. App. at p. 564, 571 (1991).

> There may be more than one proximate cause of an injury. State v. Jacobsen, 74 Wash.2d 36, 37, 442 P.2d 629 (1968). And the concurrent negligence of a third party does not break the chain of causation between original negligence and the injury. Id. If the defendant's original negligence continues and contributes to the injury, the intervening negligence of another is an additional cause. It is not a superseding cause and does not relieve the defendant of liability. Doyle v. Nor–West Pac. Co., 23 Wash.App. 1, 6, 594 P.2d 938 (1979); Eckerson, 3 Wash.2d 475, 101 P.2d 345.
>
> The general rule is that the contributing concurrent negligence of a third person is not a defense if the defendant's negligence was an "efficient cause" without which the injury would not have occurred. Eskildsen v. City of Seattle, 29 Wash. 583, 586, 70 P. 64 (1902). The rule is found in Restatement (Second) of Torts § 439: "If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability."

Travis v. Bohannon, 128 Wn. App. 231 at pp. 242-243, 115 P.3d 342 (2005); emphasis supplied; *see also Bernethy v. Walt Failor's*, 97 Wash.2d at 935, 653 P.2d 280 (1982) (finding it was for the jury to determine whether intentional criminal conduct of another broke the causal chain), *accord Mathers v. Stephens*, 22 Wn. 2d 364, 370, 156 P.2d 227 (1945); *accord Bordynoski v. Bergner*, 97 Wn. 2d 335, 341, 644 P.2d 1173 (1982).

More recently, in the context of an inadequate roadway design case against the City of Seattle, this court stated:

> The negligence of a third party does not absolve the city of its duty to maintain its roadways, including crosswalks, in a

> reasonably safe manner. Tanguma v. Yakima County, 18 Wash.App. 555, 561–62, 569 P.2d 1225 (1977) (quoting Lucas v. Phillips, 34 Wash.2d 591, 597–98, 209 P.2d 279 (1949); Restatement (Second) of Torts §§ 447, 449 (1965)).

Chen v. City of Seattle, 153 Wn. App. at p. 908 (2009).

Construing all inferences in Ms. Cho's favor, a trier of fact could easily conclude that the City's negligence in failing to install a traffic light, in failing to install a pedestrian island, and in failing to control vehicle/ pedestrian conflicts was a contributing cause of the injury.

E. Not only are the City's cases distinguishable, they were rightfully reversed by *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) and by *Lowman v. Wilbur*, 178 Wn. 2d 165, 309 P. 2d 387 (2013).

The issue of "proximate cause" is inextricably "intertwined" with the question of "duty." *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). Although the City recognizes "proximate cause" cannot be analyzed without first examining the scope of the duty owed[8] CP 132: 8-16; the City failed to undergo any type of duty analysis whatsoever. In *Chen,* this court stated that the scope of the duty owed by the City of Seattle is to all persons using the road and goes well beyond eliminating "inherently dangerous" or "misleading" conditions. *Chen v. City of*

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[8] *See also Hartley v. State*, 103 Wash.2d 768, 780, 698 P.2d 77 (1985) ("whether liability should attach is essentially another aspect of the policy decision which we confronted in deciding whether the duty exists").

Seattle, 153 Wn. App. 890, 894, 901-905, 909, 223 P. 2d 1230 (2009). What the City must do to meet its obligation is based on the "totality" of the "surrounding circumstances," *id.,* and "as the danger [at a particular roadway] becomes greater, the [municipality] is required to exercise caution commensurate with it." *Chen*, 153 Wn. App. at p. 909, *quoting Berglund v. Spokane County*, 4 Wn. 2d 309, 317-318, 103 P.2d 355 (1940).

Not only did the City fail to analyze the duty owed, but the cases it relied on, *Klein v. City of Seattle*, 41 Wn. App. 636, 705 P. 2d 806 (1985), *Braegelman v. County of Snohomish*, 53 Wn. App. 381, 766 P. 2d 1137 (1989), *Miller v. Likins*, 109 Wn. App. 140, 34 P. 3d 835 (2001) and *Medrano v. Schwendeman*, 66 Wn. App. 607, 836 P. 2d 833 (1992) (all of which suggest a municipality has no legal liability, as a matter of law, if another driver's severe negligent conduct intervenes) are distinguishable on the facts,[9] based on a faulty analysis[10] and were effectively reversed by *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). *See also Unger v. Cauchon*, 118 Wn. App. 165, 175, 73 P. 3d 1005 (2003), a

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[9] See "IV D" above.
[10] *Id.*

Division I case adopting the argument that *Keller* reversed the *Braegelmann*[11] line of cases.

Before *Keller* was decided, there was some confusion regarding whether a municipality owed its obligation to keep its roadways safe when they were used in a negligent manner. Municipalities, such as the City of Seattle, would routinely argue it had no duty to guard against unforeseeable negligent conduct.[12] The roadway authority based their argument on language contained in *Ruff v. King County*, 125 Wn.2d 697, 704, 887 P. 2d 886 (1995), wherein the Supreme Court stated:

> We recognize that the duty to maintain a roadway in a reasonably safe condition may require a county to post warning signs or erect barriers if the condition along the roadway makes it inherently dangerous or of such character as to mislead a traveler exercising reasonable care, or where the maintenance of signs or barriers is prescribed by law.

Ruff, 125 Wn.2d at 705.

Seven years later, the court clarified the duties outlined in the *Ruff* case when it decided the scope of municipal liability in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). In that case, a motorcycle

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[11] *Braegelmann v. County of Snohomish*, 58 Wn. App. 381, 766 P. 2d 1137 (1989).

[12] That argument was made by the City of Seattle even after *Keller* was decided. Rightfully, it was rejected by this court in *Chen v. City of Seattle,* 153 Wn. App. 890 at p. 907-908, 223 P.3d 1230 (2009).

driver sued the City for negligence, claiming it should have placed stop signs at an intersection. But evidence was presented that the motorcycle rider had been traveling 80 mph in a 30 mph zone, with his headlights off, before he crashed. The jury found the City had no liability but the Court of Appeals reversed, because it found the following jury instruction, which was based on WPI 140.01, "misleading and legally erroneous"[13]:

> A city has a duty to exercise ordinary care in the signing and maintaining of its public streets to keep them in a condition that is reasonably safe for ordinary travel by persons using them in a proper manner and exercising ordinary care for their own safety.

Keller, 146 Wn.2d at 241, 250. In remanding the case for another trial, the Supreme Court held that:

> a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.

Keller, 146 Wn.2d at 249.

The "misleading and legally erroneous" jury instruction rejected in *Keller* was not only practically identical to the one given in *Klein*,[14] but

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[13] *Keller*, 146 Wn. 2d at p. 250 (2002).

[14] The jury instruction in *Klein* stated:

> A city has a duty to exercise ordinary care in the design, and maintenance of its public roads to keep them in such a condition that they are reasonably safe for ordinary travel by persons using them in a proper manner and exercising ordinary care for their own safety.

it was wrongly adopted as the controlling law in *Miller*[15] *and Medrano.*[16] The *Klein* and *Miller* courts were wrong because their decision was based on the conclusion that the City only had a duty to keep its roads reasonably safe by persons using them in a "proper manner."[17] Based on its "legally erroneous"[18] understanding of the law, *Klein* and *Miller* wrongly concluded there could be no causal connection from the City's negligence if an extremely negligent driver later intervened. Likewise, *Braegelmann* relied on *Klein's* faulty analysis to also wrongly conclude the City's admitted negligence could not be a legal cause because the driver was speeding, crossed the center line and was highly intoxicated.

Medrano not only misapplied the law, but the facts in that case, as well as the issue to be decided, were materially different. In *Medrano*, the policy question analyzed to determine whether "legal causation" existed was whether the municipality owed liability to the highly intoxicated, speeding, reckless driver that swerved off a gravel road and flipped his truck. In our case, the policy question is whether the municipality should be responsible for their own liability for the harm it

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Klein, 41 Wn. App. at p. 638 (1985).
[15] *Miller*, 109 Wn. App. at p. 144-145 (2001).
[16] *Medrano*, 66 Wn. App. at p. 610 (1992).
[17] *Klein*, 41 Wn. App. at p. 638 (1985); *Miller*, 109 Wn. App. at p. 144-145 (2001).
[18] *Keller*, 146 Wn. 2d at p. 250 (2002).

caused to an innocent pedestrian who was injured by a driver who had no more fault than the average motorist not paying attention. Whereas there is no good reason to reimburse a highly reckless individual for harm they cause to themselves, there are plenty of good policy reasons to protect innocent victims. *See* RCW 48.22.030 (12) (wherein the legislature adopted the public policy to protect "innocent motorists" under UIM coverage, even when they were "intentionally injured" but not those motorist who injure themselves from intentional acts).

After the Supreme Court made its ruling in *Keller*, this court was faced with facts similar to our case. In *Unger v. Cauchon*, 118 Wn. App. 165, 73 P. 3d 1005 (2003), 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, relying on *Braegelmann* and *Klein*, 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. Unger appealed, and argued *Keller* reversed *Braegelmann*. *Unger*, 118 Wn. App. at p. 175. The Court of Appeals

accepted Unger's argument and therefore reversed the trial court's summary judgment order. In doing so, it stated:

> We agree with the Ungers because the trial court relied upon case law that was later affected by the Supreme Court's opinion in Keller v. City of Spokane, and there are material issues of genuine fact that should be resolved by a jury.

Unger, 118 Wn. App. at p. 174 (2003).

In its analysis, the *Unger* court specifically noted that *Braegelmann* "concluded there was no legal causation" "[b]ecause there was no duty." *Id.* Next, the court reasoned issues of proximate cause existed for the jury because the duty the roadway authority owed was to all persons, including highly negligent drivers:

> [*Keller*] held "that a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel." The court noted that its conclusion is supported by the comment in Washington's pattern instruction for duty, which states that " '[d]uty, as defined by this instruction, is not determined by the negligence, if any, of a plaintiff.'
>
> **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.

After this appeal was filed, the Supreme Court issued its opinion in *Lowman v. Wilbur*, 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. This court affirmed the dismissal, but the Supreme Court reversed because pursuant to *Keller*, the road authority's negligent conduct is not cut off simply because the negligent conduct of a speeding and intoxicated motorist also contributed to the collision. In ruling as it did, the Supreme Court 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). As stated in *Lowman*:

> This case presents an opportunity to clarify the interrelationship between questions of duty and legal causation in the context of a municipality's or utility's obligation to design and maintain reasonably safe roadways. 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. Contrary Court of Appeals cases predating Keller are disapproved.**

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

The court in *Lowman* also stated that"

> 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.

Further, if the City owes a duty to reckless motorists, like Unger and Keller, who injure themselves, the City also owes a duty to innocent bystanders, such as Ms. Cho, who are injured by reckless motorists. *Chen v. City of Seattle,* 153 Wn. App. at p. 908 (2009); *Tanguma v. Yakima County*, 18 Wn. App. 555, 561–62, 569 P.2d 1225 (1977) (quoting *Lucas v. Phillips*, 34 Wash.2d 591, 597–98, 209 P.2d 279 (1949); Restatement (Second) of Torts §§ 447, 449 (1965)).

Pursuant to *Unger*, *Keller* and *Lowman*e, the expansive duty owed necessitates a jury question on the proximate cause issue. That is why the Court of Appeals recently rejected the City of Seattle's argument that it

could not be held liable when the negligent conduct of a motorist intervened, stating:

> **There is likewise no merit to the city's argument that its duty to safely maintain roadways is tempered by motorists' duties to also exercise reasonable care.** Although the city need not insure against the negligence of drivers, Keller, 146 Wash.2d at 252, 44 P.3d 845, who are always bound to exercise due care to avoid colliding with pedestrians, see RCW 46.61.245, the negligence of motorists with respect to pedestrians is not determinative of whether road conditions were safe for pedestrian travel. The city owes a duty to pedestrians and motorists alike. The negligence of a third party does not absolve the city of its duty to maintain its roadways, including crosswalks, in a reasonably safe manner. Tanguma v. Yakima County, 18 Wash.App. 555, 561–62, 569 P.2d 1225 (1977) (quoting Lucas v. Phillips, 34 Wash.2d 591, 597–98, 209 P.2d 279 (1949); Restatement (Second) of Torts §§ 447, 449 (1965)). As the cases discussed above make clear, the circumstances that existed at the crosswalk provide the facts relevant to determining whether the city breached its duty to Liu.

Chen v. City of Seattle, 153 Wn. App. 890, 908 (2009); emphasis supplied.

In *Tanguma*, the County argued it had no liability for its failure to widen a bridge because the reckless driving of an oncoming vehicle was the "sole cause, or at least an intervening, superseding cause, of the accident." *Tanguma*, 18 Wn. App. at p. 560-61 (1977). Division III rejected that argument because reckless conduct of an oncoming vehicle was foreseeable. The Court stated:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.
>
> Restatement (Second) of Torts s 447 (1965).
>
> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.
>
> Restatement (Second) of Torts s 449 (1965).

Tanguma, 18 Wn. App. at p. 560-61 (1977); *see also Michaels v. CH2M Hill, Inc.*, 171 Wn. 2d 587, 613,257 P.3d 532 (2011) (applying Restatement s 447 to find that reckless conduct of a third party does not cut off the causal chain of negligence asserted against the defendant).

Certainly, issues of fact exist as to whether the City should have realized there would be an inattentive driver, including an intoxicated driver, on 1st Avenue South, especially because it is located near two large stadiums that serve alcohol to its patrons. In this regard, the court can take

judicial notice that inattentive or intoxicated drivers are not surprising or unusual and is a routine and expected occurrence. ER 201. Further, a reasonable juror could conclude that the City's failure to install appropriate treatments at the intersection was a contributing cause of the collision. In fact, the pedestrian island was designed to eliminate the danger which caused Ms. Cho's injury, and if it had been installed, Ms. Cho would have used it and no collision would have taken place. *Declaration of Jane Cho.*

In *Travis v. Bohannon*, 128 Wn. App. 231 at pp. 242-243, 115 P.3d 342 (2005), discussed at "V D" above, the court stated:

> The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.

Restatement (Second) Torts § 443.

According to official comment "b" to the Restatement:

> The word "normal" is not used in this Section in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary. It means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard its intervention as so extraordinary as to fall outside of the class of normal events.

Just as it was foreseeable in *Tanguma* that a reckless driver would cause an accident, it was foreseeable that a vehicle driving down 1st Avenue South would not see pedestrians crossing a busy road at night. Especially because another vehicle was on Ms. Mars left, blocking her view of pedestrians. CP 335. And Ms. Mars signed statement says:[19]

> I did not see the people trying to cross the street at the intersection at 1st and Massachusetts. ... There was no stoplight there, there was no crosswalk sign or warning signals. There was no flagger.

The cases relied on by the City are not only premised on bad law and faulty reasoning, but are distinguishable on the facts. For example, *Hartley v. State*, 103 Wn. 2d 768, 698 P. 2d 77 (1985) wasn't even a case against a municipality for an improper road design. Rather, it was a claim that an accident occurred because the Department of Licensing failed to revoke a person's driver's license. *Compare Hertog v. City of Seattle*, 138 Wn.2d 265, 284 (1999) (denying summary judgment motions based on legal causation in cases involving community placement, wherein the court reasoned it would not "deny potential liability on the basis that plaintiffs may have difficulty in proving their cases"). *Id.* at 291.

Moreover, the fact that Ms. Mars was unaware of the pedestrians because her view was blocked by another car, as well as the fact she

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[19] CP 331; CP 233-234.

would have stopped at a red traffic signal, distinguishes our case from the other cases relied on by the City. In fact in *Garcia v. State of Washington*, 161 Wn. App. 1, 270 P. 3d 299 (2011), there wasn't even an allegation that the road authority should have installed a traffic light, let alone any evidence the driver would have heeded the signal. And likewise, the driver in *Cunningham v. State of Washington*, 61 Wn. App. 562, 811 P. 2d 225 (1991) testified he was aware of the presence of a gate he drove into, but did so anyhow. 61 Wn. App. 571. Further, none of the cases relied on by the City were premised on the municipality's failure to install a pedestrian island, which Ms. Cho testified she would have used. CP 269-270. Nor were any of those cases based on the breach of the City's obligation to control and direct traffic, which certainly would have prevented the collision. And finally, unlike our case, the injured pedestrian testified that if the road authority had installed the treatments, it would have made a difference. For example, Ms. Cho testified that if she had the red light and Ms. Mars had the green light, Ms. Cho would not have proceeded; as such, there certainly would have been no accident. CP 269- 270.

F. The City's argument that causation is "speculative" should also be rejected.

The City's argument that causation is too speculative to withstand summary judgment was rejected in a case that had less proof of causation than our case. In doing so, the court in *Tanguma v. Yakima County*, 18 Wn. App. 555, 561–62, 569 P.2d 1225 (1977), discussed at "IV E" above, stated:

> No doubt it can be argued that the oncoming driver **might** have acted negligently, even if he either knew of the situation himself or received adequate warning, but this does not excuse the failure to warn any more than the failure of an airline to provide seat belts for its passengers would be excused on the theory the passengers might not use them anyway. It cannot be gainsaid that one who has a duty to warn another of a peril can be excused on the theory that the other may be oblivious to the good advice.

Tanguma, 18 Wn. App. at p. 562 (1977) (emphasis supplied).

Likewise, in *Wojcik v. Chrysler and Kitsap County*, 50 Wn. App. 849 (1988), an intoxicated and speeding driver spun out of control and crashed into a utility pole on a road he was highly familiar with. Kitsap County moved for summary judgment, arguing that any inadequacy in the road could not be a proximate cause of the collision. The trial court granted the County's motion for summary judgment, but the Court of Appeals reversed, stating:

> The proximate cause of an injury is "that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred." Stoneman v. Wick Constr. Co., 55 Wash.2d 639, 643, 349 P.2d 215 (1960).
> ...
>
> ...
>
> Under the definition of proximate cause stated above, the evidence creates an issue as to whether Wojcik's accident and injuries would have occurred had the shoulder been in compliance with applicable safety standards. Stevens indicated in his deposition that the shoulder was too narrow and too steep and in the absence of a more level shoulder, a guard rail should have been in place. From this evidence, we can infer that Wojcik **might** have been able to regain control of his vehicle had the county adequately maintained the shoulder and that a guard rail may have prevented the vehicle from rolling over. While we do not know precisely at what point Wojcik sustained his injuries, we reasonably can infer that the rolling over caused at least some of his injuries. Therefore, an issue of fact exists as to whether the county's improper maintenance of the road shoulder proximately caused Wojcik's injuries.

Wojcik, 50 Wn. App. at p. 856, 857-58 (1988) (emphasis supplied).

In *Stephens v. City of Seattle*, 62 Wn. App. 140, 813 P. 2d 608 (1991) a negligent, 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.*

The declarations of William Vigilante and Daniel Melcher created material issues of fact. *Eriks v. Denver*, 118 Wash.2d 451, 457, 824 P.2d 1207 (1992) ("an expert opinion on an 'ultimate issue of fact ' is sufficient to defeat a motion for summary judgment") quoting *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 352, 588 P.2d 1346 (1979)). *Miller v. Likins*, 109 Wn. App. 140, 34 P. 3d 835 (2001), relied on by the City, was not only based on law that was later determined by the Supreme Court to be "legally erroneous,"[20] but the facts of *Miller*, as well as the facts of *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 606 P. 2d 283 (1980), are also readily distinguishable from our case. Neither plaintiff in those cases even alleged the road authority was to blame due to its failure to install

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[20] The *Miller* court not only wrongly concluded the road authority owed no duty when the road was not used in a "proper manner,"[20] but the court thought it was significant there was no evidence to suggest the driver "was in fact confused or misled by the condition of the roadway." *Miller*, 109 Wn. App. at p. 147 (2001). But under a subsequent case, *Chen v. City of Seattle*, 153 Wn. App. 890 (2009), the Court of Appeals rejected the City's contention that no negligence action could be brought against a road authority unless the road was confusing, misleading or otherwise inherently dangerous. *Chen*, 153 Wn. App. at pp. 899-906 (2009).

pedestrian safety treatments at an intersection, such as a traffic light, a pedestrian island, or through a uniformed official directing traffic. In *Miller*, the driver either ran over a pedestrian on a skateboard in the middle of the road or drifted onto the shoulder and struck him.[21] The plaintiff did not assert the road authority should have placed a guard rail, only some additional stripes, which certainly would not have prevented the accident. And in *Kristjanson*, the driver was not only intoxicated, but: 1) he was driving twice the speed limit; 2) around a steep curve; 3) he knew about the curve; 4) he had his passenger steer while he accelerated; and 5) he went over the center line striking another vehicle. Under those facts, a "curve warning" sign would not have made any difference. On the other hand, Ms. Mars: 1) was not speeding; 2) she stopped her vehicle within 30 feet of the impact; 3) her view of the pedestrians was blocked by another car; 4) she had no problem driving before the impact; 5) she kept her car in her own lane; and 6) she previously stopped at every light from Seattle to Tacoma and back. Moreover, Ms. Cho would have used the pedestrian island or a traffic control signal, in addition she would have waited for traffic to stop had there been a control officer directing same. CP 269-270.

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[21] The facts were disputed. *Miller*, 109 Wn. App. at p. 143 (2001).

G. The plaintiff is not asking this court to make the City the guarantor of public safety.

The City also argued that if they are not granted summary judgment, they will become the "guarantor of public safety." CP 133: 11 That argument should be rejected. Jane Cho is not asking the court to impose liability on the City; rather, Jane Cho is asking the court to allow a jury to determine whether its negligent conduct, which they admit for purposes of this motion, contributed to the collision.

V. CONCLUSION

For all of the reasons set out above, this court should reverse the trial court's decision granting summary judgment in favor of the City of Seattle. The case should be remanded for a jury trial.

Dated this 15th day of February, 2014 at Seattle, Washington.

BUCKLEY & ASSOCIATES

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

The undersigned does hereby certify that on this **18th** day of **February**, 2014, she caused a true and correct copy of the following document(s):

1. **APPELLANT'S OPENING BRIEF**

to be delivered via the method indicated below to the following party(ies):

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