NO. 945683

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 74638-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MITCHELL KANE,

Appellant,

v.

BETHANY COMMUNITY CHURCH,

Respondent.

ANSWER TO STATEMENT OF GROUNDS FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

There is no reason for this Court to accept review of this case. In fact, appellant's Petition for Review doesn't even cite RAP 13.4, let alone address the considerations outlined in that dispositive rule. Instead, appellant's Petition for Review is a rehash of the misleading arguments that appellant made before the trial court and the Court of Appeals. Both of those courts saw through appellant's arguments and there is no reason (or basis) for this Court to hear those same arguments.

This case arises out of an intersection collision in the Green Lake neighborhood. Appellant Mitchell Kane was injured because Jonathan Hilton was driving drunk—with his drinking buddy in the car—and failed to stop or yield (as he was required to do) before crossing North 80th Street (a major arterial) on Stone Avenue North. Hilton pled guilty to Vehicular Assault.

Unfortunately, Kane brought unfounded claims against Bethany Community Church (a property owner near the intersection) claiming Hilton's failure to stop or yield at the intersection was somehow caused by a small tree located more than 40 feet north of the stop sign on southbound Stone Avenue North. As the trial court and Court of Appeals determined, this claim is unsupported by the facts:

CP 378.

More importantly, Kane's liability theory against Bethany was not supported by Hilton—who testified he does not know why he failed to stop or yield.

> Q. As you sit here today, you cannot testify with any degree of certainty that as you were sitting in your car driving southbound on Stone approaching 80th that there were branches or trees or foliage of any sort obstructing the stop sign leading you to not stop; is that a correct statement?
>
> MR. NICHOLS: Same objection.
>
> A. Well, yeah, I would say it's a correct statement. CP 42-43 at 64:19-65:1.
>
> ***
>
> Q. (By Mr. Nichols) So you have no recollection of whether they obscured your vision, is that your testimony?

A. Yes. CP 41 at 53:12-15.

In other words, Hilton (the only person who would know) cannot say what caused his failure to stop or yield other than his undisputed blood alcohol content of .116 g/100mL.

The Court of Appeals affirmed the trial court's dismissal of Kane's claims against Bethany on summary judgment. Appellant argues (as he did before the Court of Appeals) that Bethany should have been required to prove that Hilton's intoxication was the sole cause of the accident. But that argument completely misses the point of Bethany's summary judgment motion and the decisions by the trial court and the Court of Appeals.

The Court of Appeals correctly confirmed that Kane could not rely on speculation or argumentative assertions that unresolved factual issues remained on the issue of proximate cause. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 721 P.2d 1 (1986). The Court of Appeals (correctly) found that Kane's speculation that had the stop sign been fully visible (rather than mostly visible), Hilton *might* have seen the stop sign, *might* have reacted to the stop sign, *might* have applied the brakes, *might* have come to a stop at the intersection of 80th and Stone Avenue North, and *might* not have hit Kane, was insufficient to carry plaintiff's burden of proof on causation. *See Little v. Countrywood Homes*

Inc., 132 Wn. App. 777, 779-780, 133 P.3d 944, *review denied*, 158 Wn.2d 1017 (2006); *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 606 P.2d 283 (1980). Because none of the RAP 13.4 criteria are present here, this Court should deny review.

II. IDENTITY OF RESPONDENT

The respondent is Bethany Community Church ("Bethany").

III. CITATION TO COURT OF APPEALS DECISION

Respondent asks this Court to deny appellant Kane's Petition for Review of the Court of Appeals decision affirming Bethany's dismissal on summary judgment in *Kane v. City of Seattle*, 198 Wn. App. 1024, 2017 WL 1137130 (March 27, 2017). The Court of Appeals denied Kane's Motion for Reconsideration on April 19, 2017.

IV. COUNTER STATEMENT OF THE ISSUES

The Opinion of the Court of Appeals correctly applied the facts of this case to well-settled Washington law. The Court of Appeals' decision should be affirmed.

1. Kane was injured because Hilton ran a stop sign. In support of his claims against Bethany, Kane speculated that Hilton failed to stop because branches from a small tree owned by Bethany partially blocked the stop sign. However, Hilton testified that he had no idea why he failed to stop. The Court of Appeals affirmed the trial court's dismissal

of Kane's negligence claim against Bethany because Kane's speculation could not meet his burden of proof on causation. Should this Court deny Kane's Petition for Review because the Court of Appeals' decision is (1) not in conflict with any decision of this Court or the Court of Appeals, (2) does not involve a constitutional issue, and (3) does not involve an issue of substantial public interest, as required by RAP 13.4(b)?

2. In *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990), this Court held a negligence claim presented as a nuisance claim need not be considered apart from the negligence claim. Here, Kane alleges he was injured because Bethany was negligent in maintaining a small tree. The Court of Appeals affirmed the order denying Kane's motion to amend his complaint to add a nuisance claim based on the same facts as his negligence claim. Should this Court deny Kane's Petition for Review because Kane fails to offer any grounds justifying review under RAP 13.4?

V. STATEMENT OF THE CASE

A. Facts.

At 11:30 p.m. on July 9, 2014, Jonathan Hilton failed to stop before trying to cross a busy arterial and caused Mitchell Kane (who had the right of way) to hit him from the right. CP 28-32. Hilton was driving

south on Stone Avenue, a small neighborhood street, and Kane was driving his moped east on North 80th Street, a major arterial. CP 35 at 5:22-24; CP 53-54. It is undisputed that Kane had the right of way. Hilton's approach to the intersection was controlled by a stop sign and a stop bar on the pavement. *Id.;* CP 57.

Hilton knew he was approaching an intersection. CP 37 at 31:22-32:5. He also admitted he did not slow down or otherwise take any precautions before entering the intersection. CP 38 at 35:9-36:1.

Police officers arrived on the scene and immediately noticed that Hilton's speech was "thick and slurred" and that his "pupils were dilated." CP 64. Hilton failed a series of field sobriety tests and was arrested for suspicion of DUI. CP 53-54. A later blood draw showed that his blood alcohol content was .116g/100mL (above the legal limit of .08). CP 45 at 86:8-87:4. On May 14, 2015, Hilton pled guilty to Vehicular Assault. CP 71.

The first person to try to claim tree branches might have obstructed Hilton's view of the stop sign was Kane's counsel. But, Kane's counsel's conjecture on that issue is not supported by Hilton (the drunk driver) or by any other evidence. In his interrogatory answers, Hilton admitted:

> ...I didn't see the stop sign until I got to it; I remember trees being there but currently have no recollection of whether they obscured my vision.

CP 79. During his deposition, Hilton repeatedly admitted he had no idea why he did not see the stop sign.

> Q. Let me ask you this, the last two sentences of your answer says, "I was driving to drop off Sean at his house when the accident occurred. I didn't see the stop sign until I got to it. I remember trees being there but currently have no recollection of whether they obscured my vision." Is that correct?
>
> A. Yes. CP 50 at 13:11-18.
>
> ***
>
> Q. So is it fair to say as we sit here today, you don't know why you missed the stop sign on July 9, 2014?
>
> MR. NICHOLS: Objection, asked and answered.
>
> A. Yeah. I would say it's safe to say that I don't know why. CP 40 at 52:16-20.
>
> ***
>
> Q. So what I am asking you is as we sit here today, your answer is still currently, "I have no recollection of whether they obscured my vision." Is that accurate?
>
> A. Yes. CP 41 at 53:12-15.
>
> ***
>
> Q. Mr. Hilton, I have heard you today and at your prior testimony making a lot of statements about what you believe and what you assume and it's very natural for us in conversation to want to be able to provide an answer. But, unfortunately, with testimony we need a definitive answer one way or another. So as you sit here today, you do not know

what caused you to not notice the stop sign in time; is that a correct statement?

MR. NICHOLS: Object to the form.

A. Yeah. CP 42 at 63:22-64:6.

***

Q. As you sit here today, you cannot testify with any degree of certainty that as you were sitting in your car driving southbound on Stone approaching 80th that there were branches or trees or foliage of any sort obstructing the stop sign leading you to not stop; is that a correct statement?

MR. NICHOLS: Same objection.

A. Well, yeah, I would say it's a correct statement. CP 42-43 at 64:19-65:1.

***

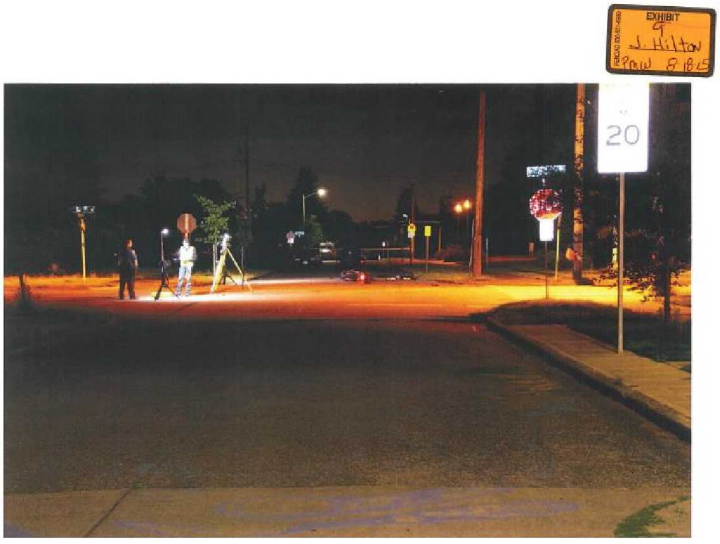
Q. (By Mr. Nichols) So you have no recollection of whether they obscured your vision, is that your testimony?

A. Yes. CP 44 at 83:6-9.

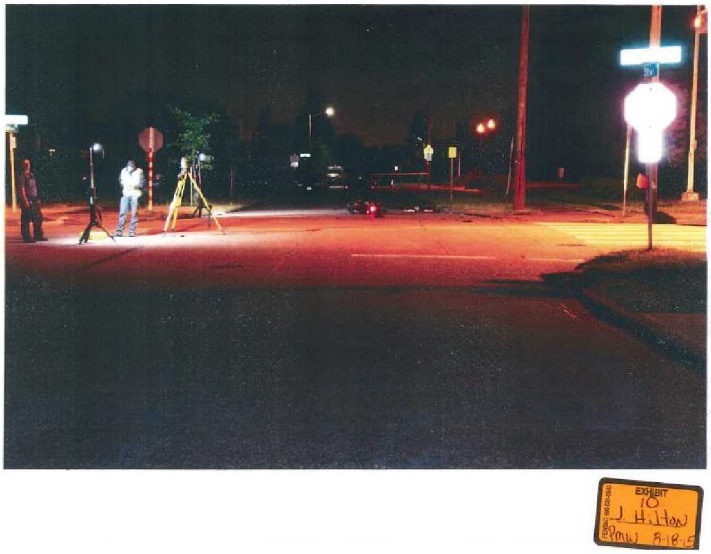
The Seattle Police Department investigated and photographed the accident scene that night. CP 379, 381. The police photographs show the stop sign as it would have appeared to Hilton as he approached the intersection. Among other things, Hilton's car's headlights would have caused the stop sign to reflect brightly in the darkness.[1] CP 37 at 30:1-3.

[1] Kane cannot provide any insight into why Hilton failed to stop or otherwise yield to him because, among other reasons, he has no memory of the accident. CP 86.

Also, as part of his investigation, Detective Bacon reviewed the in-car video of a responding officer which depicts the same southbound approach on Stone Avenue North approaching North 80th Street—the same approach taken by Hilton an hour earlier. CP 570-571, at ¶ 7. The stop sign was visible from a distance of 120 feet. *Id.*



CP 381.



CP 378. Even Hilton admits the stop sign is clearly visible. CP 38 at 35:2-7.

B. Procedural History.

1. The Trial Court's Ruling on Summary Judgment.

Kane filed this lawsuit in November of 2014. CP 1-3. On May 28, 2015, Bethany and the City of Seattle notified Kane they intended to file for summary judgment. CP 141. On September 2, 2015, Kane moved to amend his complaint to add a claim for nuisance. CP 92-94. Relying on Washington law, which holds a plaintiff may not pursue claims of private or public nuisance on what is in essence a claim sounding in negligence, Bethany opposed Kane's motion.[2] The trial court appropriately denied Kane's motion to amend. CP 198-199.

On September 29, 2015, Bethany and the City of Seattle filed motions for summary judgment. CP 8-20; CP 544-567. At Kane's request, those motions were set over until November 2015. CP 118-126. On November 13, 2015, following oral argument, the Honorable Jean Rietschel ruled from the bench and dismissed Kane's claims against Bethany and the City of Seattle. CP 529-530. The trial court ruled that, although there was some evidence that the stop sign was partially

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[2] *Atherton Condominium Apartment-Owners Ass'n Bd of Directors*, 115 Wn.2d at 527 ("[i]n those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied.").

obstructed, Hilton's testimony never deviated: he has no recollection of whether the tree obstructed his vision the night of the accident.[3] RP 39 at lines 15-16. Judge Rietschel ruled that Kane had failed to meet his burden of proof on causation. RP 41.

Judge Rietschel also ruled that Kane's duty analysis was flawed. Kane's expert analyzed Hilton's ability to stop factoring in Hilton's delayed reflexes (due to his intoxication) and his travel in excess of the speed limit, and concluded Hilton did not have enough time to stop. RP 40:9-12. Conspicuously absent was testimony that a sober driver traveling the speed limit would have had difficulty seeing and obeying the stop sign. The trial court correctly concluded Bethany did not owe Kane a duty to protect him against a drunk speeding driver. RP 40-41.

2. The Court of Appeals' Opinion.

On March 27, 2107, the Court of Appeals affirmed the trial court's dismissal of Kane's claims against Bethany. 2017 WL 1137130, at * 3. The Court of Appeals reasoned "factual causation may become a question

[3] Kane presented the trial court with the same deposition testimony relied upon in his appellate brief and argued Hilton had admitted the tree branches obstructed his vision of the stop sign. *App. Brief,* pp. 7-8. This is not correct. The testimony consists of an exchange between Hilton and Kane's counsel regarding a photo Hilton had never seen. The trial court and Court of Appeals correctly found the cited testimony related specifically to the photo, but that the thrust of Hilton's testimony never changed: he didn't know that, in fact, the tree branches obstructed his vision. RP 39; *Kane,* WL 1137130, at *2.

of law for the court if the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion." *Id.* at *2 (citing *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944, *review denied*, 158 Wn.2d 1017 (2006) (citing *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985)). The Court of Appeals concluded Kane's speculation regarding why Hilton failed to stop at the stop sign was insufficient to carry Kane's burden of proof on causation, because "Hilton repeatedly testified he did not know why he failed to stop." *Kane*, 2017 WL 1137130, at * 2.

The Court of Appeals also ruled that the trial court did not abuse its discretion denying Kane's request to add a claim of nuisance. Applying Washington law, the Court of Appeals correctly ruled Kane's allegations did not give rise to a separate nuisance claim. 2017 WL 1137130, at * 3 (*citing Hostetler v. Ward*, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985), *review denied*, 106 Wn.2d 1004 (1986); *Atherton Condominium Apartment-Owners Ass'n*, 115 Wn.2d 506, 799 P.2d 250 (1990).

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) specifies that review will be accepted *only* if (1) the Court of Appeals decision is in conflict with a decision of the Supreme Court or another Court of Appeals decision; (2) if it involves a significant

question of law under the State or Federal Constitutions; or (3) if it involves an issue of substantial public interest. RAP 13.4(b)(1)-(4).

Kane's Petition for Review doesn't even cite to RAP 13.4 and wholly fails to offer adequate grounds and supporting argument to justify this Court accepting review of the Court of Appeals' straightforward decision. This Court should deny Kane's Petition for Review.

A. The Court of Appeals' Decision is Not in Conflict with Any Supreme Court or Court of Appeals Decision.

The Court of Appeals decision here does not conflict with any Court of Appeals or Supreme Court decision. In fact, it is consistent with *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014)—the case cited by Kane. As Kane correctly notes:

> [t]he moving party bears the burden of showing that there is no genuine issue of material fact. If this burden is satisfied, the nonmoving party must present evidence demonstrating a material issue of fact. Summary judgment is appropriate if the nonmoving party fails to do so.

Watson v. Boeing Co., 181 Wn.2d 391, 395 (2005) (quoting from *Petitioner's Pet. for Review*, p. 7.)[4]

In order to prove a claim for negligence, Kane must establish the existence of a duty, a breach of that duty, and a resulting injury. *Marshall*

[4] The standard is reiterated in another case cited by appellant for a different proposition. *See Atherton Condominium Apartment-Owners Association*, 115 Wn.2d at 516 (if nonmoving party fails to make a showing sufficient to establish an element essential to case, court should grant summary judgment).

v. Bally's Pacwest, Inc., 94 Wn. App. 372, 378, 972 P.2d 475 (1999). Of course, for liability to attach, the alleged breach must be the **cause** of the injury. "Even if negligence is clearly established, the [defendant] may not be held liable unless their negligence caused the accident." *Id.* A verdict on causation cannot be based on an unsupported theory or speculation. *Marshall*, 94 Wn. App. at 378; *See also Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006), *review denied*, 158 Wn.2d 1017 (2006).

Here, Kane failed to present *prima facie* evidence of causation. Instead, Kane relied on speculation—arguing that, given additional sight distance, Hilton *might* have reacted differently and the accident *might* have been avoided. But, speculation cannot create a material issue of fact. *Little*, 132 Wn. App. at 780 (summary judgment affirmed for lack of proof that the accident was more probably than not caused by defendant's violations of safety standards); *see also Cho v. City of Seattle*, 185 Wn. App. 10, 341 P.3d 309 (2014) *review denied*, 183 Wn.2d 1007 (2015) (speculation or conclusory statements are insufficient to withstand summary judgment); *Kristjanson*, 25 Wn. App. at 327 (summary judgment affirmed because the plaintiff could not show defendant's actions proximately caused his injuries); *Marshall*, 94 Wn. App. at 378 ("a verdict [on causation] cannot be founded on mere theory or speculation").

In addition, contrary to appellant's argument (rejected below), the burden was never on Bethany to prove why Hilton failed to stop. As the Court of Appeals confirmed, the burden was on Kane (the plaintiff) to present *prima facie* evidence that the tree's branches were the reason Hilton failed to yield or stop at the intersection. On that issue, Kane could only rely on speculation and argumentative assertions. The Court of Appeals appropriately dismissed Kane's claim because speculation is insufficient to create a material issue of fact.

B. This Case Does Not Involve a Significant Constitutional Question Requiring Review Because Courts at All Levels Routinely Dismiss Claims on Summary Judgment.

This Court has previously confirmed that, when, as here, there are no issues of material fact a summary judgment ruling does not improperly infringe on a litigant's constitutional right to a jury trial. *LaMon v. Butler*, 112 Wn.2d 193, 199 n. 5 (1989), *certiorari denied,* 110 S.Ct. 61, 493 U.S. 814; *see also Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015). In short, there is no basis for this Court to take up review of this case pursuant to RAP 13.4(b)(3).

C. The Court of Appeals Appropriately Affirmed the Trial Court's Denial of Kane's Motion to Amend.

Finally, in connection with appellant's claim that he should have been permitted to assert a nuisance cause of action, this Court previously held that:

> In Washington, a "negligence claim presented in the garb of nuisance" need not be considered apart from the negligence claim. *Hosteller v. Ward*, 41 Wash.App. 343, 360, 704 P.2d 1193 (1985), *review denied* 106 Wn.2d 1004 (1986).
>
> ...
>
> Owners' contention that Atherton is a nuisance is premised on their argument that Blume was negligent in failing to construct Atherton in compliance with the applicable building code. In other words, even if Atherton does constitute a nuisance, the nuisance would be solely the result of Blume's alleged negligent construction. Accordingly, we do not consider the nuisance claim apart from the negligence claim, discussed supra. We conclude that the trial court properly dismissed Owner's nuisance claim.

Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co., 115 Wn.2d 506, 527-528, 799 P.2d 250 (1990).

Contrary to appellant's argument, there is no ambiguity in this Court's decision that "[i]n those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied." *Atherton*, 115 Wn.2d at 527. Moreover, the official

comments to the WPI 380.00 support and reiterate this Court's ruling in *Atherton.*

> Practitioners should be aware that a nuisance claim that is simply a restated negligence claim need not be the subject of a separate instruction on nuisance. A party's characterization of the theory of recovery is also not binding upon the court. It is the nature of the claim that controls. Accordingly, the trial court's refusal to give a proposed instruction on nuisance that was based upon the same omission to perform a duty that was alleged to constitute negligence has been held to be proper under Washington law. *See, e.g., Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990); *Kaech v. Lewis County Pub. Util. Dist.,* 106 Wn.App. 260, 23 P.3d 529 (2001); cf. *Albin v. National Bank of Commerce*, 60 Wn.2d 745, 753, 375 P.2d 487 (1962).

WPI 380.00.

Here, Kane's only claim against Bethany was a negligence claim. Kane alleged that Bethany negligently failed to maintain a tree located forty-one feet north of a stop sign and that the branches from that tree were what caused Hilton to blow the stop sign—a claim that was not supported by Hilton's testimony. CP 44 at 83:6-9. Because Kane relied on identical allegations to support both his negligence claim and his proposed nuisance claim, those claims are inseparable. Following Washington law, the Court of Appeals properly affirmed the trial court's

denial of Kane's motion to amend to add a futile nuisance claim. 2017 WL 1137130, *4.

VII. CONCLUSION

None of Kane's assertions in his Petition for Review meet the RAP 13.4 considerations for this Court's acceptance of review. Based on the preceding response, Bethany's underlying Response Brief, and the Court of Appeals correct and well-reasoned decision, Respondent Bethany respectfully requests that this Court deny Kane's Petition for Review.

RESPECTFULLY SUBMITTED this 19th day of June, 2017.

KELLER ROHRBACK L.L.P.

By */s/ Mirén C. First*
Mirén C. First, WSBA #26202

Attorneys for Respondent Bethany Community Church

CERTIFICATE OF SERVICE

I, Megan Johnston, declare under penalty of perjury, that on the date noted below, I caused a copy of the foregoing document to be served on the individuals identified below via E-Mail and First Class U.S. Mail, postage prepaid:

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_____
Megan Johnston

4833-3164-2186, v. 1

KELLER ROHRBACK L.L.P.

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