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No. 57218-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE ESTATE OF WESLEY A. EVANS, by and through its personal representative, WILLIAM EVANS, JR., individually and on the behalf of the beneficiaries of the ESTATE OF WESLEY A. EVANS; DELLA EVANS, individually,

Respondents,

v.

THE CITY OF TACOMA, a municipal entity under the laws of the State of Washington, TACOMA PUBLIC UTILITIES and TACOMA RAIL, agencies/sub-divisions of the City of Tacoma

Petitioners.

PETITION FOR REVIEW

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I. INTRODUCTION

This case presents a definitive opportunity for this Court to: (1) affirm the law on proximate cause and speculation for accidents with no eyewitness testimony in the face of the intense criticism from the Court of Appeals in *Behla v. R.J. Jung*, *LLC*, 11 Wn. App. 2d 329 (2019) about the line of cases stemming from this Court's decision in *Gardner v. Seymour*, 27 Wn.2d 802 (1947); and (2) overturn the clearly erroneous decision from the Court of Appeals, which reversed the Trial Court's entry of summary judgment in favor of Petitioners (hereafter "Defendants"). This lawsuit arises out of a fatal accident between a vehicle and a train in which the deceased driver Wesley Evans, Jr. ("Decedent") was likely distracted by a videogame playing on his cell phone. Respondents ("Plaintiffs") assert that the accident instead occurred because Defendants negligently failed to provide proper lighting and warnings at the train crossing. This lawsuit was properly dismissed by the Trial

Court in accordance with *Gardner* because there are two theories of how the accident happened, only one of which would create liability for Defendants, and there is no evidentiary basis for the jury to determine which of the two theories is correct. The Court of Appeals then erred when it reversed the Trial Court and invited the jury to speculate on the cause of the accident.

The *Gardner* line of cases are important to the public interest because accidents in which there is no eyewitness testimony about causation tend to be fatal or very serious accidents. These important cases have come under fire by the Court of Appeals, which explicitly stated four years ago "We criticize" the holding in *Gardner*. *Behla v. R.J. Jung, LLC*, 11 Wn. App. 2d 329, 336 (2019). This lawsuit presents an ideal opportunity for this Court to push back on the Court of Appeals and affirm the validity of the *Gardner* line of cases while overturning an incorrect decision from the Court of Appeals.

II. IDENTITY OF PETITIONERS

The Defendants in this matter, the City of Tacoma, Tacoma Rail, and Tacoma Public Utilities, seek review of the decision of the Court of Appeals identified in Section III below.

III. COURT OF APPEALS DECISION BEING APPEALED

Division II of the Court of Appeals issued an unpublished decision in Cause No. 57218-4-II on April 13, 2023, and Defendants petition for review of this decision.

IV. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

The Court of Appeals erred when it reversed the Trial Court's Order granting summary judgment for Defendants. This Court should grant this petition for review, reverse the Court of Appeals, and reinstate the Order for summary judgment in favor of Defendants. The decision from the Court of Appeals was incorrect because there is no evidence from which a reasonable jury could find, on a

more likely than not basis, that the Decedent was not distracted by his cell phone at the time of the collision. Instead, the only way a jury could determine Decedent was not distracted by his cell phone would be by impermissibly speculating that he was not distracted, but without any evidentiary support. Undisputed evidence was presented that the videogame was playing on Decedent's phone at the time of the crash. Conversely, there is: (1) no testimony Decedent was not distracted; (2) no evidence of what Decedent was doing in his car minutes before the accident; and (3) no basis to infer from the video of Decedent crashing into the train at a high speed without braking that Decedent was paying attention as he approached the train. Under these facts, there is no basis for a jury to reasonably infer that the videogame running on Decedent's phone at the time of the accident was not the cause of the accident.

V. STATEMENT OF THE CASE

A. Statement of the Facts

1. Procedural History and Decision by Court of Appeals

Defendants moved for summary judgment based on the lack of evidence on proximate cause to create a triable issue of material fact about whether any purported negligence by Defendants, and not the cell phone, was the cause of the accident. CP 413-427. The Trial Court granted Defendants' motion after oral argument, and then denied Plaintiffs' request for reconsideration. CP 1498-1500 and 1567-1569. Plaintiffs subsequently filed an appeal.

The Court of Appeals did not grant oral argument on appeal and decided to rule on the briefs submitted by the parties. After reviewing the briefs, the Court of Appeals reversed the Trial Court's summary judgment Order and remanded the case to the Trial Court for further proceedings. The Court of Appeals stated "the fact that

[Decedent] swerved only at the last minute could have been because of the clearly documented visibility issues at the crossing" and that "the jury could just as easily infer that the game was open but not being actively played by Evans as he approached the intersection (for example, he had been playing the game and left it open but was not playing it immediately prior to the collision)." Appendix 10. Even though the Court of Appeals agreed "There is no evidence where the phone was in the car, [and] there is no evidence where [Decedent] was looking as he was driving towards the train[,]" the Court of Appeals incorrectly believed that it would be appropriate for the jury to speculate on where the phone was and what Decedent was doing in order to make a decision on proximate cause. Appendix 11.

2. Decedent Was Well Aware of the Crossing.

This accident occurred at the railroad crossing on Milwaukee Way in Tacoma, Washington. CP 454-456. This is a busy crossing used by trains frequently

throughout the day and night. CP 430-432. Evans was familiar with this crossing because, in his previous employment with Pacific Rail, he had received training and instruction about the crossing. CP 430-432.

3. Decedent Drove Directly Into the "Very Visible" Train Without Braking

There is video footage that is approximately ten minutes long taken of the location of the accident on the night of the accident. CP 458. The video begins approximately seven minutes and thirty seconds before the accident. CP 458. In this time period: (1) one driver saw the train blocking the road and turned around far enough in advance of the train that only the vehicle's headlights appear on the video; (2) two other drivers turned their vehicles around well in advance of the train without incident and proceeded to take a different route; (3) Decedent then drove into the train without braking before impact; and (4)

witness Troy McDonald was at the scene of the accident within ninety seconds of impact. CP 445-446, 458.

The train had been blocking the crossing for approximately one hour before the collision. CP 435-437. During this time, the train was mostly stopped. CP 435-437. A few minutes before the accident, the train moved out of the crossing to the south for one minute, before starting to travel slowly north. CP 435-437. When the train traveled north, it again began to block the railroad crossing while moving slowly. CP 435-437. The train then continued to block the railroad crossing while moving slowly until Decedent crashed into it. CP 435-437. At the time of impact, the train was moving approximately two miles per hour. CP 435-437. The train was blocking the railroad crossing and barely moving the entire time Evans drove up to the railroad crossing, yet Decedent never applied his brakes before the collision. CP 458.

Defendant Tacoma Rail owns the train involved in the accident. CP 435-437. This train had a locomotive engine and railroad cars without any containers on them. CP 435-437. The railroad cars were taller than Decedent's vehicle even without any containers, and the railroad cars had high-visibility reflective tape on them to make them easy to see at night. CP 428-429; 433-434; 445-446. Below is a picture of the train immediately after the accident. CP 438-444.

The collision caused a huge noise, which caught the attention of Troy McDonald, who was in a nearby parking lot. CP 445-446. Mr. McDonald immediately came over to check on Decedent, who appeared to be dead. CP 445-

446, 458. The train blocking the railroad crossing was either stopped or moving slowly and was "very visible" to Mr. McDonald. CP 445-446. In addition to being able to easily see the train, Mr. McDonald could also hear it. CP 445-446.

4. The Police Determined That Decedent Was Not Paying Attention While Driving

The principal investigator of the collision was officer Brandon Cockcroft. CP 461-468. When he arrived on the scene after the accident, "it was clear there was a train there." CP 461-468. Officer Cockcroft could find no evidence at the scene that Decedent applied his brakes before the collision. CP 461-468. Based on his investigation, Officer Cockcroft believed Decedent was traveling approximately forty-three miles per hour at impact. CP 461-468. Officer Cockcroft found no obstructions that would have blocked Decedent's view of the train or blocked the signs marking the crossing. CP

461-468. Based on Officer Cockcroft's investigation, he believes Decedent was not paying attention to the road until the last possible moment before the collision:

> It was crossing the road. To me it seemed pretty obvious there was a train there. And I wouldn't drive into a train. CP 461-468.

5. First Responders Found a Videogame Playing on Decedent's Phone After the Crash

When the first wave of emergency personnel arrived after the accident, Decedent was dead, the train was "clearly visible," and the Pokémon Go videogame was playing on Decedent's phone. CP 428-429. There is no evidence that the videogame could have been turned on by the forces of the accident or that anyone who came to the scene after the accident turned on the videogame.

A member of the fire department who was among the second wave of emergency personnel to arrive on the scene that night also agrees the train was "clearly visible." CP 428-429, 433-434. There are no witnesses who will

testify that the train was difficult to see on the night of the incident while it was blocking the railroad crossing.

6. Decedent Likely Crashed Because He Was Playing the Pokémon Go Videogame on His Phone

The Pokémon Go videogame involves locating Pokémon figures with the GPS feature of a cell phone. CP 1549-1566. Once these figures are located, players then try to capture them. CP 1549-1566. One of the first responders who arrived on scene the night of the accident remembers that, at the time of the collision, there was a Pokémon figure located in the area of the accident that could be captured in the videogame. CP 428-429.

It is undisputed the videogame was playing at the time of the accident because there is no evidence: (1) that it is possible for accident forces to have turned on the videogame; or (2) that anyone turned on the videogame after the accident. At the same time, there is no evidence to rule out the videogame as the cause of the accident

because there is no evidence on the exact position of the phone before the accident or on what Decedent was looking at and doing in his vehicle as he drove towards the train. And it appears certain Decedent was distracted, because he never saw the train, if at all, until the very last instant before impact.

7. The Complaint

The Complaint contains one cause of action for negligence. CP 454-456. According to the Complaint, Defendants failed to "adequately provide advance warnings to vehicles" traveling into the crossing, and that it had been a common practice at the location for Defendants to use warning flares when a train was passing through, which was not done on the night in question. CP 454-456. The Complaint further alleges Defendants failed to secure the crossing with "adequate warnings and/or other barriers." CP 454-456. Plaintiffs' theory of relief is that Decedent drove into the train because it was hard to see

based on inadequate lighting and warnings, and not because Decedent was distracted by his phone.

VI. ARGUMENT

A. Basis for This Court's Acceptance of Review

This matter is appropriate for review by this Court under RAP 13.4 because: (1) the decision of the Court of Appeals below is in conflict with this Court's decision in *Gardner v. Seymour*, 27 Wn.2d 802 (1947), and the *Gardner* holding was recently sharply criticized by the Court of Appeals; and (2) this case involves an issue of substantial public interest that should be decided by this Court, which is to affirm the long-standing rules on causation that preclude jury speculation for accidents in which there is no eyewitness testimony, i.e. ones that tend to be very serious or fatal accidents.

Under *Gardner*, if there are two theories regarding how an accident occurred, only one of which would create liability for Defendants, and there is no evidentiary basis for

the jury to determine which of the two theories is correct, then there is insufficient evidence on proximate cause for the plaintiff to prevail. The *Gardner* decision is on point and applies to this matter. Specifically, there is no evidence that could make Plaintiffs' theory of visibility problems causing the accident more probable than Defendants' theory, which was supported by the police investigation, that cell phone distraction caused the accident.

In 2019, the Court of Appeals in *Behla v. R.J. Jung*, *LLC*, 11 Wn. App. 2d 329 (2019), criticized the *Gardner* line of cases in an aggressive manner that suggested the Court of Appeals thought *Gardner* should be overturned. The *Behla* opinion began with the well-settled law as quoted in *Gardner*:

> We have frequently said that, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture on how the accident occurred.

Behla, 11 Wn. App. 2d at 331. The Court then proceeded to analyze the *Gardner* line of cases in issuing its opinion. The *Behla* Court ultimately found there was enough evidence to present the case to the jury to determine the cause of the plaintiff's fall. In doing so, the Court of Appeals determined that *Gardner* did not apply to the facts of the case, in part because the plaintiff could "rationally rule out other potential causes" of his fall besides his theory of liability, which was that he tripped over a black cable. Yet, despite determining that *Gardner* did not apply to the facts of the case, the Court of Appeals went out of its way to express its general displeasure with *Gardner* and the related line of cases.

In its analysis, the Court of Appeals created the label of "the stated rule" for the *Gardner* rule that prevents a jury from speculating about which of two or more possible causes was the actual cause of an accident without a basis

in evidence to say which cause was more probable than the actual cause. *Id.* at 335. The Court of Appeals then attacked the *Gardner* rule as follows (emphasis added):

> ***We criticize the stated rule***. The rule applies only if at least two speculative causes subsist, suggesting that, if only one conjectural theory exists, the jury can decide causation. The rule begs the question of what action the trial court takes if the plaintiff's identified cause is speculative, but neither the defendant nor the court can conjure any other potential cause of the injuries. In this appeal, however, R.J. Jung advances other conjectural causes.
>
> The stated rule may assume that two causes of an event are just as likely to be the true cause. We question whether causes of human events can be precisely weighed such that one possible cause is just as likely to be the cause of a plaintiff's injuries as another possible cause.
>
> The stated rule suffers from a more fundamental flaw. The rule assigns to the trial court and eventually an appeals court the task of discerning whether a plaintiff's offered cause depends on speculation. But we question whether the trial court or an appellate court is always a better decision maker than twelve representatives of the community when surmising if an alleged cause suffers from speculation. Judges receive no special training

> and have no peculiar insight into cause and effect in the physical world. We specialize in wordsmithing and sophistry, not applied physics and applied psychology.
>
> If the trial court applies the stated rule and a plaintiff survives a summary judgment or directed verdict motion, the court must have determined that the plaintiff's proffered cause does not rely on speculation. Nevertheless, even if a plaintiff defeats a summary judgment motion by presenting a factual question on causation, the defense still argues to the jury that the plaintiff bases his or her claim on speculation. Based on the stated rule, defense counsel should be precluded from telling the jury that plaintiff's claim relies on speculation if the case proceeds beyond the summary judgment stage.

Id. at 336-337. In addition, not only did the Court of Appeals directly attack *Gardner*, but it went on to roundly criticize many additional cases that had applied the holding in *Gardner* (emphasis added):

> ***Other rules of causation affirm and expand the stated rule probably even to cases when the defense does not identify other possible causes.*** The claimant cannot show that an accident happened in a certain way by simply showing that it might have happened in that way and without further showing that it could

not reasonably have happened in any other way. *Gardner v. Seymour*, 27 Wash.2d 802, 810, 180 P.2d 564 (1947); *Whitehouse v. Bryant Lumber & Shingle Co.*, 50 Wash. 563, 565-66, 97 P. 751 (1908). When more than one possible cause of an injury exists, plaintiff's evidence, whether direct or circumstantial, must reasonably exclude every hypothesis other than plaintiff's offered cause. *O'Donoghue v. Riggs*, 73 Wash.2d 814, 824, 440 P.2d 823 (1968). The facts relied on to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. *Schmidt v. Pioneer United Dairies*, 60 Wash.2d 271, 276, 373 P.2d 764 (1962). In the context of a summary judgment motion or a motion for directed verdict, the trial court must view conflicting evidence in the light most favorable to the nonmovant party and determine "whether the proffered result is the only reasonable conclusion." *Estate of Bordon ex rel. Anderson v. State, Department of Corrections*, 122 Wash. App. 227, 240, 95 P.3d 764 (2004).

We also question these additional rules. The jury usually determines what conclusions are reasonable. The better rule would be that the reviewing court determines if plaintiff's proffered cause is a reasonable conclusion rather than the only reasonable conclusion or the most reasonable conclusion.

> Speculation is a specious word. One person's proof may be another person's speculation. What constitutes speculation may enter a shadow zone where some triers of fact may determine plaintiff's tendered cause to be speculative, while other reasonable people would determine causation to be proved. Whereas, the trial court should not allow a jury to decide a personal injury claim if the jury must undoubtedly speculate as to whether any breach of duty caused the plaintiff's injuries, reasonable persons may disagree as to whether causation is speculative in discrete circumstances. Thus, when addressing purported "speculative" claims, the trial court should give the benefit of the doubt as to causation to the plaintiff and dismiss a claim only to the extent the court can decide that all reasonable people would conclude causation to be speculative.

Id. at 337-338. This Court should push back against the aggressive criticism of *Gardner* and affirm the *Gardner* line of cases, which are an important line of cases relating to serious and fatal accidents, while overturning the Court of Appeals decision below as being clearly in conflict with *Gardner*.

B. Plaintiffs Lack Sufficient Evidence on Proximate Cause, and the Court of Appeals Should Have Affirmed the Trial Court's Order Granting Summary Judgment for Defendants Because Its Holding Was Consistent with *Gardner*

There is no evidence from which a reasonable jury could conclude that Decedent most likely was not distracted by his phone at the time of the accident. A reasonable jury could not presume Decedent was paying attention to the road because the cell phone videogame was running after the accident. *See Gardner*, 27 Wn.2d at 806-807 (noting it may be reasonable to infer the injured party in an unwitnessed accident used due care if there is an absence of evidence to the contrary). A reasonable jury could also not presume that additional warnings would have prevented the accident because Decedent was likely looking at his cell phone at the time. *See Garcia v. State*, 161 Wn. App. 1, 16 (2011) (where a driver was not facing forward to the roadway, an argument that a municipality's failure to provide further visual clues of possible

pedestrians was the proximate cause of the accident was too speculative to allow for recovery). In order for a jury to determine causation and apportion fault between Decedent and Defendants in this matter, the jury would have to make up what they thought happened by speculating.

It cannot be emphasized enough that there is simply no evidence making Plaintiffs' alleged theories of lack of visibility and warning the more likely cause of the accident than the cell phone. Plaintiffs' liability expert, Joellen Gill, underscores this point when she acknowledges that she is unable to rule out the cell phone as the cause of the accident because she "simply cannot formulate an opinion based on a more probable than not basis regarding how, if at all, the cell phone played a role in the tragic collision in this case." CP 658-1104. If anything, the evidence can only lead to the reasonable inference that the cell phone is the more likely cause of the accident because: (1)

Decedent was the only one that night who had trouble seeing the train; (2) the likely reason he turned the videogame on while driving was to play it while driving; and (3) there is no way Decedent could have been looking forward while driving and not see the huge train and its high-visibility retroreflective tape at any time before he crashed into it until, at most, the instant before the collision.

In addition to the *Gardner* case, numerous other Washington decisions involving speculative claims confirm that the Court of Appeals decision in this matter was incorrect.

In *Miller v. Likins*, 109 Wn. App. 140 (2001), the plaintiff was injured when he was struck by a vehicle while on foot, and the driver died after the collision and prior to the lawsuit. The plaintiff sued the City of Federal Way and argued a lack of precautions to emphasize the presence of a fog line to alert drivers about the possible presence of pedestrians outside the fog line. The trial court dismissed

the case on summary judgment because the driver was dead, so there was no evidence that the driver was misled or confused by the condition of the roadway. The Court of Appeals affirmed the dismissal.

In *Kristjanson v. City of Seattle*, 25 Wn. App. 324 (1980), the plaintiff was knocked unconscious in a motor vehicle accident and could not remember the accident. He sued the City of Seattle for a failure to ensure sufficient sight distance visibility in the area of the accident. The Court dismissed the case on summary judgment and noted that the argument proposed, i.e., given additional sight distance, plaintiff might have reacted in a way which could have avoided the collision, "can only be characterized as speculation or conjecture." The Court of Appeals affirmed the dismissal.

In *Kane v. City of Seattle*, 198 Wn. App. 1024 (2017) (unpublished), the Court of Appeals upheld the dismissal of the plaintiff's claims against a church on summary

judgment. The plaintiff argued the church was liable for the motor vehicle accident because the church's foliage blocked a stop sign at the intersection where the accident occurred. However, the at-fault driver testified he did not know why he did not stop at the stop sign, and he did not know if the trees obstructed his vision or the stop sign. As such, the trial court and Court of Appeals agreed that "maybe [the at-fault driver] would have noticed the stop sign earlier if the branches had been properly trimmed, and maybe he would have stopped before he got to the intersection. But speculation does not create an issue of material fact."

VII. CONCLUSION

This lawsuit was incorrectly decided by the Court of Appeals in a clear miscarriage of justice. Accepting this case for review would give this Court the chance to correct the Appellate Court's misapplication of well-settled law under *Gardner*, thereby affirming *Gardner* and the line of

cases stemming from *Gardner* in response to harsh criticism recently leveled by the Court of Appeals. Plaintiffs cannot exclude cell phone distraction as the obvious and most likely cause of this accident and, therefore, Plaintiffs lack sufficient evidence on proximate cause and cannot be allowed to take their case to the jury.

I certify that this memorandum contains 4,223 words in compliance with RAP 18.17.

Respectfully submitted this 17th day of May, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Preg O'Donnell & Gillett PLLC, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served via the Washington state Court of Appeals e-filing system, and via email a true and correct copy of the foregoing document on all counsel of record.

DATED this 17th day of May, 2023.

s/Jasmine Reddy
Jasmine Reddy, Legal Assistant

APPENDIX

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Filed
Washington State
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Division Two

April 18, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE ESTATE OF WESLEY A. EVANS, by and through its personal representative, WILLIAM EVANS, JR., individually and on behalf of the beneficiaries of the ESTATE OF WESTLEY A. EVANS; and DELLA EVANS, individually, Appellants, v. THE CITY OF TACOMA, a municipal entity under the laws of the State of Washington, TACOMA PUBLIC UTILITIES, and TACOMA RAIL, agencies/sub-divisions of the City of Tacoma, Respondents.	No. 57218-4-II UNPUBLISHED OPINION

CRUSER, J. – Wesley Evans struck a train that was nearly stopped on a railroad crossing and died from the collision. Evans' father, as personal representative of Evans' estate (the Estate), brought a wrongful death action against the City of Tacoma, Tacoma Public Utilities, and Tacoma Rail (Tacoma), alleging that Tacoma failed to maintain the roadway in a manner safe for ordinary travel due to visibility issues and inadequate warnings to mark the crossing.

Tacoma moved for summary judgment, arguing that the Estate could not establish that any negligence by Tacoma proximately caused Evans' death. The Estate's response included a motion to strike a surveillance video showing footage of the collision as well as any argument by Tacoma that Evans was playing a video game on his phone at the time of the collision. The trial court

denied the Estate's motion to strike, granted Tacoma's motion for summary judgment, and denied the Estate's later motion for reconsideration. The Estate appeals.

We hold that there are genuine issues of material fact regarding whether Tacoma breached its duty to maintain the railroad crossing and whether this negligence proximately caused Evans' death. Accordingly, we reverse the trial court's order granting summary judgment to Tacoma and remand for proceedings consistent with this opinion.

FACTS

I. BACKGROUND

In September 2017, Evans sustained fatal injuries after he struck a train that was almost stopped on the tracks at a railroad crossing. The crossing, at East Milwaukee Way and Lincoln Avenue in Tacoma, has trains from Tacoma Rail, Union Pacific, and Pacific Rail passing through at all hours of the day. The crossing is apparently on a main route for Pacific Rail employees, and Pacific Rail employees are shown the tracks and given warnings about the train activity at the crossing. It is marked by a railroad crossing sign in the shape of an X with a yield sign, and "2 TRACKS" appears underneath the yield sign. Clerk's Papers (CP) at 411.There is no other signage or warning system to alert drivers to the presence of trains in the crossing.

For about an hour prior to the collision, a train with empty rail cars was stopped in the crossing. The cars had yellow reflective tape on them. At approximately 2:42 a.m., when Evans was leaving work as a longshoreman at Pacific Rail, he approached the railroad crossing. By that time, the train was moving at two miles per hour in the crossing. Evans' car struck a coupler between two rail cars and caused them to disconnect. A nearby truck driver "noted that a black car had collided with the side of [the] train" and went over to check on the driver, appearing about 90

seconds after the collision. *Id.* at 446. It appeared that Evans was not alive. The truck driver called 911 to report the incident.

There was extensive damage to Evans' car. The front of the car and both doors were crushed, with the passenger door partially open, the windshield was shattered, and the steering column had been forced forward.

EMT David Marston was among the first group of first responders at the scene of the collision. Marston testified that, upon his arrival at the scene, "Mr. Evans's cellphone [was] on his left thigh face-down with his hand still on top of the phone almost holding it. When [Marston] looked at the phone to see what was playing, [he] recognized there was a Pokemon Go[1] application running." *Id.* at 429. Marston showed the phone to one of the responding officers and then put it back where he found it on Evans' thigh.

Port of Tacoma overhead surveillance cameras recorded the collision. Officer Brandon Cockcroft used the video footage to calculate how fast Evans was driving at the time of the collision, and determined that he was traveling 42 miles per hour.[2] The video apparently[3] also includes about seven and a half minutes prior to the collision and shows three other drivers turning

[1] Pokémon Go is an augmented reality video game in which a user follows a virtual map mirroring real-world surroundings. As the user travels, different Pokémon characters appear on the screen and can be caught by the user.

[2] The speed limit was 35 miles per hour where Evans' car was, but increased to 40 miles per hour on the other side of the tracks.

[3] The video was not designated for our review, so this opinion relies on the representations by Tacoma's attorney from his declaration in support of summary judgment and Officer Cockcroft's report. Although the Estate challenged the admissibility of the video, it did not appear to challenge these representations of what the video shows.

around in the road. It did not appear from the video that Evans applied his brakes before impact, and he appeared to veer slightly to the right just prior to the collision.

II. LITIGATION

The Estate brought a wrongful death action against Tacoma, alleging that Tacoma breached its duty to maintain its roadways in a manner safe for ordinary travel, including approaches to railroad crossings. Specifically, the complaint alleged that the crossing at issue did not have adequate warnings to alert drivers to the presence of a train and that there was poor visibility at the crossing.

Tacoma moved for summary judgment, arguing that the Estate could not establish any acts or omissions of Tacoma were a proximate cause of the accident because "[t]he only reasonable inference as to why [Evans] did not see the train, if at all, until immediately before the collision is that [Evans] was distracted and not looking at the road in front of him for some reason." *Id.* at 421. In support of its motion, Tacoma submitted a declaration from Marston, who described finding Evans' cell phone with Pokémon Go on the screen, and declarations from the witness who dialed 911, another first responder, and Tacoma Rail employees, one of whom attached photographs he took after the collision. Most of the individuals who arrived at the scene after the accident testified that the train was visible when they arrived. Tacoma also provided the surveillance video of the collision.

In response, the Estate provided declarations from 21 longshoremen or other Port of Tacoma employees. Each of the declarants testified that the crossing has poor visibility. Many criticized the lighting, and some also criticized the signage to warn drivers about trains in the crossing. In addition, some specified that empty rail cars were particularly hard to see because

"you can see clear through the train to the other side of the road." *Id.* at 484. Some also explained that flares were occasionally put out to indicate the presence of a train, but that the use of flares was inconsistent.

In addition, the Estate provided a declaration by human factors engineer Joellen Gill, in which she opined that the crossing was dangerous and that Evans' death could have been prevented through actions by Tacoma to ensure the safety of motorists. For example, Gill explained that strategies to mitigate a hazard that rely on administrative controls or warnings to alter behavior is the least effective mitigation method because it is too reliant on human behavior. She also explained that the inconsistent use of flares at the crossing was problematic because it "creates confusion and a potential reliance on the existence of such warnings." *Id.* at 874.

The Estate also submitted records related to other collisions occurring at the same railroad crossing that were obtained through a public records request, in addition to emails obtained through discovery regarding poor visibility at the crossing.[4] The emails contain requests to improve the intersection, including painting a railroad crossing warning on the pavement and putting a street light near the crossing. One email from a safety manager at Tacoma Rail in 2012 specifically requested street lights on either side of the tracks because "[i]t is pretty dark in that area and when a[ ] train is across the road especially flat cars, it is difficult for motorists to see them and could run into them." *Id.* at 794.

The Estate's response also included a motion to strike the video of the collision and "[a]ny reference, allusions, or argument that [Evans] was playing 'Pokémon Go' immediately prior to

[4] One of the emails was from an employee at the Port of Tacoma to a City of Tacoma employee, and another was from a Tacoma Rail safety manager to another person at Tacoma Rail, inquiring about who to email at the City of Tacoma.

and/or at the time of the collision." *Id.* at 1264. The Estate argued that the video presented different lighting conditions because it was black and white, was from a different vantage point than what Evans would have seen, and would be likely to provoke an emotional response from the jury due to its startling nature. Regarding Pokémon Go, the Estate argued that Tacoma's argument was speculative because Tacoma did not provide evidence from forensic examination of the phone that the game was actually being played at the time of the collision.[5]

The trial court denied the Estate's motion to strike and granted Tacoma's motion for summary judgment. The Estate moved for reconsideration under CR 59(a)(9) ("substantial justice has not been done"), presenting evidence that key features of Pokémon Go could not have been played at the speed at which Evans was traveling prior to the collision. Tacoma's response, supported by a video game expert declaration, speculated that Evans "could have worked around the Pokémon Go speed restrictions and been playing the full Pokémon Go videogame at the time of the accident." *Id.* at 1542. The trial court denied the Estate's motion for reconsideration.

The Estate appeals the trial court's decisions granting summary judgment to Tacoma, denying the Estate's motion to strike, and denying the Estate's motion for reconsideration.

DISCUSSION

I. STANDARD OF REVIEW

We review a summary judgment order de novo, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Meyers v. Ferndale Sch.*

[5] Notably, neither party provided such evidence, even though the Estate had previously represented in a motion for protective order that its expert concluded that the Pokémon Go application "was last visible on the screen some 5 hours before the collision at issue occurred." CP at 1304. The record does not contain any declaration attesting to this fact.

Dist., 197 Wn.2d 281, 287, 481 P.3d 1084 (2021). Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018).

In addition, we review a trial court's denial of a motion for reconsideration "to determine if the trial court's decision is manifestly unreasonable or based on untenable grounds." *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013).

II. SUMMARY JUDGMENT DISMISSAL

The Estate argues that the trial court erred by granting summary judgment to Tacoma because there are issues of material fact regarding whether Tacoma breached its duty to maintain the railroad crossing and whether the breach of this duty was a proximate cause of the accident resulting in Evans' death. Tacoma argues that the Estate provided no evidence that an act or omission by Tacoma proximately caused Evans' death. We hold that there are genuine issues of material fact regarding whether Tacoma was negligent in failing to maintain its railroad crossing to protect against even potentially negligent conduct by others and whether such negligence proximately caused Evans' death.

A. LEGAL PRINCIPLES

A plaintiff seeking to recover on a claim of negligence must establish four elements: duty, breach, proximate causation, and injury. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013). These elements apply equally to municipalities as they do to private parties. *Keller v. City*

of Spokane, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002). "[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." *Id.* at 249.

Proximate cause has two elements that must be satisfied: (1) cause in fact and (2) legal causation. *Lowman*, 178 Wn.2d at 169. " 'Cause in fact refers to the "but for" consequences of an act.' " *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 437, 378 P.3d 162 (2016) (quoting *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)). Cause in fact is typically a jury question. *Id.* Legal causation, on the other hand, " 'is grounded in policy determinations as to how far the consequences of a defendant's acts should extend.' " *Lowman*, 178 Wn.2d at 169 (quoting *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998)). An injury may have more than one proximate cause. *N.L.*, 186 Wn.2d at 437.

The Washington State Legislature adopted comparative fault in 1981. *Keller*, 146 Wn.2d at 243. Under the doctrine, "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." RCW 4.22.005.

B. ANALYSIS

Tacoma provides no argument regarding any duty owed to Evans, or breach of that duty, because regardless of any breach of a duty owed to Evans, Tacoma states, "Appellants provided no evidence on proximate cause." Br. of Resp'ts at 21. We disagree.

When reviewing a summary judgment order, we must view the facts, and all reasonable inferences from the facts, in the light most favorable to the nonmoving party. *Meyers*, 197 Wn.2d at 287. Tacoma assumes that Evans was distracted while driving toward the crossing because this

is "[t]he only reasonable inference as to why Evans did not see the train, if at all, until immediately before the collision." Br. of Resp'ts at 23. But, taking the facts in the light most favorable to the Estate, the fact that Evans swerved only at the last minute could have been because of the clearly documented visibility issues at the crossing. Twenty-one longshoremen and other Port of Tacoma employees testified to the poor visibility at the crossing, Tacoma received several requests for improvements to visibility at the crossing, and the visibility problems are plainly evident from the photographs submitted by Tacoma in support of its motion for summary judgment.

Tacoma's evidence that others found the train to be visible that evening—including the witness who called 911 to report the accident, first responders, and the three other drivers who approached the intersection (before Evans' collision) but turned around as shown in the video submitted to the trial court—merely underscores the issue of fact to be resolved by a jury. The train was disconnected after Evans hit it, and all people responding to the scene, including the witness who called 911, were specifically looking for a collision when they approached the area. These witnesses, therefore, were not only specifically on the lookout for a train in the crossing, but also had a different view of the train due to its separation after the collision and additional activity at the crossing as more people responded to the scene. Furthermore, the video evidence of other drivers turning around before reaching the crossing does not establish that the train was not difficult to see; it merely establishes that some drivers saw it. There was no testimony from these drivers regarding whether they found it difficult to see the train.

Tacoma further argues that the only reasonable inference from the evidence that Pokémon Go was visible on Evans' phone screen when first responders arrived is that Evans was playing the game while he was driving. But, again, this court must take the facts and all reasonable

inferences in the light most favorable to the Estate. *Meyers*, 197 Wn.2d at 287. Especially considering the fact that neither party presented expert testimony regarding when the game was last played on Evans' phone, the jury could just as easily infer that the game was open but not being actively played by Evans as he approached the intersection (for example, he had been playing the game and left it open but was not playing it immediately prior to the collision). Furthermore, the testimony from Marston that the phone was found on Evans' lap with his hand over the phone does not lead to the conclusion that it was on Evans' lap immediately before the collision because, given the extensive damage to the car, a reasonable fact finder could conclude that the phone would not be in the same location before, during, and after the collision when responders arrived, given the photographs in evidence.

At a minimum, there is a genuine issue of material fact regarding whether Evans was playing Pokémon Go immediately prior to the collision. And, regardless, "[a]ny negligence on the part of the decedent[ ] is irrelevant to whether a material question of fact regarding the alleged breach of [Tacoma's] duty survives summary judgment." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Tacoma owes a duty to all persons to maintain its roadways in a condition reasonably safe for ordinary travel, even for persons who are potentially negligent. *Keller*, 146 Wn.2d at 249. Because an injury can have more than one proximate cause, any negligence by Evans that proximately caused the collision does not exclude any negligence by Tacoma in failing to maintain its roadways *as an additional cause*. *See N.L.*, 186 Wn.2d at 437. Rather, any contributory fault by Evans would merely proportionately diminish any recovery; it would not completely bar recovery. RCW 4.22.005.

As stated by Tacoma in its reply in support of summary judgment: "There is no evidence where the phone was in the car, [and] there is no evidence where Mr. Evans was looking as he was driving towards the train." CP at 1277. Without such evidence, and taking the facts in the light most favorable to the Estate, it was improper for the court to grant summary judgment to Tacoma because there are genuine issues of material fact regarding proximate causation.[6]

CONCLUSION

We hold that there are genuine issues of material fact regarding whether Tacoma was negligent in failing to maintain the crossing and whether such negligence was a proximate cause of Evans' death and, therefore, we reverse the trial court's order granting summary judgment to Tacoma. We remand for proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

GLASGOW, C.J.

VELJACIC, J.

[6] Because we hold that the trial court erred by granting summary judgment to Tacoma, we need not address whether the trial court erred by denying the Estate's motion to strike or by denying the Estate's motion for reconsideration.

PREG O'DONNELL & GILLETT

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