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No. 70727-2-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON, SEATTLE

JANE CHO,

Plaintiff/Appellant,

vs.

CITY OF SEATTLE et al.,

Defendant/Respondent,

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

BRIEF OF RESPONDENT CITY OF SEATTLE

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I. INTRODUCTION

Jane Cho, along with several other pedestrians, was struck by a drunk driver while crossing a street in Seattle. She sued the City of Seattle, alleging, among other things, that the City was negligent for failing to maintain the street in a reasonably safe condition for ordinary travel.

The City moved for summary judgment on the ground that plaintiff was unable to adduce evidence from which a jury could conclude that any negligence on the City's part was a proximate cause of Cho's injuries. The trial court agreed; it granted the City's motion, and denied Cho's motion for reconsideration.

Cho argued below, as she argues here, that she would not have been struck but for the lack of a traffic signal, island, or traffic officer. She contends that the drunk driver, Juanita Mars Carpenter, would have avoided hitting her had such controls been in place. The City argued that such outcome was speculative, notwithstanding declarations by Cho and her experts, and that such speculation cannot constitute evidence of causation as a matter of law.

On this appeal, Cho fails to show that the trial court erred in finding no proximate cause. She fails to demonstrate that the declarations offered below have adequate foundation, that her expert's opinions

are something more than speculation, or that substantial evidence of causation was presented to the trial court.

II. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR

Fairly read, appellant's assignments of error raise the following issue:

> Does the record indicate an issue of fact whether any acts or omissions by the City were the proximate cause of Ms. Cho's injuries—an essential element of her negligence action?

III. STATEMENT OF THE CASE

On October 28, 2010, Juanita Mars Carpenter ("Carpenter") planned to drive her pick-up truck from West Seattle to Tacoma to retrieve her recently deceased mother's possessions from her ex-husband's apartment. CP 376. She was compelled to make the trip at that time because he was soon moving to Canada to seek medical treatment for terminal cancer. CP 377. She had been drinking the night before. CP 385. She had asked friends if they would make the trip for her; when they turned her down she gave in and decided to go herself. CP 376. She was in bad emotional shape and had not eaten or slept in three days. CP 383. Moreover, during that time, she had been acting violently, "throwing things" and "punching walls". *Id.*

Before leaving for Tacoma, Carpenter drove to a gas station, where she met two strangers, Toni and Joe, who asked her to buy them beer and give them a ride.[1] She agreed to do so in exchange for their accompanying her to Tacoma to help load and unload her mother's boxes into her pick-up truck. CP 379-380. Carpenter began drinking beer at 1:00 p.m. and left for Tacoma at about 5:30 p.m. CP 385-87. She and her passengers continued drinking during the drive to Tacoma. After loading the pick-up truck, Carpenter drove back to West Seattle with Toni and Joe. CP 389. While driving, Carpenter cried so forcefully that she was "surprised [she] even saw the road through all the tears." *Id.* The trio unloaded the boxes at Carpenter's apartment in West Seattle, bought more beer, and resumed drinking. CP 391-93. Later, Carpenter agreed to take Toni and Joe back to 4th Avenue in SoDo. CP 396. Mars missed the 1st Avenue exit off the West Seattle Bridge, winding up on the viaduct. CP 396.

Carpenter then drove south-bound ("S/B") on 1st Avenue South, using the lane closest to the curb. The weather was clear, and lighting in the area was not a problem. CP 396-97. The roadway had a total of 3 S/B

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[1] "Q: Were these guys under age, is that why they asked you to do it, or they just didn't have the money? A: They didn't have the money. I think both of them just got out of jail. I think that's what they said on the way back." Carpenter Dep. CP 388.

lanes, including one turn-only lane. CP 214. Toni and Joe were already "plastered", and began arguing about how they could get more beer and where they were going to stay that night, which infuriated Carpenter, "driving [her] insane." CP 396-97. Just as she approached the intersection at South Massachusetts Street, she turned her head away from the street in front of her towards Toni, in the front passenger seat, and told her to "shut the hell up." CP 397.

Suddenly, the three heard a thump. CP 397. Unobserved by Carpenter, pedestrians were emerging from the ShowBox Theater on the south-east corner of 1st Avenue South and South Massachusetts Street. CP 5, 269. At least one north-bound ("N/B") vehicle had stopped to allow a group of seven pedestrians to cross west-bound ("W/B") at the illuminated unmarked crosswalk on 1st Ave. CP 109. The car in the S/B lane next to Carpenter's pick-up truck also stopped for the crossing pedestrians. CP 9.[2]

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[2] At the May 31, 2013 hearing, plaintiff moved to strike as hearsay ShowBox's certified records of Carpenter's plea, statements contained therein, sentencing pleadings, the Certification for Determination of Probable Cause signed under penalty of perjury, a statement by the prosecutor and the Amended Information. The trial court denied plaintiff's motion to strike as to Carpenter's plea agreement and sentencing pleadings, based on RCW 5.40.040 and the admissibility of her guilty plea. May 31, 2013, RP 10-11. While counsel for ShowBox and plaintiff agreed between themselves that "charging documents" would not be considered by the court, counsel for the City was not a party to that agreement, and the court did not issue an order granting plaintiff's motion to strike such documents. To the extent the Court's order granting the City's motion for summary judgment includes reference to all such documents other than the charging documents, the City makes reference to them herein. RAP 9.12.

501, 504. A construction worker at the scene saw that Carpenter's headlights were not illuminated, and noted that her speed was too fast to stop in time to avoid the pedestrians; he yelled at her to stop to no avail. CP 109, 111. Cho was one of the seven.

Just as Cho reached the mid-way point of Carpenter's lane, she and four others were struck by Carpenter's pick-up truck speeding in excess of the 35 mph speed limit. CP109.[3]

Immediately after hearing the "thump," Carpenter applied heavy braking, and came to a stop. CP 109, 397-98. A police officer at the scene noted obvious signs of intoxication after screening Carpenter for impairment/intoxication. CP 110. Two hours after the collision, Carpenter's blood was drawn, showing her blood alcohol content ("BAC") was .29—nearly four times the legal limit. CP 110, 398. She was arrested, and charged with four counts of vehicular assault while under the influence of intoxicating liquor causing substantial bodily harm to Judy Cho and three other pedestrians. She later entered into a plea agreement in which she pled guilty to three counts of felony vehicular assault while driving under the influence causing serious bodily injury to Cho and

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[3] Plaintiff persists in arguing that Carpenter's view of the pedestrians was blocked by the stopped car to her left, which is logically inconsistent with the facts since the five pedestrians were in Carpenter's lane when she hit them. App. Brief at 28, citing CP 335. Nor does Carpenter ever make such a statement.

others (RCW 46.61.502), and one count of misdemeanor reckless driving (RCW 46.61.500), and received a sentence of 26 months concurrent for the assaults, and a 12-month consecutive term for reckless driving. CP 69-106.

Cho subsequently filed this negligence action against the City of Seattle, ShowBox, and Carpenter for injuries resulting from Carpenter's assault.

IV. ARGUMENT AND AUTHORITY

A. STANDARD OF REVIEW

Review of a summary judgment is de novo, and the appellate court must conduct the same inquiry as the trial court and view all admissible material facts and reasonable inferences from them most favorably to the appellant. *Renner v. City of Marysville*, 145 Wn. App. 443, 448-49, 187 P.3d 286 (2008). Summary judgment is appropriate if the pleadings, affidavits, and depositions establish both the absence of genuine issues of material fact and that movant is entitled to judgment as a matter of law. *Id.* Whether the City owed a duty, and the nature of that duty (the standard of care) are questions for the court to decide. *Tincani v. Inland Empire*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994); *Gall v. McDonald Indus.*, 84 Wn. App. 194, 202-03, 926 P.2d 934 (1996). A court should also determine as a matter of law that a duty was not breached and/or that a breach of duty did

not proximately cause the accident if the court finds insufficient evidence to support a jury finding on those issues, or if it finds no legal causation. *Ruff v. King Cy.,* 125 Wn.2d 697, 703-04 887 P.2d 886 (1995).

A non-moving party may not rely on speculation or argumentative assertions, even from an expert, to defeat summary judgment. *Craig v. Washington Trust Bank,* 94 Wn. App. 820, 824, 976 P.2d 126 (1999). In this case, Cho having failed to produce evidence sufficient to support an argument beyond speculation or conjecture, the trial court properly concluded that no act or omission of the City could be a proximate cause of this collision.

B. TO SURVIVE SUMMARY JUDGMENT ON PROXIMATE CAUSE, CHO HAS THE BURDEN OF PROVING CAUSE-IN-FACT, WHICH SHE CANNOT DO UNDER THE FACTS OF THIS CASE.

In any negligence action, a plaintiff is required to prove not only that the defendant owed a duty to the plaintiff and that the defendant breached that duty, but that the breach was a proximate cause of the plaintiff's injuries. *Tincani, supra* at 127. The issue of proximate cause is separate and distinct from the issues of duty and breach, and evidence of a breach of duty is not necessarily evidence of proximate cause. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006), *rev. den.* 104 Wn.2d 1021 (1985).

A proximate cause of an injury is a cause which, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred. *Stoneman v. Wick Constr. Co.*, 55 Wn.2d 639, 643, 349 P.2d 215 (1960). Proximate cause comprises two elements: (1) cause in fact and (2) legal cause. *Baughn v. Honda Motor Co. Ltd.,* 107 Wn.2d 127, 727 P.2d 655 (1986). Cause in fact refers to the "but for" consequences of an act, or the physical connection between an act and the resulting injury. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). Legal causation "rests on policy considerations as to how far the consequences of a defendant's acts should extend [and] involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." *Id.* at 779. Legal causation is a matter reserved for the court, and one that is a requisite prong of any negligence action. *Hartley*, *supra.*

To survive summary judgment on proximate cause, the elements of both cause in fact and legal causation must be satisfied. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991).

Cho argues (1) had the intersection contained a signal light or flagger,[4] Carpenter would not have hit her and (2) had there been a pedestrian island, Cho would have stopped before being struck by Carpenter. Neither contention can be supportable under the facts.

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[4] Plaintiff refers to various persons to control traffic: a police officer, a traffic officer, or any person. Appellants' brief at 3, 10, 13. Later references here to a "flagger" refer to this person, who plaintiff alleges should have been present to control traffic.

C. CHO'S ARGUMENTS ARE BASED ON SPECULATION.

As an evidentiary matter, arguments premised on speculation as to how events might have transpired differently had a signal light, pedestrian island or flagger been in place fail under the requirements of CR 56(e). It is hornbook law[5] that proximate cause cannot be predicated on speculation or conjecture; as is relevant here, that rule applies whether the speculation is offered to prove the possibility that a signal light, island, or flagger *might* have operated in such a way as to have led to different behaviors on the part of both Cho and the drunk driver. The evidentiary rule prohibiting speculation applies regardless of whether the speculation proffered is from an expert (Mr. Vigilante) or Ms. Cho herself. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947) (evidence sufficient to survive summary judgment on proximate cause must rise above guess, speculation, or conjecture); *Craig v. Washington Trust Bank,* 94 Wn. App. 820, 976 P.2d 126 (1999) (speculation, even by an expert, cannot defeat summary judgment); *Moore v. Hagge*, 158 Wn. App. 137, 241 P.3d 787 (2010) (one's

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[5] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 at 269 (5th ed. 1984)

> On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

own speculation as to how one probably would have proceeded is inadmissible).

1. CHO CANNOT ESTABLISH THAT THE PRESENCE OF A PEDESTRIAN ISLAND, SIGNAL LIGHT OR FLAGGER WOULD HAVE CHANGED THE BEHAVIOR OF EITHER CHO OR THE DRUNK DRIVER.

The crux of plaintiff's arguments is that the City created a dangerous condition that caused her to be hit by a drunk driver who failed to yield while she and several other pedestrians used an unmarked crosswalk to get to the other side of the street.

First, she argues that if a signal light had been in place, she would have pushed a pedestrian button while waiting for the pedestrian signal (to turn green). CP 270. Second, she argues that if the light was red for her, she would not have proceeded into the intersection, and would have avoided the drunk driver. Third, she claims that if the drunk driver had a red light, the red light would have caused the drunk driver to stop and would have prevented her from hitting Cho and others. Fourth, she argues that if a pedestrian island had been provided, she would not have been hit because the island would have caused her to wait until the driver passed, assumingly without incident. Fifth, she claims the mere presence of a flagger would have prevented the collision. CP 270.

Cho's arguments are speculative, and are not supported by actual facts in evidence. *Grimwood v. Univ. of Puget Sound*, 110 Wash. 2d 355, 359, 753 P.2d 517 (1988). ("A fact is an event, an occurrence, or something that exists in reality. *Webster's Third New Int'l Dictionary* 813

(1976). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. 35 C.J.S. *Fact* 489 (1960)").

While Cho claims in her declaration that she has personal knowledge of what she would have done if either a pedestrian island, signal light, or flagger had been present, and that their presence would have prevented the collision, she fails to allege facts—*something that exists in reality.* Nothing the City did or didn't do prevented Cho from stopping in time to avoid Carpenter. Moreover, under *Moore v. Hagge* Cho's own speculation as to how she probably would have proceeded is inadmissible. *Id.* at 154.

Cho's experts' declarations similarly fail to contain anything other than speculative and immaterial statements. First, the declaration of her civil engineer, Ed Stevens, that he personally conducted pedestrian and traffic counts of the subject intersection in 2011 fail to show any relevance of that data to this 2010 accident—particularly when the appearance of the intersection, street design, and structures in the immediate vicinity were different in 2010. CP 273-274. Second, Cho's traffic engineering expert, Daniel Melcher's conclusion that traffic controls would most likely have prevented the collision is nothing more than a conclusory statement that is premised on the effect a red light or pedestrian island would have had on 1st Ave. motorists and pedestrians. CP 318. Indeed, a red light cannot

"stop vehicles"—it merely regulates who has the right of way; only drivers can stop vehicles. Similarly, a pedestrian island does not control a pedestrian—the pedestrian controls the pedestrian.

Third, Cho's human factors expert, William Vigilante, relying on Stevens and Melcher, opined "within the bounds of reasonable scientific certainty" that a traffic signal would have prevented the collision from occurring." CP 315. Vigilante's opinion that it was foreseeable that the lack of traffic signal controls would cause this driver—whom he described as "a reasonably attentive driver[6]," to "not readily detect the unexpected presence of the pedestrians crossing 1st Ave. South" blatantly ignores glaring facts, and admissible evidence established by the driver's sworn statements as to her emotionally-charged state of mind, intoxication and most importantly, her turning her attention away from the intersection at the time she collided into the crossing pedestrians.

Rather than rely on evidence, Cho suggests (1) this Court "take judicial notice that inattentive or intoxicated drivers are not surprising or usual and is a routine and expected occurrence."; and (2) "[i]t was foreseeable that a vehicle driven down 1st Ave. South would not see

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[6] As examples, he ignores the fact that she missed her exit off the West Seattle Bridge and drove without her headlights illuminated before plowing into 5 pedestrians. CP 396 and 109.

pedestrians crossing a busy road at night. Especially [sic] because another vehicle was on Mars' left, blocking her view of pedestrians." Appellant's brief at 28-29.[7] The problem with Vigilante's analysis is that he does not take into consideration that Carpenter was highly intoxicated, and had a BAC of .29, almost 4 times the legal limit. RCW 46.61.502. Vigilante cites to no studies that support his position that drunk drivers can drive safely if roads are properly designed.[8] Scientific research, such as the studies relied on by the NTSB, flatly contradict his opinion. Without studies supporting his position, his testimony cannot assist the jury and does not tend to prove proximate cause. ER 702.

In *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 178, 817 P.2d 861 (1991), this court addressed the effect alcohol intoxication can have on the ability to drive a motor vehicle:

> The effect of measured amounts of alcohol on the ability to operate a motor vehicle has been the subject of extensive scientific research. Based upon such research, an expert may testify that after X drinks within Y hours an individual's ability to operate his automobile is affected, regardless of age, sex, weight or other physical qualities.

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[7] *See* Footnote 3, p. 5, *infra*.

[8] *See* a recent report by the National Transportation Safety Board ("NTSB") entitled "Reaching Zero: Actions to Eliminate Alcohol-Impaired Driving," detailing alcohol's effects on drivers: divided attention, perception, and reaction time. CP 591-612. "In sum, the NTSB concludes that BAC levels as low as .01 have been associated with driving-related performance impairment, and BAC levels as low as .05 have been associated with significantly increased risk of fatal crashes." *Id.* at 612.

> Indeed this scientific basis is what permits imposing criminal liability in drivers on the basis of blood alcohol on their breath.

Accordingly, based upon countless studies conducted over decades of scientific research, it is undisputed that while impaired drivers attempt to obey the rules of the road, they often do not and are not able to. That is why driving while under the influence of alcohol is a crime. Impaired drivers are just that: impaired. The City did not cause Carpenter's impairment. Carpenter's impairment caused Cho's injuries.

D. WHEN A DRIVER LOOKS AWAY FROM THE ROAD AND HITS A PEDESTRIAN IN A CROSSWALK, THE DRIVER'S INATTENTIVENESS IS THE CAUSE-IN-FACT OF THE COLLISION.

One need not look far to find a published case with similar facts directly on point with this case. In *Garcia v. State*, 161 Wn. App. 1, 16, 270 P.3d 599 (2011), this court found where a driver was not facing forward to the roadway, an argument that a municipality's failure to provide further visual clues was the proximate cause of the accident is "pure speculation."

In *Garcia*, Ms. Cushing drove towards a marked crosswalk where Garcia was crossing, failing to notice that a line-up of two other cars in the lane next to hers had stopped at the crosswalk to allow Garcia to pass. *Id* at 3-6. Because Cushing was talking to her son, who was seated in the

front passenger seat, she was not looking ahead or paying attention to the road and struck Garcia. *Id.* at 6. Garcia's estate alleged negligence on the part of the State and claimed that had it installed an operable "roving eyes"[9] warning sign at the crosswalk, the driver would have noticed and stopped before hitting Garcia. *Id.* at 7-8.

This court rejected that argument, noting that it was the driver's inattentiveness to the road, not the alleged inadequacy of the crosswalk or lack of a traffic device that caused plaintiff's injuries. *See Id.* at 16. Nor did it matter to the court that Cushing turned her attention back to the roadway two seconds before hitting Garcia once her son yelled out to alert her to the pedestrian, arguably allowing for time to react to the presence of a crosswalk warning sign. *Id.* at 3. The driver in *Garcia* was estimated to be traveling 36 m.p.h. before hitting the brakes, which is approximately the same speed Carpenter drove. CP 109.

Under *Garcia*, it is speculation to say that Carpenter might have stopped if provided different cues. Carpenter did not perceive and react to existing cues because she was not paying attention to the roadway. Even had she seen the cues, as in *Garcia*, it would not matter if she did not see

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[9] A roving eyes device is "an overhead LED display that is designed to flash when a pedestrian enters the crosswalk. The display uses a passive detection system designed to 'sense' the presence of a pedestrian and begin flashing." *Garcia*, 161 Wn. App. at 5.

them with enough time to react and stop before reaching the crosswalk. With her head turned away from the street and towards her passenger in a heated argument, Carpenter missed all visual cues (the stopped cars to her left and in front of her, and several pedestrians who were crossing in front of her). Carpenter could not stop for what she did not even look to.

To the extent a sober driver with two seconds to react to a crosswalk warning sign was deemed the cause-in-fact of the pedestrian's injuries in *Garcia*, the same conclusion should apply here as to a drunk and inattentive driver who had no time to react before hitting Cho and others.

Cho's multiple allegations that this intersection was dangerous cannot change the fact that neither of the drivers in the adjacent S/B and N/B lanes had any problem stopping at the unmarked crosswalk to allow Cho and other pedestrians to cross. Nor is there any evidence that Cho and other pedestrians were confused or misled by the roadway condition. As demonstrated below, Cho's arguments are insufficient to survive summary judgment.

In support of its opinion, the Garcia court cited *Miller v. Likins*, 109 Wn. App. 140, 145 (2001), where a 14-year old boy was injured when he was struck by a car that had allegedly crossed over the fog-line. His mother, as guardian, argued that had Federal Way "taken additional

precautions,...Likins would have been likely to be more alerted to possible presence of pedestrians, enabling him to avoid a collision." *Id* at 147.

This court affirmed summary judgment for Federal Way, stating that "summary judgment was proper here because Miller failed to satisfy her burden of producing evidence showing that the City's negligence proximately caused Quirmbach's injuries." *Id.* at 147. The court noted that all the plaintiff could show was that an accident *might* not have occurred if the City had installed additional safeguards and held such arguments to be improper speculation. *Id* at 147. Significantly, the *Garcia* court cited *Miller* for the proposition that a "showing of proximate cause must be based on more than mere conjecture or speculation." *Garcia,* 161 Wn. App. at 16. In doing so, the court affirmed that proximate cause was the core to the *Miller* holding, and that the holding was still valid.[10] For these reasons, plaintiff's argument that *Miller* does not apply must fail. Appellant's brief at 32-33.

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[10] Plaintiff contends that *Miller* was overruled by the Supreme Court, presumably in the *Keller* decision. Appellant's brief at 32-33, FN 20. *Keller* does not mention *Miller*, ruling that only *Wick v. Clark County*, 86 Wn. App. 376, 936 P.2d 1201 (1997) was overruled as a result of its decision. 146 Wn.2d at 254-255. Further, *Garcia's* citation to *Miller* rebuts plaintiff's argument that *Miller* was declared "legally erroneous." The same is true for *Kristjanson, v. City of Seattle*, 25 Wn. App. 324, 325, 606 P.2d 283 (1980), discussed below in Section E and FN 8: contrary to Appellant's claim, *Kristjianson* was never overruled by *Keller* and remains good law.

E. THE EXTREME RECKLESSNESS OF CARPENTER IS THE CAUSE-IN-FACT OF THIS COLLISION IN THE ABSENCE OF FACTS THAT CARPENTER WAS MISLED OR THAT CHO WOULD HAVE REACTED DIFFERENTLY AS A RESULT OF THE ROADWAY CONDITION.

In *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 325, 606 P.2d 283 (1980), the plaintiff was injured when struck by an intoxicated driver along a winding roadway.[11] Kristjanson alleged that the proximate cause of his accident was the City's failure to properly design or maintain the roadway. This court rejected plaintiff's argument, noting that "any suggestion that [the driver] was misled or that [the plaintiff] would have reacted sufficiently to avoid the accident is purely speculative." *Id.* This contention "can only be characterized as...conjecture." *Id.* This court affirmed summary judgment for the City, holding that even if the City negligently failed to maintain sufficient road visibility or adequately warn of hazards, there was insufficient evidence to establish that any negligence of the City was a proximate cause of the accident. *Id.* at 326.

The facts in *Kristjanson*, unlike those cases listed by the *Lowman* Court (*Id.* at 5), do not identify potential other or alternative causes-in-fact

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[11] *Kristjanson* was not referenced by the *Lowman Court* when it listed a line of lower court cases which had suggested that municipalities need not design or maintain roads to protect against negligent or reckless conduct, including conduct by those who may be comparatively at fault for their injuries. Thus, *Kristjanson* remains untouched by *Lowman*. *See* 178 Wn.2d 165, 309 P.3d 387 (2013).

for collisions or resulting injuries. Again, it would be pure speculation and conjecture to conclude that "but for" the lack of a signal, flagger or presence of a pedestrian island, Carpenter in her highly intoxicated state, would or could have exercised greater care. Such argument is particularly speculative given that other motorists approaching the same intersection while presumably sober, *did in fact see and stop* for Cho and the other pedestrians in the crosswalk. CP 109.

F. AS A MATTER OF LAW, THE EXTREME RECKLESSNESS OF CARPENTER IS THE SOLE CAUSE-IN-FACT AND PROXIMATE CAUSE OF THIS COLLISION.

The issues presented in the instant case—an extremely reckless driver with a high BAC who lacked attention to the road ahead—are identical to those addressed in *Kristjanson.*[12] Accordingly, the cause-in-fact of Cho's injuries was the reckless and inattentive driver, as nothing the City could have done would have altered the driver's actions.

Plaintiff's argument that this court should rely on the facts of *Unger v. Cauchon*, 118 Wn. App. 165, 175, 73 P.3d 1005 (2003),

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[12] Any suggestions that Carpenter was not grossly reckless can be readily dispelled by reference to her guilty pleas to 3 counts of felony vehicular assault (RCW 46.61.552: (1) A person is guilty of vehicular assault if he operates or drives any vehicle: (b) While under the influence of intoxicating liquor and this conduct is the proximate cause of serious bodily injury to another.); and 1 count of misdemeanor reckless driving (RCW 46.61.500: (1) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving...). CP 75-78, CP 95-105.

involving a fatal car crash as somehow similar to this case, must also fail. In *Unger*, the plaintiff drove at a high rate of speed, as he tried to get away from a chasing car during a night of heavy rains, snowmelt, and severe weather conditions, running red lights, swerving, turning his headlights on and off—ultimately driving off the road and crashing. *Id.* at 168-69.

Unger is inapposite and distinguishable from this case. First, there was evidence of a pre-existing drainage problem at the accident site, causing an "almost creek" to form on the road, rendering the road unsafe for ordinary travel when it rained (which would have caused good and bad drivers alike to hydroplane and crash). *Id.* at 177-78. Second, the crash in *Unger* occurred several minutes after the plaintiff was no longer being pursued. *Id.* at 169. There were no witnesses. Consequently, whether or not Unger had continued to drive recklessly at the time of the crash was unknown. Nor was it evident whether the county's failure to maintain the road was the proximate cause of his death. Accordingly, the court (1) restated the holding in *Keller*, that the County had a duty, even to reckless drivers, in designing its roads (*Id.* at 175-76), and (2) determined that there was a genuine dispute as to material facts that precluded summary judgment for the county. *Id.* at 174.

The instant case presents no similarity in facts or holding: any alleged negligence by the City did not cause Carpenter to look away from

the street and plow into the crossing pedestrians. *Unger* is inapplicable. Carpenter's recklessness is the sole cause-in-fact of Cho's injuries.

G. PLAINTIFF'S RELIANCE ON KELLER, CHEN, AND LOWMAN ARE MISPLACED, AS THOSE CASES DO NOT FOCUS ON THE CAUSE-IN-FACT ANALYSIS, ONLY DUTY AND LEGAL CAUSATION.

Cho points to *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), *Chen v. City of Seattle,* 153 Wn. App. 890 (2009), and *Lowman v. Wilbur*, 178 Wn. 2d 165, 309 P3d 387 (2013) claiming that together, these cases are sufficient to show that the City is not excused for being negligent because of Carpenter's reckless conduct. Cho is mistaken, as the facts and analysis in those cases focused on "duty", not the "cause-in-fact" component of "proximate cause", and thus, do not relieve Cho from having to prove "but for" causation. Indeed, this court specifically stated in *Chen*, at footnote 2 "The city's motion did not address the question of proximate cause." *Id.* at 899.

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 [emphasis added]." 146 Wn.2d at 249. Far from removing plaintiff's burden to show proximate cause, *Keller* reaffirmed the court's role, that "the court still retains its gatekeeper function and may determine that a municipality's actions were not the

legal cause of the accident... [and that a jury] may still conclude that the municipality's negligence is not the cause in fact of the plaintiff's injuries." *Id.* at 252.

Rather than overturn this core principal articulated in *Keller* as Cho seems to argue, *Lowman* holds that a municipality's *duty* does not extend only to those using the roads and highways in a non-negligent manner. 178 Wn.2d at 249. In *Lowman,* a driver drove down a winding hill, lost control of her car, drove off the road and hit a utility pole that was alleged to be negligently placed 4.47' from the edge of the roadway. Expert testimony provided that pole placement standards required a 10' clearance zone between the edge of the road and such utility poles. The facts in *Lowman* established the utility pole was the "but for" cause of the plaintiff's injuries; consequently, there was no need for the court to conduct a "but for" or "cause-in-fact" analysis.

Further, the *Lowman* Court merely rejected the "notion that a negligently placed utility pole cannot be the legal cause of the resulting injury." *Id.* at 172. Accordingly, although *Keller, Chen,* and *Lowman* extend the City's duty to maintain its roads in a condition that is reasonably safe for ordinary travel to negligent drivers, neither case alleviates Cho's burden to prove that "but for" the City's negligence, she would not have been injured by Carpenter.

H. UNDER THE FACTS, CHO CANNOT ESTABLISH LEGAL CAUSATION AS A MATTER OF LOGIC, COMMON SENSE, JUSTICE, POLICY AND PRECEDENT.

Notwithstanding Carpenter's admissions as the proximate cause of Cho's injuries, the issue of "legal causation"—whether liability *should* attach as a matter of law—is a matter reserved for the court. *Hartley*, *supra*. The Supreme Court of Washington, in affirming that road authorities "are not insurers against accidents nor the guarantor of public safety [,]" recognized that even where both negligence and cause-in-fact are established, "the court still retains its gatekeeper function and may determine that a municipality's actions were not the legal cause of the accident." *Keller v. City of Spokane*, 146 Wn.2d 237, 252-54, 44 P.3d 845 (2002).

While issues of duty and legal cause are intertwined, the existence of a duty does not automatically satisfy the requirement of legal causation. *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). Rather,

> The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. A determination of legal liability will depend upon "mixed considerations of logic, common sense, justice, policy, and precedent."

Id. 478-79 (citation omitted). Quoting from Prosser, the Court explained:

> It is quite possible, and often helpful, to state every question which arises in connection with [legal causation] in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur? Such a form of statement does not, of course, provide any answer to the question, or solve anything whatever; but it does serve to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact.

Id. at 479-80.

In this case, the event that gives rise to this lawsuit ("the event which did in fact occur") was a collision between an impaired motorist and a pedestrian in an unmarked crosswalk where the motorist had a statutory duty to stop (RCW 46.61.235). Where there is no evidence that the driver was confused or misled by any condition of the roadway, or even would have been able to react in time to avoid this collision, plaintiff cannot meet the "logic" and "common sense" prongs of the legal causation analysis.

Here, as in *Garcia Miller,* and *Kristjanson*, Cho's claims fail because they are simply too speculative to conclude that anything the City did or did not do with respect to the intersection was a cause-in-fact of Carpenter's failure to yield to Cho's presence in the crosswalk. To hold otherwise, in contravention of established precedent, would be to render the road authority the guarantor of public safety and fling open the

public coffers as insurance against all imaginable acts of negligent and reckless drivers.

It is precisely in this regard that *Keller* affirmed the requirement of legal causation as a gatekeeper function to safeguard against exposing a road authority to liability for every accident that occurs on its roadways. *Keller*, 146 Wn.2d at 252.

VI. CONCLUSION

As a matter of law, plaintiff cannot establish that any act or omission by the City was a proximate cause of the injuries she sustained in this unfortunate collision. Because Cho has failed to produce evidence sufficient to raise a genuine question of material fact as to whether the City's failure to provide a signal light, pedestrian island or flagger was the cause-in-fact of this collision, Cho cannot show that either was a proximate cause of a drunk and inattentive driver's failure to stop for pedestrians in a crosswalk. Accordingly, the City respectfully requests an order of dismissal under CR 56(e).

RESPECTFULLY SUBMITTED this 20th day of March, 2014.

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PROOF OF SERVICE

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

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On March 20, 2014, I requested ABC Legal Messengers to serve, by 5:00 p.m. on March 20, 2014, a copy of this document upon the following counsel:

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I further state that I requested ABC Messengers to deliver on March 20, 2014, for filing, the original and one copy of this document to the Court of Appeals, Division I at the business address listed below:

Court of Appeals, Division I
Clerk's Office
600 University St
One Union Square
Seattle, WA 98101-1176

DATED this 20th day of March, 2014.

BELEN JOHNSON, Legal Assistant