

No. 69421-9-1

King County Superior Court No. 11-2-09575-4SEA

COURT OF APPEALS, DIVISION I, OF THE STATE OF
WASHINGTON

GAYLE TORGERSON,
Petitioner

vs.

THE CITY OF SEATTLE; and AMELIA HARTMAN and JOHN DOE
HARTMAN, wife and husband, and their marital community,

Respondents

BRIEF OF RESPONDENT CITY OF SEATTLE

PETER S. HOLMES
Seattle City Attorney

REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorney
Attorneys for Respondents,
City of Seattle, Officers McDaniel and Lim

Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor
PO Box 94769
Seattle, WA 98124-4769
(206) 684-8200

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I. INTRODUCTION

Plaintiff Gayle Torgerson, a pedestrian, was struck by defendant Amelia Hartman, a motorist, while crossing a three-lane street in a marked, signed, intersection crosswalk. Plaintiff sued the City of Seattle (“the City”), alleging, without further specificity, that the City proximately caused her injuries by failing to “design, maintain, review, and operate” the “crossing area” in a “reasonably safe condition for the walking public.”

A few months before the trial date, the City moved for summary judgment. Because plaintiff had not yet identified the specific defect she claimed and the City had not yet had opportunity to depose her traffic engineering expert, the City did not address in its motion whether, in maintaining a marked, signed crosswalk without whatever additional engineering treatment plaintiff might ultimately urge as necessary, it breached the legal duty owed. Instead, the City brought its motion for dismissal on the grounds that (1) where the City had no record of prior pedestrian collisions or any citizen complaints, the City lacked actual or constructive notice of any problems with the intersection; and (2) because the City’s legal duty does not encompass actionable obligations to “review” or “operate” roadways on any particular schedule or in any particular manner, where “operations” of vehicles and pedestrians at any unsignalized crosswalk are regulated by state law, and where the danger of conflict between pedestrians and motorists arises if, and only if, one and/or the other fail to comply with the statutory Rules of the Road, plaintiff could not, as a

matter of law, establish that any act or omission on the part of the City was a legal cause of her injuries.

After the City filed its Motion, plaintiff's traffic engineering expert (Edward Stevens) opined that the crosswalk was not reasonably safe because the City had not yet installed "school zone" speed limit signage near the crosswalk that would have reduced the speed limit from 30 mph to 20 mph "When Children Are Present." Plaintiff argued that if there had been such signage in place defendant Hartman would have been driving 20 mph instead of 30 mph and either (1) would have had additional time to perceive and react to plaintiff's presence in the crosswalk, or (2) all other things being equal, would have passed behind her without incident.

Although the City disputes that its duty with respect to the design, construction, maintenance and repair of roadways includes regulatory actions with respect to traffic speed and denies that any applicable engineering standard of care required the City to have installed such signage prior to this collision, the City argued in Reply that a lack of school zone speed limit signage still could not be a cause of this crash because (1) there was no evidence that "Children [Were] Present" so as to bring the speed restriction into effect; (2) speed cannot be a proximate cause of a collision if it serves only to bring favored and disfavored parties to the same location at the same time; and (3) such argument still requires speculation that the defendant driver, who was familiar with the intersection, knew there were schools in the area, and who knew there may be pedestrians present but

saw none, would have seen and slowed had there in fact been children present.

Following argument on the City's Motion for Summary Judgment, the trial court (the Honorable Carol Schapira) granted plaintiff an additional two months to conduct further discovery into whether there were, in fact, children present such that the reduced speed limit would have been in effect. After a second hearing on the City's motion, the trial court agreed plaintiff lacked sufficient evidence to support her theory as to proximate cause and granted the City's motion for summary judgment.

Noting that the City had not opposed plaintiff's motion for certification, this Court then granted plaintiff's motion for discretionary review. The City asks this Court to affirm the order of dismissal.

II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

Whether the trial court properly concluded that plaintiff lacked sufficient evidence to defeat summary judgment as to whether the City's failure to have in place a school zone speed limit sign that would have reduced the speed limit from 30 mph to 20 mph "When Children Are Present" could be a proximate cause of this collision between a motorist and adult pedestrian in a marked, signed, intersection crosswalk.

III. STATEMENT OF THE CASE

The collision that gave rise to this lawsuit occurred at the West Seattle intersection of California Avenue SW and SW Dakota Street at approximately 7:43 a.m. on January 12, 2010. There are no independent

eyewitnesses to this event, but apparently plaintiff (a data analyst with King County Metro), was walking westbound across California, in a marked crosswalk across the south leg of the intersection, towards a Metro bus stop. In her interrogatory answers, plaintiff recalled the event as follows:

After it was safe to cross, I entered the subject crosswalk, with the right of way (I was heading for the bus stop that is just south of the intersection on the west side of California Ave SW in front of the Lutheran Church) and was subsequently hit by a vehicle driven by Amelia Hartman.

CP 50-51.

Defendant Hartman was traveling southbound on California, on her way to the morning Mass she attended daily at Holy Rosary Church. She testified that she saw a figure in the crosswalk, which she thought was just *past* her path of travel, and was surprised when plaintiff was suddenly up on her windshield. *CP 54, 57.* There is no evidence that there was any pedestrian in the crosswalk, or nearby, other than plaintiff.

Based on scene evidence, Seattle Police Traffic Investigation Unit Detective Karen Belshay determined that plaintiff had crossed the single northbound travel lane and the center left-turn median lane and was entering the single southbound travel lane from the center lane when she was struck by defendant Hartman's southbound vehicle. *CP 41-43.*

Both plaintiff and defendant Hartman were familiar with this intersection and this crosswalk. Plaintiff testified that this crosswalk was part of her usual route to work and that she had used this crosswalk as often as twice a day since 1999. *CP 61-62.* Ms. Hartman testified that she

had traveled through this intersection daily, on her way to morning Mass, since 1993. Ms. Hartman knew there was a marked crosswalk at this intersection and had seen (and stopped for) pedestrians in this crosswalk before. *CP 54, 58-59.*

A. THE ROADWAY AND INTERSECTION

California Avenue is a principal arterial that runs north/south through West Seattle, intersecting more or less in grid pattern with east/west streets. *CP 75-76*; see also, for illustrative purposes, *CP 44*. At its intersection with Dakota and at all points relevant, California comprises three lanes – one travel lane in each direction and a center median storage lane restricted to left-turning movements. *CP 76.*

Under RCW 35.78.010, cities are required to maintain “arterial” roadways; in Seattle, arterials are designated pursuant to SMC 11.18.010. Arterials are, by definition, roadways designed and intended to carry “relatively high traffic volumes.” RCW 35.78.010. It is unknown what traffic volumes approaching this crosswalk were on the morning in question. Plaintiff did not recall seeing¹ any traffic, on either California or Dakota, before stepping off the curb. *CP 64-65.*

By law, a “crosswalk” exists at every point at which two roadways

¹ Plaintiff is legally blind due to two vision impairments (amblyopia, or “lazy eye,” and a genetic form of color blindness), but testified that these impairments would not have impeded her ability to see approaching vehicles (“[G]enerally, I would be able to see headlights.” She testified that if there had been a car in southbound lane, she “would have expected to” see it. *CP 64.*

intersect, regardless of whether crosswalk markings are painted on the roadway. RCW 46.04.160. A “marked crosswalk” is separately defined as “any portion of the roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface thereof.” RCW 46.04.290. At the time of the accident, the crosswalk across the south leg of the intersection here was marked in a high-visibility Zebra pattern (horizontal white markings across the width of the crosswalk, parallel to the direction of motor travel) from the southeast to southwest curb. *CP 75-76; see also CP 45.* City records reflect that the crosswalk across the south leg had been marked for at least ten years; although records do not date back as far, it is believed that the south crosswalk has been maintained as a marked crosswalk as far back as the 1970s.² *CP 77.*

In addition to the crosswalk markings, fluorescent yellow pole-mounted warning signs were posted at and in advance of the marked crosswalk to provide additional notice of a pedestrian crossing. Fluorescent yellow “crossing flags” for pedestrians to carry or wave to further highlight their presence in the crosswalk were available in a bucket pole-mounted at

² Under RCW 40.14.060, a government agency is required to retain “official public records” as defined by RCW 40.14.010(a) for a term of six years. Washington State Archives “strongly recommends the disposition of public records at the end of their minimum retention period for the efficient and effective management of local resources.” *CP 67.* The City has not been able to locate any work order reflecting exactly when the crosswalk was first marked; however, maintenance records for the crosswalk signs that accompany marked crosswalks (and would not be installed were there not a marked crosswalk to supplement) date back to 1972. *CP 77.*

the east end of the marked crosswalk. *CP 76*; see also *CP 46*. Plaintiff knew the flags were there, but did not avail herself of a flag on the morning of this accident. *CP 63*.

There are (and were at the time of the accident) street lights along both the east and west sides of California, including street lights near both the northeast and southwest corners of the intersection that provide direct illumination of the intersection. These street lights automatically activate, and deactivate, depending on the level of ambient light sensed by photoelectric controls on the luminaires. Given the proximity of this collision to sunrise, weather conditions on that day, and the level of other ambient light present, it is unknown whether the street lights would have been activated at the time of Ms. Torgerson's crossing, but the City has no records or other information suggesting that the street lights were not in functioning order at the time of this collision. *CP 73-74*. Ms. Hartman testified that she had seen, and stopped for, pedestrians on mornings earlier (darker) than on the morning of this collision. *CP 59*.

The City has no records of any pedestrian accidents at this intersection prior to plaintiff's accident in January 2010. The City has no record of any complaints about this intersection prior to plaintiff's collision, whether as to the crosswalk, traffic on the roadway, or otherwise. *CP 78-79*.

In 2008, as part of the development of Seattle's Pedestrian Master Plan, SDOT evaluated and ranked all 16,000+ intersections in the City according to various factors, including collision history, existing

treatments, and proximity to pedestrian generators. Intersection rankings were divided into five tiers for prioritization for further review and improvement as funding allowed, with Tier 1 comprising the top 20% of intersections prioritized highest for improvement, and Tier 5 representing the lowest priority 20%. By this process, this particular intersection was ranked in Tier 4, number 9,873 on the overall list for further evaluation and, if appropriate, improvement.³ *CP 80.*

B. SPEED LIMITS ON CALIFORNIA AVE SW

Under SMC 11.52.080, speed limits along Seattle’s arterial streets are established at 30 mph unless otherwise posted. SMC 11.52.100

³ Other than citizen complaints (of which there are none here), the City does not have a way to record a “near-miss” (being, by definition, a collision that did not actually occur). With over 16,000 intersections in Seattle (across each leg of which there exists a legal crosswalk regardless of whether the City has marked it as such), the City does not have the resources to individually “monitor” operations at each of its intersections, let alone the budget to implement supplemental and discretionary engineering measures based on subjective review of dynamic traffic operations. Instead, pursuant to 23 U.S.C. §§ 152 and 402(k), which condition the City’s eligibility to receive federal highway safety grant funds upon having in place a process to gather, compile, and centrally store traffic collision information, the City “monitors” operations at intersections by compiling “high accident location” lists annually based on reported collisions (either by way of Seattle police incident reports or on insurance reports filed with the state) at intersections and mid-block locations. SDOT uses these “high accident location” lists to empirically prioritize locations for engineering review and, if warranted, improvement as available budget allows. SDOT has no records indicating that the intersection at issue ever appeared on a “high accident location” such that operations at the intersection would trigger review for supplemental engineering measures. *CP 79.*

restricts travel speeds to 20 mph “when passing any marked school or playground crosswalk or when within any marked school or playground zone when such marked crosswalk or zone is fully posted with school speed limit signs or playground speed limit signs.”

The crosswalk at California and Dakota is a school crosswalk, within the school zone for The Tilden School, a small private school near that corner. *CP 307-08*. Although there are other schools in the area (with their own established school zones and accompanying signage), the school zone at issue here is specific to The Tilden School. *CP 307-10*.

Plaintiff cites to the Manual on Uniform Traffic Control Devices⁴ (MUTCD) as imposing upon the City a requirement to have supplemented the school crosswalk at California and Dakota with school zone speed limit signage. The MUTCD standardizes signage for school zones, but does not itself mandate that school zones be established. *CP 137, 140, 153*. (“Reduced speed limits signs for school areas and crossings are included in this Manual solely for the purpose of standardizing signing for

⁴ The Manual on Uniform Traffic Control Devices (“MUTCD”), published by the Federal Highway Administration under 23 CFR, Part 655, contains the standards for signs, signals, and pavement markings (including crosswalk markings) that regulate, warn, and guide road users. Washington has adopted the MUTCD as the controlling standard for road design and maintenance. *See* WAC 468-95-010; RCW 47.36.020; *Garcia v. State*, 161 Wn. App. 1, -- P.3d – (Div. I 2011) at fn. 2 (“The MUTCD outlines current applicable traffic engineering standards[.]”). At the time of this collision, the 2003 version of the MUTCD was in effect. *CP 77*.

these zones and not as an endorsement of mandatory reduced speed zones.”).

Prior to 2007, SDOT policy provided that 20 mph school zone speed limits would be implemented only at locations that were officially designated as crossing guard locations by the Seattle Public Schools Traffic Committee (*i.e.*, a location where there was an official adult crossing guard to assist students with crossing). This intersection has never been designated as an official crossing guard location. *CP 309*.

In 2007, with funding available through the Bridging the Gap transportation levy, SDOT changed its policy to implement 20 mph school zones at all schools that had 20 or more students enrolled (whether public or private), developed a prioritization plan for establishing the new school zones, and began implementation of the plan, starting with public elementary schools and followed over the next few years by public middle schools, then public high schools, and finally private schools based on the number of students enrolled (larger schools were prioritized higher than smaller schools). The Tilden School, a private school with only approximately 90 students enrolled, few of whom walk to school, was one of the last schools to have a school zone implemented. The speed zone sign was installed pursuant to its scheduled date; it was not responsive to this collision. *CP 309*.

The City follows the MUTCD with respect to its school zone signage. Washington Administrative Code (WAC) 468-95-340 amends the MUTCD with respect to school zone speed limits signs by requiring

municipalities to supplement such signs with a plaque limiting the times that the school speed limit is in effect. Consistent with MUTCD § 7B.11 as amended by WAC 468-95-340, Seattle's school zone signs indicate a lower speed limit "When Children Are Present". CP 308. WAC 468-95-350 defines this condition to mean that:

- (1) School children are occupying or walking within the marked crosswalk;
- (2) School children are waiting at the curb or on the shoulder of the roadway and are about to cross the roadway by way of the marked crosswalk; or
- (3) School children are present or walking along the roadway, either on the adjacent sidewalk or, in the absence of sidewalk, on the shoulder within the posted school speed limit zone extending 300 feet, or other distance established by regulation, in either direction from the marked crosswalk.

There is no evidence that any "school children" (or any other pedestrians) were within the area (school zone) that, had it been signed, would have required a reduction in speed.

Based on traffic volume, speed, collision or complaint history, the City occasionally installs beacons to further supplement the "When Children Are Present" signage. In such circumstances, the beacons are programmed to flash, specific to the school they serve, for one half hour prior to the opening bell and for one half hour after classes let out – the times of day the City assumes that school children are likely to be present in that particular school zone. The City understands that classroom hours at The Tilden School run from 9:00 a.m. to 3:00 p.m. Accordingly, if

there were beacons supplementing the signage, the beacons would not begin to flash until 8:30 a.m., well after the time that this collision occurred. *CP 308*.

Ms. Hartman testified that she knew that there was a school at this location but that “there was no need to [heed the lower limit] because the children were not in school – going to school yet.” *CP 55*.

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, 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, plaintiff 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. ANY “CONFUSION” BETWEEN CAUSE-IN-FACT AND LEGAL CAUSATION IS IRRELEVANT 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*. 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). In this case, plaintiff having not yet identified the specific defect alleged (and thus, the City having no basis to address cause-in-fact in its opening papers), the City initially moved on the grounds of legal causation. The fact that the trial court ultimately articulated the basis for dismissal as a failure to produce evidence sufficient to allow a jury to infer cause-in-fact, rather than on a strict legal cause analysis, is irrelevant for three reasons:

(1) Because the “logic” and “common sense” prongs of legal causation effectively require a preliminary showing of cause-in-fact, it follows that evidence sufficient to support cause-in-fact is a necessary precedent to a finding of legal causation;

(2) where the trial court (having continued the trial) continued the summary judgment hearing for two months in order to allow plaintiff additional time to conduct discovery into whether there were “children

present” such that the reduced speed limit in that school zone would have been in effect and to supplement briefing on this issue, plaintiff cannot claim that she was afforded insufficient notice or opportunity to address the court’s concerns as to cause-in-fact; and

(3) In reviewing an order entered pursuant to CR 56, this court may affirm the trial court on any ground. *Security State Bank v. Burk*, 100 Wn. App. 94, 103, 995 P.2d 1272 (2000).

C. BECAUSE PLAINTIFF CANNOT ESTABLISH THAT THE REDUCED “SCHOOL ZONE” SPEED LIMIT WOULD HAVE BEEN IN EFFECT AT THE TIME OF HER COLLISION, PLAINTIFF CANNOT ESTABLISH THAT THE ABSENCE OF SPEED ZONE SIGNAGE WAS A PHYSICAL CAUSE OF THIS COLLISION.

The crux of plaintiff’s argument is that the City “created” a “dangerous condition” because, she speculates, if speed zone signage were in place, Ms. Hartman would have been traveling at the lower speed and would either (1) would have had additional time to perceive and react to her presence in the crosswalk, or (2) all other things being equal, would have passed behind Ms. Torgerson without incident. Both arguments are insufficient to survive summary judgment.

First, as an evidentiary matter, arguments premised on speculation as to how events might have transpired differently had a sign (informing Ms. Hartman of a restriction of which she was already aware) been in place fail under the requirements of CR 56(e). It is hornbook law⁵ that

proximate cause cannot be predicted on speculation or conjecture; as is relevant here, that rule applies whether the speculation is offered to prove the possibility that children *might* have been present or show how Ms. Hartman, in the absence of actually seeing any children, might have responded differently to the presence of a sign alone (informing her of a speed reduction that would not have been in effect absent the presence of any children). The evidentiary rule prohibiting speculation applies regardless of whether the speculation proffered is from an expert (Mr. Gill) or Ms. Hartman 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*

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.

v. *Hagge*, 158 Wn. App. 137, 241 P.3d 787 (2010) (one's own speculation as to how one probably would have proceeded is inadmissible).

Second, even if a sign had been in place on the *day* of this collision, the speed limit would not have been in force at the *time* of this collision. Pursuant to WAC 468-95-340 Seattle's school zone signs indicate a lower speed limit only "When Children Are Present", meaning, consistent with WAC 468-95-350, the reduced speed limit would have been in effect only when school children are either (1) occupying or walking within the marked crosswalk; (2) waiting at the curb or on the shoulder of the roadway and are about to cross the roadway by way of the marked crosswalk; or (3) present or walking along the roadway within the posted school speed limit zone extending 300 feet, or other distance established by regulation, in either direction from the marked crosswalk. The evidence plaintiff offers to suggest that there *could* have been "children present" at the time of this collision does nothing to establish that there were, *in fact*, children present.

Third, even if any children were present at the time of this collision, plaintiff's argument that a sign would have made any difference fails on the additional bases (1) that Ms. Hartman, being well familiar with this roadway, *knew* that there were schools in the area; (2) that Ms. Hartman *knew* that speed limits were lower when children are present, (3) that it is undisputed that Ms. Hartman did not see any schoolchildren (or any pedestrians) present, and thus, would have had no reason to modify her speed even if school zone speed limit signage informing her of a regulation of which she was already aware was in place. Logically, plaintiff's argument that a sign

would have made any difference in what actually happened makes sense if and only if plaintiff were able to put forth evidence (1) that there were, *in fact*, children present, (2) that Ms. Hartman saw schoolchildren present, but (3) because there was no sign to inform her of a reduced speed limit under such conditions, Ms. Hartman did not know that she was to modify her speed and/or stop for pedestrians in a crosswalk. The evidence being to the contrary on all three points, the trial court properly concluded that there was insufficient evidence to survive summary judgment as to whether any lack of signage proximately caused Ms. Hartman not to stop for a pedestrian who, for reasons unknown, she simply did not see in a marked, signed, intersection crosswalk.

D. BECAUSE PLAINTIFF CANNOT ESTABLISH THAT A REDUCED SPEED LIMIT WOULD HAVE BEEN IN EFFECT AT THE TIME OF HER COLLISION, AND BECAUSE SPEED CANNOT BE A PROXIMATE CAUSE OF A COLLISION IF IT SERVES ONLY TO BRING FAVORED AND DISFAVORED ROAD USERS TOGETHER AT THE SAME PLACE AND TIME, PLAINTIFF CANNOT ESTABLISH LEGAL LIABILITY AS A MATTER OF LOGIC, COMMON SENSE, JUSTICE, POLICY AND PRECEDENT.

Legal causation – whether liability *should* attach as a matter of law – is a matter reserved for the court. *Hartley, supra*. The Supreme Court, 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*, 147 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 a motorist and a pedestrian, in a marked, signed, intersection crosswalk of which the motorist was aware and at which the motorist had a statutory duty to stop for pedestrians. Where there is no evidence that Ms. Hartman was

confused or misled by any condition of the roadway, where there is no evidence that any speed zone signage, were it in place, would have been in effect at the time of this collision, and where there is no evidence beyond speculation and conjecture that Ms. Hartman, had she been traveling slower, would have perceived her surroundings any differently or reacted in time to avoid this collision (*see* Section C, above), plaintiff cannot meet the “logic” and “common sense” prongs of the legal causation analysis.

Plaintiff’s alternative argument that if Ms. Hartman had been traveling 20 mph instead of 30 mph (all other things being equal) plaintiff would have had time to cross without conflict regardless of whether Ms. Hartman stopped is likewise too flawed to go to a jury. Speed cannot be a proximate cause of a collision if it serves only to bring favored and disfavored parties to the same location at the same time. *Holmes v. Wallace*, 84 Wn. App. 156, 926 P.2d 339 (1996); *Channel v. Mills*, 77 Wn. App. 268, 890 P.2d 535 (1995). Moreover, analytically, this argument still presupposes that Ms. Hartman would have had *reason* to reduce her speed to 20 mph (*i.e.*, that she, who saw *no* pedestrians present, would have seen any hypothetical children were they present).

V. CONCLUSION

Despite being granted a two-month continuance of the summary judgment hearing and leave to conduct additional discovery and submit supplemental briefing, plaintiff failed to produce evidence sufficient to raise a

genuine question of material fact as to whether any failure to post a school zone speed limit sign could be a proximate cause of Ms. Hartman's failure to stop for a pedestrian in a crosswalk, and the court properly dismissed plaintiff's claims against the City. On de novo review, this court may affirm the trial court on any ground; thus, regardless of whether this Court finds that the trial court was less than articulate in distinguishing between cause in fact and legal cause but where both are required to establish proximate cause, this Court should affirm the order of the trial court dismissing the City on summary judgment.

DATED this 5th day of June, 2013.

PETER S. HOLMES
Seattle City Attorney

By: 
REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorney

Attorneys for Respondent, City of Seattle

Michaela M. Morrison 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 June 6, 2013, I requested ABC-Legal Messengers, Inc., to deliver, by June 7, 2013, a copy of the foregoing Brief of Respondent City of Seattle upon the following counsel:

James S. Rogers, WSBA #5335
Dana A. Henderson, WSBA #32507
Law Offices of James S. Rogers
1500 Fourth Avenue, Suite 500
Seattle, WA 98101

Howard Goodfriend, WSBA #14355
Smith Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101-2988

James N. Mendel, WSBA #29223
Bendele & Mendel PLLC
200 West Mercer Street, Suite 411
Seattle, WA 98119

and to file the original and one copy of said document with the Court of Appeals.

DATED this 6th day of June, 2013.


MICHAELA M. MORRISON