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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
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J. S. [Signature]

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

MITCHELL KANE,

Appellant,

v.

CITY OF SEATTLE, A  
MUNICIPAL CORPORATION,  
JONATHON HILTON, AND  
BETHANY COMMUNITY  
CHURCH,

Respondents.

No. 74638-3-I

BRIEF OF RESPONDENT  
BETHANY COMMUNITY  
CHURCH

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BETHANY COMMUNITY CHURCH -

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## I. INTRODUCTION

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

Unfortunately, Kane brought an unfounded claim against Bethany Community Church (a property owner near the intersection) and the City of Seattle claiming Hilton's failure to stop or yield at the intersection was somehow caused by a small tree located more than 40 feet north of the stop sign on southbound Stone Avenue North. As is abundantly clear from the police photos taken on the night of the accident, this claim is unsupported by the facts:



CP 378.

More importantly, Kane's liability theory against Bethany is not supported by Hilton (the drunk driver)-who testified he does not know why he failed to stop or yield.

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

MR. NICHOLS: Same objection.

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

\*\*\*

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

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

In other words, Hilton (the only person who would know) cannot say what caused his failure to stop or yield-other than his undisputed blood alcohol content of .12 g/100mL.

In light of Hilton's deposition testimony, admitted intoxication, and Kane's complete speculation (that a small tree more than 40 feet north of the stop sign might have been the cause of Hilton's failure to stop or yield to Kane) defendants Bethany and the City of Seattle moved for summary judgment. *See Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999) ("a verdict [on causation] cannot be founded on mere theory or speculation").

Following a hearing on summary judgment, the trial court correctly dismissed Kane's claim against Bethany ruling, as a matter of law, Kane had failed to meet his burden on causation, i.e., Kane's speculation that had the stop sign been fully visible (rather than mostly visible), Hilton *might* have seen the stop sign, *might* have reacted to the stop sign, *might* have applied the brakes, *might* have come to a stop at the intersection of 80th and Stone Avenue North, and *might* not have hit Kane, was insufficient to carry his burden of proof on causation.

In his appeal, Kane ignores the basis of the trial court's order and, instead, argues the ruling should be reversed because Bethany may have

violated some tree trimming codes. But the arguments raised by Kane do not change the fundamental reason why the trial court's order should be affirmed: Kane's theory of liability against Bethany is based entirely on speculation, which was not (and is not) sufficient to carry his burden of proof on causation.

## II. STATEMENT OF ISSUES

A. Kane was injured because Hilton (who was intoxicated) blew through a stop sign and struck Kane. Kane speculates Hilton failed to stop or yield at the intersection because branches from a small tree owned by Bethany partially blocked the stop sign; but Hilton himself has no idea why he missed the stop sign. Should this Court affirm the trial court's dismissal of Kane's negligence claim against Bethany because Kane's speculation as to why Hilton failed to slow down or otherwise take any precautions before entering the intersection does not meet his burden of proof on causation?

B. Under Washington law, a party may not pursue claims of private or public nuisance on what is in essence a claim sounding in negligence. Here, Kane claims he was injured because Bethany was negligent in maintaining a small tree. Should this Court affirm the trial court's order denying Kane's motion to amend his complaint to add a nuisance claim based on the same facts as his negligence claim?

### III. STATEMENT OF THE CASE

#### A. Facts.

At 11:30 p.m. on July 9, 2014, Jonathan Hilton failed to stop before trying to cross a busy arterial and caused Mitchell Kane (who had the right of way) to hit him from the right. CP 28-32. Before the accident, Hilton and two friends drank 18 beers over approximately two hours. CP 36 at 21:13-23:8. Hilton admits to drinking “5 or 6 beers,” himself. CP 45 at 86:13-17. He testified he believes he didn’t drink more than 6 beers—because after 6 beers he is so drunk that he almost always throws up (and he did not throw up that night). CP 36 at 22:9-25.

The accident happened at the intersection of Stone Avenue North and North 80<sup>th</sup> Street in the Green Lake neighborhood. Hilton was driving his new sports car south on Stone Avenue, a small neighborhood street, and Kane was driving his moped east on North 80<sup>th</sup> Street, a major arterial. CP 35 at 5:22-24; CP 53-54. It is undisputed that Kane had the right of way. Hilton’s approach to the intersection was controlled by a stop sign and a stop bar on the pavement. *Id.*; CP 57.

STOP SIGN

STORM AVENUE

INDICATE NORTH BY ARROW

RECEIVED JUL 15 11:00 AM DATA CENTER

N 80 ST

NARRATIVE

SEE CONTINUATION

NOT TO SCALE

I CERTIFY (DEC. 1987) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT. (RCW 9A.72.080)

INVESTIGATOR'S OFFICER'S SIGNATURE: [Signature] UNIT OR DIST. CRT: 6123V DATED: 7-10-14 PLACE SIGNED: SEATTLE WA

APPROVED BY: [Signature] DATE: 7-10-14

BADGE OR ID #	7173	ORI #	WA500000	TIME POLICE DISPATCHED	2343	TIME POLICE ARRIVED	2346
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CP 32.

Hilton knew he was approaching an intersection. CP 37 at 31:22-32:5. He also admits he did not slow down or otherwise take any precautions before entering the intersection. CP 38 at 35:9-36:1. In fact, even after the impact, Hilton kept driving until his passenger yelled at him to stop. CP 51 at 21:14-21. Hilton brought his vehicle to a stop 123 feet south of where Kane collided with him. CP 53, ¶ 2.

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Police officers arrived on the scene and immediately noticed that Hilton's speech was "thick and slurred" and that his "pupils were dilated." CP 64. Hilton failed a series of field sobriety tests and was arrested for suspicion of DUI. CP 53-54. A later blood draw showed that his blood alcohol content was .12 g/100mL (above the legal limit of .08). CP 45 at 86:8-87:4. On May 14, 2015, Hilton pled guilty to Vehicular Assault and made this admission:

On 7-9-14 in Seattle, I drove through a stop sign and hit a man on a motor scooter who had the right of way. He suffered substantial injuries including a bad leg fracture. I was impaired from alcohol at the time.

CP 71.

The first person to try to claim tree branches might have obstructed Hilton's view of the stop sign was Kane's counsel.<sup>1</sup> But, Kane's conjecture on that issue is not supported by Hilton (the drunk driver) or by any other evidence. At the accident scene, Hilton told officers that he had "pulled too far forward" and then "drove forward and the motorcycle struck his driver's side [passenger side] door." CP 63. In his interrogatory answers, Hilton admitted:

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<sup>1</sup> Bethany admits it owns the small crabapple tree on Stone Avenue North. But Kane misstates the facts in claiming a Street Use Permit produced in discovery (by the City of Seattle) imposes a duty upon Bethany. *App. Brief*, p. 3. That permit allowed Bethany to cut six holes in the sidewalk on Green Lake Way and plant six trees. CP 551 at no. 1. This permit has nothing to do with the trees on Stone Avenue North (the accident location). CP 809 at ¶ 4; CP 816-818.

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

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

Q. Let me ask you this, the last two sentences of your answer says, "I was driving to drop off Sean at his house when the accident occurred. I didn't see the stop sign until I got to it. I remember trees being there but currently have no recollection of whether they obscured my vision." Is that correct?

A. Yes. CP 50 at 13:11-18.

\*\*\*

Q. So is it fair to say as we sit here today, you don't know why you missed the stop sign on July 9, 2014?

MR. NICHOLS: Objection, asked and answered.

A. Yeah. I would say it's safe to say that I don't know why. CP 40 at 52:16-20.

\*\*\*

Q. So what I am asking you is as we sit here today, your answer is still currently, "I have no recollection of whether they obscured my vision." Is that accurate?

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

\*\*\*

Q. Mr. Hilton, I have heard you today and at your prior testimony making a lot of statements about what you believe and what you assume and it's very

natural for us in conversation to want to be able to provide an answer. But, unfortunately, with testimony we need a definitive answer one way or another. So as you sit here today, you do not know what caused you to not notice the stop sign in time; is that a correct statement?

MR. NICHOLS: Object to the form.

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

\*\*\*

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

MR. NICHOLS: Same objection.

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

\*\*\*

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

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

The Seattle Police Department investigated and photographed the accident scene that night. CP 379, 381. The police photographs show the stop sign as it would have appeared to Hilton as he approached the intersection. Among other things, Hilton's car's headlights would have

caused the stop sign to reflect brightly in the darkness.<sup>2</sup> CP 37 at 30:1-3. Also, as part of his investigation, Detective Bacon reviewed the in-car video of a responding officer which depicts the same southbound approach on Stone Avenue North approaching North 80<sup>th</sup> Street—the same approach taken by Hilton an hour earlier. CP 570-571, at ¶ 7. The stop sign was visible from a distance of 120. *Id.*



CP 381.

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<sup>2</sup> Kane cannot provide any insight into why Hilton failed to stop or otherwise yield to him because, among other reasons, he has no memory of the accident. CP 86.  
BRIEF OF RESPONDENT  
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CP 378.

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

**B. Procedural History.**

Kane filed this lawsuit in November of 2014. CP 1-3. On May 28, 2015, Bethany and the City of Seattle notified Kane they intended to file for summary judgment. CP 141. On September 2, 2015, Kane moved to amend his complaint to add a claim for nuisance. CP 92-94. Relying on Washington law, which holds a plaintiff is not allowed to pursue claims of private or public nuisance on what is in essence a claim sounding in

negligence, Bethany opposed Kane's motion.<sup>3</sup> The trial court appropriately denied Kane's motion to amend. CP 198-199.

On September 29, 2015, Bethany and the City of Seattle filed their motions for summary judgment. CP 8-20; CP 544-567. At Kane's request, those motions were set over until November, 2015. CP 118-126. On November 13, 2015, following oral argument, the Honorable Jean Rietschel ruled from the bench and dismissed Kane's claims against Bethany and the City of Seattle. CP 529-530. The trial court ruled that although there was some evidence that the stop sign was partially obstructed, Hilton's testimony never deviated: he has no recollection of whether the tree obstructed his vision the night of the accident.<sup>4</sup> RP 39 at lines 15-16. Judge Rietschel ruled that Kane had failed to meet his burden of proof on causation. RP 41.

Judge Rietschel also ruled that Kane's duty analysis was flawed. Kane's expert analyzed Hilton's ability to stop factoring in Hilton's

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<sup>3</sup> *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990) (“[i]n those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied.”)

<sup>4</sup> Kane presented the trial court with the same deposition testimony relied upon in his appellate brief and argued Hilton had admitted the tree branches obstructed his vision of the stop sign. *App. Brief*, p. 7-8. This is not correct. The testimony consists of an exchange between Hilton and Kane's counsel regarding a photo Hilton had never seen. The trial court correctly found the cited testimony related specifically to the photo, but that the thrust of Hilton's testimony never changed: he didn't know that, in fact, the tree branches obstructed his vision. RP 39 at lines 13-25.

delayed reflexes (due to his intoxication) and his travel in excess of the speed limit, and concluded Hilton did not have enough time to stop.<sup>5</sup> RP 40 at lines 9-12. Conspicuously absent was testimony that a sober driver traveling the speed limit would have had difficulty seeing and obeying the stop sign. The trial court correctly concluded Bethany did not owe Kane a duty to protect him against a drunk speeding driver. RP 40-41.

#### IV. ARGUMENT

**A. The Trial Court Properly Dismissed Kane's negligence claim against Bethany because (1) Kane cannot meet his burden of proof on proximate causation; and (2) the sole and proximate cause of Kane's injuries was Hilton's failure to exercise slight care.**

**1. The trial court's dismissal should be affirmed because, Bethany's alleged failure to maintain a small tree was not a proximate cause of Kane's injuries.**

In order to prove a claim for negligence, a plaintiff must establish the existence of a duty, a breach of that duty, and a resulting injury. *Marshall*, 94 Wn. App. at 378. Of course, for liability to attach, the alleged breach must be the cause of the injury. *Id.* "Even if negligence is clearly established, the [defendant] may not be held liable unless their

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<sup>5</sup> Kane's expert's calculations are irrelevant. Reaction times would only be relevant if Hilton *had* reacted to the stop sign. Because Hilton never reacted to the stop sign, Kane's argument that additional sight distance *might* have caused Hilton to react differently is pure speculation. Hilton admits he knew he was approaching an intersection and he admits he did not slow down or otherwise take any precautions before entering the intersection. CP 37 at 31:22-32:5; CP 38 at 35:9-36:1.

negligence caused the accident.” *Id.* A verdict on causation cannot be based on an unsupported theory or speculation. *Id.* at, 379; *See also Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006).

Before this Court, Kane argues that proximate cause should never be decided on summary judgment. *App. Brief*, 10, n. 1. But, appellate decisions have routinely affirmed trial courts’ dismissal of negligence claims when there is a failure of proof on proximate cause. In *Little, supra*, the plaintiff’s claims were dismissed on summary judgment where he injured himself after falling off a ladder on the defendant general contractor’s work site. *Little*, 132 Wn. App. at 784. Plaintiff established that the defendant had committed numerous safety violations with respect to ladder use. *Id.* at 780-81. However, the plaintiff could not describe exactly how he was injured (because he struck his head and did not remember the incident), only that he had fallen from a ladder. Thus, even though he could prove safety violations and injury, he could not prove that those violations caused him to fall, because he did not know. Accordingly, the court dismissed his claims on summary judgment. *Id.* at 784. In dismissing the plaintiff’s claims, the court reasoned,

[t]o meet his burden, Little needed to present proof sufficient to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that

the moving party should be held liable. The party who has the burden of production need not provide proof to an absolute certainty, but reasonable inferences cannot be based upon conjecture.

*Id.* at 781 (internal citations omitted).

In *Johanson v. King County*, 7 Wn.2d 111, 109 P.2d 307 (1941), the injured plaintiff claimed the County was negligent for failing to remove old lane dividers allegedly causing drivers to think the road was a two-lane rather than a four-lane road. The plaintiff claimed the driver who caused the accident “might have been and probably was deceived and misled by the yellow line.” *Id.* at 122. However, because the at-fault driver was killed in the accident, the plaintiff had no direct evidence that this was the case. The Washington Supreme Court affirmed the summary judgment dismissal of plaintiff’s claims against the County reasoning that the plaintiff could not recover because of what they claimed *might* have happened. The Supreme Court reasoned that a

...jury may not enter into the realm of conjecture or speculation, in determining whether or not the location of the yellow line was a proximate cause of the collision.

*Id.*

Similarly, in *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 606 P.2d 283 (1980), the plaintiff alleged the City caused the car accident in which he was injured by “failing to maintain, properly design, and

properly control the use of a road in Golden Gardens Park.” The Court of Appeals affirmed the trial court’s dismissal because the plaintiff could not show that the City’s actions proximately caused his injuries. The court stated: “At most, Kristjanson’s contentions are that, given additional sight distance, he *might* have reacted in a way which could have avoided the collision and that [the other driver] *might* have heeded warning signs to drive carefully. His contentions can only be characterized as speculation or conjecture.” *Id.* at 326.

Finally, in *Cho v. City of Seattle*, 185 Wn. App. 10, 341 P.3d 309 (2014), a pedestrian brought a negligent action against the City after a drunk driver struck him while he was crossing the street in an unmarked crosswalk. The pedestrian sued the drunk driver, the Showbox (a local entertainment venue), and the City. The pedestrian asserted that had the City installed a pedestrian island, she would not have been struck by the drunk driver. In affirming the dismissal of the pedestrian’s claims against the City, the Court of Appeals reasoned that the pedestrian’s entire theory of liability against the City was comprised only of speculation on what the City should have done to prevent the accident, but that such speculation did not establish causation. While *Kristjanson*, *Johanson*, and *Cho* addressed claims against municipalities, the holdings and reasoning in those cases are equally applicable to Kane’s claims against Bethany.

Here, the most Kane can do is speculate that given additional sight distance, Hilton *might* have reacted differently and the collision *might* have been avoided. But speculation cannot create a material issue of fact. As found by the trial court, the reasonable inference to be drawn from the undisputed facts is that the partial obstruction played no role in the accident. Just as the plaintiffs in *Kristjanson*, *Johanson*, and *Cho* were not allowed to posit conjectural theories of what might have caused the accidents at issue in those cases, the trial court correctly ruled Kane's conjectural theories were insufficient to carry his burden of proof. Judge Rietschel reasoned:

The fact that Mr. Hilton does not recall and has no recollection of the trees obscuring his vision, the lack of an expert that clearly states the obstruction of the sign is a clear proximate cause of this accident, as it would be in the nature of the way that opinion is expressed, even in taking everything in favor of the Plaintiff, this Court would find ... there's a failure to provide proof of a proximate cause.

RP 41. Judge Rietschel's ruling should be affirmed.

**2. Notably, even Kane's cited authority supports affirming the trial court's decision.**

Kane cites *Wuthrich v. King County*, 185 Wn.2d 19, 366 P.3d 926 (2016) for the proposition that proximate cause issues should never be decided on summary judgment. But Kane's reliance on *Wuthrich* is misplaced. While *Wuthrich* is factually similar to this case, there is one

critical difference: in *Wuthrich*, the plaintiff was not relying on speculation to establish the alleged causal link between the alleged breach and plaintiff's injury.

*Wuthrich* involved a motorcyclist who was injured by a motorist who pulled out in front of him at an intersection. The key difference between this lawsuit and *Wuthrich* is that in the latter case, Gilland (the driver) testified blackberry bushes (owned by the County) obstructed her view of the intersection, so she did not see Wuthrich until she had already begun her left-hand turn and did not have time to stop. *Wuthrich*, 185 Wn.2d at 28. The appellate court affirmed and the Supreme Court reversed the trial court's dismissal of the claims against the County reasoning that the driver's testimony raised a genuine issue of material fact as to whether Wuthrich would in fact have been injured if the driver's view had not been obstructed. *Id.* Here, Kane *speculates* that Hilton (the driver) ran the stop sign because his vision of the stop sign was partially obstructed by tree branches. But Hilton's own testimony has remained unchanged: he does not know why he failed to stop before entering the intersection. CP 50 at 13:11-18; CP 40 at 52:16-20; CP 41 at 53:12-13; CP 42-43 at 63:22-64:6, 64:19-65:5; CP 44 at 83:6-9. The trial court properly dismissed Kane's speculative causation case.

3. **Kane's focus on duty and breach is misplaced because the trial court correctly found Kane failed to carry his burden of proof on causation.**

a. **Bethany does not dispute it has a duty to maintain its tree, but Bethany's tree was not the proximate cause of Kane's injuries.**

Kane cites SMC 15.43.040 and SMC 10.52.030 which impose upon landowners the duty to maintain trees abutting public places. *App. Brief* at 12. Bethany does not dispute these propositions. But, Kane must present sufficient proof to allow a reasonable person to conclude the harm, more probably than not, happened in a way the moving party should be held liable. *Little*, 132 Wn. App. at 781. Here, Kane has no proof that Hilton's failure to stop (or slow down) was in any way related to tree branches because Hilton has no idea why he failed to stop or yield. CP 50 at 13:11-18; CP 40 at 52:16-20; CP 41 at 53:12-13; CP 42-43 at 63:22-64:6, 64:19-65:5; CP 44 at 83:6-9. The trial court's order should be affirmed.

b. **Kane's remaining cited authorities do not impose any duties upon Bethany and do not provide a basis for reversing the trial court's order.**

Kane also cites RCW 47.36.060 which states, in part, that "[l]ocal authorities in their respective jurisdictions shall place and maintain such traffic devices upon public highways under their jurisdiction as are necessary to carry out the provisions of the law or local traffic ordinances

or to regulate, warn, or guide traffic.” Kane also cites to the Washington State Department of Transportation Traffic Manual. *App. Brief*, p. 11. The introductory chapter of the Manual states in pertinent part, “[t]he intended audience is the department’s employees and others who develop traffic projects or conduct traffic engineering studies on state highways.” CP 794 at 1.1. Neither the statute nor the manual create a genuine issue of material fact. There is nothing in the statute or manual that would impose a duty upon Bethany.

Even if the statute and/or manual did impose a duty on Bethany, Kane’s expert failed to raise a material issue of fact. As the trial court correctly noted, Kane’s expert opined that because of Hilton’s excessive speed and his delayed reflexes (due to his intoxication) it would have taken Kane longer to react and stop than a sober driver. CP 494, ¶ J. RP 40. As the trial court correctly concluded, Bethany was not under a duty to protect Kane from Hilton’s extreme carelessness—speeding and driving drunk. *Klein v. City of Seattle*, 41 Wn. App. 636, 639, 705 P.2d 806 (1985).

4. **The trial court's dismissal of Kane's claim against Bethany should also be affirmed because, even if Hilton's view of the stop sign had been completely obstructed—which it was not—Hilton failed to yield to Kane—as required by law.**

The law imposes upon drivers a duty to approach an intersection at an appropriate reduced speed and requires that, when two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield to the vehicle on the right. RCW 46.61.180 and RCW 46.61.400(3).

Hilton admits he knew he was approaching an intersection. CP 37 at 31:22-32:5.

Q. How did you know you were approaching an intersection?

A. By the cross street. I mean that's a pretty apparent 80<sup>th</sup>. I could tell by 80<sup>th</sup>.

CP 37 at 32:2-5. He therefore had a duty to reduce his speed and yield the right-of-way to any driver approaching the intersection from his right.

Yet, it is undisputed that Hilton took no precautions as he approached the intersection. CP 38 at lines 35:9-15. Hilton admits he did not brake or slow down as he approached the intersection with North 80<sup>th</sup> Street. *Id.*

The sole and proximate cause of this accident was Hilton's failure to exercise *slight* care as he sped through a residential neighborhood at 11:30

p.m. The trial court's order should be affirmed. CP 19-20; CP 527 at lines 4-14.

**B. The trial court properly exercised its discretion denying Kane's motion to amend because Washington law does not allow a personal injury claim to be reasserted as a nuisance claim.**

An order denying a motion to amend a pleading under CR 15(a) is reviewed for abuse of discretion. "Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 374, 112 P.3d 522 (2005). A court's decision is "manifestly unreasonable" only if the trial court adopts a view that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115, 118 (2006). A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" only if the trial court relies on unsupported facts or applies the wrong legal standard. *Id.* Here, Judge Rietschel did not abuse her discretion when she applied Washington law and denied Kane's motion to amend.

**1. The trial court's denial of Kane's motion to amend should be sustained because Kane's negligence claim is not actionable as a public nuisance.**

CR 15(a) allows parties to amend their pleadings where justice requires. But, a motion to amend should be denied where the amended

claim is futile. *Doyle v. Planned Parenthood of Seattle–King Cty., Inc.*, 31 Wn. App. 126, 132, 639 P.2d 240 (1982); *see also Shelton v. Reed*, 90 Wn. App. 923, 927, 954 P.2d 352 (1998) (the trial court erred when it allowed a plaintiff to amend his complaint to include a claim that was barred by statute and, therefore, futile).

Actionable nuisance is an “obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property,” and may be the subject of an action for damages and other and further relief. *Womack v. Van Rardon*, 133 Wn. App. 254, 260, 135 P.3d 542 (2006) (quoting *Grundy v. Thurston Cty.*, 155 Wn.2d 1, 7, 117 P.3d 1089 (2005)). A private nuisance is every nuisance that is not public. *Id.*; RCW 7.48.150. A public nuisance is one “which affects equally the rights of an entire community or neighborhood.” *Womack*, 133 Wn. App. at 260 (quoting *Grundy*, 155 Wn.2d at 6-7). RCW 7.48.140 enumerates the statutorily proscribed public nuisances.<sup>6</sup> Kane’s proposed cause of action did not fit within any of these enumerated public nuisances. Notably, Kane cited no Washington authority in support of his motion to amend. This Court should affirm the trial court’s denial of Kane’s motion to amend.

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<sup>6</sup> A copy of the statute is attached for the Court’s reference. CP 778-779.  
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**2. The trial court correctly denied Kane's motion to amend his complaint because Kane's personal injury claim cannot be dressed-up and re-alleged as a nuisance claim.**

Kane's motion to amend was properly denied because allegations of public nuisance based on the same omissions or acts that give rise to a cause of negligence are not allowed under Washington law.

In *Atherton Condominium Apartment-Owners Association v. Blume Development Company*, 115 Wn.2d 506, 799 P.2d 250 (1990), the Supreme Court of Washington dismissed a public nuisance cause of action because it was based on the same facts and allegations that constituted the plaintiff's negligence claim. The court held:

In Washington, a "negligence claim presented in the garb of nuisance" need not be considered apart from the negligence claim. *Hosteller v. Ward*, 41 Wn.App. 343, 360, 704 P.2d 1193 (1985), *review denied* 106 Wn.2d 1004 (1986).

...

Owners' contention that Atherton is a nuisance is premised on their argument that Blume was negligent in failing to construct Atherton in compliance with the applicable building code. In other words, even if Atherton does constitute a nuisance, the nuisance would be solely the result of Blume's alleged negligent construction. Accordingly, we do not consider the nuisance claim apart from the negligence claim, discussed *supra*. We conclude that the trial court properly dismissed Owner's nuisance claim.

*Id.* at 527-528. The Court reasoned: “[i]n those situations where the alleged nuisance is the result of the defendant’s alleged negligent conduct, rules of negligence are applied.” *Id.* at 527. Consequently, nuisance law does not provide the plaintiff with an independent, alternate theory of recovery. *Id.*

Here, Kane’s claim was and is a negligence claim. Kane alleged that Bethany was negligent in its maintenance of tree branches that were forty-one feet north of a stop sign and that Hilton failed to stop because the stop sign was obscured by those branches—a claim Hilton has never made in this case. CP 44 at 83:6-9. Because Kane relies on identical allegations to support both his nuisance and negligence claims, the claims are inseparable. Following Washington law, the trial court properly denied Kane’s request to amend because Kane’s nuisance claim would have been superfluous.

**3. Even if the law allowed Kane to assert a separate nuisance claim, the claim would still fail as there is no proximate cause between the alleged nuisance and Kane’s injuries.**

Kane’s public nuisance claim, like his negligence claim, was based on the same alleged negligent conduct—failing to prune branches 41-feet north of the stop sign. *Compl.* at 2:26. But, Kane’s public nuisance cause of action would have failed for precisely the same reasons as his

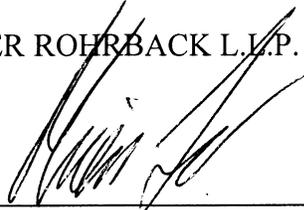
negligence cause of action—a lack of proximate cause. *See supra* Section A(1).

## V. CONCLUSION

Kane's claims against Bethany were and are a work of fiction. Kane urged the trial court to ignore Hilton's deposition testimony and to speculate about why Hilton might have failed to stop or yield before entering the intersection, as he was required to do. But it is black letter law that a jury may not enter into the realm of conjecture or speculation in determining the proximate cause of an accident. The trial court properly dismissed Kane's claim against Bethany and that order should be affirmed.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of August, 2016.

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By 

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**CERTIFICATE OF SERVICE**

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

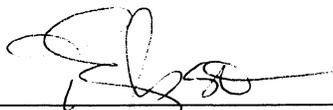
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SIGNED this 25<sup>th</sup> day of August, 2016, at Seattle, Washington.

  
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