

FILED
SUPREME COURT
STATE OF WASHINGTON
1/18/2019 4:07 PM
BY SUSAN L. CARLSON
CLERK

No. 95947-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA CANE FRAHM,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

This Court has determined that causation in criminal law must be more stringent than in tort law, because tort liability does not impose the same punitive consequences of lengthy imprisonment. Yet for the class A criminal offense of vehicular homicide, which severely punishes a driver who proximately causes the death of another, Washington courts continue to import a broad amalgam of tort law articulations of foreseeability to determine whether an intervening act supersedes the defendant's criminal liability as the proximate cause of death.

Joshua Frahm was convicted of vehicular assault for crashing into a Honda CRV. He was also convicted of vehicular homicide for the death of a pedestrian who later walked across a three-lane highway in the dark to assist the driver of the Honda CRV, and was killed when another vehicle struck the CRV. The Court of Appeals applied simple tort law foreseeability principles to determine the subsequent events were not intervening causes that relieved Mr. Frahm of criminal liability for vehicular homicide. Because this Court requires narrower causation in criminal than in tort law, his homicide conviction should be reversed for insufficient evidence.

B. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED.

In tort law, even if an intervening act breaks the chain of proximate causation, the defendant is still financially liable if the intervening act was reasonably foreseeable. However, in criminal law, where imprisonment is imposed, there should be “a closer relationship between the result achieved and that intended or hazarded,” which requires the defendant “actively participate in the immediate physical impetus of harm” in order to establish criminal liability under a theory of proximate cause. *State v. Bauer*, 180 Wn.2d 929, 936-940, 329 P.3d 67 (2014).

The Court of Appeals determined that Mr. Frahm was criminally liable for all reasonably foreseeable intervening acts within the “general field of danger” subsequent to hitting the CRV. Does Mr. Frahm’s conviction for vehicular homicide that is based on tort principles require reversal of his conviction for insufficient evidence, where this Court requires narrower causation in criminal law than in tort law?

C. STATEMENT OF THE CASE.

1. The first accident: Mr. Frahm hit Mr. Klase’s CRV.

Steven Klase was driving his Honda CRV in the right hand lane, northbound on I-205 at around 5:50 a.m. when Mr. Frahm, driving his pick-up truck at a high rate of speed, approached him from behind. RP

249-250, 277, 355. Mr. Frahm struck Mr. Klase's CRV. RP 249, 347. The impact spun the CRV and sent it across the lanes of travel into the concrete jersey barriers on the left side of the highway. RP 280, 347. The CRV came to rest at an angle across the left lane, extending a little into the middle lane. RP 280-283, 347-348.

Richard Irvine approached the CRV from the south on I-205. RP 295-296. He pulled his vehicle off to the right side of the three-lane highway and turned on his emergency flashers. RP 296, 457. He got out of his vehicle and walked across the three-lane highway to the CRV, where he called 911 to report the crash. RP 295-296, 355. Mr. Irvine's positioning next to the CRV left him limited ability to move in case of another approaching vehicle. RP 377.

2. The second accident: Mr. dela Cruz-Moreno failed to see the CRV in time and hit it, causing the CRV to hit Mr. Irvine, killing him.

While Mr. Irvine was standing in the highway near the CRV, a minivan driven by Freddie dela Cruz-Moreno was traveling north on I-205. RP 282, 347-348. Mr. dela Cruz-Moreno crashed into the CRV, which flung the CRV forward about 30 feet. RP 377-379, 383. The force from this impact caused the CRV to hit Mr. Irvine, causing injury that resulted in his death twelve days later. RP 270, 296, 889.

It was dry and the fog was only starting to roll in at the time Mr. Irvine was hit, though it was still dark out. RP 172-173, 218-219.

Mr. dela Cruz-Moreno gave two accounts of the crash. RP 495-505. In the first account given shortly after the event, he stated he was traveling in the far left passing lane, going the speed limit,¹ and did not see the disabled CRV located in that lane until he was almost upon it. RP 498-499. He was not able to apply his brakes in time, and he hit the CRV. RP 498-499, 501. At trial, Trooper Robert Wollnick stated that it was a traffic infraction² to travel in the passing lane, and he frequently tickets drivers for this offense. RP 213-214, 230.

After the accident and death of Mr. Irvine, a representative from Mr. Irvine's insurance company told Mr. dela Cruz-Moreno that he should hire a lawyer. RP 502. In his later account of events, Mr. dela Cruz-Moreno stated that he was traveling in the center lane of travel when he saw the emergency lights from Mr. Irvine's car on the right. RP 457-459. This caused him to pull into the far left lane. RP 457-458. As he moved

¹ Neither Mr. Frahm's expert nor the State's collision reconstructionist could say what the minivan's speed of travel prior to the accident. RP 302. Mr. dela Cruz-Moreno claimed he was going the speed limit because he doesn't speed. RP 499. He did, however, have previous speeding tickets. RP 499.

² RCW 46.61.100

into this lane, he saw the wrecked CRV and attempted to stop, but was unable to avoid hitting it. RP 457-459.

Mr. Frahm introduced the testimony of a mechanical engineer specializing in forensic engineering, Thomas Fries, who testified that this second accident was a full momentum impact. RP 1419-1420. Based on his calculations, he did not believe Mr. de la Cruz Moreno's second version of events was possible. RP 1424-1425.

Flashers are designed to be visible from 500 feet away. RP 1443, 1446. Mr. Fries opined that the flashers on the side of the road should have caused Mr. dela Cruz-Moreno to slow down, giving him the opportunity to brake or swerve before identifying the CRV in the roadway. RP 1421-1422, 1443-1444, 1446.

3. Mr. Frahm was found guilty of vehicular homicide based on various tort theories of foreseeability, including criminal liability for all foreseeable harm within the "general field of danger."

Mr. Frahm was charged with vehicular assault for hitting Mr. Klase's CRV, in addition to various offenses related to leaving the scene. CP 1-9. Mr. Frahm was also charged with vehicular homicide for Mr. Irvine's death, even though it was Mr. dela Cruz-Moreno who later hit the CRV, which then hit Mr. Irvine. CP 1-9.

Over Mr. Frahm's objection, the trial court instructed the jury according to WPIC 90.08,³ which employs various tort law concepts to determine whether an intervening cause supersedes the defendant's original act. RP 1336-1399, 1477-1486, 1497-1519; CP 106, 195.

The jury convicted Mr. Frahm of vehicular homicide under both the driving while intoxicated and reckless driving alternatives, in addition to all other charged offenses. CP 219-225. With an offender score of four, he was sentenced to serve 13.5 years in prison. CP 241-255. The court also imposed \$287,060.80 in restitution. CP 247.

On appeal, Mr. Frahm argued that the State presented insufficient evidence that his actions proximately caused Mr. Irvine's death. Instead, Mr. Irvine's act of crossing the freeway was a superseding, intervening cause, as was Mr. dela Cruz-Moreno's second collision in which he hit the CRV, which in turn struck Mr. Irvine, a pedestrian standing in the highway. *State v. Frahm*, 3 Wn. App.2d 812, 818, 418 P.3d 215 (2018), *rev. granted*, 191 Wn.2d 1026, 428 P.3d 1170 (2018).

³11A Washington Practice: Washington Pattern Jury Instructions: Criminal 90.08 (4th Ed. 2016) (WPIC). Mr. Frahm's proposed alternative rejected liability for foreseeable conduct of others, proposing instead *Bauer's* limitation that "the defendant cannot be held liable if he did not actively participate in the immediate physical impetus of the harm." CP 80.

The Court of Appeals affirmed Mr. Frahm’s vehicular homicide conviction. *Id.* at 822. Relying on various articulations of foreseeability, the Court of Appeals determined that “although this specific victim may not have been foreseeable, the general field of danger was clearly foreseeable,” which disqualified the events of the second accident as intervening, superseding causes of Mr. Irvine’s death, rendering Mr. Frahm liable for vehicular homicide. *Id.*

D. ARGUMENT.

Making a defendant criminally liable for all foreseeable events is an expansive application of tort law principles that should not determine criminal liability for the crime of vehicular homicide.

a. A person is guilty of vehicular homicide only if his driving is the proximate result of death; an intervening act breaks the causal chain necessary to establish proximate cause for the offense.

Vehicular homicide requires proof beyond a reasonable doubt that the accused’s driving was the proximate cause of death. Here, the second accident between Mr. dela Cruz-Moreno, the CRV, and Mr. Irvine were intervening causes of harm that should have relieved Mr. Frahm from liability for the offense.

The crime of vehicular homicide is defined as:

(1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

- (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
- (b) In a reckless manner; or
- (c) With disregard for the safety of others.

RCW 46.61.520.

For the offense of vehicular homicide, a defendant's conduct is a proximate cause of harm to another if, "in direct sequence, unbroken by any new independent cause, it produces the harm, and without it the harm would not have happened."⁴ *Frahm*, 3 Wn. App.2d at 819 (citing *State v. Meekins*, 125 Wn. App. 390, 396, 105 P.3d 420 (2005)).

"An intervening cause is a force that actively operates to produce harm to another *after* the actor's act or omission has been committed." *State v. Souther*, 100 Wn. App. 701, 710, 998 P.2d 350 (2000) (emphasis in original). An intervening cause is temporally distinct from the defendant's antecedent negligence: "'intervening' is used in a time sense; it refers to later events." *Id.* at 710.

An intoxicated defendant is not criminally liable for a death that results from his driving if the death was caused by a superseding intervening event. *State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57

⁴ The statute does not define "proximate cause," so courts derive the definition from common law. *State v. David*, 134 Wn. App. 470, 481, 141 P.3d 646 (2006).

(1995). For an intervening act to be a superseding cause, it must occur after the defendant's act or omission. *State v. Roggencamp*, 115 Wn. App. 927, 946, 64 P.3d 92 (2003), *aff'd*, 153 Wn.2d 614, 106 P.3d 196 (2005). In *Roggencamp*, another driver's act of pulling into the roadway that Roggencamp was driving on at a high rate of speed, even where the other driver was intoxicated, was not an intervening cause of the accident, but rather a concurring cause, because it did not occur after Roggencamp's act of driving recklessly. *Id.* at 946-947. This distinction is crucial where "a concurring, as opposed to an intervening, cause does not shield a defendant from vehicular homicide." *Id.* at 947 (*citing Souther*, 100 Wn. App. at 710-711 ("concurring cause" of injured driver's conduct at time of accident did not relieve the defendant from liability under a proximate cause analysis)). Importantly, in *Roggencamp* and *Souther*, the defendants' conduct was the active force that caused the victims' deaths.

In Mr. Frahm's case, unlike the concurring causes in *Roggencamp* and *Souther*, both the acts of Mr. Irvine crossing the three-lane highway on foot and Mr. dela Cruz-Moreno's minivan hitting the CRV occurred after Mr. Frahm's conduct of hitting the CRV, making them intervening acts because they were "later events" that occurred after Mr. Frahm's omission. *Souther*, 100 Wn. App. at 710.

However, the Court of Appeals determined that these intervening acts were not superseding causes of Mr. Irvine's death based on broadly applied theories of foreseeability, determining that, "although this specific victim may not have been foreseeable, the general field of danger was clearly foreseeable." *Frahm*, 3 Wn. App.2d at 822.

b. In Washington, legal causation in a criminal case is narrower than legal causation in tort cases, and this Court has rejected foreseeability in determining criminal liability.

The Court of Appeals' reliance on tort law principles to determine legal cause for the crime of vehicular homicide violates *Bauer's* requirement that legal cause "in criminal cases differs from, and is narrower than," legal causation in tort cases in Washington. *Bauer*, 180 Wn.2d at 940. Because Mr. Frahm's sufficiency challenge turns on the statutory interpretation of proximate cause in the vehicular homicide statute, review is de novo. *State v. Engel*, 166 Wn.2d 572, 576, n.3, 210 P.3d 1007 (2009).

Before criminal liability may be imposed, "the defendant must be both (1) the actual cause, and (2) the 'legal' or 'proximate' cause of the result." *Bauer*, 180 Wn.2d at 935-36 (*citing Rivas*, 126 Wn.2d at 453) (*quoting* Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.12, at 392 (1986)).

Actual cause in fact is referred to as the “but for” cause, without which the injury would not have occurred. It is the “the physical connection between an act and an injury” and is identical in tort and criminal cases. *Bauer*, 180 Wn.2d at 936 (quoting *State v. Dennison*, 115 Wn.2d 609, 624, 801 P.2d 193 (1990)).

Legal causation, or proximate cause, by contrast, “involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact.” *Bauer*, 180 Wn. 2d at 936. In criminal law, because the consequences of a determination of guilt are so much more drastic than in tort law, a more stringent causal relationship is required. *Bauer*, 180 Wn.2d at 937 (citing, e.g. *Commonwealth ex. Rel. Smith v. Myers*, 438 Pa. 218, 232, 261 A.2d 550 (1970)).

Bauer determined that “[t]he wider doctrines of causation currently applied in tort law should not be extended to criminal law.” In criminal law, it is not enough that the defendant occasioned the harm; “he must have ‘caused’ it in the strict sense.” *Bauer* at 936-937 (internal citations omitted) (quoting H.L.A. Hart & Tony Honore, *Causation in the Law* 350-51 (2d ed. 1985)). In a criminal case, there should be “a closer relationship between the result achieved and that intended or hazarded.”

Bauer, 180 Wn.2d at 936-37 (quoting LaFave, *supra*, § 6.4(c) 472 (2d ed. 2003)).

Bauer rectifies the illogic and unfairness of more harshly punishing a person who causes harm through negligent or reckless conduct than a person with criminal intent who fails to achieve their criminal aim:

One might logically, it would seem, be harder on those who intend bad results, more readily holding them criminally liable for results which differ from what they intended, than on those (morally less at fault) whose conduct amounts only to reckless or negligent creation of risk of bad results. For this reason, cause-and-result crimes of intention must be treated separately from those of recklessness and negligence.

LaFave, *supra*, § 6.4(c), ch. 6 (3d ed. 2018). Unlike in tort law, proximate cause requires a showing that the defendant “actively participated in the immediate physical impetus of the harm.” *Bauer*, Wn.2d at 940.

In *Bauer*, the defendant left multiple accessible, loaded guns in his house where his girlfriend’s six-year-old son regularly visited. *Bauer*, 180 Wn.2d at 933. The child took one of the guns to school and it later discharged, harming another child. *Id.* at 932-33. The State charged the defendant with assault in the third degree, alleging “with criminal negligence,” he “cause[d] bodily harm to another person by means of a weapon.” *Id.* at 933-34 (quoting RCW 9A.36.031(1)(d)). This Court reasoned that *Bauer* may have been negligent in leaving loaded guns out in

the presence of children, but this negligence did not amount to “intentional” “felonious” conduct. *Id.* at 939. This Court reversed the ensuing conviction. *Id.* at 946.

The conduct that underlies a defendant’s conviction for vehicular homicide, like the criminal negligence in *Bauer*, does not require intent to cause harm. *See State v. Burch*, 197 Wn. App. 382, 394, 389 P.3d 685 (2016) (DUI vehicular homicide visits an injury no matter what the intent of the violator). Vehicular homicide is committed by either driving under the influence, driving recklessly or driving with disregard for the safety of others.⁵ This conduct becomes a Class A felony offense because of the result, not the intent of the actor’s conduct; thus courts must apply a more stringent proximate cause analysis than is used to establish liability under tort law. *Bauer*, 180 Wn.2d at 940; *c.f. Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952) (Mens rea requirements

⁵ RCW 46.61.520(1)(a)-(c). DUI is classified as a gross misdemeanor unless the person has three or more prior offense, which make it a class B felony. RCW 46.61.502(5); committing the offense, “in a reckless manner,” requires driving in a “rash or heedless manner, indifferent to the consequences,” a lesser standard than is required for the misdemeanor offense of reckless driving. RCW 46.61.500; *State v. Roggencamp*, 153 Wn.2d 614, 626, 106 P.3d 196 (2005). Vehicular homicide can also be committed by mere “disregard for the safety of others.” RCW 46.61.520(c).

in criminal statutes seek to “protect those who were not blameworthy in mind from conviction of infamous common-law crimes”).

Indeed, courts are willing to construe the vehicular homicide as a strict liability offense—allowing a person to be convicted of a homicide offense without a culpable mental state— because the statute’s requirement of proximate cause bars criminal liability where there is a superseding, intervening cause of death. *See Rivas*, 126 Wn.2d at 453; *Burch*, 197 Wn. App. at 396-400 (finding DUI vehicular homicide is a strict liability offense but *Bauer* requires that the defendant “actively participate[d] in the immediate physical impetus of harm”).

This Court’s more stringent requirements for criminal liability also curtails the application of foreseeability in the context of conspiracy and accomplice liability. *State v. Stein*, 144 Wn.2d 236, 246, 27 P.3d 184 (2001) (RCW 9A.28.040(1)) (Under Washington’s conspiracy statute, a jury may not find a defendant guilty of a substantive crime committed by his coconspirators merely because that crime was foreseeable); *c.f. State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000) (“knowledge by the accomplice that the principal intends to commit ‘a crime’ does not impose strict liability for any and all offenses that follow).

Bauer's requirement of narrower legal cause in criminal law than in tort law should prohibit the application of tort law's foreseeability principles in determining whether the intervening act is a superseding cause that breaks the causal chain of criminal liability for the offense of vehicular homicide.

c. Despite *Bauer*'s requirement of narrower causation in criminal law, Washington courts continue to apply expansive tort law articulations of "foreseeability" to determine whether an intervening act is a superseding cause of death for the crime of vehicular homicide.

Despite *Bauer*'s requirement of narrower causation in criminal law than in tort law, Washington courts have imported a number of tort law articulations of foreseeability to determine whether an intervening act supersedes the accused's conduct in proximately causing the death of another for the crime of vehicular homicide.

i. In tort law, foreseeability is tied to the duty owed to the injured party; it is not an element of proximate cause.

Foreseeability is not an element of proximate cause. *Wells v. City of Vancouver*, 77 Wn.2d 800, 802, 467 P.2d 292 (1970). Rather, the concept of foreseeability limits the scope of the duty owed. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

Foreseeability is not "the handmaiden of proximate cause. To connect them leads to too many false premises and confusing

conclusions.” *Maltman v. Sauer*, 84 Wn.2d 975, 980, 530 P.2d 254 (1975) (citing *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969)).

Rather, foreseeability is an element of negligence and determines “whether the duty imposed by the risk embraces that conduct which resulted in injury to plaintiff.” *Id.*

For example, schools owe a duty of care to protect their students from reasonably anticipated hazards, making schools liable in tort for wrongful activities that are foreseeable, “when the district knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence.” *J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 57-58, 871 P.2d 1106 (1994). In order to establish foreseeability, “the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.” *Id.* at 57 (citing *Maltman*, 84 Wn.2d at 981).

Even for torts, this Court has recognized that analysis of intervening causes through the concept of foreseeability presents a “confusing anomaly in the field of tort law due to the continued use of ‘foreseeability’ as the controlling criteria for determining if a cause is truly intervening while, at the same time, holding that ‘foreseeability’ is not an aspect of proximate cause.” *Maltman*, 84 Wn.2d at 982. Nevertheless,

courts use foreseeability to determine whether an intervening act is a superseding cause in tort law by “sheer necessity and in default of anything better.” *Id.* at 982.

ii. Washington courts have applied a range of foreseeability tests in determining whether an intervening act is a superseding cause of death for the offense of vehicular homicide.

Despite what this Court has recognized to be the undesirable use of foreseeability in determining whether an intervening act is a superseding cause in tort law, courts have broadly applied this concept in interpreting when an intervening act is a superseding cause for the criminal offense of vehicular homicide.

The jury in Mr. Frahm’s case was instructed, over his objection, that an intervening act is not a superseding cause under tort law theories of foreseeability, as highlighted below:

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of death, it is not a defense that the conduct of the deceased or another may also have been a proximate cause of death.

However, if a proximate cause of death was a new independent intervening act of the deceased or another which the defendant, **in the exercise of ordinary care, should not have reasonably anticipated as likely to happen**, the defendant’s act is superseded by the intervening cause and is not a proximate cause of death. An intervening cause is an action that actively operates to produce harm to another after the defendant’s act or omission has been committed.

However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall into the general field of danger which the defendant should have reasonably anticipated.

CP 106, 195 (WPIC 90.08).

This instruction was rightly recognized to be both confusing and contradictory by Division One.⁶ *Souther*, 100 Wn. App at 708-709.

It incorporates the various principles of foreseeability that courts have borrowed from tort law, requiring, "to be a superseding cause sufficient to relieve a defendant from liability, an intervening act must be one that is not reasonably foreseeable." *Roggencamp*, 115 Wn. App. at 946 (citing *Crowe v. Gaston*, 134 Wn.2d 509, 519, 951 P.2d 1118 (1998)).

The Court of Appeals in Mr. Frahm's case also considered whether the intervening acts were so "highly extraordinary or unexpected" to compel reversal as a matter of law. *Frahm*, 3 Wn. App. 2d at 821 (citing *Micro Enhancement International v. Coopers & Lybrand, LLP*, 110 Wn.

⁶ Subsequent to Mr. Frahm's case, the Court of Appeals held that the jury must be instructed that it is the State's burden to prove the absence of a superseding cause beyond a reasonable doubt, which was not articulated in Mr. Frahm's case. *State v. Imokawa*, 4 Wn. App. 2d 545, 558, 422 P.3d 502 (2018), *rev. granted*, No. 96217-1.

App. 412, 431, 40 P.3d 1206 (2002)). The Court of Appeals determined that the intervening acts of Mr. dela Cruz-Moreno crashing into the CRV and Mr. Irvine's decision to cross lanes of travel of a highway by foot were not superseding intervening causes of death, because "although this specific victim may not have been foreseeable, the general field of danger was clearly foreseeable." *Frahm*, 3 Wn. App. 2d at 822.

This expansion of foreseeability to the "general field of danger" applies the broadest of foreseeability principles, which even in tort law, is tied to the scope of a school's affirmative duty to protect its students. *See e.g. J.N.*, 74 Wn. App. at 57; *see also Quynn v. Bellevue School District*, 195 Wn. App. 627, 640, 383 P.3d 1053 (2016) (citing *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 319–20, 255 P.2d 360 (1953)).

iii. Consistent with Bauer, this Court should reject liability for vehicular homicide based on broad tort theories of foreseeability.

These inapplicable, broadly applied foreseeability tests that in tort law are tied to the specific duty owed, and only reluctantly applied to analyze whether an intervening act supersedes a defendant's liability, should certainly have no place in determining whether an intervening act supersedes the defendant's conduct as the proximate cause of death for the

offense of vehicular homicide. Application of these principles allows for criminal liability to attach, even when, as in Mr. Frahm's case, a defendant does not cause the death "in the strict sense." *Bauer*, Wn.2d at 936-937.

d. There was insufficient evidence that Mr. Frahm was the proximate cause of Mr. Irvine's death.

Bauer requires that Mr. Frahm "actively participated in the immediate physical impetus" of Mr. Irvine's death to be criminally liable. *Bauer*, Wn.2d at 940. Because he was not the physical impetus of the intervening accident in which Mr. dela Cruz-Moreno failed to stop in time and hit the CRV, which in turn hit Mr. Irvine, causing his death, there is insufficient evidence to support his conviction. The remedy is reversal and remand to dismiss for insufficient evidence. *Engel*, 166 Wn.2d at 580-581.

E. CONCLUSION.

This Court requires that a person actively participate in the immediate physical impetus of the harm to be held criminally liable under a theory of proximate case. The Court of Appeals applied too broad a test to determine that the intervening acts were not the superseding cause of Mr. Irvine's death, requiring reversal of Mr. Frahm's vehicular homicide conviction for insufficient evidence.

DATED this 18th day of January 2019.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 95947-1
v.)	
)	
JOSHUA FRAHM,)	
)	
Petitioner.)	

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