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STATE OF WASHINGTON
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NO. 95947-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JOSHUA CANE FRAHM, Petitioner

FROM THE COURT OF APPEALS DIVISION II NO. 49231-8
and
FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-02522-0

SUPPLEMENTAL BRIEF OF RESPONDENT

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IDENTITY OF THE RESPONDENT

The State of Washington is the respondent in this matter.

STATEMENT OF THE CASE

In addition to the factual summary set forth in the State's Response at the Court of Appeals, the State submits these additional facts for this Court's consideration:

The appellant, Joshua Frahm, was consuming alcohol throughout the evening of December 6, 2014 and the early morning hours of December 7, 2014. RP 927-29, 931-33, 938. He visited bars and consumed alcohol in Vancouver, Portland, Oregon, and in an apartment in downtown Vancouver. RP 927-29, 931-33, 938. Frahm appeared very intoxicated and was stumbling as he walked to the apartment. RP 940, 956. Frahm left that apartment at 5:40 AM, and surveillance footage from a nearby hotel showed Frahm driving his truck on the sidewalk at 5:41 AM. RP 653-55, 646-47, 669-70, 676, 953-54.

Later that morning, two separate 911 callers reported Frahm driving erratically on SR-14 eastbound. RP 352, 354, 423. The callers observed Frahm cut vehicles off, nearly rear end other vehicles, almost strike the median, and weaving in and out of his lane. RP 352, 354, 402-03, 423-24. The last 911 caller called in at 5:48 AM and reported Frahm

driving onto I-205 southbound. RP 354, 426-27. At this time, the visibility was limited on I-205 by light fog, and that stretch of road was only illuminated by street lights. RP 169-73.

James Irvine was driving his car southbound on I-205 when at approximately 5:54 AM he saw Frahm crash into the back of a car driven by Steven Klase. RP 355. Klase was driving in the far right of the three lanes of travel at the time of the crash. RP 249, 268. Frahm was driving 85 MPH when he struck Mr. Klase's vehicle, did not stop and only slowed down to 66 MPH as he fled the scene. RP 1216-17. The impact from the crash sent Mr. Klase's car across all three lanes, and he struck the concrete barrier separating I-205 southbound from the northbound lanes. RP 249, 268. Mr. Klase's car then rotated off of the barrier and came to rest with the passenger side of the car facing the lanes of travel. RP 347. Mr. Klase's car was blocking the entire left lane of I-205 southbound and part of the middle lane. RP 348, 458-59.

Mr. Irvine called 911 and got out of his car to render aid to Mr. Klase. RP 271, 355, 457, 453. He pulled over onto the right shoulder and activated his emergency lights. RP 271, 457, 453. Mr. Irvine told 911 that he had just seen Frahm rear end Mr. Klase and flee the scene. RP 355-56. Mr. Klase could hear a male's voice outside of his car – presumably Mr. Irvine – after the initial crash, but he doesn't remember what was said. RP

251-52. While Mr. Irvine was on the phone with 911 he said “oh no” and the call ended. RP 356.

As Mr. Irvine was rendering aid to Mr. Klase, Mr. Klase’s vehicle was struck by a minivan driven by De la Cruz-Moreno. RP 283, 348, 486. Mr. Irvine was then hit by Mr. Klase’s car and was found face down in the street twenty feet from Mr. Klase’s car bleeding from his head and face. RP 173-74, 285-86.

Mr. Cruz-Moreno had been driving in the center lane or far left lane of travel when he saw Mr. Irvine’s vehicle parked on the shoulder and moved to the left to avoid it. RP 453, 457, 484, 497-98. Mr. Cruz-Moreno then saw Mr. Klase’s car blocking part of the road so he swerved to the left in an attempt to avoid it, but ended up striking the car on the passenger door while traveling 50-55 MPH. RP 283, 348, 453, 458-59, 484, 486.

Mr. Irvine suffered serious head, brain, and spinal injuries from the collision. RP 884-888. He ultimately passed away a few days later from pneumonia brought on by these injuries. RP 889.

SUPPLEMENTAL ARGUMENT

The Respondent, State of Washington, submits this supplemental brief for the Court’s consideration. The State requests this Court affirm the

Court of Appeals' published opinion below in *State v. Frahm*, 3 Wn. App.2d 812.

I. The Court of Appeals used the correct standard of review when it upheld Frahm's conviction for Vehicular Homicide.

Frahm claims that the Court of Appeals erred by restricting the definition of superseding intervening cause. He argues that the Court of Appeal's incorrectly added a civil law standard of foreseeability from *Micro Enhancement Int'l Inc., v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 40 P.3d 1206 (2002). The Court of Appeals did not err however because it relied on *Micro Enhancement* solely to determine the proper standard of review on appeal. This was a correct application of the law and did not incorporate any civil law standards into the criminal law analysis. Furthermore, the Court of Appeals followed precedent from *State v. Roggenkamp*, 115 Wn. App. 927, 64 P.3d 92 (2003), *aff'd*, 153 Wn.2d 614, 630-31, 106 P.3d 196 (2005), by applying its foreseeability analysis.

The Court of Appeals did not limit the applicability of a superseding intervening cause to only situations where the foreseeability of the harm was highly extraordinary or unexpected. Instead, the Court of Appeals reviewed whether or not the situation in Frahm's case was so highly extraordinary in determining what standard of review to use.

Frahm, 3 Wn. App.2d at 821-22. The Court of Appeals properly cited to *Micro Enhancement* when it held that there was nothing in *Frahm*'s case so highly extraordinary or unexpected to warrant reviewing the issue of foreseeability as a matter of law. *Frahm*, 3 Wn. App.2d at 822. Contrary to *Frahm*'s contention that the Court of Appeals added "an additional restriction to the definition of superseding intervening cause", the Court of Appeals simply held that the facts in this case were not so highly extraordinary or unexpected and that their review was limited to the sufficiency of the evidence. See *Petition for Review*, 10; *Frahm*, 3 Wn. App.2d at 822.

The standard of review applied by the Court of Appeals conforms with *Roggenkamp*. In *Roggenkamp*, the Court of Appeals cited to *Micro Enhancement* when it laid out the factors to consider in determining whether an intervening act is a superseding cause. *Roggenkamp*, 115 Wn. App. at 945. The Court in *Roggenkamp* stated that "where the acts are not so highly extraordinary or unexpected, whether an independent cause is reasonably foreseeable is a question for the trier of fact." *Id.* at 945, n. 53 (citing *Micro Enhancement*, 110 Wn. App. at 431). This reasoning was adopted by this Court. *Roggenkamp*, 153 Wn.2d at 630-31. Accordingly, the Court of Appeals did not err in relying on *Micro Enhancement* for the applicable standard of review.

The Court of Appeals did not undertake a new or novel foreseeability analysis. The Court properly determined that Frahm's actions and the harm that followed were not so "highly extraordinary or unexpected" to warrant reviewing his case as a matter of law. The standard of review used by the Court of Appeals was correct and Frahm's claim fails.

II. Sufficient evidence supports Frahm's conviction for Vehicular Homicide.

Frahm's driving and his crash into the vehicle of Mr. Klase on December 7, 2014 set off a chain of events that directly caused the death of Mr. Irvine. That following a car crash, a witness or passerby would stop to render aid to an injured motorist is foreseeable. As is the possibility that the Good Samaritan rendering aid on the roadway or shoulder could be struck by another vehicle. Thus, Mr. Irvine stopping, rendering aid to Mr. Klase, and then being struck by another vehicle were all reasonably foreseeable occurrences created by Frahm's actions. Mr. Irvine's actions in rendering aid were not a superseding intervening event, and they fall in the general field of danger created by Frahm. Frahm is not relieved from his liability for Mr. Irvine's death, and his conviction should be upheld.

A. FRAHM WAS THE PROXIMATE CAUSE OF MR. IRVINE'S DEATH.

A conviction for Vehicular Homicide requires proof of a causal link between a defendant's misconduct and the accident which results in another's death. *State v. Gantt*, 38 Wn. App. 357, 359, 684 P.2d 1385 (1984) (citing *State v. Nerison*, 28 Wn. App. 659, 625 P.2d 735, *rev. denied*, 95 Wn.2d 1024 (1981)). RCW 46.61.520 mandates that the deceased's death be the proximate result of injury proximately caused by the driving of the defendant. "Proximate cause is a cause which in direct sequence, unbroken by any new, independent cause, produces the event complained of and without which the injury would not have happened." *State v. Decker*, 127 Wn. App. 427, 432, 111 P.3d 286 (2011) (quoting *Gantt*, 38 Wn. App. at 359).

The proper inquiry here is whether or not sufficient evidence supports Frahm's conviction. When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all

reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, there was sufficient evidence at trial to prove the causal link between Frahm's driving and Mr. Irvine's death. Frahm crashed into the back of Mr. Klase's vehicle while going 85 mph, sending Mr. Klase's vehicle across all of the lanes of travel and smashing into the center concrete median. RP 249, 268, 1216. Mr. Klase's vehicle was left blocking the entire left lane and part of the center lane. RP 348, 458-59. Mr. Irvine was driving behind Frahm and saw the collision and Frahm's flight from the scene. RP 355-56. Mr. Irvine immediately pulled over, activated his emergency light, called 911, and went to provide aid to Mr. Klase. RP 271, 355, 457, 453. But for Frahm's driving, Mr. Irvine would not have stopped, he would not have gone to help Mr. Klase, and he would not have been killed. But for Frahm's driving, Mr. Cruz-Moreno would not have come upon Mr. Irvine's car and seen its emergency lights on and moved over to the left lane where he crashed into Mr. Klase's disabled vehicle. RP 453, 457, 484, 497-98. When viewing this evidence in a light most favorable to the State, sufficient evidence supported Frahm's

conviction. Frahm was the proximate cause of Mr. Irvine's death and nothing broke that chain of events.

B. NEITHER MR. IRVINE NOR MR. CRUZ-MORENO'S ACTIONS WERE SUPERSEDING INTERVENING EVENTS.

Mr. Irvine stopping to render aid and Mr. Cruz-Moreno crashing his car into Mr. Klase's were not superseding intervening events. These were reasonably foreseeable occurrences that fell within the field of danger created by Frahm. The evidence was sufficient at trial to prove neither Mr. Irvine nor Mr. Cruz-Moreno were superseding intervening events.

Contributory negligence of the deceased is not a defense to Vehicular Homicide; however, the causal chain may be broken if the death was caused by a superseding intervening event. *Roggenkamp*, 115 Wn. App. at 945 (citing *State v. Judge*, 100 Wn.2d 706, 718, 675 P.2d 219 (1984); *State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995)). For a deceased's actions to relieve a defendant of liability, "the defendant must show that the deceased's contributory negligence was a supervening cause without which the defendant's contributory negligence would not have caused the death." *State v. Souther*, 100 Wn. App. 701, 709, 988 P.2d 350 (2000) (citing *Judge*, 100 Wn.2d at 718).

A superseding cause that is sufficient enough to relieve a defendant from liability must be one that is not reasonably foreseeable. *Roggenkamp*, 115 Wn. App. at 945 (citing *Crowe v. Gaston*, 134 Wn.2d 509, 519, 951 P.2d 1118 (1998)); *Micro Enhancement*, 110 Wn. App. at 431. The causal chain between the defendant's driving and the deceased's death is broken by a superseding cause when the intervening act is one which the defendant should not have anticipated as reasonably likely to happen. *Roggenkamp*, 115 Wn. App. at 945-46 (citing *State v. McAllister*, 60 Wn. App. 654, 660, 806 P.2d 772 (1991)). The casual chain between Frahm's driving and Mr. Irvine's death can only be broken if Mr. Irvine was contributorily negligent to the point that without that negligence, Frahm's own negligence would not have caused the death. *Souther*, 100 Wn. App. at 709. However, Mr. Irvine was not negligent, and his actions were reasonably foreseeable.

Mr. Irvine's actions were not a superseding intervening event that broke the causal chain between Frahm's driving and his death. A Good Samaritan who witnesses a major hit and run crash on an interstate and stops to render aid to the person struck is a foreseeable event. Mr. Irvine did exactly that, and Frahm should have reasonably anticipated some person rendering aid as likely to occur. The field of danger created by Frahm striking a vehicle and leaving it blocking the lanes of travel

includes any person who comes upon the scene. That includes a person stopping at the scene to render aid or any person driving on that portion of the interstate. Substantial evidence supports the finding that the general field of danger that was created by Frahm was reasonably foreseeable. Therefore, Mr. Irvine's actions are not a superseding intervening event.

Roggenkamp is controlling and compels the conclusion that Frahm proximately caused Mr. Irvine's death. In *Roggenkamp*, Roggenkamp was driving down a two lane road at 70 MPH in a 35 MPH zone when he moved into the left lane to pass his friend driving in front of him. 115 Wn. App. at 933. Another car driven by JoAnn Carpenter turned left onto the road that Roggenkamp was driving down. *Id.* Roggenkamp was unable to stop in time and crashed into Carpenter's car. *Id.* The crash killed a passenger in Carpenter's car, and Carpenter and another passenger were seriously injured. *Id.* It was later determined that Carpenter had a blood alcohol concentration of 0.13 at the time of the crash. *Id.* at 934. The facts in that case established that a driver in Carpenter's position using reasonable caution should have seen Roggenkamp approaching, and that it was not safe for her to pull out onto the road. *Id.* at 944-45. However, the Court of Appeals held that a driver pulling out into the road, whether intoxicated or not, should have been reasonably foreseeable to a driver in Roggenkamp's position. *Id.* at 946. Carpenter's actions were not a

superseding intervening event, and the evidence supported the conclusion that Roggenkamp's actions were the proximate cause of the accident that caused a fatality. *Id.* at 947.

In the present case, Mr. Irvine's actions are just as foreseeable as Carpenter's in *Roggenkamp*. A car turning onto a road is a normal occurrence that someone driving down the road should foresee. Here, someone stopping to help a victim of a major hit and run crash is an occurrence that the person who caused the crash and ran from the scene should foresee. Furthermore, unlike Carpenter in *Roggenkamp*, who was intoxicated and should have seen the defendant's car approaching, Mr. Irvine was not negligent in stopping to help Mr. Klase. On the contrary, when Mr. Irvine saw the crash and pulled over, he parked his car on the shoulder and activated his emergency lights before going to Mr. Klase. RP 271, 355, 457, 453. Mr. Irvine's lack of negligence further strengthens the conclusion that his actions were not a superseding intervening event. This case falls firmly under *Roggenkamp* and supports the holding that Mr. Irvine's actions did not break the causal chain. Sufficient evidence supports the finding that Mr. Irvine's actions were not a superseding intervening event and Frahm's conviction should be upheld.

An example of the limits of foreseeability is, *State v. Bauer*, 180 Wn.2d 929, 942, 329 P.3d 67 (2014), which is unlike this case. In *Bauer*,

this Court held that there was no criminal liability for the defendant who was charged with Assault in the Third Degree after a child took his gun to school where it accidentally discharged and struck another child. *Id.* at 932-33. The defendant had left several unsecured and loaded handguns around his home, and his girlfriend's son, TC, took one of the guns from the home and brought it to school a few days later. *Id.* at 933. The gun was in TC's backpack and it accidentally discharged and struck another student. *Id.* at 932-33. Bauer was charged with Assault in the Third Degree under the theory that his negligence caused the injury to the child who was shot. *Id.* at 933-34. This Court held that Bauer was not the proximate cause of the harm to the child, because Bauer's actions (owning a gun and leaving it loaded around the house) were too attenuated to the harm that befell the child (being shot at school several days after the gun was taken). *Id.* at 942.

Frahm's actions are unlike Bauer's because there is no attenuation between his actions and the harm that Mr. Irvine suffered. Frahm's actions immediately caused the harm to Mr. Irvine when, while intoxicated, he drove recklessly and then crashed into the car driven by Mr. Klase. Importantly in *Bauer*, this Court noted that it had not found any Washington case that upheld criminal liability "where the accused did not

actively participate in the immediate physical impetus of harm.” *Id.* at 939.

Here, Frahm was an active participant in the harm that befell Mr. Irvine.

There were also several intervening facts in *Bauer* that are not present here. For example, in *Bauer*, the gun was taken without Bauer’s knowledge and two days passed before it was taken to school and went off accidentally and hit a student. *Id.* at 942. Unsurprisingly then, this Court noted that no Washington criminal cases had found criminal liability for a negligent act with so many intervening facts between the original negligence and the final injury. *Id.* at 940. In contrast, Frahm was aware of the harm he caused in the initial crash, Mr. Irvine stopped immediately, and Mr. Irvine was then struck shortly after he stopped to render aid. This sequence of events lasted only a few minutes. RP 169-72, 355.

Consequently, Frahm’s actions are not so attenuated from the harm caused to Mr. Irvine to break the causal chain.

Furthermore, the actions of Mr. Cruz-Moreno were also foreseeable and do not relieve Frahm from his liability for Mr. Irvine’s death. When Frahm sent Mr. Klase’s car into the center median the car was blocking almost half of the roadway, so it was foreseeable that another driver could crash into Mr. Klase’s car. This initial crash occurred at around 6:00 AM while it was still dark outside and some fog was on the road. RP 169-73. Under these conditions, it is reasonably foreseeable that

another car on the road would have difficulty seeing a car perpendicular on an interstate in the lanes of travel. This is an unusual occurrence brought about by Frahm, and it is not something a driver would expect to see on an interstate. Mr. Cruz-Moreno being on the road and striking Mr. Klase's vehicle in this situation is well within the field of danger created by Frahm's actions. Mr. Cruz-Moreno was not a superseding intervening event, and Frahm is not relieved from his liability for Mr. Irvine's death.

Neither Mr. Irvine's nor Mr. Cruz-Moreno's actions were superseding intervening events. When viewing the evidence in the light most favorable to the State, Mr. Irvine's death was a direct consequence of Frahm's driving, and the chain linking his death to Frahm's driving was unbroken. Substantial evidence supports the verdict that Frahm was the proximate cause of Mr. Irvine's death.

CONCLUSION

The Court of Appeals applied the correct standard of review when it analyzed the issue of proximate cause. The Court of Appeal's holding that Frahm was the proximate cause of Mr. Irvine's death and his conviction was supported by substantial evidence was correct. Mr. Irvine's and Mr. Cruz-Moreno's actions were reasonably foreseeable and they were not superseding intervening events. Frahm's actions proximately

caused Mr. Irvine's death. The State respectfully asks this Court to affirm
Frahm's convictions.

DATED this 18th day of January, 2019.

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