No. 85812-2



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

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KAREN HARDER, individually, and on behalf of the ESTATE OF DAVID HARDER; and RACHEL HARDER, individually,

Petitioners,

v.

CITY OF SEATTLE, a subdivision of the State of Washington d/b/a SEATTLE POLICE DEPARTMENT,

Respondent,

and

PAYTON MADDY, an individual,

Defendant.

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Karen Harder, individually and on behalf of the Estate of David Harder, and Rachel Harder, individually, seek review by this Court of the Division I opinion terminating review identified in Part B.

## B. COURT OF APPEALS DECISION

Division I filed its opinion on October 28, 2024. A copy is in the Appendix.

In this police pursuit case in which the negligence of a Seattle Police Department ("SPD") Officer Robert Stevenson resulted in the death of an innocent civilian, David Harder, Division I erred in upholding summary judgment in favor of the City of Seattle ("City") where the City owed Harder a duty of care, and fact issues abounded on proximate cause.

Stevenson pursued Payton Maddy, a man he believed had violated narcotics laws, on the pretext of a traffic stop. That pursuit was amply documented on the officer's body camera, and was the subject of competing experts' testimony. Proximate

cause was for the jury, particularly where Division I concluded that fact issues were present on breach and the City's position hinged directly on the credibility of Maddy, a heroin addict with a long record of eluding police officers.

Because a jury could find that Stevenson's pursuit of Maddy in a high speed chase through north Seattle residential neighborhoods ultimately resulted in Maddy's collision with Harder's motorcycle and David's consequent death, dismissal as a matter of law was inappropriate.

This Court should grant review of Division I's internally contradictory opinion that is contrary to this Court's long-established rule that causation is ordinarily a fact issue. RAP 13.4(b)(1), (2), (4).

## C. ISSUE PRESENTED FOR REVIEW

> Where a motorcyclist, an innocent bystander to a police chase, was owed a duty of care by the City whose law enforcement officer conducted a negligent pursuit of a suspect in accordance with law enforcement standards and the City's own policy on police pursuits, were there questions of fact as to proximate cause where the motorcyclist's estate provided direct evidence and expert

testimony from which a reasonable jury could determine or infer that the fleeing suspect fled, and collided with the motorcyclist, because the City's officer was negligent in conducting the pursuit or failing to terminate it?

D. STATEMENT OF THE CASE

Division I's opinion at 2-7 sets forth the facts and procedure in this case., but certain facts bear emphasis, however.

At Division I, the City made key concessions. First, it *conceded* that Harder was fault-free in operating his motorcycle. Br. of Resp't ("BR") 7. Second, the City *conceded* that Stevenson engaged with Maddy for purposes of investigating possible narcotics law violations and hoped to use possible traffic law violations as a *pretext* to stop him. BR 11. Third, it *conceded* that Stevenson and Maddy interacted, admitting that there were at least *four* instances in which Maddy could have seen Stevenson. BR 7-17. Division I acknowledged that fact, too. Op. at 15. The City noted that Maddy had to have seen Stevenson's marked SPD cruiser in the Ballard Brown Bear Car Wash parking lot initially and certainly after Stevenson engaged

his emergency lights and accelerated close to Maddy. BR 11-12. Fourth, the City *conceded* that at various times, Stevenson exceeded posted speed limits. BR 12, 13, 15. Fifth, it is undisputed that the pursuit was lengthy through north Seattle residential streets.

Division I does not address that this was an "eluding" situation within the meaning of SPD's policy manual, as Officer Stevenson himself admitted. Br. of Appellants ("BA") at 6, 25. Division I's opinion acknowledges that both Stevenson himself and SPD Captain George Davisson *admitted* that Stevenson's pursuit of Maddy was unauthorized under SPD policy. Op. at 12 n.6. *See also*, CP 1173, 1197. The pursuit was *illicit*.

As will be discussed *infra,* Division I's opinion underplays the significance of Stevenson's engagement in a pursuit of Maddy. Below, the City denied a pursuit occurred. But Stevenson's "keeping pace" with Maddy in their cat-and-mouse exercise constituted a "pursuit," as the Estate's experts testified. BA 28-32. The cat-and-mouse nature of the pursuit is critical

circumstantial evidence of the fact that Maddy was well aware of his pursuit by Stevenson.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### (1) Summary Judgment Standard

The discussion of the standard of review in appellate briefing is all too often a recitation of boilerplate statements, but here, the proper application of summary judgment principles is a reason why this Court should grant review. RAP 13.4(b)(4).

Division I's application of summary judgment principles in *Haley v. Amazon.com Services, LLC*, 25 Wn. App. 2d 207, 522 P.3d 80 (2022), cogently observed that summary judgment should not be used to cut litigants off from their right to a trial. "On summary judgment, the trial court may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact." *Id*. at 217. This is because the trial court invades the constitutional province of the jury if it does so. *Id*. at 218.

Summary judgment should not be used to cut litigants off from their right to a trial. *Id.* at 219. In effect, the trial court here did exactly what the *Haley* court said trial courts must not do.

Like the trial court, Division I should have taken the facts, and reasonable inferences from those facts, in a light most favorable to the Estate as the non-moving party on summary judgment. *Dowler v. Clover Park Sch. Dist. No. 409*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). It did not do so as to causation.

Critically, when expert opinions come to differing conclusions on a key issue, as was true here, op. at 5-6, that creates a plain issue of fact for the jury. *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019) ("Generally speaking, expert opinion on an ultimate question of fact is sufficient to establish a triable issue and defeat summary judgment."). *See also*, *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 662, 833 P.2d 390 (1992), *review denied*, 120 Wn.2d 1031 (1993) (holding that such cases present "a classic battle of the experts, a battle in which the jury must

decide the victor.") (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1535, *cert. denied*, 469 U.S. 1062 (D.C. Cir. 1984)); *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 200, 402 P.3d 346 (2017), *review denied*, 192 Wn.2d 1023 (2019) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate."); *Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn. App. 2d 613, 633, 418 P.3d 175 (2018); *Scott v. City of Tacoma*, 28 Wn. App. 2d 1050, 2023 WL 7327746 (2023), *review denied*, 2 Wn.3d 1027 (2024) (applying *Strauss*).

The Estate's police practices expert, Russ Hicks documented in detail how the City's actions here breached its duty owed to David Harder and were the proximate cause of his death, CP 1208-72, creating a fact question.

Review is merited here because the trial court's decision on causation as a matter of law is emblematic of the disturbing trend in trial courts to invade the province of the jury in granting summary judgment. The *Haley* court was correct. Review is

merited. RAP 13.4(b)(4).

(2) Division I Correctly Concluded that the City Owed Harder a Duty of Care, and Fact Questions Existed as to its Breach

Below, the City asserted that it did not owe a duty to David to conduct a "reasonable investigation," CP 282-85, and that it owed David only a common law duty to drive with due care for the safety of others. Division I properly concluded that the City was wrong. Op. at 8-10. But that argument evidences how governments misperceive the duty of their law enforcement departments to citizens.

Generally, this Court has clearly articulated that officers have a common law duty under *Restatement (Second) of Torts* § 281 in their interactions with citizens. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983); *Norg v. City of Seattle*, 200 Wn.2d 749, 522 P.3d 580 (2023) (911 calls); *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987) (DUI stop); *Stalter v. State*, 151 Wn.2d 148, 86 P.3d 1159 (2004) (negligence in detention of wrong person under a search

warrant); *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013) (City owed a duty of care to an harassment victim who was killed by her harasser after its police officers served an anti-harassment order); *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 551-52, 442 P.3d 608 (2019) (City owed a duty of care to a homeless, mentally ill Hispanic man in negligent interactions between its officer and the man resulting in his shooting by the officer); *Mancini v. City of Tacoma*, 196 Wn.2d 864, 479 P.3d 656 (2021) (execution of a search warrant on the wrong party).

Law enforcement officers have a duty to "bystanders" when undertaking pursuits of eluding suspects, arising in part out of statutes that afford emergency personnel a limited right to act outside the normal parameters of vehicle operation on Washington roads. RCW 46.61.035 (driver of an authorized emergency vehicle from the duty must drive with due regard for the safety of all persons and such driver is not protected from the consequences of his or her reckless disregard for the safety of

others). This Court long ago explained the law enforcement officers' obligations in police chases of fleeing suspects. *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975).[1]

Division I also correctly concluded that the City breached its duty to Harder because breach of a legal duty is generally a *fact question* for a jury. Op. at 10-12. *See Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). This is particularly so where breach of a statute or official policy can be evidence of negligence. RCW 5.40.050; *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 324, 119 P.3d 825 (2005).

Ample evidence supported the City's breach of duty. SPD's pursuit policy prohibited officers from pursuing suspects "without articulable justification that the public safety need to

[1] The Wyoming Supreme Court's recent decision in *Palm-Egle v. Briggs*, 545 P.3d 828 (Wyo. 2024) addresses the issue, noting Washington case law. That court concluded there that law enforcement officers acting within the scope of their duties owe a common law duty to act as reasonable peace officers of ordinary prudence under like circumstances even as to criminal suspects.

stop the eluding vehicle outweighs the inherent risk of pursuit driving." CP 1180.

Further, the circumstances justifying the decision to pursue an eluding vehicle must be articulable at the time the officer initiates the pursuit. Officers cannot pursue a suspect solely for one or more of the following:

- Traffic violations / civil infractions
- Misdemeanors / gross misdemeanors
- Property crimes
- The act of eluding alone

CP 1180-81. Thus, Stevenson's ostensible grounds for initiating the pursuit – a traffic violation, violated SPD policy. Stevenson *admitted* that under SPD policy he had no articulable justification for Maddy's pursuit. CP 1173. He further admitted that the risk a pursuit for a traffic offense outweighed the need to stop Maddy. *Id*. SPD Captain George Davisson confirmed that Stevenson was *unjustified* in engaging the pursuit under SPD Policy. CP 1197.

In fact, Stevenson conducted a pretextual stop,[2] which is a prohibited law enforcement practice under the Washington Constitution and SPD Policy 6.220. CP 1249-51.

The City contended that what Stevenson undertook as to Maddy was not a "pursuit," but that argument is belied by SPD policy and the facts. SPD policy 13.031 defined "eluding" and "pursuit" and establishes the parameters for when it is and when it is not appropriate for SPD officers to engage in pursuits of fleeing drivers. CP 1180. A "pursuit" as defined by the SPD Policy Manual as requiring: 1) an officer's attempt to keep pace with and/or stop or apprehend a fleeing suspect; 2) the suspect is "eluding"; and 3) the officer drives in a manner that is outside of normal traffic restrictions. CP 1180.

[2] A pretext contact occurs where the police use a legal justification in order to stop and contact a citizen for an unrelated, more serious offense for which the officer did not have the reasonable suspicion or probably cause by which to make the contact. CP 1249-50.

Stevenson testified that he "pursued" an eluding[3] Maddy; Stevenson was making an effort to "keep [Maddy] in sight," which for all intents and purposes is the same thing as "keeping pace with" him, as required by the technical language of the SPD Policy. CP 1172. Furthermore, Stevenson intended to "stop" Maddy when he did finally catch up to him. In fact, Stevenson himself characterized Maddy's behavior as the "failure to stop" in his own deposition. CP 1174 ("It was a failure to stop that ended in a collision where he was refusing to stop for me.").

Stevenson also operated "outside of normal traffic restrictions" when he pursued Maddy. CP 1180. The City's accident reconstruction expert, Nathan Rose, prepared a reconstruction by using the camera attached to Stevenson's vehicle and data from the vehicle to establish his position and speed throughout the pursuit. CP 1191. That video combined

[3] Stevenson agreed Maddy's conduct met the definition of "eluding." CP 1172 (Q: On May 20th, 2020, would you agree that Payton Maddy was eluding according to this definition? A: "Yes.").

the dash cam footage, Stevenson's body-worn camera and audio, and footage captured by a neighborhood resident's front door security camera. The video documented that Stevenson was travelling well above the speed limit – 12-19 mph over posted limit – for a substantial portion of the pursuit. CP 1192-93. Stevenson was speeding and attempting to keep Maddy within his line of sight throughout the pursuit. CP 1104 ("I'm trying to catch up to. I think it's a blue Honda, dark color, temp plate …").

Stevenson's actions were a pursuit under the general law enforcement community understanding of that term and under the SPD Policy definition, according to Russ Hicks, the Estate's police practices expert. CP 1210-12. As any reasonable person would grasp, Stevenson was pursuing Maddy. Stevenson was attempting to keep pace with and stop an eluding driver and was operating outside of normal traffic restrictions to do so.

Stevenson's conduct of the pursuit arguably breached his duty. Although he initially engaged his emergency lights at the Brown Bear Car Wash, prompting Maddy to elude him, op. at 3-

4, he never engaged his emergency lights or sirens (op. at 4 n.2) throughout the pursuit as required by the SPD Policy and RCW 46.61.035(3), which would have warned the public of the danger of the chase as it made its way through the neighborhood and back on to arterial roads. This, according to Hicks, created a far more dangerous situation than if the lights and sirens had been engaged for the duration of the pursuit. CP 1265.

Finally, even if the pursuit's initiation was legitimate (and it was not), in the exercise of reasonable care, Stevenson should have abandoned his efforts to contact Maddy once it became clear that Maddy was not going to stop and was willing to drive in a manner which posed a danger to the public to avoid contact with law enforcement. In failing to do so, Stevenson failed to exercise reasonable care under the circumstances and endangered the lives of others on the road by continuing to follow Maddy. CP 1266.

Division I's correct rulings on duty and its breach where Stevenson conducted an illicit pursuit, based on pretextual

grounds, had obvious implications for causation.

(3) Fact Questions Were Present on Proximate Cause

Division I erred in deciding causation as a matter of law. Op. at 12-16. In Washington, proximate cause is classically a *question of fact*, *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011). The *Mason* court addressed proximate cause in the pursuit context, explaining that "[t]he fact that Bitton was obviously guilty of negligent conduct, which had a causal effect on the ultimate injuries incurred by Mason, does not necessarily relieve the defendants of their potential liability, since the law does not require that there be but one proximate cause." *Id.* at 326.

This Court has *repeatedly* held that causation is generally for the jury, even in attenuated factual scenarios. *E.g.*, *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 289-90, 481 P.3d 1084 (2021) (teacher took his class on an impromptu walking excursion and a driver fell asleep, plowing into the students, killing two and injuring others); *Joyce*, *supra* (offender on

community supervision stole a car and rammed it into the plaintiff's vehicle).[4]

Division I determined as a matter of law that Stevenson "broke off" the pursuit a block or two before the collision and therefore no liability could attach for the collision caused by the pursuit, op. at 11-12, but that was for the jury to decide, given Hicks' expert testimony that Stevenson's behavior was tantamount to a pursuit in shadowing Maddy to the collision site. *Id.* at 12.

Division I's opinion failed to appreciate that there were

[4] Tortfeasors, like the City here, are indeed responsible for the consequences of their wrongful conduct. In *Scott*, *supra*, a police officer negligently operated his cruiser, striking the descendant's vehicle, injuring her. The collision lit up her previously dormant autoimmune condition. That condition was treated with steroids. The steroids caused osteoporosis and spinal fractures, requiring surgery. For the surgery, the doctors stopped the steroids. The plaintiff's body reacted massively with paralysis and her ultimate death. Division II determined that an expert's testimony created a question of fact on causation, and it rejected the City's argument "that the casual chain is too remote and attenuated to impose liability as a public policy matter." *Id.* at *9. It is no different here.

*two* significant features to Harder's argument on proximate cause. First, SPD policy prohibited officers like Stevenson from pursuing suspects "without articulate justification that the public safety need to stop the eluding vehicle outweighs the inherent risk of pursuit driving." CP 1180. The City's own witness, Captain Davisson, admitted Stevenson violated that policy. CP 1197.

A reasonable jury was entitled to infer from Stevenson's pretextual proposed stop of Maddy *should never have conducted this pursuit at all*, a pursuit that entailed a high-speed chase through north Seattle residential streets in clear violation of SPD policy and RCW 46.61.035. BA 33-34.[5]

Second, a reasonable juror could find that the crash occurred as a proximate result of Stevenson's negligent pursuit under the totality of the circumstances. Division I seemingly

[5] Division I fails to address this critical point argued by the Estate, focusing only on Stevenson's conduct after he deactivated his emergency lights. Op. at 11 n.5.

concludes that Maddy's conduct did not really involve a "pursuit" because he could only see Stevenson periodically and not constantly in the course of that pursuit. Op. at 14-15. But that conclusion is for a jury. In fact, Maddy saw Stevenson at the Brown Bear Car Wash initially (where his emergency lights were activated) and then enough times in the course of the pursuit for a reasonable jury to infer that such observations prompted Maddy to elude Stevenson in a dangerous fashion. The Brown Bear security surveillance video footage establishes that Maddy was parked at the Brown Bear parking lot from 6:47 a.m. until 8:43 a.m. CP 1204-05. Maddy was parked at the car wash for nearly two hours, until seeing Stevenson take an interest in him, when he started driving away. Once Stevenson continued circling around Maddy, keeping an eye on him, Maddy began driving evasively through parking lots, at higher-than-normal speeds, to avoid contact. There is a reasonable inference that Maddy was eluding and running from Stevenson.

The jury could also infer that Maddy saw Stevenson all

along. Stevenson wrote in his report that Maddy saw him and that he expected Maddy to "flee" from him. On two separate occasions in his report, Stevenson indicated that Maddy saw him when he was initially following him around the Brown Bear parking lot. Stevenson wrote: "I stopped prior to exiting and noticed in my side view mirror that Maddy had noticed my [sic] and appeared to get nervous. . . A few moments later I observed Maddy driving W/B through the parking lot. Maddy looked hard to the left over his shoulder and noticed me looking at him." CP 1160.

Stevenson testified that Maddy saw him during these initial stages and "appeared nervous," looking over his shoulder at Stevenson in his marked patrol vehicle. CP 1166-67. Stevenson testified "after seeing me and then making such a hard effort to look over his shoulder to see me, I believed that he was going to try and exit the lot and leave the area." *Id.*

Stevenson continued in his report: "My initial thought was that Maddy was going to exit the lot from the 15[th Ave] NE and

flee." CP 1160. Stevenson testified that when Maddy exited the Chevron "he left right after seeing me." CP 1167.

A reasonable jury could also infer that Stevenson's claim he "broke off" this illicit pursuit of Maddy was unsupported. By viewing the Brown Bear video footage, the dashcam video footage, as well as the City's own animated accident reconstruction video, a reasonable juror could certainly make the key factual determination on proximate cause – the jury could conclude that Maddy was fleeing from Stevenson. That is an entirely reasonable inference from the cat-and-mouse interactions of Maddy and Stevenson and the fact that Maddy could see Stevenson's police vehicle. The Rose animated video shows how close the two vehicles were in proximity to one another, and that the two vehicles played cat-and-mouse from the very beginning; the two vehicles weaved in and out of parking lots in close proximity to one another until Maddy took off, just as Stevenson expected him to. Stevenson continued in pursuit of Maddy up until the time he arrived at the Maddy/Harder

collision.

Such a conclusion was also supported by the fact discussed *supra* in connection with the breach of duty that Stevenson continuously kept pace with Maddy throughout the pursuit, kept driving beyond the speed limit, even after he claimed to return to "routine driving" and arrived at the scene of the Maddy/Harder crash. CP __. Keeping pace with an eluding suspect, and violating traffic laws to do so negates the assertion that the pursuit "terminated." Moreover, Stevenson appeared to outside observers, to be continuing his pursuit of Maddy, despite his claim of breaking off the pursuit. The witnesses who called 911 reported that the pursuit was ongoing before the collision, describing that Maddy "is being pursued" and "[the officer] was pursuing a car, and the car hit a motorcyclist." CP 252-53. Stevenson admitted his goal was to follow and "keep sight" of Maddy, which he continued to do even after he deactivated his lights. CP 1172. Stevenson's driving prompted Maddy's response; Maddy would not have been driving in such a manner

were it not for Stevenson's efforts to stop him.

Division I credited Maddy's statements that he never saw Stevenson in its attempt to take this issue away from the jury. Op. at 15-16. But Maddy's testimony was highly questionable and impeachable. When asked about his memory from the morning of May 20, 2020, Maddy testified: "It was a blur. It was a blur. . . . It was a long time ago and . . . I wasn't thinking straight then." CP 314, 316-17. He testified that he was on heroin. *Id*. Maddy repeatedly testified to his confusion regarding the events leading to David's death; he testified that he did not have any recollection of the driving he was doing on May 20, 2020. CP 317 (Q: Do you have any memory sitting here today of doing that? A: No.); *id*. (Q: Do you have a memory of having turned right onto 12th Ave. NE? A: No.); *id*. (Q: Do you have any memory of driving north on 14th Ave. NE and taking a left on 127th? A: No.). He was asked "as you sit here today, do you have any memory of what speeds you traveled along the route we've described?" His answer "I really don't." CP 317-18. Maddy's

key testimony from his deposition: “Like I said, it was just a blur. I don't really remember much. I just remember the accident.” CP 318.

Yet, somehow, Maddy claimed that he remembered, rather definitively, that he did not see a police car. Maddy himself testified in his deposition that he had previously lied to police officers, he was convicted for attempting to elude a police officer, and was charged with making false statements, but did not recall the circumstances. CP 1207. Maddy was clearly still concerned about his own criminal liability regarding the pursuit, whether he ought to be or not, and this will become clear to the jury upon examination of the witness. Maddy asked the City’s counsel during a break at the deposition if he would be charged criminally after seeing the accident reconstruction. CP 1112.

Ultimately, Maddy’s testimony fails to explain why he acted the way he did after he admittedly saw Stevenson’s cruiser with its emergency lights activated at the Brown Bear Car Wash. He engaged in a high-speed cat-and-mouse game of eluding

Steveson though residential neighborhoods because he saw Steveson's police vehicle; his pattern of conduct mirrored Stevenson's actions. Credibility issues as to such a key witness cannot be resolved on summary judgment. *Haley*, 25 Wn. App. 2d at 217 ("On summary judgment, the trial court may not … assess credibility … ").

Finally, even if the jury found that Stevenson "broke off" his pursuit seconds before Maddy collided with David Harder's motorcycle, that would not necessarily absolve the City of liability. This Court has long held that "[i]t is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, not necessarily the last act in a chain of events." *Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983) (reversing due to fact question on causation because a jury could find that the eruption of Mt. St. Helens was an "explosion" that proximately caused mudflows destroying insured homes).

A jury could find that Stevenson's negligent pursuit set

into motion the chain of events that caused Maddy to dangerously flee through residential streets leading to David's death. That Maddy might harm a bystander is exactly the type of harm that flows from a negligent pursuit.[6]

Fact questions were present for the jury on whether Stevenson's decision to initiate Maddy's pursuit at all, his conduct of the pursuit, and whether it should have been terminated under SPD Policy and general law enforcement principles, proximately caused David Harder's death. Because a jury could find that had Stevenson not pursued Maddy, had done so properly, or had terminated the pursuit, David would still be alive, the trial court erred in usurping the jury's role in deciding

[6] There was no intervening action or cause sufficient to cut off proximate causation as a matter of law. *See*, *e.g.*, *Adgar v. Dinsmore*, 26 Wn. App. 2d 866, 881, 530 P.3d 236 (2023) (when evaluating whether a superseding cause severs liability, a court must consider whether "the intervening act created a different type of harm than otherwise would have resulted from the actor's negligence"). Whether an intervening or superseding cause exists is also a classic question of fact for the jury. *Adgar*, 26 Wn. App. 2d at 881.

causation as a matter of law. Review is merited. RAP 13.4(b)(1), (2).

(4) Washington Law on Police Pursuits Is In a State of Flux and This Court Should Address Tort Liability for Illicit Police Pursuits, an Issue It Has Not Addressed for Fifty Years

The last time this Court addressed tort liability for police agencies' conduct of police pursuits was in *Mason*, filed in 1975, *nearly a half century ago*. Much has changed in tort law since that time. The Legislature addressed tort law generally in 1981 and 1986, changing the principles of negligence *per se* in RCW 5.40.050.

This Court has filed numerous decisions on police liability since *Mason*, expanding the circumstances under which law enforcement officers are liable in negligence. *See* discussion *supra*.

The Legislature in recent years has also narrowed the circumstances for police pursuits. Laws of 2021, ch. 320, § 7, only to essentially rescind that policy in enacting Initiative 2113.

Laws of 2024, ch. 6, § 1. The upshot of this change in the law is that police pursuits will likely be more prevalent, and injuries to innocent bystanders to such risky pursuits more likely to face harm.[7]

This Court should address a case where the police pursuit was admittedly illicit, a mere pretext for a law enforcement officer to apprehend a suspect for improper reasons. That illicit pursuit at high speeds through streets in a residential area was risky and foreseeably resulted in Maddy's collision with David Harder's motorcycle that killed him. That illicit pursuit was needless; it should never have been initiated and it was not broken off. This Court's establishment of clear liability principles for police pursuits is needed. RAP 13.4(b)(4).

F. CONCLUSION

Review is merited under RAP 13.4(b)(1), (2), (4). The

[7] This Court has a petition for review in a Division II police pursuit case, *Estate of Selander v. Pierce County* (Cause No. _____), pending before it.

trial court erred in granting summary judgment to the City. This Court should reverse the trial court's order on summary judgment and remand the case to the trial court for trial. Costs on appeals should be awarded to the Estate.

This document contains 4,962 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 7th day of November, 2024.

Respectfully submitted,

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# APPENDIX

RCW 46.61.035:

(1) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(2) The driver of an authorized emergency vehicle may:

> (a) Park or stand, irrespective of the provisions of this chapter;
>
> (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
>
> (c) Exceed the maximum speed limits so long as he or she does not endanger life or property;
>
> (d) Disregard regulations governing direction of movement or turning in specified directions.

(3) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of visual signals meeting the requirements of RCW 46.37.190, except that: (a) An authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle; (b) authorized emergency vehicles shall use audible signals when necessary to warn others of the emergency nature of the situation but in no case shall they be required to use audible signals while parked or standing.

(4) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his or her reckless disregard for the safety of others.

HONORABLE JIM ROGERS
Dept. 45
Hearing Date: September 8, 2023
Time: 10:00 a.m.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

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| KAREN HARDER, individually, and on behalf of the ESTATE OF DAVID HARDER; and RACHEL HARDER, individually,<br><br>Plaintiffs,<br><br>v.<br><br>CITY OF SEATTLE, a subdivision of the State of Washington d/b/a SEATTLE POLICE DEPARTMENT; and PAYTON MADDY, an individual,<br><br>Defendants. | No. 22-2-02867-0 SEA<br><br>~~[PROPOSED]~~ ORDER GRANTING DEFENDANT CITY OF SEATTLE'S MOTION FOR SUMMARY JUDGMENT |

THIS MATTER having come on regularly before this Court on Defendant City of Seattle's Motion for Summary Judgment, the parties appearing by and through counsel, the Court having reviewed the pleadings and files in this matter, specifically including the following:

1. Defendant City of Seattle's Motion for Summary Judgment;
2. Declaration of Robert L. Christie, with exhibits;
3. Declaration of Steven R. Arndt, with exhibits;
4. Declaration of Detective Aaron Parker, with exhibit;
5. Declaration of Nathan Rose, with exhibits;



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6. Plaintiffs' Opposition to Defendant City of Seattle's Motion for Summary Judgment;

7. Declaration of Samuel J. Daheim in Support of Plaintiffs' Opposition to Defendant City of Seattle's Motion for Summary Judgment, with exhibits;

8. Declaration of Russ Hicks, with exhibits;

9. City of Seattle's Reply in Support of Motion for Summary Judgment;

10. _____; and

11. _____.

Finding itself fully appraised of the matters raised, and the Court having reviewed the Court file, it is hereby:

ORDERED, ADJUDGED AND DECREED that Defendant City of Seattle's Motion for Summary Judgment is GRANTED. All claims alleged by Plaintiffs against the City of Seattle are dismissed with prejudice.

DONE IN OPEN COURT/CHAMBERS this 14 day of September, 2023.

HONORABLE JIM ROGERS

Presented by:

CHRISTIE LAW GROUP, PLLC

By /s/ Robert L. Christie
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Estate of Harder v. City of Seattle

What is the beginning and end of proximate cause in this case?

Mr. Reddy sped, ran a stop sign and hit and killed Mr. Harder. The question is whether Officer Stevenson's brief chase caused (or was a cause) of Reddy's negligent driving and his actions in killing Mr. Harder. Officer Stevenson only needs to be a cause, not the cause. Clearly, Mr. Reddy was the immediate cause of the death of Mr. Harder when he blew through a stop sign while speeding. He sits in prison for that action.

Mr. Reddy testified that he never saw the Officer-at any time. In his deposition, he describes his state of mind (on heroin) as a "blur." He also says he has a memory of where he drove and that he did not see the Officer. One might infer that he sped away because he saw the Officer's lights on, and that he was not telling the truth, and Reddy agreed, based upon being shown the police video, that he could have seen the Officer early in the chase but said he did not. In fact, he was quite upset that he killed Mr. Harder and did not understand why he was being asked whether he saw the police.

Mr. Reddy's testimony could be impeached, but that is not substantive evidence that Officer Stevenson in fact caused Mr. Reddy's negligent actions. On this ground alone, the Motion is Granted.

But take it a step further. Assume that plaintiff can prove that Mr. Reddy did see Officer Stevenson at the time the Officer gave chase.



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**King County Superior Court**
**Dept. 45**
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**KCC-SC-0203**
**Seattle, Washington 98104**

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The speed and location of the vehicles are undisputed facts. All of it is on video and has been examined by experts. It is not disputed that Officer Stevenson broke off his chase at least two blocks and several turns before Mr. Reddy ran the stop sign and killed Mr. Reddy. It also cannot be disputed that several blocks before the accident and the running through the stop sign, Reddy he could not have been seen Officer Stevenson (even if there was evidence that Reddy could have seen the Officer earlier).

This Court asked Plaintiff's counsel at argument what would be the logical end of proximate cause for the negligence of Officer Stevenson. What if Mr. Reddy had sped for another four blocks and hit and killed a motorist. Would the Seattle Police Department still be liable? The answer was yes. One might then ask, what would break the chain of causation? Is it time? Distance?

The Court concludes that under these undisputed facts, where under any possible analysis, Reddy did not and could not have seen Officer Stevenson several blocks before the accident, then the alleged negligence of the police officer was not a proximate cause of Mr. Reddy's negligence when Reddy blew through the stop sign and killed Mr. Harder. At that point, Reddy's negligence became the sole cause of the death of Mr. Harder.

For both reasons separately, under a factual cause and proximate cause analysis, the Defense Motion is Granted.



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This Court does not reach a decision on the issue of the negligence of Officer Stevenson. Instead, the Court assumed negligence for the purposes of the proximate cause analysis.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

| | |
|---|---|
| KAREN HARDER, individually, and on behalf of the ESTATE OF DAVID HARDER; and RACHEL HARDER, individually,<br><br>Appellants,<br><br>v.<br><br>CITY OF SEATTLE, a subdivision of the State of Washington d/b/a SEATTLE POLICE DEPARTMENT,<br><br>Respondents,<br><br>PAYTON MADDY, an individual,<br><br>Defendant. | No. 85812-2-I<br><br>UNPUBLISHED OPINION |

BOWMAN, J. — Karen Harder, individually and on behalf of the estate of David Harder, and Rachel Harder (collectively Estate) appeal the trial court's grant of summary judgment for the city of Seattle and the Seattle Police Department (SPD) (collectively City) on the Estate's claims of negligence, wrongful death, and loss of consortium. The Estate alleged that SPD Officer Robert Stevenson violated SPD policy in pursuing Payton Maddy, causing Maddy to drive erratically and kill David.[1] But because the Estate cannot show

[1] We refer to the individual members of the Harder family by their first names when necessary for clarity and mean no disrespect by doing so.

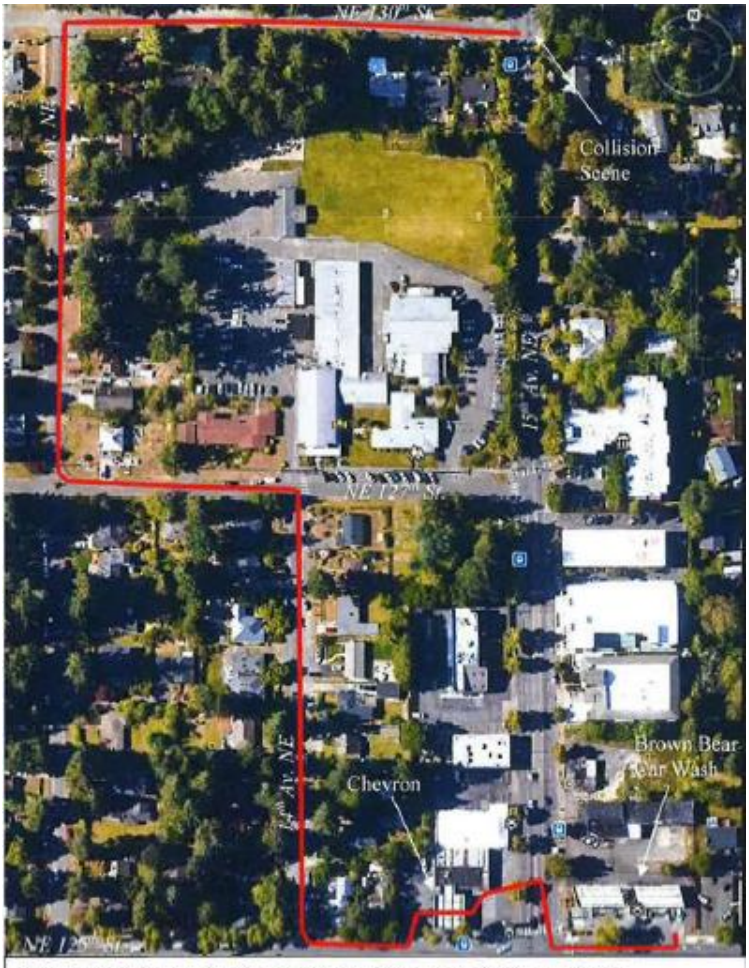
that Officer Stevenson's actions were a proximate cause of David's death, we affirm.

## FACTS

On the morning of May 20, 2020, Officer Stevenson was patrolling in North Seattle when he saw a car parked in a stall at the Brown Bear Car Wash at the corner of 15th Avenue NE and NE 125th Street. The driver was not washing or detailing his car. Officer Stevenson believed the car wash was "a nest for criminal activity" and "a hangout for nefarious characters." So, he pulled into the parking lot to get a better view of the car. As he circled the lot, Officer Stevenson noticed that the car did not have a rear license plate and that the temporary tag was expired.

Officer Stevenson then left the property and parked a block away in a position where he could see the entire lot. As he was leaving, Officer Stevenson saw the driver, later identified as Maddy, notice him and "get nervous." Shortly after parking, Officer Stevenson observed Maddy drive out of the lot and head north on 15th Avenue NE. Officer Stevenson followed Maddy. Over the next minute and a half, Maddy drove erratically through the neighborhood northwest of the car wash, with Officer Stevenson trailing him, until Maddy crashed into David's motorcycle, killing him.

The red line in the picture below shows Maddy's path through the neighborhood during the minute and a half from when he left the car wash parking lot until he hit David's motorcycle.




Google Earth image showing Payton Maddy's approximate travel path.

As shown, Maddy left the car wash and headed east on NE 125th Street. He then turned north onto 15th Avenue NE but quickly cut across the road into a Chevron gas station parking lot. He drove through the lot and exited the gas station onto NE 125th Street westbound "at a high rate of speed, without stopping," and cut off another car. Officer Stevenson followed Maddy, heading north on 15th Avenue NE and making a U-turn to stay with him as Maddy cut through the gas station and continued on NE 125th Street. Officer Stevenson saw Maddy turn north onto 14th Avenue NE and activated his emergency lights, intending to stop him for driving with expired tabs and reckless driving.

Maddy accelerated north on 14th Avenue NE toward NE 127th Street. When Officer Stevenson turned onto 14th Avenue NE, he saw that "Maddy had put over [a half] block" on him and continued "accelerating and pulling away" from him. Believing Maddy was eluding, Officer Stevenson drove about 100 yards north on 14th Avenue NE before deactivating his emergency lights[2] and broadcasting by radio to other officers that he was "return[ing] to routine driving" and "not in a pursuit." Even so, he continued following Maddy "in a routine manner in an effort to keep a visual on him."

Maddy made a left turn westbound on NE 127th Street, then a right turn northbound on 12th Avenue NE, and then another right turn eastbound on NE 130th Street. Officer Stevenson followed, expecting that "Maddy would ditch the vehicle and go to ground." Officer Stevenson explained that people who elude police often leave the car and flee on foot. But at the intersection of NE 130th Street and 15th Avenue NE, Maddy ran a stop sign and attempted a left turn northbound onto 15th Avenue NE. Cutting across oncoming southbound traffic on 15th Avenue NE, Maddy struck David's motorcycle. David died as a result of his injuries from the crash.[3]

In February 2022, the Estate[4] sued the City and Maddy, alleging negligence, wrongful death, and loss of consortium. In August 2023, the City

[2] Officer Stevenson never activated his sirens.

[3] Maddy later pleaded guilty to hit and run resulting in death and vehicular homicide. He received a 120-month sentence.

[4] Karen is David's spouse and Rachel is his daughter.

moved for summary judgment. It argued that the Estate cannot show Officer Stevenson was negligent because "there is no evidence that Officer Stevenson 'pursued' Maddy, and no evidence that he failed to exercise due regard for the safety of all persons." The City also argued that the Estate cannot establish Officer Stevenson's actions were a proximate cause of the collision. It contended that Officer Stevenson's actions could not have caused Maddy to drive recklessly because Maddy's own statements established he did not see Officer Stevenson following him.

With its motion, the City submitted the declaration of its expert, Nathan Rose, an accident reconstructionist. Rose created an animation video with a reconstruction of the route Maddy and Officer Stevenson drove before the collision. And the City submitted testimony from Officer Stevenson that when he thought Maddy was fleeing, he did not pursue and, instead, deactivated his emergency lights and resumed "routine driving." The City also submitted testimony from SPD Assistant Chief Thomas Mahaffey, the bureau chief over patrol operations, that "based on the distance," it was clear Officer Stevenson stopped pursuit of Maddy when he saw Maddy accelerating away from his attempted traffic stop.

The City also provided a declaration from its expert Dr. Steven Arndt, a human factors scientist, who testified that Maddy had about five seconds in which he could have seen Officer Stevenson trying to make a traffic stop with his lights activated, and that once Maddy turned onto NE 127th Street, "there would

be no opportunity to see the activated lights," which was about 34 seconds before the collision. And the City submitted a report summary from Dr. Jeremy Bauer, an accident reconstruction expert, showing that while Officer Stevenson was following Maddy, there were only four brief moments where Maddy could have seen him before Maddy turned onto NE 130th Street from 12th Avenue NE. Finally, the City submitted transcripts from the arresting officer's body camera footage and Maddy's later deposition testimony in which Maddy states several times that he did not know Officer Stevenson tried to stop him and that he did not see a police car following him at any point.

The Estate opposed the City's motion. It argued that the evidence showed Officer Stevenson failed to act with due regard for the safety of others by continuing to pursue Maddy. It further argued that Officer Stevenson's conduct was a proximate cause of the collision because Maddy's erratic driving shows that he was fleeing from Officer Stevenson, and that Maddy's statement that he did not see Officer Stevenson is not credible. The Estate also submitted testimony from SPD Captain George Davisson that Maddy was likely eluding. And it submitted a declaration and expert report from Russ Hicks, a retired law enforcement officer and police academy supervisor and trainer, in which Hicks states that after Officer Stevenson saw Maddy was eluding, he continued to pursue Maddy in violation of SPD policy.

On September 8, 2023, the trial court heard the City's summary judgment motion. After hearing argument from both parties, the court reserved ruling on

the matter. A few days later on September 14, the court granted the City's motion and dismissed all claims against the City. The court explained that Officer Stevenson's actions were not a proximate cause of David's death because Maddy testified that he never saw Officer Stevenson. But even assuming Maddy saw Officer Stevenson pursuing him, the court concluded Officer Stevenson "broke off his chase at least two blocks and several turns before [Maddy] ran the stop sign and killed [David]," so his conduct was too remote to amount to a proximate cause of David's death.

The Estate then moved for certification of the court's order on summary judgment under CR 54(b) and a stay of the proceedings against Maddy. The City did not oppose the motion, and the court granted certification and a stay.

The Estate appeals.

ANALYSIS

The Estate argues that the trial court erred by granting the City summary judgment because specific facts show that Officer Stevenson breached his duty of care and that the breach was a proximate cause of David's death.

We review rulings on summary judgment de novo, performing the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). The moving party bears the burden of proving that there is no genuine issue as to any material fact. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). We consider all facts and reasonable

inferences from those facts in the light most favorable to the nonmoving party. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

A defendant may move for summary judgment by showing the plaintiff lacks competent evidence to support an element of its case. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). If the defendant makes this showing, the burden shifts to the plaintiff to establish the existence of the element. *Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wn. App. 28, 36, 991 P.2d 728 (2000). The plaintiff must present specific facts showing a genuine issue for trial; conclusory allegations, speculative statements, or argumentative assertions are not enough. *Id.* If the plaintiff fails to meet its burden, summary judgment for the defendant is proper. *Knight v. Dep't of Lab. & Indus.*, 181 Wn. App. 788, 795-96, 321 P.3d 1275 (2014).

To prevail on a negligence claim, a plaintiff must prove (1) the existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). If the plaintiff cannot establish all four elements as a matter of law, summary judgment for the defendant is proper. *Id.*

1. Duty of Care

The Estate argues that the City owed a duty of care to protect others from harm under the "overarching common law duty of law enforcement officers" and RCW 46.61.035. We agree.

"Liability in tort for negligence may lie only where the defendant owes the plaintiff a duty of care." *HBH v. State,* 197 Wn. App. 77, 86, 387 P.3d 1093 (2016). A duty of care can arise from common law principles or legislative enactment. *Schneider v. Strifert*, 77 Wn. App. 58, 61, 888 P.2d 1244 (1995). The existence of a duty is a question of law. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

Under common law, every individual, including law enforcement officers, owes " 'a duty of reasonable care to refrain from causing foreseeable harm in interactions with others.' " *Mancini v. City of Tacoma*, 196 Wn.2d 864, 879, 479 P.3d 656 (2021) (quoting *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019)). And our legislature affirmed that this duty of care applies even when law enforcement officers are acting in an emergency capacity under RCW 46.61.035. There, drivers of "authorized emergency vehicle[s]" in "the pursuit of an actual or suspected violator of the law" may "[e]xceed the maximum speed limits so long as [they do] not endanger life or property." RCW 46.61.035(1), (2)(c). But the statute does not "relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons" or "protect the driver from the consequences of [their] reckless disregard for the safety of others." RCW 46.61.035(4).

As a result, Officer Stevenson had a duty to drive his patrol car with reasonable care to prevent foreseeable harm to others even if he was engaged in a pursuit.

2. Breach

The Estate argues it raised a question of fact as to whether Officer Stevenson breached his duty. It points to Hicks' testimony that Officer Stevenson failed to break off pursuit in violation of SPD's policy. We agree.

Whether a party breached a duty of care is generally a fact question. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Violation of an adopted policy that sets a standard of care to be followed by employees may be considered as evidence of negligence. *See HBH*, 197 Wn. App. at 92.

Under SPD policy 13.031(4), an officer may not pursue an eluding vehicle without an "articulable justification that the public safety need to stop the eluding vehicle outweighs the inherent risk of pursuit driving." And an officer cannot initiate pursuit solely for traffic violations, misdemeanors, property crimes, or the act of eluding alone. Under SPD policy 13.031(1), "eluding" exists when

> an officer operating an authorized police vehicle issues by hand, voice, emergency lights or siren a visual and/or audible signal to the driver of a vehicle to stop and, after a reasonable time to yield in response to the officer's signal, the driver does any of the following:
>
> - Increases speed
> - Takes evasive actions
> - Refuses to stop.

And "pursuit" exists when "an officer, in an effort to keep pace with and/or immediately stop or apprehend an eluding driver, drives in a manner that is outside of normal traffic restrictions."

Officer Stevenson testified that he complied with SPD policy 13.031 because as soon as he saw Maddy elude, he disengaged, deactivated his emergency lights, and returned to "routine driving."[5] In deposition testimony, Officer Stevenson explained that "when it became clear that [Maddy] wasn't going to stop," he "deactivated" his lights because "[p]olicy requires us to not pursue for minor offenses, which Mr. Maddy had committed, and so continuing to push it and pursue would have been violation of the department policy."

Officer Stevenson's report similarly provides that he activated his emergency lights when he intended to stop Maddy for reckless driving after Maddy exited the gas station parking lot and cut off another driver. But when Officer Stevenson turned onto 14th Avenue NE moments later, he saw "Maddy had put over [a half] block" between them and was "accelerating and pulling away." Officer Stevenson drove about 100 yards north on 14th Avenue NE before deactivating his emergency lights and broadcasting by radio to other officers that he was "return[ing] to routine driving" and "not in a pursuit."

Assistant Chief Mahaffey also testified that Officer Stevenson complied with SPD policy. He explained that when Officer Stevenson has his lights on, he is "trying to effect a traffic stop" on Maddy's vehicle, and when Maddy accelerates, he is eluding. According to Assistant Chief Mahaffey, when Officer

[5] At oral argument before this court, the Estate agreed that it was not alleging Officer Stevenson was negligent until the point when he deactivated his emergency lights but kept pursuing Maddy. It stated that "in this particular set of circumstances, it is . . . the decision to continue the pursuit that . . . is the problem here." Wash. Court of Appeals oral argument, *Harder v. City of Seattle*, No. 85812-2-I (July 16, 2024), at 2 min., 50 sec. to 3 min., 54 sec. (on file with court). Accordingly, we consider facts only after Officer Stevenson deactivated his lights to determine breach and proximate cause.

Stevenson switched off his emergency lights and returned to routine driving, the distance grew between him and Maddy, so Officer Stevenson was not "trying to keep pace."

But the Estate submitted a declaration and expert report from retired officer Hicks, in which he states that "[a]lthough [Officer] Stevenson testified that he was merely following Maddy in an effort [to] 'keep sight of' him . . . , this language is not in substance any different from 'keeping pace' " with Maddy. He concluded that Officer Stevenson engaged in an unauthorized pursuit in violation of SPD policy 13.031.[6]

Because there is competing evidence about whether Officer Stevenson pursued Maddy in violation of SPD policy 13.031,[7] a question of fact remains as to whether Officer Stevenson breached his duty to drive his patrol car with reasonable care.

3. Proximate Cause

The Estate argues that it also raised genuine issues of fact as to whether Officer Stevenson's breach was a proximate cause of Maddy's crash. We disagree.

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[6] The Estate also provided testimony from Captain Davisson that Officer Stevenson did not have an "articulable justification" to initiate a pursuit in violation of SPD policy 13.031(4).

[7] The Estate also argues that Officer Stevenson breached his duty by "operating 'outside of normal traffic restrictions' " in violation of SPD policy 13.031(1). Like a violation of policy, violation of a statute, ordinance, or administrative rule may be considered as evidence of negligence. *See*, *e.g.*, *Skeie v. Mercer Trucking Co.*, 115 Wn. App. 144, 151, 61 P.3d 1207 (2003) (defendant's failure to secure truck load to statutory standards was evidence of negligence). So, evidence that Officer Stevenson was speeding could also support breach. But because the Estate also raises an issue of fact as to whether Officer Stevenson was pursuing Maddy, we do not reach this argument.

To be liable for negligence, a plaintiff must show that a defendant's actions were a proximate cause of the plaintiff's injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Proximate cause has two elements: cause in fact and legal causation. *Id.* "[T]he cause in fact inquiry focuses on a 'but for' connection," while "legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 289, 481 P.3d 1084 (2021). Cause in fact, or "but for" causation, refers to the " 'physical connection between an act and an injury.' " *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013) (quoting *Hartley*, 103 Wn.2d at 778). To show cause in fact, the plaintiff " 'must establish that the harm suffered would not have occurred but for an act or omission of the defendant.' " *Id.* (quoting *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005)).

Cause in fact is usually a question of fact not susceptible to summary judgment. *Martini*, 178 Wn. App. at 164-65. But we may decide cause in fact as a matter of law "if the facts and inferences from them are plain and not subject to reasonable doubt or difference of opinion." *Id.* While a plaintiff need not prove cause in fact "to an absolute certainty," they must present evidence that " 'allow[s] 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.' " *Id*. at 165[8] (quoting *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 781, 132

[8] Alteration in original.

P.3d 944 (2006)). The plaintiff cannot rest their claim on a speculative theory. *Id.*

The Estate argues that there are issues of fact as to "whether Maddy perceived that [Officer] Stevenson was pursuing him" after the officer deactivated his emergency lights. But the evidence shows otherwise.

Using Rose's animated reconstruction video of Maddy and Officer Stevenson's route up to the time of the collision, the City's expert Dr. Arndt analyzed the dynamics of the situation, including visual obstructions, environmental obstructions, sightlines, and Maddy's position in the car, to determine whether Maddy could have seen Officer Stevenson following him. From his analysis, Dr. Arndt determined that "Maddy would have had the ability to see Officer Stevenson's vehicle lights activated for a total of approximately 5 seconds" as he traveled north on 14th Avenue NE. Dr. Arndt explained that once Maddy turned onto NE 127th Street, he had "no opportunity to see the activated lights,"[9] which was "approximately 34 seconds prior to the collision." He also explained that between the last point when Maddy could have seen Officer Stevenson's emergency lights on 14th Avenue NE and the point of the collision,

> it is likely that there would only be two short opportunities for Mr. Maddy to even have the ability to have an unobstructed line of sight to Officer Stevenson's vehicle. The likely total time for viewing would be approximately 3 seconds, and at each occurrence it

[9] Officer Stevenson turned off his emergency lights after driving about 100 yards north on 14th Avenue NE.

> would require Mr. Maddy to be looking back as he was navigating a corner.

Dr. Arndt also created a demonstrative that showed Maddy's possible sight lines of Officer Stevenson.

Based on Rose's and Dr. Arndt's demonstratives, accident reconstructionist Dr. Bauer concluded that there were four moments when Maddy could have seen Officer Stevenson following him: (1) when Officer Stevenson first turned onto 14th Avenue NE, (2) the next two seconds before Maddy turned onto NE 127th Street, (3) a split second when Officer Stevenson turned onto NE 127th Street as Maddy was turning onto 12th Avenue NE, and (4) a split second just before Maddy turned onto NE 130th Street as Officer Stevenson turned onto 12th Avenue NE.

The Estate offers no affirmative evidence that Maddy saw Officer Stevenson. Still, it argues the possibility that Maddy could have seen Officer Stevenson, coupled with his erratic driving, show that he was eluding Officer Stevenson's continued pursuit. But Maddy testified to the contrary. Maddy repeatedly said that he did not see Officer Stevenson following him. During his arrest, officers asked Maddy three times if he saw Officer Stevenson trying to make the traffic stop. Each time he said, "No," "I didn't even see him," and, "No, I did not." Then again in his deposition, Maddy said that his driving was not influenced by police following him. He testified that he did not see Officer Stevenson at all. And he reaffirmed the statements he made at the time of his

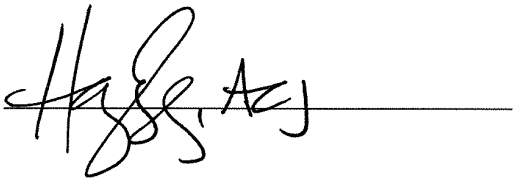
arrest, saying they were truthful. Even on cross-examination by the Estate's attorney, after watching Rose's animated reconstruction video, Maddy acknowledged that the exhibit showed he could have seen Officer Stevenson but maintained that he did not. He testified again that he "never [saw] any police vehicles."

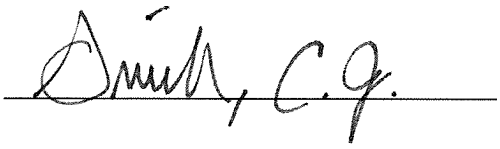
The Estate argues that Maddy's testimony is "highly questionable and impeachable" because he admitted to using heroin just before the incident. But to avoid summary judgment, the nonmoving party must present contradictory evidence or otherwise impeach the evidence of the moving party. *Dunlap v. Wayne*, 105 Wn.2d 529, 536, 716 P.2d 842 (1986). While Maddy acknowledged that he used heroin on May 20, 2020, that he was driving erratically, and that the events leading up to the collision were "a blur," he consistently and adamantly testified that he did not see Officer Stevenson. That Maddy is "impeachable" does not amount to affirmative evidence sufficient to defeat summary judgment. As a result, the Estate fails to show that "but for" Officer Stevenson's pursuit, Maddy would not have driven erratically and killed David.[10]

[10] Because the Estate cannot show the City was a cause in fact of David's death, we do not reach the issue of legal causation.

Because the Estate cannot show Officer Stevenson was a proximate cause of David's death, we affirm the trial court's dismissal of its claims against the City on summary judgment.

WE CONCUR:





DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 85812-2-I to the following:

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Original electronically filed by email to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 7, 2024 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

## OFFICE RECEPTIONIST, CLERK

**From:** OFFICE RECEPTIONIST, CLERK
**Sent:** Thursday, November 7, 2024 3:37 PM
**To:** Brad Roberts; Court of Appeals, Division I
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**Subject:** RE: Karen Harder, et al. v. City of Seattle, et al., Court of Appeals, Division I 85812-1

Received 11-7-24

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**From:** Brad Roberts <brad@tal-fitzlaw.com>
**Sent:** Thursday, November 7, 2024 3:05 PM
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**Subject:** Karen Harder, et al. v. City of Seattle, et al., Court of Appeals, Division I 85812-1



Good Afternoon:

Attached for filing in the above-referenced matter, please find the following document:

**Case Name:** Karen Harder, et al. v. City of Seattle, et al.
**Court of Appeals, Division I Cause No:** 85812-1
**Document Title:** Petition for Review
**Attorney Submitting Filing:** Philip A. Talmadge, WSBA #6973
**Party Submitting Filing:** Petitioners Karen Harder, individually, and on behalf of the Estate of David Harder; and Rachel Harder, individually

Please confirm receipt and let me know if you have any trouble accessing. Thank you.

Best regards,

**BRAD ROBERTS * LEGAL ASSISTANT**
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