Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

January 13, 2021

Kenneth M Roessler
Mix Sanders Thompson PLLC
1420 5th Ave Ste 2200
Seattle, WA 98101-1346
ken@mixsanders.com

Spencer Dion Parr
Washington Law Center, PLLC
651 Strander Blvd Bldg B
Tukwila, WA 98188-2943
spencer@washingtonlawcenter.com

Daniel Austin Swinford
Washington Law Center
15 Oregon Ave Ste 210
Tacoma, WA 98409-7464
daniel@washingtonlawcenter.com

John Robert Nicholson
Jackson & Nicholson, P.S.
900 SW 16th St Ste 215
Renton, WA 98057-2619
John@jnseattle.com

Elliot Dustin Tiller
Office of the Attorney General of Washin
PO Box 40126
Olympia, WA 98504-0126
Elliot.Tiller@atg.wa.gov

Jesse Tilson
20407 28th Ave. W., Apt 1
Lynnwood, WA 98036
jessetilson1986@gmail.com

George Allen Mix
Mix Sanders Thompson, PLLC
1420 5th Ave Ste 2200
Seattle, WA 98101-1346
george@mixsanders.com

Ashton K Dennis
Washington Law Center
15 Oregon Ave Ste 210
Tacoma, WA 98409-7464
ashton@washingtonlawcenter.com

Gregory Eugene Jackson
Jackson & Nicholson, P.S.
900 SW 16th St Ste 215
Renton, WA 98057-2619
gregj@fjtlaw.com

Patrick Joon Kang
Premier Law Group
1408 140th Pl NE Ste 100
Bellevue, WA 98007-3962
patrick@premierlawgroup.com

CASE # 377440
Salyena Mayberry, et al v. County of Spokane, et al
SPOKANE COUNTY SUPERIOR COURT No. 182012095

Counsel:

Enclosed is your copy of the Commissioner's Ruling, which was filed by this Court today.

If objections to the ruling are to be considered (RAP 17.7), they must be made by way of a Motion to Modify filed in this Court within 30 days from the date of this ruling, **February 12, 2021.** The answer, if any, to a Motion to Modify will be due **10 days** after the motion is served on the answering party. The moving party may submit a written reply to the answer to the motion to modify no later than **3 days** (excludes Saturdays, Sundays, and legal holidays) after the answer is served on the moving party. RAP 17.4(e)

Please file the original; serve a copy upon the opposing attorney and file proof of such service with this office.

If a motion to modify is not timely filed, appellate review is terminated.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:bar

The Court of Appeals
of the
State of Washington
Division III

FILED
Jan 13, 2021
Court of Appeals
Division III
State of Washington

SALENYA MAYBERRY, individually and on behalf of her son MYKA TILSON; JESSE TILSON, individually, WENDI MAYBERRY, as parent and, guardian of TAKOTAH MAYBERRY, a minor child, Respondents, v. CITY OF SPOKANE VALLEY, STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION, Appellants.	No. 37744-0-III COMMISSIONER'S RULING

This matter is before the Court on the City of Spokane Valley's ("City") and Washington Department of Transportation's ("WSDOT") motions for discretionary review of the Spokane Superior court's order denying their motions for summary judgment. In that order, the superior court refused to dismiss Respondents Salenya Mayberry, Myka Tilson, Jesse Tilson, Wendi Mayberry, and Takotah Mayberry (hereinafter "Respondents") claims against the City and WSDOT stemming from a single-vehicle accident that occurred in April 2017.

In the accident, nineteen-year old Autumn Solomon was driving a Mitsubishi Mirage with four juveniles as passengers. Sometime after 11 p.m., Solomon decided to take the Barker Road exit off Interstate-90 and turned onto East Cataldo Avenue, which is a two-lane divided road that extends from North Barker Road. A driver proceeding through the traffic light from North Barker Road onto East Cataldo Avenue must travel a short distance south before the road curves approximately 130 degrees, after which the road proceeds east and runs parallel to Interstate 90. There is a double-yellow line beginning at the intersection and proceeding beyond the curve. There is a concrete barrier and a dirt berm located to the west of the curved portion of East Cataldo Avenue, and at the opposite end of the road, East Cataldo terminates in a dead-end.

East Cataldo Avenue is owned by the City, which began operating the road in 2003. WSDOT owns the adjacent property. The evidence presented at summary judgment indicated that a WSDOT tenant had placed the dirt berm along the curve in the road sometime in 2005 or 2006, and that WSDOT had installed the concrete barriers in 2013 to prevent individuals from parking on that area. The dirt berm and barriers were located in the City's right-of-way, approximately 11 feet from the road. There were no signs warning about the curve, nor were there any markings on the berm or barrier.

A motorist travelling east on East Cataldo, as Solomon did, passes a sign indicating that the speed limit is 25 miles per hour. Solomon did not recall seeing the

sign but did not dispute its existence. When Solomon realized East Cataldo was a dead-end, she made a U-turn to travel back to Interstate 90. While traveling west, Solomon failed to negotiate the curve on East Cataldo. Her vehicle crossed over the double-yellow centerline, impacted the concrete barrier and berm located on the opposite side of the road, rolled over, and crashed on the adjacent property. Solomon was estimated to be traveling between 56 to 70 miles per hour at the time of the accident. Solomon was charged and pleaded guilty to three counts of felony vehicular assault, one count for each of the passengers who were injured.

The injured passengers (Respondents) filed an action that included claims for negligence against the City and WSDOT. Each entity filed a motion for summary judgment, both alleging that there was no genuine issue of material fact that neither entity owed a duty, or breached any duty, to the Respondents, and that neither entity's alleged breach was a proximate cause of the passengers' injuries. Both the City and WSDOT and the Respondents presented testimony from various expert witnesses in support of their respective positions.

The superior court denied both the City and WSDOT's motions, holding that genuine issues of material fact precluded summary judgment as to both defendants. The court provided a thorough oral ruling, stating in part:

> My review of the facts indicate that the Jersey barriers or types of barriers were transitioned in and out by the State of Washington over the course of

years, and that the dirt berm itself was created by one of the former tenants of the Department of Transportation. The request for -- or the requirement for notice requires that it be either actual or constructive notice. There's no evidence in this record that there was actual notice to the city of the -- or the state for that matter, of the barriers or the berm being a problem. So it comes down to whether there is evidence of constructive notice.

In addition to being on constructive notice from perhaps police reports of accidents that the city must be aware of, constructive notice can come from the lapse of time, a lapse of time where a dangerous condition is permitted to continue long enough to be able to say that the city ought to have known about the condition. This comes from the *Niebarger* case. Plaintiffs argue that the prior accidents at the curve or on that road are constructive notice to the city.

...

However, there has been argument made through the expert declarations that are attached here, including Mr. Rickman's, that the city has owned the road for quite some time and should have known that the barrier and berms were there creating an unusual condition. Solomon's expert testifies that the AASHTO barrier recommendations are based on a premise that the barrier should generally be installed if it reduces the severity of potential crashes. The opinion is that the barrier increased the severity of potential crashes making it an unusual hazard.

The barrier at the scene under the control of the -- has been under the control of the state, and with the knowledge of the city since approximately 2013 by my review of the evidence. It can be considered an unusual hazard. It is the opinion of the expert that it is not placed there to mitigate accidents and creates a dispute in fact as to that constructive notice.

...

The briefing argues obviously this goes beyond negligence to recklessness. But the case law would also support the fact that just because the defendant is speeding or driving in a negligent manner, *Keller* makes it clear that liability isn't limited, nor is this type of driving automatically not considered ordinary travel. To me, that makes a dispute in fact as to whether her driving, whether negligent or reckless, is within ordinary travel

given all of the circumstances.

The evidence that is contained here from – provided by the opposing parties indicate that Ms. Solomon testified to it being dark that evening, visibility was a problem for her. She had not -- she did not see the curve in the road until it was too late for her to slow sufficiently. She had been there one time prior at night, I believe with her brother, and was not familiar with that area. Her declaration also referred to having to -- pointed to experience. I'm not real sure what she means by "experience", but that does create some inferences with regards to the facts, and that she has no recollection of seeing a speed limit sign that evening.

The other experts, Tuttman, Ms. Grungle, Mr. Harbinson, Probst, and Mr. Rickman provide testimony that the curve in question should have been delineated with either signs or reflectors on the jersey barrier. They point to putting warning signs on the road itself or reflectors on the actual barrier that was at the curve. Their testimony is that with proper signage, the defendant would have been able to adjust speed or perhaps even direction, and a driver will know a curve is coming prior to seeing it, allowing for adjustment. Without markings, a driver doesn't know a curve is coming, and had the berm and barrier not been placed where it was, the collision or results of the collision would not have been as severe.

The city argues that the evidence -- there is evidence there's no need to update the road and asserts that it follows modern standards. Evidence is in opposition to that from Mr. Rickman that the road, in conjunction with placement of the barrier and berm, creates an unusual hazard because -- creates that unusual hazard that has been referred to. Whether defendant Solomon was operating on the roadway -- hang on -- whether the defendant was operating her vehicle and traveling the roadway and whether that roadway was reasonably safe and whether it was reasonable for the city to take or not take any corrective actions are questions of fact for the court, but those questions must be taken in the totality of the circumstances here.

In other words, one piece is not set off to a side versus another piece versus another piece. It is the curve, coupled with the barrier and the berm, rather than just looking at the road itself, looking at a potential clear zone, or looking at the berm or barrier all by itself. It is the totality of the

circumstances that this Court is looking at.

While the state's duty is different from that of the city, a landowner owes a common law duty to prevent artificial conditions on its land from being unreasonably dangerous to highway travelers. That would be the *Hutchins* case. A landowner has a duty to construct and maintain artificial structures in a way which avoids creating an unreasonable risk of harm to passersby. That is where the state's duty comes in from this Court's perspective.

It is different -- there are issues of fact that still exist with regards to placement of the berm and the barrier in the city's right-of-way, where it is located next to the road in question that is on property owned by the state and with whether the placement is unreasonably dangerous to highway travellers. It's a question of fact.

Obviously, the state does not agree with that perspective based upon arguing it doesn't matter whether it is a berm or whether it is a piece of heavy equipment. Should the obstruction have been perhaps a bulldozer or something of that nature, does not change, from my view, an analysis of the facts as to whether the obstruction is unreasonably dangerous to highway travellers. The Court is certainly not making those distinctions or determinations at this point in time, because it is a trial fact.

Proximate cause is cause in fact, which is the but-for consequences of the act, the physical connection between the act and the injury. Cause in fact is generally a jury question. I find that to be in this particular case because of the testimony of the experts involved here, as well as the testimony provided through the deposition of Ms. Solomon regarding additional signage, signage safety features, whether they be on the road or on the jersey barrier, and then leading to the inevitable question of whether there would be serious injuries resulting.

. . .

If the lack of signage and placement of the berm and barrier are determined to be negligent on the part of the city and the state, the plaintiffs' injuries, in this Court's opinion, are not so remote as to preclude liability as a matter of law. Therefore, there are still facts that need to be fleshed out and questions that remain for the fact trier at this point in time.

> There are obviously other things that this Court is not determining regarding the summary judgment motion, and that is whether there are other theories, which would negate liability to the city and the state, that is outlined in case law as potentially the comparative fault and the failure to provide that factual causation, but that does not automatically defeat the existence of any legal causation at this point in time. Causation is also a jury question.
>
> It becomes a question of law for the Court when that causal connection is so speculative and indirect that reasonable minds could differ. Taking the totality of all of the circumstances and the facts in this particular case, with the duties for both the city and the state, based on the particulars in this case, I cannot find that reasonable minds could not differ. Reasonable minds could differ as to a causal connection between the accident and the injuries and that this is not so speculative or indirect for the Court to determine this as a matter of law.
>
> All of those facts are to be taken in the light most favorable to the non-moving parties, and in this case, Tilson, Mayberry, and Solomon. I do conclude there are disputes of material fact sufficient to deny summary judgment of both the city and state on that breach of duty and proximate cause.

Appendix at 1558-1565.

Both the City and WSDOT filed motions for discretionary review. To obtain review of a decision that is not a final judgment, a party must satisfy the criteria of RAP 2.3(b). Here the City and WSDOT each claim that the superior court's refusal to dismiss Respondents' claims against them is obvious error that renders further proceedings useless under RAP 2.3(b)(1). The following rules guide the appellate court's determination of whether the superior court committed obvious or probable error when it denied summary judgment: (1) On review of an order for summary judgment, the court

on appeal performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Thus, the standard of review is de novo. *Morton v. McFall,* 128 Wn. App. 245, 252, 115 P.3d 1023 (2005). And, (2) summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). This ruling addresses each entity's motion in turn.

Denial of City's Motion for Summary Judgment

The City alleges the court committed obvious error on four different grounds regarding its denial of summary judgment as to breach. The City also contends the court erred by determining there was a genuine issue of material fact as to whether the City's conduct was a proximate cause of harm to the Respondents.

1. Negligence

"Municipalities are generally held to the same negligence standards as private parties." *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002). The elements of negligence generally are duty, breach, causation, and injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). With respect to individuals who travel on a municipality's roadways, a municipality owes a duty to all travelers to maintain its roadways in a condition that is reasonably safe for ordinary travel. *Owen v. Burlington*

Northern & Santa Fe Railroad Co., 153 Wn.2d 780, 786-87, 108 P.3d 1220 (2005). This duty includes "the duty to eliminate an inherently dangerous or misleading condition." *Owen*, 153 Wn.2d at 788 (citing *Keller*, 146 Wn.2d at 249).

a. *Ordinary Travel*

The City first contends that it owes no duty where Solomon was not engaged in "ordinary travel," as evidenced by her criminally reckless speeding and the testimony of one of her experts, Mr. Rickman, who opined that Solomon was not engaged in ordinary travel.

The Washington Supreme Court has recognized that "a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel." *Keller*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). In *Unger v. Cauchon*, 118 Wn. App. 165, 73 P.3d 1005 (2003), Division One of this Court applied *Keller* to conclude that summary judgment was improper even where a motorist was engaging in "extreme[ly] reckless driving," including speeding, swerving, crossing center lines, and running red lights during severe weather. *Id.* at 170. Division One held that under *Keller*, "the County owed the driver a duty, regardless of his allegedly negligent conduct, to make the road safe for ordinary travel. It is for the jury to decide whether the County's construction or maintenance of Camano Hill Road created a condition that was unsafe for ordinary travel and whether the condition of the

road contributed to Unger's accident and death." *Id.* at 176. Accordingly, as set forth in *Keller* and *Unger*, if the road is not safe for a reasonable or non-negligent driver, the City breaches its duty even to a reckless driver.

After noting that under *Keller*, speeding or other negligent driving is not automatically "not considered ordinary travel," the superior court concluded that there was a dispute as to whether the road was safe for ordinary travel given all the circumstances, including the absence of any signage regarding the curve in the road. Appendix at 1560. In light of the evidence and the law as set forth in *Keller* and *Unger*, this Court cannot conclude that the superior court committed obvious error by determining that, despite Solomon's reckless driving and Mr. Rickman's testimony, reasonable minds could disagree as to whether the City's maintenance of the road created a condition that was unsafe for ordinary travel and this was an issue for the jury.

b. *No Duty to Update*

The City next contends it had no duty to update East Cataldo Avenue, which was designed in the 1950s, to conform to modern clear zone design standards that were not in existence at the time of the road's construction. Moreover, it contends the evidence shows that the barrier and berm were located approximately 10-11 feet from the road, and thus there was a clear zone.

A city's duty to maintain a roadway in a reasonably safe condition does not

include a duty to update every road and roadway structure to present-day standards. *Ruff v. King County*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995). Washington courts have recognized that although evidence of a particular physical defect or violation of a roadway safety measure or statute is relevant to a determination of whether a duty has been breached, such evidence is not essential to a claim that a governmental entity breached a duty of care owed to travelers. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005); *see also Xiao Ping Chen v. Seattle of City*, 153 Wn. App. 890, 908, 223 P.3d 1230 (2009). Where a plaintiff does not claim that a city violated its own road standards and there is not statutory duty, whether the city is negligent depends upon whether the roadway was inherently dangerous or deceptive. *Ruff,* 125 Wn.2d at 706.

The City presented evidence that it had no need to update the road, which was built in the 1950's, to conform with modern standards, and that the road did provide a clear zone of approximately 10-11 feet. Although Mr. Rickman's testimony included his opinion that the road should include a clear zone of 11 feet, he also opined that the curve of the road, in conjunction with the placement of the barrier and the berm relative to the curve, created an unusual hazard. The superior court noted that it was looking at the totality of the circumstances to determine whether the roadway was reasonably safe, looking at the curve coupled with the barrier and berm, rather than looking at just the

road itself, and a potential clear zone, or the barrier and berm by itself. Appendix at 1562.

On this record, it does not appear the superior court's decision to deny summary judgment as to duty and breach of duty hinged on a finding that the City had a duty to conform to modern day clear zone requirements. Instead, the court determined there was a genuine issue of fact as to whether the totality of the circumstances created an unusual hazard such that the roadway was dangerous. Accordingly, the City fails to demonstrate the superior court probable error on this basis.

c. *No Duty to Provide Warnings of Known Ordinary Curve*

The City also contends that it had no duty to post a warning of a known ordinary curve in the road that was neither misleading or hidden, citing *Owens v. Seattle*, 49 Wn.2d 187, 191, 297 P.2d 560 (1956) and *Wessels v. Stevens County*, 110 Wash. 196, 188 P. 490 (1920). It contends Plaintiffs failed to prove the existence of an unusual or extraordinary road condition "not reasonably to be anticipated," and that under *Wessels*, a mere curve in the road is an ordinary condition that requires no warning, even when combined with other factors that make the consequences of failing to negotiate the curve dire.

A municipality's duty to provide reasonably safe roads includes the duty to safeguard against an inherently dangerous or misleading condition, and the existence of an unusual hazard may require a city to exercise greater care. *Owen v. Burlington*

Northern and Santa Fe R.R. Co., 153 Wn.2d 780, 787-88, 108 P.3d 1220 (2005). This duty includes posting warning signs when required by law or when the city has actual or constructive knowledge that the highway is inherently dangerous or of such a character as to mislead a traveler exercising reasonable care. *See e.g., McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994); *Bartlett v. Northern Pacific Railway Co.*, 74 Wn.2d 881, 447 P.2d 735 (1968).

In *Wessels,* a case decided 100 years ago, the car accident at issue occurred at a spot in the road where a 100-degree curve in the road sat above a deep canyon. 110 Wash. at 197. After a driver failed to navigate the curve, resulting in the passenger's death, the decedent's estate brought a negligence action against the county based on its failure to place a warning sign or barrier at the curve. The Court noted that whether the county was negligent depended on whether the road at the curve presented an extraordinary condition or unusual hazard. The Court concluded there was "no unusual danger or extraordinary hazard at this curve as compared with other similar curves," and held the evidence failed to present a question of fact as to whether the road presented an extraordinary condition or unusual hazard. *Id.* at 199.

As the superior court correctly noted here, the question of whether the roadway was reasonably safe and whether it was reasonable for the city not to take any corrective actions were questions of fact that must take in the totality of the circumstances – *i.e.*, the

court could not look at the road by itself or the berm and barrier by themselves – it needed to look at the hazard presented by the curve and the berm and barriers together. *See e.g., Wuthrich v. King County*, 185 Wn.2d 19, 27, 266 P.3d 926 (2016) (noting that whether roadway was reasonably safe and whether it was reasonable for county to take (or not take) corrective actions are questions of fact that must be answered "in light of the totality of the circumstances."). Respondents' experts presented testimony that the steep curve in the road, without any signage or reflectors on the barrier, in conjunction with the presence of the barriers and dirt berm, created an unreasonably hazardous condition.

Unlike the *Wessels* case, which involved a curved road above a valley, the hazard here involved an unmarked curve that was arguably made more dangerous by the presence of artificial conditions (the barriers and berm), conditions that a driver might not expect to find near a curve in the road. The presence of these artificial conditions arguably created an unusual danger or extraordinary hazard at this curve, as compared with other similar curves without any barriers or berms.[1]

In light of the evidence and the law, this Court cannot conclude that the superior court committed obvious error when determining that there were material issues of fact as

---

[1] To the extent that the City contends the hazard was one that was open and apparent such that there was no duty to provide signage, this Court recently held in an unpublished opinion that following *Keller,* the open nature or knowledge of the hazard does not eliminate the duty possessed by the municipality, but instead may reduce the municipality's responsibility for damages based on the driver's comparative fault. *Tapken v. Spokane County*, 9 Wn. App.2d 1027 (2019) (unpublished).

to whether the curve and the barriers and berm created an unusual hazard such that the City had a duty to provide signs or other warning.

d. *No Notice of Dangerous Conditions*

Finally, the City contends the superior court erred by finding there was a material fact as to the City's notice of the dangerous conditions, claiming that Mr. Rickman's conclusory assertions that the City "should have known the barrier and berms were there creating an unusual condition" are insufficient to overcome summary judgment. The City further contends that the City has no duty to inspect its roads and the only way it could have discovered the barrier and berm was on its right-of-way was to conduct a survey.

A city's duty to maintain its roads so they are reasonably safe only arises when the City has notice of, and time to correct, the hazard in question. *Laguna v. Wash. State Dep't of Transportation*, 65, 68-69, 98 P.3d 819 (2004); *see also Nguyen v. City of Seattle*, 179 Wn. App. 155, 164-65, 317 P.3d 518 (2014). Accordingly, before liability arises for negligence, there must be evidence that the City had (1) notice of a dangerous condition that it did not create, and (2) a reasonable opportunity to correct it. *Laguna*, 146 Wn. App. at 263. Notice may be actual or constructive. *Albin v. Nat'l Bank of Com. of Seattle*, 60 Wn.2d 745, 748, 375 P.2d 487 (1962). Constructive notice may be inferred from the elapse of time a dangerous condition is permitted to continue. *Ingersoll v.*

DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994).

The superior court correctly observed that there was no admissible evidence that the City had actual notice of the barriers or dirt berm, or the dangerous condition created by their proximity to the curve in the road. However, there was evidence that the berm had been in place since 2005 or 2006, and that the barriers were installed in 2013. Mr. Rickman provided testimony that based on his prior professional experience as a traffic engineer, it seemed "improbable" that the City maintenance crews were unaware of the barriers. Moreover, Respondents presented testimony that the presence of the barriers and berms in relation to the curve created an unusual hazard, particularly where there was no signage.

In view of the foregoing evidence and law, this Court cannot say that the superior court committed obvious error when it found an issue of material fact existed as to whether the City had constructive notice of the barriers and dirt berm and that they created an unusual hazard given their proximity to the curve in the road and the absence of any signage.

2. Proximate Cause

The City also contends the superior court erred by concluding reasonable minds could differ as to whether the City's alleged breach was a proximate cause of the Respondents' injuries, claiming that: (1) the City only had authority to move the barriers

out of the right-of-way, and its experts provided evidence that even if the City moved the berm and barriers to the edge of the right-of-way, Solomon would not have been able to appreciably show her speed prior to hitting the barriers, (2) the evidence does not show that the accident or injuries would not have occurred but for additional signage or warnings, and (3) Solomon was familiar with the curve in the road due to her familiarity from travelling through it moments earlier.

Washington recognizes two elements of proximate cause: cause in fact and legal causation. *Wuthrich v. King County*, 185 Wn.2d 19, n. 28, 366 P.3d 926 (2016). Cause in fact refers to the 'but for' consequences of an act – the physical connection between an act and an injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). "As a determination of what actually occurred, cause in fact is generally left to the jury." *Id.* Legal causation depends on "policy determinations as to how far the consequences of a defendant's acts should extend." *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013). The court makes that determination by "evaluating 'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Id.* (quoting *Hartley*, 103 Wn.2d at 779).

The superior court concluded that reasonable minds could differ as to both cause in fact and legal causation. The court found that proximate cause, or cause in fact, was a question for the jury here based on the testimony of the various experts and the

deposition testimony of Solomon regarding additional signage, signage safety features, and whether the Respondents' injuries would have been less severe.

The City's experts presented evidence indicating that the accident would have been essentially the same even if the berm and barriers were moved approximately 13 feet, out of the City's right-of-way and onto WSDOT's property, due to Solomon's speed. Respondents' experts presented testimony that even at the speed Solomon was traveling, if the City had provided proper signage warning of the curve, she would have been able to slow down sufficiently to safely travel around the curve and come to a stop prior to impacting the concrete barrier. Respondents' experts also opined that although the lack of signs may not have been the cause of the crash, it contributed to the severity and outcome of the crash. During her deposition, Solomon testified that as she approached the curve, she was unable to tell there was a corner, and that she started to brake immediately when she saw the concrete barrier, roughly 3-4 seconds before she hit the curve. When asked whether she believed signs or guideposts would have helped her see there was a corner,[2] Solomon indicated she did not know how to answer the question. However, her testimony indicated that she tried to stop or slow down as soon as she realized there was a curve.

As to the issue of familiarity, Solomon's expert Mr. Rickman opined that she was

---

[2] Counsel objected to this question prior to Solomon providing a response.

familiar with the curve having just passed through it going the opposite direction. But Solomon's testimony was that she only realized there was a curve when she saw the barrier. Accordingly, there was a question of fact as to whether Solomon was aware (or should have been aware) there was a curve in the road when she had traveled the road on one other occasion and had just traveled through the curve going the opposite direction, at night.

On this record, this Court cannot conclude that the superior court committed probable error by determining that a genuine issue of fact regarding proximate cause precluded summary judgment dismissal of Respondents' claims against the City.

Denial of WSDOT's Motion for Summary Judgment

WSDOT contends that the superior court committed obvious error because: (1) as an adjacent landowner, WSDOT did not owe, much less breach, any legal duty owed to any part as the barrier and dirt mound did not impact safe, ordinary travel on the road, and (2) the placement of the barrier and dirt mound within the City's right-of-way was not a proximate cause of the Respondents' injuries.

a. Duty

WSDOT first contends that it owed no legal duty to eliminate structures that do not impact safe, ordinary travel on an abutting road, and that it owed no duty where Solomon was criminally reckless and admittedly not engaged in "ordinary travel."

"The law is well settled that one must 'maintain his property so as not to injure those using the adjacent highway." *Misterek v. Washington Mineral Products, Inc.*, 85 Wn.2d 166, 170, 531 P.2d 805 (1975). Accordingly, a landowner owes a common law duty "to prevent artificial conditions on his land from being unreasonably dangerous to highway travelers." *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 222, 802 P.2d 1360 (1991) (citing Restatement (Second) of Torts § 368 (1965)). This duty is founded on the principal that "[t]he public right of passage carries with it … an obligation upon the occupiers of abutting land to use reasonable care to see that the passage is safe." *Hutchins*, 116 Wn.2d at 22.

Restatement (Second) of Torts (herein "Restatement") provides in part that a possessor of land who creates or permits an artificial condition "so near an existing roadway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who (a) are traveling on the highway, or (b) foreseeably deviate from it in the ordinary course of travel." Restatement (Second) of Torts § 368 (1965).

As WSDOT recognizes, there are few Washington cases applying § 368 of the Restatement. This Court has not found any Washington case discussing application of the Restatement where the driver at issue was behaving in a negligent or reckless manner.

WSDOT correctly points out that other jurisdictions have applied the Restatement to hold there is no duty where a driver was engaging in reckless or criminal behavior because in such cases, the driver's deviation from the highway is not foreseeable. *See e.g., Collier v. Redbones Tavern & Restaurant, Inc*., 601 F. Supp. 927, 929 *(1985); Hoffman v. Vernon Twp.,* 97 Ill. App.3d 721, 423 N.E.2d 519 (1981*).* However, other jurisdictions have held there is a duty, or at least a question of fact as to duty, even where the driver's own negligence led to the deviation from the roadway. *See e.g., Laabs v. Southern California Edison Co.*, 175 Cal.App.4th 1260, 1275, 97 Cal.Rptr.3d 241 (2009; *Sparks v. White*, 899 N.E.2d 21 (2008). In any event, Washington has yet to hold that a driver's deviation from the highway is not foreseeable or in the ordinary course of travel where the driver is speeding or otherwise behaving recklessly.

Respondents' experts and Solomon's expert Mr. Rickman presented evidence that the placement of the berm and barrier, next to an unmarked curve in the road, presented an unusual hazard, particularly where the barrier was not placed in that location to reduce the severity of potential crashes.

Given the evidence in the record and the absence of any Washington case law holding that a driver's deviation from the roadway is not foreseeable or part of ordinary travel where the driver is speeding or driving recklessly, this Court cannot conclude that the superior court committed obvious error by holding reasonable minds could disagree

as to whether WSDOT's placement of the barriers presented an unreasonable risk and whether WSDOT owed a duty here.

b. Proximate Cause

WSDOT also contends the superior court erred by ignoring controlling authority requiring dismissal where Respondents' failed to demonstrate that WSDOT's placement of the barrier caused the accident. WSDOT contends that where it is undisputed that the same accident dynamic would have occurred even if the barrier and dirt berm had been moved 26 feet from the road, outside of the clear zone and the city's right-of-way, the City contends it was entitled to summary judgment.

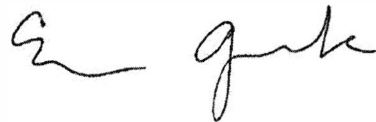
As noted above, cause in fact is normally a question for the jury, unless the causal connection is "so speculative and indirect that reasonable minds could not differ." *Cho v. City of Seattle*, 185 Wn. App. 10, 16, 341 P.3d 309 (2014); *see also Hartley v. State*, 103 Wn.2d at 777.

WSDOT and the City's experts presented testimony that even if the barriers and berm were moved out of the City's right-of-way, Solomon would have hit the barrier at the same speed given the speed she was traveling at when she first attempted to brake. However, Respondents' experts presented testimony that the barrier and berm presented an unusual hazard that actually increased the severity of potential crashes, and opined that without the barrier, Solomon would have simply driven onto the flat and unobstructed lot,

where she would have been able to slow the vehicle without rolling the vehicle. The experts specifically opined that although the barrier was not a cause of the crash, it contributed to the crash's "resultant severity and outcome." Appendix at 1191.

On this record, WSDOT fails to demonstrate that the superior court committed obvious error by concluding that the causal connection here was not "so speculative and indirect" such that reasonable minds could not differ as to whether WSDOT's placement and maintenance of the barriers and berm, relative to the curve, was a cause in fact of the Respondents' injuries.

This Court finds that neither the City nor WSDOT have demonstrated obvious error and therefore discretionary review in this matter is not appropriate pursuant to RAP 2.3(b)(1). Accordingly, both motions for discretionary review are denied.



Erin Geske
Commissioner