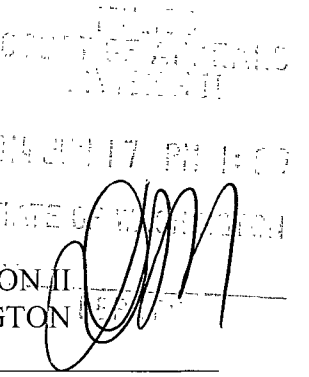


NO. 45919-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONALD C. RASHOFF, and LORI J. RASHOFF, Individually and as Personal Representatives of the Estate of RYAN RASHOFF,
Appellants/Plaintiffs.

v.

THE STATE OF WASHINGTON; and BENJAMIN O. LAMOTTE,
Respondents/Defendants.

BENJAMIN O. LAMOTTE,
Appellant/Plaintiff.

v.

THE STATE OF WASHINGTON,
Respondent/Defendant.

Appeal from Superior Court of Thurston County
The Honorable Chris Wickham
Case No. 12-2-01285-4

APPELLANT RASHOFFS' OPENING BRIEF

Keith L. Kessler, WSBA #4720
Garth L. Jones, WSBA #14795
Ray W. Kahler, WSBA #26171
STRITMATTER KESSLER WHELAN
413 8th Street
Hoquiam, WA 98550
(360) 533-2710

James M.B. Buzzard, WSBA #33555
BUZZARD & ASSOCIATES
314 Harrison Avenue
PO Box 59
Centralia, WA 98531
(360) 736-1108

Attorneys for Plaintiffs/Appellants Rashoff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

This case arises from a fatal crash at the intersection of State Route 12 and Williams Street in Mossyrock, Washington that claimed the life of 18-year-old Ryan Rashoff on December 8, 2009. Ryan was a passenger in a pickup truck driven by Ben Lamotte. As Lamotte tried to cross SR 12 in a northerly direction, the pickup truck was hit on the passenger side by a westbound log truck on SR 12, killing Ryan and injuring Lamotte.

Numerous other collisions had occurred at this intersection. Members of the Mossyrock community had in fact petitioned the State to address the hazardous conditions at the intersection following a similar collision involving another high school student in 2007. Documents produced by the State indicate that the State had determined that the intersection met criteria in the Manual on Uniform Traffic Control Devices for the installation of a traffic signal. Despite having recognized the need for a traffic signal, the State failed to install a signal until after this latest fatality.

Both Ben Lamotte and Ryan's parents filed suit against the State of Washington for its negligence in failing to provide a reasonably safe intersection. On February 7, 2014, the trial court entered an order granting Defendant State of Washington's Motion for Summary Judgment and dismissing Plaintiffs' claims against the State.

The trial court erred in granting summary judgment because, as in the majority of cases challenging the safety of a roadway, genuine issues of material fact exist as to whether or not Defendant State breached its

duty to provide a reasonably safe road for the traveling public at the SR 12/Williams Street intrersection – particularly here where experts disagree. The trial court should be reversed, and the case should be remanded for trial.

The trial court also erred in granting Defendant State of Washington's Motion for Summary Judgment to preclude Plaintiffs from recovering damages for Ryan Rashoff's fear of impending death. As with the question of whether or not the intersection was reasonably safe, genuine issues of material fact exist as to whether or not Ryan Rashoff realized that he was going to die or be seriously injured immediately before the crash. Again, these are factual issues reserved for trial, that should have precluded summary judgment.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering its February 7, 2014 Order Granting Defendant State of Washington, Washington State Department of Transportation's Motion for Summary Judgment (CP 751-755).

III. ISSUES

ISSUE 1: Did the trial court err in disregarding the opinion of Plaintiffs' transportation engineering expert, Edward M. Stevens, as well as statements in the State's own internal documents, that the intersection met criteria under the MUTCD for the installation of a traffic signal?

ANSWER: Yes. Defendant State alleged in its summary judgment motion that Transportation Engineer Edward Stevens used

incorrect traffic volume numbers in determining that the subject intersection met criteria for the installation of a traffic signal set forth in the MUTCD.[1] Even after Mr. Stevens submitted a supplemental declaration explaining in detail why Warrant 7/Crash Experience for installation of a traffic signal was satisfied, the trial court disregarded Mr. Stevens' opinions and granted summary judgment in favor of the State. The trial court did so despite evidence that (1) Chad Hancock, the State's designated CR 30(b)(6) representative and WSDOT's Southwest Region Traffic Engineer, stated in a February 21, 2008 e-mail (21 months ***before*** the subject collision) that "[t]he intersection does meet 2 of the 8 warrants for a traffic signal"[2] and (2) a signal warrant analysis performed by the State a matter of days after the subject collision determined that MUTCD Warrant 7/Crash Experience in fact had been satisfied.[3]

The differing expert opinions establish genuine issues of material fact that a trial court cannot resolve on summary judgment, particularly when Defendant State's own CR 30(b)(6) spokesperson and its own signal warrant analysis at the SR 12/Williams Street intersection reached the same conclusion as Mr. Stevens, Plaintiffs' Transportation Engineer. The trial court improperly made a factual determination on summary judgment in disagreeing with Mr. Stevens' opinion that the intersection met

---

[1] Specifically, the State alleged that Mr. Stevens did not adjust historical traffic counts to account for multi-axle vehicles and seasonal variances in traffic patterns.

[2] CP 341.

[3] CP 664-666.

MUTCD criteria for the installation of a traffic signal. Because the trial court erred in deciding this factual issue, the summary judgment order must be reversed.

ISSUE 2: Did the trial court err in requiring proof of a violation of the Manual on Uniform Traffic Control Devices (MUTCD) in order to establish a question of fact as to whether the intersection was unsafe?

ANSWER: Yes. Under Washington law, Defendant State has a duty to exercise ordinary care to design and maintain our highways in a reasonably safe condition for ordinary travel. Operating an intersection that is not reasonably safe constitutes a breach of that duty, and subjects the State to liability for collisions caused by those unsafe conditions.

The law does not require proof of a violation of the MUTCD to establish a question of fact as to whether a road location was unsafe. *Owen v. Burlington Northern & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) ("Liability for negligence does not require a direct statutory violation, though a statute, regulation or other positive enactment may help define the scope of a duty or the standard of care."); *Chen v. City of Seattle*, 153 Wn. App. 890, 900-901, 908, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010) (a governmental entity may be held liable for operating an unsafe road based on the totality of the circumstances as established by the facts presented and expert testimony, even though there is no violation of an applicable standard or regulation).

In *Chen*, Division One of this Court held that a road authority may be held liable for operating an unsafe roadway based on the totality of the

circumstances as established by the facts presented and expert testimony, even though there is no evidence of a violation of a written requirement:

> The city is incorrect ... in concluding that, because conditions triggering a mandatory duty to consider the installation of a traffic signal were not met, it had no duty to consider installing such a signal in light of the actual conditions of the roadway. "Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care." *Owen,* 153 Wn.2d at 787, 108 P.3d 1220 (citing *Bauman v. Crawford,* 104 Wn.2d 241, 244-45, 704 P.2d 1181 (1985)).

Chen, 153 Wn. App. at 908 (footnote omitted).

Here, the history of similar collisions, the complaints by community members (including the Mossyrock School District) about the unsafe conditions at the intersection, and the expert testimony that the intersection was inherently dangerous, create a genuine issue of material fact as to whether or not the intersection was reasonably safe, regardless of whether warrants were or were not met under the MUTCD for installation of a traffic signal.

The SR 12/Williams Street intersection experienced 20 reported collisions between March 3, 2003 and January 16, 2009 (the last collision before the December 2009 Lamotte/Rashoff collision). These 20 collisions over a brief six-year period included three fatalities and 23 injuries.[4] Members of the Mossyrock community had petitioned the State

[4] CP 462-463, 481.

to address the hazards at the intersection years before the collision involved in this case.[5] Days after the Rashoff collision, the State confirmed that the intersection met MUTCD criteria for the installation of a traffic signal and recommended installing a traffic signal.[6] Based on the totality of the circumstances established by the evidence, genuine issues of material fact exist as to whether or not the State breached its duty to provide a reasonably safe road at the SR 12/Williams Street intersection, and summary judgment in favor of the State should not have been granted.

ISSUE 3: Can Plaintiffs recover damages for Ryan Rashoff's fear of impending death when there is circumstantial evidence from which one can reasonably conclude that Ryan was aware of the impending collision and his imminent death?

ANSWER: Yes. Both Washington cases and cases from around the country recognize that a decedent's estate may recover for the fear experienced by the decedent immediately prior to his or her death. Here, as shown below, the evidence supports a finding that Ryan Rashoff realized that he was going to die or be seriously injured immediately prior to the crash. This evidence precludes summary judgment.

---

[5] CP 357-358, CP 362, CP 417.
[6] CP 664-666.

IV. STATEMENT OF THE CASE

A. The collision.

On December 8, 2009, Ryan Rashoff was riding in the passenger seat of a 2001 Ford F-150 pickup being driven by Ben Lamotte.[7] Mr. Lamotte was traveling north on Williams Street, intending to cross State Route 12, a 55-mph highway[8] that bisects the community of Mossyrock.[9] Mossyrock High School is less than 100 yards away from the intersection, making it particularly important for young people's safety.[10] Ryan and Ben were both high school students.

Mr. Lamotte stopped his pickup truck at a stop sign and then proceeded into the intersection to cross SR 12.[11] At the same time, Vance Steen was driving his unloaded Peterbilt log truck in a westbound direction on SR 12.[12] A collision occurred between the log truck and the pickup.[13] The log truck struck the F-150 pickup directly in the A-pillar, and intruded into the passenger space, killing Mr. Rashoff and severely injuring the driver, Ben Lamotte.[14] The weather was clear. The collision happened at 3:17 p.m.[15]

---

[7] CP 337.
[8] CP 336.
[9] CP 339.
[10] CP 417.
[11] CP 339.
[12] CP 339.
[13] CP 339.
[14] CP 338.
[15] CP 336.

Traffic controls at the time of the collision consisted of stop signs and stop bars at designated stopping points on Williams Street northbound and southbound.[16] The stop signs were supplemented by a flashing amber beacon for traffic on SR 12, and flashing red for traffic on Williams Street.[17] "Cross traffic does not stop" signs were displayed under the stop signs on Williams Street.[18]

B. The SR 12/Williams Street intersection was inherently dangerous, as demonstrated by the significant accident history prior to the December 8, 2009 collision.

At the request of the Plaintiffs, Transportation Engineer Edward Stevens conducted an engineering study of the intersection. Mr. Stevens, a former Washington State Department of Transportation engineer, reviewed the intersection's accident history, finding that the SR 12/Williams Street intersection had experienced 20 collisions between March 3, 2003 and January 16, 2009.[19] These collisions resulted in three fatalities and 23 injuries.[20] Mr. Stevens found that a high percentage of the collisions at the intersection were "enter at angle" crashes, like the collision involved in this case.

---

[16] CP 336.
[17] CP 336.
[18] CP 462.
[19] CP 462-463.
[20] CP 463, 481

Based on his experience as a Transportation Engineer, Mr. Stevens' opinion is that the high percentage of "enter at angle"[21] collisions was most likely linked to the inability of drivers on Williams Street to correctly judge the speed of traffic on SR 12, and thus the time needed to make a safe entry before traffic on SR 12 enters the intersection.[22] Mr. Stevens noted that the "enter at angle" collisions that had occurred at the intersection constituted clear evidence, from a transportation engineering standpoint, of a very dangerous condition given that drivers on the minor road (Williams Street) must try to cross through SR 12 traffic that is traveling at highway speeds.[23] As indicated above, the admissible evidence was that there had been three fatalities and 23 injuries at the intersection from March 3, 2003 to January 16, 2009.[24]

Mr. Stevens stated that five or more accidents in a 12-month period is generally accepted in the transportation engineering field as raising a red flag concerning intersection safety.[25] The SR 12/Williams Street intersection had a record of five or more enter at angle accidents per 12-

---

[21] An "enter at angle" collision is one where a vehicle entering an intersection is required to grant the right of way to traffic coming from the right or left but for some reason fails to yield the right of way and causes a crash. CP 463.

[22] CP 463.

[23] CP 463, 468.

[24] CP 463.

[25] CP 463.

month period in 2006 through 2007.[26] Because of this significant accident history, Mr. Stevens concluded that the SR 12/Williams Street intersection was inherently dangerous.[27]

Human Factors Engineer Richard Gill, Ph.D. also evaluated the intersection and the collision history. Dr. Gill found that several factors explained the significant collision history, as well as the collision involved in this case.

First, Dr. Gill noted that it is difficult for drivers on Williams Street to judge the speed of vehicles approaching on SR 12 due to the inherent difficulty that drivers have in judging the speed of approaching traffic when vehicles are more than 390 feet away.[28] Dr. Gill noted that the width of the lanes of SR 12 that a driver attempting to cross the highway at this intersection must travel through – a total distance of 68 feet – would take 5.3 seconds for a vehicle to clear at a normal acceleration rate.[29] In addition, Dr. Gill noted that it would take a driver in Mr. Lamotte's position 1.5 seconds to look right to left, verify that it is clear to the west, look straight ahead, and initiate movement.[30]

The speed limit on SR 12 is 55 mph, and given the fact that the intersection is in a rural area, it is foreseeable (and common experience)

---

[26] CP 463.
[27] CP 468.
[28] CP 442-443.
[29] CP 442.
[30] CP 442.

that vehicles will travel 60 mph or more approaching the intersection.[31] 60 mph is approximately 90 feet/second.[32] At 6.8 seconds to clear the intersection (5.3 seconds of movement for a vehicle to clear the intersection from the stop bar, plus 1.5 seconds to look right and left, then straight ahead, and begin to initiate movement), westbound vehicles on SR 12 (such as the Steen truck) would be over 600 feet away when a northbound driver (such as Lamotte) must make the decision to enter or not enter the intersection.[33] Dr. Gill stated that, at this distance, drivers are very poor at estimating the speed of approaching vehicles and the amount of time it will take for them to clear the intersection.[34]

Dr. Gill explained that humans attempt to determine the speed of an approaching vehicle by judging a change in the apparent size of the vehicle:[35]

> In order to determine at what point a person would be able to judge that the apparent size of a vehicle is changing, and thereby judge its speed, you look at the visual angle that an object takes up. If the rate of change of that visual angle increases above a certain amount that exceeds the threshold for human detection, that's when someone would perceive that the object is moving toward them.[36]

---

[31] CP 442.
[32] CP 442.
[33] CP 442.
[34] CP 442-443.
[35] CP 442.
[36] CP 442.

Dr. Gill testified that, at a closing speed of 60 mph, a vehicle must be less than 390 feet away before a driver can even perceive that a vehicle is moving based on changes in apparent size.[37] Thus, when a northbound driver (Mr. Lamotte) must decide whether to go through the intersection or not, an approaching westbound vehicle (the Steen log truck) is so far away (over 600 feet) that drivers are not good at making that judgment.[38] This is the inherent danger in this unsignalized intersection.

Second, Dr. Gill noted that the fact that Williams Street services a high school only a few blocks away from the intersection makes it likely that the population of drivers traveling through the intersection would include a significant number of younger and less experienced drivers who would have even greater difficulty judging the speed of approaching traffic.[39]

Finally, Dr. Gill noted that the severity of the hazard associated with a collision increases as the speed and weight of the vehicles involved increases.[40] Here, the high speed of traffic on SR 12 – 55 mph or more – increases the severity of the hazard associated with a collision at the intersection. In addition, the fact that 25% of the vehicles on SR 12 are trucks also increases the severity of the hazard of a collision due to the fact

---

[37] CP 442.
[38] CP 442.
[39] CP 442-443.
[40] CP 442.

that trucks (like the Steen log truck) are so much heavier than normal passenger vehicles.[41]

Dr. Gill testified that these factors made the intersection inherently dangerous at the time of the crash.[42]

C. The SR 12/Williams Street intersection met criteria under the MUTCD for the installation of a traffic signal.

The MUTCD has been adopted as law in Washington. RCW 47.36.020; *Kitt v. Yakima County*, 93 Wn.2d 670, 672, 611 P.2d 1234 (1980). Defendant State must comply with the provisions of the MUTCD. There are eight traffic signal warrants in the MUTCD. The warrants can be thought of as analytical techniques to be followed to determine if a traffic signal should be installed at a particular location.[43] The warrants look at factors such as traffic volumes and accident history.[44] If any single warrant is met at an intersection, the Washington State Department of Transportation is to undertake an operational review to determine if a traffic signal should be installed.[45]

---

[41] CP 442.

[42] CP 442.

[43] CP 463-464.

[44] CP 464.

[45] CP 464. It should be noted that there were options available to the State to address the dangerous conditions at the intersection other than installing a traffic signal. The State could have installed a four-way stop or could have reduced the speed limit in the vicinity of the intersection, both of which were suggested by a citizen who expressed concerns about the

Transportation Engineer Edward Stevens' traffic signal warrant study determined that Warrant 7 (Crash Experience) was met.[46] Warrant 7 has three elements. Section (B) of Warrant 7 states as follows: "Five or more reported crashes, of types susceptible to correction by a traffic control signal, have occurred within ***a*** 12-month period . . . ."[47] (emphasis added) Mr. Stevens' analysis of the accident history at the intersection found that there were five or more reported crashes susceptible to correction by a traffic signal during several 12-month periods from June 2005 to September 2007.[48]

Section (A) of Warrant 7 looks at whether an adequate trial of alternatives has failed to reduce the crash frequency.[49] The State's transportation engineering expert, Robert Seyfried, contended that the placement of a "cross traffic does not stop" sign in 2007 resulted in a reduction of crash frequency without a traffic signal, and that Section (A) of Warrant 7 was therefore not satisfied. Mr. Stevens acknowledged that the crash frequency reduced in 2008 after the "cross traffic does not stop" sign was installed in 2007, but he pointed out that it is also true that only one crash susceptible to correction by a traffic signal occurred in 2003,

---

intersection to the State in 2007. CP 357.
[46] CP 648-651.
[47] CP 490.
[48] CP 648.
[49] CP 490.

and only one such crash occurred in 2004, ***before*** the "cross traffic does not stop" sign was installed.[50] Then, in December 2009, the Rashoff/Lamotte crash occurred, ***after*** the "cross traffic does not stop" sign was installed. Based on this history, it is Mr. Stevens' opinion that the lack of crashes in 2008 is more likely explained by normal variation in crash frequency, rather than a result of the "cross traffic does not stop" sign that was installed in 2007.[51]

The final criterion of Warrant 7, Section (C), relates to 8-hour traffic volumes, which refers to Table 4C-1 set forth in Warrant 1.[52] The "Option" section in Warrant 7 states that the 56% column of Table 4C-1 may be used when the posted speed limit on the major street (here, SR 12) exceeds 40 mph and the intersection lies within the built-up area of an isolated community having a population of less than 10,000.[53] Because both of these factors are present at the intersection involved in this case, Mr. Stevens used the 56% column in Table 4C-1 for evaluating traffic volumes.[54]

---

[50] CP 648-649.

[51] CP 649.

[52] CP 490-491, 488, 649.

[53] CP 649.

[54] CP 649. It should be noted that the State also used the 56% column in its signal warrant analysis: "The 85th percentile speed on US 12 exceeds 40 mph. The intersection lies within a built-up area of an isolated community having a population less than 10,000. Either one of these two conditions would allow the reduction of minimum vehicular volume

Using the 56% column of Table 4C-1, the traffic volume needed to meet the 8-hour traffic volume criteria for Section (C) of Warrant 7 was 280 vehicles per hour on the major road (SR 12) and 84 vehicles per hour on the minor road (Williams Street), over ***any*** eight hours of an average day.[55]

As even defense expert Seyfried's own traffic volume summary shows,[56] traffic volumes on SR 12 in December 2009 were above the minimum requirement of 280 vehicles for the major road for 11 one-hour periods, and traffic volumes on Williams Street were above the minimum requirement of 84 vehicles for the minor road for nine one-hour periods. There were *nine* hours during the average day in December 2009 when traffic volumes on SR 12 and Williams Street satisfied the minimum traffic volume requirements of Warrant 7 (which only requires that the minimum traffic volume requirements be satisfied for *eight* hours). CP 650.

Because the December 2009 traffic counts were conducted the same month as the collision, it is Mr. Stevens' opinion that the December 2009 traffic counts most accurately reflect traffic volumes at the time of the collision, for purposes of determining whether the intersection was

---

thresholds to 56%." CP 666.

[55] CP 649-650. Table 4C-1 of Warrant 1 looks at traffic volumes over ***any*** eight hours of an average day, not necessarily consecutive eight-hour periods. CP 650.

[56] Table 7 in Mr. Seyfried's report sets forth the results of the December 2009 traffic volume counts. CP 146.

reasonably safe.[57] Contrary to the State's claims, Mr. Stevens noted that Warrant 7 does not require that that the accident history numbers needed to satisfy the warrant be from the same year as the traffic volume numbers.[58] Based on the accident history numbers from 2005-2007 and the traffic volumes obtained nearly contemporaneously with the crash involved in this case, it is Mr. Stevens' opinion that the intersection of SR 12 and Williams Street was not reasonably safe.[59]

Mr. Stevens' opinion that the intersection met warrants for a traffic signal under the MUTCD was also supported by the fact that Chad Hancock, the State's designated CR 30(b)(6) representative and Southwest Region Traffic Engineer, admitted in a February 21, 2008 e-mail (21 months ***before*** the subject collision) that "[t]he intersection does meet 2 of the 8 warrants for a traffic signal", and that "[a]n intersection only has to

---

[57] CP 651. In addition, it should be noted that the June 2003 traffic counts produced by the State only provided data for the hours of 6:00 a.m. to 10:00 a.m. and 2:00 p.m. to 6:00 p.m. Mr. Stevens' summary of those traffic counts is at CP 670. The minimum traffic volumes for Warrant 7 were met for six of those eight hours. CP 651. For whatever reason, the traffic counts for June 2003 produced by the State did not include the hours of 10:00 a.m. to 2:00 p.m. Mr. Stevens' opinion is that the traffic volumes around the noon hour would be some of the *highest* traffic volumes during the day, which would mean that the minimum traffic volumes required to meet Warrant 7 were probably present in 2003. CP 651. It should be noted that the State's 12/4/06 Southwest Region Signalization Priority List (CP 661-662) shows that signal warrants were met at this intersection (see line item #13, which is the intersection involved in this case) based on traffic count data from June 2003. CP 649-651.

[58] CP 651.

[59] CP 651.

meet one warrant for us to approve installation [of a traffic signal]."[60] In *June 2007*, another WSDOT employee stated as follows in an e-mail to Chad Hancock:

> Regarding the flashing beacon-controlled intersection in Mossyrock which is the intersection of US-12/SR-122/Williams, ***a traffic signal is warranted***. It's within top 15. Citizens and even the representative from the WA State Grange have recently asked about possible signal installation. . . .[61]

In addition, shortly after the Rashoff collision, the State conducted an Operational Review based on traffic volume data collected within five to eight days after the collision.[62] The State conducted a signal warrant analysis "using the guidelines specified in [the] 2003 Manual on Uniform Traffic Control Devices," which resulted in the following findings:

- "At-Angle collisions accounted for 83% of the total collisions. Most of these involved a vehicle entering US 12 from Williams Rd attempting to turn left or go straight through the intersection. Failure to grant right-of-way is the top listed factor contributing to 13 collisions."[63]

- "The Crash Experience signal warrant conditions are intended for application where the severity and frequency of crashes are the principal reasons to consider installing a traffic signal. This warrant takes into account not only the number of crashes but also the traffic volumes on the mainline and side street."[64]

---

[60] CP 341.
[61] CP 354 (emphasis added).
[62] CP 665.
[63] CP 664.
[64] CP 665-666.

- "There is a recurring occurrence of crashes. Five or more reported crashes, of types susceptible to correction by a traffic control signal have occurred at the intersection within a 12-month period."[65]

- **"Using the combined crash history and latest traffic volumes, Signal Warrant #7 (Crash Experience) is satisfied."**[66]

The Operational Review concluded by recommending that a traffic signal be installed at the intersection.[67] Consistent with the State's own analysis, and with Mr. Stevens' opinions, Defendant State installed a traffic signal at the intersection in 2010.[68]

D. The community of Mossyrock had repeatedly expressed concerns to the State, alerting it to the unsafe conditions at the intersection.

As discussed above, the intersection had a significant crash history. One of those crashes involved Cory Cucchiara who, like Ryan Rashoff, was a student at nearby Mossyrock High School. The Cucchiara crash

---

[65] CP 666.
[66] CP 666 (emphasis added).
[67] CP 666.
[68] CP 647-648, CP 356. The fact that a traffic signal was installed after the Rashoff collision is admissible to impeach the State's expert witness, Robert Seyfried, who claims that a traffic signal was not warranted at the intersection under the MUTCD. CP 161; *Jones v. Robert E. Bayley Const. Co.*, 36 Wn. App. 357, 361, 674 P.2d 679 (1984); *see also Pitasi v. Stratton Corp.*, 968 F.2d 1558 (2nd Cir. 1992); *Cech v. State*, 598 P.2d 584 (Mont. 1979) (evidence that state installed a guardrail after a collision admissible to impeach defense testimony that "recovery areas" were superior to guardrails). *See also* ER 407. Mr. Seyfried admits that the State would not install a signal unless MUTCD criteria were satisfied. CP 593-594.

occurred in May 2007. Cory spent eight days at Harborview Medical Center. His medical expenses exceeded $200,000.[69] The Cucchiara crash turned community frustration into a public outcry, with citizens taking it upon themselves to conduct an amateur traffic analysis of the intersection, the results of which were presented to the Mossyrock School Board.[70] In turn, the Superintendent of the Mossyrock School District sent a letter to the Washington State Department of Transportation in September 2007 expressing the School Board's concerns about the dangers of the intersection and making an "urgent plea" for the State to take action.[71]

Defendant State's CR 30(b)(6) designee, Chad Hancock, testified that the State was aware of public concern about the SR 12/Williams Street intersection. In May of 2007, Marilyn Armit, the wife of the mayor of Mossyrock, e-mailed Mr. Hancock concerning this intersection and requested that the State make safety improvements at the intersection.[72]

Mrs. Armit's e-mail stated:

> The intersection at Hwy 12 and State Rt 122 & Williams Street needs to be researched for its safety. We have lots of traffic on Hwy 12 and we also have our school buses and students which have to merge on this Hwy. This is the main entrance and exit for Mossyrock. The traffic includes RV's, Log and Lumber Trucks, passenger cars which travel much faster than the 55mph speed limit. We have had many accidents including fatalities at this

---

[69] CP 413-414.
[70] CP 413-414.
[71] CP 417.
[72] CP 347-349. Mr. Hancock received this e-mail on May 30, 2007. CP 350.

> intersection. The Mossyrock Grange will be taking action on this situation at our next meeting.[73]

In response to this e-mail, Mr. Hancock admitted that collisions had occurred at this intersection, including two fatalities.[74]

Another concerned citizen, Julie Panuska, also sent an e-mail to Chad Hancock in May 2007 inquiring about installing a traffic signal at the intersection.[75] She stated that

> crossing the road is getting harder and more dangerous. . . . Getting across Highway 12 is very scar[y] and dangerous and sometimes it's very hard to even get across. As parents we are very concerned about our children crossing Hwy 12. . . . I would like to know what it will take before something is done about this dangerous intersection.[76]

Ms. Panuska further reported that she saw a car pull out in front of a loaded log truck and come within inches of being hit.[77] She suggested that the State consider reducing the speed limit at the intersection as had been done in Packwood, or installing a four-way stop.[78]

E. Procedural history.

To hold Defendant State accountable for its role in Ryan Rashoff's death, Plaintiffs filed this lawsuit in June of 2012 alleging that Defendant State of Washington failed to keep the intersection of SR 12 and Williams

---

[73] CP 353-355.
[74] CP 361-362.
[75] CP 357.
[76] CP 357-358.
[77] CP 357.
[78] CP 357.

Street reasonably safe for ordinary travel.[79] Relying on the declaration of its expert, Robert Seyfried, Defendant State moved for summary judgment, alleging that the intersection did not meet criteria for the installation of a traffic signal set forth in the MUTCD, and that the State therefore had exercised ordinary care in its operation of the intersection.[80]

In response to Defendant State's summary judgment motion, Plaintiffs Rashoff produced the evidence set forth above that this intersection was unsafe; that, according to Transportation Engineer Edward Stevens, the intersection had a significant history of similar collisions; that the Mossyrock community had been concerned about the unsafe condition of the intersection for years; that Mr. Stevens' traffic signal warrant analysis determined that this intersection met the "Crash Experience" signal warrant in the MUTCD; and that the State itself had determined that the intersection met criteria for installation of a traffic signal under the "Crash Experience" signal warrant. Defendant State replied to the Plaintiffs' evidence by disputing the validity of Mr. Stevens' signal warrant analysis, arguing that Mr. Stevens did not make adjustments to the traffic volume data to account for multi-axle vehicles and seasonal variation in traffic volumes.[81]

At oral argument, the trial court repeatedly characterized the issue as whether the State had violated the MUTCD,[82] ignoring the broader

---

[79] CP 006-010.
[80] CP 322; CP 122-126; CP 643.
[81] CP 591-599; CP 614-618; CP 643.
[82] RP 19; RP 33 ("And the question is I think as I've identified it last

common law duty to provide a reasonably safe road. Plaintiff's counsel called the trial court's attention to the fact that the real issue was whether there are questions of fact as to whether the State breached its duty to provide a reasonably safe road, not whether the MUTCD was violated.[83]

In a letter opinion dated November 27, 2013, the trial court ignored the State's common law duty to provide a reasonably safe road, focused solely on whether the MUTCD was violated, agreed with the State's arguments concerning Mr. Stevens' opinions, and stated that he was prepared to grant the State's summary judgment motion:

> This Court is persuaded that Dr. Stevens did not correctly apply the required limitation factors to the raw data, specifically that the data must be adjusted to account for multi-axle vehicles and seasonal variance in traffic patterns. This Court is persuaded that Dr. Stevens has not demonstrated that a correct application of the various factors in the MUTCD supports his conclusions. See Second Decl. of Seyfried (filed 11/18/13). Unless Dr. Stevens is able to correctly apply the MUTCD, the Court is persuaded that his testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue ...." Evidence Rule 701. Accordingly, his testimony would not be admissible and would not be considered in opposition to the State's motion. CR 56; *Cano-Garcia v. King Co.*, 168 Wn. App. 223 (2012) (trial court may not consider inadmissible evidence when it rules on a summary judgment motion.) This Court then, is prepared to grant the State's motion for summary judgment.[84]

---

night, which is whether or not these national standards were breached.").

[83] RP 16, 18.

[84] CP 643.

The trial court also stated in its November 27th Letter Opinion that "[d]ue to the significance of such a ruling, however, this Court will allow Plaintiff to file a supplemental declaration to address whether signal warrants have been met."[85] Plaintiffs Rashoff then filed a supplemental declaration from Mr. Stevens providing further explanation for his signal warrant analysis.[86] In addition to the substance of Mr. Stevens' supplemental declaration set forth above, Mr. Stevens also pointed out that the "State's own documents show that MUTCD traffic signal warrants were met in 2003, 2006, and 2009."[87] Mr. Stevens explained that the State would not have placed the intersection on its list for future installation of a traffic signal and would not have installed a traffic signal at the intersection in 2010, a matter of months after the Rashoff collision, if the State had not determined that the intersection met one of the signal warrants under the MUTCD:

> The State listed this intersection on its signal priority listing for the Southwest Region from 2002-2006. In 2006, the intersection had risen to number 13 on the waiting list for signal installation. *See* Exhibits 3B & 3C. Mr. Seyfried states in his Second Declaration that "[t]he Washington State Department of Transportation, like, I believe, every state transportation agency in the nation, uses and relies upon the 'signal warrants' in the Manual on Uniform Traffic Control Devices (MUTCD) to determine

[85] CP 643.
[86] CP 645-652.
[87] CP 647.

> whether a traffic signal should be considered for installation at an intersection." *Seyfried Second Declaration* at ¶ 5. . . . Based on my experience working as a transportation engineer for WSDOT and working as a forensic engineer on cases involving WSDOT, I agree that it is WSDOT's position that a traffic signal should not be considered at an intersection unless MUTCD signal warrant criteria are met. In this case, the State's own documents show that WSDOT had placed installation of a traffic signal at this intersection on its list of planned projects, which indicates that the State had determined that MUTCD signal warrant criteria had been met here – otherwise, the State would not have placed installation of a traffic signal on its list of planned projects. The fact that the State then did install a traffic signal here in 2010 also shows that it considered that the MUTCD signal warrant criteria had been met.[88]

The trial court then made the *factual* determination that Mr. Stevens' analysis in his supplemental declaration was not correct, and on this basis granted the State's motion for summary judgment:

> After allowing additional time for Plaintiff's expert to explain whether the criteria for safety measures of the Manual on Uniform Traffic Control Devices had been met, the Court is still persuaded that those criteria were not met before this accident. Accordingly, Defendant's Motion for Summary Judgment is granted.[89]

An order granting the State's summary judgment motion was subsequently entered by the trial court on February 7, 2014.[90]

---

[88] CP 647-648.
[89] CP 722.
[90] CP 775.

F. The circumstantial evidence presented shows that Ryan Rashoff realized that he was going to die or be seriously injured immediately prior to the collision.

In addition to dismissing Plaintiffs Rashoff's claims against the State, the trial court's order also stated that "Plaintiffs Rashoff cannot pursue damages for Ryan Rashoff's pre-death pain and suffering, including fear of impending death/injury."[91] The trial court made this ruling despite substantial circumstantial evidence showing that Ryan Rashoff would have been well aware of the impending crash, and the fact that he was facing inevitable serious injury or death in the moments before the crash.

Human Factors Engineer Richard Gill, Ph.D. explained that Ryan had a number of visual and auditory cues that would have alerted him to the impending collision. Dr. Gill stated that several ***visual*** cues would have alerted Ryan to the Steen truck approaching and the obvious fact that a severe collision was going to occur. Dr. Gill noted that SR 12 in the intersection vicinity is flat and level, without any obstructions to the line of sight.[92] The Steen truck was a large object and had its headlights on.[93] Williams Street in the northbound direction (the direction of travel of the Lamotte vehicle) angled slightly toward the direction Steen was approaching from.[94]

---

[91] CP 754.
[92] CP 440.
[93] CP 440.
[94] CP 440.

Dr. Gill noted that the parties' accident reconstruction experts concluded that there would have been a long viewing time.[95] Dr. Gill noted that the Steen truck was in Ryan's peripheral vision and moving, with peripheral vision being most sensitive to motion.[96] In addition, as we know, the instinctive human reaction is to turn toward the perceived motion.[97]

Finally, Dr. Gill noted that Steen, the driver of the log truck, testified that the Lamotte vehicle started slowly from the stop bar, then stopped in the intersection, and then accelerated rapidly, which indicates that Benjamin Lamotte and/or Ryan Rashoff perceived the Steen truck, resulting in the Lamotte vehicle stopping briefly in the intersection as Lamotte tried to judge the speed of the oncoming truck and decide what to do. Lamotte's stopping in the intersection would have alerted Ryan Rashoff to look (if he was not looking already) because it would indicate that something unusual was going on.[98]

According to Dr. Gill, several ***auditory*** cues also would have alerted Ryan Rashoff to the approaching Steen truck, with an accompanying recognition that the collision was going to occur:

---

[95] CP 440. "Viewing time" refers to the length of time it took the Lamotte vehicle to move from the stop bar to the point of impact, and thus the amount of time available to Ryan Rashoff, before the impact, to see the approaching Steen truck. Dr. Abrous' accident reconstruction analysis concluded that it would have taken the Lamotte vehicle 4.6 seconds to travel from the stop bar to the point of impact. CP 440.

[96] CP 441.

[97] CP 441.

[98] CP 441.

- The Steen truck left 18 feet of visible skid marks. At 60 mph, this is 0.2 seconds of travel.

- The Steen truck must have skidded for a short distance to heat the tires up enough to leave skid marks. In cold weather, as existed at the time of the collision in this case (which occurred December 8, 2009), it takes longer for the tire rubber to heat up enough to leave skid marks; another 0.05 to 0.1 sec at minimum must be added.

- There is lag time for air brakes to lock up once the pedal is fully depressed. This lag time adds another 0.2 sec at minimum to the calculation.

- There is also time lag from the time Steen's foot let off the accelerator until his foot moved over to the brake and fully depressed the brake. This lag time would add another .5 seconds to the calculation.

- In short, in addition to the screeching sound of tires skidding on the highway pavement, the loud Jake brake noise would have been initiated approximately 1 second prior to the collision, when Steen was 90 feet away from the point of impact and closing 9 feet every $1/10^{th}$ of a second.

- Sudden loud noises create an automatic startle reflex, which results in the person turning their head towards the noise. It is similar to the reflex reaction that occurs when doctors tap a rubber hammer on the knee. It is an automatic, immediate reflex response.[99, 100]

---

[99] CP 441.

[100] *See also* CP 365-372.

Substantial evidence clearly existed showing that Ryan Rashoff would have been alerted to the impending collision and his potential death.

V. AUTHORITY

A. Standard of review

This Court applies a *de novo* standard of review in reviewing summary judgment orders, engaging in the same inquiry as the trial court, including taking the facts and any reasonable inferences therefrom in the light most favorable to the non-moving party. *Shellenbarger v. Brigman,* 101 Wn. App. 339, 345, 3 P.3d 211 (2000); *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.,* 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Summary judgment is proper only when no genuine issue of material fact exists. CR 56(c); *Scott Galvanizing,* 120 Wn.2d at 580.

B. The trial court erroneously decided disputed factual issues on summary judgment by finding that, in his personal opinion, Plaintiffs' transportation engineering expert incorrectly applied MUTCD traffic signal warrants.

Defendant State has an express duty set by law to provide reasonably safe roads for use by the public (*Owen v. Burlington Northern*, 153 Wn.2d 780, 786-787, 108 P.3d 122 (2005); *Keller v. City of Spokane,* 146 Wn.2d 237, 249, 44 P.3d 845 (2002)),[101] as set forth in Washington's pattern jury instructions:

---

[101] "We therefore hold 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 at 249. *See also Bradshaw v. City of Seattle,* 43 Wn.2d 766, 773, 264 P.2d 265 (1953) (municipalities have a duty to keep their streets reasonably safe

> The *[state]* has a duty to exercise ordinary care in the *[design] [construction] [maintenance] [repair]* of its public *[roads]* to keep them in a reasonably safe condition for ordinary travel.

WPI 140.01. Our Supreme Court has emphasized that the ***duty to eliminate*** an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads. *Owen,* 153 Wn.2d at 787-788.

Governmental entities are held to the same negligence standards as private individuals. Liability for negligence does not require a direct statutory or regulatory violation. *See Owen v. Burlington Northern & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

The question of whether or not a roadway is reasonably safe is *virtually always* a question of fact that cannot be resolved on summary judgment. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005); *McGough v. City of Edmonds*, 1 Wn. App. 164, 170, 460 P.2d 302 (1969).

Once a plaintiff presents evidence showing a question of fact as to whether or not a road location is reasonably safe, "then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances." *Owen*, 153 Wn.2d at 789. If the corrective actions are adequate, then the governmental entity responsible for the road has

---

for public travel); *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 854, 751 P.2d 854 (1988) ("county has a duty to maintain its highway in a reasonably safe condition for its users").

satisfied its duty to provide reasonably safe roads. *Owen*, 153 Wn.2d at 790. Here, the State argues that installing a "cross traffic does not stop" sign in 2007 was an adequate corrective action to address the history of collisions at the intersection.[102] As set forth above, Plaintiffs presented expert testimony that the intersection remained inherently dangerous even after the "cross traffic does not stop" sign was installed. Whether the corrective action taken by the State was adequate to make the intersection reasonably safe was a question of fact for trial. *Owen*, 153 Wn.2d at 789.

Plaintiffs presented substantial evidence that the State Route 12-Williams Street intersection was unsafe, including the fact that it met criteria under the "Crash Experience" warrant in the MUTCD for the installation of a traffic signal. MUTCD traffic signal warrants are tools for assessing whether a traffic signal is needed at a particular location.[103] As indicated above, Transportation Engineer Edward Stevens conducted a signal warrant study pursuant to the MUTCD and found that Warrant 7 ("Crash Experience") was met.[104]

Defendant State's claim, through its expert witness Mr. Seyfried, that the intersection did not meet criteria for installation of a traffic signal under the MUTCD, is completely undermined by the fact that Chad Hancock, Defendant State's own Southwest Region Traffic Engineer, stated in a February 21, 2008 e-mail (21 months before the subject

---

[102] CP 623.
[103] CP 464.
[104] CP 648-651.

collision) that "[t]he intersection does meet 2 of the 8 warrants for a traffic signal" and that "[a]n intersection only has to meet one warrant for us to approve installation [of a traffic signal]."[105] Further, WSDOT had placed installation of a traffic signal at this intersection on its list of planned projects, evidence that indeed the State had determined that MUTCD signal warrant criteria had been met here.[106] Additionally, Defendant State's own Operational Review of the intersection conducted within two weeks of the Rashoff collision concluded that the intersection met the MUTCD Crash Experience signal warrant:

> New traffic volume data were collected from December 14 to 17, 2009. A signal warrant analysis was conducted using the guidelines specified in 2003 Manual of Uniform Traffic Control Devices. Signal Warrant #7 (Crash Experience) is satisfied. The Crash Experience signal warrant conditions are intended for application where the severity and frequency of crashes are the principal reasons to consider installing a traffic signal. This warrant takes into account not only the number of crashes but also the traffic volumes on the mainline and side street.[107]
>
> ....
>
> There is a recurring occurrence of crashes. Five or more reported crashes, of types susceptible to correction by a traffic control signal have occurred at the intersection within a 12-month period.[108]
>
> ....

---

[105] CP 341.
[106] CP 647-648.
[107] CP 665-666.
[108] CP 666.

> Using the combined crash history and latest traffic volumes, Signal Warrant #7 (Crash Experience) is satisfied.[109]

Lastly, the fact that the State finally installed a traffic signal at the intersection in 2010 clearly shows that MUTCD signal warrant criteria had been met.[110]

Under Washington law, "an expert opinion on an 'ultimate issue of *fact*' is sufficient to defeat a motion for summary judgment." *Eriks v. Denver,* 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (quoting *Lamon v. McDonnell Douglas Corp.,* 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)). The court in *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 991 P.2d 728 (2000), explained the rule as follows:

> "In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment." *J.N. v. Bellingham Sch. Dist. No. 501,* 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).

Pagnotta, 99 Wn. App. at 34; *see also Chen*, 153 Wn. App. at 910 ("[E]ach of Chen's expert witnesses concluded that the crosswalk presented a dangerous condition. *'[A]n expert opinion on an ultimate issue of fact' is sufficient to defeat a motion for summary judgment.*" (emphasis added)). Where expert witnesses disagree as to whether a road

---

[109] CP 666.
[110] CP 648.

is or is not reasonably safe, it is improper for a trial court to select one expert over the other and resolve the disagreement on summary judgment.

Here, Mr. Stevens' conclusion that the SR 12/Williams Street intersection met the "Crash Experience" warrant for a traffic signal in the MUTCD is supported by the State's own CR 30(b)(6) spokesperson and Southwest Region Traffic Engineer, Chad Hancock, as well as by the State's own analysis of the intersection just after the collision. Thus, not only were there questions of fact based on Mr. Stevens' opinion, but the conclusions of the State's own traffic engineering analysis also conflicted with the opinions of its retained expert witness, Mr. Seyfried, clearly creating an issue of material fact as to whether the intersection met criteria for installation of a traffic signal at the time of the collision. By second-guessing Mr. Stevens' application of the MUTCD, the trial court improperly made a factual finding that should have been reserved for trial. Under CR 56(c), the existence of this genuine issue of fact precluded summary judgment as a matter of law and therefore requires reversal.

C. The trial court erred in requiring proof of an MUTCD violation to establish a genuine issue of material fact sufficient to preclude summary judgment.

Although Mr. Stevens' supplemental declaration and the State's own documents show that the MUTCD criteria for installation of a traffic signal were met at the intersection, it is well-settled that a plaintiff is not required to show a violation of the MUTCD to establish a genuine issue of material fact as to whether a roadway location is reasonably safe:

> Also without merit is the city's argument that it did not breach its duty to maintain the crosswalk in a safe condition because the MUTCD did not require it to install additional safety measures at the crosswalk. The MUTCD provides that "[t]he need for a traffic control signal at an intersection ... shall be considered" if the pedestrian volume exceeds 190 in any one-hour period or 100 in each hour of a four-hour period and there are fewer than 60 gaps per hour during those periods. The city maintains that because these conditions were not satisfied, no traffic signal at the intersection of 10th Avenue South and South Jackson Street was warranted. The city is incorrect, however, in concluding that, because conditions triggering a mandatory duty to consider the installation of traffic signal were not met, it had no duty to consider installing such a signal in light of the actual conditions of the roadway. "Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care." *Owen,* 153 Wash.2d at 787, 108 P.3d 1220 (citing *Bauman v. Crawford,* 104 Wash.2d 241, 244–45, 704 P.2d 1181 (1985)).

Chen, 153 Wn. App. at 908 (footnote omitted); *see also Owen v. Burlington Northern & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) ("Liability for negligence does not require a direct statutory violation . . . .").[111]

[111] In *Owen*, the City of Tukwila argued (as the State does here) that it was not liable because it had complied with all statutes, ordinances, and the MUTCD. *Owen*, 153 Wn.2d at 785. Nonetheless, the Supreme Court held that there were questions of fact as to whether the intersection involved in that case was or was not reasonably safe, based on the conditions present at the intersection and the lay and expert witness testimony. *Owen*, 153 Wn.2d at 789-790.

Instead, the *Chen* court held that the determination of whether or not a street or intersection is reasonably safe depends on the totality of the circumstances:

> A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel. Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway... A trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence.

Chen, 153 Wn. App. at 894.

Here, the trial court erred in requiring proof of a violation of the MUTCD.[112] As explained in *Chen*, the trial court should have considered the totality of the circumstances based on the evidence presented. As discussed below, the totality of the circumstances at this intersection – with its multiple injury-producing and even fatal collisions – make clear that it was not reasonably safe.

D. The totality of the circumstances at the intersection establishes that it was inherently dangerous and unsafe for ordinary travel.

The *Chen* court found that the totality of the circumstances as established by the evidence in that case raised genuine issues of fact as to whether or not the City of Seattle had breached its duty to provide a reasonably safe intersection for pedestrians trying to cross the street. The

---

[112] RP 19 ("[A]nd so the question is: Is there a question of fact as to whether or not those national standards were met?"); RP 33 ("And the question is I think as I've identified it last night, which is whether or not these national standards were breached.").

Chen court cited evidence that (1) there was a history of collisions at the crosswalk, (2) there was a history of citizen requests for a traffic signal at the intersection, and (3) the plaintiff's expert witnesses had concluded that the crosswalk was dangerous. The court specifically noted that the fact that nothing obstructed the views of pedestrians or drivers at the intersection and that the physical layout of the intersection was not confusing did not settle the question of whether conditions at the intersection were unsafe. The court cited testimony from the plaintiff's human factors expert that pedestrians have difficulty judging the speeds at which oncoming vehicles are traveling. Based on this evidence, the *Chen* court held that the city was not entitled to summary judgment. *Chen*, 153 Wn. App. at 909-911.

The evidence cited by the court in *Chen* as establishing genuine issues of material fact as to whether the intersection was unsafe was the same type of evidence that the Plaintiffs produced in this case -- reports of past accidents at the intersection, citizen requests for a traffic signal, expert witness opinions that the intersection was dangerous, and expert opinion that drivers stopped at the intersection waiting to cross had difficulty judging the speed of approaching vehicles. As discussed above, the evidence in this case included requests from concerned citizens of Mossyrock asking the State to address the hazards present at the intersection,[113,114,115] acknowledgment of these concerns by state

[113] CP 353-355.
[114] CP 413-414.

officials,[116] an engineering study of the intersection by the State soon after the collision confirming the need for a traffic signal,[117] expert witnesses who testified that the SR 12/Williams Street intersection was inherently dangerous and unsafe,[118,119] and a significant accident history at the intersection, including 20 collisions that resulted in three fatalities and 23 injuries between March 3, 2003 and January 16, 2009.[120] As in *Chen*, this evidence raises genuine issues of material fact based on the totality of the circumstances as to whether or not Defendant State breached its duty to maintain the SR 12/Williams Street intersection in a reasonably safe condition for ordinary travel. As in *Chen*, the trial court erred in granting summary judgment in light of this evidence. Viewing this evidence *de novo*, this Court should follow *Chen* and deny summary judgment, reversing the trial court.

E. Ryan Rashoff's Estate may recover for Ryan's fear of impending death.

A Personal Representative is entitled to recover damages for a decedent's pain and suffering prior to death under the special survival statute, RCW 4.20.060. The Washington Supreme Court in *Bingaman v. Grays Harbor Community Hospital,* 103 Wn.2d 831, 699 P.2d 1230 (1985), held that a Personal Representative was not only entitled to

---

[115] CP 415-417.
[116] CP 353-355.
[117] CP 666.
[118] CP 442.
[119] CP 651.
[120] CP 462-463; 481.

recover damages for mental and physical pain experienced by the decedent prior to the time of her death, but also for the decedent's fear that she was dying.[121] In *Bingaman,* there was evidence that the decedent, who experienced complications following childbirth, had the conscious realization that she was dying. The court noted:

> Although the decedent was unconscious during some part of her last 35 hours of life, due to her condition or sedation or both, substantial evidence was presented from which the jury could find that during much of that period of time she not only suffered extreme conscious pain, fear and despair at not being helped, but also had the conscious realization her life and everything fine that it encompassed was prematurely ending.

Bingaman, 103 Wn.2d at 837. In light of such evidence, the court held that it was proper for the jury to consider the decedent's fear that she was dying as an element of damages.

In *Gould v. Aerospatiale Helicopter Corp.*, 42 F.3d 1399 (9th Cir. 1994), the Ninth Circuit held that "the district court properly admitted

---

[121] Under RCW 4.20.060, the parents of a decedent who has reached the age of majority cannot recover for the decedent's pre-death pain and suffering unless they were financially dependent upon the decedent. In this case, Ryan Rashoff provided financial support to his parents, both in terms of furnishing valuable services in maintaining their home, property, and vehicles, and in terms of giving his parents Social Security checks that he received as a result of his father's disability. *See* CP 388-390. Because Ronald and Lori Rashoff were financially dependent on Ryan, they are qualified statutory beneficiaries under RCW 4.20.020 and are entitled to recover for Ryan's pre-death pain and suffering damages. *See, e.g., Armantrout v. Carlson*, 166 Wn.2d 931, 214 P.3d 914 (2009).

evidence of Lyn Gould's pre-death pain and suffering on the authority of the Washington Supreme Court's decision in *Bingaman* . . . ." The *Gould* court emphasized that "[t]he fact that the decedent's pain, suffering, and fear of death preceded the 'injuries' which immediately caused death did not bar recovery in *Bingaman;* the Washington Supreme Court permitted recovery for pre-death emotional distress because the same tortious conduct that caused the death also caused the fear of death and ... [t]hat was also the case here."

In *Chapple v. Ganger*, 851 F. Supp. 1481, 1487 (E.D. Wash. 1994), the plaintiffs, citing *Bingaman* as well as the special survival statute, RCW 4.20.060, contended that they were entitled to damages for any fear experienced by the decedent prior to her death. The defendants responded by arguing that any evidence of such fear would be based upon conjecture and speculation given that the decedent's death was almost instantaneous and the decedent's 10-year-old son had no memory of the accident. The court rejected the defendants' argument, noting that during his hospital stay, the decedent's son, on one occasion when he was not fully cognizant, screamed "Watch out, Mom! Watch out, Mom!" The court found this evidence sufficient to find that both mother and son were aware of and did appreciate the impending impact at least several seconds before it happened, and therefore the evidence was sufficient to support an award for the decedent's fear experienced prior to her death.

Numerous cases from other jurisdictions also establish that a Personal Representative is entitled to recover damages for the decedent's

fear of impending death as a part of "pain and suffering" within the meaning of survival statutes. In *Haley v. Pan American World Airways,* 746 F.2d 311 (5th Cir. 1984), the court held the Louisiana survival statute permitted recovery for a decedent's pre-impact fear of impending death. Defendant Pan American argued that the decedent's estate was only entitled to recovery for post-impact mental anguish associated with a physical injury. The court rejected this argument and quoted *Solomon v. Warren,* 540 F.2d 777 (5th Cir. 1976), *cert. den.*, 434 U.S. 801, as follows:

> While in the garden "variety" of claims under survival statutes, including the Florida Statute -- fatal injuries sustained in automobile accidents and the like -- the usual sequence is impact followed by pain and suffering, we are unable to discern any reason based on either law or logic for rejecting the claim because in this case as to at least part of the suffering, this sequence was reversed. We will not disallow the claims for this item of damages on that ground.

Id. at 793; *see also In Re Air Crash Disaster Near New Orleans, Louisiana*, 789 F.2d 1092 (5th Cir. 1986).[122]

---

[122] *See also Shu-Tao lin v, McDonnell Douglas Corp.,* 742 F.2d 45, 53 (2nd Cir. 1984) ("A decedent's representative unquestionably may recover for pain and suffering experienced in a brief interval between injury and death. We see no intrinsic or logical barrier to recovery for the fear experienced during a period in which the decedent is uninjured but aware of an impending death."); *Malacynski v. McDonnell Douglas Corp.,* 565 F. Supp. 105 (S.D.N.Y. 1983) (decedent's pre-impact terror is compensable in a wrongful death action); *Platt v. McDonnell Douglas Corp.,* 554 F. Supp. 360, 363 (E.D. Mich. 1983) (pre-impact fright and terror experienced by deceased passengers on a flight is compensable in a wrongful death claim).

Finally, it must be emphasized that survival statutes, including RCW 4.20.060, are remedial and require liberal application. *Cook v. Rafferty,* 200 Wash. 234, 93 P.2d 376 (1939). Given the remedial nature and liberal interpretation of the survival statute, it is inconceivable how recovery for a decedent's pre-impact terror could be denied merely on the basis that the decedent suffered no documented "physical" injury prior to impact.

Here, as explained in the declaration of Human Factors Engineer Dr. Richard Gill, there is substantial circumstantial evidence supporting Plaintiffs' claim that Ryan Rashoff would have been aware of his impending severe injury or death in the moments before the collision.[123] Based on this evidence, genuine issues of material fact exist which preclude summary judgment on the issue of whether or not Ryan Rashoff's Estate is entitled to a recovery for the fear of impending death that Ryan experienced just prior to the fatal crash.

VI. CONCLUSION

Decisive factual issues exist as to whether or not State Route 12 at its intersection with Williams Street was or was not reasonably safe for motorists attempting to cross SR 12. These issues of fact should have precluded summary judgment as a matter of law under CR 56(c). The trial court erred in granting summary judgment.

---

[123] CP 440-441.

Likewise, genuine issues of material fact exist as to whether Ryan Rashoff experienced fear of his impending death, and the trial court also erred in granting summary judgment prohibiting Plaintiffs from recovering for this element of damages.

Because summary judgment was erroneously granted on both of these issues, the trial court's order should be reversed and the case remanded for trial.

Respectfully submitted this 13th day of June, 2014.

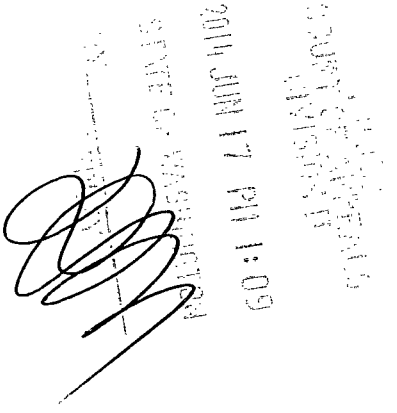
Keith L. Kessler, WSBA #4720
Garth L. Jones, WSBA #14795
Ray W. Kahler, WSBA #26171
Stritmatter Kessler Whelan
Co-counsel for Plaintiffs Rashoff

James M.B. Buzzard, WSBA #33555
Buzzard & Associates
Co-counsel for Plaintiffs Rashoff

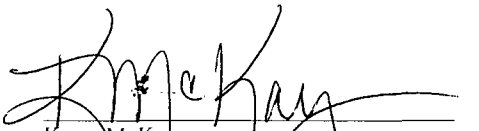
CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document as follows:

Steve Puz Patricia D. Todd Assistant Attorneys General 7141 Cleanwater Drive SW PO Box 40126 Olympia, WA 98504 Attorneys for Defendant State	☒ U.S. Mail ☐ Fax ☐ Legal Messenger ☐ Electronic Delivery
John L. Messina John R. Christensen Messina Bulzomi Christensen 5316 Orchard Street West Tacoma, WA 98467 Attorneys for Plaintiff Lamotte	☒ U.S. Mail ☐ Fax ☐ Legal Messenger ☐ Electronic Delivery
Kevin M. Carey Bolton & Carey 7016 35th Avenue N.E. Seattle, WA 98115 Attorneys for Defendant Lamotte	☒ U.S. Mail ☐ Fax ☐ Legal Messenger ☐ Electronic Delivery
Dave Lancaster Hollenbeck, Lancaster, Miller & Andrews 15500 SE 30th Place, Suite 201 Bellevue, WA 98007 Attorneys for Defendant Lamotte	☒ U.S. Mail ☐ Fax ☐ Legal Messenger ☐ Electronic Delivery
Jim Buzzard Buzzard and Associates 314 Harrison Avenue PO Box 59 Centralia, WA 98531	☒ U.S. Mail ☐ Fax ☐ Legal Messenger ☐ Electronic Delivery



DATED: June 16, 2014.



Kerry McKay
Hoquiam, Washington
E-Mail: kerrym@stritmatter.com