NO. 99122-7

SUPREME COURT OF THE STATE OF WASHINGTON

THE ESTATE OF WAI MON CHIN, by and through STANLEY CHIN, in his capacity as Personal Representative and for the beneficiaries SHIRLEY CHIN, STANLEY CHIN, SANDY CHIN, and WILLIAM CHIN,

Appellants,

v.

CITY OF RICHLAND, a municipality,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. RESPONSE TO STATEMENT OF ISSUES

If the Estate of Chin (Plaintiff) meets the requirements for a petition for review, it proposes six issues. Only two of the issues are actually addressed in the petition:

1. **Was the Court of Appeals correct in affirming the trial court's refusal to give an instruction about the signing provision in RCW 47.30.010(2)?**

2. **Was the Court of Appeals correct in affirming the trial court's decision to allow the jury to be instructed about the duties of Plaintiff pedestrian and the driver in a road design claim against the City of Richland (City), which raised defenses of comparative negligence against Plaintiff and the former co-defendant driver?**

II. RESPONSE TO STATEMENT OF FACTS

Plaintiff sets out purported facts about the history of Richland trails along State Route 240 (SR 240) and the City's design decisions for the trails. Important parts of the facts and trail history presented in support of the Petition for Review (PFR) are contradicted by undisputed facts in the record.

A. Two Separately Developed Trails Extend North And South From Van Giesen Street

Plaintiff alleges the City developed the trails bordering SR 240 as a continuous "Shelterbelt Trail." PFR, pp. 2-3. However, each trail section has a different history. The City developed the trails south and north of

Van Giesen at times 15 to 20 years apart. Different considerations determined their location and features.

The Shelterbelt was rows of trees planted by the federal government as a windbreak around the part of the City master-planned by the Atomic Energy Commission in the 1940's. RP 635-36.[1] City residents used the Shelterbelt as an informal dirt trail. RP 635-36.

Starting in the early 1990's, and completed in the mid-90's, the City designed and constructed a paved pedestrian/bicycle trail along part off the Shelterbelt bordering SR 240. RP 636-38. The original Shelterbelt path crossed two arterials (Swift and Duportail) a short distance east of their intersections with SR 240. RP 638, 640. The City designed the new paved trail to curve slightly to the west to link to new sidewalks at recently rebuilt (in 1996) SR 240 intersections. RP 638, 640. Swift and Duportail had no paved sidewalks east of 240 to which the trail could be linked. RP 638, 640. After the 1996 construction, the original unpaved paths remained mid-block on Swift and Duportail as access points for

[1] Due to both parties arranging transcription of portions of the trial, the Report of Proceedings ("RP"), requested by Plaintiff, was prepared at a different time from the Supplemental Report of Proceedings ("SuppRP"), requested by the City. Both Reports of Proceedings used a page numbering system that starts at page 1. In addition, different Court reporters transcribed these proceedings, each beginning their submissions of the trial transcript at page 1. Ms. Cheryl Pelletier transcribed the majority of the testimony. Mr. Joseph King transcribed only William Neale and Thomas Ballard's trial testimony, separately. The witness transcriptions by Mr. King used a page numbering system that starts at page 1. The City cites to "RP" for the testimony requested by Plaintiff (transcribed by Ms. Pelletier), "2ndSuppRP" for the Neale testimony (transcribed by Mr. King), and "3rdSuppRP" for the Ballard testimony (also transcribed by Mr. King).

maintenance trucks. RP 642-43. Trail users continued to use these spurs as a more direct route across the streets rather than going west to the intersections. RP 642-43.

The Shelterbelt Trail ended in a loop south of Van Giesen. RP 747-49. There was a spur on the loop connecting it to the Van Giesen south sidewalk mid-block between SR 240 and Birch Street, the residential street along which Plaintiff lived for 50 years. RP 747-49. The spur allowed park/utility maintenance trucks and trail users access from Van Giesen. RP 747-49.

In 2010, the City constructed a second trail (north trail) from the north sidewalk on Van Giesen to Jadwin Street approximately a mile from Van Giesen. RP 646, 653. The north trail is on a utility easement located between residential property fences and a sound attenuation berm for SR 240. RP 681-82. The City funded the trail with a state transportation grant after failing to obtain a park grant. RP 645-49. The primary purpose of the north trail was to create a bike route from Jadwin to Van Giesen so bike commuters from Hanford could avoid thirteen intersections on McMurray Street, the prior designated north-south bike route in Richland. RP 647-48.

B. The City Explicitly Considered Pedestrian And Bicycle Issues When Its Design Located The North Trailhead Mid-block On Van Giesen

Plaintiff asserts the city "completely failed to appreciate and/or design how the trail would be safely crossed" when it designed and constructed the north trail in 2010. PFR, p. 2. When Plaintiff says "how the trail would be safely crossed," the City assumes it means how Van Giesen would be crossed by trail users. Consistent with this interpretation, Plaintiff later asserts "Testimony at trial revealed the City's failure to contemplate the Van Giesen trail crossing effectively creates an unreasonable hazard" (emphasis added). PFR, p. 6. In a similar vein, Plaintiff asserts a rough City sketch of an alternative trail design (showing alignment of both the 2010 north trail and the 1996 Shelterbelt Trail to reach the SR 240 intersection) is evidence of the City's "forgotten intention to address the trail crossing" and was a "mysteriously omitted consideration." PFR, p. 5.

Plaintiff offers no citation to trial testimony to support his assertion the City "failed to appreciate" the trail crossing. *See* PFR, p. 2. In support of his assertions the City "forgot" to construct a trail crossing, Plaintiff offers only a citation to testimony identifying the sketch of an early 2010 trail design putting the north and Shelterbelt trail heads at the SR 240 intersection. *See* PFR, p. 5; RP 297; PFR Appx. p. 12. In support of his

assertions the City had a "failure to contemplate the Van Giesen trail crossing." Plaintiff cites only seemingly irrelevant testimony by one of his experts in response to a juror question about signs at the north end of the trail. *See* PFR, p. 6.

The City presented two witnesses to describe the history of the design of the 1996 and 2010 trails and the reasons for the designs chosen by the City. The first witness was Phil Pinard, a licensed engineer who was the planning and capital projects manager for Richland parks. RP 792-94. The second witness was Dave Bryant, a Richland public works assistant engineer who transferred to the new parks department in 1998 to continue in his role as parks project designer. RP 618-20, 629-30. Mr. Bryant designed and oversaw the construction of both the 1996 Shelterbelt Trail and the 2010 north trail. RP 610-11. Mr. Pinard and Mr. Bryant's testimony about the history of and reasons for the design of the 1996 and 2010 trails is undisputed since Plaintiff presented no witnesses on this subject.

Mr. Bryant testified the design of the north trail where it met Van Giesen had several serious and costly design constraints. The utility easement on which the trail would run was located behind a tall earthen sound attenuation berm protecting the residential neighborhood behind it. This blocked routing the trail to SR 240 without the large expense of

relocating part of the berm. RP 687-88. The area to the west of the trail had state "limited access" restrictions controlling its use while being held for an anticipated state highway interchange. RP 687-88. The Shelterbelt trailhead on the south side could not easily be relocated to SR 240 because it would descend a small hill at a degree of slope beyond that permitted by American Disability Act (ADA) rules unless rebuilt with retaining walls and a circuitous re-routing to achieve a slope within ADA requirements. RP 703-708. Any rebuild of the Shelterbelt trail would also be a capital project, separate from the north trail, that could not be done without City Council approval of the capital project and funding for it. RP 706-07.

When he designed the north trail, Mr. Bryant considered how pedestrians and bicyclists would cross Van Giesen if they wanted to use the trail on the opposite side of the street. RP 694-95. He concluded the existence of sidewalks on each side of Van Giesen, with the SR 240 and Birch intersection crosswalks only a short distance west and east of the trailheads, linked pedestrians to easily accessible Van Giesen crosswalks. RP 693, 698-701. He also expected some pedestrians would choose to cross between the intersections where he knew that state law required them to yield to vehicles. RP 698. He did not view this as a problem because:

> That was a choice that was pretty much like any street in the City of Richland where the residents - - a user of the sidewalk has a choice to either cross at the intersection or they can cross between the intersections by yielding it [sic] to traffic.

RP 698.

In designing the trail, Mr. Bryant expected some bicyclists would use the sidewalks to go to the crosswalks east and west of the trail, but some would enter the street mid-block because he was aware they operate under the same rules as vehicles on Washington roads. RP 696-97.

In regard to the rough sketch showing the trail going to the SR 240 intersection (PFR Appx. p. 12), Mr. Pinard explained he was the drafter. RP 806-07. He said it was part of the City's consideration of alternatives to trail users for crossing Van Giesen after construction of the new north trail. RP 806-07. Mr. Pinard testified the sketch was not implemented because City officials concluded the suggested re-design was unnecessary:

> Q. What can you recall, if anything, about the history of this document?
>
> A. Of this drawing itself?
>
> Q. Correct.
>
> A. I'm not sure it has much of a history. After some deliberation and discussion, we decided that we did not need to build it in this configuration.
>
> Q. Were you involved in those discussions or decisions not to build it in this configuration?

A. Yes.

Q. What was the reasoning that you understood the City to have as to why this was not the configuration chose for this intersection?

A. The main reason was it kind of duplicated what we had out there already. So there was existing sidewalks along the street, and building a parallel pathway or sidewalk just didn't make any sense. And the same was true basically with the south side of Van Giesen.

RP 806-07.

III. RESPONSE TO ARGUMENT

A. Plaintiff Does Not Meet The Criteria For Review

Plaintiff does not claim to meet the first three criteria for review in RAP 13.4(b). The Court of Appeals decision does not conflict with a Supreme Court or published Court of Appeals decision, and does not raise a question under state or federal constitutions. Plaintiff relies only on the fourth criterion, arguing the petition involves an issue of substantial public interest.

Plaintiff's argument relies primarily on the City's Motion to Publish the Court of Appeals opinion as evidence the PFR raises an issue of substantial public interest. This does not hold water because the reason the City requested publication was unique to what the Court of Appeals

held in its unpublished opinion and did not survive the Court's denial of the City motion to publish.

The basis for the Motion to Publish was the Court's decision that RCW 47.30.010(2) was not a basis for the jury instruction because: (1) there was no evidence of substantial use; (2) the term substantial had its dictionary definition of "considerable in amount;" and (3) the issue of existence of substantial usage could be decided as a matter of law when the number of trail users is very low. If the Court of Appeals decision had been published, it would have been precedential and resolved a potentially contentious issue in future trail-road intersection lawsuits for collisions occurring on low volume trails. Without publication, the Court of Appeals opinion simply resolves the issues in this case between the parties and leaves the application of RCW 47.30.010(2) to be litigated on the evidence in future cases. There is now nothing in the resolution of this case significant for other cases.

Other than arguing for review based on a mistaken view of the City's argument in its Motion to Publish, Plaintiff does not present a legal issue concerning RCW 47.30.010 that is of importance to the public. Plaintiff merely points to the need for proper jury instructions in future cases, but does not explain how that will be impossible simply working from the language of RCW 47.30.010.

B. The Court Of Appeals Interpretation And Application Of RCW 47.30.010(2) Is Correct Under The Facts In The Trial Record

The first error Plaintiff claims is the Court of Appeals affirmance of the trial court's decision to reject Plaintiff's proposed instruction based on a road signing provision in RCW 47.30.010. There are several reasons the Court of Appeals affirmance was correct.

The trial court decided the statutory signing provision applies only when a road is constructed across a pre-existing trail of substantial usage. RP 1138-39. The court based its reasoning on the language and context of the statute. RCW 47.30.010(2) provides the remedy for when a non-limited access road "crosses," but does not destroy, a substantially used trail. RP 1138-39.

The court's interpretation was consistent with language in the statute and the context of the statute within its chapter and title in the RCW. Title 47 is the title creating the State Department of Transportation and providing for the planning, property acquisition, funding, and construction of transportation infrastructure, including roads, bridges, ferries and trails. Chapter 47.30 RCW provides for establishment, construction, and funding of trails. The whole of Title 47, including chapter 47.30, is about the details of establishing, funding, and constructing transportation facilities. Thus, the trial court's conclusion the

signing requirement in RCW 47.30.010(2) was for trails crossed by newly constructed or reconstructed roads was consistent with the provisions of the other two sections of the statute and with all of the subject matter in Title 47 as a whole, including chapter 30 of Title 47.

In affirming the trial court's disapproval of Plaintiff's proposed trail interference statute instruction, the Court of Appeals did not rely on the trial court's ground for its decision, but on Plaintiff's failure to provide evidence of trail usage bearing on the issue of substantial use needed to decide the application of RCW 47.30.010. The only evidence in the record came from the City's traffic engineering expert, Tom Ballard, an experienced traffic engineer and long-time Pierce County Engineer. 3rd Supp. RP 3-5. Mr. Ballard testified, based on a five-day study of pedestrian and bicycle activity on Van Giesen at and between its SR 240 and Birch intersections, only 18 pedestrians crossed Van Giesen from the south trailhead to the north trailhead, and only four from the north trailhead to the south in the more than 60 hours of the study period. 3rd Supp. RP 27-9, 48-9. This was one pedestrian or less crossing every two hours. 3rd Supp. RP 43. Mr. Ballard further testified the Federal Highway Administration (FHWA) guideline for usage necessary to justify a study of need for pedestrian improvements is 25 crossings per hour or 75 in a four-hour period. RP 122-23. The Van Giesen pedestrian crossings

were at less than 2% of the accepted standard for even considering pedestrian improvements, let alone installing improvements. RP 122-23. The Court of Appeals, applying accepted rules of statutory construction, adopted the dictionary definition of "substantial" as "considerable in number," finding one pedestrian every two hours is not considerable in number.

Plaintiff's PFR tries to dispute the Court of Appeals conclusion about the minimal pedestrian crossings of Van Giesen by claiming 313 persons "used the trail at the Van Giesen crossing," a claim made without citation to trial testimony. *See* PFR, p. 11. The testimony was 313 people transited the two intersections, and the area in-between, during the five-day study period, including pedestrians and bicyclists, trail users and non-trail users. 3rd Supp. RP 41. Of the 313 people, 119 crossed Van Giesen (65 bicyclists and 54 pedestrians) and 75 crossed between the intersections (28 pedestrians). 3rd Supp. RP 86-87. The 28 pedestrians actually shown by testimony to have crossed between the intersections in the study period (which includes all pedestrians, not just those coming from the two trails) is only a small fraction of what Plaintiff suggests in his misleading argument.

Plaintiff also argues the Court of Appeals should have defined "substantial" in RCW 47.30.010 the same as the courts use the term in the

phrase "substantial evidence." The latter is a specialized legal term in certain legal contexts, traditionally meaning more than a mere scintilla (i.e., almost nothing), not the common meaning of the word, which is basically the opposite, i.e., a whole lot. A definition drawn from specialized legal use is not a proper definition for a term in a statute which, if undefined in the statute, must be given its dictionary definition. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P. 3d 470 (2010). This is what the Court of Appeals did.

A final deficiency in Plaintiff's argument is Plaintiff's accident occurred outside the area for which the statute imposes a duty. The only testimony in the record about where the driver struck Plaintiff in the road was by the City's accident reconstruction expert, William Neale. Mr. Neale reconstructed where Plaintiff was crossing Van Giesen. 2nd Supp RP 7, 11-24, 47-63. Mr. Neale used the testimony of the driver, the location of Plaintiff's body post-collision, the stopping point of the vehicle post-collision, location evidence gleaned from digital photos of the accident scene, and mathematical computation based on such things as vehicle speed and force of impact to determine where Plaintiff was located when struck. 2nd Supp RP 7, 11-24, 47-63

Mr. Neale's undisputed testimony was Plaintiff was crossing 70 feet east of the north trailhead, which is half-way between the trailhead

and Birch street. 2nd Supp RP 58, 103-04, 117-19. This is well outside the area of Van Giesen purported to be the trail crossing to which the statutory signing would apply.

A statute can create a duty for defendant to act only if the alleged negligence falls within the ambit of what the statute requires. *Hansen v. Wash. Nat. Gas*, 95 Wn.2d 773, 779-80, 632 P.2d 509 (1981). In *Hansen*, the Court determined violation of city ordinances requiring barricading construction trenches at intersections could not be negligence as to a pedestrian who fell at a trench not at an intersection, but mid-block. *Id*.

Here, Plaintiff wants an instruction about a statute assertedly requiring the City to sign a crossing (which the City denies it ever created), but his accident occurred outside the trail area to which the signing would have applied. As in *Hansen*, the statute cannot be used to argue negligence when it does not apply to the location of Plaintiff's accident. *See also Morgan v. State*, 71 Wn.2d 826, 430 P.2d 947 (1967). (federal highway regulation requiring fencing of freeways to protect free flow of traffic from disturbance by pedestrians does not create a duty to a pedestrian entering freeway though an allegedly ill-maintained fence).

C. The Issue Of Supplemental Instructions About The City's Duty Was Not Preserved For Review

Plaintiff includes an argument (PFR, pp. 12-14) claiming additional instructions should have been given about the City's duty, without specifying what instructions or the specific authority for those instructions. Plaintiff did request such instructions in the trial court. *See* RP 1088-95. However, the Court of Appeals found only the three assignments of error discussed in its opinion qualified for review because Plaintiff's remaining assignments of error were not sufficiently argued on appeal, so could not be considered. Slip op. at 5. Plaintiff's argument the trial court improperly rejected his additional instructions about City duty (beyond the argument for an instruction based on RCW 47.30.010) was not one of the three issues accepted for review by the Court of Appeals. It is an issue not preserved for review and should not be considered in this petition.

D. Plaintiff's Objection To Instructions About Pedestrian and Driver Duties Did Not Satisfy Requirements For Objections To Jury Instructions

Plaintiff's second claim of error is the Court of Appeals improperly rejected Plaintiff's appeal of the trial court's rejection of objections to the City's proposed instructions on the rules of the road. These instructions stated duties of Plaintiff and the driver relevant to the City's comparative negligence affirmative defense.

Plaintiff characterizes the basis of the Court of Appeals decision as Plaintiff "failed to object to the City's proposed instructions related to Rules of the Road". PFR, p. 14. Plaintiff then cites to trial court argument where he objected to the instructions.

Plaintiff mischaracterizes the Court of Appeals rather terse statement of the reason for rejecting his appeal of the rules of the road jury instructions. The Court of Appeals did not hold he failed to object, but that his objection was insufficient. Slip. Op., at 7. The Court stated, "Here the Estate never objected to the trial court's jury instructions on the basis that the rules of the road were inapplicable". *Id*. (emphasis added). This is a decision Plaintiff's objection did not satisfy criteria allowing rejection of instructions only if they inaccurately state the law or no substantial evidence in the record supports them. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 746 P.3d708 (2015); *Hough v. Stockbury*, 152 Wn. App. 328, 342, 216 P.3d 1077 (2009).

Here, the City had comparative negligence defenses against Plaintiff and the driver. Plaintiff does not contend the City did not have these defenses. The comparative negligence defenses require the jury to be instructed on duties derived from laws governing pedestrians and drivers (rules of the road).

Plaintiff never argued to the trial court that the City did not have a comparative negligence defense, the City's proposed instructions (which were Washington Pattern Instructions) inaccurately stated the duties of Plaintiff and the driver, or there was no substantial evidence supporting instructions for comparative negligence. RP 1151-63. Plaintiff's objection was only on the ground the jury would be so beguiled by the City's comparative negligence defenses, it would never be able to conclude the City's alleged negligence caused the accident.

> We start using the rules of the road and putting burdens on parties and providing extra special status to the pedestrian, to the driver, we are going to cloud the duty of the City which was to provide a safe -- their general duty. And it becomes very problematic when we start putting the rules of the road at play….
>
> And all of a sudden we've turned this case into what did Brenda Nelson do and what did Mr. Chin do without focusing on what the City didn't do.

RP 1152-53.

A party can object to a jury instruction if it prevents a party from arguing its theory of the case. *Hough*, 157 Wn. App. at 342, Plaintiff did not contend the City's instructions about the duty of pedestrians and drivers prevented him from arguing the City failed to provide a reasonably safe road for ordinary travel. Plaintiff's counsel argued his theory of the case in closing and also repeatedly wove in specific directions to the jury

to determine the City's negligence before considering comparative. RP 117-18, 125-27, 137, 142-44, 149-51, 155-56. Plaintiff even used the City's comparative negligence defense to his advantage. Plaintiff argued the City's comparative defense was the City's concession it was negligent, because if the City thought it was not negligent, then it would not ask for a comparative instruction. RP 117-18, 125-27, 137, 142-44, 149-51, 155-56. If the trial court had rejected the City instructions about duties of pedestrians and drivers, then the court would have erroneously denied the City the ability to argue its theory of the case regarding comparative negligence.

Plaintiff's argument about the rules of the road instructions is also already answered by existing law. In *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 249 P.3d 607 (2011), this Court held any error in a trial court's jury instructions on comparative negligence is *not* a ground for granting a new trial if (i) the jury returned a verdict the defendant was not negligent; and (ii) the jury was explicitly informed by the verdict form not to address comparative negligence unless it found defendant to be negligent. *Id.* at 117. *Veit* reasoned juries are presumed to follow the law, so courts must assume the jury did not consider a plaintiff's comparative negligence in determining whether a defendant was negligent. *Id.*

This case is like *Veit*. The trial court instructed on a summary of the parties' claims, the City's burden to prove comparative negligence, and that the questions on the special verdict form had to be answered in the order presented. CP at 355, 367-68, 375-76. The special verdict form required the jury to consider the City's potential negligence first, before reaching a decision on Plaintiff's or driver's fault. CP at 380-382. Thus, as in *Veit*, any alleged instructional error regarding comparative negligence is immaterial because the jury returned a negative finding on the City's alleged breach of duty.

IV. CONCLUSION

The City of Richland respectfully requests the Supreme Court reject Plaintiff's Petition for Review.

RESPECTFULLY SUBMITTED this 16th day of November, 2020.

FREIMUND TARDIF, PLLC

MICHAEL E. TARDIF, WSBA #5833
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on November 16, 2020, I served the foregoing Answer to Petition for Review on the parties to this action as follows:

Attorneys for Appellants George E. Telquist TELARE LAW 1321 Columbia Park Trail Richland, WA 99352 george@telarelaw.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☒ E-Mail ☒ Electronic delivery via eFiling Portal for the Washington State Appellate Courts

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of November, 2020, at Olympia, Washington.

NATASHA S. CEPEDA, Legal Assistant

FREIMUND TARDIF, PLLC

November 16, 2020 - 4:44 PM

Transmittal Information

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