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DIVISION II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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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.

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BENJAMIN O. LAMOTTE,

Appellant/Plaintiff.

v.

THE STATE OF WASHINGTON,

Respondent/Defendant.

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# REPLY BRIEF OF APPELLANTS RASHOFF

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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
Co-counsel for Appellants Rashoff

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

ORIGINAL

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## I. INTRODUCTION

Under Washington law, whether a roadway is reasonably safe is virtually always a question of fact that cannot be resolved on summary judgment.[1]

Plaintiffs presented evidence from Edward Stevens, a transportation engineer with over 40 years' experience,[2] that the SR 12/Williams Street intersection was not reasonably safe. Plaintiffs also presented admissions from the State's own records showing that the intersection met the Crash Experience warrant for installation of a traffic signal under the MUTCD. Like the trial court, Defendant State ignores the fact that its own employees used the same methodology as Mr. Stevens and reached the same conclusion that a traffic signal was needed at this intersection. The trial court improperly decided a dispute between expert witnesses, and impermissibly resolved questions of fact on summary judgment, concluding as a matter of law that the SR 12/Williams Street intersection was reasonably safe.

The trial court also applied an erroneous legal standard in granting the State's motion for summary judgment. The trial court required proof of a violation of the MUTCD, which Washington courts have held is not required to prove that a road location is unsafe.[3] Recognizing that the trial

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[1] *See Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

[2] CP 471-475.

[3] *Owen v. Burlington Northern & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005); *Chen v. City of Seattle*, 153 Wn. App. 890, 900-901, 908, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010).

court applied an erroneous legal standard, Defendant State asks this Court to change Washington law to require proof of a violation of "(1) accepted engineering standards and the engineering judgment those standards require, and (2) the statutory requirements imposed by the legislature."[4] This legal standard proposed by the State and adopted by the trial court is contrary to over 100 years of precedent in Washington.

Because the trial court improperly decided questions of fact on summary judgment and applied an erroneous legal standard, this Court should reverse the summary judgment order in favor of the State.

## II. REPLY

### A. Defendant State is asking this Court to change Washington law by radically narrowing the scope of its duty to provide reasonably safe roads for the public.

For more than a century, our courts have held that governmental entities have a common law duty "to exercise ordinary care in the *[design] [construction] [maintenance] [repair]* of [their] public *[roads]* to keep them in a reasonably safe condition for ordinary travel." [5, 6]

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[4] *Respondent's Brief* at p.17, 22.

[5] WPI 140.01. "Ordinary travel" means the foreseeable actions of drivers, including foreseeable negligence on the part of drivers. *See, e.g., Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002) (governmental entity "has a duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the foreseeable acts of those using the roadways"). Here, it was foreseeable that a driver in Mr. Lamotte's position would misjudge the speed and distance of an oncoming vehicle and the amount of time required to clear the intersection due to the width of the lanes of SR 12 at this location (there were left turn lanes on SR 12 in addition to the through lanes) and the speed of traffic on SR 12. CP 442-443. In fact, a number of similar collisions had occurred at the intersection in the past, again most likely due to drivers on Williams Street misjudging the speed of traffic on SR 12 and the time needed to make a safe entry before traffic on SR 12 enters the intersection. CP 462-463.

The State owes this duty to all persons using its roads, regardless of whether they are negligent in their driving or fault-free.[7] The State's duty to provide reasonably safe roads includes the duty to eliminate an inherently dangerous or misleading condition.[8]

In its Response Brief, Defendant State asks this Court to radically change Washington's common law governing highway safety claims by redefining the scope of a governmental road authority's duty. According to Defendant State, "[t]he 'ordinary care' that WSDOT must exercise in the design, construction and maintenance of state highways is defined by the customary and usual practices of engineers, and any additional

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[6] This has been the law of Washington for 119 years. *See Lowman v. Wilbur*, 178 Wn.2d 165, 170, 309 P.3d 387 (2013); *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005); *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002); *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010); *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979); *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978); *Owens v. City of Seattle*, 49 Wn.2d 187, 299 P.2d 560 (1956); *Parker v. Skagit County*, 49 Wn.2d 33, 297 P.2d 620 (1956); *Berglund v. Spokane County*, 4 Wn. 2d 309, 103 P.2d 355 (1940); *Fritch v. King County,* 4 Wn.2d 87, 102 P. 2d 249 (1940); *Slattery v. Seattle*, 169 Wash. 144, 13 Pac. 464 (1932); *Boggess v. King County*, 150 Wash. 578, 274 Pac. 188 (1929); *Gabrielsen v. Seattle*, 150 Wash. 157, 272 Pac. 723 (1928); *Lewis v. Spokane*, 124 Wash. 684, 215 Pac. 36 (1928); *Swan v. Spokane*, 94 Wash. 616, 162 Pac. 991 (1917); *Murray v. Spokane*, 117 Wash. 401, 201 Pac. 745 (1914); *Kelly v. Spokane*, 83 Wash. 55, 145 Pac. 57 (1914); *Leber v. King County*, 69 Wash. 134, 124 Pac. 397 (1912); *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616 (1912); *Neel v. King County*, 53 Wash. 490, 102 Pac. 396 (1909); *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831 (1908); *Larsen v. Sedro-Woolley*, 49 Wash. 134, 94 Pac. 938 (1908); *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122 (1900); *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273 (1895).

[7] *Lowman v. Wilbur*, 178 Wn.2d 165, 170, 309 P.3d 387 (2013); *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

[8] *See Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 787-788, 108 P.3d 1220 (2005).

requirements imposed by the legislature."[9] But this is not the law. No Washington highway safety case has ever defined ordinary care in the manner proposed by Defendant State, and the only legal authority cited by the State to support this novel proposition is *Douglas v. Freeman*, 117 Wn.2d 242, 814 P.2d 1160 (1991), a ***dental malpractice*** case.[10] Other than *Douglas*, the only other "authority" cited by the State is the testimony of its own employee, Chad Hancock,[11] and the testimony of its litigation expert, Robert Seyfried.[12]

Two recent roadway safety cases, *Owen v. Burlington Northern & Santa Fe Railroad Co.*[13] and *Chen v. City of Seattle*,[14] directly contradict the State's position. Both *Owen* and *Chen* rejected the notion that the scope of a governmental road authority's duty to provide reasonably safe roads is limited to just meeting engineering standards or legislative enactments. *Chen* explained as follows:

> The city argues that *Chen* can prevail only if she shows that a particular physical defect in the crosswalk itself rendered the crosswalk inherently dangerous or inherently misleading or if she shows that the city was in violation of a statute, ordinance, or regulation concerning maintenance of the crosswalk. The implication of the city's argument is that a trier of fact may not determine, based on

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[9] *Respondent's Brief* at 5-6.
[10] The applicable duty in a roadway safety case like this is set forth in WPI 140.01 and has been well-established for decades.
[11] *See* CP 205.
[12] CP 122, 125, 533, 593.
[13] 153 Wn.2d 780, 108 P.3d 1220 (2005).
[14] 153 Wn. App. 890, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010).

> the totality of the circumstances, that the city breached its duty of care unless one of these two conditions is satisfied. In effect, the city argues that the scope of its duty to Liu extended only to eliminating actual physical defects or to taking action expressly required by a statute, ordinance, or regulation. The city is incorrect on both accounts.
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> ....
>
> [A] trier of fact may infer that the city breached the duty of care it owed to Liu based on the totality of the surrounding circumstances.[15, 16]

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[15] *Chen*, 153 Wn. App. at 900-901.

[16] Defendant State claims that "[t]he expansive 'totality of the circumstances' test advanced by the [Plaintiffs] is both legally wrong and contrary to sound public policy." *See Respondent's Brief* at 22-23. But the State's criticism of this analysis is not an attack on the Plaintiffs; it is actually an attack on the *Chen* opinion itself and the Court of Appeals. Contrary to the State's claim, neither the Plaintiffs nor the Court of Appeals say that the determination by the jury is to be made without regard to applicable standards. Rather, as stated in *Chen*, the decision as to whether or not a road authority breached its duty is based on the totality of the circumstances established by the ***evidence*** presented in the case:

> 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. Although relevant to the determination of whether a municipality has breached its duty, evidence that a particular physical defect in a roadway rendered the roadway dangerous or misleading or evidence that a municipality was in violation of a law concerning roadway safety measures are not essential to a claim that a municipality breached the duty of care owed to travelers on its roadways. 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. The "totality of the circumstances" standard is not undefined as the State claims. *See Respondent's Brief* at 22-23. As discussed in Appellants' Opening Brief, *Chen* identified several factors to consider in evaluating the "totality of the circumstances" in a given case, including a history of similar collisions, complaints by community members, and expert testimony

Liability in roadway safety cases does not require evidence of a statutory violation or a violation of engineering standards or regulations:

> The city is incorrect, however, in concluding that, because conditions triggering a mandatory duty to consider the installation of traffic signal were not met [under the MUTCD], 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)).[17]

In *Owen*, the Supreme Court set forth a two-step analysis for determining whether a roadway was reasonably safe for ordinary travel:

> [W]hether a condition is inherently dangerous or misleading is generally a question of fact. . . .
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> . . . .
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> If the roadway is inherently dangerous or misleading, then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances. *E.g., Goodner vs. Chicago, Milwaukee, St. Paul & Pac. RR Co.*, 61 Wn.2d 12, 17-18, 377 P.2d 231 (1962). If the corrective actions are adequate, then the city has satisfied its duty to provide reasonably safe roads.[18]

Under this analysis established by the Supreme Court, a plaintiff's burden is to show that a roadway is not reasonably safe; it is for the

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on the issue of whether or not a road was reasonably safe. Here, evidence on those factors – multiple collisions, community complaints, and expert testimony -- overwhelmingly supports Plaintiffs' position that the intersection was not reasonably safe. *Opening Brief* at pp.36-38.

[17] *Chen*, 153 Wn. App. at 908.

[18] *Owen*, 153 Wn.2d at 788, 789-790.

governmental entity responsible for the roadway to decide what measures to take to correct unsafe conditions. At trial, once the plaintiff shows that an inherently dangerous condition existed, the burden shifts to the State to prove that adequate corrective actions were undertaken to remedy the dangerous condition.

Based on the *Owen* analysis, it is not the Plaintiffs' burden to establish what the State should have done to make the intersection reasonably safe. The Plaintiffs' burden is simply to prove that the intersection was not reasonably safe, not that a traffic signal should have been installed. Plaintiffs' traffic engineering expert, Edward Stevens, testified that, based on his engineering study of the intersection, and exercising transportation engineering judgment, it was his professional opinion that the intersection was not reasonably safe; the intersection's accident history and the MUTCD traffic signal warrant analysis supported that opinion.[19] As for the traffic signal warrants themselves, it must be remembered that traffic signals are one tool among many in the State's toolbox that can be used to correct an unsafe intersection. The question for purposes of summary judgment is whether the plaintiff has presented evidence creating a question of material fact as to whether the road location was not reasonably safe, not whether the plaintiff has established that a particular fix should have been used.

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[19] CP 651.

As discussed above, no Washington case has held that the scope of a government road authority's duty to maintain roadways in a reasonably safe condition is defined by "the customary and usual practices of engineers, and any additional requirements imposed by the legislature" as argued by the State.[20] Despite this, the trial court followed the erroneous "standard" advanced by the State in granting summary judgment:

> The State owes a duty to persons who use the State highways to "exercise ordinary care" in the construction, repair, and maintenance of its public highways "to keep them in a reasonably safe condition for ordinary travel." *Keller v City of Spokane*, 146 Wn.2d 237, 254 (2002). ***The standard to which the State is held is set forth in the Manual on Uniform Traffic Control Devices (MUTCD).***[21]

In requiring a violation of the MUTCD, the trial court relied on an erroneous legal standard in granting the State's motion for summary judgment. Because of this clear error of law, this case must be remanded for trial.

### B. The trial court erred by failing to view the evidence and the inferences therefrom in a light most favorable to the Plaintiffs.

On summary judgment, "the evidence and all reasonable inferences therefrom [are] considered in the light most favorable to the plaintiff, the nonmoving party."[22] The trial court erred here by failing to view the evidence and the inferences therefrom in this light. Defendant State tries to justify the trial court's error in deciding factual issues on

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[20] *See Respondent's Brief* at 7-8.
[21] CP 643 (emphasis added).
[22] *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989).

summary judgment by construing the evidence in its own favor. The State goes beyond spinning the facts and misrepresents the record by claiming that a number of disputed facts are undisputed, as the following examples illustrate:

1. The State claims that the undisputed facts establish that the intersection met or exceeded every accepted engineering standard, including the MUTCD.[23] That is clearly in dispute. The State's claim that the intersection did not meet criteria for installation of a traffic signal under the MUTCD is contradicted by the State's own engineering analysis. First, in an email sent 21 months before the collision, WSDOT's Southwest Region Traffic Engineer, Chad Hancock, stated that "[t]he [SR 12/Williams Street] intersection ***does*** meet 2 of the 8 [MUTCD] 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]."[24] Second, WSDOT had placed installation of a traffic signal at this intersection on its list of planned projects.[25] Third, an Operational Review of the intersection conducted by the State shortly after the collision concluded that the intersection did in fact meet the MUTCD Crash Experience warrant for the installation of a traffic signal.[26]

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[23] *See Respondent's Brief* at 3, 6, 27, 46.
[24] CP 341 (emphasis added).
[25] CP 647-648.
[26] 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 ... Using the combined crash history and latest traffic volumes, Signal Warrant #7 (Crash Experience) is ***satisfied***.") (emphasis added).

2. Defendant State claims that it is undisputed that the installation of a traffic signal at the intersection prior to Mr. Lamotte's collision would have increased the risk of crashes for millions of other drivers.[27] This assertion is contradicted by the fact that the State listed this intersection on its signal priority listing for the Southwest Region from 2002-2006.[28] In 2006, the intersection had risen to number 13 on the waiting list for signal installation.[29] The fact that the State ***did*** install a traffic signal at the intersection in 2010 also shows that the MUTCD signal warrant criteria were met, and refutes the State's "undisputed" claim that the installation of a traffic signal would endanger millions of drivers.[30]

3. Defendant State claims that "the undisputed evidence establishes the methodology Mr. Stevens used to analyze the MUTCD signal warrants failed to conform with any accepted engineering standard or practice."[31] But the State's own engineers used the same data and methodology as Mr. Stevens in determining that the intersection met the Crash Experience warrant for a traffic signal under the MUTCD.[32] Contrary to Defendant State's claim that the evidence is undisputed,

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[27] CP 3; CP 23; CP 28.
[28] CP 647.
[29] *Ibid.*
[30] CP 648.
[31] CP 7, 29, 33, 34.
[32] CP 664-666.

admissions by the State itself directly contradict its claims regarding Mr. Stevens' methodology and conclusions.

4. Defendant State claims that Mr. Lamotte stopped first at the stop sign, then pulled into the eastbound lane and stopped again.[33] Mr. Lamotte's accident reconstruction expert stated that this "double stop" theory is physically impossible because it would require the Lamotte vehicle's speed after the second stop to be extremely high, which would have been beyond the maximum acceleration capacity of the vehicle.[34]

5. Defendant State claims that the "undisputed facts" establish that the log truck was less than 300 feet away when Mr. Lamotte accelerated into the intersection.[35] The State makes this claim to try to rebut the analysis of human factors engineer Richard Gill, Ph.D., who stated that vehicles on SR 12 are so far away when a driver on Williams Street must decide whether to go or not go into the intersection that drivers have difficulty making a good judgment about whether they have enough time to clear the intersection.[36] First, Defendant State ignores the fact that the relevant time frame for evaluating the distance between Mr. Lamotte and the log truck for purposes of determining the ability of a driver in Mr. Lamotte's position to judge the speed and distance of the log truck is the time immediately ***before*** he began accelerating toward the intersection --

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[33] *Respondent's Brief* at p.10.
[34] CP 407-408, 410-411.
[35] *Respondent's Brief* at p.45.
[36] CP 442-443.

when he was looking left and right to make a decision to go or not go into the intersection -- not the moment that he began accelerating into the intersection after having already decided to do so.[37] Second, the State's own accident reconstruction expert stated that the log truck would have been 580 feet away when Mr. Lamotte began pulling away from the stop bar under the "double stop" theory adopted by the State.[38]

These are just a few examples of some of the State's so-called "undisputed evidence." In each of these examples, the disputed evidence must be construed in a light most favorable to the Plaintiffs, as the nonmoving party. Viewing these disputed facts in this light, the evidence supports a finding by the trier of fact that the SR 12/Williams Street intersection was unsafe at the time of the collision and that it met MUTCD warrant requirements for the installation of a traffic signal prior to and at the time of the subject crash. In any event, disputed facts are for the trier of fact to determine following a full trial on the issue, not a judge on a summary judgment motion.

These issues of material fact should have precluded the trial court from entering summary judgment in favor of the State. By failing to construe these facts in a manner most favorable to the Plaintiffs, the trial court committed error.

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[37] CP 442.
[38] CP 199.

### C. The trial court committed reversible error by weighing conflicting expert opinion.

Whether or not a road location is reasonably safe is virtually always a question of fact.[39] For this reason, a court should not resolve conflicts in expert testimony on summary judgment:

> On motion for summary judgment the trial court does not weigh evidence or assess witness credibility. Neither do we do so on appeal: "Our job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met." *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 623, 60 P.3d 106 (2002) (emphasis omitted).[40]

Contrary to this rule, the trial court weighed the conflicting opinions of traffic engineers Seyfried and Stevens in granting the State's motion for summary judgment:

> This Court is persuaded that Dr. Stevens has not demonstrated that a correct application of the various factors in the MUTCD supports his conclusions.[41]

By choosing Mr. Seyfried's analysis over the analysis of Mr. Stevens, the trial court improperly weighed the credibility of these experts.

Citing *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013), Defendant State tries to excuse the trial court's error by claiming that "the exclusion of expert testimony is reviewed for an abuse

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[39] *See, e.g., Owen*, 153 Wn.2d at 788; *Chen*, 153 Wn. App. at 900.

[40] *Barker v. Advanced Silicon Materials, LLC, (ASIMI)*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006); *see also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 119-120, 11 P.3d 726 (2000).

[41] CP 643.

of discretion."[42] But an appellate court applies a de novo standard of review to ***all*** rulings by a trial court in conjunction with a summary judgment motion:

> An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. ***The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.*** This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, *Lamon*, 91 Wn.2d at 349, 588 P.2d 1346 (citing *Morris*, 83 Wn.2d at 494-95, 519 P.2d 7), and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court. *Mountain Park Homeowners Ass'n*, 125 Wn.2d at 341, 883 P.2d 1383.[43]

A de novo standard of review is appropriate when, as here, a trial court's evidentiary ruling is based on documentary evidence that the appellate court is equally capable of reviewing, rather than an evidentiary hearing.[44]

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[42] *Respondent's Brief* at 30.

[43] *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (emphasis added). In *Folsom*, the Court specifically stated that it had reviewed the expert affidavits that the trial court had excluded. *See Ibid.*; *see also Seybold v. Neu*, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001) (although a trial court's ruling on the qualifications of an expert is normally reviewed for abuse of discretion, "we review the trial court's evidentiary rulings made for summary judgments de novo"); *Ensley v. Mollmann*, 155 Wn. App. 744, 752, 230 P.3d 599 (2010) (same); *Momah v. Bharti*, 144 Wn. App. 731, 748-749, 182 P.3d 455 (2008) (same); *Cotton v. Kronenberg*, 111 Wn. App. 258, 264, 44 P.2d 878 (2002) (same).

[44] *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 136, 130 P.3d 865 (2006).

Although a trial court may exclude expert testimony when the expert's opinion is not generally accepted in the scientific community under the "*Frye* test",[45] the trial court never made any findings or conclusions that the opinions of Plaintiffs' traffic engineer, Edward Stevens, were not generally accepted in the scientific community.[46] Instead, the trial court simply weighed the two conflicting engineering opinions and chose the opinions and analysis of the State's retained traffic engineer, Mr. Seyfried, over those of Mr. Stevens.

Here, contrary to Defendant State's claimed "undisputed facts", Mr. Stevens did not just testify that a traffic signal was warranted at the SR 12/Williams Street intersection; he testified that, exercising transportation engineering judgment, the intersection was not reasonably safe.[47]

Defendant State challenges Mr. Stevens' opinion that the lack of crashes in 2008 was due to normal variation in crash occurrence rather than the installation of a "cross traffic does not stop" sign on Williams Street.[48] Mr. Stevens' opinion that normal variation in crash occurrence

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[45] *See Frye v. U.S.*, 293 F. 1013 (1923). The State mentioned the *Frye* case just once in a Supplemental Reply brief. CP 700.

[46] Defendant State claims that the trial court excluded Mr. Stevens' opinions because his methodology was "not generally accepted in the community of traffic engineers," citing CP 643. The trial court never made any such finding. The trial court determined as a factual matter that, in its opinion, Mr. Stevens did not correctly apply the MUTCD factors. Further, as discussed above, even if the trial court had held a *Frye* hearing, the trial court's decision to exclude the declarations of Mr. Stevens would be subject to de novo review under *Folsom*.

[47] CP 651.

[48] *Respondent's Brief* at p.25.

accounts for the lack of crashes in 2008 is based on the crash history at the intersection. In 2003, four years ***before*** the "cross traffic does not stop" sign was installed, only one crash susceptible to correction by a traffic signal occurred. Likewise in 2004, only one crash susceptible to correction by a traffic signal occurred.[49] Mr. Stevens' opinion is fully supported by the evidence. Whether or not Mr. Stevens' explanation for the lack of crashes in 2008 is more or less credible than Mr. Seyfried's explanation is a question of fact that cannot be resolved on summary judgment.

In addition, Mr. Stevens' opinions are consistent with the findings and opinions of the State's own traffic engineers. As explained above, State traffic analysis documents for the SR 12/Williams Street intersection show that: (1) The State listed this intersection on its signal priority listing for the Southwest Region from 2002-2006;[50] (2) WSDOT Southwest Region Traffic Engineer Chad Hancock stated in a February 21, 2008 email that the intersection met two of the eight warrants for the installation of a traffic signal;[51] and (3) an Operational Review of the intersection conducted by the State within days of the Rashoff collision concluded that a traffic signal was warranted.[52]

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[49] CP 649 & CP 654.
[50] CP 647.
[51] CP 341.
[52] CP 665-666.

Contrary to Defendant State's claim that it is "undisputed" that Mr. Stevens' methodology "is unique to him and this lawsuit,"[53] the State's Operational Review adopted exactly the same methodology and analysis as Mr. Stevens:

> • Like Mr. Stevens, the State's Operational Review used the "combined crash history" from 2004-2009, not the crash history in 2009 alone.[54] The State specifically found that "[f]ive or more reported crashes of types susceptible to correction by a traffic control signal have occurred at the intersection within a 12-month period."[55] The State, like Mr. Stevens, was obviously relying on collision data from a different year than the year the traffic volume data it was relying on was collected (2009), because there were not five collisions in 2008-2009.
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> • Like Mr. Stevens, the State's Operational Review concluded that adequate trials of alternative safety measures had been implemented at the intersection.[56]
>
> • Like Mr. Stevens, the State's Operational Review used the 56% column in the MUTCD for determining the minimum traffic volumes necessary to warrant installation of a traffic signal.[57]
>
> • And like Mr. Stevens, the State's Operational Review concluded that Signal Warrant #7 (Crash Experience) under the MUTCD was satisfied.[58]

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[53] *Respondent's Brief* at p.30.

[54] *Compare* CP 664 & 666 (State's Operational Review) *with* CP 648-649 (Supplemental Declaration of Edward Stevens).

[55] CP 666.

[56] CP 666.

[57] "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 the minimum vehicular volume thresholds to 56%." CP 666. Mr. Seyfried, the State's engineer retained for litigation purposes, used the 70% column for determining the minimum traffic volume required. CP 141.

[58] CP 666.

It is disingenuous for Defendant State to argue on the one hand that Mr. Stevens' analysis is flawed, while on the other hand ignoring the fact that its own engineers used the same methodology and came to the same conclusions as Mr. Stevens. Likewise, the trial court erred in accepting the State's argument regarding Mr. Stevens' methodology when the State's own analysis supported Mr. Stevens' opinions. The evaluation of conflicting expert opinions is for the trier of fact. In this case, the trial court erred by weighing conflicting expert opinions on summary judgment and choosing one expert's opinion over the other.

### D. Plaintiffs satisfy the requirements for proximate cause.

#### 1. Cause in fact may be proved by inferences arising from circumstantial evidence.

A "proximate cause" is "a cause which in a direct sequence produces the event complained of and without which such event would not have happened."[59] There can be more than one proximate cause of an event.[60] By its very nature, the issue of proximate cause is ordinarily a question of fact for the jury.[61]

Circumstantial evidence is sufficient to establish a question of fact as to proximate cause if it affords room for reasonable minds to conclude that there is a greater probability that the conduct relied upon was the

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[59] WPI 15.01.

[60] WPI 15.01.

[61] *Bordynoski v. Bergner*, 97 Wn.2d 335, 340, 644 P.2d 1173 (1982).

proximate cause of the injury than there is that it was not.[62] The rationale underlying this rule was explained by our Supreme Court over 70 years ago:

> There are very few things in human affairs, and especially in litigation involving damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause.[63]

An example of a case applying this rule is *Raybell v. State*,[64] which involved the death of a motorist whose car left a state highway and plunged to the bottom of a canyon. There were no witnesses.[65] The evidence was that the decedent was generally unfamiliar with the highway in that area.[66] The plaintiff contended that there was inadequate warning of the narrowing of the roadway and the absence of a shoulder or guardrail.[67] At the outset, the court noted that "all elements of a negligence action, including proximate cause, may be established by

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[62] *Hernandez v. Western Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969); *Wise v. Hayes*, 58 Wn.2d 106, 108-109, 361 P.2d 171 (1961).
[63] *Nelson v. West Coast Dairy Co.*, 5 Wn.2d 284, 296-297, 105 P.2d 76 (1940).
[64] 6 Wn. App. 795, 496 P.2d 559 (1972).
[65] *Id.* at 796.
[66] *Id.* at 798.
[67] *Id.* at 799.

inferences based upon circumstantial evidence."[68] The court held that the circumstantial evidence was sufficient to support a verdict in favor of the plaintiff on the inadequate warnings claim:

> Defendant urges ... that where causation is based upon circumstantial evidence, the factual determination may not rest upon speculation and conjecture; and if there is nothing more substantial to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability, a jury is not permitted to speculate on how the accident occurred. [citations omitted]
>
> That rule is applicable only where the jury must speculate on how the accident occurred. While we cannot know with certainty why decedent's vehicle left the road, there is neither a presumption that he did so negligently nor that he committed suicide. [citation omitted] [T]here were substantial and not conjectural theories as to why his vehicle left the roadway and the outcome depended upon which circumstantial evidence the jury chose to believe. In our view, the rule contended for is not applicable here.[69]

A fact is not based upon speculation when the fact is based upon reasonable inferences drawn from admissible circumstantial evidence. When, as here, there are conflicting inferences that can be drawn from the evidence, it is for the ***trier of fact*** to draw from the evidence any reasonable inferences fairly deducible therefrom.[70]

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[68] *Id.* at 801; *see also Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978) (precise knowledge of how an accident occurred is not required to prove negligence; all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence).

[69] *Id.* at 803; *see also Schneider v. Yakima County,* 65 Wn.2d 352, 397 P.2d 411 (1964).

[70] *Harrison v. Whitt*, 40 Wn. App. 175, 177-179, 698 P.2d 87 (1985).

Defendant State's reliance on *Garcia v. State*, 161 Wn. App. 1, 270 P.3d 599 (2011), to argue that the Plaintiffs cannot show cause in fact[71] is misplaced. In *Garcia* the defendant driver admitted that she was not paying attention to traffic and did not notice that traffic had stopped for a pedestrian in a crosswalk.[72] Because she was not paying attention, the court held that the State's failure to ensure that an experimental roving eye device was properly functioning at the crosswalk was not a proximate cause of the pedestrian's death. For the same reason, the court also held that the City's failure to install a traffic signal at the intersection did not proximately cause the plaintiff's death. The court found that the roving eye and/or traffic signal would not have prevented the pedestrian from being hit because the driver was not paying attention to traffic conditions.

In this case, the SR 12/Williams Street intersection had overhead flashing red lights and a stop sign for drivers on Williams Street.[73] Unlike in the *Garcia* case, eyewitness testimony establishes that Benjamin Lamotte ***did*** stop at the flashing red light and stop sign before proceeding into the intersection.[74] This constitutes strong circumstantial evidence that, had there been a traffic signal or a four-way stop in place at the intersection, Mr. Lamotte would have stopped and would not have proceeded until it was his turn to enter the intersection.

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[71] *See Respondent's Brief* at 42-46.
[72] *Garcia*, 161 Wn. App. at 6.
[73] CP 204-205.
[74] CP 72, 184, 280-281.

As discussed in Appellants' Opening Brief,[75] human factors expert Richard Gill, Ph.D. identified several factors that made this intersection inherently dangerous and caused drivers on Williams Street to misjudge the time available for them to clear the intersection before traffic approaching on SR 12 arrived.[76] The collision history at the intersection supports Dr. Gill's analysis. Transportation engineer Edward Stevens noted that 70% (14 out of 20) of the collisions at the intersection between March 2003 and December 2009 were "enter at angle" crashes like the crash in this case.[77] An "enter at angle" crash is one where vehicles entering the intersection are required to grant the right of way to traffic coming from the right or left, but for some reason they fail to yield the right of way and cause a collision.[78] Like Dr. Gill, Mr. Stevens stated that the high percentage of "enter at angle" collisions at the subject intersection is most likely linked to drivers on Williams Street misjudging the speed of traffic on SR 12, and the time needed to make a safe entry before traffic on SR 12 enters the intersection.

The State claims that "there is no evidence that explains why Mr. Lamotte pulled out in front of the log truck, much less evidence that shows his decision was caused by any deficiency with or characteristic of the highway itself."[79] But the analysis by Dr. Gill and Mr. Stevens that the

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[75] *Appellants' Opening Brief* at pp.10-13.
[76] CP 442.
[77] CP 462-463.
[78] *Ibid.*
[79] *Respondent's Brief* at 47.

high percentage of "enter at angle" collisions is most likely due to the characteristics of the intersection causing drivers on Williams Street to misjudge the speed of traffic on SR 12, and the time needed to make a safe entry before traffic on SR 12 enters the intersection, explains what happened in this case and in the many other similar collisions.

While the State wants to blame Mr. Lamotte for this collision for failing to properly assess the distance and speed of the approaching truck, there can be more than one proximate cause of a collision.[80] The State's position that Mr. Lamotte just pulled out in front of an approaching truck for no reason defies common sense. Mr. Lamotte was not drunk, and there is no evidence that Mr. Lamotte intended to commit suicide.[81] The most likely explanation based on the evidence is that the distance Mr. Lamotte needed to travel to clear the intersection was too great, given the speed of the oncoming log truck on the highway. When this type of collision keeps happening, the obvious conclusion from the evidence for the trier of fact is that the lack of traffic control at the intersection played a direct role in this collision as well.

As discussed above, causation is generally a question of fact to be decided by the trier of fact, not the trial court on summary judgment. In making this decision, the trier of fact may consider both direct and circumstantial evidence. Unlike in *Garcia*, the direct and circumstantial

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[80] WPI 15.01.

[81] *See Raybell*, 6 Wn. App. at 803 ("While we cannot know with certainty why decedent's vehicle left the road, there is neither a presumption that he did so negligently nor that he committed suicide.").

evidence in this case is sufficient to establish a question of fact as to proximate cause that precludes summary judgment.

### 2. Legal cause exists in this case.

In *Lowman v. Wilbur*, our Supreme Court clarified the interrelationship between questions of duty and legal cause in the context of a governmental road authority's duty to provide reasonably safe roadways.[82] The Supreme Court held that if a jury concludes that a plaintiff suffered injuries within the scope of the duty owed to the plaintiff -- i.e., that the plaintiff's injury was not too remote -- then liability is not foreclosed on the basis of legal cause.[83] Here, as the several prior similar collisions demonstrate, the collision that occurred in this case was foreseeable and within the scope of the State's duty to provide a reasonably safe road. The State itself determined that a traffic signal was needed at this intersection. Under *Lowman*, legal cause is satisfied in this case.

## E. Under Washington law, a Personal Representative is entitled to recover damages for the decedent's fear of impending death.

Defendant State acknowledges that a decedent's estate is entitled to recover for pre-death pain and suffering consciously experienced by a decedent.[84] Defendant State does not dispute that Washington law permits recovery for a decedent's fear of impending death as part of a decedent's

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[82] *Id.* at 167.

[83] *Id.* at 172.

[84] *Respondent's Brief* at p.47.

mental suffering before death.[85] Here, as in *Bingaman v. Grays Harbor Community Hospital,* 103 Wn.2d 831, 699 P.2d 1230 (1985) and *Chapple v. Ganger*, 851 F. Supp. 1481, 1487 (E.D. Wash. 1994), there is sufficient circumstantial evidence for a jury to find that Ryan Rashoff would have been consciously aware of his impending death, and summary judgment was therefore improper.

## III. CONCLUSION

Defendant State cannot escape the fact that its own employees and records used the same methodology and reached the same conclusion as Plaintiffs' transportation engineering expert Edward Stevens. The fact that the State later hired a forensic expert who disagreed with Mr. Stevens' analysis and the State's own analysis simply demonstrates that there are questions of material fact and that summary judgment was improperly granted. This Court should reverse the summary judgment in favor of Defendant State and remand for trial.

Respectfully submitted this 3rd day of October, 2014.

Keith L. Kessler, WSBA #4720
Garth L. Jones, WSBA #14795
Ray W. Kahler, WSBA #26171
James M.B. Buzzard, WSBA #33555
Counsel for Appellants Rashoff

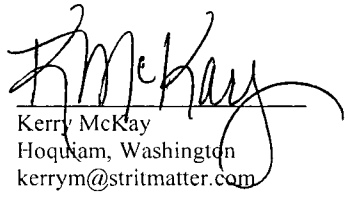
[85] *Bingaman v. Grays Harbor Community Hospital,* 103 Wn.2d 831, 837, 699 P.2d 1230 (1985).

CERTIFICATE OF SERVICE

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

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

DATED: October 3, 2014.



Kerry McKay
Hoquiam, Washington
kerrym@stritmatter.com