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NO. 62838-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

XIAO PING CHEN, individually and as
Personal Representative of RUN SEN LIU,
an incapacitated person, and YU TING LIU,
a single person,

Appellants,

v.

THE CITY OF SEATTLE; and PETER
WALTON BROWN and JANE DOE
BROWN; and JOHN AND JANE DOES 1-10,
jointly and individually,

Respondents.

BRIEF OF APPELLANTS LIU

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A. INTRODUCTION

Run Sen Liu (“Liu”) was struck by a car while he was in a crosswalk on South Jackson Street in Seattle. He suffered grievous injuries and was in a coma for two years before ultimately succumbing to his injuries. Liu’s widow, Xiao Ping Chen (“Chen”) sued the City of Seattle (“City”) on Liu’s behalf, alleging that the City negligently breached its duty to design and maintain the roadway in a reasonably safe condition. Chen presented evidence that the City was aware of the dangers posed by the intersection where Liu was struck, and that there had been numerous pedestrian injuries at that intersection. Three experts stated that the crosswalk at the intersection did not meet engineering safety standards or the City’s own standards governing traffic safety and that the intersection was inherently unsafe. Nevertheless, the trial court, the Honorable Charles Mertel, granted the City’s motion for summary judgment and denied Chen’s motion for reconsideration, holding the City breached no duty to Liu as a matter of law. The trial court erred in dismissing Chen’s claim where questions of material fact regarding the City’s breach of its duty to design and maintain the road in a safe condition existed.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting the City's motion for summary judgment.

2. The trial court erred in denying Chen's motion for reconsideration.

(2) Issue Pertaining to the Assignment of Error

Did the trial court err in dismissing Liu's negligence claim as a matter of law where the City has a duty to keep streets in a reasonably safe condition for ordinary travel, three experts testified that the crosswalk in which Liu was struck did not meet engineering and safety standards and was not safe for pedestrians travel, the City was aware of the dangers presented by the crosswalk, and the question of whether a defendant breached its duty of reasonable care is generally one for a jury to decide? (Assignment of Error Numbers 1, 2)

C. STATEMENT OF THE CASE

Run Sen Liu was struck by a car as he made his way across South Jackson Street in a marked crosswalk one rainy evening in February 2007. CP 29-36, 994-95. Liu was knocked unconscious and transported to Harborview Medical Center where he was diagnosed with traumatic brain

injury and multiple broken bones. CP 39, 897. Liu remained in a coma for 2 years until he died. CP 1087.¹

The intersection where Liu was struck had a significant history of pedestrian accidents and near misses.² Every street west of 10th on South Jackson has a traffic signal, and the first street east of South Jackson also has a light. CP 1053. And every intersection to the south (all the way to Dearborn) and to the west (all the way to 5th) is controlled by a 4-way stop sign. CP 1053-54. Thus, the intersection where Mr. Liu was struck is an “anomaly” for the area. CP 1054. There was no signal or other traffic control device to stop traffic for pedestrians at the crosswalk. CP 803-20, 977-78; Ex. 41 A at ¶ 15. On average, 15,817 cars travel through South Jackson and 10th in a 24 hour period. CP 623, 654.

The posted speed was 30 miles per hour, but studies conducted by the City before Mr. Liu’s accident established 85% of the cars drove that speed or faster. CP 411, 787-88, 802, 977. When speeds of this magnitude exist, pedestrians are more likely to suffer fatal injuries. CP 536, 544. Hundreds of pedestrians also cross South Jackson at 10th Avenue every day. CP 593, 595, 620. Those attempting to cross South

¹ Mr. Liu died after this appeal was filed.

² For the Court’s convenience, an arial photograph of the intersection is attached as Appendix A. CP 204. The photograph shows the crosswalk across the 5 lanes of traffic on South Jackson, and the adjacent Pacific Rim building.

Jackson must traverse 5 lanes of traffic. CP 978. It takes the average pedestrian 19 seconds to cross the 56.3 foot intersection. CP 979. The time it takes a pedestrian to cross is referred to as a “gap.” Ex. 41 A at ¶¶ 17, 18, 19. Traffic engineers analyze the number of gaps in traffic flow to determine whether pedestrians have adequate opportunity to cross an intersection. *Id.* A pedestrian attempting to cross a major street like Jackson must wait for a gap in traffic to make it safely to the other side. *Id.* If traffic volumes are low, adequate gaps will appear and the pedestrian will have an opportunity to cross with little or no delay. *Id.* As traffic volumes increase, the number of gaps will decrease, increasing the delay or waiting time for pedestrians attempting to cross. *Id.* When the delay becomes excessive, pedestrians begin to take chances, exposing themselves to possible injury or death. *Id.* In such situations, it is necessary to introduce measures to reduce crossing delays. *Id.* Under generally accepted engineering standards, crosswalk locations require 60 gaps per hour. *Id.*

Gap studies conducted by the City before the collision showed that pedestrians had very few opportunities to cross South Jackson without encountering heavy traffic, *i.e.*, only 6-10 gaps per hour. CP 785. Gap studies conducted by one of Chen’s experts, Edward Stevens, showed only

3 to 29 gaps per hour, both before and after Mr. Liu's accident. Ex. 41 A at ¶ 19.³

The City participated in and adopted the findings of a study conducted 7 years before Liu was struck. CP 508-09, 525-60, 562-63, 740-41. The study evaluated marked crosswalks at uncontrolled locations and offered guidelines for their use. CP 531. The study found that "Pedestrians are legitimate users of the transportation system, and they should, therefore, be able to use the system safely and without unreasonable delay. Pedestrians have a right to cross roads safely and, therefore, planners and engineers have a professional responsibility to plan, design, and install safe crossing facilities." *Id.* "In all cases, the final design must accomplish the goal of getting pedestrians across the road safely." *Id.*

Perhaps most notably, the study concluded that marked crosswalks should *not* be used under the following conditions:

1. Where the speed limit exceeds 40 miles per hour.
2. On a roadway with four or more lanes *without a raised median or crossing island* that has (or will soon have) an ADT⁴ of 12,000 or greater.

³ This means the traffic problem was between two and twenty times the acceptable magnitude.

⁴ "ADT" means average daily traffic count.

3. On a roadway with four or more lanes *with a raised median or crossing island* that has (or will soon have) an ADT of 15,000 or greater.

CP 557 (emphasis in original).

In the 5 years before Liu was hit, there were 8 pedestrian accidents at 10th and Jackson. CP 1042.⁵

The City installed a refuge island at the location in February 1999 as a pedestrian safety measure. CP 627-28, 630, 632, 1049. The refuge island provided a place for pedestrians to wait in the center of the street while waiting for a gap in traffic in order to safely cross the second half of the street. CP 1049. The island both reduced the size of the gap necessary for a pedestrian to cross Jackson Street and increased the number of adequate gaps available for crossing without confronting an oncoming automobile. *Id.* The City removed the island 2 and a half years later at the request of the owner of the Pacific Rim Building which is located at the intersection. CP 365, 374, 627-28, 630, 632, 638, 650, 1049; Ex. 41 A at ¶ 25. When the island was removed, pedestrians were again forced to cross all 5 lanes of South Jackson Street without a signal and without the necessary gaps in the traffic stream. CP 1049-50. Had the City not

⁵ The incidents occurred on 1/30/02; 6/7/02; 11/6/02; 6/7/02; 1/21/03; 11/8/04; 12/7/04; 2/8/07; CP 1042. Additional pedestrian accidents at 10th and Jackson are outlined in the deposition of Cal Agatsuma, the City employee who collected the history. CP 814, 821-28, 866, 870-72, 874-95.

removed the island, pedestrians would have had more than 800 opportunities per hour to cross Jackson Street without encountering traffic. Ex. 41 A at ¶ 13(j). The City promised to implement a pedestrian safety plan within a reasonable time, but no effective plan was ever carried out. CP 640, 652, 659, 666, 673. The City did install a pedestrian curb bulb and flashing beacons in 2003, at a cost \$55,000.⁶ But neither the curb bulb nor the flashing beacons provided pedestrians with the gaps necessary to safely cross Jackson Street. CP 514, 568, 1051; Ex. 41 A at ¶ 19.

Pedestrian-vehicle accidents occurred at 10th and Jackson both before and after the island was removed, but there were no reported accidents or problems at that spot during the time the island was in place. Ex. 41 A at ¶ 13(f). After the island was removed, a woman was struck and killed in the same crosswalk in June, 2002. *Id.* at ¶¶ 6, 13. That case resulted in litigation against the City. *Timing Qian v. City of Seattle, Cause No. 04-2-00305-9 SEA. Id.* A City employee in charge of pedestrian safety at that time was deposed in the *Qian* case in November,

⁶ A curb bulb is merely an extension of the sidewalk into the street; standard curb bulbs are 6 feet in width. The curb bulb only shortened the crossing distance for pedestrians by 6 feet. Thus, despite the installation of the curb bulb, South Jackson was still 5 lanes and more than 56 feet wide. Ex. 41 A at ¶ 19.

2004, and presented a history of accidents and complaints about the intersection. CP 320, 346-468.

That deposition was not the first time the City was made aware of the danger posed by the South Jackson Street intersection. In 1992, numerous citizens from the International District sent a petition to the City asking it to solve the difficulties pedestrians had trying to cross South Jackson. CP 583-86. In the years that followed, citizens made numerous requests for a traffic signal. CP 588, 591, 611, 615-16, 632, 645, 658-60, 697, 699, 701-02. The City declined to put in a crosswalk signal, asserting that a signal would give pedestrians a “false sense of security” and interfere with the smooth movement of traffic.⁷ CP 642-43.

By early 2000, the City was aware that marked crosswalks were not advisable across multiple lanes of traffic at non-signalized locations with an ADT of more than 12,000 cars a day and that the subject crosswalk fell into that category. CP 527, 538, 540, 550, 562-63, 654-56.

⁷ The City’s Signal Operations Manager received an email from a citizen stating that she had witnessed an elderly woman struck and killed by a car in the crosswalk at Jackson and 10th, that she had seen three people struck by vehicles on Jackson Street, and expressing the concern that the City believed “the smooth flow of traffic is more important than the lives of our senior citizens.” CP 642. The Signal Operations Manager replied that “... it may feel uncomfortable to a pedestrian to cross at that location, but the added ‘comfort’ of a traffic signal would be offset by pedestrians and motorists exhibiting less caution. That is to say: “at a signalized intersection, pedestrians and motorists may experience a false sense of security and therefore take more chances than they would in an environment where they feel a need to be vigilant.” CP 642-43.

(As noted above, more than 15 thousand vehicles pass through the intersection every 24 hours. CP 654.)

According to Seattle Department of Transportation engineer Sandra Woods, the marked crosswalk was not very visible to motorists, and she herself saw someone run to avoid being hit. CP 514, 606. In January, 2003, the City installed a flashing beacon which the City's Senior Transportation planner later acknowledged had very little safety value and was not effective in reducing pedestrian crashes. CP 471, 488-89, 506-07, 663.

Although the City acknowledged in an e-mail to an International District community group that the dangerous crosswalk had been on its "radar screen" since August, 2001, it did not decide to remove the crosswalk until 2006. CP 666-67, 1003. It did not actually remove the markings from the crosswalk until September, 2008 – some seven months after Liu was struck by a car. CP 521, 781, 783. When the City removed the marked crosswalk, it also removed the overhead sign and flashing beacon. CP 781. In a flyer the City circulated to the public about its decision to remove the crosswalk, the City said:

SDOT has completed a technical analysis of the unsignalized marked crosswalk at S Jackson Street and 10th Avenue S. This crosswalk no longer meets city safety guidelines and will be removed.

CP 782. The “guidelines” referred to had been adopted in February, 2000, 7 years before Liu was struck. CP 486-87, 550, 562-63, 654, 733-35, 742.

Three experts submitted reports on Chen’s behalf showing that the crosswalk violated engineering standards and was not reasonably safe for pedestrians’ ordinary travel across South Jackson Street. Edward Stevens is a registered professional engineer in Civil Engineering in the state of Washington. Ex. 41 A at ¶¶ 1, 2. He first reviewed the site 5 years before the subject crash following the fatal Qian accident mentioned above. *Id.* at ¶ 6. At that time, he determined the site did not meet engineering standards due to the lack of adequate gaps in the traffic flow and the lack of adequate treatments to assist pedestrians across the street. *Id.* at ¶ 12. He advised the City of that opinion before the subject crash. *Id.* at ¶ 13.

Stevens conducted an additional investigation and site review after Liu’s accident. *Id.* at ¶ 14. His additional analysis confirmed that the intersection still did not meet engineering standards due to the lack of adequate gaps and appropriate treatments for pedestrians. *Id.* He concluded that the marked crosswalk at 10th and Jackson was inherently dangerous for pedestrians and that the City had failed to exercise ordinary care and proper engineering judgment in the use of traffic controls at the crosswalk location. *Id.*

In sum, he found that the crosswalk where Liu was struck was not safe for public travel due to the City's failure to control traffic it knew to be traveling in excess of the speed limit, and failing to provide necessary safety features to reasonably alleviate the identified hazards. *Id.* at ¶ 24. The hazardous conditions at the roadway created a serious danger a pedestrian would be struck by a vehicle, especially at night when it is difficult to see pedestrians. *Id.* It was his expert opinion that conditions at the intersection required the City to install a pedestrian activated control signal. *Id.* at ¶ 14.

Another transportation engineer, William Haro, also concluded that the unprotected crosswalk, which extended across 5 busy lanes of travel, constituted a breach of sound engineering practices as well as the standard of care in the industry. CP 1046. Haro found that by at least 2005, the City knew, or should have known from vehicle counts and a history of pedestrian accidents, that the crosswalk at Jackson and 10th met the requirements for the installation of a traffic signal as laid out in the Manual on Uniform Traffic Control Devices ("MUTCD"). CP 1053.

According to Haro, the City created an unsafe condition for pedestrians when it removed the safety island it had previously installed. CP 1049-50. After the island was removed, the site was once again unsafe

for pedestrians who were forced to cross the full width of Jackson Street without the necessary gaps in the traffic. *Id.*

Haro concluded that the City knew from its investigations that the crosswalk failed to meet its own standards for marked crosswalks and that a number of pedestrians, other than Mr. Liu, had been struck or nearly struck after the island was removed. CP 1052-53. He, too, concluded the crosswalk was not reasonably safe for ordinary travel at the time of Liu's accident.

The City of Seattle's Department of Transportation failed to follow industry standards as well as the standards of the City of Seattle in the method they continued to operate the unsafe crosswalk at Jackson Street and 10th Avenue for years after knowing that this was an unsafe crossing location, and while they knew there were several low cost, easy to implement improvements including removing the crosswalk or protecting it with a pedestrian actuated traffic signal that would have prevented Mr. Liu's accident on 2/11/08.

CP 1057.

A human factors expert, Gerson Alexander, also investigated the site, both before and after the subject collision. CP 977. Like Stevens and Haro, Alexander concluded that the intersection was inherently dangerous for pedestrians due to the width of the road and the speed of vehicles traveling on South Jackson. CP 981. He found that the intersection of South Jackson and 10th Avenue was not reasonably safe for pedestrian

travel because pedestrians could not accurately gauge the speed and distance of approaching vehicles, and that City engineers should have taken action to remedy the problem. CP 981.

Chen filed the present action against the City for its failure to design and maintain the road in a reasonably safe condition for ordinary travel. CP 5, 13. On October 24, 2008, the City moved for summary judgment, arguing it did not breach a duty as a matter of law. CP 271-318. The City did not argue the issue of "proximate cause." CP 272. The trial court granted the City's motion, dismissing all of Chen's claims against the City. CP 1074-76. The court subsequently denied Chen's motion for reconsideration. CP 1096-97. This appeal timely follows. CP 1098-114.

D. SUMMARY OF ARGUMENT

This case involves numerous issues of material fact which should be presented to a trier of fact, including whether the intersection was reasonably safe for ordinary travel; whether the intersection was inherently dangerous or misleading; and whether the City's efforts to take corrective action were adequate. Questions of fact can be determined as a matter of law only when reasonable minds can reach but one conclusion. If reasonable minds can differ over the facts, summary judgment is not appropriate.

Chen presented an abundance of evidence to support her argument that the intersection was dangerous and the City breached its duty to provide Liu with safe passage through the intersection. Thus, the trial court erred in dismissing Chen's claims on summary judgment.

E. ARGUMENT

(1) Standard of Review

This Court reviews summary judgment de novo, engaging in the same inquiry as the trial court, viewing the facts, and all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Chen is the non-moving party; all facts and reasonable inferences from those facts must be viewed in the light most favorable to her. *Id.* Summary judgment is appropriate only where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Issues of negligence are not generally susceptible to summary judgment. *Unger v. Cauchon*, 118 Wn. App. 165, 173, 73 P.3d 1005 (2003).

To defeat summary judgment in a negligence case, the plaintiff must show a genuine issue of material fact as to each element – duty, breach of duty, proximate cause, and damages. *Lynn v. Labor Ready, Inc.*,

136 Wn. App. 295, 306, 151 P.3d 201 (2006). Breach of duty is ordinarily a factual question. If there is any evidence tending to show that the City failed to comply with the required standard of care, then the question of negligence must be left to the jury. *Walker v. King County Metro*, 126 Wn. App. 904, 908, 109 P.3d 836 (2005). Similarly, whether a roadway is inherently dangerous or misleading is generally a question of fact. *Owen*, 153 Wn.2d at 1223-24. Likewise, the adequacy of the City's attempt to take corrective action is generally a question of fact. *Id.* The question of whether a plaintiff's injury was foreseeable, thus creating a duty of care on the part of the defendant, is generally one for a jury to resolve. *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Questions of fact can be determined as a matter of law only when reasonable minds can reach but one conclusion. *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005). If reasonable minds can differ over the facts, summary judgment is not appropriate. *Id.* The nonmoving party seeking to show that a jury could find in his or her favor bears a burden only of production, not persuasion, and this burden may be proved through direct or circumstantial evidence. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 149, 94 P.3d 930, 936 (2004).

(2) The Trial Court Erred by Granting the City's Motion for Summary Judgment

The present case is controlled on all points by our Supreme Court's holding in *Owen*, the Court's most recent and definitive explication of a municipality's duty to maintain its roads in a condition safe for ordinary travel. In *Owen*, Glenn and Margie Nelson were trapped in their car on a railroad crossing due to a traffic jam on South 180th Street in Tukwila. *Owen*, 153 Wn.2d at 784. When the Nelsons realized that a train was approaching, they tried unsuccessfully to get off the tracks. *Id.* at 784-85. The train struck and killed them. *Id.* at 785.

Owen, the Nelsons' personal representative, sued the City of Tukwila, alleging negligence. *Id.* Tukwila moved for summary judgment and the trial court granted the motion and issued an order dismissing all Owen's claims against the city. *Id.* This Court reversed the order dismissing Owen's claims. *Id.* at 786.

After engaging in a broad review of Washington case law, our Supreme Court affirmed this Court, stating that the issue before the court was whether Owen had produced sufficient evidence of Tukwila's negligence to survive summary judgment. *Id.* The Court reiterated the duty that municipalities owe travelers to eliminate any inherently dangerous or misleading condition on a road as part of its duty to provide

reasonably safe roads for the citizens of Washington. *Id.* at 786-88. The Court held that the absence of available remedial measures, as identified by Owen, in combination with the particular conditions at the railroad crossing, including the volume of vehicle and rail traffic, the presence of traffic signals that caused vehicles to halt on multiple sets of tracks, and the alleged limited visibility of westbound drivers, provided evidence from which a reasonable jury could conclude the roadway was not maintained in a condition reasonably safe for ordinary travel or was inherently dangerous or misleading, requiring warnings or elimination of the particular dangers present. *Owen*, 153 Wn.2d at 790. Because reasonable minds could differ as to whether the roadway was reasonably safe for ordinary travel or inherently dangerous, and whether appropriate corrective action had been taken, questions of material fact existed and summary judgment was inappropriate. *Id.* Under *Owen*, the trial court in the present case erred in dismissing Chen's claims on summary judgment.

The elements of negligence are duty, breach, causation, and injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Since the Washington State Legislature waived sovereign immunity for municipalities, municipalities are generally held to the same negligence standards as private parties. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 731, 927 P.2d 240 (1996). Implicitly, the statutory waiver of sovereign

immunity functions as a promise that the State and its agents will use reasonable care while performing its duties at the risk of incurring liability. *Joyce*, 155 Wn.2d at 309.

The MUTCD developed by the United States Department of Transportation, has been adopted by Washington's Department of Transportation, and provides the legal standards for street and highway traffic control devices and their placement in Washington. RCW 47.36.020; WAC 468-95-010; *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 786 n.1, 108 P.3d 1220 (2005). Washington cases uniformly acknowledge that failure to conform to the MUTCD standards can be evidence of negligence.⁸ *Otis Holwegner Trucking v. Moser*, 72 Wn. App. 114, 122, 863 P.2d 609 (1993); *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 855, 751 P.2d 854 (1988).

It is well-established that the City owes a duty to all travelers to maintain its roadways in a condition safe for ordinary travel. *Owen*, 153 Wn.2d at 786-87. The City's duty to eliminate an inherently dangerous or misleading condition is part of its overarching duty to provide reasonably safe roads. *Id.* at 788. The inherently dangerous formulation recognizes

⁸ This Court held that the MUTCD imposed duties upon a municipality in *Owen v. Burlington N. Santa Fe R.R., Inc.*, 114 Wn. App. 227, 234-35, 56 P.3d 1006 (2002).

that as the danger becomes greater, the City is required to exercise caution commensurate with it. *Id.* at 788.

In the present case, whether the City maintained the intersection at South Jackson Street in a condition safe for ordinary travel is a question of material fact.⁹ Similarly, whether a condition is inherently dangerous is generally a question of fact, as is the adequacy of the City's attempt to take corrective action. *Id.* at 788. Chen presented ample evidence that the crosswalk was inherently dangerous and the City breached its duty to maintain the road in a reasonably safe condition for ordinary travel.

Chen presented ample evidence of the City's breach of duty. The City installed a marked crosswalk across 5 busy lanes of traffic at an uncontrolled intersection which did not provide adequate gaps in the traffic stream. CP 1046-48, 1056-57; Ex. 41 A at ¶¶ 12, 13, 14, 24. The installation violated the study previously adopted by the City which concluded that crosswalks should not be used on a roadway with four or more lanes without a raised median or crossing island that has (or will soon have) an ADT of 12,000 or greater. CP 1042. Sandra Woods of the City's Department of Transportation recommended the installation of a pedestrian refuge or an overhead sign, which according to the MUTCD,

⁹ A material fact is one that affects the outcome of the litigation. *Geer v. Tonnon*, 137 Wn. App. 838, 843, 155 P.3d 163 (2007), *review denied*, 162 Wn.2d 1018 (2008).

“should only be used at locations that are unusually hazardous or at locations where pedestrian crossing activity is not readily apparent.” CP 513, 554, 606. The City received numerous complaints from pedestrians about how difficult the intersection was to cross. CP 583-86, 588, 591, 611, 615-16, 632, 645, 658-60, 697, 699, 701-02. The City installed a traffic island in February, 1999. CP 364, 627-30; Ex. 41 A at p. 11. Unfortunately, it removed the island two and a half years later to accommodate left turning drivers. CP 650, 652. Removing the island put the City back in violation of the rule that marked crosswalks should not be used on a roadway with four or more lanes without a raised median or crossing island that has an ADT of 12,000 or greater. CP 557.

When the City removed the island, it was aware that marked crosswalks at uncontrolled intersections were not advisable across multiple lanes and when ADT exceeded 12,000 vehicles. CP 527, 548-49, 550, 557, 562-63. It was also aware that this particular uncontrolled intersection had an ADT of nearly 16,000. CP 623. The removal of the island created an inherently dangerous roadway for pedestrian travel because there were not sufficient gaps to safely cross Jackson Street, and the City knew the gaps were not adequate. *See* CP 784, 1049-50.

Numerous pedestrian accidents occurred at or near the intersection, and the City knew about those accidents years before Liu’s accident; in

fact, two years before that accident, the City employee in charge of pedestrian safety was shown the evidence documenting those accidents in connection with a previous fatal accident at the same intersection. CP 320, 346, *et seq.*

A senior transportation planner for the City with the title “Pedestrian/Bicycle Coordinator” acknowledged that the City had a policy to not put up flashing beacons over marked crosswalks, adding that he did not consider flashing beacons an effective safety measure, and that flashing beacons have no statistical effect on accident rates. CP 471, 488-89. The additional treatments (flashing beacons, overhead signs, curb bulbs) were implemented in 2002 and 2003, after the City knew that the marked crosswalk at issue did not comply with its own guidelines. CP 527, 562-63, 654-56, 704, 714, 723, 732-48.

After spending tens of thousands of dollars on ineffective treatments, the City removed the crosswalk. CP 1049-50. It made the decision to remove the crosswalk before the subject accident, because the crosswalk did not meet the City’s own safety guidelines. CP 581, 1003. It did not, however, actually remove the crosswalk until after Liu’s accident. CP 521, 781, 783.

Chen presented reports by three expert witnesses, all of whom stated that the crosswalk was not reasonably safe for pedestrians’ ordinary

travel across South Jackson Street and/or violated engineering standards. One of the experts opined that the crosswalk was not in compliance with the MUTCD. CP 1053. Failure to conform to the MUTCD standards can be evidence of negligence. *Otis Holwegner Trucking*, 72 Wn. App. at 122.

Chen, as the nonmoving party, bears the burden of production, not persuasion. *Riehl*, 152 Wn.2d at 149. If there is *any* evidence showing the City failed to comply with the required standard of care, the question of negligence must be left to the jury. *Walker*, 126 Wn. App. at 908. Chen produced more than ample evidence to survive the City's motion for summary judgment. Under *Owen*, it is for the finder of fact to resolve the factual issues at play.

It is instructive to review two cases the City relied on in seeking summary judgment, and which were quoted extensively in *Owen*. Neither of those cases, both involving suits alleging negligent design and maintenance of roadways, support a grant of summary judgment in this case.

The plaintiff in *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2d 886 (1995) brought suit after he was injured when the car in which he was a passenger drove off a road into a ditch. *Id.* at 700. Ruff filed an action against King County for negligence in breaching its duty to provide

reasonably safe roads and highways. *Id.* at 701. The court granted the county's motion for summary judgment. *Id.* at 702. Our Supreme Court affirmed summary judgment, noting that the *undisputed* evidence established that the surface of the street was in excellent condition and the markings, signage, and width of the road were appropriate and standard. *Id.* at 706-07. None of the experts had testified that the roadway was inherently dangerous or deceptive. *Id.* Moreover, while the experts stated that a guardrail would have redirected the vehicle, no expert opined that a guardrail would have prevented injury. *Id.* Based on the evidence, the court concluded that no issue of material fact existed regarding the condition of the roadway. *Id.*

The differences between *Ruff* and the present case could not be more stark. The evidence in *Ruff* regarding the condition and signage on the road was undisputed. That cannot be said here. Here, there is a tremendous amount of evidence that the conditions on South Jackson Street were not safe and the signage and markings were not adequate. Where none of the experts in *Ruff* opined that the roadway was inherently dangerous or deceptive, all three of Chen's experts came to the contrary conclusion – that the crosswalk violated engineering standards and was not reasonably safe for pedestrians' ordinary travel. Indeed, one of the experts in *Ruff*, Edward Stevens, also offered expert testimony in the

present case. In contrast to the present case, Stevens asserted in *Ruff* that the roadway provided clear and positive guidance for a driver. *Id.* at 707. Although he later stated in a deposition that the roadway constituted an unreasonably dangerous condition to the extent that “all roadways can be hazardous,” his statement regarding the general hazard in *Ruff* is far removed from the extensive and specific findings he presented showing that the crosswalk at 10th and Jackson was inherently dangerous for pedestrians and that the City had failed to exercise ordinary care and proper engineering judgment in the use of traffic controls at the crosswalk location. Ex. 41 A.

The court in *Ruff* upheld summary judgment for the county precisely because there were no issues of material fact. Here, numerous issues of material fact should have prevented the trial court from granting the City summary judgment.

In *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), the court clarified that a city’s duty to build and maintain its roads in a condition reasonably safe for travel is not limited only to those using the roads and highways in a non-negligent manner. *Id.* at 249. Keller was a motorcyclist who was injured in a collision with a car in an intersection which was controlled by stop signs at only one, not both roads. *Id.* at 240. Keller sued the City of Spokane for negligence, alleging that the

intersection was dangerous, that the city was aware of the danger and had acted negligently in not adding stop signs so as to render the intersection a four-way stop. *Id.* at 240. At trial, Keller presented evidence that the intersection was dangerous and that many accidents had occurred there. *Id.* Spokane traffic engineers testified that the intersection was dangerous and that a four-way stop was necessary. *Id.* Keller also presented evidence that citizens complained to Spokane about the intersection and had petitioned Spokane for a stop light or four-way stop sign prior to the accident. *Id.* Keller also established that both the national guidelines found in the MUTCD and Spokane's own internal standards suggested the need for a four-way stop at the intersection. *Id.* at 240-41. Finally, Keller showed that the average speed through the intersection was 40 to 50 miles per hour and argued that that in itself suggested the need for a four-way stop. *Id.*

The issue in *Keller* was the scope of the city's duty, and whether a jury instruction properly reflected that duty. *Id.* at 244, 249-51. There were no evidentiary issues at play in *Keller*, and no summary judgment. The case proceeded to trial where Keller produced evidence showing that the intersection where he was injured was dangerous and the site of numerous accidents, that traffic engineers considered it dangerous, that citizens had complained about the intersection and petitioned for a stop

light, and that the intersection did not comply with the MUTCD and the city's own standards. Evidence, in other words, of the same nature as the evidence presented to the trial court in the present case. Keller's case was not dismissed on summary judgment. It proceeded to trial where it was tried on the merits. Chen should likewise have the opportunity to present her evidence to a jury.

As stated above, this case is controlled by *Owen*, which wove the holdings in *Ruff* and *Keller* throughout its analysis. As in *Owen*, whether the intersection at 10th and Jackson was safe for ordinary travel is a question of fact. *Owen*, 153 Wn.2d at 788. If reasonable minds can differ over the facts, the question is one for the trier of fact, and summary judgment is not appropriate. *Id.* Whether the intersection was inherently dangerous is likewise a question of fact, not amenable to summary judgment, as is the adequacy of the City's attempts to take corrective action. *Owen*, 153 Wn.2d at 788-89. If the intersection was inherently dangerous or misleading, then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances. *Owen*, 153 Wn.2d 789-90. Chen provided ample evidence from which a reasonable jury could conclude the intersection was not maintained in a condition reasonably safe for ordinary travel or was inherently dangerous

or misleading, requiring warnings or elimination of the particular dangers present. *Owen*, 153 Wn.2d 790.

Because reasonable minds could differ as to whether the intersection was reasonably safe for ordinary travel, inherently dangerous, or misleading, and whether the City took appropriate corrective action, questions of material fact exist and summary judgment was not appropriate. *Id.*

(3) The Trial Court Erred in Denying Chen's Motion for Reconsideration

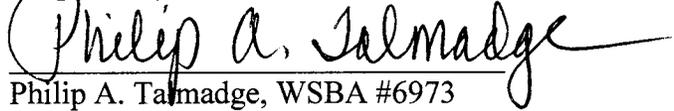
For the reasons outlined above, the trial court also erred in denying Chen's motion for reconsideration.

F. CONCLUSION

The trial court erred in granting the City's motion for summary judgment. Reasonable minds may differ as to whether the intersection of 10th and Jackson was reasonably safe for ordinary travel, or inherently dangerous, and whether the City had taken appropriate corrective action. The City owed Liu a duty of care. Breach of that duty is a question of fact. Summary judgment was not appropriate. This Court should reverse the trial court's judgment and remand the case to the trial court for trial on the merits. Costs on appeal should be awarded to Chen.

DATED this 4th day of June, 2009.

Respectfully submitted,



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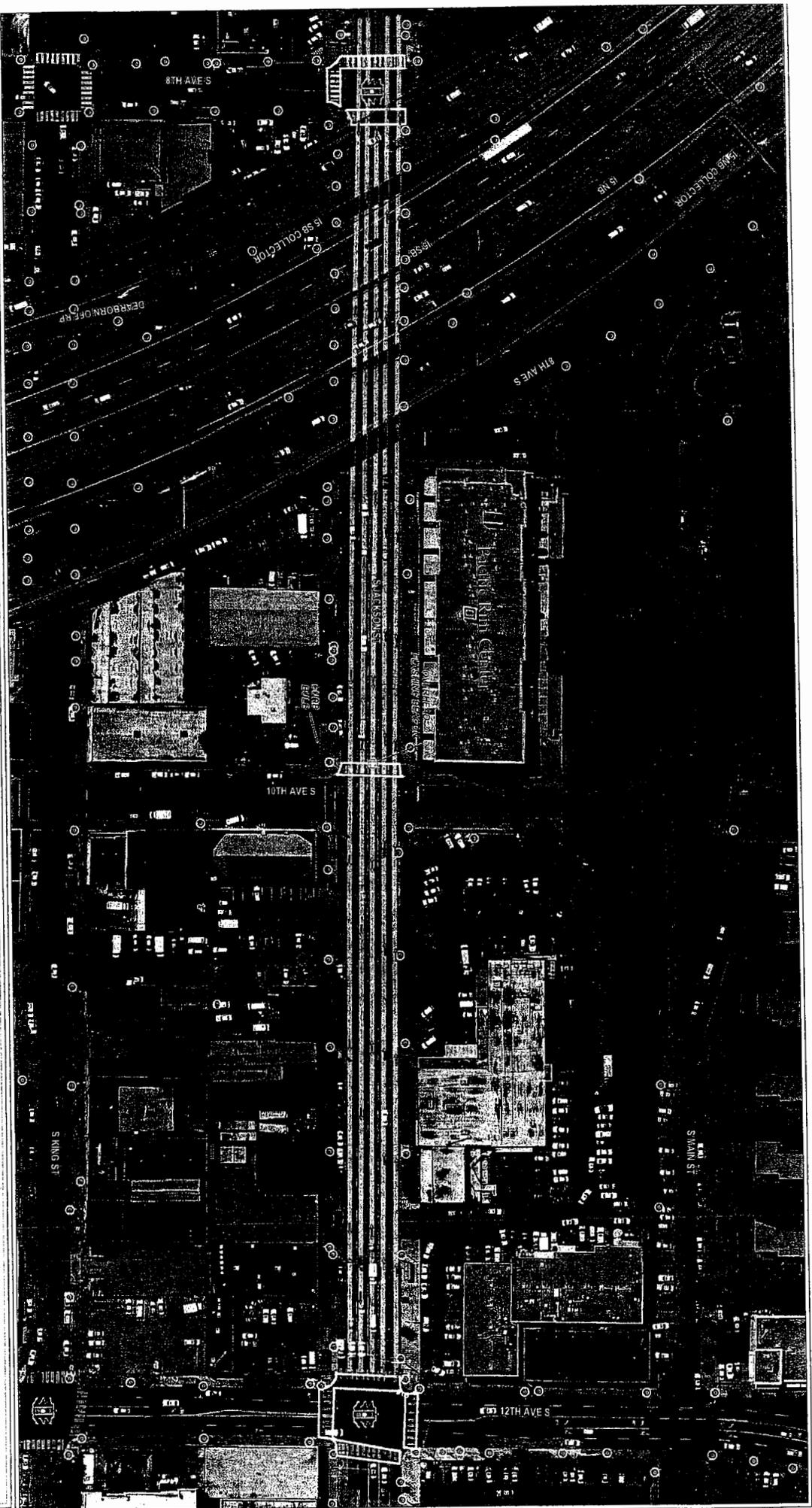
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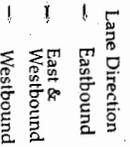
APPENDIX

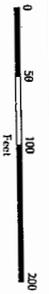


South Jackson Street

Between 10th Ave. S. & 12th Ave. S.

Chen v. City of Seattle

-  Traffic Signals
-  Point of Interest
-  Marked Crosswalks
-  Seattle City Light Poles
-  Lane Direction
 - Eastbound
 - East & Westbound
 - Westbound
-  Curb Bulb



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DECLARATION OF MAILING

On said day below I sent by email and deposited in the US Postal Service a true and accurate copy of the following document: Brief of Appellant Liu in Court of Appeals Cause No. 62838-1-I to the following:

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

DATED: May 4, 2009, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

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