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No. 62838-1-I

**DIVISION I OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON**

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

Appellant,

vs.

CITY OF SEATTLE,

Respondent,

and

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

Defendants.

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DIVISION I  
SEATTLE, WASHINGTON  
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**BRIEF OF RESPONDENT CITY OF SEATTLE**

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ORIGINAL

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## I. INTRODUCTION

Run Sen Liu was struck while crossing an arterial roadway in a marked, signed, and well-lit intersection crosswalk. Appellants alleged that the crosswalk was “dangerous because heavy traffic volumes on [the arterial] did not give pedestrians a reasonable opportunity to cross without being exposed to passing vehicles” (should motorists fail to comply with their statutory obligations to yield to pedestrians in all crosswalks). CP 8. Appellants suggested that the City could have 1) relocated the marked intersection crosswalk westward to create a new, mid-block legal crossing location, 2) supplemented the proposed mid-block crosswalk with a pedestrian refuge island, and/or 3) installed a traffic signal either at their proposed mid-block location or at the intersection to provide additional interruption in what their experts concede would be open and obvious traffic flow on the roadway. CP 12-13. Because arterial traffic conditions on a roadway are not a hazardous condition of the roadway against which, under WPI 140.01, a road authority owes a duty to warn, because appellants’ engineering expert agreed that there was no confusing or misleading condition of the roadway itself against which the City should have provided additional warning, and because no additional or alternative engineering treatments (including appellants’ proposed island or signal) were required by law or any applicable standard of care, this Court

should affirm the trial court's order dismissing appellants' claims on summary judgment.

## **II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR**

The following are Respondent's statements of the issues raised by the trial Court's Order Granting Defendant's Motion for Summary Judgment:

1. Whether the trial court properly granted Respondent's Motion for Summary Judgment because traffic conditions *on* a roadway are not "inherently dangerous" conditions *of* a roadway that can give rise to road authority liability under WPI 140.01; and
2. Notwithstanding, where appellants' experts agreed that the City provided adequate notice of the crosswalk at issue, whether the trial court properly granted Respondent's Motion for Summary Judgment on the alternate grounds that appellants lacked sufficient evidence to establish a genuine issue of material fact as to whether the City breached any duty owed.

## **III. STATEMENT OF THE CASE**

### **A. The Accident**

This accident occurred at the intersection of 10<sup>th</sup> Avenue and South Jackson Street on a rainy Sunday evening in February 2007. According to appellants, Liu was en route from the Pacific Rim Center (a building near the northwest corner of the intersection) to a vehicle in which his wife and daughter were waiting, parked facing southbound on 10<sup>th</sup> (south of the

intersection, and thus facing away from the crosswalk). Looking back over her shoulder, appellant Yu Ting Liu saw Liu standing on the northwest corner of the intersection, but then turned her attention away. CP 241-43. Liu apparently proceeded southbound across Jackson in a marked crosswalk. There are no known witnesses to either his crossing or to the accident. Both appellants were looking away from the intersection at the time of his crossing; defendant Brown, the driver of the vehicle that struck Liu, recalled only:

I got in the car. I headed eastbound on Jackson. I went through the lights obviously. And going up Jackson, I don't know whether it was 5<sup>th</sup>, 6<sup>th</sup>, or 7<sup>th</sup> all of a sudden bam on my windshield was a man. ... And it happened just that quick. I mean just that quick. And outside of that I could offer no details or anything. Just I was driving up the street and a guy was on my windshield.

CP 247. It appears, however, that Liu had crossed four-and-a half lanes of Jackson when he was struck in the eastbound curb lane.

### **B. The Roadway and Intersection**

Under RCW 35.78.010, cities are required to provide designated arterial roadways to carry “relatively high traffic volumes.” Pursuant to this statutory directive, and by local legislative action (SMC 11.18.010), South Jackson is one such roadway the City designated as a principal arterial, running east/west through Seattle’s International District, intersecting with north-south avenues in a standard urban grid. Along the

relevant stretch, Jackson comprises five lanes (two travel lanes in each direction and a center left turn lane) and supports an average daily traffic volume of approximately 16,000 vehicles.<sup>1</sup> Jackson is signalized for vehicular (and pedestrian) through traffic at 8<sup>th</sup> (one block west of 10<sup>th</sup>) and 12<sup>th</sup> (one block east of 10<sup>th</sup>). It is not signalized at 10<sup>th</sup>, which dead-ends north of the intersection. CP 204.

At the time of this accident, there was a Zebra-style (high visibility) marked crosswalk across Jackson on the west leg of the intersection. A curb bulb (6-foot curb extension) on the southwest corner of the intersection shortened the pedestrian crossing distance and supplemented the sightline for northbound pedestrians. Pole-mounted warning signs at the marked crosswalk were in place. An overhead “Crosswalk” sign with flashing light beacons provided additional notice to motorists of the marked crosswalk. CP 194-202 Appellants’ traffic engineering expert, Ed Stevens, did not criticize the condition of the crosswalk markings or signage. CP 259. He did not criticize

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<sup>1</sup> It is unknown what the traffic volume on the roadway was at the time of Liu’s Sunday evening accident. Appellant Chen testified that “[t]hat evening there weren’t that many vehicles.” CP 252. Appellant Yu Ting Liu testified that the road was “busy”, CP 244, but also testified that she was facing away from S. Jackson at the time of Liu’s crossing, did not observe his crossing, and didn’t pay attention to whether there were any cars in the intersection after becoming aware of the accident. CP 242-43. Defendant Brown testified that he “vaguely” recalled there being other cars on the road, but could not recall where those cars were in relation to his vehicle or traffic volume on the roadway in general. CP 248.

the choice or placement of signage. CP 257. Mr. Stevens testified that neither the roadway nor the intersection was confusing or misleading to road users:

Q: For a motorist traveling eastbound on South Jackson, are there any sight obstructions approaching the intersection of 10<sup>th</sup> Avenue?

A: No.  
...

Q: South Jackson is a pretty straight roadway?

A: Correct.

Q: Are there any vertical sight obstructions that would interfere with a motorist's ability to perceive the intersection at 10<sup>th</sup>?

A: No.

Q: And 10<sup>th</sup> intersects at pretty much a grid pattern?

A: Exactly.

Q: Is there anything that you found to be particularly confusing or misleading for a motorist traveling eastbound on South Jackson?

A: No.

Q: Is there anything about the intersection of 10<sup>th</sup> and Jackson that you found to be confusing or misleading for a pedestrian attempting to cross?

A: Not confusing or misleading short of no adequate gaps.<sup>2</sup>  
That would be confusing, I guess.

Q: In what way?

A: Well, you have to now try to judge the speed of vehicles. You have to be able to see vehicles coming both from left and from right. It is a considerable distance across. And at 30 miles an hour, the vehicles particularly in the furthest lane that you have to cross is a substantial distance down the road.

Q: Is it fair to say that traffic conditions on the roadway may be confusing or misleading to a pedestrian, but the configuration of the roadway itself is not?

A: I would agree with that.

CP 258.

Mr. Stevens agreed that traffic on S. Jackson is visible to pedestrians seeking to cross. CP 258. Appellants' human factors expert, Gerson Alexander, emphasized the clear and open sightlines for pedestrians of approaching vehicles. CP 1119-20. Mr. Stevens affirmatively praised the effectiveness of the overhead flashing beacons.

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<sup>2</sup> A "gap" refers to a break in the natural flow of traffic of sufficient length to allow a pedestrian to cross (i.e., assuming motorists fail to comply with their statutory obligation to stop for pedestrians in crosswalks). While both the Manual on Uniform Traffic Control Devices (MUTCD) and City guidelines consider the number of gaps on a roadway in connection with determining whether a warrant for a pedestrian traffic signal is met, the number of gaps does not, under either MUTCD standards or City guidelines, factor into a consideration as to whether to install a marked crosswalk. CP 197-98. That is because the rules of the road create opportunity for pedestrians to cross by requiring motorists to stop for pedestrians in crosswalks, whether marked or not. CP 192. Mr. Stevens agreed that pedestrian volume at 10<sup>th</sup> and Jackson was insufficient to satisfy the MUTCD warrant for a pedestrian traffic signal at this location. See Section III(C)(3)(b). CP 265.

CP 262. Mr. Alexander testified that the sign with flashing beacons “provides the obvious cue as to essentially waving its arms and say, here, look for pedestrians because this is where they cross.” CP 1119. Mr. Alexander further testified:

Q: What is your opinion in this case with regard to the cues or lack thereof that were provided to motorists at the intersection of 10<sup>th</sup> and Jackson?

A: I think the cues were adequate to be on the lookout for pedestrians. The crosswalk, the illuminated crosswalk sign, the flashing lights identifying the location are designed and intended to draw motorists’ attention to the crosswalk and to be on the alert for a pedestrian. That’s what they’re designed to do and I think they do that job well.

CP 1119.

Mr. Stevens agreed that busy roads are inherent to traffic generally. CP 260. He testified that a road authority has no obligation to make a busy road less busy or to reduce the width of a roadway. CP 260. He acknowledged that drivers have a statutory obligation to yield to pedestrians at all intersections, and conceded that the number of gaps in traffic (traffic volume) is insignificant if drivers comply with their statutory obligation to yield to pedestrians in crosswalks, whether marked or not. CP 256.

**C. Facts Relevant to Contentions of Negligence Against the City**

Appellants alleged the marked crosswalk at 10<sup>th</sup> and Jackson was “unreasonably dangerous because heavy traffic volumes on Jackson did not give pedestrians a reasonable opportunity to cross the without being exposed to passing vehicles.” CP 8. They argued that the City had “notice” of the “dangerous” traffic volumes because of community complaints regarding motorists’ failure to stop for pedestrians. CP 10-11. They alleged the crosswalk “egregiously violated the City of Seattle’s own internal guidelines,” CP 8-9, and submitted that the City

should have moved the raised pedestrian median, and the crosswalk, slightly westward. The City of Seattle should also have installed a pedestrian activated traffic control signal so that pedestrians using the crosswalk could stop traffic with a red light before they crossed. The failure of the City of Seattle to move the crosswalk and median, and the City of Seattle’s failure to install a traffic light, constituted negligent conduct and made the roadway not reasonably safe.

CP 12. Appellants then speculated that

If the City of Seattle had either moved the crosswalk and median slightly to the west, or if the City had installed a pedestrian activated traffic control signal, Run Sen Liu would not have been struck while crossing South Jackson at or near 10<sup>th</sup> Street because Run Sen Liu would not have crossed without activating the signal, which would have stopped the car that hit him. Moreover, Run Sen Liu would have used the pedestrian safety island.

CP 12-13. The following facts are relevant with respect to these allegations.

## 1. Crosswalks Generally

A legal “crosswalk” exists at every point at which two roadways intersect, regardless of whether crosswalk markings are painted on the roadway. RCW 46.04.160. A “marked crosswalk” is separately defined as “any portion of the roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface thereof.” RCW 46.04.290. Washington law requires drivers to stop for pedestrians in all crosswalks, regardless of whether the crosswalk is marked. RCW 46.61.235(1). In other words, Liu had a legal right to cross Jackson at 10<sup>th</sup>, and defendant Brown had a legal obligation to stop for him, regardless of whether the City marked, signed, or otherwise supplemented this intersection crosswalk.

The Manual on Uniform Traffic Control Devices (“MUTCD”), published by the Federal Highway Administration under 23 CFR, Part 655, contains the standards for signs, signals, and pavement markings (including crosswalk markings) that regulate, warn, and guide road users. Washington has adopted the 2003 MUTCD as a controlling standard for road design and maintenance. *See* WAC 468-95-010; RCW 47.36.020. The MUTCD contains no standards as to where “Crosswalk Lines” (or “marked crosswalks” as defined by RCW 46.04.290) shall or shall not be installed, but recognizes three specific functions of crosswalk markings:

- Crosswalk markings provide guidance for pedestrians who are crossing roadways by defining and delineating paths on approaches to and within signalized intersections, and on approaches to other intersections where traffic stops.
- Crosswalk markings also serve to alert road users of a pedestrian crossing point across roadways not controlled by highway traffic signs or STOP signs.
- At nonintersection locations, crosswalk markings legally establish the crosswalk.

CP 218. Mr. Stevens agreed that here, where through traffic on Jackson is not controlled by signals or signs at 10<sup>th</sup> but where motorists are legally obligated to stop for pedestrians regardless of whether markings are present, the function of the crosswalk markings was to “make motorists more aware.” CP 257. Had the City chosen to “move the crosswalk slightly westward” as appellants proposed (*i.e.*, create a legal pedestrian crossing where one otherwise does not exist), CP 12, it would be the third function served by such markings. Appellants offered no standard or guideline that would require or recommend that the City undertake to legally establish the mid-block crossing plaintiffs propose; that is because there is none. CP 188-89.

In Washington, local authorities have broad discretion in deciding where to mark crosswalks. *Comment*, WPI 70.03.01. RCW 35.22.280(7) grants cities the exclusive power to “regulate and control” the use of streets; under SMC 11.16.340(D), the City’s Traffic Engineer has authority

to exercise this power in part by “[d]etermin[ing] and order[ing] the marking of crosswalks at intersections or at such other places where the Traffic Engineer deems it appropriate for the identification of the crossing location[.]” Mr. Stevens does not criticize the initial decision to mark the crosswalk at 10<sup>th</sup>. CP 257.

## **2. The City’s “Internal Guidelines”**

### **a) The Zegeer Study**

The “internal guidelines” that appellants (and their second engineering expert, Mr. Haro) rely on to establish some standard of care arose from a 2002 study by Charles Zegeer of the University of North Carolina’s Highway Safety Research Center, funded and published by the Federal Highway Administration in 2005, that compared pedestrian collision rates at marked and unmarked crosswalks at unsignalized locations under various roadway conditions (“the Zegeer study”). A statistically significant finding of the Zegeer study was that on high volume, multi-lane roadways (such as South Jackson), pedestrian collision rates, while remarkably low overall, were counterintuitively higher at unsignalized locations with marked crosswalks *alone* (a condition explicitly clarified by the study’s authors to refer to markings alone without supplemental signage or other engineering treatments such as those present at 10<sup>th</sup> and Jackson) than at similar locations with unmarked

crosswalks. The primary difference between marked and unmarked crosswalks, however, related to the number of “multiple-threat” collisions that predominated at marked crosswalks – collisions that result when a driver in one lane stops to permit pedestrians to cross and an oncoming vehicle in the same direction either fails to stop in an adjacent lane or swerves around the stopped vehicle into the crosswalk (in violation of RCW 46.61.235(4)). CP 188-90. (Mr. Stevens agreed that the particular hazard noted at uncontrolled multi-lane intersections was the potential for a multiple threat accident. CP 264.) In this case, however, where there is no evidence that defendant Brown overtook or passed any vehicle stopped for Liu, this accident cannot be said to be a multiple-threat collision – that is, the specific concern noted in the literature with marked crosswalks alone is not present in this case. CP 190.

Mr. Haro (but not Mr. Stevens) reads the Zegeer study to conclude that the installation of the marked crosswalk at 10<sup>th</sup> and Jackson (which well-preceded the Zegeer study in time) violated some industry standard or somehow rendered the roadway unsafe for pedestrian travel. CP 1039-66. Contrary to appellants’ interpretation, however, Mr. Zegeer is clear that neither his study nor his formulated guidelines stand for the propositions that either marked or unmarked crosswalks generally at such locations are not reasonably safe or that crosswalk markings in some way

*cause* pedestrian collisions. CP 190. The Zegeer guidelines, which were intended to provide recommendations for pedestrian planners when planning or improving facilities as to how such crossings might be made safer, generally discourage road authorities from installing new marked crosswalks alone across multilane, high-volume roadways, but they do not establish a standard of care<sup>3</sup> with regard to what treatments should be provided, nor are they intended to apply to existing infrastructure. CP 190. Regardless, because the crosswalk here, which at the time of this accident was well-supplemented with warning signs, overhead flashing beacons, and a curb bulb, was not a crosswalk “alone” as contemplated by the Zegeer study, the findings of the study cannot be generalized to, and have no relevance with regard to, this case. CP 190.

**b) Seattle’s Crosswalk Inventory and Director’s Rule**

In comparing collision rates at existing marked and unmarked crossing locations, the Zegeer study did not study (or hypothesize as to)

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<sup>3</sup> Zegeer’s recommended guidelines were incorporated for inclusion in the 2001 FHWA Traffic Control Devices Handbook, but have not been formally adopted as mandatory standards by any authoritative entity. They have also been recommended by the National Committee on Uniform Traffic Control Devices to be incorporated into the next printing of the MUTCD, but are not contained in the MUTCD standards or guidelines applicable either at the time of this accident or currently. Zegeer’s recommendations do not establish a standard of care with respect to existing pedestrian infrastructure, such as Seattle’s existing marked crosswalks, but regardless, Zegeer testified that Seattle has closely followed, and in many cases exceeded, these recommendations even with regard to its existing infrastructure. CP 190; 192-93.

before- and after-effects of installing or removing marked crosswalks. In 2001, however, in an effort to proactively incorporate the emerging results of the yet-to-be-published Zegeer study and FHWA guidelines into departmental “guidelines to work toward the City’s goal of installing pedestrian safety improvements when funds are available,” the Seattle Department of Transportation (“SDOT”) began drafting the internal document ultimately enacted three years later as Director’s Rule 04-01. Intended to “increase the awareness of the public about the criteria for establishing or permitting” pedestrian infrastructure improvements (including marked crosswalks, general traffic control signals, and pedestrian traffic signals), the Director’s Rule explains the background research of the Zegeer study, identifies potential engineering options, and defines threshold criteria under which SDOT will consider signal requests. CP 194-202; 221-27. The Director’s Rule then establishes departmental procedures for evaluating and responding to requests for pedestrian improvements as follows:

For requests for marked pedestrian crosswalks, general traffic control signals, pedestrian traffic signals, pedestrian traffic signals for the disabled or senior citizens, and pedestrian traffic signals to accommodate school crossings:

- (1) Upon receipt of a request, the City Traffic Engineer, or the Engineer’s designated representative, shall conduct an evaluation for locations in question, using the guidelines set for in the Installation Criteria section above.

(2) If the location meets the above guidelines, the location will be added to the current needs list to compete for funding as it becomes available.

(3) If the evaluation shows that the location does not meet the guidelines set forth above for the particular type request, the request shall be placed in the Location File for future reference and the requestor will be contacted as to the decision. The City Traffic Engineer's decision to deny a request at any location may be appealed by any person to the Director of SDOT within fourteen (14) days of the date the decision was delivered to the requestor. The Director of the Seattle Department of Transportation will then respond to the appeal in a timely manner. The response shall be in writing if requested.

CP 228.

By its terms, Seattle's internal Director's Rule does not establish any standard of care as to *how* SDOT shall, should, or may engineer a particular location; *i.e.*, it does not mandate, or even recommend, any particular treatment at any particular location. It denies any intent to form the basis for legal action. CP 221. To the extent it establishes any directive whatsoever to SDOT, it does so only by setting forth internal procedures for evaluating and responding to requests for improvements in light of emerging national research; it requires no action with respect to existing infrastructure. Further, even where a location under evaluation for new improvements "meets the guidelines" for the improvements discussed, the Director's Rule does not mandate or provide any timeline for installation –

it provides only that the proposed improvements be added to a list to compete for future funding. CP 228.

Although the Director's Rule contains no directives with respect to existing infrastructure, commensurate with drafting the Director's Rule Seattle also became the first (and only known) city in the country to undertake an extensive review of its existing marked crosswalks. In doing so, SDOT inventoried, between June and September 2001, all of its approximately 850 existing marked crosswalks at unsignalized locations and classified each location, based on the Zegeer guidelines, as either 1) a "C" location (a location defined as a "candidate for a marked crosswalk alone); 2) a "P" location (a possible candidate for a marked crosswalk; or 3) an "N" location (defined as "usually not a good candidate for a marked crosswalk (unless used in combination with other treatments.")<sup>4</sup> CP 194-202; 224. For each of the marked crosswalks at "N" locations, and without regard to the existing treatments already in place, SDOT then

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<sup>4</sup> While the terms " 'N', 'P', or 'C' Crosswalk" are often thrown about as a short-hand, the designation of "N", "P", or "C" do not refer to the crosswalk itself, but rather to the *location* (*i.e.*, intersection or mid-block location) where the crosswalk is located. That is, an " 'N' Crosswalk," as used in short-hand, refers to a "marked crosswalk at an 'N' location." As relate to the Director's Rule and Seattle's crosswalk inventory, the designations of "N", "P", and "C" are significant only insofar as marked crosswalks at "N" locations – all of which met and often exceeded the MUTCD standards and guidelines in terms of supplemental engineering treatments – were generally prioritized for additional improvement over and beyond existing treatments ahead of marked crosswalks at "C" or "P locations (*i.e.*, " 'C' or 'P' crosswalks"). CP 199-200.

proposed an “action plan” for additional treatments – possible treatments ranging from simple sign and paint upgrades to signal installation to major roadway projects, including roadway rechannelization, installation of medians, or intersection reconfigurations. CP 200-01.

The crosswalk at 10<sup>th</sup> and Jackson (inventoried on August 16, 2001) was one of 84 of the approximately 850 crosswalks inventoried that SDOT identified as being at an “N” location (again, meaning a location that would not be appropriate for a marked crosswalk *alone*). At the time of the inventory, this marked crosswalk was supplemented with pole-mounted warning signs and an overhead sign; the flashing beacons and curb bulb had not yet been installed. SDOT proposed that the crosswalk be further supplemented with curb ramps and an overhead lighting upgrade. CP 200-01; 230-31. The curb bulb and the flashing beacons were subsequently installed between December 2002 and January 2003. CP 200-01. In addition, a traffic signal was installed one block to the west (at 8<sup>th</sup>), which not only created additional gaps in traffic by platooning traffic at 8<sup>th</sup> but also provided a nearby signalized alternative

for pedestrians more comfortable crossing Jackson with the benefit of a signal.<sup>5</sup> CP 200-01.

Calculations based on SDOT and Seattle City Light records show that the illumination level at the intersection provided by the fixed lighting in place at the time of the accident (4.28 footcandles) exceeded the level recommended by the Illuminating Engineering Society of North America (IESNA) guidelines (which the City adopted as recommended practices) of 2.0 footcandles by 214%; the calculated uniformity of the illumination provided by fixed lighting at the intersection (2.4) exceeded the IESNA's recommended value (3.0) by 20%. CP 232-34. The illumination of the marked crosswalk specifically was even higher than the intersection overall, with a calculated average light level of 5.65 fc and a uniformity of

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<sup>5</sup> As SDOT's crosswalk plan evolved between 2001 and the present, SDOT ultimately decided – in an effort that far exceeded either the recommendations of the Zegeer study or any legal standard – to completely eliminate unsignalized marked crosswalks across high-volume, multilane roadways by either 1) installing a traffic signal if warranted, 2) rechannelizing the roadway, where traffic volumes permitted, so as to reduce the number of traffic lanes, or 3) removing the crosswalk markings altogether. Accordingly, despite the addition of significant supplemental treatments, the marked crosswalk at 10<sup>th</sup> and Jackson remained under consideration for either removal or yet further improvement. Ultimately, because traffic volumes precluded rechannelization, because pedestrian volume didn't meet a signal warrant, and because SDOT had been able to install a signal at 8<sup>th</sup> Avenue under the MUTCD warrants, SDOT decided to remove the crosswalk markings at 10<sup>th</sup> and Jackson in the hope that pedestrians, while retaining the legal right-of-way at 10<sup>th</sup>, might choose to cross instead at either of the adjacent signalized intersections (at 8<sup>th</sup> and 12<sup>th</sup>). CP 201-02. While appellants rely heavily on the removal of the crosswalk markings, this action was taken subsequent to the subject accident and is thus neither relevant to this action under ER 401-03 nor competent evidence under ER 407

1.1. CP 232-34. Actual photometric analysis of the illumination level of the intersection at night likewise shows that the illumination level of the marked crosswalk, based on the fixed lighting at 10<sup>th</sup> and Jackson, well exceeded IESNA recommendations. CP 235-37.

### **3. Plaintiff's Proposed Alternatives.**

Neither appellants nor their experts alleged or identified any unusual condition of either the roadway or the crosswalk of such condition to mislead a traveler exercising ordinary care. Rather, appellants (and Mr. Stevens) argued only that in light of allegedly heavy (but, Mr. Stevens agreed, open, obvious, and ordinary (CP 258, 260)) traffic volumes on this arterial roadway, the City could have created a legal mid-block crosswalk with a pedestrian island and overhead flashing beacons (such as those at 10<sup>th</sup>).<sup>6</sup> Appellants and Mr. Haro (though not Mr. Stevens) also suggested

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<sup>6</sup> In furtherance of his suggestion, Mr. Stevens undertook to design the crossing that, were the City to seek out his advice as to the design of a mid-block island, he would propose. As he described:

A: [T]his is just multiple copies of my beginning of designing the island that I would be proposing and recommended in both cases. And what I've done so far is I have been able to outline the island relative to the pavement markings and the raised curbing. I have not got into the traffic control devices yet. However, there would be a sign approaching eastbound indicating to stay to the right, as the traffic markers indicate. There would be crosswalk signs at the location themselves and in advance. And there would be an overhead crosswalk sign, because it is mid-block.

Q: Okay. Would the sign be flashing?

A: I would think so.

CP 264.

that the City could have installed a traffic signal to facilitate pedestrian crossing either at 10<sup>th</sup> or at Mr. Stevens' proposed mid-block crossing.<sup>7</sup> CP 12-13; 1039-66. Appellants and Mr. Haro speculated that had the City done either, this accident would not have occurred because 1) Liu would have chosen to cross Jackson via the mid-block crossing rather than at the legal unmarked crosswalk at 10<sup>th</sup>,<sup>8</sup> and 2) faced with a signal, defendant Brown would have stopped for him. CP 12-13; 1039-66. Setting aside appellants' speculation, facts relevant to the proposal that the City should have created a new legal crossing mid-block between 8<sup>th</sup> and 10<sup>th</sup> Avenues are briefed in Sections III(C)(1) and (2), above. Facts relevant to plaintiffs' proposed pedestrian island and signal are briefed below.

**a) Pedestrian Islands.**

While pedestrian islands are one possible tool to facilitate pedestrian safety, there are no standards that would require or guidelines that would recommend that the City install a pedestrian island anywhere along Jackson, including at the intersection itself or mid-block between 8<sup>th</sup> and 10<sup>th</sup>. CP

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<sup>7</sup> There is no evidence that a signal makes crosswalks "safer."

<sup>8</sup> Mr. Stevens suggested that the City could have posted signage prohibiting pedestrians from crossing at the legal unmarked crosswalk at 10<sup>th</sup> and Jackson. CP 260. There is no standard or guideline that requires or recommends that road authorities prohibit pedestrians from crossing where state law grants them the right to do so. CP 202.

190-91; 268-69. Mr. Stevens testified that installing a pedestrian island across a busy roadway “is one possibility,” CP 263, but agreed:

Q: Does [the MUTCD], as you read it, contain any warrant for the installation of islands?

A: No, I don't believe there has ever been any warrants for installation of islands. There has been and still is a criteria related to what the size of the island has to be and these kinds of things.

Q: So if an island is installed, there are standards governing the physical characteristics of the island, but there are no standards governing when an island shall or shall not be installed?

A: That's correct.

Q: An island being a permissible tool available to traffic engineers?

A: To solve problems, that's correct.

Q: And those would be problems relating to pedestrian difficulty in getting across busy road?

A: Exactly.

Q: Assuming drivers do not comply with their statutory obligation to yield to those pedestrians in a crosswalk?

A: That's correct.

Q: Whether marked or unmarked?

A: Correct.

CP 261. Likewise, while the Zegeer guidelines suggest options that *might* be recommended should a road authority decide to install a marked crosswalk mid-block, there are no standards or guidelines that would require or recommend that the road authority undertake such a determination in the first place. CP 188. There being no legal crossing between 8<sup>th</sup> and 10<sup>th</sup>, and thus no mid-block conflict point between vehicles and pedestrians, there is no standard or guideline that would require or recommend that the City consider installing a mid-block pedestrian island. CP 190-91; 269-70.

**b) Installation Of Traffic Signals.**

Appellants and Mr. Haro proposed that the City could either have 1) installed a pedestrian traffic signal at 10<sup>th</sup> and Jackson, or 2) installed a pedestrian traffic signal mid-block in connection with Mr. Stevens' proposed pedestrian island and crosswalk. CP 12-13; 1039-66. With regard to the latter, because there was no pedestrian crossing mid-block between 8<sup>th</sup> and 10<sup>th</sup>, and thus no mid-block crossing to evaluate for a pedestrian signal, there is no standard or guideline that would require or recommend that the City

consider such location for a pedestrian signal.<sup>9</sup> With regard to the former, Mr. Stevens agreed that pedestrian volume at 10<sup>th</sup> and Jackson was below the volume required under the MUTCD warrant for consideration of a pedestrian traffic signal:

Q: And again, there was insufficient pedestrian counts to warrant a traffic signal for pedestrian crossing under the MUTCD warrant?

A: That is correct.

CP 265.

Appellants rely on the Declaration of William Haro, in which he opines that the City should have installed a traffic signal because, he suggests, motorists would not expect the presence of pedestrians at 10<sup>th</sup> and Jackson without a signal. Neither of the warrants that Mr. Haro relies

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<sup>9</sup> Standards for the installation of pedestrian signals are governed by MUTCD Section 4C.05, which provides, in relevant part:

The need for a traffic control signal at an intersection or midblock crossing shall be considered if an engineering study finds that both of the following criteria are met:

A. The pedestrian volume crossing the major street at an intersection or midblock location during an average day is 100 or more for each of any 4 hours or 190 or more during any 1 hour; and

B. There are fewer than 60 gaps per hour in the traffic stream of adequate length to allow pedestrians to cross during the same period when the pedestrian volume criterion is satisfied.

CP 206-07. 2002 and 2005 pedestrian counts taken during weekday peak traffic conditions showed an insufficient number of pedestrians crossing S. Jackson in the west crosswalk during peak hours to warrant further consideration of a traffic signal, with no more than 120 pedestrians crossing S. Jackson in the west crosswalk over a 4-hour period and no more than 42 pedestrians crossing during any one hour. CP 197; 209-12. Thus, while appellants complain about a lack of gaps in traffic, it is undisputed that part A of the warrant was not first met. CP 197-98.

on have applicability here. The 8-hour vehicular warrant is “intended for application at locations where a large volume of intersecting *vehicular* traffic is the principal reason to consider installing a traffic control signal,” CP 1124-26. (Vehicular cross-traffic, unlike pedestrians, do not enjoy a statutory right of way at intersections.) The “Crash Experience” signal warrant conditions “are intended for application where the severity and frequency of crashes are the principal reasons to consider installing a traffic control signal.” CP 1129-30. Regardless, whether or not these vehicular warrants are met is irrelevant. Satisfying the conditions of a warrant is only a threshold for undertaking additional consideration (which the City did; CP 196-97); it does not mandate signalization. CP 1133. Again, Mr. Stevens agreed that the specific warrant intended to address *pedestrian* crossing difficulty was not met. CP 265.

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. Standard of Review**

Since review in this case is *de novo*, the appellate court must conduct the same inquiry as the trial court and view all material facts and reasonable inferences from them most favorably to the appellants. *Renner v. City of Marysville*, 145 Wn. App. 443, 448-49, 187 P.3d 286 (2008). Summary judgment is appropriate if the pleadings, affidavits, and depositions establish both the absence of genuine issues of material fact

and movant's entitlement to judgment as a matter of law. *Id.* Whether the City owed a duty, and the nature of that duty (the standard of care) are questions for the court to decide. *Tincani v. Inland Empire*, 124 Wn.2d 121, 875 P.2d 621 (1994); *Gall v. McDonald Indus.*, 84 Wn. App. 194, 202-03, 926 P.2d 934 (1996). Where a plaintiff does not produce evidence sufficient to show that the defendant breached "the *required* standard of care," summary judgment must be entered. *Walker v. King Cy. Metro*, 126 Wn. App. 904, 908, 109 P.3d 836 (2005) [emphasis supplied]. A non-moving party may not rely on speculation or argumentative assertions to defeat summary judgment. *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999).

#### **B. The City's Duty**

Plaintiffs' case against the City essentially hinges on the premise that an accident happened and that, had the City engineered this intersection differently, it might not have. Proof that an accident occurred is not by itself proof of negligence, *Claar v. Auburn Sch. Dist.*, 126 Wn. App. 897, 903, 110 P.3d 767 (2005), and, as the Supreme Court affirmed in *Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002), it is axiomatic that "municipalities are not insurers against accidents nor the guarantor of public safety" and are not required to "anticipate and protect against all imaginable acts" of road users. Rather, the sole duty owed by a road

authority is that as affirmed by *Keller* and now articulated by WPI 140.01:

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

*Keller*, 146 Wn.2d at 254 [emphasis in original, as the Court expressly rejected efforts to remove from the instruction the term “ordinary” as it modifies “travel”].<sup>10</sup>

In clarifying the duty owed under WPI 140.01, our Supreme Court has explained:

[T]he duty to maintain a roadway in a reasonably safe condition may require a county to post warning signs or erect barriers ***if the condition along the roadway makes it inherently dangerous or of such character as to mislead a traveler exercising reasonable care, or where the maintenance of signs or barriers is prescribed by law.*** This duty does not, however, require a county to update every road and roadway structure to present-day standards.

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<sup>10</sup> WPI 140.01 specific limits a road authority’s actionable duty to allegations concerning the “design”, “construction,” “maintenance,” and “repair” of its roadways. WPI 140.01 does not support a cause of action more properly arising out of a road authority’s regulation of the roadway. Our courts have recognized that in providing public roads, municipalities act in both proprietary and governmental capacities, but it is only where a municipality acts in a proprietary function that the municipality can be subject to liability. *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006) (government can be subject to tort liability when serving a proprietary function, but under the public duty doctrine, is not subject to tort liability when serving a governmental function). Consistent with the language of WPI 140.01, while the design and maintenance of streets is a proprietary function that can give rise to liability, regulation of the streets is a governmental function that cannot. *Goggin v. City of Seattle*, 48 Wn.2d 894, 897, 297 P.2d 602 (1956). Here, the “condition” complained of – “heavy traffic volumes” using the roadway – does not relate to the design, construction, maintenance or repair of the roadway but rather to the regulated use of the roadway. Under RCW 35.22.280(7), the City has exclusive discretion to regulate such use; under *Goggin*, such regulation is not actionable.

Nor does the duty require a county to “anticipate and protect against all imaginable acts of negligent drivers” for to do so would make a county an insurer against all such acts.

*Ruff v. King Cy.*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995) (citations omitted, emphases supplied). Here, where no additional engineering treatments were required by law,<sup>11</sup> the proper analysis accordingly asks first whether appellants have identified an “inherently dangerous” condition of *the roadway* of such character to confuse or mislead a traveler exercising ordinary care, *Ruff*, 125 Wn.2d at 706; and second, *if so*, whether adequate warning of the condition was provided. *See Owen v. Burlington Northern*, 153 Wn.2d 780, 108 P.3d 1220 (2005). Here, the

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<sup>11</sup> Appellants did not allege that any additional engineering treatments were required by law. Mr. Haro cites to vehicular volume signal warrants in the MUTCD to support his conclusions that a signal should have been installed, but any argument that Mr. Haro’s opinion establishes a legal requirement fails for two reasons. First, although the MUTCD provides the legal standards for street and highway traffic control devices and their placement under RCW 47.36.020, Washington cases uniformly acknowledge that, unlike the force of law, the permissiveness of the MUTCD is not dispositive. *Ottis Holwegner Trucking v. Moser*, 72 Wn. App. 114, 122, 863 P.2d 609 (1993). Rather, while the MUTCD provides standards for the design and application of devices, the MUTCD places responsibility on the engineers to exercise their discretion as to *which* devices to erect. *Kitt v. Yakima Cy.*, 23 Wn. App. 548, 552, 596 P.2d 314 (1979), *rev’d on other grounds*, 93 Wn.2d 670, 611 P.2d 1234 (1980). Second, even if the MUTCD established a legal duty, a plain reading of the MUTCD provisions relied upon by Mr. Haro does not lend itself to his conclusions here. The MUTCD contains eight different warrants – *i.e.*, threshold conditions that allow a road authority to consider signalization. The two warrants that Mr. Haro relies upon (based on vehicular access issues where the right of way granted pedestrians by statute does not apply) are not intended for applicable in situations such as that alleged here – where pedestrian difficulty in getting across a roadway is the primary reason for installing a signal. CP 1122-30. Mr. Haro does not address the pedestrian volume warrant; Mr. Stevens forthrightly acknowledges that the pedestrian volume warrant is not met here and did not recommend installing a signal at this location. CP 265.

trial court properly concluded that appellants lacked sufficient evidence to establish a material question of fact under either prong.

**1. Appellants Failed to Identify an “Inherently Dangerous” Condition of the Roadway.**

To show that a roadway is “inherently dangerous” within the context of WPI 140.01, a plaintiff must show some defective or misleading physical characteristic *of the roadway* that exists at all times and/or is inherently misleading such that additional warning is required. *Ruff, supra*; *Prybysz v. City of Spokane*, 24 Wn. App. 452, 455, 601 P.2d 1297 (1979). In *Ulve v. City of Raymond*, 51 Wn.2d 241, 317 P.2d 908 (1957), for example, plaintiff’s decedent drove off the road into a river on a foggy evening. Plaintiff brought suit against the city for failing to install directional signage, alleging insufficient warning of a sharp curvature of the roadway. In *Owen*, the plaintiff’s decedents’ vehicle became trapped on railroad tracks. The plaintiff alleged that a vertical rise (crown) of the roadway could obstruct a driver’s view of tracks, signals, and approaching trains. *Citing Ulve*, a divided Supreme Court affirmed the Court of Appeals’ reversal of summary judgment for the City of Tukwila, holding that “a reasonable jury could conclude [in light of the crown in the roadway] that *unusual circumstances were presented at the crossing*, requiring more than normal signage and warnings to prevent motorists

from being trapped in the path of an approaching train.” *Owen*, 153 Wn.2d at 786 [emphasis supplied].

Appellants rely almost exclusively on *Owen* as the controlling authority in this case, but this Court should be careful to draw the distinction between the Court’s analysis in *Owen* and appellants’ efforts to apply the *Owen* analysis here. In *Owen*, the 5-4 majority opinion turned not on the open and obvious potential for conflict at rail crossings *per se* but rather on a disputed question of fact as to whether, *in light of the vertical crown in the roadway itself*, the tracks were obscured from the view of approaching motorists such that additional warning of the potential for conflict should have been provided. In other words, the “condition” at issue in *Owen* was not the possible presence of train traffic along intersecting spurs; the “condition” complained of was the alleged vertical configuration of the roadway itself which allegedly necessitated greater warning of the obscured tracks. As our Supreme Court has already clarified, in the absence of an obstruction in the roadway itself impeding visibility (such as that alleged in *Owen*), intersecting train traffic is not an “inherently dangerous” condition. *Bradshaw v. City of Seattle*, 43 Wn.2d 766, 775, 264 P.2d 265 (1953).

In contrast to the allegedly unexpected curvature of the roadway in *Ulve* and the allegedly deceptive crown in the roadway at issue in *Owen*,

here there is no alleged defect of the roadway itself. Appellants' experts testified that there are no sight obstructions along South Jackson or at the crosswalk that would impede a motorist's or pedestrian's view of one another. CP 258, 1119-20. They agreed that there is nothing about the roadway that is confusing or misleading to either motorists approaching this intersection crossing or to pedestrians attempting to cross. CP 258, 262; 1119-20. Appellants' analysis thus survive if, and only if, this court first allows that open, obvious, usual and expected traffic volumes *on* an arterial roadway can be an "inherently dangerous" *of* a roadway sufficient to give rise to road authority liability, thus effectively rendering the road authority the insurer of busy roadways. Stare decisis mandates against so holding.

Under WPI 140.01, a road authority owes no duty to protect against open and obvious hazards of traffic in general. *Lee v. Sievers*, 44 Wn.2d 881, 271 P.2d 699 (1954) (where a condition is known, open, or obvious, there is no need for warning); *see also McGough v. City of Edmonds*, 1 Wn. App. 164, 460 P.2d 302 (1969). The *Ruff* court affirmed that open, obvious, usual or ordinary hazards attributable to travel in general cannot be a basis for road authority liability:

We think it will require no argument to make plain the fact that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon

practically every mile of ... road in the state. The same hazard may be encountered a thousand times in every county of the state. .... *The unusual danger noticed by the books is a danger in the highway itself.*

*Ruff*, 125 Wn.2d at 706 [*quoting Leber v. King Cy.*, 69 Wash. 134, 124 P. 397 (1912), emphasis supplied by the *Ruff* Court]; *see also Tyler v. Pierce Cy.*, 188 Wash. 229, 62 P.2d 32 (1936); *Minehan v. Western Wash. Fair Assoc.*, 117 Wn. App. 881, 73 P.3d 1019 (2003).

The law contemplates the open and obvious hazards associated with traffic generally and places the onus on road users to adjust their actions accordingly:

In using any parts of the streets, all persons are bound to the exercise of reasonable care to prevent collisions and accidents. Such care must be in proportion to the danger or the peculiar risks in each case. ... Greater caution is required at street crossings and in the more thronged streets of a city than in the less obstructed streets in the open or suburban parts. ... The person having the management of the vehicle and the traveler on foot are both required to use such reasonable care as the circumstances of the case demand; an exercise of greater care on the part of each being required where there is an increase of danger.

*Minor v. Stevens*, 65 Wash. 423, 425, 118 P. 313 (1911) (citation omitted).

This principle has been more recently affirmed by other jurisdictions. *See*, e.g., *Orlando v. Broward Cy.*, 920 So.2d 54 (2006) (risk posed by traffic volumes is open and obvious); *Johnson v. City of Springfield*, 817 S.W.2d 611 (1991) (traffic congestion is not a “dangerous condition” of the

roadway). In *King v. Brown*, 534 A.2d 413 (1987), where a pedestrian was struck by a car while (like decedent here) attempting to cross a high-volume, multi-lane roadway, the court affirmed that heavy traffic volumes do not create a “dangerous condition” so as to impose liability on a public entity:

In the absence of due care, traffic congestion may enhance the risk of injury so that the risk becomes substantial. But the test is whether the condition complained of creates a substantial risk of injury despite the exercise of due care by motorists and pedestrians. What constitutes due care depends on the variable element of risk of harm inherent in any situation. Arguably, heavy traffic poses a greater risk of collision than light traffic. But, the greater the risk, the greater the care required. Therefore, the exercise of due care in the circumstances of traffic congestion may require greater vigilance and lower vehicle speeds than would be required in light traffic conditions. There is nothing in the evidence in this case or in common experience to support an inference that the condition of [the road] was such that the traffic condition created a substantial risk of injury despite the exercise of due care by motorists and pedestrians. The report of plaintiffs’ expert witness merely recites the density and nature of the business uses, parking patterns, and “considerable traffic movement” on [the road] and concludes that “[a]s a result of the various conditions described pedestrian traffic ... is exposed to a dangerous condition.”

*King*, 534 A.2d at 415-16.

Other jurisdictions have likewise held that the absence of traffic controls does not render a crosswalk “unsafe” within the context of a road authority’s liability. In *Brenner v. City of El Cajon*, 113 Cal.App.4<sup>th</sup> 434

(2003), the plaintiff was injured while attempting to cross a high-volume, high-speed, multi-lane arterial with, she alleged, high pedestrian volumes. She, like appellants here, alleged negligence of the city for failing to install traffic devices to reduce the dangers to pedestrians. The appellate court affirmed dismissal, holding that the volume and speed of vehicular traffic *on* a roadway does not create a dangerous condition *of* the roadway that can give rise to road authority liability. Similarly, in *Sun v. City of Oakland*, 166 Cal.App.4<sup>th</sup> 1177 (2008), plaintiff's decedent was struck and killed while crossing a four-lane arterial. The plaintiff likewise alleged a lack of traffic controls at the intersection to facilitate pedestrian travel. The trial court granted summary judgment, holding as a matter of law that an absence of traffic controls did not create a "dangerous condition" of the roadway. The Court of Appeals affirmed, finding that there was no *physical defect* in the condition of the intersection that increased the danger to pedestrians:

A public entity may be liable [under California statutory law] for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's negligent or illegal act ... *if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality.* But it is insufficient to show only harmful third party conduct ... *There must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff.* Public liability lies ... only when a feature of the

public property has “increased or intensified the danger to users from third party conduct.”

*Id.* at 1187 [emphasis supplied, citations omitted].<sup>12</sup>

Appellants cite to the Zegeer study and to Seattle’s Director’s Rule as evidence that the crosswalk markings of this legal intersection crosswalk somehow rendered the roadway unsafe. Any effort to rely on

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<sup>12</sup> The City has been unable to locate any Washington case that has imposed liability on a road authority for a motorist’s failure to stop for a pedestrian in a crosswalk. The City has been able to locate only one case nationwide that has contemplated road authority liability for an accident between a motorist and a pedestrian, but that case is both factually and analytically distinguishable from the case at bar. In *Huifang v. Kansas City*, 229 S.W.3d 68 (2007) Kansas City had installed crosswalk markings at an intersection. Kansas City supplemented the crosswalk with pole-mounted signage, but had not further supplemented the crosswalk despite funding and recommending a flashing sign (such as that in place here). The plaintiff’s decedent was killed when struck by a car that had passed a row of cars stopped in an adjacent lane to allow her to pass (*i.e.*, a multiple-threat accident). In finding an issue of fact as to whether motorists were provided adequate warning of the crosswalk, it was the specific potential for multiple threat collisions (again, not at issue in the case at bar) that the *Huifang* court called out as potentially misleading under the facts of *that* particular case:

The evidence in the case and the ordinary experiences of life suggested that existence of the crosswalk, without adequate warnings to cars, could tend to actually *enhance* the danger to the pedestrian by creating an illusion to the pedestrian that there was a zone of safety within the crosswalk. A pedestrian crossing in front of a lane of cars, particularly when the vehicles are the size of vans and sport-utility vehicles, may have difficulty seeing what is coming up in an adjacent lane, while the vehicle in the adjacent lane may have difficulty seeing the pedestrian. Therefore, it is obvious that there is a need to alert vehicles to the potential danger to pedestrians.

*Huifang*, 229 S.W.3d at 83. Thus, in *Huifang*, the relevant inquiry was thus whether, *where the line of sight between approaching motorists and pedestrians was obscured by a properly stopped vehicle*, Kansas City had failed to provide adequate notice to motorists of the presence of the crosswalk. In contrast, this was not a multiple threat collision; regardless, appellants’ experts agree that the notice to motorists of the marked crosswalk was adequate.

either the Zegeer study or Seattle's Director's Rule fails for several reasons. First, as Mr. Zegeer clarified, his study does not stand for the premise that either marked or unmarked crosswalks are "unsafe," it does not support any inference that crosswalk markings in any way cause pedestrian collisions, and it is not intended to establish an industry standard of care with respect to existing infrastructure. CP 190-93.

Second, the plain language of the "directives" contained in Seattle's Director's Rule, as derived from the Zegeer study, does not support a finding that any particular action was required with regard to the subject intersection. CP 228. But regardless of the significance appellants attach to Seattle's adoption (and expansion) of the Zegeer study in its Director's Rule, any reliance on the Director's Rule for determining whether a duty has been breached is flawed as a matter of law. To survive summary judgment, appellants must produce sufficient evidence of the *required* standard of care. *Walker, supra*. While internal procedures can, in some cases, be competent evidence of a standard of care, such procedures must be "intended to form the basis for legal action." *Walker, supra*, at 909-11. The Director's Rule expressly denies the intent to establish any basis for liability. CP 221.

Third, Mr. Zegeer further clarified that in comparing collision rates at marked vs. unmarked crosswalks, his study was limited to marked

crosswalks without any supplemental treatments (*i.e.*, pavement markings alone). Here, where the marked crosswalk at 10<sup>th</sup> and Jackson was supplemented with pole-mounted advance warning signage, overhead signage, flashing beacons, fixed street lighting, and a curb extension, the results of his study (as incorporated in Seattle's Director's Rule) cannot be generalized to and have no application to this intersection. CP 189-90.

Lastly, the results of the Zegeer study show that the significant difference in collision rates between marked and unmarked crosswalks is directly attributable to the number of multiple threat collisions disproportionately represented at marked crosswalks – again, collisions that occur when a vehicle in one lane overtakes a vehicle stopped in an adjacent lane to allow a pedestrian to cross. CP 190. There is no evidence that the accident at issue here was a multiple threat accident.

Appellants also emphasize the record of citizen complaints concerning motorist disregard for pedestrians crossing at 10<sup>th</sup> and Jackson. Preliminarily, any issues raised by these complaints relate not to the design of this grid intersection but rather to enforcement of traffic and pedestrian laws, for which the City cannot be liable in tort. As Mr. Stevens acknowledged, Washington's Rules of the Road (RCW Ch. 46.61 *et seq.*) obligate motorists approaching *any* intersection to maintain a continuous look-out for pedestrians, regardless of whether a crosswalk is

marked, signed, or otherwise supplemented. Our courts have long affirmed this fundamental principle of the Uniform Vehicle Code. *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999); *Krogh v. Pemble*, 50 Wn.2d 250, 253, 310 P.2d 1069 (1957). Where the Rules of the Road create opportunities for pedestrians to cross regardless of traffic volume, it is thus only where motorists fail to comply with their statutory obligations under RCW 46.61.235(1) and (4) that these motorists create conflicts for pedestrians. The City owes no actionable duty to enforce motorist compliance with the law, *see Coffel v. Clallam Cy.*, 58 Wn. App. 517, 794 P.2d 513 (1990) (government's duty to enforce one owed to the public at large and, barring an exception to the public duty doctrine, not actionable by any particular individual), and, in designing and maintaining its roads, the City (like all parties) has the right to assume that all road users (including pedestrians) will exercise ordinary care (WPI 12.07; WPI 70.01) and will obey the rules of the road (WPI 70.06). *See also Keller, supra* at 252, 254 (no duty to anticipate the negligent acts of others); *Bradshaw, supra* (road authority has a right to assume that road users will proceed with due regard to the rights of users of the street).

Moreover, even if construed to relate to design, construction, maintenance or repair issues, these complaints cannot establish either a duty to act or a standard of care. *See Sun, supra* at 1188 (“[W]hile the

citizens' letters [complaining about crossing difficulties at the intersection] are relevant to the issue of whether [Oakland] had notice of a potentially dangerous intersection, they are not competent evidence that the intersection was, in fact a 'dangerous condition[.]'" Citizen complaints here may be relevant to a WPI 140.02 notice inquiry, but they are of no relevance with regard to whether the conditions at the intersection were, in fact, "unsafe." Citizen lay opinions as to matters of traffic engineering are not competent evidence as to whether a road authority breached a duty of care. ER 701(c). Again, there is no evidence in this case that signalized intersections are "safer" for pedestrians.

**2. Appellants Failed to Produce Sufficient Evidence That Inadequate Notice of the Pedestrian Crossing Was Provided.**

In *Owen*, the Court held that where the plaintiff had established that a vertical rise of the roadway could obscure an approaching motorist's view of intersecting train tracks, a question of fact existed as to whether Tukwila had provided adequate warning to approaching motorists of the presence of the tracks. Here, because appellants failed to establish (or even allege) any confusing or misleading condition of the roadway, this Court need not reach the second prong of the *Owen* inquiry. Regardless, even accepting *arguendo* that "heavy traffic volumes on Jackson", CP 8, can be an "inherent danger" of the roadway within the context of WPI

140.01, the testimony of appellants' experts not only fails to raise a question of fact as to whether sufficient notice of the marked crosswalk was provided – it affirmatively establishes that the engineering treatments provided were adequate to put road users on notice. Mr. Stevens noted the clear, open sightlines on this urban grid for both motorists and pedestrians. CP 258. He offered no criticism of the pole-mounted signage in place or the visibility of the crosswalk markings. CP 257, 259. He affirmatively praised the effectiveness of the overhead flashing beacons. CP 262. Mr. Alexander likewise hailed the flashing beacons as “the obvious cue ... essentially waving its arms and say[ing] here, look for pedestrians because this is where they cross[,]” CP 1119, explaining:

I think the cues were adequate to be on the lookout for pedestrians. The crosswalk, the illuminated crosswalk sign, the flashing lights identifying the location are designed and intended to draw motorists' attention to the crosswalk and to be on the alert for a pedestrian. That's what they're designed to do and I think they do that job well.

CP 1119. Simply put, unlike in *Owen*, it is not the crossing at 10<sup>th</sup> and Jackson that approaching motorists could not see – it was the pedestrian in the marked crosswalks that for reasons unknown defendant Brown simply did not heed. Unlike in *Owen* and *Ulve*, there is no evidence that any condition of the roadway was confusing or misleading either to approaching motorists or crossing pedestrians. Under *Keller*, *Owen*, and preceding

decades of case law interpreting WPI 140.01, nothing further was required of the City.

Lastly, appellants urge this Court to consider the testimony of Mr. Haro, who opined *ipse dixit* in his declaration that after proceeding through prior signalized intersections a motorist approaching 10<sup>th</sup> would not “expect” to see pedestrians crossing at this marked, signed, and lit intersection crosswalk. Mr. Haro’s speculative opinion as to what any given motorist may “expect” to see at one intersection based on his experience with another fails to create a triable issue of fact for three reasons. First, Mr. Haro fails to identify any standard of care that conditions the engineering of one intersection on the engineering of another; *i.e.*, he identifies no standard of care that premises an engineer’s decision to signalize one intersection on conditions at another. Second, there is no evidence that any road user in this case was confused or misled by the signalization of adjacent intersections into believing that there would be no pedestrians crossing at this marked, signed, and lit intersection crosswalk. “It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.” *Miller v. Likens*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (*quoting Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991)). Finally, Mr. Haro’s conclusions are flatly contrary to Washington

law, which requires motorists to be alert for pedestrians at all intersections, regardless of the engineering in place. RCW 46.06.160, .290; RCW 46.61.235; *Burnham v. Nehren*, 7 Wn. App. 860, 864, 503 P.2d 122 (1972) (driver approaching crosswalk shall maintain continuous observation for pedestrians); *see also Pudmaroff, supra; Krogh, supra*. For all of these reasons, Mr. Haro's speculation and argumentative assertions are insufficient to defeat summary judgment. *Craig, supra*.

## V. CONCLUSION

Appellants urge this Court to consider whether there are engineering options the City could have undertaken at this intersection that might have altered the outcome of this unfortunate crossing. But the inquiry before this Court, as before the trial court, is not whether the City *could* have done more; the inquiry is whether, *if* road users were confronted with a confusing or misleading condition of the roadway at 10<sup>th</sup> and South Jackson, adequate warning of a hazard was provided. As a matter of law, open, obvious, and ordinary traffic volumes on an arterial roadway are not an "inherent danger" of a roadway against which a road authority has a duty to warn; regardless, even if a such usual hazards of traffic generally could be a basis for road authority liability under WPI 140.01, where appellants experts agreed that the treatments in place were adequate to warn approaching motorists of a marked crosswalk, appellants have failed to meet their burden under CR 56.

Were the analysis as appellants urge, there would be no case where a road authority could ever obtain summary judgment – and that is because no matter what engineering treatments are provided, there is always the usual, open, and obvious risk that one using the roadway may become involved in an accident, and there is always the possibility that the road authority *could* have done something more to protect against the risk – even, as appellants suggested, by prohibiting the use. That is not the law.

For the foregoing reasons, the City respectfully requests that the trial court's order granting summary judgment be affirmed.

DATED this 24<sup>th</sup> day of June, 2009.

Respectfully submitted,

THOMAS A. CARR  
Seattle City Attorney

By:

  
REBECCA BOATRIGHT, WSBA #32767  
Assistant City Attorney

Attorneys for Respondent City of Seattle

PROOF OF SERVICE

DONNA M. ROBINSON certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On June 25, 2009, I requested ABC Legal Messengers to serve, by June 26, 2009, a copy of this document upon the following counsel:

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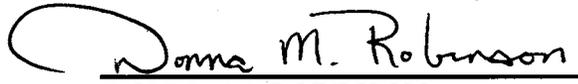
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COURT OF APPEALS, DIV. I  
STATE OF WASHINGTON  
2009 JUN 25 PM 3:42

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I further state that I requested ABC Messengers to file, by June 26, 2009, the original of this document with the Court of Appeals, Division I.

DATED this 25<sup>th</sup> day of June, 2009.

  
DONNA M. ROBINSON

▷

Court of Appeal, Fourth District, Division 1, California.

Shirley BRENNER, Plaintiff and Appellant,  
v.

CITY OF EL CAJON, Defendant and Respondent.  
No. D040579.

Nov. 10, 2003.

**Background:** Pedestrian filed second amended complaint against city for personal injuries incurred when she was struck by car while crossing street. The Superior Court, San Diego County, No. GIC771116, Ronald S. Prager, J., sustained city's demurrer without leave to amend. Pedestrian appealed.

**Holdings:** The Court of Appeal, McDonald, J., held that:

(1) facts alleged by second amended complaint did not support finding of existence of dangerous condition of public property, and  
(2) no proposed pleading or other identifiable allegation was provided to cure defects of second amended complaint.

Affirmed.

West Headnotes

**[1] Municipal Corporations 268 847**

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases  
Statute setting forth exclusive conditions under which public entity is liable for injury caused by dangerous condition of public property is the sole statutory basis for a claim imposing liability on a public entity based on the condition of public property. West's Ann.Cal.Gov.Code § 835.

**[2] Municipal Corporations 268 847**

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases  
Under statute setting forth exclusive conditions under which public entity is liable for injury caused by dangerous condition of public property, public entity may be held liable if it creates injury-producing dangerous condition on its property or if it fails to remedy dangerous condition despite having notice and sufficient time to protect against it. West's Ann.Cal.Gov.Code § 835.

**[3] Municipal Corporations 268 847**

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases  
Under statutory scheme setting forth conditions under which public entity may be held liable for injury caused by dangerous condition of public property, property is not "dangerous" if property is safe when used with due care and risk of harm is created only when foreseeable users fail to exercise due care. West's Ann.Cal.Gov.Code §§ 830, 835.

**[4] Automobiles 48A 277.1**

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak277.1 k. In General. Most Cited Cases

**Automobiles 48A 279**

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

Statutory scheme setting forth conditions under which public entity may be held liable for injury caused by dangerous condition of public property precludes plaintiff from imposing liability on public entity for creating a dangerous condition merely because public entity did not install regulatory traffic control signals, stop signs, yield right-of-way signs, speed restriction signs, or distinctive roadway markings. West's Ann.Cal.Gov.Code §§ 830, 830.4, 835; West's Ann.Cal.Vehicle Code § 21460.

**[5] Municipal Corporations 268 ↪742(4)**268 Municipal Corporations268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k742 Actions

268k742(4) k. Pleading. Most Cited

Cases

Limited and statutory nature of governmental liability mandates that claims against public entities be specifically pleaded.

**[6] Municipal Corporations 268 ↪857**268 Municipal Corporations268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k857 k. Actions for Injuries. Most Cited

Cases

Under statutory scheme setting forth conditions under which public entity may be held liable for injury caused by dangerous condition of public property, claim alleging dangerous condition of public property may not rely on generalized allegations, but must specify in what manner the condition constituted a dangerous condition. West's Ann.Cal.Gov.Code §§ 830, 835.

**[7] Municipal Corporations 268 ↪857**268 Municipal Corporations268XII Torts

268XII(E) Condition or Use of Public Build-

ings and Other Property

268k857 k. Actions for Injuries. Most Cited

Cases

A court may properly sustain a demurrer to a complaint if the facts pleaded by the plaintiff in an action based upon an alleged dangerous condition of public property cannot support, as a matter of law, the finding of the existence of a dangerous condition within the meaning of the statutory scheme setting forth the conditions under which a public entity may be held liable for an injury caused by a dangerous condition of its property. West's Ann.Cal.Gov.Code §§ 830, 830.2, 835.

**[8] Automobiles 48A ↪257**48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak257 k. Sufficiency and Safety of Way in General. Most Cited Cases

**Automobiles 48A ↪259**48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak259 k. Defective Plan of Construction. Most Cited Cases

**Automobiles 48A ↪279**48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

Facts alleged by pedestrian injured by car while crossing city street did not support finding of existence of dangerous condition at street crossing for purpose of stating claim against city for injury caused by dangerous condition of public property; alleged expansion of street to accommodate additional traffic did not permit finding of dangerous condition absent allegation that physical characteristics of street created substantial risk that careful driver would be unable to

stop for careful pedestrian, plaintiff did not allege existence of blind corners, obscured sightlines, elevation variances, or other unusual conditions that made street dangerous, and city's failure to install traffic safety devices was statutorily excluded as basis for finding dangerous condition of public property. West's Ann.Cal.Gov.Code §§ 830, 830.4, 835.

*See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 163, 164, 172, 173, 174, 176; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 579, 581, 582; Cal. Jur. 3d, Government Tort Liability, § 31 et seq.; Cal. Civil Practice (Thomson/West) Torts, §§31:10, 31:18 et seq.*

### **[9] Appeal and Error 30 ↪948**

#### 30 Appeal and Error

##### 30XVI Review

##### 30XVI(H) Discretion of Lower Court

##### 30k948 k. Burden of Showing Grounds for

Review. Most Cited Cases

### **Pleading 302 ↪225(1)**

#### 302 Pleading

##### 302V Demurrer or Exception

302k219 Operation and Effect of Decision on Demurrer

302k225 Amendment or Further Pleading After Demurrer Sustained

302k225(1) k. In General. Most Cited

##### Cases

Plaintiff did not provide proposed amendment or any identifiable allegation to cure defects of second amended complaint, and those omissions alone supported trial court order sustaining demurrer without leave to amend; plaintiff had burden of showing trial court abused its discretion by sustaining demurrer without leave to amend.

### **[10] Pleading 302 ↪225(2)**

#### 302 Pleading

##### 302V Demurrer or Exception

302k219 Operation and Effect of Decision on Demurrer

302k225 Amendment or Further Pleading After Demurrer Sustained

302k225(2) k. Authority and Discretion of Court. Most Cited Cases

It is an abuse of discretion for the court to deny a party leave to amend a complaint, after demurrer is sus-

tained, if there is a reasonable possibility the pleading can be cured by amendment.

### **[11] Appeal and Error 30 ↪948**

#### 30 Appeal and Error

##### 30XVI Review

##### 30XVI(H) Discretion of Lower Court

30k948 k. Burden of Showing Grounds for Review. Most Cited Cases

### **Appeal and Error 30 ↪959(1)**

#### 30 Appeal and Error

##### 30XVI Review

##### 30XVI(H) Discretion of Lower Court

30k959 Amended and Supplemental Pleadings

30k959(1) k. In General. Most Cited Cases

To demonstrate an abuse of discretion by the court in denying a party leave to amend a complaint, the burden is on the plaintiff to show that there is a reasonable possibility that the proposed amendment will cure the defect by demonstrating in what manner the complaint can be amended and how that amendment will change the legal effect of the pleadings.

**\*\*318\*436** Salim Khawaja, San Diego, CA, for Plaintiff and Appellant.

Daley & Heft, Robert W. Brockman Jr., and Scott E. Patterson, Solana Beach, CA, for Defendant-Respondent.

#### McDONALD, J.

Appellant Shirley Brenner was injured when struck by a car as she was walking across Chase Avenue in the City of El Cajon (City). Brenner sued City and, after demurrers were sustained to her original and first amended complaints, filed a second amended complaint alleging City was liable for a dangerous condition on public property. City's demurrer to Brenner's second amended complaint was sustained without leave to amend. Brenner asserts her second amended complaint adequately pleads facts showing a dangerous condition of public property; alternatively, she asserts it was an abuse of discretion to refuse her the opportunity to again amend her complaint.

## I

## FACTUAL AND PROCEDURAL BACKGROUND

On August 21, 2000, Brenner was walking across Chase Avenue near its intersection with Estes Street in the City. While crossing the street, she was struck by a car and suffered significant injuries.

A. *The Prior Iterations of the Complaint*

Brenner's original complaint as against City pleaded a single claim for negligence. She alleged that City negligently "designed, maintained, serviced, controlled, managed, monitored, created and operated" its streets; and City knew or should have known of the dangerous conditions on Chase Avenue, but failed to take steps to make the condition safe because it negligently did not "install safety devices to control the automobile traffic on Chase Avenue" or "take steps to prevent harm and injury to the public." City demurred to the complaint, arguing a general negligence\*\*319 claim does not lie against a public entity. City also argued that, to the extent Brenner's complaint was construed as attempting to state a statutory claim under Government Code section 835 <sup>FN1</sup> for a dangerous condition of public property based on City's not installing safety devices to control the automobile traffic on Chase Avenue, she failed to state facts sufficient to show a dangerous condition under section 830.4. The court sustained City's demurrer but granted Brenner leave to amend her \*437 complaint, cautioning that she should evaluate whether she could allege a viable claim under section 835.

FN1. All statutory references are to the Government Code unless otherwise specified.

Brenner then amended her complaint. Although she retitled her claim against City as "Dangerous Condition," her reformulated claim essentially realleged the allegations contained in her original negligence claim, adding only that City had "actual knowledge ... of the dangerous condition, or changed conditions [that] made the road [a] dangerous condition, and that created a substantial risk or unreasonable risk" on Chase Avenue, and City had been in possession of that knowledge for "several years." City again demurred, arguing the complaint's only alleged dangerous condition of public property was the City's failure to in-

stall safety control devices for the street, which under section 830.4 is deemed not to be a dangerous condition.

Brenner opposed the demurrer, asserting the Chase/Estes intersection constituted a dangerous condition. Brenner noted there was a bus stop, a park and a convenience store at the intersection that resulted in high pedestrian traffic across the intersection; notwithstanding these facts, City did not install safety devices at the intersection. The court's tentative ruling was to sustain the demurrer and deny Brenner leave to amend because the only allegation of a dangerous condition was City's failure to install safety devices to control traffic at the intersection. After oral argument, the court sustained the demurrer but again gave Brenner leave to amend her complaint.

B. *Second Amended Complaint*

Brenner's second amended complaint reasserted the set of allegations contained in her first amended complaint, but added City knew or should have known that, because of the attraction created by two bus stops, a park, a convenience store and a middle school at or near the Chase/Estes intersection, many pedestrians would be attracted to the area and would use the intersection to cross Chase Avenue. Brenner alleged that City was aware of the high number of pedestrians using the street and intersection, as well as the increased volume and speed of cars traveling on Chase Avenue and physical \*438 changes made to Chase Avenue <sup>FN2</sup> that posed risks to pedestrians; however, City did not take steps to make the intersection safe for pedestrians because it "failed to install traffic [regulatory] devices, traffic safety devices, traffic control devices, signs or traffic signs, or take any steps to manage, control, or reduce the automobile traffic flow or speed on Chase Avenue and/or ... failed to take steps to prevent increased risk of harm and injury to the pedestrians...."

FN2. Although the second amended complaint does not identify the nature of the physical or structural changes made to Chase Avenue that allegedly created the dangerous condition, it appears Brenner was referring to the fact Chase Avenue had been expanded several years earlier from a two-lane to a four-lane street.

**\*\*320** City again demurred, noting Brenner still had not alleged any aspect or condition of the roadway itself that was dangerous and instead merely reiterated her claims that it was the *absence* of traffic safety or control devices that was the dangerous condition for which City was liable. City pointed out that under sections 830.4 and 830.8, as well as controlling case law (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 45 Cal.Rptr.2d 657 and *Paz v. State of California* (2000) 22 Cal.4th 550, 93 Cal.Rptr.2d 703, 994 P.2d 975), City could not be held liable based solely on its failure to install safety devices. In opposition, Brenner argued the complaint adequately alleged a dangerous condition.<sup>FN3</sup>

FN3. Brenner argued, in the alternative, that she should be given leave to amend her complaint because the court had recently ordered City to provide her with “as built” drawings of Chase Avenue showing the design of Chase Avenue after City expanded it from a two-lane to a four-lane road. However, there is no suggestion Brenner lacked the ability to examine Chase Avenue in its current four-lane configuration to assess whether it constituted a dangerous condition (because of impaired sightlines or some other construction or other flaw), and Brenner did not explain how receipt of these “as built” drawings would provide information not currently available to her.

The court sustained City's demurrer without leave to amend, and this appeal followed.

## II

### ANALYSIS

#### A. Governing Legal Principles

[1][2] A public entity is not liable for an injury arising out of the alleged act or omission of the entity except as provided by statute. (§ 815.) Section 835 is the sole statutory basis for a claim imposing liability on a public entity based on the condition of public property. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829, 15 Cal.Rptr.2d 679, 843 P.2d 624.) Under **\*439** section 835, a public entity may be liable if it creates an injury-producing dangerous condition on its property or if it fails to remedy a dangerous

condition despite having notice and sufficient time to protect against it. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939, 67 Cal.Rptr.2d 454.)

[3] To state a cause of action against a public entity under section 835, a plaintiff must plead: (1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it. (§ 835; *Vedder v. County of Imperial* (1974) 36 Cal.App.3d 654, 659, 111 Cal.Rptr. 728.) Section 830 defines a “[d]angerous condition” as “a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used.” Property is not “dangerous” within the meaning of the statutory scheme if the property is safe when used with due care and the risk of harm is created only when foreseeable users fail to exercise due care. (*Chowdhury v. City of Los Angeles, supra*, 38 Cal.App.4th 1187, 1196, 45 Cal.Rptr.2d 657.)

[4] For purposes of this case, it is also important to note the Legislature has expressly provided that “[a] condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control **\*\*321** signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.” (§ 830.4.) Thus, the statutory scheme precludes a plaintiff from imposing liability on a public entity for creating a dangerous condition merely because it did not install the described traffic control devices. (*Chowdhury v. City of Los Angeles, supra*, 38 Cal.App.4th 1187, 1194-1195, 45 Cal.Rptr.2d 657; accord, *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 6-7, 190 Cal.Rptr. 694; *Durham v. City of Los Angeles* (1979) 91 Cal.App.3d 567, 577, 154 Cal.Rptr. 243.)

[5][6][7] Because this action was dismissed at the pleading stage, we outline the rules for pleading a claim against a governmental entity. The limited and statutory nature of governmental liability mandates that claims against public entities be specifically

pleaded. (*Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 809, 75 Cal.Rptr. 240.) Accordingly, a claim alleging a dangerous condition may not rely on generalized allegations (*Mittenhuber v. City of Redondo Beach, supra*, 142 Cal.App.3d at p. 5, 190 Cal.Rptr. 694) but must specify in what manner the condition constituted a dangerous condition. \*440(*People ex rel Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480, 1485-1486, 7 Cal.Rptr.2d 498.) Although it is the general rule that it is a factual question whether a given set of facts and circumstances creates a dangerous condition, the issue may be resolved as a question of law if reasonable minds can come to but one conclusion. (§ 830.2; *Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 72 Cal.Rptr.2d 464; *Chowdhury v. City of Los Angeles, supra*, 38 Cal.App.4th 1187, 1194, 45 Cal.Rptr.2d 657; *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 704, 50 Cal.Rptr.2d 8.) Accordingly, if the facts pleaded by the plaintiff as a matter of law cannot support the finding of the existence of a dangerous condition within the meaning of the statutory scheme, a court may properly sustain a demurrer to the complaint. (*Mittenhuber, supra*, at pp. 5-12, 190 Cal.Rptr. 694; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133-1139, 119 Cal.Rptr.2d 709, 45 P.3d 1171 [trial court correctly sustained demurrer to complaint alleging dangerous condition because plaintiff was “unable to point to any defective aspect of the purely physical condition of the property”].)

#### B. The Trial Court Sustained City's Demurrer to Second Amended Complaint

[8] Brenner's complaint, shorn of its generalized allegations and conclusions, cites three factors to support her claim of the dangerous condition of Chase Avenue. First, she alleges the expansion of Chase Avenue to a four-lane street resulted in an increase in the numbers of cars traveling the road and the speed at which they traveled. Second, she alleges an increased number of pedestrians cross Chase Avenue at or near the Chase/Estes intersection to patronize a park, two bus stops, a convenience store and a school in the area. Third, she alleges City did not install traffic regulation or safety devices to reduce the dangers to pedestrians posed by crossing Chase Avenue.

The first factor—that the volume and speed of vehicular traffic on Chase Avenue increased after it was wi-

dened—would not permit a finding of a dangerous condition, at least in the absence of some additional allegation that the physical characteristics of Chase Avenue created a substantial risk that a driver using due care while traveling along Chase Avenue would be unable \*\*322 to stop for pedestrians who were using due care while crossing at the Chase/Estes intersection. (See *Mittenhuber v. City of Redondo Beach, supra*, 142 Cal.App.3d at p. 7, 190 Cal.Rptr. 694[“[m]any of the streets and highways of this state are heavily used by motorists and bicyclists alike [but] the heavy use of any given paved road alone does not invoke application of section 835”]; accord, *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 483-485, 220 Cal.Rptr. 181.) The second amended complaint contains no allegation that Chase Avenue had blind corners, obscured sightlines, elevation variances, or any other unusual condition that made the road unsafe when used by \*441 motorists and pedestrians exercising due care (*Mittenhuber, supra*, at p. 7, 190 Cal.Rptr. 694; cf. *Plattner v. City of Riverside* (1999) 69 Cal.App.4th 1441, 1444-1446, 82 Cal.Rptr.2d 211), and Brenner cites no authority that a dangerous condition exists absent such factors.<sup>FN4</sup>

FN4. Brenner argues that under *Quelvog v. City of Long Beach* (1970) 6 Cal.App.3d 584, 86 Cal.Rptr. 127, a public entity can be held liable for any condition that creates a danger of injury when the property is used in a reasonably foreseeable manner, and here a reasonably foreseeable risk of injury exists because drivers or pedestrians will not always use due care when traveling or crossing Chase Avenue. However, in *Quelvog*, the government affirmatively created a dangerous condition on property by encouraging drivers of “autoettes” to drive on sidewalks and by not enforcing the law against their use even after accidents had occurred, and the decedent (who was lawfully working on a ladder on the public sidewalk) was knocked down by a negligent driver of an autoette. (*Id.* at pp. 585-586, 590, 86 Cal.Rptr. 127.) In contrast to *Quelvog*, Brenner's complaint contains no allegations that City did anything to encourage or facilitate any unusual or illegal use of Chase Avenue by drivers or pedestrians.

The second factor—that there is a park, a convenience

store, a school, and two bus stops at or near the Chase/Estes intersection and an increasing number of pedestrians cross Chase Avenue to patronize those facilities—does not make Chase Avenue a dangerous condition (*Mittenhuber v. City of Redondo Beach, supra*, 142 Cal.App.3d at p. 7, 190 Cal.Rptr. 694 [heavy use of road does not equate to dangerous condition]), absent some additional allegation that there is some peculiar condition that makes it unsafe to cross Chase Avenue even when motorists and pedestrians are exercising due care.

In her reply brief on appeal, Brenner cites *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 132 Cal.Rptr.2d 341, 65 P.3d 807 (*Bonanno*) to assert that the location of a bus stop can constitute a dangerous condition of public property, and her second amended complaint alleged facts bringing her within *Bonanno*. However, we are convinced the unique facts and posture of *Bonanno* make it inapplicable here. In *Bonanno*, a vehicle struck a bus patron as the patron tried to reach a bus stop by crossing the street in a crosswalk at an uncontrolled intersection. The plaintiff sued the transit authority (CCCTA) and the county; all defendants except CCCTA settled, and plaintiff tried her case against CCCTA alone. The jury found in her favor, expressly finding that the bus stop was a dangerous condition of public property, and the Court of Appeal affirmed, holding that the location of the bus stop created a dangerous condition because the stop “beckoned pedestrian bus patrons to cross, and compelled cars to stop, at the feeder crosswalk without attendant traffic lights or pedestrian-activated signals.” The Supreme Court granted review on CCCTA’s petition, expressly “limiting review to the question ‘whether the location of a bus stop may constitute a dangerous condition of public property under **\*\*323**Government Code section 830 because bus patrons will be enticed to cross a dangerous crosswalk to reach the bus stop.’” (*Bonanno, supra*, at p. 146, 132 Cal.Rptr.2d 341, 65 P.3d 807 italics added.) The majority, **\*442** although eventually holding a bus stop could be a dangerous condition, predicated its analysis by expressly cautioning:

“Our decision here, we emphasize, *does not concern the question whether the crosswalk ... was in fact an unsafe pedestrian route for crossing* [the road], or even the broader question whether painted crosswalks at uncontrolled intersections are more dan-

gerous than those at signal-controlled intersections. As the County, which controlled the intersection, settled with plaintiff before trial, our decision does not in any respect address the liability of a city or county for maintenance of an unsafe crosswalk. To be sure, plaintiff introduced evidence—which the jury apparently found persuasive—showing the De-Normandie crossing was more dangerous than that at Morello, in order to establish that CCCTA should have moved its bus stop to Morello. But the sufficiency of that evidence is not before this court. Our order limiting review, quoted earlier in this opinion, *assumes the existence of a dangerous crosswalk*, posing only the question whether a bus stop may be deemed dangerous because bus users, to reach the stop, *must cross at that dangerous crosswalk.*” (*Bonanno, supra*, 30 Cal.4th at pp. 146-147, 132 Cal.Rptr.2d 341, 65 P.3d 807 first, second and fourth italics added; third italics in original.)

Thus, *Bonanno* assumed the crossing was a dangerous condition; the precise question here is *whether* the Chase Avenue crossing was a dangerous condition. Indeed, the issue decided in *Bonanno* is the *obverse* of the issue raised by Brenner: *Bonanno* addressed whether a bus stop was dangerous because of the routes necessarily traveled by its patrons, and in contrast Brenner’s complaint addresses whether the route traveled by patrons was dangerous because of the bus stop. Because *Bonanno* did not address the issue raised by Brenner, and instead assumed the existence of a dangerous crosswalk, *Bonanno* does not illuminate the issues in this case.

Brenner’s third factor for asserting Chase Avenue was a dangerous condition—that City did not install traffic regulation or safety devices to reduce the dangers to pedestrians posed by crossing Chase Avenue—has been legislatively excluded as a basis for finding a dangerous condition. (§ 830.4.) Brenner apparently seeks to avoid the impact of section 830.4 by citing *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 159 Cal.Rptr. 835, 602 P.2d 755 and *Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466, 20 Cal.Rptr.2d 734 to argue a governmental entity can be liable when it has notice of a dangerous condition and does not install safeguards to protect the public against the danger. She asserts City, which had notice of the dangers presented by Chase Avenue, should have installed safeguards such as a median in the middle of the road or chains along the sidewalks to

prevent pedestrians from crossing Chase Avenue and to channel them to safer crossing locations. However, neither *Ducey* nor *Constantinescu*\*443 supports Brenner's claim. In *Ducey*, the court held that when the state has actual or constructive knowledge of a dangerous condition it can be held liable for failing to take reasonable steps to protect against the danger. (*Ducey*, at pp. 715-717, 159 Cal.Rptr. 835, 602 P.2d 755.) However, *Ducey's* holding was predicated on the foundational determination\*\*324 that a dangerous condition existed.<sup>FN5</sup> That foundational showing is absent here.

FN5. In *Ducey*, the issue was whether the state could be liable for not erecting a median barrier on a heavily traveled highway to prevent cross-median head-on accidents. However, *Ducey* examined at length the evidence supporting the conclusion that there was a substantial risk of injury from cross-median accidents even in the absence of negligent conduct by a motorist, and thus a dangerous condition within the meaning of section 835 was present in *Ducey*. (*Ducey v. Argo Sales Co.*, *supra*, 25 Cal.3d at pp. 718-721, 159 Cal.Rptr. 835, 602 P.2d 755.) Indeed, *Ducey* expressly noted the administrative criteria for erecting a median barrier on this stretch of road had been satisfied and its construction had been approved, but the state postponed construction for three years and the accident occurred during the hiatus. (*Id.* at pp. 712-714, 159 Cal.Rptr. 835, 602 P.2d 755.)

*Constantinescu* is also distinguishable. There, a school affirmatively created "traffic congestion that was particularly dangerous" by designating a small lot, originally designed for a different purpose, as a "pick up" area for school children where numerous automobiles converged at the same time to create "chaotic traffic conditions." (*Constantinescu v. Conejo Valley Unified School Dist.*, *supra*, 16 Cal.App.4th at pp. 1473-1474, 20 Cal.Rptr.2d 734.)<sup>FN6</sup> The court recognized that "[o]rdinarily, traffic congestion is not a dangerous condition invoking the application of section 835." (*Id.* at p. 1473, 20 Cal.Rptr.2d 734.) However, *Constantinescu* held that, considering the special duty owed by a school district to protect the safety of the students attending school functions, the creation of a congested and chaotic loading zone

permitted the finding of a dangerous condition, and therefore the school was obligated to take measures to safeguard against the dangerous condition. (*Id.* at pp. 1472-1476, 20 Cal.Rptr.2d 734.) In contrast to *Constantinescu*, Brenner does not suggest City affirmatively created chaotic traffic conditions on Chase Avenue that posed any risks to pedestrians beyond the risks inherent in a sidewalk that abuts a road. Accordingly, *Constantinescu* does not aid Brenner.

FN6. Specifically, a semicircular two-lane driveway, originally designed as a school bus loading area, was later designated as an area for parents to drive through and park to pick up waiting elementary school children. There was only enough room for six or seven cars at a time, and traffic would often be backed up onto the street. Hurried parents, jockeying for position, would often be forced to park at positions angled toward children who were waiting or walking along the sidewalk, and cars would be moving backward and forward on the inclined driveway trying to negotiate the loading zone while watching for running children and other cars. One parent described the conditions as "a zoo," and two experts opined it was "an accident waiting to happen." (*Constantinescu v. Conejo Valley Unified School Dist.*, *supra*, 16 Cal.App.4th at pp. 1469-1470, 20 Cal.Rptr.2d 734.)

We conclude the facts alleged by Brenner's second amended complaint do not support the finding of the existence of a dangerous condition within the meaning of the statutory scheme, and therefore the court properly sustained \*444 City's demurrer to the second amended complaint. (*Mittenhuber v. City of Redondo Beach*, *supra*, 142 Cal.App.3d at pp. 5-12, 190 Cal.Rptr. 694.)

#### C. Denial of Leave to File a Third Amended Complaint

[9][10][11] Brenner bears the burden of demonstrating that sustaining the demurrer without leave to amend was an abuse of discretion. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 375, 33 Cal.Rptr.2d 744.) It is an abuse of discretion to deny a party leave to amend a complaint if there is a reasonable possibility the pleading can be cured by amendment. \*\*325 (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742, 1

Cal.Rptr.2d 543, 819 P.2d 1.) To demonstrate an abuse of discretion, the burden is on the plaintiff to show there is a reasonable possibility that the proposed amendment will cure the defect (Blank v. Kirwan (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58) by showing in what manner the amendment to the complaint can be amended and how that amendment will change the legal effect of the pleadings. (Goodman v. Kennedy (1976) 18 Cal.3d 335, 349, 134 Cal.Rptr. 375, 556 P.2d 737.)

We note Brenner did not provide a proposed amendment to cure the faults of her second amended complaint and that omission alone supports the trial court's order denying leave to amend. (Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal.App.3d 218, 226, 162 Cal.Rptr. 669.) Moreover, Brenner has not advanced on appeal any allegation she could now make, were further amendment to the complaint permitted, to cure the defects in her claims against City. (Cooper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636-637, 75 Cal.Rptr. 766, 451 P.2d 406.)

Because there exists no proposed pleading nor any identifiable allegation showing a reasonable possibility that an amended complaint will cure the defect (Baum v. Duckor, Spradling & Metzger (1999) 72 Cal.App.4th 54, 73, 84 Cal.Rptr.2d 703), Brenner has not satisfied her burden of showing the trial court abused its discretion by sustaining the demurrer without leave to amend.

#### DISPOSITION

The judgment is affirmed.

WE CONCUR: HUFFMAN, Acting P.J., and AA-  
RON, J.

Cal.App. 4 Dist., 2003.

Brenner v. City of El Cajon

113 Cal.App.4th 434, 6 Cal.Rptr.3d 316, 03 Cal. Daily  
Op. Serv. 9946, 2003 Daily Journal D.A.R. 12,479

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**H**

Missouri Court of Appeals,  
 Western District.  
 Tan HUIFANG and Chen Zhiping, Respondents,  
 v.  
 CITY OF KANSAS CITY, Missouri, et al., Appel-  
 lants.  
 No. **WD 65086**.

Jan. 23, 2007.  
 Motion for Rehearing and/or Transfer to Supreme  
 Court Denied Feb. 27, 2007.  
 As Modified May 1, 2006.  
 Application for Transfer Denied Aug. 21, 2007.

**Background:** Parents of deceased pedestrian brought wrongful death action against city, alleging that city's negligence in failing to provide adequate warning and controls at intersection resulted in pedestrian's death when she was struck by motor vehicle while she was using crosswalk. The Circuit Court, Jackson County, Edith L. Messina, J., entered judgment upon jury verdict for parents. City appealed.

**Holdings:** The Court of Appeals, James M. Smart, Jr., J., held that:

- (1) any concurring negligence on part of motorist was required to be an efficient and independent intervening cause of injury to preclude statutory waiver of governmental immunity for dangerous condition of property;
- (2) waiver of immunity for dangerous condition of property was an absolute waiver that did not depend on whether placement of traffic signals was a discretionary governmental function; and
- (3) whether pedestrian's death directly resulted from city's alleged negligence, as required for waiver of immunity for dangerous condition of property, was jury question.

Affirmed.

West Headnotes

**[1] Appeal and Error 30 ↪893(1)**

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most Cited

Cases

Issue of whether city was protected by governmental immunity on the facts of the case was an issue of law subject to a de novo standard of review on appeal, in wrongful death action against city arising from death of pedestrian in a crosswalk accident at allegedly dangerous intersection. V.A.M.S. § 537.600(1)(2).

**[2] Appeal and Error 30 ↪893(1)**

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most Cited

Cases

City's argument, relating to claim of governmental immunity, that plaintiff parents of deceased pedestrian failed as a matter of law to show that the condition of the road directly resulted in the death of pedestrian in crosswalk accident was an issue of law subject to a de novo standard review on appeal, in wrongful death action against city. V.A.M.S. § 537.600(1)(2).

**[3] Automobiles 48A ↪259**

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak259 k. Defective Plan of Construction.

Most Cited Cases

**Automobiles 48A ↪279**

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries  
48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases  
Statutory waiver of a city's governmental immunity for injury caused by a dangerous condition of city property includes a waiver for negligent, defective, or dangerous roadway design, including traffic control devices such as markings, signs, and traffic signals. V.A.M.S. § 537.600(1)(2).

**[4] Municipal Corporations 268 ↪854**

268 Municipal Corporations  
268XII Torts  
268XII(E) Condition or Use of Public Buildings and Other Property  
268k854 k. Proximate Cause of Injury. Most Cited Cases

**Municipal Corporations 268 ↪856**

268 Municipal Corporations  
268XII Torts  
268XII(E) Condition or Use of Public Buildings and Other Property  
268k856 k. Negligence or Other Fault of Third Persons. Most Cited Cases  
Phrase “directly resulted from,” within meaning of statute waiving a city's governmental immunity for injury caused by a dangerous condition of city property when the injury directly resulted from city's negligence, is synonymous with proximate cause in the common law tort context, and therefore, similar to the concept of third-party intervention in the common law tort context, any concurring negligence on part of a third party must be an efficient and independent intervening cause of injury to preclude application of the statutory waiver. V.A.M.S. § 537.600(1)(2).

**[5] Automobiles 48A ↪279**

48A Automobiles  
48AVI Injuries from Defects or Obstructions in Highways and Other Public Places  
48AVI(A) Nature and Grounds of Liability  
48Ak277 Precautions Against Injuries  
48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases  
Statute waiving city's governmental immunity for injury caused by a dangerous condition of city prop-

erty, including defective roadway design in the placement of traffic signals, was an absolute waiver that did not depend on whether placement of signals was a discretionary governmental function. V.A.M.S. § 537.600(1)(2).

**[6] Appeal and Error 30 ↪927(1)**

30 Appeal and Error  
30XVI Review  
30XVI(G) Presumptions  
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict  
30k927(1) k. In General. Most Cited Cases

To determine whether plaintiff parents of deceased pedestrian made a submissible case against city on element of death directly resulting from city's alleged negligence in roadway design, in connection with claim of statutory waiver of governmental immunity for injury caused by a dangerous condition of city property, Court of Appeals was required to consider evidence in the light most favorable to plaintiffs, giving plaintiffs the benefit of all reasonable inferences and disregarding city's evidence except insofar as it would aid plaintiffs' case. V.A.M.S. § 537.600(1)(2).

**[7] Municipal Corporations 268 ↪854**

268 Municipal Corporations  
268XII Torts  
268XII(E) Condition or Use of Public Buildings and Other Property  
268k854 k. Proximate Cause of Injury. Most Cited Cases  
Causation requirement is an element of the statutory waiver of a city's governmental immunity for injury caused by a dangerous condition of city property; if plaintiff fails to show causation, the plaintiff has not shown that immunity is waived and the claim is barred. V.A.M.S. § 537.600(1)(2).

**[8] Automobiles 48A ↪308(10)**

48A Automobiles  
48AVI Injuries from Defects or Obstructions in Highways and Other Public Places  
48AVI(B) Actions  
48Ak308 Questions for Jury

48Ak308(10) k. Proximate Cause of Injury. Most Cited Cases

Whether pedestrian's death in crosswalk accident with an apparently inattentive motorist was a direct result of city's alleged negligence in failing to install proper traffic control devices at intersection was question for jury, in wrongful death action involving claim of statutory waiver of governmental immunity for injury caused by dangerous condition of city property. V.A.M.S. § 537.600(1)(2).

\*69 Douglas McMillan, Kansas City, MO, for appellant.

Thomas W. Wagstaff, Kansas City, MO, for respondent.

Before THOMAS H. NEWTON, P.J., ROBERT G. ULRICH, and JAMES M. SMART, JR., JJ.

JAMES M. SMART, JR., Judge.

This is an appeal of a judgment entered on a jury verdict in a wrongful death case brought against the City of Kansas City. The action was brought by the parents of a young woman, Chen Pei, who was a student at the Conservatory of Music at the University of Missouri at Kansas City ("UMKC") when she was struck by a vehicle on February 3, 2003. At the time of the accident, Chen Pei was crossing Troost Avenue at its intersection with 53rd Street. She passed away eleven days later due to the injuries.

In the action against the City, the plaintiff parents, who are residents of China, alleged that the City was careless and negligent in the way the City controlled traffic and pedestrian movements at 53rd and Troost. The errant driver, Melieka Perkins, was not a party defendant, having settled before trial. Plaintiffs alleged that as a result of the failure of the City to locate and install proper warnings and traffic control devices, the intersection of Troost and 53rd was in a dangerous condition. Plaintiffs further allege that the \*70 death of their daughter occurred as a direct result of the dangerous condition of the City-controlled property at 53rd and Troost.

The City pleaded the defense of governmental immunity based on section 537.600, RSMo 2000. The City maintained throughout the proceedings that the action was barred by section 537.600, because the cause of action asserted by plaintiffs was not within

any exception to the immunity provided to public entities by the statute. The City also denied that any failure by the City directly caused the death, asserting that the death was attributable to the actions of others. The trial court denied the City's motions, and the claim of negligence was submitted. The jury found that the plaintiffs suffered damages due to the death of their daughter in the amount of \$1,250,000. The jury found the decedent seventeen percent at fault and the City eighty-three percent at fault. The court also applied the statutory limit of liability under section 537.610, entering judgment against the City in the amount of \$328,011.

The City appeals the judgment, contending that the trial court erred in its rulings as to the issue of the City's immunity. The City also contends that the plaintiffs did not prove that any condition of the property caused the death. In addition, the City complains of certain other rulings of the trial court. The City's first three points on appeal are addressed in this opinion. The fourth point, which includes assertions of trial court error as to evidentiary rulings, is resolved by summary order pursuant to Rule 84.16(b) accompanied by a memorandum to the parties. We affirm the judgment of the trial court.

[1][2] The issue of whether the City is protected by governmental immunity on the facts of this case is an issue of law, which we review *de novo*. See Williams v. Kimes, 996 S.W.2d 43, 44-45 (Mo. banc 1999). The contention of the City that the plaintiffs failed as a matter of law to show that the condition of the road directly resulted in the death of Chen Pei is also an issue of law, which we review *de novo*. See *id.* Any dispute in the evidence as to factual matters is resolved in favor of the plaintiffs in determining whether a submissible case was made. Seward v. Terminal R.R. Ass'n, 854 S.W.2d 426, 428 (Mo. banc 1993).

We first address in this opinion the issue of whether the plaintiffs showed that the intersection of 53rd and Troost was a "dangerous condition of property" within the meaning of section 537.600. The text of section 537.600 provides as follows:

**537.600 Sovereign Immunity in effect-exceptions-waiver of**

1. Such sovereign or governmental tort immunity as existed at common law in this state prior to Sep-

tember 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:

- (1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment;
  - (2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, \*71 and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition. *In any action under this subdivision wherein a plaintiff alleges that he was damaged by the negligent, defective or dangerous design of a highway or road, which was designed and constructed prior to September 12, 1977, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.*
2. *The express waiver of sovereign immunity in the instances specified in subdivisions (1) and (2) of subsection 1 of this section are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort.* (Emphasis added.)

The statute was first adopted in 1978 in an effort by

the General Assembly to restore broad governmental immunity as it existed at common law prior to the decision of the Missouri Supreme Court in *Jones v. State Highway Commission*, 557 S.W.2d 225, 230 (Mo. banc 1977), which abolished common law sovereign immunity in Missouri. The General Assembly, while acting to reinstate the concept of governmental immunity, specifically waived immunity in two instances: (1) negligent motor vehicle operation; and (2) the dangerous condition of a public entity's property. Section 537.600.1. The "dangerous condition" waiver was effective if:

- The property was dangerous at the time of the injury;
- The injury "directly resulted" from the dangerous condition;
- The dangerous condition created a reasonably foreseeable risk of the kind of injury incurred; and
- (1) A negligent act or omission created the dangerous condition, or (2) a public entity had actual or constructive notice of the dangerous condition in sufficient time to have taken measures to alleviate the danger.

Section 537.600.1(2); see *State ex rel Mo. Highway & Transp. Comm'n v. Dierker*, 961 S.W.2d 58, 60 (Mo. banc 1998). In 1985, the General Assembly amended the statute to add the language we have highlighted in the text above. *Donahue v. City of St. Louis*, 758 S.W.2d 50, 51-52 (Mo. banc 1988). Before 1985, it was not clear whether "dangerous condition of property" had anything to do with negligent design of roadways. The Missouri Supreme Court noted in 1988, however, that the 1985 amendment appeared to be a "reinstatement of the holding of *Jones* as it relates to roads and highways plus opening the door to some degree prior to *Jones*." *Id.* at 52. The 1985 amendment thus made clear that the statute allows claims against public entities for "negligent, defective, or dangerous design" of roadways. Section 537.600.1(2). The amendment also provided a conditional defense for claims related to roadways designed prior to September 12, 1977 (the effective date of *Jones*).<sup>FN1</sup> *Donahue*, 758 S.W.2d at 52-53.

FN1. In the 1985 amendment, the General Assembly created a complete defense for the public entity where the entity can show that

the allegedly negligent design of a road designed and constructed prior to September 1977 complied with the then applicable road design standards. The City has not attempted in this case either to plead or to prove a defense based on that portion of the amendment.

\*72 A further significant part of the amendment was the abolition as to all public entities (including municipalities) of any immunity based on the governmental/proprietary distinction that existed at common law. The statute clarifies that the waivers are "absolute." Section 537.600.2. The statute further provided that immunity is waived in the specific instances regardless of whether the entity is covered by liability insurance. *Id.*

### Analysis

On the appeal before us, the City contends that it was entitled to judgment as a matter of law under section 537.600 because the plaintiffs failed to plead and prove that the intersection of 53rd Street and Troost Avenue was "a dangerous condition." The City also argues that it has immunity under the common law because issues such as the location of traffic signals are discretionary and not ministerial. Next, the City argues that the death of Chen Pei was caused by the intervening negligence of Melieka Perkins (the driver) and Chen Pei (the deceased), and not by the City.

As we have already noted, section 537.600 provides that public entities are immune from liability for negligence except for (1) cases arising out of the entity's operation a motor vehicle; and (2) certain cases in which the injury was caused by the condition of the public entity's property. The City contends that the court erred in denying its motions for JNOV and directed verdict, in which it asserted these legal grounds. The plaintiffs' petition stated in pertinent part as follows:

13. At all times and places relevant herein, Troost Avenue at 53rd Street, in Jackson County, Missouri, is and was under the control of defendant City, who is and was responsible to provide adequate signing, lighting and/or patrolling and had a duty to remove any known or reasonably foreseeable dangers associated with the use of Troost Avenue by pedestrians and others.

14. At all times and places relevant herein, Defendant City, by and through the acts and omissions of its respective agents servants and employees, operating in the scope and course of their employment, was careless, reckless, negligent and at fault in causing said motor vehicle accident by not locating proper warnings, including, but not limited to flashers, stop signs, traffic signals, other warning signs and crossing guards at the time of the subject accident.

15. At all relevant times and places herein, including the time when decedent suffered fatal injuries, Troost Avenue at 53rd Street was in a dangerous condition.

16. Decedent's death was the direct result of the dangerous condition of Troost Avenue at 53rd Street.

17. The dangerous condition of Troost Avenue at 53rd Street created a reasonably foreseeable risk of harm of the kind of injury which decedent incurred.

18. At all times and places relevant herein, Defendant City knew or should have known that Troost Avenue at 53rd Street was used by students at both Rockhurst and UMKC on a regular and consistent basis.

19. At all times and places relevant herein, Defendant City knew or should have known that prior motor vehicle accidents\*73 involving pedestrians had occurred at Troost Avenue at 53rd Street.

20. At all times and places relevant herein, Defendant City of Kansas City, Missouri, carelessly, recklessly, and negligently failed to properly maintain a pedestrian crosswalk that allowed safe passage across Troost Avenue at 53rd Street for the amount and type of use that it received.

21. Defendant City knew or should have known of the dangerous condition in sufficient time prior to the injuries suffered by the decedent to have taken measures to protect against said dangerous condition.

22. As a direct and proximate result of the aforesaid carelessness, negligence, recklessness and fault of Defendant City, decedent was fatally injured.

The City takes the position that plaintiffs' case falls short of alleging a cause of action, but fails to specify what is lacking in the petition. As far as we can see, the petition recites all elements of the waiver. The City next argues that the waiver was not proven because this case involves the actions of a third party, Melieka Perkins, whose own negligent actions constituted an intervening act of negligence. The City points out that Melieka Perkins approached the intersection on the day in question without observing the crosswalk or crosswalk sign. The street was damp because it had been misting or lightly raining. The sky was, of course, overcast. When the traffic in the left lane in front of her stopped, she pulled out and over into the right lane and accelerated to go through the intersection. She did not notice the crosswalk lines painted in the street. She also did not notice to her right a sign indicating the existence of a crosswalk. She had earlier noticed a school zone sign as she approached 52nd Street from the north, but she assumed that after she passed 52nd Street she was past the special school zone. As she reached 53rd Street, just before impact, she caught a glimpse of a young woman's "hair flopping" as Chen Pei came across the crosswalk, apparently scurrying or jogging across the crosswalk.

The City points out that Ms. Perkins failed to drive with the highest degree of care, failed to approach the intersection with caution, failed to recognize that she was still in a 25 miles-per-hour school zone, failed to observe the crosswalk and the crosswalk sign, and failed to keep a careful lookout for pedestrians. The City argues, therefore, that Ms. Perkins' negligent driving was, as a matter of law, an intervening cause that precluded submission of the claim. The City cites *State ex rel. City of Marston v. Mann*, 921 S.W.2d 100, 102 (Mo.App.1996), for that proposition.

The allegation in *Marston* was that injuries caused by motorists who were "drag racing" on the city street were caused by a "dangerous condition" because the drag racing was dangerous. *Id.* at 101. The allegation was that the City was negligent in failing to install traffic control devices so as to keep people from drag racing. *Id.* The court in *Marston* did not consider the pleading of the "dangerous condition" to amount to a pleading of a "negligent, defective or dangerous design, whose very existence posed a physical threat" to plaintiffs. *Id.* at 104. The court also determined that the injuries alleged did not result from deficiencies in

the road but from the actions of two individuals drag racing. *Id.* The court thus held that the petition was inadequate and should be dismissed. *Id.*

The City also discusses *Hedayati v. Helton*, 860 S.W.2d 795 (Mo.App.1993), and *Johnson v. City of Springfield*, 817 S.W.2d 611 (Mo.App.1991), to support its contention.\*74 In both cases, a child was struck and killed while trying to walk across a street. In *Johnson*, the allegation was that the road was dangerous because of the volume of traffic, because many children played in the area, and because vehicles were parked along the street, blocking the view of the drivers and of the children. 817 S.W.2d at 612. Plaintiffs contended that the children were inadequately warned of the danger, and also contended that the posted 30 m.p.h. speed limit was too great for the conditions. *Id.* The petition also contended that there had been complaints and that the City was on notice of the dangers. *Id.* In *Hedayati*, it was similarly alleged that the street was dangerous at the place in question because there were no traffic control devices in that area of the road, and no sign or traffic control devices on the private road which intersected with the street at that vicinity. 860 S.W.2d at 796. This court in *Hedayati* relied heavily on *Johnson*, holding that the allegations in the petition did not plead facts amounting to an assertion that the condition of the road posed a physical threat to the child. *Id.* at 797.

The only other authorities cited by the City on this point are (1) *Twente v. Ellis Fischel State Cancer Hospital*, 665 S.W.2d 2, 4 (Mo.App.1983), which involved a woman raped in the parking lot of the hospital who alleged the state was liable because a security guard was not at his post; and (2) *Alexander v. State of Missouri*, 756 S.W.2d 539, 540-41 (Mo. banc 1988), which involved injuries directly caused to a contractor's employee servicing elevators in a state office building when a state employee created a dangerous condition by placing a folding room partition at the foot of the ladder on which the repairman was working. In *Twente*, the claim was dismissed because the rape and assault were directly and proximately caused by the intentional criminal activity of a third party, not by the condition or design of the parking lot. 665 S.W.2d at 11-12. In *Alexander*, the Court held that a cause of action was stated by the pleading of facts indicating that the actions of a state employee created a dangerous condition of property which directly caused the injury in question. 756 S.W.2d at 542. The

City cites *Alexander* for the Court's language stating: "the condition here was dangerous because its existence *without intervention by third parties*, posed a physical threat to plaintiff." *Id.* at 542 (emphasis added).

The City argues that these authorities mandate an outright reversal of the judgment in this case. If the law were as simple as the City asserts, we would be inclined to agree. There are, however, a number of authorities that are pertinent to the facts of this case which are not discussed or mentioned by the City. The City did not in its brief discuss any decision of the Missouri Supreme Court except for a passing reference to some of the language in *Alexander, supra*. The City did not discuss *Donahue v. City of St. Louis*, 758 S.W.2d 50 (Mo. banc 1988) (making clear that the Missouri Supreme Court construed section 537.600 as including traffic control devices within the concept of "road design"). The City also did not address the cases of *Wilkes v. Missouri Highway & Transportation Commission*, 762 S.W.2d 27 (Mo. banc 1988); *Moore v. Missouri Highway & Transportation Commission*, 169 S.W.3d 595 (Mo.App.2005); *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907 (Mo.App.2004); *United Missouri Bank, N.A. v. City of Grandview*, 105 S.W.3d 890 (Mo.App.2003); *Williams v. Missouri Highway & Transportation Commission*, 16 S.W.3d 605 (Mo.App.2000); or *Cole v. Missouri Highway & Transportation Commission*, 770 S.W.2d 296 (Mo.App.1989), all of which involved claims of dangerous conditions of roadways caused by \*75 allegedly improper or inadequate traffic control devices.

In its reply brief, the City attempts to respond to the plaintiffs' arguments based on *Kraus v. Hy-Vee, Inc.*, but the City does not mention *Donahue* or any other decision of the Missouri Supreme Court involving section 537.600. See, e.g., *Jones v. City of Kansas City*, 15 S.W.3d 736, 738 n. 4 (Mo. banc 2000) (holding that the concept of a "defect in the condition of" a street for purposes of section 82.210 (the notice requirement statute) is narrower than the concept of defective design of a roadway under section 537.600 (meaning that section 537.600 encompasses more than a physical defect in the pavement itself)). Thus, the City's arguments are weakened by the appearance that the City has not considered and digested all of the pertinent authorities that a reviewing court must consider. The City has not provided us with a road map as

to how to distinguish such authorities from the facts before us.

[3] As we have already noted, the City is incorrect in arguing that the only kind of dangerous condition giving rise to possible liability is a dangerous physical condition within the property itself, such as a defect in the pavement. *Donahue*, 758 S.W.2d at 52; *Jones*, 15 S.W.3d at 738 n. 4. Indeed, the 1985 amendment to section 537.600 and *Donahue* should have put that argument to rest. The amendment makes clear that immunity is waived for the "negligent, defective or dangerous design" of a highway or road. The Supreme Court in *Donahue* determined that traffic control devices including markings, signs, and traffic signals are part of the "design" of a roadway. 758 S.W.2d at 52. It makes sense that when a road is designed, the design engineer has in mind exactly how traffic is to be controlled on the road, anticipating and sketching into the plans the precise traffic controls dictated by the pertinent engineering requirements and the anticipated conditions. See *id.*

### Third Party Intervention

[4] Our review of the law further shows that the City is incorrect in arguing that any negligence of third parties is necessarily a kind of "third-party intervention" that allows the City to retain its immunity. We start with the words of section 537.600 itself. The phrase "third-party intervention" is not in the statute itself. The statute, instead, simply provides for liability when *inter alia*, the injury "directly resulted from" the dangerous condition arising out of the public entity's negligence. The City cites *Alexander*, *Marston*, *Johnson*, and *Hedayati* for the use of the phrase "without intervention by third parties," in discussing the creation of the risk to the plaintiff. *Alexander*, which involved the negligent placement of the folding partition, was a case that involved the negligence of a state employee only. 756 S.W.2d at 540-41. The Court in *Alexander* may simply have wished to make clear that the state was not a guarantor of the safety of its property as against the actions of third parties. If a third-party actor had placed the partition at the foot of the ladder, the injury would not, without some concurring negligence by the state in failing to deal with the risk, have "directly resulted from" a negligent act of the state. See *id.* at 541-42.

The "third party intervention" language was used in

Marston, the drag racing case, to uphold the City's immunity where the third parties were directly responsible for the injuries by their intentional conduct of drag racing in spite of the obvious risk it created. 921 S.W.2d at 104. Johnson and Hedayati, though using the same phraseology, based their rulings on the fact that there was no physical aspect of the roadway\*76 which was dangerous because of its very existence without third-party intervention. See Johnson, 817 S.W.2d at 613-14.

In case there was doubt as to what was meant by "third-party intervention" in those cases, the Supreme Court, in State ex rel. Missouri Highway & Transportation Commission v. Dierker, 961 S.W.2d 58, 60 (Mo. banc 1998), clarified the matter by addressing the meaning of the phrase "directly resulted from" in the statute. The Court determined that the phrase "directly resulted from" is "synonymous with 'proximate cause.'" *Id.* The Court then stated that "[t]he practical test of proximate cause is generally considered to be whether the negligence of the defendant is that cause or act of which the injury was the natural and probable consequence." *Id.* The Court distinguished proximate cause from "but for" causation, indicating that proximate cause requires "but for" causation but is narrower than "but for" causation. *Id.* (quoting Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 865 (Mo. banc 1993)). The Court restated the view that "directly resulted from" is synonymous with "proximate cause" in Stanley v. City of Independence, 995 S.W.2d 485, 488 (Mo. banc 1999). See also Robinson v. Mo. State Highway & Transp. Comm'n, 24 S.W.3d 67, 78 (Mo.App.2000).

The City, although not discussing Dierker, seems to believe that anytime the negligence of a third party figures into the injury, the City is not liable, regardless of the probability and predictability of the third-party negligence, and regardless of how related to the City's negligence. The court in Dierker, as we have noted, described the meaning of the phrase "directly resulted from," indicating it is the same as the concept of "proximate cause." *Id.* at 60.

#### **"Third Party Intervention" is a Test of Proximate Cause**

Because the phrase "directly resulted from" in section 537.600.1(2) is synonymous with proximate cause, the concept of third-party intervention is necessarily

the same as the concept of third-party intervention in the common law tort context. In Smith v. Coffey, 37 S.W.3d 797, 801 (Mo. banc 2001), the Supreme Court specifically rejected the notion that there is a special set of tort-causation rules when the defendant is a public entity.

The General Assembly expressed no intent to create a new set of tort rules applicable only to state agencies by its use of the words "directly resulted" in the statutes granting the limited waiver of tort immunity. Rather, it intended that to the extent of the waiver, normal tort rules of liability and causation would be applicable.

*Id.* at 801. This is illustrated in United Missouri Bank v. City of Grandview, 105 S.W.3d 890 (Mo.App.2003). In that case, a plaintiff asserted a claim against the City for allegedly negligent roadway design and failure to control traffic. *Id.* at 894. After considering the apparent negligence of a driver who pulled directly in front of a motorcycle causing injuries to the cyclist, the trial court granted the City's motion for summary judgment. *Id.* at 895. This court reversed the summary judgment ruling, however, because there were sufficient conflicts concerning the facts, so that the causation remained a jury issue. *Id.* at 901-02. In addition, this court, in commenting on the intervening cause issue, quoted Heffernan v. Reinhold, 73 S.W.3d 659, 665 (Mo.App.2002):

"An efficient, intervening cause is a new and independent force which so interrupts the chain of events that it becomes the responsible, direct, proximate, and immediate cause of the injury, but it \*77 may not consist of merely an act of concurring or contributing negligence."

*Id.* at 900. The court said that even if it were undisputed that the driver operated his vehicle in negligent fashion, that evidence did not, *in and of itself*, establish that the condition of the intersection could not also have been a proximate and concurrent cause of the accident. *Id.* The court also cited five other appellate decisions indicating that concurring third-party negligence did not necessarily preclude the liability of the public entity. *Id.* at 900-01.

In view of the foregoing, we conclude that the City's analysis, which ignores a large body of case law, falls short of persuasiveness. The law clearly is that the General Assembly has waived governmental immu-

ity for negligence by a public entity that creates a dangerous condition under the circumstances detailed in the statute. It is also clear, since the 1985 amendment to the statute, and since *Donahue*, that a public entity can have liability for the negligent design or construction of a roadway, including the negligent design and placement of traffic control devices. It is also clear that the concurring negligence of a third party does not preclude the liability of the public entity unless the third-party negligence is such as to constitute an efficient and independent intervening cause of the injury. Therefore, we reject the City's first contention.

### Immunity for Discretionary Determinations

[5] The City also contends that it was immune from suit under the common law in that the placement of traffic signals is a discretionary matter. The City contends that the statute does not waive immunity for discretionary governmental functions. It argues that the placement of traffic controls at 53rd Street was a legislative determination of the City Council.

The City's argument would appear to have been defeated twenty years ago by the 1985 amendment to section 537.600. The 1985 amendment, in referring to the waivers of governmental immunity for motor vehicle negligence and dangerous condition of property, including defective roadway design, states that the waivers are "absolute waivers of sovereign immunity." Section 537.600.2; see *Donahue*, 758 S.W.2d at 51-52. Thus, for the specified instances of waiver, every aspect of governmental immunity is waived. Therefore, even if the record were to show that the City Council itself had actually deliberated on how to design and mark the intersection at 53rd and Troost, and had exercised its discretion in the issuance of a special ordinance, such fact would not provide immunity to the City's decision, if such decision were negligent and involved the creation of a dangerous condition.

The notion that there was any legislative discretion involved in the decision as to the placement of the traffic control devices did not seem to be asserted in the pleadings or the evidence. The City cites no portion of the transcript or any evidence to the effect that traffic control at 53rd and Troost involved legislative discretion. Mr. Tony Nasserri, a traffic engineer for the City, did not testify that the City Council had deter-

mined how to mark 53rd Street. Rather, he acknowledged that the City had adopted the Manual on Uniform Control Devices ("MUTCD" or "Manual")<sup>FN2</sup> to \*78 guide its traffic engineering decisions. While the manual does not entirely dispense with engineering judgment, it sets forth standards for traffic control design, which are uniformly to be followed by those jurisdictions which have adopted it. Accordingly, the City traffic engineers are required by the City to comply with the Manual when the Manual has specific requirements. Thus, for all these reasons, we reject the notion that the way the intersection was designed is protected by the discretionary immunity of legislative bodies.

FN2. The MUTCD approved by the Federal Highway Administration of the U.S. Department of Transportation is "the national standard for all traffic control devices installed on any street, highway or bicycle trail" of the federal government and any "federal-aid projects." See 23 C.F.R. §§ 655.603, 630(a)(2003). Twenty-four states, including Missouri, have adopted the national MUTCD. Twenty-one other states have adopted the MUTCD, within an accompanying state supplement. Four other states have a state MUTCD in conformance with the national MUTCD, 2003 edition. The Missouri Department of Transportation (MoDot) adopted the MUTCD with the approval of the Missouri State Highway Commission. See [http://MUTCD.fhwa.dot.gov/knowledge/natl\\_adopt\\_2000\\_2003.htm](http://MUTCD.fhwa.dot.gov/knowledge/natl_adopt_2000_2003.htm). Mr. Nasserri admitted at one point that the City had adopted the MUTCD "as law." Then he attempted to back away from that admission; then re-affirmed it. Under our standard of review for determining whether the plaintiffs made a submissible case, we must review the evidence and the inferences in a light favorable to the plaintiffs. *Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426, 428 (Mo. banc 1993).

### Condition of 53rd and Troost

In Point III, the City asserts that the plaintiffs failed to establish that the *condition of the intersection* caused or contributed to Chen Pei's death, because the evidence showed the accident was caused by the negli-

gence of Melieka Perkins and Chen Pei.

[6][7] To determine whether the plaintiffs made a submissible case against the City on the element of whether the death “directly resulted from” the City's negligence, we must consider the evidence in the light most favorable to the plaintiffs, giving the plaintiffs the benefit of all reasonable inferences and disregarding the defendant's evidence except insofar as it may aid the plaintiffs' case. Nemani v. St. Louis Univ., 33 S.W.3d 184, 185 (Mo. banc 2000). The causation requirement is an element of the “dangerous condition” exception to the sovereign immunity waiver. See Dierker, 961 S.W.2d at 61. If the plaintiff fails to show causation, the plaintiff has not shown that immunity is waived and the claim is barred. See id.

Our review of the evidence in this case shows an intertwining of the evidence as to dangerous condition, negligence, and causation. Therefore, it will be necessary to summarize some of the portions of the plaintiffs' evidence as to these concepts.

The evidence showed that Chen Pei, a student at the Conservatory, located west of Troost Avenue, lived in a residence hall at Rockhurst University, which is east of Troost. Troost is a major traffic artery running north and south. St. Francis Xavier Elementary School is located on the west side of Troost at 53rd Street, with its entrance on 53rd Street. UMKC is located to the west of St. Francis School. St. Francis Church is located north of the school at 52nd and Troost, across Troost from Rockhurst University and to the east of UMKC.

Several years before Chen Pei's accident, Rockhurst College had undertaken a reconfiguration of certain parts of the campus. Rockhurst moved the primary vehicular access to 54th Street, and obtained permission to close 53rd Street east of Troost to vehicular traffic, using that portion of 53rd Street only for pedestrian traffic. Thus, 53rd Street west of Troost is one-way eastbound, with a stop sign at Troost for eastbound traffic.

\*79 At the time of this collision, there were regular stop lights at 52nd Street and at 54th Street on Troost. The only traffic control at 53rd Street for northbound and southbound traffic on Troost was a crosswalk and a crosswalk sign. At 52nd and Troost, one long block north of 53rd Street, there was, in addition to the stop

light, a school crossing sign and a crosswalk. There was also a sign a substantial distance in advance of 52nd and Troost giving notice of a school zone and a 25 m.p.h. speed limit. That sign would flash during applicable times of the school day.

Mr. Tony Nasserri, a traffic engineer for the City, acknowledged that there were two universities, one elementary school, and one church all located at or near the area between 52nd and 54th Streets on Troost Avenue. Mr. Nasserri acknowledged that Rockhurst University contracted with HNTB, an engineering firm, for a traffic study, which was completed in 1999 and provided to the City. That study suggested, *inter alia*, that although the main vehicular entrance to Rockhurst would be shifted to 54th Street, the intersection of 53rd and Troost would continue to serve pedestrians who cross Troost Avenue. The study stated that “a pedestrian push-button signal should be studied further to provide the safest environment for pedestrians and motorists.” Mr. Nasserri acknowledged that Rockhurst University offered to fund the installation of such a signal. Mr. Nasserri could not say whether, in spite of the University's request, any traffic study was done to see if such a signal were warranted.

The evidence showed that earlier the City had similar requests. In October 1997, Patrick Schilling, associated with St. Francis School, submitted to the City a request for a “traffic light or flashing school zone light” at the intersection of 53rd and Troost. The City's paperwork concerning the request for the school speed limit flashers was marked “funded.” However, although a flasher sign was later installed north of 52nd Street, no school speed limit flashers and no school crossing advance sign, with or without flashers, was installed at or before the 53rd and Troost crosswalk. At about the same time as the request by Mr. Schilling, a similar request was submitted by Bridget Kilroy Hoffman, then an education student at Rockhurst. Ms. Hoffman and other college students were involved with a project at St. Francis. They frequently attempted a pedestrian crossing of Troost at 53rd Street at the crosswalk. Because of the difficulty and danger of crossing, she said, they also filled out a request for a stop light to be put in at 53rd and Troost. She said there was a “considerable amount of pedestrian traffic.” She said that crossing was difficult because of the high volume of the traffic and the speed of the traffic.

The evidence showed that in 1995, a traffic signal at 53rd and Troost was also requested in writing by another citizen, Leticia Zarate.<sup>FN3</sup> The evidence further showed that in August 2001, two years before the Chen Pei accident, the City had notice of an accident involving a Rockhurst professor, Frank Smist, who was crossing Troost in or near the crosswalk at 53rd Street when he was struck by a car and reportedly suffered serious and disabling brain injuries in an accident that seemed \*80 remarkably similar to the Chen Pei accident. The report stated that the driver of the offending vehicle in that case, like Melieka Perkins in this case, was reportedly driving south on Troost when a van stopped in the left lane in front of him. The driver, without knowing why the van stopped, changed to the right lane in an effort to pass the van on the right. Apparently, as in this case, the driver did not see the crosswalk lines or notice the sign at the corner indicating the presence of the crosswalk. The report states that one second before impact, the driver observed Dr. Smist walking from left to right across the front of the van. He braked and attempted to veer to the right, but reportedly could not avoid striking Dr. Smist, who was in or near the crosswalk at the time. Just like Chen Pei, Dr. Smist apparently was not closely attending to the potential danger, presumably relying on the fact that there was a crosswalk at that location. The cars that stopped had, of course, invited him to cross in front of them and waited for him to cross. Dr. Smist complied, apparently failing to appreciate the peril in which that compliance placed him.

<sup>FN3</sup>. These requests and complaints were admitted in evidence for the purpose of showing that the City had notice of concerns of people using the intersection. This notice related in part to the issue of whether the City should have done a comprehensive engineering study, as well as to the danger. The number of accidents at the intersection (discussed *infra* ) figured into whether engineering science would have indicated the need for further traffic control.

Jenelle Chu, who also attended the UMKC Conservatory and resided in a Rockhurst dormitory at the same time as Chen Pei, testified that she sometimes, in 2003, used the crosswalk at 53rd and Troost to cross the street, depending on where the classroom was located that she was going to on that day. Sometimes

she used the crosswalk at 52nd Street and Troost. Ms. Chu said that the crosswalk at 53rd Street was used by Rockhurst and UMKC students and also by students going to St. Francis School.

Mr. Nasserri acknowledged that when there is a complaint or a request for a traffic signal, the City generally conducts a comprehensive engineering study to see if a traffic light or other signal is warranted. The City is to consider a number of “warrants,” which are engineering studies based on traffic counts, pedestrians, collisions at the intersection, and other factors. The warrants are part of the science of traffic engineering and are prescribed by the MUTCD.

Mr. Nasserri acknowledged that prior to February 2003, when Chen Pei's accident occurred, no comprehensive engineering study of the intersection had been conducted by the City for over ten years. With regard to the request of Patrick Schilling of St. Francis for a school zone sign with a flashing light at 53rd Street, Mr. Nasserri could not say that an engineering study was done to see if a flashing school crossing sign was justified there. He said that a 24-hour “speed study” was done, but not an engineering study to see if a traffic signal was justified at that location. Mr. Nasserri conceded that, in view of Mr. Schilling's request and that of Ms. Hoffman, a comprehensive engineering study should have been done; if it was not done, he said, that would be a violation of the MUTCD.

#### **The City's Engineer Acknowledged That the Intersection Created a Danger for Students**

Mr. Nasserri acknowledged that the HNTB engineers had graded the intersection of 53rd and Troost with a failing grade, an “F,” for the “level of service” as to 53rd Street. He acknowledged that this meant it was extremely difficult for a car coming from the west on 53rd Street to gain access to Troost for a right or left turn because of the heavy volume of traffic. Mr. Nasserri acknowledged that the traffic on Troost left inadequate gaps to allow cars to gain access to Troost. He acknowledged this created the temptation for cars to “take a risk” by darting out in \*81 traffic. He acknowledged that such a circumstance also created a risk for students.

Q. It endangers the lives of students, correct?

A. Yes.

Q. Now you knew that in 1999 because you received a copy of the [HNTB] study, didn't you?

A. No, I received a copy 2003, only because for this case [sic].

Q. Okay, but the City received this, right?

A. Yes.

Q. Okay. And so the City knew as of that time, that the gaps at that intersection were such that it was endangering the lives of the students, correct?

The Court: Mr. Nasser, did you understand the question?

A. Oh, I'm sorry.

Q. The City of Kansas City knew as of that time in 1999, that because of the poor service and the lack of gaps in traffic, that it was endangering the lives of students, correct?

A. Yes.

Mr. Nasser acknowledged that although HNTB had recommended a comprehensive engineering study to see if a push-button pedestrian signal should be installed to provide for the safety of pedestrians, the City did not do the study.

Mr. Nasser also said the City received the report of the accident involving Dr. Frank Smist, which indicated it was a very serious accident, yet the City did nothing.

Q. In other words, even though you look at the severity of the accidents, the number of accidents, and decide whether or not maybe you need a traffic signal there, the City decided not to do a comprehensive engineering study, correct?

A. Yes.

Q. I mean at the time it had a school crossing marker there, didn't it?

A. Yes.

Q. Right over it?

A. Yes.

Q. Okay. But the question was-and by that time there had been multiple complaints about this intersection. The question was whether or not you needed to do more, maybe a flasher or a spotlight, correct?

A. Yes.

The City also maintained a list of accidents occurring at or near 53rd and Troost, in keeping with its normal monitoring of accidents. HNTB did not have the accident data when it conducted its study. The evidence showed that if HNTB had possessed the collision data (at least fifteen accidents from 1999 to 2003), the data would have supported HNTB's conclusions.

Mr. Nasser acknowledged that, according to the MUTCD, if there was a school crosswalk, there needed also to be another sign, *in addition to the crosswalk sign itself*, in advance of the crosswalk. The so-called advance sign had the purpose of further notifying drivers that there was a school crossing ahead, in order to increase the likelihood that drivers would observe the existence of the crosswalk. With regard to the advance sign, Mr. Nasser testified:

Q. There was not one of these advance warning signs anywhere within 700 feet of the actual crosswalk, like the manual says, correct?

A. Correct.

Q. And the reason for the advance warning sign that tells you it's ahead is to do what?

A. Is to warn the drivers the school zone and the student will cross ahead at the crosswalk.

\*82 Q. So that way in advance of this-

A. Yes.

Q. -oncoming drivers know they're coming up on a

crosswalk, right?

A. Right.

Q. And a school crosswalk, right?

A. Right.

\* \* \*

Q. Okay. The closest advance warning cross sign was on the-actually, the north side of 52nd, correct?

A. Yes.

Q. And there was a crosswalk at 52nd, wasn't there?

A. Yes, yes.

Q. So that was the advance warning sign for 52nd, correct?

A. Correct.

Q. There was no advance warning sign for 53rd, was there?

A. No.

The evidence showed that a school advance sign was required in advance of the crosswalk sign under both the prior MUTCD and under the 2001 manual. The 2001 manual made a change as to the *design* of the advance sign. The City had up to ten years to implement the change as to the *design* of the sign required by the 2001 manual. The City acknowledged, however, that even under the prior manual, the *placement* of the advance sign was required in advance of the crosswalk, so that there was no dispute that the lack of an advance sign was a flaw in that the signage was not in compliance with the MUTCD.

**The City's Engineer Acknowledged that a Traffic Signal Was "Justified" at 53rd and Troost**

Mr. Nasserri further acknowledged a traffic signal was justified at 53rd and Troost:

Q. We know that because of the volume of students

who were at this crosswalk and because of the lack of gaps from the '99 study, that more likely than not a traffic signal was justified at that intersection as of February 3rd, 2003, correct?

A. Yes.

Q. Yes?

A. Yes.

Q. And based on your traffic engineering study and, actually, based on your traffic engineering expertise and what you do as far as going to the sites of intersections, inspecting them, watching pedestrian traffic, typically, students do not walk into an intersection if there's a traffic signal there when they don't have a green light, correct?

A. Correct.

In addition to the City's traffic engineer, the plaintiffs' traffic control expert also testified that if a comprehensive engineering study had been done as to the intersection, the study would have justified a traffic signal. He said that from May 1999 to the date of Chen Pei's accident, there were three different twelve-month periods in which there were five preventable accidents. He said that, according to the MUTCD, all that was required for the "collision warrant" for a traffic signal would be five preventable accidents in any twelve-month period. In this case, there were three twelve-month periods in which there were five preventable accidents within that four years. These accidents occurred even after the flashing "school zone" speed sign was put in north of 52nd Street. The collision history of 53rd and Troost thus showed that the flashing sign north of 52nd Street was not adequate to reduce the risks and the danger at 53rd and Troost.

Plaintiffs' expert said that there were ways to provide more safety without unduly\*83 hindering the flow of traffic between 54th and 52nd Streets. He said that if minimizing the disruption of traffic was the City's concern, it could have installed a "semi-actuated signal" (a pedestrian-actuated push button signal) that is operated only when there is a pedestrian needing to cross (such as the kind recommended by HNTB). He stated that the absence of a traffic signal and the absence of an advance school crosswalk sign created a

hazardous and dangerous condition to pedestrians at that location. He opined that the data showed that the advance sign north of 52nd Street was not adequate for 53rd Street, because after traveling through the light at 52nd Street, drivers would tend to incorrectly think that they were past the school zone and the school crosswalk as well, when, in fact, there was another one coming up at 53rd Street.

### **The Third Party Negligence Was Not Third Party Intervention**

[8] The proof presented by the plaintiffs suggested that, even though Melieka Perkins was negligent, and although her negligence proximately caused the death, the City's negligence also remained proximately and directly responsible for this death. The impatience of a driver wanting to get around stopped traffic and to proceed through the intersection, failing to notice the crosswalk and the crosswalk sign, could not be called "unrelated" to the City's negligence; nor could it, on the face of this record, be regarded as so surprising, so unexpected, or so freakish as to be considered outside of the range of the natural and probable consequences of the City's actions and omissions. The plaintiffs were not precluded from submitting the issue of causation to the jury.

### **The Danger of An Inadequately Marked Crosswalk**

The evidence in the case and the ordinary experiences of life suggested that existence of the crosswalk, without adequate warnings to cars, could tend to actually *enhance* the danger to the pedestrian by creating an illusion to the pedestrian that there was a zone of safety within the crosswalk. A pedestrian crossing in front of a lane of cars, particularly when the vehicles are the size of vans and sport-utility vehicles, may have difficulty seeing what is coming up in an adjacent lane, while the vehicle in the adjacent lane may have difficulty seeing the pedestrian. Therefore, it is obvious that there is a need to alert vehicles to the potential danger to pedestrians.

### **Concurring Negligence**

In dealing with the issue of whether Chen Pei's accident "directly resulted from" the alleged negligence of the City in failing to comply with the requirements of the MUTCD, it has been necessary to discuss the

plaintiffs' evidence in some detail. Plaintiffs' extremely thorough case showed that even though Melieka Perkins was negligent in failing to observe the crosswalk and in not keeping a careful lookout for pedestrian traffic, her negligence concurred with the City's negligence so that the negligent acts of the City, Ms. Perkins, and Chen Pei were proximately and directly responsible for this injury. There was abundant evidence from which the jury could reasonably conclude that the intersection was dangerous in general, and especially dangerous for pedestrians attempting to cross at the crosswalk. The evidence of Melieka Perkins' negligence, and Chen Pei's negligence in failing to watch for cars, did not show as a matter of law that the negligence of either or both together was so surprising, so unexpected or so freakish as to be outside of the range of the natural and probable consequences of the City's negligence so as to interrupt \*84 the chain of events and to become an intervening cause of the injury.

It does not seem necessary to again go into significant detail distinguishing the cases upon which the City relies, *Hedayati*, *Johnson*, and *Marston*, which have already been discussed. In *Hedayati*, 860 S.W.2d 795, and *Johnson*, 817 S.W.2d 611, there were no crosswalks or other traffic controls in place at all, and at least in those cases the pedestrian was or should have been on guard. In *Johnson* the pleading raised the inference that there might be a dangerous condition of property in that it asserted that the City had received complaints concerning the street and that the City was on notice of the danger. 817 S.W.2d at 612. However, the petition in *Johnson* was not as well pleaded, in light of 537.600, as the petition in this case. In any event, the facts alleged in *Johnson* pale in comparison to the solid record evidence in this case, including admissions by the traffic engineer that the intersection was dangerous to students, that a traffic light would have been justified, and that an advance sign, at a minimum, was required by widely accepted standards of traffic engineering.

This case is also easily distinguished from *Marston*, 921 S.W.2d 100 (the drag racing case) and *Dierker* (the concrete chunk case) because those cases involved intentionally wanton activities outside of the normal range of the reasonably anticipated driving activities of ordinary citizens. While Ms. Perkins' failures were not excusable, they are not on the same level as the wanton activities of the miscreants in

*Dierker* and *Marston*. One does not have to be a traffic engineer to know that every day drivers become impatient with the stoppage of traffic in their lanes and decide to change lanes to go around the stoppage, even when they are uncertain as to the reason for the stoppage. If they do not see the crosswalk and they have not been alerted to the fact that they are still in a special school zone, they may proceed unaware of the danger to pedestrians. The more signs, signals or flashing lights there are to warn the driver, the more likely the driver is to discern that a pedestrian could be crossing. Ms. Perkins specifically testified in this case that she thought she was out of the special school zone. She testified that if there had been a stoplight at the intersection, she would have noticed it and would have complied with the light. It would be impossible for her to say definitively what it would have taken to get her attention—a flashing light, an advance sign, or other warning—without speculating. But the facts do tend to strongly suggest that any such additional warning would very likely have made a difference. The science of traffic engineering shows that such warnings make a difference every day in real life.

If the intersection in this case had been better warned or controlled, and had the accident still happened, the City would have been able to argue more persuasively that, as a matter of law, there was no dangerous condition. The City also could have argued more persuasively that the conduct of the driver was so surprising, so unexpected, or so wanton as to constitute an intervening cause. We determine in this case, however, that the City was not entitled to judgment as a matter of law.

### Conclusion

For all the foregoing reasons, we conclude that the City did not establish as a matter of law that the City retained its immunity. We deny the City's Points I, II, and III. We also deny the City's additional point related to certain evidentiary rulings (which are dealt with separately by \*85 order and memorandum pursuant to Rule 84.16(b)). We affirm the judgment.

NEWTON and ULRICH, JJ., concur.  
Mo.App. W.D., 2007.  
Huifang v. City of Kansas City  
229 S.W.3d 68

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Missouri Court of Appeals,  
Southern District,  
Division Two.

Brenda JOHNSON, a Minor, b/n/f Marla JOHNSON,  
and Marla Johnson and Charles W. Johnson, Individually,  
Plaintiffs-Appellants,

v.

CITY OF SPRINGFIELD, Missouri, Defendant-Respondent.  
No. 17456.

Sept. 17, 1991.

Motion for Rehearing or Transfer Denied Oct. 9, 1991.

Application to Transfer Denied Nov. 19, 1991.

Representatives of child injured when struck by automobile sued municipality. The Circuit Court, Greene County, Don Bonacker, J., dismissed complaint and appeal was taken. The Court of Appeals, Shrum, P.J., held that: (1) street was not in a "dangerous condition" at point of accident, for purposes of exception from statute conferring sovereign immunity on municipality, and (2) accident had not been caused by any design defect attributable to municipality.

Affirmed.

West Headnotes

[1] Automobiles 48A ↪258

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak258 k. Nature of Defects. Most Cited

Cases

Parking of automobiles on roadway, and general heavy traffic congestion, was not "dangerous condition" which was expressly excepted from general statutory grant of sovereign immunity to municipalities, so as to permit suit against the city for personal injuries sustained by child hit by automobile. V.A.M.S. § 537.600, subd. 1(2).

[2] Automobiles 48A ↪259

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak259 k. Defective Plan of Construction.

Most Cited Cases

Representatives of child struck by automobile did not establish defects in design of highway for which municipality could be liable; only road conditions alleged were those associated with heavy traffic. V.A.M.S. § 537.600, subd. 1(2).

\*612 John O. Newman, Ramsdell & Corbett, Springfield, for plaintiffs-appellants.

Dennis Budd, Asst. City Atty., Springfield, for defendant-respondent.

SHRUM, Presiding Judge.

The plaintiffs Brenda Johnson, a minor, and her parents Marla Johnson and Charles W. Johnson, appeal from a judgment dismissing their petition for damages arising from injuries sustained by Brenda when she was struck by a motor vehicle on a public street in the defendant City of Springfield, Missouri.

The issue is whether the plaintiffs alleged facts sufficient to plead that the City waived sovereign immunity under § 537.600.1(2), RSMo 1986. Because we conclude the petition does not allege facts that properly plead a dangerous condition of a public entity's property, we affirm.

FACTS

In their petition the plaintiffs alleged that on September 15, 1989, Brenda sustained personal injuries when she was struck by a motor vehicle driven by Kevin R. Lawmaster while she was attempting to cross East Avenue in Springfield. In paragraphs 6(a)-(h), the plaintiffs alleged that East Avenue was in an "unreasonably dangerous condition" because (a) it had a high volume of vehicle and pedestrian traffic, (b) vehicles parked along the street blocked motorists'

view of children and children's view of vehicles, and when children walked from behind parked vehicles into East Avenue, motorists traveling at the posted 30 m.p.h. speed limit could not stop in time to avoid striking them, (c) many children played in the area, (d) Brenda was not warned of the dangerous condition of the street, (e) motorists were not warned to reduce speed, (f) parked vehicles prevented motorists from keeping a careful lookout, (g) motorists were not warned of children playing in the area, and (h) a safe speed limit was not posted. At the end of paragraph 6(h) of the petition, the plaintiffs added this parenthetical statement: "(The foregoing is referred to as a dangerous condition.)"

The plaintiffs also alleged that Brenda's injuries directly resulted from the dangerous condition, that the risk of harm to Brenda from the dangerous condition was reasonably foreseeable, and that the City had actual or constructive knowledge of the dangerous condition because of an earlier child-pedestrian accident and numerous complaints by East Avenue residents about the dangers to children. In short, the plaintiffs sought to plead the "dangerous condition" waiver of sovereign immunity. See § 537.600.1(2), RSMo 1986. <sup>FN1</sup>

<sup>FN1.</sup> Section 537.600.1(2) waives governmental tort immunity as it existed at common law prior to September 12, 1977, for "Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in [a] dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

\*613 The City moved to dismiss the petition for failure to plead waiver of statutory sovereign immunity and, therefore, failure to state a claim upon which relief could be granted. The trial court sustained the

motion and the plaintiffs appealed.

#### SCOPE OF REVIEW

In reviewing the dismissal of a petition, we treat all alleged facts as true and construe the allegations favorably to the plaintiffs to determine whether they invoke principles of substantive law that would entitle them to relief. *Lowrey v. Horvath*, 689 S.W.2d 625, 626 (Mo. banc 1985). A petition must inform the defendant of what the plaintiffs will attempt to establish at trial. *Matyska v. Stewart*, 801 S.W.2d 697, 699-700 (Mo.App.1991). We will affirm a dismissal only if the plaintiffs could not recover on any theory pleaded. *Id.* at 700.

#### DISCUSSION AND DECISION

[1] A plaintiff seeking to plead a waiver of sovereign immunity under § 537.600.1(2) must allege facts that demonstrate:

(1) a dangerous condition of the property; (2) that the plaintiff's injuries directly resulted from the dangerous condition; (3) that the dangerous condition created a reasonably foreseeable risk of harm of the kind the plaintiff incurred; and (4) that a public employee negligently created the condition or that the public entity had actual or constructive notice of the dangerous condition.

*Kanagawa v. State by and through Freeman*, 685 S.W.2d 831, 834-35 (Mo. banc 1985). The dispositive issue in the case before us is whether the plaintiffs' allegations plead a "dangerous condition" as that term is used in the statute.

In *Twente v. Ellis Fischel State Cancer Hosp.*, 665 S.W.2d 2 (Mo.App.1983), the plaintiff was assaulted and raped on the parking lot of the hospital where she was employed. She alleged the hospital parking lot was in a dangerous condition because hospital officials were aware other rapes and assaults had been committed there and because the security guard was not at his post when the plaintiff was assaulted. In rejecting her claim, the court pointed out, "The statute does not say that the negligent or wrongful act or omission of an employee, or the actual or constructive notice are unto themselves a 'dangerous condition.'" *Id.* at 11. The court concluded "the General Assembly

... limited the term 'dangerous condition' exclusively to the physical condition of the public property." *Id.* The court also stated the statutory language "dangerous condition" referred to "some physical defect of the property...." *Id.* at 12.

In *Kanagawa*, the plaintiff was kidnapped, assaulted, and raped by an escaped prison inmate. She alleged the prison property was maintained in a dangerous condition because its surrounding fences were inadequate to prevent escape and the gate was left unsecured. In affirming the dismissal of the plaintiff's claim, the supreme court held, "The allegations in the petition fall short of averring a defect, through either faulty construction or maintenance, in the condition of the prison's property." 685 S.W.2d at 835. The court cited the *Twente* opinion with approval and stated:

It is readily apparent that the legislature, by including the various elements set forth above conditioning the waiver of immunity, sought to narrowly delimit the scope of § 537.600(2). It would violate both this manifest legislative purpose and our policy of strictly construing [a] provision waiving sovereign immunity to hold that "a dangerous condition" refers to a condition other than a defect in the physical condition of public property.

685 S.W.2d at 835.

The court of appeals and the supreme court have subsequently held that plaintiffs,\*614 attempting to plead the "dangerous condition" waiver of sovereign immunity, were not required under all circumstances to allege facts which, if true, would show a physical defect in the public entity's property. In *Jones v. St. Louis Housing Authority*, 726 S.W.2d 766 (Mo.App.1987), a mother brought a wrongful death claim against the housing authority after her son was struck by debris flung from a lawn mower being used on the premises. The court described the presence of the debris on the grounds as a "physical deficiency" which created a dangerous condition. *Id.* at 774.

The following year the supreme court employed the *Jones* court's "physical deficiency" language in *Alexander v. State*, 756 S.W.2d 539 (Mo. banc 1988). Plaintiff Alexander was an elevator repairman who, while descending a fixed metal ladder in a state office building, stepped onto a folding room partition which had been placed at the foot of the ladder. The partition

unfolded causing Alexander to fall and be injured. The court held that the "alleged placement of the partition against the ladder created a physical deficiency in the state's property which constituted a 'dangerous condition.'" *Id.* at 542. Explaining its departure from the strict "physical defects" approach of *Kanagawa* and *Twente*, the court pointed out that the danger to repairman Alexander (and the danger to the decedent in *Jones*) "was created not by any intrinsic defect in the property involved, but by the dangerous condition created by the positioning of various items of property." *Alexander*, 756 S.W.2d at 542. The court further distinguished *Kanagawa* and *Twente*, stating, "the condition [in *Alexander*] was dangerous because its existence, without intervention by third parties, posed a physical threat to plaintiff." 756 S.W.2d at 542.

Despite the somewhat relaxed pleading burden set forth in *Alexander* and *Jones*, the *Alexander* court reiterated the principle that courts "must strictly construe statutory provisions waiving sovereign immunity." 756 S.W.2d at 542. Even under *Alexander*, the plaintiffs in the case before us do not allege facts that plead the existence of a dangerous condition. There is nothing in their petition that would support an inference that the East Avenue conditions they describe constituted physical deficiencies which were dangerous because their very existence, without intervention by third parties, posed a physical threat.

[2] A dangerous condition of a public highway or road also can be pled by allegations of negligent, defective, or dangerous design. See *Donahue v. City of St. Louis*, 758 S.W.2d 50 (Mo. banc 1988); *Wilkes v. Missouri Highway and Trans. Comm.*, 762 S.W.2d 27 (Mo. banc 1988); *Cole v. Missouri Highway and Trans. Comm.*, 770 S.W.2d 296 (Mo.App.1989); and *Brown v. Missouri Highway and Trans. Comm.*, 805 S.W.2d 274 (Mo.App.1991).<sup>FN2</sup> However, the plaintiffs' reliance on these "defective road design" cases is misplaced.

<sup>FN2</sup>. In 1985 the General Assembly provided public entities with a "state of the art" defense in some cases in which a plaintiff alleged a dangerous condition as a result of the design of a road or highway. The 1985 amendment provides:

In any action under this subdivision wherein a plaintiff alleges that he was

damaged by the negligent, defective or dangerous design of a highway or road, which was designed and constructed prior to September 12, 1977, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.

In *Donahue*, the plaintiff alleged a dangerous condition existed where a stop sign was down and not visible to him as he approached an intersection. 758 S.W.2d at 50. The supreme court held that a stop sign was contemplated within the meaning of the phrase “negligent, defective, or dangerous design of roads and highways,” *Id.* at 52, and reinstated the plaintiff’s claim. In *Wilkes*, the plaintiffs alleged, among other things, that the bridge the injured plaintiff struck “was so situated that an operator of a motor vehicle had no notice of it until almost upon it” and that “the roadway and bridge were negligently constructed\*615 because they posed a danger to motorists by reason of a curve in the road just before the bridge.” 762 S.W.2d at 28. Although the issue on appeal in *Wilkes* was whether the 1985 amendments to § 537.600 had retroactive application, the opinion suggests the plaintiffs adequately pled a dangerous condition.

In *Cole*, the plaintiff’s petition included allegations that the condition of a state highway was unreasonably dangerous because of its “obscured and sudden curvature” and its “obscured and sudden intersection” with another highway. 770 S.W.2d at 297. The court reversed the dismissal of the claim. In *Brown*, the plaintiff claimed the roadway was in a dangerous condition because of the absence of a road shoulder and guardrails. 805 S.W.2d at 276. The court held that the existence or absence of shoulders and guardrails was encompassed in the language, “negligent, defective, or dangerous design of roads and highways,” and reinstated the petition. 805 S.W.2d at 278.

The plaintiffs argue that East Avenue was in as dangerous a condition as the bridge in *Wilkes*, the sudden and obscured curve and intersection in *Cole*, and the shoulder of the road in *Brown*. Argument notwith-

standing, we do not find in the petition factual allegations that the portion of East Avenue in question suffered from the “negligent, defective, or dangerous design” as pled in *Wilkes*, *Cole*, and *Brown*. Borrowing from *Alexander*, we believe the very existence of the road conditions alleged in *Wilkes*, *Cole*, and *Brown*, if true, posed a physical threat to the plaintiffs in those cases. We do not believe the alleged conditions of East Avenue, standing alone, posed a physical threat to the injured plaintiff in the case before us.

Despite the liberal standard of review stated in *Lowrey* and *Matyska*, we remain constitutionally bound to follow the controlling decisions of the Missouri Supreme Court. *Terrill v. State*, 792 S.W.2d 710, 712 (Mo.App.1990); Mo. Const. art. V, § 2 (1945). Thus we strictly construe statutory provisions that waive sovereign immunity. *Alexander*, 756 S.W.2d at 542. With that limitation in mind, we believe the observation of the *Twente* court is valid:

What appellant seeks is to engraft upon the term “dangerous condition” any and all conditions or events which, if foreseeable, cause or produce injury arising out of or in conjunction with the property or employees of a public entity. If appellant’s argument were carried to its logical conclusion, § 537.600(2) [now § 537.600.1(2)] would become a nullity.

665 S.W.2d at 12.

We affirm the judgment dismissing the plaintiffs’ petition.

FLANIGAN, C.J., and MONTGOMERY, J., concur.  
Mo.App. S.D. 1991.  
Johnson by Johnson v. City of Springfield  
817 S.W.2d 611

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Superior Court of New Jersey,  
Appellate Division.

Karl KING, an incompetent, by his guardian ad litem  
Norah KING; Christopher King, Kendra King, and  
Meredith King, infants under the age of 18 years, by  
their guardian ad litem Norah King; and Norah King,  
individually, Plaintiffs,

v.

Phyllis J. BROWN, State of New Jersey, County of  
Monmouth, Township of Ocean, John Doe, a fictitious  
name, and John Doe II through John Doe XII, De-  
fendants.

Argued Sept. 16, 1987.

Decided Nov. 16, 1987.

## SYNOPSIS

Action was brought for injuries suffered by pedestrian in attempting to cross road against, inter alia, state, county, and township. The Superior Court, Law Division, Monmouth County, entered summary judgment for public entities, and plaintiff appealed. The Superior Court, Appellate Division, D'Annunzio, J.A.D., held that: (1) volume of vehicular and pedestrian traffic on road did not constitute "dangerous condition" so as to support imposition of liability on public entities pursuant to statutes, and (2) in most cases, application of "dangerous condition" standard, for purposes of imposing liability on public entities, requires consideration of both physical characteristics of public property and nature of activities permitted on that property.

Affirmed.

West Headnotes

**[1] Automobiles 48A**  **258**48A Automobiles

48AVI Injuries from Defects or Obstructions in  
Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak258 k. Nature of Defects. Most Cited  
Cases

Volume of vehicular and pedestrian traffic on road where pedestrian was injured while attempting to cross did not constitute "dangerous condition" within meaning of statutes providing for imposition of liability on public entities, so as to justify holding state, county, and township liable for injuries; "dangerous condition" is statutorily defined as condition that creates substantial risk of injury when property is used with due care, and nothing would support inference that condition of road was such that traffic congestion created substantial risk of injury despite exercise of due care by motorists and pedestrians. N.J.S.A. 59:4-1, subd. a, 59:4-2.

**[2] Municipal Corporations 268**  **847**268 Municipal Corporations268XII Torts

268XII(E) Condition or Use of Public Build-  
ings and Other Property

268k847 k. Nature and Grounds of Liability  
of Municipality as Proprietor. Most Cited Cases  
In most cases, application of "dangerous condition"  
standard for purposes of imposing liability on public  
entities requires consideration of both physical char-  
acteristics of public property and nature of activities  
permitted on the property. N.J.S.A. 59:4-1, subd. a,  
59:4-2.

**[3] Statutes 361**  **181(1)**361 Statutes361VI Construction and Operation361VI(A) General Rules of Construction361k180 Intention of Legislature361k181 In General361k181(1) k. In General. Most CitedCases

Statutory language, policy behind statute, concepts of  
reasonableness, and legislative history are sources of  
legislative intent.

**\*\*413 \*272** Richard H. Mills, Manasquan, for plain-  
tiffs (Lautman, Henderson, Mills & Wight, attorneys).

Jacqueline M. Sharkey, Deputy Atty. Gen., for de-  
fendant, State of N.J. (W. Cary Edwards, Atty. Gen.,  
attorney).

Vincent P. Valerio, Shrewsbury, for defendant, Monmouth County (Sparks & Sauerwein, attorneys).

Ronald Prusek, Toms River, for defendant, Ocean Tp. (Lomell, Muccifori, Adler, Ravaschiere, Amabile & Pehlivanian, attorneys; Michael S. Paduano, on the brief).

\*271 Before Judges GAULKIN, GRUCCIO and D'ANNUNZIO.

*Richard H. Mills* argued the cause for appellants (*Lautman, Henderson, Mills & Wight*, attorneys). *Jacqueline M. Sharkey*, Deputy Attorney General, argued the cause for respondent, State of New Jersey (*W. Cary Edwards*, Attorney General, attorney). *Vincent P. Valerio* argued the cause for respondent, County of Monmouth (*Sparks & Sauerwein*, attorneys). *Ronald Prusek* argued the cause for respondent, Township of Ocean (*Lomell, Muccifori, Adler, Ravaschiere, Amabile & Pehlivanian*, attorneys; *Michael S. Paduano*, on the brief).

The opinion of the Court was delivered by D'ANNUNZIO, J.A.D.

Plaintiffs appeal the grant of summary judgment in favor of the three public entity defendants. Plaintiffs eventually settled their claims against Brown, the individual defendant.

\*\*414 On August 8, 1983, Karl King was a pedestrian in Ocean Township attempting to cross Sunset Avenue from the south side to the north side. Sunset Avenue has two traffic lanes, one westbound and one eastbound. During his attempt to cross the eastbound lane, King ran into the right rear of a car being operated in an easterly direction by defendant Brown. The impact caused King to fall and strike his head. It is alleged that King sustained brain damage which has rendered him incompetent.

Judgment was entered in favor of the public entities on the ground that the condition which plaintiffs contended caused King's injury did not constitute a dangerous condition within the meaning of *N.J.S.A. 59:4-2*.<sup>FN1</sup> We agree and affirm.

FN1. This statute provides in part:

A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition....

*N.J.S.A. 59:4-1a*. provides:

Dangerous condition means a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

\*273 Plaintiffs' contentions are well expressed in the first page of plaintiffs' brief on appeal:

Plaintiffs' liability theory against the public entities was that the scene of Karl King's accident was a traffic nightmare, one at which there existed (a) substantial volume of pedestrian traffic back and forth across Sunset Avenue combined with (b) an extraordinarily high volume of vehicular traffic proceeding in and from many different directions at once, both on the roadway proper and from adjacent parking lots, parking areas, and driveways; yielding the result that (c) pedestrians in Karl King's position confronted an unreasonably great difficulty in making effective observations for their safety.

Sharpening their focus, plaintiffs alleged that Sunset Avenue was a very busy street due to retail commercial development on both sides of the street, diagonal parking on the north side of Sunset and the use of Sunset as part of a *de facto* jughandle for northbound traffic on State Highway 35. According to plaintiffs, these elements created "an unreasonably busy and complicated traffic situation."

Plaintiffs emphasize the effect of the *de facto* jughandle created by the State. Northbound Route 35 traffic desiring to cross the southbound lanes of Route 35 to travel west on Sunset Avenue was directed to local streets in lieu of a left hand turn from Route 35. These vehicles, proceeding north on Route 35, would pass the Sunset Avenue intersection, turn right onto Fairmount Avenue, proceed for one block and turn right onto Allen Avenue, proceed for one block and turn right onto Sunset. After proceeding for one block on Sunset, the vehicles would be at its intersection

with Route 35 facing west.

Although plaintiffs emphasize and rely on the effect of the jughandle on Sunset Avenue traffic, the record is silent as to the volume of Sunset Avenue traffic attributable to the jughandle effect. Moreover, the Brown vehicle was not part of the \*274 jughandle traffic. Brown was proceeding *eastbound* on Sunset.<sup>FN2</sup>

FN2. At oral argument, plaintiffs' counsel suggested that creation of the *de facto* jughandle constituted a design defect. No expert opinion was offered to support this suggestion.

Similarly, the significance to this case of diagonal parking on the north side (westbound lane) of Sunset is dubious. King ran into the Brown car on the south side of the street. There is no evidence that he was struck by a vehicle while it was backing out of a diagonal parking space.

The trial judge did not base his decision on these weaknesses in plaintiffs' liability theory. Relying on Sharra v. City of Atlantic City, 199 N.J.Super. 535, 489 A.2d 1252 (App.Div.1985) (bicyclist using boardwalk knocked down by other bicyclist); Rodriguez v. N.J. Sports and Exposition Authority, 193 N.J.Super. 39, 472 A.2d 146 (App.Div.1983), cert. den. 96 N.J. 291, 475 A.2d 586 (1984) (criminal attack in parking lot of sports complex) and **\*\*415** Setrin v. Glassboro State College, 136 N.J.Super. 329, 346 A.2d 102 (App.Div.1975) (student assaulted during a racial incident), the trial judge ruled that for a dangerous condition to exist there must be a defect in the property such as a hole in the roadway or a protruding manhole cover. We understand the trial judge to mean, in line with the previously cited cases, that the phrase dangerous condition, as defined in *N.J.S.A. 59:4-1a*, does not refer to *activity* on the property. Sharra v. City of Atlantic City, *supra*, 199 N.J.Super. at 540, 489 A.2d 1252. Our understanding of the trial judge's ruling is consistent with the parties' arguments on appeal.

[1][2] We agree that plaintiffs cannot prevail on their theory that the volume of vehicular and pedestrian traffic on Sunset Avenue constituted a dangerous condition within the meaning of *N.J.S.A. 59:4-1a* and 4-2. However, we do not rest our affirmance on a distinction between physical defects in public property

and activities on that property. In our view, a condition of public property which is safe for one activity may become a dangerous condition when the property is converted \*275 to a different activity. For example, a bridge designed solely for pedestrian use may become dangerous when converted to use by vehicular traffic if its structure cannot support the additional load. In most cases, application of the dangerous condition standard requires consideration of both the physical characteristics of the public property as well as the nature of the activities permitted on that property. Indeed, the definition of dangerous condition in *N.J.S.A. 59:4-1a* requires consideration of the reasonably foreseeable use of the property. Cf. Speaks v. Jersey City Housing Auth. 193 N.J.Super. 405, 474 A.2d 1081 (App.Div.1984), cert. den. 97 N.J. 655, 483 A.2d 177 (1984) (bicycle thrown from defective window-use of area beneath defective window as play area constituted the dangerous condition). Consequently, we perceive no advantage in the adoption of a physical defect/activity dichotomy. Cf. B.W. King, Inc. v. West New York, 49 N.J. 318, 324, 230 A.2d 133 (1967) (criticizing "blind adherence" to the distinction between a municipality's proprietary function and its governmental function).

[3] The issue is whether the legislature intended that a high volume of vehicular and pedestrian traffic, creating what is commonly referred to as traffic congestion, constitutes a dangerous condition. Statutory language, the policy behind the statute, concepts of reasonableness and legislative history are sources of legislative intent. Schapiro v. Essex County Freeholder Board, 177 N.J.Super. 87, 424 A.2d 1203 (Law Div.1980), aff'd. 183 N.J.Super. 24, 443 A.2d 219 (App.Div.1982), aff'd 91 N.J. 430, 453 A.2d 158 (1982).

*N.J.S.A. 59:4-1a* defines dangerous condition as "a condition of property that creates a substantial risk of injury when such property is used with due care...." Obviously, vehicular and pedestrian traffic, whether free-flowing or congested, involve risk of injury.

In the absence of due care, traffic congestion may enhance the risk of injury so that the risk becomes substantial. But the test is whether the condition complained of creates a substantial risk of injury despite the exercise of due care by motorists \*276 and pedestrians. What constitutes due care depends on the variable element of risk of harm inherent in any situ-

ation. Arguably, heavy traffic poses a greater risk of collision than light traffic. But, the greater the risk, the greater the care required. *Ambrose v. Cyphers*, 29 N.J. 138, 144, 148 A.2d 465 (1959); *Butler v. Acme Markets, Inc.*, 177 N.J.Super. 279, 286, 426 A.2d 521 (App.Div.1981), aff'd 89 N.J. 270, 445 A.2d 1141 (1982). Therefore, the exercise of due care in the circumstances of traffic congestion may require greater vigilance and lower vehicle speeds than would be required in light traffic conditions. There is nothing in the evidence in this case or in common experience to support an inference that the condition of Sunset Avenue was such that traffic congestion created a substantial risk of injury despite the exercise of due care by motorists and pedestrians. The report of plaintiffs' expert witness merely recites \*\*416 the density and nature of the business uses, parking patterns and "considerable traffic movement" on Sunset Avenue and concludes that "[a]s a result of the various conditions described pedestrian traffic ... is exposed to a dangerous condition."

Our resolution of this issue is consistent with the purpose and spirit of the New Jersey Tort Claims Act, *N.J.S.A. 59:1-1 et seq.* (the Act). The Act was adopted in 1972. The legislature recognized that "the area in which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." *N.J.S.A. 59:1-2*. Consistent with this legislative declaration, the Act limits public entity liability. The general approach is one of public entity immunity "[e]xcept as otherwise provided by this act...." *N.J.S.A. 59:2-1a*. Any public entity liability established by the Act "is subject to any immunity of the public entity...." *N.J.S.A. 59:2-1b*.

In the comment to *N.J.S.A. 59:2-1*, the *Report of the Attorney General's Task Force on Sovereign Immunity, 1972*, (*Task Force Report*) stated: "[T]he approach should be whether an immunity applies and if not, should liability attach. It is hoped that in utilizing this approach the courts will exercise restraint \*277 in the acceptance of novel causes of action against public entities." *Id.* at 210. Our research has revealed no case in which entity liability was based on traffic congestion alone.

In New Jersey, the nation's most densely populated state, traffic congestion is a common problem which affects State, county and local roads.<sup>FN3</sup> In light of this

fact, the legislature's expressed concern about government's almost limitless responsibility and the admonition to the courts to exercise restraint in the recognition of novel causes of action, we are satisfied that traffic congestion at Sunset Avenue did not create a dangerous condition within the meaning of the Act. The fact that the State may have added to the traffic volume on Sunset Avenue through its use of local streets as a jughandle adds nothing to plaintiffs' case because all traffic on a congested road had its source in some other public road or roads.

FN3. Plaintiffs' expert's description of Sunset Avenue activity would accurately describe countless urban and suburban streets in New Jersey.

Plaintiffs reliance on the California case of *Baldwin v. State*, 6 Cal.3d 424, 491 P.2d 1121, 99 Cal.Rptr. 145 (Sup.Ct.1972) is misplaced. In *Baldwin*, the court held that design immunity may be lost as the result of changed circumstances, "e.g. the large increase in traffic on Hoffman Boulevard since its construction in 1942." *Id.*, 6 Cal.3d 429, 491 P.2d at 1123, 99 Cal.Rptr. at 147. The Attorney General's Task Force specifically rejected the *Baldwin* rule. *Task Force Report, supra*, at 223. Moreover, the dangerous condition found to exist in *Baldwin* was not merely traffic congestion. The dangerous condition was the absence of a left turn lane on a busy 55 m.p.h. highway. Because there was no left turn lane, traffic turning left from Hoffman Boulevard had to stop in the fast lane to await an opportunity to complete the turn. As a result there were many rear-end collisions caused by attempts to make left turns. Paradoxically, the *Baldwin* facts would more \*278 closely resemble the present case if the State had not directed left turning Route 35 traffic to the *de facto* jughandle.

Affirmed.

N.J.Super.A.D., 1987.  
King by King v. Brown  
221 N.J.Super. 270, 534 A.2d 413

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**H**

District Court of Appeal of Florida,  
 Fourth District.  
 Huguette ORLANDO, as personal representative of  
 the Estate of Caleb Orlando, deceased, Appellant,  
 v.  
 BROWARD COUNTY, FLORIDA, the City of Dania  
 Beach, and School Board of Broward County, Ap-  
 pellees.  
 No. 4D04-4868.

Dec. 21, 2005.  
 Rehearing Denied Feb. 22, 2006.

**Background:** Mother whose child was killed while crossing the street on the way home from school brought negligence action against school board, among others. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Ilona M. Holmes, J., concluded that school board was entitled to sovereign immunity. Mother appealed.

**Holdings:** The District Court of Appeal, Gross, J., held that:

- (1) school board's decision as to school hours was a planning-level decision, and  
 (2) school board did not create a dangerous condition for which there was no proper warning.

Affirmed.

West Headnotes

**[1] Schools 345**  **89.8(1)**345 Schools345II Public Schools345II(F) District Liabilities345k89.8 Motor Vehicles345k89.8(1) k. In General. Most CitedCases

School board's decision to operate middle school from 9:00 a.m. to 4:00 p.m., thereby exposing students to rush hour traffic on surrounding streets, was a planning-level decision, for purposes of school board's entitlement to sovereign immunity in action by mother of child who was killed while crossing a street on his

way home from school; decision involved the governmental objective of educating children, decision required the exercise of judgment and expertise to satisfy educational, health, and other requirements relating to length of the school day, and school board had statutory authority to adopt policies for the opening and closing of schools. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. §§ 768.28, 1001.42(4)(f).

**[2] States 360**  **191.6(2)**360 States360VI Actions360k191 Liability and Consent of State to Be Sued in General360k191.6 Mode and Sufficiency of Consent

360k191.6(2) k. Necessity of Constitutional or Statutory Consent. Most Cited Cases  
 Constitutional provision authorizing the legislature to make provision for bringing suits against the state provides absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment. West's F.S.A. Const. Art. 10, § 13.

**[3] States 360**  **112(2)**360 States360III Property, Contracts, and Liabilities360k112 Torts360k112(2) k. Statutory Provisions; Waiver of Immunity. Most Cited Cases

Statute waiving sovereign immunity in tort cases constitutes a limited waiver of the state's sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

**[4] States 360**  **112.2(1)**360 States360III Property, Contracts, and Liabilities360k112 Torts360k112.2 Nature of Act or Claim360k112.2(1) k. In General. Most CitedCases

Despite limited statutory waiver of sovereign immun-

ity against tort claims, certain discretionary, planning-level governmental functions remain immune from tort liability. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

**[5] Municipal Corporations 268 ↪728**

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k728 k. Discretionary Powers and Duties. Most Cited Cases

**States 360 ↪112.2(1)**

360 States

360III Property, Contracts, and Liabilities

360k112 Torts

360k112.2 Nature of Act or Claim

360k112.2(1) k. In General. Most Cited

Cases

If a challenged governmental act, omission, or decision necessarily involves a basic governmental policy, program, or objective, is essential to the realization or accomplishment of that policy, program, or objective, and requires the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved, and the governmental agency possesses the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision, then the challenged act, omission, or decision can be classified as a discretionary, planning-level governmental process, for purposes of entitlement to sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

**[6] Schools 345 ↪89.8(1)**

345 Schools

345II Public Schools

345II(F) District Liabilities

345k89.8 Motor Vehicles

345k89.8(1) k. In General. Most Cited

Cases

School board did not create a dangerous condition for which there was no proper warning by exposing students to rush hour traffic on their way to and from school, and thus exception to doctrine of sovereign immunity when a governmental entity creates a dan-

gerous condition and fails to warn of the danger did not apply to suit against school board by mother whose child was killed while crossing the street on his way home from school; danger posed by traffic was open and obvious, and school board did not create the danger and had no authority to alleviate it. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

**[7] Municipal Corporations 268 ↪723**

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k723 k. Nature and Grounds of Liability.

Most Cited Cases

When a governmental entity creates a known dangerous condition, which is not readily apparent to persons who may be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger, and the governmental entity is not entitled to sovereign immunity for a breach of this duty; however, a dangerous condition that is readily apparent to the public does not fit within this exception to the doctrine of sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

**[8] Automobiles 48A ↪279**

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

For purposes of exception to sovereign immunity when a governmental entity creates a hidden danger, the danger of jaywalking on a busy street during rush hour is readily apparent to pedestrians, so that a governmental entity has no duty to warn of such an open and obvious hazard. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

\*56 Lawrence B. Friedman of The Friedman Law Firm, P.A., Boca Raton, for appellant.

Dorsey C. Miller, III of Haliczer, Pettis & Schwamm, P.A., Fort Lauderdale, for appellee School Board of Broward County.

GROSS, J.

In this case we hold that sovereign immunity bars a mother's claim against a school board for the death of her son. The school board's decision on when to begin and end the school day was a discretionary, planning-level decision. The facts of the case do *not* give rise to a situation where the school board had an operational level duty to warn of a dangerous condition that it created, which was not readily apparent, so that it constituted a trap for the unwary.

Huguette Orlando, as the mother and guardian of her minor son, Caleb Orlando, filed a negligence complaint against the School Board of Broward County and other defendants, pursuant to the Wrongful Death Act, section 768.16, et seq., Florida Statutes (1999). The case arose out of a 1999 accident where an automobile struck and killed Caleb while he was crossing the street west of the intersection at Southeast 5th Avenue and Sheridan Street in Dania Beach.

Caleb was a 13-year-old eighth grader at Olsen Middle School. The school's hours of operation were from 9:00 a.m. until 4:00 p.m. The School Board provided bus transportation for Olsen Middle students who lived beyond a two-mile radius of the school. At the beginning of the 1997 school year, Caleb lived outside of the two-mile radius and was eligible for bus transportation. In October 1997, Caleb's family moved to a residence within the two-mile radius. Despite living within the radius, Caleb was permitted to ride the school bus until December 1998.

When the mother learned that her son was no longer permitted to ride the school bus, she protested at the school's office. Concerned for her son's safety, she asked the person in charge of bus transportation if there were any exceptions to the two-mile radius rule or if anything could be done to restore her son's bus transportation privileges. The person advised her that Caleb was ineligible for bus transportation and there were no exceptions to the policy.

On May 26, 1999, Caleb was dismissed from school at 4:00 p.m. At 4:15 p.m., Caleb was at Sheridan Street, about 30 feet west of the intersection with Southeast 5th Avenue. This intersection is within a two-mile radius of the school and does not have a crossing guard. There was no school zone at the intersection.

Attempting to cross the street, Caleb stepped into the westbound lane of Sheridan Street, against traffic and not at a crosswalk. He passed in front of a transit bus. As Caleb moved past the bus, he was struck and killed by a passing motorist.

Olsen Middle is surrounded by busy streets, where peak traffic occurred between the hours of 7:30 a.m. to 9:00 a.m. \*57 and 4:30 p.m. to 6:00 p.m. At the location on Sheridan Street, where the accident occurred, the speed limit was 45 miles-per-hour. The School Board was aware that hazardous walking routes existed within a two-mile radius of Olsen Middle; Caleb was the fourth child in a seven-year period to die in transit to or from the school, all within the two-mile radius.

[1] The mother first argues that the School Board negligently decided to operate Olsen Middle School from 9:00 a.m. to 4:00 p.m., thereby exposing the students to rush hour traffic on the surrounding streets, and creating a foreseeable zone of risk, which imposed a duty on the School Board to take precautions to protect the children.

[2][3] Article X, section 13 of the Florida Constitution provides "absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment." Cir. Ct. of the Twelfth Jud. Cir. v. Dept of Natural Resources, 339 So.2d 1113, 1114 (Fla.1976). Section 768.28, Florida Statutes (1999), "constitutes a limited waiver of the states sovereign immunity." Id. at 1116. Section 768.28(5) provides that the "state and its agencies and subdivisions [are] liable for tort claims in the same manner and to the same extent as a private individual under like circumstances."

[4] Even though the statute creates a limited waiver of sovereign immunity, certain discretionary, planning-level governmental functions remain immune from tort liability. *See, e.g., Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1022 (Fla.1979)* (holding that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability.). Setting the time when a given school opens or closes is a discretionary, planning-level function of the School Board, not subject to the waiver of sovereign immunity.

[5] In *Commercial Carrier Corp.*, the supreme court set forth a preliminary test to determine whether a governmental function is a discretionary one:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

*Id.* at 1019 (quoting *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440, 445 (1965)). If these questions can be “clearly and unequivocally answered in the affirmative,” then the challenged act, omission, or decision can be classified as a discretionary, planning-level governmental process. *Id.*

In this case, the four questions can clearly and unequivocally be answered in the affirmative. The decision when to open and close a school involves a governmental policy, program, or objective. Setting a beginning and ending of a school day is essential to the School Board's objective of educating children. Determining school hours involves the exercise of judgment and expertise. The length of the school day must meet educational, health, and other requirements, obligating the School Board to coordinate the release of hundreds of schools at locations all over \*58 Broward County. Finally, pursuant to section 230.23(4)(f), Florida Statutes (1999) (now renumbered § 1001.42(4)(f)), the School Board has the power to “adopt policies for the opening and closing of schools.” Under the *Commercial Carrier* preliminary test, the decision when to open and close a school is a planning-level decision entitled to sovereign immunity. See *Harrison v. Escambia County Sch. Bd.*, 419 So.2d 640 (Fla. 1st DCA 1982), *approved*, 434 So.2d 316 (Fla.1983) (holding that designation of the location of a school bus stop is a planning-level decision of a School Board).

[6][7] The mother seeks to avoid the operation of sovereign immunity by arguing that the School Board's decision created “a hidden trap or dangerous condition for which there was no proper warning.” *Dept't of Transp. v. Neilson*, 419 So.2d 1071 (Fla.1982). “[W]hen a governmental entity creates a known dangerous condition, which is not readily apparent to persons who may be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger.” *Payne v. Broward County*, 461 So.2d 63, 65 (Fla.1984) (citing *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla.1982)).

[8] However, a dangerous condition that is readily apparent to the public does not fit within this exception to the doctrine of sovereign immunity. The danger of jaywalking on a busy street during rush hour is readily apparent to pedestrians, so that a governmental entity has no duty to warn of such an open and obvious hazard. See *Masters v. Wright*, 508 So.2d 1299, 1300 (Fla. 4th DCA 1987). As the supreme court has written, “[a] governmental entity has no duty to warn pedestrians of the routine danger of crossing the street in midblock.” *Payne*, 461 So.2d at 66.

*Payne* is instructive on this issue. In *Payne*, a high school student walking home from school was fatally injured as she tried to cross Rock Island Road. *Id.* at 64. Coral Springs High School was located at the northeast intersection of Rock Island Road and Sample Road. *Id.* The student followed the pedestrian sidewalk that ran 125 feet north of Sample Road until it ended at Rock Island. *Id.* At this point she attempted to cross Rock Island Road, where she was struck and killed by a motorist. *Id.*

The student's parents sued Broward County, the School Board, the City of Coral Springs, and others who were dismissed at trial. The trial court entered a directed verdict in favor of the School Board. *Id.* The jury attributed 40% of the liability to the County. *Id.* The County appealed to this court, which reversed the final judgment, holding the county was immune from tort liability. *Id.* at 64-65. This court also certified questions to the supreme court, including the following:

Was this [the opening of the Rock Island Road intersection] the creation of a known danger which re-

quires a warning or an aversion of danger?

*Id.* at 65.

The supreme court in *Payne* recognized that the County both created and knew of the conditions at the intersection where the student was killed. However, the court concluded that the intersection was “not a trap” and that “whatever danger there was in crossing the street midblock was open and obvious.” *Id.* at 66.

In this case, the School Board is less culpable than the County in *Payne*. The School Board had knowledge of the traffic conditions on Sheridan Street, but it did not create the dangerous condition. As in *Payne*, the dangerous condition here was open and obvious, no “greater than that existing anywhere it is possible to cross a road midblock.” *Id.* This was not a situation presenting an “operational level duty \*59 to warn of a known dangerous condition created by the public entity not readily apparent, constituting a trap for the unwary.” *Duval County Sch. Bd. v. Dutko*, 483 So.2d 492, 495 (Fla. 1st DCA 1986).

The mother relies heavily on *Dutko*, but it is distinguishable. *Dutko* held that the School Board had created a “trap for the unwary” by its continued maintenance of a bus stop where waiting children were exposed to dangers that were not readily apparent; the hidden danger was the often-occurring, erratic actions of drivers who “left the roadway and drove upon the grassy shoulder, requiring waiting children to scurry out of the way of wayward vehicles.” *Id.* at 495. In this case, there was no hidden danger. The School Board did not create or overlook the dangerous condition, the traffic on Sheridan Street, which was readily apparent. The School Board did not have the authority to take precautionary measures to alleviate the traffic or slow it down. See *Padgett v. Sch. Bd. of Escambia County*, 395 So.2d 584 (Fla. 1st DCA 1981) (stating local government and the Department of Transportation have a statutory duty of installing and maintaining school traffic control devices); see also *Garcia v. Metro. Dade County*, 561 So.2d 1194 (Fla. 3d DCA 1990).

We have considered the mother's remaining point on appeal, concerning the School Board's Empty Seat Policy, and find it to be without merit. Under section 234.01, Florida Statutes (1999), the School Board did not have a statutory duty to provide bus transportation

to students who lived less than two miles from school.

*Affirmed.*

STONE and HAZOURI, JJ., concur.  
Fla.App. 4 Dist., 2005.  
Orlando v. Broward County, Florida  
920 So.2d 54, 31 Fla. L. Weekly D42

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**H**

Court of Appeal, First District, Division 1, California.  
SONG X. SUN et al., Plaintiffs and Appellants,  
v.  
CITY OF OAKLAND, Defendant and Respondent.  
No. A118434.

Sept. 15, 2008.  
Review Denied Dec. 10, 2008. <sup>FN\*</sup>

<sup>FN\*</sup> Werdegar, J., is of the opinion the petition should be granted.

**Background:** Family of pedestrian killed when struck by an automobile at unmarked pedestrian crosswalk brought action against city for premises liability. The Superior Court, Alameda County, No. RG05-229302, Frank Roesch, J., granted summary judgment for city. Family appealed.

**Holdings:** The Court of Appeal, Swager, J., held that:  
(1) evidence of pedestrian accident study did not preclude summary judgment;  
(2) evidence of letters from community members expressing concerns did not preclude summary judgment;  
(3) evidence of city traffic engineer's concerns did not preclude summary judgment;  
(4) declaration of expert witness did not preclude summary judgment;  
(5) installation of bulb-outs and removal of painted crosswalk markings was not a dangerous condition;  
(6) city's failure to provide notice of removal of marked crosswalk as required by statute did not preclude summary judgment; and  
(7) city was immune from liability for pedestrian's death to extent that removal of crosswalk markings was a factor.

Affirmed.

## West Headnotes

**[1] Municipal Corporations 268  857**

268 Municipal Corporations  
268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k857 k. Actions for Injuries. Most Cited Cases

The existence of a "dangerous condition," for purposes of public entity premises liability, is ordinarily a question of fact; however, it can be decided as a matter of law if reasonable minds can come to only one conclusion concerning the issue. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[2] Municipal Corporations 268  847**

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases  
If it can be shown that city property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not "dangerous" for purposes of public entity premises liability. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[3] Municipal Corporations 268  847**

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases  
A third party's negligent or illegal conduct does not necessarily absolve a city from liability for creating a dangerous condition, for purposes of public entity premises liability, if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[4] Municipal Corporations 268  856**

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Build-

## ings and Other Property

268k856 k. Negligence or Other Fault of Third Persons. Most Cited Cases  
Third party conduct by itself, unrelated to the condition of public property, does not constitute a “dangerous condition” of the property for which a public entity may be held liable. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[5] Municipal Corporations 268 ↪856**268 Municipal Corporations268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k856 k. Negligence or Other Fault of Third Persons. Most Cited Cases  
To support public entity premises liability where the immediate cause of a plaintiff's injury is a third party's negligent or illegal act, there must be a defect in the physical condition of the property that increases or intensifies the danger to users from third party conduct, and that defect must have some causal relationship to the third party conduct that injures the plaintiff. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[6] Judgment 228 ↪185.3(21)**228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Summary judgment evidence of pedestrian accident study showing that intersection at which pedestrian was killed when struck by an automobile was tied for third among all intersections in city in the number of pedestrian-involved accidents did not support a reasonable inference that removal of painted markings from crosswalk in installing bulb-outs increased the risk of such accidents, as required for removal of markings to constitute a dangerous condition supporting public entity premises liability, where study was conducted before markings were removed, and there was no evidence that any other pedestrians were struck after markings were removed. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[7] Judgment 228 ↪185.3(21)**228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Summary judgment evidence of letters from community members expressing concerns about pedestrian safety at intersection where pedestrian was killed when struck by an automobile did not support a reasonable inference that removal of painted markings from crosswalk increased the risk of such accidents, as required for removal of markings to constitute a dangerous condition supporting public entity premises liability; letters were written before markings were removed. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[8] Judgment 228 ↪185.3(21)**228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Summary judgment evidence that city traffic engineer expressed a general concern about installing bulb-outs on intersections to the extent they might encourage pedestrians to cross at intersections without traffic controls did not support a reasonable inference that removal of painted markings and installation of bulb-outs of crosswalk where pedestrian was killed when struck by an automobile increased the risk of such accidents, as required for removal of markings to constitute a dangerous condition supporting public entity premises liability, since engineer's concern did not pertain to the specific intersection where pedestrian was killed. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[9] Judgment 228 ↪185.3(21)**228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Summary judgment declaration of plaintiffs' expert witness that installation of bulb-outs and removal of painted markings created a dangerous condition at crosswalk where pedestrian was killed when struck by an automobile, in that it encouraged pedestrians to believe they could cross safely at the intersection as if it were still marked while failing to alert approaching drivers that pedestrians would be using the intersection as a crosswalk, did not support a reasonable inference that the changes increased the risk of such accidents, as required for removal of markings to constitute a dangerous condition supporting public entity premises liability, absent evidence that pedestrian or driver who hit her had crossed intersection when the crosswalk was painted. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[10] Automobiles 48A ↪252**48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak252 k. In General. Most Cited Cases

The combination of high speed traffic and heavy pedestrian use alone does not lead to public entity premises liability. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[11] Automobiles 48A ↪257**48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak257 k. Sufficiency and Safety of Way in General. Most Cited Cases

A four-way stop is not an inherently dangerous condition when used with due care by the general public, as would support public entity premises liability. West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[12] Automobiles 48A ↪279**48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

City's installation of bulb-outs on intersection and removal of painted crosswalk markings was not a "dangerous condition," as required for public entity premises liability to family of pedestrian killed when struck by an automobile in intersection. West's Ann.Cal.Gov.Code §§ 830(a), 835.

See Cal. Jur. 3d, Government Tort Liability, §§ 34, 45; Cal. Civil Practice (Thomson/West 2007) Torts, §§ 29:10, 31:18; 10 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 26:32; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 258.

**[13] Judgment 228 ↪185.3(21)**228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Summary judgment affidavit of plaintiffs' expert that community members would have opposed removal of markings on crosswalk if city had complied with statutory duty to give notice of such removal was speculative in showing that giving notice would actually have prevented removal of markings, for purposes of claim of public entity premises liability for death of pedestrian hit by car while attempting to cross. West's Ann.Cal.Vehicle Code 21950.5; West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[14] Automobiles 48A ↪279**48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

**Judgment 228 ↪185.3(21)**228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

City's failure to provide notice of removal of marked crosswalk as required by statute did not support a reasonable inference that removal of painted markings constituted a dangerous condition, and thus did not preclude summary judgment for city on claim of public entity premises liability for death of pedestrian hit by car while attempting to cross. West's Ann.Cal.Vehicle Code 21950.5; West's Ann.Cal.Gov.Code §§ 830(a), 835.

**[15] Automobiles 48A**  27948A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

**Automobiles 48A**  28248A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak282 k. Proximate Cause. Most Cited

Cases

To the extent that city's removal of crosswalk markings from intersection was a factor in driver's collision with pedestrian, city's liability for pedestrian's death was foreclosed by statute immunizing public entities for liability for accidents proximately caused by failure to provide a signal, sign, marking, or device to warn of a reasonably apparent dangerous condition, since the only other physical condition complained of, the addition of bulb-outs to the sidewalk, was not hidden from pedestrians or motorists. West's Ann.Cal.Gov.Code § 830.8.

**[16] Automobiles 48A**  27948A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

Statutory immunity to public entity premises liability for failure to provide traffic control signals or signs does not apply to the failure to mark a crosswalk. West's Ann.Cal.Gov.Code § 830.4.

**\*\*375** Casper, Meadows, Schwartz & Cook, Andrew C. Schwartz, Esq., Walnut Creek, Thom Seaton, Esq., for Plaintiffs and Appellants.

John Russo, City Attorney, Randolph W. Hall, Assistant City Attorney, William E. Simmons, Supervising Deputy City Attorney, Christopher Kee, Deputy City Attorney, for Defendant and Respondent.

SWAGER, J.

**\*1180** While crossing International Boulevard in Oakland at an unmarked pedestrian crosswalk, Rong Zeng Peng was struck by an automobile and killed. Her husband and minor daughter sued the City of Oakland (City) and others, alleging that Ms. Peng's death was proximately caused by the dangerous condition of the intersection where the accident occurred. City moved successfully for summary judgment on the ground, among others, that the intersection was not in a dangerous condition as a matter of law. Appellants appeal from the adverse judgment. Finding no triable issues of **\*1181** material fact with respect to the existence of a dangerous condition, we affirm.

**FACTUAL BACKGROUND**

The following facts are, in essence, uncontroverted and taken from the evidence submitted by the parties in support of, and in opposition to, the motion for summary judgment.<sup>FN1</sup>

<sup>FN1</sup>. All of the facts presented in this opinion come solely from the evidence presented in connection with City's motion for summary judgment.

International Boulevard is a four-lane thoroughfare with two lanes going in each direction. Just before 9:00 p.m. on October 20, 2004, Ms. Peng attempted to cross International Boulevard where it intersects with 7th Avenue. The crosswalk at this intersection had been marked with painted stripes in the past, but it was unmarked at the time of the accident. A driver proceeding in the left lane of International Boulevard saw her from about a block away and stopped to allow her

to cross. As she emerged from behind the stopped car and crossed into the right lane, she was struck by a car driven by Ramon Jackson. Jackson had initially been driving in the left lane, but he moved his car to the right lane in order to get around the stopped car and did not see Ms. Peng crossing in his path until it was too late to stop. He fled the scene immediately after the accident and later turned himself in to the police. As part of a plea bargain, he pled no contest to felony vehicular manslaughter with gross negligence. (Pen.Code, § 192, subd. (c)(1).)

### PROCEDURAL HISTORY

On November 17, 2005, appellants filed their first amended complaint, asserting claims for premises liability against City based on the theory that Ms. Peng's death was caused by a dangerous condition of public property. Specifically, they alleged: "Decedent was crossing the street at the corner of International Boulevard and 7th Avenue, near the Clinton Park Adult School. The intersection in which decedent was walking used to have in place a painted crosswalk for pedestrians for several years prior to this incident. However, sometime prior to the subject incident the \*\*376 City of Oakland repaved the roadway and never replaced the crosswalk. Decedent was walking across this street when she was struck and killed in the unmarked crosswalk. In April of 2005, the crosswalk was finally replaced."

On February 6, 2007, City moved for summary judgment on the following grounds: 1) that the intersection was not in a dangerous condition as a matter of law; 2) that the undisputed evidence shows that no dangerous condition of \*1182 public property caused the accident; and 3) that even if a dangerous condition did cause the accident, City was immune by operation of Government Code sections 830.4 and 830.8. In opposition to City's motion, appellants argued that disputed facts created material fact issues for trial with respect to: 1) whether the unmarked crosswalk was a dangerous condition, and 2) whether the dangerous condition was a concurrent cause of the accident.

The trial court granted City's motion, finding as a matter of law: 1) that the site of the accident was not in a dangerous condition, 2) that there was no evidence the accident was caused by City's earlier removal of the crosswalk markings, and 3) that there was no triable issue of material fact as to whether City was

immune from liability. This appeal followed.

### DISCUSSION

#### *I. Standard Of Review*

A defendant may move for summary judgment "if it is contended that the action has no merit..." (Code Civ. Proc., § 437c, subd. (a).) "A defendant ... has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Id.* subd. (p)(2).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.* subd. (c).) "We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, 110 Cal.Rptr.2d 370, 28 P.3d 116.)

"In undertaking our independent review of the evidence submitted, we apply 'the same three-step process required of the trial court: First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material \*1183 factual issue. [Citations.]" ' [Citation.]" (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 392, 134 Cal.Rptr.2d 689.)

#### *II. Dangerous Conditions of Public Property*

A public entity is generally liable for injuries caused by a dangerous condition of its property if "the property was in a dangerous condition at the time of the injury, ... the injury was proximately caused by the

dangerous condition, ... the \*\*377 dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and ... either: [¶] ... [a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] ... [t]he public entity had actual or constructive notice of the dangerous condition [in time to prevent the injury].” (Gov.Code, § 835.)<sup>FN2</sup>

FN2. All subsequent statutory references are to the Government Code except where otherwise indicated.

[1][2] For purposes of an action brought under section 835, a “‘dangerous condition,’ as defined in section 830, is ‘a condition of property that creates a substantial ... risk of injury when such property or adjacent property is used with due care’ in a ‘reasonably foreseeable’ manner. (§ 830, subd. (a).)” ( *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 147, 132 Cal.Rptr.2d 341, 65 P.3d 807 ( *Bonanno* ).) “The existence of a dangerous condition is ordinarily a question of fact; however, it can be decided as a matter of law if reasonable minds can come to only one conclusion concerning the issue.” ( *City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21, 28, 40 Cal.Rptr.3d 26; § 830.2.<sup>FN3</sup>) With respect to public streets, courts have observed “any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] ‘If [ ] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not “dangerous” within the meaning of section 830, subdivision (a).’ [Citation.]” ( *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196, 45 Cal.Rptr.2d 657 ( *Chowdhury* ).)

FN3. Section 830.2 provides: “A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury

when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.”

### **\*1184 III. The Motion for Summary Judgment**

#### **A. Allegations of the complaint**

From the complaint and appellants' moving papers, it appears that their claim rests on the contention that City created the allegedly dangerous condition by failing to repaint crosswalk markings after City had installed bulb-out sidewalk extensions and repaved the street as part of a streetscaping project.<sup>FN4</sup> Between June 9 and June 11, 2004, a few months prior to the accident, the bulb-outs were installed and City removed the existing crosswalk markings. Appellants note there is no evidence that Ms. Peng was not using due care as a pedestrian while crossing the intersection and assert that the “key question” is whether City's failure to re-mark the intersection after having made the intersection “pedestrian friendly by the installation of bulb-outs” created a dangerous condition.

FN4. A bulb-out is an extension of the sidewalk, usually at the corner of an intersection, that lessens the distance pedestrians must traverse across a street.

#### **B. City's motion for summary judgment**

City framed its motion for summary judgment against appellants' response to a \*\*378 special interrogatory asking them to “describe the dangerous condition of public property” that existed at the intersection. Appellants' response was: “The dangerous condition was the state of the intersection itself. There was no marked pedestrian crosswalk and no warning signs. There was also a lack of any positive controls at the intersection of International Blvd. and Seventh Avenue, i.e., traffic signals, stop signs, flashing beacons, within the crossing. Additionally, the intersection was poorly lit.” On appeal appellants focus their dangerous condition claim on the unmarked crosswalk only. This is most likely in recognition of section 830.4, which provides immunity for the failure to install devices such as warning signs, traffic signals, and stop signs.<sup>FN5</sup> Appellants also appear to have abandoned any claim with respect to the lighting conditions.

FN5. Section 830.4 excludes from the definition of “dangerous condition” a condition resulting “merely” from failure to provide regulatory traffic controls or definitive roadway markings. It states: “A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.”

With respect to the unmarked crosswalk, City argued: “[T]he fact that the crosswalk was not marked ... is irrelevant, and certainly does not create a dangerous condition. Under California law, a crosswalk is either marked or unmarked, and the obligations of drivers and pedestrians to exercise caution \*1185 and to yield the right of way are largely the same regardless of the markings or lack thereof.” In support, City cited to Vehicle Code sections 275,<sup>FN6</sup> 21950,<sup>FN7</sup> and 21951,<sup>FN8</sup> as well as to Moritz v. City of Santa Clara (1970) 8 Cal.App.3d 573, 576, 87 Cal.Rptr. 675. City also asserted it was immune from liability under Government Code sections 830.4 and 830.8.<sup>FN9</sup>

FN6. Vehicle Code section 275 defines a crosswalk as either: “(a) That portion of a roadway included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of such lines from an alley across a street. [¶] [Or] (b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface.”

FN7. Vehicle Code section 21950 provides: “(a) The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter. [¶] (b) This section does not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian may suddenly leave a curb or other place of safety and walk

or run into the path of a vehicle that is so close as to constitute an immediate hazard. No pedestrian may unnecessarily stop or delay traffic while in a marked or unmarked crosswalk. [¶] (c) The driver of a vehicle approaching a pedestrian within any marked or unmarked crosswalk shall exercise all due care and shall reduce the speed of the vehicle or take any other action relating to the operation of the vehicle as necessary to safeguard the safety of the pedestrian. [¶] (d) Subdivision (b) does not relieve a driver of a vehicle from the duty of exercising due care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection.”

FN8. Vehicle Code section 21951 provides: “Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass the stopped vehicle.”

FN9. Section 830.8 provides: “Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.”

\*\*379 In their separate statement of undisputed facts, City set forth the circumstances surrounding the accident, including deposition testimony from Jackson to the effect that he knew at the time of the accident he was required to stop for pedestrians at unmarked crosswalks, and that he did not stop for Ms. Peng because he “didn’t see a person in front of the car that was stopped [in the left lane]” and “figured [he] didn’t need to stop.” City also set forth the testimony of the

driver in the left lane who had initially stopped for Ms. Peng. The driver's testimony supported the conclusion that pedestrians crossing at this intersection were visible from a block away and there were no physical impediments associated with the intersection that would prevent a driver from seeing and stopping for pedestrians.

#### **\*1186 C. Appellants' opposition**

In opposing City's position that the intersection was not in a dangerous condition, appellants relied heavily on City's alleged failure to comply with Vehicle Code section 21950.5. This statute provides: "(a) An existing marked crosswalk may not be removed unless notice and opportunity to be heard is provided to the public not less than 30 days prior to the scheduled date of removal. In addition to any other public notice requirements, the notice of proposed removal shall be posted at the crosswalk identified for removal. [¶] (b) The notice required by subdivision (a) shall include, but is not limited to, notification to the public of both of the following: [¶] (1) That the public may provide input relating to the scheduled removal. [¶] (2) The form and method of providing the input authorized by paragraph (1)." It is undisputed that City did not follow the procedures set forth in this section before removing the marked crosswalk where the accident occurred.

Appellants also argued that a triable issue of fact exists as to whether the unmarked crosswalk was dangerous due to the recently installed bulb-outs, which encouraged pedestrian traffic. They cited to concerns about pedestrian safety expressed by community members and city employees, a history of pedestrian accidents at the intersection, and a declaration prepared by their expert witness. They also asserted that City did not qualify for the immunities of Government Code sections 830.4 and 830.8 due to its failure to comply with Vehicle Code section 21950.5.

#### **D. The trial court's decision**

The trial court found "The undisputed facts establish that the intersection where the accident that is the subject of this action occurred was not in a 'dangerous condition' within the meaning of Government Code [section] 835, and that Plaintiffs' claims are barred by the immunities provided by Government Code [sections] 830.4 and 830.8." The court further found that

"even if Oakland failed to comply with Vehicle Code [section] 21950.5, Plaintiffs cite no authority that this section provides a basis for imposing liability based on dangerous condition of public property. Nor does [the statute] clearly demonstrate a legislative intent to withdraw or qualify the immunity provided by Government Code [sections] 830.4 and 830.8.... In any event, Plaintiffs fail to submit any competent evidence that Oakland's failure to comply with Vehicle Code [section] 21950.5\*\*380 caused Mr. Jackson to violate Vehicle Code [sections] 21950 and 21951 in a grossly negligent manner, leading to decedent's death."

#### **\*1187 IV. The Grant of Summary Judgment was Proper**

##### **A. Relevance of third party conduct**

[3] Appellants claim that City's reliance on the circumstances of the accident itself is insufficient to establish the absence of a dangerous condition. They assert that a third party's negligent conduct does not preclude a jury from finding public property to be a dangerous condition. While we agree that Jackson's negligent conduct would not necessarily absolve City from liability for creating a dangerous condition, we also note that his conduct, standing alone, does not prove that the intersection itself posed a substantial risk of injury to pedestrians generally.

[4][5] "A public entity may be liable for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's negligent or illegal act ... if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. [Citation.] But it is insufficient to show only harmful third party conduct, like the conduct of a motorist. ' "[T]hird party conduct by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable." ' [Citation.] There must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff. [Citation.] '[P]ublic liability lies under [Government Code] section 835 only when a feature of the public property has "increased or intensified" the danger to users from third party conduct.' [Citation.]" (Cerna v. City of Oakland (2008) 161 Cal.App.4th 1340, 1348, 75 Cal.Rptr.3d 168.)

***B. Appellants' evidence is insufficient to demonstrate the existence of a dangerous condition***

Appellants' evidence fails to raise triable issues of material fact regarding whether the unmarked crosswalk was in a dangerous condition. They first cite to letters from community members written in 1976 and 1989, expressing concerns about pedestrian safety at the intersection. They also cite to a pedestrian accident study showing that between July 11, 1998, and June 30, 2003, the intersection at which Ms. Peng was killed was tied for third among all intersections in Oakland in the number of pedestrian-involved accidents. A total of seven accidents had occurred during that time. No information is provided as to the factual circumstances surrounding these accidents. For example, there is no information as to (1) the ratio of pedestrian-involved accidents to successful pedestrian crossings at this intersection during this same time period, (2) whether the pedestrians were utilizing the marked \*1188 crosswalks when they were struck, or (3) whether pedestrians were hit by vehicles that were proceeding along 7th Avenue as opposed to along International Boulevard.

[6][7] As City notes, the accident study was undertaken before the bulb-outs were installed, during a time when the intersection was marked. There also is no evidence in the record that any pedestrians had been struck in the unmarked, bulb-out intersection prior to Ms. Peng. Accordingly, while the study supports an inference that pedestrian accidents could occur at this intersection, it does not support a reasonable inference that the removal of the painted markings increased the risk of \*\*381 such accidents. And while the citizens' letters are relevant to the issue of whether City had notice of a potentially dangerous intersection, they are not competent evidence that the intersection was, in fact, a "dangerous condition" within the meaning of section 835.

[8] Appellants also allege "City staff feared that the design of the intersection which included bulb-outs inviting pedestrian traffic added to the dangerousness of the intersection." This assertion is based on the deposition testimony of city traffic engineer Joe Wang. Appellants misconstrue his testimony. While Mr. Wang indicated that he had expressed a general concern about bulb-outs to the extent they might encourage pedestrians to cross at intersections without

traffic controls, this concern did not pertain to the specific intersection at issue here. With respect to the 7th Avenue intersection, he stated: "I think given the pedestrian activities at the corners at the park, we were not able to—we didn't think it would be reasonable to expect people to go elsewhere to cross the street, so that at least at the four corners of the park, where the school is, we will provide bulb-outs to improve pedestrian visibility, crossing safety and so forth."

[9] Finally, appellants point to the declaration provided by their expert witness. In his declaration, the expert asserts "One important effect of a bulb-out is to further invite pedestrians to cross a street where the City has installed a bulb-out, e.g., International Boulevard and 7th Avenue." He also states that "when the City removed the marking from the high usage crosswalk, which [had] been in place for a number of years, it created a foreseeable dangerous condition. This is because pedestrians would continued [*sic*] to believe they could cross safely at the intersection as if it were marked, while drivers approached that unmarked intersection without anticipating that pedestrians [would] be using it as a crosswalk."

The trial court overruled City's objection to this last statement, noting: "However, the opinion of Plaintiffs' expert that the intersection where decedent was killed was 'dangerous' is insufficient to overcome the immunity provided by Government Code [sections] 830.4 and 830.8." While the issue \*1189 of immunity will be discussed further below, we observe that expert opinions on whether a given condition constitutes a dangerous condition of public property are not determinative: "[T]he fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate this court's statutory task, pursuant to [Government Code] section 830.2, of independently evaluating the circumstances." (*Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705, 50 Cal.Rptr.2d 8.)

Importantly, we note there is no evidence in the record that either Ms. Peng or Jackson had crossed the intersection before it was paved over. Accordingly, the expert's opinion that persons acting in reliance on the formerly painted crosswalk would lessen their vigilance is of limited relevance. This is especially so in light of the fact that the absence of markings would be immediately apparent to sighted pedestrians, even those who had crossed before the markings were re-

moved.

**C. The bulb-outs did not create a dangerous condition**

Appellants argue strenuously that the bulb-outs “which invited pedestrians to cross” operated to create a dangerous condition in conjunction with the unmarked crosswalks. They do not argue that bulb-outs themselves increase or intensify the risks associated with crossing a street. In fact, as Mr. Wang noted, bulb-outs may decrease the risk to pedestrians by shortening\*\*382 the distance needed to cross the street, by making pedestrians more visible to motorists, and by calming traffic. Appellants do claim, however, that bulb-outs along with “the traffic pattern on International Boulevard contributed to the danger the intersection posed to pedestrians using the crosswalk with due care.”

In Brenner v. City of El Cajon (2003) 113 Cal.App.4th 434, 6 Cal.Rptr.3d 316 (Brenner), the court rejected the theory that the volume and speed of vehicular traffic in combination with heavy pedestrian use created a dangerous condition. In affirming the trial court's sustaining of the city's demurrer, the appellate court noted that the plaintiff had made no allegation that some “physical characteristics” of the street such as “blind corners, obscured sightlines, elevation variances, or any other unusual condition ... made the road unsafe when used by motorists and pedestrians exercising due care” and that the plaintiff had not cited to any authority “that a dangerous condition exists absent such factors.” (Id. at pp. 440-441, 6 Cal.Rptr.3d 316.) Brenner, at page 441, 6 Cal.Rptr.3d 316, relied on Mittenhuber v. City of Redondo Beach (1983) 142 Cal.App.3d 1, 190 Cal.Rptr. 694, wherein the court stated: “Many of the streets and highways of this state are heavily used by motorists and bicyclists alike. However, the heavy use of any given paved road alone does not invoke the application of Government Code section 835.” (Id. at p. 7, 190 Cal.Rptr. 694.)

[10] \*1190 While it may be that bulb-outs invite heavier pedestrian use, there is nothing about heavy pedestrian use that increased or intensified the danger to Ms. Peng as she attempted to cross the street. The combination of high speed traffic and heavy pedestrian use alone simply does not lead to public entity liability. (Brenner, supra, 113 Cal.App.4th 434, 440-441, 6 Cal.Rptr.3d 316.) Moreover, the motorist

who was traveling in the same direction as Jackson had come to a complete stop prior to Ms. Peng entering the crosswalk. It thus appears that a reasonably careful motorist would have had no difficulty seeing a pedestrian (or in seeing a car that was stopped for a pedestrian) and stopping, confirming that the configuration of the subject crosswalk did not create a substantial risk of injury when used with due care.

Moreover, appellants do not allege any unusual physical characteristics about the crosswalk where Ms. Peng was killed, such as any visual obstructions which would establish a dangerous condition. For example, appellants did not allege or produce any specific facts describing any particular trees, shrubbery, shadows or insufficient lighting concealing the presence of pedestrians or the crosswalk itself. (Cf. Washington v. City and County of San Francisco (1990) 219 Cal.App.3d 1531, 1537-1538, 269 Cal.Rptr. 58 [dangerous condition can be due not only to the absence of regulatory traffic devices, but also because of vision limitations from pillars and shadows].)

[11][12] As the Chowdhury court explained, “A four-way stop is not an inherently dangerous condition when used with due care by the general public. The only risk of harm was from a motorist who failed to exercise due care by obeying the de facto stop signs. The City is not liable for that conduct.” (Chowdhury, supra, 38 Cal.App.4th 1187, 1196, 45 Cal.Rptr.2d 657.) Here, the only risk of harm was from a motorist who failed to exercise due care by not obeying the Vehicle Code provisions requiring him both to yield to a pedestrian and to refrain from passing around a vehicle that had stopped for a pedestrian. The bulb-outs and the absence of painted markings did not render the intersection dangerous within the \*\*383 meaning of Government Code section 835.<sup>FN10</sup>

FN10. Appellants' reliance in their reply brief on Bonanno, supra, is also misplaced. In finding that a bus stop constituted a dangerous condition, Bonanno assumed that the pedestrian crossing was a dangerous condition. As noted by the court in Brenner, “the issue decided in Bonanno is the *obverse* of the issue raised by [the plaintiff]: Bonanno addressed whether a bus stop was dangerous because of the routes necessarily traveled by its patrons, and in contrast [the plaintiff's]

complaint addresses whether the route traveled by patrons was dangerous because of the bus stop. Because *Bonanno* did not address the issue raised by [the plaintiff], and instead assumed the existence of a dangerous crosswalk, *Bonanno* does not illuminate the issues in this case.” (*Brenner, supra*, 113 Cal.App.4th 434, 442, 6 Cal.Rptr.3d 316.)

**\*1191 D. Vehicle Code section 21950.5**

[13] It is undisputed that City did not provide the notice of removal of the marked crosswalk as required by Vehicle Code section 21950.5. Appellants' expert offered that had City complied with this statute, community members would have opposed the removal and City would not have removed the marked crosswalks. This conclusion is speculative.<sup>FN11</sup> The statute does not require a public agency to take a specific course of action in response to public comment. Thus, as appellants acknowledged at oral argument, had City complied with the statute it would have been free to remove the crosswalk markings even in the face of public opposition.

FN11. Evidence that City repainted the crosswalk markings after Ms. Peng's death was deemed inadmissible by the trial court on the ground that it constituted evidence of a subsequent remedial measure.

[14] While appellants contend that Vehicle Code section 21950.5 reflects “a legislative finding that removal of a marked crosswalk may well create a dangerous condition of public property,” we agree with City and the trial court that City's failure to comply with the statute's notice and hearing requirements does not support the conclusion that the intersection at issue here was in a dangerous condition. Importantly, appellants do not cite to any portion of this statute or its legislative history containing any reference to the statutory scheme governing liability for dangerous conditions of public property.

At oral argument, appellant asserted that Vehicle Code section 21950.5 is “meaningless” if noncompliance does not support a finding of liability. Otherwise, the argument goes, there are no consequences to a public entity that fails to comply with the statute's notice provisions. We are not persuaded.<sup>FN12</sup>

FN12. We observe that neither party raises the issue of whether or not City is liable under Government Code section 815.6, which provides: “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.”

The sole evidence appellants cite in support of their argument that Vehicle Code section 21950.5 creates liability for Ms. Peng's death is a 41-page study entitled “Dangerous by Design,” which appears to be one of several studies included in the materials made available to the Legislature in 2000 when this statute was promulgated. Specifically, appellants draw our attention to the following passage from the study: “According to the California Vehicle Code, there is a legal crosswalk at every intersection whether it is marked or not. However, very few motorists or pedestrians know this. As a result, motorists often don't expect pedestrians to \*1192 cross \*\*384 at an intersection that isn't marked with a crosswalk, and assume they're jaywalking if they do.” This single passage does not cause us to conclude that the Legislature intended to impose personal injury liability on public entities that fail to follow the statutory procedures. Moreover, the legislative committee reports found in the record on appeal do not contain any references to this study. Thus, there is no way to determine the extent to which the Legislature relied on the study in crafting this statute.

In our view, Vehicle Code section 21950.5 is not “meaningless.” It sets forth a procedure that public entities are required to follow before removing crosswalk markings. That the statute itself does not specify any consequences for noncompliance does not render it superfluous. We disagree with the implication that, absent potential liability for personal injury, public entities and their employees lack incentive to comply with statutory directives. And we note that appellants do not claim City's failure to comply with section 21950.5 in the present case was caused by anything other than inadvertence.

In any event, it is well established that courts will not

resort to legislative history as an interpretive device where a statute is clear on its face. “[W]hen construing a statute, a court’s duty is ‘ “simply to ascertain and declare what is in the terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted....” ’ [Citation.] If there is no ambiguity about the meaning of the language, we must apply the provision according to its terms without further judicial construction. When the language is clear on its face, we may not consider extrinsic evidence to determine the intent of the Legislature. If the language is clear, we follow that plain meaning.” (*In re Marriage of Dupre* (2005) 127 Cal.App.4th 1517, 1525-1526, 26 Cal.Rptr.3d 328.)

While we do not condone City’s failure to comply with Vehicle Code section 21950.5, we find nothing in the language of this provision to suggest that public entities incur liability for injuries sustained by pedestrians who are struck in intersections where crosswalk markings have been removed without first having followed the statutory public notice procedures. Accordingly, we conclude that City’s failure to comply with Vehicle Code section 21950.5 does not expose it to liability under Government Code section 835.

#### ***E. City is immune under section 830.8***

[15] Appellants’ expert also stated in his declaration that “The failure to reinstall this marked crosswalk after one had existed at the intersection for \*1193 many years created a trap for a careful pedestrian who might well assume it was safe to cross the intersection and who assumed that cars may still consider the crosswalk to be marked.” To the extent appellants’ expert opined that the absence of the crosswalk markings created a “trap” for pedestrians, that claim is foreclosed by section 830.8 which immunizes a public entity for liability for accidents proximately caused by its failure to provide a signal, sign, marking, or device to warn of a dangerous condition which endangers the safe movement of traffic unless that condition “ would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.” “This ‘concealed trap’ statute applies to accidents proximately caused when, for example, the public entity fails to post signs warning of a sharp or poorly banked curve ahead on its road or of a hidden intersection behind a promontory [citations], or where a design defect in the roadway causes moisture to freeze and \*\*385 create an icy road surface, a fact known to

the public entity but not to unsuspecting motorists [citation], or where road work is being performed on a highway [citation].” (*Chowdhury, supra*, 38 Cal.App.4th 1187, 1197, 45 Cal.Rptr.2d 657.)

Appellants do not allege the presence of any hazardous condition that would not be apparent to pedestrians and motorists using the intersection with due care. Apart from the lack of a marked crosswalk, the only physical characteristics appellants take issue with are the bulb-outs. The bulb-outs, however, were not hidden from pedestrians or motorists, thus they do not constitute a concealed trap. Accordingly, to the extent the lack of crosswalk markings were a factor in causing the accident, City is immune from liability under section 830.8.

[16] In sum, the trial court properly granted summary judgment to City because there were no triable issues of material fact with respect to the existence of a dangerous condition. A number of courts have found in similar contexts that a dangerous condition did not exist. (E.g., *City of San Diego v. Superior Court, supra*, 137 Cal.App.4th 21, 40 Cal.Rptr.3d 26 [racing motorist struck another motorist]; *Brenner, supra*, 113 Cal.App.4th 434, 6 Cal.Rptr.3d 316 [motorist struck pedestrian]; *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 220 Cal.Rptr. 181 [motorist struck pedestrians].) As we have concluded that the intersection did not constitute a dangerous condition of public property as a matter of law, and that even if it did City is immune from liability under section 830.8, we do not reach the causation issue raised by City.<sup>FN13</sup>

FN13. We agree with appellants that the immunity provided in section 830.4 does not apply to the failure to mark a crosswalk.

#### **\*1194 DISPOSITION**

The judgment is affirmed.

We concur: MARCHIANO, P.J., and MARGULIES, J.

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