

63612-0

63612-0

No. 63612-0-I

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

---

**RONALD W. MOORE,**

Appellant,

v.

**The CITY of DES MOINES,** a Municipal corporation,

Respondent.

2009 NOV 12 AM 11:20

FILED  
CLERK OF COURT  
STATE OF WASHINGTON  
*[Signature]*

---

**REPLY BRIEF OF APPELLANT**

---

Richard C. Robinson  
WSBA #9035  
Layman, Layman & Robinson,  
316 Occidental Avenue South # 500  
Seattle, WA 98104  
(206) 340-1314 Telephone  
(206) 292-1792 Facsimile

William Ruthford  
WSBA # 2215  
Ruthford Valdez  
155 - 108th Ave., NE #601  
Bellevue, WA 98004  
(425) 637-3010 Telephone  
(425) 462-6371 Facsimile

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
SUMMARY OF REPLY .....	1
REPLY ARGUMENT .....	2
A. The City’s Claim that it did not Breach a Duty of Care to Mr. Moore is Inappropriate for Summary Judgment Disposition Because Genuine Issues of Material Fact Must be Resolved by a Jury .....	2
1. Sufficient facts exist for a Jury to find inherently dangerous conditions existed in South 240 <sup>th</sup> Street, beyond which was reasonably safe for ordinary travel, at the time and place of Mr. Moore’s injury .....	7
2. Sufficient facts exist to support finding the City breached its duty to safeguard and maintain South 240 <sup>th</sup> Street in a condition safe for ordinary travel....	11
B. The Extent to which the City’s Failure to Safeguard Against the Inherent Dangers Contributed to Mr. Moore’s Injuries is a Question for a Jury.....	14
1. The City’s reliance on <i>Prentice</i> disregards the Court’s cautionary statements .....	16
2. The City’s negligence was a legal cause of Mr. Moore’s injuries .....	18
C. The Declarations of William Neuman, P.E. and Ronald Moore Provide Admissible Evidence.....	19
1. This Court should reject the City’s argument relying on Oregon case law because it is completely inapposite .....	20

**TABLE OF CONTENTS (cont'd)**

	<b>Page</b>
2. Mr. Neuman's declaration is supported by the evidence .....	23
CONCLUSION .....	23
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

Cases	Page
<i>Charmley v. Lewis</i> , 302 Or. 324, 729 P.2d 567 (1986).....	20-22
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	19-20
<i>Heigis v. Cepeda</i> , 71 Wn. App. 626, 862 P.2d 129 (1993).....	22
<i>Jaquith v. Worden</i> , 73 Wash. 349, 132 P. 33 (1913).....	22
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002).....	2-3
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001).....	5, 23
<i>Momah v. Bharti</i> , 144 Wn. App. 731, 182 P.3d 455 (2008).....	19-20
<i>Nelson v. City of Tacoma</i> , 19 Wn. App. 807, 577 P.2d 986 (1978).....	4-5
<i>Owen v. Burlington Northern and Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005).....	3-7, 10-11, 13
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	18-19
<i>State v. Platz</i> , 33 Wn. App. 345, 655 P.2d 710 (1982).....	22
<i>State v. Prestegard</i> , 108 Wn. App. 14, 28 P.3d 817 (2001).....	22

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases (cont'd)</b>	<b>Page</b>
<i>Prentice Packing &amp; Storage Co. v. United Pac. Ins. Co.</i> , 5 Wn.2d 144, 106 P.2d 314 (1940).....	16-17
<i>Raybell v. State</i> , 6 Wn. App. 795, 496 P.2d 559 (1972).....	6
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	4-7
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1995).....	18
<i>Ulve v. City of Raymond</i> , 51 Wn.2d 241, 317 P.2d 908 (1957).....	4
<i>Unger v. Cauchon</i> , 118 Wn. App. 165, 73 P.3d 1005 (2003).....	14-15
<b>Statutes and Regulations</b>	
RCW 4.22.005, .070 .....	3
RCW 4.96.010.....	3
RCW 46.61.250(2) .....	13
<u>City of Des Moines Street Development Standards</u> , 1996 Ed., Promulgated by City Ordinance No. 1153, Amended by Ordinance No. 1219, June 5, 1998.....	6, 8
<b>Other Authorities</b>	
<i>A Policy on Geometric Design of Highways and Streets</i> , by the American Association of State Highway and Transportation Officials (AASHTO), 2001 .....	6-7, 9

**TABLE OF AUTHORITIES (cont'd)**

<b>Other Authorities (cont'd)</b>	<b>Page</b>
ER 406 .....	20-22
O.R.S. § 40.180 (OEC 406(2)).....	20-22

## **I. SUMMARY OF REPLY**

The fact that two reasonable juries could come to differing conclusions based on the evidence does not mean that the jury would be resorting to speculation in interpreting the evidence; rather, it means that summary judgment is inappropriate. Such is the case here.

Respondent, the City of Des Moines (the “City”), relies too heavily on the fact that Ronald Moore’s injuries left him amnesic of the injury causing event and ignores evidence of Mr. Moore’s habits, as well as several other facts and reasonable inferences. By disregarding habit evidence, lay testimony, expert testimony, and the many inferences reasonable deduced therefrom, the City has mistakenly relied on cases that are factually distinguishable.

When all of the facts and inferences are taken together and viewed in the light most favorable to Mr. Moore, sufficient evidence supports a reasonable jury’s finding on a more probable than not basis that the City’s negligence was at least a proximate cause of Mr. Moore’s injuries. Thus, the trial court erred when it granted the City’s motion for summary judgment, and this Court should reverse and remand so that a jury can resolve the many genuine issues of material fact.

## II. REPLY ARGUMENT

Despite, Mr. Moore's narrow assignments of error, the City reasserts its complete summary judgment argument in urging this Court affirm summary judgment dismissal, claiming: (1) it did not breach a duty of care owed to Mr. Moore; and (2) there is insufficient evidence to prove that the City's negligence was a proximate cause of Mr. Moore's injuries. The City further argues that testimony contained in the declarations of William Neuman and Mr. Moore should be stricken. As illustrated herein and by Mr. Moore's Appeal Brief, the City's argument fails to satisfy its summary judgment burden of proof.

### **A. The City's Claim that it did not Breach a Duty of Care to Mr. Moore is Inappropriate for Summary Judgment Disposition Because Genuine Issues of Material Fact Must be Resolved by a Jury.**

In footnote 8 of its Response Brief, the City asserts that this Court should affirm the trial court because it did not breach a duty of care to Mr. Moore. Several genuine issues of material fact preclude granting summary judgment on these elements, however.

It is well recognized that "municipalities are generally held to the same negligence standards as private parties." *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002) (opining that a municipality is held to a general duty of care, that of a reasonable person under the

circumstances); *see also* RCW 4.96.010 (waiving sovereign immunity of local governmental entities). “A party may maintain an action against a municipality if a duty can be shown.” *Keller*, 146 Wn.2d at 243, 44 P.3d 845. The existence of a duty is a question of law and generally includes a determination of whether the incident complained of was foreseeable. *Id.*

Furthermore, at common law, “[i]t is well established that [a municipality] owes a duty to all travelers, whether negligent or fault-free, to maintain its roadways in a condition safe for ordinary travel.” *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 786-87, 108 P.3d 1220 (2005)<sup>1</sup>; *see also Keller*, 146 Wn.2d at 237, 44 P.3d 845 (holding duty exists regardless of whether traveler is negligent or fault-free<sup>2</sup>). “[T]he duty to maintain a roadway in a reasonably safe condition may require a [municipality] to post warning signs or erect barriers if the condition along the roadway makes it inherently dangerous *or* of such

---

<sup>1</sup> The City’s Response Brief (and Summary Judgment Brief) made no mention of the *Owen* decision, despite the fact that it is binding authority and highly persuasive with respect to a municipality’s duties to safeguard roadways.

<sup>2</sup> Thus, to the extent the City claims that Mr. Moore somehow caused his own injuries or is at fault for negligently subjecting himself to the inherently dangerous conditions of the roadway, such arguments are irrelevant to this entire analysis, unless the City can prove Mr. Moore was the sole proximate cause of his injuries, for which no evidence has been introduced. *Cf.* RCW 4.22.005, .070.

character as to mislead a traveler...*or* where the maintenance of signs or barriers is prescribed by law.” *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995) (emphasis added).

A municipality’s duty “includes the duty to safeguard against an inherently dangerous or misleading condition.” *Owen*, 153 Wn.2d at 787-88, 108 P.3d 1220 (emphasis added). Furthermore, “the existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings.” *Id.* at 788, 108 P.3d 1220; *see also Ulve v. City of Raymond*, 51 Wn.2d 241, 251, 317 P.2d 908 (1957) (“As the danger becomes greater, the [municipality] is required to exercise caution commensurate with it.”).

**“Whether a condition is inherently dangerous or misleading is generally a question of fact.”** *Owen*, 153 Wn.2d at 788, 108 P.3d 1220 (emphasis added). Our Washington Supreme Court further recognizes that **“the adequacy of the government’s attempt to take corrective action is generally a question of fact,”** as well. *Id.* (emphasis added).

A municipality’s duties to maintain its roadways in a condition safe for ordinary travel and to safeguard against inherently dangerous and/or misleading conditions are equally applicable to pedestrian travelers as well as vehicular travelers:

It is true that the use of the street outside of the sidewalk is primarily for traffic by teams and other vehicles, and the use of the sidewalk primarily for pedestrians, but pedestrians still have the right to use the street when the necessity arises. It has never been held, to our knowledge, that they have no such right, or that the duty of a municipality to use reasonable care to keep the streets in a safe condition does not extend to making them reasonably safe for pedestrians who have occasion to be upon that portion of the street ordinarily traveled by vehicles.

*Nelson v. City of Tacoma*, 19 Wn. App. 807, 810-811, 577 P.2d 986 (1978) (internal quotes and cites removed). In short, travelers of roadways foreseeably include both pedestrian travelers and vehicular travelers, and a municipality's duty extends to both. *Id.*; see also *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001) (recognizing municipality owes duty of care to pedestrians using roadways).<sup>3</sup>

“Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care.” *Owen*, 153 Wn.2d at 787, 108 P.3d 1220. Positive enactments that define the standard of care and scope of the City's duties regarding what is safe for

---

<sup>3</sup> *Miller* only addressed whether the conditions were “misleading,” not whether the conditions were *inherently* dangerous. 109 Wn. App. 140, 34 P.3d 835. As noted by Washington's Supreme Court, a municipality owes a duty to implement safeguards when (1) inherently dangerous conditions exists; (2) the roadway is misleading; or (3) it is required by statute or ordinance. See *Ruff*, 125 Wn.2d at 704, 887 P.2d 886; see also *Owen*, 153 Wn.2d 780, 108 P.3d 1220.

ordinary travel include “A Policy on Geometric Design of Highways and Streets,” by the American Association of State Highway and Transportation Officials, 2001 (referred to as the “Green Book”), and the City’s own Street Development Standards.<sup>4</sup> CP 154-56 (Robinson Dec. Ex. D, Brewer Dep. 54:10-55:25; Neuman Dec. ¶¶ 8, 12); *see, e.g., Raybell v. State*, 6 Wn. App. 795, 805, 496 P.2d 559 (1972) (holding American Association of State Highway Officials policies (the Green Book) were admissible as evidence of negligence, even though they did not carry the force of law).

Additionally, whereas a municipality is held to the “reasonable person under the circumstances” standard, the conduct of a reasonable traffic engineer is further instructive on a municipality’s duties and any breaches of that duty. *See Owen*, 153 Wn.2d at 787, 108 P.3d 1220; *cf. Keller*, 146 Wn.2d at 243, 44 P.3d 845.

The Washington Supreme Court has specifically recognized the following conditions of a roadway in assessing whether a municipality complied with its duty of care: (i) width of the road and shoulder; (ii) whether signage was appropriate for roadway; (iii) whether the speed limit was clearly posted; (iv) condition of the asphalt; and (v) visibility

---

<sup>4</sup> City of Des Moines Street Development Standards, 1996 Ed., Promulgated by City Ordinance No. 1153, Amended by Ordinance No. 1219, June 5, 1998. CP 172-80 (Neuman Dec., Ex. B, relevant excerpts thereof).

of the roadway paint striping. *Ruff*, 125 Wn.2d at 704, 887 P.2d 886. Also, the Court has considered the amount of traffic the particular roadway must support. *Owen*, 153 Wn.2d at 789, n.3, 108 P.3d 1220 (recognizing volume of traffic as a particularly significant predictor of accidents); *cf.* CP 165 (Neuman Dec. ¶ 9).

1. **Sufficient facts exist for a Jury to find inherently dangerous conditions existed in South 240<sup>th</sup> Street, beyond which was reasonably safe for ordinary travel, at the time and place of Mr. Moore's injury.**

The facts, as well as Plaintiff's expert's testimony, support finding that inherently dangerous conditions existed in South 240<sup>th</sup> Street, making it not reasonably safe for ordinary travel by pedestrians and vehicles. CP 161-69 (Neuman Dec. ¶¶ 1-20, Ex. A through C). The inherently dangerous conditions are illustrated by significant nonconformities with the City's Street Development Standards and the AASHTO standards, all of which set out standards and policies for the design, maintenance, and safeguarding of roadways to ensure roadways are safe for ordinary travel. CP 166-67 (Neuman Dec. ¶ 12).

According to the City's published records regarding traffic counts on the portion of South 240<sup>th</sup> Street where Mr. Moore was injured, the daily usage of the roadway was in excess of 6,000 vehicles per day in 2008, and it was likely close to this amount in October 2006. CP 165,

181-83 (Neuman Dec. ¶ 9, Ex. C, Traffic Counts). Pursuant to the City's Ordinance No. 1153, the vehicle count alone qualifies South 240<sup>th</sup> Street as a "Minor Arterial," which is subject to specific regulations.<sup>5</sup> CP 165-66, 172-80 (Neuman Dec. ¶¶ 8-10, Ex. B).

Comparing the conditions of South 240<sup>th</sup> Street with the City's Street Development Standards, as adopted prior to 1998, illustrates the inherently dangerous condition of the roadway. The City's argument that the standards are only applicable to "new" construction is not relevant to the determination of whether inherent dangers existed, and the standards evidence the City's own knowledge of what was necessary in 1998 to construct a roadway that was reasonably safe for ordinary travel. The City's standards require the minimum pavement width of Minor Arterials to be 44 feet. CP 165-66 (Neuman Dec. ¶ 10). At the time of Mr. Moore's injury, South 240<sup>th</sup> Street was grossly narrower than this requirement as South 240<sup>th</sup> Street measured only 20 feet in width – less than half the required 44 feet. *Id.*

The City's standards require a minimum of sidewalks on both sides of the roadway and a curb/gutter on both sides. *Id.* There were no

---

<sup>5</sup> As traffic counts increase, the roadways progress from: Local Street less than 1,000 vehicles per day (vpd); Neighborhood Collector between 1,000 and 3,000 vpd; Collector Arterial between 1,000 and 3,000 vpd; Minor Arterial between 5,000 and 12,000 vpd; and Principal Arterial greater than 10,000 vpd. CP 165, 172-80 (Neuman Dec. ¶ 8, Ex. B).

sidewalks and there were no curb/gutters in the area where Mr. Moore was stuck on South 240<sup>th</sup> Street. *Id.* In fact, regardless of whether South 240<sup>th</sup> Street is defined as a “Minor Arterial,” it does not come close to meeting any of the 1998 standards based on the traffic it carried. CP 164-67 (Neuman Dec. ¶¶ 7-12). Even if South 240<sup>th</sup> Street was considered a Collector Arterial, it was still grossly disparate of new construction by 16 feet of required width. *Id.* In all aspects, South 240<sup>th</sup> Street’s conditions rendered it closer to a paved Alley when its usage required that it conform to a Minor Arterial. CP 165-66, 172-80 (Neuman Dec. ¶ 10, Ex. B).

In addition to the City’s own standards, the Green Book (AASHTO publication) requires a lane width of 12 feet – South 240<sup>th</sup> Street was more than four feet narrower than this requirement, providing additional evidence of the roadway’s inherently dangerous condition. CP 166-67 (Neuman Dec. ¶ 12.) South 240<sup>th</sup> Street’s disparities between the standards for safe roadways are so drastically substandard that the disparities cannot reasonably be ignored, as the City tries to invite the Court to do here. Clearly, sufficient evidence exists for a jury to find the roadway width presented an inherent danger for pedestrian and vehicular travelers.

The testimony of expert, William Neuman, P.E., offers proof that the roadway was inherently dangerous under the circumstances based on applicable width standards, the volume of traffic, and likelihood of pedestrian travelers amongst vehicular travelers on the roadway. CP 161-83 (Neuman Dec. ¶¶ 1-20, Ex. A through C). Combined, the conditions of South 240<sup>th</sup> Street (two extremely narrow traffic lanes, high traffic volumes, narrow shoulders – 4.7 feet walking to the west, comprised of grass and gravel, likelihood of pedestrians crossing roadway, and lack of pedestrian access to the pathway, restricting pedestrians to walk and stand along the roadway with grossly substandard shoulder and lane width) created an unreasonably dangerous condition for both pedestrian and vehicular travelers, for which a prudent traffic engineer would have implemented safeguards. CP 167-68 (Neuman Dec. ¶¶ 14-19). The City disputes whether these conditions presented an inherently dangerous condition; however, this is a question of fact for the jury as noted in *Owen*.

Thus, sufficient facts clearly exist for a reasonable jury to find inherently dangerous conditions existed in South 240<sup>th</sup> Street at the time and place of Mr. Moore's injury, rendering it not reasonably safe for ordinary travel by both pedestrian and vehicular travelers. As a result, the City owed Mr. Moore, a foreseeable pedestrian user of the roadway,

a duty to safeguard South 240<sup>th</sup> Street from the inherently dangerous conditions in a manner that would make the roadway reasonably safe for ordinary travel.

2. **Sufficient facts exist to support finding the City breached its duty to safeguard and maintain South 240<sup>th</sup> Street in a condition safe for ordinary travel.**

The fact that evidence supports finding South 240<sup>th</sup> Street was inherently dangerous at the time and place of Mr. Moore's injury, raises the corollary jury question of whether the City breached its duty by failing to exercise reasonable care to safeguard South 240<sup>th</sup> Street. *See Owen*, 153 Wn.2d at 789-90, 108 P.3d 1220 ("If the roadway is inherently dangerous...then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances.") Whether the City failed to exercise the same level of care, skill, and knowledge of a reasonably prudent traffic engineer to recognize the dangerous conditions and appropriately safeguard pedestrian and vehicular travelers from those conditions necessarily requires the jury weigh the evidence and determine what was reasonable.

In support of Mr. Moore's argument, expert testimony provides evidence that a reasonably prudent traffic engineer would not only recognize the inherently dangerous conditions of South 240<sup>th</sup> Street, but would and should have implement either of several remedial measures.

CP 163-68 (Neuman Dec. ¶¶ 7-19). Specifically, at the time the intersection with 9<sup>th</sup> Place South was constructed, the City should have required improvement of the north shoulder in the vicinity of the intersection as the City did for the southern shoulder. CP 167-68 (Neuman Dec. ¶¶ 13-19). The City should also have provided for pedestrian access to the gravel path north of the ditch at the intersection, for which a driveway type culvert would have been sufficient, resulting in a wider paved shoulder in the area Mr. Moore was struck and alleviating the need to walk along the north shoulder of the roadway. *Id.* However, the City failed to implement safeguards through provisions for pedestrian crossing at 9<sup>th</sup> Place South / South 240<sup>th</sup> Street intersection. *Id.* In fact, there were no safeguards implemented by the City to address these inherent dangers. *Id.*

Genuine issues of material fact exist as to whether the City satisfied its duty to use reasonable care under the circumstances for safeguarding South 240<sup>th</sup> Street, because a reasonable trier of fact could conclude, based on Plaintiff's expert's testimony, reasonable care under the circumstances required the City to improve the shoulder opposite of 9<sup>th</sup> Place South, providing pedestrians access to the path, resulting in wider shoulder area and allowing more room for pedestrians to stand, as

well as installing crossing provisions for pedestrians. CP 168 (Neuman Dec. ¶ 19).

Also, a jury must consider whether the City's maintenance of the gravel pathway on the north side of the large drainage trench and installation of a crosswalk, located some 392 feet away, were sufficient safeguards to satisfy the City's duty of care. Notably, a person who used the crosswalk 392 feet away to get to the south side of South 240<sup>th</sup> Street would be required to walk with traffic coming at their back as they walked towards 9<sup>th</sup> Place South. CP 167-68 (Neuman Dec. ¶¶ 14-19). Walking in this manner would be dangerous and in violation of RCW 46.61.250(2) which requires pedestrians face oncoming traffic in the nearest lane.

Answering the many disputed facts requires a jury weigh the evidence and credibility of witnesses, from which, reasonable juries may come to differing conclusions. *See, e.g., Owen*, 153 Wn.2d at 787-88, 108 P.3d 1220 (holding genuine issues of material fact precluded summary judgment on issue of inherently dangerous and breach of municipality's duty of care to take corrective action and safeguard the roadway for travelers). Thus, as genuine issues of material fact clearly exist as to whether the City breached its duty of care, this Court should refuse the City's invitation to affirm the trial court on these grounds.

**B. The Extent to which the City's Failure to Safeguard Against the Inherent Dangers Contributed to Mr. Moore's Injuries is a Question for a Jury.**

The City's Response Brief sets out five separate sub-headings to challenge proximate cause. The City relies too heavily on one fact, i.e., Mr. Moore's lack of memory, and in so doing, disregards several other facts and reasonable inferences that must be considered and viewed in the light most favorable to Mr. Moore.

In *Unger v. Cauchon*, this Court reversed the trial court's order granting summary judgment dismissal in favor of Defendant, Island County, in an un-witnessed, one-vehicle, wrongful death case. 118 Wn. App. 165, 73 P.3d 1005 (2003). This Court held that there were genuine issues of material fact as to whether the condition of the roadway was unsafe for ordinary travel and whether that condition was a proximate cause of the decedent's death. *Id.* at 176-77. This court reasoned that the evidence when viewed in favor of the plaintiff established that there was a dangerous condition (i.e., mud and gravel on the roadway) and the decedent likely encountered it while he was driving. *Id.* at 177-78 (implying that a reasonable jury could easily infer from the facts that the dangerous condition was at least a proximate cause of plaintiff's death).

Based on the evidence supporting the existence of a dangerous condition and the evidence that plaintiff encountered it, this Court stated:

“The extent to which Unger’s reckless driving and the County’s failure to maintain the roadway contributed to Unger’s death is a question for a jury.” *Id.* at 178. No habit testimony was offered by the deceased driver and there were no eyewitnesses to the wreck itself. *Id.*

Although *Unger* is not directly on point, it is instructive in two respects. First, Mr. Moore’s case is similar in that the evidence when viewed in the light most favorable to Mr. Moore supports finding that an inherently dangerous condition existed and that Mr. Moore encountered it – he even suffered the foreseeable injury associated with the alleged inherent danger (i.e., vehicle-pedestrian wreck). Secondly, *Unger* is illustrative of the proper functions of a jury: weighing the evidence, drawing reasonable inferences, and making findings of fact.

In this case, by disregarding the probative value of operative facts and reasonable inferences, the City attempts to narrow the Court’s focus to the fact that Mr. Moore is amnesic of the injury causing event. To this end, the City’s argument fails to address and recognize that other evidence exists (including Mr. Moore’s own habits; *see also* Appeal Br. 3-9) that supports finding proximate cause. The disputed nature of the reasonable inferences and conclusion to be drawn from the facts necessarily requires that a jury is the one to weigh the evidence, draw reasonable inferences from that evidence, and make findings of fact.

1. **The City's reliance on *Prentice* disregards the Court's cautionary statements.**

The City cites *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1940), in support of its argument that Mr. Moore's theory of liability requires the jury to speculate as to causation. (Response Br. 12-13.) In *Prentice*, the jury found in favor of plaintiff and the defendant appealed, claiming, among other things, the plaintiff's evidence did not support a finding of causation. 5 Wn.2d at 163-65. On review, our Supreme Court reversed, holding that plaintiff's experts assumed the existence of evidence that simply did not exist by inference or otherwise. *Id.* at 163. The Court reasoned, as dictated by obvious logic, proving the existence of a fact by way of circumstantial evidence necessarily requires proof of the underlying fact for which the inference is to be drawn. *Id.*

In recognizing that its decision could be taken too far (as done here by the City), the Court cautioned:

But a nice discrimination must be exercised in the application of this principle. As a theory of causation, a conjecture is simply an explanation consistent *with known facts or conditions*, **but not deducible from them as a reasonable inference.** There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. **On the other hand, if there is *evidence* which points to any one theory and effect, then there is a**

**juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.**

*Prentice*, 5 Wn.2d at 163, (italics in original, bolded emphasis added).

In *Prentice*, there was simply no evidence, by inference or otherwise, to support the theory that a pipe had become worn to a thinness of one ten-thousandth of an inch and then ruptured as a result of internal pressure (facts which were necessary to establish plaintiff's theory of causation).

Here, the City does not heed the cautionary statement from the Court, as it runs with the fact that Mr. Moore is amnesic of the injury causing event, completely disregarding the probative value of the remaining facts and inferences, all of which must be viewed in the light most favorable to Mr. Moore. The City suggests that it is just as likely that Mr. Moore darted out into the roadway, so this Court should disregard Mr. Moore's supported theory of causation. (Resp. Br. 13, FN 10.) This misses the point as stated in *Prentice*. Assuming the City can put forth *evidence* to support its theory that Mr. Moore darted into the roadway, a jury will be required to weigh that theory against the *evidence* supporting Mr. Moore's theory of causation.

Unlike the case in *Prentice* where there was no evidence to even infer facts to support plaintiff's theory of causation, Mr. Moore has

shown by way of habit evidence, lay witness testimony, and expert testimony, all of which provide a proper basis for a jury to draw reasonable inferences in favor of Mr. Moore, that there is sufficient evidence to submit his theory of causation to a jury. (*See* Appeal Br. 3-9.) Thus, this Court should reverse the trial court and remand for further proceedings.

**2. The City's negligence was a legal cause of Mr. Moore's injuries.**

The City argues that justice and policy require that it was not the legal cause of Mr. Moore's injuries. (*See* Response Br. 24-26.) The City's argument clearly undermines the duty of care to safeguard travelers from inherently dangerous conditions existing in a roadway.

"Legal causation rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend." *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243 (1995). "The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter." *Id.*; *cf. Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998) (recognizing courts can limit liability in considering "whether, as a matter of policy, the connection between the

ultimate result and the act of the defendant is too remote or insubstantial to impose liability”).

Here, common sense and policy support finding legal causation if the jury finds that an inherently dangerous condition existed in South 240<sup>th</sup> Street at the time and place of Mr. Moore’s injuries, which would trigger the City’s duty to implement reasonable safeguards for the protection of foreseeable pedestrian and vehicular travelers. The connection between Mr. Moore’s injuries and the City’s failure to safeguard users of South 240<sup>th</sup> Street is not too remote or insubstantial as the City suggests; rather, Mr. Moore’s injuries and the mechanism of injury are the exact harms and risks posed by the City’s failure to implement the appropriate safeguards. CP 161-69 (Neuman Dec. ¶¶ 1-19.) With respect to justice and policy, not recognizing legal causation in this situation would allow and reward the City for ignoring its duty of care, effectively nullifying the duty itself. Such a result is clearly contrary to common sense, policy, and justice.

**C. The Declarations of William Neuman, P.E. and Ronald Moore Provide Admissible Evidence.**

“Ordinarily, evidentiary rulings are reviewed for abuse of discretion. However, ‘[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in

conjunction with a summary judgment motion.” *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). Here, the City’s concerns go to the weight of the evidence not its admissibility. As such, the arguments are inappropriate for summary judgment disposition.

1. **This Court should reject the City’s argument relying on Oregon case law because it is completely inapposite.**

The City gives great weight to Oregon law as the authority for this Court to disregard Mr. Moore’s habit evidence. (Response Br. 47-49 (citing *Charmley v. Lewis*, 302 Or. 324, 729 P.2d 567 (1986).) The persuasiveness of Oregon law is problematic for the City, given that Oregon Evidence Code (OEC) 406 is inconsistent with Washington’s ER 406. Oregon’s rule contains an additional subsection, which states: “As used in this section, ‘habit’ means a person’s regular practice of meeting a particular kind of situation with a specific, distinctive type of conduct.” O.R.S. § 40.180 (OEC 406(2)).

In *Charmley*, defendant based its objection to the admissibility of plaintiff’s habit evidence on Oregon’s peculiar subsection two. 302 Or. at 327, 729 P.2d 567, 568 (“Defendant contends that plaintiff’s testimony and the testimony of the witnesses was not habit evidence under OEC 406(2) and was not otherwise admissible.”). The Court

noted that subsection two was specifically promulgated to “**narrow [the] definition of habit.**” *Id.* at 328, 729 P.2d 567, 569 (recognizing the need to consult and review the legislative history of OEC 406 “because the meaning of the rule is not entirely clear.”) (emphasis added).

*Charmley* stands for the Oregon-specific law that evidence of habit can only be established by satisfying three requirements: (1) regular response to particular kind of situation; (2) habit must be specific; and (3) the habit must be distinctive. *Charmley*, 302 Or. at 329, 729 P.2d 567, 570. These requirements stem from Oregon’s inclusion of the peculiar subsection two that was specifically promulgated to narrow Oregon’s definition of habit. *Id.*

After reviewing the City’s arguments it is evident that City is fervently arguing that Mr. Moore must satisfy Oregon’s three requirements; particularly, the “distinctive” element. The City’s reliance on *Charmley* is clearly misplaced as Washington Evidence Rule 406 does not contain the additional, restrictive provision that the Oregon legislature adopted for purposes of narrowing its definition of habit. Simply put, Mr. Moore is not required to satisfy the admissibility requirements of Oregon law, and *Charmley* is completely inapposite.

In light of the fact that the *Charmley* court affirmed the admissibility of the plaintiff’s habit evidence, despite the fact that

Oregon undisputedly applies a narrower interpretation of habit, *Charmley's* persuasiveness is even more questionable.

It should be noted further, under Washington case law, the mere fact that a person's habits can be interpreted as a safe characteristic does not in and of itself preclude the evidence from being admitted. *See, e.g., Heigis v. Cepeda*, 71 Wn. App. 626, 862 P.2d 129 (1993) (insurance adjuster always advised claimants in double recovery claim situations that she represented the adverse party); *Jaquith v. Worden*, 73 Wash. 349, 132 P. 33 (1913) (the defendant always parked his unlighted car in front of his house after dark, to prove he left the car in that location on the night in question).

Such evidence has even been admitted when it could be seen as an unsafe characteristic. *See, e.g., State v. Prestegard*, 108 Wn. App. 14, 28 P.3d 817 (2001) (defendant was allowed to present evidence that the sheriff's office routinely lost registration papers); *State v. Platz*, 33 Wn. App. 345, 655 P.2d 710 (1982) (defendant usually carried a knife and never home without it was admissible as habit evidence).

Based on the argument contained in Mr. Moore's Appeal Brief and the aforementioned arguments, this Court should consider all the evidence contained in Mr. Moore's declaration.

2. **William Neuman's declaration is supported by the evidence.**

The City argues that Mr. Neuman's testimony is analogous to the expert testimony offered in *Miller*. The fallacies in this analogy are adequately addressed in Mr. Moore's Appeal Brief. (*See* Appeal Br. 21-24.)

Moreover, the City's argument blurs the line between admissibility and weighing the evidence. As previously discussed, a jury must decide whether the roadway was inherently dangerous, what safeguards were required in light of the relevant dangers, and whether failure to implement the appropriate safeguards was a proximate cause of Mr. Moore's injuries. Mr. Neuman's declaration presents facts and expert testimony concerning these issues. Whether Mr. Neuman's testimony should be afforded any weight on these issues is a matter for the jury. For purposes of summary judgment, however, weight and factual issues must be resolved in favor of Mr. Moore.

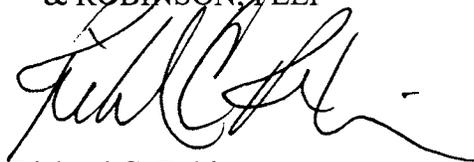
**III. CONCLUSION**

For the foregoing reasons, Appellant Ronald Moore submits that there was sufficient evidence presented that created a genuine issue of material fact which precluded the trial court from granting summary judgment in this matter, whether or not the trial court considered the

complete Declarations of William Neuman and Ronald Moore. However, the trial court should not have disregarded portions of the declarations and to the extent that these paragraphs are considered, they lend further credibility to the reasonable inferences that can and should be drawn from the admissible evidence in this case.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of November, 2009.

LAYMAN, LAYMAN  
& ROBINSON, PLLP



Richard C. Robinson  
WSBA #9035  
Layman, Layman & Robinson,  
316 Occidental Avenue South # 500  
Seattle, WA 98104  
(206) 340-1314 Telephone  
(206) 292-1792 Facsimile

RUTHFORD VALDEZ, PC

William Ruthford  
WSBA # 2215  
Ruthford Valdez  
155 - 108th Ave., NE #601  
Bellevue, WA 98004  
(425) 637-3010 Telephone  
(425) 462-6371 Facsimile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of November 2009, I served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT by delivering the same to the following attorneys of record, by the method indicated below, addressed as follows:

<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> ABC Legal Messengers <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile	Brenda L. Bannon Keating, Bucklin & McCormack, 800 - 5th Avenue, Suite 4141 Seattle, WA 98104-3175 Attorney for Respondent City of Des Moines
<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> ABC Legal Messengers <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile	David J. Wieck O'Briend, Barton, Weick & Joe 175 N.E. Gilman Blvd. Issaquah, WA 98027 Attorney for Defendant Hagge

  
\_\_\_\_\_  
RICHARD C. ROBINSON