

69421-9

69421-9

No. 69421-9

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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GAYLE TORGERSON,

Petitioner,

vs.

THE CITY OF SEATTLE; and AMELIA HARTMAN and JOHN DOE  
HARTMAN, wife and husband, and their martial community;

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE CAROL SCHAPIRA

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REPLY BRIEF OF PETITIONER

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	REPLY ARGUMENT .....	2
	A. The Trial Court's Confusion Of Cause In Fact And Legal Cause Requires Reversal Because Whether A Reduced Speed Limit Sign Would Have Slowed Ms. Hartman And Caused Her To Avoid Ms. Torgerson Presents A Question Of Fact, Not A Question Of Law.....	2
	B. Whether A Reduced Speed Limit Sign Would Have Been In Effect At The Time Of The Accident Is Also A Question For The Jury. ....	7
	C. Whether Ms. Hartman's Negligence Or General Familiarity With The Intersection Excused The City's Negligence Must Be Resolved By A Trier Of Fact. ....	10
III.	CONCLUSION.....	15

## TABLE OF AUTHORITIES

### STATE CASES

<b><i>Anderson v. Dreis &amp; Krump Mfg. Corp.</i></b> , 48 Wn. App. 432, 739 P.2d 1177, <i>rev. denied</i> , 109 Wn.2d 1006 (1987) .....	11
<b><i>Burton by Burton v. Coonrod</i></b> , 170 A.D.2d 882, 566 N.Y.S.2d 708 (1991) .....	6
<b><i>Channel v. Mills</i></b> , 77 Wn. App. 268, 890 P.2d 535 (1995).....	5-6
<b><i>Craig v. Washington Trust Bank</i></b> , 94 Wn. App. 820, 976 P.2d 126 (1999) .....	5
<b><i>Gardner v. Seymour</i></b> , 27 Wn.2d 802, 180 P.2d 564 (1947).....	5
<b><i>Grimsrud v. State</i></b> , 63 Wn. App. 546, 821 P.2d 513 (1991).....	8
<b><i>Holmes v. Wallace</i></b> , 84 Wn. App. 156, 926 P.2d 339 (1996) .....	6
<b><i>Lucas v. Phillips</i></b> , 34 Wn.2d 591, 209 P.2d 279 (1949).....	12
<b><i>Moore v. Hagge</i></b> , 158 Wn. App. 137, 241 P.3d 787 (2010), <i>rev. denied</i> , 171 Wn.2d 1004 (2011).....	4
<b><i>Simmons v. Cowlitz County</i></b> , 12 Wn.2d 84, 120 P.2d 479 (1941) .....	14
<b><i>Tanguma v. Yakima County</i></b> , 18 Wn. App. 555, 569 P.2d 1225 (1977), <i>rev. denied</i> , 90 Wn.2d 1001 (1978) .....	8, 11, 14-15
<b><i>Travis v. Bohannon</i></b> , 128 Wn. App. 231, 115 P.3d 342 (2005) .....	11

***Wojcik v. Chrysler Corp.***, 50 Wn. App. 849,  
751 P.2d 854 (1988) ..... 15

***Xiao Ping Chen v. City of Seattle***, 153 Wn.  
App. 890, 223 P.3d 1230 (2009), *rev.*  
*denied*, 169 Wn.2d 1003 (2010)..... 12

**STATUTES**

RCW 46.61.235..... 6  
SMC 11.40.040 ..... 6

**RULES AND REGULATIONS**

WAC 468-95-340 (2009) ..... 7-8

## I. INTRODUCTION

The City's answering brief pays only lip service to the proper standard of review on summary judgment, improperly taking the facts in the light most favorable to the City and ignoring the substantial evidence that would allow a jury to find that the City's negligence in failing to post in what is undisputedly a school zone *any* one of the numerous state-mandated reduced speed limit signs caused Ms. Torgerson to be struck in a cross-walk at 7:43 a.m. on a school day. The City knew the intersection had a "long crossing distance" and presented "challenging sight lines for drivers." The driver's undisputed testimony, as well as expert testimony, established that had the City posted any one of the mandated signs informing drivers of the reduced speed limit, the driver would have slowed her speed and avoided Ms. Torgerson regardless of whether any children were present.

There was nothing "speculative" about this evidence. Which particular reduced speed limit sign the City would have posted had it complied with applicable regulations and how that sign would have impacted drivers presents a question of fact. And whether this particular driver would have avoided the accident had the City

posted the correct speed limit is also question of fact, not a question of law, as is whether the driver's negligence or general familiarity with the area should absolve the City of its own negligence. This court should reverse and remand for a trial to allow a jury to fulfill its constitutional role to resolve these questions of fact and allocate fault between the City and its co-defendant driver.

## II. REPLY ARGUMENT

### A. **The Trial Court's Confusion Of Cause In Fact And Legal Cause Requires Reversal Because Whether A Reduced Speed Limit Sign Would Have Slowed Ms. Hartman And Caused Her To Avoid Ms. Torgerson Presents A Question Of Fact, Not A Question Of Law.**

The City concedes that the trial court may have been "less than articulate in distinguishing between cause in fact and legal cause" (Resp. Br. 21), but argues that any confusion between the two is irrelevant and does not require reversal (Resp. Br. 14). Far from being "irrelevant," the trial court's confusion caused it to conclude that admissible evidence was "speculation" and that competing factual inferences could be resolved as a matter of law. (9/14 RP 29 ("[i]t is not legal causation to say if she had been going slower, maybe she would have seen something. . . . [T]he Court cannot make facts out of speculation"); see *also* Opening Br. 8-9)

Whether this collision would have been averted if the City had complied with its duty to direct Ms. Hartman to reduce her speed to 20 MPH in a school zone was not "speculation" but an issue of fact that should have been resolved by a jury.

The trial court dismissed this claim against the City based on a perceived failure of proving proximate cause. This court should therefore reject the City's argument, made for the first time on appeal, that it had no duty to post a reduced speed limit sign because the Manual on Uniform Traffic Control Devices "does not itself mandate that school zones be established." (Resp. Br. 9) The City does not dispute that *where* it has established a school zone, it *must* safeguard pedestrians in that zone by posting a reduced speed limit sign. (Opening Br. 4-5) Here, it is undisputed that the City designated the intersection where Ms. Torgerson was struck as a school zone and that the City failed to post the sign before Ms. Torgerson was struck. (CP 141, 168-69, 173-76, 206, 239, 678-79)

A reasonable juror could find that but for the City's failure to post a required reduced speed limit sign, this collision would not have occurred. Ms. Hartman herself stated she would have obeyed

the reduced speed limit. (CP 449) Ms. Torgerson's experts, whose testimony was considered without any objection from the City, stated that a reduced speed limit sign would probably slow drivers such as Ms. Hartman, causing them to be more vigilant. (CP 122-23, 439, 452-54) Ms. Torgerson's experts directly refuted the City's contention, adopted by the trial court, that Ms. Hartman would not have been "more attentive" or "perceived her surroundings any differently" had she been traveling slower. (*Compare* CP 122-23, 439, 452-54 *with* 9/14 RP 29 and Resp. Br. 20) To the contrary, Ms. Torgerson's experts stated that had Ms. Hartman been traveling at 20 MPH – instead of the posted 30 MPH – she likely would have seen Ms. Torgerson in time to avoid the accident. (CP 122-23, 439, 452-54) Ms. Torgerson's experts also demonstrated through mathematical calculation that a reduced speed would have given Ms. Torgerson time to clear the intersection without being struck. (CP 122, 315-16, 439)

The cases cited by the City underscore that Ms. Torgerson's evidence of causation rises above "speculation." For example, in ***Moore v. Hagge***, 158 Wn. App. 137, 154, ¶¶ 34-37, 241 P.3d 787 (2010), *rev. denied*, 171 Wn.2d 1004 (2011) (Resp. Br. 16-17), the

court held that a plaintiff's declaration regarding how an accident occurred was speculative because his injuries left him with no independent memory of the accident. See also **Gardner v. Seymour**, 27 Wn.2d 802, 805, 180 P.2d 564 (1947) (reversing verdict finding employer negligently maintained elevator shaft where employee's fall into shaft was unwitnessed and there was "absolutely no evidence" "[a]s to what actually happened") (Resp. Br. 16).<sup>1</sup> Here, by contrast, we know exactly how the collision occurred. (CP 317-94) The jury would not have to speculate to find that the collision would have been avoided had the City properly posted the reduced speed limit. (CP 122-23, 315-16, 439, 452-54)

The City erroneously argues that Ms. Torgerson could not establish causation because "[s]peed cannot be a proximate cause of a collision if it serves only to bring favored and disfavored parties to the same location at the same time." (Resp. Br. 20 (*citing Channel v. Mills*, 77 Wn. App. 268, 890 P.2d 535 (1995))) But the **Channel** court held only that the *disfavored* driver or pedestrian

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<sup>1</sup> **Craig v. Washington Trust Bank**, 94 Wn. App. 820, 976 P.2d 126 (1999), also cited by the City, did not involve issues of proximate cause, but whether the defendant owed the plaintiff a duty.

cannot claim that the favored driver's excessive speed is the proximate cause of a collision based on the theory that but for excessive speed the favored driver would not have arrived at the scene of the accident. (Opening Br. 14) Ms. Torgerson, who was crossing in a marked crosswalk, is not a disfavored driver. RCW 46.61.235; SMC 11.40.040. Ms. Hartman's excessive speed – that posted by the City – is still causal because it prevented her “from slowing down, stopping, or otherwise controlling the vehicle so as to avoid the collision.” 77 Wn. App. at 276; *see also Holmes v. Wallace*, 84 Wn. App. 156, 162, 926 P.2d 339 (1996) (speeding defendant's excessive speed was a proximate cause of collision with pedestrian because “a slower speed would have avoided the accident”) (Resp. Br. 20); *see also Burton by Burton v. Coonrod*, 170 A.D.2d 882, 883-84, 566 N.Y.S.2d 708, 710 (1991) (“the issues of whether the road was negligently posted by the Town at 40 miles per hour, as opposed to the mandated 30 miles per hour . . . and whether the posting of the 40-mile-per-hour speed limit impacted proximately on the cause of the accident” were questions of fact).

The trial court erred by dismissing Ms. Torgerson's evidence as “speculation” based on its belief that “[i]t is not legal causation to

say if she had been going slower, maybe she would have seen something.” (9/14 RP 29) Whether Ms. Hartman would have avoided Ms. Torgerson had the City fulfilled its duty to post a reduced speed limit sign was a question of cause in fact that should have been determined by a jury – not the trial court on summary judgment.

**B. Whether A Reduced Speed Limit Sign Would Have Been In Effect At The Time Of The Accident Is Also A Question For The Jury.**

The trial court below rejected the City’s argument that Ms. Torgerson could not establish causation because a reduced speed limit sign would not have been in effect absent evidence that children were present. (Resp. Br. 17; Opening Br. 7-8) The City’s argument, repeated on appeal, misreads the applicable regulations and ignores the disputed evidence in the summary judgment record. The City relies on WAC 468-95-340 (2009) to assert that the required, but absent, sign would have stated that the reduced speed limit applied only “When Children Are Present.” (Resp. Br. 17) But that regulation allows a choice between several sign options, including signs that say “Mon-Fri” and “7:30-8:30 AM[ ]2:30-3:30 PM.” (WAC 468-95-340 (stating that municipality

may use signs S4-1, S4-2, S4-4, S4-6 or S4-501 (displayed at CP 201)) The regulation requires the City to specify *some* period of application so that drivers know when to slow down, but it is undisputed that the City provided *none*. WAC 468-95-340 (sign shall indicate "the specific periods of the day and/or days of the week that the special school speed limit is in effect").

Whether the City would have in fact posted a "When Children Are Present" sign presents a question of fact that must be resolved by a jury. "[V]arying viewpoints on the applicability and interpretation of standards and measurements . . . create issues of fact which must be resolved by the trier of the fact." ***Tanguma v. Yakima County***, 18 Wn. App. 555, 558, 569 P.2d 1225 (1977), *rev. denied*, 90 Wn.2d 1001 (1978); *see also Grimsrud v. State*, 63 Wn. App. 546, 550, 821 P.2d 513 (1991) ("the MUTCD does not resolve the factual issue of whether the signs stating 'abrupt lane

edge' provided an adequate warning to motorists as a matter of law").<sup>2</sup>

This collision occurred at 7:43 a.m. on a school day during peak school transportation hours for four nearby schools. (CP 322-23) Contrary to the City's assertion that the school zone "at issue here is specific to The Tilden School" (Resp. Br. 9), its own records indicate that the intersection where the collision occurred "is a designated school crossing for four schools located within one to two blocks." (CP 206; *see also* CP 409-10) These schools open between 7:30 a.m. and 9:00 a.m. and before-school activities start as early as 7:00 a.m. (CP 410-11, 445-47; *see also* 9/14 RP 16 (City's concession that children may "have a random before-school activity – many schools do"); Resp. Br. 11 (City "assumes that school children are likely to be present" one half hour prior to the opening bell))

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<sup>2</sup> The City's concession that flashing beacons were an optional supplement to signs further demonstrates that what measures the City should have taken is an issue of fact. (See Resp. Br. 11-12) Contrary to the City's assertion that beacons – had they been installed – would have flashed from 8:30 to 9:00 a.m., the City could have programmed the beacons to flash from 7:30 to 9:00 a.m. given the starting times of the four nearby schools. (CP 410-11, 445-47)

Moreover, regardless whether children were present at 7:43 a.m., Ms. Hartman likely would have slowed her speed in response to *any* reduced speed limit sign. Reasonable drivers would not wait until they actually saw a child to slam on their brakes, but would as expert testimony established, lower their speed in response to reduced speed limit signs during school transportation hours in *anticipation* of children and otherwise become more vigilant. (CP 122-23, 439, 452-54)

The trial court properly recognized that a “When Children Are Present” sign may alter driver behavior even if no children are within the driver’s immediate field of vision. (9/14 RP 30 (“If that sign is up, you don’t have to see a child to be liable for it.”)) A jury could readily conclude that a sign (*any* sign) requiring drivers to reduce their speed to 20 MPH “When Children Are Present” would have informed Ms. Hartman of the need to slow down at the time of the accident.

**C. Whether Ms. Hartman’s Negligence Or General Familiarity With The Intersection Excused The City’s Negligence Must Be Resolved By A Trier Of Fact.**

The City’s assertion that Ms. Hartman’s failure to stop in time to avoid a collision absolves the City of its own negligence usurps

the jury's constitutional role to resolve issues of fact. "[O]nly intervening acts which are *not* reasonably foreseeable are deemed superseding causes." **Anderson v. Dreis & Krump Mfg. Corp.**, 48 Wn. App. 432, 442, 739 P.2d 1177 (emphasis in original), *rev. denied*, 109 Wn.2d 1006 (1987) (Opening Br. 17). There was nothing unforeseeable about an intersection collision between a car and a pedestrian in a school zone. The trial court erred in concluding that Ms. Hartman's negligence in "simply failing" to stop and her familiarity with the intersection excused the City's negligence as a matter of law because "it is for the jury to determine whether the act of a third party is a superseding cause or simply a concurring one." **Travis v. Bohannon**, 128 Wn. App. 231, 242, ¶ 30, 115 P.3d 342 (2005) (Opening Br. 16).

The City fails to address the long line of authority, much of it cited in Ms. Torgerson's opening brief at 17-18, holding that driver negligence is always foreseeable and thus does not as a matter of law excuse a municipality's breach of its duty to maintain safe roads. **Tanguma v. Yakima County**, 18 Wn. App. 555, 560-61 P.2d 1225 (1977) (oncoming driver's negligence was not superseding cause because it was "one of the foreseeable risks

occasioned by narrow bridges”); **Lucas v. Phillips**, 34 Wn.2d 591, 598, 209 P.2d 279 (1949) (“The jury could well have found that this was precisely the type of accident which the county could, and should, have foreseen would be likely to happen as the result of its failure to place proper warning signs.”). See also **Xiao Ping Chen v. City of Seattle**, 153 Wn. App. 890, 908, ¶ 26, 223 P.3d 1230 (2009) (“The negligence of a third party does not absolve the city of its duty to maintain its roadways, including crosswalks, in a reasonably safe manner.”), *rev. denied*, 169 Wn.2d 1003 (2010).

Here, the City could – and did – foresee the dangers presented by the intersection where Ms. Torgerson was struck, including the specific risk that a driver traveling in excess of 20 MPH might fail to see a pedestrian in time to avoid a collision. The City knew that the crosswalk had “a long crossing distance” with “high pedestrian volumes” and that it presented “challenging sight lines for drivers” whose speed routinely exceeded the 20 MPH speed limit. (CP 177-79, 206-07, 298) The City also knew that reduced speed limit signs “enhance the safe operation” of intersections and “result in improved driver awareness.” (CP 241, 708) Contrary to the City’s assertion that “there is no evidence that

Ms. Hartman was confused or misled by any condition of the roadway” (Resp. Br. 19-20), Ms. Hartman testified that she would have obeyed the absent reduced speed limit sign had the City posted it as required by law. (CP 449)

Had the City properly informed Ms. Hartman of the applicable speed limit she would have likely acted as most drivers would – she would have slowed her speed and seen Ms. Torgerson in time to avoid the collision. (CP 122-23, 439, 452-54) Because both the City’s and Ms. Hartman’s negligence contributed to the collision, the trial court improperly held that Ms. Hartman’s negligence was a superseding cause that excused the City’s negligence as a matter of law.

The trial court further confused causation principles by concluding as a matter of law that Ms. Hartman’s general familiarity with the intersection absolved the City of liability. (6/29 RP 36 (“We have a different case if this is a driver who is unfamiliar with the neighborhood”); 9/14 RP 28-29 (“[Ms. Hartman] knows where she is. She knows there’s a crosswalk there.”)) Although “[t]he familiarity of the plaintiff or the other driver with the situation may be relevant . . . it does not as a matter of law insulate [a municipality]

from liability.” *Tanguma v. Yakima County*, 18 Wn. App. at 560; *Simmons v. Cowlitz County*, 12 Wn.2d 84, 91, 120 P.2d 479 (1941) (“The mere fact that appellants frequently traveled over Kalama river road is not per se conclusive that appellants were aware of the . . . unsafe condition”).

Moreover, the record does not support the City’s assertion that Ms. Hartman “*knew* that speed limits were lower when children are present,” but thought “there was no need to [heed the lower limit].” (Resp. Br. 12, 17 (emphasis and alterations in original)) To the contrary, Ms. Hartman stated that she believed the speed limit was 30 MPH and that had she been informed of the lower limit she would have slowed her speed. (CP 55 (“The zone is 30 miles an hour”), 448 (“At the time of the accident, I knew the speed limit was 30 MPH on California Ave. near the intersection with Dakota, southbound.”), 449 (“If the speed limit had been 20 mph on California Ave. approaching the crosswalk at the intersection of Dakota, I would have followed the law and not have exceeded 20 mph.”)) In any event, Ms. Hartman’s general knowledge of the intersection and the surrounding area is not the type of specific knowledge that can negate the City’s negligence as a matter of law.

***Wojcik v. Chrysler Corp.***, 50 Wn. App. 849, 856, 751 P.2d 854 (1988) (“While it is true that a person cannot complain of a lack of warning of a danger of which they have knowledge that knowledge must be specific and not general.”) (citing ***Tanguma***, 18 Wn. App. at 559).

Ms. Hartman was traveling at the posted speed limit on her way to morning mass when she failed to see a pedestrian crossing a busy intersection – a risk the City could, and did, foresee. The trial court erroneously determined that Ms. Hartman’s negligence and general familiarity with the area excused the City’s negligence as a matter of law.

### III. CONCLUSION

This court should reverse the trial court’s summary judgment dismissal of Ms. Torgerson’s negligence claim against the City, and remand for a trial at which the jury assesses the defendants’ comparative fault.

Dated this 8<sup>th</sup> day of July, 2013.

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### DECLARATION OF SERVICE

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

That on July 8, 2013, I arranged for service of the foregoing Reply Brief of Petitioner, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 8th day of July, 2013.

  
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