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Benton County Superior Court No. 16-2-01880-4

COURT OF APPEALS

DIVISION III, STATE OF WASHINGTON

THE ESTATE OF WAI MON CHIN, by and through
STANLEY CHIN, in his capacity as Personal Representative
and for the benefit of beneficiaries SHIRLEY CHIN,
STANLEY CHIN, SANDY CHIN and WILLIAM CHIN,

Appellants,

v.

CITY OF RICHLAND, a municipality,

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

The Trial Court committed egregious and prejudicial error in instructing the jury and applying the law of this case. Title 47 of the Revised Code of Washington created the Public Highways and Transportation Act. Within the scope of the Transportation Act is the creation of highways, paths and trails. The Court flatly refused to apply Title 47 in this case. The Court refused to instruct the jury on the statutory obligations created in the Transportation Act.

Instead, the Trial Court applied Title 46 of the Revised Code of Washington. Commonly referred to as the Motor Vehicle's Act. Specifically, the Trial Court applied the Rules of the Road, 46.61, RCW. That chapter defines the relationship between motorists, pedestrians and bicycles. The City in this case was none of those.

In adopting this position, the Trial Court failed to accurately define the duty that the City owed to Mr. Chin. Instead, the Trial Court composed a set of jury instructions which wrongfully placed significant obligations upon Mr. Chin by applying the Rules of the Road, and yet only one general generic duty definition for purposes of maintaining highways on behalf of the City. The jury was never instructed that the City, when designing the trail, owed Mr. Chin and all other users a statutory duty of signage. The City owed motorists warning signs of the path crossing. The

jury received no instruction that would have been of assistance to them in defining the City's duty and/or allowing counsel for Chin to advance their theory by arguing the Chin's case. Rather, the jury immediately returned a verdict that the City did not breach its duty to Chin. The inadequate instructions made that a certainty.

II. ASSIGNMENTS OF ERROR

1) Did the Court err in failing to apply RCW 47.30.010 to the facts of this case?

2) Did the Court err in failing to direct verdict for Chin on the City's duty and breach?

3) Alternatively, did the Court err in failing to define the existence and scope of the City's duty, as a matter of law, to the jury?

4) Did the Court err in issuing Instruction No. 9 (CP 358)?

“The City has a duty to exercise ordinary care in the design and maintenance of its public streets to keep them in a reasonably safe condition for ordinary travel”

5) Did the Court err in issuing Jury Instruction No. 10 (CP 359)?

“The City has no duty to maintain its roads in ideal traveling condition, or to guard the traveling public from normal road conditions that a driver or a pedestrian can reasonably expect to encounter”

6) Did the Court err in issuing Jury Instruction No. 12 (CP 361)?

“Every person has a duty to see what would be seen by a person exercising ordinary care”

7) Did the Court err in issuing Jury Instruction No. 13 (CP362)?

“Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary”

8) Did the Court err in issuing Jury Instruction No. 14 (CP 363)?

“A marked crosswalk means any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface of the roadway”

A crosswalk exists at every intersection of roadways regardless of whether the roadway is marked within crosswalk lines. An intersection is defined as the area where roadways meet and vehicles traveling upon the different roadways may collide. The crosswalk extends across the roadway at the same angle as the roadways meet. The crosswalk is 10 feet wide. It begins at the edge of the intersection and extends 10 feet back from the intersection. Existing curbing defines the edge of the intersection”

9) Did the Court err in issuing Jury Instruction No. 15 (CP 364)?

“A statute provides that a pedestrian crossing a roadway at any point other than within a crosswalk shall yield the right-of-way to all vehicles upon the roadway”

10) Did the Court err in failing to issue Plaintiffs’ Proposed Jury Instruction No. 22 (CP 292)?

“A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary

travel. Whether roadway conditions are reasonably safe for ordinary travel depends on all circumstances surrounding a particular roadway. Although relevant to the determination of whether a municipality has breached its duty, evidence that a particular physical defect in a roadway rendered the roadway dangerous or misleading or evidence that a municipality was in violation of a law concerning roadway safety measures are not essential to a claim that a municipality has breached the duty of care owed to its travelers on its roadways”?

11) Did the Court err in failing to issue Plaintiffs’ Proposed Jury

Instruction No. 23 (CP 293)?

“The City maintains a duty to exercise reasonable care in providing a place of reasonable safety for pedestrians”?

12) Did the Court err in failing to issue Plaintiffs’ Proposed Jury

Instruction No. 24 (CP 294)?

“The City of Richland is required to exercise a reasonable amount of care in maintaining the Shelter Belt Trail in a reasonably safe condition for all pedestrians who have been invited to use it”

13) Did the Court err in failing to issue Plaintiffs’ Proposed Jury

Instruction No. 25 (CP 295)?

“A municipality owes a duty to all persons, which are negligent or fault-free, to build or maintain its roadways in a condition that is reasonably safe for ordinary travel”

14) Did the Court err in failing to issue Plaintiffs’ Proposed Jury

Instruction No. 26 (CP 296)?

“A municipality’s decision to open a roadway triggers its duty to maintain the roadway in a reasonably safe condition. The circumstances present on the particular roadway dictate that which will constitute reasonably safe maintenance. The City owes a duty to pedestrians and motorists alike.

As the danger at a particular roadway becomes greater, the municipality is required to exercise caution commensurate with it.

The existence of an unusual hazard may require City to exercise greater care than would be sufficient in other settings.”

15) Did the Court err in failing to issue Plaintiffs’ Proposed Jury Instruction No. 27 (CP 297)?

“The City has a duty to exercise reasonable care to keep the Shelter Belt Trail and the intersecting roadways in reasonably safe condition for both intended modes of travel.” (CP 297).

16) Did the Court err in failing to issue Plaintiffs’ Proposed Jury Instruction No. 30 (CP 338)?

“A statute provides that:
Where a highway crosses a recreational trail of substantial usage for pedestrians, equestrians, or bicyclists, signing sufficient to ensure safety shall be provided.”

17) Did the Court err in failing to issue Plaintiffs’ Proposed Jury Instruction No. 31 (CP 339)?

“The violation, if any you find, of a statute relating to signing sufficient to ensure safety for a highway which crosses a recreational trail, is negligence as a matter of

law. Such negligence has the same effect as any other act of negligence.”

18) Did the Court err in failing to issue Plaintiffs’ proposed Jury Instruction No. 32 (CP 340)?

“The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence”?

III. FACTUAL SUMMARY

A. The Tragic Accident

Raymond Chin (hereinafter “Ray”) was a long-time resident of Richland. CP 72. For decades, he ran Ray’s Golden Lion, which was a well-known restaurant establishment within the Richland community. CP 72. Together with his wife, Ray raised his family in a residence off of Birch Avenue just north of Van Giesen Street. CP 72. Ray was 83 years old and very active. Id. He walked down/up the Shelter Belt Trail (“trial”) daily. Id.

In the evening hours of February 12, 2016, Ray was on his way back home from his daily walk using the trail. CP 72. It was after 5:30 and had become very dark due to the clouds and rainfall. VR 454. The rain had started light but was getting heavier over time. Id. The road was wet, causing a shimmering effect on the ground. VR 455. Ray was attempting

to cross Van Giesen Street from the south side trailhead to the north side trailhead, where his home was less than one block away. CP 72.

As chance would have it, Brenda Nelson was traveling, in her vehicle, westbound on Van Giesen. CP 72. She was traveling home on her usual route from work. Id. She stopped for a soda at the Rocket Mart. VR 448. As she returned to Van Giesen, she recalled there were gaps in the traffic. Id. By the time she reached Birch Street, there were no cars ahead of her and she didn't recall any cars coming towards her in the eastbound lanes. Id. She recalls cars behind her. Id.

Brenda Nelson testified that she saw Ray Chin after he had come across the east bound traffic, at an angle, halfway past her lane, between the lane and the sidewalk. VR 451. She observed the right side of his body, his legs mainly. VR 451. She observed his position at an angle going from the south side to the north side, he was not coming straight across. VR 451, 458. She was only able to briefly notice him when he came past her right headlight. Id. Brenda swerved left and took her foot off the gas. VR 450. She didn't even have time to break. Id. She didn't actually see him hit her car, but she felt him hit. Id. Afterwards, Brenda observed her mirror broken off and was hanging from her vehicle. VR 461. February 12, 2016 changed Brenda's life forever. VR 462.

Brenda Nelson believes she didn't see Ray Chin that night because it was dark and rainy. VR 481. Indeed, it was dark as the City provided no artificial lighting, like a street light, to illuminate the trailhead crossing whatsoever. VR 536. Also, the City provided no warning signs for Brenda that a pedestrian may be crossing the trail in a diagonal direction to reach the other trailhead either. VR 455.

After Brenda stopped and parked her vehicle, she went immediately over to Ray. VR 481. He was breathing but unresponsive. VR 482-83. While lying on the ground motionless, Brenda notice Ray was wearing dark clothing. VR 482. Ray suffered massive and traumatic injuries as a result of being struck by Brenda Nelson's vehicle. CP 72. Sadly, Ray Chin died two days later. Id.

B. Creation of the Shelter Belt Trail

The Shelter Belt Trail ("trail") is a multi-use recreational trail created by the City of Richland. CP 69. In the beginning (1940's), the Federal government placed a "Green Belt" (row of trees/greenery) bordering the south and west side of the City of Richland when the federal government designed the original City. CP 111. Back then, pedestrians would walk between the tree rows in the "Green Belt" on an informal dirt path. Id. Back then, along State Route 240, bordering the west side of

Richland, the trail/path crossed two arterial streets (Swift and Duportail) at the mid-block point. Id.

In 1996, the City paved the dirt path to make a formal multi-use recreational trail for pedestrians and bicyclists. CP 111. At that time, the City formally moved the two mid-block trailheads at the arterials, Swift and Duportail, to the SR 240 intersections by paving and turning the trail. Id. City and State funds were used to add sidewalks and signalize the intersections at SR 240. Id. The now paved trail, with signage to ‘stay on the trail’ safely linked the trailheads to the new sidewalks and intersection crosswalks at SR 240 thereby eliminating the former mid-block trail crossings. Id. The 1996 newly paved trail ended in a loop at Van Giesen Street so users would follow the paved portion of the trail back. Id. The trail still connected to Van Giesen at mid-block between SR 240 and Birch Street by a paved service road, including curb cuts which accommodated trucks to access and maintain the City’s landscaping and/or power sources. Id.

In 2010, the City received a significant grant to pave the existing dirt path extending north from Van Giesen. CP 111. After the 2010 improvements however, the trail, was not redirected at Van Giesen to the crosswalk intersection at 240 like the others. CP 111. Rather, the south trailhead to the north trailhead created a mid-block awkward angle

crossing from curb cut to the curb cut on the opposite side of Van Giesen. VR 223. There is no evidence in the record that anybody from the City considered the trail crossing at Van Giesen Street. CP 71.

C. The Pedestrian and Bicycle Safety Program

The 2010 grant referenced above was initiated in 2008 when the City responded to a call for projects by the State. VR 286. Grant funds were channeled from the “Pedestrian and Bicycle Safety Program”. Id. This was to be the final phase of the Shelter Belt Trail construction, paving the trail north from Van Giesen to Jadwin Street and thereby connecting the existing paved trail further north of Jadwin. VR 286. The purpose of the Program was to aid public agencies in funding cost-effective projects that would improve pedestrian and bicycle safety through engineering, education and enforcement. VR 287. Typically, the local agency (the City) would apply for the funding, and the granting agency (the State) would score and rank all of the project submittals. Id. Then, the granting agency would go through the ranks, select and award funding to the highest ranked projects going down the list until the program funds were exhausted. Id. The projects were scored based on how well they complied with the purpose statements and for how well they provided improvements to the roadway or pedestrian or bicycle network. VR 288. In this case, the program emphasized pedestrian and

bicycle safety, so the program would rate how well the City proposes to accomplish the goals of the program. VP 288. Ultimately, the grant money was received by the City of Richland to pave the section north of Van Giesen up to Jadwin. VR 289.

Within the call for projects under “Purpose A - Engineering Improvements”, projects may include items such as intersection improvements, curb extensions, lighting, raised median, crosswalk enhancement, signs, signals and mid-block crossing treatments. VR 290. Additionally, the grant program focused on pedestrian and bicycle safety improvements for at-risk groups, defined as children, elderly, and people with disabilities. VR 290. Hence, the Bicycle and Pedestrian Safety Program was inviting municipalities to create safe environments specifically for the ‘**at-risk groups**’. Id. Under “Engineering Component A” within the grant program, it defined how the projects will be ranked “high” if the project is on the high-speed urban street with volumes exceeding or expected to exceed 10,000 average daily traffic and would provide substantial improvements corridor to reduce potential pedestrian and bicycle conflicts with motor vehicle traffic and/or establish safer and fully accessible crossings, walkways, trails or bikeways. VR 291. For a low-ranking project, the project would provide for few improvements, spot location, to reduce potential pedestrian and bicycle conflicts with

motor vehicle traffic and/or establish safer and fully-accessible crossings, walkways, trails, or bikeways. VP 292. Within the City's application materials for the grant and ultimately its submitted engineering plans to complete the project with grant money, surprisingly there wasn't anything that would acknowledge there was even a crossing at Van Giesen, except a 1-page hand drawing. VR 297. The City's hand written drawing showed the trail at Van Giesen extending up to the corners at the SR 240 intersection. VR 297. The sketch further showed, very roughly, the trail connecting from the south, using the old trail loop and then the trail coming from the north connecting both to the two corners on the east side of the highway where there is a signal and a crosswalk. Id. A reference is made to "*need to relocate the trail on the south side*". Id. There was no engineering design or proposal consistent with the drawing. P 298. Along these lines, there is no evidence in the record that anybody from the City considered the trail crossing at Van Giesen Street. CP 71.

C. Civil Engineer Richard Haygood

Richard Haygood was retained by the Chins and admitted to testify as an expert. CR 149, 158. Mr. Haygood is a registered/licensed traffic engineer and certified civil engineer. VR 149-150. As a former city traffic engineer, Mr. Haygood's responsibilities included time spent looking at pedestrian safety issues, evaluating locations where pedestrian safety was

a concern, designing and implementing pedestrian safety measures at those locations. VR 151.

Mr. Haygood viewed the trailhead crossing, took measurements, and detailed his observations to the jury. VR 164. Where the south trailhead is located on Van Giesen, there are curb cuts which extend the ‘flush with the road’ portion for 30 feet (curb cut to curb cut) then returns to the full height of the curb. VR 164. The lower/flush to the street portion allows people to transverse on their bike, push a stroller, or wheelchair without going over a curb. VR 164-65. The same design exists on the north side trailhead except the flush portion is about 20 feet across from curb cut to curb cut. VR 165. Like the south side, one could easily push a stroller or wheelchair onto the trailhead. Id.

The roadway at the Van Giesen trailhead crossing changes in width as vehicles approach SR 240 (from two lanes to four lanes). VR 221. Straight across from the south crossing is 60 feet which is a long measurement for pedestrian travel against cars without warning or cross walk markings. Id. However, from mid-point curb cut to mid-point curb cut at the north/south trailheads, it measures 80 feet to connect directly between the trail. VR 221-22. The reason it is longer is because trailhead to trailhead (or curb cut to curb cut) is not straight across but rather diagonally positioned. VR 222. Typically, straight across represents a 90

degree angle and the trail heads meet at about 50 degree angle here. VR 222.

As a traffic engineer, Mr. Haygood expected the City to have something safer, to provide more information to pedestrians and drivers. VR 223. Meaning, signage identifying where to cross and to notify drivers that pedestrians may be crossing in this area, entering the roadway unexpectedly. Id. However, there were no indicators to anybody in a motor vehicle, in either direction, alerting drivers as they approached the trail crossing. Id. Pedestrian warning signs have a reflective surface to be viewed by headlights at night or in rainy conditions and should have been placed at least 150 feet from the trail crossing. VR 232.

Mr. Haygood observed signs on the trail south of Van Giesen warning trail users, in both directions, to 'keep on path' with an arrow indicating they are to follow the paved portion to the corner of SR 240 and cross at the signal. VR 237. Such signage directing users to 'keep on path' are also located at the Duportail/SR 240 intersection. VR 242. When looking at the trail as it extends north from Van Giesen and crosses Jadwin, Saint, Snyder, and Spangler (ending at Spangler) streets, the trailhead crossings also meet at the SR 240 intersection. VR 241-42. This allows users to safely cross where there is an intersection with markings, pedestrian push buttons and pedestrian walk/don't walk signals. VR 241-

42. Thus, each trailhead crossing connects to a signalized intersection except Van Giesen. VR 259-60.

Mr. Haygood examined and compared the ADT's (average daily traffic) for the arterials along the trail. VR 267. The ADT's were derived from the City's materials taken June 18-23, 2010. VR 268. For Van Giesen, Eastbound: 6,029; Westbound 6,800 vehicles per day. VR 268-69. The highest totals were from 5:00 pm to 6:00 pm. Thus, the total traffic volume on Van Giesen was about 12,000 per day. VR 281. For Duportail the total traffic volume was about 6,000 per day. VR 281. Going through the evidence admitted, Mr. Haygood testified that Van Giesen was higher than Jadwin and Swift by a significant amount. VR 281. The ADT's of Saint was 1,700 and Spangler reached 4,500¹ in comparison. Indeed, Van Giesen was the busiest roadway the Shelter Belt Trail crosses.

E. Human Factors Dr. Frank Perez

Dr. Frank Perez testified as an expert witness with training in Accident Reconstruction, Mechanical Engineering, and graduate work in Human Factors and Safety. VR 505. Dr. Perez opined that the trailhead crossing maintains significant visibility issues which contributed to the accident occurrence and constitutes an unsafe condition/hazard. VR 513. With regard to human factors there are four elements: 1) when a driver

¹ Haygood testified that Snyder ADT was in between Spangler and Saint. VR 282.

sees a pedestrian and when the pedestrian sees the driver, 2) lighting is a large factor in night verses day (factor of a thousand in the illumination) for contrast; 3) size of the object (Mr. Chin); 4) time (how fast the driver was traveling at the time of accident affects how long the stimuli is afforded to the observer). VR 513. The most critical one is the nighttime environment which affects the ability to see contrast and more importantly perception-reactions. VR 513-14. Weather was a factor here insofar as when it is raining heavy and windshield wipers are on, there are moments of blurry and not blurry each swipe for the driver. VR 514.

Dr. Perez testified that a pedestrian, at the trailhead crossing would see headlights *a mile away* while the driver sees only headlights, aimed downward, about *100ft directly in front of them* (for low beams). VR 515. The dichotomy is that the headlights create a 10 times more visible situation to one verses the other. Id. Dr. Perez discussed various articles which show it is human nature for a pedestrian to perceive “if I can see you, you can see me” however, that perception is not accurate. Id.

Considering the lack of any lighting surrounding the accident scene, Dr. Perez testified that better lighting could have assisted the timing for when Ms. Nelson perceived the hazard (Chin in roadway) to the time she was able to react. VR 516. He concluded an extra .4 to .8 seconds could have allowed Nelson to brake or the pedestrian to adequately get out

of harm's way. Id. Likewise, a driver that has no knowledge there is a hazard ahead compared to one that is alerted (with for example a reflective pedestrian warning sign), according to research could improve perception-reaction time by .4 seconds. VR 518. He observed the City provided no artificial lighting, like a street light, to illuminate the trailhead crossing. VR 536. The nearest light was on Birch Street too far away (consistent with Brenda Nelson's observations). VR 536. Thus, Ray Chin was completely unseen in dark clothing until Brenda's headlights caught him, as neither side of the crossing had any illumination at all. VR 537.

Dr. Perez opined that the City designed the hazard by inviting pedestrians, more so for at-risk pedestrians, with the trailhead and corresponding curb cuts which naturally releases them into the roadway at approximately a fifty (50) degree angle without providing any warning or guidance to the pedestrian or drivers. VR 519. There is absolutely nothing at the trail crossing to give the user any instruction on how to cross or if they may not. Id. Thus, the City designed a hazardous condition by mixing pedestrian, slow moving elderly man, with high speed 4,000 pound vehicles. Id. Based upon Dr. Perez' experience and training, the City should have mitigated the hazard at least by 1) designing it out (re-doing the design to eliminate hazard); 2) guard it so people don't use it; and if you cannot guard it; 3) warn users about the risks. VR 520. He found the

curb cuts presented a false guidance for users insofar as ‘this’ is where they get off the trail and go north to the other trailhead ‘here’. VR 521. Dr. Perez believes the design is unsafe and especially at night, it is even more unsafe. VR 584.

Finally, Dr. Perez compared the trailhead crossings south of Van Giesen and found the others each had signs telling users to ‘stay on the path’ but absolutely no signage at the Van Giesen crossing. VR 525. He also noted that the angle of the crossing contributed to the hazard. *Id.* The north trailhead curb cuts existed perpendicular to Van Giesen while the south trailhead was angled relative to Van Giesen and neither was directly across from the other. He found this forced users to change paths mid-way through the street. VR 525. He concluded that trailhead crossing presents an overall confusing invitation to the users and should not exist or at least be rendered safer for all parties, both drivers and pedestrians. VR 535.

IV. ARGUMENT

A. The Trial Court committed error by failing to instruct the jury as to the duty owed by the City to Chin under the Transportation Act

The Trial Judge in the case was new to the bench and resisted the concept that the Court had to define the duty owed by the City to Chin. The background and experience of the newly appointed Trial Judge was exclusive to the criminal law. Consequently, he seemed very

uncomfortable in wandering from the Washington Pattern Civil Instructions at all as criminal law practitioners have no need to vary. In fact, he rejected each of Chin's proposed jury instructions that were creatively proposed based upon Washington case law and not part of the Washington Pattern Instructions. The problem is municipal duty/liability is simply not adequately defined in the pattern instructions.

The Jury instructions of the Court were wholly insufficient and prejudicial to Chin. On review the Court generally looks to determine if the instructions allowed a party to argue that party's theory of a case; whether they were misleading; and when read as a whole did they properly inform the trier of fact on the applicable law. See *Douglas v. Freeman*, 117 Wn. 2d. 242, 256, 814 P2d. 1160 (1991). Jury instructions that are misleading and prejudice a party's ability to argue their case create reversible error. See *Keller v. City of Spokane*, 146 Wn. 2d. 237, 249, 44 P3d. 845 (2002). If a Court fails to give a proposed jury instruction based upon the interpretation of law, de novo review applies. *State v. Walker*, 136 Wn. 2d. 767, 771, 966 P2d. 883 (1998). This Court in reviewing the instructions given to the Chin jury is to determine whether they were misleading or incorrectly state the law resulting in prejudice to the objecting party. For *Furfaro v. City of Seattle*, 144 Wn. 2d. 363, 382, 27

P3d. 1160, 36 P3d. 1005 (2001). If an improper jury instruction results in prejudice to the objecting party a new trial should be ordered. Id.

It is appropriate to allow an instruction that follows the words of a statute unless the statutory language is not reasonably clear or misleading. *State v. Humphries*, 21 Wn. App. 405, 586 P2d. 130 (1978). It was proposed by Chin that the text of RCW 47.30.010 (2) be given to the jury to describe the duty owed by the City when it developed and constructed the trail that crosses Van Giesen. CP 338. The Court refused. The Court did not inform the jury of the applicable law. The Court took from Chin his theory and argument that the City was required to provide signage at the crossing and that breach of that duty was a proximate cause of Chin's death.

Instead, the Court gave instructions largely placing the duty on Mr. Chin under the Motor Vehicle Act. In reviewing the instructions as a whole, the Trial Court put an extra emphasis on Mr. Chin without the jury being aware of the duty in the design phase of the trail owed by the City.

B. The Trial Court erred in denying the Plaintiffs' Motion for Directed Verdict and instruct the jury that the City owed Chin a duty and failing to

Title 47 of the Revised Code of Washington addresses public highways and transportation. In its general provisions of Title 47, the legislature defined "highway" as "every way, lane, road, street, boulevard,

and every way or place in the State of Washington open as a matter of right to public vehicular travel both inside and outside the limits of incorporated cities and towns.” RCW 47.04.010(11). The legislature specifically enacted a chapter in Title 47 related to trails and paths. See 47.30, RCW. For the purposes of Title 47, Chapter 30, the legislature defined “trail” or “path.” It is defined as follows:

“‘Trail’ or ‘path’ means a public way constructed primarily for and open to pedestrians, equestrians, or bicyclists, or any combination thereof, other than a sidewalk constructed as a part of a city street or county road for the exclusive use of pedestrians. ...”

RCW 47.30.005.

Before establishing a path or trail, factors are to be considered, to include public safety. RCW 47.30.040. Further, there are limitations on interfering with a recreational trail. The statute reads, in part:

“(2) Where a highway other than a limited access highway crosses a recreational trail of substantial uses for pedestrians, equestrians, or bicyclists, signing sufficient to ensure safety shall be provided. ...”

RCW 47.30.010(2). (Underscore added).

In reviewing a Trial Court’s decision to deny a Motion for Directed Verdict the reviewing Court applies the same standard as the Trial Court. *Industrial Indemnification Company of Northwest Inc. v.*

Kallevig, 114 Wn. 2d. 907, 915, 792 P2d. 520 (1990). A directed verdict is appropriate if, when viewing the material evidence most favorable to the non-moving party, the Court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the non-moving party. *Id.* The requirement of substantial evidence necessitates that the evidence be such that it would convince “an unprejudiced, thinking mind”. *Hojem v. Kelly*, 93 Wn. 2d. 143, 145, 606 P2d. 275 (1980). Denial of a Motion for Directed Verdict is appropriate only when it is clear that the evidence and reasonable inferences are sufficient to support the jury's verdict. *Baldwin v. Sisters of Providence in Washington Inc.* 112 Wn. 2d. 127, 132, 679 P2d. 298 (1989).

The Trial Court, when presented with RCW 47.30.010 (2) not only refused to instruct the jury as to the City’s obligation but further refused to grant directed verdict. The undisputed evidence is that the Shelter Belt Trail crosses Van Giesen. The comprehensive plan for development of the trail contemplated a five mile trail from Thayer north to Spengler Street. Van Giesen crosses the trail at nearly its mid-section. The Transportation Act unequivocally provides that the City “shall” have sufficient signing to ensure safety. The City has no signage at the Van Giesen crossing. The Court should have ordered that as a matter of law the City breached its duty to Chin and left for the jury causation and damages.

C. RCW 47.30.010 (2) can only be interpreted in support of Chin’s Motion for Directed Verdict or, at the very least a proper Jury Instruction.

Statutory interpretation is a question of law which the Appellate Court reviews de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 104-105, 26 P.3d 257 (2001). Courts should assume the legislature means exactly what it says. Plain words do not require construction. The Courts do not engage in statutory interpretation of a statute that is unambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. *Id.* at 105.

The language of RCW 47.30.010(2) is unambiguous. The statute does not define the word “crosses.” The dictionary definition of the word “cross” is:

“Go or extend across or to the other side of (a path, road, stretch of water, or area).”

Merriam-Webster Online Dictionary.

The highway, Van Giesen Street, “crosses” the Shelter Belt Trail. The City meant to have a continuous trail from Thayer to Spengler. It mandates placement of signage for purposes of public safety.

It is the unambiguous nature of RCW 47.30.010 (2) that makes the Court’s decision in applying the law and instructing the jury more perplexing. The Trial Court seemed to be more focused on the Rules of

the Road and the location of where Chin was struck by Brenda Nelson. The proper inquiry as for the duty owed by the City was the Transportation Act. Failure to interpret this unambiguous statute in a manner that allowed Chin to argue his theory of the case is reversible error.

D. Motor Vehicle Act, Title 46, RCW, does not apply in this case

Instead, the Court instructed the jury, following the Motor Vehicle Act. The Motor Vehicle Act and the instructions given from that statute are inapplicable in the claim of Chin versus The City of Richland. The Motor Vehicle Act was enacted in 1937. *Laws of 1973, CH. 189*. Later the scope of the original Act included the creation of Title 46 of the Revised Code of Washington which deals specifically with motor vehicles and the regulation and licensing of vehicles and persons, and provided penalties for violations of the Act. *City of Fircrest v. Jensen*, 158 Wn. 2d. 384, 389, 143 P3d. 776 (2006). The Trial Court in essence allowed the City to use the Motor Vehicle Act as a defense against the wrongful design and maintenance as required under Title 47. The analysis of the rules of the roadway would be applicable between the driver, Brenda Nelson and Chin. The claim against the City was based upon the design and maintenance of the trail. It was improper for the Court to instruct the jury on the Rules of the Road as the City is not a user of the Shelter Belt

Trail on Van Giesen but is rather in charge of design and maintenance of the trail crossing at Van Giesen. At best a comparative fault instruction was appropriate.

E. The Court's instructions did not define the duty owed by the City to Chin

In colloquy related to jury instructions counsel for Chin attempted to explain to the Trial Court that the instructions needed to define the duty owed from the City to Chin. The general principles of whether a municipality owes a duty in a particular situation is a question of law. *Keller*, 146 Wn. 2d. 243, 44 P3d. 845 (2002). Implicit in that question are questions as to “whom the duty is owed, and what is the nature of the duty owed”, which are required to define the scope of the City’s duty. *Keller*, 146 Wn. 2d. 243. Negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of the duty or the standard of care. *Id.* 242-43; *CF. Bowman v. Crawford*, 104 Wn. 2d. 241, 244-45, 704 P2d. 1181 (1985). The Court ignored the statutory highway design requirements for this path. Such design requirements are placed upon the City by law. Failure to adequately define that duty for the jury is reversible error. In essence the City convinced the Trial Court to ignore the City’s obligations when designing a trail near highways but rather achieved its goal of having the

Trial Court focus on the location of the accident and then attempt to apply the Rules of the Road. This led to an erroneous decision on Directed Verdict and misleading Jury Instructions to the prejudice of Chin.

The evidence presented at trial against the City by Chin related to the design and maintenance of the Shelter Belt Trail as it crosses Van Giesen. Of the seven areas where the path crosses a highway within the City of Richland Van Giesen is the busiest for car travel. It is also the only crossing on the entire length of the five mile path that does not direct pedestrians to a cross-walk with a control and protected by signals. It is undisputed that the legislature mandated signage for any time a path crosses a highway. The law is well settled that the City has a duty of maintenance owed to all users; the City has a duty to provide a reasonably safe place for pedestrians; that the City is required to exercise care in maintaining the trail in a reasonably safe condition for pedestrians; that the violation of a statute is not necessarily negligence but maybe considered as evidence. Chin should've been entitled to argue each of these theories to the jury but was deprived by the Trial Court. See *RP 292-294*; *RP 339-340*.

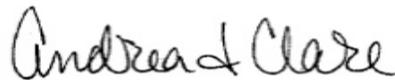
V. CONCLUSION

Based on the foregoing, the Appellant respectfully requests this Reviewing Court Remand the case for a New Trial with directions to the

Trial Court to Directed Verdict on the City's duty/breach based upon RCW 47.30.010(2). Alternatively, the Appellant respectfully requests this Reviewing Court to define the City's duty to Chin as a matter of law and issue specific instructions to the Trial Court that the 'Rules of the Road' under RCW 46.61 do not apply to the instant case.

RESPECTFULLY SUBMITTED, this 30th day of May, 2019.

TELQUIST McMILLEN CLARE, PLLC



By: _____

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CERTIFICATE OF SERVICE

On the 30th day of May, 2019, I caused to be served a true and correct copy of the within document described as BRIEF OF APPELLANT to be served on all interested parties to this action as follows:

Michael E. Tardif Amanda Bley Freimund Jackson & Tardif, PLLC 711 Capitol Way South, Suite 602 Olympia, WA 98501- 1236	<input checked="" type="checkbox"/> Regular U.S. Mail, postage prepaid <input type="checkbox"/> Certified U.S. Mail w/ Return Receipt Requested <input checked="" type="checkbox"/> E-Mail to miket@fjtlaw.com and amandab@fjtlaw.com <input type="checkbox"/> Hand delivery <input type="checkbox"/> Facsimile to (360) 534-9959
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Dated this 30th day of May, 2019.

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KRISTI FLYG, *Legal Assistant*

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