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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

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

Plaintiffs-Appellants,

v.

CITY OF RICHLAND, a municipality,

Defendant-Respondent,

**BRIEF OF RESPONDENT
CITY OF RICHLAND**

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I. INTRODUCTION

This is a tort action against the City of Richland (the “City”) by the estate of Wai Mon Chin (“Chin”). Former co-defendant,¹ Brenda Nelson’s (“Nelson”) vehicle struck and killed Chin as he crossed a dark City street near his home at a mid-block (non-intersection) location.

Chin tried this case to a jury over four weeks in May and June 2018. The jury returned a verdict for the City, answering “no” to the first question on the special verdict form that asked whether the City was negligent.

Chin appeals the jury verdict and requests a new trial, claiming the trial court’s instructions were erroneous and his motion for a directed verdict should have been granted. The jury’s verdict should be affirmed because: (1) the trial court properly instructed the jury on the City’s duty to use ordinary care in the design and operation of its public streets and to keep them in a reasonably safe condition for ordinary travel; (2) the trial court properly rejected Chin’s proposed jury instructions premised upon RCW 47.30.010 (Public Highways and Transportation statute regarding Recreational Trail Interference); (3) the trial court properly instructed the jury on the statutes applicable to pedestrian and vehicle rights of way at

¹ Chin and Nelson settled shortly before trial.

marked and unmarked crosswalks; and (4) the trial court properly denied Chin's motion for a directed verdict.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court properly instruct the jury the City owed a duty of ordinary care to design and maintain its public ways in a reasonably safe condition for ordinary travel, rather than Chin's proposed instructions on the City's duty that were duplicative and contained inaccurate and incomplete statements of the law?

B. Did the trial court properly refuse to instruct the jury on the Washington State Recreational Trail Interference statute, which only applies to construction of a highway which crosses a recreational trail resulting in the severance or destruction of a pre-existing recreational trail of substantial usage?

C. Did the trial court properly instruct the jury on the laws applicable to marked and unmarked crosswalks, and vehicle and pedestrian rights of way, using statutory language contained in the WPI and RCW Ch. 46.61, where substantial evidence showed these authorities are relevant to issues of Chin's contributory negligence and the City's reasonable care?

D. Did the trial court properly deny Chin's motion for a directed verdict where genuine issues of material fact existed regarding the City's alleged breach and causation?

III. STATEMENT OF THE CASE

A. Facts

1. Chin's Accident

On February 12, 2016 at approximately 5:36 p.m., Nelson's vehicle struck and injured Chin in the westbound lane of Van Giesen Street, approximately 70 feet west of the intersection of Van Giesen and Birch. RP 447-450, 454, 2ndSuppRP 117-119.² The weather was dark and rainy; Chin wore dark clothes and was not in a crosswalk. RP 447, 454, 482. Nelson hit Chin with the right front corner of her Honda Accord. RP 450. Nelson did not see Chin until just before impact, but stated he was moving to the right (north) when he was struck. RP 450-51. Nelson believed she didn't see Chin because it was dark and rainy. RP 481. There were no other witnesses and no evidence of Chin's path of travel before the collision. 2ndSuppRP 11-14.³

² Due to both parties arranging for transcription of various portions of the trial, the Report of Proceedings ("RP"), requested by Chin, was prepared at a different time from the Supplemental Report of Proceedings ("SuppRP"), requested by the City. Both Reports of Proceedings used a page numbering system that starts each Report of Proceedings at page 1. In addition, two different Court reporters transcribed these proceedings, each beginning their submissions of the trial transcript at page 1. Ms. Cheryl Pelletier transcribed the majority of the testimony. Mr. Joseph King transcribed only William Neale and Thomas Ballard's trial testimony, separately. Both witness transcriptions by Mr. King used a page numbering system that starts at page 1. The City cites to "RP" as the testimony requested by Chin (transcribed by Ms. Pelletier), "SuppRP" as to the testimony requested by the City (also transcribed by Ms. Pelletier), "2ndSuppRP" as to the Neale testimony (transcribed by Mr. King), and "3rdSuppRP" as to the Ballard testimony (also transcribed by Mr. King).

³ Given the lack of physical evidence at the scene, the City hired William Neale, an accident reconstructionist, to reconstruct this accident. *See generally*, 2ndSuppRP 2-8.

Van Giesen is an arterial street running east and west through the City. 3rdSuppRP 18. In the area of this incident, Van Giesen is intersected by SR 240 on the west and Birch Avenue, a small City neighborhood street, on the east. *Id.* The Van Giesen/SR 240 intersection is signalized, including marked and lit pedestrian crosswalks. *Id.* The Van Giesen/Birch intersection is not signalized but includes lit marked and unmarked pedestrian crosswalks. 3rdSuppRP 126.

In between Birch and SR 240, a paved pedestrian/bicycle trail (the Shelterbelt Trail) extends south from the south sidewalk of Van Giesen and runs along a former dirt shelterbelt⁴ parallel to SR 240. 2ndSuppRP 59-60. A later-constructed trail begins at the north Van Giesen sidewalk and runs north adjacent to SR 240. RP 646, 53. The north and south trails meet Van Giesen at pedestrian sidewalks approximately mid-block, but do not align. *Id.* The north trail entrance is east of the south trail entrance due to topography, land ownership, and construction considerations at the fourteen-year difference in time of design and building the two trails. RP 704-706, and 733; Ex. 149.

Using the process of photogrammetry, Mr. Neale reconstructed this accident to determine where Nelson struck Chin.

⁴ One or more lines of windbreak trees planted by the federal government in the 1940's south and west of then-Richland. *See discussion, infra*, at III(A)(2).

Nelson struck Chin approximately 70 feet east of the northern trailhead. 2ndSuppRP 23-24, 47-53; Ex. 155, pp. 47, 64, 65-72. The accident location was approximately equidistant between the northern trailhead and the Birch/VanGiesen intersection. *Id.*

On the day of the accident, Nelson was driving home from work at Kadlec using her usual route. RP 465. Nelson entered Van Giesen after a left turn at a signalized intersection two blocks east of Birch (Wright Street). RP 446-47. There were no vehicles for a long distance in front of her as she traveled west on Van Giesen. RP 478-79. As Nelson approached Birch, there was also a gap in the eastbound Van Giesen vehicles. *Id.* There are gaps in west and eastbound traffic in this area of Van Giesen due to blocking effect of the signals at Wright and SR 240. 3rdSuppRP 38, 52-54. From her daily commutes, Nelson was aware of the trails south and north of Van Giesen. RP 455, 470-71.

Chin had resided in Richland on the west side of Birch one house north of the Birch/Van Giesen intersection for over 50 years. SuppRP 81. He walked for health reasons. SuppRP 104. He was experienced in crossing Van Giesen; Chin walked south on the trail daily. *Id.*

2. Construction of the Shelterbelt Trail

The Shelterbelt trail originated as an informal dirt path used by pedestrians to walk between tree rows placed by the federal government to

create a green belt prior to the City's incorporation. RP 635-37. In 1996, the City paved the dirt path south of Van Giesen to make a formal multi-use trail for pedestrians and bicyclists. RP 367-38. This trail ended in a loop at the south side of Van Giesen Street; the paving did not continue north of Van Giesen at that time. RP 747-48. The trail connected to Van Giesen mid-block between SR 240 and Birch via a driveway primarily used for service access for trucks maintaining City utilities and the trail. RP 474-49, 682. In 2010, the City received a grant to pave a utility easement extending north of Van Giesen adjacent to SR 240. RP 646. The 2010 trail ended mid-block on the north side of Van Giesen, east of the driveway installed during the 1996 paving on the south side. RP 653.

When the City designed the north trail, the City foresaw that trail users wanting to cross Van Giesen could use existing pedestrian facilities (the sidewalks on the north and south-sides of Van Giesen) to reach pedestrian crosswalks at SR 240 or Birch, short distances from the two trails. RP 691-697. The City also foresaw that some pedestrians might choose to cross mid-block, which they could do if they yielded to vehicles. RCW 46.61.240; RP 697-701.

3. **Marked and Unmarked Crosswalks and Vehicle and Pedestrian Rights of Way**

At trial, the City argued Chin was contributorily negligent for failing to exercise reasonable care for his own safety. SuppRP 214 – 215. Under the laws applicable to marked and unmarked crosswalks and vehicle and pedestrian rights of way (RCW 46.61.240), the City claimed Chin was contributorily negligent by failing to either (i) yield to oncoming vehicles on Van Giesen between SR 240 and Birch; or, if the midblock crossing was not safe, (ii) failing to use the signalized marked crosswalk at SR 240 or the lit, marked and unmarked crosswalks at Birch. *Id.* In addition to Chin’s contributory fault, Chin’s and the City’s experts also testified project planners consider laws applicable to marked and unmarked crosswalks and vehicle and pedestrian rights of way (i.e., RCW Ch. 46.61) when designing trails meeting with streets.

David Bryant (“Bryant”), long-time City of Richland Public Works and Parks Department employee and the 1996⁵ and 2010⁶ trail designer, testified he considers pedestrian crosswalk options when designing trails and trail intersections with existing roads. RP 697-701. This includes the understanding pedestrians will have priority when crossing at marked or unmarked crosswalks at the intersection of two streets (like Birch or SR

⁵ South of Van Giesen.

⁶ North of Van Giesen.

240) and that pedestrians may cross mid-block⁷ as long as they yield to vehicles (i.e., cross in gaps in traffic). *Id.*

The City's expert traffic engineer, Thomas Ballard ("Ballard"), testified when analyzing pedestrian issues, he conducts research into the laws applicable to marked and unmarked crosswalks and vehicle and pedestrian rights of way applicable to locations of this type:

I've done research into the degree that has to do with this crossing or the operational requirements at this crossing. And what I mean by that is the operation is governed by the rules of the road. The ones that we learn when we get our driver's license, but they're basically part of the laws of the State of Washington. And as a traffic engineer, as a county engineer, we use those as a basis for understanding what is required of the various users and how they are supposed to interact with one another, their roles and their responsibilities.

3rdSuppRP 22. Ballard continued to emphasize the rules of the road are assumptions traffic engineers use when designing pedestrian features and assessing the safety of pedestrian features. 3rdSuppRP 39, 59.

Chin's expert traffic engineer, Richard Haygood ("Haygood"), testified similarly: in areas between non-signalized intersections, such as Van Giesen between Birch and SR 240, pedestrians may cross Van Giesen outside of an established crosswalk, but must yield to approaching traffic. RP 340-42. He also testified pedestrians were permitted the right of way

⁷ Except between two signalized intersections, which is not applicable to this location. RCW 46.61.240(4).

to cross at the corner of Birch and Van Giesen within the marked or unmarked crosswalks. RP 343.

4. Trail Interference Statute

Chin did not question his experts regarding the Recreational Trail Interference statute (RCW 47.30.010).

Nearing the end of trial, on cross examination of the City's expert, Ballard, Chin provided Ballard a copy of identification exhibit 78,⁸ which included RCW 47.30.010 (the Recreational Trail Interference statute). 3rdSuppRP 67. Upon request, Ballard read subsection two to the jury: "Where a highway other than a limited access highway crosses a recreational trail of substantial usage for pedestrians, equestrians or bicycles, signing sufficient to ensure safety shall be provided." 3rdSuppRP 68. Ballard testified this provision is applicable "contingent on other conditions." *Id.* Chin did not inquire further as to what those conditions would be. *Id.*

On re-direct examination, Ballard, again, read subsection two of the above-mentioned RCW, and testified:

Q. And at this location [Van Giesen] is it your opinion that the highway crosses the trail?

A. No, it does not.

⁸ Plaintiff's Identification Exhibit 78, including the language of RCW Title 47.30.010 was neither offered nor admitted as an exhibit. 3rdSuppRP 67-69.

Q. Can you explain that, please?

A. First, all of all [sic] to put the passage that I have been asked to read in context, it's entitled, and I believe we covered this, Public Highways and Transportation. That title basically speaks to the operation of the Washington – establishment of the Washington State Department of Transportation. A lot of different sections and chapters in that. This one, the intent of this one is entitled Recreational Trail Interference. And it speaks to the protection of an existing trail being bisected by a newly constructed highway. And it has provisions in here about limited access highways doing that when they are constructed, and the provisions that need to be evaluated in terms of alternatives to protect and preserve the use, provided the trail is substantially being used. And then if they're not limited access highways, they still need to be substantially used, but at that point the crossing would be at grade, as we call it, at surface, when the new road is bisecting the trail. And at that point the state is directing those who are building that new road to also ensure that there is safety for that crossing.

Q. So at this location the trail is not crossing the road?

A. Well, the trail at this point does not cross the road. It ends. South side ends at the sidewalk, and the north end ends at the sidewalk on the north side of Van Giesen.

Q. Does this trail have substantial use?

A. No, not at all.

Q. And is this trail being newly constructed at this time?

A. Well, neither the trail or the road are being newly constructed.

3rdSuppRP 121-22. Ballard later defined substantial use as approximately 25 pedestrians crossings during the peak hour. 3rdSuppRP 123.

And that's why I keep saying it's not even close. It's multiple times. If you do the math, I guess it's around 50 times more demand... about 2% of the threshold to even get you on the radar screen. The other way they offer to look at is if you can't meet the 25 guideline, you can look at it over a stretch of four hours, and at that point over four hours you have to have 75 pedestrian crossings. And obviously over four hours we'd in this case probably have two as opposed to 75. When you get to that threshold, that's when the agency should begin to look at a location and to monitor it. Not that there's anything wrong, but to monitor it to make sure they're following any changes of condition to develop a strategy that might need to be mitigated at some point in the future and then put that on a priority of other locations within their jurisdiction.

3rdSuppRP 123-124; *see accord*, 3rdSuppRP pp. 28–31, 38-51 (regarding the City's pedestrian use survey).

Chin did not provide any testimony on the applicability of this Recreational Trail Interference statute (i.e., whether the trail crosses the road, what constitutes "substantial use," or whether Van Giesen was newly constructed). Even presuming this statute applied, Chin did not provide any expert testimony as to what "signing sufficient to ensure safety" would be or evidence a sign would have prevented an accident that Nelson said was caused by darkness and rain. RP 481.

B. Response To Chin's Statement Of Facts

1. No Evidence of Chin's Crossing To North From South Trailhead

Chin alleges in his Factual Summary that Chin was crossing Van Giesen Street mid-block from the south side trailhead to the north side trailhead. Br. of App., p. 7. Nelson testified she saw Chin approaching her vehicle from south to north "at an angle," but did not see Chin until immediately before the impact. RP 450, 458-59. The trial court did not permit Nelson to speculate on whether Chin began to cross Van Giesen at the south trailhead. RP 458-59. Further, Chin presented no evidence Chin was traveling to the north trailhead. At impact, Chin was roughly 70 feet east of the northern trailhead, in the direction of his home. 2ndSuppRP 11-14; Ex. 155. Stanley Chin, Chin's son, testified he never knew Chin to walk on the north trail – Chin always walked south and then returned to his home on Birch. SuppRP 65-66.

2. Nelson's Prior Familiarity With Van Giesen, The Trailheads, and Pedestrian Crossings

Appellants allege the City failed to warn Nelson a pedestrian might be crossing Van Giesen between the trailheads. Br. of App., p. 8. Nelson testified this route was her daily route to and from work, she was aware of the north and south trailheads and was aware of pedestrian traffic crossing Van Giesen. RP 470-71, 747-47.

3. Chin's Allegations As To Visibility Issues Pertain to Darkness and Weather, Not Road or Trail Design

Chin cites the testimony of his human factors expert, Dr. Frank Perez ("Perez"), for the proposition this location contains hazardous visibility issues. *See e.g.*, Br. of App, pp. 15-17. This testimony does not include any expert opinion regarding any visibility problems associated with the road or trail design, but only testimony about vision issues with elderly people, and with darkness and rain. The City's expert, Ballard, testified that for trail users, "nothing blocks visibility." 3rdSuppRP 39.

Pretty much anyplace along either the north side or the south side of Van Giesen you can see pretty much indefinitely. There's nothing blocking any visibility. There's no shrubs. There's no bushes. There's no turn in the road that you can't see around. You're looking down a straight road. You're looking down a flat road. You're looking down a road that doesn't have anything between the sidewalks and the road surface itself. There's just no visibility blockages. At daylight you can see everything. At nighttime you're dealing with, you know, less natural light, but there are lights, not only just ambient lights but also luminary signal lights at the traffic signal and at Birch. Also at night you have vehicle headlights to follow so that you can judge distances and speeds. And so in my mind there's nothing restricting a pedestrian from seeing and gathering the information they need to make a decision on their own whether they feel it is safe enough to cross at any particular location along Van Giesen between the highway and Birch.

3rdSuppRP 54-55.

4. The City Considered Pedestrian Use, Including Crossings, When It Designed The Trail

Chin alleges there is no evidence in the record the City considered pedestrian crossings at Van Giesen Street when the City paved the north trail. Br. of App., p. 10.⁹ The City presented Bryant's testimony that the City considered pedestrian crossing when designing these trails. RP 693-97.

First, City ordinances do not forbid jaywalking (i.e., crossing between intersections). RP 697. The City knew pedestrians could cross in between the two intersections at Birch and SR 240 in gaps in traffic if pedestrians yielded to vehicle traffic. *Id.* Second, if pedestrians did not cross in gaps in traffic, the City knew pedestrians could cross using either the signalized crossing at SR 240 or the marked crosswalk at Birch, each visible and a short walk from the trailheads. RP 696-97; Ex. 155, pp. 73-82. Both trailheads end at sidewalks, allowing pedestrians time to make their crossing decision before proceeding across Van Giesen and allowing access to close-by crosswalks at intersections. *Id.*; *see also*, 3rdSuppRP 693-97.

⁹ In support of this allegation, Chin cites to CP 71, which is Chin's response to the City's pre-trial trial court motion for summary judgment. On appeal, evidence before a trial court in pre-trial motions is irrelevant after a jury trial on the merits. *See Johnson v. Rothstein*, 52 Wn. App. 303, 305-06, 759 P.2d 471 (1988). Even if considered, it should be noted Chin did not include any citation to any evidence in support of this proposition here or in his trial court response to the City's motion for summary judgment.

As a corollary, Chin alleges the City's failure to implement a preliminary plan to "relocate the trail on the south side [of Van Giesen]," evidences the City's failure to consider pedestrian traffic at the purported trail crossing at Van Giesen. Br. of App., p. 12. At trial, the author of the preliminary plan, Pinard, testified he created the planning document during the design phase of the 2010 northern trail installation, but after some discussion and deliberation regarding the topography, expense, the Americans with Disabilities Act requirements, and laws pertaining to pedestrian and vehicle rights of way, the City decided not to relocate the south trailhead. RP 806-9.

C. Statement of Procedure

This matter proceeded to trial on May 18, 2018, against the City, only. On June 4, 2018, the 12-person jury returned a verdict for the defense, finding the City was not negligent in response to the first question on the special verdict form. CP 380-382.

Before and during trial, the parties submitted proposed jury instructions. CP 263-86 (original), 287-91 (1st Supp.), 293-98 (2nd Supp), 331-340 (3rd Supp) (collectively, Plaintiff's Proposed Instructions ("PPI")); 214-61 (original), 262-63 (supplemental), 341-42 (2nd Supp) (collectively the City's Proposed Instructions ("CPI")). The trial court heard argument on the parties' respective proposed instructions, as well as the parties'

objections to the court's instructions. RP 940-99, 1004-1018, 1056-76, 1088-1199, 1204-1219, and 1230-1252. The court also considered the City's Memorandum on Plaintiffs' and the City's Proposed Jury Instructions. CP 307-314.

1. Trial Court's Rulings on Jury Instructions Regarding the City's Duty¹⁰

The trial court gave two instructions defining the City's duty. These instructions include Instruction No. 9 (CP 358) (WPI 140.01) and Instruction No. 10 (CP 359) (premised upon *Owens v. Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956)). Chin did not object to (or take exception to) giving these instructions. RP 1094, 1108, 1245. The trial court reasoned Instruction No. 9 was an accurate statement of the law under both WPI 140.01 as well as *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). RP 1094-95. Chin agreed this was "an appropriate instruction". *Id.* The trial court also reasoned Instruction No. 10 was an appropriate instruction in conjunction with Instruction No. 9 because it allowed both parties to argue their theories of the case and Chin had no objection to its inclusion. RP 1108-9.

The trial court also issued two instructions refining a City's duty as

¹⁰ Chin assigns error to the trial court's jury instructions about the City's duty but does not make any argument regarding these instructions. Accordingly, the City has no arguments to which it can respond and can only present plaintiff's assignments of error and Chin's trial court arguments advanced regarding the same.

well as the duty for those using a City street. These instructions include Instruction No.12 (CP 361) (WPI 12.06) and Instruction No. 13 (CP 362) (WPI 70.06). Chin did not object or take exception to Instruction No. 12 (WPI 12.06). RP 1245. Chin objected to Instruction No. 13, arguing the “rules of the road” do not apply. RP 1151-54. After considering argument from Chin as well as the City’s Memorandum, the trial court found Instruction 13 proper as a verbatim WPI instruction and applicable considering the instructions in the notes on use. RP 1154.

As to duty, the Court rejected Chin’s proposed instructions premised upon snippets of case law cited in the “Notes on Use” for WPI 140.01 (which the Court had already adopted as Instruction No. 11). CP 360; *e.g.*, PPI Nos. 22-27 (CP 292-97). PPI No. 22 states:

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 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.

CP 292. Despite proposing this instruction, after the Court determined WPI 140.01 would be given as Instruction No. 11, Chin withdrew his PPI No.

22. RP 1110. The Court accepted Chin's withdrawal. *Id.* He did not take exception to its not being given, later. RP 1245.

PPI No. 23 states: "The City maintains a duty to exercise reasonable care in providing a place for reasonable safety for pedestrians." CP 293. In support, he cited *Berglund v. Spokane Co.*, 4 Wn.2d 309, 103 P.2d 355 (1940). *Id.* The City opposed this instruction as duplicative of WPI 140.01 (Instruction No. 11) and unnecessary due to Chin's ability to argue his theory under WPI 140.01. RP 1113. The City noted giving two instructions on the City's duty which are virtually identical would unfairly overemphasize Chin's theory of the case. *Id.* Agreeing with the City, the trial court declined to give PPI No. 23. *Id.*

PPI No. 24 states: "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." CP 294. In support, he cited *Berglund v. Spokane Co.*, 4 Wn.2d 309, 103 P.2d 355 (1940). *Id.* Chin argued the instruction was necessary "to focus on this pedestrian, to focus on Mr. Chin." RP 1114. "This one's in on the duty to the pedestrians to maintain its public areas in a safe condition for pedestrians who have invited to use it." *Id.* The City opposed PPI No. 24 for the same reasons it opposed PPI No. 23 – it is a restatement of the duty stated in WPI 140.01 and Chin could sufficiently argue his theory of

the case under WPI 140.01. RP 1115. The trial court agreed. *Id.* The trial court also found giving this additional instruction on duty would unfairly emphasize Chin's theory of the case. *Id.*

PPI No. 25 states: "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." CP 295. In support, he cited *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). Chin argued this instruction was necessary because the jury could become confused as to whether the City maintains a duty regardless of the jury's findings on Chin's contributory fault. RP 1116-19. The trial court asked Chin: if the *Keller* court remedied the WPI 140.01 instruction, but plaintiff's proposed instruction language was not included in the remedied WPI 140.01, would it "still be a concern for the court when the language that had been in the general instruction that created this concern is no longer there?" RP 1116. Chin responded the jury may become confused as to whether the City maintained any duty to Chin if the jury found Chin was partially at fault for this incident. RP 1118-19.

The City agreed with the trial court, arguing the *Keller* court had purposefully *not* included the PPI language when it reformulated WPI 140.01. RP 1119-20. The City also argued the proposed special verdict form, which had not been ruled upon but was largely unopposed at that time,

would include as question 1: “Were any of the following negligent: City of Richland or Brenda Nelson.”¹¹ CP 258, RP 1119. Chin’s comparative fault was not raised until proposed question four, after all questions regarding the City’s negligence have already been answered. CP 258-259, RP 1119-1120. Accordingly, the City argued, there was no risk of the jury confusing the City’s duty as compared with any issues of Chin’s contributory negligence. *Id.* The trial court agreed. RP 1121-22. Finding the *Keller* court revised WPI 140.01 to remove problematic language which the *Keller* court found confusing and misleading to the jury, the trial court stated:

So the issue becomes, does the court have to give an instruction, or should the court give an instruction to further state that to a jury? And this court is going to find that the case law says on this that just because it’s the finding of the case, or language of the opinion, does not mean that it becomes a proper jury instruction....

The court does not believe it’s necessary, does not need to be clarified in light of the instruction 140.01 having already been corrected in light of *Keller*. If it was that big of a concern, I imagine Washington Pattern Instructions committee would have already created a clarifying instruction or added it to 140.01 themselves. 25 is out.

RP 1122-25. The trial court declined to issue the instruction. RP 1123.

PPI No. 26 states:

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

¹¹ Ultimately, question one on the special jury verdict read (only): “Was the City of Richland negligent?” to which the jury answered “no.” CP 380.

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.

CP 296. In support, Chin cited *Berglund v. Spokane Co.*, 4 Wn.2d 309, 103 P.2d 355 (1940); *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005); and *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009). Chin represented “I pulled this again from the notes of the WPI 140... I took this language directly from the notes and suggest that it’s an accurate statement of the law.” RP 1125-28. The City opposed PPI No. 26 and argued it overly emphasized the City’s duty. RP 1128. The Court agreed with the City, finding PPI No. 26 would not be given. *Id.*

PPI No. 27 stated “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. In support, Chin reiterated his earlier arguments, stating this was clarifying the over-arching duty as suggested by the notes on WPI 140.01 and case law. RP 1128. The City stood on its earlier objections (i.e., duplicative in light of WPI 140.01 and, if given, would overly emphasize Chin’s theory of the City’s liability) and further objected that the reference to “intersecting roadways” was unsupported by the evidence since the evidence showed the trails do not

“intersect” Van Giesen (they end at the north and south sidewalks on Van Giesen). RP 1129, *see accord*, 3rdSuppRP 121-22. The trial court believed WPI 140.01 was sufficient to allow each party to argue Chin’s theory of the case and declined to give PPI No. 27. RP 1129.

2. Trial Court’s Rulings Finding The Recreational Trail Interference Statute Inapplicable

Chin proposed three jury instructions regarding the Washington State Recreational Trail Interference statute. CP 338-40. PPI No. 30 (CP 338) provided; “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.” In support he cited WPI 60.01 and RCW 47.30.010. CP 338. Chin proposed two additional instructions, but only to be given if the Court permitted his PPI No. 30: (i) PPI No. 31 (CP 339) which provides “the violation, if you find, of 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;” and (ii) PPI No. 32 (CP 340) which provides, “the violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.” In support, he cited WPI 60.01.01 and WPI 60.03/RCW 47.30.010, respectively.

The trial court heard lengthy argument from the parties regarding these proposed instructions. RP 1129-41. Chin claimed these instructions were appropriate as WPI 60.01 provides for instructing on an applicable statute. RP 1131. The City agreed WPI 60.01 provided for a statutory instruction where applicable, but disagreed RCW 47.30.010 was applicable. RP 1132. The City argued expert Ballard, the only witness to testify to RCW 47.30.010, testified the statute was not applicable for at least three reasons. RP 1132-34. First, subpart three of the statute states the statute is applicable to those instances where the construction or reconstruction of a highway would destroy the usefulness of an “existing trail.” RP 1132. It was undisputed the City built the trails in 1996 and 2010 – substantially later than Van Giesen itself. RP 1132-33. Ballard explained this statute was essentially a conservation statute intended to ensure trails are maintained despite roads developing around or through them. RP 1132, 1136. Second, Ballard testified this statute is only applicable where a highway “crosses” a recreational trail. RP 1133. Here, no trails crossed Van Giesen; they ended at the north and south sidewalks along Van Giesen. *Id*; *see also*, Ex. 149 (evidencing no dedicated crossing was established in between the north and south trailheads on Van Giesen). Third, this was not a trail of “substantial usage.” RP 1133. Ballard testified substantial usage was approximately 25 pedestrian crossings per hour. *Id*. In the pedestrian

use survey done by the City, this trail did not have 25 pedestrian crossings in five days. *Id.* The City argued instructing on this statute would confuse the issues before the jury and would likely constitute an error of law if given. RP 1133-34.

After significant colloquy with counsel for the parties, the trial court ruled RCW 47.30.010 applied to a situation where the trail pre-existed the roadway, “and the signage that you need to put up at that point in time because the roads would be actually going across the trail.” RP 1138. The court further held, “I don’t think that you can pull out subsection 2 of this in a vacuum and say that the rest of what it talks about and apply to, doesn’t apply to subsection 2.” RP 1140-41.

Considering the trial court’s ruling on PPI No. 30, Chin withdrew PPI nos. 31 and 32. RP 1141.

3. Trial Court’s Rulings on the Applicability of the Washington State Crosswalk Statutes and Rules of the Road

The City proposed two WPI instructions on the laws applicable to pedestrian crosswalks. The first, taken from the WPI Motor Vehicles chapter, consists of excerpted¹² definitions from the WPI definition of a “crosswalk.” CP 363 (WPI 70.06). This instruction reads:

¹² WPI 70.03.05 contains various crosswalk definitions in bracketed language, which may be adopted in whole or in part as the case requires. Here, the City proposed

A marked crosswalk means any portion of 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.

CP 363. In support, the City argued this was an accurate statement of law, taken from the WPI and applicable (1) as to Chin's and Nelson's comparative fault; and (2) as the foundation by which the City staff relied upon when designing a trail meeting with a City street. RP 1154-56. The City argued the jury should be instructed Chin did not have the right-of-way where he was struck and would have had the right-of-way had he chosen the marked intersection at Birch or the signalized intersection at SR 240. RP 1156. Chin responded the ordinary negligence standard should apply. *Id.* He further argued the status of Mr. Chin as a pedestrian would unlawfully suggest that he had a duty to yield to cars rather than Nelson having a duty to avoid hitting pedestrians. RP 1158. The trial court determined the WPI was accurate and appropriate.

(and the Court adopted) paragraphs one and three, only – omitting paragraph two. RP 1154; CP 363 (Instruction No. 14) & CP 243 (CPI No. 16).

I think it certainly is fair game for purposes of talking about what the rights were with regards to making the crossing at this point in time. It has to come into consideration for determinations of, possible determinations by the jury depending on how they utilize this of comparative fault, if nothing else. And in looking at the note on use however, it says – so I find under first it says, select the appropriate definition or definitions when it will be useful to the jury. The court finds that it would be useful to the jury.

RP 1158-59. The Court recognized the two duties are not irreconcilable; the pedestrian has a duty to yield to the vehicle, but if he fails to do so, then the driver has a duty to avoid him to the extent possible. *Id.*

The City also proposed, in part,¹³ WPI 70.03.04: “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.” CP 364. Chin, again, argued the rules of the road do not apply. RP 1162-63. The trial court found the instruction appropriate: “Brenda Nelson is still part and parcel and this would certainly apply to attributing her portion of the fault if nothing else.” RP 1163.

¹³ The City proposed additional language, which was not adopted by the trial court and which is not the subject of this appeal.

4. The Trial Court’s Rulings on Chin’s Motion for Directed Verdict¹⁴

Chin argued his CR 50 motion after both parties rested their cases. CP 316–329; RP 916–940, 1076-88. In his first motion, made May 29, 2018, Chin argued the City owed Chin a duty, and requested the trial court “define that duty and the scope of that duty.” RP 916-17. Chin conceded “whether or not that breach of their duty proximately caused his death will be something that the jury will have to grapple with.” *Id.* The trial court denied Chin’s motion, finding issues of fact existed regarding breach of duty and causation. RP 938-39.

The evidence wasn’t, in the court’s estimation, such that it’s only subject to being possibly viewed in one fashion. And as a result of that, it’s going to be up to the jury to decide to look at the evidence, weigh the evidence, determine the credibility of the evidence and make a determination of what they believe that evidence proves or does not prove. And so, as such, the court is going to find that there is – the plaintiffs have not met the burden of proving that no rational jury on this court find that – could find that the breach of a duty did not occur in this case, and so the court’s going to deny the same.

RP 938-39.

¹⁴ Chin’s assignments of error 2 and 3 pertain to the trial court’s failure to direct a verdict for Chin on the City’s duty and breach and the trial court’s failure to define the existence and scope of the City’s duty, as a matter of law, to the jury. Chin does not dedicate argument to the trial court’s specific failure to grant his motion for directed verdict, but alleges, in his argument, the trial court’s failure to define the City’s duty constituted error.

Chin attempted to reargue his motion for directed verdict the following day, May 30, 2018. RP 1076-88. After colloquy regarding the specific relief sought in Chin's motion for directed verdict, the trial court again denied Chin's motion. RP 1076-88.

With regards to the duty that is owed – that was owed here by the City that applied to Mr. Chin and the accident and whether or not it was breached, let's get back into the jury instructions and when we get specifically to that jury instruction, I think it will make more sense to handle it in that way and address it as we come to those instructions and we have something in front of us that we can try to work from and make decisions based on.

Id.

IV. ARGUMENT IN SUPPORT OF JURY VERDICT

A. Standard of Review

“Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law.” *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

It has, for some years, been the policy of our Washington system of jurisprudence in regard to the instruction of juries, to avoid instructions which emphasize certain aspects of the case and which might subject the trial judge to the charge of commenting on the evidence, and also, to avoid slanted instructions, formula instructions, or any instruction other than those which enunciate the basic and essential elements of the legal rules necessary for a jury to reach a verdict.

Laudermilk v. Carpenter, 78 Wn.2d 92, 100, 457 P.2d 1004 (1969) (affirming use of standard ordinary care instructions and rejecting use of more detailed instructions augmenting the ordinary care instructions). If the court's instructions accurately state the law, are supported by substantial evidence, and allow the parties to argue their respective theories of the case, the jury's verdict should be affirmed. *Hough v. Stockbridge*, 152 Wn. App. 328, 342, 216 P.3d 1077 (2009).

Claimed legal errors in jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). "An erroneous instruction is reversible error only if it prejudices a party." *Id.* "Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading." *Id.* An instructional error is harmless if it had no effect on the verdict or did not prevent a party from arguing his or her theory of the case. *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 861, 313 P.3d 431 (2013).

If a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). A trial court's refusal to give a proposed jury instruction is also reviewed for an abuse of discretion. *State v. Stacy*, 181 Wn. App. 553, 569, 326 P.3d 136, *rev.*

denied, 181 Wn.2d 1008 (2014). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *State v. Cuthbert*, 154 Wn. App. 318, 326, 225 P.3d 407, *rev. denied*, 169 Wn.2d 1008 (2010).

Use of the WPI pattern instructions to accurately state the law is favored. “The *Washington Pattern Jury Instructions* are an immense aid to the bench and bar in selecting appropriate jury instructions. [Citation omitted.] They are to be used in preference to individually drafted instructions, but are not absolutely required.” *Humes v. Fritz Cos., Inc.*, 125 Wn. App. 477, 498, 105 P.3d 1000 (2005).

The trial court’s instructions to the jury about the City’s duty of ordinary care and Chin’s duty to use reasonable care for his own safety met these standards. Therefore, the jury’s verdict should be affirmed.

B. The Trial Court Properly Instructed The Jury on the City’s Duty of Ordinary Care (Assignments of Error 4-7 & 10-15).

Chin argues the trial court misstated the law and deprived him of his ability to argue his theory of the case by using WPis 140.01, 12.06 and 70.06 and language from *Owens v. City of Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956) to instruct on the City’s duty of ordinary care rather than PPIs 22-26, which he argues were “creatively proposed” to account for his conclusion that municipal duty/liability “is simply not adequately defined

in the pattern instructions.” Br. of App., p. 19.¹⁵ Chin did not object to using WPI 140.01 (Instruction No. 9), the instruction premised upon *Owens*, 49 Wn.2d at 191 (Instruction No. 10), and WPI 12.06 (Instruction No. 11) to instruct on the City’s duty to use ordinary care (RP 1089-1094, 1107-1110, 1245).

Using these instructions to instruct the jury on the City’s duty was not error. Furthermore, the trial court did not abuse its discretion by declining to give PPIs 22-26, which were duplicative and over-emphasized Chin’s theory.

1. Chin Did Not Object To The Trial Court’s Instructions 9, 10, and 12 Which Properly Stated the City’s Duty of Ordinary Care (Assignments of Error 4-6)

With limited exceptions, which do not apply here, “the appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 313, 372 P.3d 111 (2016) (“Unless there is a proper objection, jury instructions become the law of the case”). Here, Chin agreed Instruction No. 9, containing WPI 140.01, was “an appropriate instruction.” RP 1094. He did not take exception to giving this instruction. RP 1245. Chin also

¹⁵ Other than the assertion PPIs 22-26 were necessary to define the duty in the pattern instructions, Chin neither cites authority for this proposition nor argues this point in his brief. A party waives an assignment of error not adequately argued in its brief. *State v. Motherwell*, 114 Wn.2d 353, 358 n. 3, 788 P.2d 1066 (1990); RAP 10.3(a)(5).

agreed to Instruction No. 10, containing the language from *Owens*, 49 Wn.2d at 191: “the defense is going to have to get some kind of limitation on their duty that’s addressed in the notes, if this is the limitation on their duty, Plaintiff doesn’t have any objection... It’s fine.” RP 1108. He did not take exception to giving this instruction. RP 1245. Finally, Chin did not oppose Instruction No. 12 (containing WPI 12.06) and did not take exception to its being given. RP 1245. These instructions were agreed to and are law of the case.

Moreover, these instructions were proper, as there is no dispute a City owes a duty of ordinary care to design and maintain its public streets in reasonably safe condition for ordinary travel. *See Wessels v. Stevens Co.*, 110 Wash. 196, 188 P. 490 (1920). There is also no dispute this duty is limited to maintaining roads in reasonably safe condition as opposed to “ideal traveling conditions.” *Owens*, 49 Wn.2d at 191. Likewise, every person (including municipalities) has a duty to see what would be seen by a person exercising ordinary care. *Davis v. Bader*, 57 Wn.2d 871, 873-74, 360 P.2d 352 (1961). WPIs 140.01 and 12.06 and the language cited from *Owens* (the trial court’s instructions 9, 10 and 12, CP 358-59, 361) correctly defines the City’s duty of ordinary care. Chin neither disputed this before the trial court, nor in argument on appeal.

2. Chin Did Not Object To The Trial Court's Instruction No. 13, Reciting WPI 70.06 Which Stated A Person's Right To Assume Others Will Use Ordinary Care (Assignment of Error 7)

Chin assigns error to giving Instruction No. 13. Br. of App., p. 3 (Assignment of Error No. 7). Other than his assignment of error, he does not argue giving Instruction No. 13 was error in his brief. A party waives an assignment of error not adequately argued in its brief. *Motherwell*, 114 Wn.2d at 358 n. 3 (citing RAP 10.3(a)(5)); *see accord, Cowiche Canyon Conservancy v. Bosley*, 118.Wn.2d 801, 809, 828 P.2d 549 (1992). Chin waived his assignment of error; it should not be addressed on appeal.

If this Court reviews Instruction No. 13, WPI 70.06 was proper because it is an accurate statement of the law and supported by the facts of the case. Instruction No. 13 contained a verbatim Washington Pattern Instruction. Under the Comments on Use, the committee cites *Kelsey v. Pollock*, 59 Wn.2d 796, 370 P.2d 598 (1962) for the proposition that it was reversible error to refuse to give this instruction where the evidence showed an issue of fact relating to whether a party (in *Kelsey*, the plaintiff) failed to look before entering an intersection. Here, the City presented evidence that, despite unlimited visibility, Chin failed to see a vehicle traveling towards him, resulting in a factual issue regarding the cause of the accident. 2ndSuppRP 65-67. The City also presented evidence Nelson failed to see

Chin, resulting in a factual issue regarding her comparative negligence and the cause of the incident. 2ndSuppRP 61-63, 65; RP 481. Under *Kelsey*, 59 Wn.2d at 798-99 (1962), a party is entitled an instruction to the jury on its theory of the case where there is substantial evidence to support it. Here, like the defendant in *Kelsey*, the City presented substantial evidence that the jury should consider whether Chin's or Nelson's failure to look was a proximate cause of the collision, justifying this Instruction.

3. The Trial Court Properly Rejected Chin's Proposed Instruction Nos. 22-27 (Assignments of Error 10-15)

While Chin does not dedicate specific argument in his brief regarding PPIs Nos. 22-27, he asserts, generally, that his instructions were "creatively proposed based on Washington case law and not part of the Washington Pattern Instructions" and necessary because WPI 140.01 allegedly does not adequately define a municipality's duty/liability. Br. of App., p. 19. He does not cite to any authority or the record in support of these assertions. *Id.* A party waives an assignment of error not argued with authority or rationale. *See* discussion, *supra*, at IV(B)(2).

If the Court is inclined to review Chin's assignments of error regarding PPIs Nos. 22-27, the City rests on the arguments made before the trial court and the trial court's reasoning for denying the same. *See, supra*, III(C)(1) (City's Statement of Procedural Facts).

Although Chin implies the trial court's duty instructions did not permit him to argue his theory of the case, he did so. *See* RP 135, 144, 147, 151-52, 153-55, 220-22. Thus, Chin is unable to meet his burden of showing prejudice resulted from the use of the standard WPIs and instructions on *Owens*, on the duty owed in negligence cases, as opposed to his proposed instructions overelaborating on the WPI 140.01 statement of the City's duty.

C. The Trial Court Properly Refused to Instruct the Jury on the Washington Recreational Trail Interference Statute (Assignments of Error 1 & 16-18).

PPIs 30-32 (CP 338-340) contain parts of the Washington State Recreational Trail Interference statute ("Trail Interference Statute") and WPIs regarding violation of a statute. CP 338-340. These instructions were rejected as legally inapplicable and unsupported by substantial evidence.

In its entirety, the Trail Interference Statute at RCW 47.30.010 reads:

Recreational Trail Interference.

(1) No limited access highway shall be constructed that will result in the severance or destruction of an existing recreational trail of substantial usage for pedestrians, equestrians or bicyclists unless an alternative recreational trail, satisfactory to the authority having jurisdiction over the trail being severed or destroyed, either exists or is reestablished at the time the limited access highway is constructed. If a proposed limited access highway will sever a planned recreational trail which is part of a comprehensive

plan for trails adopted by a state or local government authority, and no alternative route for the planned trail exists which is satisfactory to the authority which adopted the comprehensive plan for trails, the state or local agency proposing to construct the limited access highway shall design the facility and acquire sufficient right-of-way to accommodate future construction of the portion of the trail which will properly lie within the highway right-of-way. Thereafter when such trail is developed and constructed by the authority having jurisdiction over the trail, the state or local agency which constructed the limited access highway shall develop and construct the portion of such trail lying within the right-of-way of the limited access highway.

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

(3) Where the construction or reconstruction of a highway other than a limited access highway would destroy the usefulness of an existing recreational trail of substantial usage for pedestrians, equestrians, or bicyclists or of a planned recreational trail for pedestrians, equestrians, or bicyclists incorporated into the comprehensive plans for trails of the state or any of its political subdivisions, replacement land, space, or facilities shall be provided and where such recreational trails exist at the time of taking, reconstruction of said recreational trails shall be undertaken.

RCW 47.30.010. In his PPI 30, Chin proposes only the second paragraph of RCW 47.30.010. CP 338. On appeal, Chin argues this statutory language (at paragraph two) should have been a jury instruction because it was “undisputed” the Trail “crossed Van Giesen.” Br. of App., p. 22-23. Chin provides no support for this proposition. *Id.*

The trial court rejected PPI 30, and derivative PPIs 31 and 32.¹⁶ RCW 47.30.010 does not apply to the facts of this case. The trial court found it would be improper to “pull out subsection 2 of this in a vacuum and say that the rest of what it talks about and apply to, doesn’t apply to subsection 2” and found this statute only applies in instances where a trail pre-existed the roadway. RP 1140-41, 1138.

PPI 30, containing RCW 47.30.010, is likewise not supported by substantial evidence. “A party is entitled to a jury instruction only if it has offered substantial evidence to support the instruction.” *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). At trial, only the City’s expert, Ballard, testified to RCW 47.30.010 and he testified the statute is inapplicable. 3rdSuppRP 121-22. Chin neither presented testimony on the applicability of RCW 47.30.010 from his experts nor did he present testimony to rebut Ballard’s testimony this statute does not apply.

First, under subsections (1) and (3), this statute applies only to the construction of highways built across an existing trail (*e.g.*, where construction of a trail results in the destruction of an existing recreational trail (thus, its title: “Recreational Trail Interference”). RCW 47.30.010. As the language of subsections 1 and 3 reflects, the purpose of this statute is to

¹⁶ Considering the trial court’s ruling on PPI No. 30, Chin withdrew PPI Nos. 31 and 32. RP 1141.

preserve and protect existing trails of substantial use when they are “crossed” by later-constructed highways. RCW 47.30.010(1) (“No limited access highway shall be constructed that will result in the severance or destruction of an existing recreational trail of substantial usage... [listing alternatives for replacing the destroyed recreational trail]”). Here, it is undisputed Van Giesen pre-existed both the 1996 construction of the south trail and the 2010 construction of the north trail. 3rdSuppRP 121-22. No highway construction ‘destroyed’ a pre-existing trail.

Second, these trails do not “cross” Van Giesen. *See*, Br. of App. p., 21-22. Ballard explained, “the trail at this point does not cross [Van Giesen]. It ends. South side ends at the sidewalk, and the north end ends at the sidewalk on the north side of Van Giesen.” *See* 3rdSuppRP 121-22. RCW 47.30.010(2) only applies to situations where a highway crosses a recreational trail, and the uncontested testimony shows Van Giesen did not cross a trail. *See also*, Ex 149.

Third, this is not a trail of substantial usage. 3rdSuppRP 121-22. Ballard testified “substantial use” is approximately 25 pedestrians crossing per hour during the peak hour. 3rdSuppRP 123. He explained, given the pedestrian use survey conducted by the City, this alleged crossing had approximately 2% of the threshold. *Id.* at 123-24.

Finally, Chin was not within the class of persons intended to be protected by this statute, since there is no evidence Chin crossed from the south trail to the north trail or that he intended to walk on the north trail. Under the Restatement (Second) of Torts § 286 (1965), for a statute to be applicable on the issue of negligence, the plaintiff must be part of a specific class of persons intended to be protected by the statute. *See Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 486, 474-75, 951 P.2d 749 (1998). Here, Chin's point of impact with the Nelson vehicle is approximately 70' east of the area in between the trailheads. 2ndSuppRP 117-118; Ex. 155. Chin was no longer a trail user at the time of his accident, as he had left the south trail, and there was no evidence he intended to use or was crossing to the trail on the north side of Van Giesen.¹⁷

D. The Trial Court Properly Instructed on the Laws Applicable to Marked and Unmarked Crosswalks and Vehicle and Pedestrian Rights-of-Way (Assignments of Error 8 & 9).

Chin argues the trial court committed reversible error by giving Instruction Nos. 14 and 15 (CP 363-64), which define crosswalks and pedestrian and driver rights of way. Br. of App., pp. 20, 24-25. Instruction

¹⁷ While this argument pertains to duty (and the lack of any City duty to comply with the signage requirements prescribed in the Recreational Trail Interference statute because Chin is not within the class of individuals to be protected by this statute), the City's arguments apply with equal force to a lack of causation. Even if the trial court found the Recreational Trail Interference statute applied, signage for a trail crossing would not have prevented this accident since the accident occurred 70' in advance of the trail.

No. 14, taken from WPI 70.03.05 and supported by RCW 46.61.235, states as follows:

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 with 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.

CP 363. Instruction No. 15, taken from WPIs 70.05 and 70.03.04, incorporating RCW 46.61.240, states, “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.” CP 364. Chin claims these statutes were not applicable to this claim and giving these instructions would “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.” Br. of App., pp. 20, 24-25. These instructions were accurate statements of the law, supported by substantial evidence, and were necessary on comparative fault issues in the case. The trial court’s decision to give these instructions is harmless error because these instructions pertain mainly to issues the jury

did not reach (i.e., the City's affirmative defenses of Chin's contributory negligence and Nelson's comparative fault).

Chin admits "the analysis of the rules of the roadway [RCW Ch. 46.61] would be applicable between the driver, Brenda Nelson and Chin." Br. of App., p. 24. These instructions, reciting the laws regarding crosswalks and vehicle/pedestrian rights of way form the basis for the City's affirmative defenses that Chin was contributorily negligent and Nelson was, in part, comparatively negligent. However, the jury did not reach the issues of contributory/comparative fault. CP 378-82. It found, only, that the City did not breach its duty of ordinary care. *Id.* The alleged error in giving Instruction Nos. 14 and 15 (CP 363-64) is immaterial because these instructions applied only if the jury found the City negligent and reached the issues of contributory and comparative negligence, which it did not reach.

Veit v. Burlington N. Santa Fe Corp., 171 Wn.2d 88, 249 P.3d 607 (2011) is instructive on this point. There, the court held because Washington is a pure comparative negligence jurisdiction (where a defendant can be held liable in negligence even when the plaintiff bears the majority of fault), any error in a trial court's jury instructions on the plaintiff's contributory negligence is *not* a ground for granting a new trial if (i) the jury returned a verdict that the defendant was not negligent; and (ii)

the jury was explicitly informed by the verdict form not to address contributory negligence unless it found the defendant to be negligent. *Id.* at 117. The *Veit* court reasoned that juries are presumed to follow the law, so courts must assume the jury did not consider the plaintiff's contributory negligence in determining whether the defendant was negligent. *Id.*

This case is like *Veit*. The jury was instructed on a summary of the parties' claims, the City's burden to prove contributory negligence, and that the questions on the special verdict form had to be answered in the order presented. CP 355, 367-68, 375-76. The special verdict form required the jury to consider the City's potential negligence first, before reaching any decision on Chin's contributory negligence or Nelson's fault. CP. 380-382. Thus, as in *Veit*, any alleged instructional error regarding contributory negligence is immaterial because the jury returned a negative finding on the City's alleged breach of duty.

Even if this Court determines Instruction Nos. 14 and 15 were material to the jury's ultimate "no negligence" decision, the instructions were proper. Chin agrees Instruction Nos. 14 and 15 are accurate statements of the law; he argues only that the instructions are inapplicable. Br. of App., p. 20, 24-25. Finding the statutes were relevant and supported by substantial evidence, the court used standard WPI instructions to define the laws applicable to crosswalks and vehicle/pedestrian rights of way.

As to relevancy, Instruction Nos. 14 and 15 were relevant in two respects. First, the crosswalk laws were relevant to whether Chin was contributorily negligent for causing this accident. In closing, the City argued to the jury these instructions make it clear that although Chin alleged he was in a designated “crossing.”¹⁸ The two trailheads did not create a legal crosswalk where Chin would have the right-of-way over vehicles traveling on Van Giesen. SuppRP 183-184. The City argued Chin was contributorily negligent for this decision to cross where he did (as opposed to the lighted signalized crosswalk at SR 240 or the lighted marked and unmarked crosswalks at Birch) and for his failure to yield to the Nelson vehicle.

Second, these instructions were relevant to whether the City breached its duty of ordinary care in designing this pedestrian facility in a reasonably safe condition for ordinary travel. Chin claimed City negligence because there was “no evidence in the record that anybody from the City considered the trail crossing at Van Giesen Street.” *See e.g.*, Br. of App., p. 10; SuppRP 134-35. To counter this allegation, the City called chief designer Bryant who testified he considered the crosswalk rules applicable to this location when he designed the 2010 trail. CP 697-701. This included

¹⁸ As noted above, there was undisputed evidence, the point of impact was 70 feet east of the area in-between the trailheads. Therefore, it was undisputed Chin crossed mid-block in an area without a crosswalk and failed to yield to a vehicle, making the crosswalk instruction essential to the City’s comparative negligence defense if the jury reached that issue.

understanding that pedestrians would have priority when crossing at marked or unmarked crosswalks at the intersection of two streets (like Birch), as well as the understanding that pedestrians could cross mid-block as long as they yield to vehicles (i.e., cross in gaps in traffic). *Id.*

In total, the trial court's instructions were accurate statements of the law, applicable to the facts, circumstances, and arguments advanced by the parties.

E. The Trial Court Properly Denied Plaintiff's Motion for Directed Verdict (Assignments of Error 2 & 3).

Chin alleges the trial court erred in failing to grant his motion for directed verdict. *See* Br. of App., p. 2 (Assignments of Error Nos 2 & 3) and pp. 21-22. He argues the Recreational Trail Interference statute applies, and he was entitled to a directed verdict that the City failed to erect "signing sufficient to ensure safety shall be provided." *Id.*, p. 21.

Pursuant to CR 50(a)(1):

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim... such motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

"Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can

say, as a matter of law, that there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 61, 366 P.3d 1246 (2015), *rev. denied*, 185 Wn.2d 1038, 377 P.3d 744 (2016). The Court of Appeals reviews a trial court’s decision on a motion for judgment as a matter of law using the same standard as the trial court; a motion for judgment as a matter of law admits the truth of the opponent’s evidence and all reasonable inferences that can be drawn from it. *Tapio Inv. Co., I v. State Dept. of Trans.*, 196 Wn.App. 528, 538, 384 P.3d 600 (2016).

This Court should uphold the trial court’s denial of Chin’s motion for directed verdict because, viewing the evidence in the light most favorable to the City, there was sufficient evidence or reasonable inference to sustain a verdict for the City.

CR 50(a)(1) requires a movant seeking an order for directed verdict to “specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.” At the trial court, Chin did not specify the judgment sought nor did he articulate the law and facts on which he sought judgment. While Chin provided a written motion in support of his motion for directed verdict, he did not provide a proposed order setting out his specific relief sought. CP 316-29. He pled only, in his conclusion,

that his “Motion for Directed Verdict on these issues should be granted in this case.” CP 329.

Chin’s oral argument was no more insightful. At the beginning of his motion, Chin claimed, “It is apparent that the law in [road cases] are [sic] quite confusing. And the case law suggests that it’s confusing. What I will be seeking is the court to define the duty.” RP 916. He continued, “We’re seeking a directed verdict on the two issues that, yes, the City did maintain a duty and define that duty and the scope of that duty. And also to find that the City has breached that duty. What then will be going to the jury is the issue of whether or not that duty and breached [sic] had actually proximately caused Mr. Chin’s death.” RP 916-17. “[W]hether or not that breach of their duty proximately caused his death will be something that the jury will have to grapple with.” *Id.* Chin sought a motion for directed verdict that the City owed Chin a duty and requested the trial court find the City as a matter of law had breached that duty – leaving for the jury only the issue of causation. *Id.* In response, the City acknowledged it owed a duty of care to Chin, stated in WPI 140.01, but denied the evidence viewed in the light most favorable to the City supported a finding the City had breached its duty or caused Chin’s accident. RP 927.

If it is Chin’s position the trial court erred in denying his motion for directed verdict because the trial court found the Recreational Trail

Interference statute did not apply to the facts of this case, the trial court's reasoning finding the statute does not apply is well-grounded in law and fact for the above-mentioned reasons and is not error. *See* discussion, *supra*, at III(c)(2) and IV(C) (containing the trial court's reasonings behind its finding the Recreational Trail Interference statute is inapplicable because (i) Van Giesen pre-dated the 1996 and 2010 trail construction and therefore did not "destroy" an existing trail; (ii) the trail does not "cross" Van Giesen; and (iii) this trail does not have "substantial" pedestrian use). *See accord*, 3rdSuppRP 121-22 (Ballard testimony regarding the same). In so finding, the trial court held there was no obligation on the part of the City to install signing "sufficient to ensure safety shall be provided," where the statute requiring such signing did not apply to this location. Further, Chin's experts did not opine this statute applied or outline what signage would be sufficient to "ensure safety shall be provided."

Even if the trial court found the Trail Interference statute applied and determined the City breached the mandatory signage provisions therein, the issue of whether the City's purported violation of the Recreational Trail Interference statute was sufficient to find negligence would have remained a question of fact for the jury. Violation of a statute is "not necessarily negligence but may be considered by you as evidence in determining negligence." *See* WPI 60.03 (PPI 32) (CP 340) & RCW 47.30.010; *see*

contra, WPI 60.01 & RCW 5.40.050 (prescribing subject areas for which negligence per se applies).¹⁹ Accordingly, if the trial court applied the Trail Interference statute, this would not have directed a verdict for Chin, as the issue of breach of the duty of ordinary care would still have been submitted to the jury for its consideration.

The trial court found the evidence “wasn’t, in the court’s estimation, such that it’s only subject to being possibly viewed in one fashion.” RP 938. The trial court properly determined Chin had not shown he was entitled to judgment as a matter of law on the issue of the alleged breach of the City’s duty.

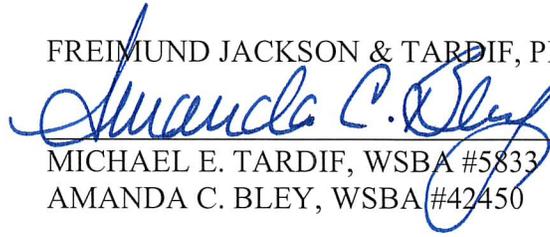
V. CONCLUSION

The trial court properly instructed the jury on the City’s duty to use ordinary care to design and maintain its public ways in a reasonably safe condition for ordinary travel, as well as Chin’s duty to exercise reasonable care for his own safety. Therefore, the jury’s verdict finding that the City was not negligent should be affirmed. Chin’s request for a new trial should be denied.

¹⁹ RCW 5.40.050 prescribes certain areas for which negligence per se applies, none of which apply here.

RESPECTFULLY SUBMITTED this 5th day of September, 2019.

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AMANDA C. BLEY, WSBA #42450

CERTIFICATE OF SERVICE

I certify that the foregoing was served by the method indicated below to the following this 5th day of September, 2019.

George E. Telquist
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1321 Columbia Park Trail
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Regular U.S. Mail, postage prepaid
 Certified U.S. Mail w/ Return
Receipt Requested
 E-Mail to George@tmc.law
 Hand delivery
 Facsimile to
 Electronic delivery via Court of
Appeals ECF

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of September, 2019, at Olympia, Washington.



NATASHA S. CEPEDA

FREIMUND JACKSON & TARDIF P.L.L.C

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