92865-5

NO.

THE SUPREME COURT
OF THE STATE OF WASHINGTON

RONALD C. RASHOFF, and LORI J. RASHOFF, Individually and as Personal Representatives of the Estate of RYAN RASHOFF,

Appellants/Plaintiffs.

v.

THE STATE OF WASHINGTON; and BENJAMIN O. LAMOTTE,

Respondents/Defendants.

BENJAMIN O. LAMOTTE,

Appellant/Plaintiff.

v.

THE STATE OF WASHINGTON,

Respondent/Defendant.

APPELLANTS RASHOFF'S ANSWER TO RESPONDENT STATE'S PETITION FOR REVIEW

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I. INTRODUCTION

This case does not involve any issues of substantial public interest that warrant review by this Court.[1] The Court of Appeals correctly followed and applied the law as set forth in *Wuthrich v. King County*, Slip Opinion No. 91555-5 (2016).[2] *Owen v. Burlington Northern & 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), *review denied*, 169 Wn.2d 1003 (2010).

These cases make it clear that a plaintiff's burden is to show that the roadway in question was not reasonably safe.[3] Once the plaintiff makes this showing, the burden then shifts to the State to show that it fulfilled its duty to provide a reasonably safe road by making reasonable efforts to correct the hazardous condition.[4] Contrary to Defendant State's argument, a plaintiff does not have the burden of showing how the State should have corrected the hazardous condition. Instead, deciding how to remedy the hazard is the responsibility of the State.[5]

Despite the clear holdings of *Wuthrich*, *Owen*, and *Chen*, the State's Petition for Review focuses exclusively on a traffic signal as the

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[1] Appellant Lamotte joins in this Answer and the relief requested by Appellants Rashoff.

[2] *Wuthrich* was decided after the Court of Appeals decision in this case, but the Court of Appeals decision is consistent with this Court's analysis of the applicable law in *Wuthrich*.

[3] *Wuthrich*, Slip Opinion No. 91555-5 at 6; *Owen*, 153 Wn.2d at 788; *Chen*, 153 Wn. App. at 900.

[4] *Ibid.*

[5] *Ibid.*

sole solution for correcting the unsafe conditions at the SR 12/Williams Street intersection. But a traffic signal is just one option available to the State to address the hazard at this intersection. Another option available to the State would have been to lower the speed limit on SR 12 through Mossyrock, as the State has done on dozens of other state highways that pass through small towns. But again, the State has the responsibility for deciding how to correct such hazardous conditions, not the plaintiff.

Defendant State argues that the Court of Appeals erred by relying "on a totality of circumstances analysis that considered reports of past accidents and citizen requests for a traffic light..."[6] This argument ignores this Court's decision two months ago in *Wuthrich v. King County*. In *Wuthrich*, this Court held that a totality of the circumstances analysis applies in highway safety cases like this:

> Whether the roadway was reasonably safe and whether it was reasonable for the County to take (or not take) any corrective actions are questions of fact that must be answered in light of the totality of the circumstances. [*Owen*, 153 Wn.2d] at 788–790; *Chen,* 153 Wn. App. at 901.[7]

The fundamental flaw in Defendant State's argument is that it ignores the applicable duty. The State's common law duty is "to provide reasonably safe roads for the people of this state to drive upon."[8] In its Petition, the State attempts to define its duty solely in terms of MUTCD

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[6] Petition for Review at 4.

[7] *Wuthrich*, Slip Opinion No. 91555-5 at 6.

[8] *Owen*, 153 Wn.2d at 788.

traffic signal warrants.[9] But the State's common law duty to provide reasonably safe roads is not defined solely by the MUTCD.

In *Owen*, this Court explained that governmental entities are held to the same negligence standards as private individuals, and that liability for 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."[10] The issue is whether the road was reasonably safe for ordinary travel, not whether an MUTCD traffic signal warrant was or was not met.[11]

It is well-settled that whether a roadway is reasonably safe is generally a question of fact that cannot be resolved on summary judgment.[12] Likewise, the adequacy of the corrective action taken by the government is generally a question of fact.[13]

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[9] Petition for Review at p. 20 ("The court's analysis should have been limited to whether there was a genuine dispute over whether DOT had complied with the mandatory provisions of the MUTCD and RCW 47.36.020.").

[10] *Owen*, 153 Wn.2d at 787.

[11] Throughout its Petition, the State argues that it did not have discretion to install a traffic signal at this intersection because the intersection did not satisfy MUTCD signal warrants. The State also repeatedly argues that because the intersection did not meet MUTCD requirements, the installation of a traffic signal would have rendered the intersection unsafe by increasing the frequency of crashes. Both of these arguments are belied by the State's actions following the subject collision at this intersection. As discussed *infra*, the State installed a traffic signal at the intersection in 2010 even though it now claims that the intersection did not meet MUTCD signal warrant requirements and that the installation of a traffic signal not warranted under the MUTCD would increase the risks of crashes at this intersection. Petition for Review at 1.

[12] *Wuthrich,* Slip Opinion No. 91555-5 at p. 6; *Owen*, 153 Wn.2d at 788; *Tanguma v. Yakima County*, 18 Wn. App. 555, 563, 569 P.2d 1225 (1977) ("The question of whether a given condition is inherently dangerous is generally a matter upon which reasonable minds may differ and virtually always decided

Juries can and do consider other factors besides the MUTCD in determining whether or not a road is reasonably safe. Here, the Court of Appeals correctly ruled that it is for the jury to assess the extensive crash history at the subject intersection, the factors identified by Plaintiffs' experts as indicating that the intersection was inherently dangerous, the history of citizen complaints, admissions by WSDOT employees that the intersection met MUTCD warrants for a traffic signal, the fact that there are schools nearby, and the State's efforts to address the dangerous conditions at the intersection (flashing yellow and red lights and "Cross Traffic Does Not Stop" signs) and decide whether or not the State's corrective actions were adequate under all of the circumstances.[14]

II. RESTATEMENT OF THE CASE

This case arises from a fatal crash at the intersection of State Route 12 and Williams Street in Mossyrock, Washington that claimed the life of 18-year-old Ryan Rashoff on December 8, 2009. Ryan was a passenger in a pickup truck driven by Ben Lamotte.[15] As Lamotte tried to cross SR 12 in a northerly direction, the pickup truck was hit on the passenger side by a westbound log truck on SR 12, killing Ryan and injuring Lamotte.[16]

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after the fact, that is to say, in the course of a lawsuit.").

[13] *Wuthrich,* Slip Opinion No. 91555-5 at page 6; *Owen*, 153 Wn.2d at 788.

[14] *Owen*, 153 Wn.2d at 789-790.

[15] CP 337.

[16] CP 338-339.

Numerous other collisions had occurred at this intersection. The SR 12/Williams Street intersection experienced 20 reported collisions between March 3, 2003 and January 16, 2009 (the last collision before the December 2009 Lamotte/Rashoff collision). These 20 collisions over a brief six-year period included three fatalities and 23 injuries.[17] Members of the Mossyrock community had in fact petitioned the State to address the hazardous conditions at the intersection following a similar collision involving another high school student in 2007.[18]

Documents produced by the State indicate that the State had determined that the intersection met MUTCD criteria for the installation of a traffic signal. Chad Hancock, the State's designated CR 30(b)(6) representative and WSDOT's Southwest Region Traffic Engineer, stated in a February 21, 2008 e-mail addressed to citizens of Mossyrock[19] that "[t]he intersection does meet 2 of the 8 warrants for a traffic signal."[20] Similarly, a signal warrant analysis performed by the State a matter of days after the subject collision determined that MUTCD Warrant 7/Crash Experience was satisfied.[21] Consistent with its recognition of the need for

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[17] CP 462-463, 481.
[18] CP 357-358, CP 362, CP 417.
[19] This email was sent 21 months ***before*** the subject collision.
[20] CP 341.
[21] CP 664-666.

a traffic signal, the State in fact installed a signal within months after Ryan Rashoff was fatally injured at this intersection.

Both Ben Lamotte and Ryan's parents filed suit against the State of Washington for its negligence in failing to provide a reasonably safe intersection. On February 7, 2014, the trial court entered an order granting Defendant State of Washington's Motion for Summary Judgment and dismissing Plaintiffs' claims against the State. Plaintiffs then appealed the trial court's order and the Court of Appeals reversed.

On appeal, Defendant State argued that the undisputed evidence showed that the Williams Street/SR 12 intersection did not meet MUTCD criteria for installation of a traffic signal, and therefore, it did not breach any duty as a matter of law.[22] The court disagreed with the State's argument, noting that in *Chen v. City of Seattle, supra*, Division One rejected the same argument relied on by the State in this case.[23] The court also noted that the Plaintiffs had presented evidence similar to the evidence produced by the plaintiff in *Chen* "to show that WSDOT breached its duty to keep the intersections reasonably safe for ordinary travel, including evidence of past accidents at the intersection; requests by community members for the installation of a traffic signal; the e-mail from

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[22] *Rashoff v. State*, Slip Opinion No. 45919-1-II at p. 10 (2015).
[23] *Ibid.*

WSDOT's traffic engineer, Hancock, stating the intersection met two of eight warrants for a traffic signal and was on a priority list for the installation of a traffic signal; and the opinions of their experts, Stevens and Gill."[24] The court then concluded that this evidence "created an issue of material fact as to whether WSDOT breached its duty to keep the intersection reasonably safe for ordinary travel sufficient to withstand summary judgment."[25]

The State now asks this Court to dramatically alter the law in highway safety cases by limiting the scope of its duty to provide reasonably safe roads to complying with MUTCD provisions.

III. ARGUMENT

A. Defendant State wants this Court to significantly narrow the scope of its duty to provide reasonably safe roads for the public.

For more than a century, our courts have held that governmental entities have a common law duty "to exercise ordinary care in the *[design] [construction] [maintenance] [repair]* of [their] public *[roads]* to keep them in a reasonably safe condition for ordinary travel."[26, 27]

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[24] *Id.* at page 11.

[25] *Id.* at page 12.

[26] WPI 140.01. "Ordinary travel" means the foreseeable actions of drivers, including foreseeable negligence on the part of drivers. *See, e.g., Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002) (governmental entity "has a duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the foreseeable acts of those using the roadways"). Here, it was foreseeable that a driver in Mr. Lamotte's position could misjudge the speed and distance of an oncoming vehicle and the amount of time required to clear the intersection due to the width of the lanes of SR 12 at this location (there were left

In its Petition for Review, Defendant State asks this Court to radically change Washington's common law governing highway safety claims by redefining the scope of a governmental road authority's duty. According to Defendant State, its duty is defined solely by the MUTCD. But this is not the law. Defendant State does not cite a single case that defines a governmental entity's duty to provide a reasonably safe road as being defined solely by the MUTCD.

Owen v. Burlington Northern & Santa Fe Railroad Co., *supra*, and *Chen v. City of Seattle*, *supra*, directly contradict the State's position. Both cases specifically reject the notion that the scope of a governmental road authority's duty to provide reasonably safe roads is defined solely by legislative enactments or the MUTCD. As explained in *Chen*, a breach of duty may be based on the totality of the surrounding circumstances:

> The city argues that *Chen* can prevail only if she shows that a particular physical defect in the crosswalk itself rendered the crosswalk inherently dangerous or inherently misleading or if she shows that the city was in violation of a statute, ordinance, or regulation concerning maintenance of the crosswalk. The implication of the city's argument is that a trier of fact may not determine, based on the totality of the circumstances, that the city breached its duty of care unless one of these two conditions is satisfied. In effect, the city argues that the scope of its duty to Liu

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turn lanes on SR 12 in addition to the through lanes) and the speed of traffic on SR 12. CP 442-443. In fact, a number of similar collisions had occurred at this intersection in the past, again most likely due to drivers on Williams Street misjudging the speed of traffic on SR 12 and the time needed to safely clear the intersection before traffic on SR 12 enters the intersection. CP 462-463.

[27] This has been the law of Washington for 120 years dating back to *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273 (1895).

> extended only to eliminating actual physical defects or to taking action expressly required by a statute, ordinance, or regulation. The city is incorrect on both accounts.
>
> ....
>
> [A] trier of fact may infer that the city breached the duty of care it owed to Liu based on the totality of the surrounding circumstances.[28]

As also explained in *Chen*, liability in roadway safety cases does not require evidence of a statutory violation or a violation of engineering standards or regulations:

> The city is incorrect, however, in concluding that, because conditions triggering a mandatory duty to consider the installation of traffic signal were not met [under the MUTCD], it had no duty to consider installing such a signal in light of the actual conditions of the roadway. "Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care." *Owen*, 153 Wn.2d at 787, 108 P.3d 1220 (citing *Bauman v. Crawford*, 104 Wn.2d 241, 244-45, 704 P.2d 1181 (1985)).[29]

In *Owen*, this Court set forth a two-step analysis for determining whether a roadway was reasonably safe for ordinary travel:

> [W]hether a condition is inherently dangerous or misleading is generally a question of fact. . . .
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> . . . .
>
> If the roadway is inherently dangerous or misleading, then the trier of fact must determine the

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[28] *Chen*, 153 Wn. App. at 900-901.

[29] *Chen*, 153 Wn. App. at 908.

> adequacy of the corrective actions under all of the circumstances. *E.g., Goodner vs. Chicago, Milwaukee, St. Paul & Pac. RR Co.*, 61 Wn.2d 12, 17-18, 377 P.2d 231 (1962). If the corrective actions are adequate, then the city has satisfied its duty to provide reasonably safe roads.[30]

This Court recently reaffirmed *Owen*'s two-step analysis in *Wuthrich v. King County*:

> Whether the County breached its duty depends on the answers to factual questions: Was the road reasonably safe for ordinary travel, and did the municipality fulfill its duty by making reasonable efforts to correct any hazardous conditions? Wuthrich introduced sufficient evidence to create genuine issues of material fact as to both of these questions.[31]

Based on the *Owen* analysis, it is not the Plaintiffs' burden to establish what the State should have done to make the intersection reasonably safe. The Plaintiffs' burden is simply to prove that the intersection was not reasonably safe, not that there was a mandatory obligation under the MUTCD to install a traffic signal before the collision. Plaintiffs' traffic engineering expert, Edward Stevens, testified that, based on his engineering study of the intersection, and exercising transportation engineering judgment, it was his professional opinion that the intersection was not reasonably safe;[32] the intersection's accident history and the MUTCD traffic signal warrant analysis supported that opinion.[33] As for the traffic signal warrants themselves, it must be remembered that a traffic

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[30] *Owen*, 153 Wn.2d at 788, 789-790.
[31] *Wuthrich v. King County*, Slip Opinion No. 91555-5 at page 6 (2016).
[32] CP 651.
[33] CP 646-651.

signal is only one option available to the State to correct an unsafe intersection.[34] The question for purposes of summary judgment is whether the plaintiff has presented evidence creating a question of material fact as to whether the road location was not reasonably safe, not whether the plaintiff has established that a particular fix should have been used.

That the State recognized safety problems at the subject intersection is clear from e-mails sent by State personnel to members of the public, and the fact that the State had the intersection on its list for the installation of a traffic signal.[35] The fact that the State installed flashing beacons at the intersection and "Cross Traffic Does Not Stop" signs also shows an acknowledgement that there was a problem at this intersection. These are measures that the State does not take at most intersections.

The significant accident history at the intersection, history of citizen complaints, and measures taken by the State to try to address the recognized hazards at this intersection distinguish this case from *Ruff v.*

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[34] For example, the State could have reduced the speed limit on SR 12 in the vicinity of Mossyrock, which would have given vehicles crossing SR 12 more time to clear the intersection before vehicles approaching on SR 12 reached the intersection. *See* MUTCD (2003) at Sec. 4B.04, "Alternatives to Traffic Control Signals" (www.mutcd.fhwa.dot.gov/pdfs/2003/Ch4.pdf) (listing alternatives to traffic control signals to address safety concerns at an intersection, including reducing speeds on the approaches). This Court has recognized that some unsafe road locations may require creative thinking on the part of a governmental entity to address the hazard. *See Boeing v. State*, 89 Wn.2d 443, 448, 572 P.2d 8 (1978) (where there had been a history of accidents involving trucks striking a low underpass, despite a warning sign being posted, the evidence was sufficient to take to the jury the question of whether the State exercised reasonable care under the circumstances; "[t]he jury could reasonably conclude that the situation called for the exercise of some ingenuity in the solution of the problem").

[35] CP 647, CP 341, CP 354.

King County, 125 Wn.2d 697, 887 P.2d 886 (1995), where there was no evidence that the road location was unsafe.[36] Unlike the situation in *Ruff*, the State recognized there was a problem here and had taken measures to try to address it.

B. The State's MUTCD signal warrant analysis is contradictory.

The State's claim that MUTCD signal warrants were never met at the intersection is contradicted by the State's own statements and actions. First, in an email sent 21 months before the collision, WSDOT's Southwest Region Traffic Engineer, Chad Hancock, stated that "[t]he [SR 12/Williams Street] intersection ***does*** meet 2 of the 8 [MUTCD] warrants for a traffic signal" and that "[a]n intersection only has to meet one warrant for us to approve installation [of a traffic signal]."[37] Second, WSDOT had placed installation of a traffic signal at this intersection on its list of planned projects.[38] Third, an Operational Review of the intersection conducted by the State just after the collision concluded that the intersection in fact met the MUTCD Crash Experience warrant for the installation of a traffic signal.[39]

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[36] In *Wuthrich v. King County*, *supra*, this Court clarified that "to the extent that *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2d 886 (1995), has been misread as holding that a municipality's duty is limited to complying with applicable law and eliminating inherently dangerous conditions, we clarify that it is not." *Wuthrich*, Slip Opinion No. 91555-5 at page 5.

[37] CP 341 (emphasis added).

[38] CP 647-648.

[39] CP 665-666 ("There is a recurring occurrence of crashes. Five or more reported crashes, of types susceptible to correction by a traffic control signal have occurred at the intersection within a 12-month period ... Using the

Defendant State claims that it cannot install a traffic signal unless MUTCD signal warrants are met, and that traffic signal warrants were not met at the subject intersection. Defendant State has taken the position that the number of crashes required by the second element of MUTCD Signal Warrant No. 7 (five or more crashes of types susceptible to correction by a traffic signal within a 12-month period)[40] must occur during the ***same year*** in which traffic volumes are measured for purposes of the third element of MUTCD Signal Warrant No. 7:

> The purpose of this element is to evaluate crash frequency relative to exposure to potential crashes (as measured by traffic volume). Thus, ***the traffic volume and crash history from the same time period must be used.*** Using a traffic volume that is literally years after the time period when crash frequency was a concern, as Mr. Stevens does, is contrary to the MUTCD, and does not conform with engineering practices.[41]

Because no crashes susceptible to correction by a traffic signal occurred in the 12 months before the subject collision, the State takes the position that the second element of Signal Warrant No. 7 cannot be satisfied.[42]

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combined crash history and latest traffic volumes, Signal Warrant #7 (Crash Experience) is ***satisfied.***") (emphasis added).

[40] Under the State's analysis, the State would have no potential liability until at least five crashes have occurred at an intersection. Numerous people could die at an intersection without any potential liability on the part of the State because MUTCD warrants require five collisions in a 12-month period before a traffic signal is required. But as discussed in *Tanguma v. Yakima County*, 18 Wn. App. 555, 569 P.2d 1225 (1977), that is not the law. *Tanguma*, 18 Wn. App. at 562 ("Defendant is no more entitled to one free accident than a dog is entitled to one free bite.").

[41] Exhibit A -- *Brief of Respondent* at p. 38 fn. 23 (emphasis added); *see also id.* at p. 35.

[42] *Id.* at p.38.

Yet after only two crashes (including the subject crash) occurred in 2009,[43] the State installed a traffic signal at the intersection in 2010. According to the State's position in this appeal, Signal Warrant No. 7 could not possibly have been met in 2010 because only one crash susceptible to correction by a traffic signal occurred in 2009, and Signal Warrant No. 7 requires five crashes in one year. Despite the State's claim that Signal Warrant No. 7 was not met, it installed a traffic signal in 2010. The actions and words of WSDOT personnel contradict the arguments being made by the State's lawyers in this case. The State's action in installing a traffic signal in 2010 demonstrates that either (1) the State does, in fact, have discretion to install a traffic signal even when MUTCD Signal Warrant criteria are not met, or (2) the State's arguments regarding MUTCD Signal Warrant analysis in this appeal are being made solely for purposes of this case and are contrary to the State's actual Signal Warrant analysis in practice.

It is disingenuous for the State to argue on the one hand that Plaintiffs' expert's analysis is flawed, while on the other hand ignoring the fact that its own engineers used the same methodology and came to the same conclusions as Plaintiffs' expert, Mr. Stevens.

Defendant State also claims that the installation of a traffic signal at the intersection prior to the subject collision would have increased the

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[43] CP 481. Only the subject crash was an "entering at angle" collision that would have been susceptible to correction by a traffic signal. The other crash in 2009 involved a vehicle striking a fixed object. CP 481.

risk of crashes for millions of other drivers. This assertion is also contradicted by the State's actual conduct -- the State listed this intersection on its signal priority listing for the Southwest Region from 2002-2006.[44] In 2006, the intersection had risen to number 13 on the waiting list for signal installation.[45] And the State ***did*** install a traffic signal at the intersection in 2010, despite its claim that MUTCD signal warrant criteria were not met, which refutes the State's claim that the installation of a traffic signal would endanger millions of drivers.[46]

C. The MUTCD allows for the exercise of engineering judgment.

The various standards and recommendations contained in the MUTCD are not a substitute for engineering judgment:

> The decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment. Thus, while this Manual provides Standards, Guidance, and Options for design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment.[47]

The MUTCD specifically provides that Warrants are subject to engineering judgment:

> 95. Warrant – a warrant describes threshold conditions to the engineer in evaluating the potential safety and operational benefits of traffic control devices and is based

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[44] CP 647.

[45] *Ibid.*

[46] CP 648.

[47] 2003 MUTCD, Section 1A.09 Guidance. (www.mutcd.fhwa.dot.gov/pdfs/2003/Ch1.pdf)

> upon average or normal conditions. Warrants are not a substitute for engineering judgment. The fact that a warrant for a particular traffic control device is met is not conclusive justification for the installation of the device.[48]

As discussed above, the common law duty to maintain roads in a condition that is reasonably safe for ordinary travel recognizes that a road location can be unsafe regardless of MUTCD provisions. The common law duty of reasonable care is broader than statutory or regulatory mandates. The common law duty recognizes that there can be situations in which an intersection is not reasonably safe, even though the traffic volume in a given hour is a few vehicles less than what an MUTCD traffic volume warrant requires for installation of a traffic signal. The common law duty recognizes that circumstances evolve over time and that an unsafe condition can develop before the technical requirements of an MUTCD warrant are met. And even the MUTCD itself recognizes that discretion is to be involved in its application, as shown by the fact that it calls for the use of engineering judgment, even with regard to Warrants.

The State attempts to distinguish *Chen v. City of Seattle* on the basis that one of the remedies at issue in *Chen*, a pedestrian safety island, was "a discretionary safety measure under the MUTCD," but that this case involves "a mandatory directive in the MUTCD that traffic signals are not to be installed unless at least one of the eight signal warrants has been met."[49] The State's attempt to distinguish *Chen* fails because the City of

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[48] 2003 MUTCD at Section 1A.13
(www.mutcd.fhwa.dot.gov/pdfs/2003/Ch1.pdf)

[49] *State's Motion for Reconsideration* at p.8.

Seattle made the same argument that Defendant State makes here, which was rejected by the Court of Appeals:

> Also without merit is the city's argument that it did not breach its duty to maintain the crosswalk in a safe condition because the MUTCD did not require it to install additional safety measures at the crosswalk. The MUTCD provides that "[t]he need for a traffic control signal at an intersection . . . shall be considered" if the pedestrian volume exceeds 190 in any one-hour period or 100 in each hour of a four-hour period and there are fewer than 60 gaps per hour during those periods.[50] ***The city maintains that because these conditions were not satisfied, no traffic signal at the intersection of 10th Avenue South and South Jackson Street was warranted. The city is incorrect, however, in concluding that, because conditions triggering a mandatory duty to consider the installation of a traffic signal were not met, it had no duty to consider installing such a signal in light of the actual conditions of the roadway.*** "Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care." *Owen*, 153 Wn.2d at 787, 108 P.3d 1220 (citing *Bauman v. Crawford*, 104 Wn.2d 241, 244-245, 704 P.2d 1181 (1985)).[51]

Contrary to the State's claim, the Court of Appeals in *Chen* rejected the argument being made by the State here, and held that, based on the totality of the circumstances in that case, there were questions of fact as to

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[50] This language regarding pedestrian volumes at an intersection is from the MUTCD's Signal Warrant No. 4, Pedestrian Volume, which is in the same section of the MUTCD as the traffic signal warrants discussed in the State's Motion for Reconsideration. *See* MUTCD (2003) at Section 4C.05, Warrant 4 (www.mutcd.fhwa.dot.gov/pdfs/2003/Ch4.pdf).

[51] *Chen*, 153 Wn. App. at 908 (emphasis added).

whether the intersection was reasonably safe, irrespective of any MUTCD traffic signal warrants.

IV. CONCLUSION

Defendant State's argument that its duty is defined solely by the MUTCD is legally erroneous and would lead to absurd results. In essence, the State is arguing that the Court of Appeals' opinion would force it to act unlawfully in installing a traffic signal contrary to the requirements of the MUTCD. But it should never be a violation of the law to make a road safe. Recognizing this, the Court of Appeals correctly held that Defendant State's duty is to "maintain the intersection in a condition reasonably safe for ordinary travel."[52] Whether or not Defendant State breached that duty is to be determined based on all of the surrounding circumstances. The MUTCD is one factor to be considered by the jury, but is neither the sole factor nor the determinative factor.

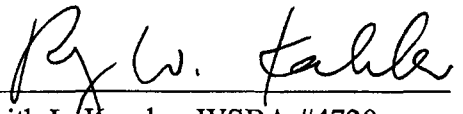
Defendant State cannot escape the fact that its own employees and records used the same methodology and reached the same conclusion as Plaintiffs' transportation engineering expert Edward Stevens. The fact that the State had installed flashing lights and "Cross Traffic Does Not Stop" signs at the intersection, and the fact that the State had the intersection on a list for the installation of a traffic signal, show that the State recognized that there were safety concerns at this intersection. The prior accident history, which included two collisions that resulted in three

[52] *Rashoff v. State*, Slip Opinion No. 45919-1-II at page 9.

fatalities,[53] the proximity of the intersection to schools, and the citizen complaints about the dangerous condition of the intersection, are all factors that must be considered in determining whether the State breached its duty to provide a reasonably safe road. The fact that the State hired a forensic expert in this case who disagrees with Mr. Stevens' analysis and the State's own analysis simply demonstrates that there are questions of material fact, and that the Court of Appeals properly reversed the summary judgment in favor of Defendant State.

Because the Court of Appeals correctly followed and applied the law, this case does not involve any issues of substantial public interest that warrant review by this Court. Plaintiffs Rashoff therefore request that Defendant State's Petition for Review be denied.

Respectfully submitted this 1st day of March, 2016.



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[53] CP 361-362, CP 462-463, 481.

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document as follows:

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Exhibit A

NO. 45919-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONALD C. RASHOFF, and LORI J. RASHOFF, Individually and as Personal Representatives of the Estate of RYAN RASHOFF,

Appellants,

v.

THE STATE OF WASHINGTON; and BENJAMIN O. LAMOTTE,

Respondents.

BENJAMIN O. LAMOTTE,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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reaching this conclusion, and, thus, the trial court's ruling should be affirmed.

b. Mr. Stevens' Analysis Of Signal Warrant No. 7 Did Not Follow The MUTCD Requirements Or Conform With Accepted Engineering Practices

The methodology Mr. Stevens used in his analysis of signal warrant No. 7 was similarly flawed. Signal warrant No. 7 provides the methodology for analyzing the crash history at an intersection and "is intended for application where the severity and frequency of crashes are the principal reasons to consider installing a traffic control signal." CP at 160, 490. Here, there were 13 "enter at angle" collisions at the Williams Street/SR 12 intersection between 2003 and Mr. Lamotte's collision. By way of perspective, it is undisputed that more than 11.7 million vehicles drove through this intersection over that same period without incident. CP at 206.

The experts agree all three criteria must be met for signal warrant No. 7 to apply: (1) the engineer must attempt an "adequate trial of alternatives with satisfactory observance and enforcement" in an attempt to reduce the crash frequency; (2) there must be five or more reported crashes, of types susceptible to correction by a traffic control signal, occurred within a 12-month period; *and* (3) the traffic volume at the intersection must meet certain minimum levels. CP at 466, 490 (text of signal warrant No. 7).

By choosing to completely disregard one of the required elements of signal warrant No. 7, Mr. Stevens adopted a methodology that was both inconsistent with the MUTCD and failed to conform with any accepted engineering standard or practice. CP at 599-600. For this reason alone, the trial court correctly rejected Mr. Stevens' analysis of signal warrant No. 7 under ER 702. *Lakey*, 176 Wn.2d at 918-19.

Second, as demonstrated above, it is undisputed there were no crashes susceptible to correction by a traffic signal in the 12 months prior to Mr. Lamotte's collision.[23] Thus, the second element of signal warrant No. 7 cannot be satisfied. Third, Mr. Stevens concedes he used the same flawed traffic volume data from his analysis of signal warrant No. 1 to

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[22] Appellants mistakenly suggest the effectiveness of the corrective action taken by WSDOT presents a question of fact. Opening Br. at 31. They are mistaken. Again, the signs installed by WSDOT did not just reduce crashes at the intersection, *they completely eliminated them*. Thus, reasonable minds can only conclude the measure taken by WSDOT was both appropriate and successful. *Hartley*, 103 Wn.2d at 775. Moreover, Appellants' contention demonstrates a fundamental misunderstanding of signal warrant No. 7. Warrant No. 7 required WSDOT to implement an alternative measure to try and reduce crash frequency, and, through further study, determine its effectiveness. WSDOT did both here. And, of course, it is undisputed the action taken by WSDOT was **100 percent successful** in reducing crashes for more than two years. Indeed, the effectiveness of WSDOT's action was only called into question *because of* Mr. Lamotte's collision. Thus, signal warrant No. 7 "could not have been and was never satisfied before Mr. Lamotte's collision." CP at 689-90, 792-93. It is undisputed WSDOT installed a traffic signal immediately after it determined that all requirements of signal warrant No. 7 were met. Specifically, the December, 2009 traffic study showed that the traffic volume had increased since the traffic study completed just seven months earlier, and, with Mr. Lamotte's collision, WSDOT determined that the alternative measures it had employed were no longer sufficient to prevent "enter at angle" crashes. CP 689-91, 791-92.

[23] The purpose of this element is to evaluate crash frequency relative to exposure to potential crashes (as measured by traffic volume). Thus, the traffic volume and crash history from the same time period must be used. Using a traffic volume that is literally years after the time period when crash frequency was a concern, as Mr. Stevens does, is contrary to the MUTCD, and does not conform with engineering practices. CP at 690-91.

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Attached for filing, please find Appellants Rashoff's Answer to Respondent State's Petition for Review regarding the matter below.

Thank you.

Kerry Fuller, Legal Assistant

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NO.

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