NO. 93866-5

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,

v.

THE STATE OF WASHINGTON; and BENJAMIN O. LAMOTTE,

Respondents/Petitioners.

STATE OF WASHINGTON'S PETITION FOR REVIEW

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I. INTRODUCTION

This suit arises from a collision at the intersection of State Route 12 (SR 12) and Williams Street in Mossyrock, Washington. Plaintiff Ben Lamotte drove from the Williams Street stop sign directly in front of a clearly visible, fast-approaching 26,000 pound log truck. Plaintiffs contend that DOT breached the standard of care because it did not install a traffic signal at the intersection prior to the collision.

The superior court properly granted summary judgment because under well-established engineering practices, a traffic signal can only be installed at an intersection that satisfies at least one of the mandatory, non-discretionary criteria (which are called "signal warrants") in the Manual of Uniform Control Devices (MUTCD). These signal warrants are the product of more than five decades of research and highway experience; it is the engineering standard used by every transportation agency in the United States. And, critical to the summary judgment ruling below, RCW 47.36.020 directs DOT to comply with the MUTCD signal warrant requirements before installing a signal. The signal warrant criteria are mandatory because it is undisputed that the installation of a traffic signal at an intersection that does not satisfy any of the signal warrants increases the risk of crashes at that site—it makes the intersection less safe. CP at 125, 533, 593. The trial court properly granted summary judgment because the undisputed evidence established that none of the signal

warrants were met prior to plaintiffs' accident. Therefore, DOT's decision not to put in a signal at the intersection could not have been negligent because installing a signal under the circumstances shown by the summary judgment record would have been unlawful.

The Court of Appeals misunderstood the record and thus misapplied the MUTCD signal warrant criteria to reach the erroneous conclusion that a genuine dispute of fact existed as to whether two of the signal warrant criteria had been met. *Rashoff*, slip op. at 11. But there is no genuine issue of material fact.

This Petition, however, is not about correcting a Court of Appeals' error that reversed and remanded a summary judgment. Rather, it is about the fundamental flaw in the Court of Appeals analysis. Specifically, the ruling misanalyses the breach of duty question and suggests that DOT must violate the standard of care (mandatory signal warrant criteria) in order to comply with a totality of circumstances analysis. If not corrected, this approach could lead to holding DOT liable for failing to install a traffic signal at an intersection when undisputed engineering standards indicate that doing so would likely increase the number of crashes and make the intersection less safe, and violate the MUTCD and RCW 47.36.020.

This ruling puts DOT in an untenable position. It can face potential liability for complying with the nondiscretionary engineering standards as mandated by statute, or under the opinion below, face a "totality" examination that contradicts its statutory duty and knowingly makes an intersection less safe by installing a traffic signal where the MUTCD signal warrants are not met.

This Court should grant review. The Court of Appeals error and its reasoning undermines the legal mandate of the Legislature that directs DOT's compliance with accepted engineering standards in order to keep roads safe.

II. IDENTITY OF PETITIONER

The petitioner is the State of Washington, Department of Transportation.

III. COURT OF APPEALS DECISION

DOT seeks review of the decision of the Court of Appeals, Division II, in *Rashoff v. State*, No. 45919-1-II, 2015 WL 6440967. (Wash. Ct. App. Oct. 20, 2015) (unpublished). The State's motion for reconsideration was denied on January 8, 2016. The slip opinion and order denying motion for reconsideration are in Appendix (App.) at 1-2.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the superior court properly grant summary judgment where (i) the mandatory, nondiscretionary MUTCD signal warrant criteria

were not met and therefore the installation of a traffic signal was prohibited by RCW 47.36.020; and (ii) it is undisputed that installation of a traffic signal where none of the signal warrants are met increases the likelihood of crashes at that intersection?

2. Can a totality of circumstances analysis be a basis for highway design liability when the negligence theory is based upon the failure to install a traffic signal and the installation of a traffic signal was prohibited by mandatory, nondiscretionary provisions of the MUTCD and RCW 47.36.020?

V. STATEMENT OF THE CASE

The intersection of SR 12 and Williams Street consists of one eastbound and one westbound lane, with left turn lanes in both directions. Overhead flashing yellow lights caution drivers traveling on SR 12 of the intersection with Williams Street. CP at 204-05. Overhead flashing red lights and posted stop signs tell drivers on Williams Street to stop and yield the right-of-way to traffic on SR 12. CP at 215. In addition, DOT attached "CROSS-TRAFFIC DOES NOT STOP" signs to the stop signs emphasizing the need for Williams Street traffic to yield the right of way to vehicles traveling on SR 12. CP at 204-06.

As a 19-year-old resident of Mossyrock, plaintiff Benjamin Lamotte was familiar with the intersection, and drove through it almost daily. On December 8, 2009, Mr. Lamotte drove north on Williams Street

in his Ford F-150 pick-up truck and stopped at the intersection with SR 12. Mr. Lamotte had an unobstructed view of more than 2,000 feet looking at the vehicles approaching from the east. CP at 187.

Mr. Steen, who was in his 1997 purple Peterbilt log truck, drove towards the intersection from the east on SR 12. CP at 283-84. His empty log trailer rested on the truck's bunk assembly. CP at 194. As Mr. Steen approached the intersection he saw Mr. Lamotte's pick-up truck stop at the Williams Street stop sign. Mr. Steen initially reported that Mr. Lamotte suddenly accelerated from the stop sign directly into his westbound lane. Mr. Steen later indicated that Mr. Lamotte initially pulled into the closer, eastbound lane of SR 12 and stopped. Mr. Steen concluded that Mr. Lamotte saw his log truck and planned to remain stopped in the eastbound lane until his log truck cleared the westbound lane of the intersection. CP at 280-81.[1] Tragically, and for reasons that remain unknown, Mr. Lamotte did not wait.

Without warning, and with Mr. Steen less than 300 feet from the intersection, Mr. Lamotte pulled directly in front of the log truck. CP at 199-200, 238-39. Mr. Steen had no time to stop and his log truck struck

[1] DOT's expert, Nathan Rose, an accredited traffic reconstruction expert separately analyzed both descriptions of the accident. He concluded that Mr. Lamotte caused the collision by either entering the intersection when it was unsafe to do so or failing to fully utilize the acceleration capacities of his pick-up truck as he travelled through the intersection. Accounting for all versions of the accident, Mr. Lamotte alone controlled the sequence of events that caused this collision. CP at 174-80, 201-202.

the pick-up truck on the passenger side. CP at 286-87. The passenger, Ronald Rashoff, died at the scene of the accident; Mr. Lamotte suffered significant injuries. CP at 121, 253. Mr. Lamotte has no recollection of the events leading up to the accident. CP at 267.

A. The Superior Court Grants Summary Judgment

Messrs. Lamotte and Rashoff filed separate lawsuits against DOT, which were consolidated. CP at 21. DOT filed a motion for summary judgment. CP at 305. In their initial response the plaintiffs, relying on the opinion of their engineering expert, Edward Stevens, alleged that DOT violated the signal warrants of the MUTCD by failing to install a traffic signal at the intersection prior to the accident. CP at 513. However, Mr. Stevens reached his opinion because he misinterpreted and incorrectly analyzed the traffic volume data, an error he later conceded. CP at 534, 596, 646-47, 684-86, 789-90. The trial judge concluded these miscalculations rendered his opinion inadmissible. CP at 643-44.

Recognizing this point was critical to the negligence claim, the trial court gave plaintiffs an opportunity to correct the flaws that rendered Mr. Stevens's analysis inadmissible. Mr. Rashoff submitted a supplemental brief (CP at 391) and declaration from Mr. Stevens (CP at 645). But Mr. Stevens was unable to correct his miscalculations. Plaintiffs, however, changed their legal position and argued that compliance with the

MUTCD was optional. CP at 394. The trial court disagreed, and on January 7, 2014, it issued a letter opinion that dismissed plaintiffs' lawsuits against DOT. At their request, the Court stayed the Rashoffs' negligence action against Mr. Lamotte and entered final judgment as to DOT under CR 54(b). CP at 746.

B. The Court of Appeals Reversed Based On An Unsupported Conclusion That The Record Showed Some Evidence That Some Signal Warrants Were Met

On appeal, plaintiffs argued that the trial court erred in excluding Mr. Stevens' testimony. The Court of Appeals quoted from the trial judge's letter opinion where Judge Wickham stated that unless Mr. Stevens is able to correctly apply the MUTCD, his testimony would not be admissible. Slip op. at 6 quoting CP at 643.[2] Despite this unequivocal evidentiary ruling, the Court of Appeals stated in footnote 5 that the superior court never struck Mr. Stevens' testimony and, at Slip op. at 8-9, declined to address admissibility of Mr. Stevens' testimony based on its earlier faulty conclusion that the superior court never struck it. At the same time, the Court of Appeals recognized the erroneous analysis of the signal warrants done by Mr. Stevens. Slip op. at 5-6.

The Court of Appeals reversed the trial court's grant of summary judgment based upon its conclusion that the plaintiffs raised a genuine

[2] The trial court mistakenly cited ER 701 in its letter opinion. However, the actual quote cited by Judge Wickham was taken directly from ER 702. Both the quote and the context make it clear the reference to ER 701 was a scrivener's error.

issue of material fact. Its ruling on this point claimed disputed evidence as to whether the MUTCD traffic signal warrants had been met and whether a traffic signal should have been installed. The ruling also cites one expert's opinion that the roadway was inherently dangerous because of the width of the lanes and the time it took to cross them. Slip op. at 12.

DOT argued that the MUTCD signal warrant criteria were mandatory and that if none of the signal warrant criteria were met, DOT was prohibited by law from putting in a signal warrant (*see*, *e.g.*, RCW 47.36.020 directing DOT to comply with the provisions of the MUTCD). *See*, *infra*, 10.

The Court of Appeals did not address the mandatory nature of the MUTCD signal warrant criteria. To the contrary, the Court of Appeals relied on a totality of circumstances analysis that considered reports of past accidents and citizen requests for a traffic light, along with the unsupported conclusions of the plaintiffs' experts to create a genuine issue of fact as to whether DOT breached its duty to keep the intersection reasonably safe for ordinary travel. Slip op. at 11.

VI. REASONS WHY REVIEW SHOULD BE GRANTED

While many provisions of the MUTCD are discretionary, the signal warrant criteria for the installation of a traffic signal or four-way stop are not. CP at 535, 594. These provisions are mandatory. The Court

of Appeals approach to reviewing this summary judgment ignored the proper legal framework for the claim and introduced a flawed analysis of the breach of duty that presents a significant question of public importance requiring this Court's review. RAP 13.4(b)(4).

A. DOT Is Required By Law To Comply With The MUTCD Signal Warrants

The Legislature directed DOT and other transportation agencies to comply with the MUTCD. RCW 47.36.020 provides:

> Traffic control signals.
> The secretary of transportation shall adopt specifications for a uniform system of traffic control signals consistent with the provisions of this title for use upon public highways within this state. Such uniform system *shall correlate with and so far as possible conform to* the system current as approved by the American Association of State Highway Officials and as set out in the manual of uniform traffic control devices [MUTCD] for streets and highways.

(Emphasis added.) *See also* RCW 47.36.050, .110 (stop sign must conform to the MUTCD); RCW 47.36.053 (the placement and maintenance of traffic devices on highways must conform to the adopted provisions of the MUTCD); RCW 36.86.040 (counties are directed to conform to the MUTCD).

The MUTCD provides that: "**A traffic control signal should not be installed unless one or more of the factors described in this chapter**

are met." CP at 486, 535, 594; *see* App. 2.[3] The trial judge correctly concluded there was no genuine dispute; none of the eight signal warrants were met at the intersection prior to the accident in this case. CP at 722, *Rashoff*, slip op. at 7. DOT could not have undertaken the "fix" proposed by plaintiffs without violating the law, and the legal duty it had to all motorists to reject modifications to the intersection that would make it less safe.

The eight signal warrants require a comprehensive evaluation of: traffic speed; average traffic volume and the corresponding gaps available for the disfavored traffic (*e.g.*, those vehicles that are required to yield the right of way to cross traffic); the number and type of lanes on the respective roads; the crash experience at the intersection; and the intersection's relationship to other intersections, the highway network, school crossings, and pedestrian volume. CP at 464.

The signal warrants "define the minimum conditions under which installing traffic signals might be justified." CP at 126. The potential for increasing the frequency of crashes is so significant that the MUTCD warns transportation officials that "consideration should be given to providing alternatives to traffic control signals even if one or more of the signal warrants has been justified." CP at 126.[4]

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[3] *See also* U.S. Department of Transportation Manual of Uniform Traffic Control Devices (2003 ed.), http://mutcd.fhwa.dot.gov/htm/2003/html-index.htm.

[4] Warrant 7, Crash Experience: This Signal Warrant is "intended for application where the severity and frequency of crashes are the principal reasons to consider installing a

Tellingly, plaintiffs initially argued that DOT was statutorily required to comply with the MUTCD and was negligent for failing to do so here, relying on the erroneous conclusions of their experts that the signal warrants were met. CP at 513 ("The MUTCD has been adopted as law in Washington. . . . [DOT] must comply with the provisions of the MUTCD."). But after DOT exposed the errors made by plaintiffs' experts and established that the MUTCD warrants had not been met, plaintiffs argued that compliance with the MUTCD did not matter. CP at 674.

If DOT had installed a traffic signal when the signal warrants had not been met and the number of accidents had increased, as engineering research and experience shows it would, the persons involved in those accidents would have had strong liability claims against DOT because of its violation of mandatory provisions of the MUTCD. CP at 124, 163 (four-way stop would have resulted in high-speed, rear-end collisions); *Kitt v. Yakima Cnty.*, 93 Wn.2d 670, 673-74, 611 P.2d 1234 (1980) (MUTCD is deemed to have the force of law). The Court of Appeals' decision should have focused on one narrow question—whether there was a genuine dispute of fact over whether any of the MUTCD signal warrants

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traffic control signal." The MUTCD goes on to state that the need for a traffic control signal shall be considered if an engineering study finds ***all*** **of the following conditions are met:**

> **A...Adequate trial of alternatives with satisfactory observance and enforcement has failed to reduce the crash frequency...."**

App. 3; CP at 490-91 (emphasis added).

were met. If there was no genuine dispute, then DOT had no discretion to install a signal and summary judgment was proper.[5]

When a highway design liability claim is based upon a negligence theory that would have required a transportation agency to violate a mandatory, nondiscretionary provision of the MUTCD and RCW 47.36.020, summary judgment should be granted. The analysis of the Court of Appeals which reaches the opposite result warrants review pursuant to RAP 13.4(b)(4).

B. Rather Than Focus on the Proper Framework Provided by the MUTCD Warrants, the Court Of Appeals Reversed Summary Judgment By Citing a Totality Of Circumstances Test in Conflict with the Mandatory, Nondiscretionary MUTCD Requirements

As previously noted, many provisions of the MUTCD are discretionary. Traffic signal warrant criteria are not. Unless one of the criteria has been met, transportation agencies are directed not to install a traffic signal, and that is because decades of engineering data, studies and analysis establish that when these minimum criteria are not met, the installation of a traffic signal increases the probability of crashes; i.e., it makes the road less safe. CP at 125, 533, 593.

The Court of Appeals, however, relied on "totality of circumstances" approach that imposes a standard of care that may neither

[5] *See generally* Part C, outlining how the Court of Appeals decision misunderstood the facts and misapplied the MUTCD signal warrant criteria.

reflect nor be consistent with the law and accepted engineering standards. By untethering this test from the mandatory engineering standards, the Court of Appeals transforms the "totality of circumstances" test into one that can be met by "any circumstance" alleged. It is the reversal of summary judgment based on evidence that is immaterial to the MUTCD warrants but relevant to a "totality of circumstances" that must be corrected.

While the role of discretionary engineering standards should be significant in determining the standard of care, the effect of mandatory MUTCD provisions are conclusive. The mandatory MUTCD provisions define what facts are material and what facts are immaterial when the alleged breach of duty is the government's failure to place a traffic signal.

As DOT's expert explained:

> It is improper to expect or demand transportation agencies to risk the safety and lives of millions of drivers and abandon accepted traffic engineering principals to try and prevent a single driver from taking an unreasonable, dangerous risk that causes a terrible accident.

CP at 691-92.

The Court of Appeals error is shown when it compares DOT's argument to an argument made by the City of Seattle in *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010). *Rashoff*, slip op. at 10. The *Chen* decision is

distinguishable because it involved a discretionary application of the MUTCD. *Chen* dealt with the installation of a pedestrian island in a crosswalk. The installation was a discretionary safety measure under the MUTCD. As indicated by the facts in *Chen*: the City initially installed such a pedestrian island which prevented pedestrian accidents. It then later removed the pedestrian island after which pedestrian accidents, including the plaintiff's, resumed. A question of fact existed whether the City affirmatively made a safe road unsafe by removing the pedestrian island.

There is no case law in Washington addressing the situation presented here, where MUTCD standards contain a mandatory restriction on a transportation agency's action—the installation of a traffic signal, when none of the signal warrants were met.[6] Where the Legislature has directed DOT to comply with the MUTCD, RCW 47.36.020, DOT should not be held liable for failing to install a traffic signal when the MUTCD prohibited it from doing so and doing so would have made the road less safe.

C. The Court of Appeals Misunderstood And Misapplied The MUTCD's Signal Warrant Criteria Erroneously Concluding

[6] The State anticipates that plaintiffs' may argue that the allegations in *Chen* also related to a failure to install a traffic signal and therefore the MUTCD criteria are discretionary rather than mandatory. However, in *Chen* the City of Seattle never argued that it was prohibited from installing a traffic signal unless one of the signal warrants were met. The City never raised the mandatory nature of the signal warrant requirement nor did the court in *Chen* address that issue. Since the legal theory presented by the State in this case was not discussed in *Chen* that case is not controlling here. *See State, ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 449, 48 P.3d 274 (2002), quoting *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

That A Question Of Fact Existed As To Whether Any Of The Warrants Were Ever Met Prior To The Accident In This Case

Had the Court of Appeals focused on the narrower framework that governs traffic signals, it would have recognized that there was no evidence creating a genuine issue of fact that a signal warrant existed, and it would have affirmed the superior court.

1. Plaintiffs Cannot Rely on Projected, Admittedly Unrealized Traffic Volumes To Create A Question Of Fact

The Court of Appeals focused on an email by a DOT traffic engineer, Mr. Hancock, claiming it was evidence that the intersection might have met two of eight warrants for a traffic signal. *Rashoff*, slip op. at 11. But it is undisputed the email relied on a projected increase in future traffic volumes that never occurred. All transportation agencies including DOT, must plan highway construction projects years in advance using projected changes in traffic volume. Every single traffic study for this intersection demonstrated that the actual traffic volume never rose to the level projected by DOT or required by the MUTCD to satisfy Warrant 1.[7] CP at 532-43. In short, Mr. Hancock's email is on its face based on a

[7] WSDOT studied the subject intersection four times between 2003 and Mr. Lamotte's December, 2009 accident—2003, 2006, 2007, and May, 2009. CP at 139. It is undisputed that none of the traffic counts in any of these studies met the email projections, much less the signal warrant requirements. It is also undisputed that no other traffic counts were conducted of this intersection by WSDOT, nor did plaintiffs identify any traffic counts conducted by any other entity. CP at 594. Further, plaintiffs could not identify any engineering principal, standard or guideline that permits or justifies the use of unverified traffic volume *projections*, especially where, like here, those projected traffic volumes were never realized.

premise that did not come to be, and, therefore, cannot create a material issue of fact about the conditions at the time of the accident.

2. Plaintiffs' Reliance On A "History Of Accidents" Is Insufficient To Demonstrate That An Intersection Is Unsafe

Second, reliance on a "history of accidents" also is insufficient to satisfy the MUTCD signal warrants or create a material issue of fact. A history of past accidents standing alone does not warrant or justify the installation of a traffic signal. *Cho v. City of Seattle*, 185 Wn. App. 10, 341 P.3d 309 (2014) (the mere fact that an accident previously occurred does not necessarily give rise to an inference of negligence). Because the installation of traffic signals actually increases the likelihood of crashes, even when an intersection has a history of enter at angle crashes,[8] MUTCD Warrant 7 requires an "adequate trial of alternatives, to be tried before a signal can be installed."

The last accident at this intersection prior to this case involved a driver who thought cross-traffic was required to stop. DOT installed signs on each side of Williams Street indicating that "CROSS-TRAFFIC DOES NOT STOP," as the required alternative to installing a traffic signal. CP at 206. And, it worked. Over the ensuing two years, more than four

[8] An "enter at angle" crash is one where the vehicle entering the intersection is required to grant right of way to traffic coming from the right or left but fails to do so. CP at 463. *See* MUTCD Warrant 7, Crash Experience; CP at 124-26, 163.

million cars safely crossed through the intersection without *any* enter at angle accidents. CP at 689-90.

To suggest there was a dispute of material fact about Warrant 7, the crash experience signal warrant, the Court of Appeals relied on a statement by plaintiffs' expert where he opines that the absence of accidents from the time the "cross-traffic does not stop" signs were installed to the accident in this case was "more likely explained by normal varying in the crash frequency." CP at 649. The Court of Appeals concluded that this statement was admissible. (Slip op. at 11, n.9.) But under the MUTCD, as long as there weren't any enter at angle crashes after the installation of a less-restrictive alternative, the warrant was not met and the installation of a traffic signal was prohibited.[9]

Under Warrant 7, DOT was required to try an alternative prior to the installation of a signal or four-way stop, and could not ignore the fact that the alternative it chose was completely successful in preventing accidents until the accident in this case occurred. *See* n.4, *supra*, at 10-11 (490-91.) By misinterpreting the record and misapplying MUTCD

[9] Nor was Mr. Steven's speculation the type of evidence a jury could rely upon. DOT's expert did a critical rate analysis of the complete cessation of accidents following installation of the highway signs and determined that there was less than a 0.5 percent chance that the change in the crash frequency (from before the installation of the warning signs compared with after the signs were installed) could be due to randomness. This shows a 99.5 percent certainty that the change in crash history was not random (CP at 599-600), which makes Mr. Stevens' speculation immaterial, not a genuine issue that warrants a trial. *Cho*, 185 Wn. App. at 20 ("To preclude summary judgment, an expert's affidavit must include more than mere speculation or conclusory statements.") *Bowers v. Marzano*, 170 Wn. App. 498, 505, 290 P.3d 134 (2012).

engineering standards, the Court of Appeals found a question of fact where none exists.[10]

3. The Unsupported Criticisms Of The Width Of The SR 12 Travel Lanes Had No Causal Relationship To Mr. Lamotte's Collision

On page 12 of its opinion, the Court of Appeals references the opinion of plaintiffs' expert, Dr. Richard Gill, and his conclusion that the roadway itself was inherently dangerous because of the width of the lanes and the time it takes to cross them. However, the Court of Appeals ignored the undisputed evidence that the lane widths were the same dimension found on state highways across the state and complied with highway engineering standards. Indeed, intersections like the one at issue in this case exists across America.[11] However, even if one accepted Dr. Gill's unsupported criticisms of the standard lane width at this intersection, he

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[10] Mr. Stevens also suggests WSDOT should have installed a four-way stop on this highway as an "interim" measure until a traffic signal was installed. CP at 468. Again, his suggestion is directly contrary to mandatory requirements in the MUTCD. Under the MUTCD, consideration of a four-way stop at an intersection is only appropriate when the volume of traffic on the intersecting roads is approximately equal, and, again, states that consideration should only be given to this option when less intrusive measures are first attempted. It is undisputed neither of these factors were met. CP at 535, 600-01. Thus, installation of a four-way stop on this highway would have violated both the statutory MUTCD requirements and accepted engineering standards, and likely increased the number of high speed, rear-end collisions on SR 12. CP at 161.

[11] In *Ruff v. King Cnty.*, 125 Wn.2d 697, 706, 887 P.2d 886 (1995), this Court quoted from *Leber v. King Cnty.*, 69 Wash. 134, 136-37, 124 P. 397 (1912):

> "We think it will require no argument to make plain the fact that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill or road in the state. The same hazard may be encountered a thousand times in every county of the state."

As in *Ruff*, plaintiffs' experts fail to explain how the intersection was unreasonably safe. In *Ruff*, this Court unanimously affirmed summary judgment in favor of King County. *See Ruff*, at 706, n.5. *See* App. 4, aerial photo of the intersection of Williams Street and SR 12.

never opined that the lane widths on SR 12 were a proximate cause of Mr. Lamotte's collision, nor is there any evidence in the record to substantiate such a theory.[12] CP at 435-444.

Given the absence of any evidence establishing that the lane widths on SR 12 were a proximate cause of the accident, there is no mention of that allegation in the portion of the Court of Appeals decision that analyzed proximate cause. *Rashoff*, slip op. at 12-13.

Dr. Gill also suggests the sight distance available to Mr. Lamotte from the stop sign on Williams Street was *too great*. Dr. Gill opined that Mr. Lamotte would have been unable to perceive the speed of Mr. Steen's truck when it was greater than 390 feet from the intersection, and, thus, could not have gauged whether it was safe to cross. CP at 443. However, it is undisputed that concern was not a cause of Mr. Lamotte's collision. Specifically, the unchallenged evidence established Mr. Steen was *less than 300 feet away* when Mr. Lamotte accelerated into the intersection. CP at 199-200. Thus, Dr. Gill's opinion confirms that Mr. Lamotte was able to accurately estimate the log truck's speed and Mr. Lamotte he knew or should have known it was unsafe to pull into the intersection. CP at 201, 601-02.

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[12] Importantly, Dr. Gill assumed that Mr. Lamotte's vehicle stopped in the eastbound lane before then accelerating through the westbound lane. CP at 441. The undisputed opinion of DOT's accident reconstruction expert established that if Mr. Lamotte had normally accelerated through both lanes, he had plenty of time to cross the intersection. *See* n.1, *supra*, at 6.

Dr. Gill simply assumed a scenario that comported with his conclusory statements. "The following scenario, whether it is precisely what happened or not, explains both the collision [and his conclusions]". CP at 443. However, speculation and conjecture are not enough to satisfy the proximate cause element of plaintiffs' negligence claims or defeat summary judgment. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). For each of these reasons, Dr. Gill's opinions do not create a material issue of fact.

VII. CONCLUSION

By stepping outside the legal framework that should have governed the plaintiffs' negligence claim, the Court of Appeals creates potential liability for refusing to violate standards used by every transportation agency across the nation to make intersections reasonably safe for ordinary travel. 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. This result is contrary to public policy and undermines the scientific basis of highway engineering standards. The conundrum created by the Court of Appeals' decision presents an issue of substantial public interest. DOT respectfully requests that this Court accept review to address the proper analysis of duty for this claim. RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 5th day of February, 2016.

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APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RONALD RASHOFF, LORI RASHOFF AND BENJAMIN LAMOTTE,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

No. 45919-1-II

ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT moves for reconsideration of the Court's **October 20, 2015** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Lee, Worswick, Maxa

DATED this 8th day of January, 2016.

FOR THE COURT:

Worswick J
PRESDING JUDGE

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APPENDIX 2

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Washington State
Court of Appeals
Division Two

October 20, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RONALD C. RASHOFF, and LORI J. RASHOFF, individually and as Personal representative of the Estate of RYAN C. RASHOFF, Appellants, v. THE STATE OF WASHINGTON Respondent, BENJAMIN O. LAMOTTE, Defendant.	No. 45919-1-II
BENJAMIN O. LAMOTTE, Appellant, v. STATE OF WASHINGTON Respondent.	UNPUBLISHED OPINION

LEE, J. — Ryan Rashoff and Benjamin Lamotte were involved in a car accident that killed Ryan[1] and injured Lamotte. Ryan's parents (the Rashoffs) and Lamotte each filed suits against the Washington State Department of Transportation (WSDOT), which were consolidated for trial.

[1] Because Ryan Rashoff's parents are the appellants in this suit, this opinion refers to Ryan Rashoff as "Ryan" to avoid confusion, and we intend no disrespect in doing so.

The suits alleged that WSDOT was liable for negligently failing to maintain the intersection where the collision occurred in a reasonably safe manner.

The Rashoffs and Lamotte now appeal the superior court's dismissal of WSDOT on summary judgment, arguing that (1) the superior court erred in finding their expert's conclusions based on the warrants in the Manual on Uniform Traffic Control Devices were inadmissible under ER 702; (2) material issues of fact exist as to whether the intersection was reasonably safe for an ordinary traveler; (3) the condition of the intersection was a proximate cause of the accident; and (4) the superior court erred in dismissing their claim for impending death damages. We hold that (1) the superior court did not exclude appellants' experts' testimony; (2) issues of material fact exist as to whether the intersection was reasonably safe for an ordinary traveler; (3) issues of material fact exist as to whether the condition of the intersection was a proximate cause of the accident; and (4) summary judgment denying impending death damages is proper. Therefore, we reverse in part, remand for trial on appellants' negligence claim against WSDOT, and affirm the dismissal of impending death damages.

FACTS

Ryan was killed in a car accident at the intersection of State Route 12 (SR 12) and Williams Street/New Harmony Road (Williams Street.) in Mossyrock, Washington. The accident occurred at 3:17 PM on December 8, 2009. Ryan was riding in the front passenger seat of a pickup driven by Lamotte.[2] The pickup was travelling northbound on Williams Street and entered the intersection after stopping at the stop sign in front of the intersection. Vance Steen was driving a

[2] The Rashoffs have an ongoing negligence claim against Lamotte which does not affect this appeal and was stayed in the superior court pending the outcome of this appeal.

log truck westbound on SR 12. Lamotte's pickup accelerated into the intersection, and the log truck collided with the passenger side of Lamotte's pickup. The log truck entered the passenger compartment, killing Ryan and injuring Lamotte.

At the intersection where the accident occurred, SR 12 consists of one lane eastbound and one lane westbound, each with a left turn lane. Williams Street consists of one lane northbound and one lane southbound. Suspended over the intersection were flashing red lights facing the north and south approaches on Williams Street and yellow flashing lights facing the east and west approaches on SR 12. Signs reading "CROSS TRAFFIC DOES NOT STOP" were posted under the stop signs on Williams Street. Clerk's Papers (CP) at 138. Lamotte's view was not obstructed, the log truck had its headlights on, the sun was "behind" Lamotte's line of sight, and his line of sight was 2,000 feet. The speed limit on SR 12 was 55 m.p.h., and witnesses stated that the log truck had been traveling at approximately 55-60 m.p.h. before the accident. Lamotte testified that he only remembers stopping at the stop sign and proceeding forward; he remembers nothing else.

Lamotte's actions after stopping at the stop sign are unclear. In his deposition, Steen described Lamotte as accelerating into the eastbound lane, pausing, and then accelerating into the westbound lane Steen was traveling in. Steen said that when he saw them pause in eastbound lane, he thought Lamotte had seen him and was letting him pass. But in his statement to the Washington State Patrol shortly after the accident, Steen does not mention Lamotte pausing in the eastbound lane.

Richard Ary was driving in the eastbound lane on SR 12, but he did not see whether Lamotte paused in the intersection. Ary was checking his mirrors when Lamotte entered the intersection and looked up just as Lamotte was entering Steen's lane. When Ary arrived at the

intersection "less than a minute" after the collision, Ryan was unconscious and died before regaining consciousness. CP at 224.

The Rashoffs and Lamotte filed separate suits against WSDOT, which were subsequently consolidated for trial. They alleged that the intersection where the accident occurred was unreasonably unsafe. The claims against WSDOT were based in part on the intersection's accident history, which showed 21 accidents—including three fatalities—between March 2003 and the Rashoff-Lamotte accident on December 8, 2009.

WSDOT filed a motion for summary judgment, offering the declarations of its experts, Robert Seyfried and Chad Hancock.[3] The Rashoffs and Lamotte opposed the motion, filing declarations of its own experts, Edward Stevens and Richard Gill.

Both of WSDOT's experts testified that the intersection did not meet any of the traffic "warrants"[4] that indicate an "all-way stop control" may be needed, and therefore, it would have

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[3] Hancock was WSDOT's Southwest Region traffic engineer.

[4] Appellants' expert, Stevens, describes "warrants" as follows: "Warrants can be thought of as analytical techniques to be followed to determine if a traffic signal is justified at a particular location." CP at 464. Stevens further states: "Signal warrants and their prescribed methods of determination are part of the Manual on Uniform Traffic Control Devices (MUTCD)." CP at 463-64. Seyfried's explanation is similar and explains further:

> The Washington State Department of Transportation, like, I believe, every state transportation agency in the nation, uses and relies upon the "signal warrants" in the Manual on Uniform Traffic Control Devices (MUTCD) to determine whether a traffic signal should be considered for installation at an intersection. The MUTCD signal warrants . . . evaluate the operation and geometrics of an intersection from a wide variety of perspectives including traffic speed, average traffic volume and the corresponding gaps available for the disfavored traffic . . . , the number and type of lanes on the respective roads, the crash experience at the intersection, and the intersection's relationship to other intersections and the highway network, school crossings, and pedestrian volume.

been imprudent and contrary to the Manual on Uniform Traffic Control Devices (MUTDC) for WSDOT to have installed a traffic signal before the December 8, 2009 accident. WSDOT's experts also testified that after the most recent accident at the intersection in 2007, the State had taken the next appropriate action and installed the "CROSS TRAFFIC DOES NOT STOP" signs. CP at 206. There were no accidents at the intersection between the installation of the signs and the accident suffered by Ryan and Lamotte over a year later.

Stevens testified that, according to his calculations, the intersection met two of the eight "warrants" and was inherently dangerous because of the traffic volume and number of accidents occurring in prior years. Stevens also pointed to the accident history reports for the intersection and the several e-mails from community members to Hancock requesting a controlled intersection.

Gill similarly testified that the intersection was inherently dangerous, but for different reasons. Gill relied on his analysis of the lane widths, the speed of through traffic on SR 12 compared to the stationary position of someone at the Williams Street stop signs, the impact severity of high speed cross through traffic, human perception of distances, and the amount of time it would take a car on Williams Street to clear the intersection. Gill also discussed "a number of visual and auditory cues available to him [Ryan] that would most likely have alerted him to the impending collision," to support the argument for impending death damages. CP at 440.

The Rashoffs and Lamotte also submitted an e-mail sent from Hancock to a concerned citizen. The e-mail stated:

> The intersection does meet 2 of the 8 warrants for a [traffic] signal. An intersection only has to meet one warrant for us to approve the installation. Because our needs list is longer than what we can afford to build, we have to prioritize all

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CP at 593.

> of the intersections that meet the warrants. It's currently #13 on our prioritization list, so it will be several years before WSDOT could get to it. An earmark is most likely the only way to fund the project in the near future, so you're going about it the right way. Our quick estimate for design and construction of just the signal is about $400,000. We have left turn lanes in place, so I'm assuming no widening will be necessary. There may be some other costs associated with the improvement that we're unaware of at this time, but nothing jumps out at us.

CP at 341.

WSDOT filed supplemental declarations from Seyfried and Hancock. Both agreed with Stevens that WSDOT follows the methodology set forth in the MUTCD for determining whether to consider installing a traffic signal, but both testified that Stevens had inflated the results of his calculations by not adjusting the raw data to account for multi-axel vehicles and seasonal changes in traffic volumes.

In a letter opinion on WSDOT's motion for summary judgment, the superior court stated:

> This Court is persuaded that Dr. [sic] Stevens has not demonstrated that a correct application of the various factors in the MUTCD support his conclusions. *See* Second Decl. of Seyfried (filed 11/18/13). Unless Dr. [sic] Stevens is able to correctly apply the MUTCD, the Court is persuaded that his testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." Evidence Rule 701 [sic]. Accordingly, his testimony would not be admissible and would not be considered in opposition to the State's motion. CR 56; *Cano-Garcia v. King Co.*, 168 Wn. App. 223 (2012). . . .
>
> Due to the significance of such a ruling, however, this Court will allow Plaintiff to file a supplemental declaration to address whether the MUTCD's signal warrants have been met.

CP at 643.

In his supplemental declaration, Stevens acknowledged that an adjustment for multi-axle vehicles was not made to the 2006 data, but did not offer any explanation as to why he did not apply a multi-axle adjustment. Stevens responded to the absence of a seasonal adjustment in his calculations:

> I did not make any seasonal adjustments to the traffic counts because I was interested in the actual traffic volumes during the more heavily traveled summer months, which is when most of the accidents were occurring.

CP at 647.

After consideration of Steven's supplemental declaration, the superior court ruled:

> After allowing additional time for Plaintiff's expert to explain whether the criteria for safety measures of the Manual on Uniform Traffic Control Devices had been met, the Court is still persuaded that those criteria were not met before the accident.

CP at 722.[5] Accordingly, the superior court granted summary judgment in favor of WSDOT and dismissed both lawsuits. The Rashoffs and Lamotte appeal.[6]

ANALYSIS

A. STANDARD OF REVIEW

"We review summary judgment orders de novo and perform the same inquiry as the trial court." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is proper if the record before the superior court establishes that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Owen*, 153 Wn.2d at 787. A material fact is one affecting the outcome of litigation. *Owen*, 153 Wn.2d at 789. Summary judgment is also proper if the non-moving party "'fails to make a showing

[5] The record shows that the superior court never struck Steven's testimony. Instead, the order for summary judgment states that it received Stevens' testimony, and the superior court still found summary judgment was appropriate.

[6] Lamotte joined and adopted by reference Rashoff's arguments on appeal with the exception of those concerning Ryan's impending death damages. To try to minimize confusion, "appellants" is used when referring to the arguments made by the Rashoffs and adopted by Lamotte. Otherwise, each appellant is referenced by name.

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (quoting *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). A court may not consider inadmissible evidence when ruling on summary judgment. *Cano-Garcia v. King County*, 168 Wn. App. 223, 249, 277 P.3d 34, *review denied*, 175 Wn.2d 1010 (2012).

Generally, issues of negligence and proximate cause are not appropriate for summary judgment because they are questions of fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). But, a question of fact may be decided as a matter of law in situations where reasonable minds can only reach one conclusion. *Owen*, 153 Wn.2d at 788; *Moore v. Hagge*, 158 Wn. App. 137, 147, 241 P.3d 787 (2010). As the non-moving party, all facts and reasonable inferences are viewed in the light most favorable to appellants. *Owen*, 153 Wn.2d at 787. But, the nonmoving party may not rely on speculation, argumentative assertions, or on having its declarations considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Rather, after the moving party submits adequate declarations, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue of material fact exists. *Id.*

B. EXPERT TESTIMONY OF STEVENS

Appellants argue the trial court erred in finding Stevens' conclusions based on the MUTCD warrants inadmissible under ER 702.[7] However, the record demonstrates that the superior court

[7] Appellants' argument on this point is a bit ambiguous. They never explicitly state they are disputing an ER 702 ruling. Instead they characterize it as "the trial court . . . *disregarding*" Stevens' opinion, and "improperly ma[king] a factual finding." Br. of Appellant at 2, 34. The respondents extensively argue that the testimony was excluded under ER 702 and that it was

never excluded Stevens' testimony. For that reason, and because we reverse and remand on other grounds, we decline to further address the issue of the admissibility of Stevens' testimony.

C. NEGLIGENCE

To prevail on their negligence claim, appellants must show that (1) WSDOT owed Ryan and Lamotte a legal duty, (2) WSDOT negligently breached its duty, (3) the appellants suffered injury; and (4) the breach proximately caused appellants' injury. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795 (2009) (citing *Ruff*, 125 Wn.2d at 704). "Today, governmental entities are held to the same negligence standards as private individuals." *Owen*, 153 Wn.2d at 787; *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002).

1. Breach of Duty

Appellants argue that the superior erred in granting WSDOT's summary judgment on their negligence claim because issues of material fact exist as to whether WSDOT breached its duty to maintain the intersection where the accident occurred in a reasonably safe condition. We agree.

The parties agree that as the governmental entity responsible for the intersection, WSDOT owes a duty to all travelers to maintain the intersection in a condition reasonably safe for ordinary travel, which includes eliminating inherently dangerous or misleading conditions.[8] *Owen*, 153 Wn.2d at 788. "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

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properly excluded. Even in the reply brief, the appellants do not address this as an ER 702 issue, but instead claim the trial court improperly weighed expert testimony.

[8] "That is not to say that any negligence on the part of the [Appellants] is irrelevant to the cause of action and may be raised by the [WSDOT] when appropriate." *Owen*, 153 Wn.2d at 787.

of care. The MUTCD provides at least some evidence of the appropriate duty." *Id.* at 787 (citation omitted); *see also* RCW 47.36.030(1) (imposing duty on secretary of transportation to adopt uniform state standard for signs and other traffic control devices used on state highways and directing that such signs "shall conform as nearly as practicable to the manual of specifications for the manufacture, display, and erection of uniform traffic control devices for streets and highways"); WAC 468-95-010 (noting secretary of transportation's adoption of the MUTCD); *Kitt v. Yakima County*, 93 Wn.2d 670, 672, 611 P.2d 1234 (1980) (noting the adoption of the MUTCD).

Generally, whether WSDOT breached that duty by failing to maintain a roadway that is reasonably safe for ordinary travel is a question of material fact. *Owen*, 153 Wn.2d at 788. However, "[q]uestions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.'" *Id.* at 788 (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). Whether a condition is inherently dangerous or misleading, and the adequacy of the government's attempts at corrective action, are also, generally, questions of fact. *Id.*, at 788. An inherently dangerous condition is one that exists in the roadway itself. *Barton v. King County*, 18 Wn.2d 573, 576-77, 139 P.2d 1019 (1943) (quoting *Leber v. King County*, 69 Wash. 134, 136-37, 124 P. 397 (1912)).

WSDOT argues that the undisputed evidence showed that the Williams Street/SR 12 intersection met or exceeded accepted engineering standards, and therefore, it did not breach any duty as a matter of law. We disagree.

In *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010), Division One of this court rejected the same argument relied on by WSDOT. In *Chen*, the city argued that summary judgment was appropriate because the plaintiff

failed to establish any physical defect with the crosswalk that rendered the crosswalk inherently dangerous or misleading, there was no evidence that the City had violated any law requiring safety measures different than those installed at the crosswalk, and MUTCD did not require the city to do anything more with the marked crosswalk. *Id.* at 898. The court in *Chen* rejected the city's arguments and held that a plaintiff did not need to establish a particular defect existed in order to defeat summary judgment. *Id.* at 894. Rather, "consideration of all of the surrounding circumstances is necessary to determine whether a particular roadway presented an unsafe condition." *Id.* at 909. In *Chen*, the plaintiff-appellant's production of reports of past accidents in the crosswalk, multiple citizen requests for a traffic light, and expert witness opinions were sufficient to reverse the superior court's summary judgment decision in favor of the city of Seattle. *Id.* at 909-11.

Here, the appellants presented similar evidence 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 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. Specifically, Stevens testified he believed the absence of any accidents from the time the "Cross Traffic Does Not Stop" sign was installed to Ryan's and Lamotte's accident was "more likely explained by normal variation in the crash frequency, rather than a result of the 'cross traffic does not stop' sign."[9] CP at 649.

[9] This particular conclusion was not substantiated with improperly applied methodology, and thus is admissible.

Additionally, Gill concluded that the roadway itself was inherently dangerous because of the width of the lanes and the time it takes to cross them. This conclusion, combined Stevens' interpretation of the prior accident reports, Hancock's e-mail, and the community requests for the installation of a traffic signal 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. *Chen*, 153 Wn. App. at 909-11.

2. Proximate Cause

WSDOT argues that the appellants failed to show the condition of the intersection proximately caused the accident. We hold that an issue of material fact exists as to whether WSDOT's alleged failure to maintain the intersection in a reasonably safe condition was a proximate cause of the accident.

"Washington Courts have repeatedly held that in order to hold a governmental body liable for an accident based upon its failure to provide a safe roadway, the plaintiff must establish more than that the government's breach of duty *might* have caused the injury." *Miller*, 109 Wn. App. at 145 (alteration in original). To defeat summary judgment, a showing of proximate cause must be made, and the showing "must be based on more than mere conjecture or speculation." *Garcia v. Dep't of Transp.*, 161 Wn. App. 1, 15, 270 P.3d 599 (2011). To establish WSDOT's breach was a proximate cause of appellants' injuries, appellants must establish both cause-in-fact and legal causation. *Miller*, 109 Wn. App. at 145.

Cause-in-fact means that "but-for" WSDOT's failure to make the intersection reasonably safe for ordinary travel, the injury would not have occurred. *See Id.*, at 145. Cause-in-fact is generally a question for the jury, "but it may be decided as a matter of law if the causal connection

between the act and the injury is 'so speculative and indirect that reasonable minds could not differ.'" *Cho v. City of Seattle*, 185 Wn. App. 10, 16, 341 P.3d 309 (2014) (quoting *Moore*, 158 Wn. App. at 148), *review denied*, 183 Wn.2d 1007 (2015). "'The cause of [the] accident [is] . . . speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another.'" *Cho*, 185 Wn. App. at 16 (quoting *Moore*, 158 Wn. App. at 148) (alterations in original). Legal causation asks whether liability attaches as a matter of law, or if the relationship between the defendant's acts and the plaintiff's injuries are instead too attenuated. *Miller*, 109 Wn. App. at 145; *Hartley*, at 778-79.

The appellants argue that Lamotte's stopping at the stop sign before proceeding into the intersection "constitutes strong circumstantial evidence that, had there been a traffic signal or a four-way stop in place," Lamotte would not have crossed until it was his turn. Reply Br. at 21. We agree.

Here, the evidence shows that Lamotte followed the rules of the road by stopping at the stop sign on Williams Street. Lamotte then traveled into the intersection, maybe pausing in the eastbound lane, before traveling into the path of Steen's log truck. The evidence also shows that Steen followed the rules of the road by traveling at, or close to, the speed limit, having his headlights on, and watching Lamotte's actions. Given these facts, we cannot say as a matter of law that the causal connection between WSDOT's alleged breach of its duty to maintain the intersection in a reasonably safe condition for ordinary travel (by installing further safety measures to control vehicle travel) and the collision is "'so speculative and indirect that reasonable minds could not differ.'" *Cho*, 185 Wn. App. at 16 (quoting *Moore*, 158 Wn. App. at 148). Therefore, we hold that summary judgment was improper on this issue.

D. IMPENDING DEATH DAMAGES

The Rashoffs[10] argue that the superior court erred by dismissing their claim for Ryan's fear of impending death. We disagree.

The Rashoffs claim the declaration of Gill presents "substantial circumstantial evidence . . . that Ryan Rashoff would have been aware of his impending severe injury or death in the moments before the collision." Br. of Appellant Rashoff at 42. WSDOT acknowledges that Washington law allows recovery for a decedent's fear of impending death, but argues "there is no admissible evidence that Ryan perceived or knew the crash was imminent." Br. of Resp't at 48.

An estate is entitled to recover for a decedent's pain and suffering prior to death under Washington law. *See* RCW 4.20.020, .046, .060. To recover for a fear of impending death, the plaintiff must show the decedent had a conscious realization of his or her imminent death and that conscious realization caused suffering. *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 837, 699 P.2d 1230 (1985); *Otani ex rel. v. Broudy*, 151 Wn.2d 750, 758, 92 P.3d 192 (2004).

In *Bingaman*, the surviving husband and two sons brought a survival action on behalf of his wife's estate for her untimely death as a result of complications from childbirth. 103 Wn.2d at 833. In support of its recovery, the Bingaman estate presented uncontroverted evidence that Bingaman screamed in pain to the nurses for help, regained consciousness after three separate grand mal seizures during a three-hour period, and said to a patient in the bed next to her, "I'm dying. I know I'm dying. Why can't they help me? What is the matter with me?" *Id.* at 834. The

[10] Lamotte does not join in the Rashoffs' pre-death pain and suffering claim. Br. of Appellant Lamotte at i-2.

Bingaman court held this was substantial evidence from which a jury could find that Bingaman "not only suffered extreme conscious pain, fear and despair at not being helped, but also had the conscious realization her life and everything fine that it encompassed was prematurely ending." *Id.* at 837-38.

Here, the Rashoffs' claim fails because the Rashoffs only present speculation that Ryan could have known he was going to die before he did. Gill stated in his declaration, "Ryan Rashoff had a number of visual and auditory cues *available to him* that would *most likely* have alerted him to the impending collision." CP at 440 (emphasis added). No evidence was presented that Ryan took advantage of any of these cues. The evidence shows Ryan never regained consciousness after the collision, and died moments after. This leaves Lamotte as the only person who could know whether Ryan had a conscious realization of his impending death, but the evidence shows that Lamotte does not have a memory of the accident beyond initially stopping at the intersection.

The law requires the plaintiff in survival actions such as this to present evidence of the decedent's conscious realization of his or her impending death and suffering from that realization. *See Bingaman*, 103 Wn.2d at 837; *Otani*, 151 Wn.2d at 758. The Rashoffs fail to present evidence that Ryan realized he was going to die and suffered therefrom. Gill's testimony that cues were "available" that would have "most likely" alerted Ryan, is nothing more than speculation, and non-moving parties may not rely on speculation to survive summary judgment motions. *Seven Gables*, 106 Wn.2d at 13. Therefore, we affirm the superior court's summary judgment dismissal of Rashoff's claim for pre-death damages.

CONCLUSION

We reverse the superior court's summary judgment dismissal of appellants' negligence claim against WSDOT and remand for trial on that issue. But, we affirm the superior court's summary judgment dismissal of the Rashoffs' claim for pre-death damages.

A majority of the panel having determined that this opinion will not be published in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

APPENDIX 3

Standard:

The need for a traffic control signal shall be considered when an engineering study of the frequency and adequacy of gaps in the vehicular traffic stream as related to the number and size of groups of school children at an established school crossing across the major street shows that the number of adequate gaps in the traffic stream during the period when the children are using the crossing is less than the number of minutes in the same period (see Section 7A.03) and there are a minimum of 20 students during the highest crossing hour.

Before a decision is made to install a traffic control signal, consideration shall be given to the implementation of other remedial measures, such as warning signs and flashers, school speed zones, school crossing guards, or a grade-separated crossing.

The School Crossing signal warrant shall not be applied at locations where the distance to the nearest traffic control signal along the major street is less than 90 m (300 ft), unless the proposed traffic control signal will not restrict the progressive movement of traffic.

Guidance:

If this warrant is met and a traffic control signal is justified by an engineering study, then:

A. If at an intersection, the traffic control signal should be traffic-actuated and should include pedestrian detectors.
B. If at a nonintersection crossing, the traffic control signal should be pedestrian-actuated, parking and other sight obstructions should be prohibited for at least 30 m (100 ft) in advance of and at least 6.1 m (20 ft) beyond the crosswalk, and the installation should include suitable standard signs and pavement markings.
C. Furthermore, if installed within a signal system, the traffic control signal should be coordinated.

Section 4C.07 Warrant 6, Coordinated Signal System

Support:

Progressive movement in a coordinated signal system sometimes necessitates installing traffic control signals at intersections where they would not otherwise be needed in order to maintain proper platooning of vehicles.

Standard:

The need for a traffic control signal shall be considered if an engineering study finds that one of the following criteria is met:

A. On a one-way street or a street that has traffic predominantly in one direction, the adjacent traffic control signals are so far apart that they do not provide the necessary degree of vehicular platooning.
B. On a two-way street, adjacent traffic control signals do not provide the necessary degree of platooning and the proposed and adjacent traffic control signals will collectively provide a progressive operation.

Guidance:

The Coordinated Signal System signal warrant should not be applied where the resultant spacing of traffic control signals would be less than 300 m (1,000 ft).

Section 4C.08 Warrant 7, Crash Experience

Support:

The Crash Experience signal warrant conditions are intended for application where the severity and frequency of crashes are the principal reasons to consider installing a traffic control signal.

Standard:

The need for a traffic control signal shall be considered if an engineering study finds that all of the following criteria are met:

A. Adequate trial of alternatives with satisfactory observance and enforcement has failed to reduce the crash frequency; and
B. Five or more reported crashes, of types susceptible to correction by a traffic control signal, have occurred within a 12-month period, each crash involving personal injury or property damage apparently exceeding the applicable requirements for a reportable crash; and
C. For each of any 8 hours of an average day, the vehicles per hour (vph) given in both of the 80 percent columns of Condition A in Table 4C-1 (see Section 4C.02), or the vph in both of the 80 percent columns of Condition B in Table 4C-1 exists on the major-street and the higher-volume minor-street approach, respectively, to the intersection, or the volume of pedestrian traffic is not

less than 80 percent of the requirements specified in the Pedestrian Volume warrant. These major-street and minor-street volumes shall be for the same 8 hours. On the minor street, the higher volume shall not be required to be on the same approach during each of the 8 hours.

Option:

If the posted or statutory speed limit or the 85th-percentile speed on the major street exceeds 70 km/h or exceeds 40 mph, or if the intersection lies within the built-up area of an isolated community having a population of less than 10,000, the traffic volumes in the 56 percent columns in Table 4C-1 may be used in place of the 80 percent columns.

Section 4C.09 Warrant 8, Roadway Network

Support:

Installing a traffic control signal at some intersections might be justified to encourage concentration and organization of traffic flow on a roadway network.

Standard:

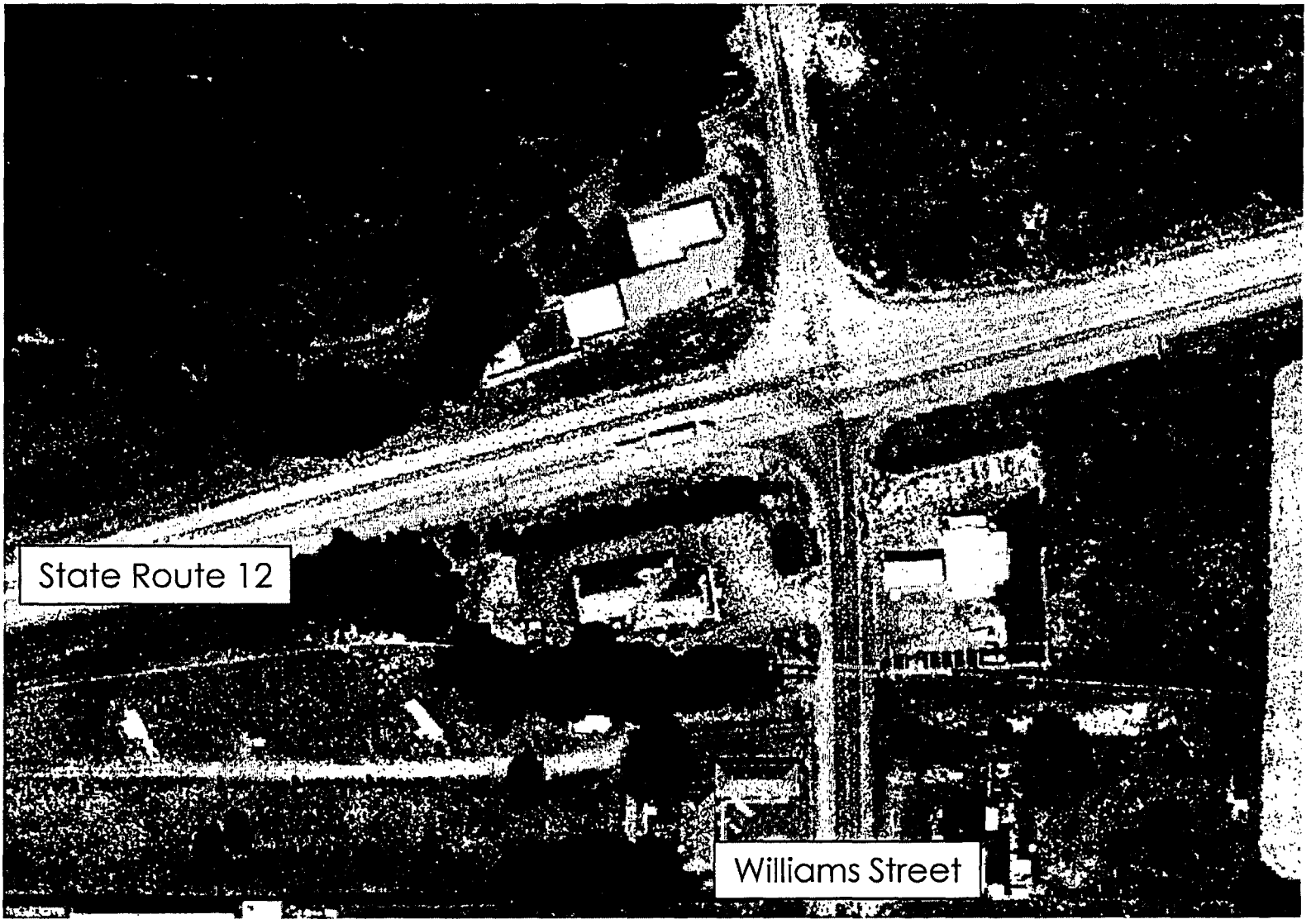
The need for a traffic control signal shall be considered if an engineering study finds that the common intersection of two or more major routes meets one or both of the following criteria:

A. The intersection has a total existing, or immediately projected, entering volume of at least 1,000 vehicles per hour during the peak hour of a typical weekday and has 5-year projected traffic volumes, based on an engineering study, that meet one or more of Warrants 1, 2, and 3 during an average weekday; or
B. The intersection has a total existing or immediately projected entering volume of at least 1,000 vehicles per hour for each of any 5 hours of a nonnormal business day (Saturday or Sunday).

A major route as used in this signal warrant shall have one or more of the following characteristics:

A. It is part of the street or highway system that serves as the principal roadway network for through traffic flow; or
B. It includes rural or suburban highways outside, entering, or traversing a City; or
C. It appears as a major route on an official plan, such as a major street plan in an urban area traffic and transportation study.

APPENDIX 4



CP at 182

DECLARATION OF FILING AND SERVICE

I declare that I caused a copy of the foregoing document to be electronically filed via coa2filings@courts.wa.gov with Division II, Court of Appeals.

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DATED this 5th day of February, 2016, at Tumwater, WA.

/s/ Lisa Savoia
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