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No. 64024-1-I

**DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

GERALD R. TARUTIS, as Guardian ad Litem for Nicholas K.
Messenger,

Appellant,

vs.

THE CITY OF SEATTLE,

Appellee,

Respondent
~~BRIEF OF APPELLEE~~ CITY OF SEATTLE

PETER S. HOLMES
Seattle City Attorney

REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorney
Attorneys for Appellee City of Seattle

Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor
PO Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ISSUES PERTAINING TO APPELLANTS’ ASSIGNMENTS OF ERROR.....	3
1. Whether plaintiff’s analysis abrogates the statutory framework that regulates traffic operations at intersections;	3
III. STATEMENT OF THE CASE	4
A. The Accident.....	4
B. Facts Relevant to Plaintiff’s Contentions of Negligence Against the City and the City’s Motion for Summary Judgment.....	5
C. Facts relevant to plaintiff’s Motions for Partial Summary Judgment and the City’s Motion to Strike Inadmissible Evidence	13
D. The Court’s Orders	17
IV. ARGUMENT AND AUTHORITY.....	17
A. Standard of Review.....	17
B. The City’s duty must be analyzed in context with the statutory framework that regulates traffic operations at all unsignalized intersections.	19
C. The trial court correctly concluded that claims based on the engineering of the intersection of 15 th and 87 th fail as a matter of law.....	24
1. The City’s duty to maintain roadways in reasonably safe condition for ordinary travel does not require it to mark statutory crosswalks.....	24
2. Citizen correspondence requesting engineering treatments does not establish a duty to act and is inadmissible to establish a breach of duty.	26
3. Plaintiff’s reliance on <i>Chen v. City of Seattle</i> is misplaced.	27

D.	The trial court correctly concluded that claims based on the engineering of the intersection of 15 th and Holman, either before or after this accident, fail as a matter of law.	32
1.	The absence of signs, markings, and signals at Holman cannot give rise to municipal liability.....	33
2.	Plaintiff lacks sufficient evidence to establish that the engineering of 15 th and Holman was a proximate cause of this accident. The trial court properly exercised its discretion in striking speculative testimony as to how Nicholas might have decided differently had Holman been signalized.....	34
E.	The trial court properly denied plaintiff’s motion for partial summary judgment asking that the court rule that the City had notice of a dangerous condition as a matter of law.	40
F.	The trial court properly denied plaintiff’s motion for partial summary judgment asking that he, and the motorist who struck him, be found fault-free as a matter of law.	43
G.	The trial court properly exercised its discretion by deeming admissible evidence of plaintiff’s settlement with the commercial owner of the van for the limited purpose of impeaching the van driver’s inconsistent testimony.....	49
V.	CONCLUSION.....	50

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Alston v. Blythe</i> , 88 Wn. App. 26, 943 P.2d 692 (1997).....	44, 48
<i>Ayers v. Johnson & Johnson</i> , 117 Wn.2d 747, 818 P.2d 1337 (1991).....	37, 38
<i>Beireis v. Leslie</i> , 35 Wn.2d 554, 214 P.2d 194 (1950)	43
<i>Berglund v. Spokane Cy.</i> , 4 Wn.2d 309, 103 P.2d 355 (1940).....	24, 28, 29, 30, 31
<i>Bradshaw v. City of Seattle</i> , 43 Wn.2d 766, 264 P.2d 265 (1953)	23
<i>Chen v. City of Seattle</i> , ___ P.3d ___ (2009).....	27, 28, 29, 30, 31
<i>City of Seattle v. Wilson</i> , 151 Wn. App. 624, 213 P.3d 636 (2009).....	20
<i>Clements v. Blue Cross of Washington & Alaska Inc.</i> , 37 Wn. App. 544, 682 P.2d 942 (1984).....	46, 47
<i>Cox v. Spangler</i> , 141 Wn.2d 431, 5 P.3d 1265 (2000).....	39
<i>Craig v. Washington Trust Bank</i> , 94 Wn. App. 820, 976 P.2d 126 (1999).....	18, 35
<i>Dabol v. United States</i> , 337 F.2d 163 (9 th Cir. 1964).....	44
<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772 (1991).....	36
<i>Farrow v. Ostrom</i> , 10 Wn.2d 666, 117 P.2d 963 (1941)	43
<i>Gall v. McDonald Indus.</i> , 84 Wn. App. 194, 926 P.2d 934 (1996).....	18

<i>Guile v. Ballard Community Hospital</i> , 70 Wn. App. 18, rev. denied, 122 Wn.2d 1010 (1993)	36
<i>Hedlund v. White</i> , 67 Wn. App. 409, 836 P.2d 250 (1992)	27
<i>Hoglund v. Meeks</i> , 139 Wn. App. 854, 170 P.3d 37 (2007)	18
<i>Horrell v. City of Chicago</i> , 495 N.E.2d 1259 (1986)	25
<i>Hunt v. City of Bellingham</i> , 171 Wash. 174, 17 P.2d 870 (1933)	26
<i>Iwata v. Champine</i> , 74 Wn.2d 844, 447 P.2d 175 (1968)	46
<i>James S. Black & Co. v. P & R Co.</i> , 12 Wn. App. 533, 530 P.2d 722 (1975)	40
<i>Johanson v. King Cy.</i> , 7 Wn.2d 111, 109 P.2d 307 (1941)	35
<i>Jung v. York</i> , 75 Wn.2d 195, 449 P.2d 409 (1969)	47, 48
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002)	19, 21
<i>Krogh v. Pemble</i> , 50 Wn.2d 250, 310 P.2d 1069 (1957)	22, 31
<i>La Breck v. City of Hoquiam</i> , 95 Wash. 463, 164 P. 67 (1917)	24
<i>Leber v. King Cy.</i> , 69 Wash. 134, 124 P.397 (1912)	20
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)	18
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001)	34, 36
<i>Niebarger v. Seattle</i> , 53 Wn.2d 228, 332 P.2d 463 (1958)	42
<i>Oberlander v. Cox</i> , 75 Wn.2d 189, 449 P.2d 388 (1969)	43, 44, 45

<i>Owen v. Burlington Northern</i> , 153 Wn.2d 780, 108 P.3d 122 (2005).....	26
<i>Renner v. City of Marysville</i> , 145 Wn. App. 443, 187 P.3d 286 (2008).....	18
<i>Ruff v. King Cy.</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	18, 20
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App. 170, 817 P.2d 861 (1991).....	36
<i>Security State Bank v. Burk</i> , 100 Wn. App. 94, 995 P.2d 1272 (2000).....	19
<i>Shasky v. Burden</i> , 78 Wn.2d 193, 470 P.2d 544 (1970)	44, 45
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	39
<i>State v. Blanchey</i> , 75 Wn.2d 926, 454 P.2d 841 (1969).....	37
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997).....	39
<i>State v. Uglem</i> , 68 Wn.2d 428, 413 P.2d 643 (1966)	35
<i>Stewart v. State</i> , 92 Wn.2d 285, 597 P.2d 101 (1979).....	21
<i>Sun v. City of Oakland</i> , 166 Cal. App. 4 th 1177 (2008)	25, 27
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	40
<i>Tincani v. Inland Empire</i> , 124 Wn.2d 121, 875 P.2d 621 (1994)	18
<i>Van Cleve v. Betts</i> , 16 Wn. App. 748, 559 P.2d 1006 (1977).....	46
<i>Wright v. Kennewick</i> , 62 Wn.2d 163, 381 P.2d 620 (1963)	42

STATUTES

RCW 35.78.010 19
RCW 4.22.070..... 48
RCW 46.04.160 21
RCW 46.04.290 5, 21
RCW 46.61.050 22, 23, 29
RCW 46.61.060 22, 23, 26
RCW 46.61.230 22, 23, 29
RCW 46.61.235(2)..... 45
RCW 46.61.235(4)..... 22
RCW 46.61.240 22, 26, 29, 30

COURT RULES

CR 56 2, 19
CR 56(e)..... 26, 39
ER 104 37
ER 407 32, 40
ER 408 16, 49, 50
ER 611 37
ER 701 27, 37
ER 701(c)..... 26, 27
ER 703..... 35, 37

ORDINANCES

SMC 11.16.340(L)..... 6

MISCELLANEOUS

5 K. Tegland, WASH PRAC., EVIDENCE, § 611.15 (Fifth Ed.).....	37
BLACK'S LAW DICTIONARY 6 th Ed. (1990)	35
RESTATEMENT (SECOND) OF TORTS § 328A	34
Tort Reform Act	48
W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 at 269 (5 th ed. 1984)	34
W. Page Keeton, PROSSER & KEETON ON TORTS, § 131 (5 th ed. 1984)....	20
WPI 140.01	2, 19, 26, 27, 28, 33, 41, 42
WPI 140.02	41, 42
WPI 70.03.01	22
WPI 70.06	23

I. INTRODUCTION

In this motor vehicle/pedestrian accident case, plaintiff sued the City of Seattle for not installing a marked, signalized crosswalk at the intersection where plaintiff attempted to cross a busy arterial roadway. CP 7. Plaintiff complained that the roadway was inherently dangerous because of heavy traffic volumes. CP 1-13. Citing to citizen complaints, he argued that the City had notice of the traffic conditions at this intersection and should have installed measures to facilitate pedestrian crossing at this intersection. CP 1-13

Plaintiff's traffic engineering expert did not support plaintiff's theory. He testified that no engineering improvements (marked crosswalks or traffic signals) were appropriate at the intersection where plaintiff chose to cross. He testified that there was nothing unusual about the traffic conditions on this arterial road and that, while there were few "gaps" in the natural flow of traffic on this road, the Rules of the Road create opportunities for pedestrians to cross by requiring motorists to stop for pedestrians in crosswalks. Plaintiff's expert then opined that an analysis of vehicular movements at the intersection adjacent to where plaintiff chose to cross would support the installation of a signal at that intersection to regulate vehicular movements. Plaintiff then changed his theory of the case, arguing that the City should have installed a marked,

signalized crosswalk at that adjacent intersection, and argued that if the City had done so, he would have chosen to cross at that intersection instead. But plaintiff's expert acknowledged that pedestrian demand at the adjacent intersection did not meet criteria for a signal, and agreed that no industry standard required the City to install a signal at the adjacent intersection, regardless of whether warrants were met. CP 829-47.

The City moved for summary judgment. The City argued that, given the statutory framework that regulates traffic operations at unsignalized intersections, the City could not be liable under WPI 140.01 for not marking or otherwise improving a statutory crosswalk. The City argued that, where plaintiff's expert agreed that no engineering improvements were warranted at the intersection in question, and where he agreed that no industry standard required the City to undertake improvements elsewhere along the arterial corridor, plaintiff lacked sufficient evidence under CR 56 to establish that the City breached any duty alleged. CP 320-53. The City also argued that plaintiff lacked sufficient evidence to establish that any failure to mark and/or signalize the adjacent intersection was a proximate cause of plaintiff's injuries.

Plaintiff too moved for partial summary judgment. He asked that the court 1) rule that the City had notice of a dangerous intersection; and

2) hold fault-free as a matter of law both plaintiff and the motorist involved. CP 206-46.

The trial court granted the City's motion for summary judgment and the City's motion to strike certain evidence that plaintiff submitted in response and in support of his summary judgment motions. The trial court denied plaintiff's cross-motions. CP 957-66. Plaintiff now appeals from those decisions.

II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

1. Whether plaintiff's analysis abrogates the statutory framework that regulates traffic operations at intersections;
2. Whether the trial court correctly concluded that claims based on the engineering of the intersection of 15th and 87th fail as a matter of law;
3. Whether the trial court correctly concluded that claims based on the engineering of the intersection of 15th and Holman fail as a matter of law;
4. Whether the trial court acted within its discretion in striking speculative and conclusory statements as to how plaintiff might have behaved differently under different circumstances;
5. Whether the trial court properly denied plaintiff's motion for partial summary judgment asking that the court rule as a matter of law that the City had notice of a dangerous intersection;

6. Whether the trial court properly denied plaintiff's motion for partial summary judgment asking that both he and the driver be found fault-free as a matter of law;
7. Whether the trial court acted within its discretion in admitting evidence of plaintiff's prior settlement with the commercial owner of the van involved for the limited purpose of impeaching the driver's post-settlement account of this accident.

III. STATEMENT OF THE CASE

A. The Accident

Nicholas Messenger, age 12, was struck and seriously injured while walking home from a Pizza Hut on the west side of 15th Avenue NW (15th), between NW 85th Street and NW 87th Street (87th), in Seattle's Crown Hill neighborhood. He was with his friend, 11-year-old Charlie Spencer-Davis. CP 821-28; 854-69. Rather than availing themselves of marked, signalized crosswalks a half-block south of the Pizza Hut at 85th or continuing north to a marked, signalized crosswalk at Mary Avenue, the boys decided to enter 15th in an unmarked but legal crosswalk at the intersection of 87th. CP 827, 855. They proceeded in front of a stopped curb-lane vehicle (operated by Merilee Mulholland); as they entered the second (inside) lane of southbound travel, Nicholas was struck by the passenger-side mirror of a passing commercial van (operated by Steve Hansen). CP 5-6.

B. Facts Relevant to Plaintiff's Contentions of Negligence Against the City and the City's Motion for Summary Judgment

15th is a principal arterial that travels through Seattle's Crown Hill neighborhood and continues south across the Ballard Bridge towards downtown Seattle. One block north of 87th, 15th forms a Y-intersection with Holman Road; there, 15th continues west into the Blue Ridge neighborhood as a collector arterial while the principal arterial branches to the northeast (as Holman) towards the Northgate area and I-5. CP 855, 865, 869. At 87th (and as it continues as a principal arterial), 15th comprises five lanes – two lanes in each direction and a center two-way left-turn lane. CP 855-56. The American Association of Highway and Transportation Officials (AASHTO) defines the “normal range for urban arterial streets [to be] four to eight lanes in both directions of travel combined.” CP 855, 871-75. Plaintiff's traffic engineering expert, Edward Stevens, testified that there is nothing unusual about the width or number of lanes comprising 15th at or in the vicinity of 87th. CP 834-35.

While “crosswalks” are established by statute on all legs of the intersection (*see* RCW 46.04.160), the crosswalks at 15th and 87th are not (and never have been) marked (*see* RCW 46.04.290). As plaintiff notes, the City has received, over the years, requests by citizens to mark a crosswalk at 87th. In response to these requests, and prior to the accident,

the City evaluated this location but, on all occasions, determined not to mark a crosswalk. CP 857-60.

Although there was no marked crosswalk, there was, for some time prior to this accident, an overhead sign displaying the word “crosswalk” over the intersection. CP 861. Such signs are innovative treatments which, under SMC 11.16.340(L), Seattle’s Traffic Engineer is authorized to install for testing “under actual conditions of traffic.” CP 838; 848-53; 861. They are not prescribed or recognized by any industry standard. The Seattle Department of Transportation (SDOT) occasionally, but infrequently, installs these overhead signs, but, with exceedingly rare exception under recent practices, only in conjunction with marked crosswalks. CP 861. SDOT records do not indicate when or why, in the absence of marked crosswalks, the signs that formerly hung at this intersection were originally installed, but the City removed this sign approximately two months prior to this accident based on 1) observably low pedestrian demand at the intersection, 2) its decision not to mark a crosswalk, and 3) citizen correspondence complaining that drivers ignored the sign. CP 861. Mr. Stevens testified that he “would assume” that the fact that there was no sign at the time of this accident was obvious to any pedestrian attending to the features of the intersection. CP 839.

Plaintiff retained Mr. Stevens “to evaluate the safety for pedestrian travel at the intersection of 87th and 15th and to evaluate any options that [he] thought might alleviate any unsafe condition if [he] found one.” CP 833. Mr. Stevens opined that the intersection of 87th and 15th was “not reasonably safe for pedestrians crossing” because of 1) “a lack of traffic control signals”, 2) a lack of “allowable gaps”¹ in traffic; 3) “the speed of vehicles;” 4) “vehicular volume;” and 5) “the fact that there is a school in the immediate area.” CP 834; 841-47.

Mr. Stevens agreed, however, that it would not be appropriate to mark a crosswalk at 87th. He testified that he would not recommend marking a crosswalk at 87th. CP 837. He agreed that no traffic signal was warranted at 87th. CP 833. He noted a lack of “gaps” in traffic at 87th, but admitted that no engineering standard of care requires “sufficient allowable gaps” at any particular location. CP 835. He agreed that the Rules of the Road create gaps for pedestrians to cross by requiring motorists to stop for pedestrians in all unsignalized crosswalks, marked or unmarked. CP 836. Mr. Stevens identified the width of 15th as a factor in

¹ A “gap” refers to a break in the natural flow of traffic of sufficient length to allow a pedestrian to cross (*i.e.*, excluding from the analysis a motorist’s obligation under RCW 46.61.235 to yield to pedestrians in all crosswalks). CP 857-58. Because gap studies measure only traffic flow in the absence of a pedestrian’s presence, they do not consider those “gaps” created by statute when a pedestrian is present.

evaluating the “safety” for pedestrian crossing, but agreed that 15th was designed to be an urban arterial, that urban arterials are typically multi-lane in each direction, that heavy vehicular volumes on arterials are open and expected conditions of traffic in general, and that it is for such volumes that arterials are intended. He testified that he was not critical of Seattle for maintaining 15th as an arterial. He testified that there is no standard of care that would have required Seattle to reduce the number of lanes or the width of 15th. CP 834-35.

Mr. Stevens testified that there were no additional engineering treatments he would have recommended at 87th and 15th.² CP 836. He testified that no standard requires a municipality to install treatments based on the requests of citizens. CP 837. He opined only that “a reasonably safe crossing at 15th Avenue Northwest in the vicinity of 87th Northwest should have been provided.” CP 839, 841-47. He testified that “reasonably safe” means that pedestrians have available to them the information they need to decide, based upon their capabilities and nearby options, when, how, and where to get across a roadway. CP 845. He did not identify any missing pieces of information a pedestrian seeking to

² Mr. Stevens did question, in hindsight, the removal of the overhead sign, but conceded that there is no industry standard that required or recommended that the City install or retain any signage at this unmarked crosswalk. CP 838-39.

cross 15th in the vicinity of 87th would need to decide how to cross the road (whether at 87th or with a signal at 85th).

Mr. Stevens admitted that “reasonably safe” does not mean that a traffic signal should be installed at every intersection where a pedestrian might have reason to cross. CP 835-36. He conceded that, for pedestrians wishing to cross 15th with a signal, there was a marked, signalized crosswalk in the vicinity of 87th (one block to the south at NW 85th). CP 839. He testified that another “option” would have been to install a signal one block to the north (at Holman), CP 839, but acknowledged that pedestrian demand at Holman did not meet warrants supporting a signal. CP 836, 840. Mr. Stevens also conceded that he could not identify any industry standard that would have required or recommended that the City install a signal at Holman prior to this accident. CP 835, 840.

Plaintiff emphasizes that, after this accident, the City did redesign the intersection of 15th and Holman (one block north of the subject accident) to include full traffic signals and marked crosswalks. *Appellant’s Brief* at p. 15. The signal redesign at Holman was done in conjunction with a planned (but not yet scheduled) upgrade of an existing fire signal at Holman (servicing nearby Fire Station 35). CP 861-62. The intersection was redesigned and rechannelized based on 1) increased pressure from the neighborhood following this accident for a signalized

crosswalk at 87th; 2) anticipated increases in pedestrian traffic related to the then-planned (but subsequently voter-rejected) development of a monorail line along 15th and the anticipated concurrent development of Crown Hill as an urban village; and 3) SDOT's determination that expected increases in vehicular volume (though not pedestrian volume) at that particular intersection would satisfy federal warrants justifying a full signal (onto which SDOT could then piggyback pedestrian signals). CP 861-63. Again, Mr. Stevens acknowledged that the signal at Holman and 15th was installed based on vehicular volume warrants (CP 837), that pedestrian volumes at Holman did not meet the threshold that would justify a signal (CP 837), and that no industry standard required a signal at 15th and Holman notwithstanding any warrant (CP 836, 840).

Plaintiff relies on an internal SDOT Director's Rule to argue that citizen complaints regarding 87th and 15th imposed upon the City a duty to initiate a signal redesign at Holman and 15th prior to plaintiff's accident such that northbound pedestrians wishing to cross 15th with a signal need not travel out of their way to access the signal at 85th or the additional distance to Mary Avenue. CP 922-29. The Director's Rule does not establish any standards or guidelines as to how SDOT shall, should, or may engineer a particular location. It does not mandate, recommend, or consider any particular treatment at any particular location. The Director's Rule

establishes departmental procedures for evaluating and responding to requests for pedestrian improvements:

For requests for marked pedestrian crosswalks, general traffic control signals, pedestrian traffic signals, pedestrian traffic signals for the disabled or senior citizens, and pedestrian traffic signals to accommodate school crossings:

(1) Upon receipt of a request, the City Traffic Engineer, or the Engineer's designated representative, shall conduct an evaluation for locations in question, using the guidelines set for in the Installation Criteria section above.

(2) If the location meets the above guidelines, the location will be added to the current needs list to compete for funding as it becomes available.

(3) If the evaluation shows that the location does not meet the guidelines set forth above for the particular type request, the request shall be placed in the Location File for future reference and the requestor will be contacted as to the decision. The City Traffic Engineer's decision to deny a request at any location may be appealed by any person to the Director of SDOT within fourteen (14) days of the date the decision was delivered to the requestor. The Director of the Seattle Department of Transportation will then respond to the appeal in a timely manner. The response shall be in writing if requested.

CP 929 [emphasis supplied].

Upon requests by citizens for marked crosswalks at 87th, the City did evaluate the location as directed by subpart (1). CP 860. After determining, on each occasion, that the treatments requested did not meet installation guidelines, the City so advised the requestors and placed the requests in it Location File for 15th and 87th as directed by subpart (3). *Id.*

Mr. Stevens agreed that no engineering improvements for pedestrian access were warranted (and he would recommend none) at 15th and 87th. He agreed that pedestrian warrants for a signal at Holman were not met. CP 833-47. But even if Mr. Stevens had opined that pedestrian engineering warrants were met at either 87th or Holman, under subpart (2) of the Director's Rule's "Procedures" no action was required of SDOT with respect to either intersection beyond adding any proposed improvements to a list to compete for future funding. CP 929.

Moreover, and importantly, there is no evidence in the record that signaling an intersection makes it "safer" for pedestrians. While signals can, and are intended to, provide additional interruption in the natural flow of traffic, there is no engineering study that has concluded that pedestrian collision rates at signalized crosswalks are lower than at unsignalized crosswalks, marked or unmarked. To the contrary, in Seattle as in other large cities, pedestrian collisions statistically occur more frequently at signalized intersections. CP 375.

C. Facts relevant to plaintiff's Motions for Partial Summary Judgment and the City's Motion to Strike Inadmissible Evidence

Plaintiff moved for partial summary judgment asking the court to determine that the City had notice of an “unsafe intersection” as a matter of law. CP 206-22. (Plaintiff did not, however, ask that the court for a prerequisite finding the conditions of which he alleged the City had notice were, in fact, “unsafe”.) Plaintiff argued that once the City had notice of citizen concerns about 87th, it was incumbent upon the City to install a signalized crosswalk at Holman such that pedestrians not wishing to travel to 85th would have another nearby signalized alternative to cross 15th. CP 206-22. Plaintiff offered statements from the boys’ mothers and Charlie Spencer-Davis that, if Holman been signalized at the time, the boys would have chosen to cross at Holman instead. CP 74-75; 478-79.

The City did not dispute that it had notice that some citizens were uncomfortable crossing at 87th. The City did not dispute that it had notice that some citizens wanted a marked crosswalk or a signal at 87th. The City argued that the failure of some drivers to stop for pedestrians as directed by statute is not an “unsafe condition” within the meaning of a municipality’s duty – that is, evidence of citizen discomfort with a condition does not establish that the condition is, in fact, “unsafe.” CP 356-73. The City moved to strike (1) hearsay and inadmissible opinion

statements from lay witnesses concerning matters of traffic engineering, and (2) an opinion from plaintiff's human factors expert (Richard Gill) as to where the boys might have chosen to cross 15th had Holman been signalized. CP 744-51.

Plaintiff also moved for partial summary judgment on contributory and third-party fault. CP 223-46. He asked that both he and the van driver be deemed fault-free as a matter of law, but conceded questions of fact as to the conduct of both. CP 234-35. There is eyewitness testimony that the boys "ran out into the roadway." CP 404-05; 411-12. There is evidence that the van was speeding. CP 402. Steven Wiker, a biomechanical engineer, concluded 1) that Nicholas was running as he impacted the side mirror of the passing van; 2) that had Nicholas been walking, he would have been able to stop in time to avoid this accident; 3) that the van may have been travelling as fast as 50 mph; and 4) had the van driver attended to and slowed in response to the cue of the stopped curb-lane vehicle, he could have avoided this accident. CP 406-10.

In support of his motions, plaintiff relied on hearsay opinion statements contained in a hearsay police report and the recollections of Charlie Spencer-Davis as to an instantaneous and traumatic event that occurred when he was only 11 years of age. CP 249-319. The police reports plaintiff relied on were authored by law enforcement officers

charged with evaluating this incident for the law enforcement purpose of determining whether the evidence at the scene supported either criminal charges or civil citations against either the driver or the pedestrian. Detective Ron Sanders testified that these reports were not intended to supplant a jury as a finder of fact in a civil matter (CP 400), but regardless, they do not support plaintiff's claims. Even if admissible, Det. Sanders' conclusion was that both the driver (in proceeding past a driver stopped for a pedestrian in a crosswalk) and the pedestrian (in running into the roadway) caused this accident. CP 401, 403.

The City also pointed out significant inconsistencies between Charlie's recollection and undisputed facts in evidence. For example, Charlie recalled Ms. Mulholland driving a blue or black Volkswagen (CP 256), but plaintiff acknowledges that Ms. Mulholland was actually driving a white Murano SUV. CP 225. Charlie recalled the driver stopping and waving the boys across the street. CP 256. No other witness, including Ms. Mulholland, confirmed seeing (or making) such a gesture. Charlie recalled white crosswalk lines painted across the roadway at 87th at the time of this accident. CP 259. There was no marked crosswalk at 87th. CP 224. Charlie first testified that there were no other engineering measures in place (CP 259); under leading questioning, he then testified

that there was an overhead sign. CP 260. It is undisputed that there was no sign at the time of this accident or for several weeks prior. CP 231.

The City did not move to strike Charlie's testimony as to his recollection of the event, but in connection with its response to plaintiff's motion, the City did move to strike (1) hearsay statements of police officers opining as to the culpability of either the driver or pedestrian; and (2) speculation and conjecture that, had Holman been signaled, Nicholas would have chosen to cross there instead. CP 744-53.

Also in response to plaintiff's motion, the City cited to evidence of plaintiff's prior settlement with the commercial owner of the van involved. Consistent with ER 408, the City did not cite to this settlement for purposes of establishing Hansen's liability. The City cited to this settlement 1) to illustrate the inconsistency of plaintiff's position asking that the court deem this driver, from whom plaintiff had demanded and received significant compensation, fault-free as a matter of law; and 2) to impeach a statement by Hansen crafted after settlement of plaintiff's claims against Hansen which conflicted substantively with statements recorded before settlement (but which Hansen subsequently affirmed in sworn testimony). CP 792-97. Plaintiff moved to strike evidence of this settlement. CP 754-78.

D. The Court's Orders

The trial court denied plaintiff's motion for partial summary judgment as to contributory and third party fault, finding genuine issues of material fact as to the conduct of both the driver and pedestrian. CP 957-59. The court granted plaintiff's motion to exclude evidence of the prior settlement except as may be used to impeach Hansen's testimony. CP 955-96. The court granted the City's motion to strike inadmissible evidence, striking as speculative and lacking in foundation the opinions of police officers and opinions that the boys would have crossed at Holman, had it been signalized. CP 963-64. The court granted the City's Motion for Summary Judgment but clarified:

The Court decided this case based upon the evidence admitted and did not reach the broader legal question posed by the City. Unlike in Owen, and based upon the evidence here, plaintiff did not introduce facts sufficient to raise a genuine issue of material fact as to the City's duty/foreseeability to this young man who was tragically injured at 15th Ave and 87th NW.

CP 955-56. The court denied plaintiff's motion for partial summary judgment on notice as moot. CP 960-62.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

Review of a summary judgment is de novo, and the appellate court must conduct the same inquiry as the trial court and view all admissible

material facts and reasonable inferences from them most favorably to the appellant. *Renner v. City of Marysville*, 145 Wn. App. 443, 448-49, 187 P.3d 286 (2008). Summary judgment is appropriate if the pleadings, affidavits, and depositions establish both the absence of genuine issues of material fact and movant's entitlement to judgment as a matter of law. *Id.* Whether the City owed a duty, and the nature of that duty (the standard of care) are questions for the court to decide. *Tincani v. Inland Empire*, 124 Wn.2d 121, 875 P.2d 621 (1994); *Gall v. McDonald Indus.*, 84 Wn. App. 194, 202-03, 926 P.2d 934 (1996). A court may also determine as a matter of law that a duty was not breached and/or that a breach of duty did not proximately cause the accident if the court finds insufficient evidence to support a jury finding on those issues, or if it finds no legal causation. *Ruff v. King Cy.*, 125 Wn.2d 697, 703-04 887 P.2d 886 (1995). A non-moving party may not rely on speculation or argumentative assertions to defeat summary judgment. *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999).

The appellate court reviews a trial court's evidentiary rulings for abuse of discretion. *Hoglund v. Meeks*, 139 Wn. App. 854, 875, 170 P.3d 37 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). In considering de

novo whether plaintiff produced sufficient evidence to survive a CR 56 inquiry, this Court may not consider evidence rejected by the trial court unless this Court first concludes that the trial court abused its discretion in striking the evidence.

The trial court did not address the City's preliminary argument that the City owed no duty to improve unmarked crosswalks at either 87th or Holman to facilitate pedestrian crossing. In reviewing an order entered pursuant to CR 56, this court may affirm the trial court on any ground. *Security State Bank v. Burk*, 100 Wn. App. 94, 103, 995 P.2d 1272 (2000).

B. The City's duty must be analyzed in context with the statutory framework that regulates traffic operations at all unsignalized intersections.

The City's duty to pedestrians is the same duty it owes to all road users, as affirmed in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). This duty is articulated by WPI 140.01:

The [county][city][town][state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a reasonably safe condition for ordinary travel.

Keller at 254 [emphasis in original].

Plaintiff complains essentially of the arterial character of 15th. Municipalities are required by state law to establish arterial roadways to carry high traffic volumes. RCW 35.78.010. Arterial roads are, by

definition, busy streets. Division I recently (and bluntly) took judicial notice of obvious hazards inherent to travel on busy streets ubiquitously:

Seattle is a densely populated city and its streets are busy with traffic. The operation of motor vehicles in close proximity to bicyclists and pedestrians sometimes results in appalling carnage.

City of Seattle v. Wilson, 151 Wn. App. 624, 638, 213 P.3d 636 (2009).

The Supreme Court has consistently affirmed that usual and ordinary risks inherent to travel generally are not a basis for municipal liability.

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 ... road in the state. The same hazard may be encountered a thousand times in every county of the state ... *The unusual danger noticed by the books is a danger in the highway itself.*

Ruff v. King Cy., 125 Wn.2d 697, 706, 125 Wn.2d at 706, 887 P.2d 886 (1995) [emphasis in original] (*quoting Leber v. King Cy.*, 69 Wash. 134, 137, 124 P.397 (1912)). Simply put, evidence that a road might be “dangerous” in the sense that all roads can be “dangerous” (*accord Wilson, supra*) is not enough to take an issue to trial. *Ruff*, 125 Wn.2d at 706-07, fn. 5. This principle is not just Washington Supreme Court precedent; it is hornbook law. *See* W. Page Keeton, PROSSER & KEETON ON TORTS, § 131 (5th ed. 1984) (“[Municipal liability for its public streets and ways] is usually limited to injuries arising out of conditions on the

streets, sidewalks, and other public ways and is not extended to active operations on or around the streets.”).

Keller emphasized that “municipalities are not insurers against accidents nor the guarantors of public safety and are not required to ‘anticipate and protect against all imaginable acts of negligent drivers.’” *Id.* at 252, citing *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979). There is no published appellate law in Washington that addresses the scope of a road authority’s duty to maintain its roadways so as to protect pedestrians choosing to cross a busy road in an unmarked crosswalk from conflict with approaching motorists. Conversely, the statutory framework that regulates traffic operations (for both motorists and pedestrians) at all crosswalks, whether marked or unmarked, is well established. Accordingly, any analysis of a road authority’s duty in this context must be crafted so as not to abrogate the statutory framework that governs.

“Crosswalks” exist at all intersections, either as a continuation of the sidewalk or, where there are no sidewalks, as a portion of the roadway extending ten feet from the intersection. RCW 46.04.160. A municipality may, but need not, designate crosswalks by pavement markings. Pavement markings designating crosswalks may be placed at any location on a roadway, not just at intersections. RCW 46.04.290. Municipalities

have broad discretion in deciding where to mark crosswalks, *see* Comment, WPI 70.03.01, but the statutory framework that regulates traffic at all unsignalized crosswalks does not differ depending on whether the crosswalk is marked or unmarked. *See Krogh v. Pemble*, 50 Wn.2d 250, 254, 310 P.2d 1069 (1957):

While the statute invests local authorities with a very wide discretion in establishing and locating marked crosswalks, there is no other exception to the definition of 'crosswalk.'

(rejecting motorist's argument that marked crosswalk on one side of an intersection abrogates an unmarked crosswalk on the other side).

Where intersections are signalized, vehicular and pedestrian movements are regulated by RCW 46.61.050, .060, and .230. At all intersections where there are no signals, traffic operations are regulated by RCW 46.61.235. RCW 46.61.235 requires motorists to stop for pedestrians in all crosswalks, regardless of whether the crosswalk is marked or unmarked. On multi-lane roadways, RCW 46.61.235 prohibits motorists approaching from the rear of any vehicle stopped for a pedestrian in a crosswalk from overtaking and passing such stopped vehicle. RCW 46.61.235(4). The Rules of the Road do not direct pedestrians to cross in crosswalks, but if pedestrians choose to cross outside of a crosswalk, the Rules of the Road require that they yield to motor vehicles. RCW 46.61.240.

Road authorities, like all other parties, have the right to assume that road users will obey the law and will proceed without negligence and with due regard to the rights of users of the street. WPI 70.06; *Bradshaw v. City of Seattle*, 43 Wn.2d 766, 775, 264 P.2d 265 (1953). Accordingly, in designing its signalized intersections, the City has a right to assume that road users will proceed as directed by RCW 46.61.050, .060, and .230. At unsignalized intersections, the City has a right to assume that road users will proceed as directed by RCW 46.61.235 – regardless of whether the crosswalks are marked.

The statutory framework that regulates traffic operations at unsignalized intersections does not differentiate between marked and unmarked crosswalks, nor does it differentiate between low-volume and high-volume highways. RCW 46.61.235. Plaintiff and his expert effectively urge that on busy, arterial roadways, the statutory framework set forth under RCW 46.61.235 is intrinsically insufficient to protect the pedestrian travels of pedestrians who chose to cross at unsignalized intersections amidst what plaintiff's expert admits would be open and obvious arterial traffic conditions. Plaintiff puts forth no evidence that a signal makes crosswalks “safer” (and ignores the evidence of record to the contrary, CP 375). But regardless of whether there are deficiencies in the statutory framework articulated by RCW 46.61.235, and even if a signal

does make crosswalks safer, where, as Mr. Stevens agreed, there is no engineering standard that requires a municipality to mark and signalize every crosswalk where one might choose to cross (and thus effectively render RCW 46.61.235 obsolete), such claims are not bases upon which municipal liability can rest.

C. The trial court correctly concluded that claims based on the engineering of the intersection of 15th and 87th fail as a matter of law.

1. The City's duty to maintain roadways in reasonably safe condition for ordinary travel does not require it to mark statutory crosswalks.

A municipality owes no duty to undertake any particular street improvements. *Berglund v. Spokane Cy.*, 4 Wn.2d 309, 103 P.2d 355 (1940); *La Breck v. City of Hoquiam*, 95 Wash. 463, 164 P. 67 (1917). It is only where a municipality has chosen to initiate improvements that it must exercise reasonable care in designing and maintaining such improvements, "it being the invitation, expressly or impliedly extended to the public, that imposes the obligation and the duty extends to so much of a way ... as the public is invited to use." *Berglund*, 4 Wn. 2d at 317.

To date, no Washington appellate court has contemplated road authority liability for not marking or otherwise improving an unmarked but statutory crosswalk. Other jurisdictions have soundly and consistently rejected similar claims. In *Horrell v. City of Chicago*, 495 N.E.2d 1259

(1986), for example, a pedestrian brought suit against the city for injuries sustained when she was struck by a truck as she crossed a busy city street in an unmarked crosswalk. The appellate court affirmed the city's dismissal on summary judgment, holding that the city owed the pedestrian no duty to establish marked crosswalks. Likewise, in *Sun v. City of Oakland*, 166 Cal. App. 4th 1177 (2008), plaintiff's decedent was struck and killed while crossing a four-lane arterial in (like here) an unmarked crosswalk (but which, unlike here, had formerly been marked). The trial court granted summary judgment for the municipality, holding as a matter of law that an absence of markings or traffic controls did not create a "dangerous condition" of the roadway. The Court of Appeals affirmed.

But even if plaintiff could show that the City has a duty to install engineering improvements where permissible, plaintiff cannot show that the City breached any such duty here. Plaintiff complained that the City acted tortiously by not providing engineering treatments at 87th and 15th to facilitate plaintiff's travels. But his expert testified that there were no additional engineering treatments he would have recommended at 87th. CP 836. He testified that maintaining a roadway in "reasonably safe" condition does not mean that a signal should be installed at every intersection where a pedestrian might have reason to cross, but rather, opined that a roadway is "reasonably safe" if pedestrians have available to

them the information they need to decide for themselves when, how, and where to cross a roadway (*i.e.*, where there is no condition of the roadway that would confuse or mislead a traveler exercising ordinary care, *contrast Owen v. Burlington Northern*, 153 Wn.2d 780, 108 P.3d 122 (2005)). There is no evidence that pedestrians near 87th had insufficient information to determine how to cross 15th, whether at the signalized intersections at 85th and Mary (subject to RCW 46.61.060), the unsignalized intersections at 87th and Holman (subject to RCW 46.61.235), or anywhere in between (subject to RCW 46.61.240). The City had no control over Nicholas' decision to cross 15th at 87th.

2. Citizen correspondence requesting engineering treatments does not establish a duty to act and is inadmissible to establish a breach of duty.

A city's duty in maintaining its streets "is not measured by the desires of adjacent property owners" but by the rule of reasonable care under the circumstances. *Hunt v. City of Bellingham*, 171 Wash. 174, 177, 17 P.2d 870 (1933). Consistent with *Hunt*, correspondence requesting treatments is insufficient to defeat summary judgment under WPI 140.01.

CR 56(e) requires that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." ER 701(c) excludes lay

witnesses from testifying as to matters of scientific, technical, or other specialized knowledge. Plaintiff relies on citizen complaints to argue that the engineering at 87th and 15th was inadequate, but citizen opinion as to matters of traffic engineering is inadmissible under ER 701. *See Sun, supra*, at 1188 (“[W]hile the citizens’ letters [complaining about crossing difficulties at the intersection] are relevant to the issue of whether [Oakland] had notice of a potentially dangerous intersection, they are not competent evidence that the intersection was, in fact a ‘dangerous condition[.]’”) Particularly where plaintiff’s expert does *not* criticize the engineering of 15th and 87th, under ER 701(c) citizen discomfort with heavy arterial traffic cannot create a question of fact – let alone establish as a matter of law – that the condition of the roadway was “dangerous” within the context of WPI 140.01. *See Hedlund v. White*, 67 Wn. App. 409, 836 P.2d 250 (1992) (trial court properly excluded testimony regarding engineering measures where witness had no personal knowledge and lacked expert qualifications).

3. Plaintiff’s reliance on *Chen v. City of Seattle* is misplaced.

Plaintiff submits that Division I’s recent ruling in *Chen v. City of Seattle*, ___ P.3d ___ (2009), mandates jury determination as to whether, considering what it broadly termed “the totality of the surrounding

circumstances,” a road authority has breached its duty under WPI 140.01. *Appellant’s Brief* at p. 27. Thus, in this case, plaintiff argues that it is for the jury to determine whether the arterial character of the roadway (width and traffic volumes), the absence of signs, markings or signals, and citizen complaints establish an inherently dangerous condition of the roadway that can give rise to liability under WPI 140.01. *Brief of Appellants* at p. 30. The City submits that *Chen*, which is internally inconsistent with the statutory framework that regulates traffic operations at intersections (*see* Section IV(B), *supra*), was wrongly decided (and has petitioned for review). Regardless, because the court’s opinion in *Chen* hinges entirely on what the court perceived to be a “direction” by the road authority to pedestrians to cross in the marked crosswalk at issue in that case, this court cannot apply the holding of *Chen* to the facts of this case without undermining the very premise on which *Chen* was decided.

In *Chen*, plaintiff’s decedent was struck crossing an arterial roadway in a marked crosswalk at an unsignalized intersection. Division I acknowledged that there was no evidence of any defect in the design or maintenance of the roadway or the crosswalk itself, but held that an absence of such evidence was not dispositive. *Slip Op.* at 18-20. Rather, hailing *Berglund v. Spokane Cy.*, 4 Wn.2d 309, 103 P.2d 355 (1940) as the “striking” precedent for its decision, Division I held that heavy traffic

volumes, a history of prior accidents, and a supposed “direction” from the road authority to use a particular crosswalk comprised evidence from which a jury could “infer” a dangerous condition of the roadway, regardless of whether the plaintiff put forth evidence of a defective or misleading condition in the roadway itself. *Slip Op.* at 11-13, 17-24.

Importantly, *Berglund* is not a crosswalk case, the statutes that regulate traffic operation at crosswalks were not in play, and the facts alleged in *Berglund* are not like the facts alleged in *Chen*. In *Berglund*, Spokane County had constructed a bridge over the Spokane River. Unlike the situation here, as in *Chen*, where the statutes allow pedestrians to cross roadways at *any* point of their choosing, whether at signalized crosswalks (RCW 46.61.050, .060, and .230), unsignalized crosswalks (RCW 46.61.235), or any point in between (RCW 46.61.240), and regulate traffic operations accordingly, the bridge in *Berglund* was the *only* way for pedestrians to cross a river. The plaintiffs in *Berglund* alleged that the bridge *design* was deficient because it failed to provide sidewalks. Pedestrians were thus forced by the physical constraints of the bridge structure itself into narrow lanes of vehicular travel. *Berglund* at 316-17.

In *Chen*, Division I read *Berglund* to hold that the “dangerous condition” for pedestrians on the bridge was not the physical design of the bridge *per se*, but rather the “simultaneous use” of the roadway by

pedestrians and motorists forced into conflict by the structural limitations of the bridge. *Slip Op.* at 12. Division I then concluded that the pedestrian in *Chen* was likewise “directed” into vehicular traffic by the crosswalk markings at this arterial intersection, and held that it was this “direction,” in combination with arterial traffic volumes and a history of prior accidents (the facts of which were not of record), from which a jury could “infer” a dangerous situation, regardless of whether there was evidence of any defective or misleading condition of the road itself. *Slip Op.* at 17-18.

The court’s analysis in *Chen* is premised entirely on its conclusions 1) that the Rules of the Roads somehow “direct” pedestrians to use *marked* crosswalks, *Slip Op.* at 17, and 2) that by marking a crosswalk, the City “directed” pedestrians considering how and where to cross the arterial to use that crosswalk specifically. *Slip Op.* at 18. In analogizing to *Berglund*, the *Chen* court ignored that, unlike pedestrians with but one way to cross a river, unless traffic is regulated by a signal pedestrians are free to cross city streets wherever and however they so choose, whether at marked crosswalks, unmarked crosswalks, or anywhere in between (see RCW 46.61.235, RCW 46.61.240). The opinion in *Chen* ignores that the Supreme Court has rejected argument that the statutes “direct” pedestrians to marked crosswalks specifically or require lesser deference for

pedestrians in unmarked crosswalks than in marked crosswalks – even when both are at the same intersection. *Krogh, supra*, at 254. The opinion in *Chen* ignores that the statutory framework that regulates traffic operations at all unsignalized crosswalks, whether marked or unmarked, expressly directs *against* the “simultaneous use” of the road by motorists and pedestrians that the court found so compelling in *Berglund*. RCW 46.61.235.

But regardless, *Chen* does not apply to the circumstances of this case. That is because in *Chen*, it was the marked crosswalk specifically that the court concluded “directed” pedestrians considering where to cross the arterial to use that crosswalk at that intersection specifically. *Slip Op.* at 18. In contrast, there were no crosswalk markings at 87th, or any signage in place at the time of the accident, that could have “directed” pedestrians to cross at this intersection. To the extent that the City in any way “directed” pedestrians in the vicinity of 87th how to cross 15th, under the reasoning in *Chen*, it could only have been by way of the marked crosswalks at 85th and Mary. *Chen* cannot be extended to this case without completely abrogating the court’s distinction of the marked crosswalk on which the *Chen* analysis rests.

D. The trial court correctly concluded that claims based on the engineering of the intersection of 15th and Holman, either before or after this accident, fail as a matter of law.

Mr. Stevens testified that there were no additional engineering treatments he would have recommended at 87th. He acknowledged that a marked, signalized crosswalk was available at 85th (one block south of 87th) but offered that another “option” would have been to install a signal at Holman (one block to the north).

His expert having rejected the theories plaintiff advanced in his Complaint, plaintiff turned to evidence regarding the post-accident signalization of Holman to argue that the City had breached its duty to Nicholas by not marking and signalizing the crosswalks at Holman prior to this accident at 87th. Preliminarily, facts concerning the engineering of 15th and Holman, either prior to or subsequent to this accident, are simply of no relevance to this case because Nicholas Messenger was not attempting to cross 15th at Holman. Further, to the extent that plaintiff seeks to use evidence regarding the subsequent redesign of Holman and 15th as evidence of a measure which, had it been taken prior to this accident, would have made this accident less likely to occur, such evidence is not admissible under ER 407 to prove negligence or culpable conduct in connection with the accident itself. But even if somehow

relevant to this case, facts concerning the design and maintenance of Holman and 15th cannot give rise to municipal liability.

1. The absence of signs, markings, and signals at Holman cannot give rise to municipal liability.

At the time of this accident, the intersection of 15th and Holman included, as did 15th and 87th, unmarked but legal crosswalks across a high-volume, multi-lane arterial roadway. For the same reasons that conditions of 15th at 87th are insufficient to give rise to road authority liability under WPI 140.01, those same conditions at Holman are insufficient to give rise to road authority liability. For the same reasons that the City owed no duty to design the unmarked crosswalks at 87th as marked crosswalks, the City owed no duty to design the unmarked crosswalks at Holman as marked crosswalks. *See* Sections IV(B) and (C), *supra*. The fact that the City, subsequent to this accident, did exercise its discretion under vehicular volume warrants to signalize 15th and Holman in a manner such that it could piggyback pedestrian improvements onto the project is irrelevant. Mr. Stevens admitted that pedestrian demand did not support a signal at Holman and that he was unaware of any industry standard that would have required or recommended that the City install the signal he recommended regardless of whether warrants were met.

2. **Plaintiff lacks sufficient evidence to establish that the engineering of 15th and Holman was a proximate cause of this accident. The trial court properly exercised its discretion in striking speculative testimony as to how Nicholas might have decided differently had Holman been signaled.**

The law mandates summary judgment on an issue when a non-movant fails to establish sufficient evidentiary support for any element of a negligence action, including proximate cause:

On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 at 269 (5th ed. 1984) [emphasis supplied]; *see also* RESTATEMENT (SECOND) OF TORTS § 328A. In road design cases specifically,

Washington Courts have repeatedly held that in order to hold a governmental body liable for an accident based on 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 v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (emphasis in original), *citing Johanson v. King Cy.*, 7 Wn.2d 111, 122, 109 P.2d 307

(1941). Speculative and argumentative assertions, even by an expert, are insufficient to create a triable issue of fact. *Craig, supra*, at 824

As defined by Black's, "[s]peculation, upon which neither court in nonjury case nor jurors in jury case may base verdict, is the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge."

BLACK'S LAW DICTIONARY 6th Ed. (1990). The Supreme Court has explained,

Speculation is no more than guesswork or conjecture. ... It is a mental process by which one reaches a conclusion as to the existence of an essential fact by theorizing either on incomplete evidence or on assumed factual premises that are outside and beyond the actual scope of the evidence.

State v. Uglem, 68 Wn.2d 428, 436, 413 P.2d 643 (1966).

In this case, plaintiff relies on the speculation of his human factors expert, Richard Gill, to argue a question that, had Holman been signaled at the time of this accident, Nicholas would have chosen to cross there instead. *Appellant's Brief* at pp. 15-16. ER 703 requires that expert opinion testimony be based on specific facts or data. Before an expert may offer such opinion testimony, the court must determine whether data relied upon is of a kind that is reasonably relied upon by experts in forming opinions or inferences upon the subject in their particular field. ER 703. In other words, speculation and conjecture is no more admissible simply because cloaked in the guise of an expert opinion. "It is well established that conclusory or

speculative expert opinions lacking an adequate foundation will not be admitted.” *Miller*, 109 Wn. App. at 148 (quoting *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991)). Thus, in *Miller*, the court upheld summary judgment where a vehicle collided with a skateboarder, refusing to admit an expert’s speculation that if the City had taken additional precautions the accident could have been avoided. The court reasoned, “[t]here is no direct or circumstantial evidence showing that Likins was in fact confused or misled by the condition of the roadway.” *Id.* Such contentions are only “speculation or conjecture.” *Id.* See also *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, *rev. denied*, 122 Wn.2d 1010 (1993) (under CR 56(e), affidavits containing conclusory statements without adequate factual foundation are insufficient); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772 (1991) (expert opinion which is only a conclusion or based on assumptions is not evidence which satisfies summary judgment standards).

Mr. Gill fails to identify any facts or data to support his conclusion that “we cross a busy street with a traffic signal and marked crosswalk whenever possible.” Particularly where Nicholas did *not* choose to cross 15th with a signal and marked crosswalk where possible (either at 85th – only one-half block away from the Pizza Hut at which his trip originated – or further north at Mary), Mr. Gill’s statement is without adequate foundation

under ER 703. The trial court was well within its discretion in striking this speculative testimony.

In addition, plaintiff offers speculative statements by the boys' mothers that if there had been a signal at Holman, they would have instructed their sons to cross at Holman, and the boys would have acted as directed. They offer the testimony of Charlie Spencer-Davis, 11 years old at the time of this accident, that he would have crossed with a signal. CP 74-75; 478-79. But ER 104, 611 and 701 all require that proper foundation be laid before testimony will be deemed relevant. *See, e.g.,* 5 K. Tegland, WASH PRAC., EVIDENCE, § 611.15 (Fifth Ed.) (evidence is only relevant if other facts are known to be true or at least shown by the evidence); *see also State v. Blanchey*, 75 Wn.2d 926, 454 P.2d 841 (1969) (objection properly sustained to question asked of detective as to what detective would have done, had defendant requested counsel, inasmuch as defendant had not made such request and what detective would have done was speculative and, thus, irrelevant).

Plaintiff relies on *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 818 P.2d 1337 (1991), to argue the admissibility of this testimony. The trial court properly distinguished *Ayers*. In *Ayers*, the parents of a child who aspirated baby oil, brought suit against the manufacturers for failing to warn of the danger of ingesting baby oil. The parents argued that had

there been adequate warning, the child would not have inhaled the oil because the parents would have kept it out of his reach. Johnson & Johnson objected to this evidence on grounds that it was speculative that further warning would have caused the parents to modify their behavior. The Court allowed the evidence, but specifically noted the factual foundation on which a jury could infer that the parents would have acted as they so claimed, including testimony 1) that the parents habitually kept items they knew to be dangerous out of reach; 2) that the parents had a practice of reading the labels on products to determine their dangers; 3) that the mother relied on the absence of any warning on the bottle to conclude there was no danger posed and thus no need to store the oil out of reach; and 4) the child's mother had specifically told her daughters that if they were carrying anything dangerous in their purses, including personal toiletries, they were to keep the purses out of the child's reach. The Court held that it was on the basis of this evidence that the jury could infer the truth of the parents' testimony. *Id.* at 754 [emphasis supplied].

But here, setting aside speculation as to what all other road users would have done had there been a signal at Holman, there are no facts from which the jury can infer the truth of claims that, had there been a signal at Holman, the boys' parents would have acted as they so speculate, much less that the boys would have behaved as directed. Unlike in *Ayers*,

there is nothing in the record that suggests that either the boys or their parents were unaware of volume and flow of arterial traffic along 15th. There are no facts in the record from which a jury could infer that the boys' parents habitually directed their sons to cross with a signal where available. Further, where the boys chose not to cross 15th at the signal only one-half block away at 85th, and where they chose not to travel further north to access the signalized crosswalk at Mary, there is nothing in the record from which a jury could infer the truth of hindsight speculation that, had there been a signal at Holman, the boys would have crossed there instead.

A trial court has “broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.” *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (quoting *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)). A trial court abuses its discretion when it applies the wrong legal standard to an issue or “takes a view no reasonable person would take.” *Id.* (citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). CR 56(e), the rules of evidence, and the case law interpreting the same soundly prohibit a court from considering speculative testimony offered to defeat summary judgment. The trial court was well within its discretion in striking

testimony as to how Nicholas, his friend, or his parents might have acted differently had the engineering at Holman been different.

But even were the court to find abuse of discretion, such error is grounds for reversal only if it is prejudicial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). An error is prejudicial if it affects, or presumptively affects, the outcome. *James S. Black & Co. v. P & R Co.*, 12 Wn. App. 533, 537, 530 P.2d 722 (1975). Because the City owed no duty to mark and signalize a crosswalk at 15th and Holman, because evidence that the City did mark and signalize crosswalks at Holman post-accident is inadmissible under ER 407, and because plaintiff has put forth no evidence that pedestrian accidents are less likely at signalized intersections, it is irrelevant whether Nicholas would have crossed there had there been a signal. Any abuse of discretion by the trial court in striking this evidence would, accordingly, not be grounds for reversal.

E. The trial court properly denied plaintiff's motion for partial summary judgment asking that the court rule that the City had notice of a dangerous condition as a matter of law.

The City did not dispute that it had notice of citizen concerns about traffic conditions at 87th. The City did not dispute that it had notice that some citizens wanted a marked crosswalk at 87th. But where plaintiff's own expert did not fault the engineering of 87th and 15th, and where the

City owed no duty to design any unmarked crosswalk (whether at 87th or at Holman) as a marked crosswalk, whether the City had notice of citizen concerns is irrelevant.

Further, as a procedural matter, the trial court could not have granted plaintiff's motion for partial summary judgment under WPI 140.02 without first entering summary judgment for plaintiff under WPI 140.01. That is because, read together, the plain language of the two pattern instructions makes clear that any inquiry under WPI 140.02 necessarily requires the plaintiff to first establish an "unsafe condition" of the roadway under WPI 140.01.

WPI 140.01 provides:

The [county] [city] [town] [state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a reasonably safe condition for ordinary travel.

WPI 140.02 provides as a defense:

In order to find a [town] [city] [county] [state] liable for an unsafe condition of a [sidewalk] [street] [road] that was not created by its employees, [and that was not caused by negligence on its part,] [and that was not a condition which its employees or agents should have reasonably anticipated would develop,] you must find that the [town] [city] [county] [state] had notice of the condition and that it had a reasonable opportunity to correct the condition [or give proper warning of the condition's existence].

A [town] [city] [county] [state] is deemed to have notice of an unsafe condition if the condition has come to

the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

Read together, liability cannot attach under WPI 140.02 for an “unsafe” condition of the roadway under WPI 140.01 if the city did not first have notice, actual or constructive, of the condition. *Wright v. Kennewick*, 62 Wn.2d 163, 381 P.2d 620 (1963); *Niebarger v. Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958). But unless and until it is established that the condition of the roadway alleged is a condition sufficient to trigger road authority liability under WPI 140.01, neither the court nor the jury need reach any inquiry into the defense articulated under WPI 140.02. Plaintiff did not move for summary judgment asking the court to rule as a matter of law that the City breached its duty under WPI 140.01. It would have been error for the trial court to implicitly rule for plaintiff as a matter of law under WPI 140.01 by finding notice under WPI 140.02, regardless of whether the court had granted the City’s motion for summary judgment or not. Having properly ruled as a matter of law that the facts introduced and evidence admitted were insufficient to create a genuine issue of material fact as to whether the City breached its duty under WPI 140.01, the trial court properly denied plaintiff’s motion under WPI 140.02 as moot.

F. The trial court properly denied plaintiff's motion for partial summary judgment asking that he, and the motorist who struck him, be found fault-free as a matter of law.

Plaintiff asked the trial court to order that he, and the non-party driver who struck him, be declared fault-free as a matter of law. Plaintiff apparently does not seek review of the order insofar as it denied exculpating the driver; the City accordingly will not address the facts relevant to the driver's conduct.

While plaintiff is correct that, vis-à-vis the statutory duties of a motorist, the protection granted to pedestrians by law in all crosswalks (marked or unmarked) is strong. Case law is consistent, however, that in motor vehicle/pedestrian accidents occurring in crosswalks and a road user's statutory rights and responsibilities notwithstanding, a pedestrian is not relieved of the general duty to exercise ordinary care for his own safety and may be apportioned contributory fault. *See, e.g., Beireis v. Leslie*, 35 Wn.2d 554, 214 P.2d 194 (1950), *Farrow v. Ostrom*, 10 Wn.2d 666, 117 P.2d 963 (1941) (where a pedestrian leaves the curb after looking and no vehicle appears to be within striking distance at that time, it is a jury question as to whether the pedestrian's action was contributorily negligent); *Oberlander v. Cox*, 75 Wn.2d 189, 449 P.2d 388 (1969) (a pedestrian crosswalk provides strong protection, but it is not an absolute sanctuary; where pedestrian does

not look for approaching vehicles after entering crosswalk, jury could infer contributory negligence); *Dabol v. United States*, 337 F.2d 163 (9th Cir. 1964) (whether pedestrian exercised ordinary care by failing to keep a proper lookout after entering a crosswalk is a jury question). As one court explained:

In *Oberlander v. Cox*, 75 Wn.2d 198, 449 P.2d 388 (1969), we emphasized the strength of the protection which the crosswalk gives to pedestrians, stating that ‘when an automobile strikes a pedestrian in a crosswalk the driver’s burden is a heavy one if he would exonerate himself.’ We noted in that case that the law placed on a driver approaching a pedestrian crosswalk a continuous burden of observation. We have never extended the protective rule to a point where the crosswalk is a complete and absolute sanctuary. The law does not place on the motorist an impossible burden. Strong as the protection afforded by the crosswalk may be and however unlikely that a pedestrian struck in a crosswalk would be contributorially negligent, there nevertheless remains in the law a legal possibility that a pedestrian ... may have been contributorially negligent. If there is evidence to support the issue, the court must submit the issue of contributory negligence to the jury. *Oberlander v. Cox*, *supra*.

Shasky v. Burden, 78 Wn.2d 193, 200, 470 P.2d 544 (1970); *see also Alston v. Blythe*, 88 Wn. App. 26, 39, 943 P.2d 692 (1997).

There is ample evidence that Nicholas failed to exercise reasonable care. Eyewitness testimony describes Nicholas running from the curb into the inside lane, where he was struck by the side mirror of the passing van. As in *Oberlander*, there is no evidence that Nicholas looked for approaching

cars after entering the crosswalk. While the law clearly places the primary burden of continuous observation on a driver approaching a crosswalk, *Oberlander* and *Shasky* nevertheless require that a pedestrian at least look for oncoming traffic as he continues to cross a street. *Shasky*, 78 Wn.2d at 200; *Oberlander*, 75 Wn.2d at 193. The evidence here, including Dr. Wiker's biomechanical analysis, shows that Nicholas not only failed to look after entering the street, but that he ran out from in front of the stopped curb-lane vehicle just before he impacted the van, and that had he been walking, he could have avoided this accident. While plaintiff submits, contrary to RCW 46.61.235(2), that one's pace of travel across a roadway cannot subject him to liability, there is no legal support for this theory. Based on common experience, a reasonable jury could conclude that a reasonable pedestrian³ should keep a lookout for oncoming traffic, clear each lane of travel (*i.e.*, wait in front of a stopped vehicle for motorists in adjacent lanes to stop) before proceeding, and walk, rather than run, across a roadway. Based on Dr. Wiker's analysis, a reasonable jury could conclude that if Nicholas had walked and/or looked at all material times, this collision would not have

³ WPI 140.01 requires a road authority to maintain a roadway in "reasonably safe condition for *ordinary* travel." The duty as to a road authority does not shift depending on the on the age, maturity, or ability of a pedestrian.

occurred. Because these issues are properly reserved for the jury, summary judgment was not appropriate.

Notably, Washington law also holds that a pedestrian who is lawfully in a crosswalk but who ignores circumstances alerting him to the impending failure of a vehicle to yield the right-of-way and consequently runs or walks into the side of a vehicle is guilty of contributory negligence as a matter of law. *Van Cleve v. Betts*, 16 Wn. App. 748, 559 P.2d 1006 (1977); *Iwata v. Champine*, 74 Wn.2d 844, 447 P.2d 175 (1968) (a pedestrian who walks or runs into the side of a car, the front of which has passed him, is guilty of contributory negligence as a matter of law). Here, where the uncontroverted evidence is that Nicholas Messenger was not struck by the *front* of the van but rather by the side mirror once the front was already past him, his contributory negligence is not just an obvious question of fact – it could arguably be so as a matter of law.

Plaintiff further relies on *Clements v. Blue Cross of Washington & Alaska Inc.*, 37 Wn. App. 544, 682 P.2d 942 (1984). In *Clements*, the evidence showed that the plaintiff entered a signalized crosswalk on a green light; the light changed to amber, and then red after she was lawfully in the crosswalk. One car stopped to allow her to continue across; a vehicle in an adjacent lane (like here) continued past the stopped car and struck her in the crosswalk. The plaintiff argued (as does plaintiff here), and the *Clements*

trial court agreed, that a pedestrian who enters a crosswalk lawfully cannot be contributorily negligent for failing to maintain a look-out for approaching motorists. It was precisely on this question of the plaintiff's contributory negligence on which the appellate court reversed and remanded:

There was substantial evidence presented to support defendants' position that Clements should have known to look for oncoming traffic even though she was legally in the crosswalk. It was error to refuse to instruct the jury on contributory negligence and to direct a verdict on liability.

Clements at 553.

Plaintiff's' reliance on *Jung v. York*, 75 Wn.2d 195, 449 P.2d 409 (1969) is also misplaced. In *Jung*, a mother entered a marked crosswalk with her two children, walked in front of a car stopped in the outside lane, and was hit by a car passing in the lane. *Id.* at 196. There was no evidence that the plaintiff "ran" at any time during the crossing. *Id.* at 197. She pulled one of the children out of the way of the car, and was struck by the center of the defendant's front bumper. *Id.* at 196. The defendant argued that the plaintiff should have seen him, that she should have heard his brakes squealing, and that she was contributorily negligent in failing to react immediately and jump out of his way. *Id.* at 196. Affirming the trial court's refusal to issue an instruction on contributory negligence under these facts, the court reasoned that she reasonably reacted to the squealing brakes by pulling her child out of the way. *Id.* at 196.

Jung differs from the case at bar. In *Jung*, the court specifically noted that “there was no evidence that [the plaintiff] ran in front of [the defendant’s vehicle],” *id.* at 197, and “there was no evidence in this case to support an inference that the plaintiff darted suddenly from the curb in front of approaching traffic.” *Id.* at 199. In contrast here, neutral eyewitnesses saw Nicholas running across the roadway, and out from in front of the curb-lane vehicle. Without looking to see what was on the other side of this stopped car, he ran into a lane of traffic occupied by a passing vehicle. But even if *Jung* supported plaintiff’s position, the continuing vitality of *Jung* after the Tort Reform Act is questionable. As Division II has observed, *Jung* “is a product of the era when contributory negligence was a complete bar to recovery, and it may not have survived the advent of comparative negligence.” *Alston*, 88 Wn. App. at 39 (citing RCW 4.22.070). In *Alston*, the plaintiff relied on *Jung* to appeal the trial court’s issuance of comparative fault instructions to the jury, arguing that if she were walking in an unmarked crosswalk area, she had no continuing duty to look out for the vehicle that struck her. *Id.* at 38-39. The court disagreed, stating that “even if *Alston* was in marked or unmarked crosswalk, she still had a duty to exercise reasonable care for her own safety....” *Id.* at 39. In an era of comparative fault, when a plaintiff’s damage award is reduced only incrementally by his or her own degree of fault, plaintiff’s interpretation of

Jung as a complete shield makes little sense and is contrary to nearly four decades of subsequent case law. The trial court properly denied plaintiff's motion for summary judgment on this issue.

G. The trial court properly exercised its discretion by deeming admissible evidence of plaintiff's settlement with the commercial owner of the van for the limited purpose of impeaching the van driver's inconsistent testimony.

ER 408 does not exclude evidence of prior settlements "when offered for another purpose" (than to prove liability). The City cited to plaintiff's settlement with the commercial van owner not to establish the driver's liability but, in response to plaintiff's motion asking that the driver be declared fault-free as a matter of law, to show the inherent inconsistency between plaintiff's efforts to argue that this driver – against whom he had previously asserted a claim of negligence and from whom significant recovery was had – should now be found fault-free in these proceedings. In addition, in connection with his motion to have both himself and Hansen declared fault-free as a matter of law, plaintiff relied heavily on a sworn statement by Hansen crafted after settlement of plaintiff's claims against Hansen. This post-settlement statement conflicted substantively with statements recorded before settlement (but which Hansen subsequently affirmed in sworn testimony). The trial court was well within its discretion in ruling that evidence of the settlement as

an intervening event weighing on Hansen's bias, and thus credibility, would be admissible. See ER 408 ("This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness....").

V. CONCLUSION

For the foregoing reasons, the trial court's order granting summary judgment be affirmed.

DATED this 5th day of February, 2010.

Respectfully submitted,

PETER S. HOLMES
Seattle City Attorney

By:



REBECCA BOATRIGHI, WSBA #32767
Assistant City Attorney

Attorneys for Respondent City of Seattle

PROOF OF SERVICE/FILING

DONNA M. ROBINSON certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On February 9, 2010, I requested ABC Legal Messengers to serve, by February 9, 2010, a copy of this document upon the following counsel:

Kevin Coluccio
Stritmatter Kessler Whelan Coluccio
200 Second Ave. West
Seattle, WA 98119-4204

I also state that on February 9, 2010, I caused to be mailed and faxed this document to the following counsel:

Paul L. Stritmatter
Keith Kessler
Stritmatter Kessler Whelan Coluccio
413 Eighth Street
Hoquiam, WA 98550
(360) 532-8032 – fax number

I further state that I requested ABC Messengers to file, by February 2010, the original and one copy of this document with the Court Appeals, Division I.

DATED this 9th day of February, 2010.


DONNA M. ROBINSON

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Appellate Court of Illinois,
 First District, First Division.

Mary HORRELL, Plaintiff-Appellant,
 v.
 CITY OF CHICAGO, Defendant-Appellee.
 No. 85-1986.

June 30, 1986.

Pedestrian brought personal injury action against county, city, transit authority and truck driver for injures resulting when truck hit her as she crossed a city street. The Circuit Court, Cook County, Dean J. Sodaro, J., granted city's motion for summary judgment and pedestrian appealed. The Appellate Court, Quinlan, P.J., held that: (1) city did not owe pedestrian common-law duty to establish cross walks at bus stops, and (2) city did not owe statutory duty to establish cross walks at bus stop.

Affirmed.

West Headnotes

[1] Judgment 228 ⚡178

228 Judgment
228V On Motion or Summary Proceeding
228k178 k. Nature of Summary Judgment.
Most Cited Cases

Judgment 228 ⚡185(6)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) k. Existence or
Non-Existence of Fact Issue. Most Cited Cases
 The purpose of summary judgment is not to try an issue of fact but to determine whether one exists and if all the evidence presented to the trial court does not raise an issue of material fact, then the motion for summary judgment should be granted, if warranted as

a matter of law. S.H.A. ch. 110, ¶ 2-1005.

[2] Appeal and Error 30 ⚡223

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds for Review
30V(B) Objections and Motions, and Rulings Thereon

30k223 k. Judgment. Most Cited Cases
 Alleged procedural errors concerning defendant's motion for summary judgment not raised in the trial court could not be raised for the first time on appeal.

[3] Negligence 272 ⚡202

272 Negligence
272I In General
272k202 k. Elements in General. Most Cited Cases
 (Formerly 272k121.5, 272k121.1(4))
 In an action alleging negligence, a plaintiff must establish the existence of a duty, a breach of that duty and an injury proximately resulting from the breach of the duty.

[4] Judgment 228 ⚡181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General.
Most Cited Cases
 The question of the existence of a duty in an action alleging negligence is a question of law properly addressed in a motion for summary judgment and not solely in a motion to dismiss.

[5] Municipal Corporations 268 ⚡757(1)

268 Municipal Corporations
268XII Torts
268XII(C) Defects or Obstructions in Streets and Other Public Ways
268k757 Duty to Construct or Repair Streets and Other Ways

268k757(1) k. In General. Most Cited

Cases

The traditional common-law duty of local governments concerning public property is a duty to maintain that property in a reasonably safe condition but the duty is only to maintain the property and does not require the creation of public improvements and a municipality is not liable for the failure to undertake public improvements even when an ordinance authorizes such a project and thus the duty to maintain does not commence until improvement is actually undertaken.

[6] Automobiles 48A ⚡277.1

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak277.1 k. In General. Most Cited

Cases

(Formerly 48Ak277)

City owed no common-law duty to plaintiff to establish a crosswalk at intersection at which plaintiff, after leaving bus, was struck by vehicle and since no crosswalk existed there was no duty of maintenance.

[7] Automobiles 48A ⚡277.1

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak277.1 k. In General. Most Cited

Cases

(Formerly 48Ak277)

Ordinances authorizing commissioner of public works to place bus stops where "as he shall determine" they are appropriate and to designate and maintain crosswalks "where in his opinion there is a particular danger to pedestrians" were discretionary and not mandatory and did not impose a statutory duty on the commissioner of public works either to establish bus stops or to designate crosswalks.

[8] Automobiles 48A ⚡277.1

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak277.1 k. In General. Most Cited

Cases

(Formerly 48Ak277)

Existence of city's "Street Marking Standards" did not establish that city owed pedestrian a duty to establish crosswalks at all bus stops, under exception to grant of immunity to municipalities providing that if after the execution of a plan or design it appears from its use that it has created a condition that is not reasonably safe the local public entity can be held liable, where "Street Marking Standards" did not create an overall plan but merely established guidelines for placing crosswalks and where the location of each crosswalk was separately determined and would involve a discretionary decision on the part of the commissioner of public works each time a crosswalk was established and, thus a separate plan. S.H.A. ch. 85, ¶ 3-103(a).

[9] Municipal Corporations 268 ⚡277

268 Municipal Corporations

268IX Public Improvements

268IX(A) Power to Make Improvements or Grant Aid Therefor

268k277 k. Improvements and Works Beyond Boundaries of Municipality. Most Cited Cases

The Local Governmental and Governmental Employees Tort Immunity Act codified the common-law duty of a local public entity to maintain its property and created no new duties, and thus, since city owed no common-law duty to establish cross walk at bus stop there could be no duty owed to plaintiff under exception to Act. S.H.A. ch. 85, ¶¶ 3-102, 3-103(a). **1260*429***525 James D. Griffith, James D. Griffith, Ltd., Chicago, Marshall E. LeSueur, Chicago, for plaintiff-appellant.

James D. Montgomery, Corp. Counsel of the City of Chicago, Chicago, for defendant-appellee.

Presiding Justice QUINLAN delivered the opinion of the court:

Plaintiff, Mary Horrell, brought suit in the circuit court of Cook County against the City of Chicago (City), the Chicago Transit Authority (CTA), and Joseph Kawa,

an individual, for injuries resulting when Kawa's truck hit the plaintiff as she crossed a City street. One circuit court judge denied a motion of the City for summary judgment, but, subsequently, a second circuit court judge, after further consideration, granted the City's motion. At the same time, the second judge also granted the CTA's motion for summary judgment. Trial on the remaining allegations concerning Joseph Kawa was continued pending the disposition of this appeal.

The facts underlying the suit are as follows. On July 1, 1983, Mary Horrell got off a CTA bus on the east side of State Street at the "T" intersection of State and Maple in Chicago. Following the bus's departure from the intersection, she proceeded to cross State Street in a westerly direction at a point where no crosswalk markings had been painted. As she was crossing the street, she was struck by a truck driven by Joseph Kawa. It is undisputed that crosswalks existed across State Street within one-half block in both directions of the point where Ms. Horrell chose to cross the street. Ms. Horrell brought suit against the City of Chicago, the CTA, and Joseph Kawa for injuries resulting from the collision. She alleged that the City was negligent in failing to *430 provide a crosswalk for a bus stop at a busy intersection and that the City's own "Street Marking Standards" required it to do so. The City denied the allegations of negligence and asserted the Local Governmental and Governmental Employees Tort Immunity Act as an affirmative defense. (Ill.Rev.Stat.1985, ch. 85, par. 1-101 *et seq.*) The City filed its motion for summary judgment on March 5, 1985, which, as stated previously, was originally denied by the first judge on April 24, 1985. Ms. Horrell was given leave to file a first amended complaint which she did. The amended complaint alleged that the City negligently:

- (a) failed to provide a crosswalk in violation of section 27-398 of the Municipal Code of Chicago;
- (b) failed to provide a crosswalk in accordance with its "Street Marking Standards" adopted by the City Bureau of Traffic Engineering and Operations;
- (c) permitted a bus stop to be located at an unmarked crosswalk in violation of section 27-412 of the Municipal Code of Chicago;
- (d) permitted another municipal corporation (the

CTA) to "usurp and abuse its obligation" to establish and maintain bus stops.

The case was transferred to the second judge, Judge Sodaro, on June 10, 1985. The City filed an answer to the plaintiff's complaint on June 12, 1985. No notice of **1261***526 motion or specific motion for summary judgment directed against this first amended complaint was filed by the City. However, the record reveals that on June 13 and 14, 1985, extensive discussions were conducted by Judge Sodaro and counsel for plaintiff concerning motions for summary judgment on behalf of both the CTA and the City. After some additional arguments, Judge Sodaro granted both motions. In granting the City's motion, the trial judge found that there was "no duty running from the City to the plaintiff in this case, that there was no contested issue of fact," and accordingly, the City was entitled to summary judgment. Ms. Horrell now appeals the trial court's granting of summary judgment in favor of the City.

[1] It is well settled that a motion for summary judgment should only be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (Ill.Rev.Stat.1985, ch. 110, par. 2-1005; *Carruthers v. Christopher & Co.* (1974), 57 Ill.2d 376, 380, 313 N.E.2d 457.) The purpose of summary judgment is not to try an issue of fact but to determine whether one exists. (*Boylan v. Martindale* (1982), 103 Ill.App.3d 335, 339, 59 Ill.Dec. 43, 431 N.E.2d 62.) If all the evidence presented to the *431 trial court does not raise an issue of material fact, then the motion for summary judgment should be granted, as stated above, if warranted as a matter of law. *Kramer v. Weedhopper of Utah* (1986), 141 Ill.App.3d 217, 221, 95 Ill.Dec. 631, 490 N.E.2d 104.

[2] While the primary issue on appeal is whether the trial court erred in granting the City's motion for summary judgment, Ms. Horrell also alleges that the trial court committed procedural errors in addressing the City's motion. Specifically, Ms. Horrell contends that the question of duty, which was the issue here, is a question of law that is more properly decided by a motion to dismiss rather than a motion for summary judgment; and, that the City's written motion for summary judgment was actually filed prior to the first

amended complaint and did not directly relate to the amended complaint; and thus, she says summary judgment was improperly granted. Our review of the record, however, reveals that there were over two days of discussion and argument before Judge Sodaro concerning the City's motion for summary judgment and no objection was made by any party concerning any of the procedures employed by the City or followed by the court. It is well settled that alleged questions of error not raised in the trial court are waived for purposes of review and may not be raised for the first time on appeal. (*Western Casualty and Surety Co. v. Brochu* (1985), 105 Ill.2d 486, 500, 86 Ill.Dec. 493, 475 N.E.2d 872.) Therefore, we need not consider these questions raised by the plaintiff concerning the propriety of the procedures in considering the City's motion.

[3][4] However, we note that in a cause of action alleging negligence, such as here, the plaintiff must establish the existence of a duty, a breach of that duty and an injury proximately resulting from the breach of the duty. (*Pelham v. Griesheimer* (1982), 92 Ill.2d 13, 18, 64 Ill.Dec. 544, 440 N.E.2d 96.) This question of duty is a question of law, as plaintiff contends. (*Curtis v. County of Cook* (1983), 98 Ill.2d 158, 163, 74 Ill.Dec. 614, 456 N.E.2d 116.) But, contrary to the plaintiff's contention, a motion for summary judgment does properly address an issue of duty. (*Eddings v. Dundee Township Highway Commission* (1985), 135 Ill.App.3d 190, 197, 88 Ill.Dec. 397, 478 N.E.2d 888.) As our supreme court in *Barnes v. Washington* (1973), 56 Ill.2d 22, 27, 305 N.E.2d 535, expressly noted:

"This court has also held that the entry of a summary judgment is proper when only a question of law is involved. (*Allen v. Meyer*, 14 Ill.2d 284 [152 N.E.2d 576].) Thus, if under the pleadings and affidavits it appears that the defendant owed no duty * * *, the granting of [a] motion for summary judgment [is] proper."

1262*527 Therefore, Ms. Horrell is incorrect in her claim that the question of duty could only be decided by a motion to dismiss.

*432 In her complaint in the circuit court, Ms. Horrell alleged that the City was negligent in its failure to provide a crosswalk at the intersection of State and Maple. She maintained that the City's negligent failure to place a crosswalk at the intersection caused or

contributed to Mr. Kawa's striking her and causing the injuries she suffered. Ms. Horrell does not, however, allege that the City negligently constructed the intersection, or that the crosswalk was established and negligently maintained. Rather, she is contending that two City of Chicago Municipal Ordinances, Municipal Code of Chicago, sections 27-398 and 27-412, affirmatively impose a duty on the City to paint crosswalks at apparently every bus stop in the City. In the alternative, Ms. Horrell argues that even if the above ordinances do not create such a duty, the City of Chicago "Street Marking Standards," as adopted by the City Bureau of Traffic Engineering and Operations, constituted a "plan" under section 3-103(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Ill.Rev.Stat.1985, ch. 85, par. 3-103(a)), for the installation of crosswalks at intersections to coincide with bus stops in the City, and that by failing to properly implement this "plan," the City created an unsafe condition. We disagree with Ms. Horrell and find that the City of Chicago owed no common law or statutory duty to plaintiff to construct a crosswalk at the intersection of State and Maple.

[5][6] The traditional common law duty of local governments concerning public property is a duty to maintain that property in a reasonably safe condition. (*Curtis v. County of Cook* (1983), 98 Ill.2d 158, 163, 74 Ill.Dec. 614, 456 N.E.2d 116.) The duty is only to "maintain" the property and does not require the creation of public improvements. (*American State Bank of Bloomington v. Cude* (1975), 30 Ill.App.3d 206, 207, 331 N.E.2d 825.) A municipality is not liable for the failure to undertake public improvements even where an ordinance authorizes such a project. (*Best v. Richert* (1979), 72 Ill.App.3d 371, 374-75, 27 Ill.Dec. 663, 389 N.E.2d 894.) Thus, the duty to maintain does not commence until an improvement is actually undertaken. (*Deren v. City of Carbondale* (1973), 13 Ill.App.3d 473, 478, 300 N.E.2d 590.) Therefore, under the facts alleged here, the City of Chicago owed no common law duty to Ms. Horrell to establish a crosswalk at the intersection of State and Maple, and since it had not placed a crosswalk at the intersection, there could not be a duty of maintenance.

[7] We further find that Ms. Horrell has failed to establish the existence of a statutorily created duty owed by the City of Chicago to paint crosswalks at every bus stop in the City. In support of her argument, Ms. Horrell cites sections 27-398 and 27-412 of the Mu-

municipal *433 Code of Chicago. Section 27-412 provides that:

“The Commissioner of Public Works, subject to the concurrence of the Chicago street traffic commission and to the approval of the city council, is hereby authorized and required to establish bus stops, bus stands, taxicab stands, and stands for other passenger common-carrier motor vehicles on such public streets in such places and in such number as he shall determine to be of the greatest benefit and convenience to the public, and every such bus stop, bus stand, taxicab stand, or other stand shall be designated by appropriate signs.” Amend.Coun.J. Dec. 27, 1986, p. 14398.

Section 27-398 authorizes the Commissioner of Public Works “[t]o designate and maintain, by appropriate devices, marks, or lines upon the surface of the roadway, crosswalks at intersections where in his opinion there is particular danger to pedestrians crossing the roadway and at such other places as he may deem necessary.” Amend.Coun.J. Dec. 27, 1982, p. 14398.

It is Ms. Horrell's position that the language of these two ordinances is mandatory and that these ordinances, when read together, impose a duty on the City of Chicago to provide a crosswalk at every bus stop in the City. Therefore, she argues that the failure to have a crosswalk at **1263***528 the bus stop was a breach of the duty owed to her by reason of these ordinances.

We disagree with Ms. Horrell's argument. Both of these ordinances are clearly discretionary, and authorize the Commissioner of Public Works to place bus stops where “as he shall determine” they are appropriate, and place crosswalks where “in his opinion there is a potential danger” and “such other places as he may deem necessary.” Such ordinances are readily distinguishable from the ordinances involved in *French v. City of Springfield* (1976), 65 Ill.2d 74, 2 Ill.Dec. 271, 357 N.E.2d 438, and *First National Bank of DeKalb v. City of Aurora* (1978), 71 Ill.2d 1, 15 Ill.Dec. 642, 373 N.E.2d 1326, cited by Ms. Horrell in support of her argument. Unlike the City of Chicago's ordinances here, the ordinances in *French* and *First National Bank* contained mandatory language which required the city to affirmatively take specific action. In *First National Bank* the ordinances provided in pertinent part that it was the city's duty to summarily

remove any obstruction or encroachment on the city's property. Similarly in *French*, the ordinance required the city to obtain a permit before a street could be barricaded. We, therefore, agree with the trial court's determination here that, in contrast to the ordinances in *French* and *First National Bank*, the City of Chicago ordinances cited by Ms. Horrell are merely authorizing ordinances and *434 did not impose a duty on the Commissioner of Public Works either to establish any bus stops or to designate any crosswalks. These ordinances merely permit him to do so as he sees fit.

[8] Ms. Horrell further argues, however, that the painting of the crosswalks at certain intersections, together with the City's “Street Marking Standards,” indicate the creation and adoption of a plan of crosswalks at all intersections and all bus stops. It is her contention that because of the City's failure to place a crosswalk at the intersection here, the City has improperly implemented the plan. Specifically, Ms. Horrell alleges that when the City put in a north-south crosswalk on Maple and east-west crosswalks at fifteen other adjacent streets pursuant to the “Street Marking Standards,” the City only partially, and thus imperfectly, implemented its plan.

Ms. Horrell's argument is an attempt to demonstrate that the City owed her a duty of care based on an exception to the grant of immunity to municipalities found in section 3-103(a) of the Local Governmental and Governmental Employees Tort Immunity Act. (Ill.Rev.Stat.1985, ch. 85, par. 3-103(a).) That exception holds a local public entity to be liable “if after the execution of [a] plan or design it appears from its use that it has created a condition that it is not reasonably safe.”

We find no merit in Ms. Horrell's argument here for two reasons. First, as the trial court properly found, the “Street Marking Standards” do not create an overall plan, but merely establish guidelines for placing crosswalks and do not delineate particular locations for crosswalks. Secondly, the location of each crosswalk is separately determined and would involve a discretionary decision on the part of the Commissioner of Public Works each time a crosswalk was established and, thus, a separate plan.

In support of her argument, Ms. Horrell cited *Baran v. City of Chicago Heights* (1969), 43 Ill.2d 177, 251

N.E.2d 227, and Johnston v. City of East Moline (1950), 405 Ill. 460, 91 N.E.2d 401. We find Ms. Horrell's reliance on these two cases to be misplaced. In Baran, the City of Chicago Heights had erected a light pole at a location which caused inadequate lighting to be provided. The supreme court, relying on its earlier holding in Johnston v. City of East Moline, held that " * * * where a city undertakes to provide lights, it is liable for injuries which result from deficient or inadequate ones." (Baran v. City of Chicago Heights (1969), 43 Ill.2d 177, 180, 251 N.E.2d 227.) In Johnston, the City of East Moline had failed to repair a traffic signal which was found to have been the proximate cause of plaintiff's injuries. The supreme court there held that, " * * * after the signal system in question was *435 constructed and in operation, the keeping of it **1264***529 in such condition that it would not inevitably be hazardous and invite citizens into danger was a corporate duty, for the failure of which liability was incurred." (405 Ill. 460, 468, 91 N.E.2d 401.) Here the City of Chicago did not place a crosswalk at the intersection of State and Maple; hence, there is no question concerning the adequacy of the crosswalk or the propriety of its location. Therefore, the holdings in Baran and Johnston are inapposite.

[9] As a collateral matter, the City argues, and we agree, that Ms. Horrell's reliance on section 3-103(a) of the Local Governmental and Governmental Employees Tort Immunity Act as a basis for her claim that the City owed her a "duty" to paint a crosswalk at the intersection of State and Maple is erroneous. Section 3-102 of the Act codifies the common law duty of a local public entity to maintain its property. (Ill.Rev.Stat.1985, ch. 85, par. 3-102; see Warchol v. City of Chicago (1979), 75 Ill.App.3d 289, 294, 30 Ill.Dec. 689, 393 N.E.2d 725.) The Act creates no new duties, but simply articulates the common law duty to which the subsequently delineated immunities apply. (Hannon v. Counihan (1977), 54 Ill.App.3d 509, 512, 12 Ill.Dec. 210, 369 N.E.2d 917.) The exceptions to immunity do not form the basis for creating a new duty upon which a plaintiff can rely because the Act simply provides an affirmative defense for a defendant municipality. Thus, the "duties" described in the exceptions to immunity found in the immunity provisions, and, specifically those that are found in section 3-103(a) regarding the execution of a plan, are derived from the basic common law duty articulated in section 3-102. As noted by our supreme court in Curtis v. County of Cook (1983), 98 Ill.2d 158, 165, 74 Ill.Dec.

614, 456 N.E.2d 116, where there is no duty owing to the plaintiff under section 3-102 of the Act, no duty exists under section 3-103. Therefore, because the City of Chicago owes no common law duty to Ms. Horrell under the facts presented here, there can be no duty owing to Ms. Horrell under section 3-103(a) of the Act either.

Accordingly, we find that Ms. Horrell has failed to establish any common law or statutory duty owed to her by the City of Chicago, and, inasmuch as there was no material issue of fact presented, the trial court properly granted the City's motion for summary judgment.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

BUCKLEY and O'CONNOR, JJ., concur.

Ill.App. 1 Dist., 1986.
Horrell v. City of Chicago
145 Ill.App.3d 428, 495 N.E.2d 1259, 99 Ill.Dec. 524

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166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

▷

Court of Appeal, First District, Division 1, California.

SONG X. SUN et al., Plaintiffs and Appellants,
v.

CITY OF OAKLAND, Defendant and Respondent.
No. A118434.

Sept. 15, 2008.

Review Denied Dec. 10, 2008.^{FN*}

FN* Werdegar, J., is of the opinion the petition should be granted.

Background: Family of pedestrian killed when struck by an automobile at unmarked pedestrian crosswalk brought action against city for premises liability. The Superior Court, Alameda County, No. RG05-229302, Frank Roesch, J., granted summary judgment for city. Family appealed.

Holdings: The Court of Appeal, Swager, J., held that:

- (1) evidence of pedestrian accident study did not preclude summary judgment;
- (2) evidence of letters from community members expressing concerns did not preclude summary judgment;
- (3) evidence of city traffic engineer's concerns did not preclude summary judgment;
- (4) declaration of expert witness did not preclude summary judgment;
- (5) installation of bulb-outs and removal of painted crosswalk markings was not a dangerous condition;
- (6) city's failure to provide notice of removal of marked crosswalk as required by statute did not preclude summary judgment; and
- (7) city was immune from liability for pedestrian's death to extent that removal of crosswalk markings was a factor.

Affirmed.

West Headnotes

[1] Municipal Corporations 268 ↪ 857

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k857 k. Actions for Injuries. Most Cited Cases

The existence of a "dangerous condition," for purposes of public entity premises liability, is ordinarily a question of fact; however, it can be decided as a matter of law if reasonable minds can come to only one conclusion concerning the issue. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[2] Municipal Corporations 268 ↪ 847

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases

If it can be shown that city property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not "dangerous" for purposes of public entity premises liability. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[3] Municipal Corporations 268 ↪ 847

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases

A third party's negligent or illegal conduct does not necessarily absolve a city from liability for creating a dangerous condition, for purposes of public entity premises liability, if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. West's

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

Ann.Cal.Gov.Code §§ 830(a), 835.

[4] Municipal Corporations 268 ↪856

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k856 k. Negligence or Other Fault of Third Persons. Most Cited Cases

Third party conduct by itself, unrelated to the condition of public property, does not constitute a "dangerous condition" of the property for which a public entity may be held liable. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[5] Municipal Corporations 268 ↪856

268 Municipal Corporations

268XII Torts

268XII(E) Condition or Use of Public Buildings and Other Property

268k856 k. Negligence or Other Fault of Third Persons. Most Cited Cases

To support public entity premises liability where the immediate cause of a plaintiff's injury is a third party's negligent or illegal act, there must be a defect in the physical condition of the property that increases or intensifies the danger to users from third party conduct, and that defect must have some causal relationship to the third party conduct that injures the plaintiff. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[6] Judgment 228 ↪185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases

Summary judgment evidence of pedestrian accident study showing that intersection at which pedestrian was killed when struck by an automobile was tied

for third among all intersections in city in the number of pedestrian-involved accidents did not support a reasonable inference that removal of painted markings from crosswalk in installing bulb-outs increased the risk of such accidents, as required for removal of markings to constitute a dangerous condition supporting public entity premises liability, where study was conducted before markings were removed, and there was no evidence that any other pedestrians were struck after markings were removed. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[7] Judgment 228 ↪185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases

Summary judgment evidence of letters from community members expressing concerns about pedestrian safety at intersection where pedestrian was killed when struck by an automobile did not support a reasonable inference that removal of painted markings from crosswalk increased the risk of such accidents, as required for removal of markings to constitute a dangerous condition supporting public entity premises liability; letters were written before markings were removed. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[8] Judgment 228 ↪185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases

Summary judgment evidence that city traffic engineer expressed a general concern about installing bulb-outs on intersections to the extent they might encourage pedestrians to cross at intersections

without traffic controls did not support a reasonable inference that removal of painted markings and installation of bulb-outs of crosswalk where pedestrian was killed when struck by an automobile increased the risk of such accidents, as required for removal of markings to constitute a dangerous condition supporting public entity premises liability, since engineer's concern did not pertain to the specific intersection where pedestrian was killed. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[9] Judgment 228 ↪185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases

Summary judgment declaration of plaintiffs' expert witness that installation of bulb-outs and removal of painted markings created a dangerous condition at crosswalk where pedestrian was killed when struck by an automobile, in that it encouraged pedestrians to believe they could cross safely at the intersection as if it were still marked while failing to alert approaching drivers that pedestrians would be using the intersection as a crosswalk, did not support a reasonable inference that the changes increased the risk of such accidents, as required for removal of markings to constitute a dangerous condition supporting public entity premises liability, absent evidence that pedestrian or driver who hit her had crossed intersection when the crosswalk was painted. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[10] Automobiles 48A ↪252

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak252 k. In General. Most Cited Cases

The combination of high speed traffic and heavy

pedestrian use alone does not lead to public entity premises liability. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[11] Automobiles 48A ↪257

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak257 k. Sufficiency and Safety of Way in General. Most Cited Cases

A four-way stop is not an inherently dangerous condition when used with due care by the general public, as would support public entity premises liability. West's Ann.Cal.Gov.Code §§ 830(a), 835.

[12] Automobiles 48A ↪279

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

City's installation of bulb-outs on intersection and removal of painted crosswalk markings was not a "dangerous condition," as required for public entity premises liability to family of pedestrian killed when struck by an automobile in intersection. West's Ann.Cal.Gov.Code §§ 830(a), 835.

See Cal. Jur. 3d, Government Tort Liability, §§ 34, 45; Cal. Civil Practice (Thomson/West 2007) Torts, §§ 29:10, 31:18; 10 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 26:32; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 258.

[13] Judgment 228 ↪185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

Summary judgment affidavit of plaintiffs' expert that community members would have opposed removal of markings on crosswalk if city had complied with statutory duty to give notice of such removal was speculative in showing that giving notice would actually have prevented removal of markings, for purposes of claim of public entity premises liability for death of pedestrian hit by car while attempting to cross. West's Ann.Cal.Vehicle Code 21950.5; West's Ann.Cal.Gov.Code §§ 830(a), 835.

[14] Automobiles 48A ↪279

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

Judgment 228 ↪185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

City's failure to provide notice of removal of marked crosswalk as required by statute did not support a reasonable inference that removal of painted markings constituted a dangerous condition, and thus did not preclude summary judgment for city on claim of public entity premises liability for death of pedestrian hit by car while attempting to cross. West's Ann.Cal.Vehicle Code 21950.5; West's Ann.Cal.Gov.Code §§ 830(a), 835.

[15] Automobiles 48A ↪279

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability
48Ak277 Precautions Against Injuries
48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

Automobiles 48A ↪282

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak282 k. Proximate Cause. Most Cited Cases

To the extent that city's removal of crosswalk markings from intersection was a factor in driver's collision with pedestrian, city's liability for pedestrian's death was foreclosed by statute immunizing public entities for liability for accidents proximately caused by failure to provide a signal, sign, marking, or device to warn of a reasonably apparent dangerous condition, since the only other physical condition complained of, the addition of bulb-outs to the sidewalk, was not hidden from pedestrians or motorists. West's Ann.Cal.Gov.Code § 830.8.

[16] Automobiles 48A ↪279

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak277 Precautions Against Injuries

48Ak279 k. Notices, Warning Signals, or Lights. Most Cited Cases

Statutory immunity to public entity premises liability for failure to provide traffic control signals or signs does not apply to the failure to mark a crosswalk. West's Ann.Cal.Gov.Code § 830.4.

**375 Casper, Meadows, Schwartz & Cook, Andrew C. Schwartz, Esq., Walnut Creek, Thom Seaton, Esq., for Plaintiffs and Appellants.

John Russo, City Attorney, Randolph W. Hall, Assistant City Attorney, William E. Simmons, Supervising Deputy City Attorney, Christopher Kee, Deputy City Attorney, for Defendant and Respondent.

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

ent.

SWAGER, J.

*1180 While crossing **International Boulevard** in Oakland at an unmarked pedestrian crosswalk, Rong Zeng Peng was struck by an automobile and killed. Her husband and minor daughter sued the City of Oakland (City) and others, alleging that Ms. Peng's death was proximately caused by the dangerous condition of the intersection where the accident occurred. City moved successfully for summary judgment on the ground, among others, that the intersection was not in a dangerous condition as a matter of law. Appellants appeal from the adverse judgment. Finding no triable issues of *1181 material fact with respect to the existence of a dangerous condition, we affirm.

FACTUAL BACKGROUND

The following facts are, in essence, uncontroverted and taken from the evidence submitted by the parties in support of, and in opposition to, the motion for summary judgment.^{FN1}

FN1. All of the facts presented in this opinion come solely from the evidence presented in connection with City's motion for summary judgment.

International Boulevard is a four-lane thoroughfare with two lanes going in each direction. Just before 9:00 p.m. on October 20, 2004, Ms. Peng attempted to cross International Boulevard where it intersects with 7th Avenue. The crosswalk at this intersection had been marked with painted stripes in the past, but it was unmarked at the time of the accident. A driver proceeding in the left lane of International Boulevard saw her from about a block away and stopped to allow her to cross. As she emerged from behind the stopped car and crossed into the right lane, she was struck by a car driven by Ramon Jackson. Jackson had initially been driving in the left lane, but he moved his car to the right lane in

order to get around the stopped car and did not see Ms. Peng crossing in his path until it was too late to stop. He fled the scene immediately after the accident and later turned himself in to the police. As part of a plea bargain, he pled no contest to felony vehicular manslaughter with gross negligence. (Pen.Code, § 192, subd. (c)(1).)

PROCEDURAL HISTORY

On November 17, 2005, appellants filed their first amended complaint, asserting claims for premises liability against City based on the theory that Ms. Peng's death was caused by a dangerous condition of public property. Specifically, they alleged: "Decedent was crossing the street at the corner of International Boulevard and 7th Avenue, near the Clinton Park Adult School. The intersection in which decedent was walking used to have in place a painted crosswalk for pedestrians for several years prior to this incident. However, sometime prior to the subject incident the **376 City of Oakland repaved the roadway and never replaced the crosswalk. Decedent was walking across this street when she was struck and killed in the unmarked crosswalk. In April of 2005, the crosswalk was finally replaced."

On February 6, 2007, City moved for summary judgment on the following grounds: 1) that the intersection was not in a dangerous condition as a matter of law; 2) that the undisputed evidence shows that no dangerous condition of *1182 public property caused the accident; and 3) that even if a dangerous condition did cause the accident, City was immune by operation of Government Code sections 830.4 and 830.8. In opposition to City's motion, appellants argued that disputed facts created material fact issues for trial with respect to: 1) whether the unmarked crosswalk was a dangerous condition, and 2) whether the dangerous condition was a concurrent cause of the accident.

The trial court granted City's motion, finding as a matter of law: 1) that the site of the accident was

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

not in a dangerous condition, 2) that there was no evidence the accident was caused by City's earlier removal of the crosswalk markings, and 3) that there was no triable issue of material fact as to whether City was immune from liability. This appeal followed.

DISCUSSION

I. Standard Of Review

A defendant may move for summary judgment "if it is contended that the action has no merit..." (Code Civ. Proc., § 437c, subd. (a).) "A defendant ... has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Id.* subd. (p)(2).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.* subd. (c).) "We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, 110 Cal.Rptr.2d 370, 28 P.3d 116.)

"In undertaking our independent review of the evidence submitted, we apply 'the same three-step process required of the trial court: First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's

favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material *1183 factual issue. [Citations.]" ' [Citation.]" (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 392, 134 Cal.Rptr.2d 689.)

II. Dangerous Conditions of Public Property

A public entity is generally liable for injuries caused by a dangerous condition of its property if "the property was in a dangerous condition at the time of the injury, ... the injury was proximately caused by the dangerous condition, ... the **377 dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and ... either: [¶] ... [a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] ... [t]he public entity had actual or constructive notice of the dangerous condition [in time to prevent the injury]." (Gov.Code, § 835.)^{FN2}

FN2. All subsequent statutory references are to the Government Code except where otherwise indicated.

[1][2] For purposes of an action brought under section 835, a " 'dangerous condition,' as defined in section 830, is 'a condition of property that creates a substantial ... risk of injury when such property or adjacent property is used with due care' in a 'reasonably foreseeable' manner. (§ 830, subd. (a).)" (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 147, 132 Cal.Rptr.2d 341, 65 P.3d 807 (*Bonanno*).) "The existence of a dangerous condition is ordinarily a question of fact; however, it can be decided as a matter of law if reasonable minds can come to only one conclusion concerning the issue." (*City of San Diego v. Superior Court* (2006) 137 Cal.App.4th 21, 28, 40 Cal.Rptr.3d 26; § 830.2.^{FN3}) With respect to public streets, courts have observed "any

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
 (Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] 'If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not "dangerous" within the meaning of section 830, subdivision (a).' [Citation.]" (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196, 45 Cal.Rptr.2d 657 (*Chowdhury*)).

FN3. Section 830.2 provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

***1184 III. The Motion for Summary Judgment**

A. Allegations of the complaint

From the complaint and appellants' moving papers, it appears that their claim rests on the contention that City created the allegedly dangerous condition by failing to repaint crosswalk markings after City had installed bulb-out sidewalk extensions and repaved the street as part of a streetscaping project. FN4 Between June 9 and June 11, 2004, a few months prior to the accident, the bulb-outs were installed and City removed the existing crosswalk markings. Appellants note there is no evidence that Ms. Peng was not using due care as a pedestrian while crossing the intersection and assert that the

"key question" is whether City's failure to re-mark the intersection after having made the intersection "pedestrian friendly by the installation of bulb-outs" created a dangerous condition.

FN4. A bulb-out is an extension of the sidewalk, usually at the corner of an intersection, that lessens the distance pedestrians must traverse across a street.

B. City's motion for summary judgment

City framed its motion for summary judgment against appellants' response to a **378 special interrogatory asking them to "describe the dangerous condition of public property" that existed at the intersection. Appellants' response was: "The dangerous condition was the state of the intersection itself. There was no marked pedestrian crosswalk and no warning signs. There was also a lack of any positive controls at the intersection of International Blvd. and Seventh Avenue, i.e., traffic signals, stop signs, flashing beacons, within the crossing. Additionally, the intersection was poorly lit." On appeal appellants focus their dangerous condition claim on the unmarked crosswalk only. This is most likely in recognition of section 830.4, which provides immunity for the failure to install devices such as warning signs, traffic signals, and stop signs. FN5 Appellants also appear to have abandoned any claim with respect to the lighting conditions.

FN5. Section 830.4 excludes from the definition of "dangerous condition" a condition resulting "merely" from failure to provide regulatory traffic controls or definitive roadway markings. It states: "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code."

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

With respect to the unmarked crosswalk, City argued: “[T]he fact that the crosswalk was not marked ... is irrelevant, and certainly does not create a dangerous condition. Under California law, a crosswalk is either marked or unmarked, and the obligations of drivers and pedestrians to exercise caution *1185 and to yield the right of way are largely the same regardless of the markings or lack thereof.” In support, City cited to Vehicle Code sections 275,^{FN6} 21950,^{FN7} and 21951,^{FN8} as well as to *Moritz v. City of Santa Clara* (1970) 8 Cal.App.3d 573, 576, 87 Cal.Rptr. 675. City also asserted it was immune from liability under Government Code sections 830.4 and 830.8.^{FN9}

FN6. Vehicle Code section 275 defines a crosswalk as either: “(a) That portion of a roadway included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of such lines from an alley across a street. [¶] [Or] (b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface.”

FN7. Vehicle Code section 21950 provides: “(a) The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter. [¶] (b) This section does not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. No pedestrian may unnecessarily stop or delay traffic while in a marked or unmarked crosswalk. [¶] (c) The driver of a vehicle approaching a pedestrian within any marked or unmarked crosswalk shall exer-

cise all due care and shall reduce the speed of the vehicle or take any other action relating to the operation of the vehicle as necessary to safeguard the safety of the pedestrian. [¶] (d) Subdivision (b) does not relieve a driver of a vehicle from the duty of exercising due care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection.”

FN8. Vehicle Code section 21951 provides: “Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass the stopped vehicle.”

FN9. Section 830.8 provides: “Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.”

**379 In their separate statement of undisputed facts, City set forth the circumstances surrounding the accident, including deposition testimony from Jackson to the effect that he knew at the time of the accident he was required to stop for pedestrians at unmarked crosswalks, and that he did not stop for Ms. Peng because he “didn’t see a person in front of the car that was stopped [in the left lane]” and “figured [he] didn’t need to stop.” City also set

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

forth the testimony of the driver in the left lane who had initially stopped for Ms. Peng. The driver's testimony supported the conclusion that pedestrians crossing at this intersection were visible from a block away and there were no physical impediments associated with the intersection that would prevent a driver from seeing and stopping for pedestrians.

**1186 C. Appellants' opposition*

In opposing City's position that the intersection was not in a dangerous condition, appellants relied heavily on City's alleged failure to comply with Vehicle Code section 21950.5. This statute provides: "(a) An existing marked crosswalk may not be removed unless notice and opportunity to be heard is provided to the public not less than 30 days prior to the scheduled date of removal. In addition to any other public notice requirements, the notice of proposed removal shall be posted at the crosswalk identified for removal. [¶] (b) The notice required by subdivision (a) shall include, but is not limited to, notification to the public of both of the following: [¶] (1) That the public may provide input relating to the scheduled removal. [¶] (2) The form and method of providing the input authorized by paragraph (1)." It is undisputed that City did not follow the procedures set forth in this section before removing the marked crosswalk where the accident occurred.

Appellants also argued that a triable issue of fact exists as to whether the unmarked crosswalk was dangerous due to the recently installed bulb-outs, which encouraged pedestrian traffic. They cited to concerns about pedestrian safety expressed by community members and city employees, a history of pedestrian accidents at the intersection, and a deposition prepared by their expert witness. They also asserted that City did not qualify for the immunities of Government Code sections 830.4 and 830.8 due to its failure to comply with Vehicle Code section 21950.5.

D. The trial court's decision

The trial court found "The undisputed facts establish that the intersection where the accident that is the subject of this action occurred was not in a 'dangerous condition' within the meaning of Government Code [section] 835, and that Plaintiffs' claims are barred by the immunities provided by Government Code [sections] 830.4 and 830.8." The court further found that "even if Oakland failed to comply with Vehicle Code [section] 21950.5, Plaintiffs cite no authority that this section provides a basis for imposing liability based on dangerous condition of public property. Nor does [the statute] clearly demonstrate a legislative intent to withdraw or qualify the immunity provided by Government Code [sections] 830.4 and 830.8.... In any event, Plaintiffs fail to submit any competent evidence that Oakland's failure to comply with Vehicle Code [section] 21950.5 ****380** caused Mr. Jackson to violate Vehicle Code [sections] 21950 and 21951 in a grossly negligent manner, leading to decedent's death."

**1187 IV. The Grant of Summary Judgment was Proper*

A. Relevance of third party conduct

[3] Appellants claim that City's reliance on the circumstances of the accident itself is insufficient to establish the absence of a dangerous condition. They assert that a third party's negligent conduct does not preclude a jury from finding public property to be a dangerous condition. While we agree that Jackson's negligent conduct would not necessarily absolve City from liability for creating a dangerous condition, we also note that his conduct, standing alone, does not prove that the intersection itself posed a substantial risk of injury to pedestrians generally.

[4][5] "A public entity may be liable for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

negligent or illegal act ... if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. [Citation.] But it is insufficient to show only harmful third party conduct, like the conduct of a motorist. ‘ “[T]hird party conduct by itself, unrelated to the condition of the property, does not constitute a ‘dangerous condition’ for which a public entity may be held liable.” ’ [Citation.] There must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff. [Citation.] ‘ [P]ublic liability lies under [Government Code] section 835 only when a feature of the public property has “increased or intensified” the danger to users from third party conduct.’ [Citation.]” (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348, 75 Cal.Rptr.3d 168.)

B. Appellants' evidence is insufficient to demonstrate the existence of a dangerous condition

Appellants' evidence fails to raise triable issues of material fact regarding whether the unmarked crosswalk was a dangerous condition. They first cite to letters from community members written in 1976 and 1989, expressing concerns about pedestrian safety at the intersection. They also cite to a pedestrian accident study showing that between July 11, 1998, and June 30, 2003, the intersection at which Ms. Peng was killed was tied for third among all intersections in Oakland in the number of pedestrian-involved accidents. A total of seven accidents had occurred during that time. No information is provided as to the factual circumstances surrounding these accidents. For example, there is no information as to (1) the ratio of pedestrian-involved accidents to successful pedestrian crossings at this intersection during this same time period, (2) whether the pedestrians were utilizing the marked *1188 crosswalks when they were struck, or (3) whether pedestrians were hit by vehicles that were proceeding along 7th Avenue as opposed to along International Boulevard.

[6][7] As City notes, the accident study was undertaken before the bulb-outs were installed, during a time when the intersection was marked. There also is no evidence in the record that any pedestrians had been struck in the unmarked, bulb-out intersection prior to Ms. Peng. Accordingly, while the study supports an inference that pedestrian accidents could occur at this intersection, it does not support a reasonable inference that the removal of the painted markings increased the risk of **381 such accidents. And while the citizens' letters are relevant to the issue of whether City had notice of a potentially dangerous intersection, they are not competent evidence that the intersection was, in fact, a “dangerous condition” within the meaning of section 835.

[8] Appellants also allege “City staff feared that the design of the intersection which included bulb-outs inviting pedestrian traffic added to the dangerousness of the intersection.” This assertion is based on the deposition testimony of city traffic engineer Joe Wang. Appellants misconstrue his testimony. While Mr. Wang indicated that he had expressed a general concern about bulb-outs to the extent they might encourage pedestrians to cross at intersections without traffic controls, this concern did not pertain to the specific intersection at issue here. With respect to the 7th Avenue intersection, he stated: “I think given the pedestrian activities at the corners at the park, we were not able to—we didn't think it would be reasonable to expect people to go elsewhere to cross the street, so that at least at the four corners of the park, where the school is, we will provide bulb-outs to improve pedestrian visibility, crossing safety and so forth.”

[9] Finally, appellants point to the declaration provided by their expert witness. In his declaration, the expert asserts “One important effect of a bulb-out is to further invite pedestrians to cross a street where the City has installed a bulb-out, e.g., International Boulevard and 7th Avenue.” He also states that “when the City removed the marking from the high usage crosswalk, which [had] been in place for

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

a number of years, it created a foreseeable dangerous condition. This is because pedestrians would continued [*sic*] to believe they could cross safely at the intersection as if it were marked, while drivers approached that unmarked intersection without anticipating that pedestrians [would] be using it as a crosswalk.”

The trial court overruled City's objection to this last statement, noting: “However, the opinion of Plaintiffs' expert that the intersection where decedent was killed was ‘dangerous’ is insufficient to overcome the immunity provided by Government Code [sections] 830.4 and 830.8.” While the issue *1189 of immunity will be discussed further below, we observe that expert opinions on whether a given condition constitutes a dangerous condition of public property are not determinative: “[T]he fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate this court's statutory task, pursuant to [Government Code] section 830.2, of independently evaluating the circumstances.” (*Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705, 50 Cal.Rptr.2d 8.)

Importantly, we note there is no evidence in the record that either Ms. Peng or Jackson had crossed the intersection before it was paved over. Accordingly, the expert's opinion that persons acting in reliance on the formerly painted crosswalk would lessen their vigilance is of limited relevance. This is especially so in light of the fact that the absence of markings would be immediately apparent to sighted pedestrians, even those who had crossed before the markings were removed.

C. The bulb-outs did not create a dangerous condition

Appellants argue strenuously that the bulb-outs “which invited pedestrians to cross” operated to create a dangerous condition in conjunction with the unmarked crosswalks. They do not argue that bulb-outs themselves increase or intensify the risks

associated with crossing a street. In fact, as Mr. Wang noted, bulb-outs may decrease the risk to pedestrians by shortening**382 the distance needed to cross the street, by making pedestrians more visible to motorists, and by calming traffic. Appellants do claim, however, that bulb-outs along with “the traffic pattern on International Boulevard contributed to the danger the intersection posed to pedestrians using the crosswalk with due care.”

In *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 6 Cal.Rptr.3d 316 (*Brenner*), the court rejected the theory that the volume and speed of vehicular traffic in combination with heavy pedestrian use created a dangerous condition. In affirming the trial court's sustaining of the city's demurrer, the appellate court noted that the plaintiff had made no allegation that some “physical characteristics” of the street such as “blind corners, obscured sightlines, elevation variances, or any other unusual condition ... made the road unsafe when used by motorists and pedestrians exercising due care” and that the plaintiff had not cited to any authority “that a dangerous condition exists absent such factors.” (*Id.* at pp. 440-441, 6 Cal.Rptr.3d 316.) *Brenner*, at page 441, 6 Cal.Rptr.3d 316, relied on *Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 190 Cal.Rptr. 694, wherein the court stated: “Many of the streets and highways of this state are heavily used by motorists and bicyclists alike. However, the heavy use of any given paved road alone does not invoke the application of Government Code section 835.” (*Id.* at p. 7, 190 Cal.Rptr. 694.)

[10] *1190 While it may be that bulb-outs invite heavier pedestrian use, there is nothing about heavy pedestrian use that increased or intensified the danger to Ms. Peng as she attempted to cross the street. The combination of high speed traffic and heavy pedestrian use alone simply does not lead to public entity liability. (*Brenner, supra*, 113 Cal.App.4th 434, 440-441, 6 Cal.Rptr.3d 316.) Moreover, the motorist who was traveling in the same direction as Jackson had come to a complete

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

stop prior to Ms. Peng's entering the crosswalk. It thus appears that a reasonably careful motorist would have had no difficulty seeing a pedestrian (or in seeing a car that was stopped for a pedestrian) and stopping, which further supports the conclusion that the configuration of the subject crosswalk did not create a substantial risk of injury when used with due care.

Moreover, appellants do not allege any unusual physical characteristics about the crosswalk where Ms. Peng was killed, such as any visual obstructions which would establish a dangerous condition. For example, appellants did not allege or produce any specific facts describing any particular trees, shrubbery, shadows or insufficient lighting concealing the presence of pedestrians or the crosswalk itself. (Cf. *Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1537-1538, 269 Cal.Rptr. 58 [dangerous condition can be due not only to the absence of regulatory traffic devices, but also because of vision limitations from pillars and shadows].)

[11][12] As the *Chowdhury* court explained, "A four-way stop is not an inherently dangerous condition when used with due care by the general public. The only risk of harm was from a motorist who failed to exercise due care by obeying the de facto stop signs. The City is not liable for that conduct." (*Chowdhury, supra*, 38 Cal.App.4th 1187, 1196, 45 Cal.Rptr.2d 657.) Here, the only risk of harm was from a motorist who failed to exercise due care by not obeying the Vehicle Code provisions requiring him both to yield to a pedestrian and to refrain from passing around a vehicle that had stopped for a pedestrian. The bulb-outs and the absence of painted markings did not render the intersection dangerous within the **383 meaning of Government Code section 835.^{FN10}

FN10. Appellants' reliance in their reply brief on *Bonanno, supra*, is also misplaced. In finding that a bus stop constituted a dangerous condition, *Bonanno* assumed that the pedestrian crossing was a dangerous

condition. As noted by the court in *Brenner*, "the issue decided in *Bonanno* is the *obverse* of the issue raised by [the plaintiff]: *Bonanno* addressed whether a bus stop was dangerous because of the routes necessarily traveled by its patrons, and in contrast [the plaintiff's] complaint addresses whether the route traveled by patrons was dangerous because of the bus stop. Because *Bonanno* did not address the issue raised by [the plaintiff], and instead assumed the existence of a dangerous crosswalk, *Bonanno* does not illuminate the issues in this case." (*Brenner, supra*, 113 Cal.App.4th 434, 442, 6 Cal.Rptr.3d 316.)

***1191 D. Vehicle Code section 21950.5**

[13] It is undisputed that City did not provide the notice of removal of the marked crosswalk as required by Vehicle Code section 21950.5. Appellants' expert offered an opinion that had City complied with this statute, community members would have opposed the removal and City would not have removed the marked crosswalks. This conclusion is speculative.^{FN11} The statute does not require a public agency to take a specific course of action in response to public comment. Thus, as appellants acknowledged at oral argument, had City complied with the statute it would have been free to remove the crosswalk markings even in the face of public opposition.

FN11. Evidence that City repainted the crosswalk markings after Ms. Peng's death was deemed inadmissible by the trial court on the ground that it constituted evidence of a subsequent remedial measure.

[14] While appellants contend that Vehicle Code section 21950.5 reflects "a legislative finding that ~~removal~~ of a marked crosswalk may well create a ~~dangerous~~ condition of public property," we agree with City and the trial court that City's failure to

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

comply with the statute's notice and hearing requirements does not support the conclusion that the intersection at issue here was a dangerous condition. Importantly, appellants do not cite to any portion of this statute or its legislative history containing any reference to the statutory scheme governing liability for dangerous conditions of public property.

At oral argument, appellant asserted that Vehicle Code section 21950.5 is "meaningless" if noncompliance does not support a finding of liability. Otherwise, the argument goes, there are no consequences to a public entity that fails to comply with the statute's notice provisions. We are not persuaded.^{FN12}

FN12. We observe that neither party raises the issue of whether or not City is liable under Government Code section 815.6, which provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

The sole evidence appellants cite in support of their argument that Vehicle Code section 21950.5 creates liability for Ms. Peng's death is a 41-page study entitled "Dangerous by Design," which appears to be one of several studies included in the materials made available to the Legislature in 2000 when this statute was promulgated. Specifically, appellants draw our attention to the following passage from the study: "According to the California Vehicle Code, there is a legal crosswalk at every intersection whether it is marked or not. However, very few motorists or pedestrians know this. As a result, motorists often don't expect pedestrians to *1192 cross **384 at an intersection that isn't marked with a crosswalk, and assume they're jaywalking if they do." This single passage does not cause us to con-

clude that the Legislature intended to impose personal injury liability on public entities that fail to follow the statutory procedures. Moreover, the legislative committee reports found in the record on appeal do not contain any references to this study. Thus, there is no way to determine the extent to which the Legislature relied on the study in crafting this statute.

In our view, Vehicle Code section 21950.5 is not "meaningless." It sets forth a procedure that public entities are required to follow before removing crosswalk markings. That the statute itself does not specify any consequences for noncompliance does not render it superfluous. We disagree with the implication that, absent potential liability for personal injury, public entities and their employees lack incentive to comply with statutory directives. And we note that appellants do not claim City's failure to comply with section 21950.5 in the present case was caused by anything other than inadvertence.

In any event, it is well established that courts will not resort to legislative history as an interpretive device where a statute is clear on its face. "[W]hen construing a statute, a court's duty is 'simply to ascertain and declare what is in the terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted...'" [Citation.] If there is no ambiguity about the meaning of the language, we must apply the provision according to its terms without further judicial construction. When the language is clear on its face, we may not consider extrinsic evidence to determine the intent of the Legislature. If the language is clear, we follow that plain meaning." (*In re Marriage of Dupre* (2005) 127 Cal.App.4th 1517, 1525-1526, 26 Cal.Rptr.3d 328.)

While we do not condone City's failure to comply with Vehicle Code section 21950.5, we find nothing in the language of this provision to suggest that public entities incur liability for injuries sustained by pedestrians who are struck in intersections where crosswalk markings have been removed without first having followed the statutory public

166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499
(Cite as: 166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372)

notice procedures. Accordingly, we conclude that City's failure to comply with Vehicle Code section 21950.5 does not expose it to liability under Government Code section 835.

E. City is immune under section 830.8

[15] Appellants' expert also stated in his declaration that "The failure to reinstall this marked crosswalk after one had existed at the intersection for *1193 many years created a trap for a careful pedestrian who might well assume it was safe to cross the intersection and who assumed that cars may still consider the crosswalk to be marked." To the extent appellants' expert opined that the absence of the crosswalk markings created a "trap" for pedestrians, that claim is foreclosed by section 830.8 which immunizes a public entity for liability for accidents proximately caused by its failure to provide a signal, sign, marking, or device to warn of a dangerous condition which endangers the safe movement of traffic unless that condition "would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." "This 'concealed trap' statute applies to accidents proximately caused when, for example, the public entity fails to post signs warning of a sharp or poorly banked curve ahead on its road or of a hidden intersection behind a promontory [citations], or where a design defect in the roadway causes moisture to freeze and **385 create an icy road surface, a fact known to the public entity but not to unsuspecting motorists [citation], or where road work is being performed on a highway [citation]." (*Chowdhury, supra*, 38 Cal.App.4th 1187, 1197, 45 Cal.Rptr.2d 657.)

Appellants do not allege the presence of any hazardous condition that would not be apparent to pedestrians and motorists using the intersection with due care. Apart from the lack of a marked crosswalk, the only physical characteristics appellants take issue with are the bulb-outs. The bulb-outs, however, were not hidden from pedestrians or motorists, thus they do not constitute a concealed trap.

Accordingly, to the extent the lack of crosswalk markings were a factor in causing the accident, City is immune from liability under section 830.8.

[16] In sum, the trial court properly granted summary judgment to City because there were no triable issues of material fact with respect to the existence of a dangerous condition. A number of courts have found in similar contexts that a dangerous condition did not exist. (E.g., *City of San Diego v. Superior Court, supra*, 137 Cal.App.4th 21, 40 Cal.Rptr.3d 26 [racing motorist struck another motorist]; *Brenner, supra*, 113 Cal.App.4th 434, 6 Cal.Rptr.3d 316 [motorist struck pedestrian]; *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 220 Cal.Rptr. 181 [motorist struck pedestrians].) As we have concluded that the intersection did not constitute a dangerous condition of public property as a matter of law, and that even if it did City is immune from liability under section 830.8, we do not reach the causation issue raised by City.^{FN13}

FN13. We agree with appellants that the immunity provided in section 830.4 does not apply to the failure to mark a cross-walk.

***1194 DISPOSITION**

The judgment is affirmed.

We concur: MARCHIANO, P.J., and MARGULIES, J.
Cal.App. 1 Dist., 2008.
Song X. Sun v. City of Oakland
166 Cal.App.4th 1177, 83 Cal.Rptr.3d 372, 08 Cal. Daily Op. Serv. 12,138, 2008 Daily Journal D.A.R. 14,499

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337 F.2d 163
(Cite as: 337 F.2d 163)

C

United States Court of Appeals Ninth Circuit.
Milda DABOL, Appellant,

v.

UNITED STATES of America, Appellee.
No. 18935.

Sept. 9, 1964.

Rehearing Denied En Banc Oct. 9, 1964.

Federal Tort Claims Act action brought by pedestrian involved in accident with military vehicle. The United States District Court for the Western District of Washington, Southern Division, George H. Boldt, J., rendered judgment for defendant, and plaintiff appealed. The Court of Appeals, Browning, Circuit Judge, held that exclusionary clause in first paragraph of Washington pedestrian regulation statute stating that 'this provision shall not apply under the conditions stated hereinafter' did not apply to succeeding paragraph providing that vehicle shall not overtake and pass another vehicle stopped at marked crosswalk, and, accordingly, pedestrian crossing in crosswalk where one vehicle had stopped was not relieved of duty imposed by first paragraph of not walking into path of vehicle so close that its driver cannot yield.

Affirmed.

Madden, Judge of the Court of Claims, dissented.

West Headnotes

[1] Automobiles 48A ↪ 217(2)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability

48Ak202 Contributory Negligence

48Ak217 Persons Crossing Highway

48Ak217(2) k. At Intersections in

General. Most Cited Cases

That Washington pedestrian was crossing street in marked crosswalk not controlled by traffic signal and therefore had right of way over vehicle did not relieve her of duty to exercise reasonable care for own safety. RCWA 46.60.250.

[2] Automobiles 48A ↪ 217(6)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability

48Ak202 Contributory Negligence

48Ak217 Persons Crossing Highway

48Ak217(6) k. Crossing in Front of

Approaching Vehicle. Most Cited Cases

Exclusionary clause in first paragraph of Washington pedestrian regulation statute stating that "this provision shall not apply under the conditions stated hereinafter" did not apply to succeeding paragraph providing that vehicle shall not overtake and pass another vehicle stopped at marked crosswalk, and, accordingly, pedestrian crossing in crosswalk where one vehicle had stopped was not relieved of duty imposed by first paragraph of not walking into path of vehicle so close that its driver cannot yield. RCWA 46.60.250; 28 U.S.C.A. §§ 1346(b), 1402(b), 2671-2680.

*163 Vernon R. Pearson, Davies, Pearson, Anderson & Pearson, Tacoma, Wash., for appellant.

Brockman Adams, U.S. Atty., Charles W. Billinghurst, Asst. U.S. Atty., Tacoma, Wash., for appellee.

Before MADDEN, Judge of the Court of Claims, and BROWNING and DUNIWAY, Circuit Judges.

BROWNING, Circuit Judge.

Mrs. Dabol appeals from an adverse judgment in an action under the Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 1402(b), 2671-2680.

The district court found that while crossing a street in a marked crosswalk not controlled by a traffic signal, Mrs. Dabol passed in front of a vehicle stopped halfway across the crosswalk in the first lane, and, without looking to determine whether traffic was approaching, walked into the side of a slow-moving Air Force vehicle in the next lane. The court concluded that 'Milda Dabol was guilty of contributory negligence as a matter of fact and also as a matter of law in walking around a stationary vehicle and into the side of the vehicle driven by Sgt. Craig in that she made no at-

337 F.2d 163
(Cite as: 337 F.2d 163)

tempt to observe and see Sgt. Craig's vehicle when under the circumstances a reasonably prudent person using ordinary care would have seen and observed the military vehicle.'

We do not understand Mrs. Dabol to challenge the district court's findings as *164 to the physical facts. Her argument is that under the provisions of section 46.60.250 of the Revised Code of Washington, Sgt. Craig was negligent as a matter of law in passing a vehicle which had stopped to permit her to cross the street,^{FN1} and her conduct could not absolve the United States from liability for her resulting injuries.

FN1. But see note 6.

Omitting an initial provision not applicable here, R.C.W. § 46.60.250 is set out below. For ease of reference we have added paragraph numbers and italicized the particular portions of the statute upon which Mrs. Dabol relies:

'Pedestrian traffic regulations.

* * * Where traffic control signals are not in place or not in operation, the operator of a vehicle shall yield the right of way, slowing down or stopping, if need be, to so yield, to any pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger, but no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield. This provision shall not apply under the conditions stated hereinafter.

'(2) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the operator of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

'(3) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

'(4) Any pedestrian crossing a roadway at a point

where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right of way to all vehicles upon the roadway.

'(5) Between adjacent intersections at which traffic control signals are in operation, pedestrians shall not cross at any place except in a marked crosswalk.'

[1] The facts found by the district court brought Mrs. Dabol within the conditions described in the first portion of the initial sentence of paragraph 1 of the statute, and she was therefore given the right of way over the Air Force vehicle. This does not mean, however, that Mrs. Dabol was relieved of the duty to exercise reasonable care for her own safety. In Williams v. Brockman, 30 Wash.2d 734, 193 P.2d 863, 867 (1948), the Washington Supreme Court said:

'A pedestrian must use the right of way accorded him by statute at a recognized street crossing, with due care for his own safety. By his negligence, a pedestrian may subject himself to a ruling that he was guilty of contributory negligence as a matter of law, or he may by his conduct justify a finding by the trier of the fact that he was guilty of contributory negligence as a matter of fact. Those are questions which must be determined in each individual case as it arises.'^{FN2}

FN2. Quoting Miller v. Edwards, 25 Wash.2d 635, 644, 171 P.2d 821, 826 (1946). See also Beireis v. Leslie, 35 Wash.2d 554, 560, 214 P.2d 194, 197 (1950); Hagstrom v. Limbeck, 15 Wash.2d 399, 404, 130 P.2d 895, 898 (1942); Estill v. Berry, 193 Wash. 10, 16-19, 74 P.2d 482, 484-486 (1937); Hamblet v. Soderburg, 189 Wash. 449, 452, 65 P.2d 1267 (1937).

This is the majority view.^{FN3}

FN3. Where, as in this case, the action is based upon defendant's failure to satisfy the standard of conduct fixed by a criminal statute, contributory negligence is ordinarily a defense, unless the statute is 'so clearly intended to protect a particular class of persons against their own inability to protect themselves, that the policy of the legislature is interpreted to mean even that such defenses are not available.' Prosser on Torts 161 (2d ed. 1955). 'Child labor acts, factory acts for

337 F.2d 163
(Cite as: 337 F.2d 163)

the protection of workmen, or railway fencing or fire statutes' (Id. at 289) fall in the latter category. See also 2 Harper and James, *The Law of Torts* § 22.9 (1956); *Restatement, Torts* § 483 (1934). But no authority has suggested that this is true of statutes regulating the rights and obligations of pedestrians and motorists. Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 *Minn.L.Rev.* 105, 114 (1948). Decisions in accord with the Washington view are collected in 2A *Blashfield's Cyclopaedia of Automobile Law & Practice* § 1272 at 174, § 1431.5 at 312 (1951).

*165 Furthermore, unless the provisions of *R.C.W. § 46.60.250* relied upon by Mrs. Dabol dictate a different result, the finding that Mrs. Dabol passed the stopped vehicle and walked into the adjacent traffic lane with no attempt to observe approaching traffic probably required a holding that she was guilty of negligence as a matter of law,^{FN4} at least where, as here, the court also found that Mrs. Dabol walked into the side of appellee's slowly moving vehicle.^{FN5} In any event, absent a special statutory immunity, it can hardly be denied that the physical facts found by the district court were sufficient to support the court's conclusion that Mrs. Dabol was negligent as a matter of fact.

FN4. See, e.g., *Hamblet v. Soderburg*, 189 *Wash.* 449, 452, 65 *P.2d* 1267, 1269 (1937); 'Where, as here, no attempt at observation is made and especially where one steps out from behind an obstructing object, the pedestrian is guilty of negligence as a matter of law.'

FN5. In *Ogilvie v. Hong*, 175 *Wash.* 209, 214, 27 *P.2d* 141, 143 (1933), the Washington Supreme Court approved the following instructions:

'You are instructed that if you find that decedent walked into or against the side of the defendant Hong's car, then the decedent was guilty of negligence as a matter of law * * *.

See also *Williams v. Brockman*, 30 *Wash.2d* 734, 740, 193 *P.2d* 863, 866 (1948); *Hagstrom v. Limbeck*, 15 *Wash.2d* 399, 404, 130

P.2d 895, 898 (1942), and *Estill v. Berry*, 193 *Wash.* 10, 20, 74 *P.2d* 482, 486 (1937).

[2] We therefore turn to Mrs. Dabol's contention that the case is altered by the portions of *R.C.W. § 46.60.250* which we have italicized above.

As we have seen, the first sentence of paragraph 1 provides that where there are no operating traffic signals, a vehicle must yield the right of way to a pedestrian crossing in a crosswalk, but the pedestrian shall not move suddenly from a place of safety into the path of a vehicle so close that the driver cannot yield. This provision, the statute adds, 'shall not apply under the conditions stated hereinafter.' Paragraph 2, immediately following, provides that when a vehicle is stopped to permit a pedestrian to cross, vehicles approaching the stopped vehicle from the rear shall not pass; this, Mrs. Dabol contends, was the present case.^{FN6} Mrs. Dabol's argument is that it follows from the juxtaposition of these provisions*166 that when a vehicle has stopped to permit a pedestrian to pass, the prohibition in paragraph 1 against a pedestrian's moving into the path of an approaching vehicle from a place of safety 'shall not apply,' and therefore no duty is imposed upon the pedestrian to observe oncoming traffic or otherwise act to protect himself. If the approaching vehicle violates its duty to stop, Mrs. Dabol argues, the pedestrian's acts or omissions cannot affect liability.

FN6. We proceed on the assumption that this is so, though no finding to this effect was made by the district court, and the findings which were made suggest the contrary. The district court found that the stationary vehicle had stopped in the middle of the cross-walk in a line of traffic halted by a traffic signal at the next intersection. The Washington Supreme Court has held that the provision of *R.C.W. § 46.60.250* relied upon by plaintiff does not apply unless the circumstances are such that the driver of the approaching vehicle knew or should have known that the stationary vehicle was stopped to permit a pedestrian to pass. *Rettig v. Coca-Cola Bottling Co.*, 22 *Wash.2d* 572, 576, 156 *P.2d* 914, 917 (1945). To the same effect see *Woody v. Cope*, 207 *Tenn.* 78, 338 *S.W.2d* 551, 555 (1960). Under an identical statute, the Supreme Court of Minnesota held the

337 F.2d 163
(Cite as: 337 F.2d 163)

provision inapplicable where the stationary vehicle was stopped by a traffic light. Kolodge v. F. & L. Appliances, Inc., 248 Minn. 357, 80 N.W.2d 62, 65 (1956).

We note also that in Woody v. Cope, supra, the Supreme Court of Tennessee held, as an alternate ground, that a provision identical with paragraph 2 of R.C.W. § 46.60.250 was applicable only to two-lane highways. The court said: 'It would be utter folly to hold that it was the legislative intent to have all traffic stopped on a multilaned road when one vehicle stopped. We think the intent was to regulate traffic on two lane streets so that no driver would swerve out into the path of a vehicle approaching from the opposite direction.' 338 S.W.2d at 555-556. This aspect of the decision is criticized in 28 Tenn.L.Rev. 425 (1961).

In any event, we assume for purposes of the present case that the statute applied and that Sgt. Craig violated its provisions and was negligent as a matter of law.

1. The portion of R.C.W. § 46.60.250 involved here is identical with sections 88 and 89 of the Uniform Vehicle Code of 1944^{FN7} - with a single exception. The last sentence of the first paragraph in section 88 of the Uniform Vehicle Code states that the provisions of that paragraph 'shall not apply under the conditions stated in section 89(b).' Section 89(b) is identical to paragraph 4 of R.C.W. § 46.60.250. Thus, under the Uniform Vehicle Code, it is made explicitly clear that the provisions of paragraph 1 with respect to pedestrian privileges and duties in crosswalks not controlled by traffic signals are inapplicable only when the pedestrian crosses the roadway at a point at which a tunnel or overpass was available for his use. This is also true of substantially all comparable state statutes.^{FN8}

^{FN7}. Secs. 88 and 89 of the Uniform Vehicle Code of 1944 read as follows:

'Sec. 88. Pedestrians' right-of-way in crosswalks.- (a) When traffic-control signals are not in place or not in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a

pedestrian crossing the roadway within a cross walk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger, but no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield. This provision shall not apply under the conditions stated in section 89(b).

'(b) Whenever any vehicle is stopped at a marked cross walk or at any unmarked cross walk at an intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

'Sec. 89. Crossing at other than cross walks.- (a) Every pedestrian crossing a roadway at a point other than within a marked cross walk or within an unmarked cross walk at an intersection shall yield the right of way to all vehicles upon the roadway.

'(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of way to all vehicles upon the roadway.

'(c) Between adjacent intersections at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked cross walk.'

^{FN8}. Code of Ala., tit. 36, § 58(15); Ariz. Rev.Stat. § 28-792 (1955); Ga.Code Ann. § 68-1656 (1957); Idaho Code § 49-733 (1947); Burns Ind.Stat. § 47-2032 (1952 Replacement); LSA-Rev.Stat. § 32:212; Rev.Code of Mont. § 32-2177 (1947); Nev.Rev.Stat. § 484.176; N.M.Stat. Ann. § 64-18-33 (1953); N.Y.Vehicle and Traffic Law, McKinney's Consol.Laws, c. 71, § 1151; N.D.Century Code Ann. § 39-10-28; Okla.Stat. Ann., tit. 47, § 11-502; Gen.Laws of R.I. § 31-18-3 (1956); Code of Laws of S.C. § 46-433 (1962); Tenn.Code Ann. §

337 F.2d 163
(Cite as: 337 F.2d 163)

59-834 (1956); Vern. Ann. Tex. Civ. Stat. art. 6701d, § 77; Utah Code Ann. § 41-6-78 (1953); W. Va. Code Ann. § 1721 (368); Wyo. Stat. § 31-158 (1957). Exceptions, in addition to R.C.W. § 46.60.250 are Minn. Stat. Ann. § 169.21(2); N.H. Rev. Stat. § 262-A:33 (1955).

The exclusionary clause in paragraph 1 of the comparable Minnesota statute (Minn. Stat. Ann. § 169.21(2)), like the *167 exclusionary clause in R.C.W. § 46.60.250, is not expressly limited to the situation described in paragraph 4. Thus, the Minnesota exclusionary clause, like that in the Washington statute, if read literally would render paragraph 1 inapplicable to paragraph 2. However, the Minnesota Supreme Court has held that the literal language of the exclusionary clause is to be read as if limited to paragraph 4 in accordance with the Uniform Vehicle Act, and that it therefore does not apply to paragraph 2. Kollodge v. F. & L. Appliances, Inc., 248 Minn. 357, 80 N.W.2d 62 (1956).

2. This result seems proper, not only by analogy to the Uniform Vehicle Act, but also because the exclusionary clause of paragraph 1 can be applied with reason only to paragraph 4.

Mrs. Dabol has unjustifiably dismembered the 'provision' which the exclusionary clause of paragraph 1 states 'shall not apply' in the instances thereafter enumerated. The first sentence of paragraph 1, as we have seen, provides that the pedestrian shall have the right of way when crossing in a crosswalk where there is no traffic signal, but that he is not to move suddenly into the path of an approaching vehicle. The purpose of this provision is to grant a right of way to the pedestrian in the situation described- albeit a qualified one. The exclusionary clause applies to the grant of pedestrian right of way, qualified as it is; the statutory language affords no basis for applying the exclusionary clause to the qualification alone.^{FN9}

FN9. That the intent was to exclude the grant of pedestrian right of way in subsequent situations described in the statute is made expressly clear in the 1962 revision of the Uniform Vehicle Code by stating the grant and the qualification in separate paragraphs and making the exclusionary clause applicable only to the former. Sec. 11-502 of the

Uniform Vehicle Code of 1962 reads as follows:

'Sec. 11-502- Pedestrians' right of way in cross walks

'(a) When traffic-control signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a cross walk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

'(b) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.

'(c) Paragraph (a) shall not apply under the conditions stated in section 11-503(b).

'(d) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked cross walk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.'

Sec. 11-503(b) referred to in Sec. 11-502(c), reads:

'Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right of way to all vehicles upon the roadway.'

The provisions of the Nevada, New Mexico, North Dakota, Oklahoma, Tennessee, and Wyoming statutes are identical with those of the 1962 revision of the Uniform Vehicle Act. See note 8.

The reason for making the grant of pedestrian right of way in paragraph 1 inapplicable to paragraph 4 is clear. Paragraph 4 requires the pedestrian to yield the

337 F.2d 163
(Cite as: 337 F.2d 163)

right of way when crossing on the highway, at a point where a tunnel or overhead crossing is available for his use. If a crosswalk not controlled by a signal were also available at such a point, paragraph 1, if left applicable, would grant a right of way to a pedestrian crossing in the crosswalk. The exclusionary clause makes paragraph 1 inapplicable*168 to paragraph 4 so that if a pedestrian chooses to use the crosswalk instead of the alternative means of crossing provided for his use (which would eliminate any possible conflict with vehicular traffic), he must yield the right of way to the vehicular traffic.

Since paragraph 1 applies only when a pedestrian is crossing in a crosswalk, the clause rendering paragraph 1 inapplicable to subsequent provisions would serve no purpose with respect to paragraphs 3 and 5, which by their express terms apply only where there is no crosswalk.

Moreover, read as appellant reads it, the exclusionary clause in paragraph 1 would produce an absurd result as to all three of these paragraphs: a pedestrian required by paragraph 3 to yield to approaching vehicles because he is crossing elsewhere than at a crosswalk would nonetheless be free to walk or run into the path of an approaching vehicle; and a pedestrian denied the right of way by paragraph 4 because a tunnel or overpass was provided for his use, and by paragraph 5 because he was crossing where there was no crosswalk at a point between intersections controlled by traffic lights, could act in the same fashion. And although a motorist is expressly given the right of way in all three situations, he could not assert as a defense the grossest failure of a pedestrian to yield that right of way.

It is clear that the exclusionary clause in paragraph 1, properly read, cannot apply to paragraph 2. If the pedestrian right of way granted by paragraph 1 did not apply in the situation described in paragraph 2, an impasse would be created: an approaching vehicle could not pass a vehicle stopped to permit a pedestrian to cross in a crosswalk, but the pedestrian would have no right of way.

3. We may add that it seems reasonable to suppose that if the Washington legislature had wished to exclude contributory negligence as a defense to the claim of a pedestrian under paragraph 2, it would have employed a more direct means of saying so than that of negating a prohibition imposed upon the pedestrian in a dif-

ferent set of circumstances.

4. Finally, even if the language of the statute were given the effect contended for by Mrs. Dabol, it would not wholly exclude the defense of contributory negligence, and, indeed, would not reach Mrs. Dabol's own case. The prohibition which would be excluded is simply that the pedestrian shall not suddenly leave a place of safety and enter the path of a vehicle approaching so closely that the driver cannot yield. The maximum effect of the exclusionary clause would be to permit the pedestrian to do under conditions described in subsequent paragraphs what he was prohibited from doing in the situation described in paragraph 1. However, dashing from a place of safety into the path of an approaching vehicle is not the only conduct of a pedestrian which may constitute negligence. The Washington Supreme Court has treated the failure of a pedestrian to maintain a reasonable lookout for approaching vehicles while crossing in a crosswalk as contributory negligence, even though it did not also appear that the pedestrian had suddenly moved into a vehicle's path from a curb or other place of safety.^{FN10} The trial court did not find Mrs. Dabol negligent because she suddenly left a place of safety and projected herself into the path of appellee's vehicle, but rather because 'she made no attempt to observe and see Sgt. Craig's vehicle when under the circumstances a reasonably*169 prudent person using ordinary care would have seen and observed the military vehicle.'

FN10. James v. Ellis, 44 Wash.2d 599, 603, 269 P.2d 573, 575 (1954). The same rule is applied in other jurisdictions having similar statutes. See, e.g., Terry v. Biswell, 66 N.M. 201, 345 P.2d 217, 219 (1959) (N.M.Stat. Ann. § 64-18-33 (1953)); Green v. Tingle, 92 R.I. 393, 169 A.2d 373, 375, 908 (1961) (Gen.Laws of R.I. § 31-18-3 (1956)); Lofland v. Jackson, 237 S.W.2d 785, 789 (Tex.Civ.App.1950) (Vern. Ann. Tex.Civ.Stat. Art. 6701d, § 77); Callahan v. Van Galder, 3 Wis.2d 654, 89 N.W.2d 210, 213 (1958) (Wis.Stat. Ann. § 85.44(1)).

Affirmed.

MADDEN, Judge (dissenting).

I think the court's decision is wrong, and I dissent.

337 F.2d 163
(Cite as: 337 F.2d 163)

The Federal Tort Claims Act provides that the applicable law is the law of the state in which the alleged tort occurred. In this case, the unfortunate incident occurred in the State of Washington. The court has, in effect, applied the Uniform Motor Vehicle Code of 1944, a proposed model statute tendered to all the states but which, so far as I know, has not been adopted in any state without some modification of its provision, and certainly had not been adopted by the State of Washington without an important modification directly applicable to this case.

It is relevant, I think, to note that the Government in its brief in support of the judgment of the District Court does not take the position that the Uniform Motor Vehicle Code is the 'supreme law of the land, * * * anything in the * * * laws of any State to the contrary notwithstanding.' Indeed, the Government's brief does not even make passing mention of the Uniform Motor Vehicle Code, and I think that was a correct estimate of its relevancy to this case.

The Washington statute is quoted in the opinion of the court. It provides that in a situation such as that involved in this case, the pedestrian shall have the right of way in a cross-walk, but no pedestrian shall so suddenly put himself in the path of a vehicle that it is impossible for the driver to yield the right of way. In short, a pedestrian who does that will have only himself to blame for his injury. Following this 'but' language is the sentence:

'This provision shall not apply under the conditions stated hereinafter.'

Immediately thereafter is this paragraph:

'Whenever any vehicle is stopped at a marked cross-walk * * * to permit a pedestrian to cross the roadway, the operator of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.'

In the ordinary situation in which there is no obstruction of the vision of the pedestrian, it is proper that he should be required to use that vision to assure his own safety. But in the situation covered by the paragraph quoted just above, the Washington Legislature recognized that neither the pedestrian nor the driver of the vehicle approaching from the rear of the stopped vehicle can see the other. The Legislature concluded that if accidents were to be prevented in such situations, a

hard and fast rule was required, and it made the rule that the driver approaching from the rear 'shall not overtake and pass such stopped vehicle.' The rule was made to prevent injuries to pedestrians in such situations. In the instant case the defendant's driver violated the rule and, because he violated it, the plaintiff was seriously hurt.

The District Court made a finding:

That Sergeant Allen E. Craig was guilty of no negligence at the time and place mentioned above.

This finding, which passeth understanding, is quite properly discarded by this court, which says, 'In any event, we assume for purposes of the present case that the statute applied and that Sgt. Craig violated its provisions and was negligent as a matter of law.' It seems to me that the District Court's erroneous finding that Sgt. Craig was innocent of fault quite naturally led that court into its conclusion that the conduct of the plaintiff, Mrs. Dabol, was the sole legal cause of the accident. The court makes its finding about her conduct in the language of contributory negligence, which *170 is illogical since it follows a finding that the driver was guilty of no negligence.

However, the real issue in the case is whether the Washington statute required that Mrs. Dabol, having waited a considerable time for a break in the automobile traffic which would leave the cross-walk available for her, and having properly committed herself to the crossing, and having passed two automobiles, one parked in the curb lane and one stopped to allow her to pass, could assume that she might, as she did, devote her attention to what the situation would be on the other half of the street, which was a few feet ahead of her, and in which she did not yet have the right of way, or whether she must go peeking around the corner of the stopped automobile in anticipation that a driver, in plain violation of the law, would collide with her if she proceeded straight ahead.

I think the Washington statute has given us the answer to that issue in plain language. In the first paragraph it tells us that the pedestrian, in certain circumstances, must not suddenly get in the path of an automobile which has no real opportunity to stop. Then it says that the provision relating to the negligence of the pedestrian shall not apply in the situation in which the law requires the potentially dangerous automobile to stop,

337 F.2d 163
(Cite as: 337 F.2d 163)

and in which neither the pedestrian nor the driver can see the other, and in which there is, in fact, a pedestrian, though the driver cannot see him. Is there something so fundamentally fair and right about the common law of contributory negligence that a legislature cannot, even by plain language, abolish it in clearly defined situations? When legislatures abolished certain common law defenses, including contributory negligence, in certain labor situations—among others, injuries to children in factories—there were anguished cries that these changes in the law spelled the doom of free enterprise.

In all humanity, why could not a legislator of the State of Washington stand at a cross-walk on a busy traffic street and take notice of what he saw: the old and the young, the half-blind and the half-deaf, the half-drunk and the sober, the timid and inexperienced and confused, who get down town only once in six months, and the sophisticated down-town worker. If the legislator chose to propose a law which recognized the inequity of holding these nondescript pedestrians to the standard of the ordinary reasonable licensed automobile driver who sits in the safety of his vehicle and violates the law, is it for a court to frustrate this legislator's experiment in humanity by looking far afield for reasons to nullify the statute?

The court says that the Uniform Motor Vehicle Act is better written in that it specifically provides that the pedestrian's right of way on a highway shall not apply where there is a tunnel or an overhead pedestrian crossing. That is logical, but completely irrelevant. The Washington statute says that the contributory negligence doctrine shall not apply when the pedestrian passes in front of a stopped automobile behind which is an automobile which the law has ordered to stop but which may disregard the law.

The court says, in effect, that since there are several paragraphs of the statute which follow the sentence, 'This provision shall not apply under the conditions stated hereinafter,' and since, as to some of those paragraphs, the language of the first paragraph would not be logically applicable anyway, therefore the non-applicability statement cannot be applied, even as to the immediately following paragraph as to which the non-applicability statement is completely logical. I think the court's interpretation of the statute indicates a deplorable tendency to meddle in and frustrate the purpose of legislators. What seems to me plain enough

is that, whatever the Uniform Motor Vehicle Act may have said, and meant by what it said, the Washington Legislature when it referred to 'this provision' meant the 'but no pedestrian, etc.' provision and nothing more, and that when it spoke of 'the conditions stated hereinafter,' it meant the conditions stated first thereafter. The statute *171 should be so interpreted *ut res valeat magis quam pereat*. The numerous Washington cases cited by the court have nothing to do with this case. Of course, a pedestrian may, in many situations, be barred from recovery by his contributory negligence. But the Washington courts have not had occasion to interpret and apply the statutory provisions upon which this case depends. In the case of Allen v. Hart, 32 Wash.2d 173, 201 P.2d 145, the court said:

'There are few rights of way known to the law that are as nearly absolute as that given a pedestrian on a crosswalk at an intersection where there are no traffic signals in place or in operation under the statute * * * and the city ordinance here applicable, both of which require the operator of a vehicle to yield the right of way to such pedestrians, '* * * slowing down or stopping, if need be to so yield.'

The case from which the foregoing quotation was taken did not involve the statute which is here under construction. I think it is particularly inappropriate for a federal court, in a suit against the federal Government, to so construe a statute statute not yet construed by the courts of the state, as to violate the spirit and attitude which the courts of the state have shown toward related statutes.

On Petition for Rehearing En Banc

Before MADDEN, Judge of the Court of Claims, and BROWNING and DUNIWAY, Circuit Judges.

The petition for rehearing en banc is denied. The petition calls our attention to the case of Daley v. Stephens, 64 Wash.2d, 394 P.2d 801, decided July 30, 1964, disapproving certain language in Rettig v. Coca-Cola Bottling Co., 22 Wash.2d 572, 156 P.2d 914 (1945). At most, Daley is relevant to the issue of Sgt. Craig's negligence, which we assumed in Mrs. Dabol's favor. See note 6, page 165.

MADDEN, J., would grant the petition.
C.A.Wash. 1964.

Dabol v. U.S.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

XIAO PING CHEN, individually and as)
Personal Representative for the estate)
of Run Sen Liu, and Yu Ting Liu, a)
single person,)

Appellants,)

v.)

THE CITY OF SEATTLE,)

Respondent,)

and)

PETER WALTON BROWN and)
JANE DOE BROWN; and JOHN and)
JANE DOES 1-10, jointly and)
individually,)

Defendants.)

DIVISION ONE

No. 62838-1-I

PUBLISHED OPINION

FILED: December 28, 2009

Dwyer, A.C.J. — A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel. Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway. Although relevant to the determination of

No. 62838-1-1/2

whether a municipality has breached its duty, evidence that a particular physical defect in a roadway rendered the roadway dangerous or misleading or evidence that a municipality was in violation of a law concerning roadway safety measures are not essential to a claim that a municipality breached the duty of care owed to travelers on its roadways. A trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence. Xiao Ping Chen adduced several pieces of evidence raising a genuine issue as to whether the city of Seattle failed to maintain in a reasonably safe condition the crosswalk in which her now-deceased husband, Run Sen Liu, was struck by an oncoming car. Therefore, the city was not entitled to summary judgment on Chen's negligence claim. Accordingly, we reverse.

I

On a rainy evening in February 2007, Liu was struck by a car driven by Peter Brown at the intersection of South Jackson Street and 10th Avenue South in Seattle's International District. Liu was crossing from the north side of South Jackson Street to its south side through a marked crosswalk. South Jackson Street is a five-lane arterial. At the time of the incident, there were no stoplights, stop signs, or pedestrian signals at the intersection. There were, however, stoplights and pedestrian signals on South Jackson Street at the intersections both preceding and following 10th Avenue South (8th Avenue South and 12th Avenue South). The 10th Avenue South intersection contained only pole-

mounted signs at the curbs warning that there was a crosswalk and an overhead "Crosswalk" sign with a flashing light suspended above the street. Liu almost crossed the street safely; Brown's car collided with him in the curbside lane heading eastbound—the fifth and final lane Liu had to cross in order to walk from one side of the street to the other. He suffered a severe brain injury, among other trauma, and spent two years in a coma before dying. Chen brought a claim of negligence against Brown. She also brought a negligence action against the city, claiming that it failed to maintain the crosswalk in a reasonably safe condition for ordinary travel.

Evidence produced during discovery showed that Liu's accident was not the first serious accident that occurred in the crosswalk. Records produced by the city revealed that, as early as 1992, numerous residents from the surrounding neighborhood had petitioned the city to install stoplights at the intersection because of difficulties they had experienced while trying to cross the street. The city received requests throughout the next decade. In 1999, the city installed a pedestrian island in the center turn lane to provide a refuge at the midway point for pedestrians as they made their way across all five lanes. The city has no record of pedestrian-motor vehicle accidents reported during the time the island was in place. However, at the request of a nearby business, the city removed the island in 2002 in order to facilitate easier left turns through the intersection. Records prepared by city employees indicate that in the five-year

No. 62838-1-1/4

period after the island was removed and before Liu was hit, there were at least eight other pedestrian–motor vehicle accidents at this intersection. One of these accidents, which occurred in the same crosswalk in which Liu was hit, resulted in the pedestrian's death.

Studies of the volume of traffic—or average daily traffic count (ADT)—passing through the intersection conducted before and after the incident show that approximately 16,000 motor vehicles traveled through the intersection every day. These studies also show that every day hundreds of pedestrians crossed the intersection, which is roughly 56 feet wide and takes the average pedestrian 19 seconds to cross. According to both parties' experts, this amount of time constituted the necessary crossing "gap" for the intersection at South Jackson Street and 10th Avenue South. A "gap" is a break in the flow of traffic sufficiently long to allow a pedestrian to cross from one side of the street to the other without having to stop for oncoming cars. Gap studies conducted by the city showed that, before Liu was hit, there were only 6 to 10 gaps per hour; post-accident studies showed that the number of gaps per hour ranged from 3 to 29.

Chen also submitted a 2005 study conducted by Charles Zegeer for the Federal Highway Administration ("the Zegeer study"). The city took part in this study as it was being prepared, and the director of the city's Department of Transportation later incorporated some of the findings of the Zegeer study into an administrative rule concerning safety measures for marked crosswalks in

Seattle (“the director’s rule”). The Zegeer study concluded that “[m]arked crosswalks alone are insufficient (i.e., without traffic-calming treatments, traffic signals and pedestrian signals when warranted, or other substantial crossing improvement) and should not be used . . . [o]n a roadway with four or more lanes without a raised median or crossing island that has . . . an ADT of 15,000 or greater.” The director’s rule incorporated this recommendation and characterized a roadway with these conditions as “[u]sually not a good candidate for a marked crosswalk.”

In addition, Chen submitted the declarations of two engineering expert witnesses. Each of these witnesses concluded that the crosswalk did not adhere to sound engineering principles and posed a danger to pedestrians because it did not provide for adequate crossing “gaps.” One of these witnesses, Edward Stevens, had analyzed the crosswalk following the fatal 2002 pedestrian–motor vehicle collision that occurred in the crosswalk. He had apprised the city of his opinion that the crosswalk was unsafe as early as 2005 in litigation arising out of the prior accident. Stevens also opined that the intersection was more dangerous at night because of drivers’ diminished ability to see pedestrians in the crosswalk. Stevens testified at his deposition, however, that nothing at the intersection obstructed a pedestrian’s view of oncoming traffic and that nothing was particularly confusing about the intersection for a motorist. He also agreed that, while “traffic conditions on the roadway may be confusing or misleading to a

pedestrian, . . . the configuration of the roadway itself is not.” William Haro, Chen’s other engineering expert witness, opined that the city created an unsafe condition when it removed the pedestrian island.

Chen also submitted the declaration of Gerson Alexander, an expert on ergonomics and human factors.¹ Alexander opined that the crosswalk presented a dangerous condition because pedestrians often have trouble accurately gauging the speed and distance of vehicles that are approaching from several hundred feet away and therefore might overestimate the margin of safety they have to cross an intersection. Specifically, he declared that “it is extremely difficult for pedestrians waiting to cross South Jackson to ascertain the distance, speed and time they have to get the necessary 56.3 feet across the intersection without being struck.” In his deposition, Alexander acknowledged that there was nothing about the crosswalk or the configuration of the intersection that was dangerous or misleading “per se,” but he testified consistently with his declaration that the combination of the crosswalk distance, problems of human perception, and the volume and speed of vehicular traffic passing through the intersection combined to create a dangerous condition at the crosswalk.

The city moved for summary judgment of dismissal. Pointing to the deposition testimony of Chen’s experts that the crosswalk did not contain any

¹ According to Alexander’s declaration, “[h]uman factors is a branch of psychology that examines the application of capabilities and limitations of human beings as they relate to their physical environment. . . . As a human factors analyst, [Alexander is] qualified to analyze and give opinions about the interaction between roadway characteristics and the cues it conveys to the roadway users, including drivers and pedestrians.”

No. 62838-1-1/7

physical defect rendering the crosswalk inherently dangerous or misleading, the city argued that Chen had failed to produce any evidence establishing that the crosswalk presented an unsafe condition. The city also argued that it was not in violation of any law requiring safety measures different from those installed at the crosswalk. On this point, the city noted that the Manual on Uniform Traffic Control Devices (MUTCD), which Washington has adopted, see RCW 47.36.020; WAC 468-95-010, did not require the city to remove, move, or further regulate the marked crosswalk at issue. Further, the city argued that the Zegeer study and the director's rule applied only to the installation of future crosswalks, not to preexisting crosswalks such as the one in which Liu was fatally injured.

The trial court granted the city's motion. Chen appeals.

II

We review de novo a trial court's order granting summary judgment.

Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009) (citing Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 693, 169 P.3d 14 (2007)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one upon which the outcome of the litigation depends in whole or in part." Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev.

Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). In determining whether a genuine issue of material fact exists, we view all facts and draw all reasonable inferences in favor of the nonmoving party. Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (citing Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)).

Chen claims that the city was negligent in maintaining the crosswalk in which Liu was struck by Brown's oncoming car. To prevail on this claim of negligence, Chen must prove that the city owed Liu a duty of care, that the city breached its duty, and that the city's breach was the proximate cause of Liu's injuries. Ruff, 125 Wn.2d at 704 (citing Hansen v. Wash. Natural Gas Co., 95 Wn.2d 773, 776, 632 P.2d 504 (1981); LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975)); see also Keller v. City of Spokane, 146 Wn.2d 237, 242, 44 P.3d 845 (2002) ("The elements of negligence are duty, breach, causation, and injury.") (citing Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)). At issue here is whether genuine issues of material fact exist as to the first two elements of Chen's negligence claim.²

III

The city contends that the duty it owed to Liu extended only to eliminating particular physical defects in the crosswalk that would have rendered the crosswalk inherently dangerous or misleading and to implementing safety

² The city's motion did not address the question of proximate cause.

measures required by law. The city further maintains that proof of its failure to do either of these things is essential to Chen's claim. We disagree.

"Whether a municipality owes a duty in a particular situation is a question of law." Keller, 146 Wn.2d at 243 (citing Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992)). Implicit in this question are the questions "to whom the duty is owed, and what is the nature of the duty owed," which define the scope of the municipality's duty. Keller, 146 Wn.2d at 243 (citing Wick v. Clark County, 86 Wn. App. 376, 385, 936 P.2d 1201 (1997) (Morgan, J., concurring)). The parties agree that the city owed Liu a duty of care. They sharply dispute, however, what this duty entailed and, thus, which facts are material to the determination of whether the city breached its duty.

"[M]unicipalities are generally held to the same negligence standards as private parties." Keller, 146 Wn.2d at 242-43 (citing Bodin v. City of Stanwood, 130 Wn.2d 726, 731, 927 P.2d 240 (1996)). Thus, they are "held to a general duty of care, that of a 'reasonable person under the circumstances.'" Keller, 146 Wn.2d at 243 (quoting Dan B. Dobbs, The Law of Torts § 228, at 580 (2000)). Specifically with respect to individuals who travel on a municipality's roadways, a municipality owes a duty to all travelers to maintain its roadways in a condition that is reasonably safe for ordinary travel.³ Owen, 153 Wn.2d at 786-87 (citing

³ In several cases decided before Keller, Washington courts defined the scope of a municipality's duty in this regard as being owed to persons using roadways in a "proper manner" or while "exercising ordinary care for their own safety." See Keller, 146 Wn.2d at 246-47 (discussing cases). Some of the decisions referenced herein employed this language in defining a municipality's duty to maintain its roadways in a safe condition. In Keller, however, our Supreme Court clarified that, consistent with the State's law concerning contributory fault in

Keller, 146 Wn.2d at 249); see also Ruff, 125 Wn.2d at 704. Our Supreme Court has explained that a municipality's duty to maintain its roadways in a reasonably safe condition includes the "duty to eliminate an inherently dangerous or misleading condition." Owen, 153 Wn.2d at 788 (citing Keller, 146 Wn.2d at 249).

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 Llu 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.

Although the city contends that this case presents an issue of first impression, in reality the question of whether Chen can prove that the city was negligent without showing that the crosswalk contained a physical defect is not a novel one. Nearly 70 years ago, our Supreme Court addressed the question of which facts are material to determining whether a municipality has breached its

negligence actions, see RCW 4.22.005, "a municipality owes a duty to *all* persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel." 146 Wn.2d at 249 (emphasis added).

duty to maintain a roadway in a manner that is reasonably safe for ordinary travel. See Berglund v. Spokane County, 4 Wn.2d 309, 103 P.2d 355 (1940). In light of the analysis and holding in Berglund, we conclude that it is not essential for Chen to prove that the crosswalk contained a particular defective physical characteristic rendering the crosswalk inherently misleading or inherently dangerous. Rather, 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.

The situation in Berglund is highly analogous to that herein presented. Berglund's claim concerned whether Spokane County had failed to maintain in a reasonably safe condition a bridge that it had built for use by both pedestrians and motor vehicles. Berglund, 4 Wn.2d at 316. The bridge essentially provided the only way for travelers in the vicinity to cross from one side of a river to the other. Berglund, 4 Wn.2d at 316. Even though the bridge was maintained to accommodate pedestrian traffic as well as vehicular traffic, it contained "no footpath or sidewalk for pedestrians." Berglund, 4 Wn.2d at 316. Pedestrians walked between the bridge railing and the edges of traffic lanes. Berglund, 4 Wn.2d at 316-17. Berglund was hit by a truck that drove out of its lane of traffic and into the space where Berglund was walking. Berglund, 4 Wn.2d at 312.

The court emphasized that "[t]his situation, of itself, would not necessarily present a dangerous condition." Berglund, 4 Wn.2d at 316. The court did not, however, limit its analysis to the issue of whether the bridge contained a

defective physical characteristic rendering it inherently dangerous. Instead, it also considered that the volume of traffic on the bridge was heavy, that numerous pedestrians were required to cross the bridge daily, and that the county was aware, prior to Berglund's accident, that motor vehicles had nearly hit pedestrians on several occasions. Berglund, 4 Wn.2d at 316–17. In other words, the court concluded that what was material was not just whether the physical structure of the bridge was safe for pedestrian travel in isolation but whether the bridge was reasonably safe in light of its intended use and the actual situation that existed on the roadway.

In considering these several factors, the court declared that “the determination of whether or not a municipality has exercised reasonable care . . . must in each case necessarily depend upon the surrounding circumstances.” Berglund, 4 Wn.2d at 315–16 (citing Ferguson v. City of Yakima, 139 Wash. 216, 246 P. 287 (1926); Lewis v. City of Spokane, 124 Wash. 684, 215 P. 36 (1923); James v. City of Seattle, 68 Wash. 359, 123 P. 472 (1912)). The court did not hold that Berglund, in order to prevail on a claim of negligence against the county, was required to establish the existence of a physical characteristic of the bridge that “necessarily present[ed] a dangerous condition.” Berglund, 4 Wn.2d at 316. Instead, it clarified that the “vital question . . . is not whether the county was, *in any event*, required to build a sidewalk . . . but whether, *under the circumstances*, [the county] exercised the required amount of care to maintain

the bridge in a reasonably safe condition for pedestrians . . . who had been invited to use it.” Berglund, 4 Wn.2d at 317–18 (emphasis added). Indeed, nothing indicates that the physical design of the bridge at issue in Berglund was inherently dangerous or inherently misleading. Rather, what made the conditions on the bridge dangerous was the simultaneous use of the roadway by both pedestrians and motor vehicles. Moreover, by inviting, indeed directing, pedestrians to use the bridge along with motor vehicles, the county had a duty to “exercise reasonable care to keep [the bridge] in a reasonably safe condition for [both of the intended modes of] travel.” Berglund, 4 Wn.2d at 317.

The similarities between this case and Berglund are striking. Similar to Berglund, Chen contends that the totality of the circumstances surrounding the crosswalk made the crosswalk dangerous, while the city maintains, similar to the arguments advanced by the county in Berglund, that it had no duty to design the crosswalk and control the flow of pedestrian and vehicular traffic through the intersection any differently than it did. The city may be correct that the crosswalk, by itself, was not inherently dangerous or inherently misleading. But our Supreme Court made clear in Berglund that the analysis of whether a dangerous condition at a roadway exists and, in turn, whether a municipality has breached its duty to maintain the roadway in a reasonably safe condition, does not begin and end with consideration of only the physical characteristics of the roadway at issue. Thus, in the situation herein presented, what are also material

No. 62838-1-I/14

to the determination of whether the city exercised reasonable care under the circumstances are the intended uses of the crosswalk and of the intersecting street and the conditions at the crosswalk. Accordingly, proof that a particular physical defect rendered the crosswalk inherently dangerous or inherently misleading is not essential to Chen's claim.

The city reads some of our Supreme Court's opinions in cases decided after Berglund as abrogating the reasoning and holding in Berglund. See Owen, 153 Wn.2d 780; Ruff, 125 Wn.2d 697; Ulve v. City of Raymond, 51 Wn.2d 241, 317 P.2d 908 (1957). Our Supreme Court, however, did not indicate in these cases that it was overruling its holding in Berglund. To the contrary, in both Owen and Ulve, the court explained that its determination of whether sufficient evidence to sustain the claims of negligence brought against the respective municipalities in those cases turned on the myriad circumstances surrounding the roadways therein at issue. See Owen, 153 Wn.2d at 790; Ulve, 51 Wn.2d at 251–52. In neither case did the court indicate that proof of particular physical defects in the roadways therein at issue were essential to the plaintiffs' claims. Moreover, in the context of a negligence action against a municipality, our Supreme Court has recently relied directly upon Berglund in articulating that “the determination [of] whether a municipality has exercised reasonable care ‘must in each case necessarily depend upon the surrounding circumstances.’” Bodin, 130 Wn.2d at 734 (quoting Berglund, 4 Wn.2d at 316). Our Supreme Court's

subsequent decisions have not eroded Berglund's precedential value.

The third case cited by the city, Ruff, is readily distinguishable from Owen, Ulve, and this case. Ruff specifically claimed that the physical characteristics of the roadway, by themselves, rendered the roadway therein at issue unsafe for ordinary travel. Ruff, 125 Wn.2d at 701. He did not allege that any other circumstances surrounding the roadway combined with the road's physical characteristics to make the roadway unsafe. The court concluded that the road authority was entitled to summary judgment because the undisputed evidence—in particular the testimony and declarations of Ruff's own experts—established that the roadway was in excellent physical condition at the time of the accident and was neither inherently dangerous nor inherently misleading. Ruff, 125 Wn.2d at 706–07. However, the court did not indicate that it directed its analysis exclusively toward the evidence concerning the roadway's physical characteristics for any reason other than the narrow focus of Ruff's claims and the fact that the evidence at issue concerned only the roadway's physical characteristics as they related to vehicular traffic. In reading Ruff as requiring a plaintiff to show that a roadway suffers from a particular physical defect, the city overstates its holding.

The city also argues that it was not required to install additional traffic safety measures because the traffic moving through the intersection constituted an open and obvious hazard.⁴ In advancing this argument, however, the city

⁴ In advancing this argument, the city cites to several decisions of courts in other

ignores that a pedestrian using a crosswalk is given a preference over individuals using other modes of transportation. A marked crosswalk is “any portion of a roadway *distinctly indicated* for pedestrian crossing by lines or other

jurisdictions, in which those courts held that high traffic volumes by themselves do not constitute dangerous conditions such that the absence of traffic or pedestrian signals or stop signs at those locations could not cause liability to attach to municipalities for negligent maintenance of the roadways. See Song X. Sun v. City of Oakland, 166 Cal. App. 4th 1177, 83 Cal. Rptr. 3d 372 (2008); Orlando v. Broward County, Florida, 920 So.2d 54 (Fla. Dist. Ct. App. 2005); Brenner v. City of El Cajon, 113 Cal. App. 4th 434, 6 Cal. Rptr. 3d 316 (2003); King by King v. Brown, 221 N.J. Super. 270, 534 A.2d 413 (N.J. Super. Ct. App. Div. 1987). These cases, however, are inapposite to the factual situation herein presented, as they do not involve situations in which pedestrians crossed a street through *marked crosswalks*. See Sun, 166 Cal. App. 4th at 1180–81 (involving pedestrian who was killed while crossing an intersection in an “unmarked pedestrian crosswalk,” which had been previously marked but not remarked after the city repaved the street); Orlando, 920 So.2d at 56 (involving a child who was killed by an oncoming motorist while crossing the street in front of his school mid-block, “not at a crosswalk,” to reach his mother waiting on the other side of the road); Brenner, 113 Cal. App. 4th at 436 (involving a pedestrian–vehicle collision where the pedestrian was attempting to cross a street “near” an intersection and contrasting it with a case in which a pedestrian was hit by a car in an unmarked crosswalk at an uncontrolled intersection while trying to catch a bus); King, 221 N.J. Super. at 272 (involving a pedestrian attempting to cross a street mid-block, not at an intersection, who walked into the rear of a vehicle traveling in the first lane of traffic he tried to cross). In addition, the nature of the plaintiffs’ claims and the reasons for dismissal in some of these cases also make them inapposite. See Orlando, 920 So.2d at 56 (holding that sovereign immunity against claims arising out of discretionary policy decisions barred plaintiff’s claim that her child’s death, caused while crossing the street to be picked up from school, was a proximate result of the school board’s negligence in planning the end of the school day to coincide with rush hour traffic and in not extending bus service to her child). Also, the California cases involved a statutory scheme governing a municipality’s duties toward travelers that differs from the duties that Washington municipalities have under the common law.

Further, the city overlooks part of the court’s analysis in King that actually undermines its argument advanced herein. The King court clarified that its decision barring recovery on a theory that the municipality maintained a dangerous condition on the roadway did not rest “on a distinction between physical defects in public property and activities on that property.” 221 N.J. Super. at 274. It continued:

In our view, a condition of public property which is safe for one activity may become a dangerous condition when the property is converted to a different activity. For example, a bridge designed solely for pedestrian use may become dangerous when converted to use by vehicular traffic if its structure cannot support the additional load. In most cases, application of the dangerous condition standard requires consideration of both the physical characteristics of the public property as well as the nature of the activities permitted on that property. Indeed, the definition of dangerous condition . . . requires consideration of the reasonably foreseeable use of the property.

King, 221 N.J. Super. at 274–75 (emphasis added). The city ignores King’s holding that whether a roadway is dangerous depends, at least in part, on how and for what purpose the roadway will be used.

No. 62838-1-I/17

markings on the surface thereof.” RCW 46.04.290 (emphasis added). Motor vehicles must yield to pedestrians in marked or unmarked crosswalks. RCW 46.61.235(1). That the law directs pedestrians to use crosswalks can be inferred from the lack of priority given to pedestrians who cross at points other than crosswalks: “Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.” RCW 46.61.240. Although the law does not permit a pedestrian to walk “suddenly” into a crosswalk so that an approaching vehicle cannot stop, RCW 46.61.235(2), Washington courts have long recognized that a pedestrian in a crosswalk “may assume that the driver of a vehicle will recognize the pedestrian’s right of way.” Knight v. Pang, 32 Wn.2d 217, 232, 201 P.2d 198 (1948); see also Jung v. York, 75 Wn.2d 195, 198, 449 P.2d 409 (1969) (citing Jerdal v. Sinclair, 54 Wn.2d 565, 342 P.2d 585 (1959)); Burnham v. Nehren, 7 Wn. App. 860, 864, 503 P.2d 122 (1972) (citing Shasky v. Burden, 78 Wn.2d 193, 470 P.2d 544 (1970)). Indeed, one of the city’s own traffic engineers testified in a deposition that the crosswalk herein at issue was the only crosswalk at the intersection and that it was the preferred location for pedestrians to cross the intersection.

By establishing certain presumptions in their favor, the law directs pedestrians to use marked crosswalks. Therefore, the city has a corresponding duty to maintain its crosswalks in a manner that is reasonably safe for ordinary

travel in light of the circumstances at each particular crosswalk. A municipality's decision to open a roadway triggers its duty to maintain the roadway in a reasonably safe condition. The circumstances present on the particular roadway dictate that which will constitute reasonably safe maintenance. Berglund, 4 Wn.2d at 317–18. “[A]s the danger [at a particular roadway] becomes greater, the [municipality] is required to exercise caution commensurate with it.’ Simply stated, the existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings.” Owen, 153 Wn.2d at 788 (alteration in original and citation omitted) (quoting Ujve, 51 Wn.2d at 246, 251–52).

Therefore, by virtue of its decision to direct pedestrians to walk in the crosswalk herein at issue, the city had a duty to ensure that the crosswalk would be reasonably safe for its intended use in light of the circumstances present at the crosswalk, which included the busy intersection through which the pedestrians were directed to walk. Traffic control measures that render safe one crosswalk may be insufficient to render safe another crosswalk of the same length and in the same physical condition because of vehicular traffic or other factors. That which constitutes reasonable care in a particular situation depends on the surrounding circumstances. Keller, 146 Wn.2d at 243 (quoting Dobbs, supra, at 580). In the context of the city's duty to maintain its roadways in a reasonably safe condition, its duty is not necessarily limited only to eliminating

physical defects or to implementing mandatory traffic control devices.

There is likewise no merit to the city's argument that its duty to safely maintain roadways is tempered by motorists' duties to also exercise reasonable care. Although the city need not insure against the negligence of drivers, Keller, 146 Wn.2d at 252, who are always bound to exercise due care to avoid colliding with pedestrians, see RCW 46.61.245, the negligence of motorists with respect to pedestrians is not determinative of whether road conditions were safe for pedestrian travel. The city owes a duty to pedestrians and motorists alike. The negligence of a third party does not absolve the city of its duty to maintain its roadways, including crosswalks, in a reasonably safe manner. Tanguma v. Yakima County, 18 Wn. App. 555, 561-62, 569 P.2d 1225 (1977) (quoting Lucas v. Phillips, 34 Wn.2d 591, 597-98, 209 P.2d 279 (1949); Restatement (Second) of Torts §§ 447, 449 (1965)). As the cases discussed above make clear, the circumstances that existed at the crosswalk provide the facts relevant to determining whether the city breached its duty to Liu.

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

No. 62838-1-I/20

periods.⁵ 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 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 (citing Bauman v. Crawford, 104 Wn.2d 241, 244–45, 704 P.2d 1181 (1985)).

None of the cases on which the city relies requires a plaintiff to prove that a particular physical defect of the roadway, by itself, made the roadway unsafe. Our Supreme Court has consistently held that consideration of all of the surrounding circumstances is necessary to determine whether a particular roadway presented an unsafe condition. In determining whether a dangerous condition exists at a roadway and whether a municipality has breached its duty to maintain a roadway in a safe condition, the trier of fact may infer that a breach has occurred based on the totality of the relevant surrounding circumstances, regardless of whether there is proof that a defective physical characteristic in the roadway rendered the roadway inherently dangerous or inherently misleading.

⁵ Although the MUTCD was adopted in its entirety, the code reviser determined not to publish every regulation contained in the MUTCD. WAC 468-95-010. The MUTCD provision cited, supra, is not in the published code, but is contained in our Clerk’s Papers.

No. 62838-1-I/21

That Chen may not have put forth evidence that the crosswalk itself contained a defective physical characteristic making the crosswalk misleading or dangerous is not dispositive.

Having clarified which types of facts are material to Chen's claim, we now address whether there is evidence in the record to raise a genuine issue as to whether the city breached its duty to Liu.

IV

The city contends that Chen failed to adduce evidence raising a genuine issue as to whether the crosswalk was unsafe and, correspondingly, whether the city breached the duty of care it owed to Liu. Again, we disagree.

We observe at the outset that whether a roadway was safe for ordinary travel and whether a municipality took adequate corrective action are questions of fact. Owen, 153 Wn.2d at 788. Such questions concern a municipality's **negligence** and "are generally not susceptible to summary judgment." Owen, 153 Wn.2d at 788 (quoting Ruff, 125 Wn.2d at 703).

There is ample evidence in the record raising a genuine issue as to whether the city breached its duty to Liu to maintain the crosswalk in a reasonably safe condition for ordinary travel. The evidence shows that the city was aware of several accidents and near-accidents that had occurred in this crosswalk before Liu was struck. The city does not dispute that, from 1992 to 1999, it received dozens of requests from area residents for the installation of a traffic signal at the intersection. Records maintained by city employees reflect that there were many reported accidents both before the installation of a pedestrian island in 1999 and after the island was removed in 2002. But the city's records do not reflect that any accidents were reported during the period the island was in place.

In addition, each of Chen's expert witnesses concluded that the crosswalk

presented a dangerous condition. “[A]n expert opinion on an ‘ultimate issue of fact’ is sufficient to defeat a motion for summary judgment.” Eriks v. Denver, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (quoting Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)). Chen’s experts’ conclusions are based on the small number of crossing gaps resulting from the city’s decision to maintain the crosswalk through five lanes of traffic without interruption. The traffic volume studies demonstrate that the ADT at the crosswalk exceeded the volume deemed safe for a marked crosswalk crossing four or more lanes of traffic without a pedestrian island, as set forth in the director’s rule and recommended by the Zegeer study. The city was aware of the Zegeer study and had incorporated portions of the study’s findings into its own internal guidelines. Although the Zegeer study did not itself carry the force of law, the study nonetheless bears on whether the city acted reasonably in maintaining the crosswalk as it did in light of the history of accidents at the intersection. Whether conditions at the crosswalk were unsafe and whether the city was negligent in failing to eliminate them must be determined with respect to all of the surrounding circumstances.

Further, that the experts agreed that nothing obstructed the views of pedestrians or drivers and that the physical layout of the intersection was not confusing does not settle the issue of whether the conditions at the crosswalk were unsafe. Alexander’s expert report and testimony tend to prove that

No. 62838-1-1/24

pedestrians can be poor judges of the speeds at which oncoming vehicles are traveling. The evidence in the record also shows that the intersection at 10th Avenue South and South Jackson Street differed from other intersections along South Jackson Street in that it did not have traffic and pedestrian signals.

Viewed in the light most favorable to Chen as the nonmoving party, the evidence raises genuine issues as to whether an unsafe condition existed and whether the city breached its duty of care. Therefore, the city was not entitled to summary judgment.

Reversed.

Dwyer, A.C.J.

We concur:

Appelwick, J.

Cox, J.