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NO. 62838-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

XIAO PING CHEN,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

CHEN'S REPLY BRIEF

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A. INTRODUCTION

Run Sen Liu (“Liu”) was gravely injured when he was struck by a car while crossing South Jackson Street in Seattle. Liu never recovered consciousness and died of his injuries after this appeal was commenced. The intersection where Liu was struck had a long and unhappy history of accidents and near-misses involving cars and pedestrians. The City of Seattle (“City”) had made various attempts over the years to address the hazard posed by the intersection where Liu was struck so that pedestrians could safely navigate across the five lanes of traffic. At one point, it constructed a pedestrian refuge island in the middle lane but subsequently removed it at the request of a business located near the intersection. Liu was struck while in the crosswalk after the island was removed.

The trial court here granted summary judgment to the City, although the court did not make clear whether it was doing so because the City owed no duty to Liu or did not breach its duty to Liu as a matter of law. Either way, the trial court erred in prematurely dismissing the case brought by Liu’s personal representative, Xiao Ping Chen (“Chen”). The City below was equally unclear as to whether it owed Liu no duty or did not breach such duty as a matter of law. Now, on appeal, after reading Liu’s opening brief, the City still cannot decide if it wants to contend that

it owed no duty to Liu or that it did not breach the duty it did owe to Liu as a matter of law.

The City makes various arguments implying it owed no duty to Liu. Washington law, however, is clear that a municipality owes a pedestrian like Liu a duty of care in the design and maintenance of a road like the one at issue here. This duty is informed by statute, case law, and regulation.

Moreover, breach of duty is a *question of fact*. Chen presented ample evidence that the City was aware of the hazard at the intersection where Liu was killed, and that the City failed to take appropriate steps to address the hazard. The trial court erred in granting summary judgment to the City.

B. RESPONSE TO RESTATEMENT OF FACTS

As a preliminary matter, the City's brief flagrantly fails to comply with RAP 10.3(a)(5), which requires a party to provide a fair statement of the facts and procedure relevant to the issues presented for review, without argument. As a respondent, the City is bound by that rule. RAP 10.3(b). The City's statement of the case is rife with argument. Indeed, the bulk of the City's brief is found in its statement of the case. On page 9, the City engages in legal argument and analysis of the statute governing crosswalks; on page 10 it argues that Chen "offered no standard or

guideline...” and again engages in legal argument about Washington Pattern Jury Instructions and statutes; on page 11 it engages in legal argument and analysis of “the Zegeer study” (the “Study”); on page 12 the City argues about evidence of the type of accident which injured Liu, experts’ interpretation of the Study, as well as Chen’s interpretation of the Study; page 13 contains legal argument regarding the establishment of a standard of care and the relevance of the Study to the present case; page 15 contains explicit argument regarding the legal effect of a City Director’s Rule; footnote 4 on page 16 contains legal argument about design standards of Seattle crosswalks; page 19 contains the assertion that neither Chen nor her expert witnesses identified certain conditions on the roadway; on page 20 the City argues that Chen and one of her experts “speculated” about certain actions the City might have taken and invites the court to set Chen’s “speculation” aside; on pages 22-23 the City argues that “there is no standard or guideline” requiring the City to consider installing a pedestrian signal; page 23 footnote 9 contains legal argument about whether certain traffic standards had been met; on page 24 the City argues that whether those standards are met is “irrelevant” and that the standards are only “a threshold” which does not mandate a specific response.

The bulk of the City's statement of the case consists of its statutory and regulatory analysis, rather than "a fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5). This Court should disregard the City's so-called statement of the case.¹

For all the legal argument the City included in its statement of the case, it does not dispute the facts presented by Chen in the brief of appellant. It does not dispute that Liu was struck and killed in the intersection of South Jackson Street and 10th Avenue. It does not dispute that hundreds of pedestrians cross that intersection every day; that in the five years before Liu was hit, there were *eight pedestrian accidents* at the intersection, including one fatality; that South Jackson is a heavily traveled street five lanes in width; that the City installed a pedestrian refuge island at the intersection and subsequently removed it, and that during the time the island was in place, no pedestrian accidents occurred at the intersection.

¹ This Court may strike portions of a brief and sanction a party for failing to comply with the Rules of Appellate Procedure. RAP 10.7; *Sheikh v. Choe*, 156 Wn.2d 441, 446-47, 128 P.3d 574 (2006). Where a party blatantly disregards directives in the Rules of Appellate Procedure for the preparation of a brief, sanctions are merited. *Hurlbert v. Gordon*, 64 Wn. App. 386, 401, 824 P.2d 1238 (1992). Here, the City's improper brief has made this Court's analysis of the case difficult, and required Chen to expend additional time differentiating between the City's facts and argument. Sanctions are merited.

The City does not dispute the findings of studies that showed 85% of traffic on South Jackson exceeded the posted speed limit. Nor does the City dispute its own studies' finding that crosswalks should not be used on a roadway with four or more lanes without a raised median or crossing island where the street has an average daily traffic count of 12,000 or greater as was the case here. The City does not dispute that it received numerous citizen complaints over the years about the dangers the intersection posed to pedestrians. Nor does the City dispute that three experts submitted reports on Chen's behalf showing that the crosswalk violated engineering standards and was not reasonably safe for pedestrian travel. In short, the City disputes no facts relevant to Chen's contention that summary judgment was erroneously granted here.

C. ARGUMENT

(1) Summary Judgment Was Not Appropriate Where Issues of Material Fact Were in Dispute

The City's brief is larded with factual assertions and statutory analysis irrelevant to this Court's scrutiny of the trial court's grant of summary judgment. In addition to containing a great deal of legal argument, the City fills its statement of the case with citations to various statutes, City codes, engineering standards and studies, and expert witness testimony. The ironic, and doubtless unintended, consequence of

introducing this jumble of disparate facts is to reinforce the long-established proposition that where there is *any* evidence tending to show that the City failed to comply with the required standard of care, then the question of liability *must* be left to the jury. *Walker v. King County Metro*, 126 Wn. App. 904, 908, 109 P.3d 836 (2005). Where there is a genuine issue as to any material fact, a trial is absolutely necessary. *Moore v. Pacific Northwest Bell*, 34 Wn. App. 448, 456, 662 P.2d 398, *review denied*, 100 Wn.2d 1005 (1983). Issues of negligence are not generally susceptible to summary judgment. *Unger v. Cauchon*, 118 Wn. App. 165, 173, 73 P.3d 1005 (2003). If reasonable minds can differ over the facts, summary judgment is not appropriate. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).²

(2) Elements of a Negligence Claim for Roadway Design

The City for the most part does not dispute the elements of a negligence claim. Negligence consists of (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; and (3) a resulting

² The City argues that, were this Court to remand this case for trial, there would be “no case” where the City could ever obtain summary judgment. Br. of Appellant at 42. That contention is absurd, and is less a policy argument than simple fear-mongering. A review of *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2d 886 (1995) (a case cited by both parties) puts such fear of an insurmountable barrier to summary judgment to rest. The City, like any other defendant, will always have summary judgment available to it where there are no issues of material fact.

injury. *Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 776, 632 P.2d 504 (1981).

By citing to WPI 140.01,³ the City essentially concedes that it owed a duty to Liu. Br. of Appellant at 26. Thus, the only questions before this Court are whether there are genuine issues of material fact regarding the foreseeability of Liu's injury and the City's breach of duty.⁴ Chen has provided copious evidence to support a finding that Liu's injury was foreseeable and that the City breached its duty to design, construct, or maintain the intersection and crosswalk in a reasonably safe manner.

(a) The City Owed a Duty to Liu to Make South Jackson Street Safe For Ordinary Travel

Washington law unambiguously imposes a duty on the City to maintain its roadways in a condition safe for ordinary travel. *Owen*, 153 Wn.2d at 786. The City has a duty to exercise ordinary care in the design, construction, maintenance, and repair of its public roads to keep them in a reasonably safe condition for ordinary travel. WPI 140.01; *Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002). The City's duty to eliminate an inherently dangerous or misleading condition is part of its

³ WPI 140.01 states that the City has a duty to exercise ordinary care in the design, construction, maintenance, and repair of its public roads to keep them in a reasonably safe condition for ordinary travel.

⁴ Only the elements of duty and breach of duty are at issue here. The City reserved issue of causation. CP 272. There is no question that Liu was killed as a result of the accident in the intersection on South Jackson.

overarching duty to provide reasonably safe roads. *Id.* at 788. The duty requires the City to take action when required by law or when it has actual or constructive knowledge that the roadway is inherently dangerous. *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994). This duty extended to Liu.

The City has a duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner so that Liu could cross the intersection safely. *Keller*, 146 Wn.2d at 252. That duty extends to crosswalks, as crosswalks are part of the roadway. RCW 46.61.235. This duty is informed by statute, case law, regulation, or other positive enactment which may help define the scope of the City's duty or the standard of care. *Owen*, 153 Wn.2d at 787. Liability for negligence does not require a direct statutory violation. *Id.* The MUTCD provides evidence of the appropriate duty. *Id.*; *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 855, 751 P.2d 854 (1988).⁵ The City's adoption of the Study

⁵ The City contends that the MUTCD does not impose a duty on the City because its standards are permissive, br. of appellant at 27 fn.11, mistakenly implying that Chen is arguing negligence per se here. But the MUTCD informs the common law duty analysis. *Wojcik*, 50 Wn. App. at 855. Chen has never argued that the City was negligent *per se*. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 143-44, 750 P.2d 1257 (1988) (breach of duty imposed by administrative regulation does not constitute negligence per se, but may be considered by trier of fact as evidence of negligence). The manual provides standards for design and application of devices, and places responsibility on engineers to decide which measures to enact. *Kitt v. Yakima County*, 23 Wn. App. 548, 552, 596 P.2d 314 (1979), *rev'd on other grounds*, 93 Wn.2d 670, 611 P.2d 1234 (1980).

and the Director's Rule likewise helps define the scope of its duty or the standard of care. *Owen*, 153 Wn.2d at 787. Furthermore, Washington law strongly favors pedestrians' right of way over vehicular traffic even where the vehicular traffic would otherwise have the right of way. *Shasky v. Burden*, 78 Wn.2d 193, 199, 470 P.2d 544 (1970) (vehicular traffic, even with a green light in its favor, must yield to pedestrian lawfully within crosswalk); RCW 46.61.060(1). (The primacy of pedestrian safety proclaimed in *Shasky*, RCW 46.61.060(1), and the Study and Director's Rule was reflected in the City's public notice that it was removing the crosswalk on South Jackson entirely after Liu's accident. Printed in bold face on the top of the notice is the statement, "Safety is SDOT's top priority, especially pedestrian safety." CP 783.)

Whether the City owed Liu a duty includes a determination of whether his accident was foreseeable. *Keller*, 146 Wn.2d at 243. The question of whether Liu's injury was foreseeable, thus creating a duty of care on the part of the City, is one for a jury to resolve. *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005).

Chen provided abundant evidence that Liu's injury was foreseeable. In the five years before Liu was hit, there were *eight pedestrian accidents* at 10th and Jackson and one pedestrian was killed. CP 1042; Ex. 41 A at ¶¶ 6, 13. Hundreds of pedestrians cross South

Jackson at 10th Avenue every day. CP 593, 595, 620. Those attempting to cross South Jackson must traverse five lanes of traffic. CP 978. The City installed a refuge island at the location in February 1999 as a pedestrian safety measure. CP 627-28, 630, 632, 1049. There were no reported accidents or problems at the intersection during the time the island was in place. Ex. 41 A at ¶ 13(f). The City removed the island two and a half years later at the request of a business located at the intersection. CP 365, 374, 627-28, 630, 632, 638, 650, 1049; Ex. 41 A at ¶ 25.

When the island was removed, pedestrians were once again forced to cross all five lanes of South Jackson Street without a signal and without the necessary gaps in the traffic stream. CP 1049-50. The first pedestrian fatality occurred after the island was removed. Ex. 41 A at ¶¶ 6, 13. Had the City not removed the island, pedestrians would have had more than 800 opportunities per hour to cross Jackson Street without encountering traffic. Ex. 41 A at ¶ 13(j). Even after receiving numerous citizen complaints, the City declined to put in a crosswalk signal, asserting that a signal would give pedestrians a “false sense of security” and interfere with the smooth movement of traffic. CP 642-43. Clearly, the aspect of the City’s duty imposed by foreseeability of harm was satisfied.

The City has a duty of care to correct an unsafe condition of a street if the City has actual or constructive notice of the condition and a

reasonable opportunity to do so. *Leroy v. State*, 124 Wn. App. 65, 69, 98 P.3d 819 (2004); *Nibarger v. City of Seattle*, 53 Wn.2d 228, 230, 332 P.2d 463 (1958). Here, the City was on notice where it was aware of eight pedestrian accidents including a fatality, and had received numerous citizen complaints about the intersection. CP 583-86, 588, 591, 611, 615-16, 632, 645, 658-60, 697, 699, 701-02, 1042; Ex. 41 A at ¶¶ 6, 13.

The City argues that no matter what measures it took, there would always be open and obvious risks that someone using the roadway could be involved in an accident, and there would always be the possibility that it could have done something more to protect against the risk. Br. of Appellant at 42. This is a specious representation of the law and of Chen's negligence claim. At its heart, the City's argument is that busy roads will always be dangerous and pedestrians had better be careful; that it cannot act as an insurer against all risk or as guarantor of public safety. The City's argument ignores both its well established duty to make its streets safe for ordinary travel, and the factual analysis involved in summary judgment.

Even as it acknowledges the duty imposed upon it by WPI 140.01, the City never addresses its duty under *Owen* to eliminate inherently dangerous conditions and provide reasonably safe roads. But the City's elaborate hedging does not relieve it of that duty. Rather than meet

Chen's argument regarding its duty head-on, the City provides the court with a grab bag of miscellaneous diversions. The City argues that Liu has not identified an inherently dangerous condition of the roadway of such character as to confuse or mislead a traveler exercising ordinary care.⁶ Br. of Appellant at 27. That argument relies on a flat-out misstatement of the holding in *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2d 886 (1995). The *Ruff* court did not frame its analysis around a hazard that would confuse or mislead. It held that the City's duty to maintain a roadway in a reasonably safe condition required it take remedial measures if the condition along the roadway makes it inherently dangerous *or* of such character as to mislead a traveler. *Ruff*, 125 Wn.2d at 705. Liu has never argued that conditions on South Jackson Street were merely misleading: She argued they were hazardous and unsafe for ordinary travel, and inherently dangerous as well. Ex. 41 A at ¶¶ 12, 14, CP 981.

The City argues that its actionable duty is limited to the design, construction, maintenance, and repair of roadways. Br. of Appellant at 26, fn.10. It then argues that the issues raised by Chen's complaint relate not to the design of the intersection, but rather to the enforcement of traffic and pedestrian laws, and that it owes no actionable duty to enforce motorist compliance with the law. Br. of Appellant at 36-37; CP 36-37.

⁶ There is no evidence at all that Liu did not exercise ordinary care.

Liu has made no such claim, but argues instead that the City breached its duty to maintain South Jackson Street and the crosswalk in which Liu was struck in a condition safe for ordinary travel. How the City's installation of a crosswalk, signs, lights, and traffic dividers does not fall under the rubric of design, construction, maintenance, and repair of roadways, the City does not explain.⁷ This Court will not engage in a hyper-technical reading of statutes and codes so as to yield an absurd result. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). To argue that the installation and subsequent removal of a refuge island on South Jackson somehow falls outside the City's duty under WPI 140.01 would be just such an absurd result.

The City has a duty to exercise ordinary care in the repair and maintenance of its public highways, keeping them in such a condition that they are reasonably safe for ordinary travel. *McCluskey*, 125 Wn.2d at 6. Ordinary or reasonable care is that care which an ordinarily reasonable person would exercise under the same or similar circumstances. *Berglund v. Spokane County*, 4 Wn.2d 309, 315-16, 103 P.2d 355 (1940). Inherent in the City's duty is the principle that the care required in a given instance must be commensurate with the risk of harm, or danger, to which others might be exposed by one's conduct. *Id.* As the danger becomes greater,

⁷ Crosswalks are part of the roadway. RCW 46.61.235.

the City is required to exercise caution commensurate with it. *Owen*, 153 Wn.2d at 788. Simply stated, the existence of an unusual hazard may require the City to exercise greater care than would be otherwise sufficient. *Id.* The City had voluminous evidence that the crosswalk was hazardous. But rather than increasing its remedial measures commensurate with the risk, it affirmatively *reduced* pedestrian protection and increased risk by removing the refuge island. It is disingenuous for the City to argue that it had no duty to protect Liu because it has no liability for failing to enforce traffic laws.

In sum, as expressed in WPI 140.01, the City owed a duty of care to pedestrians like Liu to properly design and maintain a street like South Jackson. That duty extends to properly designing and maintaining crosswalks and removing inherently dangerous or misleading conditions on that street when the City clearly had notice of hazards in crossing South Jackson at the crosswalk where Liu was killed. That duty is informed by statute, case law, and public policy. If the trial court concluded the City owed Liu no duty, it erred.

(b) The City Breached Its Duty to Liu

The City ignores the fact that breach of duty is ordinarily a question of fact, and here there was ample evidence of breach to create a question of fact. The question of whether the City breached its duty of

ordinary care, i.e., whether the intersection at issue was reasonably safe should have been decided by the trier of fact. *Keller*, 104 Wn. App. at 554. If the intersection was not reasonably safe, the jury should determine whether the unsafe condition constituted a breach of the duty of ordinary care. *Id.* Where there is *any* evidence tending to show that the City failed to comply with the required standard of care, then the question of liability *must* be left to the jury. *Walker*, 126 Wn. App. at 908.

Moreover, whether a roadway is inherently dangerous or misleading is generally a question of fact. *Owen*, 153 Wn.2d at 788. Likewise, the adequacy of the City's attempt to take corrective action is generally a question of fact. *Id.* If a roadway is inherently dangerous or misleading, then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances. *Owen*, 153 Wn.2d at 789-90. The determination of whether the City exercised reasonable care in the performance of its duty to maintain its public ways in a reasonably safe condition must necessarily depend upon the surrounding circumstances. *Berglund v. Spokane County*, 4 Wn.2d 309, 315-16, 103 P.2d 355 (1940).

As detailed in her opening brief, Chen provided ample evidence from which a reasonable jury could conclude that the intersection was inherently dangerous or misleading and that the City breached its duty to

maintain the intersection in a manner safe for ordinary travel. *Owen*, 153 Wn.2d at 790.

Three experts submitted reports on Chen's behalf showing that the crosswalk violated engineering standards and was not reasonably safe for pedestrians' ordinary travel across South Jackson Street. Ex. 41 A at ¶¶ 12, 13, 14, 24; CP 981, 1046, 1049-50, 1053, 1056. The experts' reports, by themselves, were more than ample to create a material question of fact regarding the City's breach of duty and bar a summary judgment in the City's favor.

But the experts' reports were hardly the only evidence Chen submitted to show that the City breached its duty. As discussed above, the City installed the crosswalk across five busy lanes of traffic at an uncontrolled intersection which did not provide adequate gaps in the traffic stream. CP 1046-48, 1056-57; Ex. 41 A at ¶¶ 12, 13, 14, 24. The installation violated the Study previously adopted by the City which concluded that crosswalks should not be used on a roadway with four or more lanes without a raised median or crossing island that has an ADT of 12,000 or greater. CP 1042. An employee of the City's Department of Transportation recommended the installation of a pedestrian refuge which, according to the MUTCD, "should only be used at locations that are unusually hazardous or at locations where pedestrian crossing activity

is not readily apparent.” CP 513, 554, 606.⁸ The City received many complaints from pedestrians about how dangerous the intersection was. CP 583-86, 588, 591, 611, 615-16, 632, 645, 658-60, 697, 699, 701-02. The City installed a traffic island in February, 1999, but removed it two and a half years later. CP 364, 627-30, 650, 652; Ex. 41 A at p. 11. Removing the island put the City back in violation of the rule that marked crosswalks should not be used on a roadway with four or more lanes without a raised median or crossing. CP 557.

When the City removed the island, it was aware that marked crosswalks at uncontrolled intersections were not advisable across multiple lanes and when ADT exceeded 12,000 vehicles. CP 527, 548-49, 550, 557, 562-63. It was also aware that this particular uncontrolled intersection had an ADT of nearly 16,000. CP 623. Removing the island created an inherently dangerous roadway for pedestrian travel because there were no longer sufficient gaps for pedestrians to safely cross Jackson Street, and the City was aware that the gaps were not adequate. *See* CP 784, 1049-50.

⁸ Failure to conform to the standards of the MUTCD, can be evidence of negligence. *Ottis Holwegner Trucking v. Moser*, 72 Wn. App. 114, 122, 863 P.2d 609 (1993). One of Chen’s experts opined that the crosswalk was not in compliance with the MUTCD. CP 1053.

The City knew about the numerous pedestrian accidents in the intersection in the years before Liu's accident. CP 320, 346, *et seq.*

A senior transportation planner for the City acknowledged that the City had a policy of not putting up flashing beacons over marked crosswalks, and did not consider flashing beacons an effective safety measure. CP 471, 488-89. The flashing beacons, overhead signs, and curb bulb were put in place in 2002 and 2003, after the City knew that the marked crosswalk at issue did not comply with its own guidelines. CP 527, 562-63, 654-56, 704, 714, 723, 732-48.

Ultimately, the City decided to remove the crosswalk, because it did not meet the City's own self-proclaimed safety guidelines. CP 581, 1003, 1049-50. It did not, however, actually remove the crosswalk until after Liu's accident. CP 521, 781, 783.

All of this evidence, combined with Chen's expert witness reports, provided an overwhelming array of material facts which should have been presented to a finder of fact so that the finder of fact could determine whether the City breached its duty. In the face of this evidence, summary judgment was entirely inappropriate.

The City disputes Chen's citing of the Study and the Seattle Director's Rule, arguing that the plain language of the directives "does not support a finding that any particular action was required with regard to the

subject intersection.” Br. of Appellant at 34-35. There is nothing plain about it. CP 228. The City also asserts that the Rule expressly denies the intent to establish any basis for liability. Br. of Appellant at 35. The Rule expressly denies no such thing. CP 221. Rather, it states, “This Director’s Rule is established solely to provide guidelines to work toward the City’s goal of installing pedestrian safety improvements when funds are available. The intent is to provide for and promote the health, safety and welfare of the general public.” *Id.* The Rule then notes that pedestrians and drivers have liability for failing to comply with the rules of the road. *Id.* It is silent on the question of the City’s liability. In any event, all of the City’s assertions regarding the Study and the Rule involve disputed issues of material fact which should properly be resolved by a trier of fact.

The City ignores the Study’s conclusion that crosswalks should not be used on a roadway with four or more lanes without a raised median or crossing island. CP 1042. The Study was conducted seven years before Liu was struck. CP 508-09, 525-60, 562-63, 740-41. It found that “Pedestrians are legitimate users of the transportation system, and they should, therefore, be able to use the system safely and without unreasonable delay. Pedestrians have a right to cross roads safely and, therefore, planners and engineers have a professional responsibility to plan, design, and install safe crossing facilities.” CP 531. “In all cases,

the final design must accomplish the goal of getting pedestrians across the road safely.” *Id.* It was for a jury to decide whether the City’s failure to comply with its own standards constituted negligence.

The City further argues that *Owen* does not support Chen’s argument that it breached its duty to Liu, but it offers an extremely narrow and misleading interpretation of that controlling decision. In the City’s telling, the *Owen* court fixed its attention on a crown in the roadway which allegedly obstructed drivers’ view of a railway crossing. Br. of Appellant at 28-29. (It goes so far as to substitute the words “in light of the crown in the roadway” for the words “based upon the evidence in the record” in a quote from this Court’s opinion cited in the Supreme Court opinion.) *Id.* at 28; *Owen*, 153 Wn.2d at 786. The *Owen* court considered that:

there is a high volume of both vehicle and train traffic at the crossing. The train traffic includes high-speed trains. There are three sets of active railroad tracks and two sets of crossing signals together in close proximity. There are nearby traffic signals which, according to lay witnesses and Owen's expert, frequently cause queuing of vehicles over the tracks. Additionally, there is an incline in the road [not a crown, as stated by the City] as westbound travelers approach the crossings that, according to the lay witness and Owen's expert, limits drivers' ability to see the traffic signals or approaching trains.

Owen, 153 Wn.2d at 789.

The *Owen* court took into consideration, not just a limit on visibility, but *all* of the relevant aspects of the intersection to determine

whether material issues of fact were present by which a jury could affect the outcome of the litigation. If a roadway is inherently dangerous or misleading, then the trier of fact must determine the adequacy of the City's corrective actions under all of the circumstances. *Id.* at 789-90. Because reasonable minds could differ as to whether the roadway was reasonably safe for ordinary travel or inherently dangerous, and whether appropriate corrective action had been taken, questions of material fact existed and summary judgment was inappropriate. *Id.* Precisely such factual issues as were present in *Owen* are present here, and summary judgment is as inappropriate here as it was in *Owen*. The question of the City's breach of duty must go to a jury.

Curiously, the City also cites to *Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957), noting that the *Owen* court cited it as well.⁹ Br. of Appellant at 28. The *Ulve* decision actually supports Chen. The *Ulve* court upheld remand for a new trial to correct an erroneous jury instruction in a case where the decedent had driven off a dock into a river on a foggy night. *Id.* at 246-47. The wrongful death action brought by the executrix was tried before a jury, not dismissed on

⁹ The *Owen* court cited it for the proposition that as the danger becomes greater, the City is required to exercise caution commensurate with it. *Id.* at 788.

summary judgment.¹⁰ The Court held that there was evidence in the record, which, if believed by the jury, would support the conclusion that the intersection, the lack of signs, and the dock, together with fog and poor visibility, constituted an inherently dangerous and unusual condition. *Id.* at 251-52. Importantly, the Court found that the City was on notice that others had driven off or narrowly missed driving off the dock prior to the subject accident. *Id.* at 252.

The City also attempts to deny breaching its duty by drawing a distinction between traffic *on* a roadway and the inherently dangerous condition *of* a roadway, but cites no Washington authority for such a distinction.¹¹ Br. of Appellant at 30. In doing so, the City states that there is nothing about the roadway that is *confusing or misleading* to either motorists or pedestrians. Br. of Appellant at 27, 38, 39, 40. Besides raising a disputed factual issue categorically unsuited to resolution by

¹⁰ The City also cites to *Prybysz v. City of Spokane*, 24 Wn. App. 452, 601 P.2d 908 (1957) (executor sued city after husband and wife were killed when their car drove through a guardrail on a bridge and fell to the river below). Like, *Ruff* and *Ulve*, *Prybysz* was tried before a jury, not dismissed on summary judgment.

¹¹ The City cites a number of foreign cases which are readily distinguishable. *King v. Brown*, 534 A.2d 413 (1987), for example, is factually and legally distinguishable. The pedestrian in *King* ran into the rear of a car while crossing the street (he was not struck by a car, as stated by the City). *Id.* at 271. The holding rested on a specific New Jersey statute governing hazardous conditions. *Id.* at 274. Compare NJSA 59:4-1 a and 59:4-2 (precluding municipal liability if “due care” is not used by others) with *Keller*, which holds municipalities owe a duty to exercise reasonable care to make their roadways safe, even if others do not use “due care.” Even then, the Court was careful not to base its decision on a distinction between physical defects *in* public property and activities *on* that property. *Id.* This Court need not look to foreign law, as *Owen* and settled Washington law resolve the issues at hand.

summary judgment, this argument ignores Chen's claim that the intersection was inherently *dangerous*. Furthermore, Chen's human factors expert found that the intersection of South Jackson and 10th Avenue was not reasonably safe for pedestrian travel because pedestrians could not accurately gauge the speed and distance of approaching vehicles, and that City engineers should have taken action to remedy the problem. CP 981.

The City makes much of another expert's testimony that the roadway and intersection were not "confusing or misleading." Br. of Appellant at 5-7. The City's emphasis on "confusing and misleading" conditions ignores the expert's emphatic conclusion that the crosswalk was inherently dangerous for pedestrians and that the City had failed to exercise ordinary care and proper engineering judgment in the use of traffic controls at the crosswalk location. Ex. 41 A at ¶ 14.

The City admits that citizen complaints about the intersection might be relevant to the question of its duty under WPI 140.02 but argues that, because citizen lay opinions are not competent evidence under ER 701(c), they are of no relevance in determining whether the conditions at the intersection were unsafe. Br. of Appellant at 38. The City confuses notice with expert testimony. Chen has never argued that the citizen complaints constituted expert testimony: She has argued that the numerous

complaints put the City on notice of the danger. When the City has actual or constructive knowledge that a roadway is inherently dangerous, it is required to take action to eliminate the dangerous condition as part of its duty to provide reasonably safe roads. *McCluskey*, 125 Wn.2d at 6. If the City had actual or constructive notice of a hazard, the failure of the City to remove the hazard constitutes negligence. *Owens v. City of Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956).

Finally, the City objects to the testimony of Chen's expert William Haro, describing his testimony as "conclusory or speculative." Br. of Appellant at 40. Haro's testimony was for a trier of fact to weigh. The City's quibbling over the expert's testimony adds no weight to its assertion that it did not breach its duty to Liu.

In sum, Washington law as set forth in *Owen* and *Keller* clearly provides that breach of duty – the City's response to the known hazards of the crosswalk on South Jackson – is a question for the trier of fact. If this was the basis for the trial court's summary judgment, it erred.

D. CONCLUSION

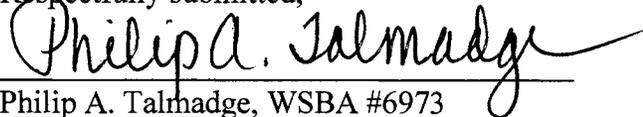
This case is controlled by *Owen*, the Supreme Court's most recent and definitive explication of a municipality's duty to maintain its roads in a condition safe for ordinary travel. The City owed Liu a duty in connection with the design and maintenance of the crosswalk on South

Jackson where Liu was killed, a crosswalk the City knew to be hazardous. Chen provided ample evidence from which a reasonable jury could conclude that Liu's injury was foreseeable and that the City breached its duty to maintain the intersection in a condition reasonably safe for ordinary travel. *Owen*, 153 Wn.2d 790.

Because reasonable minds could differ as to whether the intersection was reasonably safe for ordinary travel, inherently dangerous, or misleading, and whether the City took appropriate corrective action, questions of material fact exist and summary judgment was not appropriate. This Court should reverse the trial court's judgment and remand the case for trial on the merits. Costs on appeal should be awarded to Chen.

DATED this 14th day of August, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Postal Service a true and accurate copy of the following document: Chen's Reply Brief in Court of Appeals Cause No. 62838-1-I to the following:

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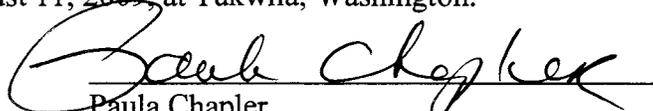
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 11, 2009, at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick

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