

**NO. 63612-0-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

RONALD W. MOORE,

Appellant,

vs.

CITY OF DES MOINES,

Respondent.

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CITY OF DES MOINES RESPONSE TO BRIEF OF APPELLANT

**Brenda L. Bannon, WSBA #17962
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
Attorneys for Respondent City of Des Moines**

ORIGINAL

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Because this court has repeatedly affirmed summary judgment in negligent road design cases against municipalities where a Plaintiff's proximate cause theory is supported by mere speculation, and Plaintiff Moore has no recollection, no collision eyewitness, and no physical evidence to explain the accident dynamics or the point of impact (how, where or why did Hagge's car collide with pedestrian Moore), should this court affirm the trial court's grant of summary judgment as to the City?

B. SUPPLEMENTAL STATEMENT OF THE CASE.

1. Introduction.

Moore's lawsuit stems from an October 2006 car-pedestrian accident that occurred on S. 240th Street in Des Moines, Washington; Plaintiff Moore was struck by a car driven by defendant Hagge. Defendant City of Des Moines' Summary Judgment Motion was granted by the trial court below. The City urged summary judgment dismissal because based on the admissible evidence, the City breached no legal duty to a jaywalking pedestrian, and Washington courts have held for the last century that proximate cause of an accident or injury cannot be submitted to the jury based on speculation and conjecture.¹ CP-105-07 (MSJ).

¹ E.g., *Keller v. Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) (plaintiffs have the burden to prove legal duty owed to plaintiffs, breach of that duty, and injury to plaintiff proximately caused by the breach). The City argued (1) there is no municipal duty owed

Plaintiff has no recollection of the accident; neither defendant driver Hagge nor witness Mineard actually saw what Plaintiff was doing or where he was walking prior to the Hagge vehicle colliding with Plaintiff.

Besides the evidence suggesting that Plaintiff was on the traveled surface of S. 240th Street somewhere east of 9th Place South (walking or darting out), no witness knows where Plaintiff was walking when the Hagge vehicle collided with him.² CP 99-102 (MSJ).

Plaintiff's duty theories pursue an alleged duty to upgrade S. 240th Street to current day design standards, which is not a cognizable claim in Washington. On appeal Plaintiff only seeks review of the proximate cause legal issue. App. Br., 10-12, f.n. 2. Nonetheless, Plaintiff cannot prove the complained of roadway proximately caused his accident; instead, he is hoping the Court will allow him to let the jury guess.

2. Collision and Injury.

On Halloween evening, October 31, 2006, at approximately 5:00 p.m., Plaintiff Ronald Moore was walking when he was struck by a vehicle driven by Co-Defendant L. Billie Hagge. Ms. Hagge was traveling westbound on S. 240th Street at the time of the collision, driving

to ensure the safety of a pedestrian who is crossing a City street mid-block, *Hansen v. Washington Natural Gas*, 95 Wn.2d 773, 776-77, 824 P.2d 483 (1981); and (2) there is no duty to upgrade a city street to present day design standards, *Ruff v. County of King*, 125 Wn.2d 697, 705, 736 P.2d 886 (1995). The fact of injury does not demonstrate a dangerous condition. *Id.*

² Plaintiff settled with driver Hagge after the trial court granted the City's motion.

under the posted 35 M.P.H. speed limit. CP 51-53 (Hagge Dep. 11:23-12:25; 15:8-16:9); CP 2 (¶¶ 6-7). The evidence of what generally occurred that evening comes primarily from eyewitness Miranda Mineard and Ms. Hagge; Plaintiff has no recollection of the day of the accident or the collision itself. CP 58-80 (“I have no memory.”) (Pl. Dep. 56:13-17; 69:8-70:30; 76:8-78:8; 164:7; 167:16-19; 178:19-179:8; 224:11-225:13); CP 89 (Pl. Answer to Inter. No. 34). **No available witness actually saw the Hagge vehicle collide with Plaintiff.**

Ms. Mineard was driving behind Hagge. Mineard asserts that Hagge was traveling in her lane of travel when she struck Plaintiff. CP 2 (¶ 9). Hagge was driving with her headlights on. CP 52 (Hagge Dep. 12:24-25); CP 12 (¶ 13). Hagge did not see Moore before striking him, but she felt her car strike him. CP 53 (Hagge Dep. 16:3-19). Hagge thought something had darted out in front of her immediately before the collision. CP 53 (Hagge Dep. 16:11-19). Mineard did not see Moore before the collision, but she saw a man go flying about 10-feet up in the air on the North side of S. 240th street. CP 2-3 (¶¶ 10-11). Hagge testified that immediately after the accident bystanders yelled that Moore had just jumped over the ditch and into her car. CP 53 (Hagge Dep. 16:21-17:7); *See also*, CP 10-13 (¶¶ 3-19). There was no evidence that Hagge swerved within her lane before the collision. CP 2 (¶ 9).

The damage to Hagge's car was all on the far right passenger side; a spider web crack on the far right passenger side windshield comprises the prominent physical damage. CP 54 (Hagge Dep. 20:12-21:6); CP 12 (¶ 14). Moore was found lying in a drainage ditch approximately 5 (five) feet north of S. 240th Street when the medics arrived on the scene. CP 53-54 (Hagge Dep., 17:17-18:18; 21:12-16); CP 12 (¶ 12); CP 3 (¶ 11-16), CP 5-9 (photos). No tire marks were found in the grass shoulder after the accident. CP 11 (¶ 7). There was no physical evidence of the point of impact between the Hagge vehicle and Moore; there was no evidence that Moore was preparing to traverse S. 240th St. in an unmarked crosswalk at the time of the collision. CP 11-12 (¶¶ 7-18); CP 31 (¶ 18).

Moore received injuries primarily to the left side of his body, predominantly to the left side of his skull and his left shoulder. CP 67-69 (Pl. Dep. 91:2-9; 100:11-19; 112:19-113:23). Moore suffered a brain injury, was in a coma at Harborview for a month, and was cared for at the UW rehabilitation clinic for several months before he returned to the same job he had before this accident. CP 70-71, 77 (Pl. Dep. 130:14-131:12; 155:11-15; 228:19-229:3).

In his deposition, though candidly acknowledging that he has no memory of the October 31, 2006 accident, Plaintiff testified that he **assumes** that at the time of the collision, he was crossing S. 240th Street

(north to south) to return to his car parked in a nearby cul-de-sac; he testified that he premises his assumptions as to accident dynamics on hearsay and police reports. CP 64-66, 73-74, 76-77 (Pl. Dep. 80:3-86:24; 167:1-169:19; 177:11-25; 224:7-226:22).³

The City of Des Moines had provided a marked crosswalk approximately 390 feet from Moore's accident vicinity; it is located at the corner of S. 240th Street and Marine View Drive. CP 31 (¶ 19). There was also an available gravel pedestrian walking path running parallel to S. 240th Street located away from vehicular traffic. CP 29 (¶ 7).

3. Plaintiff's Changing Allegations Against Des Moines.

Plaintiff's Complaint alleged the City was negligent for failing to provide a safe walkway along the street:

The City of Des Moines failed to provide a safe walkway along South 240th Street, East of Marine View Drive that was reasonably obvious and accessible to Plaintiff forcing Plaintiff, as a pedestrian, to walk dangerously close to or on the traffic lane of South 240th Street and thus breached its duty.

CP 83 (Complaint, p. 2, ¶ 10).⁴

³ The City objected to and moved to strike the inadmissible evidence Plaintiff offered in response to the City's Motion that contained Moore's speculation based upon hearsay, improper lay opinion, and other inadmissible character evidence. CR 56(e). CP 236-265.

⁴ Plaintiff reiterated this allegation in Inter. answer No. 33 ("***The City of Des Moines has an obligation to provide safe streets but breached its duty when it failed to provide a safe walkway along S. 240th St., east of Marine View Dr. that was visible and accessible. The breach of duty by the City of Des Moines to provide a safe walkway along S. 240th St. forced me as a pedestrian to walk close to or on the traffic lane of South 240th Street...***") CP 87-89 (Pl. Ans. Inter. No. 33). Moore also asserted that the City failed to provide a safe "sidewalk" or street. CP 87, (Pl. Ans. Inter. No. 32). This

Prior to receiving the City's Motion, Plaintiff asserted that the roadway itself was "insufficient in its characteristics" due to traffic volumes and location:

Mr. Neuman is expected to testify that the roadway in question, at or near the area of the accident, was insufficient in its characteristics such that it provided an unduly unsafe condition for pedestrians as well as drivers based upon the amount of traffic the roadway carried as well as its location in the Des Moines area.

CP 92-93 (Pl. Sup. Ans. Inter. No. 31). In response to the City's Motion, Plaintiff's expert criticized S. 240th Street lane widths, considering traffic volumes, location, and *current design standards*. CP 161-183 (Dec. Neuman). He suggested various improvements that could *theoretically* alert vehicular travelers to crossing pedestrians, and/or provide a paved shoulder and marked crosswalk for crossing pedestrians, and/or warn pedestrians against crossing in the accident vicinity. CP 161-183.

On appeal, Moore argues that the City of Des Moines's failure to (1) improve the North side of S. 240th Street opposite 9th Place S. "such that pedestrians could access the gravel path," (2) provide more room for pedestrians to stand while waiting to cross the street, (3) provide "crossing provisions alerting vehicles of pedestrians", and/or (4) direct "pedestrians to not cross or to stay off the roadway", provided the "cause in fact" of

allegation is in discord with Moore's deposition testimony, discussed above, where he asserted his *presumption* that he was crossing the street at the time of the collision.

Moore's injuries. App. Br. at 15-16.

4. South 240th Street Characteristics.⁵

Plaintiff's Complaint targeted the northern edge and outside unimproved portion of S. 240th Street -- a straight, two-lane, two-way, 35 M.P.H., City Collector Arterial. The City defines "collector arterials" as "streets connecting residential neighborhoods with community centers and facilities."⁶ S. 240th Street connects residential areas of the City south of Kent-Des Moines Road to Pacific Highway S. to the east and Marine View Drive to the west. CP 29 (Dec. Brewer, ¶ 7). S. 240th Street was originally constructed in the 1890s by King County. CP 28-29 (*Id.*, ¶ 5).⁷

S. 240th Street runs east-west and has a combined roadway surface width of approximately 20 feet; each lane is approximately 10 feet wide. At the northern edge of S. 240th Street, in the 900 block -- Plaintiff's accident vicinity -- there is a reflectorized white fog line, followed by, (1) a 5 to 5.5 foot wide grass shoulder, (2) an open grass drainage ditch, and (3) a wide, gravel pedestrian footpath. The gravel pedestrian footpath is located away from the roadway surface on the northern side of the drainage ditch. According to two Professional Civil Engineers, **the 4.7 to**

⁵ Unless otherwise specified, the 900 block vicinity of S. 240th Street is being described.

⁶ The City defines higher classified streets as follows: (1) "Principal Arterial." Inter-community highways connecting community centers and major facilities...; "Minor Arterials." Intra-community highways connecting community centers and major facilities..." City D.M. Street Dev. Std. I, A. CP 29 (¶ 6, fn. 2).

⁷ The City annexed the street in the early 1980s. *Id.*

6.5-foot grass north shoulder provided ample space for Moore to wait off the paved road surface if waiting for traffic to clear. CP 29, 31 (¶¶ 9-10, 21); CP 15 (¶ 8). On the northern side of the pedestrian footpath is a chain link fence. There is also a posted, reflectorized “Stop Ahead” warning sign located immediately north of the fog line. CP 29 (¶¶ 7, 10), CP 39 (App. B (photos)). There is no evidence of prior car-pedestrian accidents at his location. CP 3 (¶ 17); CP 31 (¶ 20); CP 13 (¶ 19).

See westbound photo of S. 240th Street in the accident vicinity:



CP 104. Moore produced no evidence that he was walking on the grass shoulder at the time of the collision; the admissible evidence suggests Moore was walking in the street (darting out or walking) when he was struck. Moore admitted he may have been walking on the traveled portion of the

street. CP 83 (Compl. ¶ 10); CP 88-89 (Inter. Ans. No.33). Moore now concedes it is likely he “was struck by Ms. Hagge’s car while on the improved, far-right portion of South 240th Street.” App. Br. at 13.

C. SUMMARY OF ARGUMENT.

Plaintiff argues “[t]he negligence of the City that is asserted is that the City had a duty to remedy the inherently dangerous condition of the roadway in one or more of the manners identified by Mr. Neuman **and** if they had done so, **Mr. Moore’s** actions would have been different.” App. Br. at 18. This court should follow precedent where it has repeatedly affirmed summary judgment in negligent road design cases against cities where a Plaintiff’s proximate cause theory is based on mere speculation, conjecture, and tenuous expert testimony: *Kristjianson v. Seattle*, 25 Wn. App. 324, 326, 606 P.2d 283 (1980) (Plaintiff had no recollection of the 2-car accident); *Miller v. Likins*, 109 Wn. App. 140, 145 34 P.3d 835 (2001) (driver of car died before providing testimony of car-ped accident and injured minor skateboarder provided no evidence). On summary judgment review, this court may only consider the admissible evidence, and must disregard Neuman’s inadmissible conclusory expert opinions and Moore’s inadmissible character and unsupported lay opinions.

D. ARGUMENT.

“Summary judgment is proper if the non-movant ‘fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Miller* at 145 (car-pedestrian collision), *citing*, *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (*quoting*, *Celotex Corp. v Catrett*, 477 U.S. 317, 322 (1986). Where a plaintiff only alleges a government theoretically *could have* prevented an accident instead of being the cause in fact, such speculation fails proximate cause. *Tortes v. King Cty.*, 119 Wn. App. 1, 8-9, 84 P.3d 352 (2003) *rev. den'd* 151 Wn.2d 1010 (2004), *citing Miller with approval*. In Moore's case, expert Neuman's supposition regarding speculative theoretical defects in the city street fails to meet this burden. An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e. information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).⁸

⁸ Moore's suggestion that the trial court made "findings" is legally and factually incorrect. App. Br., 10 11, f.n.2. See MSJ hearing transcript, RP 37-40. Moore is only assigning error to the proximate cause element of his burden to establish all elements of negligence. Because summary judgment can be affirmed on any grounds supported by the record, this court can determine as a matter of law that Moore failed to establish that the City breached a duty owed to him under the admissible facts. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 183 P.3d 283, *infra*. Duty is a legal question; and such is also interrelated to the question of legal causation. The City of Des Moines had no legal duty to install a sidewalk at the Moore accident location. The City provided a pedestrian walkway -- a gravel pedestrian footpath located away from vehicular traffic -- and cannot be faulted for Moore's decision not to use it. CP 105-109, 113 (MSJ argument). Nor is there a duty to provide a marked crosswalk. (CP 109-113). State law provides discretion to provide

1. **Proximate Cause Cannot Be Proven By Speculation.**

Moore's proximate cause theories are supported by threads of speculation and no evidence. Moore has theories as to what caused Hagge to drive into him, and hypothesizes that somehow the roadway "characteristics" were involved. He makes this assumption not based on any physical evidence or eyewitness testimony, but merely based on circular logic. Moore admits he has "no recollection of walking dangerously close to or on the traffic lane of South 240th St. on October 31, 2006." CP 78 (Pl. Dep. 226:5-22). Washington appellate courts have made clear that circular reasoning of expert witnesses will not support a

marked or unmarked crosswalks at intersections. RCW 46.61.235(1); 47.040.010(10), (15); 46.04.160. There is a crosswalk at every intersection even if painted lines do not mark it, unless the area that would normally take you to a crosswalk is barricaded or signed as closed to pedestrian traffic. RCW 47.040.010(10); 46.04.160 ("Crosswalk" means the portion of the roadway between the intersection area and a prolongation or connection of the farthest sidewalk line or in the event there are no sidewalks then between the intersection area and a line ten feet therefrom, except as modified by a marked crosswalk.") The law requires approaching vehicles to stop for pedestrians that are walking within marked or unmarked crosswalks, and prohibits a pedestrian from suddenly leaving a place of safety to walk into the path of a vehicle. RCW 46.61.235 (1) and (2); RCW 46.61.245 (driver to exercise due care). Pedestrians are required to yield the right of way to all vehicles at any point other than a crosswalk. RCW 46.61.240(1). A municipality owes no duty to a pedestrian to ensure the safety of crossing a city street at mid-block. *Hansen*, 95 Wn.2d at 776-77; *Nelson v. Tacoma*, 19 Wn. App. 807, 808-11, 577 P.2d 986 (1978) (where a plaintiff is "jaywalking" by electing to cross a street at mid-block, there is no legal duty to make the street normally used for vehicular traffic safe for him). Here, the City of Des Moines provided a marked crosswalk at the nearby corner of S. 240th and Marine View Drive and cannot be faulted for Moore's decision not to use it. "Marked Crosswalk" refers to "any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface thereof." RCW 46.04.296; RCW 47.04.010(15). Crosswalks are marked to encourage pedestrians to use a particular crossing. CP 31 (¶ 19). Where a marked crosswalk is readily available nearby, there is no legal duty for a City to provide a mid-block crosswalk. *McKee v. Edmonds*, 54 Wn. App. 265, 268-69, 773 P.2d 434 (1989).

jury verdict where it is based on supposition; Moore's theories do not support cause in fact or legal causation. "Mr. Moore does not dispute that 'evidence of proximate cause must rise above speculation, conjecture, or mere possibility.'" App. Br. at 12. Instead, he argues that the Neuman and Moore opinions meet his burden. *Id.* at 15-26.

Regarding speculative expert testimony, it has been long established that a jury may not be allowed to render a verdict based on reasoning that "assumes a fact necessary to establish a cause of action, but concerning which assumed fact there is no evidence, and then employs the suppositious fact as the basis for conjecture as to the possible cause of a particular physical result." *Prentice, Etc. Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 162-163, 106 P.2d 314 (1940).⁹ "In order to prove a fact by circumstances there should be positive proof of the fact from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture." *Id.* at 163. The Washington Supreme Court emphasized that "[p]roof which goes no further than to show that an injury *could have* occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other

⁹The *Prentice* court reversed a jury verdict based on the testimony of an expert witness that testified that the pressure of a refrigerant *could have* caused the rupture of a pipe if the pipe were worn to a thinness of approximately one thousandth of an inch; the rupture did occur; therefore, the pipe must have been worn to the required point. *Id.*

cause.” *Id.* (internal cit. omitted, *emph. added*). “Presumptions may not be pyramided upon presumption, nor inference upon inference.” *Id.* at 163-64. Specifically in negligent road design cases, “we cannot find negligence based upon speculation or conjecture.” *Ruff* at 706-707.¹⁰

Where experts opine that additional roadway improvements might have caused a driver to react in a different way and thereby avoid an accident, such can only be characterized as speculation or conjecture. *E.g., Kristjanson*, 25 Wn. App. at 326. “Recovery cannot be based upon a claim of what ‘might have happened.’” *Id.*, citing, *Johanson v. King Cty.*, 7 Wn.2d 111, 122, 109 P.2d 307 (1941). “Liability does not rest in the negligent act, but upon proof that the act of negligence was the proximate cause of the injury.” *Wilkie v. Chehalis Cty. Logging Etc.*, 55 Wn. 324, 327, 104 Pac. 616 (1909). Plaintiffs’ argument that if the City had made modifications to the roadway “characteristics,” *Moore’s actions would have been different*, is mere speculation and conjecture. App. Br. at 18.

¹⁰ “A verdict cannot be founded on mere theory or speculation.” *Sortland v. Sandwick*, 63 Wn.2d 207, 210-211, 386 P.2d 130 (1963). In a negligence case, “proof may not be made by inference piled on inference.” *Boyle v. King Cty.*, 46 Wn.2d 428, 432, 282 P.2d 261 (1955). “The cause of an action may be said to be speculative when, from a consideration of all of the facts, it is as likely that it happened from one cause as another.” *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001). **In Moore’s case, it is just as likely that Plaintiff darted in front of Hagge, walked in front of Hagge, walked at an angle jaywalking mid-block across the street, or tripped on his own feet, as it is that Moore was attempting to cross in an unmarked crosswalk. Moore cannot produce evidence that he was in an unmarked crosswalk at the time of the collision. Plaintiff’s assertion that no evidence supports darting or jumping in front of Hagge (App. Br. at 6) ignores that it is just as likely the collision happened from one cause as another under the admissible facts.**

2. **Proximate Cause (“Cause in Fact”) Requires More Than “Maybe.”**

Applying these rules of black letter law, this court has twice upheld summary judgment dismissals where the plaintiff in a negligent highway design case failed to provide evidence of proximate cause beyond mere conjecture or speculation. *E.g., Miller, supra; Kristjanson, supra. In both instances, the plaintiff’s case rested on the opinions of expert witnesses who speculated regarding what a driver might have seen or how a driver might have reacted. Id.* Such opinions were considered by the appellate courts as rank speculation that should not be allowed to be considered by a jury. Moore’s argument that the rule of *Miller* and its progenitors does not apply where “how the accident occurred” (Hagge’s car colliding with Moore) is not contested is specious. App. Br. at 13-15.¹¹

3. **Miller v. Likens Requires Dismissal.**

This court affirmed summary judgment dismissal in an earlier car/pedestrian (skate-boarder) accident, refusing to allow speculation on the proximate cause legal issue to proceed to the jury. *Miller*, 109 Wn. App. at 145-47. Likens was an 87-year-old driver who struck 14-year-old

¹¹ Moore relies on an anomalous 1972 Div. Two case that has not been cited by this court or the WA Supreme Court as altering the proximate cause analysis in road design cases; such should be ignored and distinguished on its facts. App. Br. 13-14. *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972) (*1-car fatal accident* where temporary guardrails had become damaged and ineffective). The Court has made clear that an allegation of negligent maintenance of a highway does not allow an individual to recover damages “unless it can be shown by competent evidence, attaining a higher degree than conjecture evidence, that he has suffered an injury because of it.” *Wilkie* at 327; *Ruff* at 706-07.

skateboarder, Matt Quirnbach, on a curved section of a city street. Miller (Quirnbach's mother), brought a personal injury suit alleging that the City was negligent for failing to adequately or properly perform design, engineering, and maintenance duties on its City streets. **Likins died prior to providing testimony in the suit.** Similar to the issues in Moore's case, the legal issues in *Miller* concerned whether Quirnbach was on the traveled portion of the road or outside the fog line when he was hit, and proximate cause. *Id.* at 142-3. To fill the void of evidence, plaintiffs attempted to offer the expert testimony of an accident reconstructionist. *Id.* at 148.

This court highlighted that "to survive summary judgment, the plaintiff's showing of proximate cause must be based on more than mere conjecture or speculation." *Miller* at 145. **Further, "Washington courts have repeatedly held that in order to hold a governmental body liable for an accident based upon its failure to provide a safe roadway, the plaintiff must establish more than that the government's breach of a duty *might* have caused the injury."** *Id.* (emph. added), citing, *Ruff* at 707; see also, *Johanson; Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 857, 751 P.2d 854 (1988); *Kristjanson*. As a matter of law, this court concluded *Miller's* evidence failed. *Id.* at 147.

This court emphasized that despite the absence of physical

evidence and lack of testimony from Likins, the expert reconstructionist testified in detail “on a more probable than not basis,” regarding the kinematics of the accident, and his opinion regarding the physical placement of the parties and the accident dynamics. *Miller* at 148-49. Plaintiffs’ reconstructionist agreed at his deposition that he did not perform a quantitative analysis to support his opinions, and that because there was no physical evidence on the roadway, there was no way of determining where the point of impact of the accident occurred. *Id.* Instead, the expert relied on a declaration of another minor at the scene. This declaration conflicted with both the County’s eyewitness and expert testimony. *Id.* **The trial court excluded plaintiff’s speculative expert testimony and this was affirmed on appeal. *Id.***

The “evidence” supporting Moore’s case rests on even finer threads of supposition than the record in *Miller*. There is no physical evidence of the point of impact (CP 11, 12 (¶¶ 7-9, 15-18)), and Moore’s expert performed no quantitative analysis. **The eyewitness testimony of following driver Mineard specifically describes driver Hagge proceeding westbound in her lane of travel, at a speed below the 35 mph posted limit, when Hagge unexpectedly struck Moore; Mineard did not actually see the vehicle collide with Moore, but instead saw him flying up and to the right of Hagge’s car. CP 2-3 (¶¶ 7-9, 11).** In

conflict with Moore's conjectural theories, Mineard did not see Hagge's car swerve to the right and strike Moore on the grass shoulder or on the fog line, nor was Mineard able to testify that Moore was in an unmarked crosswalk as opposed to jaywalking mid-block at the time of the collision. CP 2. Neither Mineard nor Hagge provided any testimony as to where Moore was or what he was doing immediately before the Hagge vehicle struck Moore. CP 1-3. To overcome summary judgment, the Court would have to ignore this uncontroverted eyewitness testimony. Unless the jury is allowed to engage in mere guesswork, no physical evidence, quantitative analysis, or witness testimony supports any proximate cause theory, vis-à-vis the City of Des Moines.

This court also rejected Miller's bare arguments that if the City had taken additional precautions, such as installing raised pavement markings or posting additional road signs, Likins would likely have been more able to avoid colliding with skateboarder Quirnbach. *Miller*, at 147. 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.*

In the case at bar, as in *Miller*, there is no evidence that either Ms. Hagge or Moore were surprised by the street, its reflectorized markings, reflectorized center buttons or signage, the clearly marked reflectorized

fog line and lane edge, or that they were confused or misled by the abutting, in-plain-view shoulder, ditch and walking path; nor is there any evidence to suggest Moore expected the traffic to stop for him if he walked in front of it mid-block. CP 32 (¶ 25). As in *Kristjanson*, Moore is unavailable as a fact witness because he has no memory of the accident. CP 58-80 (Pl. Dep. 56:13-17; 69:8-70:30; 76:8-78:8; 164:7; 167:16-19; 178:19-179:8; 224:11-225:13).

Nonetheless, on appeal, Moore argues that the City's failure to (1) improve the north side of S. 240th Street opposite 9th Place S., (2) provide more room for pedestrians to stand while waiting to cross the street, (3) provide "crossing provisions" alerting vehicles of pedestrians, (4) or direct pedestrians to not cross or to stay off the street, provide the cause in fact of Moore's injuries. App. Br. at 16. (*See*, arguments below, re: disregarding Neuman's opinions.) Absent speculation, there is no evidence from Hagge that if the City had improved S. 240th Street as urged by Moore, that Hagge would likely have been more able to avoid colliding with Moore. Additionally, there is no evidence that if the City had taken measures to modify the roadway "characteristics," Moore would not have nonetheless stood in the street, walked or darted into oncoming traffic. CP 32-33 (¶¶ 25, 27). Moore's expert opinion testimony should be rejected inasmuch as similar opinions were rejected in *Ruff*, *Miller* and

Kristjiansen: there is no basis in law for improvements designed to make a safe street safer, and such arguments fail to establish that the absence of such improvements was the proximate cause of Moore’s accident.

As the City argued below (CP 118), a jury should not be allowed to enter into the realm of conjecture or speculation in determining whether or not Hagge or Moore were confused or misled by the street and related configuration (e.g. the proximate cause of his accident). As in Miller, summary judgment is proper here. Theoretical defects in a city street do not establish proximate cause.¹² There is no evidence that the S. 240th St. “characteristics” in fact caused this accident. CP 32-33, (¶¶ 25-27).

4. **Theoretical Defects in a Street do not Establish Proximate Cause.**

This court’s decision in *Miller* follows a long line of cases affirming

¹² In other negligence contexts, Washington Appellate Courts have upheld summary judgment where the plaintiff failed to provide evidence of proximate cause beyond mere conjecture or speculation. *E.g., Marshall v. Bally’s Pac West*, 94 Wn. App. 372, 379-80, 972 P.2d 475 (1999)(plaintiff (Marshall) fell off a treadmill at a workout club, hitting her head; she sued the workout facility and the treadmill manufacturer alleging negligence; she could not remember the fall and the events leading up to the fall).

In short, Marshall provides no evidence that she was thrown from the machine, what caused her to be thrown from the machine, or how she was injured. **Given this failure to produce evidence explaining how the accident occurred, proximate cause cannot be established.**

See also, this court’s decision in *Little v. Countrywood Homes*, 132 Wn. App. 777, 781-82, 133 P.2d 944 (2006) (Plaintiff Jared Little was finishing work on a house; his brother heard Jared call him; Kenny found Jared on the ground trying to stand up; Jared sued the contractor; Jared suffered a brain injury and had no memory of what happened.)

To meet his burden, [Plaintiff] Little needed to present proof sufficient to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that the moving party should be held liable....He [Little] needed to submit evidence allowing a reasonable person to infer, without speculating, that Countrywood’s negligence more probably than not caused the accident.

dismissal where evidence supporting proximate cause is lacking.¹³ Over 60 years ago, the Washington Supreme Court affirmed a dismissal in a negligent road design case where the evidence was insufficient to establish proximate cause. *Johanson*, 7 Wn.2d 111. After a jury verdict was rendered in favor of plaintiff, the trial court entered a judgment notwithstanding the verdict. *Id.* at 114. In a 2-car collision, the injured plaintiff argued that the county was negligent in failing to remove old road lines which theoretically could mislead drivers into thinking that the road was a two-lane roadway, rather than a four-lane roadway. *Id.* at 119. Plaintiff theorized “[the offending driver] *might have been* and probably was deceived and misled by the yellow line.” *Id.* at 122. **The offending driver died in the accident and was thereby unavailable as a witness.** *Id.* at 112. “The Court affirmed dismissal of the claim against the county because even if the county breached its duty of care, the plaintiff failed to present any ‘testimony or inference which can reasonably be drawn from [the] testimony, that the location of the [road] line was the proximate cause of the accident.’” *Id.* at 120 (*cited by Miller at 146*).

Similarly, in *Nakamura v. Jeffery*, 6 Wn. App. 274, 492 P.2d 244 (1972), *pet. den’d*, 80 Wn.2d 1005 (1972), another negligent road design case, the plaintiff produced no evidence beyond speculation and conjecture,

¹³ Moore concedes the City’s authorities “remain good law.” App. Br. at 17.

that the complained of defect proximately caused the accident; the trial court dismissed the case following the close of plaintiff's evidence. On appeal, this court affirmed the judgment of dismissal. In *Nakamura*, plaintiff received injuries in a 2-car collision that occurred at an uncontrolled Seattle intersection. The only evidence concerning the collision was plaintiff's testimony stating that when he reached the center of the intersection, his car was struck on the left side by the offending driver's speeding car; **the offending driver did not testify**. *Id.* at 275-76. Plaintiff argued that the City had a duty to post a warning sign at the intersection regarding structures allegedly obstructing the view of approaching drivers. The trial court reasoned that, assuming arguendo that the City's failure to post a warning sign was negligence, the record provided no evidence that the absence of a warning sign was the proximate cause of plaintiff's injuries. *Id.*

Relying on *Johanson*, this court agreed with the trial court, and emphasized the following language from the Washington Supreme Court:

The burden is upon appellants to establish, by direct or circumstantial evidence, that the location of the yellow line did, in fact, deceive and mislead the driver of the Ryan car, to his injury.

The jury may not enter into the realm of conjecture or speculation in determining whether or not the location of the yellow line was the proximate cause of the collision...[I]t would be mere guessing, in view of all the facts, to say that Ryan was in any way deceived and misled by the location of the yellow line.

Nakamura at 277, citing, *Johanson* at 122 (emph. added). This court refused to allow similar guessing by the jury regarding whether or not the offending driver was in any way deceived or misled by the absence of a warning sign to alert of alleged sight obstructions. *Id.*

Eight years later, in another negligent road design case against the City of Seattle, this court again relied on *Johanson* when it affirmed summary judgment dismissal. In *Kristjanson*, 25 Wn. App. 324, *Kristjanson* involved a 2-car accident that occurred on a curve on a steep, sharply curving, two-lane roadway through a wooded area, where the speed limit was set at 30 mph. *Id.* at 325. The causing driver was said to be driving at 54 mph, and had crossed over the centerline at the time of the collision; afterwards, his blood alcohol reading reflected a .21 blood alcohol content. *Id.* **The injured plaintiff, Kristjanson, was unconscious after the collision, and had no recollection of the events.** *Id.*

The claim against the City alleged a breach of a duty to provide adequate site distance and adequate signing on the roadway to assist driver visibility of the road. Although curve warning signs on the roadway were either missing or obstructed on the day of the collision, the court granted summary judgment in favor of the City concluding that there was “no substantial evidence which would support a finding that any negligence of

the City was the proximate cause of the collision.” *Kristjanson* at 326. “The trial court concluded that ‘any suggestion that [the causing driver] was misled or that [plaintiff] would have reacted sufficiently to avoid the accident is purely speculative.’” *Id.* The appellate court agreed. *Id.* Plaintiff’s contentions that “given additional site distance, he *might* have reacted in a way that could have avoided the collision in that [the causing driver] *might* have heeded warning signs to drive carefully...can only be characterized as speculation or conjecture.” *Id.*, citing, *Johanson*. Such mere guesswork should not proceed to a jury. *Id.* (*accord, Miller* at 146).

Relying on this long established rule of Washington law, where (1) there is no physical evidence to explain the point of impact or accident dynamics (how, where, why); (2) there is no eye-witness to the actual car-pedestrian collision; (3) the causing driver testified she did not actually see Moore before the collision; (4) Moore remembers nothing about the day of the accident; (5) there is no evidence Moore was crossing in an unmarked crosswalk at the time of the collision; (6) there is no evidence that Hagge swerved in her lane before the collision; (7) there is no evidence that the approximately 5-foot wide grass north shoulder was insufficient for a pedestrian to stand and wait upon; Moore’s theoretical arguments about roadway defects as potentially having caused this accident (or failing to prevent this accident) are sheer speculation not creating a genuine issue of

material fact for the jury's consideration.

Plaintiff's reliance on the *Wojcik* case is misplaced. App. Br. at 18-20. By contrast to Moore, who has no memory, Plaintiff Wojcik provided admissible evidence of his recollection of events leading up to the collision and his own passing maneuver. *Wojcik* at 856-57. *See arguments below as to inadmissibility of Neuman and Moore's declaration.*

5. As a Matter of Justice and Policy, the City Was Not the "Legal Cause" of Injury.

As a matter of common sense, logic, justice and policy, the Court should exercise its important gatekeeper function and place a meaningful limit on governmental tort liability under the facts at bar. *E.g., King v. Seattle*, 84 Wn.2d 239, 249-50, 525 P.2d 228 (1974) (legal cause is a question of law and the entire doctrine "assumes that a defendant is not necessarily to be held responsible for all the consequences of his acts"); *Keller v. Spokane*, 146 Wn.2d at 252 (the court has the "gatekeeper function" of determining that a defendant's "actions were not the legal cause of the event").

As Washington appellate courts have often recognized, governments must not be made insurers against every imaginable type of negligence (*e.g. Ruff, et al.*). Under the facts at bar, where (1) an available gravel foot path was situated away from vehicular traffic, (2) an available

5 to 5.5 foot grass shoulder was present, (3) a marked crosswalk was nearby, (4) driver Hagge drove straight into Moore, and (5) Moore either stood, walked or darted directly into the path of an oncoming car at dusk while wearing dark clothing, the combined gross negligence of Hagge and Moore presents this Court with sufficient policy reason such that the Court's gatekeeper function should be exercised here. "Legal causation" requires a determination of whether liability should attach as a matter of law, given the existence of cause in fact...considering "mixed considerations of logic, common sense, justice, policy, and precedent." *Braeglemann v. Snoh. Co.*, 53 Wn. App. 381, 384-85, 766 P.2d 1137, *rev. den'd*, 112 Wn.2d 1028 (1989); *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985) ("legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend.")

Assuming *arguendo* the City had a duty to build a sidewalk, marked crosswalk, or a paved shoulder, because Hagge's egregious conduct of driving her car directly into Moore is the cause in fact of this collision, under the evidence at bar liability *should not attach* as a matter of law: Lack of legal causation arises here because it is speculative that the corrective measures implicated would have avoided the result. *E.g.*, *Braeglemann* (this court determined the county was not legal cause of 2-car accident); *Riksem v.*

Seattle, 47 Wn. App. 506, 511-12, 736 P.2d 275, *rev. den'd.*, 108 Wn.2d 1026 (1987) (City not legal cause of jogger-biker accident; this court concluded that the City's alleged negligence for failure to post warning signs presented a causal connection that "is too attenuated to impose liability)." *King* (no legal causation); *Hartley* (in 2-car collision, this court determined that the failure of the government to act is too attenuated a causal connection to impose liability).¹⁴

6. **The Trial Court Properly Exercised Its Discretion When It Excluded Expert Neuman's Conclusory Speculative Opinions and Legal Conclusions.**

Moore cites to no analogous authority to support the admissibility of Neuman's opinions and legal conclusions, and his efforts to distinguish *Miller* fail. App. Br. at 21-25. Only *admissible evidence* may be considered by the Court on a Motion for Summary Judgment. CR 56(e) (*emph. added*). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Doe v. Dept. of Trans.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997). CR 56(e) provides that affidavits

¹⁴ *E.g.*, *McKee v. Edmonds*, 54 Wn. App. 265 (no liability where pedestrian failed to use crosswalk); *Klein v. Seattle*, 41 Wn. App. 636, (1985) (no liability); *Cunningham v. State*, 61 Wn. App. 562, 811 P.2d 225 (1991) (no legal causation); *Ruff*, (no legal requirement to place guard rail on otherwise good road, just to protect careless drivers; no liability).

made in opposition to summary judgment must “...be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 493, 183 P.3d 283 (2008). “Expert testimony must be made on the facts of the case and not on speculation or conjecture.” *Id.* Because the appellate court performs the same function as the trial court in reviewing a summary judgment order, this court “...cannot consider conclusions of law contained in affidavits.” *Parkins v. Cooucousis*, 53 Wn. App. 649, 653, 769 P.3d 326 (1989).

In Moore’s case, in response to the City’s Objection and Motion to Strike, the trial court properly excluded Mr. Neuman’s declaration at ¶¶ 17-20. CP 284-85 (Order Sustaining CR 56(e) Objection 2:4-8); CP 288 (MSJ Order ¶ 10); CP 168-69 (Neuman paragraphs disregarded by the court); (*see*, City’s Obj., CP 235, 336-357, 307-335; City’s Mo. to Strike, CP 236-265; 358-371; CP 289 (MSJ Order 4:3-14 (docs. considered))).

The excluded opinions included supposition that a theoretical pedestrian may step onto the pavement and a theoretical driver may deviate from her lane to the right and collide with a pedestrian (CP 168, ¶ 17); that from an accident reconstructionist’s perspective, Moore was facing south when he was hit by the Hagge car and was in the process of crossing S. 240th Street “reasonably in the intersection of 9th Pl. S. and S.

240th St.” at the time he was hit (CP 168, ¶18); that inherent dangers of S. 240th St. were more likely than not a substantial factor in causing Mr. Moore’s injuries, and if the City had provided safeguards for pedestrians and vehicular travelers Ms. Hagge more likely than not would not have struck Moore (CP 168, ¶ 19); and that the City should have known of the ped-vehicle problem at this location, and *could have* required improvements to the north shoulder, provided pedestrian access to the gravel path, provided a driveway type culvert, installed crossing provisions at the intersection, or could have directed pedestrians away from using the street’s north shoulder (CP 168-69, ¶ 20). This exclusionary Order should be affirmed by the court.

“The trial court has wide discretion in ruling on the admissibility of expert testimony.” *Miller* at 147. “This court will not disturb the trial court’s ruling ‘[i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable.’” *Id.* Where the opponent challenges the qualifications of an expert to testify as to certain opinions in a summary judgment proceeding, on review the appellate court reviews the qualifications *de novo*. *Davies* at 494-96, *citing, Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), *et al.*

In *Miller*, the trial court excluded the expert testimony of plaintiff’s accident reconstructionist, concluding that it was speculative

and without factual basis. *Miller* at 148. This court upheld the exclusionary Order. As discussed above, despite the fact that there was an absence of physical evidence at the scene, and neither the offending driver nor the injured plaintiff provided testimony, *Miller's* expert testimony was offered “**to show how the accident occurred.**” *Id.* at 147 (emph. added).

“ER 702 permits testimony by a qualified expert where ‘scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.’” *Miller* at 147-48. However, in *Miller*, as the case at bar, the City argued that the expert testimony on the issue of “how the accident occurred,” was properly excluded because it was “speculative and without factual basis.” *Id.* “It is well established that conclusory or speculative expert opinions lacking foundation will not be admitted.” *Id.* This court further emphasized, “[i]n addition, when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Id.*

a. Neuman is not qualified.

Preliminarily, Plaintiff has failed to establish Mr. Neuman, a civil engineer, as a qualified expert regarding the standard of care in Washington and the legal issues at bar with respect to City right-of-way. ER 702. Neuman is not a licensed professional engineer in the state of

Washington. CP 171. He did not demonstrate to the Court that he is familiar with the engineering issues and the standard of care in Washington. His assertions as a “reconstructionist” are completely without foundation. The defense discovered no published case in Washington State or U.S. District Court that reveal him to have been admitted as an expert witness. This failure of qualifications alone is enough reason to exclude Neuman’s opinions.

b. Neuman speculates and concludes on the law.

On the merits, Mr. Neuman’s declaration is rife with conclusory assertions and legal conclusions. His opinions do not create factual issues for a jury to consider. The purely legal questions presented to the Court on summary judgment were not assisted by speculative expert testimony lacking adequate factual basis, or Neuman’s legal conclusions. On *de novo* review, Mr. Neuman’s conclusory opinion that bucolic, straight and wide-open S. 240th Street in the 900 block of Des Moines is “inherently dangerous” should be excluded by the Court. CP 167 (¶ 14, ln. 25-26). Although the trial court only excluded ¶¶ 17-20 (CP 168-69) of Neuman’s Declaration, on *de novo* review, **the City urges the Court to additionally exclude ¶¶ 8-21 of Neuman’s Declaration (CP 165-69).** CR 56(e). “A court may not consider inadmissible evidence when ruling on a motion for summary judgment.” *Fire Prot. Dists. v. Housing Auth.*, 123 Wn.2d 819,

826, n. 13, 872 P.2d 516 (1994).

Affidavits submitted in support of, or in response to, a motion for summary judgment must set forth such facts as would be admissible in evidence. CR 56(e). An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e. information as to “what took place, an act, an incident, **a reality as distinguished from supposition or opinion.**”...**Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact.**

Curran v. Marysville, 53 Wn. App. 358, 367, 766 P.2d 1141 (1989) (*emph. added*), quoting *Grimwood* at 359-60.

Affidavits submitted by expert witnesses in opposition to summary judgment are properly not considered by the court where they merely contain “conclusory assertions rather than factual allegations.” *McBride v. Walla Walla*, 95 Wn. App. 33, 36-37 (1999). On summary judgment, “a trial court does not abuse its discretion by excluding a declaration containing legal conclusions.” *Id.*; ***neither the trial court nor the appellate court can consider conclusions of law contained in an affidavit under the guise of expert testimony.*** *Fire Prot. Dists.*, at 826, n. 14.¹⁵

As discussed above, “[t]he twin elements of proximate cause are cause in fact, the ‘but for’ consequences of an act, and legal causation,

¹⁵ Expert conclusions unsupported by specific facts are not admissible to overcome a motion for summary judgment. CR 56(e); *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 25-26, 851 P.2d 686 (1993). Nor will conclusory statements of fact suffice to defeat a motion for summary judgment. *Lambert v. Morehouse*, 68 Wn. App. 500, 507, 943 P.2d 1116 (1993). Expert testimony must also be helpful to the jury and provide meaningful opinion on the issue about which he is testifying. ER 702; *Charlton v. Day Island Marina*, 46 Wn. App. 784, 788, 732 P.2d 1008 (1984) (disregarding expert opinion that did not create issue of material fact to the elements of the legal claim at hand).

whether liability should attach as a matter of law.” *Miller* at 145. In this case, the court should note that Moore did not argue below that the City was the cause in fact of his accident (Hagge’s car colliding with Moore is the cause in fact of Moore’s injuries); but rather, Moore merely speculated as to what the City “should” have done to theoretically prevent the accident. CP 196, 199, 211, 213-14 (Pl. MSJ Resp. 3:16-19, 6:24, 18:15-18; 20:17-21:14). Nonetheless, “...to survive summary judgment, the Plaintiffs’ showing of proximate cause must be based on more than mere conjecture or speculation.” *Id.* See also, *Tortes* at 8-9 (where “there is no claim that Metro was the cause in fact of the accident ...[r]ather, there was only speculation as to what Metro should have done to prevent the shooting and the accident...” plaintiff failed to establish proximate cause).

c. Neuman ignored available evidence.

As the expert did in *Miller*, Neuman had to overlook other available evidence in order to reach his conclusory assertions. First, he posits that the accident location presents a “high likelihood of pedestrian traffic,” but he ignores the City’s Assistant Public Works Director’s Declaration which informs the Court that there have been no prior complaints of car-pedestrian conflicts, and no prior car-pedestrian accidents. CP 31, 32-33 (¶¶ 20, 25-27). Neuman similarly ignores that the 9th Pl. cul-de-sac only supports 13 (thirteen) residences and there is no

pedestrian generator on the North side of S. 240th Street (i.e., school, library, bus stop, public destination). CP 23. Neither Officer Guest nor Miranda Mineard (frequent users of the street) have seen any high incidence of pedestrian use, crossings or accidents; they have seen no accidents pre-dating Moore's collision. CP 3 (¶ 17); CP 13 (¶ 19). Second, Neuman completely ignores that there was an available grass shoulder for Moore to stand on to wait for any traffic to clear; he measured the grass shoulder at different locations to be 4.7 to 6.5 feet in width. CP 164 (¶ 7, g-h).¹⁶ There can be no reasonable debate that neither a sidewalk nor a paved shoulder "would have prevented" Moore from standing on the paved street surface if he chose to step there to prepare to cross, as Moore appears to argue. App. Br. at 13, 25. *See also* CP 196, 199, 203, 206. Third, Neuman ignores that driver Hagge never even saw Moore before the collision; he cannot reasonably argue that a marked crosswalk ("crossing provision") would have impacted Hagge's driving behavior; Hagge never testified that she would have avoided the collision had there been a crosswalk. Such arguments are pure speculation.

¹⁶ According to the City's Asst. Public Works Director, Dan Brewer, the ample sight-distance at S. 240th Street "should have provided a reasonable and safe opportunity for Mr. Moore to wait on the adjacent grass shoulder area for any traffic to clear before making a decision to cross S. 240th Street -- if he had chosen to do so." CP 31 (¶ 21) (if in fact Moore was trying to cross the street at the time of the collision). Both the grass shoulder and the gravel walking path located away from the traveled portion of the roadway provided safe locations for Moore to walk outside of the traveled portion of the street. CP 29-31 (¶¶ 9-22); CP 14-26.

d. Neuman's testimony must be disregarded.

In evaluating the proposed expert testimony in Miller, this court criticized that (1) although there was no physical evidence to determine where the causing driver hit the injured pedestrian, and (2) although the expert had performed no quantitative analysis to support his version of the facts of the accident, the expert nonetheless testified "on a more probable than not basis." *Id.* at 148-49 (emphasis added). This court set out the speculative aspects of the expert's testimony as follows:

'On a more probable than not basis,' the accident occurred when Likins' vehicle 'quickly approached and veered across the fog line, momentarily leaving the north/east lane of travel.' He testifies that in his opinion, 'at the moment of the impact, neither [pedestrians] were on skateboards.' Cottingham further declares that [the injured pedestrian] was standing outside the fog line when he was hit and 'instinctively lunged toward his right to avoid the approaching car, which meant that in his effort to avoid the car, he lunged toward the lane of travel from which the car was drifting...he was struck by the car's front bumper and thrown up on the hood. His head or body smashed the windshield on the driver's side; he was then thrown off to the left of the windshield, and the curvature of the windshield caused him to the fall to the west and continuing rolling or sliding until he came to a rest near the west fog line.'

Id. 148-49. This excluded testimony is akin to Neuman's opinion at ¶ 18:

...Mr. Moore was facing south when he was hit. This is not consistent with him going east or west at the time of the vehicle contact. Thus, it is my opinion that he was in the process of crossing South 240th Street and thus reasonably in the intersection of 9th Place South and South 240th Street.

CP 168. Neuman's opinion likewise should be disregarded.

This court agreed that Cottingham’s opinion about where on the roadway Quirnbach was struck was speculative and lacked an adequate factual basis. *Id.* As in the case at bar, Cottingham admitted he did not perform a quantitative analysis to support his version of the facts of the accident. In fact, at his deposition, “Cottingham testified that he had no way of determining where the point of impact in this accident occurred.” *Miller* at 149. Because Cottingham merely relied on the declaration of another involved pedestrian, and this pedestrian’s declaration conflicted with the expert testimony and eyewitnesses produced by the county, the evidence was excluded. *Miller* at 143, 149-50. This court concluded “the trial court acted within its discretion in excluding the testimony.” *Id.* at 149-50. The same result should occur here. *See* CP 222, *App. A to City’s Reply, MSJ* (chart comparing Cottingham and Neuman’s opinions).

First, just as the expert in *Miller*, Mr. Neuman is offered by Moore, in part, “to show how accident occurred.” *Miller* at 147 (*i.e.*, City theoretically failed to prevent the accident as Moore was crossing the street at the intersection, in an unmarked crosswalk). Moore relies on Mr. Neuman’s proffered “expert opinion” because neither Moore nor Ms. Hagge know how the accident actually occurred (how, where or why did

Hagge's car collide with Moore?).¹⁷

Second, just as in *Miller*, in this case there was no physical evidence at the accident scene to indicate where Moore was standing, facing or impacted/struck by Hagge's car. CP 11-12 (¶¶ 7-9, 15-17).¹⁸ A number of different theoretical scenarios can explain this accident without any of them being caused in fact by the City of Des Moines. *Miller* at 149. ***Whether or not Moore tripped on his own feet while caught up with his paperwork, was walking with his back to traffic and looked towards Hagge's approaching headlights at the last minute, darted into traffic believing he had more time, was walking towards traffic and not paying attention, these witnesses do not know.***

Third, Moore's bald assertions notwithstanding (App. Br. 24-25), like Cottingham, Mr. Neuman has performed no scientific or quantitative analysis to support Moore's version of the facts of the accident. CP 12-13; 162-69. Despite the lack of physical evidence at the scene, the lack of any quantitative analysis by an expert to determine Moore's accident kinematics or to reconstruct Hagge's pre-collision behaviors, and the fact

¹⁷ CP 58-80 ("I have no memory.") (Pl. Dep. 56:13-17; 69:8-70:30; 76:8-78:8; 164:7; 167:16-19; 178:19-179:8; 224:11-225:13); and CP 87-89 (Pl. Answer to Inter. No. 34). Moore testified that he did not remember at all the day of the accident. *Id.*

¹⁸ Ms. Mineard does not know where Moore was standing; she merely saw Moore after he was struck by Hagge's car. CP 2 (¶ 10). She was behind Hagge and did not see Moore before the accident. *Id.* (¶ 7). Hagge testified she did not see Moore until her car struck him. CP 53 (Hagge Dep. 16:3-19).

that Hagge never saw Moore before impact, Mr. Neuman nonetheless testified that the City of Des Moines' pre-collision failure to theoretically prevent the accident by retrofitting S. 240th St. with modern day design features constituted a breach of a duty to provide a reasonably safe roadway for ordinary travel.

Neuman essentially opined that such a myriad of failures *might have* prevented Moore's accident; these alleged failures apparently include reconstruction to provide increased lane widths, build a curb, gutter and sidewalk, build a crosswalk, build a wider paved north shoulder, cover the ditch, install signs posting the pedestrian footpath as accessible to pedestrians or warning against using north shoulder, and reclassification to specify the street as a minor arterial. CP 165-169 (¶¶ 9-21). It is pure speculation to assert that any such additional safeguard would have prevented Moore's accident. Because Mr. Neuman is not a demonstrated qualified expert in Washington, and his proffered testimony is conclusory and purely speculative, lacking factual basis, and replete with legal conclusion, it is inadmissible pursuant to ER 702. CR 56 (e).

7. **The Trial Court Properly Exercised Its Discretion When It Excluded Moore's Conclusory Speculative Lay Opinions; on Review, This Court Should Disregard Moore's Declaration.**

Moore's Statement of the Case and proximate cause arguments are premised on Mr. Moore's Declaration, which is replete with inadmissible

evidence that Moore has attempted to smuggle in under the guise of ER 406, evidence of habit. App. Br. at 2-4; 15-17 (“Mr. Moore relies on evidence of his habits to satisfy causation.”) Moore argues in assignments of error one (1) and two (2) that a jury is entitled to weigh his “habit” testimony. App. Br. 2-3. Moore’s reliance on ER 406 has been wrongfully employed, and therefore Mr. Moore’s Declaration should be completely excluded by the Court. CR 56(e). The trial court properly excluded ¶¶ 6-8 of Moore’s Declaration (CP 159-160) where he basically testified as to his lay opinion that on the day of the accident he would have proceeded as a reasonable prudent and safe pedestrian when encountering all of the various roadway features at S. 240th Street. CP 284-85 (Order Sustaining CR 56(e) Objection 2:8-11); CP 288 (MSJ Order 3:7-9).

On *de novo* review, this court should likewise disregard the unfounded lay opinions of Moore, and further disregard the improper ER 404 character evidence; such do not provide information as to what took place, an act, an incident, or a reality. *E.g.*, *Grimwood* at 359-60. The City preserved these issues for the court’s review by filing an Objection to this evidence and filing a separate Motion to strike Moore’s Declaration. CP 235, 307-371; CP 236-243; 270-272 (Obj. and Mot.); CP 289 (MSJ Order 4:12-14). *E.g.*, *Parkin v. Colocousis*, at 652-53 (“Generally, in order to preserve for review a claim that an affidavit is defective, a party must register an

objection which specifies the deficiency or must move to strike the affidavit before the trial court's entry of summary judgment.") Inadmissible evidence may not be considered by the reviewing court. *Id.*¹⁹

a. Plaintiff's Lay Opinions are Inadmissible.

ER 701 states as follows (emph. added):

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences, which are (a) rationally based on the *perception of the witness*, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702

Moore provided no case authority to support the admissibility of his opinion evidence because there is none. App. Br. at 24-25. Restrictions on lay opinion are based upon the traditional belief that a lay witness is no better equipped than a juror to arrive at an opinion or conclusion from the facts known to the witness. 5D, Tegland, *Courtroom Handbook on WA Evidence*, Sec. 701, p. 351 (2009-10). Consequently, a lay witness should normally relate facts to the jury and let the jurors form their own opinions and conclusions. *Id.* That the lay witness is also the party to the action does not alter the application of the Rule.

¹⁹ See *Fire Prot. Dists.*, at 826 (inadmissible evidence may not be considered by the reviewing court on summary judgment). See also, e.g., *Grimwood* at 360 (summary judgment appropriate where defendant sets forth facts ... specific events, occurrences, things that were claimed to exist in reality, but plaintiff presented only conclusions and opinions as to the significance of the facts).

A lay opinion is admissible under Rule 701 *only* if it is “rationally based upon the perception of the witness.” ER 701. Opinion testimony may be objectionable if the opinion is not based upon the firsthand observations of the witness. 5D, Teglund, Sec. 701, p. 352.

The trial court properly exercised its discretion when it disregarded ¶¶ 6-8 of Moore’s Declaration (CP 159-160). Moore attempted to introduce evidence of inadmissible lay opinion. ER 701. His Declaration stated his opinion, “I have no reason to believe that I was not acting in conformity with the foregoing habits and routine practices on October 31, 2006 when working in Des Moines’ neighborhoods and when I was on South 240th Street...at about 5:00 p.m.” CP 159-160 (¶ 6). He provided his opinion of where he parked and his canvassing activities after he parked. CP 160 (¶ 7). Moore’s opinion regarding the accident dynamics and how, where, and why he was struck by the Hagge vehicle -- are opinions on all the ultimate issues to be determined by the trier of fact:

Since October 31, 2006, I returned to the location where I *learned* that I was hit by Ms. L. Billie Hagge...it is *my opinion* that on October 31, 2006, at approximately 5:00 p.m., I was finishing work and returning to my car from the north side of South 240th Street. It was necessary for me to cross from the north side of South 240th Street to the south side because my car was parked off of 9th Place South. Because no crossing provisions were in the vicinity, I prepared to cross at the intersection of 9th Place South. As I stood at the north edge paved portion of South 240th Street, preparing to cross, I looked to my right for oncoming traffic just as Ms. Hagge struck me

with her car on my left.

CP 160, (¶ 8) (emph. added). This evidence is precisely what ER 701 prohibits. ER 701 requires firsthand knowledge. Tegland, ER 406.

i. No personal knowledge.

Moore has readily admitted that he lacks any firsthand knowledge whatsoever as to what occurred on the date in question. Numerous excerpts from his deposition illustrate his lack of firsthand knowledge.

- Q. So would you say that on October 31st, 2006, this was the first time you'd walked down South 240th Street?
- A. *I don't know. I don't know.*
- Q. You don't know one way or the other?
- A. *I really--you know, I don't know one way or the other. I really don't know one way or the other...*
- Q. *Do you have any memory of being struck by my client's vehicle?*
- A. *No.*
- Q. Do you have any memory of what you were doing in the ten minutes prior to being struck by my client's vehicle?
- A. *No.*
- Q. So as you sit here today, you just simply -- it sounds to me like you have no memory of October 31st, 2006.
- A. Is that correct?
- A. *No, I have no memory.*
- Q. Okay. So that is correct, you have no memory?
- A. *Yes. So that's a "yes", I have no memory.*
- Q. What is your first memory after October 31st of 2006?
- A. Waking up in Harborview Hospital, wondering why I was there.

CP 62-63 (77: 10-78:11) (emph. added); CP 62 (76:8-20) (no memory of walking on S. 240th St. on 10/31/2006).

In discussing his Interrogatory answers, Moore testified as follows:

- Q. The last sentence of your answer says, "At approximately 5:00 p.m., I was returning to my car to go home, at which time I was hit by the vehicle driven by Ms. Hagge.
And what my question is, how do you know that? How do you know --
- A. Based on police reports. *I don't know that precisely.* That was based on police reports. That's why I said approximately 5:00 p.m.
- Q. And the part, "I was returning to my car," how do you know you were returning to your car if you have no memory of that day?
- A. That would have been based on my normal routine. You go out to work, and when you go home, when you're finished with the day, whether it's October 31st, October 30th, or whatever day it is, I'm going to be returning to my car because if I don't return to my car, I can't get home.
- Q. So what I hear you saying is that because of the time of day, you're *assuming* at that time, you must have been returning to your car because it was about 5:00 p.m.?
- A. It was about 5:00 p.m., it was dark, and I'm presuming, based on normal routines and what you would do, just like you when -- when you're finished with the day, just like any of us will be finished with the day, you'll return to your car to be able to go home.
- Q. Right.
- A. *So do I have a memory of that, of being hit by Ms. Hagge? No.*

CP 63-64 (81:15-82:19) (*emph. added*); CP 73 (168:13-169:14); CP 75 (178:19-179:14); CP 76 (224:23-225-13) (Moore *presumes* he returned to his car after canvassing the neighborhood, but has no memory of doing so and no memory of the entire day of the accident; Moore admitted he had *no personal knowledge of where the accident occurred*; description of the

location and the accident itself is based on his review of other records in combination with talking to other people, including his attorneys).

Given that Moore has absolutely no memory of the events at issue, it is impermissible for him to opine as to the circumstances/causes surrounding the incident in question (how, where, why).

ii. No unsupported lay conclusions permitted.

Moore's opinion testimony is akin to those opinions offered by lay witnesses in cases where Washington courts have held that such evidence is inadmissible under ER 701. For example, in *Ashley v. Hall*, 138 Wn.2d 151, 153, 978 P.2d 1055 (1999), a lay witness offered testimony that an auto accident involving a child pedestrian was unavoidable. The Court held that the testimony was inadmissible pursuant to ER 701 as the lay witness did not have sufficient opportunity to observe whether the accident was unavoidable, given that he was paying more attention to the children than he was to the road and his focus was elsewhere immediately prior to impact. *Id.* at 158. The Court noted that the problem in the case was the lay witness not only described what he *saw* as he drove up to the location of the accident, but he also gave a conclusion unsupported by his limited observations (emphasis added). *Id.* Given that the lay witness in *Ashley* actually did make some observations surrounding the incident in question and was still not allowed to offer opinion evidence, than a

fortiori an individual who does not even observe the incident and has absolutely no firsthand knowledge regarding the incident may not testify as to his opinions about what he “likely” did, how he “probably” responded, or why the incident “may have” occurred.

The case at bar is similar to *McBroom v. Orner*, 64 Wn.2d 887, 395 P.2d 95 (1964). In that case, (also an auto accident case), the Court held that three lay witnesses *who did not see* the collision, could, and should have described everything *they saw* when they arrived at the scene, the location of the cars, the location of any debris the condition of the roadway, and the like *without expressing an opinion* as to where on the roadway the collision occurred (emphasis added). *Id.* at 888. Thus, the lay witnesses were only permitted to testify as to those conditions/circumstances they in fact observed firsthand. Similarly, the trial court properly exercised its discretion when it excluded Plaintiff Moore’s testimony drawing conclusion as to conditions/circumstances he cannot remember seeing/observing. This court should also disregard ¶¶ 6-8 of Moore’s Declaration. CP 159-160.

b. Moore’s Eight Examples of Careful Pedestrian Behavior Are Precluded by ER 404 (¶¶3 – 5 (a) – (h)).

In Response to the City’s Motion, Moore produced a self-serving declaration in which he sets forth eight general examples of his claimed

careful pedestrian behaviors in order to argue to this court his opinion that he was acting in conformity therewith on the particular day in question (*see* argument in opposition to “opinion” evidence above). CP 158-59 (¶ 5, a-h). App. Br. 3-4.²⁰ Where Moore was standing, what he was doing, and his own negligence and comparative fault are central issues in this case should this matter proceed to trial.²¹ Under well-established precedent, Moore is not allowed to fill the void of no memory of the day in question by proffering his own general testimony of historically being a law abiding pedestrian, and thus, *ipso facto* arguing that he must have been a careful law abiding pedestrian on the day in question. Such does not reach the level of ER 406 habit evidence, but instead will lead to ER 403 issues of unfair prejudice, confusion of the issues, and waste of time.²² On summary judgment, it is inadmissible. CR 56(e). The City has found no legal authority supporting the admissibility of general careful pedestrian evidence offered by an injured Plaintiff in a negligence case.

ER 404 states the general rule that evidence of a person’s character

²⁰ Moore’s reliance on *Little*, 132 Wn. App at 783, undermines his argument since this court affirmed summary judgment, and in dicta assumed but did not decide the “habit” evidence was admissible (i.e., Plaintiff. was *on a ladder before the fall*). App. Br. at 15.

²¹ As to Moore’s own comparative fault, of note is the following statute: “[w]here sidewalks are not provided any pedestrian walking or otherwise moving along and upon a highway shall, when practicable, walk or move only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction and upon meeting an oncoming vehicle shall move clear of the roadway.” RCW 46.61.250(2).

²² ER 406 states in relevant part as follows: “Evidence of the habit of a person...is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.”

or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. ER 404. Such evidence is inadmissible because people frequently act “out of character.” Aronson, *The Law of Evidence in Washington*, 4th Ed. at §404.05 (2008); *see also, McCormick*, § 195, pp. 782-87, 2 Vol. (CP 263-65). Character evidence is of slight probative value and may be very prejudicial. Aronson, §404.04. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. *Id.* It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened. *Id.*

Ultimately, character evidence is of marginal probative value in determining how an individual acted on a particular occasion. *Id.* at §404.05. For example, a so-called “negligent driver” watches where he or she is going most of the time; a “violent” person is only violent during a small proportion of his or her life; **and it only takes a single moment of inattention for a generally “careful” person to be negligent on a specific occasion.** *Id.* “Thus, in an automobile accident case, evidence that the defendant was a careful driver would be inadmissible as to her character, since even the most careful drivers can be negligent on a

*specific occasion. Thus, the relevancy is very low.” Id. at §406.04.*²³

c. Moore’s Evidence Does Not Rise to the Level of Semi-Automatic Almost Involuntary and Invariable Specific Responses to Specific Stimuli.²⁴

When evaluating Moore’s proffered “habit” evidence in the case at bar, this court must guard against admitting evidence of character in disguise. Moore is attempting to place his claimed “careful” behavior as a pedestrian before the trier of fact: Moore argues his careful character through eight general assertions about how he typically responds to generic roadways, sidewalks, curbs, fog lines, crosswalks, traffic conditions, and road signs. Moore’s testimony does not rise to the level of specificity required by ER 406 to admit pedestrian habits. *See contra.*, *Charmley v. Lewis*, 302 Or. 324, 330, 729 P.2d 567 (1986) (only evidence of a pedestrian’s semi-automatic response to one particular crosswalk, at one particular intersection that plaintiff used every day to walk to and from his neighborhood grocery store--as testified to by six witness to

²³ By contrast, to be admissible, a habit must be one’s regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic. *Heigis v. Cepeda*, 71 Wn. App. 626, 632, 862 P.2d 129 (1993). Habitual behavior consists of semi-automatic, almost involuntary and invariably specific responses to fairly specific stimuli. *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 326, 858 P.2d 1054 (1993); *See also*, *State v. Young*, 48 Wn. App. 406, 739 P.2d 1170 (1987) (cited by *Tegland*, Courtroom Handbook of WA Evid., ER 406 (2008-09).

²⁴ In Washington, ER 406 was adopted in 1978 and became effective April 2, 1979; its language is the same as the Federal Rule. The Advisory Committee Note to Federal Rule 406 contains a quote from *McCormick*, describing habitual behavior as “consisting of semi-automatic, almost involuntary and invariable specific responses to fairly specific stimuli.” Aronson, §406.02, *citing* the Task Force Comment. The Washington Supreme Court has adopted this definition. *Fisons Corp.*, 122 Wn.2d at 326.

establish the semi-automatic response to a specific stimuli--was admissible in evidence) (CP 254-262) (*cited in* Aronson, *The Law of Evidence*, § 406.04[2]).

By contrast to *Charmley*, **especially since Moore had never before walked in the neighborhood of S. 240th St.**, this court should disregard Moore's general, self-serving claimed careful pedestrian behaviors offered under the guise of "habit." The rationale for treating habit evidence differently under ER 406 "is that habit describes one's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic." Aronson, §406.04 (emph. added), *citing* the Task Force Comment. This court should categorically reject any argument, "that Mr. Moore has never been to this location is totally irrelevant with respect to proof of habit." CP 228 (Pl. Resp. at 5:31-32). It is the notion of the invariable regularity that gives habit evidence its probative force." Aronson, §406.04. "[T]he more narrowly oriented the stimulus and response, the more likely it is to be deemed habit evidence. At some point one's actions become so automatic that no thought process is involved." *Id.* Washington Appellate Courts should not weigh on the side of admitting unreliable, collateral, self-serving testimony offered by an injured plaintiff to disprove negligence on the day at issue. That Moore may typically behave as a careful pedestrian does not provide any

probative evidence to the court regarding whether or not he conducted himself in a negligent fashion on October 31, 2006 in the 900 block of S. 240th Street, which is a primary legal issue at bar. E.g. *Breimon v. GM Corp.*, 8 Wn. App. 747, 753, 509 P.2d 398 (1973) (proffered habit evidence should be excluded where under ER 403 the danger of confusion and prejudice outweighs probative value). Moore's blatant effort to smuggle in character evidence should be thwarted by judicious application of law. ER 406; 403; 404; CR 56 (e).

E. CONCLUSION.

Despite having no memory for the entire day at issue, no collision eyewitness, and no point of impact physical evidence, in opposition to the City's properly supported summary judgment motion, Moore presented unfounded *opinions* as to where he parked his car, which houses he canvassed, what time he was returning to his car, where the accident occurred, how the accident occurred, why the accident occurred and what he was doing and thinking just before the collision. However, not a single opinion is based on his firsthand knowledge of the events in question.

An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e. information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. The trial court properly determined that (1) no genuine issues of material

fact remain for a jury to determine as to proximate cause (CR 56); (2) expert Neuman's unsupported, speculative, and conclusion-laden opinions should be disregarded (ER 702, 703); and (3) Moore's unsupported, character evidence-filled lay opinions should be disregarded (ER 701).

Given that neither Moore nor Ms. Hagge know how, where, or why this car-ped collision actually occurred, the trial court properly refused Moore's attempt to introduce unsupported conclusory statements and opinions on summary judgment. The court's order granting the City's Motion for Summary Judgment underscoring Moore's inability to prove all aspects of his negligence claim, to include no duty to a jaywalking pedestrian, no breach of a duty, and lack of evidence establishing proximate cause should be affirmed.

RESPECTFULLY submitted this 12th day of October, 2009.

KEATING, BUCKLIN & McCORMACK,
INC., P.S.



Brenda L. Bannon, WSBA #17962

Attorneys for Respondent

City of Des Moines

KEATING BUCKLIN & McCORMACK

800 Fifth Avenue, Suite 4141

Seattle, WA 98104

(206) 623-8861 phone

(206) 223-9423 fax

bbannon@kbmlawyers.com

APPENDIX

FILED

09 FEB 20 PM 3:17

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

THE HONORABLE CHERYL CAREY
Noted for Hearing: Friday, March 20, 2009, 9:00 a.m.
Without Oral Argument

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RONALD W. MOORE,

Plaintiff,

v.

L. BILLIE HAGGE and the CITY OF DES
MOINES,

Defendants.

No. 07-2-27634-3 KNT

DECLARATION OF MIRANDA
MINEARD

I, MIRANDA MINEARD, declare as follows:

1. I am over the age of eighteen years old, am otherwise competent to testify to the matters herein, and provide the following declaration based on my own personal knowledge of the facts contained herein.

2. I am twenty seven (27) years old, and currently work as a Credentials Evaluator in the Registration Office at Highline Community College. I have held that position since July 2007; I have worked at Highline Community College since 2005. I have a High School Diploma from Tyee High School in Seattle, and graduated from there in the year 2000. I received my Associate's Degree from Highline Community College in 2007. I am currently enrolled at Central Washington University. I currently reside in Renton, WA.

3. It is my understanding that Plaintiff Ronald Moore is the pedestrian I saw

DECLARATION OF MIRANDA MINEARD - 1

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KEATING, BUCKLIN & MCCORMACK, INC. P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 622-8881
FAX: (206) 222-9430

ORIGINAL
Page 1

A1

1 struck by a car on October 31, 2006. It is my understanding that Plaintiff is suing the car
2 driver, L. Billie Hagge, and the City of Des Moines.

3 4. Late in the afternoon of October 31, 2006, I had just left Highline
4 Community College and was driving myself to an appointment in Burien, WA. The
5 College is located at the intersection of S. 240th Street & Pacific Highway S. in Des
6 Moines, WA.

7
8 5. I recall the weather was cold and relatively dry.

9 6. At approximately 5:00 p.m., just before Plaintiff's accident, I was driving
10 my car westbound on S. 240th Street in Des Moines, WA. I was driving behind a car that
11 was being driven by a lady who I later learned was L. Billie Hagge; I recall she was driving
12 a light gold-colored sedan.

13 7. S. 240th Street in Des Moines is posted at 35 M.P.H. At the time of the
14 collision, I was driving behind Ms. Hagge, and I believe I was traveling at approximately
15 30 M.P.H. I was driving approximately three car lengths behind, and at about the same
16 speed as Ms. Hagge's car.

17
18 8. It was twilight as I was driving; it had turned to dusk at the time of the
19 collision with Plaintiff, and it was getting dark.

20 9. Ms. Hagge seemed to be driving in her lane of travel before the collision. I
21 did not see any swerving in either direction.

22 10. I did not see the pedestrian before the collision.

23
24 11. At the time of the collision, Ms. Hagge had slowed down a bit, and then she
25 was resuming her prior speed when her car struck the pedestrian. I saw the man go flying
26 about 10-feet up in the air on the right (North) side of the street. He landed in a ditch on the
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right (North) side of S. 240th Street.

12. After the collision, I immediately stopped my car and activated my emergency flashers. Ms. Hagge stopped her car.

13. After I secured my car, I hurried over to where the pedestrian lay in the ditch. I stood on the grassy shoulder adjacent to the street. The man initially was not responsive. I saw no other people nearby. I then called 9-1-1.

14. When I saw the man in the ditch, he was wearing dark colored clothes.

15. While I was still talking to the 9-1-1 operator, a few other people walked over to where the man lay in the ditch. After a bit of time went by, the man began to make some noise. I was still at the scene when the police and emergency medical responders arrived. I left after I provided my name and information to the police.

16. Attached as Exhibit A is a true and correct set of photographs depicting the general location of where the pedestrian landed in the ditch (A-1 through A-5). The court will see black ink encircling the ditch to draw the Court's attention to the approximate location of the ditch where the pedestrian came to rest.

17. I have driven on S. 240th Street on a fairly routine basis since 2005. I had never before seen a car-pedestrian accident during my travel on S. 240th Street, nor have I seen a car-pedestrian accident since October 31, 2006.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 29th day of January, 2009, at Des Moines, WA.


MIRANDA MINEARD

DECLARATION OF MIRANDA MINEARD - 3
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KUATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 463-8881
FAX: (206) 463-8823

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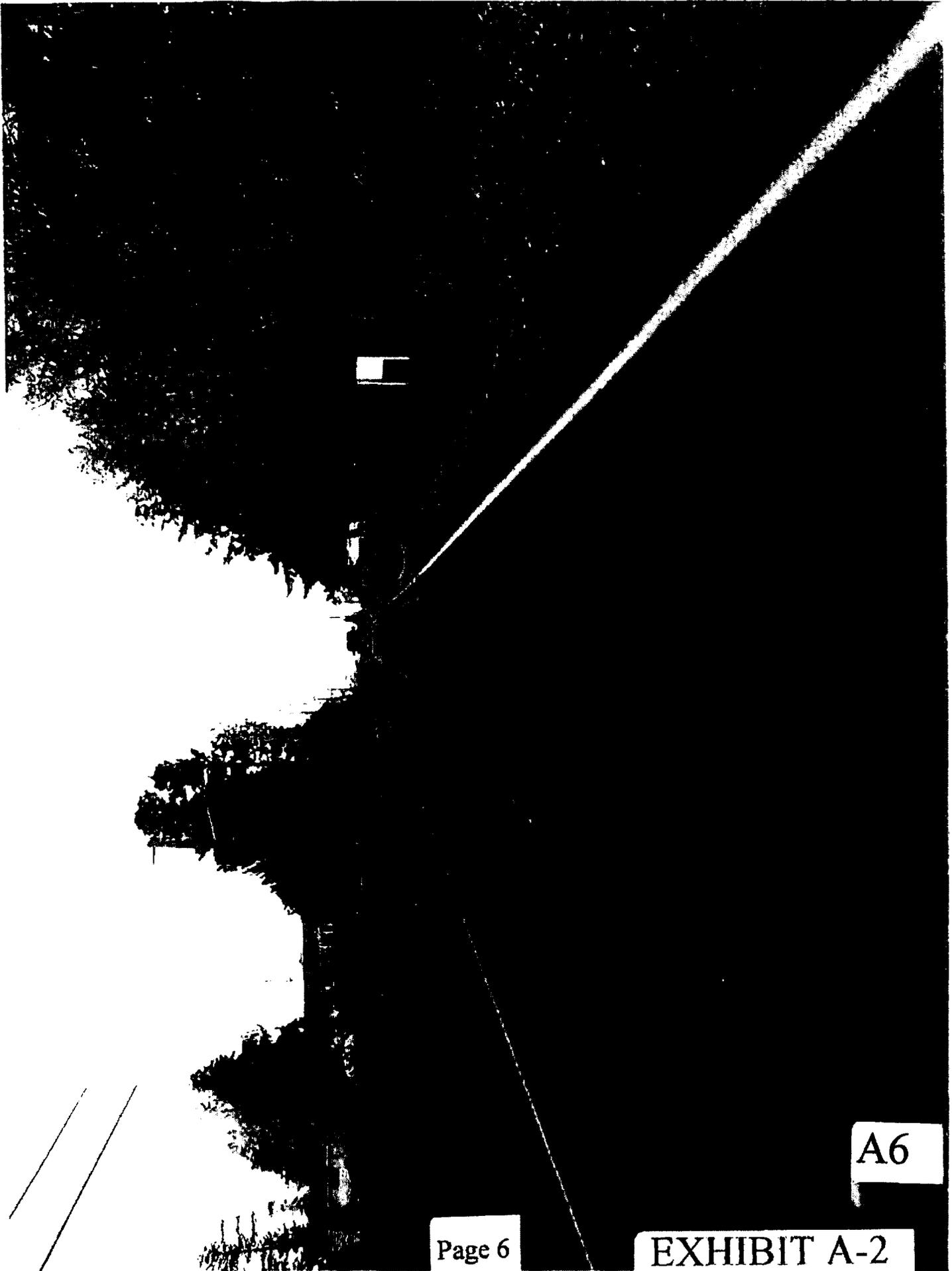


EXHIBIT A-1

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EXHIBIT A-2

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EXHIBIT A-3



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KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

THE HONORABLE CHERYL CAREY
Noted for Hearing: Friday, March 20, 2009, 9:00 a.m.
Without Oral Argument

BEST IMAGE POSSIBLE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RONALD W. MOORE,

Plaintiff,

v.

L. BILLIE HAGGE and the CITY OF DES
MOINES,

Defendants.

No. 07-2-27634-3 KNT

DECLARATION OF DANIEL J.
BREWER, P.E. IN SUPPORT OF CITY
OF DES MOINES MOTION FOR
SUMMARY JUDGMENT

I, DANIEL J. BREWER, P.E., declare as follows:

1. I am the Assistant Planning, Building, and Public Works Director for the City of Des Moines. I am a licensed Civil Engineer in the State of Washington, and have held my license since 1996. I received my Bachelor of Science Degree in civil engineering from the University of Washington in 1991, with an emphasis in transportation and construction engineering. My prior employment includes working as a transportation engineer for the City of Seattle, the private firm of Parsons Brinkerhoff, Pierce County Public Works and Utilities, and the City of Puyallup. My resume is attached hereto as Appendix A.

2. I have now reviewed Plaintiff's Complaint, Claim for Damages and accompanying letter, deposition transcript, the pertinent police collision traffic reports, a May 2007 site examination memo by Ken Thomas, May 2007 photographs of S. 240th Street east of

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DECLARATION OF DANIEL J. BREWER P.E. - 1

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KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 823-8881
FAX: (206) 223-8423

ORIGINAL
Page 27

1 Marine View Drive, microfiche copies of historical documents pertaining to S. 240th Street,
2 traffic counts for the accident vicinity, twilight and dusk photographs of the accident vicinity,
3 portions of the Hagge deposition transcript, ortho-aerial photo/maps generally depicting City
4 right-of-way, as well as photographs and documents pertaining to Mr. William Neuman's
5 evaluation and opinions. I did not receive Mr. Neuman's opinions as described in the
6 supplemental answer to Interrogatory No. 31, or Mr. Neuman's notes or reference materials
7 until after Plaintiff's attorney deposed me. I have driven through, evaluated, and generally
8 familiarized myself with the accident vicinity at issue in this lawsuit, and have specifically
9 evaluated the 900 block area of S. 240th Street.¹ I have verified the accuracy of the factual
10 information, to include measurements, that is described in this declaration. Also, on an as-
11 needed basis, I have referred to reference materials such as the Manual on Uniform Traffic
12 Control Devices (MUTCD), the City's Comprehensive Transportation Plan, and the City's
13 Street Development Standards. I also was present during the February 10, 2009 deposition of
14 Officer Paul Guest who responded to the accident scene on October 31, 2006.
15

16
17 3. In his Complaint, Plaintiff's lawsuit targets the northern edge and outside
18 unimproved portion of S. 240th Street, in the 900 block, which is near Marine View Drive.

19 4. Plaintiff's Complaint at ¶ 10 alleges:

20 "The City of Des Moines failed to provide a safe walkway along South 240th
21 Street, East of Marine View Drive that was reasonably obvious and
22 accessible to Plaintiff forcing Plaintiff, as a pedestrian, to walk dangerously
23 close to or on the traffic lane of South 240th Street and thus breached its
24 duty."

25 5. At the Moore accident vicinity, S. 240th Street is a straight, two-lane, two-way,
26 posted 35 M.P.H., City Collector Arterial. It is my understanding that this street was originally

27 ¹ Unless otherwise stated, my description provided in this declaration is focusing on the 900 block and
surrounding vicinity of S. 240th Street.

1 built in the early 1890s; the City annexed the street in the early 1980s. S. 240th Street is *not* a
2 State Route and it was *not* a State Route in October 2006 when Moore's accident occurred.

3 6. The City of Des Moines defines "collector arterials" as "streets connecting
4 residential neighborhoods with community centers and facilities."²

5 7. S. 240th Street runs east-west; in the 900 block and surrounding vicinity, S.
6 240th Street has a combined roadway surface width of 20 feet; each lane is 10-feet wide. S.
7 240th Street connects residential areas of the City south of Kent-Des Moines Road to Pacific
8 Highway S. to the east and Marine View Drive to the west.

9 8. The traveled roadway lane width on S. 240th Street is typical for an older city
10 collector arterial; in my opinion the existing lane widths are more than adequate for safe
11 vehicular travel.

12 9. At the northern edge of S. 240th Street, in the 900 block (Plaintiff's accident
13 vicinity) there is a white reflectorized fog line followed by, (1) a 5 (five) to 5.5 (five and one-
14 half) foot wide grass shoulder³; 2) an open grass drainage ditch; and (3) a wide gravel
15 pedestrian footpath. There is also a posted, reflectorized "Stop Ahead" warning sign for
16 westbound traffic on S. 240th Street approaching Marine View Drive S., that is located
17 immediately north of the fog line near the top of the ditch. See photos of these physical
18 features depicted in the attached photographs, Appendix B.

19 10. A standard sidewalk width in the City of Des Moines is typically 5-feet wide
20 (non-commercial); or 6-feet wide if installed in a commercial setting.

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26 ² The City defines higher classified streets as follows: (1) "Principal Arterial." Inter-community highways
27 connecting community centers and major facilities...; "Minor Arterials." Intra-community highways
connecting community centers and major facilities..." City D.M. Street Dev. Std. I, A.

³ This measurement is variable depending on the slope and depth of the open drainage ditch at a given location.

1 11. The gravel pedestrian footpath running parallel to S. 240th Street is located
2 away from the roadway surface on the northern side of the drainage ditch. In sections of the
3 900 block on the northern side of the pedestrian footpath there is a chain link fence. The
4 City's crews have periodically maintained this pedestrian footpath and the grass shoulder.
5 Based on the maps, ortho photos and historical documents I have reviewed, the footpath
6 certainly appears to be located within the City's 60 foot right-of-way.
7

8 12. In my professional opinion, there was no unusual danger in S. 240th Street,
9 in the vicinity where Mr. Moore's accident occurred. The asphalt was in good condition.
10 The striping along the roadway and all street features were clearly visible, including the
11 reflectorized center buttons. The fog lines were painted with reflectorized paint. See
12 roadway features depicted in attached photographs, Appendix C.
13

14 13. This section of S. 240th Street runs straight, creating no surprises or
15 confusion. See ortho-aerial photographs, Appendix D.

16 14. The abutting grassy shoulder, ditch, and pedestrian footpath are in plain
17 view.

18 15. The white reflectorized fog line provides a clear lane edge demarcation.

19 16. In my opinion, at the accident vicinity on S. 240th Street, the two-way nature,
20 the reflectorized 35 M.P.H. speed limit signs, center markings, lane edges, reflectorized fog
21 lines, shoulder, drainage ditch, and gravel walking path were all clearly posted, marked
22 and/or visible.
23

24 17. Based on Plaintiff's deposition, it is my understanding that Plaintiff assumes
25 he was trying to cross S. 240th Street somewhere in the 900 block, from north to south, to
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1 return to his parked vehicle at the time of the collision. It appears from the discovery
2 materials to date that Plaintiff's expert Mr. Neuman is similarly making this assumption.

3 18. I know of no eyewitnesses to the actual collision, so I do not precisely know
4 where Moore would have crossed the street, if that was what he was doing before the
5 collision. Officer Guest testified in his deposition that he was unable to determine the point
6 of impact between the Hagge vehicle and Mr. Moore. Any "crossing" by Mr. Moore
7 theoretically could have been a mid-block crossing or an intersection crossing; there was no
8 marked crosswalk in the accident vicinity.
9

10 19. Approximately 390 feet to the west of 9th Place S., at the corner of S. 240th
11 and Marine View Drive, there was a marked crosswalk adjacent to a STOP sign, that was
12 available for Mr. Moore's use. Marked crosswalks are installed to encourage pedestrian
13 use at a particular crossing location if warranted by engineering judgment.
14

15 20. I have searched for and have found no evidence of prior complaints
16 regarding pedestrian safety at the Moore accident vicinity on S. 240th Street. I have
17 reviewed City records for citizen complaints and prior car-pedestrian traffic accidents. I
18 routinely review such records as a part of my official duties, and as a part of developing the
19 City's long range transportation planning. I have located no record of any prior car-
20 pedestrian accident in the Moore accident vicinity.
21

22 21. There is ample sight distance at the accident vicinity for pedestrians to see
23 oncoming vehicles to the east, and for westerly traveling vehicles to see pedestrians. Such
24 should have provided a reasonable and safe opportunity for Mr. Moore to wait in the
25 adjacent grass shoulder area for any traffic to clear before making a decision to cross S.
26 240th Street -- if he had chosen to do so.
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DECLARATION OF DANIEL J. BREWER P.E. - 5

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KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4111
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 823-8881
FAX: (206) 223-8423

1 22. It is my professional opinion that S. 240th Street at Plaintiff Moore's accident
2 vicinity is maintained in a reasonably safe condition for ordinary travel.

3 23. The City's Street Development Standards only apply to new development or
4 City funded reconstruction and/or improvement projects. Such standards have no
5 applicability whatsoever to Plaintiff's accident location. Similarly, "design" references
6 such as those published by the American Association of State Highway and Transportation
7 Officials (AASHTO) -- such as the 2001 Policy on Geometric Design of Highways and
8 Streets -- or the WSDOT/APWA design standards or specifications only apply to new
9 design and new construction or reconstruction, and are not considered standards applicable
10 to already established City infrastructure.

11 24. Officer Guest testified that he concluded that Mr. Moore was on the
12 paved/traveled portion of S. 240th Street at the time of the collision with the Hagge vehicle.
13 Mr. Moore was found lying in the open ditch on the north side of the Street, in the 900
14 block of S. 240th Street, immediately after the collision.

15 25. I have seen no evidence that either Plaintiff Moore or driver Hagge was
16 surprised by this City street, or was confused or misled by the clear white edge/fog line, the
17 abutting, in-plain-view grass shoulder, the ditch and/or the gravel walking path; nor have I
18 seen any evidence that Moore expected the traffic to stop for him if he walked in front of it,
19 or that any additional features such as a sidewalk or marked crosswalk would have
20 prevented him from walking onto the traveled portion of the roadway as a car was
21 imminently approaching.

22 26. In my professional opinion, no reasonable traffic engineer would have
23 installed a marked crosswalk or pedestrian traffic signing at this accident location, given the
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fact that there is no previous car-pedestrian accident history and no significant pedestrian crossing volumes in this area.

27. I have seen no evidence that if the City had taken measures to install additional capital improvements, ahead of higher priority corridors, Mr. Moore would not have nonetheless walked onto the traveled portion of the street and in the path of oncoming traffic.

DATED this 19th day of February, 2009, at DES MOINES, WA.


Daniel J. Brewer, P.E.

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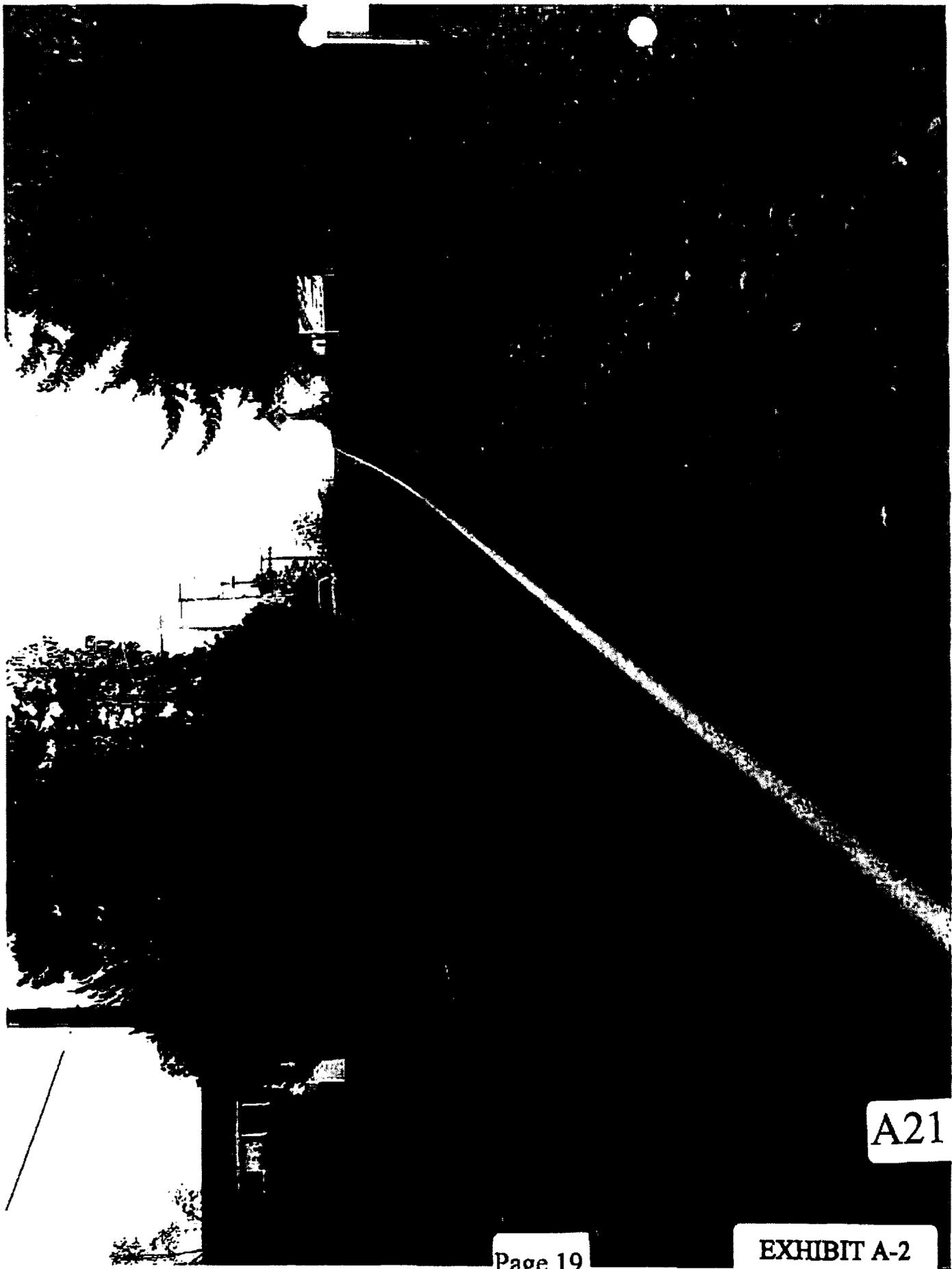
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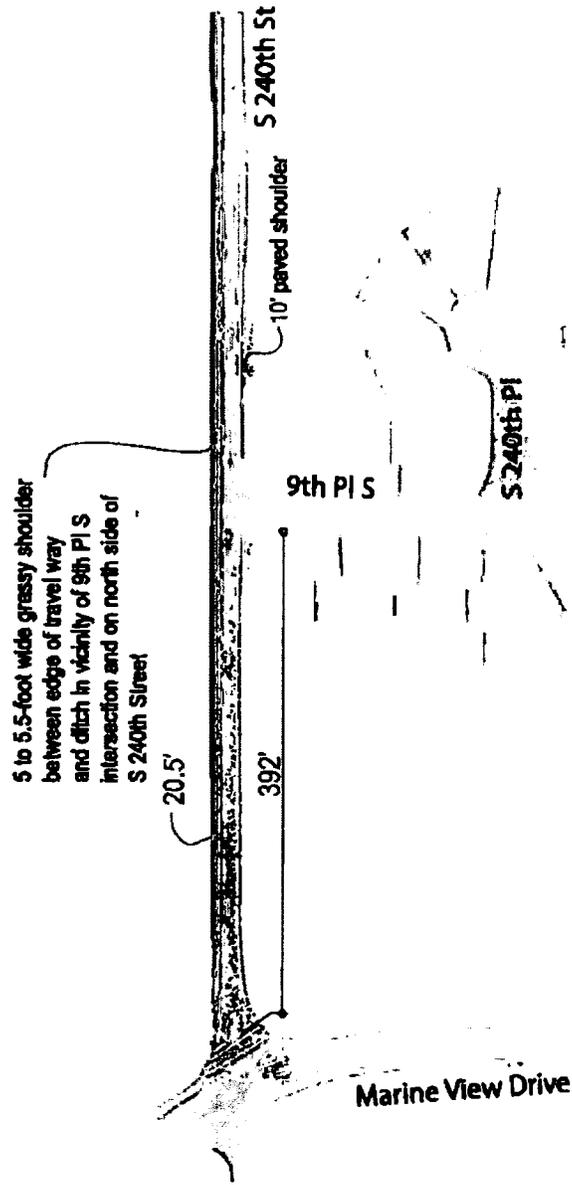
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EXHIBIT A-3



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EXHIBIT A-4



13 Single Family Residents that access off 9th PI S onto S 240th St

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EXHIBIT B

302 Or. 324
Charmley v. Lewis
729 P.2d 567

CHARMLEY, Respondent on Review, v. LEWIS,
Petitioner on Review.

[Cite as Charmley v. Lewis, 302 Or. 324]

(TC A8202-00967, CA A31532, SC S32556)

Argued and submitted April 1, affirmed December 5,
1986

729 P2d 567

In pedestrian's personal injury action, the Circuit Court, Multnomah County, Donald H. Londer, J., entered judgment on jury verdict for pedestrian, and driver appealed. The Court of Appeals, 77 Or. App. 112, 711 P2d 984, review allowed by 300 Or. 562, 715 P2d 94, affirmed and driver petitioned for review. The Supreme Court, Gillette, J., held that testimony of pedestrian and five other witnesses that pedestrian invariably used particular crosswalk in crossing street at intersection where accident had occurred was admissible evidence of habit, as it was evidence of frequent and invariable or consistent response that was specific and distinctive.

Affirmed.

Linde, J., concurred and filed opinion.

Peterson, C. J., dissented and filed opinion in which Campbell, J., joined.

1. Evidence—Relevancy, materiality, and competency in general—Similar facts and transactions

Habit is "distinctive" if it is at least semiautomatic and recurring response, beyond mere obedience to law, by actor who was confronted by particular situation to which variety of definable responses will be more or less equally reasonable; i. e., behavior can only achieve status of habit as defined in evidentiary rules if situation giving rise to it reasonably could be responded to a variety of ways, each of which was unique characteristics by which it can be readily distinguished from the others. OEC 406(1, 2).

2. Automobiles—Injuries from operation, or use of highway—Actions—Evidence

Testimony of pedestrian and five other witnesses that pedestrian invariably used particular crosswalk at intersection where accident occurred was admissible evidence of habit in pedestrian's personal injury action against driver; evidence that pedestrian crossed street nearly every day on way to grocery store was evidence of

sort of ingrained response that was envisioned by legislature and was specific rather than indication of character for care, and choice of crosswalk was distinctive in that pedestrian unflinchingly used same reasonable and definable alternative as opposed to jaywalking or selecting different crosswalk. OEC 406(1, 2).

CJS, Evidence § 582.

In Banc

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On review from the Court of Appeals.(fn*)

Thomas W. Brown, Portland, argued the cause and filed the brief for petitioner on review. With him on the brief was Cosgrave, Kester, Crowe, Gidley & Lagesen, Portland.

Bernard Jolles, Portland, argued the cause and filed the brief for respondent on review. With him on the brief was Jolles, Sokol & Bernstein, P.C., Portland.

GILLETTE, J.

The decision of the Court of Appeals and of the trial court is affirmed.

Linde, J., concurred and filed an opinion.

Peterson, C. J., dissented and filed an opinion which Campbell, J., joined.

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GILLETTE, J.

In this personal injury case, the trial court admitted evidence of plaintiff's "habit" of invariably using a particular crosswalk in crossing a street at a certain intersection. Plaintiff offered the evidence to prove that he must have been in that particular crosswalk when he was struck by defendant's car. A jury returned a verdict for plaintiff. Defendant appealed. The Court of Appeals affirmed. *Charmley v. Lewis*, 77 Or. App. 112, 711 P2d 984 (1985). We granted defendant's petition for review to determine whether the Court of Appeals erred in interpreting the requirements contained in Oregon Evidence Code (OEC) 406(2), concerning the admissibility of evidence of habit. We affirm the decision of the Court of Appeals.

Plaintiff, a pedestrian, was injured in an accident with

a car operated by defendant on the evening of November 20, 1981. The accident occurred while plaintiff was walking from his home to the grocery store. He was struck while crossing the street at a "T" intersection where North Syracuse ends at North Ida Street in Portland. It was — and we hesitate to say this — a dark and stormy night.

Crosswalks at the intersection are unmarked. A crucial issue at trial was whether plaintiff was crossing the street within the unmarked crosswalk when he was struck because, if he was, he had the right of way. Former ORS 487.290(1) (repealed by Or Laws 1983, ch 338, § 978, now codified (as further amended by Or Laws 1985, ch 16, § 279) as ORS 811.010(1)). Defendant testified that plaintiff ran out from behind a parked car outside the crosswalk. Plaintiff has no recollection of the accident and there were no other eyewitnesses to it.

Our focus on review is on plaintiff's testimony and the testimony of five other witnesses that it was plaintiff's invariable habit to cross the intersection within the unmarked crosswalk. Plaintiff testified that, when he crossed North Ida Street at the intersection, he always walked from the northwest corner to the northeast corner and then turned left and walked north about 20 feet along the sidewalk where he would enter the driveway to the store's parking lot. This route was within the unmarked crosswalk. Plaintiff testified that he never walked diagonally from the northwest corner to the

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driveway of the grocery store and he never walked past the northwest corner to cross North Ida Street directly across from the driveway (and outside the unmarked crosswalk).

Five other witnesses testified as to plaintiff's habitual use of that same particular route. All testified that they had seen plaintiff cross straight across the street in the manner plaintiff described and never otherwise. The observations occurred on many occasions and at various times during the day and year, although most observations were made during the summer.

Plaintiff offered, and the trial court admitted, the challenged evidence under OEC 406:

"(1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

"(2) As used in this section, 'habit' means a person's regular practice of meeting a particular kind of situation with a specific, distinctive type of conduct."

Defendant contends that plaintiff's testimony and the

testimony of the witnesses was not habit evidence under OEC 406(2) and was not otherwise admissible, so that its admission was prejudicial error requiring a new trial.

The probative value of admitting habit evidence is well recognized. See 1A Wigmore, Evidence 1607, § 92 (1983); Legislative Commentary to OEC 406 (hereafter "Legislative Commentary"), published in Kirkpatrick, Oregon Evidence (Butterworth 1982) (hereafter "Kirkpatrick"). Any discussion of habit evidence, however, should begin by distinguishing it from character evidence, with which it is often confused. McCormick distinguishes character from habit in the following manner:

"Character is a generalized description of a person's disposition in respect to a general trait, such as honesty, temperance or peacefulness. Habit, in the present context, is more specific. It denotes one's regular response to a repeated situation. If we speak of character for care we think of a person's tendency to act prudently in all the varying situations of life - in business, at home, in handling automobiles and in walking across the street. A habit, on the other hand, is

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the person's regular practice of responding to a particular kind of situation with a specific type of conduct. Thus, a person may be in the habit of bounding down a certain stairway three steps at a time, of patronizing a particular pub after each day's work, or of driving his automobile without using a seatbelt. The doing of the habitual act may become semi-automatic, as with the driver who invariably signals before changing lanes." McCormick, Evidence, 575-76, § 195 (3d ed 1984).

The Federal Rules of Evidence have adopted this distinction between habit and character. FRE 406.

The history of OEC 406 shows that its authors had this distinction between character and habit very much in mind.^(fn1) The Oregon Advisory Committee on Evidence Law Revision ("Advisory Committee"), which was appointed to propose revisions to Oregon evidence rules, began its consideration of "habit" by eliminating the no-eyewitness and corroboration requirements that had previously existed in Oregon law. Legislative Commentary to OEC 406; see *Fenton v. Aleshire*, 238 Or. 24, 393 P2d 217 (1964) (illustrating application of former rule). The elimination of these requirements brought Oregon into conformity with the federal rule. The Advisory Committee, however, was concerned that the elimination of the no-eyewitness and corroboration requirements would lead to admission of character evidence "under the guise of habit." Legislative Commentary to OEC 406. In response to this concern, the Advisory Committee agreed that a narrow definition of habit, together with illustrative examples, would be inserted into the Commentary accompanying the rule. The definition did not stay in the Commentary, but

instead ultimately became subsection (2) of OEC 406:

"* * * '[H]abit' means a person's regular practice of meeting a particular kind of situation with a specific, distinctive type of conduct."

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While OEC 406(1) is identical to the federal rule, FRE 406, OEC 406(2) is peculiar to Oregon evidence law. The crucial word in its definition is "distinctive." The Commentary to OEC 406 defines conduct as "distinctive" "if there is some aspect of the activity that would set it apart from the ordinary response to the same situation."

When the proposal was discussed by the Joint Legislative Committee on the Judiciary - Evidence (October 6, 1980), the definition of habit was taken from the Commentary and placed in subsection (2) of the rule. At that time, however, the term "distinctive" was deleted from the rule. There seemed to be a desire that the Oregon rule be shaped to track the federal rule in order that this state have the benefit of federal interpretation.

"Distinctive" was reinserted into the final version of the rule by the legislature just before final enactment of the evidence code. (Minutes, House Committee on the Judiciary, July 10, 1981.) Speaking to an earlier meeting of the committee, Judge (as he then was) Robert E. Jones explained that the Advisory Committee had originally inserted the term distinctive to keep out habits that everyone has, such as stopping at stop signs. He explained that the Advisory Committee fell and tried to reflect in the Commentary that habit had to be unique; admissible habit had to be acting in a given circumstance in an "ingrained" way. Minutes, House Committee on the Judiciary, Subcommittee 1, February 19, 1981.

In interpreting the words of, commentary on and legislative intent of OEC 406, Professor Kirkpatrick offers a useful approach for practitioners and judges by dividing the OEC 406(2) definition of habit into three elements. First, the evidence must be the regular practice of a person responding to a particular kind of situation; second, the habit must be specific; and, third, the habit must be distinctive. Kirkpatrick, *supra*, at 115-16. We agree with this approach. We turn to a consideration of each of these three elements.

Regular Response to Particular Kind of Situation

A person's regular response to a particular kind of situation has two components: the practice must be frequent, and it must be invariable or, at least, consistent. Kirkpatrick, *supra*, at 115. Plaintiff's evidence meets these criteria. The

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testimony was that plaintiff went to the grocery store

nearly every day and, when crossing at North Ida Street, he invariably crossed straight across the street within the unmarked crosswalk. Six witnesses, including plaintiff, attested to this behavior. Plaintiff's alleged habit was the sort of ingrained behavior envisioned by the Advisory Committee and legislature. The evidence was admissible under these criteria.

Defendant argues that, even if plaintiff met Kirkpatrick's frequency and invariability requirements, the requisite response to a "particular kind of situation" was not met because neither plaintiff nor his witnesses specifically testified to seeing plaintiff cross the street on rainy winter evenings. We disagree. There was testimony that plaintiff crossed North Ida Street in the manner described during all seasons and in the evening. The Court of Appeals correctly concluded that

"the particularity requirement does not necessitate an exact duplication of the climatic conditions. Defendant's argument concerns the weight which the habit evidence deserves, and not its admissibility, and defendant did argue to the jury that plaintiff's practice on the night of the accident may have been different because of the rain." 77 Or App at 116-17 n 1.

Habit Must Be Specific

The specificity requirement is the primary tool for weeding out character evidence when it is offered as habit evidence. For example,

"[a] person's tendency to be accident-prone, or habitually careful, is probably too general to satisfy the definition of habit. However, a driver's behavior in always using a hand signal in addition to a turn signal or always traveling a particular route to the office may satisfy the specificity requirement." Kirkpatrick, *supra*, at 115-16.

Plaintiff's route was a specific response to going to the grocery store. Evidence of the route was not an indication of care. Plaintiff's attorney carefully limited testimony of plaintiff's habit to physical descriptions of where plaintiff crossed North Ida and how, not whether he was careful or that he always crossed all streets within the crosswalk.

Admission of plaintiff's evidence of habit is also consistent with the Legislative Commentary to OEC 406(2).

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The Commentary cites as an example of habit the practice of a child in always using a particular crosswalk. *Fenton v. Aleshire*, *supra*. The facts of *Fenton* are similar to the present case. A young child was killed when struck by a motor vehicle while crossing the street one dark, rainy evening while she was apparently on her way home from her school playground. Defendant argued that the child was not within the crosswalk. Plaintiff had offered - - and the trial court had admitted - - evidence that it was

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the child's practice to cross at a particular crosswalk when crossing that street. While apparently accepting that the evidence showed a habit, this court held that, on retrial, the evidence should be excluded pursuant to the now discarded "no eyewitness" rule. 238 Or at 36-37. There is no suggestion in the opinion that, had there not been an eyewitness, the preferred evidence would have failed to qualify as proper habit evidence.

Distinctiveness Requirement

As noted, the distinctiveness requirement presents the real issue in this case. The two commentaries on OEC 406 — the legislature's and Kirkpatrick's — illustrate the interpretive problem posed by the requirement that the actor's response to the particular situation be "distinctive." The Legislative Commentary notes:

"*Subsection (2)*. The Legislative Assembly felt it desirable to include a definition of 'habit' in Rule 406. The definition is intended to forestall the use, as habit evidence, of evidence of conduct which in fact shows a character trait.

"There has been much confusion between the concepts of habit and trait of character. Much character evidence has been smuggled into court under the guise of habit. A character trait, such as character for care, is a person's tendency to act in a certain way in all the varying situations of life — in business, in family life, in handling an automobile, in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular situation with a specific type of conduct which is distinctive. Conduct is 'distinctive' if there is some aspect of the activity that would set it apart from the ordinary response to the same situation. For example, an individual who always stops a motor vehicle at a particular stop sign cannot be said to be in the 'habit' of stopping at the sign. The individual's behavior is not distinctive. It is a response that is required by law and that is typical of most drivers at the same intersection. However, if

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the individual never stops at that particular sign, then that distinctive and specific conduct is 'habit.'

"Other examples of habit or routine practice can be found in Oregon case law. *State v. Mims*, 36 Or. 315, 61 P 888 (1900) (habit of deceased to arm himself whenever he became involved in quarrel); *McMillan v. Montgomery*, 121 Or. 28, 253 P 879 (1927) (practice of bank to give notice of dishonor); *Start v. Shell Oil Co.* [202 Or. 99, 260 P2d 468 (1954)] (practice of employer to instruct stenographer to enclose materials with dictated letters, and of stenographer always to follow instructions); *Fenton v. Aleshire*, *supra* (habit of child to use particular cross-walk); *Krause v. Eugene Dodge*, [265 Or. 486, 509 P2d 1199 (1973)] ('inflexible rule, habit and custom' of auto dealer to require that all buyer's orders be

completely filled out before being signed by buyer); cf. *Blue v. City of Union*, 159 Or. 5, 75 P2d 977 (1938) (evidence of person repeatedly riding horse rapidly and carelessly about streets of city not habit evidence)." (Emphasis added.)

Kirkpatrick comments:

"* * * [T]he third requirement — that the conduct be 'distinctive' — was apparently added to encourage a narrow construction of the rule. Although this requirement is emphasized by the Commentary, it seems likely to cause the greatest difficulty of interpretation. Merely because conduct is unusual or distinctive does not establish that it is a habit. On the other hand, many behaviors that would seem clearly to be habits are not distinctive. Many of the cases cited with approval in the Commentary where habit evidence was admitted under prior Oregon law do not involve distinctive conduct. It would not seem 'distinctive' for a stenographer to follow instructions, a child to use a particular crosswalk, or a car dealer to require orders to be completely filled out. Because the Commentary does not indicate an intention to overturn prior case law, courts should be flexible in interpreting the distinctiveness requirement when the regular practice and specific behavior requirements are clearly satisfied." Kirkpatrick, *supra*, at 116.

We have the same difficulty with "distinctive" that Professor Kirkpatrick has. The examples of habit in the Legislative Commentary are not all that "distinctive." (fn2) Is

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there some way of ascertaining more precisely what the drafters — and the legislature — had in mind?

Not definitively. While the Advisory Committee wanted a rule similar to the federal rule, it wanted a construction of the rule ensuring that character evidence was not admitted as habit and that admissible habit evidence was set apart from ordinary conduct. The Advisory Committee's rationale for choosing the term "distinctive" to further this aim is not clear. Different terms were proposed or discussed at different times during consideration of the habit rule, including "semi-automatic" (Advisory Committee meeting, April 9, 1976), "unique" (Advisory Committee meeting, October 22, 1976), "extraordinary or unusual" (*Id.*; see also Advisory Committee meeting, December 17, 1976), and "idiosyncratic" (House Committee on the Judiciary, Subcommittee 1, February 19, 1981). The Advisory Committee finally settled on "distinctive" with the understanding that examples from existing Oregon law would be inserted into the Commentary to illustrate what was intended. (Advisory Committee meetings December 17, 1976; January 21, 1977.)

The term "distinctive" must have some meaning outside of, or complementary to, the other requirements.

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The Advisory Committee thought it fairly characterized the examples of habit included in the Commentary. Thus, to the Committee, the habit of a child crossing a particular crosswalk, in *Fenton*, was distinctive, while an individual always stopping at a particular stop sign was not.

The specific use of *Fenton* as an illustrative example of habit evidence also was highlighted in the legislative discussion. Representative Mason, during the House Judiciary Subcommittee discussion of habit, stated

"[T]his section [then proposed 406] specifically rejects the no witness limitation of admissibility, then later the Commentary says evidence that a child used a particular crosswalk is

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admissible as habit. *Fenton v. Aleshire*. I would assume that the particular crosswalk is that distinctive habit we've been talking about. Is that correct? And then it further discusses *Fenton v. Aleshire* down under the first paragraph, the relationship with existing law. This section changes existing Oregon law eliminating the requirement there be no eyewitness. Thus you could bring in the child's actions I assume in the *Fenton* case irregardless or regardless of whether or not there was eyewitnesses as long as you could show that the habit was distinctive? So the no eyewitness rule would be moot so long as the habit was distinctive."

Judge Jones responded, "That is right." Tape recording, House Committee on the Judiciary, Subcommittee 1, February 19, 1981, Tape 82, side B at 074-146.

1. In essence, the construction of "distinctive" for which the defendant argues is that it requires that the form of habit be unusual, if not unique. From the Commentary and legislative discussion, however, we conclude that the use of "distinctive" does not so much require that a certain act be wholly unusual, in the sense that no one else does it — although that condition would doubtless satisfy the rule — as that it at least be a semi-automatic and recurring response, beyond mere obedience to the law, by an actor confronted by a particular situation to which a variety of definable responses would be more or less equally reasonable.

Our view is supported by the dictionary definition. "Distinctive" means "having the quality of distinguishing; serving or used to distinguish or discriminate; characteristic, distinguishing." Oxford English Dictionary 526 (1971). "Distinctive" applied to the present context means behavior that has sufficient particular characteristics to permit it to be distinguished from all other reasonable responses to the same situation. That is, a behavior can only achieve the status of habit, under OEC 406(2), if the situation giving rise to it reasonably could be responded to in a variety of ways, each of which ways has unique characteristics by which it can be readily

distinguished (i.e., shown to be distinct) from the others.

Seen in this way, the choice of an intersection crosswalk by the child in *Fenton* is distinctive, not because it is unusual — one may assume that many people cross there —

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but because it is a particular, describable choice separate from other possible choices available to the child, e.g., jaywalking or selecting a different crosswalk. So construed, "distinctive" becomes truly complementary to the regularity and specificity criteria of OEC 406(2).

This evaluation of the use of *Fenton v. Aleshire* as an example of habit is also consonant with the other key example from the Commentary, viz., it is not evidence of habit that a person always stops at a particular stop sign. A stop sign does not present, to one who approaches it, a variety of definable responses, each of which would be more or less equally reasonable. The only reasonable response is to stop. There is nothing from which the automatic response of stopping can be distinguished. (*Unreasonable* responses, on the other hand, may be distinctive by the very fact of their unreason. It would be evidence of habit, for example, if the driver always stopped by crashing into the sign or by pulling off the road or if the driver always drove past the sign without stopping.) The key to the present case is plaintiff's unfailing use of one of several reasonable and definable alternatives for crossing the street to reach the store.

2. The evidence that plaintiff always crossed this particular street within this particular crosswalk demonstrated an ingrained habit that meets the requirements of OEC 406. Plaintiff went to the grocery store nearly every day and invariably took the same route. Plaintiff's attorney limited testimony to descriptions of the route plaintiff took to the store, which reduced the likelihood that the evidence would be seen by the jury as a reflection of plaintiff's character. Certainly, the testimony, if believed, was probative. A crucial issue in the case was the location of plaintiff when the accident occurred. Plaintiff's evidence directly contradicted that given by defendant. It met all three of the criteria established by OEC 406. The trial court did not err in admitting it.

The decision of the Court of Appeals and of the trial court is affirmed.

LINDE, J., concurring.

It is unfortunate that the drafters of OEC 406 compromised their differing views and apprehensions about habit

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evidence by inserting the adjective "distinctive" without

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stating more clearly from what a person's habitual conduct must be distinct in order to be admitted. I agree with the Chief Justice that the Court's opinion does not successfully give meaning to that requirement.

It is also unfortunate that everyone debating the addition of "distinctive" to the rule and everyone debating the present case have had their minds so firmly fixed on the uses of habit evidence in automobile tort actions that there are few clues as to how the generalizations formulated in describing a "distinctive" habit in crossing a street would fit other kinds of habitual conduct in very different contexts. But, of course, the rule does not apply only to traffic accidents. Some examples of quite different cases were inserted in the Legislative Commentary quoted by the Court, and many more can be found in other state and federal courts. I write primarily to note that the present opinion should be understood to apply specifically to the kind of conduct involved in this case and that the meaning of "distinctive" remains open for further argument in other settings.

Perhaps "distinctive" was chosen to express the idea of habitual conduct different from other people's behavior, but there is no obvious reason for this. If evidence of a person's invariable practice under the relevant circumstances tends to support an inference that the person more likely than not behaved in the same way on a particular occasion, why does it matter whether other people might behave differently? And how is the common behavior of other people to be shown before a trial judge rules on the admissibility of evidence, if that fact is disputed?

Why does it matter, moreover, how frequently the occasion for "habitual" conduct arises, as the Court quotes Professor Kirkpatrick, as long as one repeatedly responds in the same way whenever it arises? Is evidence admissible that a person habitually deposited a weekly paycheck on payday, but not a monthly paycheck or a quarterly dividend check? That a family habitually ate fish on Friday nights but not that they invariably ate turkey on Thanksgiving Day? If the fact to be inferred is what a man ate for Thanksgiving dinner, why not look for "distinctiveness" from his ordinary meals rather than from the meals of other people? How frequently any class of

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events occurs depends on how widely or narrowly the class is defined. If someone only signed one will in his life, may evidence that he read other legal documents carefully be admitted or not? That he read business letters carefully?

The facts in the present case do not call for defining the frequency or distinctiveness of a "regular practice" for all kinds of issues and types of behavior that may raise questions under OEC 406. The general rule is that relevant evidence, evidence "having any tendency to

make the existence of any fact" of consequence more probable or less probable, OEC 401, is admissible unless there is some legal reason to exclude it. I am not persuaded that the drafters of OEC 406 meant to direct the courts to exclude the specific challenged evidence in this case. I therefore concur in the decision.

PETERSON, C. J., dissenting.

The majority correctly states that the OEC 406(2) habit definition has three elements:

1. The evidence must be "the regular practice of a person responding to a particular kind of situation."
2. The habit must be "specific."
3. The habit must be "distinctive."

The majority has, however, misapplied the rule that it adopts.

The evidence in this case only meets the requirements of elements 1 and 2. There is no evidence that the plaintiffs conduct was "distinctive."

There can be no question that in adding the words "a specific, distinctive type of conduct," the legislature intended a restrictive rule of admissibility. The Advisory Committee considered using the terms "extraordinary," "unusual," or "unique" and finally settled on "distinctive." The majority settles on a definition that "distinctive" means "behavior that has sufficient particular characteristics to permit it to be distinguished from all other reasonable responses to the same situation." *Charmley v. Lewis*, 302 Or. 324, 334, 729 P2d 567 (1986). As I will explain below, that definition merely restates the specificity requirement of the rule; it does not address the distinctiveness requirement.

I read the word "distinctive" to mean more than

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"different." It means "unusual" or "out of the ordinary." "Conduct is distinctive if there is some aspect of the activity that would set it apart from the ordinary response to the same situation." Legislative Commentary to OEC 406, published in Kirkpatrick, Oregon Evidence 114 (1982). Distinctive conduct might be legal or illegal, reasonable or unreasonable. Whatever the conduct, it must be unusual or not ordinary.

The very word "distinctive" implies that there must be a comparison of some kind. Something must distinguish that conduct from other conduct.

In determining whether conduct is a "distinctive type of conduct," these inquiries should be made:

1. Determine the issue for which the evidence is offered. Even if a particular person's conduct is

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distinctive in one sense, it may not be distinctive as to the issue in question. The trial court first must isolate the issue with relation to which the evidence is offered, and admit the evidence only if the actor's invariable past acts or responses were unusual or not ordinary.

2. The trial court must determine (a), whether there were several possible definable responses or choices to an actor confronted with a specific situation and (b), that the actor's invariable response or choice was not an ordinary or usual response or choice to the specific situation. The actor's invariable response or choice need not be a reasonable choice or even a lawful choice among several definable responses.

3. To be distinctive implies and likely requires a comparison. In determining whether conduct is unusual or not ordinary, the trial court likely will be required to determine *the* comparison group or a comparison group. In determining the ordinary response, the comparison may be to other members of the community or to the hypothetical "reasonable person."

The legislative history quoted by the majority is not inconsistent with this analysis. *Charmley v. Lewis, supra*, 302 Or at 331. The paragraph beginning with the phrase "other examples of habit or routine practice can be found in Oregon case law" merely lists illustrative decisions of this court in some of which evidence of habit had been received and in others the evidence was not received.

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Fenton v. Aleshire, 238 Or. 24, 393 P2d 219 (1964) is one of a number of cases cited in which the evidence was not admitted. In *Fenton*, evidence of a child's consistent use of a particular crosswalk was not held admissible. The court stated:

"In view of another trial, however, it should be stated that we have given no consideration to evidence admitted over objection that it was the habit of the deceased to use the crosswalk on Southwest Parkway. The defendant Aleshire testified that the accident occurred a considerable distance east of the crosswalk. The great weight of authority in this country supports the rule that * * * evidence of the general habits of a person is not admissible for the purpose of showing the nature of his conduct upon a specific occasion * * *." *Id.* at 36-37.

The colloquy between Representative Mason and Judge Jones quoted in the majority opinion may not support the conclusion reached by the majority. Representative Mason asked,

"Thus you could bring in the child's actions, I assume in the *Fenton* case irregardless or regardless of whether or not there was eyewitnesses as long as you could show that the habit was distinctive? So the no eyewitness rule would be moot so long as the habit was distinctive." Tape Recording, Subcommittee 1 of the House Committee on

the Judiciary, February 19, 1981, Tape 82, Side B at 074-146.

The colloquy largely concerned the "no eye witness rule." I am not convinced that the exchange concerned evidence that a person always walked within a crosswalk.

Even conceding that the colloquy supports the majority, I am convinced that the only way that we can give meaning to this statute is to require that the term "distinctive" means something other than "specific" and something more than "different." In considering legislative intent, one should keep in mind the in-and-out history of the word "distinctive."

Before the full Interim Committee, Senators Jernstedt and Brown led a discussion that resulted in the deletion of the distinctiveness requirement. The senators apparently objected because the term "distinctive" connotes something unique and unusual. Such a requirement would limit habit to conduct out-of-the-ordinary, rather than apply

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to any invariable repetitive conduct that might be characteristic of many people. Minutes, Joint Committee on the Judiciary 5 (October 6, 1980).

The Jernstedt and Brown argument did not survive the House Judiciary's consideration of OEC 406. The rule proposed by the Interim Committee to the legislature was again amended at the suggestion of Representative Mason to include the distinctiveness requirement. Minutes, Subcommittee 1 of the House Committee on the Judiciary 9 (February 19, 1981).

At the House hearings, Judge Jones stated that habit evidence deals with a person's "idiosyncrasies." (fn1) *Id.* at 6. He stated that the Advisory Committee tightened up the Commentary from the federal rule and that the Advisory Committee wanted to avoid evidence of habit of what everyone does. *Id.*

Chairperson Mason stated that one of the problems with the proposal is that the word "habit" in the rule itself indicates "mundane" things, and that it does not indicate distinctive habits. *Id.* He suggested putting the word distinctive into the rule itself. *Id.* Judge Jones stated that that would be fine, and that such an amendment would tighten up the rule even more. *Id.* Mason suggested that the term would keep out "general" habit (as opposed to "distinctive" habits). *Id.* at 7.

The majority states that "distinctive"

"means behavior that has sufficient particular characteristics to permit it to be distinguished from all other reasonable responses to the same situation. That is, a regular behavior can achieve the status of habit under OEC 406(2) if the situation giving rise to it reasonably

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could be responded to in a variety of ways, each of which ways has unique characteristics by which it can be readily distinguished (i.e. shown to be distinct) from the others." *Charmley v. Lewis, supra*, 302 Or at 334-335.

That definition makes all habit admissible merely by showing that it is regular (element number 1) and specific

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(element number 2), for almost all repeated, specific conduct is "distinctive" under that definition. Almost any conduct is different from other conduct. "Distinctive" has to mean more than different.

Many, perhaps most, situations involve a choice among alternatives. Under the majority opinion, one's invariable practice of following one choice among multiple available alternatives would meet the requirement of the rule, even if the choice made was that of most persons and was a mundane choice. With the addition of the word "distinctive," Oregon departed from the traditional definition of habit. That a given response to a certain stimulus is reasonable, regular and specific does not make it distinctive. The drafters may have felt that evidence of regularly repeated conduct that was no more than the ordinary response to a particular situation would be given undue weight, especially when directed at the key fact at issue.

The distinctiveness requirement bars evidence of average or ordinary conduct or tendencies (however frequent and invariable) to act in a certain manner from determining a key fact at issue, particularly with respect to whether due care was exercised.

Under its federal counterpart, the evidence is admissible. Under OEC 406(2) it is not. I would reverse.

Campbell, J. joins in this dissent.

Footnotes:

* Appeal from Circuit Court, Multnomah County; Donald H. Londer, Judge. 77 Or. App. 112, 711 P2d 984 (1985).

1 We turn to the history of the creation of OEC 406 because the meaning of the rule is not entirely clear, at least in the context of the present case. Of course, in interpreting a statute, "[t]he starting point in every case involving a determination of legislative intent is the language of the statute itself." *Whipple v. Howser*, 291 Or. 475, 479, 632 P2d 782 (1981); ORS 174.010. However:

* * * When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." * * * *State ex rel Cox v. Wilson*, 277 Or. 747, 750, 562

P2d 172 (1977), quoting *U. S. v. Amer. Trucking Ass'ns*, 310 US 534, 542-44, 60 S Ct 1059, 84 L Ed 1345 (1940).

2 We do note, however, that Kirkpatrick may overstate his point when he questions the "distinctiveness" of a stenographer following instructions or a car dealer requiring that orders be completely filled out. Of those two examples, one — the car dealer case, *Krause v. Eugene Dodge*, 265 Or. 486, 509 P2d 1199 (1973) — was clearly intended to be an example of "routine practice of an organization," not "habit." The other — the stenographer case, *Start v. Shell Oil Co.*, 202 Or. 99, 260 P2d 468 (1954) — was probably also intended to be an example of "routine practice of an organization," although its focus on her practice brings it closer to "habit." The distinction is important. By the terms of OEC 406, habit refers to individuals, routine practice refers to organizations. And subsection (2) of OEC 406 speaks only to habit. Its criteria do not, by the subsection's own terms, have to be met in order that evidence of the routine practice of an organization be admissible.

1 Webster's New International Dictionary, 1237 (2d ed 1959) defines "idiosyncratic" as "of peculiar temper or disposition, of one's peculiar individual character." (Emphasis added.)

OR

Or.

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APPENDIX A TO CITY OF DES MOINES' MSJ REPLY.

| <i>Miller v. Likins</i> requires dismissal: | Moore's deficiencies mirror those in <i>Miller</i>: |
|--|--|
| <ul style="list-style-type: none"> Miller's expert admitted he did not perform a quantitative analysis to support his version of the facts of the accident. <i>Id.</i> at 149. | <ul style="list-style-type: none"> Moore's expert acknowledges he did not perform a quantitative analysis to support his version of the facts of the accident. 1 |
| <ul style="list-style-type: none"> Miller's expert testified he had no way of determining where the point of impact in this accident occurred. <i>Id.</i> | <ul style="list-style-type: none"> Moore's expert acknowledges he had no independent way of determining where Moore was struck by the Hagge vehicle. 2 |
| <ul style="list-style-type: none"> Miller's expert testified he relied on the declaration of an involved eyewitness and disregarded the eyewitness testimony of other independent witnesses offered by the City. <i>Id.</i> | <ul style="list-style-type: none"> Moore's expert has apparently ignored the sworn testimony of independent eyewitness Mineard regarding her witnessing the aftermath of the collision and seeing Hagge's slow speed and no swerving within or outside of her lane by driver Hagge. 3 |
| <ul style="list-style-type: none"> Miller's expert testified there was no physical evidence on the roadway to show the point of impact. <i>Id.</i> | <ul style="list-style-type: none"> Moore's expert acknowledges there was no physical evidence on the roadway to show where Moore's point of impact by Hagge's vehicle. Moore's expert acknowledges there was no physical evidence on the roadway to determine or calculate Moore's pre-collision conduct. 4 |
| <ul style="list-style-type: none"> The trial court concluded that Cottingham's opinion on a more probable than not basis lacked adequate factual basis and was speculative. <i>Id.</i> | <ul style="list-style-type: none"> This Court should properly conclude that the Moore's expert lacks adequate factual basis to testify on a more probable than not basis, and that his opinions are speculative. |

1 Neuman Dec. ¶¶ 1-26.

2 Neuman Dec. ¶ 18; Guest Dec. ¶¶ 7-18.

3 Neuman Dec. ¶ 17; Mineard Dec. ¶¶ 7-11; Guest Dec. ¶¶ 6-7.

4 Neuman Dec. ¶¶ 1-21; Guest Dec. ¶¶ 7-18.

**NO. 63612-0-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

RONALD W. MOORE,

Appellant,

vs.

CITY OF DES MOINES,

Respondent.

CERTIFICATE OF SERVICE

**Brenda L. Bannon, WSBA #17962
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
Attorneys for Respondent City of Des Moines**

ORIGINAL

I certify that on the 12th day of October, 2009, I caused a true and correct copy of City of Des Moines' Response to Brief of Appellant to be served on the following in the manner indicated below:

Richard C. Robinson
LAYMAN LAYMAN & ROBINSON
316 Occidental Ave. South, #500
Seattle, WA 98104
(206) 292-1790

faxed; and/or
 mailed via U.S. Mail, postage
pre-paid; and/or
 sent via Legal Messenger


Heather Hegeman