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No. 63689-8

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

TARA A. GARCIA, individually and as personal representative of the
estate of FRANK J. GARCIA, Appellant,

v.

DIANA J. CUSHING and "JOHN DOE" CUSHING,
wife and husband, Defendant,

and

THE STATE OF WASHINGTON DEPARTMENT OF
TRANSPORTATION, THE STATE OF WASHINGTON, Respondent

and

The CITY OF SHORELINE, Respondent

BRIEF OF APPELLANT

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2003 DEC 15 11:11 AM '03
COURT OF APPEALS
DIVISION I
CLERK OF COURT
JANET M. HARRIS

ORIGINAL

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I. Assignments of Error

Assignments of Error

- No. 1 The trial court erred in granting Respondent State of Washington's Motion for Summary Judgment in the order entered April 7, 2005.
- No. 2 The trial court erred in granting Respondent City of Shoreline's Motion for Summary Judgment in the order entered May 19, 2006.

Issues Pertaining to Assignments of Error

1. After the decision has been made to install roadway improvements at a known hazardous roadway, that included an experimental overhead pedestrian warning device ("roving eyes"), which was specifically designed to minimize the exact type of collision that killed decedent, and when the improvements were substantially complete four months prior to the collision, is the failure to activate the "roving eyes" prior to decedent's death a discretionary governmental functional? (Assignment of Error 1)

2. If the failure to activate the "roving eyes" prior to decedent's death is not a discretionary governmental function, does such failure to activate satisfy the legal causation prong of proximate cause? (Assignment of Error 1)

3. Can a reasonable trier of fact find the City of Shoreline was negligent for not requesting a more traditional overhead traffic light be installed prior to decedent's death and that such negligence was also a proximate cause of decedent's death. (Assignment of Error 2)

II. Statement of the Case

Frank Garcia died as a direct result of injuries he sustained in a collision with Defendant Diana Cushing, while a pedestrian in a marked crosswalk, at the intersection of N. 170th and Aurora Ave. North (SR 99) on October 26, 2002. (CP 323)

On August 31, 1995, Shoreline was incorporated as a city with a population over 22, 500. (CP 149) Aurora Ave. North, or SR 99, is the major arterial in the City of Shoreline. (CP 149)

Pursuant to RCW 47.24.020(13), the City of Shoreline is responsible at its expense for the installation, maintenance, operation, and control of traffic control signals, signs, and devices for the regulation, warning and guidance of both pedestrian and motor vehicle traffic on state highways within the City's boundaries. (CP 149) The City's actions in this regard were subject to the approval of WSDOT "for the installation and type only". (CP 149)

After Shoreline became incorporated in August 1995, it hired a traffic consultant, William E. Haro, to conduct a study on pedestrian safety. (CP 149) Mr. Haro's 1998 report identified specific locations for pedestrian improvement in Shoreline and outlined a pedestrian education strategy. (CP 149) Both North 170th Street and North 165th Street were identified as specific locations on SR 99 for pedestrian improvements. (CP 150)

At the same time, the City of Shoreline was developing a comprehensive plan which included vehicular and pedestrian traffic improvements on Aurora Avenue. (CP 150) During this planning process, the City had secured multiple federal Hazard Elimination Safety (HES) grants to improve pedestrian safety conditions on SR 99. (CP 150)

During this same period, WSDOT in conjunction with the Washington Traffic Safety Commission initiated the Washington Quality Initiative Pedestrian Safety Team to identify ways to improve pedestrian safety in the state of Washington. (CP 150) Over an eight-month period the team met, interviewed, studied and discussed pedestrian safety. (CP 150) An action plan was developed (CP 150)

Julie Mercer Matlick was the overall project manager for WSDOT. (CP 150, CP 382) Ms. Matlick was the project manager at the outset and

worked with the City and consultants that were hired to do work both on the education side and the design side. (CP 383)

One aspect of the plan was to develop a demonstration project to test the recommendations identified by the team. (CP 150) \$400,000 in federal safety funds were secured for this project. (CP 150)

In the spring 1999, WSDOT and Shoreline agreed to combine their federal grants to construct pedestrian safety improvements on SR 99 and N. 165th and N. 170th. (CP 151) Initially, the Shoreline Public Works Department was to take the lead on the engineering phase, as installation, maintenance, and control of traffic control signals, signs and devices on SR 99 were Shoreline's responsibility pursuant to statute. (CP 151)

Although Shoreline was to take the lead, WSDOT assumed responsibility because of staffing issues at the City. (CP 151) Prior to undertaking these pedestrian safety improvements, only an unmarked crosswalk existed at the intersection of N. 170th and SR 99. (CP 149)

Former WSDOT employee, Julie Mercer Matlick led the Washington Quality Initiative Team. (CP 330) She led the team for the project that was to reduce pedestrian collisions. (CP 330) That project encompassed intersections at N. 170th and N. 165th on Aurora Ave. (CP 330)

Per Ms. Mercer Matlick, Shoreline has one of the highest pedestrian accident rates of any section of the highway (SR 99) in the whole State. (CP 335) Most motorists in that corridor do not obey the crosswalk law. (CP 340) This section of roadway had a very high percentage of pedestrian collisions and motorists did not respond to yielding to pedestrians as State law says in the crosswalks. (CP 341)

The “roving eyes” technology was chosen because it had great promise for pedestrian safety. (CP 331-333) The roving eye signals were supposed to convey to motorists that a pedestrian was entering the crosswalk and to convey additional information to motorists and they looked specifically in the direction the pedestrian was approaching from. (CP 339, CP 340)

The study performed by University of Washington Traffic Research Center determined the signals had a high rate of yielding rate compared to other devices. (CP 336-337) The study showed that a majority of the motorists were actually responding to them. (CP 337) It was a significant improvement over the way it had been for pedestrian safety crossing. (CP 342, CP 345) The increase in yielding behavior was substantial. (CP 345). In Ms. Mercer Matlick’s opinion the project was successful. (CP 333)

It was a joint decision between WSDOT and Shoreline to install the roving eye signals. (CP 384) In September, 2000, the Shoreline City Council approved the project as planned. (CP 153)

A condition of federal funding for projects is the requirement of compliance with the MUTCD. (CP 152) Because the “roving eyes” animated devices were not yet recognized by the MUTCD, WSDOT applied in July 2000, to the Federal Highway Administration for permission to use the devices as part of a demonstration project for pedestrian safety enhancement on SR 99. (CP 152)

An illustration and explanation of the animated, roving-eyes LED signs is at CP 168. In the fall of 2000, WSDOT secured authorization from the Federal Highway Administration to proceed with these projects. (CP 153) The process of requiring FHA approval for exceptions to the MUTCD is a check on people doing things that are not considered to have a high probability of success. (CP 388)

Construction began March 21, 2002 and was substantially completed June 11, 2002. (CP 154) The project was implemented in four phases and was designed to evaluate the effectiveness of the respective pedestrian improvements after each had been installed. (CP 154)

The four phases were: 1) basic construction, 2) installation of crosswalk and yield bar pavement markings, 3) activation of dynamic pedestrian warning signs, and 4) enforcement activities. (CP 151)

The crosswalk at N. 170th, advance yield bars and signage were phase 2 and were installed on September 22, 2002. (CP 154) A crosswalk was not marked at N. 165th in order to evaluate a crosswalk's effectiveness in and of itself. (CP 154) The phase 2 observations were conducted in September, 2002. (CP 154) Each observation phase took only 3 workdays. (CP 181) No meaningful difference was observed in yielding by motorists at marked vs. unmarked crosswalks. (CP 155, CP 171)

The "roving eyes" were phase 3. (CP 154) WSDOT's signal technician, Stan Nove, visited the site on several occasions when the general contractor and their subcontractors were working on the LED signing system. (CP 437)

Mr. Nove was at the site on June 11, 2002, the day on which the LED overhead signs were installed. (CP 437, CP 444) When activated that day, the signs did not operate properly and Mr. Nove discussed the issue with the general contractor's foreman. (CP 444) The wiring diagram included in the plans was incorrect and needed to be replaced. (CP 437) The contractor and its subcontractor began installation of the new wiring diagram and troubleshooting of the LED signing system on

September 11, 2002, and continued their efforts until October 11, 2002, without success. (CP 437)

On October 11, 2002, Mark Leth alleges the LED motorist and pedestrian warning sign system was turned over to WSDOT to troubleshoot the microwave detection system. (CP 437) WSDOT's Stan Nove's work orders, however, show WSDOT was repairing the signal on September 24, 2002. (CP 401, CP 447) Only in reply to Plaintiff's Opposition, did Mark Leth admit that Stan Nove visited the site on several occasions when the general contractor and their subcontractors were working on the system. (CP 437) In the Reply Declaration, Mark Leth states the date as September 25, 2002. (sic) (CP 437)

While Mr. Nove was at the site on September 24, 2002, he diagnosed that four cables needed replacement. (CP 437) It was Mr. Nove's expertise that led WSDOT to assume responsibility for the electronic system on October 11, 2002. (CP 437) Mr. Nove, working with the manufacturer, determined the remedy on October 11, 2002. (CP 437, CP 438)

Shortly before the collision on October 26, 2002, Frank Garcia had been to the Pawn Exchange located on the east side of Aurora Ave, and had crossed the street to use the restroom at Parker's Lounge, on the west

side of Aurora Ave. (CP 58) Mr. Garcia was on his way back when the collision occurred. (CP 58)

Mr. Garcia stood on the NW corner of Aurora Ave. and waited until a Volkswagen Van driven by James Green, who was driving southbound on Aurora Ave., stopped in the outside (curb) lane. (CP 58) Mr. Garcia started to cross in the crosswalk in front of Mr. Green's van. (CP 58) At the same time, Diana Cushing was driving in the inside southbound lane approaching the pedestrian crosswalk. (CP 58) Ms. Cushing did not notice that Mr. Garcia was attempting to cross. (CP 58)

Ms. Cushing's son, Andrew Bergstrom, a front seat passenger, observed Mr. Garcia step out from behind Mr. Green's van and yelled at his mother to stop. (CP 58) Mr. Bergstrom yelled at his mother to stop, she slammed on her brakes, and she impacted with Mr. Garcia. (CP 58)

The collision occurred at approximately 4:57 p.m. (CP 131) It was still light out at the time of the collision. (CP 132, CP 136) Mr. Green noticed the "new crosswalk" and noticed a "new flashing light thing that wasn't on". (CP 134)

Witness Mary Weatherley, also noted it was still light out, and it was just before the clocks were turned back. (CP 141, CP 144) By 6:00 p.m., when Detective Leach started taking scene photos, it was dark out.

(CP 54) The daylight photographs taken by Detective Leach were taken the following day at 8:18.a.m. (CP 54)

At the time of the accident, it was still daylight and just starting to get dark. (CP 79) Exhibit 2-3 attached to the Declaration of Detective Leach clearly shows the overhead “roving eyes’ display was not bagged or covered. (CP 128)

Exhibit 2-2 attached to the Declaration of Detective Leach shows the point of impact, where the skid mark shows a “widening” change caused by the “loading” of Mr. Garcia. (CP 59, CP 127). The point of impact was just inside the inside lane and on the southern portion of the crosswalk (CP 59, CP 66)

After Mr. Garcia died, Stan Nove was out to the site on October 30 and 31, 2002 and the LED warning sign systems were determined to be ready for full time operation and were activated. (CP 155)

In his Reply Declaration, Mark Leth alleges that Mr. Nove special ordered needed parts, which ultimately did not arrive until October 30, 2002, and further alleges that the work order of October 30, 2002, confirms that parts were obtained that day. (CP 438, CP 450). The work order of October 11, 2002, (CP 448) however, does not mention any parts being ordered that were required to activate the LED warning signs. Also, the work order of October 30, 2002 (CP 450) does not support a

reasonable inference that the “got parts” refers to any parts necessary to activate the LED warning signs.

None of the materials submitted by Respondent WSDOT in support of its Motion for Summary Judgment ever alleged that the “roving eyes” displays could not have been activated before Mr. Garcia was killed.

Plaintiff’s expert, Tim Miller, opined WSDOT should have activated the “roving eyes” displays sooner. (CP 403) WSDOT did not rebut this opinion in any materials submitted in support of its Motion for Summary Judgment.

During the time period of October 11, 2002, up to and including October 26, 2002, the system was activated only when field tests were being conducted by WSDOT. (CP 155) The system was off at the time of the collision. (CP 155)

Mr. Miller also testified that WSDOT advocated and pursued the design and installation of the particular pole mounted passive microwave sensors for the “roving eyes” system rather than utilizing standard pushbutton controls or other detection technologies. (CP 400) Mr. Miller testified it was reasonably foreseeable that the microwave sensors chosen could cause faulty system operation because 1) the detection zone was close to the travel lanes, 2) vehicles in the adjacent travel lanes present a much larger target value than a pedestrian would present to the microwave

sensors and, 3) microwave systems tend to have wide detection zones rather than tightly controlled and/or narrow detection zones that other detection technologies can offer. (CP 400)

Mr. Miller testified WSDOT should have used pushbutton controls or other more reliable technology than pole mounted sensors. (CP 403)

Mr. Miller also testified that WSDOT could have placed a simple warning sign, similar to exhibit 2 in his Declaration, during this period when the “roving eyes” were not activated. (CP 403-404, CP 411)

Mr. Miller also testified with respect to Traffic Control Signals, Section 4B.02 of the MUTCD provides that the selection and use of traffic control signals should be based on an engineering study of roadway, pedestrian, bicyclist, and other conditions. (CP 398) Section 4D.01 of the MUTCD provides that uniformity in the design features that affect the traffic to be controlled is especially important for safe and efficient traffic operations. (CP 398-399)

A standard set by the MUTCD at section 4D.01 is “when a traffic control signal is not in operation, such as before it is placed in service, during seasonal shutdowns, or when it is not desirable to operate the traffic control signal, the signal faces shall be covered, turned, or taken down to clearly indicate that the traffic control signal is not in operation.” (CP 399)

Section 4D.02 of the MUTCD, pertaining to Responsibility for Operation and Maintenance, provides that prior to installing any traffic control signal, the responsibility for the maintenance of the signal and all of the appurtenances, hardware, software, and the timing plan(s) should be clearly established. (CP 399) Under this same section, the agency should provide for alternate operation of the traffic control signal during a period of failure, including erecting other traffic control devices. (CP 399)

Mr. Miller also testified that WSDOT also should have used the more traditional over the road amber light display. (CP 403)

Construction of traffic signals on Aurora Avenue North is the responsibility of the City, not WSDOT, and the city must secure approval from WSDOT to do so. (CP 157) Prior to the Mr. Garcia's fatal collision, the City of Shoreline had not requested approval for installation of a traditional traffic control signal. (CP 158)

Installation of signal lights is a matter of engineering discretion to be exercised when specific criteria or warrants are met. (CP 157) Satisfaction of one or more warrants does not in itself require the installation of a traffic signal. (CP 157) Even if the criteria are satisfied, installation of a traffic signal at a particular location is a matter of discretion and judgment as to whether the signal is appropriate pursuant to highway engineering standards. (CP 157)

WSDOT was still maintaining the signals until the roving eyes were removed in January, 2004. (CP 386) Although the LED motorist and pedestrian warning signs operated successfully from late November, 2002, until early January 2004, the City of Shoreline did not want to accept ownership of the devices because of the adverse publicity that had occurred previously. (CP 158) The roving eyes displays had a positive effect on yielding behavior. (CP 387)

Ms. Mercer Matlick had an indication the signals were taken down by Shoreline for political reasons. (CP 338) Mark Leth also testified that his understanding was that the City wanted to install more traditional traffic signals. (CP 373-375, CP 22) Mark Leth also testified the overall project that included the "roving eyes" was deemed effective. (CP 374, CP 376, CP 377, CP 379, CP 387) The electronic difficulties that the contractor ran into had been corrected essentially by November, 2002. (CP 381-382)

Mr. Leth also testified that the electrical difficulties were primarily detection and there was a design flaw in the wiring scheme. (CP 388-389). Finally, a pedestrian activated traffic signal was installed after removing the roving eyes (CP 390), which researchers have found provokes a higher degree of yielding behavior by motorists. (CP 390)

The pedestrian traffic signals were installed at both North 165th and North 170th intersections in January 2004, under a special exceptions warrant granted by WSDOT. (CP 158) Mr. Miller testified that proper exercise of engineering discretion called for the installation of the more traditional traffic control signal utilizing pedestrian push button controls that cause the signal regulating traffic to turn red when the pedestrian pushes the button. (CP 527) Mr. Miller further testified the collision would not have occurred had the city of Shoreline requested the more traditional signal, as it would have been operational before the collision because it would not have encountered the same operational problems that the “roving eyes” technology did. (CP 527)

WSDOT moved for Summary Judgment on March 25, 2005, and the Order in issue was entered during presentation after oral argument on April 7, 2005. (CP 575- 578) The trial court reasoned the decisions of the governmental entities were discretionary and that there was no legal causation. (CP 576-577)

The City of Shoreline moved for Summary Judgment on May 19, 2006, and the Order in issue was entered after oral argument on May 19, 2006. (CP 580-582) The trial court reasoned there was no evidence the City was negligent as there was no evidence WSDOT would have agreed to installation of the more traditional traffic signal had the City requested

it before Mr. Garcia's fatal collision. (VRP 2, P. 24, L. 24-25, P. 25, P. 26, P. 27, L. 1-5)

Defendant Diana Cushing Stipulated to the entry of Judgment against her, and Final Judgment was entered May 22, 2009. (CP 584). This appeal timely followed. (CP 571-572)

III. Argument

A. Standard of Review

It is well settled that review of the record on summary judgment is de novo, and the appellate court engages in the same inquiry as the trial court. *Benjamin v. Wash. State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.* The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* The burden is upon the party moving for summary judgment to show that there is no

genuine dispute of a material fact and this burden cannot be shifted to the adversary. *American Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 816, 370 P.2d 867 (1962).

B. The failure to activate the “roving eyes” prior to Frank Garcia’s death was not a discretionary governmental decision

A municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel. *Keller v City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). A municipality has a duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the foreseeable acts of those using the roadways. *Berglund v. Spokane County*, 4 Wn.2d 309, 319-21, 103 P.2d 355 (1940).

The court in *Berglund* also held “if under the surrounding conditions, the negligence of drivers at the particular point was reasonably to be anticipated, it would be the county’s duty to exercise reasonable care to protect the public against the resulting dangers. *Berglund*, 4 Wn.2d at 321. This holding in *Berglund* has not been overruled nor modified by the holding in *Keller*.

This obligation includes posting warning signs when required by law or when the State has actual or constructive knowledge that the highway is inherently dangerous or of such a character as to mislead a

traveler exercising reasonable care. *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994) [citing *Bartlett v. Northern P. Ry.*, 74 Wn.2d 881, 882, 447 P.2d 735 (1968)]

In this action before the Court, the testimony of Julie Mercer Matlick establishes that WSDOT knew that Shoreline has one of the highest pedestrian accident rates of any section of the highway (SR 99) in the whole State. (CP 335) WSDOT also knew that most motorists in that corridor do not obey the crosswalk law. (CP 340) WSDOT also knew that section of roadway had a very high percentage of pedestrian collisions and motorists did not respond to yielding to pedestrians as State law required in the crosswalks. (CP 341)

This knowledge, coupled with the 40 mph speed limit (CP 64) and the number of pedestrians having to traverse Aurora Ave. North made it reasonably foreseeable that the exact type of collision that killed Frank Garcia would occur. Applying the facts and all reasonable inferences in the light most favorable to the Plaintiff, as non-movant, WSDOT owed a duty of ordinary care under the circumstances.

A narrow category of discretionary governmental immunity exists as a court-created exception to the general rule of governmental tort liability. *Bender v. Seattle*, 99 Wn.2d 582, 588, 664 P.2d 492 (1983) Its applicability is limited to high-level discretionary acts exercised at a truly

executive level. *Bender*, at 588. *See Also, Karr v. State of Washington*, 53 WnApp. 1, 765 P.2d 316 (1988) (Karr was a wrongful death action involving the Mount St. Helens eruption, alleging that the Governor was negligent in her enactment of the restricted zones.

The Washington Supreme Court set out four questions to help determine whether an act is a discretionary governmental process and therefore nontortious:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy ... as opposed to one which would not change the course or direction of the policy, program, or objective?
- (3) Does the act ... require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
- (4) Does the governmental agency involved possess the requisite ... authority...?

King v. Seattle, 84 Wn.2d 239, 245, 525 P.2d 228 (1974)

In addition, the action or decision at issue must actually have been considered and reasoned in order to be entitled to immunity. *King*, at 246.

The decision to build a highway and specifying its general location were discretionary functions, but the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions. (citations omitted) *Stewart v. State*, 92 Wn.2d 285, 295, 597 P.2d 101 (1979). The specific details of

implementing that determination by discrete design determinations and construction effort are not the exercise of discretionary functions.

The “roving eyes” had been installed since June 11, 2002. (CP 154) WSDOT admits there were design flaws in the initial installation which it knew about as early as June 11, 2002. (CP 444) WSDOT let the contractors and subcontractors deal with the problems until October 11, 2002. (CP 437) Doing so did not satisfy factor 3 in the discretionary functions test.

Regardless that the overall project was designed to be implemented in 4 phases (CP 154), phase 2 was completed on September 22, 2002, (CP 154) and the observations pertaining to phase 2 were completed in September, 2002. (CP 154) Factors 1 and 2 are not satisfied because it was time to implement phase 3, which was the “roving eyes”, at the end of September. (CP 151, CP 154, CP 181) Furthermore, the failure to activate the “roving eyes” did not involve high level discretionary acts exercised at a truly executive level.

C. The legal prong of proximate cause has been satisfied.

There are two elements to proximate cause: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 778-79, 698 P.2d 77 (1985). Cause in fact refers to the “but for” consequences of an act—the physical connection between an act and an injury. [Citations omitted]. *Id.* Legal

causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend. *Id.* It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. *Id.*

With respect to legal causation:

that rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy and precedent.

Hartley v State, 103 Wn.2d at 779.

Policy considerations and common sense dictate whether the connection of the county and state with the collision is too remote or insubstantial. *Id.* at 784. In the instant action, only an unmarked crosswalk existed at the N. 170th and Aurora intersection prior to the improvements undertaken before the fatal collision. (CP 149) By constructing the improvements, WSDOT and Shoreline were channeling pedestrians into specific pedestrian crossing areas. WSDOT undertook the improvements and reasonable minds could agree that it breached its duty of ordinary care.

By specifically choosing new technology rather than uniformity in the design features that affected the traffic to be controlled, WSDOT

clearly was accepting a risk. WSDOT was also accepting a risk by choosing high technology devices that would foreseeably be problematic and initially faulty in operation.

WSDOT was ignoring MUTCD basics, that uniformity in the design features is especially important for safe and efficient traffic operations. (CP 398-399) Furthermore, WSDOT created a confusing and hazardous condition when they elected to turn the systems off during the 2 weeks before Frank Garcia's fatality when WSDOT was troubleshooting the system.

A reasonable inference to be drawn from the facts is that motorists probably started getting used to seeing the devices in operation and began learning that it meant a pedestrian was somewhere near the crosswalk. However, when the same motorists passed through that intersection in those two weeks when the signals were off and not bagged, it is a reasonable inference they associated no signal with no pedestrian. Under the facts of this case, logic, common sense, justice, policy and precedent support a finding of legal causation rather than against.

Had WSDOT provided a properly working roving eyes display prior to October 26, 2002, or left the displays on during the troubleshooting stage as did the previous contractors, or used push button activators rather than the microwave sensors, which were known to be less

reliable, or provided at least a traditional over the roadway amber display, it would have alerted Diana Cushing to a pedestrian in the crosswalk.

WSDOT knew years before the construction project, that the section of SR 99 as it passed through Shoreline was hazardous for pedestrians and that motorists were not yielding to pedestrians (CP 335) This specific technology was chosen because it had substantial positive effects in motorists yielding to pedestrians in multiple threat situations. (CP 336-337, CP 342, CP 345)

Defendant WSDOT argued that it is sheer speculation that Ms. Cushing would have noticed a properly working roving eyes display and relies upon her statement to the investigating officer that she did not notice the vehicle(s) to her right. (CP 36) While she admits she did not notice the vehicles to her right, a reasonable inference that must be drawn in Plaintiff's favor is that she was probably looking ahead instead of to her right. That is a reasonable inference, since it is unreasonable to argue that she could be going forward at approximately 40 mph without looking where she was going.

Furthermore, Ms. Mercer Matlick testified WSDOT chose this experimental technology rather than the In-Pavement Lighting because WSDOT knew motorists in the Shoreline corridor of SR 99 were distracted by visual clutter and were tending to look up rather than down.

(CP 334) Again, this technology was specifically designed to alert those motorists who were inattentive in specifically the multiple threat type of collision that killed Frank Garcia. This technology also proved effective in reducing these types of collisions. (CP 331-333, CP 336-337)

D. The fact the City of Shoreline did not request a more traditional traffic signal is evidence of negligence

A municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel. *Keller v City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). A municipality has a duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the foreseeable acts of those using the roadways. *Berglund v. Spokane County*, 4 Wn.2d 309, 319-21, 103 P.2d 355 (1940).

The court in *Berglund* also held “if under the surrounding conditions, the negligence of drivers at the particular point was reasonably to be anticipated, it would be the county’s duty to exercise reasonable care to protect the public against the resulting dangers. *Berglund*, 4 Wn.2d at 321. This holding in *Berglund* has not been overruled nor modified by the holding in *Keller*.

The City of Shoreline had identical duties as WSDOT, except the City of Shoreline also had the duty to request a traditional traffic signal at

the North 170th intersection. (CP 149) It was the City of Shoreline that hired traffic consultant, William E. Haro, to conduct a study on pedestrian safety. (CP 149) North 170th Street was specifically identified by Mr. Haro's report as a specific location for pedestrian improvements. (CP 149-150).

The fact that the City of Shoreline did not request the installation of a traditional traffic signal at the N. 170th intersection prior to Mr. Garcia's death, in and of itself, is evidence of negligence and a proximate cause of Mr. Garcia's death.

IV. Conclusion

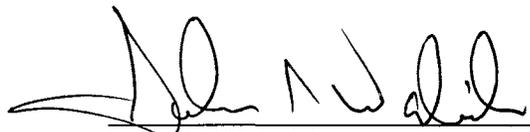
Reasonable minds could agree that Defendant WSDOT breached its duty of ordinary care in several ways. Reasonable minds could agree that 1) the roving eyes displays should have been activated sooner than they had, or 2) should have been left on during the time WSDOT was troubleshooting the system, or 3) WSDOT should have used pushbutton controls or other more reliable detection technology rather than pole mounted microwave sensors, or 4) used the more traditional over the roadway amber light display, or 5) installed pedestrian instructional signs similar to that specifically requested by WSDOT on 11/19/02.

Reasonable minds could also agree that the City of Shoreline breached its duty and was negligent by not requesting a traditional traffic

signal prior to Mr. Garcia's death and that the city of Shoreline was negligent in this joint venture with WSDOT.

The acts and omissions of WSDOT and the City of Shoreline were not discretionary governmental activity. Material questions of fact, supported by competent credible evidence, exist with respect to the above. For all of the above reasons, the Orders granting Summary Judgment on behalf of WSDOT and the City of Shoreline should be reversed, and this matter should be remanded back to the trial court.

Respectfully submitted, this 15th day of December, 2009.

A handwritten signature in black ink, appearing to read "John R. Walicki", written over a horizontal line.

John R. Walicki
Attorney for Appellant
WSBA # 19179

CERTIFICATE OF SERVICE

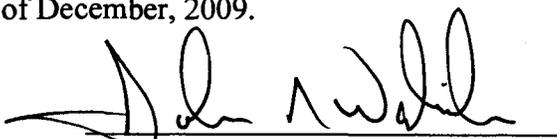
I certify under penalty of perjury under the laws of Washington State that on the 15th day of December, 2009, I caused true and correct copies of the attached Brief of Appellant to be served on the following in the manner indicated below:

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