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**NO. 63689-8-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

TARA A. GARCIA,
individually and as personal representative of the
Estate of **FRANK J. GARCIA,**

Appellant,

vs.

**DIANA J. CUSHING and "JOHN DOE" CUSHING, wife and
husband, THE STATE OF WASHINGTON DEPARTMENT OF
TRANSPORTATION, and THE STATE OF WASHINGTON, CITY
OF SHORELINE, TOTEM ELECTRIC OF TACOMA, INC.,
OTAK, INC., SKYLINE ELECTRIC & MFG. COMPANY,
MICROWAVE SENSORS, INC., and CUETRONICS, INC. d/b/a
RELUME TECHNOLOGIES,**

Respondents.

**On appeal from the Superior Court of the State of Washington
In and For the County of King
Cause No. 03-2-41742-4 SEA
The Honorable Greg Canova**

BRIEF OF RESPONDENT CITY OF SHORELINE

**Andrew G. Cooley, WSBA #15189
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
Attorneys for Respondent City of Shoreline**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....1

A. The City had a Limited Role in the Roving Eyes Project.....2

B. There Were Numerous Improvements Made by WSDOT which Were All in Place on the Day of the Accident.....3

C. The Accident Occurs Because the Driver Was Inattentive3

D. It Is Speculation that any Feature of the Roadway Caused the Accident, and even more Speculation that the Accident Would Have been Different if the Roving Eye Signs had been in Place.....4

E. Plaintiff’s Allegations Against the City of Shoreline Were Very Narrow: Plaintiff Alleged the City Should Have Sought a Permit for an Extraordinary Signal to be Installed.....5

III. ARGUMENT8

A) The Case Law Requires Proof The City Was Negligent. ..8

B) The Plaintiff’s Expert Failed to Deliver Evidence or Testimony That the City Was Negligent.9

C) The Plaintiff’s Expert Failed to Establish That A Signal Permit Would Have Been Granted or That A Signal Would Be Built.....11

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

Berglund v. City of Spokane,
4 Wn.2d 309, 315, 103 P.2d 355 (1940)..... 8

Chen v. City of Seattle,
COA No. 62838-1-I 8

Ericks v. Denver,
118 Wn.2d 451, 457, 824 P.2d 1207 (1992)..... 9

Owen v. BNSF,
153 Wn.2d 780, 787 n.7 (2005)..... 9

Raybell v. State,
6 Wn. App. 795, 803, 496 P.2d 559 (1972)..... 9

Tanguma v. Yakima Cy.,
18 Wn. App. 555, 557, 569 P.2d 1225 (1997)..... 9

Wick v. Clark Cy.,
86 Wn. App. 376, 379 (1997)..... 9

Other Authorities

W.W. Merriam-Webster.com
(last visited January 7, 2010)..... 10

I. INTRODUCTION

Both in the trial court and here, the Plaintiff makes a very narrow claim against the City of Shoreline. Plaintiff concedes the City had nothing to do with WSDOT's Roving Eyes Project, and that the City had no authority to act without WSDOT's explicit approval. The narrow claim against Shoreline is that it was negligent for not seeking and obtaining a permit from WSDOT to install a traditional traffic signal at the intersection.

In support of this claim, Plaintiff did not produce evidence that the City failed to exercise ordinary care. No expert labeled the City's acts as unreasonable or negligent or below the standard of care. Plaintiff also failed to provide any evidence that if the City had requested such a permit, it would have been granted and the signal would have been designed and built before the accident date.

Judge Canova properly granted the City's summary judgment motion holding that Plaintiff failed to provide evidence of negligence and it would be speculation to claim that the City's permit would be approved. Judge Canova's order should be affirmed.

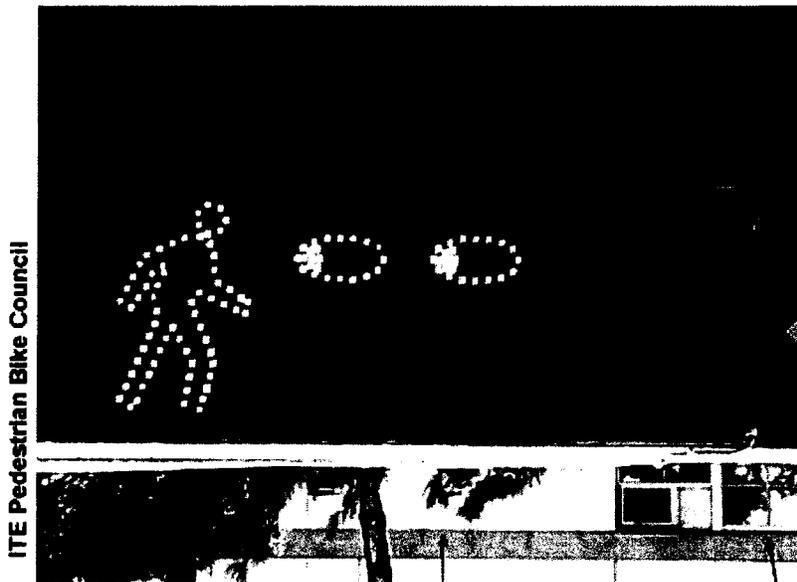
II. STATEMENT OF THE CASE

The City of Shoreline was incorporated in 1995. CP 149. State Route 99 (also known as Aurora Avenue North) is a state highway that passes through the City. CP 149.

A. The City had a Limited Role in the Roving Eyes Project.

In the spring of 1999, WSDOT assumed responsibility for a pedestrian safety improvement project on SR 99 at the intersections of North 165th and North 170th. CP 151. The City of Shoreline's role was limited to the transfer of certain grant funds. CP 150-151. Federal grant funds were transferred from the City to WSDOT. CP 398. The City's grant funds were approximately \$80,000 of the almost \$500,000 project. CP 398.

WSDOT and its contractors determined that a set of experimental treatments should be installed at the two intersections. CP 152. One particular treatment was a device called the "Animated Roving Eyes LED Warning Sign." CP 152.¹



¹ The sign's intent is to direct motorists to look in the direction of the crossing pedestrian.

B. There Were Numerous Improvements Made by WSDOT which Were All in Place on the Day of the Accident.

In addition to the Roving Eyes LED Animated Sign, WSDOT and its contractors made numerous substantial improvements to pedestrian safety at the intersections at issue. The WSDOT safety improvement project included: (1) marked crosswalks; (2) raised planted median with a pedestrian refuge; (3) advance yield bars, 40 feet before the pedestrian crosswalk; (4) large advance warning signs on both sides of the yield bars; (5) enhanced overhead lighting; (6) relocated transit stops; (7) new sidewalks, curbs and gutters; and (8) large pedestrian warning signs 200 feet before the crosswalk with amber beacons. CP 153-154.

By June 11, 2002, all of these pedestrian safety improvements had been installed. All were functioning perfectly. (CP 155). The only remaining addition was the experimental “Roving Eyes LED sign.” CP 155; CP 157.

C. The Accident Occurs Because the Driver Was Inattentive.

On October 26, 2002, Frank Garcia crossed SR 99 at North 170th. He used the new sidewalk to access the new marked crosswalk. He had the benefit of the pedestrian refuge island. The advance warning signs were present and the beacons operational. It was daylight. CP 132. A car driven by James Green properly stopped for Garcia who was in the

crosswalk. CP 132. A car next to Green, driven by Defendant Cushing, did not see the pedestrian or stop, and she hit him. CP 132. An investigation determined that Cushing was inattentive. CP 307. She was inattentive to the existence of the pedestrians. CP 307. She was inattentive to the large warning signs alerting her that she was approaching a crosswalk. CP 307. She was also inattentive to the presence of a car stopped at the crosswalk. CP 307. The investigator concluded that Cushing violated two laws – one requiring that she yield to a pedestrian lawfully in a crosswalk and the second prohibiting her from passing a car stopped at a crosswalk. CP 307 (quoting RCW 46.61.235(1) and (2)).

D. It Is Speculation that any Feature of the Roadway Caused the Accident, and even more Speculation that the Accident Would Have been Different if the Roving Eye Signs had been in Place.

The improvements done by WSDOT were subject of an extensive before and after academic study that attempted to gauge the effectiveness of the several treatments on pedestrian safety. CP 246; 248. The study was trying to determine whether the combination of devices at the study location changed both pedestrian and driver behavior. CP 178. The study wanted to determine if the devices caused more pedestrians to use the crosswalk. CP 178. It also wanted to evaluate if more drivers yielded to pedestrian. CP 178.

The study looked at the yielding rates at the North 170th crosswalk where Garcia was hit. CP 198. With all of the treatments in place, including the Roving Eyes LED sign, yielding rates went from 7% before to 33% after. CP 198. In other words, even with all of the devices in operation, a full 67% of cars did not yield to pedestrians. Moreover, “only a fraction of pedestrians pushed the button to activate the traffic warning devices. . . .” CP 198.

These empirical and undisputed facts have a material impact on the Plaintiff’s claim. Plaintiff speculates that if the Roving Eyes sign was operating, Garcia would have pushed the button to activate the sign and driver Cushing would have yielded. But the empirical evidence shows otherwise. Most pedestrians do not push the buttons, and most cars do not yield. Plaintiff’s speculation that Garcia’s experience would be different is without foundation and contradicted by ample undisputed evidence. CP 219.

E. Plaintiff’s Allegations Against the City of Shoreline Were Very Narrow: Plaintiff Alleged the City Should have Sought a Permit for an Extraordinary Signal to be Installed.

Plaintiff’s initial suit against WSDOT did not name the City of Shoreline. CP 1. WSDOT was dismissed by Order dated April 7, 2005. CP 580. Thereafter, Plaintiff filed an amended complaint against the City of Shoreline. CP 487-495. According to the Plaintiff, the amended

complaint had new and different allegations against the City of Shoreline. “The claims and allegations against Defendant City of Shoreline are not identical to the claims against WSDOT.” CP 550. “Plaintiff alleges that the City of Shoreline was negligent for not requesting and installing a traditional traffic control signal utilizing pedestrian pushbutton controls that cause the signal regulating traffic to turn red when the pedestrian pushes the button.” CP 550. Plaintiff claimed that the sponsor of this “negligent failure to request and install a signal” claim, was forensic traffic engineering expert Tim Miller.

There are two factual problems with Plaintiff’s negligence theory against the City of Shoreline. Miller did not state that the City of Shoreline was “negligent.” CP 527. He does not claim that the City of Shoreline’s actions fall below the standard of care. CP 527. He does not claim that the City failed to act like a reasonable city in the same or similar circumstances would act. CP 527. While he talked about what WSDOT “should” have done (CP 540), he never offered any such opinion about the City of Shoreline.

Instead, Miller used extraordinarily unusual language to describe his opinions about the City of Shoreline. He claimed that “the proper exercise of engineering discretion called for installation of the more traditional traffic control signals. . . .” CP 527.

The next problem with Plaintiff's claim is proving that if the City had exercised this discretion and sought a permit from WSDOT, the City would have received the permit, funded, designed and built the "traditional signal and made it operational before October 26, 2002, the day of Garcia's accident. Thus, even if the City was negligent, there has to be evidence that if it acted differently, a different signal would have been present on the date of the accident.

Neither Plaintiff nor Plaintiff's expert offered any evidence to support this theory.² Miller never knew anything about the permit process, or the time necessary to design and build a traffic control signal. There is no evidence of when the City should have sought the permit. There is no evidence of how such permits are typically processed. Indeed, the City eventually obtained a "special exceptions warrant granted by WSDOT." CP 158. There is no evidence about how long it takes to design and build such a traffic signal. There is no evidence explaining how much it would cost or where the money would come from. There is no evidence that it would be up and running on October 26, 2002. A jury would be required to speculate, so found Judge Canova. VRP 2, pp. 24-26. The Court stated:

² Miller did claim that a traditional traffic signal would have "been operational before the collision because it would not have encountered the same operational problems the experimental roving eyes technology did." CP 527. This apparently refers to the fact that a traditional pushbutton is more reliable than a microwave sensor initially used.

There is, in the Court's view, no evidence and no genuine issue of material fact to establish that the Department [of Transportation] would have, in fact, approved a request under [RCW] 47.24.020(13) in a timely manner had the City made such a request. . . .

VRP 2, p. 26.

III. ARGUMENT

A.) The Case Law Requires Proof The City Was Negligent.

In this Court, the Plaintiff admits her narrow theory against the City of Shoreline. Opening Brief, p. 28. The sole theory against the City of Shoreline is that it should have requested the installation of a traffic signal. CP 493; Opening Brief, p. 28.

Understandably, Plaintiff fails to address the evidence below which caused Judge Canova to grant the City's motion for summary judgment. It was the glaring lack of evidence on this theory that led to dismissal and it compels affirmance here as well.

When a City has a duty in negligence, it is "held to a general duty of care, that of a reasonable person under the circumstances." *Chen v. City of Seattle*, COA No. 62838-1-I (filed 12/28/09) at p. 9. The road owner must exercise "reasonable care." *Id.* at 12 (quoting *Berglund v. City of Spokane*, 4 Wn.2d 309, 315, 103 P.2d 355 (1940)).

In road design cases, "an expert's opinion on the ultimate issue of fact is sufficient to defeat a motion for summary judgment." *Chen, supra*

at p. 23; *Ericks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992). Expert testimony that a road is “inherently dangerous” can create an issue of fact. *Raybell v. State*, 6 Wn. App. 795, 803, 496 P.2d 559 (1972); *Wick v. Clark Cy.*, 86 Wn. App. 376, 379 (1997) (expert said road was “inherently dangerous”). An expert opinion that a highway is “extra hazardous” has been held sufficient to defeat a motion for summary judgment. *Tanguma v. Yakima Cy.*, 18 Wn. App. 555, 557, 569 P.2d 1225 (1997).³

B.) The Plaintiff’s Expert Failed to Deliver Evidence or Testimony That the City Was Negligent.

In support of its summary judgment motion, the City produced competent expert testimony that the crosswalk and roadway, “met all applicable traffic engineering standard.” CP 257. The City’s experts stated that the road conformed to the MUTCD. CP 257.⁴ The intersection at the time of Garcia’s accident was “a reasonably safe crosswalk.” CP 218. It was “reasonably safe for ordinary travel by pedestrians and motorists at the time of the accident in question.” CP 160.

Plaintiff’s sole expert in opposition to the City’s evidence was traffic engineer Tim Miller. CP 583. Miller submitted two declarations.

³ At oral argument, Plaintiff’s counsel claimed the road was “ultra-hazardous” but that was only lawyer’s talk. VRP 2, p. 17. Plaintiff’s expert and sponsoring declarant did not offer such an opinion.

⁴ The Manual on Uniform Traffic Control Devices (MUTCD) provides some evidence of the appropriate duty. *Owen v. BNSF*, 153 Wn.2d 780, 787 n.7 (2005).

CP 583. In his declaration against WSDOT, Miller described what the State “should” have done to make the road safe. CP 540. Miller claimed WSDOT’s “inactions were breaches of responsibility of Section 4D.02” of the MUTCD. CP 538. But as to the City, Miller’s declaration was missing any language remotely resembling that found in the case law, he avoided any expert opinion on the “ultimate issues” and did not even discuss what the City “should” have done. Instead, Miller opined that “the proper exercise of engineering discretion” called for a traditional traffic signal. CP 527. Plaintiff made no effort in the trial court or this court to explain this phrase or suggest that it equates to negligence. Discretion involves situations where reasonable minds can differ. “Discretion” means “individual choice or judgment . . . power of free decision or latitude of choices within certain legal bounds.” W.W. Merriam-Webster.com (last visited January 7, 2010). A failure to exercise “proper discretion” has not been equated to acting unreasonably or falling below the standard of care. At least no case has done so, and this Court should not struggle to do so either.⁵

⁵ At oral argument, Plaintiff’s counsel gamely claimed that an expert does not have to use “magic words.” VRP 2, p. 21. While generally true, at the end of the day words are all that lawyers have. Given the wealth of available options and synonyms for negligence, it is mind boggling why an expert would choose the use of this phrase, except that he could not call the City’s actions negligent, and he could not find evidence that the City’s actions fell below the standard of care.

C.) The Plaintiff's Expert Failed to Establish That A Signal Permit Would Have Been Granted or That A Signal Would Be Built.

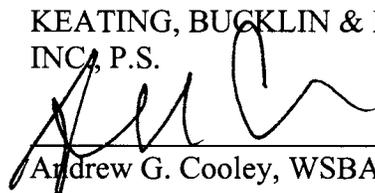
But this Court has a second independent ground to affirm the trial court. Whatever Miller says, he did not explain how this hypothetical permit would be issued and when this new signal would be constructed. The only evidence before this Court is that the eventual traffic signal that was installed took "a special exceptions warrant granted by WSDOT." CP 158. Plaintiff's expert did not claim that such a permit would be granted, or explain why it would be granted in time for the City of Shoreline to install a full signal before the October 26, 2002 accident. Such proof is necessary for Plaintiff to meet the "but for" prong of her causation proof. It was not supplied in this case, which led Judge Canova to dismiss the claims against the City of Shoreline.

IV. CONCLUSION.

Judge Canova's decision should be affirmed. Plaintiff's narrow claim against the City of Shoreline is not supported with evidence that the City was negligent, and no evidence that the City's negligence was the proximate cause of the accident. It would be speculation to say so. The Court should affirm Judge Canova.

RESPECTFULLY SUBMITTED this 26th day of January, 2010.

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



Andrew G. Cooley, WSBA #15189

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on January 27, 2010, the original of the preceding Brief of Respondent City of Shoreline's and Certificate of Service was filed in the Washington State Court of Appeals, Division I, by ABC Legal Messenger, at the following address:

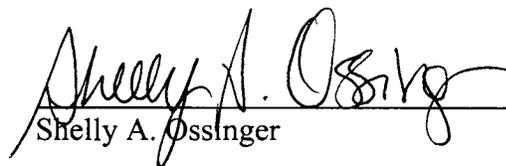
**Court of Appeals of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101**

And I further certify that a copy of the same was served on counsel at the following addresses, by ABC Legal Messenger no later than January 27, 2010:

**Catherine Hendricks
Assistant Attorney General
800 5th Ave., Suite 2000
Seattle, WA 98104-3188**

**Michael William Brown
Lee Smart, P.S., Inc.
701 Pike St., Suite 1800
Seattle, WA 98101-3929**

**John Robert Walicki
Law Office of John R. Walicki
1001 4th Ave., Suite 3200
Seattle, WA 98154-1003**


Shelly A. Ossinger