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NO. 63689-8-I

**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,
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.

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**BRIEF OF RESPONDENT STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION**

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I. INTRODUCTION

Tara Garcia is the personal representative of the estate of her father Frank Garcia. She brought wrongful death action against Diana Cushing and the Washington State Department of Transportation (WSDOT) after her father was killed by a vehicle driven by Ms. Cushing in a marked crosswalk at Aurora Avenue North (SR 99 or Aurora Avenue) and North 170th Street in Shoreline, Washington. CP at 1-8. In her claim against WSDOT, Ms. Garcia alleged that her father would not have been struck and killed by Ms. Cushing had the crosswalk's animated, cautionary, "roving eyes" warning sign been activated at the time of the accident. CP at 1-8; 266-90. At summary judgment, WSDOT argued that it had satisfied its duty to provide Mr. Garcia with a reasonably safe pedestrian crosswalk¹ and that it would require juror speculation to find that WSDOT's discretionary decisions regarding the improvements to the

¹ The evidence before the trial court established that, in the months prior to this accident, WSDOT had made nine different pedestrian safety improvements at the intersection where Ms. Cushing's vehicle struck Mr. Garcia as part of an extensive pedestrian safety project. CP at 146-213. The animated "roving eyes" warning sign was one of several safety measures being installed. \$400,000 in federal safety incentive funds was secured for this demonstration project, which was evaluated by an independent research team at the University of Washington. CP at 150, 151-53. Installation of the animated warning sign required that WSDOT seek specific approval from the Federal Highway Administration (FHWA). CP at 152, 237-53. All of the pedestrian safety improvements made by WSDOT—except the animated warning sign--were operating on the day of Mr. Garcia's accident. CP at 155-56. The animated "roving eyes" warning sign had not been activated because its passive detection system was not functioning properly and new parts had been ordered. CP at 155-56, 438. The new parts arrived on October 30, 2002. CP at 438. At the time of Mr. Garcia's accident, the safety measures in place at the North 170th and SR 99 intersection far exceeded those at any other intersection on the Aurora corridor.

crosswalk at SR 99 and North 170th were a proximate cause of Mr. Garcia's accident. WSDOT maintains that Mr. Garcia's death resulted from the combined negligence of Ms. Cushing and Mr. Garcia who were each in a position to see and avoid the other. The trial court correctly awarded summary judgment to WSDOT² and correctly entered judgment against Ms. Cushing.

II. COUNTERSTATEMENT OF THE ISSUES³

(1) Did the trial court correctly find that WSDOT was not negligent, as a matter of law, where the intersection of SR 99 and North 170th was reasonably safe for ordinary travel by pedestrians and motorists on October 26, 2002?

(2) Did the trial court correctly find that the sole proximate cause of this accident was the combined negligence of Diana Cushing and Frank Garcia?

²After this court denied discretionary review of the award of judgment to WSDOT (CP at 499-504), Mr. Garcia's estate amended its complaint to name the City of Shoreline as a defendant. CP at 487-498. The trial court awarded summary judgment to Shoreline on May 19, 2006. On May 22, 2009, the trial court entered final judgment against Ms. Cushing. CP at 570.

³Ms. Garcia may construe the issues in this appeal too narrowly. This court may affirm on any grounds supported by the record. *State v. Bryant*, 97 Wn. App. 479, 490-91, 983 P.2d 1181 (1999), *review denied*, 140 Wn.2d 1026, *cert. denied*, 121 S. Ct. 576 (2000); RAP 2.5(a). All of the issues identified by WSDOT are supported by the record.

(3) Did the trial court correctly find that a jury would need to speculate in order to find WSDOT was a proximate cause of Mr. Garcia's death?

(4) Did the trial court correctly find that WSDOT's decisions regarding the nature and installation of pedestrian safety improvements at this location were discretionary governmental decisions?

III. COUNTERSTATEMENT OF THE CASE

A. Counterstatement Of Facts

1. Mr. Garcia's Fatal Accident

Frank Garcia, a 47-year-old pedestrian, was struck and fatally injured by Diana Cushing, a 37 year-old motorist, as he was crossing SR 99 in a marked crosswalk at the intersection of North 170th in Shoreline, Washington. *See generally*, CP at 49-130. The accident occurred Saturday, October 26, 2002, at 4:57 p.m. It was daylight. CP 52.

That afternoon, Mr. Garcia had driven to the Pawn Exchange on the eastern side of Aurora Avenue at North 170th to shop for a gold chain. CP at 76-77; 103-05. He asked to use the restroom and was directed to cross the street and use the restroom at Parker's Casino on the western side of Aurora Avenue. CP at 76-77; 103-05. He successfully crossed Aurora when walking westbound to Parker's. CP at

54-55; 103-05. His fatal accident occurred when he was returning to the Pawn Exchange, walking eastbound across the marked North 170th Street crosswalk. CP at 54-59; 76-77; 103-05.

At that time of the accident, Diana Cushing was driving a 1988 white Plymouth Horizon southbound on Aurora in the inside lane at a speed subsequently calculated to be 36 m.p.h.⁴ CP at 58-59; 77. She and her thirteen-year-old son, Andrew Bergstrom, were talking about a movie. CP at 58-59. Two of Andrew's friends were seated in the back seat. CP at 54; 77. Suddenly Andrew yelled for his mother to stop. CP at 58-59. Ms. Cushing slammed on her brakes and hit Mr. Garcia in the crosswalk as he stepped from behind a VW van driven by James Green. CP at 58-59. Mr. Green had come to a complete stop in the southbound outside lane to Ms. Cushing's right in order to allow Mr. Garcia to cross the highway in the crosswalk. CP at 58-59; 77. The two cars behind Green in the southbound outside lane also stopped. CP at 90-93; 107.

Detective James Leach of the Major Accident Response and Reconstruction (MARR) unit of the King County Sheriff's office estimated the collision impact speed to be 27-30 m.p.h. CP at 57. A skid mark of 63 feet was measured at the scene. CP at 75. The right front of Ms. Cushing's vehicle hit Mr. Garcia's left lower leg, he flew

⁴ The speed limit on SR 99 is 40 m.p.h. CP at 305.

into the air, and his head hit the windshield of Ms. Cushing's vehicle.⁵ CP 59, 74-75. After the impact, Mr. Garcia was thrown approximately 49 feet into the intersection (CP at 86); he died at Harborview Hospital at 7:18 a.m. the following morning. CP at 74; 80, 82.

Richard Chapman, the State's accident reconstruction expert (CP at 291-308), confirmed that Ms. Cushing's minimum speed was 36 m.p.h. and that Frank Garcia was struck within the center of the crosswalk just as he entered the inside lane. CP at 304-07.

Ms. Cushing admitted to Detective Leach in a tape-recorded statement taken at the accident scene forty-five minutes after the accident that immediately prior to the accident she was talking to her son and "wasn't really looking." CP at 77; 98-102. By her own admission, Ms. Cushing failed to notice that the VW van in the outside lane to her right had come to a complete stop. CP at 100. She also failed to notice that two vehicles following Mr. Green were slowing or had stopped. CP at 90-93; 100; 107. She overtook and passed all three vehicles before striking Mr. Garcia. CP at 100; 107. She also failed to see Mr. Garcia who was in the marked crosswalk even though he was there

⁵ The accident was captured on the several surveillance cameras surrounding Parker's. CP at 77. The eyewitness accounts and the Parker's tapes are in accord. CP at 90-109. All of the reconstruction experts in the case reviewed the Parker's tapes. CP at 291-308; 393-411. There is no factual dispute regarding the circumstances surrounding the accident.

to be seen. CP at 99-100; 106-09. As she was passing the three vehicles to her right, it was her son who first saw the pedestrian and yelled at her to stop. CP at 58; 76-77. It was only then that she slammed on her brakes. CP at 76-77.

There were other warning signs and visual cues at this intersection which Ms. Cushing failed to notice. CP at 126-30. Unlike the innumerable unmarked crosswalks at street intersections throughout the Aurora Avenue corridor, this particular intersection had been improved for the purpose of enhancing pedestrian safety. There was a painted ladder crosswalk at this intersection. CP at 126-27. Forty feet in advance of the crosswalk was a painted stop bar for approaching vehicles. CP at 128. On either side of the stop bar—to Ms. Cushing's immediate left and to her right—were two-foot by three-and-a-half-foot Yield-for-Pedestrians warning signs with arrows pointing at the stop bar. CP at 128-30. The sign's background was reflective white with a black pedestrian symbol and black lettering. CP at 128-30. The yield symbol was bright red. CP at 128-30. In the immediate vicinity of the crosswalk and stop bar was a landscaped, elevated 150 foot median with a directional warning sign at its northern edge facing Ms. Cushing. CP at 128-30. The median occupied the two-way left-turn lane north and south of the intersection. CP at 128; 153-54. In the middle of the

island was a path cut through the median at ground level for use by pedestrians. CP at 128. Overhead was a pedestrian warning sign⁶ which had not been activated at the time of the accident. CP at 128; 153-54. Three hundred feet in advance of the stop bar on the right hand shoulder was a four-foot by four-foot yellow pedestrian warning sign. CP at 153-54.

Reconstruction expert Chapman also concluded that James Green's brake lights and those of the two vehicles following him had been on for a minimum of three seconds while Frank Garcia was crossing the outside lane in the crosswalk in front of Mr. Green. CP at 306-07.

Despite all of these visual cues, Ms. Cushing failed to recognize that a pedestrian was crossing the marked crosswalk as she approached the intersection. Detective Leach noted in the police traffic collision report that the circumstances contributing to this accident were Ms. Cushing's improper passing (#6), her failure to grant the right-of-way to a pedestrian (#22), and her inattention (#23). CP at 64. Ms. Cushing was charged with Negligent Driving in the Second Degree by the King County Prosecutor's Office after consideration of a Vehicular Homicide charge. CP at 76-77. In Detective Leach's opinion,

⁶ This is the "roving eye" sign discussed below. As the photograph illustrates, it was dark at the time of Mr. Garcia's accident. CP at 128.

the inactive “roving eyes” warning sign did not cause or contribute to the accident. CP at 59.

In the block where this accident occurred, Aurora Avenue is a six-lane arterial with a posted speed limit of 40 m.p.h. CP at 305. WSDOT had no duty to install a stop light at this intersection because of the small amount of pedestrian and motor vehicle traffic crossing Aurora at this location. CP at 156-57. The intersection did not meet state or federal criteria, referred to as warrants, for the installation of a traffic light. CP at 156-57.

WSDOT also had no duty to install a cautionary pedestrian warning sign at this location. CP at 156-57; RCW 46.04.160; RCW 46.61.235(1)⁷. This intersection constituted a legal pedestrian crosswalk in its unimproved state before any pedestrian improvements were made at this location. CP at 156-57; RCW 46.04.160; RCW 46.61.235(1).

2. Status Of Pedestrian Improvements At North 170th Street And SR 99

In 1999, WSDOT and the City of Shoreline combined federal pedestrian safety grants to make \$345,000 in pedestrian improvements at

⁷ The statutes and pattern instructions (WPI) referred to throughout this brief are included in the Appendix.

this location, North 170th Street, and at an adjoining location, North 165th Street. *See generally*, CP at 146-213.

The project had to be submitted to the Federal Highway Administration (FHWA) for approval and authorization to make the improvements as the animated “roving eyes” cautionary warning sign and the advanced yield bars were non-standard traffic control devices. *See generally*, CP at 237-53. The FHWA granted approval on September 2, 2000. CP at 238; 252-53.

The project was substantially completed on June 11, 2002. CP at 154, ¶ 20. Nine pedestrian safety improvements had been installed before Mr. Garcia’s accident:

- (1) A marked crosswalk
- (2) Raised planted medians with a pedestrian refuge path cut through the median at an angle so pedestrians were directed toward a view of oncoming traffic;
- (3) Advance yield bars 40 feet in advance of the designated pedestrian crosswalk;
- (4) 2’ x 3½’ advanced Yield for Pedestrians Warning Signs on both sides of the yield bar to the approaching driver’s right and left;
- (5) Enhanced overhead lighting of the intersection and crosswalk;
- (6) Relocated transit stops;
- (7) New sidewalks, curbs and gutters;

(8) A 4' x 4' standard international Pedestrian Warning Sign 300 feet in advance of the crosswalk with an amber beacon;

(9) Overhead electric ITS/LED cautionary animated “roving eyes” warning signs for both pedestrians and motorists.

CP at 153-54, ¶19. Only the animated “roving eyes” warning sign was not operational at the time of Mr. Garcia’s accident. CP at 155-56, ¶s 23-25.

The cautionary, animated, “roving eyes” warning sign was not activated because the passive microwave detection system⁸ which activated the “roving eyes” warning lights was malfunctioning and had not passed its testing phase. CP at 155, ¶s 23-24; CP at 128.⁹ The passive microwave detection system continued to malfunction throughout October 2002. CP 155-56. The “roving eyes” would turn on when no pedestrians were present and the “roving eyes” would fail to turn off when pedestrians had completed the crossing movement. CP at 155-56, ¶s 23-25. Because of passive microwave detection system was

⁸ WSDOT’s original request to the FHWA specified that the system it would be testing would have microwave directional sensors like the systems tested in prior FHWA studies. CP at 248. Passive systems (like the proposed microwave detectors) are used because of the comparatively small number of pedestrians willing to use a push button system. CP at 192-193. Subsequent study of *this* intersection (once manual controls had been put in place) found that only one third of the pedestrians pushed the button to activate the “roving eyes.” CP at 192-93.

⁹The “roving eye” signal at North 170th and SR 99 (which is dark) is depicted in Detective Leach’s photographs. CP at 128. The “roving eye” sign is explained in an exhibit to WSDOT regional traffic engineer Mark Leth’s Declaration. CP at 168.

malfunctioning, the “roving eye” system had not been activated on October 26, 2002, when Mr. Garcia was killed.

On November 20, 2002, the system was shut down and the passive microwave detection system replaced with a manual, pedestrian-activated push-button device. CP at 155-56, ¶s 27. This device functioned appropriately at North 170th and North 165th from November 27, 2002 until the “roving eyes” signs were removed in January 2004. The demonstration project was evaluated by the University of Washington (Washington Transportation Center / TRAC) and deactivated at the request of the City of Shoreline. CP at 155-56, ¶s 26-27.

An evaluation of the project conducted by the University of Washington TRAC Center concluded in March 2003 that the safety treatments at North 170th and North 165th “significantly improved vehicle compliance in yielding for pedestrians.” CP at 170-213. Higher motorist yielding behaviors were noted at North 170th after the crosswalks were marked and yield bars installed and before activation of the “roving eyes” warning sign. CP at 192. The study also noted that there had *not* been a significant change in shielding conflict¹⁰ during the

¹⁰ A shielding conflict is defined as a vehicle in the lane closest to the pedestrian yielding while vehicles in the adjacent travel lane(s) still proceed. CP at 195. Mr. Garcia’s death was part of a shielding conflict.

various treatments, except for the northbound direction of Aurora at 170th.¹¹ CP at 195.

3. Expert Testimony

The three highway engineering experts who testified on behalf of WSDOT, Charles Zegeer of the University of North Carolina Highway Safety Research Center; Michael Cynecki, traffic engineer for the City of Phoenix and a member of, TRB and ITE Pedestrian Committees; and Mark Leth, traffic engineer, Northwest Region WSDOT all concluded that, at the time of Frank Garcia's accident, the intersection of SR 99 and North 170th Street and its crosswalk were reasonably safe for ordinary travel. CP at 160, ¶35; 218 ¶6; 257 ¶11.

Timothy G. Miller, the expert retained by Mr. Garcia's estate, focused on the many changes that *might* have made the intersection safer, speculating that WSDOT *should* have activated the "roving eyes" system sooner, *should* have left it operating during the period it was malfunctioning, *should* have used pushbutton controls rather than microwave technology, *should* have used the more traditional over the

¹¹ Mr. Garcia was killed in the southbound lanes of Aurora. No significant change in shielding conflict was recorded in the southbound lanes after the "roving eyes" were activated on November 27, 2002. CP at 195. Timothy G. Miller, the expert for Mr. Garcia's estate, erroneously argues that the "roving eyes" animated warning sign had been successful in reducing "multiple threat accidents" (his term for the shielding conflict). CP at 403. While that may have been the theoretical evidence that WSDOT relied upon when it initiated the project, the *actual* project data showed a slight *increase* in shielding conflicts (3%) at N 170th Street. CP at 196.

roadway amber light display, or *should* have installed pedestrian instructions signs (as WSDOT did on 11/19/02) once the manual system was implemented. CP at 403-04. Mr. Miller did not contest the core WSDOT expert opinion that the intersection and the crosswalk were reasonably safe for ordinary travel. CP at 393-404.

B. Procedural Posture

Ms. Garcia, acting individually and as personal representative of her father's estate, filed a Complaint for Damages and Wrongful Death, on November 28, 2003. CP at 1-8.

The trial court heard oral argument on WSDOT's motion for summary judgment and entered its oral ruling on March 26, 2005. CP at 476. The court's written order on summary judgment was entered on April 7, 2005. CP at 477-80. When it entered the summary judgment order, the trial court did not make the finding required by RAP 2.2 (d) in multiple party actions "that there is no just reason for delay," although it had been asked to enter CR 54(b) findings by Ms. Garcia. CP 469-75; 477-80. The trial court chose not to enter 54(b) findings because Ms. Cushing remained as a defendant for trial.

Ms. Garcia sought discretionary review of the trial court's award of summary judgment to WSDOT. CP at 481. On August 5, 2005, Commissioner Susan Craighead denied discretionary review, finding that

Ms. Garcia failed to establish that the trial court's dismissal of her claim constituted probable error on the issue of legal causation. CR at 499-504. Commissioner Craighead found that the intersection of North 170th and SR 99 was safe for ordinary travel. CP at 499-504.

On October 26, 2005, Ms Garcia amended her complaint, naming the City of Shoreline as a defendant. CP 487-95. The trial court granted Shoreline's motion for summary judgment on May 19, 2006. CP at 565-67. The trial court subsequently entered a final judgment against Ms. Cushing for \$883,884.31, with costs of \$447.50 and interest accruing at 12% per annum. CP at 570.

This appeal against WSDOT and the City of Shoreline followed.

IV. ARGUMENT

A. Standard of Review

This court reviews summary judgment orders *de novo* and generally performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). It examines the pleadings, affidavits, and depositions before the trial court and "take[s] the position of the trial court and assume[s] facts [and reasonable inferences] most favorable to the nonmoving party." *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). Affirming the trial court's

award of summary judgment is proper if the record before the trial court establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

B. Ms. Garcia Cannot Satisfy The Burden Of Proving WSDOT Was Negligent

Ms. Garcia alleges that WSDOT was negligent. In order to prove this claim, Ms. Garcia must establish four elements: 1) that WSDOT owed a duty to Frank Garcia; 2) that WSDOT breached that duty; 3) that WSDOT's breach was a proximate cause of Ms. Garcia's injury; 4) that Ms. Garcia (either individually or as the personal representative of Frank Garcia's estate) was damaged. *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002); *Hartley v. State* 103 Wn.2d at 777; Restatement (Second) of Torts §§ 281, 284 (1965).

Ms. Garcia has the burden to prove each element of her negligence case by a preponderance of the evidence. WPI 21.02, WPI 21.01; *Peacock v. Piper*, 81 Wn.2d 731, 735, 504 P.2d 1124 (1973). Preponderance means "more probably true than not true." *In Re Sego*, 82 Wn.2d 736, 739 n.2, 513 P.2d 831 (1973); *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 673, 374 P.2d 939 (1962).

In this case, Ms. Garcia failed to prove two of the four elements of negligence. She failed to show that WSDOT breached any duty it owed to

her father, since, on October 25, 2002, the intersection and crosswalk where Mr. Garcia was killed were safe for ordinary travel by pedestrians and motorists. And she failed to show that WSDOT was a proximate cause of her father's death since it would have required juror speculation to find that WSDOT's discretionary decision not to activate the "roving eyes" warning sign (while the passive microwave detection system was malfunctioning) was a factual or legal cause of the accident.

C. Diana Cushing Was A Proximate Cause Of This Accident

The trial court entered Final Judgment against Diana Cushing in this case. CP at 570. Ms. Garcia does not challenge this judgment (which accurately reflects the trial court's determination of proximate cause in this case).

If this accident had occurred before the pedestrian improvement project was initiated¹², Ms. Cushing would have been at fault for causing this accident under the same fact pattern. An unmarked legal crosswalk existed at North 170th by virtue of RCW 46.04.160:

46.04.160 Crosswalk. "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.

¹² Construction began on March 21, 2002, approximately six months before Mr. Garcia's accident. CP at 154.

RCW 46.61.235(1) provides that an approaching driver has a *duty to stop* for a pedestrian when the pedestrian is on the roadway and in an unmarked or marked crosswalk:

46.04.160 Crosswalk. (1) The operator of an approaching vehicle *shall stop and remain stopped* to allow a pedestrian or bicycle to cross the roadway within an unmarked or marked crosswalk when the pedestrian or bicycle is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning. For purposes of this section “half of the roadway” means all traffic lanes carrying traffic in one direction of travel, and includes the entire width of a one-way roadway.

WPI 70.03.01 defines a crosswalk in plain language:

[A [marked] crosswalk means any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface of the roadway.]

[A crosswalk exists at every intersection of roadways, regardless of whether the roadway is marked with crosswalk lines. The crosswalk is an extension of the existing curbing and sidewalks. The width of the crosswalk is from the curbing to the farthest edge of the sidewalk. The crosswalk extends across the roadway to the opposite side curbing and sidewalk.]

[A crosswalk exists at every intersection of roadways, regardless of whether the roadway is marked with crosswalk lines. An intersection is defined as the area where roadways may collide. The crosswalk extends across the roadway at the same angle as the roadways meet. The crosswalk is 10 feet wide. It begins at the edge of the intersection and extends 10 feet back from the intersection. [Existing curbing defines the edge of the intersection.]

RCW 46.61.235(4) provides that a driver approaching from the rear shall not overtake and pass a vehicle stopped at an unmarked or marked crosswalk:

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

Ms. Cushing violated both provisions of RCW 46.61.235. She failed to stop for a pedestrian in a marked crosswalk. She overtook and passed the vehicles stopped at a marked crosswalk for a pedestrian crossing in the crosswalk. She was cited for negligent driving on the basis of both of these violations and, accurately, found by the trial court in this case to be a proximate cause of Mr. Garcia's death.

D. Frank Garcia Was A Proximate Cause Of This Accident

The evidence also proves that Frank Garcia was a proximate cause of this accident because he failed to look at the inside lane before he stepped into it to see if a vehicle was approaching at a speed that would make it impossible for that vehicle to stop.

RCW 46.61.235(2) provides:

(2) No pedestrian or bicycle shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle which is so close that it is impossible for the driver to stop.

In the present case, there is no evidence that Mr. Garcia slowed or stopped before proceeding into the inside lane of Aurora.¹³ CP at 77.

WPI 70.01 provides “it is the duty of every person using a public street or highway [whether a pedestrian or a driver of a vehicle] to exercise ordinary care to avoid placing [himself or herself or] others in danger and to exercise ordinary care to avoid a collision. *Robison v. Simard*, 57 Wn.2d 850, 360 P.2d 153 (1961); *Hanson v. Anderson*, 53 Wn.2d 601, 335 P.2d 581 (1959).

WPI 70.06 provides: “Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption *until he or she knows, or in the exercise of ordinary care should know, to the contrary.*” *Kelsey v. Pollock*, 59 Wn.2d 796, 370 P.2d 598 (1962) (emphasis added).

WPI 12.06 provides: “Every person has a duty to see what would be seen by a person exercising ordinary care.”

In *Hammel v. Rife*, 37 Wn. App. 577, 692 P.2d 949 (1984), the Supreme Court held that was not error to give WPI 70.01 in combination with WPI 70.06 and WPI 12.06. In *Alston v. Blythe*, 88 Wn. App. 26,

¹³ The testimony of Cushing’s thirteen-year-old son Andrew Bergstrom was that “the pedestrian was walking at a fast pace and then was startled and jumped backwards.” CP at 54-55.

39, 943 P.2d 692 (1997), Division Two approved the use of WPI 70.06 and WPI 12.06 in a case in which a pedestrian (who was not in a crosswalk, either marked or unmarked) was killed by a vehicle traveling in the outside lane on Portland Avenue in Tacoma after the driver of a truck in the inside lane had yielded for the pedestrian and motioned her across highway.

In an accident resulting from a “shielding conflict” or a “multiple threat” like this one, Frank Garcia’s failure to proceed cautiously across the inside lane of Aurora was also a proximate cause of his death.

E. WSDOT Satisfied Its Duty to Maintain This Intersection In A Reasonably Safe Condition For Ordinary Travel

WSDOT’s duty to Frank Garcia (and to all pedestrians and motorists) at the time of this accident was to construct, design and maintain the intersection of North 170th Street and SR 99 so that it was reasonably safe for *ordinary travel* by motorists and pedestrians. The limited duty of government entities with respect to the design, construction, maintenance and repair of their public roads, streets and highways was reaffirmed by the Supreme Court in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002): “A county / city / town / state has a duty to exercise ordinary care in the construction /repair / maintenance of its public roads /streets / highways to keep them in a

reasonably safe condition for *ordinary* travel.” 146 Wn.2d. at 254 (emphasis in original).

In *Keller*, the Supreme Court made it clear that it was not overruling prior precedent in reaching its holding. *Keller*, 146 Wn.2d at 254-55. The duty of a government entity with respect to its streets, roads and highways is the same now as it was before the *Keller* opinion.

In the opinion of Mark Leth, traffic engineer, Northwest Region WSDOT, at the time of Mr. Garcia’s accident, the intersection and crosswalk at North 17th Street and SR 99 were reasonably safe for ordinary travel by motorists and pedestrians. CP at 159-60; *see also*, CP 218 ¶6 (Zegeer); 257 ¶11 (Cynecki). Although the animated “roving eyes” cautionary warning sign had not been activated, eight other pedestrian improvements were in place:

- (1) Marked crosswalks;
- (2) Medians with a pedestrian refuge;
- (3) Advance yield bars;
- (4) Advance yield to pedestrian warning signs;
- (5) Enhanced lighting;
- (6) Relocated transit stops;
- (7) New sidewalks, curbs and gutters;
- (8) Pedestrian warning sign.

The undisputed evidence indicates that WSDOT had discharged its duty to Frank Garcia and Diana Cushing at the time of this accident. Ms. Garcia contends that WSDOT had a duty to make a safe road safer.

Under Washington law, WSDOT had no such duty. *Ruff v. Cty. of King*, 125 Wn.2d at 706¹⁴; *Lucas v. Phillips*, 34 Wn.2d 591, 596, 209 P.2d 279 (1949); *Tanguma v. Yakima Cty.*, 18 Wn. App. 555, 558-59, 569 P.2d 1225 (1977).

F. The Acts or Omissions WSDOT Were Not A Proximate Cause Frank Garcia's Fatal Accident

Absent proof of causation, Ms. Garcia's claims against WSDOT must fail. *Hartley v. State, supra*. *Hartley* was wrongful death action brought by the heirs of Jeanette Hartley, who was killed when an intoxicated motorist, Eugene Johnson, crossed the centerline and collided head-on with her vehicle. Plaintiffs filed suit against the State and County alleging negligence based on the government's failure to revoke Mr. Johnson's driver's license prior to the accident on the grounds that he was a habitual offender.

In *Hartley*, the State and County moved for dismissal, maintaining that their omissions were not a proximate cause of plaintiff's death. The Supreme Court agreed finding that the failure of the governmental entities to

¹⁴ Recently, a panel of this court distinguished *Ruff* in *Xiao Ping Chen v. City of Seattle*, ___ Wn. App. ___, ___ P.3d ___, 209 WL 5067512 (December 28, 2009). In *Chen*, this court applied *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940) and found that "the trier of fact may infer that the city breached the duty of care it owed to [plaintiff] based on the totality of the circumstances." Slip Opinion at 10. Although the City of Seattle seeks Supreme Court review of *Chen* based upon its incompatibility with *Keller v. City of Spokane*, WSDOT would also be entitled to summary judgment in this case under the test applied in *Chen*. The totality of the circumstances here demonstrate that, as a matter of law, WSDOT did not breach its duty to Mr. Garcia.

revoke Johnson's license was too remote and insubstantial to impose liability for Johnson's drunk driving and, therefore, was not a legal cause of Mrs. Hartley's death.

In reaching this decision, the *Hartley* court defined proximate cause.

Washington law recognizes two elements to proximate cause: Cause in fact and legal causation. (citations omitted)

Cause in fact refers to the "but for" consequences of an act--the physical connection between an act and an injury. [Citation omitted.] "It is a matter of what has in fact occurred." W. Prosser, *Torts* 237 (4th ed. 1971).

...

Legal causation, on the other hand, 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. (citation omitted)

Hartley, 103 Wn.2d at 778-79.

1. Tara Garcia Cannot Establish That WSDOT's Actions Or Omissions Were A Cause In Fact Of Frank Garcia's Injuries

The *Hartley* opinion relies upon Washington Pattern Jury Instruction 15.01 as a definition of cause in fact: "a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury could not have

happened.” *Hartley*, 103 Wn.2d at 778. The *Hartley* opinion recognizes that summary judgments for want of “cause in fact” causation are appropriate where “but one reasonable conclusion is possible.” *Hartley*, 103 Wn.2d at 778.

Under Washington law, a plaintiff has no cause of action where an accident and injury would have occurred regardless of or in spite of the alleged wrongful conduct of the defendant, because the conduct or omissions of the defendants were merely circumstances or conditions at the scene of the accident, not causes of the accident. *Ross v. Altvater*, 72 Wn.2d 63, 431 P.2d 701 (1967) (holding that the cause of plaintiff’s injury was the fact that plaintiff’s vehicle lost traction on the ice and affirming dismissal of the defendant on the grounds that the accident would have occurred whether or not defendant had placed warning flares); *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 444 P.2d 701 (1968) (holding that an accident would have occurred regardless of the alleged wrongful conduct of two following motorists and affirming their dismissal where their presence constituted “merely a condition of the accident, not a proximate cause of it”).

Reasonable minds cannot come to any other conclusion other than that the actions of Diana Cushing and Frank Garcia were the sole

proximate cause of this accident as either party should have seen that the other was approaching and an accident was imminent.

A jury would be required to speculate in order to conclude that Frank Garcia's accident would have been avoided by the activation of the animated, "roving eyes" cautionary sign. Ms. Cushing failed to recognize that the three vehicles to her right had stopped for a pedestrian in a crosswalk; she failed to note a ladder crosswalk, a pedestrian median, and three large warning signs. It is improbable that another cautionary warning sign would have caused her to react any differently given that she admitted she was not paying attention to the visual cues and signs around her. As Ms. Cushing stated in her interview, "I was talking to my son... and I wasn't really looking." CP at 99. Since the accident would likely have occurred due to Ms Cushing's inattention, even if the cautionary "roving eyes" warning sign had been activated, then, on the authority of *Altvater* and *Ferrin*, the State's alleged omission in failing to activate the sign is not a cause in fact of this accident, but simply a circumstance present at the accident scene at the time of this accident.

2. Ms. Garcia Cannot Establish That WSDOT's Actions Or Omissions Were A Legal Cause Of Mr. Garcia's Death As The State Has No Duty To Make A Safe Road Safer

Legal causation was defined in *Hartley* as a consideration separate from cause in fact causation.

Legal causation, on the other hand, 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, 103 Wn.2d at 779.

The *Hartley* opinion identified legal causation and duty as two sides of the same coin. *Hartley*, 103 Wn.2d at 780.

Thus, it may be immaterial whether we analyze the county and state's liability on the basis of duty or legal causation. Policy considerations and common sense dictate whether the connection of the county and state with the collision is too remote or insubstantial to impose liability.

Id. at 784.

In *Ruff v. King Co.*, *supra*, the Supreme Court held there is no duty to make a safe road safer in order to protect innocent drivers from the negligent actions of careless motorists. *Ruff*, 125 Wn.2d at 891.

Ms. Garcia makes the same argument that the plaintiff presented in *Ruff*: the State should be required to protect other drivers against the

extraordinary acts of negligent drivers by making additional capital improvements and safety improvements to a highway intersection which met or exceeded all applicable standards and was safe for ordinary travel at the time of the accident. As the declarations of Charles Zegeer, Michael Cynecki and Mark Leth indicate, this highway intersection and its crosswalk met all applicable codes and standards at the time of the accident and were safe for ordinary travel by motorists and pedestrians alike.

Under *Hartley*, and the other precedents that define legal causation, “policy considerations and common sense dictate whether the connection of...state with the collision is too remote or insubstantial to impose liability.” *Hartley*, 103 Wn.2d at 784. Logic, common sense, justice, policy and precedent all make it clear that Ms. Cushing would have been impervious to yet another warning sign. *Hartley*, 103 Wn.2d at 780. Ms. Cushing’s inattention was the proximate cause of this accident. The trial court properly found that Ms. Garcia failed to establish that WSDOT was a proximate cause of this accident because she failed to establish legal causation. It would be bad policy to require WSDOT to make safe roads safer.

G. The State's Decisions Concerning The SR 99 Shoreline Pedestrian Safety Demonstration Project Are Discretionary Governmental Decisions Which Are Neither Tortious Nor Actionable

Although sovereign immunity has been waived by statute, in most respects, by the Federal government and nearly every state, the concept of an exemption from judicial challenge for discretionary, governmental policy-making decisions has been universally recognized. W. Page Keeton, et al., *Prosser and Keaton on the Law of Torts* ¶ 131, at 1039 and 1046 (5th ed. 1984); Restatement (Second) of Torts § 895 cmt. B § C (1979). Policy and planning decisions are exempt whereas operational decisions are not. *Dalehite v. United States*, 346 U.S. 15, 34-35, 73 S. Ct. 956, 97 L. Ed. 1427 (1953). “The main idea here is that certain governmental activities are legislative or executive in nature and that any judicial control of those activities, in tort suits or otherwise, would disrupt the balanced separation of powers of these branches of government.” *Prosser, supra*, at 1039.

Government cannot merely be made liable as private persons are, for public entities are fundamentally different from private persons. Private persons do not make laws . . . Only public entities are required to build and maintain . . . streets . . . and highways. Unlike many private persons, a private entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.

4 Cal. Law Revision Comm'n 810 (1963).

Stewart v. State, 92 Wn.2d 285, 597 P.2d 101 (1979), recognizes the non-tortious nature of discretionary highway planning decisions if certain criteria are met.

In *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 254, 407 P.2d 440 (1965), we recognized that, as a matter of public policy, not every act, omission or decision of government should subject the governmental unit to potential liability. We postulated four preliminary questions (citation omitted):

(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 . . . ?

Stewart, 92 Wn.2d 285 at 293-94.

In *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990), Division Two found that the decision to install a Jersey barrier was discretionary and its implementation pursuant to the State's budgetary process was reasonable. The facts of *Jenson* are helpful in analyzing the present case.

On May 6, 1983, plaintiff Jenson was injured in a head-on collision with Scribner who was traveling in the opposite direction and crossed the centerline into Jenson's lane of travel. The State was alleged to be negligent in failing to install a Jersey barrier, which would have divided the north and southbound lanes. The trial court granted the State's motion for summary judgment ruling that the State's omission was not the proximate cause of plaintiff's injuries. On appeal, Division Two sustained the trial court by emphasizing the non-tortious nature of the Department of Transportation's discretionary decision-making process. Plaintiff stipulated that the State's decision as to when and where to install a Jersey barrier was discretionary, but alleged that the State was negligent in its implementation. Plaintiff's contended that there was an unreasonable delay in the installation of the barrier. The Court of Appeals ruled that there was no unreasonable delay as a matter of law where the department followed the Legislature's budgetary process. The project was proposed to the Transportation Commission in August of 1981, the Legislature authorized design and preliminary engineering for the 1981/1983 biennium, and construction funds for the 1983/1985 biennium. The record reflected that design work was completed in January 1983, the project was advertised for bids in May 1983, construction began in June 1983, and was completed in August 1983. Plaintiff was injured on May 6, 1983 before

construction began. The Court concluded that in these circumstances “reasonable minds could only conclude that there was no unreasonable delay.” *Jenson*, 57 Wn. App. at 482.

In the case of Frank Garcia, the discretionary decision to make and implement in various phases multiple pedestrian improvements at the intersection of SR 99 and North 170th including the animated “roving eyes” cautionary warning sign is a discretionary governmental decision and is therefore neither nor tortious nor actionable.

In particular, the passive microwave detection system which was not operative on October 26, 2002, had been central to WSDOT’s discretionary request to FHWA for permission to implement the “roving eyes” animated warning system. WSDOT’s original request to the FHWA specified that the system it would be testing would have microwave directional sensors like the systems tested in prior FHWA studies. CP at 248. Passive systems (like the proposed microwave detectors) were part of the North 170th and SR 99 demonstration project because of the comparatively small number of pedestrians willing to use a push button system. CP at 192-93. Although the passive microwave system was ultimately replaced at the North 170th and SR 99 demonstration project because it was not effective in the Aurora corridor, the subsequent University of Washington analysis of this aspect

of the project established that passive microwave system would have provided a more accurate test of the “roving eye” technology since only one third of the pedestrians at the North 170th and SR 99 demonstration project pushed the button to activate the “roving eye” technology. CP at 192-93.

Every aspect of the demonstration project at North 170th and SR 99 was discretionary, including the prolonged attempt to activate the passive microwave sensors that had been key to the effectiveness of the “roving eye” technology in other jurisdictions. These were discretionary governmental decisions that were neither tortious nor actionable.

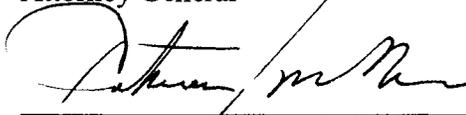
V. CONCLUSION

WSDOT respectfully requests that this court affirm the trial court’s dismissal of Ms. Garcia’s negligence claim on one or more of the grounds articulated in the trial court record. WSDOT fulfilled its duty to provide an intersection and a crosswalk that were reasonably safe for ordinary

travel. This accident was proximately caused by the negligence of Diana Cushing and Frank Garcia.

RESPECTFULLY SUBMITTED this 22 day of February, 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'Catherine Hendricks', written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the undersigned date the original and one copy of the preceding Brief of Respondent State of Washington Department of Transportation and Certificate Of Service were filed in the Washington State Court of Appeals, Division I, by legal messenger, at the following address:

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And, I further certify that a copy of the preceding Brief of Respondent State of Washington Department of Transportation was served on counsel at the following addresses, by legal messenger:

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DATED this 22nd day of February, 2010, at Seattle, WA.


PATTI L. VINCENT

STATUTORY APPENDIX

RCW 46.04.160

Crosswalk.

"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.

[1961 c 12 § 46.04.160. Prior: 1959 c 49 § 17; prior: 1937 c 189 § 1, part; RRS § 6360-1, part.]

* * *

RCW 46.61.235

Crosswalks.

(1) The operator of an approaching vehicle shall stop and remain stopped to allow a pedestrian or bicycle to cross the roadway within an unmarked or marked crosswalk when the pedestrian or bicycle is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning. For purposes of this section "half of the roadway" means all traffic lanes carrying traffic in one direction of travel, and includes the entire width of a one-way roadway.

* * *

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

[2000 c 85 § 1; 1993 c 153 § 1; 1990 c 241 § 4; 1965 ex.s. c 155 § 34.]

**WASHINGTON PATTERN INSTRUCTIONS
APPENDIX**

WPI 15.01

PROXIMATE CAUSE—DEFINITION

The term "proximate cause" means a cause which in a direct sequence [unbroken by any new independent cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

[There may be more than one proximate cause of an [injury] [event].]

WPI 70.03.01

CROSSWALK—DEFINITION

[A [marked] crosswalk means any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface of the roadway.]

[A crosswalk exists at every intersection of roadways, regardless of whether the roadway is marked with crosswalk lines. The crosswalk is an extension of the existing curbing and sidewalks. The width of the crosswalk is from the curbing to the farthest edge of the sidewalk. The crosswalk extends across the roadway to the opposite side curbing and sidewalk.]

[A crosswalk exists at every intersection of roadways, regardless of whether the roadway is marked with crosswalk lines. An intersection is defined as the area where roadways meet and vehicles traveling upon the different roadways may collide. The crosswalk extends across the roadway at the same angle as the roadways meet. The crosswalk is 10 feet wide. It begins at the edge of the intersection and extends 10 feet back from the intersection. [Existing curbing defines the edge of the intersection.]]

WPI 12.06

DUTY OF SEEING

Every person has a duty to see what would be seen by a person exercising ordinary care.

WPI 70.01

GENERAL DUTY—DRIVER OR PEDESTRIAN

It is the duty of every person using a public street or highway [whether a pedestrian or a driver of a vehicle] to exercise ordinary care to avoid placing [himself or herself or] others in danger and to exercise ordinary care to avoid a collision.