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NO. 640241-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

GERALD R. TARUTIS, as Guardian ad Litem for  
Nicholas K. Messenger,

Appellant,

v.

THE CITY OF SEATTLE,

Appellee.

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Appeal from Superior Court of King County  
Honorable James Rogers  
NO. 07-2-33883-7 SEA

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

On February 17, 2005, 12-year-old Nick Messenger sustained permanent brain damage when the side mirror of a van struck him in the head as he crossed a busy city street in a legal crosswalk. Nick and a friend were walking home from school when the incident occurred.

For several years, citizens of the Crown Hill community where this incident occurred had complained to the City of Seattle that the intersection was dangerous for pedestrians, and had asked the City for help. Following Nick's incident, a transportation engineer retained on behalf of the boy evaluated traffic volumes and determined that there were insufficient gaps for pedestrians to make it across the street without being confronted by a car and at risk of being hit. His analysis was that the crossing area was inherently dangerous.

The City took the position below that, unless there was a specific defect in the crosswalk or a physical defect in the roadway itself, it could not be held responsible for operating an unsafe roadway. CP 340, 341. Plaintiff contended that the City's duty to provide the traveling public with reasonably safe roads extends to the overall traffic conditions and pedestrian safety, not merely the roadway's physical characteristics.

This appeal raises a number of issues, but the overriding issue is whether or not the trial court erred in granting Defendant City of Seattle's

motion for summary judgment and dismissing Plaintiff's claims against it. This Court's recent opinion in *Chen v. City of Seattle*, No. 62838-1-I (Dec. 28, 2009) (attached as Appendix "A"), is dispositive and requires reversal of the summary judgment in favor of the City.

This case is on all fours<sup>1</sup> with *Chen*, decided by this Court only a short time ago. In *Chen*, this Court rejected the very position that Defendant City attempted to advance below in this case, holding that a plaintiff

. . . need not prove that the crosswalk contained a particular defective physical characteristic rendering the crosswalk inherently misleading or inherently dangerous. Rather, a trier of fact may infer that the city breached the duty of care it owed . . . based on the totality of the circumstances.

*Chen*, Slip Op. at 11.

The reversal of summary judgment in *Chen* requires reversal here.

## II. ASSIGNMENTS OF ERROR

The trial court erred in entering the following orders:

1. The July 31, 2009 Order Granting Defendant City of Seattle's Motion for Summary Judgment. CP 970-971.
2. The July 31, 2009 Order Denying Plaintiff's Motion for Partial Summary Judgment -- Notice of Unsafe Intersection. CP 975-976.
3. The July 30, 2009 Order Denying Plaintiff's Motion for

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<sup>1</sup> See factual parallels discussed at pp. 30 to 32, *infra*.

Partial Summary Judgment Striking Defendant City of Seattle's Affirmative Defense of Contributory Fault. CP 972-CP 974.<sup>2</sup>

4. The July 31, 2009 Order Granting Defendant City of Seattle's Motion to Strike Inadmissible Evidence. CP 977-979.

5. The trial court also erred in denying in part Plaintiff's Motion to Exclude Evidence of Prior Settlement. CP 980-981.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**Issue One:** Did the trial court err in granting Defendant City's motion for summary judgment when the evidence established that conditions existing along 15th Avenue NW between 87<sup>th</sup> Street NW and Holman Road NW -- including high traffic volumes, lack of gaps in traffic, five lanes, the presence of school children, the presence of a shopping center and other businesses that generate pedestrian traffic, the lack of any signs warning pedestrians not to cross, the lack of any signs warning drivers of the pedestrian crossing, and the fact that warrants for a traffic signal were met at Holman and 15<sup>th</sup> -- created an inherently dangerous condition for pedestrians attempting to cross 15th?

**Answer:** Yes. The volume of traffic on 15th Avenue between 87<sup>th</sup> Street NW and Holman Road NW was so heavy that there were virtually

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<sup>2</sup> This Order also denied Plaintiff's Motion for Partial Summary Judgment Striking Defendant's Affirmative Defense of Third-Party Fault. Plaintiff does not assign error to this portion of the Order because he is not appealing this issue.

no gaps in traffic during the peak hour at this location. Because of this lack of traffic gaps, residents who lived in the area complained to Defendant City that pedestrians trying to cross 15th at 87th could not safely use the crosswalk. Defendant City did nothing in response. According to Transportation Engineer Edward Stevens, given the vehicle volumes and lack of gaps in traffic for pedestrian crossings on 15th, this street was inherently dangerous on February 17, 2005 when Nick Messenger was hit by a van while trying to cross in the lawful crosswalk at 15th and 87th. Because there was evidence that the subject intersection was inherently dangerous and not reasonably safe for pedestrians, the trial court erred in granting Defendant City's summary judgment motion.

**Issue Two:** Did the trial court err in denying Plaintiff's partial summary judgment motion asking the court to find as a matter of law that Defendant City had been put on notice, prior to the Messenger incident, that the intersection of 15<sup>th</sup> Avenue NW and NW 87<sup>th</sup> was unsafe for pedestrians?

**Answer:** Yes. The evidence established that citizens residing in the vicinity of the subject intersection had for a number of years complained to the City that 15th Avenue was hazardous for persons trying to cross in this unmarked crosswalk. As this Court observed in *Chen*,

citizen complaints such as those made in this case are sufficient to put a municipality on notice of a dangerous roadway condition.

**Issue Three:** Did the trial court err in denying Plaintiff's partial summary judgment motion to strike Defendant City's affirmative defense of contributory fault on the part of Nick Messenger?

**Answer:** Yes. Under Washington law, the right of way protection afforded a pedestrian in a crosswalk is exceedingly strong; a pedestrian in a crosswalk has a right to rely on this protection and to assume that motorists will respect it until he or she knows or should know that an approaching vehicle is not going to yield the right of way. *See Jung v. York*, 75 Wn.2d 195, 198, 449 P.2d 409 (1969). The trial court erred in denying Plaintiff's motion for partial summary judgment because there is no evidence showing circumstances that would have alerted Nick to the fact that the van, which he could not see, was not going to yield.

**Issue Four:** Did the trial court err in granting Defendant City of Seattle's Motion to Strike Inadmissible Evidence?

**Answer:** Yes. Paragraph 9 of Dr. Richard Gill's expert declaration and paragraphs 3 and 4 of Charlie Spencer-Davis' declaration should not have been excluded. Dr. Gill's opinion is supported by the specific facts cited in his declaration, and Charlie Spencer-Davis'

declaration simply stated what he would have done had a traffic signal been provided at the next intersection.

**Issue Five:** Did the trial court err in denying in part Plaintiff's Motion to Exclude Evidence of Prior Settlement?

**Answer:** Yes. Evidence of Plaintiff's settlement with the driver of the van is inadmissible to establish Mr. Hansen's alleged negligence. *See Northington v. Sivo*, 102 Wn. App. 545, 8 P.3d 1067 (2000).

#### IV. STATEMENT OF THE CASE

##### A. The Collision.

On February 17, 2005, 12-year-old Nick Messenger and his friend Charlie Spencer-Davis were walking home from school after going to a neighborhood Pizza Hut. CP 256. Their route took them to the unmarked crosswalk at the intersection of 15<sup>th</sup> Avenue NW and NW 87<sup>th</sup> Street. *Ibid.* 15<sup>th</sup> Avenue NW consists of five lanes at this point – two lanes for each direction and a left turn lane. A police diagram of the intersection is attached as Appendix B (CP 319).

The boys waited on the curb for a break in traffic. CP 256. According to Charlie, he and Nick chose to cross at 87<sup>th</sup> because they “knew that there had been a crosswalk there, so we stopped there, waiting for people or for traffic to stop so that we could cross.” CP 258, CP 259.

Merilee Mulholland was driving her Nissan Murano SUV southbound in the outside (curb) lane of 15<sup>th</sup> to the boys' immediate left. According to Charlie, Ms. Mulholland stopped her vehicle as she approached the intersection and motioned with her hand for the boys to cross the street. CP 256-257.

Both Nick and Charlie then entered the crosswalk. CP 257. As the boys crossed in front of her SUV, Ms. Mulholland looked in her left side mirror and saw a van approaching the intersection in the inside lane of southbound 15<sup>th</sup>. CP \_\_\_\_\_. She also saw that the van was not slowing for the boys in the crosswalk. CP \_\_\_\_\_. Ms. Mulholland then looked in front of her SUV to see both boys beginning to enter the inside lane of southbound 15<sup>th</sup>, and saw the passing van strike Nick. CP \_\_\_\_\_.

Steve Hansen was the driver of the van. As his van approached the intersection, he saw people standing on the sidewalk, but not crossing:

I was watching traffic ahead of me, as well as traffic approaching from the opposite direction (northbound).

I saw people standing on the sidewalk on my right.

I also saw an SUV stopped in the outside (curb) lane with its right-turn signal on, waiting to turn right onto 87<sup>th</sup>.

As I approached the intersection, I saw no pedestrians crossing 15<sup>th</sup>.

As I entered the intersection, in my peripheral vision, there were 2 boys in front of the SUV on my right and I heard a noise. I

looked at my right-side mirror to see what had occurred. My mirror was missing.

I carefully braked to a stop. I got out of my van and saw a boy lying in the street.

A statement is attributed to me that I saw the boys running. I simply stated what the driver of the SUV told me. Even though I had been looking, I did not see the boys crossing the street, until I was almost even with the stopped SUV. I did not see the boys running.

The SUV on my right had blocked my view of the boys. The SUV had its right turn signal on, so I thought that she was slowing or stopping to turn right. Had I known anyone was crossing 15<sup>th</sup>, I certainly would have stopped at the intersection and allowed them to safely cross.

CP 247-248.

Nick sustained a severe brain injury and is left with no memory of the event. Charlie, however, reports that they could not see the Hansen van as they crossed until Nick was hit. CP 257.

Charlie testified that he and Nick were side-by-side in the crosswalk and that he hit his hand on the van. CP 257-258. Charlie then witnessed the side-mirror of the Hansen van hit Nick in the head. CP 258.

**B. Defendant City was on notice for years that the subject intersection was unsafe.**

An Automatic Traffic Count by the City's Department of Transportation at the intersection of 15<sup>th</sup> and 87<sup>th</sup> recorded an average weekday traffic volume of 17,004 vehicles per day as of 2000. CP 117.

During the peak traffic hour, traffic is so heavy that a pedestrian walking at an average pace cannot cross all five lanes of 15<sup>th</sup> without being confronted by a vehicle. CP 127 (“In the peak hour there were *zero gaps available*.”); *see also* CP 126-127. The intersection has only unmarked crosswalks.<sup>3</sup> Because of the lack of gaps in traffic, pedestrians attempting to cross 15<sup>th</sup> at 87<sup>th</sup> must rely on drivers seeing them and yielding.<sup>4</sup>

City of Seattle traffic personnel knew about this unsafe condition at 15<sup>th</sup> and 87<sup>th</sup> long before February 17, 2005. Year after year, members of the Crown Hill community called and wrote to the City about the danger to pedestrians at the crossing, including the following:<sup>5</sup>

Reported by Lt. Dean Winefield, Address 8750 15 AV NW, Tel. 386-1435

Problem Statement: Lt. is with the Crown Hill Fire Station. They get a lot of citizen concerns regarding the Xing of 15 AV NW between NW 85 & NW 87 Streets. There is a lot of new

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<sup>3</sup> By law, a crosswalk exists at every intersection, regardless of whether the street is marked with painted crosswalk lines. *See* RCW 46.04.160; WPI 70.03.01.

<sup>4</sup> Transportation Engineer Edward Stevens states that “[i]ndustry standards direct engineers to use the peak traffic hour when conducting gap studies.” CP 103. The peak hour at this location was from 5:00 p.m. to 6:00 p.m. *Ibid*. According to Mr. Stevens, “[d]uring that period, there was absolutely no gap in traffic sufficient to allow a pedestrian to cross 15<sup>th</sup> at 87<sup>th</sup> without being confronted by a vehicle.” *Ibid*. As a result, pedestrians crossing 15<sup>th</sup> at 87<sup>th</sup> must rely on drivers seeing them and yielding, or they will be subject to being hit by the approaching car. *Ibid*.

<sup>5</sup> CP 133, 135, 137, 139, 141, 143, 145 (Citizen Complaints and SDOT Traffic Control Requests).

development: Value Village, QFC, 7-11 & 2 banks that generates a lot of ped traffic. *Can something be done to assist peds?*<sup>6</sup>

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Reported by Rudy McCoy, Tel. 784-4284

Problem Statement: Citizen reports 3 accidents involving peds/veh in past 3 months on 15 AV NW at NW 87 ST.... High ped generators: Wash. Mutual; Seafirst; Value Village.<sup>7</sup>

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Reported by Mary Hillier, Tel. 782-0285

Problem Statement: Trying to cross 15<sup>th</sup>.... No pavement markings. I informed [her] that we were investigating this location. Potential signal location at 87<sup>th</sup> or at 15<sup>th</sup> & Holman [approximately] 1 block north.

Investigator's Evaluation: This location is currently being evaluated along [with] 15<sup>th</sup> & Holman for signal improvement.<sup>8</sup>

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Reported by Beverly (Bobby?) Poceen, Tel. 297-3201

Problem Statement: Reporting '*dangerous*' pedestrian situation

- Overhead crosswalk sign
  - No marked crossing
  - No advanced warning<sup>9</sup>
- 

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<sup>6</sup> CP 133 (Seattle Engineering Department, Transportation Division, Traffic Control Request (June 28, 1993)) (emphasis added).

<sup>7</sup> CP 135 (Traffic Control Request (October 13, 1993)).

<sup>8</sup> CP 137 (Traffic Control Request (November 3, 1995)).

<sup>9</sup> CP 137 (Traffic Control Request (September 5, 2001)) (emphasis added).

I'd like to bring to your attention an *extremely dangerous crosswalk* located at the corner of 15<sup>th</sup> Ave Northwest and [87<sup>th</sup>] Street in Crown Hill/North Ballard.

I drive by this crosswalk twice a day, every day, on my way to and from work. *I used to use this crosswalk, until I realized that I was taking my life into my hands by doing this....*

*There are several schools located in the area, and almost every morning I see elementary school kids trying their luck by crossing at this crosswalk.*

These pedestrians are given a false sense of security that drivers will stop for them, and *end up running across five lanes of traffic* when drivers don't even slow down....

I'm reminded daily how *dangerous* this crosswalk is, and I will keep writing letters to you and the City Council and the media until something is done about this.<sup>10</sup>

*There is no question that this is a dangerous crossing.* My understanding of Seattle Transportation's position, based on discussions in 2000/2001 with George Frost and Cynthia Robinson with the above mentioned Advisory Group, is that *it is such a dangerous crossing that the Department is unwilling to paint a crosswalk on the street because it might encourage more people to risk crossing.*

....

I believe that a signalized pedestrian crossing is urgently needed in this vicinity to facilitate safe pedestrian crossing, particularly for Whitman Middle School students, many of whom are driven to school because of the unsafe pedestrian conditions on 15<sup>th</sup> Ave NW....<sup>11</sup>

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<sup>10</sup> CP 141 (Letter from Lisa Kious to Mayor Greg Nickels (June 10, 2002)) (emphasis added).

<sup>11</sup> CP 141 (e-mail from Marianne Scholl to Grace Crunican, SDOT Director, and Greg Nickels, Mayor (June 11, 2002)) (emphasis added); CP 811-815.

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Reported by Susan Frank, Tel. 783-8988

Problem Statement: Caller reported that two years ago she requested that a crosswalk be marked at this location and was told that this would be done. But it never was.

Investigator's Evaluation: Left message 9/24/02 with current information. We have no plans to mark a crosswalk at this location *due to high ADT* [Average Daily Traffic volumes] *and many lanes of vehicle traffic 4 plus turn lane*. There is currently an overhead [crosswalk warning] sign which *we do not plan on removing because it creates some driver awareness of the crossing....*<sup>12</sup>

Strikingly, the City in fact *removed* this crosswalk warning sign shortly before Nick was hit, eliminating the only aid for drivers to recognize the hazard of pedestrian-vehicle conflict at this intersection. CP 329.

**C. The City did nothing to fix the unsafe situation at the subject intersection.**

The City's own long-established policy requires it to respond to community requests for a marked crosswalk or traffic signal by going to the site and evaluating the complaint and potential solutions. CP 149, 151. If the subject site does not meet applicable warrants for painting a crosswalk or installing a traffic signal, SDOT personnel are directed to look for a solution using nearby intersections where a safer crossing could

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<sup>12</sup> CP 145 (Traffic Control Request (September 18, 2002)) (emphasis added); CP 816-818.

be provided. According to Seattle Department of Transportation Director's Rule #04-01 (adopted by the Seattle City Council):

***Pedestrians should be able to cross roads safely, and therefore, the City should try to provide safe crossing facilities.*** There are many engineering measures that may be used at a pedestrian crossing, depending on site conditions. Marked crosswalks are commonly used at intersections and sometimes at mid-block locations.

***It is important to remember that providing marked (painted) crosswalks is only one of many possible engineering measures. Thus, when considering how to provide safer crossings for pedestrians, the questions should NOT simply be: "Should I provide a marked crosswalk or not?" Instead the question should be: "What are the most effective measures that can be used to help pedestrians to safely cross the street?"*** Deciding where to mark or not mark crosswalks is only one consideration in meeting the objective to create safe pedestrian crossings.

Treatments other than installing marked pedestrian crosswalks may be considered prior to installing a marked crosswalk, if determined to be appropriate by the City Traffic Engineer. Examples of some of these pedestrian improvements include:

- ...
- ***Installing traffic signals (or pedestrian signals) where warranted or where serious pedestrian crossing problems exist....***
- ...
- Using innovative signs, signals and markings.

CP 160-161 (emphasis added).

In fact, 275 feet to the north, the intersection of Holman Road and 15<sup>th</sup> met and exceeded vehicle volume warrants for the installation of a

traffic signal back in 1993, as shown by SDOT traffic counts.<sup>13</sup> A traffic signal at Holman and 15<sup>th</sup> was further justified by turning movements, with northbound left-turning traffic on 15<sup>th</sup> creating a direct conflict with opposing southbound traffic on Holman Road.<sup>14</sup>

Worse, in 1992, the heavy traffic volumes were projected to *increase* with the construction of a shopping center along 15<sup>th</sup> between 87<sup>th</sup> and Holman Road.<sup>15</sup> Rather than comply with Director's Rule #04-01 -- look around and focus on the next intersection, at Holman and 15<sup>th</sup> -- City personnel simply concluded that 87<sup>th</sup> and 15<sup>th</sup> had too many lanes of heavy traffic to justify a marked crosswalk, and did nothing further.

One Seattle Department of Transportation employee reported in 1996 that the fire signal at Holman and 15<sup>th</sup> was supposed to be converted that year to a full, standard traffic signal. CP 188 ("Fire signal to be upgraded to full signal in '96."). Another SDOT employee denied that such a plan existed. CP 198. Residents continued complaining to the City about pedestrian safety at 15<sup>th</sup> and 87<sup>th</sup>, and even stated that they would cross at Holman and 15<sup>th</sup> if there was a signal there. CP 188. Even though

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<sup>13</sup> CP 168-173 (Seattle Engineering Department, Transportation Division, 1993 Traffic Counts); CP 104 (Stevens Decl. at ¶ 9); CP 121, 128 (Stevens Dep. at 6-7, 34-35); CP 451 (Stevens Decl. at ¶ 12).

<sup>14</sup> CP 186 (Gibson Traffic Consultants Report (April 10, 1992)); CP 122 (Stevens Dep. at pp.11-12).

<sup>15</sup> CP 181.

it had converted fire signals to full traffic signals throughout the city, and had a fire signal at Holman and 15<sup>th</sup> that could easily and inexpensively have been converted to a full signal, year after year, the City did nothing, leaving pedestrians to fend for themselves.

Not until Nick Messenger was hit and severely injured while trying to cross in the unmarked crosswalk at 87<sup>th</sup> and 15<sup>th</sup> did the City act. Its traffic counts at 15<sup>th</sup> and Holman three weeks after the tragedy confirmed that vehicle volumes and left-turning vehicle conflicts still met traffic signal warrants, as had been the case 12 years earlier. Then only 12 weeks after Nick was hit the City installed a full traffic signal, marked crosswalks and pedestrian signal activation buttons which had long been warranted at Holman and 15<sup>th</sup> to provide pedestrians with the needed protected crossing.



The same warrants that justified a full traffic signal at 15<sup>th</sup> and Holman in 2005 had been met back in 1993. According to Human Factors

Engineer Richard Gill, Ph.D., this incident would, on a more probable than not basis, have been avoided had the traffic signal and marked crosswalk at Holman and 15<sup>th</sup> been installed back when they were warranted:

Prior to the incident, the boys had been told to cross 15<sup>th</sup> and other roadways at crosswalks, such as they were doing at the time of the incident. According to Charlie, the boys were unaware that the City of Seattle had removed the "CROSSWALK" sign that had long been in place at the intersection of NW 87<sup>th</sup> Street and 15<sup>th</sup> Avenue NW.

Shortly after the incident, the City of Seattle installed a traffic signal and marked crosswalks just north of the incident site at the intersection of 15<sup>th</sup> Avenue NW and Holman Road. The traffic signal allows pedestrians to cross 15<sup>th</sup> Avenue NW while vehicles are stopped by a red light.

Based upon my review of the materials listed above, my experience, training and expertise, it is my opinion, on a more probable than not basis, that, if the traffic signal and marked crosswalks had been in place at 15<sup>th</sup> Avenue NW and Holman Road at the time of the incident, Nick and Charlie would have walked further north and crossed 15<sup>th</sup> Avenue NW at the traffic signal. The boys' intended destination, which was further north, the instructions they had and would have received from parents, and the available course of travel all support this opinion. In other words, had the City installed the traffic signal and marked crosswalks at 15<sup>th</sup> Avenue NW and Holman Road prior to February 17, 2005, this incident would not have happened and Nick would not have been injured.

CP 484.

It is uncontradicted that citizens had complained for 12 years of the need for this signal and crosswalk. It is uncontradicted that Holman and 15<sup>th</sup> met warrants for a traffic signal for 12 years prior to the incident. It is

also uncontradicted that the conversion of the fire signal at Holman and 15<sup>th</sup> to a full signal was easy and inexpensive.

**D. Affirmative Defense of Contributory Fault by Nick Messenger.**

The incident was investigated by Detective Ronald Sanders, a 20-year veteran of the Seattle Police Department. CP 267. Detective Sanders determined that Nick and Charlie were legally crossing the roadway. CP 271-272; CP 272 (“Whether it’s marked or unmarked, it is legal to cross at an intersection.”). He reported that the boys chose this crossing because their parents had warned them to only cross at crosswalks. CP 279.

Charlie testified that he and Nick were walking as they attempted to cross the street. CP 258; CP 259. Admittedly, others provided a variety of descriptions as to the pace at which the boys were crossing. As discussed below, however, the *pace* at which the boys crossed in the crosswalk is irrelevant.

**E. Defendant City took down the overhead warning sign alerting drivers to the presence of a pedestrian crossing at 15<sup>th</sup> and 87<sup>th</sup> shortly before the Messenger incident.**

Just eight weeks before the Messenger incident, Defendant City removed an overhead “CROSSWALK” sign at 15<sup>th</sup> and 87<sup>th</sup> that warned drivers of the presence of a pedestrian crossing. CP 329. A July 29, 2002 letter to a member of the 15<sup>th</sup> Avenue Improvement Committee from the City’s Pedestrian Safety Specialist, Megan Hoyt (CP 611-614), explained

that the City did not want to paint a marked crosswalk at 15<sup>th</sup> and 87<sup>th</sup> because some studies indicated that pedestrians tend to “let down their guard” in marked crosswalks and would be more vigilant when crossing if the crosswalk remained unmarked. However, Ms. Hoyt acknowledged that “[d]rivers are . . . less accustomed to stopping for pedestrians on large roadways without appropriate indication from some form of traffic control device – usually a traffic signal,” and therefore, the City provided this overhead crosswalk warning sign to alert drivers to the presence of pedestrians:

To answer your final question, regarding the overhead sign that is in place at this location even though there is no marked crosswalk, let me mention the difference in the ways we provide information to drivers and pedestrians. We have found that pedestrians sometimes change their behavior when crossing in a marked crosswalk and do not use the same caution as when crossing at an unmarked location. The visibility of a marked crosswalk is small compared to the visibility from the perspective of a pedestrian who is crossing. Signs are used to give motorists the same awareness that crosswalk markings give to pedestrians. *By leaving the signs in place, even while leaving the crosswalk itself unmarked, drivers are reminded of the fact that they must stop for pedestrians (a fact which remains unchanged regardless of whether the crosswalk is marked or not),* while pedestrians maintain a degree of caution, a necessity as the crossing is multilane.

*See* CP 689-690 (emphasis added); *see also* CP 558 (9/18/02 Traffic Control Request memo) (“There is currently an overhead sign which we

do not plan on removing because it *creates some driver awareness of the crossing.*”) (emphasis added); CP 621-623.

Peter Lagerwey, Defendant City’s Senior Transportation Planner at the time, agreed with Ms. Hoyt’s statement that overhead crosswalk warning signs provide awareness for drivers of the existence of a pedestrian crossing. He further testified that Ms. Hoyt’s letter would have been reviewed and signed off on by her supervisor, which at the time was Mr. Lagerwey. CP 563; CP 571-573. A 2000 Federal Highway Administration study examined the effectiveness of an overhead crosswalk warning sign in Seattle and concluded that the sign “*was* effective in encouraging motorists to yield to pedestrians.”<sup>16</sup> See CP 271 (emphasis added). The study reported that Defendant City had installed 182 overhead crosswalk warning signs as of April 1999. See CP 705.

Placing an overhead crosswalk warning sign at a location without a marked crosswalk was an unusual measure for Defendant City to take. CP 619-620, 624-625 (“... I think this was a pretty unique situation to have just the sign without the markings.”). According to Mr. Lagerwey, the City posted overhead crosswalk warning signs in locations with unmarked

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<sup>16</sup> The fact that the Federal Highway Administration studied the effectiveness of a crosswalk warning sign at *marked* crosswalks does not detract from the finding that overhead warning signs are effective in alerting drivers of the need to yield to pedestrians at a pedestrian crossing. See CP 689-690 (“Signs are used to give motorists the same awareness that crosswalk markings give to pedestrians.”).

crosswalks at only four or five locations. CP 578-579. It is apparent that Defendant City only took this unusual measure at crossings that presented particularly dangerous conditions for pedestrians and required additional measures to alert drivers to the existence of a pedestrian crossing. The fact that Defendant City put a crosswalk warning sign at this unmarked crosswalk strongly supports Transportation Engineer Edward Stevens' analysis that this location was inherently dangerous.

The City has admitted that the Manual on Uniform Traffic Control Devices (MUTCD) provides that signs should be used to call attention to situations that might not be readily apparent to road users, and placement of signs must be "based on an engineering study or engineering judgment." *See* CP 336. A jury can reasonably conclude from the fact that Defendant City maintained an overhead crosswalk warning sign at 15<sup>th</sup> and 87<sup>th</sup> for a number of years (CP 729; CP 735-736) that the decision to place the sign was based on an engineering judgment that it was needed for safety reasons at this intersection.

Yet, a matter of weeks before the Messenger incident, Defendant City removed this overhead warning sign. CP 329. Charlie testified that he thought the overhead sign was still there and did not realize it had been removed. CP 522. Steve Hansen testified that he would have been more vigilant in looking for pedestrians if the overhead crosswalk sign had been

in place. CP 742. A jury could reasonably conclude that removing the overhead crosswalk warning sign caused drivers to “let down their guard” because it suggested that drivers no longer needed to anticipate that pedestrians would be crossing at that location.

Defendant City does not dispute that 15<sup>th</sup> Avenue is a large, high-volume roadway, and it acknowledges that drivers are “less accustomed to stopping for pedestrians on large roadways without appropriate indication from some form of traffic control device.” CP 689. Yet it removed the sign that had it used for years there to warn drivers to yield to pedestrians.

When Defendant City removes a marked crosswalk, its policy calls for looking “for opportunities to redirect pedestrians to an alternative preferred crossing location.” *See* CP 602. But here, Defendant City removed the sign that alerted drivers to the existence of an established pedestrian crossing that Defendant City knew had been the subject of many citizen complaints for more than a decade, without doing anything to direct pedestrians to another crossing location or to otherwise provide an alternative safe means of crossing 15<sup>th</sup> in this vicinity.

Transportation Engineer Edward Stevens testified that Defendant City should not have removed the crosswalk warning sign without first taking some other measure to allow pedestrians to cross the street safely:

Q. Are there any additional engineering treatments you would have recommended at 87<sup>th</sup> and 15<sup>th</sup>?

A. No. Well, I guess the thing that I would never have done – it's not a new treatment, it's the old one. I would not have removed the crosswalk sign.

....

A. At or in the vicinity of the intersection of 87<sup>th</sup> and 15<sup>th</sup> until such time that some alternative means of getting people safely across the streets could be accomplished.

The accident history certainly borne out that there was a lack of pedestrian accidents at that intersection during the time period that sign was there, and immediately, almost immediately after taking it down, immediately had an accident, particularly this one.

I would not have taken that down under the operational characteristics that took place there, particularly with the lack of pedestrian accidents at the time, until, I say until, some other effective measure could be taken.

Q. What is your understanding of the purpose of the sign that was in place prior to the accident at 87<sup>th</sup> and 15<sup>th</sup>?

A. The purpose of the sign was to give awareness to a motorist that they are in an area where pedestrians are crossing.

CP 535-536.

Defendant City essentially claims that it removed the sign to avoid misleading pedestrians into thinking that it was safe to cross 15<sup>th</sup> at 87<sup>th</sup> (*see* CP 336), but Defendant City posted no warning advising pedestrians not to cross there. Defendant City's claim that it removed the sign to avoid confusing pedestrians does not make sense because the purpose of

the sign was to warn drivers, not to inform pedestrians. CP 689 (“Signs are used to give motorists the same awareness that crosswalk markings give to pedestrians.”). Removing the crosswalk warning sign did nothing to make the dangerous conditions for pedestrians on this stretch of 15<sup>th</sup> reasonably safe; it made the situation even more dangerous.

By its conduct in removing the overhead crosswalk warning sign, the City was admittedly trying to discourage pedestrians from crossing at 87<sup>th</sup>. Why? Because, in Defendant City’s opinion, as a practical matter, the arterial was too busy with too many lanes of fast-moving cars, and was therefore unsafe for people wanting to cross. It was inherently dangerous. The conduct of the City of Seattle meets the very burden placed on the Plaintiff to avoid summary judgment.

**F. Decisions in the trial court.**

Defendant City brought a motion for summary judgment to dismiss Nick Messenger’s lawsuit. CP 320-353. Plaintiff Messenger brought two motions for summary judgment, one to establish the City’s knowledge of dangerous conditions at the intersection, and one to strike the affirmative defenses of contributory fault on the part of Nick and fault on the part of Steve Hansen. CP 206-222; CP 223-246.

In its response to Plaintiff’s motion to strike the affirmative defense of fault on the part of Mr. Hansen, the City referenced Plaintiff’s

settlement with Mr. Hansen's employer. *See* CP 378, n. 1. Plaintiff moved to exclude evidence of the prior settlement. CP 754-778. The trial court granted Plaintiff's motion, "except to impeach Hansen's version of events." CP 955; VRP (7/24/09) at 4.

The City moved to strike certain evidence presented by the Plaintiff. *See* CP 744-753. The trial court granted Defendant City's motion in part, striking the following evidence:

- Opinions by police officers;
- Paragraph 9 of Dr. Gill's Declaration;
- Paragraphs 3 and 4 of Mr. Spencer-Davis' Declaration and similar testimony;
- Declarations of Mary Beth Spencer-Davis and Jennifer Messenger as to what their sons would have done or what they habitually did.

CP 964.

The trial court denied Plaintiff's motion to strike the affirmative defenses of alleged fault by Steve Hansen and alleged contributory fault by Nick Messenger. CP 957-959.

The trial court granted Defendant City's motion for summary judgment dismissing Nick Messenger's lawsuit. CP 965-966; CP 982-986.

The trial court denied Plaintiff's motion for partial summary judgment to establish the City's notice of an unsafe intersection "as moot"

because the trial court granted Defendant City's motion for summary judgment dismissing all claims. CP 960-962.

Plaintiff then timely filed this appeal. CP 967-968.

## V. ARGUMENT

### A. Standard of review

This Court reviews a trial court's summary judgment order de novo, engaging in the same inquiry as the trial court, to determine if a party is entitled to judgment as a matter of law, or whether genuine issues of material fact exist, requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-795, 64 P.3d 22 (2003); *Green v. A.P.C.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998); *Welch v. Southland Corp.*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998). All facts and reasonable inferences therefrom must be viewed in a light most favorable to the Plaintiff.

### B. The trial court erred in granting the City of Seattle's motion for summary judgment.

#### 1. Whether or not a municipality has breached its duty to provide reasonably safe crosswalks and roadways depends on the totality of the circumstances present at a given location.

In an action for negligence, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *See Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845

(2002); *Chen v. City of Seattle*, Slip Op. at 9.<sup>17</sup> The threshold determination of whether a duty exists is a question of law.

The law imposes a duty on municipalities to provide reasonably safe roadways for all travelers using them, including those on foot:

We ... hold that 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); see also *Berghund v. Spokane County*, 4 Wn.2d 309, 358-359, 103 P.2d 355 (1940) (addressing the liability of a county for failing to provide a sidewalk for pedestrians crossing a bridge with a high volume of traffic).

[T]he city has a ... duty to maintain its crosswalks in a manner that is reasonably safe for ordinary travel in light of the circumstances at each particular crosswalk. A municipality's decision to open a roadway triggers its duty to maintain the roadway in a reasonably safe condition. The circumstances present on the particular roadway dictate that which will constitute reasonably safe maintenance.

*Chen v. City of Seattle*, Slip Op. at 17-18 (citations omitted).

This duty requires a municipality to eliminate inherently dangerous roadway conditions:

A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon.

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<sup>17</sup> Only duty and breach of duty are at issue here. Defendant City did not raise causation as an issue in its summary judgment motion.

*Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005); *Chen*, Slip Op. at 10.

Defendant City's summary judgment motion raised three issues. First, “[a]s a matter of law, heavy traffic volumes and vehicle speeds on a multi-lane arterial roadway are not inherently dangerous conditions of the roadway that can give rise to road authority liability under WPI 140.01.” CP 338. Second, the City argued that “a road authority owes no duty to design or improve unmarked crosswalks to the engineering standards applicable to marked crosswalks.” CP 338. Lastly, it claimed that “where plaintiff's engineering expert agrees that the conditions alleged were open, obvious, and usual considerations of travel in general, and where plaintiff's expert agrees that no applicable standard of care required the City to undertake any improvements to facilitate pedestrian travel across 15th at either 87th or Holman, plaintiffs lack sufficient evidence to establish that the City breached the duty alleged.” CP 388.

Defendant City made the same arguments in *Chen v. City of Seattle*. This Court in *Chen* rejected these arguments, holding that dangerous roadway conditions include more than just the physical condition of the road itself, and that the determination of whether or not a roadway is inherently dangerous is based on the totality of the surrounding circumstances. *Chen*, Slip Op. at 2.

In *Chen*, this Court rejected Defendant City's claims that its duty was limited to complying with statutes, ordinances, or the MUTCD and that it could not be held liable because the intersection did not meet the warrants set forth in the MUTCD for a traffic signal at a particular crossing (CP 331; CP 333-335; CP 336; CP 352):

Also without merit is the city's argument that it did not breach its duty to maintain the crosswalk in a safe condition because the MUTCD did not require it to install additional safety measures at the crosswalk. . . . The city is incorrect, however, in concluding that, because conditions triggering a mandatory duty to consider the installation of traffic signal were not met, it had no duty to consider installing such a signal in light of the actual conditions of the roadway. "Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care." *Owen*, 153 Wn.2d at 787 (citing *Bauman v. Crawford*, 104 Wn.2d 241, 244-45 (1985)).

*Chen*, Slip Op. at 19-20.

Finally, this Court also rejected the City's argument in *Chen* that "a road authority owes no duty to protect against open, obvious and expected hazards of arterial traffic in general." CP 342.

The city also argues that it was not required to install additional traffic safety measures because the traffic moving through the intersection constituted an open and obvious hazard. In advancing this argument, however, the city ignores that a pedestrian using a crosswalk is given a preference over individuals using other modes of transportation ... Motor vehicles must yield to pedestrians in marked or unmarked crosswalks. RCW 46.61.235(1). That the law directs pedestrians to use crosswalks can be inferred from the lack of priority given to pedestrians who cross at points other than crosswalks: "Every pedestrian crossing a

roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.” RCW 46.61.240. ... Washington courts have long recognized that a pedestrian in a crosswalk “may assume that the driver of a vehicle will recognize the pedestrian's right of way.” Indeed, one of the city's own traffic engineers testified in a deposition that the crosswalk herein at issue was the only crosswalk at the intersection and that it was the preferred location for pedestrians to cross the intersection.

*Chen*, Slip Op. at 15-17.

This Court summarized its holding in *Chen* as follows:

A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel. Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway. Although relevant to the determination of whether a municipality has breached its duty, evidence that a particular physical defect in a roadway rendered the roadway dangerous or misleading or evidence that a municipality was in violation of a law concerning roadway safety measures are not essential to a claim that a municipality breached the duty of care owed to travelers on its roadways. A trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence. Xiao Ping Chen adduced several pieces of evidence raising a genuine issue as to whether the city of Seattle failed to maintain in a reasonably safe condition the crosswalk in which her now-deceased husband, Run Sen Liu, was struck by an oncoming car. Therefore, the city was not entitled to summary judgment on Chen's negligence claim. Accordingly, we reverse.

*Chen*, Slip Op. at 1-2.

Like the trial court in *Chen*, the trial court here failed to consider the totality of the surrounding circumstances that existed in the vicinity of 15<sup>th</sup> Avenue NW and NW 87<sup>th</sup> Street. Because the Plaintiff produced

evidence that would allow a reasonable person to conclude that 15th Ave. in this location was inherently dangerous for pedestrians, the trial court erred in granting the City's summary judgment motion.

**2. This case is very similar factually to *Chen v. City of Seattle*.**

This Court's recent opinion in *Chen v. City of Seattle* addresses the issues raised by the City in its summary judgment motion in this case. As here, *Chen* involved a pedestrian who was hit by a vehicle while crossing in a crosswalk maintained and operated by the City of Seattle.

This case and *Chen* share a number of striking similarities:

1. The streets involved in both cases are busy five-lane arterials.

2. There were no stoplights, stop signs, or pedestrian signals at the intersections.<sup>18</sup>

3. In both *Chen* and this case, numerous residents from the surrounding neighborhood for years had contacted the City to complain about the lack of safety measures at these intersections and crosswalks.

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<sup>18</sup> In *Chen*, the intersection where the collision occurred contained only pole-mounted signs at the curbs warning that there was a crosswalk and an overhead "Crosswalk" warning sign with a flashing light suspended above the street. *Chen*, 2009 WL 5067512 at 1-2. Here, the overhead crosswalk warning sign had been removed shortly before the Messenger incident. CP 329.

4. The intersections in both cases involved very high volumes of traffic. In *Chen*, traffic studies indicated that approximately 16,000 vehicles traveled through the intersection daily. Traffic studies in this case show an average weekday traffic volume of 17,000 vehicles as of 2000. CP 117.

5. As in this case, traffic gap studies in *Chen* showed few opportunities for pedestrians to cross safely. Traffic gap studies<sup>19</sup> in *Chen* established that there were only 6 to 10 gaps per hour. *Chen*, Slip Op. at 4. Traffic gap studies in this case established that in the peak traffic hour there were **zero gaps available** for pedestrians trying to cross at either 87th or Holman Road. CP 127; *see also* CP 126-127.

6. In *Chen*, the plaintiff's traffic engineering expert, Edward Stevens,<sup>20</sup> testified that the intersection at issue was inherently dangerous for pedestrians trying to cross at that location. In this case, Mr. Stevens opined that "pedestrians crossing 15<sup>th</sup> Avenue NW at its intersection with 87<sup>th</sup> St. NW are presented with an unreasonable risk of harm and the crossing is inherently dangerous." CP 103; CP 473.

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<sup>19</sup> A "gap" is a break in the flow of traffic sufficiently long to allow a pedestrian to cross from one side of the street to the other without having to stop for oncoming cars. *Chen*, Slip Op. at 4.

<sup>20</sup> Mr. Stevens is also the Plaintiff's traffic engineering expert in this case.

As it did in this case, the City in *Chen* moved for summary judgment. Defendant City made the same arguments in its summary judgment motion in *Chen* as it did here, as discussed above. As in this case, the trial court in *Chen* granted the City's motion, and the plaintiff appealed. *Chen*, Slip Op. at 6-7.

In *Chen*, this Court held that there was “ample evidence in the record raising a genuine issue as to whether the city breached its duty to Liu to maintain the crosswalk in a reasonably safe condition for ordinary travel.” *Chen*, Slip Op. at 22. Likewise, here, the evidence presented by the Plaintiff raises multiple issues of fact as to Defendant City’s breach of its duty to maintain its crosswalks and roadways in a manner that is reasonably safe for ordinary travel in light of the totality of the circumstances present. *See Chen*, Slip Op. at 10, 11.

**C. The City of Seattle had been put on notice that the intersection of 15<sup>th</sup> Avenue NW and NW 87<sup>th</sup> was unsafe long before the February 17, 2005 pedestrian-vehicle collision.**

A governmental entity is deemed to have notice of an unsafe condition of a street if the condition has come to the attention of its employees. *See* WPI 140.02. In this case, there is no question that Defendant City had notice of the unsafe condition that existed for pedestrians trying to cross 15<sup>th</sup> at 87<sup>th</sup>.

Here, residents who lived in the vicinity of 87<sup>th</sup> and 15<sup>th</sup> and faced heavy traffic on a daily basis when trying to cross there, repeatedly put the City on notice that the intersection was unsafe, and year after year requested help to safely cross. Defendant City acknowledged the residents' concerns, but did nothing. As shown above, by its own policy, when the public brought an unsafe crossing area to its attention, and the problem could not be solved at that intersection, the City was supposed to examine nearby intersections for a solution. CP 160-161, 149, 151.

Based on this evidence, the trial court erred in denying Plaintiff's motion for partial summary judgment. This evidence warranted the entry of an order declaring that Defendant City had been put on notice by the community that its intersection of 87<sup>th</sup> and 15<sup>th</sup> was unsafe for pedestrian crossings.

**D. The trial court erred in denying Plaintiff's partial summary judgment motion to strike Defendant City's affirmative defense of contributory fault on the part of Nick Messenger.**

- 1. There is no evidence that, once Nick was in the crosswalk, circumstances existed that should have alerted him that the van was not going to yield the right of way to him.**

As a pedestrian in a crosswalk, Nick Messenger had the right of way. *See* RCW 46.61.235(1); *Jung v. York*, 75 Wn.2d 195, 449 P.2d 409 (1969); *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn.

App. 544, 682 P.2d 942 (1984); *Burnham v. Nehren*, 7 Wn. App. 860, 503 P.2d 122 (1972).

Under Washington law, the right of way protection afforded a pedestrian in a crosswalk is exceedingly strong; a pedestrian in a crosswalk has a right to rely on this protection and to assume that automobile drivers will respect it until he or she knows or should have known otherwise. *Burnham*, 7 Wn. App. at 864. For example, in *Jung v. York*, *supra*, as Ms. Jung entered a crosswalk, a car stopped, yielding the right of way (as did Ms. Mulholland in this case). Ms. Jung proceeded in front of this car, entered the next lane, and was struck by a car. The Washington Supreme Court held that Ms. Jung had no duty to stop at various points along the crosswalk and look for vehicles that might disregard her lawful right of way:

[W]hether or not she could have avoided the accident by stopping one quarter of the way across the intersection and looking, it cannot be held that she had a duty to do so or that the jury would be justified in finding on the evidence in the record that she was negligent if she failed to do so.

*Jung v. York*, 75 Wn.2d at 197.

Similarly, in *Clements v. Blue Cross of Washington & Alaska, Inc.*, *supra*, a pedestrian attempted to cross four lanes of an arterial in Seattle within a crosswalk. As she crossed, a car stopped for her at the crosswalk (again, as did Ms. Mulholland here). After passing in front of the stopped

car, she was struck by a car traveling through the next lane. The evidence was “undisputed that Clements [the pedestrian] was looking straight ahead or down in front of her as she walked.” *Clements*, 37 Wn. App. at 550. The court held that, as a matter of law, she had no duty to try to observe oncoming traffic or to anticipate that her right of way would be violated:

Plaintiff ... asserts that the law does not impose a duty to look upon a pedestrian lawfully within a marked crosswalk even if the light changed against her as she crossed. Clements correctly states the general rule. *See Riddel v. Lyon*, 124 Wash. 146, 149, 213 P.487 (1923). Therefore, Clements’ failure to look or to make any effort to observe oncoming traffic even after the light changed to red before she passed the stopped car, standing alone, does not amount to negligence.

*Clements*, 37 Wn. App. at 550.

In order to support a finding of fault for claimed negligence by a plaintiff-pedestrian with the right of way, a defendant must present evidence showing that, once the favored pedestrian was in the crosswalk, circumstances existed that would have alerted the favored pedestrian that the disfavored driver was not going to yield the right of way:

[T]he pedestrian rightfully in a crosswalk has the right to assume that operators of approaching vehicles will obey the law and yield the right of way until he knows or should know to the contrary. . . .

A pedestrian cannot at one and the same time have a right to assume that the right of way will be yielded and a duty to look to make sure that it is. In the absence of circumstances which would alert the pedestrian rightfully in the crosswalk to the fact that an approaching vehicle is not going to yield, negligence

cannot be predicated on his failure to look and see the vehicle in time to avoid the accident.

*Jung*, 75 Wn.2d at 198. Because pedestrians in crosswalks have the right to assume that approaching vehicles *will* yield the right of way, the favored pedestrian is entitled to rely on the disfavored driver's yielding the right of way until the favored pedestrian reaches that point at which a reasonable person exercising reasonable care would realize that the disfavored driver was not going to yield.

That did not occur here. The only evidence is that the van driver was unable to see Nick until it was too late to avoid him. Nick's view of the van was also blocked by the height of the Mulholland SUV. Only an instant existed between the time Nick's head cleared Ms. Mulholland's stopped vehicle and then was immediately struck by the Hansen van's mirror. Here, there is no evidence of anything that would have alerted Nick that the Hansen van was not going to yield to his legal right of way. The only evidence is that neither Mr. Hansen nor Nick was aware of the other's presence at the intersection until it was too late. Lacking notice that the van would fail to yield, Nick was without fault as a matter of law.

**2. The quickness of Nick's pace while crossing within the crosswalk is irrelevant.**

Defendant City sought to impose fault on Nick based on his reportedly quick pace upon leaving the curb. Defendant City improperly

characterizes this as a “darting” case. It claims that Nick was going too fast as he proceeded in the crosswalk. These facts are disputed. But even walking quickly or running through a crosswalk cannot sustain a claim of contributory fault here.

Under Washington law, the strong protection afforded a pedestrian in a crosswalk is not based on the pace of the pedestrian in the crosswalk. Instead, this protection is based on the simple fact that the pedestrian is within the crosswalk. *See* RCW 46.61.235(1).<sup>21</sup>

Contrary to Defendant City’s claim, Nick and Charlie did not dart into traffic. The undisputed evidence is that the boys *waited* for traffic to clear before they entered the crosswalk. CP 256. The Mulholland SUV stopped to allow Nick and Charlie to enter the crosswalk. CP 256-257; CP \_\_\_\_\_. This clearly shows that neither boy darted into the crosswalk. As in *Pudmaroff*, they waited to proceed:

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<sup>21</sup> It goes without saying that some pedestrians are going to cross a crosswalk more quickly than others. As noted by the Supreme Court in *Pudmaroff v. Allen*, 138 Wn.2d 55, 66, 977 P.2d 574 (1999), persons entitled to a crosswalk’s protection include pedestrians on foot, those on skateboards, those using roller blades and those using bicycles whether mounted or dismounted. *See also Crawford v. Miller*, 18 Wn. App. 151, 566 P.2d 1264 (1977) (protection of the crosswalk applied to bicyclist who entered the crosswalk first walking her bike and then mounting it in the middle of the crosswalk). Obviously, pedestrians on skateboards or using roller blades, or bicyclists riding bikes though a crosswalk, are going to be traveling at a much quicker speed than an elderly pedestrian. It is precisely for this reason that the law focuses on the fact that the pedestrian is *in* the crosswalk, rather than the pace at which the pedestrian crosses the street.

Regarding whether the issue of comparative negligence should have been submitted to the jury, the Court of Appeals noted as follows:

Summary judgment was proper only if the evidence did not support an inference that Pudmaroff unsafely entered the crosswalk or continued crossing after being alerted that Allen was not going to yield.

The undisputed evidence here is that Pudmaroff stopped at the intersection and waited to proceed. The fact that a westbound vehicle stopped and waited for him indicates he did not dart into the intersection ...

*Pudmaroff v. Allen*, No. 38800-2-I, 89 Wn. App. 928, 951 P.2d 335 (Wash. Ct. App. Feb.17, 1998) (unpublished portion slip op. at 8-9) (footnotes containing citations omitted).

The Court of Appeals is correct ... Although Pudmaroff still had a duty to exercise reasonable care for his own safety, ... the facts as above stated indicate he did all that was required of a reasonable person utilizing a crosswalk.

*Pudmaroff v. Allen*, 138 Wn.2d 55, 66-67, 977 P.2d 574 (1999).

**3. Defendant City has failed to show that Nick Messenger's pace while crossing was a cause in fact of the collision.**

Defendant City has the burden of producing evidence sufficient to support a finding of causation for its claim of negligence on Nick's part. *See Whitchurch v. McBride*, 63 Wn. App. 272, 275, 818 P.2d 622 (1991); *Maltman v. Sauer*, 84 Wn.2d 975, 980, 530 P.2d 254 (1975). A cause in fact is one without which the accident would not have happened. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); WPI 15.01.01. In a

negligence case, then, a defendant claiming contributory fault has the burden of producing evidence sufficient to support a finding that the accident would not have occurred but for the alleged negligent conduct of the plaintiff. See *Whitchurch v. McBride*, *supra*; *Maltman v. Sauer*, *supra*.

In meeting this burden, it is not enough for Defendant City to merely claim that Nick was crossing too quickly within the crosswalk. Because a reasonable person in the favored pedestrian's position would justifiably expect to have the right of way, the favored pedestrian is entitled to rely on the disfavored driver's yielding the right of way until the favored pedestrian reaches that point at which a person exercising reasonable care would realize that the disfavored driver was not going to yield. See *Olpinski v. Clement*, 73 Wn.2d 944, 949, 442 P.2d 260 (1968); *Maxwell v. Piper*, 92 Wn. App. 471, 476, 963 P.2d 941 (1998); *Whitchurch*, 63 Wn. App. at 276; 818 P.2d 622; *Kilde v. Sorwak*, 1 Wn. App. 742, 746, 463 P.2d 265 (1970). That evidence does not exist here. As was made clear in the above cases, the City must show more than the fact that Nick's pace merely brought him to the point where the collision occurred. As the party with the right of way, whether he is walking fast or slow, the fact that he got to the point of the collision sooner than if he had been moving slower is irrelevant as a matter of law.

For example, in *Whitchurch v. McBride, supra*, a disfavored motorist brought an action against a favored motorist to recover damages resulting from a collision at an uncontrolled intersection based on the excessive speed of the favored driver. The trial court granted the favored driver's motion to dismiss at the close of the disfavored driver's case-in-chief, and the disfavored driver appealed. The Court of Appeals held that, in the absence of evidence of the point at which the favored driver would have realized that the disfavored driver was not going to yield the right of way, the conduct of the favored driver could not be compared with the hypothetical conduct of a reasonable person, and it thus could not be determined whether the favored driver's excessive speed was a cause in fact of the collision. *Whitchurch*, 63 Wn. App. at 275-277.

In this case, Nick was entitled to rely on the Hansen van yielding the right of way until he reached that point at which a reasonable person exercising reasonable care would realize that the van was not going to yield. *See Olpinski*, 73 Wn.2d at 949. There is no evidence showing the point at which Nick would have reasonably become aware of the Hansen van's failure to yield. Without this evidence, the hypothetical reasonable person's conduct cannot be compared with Nick's actual conduct. As a result, Defendant City failed to sustain its burden of producing evidence sufficient to support a finding that the accident would not have happened

but for Nick’s “negligence”, and Plaintiff’s motion for summary judgment to strike the affirmative defense of contributory negligence should have been granted. *See Whitchurch*, 63 Wn. App. at 276-277.

**E. The trial court erred in granting Defendant City’s Motion to Strike Inadmissible Evidence.**

In the court below, Defendant City moved to strike certain evidence that it claimed was inadmissible. CP 744-750. Among the evidence that the City sought to strike was the opinion in paragraph 9 of the Declaration of Richard Gill, Ph.D. that, based on his experience and education in the field of human factors and knowledge of the facts of this case, on a more probable than not basis, Nick and Charlie would have crossed 15<sup>th</sup> Avenue NW at Holman Road if there had been a traffic signal and marked crosswalk there at the time of the incident. CP 484. Specifically, Defendant City claimed that Dr. Gill lacked factual bases for his opinion. CP 749. The trial court struck this portion of Dr. Gill’s declaration. CP 964.

In granting Defendant City’s motion, the trial court erred in completely ignoring the following facts cited by Dr. Gill as the bases for his opinion:

- The boys’ intended destination was further north (Holman Road is north of the 87<sup>th</sup> Street intersection where the boys attempted to cross);

- The instructions they had and would have received from their parents (both of the boys' mothers stated that they would have directed the boys to cross at Holman Road if there had been a signal and marked crosswalk there (CP 75, 77); and
- The available course of travel (nearby Holman Road was the next intersection to the north along 15<sup>th</sup> and the only available route for the boys to take without either (a) crossing 15<sup>th</sup> at 87<sup>th</sup> or (b) going over 1,000 feet out of their way to backtrack to the crossing at 85<sup>th</sup> street to the south and then proceed back to the north on the opposite side of 15<sup>th</sup> (CP 641, CP 449)).

Clearly, Dr. Gill identified specific facts supporting his opinion that Nick and Charlie would, more probably than not, have crossed 15<sup>th</sup> at nearby Holman Road if the signalized crossing that now exists had been there at the time of the incident. Holman Road would have been convenient for their intended course of travel (unlike 85<sup>th</sup> Street to the south, which would have required going more than 330 yards -- three football fields -- out of their way). Crossing at Holman Road -- had there been a traffic signal there -- would have been in accordance with instructions from the boys' parents.

The trial court also granted Defendant City's motion to strike Paragraphs 3 and 4 of Charlie Spencer-Davis' Declaration. CP 750. In his Declaration, Charlie testified that he and Nick would have crossed 15<sup>th</sup> Avenue at the traffic signal at Holman Road had it been in place on February 17, 2005. CP 479. Charlie also testified that if the traffic light at

Holman had been in place, the boys would have followed their mothers' instructions to cross there. CP 749.

Charlie's testimony is similar to the evidence that the Supreme Court found to be sufficient to support an inadequate warnings claim in *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 818 P.2d 1337 (1992). In *Ayers*, a 15-month-old child suffered irreparable brain damage after drinking baby oil. The child found the baby oil in a purse belonging to his 13-year-old sister. The child's parents brought a product liability claim based on inadequate warnings against the baby oil manufacturer. The parents argued that, had there been adequate warnings, the child never would have inhaled the oil because the parents would have kept it out of his reach. *Ayers*, 117 Wn.2d at 753. The Washington Supreme Court found the parents' testimony about what they would have done under different circumstances sufficient to support the jury's verdict against the product manufacturer for inadequate warnings:

[M]embers of the Ayers family testified that they kept items they knew to be dangerous out of the reach of the twin baby boys. . . . Mrs. Ayers testified that she made a practice of reading labels on products, and that she shelved them at home according to what she read on the labels. Items she knew to be particularly dangerous, such as cleaning waxes or bathroom cleansers, were shelved up high in a cupboard above the kitchen stove or in a box on the top shelf of the bathroom closet. . . .

On the basis of this evidence, the jury was entitled to infer that if the Ayerses had known of the dangers of aspiration, they would

have treated baby oil with greater care; that they would have treated it with the caution they used in relation to those items they recognized as highly dangerous, like cleaning products; and that had they done so, the accident never would have occurred. We conclude that the evidence of causation presented to the jury was sufficient to sustain the jury's verdict.

*Ayers*, 117 Wn.2d at 753-754. The Supreme Court rejected the product manufacturer's claim – like Defendant City's claim here – that there was nothing but “rank speculation” to support the plaintiff's claim that additional warnings would have prevented the injury:

Johnson & Johnson also emphasizes that to reach the conclusion that the absence of a warning caused David's injury, one must assume that had there been a warning, it would have been heeded by Mrs. Ayers, that she would have communicated the need for caution to the other members of her family, and that Laurie would not have left her purse on the bedroom floor. Johnson & Johnson asserts that under these circumstances it is “rank speculation” to suppose a warning would have prevented the injury.

We reject this argument. All the Ayerses apparently knew was that baby oil could cause diarrhea if swallowed. They did not know of the risks of aspiration and the evidence they presented . . . is sufficient to support the jury's conclusion that if they had been alert to those risks, they would have treated the product more carefully. At most, Johnson & Johnson suggests that reasonable persons might disagree as to whether a warning would have made any difference. For this court to uphold the trial court's judgment notwithstanding the verdict, however, more is required. This court must be prepared to conclude that no reasonable person could infer, as did the jury, that a warning would have altered the Ayerses' behavior. The evidence presented at trial was not so weak as to permit such a conclusion.

*Ayers*, 117 Wn.2d at 755.

Charlie's statements in his Declaration are no different from the testimony held to be admissible in *Ayers*. Charlie merely states that he and Nick would have crossed 15th Avenue at Holman Road if the traffic signal had been in place on the day of Nick's injury. As *Ayers* makes clear, nothing precludes a witness from testifying how he or she would have acted under a different set of circumstances. The trial court erred in granting the City's motion to strike paragraphs 3 and 4 of the Declaration.

**F. The trial court erred in considering evidence of Plaintiff's settlement with Mr. Hansen "to impeach Hansen's version of events."**

Plaintiff previously settled his potential claim against Steve Hansen and Hansen's employer. The trial court granted Plaintiff's motion to exclude evidence of the prior settlement, "except to impeach Hansen's version of events." CP 955. The trial court erred in considering evidence of the settlement "to impeach Hansen's version of events." Evidence of the settlement should have been excluded entirely.

Defendant City conceded that the settlement was inadmissible to establish Hansen's alleged negligence. CP 792. However, the City argued that the settlement was admissible to impeach Plaintiff's claim that Hansen was not at fault. CP 793. Contrary to this argument, this Court's decisions in *Grigsby v. City of Seattle*, 12 Wn. App. 453, 529 P.2d 1167

(1975) and *Northington v. Sivo*, 102 Wn. App. 545, 8 P.3d 1067 (2000) are both directly on point and require exclusion of the settlement.

In *Grigsby*, a passenger in a car sued both the driver and the City of Seattle. The plaintiff's claim against the city alleged negligent design, construction, and maintenance of the street. The plaintiff settled his claim against the driver and proceeded to trial against the City, which resulted in a defense verdict. This Court reversed the trial court because it admitted evidence of the plaintiff's settlement with the driver:

It was error for the trial court to reveal to the jury that Grigsby settled a claim against his driver. The jury need not have known that the driver had been a party to the action. In a retrial of the cause, it should be unnecessary for the court to make any explanation regarding the absence of the driver as a party defendant.

*Grigsby*, 12 Wn. App. at 458 (citations omitted).

This Court's decision in *Northington* is also dispositive of this issue. *Northington* was a passenger in a vehicle driven by Sivo, which was struck by a logging truck driven by Gasho. *Northington* sued Sivo and Gasho, but settled with Sivo before trial. The trial court allowed Gasho to question *Northington* about her settlement with Sivo because of an alleged inconsistency between *Northington*'s allegations in her complaint and her trial testimony. The questioning was allowed on the theory that it demonstrated *Northington*'s bias against Gasho (i.e., to

suggest that Northington would be placing as much blame as possible on Gasho to maximize her recovery). Following a defense verdict, Northington appealed, arguing that evidence of her settlement with Sivo should have been excluded. This Court agreed, holding that the “trial court abused its discretion in admitting the settlement evidence because it was irrelevant and unfairly prejudicial.” *Northington*, 102 Wn. App. at 549.

In *Northington*, this Court stated that evidence of a partial settlement has a “corrosive effect” on the jury, that ER 408 was designed to be a safeguard against this corrosive effect, and that discussing a settlement, even for purposes of impeachment, “compromises that safeguard.” *Northington*, 102 Wn. App. at 550. *Northington* established an extremely rigorous test for admissibility, allowing evidence of a settlement to be admitted for purposes of impeachment if, but *only* if, (1) there is a “clear conflict” between the witness’s version of the events as told before the settlement and the witness’s version of the events as told after the settlement, or (2) there is some “circumstance in which the settlement’s content provides a motive for the witness to offer biased testimony.” *Id.* Here, there is no testimony of Nick to impeach. As a result of his severe brain injury, Nick is unable to testify. There is no conflict with any witness’s version of the events before the settlement with Hansen vs. after the settlement. The *Northington* test is not satisfied:

In the absence of clear conflict in a witness's testimony or a circumstance in which the settlement's content provides a motive for the witness to offer biased testimony, ER 408 does not permit the jury to consider settlement evidence. Here, Northington's testimony remained basically consistent before and after she settled with Sivo, and there were no other grounds for inferring that the settlement may have biased Northington against Gasho. Accordingly, the settlement evidence was far more prejudicial than probative of bias in this case, and the trial court should have excluded it.

*Northington*, 102 Wn. App. at 550.

The *Northington* court recognized that, when, as here, the plaintiff does not personally offer testimony about how an accident occurred, there is no basis for admitting evidence of a settlement to show the plaintiff's alleged bias. *Northington*, 102 Wn. App. at 550-551. Here, the facts are even stronger for excluding settlement evidence in that Nick will not testify at all about how the accident occurred because of his severe brain injury. And the City did not point to any specific *testimony* of Steve Hansen that is inconsistent with other *testimony* by him.

Defendant City cited no case holding that evidence of a settlement can be admitted to rebut *argument* of counsel, as opposed to impeaching a witness's *testimony*. Defendant City cited no specific *testimony* as to which evidence of the settlement could conceivably be admissible for the

purpose of impeachment, even assuming that Defendant City could overcome the relevancy and ER 403 issues with regard to such evidence.<sup>22</sup>

The law is absolutely clear that evidence of Plaintiff's settlement with Steven Hansen and his employer is inadmissible. The trial court erred in considering the settlement "to impeach Hansen's version of events."

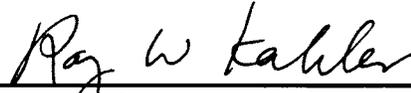
## VI. CONCLUSION

As this Court recognized in *Chen*, "[t]he determination of whether or not a municipality has exercised reasonable care in the performance of its duty to maintain its public ways in a reasonably safe condition must in each case necessarily depend upon the surrounding circumstances." *Chen*, Slip Op. at 12. The trial court erred in granting Defendant City's motion for summary judgment in this case, having ignored the totality of the circumstances that existed in the subject vicinity. It erroneously narrowed the scope of Defendant City's duty to keep its roads reasonably safe for ordinary travel. The trial court's decisions should be reversed as set forth above and this case remanded for trial.

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<sup>22</sup> Even assuming that the fact of Plaintiff's settlement with Hansen has some minimal probative value, its probative value must not be substantially outweighed by prejudice or the other factors listed in ER 403. *Northington*, 102 Wn. App. at 549. Here, any minimal probative value of the settlement is greatly outweighed by its prejudicial impact under ER 403.

DATED: January 13, 2010.



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CERTIFICATE OF SERVICE

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DATED: January 13, 2010

  
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# Appendix A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

XIAO PING CHEN, individually and as ) Personal Representative for the estate ) of Run Sen Liu, and Yu Ting Liu, a ) single person, ) Appellants, ) v. ) THE CITY OF SEATTLE, ) Respondent, ) and ) PETER WALTON BROWN and ) JANE DOE BROWN; and JOHN and ) JANE DOES 1–10, jointly and ) individually, ) Defendants. )	DIVISION ONE No. 62838-1-I  PUBLISHED OPINION   FILED: December 28, 2009
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Dwyer, A.C.J. — A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel. Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway. Although relevant to the determination of

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whether a municipality has breached its duty, evidence that a particular physical defect in a roadway rendered the roadway dangerous or misleading or evidence that a municipality was in violation of a law concerning roadway safety measures are not essential to a claim that a municipality breached the duty of care owed to travelers on its roadways. A trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence. Xiao Ping Chen adduced several pieces of evidence raising a genuine issue as to whether the city of Seattle failed to maintain in a reasonably safe condition the crosswalk in which her now-deceased husband, Run Sen Liu, was struck by an oncoming car. Therefore, the city was not entitled to summary judgment on Chen's negligence claim. Accordingly, we reverse.

I

On a rainy evening in February 2007, Liu was struck by a car driven by Peter Brown at the intersection of South Jackson Street and 10th Avenue South in Seattle's International District. Liu was crossing from the north side of South Jackson Street to its south side through a marked crosswalk. South Jackson Street is a five-lane arterial. At the time of the incident, there were no stoplights, stop signs, or pedestrian signals at the intersection. There were, however, stoplights and pedestrian signals on South Jackson Street at the intersections both preceding and following 10th Avenue South (8th Avenue South and 12th Avenue South). The 10th Avenue South intersection contained only pole-

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mounted signs at the curbs warning that there was a crosswalk and an overhead “Crosswalk” sign with a flashing light suspended above the street. Liu almost crossed the street safely; Brown’s car collided with him in the curbside lane heading eastbound—the fifth and final lane Liu had to cross in order to walk from one side of the street to the other. He suffered a severe brain injury, among other trauma, and spent two years in a coma before dying. Chen brought a claim of negligence against Brown. She also brought a negligence action against the city, claiming that it failed to maintain the crosswalk in a reasonably safe condition for ordinary travel.

Evidence produced during discovery showed that Liu’s accident was not the first serious accident that occurred in the crosswalk. Records produced by the city revealed that, as early as 1992, numerous residents from the surrounding neighborhood had petitioned the city to install stoplights at the intersection because of difficulties they had experienced while trying to cross the street. The city received requests throughout the next decade. In 1999, the city installed a pedestrian island in the center turn lane to provide a refuge at the midway point for pedestrians as they made their way across all five lanes. The city has no record of pedestrian–motor vehicle accidents reported during the time the island was in place. However, at the request of a nearby business, the city removed the island in 2002 in order to facilitate easier left turns through the intersection. Records prepared by city employees indicate that in the five-year

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period after the island was removed and before Liu was hit, there were at least eight other pedestrian–motor vehicle accidents at this intersection. One of these accidents, which occurred in the same crosswalk in which Liu was hit, resulted in the pedestrian’s death.

Studies of the volume of traffic—or average daily traffic count (ADT)—passing through the intersection conducted before and after the incident show that approximately 16,000 motor vehicles traveled through the intersection every day. These studies also show that every day hundreds of pedestrians crossed the intersection, which is roughly 56 feet wide and takes the average pedestrian 19 seconds to cross. According to both parties’ experts, this amount of time constituted the necessary crossing “gap” for the intersection at South Jackson Street and 10th Avenue South. A “gap” is a break in the flow of traffic sufficiently long to allow a pedestrian to cross from one side of the street to the other without having to stop for oncoming cars. Gap studies conducted by the city showed that, before Liu was hit, there were only 6 to 10 gaps per hour; post-accident studies showed that the number of gaps per hour ranged from 3 to 29.

Chen also submitted a 2005 study conducted by Charles Zegeer for the Federal Highway Administration (“the Zegeer study”). The city took part in this study as it was being prepared, and the director of the city’s Department of Transportation later incorporated some of the findings of the Zegeer study into an administrative rule concerning safety measures for marked crosswalks in

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Seattle (“the director’s rule”). The Zegeer study concluded that “[m]arked crosswalks alone are insufficient (i.e., without traffic-calming treatments, traffic signals and pedestrian signals when warranted, or other substantial crossing improvement) and should not be used . . . [o]n a roadway with four or more lanes without a raised median or crossing island that has . . . an ADT of 15,000 or greater.” The director’s rule incorporated this recommendation and characterized a roadway with these conditions as “[u]sually not a good candidate for a marked crosswalk.”

In addition, Chen submitted the declarations of two engineering expert witnesses. Each of these witnesses concluded that the crosswalk did not adhere to sound engineering principles and posed a danger to pedestrians because it did not provide for adequate crossing “gaps.” One of these witnesses, Edward Stevens, had analyzed the crosswalk following the fatal 2002 pedestrian–motor vehicle collision that occurred in the crosswalk. He had apprised the city of his opinion that the crosswalk was unsafe as early as 2005 in litigation arising out of the prior accident. Stevens also opined that the intersection was more dangerous at night because of drivers’ diminished ability to see pedestrians in the crosswalk. Stevens testified at his deposition, however, that nothing at the intersection obstructed a pedestrian’s view of oncoming traffic and that nothing was particularly confusing about the intersection for a motorist. He also agreed that, while “traffic conditions on the roadway may be confusing or misleading to a

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pedestrian, . . . the configuration of the roadway itself is not.” William Haro, Chen’s other engineering expert witness, opined that the city created an unsafe condition when it removed the pedestrian island.

Chen also submitted the declaration of Gerson Alexander, an expert on ergonomics and human factors.<sup>1</sup> Alexander opined that the crosswalk presented a dangerous condition because pedestrians often have trouble accurately gauging the speed and distance of vehicles that are approaching from several hundred feet away and therefore might overestimate the margin of safety they have to cross an intersection. Specifically, he declared that “it is extremely difficult for pedestrians waiting to cross South Jackson to ascertain the distance, speed and time they have to get the necessary 56.3 feet across the intersection without being struck.” In his deposition, Alexander acknowledged that there was nothing about the crosswalk or the configuration of the intersection that was dangerous or misleading “per se,” but he testified consistently with his declaration that the combination of the crosswalk distance, problems of human perception, and the volume and speed of vehicular traffic passing through the intersection combined to create a dangerous condition at the crosswalk.

The city moved for summary judgment of dismissal. Pointing to the deposition testimony of Chen’s experts that the crosswalk did not contain any

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<sup>1</sup> According to Alexander’s declaration, “[h]uman factors is a branch of psychology that examines the application of capabilities and limitations of human beings as they relate to their physical environment. . . . As a human factors analyst, [Alexander is] qualified to analyze and give opinions about the interaction between roadway characteristics and the cues it conveys to the roadway users, including drivers and pedestrians.”

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physical defect rendering the crosswalk inherently dangerous or misleading, the city argued that Chen had failed to produce any evidence establishing that the crosswalk presented an unsafe condition. The city also argued that it was not in violation of any law requiring safety measures different from those installed at the crosswalk. On this point, the city noted that the Manual on Uniform Traffic Control Devices (MUTCD), which Washington has adopted, see RCW 47.36.020; WAC 468-95-010, did not require the city to remove, move, or further regulate the marked crosswalk at issue. Further, the city argued that the Zegeer study and the director's rule applied only to the installation of future crosswalks, not to preexisting crosswalks such as the one in which Liu was fatally injured.

The trial court granted the city's motion. Chen appeals.

## II

We review de novo a trial court's order granting summary judgment.

Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009) (citing Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 693, 169 P.3d 14 (2007)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). "A material fact is one upon which the outcome of the litigation depends in whole or in part." Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev.

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Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). In determining whether a genuine issue of material fact exists, we view all facts and draw all reasonable inferences in favor of the nonmoving party. Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (citing Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)).

Chen claims that the city was negligent in maintaining the crosswalk in which Liu was struck by Brown's oncoming car. To prevail on this claim of negligence, Chen must prove that the city owed Liu a duty of care, that the city breached its duty, and that the city's breach was the proximate cause of Liu's injuries. Ruff, 125 Wn.2d at 704 (citing Hansen v. Wash. Natural Gas Co., 95 Wn.2d 773, 776, 632 P.2d 504 (1981); LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975)); see also Keller v. City of Spokane, 146 Wn.2d 237, 242, 44 P.3d 845 (2002) ("The elements of negligence are duty, breach, causation, and injury.") (citing Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)). At issue here is whether genuine issues of material fact exist as to the first two elements of Chen's negligence claim.<sup>2</sup>

### III

The city contends that the duty it owed to Liu extended only to eliminating particular physical defects in the crosswalk that would have rendered the crosswalk inherently dangerous or misleading and to implementing safety

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<sup>2</sup> The city's motion did not address the question of proximate cause.

measures required by law. The city further maintains that proof of its failure to do either of these things is essential to Chen's claim. We disagree.

"Whether a municipality owes a duty in a particular situation is a question of law." Keller, 146 Wn.2d at 243 (citing Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992)). Implicit in this question are the questions "to whom the duty is owed, and what is the nature of the duty owed," which define the scope of the municipality's duty. Keller, 146 Wn.2d at 243 (citing Wick v. Clark County, 86 Wn. App. 376, 385, 936 P.2d 1201 (1997) (Morgan, J., concurring)). The parties agree that the city owed Liu a duty of care. They sharply dispute, however, what this duty entailed and, thus, which facts are material to the determination of whether the city breached its duty.

"[M]unicipalities are generally held to the same negligence standards as private parties." Keller, 146 Wn.2d at 242-43 (citing Bodin v. City of Stanwood, 130 Wn.2d 726, 731, 927 P.2d 240 (1996)). Thus, they are "held to a general duty of care, that of a 'reasonable person under the circumstances.'" Keller, 146 Wn.2d at 243 (quoting Dan B. Dobbs, The Law of Torts § 228, at 580 (2000)). Specifically with respect to individuals who travel on a municipality's roadways, a municipality owes a duty to all travelers to maintain its roadways in a condition that is reasonably safe for ordinary travel.<sup>3</sup> Owen, 153 Wn.2d at 786-87 (citing

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<sup>3</sup> In several cases decided before Keller, Washington courts defined the scope of a municipality's duty in this regard as being owed to persons using roadways in a "proper manner" or while "exercising ordinary care for their own safety." See Keller, 146 Wn.2d at 246-47 (discussing cases). Some of the decisions referenced herein employed this language in defining a municipality's duty to maintain its roadways in a safe condition. In Keller, however, our Supreme Court clarified that, consistent with the State's law concerning contributory fault in

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Keller, 146 Wn.2d at 249); see also Ruff, 125 Wn.2d at 704. Our Supreme Court has explained that a municipality's duty to maintain its roadways in a reasonably safe condition includes the "duty to eliminate an inherently dangerous or misleading condition." Owen, 153 Wn.2d at 788 (citing Keller, 146 Wn.2d at 249).

The city argues that Chen can prevail only if she shows that a particular physical defect in the crosswalk itself rendered the crosswalk inherently dangerous or inherently misleading or if she shows that the city was in violation of a statute, ordinance, or regulation concerning maintenance of the crosswalk. The implication of the city's argument is that a trier of fact may not determine, based on the totality of the circumstances, that the city breached its duty of care unless one of these two conditions is satisfied. In effect, the city argues that the scope of its duty to Liu extended only to eliminating actual physical defects or to taking action expressly required by a statute, ordinance, or regulation. The city is incorrect on both accounts.

Although the city contends that this case presents an issue of first impression, in reality the question of whether Chen can prove that the city was negligent without showing that the crosswalk contained a physical defect is not a novel one. Nearly 70 years ago, our Supreme Court addressed the question of which facts are material to determining whether a municipality has breached its

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negligence actions, see RCW 4.22.005, "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." 146 Wn.2d at 249 (emphasis added).

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duty to maintain a roadway in a manner that is reasonably safe for ordinary travel. See Berglund v. Spokane County, 4 Wn.2d 309, 103 P.2d 355 (1940). In light of the analysis and holding in Berglund, we conclude that it is not essential for Chen to prove that the crosswalk contained a particular defective physical characteristic rendering the crosswalk inherently misleading or inherently dangerous. Rather, a trier of fact may infer that the city breached the duty of care it owed to Liu based on the totality of the surrounding circumstances.

The situation in Berglund is highly analogous to that herein presented. Berglund's claim concerned whether Spokane County had failed to maintain in a reasonably safe condition a bridge that it had built for use by both pedestrians and motor vehicles. Berglund, 4 Wn.2d at 316. The bridge essentially provided the only way for travelers in the vicinity to cross from one side of a river to the other. Berglund, 4 Wn.2d at 316. Even though the bridge was maintained to accommodate pedestrian traffic as well as vehicular traffic, it contained "no footpath or sidewalk for pedestrians." Berglund, 4 Wn.2d at 316. Pedestrians walked between the bridge railing and the edges of traffic lanes. Berglund, 4 Wn.2d at 316-17. Berglund was hit by a truck that drove out of its lane of traffic and into the space where Berglund was walking. Berglund, 4 Wn.2d at 312.

The court emphasized that "[t]his situation, of itself, would not necessarily present a dangerous condition." Berglund, 4 Wn.2d at 316. The court did not, however, limit its analysis to the issue of whether the bridge contained a

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defective physical characteristic rendering it inherently dangerous. Instead, it also considered that the volume of traffic on the bridge was heavy, that numerous pedestrians were required to cross the bridge daily, and that the county was aware, prior to Berglund's accident, that motor vehicles had nearly hit pedestrians on several occasions. Berglund, 4 Wn.2d at 316–17. In other words, the court concluded that what was material was not just whether the physical structure of the bridge was safe for pedestrian travel in isolation but whether the bridge was reasonably safe in light of its intended use and the actual situation that existed on the roadway.

In considering these several factors, the court declared that “the determination of whether or not a municipality has exercised reasonable care . . . must in each case necessarily depend upon the surrounding circumstances.” Berglund, 4 Wn.2d at 315–16 (citing Ferguson v. City of Yakima, 139 Wash. 216, 246 P. 287 (1926); Lewis v. City of Spokane, 124 Wash. 684, 215 P. 36 (1923); James v. City of Seattle, 68 Wash. 359, 123 P. 472 (1912)). The court did not hold that Berglund, in order to prevail on a claim of negligence against the county, was required to establish the existence of a physical characteristic of the bridge that “necessarily present[ed] a dangerous condition.” Berglund, 4 Wn.2d at 316. Instead, it clarified that the “vital question . . . is not whether the county was, *in any event*, required to build a sidewalk . . . but whether, *under the circumstances*, [the county] exercised the required amount of care to maintain

the bridge in a reasonably safe condition for pedestrians . . . who had been invited to use it.” Berglund, 4 Wn.2d at 317–18 (emphasis added). Indeed, nothing indicates that the physical design of the bridge at issue in Berglund was inherently dangerous or inherently misleading. Rather, what made the conditions on the bridge dangerous was the simultaneous use of the roadway by both pedestrians and motor vehicles. Moreover, by inviting, indeed directing, pedestrians to use the bridge along with motor vehicles, the county had a duty to “exercise reasonable care to keep [the bridge] in a reasonably safe condition for [both of the intended modes of] travel.” Berglund, 4 Wn.2d at 317.

The similarities between this case and Berglund are striking. Similar to Berglund, Chen contends that the totality of the circumstances surrounding the crosswalk made the crosswalk dangerous, while the city maintains, similar to the arguments advanced by the county in Berglund, that it had no duty to design the crosswalk and control the flow of pedestrian and vehicular traffic through the intersection any differently than it did. The city may be correct that the crosswalk, by itself, was not inherently dangerous or inherently misleading. But our Supreme Court made clear in Berglund that the analysis of whether a dangerous condition at a roadway exists and, in turn, whether a municipality has breached its duty to maintain the roadway in a reasonably safe condition, does not begin and end with consideration of only the physical characteristics of the roadway at issue. Thus, in the situation herein presented, what are also material

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to the determination of whether the city exercised reasonable care under the circumstances are the intended uses of the crosswalk and of the intersecting street and the conditions at the crosswalk. Accordingly, proof that a particular physical defect rendered the crosswalk inherently dangerous or inherently misleading is not essential to Chen's claim.

The city reads some of our Supreme Court's opinions in cases decided after Berglund as abrogating the reasoning and holding in Berglund. See Owen, 153 Wn.2d 780; Ruff, 125 Wn.2d 697; Ulve v. City of Raymond, 51 Wn.2d 241, 317 P.2d 908 (1957). Our Supreme Court, however, did not indicate in these cases that it was overruling its holding in Berglund. To the contrary, in both Owen and Ulve, the court explained that its determination of whether sufficient evidence to sustain the claims of negligence brought against the respective municipalities in those cases turned on the myriad circumstances surrounding the roadways therein at issue. See Owen, 153 Wn.2d at 790; Ulve, 51 Wn.2d at 251–52. In neither case did the court indicate that proof of particular physical defects in the roadways therein at issue were essential to the plaintiffs' claims. Moreover, in the context of a negligence action against a municipality, our Supreme Court has recently relied directly upon Berglund in articulating that "the determination [of] whether a municipality has exercised reasonable care 'must in each case necessarily depend upon the surrounding circumstances.'" Bodin, 130 Wn.2d at 734 (quoting Berglund, 4 Wn.2d at 316). Our Supreme Court's

subsequent decisions have not eroded Berglund's precedential value.

The third case cited by the city, Ruff, is readily distinguishable from Owen, Ulve, and this case. Ruff specifically claimed that the physical characteristics of the roadway, by themselves, rendered the roadway therein at issue unsafe for ordinary travel. Ruff, 125 Wn.2d at 701. He did not allege that any other circumstances surrounding the roadway combined with the road's physical characteristics to make the roadway unsafe. The court concluded that the road authority was entitled to summary judgment because the undisputed evidence—in particular the testimony and declarations of Ruff's own experts—established that the roadway was in excellent physical condition at the time of the accident and was neither inherently dangerous nor inherently misleading. Ruff, 125 Wn.2d at 706–07. However, the court did not indicate that it directed its analysis exclusively toward the evidence concerning the roadway's physical characteristics for any reason other than the narrow focus of Ruff's claims and the fact that the evidence at issue concerned only the roadway's physical characteristics as they related to vehicular traffic. In reading Ruff as requiring a plaintiff to show that a roadway suffers from a particular physical defect, the city overstates its holding.

The city also argues that it was not required to install additional traffic safety measures because the traffic moving through the intersection constituted an open and obvious hazard.<sup>4</sup> In advancing this argument, however, the city

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<sup>4</sup> In advancing this argument, the city cites to several decisions of courts in other

ignores that a pedestrian using a crosswalk is given a preference over individuals using other modes of transportation. A marked crosswalk is “any portion of a roadway *distinctly indicated* for pedestrian crossing by lines or other

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jurisdictions, in which those courts held that high traffic volumes by themselves do not constitute dangerous conditions such that the absence of traffic or pedestrian signals or stop signs at those locations could not cause liability to attach to municipalities for negligent maintenance of the roadways. See Song X. Sun v. City of Oakland, 166 Cal. App. 4th 1177, 83 Cal. Rptr. 3d 372 (2008); Orlando v. Broward County, Florida, 920 So.2d 54 (Fla. Dist. Ct. App. 2005); Brenner v. City of El Cajon, 113 Cal. App. 4th 434, 6 Cal. Rptr. 3d 316 (2003); King by King v. Brown, 221 N.J. Super. 270, 534 A.2d 413 (N.J. Super. Ct. App. Div. 1987). These cases, however, are inapposite to the factual situation herein presented, as they do not involve situations in which pedestrians crossed a street through *marked crosswalks*. See Sun, 166 Cal. App. 4th at 1180–81 (involving pedestrian who was killed while crossing an intersection in an “unmarked pedestrian crosswalk,” which had been previously marked but not remarked after the city repaved the street); Orlando, 920 So.2d at 56 (involving a child who was killed by an oncoming motorist while crossing the street in front of his school mid-block, “not at a crosswalk,” to reach his mother waiting on the other side of the road); Brenner, 113 Cal. App. 4th at 436 (involving a pedestrian–vehicle collision where the pedestrian was attempting to cross a street “near” an intersection and contrasting it with a case in which a pedestrian was hit by a car in an unmarked crosswalk at an uncontrolled intersection while trying to catch a bus); King, 221 N.J. Super. at 272 (involving a pedestrian attempting to cross a street mid-block, not at an intersection, who walked into the rear of a vehicle traveling in the first lane of traffic he tried to cross). In addition, the nature of the plaintiffs’ claims and the reasons for dismissal in some of these cases also make them inapposite. See Orlando, 920 So.2d at 56 (holding that sovereign immunity against claims arising out of discretionary policy decisions barred plaintiff’s claim that her child’s death, caused while crossing the street to be picked up from school, was a proximate result of the school board’s negligence in planning the end of the school day to coincide with rush hour traffic and in not extending bus service to her child). Also, the California cases involved a statutory scheme governing a municipality’s duties toward travelers that differs from the duties that Washington municipalities have under the common law.

Further, the city overlooks part of the court’s analysis in King that actually undermines its argument advanced herein. The King court clarified that its decision barring recovery on a theory that the municipality maintained a dangerous condition on the roadway did not rest “on a distinction between physical defects in public property and activities on that property.” 221 N.J. Super. at 274. It continued:

In our view, a condition of public property which is safe for one activity may become a dangerous condition when the property is converted to a different activity. For example, a bridge designed solely for pedestrian use may become dangerous when converted to use by vehicular traffic if its structure cannot support the additional load. In most cases, application of the dangerous condition standard requires consideration of both the physical characteristics of the public property as well as the nature of the activities permitted on that property. Indeed, the definition of dangerous condition . . . *requires consideration of the reasonably foreseeable use of the property.*

King, 221 N.J. Super. at 274–75 (emphasis added). The city ignores King’s holding that whether a roadway is dangerous depends, at least in part, on how and for what purpose the roadway will be used.

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markings on the surface thereof.” RCW 46.04.290 (emphasis added). Motor vehicles must yield to pedestrians in marked or unmarked crosswalks. RCW 46.61.235(1). That the law directs pedestrians to use crosswalks can be inferred from the lack of priority given to pedestrians who cross at points other than crosswalks: “Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.” RCW 46.61.240. Although the law does not permit a pedestrian to walk “suddenly” into a crosswalk so that an approaching vehicle cannot stop, RCW 46.61.235(2), Washington courts have long recognized that a pedestrian in a crosswalk “may assume that the driver of a vehicle will recognize the pedestrian’s right of way.” Knight v. Pang, 32 Wn.2d 217, 232, 201 P.2d 198 (1948); see also Jung v. York, 75 Wn.2d 195, 198, 449 P.2d 409 (1969) (citing Jerdal v. Sinclair, 54 Wn.2d 565, 342 P.2d 585 (1959)); Burnham v. Nehren, 7 Wn. App. 860, 864, 503 P.2d 122 (1972) (citing Shasky v. Burden, 78 Wn.2d 193, 470 P.2d 544 (1970)). Indeed, one of the city’s own traffic engineers testified in a deposition that the crosswalk herein at issue was the only crosswalk at the intersection and that it was the preferred location for pedestrians to cross the intersection.

By establishing certain presumptions in their favor, the law directs pedestrians to use marked crosswalks. Therefore, the city has a corresponding duty to maintain its crosswalks in a manner that is reasonably safe for ordinary

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travel in light of the circumstances at each particular crosswalk. A municipality's decision to open a roadway triggers its duty to maintain the roadway in a reasonably safe condition. The circumstances present on the particular roadway dictate that which will constitute reasonably safe maintenance. Berglund, 4 Wn.2d at 317–18. “[A]s the danger [at a particular roadway] becomes greater, the [municipality] is required to exercise caution commensurate with it.’ Simply stated, the existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings.” Owen, 153 Wn.2d at 788 (alteration in original and citation omitted) (quoting Ulve, 51 Wn.2d at 246, 251–52).

Therefore, by virtue of its decision to direct pedestrians to walk in the crosswalk herein at issue, the city had a duty to ensure that the crosswalk would be reasonably safe for its intended use in light of the circumstances present at the crosswalk, which included the busy intersection through which the pedestrians were directed to walk. Traffic control measures that render safe one crosswalk may be insufficient to render safe another crosswalk of the same length and in the same physical condition because of vehicular traffic or other factors. That which constitutes reasonable care in a particular situation depends on the surrounding circumstances. Keller, 146 Wn.2d at 243 (quoting Dobbs, supra, at 580). In the context of the city's duty to maintain its roadways in a reasonably safe condition, its duty is not necessarily limited only to eliminating

physical defects or to implementing mandatory traffic control devices.

There is likewise no merit to the city's argument that its duty to safely maintain roadways is tempered by motorists' duties to also exercise reasonable care. Although the city need not insure against the negligence of drivers, Keller, 146 Wn.2d at 252, who are always bound to exercise due care to avoid colliding with pedestrians, see RCW 46.61.245, the negligence of motorists with respect to pedestrians is not determinative of whether road conditions were safe for pedestrian travel. The city owes a duty to pedestrians and motorists alike. The negligence of a third party does not absolve the city of its duty to maintain its roadways, including crosswalks, in a reasonably safe manner. Tanguma v. Yakima County, 18 Wn. App. 555, 561-62, 569 P.2d 1225 (1977) (quoting Lucas v. Phillips, 34 Wn.2d 591, 597-98, 209 P.2d 279 (1949); Restatement (Second) of Torts §§ 447, 449 (1965)). As the cases discussed above make clear, the circumstances that existed at the crosswalk provide the facts relevant to determining whether the city breached its duty to Liu.

Also without merit is the city's argument that it did not breach its duty to maintain the crosswalk in a safe condition because the MUTCD did not require it to install additional safety measures at the crosswalk. The MUTCD provides that "[t]he need for a traffic control signal at an intersection . . . shall be considered" if the pedestrian volume exceeds 190 in any one-hour period or 100 in each hour of a four-hour period and there are fewer than 60 gaps per hour during those

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periods.<sup>5</sup> The city maintains that because these conditions were not satisfied, no traffic signal at the intersection of 10th Avenue South and South Jackson Street was warranted. The city is incorrect, however, in concluding that, because conditions triggering a mandatory duty to consider the installation of traffic signal were not met, it had no duty to consider installing such a signal in light of the actual conditions of the roadway. “Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care.” Owen, 153 Wn.2d at 787 (citing Bauman v. Crawford, 104 Wn.2d 241, 244–45, 704 P.2d 1181 (1985)).

None of the cases on which the city relies requires a plaintiff to prove that a particular physical defect of the roadway, by itself, made the roadway unsafe. Our Supreme Court has consistently held that consideration of all of the surrounding circumstances is necessary to determine whether a particular roadway presented an unsafe condition. In determining whether a dangerous condition exists at a roadway and whether a municipality has breached its duty to maintain a roadway in a safe condition, the trier of fact may infer that a breach has occurred based on the totality of the relevant surrounding circumstances, regardless of whether there is proof that a defective physical characteristic in the roadway rendered the roadway inherently dangerous or inherently misleading.

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<sup>5</sup> Although the MUTCD was adopted in its entirety, the code reviser determined not to publish every regulation contained in the MUTCD. WAC 468-95-010. The MUTCD provision cited, supra, is not in the published code, but is contained in our Clerk’s Papers.

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That Chen may not have put forth evidence that the crosswalk itself contained a defective physical characteristic making the crosswalk misleading or dangerous is not dispositive.

Having clarified which types of facts are material to Chen's claim, we now address whether there is evidence in the record to raise a genuine issue as to whether the city breached its duty to Liu.

IV

The city contends that Chen failed to adduce evidence raising a genuine issue as to whether the crosswalk was unsafe and, correspondingly, whether the city breached the duty of care it owed to Liu. Again, we disagree.

We observe at the outset that whether a roadway was safe for ordinary travel and whether a municipality took adequate corrective action are questions of fact. Owen, 153 Wn.2d at 788. Such questions concern a municipality's negligence and "are generally not susceptible to summary judgment." Owen, 153 Wn.2d at 788 (quoting Ruff, 125 Wn.2d at 703).

There is ample evidence in the record raising a genuine issue as to whether the city breached its duty to Liu to maintain the crosswalk in a reasonably safe condition for ordinary travel. The evidence shows that the city was aware of several accidents and near-accidents that had occurred in this crosswalk before Liu was struck. The city does not dispute that, from 1992 to 1999, it received dozens of requests from area residents for the installation of a traffic signal at the intersection. Records maintained by city employees reflect that there were many reported accidents both before the installation of a pedestrian island in 1999 and after the island was removed in 2002. But the city's records do not reflect that any accidents were reported during the period the island was in place.

In addition, each of Chen's expert witnesses concluded that the crosswalk

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presented a dangerous condition. “[A]n expert opinion on an ‘ultimate issue of fact’ is sufficient to defeat a motion for summary judgment.” Eriks v. Denver, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (quoting Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)). Chen’s experts’ conclusions are based on the small number of crossing gaps resulting from the city’s decision to maintain the crosswalk through five lanes of traffic without interruption. The traffic volume studies demonstrate that the ADT at the crosswalk exceeded the volume deemed safe for a marked crosswalk crossing four or more lanes of traffic without a pedestrian island, as set forth in the director’s rule and recommended by the Zegeer study. The city was aware of the Zegeer study and had incorporated portions of the study’s findings into its own internal guidelines. Although the Zegeer study did not itself carry the force of law, the study nonetheless bears on whether the city acted reasonably in maintaining the crosswalk as it did in light of the history of accidents at the intersection. Whether conditions at the crosswalk were unsafe and whether the city was negligent in failing to eliminate them must be determined with respect to all of the surrounding circumstances.

Further, that the experts agreed that nothing obstructed the views of pedestrians or drivers and that the physical layout of the intersection was not confusing does not settle the issue of whether the conditions at the crosswalk were unsafe. Alexander’s expert report and testimony tend to prove that

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pedestrians can be poor judges of the speeds at which oncoming vehicles are traveling. The evidence in the record also shows that the intersection at 10th Avenue South and South Jackson Street differed from other intersections along South Jackson Street in that it did not have traffic and pedestrian signals.

Viewed in the light most favorable to Chen as the nonmoving party, the evidence raises genuine issues as to whether an unsafe condition existed and whether the city breached its duty of care. Therefore, the city was not entitled to summary judgment.

Reversed.

Dwyer, A.C.J.

We concur:

Appelwick, J.

Cox, J.

# Appendix B

