

65177-3

65177-3

NO. 65177-3-1

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

RAEGAN MCKIBBIN, a single women, *Appellant*,

v.

CITY OF SEATTLE, a municipal corporation, *Respondent*,

PUGET SOUND ENERGY, INC., a public for-profit corporation,
PILCHUCK CONTRACTORS, a for-profit Washington corporation, and
a subsidiary of MICHAEL CORPORATION, a Washington corporation,
Defendants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MICHAEL HEAVEY

BRIEF OF APPELLANT

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INTRODUCTION

In 2005, the undisputed industry standard for municipal street drain grates in Seattle and the rest of the country was steel or iron. Nevertheless, a number of old street drains in a North Seattle neighborhood had wood boards serving as grate covers. These drains dated back to the 1950s or before. By 2005, these wood boards were failing and a number of them had been replaced by readily available and inexpensive metal grate covers. The replacement metal grate covers were “weathering well” and were in “excellent condition.”

The street drain in front of the Plaintiff’s house was in particularly bad repair and in 2005, in response to a call from the Plaintiff informing the City that one of the boards was broken and had created a hole into which several people had almost stepped, workers for the City of Seattle rebuilt the drain, including repouring portions of the concrete base. Despite the fact that metal was the industry standard and other old drains in the vicinity had their old wood grates replaced with metal ones, the City workers in the instance of the street drain in front of Ms. McKibbin’s house, re-used wood boards as the grate cover. Less than two years later, one of the boards gave way when the Plaintiff stepped on it and she was severely injured.

The regular instruction in this circumstance, WPI 140.01, requires municipalities to exercise ordinary care in the design, construction, maintenance and repair of sidewalks, streets and roads so that they are reasonably safe for the public. There is an alternative instruction, WPI 140.02, that is reserved for situations in which temporary conditions created by others on a sidewalk, street or road create a danger to the public. The classic example of this circumstance is when someone pulls the cover off an otherwise well designed, constructed and maintained man hole, leaving a hole in the street which is obviously a hazard to pedestrians and traffic. In such a situation, WPI 140.02 applies and requires the municipality to be placed on notice of the temporarily dangerous condition before liability will attach. Then the question for the jury under WPI 140.02 is whether the municipality responded to address the temporarily dangerous condition in a reasonable time before the Plaintiff was injured.

Here, there was some speculation that a gas pipe repair contractor may have parked its vehicle on the street drain in front of the Plaintiff's house and harmed it in some way, even though it is undisputed that the Plaintiff jumped up and down on the drain cover boards after the vehicle was moved and it appeared to be fine. Unfortunately, the Trial Court herein ruled that WPI 140.02 applied and the City had to be on notice of

the fact that a vehicle had parked on the drain cover two months before the accident before liability could attach.

Plaintiff alleges this was error. The Plaintiff's theory of the case as argued to the Trial Court is that the City breached its duty of ordinary care when it installed a wood rather than metal drain cover in violation of the industry standard then existing when rebuilding the street drain in 2005. The Plaintiff alleged that the City breached its duty of ordinary care in the design, construction, maintenance and repair of its streets by using substandard materials in violation of the industry standard which created a condition that foreseeably caused injury to the Plaintiff. Since the City created the condition, the notice instruction could not apply.

Plaintiff's expert testified that because wood deteriorates over time, it is not a matter of *if* wood will fail catastrophically in the setting of a municipal street drain grate, it is a matter of when. CP 197-98, 286-88. He also testified that wood is not as strong as the industry standard of metal and frequently cannot support the weight of foreseeable vehicles using modern city streets without sustaining damage which will lead to catastrophic failure. *Id.* He testified that metal street drain covers are the industry standard and the City violated this industry standard when it chose to employ wooden drain cover when rebuilding the drain in 2005.

CP 197-98, 288-89. And he further testified that wood subjected to moisture loses strength, making it a particularly inappropriate material for a street drain cover, which is frequently subjected to moisture, CP 197-98, 287, 289-90, and thus, compared to metal, wood is an inferior and inadequate material for modern municipal street drain covers, CP 197-98, 286-89.

The Trial Court did not receive this testimony, however, because it incorrectly ruled that the expert's report addressed to counsel and attached to counsel's sworn declaration was not properly authenticated to be received in evidence in response to a motion for summary judgment. Thus, the Trial Court apparently resolved the purely factual question of whether wood was a reasonable material for use as a modern municipal street drain cover on its own, and then, applying WPI 140.02, held that whatever might have compromised the wood needed to have been brought to the attention of the City before liability would be imposed. The Trial Court required this notice to the City, even though no one could say exactly what, other exposure to moisture, the passage of time, and possibly foreseeable municipal vehicular traffic, compromised the wooden boards.

Plaintiff asserts herein that the Trial Court misapplied the law both in ruling that WPI 140.02 applied, and in striking the report of Plaintiff's

expert. Plaintiff requests this Court reverse and remand for trial.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in granting the City of Seattle's motion for summary judgment, incorrectly concluding that WPI 140.02 rather than WPI 140.01 provides the rule of decision in this case.

2. The Trial Court erred in striking the Report of Bryan Jorgensen, attached to the sworn Declaration of David B. Richardson.

RESTATED ASSIGNMENTS OF ERROR

1. Where the municipality creates the unsafe condition which injures the plaintiff by using materials that violate the industry standard at the time they are used, does the municipality need to be provided with additional notice of the unsafe condition before liability may be imposed?

2. Is the report of an expert witnesses which is addressed to counsel and attached to counsel's sworn declaration authenticated such that the report will be considered in response to a motion for summary judgment?

STATEMENT OF THE CASE

A. Background.

In January 2005, Raegan McKibbin and her boyfriend Michael Clark moved into the home at 10318 Midvale Avenue North in Seattle's

Greenwood neighborhood. CP 115-16, 208. The street in this block of Midvale Avenue North and much of the surrounding neighborhood is not improved with curbs or sidewalks. CP 151, 140, 203. Between the asphalt street and the McKibbin/Clark home is an unimproved parking strip owned by the City of Seattle (“City” herein) that is covered with gravel and contains the street drain at issue herein.¹ CP 93, 151, 203.

In approximately 1955, the City of Seattle annexed a large area of the city north of North 85th Street, which includes the block of Midvale Avenue North where the McKibbin/Clark home is located. CP 103. In doing so, the City inherited the storm water drainage system that had been installed many years previously by the Lake City Sewer District. *Id.* Some of the street drains inherited by the City, no doubt constructed many years prior by the Lake City Sewer District, consisted of roughly square concrete frames approximately two and one-half feet across, fitted with wooden boards with wooden spacers between the boards creating gaps through which storm water could flow. CP 103, 151-52, 199, 204. The wooden boards constituted the “grates” or “covers”² for the street drains

¹ The City prefers to refer to these street drains as “sandboxes,” which are part of a larger “ditch and culvert drainage system” for storm water. CP 93, 103. Plaintiff will refer to these inlets by their common name: “street drains.”

² These terms for the grate on the surface of the street drains will be used interchangeably herein, but will be mainly referred to as “covers.” The “covers” are, in fact, “grates.”

and was the portion of the ditch and culvert system on the surface of the street with which members of the public came into contact. *Id.* One such street drain with a wooden cover was located in the City's gravel-covered parking strip between Midvale Avenue North and the McKibbin/Clark residence. *Id.* The gravel parking strip containing the street drain was used primarily for parking vehicles. CP 93, 131-32; 140-01, 148, 197.

B. The City rebuilt the street drain and cover in front of Ms. McKibbin's house in 2005, two years before Ms. McKibbin's accident, but choose to install a wood rather than metal grate cover, despite the fact that metal grate covers were the industry standard at the time.

Soon after Ms. McKibbin and Mr. Clark moved into their home in January 2005, they noticed that the subject street drain was in considerable disrepair. One of the boards comprising the subject street drain cover was broken with pieces of it lying inside the street drain box and the concrete frame of the drain was deteriorated and crumbling with one side of it sunk somewhat into the ground. CP 127, 208. Ms. McKibbin called the City to report the hazard. CP 127, 208-09. The City failed to respond in any way. Ms. McKibbin observed an elderly women and some children at play almost step into the void created by the missing board in the street drain and called the City again. *Id.* Mr. Clark put a piece of plywood over the street drain so no one would get hurt. *Id.* City workers responded to the

second call, and came out and rebuilt the street drain. *Id.*

To rebuild the street drain, the City removed all of the wooden boards which constituted the drain cover grate and poured new concrete forms to rebuild the concrete frame where one of the sides had sunk and crumbled. CP 127, 209. Other wooden street drain covers in nearby street drains in the same neighborhood of the identical design and vintage as the subject street drain had suffered the same “beam failure” as the subject street drain and had been replaced with metal drain cover grates. CP 197, 205 (photo #1936). In 2005, metal had long been the industry standard for street drain cover grates, was in wide use in the City of Seattle in “the vast majority of situations” and was the material used for street drain covers in “virtually all modern jurisdictions.” CP 197, 289.

Nevertheless, rather than install a common, readily available and inexpensive metal drain cover, the City instead elected to re-install wooden boards in the reconstructed street drain, either reusing the three old wooden boards and replacing the broken one, or installing four replacement boards fashioned to fit into the frame of the drain opening. CP 127, 209.

In her deposition, Ms. McKibbin testified that the street drain had deteriorated, there was a hole where a board had been, and the concrete

base was crumbled:

When I first moved in there was no -- the grate was completely -- there was a board missing completely out of it and the concrete around the edge of the grate had deteriorated and crumbled into the grate. So I had made a phone call in January when we moved in to the City of Seattle and told them that the grate was dangerous and it had a big hole in it, and nothing happened.

Then I made a second phone call to them, because a lady that comes and walks her -- the lady that lives at the end of the block walks her dog to get the mail every day and she almost fell in it. I watched her, you know, just about step into the grate. And so the second time I called them back and told them that someone had almost fallen into it.

And my boyfriend Michael went out and put, at that time when the lady almost fell through, he put a piece of plywood over the top of the grate until they came out to fix it. And about a week later they came out and fixed it. But they just put the same wood in there as they had before. So because it was replaced with wood, I was just -- you know, it was just something that I didn't -- I couldn't believe that that's how they fixed it.

CP 127. She testified that the grate continued to be dangerous thereafter:

I just know it's been dangerous ever since -- when they came out to fix it the last time, it still isn't -- they say it's fixed but you can kick the board and it will fall, when it gets dried, you know.

CP 139-40. She testified that she and her boyfriend Michael Clark thought the City would replace the broken wooden grate with a modern metal grate: "No, our opinion was that they should have never replaced it with wood in the first place. We thought they were going to come out and

replace it with metal when they came out that January.” CP 147.

- C. In September 2007, two months before Ms. McKibbin’s accident, a vehicle owned by Pilchuck Contractors was seen parked on the drain cover. After it was moved the drain cover appeared sound.

In September 2007, Pilchuck Contractors, a subcontractor for Puget Sound Energy, replaced the gas lines under Midvale Avenue North in the block of the McKibbin/Clark residence. CP 139, 156-67, 209. Ms. McKibbin recalls a Pilchuck Contractors vehicle parked with one of its wheels on the subject street drain. CP 131, 138, 144, 209. She and Michael Clark examined the street drain after the vehicle was moved and although one of the wooden street drain boards had a tire track on it and appeared to have been pushed downward slightly, they jumped up and down on it and it appeared to be sound. CP 131, 138-39, 143, 149, 209.

- D. Ms. McKibbin was severely injured when the wooden drain cover gave way under her own weight.

On October 14, 2007, Ms. McKibbin’s car was parked in the gravel parking strip in front of her house next to the subject street drain. CP 125-29, 143, 207-08. She backed her car slightly away from the fence and got out to check the oil before starting the car. *Id.* As she got out of the car, she stepped on the street drain and one of the wooden boards that comprised the drain cover broke in two. *Id. See photos*, CP 184-189. Her left leg plunged downward into the empty space beneath the drain cover

approximately up to her hips, while her right leg remained on the level of the parking strip and she “did the splits.” CP 127. Her back struck the baseboard of her vehicle door. CP 128, 131. She suffered serious injuries including a herniated lumbar disc which has left her unable to work. CP 118, 134, 144.

- E. Expert testimony established that because wood deteriorates and cannot withstand the foreseeable loads posed by vehicular traffic, its use as a material for the grate cover in a modern municipal street drain violates the industry standard and breaches the standard of care.

Accident Reconstructionist Bryan Jorgensen evaluated the wooden street drain on July 23, 2009, and submitted a report dated August 25, 2009. CP 195-206. Mr. Jorgensen concluded that the wooden boards which comprised the street drain cover originally had the capacity to carry Ms. McKibbin’s weight, but failed catastrophically at a fraction of their load-bearing capability. CP 196. He noted that “it is the nature of wood that it deteriorates over time and it rots more rapidly when damaged as water is allowed access to the interior fibers of the beam.” CP 197. He observed, “Metal used in drain covers deteriorates exponentially more slowly than wood, and it is generally much stronger as well.” *Id.*

Concluding, Mr. Jorgensen stated:

The drain of interest was located in what was essentially a street parking area open to general use. In such a location,

a wide variety of vehicular traffic would occur (including such heavy vehicles as required by maintenance) leading to a variety of loads, some of which would be maintained for many hours. In such a foreseeable situation, wood was a poor choice. In this application wood was far weaker than steel, and more importantly it deteriorates much more quickly – also foreseeable. ***The overwhelming material of choice for such applications is steel, or iron.***

There were two documented severe failures of the grate cover of interest within a few years. There was clear evidence in another similar drain nearby that it had also failed and had been replaced relatively recently. The use of inferior material as a grate cover resulted in an otherwise easily avoided injury accident to Ms. McKibbin.

The current state of the drain of interest is poor. The materials and workmanship were inferior and the drain cover is currently a hazard to pedestrians. [Emphasis added].

CP 197-98.

Mr. Jorgensen noted that other wood drain covers in the subject location had experienced “beam failure.” CP 197. Other formerly wooden drain covers in the area “similar to the drain of interest” had been replaced with “metal drain covers” which were “weathering extremely well,” “were in excellent condition and posed no hazard to pedestrian or vehicular traffic.” *Id.* CP 205, photo #1936 (formerly wooden drain cover replaced with a metal drain cover.)

In his Declaration, Mr. Jorgensen testified that because wood deteriorates over time, it is not a matter of *if* wood will fail catastrophically

in the setting of a municipal street drain grate, it is a matter of when. CP 286-88. Wood is not as strong as the industry standard of metal and frequently cannot support the weight of foreseeable vehicles using modern city streets without sustaining damage which will lead to catastrophic failure. *Id.* Metal street drain grate covers were the industry standard in 2005 and used by the City of Seattle and “virtually all modern jurisdictions” in “the vast majority of situations.” CP 288-89.³ The City violated this industry standard when it chose to employ wooden drain covers when rebuilding the drain in 2005. *Id.* Compared to metal, wood is an inferior and inadequate material for street drain covers. CP 286-89. Wood subjected to moisture loses strength, making it a particularly inappropriate material for a street drain cover, which is frequently subjected to moisture. CP 287, 289-90.

³ Before the trial court, the City claimed that it believed that there might be 5,000 street drains with wooden covers in Seattle. CP 94, 163, 346. There is no actual evidence in this case to support this claim. In discovery, the City produced a CD Rom disk with an Excel file containing nothing but unintelligible data, without a declaration from a person competent to interpret the data or to state that the data means what the City contends it means. CP 163, 185, 190-93. It is raw data, and without more, it is meaningless. *See id.* The City’s counsel simply claims she has been informed of its meaning. Further, the City does not even claim that the data indicates whether the particular type of street drains it claims may be identified by the data (“Sand Boxes”) actually have wooden covers, only that they were the *type* of street drains which *may have employed wooden covers at some time in the past*. Therefore, since there is no actual evidence to support the City’s claim in this regard, it should be disregarded by the Court.

The City has not employed an accident reconstructionist or other expert, nor has it submitted testimony or other evidence that conflicts with or contradicts the testimony of Ms. McKibbin or Bryan Jorgensen. Their testimony is un rebutted.

F. Procedural history.

Plaintiff filed this action on December 5, 2008 against the City of Seattle, Puget Sound Energy and Pilchuck Contractors, a subsidiary of Michael's Corporation. CP 1. Pilchuck Contractors promptly assumed the defense and indemnity of Puget Sound Energy, and on June 16, 2009, Puget Sound Energy was dismissed. CP 38-40.

On December 1, 2009, Pilchuck Contractors filed a motion for summary judgment. CP 43-55. Pilchuck claimed that none of its vehicles had parked on the drain cover, and even if they had, there was no evidence the drain cover was damaged in any way. *Id.* On January 8, 2009, the City of Seattle filed a motion for summary judgment. CP 92-102. On January 21, 2009, Plaintiff filed its response to Pilchuck's motion for summary judgment, indicating that it did not oppose Pilchuck's dismissal from the case. CP 182-83. Plaintiff stated that although it was possible that the Pilchuck vehicle had weakened the wooden drain cover when parked on it two months before the accident, the evidence in this regard was

speculative and Pilchuck had breached no duty owed to the Plaintiff by simply parking its vehicle on a city parking strip. *Id.* The City of Seattle, however, opposed Pilchuck's motion for summary judgment, and filed a response to the motion. CP 232-36.

Plaintiff filed her response to the City's motion for summary judgment on January 26, 2009, together with the Declaration of Raegan McKibbin and the Declaration of David B. Richardson, attaching certain documents, including the Report of Bryan Jorgensen. RP 2; CP 184-225. On January 28, the City filed a motion to strike the Report of Bryan Jorgensen. RP 2; CP 226-31. On February 1, 2009, the City filed its reply to its motion for summary judgment. RP 2; CP 269-73. On February 3, 2009, the Plaintiff filed her response to the motion to strike the Report of Bryan Jorgensen, and filed the Declaration of Bryan Jorgensen and the Declaration of David B. Richardson in support. RP 2; CP 274-305. On February 3, 2009, the City filed its reply regarding the motion to strike the Report of Bryan Jorgensen. RP 2; CP 313-16.

On February 5, 2010, the parties appeared before the Honorable Michael J. Heavey in Department 20 of the King County Superior Court. RP 2. Counsel for Pilchuck Contractors appeared but took no position on the motion. *Id.* The Court first heard argument from counsel for the City

and the Plaintiff on the motion to strike the Report of Bryan Jorgensen. RP 3. Thereafter, and prior to receiving argument on the motion for summary judgment, the Court indicated that if it found that WPI 140.02 did not apply and that WPI 140.01 provided the proper legal standard in the case (i.e., if it adopted the position advanced by Plaintiff), it would entertain a motion to continue the hearing to allow the City of Seattle to respond to the Declaration of Bryan Jorgensen, filed in response to the motion to strike the Report of Bryan Jorgensen. *Id.* The Court then heard argument from counsel on the motion for summary judgment and determined that the notice provision of WPI 140.02 applied. *Id.* The Court then granted the City's motion for summary judgment and signed the City's proposed order. RP 3; CP 319, 321. The Court interlineated on the bottom of page two of the Order, "The Motion to strike the declaration of Bryan Jorgensen is granted." *Id.*

The only motion pending before the Court regarding the submissions from Bryan Jorgensen was the motion to strike the Report of Bryan Jorgensen. RP 3; CP 226-31. Under the circumstances, it is felt that the Court meant to interlineate that the motion to strike the *report* of Bryan Jorgensen was granted, and that use of the word "declaration" rather than "report" by the Court was an inadvertent scrivener's error.

On February 11, 2010, the Court granted Pilchuck's motion for summary judgment, finding as a matter of law that Pilchuck breached no duty owed to the Plaintiff or the City by parking its vehicle on a city street or parking strip, and that there was insufficient evidence that Pilchuck's vehicle caused any damage to the subject street drain. CP 324-26. This decision has not been appealed and is now the law of the case.

On February 17, 2010, the Plaintiff filed a motion for reconsideration of the Court's decision to grant the City's motion for summary judgment and strike the Report of Bryan Jorgensen. RP 3; CP 327-42. The Court requested briefing and the City filed its response on March 6, 2010. CP 343-56. The Plaintiff filed her Reply on March 9, 2010 (received by the Court's e-filing system on March 10, 2010). CP 357-77. The Court denied the motion for reconsideration on March 10, 2010. RP 3; CP 378-80. This appeal followed.

ARGUMENT

A. Standard of Review

Appellate review of the Trial Court's order on Summary Judgment is *de novo*. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

In a motion for summary judgment, the moving party bears the

initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 108, 751 P.2d 282 (1988); *Nicholson v. Deal*, 52 Wn. App. 814, 764 P.2d 1007 (1988); *Hostetler v. Ward*, 41 Wn. App. 343, 346, 704 P.2d 11903 (1985) *review denied*, 106 Wn.2d 1004 (1986). If the moving party meets this burden by presenting evidence from which reasonable persons could reach but one conclusion, the burden shifts to the non-moving party to present evidence that would support a genuine issue for trial. *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980); *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 853, 751 P.2d 854 (1988). The facts submitted and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989); *Douchette v. Bethel Sch. Dist. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991). The court may grant the motion only if reasonable minds could reach but one conclusion. *Nicholson, supra*. "Issues of negligence and proximate cause are generally not susceptible to summary judgment." *Owen v.*

Burlington Northern and Santa Fe R.R., 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (citing *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 299 (1995)). As long as a reasonable jury could find for the nonmoving party, the motion for summary judgment must be denied and the issue submitted to the trier of fact. *Herron v. KING Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989). The trial court may not replace the trier of fact by weighing facts or deciding factual issues. *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991); *Hemenway v. Miller*, 116 Wn.2d 725, 807 P.2d 863 (1991); *Ames v. Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993). The function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists; it is not to resolve issues of fact or to arrive at conclusions based thereon. *Hamilton v. Huggins*, 70 Wn. App. 842, 855 P.2d 1216 (1993).

B. WPI 140.01, the regular instruction regarding the duty of a governmental entity to maintain sidewalks, streets and roads, provides the rule of law in this case. The Trial Court erred in applying the alternative instruction, WPI 140.02.

Washington Pattern Jury Instruction 140.01 provides the rule of law to be applied in this case:

WPI 140.01 Sidewalks, Streets, and Roads—Duty of Governmental Entity

The [county] [city] [town] [state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a reasonably safe condition for ordinary travel.

In this case Ms. McKibbin alleges, and the expert opinion of Mr. Jorgensen supports, that in 2005 metal street drain covers were the industry standard in Seattle. CP 197, 288-89. Ms. McKibbin further alleges that the use of wood for the grate cover of a municipal street drain, which deteriorates over time and is certain at some point to be unable to support the weight of foreseeable vehicular traffic, breaches the City's duty to use ordinary care to keep its streets reasonably safe for ordinary vehicular and pedestrian traffic. CP 197. Stated with reference to the language of WPI 140.01, the Plaintiff contends that the City of Seattle breached its duty to exercise ordinary care in the *design* of the street drain (employing a wood rather than metal cover), the *construction* of the street drain (employing a wood rather than metal cover), and the *maintenance* and *repair* of the street drain (in replacing the broken grate cover with wood rather than metal).

In granting the City's motion for summary judgment, the Trial Court incorrectly concluded that the alternative "notice" instruction

contained in WPI 140.02 applies. WPI 140.02 provides:

WPI 140.02 Sidewalks, Streets, and Roads—Notice of Unsafe Condition

In order to find a [town] [city] [county] [state] liable for an unsafe condition of a [sidewalk] [street] [road] **that was not created by its employees, [and that was not caused by negligence on its part,] [and that was not a condition which its employees or agents should have reasonably anticipated would develop,]** you must find that the [town] [city] [county] [state] had notice of the condition and that it had a reasonable opportunity to correct the condition [or give proper warning of the condition's existence]. **A [town] [city] [county] [state] is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.** [Emphasis added.]

The instruction itself makes it clear that WPI 140.02 does not apply herein because the City's employees created the condition complained of by negligently installing a wood cover which did not meet the industry standard at the time and that they should have reasonably anticipated would deteriorate over time (because wood does that) and develop into an unsafe condition. The Comment to the instruction states unequivocally that WPI 140.02 does not apply:

The notice requirement does not apply to conditions that are created by the municipality or its employees or to conditions that result from their conduct. Batten v. South Seattle Water Co., 65 Wn.2d 547, 398 P.2d 719 (1965);

Palmer v. Puyallup, 50 Wn.2d 627, 313 P.2d 1114 (1957);
Russell v. Grandview, 39 Wn.2d 551, 236 P.2d 1061
(1951). ***Nor does the requirement apply if there was a
duty to anticipate unsafe conditions.*** Argus v. Peter
Kiewit Sons' Co., 49 Wn.2d 853, 307 P.2d 261 (1957). If
the unsafe condition was created by the municipality either
directly through its negligence or if it was a condition that
the municipality should have anticipated, ***then WPI 140.01,
Sidewalks, Streets and Roads—Duty of Municipality,
adequately covers the duty of the municipality and there is
no need for any special instruction on notice.*** [Emphasis
added.]

The condition which the Plaintiff contends constitutes the breach of the City's duty of ordinary care to keep its streets in a reasonably safe condition for vehicles and pedestrians is: a) its decision to employ a wooden street drain cover on the subject street drain when it undertook to rebuild the street drain in 2005, rather than to install a readily available metal street drain cover which was the industry standard, and b) its decision not to replace the antiquated and dangerous wooden street drain covers with readily available metal covers as a matter of policy throughout the City once it was on notice of a pattern of failure. These claims go to the decisions made by City employees which are precisely the design, construction, maintenance or repair issues covered by WPI 140.01, not actions taken by others which lead to temporary dangerous conditions, which are the situations covered by WPI 140.02. Thus, the Trial Court erred in concluding that WPI 140.02 rather than WPI 140.01 applied to

this case.

Plainly, after the City rebuilt the subject street drain in 2005 and employed another wooden cover instead of a metal cover, the wooden cover it chose to install was a “condition . . . created by the municipality or its employees or . . . result[ing] from their conduct.” *Comment to WPI 140.02, supra. Batten v. South Seattle Water Co.*, 65 Wn.2d 547, 398 P.2d 719 (1965); *Palmer v. Puyallup*, 50 Wn.2d 627, 313 P.2d 1114 (1957); *Russell v. Grandview*, 39 Wn.2d 551, 236 P.2d 1061 (1951). It was this condition – a substandard wooden grate cover that was certain to deteriorate and not be able to stand the weight of foreseeable street traffic – not the actions of others, that resulted in the accident on October 14, 2007 that injured Ms. McKibbin. For this reason, WPI 140.02 does not apply to this case. *Comment to WPI 140.02.*

Further, having observed the broken wooden street drain board in the subject street drain at the time of rebuilding in 2005 and other wooden drain covers in the subject location had experienced “beam failure,” CP 197, and because wood deteriorates over time, CP 286-88, the City had a “duty to anticipate” that wood used for a street drain regularly saturated with water will lose its strength and result in an unsafe condition. *Comment to WPI 140.02, supra; Argus v. Peter Kiewit Sons’ Co, supra.*

For this reason as well, WPI 140.02 does not apply.

In *Russell v. Grandview, supra*, the court stated:

If . . . the dangerous condition is caused by agents of the city in the performance of their duties, the rule of liability is not based on notice and failure to repair, but upon the creation of a dangerous condition by the city.

Id. at 554. *Accord Impero v. Whatcom County*, 71 Wn.2d 438, 445, 430 P.2d 173 (1967) (“[W]here the municipal corporation created the dangerous condition, no notice is required to be imparted to it as a prerequisite to liability for injuries resulting from such condition.”). The Court in *Erdman v. B.P.O.E.*, 41 Wn. App. 197, 207, 704 P.2d 150 (1985), was even more emphatic:

The requirement of actual or constructive notice applies only to temporary conditions ***created by others***. The notice instruction is limited by its terms to those situations where there is no such participation on the part of the defendant. It does not apply where the condition was created by the landowner [the City] or his agents and had been in existence for a long time. [Emphasis added.]

Here, the wooden street drain is owned by the City. The City certainly knew that the wooden street drain existed. The wooden street drain had been in existence for a long time. *Erdman, supra*. Several wooden street drains in the neighborhood had suffered “beam failure” and other formerly wooden street drain covers “similar to the drain of interest” had been replaced with “metal drain covers” which were “weathering

extremely well,” “were in excellent condition and posed no hazard to pedestrians or vehicular traffic.” CP 289. The City’s decision to employ a wood cover when rebuilding the street drain in 2005 was a “condition created by the landowner [the City],” as was its decision not to replace the wooden street drains in the neighborhood in the face of beam failures in other drains. It was not a “temporary condition created by others.”

Erdman, supra. Thus, WPI 140.02 does not apply.

It should be pointed out that even if the notice requirement in WPI 140.02 applied (and given the authority cited above, it clearly does not), the City would be on notice of the existence of its wooden street drains and its experience with these drains, including the street drain in question. Thus, the rules in this area of premises liability law actually make sense whether the notice requirement applies or not. Municipalities that create the dangerous condition complained of are not afforded the protection of the notice requirement contained in WPI 140.02. But this is because even if they were afforded such protection, since they created the dangerous condition in the first place, they will be held to have notice of it. *See*

Comment to WPI 140.02:

Constructive notice arises if the condition has existed for such a period of time that the municipality should have known of its existence by the exercise of ordinary care. *Nibarger v. Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958);

Skaggs v. General Electric Co., 52 Wn.2d 787, 328 P.2d 871 (1958).

See also Trueax v. Ernst Home Center, 70 Wn. App. 381, 387-88, 853 P.2d 491 (1993), *rev. on other grounds*, 124 Wn.2d 334, 878 P.2d 1208 (1994) (“a plaintiff injured by the active negligence of a possessor of land may recover without the landowner’s actual or constructive notice of the existence of a danger so long as the danger was reasonably foreseeable.”) As Mr. Jorgensen states, wood deteriorates over time and cannot support foreseeable municipal vehicular traffic. CP 197. Its failure is reasonably foreseeable.

It is anticipated that the City will argue, as it did below, that *Hunt v. Bellingham*, 171 Wash. 174, 17 P.2d 870 (1933) suggests a different result herein. The City’s citation of *Hunt* is misplaced and a close reading of *Hunt* indicates the decision strongly supports Plaintiff’s position herein. In *Hunt*, after being apprised of deficiencies and the need to repair a “water meter box” located in the parking strip in front of Plaintiff’s property - facts remarkably similar to the case at bar - the City of Bellingham did *exactly* what the Plaintiff herein contends the City of Seattle *should have done* when faced with deficiencies and the need to repair the street drain in the parking strip in front of Ms. McKibbin’s property. The City of Bellingham installed “a new box . . . of the same

kind and construction as those used in larger cities and throughout the Pacific coast.” *Hunt* at 177. In other words, it replaced the old meter box with one that conformed to the industry standard existing at the time (1933). That meter box happened to have been made of wood, a point the City suggested was somehow significant. CP 345. But the issue in *Hunt* was not the material employed, but whether the *design* of the box met the industry standard at the time in terms of preventing the lid from sliding off, which was the problem with the design of the old meter box at issue in the case. The design of the new meter box installed by the City of Bellingham required that “a pick had to be used” to remove the lid, and the lid could only be removed by being “lifted” rather than being slid, as was possible with the old design. Nevertheless, someone had removed the new lid (presumably by using a pick and then lifting in off) just before the plaintiff’s accident. As the court stated, the accident occurred when the plaintiff stumbled and fell into the open box, “its cover having been, in some unknown way, removed.” *Hunt* at 176. This is simply a manifestation of the classic case of the man hole cover being lifted off by an unknown person and is precisely the “temporary condition created by others,” *Erdman, supra*, for which a municipality must be on notice before liability will attach. It is not an issue of the design, construction,

maintenance or repair employed by the landowner covered by WPI 140.01.

The decisions of the two landowners - the City of Bellingham in *Hunt* and the City of Seattle herein - in the discharge of their duties of reasonable care to ensure the safety of members of the public, are polar opposites of each other. In *Hunt*, the City of Bellingham was presented with a safety issue with regard to its water meter box located in the parking strip in front of the plaintiff's property. The lid had a tendency to slide off, creating a potential danger. In response, the City of Bellingham employed the industry standard, a new box of the same kind and construction as those used in the larger cities and throughout the Pacific coast. *Hunt* at 177. Nevertheless, someone had removed the cover, and it was this action that created the hazard which injured the plaintiff.

In contrast, in 2005, presented with an old street drain with a broken wooden beam in its cover and a crumbling concrete frame, in addition to several wooden beams in drain covers in the immediate vicinity that had recently failed, some with metal grate covers, CP 197, the City of Seattle installed the same technology which had been used when it acquired the drains 50 years before, rather than install a street drain cover "of the same kind and construction as those used in the larger cities and throughout the Pacific coast" and indeed, according to the un rebutted testimony of Mr.

Jorgensen, used by “virtually all modern jurisdictions,” CP 289, as the “overwhelming material of choice for such applications,” CP 197. The City of Bellingham met the standard of care in the design, construction, maintenance and repair of their meter box and were entitled to notice of the actions of others that created the hazard before liability would be imposed. The City of Seattle, on the other hand, has not met the standard of care in the design, construction, maintenance and repair of the drain cover, and it is the sub-standard wooden cover, not the actions of others, was the cause of Plaintiff’s the injury. The Plaintiff is entitled to present her theory of the case to the jury and have the jury decide this issue of negligence. *Owen, supra; Trueax, supra.*

The *Hunt* court observed that the “city’s duty . . . is not measured by the desires of adjacent property owners, but by the rule of reasonable care.” *Hunt* at 177. In both cases, *Hunt* and the case at bar, whether reasonable care was observed is defined by the industry standard. In *Hunt*, the Court found that the City of Bellingham had met that standard by installing a box that was “of the same kind and construction as those used in the larger cities and throughout the Pacific coast.” *Hunt* at 177. In the case at bar, the only testimony regarding the industry standard is that of Mr. Jorgensen, who states: “virtually all modern jurisdictions use metal

drain covers,” “the City of Seattle uses metal for the vast majority of their drain covers,” and “[u]se in the ‘vast majority of situations’ creates an ‘industry standard.’” CP 289. Not surprisingly, this lead him to conclude that “metal is the industry standard for drain covers.” *Id.*

Therefore, the rule of law to be taken from the *Hunt* case is not defined by the materials used by the City of Bellingham in 1933 or the fact that the Plaintiff in *Hunt* wanted the issue of the chronically sliding cover cured by an “iron cover upon the box” or “one with hinges and a lock on it,” rather than the industry standard box that the City of Bellingham chose to install. *Hunt* at 177. Rather by the rule of law to be taken from *Hunt* is that “the city’s duty is . . . measured by . . . the duty of reasonable care,” which is met, per *Hunt*, by the City’s employment of a meter box that *met the industry standard at the time*. *Hunt* at 177. It is submitted that since the City of Seattle did not employ a readily available metal drain grate cover which was the industry standard in 2005 and which it had employed on similar drains in the same neighborhood, it failed to discharge its duty to use ordinary care in the design, construction, maintenance and repair of its public streets to keep them in a reasonably safe condition for ordinary travel. WPI 140.01. By employing wood and thus creating the condition complained of, the alternative instruction contained in WPI 140.02 does

not apply.

Whereas the actions of the municipalities in question in *Hunt* and the present case are polar opposites, the actions of the municipalities in *Batton v. South Seattle Water Co.*, 65 Wn.2d 547, 398 P.2d 719 (1965) and the present case are very similar. In *Batton*, a water meter box in a public right of way adjoining a public street near the plaintiff's home was "installed [by the municipality] in such a way that it created a dangerous condition." *Id.* at 547. The lid to the water meter box did not fit snugly into the recess into which it was supposed to sit, and when the plaintiff stepped on it, the lid slid, causing the plaintiff to fall. There was evidence that the lid was improperly designed because its poor fit encouraged debris to build up in its recess, causing it to slide when stepped upon. The Defendant urged that the lid might have been tampered with, and since it did not have notice of the tampering, it could not be held liable, citing *Hunt v. Bellingham, supra*. The Supreme Court rejected that argument, stating:

Rather than being similar to *Hunt v. Bellingham, supra*, where the meter box was installed in a parking strip and had a lid which could not slide off, this case . . . is controlled by the principle of *Russell v. Grandview*, 39 Wn. (2d) 551, 236 P. (2d) 1061, in which it was held that, where a municipal corporation creates the dangerous condition, no notice is required.

Batton at 550-51. In *Batton*, the Supreme Court thus allowed the jury to decide whether the municipality would be liable when the maintenance or design of the box in its parking strip was not up to standards, either because the debris was allowed to build up in the recess making the lid unsecure, or because the design allowed the same to occur, and thus a dangerous condition was allowed to exist. *Id.* Ms. McKibbin submits that the present case is in the line of cases in Washington, beginning with *Russell v. Grandview*, in which no notice to the municipal corporation is required because the municipal corporation created the dangerous condition, here the City's choice to continue to employ a wooden street drain grate contrary to the industry standard then prevailing in 2005. Ms. McKibbin is entitled to have a jury hear her evidence, Mr. Jorgensen's un rebutted opinion, and to decide this issue of negligence. *Owen, supra; Trueax, supra.*

Below, the City also cited *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 600, 20 P.3d 1003 (2001), for the proposition that what constitutes a reasonably safe condition is different for a parking strip and a sidewalk. CP 347. This of course is undeniably true. The reasonably foreseeable use defines the duty of care. *Palsgraf v. Long Island RR*, 248 N.Y. 339, 162 N.E. 99 (1928) ("the risk reasonably perceived defines the

duty to be obeyed"); *Wells v. City of Vancouver*, 77 Wn.2d 800, 808, 467 P.2d 292 (1970) (citing *Palsgraf* for this point). This street drain was in a gravel parking area abutting the street and was used by vehicles constantly, including the Pilchuck truck. See CP 187-89, for photos of the street drain as it appeared at the time of the accident. See photos attached to *Jorgensen Report*, CP 203, to appreciate that the street drain actually directly abuts the street.⁴ Plainly it was foreseeable that vehicle drivers and their passengers would walk through the parking strip to get in and out of their cars, and the area would need to be safe for use by both vehicles and foot traffic.

The City also cited *Ruff v. King County*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995), for the proposition that while the duty to maintain a roadway in a reasonably safe condition requires many things, including the exercise of reasonable care in construction, design, maintenance and repair (WPI 140.01) and the duty to post warning signs or erect barriers if a condition makes a roadway inherently dangerous, it does not mean that a county or other municipality must update every roadway to present-day standards. CP 347. Of course, this rule is not absolute, and at times, as

⁴ Note that the Jorgensen photos were taken several years after the subject accident, after Ms. McKibbin had moved a trailer close to the street drain so no one would park on it, and grass had grown near the street drain from lack of vehicle traffic. CP 140.

the *Ruff* court observed, a municipality must do exactly that, noting that in *Ruff* there was no statute or ordinance requiring the installation of barriers. *Ruff* at 705. The Court also noted there was no evidence that the County had violated any industry standard in its maintenance or construction of the road in question. *Ruff* at 707, fn. 5. But all these rules, and indeed the entire inquiry in *Ruff*, pertained to consideration of the duty of the municipality to update roadways *absent defects in the roadway requiring repair, rebuilding or reconstruction*. There is no suggestion in *Ruff* or in any other Washington case that when a municipality undertakes to repair, rebuild or construct some aspect of a roadway, that work does not have to conform to the industry standard, statute, ordinance or code *applicable at the time the work is completed*. In the case at bar, Plaintiff's contention is not that the City needed to replace the wooden cover of this street drain in 1955 when it took possession from the Lake City Sewer District, or in 1965 or 1975. At some point, certainly, the City does come under an obligation to replace outdated, antiquated and unsafe parts of a roadway that pose a foreseeable risk of harm and which render, in the words of WPI 140.01, the roadway not "reasonably safe for ordinary travel." That point was probably reached when beams began failing in nearby wooden street drain covers and some were replaced with metal covers. CP 197-8. As

Mr. Jorgensen observed after viewing broken beams on wood drain covers following a survey of the wood drain covers in the neighborhood, “Clearly, the wood beams are failing.” CP 287. As stated, the point at which the outdated parts of a roadway render the roadway not reasonably safe for ordinary travel is the point at which time the municipality comes under an obligation to update them. *Ruff* at 705; 707 fn. 5.

However, *that is not the question presented which is necessary to the resolution of this case.* The critical question with respect to this motion for summary judgment is whether, *in 2005*, the City had a duty to employ 2005 technology and meet 2005 industry standards when repairing and reconstructing the subject street drain, or whether the City can go on forever replacing rotten wooden street drain covers with the same inferior and inadequate material whose failure caused the need for them to be replaced in the first place. Stated another way, does the 2005 industry standard apply to the City when rebuilding the street drain or doesn’t it? Plaintiff submits that under no known rule of law may the City avoid the 2005 industry standard when doing work in 2005. Any other rule would make no sense, and would lock every municipality into the standards of the past, despite the march of innovation and technology which occurred since the original construction.

When replacing old windows, may a homeowner install replacements that were manufactured decades before and no longer meet the existing code? When painting a room, may a painter use lead-based paint despite the known risks of lead paint at the time he or she uses it? When repairing a guardrail, may a municipality use materials that match the old materials in the old guardrail but no longer meet the industry standard? When repaving a street, may a municipality use asphalt that matches the old asphalt but violates the industry standard at the time it is paved? Of course not. Then why would a city be permitted to use an antiquated and inferior material in rebuilding a street drain simply because that material may have meet the industry standard 60 or 70 years previously when the street drain was originally constructed? It would not. Rather, the City would be required, just as in all of the other examples, to use materials that met the industry standard at the time they were installed. That is what is meant by the duty in WPI 140.01 to use “ordinary care” in the design, construction, maintenance or repair of public roads to keep the reasonably safe for ordinary travel. Ordinary care means using the materials and designs that are “ordinarily” used at the time the work is done as defined by the industry standard. *Haysome v. Coleman Lantern Company*, 89 Wn.2d 474, 487, 573 P.2d 785 (1978); *Ruff* at 707, fn. 5.

Since, according to Bryan Jorgensen, the use of wood violated the industry standard for street drains at the time it was installed, its use was not reasonable. As a result, because a reasonable jury could find the City's violation of the industry standard constitutes the failure to use ordinary care, this case is not appropriate for determination on summary judgment. The Trial Court erred in holding otherwise.

C. Reasonable minds can differ as to whether the wooden street drain was negligently designed, constructed, maintained or repaired, precluding summary judgment.

In this case, taking the facts submitted and reasonable inferences therefrom in the light most favorable to the Ms. McKibbin's position, the Court must accept the following assertions for the purpose of deciding the motion for summary judgment:

1. Wood deteriorates over time; it is not a matter of *if* wood will fail catastrophically in the setting of a municipal street drain grate, it is a matter of *when*. CP 197-98, 286-88.
2. Wood is not as strong as the industry standard of metal and frequently cannot support the weight of foreseeable vehicles using modern city streets without sustaining damage which will lead to catastrophic failure. *Id.*
3. Metal street drain covers are the industry standard. CP 197-98, 288-89. The City violated this industry standard when it chose to employ wooden drain covers when rebuilding the drain in 2005. *Id.*

4. A reasonable inference to be drawn from the fact that metal street drains are the standard in the industry is that compared to metal, wood is an inferior and inadequate material for street drain covers. CP 197-98, 286-89.
5. Wood subjected to moisture loses strength, making it a particularly inappropriate material for a street drain cover, which is frequently subjected to moisture. CP 197-98, 287, 289-90.

Ms. McKibbin believes that the Trial Court impermissibly invaded the province of the jury and concluded that wood was a reasonable material to use in this application, despite the existence of unrebutted expert testimony to the contrary. This, the Plaintiff respectfully submits, is inappropriate in the setting of a motion for summary judgment, where all facts and inferences therefrom must be resolved in the favor of the non-moving party. *Mountain Park Homeowners Association v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989); *Douchette v. Bethel Sch. Dist. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991).

Moreover, “negligence and proximate cause are ordinarily factual issues, precluding summary judgment.” Tegland, 14A Washington Practice: Civil Procedure at 120 (2009). “Issues of negligence and proximate cause are generally not susceptible to summary judgment.” *Owen v. Burlington Northern and Santa Fe R.R.*, 153 Wn.2d 780, 788,

108 P.3d 1220 (2005) (*citing Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 299 (1995)); *Brown v. Stevens Pass, Inc.*, 97 Wn. App. 519, 984 P.2d 448 (1999), *rev. denied*, 141 Wn.2d 1004, 10 P.3d 403 (2000).

Similarly, questions of whether a condition is dangerous and the culpability of a governmental entity in creating a particular danger are generally questions of fact. *Owen*, 153 Wn.2d at 788. Whether an injury is foreseeable is a question of fact. *Seeberger v. Burlington Northern Railroad Co.*, 138 Wn.2d 815, 982 P.2d 1149 (1949). All of these issues, whether the City was negligent, acted reasonably, and whether Plaintiff's injury was foreseeable, must be resolved by the jury, not the Court.

Since a jury must hear this evidence and decide these issues, Ms. McKibbin respectfully requests that the decision of the Trial Court be reversed, the City's motion for summary judgment denied, and the case remanded for trial.

D. The Trial Court erred in striking the Report of Bryan Jorgensen, attached to the Declaration of David B. Richardson.

In support of Plaintiff's Response to the City's Motion for Summary Judgment, the Plaintiff submitted a copy of the Report of its expert, Bryan Jorgensen, attached as Exhibit C to the Declaration of David B. Richardson. CP 195-206. The City moved to strike the Report of Bryan Jorgensen, arguing that his report was unsworn and that his

“conclusions and opinions” lacked foundation because he did not have the “knowledge, skill, experience, training, or education” required by ER 702. CP 226-28. In its ruling from the bench, the Court struck Mr. Jorgensen’s Report *not* on the basis of foundation under ER 702 - an issue which the Court did not discuss or reach - but rather because the Report was not itself sworn in affidavit or declaration form. The Court erred because, as discussed in detail below, an expert’s report addressed to counsel is properly authenticated if attached to counsel’s sworn declaration, and will be received as expert opinion in a summary judgment proceeding.

International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 87 P.3d 744, *rev. den.*, 153 Wn.2d 1016, 101 P.3d 109 (2004).

Submitted in support of the Plaintiff’s Response to the City’s Motion to Strike, the Plaintiff also provided the Declaration of Bryan Jorgensen, in which Mr. Jorgensen attached a true and accurate copy of his Report and Curriculum Vitae, stating “all of the statements that I made and conclusions I drew in my Report were true and correct to the best of my understanding and belief.” CP 292. Mr. Jorgensen also responded to each point raised in the City’s challenge to his credentials and opinions. CP 284-305.

Courts in Washington are very clear that an expert’s report

addressed to counsel is properly authenticated and admissible under ER 901 by counsel's declaration, and then is to be considered in response to a motion for summary judgment. *International Ultimate, supra*. In *International Ultimate*, the Court considered the issue of an expert's report submitted in response to a motion for summary judgment attached to counsel's declaration indicating that the report was a true and accurate copy of the original. *Id.* at 749. Therein, Attorney John Hayes had engaged an expert named Joseph Berger to investigate and provide his opinion on various issues relevant to that case. Mr. Berger's report was addressed to Mr. Hayes. The Court concluded that because the Berger report was "addressed to Hayes," "Hayes' declaration is sufficient to authenticate the report." *Id.* at 750. Since the attorney's declaration authenticated the report, the Court concluded that the report was properly considered as evidence in response to the motion for summary judgment. *Id.* at 746, 750. The Court held:

[U]nderlying CR 56(e) is the requirement that documents the parties submit must be authenticated to be admissible. Because the proponent seeking to admit a document must make only a prima facie showing of authenticity, the Rule's requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact-finder to find in favor of authenticity. The Rule does not limit the type of evidence allowed to authenticate a document; it merely requires some evidence which is sufficient to support a finding that the evidence in question

is what its proponent proclaims it to be.

Id. at 745-46.

In this case, Mr. Jorgensen's Report was addressed to "David B. Richardson" and was attached to the Declaration of David B. Richardson. CP 195, 185. The Declaration authenticated the Report, swearing under oath: "Attached hereto as Exhibit C, please find a true and accurate copy of the Northwest Casualty Claims Service Report of Bryan V. Jorgensen, dated August 5, 2009, with attached photographs." CP 185. The first line of the Report stated, "Dear Mr. Richardson, your office requested an evaluation of the scene and circumstances surrounding the above-referenced accident." CP 195. No challenge to the authenticity of the Jorgensen Report was advanced by the City in its Motion to Strike, and no contention could be reasonably made that the Report was not authentic. Clearly it was authentic. The person to whom the Report was addressed and who received the Report swore on oath on personal knowledge that it was authentic. CP 185. According to the rule of law set out in *International Ultimate*, the Report of Mr. Jorgensen, attached to the sworn declaration of Mr. Richardson, should have been considered by the court in response to the City's Motion for Summary Judgment. The Trial Court erred in striking and failing to consider it.

Leaving aside the issue of the authenticity of the Jorgensen Report, any objection to its authenticity or substance was plainly cured by Mr. Jorgensen's lengthy and comprehensive Declaration, in which he attached his Report and swore under oath as to its accuracy, authenticity, and that it contained his opinions. CP 292. It was the same report which was submitted several days before attached to counsel's declaration, which, according to *International Ultimate*, should have been received then.

The Court has broad discretion to accept factual materials at any time prior to decision, and there is no abuse of discretion unless the non-moving party can demonstrate prejudice which cannot be cured by a continuance. *Security State Bank v. Burk*, 100 Wn. App. 94, 995 P.2d 1272 (2000). *Accord, Rainier National Bank v. Inland Machinery*, 29 Wn. App. 725, Fn3, 631 P.2d 389 (1981) ("The court may accept affidavits any time prior to issuing its final order."); *Felsman v. Kessler*, 2 Wn. App. 493, 468 P.2d 691 (1970).

The Court should have accepted the Report of Bryan Jorgensen at the time it was submitted, and certainly after it was attached to Mr. Jorgensen's declaration several days later. Accordingly, the Court erred in granting the City's motion to strike the Report of Bryan Jorgensen. Any concerns could and should have been addressed by consideration of a

continuance of the hearing, as the Court indicated it was prepared to do before mistakenly concluding the WPI 140.02 applied and granting the City's motion for summary judgment. RP 3.

E. Although the Trial Court did not reach the Issue of Mr. Jorgensen's qualifications to render an expert opinion under ER 702, had it done so Mr. Jorgensen would have been found to be qualified.

ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

West's Washington Practice: Courtroom Handbook on Washington

Evidence (2003), Professor Karl B. Tegland observes at page 317:

The witness need not possess the academic credentials of an expert; practical experience may suffice. Rule 702 states very broadly that the witness may qualify as an expert by virtue of knowledge, skill, experience, training, *or* education. [Italics in original.]

Washington courts have been consistent in qualifying experts based on knowledge, skill, experience and training, not only education. In a prosecution for manufacturing methamphetamine with intent to deliver, a police officer was qualified to testify regarding the manner in which methamphetamine is manufactured and sold, even though the officer did not have a college degree. The officer had received special training on the

subject and had personally investigated many methamphetamine labs. *State v. McPherson*, 111 Wn. App. 747, 46 P.3rd 284 (2002). The Court observed, “Practical experience is sufficient to qualify a witness as an expert.” *Id.* at 762 (citing *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992)). Continuing, the Court stated, “a person with sufficient training and experience may qualify under ER 702 as an expert on methamphetamine production notwithstanding that person’s lack of a complete and formal college education in the field of chemistry.” *Id.*

Here, Mr. Jorgensen *does* have a formal education in the field of Physics, exactly the discipline involved in calculating the elastic and plastic limits of various materials, including wood. CP 284-85. Further, he has 17 years of experience in forensic accident reconstruction. *Id.* See also Curriculum Vitae, CP 206. He has 200 hours of training at Northwestern University, including “Newton’s Laws applied to Dynamics, Statics, Momentum, and Energy.” *Id.* And he has worked on many cases in which the material at issue in his failure analysis was wood. CP 284-85, 290-91. As the Court in *McPherson* concluded, given an expert’s “specialized training and practical experience,” any concerns expressed by the defense about his “background and experience went to the weight of his evidence and not its admissibility.” *Id.* at 762.

Washington courts have consistently given meaning to the first four qualities identified in ER 702, and allowed experts to testify based upon their knowledge, skill, experience, and training in a particular field. In a mental commitment proceeding, a social worker with psychiatric training and many years of experience was qualified to testify as to the respondent's mental condition. *In re Detention of A.S.*, 138 Wn.2d 898, 982 P.2d 1156 (1999). In a prosecution of child molestation, a school counselor was qualified on the subject of child abuse by virtue of her Masters Degree in counseling psychology, her certification to work in the schools, and her actual experience in counseling abused children. *State v. Holland*, 77 Wn. App. 420, 890 P.2d 49 (1995). *See also State v. Lass*, 55 Wn. App. 300, 777 P.2d 539 (1989).

In his deposition, Mr. Jorgensen explained chapter and verse regarding the properties of wood, the plastic limits of wood, the elastic limits of wood, the ultimate limits, the tensile stress on the outside of a deflecting piece of wood, the compression stress on the inside of a deflecting piece of wood, and answered all of counsel's questions in this regard. CP 289. He described that his calculations were based on a 5.5" x 2.5" x 29" board with a 26" span, and using the Bernoulli Equation for beam deflection, employed the constants for Douglas Fir – Coastal variety,

because it was the strongest wood listed for woods of the type which failed in Ms. McKibbin's accident. *Id.* He described in great detail the concept of "creep failure," wherein wood undergoes tiny changes even within its elastic limit, which changes accumulate over time. He discussed how moisture and high humidity made wood weaker with regard to its elastic and plastic limits, and additionally created the conditions for wood fiber deterioration. CP 289-90. Counsel took copies of the scientific calculations he made as Exhibits to the deposition. CP 290.

Mr. Jorgensen described the concepts of "static load," dynamic load," and "rupture modulus." *Id.* He described how wood was "orthotropic," meaning that it was stronger parallel to the grain than against it. *Id.* He described the factors of deterioration, including relative humidity, moisture, protection from weakness, insects, the kind of wood, whether it was kiln dried, the dimensions of the wood, whether it was planed or rough cut, and whether it was treated. *Id.* In terms of failure models, he discussed the Gerrard Damage Theory and the Exponential Model used by the Forest Service. *Id.* Any suggestion by the City that Mr. Jorgensen possesses no knowledge, skill, experience or training in evaluating wood failure or the properties of wood is simply not in accord with the facts.

In terms of education and training, Mr. Jorgensen has a Bachelor of Arts degree in Physics, the very academic discipline involved in failure analysis of wood. *Id.* The Bernoulli Equation is a *Physics equation*, and it is Physics which determine when an object with certain properties will fail and under what stresses. *Id.* In his Declaration, he explained that the physics equations upon which he based his conclusions apply whether the material in question is wood, metal, or any other material. CP 285. And failure analysis is the same whether considering the deflection and elastic properties of a metal bumper in an auto accident reconstruction or a piece of wood with respect to a wooden street drain. *Id.* Newton's Laws and the equations of the physics apply to both. *Id.*

He has been a forensic accident reconstructionist with the Northwest Casualty Claims Service since 1993, a period of 17 years. *Id.* In this time, he has investigated a huge number of premises liability, product liability (part failure), and construction site accidents, including many cases in which the object at issue in his failure analysis was wood. *Id.* He is now his firm's principal and managing director. CP 291.

In his deposition, he described that he recently worked on a products liability case in which wood window frames rotted and gave way, leading to a fall from the allegedly defective window. The issue in that

case was wood failure. *Id.* He provided an analysis of an automobile accident in which a truck went through a guard rail, and the failure points were wooden posts. Again, the material upon which his failure analysis was directed was wood. *Id.* He worked on a case in which three houses slid down a slope, and the principal material involved in the failure analysis was wood. *Id.* He also provided his analysis in a construction case in which the issue revolved around the failure of wood scaffolding. *Id.*

Mr. Jorgensen is clearly an individual who has the ability to assist the trier of fact understand the evidence or a fact at issue, and as such, had the Trial Court reached the issue of his qualifications under ER 702, he would have been permitted to testify.

CONCLUSION

For the reasons stated, the Plaintiff requests this Court reverse the decision of the Trial Court and remand, finding that:

1. WPI 140.01 supplies the rule of decision in this case;
2. The “notice” requirement in WPI 140.02 does not apply to this case;
3. An issue of material fact exists as to whether the City of Seattle breached its duty to exercise ordinary care in the design,

construction, maintenance, or repair of its public streets to keep them in a reasonably safe condition for ordinary travel by rebuilding the subject street drain cover using materials that did not meet the industry standard at the time and in failing to update all wooden street drain covers from wood to metal when it was on notice that a substantial number of them were failing;

4. Under *International Ultimate*, a report addressed to counsel and attached to counsel's sworn declaration authenticates the document for purposes of consideration of the report in response to a motion for summary judgment, and

5. That Plaintiff's expert Bryan Jorgensen is qualified to testify as an expert witness in this case.

Respectfully submitted: August 6, 2010.

LAW OFFICES OF DAVID B. RICHARDSON, P.S.

A handwritten signature in black ink, appearing to read "David B. Richardson", written over a horizontal line.

David B. Richardson, WSBA No. 21991
Attorney for Appellant

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

RAEGAN McKIBBIN, a single woman,

Plaintiff,

v.

CITY OF SEATTLE, a municipal corporation;
PUGET SOUND ENERGY, INC., a public for-
profit corporation; and PILCHUCK
CONTRACTORS, a for-profit Washington
corporation, and a subsidiary of MICHELS
CORPORATION, a Washington corporation,

Defendants.

No. 08-2-41855-3 SEA

COURT OF APPEALS No. 65177-3-1

DECLARATION OF FILING AND
SERVICE OF PLAINTIFF'S
APPELLATE BRIEF

I, David B. Richardson, certify that I am a citizen of the United States and a resident of the State of Washington; I am over the age of 18 years and not a party of the within entitled cause; I am the attorney of record for the Plaintiff in the above-entitled case; I caused to be filed in the Court of Appeals, Division I, and served upon Defendant City of Seattle's counsel of record at the addresses and in the manner described below, Plaintiff's Appellate Brief, as follows:

DECLARATION OF FILING AND SERVICE OF
PLAINTIFF'S APPELLATE BRIEF - 1
31101.McKibbin.Decl.Serv.Brief.Appeal

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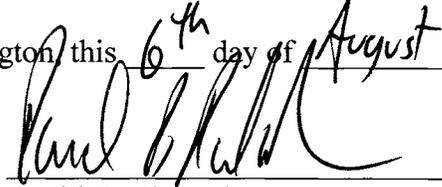
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Clerk of the Court of Appeals
Division One

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 By Facsimile

I hereby declare under the penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED at Bellevue, Washington, this 6th day of August, 2010.



David B. Richardson



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