IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GERALD R. TARUTIS, as Guardian ad Litem for NICHOLAS K. MESSENGER, and ERIC and JENNIFER MESSENGER, the parents of NICHOLAS K. MESSENGER,	)	No. 64024-1-I
	)	DIVISION ONE
Appellant,	)	
v.	)	
THE CITY OF SEATTLE,	)	UNPUBLISHED
Respondent.	)	FILED: November 8, 2010

Cox, J.—A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel.[1] Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway.[2] 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 is

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[1] Xiao Ping Chen v. City of Seattle, 153 Wn. App. 890, 894, 223 P.3d 1230 (2009), review denied, 169 Wn.2d 1003 (2010).

[2] Id.

not essential to a claim that a municipality breached the duty of care owed to travelers on its roadways.[3] 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.[4]

Here, Nicholas K. Messenger was struck by the side mirror of a vehicle in an unmarked crosswalk at 15th Avenue Northwest ("15th") and NW 87th Street ("87th") in Seattle by a motorist who failed to see him before the accident. There are genuine issues of material fact whether the roadway was inherently dangerous. Likewise, there are also genuine issues of material fact whether the City of Seattle breached its duty to Messenger to maintain that roadway so that it was reasonably safe for ordinary travel. We reverse the summary dismissal of this lawsuit.

On February 17, 2005, 12-year-old Messenger and his friend, Charlie Spencer-Davis, walked home from school and attempted to cross 15th in an unmarked crosswalk at the intersection of 15th and 87th in Seattle. Merilee Mulholland was driving southbound on 15th in the outside lane nearest the sidewalk. When she approached 87th, she put on her right turn blinker, stopped, and allowed the boys to cross 15th in front of her vehicle.

Steve Hansen was also travelling southbound on 15th in the inside lane

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[3] Id.

[4] Id.

and did not see the boys crossing in front of Mulholland's vehicle. As Messenger moved within the unmarked crosswalk from the curbside lane of 15th to the inside lane, the passenger side mirror of Hansen's vehicle struck him. As a result of the accident, Messenger suffered a traumatic brain injury.

Between 1993 and 2002, the City received numerous public complaints about the dangers of this intersection. Sometime prior to the accident, the City installed two "Crosswalk" signs over the intersection. The City never made any other improvements to the intersection. On December 14, 2004, just two months before Messenger's accident, the City removed these overhead signs. The record indicates that the City removed the overhead signs "so as to avoid any pedestrians mistakenly relying on these signs as an indication that [the Seattle Department of Transportation] had designated this intersection to be a preferred crossing location." After the accident, the City installed full traffic signals and marked crosswalks at the intersection immediately north of 87th, at Holman Road ("Holman") and 15th.

In 2007, Gerald Tarutis, Guardian ad Litem for Messenger, sued the City for negligence, alleging that it breached its duty to design, maintain, review, and operate the crosswalk in a reasonably safe condition for pedestrians. In June 2009, the City moved for summary judgment, arguing that it had no duty to install improvements along the 15th corridor and, therefore, did not breach any duty to Messenger. Tarutis also moved for partial summary judgment, asking the court to find that the City had notice of an unsafe intersection and to strike the City's

affirmative defenses of third-party fault against Hansen and contributory fault against Messenger. The City moved to strike as inadmissible testimony by several witnesses that Messenger would have crossed the street at Holman and 15th if a marked crosswalk had been available there at that time. Tarutis moved to exclude evidence of Messenger's settlement with Hansen.

The court denied Tarutis' motion for partial summary judgment to strike the City's affirmative defenses and it granted Tarutis' motion to exclude evidence of the settlement, except for impeachment purposes. The court also granted the City's motion to strike as inadmissible evidence from Dr. Richard Gill, Spencer-Davis, and the mothers of Spencer-Davis and Messenger, respectively. It then denied Tarutis' motion for partial summary judgment on the City's notice of an unsafe intersection as moot. Finally, in August 2009, the court granted the City's motion for summary judgment, dismissing Tarutis' claims.

Tarutis appeals.

SUMMARY JUDGMENT MOTIONS

Tarutis argues that the trial court erred in granting the City's motion for summary judgment dismissing this action. He also claims the court erred by denying his motions for partial summary judgment.

When a defendant moves for summary judgment, it bears the initial burden of showing the absence of an issue of material fact.[5] The burden then

[5] Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

moves to the plaintiff to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[6] In meeting his burden, the plaintiff cannot rely solely on allegations made in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.[7] If the plaintiff does not meet his burden, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[8]

We review de novo a trial court's order granting summary judgment, taking all facts and inferences in the light most favorable to the nonmoving party.[9]

City's Motion for Summary Judgment – Negligence

Tarutis argues that the trial court erred in granting the City's motion for summary judgment to dismiss the case. We agree.

The elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to plaintiff proximately caused by

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[6] Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)).

[7] Id.

[8] Celotex, 477 U.S. at 322-23 (citations omitted).

[9] 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)).

the breach.[10] "[G]overnmental entities are held to the same negligence standards as private individuals."[11] A municipality has a duty to all persons to maintain its roadways in a reasonably safe manner.[12] Generally, issues of negligence are not susceptible to summary judgment.[13] Whether a roadway is reasonably safe is a material question of fact.[14] "Questions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.' "[15]

The City argued below that the roadway where the accident occurred was not inherently dangerous. It also argued that it had no duty to design or improve unmarked crosswalks to the engineering standards for marked crosswalks, and that it did not breach any duty it owed to Messenger. We recently rejected similar arguments in a factually similar case.

In Xiao Ping Chen v. City of Seattle,[16] Run Sen Liu was struck by a car

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[10] Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (citing Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996)).

[11] Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (citing Keller v. City of Spokane, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002)).

[12] Id. at 786.

[13] Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

[14] Owen, 153 Wn.2d at 788.

[15] Id. (quoting Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

[16] 153 Wn. App. 890, 894, 223 P.3d 1230 (2009), review denied, 169

and killed while crossing at a marked crosswalk in Seattle's International District.[17] The crosswalk spanned a five-lane arterial road. While there were no stoplights, stop signs, or pedestrian signals, there were pole-mounted signs at the curbs warning of a crosswalk and an overhead "Crosswalk" sign with a flashing light above the street.[18] The pedestrian's widow, Xiao Ping Chen, sued the City of Seattle for negligence, arguing that the City failed to maintain the crosswalk in a reasonably safe condition for ordinary travel.[19] During discovery, she produced evidence that for seven years residents petitioned the City for a stoplight at the intersection before the City installed a pedestrian island in the center turn lane.[20] Three years later, that island was removed at the request of a nearby business.[21] During the five years after its removal, at least eight accidents occurred between pedestrians and motor vehicles, not including Liu's accident.[22] Chen submitted a study on traffic volume at the intersection showing that 16,000 cars passed through the intersection each day. The study showed

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Wn.2d 1003 (2010).

[17] Id. at 894-95.

[18] Id. at 895.

[19] Id. at 894-95.

[20] Id. at 895.

[21] Id.

[22] Id.

that it took an average pedestrian 19 seconds to cross the street, and there were only six to ten "gaps" in traffic per hour allowing a pedestrian to cross safely.[23] Chen submitted declarations from two engineering experts who concluded that the crosswalk was dangerous because there were not adequate "gaps."[24] Finally, she submitted a declaration from a human factors and ergonomics engineer that the crosswalk presented a dangerous condition because pedestrians could not accurately gauge whether they had time to safely cross the street.[25]

At summary judgment, the City argued that it had no duty to improve the crosswalk because it was not in violation of any law requiring safety measures different from those employed.[26] It also argued that Chen produced no evidence that the crosswalk was an unsafe condition or that there was any physical defect in the crosswalk making it inherently dangerous.[27] The trial court granted summary judgment in favor of the City.[28] Chen appealed, and we reversed.

In Chen, we noted that whether a municipality owes a duty in a particular

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[23] Id. at 896.

[24] Id. at 896-97.

[25] Id. at 897.

[26] Id. at 898.

[27] Id.

[28] Id.

situation is a question of law, but that implicit in that legal question are the questions "to whom the duty is owed, and what is the nature of the duty owed."[29] We also noted that while the parties in that case both agreed that the City owed Chen a duty, they sharply disputed the nature of the duty and whether there was a breach.[30] We held that the totality of the circumstances surrounding the crosswalk, not just the design of the crosswalk itself, were material to the determination whether the City breached its duty to Chen.[31] We also rejected the City's claim that it can have no duty to pedestrians beyond repairing a physical defect or taking action only when required by either the Manual on Uniform Traffic Control Devices (MUTCD) or by statute.[32]

Here, the City moved for summary judgment, arguing the absence of a duty and claiming there was no breach of any duty it owed to Messenger. But to the extent the City claimed that it had no duty because it was not required by statute or otherwise to install a marked crosswalk, this was incorrect. " 'Liability for negligence does not require a direct statutory violation . . . .' "[33] Moreover, because the law gives pedestrians crossing at an unmarked crosswalk the right

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[29] Id. at 899-900.

[30] Id. at 900.

[31] Id. at 901-03.

[32] Id. at 908.

[33] Id. (quoting Owen, 153 Wn.2d at 787).

of way (as opposed to pedestrians crossing in mid-block),[34] they are "directed" to use such statutory crosswalks. Therefore, as in Chen, the City cannot claim that it had no duty to Messenger as a matter of law.

The City argues that "[i]t is only where a municipality has chosen to initiate improvements that it must exercise reasonable care in designing and maintaining such improvements, '[i]t [being] the invitation, expressly or impliedly extended to the public, that imposes the obligation . . . .' "[35] But under this logic, the City, in erecting "Crosswalk" signs over the intersection at 15th and 87th, sought to improve the statutory crosswalk at this intersection. Thus, it must exercise reasonable care in maintaining that improvement. This record does not show the date and actual reason for the signs' installation. Construing the evidence in the light most favorable to Tarutis, the non-moving party, it is reasonable to assume that the reason was pedestrian safety. The City then removed the signs, despite resident complaints while the signs were in use, without installing alternative safety measures or warning the public about the removal. Viewing the evidence in the same light, it is also reasonable to assume that a jury could find that the City breached its duty.

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[34] Compare RCW 46.61.235(1) (providing a right of way for pedestrians in marked and unmarked crosswalks) with RCW 46.61.240(1) (directing pedestrians that cross at points other than marked or unmarked crosswalks to yield to vehicles).

[35] Brief of Respondent at 24 (quoting Berglund v. Spokane County, 4 Wn.2d 309, 317, 103 P.2d 355 (1940)).

In arguing that it had no duty to mark the crosswalk at 15th and 87th, the City relies on cases from Illinois and California. Neither is persuasive.

In Horrell v. City of Chicago,[36] the plaintiff alleged that the city was negligent for failing to place a crosswalk at a bus stop.[37] She argued that the city had an affirmative duty to do so because two city ordinances required the city to place crosswalks at every bus stop.[38] The court found that no such statutory requirement existed and that the traditional common law duty of a city to maintain property in a reasonably safe condition does not require the creation of public improvements.[39] Rather, "the duty to maintain does not commence until an improvement is actually undertaken."[40]

Here, the City did make an improvement, so the common law duty to maintain the property in a reasonably safe condition was triggered. Additionally, Tarutis does not argue that the City breached an affirmative statutory duty, as the plaintiff in Horrell did. This case is not helpful.

The City also relies on Song X. Sun v. City of Oakland.[41] In that case, a

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[36] 145 Ill. App. 3d 428 (1986).

[37] Id. at 432.

[38] Id.

[39] Id.

[40] Id.

[41] 166 Cal. App. 4th 1177, 83 Cal. Rptr. 3d 372 (2008).

pedestrian was hit and killed while crossing in an unmarked crosswalk.[42] The plaintiff argued that the city created a dangerous condition by failing to repaint crosswalk markings at the intersection after it repaved the street and installed sidewalk extensions to lessen the distance a pedestrian had to travel across the street.[43] The court held that the plaintiff could not raise any issues of material fact regarding whether the unmarked crosswalk was a dangerous condition because it could show no defect in the physical condition of the property that increased or intensified the danger to users from third party conduct.[44] However, in Chen, we specifically held that a plaintiff need not show that a particular physical defect made the intersection inherently dangerous.[45] Therefore, Sun is not persuasive.

Next, the City challenges the testimony of Tarutis' traffic engineering expert witness, Edward Stevens. It argues that because he failed to identify specific engineering treatments that the City was required to install at the location of the accident, Tarutis cannot prove that the City breached any duty. This is incorrect. The issue here is whether the City breached its duty to make the road reasonably safe for ordinary travel, not whether the City breached a duty to make specific improvements to a statutory crosswalk. Accordingly, the

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[42] Id. at 1181.

[43] Id. at 1184.

[44] Id. at 1187-88.

[45] Chen, 153 Wn. App. at 900-01.

City's argument is unpersuasive.

The City also argues that it has different duties to pedestrians in marked and unmarked crosswalks. In doing so, it attempts to distinguish Chen because that case involved a marked crosswalk, not the unmarked, statutory crosswalk at issue here. As described in Chen, "[t]hat 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."[46] This statement distinguishes between the priority given to pedestrians using crosswalks and those who do not. It does not make any comparison of marked and unmarked crosswalks for purposes of liability. Pedestrians have priority when crossing unmarked intersections, which are statutory crosswalks.[47] Given the lawfulness of unmarked statutory crosswalks, our analysis in Chen, and the City's general duty to provide safe roadways, this argument is unpersuasive.

Further, the City argues that citizen complaints are not sufficient to prove a duty on the part of the City to make improvements. For this proposition it relies on Hunt v. City of Bellingham,[48] where the supreme court held that the city did not breach its duty to safely maintain a meter box along a public street by outfitting it with a wooden cover.[49] In that case, the plaintiff fell into the box and

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[46] Id. at 906.

[47] See RCW 46.61.235.

[48] 171 Wash. 174, 17 P.2d 870 (1933).

[49] Id. at 177.

injured herself because the cover was removed unbeknownst to the city.[50] A year before the incident, the plaintiff filed a complaint with the city that the cover could easily slide off.[51] In response, the city installed a new cover that had to be lifted off with a pick.[52] At trial, the plaintiff testified that either an iron box or a box with hinges and a lock would have been preferable.[53] The court held that the city took reasonable care under the circumstances and its "duty in installing and maintaining its equipment in or about its streets [was] not measured by the desire of adjacent property owners . . . ."[54]

However, that case is factually distinguishable from this one. It appears that the plaintiff in Hunt was the only person who complained to the City of Bellingham. Additionally, no complaints were received between the time that the new cover was installed and the plaintiff was injured. Here, there were multiple complaints from different individuals even after the City installed the overhead crosswalk signs. While the complaints, by themselves, do not establish that the crosswalk was unsafe, they serve as evidence that the City knew of a potentially unsafe condition. They can also be considered as part of the totality of

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[50] Id. at 175-76.

[51] Id. at 177.

[52] Id.

[53] Id.

[54] Id.

circumstances in determining whether the City breached its duty to maintain the roadway in a condition reasonably safe for ordinary travel.

Finally, the City argues that the citizen complaints cannot be used as evidence that there was a "dangerous condition" because ER 701(c) excludes lay witnesses from testifying as to matters of scientific, technical, or other specialized knowledge. However, as we just discussed, the complaints are not presented as evidence to prove that there was a dangerous condition as a matter of law. Rather, the complaints are one of several pieces of evidence that Tarutis relies upon to prove that the City breached its duty to reasonably maintain the road for ordinary travel.

Upon the City's motion for summary judgment, the burden of proof shifted to Tarutis to show that there is a genuine issue of material fact whether the intersection was maintained in a reasonably safe manner for ordinary travel. According to Chen, "[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."[55] Under this standard, Tarutis has met his burden to show the existence of a genuine issue of material fact.

Here, Tarutis presented the court with evidence similar to that presented in Chen. First, there is evidence that the City received numerous complaints about the intersection's safety between 1993 and 2002. Second, Tarutis

[55] Chen, 153 Wn. App. at 894.

provided traffic counts from Holman and 15th in 1993 and 87th and 15th in 2000. In 1993, more than 14,000 cars traveled in each direction along 15th through Holman. In 2000, the average daily traffic through 87th and 15th was 16,169 vehicles, virtually identical to the count in Chen. Finally, Tarutis presented expert testimony by Stevens, a traffic engineering expert witness. Stevens examined traffic reports and gap studies conducted in 2005, after Messenger's accident, and concluded that pedestrians at 87th and 15th need 18 seconds to safely cross the intersection. He also concluded that during the peak traffic hour there were zero gaps available. Stevens noted that there were two signalized crosswalks along 15th: one at 85th Avenue North, 700 feet south, and one at Mary Avenue, 1,000 feet north. Stevens opined on the basis of these points and other information that as of the date of the accident, "15th Avenue NW from 87th through Holman Road was inherently dangerous and, as operated, presented a risk of serious injury for pedestrians trying to cross 15th at 87th or Holman."[56] He opined further that "pedestrians crossing 15th Avenue NW at its intersection with 87th St NW are presented with an unreasonable risk of harm and the crossing is inherently dangerous."[57]

These expert opinions are sufficient to create genuine issues of material fact regarding the safety of the location of the accident. They also bear on the

[56] Clerk's Papers at 450.

[57] Clerk's Papers at 473.

question of whether the City breached its duty in this case. Moreover, removal of the crosswalk sign at 15th and 87th with neither a warning to the public nor installation of alternative safety measures arguably resulted in an increased danger to pedestrians at that intersection. For these reasons, the City was not entitled to summary judgment as a matter of law on negligence.

Alternatively, the City argues that summary judgment should be affirmed on a basis not argued below. The City now claims that Tarutis cannot prove that its alleged breach of duty was the proximate cause of Messenger's injuries. The City may argue on appeal for affirming the trial court on a basis not considered below.[58] Nevertheless, we reject the City's contention that there are no genuine issues of material fact regarding proximate cause.

The City argues that its failure to install a full signal at Holman and 15th was not the proximate cause of the accident because it is unknown whether the boys would have crossed there. The City contends that testimony from Dr. Gill and the boys' mothers about where the boys would have crossed is speculative and not supported by adequate foundation under ER 703. Tarutis does not directly reply to this part of the City's argument.

However, this argument ignores Stevens' testimony that the intersection of 15th and 87th is inherently dangerous for pedestrians. While his evidence

[58] See RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.").

relies, in part, on what was happening at Holman road, whether those events constitute a proximate cause of the accident cannot be determined on summary judgment. In short, ignoring Dr. Gill's speculative testimony does not eliminate the factually disputed question of whether the crossing at the scene of the accident was inherently dangerous due, in part, to the conditions at Holman road.

Tarutis' Motion for Summary Judgment–Notice of Potentially Unsafe Intersection

Tarutis next argues that the trial court erred in denying his motion for partial summary judgment that the City had notice that 15th and 87th was unsafe for pedestrians. We disagree.

Washington pattern jury instruction WPI 140.02 requires a city to have notice of an "unsafe condition" before it can be liable for a condition that was not caused by its negligence.[59] The notice requirement is met "if the condition has come to the actual attention of its employees or agents . . . ."[60]

In his motion for summary judgment, Tarutis argued that the City had the notice required under WPI 140.02 of an "unsafe condition" because it received multiple resident complaints about safety at the intersection of 15th and 87th. Tarutis cites eight notifications from citizens to the City warning of the dangers of the intersection before Messenger's accident. While there is ample evidence

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[59] WPI 140.02.

[60] Id.

that the City had notice of citizen concern, Tarutis cites no authority that citizen concern necessarily means an "unsafe condition" under WPI 140.02. Therefore, the denial of summary judgment on this issue was proper because Tarutis did not prove, as a matter of law, that the City had the type of notice required.

Tarutis' Motion for Summary Judgment – Contributory Fault

Tarutis argues that the trial court erred in denying his motion for partial summary judgment to strike the City's affirmative defense of contributory fault on the part of Messenger. We disagree.

Contributory fault, also known as contributory negligence, is defeated when "plaintiff . . . exercise[s] the care which a reasonably prudent man would have exercised for his own safety under the circumstances."[61] " 'The issue of contributory negligence is generally one for the jury to determine from all the facts and circumstances of the particular case.' "[62] "Questions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.' If reasonable minds can differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate."[63]

Vehicles must stop for a pedestrian in an unmarked or marked crosswalk

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[61] Bertsch v. Brewer, 97 Wn.2d 83, 91, 640 P.2d 711 (1982) (citing Poston v. Mathers, 77 Wn.2d 329, 331, 462 P.2d 222 (1969)).

[62] Id. (quoting Bauman v. Complita, 66 Wn.2d 496, 497, 403 P.2d 347 (1965)).

[63] Owen, 153 Wn.2d at 788 (citations omitted).

when the pedestrian is within one lane of the half of the road the vehicle is travelling upon.[64] Even so, an individual in a crosswalk has a duty to exercise reasonable care for his own safety.[65] Pedestrians must not "suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle which is so close that it is impossible for the driver to stop."[66]

> Strong as the protection afforded by the crosswalk may be and however unlikely that a pedestrian struck in a crosswalk would be contributorially negligent, there nevertheless remains in the law a legal possibility that a pedestrian . . . may have been contributorially negligent. If there is evidence to support the issue, the court must submit the issue . . . to the jury.[67]

In Oberlander v. Cox, the supreme court held that there was sufficient evidence of a pedestrian's contributory negligence to submit the defense to the jury.[68] The plaintiff was struck by a car while crossing in a marked crosswalk spanning a four lane road.[69] Although she checked for traffic before entering the crosswalk, she failed to look both ways after she entered the street, despite the fact that visibility was decreased due to heavy rain and wind.[70] "All of these

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[64] RCW 46.61.235(1).

[65] Pudmaroff v. Allen, 138 Wn.2d 55, 67, 977 P.2d 574 (1999).

[66] RCW 46.61.235(2).

[67] Shasky v. Burden, 78 Wn.2d 193, 200, 470 P.2d 544 (1970).

[68] 75 Wn.2d 189, 194, 449 P.2d 388 (1969).

[69] Id. at 190.

[70] Id. at 193-94.

circumstances, when related to the conditions prevailing, while not amounting perhaps to strong proof of contributory negligence, nevertheless supply some substantial evidence from which a jury could infer contributory negligence."[71]

Here, there is conflicting evidence whether Messenger ran into Hansen's path such that a jury could infer contributory negligence. Tarutis admitted as much in his motion for summary judgment when he stated that "[a]dmittedly, others provided a variety of descriptions as to the pace at which the boys were crossing." Christopher Entrop, a witness, stated in his declaration that, after a woman in a sport utility vehicle ("SUV") stopped, "[t]he boys left the curb ***jogging***, holding hands and laughing, and ***ran out into the roadway***."[72] In his May 2009 declaration, Hansen stated that "[j]ust as [his] van was almost even with the SUV, [he] noticed, through the righthand corner of [his] windshield, two children ***running*** into the road."[73] Using eyewitness testimony, the damage to the van, and Messenger's physical characteristics and resulting injuries, Dr. Steven Wiker performed a biophysical mechanical analysis of the accident. He concluded that Messenger "was running across 15th NW as he impacted the van . . . at a speed of between 4.9 and 10 mph . . . [which] support the accounts of eyewitnesses, all of which indicated that the pedestrian was running in front of

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[71] Id. at 194.

[72] Clerk's Papers at 405 (emphasis added).

[73] Clerk's Papers at 412 (emphasis added).

the stopped [SUV]."[74] Dr. Wiker concluded that "the van would not have been able to stop in time to avoid a collision with a pedestrian who was running across the street."[75]

There is evidence that Messenger ran into the street. Because reasonable minds could disagree whether Messenger was negligent under these circumstances, summary judgment is not appropriate.

Tarutis argues that, based on Jung v. York,[76] a pedestrian has no duty to stop part way across an intersection and look for traffic when another car stops to allow him to cross.[77] Because there is no evidence that Messenger should have known that the van was not going to yield to him, Tarutis claims that Messenger cannot be contributorily negligent. However, in Jung, there was no evidence that the plaintiff ran into the intersection, as there is in this case.[78] Thus, the case is not helpful.

Tarutis also relies on Clements v. Blue Cross of Washington & Alaska, Inc.,[79] for the proposition that Messenger had no duty to observe oncoming

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[74] Clerk's Papers at 408.

[75] Clerk's Papers at 409.

[76] 75 Wn.2d 195, 449 P.2d 409 (1969).

[77] Id. at 197.

[78] Id. at 199.

[79] 37 Wn. App. 544, 682 P.2d 942 (1984).

traffic once he was in the crosswalk because he had the right of way. That case did confirm the general legal principle that "[t]he law does not impose a duty to look upon a pedestrian lawfully within a marked crosswalk . . . ."[80] But, the court went on to say that a plaintiff should not assume that vehicles will obey the right of way once "***he knows or should know to the contrary***."[81] In that case, the plaintiff entered a marked crosswalk while the light was green, but did not finish crossing before the light changed to red.[82] A vehicle stopped at the light, honked several times and yelled at the plaintiff to warn her of oncoming traffic, but she was unresponsive and continued to cross without looking.[83] The court concluded that "[t]here was substantial evidence presented to support defendants' position that [the plaintiff] should have known to look for oncoming traffic even though she was legally in the crosswalk [and i]t was error to refuse to instruct the jury on contributory negligence . . . ."[84]

Here, the City presented no evidence that Messenger should have known that Hansen was not going to yield. Even so, this case does not support Tarutis' argument that Messenger had no duty to look for oncoming traffic once he

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[80] Id. at 550.

[81] Id. (citing Jung, 75 Wn.2d at 198).

[82] Id.

[83] Id. at 551.

[84] Id. at 553.

entered the crosswalk. Instead, it discusses a set of circumstances where the pedestrian in a marked crosswalk did have a duty to look. Thus, it is unpersuasive.

Additionally, Tarutis argues that Messenger's pace within the crosswalk is irrelevant. He relies on Pudmaroff v. Allen, which held that a bicyclist was not contributorily negligent where he stopped at a marked crosswalk, waited until traffic stopped to proceed, and was hit by a vehicle in the outside lane that failed to yield.[85] In that case, the court held that "[t]he fact that a . . . vehicle stopped and waited for him indicates he did not dart into the intersection."[86]

However, this case involves an unmarked intersection and there is evidence that the boys did run into the intersection once they passed Mulholland's vehicle. Additionally, this argument is not persuasive because the statute does not require running to occur only from a sidewalk, but any "place of safety" in a manner that the oncoming vehicle cannot stop in time, which could include from in front of a stopped vehicle.[87]

Finally, he argues that the City failed to show that Messenger's pace was a cause in fact of the collision. But at the summary judgment stage, all that the non-moving party is required to show is that a genuine issue of material fact

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[85] 138 Wn.2d 55, 66-67, 977 P.2d 574 (1999).

[86] Id.

[87] RCW 46.61.235(2).

exists, no more.[88] Here, there is a genuine issue of material fact. Therefore, the City was under no obligation to prove causation in response to Tarutis' summary judgment motion.

EVIDENTIARY MOTIONS

Tarutis argues that the trial court erred in excluding and admitting certain evidence in connection with the several summary judgment motions. We address each challenge in turn.

We review de novo evidentiary rulings made in conjunction with a summary judgment motion.[89] "[The] standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court."[90]

Expert Testimony

Tarutis argues that the trial court erred when it granted the City's Motion to Strike as inadmissible paragraph nine of Dr. Gill's declaration that the boys would have crossed at Holman and 15th had there been a traffic signal and marked crosswalk there at the time of the accident. There was no error.

ER 702 allows testimony by an expert witness if the testimony will be

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[88] Young, 112 Wn.2d at 225-26.

[89] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

[90] Id. (citations omitted).

helpful to the trier of fact and the expert is qualified as an expert by knowledge, skill, experience, training, or education.[91] "The trial court has wide discretion in ruling on the admissibility of expert testimony."[92] However, conclusory or speculative expert opinions that lack an adequate foundation should not be admitted, due in part to the "'danger that the jury may be overly impressed with a witness possessing the aura of an expert.'"[93]

In paragraph 9 of his declaration, Dr. Gill stated that:

> 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 15th Avenue NW and Holman Road at the time of the incident, Nick and Charlie would have walked further north and crossed 15th 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 15th Avenue NW and Holman Road prior to February 17, 2005, this incident would not have happened and Nick would not have been injured.[94]

The trial court ruled this statement was inadmissible because it was speculative and lacked foundation for expert testimony. We agree.

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[91] ER 702.

[92] Miller v. Likins, 109 Wn. App. 140, 147, 34 P.3d 835 (2001) (citing State v. Fagundes, 26 Wn. App. 477, 483, 614 P.2d 198 (1980)).

[93] Id. at 148 (quoting Davidson v. Mun. of Metro. Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986)).

[94] Clerk's Papers at 80.

Dr. Gill is a certified Human Factors Professional with expertise in safety, human factors, accident reconstruction, and traffic and pedestrian situations. In preparing his declaration, Dr. Gill reviewed accident reports, diagrams of the scene and surrounding area, and the declarations of Spencer-Davis, Messenger's mother, and Spencer-Davis' mother. Although these documents may be of the type relied upon by a Human Factors Professional, Dr. Gill's opinion as to Messenger's hypothetical course of travel was speculative and not supported by adequate facts. The testimony on which he relied from both mothers was also excluded as speculative by the trial court. Tarutis does not challenge the trial court's exclusion of these latter statements. Additionally, as discussed below, Spencer-Davis' declaration stating what the boys would have done was also excluded as speculative.

The trial court did not err in excluding these portions of his declaration in considering the summary judgment motions.

Lay Opinion Testimony

Tarutis also argues that the trial court erred when it granted the City's Motion to Strike as inadmissible two paragraphs of Spencer-Davis' declaration. We again disagree.

Under ER 602 "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[95] In addition, ER 701 requires opinion testimony by

[95] ER 602.

lay witnesses to be "rationally based on the perception of the witness . . . ."[96]

Here, the stricken portions of Spencer-Davis' declaration state:

> If that Holman Road traffic light had been in place on February 17, 2005, Nick and I would have crossed 15th Avenue NW at the "new" traffic light and not at 87th NW Street and 15th Avenue NW.
>
> In addition, if the "new" traffic light had been in place and either my mom, or Nick's mom, Jennifer, would have told us to cross 15th Avenue NW at the "new" traffic light, we would have followed their instruction and crossed at the "new" traffic light.[97]

The trial court correctly struck this testimony as speculative and inadmissible.

Tarutis argues that Ayers v. Johnson & Johnson Baby Products Co.[98] is controlling. It is not.

In that case, David Ayers, an infant, was severely injured when he ingested baby oil.[99] Ayers' mother testified about how she would have handled the baby oil if there had been adequate warnings on the label. The supreme court held that the testimony was not speculative because she also testified that she diligently read product labels, stored hazardous materials out of David's reach, and instructed her family to do the same.[100]

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[96] ER 701.

[97] Clerk's Papers at 479.

[98] 117 Wn.2d 747, 818 P.2d 1337 (1991).

[99] Id. at 750-51.

[100] Id. at 754.

Ayers is distinguishable from this case because the mother testified as to how her own behavior would have changed, not as to how someone else's behavior would have changed.[101] While Ayers supports the admissibility of Spencer-Davis' opinion as to how his own behavior would have changed in response to a "new" traffic light, to the extent he gave an opinion as to what Messenger would have done, his opinion is not admissible on the basis of Ayers.

The trial court did not err in striking Spencer-Davis' lay opinion.

Evidence of Prior Settlement

Tarutis also argues that the trial court erred in its ruling concerning evidence of the prior settlement with Hansen. Specifically, he argues that the court erred in considering evidence of the settlement to impeach Hansen's version of events.[102]

To the extent that this argument is limited to the court's grant of the motion for summary judgment, we reject this claim.

The court's written ruling states:

> Plaintiff's Motion to Exclude Evidence of Prior Settlements if [sic] GRANTED; Defendant City shall be prohibited from referring in pleadings to Plaintiff's prior settlement with Steven Hansen and POP Electric, ***except to impeach Hansen's version of events. The Court did not weigh, for purposes of a jury trial, the admissibility of the evidence under ER 403 and defers that issue for trial***.[103]

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[101] Id.

[102] Appellant's Opening Brief at 45.

[103] Clerk's Papers at 980 (emphasis added).

A fair reading of this ruling is that the court, for purposes of the summary judgment motion, excluded consideration of the settlement, as ER 408 generally requires. We do not read the ruling to mean that the trial court considered the settlement as impeachment evidence of Hansen's version of events at the summary judgment stage. That reading not only makes no sense, but also ignores the emphasized portion of the ruling stating that the court would rule on the admissibility of the evidence at trial after considering ER 403. In short, there was no error here.

In so concluding, we express no opinion on the trial court's possible future ruling on the admissibility of this evidence at trial or otherwise. Those issues are not presently before us.

We affirm in part, reverse in part, and remand for further proceedings.

Cox, J.

WE CONCUR: