11-22-2011

Woodworth v. State Ex Rel. Id. Transp. Bd. Appellant's Brief Dckt. 38884

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Case No. 38884-2011

BRIAN P. WOODWORTH,
Appellant,

vs.

STATE OF IDAHO, BY AND THROUGH ITS
IDAHO TRANSPORTATION BOARD AND
IDAHO TRANSPORTATION DEPARTMENT,

Defendant.

APPELLANT'S BRIEF

Appeal from the District court of the Third Judicial District for Canyon County
Case No. CV 2009-11334
Hon. Bradly S. Ford, District Judge

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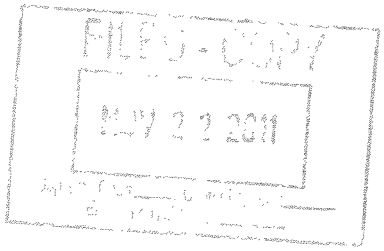

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

Nature of the Case

A legal but unmarked crosswalk on a State Highway running through the city of Nampa was adequate for traffic and pedestrian volumes when it was designed in 1954. However, Nampa's population and thus the traffic and pedestrian volumes grew substantially over the next 53 years, such that pedestrians were struck by vehicles with ever-increasing frequency until, following plaintiff's October 2007 accident and another one just a month later, the city of Nampa installed warnings consisting of pavement markings, flashing amber lights, signs and several other pedestrian safety enhancements. At no time did the state make any effort to fulfill its duty to inspect for and correct or warn of the conditions that made the unmarked crosswalk unreasonably dangerous to pedestrians. Instead it entered into a "joint maintenance agreement" with Nampa whereby Nampa was to perform maintenance – but not any necessary improvements – to the crosswalk. The lower court granted the state summary judgment on the alternate grounds that (a) the "arises out of a plan or design" immunity set out in Idaho Code § 6-904 (7) affords the state immunity even for subsequent non-design failures to inspect for, find and warn of or correct dangerous conditions that come into existence after the location was designed and (b) the State's "High Accident Location" program, which merely *identifies* the 20 worst locations in the entire state highway system, fulfilled all of the duties it owed concerning the highways in its system. This appeal challenges both of the lower court's alternate grounds for summary judgment in favor of the state. Plaintiff appellant maintains the case doesn't "arise out of" the original plan or design at all, but instead arises out of the state's *subsequent* failure to inspect for and correct or warn of *subsequently-arising* hazards that stemmed from the substantially changed traffic and pedestrian volumes flowing through the crosswalk. If the lower court's reasoning were accepted, then the state would effectively be excused from its continuing duty to inspect, study and correct or warn of dangerous conditions on any of the highways in its system so long as the highways were designed in accordance with engineering standards – regardless of how *later* demands on the highways might render them unreasonably dangerous to the motorists and pedestrians who use them.

A State Highway designed and built in the mid 1950's runs through the City of Nampa with a 35 MPH speed limit. No pavement markings or other warning features were installed at one of its legal crosswalks, which exist as a matter of statute. Nampa installed overhead street lights along the sides, creating "glare bombs" that make pedestrians using the crosswalk

especially hard to see. The population of Nampa grew substantially over the ensuing half-century, but still no pavement markings or other safety features were installed at the crosswalk. By 2007, the frequency of cars hitting pedestrians in or near the crosswalk at night had reached seven in five years, counting plaintiff.

Plaintiff timely filed a notice of tort claim, which the State's "Claims Adjudicator" denied on the stated ground

> "The information we have obtained indicates that the State of Idaho has a joint agreement with the City of Nampa regarding maintenance of the 11th Avenue North in Nampa. The ***city*** is responsible for crosswalks and various traffic control devices within the City Limits. The ***only*** responsibility the State would have regarding the City's plans to install a crosswalk would be to review and approve the plans to ensure they are in compliance with I[daho] T[ransportation D[epartment] standards. Based upon our review we do not find that the State has liability in this matter and must deny the claim."

(Exhibit H to affidavit of Pat Furey, R., p. 269, emphasis added.) Plaintiff sued the State, by and through its Idaho Transportation Board and Transportation Department (hereinafter, collectively, "the Department") and Nampa (eventually reaching a settlement with the latter, which has been dismissed from the appeal). In the complaint, plaintiff specifically pleaded the authority set out in *Roberts v. Transportation Dept.*, 121 Idaho 727, 827 P.2d 1178 (Idaho App.,1991), *affirmed*, 121 Idaho 723, 827 P.2d 1174 (1992) i.e., that the State's statutory duties with respect to State Highways are non-delegable. He then alleged the State was negligent in its failure to perform any engineering studies of the location and to correct or warn of the dangerous conditions such a study would have shown.

The Department then abandoned its claimed "transfer of duty" defense and instead asserted that Idaho Code § 6-904(7) ("arises out of a plan or design" immunity) shields it from liability. Plaintiff has never contested the adequacy of the original 1954 plan or design, however, but attacks the Department's proposition that the adequacy of a design at its inception affords

infinite immunity for *subsequent* negligent failure to inspect for, find, and implement necessary safety improvements, including pedestrian warnings, when changed conditions warrant them.

In addition, the Department urged its "High Accident Location" program (the effect of which was to identify only the 20 worst areas in the State Highway System) excused it, due to "funding limitations," from correcting any other defects in its highways. Plaintiff also contests this, because the Department's proposition that a claimed "policy" against inspecting for, finding and correcting any but the 20 very worst safety hazards in the State Highway System is foreclosed by its statutory duty to inspect for, find and correct safety hazards in ***all*** of the locations for which it is statutorily responsible. Moreover, the Department offered no evidence whatsoever of any "funding limits" that prevented it from inspecting for the hazards that Nampa found and fixed itself.

Finally, given the Department's early and longstanding reliance on its intended handoff of responsibility to the City of Nampa (R., p. 269), the appeal presents an urgent opportunity for the Court to answer the question it specifically left open in *Roberts v. Transportation Dept.*, 121 Idaho 727, 732 **n. 4**, 827 P.2d 1178, 1183 **n. 4** (Idaho App.,1991), *affirmed*, 121 Idaho 723, 827 P.2d 1174 (1992), i.e., whether the Department lawfully may enlist another entity to help execute its own non-delegable duties at all.

The concise nature of the case, then, is that it is primarily a dispute over the extent of the Department's "arises out of a plan or design" immunity: Does the fact a design was in accordance with engineering standards or was duly approved when done forever after immunize the Department for its subsequent failure to inspect for, find and correct or warn of hazards that have arisen over the ensuing decades? Stated another way, it presents for the Court's determination the question whether the "perpetual immunity" part or the "governmental liability"

part of *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983) controls plaintiff's case as plaintiff pleaded it, rather than as the defendant and the lower court re-cast it.

A secondary aspect of the case is that it presents a dispute as to whether the Department can avoid its statutory duty to inspect for, find and correct hazards simply by adopting a "program" to look only at the 20 very worst ones in its entire system.

Course of proceedings and disposition below

On October 29, 2007, Plaintiff pedestrian was hit and severely injured in an unmarked, ill-lighted crosswalk[1] that presented what is known as a "glare bomb" effect to motorists. He was the seventh in five years.[2] (R., p. 222.) He timely served a notice of tort claim on both the Idaho Department of Transportation (hereinafter, "the Department") and the City of Nampa, since the crosswalk was on a State Highway that went through Nampa's city limits. The Department's denial of the tort claim by its "Claims Adjudicator" Kim Coffman as quoted above, declared that since it had entered into a "Joint Maintenance Agreement" with Nampa, then any responsibility for failure to mark, sign or otherwise improve the crosswalk was solely Nampa's.

Upon the denial of his tort claim by both entities, plaintiff sued them (Complaint, R., p. 5 – 20). The complaint specifically asserted the authority of *Roberts v. Transportation Dept.*, 121 Idaho 727, 827 P.2d 1178 (Idaho App.,1991), *affirmed*, 121 Idaho 723, 827 P.2d 1174 (1992), which had unequivocally held the duties of the State were non-delegable – a holding the

[1] The existence of a "crosswalk" is determined by statute, I.C. § 49-104(14)(a) and § 49-110 (10)(a), and not by whether it is painted on the pavement.

[2] About a month later, the eighth one (an elderly woman) would be hit and killed.

Department completely ignored in its denial of liability. (Denial of tort claim, R., p. 269.) Nampa, on the other hand, claimed it had no responsibility, either, since the joint maintenance agreement only required it to maintain – but not improve or correct – that which was already in place. In other words, according to the defendants, *no one* had responsibility for the safety of crosswalks on the State's highway through Nampa's city limits.

Both defendants moved for summary judgment, with the Department basing its motion on I.C. 6-904(7) (plan or design immunity) and its "High Accident Location" ("HAL") program and Nampa on the fact it was a State highway, rather than a city street. At the hearing, plaintiff's counsel focused on his common law negligence claim to the exclusion of his negligence per se claim, given the persuasive reasoning of the Washington Court of Appeals in the just-found case of *Xiao Ping Chen v. City of Seattle,* 223 P.3d 1230 (Wash. App. 2009).

The lower court, in a memorandum decision, granted the motions and entered judgments for both defendants. (R., p. 327-354.) Plaintiff timely appealed (R., p. 355-363), following which he reached the settlement with Nampa and stipulated to its dismissal from the appeal.

Statement of Facts

The subject intersection includes a pedestrian crosswalk as a matter of the law codified at I.C. § 49-104(14)(a) and § 49-110 (10)(a). It was designed by the Department in 1954. Affidavit of Kevin Sablan, R., p. 124. The crosswalk remained completely unimproved – that is, it had no warnings consisting of pavement paint, "pedestrian crossing" signs, flashers, or anything else – for the next ***fifty-three years.*** On October 29, 2007, plaintiff was struck in the crosswalk and severely injured.

The Department's motion for summary judgment was brought on a perfunctory set of facts (R., p. 113-115) which it purported to paraphrase from the allegations of plaintiff's complaint. It then concluded:

> "It is the position of [the Department] that ***despite Woodworth's allegations***, it is entitled to immunity under the exceptions to governmental liability pursuant to Idaho Code § 6-904(7) as the roadway at issue was appropriately designed in conformance with the standards at the time [i.e., 1954] and approved in advance of construction. Further, the State's monitoring program in place at the time [of the accident, i.e., 2007] reflecting accident data for the Intersection and surrounding intersections reflected no deviation from any standard, which required affirmative action on the part of the State."

State of Idaho's Memorandum in Support of Motion for Summary Judgment at 3 (R., p. 115), emphasis added. Because the Department's abbreviated paraphrasing of plaintiff's allegations was incomplete and misleading in (a) its suggestion that plaintiff was jaywalking instead of crossing in a legal albeit unmarked crosswalk and in (b) its attempt to re-cast plaintiff's theory of recovery as an attack on the crosswalk's design instead of an attack on the defendant's failure to inspect for, find and warn of or correct subsequently-arising hazards, they are quoted or paraphrased accurately as follows.

Scene of the Accident.

At all material times there existed in the State of Idaho and in its municipalities a number of roads and highways carrying sufficient traffic volume as to be designated by the Department as State Highways and comprising parts of the state highway system. The passage of a segment of a State Highway through a municipality at no time vitiated, altered or changed its character as a designated State Highway, notwithstanding the popular name of such segment as a street, boulevard, avenue or the like. (Complaint, paragraph 4, R., p. 7.) The Department was statutorily obligated by Idaho Code § 40-313 (1) to "erect and maintain, whenever necessary for public safety and convenience, suitable signs, markers, signals and other devices to control,

guide and warn pedestrians and vehicular traffic . . . traveling upon the state highway system." (Complaint, paragraph 5, R., p. 7.)

There existed within the city limits of Nampa a State Highway segment known as Eleventh Avenue North that ran generally north-south and carried two lanes each direction with a turn lane in the center for a total of 5 separate lanes. The segment material to this action was cross-intersected on its north end by 4th Street North (a city street that was not part of the state highway system) and cross-intersected on its south end by 2nd Street North (likewise a city street that was not a part of the state highway system). Adjacent to the segment on its west side was a commercial strip mall occupied by Paul's Market (a popular grocery outlet) and a number of smaller businesses that shared a large parking lot fronting onto the sidewalk that ran parallel to Eleventh Avenue North. Directly east across Eleventh Avenue North from Paul's Market and the strip mall was an area consisting almost entirely of residences. This residential area was generally bisected by 3rd Street North (still another city street that was not a part of the state highway system), which "T"- ed onto Eleventh Avenue North in the middle of the subject segment from its east side and opposite the entrance to the Paul's Market parking lot. (Complaint, paragraph 6, R., p. 7-8.) An aerial map is attached as Exhibit A for illustrative purposes.

Because the strip mall parking lot exited onto Eleventh Avenue North directly across from the entrance to 3rd Street North serving the residences, and because the only through intersections (as distinct from the subject "T" one) were a full city block to the north or to the south, pedestrians going between the residential area and the strip mall regularly crossed Eleventh Avenue North from the parking lot immediately opposite the entrance to 3rd Street North. Although this was a legal crosswalk (I.C. § 49-104(14)(a) and 49-110), it had poor

lighting, no pavement markings and no traffic warning signals. This lawful but unmarked crosswalk had been regularly used by pedestrians for many years before the accident. (Complaint, paragraph 7, R., p. 8.) Since the crosswalk was so frequently used by pedestrians and because it lacked traffic control devices, warnings or markings; and because the lawfully permitted speed in the four main travel lanes of Eleventh Avenue North was fully 35 miles per hour, the crosswalk was sufficiently hazardous to public safety as to present the requisite "warrants" for a substantially improved pedestrian crosswalk system and enhanced lighting. The need for these safety enhancements would have been shown by a competent traffic engineering study had the Department caused one to be done. (Complaint, paragraph 8, R., p. 8.)

On multiple occasions before October 29, 2007, pedestrians using the crosswalk were struck and seriously injured by motor vehicles, all of which accidents resulted in accident reports duly filed with the Department. (Complaint, paragraph 9, R., p. 8.) At some point prior to October 29, 2007, the Department enlisted Nampa to help in the execution of its duties with respect to public safety on the subject segment of its highway. This was admitted by the State of Idaho in its July 31, 2008 denial of the tort claim (R., p. 269) attached hereto as Exhibit B:

> "Your claim against the State of Idaho filed on behalf of your client, Brian P. Woodworth, has been reviewed.
>
> The information we have obtained indicates that the State of Idaho has a joint agreement with the City of Nampa regarding maintenance of the 11th Avenue North in Nampa. The *city* is responsible for crosswalks and various traffic control devices within the City Limits. ***The only responsibility the State would have regarding the City's plans to install a crosswalk would be to review and approve the plans to ensure they are in compliance with ITD [the Department] standards."***

(Complaint, paragraph 10, R., p. 9, emphasis added.)

By October 29, 2007, at 7:34 p.m., no pertinent traffic engineering study had been conducted, the crosswalk still had no pavement markings, lights, signs or other warnings to

benefit the safety of pedestrians and, except for the dim illumination provided by the lamps on nearby poles, it was dark.[3] (Complaint, paragraph 12, R., p. 10.)

The accident.

On October 29, 2007, at 7:34 p.m., plaintiff left the Paul's Market parking lot pushing a shopping cart eastward across Eleventh Avenue North at the crosswalk. As he passed the midpoint and approached the nearer of the two northbound lanes, the driver of a northbound vehicle saw him and stopped, allowing him to proceed. As he traversed the very last of Eleventh Avenue North's five lanes, however, the driver of another northbound car didn't see him and hit him at about the posted speed of 35 miles per hour, causing severe injury. (Complaint, paragraph 13, R., p. 10.)

The Department's actual and constructive knowledge of the hazardous condition of the intersection.

Not only did the Department have actual knowledge of the hazardous condition of the crosswalk from the accident reports required by law to be filed with it, the Department also owed affirmative statutory duties pursuant to Idaho Code § 40-310, 40-313, 40-502, 40-1310, 40-312 (adoption of the Manual on Uniform Traffic Control Devices, "MUTCD"), MUTCD § (A) 1A-1, MUTCD § (C) 1A-3, (D) 1A-3.1, (E) 1A-4, (R) 2C-1 and other provisions to inquire, to inspect and to cause to be made and kept various surveys, engineering studies, maps, plans,

[3] Worse, the overhead street lights Nampa had installed were of the type that, instead of directing their light downward, diffused it outward creating what traffic safety engineers call "veiling luminance" or "glare bombs" that make pedestrians even more difficult to see. (Stephen J. Lewis, P.E., "11th Avenue Pedestrian Study; Findings and Recommendations" to City of Nampa, dated November 23, 2007 – less than a month after the accident. Attachment to Affidavit of Kent Fugal (R., p. 66-70.))

specifications and estimates for the alteration, repair and maintenance of state highways (and as far as practicable of all highways in the state), and for that purpose to demand and to receive reports and copies of records from all other highway officials in the state. (Complaint, paragraph 17, R., p. 12.) However, because the Department erroneously believed it had legally and successfully transferred its pertinent duties completely away from itself by means of the "joint maintenance agreement" referenced in its tort claim denial attached as Exhibit B, it completely failed to undertake any effort to fulfill its duties concerning the subject segment of Eleventh Avenue North. Consequently, no competent engineering study was done before plaintiff was struck in the unmarked crosswalk. (Complaint, paragraph 18, R., p. 12.)

Had the Department accepted and fulfilled its duty to apprise itself of the crosswalk's hazardous condition and had it done or caused to be done a competent engineering study as required, the product of such study would have presented warrants for the installation of a two-section crosswalk system that would include enhanced overhead lighting and, for each of the two halves of the crosswalk, four pedestrian-activated flashing yellow warning lights, two pedestrian-depicting diamond-shaped warning signs, a safety island in the middle of Eleventh Avenue North with a staggered alignment of the pedestrian lanes to require a pause in the island before proceeding across the other two traffic lanes and other signs and markings. (Complaint, paragraph 19, R., p. 12.)

The Department having failed to fulfill or even attempt to fulfill its non-delegable statutory duties regarding the crosswalk at Eleventh Avenue North, Nampa's Public Works Director stepped up to obtain the engineering study that the Department should have performed, but only after it was too late to benefit the safety of plaintiff. On November 5, 2007 (just six

days after the subject accident), Nampa Public Works Director Fuss submitted a "Staff Report" to the City Council stating:

> "A serious vehicle/pedestrian accident occurred on the evening of Monday, October 29, near the intersection of 11th Avenue North and 3rd Street North. Public Works Staff were charged to look into available options for pedestrians at the intersection with emphasis on a pedestrian actuated in-pavement flashing crosswalk.
> * * *
> **Preliminary Finding**
> [M]erely painting crosswalks may [actually] increase pedestrian crash risk. (See Attachment #4). Therefore, additional treatment is necessary such as traffic calming, traffic signals with pedestrian signals, or other substantial crossing improvements to improve crossing safety for pedestrians. A review of the pedestrian-vehicle accident data over the past four years finds that 7 of 8 accidents occurred at night indicating that lighting improvements may also be necessary.
>
> **Recommendation**
> We believe action is warranted to improve pedestrian safety. A pedestrian actuated in-pavement flashing crosswalk with overhead flashing beacon may be warranted. A raised median with pedestrian safety area in the middle lane may also be appropriate. Furthermore, increased roadway lighting may illuminate the crossing area and improve overall pedestrian visibility. However, additional study is necessary to make the most appropriate decision. It would be tragic to make an improvement, though with the right inten[t]ions, that increases the pedestrian vehicle accidents. Public Works Staff recommends moving forward in making pedestrian safety improvements by reallocating funds from the budgeted Cassia Street Project.
> * * *
> The estimated cost for the proposed pedestrian safety improvements is $100,000 to $200,000. However, funding the project with City funds, and without going through the Federal Aid State Transportation Improvement Program (STIP), would preclude the City from obtaining any State assistance for the project. However, we also must be mindful that 11th Avenue North is a State Highway and any improvements funded or not will require the approval of ITD.
>
> **Request**
> Authorize the reallocation of budgeted City funds for pedestrian safety improvements on 11th Avenue North."

Exhibit 7 to Fuss deposition, (R., p. 203-204).

The request was granted, the traffic safety engineer was engaged (Stephen J. Lewis of P.E.C.) and Lewis conducted his 11th Avenue Pedestrian Study, the Findings and Recommendations per which were committed to print and provided to Fuss on November 23, 2007. Lewis's report articulated the deficiencies and the need for their correction as follows:

> "Currently there are no marked pedestrian crossings between the underpass south of 1st Street and the traffic signal at 6th Street.
>
> Replacement of Existing Light Fixtures
>
> ***With 7 out of the 8 pedestrian crashes*** **[in the past five years]** ***occurring after dark, one would suspect that street lighting is a contributing factor. Indeed, our study concludes that the existing lighting is deficient, making pedestrians very difficult to see at night.***
>
> The existing luminaires have characteristics that are not conducive to lighting the actual roadway surface. Most notably, it appears that these fixtures have very little light cutoff, meaning the fixtures do not direct light onto the roadway. As a result, a good share of light is directed in other directions, which does not help light the roadway. In fact, some of the light is directed at drivers, producing a glare effect that reduces the contrast of the roadway. The technical term for this is veiling luminance. The non-technical term is 'glare bomb.'
>
> * * *
>
> We recommend that all of the existing light fixtures along 11th Avenue North be replaced with fixtures similar to those installed on the Kings Corner overpasses. The existing concrete and steel poles can remain in place.
>
> Construction of Enhanced Pedestrian Crossing
>
> National research has shown that placing [merely] *marked* crosswalks [alone] at uncontrolled intersections on a multi-lane roadways as being *more* dangerous to pedestrians than an *un*marked crosswalk. ***In these cases, some other treatment is needed to improve crossing safety for pedestrians.***
>
> To further study the need for some sort of pedestrian facility enhancement, we took the raw data from the City's traffic counts and performed a gap analysis. In

this analysis we looked to see how many gaps were available in existing traffic of sufficient length for a pedestrian to cross 11th Avenue safely. With 60 feet of pavement to cross and an assumed walking speed of 3 feet/second, *a gap in traffic of 20 seconds or greater is needed to cross 11th Avenue safely.* Following is a summary of the available gaps observed in traffic during the weekday 5 to 10 PM period: [here follows chart of gaps observed in each fifteen-minute period between 5:00 and 10:00 p.m.]

As one would expect, very few gaps are available in the existing traffic stream during the early evening, and some sort of enhanced pedestrian treatment is needed.

We recommend that a new crosswalk with pedestrian-actuated (push button) in-pavement flashers and adjacent post-mounted sign and amber beacons be installed. Based on observed pedestrian volumes and the origins and destinations of pedestrians, our preferred location for this crossing is the south side of the 11th Ave N/ 3rd St N intersection. Our next choice if this location proves difficult would be the north side of the 11th Ave N / 2nd St N intersection. Either location should provide a safer crossing opportunity for pedestrians in the area." (Attachment to Affid of Kent Fugal; Exh 6 to Fuss dep; Exhibit A to Furey aff.)

(R., p. 189-194, emphasis added.) In a News Release issued on December 4, 2007 (i.e., just over a month after plaintiff was injured), Nampa's Mayor Tom Dale explained the product of the belated engineering study as follows:

"Nampa City Council Adopts Plan for 11th Ave North Crosswalk
The Nampa City Council has approved a plan to put in new lighting and a crosswalk with flashing lights at 11th Avenue North and 3rd Street North. *Public Works Director Michael Fuss presented the Council with an engineering study showing improvements would greatly increase safety for pedestrians crossing 11th Avenue North.*
The engineering study . . . revealed street lighting is deficient in this area, making pedestrians very difficult to see at night. New lighting fixtures will be installed on current poles to improve the situation. The lighting fixtures will be similar to those of Kings Overpass.

The engineering study also showed the amount of traffic on 11th Avenue North and the speed of the traffic create a situation where there are very few gaps in

> *traffic that allow pedestrians a safe amount of time to cross.* A new crosswalk with in-pavement flashers will be installed. Pedestrians will push a button to activate the pavement lights as well as flashing lights mounted on posts at each side of 11th Avenue North.
> The total cost of the improvements is estimated to be about $140,000. The City will still need approval from the Idaho Transportation Department before it can move forward with the plan because 11th Avenue North is a state highway."

(Complaint, paragraph 20, R., p. 13, emphasis added.)

In a matter of a few months the city of Nampa had the needed safety enhancements in place, a fact the Department admitted in its own press release had been "long anticipated by northside residents wanting to safely cross 11th Avenue South:

> "***The lighted crosswalk has long been anticipated by northside residents wanting to safely cross 11th Avenue North***.
> * * *
> The crosswalk is in two sections that don't span the street at the same place. The city literally put the crosswalk project on a fast track after several pedestrians in a short time period were hit by vehicles while trying to cross the street. Most recently, a minivan struck and killed 85-year-old Nampa resident Maria Alvarez in March when she attempted to cross the five-lane thoroughfare. Alvarez had tried to walk across the street from the Paul's Market grocery store to her home nearby. In 2007, a man [plaintiff Woodworth] was severely injured while crossing the street. ***Nine people in the past decade have been injured in the old crosswalk***." (Exhibit 3 to deposition of Michael Fuss)[4]

(R., p. 151.)

In his opposition to the Department's motion for summary judgment, plaintiff urged, along with the deposition of Nampa's Public Works Director Michael Fuss, the affidavit of his expert, Edward Stevens. Stevens opined:

> "Considering a speed limit of 35 m.p.h., 4 or more lanes without a raised median and an average daily traffic of greater than 15,000, indicates a marked crosswalk

[4] The Department's press release was made part of the record on the summary judgment proceedings as Exhibit C to the Affidavit of Patrick D. Furey (R., p. 185-277), but it appears Exhibit C wasn't copied when the clerk's record on appeal was prepared. The press release is in the record as a page in plaintiff's brief in opposition to summary judgment, however (R., p. 151).

alone is insufficient. Other substantial crossing improvements to improve crossing safety for pedestrians are needed.

It is unknown within the research conducted to date when 11th Avenue North was constructed to 4 or more lanes, however it has been a number of years since the traffic volume exceeded 15,000 vehicles per day. Certainly by year 2002 when the aforementioned FHWA study was released the subject intersection met the requirements for a marked crosswalk and other substantial improvements.

Based on my review of all the documents and recognized Engineering Standards it is my opinion that 11th Avenue North at its intersection with 3rd Street North was not reasonably safe for pedestrians crossings on October 29, 2007 and several years prior. I concur with the conclusions of the PEC study and Public Works staff as it relates to the need for pedestrian crossing improvements. It is further my opinion that as an interim measure the intersection could have been made reasonably safe at a much reduced cost by the installation of a median island and an advance warning beacon system until such time that a permanent system could have been installed.

Finally, it is my opinion that in the exercise of ordinary care for the safety of pedestrians crossing 11th Avenue at its intersection with 3rd Street, the State of Idaho and the city of Nampa should have performed, or caused to be performed, prior to the time of this accident, a competent pedestrian safety study of the type performed by Stephen J. Lewis of PEC on November 23, 2007."

Edward Stevens report, attached to his affidavit as Exhibit B. (R., p. 290-291.)

The Department's breach of its duties and
causation of plaintiff's brain damage and other injuries.

The Department's failure to perform any engineering study before the subject accident left plaintiff brain-damaged and its failure to act in accordance with what ordinary care required in the face of what such engineering study would have shown constituted breaches of the duties imposed on the Department by statute and shared by Nampa pursuant to its agreement to do so. These breaches and others directly and proximately caused plaintiff's

brain damage and other injuries because had the study been timely performed as required, the product thereof would have disclosed the warrants for the crosswalk system and enhanced lighting that more probably than not would have prevented the accident. (Complaint, paragraph 21, R., p. 14.)

ISSUES ON PRESENTED APPEAL

1. Whether the lower court erred in its application of Idaho Code § 6-904 (7) to this case.

2. Whether the lower court erred in concluding the Department's "High Accident Location" monitoring program fulfilled all of its duties concerning the highways in the state highway system.

3. Whether the Department can lawfully enlist the assistance of other highway authorities in the fulfillment of its non-delegable duties at all.

ARGUMENT

1. The lower court erred in concluding Idaho Code § 6-904 (7) applies to this case.

A. Contrary to the Department's assertion and the lower court's acceptance of it, plaintiff has not based his claim on any attack against the crosswalk's 1954 design.

The fundamental error into which the Department led the lower court was the conclusion that I.C. § 6-904 (7) applies to this case. That section provides:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable ***for any claim which***:
>
> * * *

> 7. ***Arises out of*** a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

Nowhere in his complaint did plaintiff claim the Department was negligent in its 1954 design of the subject crosswalk. Indeed, given the population and traffic volumes of the 1950's, it is supposed as an aside that in those days there were probably more than enough gaps between cars to permit a pedestrian to cross all five lanes of Eleventh Avenue North safely at its intersection with Third Street, even without any of the warnings given by pavement markings, signs or flashing lights that draw the attention of motorists to the presence of pedestrians using the crosswalk. In its brief in support of summary judgment, however, the Department put enough of its "spin" on the case to make it appear that (a) the plaintiff was jaywalking and (b) he was suing the Department over its design of the crosswalk. The State offered the innuendo plaintiff was jaywalking when he was struck:

> "Just prior to the accident, Woodworth was shopping in Paul's Market, one of the aforementioned businesses. As alleged in his Complaint, if a patron leaving Paul's intends to cross the street at a *crosswalk*, he must walk one block in either direction. Woodworth alleges that patrons regularly forego walking one block in either direction and instead cross directly in front of Paul's, ***where there is no crosswalk***. Complaint, Para. 7."

[Department's] memorandum in support of motion for summary judgment at 2, R., p. 114. Plaintiff sought to alert the lower court to the Department's tactic with the following:

> The misdirection fails, though, because: (a) the distinction truly drawn in the complaint is the distinction between the through or cross-*intersections* at Second and Fourth Streets and the subject "T" one [fn. 4: Deliberately referred to as "the crossing" in the complaint, to avoid precisely the confusion the State would foist here.] and (b) legal *crosswalks*, whether marked or unmarked, signed or unsigned, lighted or unlighted, etc., are determined by law, not paint, I.C. § 49-104 (14) (a)

> and §49-110 (10) (a). The Court is respectfully invited to read paragraphs 7 and 8 of plaintiff's complaint as they actually are, and to place little stock in the State's "paraphrasing" of them. Plaintiff was very much crossing at a legal crosswalk – notwithstanding the State's failure for the last half-century or so to notice or bother with the evolving realities at the subject intersection.

Plaintiff's brief in opposition to [Department's] motion for summary judgment, etc., at 2, R., p. 143. From the lower court's discussion of *Xiao Ping Chen v. City of Seattle,* 223 P.3d 1230 (Wash. App. 2009), however, it appears it still may not have apprehended that a crosswalk is very much a crosswalk ***regardless*** of whether it has been treated with pavement markings or any other attention-drawing features. In its memorandum decision and order on the defendants' motions for summary judgment at 8, it observed:

> [A] major consideration for the Washington appella[te] court was the fact that *there was an existing crosswalk* at the intersection where Chen was struck and severely injured.
> * * *
> The court finds the *Chen* case to be of limited assistance in analyzing the case at hand. While the basic facts of the accidents in each case are similar, there are differences in both the factual basis for the Washington court's decision and the legal authority upon which their decision rests. In this case, the information in the record indicates that while the *location* of Woodworth's accident was commonly used by pedestrians to cross 11th Avenue North, there was *not a marked crosswalk in that location* nor was there lighting or traffic warning signals. It has been represented to the court that there *were* crosswalks at each of the intersections in the blocks to the north and the south.

(R., p. 334, emphasis added.) It is unknown whether the lower court's likely confusion as to whether plaintiff was jaywalking or not affected its perception of the case in a material way, but its misperception of what plaintiff was suing the Department for surely must have. In its brief in support of summary judgment, the Department had characterized plaintiff's claim as follows:

> "In this lawsuit, Plaintiff Brian Woodworth (Woodworth) alleges that [the Department] negligently failed to locate, ***design***, construct, install and maintain for public convenience and safety that portion of the state highway system known as Eleventh Avenue North and, more particularly, the intersection of Eleventh Avenue North with Third Street North (hereinafter the "Intersection").

But although plaintiff, in the complaint's paragraph 1 (identifying the Department as one of the parties), had indeed enumerated most of those acts[5] as ones for which the legislature had imposed a duty on the Department, he declared the gravamen of his claim against the Department in the complaint's paragraph 21:

> "DEFENDANTS' BREACH OF THEIR DUTIES AND CAUSATION OF PLAINTIFF'S BRAIN DAMAGE AND OTHER INJURIES
>
> 21.
>
> ITD's ***failure to perform any engineering study*** and Nampa's failure to perform one before the subject accident left plaintiff brain-damaged and both defendants' ***failures to act in accordance with what ordinary care required in the face of what such engineering study would have shown*** constituted breaches of the duties imposed on ITD by statute and shared by Nampa pursuant to its agreement to do so. These breaches and others directly and proximately caused plaintiff's brain damage and other injuries because had the study been timely performed as required, the product thereof would have disclosed the warrants for the crosswalk system and enhanced lighting that more probably than not would have prevented the accident."

(Complaint, paragraph 21, R., p. 13-14.) Plaintiff was not suing the Department for an allegedly negligent design – which of course would go nowhere in the face of I.C. § 6-904(7)'s grant of perpetual immunity for a claim that "***arises out of*** a plan or design for construction or improvement to the highways . . ." He sued it for its failure to perform any engineering study and to do what the study, if performed, would have shown to be necessary. As with the Department's creation of confusion as to the existence of a crosswalk where plaintiff was crossing, plaintiff specifically alerted the lower court to the fact the Department was advancing a "straw man" argument that simply didn't jibe with what plaintiff was actually alleging:

> The State's next illusion is to suggest plaintiff's case against it is premised in an attack on the *plan* or *design* per which the segment was built – back in 1954. Not so. Plaintiff has never had any quarrel with the adequacy of the 1954 plan or design of the subject road segment and in fact supposes it was a very good plan or design. But Nampa then wasn't Nampa now, and what matters now is that in the

[5] "Install" was not among them, whereas "reconstruct," "alter," and "repair" were.

> late fall of 2007 – when one driver saw plaintiff in the unmarked crosswalk and the next one didn't – the traffic volume at this intersection was sufficiently great that it worked like the old arcade game of "Frogger." It required some non-negligent highway safety improvements, inspections and maintenance in the exercise of ordinary care for the well-being of people like plaintiff, a thing recognized by Fugal's partner Stephen Lewis of P.E.C. and also Nampa's Director of Public Works, Michael Fuss.

Plaintiff's brief in opposition to state's motion for summary judgment, etc., at 5 (R., p. 153). The lower court seemed to acknowledge this ("Woodworth *asserts* that he does not take issue with the 1954 plan or design of the intersection") in its decision at 16 (R., p. 342), but it nonetheless bought into the Department's characterization of plaintiff's claim:

> "Here, Woodworth's action arises out of his claims that the State failed to 'locate, ***design***, construct, reconstruct, alter, repair or maintain . . . a part of the stat[e] highway system . . . known a[s] Eleventh Avenue North.' (Complaint, [paragraph] 1)."

Memorandum decision and order on the defendants' motions for summary judgment at 17 (R., p. 343), emphasis added. Again, those were acts for which plaintiff alleged the Department owed duties in his identification of the parties, but nowhere did the court address what duties plaintiff specifically alleged, in paragraph 21 of the complaint, the Department *breached*:

> ITD's ***failure to perform any engineering study*** and Nampa's failure to perform one before the subject accident left plaintiff brain-damaged and both defendants' ***failures to act in accordance with what ordinary care required in the face of what such engineering study would have shown*** constituted breaches of the duties imposed on ITD by statute and shared by Nampa pursuant to its agreement to do so. These breaches and others directly and proximately caused plaintiff's brain damage and other injuries because had the study been timely performed as required, the product thereof would have disclosed the warrants for the crosswalk system and enhanced lighting that more probably than not would have prevented the accident."

(Complaint, paragraph 21, R., p. 13-14.) Instead, the court simply accepted without discussion the Department's characterization of plaintiff's claim:

> "The State relies on Idaho Code 6-904(7) in support of its motion and argues that it has governmental immunity from Woodworth's claims ***because his claims arise out of the State's plan and design*** of the relevant section of 11th Avenue North."

Memorandum decision at 16 (R., p. 342), emphasis added. The court then "found" that "this is the relevant statutory authority for governmental immunity for this action," *id.*, at 17 (R., p. 343). The court then adopted the Department's treatment of the *Estate of Wellard v. State, Dept. of Transp.*, 801 P.2d 561 (Idaho 1990), *Bingham v. Idaho Dept. of Transp*, 786 P.2d 538 (Idaho 1989), *Brown v. City of Pocatello*, 229 P.3d 1164 (Idaho 2010) and *Lawton v. City of Pocatello*, 886 P.2d 335 (Idaho 1994) (R., p. 17-18), but failed to acknowledge that those cases were distinguishable, primarily by the fact they were cases where *the plaintiff was specifically attacking the design*, rather than the Department's failure to study the post-design evolution of the actual use of the highway and to warn of the hazards presented thereby. This is odd, because that distinction was specifically drawn to the court's attention in plaintiff's opposing brief:

> Nor does the State find any help in the "implications" or "inferences" it sees in the *Lawton, City of Pocatello, Bingham,* and *Estate of Wellard* cases cited in its brief. Its cries for immunity are wholly inapposite because plaintiff isn't suing it for any allegedly negligent plan or design of the segment back in 1954. Plaintiff is suing it for its negligent operational failure to inspect, improve and maintain the segment to meet the pedestrian safety issues that evolved with the traffic volume and the frequency of the crosswalk's use to access the nearby businesses. *Lawton* was a case where the plaintiff specifically based his case on the premise the highway was negligently designed; plaintiff makes no such contention here. *Lawton* held simply that the "plan or design" immunity made available by I.C. 6-904(7) presented a ***jury question*** in that case. *Lawton's* only applicability here is for the proposition that evidence of prior accidents is admissible. *City of Pocatello* likewise involved a challenge to the adequacy of the original plan or design and, more specifically, the question whether the city had to prove it acted in accordance with the challenged plan – neither of which issues obtains in this case. *Roberts* has already been addressed above; it destroys, rather than supports, the State's motion. *Bingham* was another case in which one of the plaintiff's claims was specifically for allegedly negligent plan or design; summary judgment on that issue was reversed. Summary judgment on the claims that at least resemble some aspect of those at bar – negligent failure to inspect and maintain – was affirmed, ***but only because the plaintiff there had failed to***

> ***adduce any evidence to support the claim.*** Here, plaintiff ***owns*** all the evidence on that issue because it's been handed to him on a plate via the defendants' own documents, the testimony of Michael Fuss (Nampa Public Works Director), the Pedestrian Study authored by P.E.C.'s Stephen J. Lewis (attached to his partner Kent Fugal's own affidavit in this case) and the State's own press release. *Bingham* indeed. *Wellard* is dispatched by the mere quotation of the State's assertion of it:
>
> > "[*Wellard*] merely affirms the ***inference*** that I.C. § 6-904(1) applies only if there is no plan or engineering standards at issue. Although ITD's . . . summary judgment was ***reversed***, *Wellard* ***implies*** that had I.C. § 6-904(7), not (8), been in effect, summary judgment ***may*** have be proper (because the dual requirement under (8) had been replaced [by] the either-or test under (7))."
>
> State's Brief at 7, emphasis added. This is scarcely authority for immunizing the governmental entity that acted in accordance with its dead-wrong belief that by enlisting Nampa to mind its highway, it was thus entitled to wash its hands of its non-delegable responsibilities. *Roberts* rules this case.

Plaintiff's brief in opposition to state's motion for summary judgment at 17-119, R., p. 164-166.

Thus, it simply can't be said – as the Department has said and as the lower court has accepted – that plaintiff in this case has alleged any deficiency in the 1954 design of the subject crosswalk. Quite to the contrary, he has declared over and over that he has no quarrel with the adequacy of the design that was done in 1954. His quarrel is with the fact the realities of the highway's ***use*** over the ensuing half-century ***changed***, resulting in a hazardous condition that an engineering study would have shown had the Department done one, as required by statute and by ordinary care, and which dangerous condition it should have fixed or warned against. The Department's attack on plaintiff's case – declaring plaintiff's claim is based on the Department's design and is thus subject to I.C. § 6-904(7)'s provision of immunity – is no more legitimate than if it were to assert that plaintiff's claim is based on a 1954 injury and is thus barred by the statute of limitations. It constitutes a classic "straw man" attack.

B. "Plan or design immunity" does not shield highway authorities from liability for post-design failures to inspect for, find and fix or warn of dangerous highway defects.

With the Department's strawman characterization of plaintiff's allegations exposed, a second, more difficult, question is presented: Does § 6-904(7)'s perpetual "plan or design immunity" attach – immutably and without regard to subsequent breaches of duty – to every highway authority that designs a highway in accordance with the engineering standards[6] in effect at the time? Inasmuch as plaintiff here simply isn't contending there was anything wrong with the 1954 design, he submits the only way "plan or design immunity" can be forced onto the case is by sophistry on the order of the following:

> "The crosswalk was designed [in 1954] without pavement markings or other warnings. Plaintiff contends the crosswalk should [in 2007] have pavement markings and other warnings. Therefore, plaintiff is attacking the no-warnings design of the crosswalk. Idaho Code § 6-904(7) affords immunity for a claim that arises out of the plan or design. Therefore, the Department enjoys immunity against plaintiff's claim."

If this reasoning were valid, then any highway authority that produced a design which was adequate at the time of its creation could never be held liable for a subsequent failure to inspect for, find and warn of or correct aspects of the highway that had, over time, become unreasonably dangerous to its users. It is submitted that this outcome would be irreconcilably at odds with the purpose and intent of I.C. §§ 40-201, 40-310(6) and 40-313(1):

> I.C. §40-201: There shall be a system of state highways in the state, a system of county highways in each county, a system of highways in each highway district, and a system of highways in each city, except as otherwise provided. The ***improvement*** of highways and highway systems ***is hereby declared to be the established and permanent policy of the state of Idaho***, and the duty is hereby imposed upon the state, and all counties, cities, and highway districts in the state,

[6] The Department and the lower court spent some time insisting on the importance of the statute's evolution to provide immunity for designs done *either* in accordance with engineering standards *or* (instead of "and") that were approved in advance of construction by the appropriate legislative or administrative authority. Plaintiff has never disputed the disjunctive nature of subsection (7).

> to ***improve*** and maintain the highways within their respective jurisdiction as hereinafter defined, within the limits of the funds available.
>
> I.C. §40-310(6): The board shall . . . Cause to be made and kept, surveys, studies, maps, plans, specifications and estimates for the alteration, extension, repair and maintenance of state highways, and so far as practicable, of all highways in the state, and for that purpose to demand and to receive reports and copies of records from county commissioners, commissioners of highway districts, county engineers and directors of highways and all other highway officials within the state.
>
> I.C. §40-313(1): The board shall . . . Furnish, erect and maintain, ***whenever*** necessary for public safety and convenience, suitable signs, markers, signals and other devices to control, guide and warn pedestrians and vehicular traffic entering or traveling upon the state highway system.

Plaintiff submits this case is controlled by *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983), and that when plaintiff's *actual* theory of recovery (rather than the one attributed to him by the State and the lower court) is in focus, the reasoning of *Leliefeld* requires reversal of the Department's summary judgment.

Leliefeld was factually similar: A narrow bridge on a State highway, designed and built in accordance with then-current engineering standards in 1937, had no warning signs concerning the bridge width. 659 P.2d at 115. By 1975, there had been a substantial increase in the amount, speed and type of traffic using the bridge since it was first constructed; there had been several other accidents and frequent collision damage to the bridge and the State was aware of these accidents and the frequency of the collisions. 659 P.2d at 121. Plaintiff was injured when, driving a truck over the bridge at the same time it was occupied by an oncoming one, the two collided. He sued the State on the theory that the bridge in question was dangerous at the time of the accident, that the State knew it was a dangerous condition and yet failed to correct the dangerous condition, either by reconstructing the bridge ***or by warning of its characteristics***. 659 P.2d at 117.

Plaintiff concedes application of *Leliefeld* to this case requires some massaging, because the Court there dealt with both the issue of "discretionary function" immunity pursuant to I.C. § 6-904(1) (which the Department hasn't raised here) ***and*** "plan or design" immunity pursuant to I.C. § 6-904(8)[7], and plaintiff here seeks to avail himself of *Leliefeld's* treatment of both. He maintains the Court's rationale for refusing subsection (1)'s discretionary function immunity (i.e., that plaintiff's theory was a failure to warn, which was different from an attack on statewide standards) is equally applicable here, since Woodworth isn't attacking the Department's design at all, but rather its failure to inspect for, find and correct or at least warn of known dangerous conditions. He further maintains, however, that this Court's treatment of "plan or design" immunity in *Leliefeld* (i.e., although plan or design immunity is perpetual, it doesn't apply to a negligent failure to warn) is directly on point. The net effect of the Court's disposition of both issues is that, although immunity for design (whether by "discretionary function" immunity for promulgation of the standards per which the highway/bridge is designed and built or whether by explicit "plan or design" immunity per subsection (7)) is perpetual and immutable, it simply doesn't attach to liability for *other* torts, such as a negligent failure to find out about and warn of known dangerous conditions that subsequently come into being. As respects the inapplicability of discretionary function immunity, this Court dispatched a "straw man" approach much like the one the Department employed against Woodworth here:

> We have considered this exemption from liability [i.e., that afforded by 6-904 (1)] in three other cases— *McClure v. Nampa Highway District,* 102 Idaho 197, 628 P.2d 228 (1981), *Gavica v. Hanson,* 101 Idaho 58, 608 P.2d 861 (1980), and *Dunbar v. United Steelworkers of America,* 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied,* 446 U.S. 983, 100 S.Ct. 2963, 64 L.Ed.2d 839 (1980). In *McClure* and *Gavica,* we considered the application of the discretionary function exception with regard to actions which alleged negligence on the part of a governmental entity in maintaining or failing to warn of a known dangerous

[7] Now codified as subsection (7).

> condition in or on a public highway. *McClure* and *Gavica* make it clear that the State is not immunized from liability when with respect to a public highway, the State maintains a known dangerous condition on the highway and fails to properly warn motorists of such a condition.
>
> The State responds to *McClure* and *Gavica* by asserting that bridges are signed according to statewide standards promulgated by the Idaho Transportation Department. According to the State, the formulation of criteria governing the signing of bridges occurs at the state level and has no parallel in the private sector. The State directs our attention to plaintiffs' exhibit 58, a document delineating certain signs to be placed on various types of bridges. This document was formulated after four to five years of study by the state traffic engineer's office. The State argues that this is evidence that the decision to sign or not sign bridges is made at the state level for all of the bridges in this state and therefore has no parallel in the private sector. This would be cogent to our deliberations, ***if*** the theory upon which this case was tried was that these statewide signing and striping standards were inadequate, negligently promulgated or a cause of the accident. In such a case, the discretionary immunity accorded the State by I.C. § 6–904(1) would apply. ***However, this case was tried upon a different theory*** that this particular bridge was dangerous at the time of the accident, that the State knew that it was a dangerous condition, and yet failed to correct the dangerous condition, either by reconstructing the bridge ***or by warning of its characteristics***. We are not persuaded that *McClure* and *Gavica* were wrongly decided or should not be applied. ***The declaration and existence of statewide standards are not talismanic and do not provide immunity from liability for breach of a duty to make safe or warn of known dangerous conditions on public highways.***

Leliefeld v. Johnson 104 Idaho 357, 362-363, 659 P.2d 111, 116 - 117 (1983), emphasis added. Accordingly, it *matters* that plaintiff here pleaded his theory of recovery as he did – instead of the way it was reworked by the Department and the lower court – and the rationale for denying subsection (1)'s discretionary immunity should apply to subsection (7)'s plan or design immunity, as well.

In its rejection of subsection (7)'s plan or design immunity, as well, this Court in *Leliefeld* rejected the plaintiff's contention that subsequently adopted standards should be admitted to show the Department's awareness of the bridge's evolution from a safe one to a dangerous one as the result of substantially increased amount, speed and type of traffic. It specifically held, in fact, that the design immunity afforded by what is now subsection (7) is perpetual and unaffected

by changed circumstances that might eventually make the design inadequate. 659 P.3d at 123. ***However***, the Court took pains to distinguish one aspect of plaintiff Leliefeld's case from the two California cases it found persuasive in arriving at that holding:

> California in 1963 appears to have been the first state to enact a design immunity statute (current version Cal. Gov't. Code § 830.6 (West 1980)) based upon the standards as of the time of construction. [footnote omitted.] In first construing § 830.6, the California Supreme Court held that passage of time and change of conditions did not diminish the immunity granted by the statute. *Becker v. Johnston,* 67 Cal.2d 163, 60 Cal.Rptr. 485, 430 P.2d 43 (1967), *Cabell v. State,* 67 Cal.2d 150, 60 Cal.Rptr. 476, 430 P.2d 34 (1967). In *Cabell* a glass door had been originally designed in accordance with the then contemporary standards. A student injured by the door was not permitted to sue the State for defective design even though other students had been previously injured on the same door and even though the then current design standards called for a different type of glass. In *Becker* a highway intersection was designed in 1927 and completed in 1929. A motorist injured in a 1963 accident was held to have no cause of action against the State even though under changing conditions the intersection was not designed in accordance with engineering standards of the 1960's, and even though the intersection had been the scene of numerous accidents. ***In neither Cabell nor Becker did the plaintiff present as a theory of liability a failure of a duty to warn.***

Leliefeld v. Johnson, 104 Idaho 357, 367-368, 659 P.2d 111, 121 - 122 (1983), emphasis added. Finally, the Court reiterated the statement emphasized immediately above, presumably to ensure the force and gravity of its declaration of "perpetual" design immunity wouldn't be "over-interpreted" to suggest some subsumption of liability for ***other*** lapses into immunity for ***design*** decisions:

> The construction we place upon § 6–904(8) does ***not*** preclude a finding of liability founded upon a failure to warn of a dangerous condition. *McClure, supra; Gavica, supra.*

104 Idaho at 369, 659 P.2d at 123, emphasis added. For these reasons and those articulated by the Washington Court of Appeals in *Xiao Ping Chen v. City of Seattle*, 223 P.3d 1230 (2009), the Court should hold § 6-904(7) inapplicable to plaintiff's claims, which were for the Department's subsequent negligent failure to inspect the situation by conducting the appropriate engineering

studies (such as the one Stephen J. Lewis performed and signed off on less than a month after plaintiff was hit, R., p. 222-226) and to place pavement markings, flashing beacons and "pedestrian crossing" signs – i.e., ***warnings*** – at the crosswalk once the danger materialized due to the increase in traffic volumes. The lower court's entry of summary judgment for the Department should be reversed and the case remanded for trial.

2. The lower court erred in concluding the Department's "High Accident Location" monitoring program fulfilled all of its duties concerning the highways in the state highway system.

Whereas the correct application of *Leliefeld* does take some thought, the lower court's adoption of the Department's "High Accident Location Program," as an alternative ground for summary judgment, is so analytically empty as to make its rejection self-evident. It must first be noted that the ***entirety*** of the actual ***record*** on the issue consists of (1) the affidavit of Kevin Sablan, a Department staff engineer (R., p. 123-133) and (2) the affidavit of the Department's counsel (R., p. 87-112). All in the world the Sablan affidavit offers on the issue is in its paragraphs 7, 8 and 9: Once a year he gets reports that identify "the top 20 locations on the State Highway system with potential safety deficiencies within District 3" (paragraphs 7 and 8) and the subject crosswalk wasn't on the list (paragraph 9). That's it. There is nothing even to suggest that the Department limits its engineering studies or warning activities or repair activities to *just* the 20 worst locations in the State. There is nothing even to suggest that the ordinary care of a highway authority, *Xiao Ping Chen v. City of Seattle*, 223 P.3d 1230 (2009), requires only that it perform engineering studies, perform warning activities, or perform repair activities on *just* the 20 worst locations in the State. There is nothing even to suggest what the State's "funding limitations" are. There is nothing even to suggest what it costs to do – something, presumably, we aren't told what – with the 20 worst locations in the State. And there is nothing

even to suggest how the "High Accident Location Program" has anything whatsoever to do with this case. For all that appears in the Sablan affidavit, the "top 20" locations might have required nothing more than the installation of 20 cheap stop signs.

The affidavit of the Department's counsel has no more substance that Mr. Sablan's, either. It simply attaches a document that details the methodology by which these "top 20" locations are scored. That's it. Nothing about what will or won't be done with them; nothing about what it will cost to do whatever will be done with them; nothing about what the Department's "funding limitations" are; nothing about how, if at all, it relates to what ordinary care requires of a highway authority, *Xiao Ping Chen v. City of Seattle*, 223 P.3d 1230 (2009) – ***nothing*** of any substance. And yet, the lower court supposed those feathers could be made to carry these heavy loads:

> "The State acknowledges that it is responsible for the State Highway system pursuant to Idaho Code 40-201 which states:
>
> > State highway, county highway, highway districts and city highway systems established
> >
> > There shall be a system of state highways in the state, a system of county highways in each county, a system of highways in each highway district, and a system of highways in each city, except as otherwise provided. The improvement of highways and highway systems is hereby declared to be the established and permanent policy of the state of Idaho, and the duty is hereby imposed upon the state, and all counties, cities, and highway districts in the state, to improve and maintain the highways within their respective jurisdiction as hereinafter defined, within the limits of the funds available.
>
> I.C. 40-201.
>
> ***In order to comply with this statutory mandate***,[8] the State has established the High Accident Location program. The affidavit of Counsel provides a copy of

[8] This has no basis in the record whatsoever.

the HAL methodology protocol for the court.[9] The court has reviewed that protocol and ***it appears to the court that it is a thorough and complicated analysis that is completed by the State with regard to potentially dangerous locations on the State Highway System.***[10]

The Sablan Affidavit states that as the [sic: "a"] District 3 Traffic Engineer for ITD he receives yearly reports from the HAL program which identifies the top 20 locations within District 3 that have been identified as having potential safety deficiencies. He then states that prior to Woodworth's accident 'none of the intersections on Eleventh Avenue North between First Street North and Sixth Street North in Nampa, Idaho were on the District 3 HAL listing.' (Sablan Affidavit, para. 9).[11] The court finds additional support for the State's arguments in the Fugal affidavit. In his report, Fugal states that he has reviewed the accident reports for the time period between 2003 and 2006 and he notes that of the seven prior pedestrian and/or bike collisions with motor vehicles, only two of those accidents had characteristics that would indicate that the accidents were potentially avoidable if there had been an enhanced crossing at the location of Woodworth's accident.[12] Thus, the State argues that to the extent it had a duty to Woodworth, that duty has been fulfilled by the HAL program and that summary judgment should also be granted on that basis.

To the extent that Woodworth addresses this element of the motion for summary judgment in his briefing, he simply states that the State had a non-delegable duty to [inspect for, find, and fix or warn of dangerous conditions] and that it was negligent in failing to identify problems with this intersection and to

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[9] And not one thing more.

[10] This may be, but it still doesn't fill any of the voids mentioned above.

[11] Both of these statements are correct, but neither of them is ever connected up, in any fashion whatsoever, to anything in the case.

[12] Here, the lower court presumes to try an issue of fact and decide it for the Department, ignoring the affidavit and report of plaintiff's expert, Edward Stevens ***and*** the conclusions of both Nampa's retained consultant P.E.C. ***and*** its Public Works Director: "Certainly by year 2002 when the aforementioned FHWA study was released the subject intersection met the requirements for a marked crosswalk and other substantial improvements. Based upon my review of all the documents and recognized Engineering Standards it is my opinion that 11th Avenue North at its intersection with 3rd Street North was not reasonably safe for pedestrians crossings on October 29, 2007 and several years prior. *I concur with the conclusions of the PEC study and the Public Works staff as it relates to the need for pedestrian crossing improvements.* * * * *Finally, it is my opinion that in the exercise of ordinary care for the safety of pedestrians crossing 11th Avenue at its intersection with 3rd Street, the State of Idaho and the City of Nampa should have performed, or caused to be performed, prior to the time of this accident, a competent pedestrian safety study of the type performed by Stephen J. Lewis of PEC on November 23, 2007.*" (R., p. 290-291, emphasis added.)

expend the funds requried to fix those issues.[13] ***Woodworth appears to disregard the portion of I.C. 40-201 that limits the State's duties under that code section to the extent that funds are available to address such issues.***[14] In addition, Woodworth does not directly address the issue addressed by Sablan in which he states that this location has not be[en] identified as a highly dangerous intersection, rather Woodworth seems to simply rely on his assertions that accidents had occurred in that location and again, that the City of Nampa chose to make modification to this intersection[] within a matter of weeks after Woodworth's accident.[15]

The court finds that the State has provided an adequate record that it has a monitoring system in place through the HAL program and that this ***likely satisfies the duties it owes pursuant to I.C. 40-201.***[16] In addition, the court does not find that Woodworth has raised a genuine question of fact as to ***whether or not the State complied with its own program***[17] for this particular intersection *or that it has otherwise been negligent* ***in light of the limitations as to funding***[18] that is built into the duties imposed by I.C. 40-201. Thus, the court will grant the State's motion for summary judgment on this issue.

Memorandum Decision and Order on the Defendants' Motions for Summary Judgment at 20-22,

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[13] That is because the Court in Roberts v. Transportation Department, 827 P.2d 1178 (Idaho App. 1991) held: "[W]here, as here, the legislature enacts a statute requiring that an administrative agency carry out specific functions, *i.e.,* furnish, erect and maintain signs on side highways, that agency cannot validly subvert the legislation by promulgating contradictory rules." 827 P.2d at 1182-1183. "[A]n administrative agency may not alter, modify or diminish its statutorily-imposed responsibilities, either unilaterally or through agreement with another public or private entity, absent legislative authority to do so. Thus, the fact that the ACHD has assumed part of the Department's legal obligations might affect the rights and liabilities *between the Department and the ACHD.* However, such an agreement between these two entities does not alter the statutory duty owed *by the Department to the Roberts.*" 827 P.2d at 1183, emphasis original.

[14] No, Woodworth elected ***not*** to disregard the fact the Department hadn't adduced one ***shred*** of evidence that even ***touched on*** cost, funding or funding limitations.

[15] No, Woodworth relies on the ***fact*** there had been numerous accidents in a short period of time and that ***the engineering study done within a matter of weeks after the accident identified the dangerous condition and a recommended cure.***

[16] Again, the lower court is impermissibly trying a question of fact for the jury here.

[17] An "issue" that was nowhere raised.

[18] Again, a skyhook supposition that has no basis in the record.

R., p. 346-348, emphasis added.

The lower court's alternate ground for granting the Department summary judgment, i.e., that its adoption of the "H.A.L." monitoring program fulfilled or avoided all of the Department's duties concerning the highways in the state highway system, is clearly erroneous and cannot be upheld.

3. This Court should declare the Department prohibited from enlisting another entity to help execute its duties.

In *Roberts v. Transportation Dept.* 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Idaho App.,1991), *affirmed*, 121 Idaho 723, 827 P.2d 1174 (1992), the Department had attempted to transfer to a county-wide highway district its duties pertaining to the placement of stop warnings on side roads intersecting with a state highway. As here, neither entity followed through and a serious accident resulted. The Court held the Department could not thereby avoid liability, but left for another day the question whether it could lawfully even enlist the other entity's assistance:

> Nor do we believe that judicial observance of the Department's statutory duty-to place necessary signs and conduct maintenance activities outside of its right-of-way-need result in the administrative confusion feared by the district court. Only the Department has the statutory duty to ensure that side-road traffic comes to a stop before crossing a through highway. To the extent that the Department lawfully enlists another entity to help execute its duties,[FN4] the primary responsibility to see that the obligation is fulfilled remains with the Department. Accordingly, we conclude that the district court erred when it determined that the Department had no legal duty to conduct any activity outside of its right-of-way.
>
> FN4. ***Whether the Department lawfully may do so*** **[at all]** ***is not an issue presently before this Court.*** [Emphasis added.]

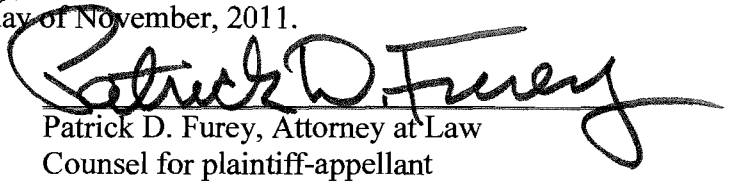
Roberts v. Transportation Dept. 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Idaho App.,1991), *affirmed*, 121 Idaho 723, 827 P.2d 1174 (1992), emphasis added. Given the Department's continuing reliance on an attempted to transfer its obligations to the City of Nampa over a decade

later in this case (R., p. 269), it may be time to foreclose the practice of "joint agreements" between highway authorities. What seems to be happening is that when one agrees to "share" the responsibilities of another for highways in the other's jurisdiction, neither one is as diligent in the fulfillment of those duties as it would be if it had no one else to blame. The practice should be halted by this Court.

Conclusion.

For all of the foregoing reasons, the entry of summary judgment for the Department must be reversed and the case remanded for further proceedings.

Respectfully submitted this 22nd day of November, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 2011, I served two true and correct copies of the foregoing on the following by the means indicated:

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