Supreme Court No. 92908-4
(Court of Appeals No. 32909-7-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MADELYNN M. TAPKEN,

Respondent,

v.

SPOKANE COUNTY, a municipal corporation,

Petitioner,

and

CONRAD MALINAK,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Madelynn Tapken was a passenger on the back of a motorcycle on a rural road in Spokane County when its operator, Conrad Malinak, did not perceive the sharpness of a curve in time to slow down sufficiently for it and lost control of the bike. The sharpness of the curve was obscured by a large hawthorn bush that Spokane County was aware of but failed to maintain.

Tapken sustained serious injuries and paralysis in the ensuing crash and filed suit against Malinak and Spokane County. She alleged negligent road design and maintenance against the County, and Malinak asserted a similar cross claim against the County. After the conclusion of the evidence against the County, the trial court granted the County's motion for judgment as a matter of law under CR 50, concluding that Tapken and Malinak failed to present evidence from which the jury could find breach of duty or proximate causation against the County.

The Court of Appeals correctly reversed the judgment because there was substantial evidence of both breach of duty and proximate causation, including that Malinak would have slowed down sufficiently for the curve had the overgrown bush not prevented him from perceiving its sharpness.

Spokane County now seeks review based on a footnote in the Court of Appeals' unpublished decision, arguing that it reveals the court's application of a "previously unrecognized 'presumption'" in finding that there was substantial evidence of proximate causation. *Petition* at 1. But

while it invokes RAP 13.4(b)(1) and (2), the County does not argue that the Court of Appeals decision is "in conflict with" any other decision. Instead, it argues that the court failed to adhere to CR 50 and related case law, which would be an error, not a conflict. In any event, the County's argument is without merit, as it is based on a misreading of the Court of Appeals' proper application of the rule that, in deciding a CR 50 motion, the court must presume the truth of the nonmoving party's evidence and consider the facts and reasonable inferences in the light most favorable to that party. The County's petition should be denied.

II. STATEMENT OF THE CASE

On a sunny day in the summer of 2011, Malinak took Tapken riding on his motorcycle in the Palouse, intending to take a broad loop through southern Spokane County. RP 957, 998. It was their second ride together, both rides having been taken for pleasure. RP 952, 994-95; RP Vol. 11 at 14. The accident that injured Tapken occurred near the town of Waverly.

Just north of Waverly, roads from three directions converge at what is known locally as the "Waverly 'Y.'" Each road forks at the convergence such that there are three 'Y' intersections, and no stop sign is posted for traffic from any direction. *See* Exhs. P84, P61. Approaching the Waverly 'Y' southbound, as Malinak did, the 90-degree sharpness of the curve to the right was obscured by a large hawthorn bush until well into the curve. RP Vol. 10 at 22, 31-34, 77-78, 86; RP 742-43, 767-70, 772, 791, 800. Further, a yield sign for motorists taking the left fork was

visible, but a yield sign intended for drivers taking the right fork was, like the sharpness of the curve, hidden by the bush. RP Vol. 10 at 20-21; RP 743, 886.

County maintenance personnel were aware that the hawthorn bush had spread onto the shoulder but did not trim it because "[i]t wasn't obstructing out on the roadway as far as hitting vehicles' mirrors or anything like that." RP 699. The County had no formal vegetation-control policy and no records of ever having taken measures to control vegetation at the Waverly 'Y.' RP 518-19. Unlike on other sharp curves on this road preceding the Waverly 'Y,' the County posted no sign warning of the mostly obscured, 90-degree turn ahead or advising motorists to reduce speed. RP 620, 633, 882-83, 826-29, 891, 966-67; RP Vol. 10 at 76; Exh. D209.

The posted speed limit was 45 miles per hour, but the County's experts conceded the curve could not be negotiated safely at that speed. RP 530, 1379. The undisputed maximum safe speed for the curve was 20 miles per hour—25 miles per hour below the posted speed limit. RP Vol. 10 at 64, 84; *see also* RP 767. Tapken's motorcycle expert, Steven Harbinson, testified that, entering the curve at 35 to 40 miles per hour, a motorcyclist would have insufficient time to slow down enough to make the curve. RP 767-72, 777-78, 791-92.

As Malinak approached the Waverly 'Y,' he was traveling at about 45 miles per hour and intended to go right at the fork. RP 967-68, 1195. Seeing a yield sign only on the left, he concluded that the main road or

arterial continued to the right; he never saw the hidden yield sign meant for traffic going in that direction. RP 967, 971. Malinak slowed down by "a little bit"—about 5 to 10 miles per hour—for the upcoming curve. RP 968, 1022-23. Just before entering it, he started leaning right to make the turn, and Tapken leaned with him. RP 968, 970. At that point, Malinak could not see that it was a 90-degree turn. RP 967-68.

Only as he passed the hawthorn bush did Malinak perceive the 90-degree turn. RP 967-68. He then realized he was going too fast to negotiate the curve or to slow down sufficiently. RP 967-68. He testified, "I saw that the curve was way too sharp and I knew that, if we tried to make that curve at 35 or 40, the motorcycle would have went off the roadway." RP 968. He testified further that he abruptly leaned to the left in an emergency attempt to make the less-severe curve of the left fork. RP 967-70, 1061.

The motorcycle followed Malinak's lean reversal, but only to approximately a vertical orientation. RP 969. Although Malinak could not see Tapken behind him, he speculated that her body may have leaned farther right when he reversed course. RP 969. In any case, rather than making either the right or left curve, the motorcycle proceeded through the 'Y' and went airborne over a bank. RP 971-74, 1031. Tapken and Malinak landed 20 to 30 feet apart. RP 974. Tapken was in a coma for three weeks and has no recollection of the accident. RP Vol. 11 at 15, 45; CP 203-04. She sustained a traumatic brain injury and is paralyzed from the chest down. CP 1166, 1168.

Tapken's road design expert, Edward M. Stevens, testified that the Waverly 'Y' had the most complex and confusing layout he had seen in his 40-year career and that speed was the main problem. RP Vol. 10 at 87-88. He testified that with only the yield sign on the left being visible on approach, motorists could be misled to conclude that the road to the right was the arterial, and thus be unlikely to anticipate a 90-degree curve in that direction. RP Vol. 10 at 68, 85-86, 145, 153-54; *see also* RP 886. Mr. Stevens opined that the misleading design and signage, sharpness of the curve, and obstructive bush created an inherently dangerous condition in that motorists would enter the curve too fast to negotiate it safely. RP Vol. 10 at 20-22, 32, 66-70, 86-87, 93.

Mr. Stevens testified that the intersection could have been made reasonably safe relatively easily and inexpensively by converting it into a 'T' intersection with a stop sign for at least one of the three legs. RP Vol. 10 at 75-76. The County's traffic engineer acknowledged this was feasible. RP 564.

Before trial, the superior court denied summary judgment to the County on breach of duty and proximate causation. *See* CP 808-09, 1020-21. After Tapken and Malinak rested, however, the court granted judgment as a matter of law to the County as to both elements. RP 1746-56; CP 2126-27. As to proximate causation, the court held as a matter of law that Malinak's actions were the sole proximate cause of Tapken's injuries. RP 1755. The court reasoned that Malinak had a duty to slow down for existing conditions and, disregarding his testimony that he

slowed down 5 to 10 miles per hour for the curve, the court found: "No such attempt was ever made. Rather, Mr. Malinak maintained approximately the maximum speed allowed of 45 miles per hour." RP 1752-53.

On appeal, the Court of Appeals, Division Three, reversed the CR 50 judgment in an unpublished decision. The Court of Appeals determined that substantial evidence was presented at trial from which the jury could have found breach of duty and proximate causation against the County. *Slip Op.* at 7-11. On proximate causation, the Court of Appeals determined that "evidence establishes that Malinak would have slowed more had he been able to perceive the sharpness of the right turn earlier." *Slip Op.* at 11. The County does not seek review of the Court of Appeals' determination that the jury could find breach of duty by the County.

III. ARGUMENT

A. This Court should deny the County's petition.

1. The County presents no argument that the Court of Appeals' decision is in conflict with any other decision.

Although the County invokes RAP 13.4(b)(1) and (2) and states that the Court of Appeals decision is "in conflict with" a decision of this Court or another decision of the Court of Appeals, that is not what it argues. Instead, it argues that the Court of Appeals failed to adhere to CR 50 and related case law in reaching its decision in this case in that it did not "require that a plaintiff come forward with evidence showing cause in fact." *Petition* at 9. Even assuming the County were correct (and as will

be shown, it is not), this would not satisfy either of the criteria for acceptance of review invoked by the County. *See* RAP 13.4(b)(1), (2). This Court is not an "error-correcting" court. *See generally* RAP 13.1(a), 13.4(b). Thus, even without reaching the merits, the County's petition should be denied.

2. The Court of Appeals' decision is consistent with established law on review of a judgment as a matter of law under CR 50.

A motion for judgment as a matter of law is a challenge to the sufficiency of the evidence to support a verdict in favor of the nonmoving party. *Leach v. Ellensburg Hosp. Ass'n*, 65 Wn.2d 925, 931-32, 400 P.2d 611 (1965). There is substantial evidence to support a finding of the factual element of proximate causation if the jury could find that, but for the defendant's actions, the plaintiff would not have been injured. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). "Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury." *Id.*

Contrary to the County's argument, the Court of Appeals did not employ a "previously unrecognized 'presumption'" in reversing the trial court's CR 50 ruling on proximate causation. *Petition* at 1. Instead, the court applied the well-established rule (disregarded by the trial court) that, in deciding a CR 50 motion, the court must presume the truth of the nonmoving party's evidence and consider the facts and reasonable inferences in the light most favorable to that party. *See Faust v. Albertson*, 167 Wn.2d 531, 537-38, 222 P.3d 1208 (2009). The Court of Appeals

correctly recited and applied this standard, even in the footnote upon which the County grounds its petition. *See Slip Op.* at 11 n.4 ("Because our standard of review requires us to assume the facts and inferences in the light most favorable to Malinak [and Tapken], we must presume....").

The County criticizes the Court of Appeals' observation in footnote 4 that the jury could find that Malinak would have slowed sufficiently for the curve had he been able to perceive its sharpness timely because "drivers routinely slow to safely navigate a sharp curve when the sharpness of the curve is apparent." *Slip Op.* at 11 n.4. In other words, anyone but a reckless driver would "slow down sufficiently rather than wreck." *Id.* This is an appropriate consideration. Indeed, properly applying the CR 50 standard, the court must presume that a jury would so find, based on common sense and experience. "[A] jury, in exercising its collective wisdom, is expected to bring its opinions, insights, common sense, and everyday life experience into deliberations." *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn. App. 475, 493, 302 P.3d 500 (2013), quoting *State v. Briggs*, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989).

Nevertheless, the jury need not rely upon common sense or experience alone to find that Malinak would have slowed sufficiently for the curve had the overgrown bush not prevented him from timely perceiving its sharpness. His testimony provides ample basis to so find. And contrary to the County's argument, his testimony does not contradict the Court of Appeals' footnoted rationale.

The County asserts that Malinak testified he would reduce his speed only if he saw conflicting traffic or an advisory speed sign. *Petition* at 13. It emphasizes Malinak's testimony that, "[C]oming to a curve with no traffic impeding it, I would only know to slow down if there was an advisory sign." *Petition* at 13, quoting RP 1114. According to the County, this means that, even if the curve's sharpness had been fully visible, Malinak would have kept going 45 miles per hour no matter how sharp it appeared, absent traffic or a warning sign. The County maintains that this would be contrary to the Rules of the Road, which require a motorist to drive at an "appropriate reduced speed" when approaching and going around a curve. RCW 46.61.400(3).

The County's argument is contrary to the evidence. Read in conjunction with his other testimony, Malinak plainly meant that, given an obscured sharp curve, an advisory speed sign was the only way he could know in advance how much to slow down. Like the trial court, the County ignores Malinak's testimony that he would normally slow down when approaching an observable curve, RP 1162, and that he in fact slowed down in anticipation of the curve involved here. RP 968, 1022-23, 1162. He testified that he slowed down "a little bit" after perceiving that there was a curve ahead:

> Q. And so on your approach were you doing the speed limit?
>
> A. Yes. And then ***as I saw the road looked like it went to the right, I slowed down a little bit.***

RP 1022 (emphasis added). Specifically, he slowed down by about 5 to 10 miles per hour. RP 968, 1022-23. He testified that he was surprised when he finally could perceive the curve's sharpness and found he was going too fast to negotiate it:

> Well, as I came to the intersection, as I got closer and closer as my view was past the bush, I could see that the way to the right was actually an extremely sharp curve, a curve that I was not prepared for. I realized that I was going way too fast to make that curve, and in an emergency reaction to the situation, I attempted to take the left-hand turn or corner there to keep the motorcycle on the roadway.

RP 967-68. The jury could reasonably conclude from Malinak's testimony that, had he been able to see the curve, he would have slowed down not just "a little bit," as in 5 to 10 miles per hour, but sufficiently to negotiate the curve safely.[1]

As shown, the Court of Appeals did not adopt or employ a new presumption in reversing the trial court's CR 50 ruling. That the text challenged by the County appears in a footnote in an opinion that the Court of Appeals determined did not warrant publication, and which no one (including the County) moved to publish, shows that the Court of Appeals was not making new law in its opinion. The Court of Appeals confirmed that it correctly understood and applied established law when it denied a motion for reconsideration by the County, which was premised

[1] Whether Malinak should have slowed down more than he did based on the conditions as they appeared to him is likewise a question of fact for the jury. The answer can only affect Malinak's potential liability and cannot defeat proximate causation against the County.

on the same grounds as the County's Petition. Because the Court of Appeals applied the correct standard for deciding a CR 50 motion, and because the evidence and reasonable inferences provide a sufficient basis to find factual causation, this Court should deny the County's petition.

B. If this Court accepts review, it should also review the denial of partial summary judgment to Tapken on contributory negligence.

Tapken had no notice that Malinak would suddenly change directions, yet the County argued she was negligent in not assisting with the turn by leaning left. Before trial, Tapken moved for partial summary judgment to strike the County's affirmative defense of contributory negligence. CP 173, 183-84. The trial court denied her motion, CP 1022-23; RP 102, and the Court of Appeals affirmed. *Slip Op.* at 16-18. If this Court accepts review, it should review this issue and grant partial summary judgment on contributory negligence.

To constitute contributory negligence, the plaintiff's conduct must not only have been a *cause* of injury, but must also have been *negligent*, meaning that the plaintiff failed to use due care for her own protection. *Geshwind v. Flanagan*, 121 Wn.2d 833, 838, 854 P.2d 1061 (1993). "Not every action by a plaintiff, even though it be a cause of the mishap, can be characterized as negligent action." *Zukowsky v. Brown*, 1 Wn. App. 94, 99, 459 P.2d 964 (1969), *aff'd*, 79 Wn.2d 586, 488 P.2d 269 (1971); *cf. Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976) ("Not every act which causes harm results in liability."). Here, in response to Tapken's motion for partial summary judgment, the County failed to

present substantial evidence from which a jury could find that Tapken failed to use due care for her own protection.

The County's contributory negligence theory is that Malinak lost control of the motorcycle because Tapken did not match his lean direction when he abruptly reversed course. In affirming the denial of summary judgment, the Court of Appeals reasoned, "if Tapken had sufficient time to lean farther right, she also may have had sufficient time to lean to the left." *Slip Op.* at 17-18. This rationale is unsound for two reasons.

First, assuming a passenger has a duty, it arises only when the passenger has notice and an opportunity to act. *Murray v. Amrine*, 28 Wn. App. 650, 657, 626 P.2d 24 (1981). *Cf. Kilde v. Sorwak*, 1 Wn. App. 742, 747, 463 P.2d 265 (1970) (dismissing a contributory negligence allegation that was based on "split-second computation" where the plaintiff could not have anticipated the defendant's bad left turn). Tapken had several seconds to appreciate the intended right turn and appropriately leaned into the turn. The undisputed evidence is that Malinak then abruptly changed course and leaned left in a "split second," giving Tapken no notice *i.e.*, "less than [a] split second." CP 95, 218-19, 222, 224; RP 970. No reasonable juror could find Tapken was negligent in failing to match a sudden reversal of course—which she had no reason to anticipate—within a split second of the initial, opposite lean.

Second, a breach of duty must result from a *voluntary* act or omission. RESTATEMENT (SECOND) OF TORTS § 2 cmt. a, § 282 cmt. a (1965). Here, there is no evidence from which a jury could find that

Tapken's leaning right as Malinak changed course was a volitional act rather than an *involuntary* movement caused by the whipsaw motion of Malinak's sudden lean reversal. *See* RP 779-81. A jury must not be permitted to resort to speculation to choose between two theories, under one of which a party was negligent and under the other of which she was not. *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981).

The Court of Appeals erred in affirming the denial of partial summary judgment on contributory negligence. If this Court accepts review, it should review this issue and grant partial summary judgment to Tapken.

C. If this Court accepts review, it should also review the exclusion of evidence of prior similar accidents to establish notice and dangerousness.

During pre-trial discovery, Tapken developed evidence of over two dozen prior accidents at the Waverly 'Y' involving single vehicles departing the roadway as occurred here. *See* CP 2018-77. Prior similar accidents are relevant and admissible to establish both the existence of a condition and notice to the defendant. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

The trial court ruled before trial that three prior accidents (occurring in 1995, 2007, and 2009) were substantially similar to the subject accident, and that evidence of those accidents would be admitted, but only to prove that the County had notice of the alleged dangerous condition of the intersection and not that the condition actually was dangerous. RP 422-24. During trial, the court modified its ruling and

excluded all evidence regarding prior accidents, reasoning that (1) notice was not an issue because the County created the alleged dangerous condition and (2) prior accidents are not relevant to dangerousness. RP 864-67.

Although the Court of Appeals disagreed with the notion that the County created the dangerous condition, it nevertheless found that notice was undisputed because the County had supposedly conceded it had notice that the bush obscured the yield sign and curve. *Slip Op.* at 14. But notice remains disputed in this case. Contrary to the Court of Appeals' conclusion that the County "certainly did not claim to have lacked notice" of the visibility obstruction, *id.*, the County maintained even on appeal that "all but the last few feet of the right turn is visible from several hundred feet south of the intersection" and "there is no evidence that the bush obstructed a view of the right turn at the intersection." *Brief of Respondent* at 8, 10.

Even if prior accidents were not relevant to prove notice, they would still be relevant to prove dangerousness. The Court of Appeals considered only notice and did not address the dangerousness issue. But the Court of Appeals quoted the trial court's misstatements of law that "prior collisions don't decide whether or not the roadway was unsafe," and "[t]hey're not at all relevant to whether or not this was properly designed and maintained[.]" *Slip Op.* at 12-13, quoting RP 866-67. The Court of Appeals then concluded, "The trial court correctly concluded that the prior

accidents were irrelevant. ... We hold that the trial court did not abuse its discretion in excluding evidence of prior accidents." *Slip Op.* at 14-15.[2]

This Court has long held that prior accidents are relevant to dangerousness even where notice is undisputed. *See Turner v. City of Tacoma*, 72 Wn.2d 1029, 1035-36, 435 P.2d 927 (1967). In *Turner*, the plaintiff had hit her head on a fire escape that obstructed part of a public sidewalk in Tacoma. *Id.* at 1031. The city sought to exclude evidence of prior accidents by stipulating to notice of the existence of the fire escape, but the city did not concede that this condition was dangerous. *Id.* at 1036. The Supreme Court held that stipulating to notice of the condition still left evidence of prior similar accidents relevant and admissible to prove dangerousness. *Id.*

This Court recently confirmed this principle in *Wuthrich v. King County*, 185 Wn.2d 19, 366 P.3d 926, 931 (2016), a case in which this Court held unanimously that a municipality has a duty to take reasonable steps to address sight obstructions caused by roadside vegetation, overruling cases previously relied on by the County here to escape its duty. *See id.* at 929. Recognizing that accident history is relevant regardless of any issue of notice, this Court held:

> There is evidence in the record that the blackberry bushes had been there for years and the County knew about them [*i.e.*, had notice]. The lack of prior accidents could be relevant circumstantial

[2] The Court of Appeals denied Tapken's motion for reconsideration, which asked the court to clarify its opinion and recognize that prior similar accidents are relevant to establish dangerousness.

> evidence as to the reasonableness of the County's actions when evaluating breach [*i.e.*, dangerousness].

Id. at 931. *See also O'Dell v. Milwaukee, St. Paul & Pac. R. Co.*, 6 Wn. App. 817, 825-26, 497 P.2d 519 (1972) (holding that evidence of prior near-accidents was admissible to establish dangerousness even though defendant lacked notice of the occurrences). The trial court's exclusion of the prior similar accidents to prove dangerousness contravenes these precedents and should have been reversed by the Court of Appeals.

Finally, it was error to exclude evidence of prior accidents after the County's traffic engineer testified on direct examination he based his opinion that the intersection was safe in part on prior accident history. RP 547-48. Tapken and Malinak were entitled to rebut the false impression left by this testimony that there was no significant accident history. *See State v. Gefeller*, 76 Wn.2d 449, 454-55, 458 P.2d 17 (1969); *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 52-53, 366 P.3d 1246 (2015).

This Court should review this evidentiary issue, which will arise on remand, and hold that evidence of prior similar accidents is relevant and admissible to establish notice and dangerousness, both of which are disputed issues in this case.

IV. CONCLUSION

The County's petition fails to meet the criteria for acceptance of review, and the County's arguments are without merit. Footnote 4 of the Court of Appeals' decision is consistent with CR 50. It is an aside that merely emphasizes the common sense nature of the determination the jury

should have been allowed to make. But should this Court decide to accept review, it should also review the issues conditionally raised by Tapken.

Respectfully submitted this 18th day of April, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 18th day of April, 2016.

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Dear Clerk:

Attached for filing is *Respondent Madelynn M. Tapken's Answer to Petition for Review*.

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