NO. 44019-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GUY WUTHRICH,

Appellant,

v.

KING COUNTY and CHRISTA GILLAND,

Respondents.

Appeal from the Superior Court of Pierce County
Honorable Garold E. Johnson
NO. 11-2-10263-2

BRIEF OF APPELLANT GUY WUTHRICH

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I. INTRODUCTION

This case involves an intersection collision. Plaintiff Guy Wuthrich was the favored driver, and Defendant Christa Gilland was the disfavored driver who entered the intersection from a street controlled by a stop sign. Because of an overgrown wall of blackberries to Ms. Gilland's left, she did not see Mr. Wuthrich's motorcycle approaching and pulled out directly in front of him, causing a collision between the two vehicles.

Mr. Wuthrich sued Ms. Gilland, as well as King County for failing to maintain the intersection in a reasonably safe condition. In particular, Plaintiff contends that the County breached its duty to provide a reasonably safe road by failing to maintain vegetation at the intersection, allowing it to grow to the point that it obstructed Ms. Gilland's view of approaching traffic. The trial court ruled that King County only had a duty to design and maintain roads in a reasonably safe condition for ***prudent*** drivers, and that because Ms. Gilland was negligent, the County could not be at fault. Because the trial court relied on a rule of law that had been directly overruled by the Supreme Court in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), the trial court's order granting summary judgment to Defendant King County should be reversed. As discussed below, there are questions of fact for a jury to decide as to whether the intersection was unsafe due to the County's failure to correct the sight obstruction caused by overgrown vegetation and a utility pole.

In addition, the trial court denied Plaintiff's motion for partial summary judgment to establish that the owner of the land where the overgrown vegetation was located had a duty to maintain its property in such a manner that conditions on the land did not create hazards for motorists using the abutting roads. In denying the motion, the trial court again relied on an erroneous understanding of the law. The trial court's ruling on this motion is the subject of a motion for discretionary review.

The trial court also denied Plaintiff's motion for partial summary judgment to strike the affirmative defense of contributory fault, despite the fact that the Defendants failed to show that Mr. Wuthrich, as the favored driver who was simply traveling straight ahead and within the speed limit, had adequate time to react to Ms. Gilland's sudden violation of his right of way and avoid the crash she caused. The trial court's ruling on this motion is also the subject of a motion for discretionary review.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering the following orders:

1. Order Granting King County's Motion for Summary Judgment (CP 1279-1281); and
2. Order Denying Plaintiff's Motion for Reconsideration of Order Granting King County's Motion for Summary Judgment (CP 1442-1444).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. ISSUE: Did the trial court err in granting Defendant King County's motion for summary judgment on the basis of language in *Ruff v. King County* that was overruled by the Supreme Court in *Keller v. City of Spokane*?

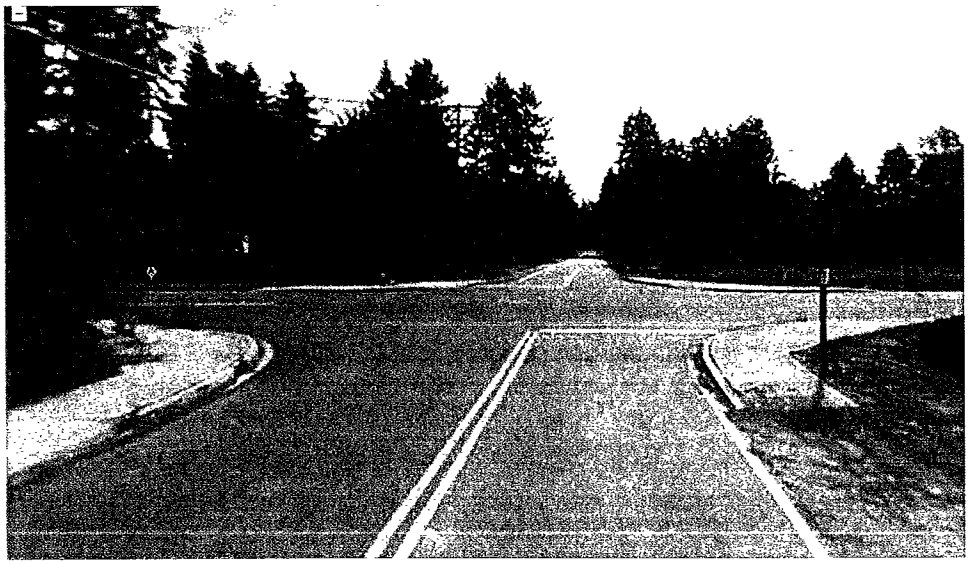
ANSWER: Yes. The trial court granted Defendant King County's motion for summary judgment on the basis of language in *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995), to the effect that, in designing and maintaining roads, governmental entities are entitled to presume that all drivers will be reasonably prudent. The trial court reasoned that Defendant King County could not be liable because Defendant Gilland was not reasonably prudent. In *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), the Supreme Court held that a governmental entity has a duty to provide a reasonably safe road, regardless of whether drivers involved in a collision were also negligent. A governmental entity's negligence in failing to provide reasonably safe roads can combine with a driver's negligence to cause a collision. Because the trial court relied on language in *Ruff* that was overruled in *Keller*, the trial court erred, and its summary judgment in favor of Defendant King County should be reversed.

IV. STATEMENT OF THE CASE

A. The collision

On June 20, 2008, at approximately 5:15 p.m., Plaintiff Guy Wuthrich was operating a Harley Davidson motorcycle southbound on Avondale Road in King County, approaching an intersection at 159th

Street. He was traveling at 35 mph, 5 mph under the speed limit.[1] Defendant Christa Gilland, an off-duty Kirkland Police Officer,[2] approached the intersection traveling in an easterly direction on 159th Street, which is controlled by a stop sign and a stop line, as shown in the photograph below.



CP 361.

Ms. Gilland testified that she stopped her car at the stop line,[3] looked both ways (south and north), did not see Mr. Wuthrich's motorcycle approaching, and started her left turn onto Avondale Road.[4]

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[1] CP 1544 (*Wuthrich Dep.* at 8).

[2] As a police officer, Ms. Gilland has specialized training regarding driving, and she applies defensive driving principles. CP 1560 (*Gilland Dep.* at 30-31).

[3] The terms "stop line", "limit line" and "stop bar" mean the same thing and are used interchangeably by traffic engineers, and will be so-used in this Brief.

[4] CP 1564, 1581, 1583 (*Gilland Dep.* at 45-46, 114-116, 122).

This put her directly and suddenly in the path of Mr. Wuthrich's southbound motorcycle, causing a collision between the vehicles.[5]

Mr. Wuthrich sustained multiple, severe injuries in the collision.

It is uncontested that:

1. Mr. Wuthrich was traveling straight ahead on Avondale and within the speed limit as he approached the intersection.[6]

2. Mr. Wuthrich had the right-of-way; 159th Street, where Ms. Gilland was stopped, was controlled by a stop sign.[7]

3. As Mr. Wuthrich was about to enter the intersection, Ms. Gilland began her left turn directly into the path of Mr. Wuthrich's motorcycle, whereupon the vehicles collided.[8]

4. According to Ms. Gilland, she was unable to see Mr. Wuthrich's approaching vehicle because of overgrown vegetation on her left.[9]

B. Ms. Gilland's ability to see southbound traffic on Avondale was impeded by sight obstructions at the intersection.

The stop line at 159th Street is approximately 15 feet back from the extension of the fog line. CP 473. Due to a wall of overgrown blackberry bushes, the available sight distance for a vehicle stopped at the stop line was less than a third of the sight distance that Defendant King County

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[5] CP 1564, 1581, 1583 (*Gilland Dep.* at 45-46, 114-116, 122).

[6] CP 1544 (*Wuthrich Dep.* at 8); CP 1515, 1525 (*Olson Dep.* at 47; 87-88).

[7] CP 1561, 1565 (*Gilland Dep.* at 33, 50-51).

[8] CP 1564 (*Gilland Dep.* at 46-47).

[9] CP 1565 (*Gilland Dep.* at 50-51).

concedes is required. CP 461 (there was only 191 feet of sight distance for a vehicle stopped at the stop line); CP 167 (685 feet of sight distance is required for a 40-mph road).

King County Detective James Leach took a recorded statement from Ms. Gilland a few hours after the collision:

> I was stopped at the intersection of Avondale and NE 159th ***at the stop line*** looking for traffic. I sat there for quite a while, I waited until it was really wide open. And I pulled out to make a left turn onto Avondale and when I got probably half way through the lane closest to me there was a motorcyclist in front of me and I hit him.

CP 432 (emphasis added).

Ms. Gilland's statement that she stopped at the stop line is supported by the testimony of the only witnesses to the collision – Ms. Gilland and Mr. Wuthrich – that they did not see each other until an instant before the collision. Mr. Wuthrich testified that he was driving along and "saw a bumper real close, it was coming fast." CP 394; CP 396 (he had less than a second to react after he saw Gilland's car). Ms. Gilland testified that the motorcycle appeared in front of her just as she started her left turn onto Avondale. CP 402.

A rule of accident reconstruction is that a vehicle accelerating from a stopped position moves very little – only five feet -- in the first two seconds; thus, for Ms. Gilland's vehicle to have been "coming fast," as Mr. Wuthrich testified, she had to be far enough back from the intersection – that is, at the stop line – when she began accelerating to pick up speed

by the time she entered the intersection.[10] Accident reconstruction expert Paul Olson explained as follows:

> [W]hen a witness tells you first thing I saw was a quick movement from something, you know it isn't just sitting there waiting and accelerating. It is back a little bit and it is accelerating and it's got some speed when it gets here.
>
> Otherwise, you'd say I see him creeping out because in one second, literally, this is all the further that car can go (indicating). And in two seconds it might travel five feet total, in the first two seconds. So that's not quick. What [Wuthrich] describes is seeing the front bumper of a car coming out quickly in front of him. What that indicates is that car has to be back – further back – say further back than this one here and accelerating before the front bumper comes out.

CP 440-441.

Ms. Gilland testified that the view to her left (north) was obstructed by overgrown blackberry bushes and a utility pole. She testified that she looked left and saw the blackberry bushes and the utility pole, but did not see Mr. Wuthrich's motorcycle. CP 423-425, 428; *see also* CP 403-404, 406; CP 408 ("I believe that the bushes contributed to me not seeing the oncoming motorcyclist."); CP 414 ("A. . . . I think there are things that contributed to me not seeing him. Q. And what would those be? A. I think . . . the overgrown bushes that are on the corner.").

The sight obstruction created by the wall of blackberries was described by Detective Leach as follows:

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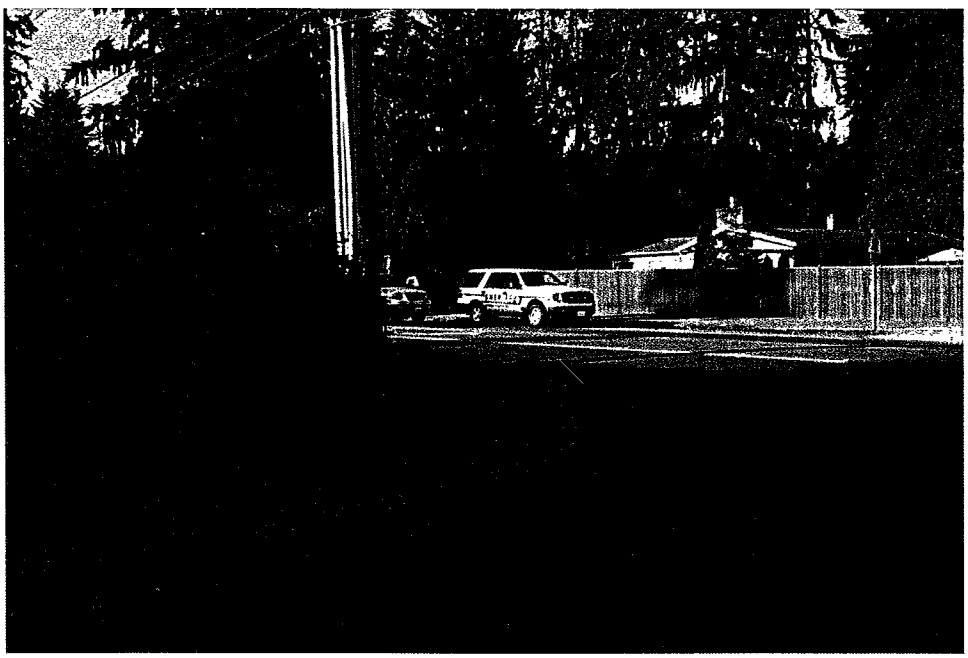
[10] Ms. Gilland testified that she accelerated into the intersection in a normal manner -- not exceptionally fast. CP 405.

> On the northwest corner of the intersection there is a large brush line that runs from the corner northbound along the west side of Avondale Rd NE. This brush line causes somewhat of a site [sic] obstruction from vehicles stopped eastbound NE 159 St at the stop bar looking north on Avondale Rd NE.

CP 445.

A photograph taken by the King County Sheriff's office at the accident scene demonstrates the sight-obstructing wall of overgrown vegetation at the northwest quadrant:



CP 1243.

Expert testimony confirmed that the sight distance for drivers in the immediate vicinity of the Avondale Road-159th Street intersection was substandard and inadequate for safe driving at the time of the collision.

Transportation engineer Edward M. Stevens stated that "[t]hese sight obstructions in the northwest quadrant of the intersection created an inherently dangerous condition at the intersection." CP 1265. Accident reconstruction expert Paul Olson testified that "clearly the sight line for drivers pulling up to this intersection was obstructed." CP 439. *See also* CP 1501-1502 (Exhibit 9 to the Deposition of Paul H. Olson at 1).[11]

C. Guy Wuthrich was not at fault.

Accident reconstruction expert Paul Olson reconstructed the collision.[12] Mr. Olson's reconstruction determined that Mr. Wuthrich was traveling at least 5 mph below the 40-mph speed limit when Ms. Gilland failed to yield the right-of-way to him and the collision occurred.[13]

Even Defendant King County's accident reconstruction expert, Nathan Rose, concluded that Mr. Wuthrich was traveling at a speed of 26 to 31 mph at the time of the collision.[14] Mr. Rose further opined that Mr. Wuthrich's motorcycle was approximately 118 feet back from the point of

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[11] Exhibit 9 to the Olson Deposition is a letter written by Mr. Olson to Plaintiff's counsel, Keith Kessler, which was referenced by both counsel and Mr. Olson during his deposition. The letter sets forth Mr. Olson's opinions and analysis in this case. *See* CP 1513 (*Olson Dep.* at 38-40).

[12] CP 1501 (Exh. 9 to Olson Dep. at 1). Mr. Olson personally inspected the collision site and reviewed the King County Sheriff's Collision Investigation (including photographs and measurements from the collision scene), the depositions of Guy Wuthrich and Christa Gilland, and documents produced by Transportation Engineer Edward Stevens. CP 1501 (Exh. 9 to Olson Dep. at 1).

[13] CP 1501 (Exh. 9 to Olson Dep. at 1).

[14] CP 548.

impact when Ms. Gilland began moving toward the intersection from a stopped position.[15]

35 miles per hour equals 51 feet per second.[16] Traveling at 35 mph, Mr. Wuthrich would have traveled 118 feet in 2.3 seconds.[17] During Ms. Gilland's first second of acceleration from a stopped position, however, she would have traveled only a couple of feet (CP 1522, *Olson Dep.* at 75), which would not have been enough movement to put a reasonable driver in Mr. Wuthrich's position on notice that she was going to violate his right of way as opposed to merely creeping closer to the intersection to get a better view. The evidence clearly shows that, from the point Ms. Gilland actually began encroaching on Mr. Wuthrich's lane of travel – in other words, the point at which Mr. Wuthrich would have been on notice that she was not going to yield the right of way – Mr. Wuthrich had insufficient time to avoid a collision. CP 1501.

Mr. Wuthrich's own eyewitness observations are consistent with the experts' findings:

> ...I know I was doing the – five miles an hour under the speed limit. The speed limit was 40, and I was doing 35, which I always do on that road, 35 miles an hour when there's no traffic.
> ....
>
> Q. You had indicated that you had a second or less than a

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[15] CP 545.

[16] 35 mph x 5,280 feet per mile = 184,800 feet, divided by 3,600 seconds per hour = 51.33 feet per second.

[17] 118 feet divided by 51 feet per second = 2.3 seconds.

second when you first noticed the bumper of Ms. Gilland's vehicle?

A. Yes.

Q. How close was that bumper to your motorcycle approximately?

A. I don't think it was much further away than about six feet.

CP 1544, 1549 (*Deposition of Guy Wuthrich* at 8, 28).

The uncontradicted evidence is that Ms. Gilland suddenly pulled out directly in front of Mr. Wuthrich.[18] Mr. Olson's accident reconstruction analysis substantiates Mr. Wuthrich's testimony that Ms. Gilland's car appeared suddenly, leaving him no time to stop:

> When the car began its acceleration Mr. Wuthrich was too close and had too little time to be able to avoid this collision.

CP 1501 (Exh. 9 to Olson Dep. at 2).

There is no evidence that Mr. Wuthrich did anything wrong. He was lawfully riding his motorcycle on Avondale Road when Ms. Gilland failed to yield the right-of-way to him and suddenly drove her car directly into his path of travel.[19]

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[18] CP 1526-1527 (*Olson Dep.* at 92-93).

[19] The primary duty to avoid a collision at an intersection with a stop sign rests upon the driver who is required to stop at a stop sign -- in this case, Ms. Gilland. *See* RCW 46.61.190 (2).

V. ARGUMENT

A. Standard of review

This Court applies a *de novo* standard of review in reviewing summary judgment orders, engaging in the same inquiry as the trial court, including taking the facts and any reasonable inferences therefrom in the light most favorable to the non-moving party. *Shellenbarger v. Brigman,* 101 Wn. App. 339, 345, 3 P.3d 211 (2000); *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.,* 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Summary judgment is proper only when no genuine issue of material fact exists. CR 56(c); *Scott Galvanizing,* 120 Wn.2d at 580.

B. In granting the County's motion for summary judgment, the trial court erroneously relied on language in *Ruff v. King County* that was overruled by the Supreme Court in *Keller v. City of Spokane.*

In granting the County's motion for summary judgment, the trial court relied upon language in *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995), stating that "[a] county has a duty to maintain its roadways in a reasonably safe condition for ordinary travel ***by persons using them in a proper manner.***" *See Ruff*, 146 Wn.2d at 704 (emphasis added); VRP 60 (7/27/12). The trial court ruled, based on this language from *Ruff*, that the County did not breach its duty because it had a right to assume that Ms. Gilland would be a "prudent" driver and not pull out into a lane of travel if she could not see approaching traffic. The trial court concluded that because Ms. Gilland was negligent, the County could not also be at fault. The trial court indicated that its reasoning as to both the

elements of breach of duty and proximate cause was based on its conclusion that Ms. Gilland was negligent:

> *Ruff* tells us that there's a duty to maintain a roadway in a reasonably safe condition . . . .
>
> Nor does the duty require the county to anticipate and protect [against] all imaginable acts of negligent drivers; for to do so would make the county [an insurer] against all such acts.
>
> Negligence depends on whether the roadway was inherently dangerous or deceptive to a ***prudent driver***.
>
> And that bothered me here quite a bit. And the reason it bothers me is because a ***prudent driver*** simply does not get in the lane of travel when another vehicle is approaching at 35 miles an hour. You just don't do it.
>
> . . .
>
> [Y]ou just simply don't go into the lane of traffic where you can't see to travel. A ***prudent driver*** would not do that.
>
> I don't think that's a question for the jury. Consequently, summary judgment is granted.

VRP at 60-61 (7/27/12) (emphasis added).

> That circulates back into what we talked about; that ***a reasonabl[y] prudent driver is required in the first place, the county is entitled to rely upon that before they're liable.***
>
> I don't know if that's a causation issue. And the way I used it earlier, it seems to me they're tied together.

VRP at 65 (7/21/12) (emphasis added).

> Consequently, I can't imagine – I have seen no facts that dispute in this particular situation ***she was not reasonably prudent; and consequently, the county does not have liability.***

> That really is a circular argument when it comes to causation, because once again, ***if they're entitled to presume that the driver is to be reasonably prudent, I think that goes to causation***. It's a circular kind of an argument. It's more than – as I see it, they're entitled to rely upon that, and ***that eliminates that causation issue in this case because she wasn't reasonably prudent.***

VRP at 67-68 (7/27/12) (emphasis added).

The legal basis for the trial court's ruling was rejected by the Washington Supreme Court in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), which held that the characterization of a governmental entity's duty with regard to providing reasonably safe roads as stated in *Ruff* was an incorrect statement of the law because it could wrongly be interpreted as "limit[ing] the scope of a municipality's duty to only those using the roads and highways in a non-negligent manner." *Id.* at 249. Instead, under the correct legal standard in highway safety cases, "a municipality owes a duty to all persons, ***whether negligent or fault-free***, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel." *Ibid.* (emphasis added). Contrary to the trial court's approach in this case, *Keller* requires that the fault of a governmental entity be analyzed independent of and without regard to the fault of other persons who may have been involved in a collision.

There was a time when a municipality's defense of a third party's extreme negligence was allowed by the courts in roadway safety cases like this. The classic examples are *Klein v. City of Seattle*, 41 Wn. App. 636, 705 P.2d 806 (1985) and *Braegelman v. County of Snohomish*, 53 Wn.

App. 381, 766 P.2d 1137 (1989). In *Klein*, a driver traveling between 49 and 63 mph in a 30-mph zone lost control and crossed the center line of a bridge, causing a collision with the plaintiff's vehicle. The Court of Appeals affirmed summary judgment in favor of the city based on reasoning similar to the trial court's reasoning in this case:

> The City was under no duty to protect [the plaintiff] from the extreme carelessness of [the driver who crossed the center line]. As a matter of public policy, the City cannot be expected to guard against this degree of negligent driving.

Klein, 41 Wn. App. at 639.

Likewise, in *Braegelman*, an intoxicated driver crested a hill in the wrong lane, driving 40 mph in a 25-mph zone, and collided head-on with an oncoming car. Although the plaintiff presented expert testimony that the speed limit was too high for the sight distance limitations at the location, the Court of Appeals affirmed summary judgment in favor of the county on the basis of *Klein*, reasoning that any negligence on the part of the county in failing to design and maintain the road in a reasonably safe condition was not a legal cause of the collision because of the defendant driver's "extreme conduct." *Braegelman*, 53 Wn. App. at 385-386.

Klein and *Braegelman* were overruled by the Supreme Court in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), as the Court of Appeals recognized in *Unger v. Cauchon*, 118 Wn. App. 165, 73 P.3d 1005 (2003). *Unger* involved a driver (Unger) who was being chased by two other drivers (the Cauchon family). The chase involved high rates

of speed, swerving, crossing center lines, and turning headlights on and off. The weather was severe – heavy rain, melting snow, and the potential for slides. *Unger*, 118 Wn. App. at 168-169. The plaintiff/decedent's vehicle ultimately crashed in an area where witnesses testified the road tended to accumulate loose gravel, mud, and debris during rainy conditions. *Unger*, 118 Wn. App. at 176-177. The trial court granted summary judgment to the county on the basis that the county had no duty because the plaintiff was driving recklessly. *Unger*, 118 Wn. App. at 176.

The Court of Appeals reversed, holding that the county owed the decedent a duty, regardless of his allegedly negligent conduct, to make the road safe for ordinary travel. *Unger*, 118 Wn. App. at 176. The Court of Appeals held that *Braegelman*'s holding that a governmental entity has no duty to protect against a driver's extreme negligence was overruled by *Keller*:

> [W]e read the [*Keller*] opinion to require the court to determine, or properly instruct a jury to determine, that a municipality's duty is independent of the plaintiff's negligence. Thus, the County owed Unger a duty, regardless of his allegedly negligent conduct, to make the road safe for ordinary travel. It is for the jury to decide whether the County's construction or maintenance of Camano Hill Road created a condition that was unsafe for ordinary travel and whether the condition of the road contributed to Unger's accident and death.
>
> . . .
>
> . . . The extent to which Unger's reckless driving and the County's failure to maintain the road contributed to Unger's death is a question for the jury.

Unger, 118 Wn. App. at 176, 178.

As Defendant County acknowledges, the Supreme Court held in *Keller* that a municipality has a duty to "build and maintain its roadways in a reasonably safe manner for the ***foreseeable acts*** of those using the roadways." *Keller*, 146 Wn.2d at 252 (emphasis added); CP 1392. Whether or not it was foreseeable that a driver would stop at a designated stop line where sight obstructions interfered with drivers' ability to see approaching traffic, and then pull out into the intersection and crash into an unseen approaching vehicle, is a question of fact for a jury. Ms. Gilland's negligence in this case was no worse than the negligence of the drivers involved in *Chen v. City of Seattle,* 153 Wn. App. 890, 223 P.3d 1230 (2009) (driver hit pedestrian in crosswalk), *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940), (driver crossed center line on bridge and struck pedestrian), *Keller* (plaintiff motorcyclist may have been traveling as fast as 80 mph in a 30 mph zone), or *Unger* (high rates of speed, swerving, crossing center lines, and turning headlights on and off), all of which were found to present questions of fact for a jury to decide. This is not a situation in which Ms. Gilland was drunk and simply drove into the intersection without stopping and looking. Ms. Gilland testified that she stopped and believed that she had exercised appropriate care in looking for traffic. CP 1564 (*Gilland Dep.* at 45-46).

Because the rule of law applied by the trial court in granting Defendant County's motion for summary judgment -- that the County could not have breached its duty to maintain its roads in a reasonably safe condition because Ms. Gilland was negligent -- is contrary to controlling

precedent from the Supreme Court and Court of Appeals, the summary judgment in favor of Defendant County should be reversed.

C. The trial court's ruling on the element of proximate cause was based on the same erroneous legal standard as its ruling on breach of duty.

Proximate cause involves a determination of what actually occurred; it is a decision virtually always left to the jury. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982) ("[T]he ***question of proximate cause is for the jury***, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.") (emphasis added). It is based on a physical connection between an act and an injury. *See Schooley v. Pinch's Deli-Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998).

Proximate cause is often proved by inferences arising from circumstantial evidence. *See, e.g., Hernandez v. Western Farmers Ass'n*, 76 Wn.2d 422, 425-426, 456 P.2d 1020 (1969); *Schneider v. Yakima County*, 65 Wn.2d 352, 359, 397 P.2d 411 (1965). The Supreme Court has repeatedly held that circumstantial evidence is sufficient to establish a question of fact as to proximate cause if the "evidence affords room for . . . reasonable minds to conclude that there is a greater probability that the matter in question happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable." *Mason v. Turner*, 48 Wn.2d 145, 149, 291 P.2d 1023 (1956); *see also Hernandez*, 76 Wn.2d at 426.

There can be more than one proximate cause of a collision. WPI 15.04; *see also Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 677, 709 P.2d 774 (1985); *Brashear v. Puget Sound Power and Light Co., Inc.*, 100 Wn.2d 204, 667 P.2d 78 (1983); *Jonson v. Milwaukee Railroad Co.*, 24 Wn. App. 377, 379-380, 601 P.2d 951 (1979). As held in *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), a governmental entity's duty to maintain its roads in a reasonably safe manner is not negated by a third party's negligence:

> There is likewise no merit to the city's argument that its duty to safely maintain roadways is tempered by motorists' duties to also exercise reasonable care. . . . The negligence of a third party does not absolve the city of its duty to maintain its roadways . . . in a reasonably safe condition.

Chen, 153 Wn. App. at 907. The fact that Ms. Gilland's negligence may have been a proximate cause of the collision does not mean that Defendant King County's negligence was not also a proximate cause of the collision.[20]

The trial court acknowledged the evidence that Ms. Gilland stopped at the stop line. VRP at 62 (7/27/12). The trial court further acknowledged that the mere fact that the County argues the collision could have been caused by factors other than a sight obstruction does not mean that the Plaintiff's theory of causation is speculative. VRP at 64 (7/27/12). Rather than being based on the absence of questions of fact, the trial

[20] WPI 15.04 ("If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damage to the plaintiff, it is not a defense that some other cause may also have been a proximate cause.").

court's ruling on proximate cause, like its ruling on breach of duty, was based on the proposition that Ms. Gilland's negligence was the sole proximate cause of the collision:

> That circulates back into what we talked about; that a reasonable prudent driver is required in the first place, the county is entitled to rely upon that before they're liable.
>
> I don't know if that's a causation issue. And the way I used it earlier, it seems to me they're tied together.

VRP at 65 (7/27/12).

> . . . I have seen no facts that dispute in this particular situation she was not reasonably prudent; and consequently, the County does not have liability.
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> That really is a circular argument when it comes to causation, because once again, if they're entitled to presume that the driver is to be reasonably prudent, I think that goes to causation. It's a circular kind of an argument. It's more than – as I see it, they're entitled to rely upon that, and that eliminates that causation issue in this case because she wasn't reasonably prudent.

VRP at 67 (7/27/12).

As the trial court acknowledged, the Plaintiff produced evidence showing that Defendant County's breach of its duty to provide a reasonably safe road was a proximate cause of this collision, including Ms. Gilland's testimony that she looked left and saw the blackberry bushes and the utility pole, but not the motorcycle. CP 1581, 1583 (*Gilland Dep.* at 114-116, 122); *see also* CP 1565, 1572 *(id.* at 50-51, 78); CP 1572 (*id.* at 80) ("I believe that the bushes contributed to me not seeing

the oncoming motorcyclist."); CP 1574 (*id.* at 86) ("A. . . . I think there are things that contributed to me not seeing him. Q. And what would those be? A. I think the . . . overgrown bushes that are on the corner."). The wall of blackberries concerned Detective Leach enough at the time of the collision to cause him to comment on it creating a sight obstruction in his report. CP 445.

A jury can readily conclude from the evidence that Ms. Gilland, as a police officer who has special training in driving and the rules of the road, would have exercised proper caution when entering the intersection, and that the sight obstruction caused by the overgrown wall of blackberries was the cause of her inability to see Mr. Wuthrich's motorcycle, just as she testified. Additionally, Mr. Wuthrich and Ms. Gilland were the only eyewitnesses to this crash, and no one contradicts their first-hand account that they were not visible to each other until immediately before the crash.

The evidence in the record clearly raises factual questions as to whether or not Ms. Gilland's ability to see southbound traffic on Avondale Road was impaired (whether partially or completely) by sight obstructions at the intersection, and as to whether those sight obstructions were a proximate cause of this collision. The trial court's ruling that the County's negligence cannot be a proximate cause of the collision because Ms. Gilland was also negligent is error as a matter of law for the reasons discussed above, and should be reversed.

D. The trial court erred in granting the County's motion for summary judgment because there are questions of fact as to whether or not the intersection of Avondale Road and 159th Street was reasonably safe.

Defendant King County has a duty to exercise ordinary care in keeping its public roadways in a safe condition for ordinary travel. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005). This includes a duty to eliminate inherently dangerous or misleading conditions. *Owen*, 153 Wn.2d at 788; *Chen v. City of Seattle*, 153 Wn. App. 890, 894, 223 P.3d 1230 (2009). As discussed above, governmental entities are required by law to design and maintain roads so that they are reasonably safe for drivers, even if the driving is imperfect. *Keller*, 146 Wn.2d at 245.

Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway. *Chen*, 153 Wn. App. at 894. It is not necessary to prove a violation of a statute or ordinance for a governmental entity to be liable for an unsafe road. *Chen*, 153 Wn. App. at 901 ("In effect, the city argues that the scope of its duty to Liu extended only to eliminating actual physical defects or to taking action expressly required by a statute, ordinance, or regulation. The city is incorrect on both accounts."). Whether a condition is inherently dangerous or misleading is generally a question of fact. *Owen*, 153 Wn.2d at 788.

Evidence of a violation of industry standards is relevant to the question of whether a defendant failed to exercise reasonable care. *See,*

e.g., Nordstrom v. White Metal Rolling and Stamping Corp., 75 Wn.2d 629, 637-641, 453 P.2d 619 (1969) (safety standards are relevant to the issue of negligence, regardless of whether they have the force of law); *Andrews v. Burke*, 55 Wn. App. 622, 626, 779 P.2d 740 (1989) ("[s]tandards adopted by private parties or trade associations are admissible on the issue of negligence where shown to be reliable and relevant"); *Raybell v. State of Washington*, 6 Wn. App. 795, 805, 496 P.2d 559 (1972) (highway safety standards admissible on issue of whether a governmental entity breached its duty to provide a reasonably safe road).

Transportation Engineer Edward Stevens testified that controlling transportation engineering standards require that sight distance be measured from a point eight feet back from a marked stop line. CP 467. By law, a stop line establishes the point at which drivers are directed to stop and observe traffic. RCW 46.61.190(2) ("every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line"); WAC 468-95-220 ("In the absence of a marked crosswalk, the stop line . . . should be placed at the desired stopping . . . point . . . .").

Defendant King County's position is that the point for measuring sight distance is ten feet back from the edge of traveled way (i.e., an extension of the fog line) (CP 167), based on Section 2.13 of the King County Road Standards, which states that "[e]ntering vehicle eye height is 3.5 feet, measured from 10-foot back from edge of traveled way." However, Defendant County ignores the fact that its internal road standards do not address the situation where a stop line has been painted

on a roadway as the point at which to stop and observe traffic, and how that affects the evaluation of sight distance.

Many stop signs are accompanied by a stop line painted on the roadway to identify "the point at which the stop is intended or required to be made." Manual on Uniform Traffic Control Devices (MUTCD) (2003 Edition) Section 3B.16 (CP 484-486). There is no standard location for placing a stop line; stop lines are used when, based on engineering judgment, the geometric characteristics of a particular intersection require having vehicles stop at a particular location. CP 465-466; *see also* CP 470.[21]

The MUTCD provides as follows regarding stop lines:

> If used, stop lines shall consist of solid white lines extending across approach lanes to indicate the point at which the stop is intended or required to be made.
>
> ....
>
> Stop lines should be used to indicate the point behind which vehicles are required to stop, in compliance with a STOP (R1-1) sign....
>
> If used, stop . . . line[s] should be placed a minimum of 1.2 m (4 ft) in advance of the nearest crosswalk line at controlled intersections . . . . ***Stop lines should be placed to allow sufficient sight distance to all other approaches to an intersection.***

[21] At the intersection where the collision occurred, Defendant King County's engineers might have determined that having drivers stop two feet from the fog line before entering the intersection would create problems for drivers turning left from Avondale onto 159th Street because a vehicle that close to the intersection would be in the path of a turning vehicle. King County's Road Standards provide for measuring sight distance 10 feet back from the fog line, which assumes that the front bumper of a vehicle is two feet from the fog line, because engineering standards assume that the driver's eye (the location for measuring sight distance) will be approximately eight feet behind the front bumper. WSDOT Design Manual, Sec. 910.09, p.910-21 (CP 493).

MUTCD (2003 Edition) Section 3B.16 (CP 485-486) (emphasis added); *see also* WAC 468-95-220 (CP 488).

Drivers are required by law to stop at a stop line. RCW 46.61.190.[22] The stop line designates the point of safety for stopping and observing traffic, rather than at a position too near the cross-traffic where, according to Transportation Engineer Edward Stevens, the driver would be in a position of jeopardy:

> From an engineering standpoint, I can tell you the reason we put stop bars in, because we don't want a vehicle to move forward from there. They're placing themselves in jeopardy when they do.

CP 469.

A stop line is a traffic control device. CP 464, 472. Under Washington law, traffic control devices must conform to the provisions of the Manual on Uniform Traffic Control Devices (MUTCD). RCW 47.36.030(2); RCW 36.86.040.

Not only is the MUTCD a recognized national standard published by the Federal Highway Administration, but it is the law in Washington. *See* WAC 468-95-010; CP 968 (*Stevens Dep.* at p.160). The MUTCD requires that stop lines "be placed to allow sufficient sight distance to all

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[22] RCW 46.61.190 provides in pertinent part as follows:

> ...every driver of a vehicle approaching a stop sign shall stop at a clearly marked line, but if none, . . . then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway....

other approaches to an intersection."[23] The sight triangle needed for viewing approaching traffic is therefore based on the location of a driver's eye in a vehicle stopped at the stop line – 8 feet behind the stop line and a height of 3.5 feet above the pavement.[24]

King County's Road Design standards state that, except where the King County Standards provide otherwise, King County shall follow the Washington State Department of Transportation (WSDOT) Design Manual. CP 659. The WSDOT Design Manual[25] states that drivers approaching an intersection need to be able to see each other sufficiently in advance to avoid collisions:

> For traffic to move safely through intersections, drivers need to be able to see . . . oncoming traffic in time to react accordingly.
>
> . . . .
>
> The driver of a vehicle that is stopped and waiting to cross or enter a through roadway needs obstruction-free sight triangles in order to see enough of the through roadway to safely complete all legal maneuvers before an approaching vehicle on the through roadway can reach the intersection.[26]

The diagram below from the Design Manual illustrates the required sight triangles:

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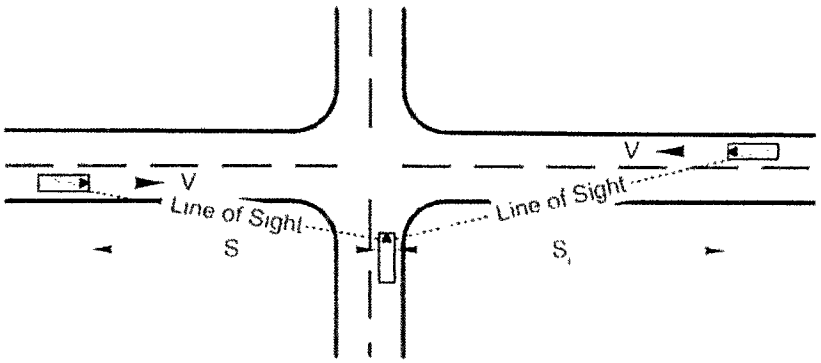
[23] WAC 468-95-220 (CP 488); MUTCD Sec. 3B.16, Guidance (CP 486).

[24] CP 467.

[25] The WSDOT Design Manual reflects transportation engineering policy in the State of Washington. Design Manual, Washington State Department of Transportation, §100.01 (November 2007). CP 491.

[26] Design Manual, §910.09 at page 910-20 (CP 492).



Design Manual, Figure 910-22a (CP 495).

To provide the obstruction-free sight triangle, the WSDOT Design Manual states that trees and other vegetation "large enough to be a sight obstruction" are to be removed.[27]

Defendant County's position that the location for assessing sight distance is ten feet back from an extension of the fog line ignores the fact that the County chose to place a stop line for traffic entering from 159th Street.[28] CP 463, 474-475 (measurement of sight distance for an intersection controlled by a stop line is not covered under the King County Road Standards). The stop line at 159th Street is approximately 15 feet back from the extension of the fog line. CP 473. Because 159th Street is controlled by a stop line that the County placed based on engineering judgment, the applicable sight distance standard is the MUTCD, which

[27] Design Manual, §910.09 at page 910-20 (CP 492).

[28] Likewise, if engineering judgment required placing a stop bar very close to the edge of a roadway in order to have adequate sight distance, applicable transportation engineering standards would require that sight distance be evaluated from a position closer than the generic 10 feet from the edge of traveled way set forth in King County's Road Standards. CP 471.

addresses sight distance measurement in the context of intersections controlled by stop lines, rather than King County's generic sight distance standard for intersections that do not have stop lines.

Because Defendant King County chose to place a stop line on 159th Street, the MUTCD requires adequate sight distance for a vehicle stopped at that stop line. WAC 468-95-220 (CP 488); MUTCD Sec. 3B.16, Guidance (CP 486). Due to the wall of overgrown blackberry bushes, the available sight distance for a vehicle stopped at the stop line was less than a third of the sight distance that Defendant King County concedes is required. CP 461 (*Stevens Dep.* at 51) (there was only 191 feet of sight distance for a vehicle stopped at the sight line); CP 167 (685 feet of sight distance is required for a 40-mph road).

Given the fact that Defendant King County failed to provide adequate sight distance from the location of the stop line on 159th Street, as required by the MUTCD, it is not surprising that Ms. Gilland testified that the blackberry bushes and utility pole obstructed her view of traffic on Avondale Road. CP 415; CP 417 ("... I do know that I've been through the intersection and thought that those bushes are overgrown and it makes it hard to see down the roadway."); CP 417 ("[F]rom what I recall, it completely blocked out my ability to see between the bushes and the power line."); CP 418.

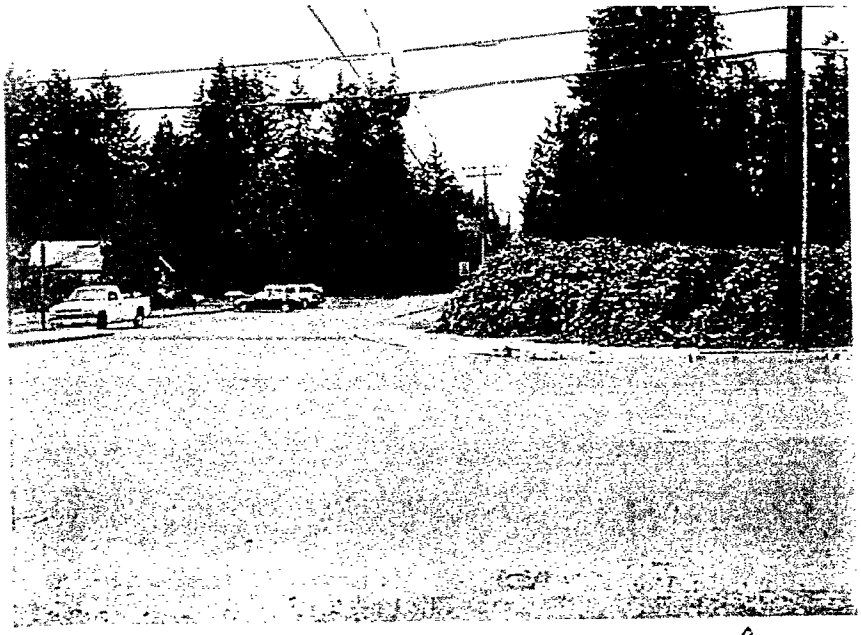
Ultimately, the issue is simply whether or not Defendant County provided drivers with adequate sight distance, or whether the

intersection's sight obstructions rendered it unsafe. That, of course, is a jury question.

To the extent Plaintiff is required to prove that the County had notice of the wall of overgrown blackberries, whether Defendant King County had actual or constructive notice of the wall is also a question of fact for the jury. *See, e.g., Skaggs v. General Electric Co.*, 52 Wn.2d 787, 872, 328 P.2d 871 (1958) ("What constitutes a sufficient period of time to place a municipality on constructive notice of a defect is determinable largely from the circumstances of each particular case.").

The evidence in fact shows that Defendant King County had ***actual*** knowledge of the problem of vegetation overgrowth at this intersection. King County maintenance personnel conducted a mowing operation at the intersection on October 5, 2007 (nine months before the collision) in response to a citizen's complaint about Scotch Broom at another corner of the intersection. CP 455-456 (*Stevens Dep.* at 37-38); CP 477-482. County personnel photographed the vegetation at the intersection of Avondale and 159th at the time, including a photograph of the northwest corner that documented the overgrown vegetation:[29]

[29] In the photo of the northwest corner, Mr. Wuthrich's motorcycle would have been traveling southbound, from right to left. CP 479.



CP479. This October 2007 photo documenting the wall of blackberries in the northwest quadrant is direct evidence of King County's actual knowledge of the vegetation overgrowth and potential sight obstruction.

Defendant King County conducts a vegetation maintenance program because it has recognized that "vegetation management is necessary to maintain a safe right-of-way by providing clear sight distance for vehicles." CP 502-503. In that regard, Transportation Engineer Edward Stevens testified that Defendant King County's failure to maintain the vegetation at the intersection violated its own policy, in that the County failed to preserve adequate sight distance. CP 462.

The mass of blackberries that existed at the corner of the intersection clearly did not grow overnight. It is common knowledge that vegetation generally stops growing in the winter and starts growing again

in the spring. CP 459-460. This was clearly a chronic problem that waxed and waned in severity somewhat over the course of a year. CP 1166. The collision occurred on June 20 – the end of spring/beginning of summer.

A jury can reasonably conclude that the overgrown blackberries had been present for a sufficient period of time before the collision for Defendant King County to have had notice of the wall of vegetation at the northwest corner of the intersection. In fact, an identical collision occurred at this same location just one year before the collision in this case. On July 12, 2007, an eastbound driver on NE 159th Street stopped at the same stop sign and then proceeded into the intersection, directly into the path of a southbound vehicle on Avondale, the same as the Wuthrich-Gilland crash. CP 497-499. A jury could reasonably conclude that the hazard of this thicket of blackberries had existed for a considerable period of time, and that its annual growth was foreseeable to the County.

In light of this evidence, there are genuine issues of material fact for a jury to decide as to whether the intersection of 159th Street and Avondale Road was or was not reasonably safe at the time of the collision, and the trial court therefore erred in granting the County's motion for summary judgment and deciding questions of fact reserved for the jury.

VI. CONCLUSION

For the reasons set forth above, this Court should reverse the summary judgment in favor of Defendant King County and remand this case for trial so that a jury can determine whether or not Defendant King

County breached its duty to maintain the subject intersection in a reasonably safe condition.

Respectfully submitted this 26th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2013, I served the foregoing via email to the Clerk's Office of the Court of Appeals Division II (coa2.filings@courts.wa.gov) and provided a copy of the document via email to all counsel of record as follows:

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