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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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MADELYNN TAPKEN,

Respondent-Cross Appellant,

v.

SPOKANE COUNTY, a municipal corporation,

Appellant-Cross Respondent,

and

CONRAD MALINAK,

Respondent.

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**OPENING BRIEF OF APPELLANT SPOKANE COUNTY**

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## I. INTRODUCTION

This is a negligence lawsuit against Spokane County by two motorcycle riders who drove off a rural County road at a Y-shaped intersection located near the town of Waverly. This intersection is known as the “Waverly Y.” A motorist travelling through the Waverly Y must turn either left or right. Because they leaned in opposite directions from one other, the motorcycle driver, Conrad Malinak, and his passenger, Madelyn Tapken, went straight off the road and crashed rather than turning. This appeal, which follows a jury verdict against the County, is the second in this matter.<sup>1</sup>

Tapken and Malinak’s theory at this trial was that a hawthorn bush obscured the right turn at the Waverly Y, and Malinak consequently did not slow enough to go around it, causing him to attempt to change directions at the last moment and lose control. The core County defense to this claim was that the right turn was open, apparent, and known: evidence

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<sup>1</sup> A copy of this Court’s opinion from the prior appeal is attached as an appendix. App. A, *Tapken v. Spokane County*, No. 32909-7 (Wash. Ct. App. Jan. 12, 2016). In the first trial of this lawsuit in 2014, Tapken and Malinak asserted County liability on a theory a roadside bush limited sight distance to a yield sign on the right arm of the Y intersection to a degree that a right-turning driver could not stop before reaching the yield sign. After the trial court dismissed their claims against the County under CR 50 for lack of causation, they appealed based on evidence in the record that limited sight distance to the right turn (as opposed to the yield sign) caused their failure to slow. While not disturbing the trial court’s decision that causation was lacking to establish Tapken and Malinak’s original obscured yield sign theory, in a 2-1 decision this Court reversed the dismissal of the County and remanded for a second trial on their new obscured right-turn theory.

showed that Malinak had taken the same turn many times before, that he was aware of the nature of the intersection based on prior knowledge of it, and that the intersection and turn were objectively visible to motorists even without that prior knowledge. Photographs and testimony showed that any sight obstruction condition was plainly visible to a motorist and actually observed by Malinak on his approach. The trial court not only failed to instruct the jury on long-standing law that the County has no duty to warn motorists of an open, apparent, and known condition, it also gave an instruction to the opposite effect that Malinak's knowledge of the condition did not relieve the County of a duty to warn about it.

In addition to misstating the County's duty, the court erroneously instructed the jury on Tapken's and Malinak's duties. By instructing the jury that their conduct could be excused or mitigated by the "sudden emergency" doctrine, the trial court further prejudiced the County. The facts did not warrant an emergency instruction, especially given that the alleged emergency was based in part, if not wholly, on Malinak's carelessness in approaching the intersection at too high a speed and failing to see road conditions there to be seen.

The court further compounded these errors by admitting prejudicial evidence of prior accidents, even though this Court previously upheld exclusion of the accidents when Tapken and Malinak appealed the issue.

Because there was no substantial similarity between the accidents, the prior accidents were irrelevant and there was no legitimate purpose to admit evidence of them. The irrelevant accidents were used by Tapken and Malinak to imply unfairly that a hazard existed that should have caused the County to warn of the right turn.

Last, the trial court's rulings regarding Malinak's claim for medical expenses were also error. On the first day of trial the court unexpectedly reversed itself and reinstated Malinak's previously dismissed claim for medical expenses, then allowed Malinak's untimely disclosed expert witness to testify regarding those expenses, and ultimately instructed the jury that the expenses were undisputed. The trial court had no reasonable basis for reinstating this claim at the eleventh hour, and its rulings completely foreclosed the County from rebutting it.

In sum, the court incorrectly instructed on the parties' duties, did not allow the County to argue its theory of the case, and deprived the County of a fair trial. This Court should reverse the judgment and remand for a new trial.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by giving Instruction No. 14.
2. The trial court erred by refusing to give the County's Proposed Instruction No. D-23.

3. The trial court erred by giving Instruction No. 13.

4. The trial court erred by denying the County's motion *in limine* to exclude evidence of prior accident history at the Waverly Y and granting Tapken's motion to admit the evidence.

5. The trial court erred by denying the County's motion *in limine* to maintain the dismissal of Malinak's claim for medical expenses as the law of the case and then reinstating this claim on the first day of trial.

6. The trial court erred by denying the County's motion *in limine* to exclude Malinak's untimely disclosed expert witness, Charles Morrison, M.D., and then allowing him to testify.

7. The trial court erred by giving Instruction No. 31.

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

A. When motorists sue a municipality for failure to warn of a road condition and there is substantial evidence that the condition was open, apparent, and known, must the jury be instructed on the law stating that a municipality's duty to warn does not extend to open, apparent, and known conditions? (Assignments of Error 1 and 2)

B. Are jury instructions which augment a municipality's duty to warn a motorist of road conditions by negating the import of the motorist's knowledge of those conditions an incorrect statement of the law and a comment on the evidence? (Assignments of Error 1 and 2)

C. Are a motorcycle driver and passenger who are involved in a single-vehicle accident entitled to the benefit of an instruction on the

“sudden emergency” doctrine where multiple conditions required for giving the instruction were not met? (Assignments of Error 3)

D. When an appellate court has affirmed the exclusion of irrelevant and prejudicial evidence in a case under appeal and the criteria for the evidence’s admissibility were not satisfied, can the trial court hearing the remanded case ignore the appellate court’s holding and admit the evidence? (Assignment of Error 4)

E. Does a trial court commit reversible error when a claim previously dismissed under CR 50 is not challenged by the plaintiff in an appeal but the court reinstates that claim on the first day of trial, allows untimely disclosed expert testimony regarding the claim, and then comments on the evidence by instructing the jury that the claim is “undisputed”? (Assignments of Error 5, 6, and 7)

#### **IV. STATEMENT OF THE CASE**

##### **A. Nature of the Case**

The Waverly Y is located at the intersection of Prairie View Road and Spangle-Waverly Road in rural Spokane County. RP 1263-64. A vehicle traveling southbound on Prairie View, upon reaching the Waverly Y, must turn – either right or left – onto Spangle-Waverly. Exhs. P-73, P-74, P-92. Both the right and left turns are controlled by yield signs.<sup>2</sup> RP 542-43, 699; Exhs. P-60, P-73. From some vantage points, the yield sign on the right and the far end of the right turn are partially obscured by a hawthorn bush on the right side of the road. RP 417, RP 420-21. The County mitigated this condition by placing a yield-ahead sign on the right

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<sup>2</sup> A copy of Exh. P-60 is attached as an appendix. App.E.

side of southbound Prairie-View 775 feet ahead of the intersection.<sup>3</sup> RP 417, 525, 544-45, 708; Exh. P-38.

Upon reaching the intersection the subject motorcycle turned neither right nor left, but instead travelled straight and crashed into a ravine. RP 1299. Tapken, the motorcycle passenger, brought suit against both the motorcycle driver, Malinak, and the County. CP 666-69. She alleged Malinak negligently operated the motorcycle and the County was “negligent in failing to sign and maintain its roadway in a condition reasonably safe for ordinary travel.” CP 668. Malinak denied fault, claimed the County was at fault, and asserted a cross-claim for his own injuries. CP 18-26. The County denied all claims of negligence and asserted Tapken and Malinak were at fault for the accident. CP 670-73.

#### **B. Procedural History of First Trial and Appeal**

The parties first tried this case before Spokane County Superior Court Judge John Cooney in 2014. After three weeks of trial, Judge Cooney granted the County’s CR 50 motion for judgment as a matter of law, holding Malinak and Tapken failed to establish any evidence the County breached its duty or that its conduct was a proximate cause of the accident. App A, *Tapken v. Spokane County*, No. 32909-7, slip. op. at 5-6 (Wash. Ct. App. Jan. 12, 2016). Following Judge Cooney’s dismissal of

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<sup>3</sup> A copy of Exh. P-38 is attached as an appendix. App. B.

the County from the case, Tapken voluntarily dismissed her claim against Malink, and Tapken and Malinak jointly appealed the trial court's order dismissing their claims against the County. CP 30-37; CP 1773-75.

On January 12, 2016, in a 2-1 opinion this Court reversed the trial court's CR 50 dismissal of the County from the case, reasoning that the record contained evidence of a sight-distance limitation at the intersection that supported a claim against the County. App. A, *Tapken v. Spokane County*, No. 32909-7, slip. op. at 11 (Wash. Ct. App. Jan. 12, 2016). The court also addressed Tapken and Malinak's challenge to Judge Cooney's decision to exclude evidence of prior accidents, affirming that decision based on the County's admission that it had notice of the bush despite the fact the County did not admit that the condition was dangerous. *Id.*, slip. op. at 14. Last, the court affirmed the trial court's denial of Tapken's motion for partial summary judgment seeking dismissal of the County's affirmative defense based on her comparative fault, holding this issue was a question of fact. *Id.*, slip. op. at 17-18.

**C. Relevant Proceedings After Remand to Superior Court**

On remand to superior court following the first appeal, Judge Cooney recused himself. The case was initially assigned to Judge Annette

Plese.<sup>4</sup> Judge Plese decided a motion by the County to enforce certain of Judge Cooney's earlier rulings as the law of the case. App. M, CP 653-63. Judge Plese granted the County's motion on certain issues and denied the motion with respect to other issues. *Id.*

The case later transferred from Judge Plese to Judge Timothy Fennessy, who presided over the second trial. Judge Fennessy ruled on a discovery motion brought by Tapken, the parties' pre-trial motions *in limine*, jury instructions, and all other legal issues raised during the second trial. *See* 2017 Report of Proceedings.

**1. Evidence and Testimony Regarding the Accident on Remand**

Before the accident, Malinak and Tapken took one motorcycle ride together previously. RP 842-43. Tapken also had prior experience riding motorcycles with boyfriends and her stepfather. RP 969-70, 1156. Nevertheless, before their first ride, Malinak specifically instructed her that "when a motorcycle driver leans one way or the other, the passenger needs to mimic their movements and move with them as opposed to against them." RP 935.

The accident occurred on Malinak and Tapken's second ride, which was on September 28, 2011. RP 843, 855-58. Because Tapken has

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<sup>4</sup> The single volume of the Report of Proceedings before Judge Plese, which took place on October 7, 2016 and December 12, 2017, was filed separately from the more voluminous ten-volume Report of Proceedings from 2017.

no memory of the accident, Malinak is the only witness with personal knowledge of how it happened. RP 1165. That day, Malinak explained to Tapken the route they would be taking before setting out, also showing her on google. RP 843-44, 947-48.

At trial, Malinak claimed that although he had intended to make a right turn at the Waverly Y, he had “no idea how sharp it was.” RP 856. He estimated he was travelling at or near the speed limit of 45 miles per hour as he approached the intersection southbound on Prairie View. RP 857. He did not recall seeing the yield-ahead sign before the intersection but conceded it was there to be seen. RP 850-51; RP 918. However, he saw the yield sign on the left. RP 851. He claims to have braked at some point prior to reaching the intersection, but he does not recall at what point. RP 924-25. He believes he slowed his bike to 35 or 40 miles per hour before reaching the right turn. RP 858.

Photographs show that the sharp right turn and the existence of the bush partially obstructing the view of the right turn were both visible well in advance of the turn itself. Exhs. P-48, P-51.<sup>5</sup> Even Malinak admitted that from the vantage point of the photo in Exhibit P-48, he could see the right turn. RP 927. The fact that the bush obscures the right turn is also fully visible from the same vantage point. App. C, Exh. P-48. However,

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<sup>5</sup> Copies of Exhs. P-48 and P-51 are attached as appendices. App. C-D.

Malinak testified that he recognized the sharpness of the right turn only as he cleared the bush, but that by then he was unable to negotiate it at the speed he was travelling. RP 856. Malinak claims he then “tried to make the left-hand corner at the last second. And as I changed my lean to go to the left, the motorcycle sort of stayed in the center upright position, and after that it’s - - it’s a blur.” RP 856-57.

Shortly after the accident, Detective David Thornburg of the Spokane County Sheriff’s Office interviewed Malinak at Sacred Heart Medical Center. RP 1294-95. Malinak explained his route to Detective Thornburg as follows: “from his home, which is on the Lower South Hill, to Palouse Highway, to Highway 27, to Prairie View, to Spangle Waverly and then to Highway 95 and then come back home.” RP 1297-98.<sup>6</sup> Malinak told Detective Thornburg that he “liked that particular route and had taken it many times” in the past. RP 930.<sup>7</sup> This route required Malinak to take the same right turn that he attempted to take on the day of the accident. RP 949. On the prior occasions when Malinak took the right turn, he had taken it more slowly. RP 950. In contrast to his explanation at trial, when asked by Detective Thornburg how the accident happened,

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<sup>6</sup> A copy of Exh. P-92 is attached as an appendix. App. F.

<sup>7</sup> After this case was filed and Malinak was deposed, he revised his statement about his familiarity with the route from “many times” to “three or four times.” RP 931-32.

Malinak did not state it resulted from his confusion about the roadway or having a partly obstructed view due to the bush. RP 1300.

In addition to photographs, expert testimony showed the right turn and whatever sight limitation resulted from the bush was open and apparent to motorists, even without the benefit of prior knowledge of the intersection. The yield-ahead sign, located before the turn, gave notice not just of an upcoming yield sign but of the existence of an intersection. RP 417-18, 439-40, 708. As they approach the Waverly Y, motorists can see the intersection and the need to slow to make a right or left turn. RP 414.

The rules of the road impose a requirement on motorists to slow at intersections.<sup>8</sup> Ed Stevens, Tapken's traffic engineering expert, conducted a survey of the Waverly Y that included photographs showing the view of a motorist from Malinak's position on approach to the intersection at different distances.<sup>9</sup> According to Mr. Stevens, a motorist could see a break in the double-yellow center line of the roadway, which signals the existence of an intersection, 425 feet from the Waverly Y. App. H, RP 811-12; App.G, Exh. D-559. Mr. Stevens further testified that 425 feet is

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<sup>8</sup> RCW 46.61.190 requires a motorist approaching a yield sign to "slow down and if required for safety be prepared to stop," but RCW 46.61.400 imposes a separate duty to "drive at an appropriate reduced speed when approaching and crossing an intersection, when approaching and going around a curve, when travelling upon any winding roadway, and when special hazard exists with respect to pedestrians or other traffic, or when special hazard exists by reason of weather or highway conditions."

<sup>9</sup> Ex. D-551 shows Mr. Stevens' survey with photographs taken by his assistant showing the view of a motorist in Malinak's position at different points on the approach to the Waverly Y. RP 806-10.

sufficient distance for a motorist to reduce his speed and either make the right-hand turn or, if needed, to stop. App. H., RP 812-13.

During his interview with Detective Thornburg, Malinak explained he went straight at the Waverly Y rather than turning because Tapken had countered his lean when he decided to try to turn left instead of right:

He said as they were approaching Spangle Waverly, on Prairie View, he was traveling around 45 miles an hour. He started to lean right to make a right turn, and so did Maddy. He then decided to go left instead, so he leaned back to the left, but Maddy leaned even farther right. Conrad stated this made the bike unstable and they ended up going straight off the road.

RP 1305 (emphasis added); *see also* RP 932-33. As Detective Thornburg and the County's experts explained, when a passenger on a motorcycle counters the lean of the motorcycle driver, the motorcycle will go straight rather than turn. RP 1299, 1528, 1536.

## **2. Jury Instructions Regarding the County's Duty to Warn**

The trial court instructed the jury based on WPI 140.01, stating the County's general duty to maintain its roadways in a condition reasonably safe for ordinary travel. CP 2622. However, the court also gave the following as Instruction 14 regarding the scope of a duty to warn ostensibly owed by the County:

The duty of a governmental body to warn of a dangerous or unsafe roadway condition is not eliminated by general knowledge of a motorist of roadway conditions.

App. I, CP 2625; RP 1613. The County objected that the instruction misstated the law and should not be given. RP 1613. The court also refused to give the County's proposed instruction D-23, which stated any duty to warn by the County is limited as follows:

The County has no duty to warn a road user about a road hazard if the hazard is open, apparent, and known to the road user. Whether a hazard is open and apparent depends on whether the road user knew, or had reason to know, the full extent of the risk posed by the condition.

App. K, CP 2343; RP 1614. The County took exception to the court's failure to give this proposed instruction because it precluded the County from arguing that its theory of the case that it did not owe a duty to warn because Malinak was familiar with the intersection and it was open and apparent. RP 1613-14. The County also objected this instruction was necessary, because the court's other instructions had the effect of diminishing the importance of Malinak's prior knowledge of the intersection. RP 1614.

### **3. Jury Instruction Regarding the "Sudden Emergency" Doctrine**

Tapken and the County submitted briefing to the court regarding the applicability of the "sudden emergency" doctrine to excuse or mitigate

the negligent conduct of Tapken and Malinak. CP 2560-72. The court gave Instruction 13 on this issue over the County's objections that it is not supported by the evidence, and improper because Malinak and Tapken were, at least in part, at fault for the accident. RP 1612-13; App L, CP 2624.

#### **4. Admission of Accident History Evidence**

This Court upheld the trial court's exclusion of accident history evidence on Tapken's appeal from the first trial. App A, *Tapken v. Spokane County*, No. 32909-7, slip. op. at 13-14 (Wash. Ct. App. Jan. 12, 2016). The County filed a motion to enforce this ruling as the law of the case. CP 98. On December 12, 2016, Judge Plese granted the motion, holding accident history evidence would be excluded "as long as the County does not dispute notice that the yield sign and sharpness of the curve to the right were obstructed by the hawthorn bush." App. M, CP 655, 659. At trial, arguing in support of a motion *in limine* to maintain this ruling, the County was explicit about what precisely it was admitting:

So we've never denied that the bush was here. We've never denied that the bush blocks a portion of this connector road going to the right. But we have denied that this bush blocks the intersection. That's what we've denied. Not that it blocks the – it – we've denied that it blocks the entire intersection. We admit that from this angle, this black hawthorn bush blocks a portion of the right-hand turn.

RP 65.<sup>10</sup> The County's admission was identical to its admission at the first trial in 2014, after which this Court upheld exclusion of the evidence.<sup>11</sup> Citing the language of this Court's earlier opinion, the County argued, "[t]he relevant notice is notice of the alleged dangerous condition which the county admitted, not whether the condition actually was dangerous." RP 68. Disregarding this holding, Judge Fennessy ruled that accident history was admissible, because the County refused to admit the condition was dangerous. RP 75-77. Thus, the court admitted evidence regarding three prior accidents, which occurred on February 18, 1995, December 12, 2007, and September 5, 2009. CP 2656; RP 1368-76; RP 658-84; RP 1125-45.

**5. Reinstatement of Malinak's Claim for Medical Expenses and Instruction to the Jury the Expenses Were "Undisputed"**

At the first trial, Judge Cooney dismissed Malinak's claim for medical expenses because he failed to introduce evidence the expenses were actually incurred or reasonable and necessary. CP 356-57, 361.

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<sup>10</sup> The County's traffic engineer, Barry Green, testified consistently that the hawthorn bush partially obstructed both the yield sign to the right and the right turn, but that the County mitigated this partial obstruction by installing a yield-ahead sign that warned motorists that they are approaching an intersection controlled by a yield sign. RP 417-21.

<sup>11</sup> "Prior to trial, the County admitted that it had notice that the large hawthorn bush obscured the intersection, although it disputed that this condition was dangerous. At trial, the County equivocated somewhat. It disputed the degree to which the hawthorne bush actually obscured the yield sign and intersection, but it certainly did not claim to have lacked notice of the condition." App. A, *Tapken v. Spokane County*, No. 32909-7, slip op. at 14 (Wash. Ct. App. Jan. 12, 2016).

Malinak did not assign error to this ruling in his 2014 appeal. Thus, on remand the County moved to enforce the earlier dismissal as the law of the case. CP 98. On December 12, 2016, Judge Plese granted the County's motion. CP 983. She reasoned, "The Court was clear on this. The previous court ruled that this claim was dismissed as the Plaintiff presented no evidence to support the basis for this claim. This was not taken up on appeal, and the ruling stands." App. M, CP 659.

The case scheduling order required Malinak's disclosure of witnesses in March 2017. CP 665. On March 13, 2017, the County's attorney contacted Malinak's attorney because Malinak had made no disclosure. CP 1906. Malinak's attorney stated Malinak would not be calling any expert witnesses other than those who were identified in the 2014 trial. *Id.* Reneging on this promise, on May 8, 2017, just two days before the May 10, 2017 discovery cut-off, Malinak disclosed a new expert, Charles Morrison, M.D., whom he claimed would testify regarding his medical expenses despite Judge Plese's upholding dismissal of this claim. CP 1908-17.

At trial the County renewed its request to exclude evidence of Malinak's medical expenses and further moved to exclude Dr. Morrison as a witness. CP 1506-07. On June 12, 2017 – the first day of trial – Judge Fennessy reversed Judge Plese's earlier ruling and reinstated Malinak's

claim for medical expenses. RP 251. Judge Fennessy gave no explanation for contradicting Judge Plese's ruling other than, "I think that it is important that this matter get re-tried completely this time around . . ." RP 251. In part based on this inexplicable reversal, the County unsuccessfully requested that Judge Fennessy recuse himself. RP 493.<sup>12</sup>

Judge Fennessy initially reserved ruling on the request to exclude Dr. Morrison based on Malinak's discovery violations, noting he would need to consider the factors under *Burnet v. Spokane Ambulance*.<sup>13</sup> RP 247-48. The County again renewed its objections to Dr. Morrison testifying at the time of his testimony on June 23, 2017. RP 1221. Over the County's objections, Judge Fennessy allowed him to testify without analyzing the *Burnet* factors or stating his reasoning. *Id.*

Dr. Morrison opined on the value of necessary medical expenses Malinak incurred. RP 1229-30. On cross-examination, the County impeached Dr. Morrison's opinion by establishing:

- Dr. Morrison was the personal doctor and a friend of Malinak's attorney. RP 1233.
- Dr. Morrison was first asked to review the records and billings relating to Malinak's treatment approximately three weeks prior to trial. RP 1233.

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<sup>12</sup> Judge Fennessy had also previously refused to recuse himself when the County requested that he do so following his disclosure of prior familiarity with Tapken's attorneys. RP 15-24.

<sup>13</sup> *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

- Dr. Morrison had not surveyed the type of hospital charges claimed by Malinak either at the local or national level. RP 1234-35.
- Dr. Morrison had not compared the cost of medical treatment claimed by Malinak with similar information made available by the American Medical Association or the Department of Health. RP 1235.

Over the County's objection, the court then gave Instruction 31, which stated Malinak's claim against the county included "undisputed medical expenses in the amount of \$21,395.58." App. N, CP 2643 (emphasis added); RP 1621-23.

#### **6. Verdict and Second Appeal**

On July 3, 2017, the jury entered a verdict finding all parties were negligent and apportioning 60 percent fault to the County, 30 percent to Malinak, and 10 percent to Tapken. CP 2652-54. It found that Tapken's total damages were \$12,535,000 and Malinak's total damages were \$35,000. *Id.* The court entered judgment on the verdict on July 19, 2017, and the County filed its notice of appeal on July 28, 2017. CP 2659-81.

### **V. ARGUMENT**

The trial court's judgment should be reversed because its instruction on the County's duty to warn was contrary to law. By giving Instruction 14 and declining to give Instruction D-23, the court expanded the County's duty to warn to include conditions that were known and fully

visible to Malinak, rather than conditions that were misleading or hidden. In doing so, the court foreclosed the County from arguing its theory of the case and unduly emphasized the County's duty over Malinak's. By giving Instruction 13 the court also erred by allowing the jury to find that Tapken and Malinak's negligence could be excused or mitigated by a non-existent "sudden emergency."

The trial court further erred by admitting toxic and prejudicial evidence of prior accidents. In doing so, the trial judge disregarded the holding of this Court in its 2016 opinion, as well as the rulings of two superior court judges who presided over the case before him.

Finally, several of the trial judge's rulings regarding Malinak's claim for medical expenses require reversal of the judgment in Malinak's favor. On the first day of trial, the court inexplicably reversed the decision of the prior judge that the dismissal of Malinak's claim for medical expenses at the first trial was the law of the case and reinstated the claim. Further prejudicing the County, the court allowed Malinak's untimely disclosed expert to offer opinions regarding these expenses, and then improperly commented on the evidence by erroneously instructing the jury the expenses were "undisputed."

**A. The Court's Instructions Erroneously Expanded the County's Duty to Warn of Conditions that Were Open, Apparent, and Known and Precluded the County from Arguing Its Theory of the Case**

The propriety of a jury instruction is governed by the facts of a particular case. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Legal errors in jury instructions are reviewed *de novo*. *Id.* Jury instructions are sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law. *Id.* An erroneous instruction is reversible error if it is prejudicial to a party. *Id.*

When an instruction contains a clear misstatement of law, prejudice is presumed and is grounds for reversal unless it can be shown the error was harmless. *Id.* Additionally, instructions which “cover a point of law or the application of a rule as to grossly outweigh their total effect on one side and thereby generate an extreme emphasis in favor of one party to the explicit detriment of the other party” unfairly deprive the other party of a fair trial. *Brown v. Dahl*, 41 Wn. App. 565, 579-80, 705 P.2d 781 (1985); *see also* *Laudermilk v. Carpenter*, 78 Wn.2d 92, 100-01, 457 P.2d 1004 (1969); *Harris v. Groth*, 31 Wn. App. 876, 881, 645 P.2d 1104 (1982), *aff'd*, 99 Wn.2d 438, 663 P.2d 113 (1983).

The trial court's instructions regarding the County's duty to warn were a clear misstatement of the law on the central issue of the County's defense. This kind of error is presumed to have prejudiced a party. The County's duty is to maintain its roadways in a condition reasonably safe for ordinary travel. WPI 140.01; *Keller v. City of Spokane*, 146 Wn.2d 237, 254, 44 P.3d 845 (2002). When a dangerous condition on a County roadway exists, the County can discharge its duty by either repairing the condition or warning motorists of it. *Owens v. Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956); *Meabon v. State*, 1 Wn. App. 824, 827-28, 463 P.2d 789 (1970). A duty to erect warning signs exists only if (1) prescribed by law or (2) the situation is inherently dangerous or misleading. *Lucas v. Phillips*, 34 Wn.2d 591, 595, 209 P.2d 279 (1949).

Municipalities are generally held to a reasonableness standard consistent with that applied to private parties. *O'Neill v. City of Port Orchard*, 194 Wn. App. 759, 771, 375 P.3d 709 (2016). Thus, there is no duty to warn of a condition if the condition is open, apparent, or known to a road user. *Hansen v. Washington Nat'l. Gas Co.*, 95 Wn.2d 773, 778, 780, 632 P.2d 504 (1981). "[A] person cannot complain of a lack of warning of a danger of which he has knowledge." *Tanguma v. Yakima County*, 18 Wn. App. 555, 559, 569 P.2d 1225 (1977).

This limitation on the government's duty is analogous to the same limitation recognized for all types of private entities throughout negligence law. For example, the same limitation on the duty to warn applies to private contractors who carry out work on public roads<sup>14</sup>, product manufacturers<sup>15</sup>, and suppliers of chattels.<sup>16</sup> Washington courts recognize similar limitations on the duties landowners owe to their invitees and licensees for harm caused by conditions on the land.<sup>17</sup> The County's duty to warn is limited in the same way. Otherwise, it becomes an insurer for all imaginable acts of negligent motorists:

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<sup>14</sup> See, e.g., *Lee v. Sievers*, 44 Wn.2d 881, 882, 271 P.2d 699 (1954) ("The conditions being apparent and known to her, there was no necessity for signs and barriers."); *Lombardi v. Bates and Rogers Constr. Co.*, 88 Wash. 243, 250, 152 P. 1025 (1915) (where the condition of a street is its own warning, no further warning is required).

<sup>15</sup> See, e.g., *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 73, 684 P.2d 292 (1984)("[T]here is generally no duty to warn of obvious or known dangers.")

<sup>16</sup> See, e.g., *Mele v. Turner*, 106 Wn.2d 73, 80, 720 P.2d 787 (1986) (citing Restatement (Second) of Torts § 388 (1965)); *Lunt v. Spokane Skiing Corp.*, 62 Wn. App. 353, 359, 814 P.2d 1189 (1991)("[A] supplier of chattels does not have a duty to warn a user of obvious or known dangers.")

<sup>17</sup> See, e.g., Restatement § 342 (possessor of land liable to licensees for harm caused by dangerous condition on the land only if "licensees do not know or have reason to know of the condition and the risk involved."); Restatement (Second) Torts § 343 A (possessor of land not liable to invitees based on "any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."); see also *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 P.2d 621 (1994) (citing Restatement § 342); *McDonald v. Cove to Clover*, 180 Wn. App. 1, 6, 321 P.3d 259 (2014)(summary judgment to landowner affirmed where invitees knew of wet grass and there was no evidence that landowner should have expected they would fail to protect themselves from this condition.) See also, e.g., WPI 120.02.01 (owner of land had a duty of care to licensee and social guests only with respect to dangerous conditions "of which the [licensee][social guest] cannot be expected to have knowledge."); WPI 120.07(owner of land liable to business of public invitees for dangerous condition only where the owner "should expect that they will not discover or realize the danger, or will fail to protect themselves against it.")

We recognize that the duty to maintain a roadway in a reasonably safe condition may require a county to post warning signs or erect barriers if the condition along the roadway makes it inherently dangerous or of such character as to mislead a traveler exercising reasonable care, or where the maintenance of signs or barriers is prescribed by law. This duty does not, however, require a county to update every road and roadway structure to present-day standards. Nor does the duty require a county to “anticipate and protect against all imaginable acts of negligent drivers” for to do so would make a county an insurer against all such acts.

*Ruff v. King County*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995)(citations omitted).

Here, the court’s instructions regarding the County’s duty to warn were a misstatement of the law and precluded the County from arguing its theory of the case. Instruction 14 affirmatively states the County has a duty to warn, but it did not instruct the jury about the scope of this duty or under what circumstances it arises. This instruction contradicts a long history of municipal liability law by stating that Malinak’s “general knowledge” of roadway conditions – an extremely vague term that was not defined – did not affect the County’s duty to warn.

The court maintained that Instruction 14 was a correct statement of the law, but did not identify the legal authority supporting it. RP 1620. The court’s instruction appears to be a modified version of an instruction that was proposed by Malinak, which cited *Johanson v. King County*, 7 Wn.2d 111,

109 P.2d 307 (1941), and *Nakamura v. Jeffrey*, 6 Wn. App. 274, 492 P.2d 244 (1972).<sup>18</sup> However, these cases do not support the instruction.

In *Johanson*, King County widened a highway but failed to remove the yellow traffic stripe that had marked the center-line prior to widening. *Johanson*, 7 Wn.2d at 116. When the road re-opened, plaintiffs were involved in a head-on collision with a vehicle driving in the opposite direction. *Id.* at 117. The Supreme Court affirmed dismissal of the action because no evidence showed the offending driver had been misled by the old center-line striping. *Id.* at 123.

In *Nakamura*, the plaintiffs were the occupants of a favored vehicle in a two-car collision at an uncontrolled intersection who sued the City of Seattle based on the allegation that a fully visible garage, bulkhead and hedge located at the corner of the intersection created an “inherently dangerous” condition requiring a warning sign for the visual impairment to the disfavored driver. *Nakamura*, 6 Wn. App. at 275-76. Citing *Johanson*, the Court of Appeals affirmed the trial court’s dismissal of the plaintiffs’ case against the City because they presented no evidence that the condition had misled the disfavored driver. *Id.* at 276-77.

These cases simply reflect the rule that a municipality has no duty to erect warning signs unless either prescribed by law or the situation is

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<sup>18</sup> A copy of Malinak’s proposed instruction is attached as an appendix. App J (CP 2683).

inherently dangerous or misleading. *Johanson*, 7 Wn.2d at 119; *Nakamura*, 6 Wn. App. at 276 (citing *Johanson*, 7 Wn.2d at 122). A road is inherently dangerous or misleading only if it presents “an extraordinary or unusual condition.” *Lucas*, 34 Wn.2d at 591 (citing *Wessels v. Stevens County*, 110 Wash. 196, 198, 188 Pac. 490 (1920)). These are important limitations on the duty to warn reflected in *Johanson* and *Nakamura* that Instruction 14 did not recite. However, these cases have nothing to do with a motorist’s prior knowledge of a roadway condition or the effect such knowledge would have on a municipality’s duty to warn of it, as Instruction 14 provides.

Instruction 14 was wrong in stating the County had a duty to warn regardless of Malinak’s “general knowledge” of road conditions. Contrary to the instruction, whether a municipality owes a duty to warn of a condition does depend on a motorist’s knowledge of the condition. *Hansen*, 95 Wn.2d at 778; *Tanguma*, 18 Wn. App. at 559. Therefore, the trial court erroneously instructed the jury the County’s duty is far more expansive than the law provides.

The trial court compounded this error by also rejecting the County’s proposed instruction D-23, which would have correctly instructed the jury that the County has no duty to warn of conditions that were open, apparent, and known. In refusing to give proposed instruction D-23, the trial court reasoned the County was able to argue its theory of the case based on other

instructions relating to the effect of traffic control signals at the intersection. RP 1620-21. However, the other instructions given by the court did not cure the error in Instruction 14, nor did they allow the County to argue its theory that warning Malinak of a condition that was open, apparent, and known was not required by law.

For example, Instruction 22 simply stated Malinak's legal obligations at intersections and when encountering yield signs. Instruction 23 stated it was Malinak's duty to obey traffic control devices, and Instructions 24 and 25 described the County's authority to place those devices and their legal effect. These instructions defined the scope of Malinak's duty, but they did not define the scope of the County's duty.

Substantial evidence established Malinak was familiar with the Waverly Y intersection, including the right turn. Malinak told the investigating Deputy he chose the route because he liked it and that he had driven through it many times. Testimony by County's traffic engineer and its experts and physical evidence, including survey photographs, further demonstrated the right turn was visible to a motorist well in advance of the intersection. Evidence also showed that the existence of the bush and the fact that it limited visibility of the right turn were obvious to motorists approaching the intersection. This evidence was relevant not only to Malinak's breach of his own duty of care, but to the County's lack of a duty

to warn that a turn was ahead or that a sight obstruction existed. With this evidence, the jury would have been permitted to find – if given proper instructions – that the County owed no duty to warn.

The law that the County does not owe a duty to warn road users of alleged dangerous conditions on the roadway that are visible and known is an essential jury instruction when evidence shows both road user knowledge and a patently visible condition. The Court of Appeals recently reaffirmed the imperative that standard jury instructions on duty must be supplemented with instructions about specific elements of duty that are applicable to the particular facts of a case. *Hopkins v. Seattle Pub. School Dist. No. 1*, 195 Wn. App. 96, 108, 380 P.3d 584 (2016). Washington courts have already recognized that where substantial evidence shows that an allegedly dangerous condition was open and obvious, the jury must receive a special instruction stating the law on this issue. *Suriano v. Sears Roebuck & Co.*, 117 Wn. App. 819, 830, 72 P.3d 1097 (2003) (citing *Tincani*, 124 Wn.2d at 139). Because substantial evidence supported the County's defense the road condition at issue was open, apparent, and known, an instruction on the issue was required here.

Unfortunately, by giving Instruction 14 and refusing to give the County's proposed Instruction D-23, the court instructed the jury the visibility of the right turn and Malinak's familiarity with it were irrelevant to

whether the County owed or breached a duty to erect warnings. By telling the jury that the County's duty to warn outweighed any effect of Malinak's knowledge of the intersection, the court's instruction both misstated the law and had the prejudicial effect of emphasizing the County's duty over Malinak's, resulting in a comment on the evidence. *See, e.g., Brown*, 41 Wn. App. at 579-80. Malinak's attorney fully exploited this instructional error when, in closing arguments, he responded to evidence of Malinak's frequent use of the Waverly Y route as follows:

With respect to the route, the judge has instructed you that the duty of a governmental body to warn of a dangerous or unsafe road condition is not eliminated by general knowledge of a motorist of roadway conditions. That's the law.

RP 1704. The trial court's misstatement of the law is presumed to have prejudicially affected the jury's determination that the County was negligent and 60 percent at fault for the accident. Reversal of the judgment and a new trial is therefore required.

**A. The Court's Instructions Erroneously Allowed the Jury to Mitigate Tapken and Malinak's Negligence Based on a Non-Existent "Sudden Emergency"**

The court's decision to give Instruction 14 based on WPI 12.02 – "Duty of One Confronted by an Emergency" – was also harmful error. The "sudden emergency" doctrine applies only if (1) the emergency arose through no fault of the party seeking to invoke the doctrine, and (2) the

party was placed in a position of peril and faced a choice between at least two courses of action after the peril has arisen. *Seholm v. Hamilton*, 69 Wn.2d 604, 609, 419 P.2d 328 (1966). In deciding whether to give an emergency instruction, the trial court must determine whether the record contains the kind of facts to which the doctrine applies, and its determination is reviewed for an abuse of discretion. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

Not every occurrence – even if characterized by a party as sudden or creating an emergency – will constitute an emergency for purposes of the doctrine. The peril must require instinctive action. *Seholm*, 69 Wn.2d at 609. The doctrine does not apply in “cases of obscured vision, a factor well known to the parties claiming the benefit of the doctrine.” *Bell v. Wheeler*, 14 Wn. App. 4, 7, 538 P.2d 857 (1975). “In situations of obscured vision where sudden confrontations with peril are to be anticipated and there is evidence which indicates that the party claiming a sudden emergency was responsible for it, the doctrine is inappropriate.” *Zook v. Baier*, 9 Wn. App. 708, 514 P.2d 923 (1973).

For example, in *Mills v. Park*, 67 Wn.2d 717, 409 P.2d 646 (1966), the plaintiff motorists sued a defendant who rear ended their vehicle during a snow storm. *Id.* at 718-19. The court held that the lack of visibility from the snow did not create a “sudden emergency,” which caused the defendant to

crash: “we find no support for counsel’s argument that defendant’s view was *suddenly obscured*, prior to his approaching the plaintiffs’ car, thereby creating a sudden emergency. The defendant’s view of the road ahead was continuously obscured from a substantial distance prior to his seeing the plaintiffs’ car . . .” *Id.* at 720 (emphasis added). From this line of cases, it is clear that when a motorist knows his vision is obscured and does not reduce speed appropriately despite that knowledge, the motorist’s conduct will not be excused by the doctrine.

In the trial court, Respondents cited *Hegghund v. Nordby*, 480 Wn.2d 259, 292 P.2d 1057 (1956), a case involving a driver who departed an unfamiliar roadway on a steep hill, to argue that the obscured right turn could create a sudden emergency to justify Malinak’s invoking the doctrine. However, in *Hegghund*, the court found that the instruction was proper, because the road itself was hidden by leaves and the driver was unfamiliar with it. *Id.* at 262-63. Unlike the driver in *Hegghund*, here (1) Malinak knew of the Waverly Y intersection and had previously driven through it numerous times; (2) the road was not covered up and Malinak was given notice of the intersection by a “yield” sign that he saw and a “yield ahead” sign that was there to be seen; and (3) Malinak could see that the bush obscured the right turn but failed to exercise caution approaching it, even though he did not know how sharp it was.

A “sudden emergency” instruction is appropriate only if a rational trier of fact could find the emergency arose through no fault of the party seeking to invoke the doctrine. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 197, 668 P.2d 571 (1983). As the County maintained both at the beginning of the case and during its CR 50 motion, Malinak should have been held negligent as a matter of law by the court.<sup>19</sup> Because the accident resulted, at least in part, from his fault, no emergency instruction should have been given.

The testimony at the 2017 trial established Malinak misunderstood his legal obligations at an intersection controlled by yield signs under RCW 46.61.400 under RCW 46.61.190(3), just as Judge Cooney recognized during the trial in 2014.<sup>20</sup> Malinak testified that the yield-ahead sign – had he seen it – would “not particularly” alert him that he would need to slow down and be prepared to stop. RP 917. Rather, he stated, it “may require me to slow down. It’s not regulatory at this point.” *Id.*

Regardless of whether traffic is approaching, drivers must “drive at an appropriate reduced speed” at all intersections and curves. RCW 46.61.400. Thus, the maximum rate of speed is not always permitted by law.

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<sup>19</sup> During the County’s CR 50 motion, it requested that the claims against the County be dismissed and argued that “the evidence, even in the light most favorable to Mr. Malinak establishes that he did not exercise due care . . .” CP 1351-52.

<sup>20</sup> In granting the County’s CR 50 motion in 2014, Judge Cooney noted that Malinak had violated his duties under RCW 46.61.190, RCW 46.61.400, and RCW 46.61.006. CP 387.

*Robison v. Simard*, 57 Wn.2d 850, 852, 360 P.2d 153 (1961). A driver is negligent, even though he maintains a speed at or below the speed limit, where the circumstances require a lower speed. *See, e.g., Ashley v. Ensley*, 44 Wn.2d 74, 265 P.2d 829 (1954). Contrary to Malinak's understanding of the rules of the road, when a driver approaches an intersection controlled by yield signs, the law also expressly requires the driver to slow down to such a degree that he must be prepared to stop. RCW 46.61.190(3). Additionally, the law required that Malinak exercise due care to keep his vehicle under control. RCW 46.61.445; *Radosevich v. County Comm'rs*, 3 Wn. App. 602, 608-09, 476 P.2d 705(1970).

The "sudden emergency" Malinak claims caused him peril resulted, at least in part, from his failure to react to a yield-ahead sign, a yield sign, road striping, and other visual cues that should have alerted him to the existence of an intersection. Additionally, any sight distance limitations of the right turn resulting from the hawthorn bush were detectable well before the intersection such that Malinak could account for them.

This is precisely the type of situation that the court in *Zook* held cannot be excused by the doctrine: "[W]hen there is evidence that indicates that the sudden emergency came about because of the party seeking to excuse his acts *after* the confrontation with the emergency, that party may not do so when his own failure to foresee the danger permitted the

emergency to occur.” *Zook*, 9 Wn. App. at 714. A “sudden emergency” doctrine instruction was inappropriate here, because the accident resulted, at least in part, from Malinak’s apparent failure to understand that if the sharpness of a turn is obscured, a motorist must slow to a speed that will account for any possible sharpness.

Even if the court determines that the emergency doctrine properly applied to Malinak, it did not apply to Tapken. Where the emergency doctrine properly applies only to one party, it is error for the court to provide a general instruction that might mislead the jury into applying it to other parties. *Heinz v. Blagen Timber Co.*, 71 Wn.2d 728, 732-33, 431 P.2d 173 (1967)(citing *DeKoning v. Williams*, 47 Wn.2d 139, 141-42, 286 P.2d 694 (1955)). “[T]he claimed emergency must comprehend the availability of and possible choice between courses of action after the peril arises in order for the doctrine to be applicable.” *Bell*, 14 Wn. App. at 8 (citing *Seholm*, 69 Wn.2d at 609.) “When . . . there were not alternatives available but only an instant of time . . . for a single instinctive reaction, an emergency doctrine instruction [is] . . . improper.” *Zook*, 9 Wn. App. at 714.

Here, there was no evidence or testimony from which the jury could conclude that Tapken’s negligence – failing to follow the leans of Malinak as his passenger – resulted from her having to choose between different courses of action to avoid peril. Her only reasonable course of action was to follow

Malinak's leans. The mere fact that Tapken had to respond quickly is insufficient to invoke the emergency doctrine.

The jury determined both Malinak and Tapken *were* negligent despite being instructed on the emergency doctrine. However, Instruction 13 would affect the jury's calculus with respect to Malinak and Tapken's proportional fault: "In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages . . ." RCW 4.22.070 (1). This determination, which involves a comparison of the fault of the three parties, required the jury to consider "both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and damages." RCW 4.22.015.<sup>21</sup> Had the jury not been instructed negligence of Tapken and Malinak's conduct could be mitigated or excused by the "sudden emergency" of their accident situation, the jury would need to assign more fault to them.

**B. The Trial Court Erred By Admitting Evidence of Prior Accident History**

A trial court's ruling on the admission of evidence or a motion *in limine* is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). "[A] court 'would necessarily abuse its

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<sup>21</sup> For example, "fault" includes conduct that is negligent, reckless, or for which a party is strictly liable. *Tegman v. Accident & Med. Inves., Inc.*, 150 Wn.2d 102, 111, 75 P.3d 497 (2003)(citing RCW 4.22.070 (1)).

discretion if it based its ruling on an erroneous view of the law.” *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)(quoting *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054)(1993)). Moreover, under the law of the case doctrine, a trial court does not have discretion to disregard or contradict a holding of the appellate court. *Lodis v. Corbis Holdings*, 192 Wn. App. 30, 57, 366 P.3d 1246 (2015).

“A decision by the appellate court on appeal as to every question that was determined on appeal and as to every question which might have been determined becomes the law of the case . . .” *Bailie Communications v. Trend Business Sys.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991) (citing *Miller v. Sisters of St. Francis*, 5 Wn.2d 204, 207, 105 P.2d 32 (1940)). In the prior appeal, this Court affirmed Judge Cooney’s exclusion of prior accident history, because the County admitted it had notice of the relevant condition – the hawthorn bush: “The relevant notice is notice of the alleged dangerous condition – which the County admitted – not whether the condition actually was dangerous.” App. A, *Tapken v. Spokane County*, No. 32909-7, slip op. at 14 (Wash. Ct. App. Jan. 12, 2016)(citing *Tanguma*, 18 Wn. App. at 555).<sup>22</sup> This conclusion was

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<sup>22</sup> The only caveat to this court’s holding regarding exclusion of prior accident history evidence was contained in the following footnote: “If the County’s evidence leaves the jury with the false impression that there has never been any similar accidents at

supported by longstanding case law: “Unless the existence of the hazard or knowledge of its existence is in issue, there is no reason for the collateral issues of prior accidents to be interjected into the case.” *Hinkel v. Weyerhaeuser Co.*, 6 Wn. App. 548, 555, 494 P.2d 1008 (1972) (citing *Tonning v. Northern Pac. Ry.*, 180 Wash. 374, 39 P.2d 1002 (1935)); *see also Wuthrich v. King County*, 185 Wn.2d 19, 29, 366 P.3d 926 (2016) (“[T]o the extent legal causation includes a notice component, it is notice of the *condition*.”)

Completely contradicting the court’s earlier holding, on remand the trial court impermissibly conditioned the exclusion of accident history evidence on the County admitting not only that it had notice that the bush obstructed the yield sign and the right turn, but that it also had notice this obstruction rendered the condition dangerous. This ruling directly violated this Court’s earlier opinion and the law of the case doctrine. “Upon the retrial, the parties and the trial court [are] all bound by the law as made by the decision on the first appeal.” *Lodis*, 192 Wn. App. at 57 (quoting *Bunn v. Bates*, 36 Wn.2d 100, 103, 216 P.2d 741 (1950) and *Baxter v. Ford Motor Co.*, 179 Wash. 123, 127, 35 P.2d 1090 (1934)).

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the intersection, the trial court may reevaluate the relevance and admissibility of the substantially similar accidents.” App. A., *Tapken v. Spokane County*, No. 32909-7, slip op. at 14-16, fn. 5 (Wash. Ct. App. Jan. 12, 2016).

Given that the trial court had no discretion to decline to follow earlier opinion of this court, its admission of the evidence was an error of law.

Even looking past the trial court's decision to disregard the Court of Appeals' holding, the trial court's admission of the evidence was substantively wrong, because the evidence did not meet the fundamental prerequisite of substantial similarity: "Because collateral issues are thereby interjected into a case, as a predicate for admission, there must be a substantial similarity shown between the proffer and the case at bar." *Blood v. Allied Stores Corp.*, 62 Wn.2d 187, 189, 381 P.2d 187 (1963); *see also Hinkel*, 6 Wn. App. at 555 (recognizing limited admissibility of prior accidents due to "the prejudicial effect such testimony has").

The County's motion *in limine* pointed out the extreme lack of similarity between the three prior accidents and the one at issue in this case:

- The February 18, 1995 accident – which occurred sixteen years earlier – involved an abandoned vehicle that had rolled over. Thus, neither the condition of the roadway, the weather conditions at the time of the roll-over, nor the driver's physical and mental state were ever determined. CP 1932-36.
- The December 12, 2007 accident involved a one-car roll-over collision that occurred when it was foggy and as a result of sliding on snow and ice on the roadway. CP 1945-49. No weather-related visibility or driving conditions were involved in the September 14, 2011 accident involving Tapken and Malinak.

- The September 5, 2009 accident involved a rolled-over vehicle travelling through the intersection at 60 miles per hour – more than 15 miles per hour over the posted 45 mile per hour speed limit. CP 1938-43.<sup>23</sup>

In summary, this court should reverse the trial court's judgment with instructions on remand that none of the prior accidents were admissible. The trial court admitted the evidence for an improper purpose in clear contradiction of this Court's earlier opinion and without a showing that the accidents were sufficiently similar to the accident involving Tapken and Malinak.

**C. The Judgment Awarding Malinak Damages Based on His Medical Expenses Must Be Reversed**

The trial judge's rulings regarding Malinak's reinstated claim for medical expenses also require reversal of the judgment in his favor. A court's decisions regarding the reinstatement of a claim and the exclusion of evidence for discovery violations are reviewed for abuse of discretion. *Hubbard v. Scroggin*, 68 Wn. App. 883, 889, 846 P.2d 580 (1993) (reinstatement of a claim); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)(discovery sanctions). Legal errors in jury instructions are reviewed *de novo*. *Fergen*, 182 Wn.2d at 803.

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<sup>23</sup> The driver in the 2009 accident, Jared Freeman, also testified that he believed that his collision was caused by gravel on the roadway: "[I]f the gravel would not have been on the roadway, I would have been able to stop in time without going over the road." RP 666-67, 679. No witness testified that gravel played any part in causing the September 14, 2011 accident involving Tapken and Malinak.

A defendant must have a fair opportunity to rebut a reinstated claim that was previously dismissed. *Green v. Hooper*, 149 Wn. App. 627, 638, 205 P.3d 134 (2009); *see also Hubbard*, 68 Wn. App. at 889. Additionally, when a party brings a motion for exclusion of evidence based on discovery violations, the court must analyze whether the failure to obey a discovery order was willful and substantially prejudiced the opponent's ability to prepare for trial. *Burnet*, 131 Wn.2d 484. Here, the trial judge offered no explanation for *sua sponte* reversing Judge Plese's order despite it being the law of the case. *Bailie Communications*, 61 Wn. App. at 160 (“[E]very question which might have been determined [on appeal] becomes the law of the case . . .”). Nor did he explain why he allowed Dr. Morrison to testify despite Malinak's discovery violations.

The County had no time to depose Dr. Morrison, much less retain a rebuttal expert within the discovery period or before trial. More importantly, the County relied upon Judge Plese's decision that Malinak's claim for medical expenses could not be reintroduced after the prior appeal, and it therefore had no reason to discover Dr. Morrison's untimely opinions regarding an issue that had been dismissed by the court. Reinstating the claim on the first day of trial and allowing untimely disclosed witness testimony was a clear abuse of discretion.

Dr. Morrison's opinions about the reasonableness of Malinak's medical expenses and necessity of treatment were impeached on the basis of his bias and his lack of relevant knowledge. Instruction 31, which instructed the jury that the amount of the expenses was "undisputed," was an error of law. It contradicted Instruction 5 (WPI 2.10), which correctly reflects that the jury is never required to accept the opinion of an expert witness. "The weight, if any, to be given such testimony is for the jury to determine." *Sigurdson v. Seattle*, 48 Wn.2d 155, 165, 292 P.2d 214 (1956). Instructions deciding factual issues as a matter of law are an unconstitutional comment on the evidence and presumed to be prejudicial. *State v. Levy*, 156 Wn.2d 709, 722-25, 132 P.3d 1076( 2006)(citing WASH. CONST. art. IV, §16). Therefore, the verdict awarding Malinak medical expenses must be reversed.

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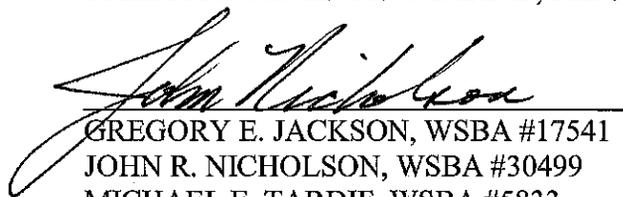
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## VI. CONCLUSION

For all the forgoing reasons, the County respectfully requests that the Court of Appeals reverse the judgment of the trial court and remand for a new trial.

RESPECTFULLY SUBMITTED this 29th day of January, 2018.

FREIMUND JACKSON & TARDIF, PLLC

A handwritten signature in cursive script, appearing to read "John R. Nicholson", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

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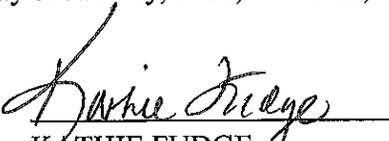
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I declare under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 29th day of January, 2018, at Seattle, Washington.

  
KATHIE FUDGE

***Tapken v. Spokane County, et. al.***  
**COA Case No. 354733**

**INDEX TO APPENDICES TO  
APPELLANT SPOKANE COUNTY'S OPENING BRIEF**

<b>Appendix</b>	<b>Description</b>
<b>A</b>	Unpublished Slip Opinion, <i>Tapken v. Spokane County, et. al.</i> , No. 32909-7-III (Wash. Ct. App. Jan. 12, 2016).
<b>B</b>	Exhibit P-38, Enlargement: Ed Stevens, PE, photo of subject roadway, 8/8/2012, DSCN1175
<b>C</b>	Exhibit P-48, Ed Stevens, PE, photo of subject roadway, 8/8/2012, DSCN1185
<b>D</b>	Exhibit P-51, Ed Stevens, PE, photo of subject roadway, 8/8/2012, DSCN1188
<b>E</b>	Exhibit P-60, Ed Stevens, PE, photo of subject roadway, 8/8/2012, DSCN1197
<b>F</b>	Exhibit P-92, Map Showing Roads Spokane-Waverly Vicinity
<b>G</b>	Exhibit D-559, Enlargement: Stevens Photo DSN1183
<b>H</b>	Excerpt of Edward Stevens Testimony, RP 810-13
<b>I</b>	Court's Instruction 14 (CP 2625)
<b>J</b>	Malinak's Proposed Instruction 1 (CP 2683)
<b>K</b>	County's Proposed Instruction D-23 (CP 2343)
<b>L</b>	Court's Instruction 13 (CP 2624)
<b>M</b>	Order By Judge Annette Plese entered on December 12, 2016 (CP 653-63)
<b>N</b>	Court's Instruction 31 (CP 2643)

# Appendix A



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roadway. Malinak asserted a similar cross-claim against the County.<sup>1</sup> At the conclusion of plaintiffs' evidence to the jury, the County moved for judgment as a matter of law on the issues of liability and proximate cause. The trial court granted the County's motion. The trial court determined as a matter of law that the County was not negligent; but even if it was, that its negligence was not the proximate cause of plaintiffs' injuries.

Tapken and Malinak appeal. They assert various errors. We agree with only one of their assertions. We hold that the trial court erred by granting the County's motion for judgment as a matter of law. We therefore reverse and remand for a new trial.

#### FACTS

In the summer of 2011, Malinak and Tapken met while working at Red Robin in downtown Spokane. At the time, Malinak had owned his motorcycle for a few months and had previously owned a similar bike. When Tapken learned Malinak had a motorcycle, she told him that she enjoyed taking rides and had frequently ridden with her father and ex-boyfriends. Tapken knew how to ride as a passenger, including that she should match and not resist the operator's leaning of the motorcycle on turns. The two arranged to take a ride together, and the first time out was uneventful.

On their second ride, they left Spokane to drive on the Palouse. The weather was

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<sup>1</sup> The parties at trial and in their briefs refer to Tapken and Malinak as plaintiffs.

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sunny and approximately 60 degrees. The two rode to Fairfield and then took Prairie View Road out of town toward Waverly, driving at approximately the speed limit of 45 m.p.h.

Just before Waverly, the road forks into a “Y” intersection, known as the “Waverly Y.” It is a triple intersection, in that each of the three intersecting roads splits into two legs as they converge, forming a triangle of unused roadway at the convergence of the intersection. The convergence of these three roads creates a need to regulate the traffic. Spokane County elected to regulate the converging traffic with various signs. Specifically, for a driver coming from the north and driving toward Waverly, there is a yield ahead warning sign 800 feet from the intersection, and two yield signs in the intersection—one for a driver veering right and another for a driver veering left. As a driver passes the yield ahead warning sign (800 feet from the intersection), a driver sees a large hawthorn bush located on the right side of the road several hundred feet toward the intersection. Because of its close proximity to the road and the contour of the road bending to the left near it, the large hawthorn bush obscures both the yield sign for traffic veering right and a portion of the road to the right. This makes it difficult for a driver approaching from the north to gauge the sharpness of both the right and the left turn

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For ease of reference, we will also.

choices until the driver is much closer to the large bush and intersection. There is no sign warning a driver to reduce speed below the posted speed of 45 m.p.h.

As he approached the intersection from the north, Malinak slowed to 35-40 m.p.h., anticipating he would veer to the right.<sup>2</sup> Malinak began to lean right. But almost immediately, he realized that the right turn was sharper than he had earlier perceived. Believing that he was going too fast to veer right, he braked and leaned left, trying to make the more gradual left turn. Tapken did not follow the lean, resulting in the motorcycle running straight through the intersection, traveling in the air for over 50 feet and into a quarry. Tapken was severely injured and permanently paralyzed. She initiated the present action.

At trial, the plaintiffs presented testimony from three County employees about the design and maintenance of the road, followed by testimony from three experts and then testimony from Malinak. Of the experts, Andrew Harbinson testified first as a collision analyst. Although he was unable to reconstruct the accident because there was insufficient physical evidence at the scene, he did state that there was no evidence of excess speed. He testified that the motorcycle travelled approximately 56 feet in the air

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<sup>2</sup> Because of her head injury, Tapken does not remember the events of the day and did not testify at trial. Since there were no other witnesses, Malinak was the only source of information about the events that transpired.

before landing off the roadway and therefore was traveling between 35 and 43 m.p.h. when it departed from the roadway.

Next, the plaintiffs presented testimony from Dr. Richard Gill, a human-factors engineering consultant. He testified how a reasonable motorist would respond to the intersection. In his opinion, the intersection was misleading and needed to be reconfigured. Primarily he took issue with the triple-“Y” having three points where traffic crosses, one of which has no form of traffic control. He then testified that because there were speed warnings around previous curves, a driver would have expected there to be a speed warning here if the maximum safe speed was less than the speed limit. Finally, he testified that the yield ahead sign was too far from the intersection, and that people were likely to forget about it in the 12 seconds between seeing the yield ahead sign and seeing the yield sign near the intersection.

After this, the plaintiffs presented a videotaped deposition of Transportation Engineer Edward M. Stevens. He testified that a yield sign is an inappropriate sign to control speed and that a driver would not have been able to see the yield sign to the right in time to actually yield. He also calculated that the reasonable safe speed for a right turn there was approximately 20 m.p.h.

At the conclusion of the plaintiffs' evidence, the County orally moved for

judgment as a matter of law, both on liability and on proximate cause. The trial court looked to the duties imposed on drivers under chapter 46.61 RCW: to slow when approaching a yield sign, to drive at an appropriate reduced speed when approaching and crossing an intersection, and to see what would be seen by a person exercising ordinary care. The trial court then looked at testimony establishing that yield signs are only used at intersections, and that any reasonable person seeing a yield ahead sign would expect an intersection and for those duties under chapter 46.61 RCW to apply. Because Malinak testified that he did not believe a yield sign imposed any obligation to slow down absent conflicting traffic, the trial court determined as a matter of law that the obscured yield sign and corner did not contribute to the accident. The court also stated that there was insufficient evidence that the County violated its duty to exercise ordinary care in the design and maintenance of its public roads. At best, the evidence allowed the jury to speculate as to breach and causation. For these reasons, the trial court granted the County's motion for judgment as a matter of law. Tapken and Malinak appeal.

#### ANALYSIS

1. *Standard of review: Evidence must be viewed most favorable to the nonmoving party*

“When reviewing a trial court’s decision on a motion for judgment as a matter of law, the appellate court applies the same standard as the trial court and reviews the grant

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or denial of the motion de novo.” *Alejandro v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007). Such a motion must be granted ““when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.”” *Id.* (quoting *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003)).

2. *Whether the trial court erred when it granted the County’s motion for judgment as a matter of law*

To prevail on a claim of negligence against the County, the plaintiffs were required to show a duty owed, breach of that duty, a resulting injury, and that breach proximately caused that injury. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (quoting *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998)). Only breach of duty and proximate cause are issues on appeal.

a. *Breach of duty*

A county owes a duty generally to design and maintain roads in a reasonably safe condition for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 246, 44 P.3d 845 (2002). Whether roadway conditions are reasonably safe for ordinary travel, or instead are inherently dangerous or misleading, is usually a question of fact. *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). In *Owen*, a train hit a car blocked by traffic on a railroad crossing, killing its two passengers. *Id.* at 784-85. Jean

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Owen, individually and as personal representative of the estates of the deceased persons, brought suit against the railroad and the City of Tukwila. *Id.* at 783. Owen settled with the railroad. *Id.* Subsequently, the city moved for summary judgment, and argued that it complied with all statutes, ordinances, and the manual on uniform traffic control devices. *Id.* at 785. The trial court granted the city's motion. *Id.* In reversing, the *Owen* court noted "'issues of negligence and proximate cause are generally not susceptible to summary judgment.'" *Id.* at 788 (quoting *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)). Moreover, violation of a statute, regulation, or other positive enactment need not be shown to establish liability, although compliance may help in defining the scope of a duty for providing reasonably safe roads. *Id.* at 787. "A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon." *Id.* at 788. "[T]he existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings." *Id.*

The *Owen* court then reviewed the various conditions present that contributed to the collision. These conditions included high traffic volume, a crown in the roadway, and traffic signals located just beyond the tracks, which combined to cause frequent queuing of vehicles on the tracks. *Id.* at 784, 789. The *Owen* court then reviewed the testimony

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from Owen's expert, who opined that the conditions were unsafe and described how the conditions could be mitigated. *Id.* at 789-90. The *Owen* court reversed the trial court's order of dismissal, concluding that "reasonable minds may differ as to whether the roadway was reasonably safe for ordinary travel, inherently dangerous, or misleading, and whether appropriate corrective action has been taken." *Id.* at 790.

Here, the presence of the large hawthorn bush that obscured the roadway to the right and one of the two yield signs created a situation that arguably required the County to do more than simply comply with positive regulations. Plaintiffs presented evidence that a driver approaching from the north would be unable to appreciate the sharpness of the road, which veered right, until too late.<sup>3</sup> Plaintiffs also presented evidence that the yield ahead sign, 800 feet from the intersection, would not satisfactorily warn of the degree to which a person might be required to reduce his or her speed to safely veer right. Plaintiffs also presented evidence of how the intersection could be easily made safer. We conclude that plaintiffs presented substantial evidence that the County breached its duty to design and maintain a safe intersection.

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<sup>3</sup> The County argues that the hazards were open and apparent, and that Malinak knew of the hazards. Viewing the evidence most favorably to the plaintiffs, however, creates issues of fact of how familiar Malinak was with the intersection, how clearly and quickly a reasonable driver should perceive the sharp right curve, and whether Malinak's failure to slow beyond his already reduced speed was reasonable in light of what a

b. *Proximate cause*

Proximate cause has two elements: cause in fact and legal causation. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998). Legal causation involves a legal determination of whether liability should exist. *Petersen v. State*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983). Only the first element, factual causation, is at issue here.

Substantial evidence of factual causation exists if the jury could find that, but for the defendant's actions, the plaintiff would not have been injured. *Schooley*, 134 Wn.2d at 478. "Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury." *Id.* Causation need not be proved to a certainty. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947) (quoting *Home Ins. Co. of New York v. N. Pac. Ry.*, 18 Wn.2d 798, 802, 140 P.2d 507 (1943)). It is sufficient that plaintiff's evidence allows a jury to find that the harm more probably than not happened in such a way that defendant's negligence played a role. *Id.* (quoting *Home Ins.*, 18 Wn.2d at 802). An accident can have more than one proximate cause. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 676, 709 P.2d 774 (1985).

The trial court determined that plaintiffs failed to establish proximate cause

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reasonable person should perceive.

because Malinak testified that he only slows for a yield sign if there is converging traffic, and because there was no converging traffic, the yield sign hidden by the hawthorn bush could not have proximately caused Malinak's failure to slow down. The plaintiffs note that the hawthorn bush obscured both the yield sign to the right *and the sharpness of the right hand turn*. They persuasively argue evidence establishes that Malinak would have slowed more had he been able to perceive the sharpness of the right turn earlier. We hold that plaintiffs presented substantial evidence of proximate cause.<sup>4</sup>

3. *Whether the trial court abused its discretion in excluding evidence of prior accidents at the "Waverly Y"*

During discovery, the plaintiffs developed evidence of over two dozen prior accidents near the "Waverly Y" in less than 20 years—all involving single vehicles leaving the roadway. Plaintiffs contended that the number of prior road-departure

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<sup>4</sup> The dissent concedes that "the cause of the accident was the failure to slow sufficiently to make the turn." Dissent at 1. It then concludes that the obstruction that prevented Malinak from seeing the sharpness of the curve was not a proximate cause of his failure to slow sufficiently.

One does not need to take judicial notice of the fact that drivers routinely slow to safely navigate a sharp curve when the sharpness of the curve is apparent. A jury is entitled to decide whether Malinak, had the intersection been unobstructed so he could have earlier seen the sharpness of the curve, would have sufficiently slowed or whether he would have launched himself and his passenger off the road. Because our standard of review requires us to assume the facts and inferences in the light most favorable to Malinak, we must presume that he would have done what almost every other driver does when perceiving a sharp curve: slow down sufficiently rather than wreck.

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accidents at that location, regardless of the causes or the similarity of those accidents to theirs, was admissible to establish the County should have conducted a road study.

Tapken made an offer of proof that the County's own road standards manual required the County to study any location with a history of road departures and mitigate the problem.

However, the plaintiffs fail to provide authority or argument that the County's failure to perform a study violates a duty owed to them. We therefore decline to review this issue.

*Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002); RAP 10.3(a)(6).

In addition, the plaintiffs sought admission of historical accidents that were substantially similar to theirs at the "Y" intersection to establish that the County was on notice not only of the conditions near the intersection, but also that those conditions were dangerous. The County argued that evidence of even substantially similar accidents was not admissible because it admitted it had notice of the conditions near the intersection, specifically that the hawthorn bush obscured one of the yield signs.

Prior to trial, the trial court ruled that evidence of three substantially similar accidents would be admissible, but only if the County presented evidence that it lacked notice that the intersection was dangerous. The trial court later modified its ruling and excluded all evidence of prior accidents. The trial court explained:

[P]rior collisions don't decide whether or not the roadway was unsafe. That's for the experts to decide. Both sides have their experts talking about

how safe the condition of the roadway is, which is the ultimate question, and all these accidents don't help the jury understand that at all.

When I went through all the accidents that were presented, some of them were deer, some of them were snow and ice, some were at night, some were off the roadway. There's really no uniformity as to how these accidents occur.

So at this point once and for all I'm going to decide this issue. There won't be any testimony regarding prior accidents. They're not at all relevant to whether or not this was properly designed and maintained, and any such testimony would be prejudicial.

Report of Proceedings (RP) at 866-67.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). A trial court abuses its discretion when it renders a decision that is “manifestly unreasonable or based upon untenable grounds or reasons.” *Id.* at 669 (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). “A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.” *Id.* (quoting *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009)).

Prior to determining whether evidence was properly excluded as irrelevant, we examine the nature of the notice that the plaintiffs must establish. A municipality is deemed to have notice of an unsafe condition created by its employees or agents. *Wright v. City of Kennewick*, 62 Wn.2d 163, 167, 381 P.2d 620 (1963). But to establish liability

for a condition not created by the municipality, the plaintiff must prove that the municipality knew or should have known of the condition before the accident. *Russell v. City of Grandview*, 39 Wn.2d 551, 554-55, 236 P.2d 1061 (1951). The dangerous condition alleged here is the large hawthorn bush and how it obscures the intersection so that a person veering right could not gauge the severity of the turn until too late to slow to a safe speed. This is a condition not created by the County. Therefore, unless admitted by the County, the plaintiffs were required to establish knowledge of the condition.

Prior to trial, the County admitted that it had notice that the large hawthorn bush obscured the intersection, although it disputed that this condition was dangerous. At trial, the County equivocated somewhat. It disputed the degree to which the hawthorn bush actually obscured the yield sign and the intersection, but it certainly did not claim to have lacked notice of the condition.

The trial court correctly concluded that the prior accidents were irrelevant. The relevant notice is notice of the alleged dangerous condition—which the County admitted—not whether the condition actually was dangerous. *See Tanguma v. Yakima County*, 18 Wn. App. 555, 562-63, 569 P.2d 1225 (1977). Under these facts, the County's admission of notice was sufficient.<sup>5</sup> We hold that the trial court did not abuse

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<sup>5</sup> If the County's evidence at trial leaves the jury with the false impression that

its discretion in excluding evidence of prior accidents.

4. *Whether the trial court abused its discretion in excluding certain expert testimony*

Plaintiffs argue that the trial court erred by excluding Mr. Harbinson's testimony concerning causation of the accident. Tapken's counsel asked Mr. Harbinson his opinion of the particular cause of the accident. Mr. Harbinson answered, "I've got three." RP at 781. "The proximate cause of the collision is speed." RP at 781. Defense counsel objected on the grounds that "[i]t's improper for any witness to talk about the proximate cause of an accident," arguing that proximate cause is "beyond the expertise of an expert witness." RP at 781-82. Meanwhile, Tapken's counsel clearly believed that the objection was to the witness testifying to causation generally, pointing to opinions Mr. Harbinson had previously given in his deposition. The trial court ruled using the unreferenced demonstrative pronoun "that," and concluded that "that" was an ultimate issue of fact reserved for the jury. RP at 781-82. While the County believes "that" referenced proximate cause, plaintiffs believe "that" referenced causation in general. This uncertainty was never resolved because following the ruling, Tapken's counsel moved on to a separate line of questioning. However, because the exclusion is premised on the objection, and the objection was to proximate cause—not causation in general—we deem

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there has never been any similar accidents at the intersection, the trial court may

it unnecessary to review plaintiffs' assigned error.

5. *Whether the trial court erred in denying Tapken's motion for partial summary judgment*

Tapken argues that the trial court erred in denying her motion for partial summary judgment, which sought to dismiss the County's claim that she was contributorily at fault for her injuries. Tapken's argument is premised on her assertion that there was insufficient time for her to react to Malinak's sudden attempt to turn left instead of right, and if she failed to lean left, or even if she leaned further right, her act was not volitional and therefore not negligent. Alternatively, Tapken argues that the County has no evidence what she did, and therefore its claim that she was contributorily at fault must fail because it is pure speculation.

Decisions on summary judgment are reviewed de novo. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Evidence is reviewed in the light most favorable to the nonmoving party, and summary judgment is appropriate where there is not substantial evidence or a reasonable inference to support a finding of liability. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484-85, 258 P.3d 676 (2011).

Preliminarily, the County cites *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988), and argues that this court may not review a denial of summary judgment after

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reevaluate the relevance and admissibility of the substantially similar accidents.

No. 32909-7-III

*Tapken v. Spokane County*

a trial on the merits. *Johnson* is inapposite. Here, there has not been a trial on the merits; rather, the trial court granted the County's motion for judgment as a matter of law.

In its substantive response to this issue, the County quotes a portion of Detective David Thornburg's interview with Malinak at the hospital, recorded in his accident report.

[Malinak] started to lean right to make a right turn and so did [Tapken]. He then decided to go left instead, so he leaned back to the left, but [Tapken] leaned even farther right. [Malinak] stated this made the bike unstable and they ended up going straight off the road.

Clerk's Papers (CP) at 691. The County then takes issue with applying the rule that allows disfavored drivers a reasonable reaction time to this case. The County argues that reasonable care in the context of experienced motorcycle riders and passengers "requires [both] riders to closely mirror the movements of each other so they move in synch." Resp't's Br. at 47.

First, neither we nor the County need speculate on why the motorcycle did not veer left once Malinak leaned left after deciding to veer that direction: Tapken did not match his movement. Moreover, construing the evidence in the light most favorable to the County, the nonmoving party at summary judgment, we must accept the truth of Malinak's statement to the deputy: "[Tapken] leaned even farther right." CP at 691. Again, assuming these facts in the light most favorable to the County, if Tapken had sufficient time to lean farther right, she also may have had sufficient time to lean to the

No. 32909-7-III

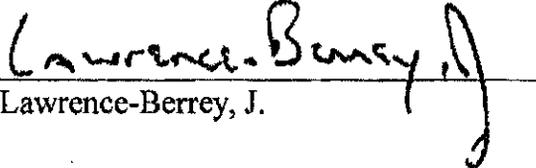
*Tapken v. Spokane County*

left. Despite Malinak's sudden and unexpected weight shift to the left, it is a genuine issue of material fact what a reasonable motorcycle passenger would have done in Tapken's situation. Just as the reasonableness of the County's conduct must be evaluated by a jury, so must Tapken's and Malinak's. The trial court did not err in denying Tapken's motion for partial summary judgment.

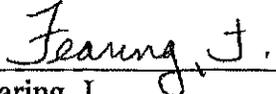
#### CONCLUSION

Although we affirm the trial court's other challenged rulings, we reverse the trial court's order granting the County's motion for judgment as a matter of law and remand for trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Lawrence-Berrey, J.

I CONCUR:

  
Fearing, J.

KORSMO, J. (dissenting) — While the majority nicely analyzes the appellants' theory of the case, it misses the fact that led the trial court to dismiss this action—the appellants did not prove that the supposedly dangerous interchange caused the accident. The trial court concluded, and I agree, that the evidence did not support their case. Since we should be affirming that ruling, I respectfully dissent.

Viewing the evidence in the light most favorable<sup>1</sup> to the appellants, as the trial court did and as we must do at this juncture, shows that while there was a factual dispute whether the intersection design was dangerous, the cause of the accident was the failure to slow sufficiently to make the turn. Mr. Malinak and Ms. Tapken never showed that it was some feature of the intersection that led to the failure to sufficiently navigate the turn. If, for instance, the motorcycle had struck another vehicle due to the design, the appellants would have a case. However, the accident occurred because Mr. Malinak treated the intersection as if it were a mere curve in the road subject to the posted highway speed rather than an intersection.<sup>2</sup>

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<sup>1</sup> Two otherwise salient facts that therefore are not relevant are that (1) Mr. Malinak had driven this road on several prior occasions and (2) that he realized when entering the turn that Waverly, his destination, was to the left, not the right.

<sup>2</sup> Particularly telling is this testimony: "Well, what I understand about this roadway, and I guess any roadway but particularly this roadway, is that any, anytime that I was supposed to slow down for a curve, I was told to. But, you know, whenever I was meant to deviate from the posted speed limit, also I was told which direction I would have to go." Report of Proceedings (RP) at 1015.

In examination by his own attorney, Mr. Malinak agreed that he was driving the posted speed limit and, when shown other types of road signs from this highway such as “curve ahead” or cautionary speed posting, agreed that he would slow down in accordance with the dictates of those signs. RP at 1015-1016. Here, he did not see the “yield ahead” sign. RP at 965. He also believed that a yield sign did not indicate an upcoming intersection and meant slow down only if needed. RP at 1019. Since he did not see any other traffic, he did not slow down when he saw the yield sign on his left. RP at 1117-1118. His misunderstanding of his obligations when approaching an intersection led to this tragic accident.

As the trial judge correctly analyzed, yield signs govern intersections, not curves. RCW 46.61.180; .190. All drivers are required to drive at a speed that is “reasonable and prudent under the conditions.” RCW 46.61.400(1). A driver approaching a yield intersection has an obligation to slow and/or stop:

The driver of a vehicle approaching a yield sign shall in obedience to such sign slow down to a speed reasonable for the existing conditions and if required for safety to stop, shall stop.

RCW 46.61.190(3).

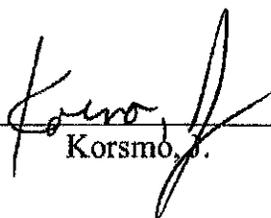
Mr. Malinak did not stop or even slow down for the intersection both because he missed the sign alerting him to the upcoming intersection and he did not know his driving

No. 32909-7-III  
*Tapken v. Spokane County*

obligation with respect to the yield sign.<sup>3</sup> The county properly signed the intersection by notifying drivers of a yield ahead. The motorcyclist then had the duty to slow sufficiently or stop in order to make a turn. Thus, the county had no liability with respect to the actual cause of the accident—the failure of the motorcycle to slow sufficiently to make a turn at the intersection.

The trial court correctly realized there was no basis, other than speculation, for the county to be held liable. This was not the case of an improperly signed curve in the road. It was the case of a properly signed intersection that was not timely comprehended by the driver. That was the only cause of the accident. The trial court thus correctly dismissed the action after the plaintiff's case.

I respectfully dissent.

  
Korsmo, J.

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<sup>3</sup> Even under his own theory that he slowed, albeit insufficiently, to make the unexpectedly sharp right turn, he was in violation of his basic duty to drive slowly enough for the conditions. RCW 46.61.400(3). He blames this failure on the county in a dubious attempt to delegate his own driving responsibility.

# Appendix B

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# Appendix C

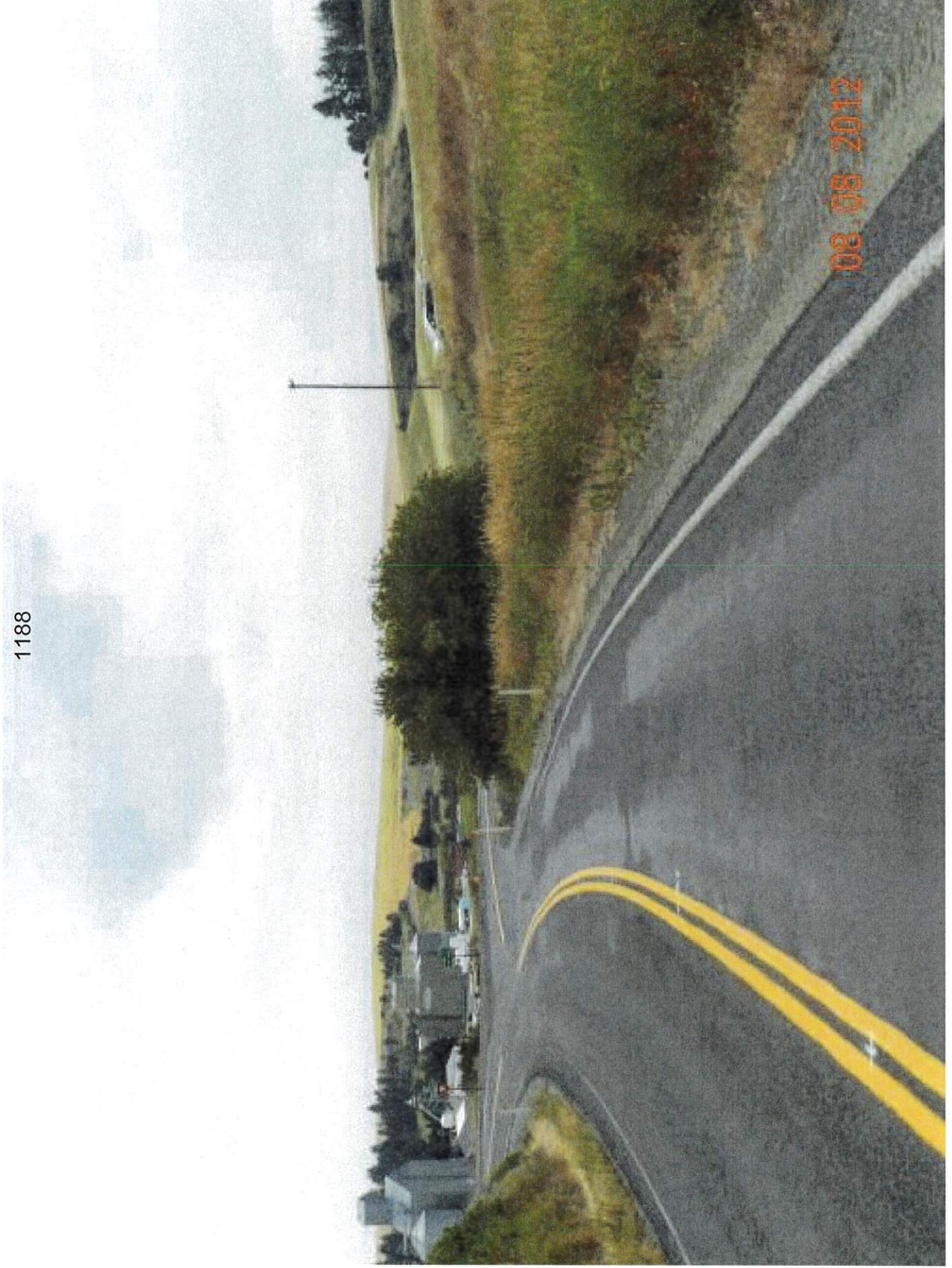
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08.08.2012

# Appendix D

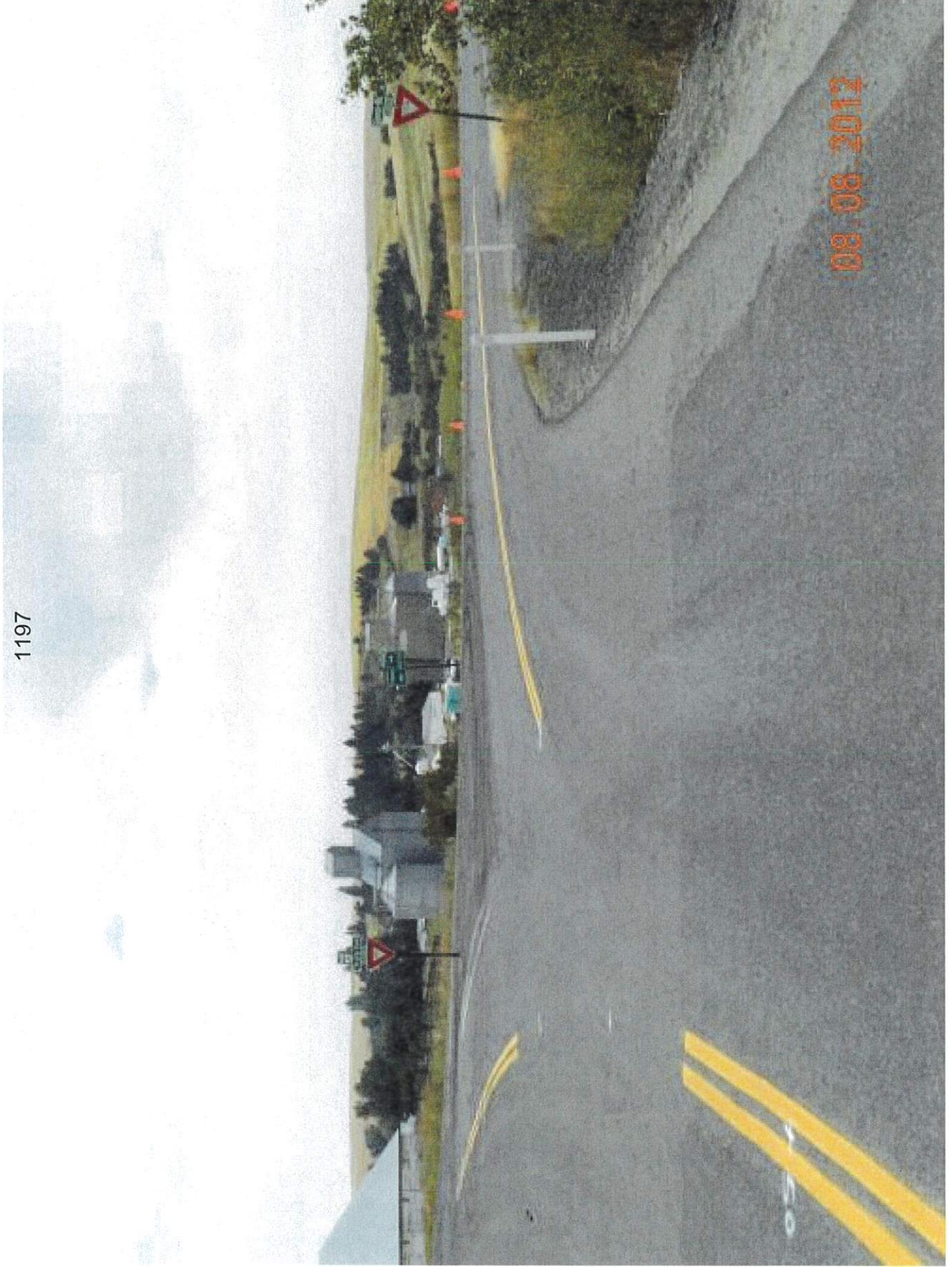
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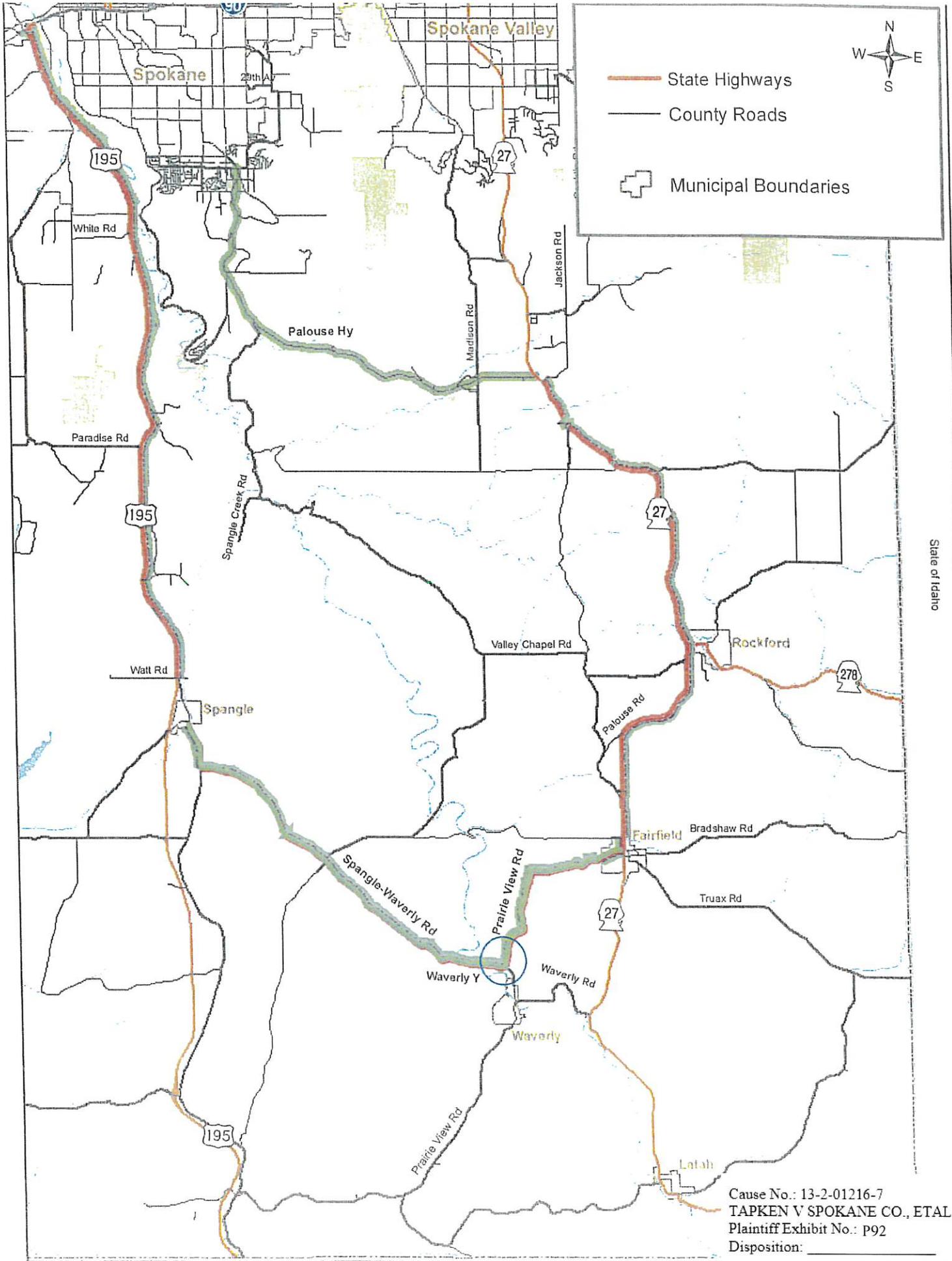
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# Appendix E

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# Appendix F



# Appendix G



08.08.2012

# Appendix H

1           **A.** Okay. So 13, it's 300 feet. It's taken from right  
2 there where it says 13, taken right there.

3           **Q.** All right. So the jury, in looking at these  
4 photographs can take the number and then place it on your  
5 diagram to figure out where it's taken; is that correct?

6           **A.** Exactly. With the exception that the picture is  
7 always taken 25 feet before that.

8           **Q.** Okay.

9           **A.** If he was standing on the number, you couldn't see  
10 it.

11          **Q.** Okay.

12          **A.** So he always goes 25 feet further up the hill.

13          **Q.** Got it.

14               MR. JACKSON: I'm finished with this, Your Honor.

15               THE COURT: Thank you.

16          **Q.** (BY MR. JACKSON:) Now, Mr. Stevens, I am next going  
17 to show you what is marked as Defendant's Exhibit No. 559. And  
18 you probably can't see it from there, but I hope the jury can.  
19 What do the double yellow lines that are going down South  
20 Prairie View Road tell a motorist who is traveling in that  
21 direction?

22          **A.** Well, it tells them there's a serpentine curve coming  
23 ahead that goes first to the left and back to the right.

24          **Q.** And how far away from the intersection is that  
25 photograph taken?

1           **A.** If I could approach it?

2           THE COURT: Yes, you can.

3           THE WITNESS: I would have to look at mine. Maybe I  
4 can tell --

5           **Q.** (BY MR. JACKSON:) Sure.

6           **A.** -- from my photographs. I'm not sure.

7           **Q.** If it will help you, look at yours, please.

8           **A.** I believe it's about 425 feet from the yield sign  
9 that's on the right.

10          **Q.** 425 feet?

11          **A.** From the yield sign on the right, yes.

12          **Q.** From that photograph, 450 feet from the yield sign on  
13 the right, can you see an intersection?

14          MR. SCARPELLI: Excuse me. I don't think he said  
15 450 feet.

16          THE WITNESS: It's 4 -- it's 425.

17          **Q.** (BY MR. JACKSON:) I apologize. Let me ask you the  
18 question again.

19                 From that photograph, 425 feet from the intersection,  
20 can -- or excuse me, 425 feet back, can you see an  
21 intersection?

22          **A.** Well, I can see a break in the line, in the double  
23 yellow center line, but I really don't see an intersection.

24          **Q.** What do -- does a break in the double yellow line  
25 tell a motorist?

1           **A.** Well, it can tell you that there's -- there's traffic  
2 coming from another direction, cross-traffic.

3           **Q.** And cross traffic from another direction is another  
4 way of saying there is an intersection, correct?

5           **A.** Could be.

6           **Q.** And so from 450 feet, a motorist who is paying  
7 attention knows that there is an intersection ahead, correct?

8           **A.** Could be. If they pick it up like -- it's just hard  
9 to say. We're sitting here staring at this where, of course, a  
10 car only sees this -- the driver of a car only sees this just  
11 momentarily. Because there's nothing there one second before  
12 or 70-some feet back, and one second later you're going to see  
13 more. So it's a continual changing dynamic situation.

14           **Q.** From this direction 425 feet, can you see that a  
15 motorist intending to go right will have to turn?

16           **A.** Certainly.

17           **Q.** And so, a motorist who has the intent of turning to  
18 the right will be able to see that they are going to need to  
19 turn 425 feet before they get there, correct?

20           **A.** Correct. Well, there's -- there's the first turn  
21 before the second one.

22           **Q.** According to the AASHTO standards and to your  
23 calculations and your opinions as a professional engineer, is  
24 425 feet a sufficient distance for a motorist to reduce his  
25 speed and stop?

1           **A.** If need be, yes.

2           **Q.** Is it also a sufficient distance for a motorist to  
3 reduce his speed to make a right-hand turn?

4           **A.** If told so, that's correct, if needed.

5           MR. JACKSON: I have no further questions,  
6 Your Honor.

7           Thank you, sir.

8           Do you want me to take this down?

9           **Q.** (BY MR. JACKSON:) Oh, I do. I need to play your  
10 video. Mr. Stevens, during the break, we showed you a video  
11 that was taken by your employee back in 2012, and you  
12 recognized that video; is that correct?

13          **A.** Correct.

14          **Q.** All right. And the video that you saw was accurate  
15 to your memory; is that correct?

16          **A.** That's correct.

17          MR. JACKSON: Your Honor, I would offer this  
18 Exhibit 544.

19          THE COURT: Mr. Scarpelli?

20          MR. SCARPELLI: I have no objection. I have none, no  
21 objection.

22          THE COURT: Mr. Michaud?

23          MR. MICHAUD: No objection.

24          MR. SCARPELLI: It's a waste of time, but...

25          THE COURT: 544 is admitted. You may publish.

# Appendix I

**INSTRUCTION NO. 14**

**The duty of a governmental body to warn of a dangerous or unsafe roadway condition is not eliminated by general knowledge of a motorist of roadway conditions.**

# Appendix J

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**INSTRUCTION NO. 1**

The duty of a governmental body to warn of a dangerous or unsafe roadway condition is not eliminated by general knowledge of a motorist of roadway conditions, including a curve or dip at a particular location and cannot be the proximate cause of an accident when the motorist is misled or deceived by the condition.

*Johanson v King County*, 7 Wn. 2d 111, 121; *Nakamura v Jeffery*, 6 Wn. 2d 274, 276 (1972).

# Appendix K

INSTRUCTION NO.  D-23

The County has no duty to warn a road user about a road hazard if the hazard is open, apparent, and known to the road user. Whether a hazard is open and apparent depends on whether the road user knew, or had reason to know, the full extent of the risk posed by the condition.

*Hansen v. Washington Nat. Gas. Co.*, 95 Wn.2d 773, 780, 632 P.2d 504 (1981); *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 134, 875 P.2d 621 (1994); *Owens v. City of Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956).

# Appendix L

INSTRUCTION NO. 13

A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.

# Appendix M

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Honorable Annette S. Plese

FILED

DEC 12 2016

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN,  
Plaintiff,  
  
v.  
  
SPOKANE COUNTY, a municipal  
corporation; and CONRAD MALINAK, a  
single person,  
  
Defendants.

NO. 2013-02-01216-7  
ORDER ON MOTIONS ARGUED  
OCTOBER 7, 2016  
[Plaintiff's Proposed]

THIS MATTER came before the Court on Defendant Spokane County's motion to enforce rulings as the law of the case and Plaintiff's Motion for Leave to File Amended Complaint, and Plaintiff's Motion for Priority Trial Setting. In addition to the pleadings and the court file herein, the Court reviewed the materials submitted by the parties concerning these motions, including:

1. Defendant Spokane County's Motion to Enforce Rulings as Law of the Case;
2. Declaration of John R. Nicholson with Exhibits 1-3 thereto;
3. Plaintiff's Opposition to Defendant Spokane County's Motion to Enforce Rulings as Law of the case;
4. Declaration of Nicholas P. Scarpelli, Jr., in Support of Opposition to Defendant Spokane County's Motion to Enforce Rulings as Law of the Case with Exhibits A-L thereto;
5. Plaintiff's Motion for Leave to File Amended Complaint;

ORDER ON MOTIONS ARGUED OCTOBER 7, 2016 - 1

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CARNEY BADLEY SPELLMAN, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
(206) 622-8020

1           6. Defendant Spokane County's Response in Opposition to Plaintiff's Motion to  
2 Amend to Add a Party Defendant;

3           7. Declaration of Gregory E. Jackson in Opposition to Plaintiff's Motion to Amend  
4 the Complaint with Exhibits 1-2 thereto;

5           8. Plaintiff's Reply in Support of Motion for Leave to File Amended Complaint;

6           9. Plaintiff's Motion for Priority Trial Setting;

7           10. Defendant Spokane County's Response to Motion for Priority Setting;

8           11. Plaintiff's Reply to Spokane County's Response to Motion for Priority Setting;

9  
10 and

11           12. Declaration of David Michaud.

12           The Court issued a letter ruling on October 24, 2016, attached hereto as **Appendix A**,  
13 reflecting its decisions on the above motions. An excerpt from the Court's transcript of the  
14 Court's decision on Motions in Limine other than prior accidents is attached as **Appendix B**.

15  
16 Based on the forgoing, the Court hereby ORDERS:

17           1. Defendant's motion to allow Plaintiff to proceed to trial on only one theory of  
18 the case is **DENIED**.

19           2. Plaintiff's motion for leave to file an Amended Complaint is **GRANTED**.

20           3. Plaintiff's Motion for Priority Trial Setting is **GRANTED**, and a three-week  
21 jury trial is scheduled to begin June 12, 2017. The Court Clerk is instructed to  
22 prepare an Amended Case Scheduling Order and provide it to counsel of  
23 record.  
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ORDER ON MOTIONS ARGUED OCTOBER 7, 2016 - 2

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**CARNEY BADLEY SPELLMAN, P.S.**  
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4. Defendant's motion for the Court to find Mr. Malinak negligent as a matter of law and that Mr. Malinak's negligence was a proximate cause of Plaintiff Tapken's injuries is **DENIED**.

5. Defendant's motion to enforce the prior trial court's ruling dismissing Conrad Malinak's claim for past medical expenses claimed at the first trial is **GRANTED**.

6. Defendant's motion to enforce the prior trial court's ruling to exclude evidence of prior accidents at or near the Waverly Y to prove notice is **GRANTED**, as long as the County does not dispute notice that the yield sign and sharpness of the curve to the right were obstructed by the hawthorn bush.

7. In light of the Court of Appeals' decision affirming the denial of Tapken's Motion for Partial Summary Judgment regarding comparative fault, this ruling by the prior trial court will stand. This ruling does not preclude any party from moving for summary judgment or judgment as a matter of law on any

*APJ* additional theory or issue that is supported by the issue or renewing a motion previously made. *evidence in the case.* ~~by the Court~~

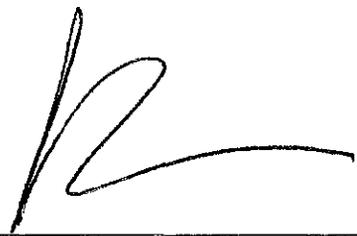
8. Defendant's motion to enforce the Court's previous rulings on the parties' motions in limine as the law of the case is **GRANTED**. This ruling does not preclude either party from bringing additional motions in limine, nor does it preclude either party from moving the Court to modify previous rulings on motions in limine based upon an appropriate showing *with good*

*cause.* ~~by the Court~~

*MPB*

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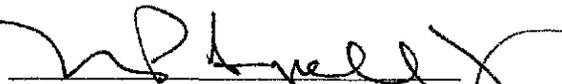
SIGNED this 12 day of Dec ~~November~~, 2016.



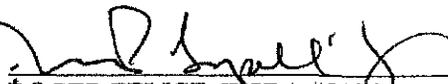
JUDGE ANNETTE S. PLESE  
Spokane County Superior Court Judge

Presented by:

**CARNEY BADLEY SPELLMAN, PS**

  
NICHOLAS P. SCARPELLI, JR. WSBA #5810  
Attorney for Plaintiff

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Attorney for Plaintiff

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DAVID MICHAUD, WSBA #13831  
Attorney for Defendant/Cross-Claimant Malink

ORDER ON MOTIONS ARGUED OCTOBER 7, 2016 - 4

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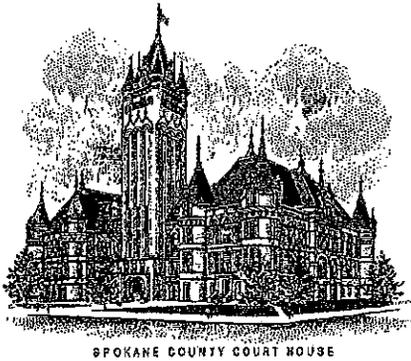
# Appendix A

ORDER ON MOTIONS ARGUED OCTOBER 7, 2016 – 5

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**CARNEY BADLEY SPELLMAN, P.S.**

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Seattle, WA 98104-7010  
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**STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT**

**Annette S. Plese**  
Superior Court Judge

Spokane County Courthouse  
1116 West Broadway Avenue  
Spokane, Washington 99260-0350  
(509) 477-4709  
dept1@spokanecounty.org

October 24, 2016

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Attorney at Law  
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Spokane, WA 99218

Gregory E. Jackson  
Freimund Jackson & Tardif, PLLC  
701 Fifth Ave, Suite 3543  
Seattle, WA 98104

RE: Tapken v. Spokane Co. and Mallnak, Cause NO. 13-2-01216-7

Dear Counsel,

This letter is a follow up from the hearing held on October 7, 2016 in regards to numerous motions filed by counsel. The Court again reviewed your briefing and the cases listed by all parties. The Court makes the following clarifications to each of the previous rulings:

**Motion to allow only one theory of Plaintiff's case.**

Court already ruled on this motion. Plaintiff will be allowed to argue their different theories as to the accident. Specifically the obstruction and the sharpness of the turn.

**Amendment of the Complaint to add Malinak.**

The Court will allow the Plaintiff to amend the complaint to add Malinak as a defendant in the matter. Though, the Plaintiff had dismissed him (without prejudice) originally at the end of the Plaintiff's case with the agreement of Malinak's attorney, it was a strategic move as they were focused on the Court's ruling for the County. The Court of Appeals held that the issue of negligence and proximate cause were a matter for the jury and not subject to a question of law based on the evidence presented. Since the COA clearly indicated that this was a question for the jury, the Court believes this would have been the same for Malinak.

As for the Statute of Limitations argument, this is an affirmative defense and can only be raised by Malinak. Since Malinak is not asserting this defense and stipulating that it was in Malinak's best interest to waive that affirmative defense, the Court will allow the amendment.

**Malinak's negligence finding as a matter of law.**

Though the previous trial court held at the end of the Plaintiff's case that Malinak was negligent as a matter of law, this issue was a question of fact and should be decided by the fact finder. Based on the Court of Appeals ruling that the Plaintiff "persuasively argued evidence establishing Malinak would have slowed more - had he been able to perceive that sharpness of the right turn earlier." (See COA ruling, page 11). Although, the Court was referring to proximate cause, it was clear from their ruling that this would invade the question for the jury as to negligence, also. This Court is reversing the oral ruling from the hearing and finding it a question of fact.

**Court's dismissal of Malinak's claim for medical expenses.**

The Court was clear on this. The previous court ruled that this claim was dismissed as the Plaintiff presented no evidence to support the basis for this claim. This was not taken up on appeal, and the ruling stands.

**Evidence as to prior Accidents.**

The trial court held that these were not admissible, and this was upheld by the Court of Appeals. The COA agreed as to this ruling because the County was not disputing notice as long as this is the County's position. This ruling will stand.

**Denial of Tapken's motion for Partial Summary Judgment regarding Comparative Fault.**

In light of the Court of Appeal's rulings, this ruling stands.

**Numerous motions in limine.**

The Court did not hear argument on these at the hearing on October 7, 2016. However, after reviewing those motions, the Court will adopt all of the previous rulings of the trial court. Since this case will be handed over to another trial Judge in January 2017, you may bring up any of the motions that might have changed based on any new discovery. However, the court is

---

not allowing any further argument as to these motions absent a significant change in the evidence since the last trial.

The Court is requesting that Mr. Jackson prepare a formal order on the above rulings and send to Counsel for signature. Since the Court is allowing the Plaintiff to amend their complaint, the Court will allow the Defendants to answer or amend their answer. If no agreement can be reached on the wording of the formal order, counsel can set a presentment hearing.

Sincerely,



Judge Annette Plese

# Appendix B

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ORDER ON MOTIONS ARGUED OCTOBER 7, 2016 – 6

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1 the proximate cause. That's what you're taking under  
2 advisement?

3 THE COURT: I ruled on it. I'm going to go back and  
4 reconsider it. I'm going to look at it as a  
5 reconsideration. You got to argue all your theories. I'm  
6 upholding Judge Cooney's ruling on Malinak's negligence.  
7 I'm going to reconsider it because now I've got your  
8 argument, but I am ruling on it.

9 Then as far as the medical expenses, I'm ruling on that  
10 issue. Then as far as the accidents, ruled on that one,  
11 and then the comparative fault issue I'm ruling on that.  
12 Does that clarify it?

13 MR. JACKSON: It does. The only issue left is the  
14 other Motions in Limine, and there are a bunch of them,  
15 and if you don't want to address them, I can put reserved  
16 in here.

17 THE COURT: Some of those depending on that day of  
18 trial, you're going to have I assume new Motions in  
19 Limine, but I'm going to reserve on them until the day of  
20 trial because there were some that may shift depending on  
21 the change when we get down to what's really going to go  
22 to trial.

23 Normally I would stick to the same Motions in Limine,  
24 but I think I've narrowed down some of the issues for  
25 trial. There may be some where we're saying definitely

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stick to them, and I'm going to let you go through those  
and reserve on them at this point.

I think Judge Cooney made most of the right rulings,  
but as this dynamic changes, depending on my ruling with  
Mr. Malinak and stuff, rulings may change a little bit on  
the Motions in Limine.

**FREIMUND JACKSON & TARDIF P.L.L.C**

**January 29, 2018 - 4:47 PM**

**Transmittal Information**

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**Appellate Court Case Number:** 35473-3  
**Appellate Court Case Title:** Madelynn M. Tapken v. Spokane County, et al  
**Superior Court Case Number:** 13-2-01216-7

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