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No. 354733

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

MADELYNN M. TAPKEN,

Respondent/Cross-Appellant,

v.

SPOKANE COUNTY, a municipal corporation,

Appellant/Cross-Respondent

and

CONRAD MALINAK,

Respondent.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
Honorable Timothy B. Fennessy

**MADELYNN M. TAPKEN'S ANSWERING BRIEF AND
OPENING BRIEF ON CROSS-APPEAL**

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I. INTRODUCTION

Spokane County knew about but failed to eliminate or warn of a longstanding hazard at the confusing Waverly Y intersection. After passing through eight curves with posted warning signs, drivers on S. Prairie View Road reasonably expected to be warned of any significant curve. But the County posted no warning for an obscured, 90-degree curve at the Waverly Y, where an overgrown bush, improper signage, and other unsafe conditions combined to mislead motorists not to slow down sufficiently for it. As a result, Madelynn Tapken, a passenger on the back of a motorcycle operated by Conrad Malinak, sustained permanent, paralyzing injuries.

Tapken sued the County and Malinak, and Malinak cross-claimed against the County. After the trial court dismissed Tapken's and Malinak's claims mid-trial, this Court reversed and remanded for trial, holding that a jury could find negligence and proximate causation against the County. At the trial on remand, the jury returned a \$12.5 million verdict for Tapken against the County and Malinak, but found Tapken partially at fault for her injuries, which meant the defendants could be held liable for the judgment only to the extent of their proportionate shares of fault (60% County, 30% Malinak).

The County now appeals, asserting instructional and evidentiary errors pertaining only to liability, and Tapken cross-appeals on the County's failure to present sufficient evidence to permit the jury to find facts essential to its affirmative defense that she was contributorily negligent.

The County received a fair trial under proper instructions. The trial court did not abuse its discretion in instructing the jury on the County's duty. The duty extends to negligent motorists, which includes those who knowingly encounter a hazard. Nor did the court abuse its discretion in instructing on the emergency doctrine or admitting evidence of three prior similar accidents at the intersection to prove its dangerousness. This Court should affirm the judgment with one exception: because the finding that Tapken was negligent cannot be sustained, this Court should vacate that finding and remand with directions to amend the judgment to reflect that, under RCW 4.22.070(1)(b), the County and Malinak are jointly and severally liable for the full amount of the jury's verdict in Tapken's favor.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. Because the County failed to present sufficient evidence to permit the jury to find facts essential to its affirmative defense of Tapken's contributory negligence, it was error to submit the issue of her negligence to the jury.

2. Because as a matter of law Tapken was fault free, it was error to enter judgment against the County and Malinak according to their proportionate shares of fault, rather than jointly and severally under RCW 4.22.070(1)(b). *See* CP 2659-62.

III. ISSUES PRESENTED

A. Restatement of Appellant's Issues

1. *Duty Instructions.* A municipality's duty of care in building and maintaining its roads extends to motorists who knowingly encounter a hazard. The trial court (1) instructed the jury that a motorist's general knowledge of a road hazard does not "eliminate" the municipality's duty and (2) refused to instruct the jury that a municipality has "no duty" to warn a road user about an open, apparent, and known hazard. Did the trial court act within its discretion?

2. *Emergency Instruction:*

a. One defendant based on evidence that he confronted a choice between two or more courses of action in a sudden emergency not of his own making is entitled to a jury instruction on the emergency doctrine. As this Court previously recognized, the evidence permitted a finding that Malinak was not negligent. Did the trial court act within its discretion in giving an emergency instruction as to Malinak?

b. The County's expert testified that Tapken confronted an "emergency situation" and had to make a "split-second decision." Furthermore, the County's contributory-negligence theory required it to concede that Tapken confronted a choice between at least two actions when Malinak suddenly reversed course. Did the trial court act within its discretion in giving the emergency instruction as to Tapken?

c. The emergency instruction required the jury to find Malinak and Tapken "not negligent" if it found that they confronted an emergency. The jury found both Malinak and Tapken negligent. Where the jury thus necessarily rejected the theory that either Malinak or Tapken confronted an emergency, was any error in giving the emergency instruction harmless?

3. *Admissibility of Accident History:*

a. This Court previously decided that the trial court did not abuse its discretion in excluding accident history for the purpose of proving notice of a condition. Nothing in this Court's decision foreclosed admitting accident history on remand, including for the purpose of proving the independent issue of the condition's dangerousness. Did the trial court act within its discretion in admitting accident history to prove dangerousness?

b. To be relevant, prior accidents need only be substantially similar to the subject accident, while differences go to the weight to be given the evidence. In each of the three prior accidents admitted, the driver (like Malinak here) was traveling southbound on Prairie View Road, failed to negotiate the right turn due to speed, and went off the roadway and down the embankment. Did the trial court act within its discretion in determining substantial similarity?

c. Error in admitting evidence is harmless if it is of minor significance in the context of the evidence as a whole. Here, Tapken and Malinak presented overwhelming evidence of the Waverly Y's dangerousness, without regard to the accident-history evidence, which was relatively minimal. Was any error in admitting three prior accidents harmless?

B. Statement of Issues on Cross-Appeal

1. *No Evidence of Conscious Volition.* An involuntary act is not negligence; only a conscious and volitional act can be found to constitute negligence. In support of its affirmative defense of contributory negligence, the County failed to present evidence that Tapken's upper body moving right when Malinak turned left was a conscious and volitional act, as opposed to the involuntary and expected result of inertia. Must the finding of contributory negligence be vacated?

2. *No Evidence of Opportunity to React.* A person may be found contributorily negligent in failing to avoid an accident only if she had a reasonable opportunity to appreciate and react to a hazard. For its affirmative defense of contributory negligence, the County maintained that Tapken was negligent in leaning farther right when Malinak suddenly abandoned the right turn to go left. Yet Tapken undisputedly had no more than a "split second" to perceive and react. Must the finding of contributory negligence be vacated?

IV. STATEMENT OF THE CASE

A. Madelynn Tapken sustained serious injuries in a motorcycle crash because an inherently dangerous condition on a Spokane County road misled the motorcycle operator, Conrad Malinak, not to slow down sufficiently for a curve.

On a sunny afternoon in September 2011, Conrad Malinak took Madelynn Tapken riding on his motorcycle, intending to take a broad loop through the scenic Palouse region in south Spokane County. RP 824-25, 844.¹ The two were becoming acquainted; it was their second ride together. RP 842. The accident that injured them occurred near the town of Waverly.

¹ Except where a date is specified, RP citations refer to the transcript of the trial.

Just north of Waverly, roads converge from three directions at what is known locally as the Waverly Y. Each road splits at the convergence such that there are actually three ‘Y’ intersections and six ways to go through. RP 520, 700-02; *see* Ex. P72. No stop sign is posted for traffic from any direction. *See* Ex. P65. The road that approaches the intersection southbound is S. Prairie View Road. The left fork is the through road—the continuation of Prairie View Road—which leads to Waverly. RP 719, 756-57, 1385-87. The right fork is a side road—E. Spangle-Waverly Road—which leads to the town of Spangle.² *Id.*; *see* Exs. P65, P92; *see also* P72 (modified here; arrow on roadway indicates Malinak’s direction of travel):



Malinak arrived at the Waverly Y heading southbound on Prairie View Road, having come through the town of Fairfield. RP 824-25. The

² The County misidentifies the roads in its brief. *See Brief of Appellant* at 5. A driver taking the left fork continues on Prairie View Road.

posted speed limit was 45 miles per hour. RP 401, 413-14; Ex. 76. In the four miles between Fairfield and the Waverly Y, Malinak encountered eight curves, each preceded by a curve-warning sign and most preceded by an advisory-speed warning sign as well. RP 396, 845, 888-902; *see* Exs. P75-P85, P170. One advisory speed was 40 miles per hour, five were 35 miles per hour, and one was 15 miles per hour. Exs. 75, 77-78, 81, 83-85.

Malinak intended to continue on Prairie View Road toward Waverly, which he believed meant he should turn right at the Y. RP 850. Although Malinak had previously driven through the intersection in one direction or another perhaps three or four times, he did not recall ever having taken the right fork southbound. RP 847-49, 908-09. Indeed, his recollection was faulty: Waverly was actually to the left. And although the County had posted a directional sign indicating Waverly was to the left and Spangle was to the right, Malinak never saw it because it was posted beyond the intersection, at the back side of the Y. RP 729-30, 925-26; *see* Exs. P2, P60.

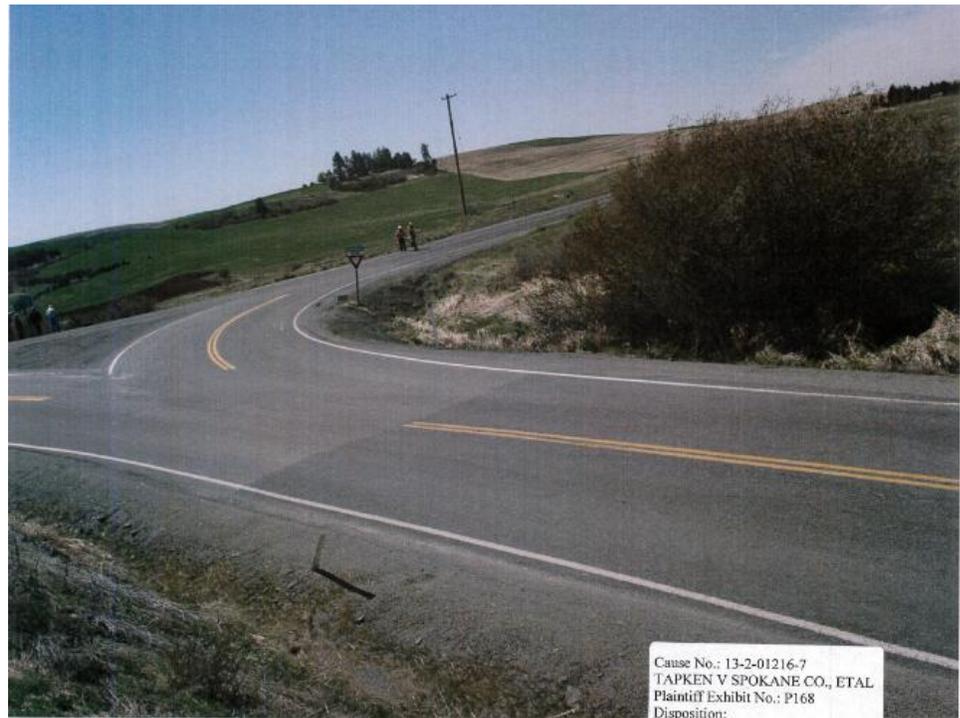
At nearly 800 feet before the intersection—before the intersection was visible—Malinak passed a yield-ahead warning sign. He believes he saw this sign, though he does not specifically recall it. RP 916. He does recall a yield sign plainly visible on the left fork of the Y, as the intersection came into view. RP 851; *see* Ex. P54. He deemed the sign irrelevant because he planned to go right, not left, and besides, no other traffic was present. RP 852, 907. Leading up to the Y, Malinak traveled at about the speed limit of 45 miles per hour. RP 857.

A large hawthorn bush obscured Malinak's view through the curve to the right. RP 856, 907-08; *see* Ex. P9:



Because no warning was posted—unlike on the preceding curves—Malinak anticipated only a slight curve and slowed only 5 to 10 miles per hour below the speed limit. RP 845-46, 852-54, 857-58, 903, 967. As he entered the curve, Malinak began leaning right to turn the motorcycle, and Tapken echoed his movement.³ RP 911, 973-74. But once Malinak traveled past the bush, he could see this was no slight curve; it was a nearly 90-degree curve. RP 856, 911-12; *see* Exs. P10, P168:

³ At speed, a motorcycle is turned primarily by leaning, as opposed to turning the handlebars. RP 1560-61.



Malinak testified he was surprised by the curve's sharpness; he found the situation "unbelievable." RP 856. He immediately realized that even at 5 to 10 miles per hour below the speed limit, he was going too fast to negotiate the curve or slow down sufficiently for it; it was "not possible." RP 856, 911-12, 969. He abruptly turned "hard" left in a desperate attempt to make the far less-severe curve of the left fork. RP 856-57, 910-12. He felt this was the only way to keep the motorcycle on the road. RP 911-12.

When Malinak turned left, the motorcycle came up to an approximately vertical orientation. RP 857. It exited the curve and went airborne off the roadway, landing 50 feet down an embankment on the south side of the intersection. RP 369-70, 740, 856-57, 1017-18, 1281, 1369; *see* Ex. P4, P12. Malinak and his passenger, Tapken, landed in different locations, apart from the motorcycle. RP 862-63.

Though unable to see Tapken seated behind him on the motorcycle, Malinak speculated to the investigating officer she may have leaned farther right when he suddenly turned left. RP 932-33, 1305. At trial, Malinak testified he switched from right to left a "split second" after realizing he could not make the right turn, and Tapken would have had "even less time" to react to his reaction. RP 860. A nurse at the scene was told the motorcycle operator "missed a corner." RP 369-70. Neither Malinak nor Tapken was under the influence of alcohol or drugs. RP 1310, 1333.

Tapken was comatose for three weeks and does not recall the accident. She sustained a traumatic brain injury and is paralyzed from the chest down.

B. The evidence established the existence of an inherently dangerous condition that the County knew about but failed to fix.

1. Five main defects in the Waverly Y intersection combined to cause this accident.

Tapken's experts identified five main defects in the Waverly Y that combined to mislead Malinak not to slow down sufficiently for the curve and ultimately caused this tragic, but preventable, accident.

(a) Warning signs on the preceding eight curves led motorists to expect to be warned of any significant curve.

Tapken's highway-design expert, Edward M. Stevens, Ph.D., and human-factors engineering expert, Richard T. Gill, Ph.D., testified that the conditions a driver experiences on a road influence his expectations of what lies ahead. RP 815-16, 1104-06. The County's experts agreed. RP 419, 1419. Stevens and Gill testified that the warning signs Malinak saw posted on all eight curves in the four miles of road preceding the Waverly Y created the expectation that all significant curves would have similar signs. RP 815-16, 1104-06.

According to the Manual of Uniform Traffic Control Devices (MUTCD)—which governs the placement and use of highway traffic control devices (including signs)⁴—the purpose of a warning sign is to “call attention to unexpected conditions...that might not be readily apparent...[and] that might call for a reduction of speed[.]” RP 387-88, 390-91; Ex. P114 at 105 (§ 2C.01). A curve warning with an advisory speed

⁴ See WAC 486-95-010.

warns a driver of an upcoming curve and the safe speed to negotiate it. RP 393. No curve warning, advisory speed, or other sign was posted to warn southbound motorists of the sharp curve at the Waverly Y. RP 413. The County relied on the yield-ahead sign as the sole warning. RP 417. But the County's traffic engineer, Barry Greene, admitted that the MUTCD does not allow using a yield sign or yield-ahead sign to control speed or to warn of a curve. RP 418-19; *see also* RP 530-34, 1476-77.

The County's former chief traffic-sign technician, John Burks, who retired the month after the accident, testified that he drove through the Waverly Y hundreds of times during his career and thought there was a curve warning and speed advisory—"or if there wasn't, there should have been one there." RP 562-63, 640. The County posted Y-intersection warning signs in advance of the two other approaches to the Waverly Y, but not on the southbound approach. RP 537-38; *see* Ex. P161.

(b) A yield-ahead sign was placed too far in advance of the intersection.

The yield-ahead sign preceding the Waverly Y was placed approximately 775 feet before the intersection. RP 708. Under the MUTCD, a yield-ahead sign should be placed much closer—175 feet before an intersection. RP 525, 708; Ex. P114 at 110 (Table 2C-4). A sign placed too far in advance is ineffective because it fades from a driver's working memory before the information is needed. RP 711, 1109-10, 1119. Greene, the County traffic engineer, admitted there was no reason the yield-ahead sign could not have been placed closer per the MUTCD. RP 526.

(c) A bush obscured the curve's sharpness.

A large hawthorn bush obstructed the curve's sharpness. RP 856, 907-08, 1006, 1009-10, 1013; *see* Ex. P9. Greene admitted that the bush partially obscured the curve. RP 417, 523-24. Burks, the former chief traffic-sign technician, testified that the bush had "always been an issue" and an "inherent problem." RP 571-72, 639. Dan Meyers, a County traffic-sign technician, agreed that the bush was a "regular problem" and once reported to Burks that it was obscuring the yield sign and protruding into the roadway. RP 652-55. The County admitted it could have cut the bush because it was within the right of way. RP 458. The County has a maintenance facility nearby, just outside Spangle. RP 381.

(d) The bush left only the yield sign for the left fork visible, making it appear that the right fork was the through road.

In addition to the curve's sharpness, the hawthorn bush obscured a second yield sign, for the right fork, which Malinak never saw. RP 524-25, 852. The obscured sign was not visible until 123 feet from the intersection. RP 699-700. Greene admitted that a yield-ahead sign does not warn a motorist that there are *two* yield signs ahead. RP 439, 533. Stevens testified that a motorist intending to go right would reasonably conclude that the "major road goes on around to the right" and not think he might need to slow down. RP 729. Gill testified that a motorist approaching the intersection and seeing a yield sign on only the left fork will reasonably conclude that the right fork is a through road with "a nice sweeping curve." RP 1110-11.

The County had no record of when or why the yield-ahead sign was installed. RP 440-41. Greene presumed it was because the bush obscured the yield sign on the right. RP 440, 543. Yet the County’s highway-design expert, Thomas Ballard, testified that the yield-ahead sign applied primarily to the yield sign for the through road—to the *left*. RP 1477.

(e) A destination sign was placed beyond, rather than ahead of, the intersection.

The County installed a small destination sign in the middle of the Y, at the back of the intersection, indicating that Waverly was to the left and Spangle was to the right. *See* RP 730; Ex. P10, P58, P64. Per the MUTCD, a destination sign should be placed at least 200 feet in advance of an intersection to give a motorist a reasonable opportunity to perceive and react to it. RP 444-45, 730-31, 751, 1107, 1112; Ex. P114 at 144 (§ 2D.35). Malinak thought Waverly was to the right. RP 850.

2. The result of the County’s negligence was to mislead Malinak not to slow sufficiently for the curve.

Stevens testified that the problems with the Waverly Y combined to create an inherently dangerous condition that caused southbound motorists not to slow down sufficiently for the right-hand curve. RP 741-42. Gill testified that the combination of only the yield sign on the left fork being visible and the lack of any warning for the obscured, right-hand curve created a “trap” by giving motorists the mistaken impression that they could proceed toward the right at 45 miles per hour. RP 1111, 1118.

Tapken’s motorcycle expert, Steve Harbinson, testified the accident occurred because Malinak could not appreciate the curve’s sharpness soon

enough to slow down sufficiently. RP 1032-33. Malinak's motorcycle left the roadway at about 35-40 miles per hour. RP 529, 1021, 1301-02, 1317-21, 1344. The curve undisputedly could not safely be negotiated anywhere near that speed. *See* RP 1002-03. Neither of the County's motorcycle experts would even attempt it above 30 miles per hour (again, the posted speed limit was 45). RP 1549-50, 1600. The County never measured the safe speed for the curve, even though its sign-crew supervisors had measuring equipment in their trucks. RP 415-16, 513.

The undisputed safe speed for the curve was 19 miles per hour—26 miles per hour below the posted speed limit. RP 732-36. Harbinson testified that, entering the curve at 35 to 40 miles per hour, a motorcyclist would have insufficient time to slow down enough to make the curve or to stop. RP 1021-25. The bush and road design obstructed the curve's sharpness until 60 feet from its apex. RP 1006, 1009-10, 1013. During the standard minimum perception-reaction time of 1.5 seconds, a motorcycle traveling at 45 miles per hour travels nearly 100 feet. RP 1022-23.

3. As the County admitted, the problem was easily fixable.

The County admitted that the Waverly Y is the only intersection in Spokane County where three roads with a posted speed limit of 45 miles per hour intersect without any stop sign or curve warning or both. RP 469. Stevens testified that the preferred solution to make the intersection reasonably safe was to convert it into a 'T' intersection with a stop sign for southbound traffic. RP 752-53, 760-61; Ex. 71. This would have required

only changing the signs and restriping the pavement. RP 753. The County admitted this fix was feasible and reasonable. RP 463-65.

The County also admitted it would have been feasible to install a double-arrow warning sign at the back of the intersection (where it had installed the misplaced destination sign). RP 461-62. And had a properly placed destination sign informed Malinak which fork went to Waverly—where he intended to go—he never would have tried to take the sharp right curve, but would have remained on the unobscured through road to the left.

C. Tapken and Malinak sued the County, which alleged contributory negligence by both.

Tapken sued the County and Malinak, and Malinak cross-claimed against the County. CP 5-11, 22-25. Tapken’s amended complaint alleged in part that “[t]he unsafe road design with multiple roads converging, defective and hidden signage, the unmaintained hawthorn tree obscuring a sharp, horizontal curve, and the 45-mile per hour speed limit created an inherently dangerous condition in that motorists would enter the curve too fast to negotiate it safely.” CP 667. The County alleged as an affirmative defense that Malinak and Tapken were contributorily negligent. CP 672, 962. As to Tapken, the County’s theory was that Tapken negligently leaned farther right when Malinak suddenly reversed course to go left instead of right, and that this caused Malinak to lose control of the motorcycle. RP 1687-88. Before any trial, the trial court denied summary-judgment motions by the County and Tapken, each urging the court to determine as a matter of law that they were not negligent.

The case first went to trial in 2014 before Judge John O. Cooney. After Tapken and Malinak rested, the court dismissed their claims against the County on the basis that Malinak was negligent as a matter of law and his negligence was the sole proximate cause of the accident. CP 28-29, 524-30. The truncation of the trial meant the County never completed its case, and Tapken never had the opportunity to move for judgment as a matter of law on the County's affirmative defense of contributory negligence. On appeal, this Court reversed the dismissal and remanded for trial on all issues, including Tapken's negligence. *Slip Op.* 7-11, 17-18. (A copy of the slip opinion is attached at Appendix A to the County's Opening Brief.)

D. The jury returned verdicts in favor of Tapken and Malinak, but also found them negligent, and judgment was entered accordingly.

Judge Cooney recused himself on remand. Judge Annette S. Plese ruled that, absent a material difference between the summary-judgment record and the evidence at trial, this Court's decision affirming the denial of summary judgment on Tapken's contributory negligence was the law of the case. CP 655; RP (10/7/2016) 57. At the new trial, held before Judge Timothy B. Fennessy, the jury found all parties negligent and allocated fault 60% to the County, 30% to Malinak, and 10% to Tapken. CP 2652-54. It found Tapken's damages were \$12,535,000. CP 2653. Based on the fault allocation, the court entered judgment for Tapken against the County in the amount of \$7,521,000 plus costs and against Malinak in the amount of \$3,760,500 plus costs. CP 2659-61.

V. RESPONSE ARGUMENT

A. The trial court acted within its broad discretion in instructing the jury on the County’s duty to build and maintain its roads in a condition reasonably safe for ordinary travel.

1. The County’s duty extends to all motorists, including those who are negligent.

A municipality owes a duty to all motorists to build and maintain its roadways in a condition reasonably safe for ordinary travel. *Wuthrich v. King County*, 185 Wn.2d 19, 26, 366 P.3d 926 (2016); *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). The trial court properly gave the pattern instruction on the County’s duty: “Spokane County has a duty to exercise ordinary care in the maintenance of its public roads to keep them in a reasonably safe condition for ordinary travel.” CP 2622; *see* 6A WASH. PRACTICE, WASH. PATTERN JURY INSTR. CIV. 140.01 (6th ed. 2012).

A municipality’s duty specifically includes eliminating or safeguarding against inherently dangerous or misleading conditions. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787-88, 108 P.3d 1220 (2005); *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994). The duty is not limited to conditions on the roadway itself, but includes sight obstructions caused by roadside vegetation. *Wuthrich*, 185 Wn.2d at 25-27.

The County seeks to limit the duty it owes members of the public so that it extends only to fault-free motorists. *See Brief of Appellant* (BA) 21, 24-25. This is not the law. After the adoption of comparative negligence in 1981, some courts still held that a motorist’s claim against a municipality

was barred if the motorist was contributorily negligent. *See Keller*, 146 Wn.2d at 243-46 (discussing cases). But in *Keller*, the Washington Supreme Court held that a municipality owes its duty to *all* road users, whether fault free or negligent. 146 Wn.2d at 244-49. It was thus prejudicial error in *Keller* to instruct the jury that the municipality owed no duty if the plaintiff was contributorily negligent. *Id.* at 239, 251.⁵ Tellingly, the County relies on pre-*Keller* law in defining its duty. *See* BA 21-23.

2. The trial court instructed the jury consistent with the established principle that a motorist’s contributory negligence—which includes knowingly encountering a hazard—does not eliminate a municipality’s duty.

Jury instructions are sufficient if they are readily understood, not misleading, and permit a party to argue its theory of the case to the jury. *Keller*, 146 Wn.2d at 249. Instructions are to be considered in their entirety, not in isolation. *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 533, 730 P.2d 1299 (1987). The number and specific language are left to the trial court’s discretion. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). A court should give only the instructions that “enunciate the basic and essential elements of the legal rules necessary for a jury to reach a verdict.” *Laudermilk v. Carpenter*, 78 Wn.2d 92, 100-01, 457 P.2d 1004 (1969). The decision whether to give a particular instruction is reviewed

⁵ The Supreme Court rejected the policy concern (also raised by the County here, BA 22) that exposing a municipality to potential liability to negligent drivers would render it liable for all traffic accidents, reasoning that the element of proximate causation remains an appropriate limitation on liability. *Keller*, 146 Wn.2d at 251-52.

for abuse of discretion. *Clark County v. McManus*, 185 Wn.2d 466, 474, 372 P.3d 765 (2016).

The trial court acted within its discretion both in giving Instruction 14, which correctly informed the jury that a municipality’s duty to warn “is *not eliminated* by general knowledge of a motorist of roadway conditions,” and in refusing to give the County’s Proposed Instruction D-23, which would have told that jury—*conversely*—that 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.” CP 2625, 2343 (emphasis added).

A motorist’s knowledge of a road hazard will never “eliminate” a municipality’s duty or leave it with “no duty.” Citing a pre-*Keller* decision, the County confuses the existence of a duty with the separate issue of contributory negligence. *See* BA 21 (citing *Hansen v. Wash. Natural Gas Co.*, 95 Wn.2d 773, 632 P.2d 504 (1981)). The County ignores that, in *Keller*, the Supreme Court clarified that its decision in *Hansen* was not meant to restrict a municipality’s duty. *Keller*, 146 Wn.2d at 244-46. Under *Keller*, evidence that a hazardous condition was open, apparent, or known is relevant not to the existence of a duty, but only to a motorist’s contributory negligence. *Id.* at 244-49, 251-52; *see also* *Millson v. City of Lynden*, 174 Wn. App. 303, 314, 298 P.3d 141 (2013).

Failing to exercise reasonable care in encountering an open, apparent, or known hazard is contributory negligence. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 497-502, 834 P.2d 6 (1992); *Naccarato v. Pengelly*, 148 Wash. 429, 430-31, 269 P.3 813 (1928); *Millson*, 174 Wn.

App. at 310-14. Contributory negligence includes any “conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant in bringing about the plaintiff’s harm.” *Hughey v. Winthrop Motor Co.*, 61 Wn.2d 227, 229, 377 P.2d 640 (1963) (quoting RESTATEMENT (FIRST) OF TORTS § 463 (1939)).

The County’s Proposed Instruction D-23, a negative instruction that would have told the jury the County owed “no duty” to warn of an inherently dangerous condition that was “open, apparent, and known,” would have contravened *Keller* because it would have relieved the County of a duty based on a finding of contributory negligence.⁶ *Millson* confirms this conclusion.

Although *Millson* involved a sidewalk, a municipality’s duty regarding sidewalks and roads is the same. *Millson*, 174 Wn. App. at 309 (citing *Keller*, 146 Wn.2d at 249). The plaintiff in *Millson* tripped on an offset in a sidewalk in her neighborhood. *Id.* at 307-08. The trial court granted the defendant municipality summary judgment because the offset was “open and obvious and known” to the plaintiff. *Id.* at 308. Reversing and remanding for trial, the Court of Appeals observed: “The supreme court has made clear that a city is *not relieved of its duty* to citizens where an offset is open and obvious.” *Id.* at 310 (citing *Blasick v. City of Yakima*, 45 Wn.2d 309, 313-14, 274 P.2d 122 (1954)) (emphasis added). The court held

⁶ Instructions framed in the negative are disfavored because they “tend to muddle the jury’s understanding of the burden imposed upon a plaintiff[.]” *Terrell v. Hamilton*, 190 Wn. App. 489, 505-06, 358 P.3d 453 (2015).

evidence that a hazard was open, obvious, or known instead goes to the plaintiff's contributory negligence. *Id.* at 310-14.

In certain circumstances, a motorist's knowledge of a hazard may be sufficiently specific to support a finding not just that he was contributorily negligent, but that his negligence was the sole proximate cause of the accident.⁷ *See Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 856, 751 P.2d 854 (1988). But that still does not mean the municipality owed "no duty." Absence of proximate causation does not relieve the defendant of a duty. *See id.*; *see also Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). *Wojcik* illustrates this point.

In *Wojcik*, the plaintiff was attempting to pass another vehicle in a curve when an oncoming vehicle suddenly appeared from a dip. 50 Wn. App. at 851. The plaintiff swerved, lost control, and crashed. *Id.* At the point where he began his passing maneuver, there was no double yellow line. *Id.* In support of its successful summary-judgment motion, the municipal defendant argued that improper striping could not have been a proximate cause of the accident because the plaintiff admitted in deposition that he was "generally" familiar with the road, including the curve and dip. *Id.* at 852, 856. On appeal, the Court of Appeals reversed and held that proximate causation was for the jury because it could reasonably find that the plaintiff's general knowledge was not sufficiently specific to defeat

⁷ The County misapprehends the significance of *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). *See* BA 23-25. These cases support the trial court's giving of Instruction 14. Both hold that the motorist's state of mind regarding a condition goes to proximate causation. *See Johanson*, 7 Wn.2d at 121-22; *Nakamura*, 6 Wn. App. at 276-77.

proximate causation. *Id.* at 856. Significantly, nothing in *Wojcik* suggested that the plaintiff's knowledge of road conditions, whether general or specific, could relieve the defendant of its duty.

In sum, based on evidence that a dangerous condition was open, apparent, or known, a jury may find that a motorist was at fault for an accident, and possibly even that such negligence was the sole proximate cause of the accident. But under *Keller*, a trial court may not empower a jury to relieve a municipality of a duty based on a motorist's contributory negligence. *Keller*, 146 Wn.2d at 250-51. Because that is precisely what the County's Proposed Instruction D-23 would have allowed the jury to do, the trial court did not abuse its discretion in refusing to give that instruction. Meanwhile, the court instructed the jury correctly in Instruction 14 that a motorist's knowledge of a hazard does not eliminate a municipality's duty.

Overall, the trial court's instructions allowed the County to argue a legitimate defense theory: Malinak was negligent because he knew or should have known he could not see around a curve that might be sharp and thus should have slowed more than he did. RP 1692-93. The trial court properly instructed on the County's duty under *Keller* and the principles of contributory negligence and proximate causation. *See* CP 2618-19 (Court's Instructions 8 and 9—contributory negligence), 2626 (Court's Instruction 15—proximate causation). The court further instructed on a motorist's obligations when approaching yield signs and intersections and that “[e]very person has a duty to see what would be seen by a person exercising ordinary care.” CP 2621, 2633, 2637 (Court's Instructions 10, 22, & 26).

Ultimately, the jury found that Malinak was negligent and that his negligence was a proximate cause of the accident, but as a matter of law this did not relieve the County of a duty. Per *Keller*, the court properly refused to conflate Malinak's negligence and the existence of a duty.

3. The trial court instructed the jury consistent with the established principle that, to defeat proximate causation, a motorist's knowledge of a hazard must be specific and not merely general.

As already discussed, Instruction 14 was correct because, under *Keller*, a motorist's knowledge of a hazard can never "eliminate" a municipality's duty. In addition, the instruction is consistent with the principle that a motorist's knowledge of a hazard may defeat proximate causation only if such knowledge is "specific and not general." *Wojcik*, 50 Wn. App. at 856. Instructing on this principle was appropriate given Malinak's testimony that, although he had driven through the Waverly Y a few times before the accident, he did not recall taking the right fork southbound and was not anticipating a sharp curve. RP 847-49, 908-09.

The County complains that the term "general" knowledge in Instruction 14 was vague and undefined. BA 23. But an instruction need not define terms that are of ordinary understanding or self-explanatory. *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). Here, *general* knowledge plainly is distinguished from *specific* knowledge. And under *Wojcik*, it was appropriate to instruct the jury that general knowledge does not suffice. *Wojcik*, 50 Wn. App. at 956.

4. Authorities on premises liability of private landowners and other unrelated contexts are neither controlling nor persuasive.

The County cites multiple authorities outside the context of public roads for the supposed proposition that there is no duty to warn of an open and obvious condition. *See* BA 22 (& nn.14-17), 27. None governs in the context of public roads, where *Keller* controls, and each is distinguishable.

For instance, the County fails in its attempt to analogize to *McDonald v. Cove to Clover*, 180 Wn. App. 1, 321 P.3d 259 (2014). There, the plaintiff while attending an outdoor festival chose to walk on a grassy slope he knew was wet, rather than use a nearby concrete sidewalk, and he slipped and fell. *Id.* at 3, 6. The Court of Appeals affirmed a summary judgment of dismissal because the festival organizer had no reason to foresee that an attendee would fail to protect himself from obvious and known risks. *Id.* at 6. Electing to walk on wet slope is unlike using a public road. If anything, the facts here are akin to those in a case *distinguished* in *McDonald—Mucsi v. Graoch Associates Ltd. Partnership No. 12*, 144 Wn.2d 847, 859-60, 31 P.3d 684 (2001)—where the court recognized potential liability, despite the plaintiff’s knowledge that the walkway where he slipped and fell was icy, because the walkway was open and designated for pedestrian use. *See McDonald*, 180 Wn. App. at 5-6 (citing and discussing *Mucsi*). Similarly here, and unlike in *McDonald*, injury occurred on an open, public way.

The County ignores that “[a] landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the

harm, despite the open and obvious nature of the danger.” *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002) (citing RESTATEMENT (SECOND) OF TORTS § 343A (1965)); *see also Mucsi*, 144 Wn.2d at 859-60. This by itself refutes the County’s position that one is automatically relieved of a duty where a hazard is open and obvious. Moreover, although government entities are generally held to the same standards as private individuals, as the court observed in *Millson*, “a municipality...generally owes a higher duty of care to those traveling on its sidewalks [and roads] than do private landowners.” 174 Wn. App. at 315 (citing RESTATEMENT, *supra*, § 343A).

Restatement § 343A, quoted in *Millson*, states that “[i]n determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land...is a factor of importance indicating that the harm should be anticipated.” *Millson*, 174 Wn. App. at 316 (quoting § 343A). Significantly, the comment to § 343A adds that government “may have special reason to anticipate that one who so enters will proceed to encounter known or obvious dangers; and such a defendant may therefore be subject to liability in some cases where the ordinary possessor of land would not.” *Id.* (quoting § 343A cmt. a) (emphasis removed). Certainly, such “special reason” may exist where conditions can mislead motorists into not slowing down sufficiently for a curve. The trial court committed no error in instructing on the County’s duty. *See* RP 1620-21.

B. The trial court acted within its broad discretion in instructing the jury on the emergency doctrine.

1. Malinak's negligence was a fact question, and the evidence permitted a finding that he confronted an emergency not of his making.

A party is entitled to a jury instruction on a theory if substantial evidence supports it. *Kelsey v. Pollock*, 59 Wn.2d 796, 798, 370 P.2d 598 (1962). Under the emergency doctrine, “[a] defendant who is suddenly confronted by an emergency through no fault of his own and chooses a damaging course of action in order to avoid the emergency is not liable for negligence although the particular act might constitute negligence had no emergency been present.” *Kappelman v. Lutz*, 167 Wn.2d 1, 10, 217 P.3d 286 (2009).⁸ In arguing that Malinak as a matter of law contributed to his own emergency, the County seeks to revisit this Court’s determination in the first appeal that a jury could find Malinak not negligent. *See* BA 31.

Under the law-of-the-case doctrine, the trial court on remand must abide by the legal rulings and principles enunciated by the appellate court. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). In its decision reversing the prior dismissal, this Court concluded that a jury could find that Malinak was not negligent, despite the County’s contention that the hazards were open, apparent, and known:

⁸ The trial court’s emergency instruction was a pattern instruction, WPI 12.02:

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.

CP 2624 (Court’s Instruction 13); 6A WASH. PRACTICE, WASH. PATTERN JURY INSTR. CIV. 12.02 (6th ed. 2012).

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 reasonable person should perceive.

Slip Op. at 9 n.3. This Court's rejection of Judge Cooney's determination that Malinak was negligent was central to its decision to reverse. *See Slip Op.* at 9, 9 n.3. The trial court on remand properly rejected the County's argument that Judge Cooney's ruling, rather than this Court's decision, was the law of the case regarding Malinak's negligence. *See CP 95-97, 655.*

The County's argument that Malinak was negligent as a matter of law ignores that the evidence allowed the jury to find that the conditions at the Waverly Y could mislead a motorist such as Malinak not to anticipate a sharp curve without warning. *See Slip Op.* at 4-5, 9; *see, e.g., RP 741-42, 1104-06, 1111, 1118.* Although the rules of the road require a driver to slow down for an intersection, highway design must take into account foreseeable driver behavior. *Keller*, 146 Wn.2d at 248-49; *see also RP 765-67, 784, 817-19.*

Malinak testified that because he expected to be warned of any significant curve, he was surprised once the sharpness of the curve to the right became visible past the bush. RP 856-57. This created the sudden emergency. At that point, Malinak had at least two choices: stay with the right turn and try to negotiate it despite his speed, or attempt to switch to the more gradual, left turn. Malinak reacted by "tr[ying] to take the left-hand corner at the last second." RP 856-57. Although the County maintains

that Malinak's being surprised by the curve's sharpness was at least partially his own fault, again, this Court held that Malinak's negligence was a question for the jury. *Slip Op.* at 9 n.3; *see* BA 32-33. And where the evidence is in conflict as to whether the party seeking to invoke the emergency doctrine helped create the emergency, the trial court should instruct on the doctrine and allow the jury to resolve the conflict. *Szupkay v. Cozzetti*, 37 Wn. App. 30, 34, 678 P.2d 358 (1984).

Contrary to the County's assertion, there is no blanket rule that the emergency doctrine does not apply in sight-obstruction cases. BA 29. The County fails to distinguish *Heggelund v. Nordby*, 48 Wn.2d 259, 292 P.2d 1057 (1956), which is on point. There, driving on a leaf-covered road, the defendant unexpectedly came upon a 90-degree turn at the bottom of a hill and instantly had to choose between crashing into a house or driving off the road into a stump. *Id.* at 260. Affirming a judgment for his passenger, the plaintiff, the Supreme Court held that under the circumstances, both negligence and the existence of an emergency were fact questions for the jury. *Id.* at 262-63.

The County's proffered bases to distinguish *Heggelund* gloss over key facts already discussed: although Malinak had previously driven through the Waverly Y on a few occasions, he did not remember having gone southbound through the sharp, right-hand curve and did not anticipate it (indeed, this Court held that his familiarity with the roadway was a fact question, *Slip Op.* at 9 n.3); although the road was not covered with leaves as in *Heggelund*, the curve was nonetheless obscured by a bush; and

although Malinak could see that the bush obscured the road ahead, he reasonably expected from the signage on the eight preceding curves to be warned of any significant curve, and particularly one that should be taken at 20 miles per hour. *See* BA 30.

The County likewise fails in its attempt to analogize to *Mills v. Park*, 67 Wn.2d 717, 409 P.2d 646 (1966). In that case, the plaintiffs' vehicle was traveling slowly behind a snow plow. *Id.* at 718. The defendant failed to slow his vehicle to account for the reduced visibility from snow thrown up by the plow and thus failed to observe the plaintiffs' car in time to avoid a collision. *Id.* at 718-20. Reversing a defense verdict, the Supreme Court held that the trial court erred in instructing on the emergency doctrine because the defendant's own testimony established that his visibility did not *suddenly* become obscured, but had been obscured continuously for a substantial distance. *Id.* at 720.

Unlike *Mills*, this is not a case of mere reduced visibility. Nothing in *Mills* suggests the defendant was misled regarding the presence or absence of slow-moving vehicles in the blown snow ahead. Here, again, the County's negligence led Malinak not to anticipate encountering a sharp curve without being warned. He thus confronted a sudden emergency once the curve's sharpness became visible. Because the jury could have found the emergency was sudden and not of his making, the trial court did not abuse its discretion in giving the emergency instruction. *See* RP 1619-20.

2. The trial court did not abuse its discretion in allowing the jury to consider the emergency instruction as to Tapken. The County's expert testified that she confronted an emergency, and its contributory-negligence theory requires that had at least two choices.

Tapken should never have needed to argue the emergency doctrine because there was no basis to find her negligent. As explained in her cross-appeal argument, the County failed to present sufficient evidence to permit the jury to find facts essential to its affirmative defense of her negligence, including the essential facts that she (1) exercised conscious volition when Malinak reversed course or (2) had a reasonable opportunity to appreciate and react to Malinak's sudden action. *See* § VI.A, *infra*. Absent such evidence, the County's affirmative defense failed as a matter of law, and the emergency instruction necessarily pertained only to Malinak.

But assuming the County *had* presented evidence from which the jury could find Tapken contributorily negligent, the jury could also have found she confronted an emergency. In fact, the County's own expert testified as much. After initially denying it, the County's motorcycle expert, Stephen Garets, was impeached with his deposition testimony that Tapken confronted an "emergency situation" and had to make a "split-second decision." RP 1603-05. Prior inconsistent deposition testimony is not hearsay and is admissible as substantive evidence. ER 801(d)(1)(i); *State v. McComas*, 186 Wn. App. 307, 312, 345 P.3d 36 (2015). Further, Garets' deposition testimony became substantive evidence for the additional reason

that he affirmed its truth, effectively adopting it as his trial testimony.⁹ RP 1604-05; *see United States v. Cisneros-Gutierrez*, 517 F.3d 751, 759, 759 n.8 (5th Cir. 2008); *United States v. Tavares*, 512 F.2d 872, 874-75 (9th Cir. 1975). This testimony, by itself, was sufficient to support giving the emergency instruction as to Tapken.

Moreover, although the County disagrees with its expert’s testimony that Tapken faced a choice between two courses of action (*see* BA 33), its contributory-negligence theory requires that she did.¹⁰ An essential premise of the County’s theory is that Tapken’s leaning farther right when Malinak turned left was a conscious and volitional act—a choice—otherwise it could not have been a *negligent act*.

“Negligence consists in doing some act which should not have been done, or in omitting some act which should have been done.” *Herrick v. Wash. Water Power Co.*, 75 Wash. 149, 162, 134 P. 934 (1913); *see also* RESTATEMENT (SECOND) OF TORTS § 282 cmt. a (1965). Not every movement constitutes an “act.” An act requires conscious volition, and movements that are “purely a reaction to some outside force” are not acts. RESTATEMENT (SECOND) OF TORTS § 2 cmt. a; *see also Herrick*, 75 Wash. at 162 (holding that negligence requires “the power of volition at the time

⁹ The trial court instructed the jury that the deposition testimony could only be considered for impeachment purposes. *See* RP 1624-27. This was contrary to ER 801(d)(1)(i) and an abuse of discretion benefitting the County. *See McComas*, 186 Wn. App. at 312; *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). Regardless, substantial evidence supported giving the emergency instruction.

¹⁰ *Cf. Locker v. Sammons Trucking Co.*, 10 Wn. App. 899, 903-04, 520 P.2d 939 (1974) (reasoning that the plaintiff’s contention that the defendant could have sounded his horn in addition to braking meant the defendant necessarily had a choice between actions for purposes of the emergency doctrine).

of the act or omission”); *Kuhlmann v. Rowald*, 549 S.W.2d 583, 584 (Mo. Ct. App. 1977) (holding it was error to submit contributory negligence to the jury where the plaintiff pedestrian, before being struck by the defendant’s car, was either pushed or slipped and fell into the roadway, and “[n]either was a voluntary act”).

To maintain its contributory-negligence theory, the County must accept that Tapken faced a choice between at least two actions: (1) the action the County maintains she should have taken, *i.e.*, cooperate with Malinak’s sudden attempt to make the left turn by leaning left with him, or (2) the “action” she ostensibly took, *i.e.*, lean farther right. In arguing that leaning farther right does not count because it was not a *reasonable* choice, the County ignores the purpose of the emergency doctrine, which is to recognize that reasonable persons may make “damaging” choices when confronted with an emergency. *Kappelman*, 167 Wn.2d at 10; CP 2624 (Court’s Instruction 13); *see* BA 33-34. It also ignores that leaning farther right could have been found reasonable.¹¹ Thus, unless the County is prepared to concede Tapken was not negligent, it cannot complain she was not entitled to the benefit of the emergency instruction.

The trial court did not abuse its discretion in giving the emergency instruction or in allowing the jury to consider it for both Malinak and

¹¹ Even assuming she had time to appreciate and react to Malinak’s sudden action and exercised conscious volition when her upper body moved right (neither of which the County proved), Tapken may have reasonably done so because she concluded that Malinak’s sudden decision to go left was unwise, rash, or reckless, and that countering his left lean presented her best chance to come away from the perilous situation unscathed. This of course is speculation, but it is no more speculative than the County’s unproven assumption that Tapken acted with conscious volition.

Tapken. RP 1619-20. If the finding that Tapken was negligent survives, then she was entitled to the benefit of the emergency instruction. If not, then the instruction necessarily did not apply to her. Either way, the trial court committed no error in giving the emergency instruction.

3. Any error in instructing on the emergency doctrine was harmless because, in finding both Malinak and Tapken negligent, the jury necessarily rejected the theory that either of them confronted an emergency.

Only prejudicial error requires reversal, and error is prejudicial only if it affected the trial outcome. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983); *Keller*, 146 Wn.2d at 249. Any error in giving the emergency instruction plainly did not affect the trial outcome. The instruction directed the jury that, if it accepted the emergency theory as to either Malinak or Tapken, it must find him or her “not negligent.” CP 2624. The jury necessarily rejected the theory that either Malinak or Tapken confronted an emergency when it found each of them negligent. *See* CP 2652. Any error in giving the emergency instruction was thus harmless. *See McCluskey*, 68 Wn. App. at 111 (“Any error in the giving of [an emergency] instruction would be harmless because the jury clearly rejected the emergency theory when it found [the defendant] 50 percent negligent.”). The County’s argument that the jury might have “assign[ed] more fault” to Malinak or Tapken absent the emergency instruction ignores the instruction’s plain language, which the jury is presumed to follow. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 738, 389 P.3d 504 (2017); *see* BA 34.

C. The trial court acted within its broad discretion in admitting limited evidence of the Waverly Y's accident history.

1. The trial court admitted evidence of three prior similar accidents to prove dangerousness.

The admissibility of accident-history evidence is within the trial court's broad discretion. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984); *Toftoy v. Ocean Shores Props., Inc.*, 71 Wn.2d 833, 836, 431 P.2d 212 (1967). An appellate court will reverse a trial court's evidentiary ruling "only when no reasonable person would take the view adopted by the trial court." *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.2d 596 (2017) (quoting prior cases).

When a plaintiff alleges injury resulting from a dangerous condition under the defendant's control, evidence of prior similar accidents is relevant and admissible to establish: (1) the defendant had prior notice of the condition, (2) the condition was dangerous, or (3) both. *Id.* Notice and dangerousness are independent issues, and prior accidents are relevant to prove dangerousness, even where notice is stipulated. *Turner v. City of Tacoma*, 72 Wn.2d 1029, 1035-36, 435 P.2d 927 (1967).

Here, litigation of the admissibility of accident history before the second trial focused primarily on the notice issue. Records produced by the County disclosed over two dozen prior accidents at the Waverly Y in less than 20 years, all involving single vehicles departing the roadway as occurred here. *See* CP 1513-91; *Slip Op.* at 11. Judge Cooney ruled before the first trial that three of the prior accidents (occurring in 1995, 2007, and 2009) were substantially similar to the subject accident and that evidence of

those accidents would be admitted to prove that the County had prior notice of the conditions at the Waverly Y that Tapken alleged were dangerous. CP 1007. But he later excluded accident history after ruling that the County had admitted notice of the relevant condition. CP 1009-10.

On appeal, this Court held that Judge Cooney did not abuse his discretion in excluding prior accidents for purposes of proving notice because the County (despite “equivocat[ing] somewhat”) had admitted notice of the alleged dangerous condition, which this Court described as “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.” *Slip Op.* at 14-15.

In light of this Court’s decision being premised on the County’s admission of notice, Judge Plese ruled that Judge Cooney’s ruling excluding accident history to prove notice would stand “as long as the County does not dispute that the yield sign and sharpness of the curve to the right were obstructed by the hawthorn bush.” CP 655. Based on that ruling, Tapken asked the County formally to admit those facts. CP 878-79. Under court order to respond unequivocally, the County *denied* having notice that the bush obscured the curve. CP 878-79, 965-66, 1313-14.

At a hearing on motions in limine before the second trial (before Judge Fennessy), the County again equivocated on the notice issue, first stating, “We do not believe...that the bush obscures the intersection,” then admitting that the bush obscured the yield sign “from certain perspectives” and that “a portion of the black hawthorn bush obscures the sight view to a

portion of the intersection.” RP 60, 62. At one point, the County went so far as to admit *dangerousness*—*i.e.*, that the hawthorn bush created “a defect or dangerous condition” (of which the yield-ahead sign supposedly was intended to warn)—before retracting that admission. RP 65, 75-76. The trial court commented that it was “struggl[ing] with what it is that is being admitted” and that the County’s position suffered from a “lack of clarity.” RP 71, 74.

The court ultimately ruled that substantially similar prior accidents would be admitted to prove dangerousness.¹² RP 71, 74; CP 2656.

2. This Court’s decision in the first appeal that the trial court did not abuse its discretion in excluding accident history offered to prove notice did not bar the trial court on remand from admitting the evidence to prove dangerousness.

Although the law-of-the-case doctrine requires a trial court on remand to abide by the legal rulings and principles enunciated by the appellate court, it applies only to issues “actually decided” by the appellate court. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356, 361 (1986). It does not preclude the trial court, on remand, from deciding issues that were not the subject of the appeal or revisiting prior, unappealed rulings. *State v. Barberio*, 121 Wn.2d 48, 50-

¹² At one point, after the County admitted that the hawthorn bush created a dangerous condition, the trial court ruled that it would accept the County’s stipulation to dangerousness, leaving for the jury the question whether the posted signage provided a sufficient warning. RP 65, 75-76. But after defense counsel then retracted that admission, the trial court returned to its “original decision”—*i.e.*, that substantially similar accidents would be admitted to prove dangerousness. RP 77.

51, 846 P.2d 519 (1993).¹³ When an appellate court remands for further proceedings, it expects the trial court will exercise its discretion to decide any issue necessary to resolve the case. *Marriage of Rockwell*, 157 Wn. App. 449, 453, 238 P.3d 1184 (2010).

Contrary to the County’s argument, the trial court’s ruling admitting accident history on remand to prove dangerousness does not conflict with this Court’s decision in the first appeal. *See* BA 35-36. This Court ruled that the trial court did not abuse its discretion in excluding accident history; it did not rule that the court would abuse its discretion if it admitted the evidence. Moreover, because this Court addressed only admissibility to prove notice, not dangerousness, the trial court was free to revisit admissibility to prove dangerousness.¹⁴ *Barberio*, 121 Wn.2d at 50-51.

The County relies on this Court’s statement, “[T]he relevant *notice* is of the alleged dangerous condition—which the County admitted—not whether the condition actually was dangerous.” BA 35 (quoting *Slip Op.* at

¹³ The County cites *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 810 P.2d 12 (1991), which stated: “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 and supersedes the trial court’s findings.” *Id.* at 161 (emphasis added). The phrase “might have been determined” does not mean that the appellate court’s decision somehow binds the trial court on remand on issues not decided by the appellate court. Rather, it means that “questions...which might have been determined *had they been presented*, will not be considered *upon a second appeal of the same action.*” *Morehouse v. City of Everett*, 141 Wash. 399, 404 252 P. 157 (1926) (emphasis added) (quoting *Perrault v. Emporium Dep’t Store Co.*, 83 Wash. 578, 581, 145 P. 438 (1915)); *see also* RAP 2.5(c)(1). Furthermore, this rule applies in the second appeal only if the trial court did not exercise its discretion to revisit the issue on remand. *Barberio*, 121 Wn.2d at 51; *see also State v. Kilgore*, 167 Wn.2d 28, 38-39, 216 P.3d 393 (2009).

¹⁴ Tapken raised only the notice issue in the first appeal. *See Appellant’s Opening Brief*, No. 32909-7-III, at 4, 39-42 (available at <https://bit.ly/2GtAMbA>); *Appellant’s Reply Brief*, No. 32909-7-III, at 20-22 (available at <https://bit.ly/2JiIPFU>).

14) (emphasis added). Taking that statement out of context, the County blurs the distinction between notice and dangerousness, asserting that the trial court on remand “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.*” BA 36 (emphasis added).

The trial court on remand did not admit the evidence to prove notice of anything. It admitted the evidence to prove dangerousness, irrespective of notice. RP 71, 74. *Turner* establishes the independence of the notice and dangerousness issues. There, the plaintiff hit her head on a fire escape that obstructed part of a public sidewalk in Tacoma. 72 Wn.2d at 1031. The city sought to exclude evidence of prior accidents by stipulating to notice of the existence of the fire escape, but the city did not concede that the condition was dangerous. *Id.* at 1036. The Supreme Court held that stipulating to notice of the condition still left evidence of prior similar accidents relevant and admissible to prove dangerousness. *Id.*

Under *Turner*, the trial court had discretion to admit the accident-history evidence because it was relevant to prove dangerousness even if the County admitted notice of the condition at issue and regardless of the elusive scope of that admission. *See also, e.g., Boeing Co.*, 89 Wn.2d at 450 (holding that *subsequent* accidents, although plainly not relevant to notice, were relevant and admissible to establish the dangerousness of the condition at issue); *O’Dell v. Milwaukee, St. Paul & Pac. R. Co.*, 6 Wn. App. 817, 825-26, 497 P.2d 519 (1972) (holding that prior near-accidents

were admissible to establish dangerousness even though the defendant undisputedly lacked notice of the occurrences).¹⁵

The trial court had discretion to decide the admissibility issue on remand and did not abuse its discretion in admitting accident history to prove dangerousness.

3. The trial court did not abuse its discretion in determining that the prior accidents it admitted were substantially similar to the subject accident.

Prior accidents are relevant to prove the dangerousness of a condition if they occurred under the same or substantially similar circumstances as the subject accident. *Turner*, 72 Wn.2d at 1036; *Toftoy*, 71 Wn.2d at 835. Only the material circumstances need be substantially similar. *See Boeing Co. v. State*, 89 Wn.2d 443, 449, 572 P.2d 8 (1978). Once substantial similarity is established, factual differences go to the weight to be given the evidence by the jury, rather than to admissibility. *Jenkins v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 107, 713 P.2d 79 (1986).

In each of the three accidents the trial court admitted, a driver traveling southbound on Prairie View Road failed to negotiate the right turn due to speed and went off the roadway and down the embankment. CP 1362-63, 1375, 1377-78, 1386-87. These were the material facts with respect to Tapken's and Malinak's claims against the County. Stevens

¹⁵ *Accord Wuthrich*, 185 Wn.2d at 29 (holding that accident history, as in a lack of prior accidents, "could be relevant circumstantial evidence as to the reasonableness of a municipality's actions when evaluating breach").

opined in connection with a motion in limine that these facts were material and common among the accidents. CP 1362-63. In addition, the court was made aware that, before litigation, the County considered two of the accidents (2007 and 2009) substantially similar to the subject accident: in preparing to apply for a WSDOT-funded grant to address roadways with “a history of serious and fatal crashes,” the County identified those accidents as demonstrating such a history at the Waverly Y intersection and as evidencing a need to “realign” the intersection.¹⁶ CP 1364, 1411, 1419-22, 1423-24, 1429-30.

The trial court did not abuse its discretion in concluding, as did Judge Cooney, that three of the more than two dozen prior accidents were substantially similar to the subject accident.¹⁷ Once their similarity in the material respects was established, the factual differences went to the weight to be given the evidence by the jury. *Jenkins*, 105 Wn.2d at 107.

4. Any error in admitting three prior accidents was harmless given the overwhelming evidence of the Waverly Y’s dangerousness.

An erroneous evidentiary ruling is not grounds for reversal absent prejudicial error. *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 474, 360 P.3d 855 (2015). Error is harmless “if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.”

¹⁶ This evidence was excluded from presentation to the jury. RP 267.

¹⁷ Although Judge Cooney observed there was no “uniformity” to how the accidents occurred, he never changed his decision that the material facts of the three prior accidents were substantially similar to the subject accident. CP 1007, 1036. He excluded the accidents based on the County’s admission to notice and because dangerousness was supposedly “for the experts to decide.” CP 1009-12, 1036-37.

Id. (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). An erroneous evidentiary ruling “is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.* (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Here, accident history was not a major factor in the liability case against the County. Tapken presented brief testimony from the County’s traffic engineer (Greene), her highway-design expert (Stevens), and two of the drivers involved in the prior accidents, and she cross-examined the County’s highway-design expert, Ballard. *See* RP 465-66, 658-84, 739-40, 814-15, 1126-36, 1462-76. In the context of the nearly three-week trial, the significance of this evidence was minor. Tellingly, neither Tapken’s nor Malinak’s counsel specifically discussed the prior accidents in closing arguments. *Cf. Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876, 281 P.3d 289 (2012) (holding that prejudice resulted from erroneous jury instruction when counsel emphasized it during closing argument); *see* RP 1628-47, 1662-83, 1701-05.¹⁸

¹⁸ During its opening statement, defense counsel for the County compared the three prior similar accidents that would be discussed during the trial with an estimated three million vehicles that traveled through the Waverly Y in 16 years. RP 355-56. After the court *sua sponte* raised a concern, outside the presence of the jury, that defense counsel’s statement misleadingly implied that only three accidents occurred during the 16 years, defense counsel moved to recuse Judge Fennessy based on alleged undisclosed ex parte contact and bias. RP 472-74, 481-84, 489-95. Judge Fennessy explained that there was no ex parte contact and denied the motion, reserving the issue of a remedy for defense counsel’s misconduct. RP 501-04. The trial court ultimately granted no remedy, denying Tapken’s request to recall the County’s traffic engineer to establish that there were not just three but at least 11 accidents in the 16 years. RP 1200-20.

Moreover, the evidence of the dangerousness of the Waverly Y was overwhelming, without regard to accident history.¹⁹ It included, among other things: (1) the County’s admissions at trial that the bush obscured the yield sign and curve and that the posted signs were not meant to slow traffic or warn of a curve (RP 417-19, 523-25); (2) Stevens’ and Gill’s undisputed testimony about driver expectancy, agreed to by Greene and Ballard (RP 419, 815-16, 1104-06, 1419); (3) Stevens’ undisputed testimony that the reasonable safe speed for the curve was 19 miles per hour (RP 736); (4) Stevens’ and Gill’s testimony that the layout, signage, and overgrown vegetation combined to mislead motorists not to slow down sufficiently for the curve (RP 741-42, 1111, 1118); (5) Harbinson’s undisputed testimony that the curve could not be safely negotiated at 30 miles per hour or higher and that a motorcyclist at that speed would have insufficient time to slow down once the curve’s sharpness became visible (RP 1002-03, 1021-25); and (6) former chief sign technician Burks’ testimony that the bush was an “inherent problem” and the curve should have had a curve warning and advisory speed (RP 571-72, 639, 562-63, 640).

This Court should affirm as to the County’s liability.

¹⁹ This Court held that Tapken and Malinak presented sufficient evidence to establish breach of duty in the first trial, where accident history was excluded. *Slip Op.* at 9.

VI. CROSS-APPEAL ARGUMENT

A. The County failed to present sufficient evidence to permit the jury to find facts essential to its affirmative defense that Tapken was contributorily negligent.

Where the party with the burden of proof on a claim or defense fails to present evidence sufficient to support the finding of a fact essential to the claim or defense, the verdict on that claim or defense must be set aside. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001); *see* CR 50. The County had the burden to prove its affirmative defense that Tapken was negligent. *Hughey*, 61 Wn.2d at 229; *Liesey v. Wheeler*, 60 Wn.2d 209, 211, 373 P.2d 130 (1962). Given the County's contributory-negligence theory, this meant presenting evidence that Tapken (1) exercised conscious volition when Malinak suddenly turned left and her upper body moved right and (2) had sufficient time to appreciate and react to Malinak's sudden action. The County failed to present evidence sufficient to support findings of either of these facts.²⁰

In the first appeal, this Court held, based on the summary-judgment record, that Tapken's contributory negligence was a fact question. *Slip Op.* at 16-18. On remand, the law-of-the-case doctrine precluded the trial court from deciding otherwise before the trial; Tapken could move for judgment

²⁰ Unlike the County, Tapken has consistent positions on contributory negligence and the emergency instruction. *See* § V.C.2, *supra*. Her request that the contributory-negligence finding be vacated is based not on an argument that she reacted reasonably when confronted with an emergency, but rather that the County failed to establish the essential facts that she could have reacted and did react. If the finding that Tapken was negligent is vacated, the issue of the emergency instruction applying to her is moot because the jury never should have been allowed to consider whether she was negligent, and the instruction necessarily applied only to Malinak.

as a matter of law only if the evidence presented on the issue at trial differed materially from the summary-judgment record. *See* CP 655; RP (10/7/2016) 57. Because there was no material difference in the evidence, any motion for judgment as a matter of law under CR 50 during or after trial was legally precluded and would have been futile. A party is not required to make a futile CR 50 motion to preserve error for review. *See Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 804 n.6, 65 P.3d 16 (2003).

To hold otherwise would defeat a primary purpose of the rules on preservation of error, which is to promote judicial economy, including by avoiding unnecessary retrials. *See Ryan v. Westgard*, 12 Wn. App. 500, 510, 530 P.2d 687, 694 (1975). By allowing the issue to go to the jury, Tapken prevented any possible need for a third trial regardless of how this Court decides the issue in this second review. Her remedy now is simply amendment of the judgment. Given her serious injuries, her needful circumstances, and the years of delay caused by the erroneous dismissal of her claim during the first trial, the risk of a third trial being ordered was not one Tapken could take. *See* CP 87-90 (addressing her physical, mental, and financial condition as of September 2016).

For two independent reasons discussed next, Tapken respectfully asks this Court to revisit its earlier decision and now decide that the County, after a full opportunity to present its case at trial, failed to present sufficient evidence to permit the jury to find passenger contributory negligence. The Rules of Appellate Procedure authorize an appellate court to revisit its

earlier decision in the same case and reach a different result in the interest of justice:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, *where justice would best be served*, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c)(2) (emphasis added); *see, e.g., Folsom v. County of Spokane*, 111 Wn.2d 256, 263-65, 759 P.2d 1196 (1988); *First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or.*, 108 Wn.2d 324, 332-33, 738 P.2d 263 (1987); *Eserhut v. Heister*, 62 Wn. App. 10, 14, 821 P.2d 902 (1991). Here, given legal precedents not previously analyzed by this Court and a complete failure of proof by the County at trial, justice demands that this Court vacate the finding that Tapken was negligent.

1. The County presented no evidence that Tapken exercised conscious volition when Malinak suddenly reversed direction.

As explained above in the context of the emergency-instruction issue, negligence requires evidence that a person exercised conscious volition. *Herrick*, 75 Wash. at 162; *Kuhlmann*, 549 S.W.2d at 584; RESTATEMENT (SECOND) OF TORTS § 2 cmt. a. *See* § V.C.2, *supra*. The County presented no evidence that Tapken exercised conscious volition if and when her upper body moved right as Malinak turned left. The County's accident-reconstruction expert, William Neale, did not presume to offer any opinion one way or the other on this issue; at most, he assumed Tapken exercised conscious volition. *See* RP 1536.

Malinak testified he abruptly abandoned the right turn and switched to the left “as hard as [he] could.” RP 911. Tapken’s expert, Harbinson, testified that the force of Malinak’s suddenly turning left after first turning right would have pulled Tapken’s lower body (with her legs wrapped around the bike) to the left. RP 1031. Inertia then would have pushed her upper body to the right. *See id.* Elementary physics tells us that for every action, there is an equal and opposite reaction. In the first appeal, this Court affirmed the trial court’s denial of Tapken’s summary-judgment motion on the basis that, “if Tapken had sufficient time to lean farther right, she may also have had sufficient time to lean to the left.” *Slip Op.* at 17-18. This rationale presumed the County would prove Tapken voluntarily leaned farther right. It failed to do so.

Absent evidence to permit a finding that Tapken’s movement was voluntary, the jury could only speculate. But a jury may not find negligence based on speculation: “[I]f there is nothing more substantial to proceed upon than two theories, under one of which a [party] would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.” *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981). Absent evidence she exercised conscious volition, the negligence finding against Tapken cannot be sustained.

2. The County presented no evidence that Tapken had sufficient time to react to Malinak’s sudden action.

To maintain an affirmative defense of contributory negligence on the ground that the plaintiff failed to react to avoid an accident, a defendant

must present substantial evidence that the plaintiff had a reasonable time to appreciate a hazard and react. *Kilde v. Sorwak*, 1 Wn. App. 742, 747-48, 463 P.2d 265 (1970). The County failed to present any evidence that Tapken had sufficient time to appreciate and react to Malinak's sudden reversal of direction, including by leaning in any direction.

Kilde is illustrative. There, the defendant made a left turn in front of the plaintiff's oncoming vehicle. 1 Wn. App. at 743-44. The defendant alleged as an affirmative defense that the plaintiff was contributorily negligent. *Id.* at 745. The Court of Appeals held that the trial court properly refused to submit the issue to the jury because the defendant "failed to sustain [his] initial burden of proof" where the plaintiff would have had, at most, about two seconds to react to the defendant's negligent maneuver. *Id.* at 747-48; *see also Liesey*, 60 Wn.2d at 212-13 (holding that the trial court properly refused to submit the issue of contributory negligence to the jury where the plaintiff "had less than half a second in which to act").

Malinak switched from right to left a "split second" after realizing he could not make the right turn, leaving Tapken "even less time" to react to his reaction. RP 860. A passenger generally is not required to anticipate negligent acts on the part of the driver. *Murray v. Amrine*, 28 Wn. App. 650, 656, 626 P.2d 24 (1981). Only if there existed "circumstances that would serve to put [the passenger] on alert" does the passenger have a duty to warn or act. *Id.* There was no evidence that Tapken had time to appreciate let alone react to Malinak's sudden reversal of direction. The County's expert, Garets, testified that a passenger must "move with the

rider,” implying appreciation and volition. RP 1584. Yet the County presented no evidence that a person can react faster as a passenger on a motorcycle than in other circumstances. The standard minimum perception-reaction time is 1.5 seconds. RP 1022-23, 1325-26.

Tapken had time to anticipate and perceive the intended right turn and lean into the turn. RP 973-74. In contrast, she undisputedly had no notice of Malinak’s sudden shift in the opposite direction. Because the County failed to present evidence that Tapken had a reasonable opportunity to react, the jury’s finding that Tapken was negligent cannot be sustained.

B. This Court should vacate the finding that Tapken was negligent and remand for amendment of the judgment to reflect that the County and Malinak are jointly and severally liable for the full amount of the jury’s verdict for Tapken.

The jury found that Tapken sustained \$12,535,000 in damages. CP 2653. Under an exception to the general rule of several liability, if the plaintiff was not at fault, the defendants against whom judgment is entered are jointly and severally liable for the sum of their proportionate shares of the plaintiff’s damages. RCW 4.22.070(1)(b). Because of the finding that Tapken was partially at fault, the trial court entered judgment against the defendants only for their proportionate shares of the verdict (60% County, 30% Malinak). CP 2660.

Because the County failed to present sufficient evidence to permit the jury to find Tapken contributorily negligent, she was fault free as a matter of law. This Court should remand with directions to amend the

judgment to reflect that the County and Malinak are jointly and severally liable for the jury's verdict in Tapken's favor.

VII. CONCLUSION

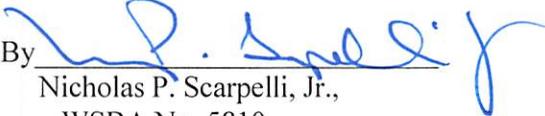
The trial court committed no instructional or evidentiary error affecting the County's liability. This Court should vacate the finding that Tapken was negligent and remand with directions to amend the judgment to reflect that the County and Malinak are jointly and severally liable for the jury's entire verdict in Tapken's favor. This Court should otherwise affirm.

Respectfully submitted this 10th day of April, 2018.

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CERTIFICATE OF SERVICE

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

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DATED this 10th day of April, 2018.



Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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