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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MADELYNN TAPKEN,

Respondent-Cross Appellant,

v.

SPOKANE COUNTY, a municipal corporation,

Appellant-Cross Respondent,

and

CONRAD MALINAK,

Respondent.

REPLY BRIEF OF APPELLANT-CROSS RESPONDENT
SPOKANE COUNTY

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I. INTRODUCTION

Appellant/Cross-Respondent Spokane County appealed based on clear instructional error that expanded the nature of its duty to include a duty to warn of conditions that are visible and known to motorists. This Court should disregard Respondent/Cross-Appellant Madelynn Tapken's¹ efforts to divert attention from the pertinent legal question. Instruction 14 was an instruction on the County's duty to warn. It was neither an instruction on the County's duty to maintain the roadway in a reasonably safe condition, nor an instruction on proximate cause. Instructing the jury the County owed Malinak a duty to warn of roadway conditions, even if they were visible and Malinak had knowledge of them, was a misstatement of the law. This error foreclosed the County from arguing its theory of the case and commented on the evidence, requiring reversal. The trial court compounded the error with its instruction on the emergency doctrine, its admission of prior accident evidence despite this Court's decision excluding it, and its rulings on Malinak's medical expenses.

The Court should reject Tapken's cross-appeal on the issue of her comparative fault, because a summary judgment denial is not reviewable

¹ Because Respondent Conrad Malinak has simply adopted Tapken's positions and not filed a separate brief addressing the jury instructions relating to the County's duty, the jury instruction on the emergency doctrine, and the admission of prior accidents at trial, the County simply refers to the Respondents as Tapken in the portion of its reply brief addressing those issues.

following a trial, the issue is foreclosed by the law of the case doctrine, and she did not preserve it by raising it at trial. Indeed, Tapken herself proposed jury instructions and verdict forms that included her comparative fault as jury questions. Any supposed error was invited. Should the Court reach Tapken's cross-appeal, it should affirm the jury's finding of comparative fault, because substantial evidence supported it.

II. COUNTER-STATEMENT OF FACTS RELATING TO TAPKEN'S CROSS-APPEAL

When the trial court originally dismissed this action in 2014, Tapken appealed both the trial court's decision to grant the County's CR 50 motion and its earlier denial of her motion for partial summary judgment on the issue of her comparative fault for the accident.² The County objected that denial of Tapken's summary judgment motion was not appealable following a trial.³ This Court reviewed the issue, because the case had been dismissed under CR 50 before the conclusion of trial. However, on the merits the Court affirmed the trial court's decision denying summary judgment based on genuine issues of material fact.⁴

² Opening Brief of Appellant Madelyn Tapken, No. 32909-7-III, at 3-4 (available online at <http://www.courts.wa.gov/content/petitions/92908-4%20COA%20Apps%20Brief%20M.%20Tapken.pdf#search=Tapken>).

³ Answering Brief of Respondent Spokane County, No. 32909-7-III, at 45, (available online at <http://www.courts.wa.gov/content/Briefs/A03/329097%20Respondent.pdf>).

⁴ App. A, *Tapken v. Spokane County*, No. 32909-7, at 17-18 (Wash. Ct. App. Jan. 12, 2016).

On remand, the County brought a motion seeking to enforce as the law of the case several holdings of this Court and several rulings of the trial court that were undisturbed on appeal. CP 92-99. When the trial court granted the motion in part, it held the earlier denial of Tapken's motion for summary judgment on comparative fault was the law of the case, having been affirmed by this Court. CP 596, 653-63. However, the trial court did not foreclose Tapken from re-raising the issue based on the evidence at trial, by either making a motion for judgment as a matter of law under CR 50 or arguing that the jury should not be instructed on the issue. *Id.* The trial court was clear about this when counsel argued the motion, noting Tapken "can raise it depending on what comes up," explaining "there could be a question of fact, they can raise it at a later date." 10/17/16 RP 69-70. At the subsequent hearing at which the order was entered, the trial court made clear Tapken was not forbidden from renewing the issue at trial:

THE COURT: I believe you can renew any kind of motion where you have a basis for are [sic] it.

MR. SCARPELLI: Yeah.

THE COURT: Just standing up and rearguing the same thing, the Court is going to shut you off.

MR. SCARPELLI: Right.

THE COURT: My ruling was basically it's already been ruled on. The Court of Appeals has already ruled on it. If something comes up, then you can renew that motion if there's something different, but if you're just going to stand up and argue the same thing that the Court's already ruled on, no.

So, I see it as the same as the county language.

MR. SCARPELLI: All right.

THE COURT: Any additional theory, issue or anything that's supported by the evidence - -

MR. SCARPELLI: All right.

THE COURT: - - you can renew your motion.

12/12/16 RP 91-92.

The evidence at trial established Tapken did not follow Malinak's leans, even though she was an experienced motorcycle rider who had been specifically instructed to do so. RP 842-43, 935, 969-70, 1156. Detective David Thornburg, the officer who investigated the accident, testified Malinak's explanation of how the accident happened was as follows:

Q. And then after Mr. Malinak told you this route that he had taken many times in the past, what did he tell you about how the accident occurred?

A. Well, he said as he was coming in towards Waverly, he began to slow down and he originally was going to turn right to go back to 195, but at the last second he decided to go left, The passenger leaned more to the right and he's trying to go left and that basically – that kind of negates each other and makes the bike neutral and it's just going to

go straight off the roadway. And it's certainly what we had there on-scene.

RP 1299. Detective Thornburg similarly noted in his report following his interview with Malinak:

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. He remembers the bike going out from underneath him and the sensation of falling. And then after the crash Maddy wasn't breathing and he opened up her airway.

RP 1305. The County's accident reconstructionist, William Neale, testified that the accident would have been avoided if Malinak and Tapken and leaned in the same direction together (either left or right). RP 1536.

Tapken never renewed the issue of her comparative fault at trial by making a motion under CR 50 after the County closed its case. She likewise made no objection at trial to the inclusion of the issue of her comparative fault in the court's jury instructions. In fact, the jury instructions and verdict forms Tapken proposed included her comparative fault as a jury question. CP 2300, 2280-81, 2556-59, 2592-94.

III. COUNTER-STATEMENT OF ISSUES RELATING TO TAPKEN'S CROSS-APPEAL

- A. Is Tapken's cross-appeal challenging the denial of her pre-trial motion for summary judgment precluded, because denial

of a summary judgment motion based on genuine issues of material fact is no longer reviewable following a trial on the merits?

- B. Is Tapken's cross-appeal precluded by the law of the case doctrine and this Court's earlier opinion?
- C. Is Tapken's cross-appeal precluded, because she not only failed to preserve the claimed error by not raising it at trial, but also invited the claimed error by including the issue of her comparative fault as a jury question in her own proposed instructions and verdict forms?
- D. Should the Court affirm the jury's finding that Tapken was at fault for the accident, because it was supported by substantial evidence?

IV. REPLY ARGUMENT IN SUPPORT OF COUNTY'S APPEAL

A. The Trial Court Erred In Instructing on the County's Duty to Warn

Tapken repeatedly conflates the County's duty to maintain roadways in a reasonably safe condition with the specific duty to warn of conditions on the roadway. A lack of duty to warn of visible and known roadway condition is a necessary limitation or qualification of the County's overall duty and is long-established in the law.

The trial court instructed the jury that the County had the duty to maintain its roadways in a reasonably safe condition for all motorists when it gave Instruction 11, the instruction approved in *Keller v. City of Spokane*, 146 Wn.2d 237, 254, 44 P.3d 845 (2002). The County's appeal is based not on Instruction 11, but on the court's erroneous additional

instruction, Instruction 14, which stated the County had a duty to warn of roadway conditions, even when the conditions are visible and motorists already have knowledge of them. Its appeal is further based on the trial court's refusal to give the County's proposed instruction D-23, which would have specifically instructed on limitations on the duty to warn recognized by the Washington Supreme Court in *Hansen v. Wash. Natural Gas*, 95 Wn.2d 773, 632 P.2d 504 (1981) and other cases. By giving Instruction 14 and declining to give the County's proposed Instruction D-23, the Court expanded the County's duty, foreclosed it from arguing its theory of the case, and deprived it of a fair trial.

The County always owes motorists a duty to maintain its roadways in a reasonably safe condition, but it does not always owe a duty to warn. In *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995), the Washington Supreme Court recognized the long line of cases holding a duty to warn is limited: "the duty to maintain a roadway in a reasonably safe condition may require a county to post warning signs," but only in limited circumstances where the condition of the roadway is inherently dangerous or misleading or if required by law. *Id.* at 705 (emphasis added) (citing *Hansen*, 95 Wn.2d at 778; *Lucas v. Phillips*, 34 Wn.2d 591, 595, 209 P.2d 279 (1949); *Tanguma v. Yakima Cy.*, 18 Wn. App. 555, 558-59, 569 P.2d 1225 (1977); *see also Bartlett v. Northern Pac. Ry.*, 74 Wn.2d

881, 447 P.2d 735 (1968); *Wessels v. Stevens Cy.*, 110 Wash. 196, 188 P. 490 (1920); *Leber v. King Cy.*, 69 Wash. 134, 124 P. 397 (1912)). *Keller* did not disturb this long line of cases limiting the duty to warn.

Contrary to Tapken's arguments, the Washington Supreme Court's holding in *Hansen* that a municipality does not owe a duty to warn of open and apparent conditions remains the law and controls the issue before the Court. In *Hansen*, a pedestrian who jaywalked across an intersection slipped on a plank in the street that was placed over an excavation of a co-defendant public utility. *Hansen*, 95 Wn.2d at 775-76. Following a jury verdict in favor of the pedestrian, the trial court granted judgment notwithstanding the verdict in favor of the defendants. *Id.* On appeal, the Washington Supreme Court upheld the trial court's dismissal of the action, because the duty to maintain safe roadways did not include a duty to warn of an open and apparent condition:

In granting the judgment notwithstanding the verdict, the trial court observed:

There is no duty on the part of defendants to make the middle of the street, mid-block, safe for pedestrians who might elect to leave the sidewalk in the middle of the block and angle illegally across the street through a construction area that is open and apparent and is safe for cars.

We agree.

Id. at 778 (emphasis added). Rejecting the existence of a duty to warn under the facts of the case, the Court observed, “There is no evidence here of inherent danger or of the plaintiff being misled.” *Id.* at 778 (citing *Bartlett v. Northern Pac. Ry, supra*, and *Barton v. King County*, 18 Wn.2d 573, 576, 139 P.2d 1019 (1943))). The Court expressly stated in *Hansen* that the question it resolved was based on the nature of the County’s duty, not the plaintiff’s comparative fault: “[Contributory negligence] is not the question here. Rather, it is the negligence of the City of Seattle or the Gas Company.” *Hansen*, 95 Wn.2d at 777. In sum, *Hansen* recognized that “open and apparent” conditions cannot be inherently dangerous or misleading, and warning of them is therefore not part of a municipality’s duty to maintain safe roadways. The trial court’s instructions contradicted *Hansen*, precluding the County from arguing its primary defense.

Tapken also mischaracterizes the Court’s subsequent discussion of *Hansen* in *Keller*. In *Keller*, the plaintiffs challenged the trial court’s jury instruction stating the defendant city owed the general duty to maintain its roadways in a reasonably safe condition only to “persons using them in a proper manner and exercising ordinary care for their own safety.” *Id.* at 241. The Court rejected the city’s argument *Hansen* supported this language, explaining that *Hansen* “did not turn on whether the jury had been given the proper instruction, but on whether there was sufficient

evidence to support the verdict.” *Id.* at 245 (citing *Hansen*, 95 Wn.2d at 777). Indeed, in *Keller* the Supreme Court expressly declined to overrule *Hansen*. *Keller*, 146 Wn.2d at 254. Thus, *Keller* did not disturb the limitation recognized in *Hansen* that warning of an “open and apparent” condition is not part of a municipality’s duty to maintain safe roads.

Tapken’s assertion that Washington’s abolition of contributory negligence as a bar to recovery results in open and obvious conditions no longer being a limitation on duty and only being relevant to a plaintiff’s comparative fault is incorrect.⁵ In both *Hansen* and *Keller*, the Washington Supreme Court recognized that “the adoption of comparative fault did not create or enhance a defendant’s prior common law duty.” *Keller*, 146 Wn.2d at 244 (citing *Hansen*, 95 Wn.2d at 778). The limitation exempting open and obvious roadway conditions from the duty to warn existed long before *Hansen*. *See, e.g., Wessels* 110 Wash. at 198 (holding no duty to warn of a curve where photographs showed “the condition of the road and the curve are made reasonably apparent.”); *Tanguma*, 18 Wn. App. at 599 (“[A] person cannot complain of a lack of warning of a danger of which he has knowledge.”). It has also been re-affirmed in road cases since *Hansen* was decided. *See, e.g., Fernandez v. Dep’t. of Highways*, 49 Wn. App. 28, 36, 741 P.2d 1010 (1987)(“[T]here is no duty to warn when the person

⁵ Tapken’s Answering Brief and Opening Brief on Cross-Appeal at 17-18.

knows of the condition.”). Major treatises on governmental liability for roadway negligence also include the rule that although municipalities have a duty to maintain roadways in a reasonably safe condition, they have no duty to warn motorists of an open and obvious condition on a road.⁶ Thus, the lack of a duty to warn for open and obvious conditions is a well-settled limitation on the duty of municipalities in maintaining roadways that existed both before and after the adoption of comparative fault.

This long-standing limitation on the duty to warn is not a relic of old case law, but a policy necessity. From the beginning, a fundamental requirement for municipal road liability has been the existence of an unusual or extraordinary road hazard. *Wessels*, 110 Wash. at 109. This limitation is necessitated by the practical and financial inability of municipalities to bring all their existing roads up to current modern design standards and keep them in perfect condition. *See Ruff*, 125 Wn.2d at 705. Municipalities are neither insurers against accidents nor the guarantors of public safety and are not required to anticipate and protect against all imaginable acts of negligent drivers. *Stewart v. State*, 92 Wn.2d 285, 299,

⁶ “[T]here may be a duty upon the governmental body to provide a warning to users of the roadway of a danger or hazard. However, where the hazard is obvious, or should be timely discovered by the roadway user, a warning is not required; and a motorist with actual knowledge may not complain of the absence of warning signs or signals.” 4 *Blashfield on Automobile Law and Practice* § 153.2 at 375-77 (Rev. 4th Ed. 1999); *see also* 19 Eugene McQuillen, *The Law of Municipal Corporations* § 54:156, at 516 (3d Ed. 2004) (recognizing “a municipality is not required to guard against an obvious danger,” but this does not “negate the city’s duty to keep its streets and sidewalks in a reasonably safe condition and in reasonably good repair.”).

597 P.2d 101 (1979); *Owens v. Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956); *see also Keller*, 146 Wn.2d at 252. Instruction 14 expanded the County's duty to include the obligation to warn of any condition that might be considered "dangerous," even if the danger is visible and obvious, resulting in the County being an insurer of all road accidents.⁷

Tapken's reliance on *Millson v. City of Lynden*, 174 Wn. App. 303, 298 P.3d 141 (2013), is also misplaced. Millson sued the City of Lynden after she tripped and fell over an offset in a city sidewalk, and the Court of Appeals reversed the trial court's summary judgment in favor of the city. *Id.* at 307. Ultimately, the court based the reversal on genuine issues of material fact about the level of knowledge Millson had about the sidewalk: "[Millson] states that she had walked on the street where she fell only a couple of times before. Further, she claims she had never before walked on the particular portion of the sidewalk where she fell." *Id.* at 313.

Although the court in *Millson* went on to discuss issues relating to comparative fault and the level of care owed by a municipality in comparison to private landowners,⁸ this discussion was simply *dicta*

⁷ For the same basic policy reason, a motorist cannot claim that his failure to account for a turn that he can objectively see is partially obscured creates a sudden emergency such that his negligent conduct will be excused by the emergency doctrine. *See* Section IV.B., *infra*, regarding the emergency doctrine.

⁸ Significantly, *Millson* failed to discuss or cite the Washington Supreme Court's decision in *Hansen*. To the extent that *Millson* could be read to hold that a municipality owes a duty to warn motorists of open, obvious, and known conditions, it is inconsistent with *Hansen* and should not be followed. Further, the court's statements in *Millson* that

ancillary to its holding that summary judgment was improper based upon disputed facts. *Millson* held that the issue of visible and known conditions could not be resolved on summary judgment if there are disputed facts. *Millson* did not hold that it is improper to instruct a jury on the limitation on the duty to warn when there are disputed issues of fact, as here, about visibility and knowledge of conditions.⁹ Spokane County is neither arguing for summary judgment nor claiming that Tapken and Malinak's fault extinguished its duty to maintain its roadway in a reasonably safe condition. Rather, the County asks the Court to remand with proper instructions to the jury. While municipalities have a general duty to maintain safe roads, the specific duty to warn is qualified by important factors the trial court ignored.

Furthermore, *Millson* involved a sidewalk rather than a roadway. Tapken points out that municipalities owe the same duty in pedestrian sidewalk cases as in roadway cases, but the court nevertheless applies different rules for purposes of determining the contours of this duty in

governmental entities owe a higher duty of care than private entities are inconsistent with the Washington Supreme Court's repeated statements to the contrary. *Wuthrich v. King County*, 185 Wn.2d 19, 26, 366 P.3d 926 (2016) ("Municipalities are generally held to a reasonableness standard consistent with that applied to private parties."); *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) ("governmental entities are held to the same negligence standards as private individuals."); *Keller v. City of Spokane*, 146 Wn.2d 237 (2002) ("municipalities are generally held to the same negligence standards as private parties.").

⁹ It would have been equally erroneous for the court in *Millson* to give a jury instruction that the City owed the plaintiff a duty to warn of the sidewalk even if the plaintiff had "general knowledge" of the sidewalk's condition.

different contexts. As the court in *Millson* observed, “a pedestrian is not required to keep his eyes on the walk immediately in front of him at all times . . .” *Id.* at 310 (citing *Blasick v. Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954)).¹⁰ In contrast, motorists on roadways are required by law to be aware of curves, turns, yield requirements, and other road conditions. RCW 46.61.190; RCW 46.61.006. Because of this important distinction, the analysis of what kinds of conditions will be considered open and apparent is not the same in roadway cases as in sidewalk cases.

Tapken argues the evidence in the light most favorable to herself and Malinak, but the questions for this Court on appeal are whether substantial evidence supported the County’s theory of the case and whether the County was able to argue that theory under the instructions. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Substantial evidence permitted the jury to find the existence of a partially obscured turn at the Waverly Y was visible to Malinak. The County should have been permitted to argue under *Hansen*, and the other cases discussed above, that its duty to maintain the roadway in a reasonably safe condition

¹⁰ In distinguishing *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 20 P.3d 1003 (2001), the court in *Millson* further made clear that different kinds of public property will dictate that the scope of a municipality’s duty to keep public areas reasonably safe will vary in different contexts: “It is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when *walking on a sidewalk*.” *Millson*, 174 Wn. App. at 315 (quoting *Hoffstatter*, 105 Wn. App. at 601) (emphasis added).

did not require that it provide a warning of patent and known conditions. The trial court not only foreclosed the County from arguing its theory, it went further in Instruction 14, erroneously instructing that Malinak's prior knowledge of the turn – whether from his own experience or from the open and obvious nature of it – had no effect on whether the County had a duty to warn him of it. This is clear misstatement of the law requiring reversal. *Id.* (Holding that legal errors in jury instructions are subject to *de novo* review and are presumed to be prejudicial.).

In a further effort to justify the trial court's decision to give Instruction 14, Tapken attempts to recharacterize the instruction as relating to proximate cause rather than duty, relying on *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 751 P.2d 854 (1988). However, Instruction 14 plainly identifies a duty to warn by the County and states absolutely nothing about the element of proximate cause.¹¹ Thus, Tapken's arguments bear no relationship to the actual language of Instruction 14.¹²

¹¹ The jury was instructed on proximate cause in Instruction 15. CP 2626.

¹² For example, Tapken claims that *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), "support the trial court's giving of Instruction 14," because these cases recognize "the motorist's state of mind regarding a condition goes to proximate causation." Tapken Opening Brief at 21, fn.7. Instruction 14 was an instruction on duty, not proximate cause. The County is not arguing that there was no causation, but rather that there is not a duty to remedy or warn of a condition that motorists can account for. *See, e.g., Owens v. Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956)(recognizing municipal duty is to eliminate or warn of a hazard "not reasonably to be anticipated by users of the street").

Tellingly, neither Tapken, Malinak, nor the trial court cited *Wojcik* in support of Instruction 14 at the time of trial. This is because *Wojcik* is inapposite. *Wojcik* neither defines the scope of a municipality's duty to warn nor discusses how a jury should be instructed relative to such a duty. In *Wojcik*, the plaintiff insured driver attempted to pass another vehicle on a curved portion of a two-lane county road. *Id.* at 850-51. When the plaintiff unexpectedly encountered an oncoming vehicle in the lane used to pass, he swerved, lost control, and collided with a utility pole. *Id.* at 851. In reversing summary judgment for the County, the Court of Appeals only briefly discussed the County's duty, because the County's violation of the Manual on Uniform Traffic Control Devices ("MUTCD") was negligence *per se* at the time. *Id.* at 855 (citing *Kitt v. Yakima County*, 93 Wn.2d 670, 611 P.2d 1234 (1980)). Expert testimony supported the plaintiffs' claim that the County violated the MUTCD,¹³ and there was consequently no need for further examination of the issue. As a result, the County's defense and the Court of Appeals' opinion were focused on proximate cause.

Negligence *per se* for statutory violations is no longer the law, as it was in *Wojcik*. RCW 5.40.050; *Hansen v. Friend*, 118 Wn.2d 476, 483,

¹³ In *Wojcik*, traffic engineering expert Ed Stevens' declaration opposing the defendant county's summary judgment motion "suggested that the absence of a double yellow line at the point Wojcik began the passing maneuver did not meet the standards of the MUTCD and, consequently constituted an unsafe condition." *Id.* at 855.

824 P.2d 483 (1992). *Wojcik* does not address the current question before the Court, namely whether the County's duty to maintain roads in a reasonably safe condition includes a duty to warn motorists of visible and known conditions.

Wojcik is distinguishable on its facts. There was no evidence the dangerous condition at issue in that case was open and apparent to motorists. The county in *Wojcik* relied on evidence the plaintiff had travelled the road previously and therefore generally knew of its condition. *Wojcik*, 50 Wn. App. at 852. However, the court found there was no evidence the plaintiff knew a dip in the road was sufficient to hide an oncoming vehicle. *Id.* at 856. In contrast, here substantial evidence showed not only that Malinak personally knew of the specific right turn at the Waverly Y from prior experience, but also that the inability to see the sharpness of the entire turn was objectively apparent to all motorists, regardless of any prior knowledge.

Again, the County here is not requesting summary judgment as the defendant in *Wojcik* was, but only jury instructions correctly stating the scope of its duty. Based on the facts shown by the County at trial, it should have been permitted to argue with proper instructions – as a question of fact – that its duty to maintain the roadway in a reasonably safe condition does not include a duty to warn of a turn the driver could see and had

previously experienced. The County's proposed instruction D-23 properly framed the scope of a municipality's duty to warn. The instruction does not eliminate the WPI 140.01 duty to maintain a reasonably safe road. However, it does instruct the jury that, insofar as the plaintiff is specifically claiming a failure to warn as a basis for liability, that duty is limited to misleading and/or unknown conditions rather than open and apparent ones.¹⁴ There is no evidence here that Malinak was misled about his inability to see the full turn. His claim is that he went into the turn without knowing its sharpness and then was caught off-guard because he failed to slow sufficiently to account for his lack of knowledge of sharpness.

Tapken argues premises liability authorities do not control this case. The County provided numerous examples of case law recognizing there is no duty to warn of open and apparent conditions as an illustration that this basic principle is recognized not only in the premises liability context, but across all tort law. County's Opening Brief at 21-22. This is

¹⁴ The County's Instruction D-23 would have informed the jury the County has no duty to warn of open, apparent, and known conditions and that "[w]hether 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." CP 2343. This formulation is consistent with the Washington Supreme Court's definition of "open and apparent" conditions in premises liability cases: "The phrase 'open and apparent' assumes knowledge on the part of the licensee. Whether a natural hazard is open and apparent depends on whether the licensee knew, or had reason to know, the full extent of risk posed by the condition. That is a question of fact." *Tincani v. Inland Emprise Zoological Soc'y*, 124 Wn.2d 121, 135, 875 P.2d 621(1994).

the same limitation recognized by the Supreme Court in *Hansen* and numerous other cases discussed above, which do control roadway cases.

Alternatively, Tapken focuses on special provisions in the Restatement providing a landowner may be liable to an invitee for open and obvious dangers 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 (citing Restatement (Second) Torts §343A (1965)). Users of public roads are usually not classified by Washington courts as invitees, licensees, or trespassers, a rubric used in premises liability cases to define the duty owed by a landowner to particular individuals based on their status. *See Younce v. Ferguson*, 106 Wn.2d 658, 666, 724 P.2d 991(1986)(discussing distinctions between invitees, licensees, and trespassers); *Cf., Fernandez*, 49 Wn. App. at 34 (treating pedestrian on a highway not open to pedestrian traffic as a “trespasser,” but holding that even if he were an invitee “there is no duty to warn when the person knows of the condition.”). Even in premises liability cases involving invitees, the duty to anticipate open and obvious dangers arises only in limited circumstances.¹⁵ Neither *Hansen* nor any of

¹⁵ In *Tincani*, the Court described the reasons for this duty in some cases involving invitees:

[R]eason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee’s attention may be distracted, so that he [or she] will not

the other cases governing the County's duty to motorists set forth any similar exception for municipal liability for open and apparent conditions.

Even if this Court accepts Tapken's assertion that motorists on public roads are analogous to invitees, the instructions were still insufficient to allow the County to argue its theory of the case that its duty did not extend to warning of the right turn at the Waverly Y. Whether a landowner should anticipate an open and obvious danger will cause harm to an invitee is a question of fact that must be decided by the jury with appropriate instructions. *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 54, 914 P.2d 728 (1996). Even under case law governing the duty owed by a landowner to invitees, the jury should have been allowed to decide whether the partially obscured nature of the turn at the Waverly Y was open and obvious and, if so, whether the County's duty to maintain reasonably safe roadways extended to warning of the turn that he knew he was entering blindly. The jury was not provided sufficient instructions to

discover what is obvious, or will forget what he [or she] has discovered, or fail to protect . . . against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the advantages of doing so would outweigh the apparent risk.

Tincani, 124 Wn.2d at 139-40 (quoting Restatement (Second) of Torts § 343A cmt. f (1965)).

make this determination, because it was not instructed about what types of conditions properly give rise to a duty to warn.¹⁶

Tapken provides no response to the County's separate challenge to Instruction 14 as having unfairly commented on the evidence. The instruction explicitly emphasized the County's duty over the duties of Malinak and Tapken. In *Keller*, the court held that a municipality owes all motorists, whether or not they are negligent, a duty to maintain roadways in a condition reasonably safe for ordinary travel. *Keller*, 146 Wn.2d at 239. Significantly, even though the court held municipalities owed a duty to negligent and non-negligent motorists alike, it was careful to approve a jury instruction that did not define this duty by comparing it to the conduct of plaintiff motorists:

A [County][City][Town][State] has a duty to exercise ordinary care in the [construction][repair][maintenance] of its public [roads][streets] to keep them in a reasonably safe condition for ordinary travel.

Id. at 254. Under the above instruction, a jury assesses whether a municipality is negligent independently from any conduct of the plaintiff. Underscoring to the jury in its instructions that a municipality owes a duty

¹⁶ The existence of a duty is a question of law, but whether some duties are owed depends on facts, which may be in dispute such that a jury must determine them. *See, e.g., Alfoa v. Seattle*, 160 Wn. App. 234, 238, 247 P.3d 482 (2011)(citing *Sjoren v. Props. Of Pac. NW, LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003)). Here, whether the right turn at the Waverly Y was open and apparent such that there was a duty to warn of it was, at a minimum, a disputed question of fact for the jury that it should have been instructed on.

even to negligent motorists would be a comment on the evidence, because it would have the effect of emphasizing the municipality's duty and diminishing the countervailing duty of motorists to be attentive to road conditions. *See, e.g., Brown v. Dahl*, 41 Wn. App. 565, 579-80, 705 P.2d 781 (1985); *see also Lauder milk 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).

Unfortunately, this is precisely what the trial court did when it gave Instruction 14. In addition to being an incorrect statement of the law on the County's duty, the instruction commented on the evidence by explicitly emphasizing the County's duty to warn and diminishing the importance of the duty of motorists. The effect was an extreme emphasis in favor of Tapken and Malinak to the explicit detriment of the County, depriving the County of a fair trial. For this reason too, the trial court's instruction on the County's duty to warn was reversible error.

B. The Trial Court Erred By Instructing the Jury on the Emergency Doctrine

Tapken's arguments that the trial court properly gave an instruction on the emergency doctrine, which permitted the jury to find that both Malinak and Tapken's negligent conduct could be excused or diminished, are spurious. Tapken first argues the emergency instruction

properly applied to Malinak, because an emergency situation was created by the County's failure to provide him a sufficient warning of the sharp right turn at the Waverly Y. Rather than arguing that a partially obscured sharp turn is an extraordinary road condition that created an emergency, Tapken argues that the County's warnings about other turns gave rise to an expectation by Malinak that he would be warned of all turns or curves.¹⁷ This argument turns the law on its head, because partly obscured turns are common road conditions that do not require a warning.¹⁸

It is a logical truism that a motorist cannot be deceived by that which he knows he cannot see. If the existence of a turn is visible, but the full turn and its sharpness are partially obscured, a motorist is naturally warned to slow until the turn unfolds and its sharpness is revealed. The warning is just as a driver is warned by the range of his headlights at night not to drive too fast given the visibility available. This situation, like the turn at the Waverly Y, is a "known unknown" for which a driver can

¹⁷ Tapken argues an emergency was created, because Malinak "expected to be warned of any significant curve." Tapken Answering Brief and Opening Brief on Cross-Appeal at 27.

¹⁸ A road is inherently dangerous or misleading such that it will require a warning only if it presents "an extraordinary or unusual condition." *Wuthrich v. King County*, 185 Wn.2d 19, 26-27, 366 P.3d 926 (2016)(quoting *Barton v. King County*, 18 Wn.2d 573, 576, 139 P.2d 1019 (1943)); *Lucas v. Phillips*, 34 Wn.2d 591, 595, 209 P.2d 279 (1949) (citing *Wessels*, 110 Wash. at 198). In *Wessels*, the Washington Supreme Court specifically held that a curve was not an extraordinary condition requiring a warning: "There are probably hundreds of just such curves upon the highways of this state, and if it were held that the county failed in the performance of its duty by not having a warning sign or barrier here, the same would be true of every other similar situation." *Wessels*, 110 Wash. at 198.

account rather than an “unknown unknown,” which necessitates a warning. Here, substantial evidence showed the existence of a partially obscured right turn at the Waverly Y was detectible long before the intersection. This situation is distinguishable from a case such as *Heggelund v. Nordby*, 48 Wn.2d 259, 292 P.2d 1057 (1956), where an emergency arose from the roadway itself being hidden by leaves.

Tapken fails to distinguish or even discuss *Zook v. Baier*, 9 Wn. App. 708, 514 P.2d 923 (1973), which expressly held, “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.” *Id.* at 714 (emphasis added). This specifically includes situations where the party’s “own failure to foresee the danger permitted the emergency to occur.” *Id.* Tapken’s own motorcycle expert, Steve Harbinson, testified motorcyclists are trained that if they cannot see around a corner, they should reduce their speed until they can see around it. RP 1068. Thus, Tapken’s argument for an emergency instruction is merely an attempt to shift onto the County Malinak’s legal obligation as a motorist to be attentive to ordinary roadway conditions, such as partly obscured turns. Regardless of whether the County was negligent in maintaining the roadway, there is no dispute the accident resulted, in part, from Malinak’s failure to understand and

satisfy his legal obligations as a motorist.¹⁹ In this situation, an instruction on the emergency doctrine is improper. *Sandberg v. Spoelstra*, 46 Wn.2d 776, 783, 285 P.2d 564 (1955).

Even more unsound was the trial court's decision to allow Tapken to claim the benefit of the emergency doctrine. Tapken's assertion that the County must concede she had to make a choice between two actions to sustain its comparative negligence affirmative defense is misguided, because it ignores the basic principle that negligence can be established through either an act or omission.²⁰ Inattentive inaction is frequently the basis for a finding of negligence. *See, e.g., Estill v. Berry*, 193 Wash. 10, 17, 74 P.2d 482 (1937). The jury could find Tapken negligent by either determining that she actively leaned further away from Malinak or that she simply failed to follow his leans.

¹⁹ Tapken cites to *Keller* to argue that the emergency doctrine instruction was appropriate, because "highway design must take into account foreseeable driver behavior." Tapken Answering Brief and Opening Brief on Cross-Appeal at 27. However, the driver behavior *Keller* discussed specifically included negligent driver behavior. *Keller*, 142 Wn.2d at 248-49 (quoting *Berglund v. Spokane County*, 4 Wn.2d 309, 321, 103 P.2d 355 (1940)). When there is evidence a party was negligent, that party cannot claim the benefit of the emergency doctrine. *Zook*, 9 Wn. App. at 714.

²⁰ "Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances." WPI 10.01 (emphasis added); Restatement (Second) Torts § 6 (Tortious conduct includes "conduct whether of act or omission . . . of such a character as to subject the actor to liability under the law of Torts."); *see also, e.g., Wharton v. Warner*, 75 Wash. 470, 472, 135 P. 235 (1913)(describing negligence arising from both "commission" and "omission").

Contrary to her arguments, Tapken was not presented with any choice between alternative courses of conduct, as required for an emergency instruction. *Zook*, 9 Wn. App. at 713. The undisputed evidence is that the only reasonable action of a motorcycle passenger is to follow the leans of the driver. The fact that this action must be done in a short amount of time may be relevant to whether the passenger's failure to follow is negligent, but the need for quick action alone is insufficient to invoke the emergency doctrine. *Zook*, 9 Wn. App. at 714. Thus, even if the court holds Malinak was entitled to an emergency instruction, Tapken clearly was not. Even if this Court affirms the emergency instruction as to Malinak, its failure to limit the instruction to him was error. *Heinz v. Blagen Timber Co.*, 71 Wn.2d 728, 732-33, 431 P.2d 173 (1967).

Instructing the jury on the emergency doctrine was not harmless error. Tapken ignores RCW 4.22.015, which requires the jury 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” when calculating relative comparative fault of the parties. By allowing Tapken and Malinak to claim that their conduct occurred because of an emergency situation, the jury presumably diminished the degree of fault it allocated to them.²¹

²¹ Further, even if this Court holds that the emergency instruction was harmless or otherwise not independently reversible, it should nevertheless provide the trial court

C. The Trial Court Erred By Allowing Tapken and Malinak to Present Evidence of Prior Accidents

Remarkably, despite the fact that she appealed the trial court's exclusion of prior accident evidence and this Court then affirmed exclusion of the evidence, Tapken claims this holding was not the law of the case for the trial court on remand. Tapken's briefing from the prior appeal belies her claim that she did not raise the question of dangerousness in the earlier appeal and that this Court did not consider the issue. For example, in arguing to reverse the trial court's exclusion of the prior accident evidence in her prior appeal Tapken argued, "The issue is not merely whether the government was on notice that a condition existed, but specifically that the condition was inherently dangerous or misleading."²² In her reply brief, she again argued that prior accident evidence should have been admitted because it was "relevant to prove notice to the County of the existence of a dangerous condition, and the trial court erred in concluding that it was not relevant."²³ Tapken accuses the County of

appropriate direction on remand if it reverses based on erroneous jury instructions or evidentiary rulings.

²² Appellant Madelynn Tapken's Opening Brief, No. 32909-7-III, at 41 (available online at <http://www.courts.wa.gov/content/petitions/92908-4%20COA%20Apps%20Brief%20C.%20Malinak.pdf#search=Tapken>).

²³ Reply Brief of Appellant Madelyn Tapken, No. 32909-7-III, at 21-22 (available online at <http://www.courts.wa.gov/content/Briefs/A03/329097%20Appellant%20Reply%20Tapken.pdf>).

“blur[ing] the distinction between notice and dangerousness,”²⁴ but this is precisely how she approached these issues in her prior appeal. As a result, this Court considered both notice and dangerousness when it previously determined that the prior accidents were irrelevant and inadmissible.

After considering the parties’ briefing in the last appeal, the appellate record containing the parties’ briefing in the trial court, and the Report of Proceedings showing the trial court’s reasoning, this Court held, “The trial court correctly concluded that prior accidents were irrelevant. The relevant notice is notice of the alleged dangerous condition – which the County admitted – not whether the condition was actually dangerous.”²⁵ Aside from this holding, the only instructions the Court gave to the trial court on remand regarding the admissibility of prior accidents were contained in footnote 5 of the Court’s opinion:

If the County’s evidence at trial leaves the jury with the false impression that there has never been any similar accidents at the intersection, the trial court may re-evaluate the relevance and admissibility of the substantially similar accidents.²⁶

The second trial court contradicted the above holding by first announcing that “some evidence with regard to the notice question will be required.”

²⁴ Tapken’s Answering Brief and Opening Brief on Cross-Appeal at 38.

²⁵ App. A, *Tapken v. Spokane County*, No. 32909-7, at 14 (Wash. Ct. App. Jan. 12, 2016).

²⁶ App. A, *Tapken v. Spokane County*, No. 32909-7, at 14 fn.5 (Wash. Ct. App. Jan. 12, 2016).

RP 71. After further argument, it made clear that it was explicitly conditioning exclusion of the prior accidents on the County admitting not merely notice of the relevant condition, but that the condition was dangerous:

THE COURT: And if that's the argument, then it seems to me – and I'll take that as at – at its word that there is an admission by the county and a stipulation by the county that it was aware of a dangerous condition that was created in its roadway, and that it therefore undertook the placement of a yield sign in correction. And this case changes, I think, based on that stipulation, to a question about whether or not the county's effort in placing a yield sign when they placed it was a sufficient warning and sufficient to then comport and satisfy the duty you have admitted.

MR. JACKSON: The cases do not require the county to admit that was a dangerous condition.

THE COURT: And so, Mr. Jackson, that's where you and I, in our understanding of the law, simply disagree. And this is what I believe caused the equivocation at the court of – at the trial court and the complication that is illustrated in the Court of Appeals decision. And for me to be able to marshal the evidence in this case, and for you to be able to make your arguments, I believe we have to have it one way or the other.

RP 75-76 (emphasis added). The trial court made this decision *in limine*, before any evidence was presented to the jury that would have left a “false impression” about there being no prior accidents.

Although a trial court has discretion in its evidentiary rulings, it does not have discretion to disregard or contradict a holding of the Court

of Appeals. *Lodis v. Corbis Holdings*, 192 Wn. App. 30, 57, 366 P.3d 1246 (2015). “An appellate court’s mandate is binding on the lower court and must be strictly followed. While a remand ‘for further proceedings’ ‘signals this court’s expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case,’ the trial court cannot ignore the appellate court’s specific holdings and directions on remand.” *Bank of America v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013)(quoting *In re Marriage of Rockwell*, 157 Wn. App. 449, 453, 238 P.3d 1184 (2010)). This Court’s mandate from the earlier appeal remanded “for further proceedings in accordance with” its opinion. CP 38. Because this Court considered the admissibility of prior accidents and affirmed their exclusion, the Court’s opinion and reasoning were binding. The trial court abused its discretion by contradicting this Court’s earlier holding and conditioning the exclusion of prior accident evidence on the County stipulating that it had notice not just of the bush obstructing the sharpness of the right turn at the Waverly Y, but that this condition rendered the intersection dangerous.

In arguing the threshold requirement of substantial similarity was met, Tapken completely glosses over significant factors that contributed to

the three prior accidents that were not present in the case at bar.²⁷ The presence of fog and ice clearly caused one of the accidents. Another involved a motorist speeding far over the speed limit. These factors were not present in this case. The third accident occurred sixteen years before the accident involving Tapken and Malinak, and there was no evidence the bush and other road features were the same at the time. The supposed similarity of these three accidents boils down to the fact that they all involved vehicles travelling in the same direction. This was tantamount to no evidence of similarity at all. The court should hold the trial court's discretion was abused.

Tapken argues that the trial court's refusal to follow this Court's decision was not reversible error, because there was no prejudice. However, the jury asked questions to witnesses about all three of these prior accidents. RP 682, 1136, 1144, 1374. Thus, contrary to Tapken's

²⁷ Tapken mischaracterizes Judge Cooney's rulings regarding the prior accidents during the first trial in 2014. He preliminarily ruled that the three prior accidents at issue would be admissible for the limited purpose of proving the County was on notice of a dangerous condition, but that the previous accident history "can't be used to infer negligence in maintaining the roadway, the shrubbery, or the signage." CP 1839-40. Later, Judge Cooney revised his ruling to exclude all accident history, noting a lack of substantial similarity:

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.

CP 1892. He also expressly held this evidence was admissible to show that the roadway was unsafe and it would not be helpful to the jury. *Id.* Thus, contrary to Tapken's assertions, Judge Cooney ultimately excluded the accident history on multiple grounds, including a lack of substantial similarity.

arguments, the jury was focused on the prior accident evidence. The jury asked the drivers from two of the accidents, Eric Andersen and Jared Freeman, whether they received traffic citations for their conduct. RP 682, 1144. Over the County's objection, the trial court even allowed Mr. Freeman to testify a judge dismissed the traffic citation charging him with driving too fast for conditions. RP 683-84. It is well settled that this type of evidence is inadmissible and highly prejudicial. *Warren v. Hart*, 71 Wn.2d 512, 515-16, 429 P.2d 873 (1967). In *Warren*, the court noted that injection of this type of collateral matter alone might be sufficient to support a request for a new trial.²⁸ *Id.* at 515. This testimony suggested to the jury that Mr. Freeman was not responsible for the accident and that the court determined the roadway had caused it. This compounded the prejudice already caused to the County by the collateral issues that were injected into the case by the trial court's admission of prior accidents previously determined by this Court to be irrelevant and inadmissible.²⁹ Because of the extreme prejudice that resulted, this Court should order a new trial.

²⁸ The court in *Warren* held that the admission of collateral evidence of a traffic citation "might be reversible error" independently, but not where the appellant had originally introduced the issue at trial. *Warren*, 71 Wn.2d at 516. However, it held that a new trial was required, because counsel committed misconduct in closing argument by arguing that the police officer issuing the citation served the function of being "a little baby court at the scene of this collision." *Id.* at 518-19.

²⁹ Again, even if the admission of prior accidents is not held to be reversible, this Court should provide the trial court with appropriate instructions on remand in connection with other reversible error.

D. The Trial Court Erred in Its Rulings Regarding Malinak's Claim for Medical Expenses

As the County explained in its opening brief, in 2014 Judge Cooney dismissed Malinak's claim for medical expenses due to a lack of any evidence supporting them. CP 356-57, 361. He made this ruling independently of his dismissal of all claims against the County based on the lack of evidence of the County's negligence. *Id.* Pointing to his notice of appeal in 2014, Malinak claims that he previously appealed "the Trial Court's order granting the judgment as a matter of law and all other rulings or orders which became final upon entry of the order."³⁰ However, Malinak's brief in the earlier appeal consisted, in its entirety, of two sentences, which made no mention of the trial court's dismissal of his claim for medical expenses.³¹ Malinak relied completely on the briefing filed by Tapken in the earlier appeal, and he made no independent assignments of error. Tapken's brief in the earlier appeal, in turn, assigned error to the trial court's dismissal of the County from the case, its decision to exclude evidence of prior accidents, certain rulings on expert testimony, and the denial of her motion for partial summary judgment on comparative

³⁰ Malinak Answering Brief at 2.

³¹ "Appellant Malinak hereby [sic] adopts the entire brief of Appellant Madelyn M. Tapken except for sections in relation to Plaintiff/Appellant's Motion for Summary Judgment. Defendant/Appellant Malinak takes no position as to the Plaintiff/Appellant's Tapken's [sic] Motion for Summary Judgment re: Comparative Fault." Opening Brief of Appellant Conrad Malinak at 2 (available online at <http://www.courts.wa.gov/content/petitions/92908-4%20COA%20Apps%20Brief%20C.%20Malinak.pdf#search=Tapken>).

fault.³² There was no assignment of error to the dismissal of Malinak's claim for medical expenses by any party. Not surprisingly, the Court's opinion was silent on the issue.

Malinak's reliance on his broadly-worded notice of appeal from 2014 is misguided, because a party must assign error to a ruling of the trial court in order to secure judicial review of that ruling. RAP 10.3(a)(4). "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g). Failure to assign error to a ruling precludes judicial review of the ruling. *Escude v. King Co. Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 fn.4, 69 P.3d 894 (2003). Unappealed decisions of the trial court which are otherwise undisturbed on appeal are the law of the case on remand. *In re Marriage of Bernard*, 137 Wn. App. 827, 833, 155 P.3d 171 (2007). Thus, when the County promptly sought a ruling on this issue, Judge Plese correctly held the trial court's earlier unappealed dismissal of Malinak's claim for medical expenses was the law of the case. CP 659, 983.³³

³² Opening Brief of Appellant Madelynn Tapken at 3-4 (available online at <http://www.courts.wa.gov/content/petitions/92908-4%20COA%20Apps%20Brief%20C.%20Malinak.pdf#search=Tapken>)

³³ Malinak's assertion that the trial court did not reinstate the claim is unsupported. The record plainly shows Judge Cooney dismissed this claim in 2014, Judge Plese confirmed that the dismissal remained the law of the case on remand, and the trial court (Judge Fennessey) reinstated it only on the first day of trial. The County had no reason to believe the trial court would reverse its earlier decision on the first day of trial.

Malinak's discovery violation was clear. He disclosed a new expert witness, Dr. Charles Morrison, long after witness disclosures were due and just weeks before trial, all after previously representing to the County that he would not be calling any new experts. Malinak correctly recognizes the law that when exclusion of a witness is requested for a discovery violation, the court must undertake the analysis in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). The trial court must undertake this analysis on the record. *Jones v. City of Seattle*, 179 Wn.2d 322, 340-41, 314 P.3d 380 (2013). Here, the trial court simply allowed Malinak to present his late-disclosed expert testimony over the County's motion *in limine* and continued objections. The trial court may have discretion under *Burnet*, but where, as here, it fails to undertake any analysis on the record for its decision, that discretion is abused. *Id.*

In a noteworthy contradiction, Malinak argues the trial court was justified in instructing the jury that the dollar figure for his medical expenses was undisputed in Instruction 31, because the County did not call any expert rebutting Dr. Morrison's opinions that the figure was

Because the trial court had already unequivocally excluded this issue from the case, the County had no reason to take a deposition of Dr. Morrison, to hire its own rebuttal expert, or otherwise prepare to defend against this claim. By the time the court reversed itself on the first day of trial, it was too late. This last-minute reversal caused extreme prejudice to the County.

reasonable. Malinak's own last-minute disclosure of Dr. Morrison and the trial court's decision to reinstate his claim on the first day of trial obviously precluded the County from retaining a rebuttal expert to provide such a rebuttal. Notwithstanding this, Malinak concedes the jury is able to consider bias and lack of relevant knowledge by an expert in weighing the expert's opinion. Dr. Morrison's opinion that \$21,395.58 was the reasonable value of Malinak's past medical expenses³⁴ was a question of fact for the jury that it should not have been required to accept, given Dr. Morrison's credibility was impeached based on his lack of credibility and knowledge. Yet, Instruction 31 stated that, regardless of this function of the jury, the above dollar figure representing the reasonable value of Malinak's medical expenses was undisputed. CP 2643. The reasonable value of the expenses was disputed, and the trial court's instruction to the contrary was a comment on the evidence, also requiring reversal. *State v. Levy*, 156 Wn.2d 709, 722-25, 132 P.3d 1076(2006)(citing WASH. CONST. art. IV, §16).

³⁴ The fact that the County did not dispute the authenticity of Malinak's medical records makes no difference: "A plaintiff in a negligence case may recover only the reasonable value of medical services received, not the total of all bills paid. Thus, the plaintiff must prove that the medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills. In other words, medical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable." *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.d 1125 (1997)(citations omitted). Dr. Morrison's opinion testimony, which was impeached by the County, was the only evidence at trial that the amount of medical expenses Malinak claimed was reasonable.

V. ARGUMENT REGARDING TAPKEN'S CROSS-APPEAL

For multiple reasons, the jury's determination that Tapken was ten percent at fault for the accident is not reviewable on appeal. The denial of Tapken's earlier summary judgment motion on comparative fault is no longer reviewable, because a trial on the merits has now occurred. Tapken never raised the sufficiency of the evidence at trial, either by bringing a CR 50 motion or objecting to the inclusion of this issue in the jury instructions or the verdict form. As a result, Tapken did not preserve the issue for appeal.

The law of the case doctrine and the invited error doctrine also preclude Tapken's cross-appeal. Even if the court's denial of Tapken's earlier summary judgment motion was somehow preserved for review in this appeal, this Court already affirmed that decision, and Tapken fails to meet the criteria under RAP 2.5 for a second review. Additionally, because Tapken did not object to the jury instructions or verdict form, which submitted the question of her comparative fault for the jury, the unchallenged instructions establish the law of the case. Tapken's own proposed instructions and verdict form included the question of her comparative fault. The invited error doctrine precludes her claim that it was error to submit the issue to the jury.

If the Court reaches Tapken's cross-appeal despite the many reasons for refusing to do so, it should affirm the jury's finding of comparative fault. She ignores that negligence can be found based on acts or omissions, relies on cases that are factually and legally distinguishable, and simply reasserts the same arguments that were rejected by the Court in the last appeal. Substantial evidence supported the jury's finding that she was at fault for the accident.

A. Denial of Tapken's Summary Judgment Motion on Comparative Fault is Not Reviewable Following a Trial on the Merits and Tapken Did Not Preserve the Issue for this Appeal

"[A]ppellate review of the denial of a summary judgment motion is inappropriate after a trial unless the motion turned on pure issues of law." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 754 fn.8, 310 P.3d 1275 (2013) (citing *University Vill. Partners v. King Co.*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001)); *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988). "Instead, the 'losing party must appeal from the sufficiency of the evidence presented at trial.'" *Draszt v. Naccarato*, 146 Wn. App. 536, 540-41, 192 P.3d 921 (2008) (quoting *Caulfield v. Kitsap County*, 108 Wn. App. 242, 249 fn.1, 29 P.3d 738 (2001)).

In the earlier appeal, this Court reviewed Tapken's challenge to the denial of her summary judgment motion despite the above authorities,

because “there [had] not been a trial on the merits; rather, the trial court granted the County’s motion for judgment as a matter of law.”³⁵ However, there has now been a trial on the merits. The denial of Tapken’s pre-trial summary judgment motion, which was already affirmed in the first appeal, is no longer properly before the Court. Tapken did not challenge the sufficiency of the evidence at trial. She neither made a motion under CR 50 nor objected to the court’s instructions or its verdict form. Thus, there is no trial court decision properly before this Court for appellate review.

Tapken’s citation to *Kaplan v. NW Mut. Life Ins. Co.*, 115 Wn. App. 791, 65 P.3d 16 (2003), to excuse her failure to preserve the claimed error is misplaced. There, the court held no CR 50 motion at trial was required to preserve the appeal of a denial of summary judgment, because the summary judgment decision turned solely on an issue of substantive law – the meaning of a contractual provision – rather than disputed issues of material fact. *Id.* at 804. The Court was careful to note that this was an exception to the general rule that a denial of summary judgment is not appealable following a trial. *Id.*

This limited exception does not apply here, because the trial court denied Tapken’s motion for summary judgment based on disputed issues of fact. Tapken’s summary judgment motion claimed that “[n]o reasonable

³⁵ App. A, *Tapken v. Spokane County*, No. 32909-7, at 16-17 (Wash. Ct. App. Jan. 12, 2016)

juror could conclude that Ms. Tapken acted unreasonably.” CP 2711.³⁶ Considering all of the evidence submitted by the County in response to Tapken’s motion, this court held: “[I]t is a genuine issue of material fact what a reasonable motorcycle passenger would have done in Tapken’s situation.”³⁷ Because the denial of summary judgment turned on material issues of fact, Tapken was required to challenge the sufficiency of the evidence at trial, as in *Draszt*, to preserve the issue for appeal.

Additionally, the Court should reject Tapken’s disingenuous claim that she was precluded by the trial court from raising the sufficiency of the evidence at trial. The County’s motion to enforce this Court’s decision affirming the denial of Tapken’s summary judgment motion simply sought to foreclose additional pre-trial motions for summary judgment regarding the same issue. CP 98-99. The trial court explicitly stated to Tapken’s attorneys on the record that a pre-trial motion for summary judgment could be renewed at trial. Tapken claims in her current appeal that this Court’s prior decision affirming the denial of her summary judgment

³⁶ Tapken also now cites authorities to suggest that whether her conduct was a proximate cause of the accident was based on speculation. Tapken’s Answering Brief and Opening Brief on Cross-Appeal at 46 (citing *Sanchez v. Haddix*, 95 Wn.2d 593, 627 P.2d 1312 (1981)). Tapken’s summary judgment motion challenged only the question of whether she was negligent, not whether her conduct was a proximate cause of the accident. CP 2704-12. An appellate court will not review issues that are raised for the first time on appeal. RAP 2.5(a); *Ledgering v. State*, 63 Wn.2d 94, 97, 385 P.2d 522 (1963).

³⁷ App. A, *Tapken v. Spokane County*, No. 32909-7, at 18 (Wash. Ct. App. Jan. 12, 2016) (emphasis added).

motion “presumed the County would prove Tapken voluntarily leaned farther right,” but that “it failed to do so.”³⁸ But Tapken never raised this supposed failure of proof at trial. As a result, the trial court never ruled on the sufficiency of the evidence at trial. The Court should decline to consider Tapken’s cross-appeal.

B. The Submission of Tapken’s Comparative Fault to the Jury is the Law of the Case and Any Claimed Error Was Invited

This Court previously affirmed the denial of Tapken’s motion for partial summary judgment. The Court’s prior decision is the law of the case. Tapken argues that the court should exercise its discretion under RAP 2.5 to review the denial of summary judgment for a second time, but she fails to justify this request under the circumstances.

An appellate court will exercise discretion under RAP 2.5(c)(2) to review an identical legal issue in a subsequent appeal of the same case only if the holding of the prior appeal is clearly erroneous and the application of the law of the case doctrine would result in manifest injustice. *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988); *Sintra v. City of Seattle*, 131 Wn.2d 640, 652, 935 P.2d 555 (1997). Tapken urges the court to review the denial of her summary judgment motion a second time under this rule based on “legal precedents

³⁸ Tapken Answering Brief and Opening Brief on Cross-Appeal at 46.

not previously analyzed by this Court.”³⁹ However, Tapken cites no new authorities or recent case law justifying this second bite at the apple. While they are easily distinguished in Section C *infra*, all of the authorities Tapken cites either were cited or easily could have been cited previously.⁴⁰ Thus, Tapken cannot establish either clear error or manifest injustice meriting a second review of the same decision, especially since she failed to raise this issue at trial.

Furthermore, instructions given to the jury, if not objected to, shall be treated as the law of the case. *Roberson v. Perez*, 156 Wn.2d 33, 49, 123 P.3d 844 (2005); *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 225 P.3d 339 (2010); *Guijosa v. Wal-Mart Stores*, 101 Wn. App. 777, 797, 6 P.3d 583 (2000). Tapken never objected to any of the jury instructions or the verdict form that included her comparative fault as a fact question for the jury’s consideration. Consequently, she cannot complain on appeal that the trial court instructed the jury to decide the issue and then entered judgment accordingly.

³⁹ Tapken’s Answering Brief and Opening Brief on Cross-Appeal at 45.

⁴⁰ The principle authorities Tapken relies upon for her cross-appeal are, at least, decades old: *Herrick v. Washington Water Power Co.*, 75 Wash. 149, 134 P. 934 (1913); *Kilde v. Sorwak*, 1 Wn. App. 742, 463 P.2d 265 (1970).

Tapken claims “it was error to submit the issue of her negligence to the jury,”⁴¹ but her own proposed instructions included the question of her comparative fault for the jury to consider. “Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal. The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal.” *Lavigne v. Chase, Haskell*, 112 Wn. App. 677, 681, 50 P.3d 306 (2002) (citing *In re Thompson*, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000)). The invited error doctrine precludes a party from claiming on appeal that giving an instruction or a verdict form that she proposed was erroneous. *State v. Schaler*, 169 Wn.2d 274, 292, 236 P.3d 858 (2010); *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 587-88, 187 P.3d 291 (2008); *Nania v. Pac. Northwest Bell Tel. Co.*, 60 Wn. App. 706, 709-10, 806 P.2d 787 (1991). The Court should decline to review the jury’s finding of comparative fault for this reason, too.

C. Tapken’s Comparative Fault Was Properly Submitted as a Question of Fact for the Jury to Decide

Had Tapken raised the sufficiency of the evidence at trial, CR 50 would have required the trial court consider the County’s evidence and all reasonable inferences that could be drawn from it in the light most

⁴¹ Tapken’s Answering Brief and Opening Brief on Cross-Appeal at 2.

favorable to the County as the non-moving party. *Rhoades v. De Rosier*, 14 Wn. App. 946, 948, 546 P.2d 930 (1976). Under this standard, the court would have been required to deny Tapken's motion.

As previously explained, the evidence at trial established Tapken did not follow Malinak's leans, even though she was an experienced motorcycle rider who had been specifically instructed to do so. RP 842-43, 935, 969-70, 1156. Detective Thornburg, the officer who investigated the accident, testified that Malinak stated during his interview that the accident occurred, because Tapken had not followed in his leans and had, in fact, leaned "even farther to the right" when he initiated a lean to the left. RP 1299, 1305. Given this evidence, this Court's conclusion in the earlier appeal still governs the resolution of this issue:

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 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 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.⁴²

For the same reasons Tapken's summary judgment motion was denied, denial of a motion for judgment as a matter of law by Tapken at trial also would have been required.⁴³ *Shiekh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) ("The standard on a motion for judgment as a matter of law mirrors that of summary judgment.")

Tapken's arguments that the issue of her comparative fault should have been removed from the jury's consideration – despite the fact she never asked the court to do so – are unavailing. Construing the evidence in the light most favorable to herself rather than in the light most favorable to the County, Tapken first relies upon the speculative assertion of her own hired expert witness, Steve Harbinson, to argue that countering Malinak's lean was the result of inertia and not voluntary.⁴⁴ The jury was not required to accept this explanation from an expert whose credibility was at issue. CP 2615; WPI 2.10. This testimony by Mr. Harbinson was in response to a question about what effect a sudden change in direction by Malinak would have on Tapken as his passenger and was qualified by the

⁴² App. A, *Tapken v. Spokane County*, No. 32909-7, at 17-18 (Wash. Ct. App. Jan. 12, 2016).

⁴³ Notably, the Washington Supreme Court also denied discretionary review of this Court's earlier opinion, including Tapken's request that, if review were accepted, the Court should review the decision affirming denial of her summary judgment motion.

⁴⁴ Tapken's Answering Brief and Opening Brief on Cross-Appeal at 46.

statement, “It depends on, one, where Ms. Tapken is looking.” RP 1031. He elaborated, “Her upper body could actually stay down if she’s still looking through the curve.” *Id.* (emphasis added). In other words, if Tapken’s attention and gaze were focused on Malinak instead of looking elsewhere, she would have better been able to negotiate the turn in synch with him.

Tapken also cites *Herrick v. Washington Water Power Co.*, 75 Wash. 149, 134 P. 934 (1913), which involved a plaintiff who was run over by a street car while he was intoxicated and unconscious, to argue her conduct was not the result of “conscious volition.” However, in *Herrick* the Court simply held that “negligence resulting from drunkenness culminates with unconsciousness” and that such negligence “is terminated by unconsciousness.” *Id.* at 162. There is no evidence Tapken was unconscious or otherwise unaware of what she was doing when she countered Malinak’s lean.

Moreover, Tapken’s claim that the County must show active conduct by her to establish that she was negligent ignores the basic principle that negligence can be established through either an act or an omission.⁴⁵ Inattentive inaction is frequently the basis for a finding of

⁴⁵ “Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the

negligence. *See, e.g., Estill v. Berry*, 193 Wash. 10, 17, 74 P.2d 482 (1937). As this court recognized in its prior decision, the jury could find Tapken negligent by either determining she actively leaned further away from Malinak or that she simply failed to follow his lean. The bottom line is that “Tapken did not match [Malinak’s] movement.”⁴⁶

Tapken next attempts to resurrect the same argument she unsuccessfully made in the first appeal. She again relies upon inapposite cases involving multi-vehicle accidents to assert she had no reason to anticipate Malinak’s sudden lean and that the County was required prove she had sufficient time to react.⁴⁷ The cases Tapken cites simply recite the rule that a “favored driver” is entitled to reasonable reaction time before reacting to “disfavored driver.” As the County pointed out in the last appeal, this rule is borne out of the status of “favored drivers” under the rules of the road.⁴⁸ Tapken was not a “favored driver” in a multi-vehicle

same or similar circumstances.” WPI 10.01 (emphasis added); Restatement (Second) Torts § 6 (Tortious conduct includes “conduct whether of act or omission . . . of such a character as to subject the actor to liability under the law of Torts.”); *see also, e.g., Wharton v. Warner*, 75 Wash. 470, 472, 135 P. 235 (1913)(describing negligence arising from both “commission” and “omission”).

⁴⁶ App. A, *Tapken v. Spokane County*, No. 32909-7, at 17 (Wash. Ct. App. Jan. 12, 2016).

⁴⁷ In both *Kilde v. Sorwak*, 1 Wn. App. 742, 463 P.2d 265 (1970), and *Liesey v. Wheeler*, 60 Wn.2d 209, 373 P.2d 130 (1962), the plaintiffs were “favored drivers” who had accidents at uncontrolled intersection caused by defendants who were “disfavored drivers.” *Kilde*, 1 Wn. App. at 743; *Liesey*, 60 Wn.2d at 210.

⁴⁸ “A favored driver is entitled to a reasonable reaction time after it becomes apparent in the exercise of due care that the disfavored driver will not yield the right-of-way. Until he has been allowed that reaction time, he is not chargeable with contributory negligence from omissions or acts regarding his failure to observe or respond to the

accident, but a co-rider with Malinak in a single-motorcycle accident. Unlike car or truck passengers, a motorcycle rider participates in turning and stability of the vehicle through her movements.

This Court's earlier decision recognizes the differences between passengers in cars and motorcycle passengers by holding that Tapken's negligence is rooted in failing to respond to Malinak's movements. Thus, cases cited by Tapken, such as *Murray v. Amrine*, 28 Wn. App. 650, 626 P.2d 24 (1981), which hold that there is no duty owed by car passengers to anticipate negligent acts by car drivers, do not govern this case. Reasonable care requires two motorcycle riders to closely mirror the movements of each other so they move in synch. Tapken cites no new or recent authorities supporting her argument to the contrary, and there is no reason for this Court to overrule its earlier opinion. The jury's finding on the comparative fault of Tapken should be affirmed.

D. Even if Tapken is Fault-Free, the Right to Contribution Among Jointly and Severally Liable Parties Requires a New Trial to Resolve Relative Percentages of Fault Between the County and Malinak

The remedy Tapken requests in her cross-appeal is "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."

conduct of the disfavored driver." *Poston v. Mathers*, 77 Wn.2d 329, 335, 462 P.2d 222 (1969).

Tapken Opening Brief at 48-49. However, Tapken's request ignores that "[i]n all actions involving fault of more than one entity, the trier of fact shall determine the percentage of total fault which is attributable to every entity which caused the claimant's damages" and that "[t]he sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent." RCW 4.22.070 (emphasis added). If Tapken were fault-free, the plain language of the statute would require the jury to re-assess the fault of the County and Malinak without Tapken on the verdict form.

This requirement is critical, because co-defendants who are jointly and severally liable have a right to seek contribution from one another. RCW 4.22.040(1); *Kottler v. State*, 136 Wn.2d 437, 442, 963 P.2d 834 (1988). "The basis for contribution among liable persons is the comparative fault of each such person." RCW 4.22.040(1). If this Court agreed with Tapken that she should not be responsible for the 10% of fault that the jury allocated to her, this 10% must be allocated to the other at-fault parties by the jury in order to allow those parties to vindicate their rights to contribution from one another. Similarly, the jury would be required to allocate this percentage to resolve the proper amount of Malinak's claim against the County. RCW 4.22.070(1). Therefore, even if Tapken were to prevail on her cross appeal, a new trial in which a jury

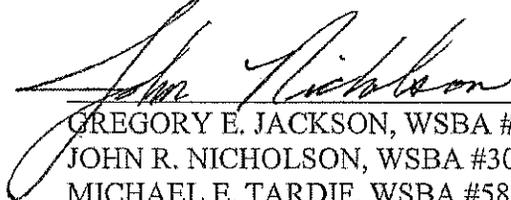
decides the relative comparative fault of the remaining at-fault parties would still be required.

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. To the extent that the Court considers Tapken's challenge to the jury's finding that she was partially at fault for the accident, that determination should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of June, 2018.

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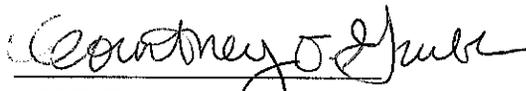
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I declare under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 11th day of June, 2018, at Olympia, Washington.


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