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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JAMES WALKER and BARBARA WALKER, husband and
wife and the marital community composed thereof,
Appellants/Plaintiffs,

v.

THE WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS, a State
agency, STEVENS COUNTY, DEPARTMENT OF PUBLIC
WORKS,
Defendants/Respondents

Brief of Appellants

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Table of Contents

Table of Authorities..... iv
 Cases..... iv
 Statutes and Other Authority..... vi

Assignments of Error..... 1

Issues Pertaining to Assignments of Error..... 2

STATEMENT OF THE CASE:..... 4
 FACTS..... 4
 A. The Accident..... 4
 B. A Tree Hid the Stop Sign..... 6
 C. The Hidden Stop Sign Proximately Caused the Accident..... 11
 D. The Missing Stop Ahead Proximately Caused the Accident..... 13
 E. Walker Acted Properly..... 17
 PROCEDURE..... 18

ARGUMENT..... 19
 I. STANDARD OF REVIEW..... 18
 II. STEVENS COUNTY AND THE STATE HAD DUTIES TO ENSURE THE STOP SIGN WAS VISIBLE TO WALKER SO HE COULD STOP SAFELY..... 23
 III. WALKER PRESENTED SUFFICIENT EVIDENCE OF PROXIMATE CAUSE TO MAKE SUMMARY JUDGMENT ERRONEOUS..... 28
 A. PLAINTIFF NEED NOT SHOW PRECISE MEMORY OF THE

ACCIDENT.....	29
1. Proof of Proximate Cause.....	29
2. Memory of Accident in Road Design	33
B. WALKER DID REMEMBER THE ACCIDENT.....	33
1. Prior Recollection.....	33
a. Not Hearsay.....	34
b. Recorded Recollection.....	35
C. ‘LACK OF MEMORY’ CASES ARE INAPPLICABLE.	37
1. Experts’ Opinions	37
2. Following Rules of the Road.	41
3. Inference Based on Normal Conduct	43
4. Defendant Burden to Provide Alternate Theory.....	45
5. Conclusion.	38
 CONCLUSION.....	 48
 CERTIFICATE OF SERVICE.	 50

Table of Authorities

Cases

<i>Argus v. Peter Kiewit & Sons Co.</i> , 49 Wn.2d 853, 856, 307 P.2d 261 (1957).	24
<i>Behla v. R.J. Jung, LLC</i> , ___ Wn. App ___, ___ P.3d ___ (Slip. Op. No. 36276-1-III, 12/3/2019).	29
<i>Burlington N. Santa Fe R.R.</i> , 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).	20
<i>City of Seattle v. Blume</i> , 134 Wash.2d 243, 252, 947 P.2d 223 (1997).	29
<i>Conrad v. Alderwood Manor</i> , 119 Wn. App. 275, 78 P.3d 177 (2003).	31
<i>Dowler v. Clover Park Sch. Dist. No. 400</i> , 172 Wn.2d 471, 484, 258 P.3d 676 (2011).	20
<i>Gardner v. Seymour</i> , 27 Wn.2d 802, 808, 180 P.2d 564 (1947)	29
<i>Goucher v. J.R. Simplot Co.</i> , 104 Wn.2d 662, 676, 709 P.2d 774 (1985).	29
<i>Hernandez v. W. Farmers Ass'n</i> , 76 Wn.2d 422, 425-26, 456 P.2d 1020 (1969).	30
<i>JN By & Through Hager v. Bellingham Sch. Dist. No. 501</i> , 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).	21
<i>Keller v. City of Spokane</i> , 146 Wash.2d 237, 247, 44 P.3d 845	

(2002).....	24
<i>Klossner v. San Juan County</i> , 21 Wn. App. 689, 692, 586 P.2d 899 (1978).....	30
<i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 922, 296 P.3d 860 (2013).....	19
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wn.2d 345, 352, 588 P.2d 1346 (1979).....	20
<i>Leahy v. State Farm Mut. Auto. Ins. Co.</i> , 3 Wn.App. App. 2d 613, 633, 418 P.3d 175 (2019).....	41
<i>Marshall v. AC & S, Inc.</i> , 56 Wash.App. 181, 185, 782 P.2d 1107 (1989)	36
<i>McCarthy v. Clark County</i> , 193 Wn.App. 314, 328, 376 P.3d 1127 (2016).....	19, 20
<i>Mehlert v. Baseball of Seattle. Inc.</i> , 1 Wn.App. 2d 115, 404 P.3d 97 (2017)	2, 37
<i>Miller v. Likins</i> 109 Wash.App. 140, 146, 34 P.3d 835 (2001)	25, 29, 33
<i>Moore v. Hagge</i> , 158 Wn.App. 137, 241 P.3d 787 (2010) . . .	2, 3, 24, 29, 33
<i>Mountain Park Homeowners Ass 'n v. Tydings</i> , 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).....	32
<i>Owen v. Burlington N. Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).....	23

<i>Prentice Packing & Storage Co. v. United Pac. Ins. Co.</i> , 5 Wn.2d 144, 106 P.2d 314 (1940).....	31
<i>Rashoff v. State</i> , No. 45919-1-II (unpublished 10/20/2015).....	41
<i>Rasmussen v. Bendotti</i> , 107 Wn.App. 947, 959, 29 P.3d 56 (2001).....	45
<i>Raybell v. State</i> , 6 Wn. App. 795,496 P.2d 559 (1972).	23
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn, 2d 468, 474, 951 P.2d 749 (1998)..	22
<i>State v White</i> , 152 Wn.App. 173,183,215 P.3d 251 (2009).	27
<i>State v. Castellanos</i> , 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)	27
<i>State v. Huelett</i> , 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)	27
<i>State v. Mathes</i> , 41 Wn. App. 863, 867-68, 737 P.2d 700 (1987).	27
<i>State v. Strauss</i> , 119 Wn.2d 401,417,832 P.2d 78 (1992).. . . .	27
<i>State v White</i> , 152 Wn.App. 173, 183, 215 P.3d 251 (2009). .35	
<i>Tapken v. Spokane County</i> , (6/13/19 no. 35473-3, Division III) (unpublished) (<i>Tapken II</i>),	43
<i>Tapken v. Spokane</i> No. 329097-III (1/12/16) (unpublished)	

.....	43
<i>Tubbs v. Estate of Vail</i> , No. 67201-1-I, (Court of Appeals Division 1, February 19, 2013)(unpublished)	45
<i>Wutherich v. King County</i> (No. 44019-9-II, March 10, 2015, unpublished)	44
<i>Wuthrich v. King County</i> , 185 Wn.2d 19, 366 P.3d 926 (2016)	24

Statutes and Other Authority

CR 30(b)(6).....	16
CR 56 (c).....	19
ER 703.	37
ER 801.	34
ER 803(a)(5).....	35
GR 14.1 (a).....	41
Manual on Uniform Traffic Control Devices	11, 14, 23, 26
WAC 468-95-010.....	23

Assignments of Error

1. The Court below erred by granting summary judgment dismissing Appellants' claims against both Defendants/Respondents due to failure to establish proximate cause.
2. The Court below erred by granting summary judgment dismissing STEVENS COUNTY due to failure to establish duty on its part.
3. The Court below erred in failing to grant reconsideration of the decisions set out in Nos. 1 & 2 above.

Issues Pertaining to Assignments of Error

Issue No. 1: Does Stevens County have a duty to ensure a stop sign along its road is visible to drivers driving on its road?

Issue No. 2: Does Stevens County have a duty to install a stop ahead sign along its road?

Issue No. 3: Do Walker's experts' opinions establishing proximate cause prevent summary judgment under *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn.App. 2d 115, 404 P.3d 97 (2017)?

Issue No. 4: Does Walker's lack of recall of the accident prevent him from establishing proximate cause against Stevens County and Washington State for failing to ensure the stop sign was visible under *Behla v. R.J. Jung, LLC*, ___ Wn. App ___, ___ P.3d ___ (Slip. Op. No. 36276-1-III, 12/3/2019)?

Issue No. 5: Does Walker's recorded statement detailing how the stop sign was not visible overcome his later lack of recall

about the accident?

Issue No. 6: Does evidence that Walker was obeying rules of the road preclude application of the rule in *Moore v. Hagge*, 158 Wn.App. 137, 241 P.3d 787 (2010)?

Issue No. 7: Should the Trial Court have considered the normal perception-reaction and stopping time of drivers faced with a stop sign in determining whether the rule in *Moore v. Hagge*, 158 Wn.App. 137, 241 P.3d 787 (2010) applies?

Issue No. 8: Must the Court consider the normal reaction of drivers faced with a stop sign in determining whether the rule in *Moore v. Hagge*, 158 Wn.App. 137, 241 P.3d 787 (2010) applies?

Issue No. 9: Must the Defendant in a road design case advance an equally plausible explanation for the accident in order to show lack of proximate cause?

STATEMENT OF THE CASE:

FACTS

A. The Accident

What started out as a short vacation trip for plaintiff James Walker ("Walker") has become his worst nightmare. An engineer by profession, Walker was also a motorcycle enthusiast. (CP 141) He rode for pleasure and was very experienced; he had owned, over the years, 20 motorcycles and ridden 30 years. (CP 141) He had never had an accident or a ticket. He was a careful, thoughtful rider. (CP 141)

On July 26, 2013, Walker was in Republic, Washington, with other motorcycle enthusiasts. (CP 141) Walker and Ulrich "Uli" Schildt left Republic and rode on Ford-Wellpinit Road approaching SR 231 near Ford, Washington. (CP 142) The speed limit on Ford-Wellpinit is 50 mph; Walker and Schildt were traveling slightly below the limit. (CP 29)

The Ford-Wellpinit road crosses a small stream shortly before the intersection with SR 231, then goes up a slight incline (CP 13) and meets the highway. SR 231 is a 55 mph 2-lane highway; it curves on the left approaching the intersection with Ford-Wellpinit. (CP 32) Mr. Schildt was a few car lengths behind Walker. (CP 32) He was unable to see the stop sign until he was quite close, nor could he see any car coming from the left on SR 231. (CP 34)

This is a recent satellite photo of the actual intersection (again for general information, not evidence):



Figure 1 Satellite photo demonstrative only

Walker entered the intersection without stopping and was struck by a car coming from his left on SR 231. He suffered life-threatening injuries and was airlifted to Sacred Heart. (CP 31)

B. A Tree Hid the Stop Sign

The Washington State Patrol (WSP) inspected the accident and took many photos. Inexplicably, the WSP neglected to take photos from Walker's direction that would have shown the tree hiding the stop sign. (CP 133) The WSP's failure is shocking because Schildt told the officer the stop sign was obscured. (CP 32)

Nevertheless, several witnesses establish vegetation hid the stop sign. Shortly after this tragedy, Walker provided a recorded statement in which he stated he could not see the stop sign. (CP 140)

1. Walker testified the stop sign was hidden: [CP 142, 148]

I couldn't see any stop sign and so I believe the stop sign was way over to one side and you had to get right up

really close to it and then you had to look over to one side in order to see it so it was very, very blocked.

(CP 142-43)

Walker clearly testified the stop sign was hidden.

Q And the road that you were on did it have a stop sign then at the SR road or was it...

A. I did not see, I did not see a stop sign.

Q. Ok. And is there trees, bushes, fencing that?

A. Well, ya, um, um, I, my rider or the guy that I was riding with, um, ah, he went and took some pictures at the intersection he said it was a horrible intersection there was trees blocking the, the, he said that he saw a stop sign there but you couldn't see it until you were, until it was almost too late you couldn't see there was no warning of a stop sign.

Q. Ok.

A. And I couldn't see any stop sign and so I believe the stop sign was way over to one side and you had to get right up really close to it and then you had to look over to one side in order to see it so it was very, very blocked.

Q. Ok.

A. Ah, by it and I think there was shrubbery and things like that.

(CP 148)

Likewise, Schildt carefully examined the intersection after the accident. (CP 33) Schildt describes "pretty high

vegetation" around the stop sign that hid it. (CP 33, 36) He concluded the stop sign was not visible even as close as 100 feet. (CP 34)

Schildt describes the vegetation prevented him from seeing the stop sign until after the accident.

Q When was the first time that you became aware that there was a stop sign at the intersection of Wellpinit and 231 from the direction you were approaching?

A After the collision.

Q And were you ever aware that there was a vehicle coming down on 231 prior to the point of impact?

A No. Where I was, you would not be able to see that. Again, if you look at photos, the Ford-Wellpinit Road, as it enters the intersection is on an incline. **And if I recall, there's a tree -- a fairly large tree on the right side. And the highway -- the main highway, 231, is in a bit of a curve. So when I go up the incline entering towards the intersection, you really can't see any left and right. Or even if you're like 100 feet back from the intersection, you can't really see anything.** And also, the day when I -- again, this was after the accident -- when I looked around, there was pretty high vegetation in the ditch right here as well (indicating) just north of the intersection. And so **c even if you are, like I say, 100 feet from the intersection, the direction where we were coming, you can't see anything.**

(Emphasis added) (CP 425)

Engineering expert William Skelton carefully examined the vegetation. He found a large tree about 15 feet in front of the stop sign. (CP 72) The tree was so large that its branches hung to within three feet of the stop sign's face. (CP 72). Skelton carefully determined the stop sign was visible only 125' away. (CP 71)

The vegetation may have changed between the accident and Dr. Skelton's inspection of the scene, but based on Mr. Schildt's testimony, it was not materially different: Schildt said there was no visibility at 100 feet, [CP 34] Skelton found 125. [CP 71] Mr. Flott testified that the vegetation would likely not have been materially different. [CP 237]

State maintenance supervisor Samuel Jennings agreed the tree hid the stop sign. (CP 77) He opined the hidden stop sign made driving the road dangerous for riders like Walker. (CP 83)

The vegetation that hid the stop sign violated the State's own policy. *The WSDOT Eastern Region, Area 1, Integrated Roadside Vegetation Management Plan, 2011*, states as follows:

Exhibit 3.

1.6. Tree and Brush Control

1.6.1. Policy and Practices

Trees and brush are controlled for safety reasons including preservation of sight distance at curves and intersections, and for visibility of signs, and preventing trees with large trunk diameter from growing too close to traffic lanes. (Emphasis Added)

(CP 162).

Arborist James Flott examined the tree and noted it was a Siberian Elm. Flott determined the Elm negatively impacted the stop sign's visibility. (CP 238) He opined the State should have removed any vegetation within the sight triangle of a stop sign to ensure it was visible. (CP 238)

Amazingly, the State had ignored its duty to ensure the

stop sign was visible for years before this accident. The State did not complete a vegetation inspection of the area in the 2 years before the accident - and possibly not since 2004. (CP 58)

C. The Hidden Stop Sign Proximately Caused the Accident.

The State has adopted the Manual on Uniform Traffic Control Devices ("MUTCD"). (CP 62, 63) Stevens County has adopted the MUTCD. (CP 42, 43).

Road design expert Edward Stevens opined that the intersection did not comply with the MUTCD and, thus, was inherently dangerous. (CP 802-03) The MUTCD required the stop sign to be visible for 350 feet. (CP 86). The sight distance was about 100 feet at the time of the accident. (CP 38)

Human Factors Expert Joellen Gill opined the hidden stop sign blindsided Walker. He had not driven the road before and would have relied heavily on a visible stop sign to safely stop. (CP 223) Gill explains that perception-reaction time is "the interval of time that starts when something can be detected

in the roadway and ends when a response is initiated." (CP 220)

Accident reconstruction expert Steve Harbinson opines the average perception-reaction time is 1.5 seconds. (CP 134) He opines that the hidden stop sign was a proximate cause of the accident under several scenarios:

- If Walker was traveling at 50 mph when he first saw the stop sign, Walker required 214 feet to stop. As the stop sign was visible only about 125 feet before the intersection, Walker could not have stopped before the intersection. (CP 134-135)
- If Walker was traveling at 45 mph when he first saw the stop sign, Walker required 183 feet to stop. As the stop sign was visible only about 125 feet before the intersection, Walker could not have stopped before the intersection. (CP 135)
- Harbinson further opined if Walker was traveling 40

mph when he first saw the stop sign, Walker required 154 feet to stop. As the stop sign was visible only about 125 feet before the intersection, Walker could not have stopped before the intersection. (CP 134-135)

- Proximate cause is even stronger if the stop sign was only visible 100 feet away as eyewitness Schildt testified. Thus, Walker could not have stopped before the intersection. (CP 134-135)

Gill agrees that the hidden stop sign was a proximate cause of the accident. (CP 224) Gill also opined the hidden stop sign precluded Walker from having enough time to react and stop. (CP 224) Gill testified that "the lack of a stop ahead sign and/or the inadequate 125' sight-stopping distance constituted safety hazards that contributed to this accident." (CP 224)

D. The Missing Stop Ahead Proximately Caused the Accident.

The MUTCD required the stop sign to be visible for 350 feet. As it was not visible for 350 feet, the MUTCD required

Stevens County and the State to install a stop ahead sign on Ford Wellpinit Road. (CP 86). The sight distance was about 100 feet at the time of the accident. (CP 425).

As Walker was not familiar with the road, the stop ahead sign would be vital to inform him of the pending stop sign. (CP 223)

Signage that is consistent with driver expectancy and conforms to the MUTCD is especially critical for naïve drivers such as Mr. Walker who have no prior experience with the intersection from which to draw. Mr. Walker had no expectancy that a Stop sign was ahead; a Stop Ahead sign would have created that expectancy. (CP 223) The stop ahead sign is designed to alert a driver to perceive, react and safely stop. (CP 221)

Additionally, cross traffic to the rider's left was not visible more than 120 feet from the intersection, making a stop sign even more important. (CP 221)

Thus, approaching vehicles traveling on SR231 may not even be visible to a driver approaching on Ford-Wellpinit Road until it is too late to stop before continuing into the intersection. (CP 222)

Stevens County neglected to install a stop ahead sign. Walker clearly articulated the lack of a stop ahead sign and the hidden stop sign caused the accident.

A.Is there anything you would like to add to the statement that I didn't maybe ask you or cover with you?

Q. Um, well I guess my, my real concern is, um, I guess I'm real disappointed that that intersection was so poorly constructed and, and that there was finding a stop sign there or any kind of cautionary sign that this road was coming up was, I think it's a very bad design and, ah, and especially since there was a, there was an accident that very same intersection a week before and that was specifically noted by the policeman who showed up so he was aware of that intersection and he knew it was a, it was a problem and so, um, anyway, I think that's gonna, I mean I'm disappointed that that, that was so poorly of course identified and, ah...

Q. Well marked or a stop ahead sign coming or.

A. Ya something say hey stop, you know if you're gonna hide the stop sign then put a warning, put a

warning say stop you know stop ahead ya something.
Anyway, ah, I guess that's the only thing I can think of.

(CP 142-143)

Stevens County admits it had the duty to determine if a stop ahead sign is warranted, in the testimony of Jason Hart, Stevens County acting director of Public Works and assistant county engineer, pursuant to CR 30(b)(6):

Q Does the MUTCD require the county to independently determine when a "Stop Ahead" sign is indicated?

A Yes.

(CP 47)

After the State moved the stop sign in 2004, Stevens County did not determine if a stop ahead sign was indicated.

(CP 49-50) Further, Stevens County has a continuing duty to determine if a stop ahead sign is legally required. If, after the stop sign is installed, vegetation makes a stop ahead sign legally mandated, Stevens County has the duty to install the stop ahead sign. (CP 94-95)

Contrary to the law (See p. 26-27 infra) and common sense, Stevens County has a policy not to determine if stop ahead signs are required on existing roads. Nor does Stevens County have a policy to affirmatively look for vegetation that obscures stop signs. (CP 94).

Gill opined the lack of the stop ahead sign was a proximate cause of this accident. (CP 224)

Therefore, Stevens County breached its duty to install a stop ahead sign.

E. Walker Acted Properly

Gill notes the lack of evidence that Walker contributed to the accident. He was not exceeding the speed limit, not under the influence of drugs or alcohol and was wearing proper motorcycle safety gear, including an expensive helmet, gloves and riding leathers. (CP 222-23)

Gill concludes,

(G)iven the inherent limitations in our visual system, it is foreseeable that drivers such as Mr. Walker,

when focusing on the roadway in front of him and engaged in the primary demands of driving (i.e. vehicle placement and obstacle avoidance) would not reliably detect the stop sign that was well off to the right-hand side of the road and in his peripheral vision....**In short, Mr. Walker's behavior at the time of this incident was consistent with foreseeable human behavior.**

(CP 223, emphasis added)

In sum, the Trial Court erred when it granted Stevens County and Washington State's summary judgment motions on proximate cause and Stevens County's motion on duty.

PROCEDURE

Suit was filed February 22, 2016. [CP 3] After quite a bit of discovery a summary judgment motion was filed by both defendants as to proximate cause, [CP 385] and by STEVENS COUNTY as to Duty. [CP375] Both motions were granted by the Superior Court. [CP 1138]

A timely motion for reconsideration of both orders was filed and denied. [CP 1145] This appeal was filed thereafter.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews summary judgment orders *de novo*. *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Proximate Cause is usually a Jury question, unless reasonable minds cannot disagree as to the facts and inferences therefrom. *McCarthy v. Clark County*, 193 Wn.App. 314, 328, 376 P.3d 1127 (2016).

All facts and reasonable inferences from facts must be viewed in the light most favorable to the nonmoving party. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Summary judgment is proper only if the record before the trial court establishes ‘that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ CR 56 (c). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the

litigation. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

The first issue is purely one of law: did STEVENS COUNTY have a duty to do something to prevent the accident? Case law clearly says it does, and this was an error of law by the court below. It is a fact question whether STEVENS COUNTY in fact failed in its duty to inspect or otherwise be aware of the hazard and do something – cut down the vegetation, notify the STATE, put up a stop ahead sign.

The second issue involves two matters that are reserved for the jury. Proximate cause is usually a question of fact and justifies denying summary judgment. *McCarthy v. Clark County*, 193 Wn.App. 314, 328, 376 P.3d 1127 (2016). Whether roadway conditions are reasonably safe for ordinary travel or are inherently dangerous is usually a question of fact. *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

A court should deny summary judgment when the responding party produces expert opinion on an ultimate issue of fact that creates a genuine issue as to that fact. *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn.App.2d 115 (2017); *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979).

The trial court commits reversible error in ignoring the non-moving party's experts' opinions when they create material issues of fact.

In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.

JN By & Through Hager v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994) (citations omitted). *Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn.App. App. 2d 613, 633, 418 P.3d 175 (2019) holds,

At the summary judgment state with which we are concerned, both [sides' experts] appeared to render opinions whether the accident caused Leahy's DM. There

was a clear conflict between two experts on a central issue: causation. Could this insurer, on this record, claim that there was a genuine issue of material fact on the reasonableness of its action in solely relying on its expert? We think not.

As established, Walker's experts opined that the stop sign was hidden and prevented Walker from stopping in time. Thus, the Trial Court committed reversible error in granting summary judgment.

Here we have direct testimony from Mr. Walker in the form of his hospital statement; we have the testimony of his fellow rider, Uli Schildt, traveling right behind him; we have experts saying the conditions would be expected to cause an accident; we have what the normal behavior of a prudent rider faced with a stop sign would be, which is not what Mr. WALKER did. The inferences from these facts are that Mr. WALKER didn't see the stop sign or the cross traffic in time to react and avoid accident. The Respondents have not offered an alternative that is as probable. It was error not to recognize a

fact question existed.

Summary judgment should not have been granted.

II. STEVENS COUNTY AND WASHINGTON STATE HAD DUTIES TO ENSURE THE STOP SIGN WAS VISIBLE TO WALKER SO HE COULD STOP SAFELY.¹

A. Vegetation

Like any other entity, Stevens County and the State have duties to exercise reasonable care in their activities.

Today, governmental entities are held to the same negligence standards as private individuals. . . . Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care.

Owen v. Burlington Northern, 153 Wn.2d 780, 787, 108 P .3d 122 (2005) (citation omitted).

Washington has adapted the MUTCD. WAC 468-95-010. So has Stevens County. (CP 47).

¹The State's duty is not technically before this Court because the Trial Court held it had a duty to ensure the stop sign was visible. WALKER mentions it to support his proximate cause argument.

Stevens County and Washington State owed a duty to maintain their roadways in safe condition for drivers, whether they are negligent or fault-free. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). The State and Stevens County have a duty to anticipate foreseeable dangers. *Argus v. Peter Kiewit & Sons Co.*, 49 Wn.2d 853, 856, 307 P.2d 261 (1957).

Our Supreme Court has emphasized that the overarching duty to provide reasonably safe roads includes a duty to eliminate an inherently dangerous or misleading conditions. *Owen v. Burlington Northern*, 153 Wn.2d 780, 787-88, 108 P.3d 122 (2005).

The Washington State Supreme Court has held counties have an affirmative duty to ensure a stop sign is visible to motorists. This duty specifically includes the duty to clear vegetation around the stop sign. *Wuthrich v. King County*, 185 Wn.2d 19, 366 P.3d 926 (2016).

Wuthrich was riding a motorcycle in King County.

Defendant Gilland stopped at a stop and did not see oncoming traffic. Gilland made a left turn, hitting Wuthrich. Wuthrich sued Gilland and King County. Wuthrich alleged King County was liable because "overgrown blackberry bushes obstructed Gilland's view of traffic at the intersection." *Wuthrich*, at 24. The Washington State Supreme Court over-turned prior case law and specifically held a county may be liable for failing to ensure vegetation does not hide a stop sign.

Therefore, to the extent that Rathbun, Bradshaw, and Barton hold that a municipality has no duty at all to address dangerous sight obstructions caused by roadside vegetation, we now explicitly hold they are no longer good law.

We also note that whether a condition is inherently dangerous does not depend on whether the condition "exists in the roadway itself." *Wuthrich*, slip op. at 7. It depends on whether there is an "extraordinary condition or unusual hazard." . . . **Such a hazard may be presented by "the situation along the highway."**

Wuthrich, 26-27 (citations omitted)(emphasis added).

Stevens County therefore had the common-law duty to

ensure the stop sign was visible to drivers on its road.

Further, Stevens County admits that it has the duty to maintain vegetation outside the State's right-of-way.

Q What is -- who is it? Who was responsible for maintaining vegetation along Ford-Wellpinit Road outside of the "Stop" sign easement area?

A The state highway right-of-way?

Q Yes.

A Stevens County.

(CP 782-783)

The MUTCD also requires Stevens County to ensure the stop sign was visible.

Section 2A.22 Maintenance

Guidance:

...

Steps should be taken to see that weeds, trees, shrubbery, and construction, maintenance, and utility materials and equipment do not obscure the face of any sign or object marker.

(MUTCD Section 2A.22, CP 778) The State and Stevens

County have these duties even if they claim WALKER has

fault.

B. 'Stop Ahead' Sign

After the State moved the stop sign in 2004, Stevens County did not determine if a stop ahead sign was required.

(CP 49-50)

Further, Stevens County has a continuing duty to determine if a stop ahead sign is legally required. If, after the stop sign is installed, vegetation makes a stop ahead sign legally mandated, Stevens County has the duty to install the stop ahead sign. (94-95)

Contrary to the law and common sense, Stevens County's policy is not to determine if stop ahead signs are required on existing roads. Nor does Stevens County have a policy to affirmatively look for vegetation that obscures stop signs. (CP 94) The MUTCD required a stop ahead sign on Ford Wellpinit Road because the sight distance was less than 350 feet. (CP 86) The sight distance was about 100 feet at the time

of the accident. (CP 38) WALKER testified someone should have installed a stop ahead sign to alert him of the stop sign. (CP 143) Expert Gill opined the lack of the stop ahead sign was a proximate cause of this accident. (CP 224)

Therefore, Stevens County breached its duty to install a stop ahead sign.

III. WALKER PRESENTED SUFFICIENT EVIDENCE OF PROXIMATE CAUSE TO MAKE SUMMARY JUDGMENT ERRONEOUS

WALKER presented evidence Stevens County and the State proximately caused this accident, making Summary

Judgment erroneous:

- Where the Plaintiff has provided evidence of what happened.
- Where the Plaintiff has provided expert testimony of a hazard that, in their opinion, caused the accident.
- Where the Plaintiff was following the rules of the road.
- Where a normally safe driver failed to do what normal drivers do if they see and perceive a

warning sign.

- Where the Defendants are unable to offer an alternate hypothesis that is just as likely as a failure to perceive a warning sign.

In this case it is reasonable to infer Mr. WALKER didn't stop *because* he couldn't see the sign, a fact question.

A. PLAINTIFF NEED NOT SHOW PRECISE MEMORY OF THE ACCIDENT

1. Proof of Proximate Cause

Division III just released a decision very much on point.

Behla v. R.J. Jung, LLC, ___ Wn. App ___, ___ P.3d ___ (Slip. Op. No. 36276-1-III, 12/3/2019)). Plaintiff Behla fell and was knocked out. When he awoke, he could not recall how he fell. He observed a cable stretched out where he would have tripped and no other hazard likely to have caused his fall. That created a fact question as to proximate cause.

The Court analyzed in detail the "speculation" rule of causation, basically questioning whether it should exist at all.

The Court concluded:

We reject application of *Gardner v. Seymour*'s stated rule under the circumstances of James Behla's fall. We instead rely on at least two other rules of causation. First, **if the plaintiff can rationally rule out other potential causes, the jury should decide** if plaintiff's proffered cause constitutes the true cause of harm or rests in speculation. **Second, if the plaintiff can show that his offered cause could have caused his injury, the jury should decide** whether the plaintiff's proffered cause is based on speculation or if defendant's list of possible causes relies on speculation. (Id at 7, ¶ 37)(Emphasis Added)

The Court concludes,

The plaintiff can survive a motion to dismiss if he presents "some competent evidence of factual causation" that precludes jury speculation. ...The court may decide cause in fact as a matter of law, however, if the facts and inferences from them are plain and not subject to reasonable doubt or difference of opinion. ... **Stated another way, causation becomes a question of law for the court only when the causal connection is "so speculative and indirect" that reasonable minds could not differ. ...** Use of the phrase "so speculative" suggests degrees of speculation such that the jury should often be the decider of speculation. (Id at 9 ¶ 47) (Emphasis added, citation omitted)

The Trial Court in this case lacked the *Behla* decision for guidance, but the same result should have been obtained under

prior case law. There may be more than one proximate cause of an accident. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 676, 709 P.2d 774 (1985). Proximate cause need not be shown with certainty. Evidence that would allow a jury to find that the harm more probably than not happened in such a way that Stevens County and the State's negligence played a role is enough. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). Cause in fact is generally left to the jury. *City of Seattle v. Blume*, 134 Wash.2d 243, 252, 947 P.2d 223 (1997). Proof may be circumstantial, *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 425-26, 456 P.2d 1020 (1969), and may be based on *inferences from circumstantial evidence*:

Precise knowledge of how an accident occurred, however, is not required to prove negligence and all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence.
(Emphasis added)

Klossner v. San Juan County, 21 Wn. App. 689, 692, 586 P.2d 899 (1978).

[I]f there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, **notwithstanding the existence of other plausible theories** with or without support in the evidence. (Emphasis added)

Prentice Packing & Storage Co. v. United Pac. Ins. Co., 5 Wn.2d 144, 106 P.2d 314 (1940).

An elderly woman, who later died, suffered a femur fracture while in a nursing home in *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P.3d 177 (2003), cited in *Behla*. There was no direct evidence of the cause of the decedent's femur fracture. The defendant argued that the circumstantial evidence presented only alternate possibilities and that the jury's finding of causation was based on mere speculation. The plaintiff presented expert medical testimony that the decedent's leg fracture was not the result of osteoporosis and was caused by a twisting force, more probably than not the result of someone catching the decedent's leg in the bed rails or dropping her on the floor.

In affirming the jury's award for the plaintiff, the Court of Appeals noted that a plaintiff need not establish causation by direct and positive evidence. A plaintiff need only show "a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable." *Conrad*, at 281. In summary judgment proceedings, courts are required to take all reasonable inferences in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass 'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

The trial court erred in failing to find that the circumstantial evidence in this case creates a reasonable inference that the defendants proximately caused WALKER's horrific injuries. Here, as in *Conrad* and *Behla*, there is a logical sequence of cause and effect. The two eyewitnesses (WALKER and Schildt) testified they were unable to see the stop sign. Schildt testified the vegetation hid the stop sign until about 100 feet away. Experts Gill and Harbinson opined

WALKER could not have stopped when the stop sign was visible only 100 feet away.

2. Memory of Accident in Road Design

Road design cases have found a failure of proof of proximate cause if a Plaintiff can't produce evidence of exactly what happened at the moment of the accident. In *Moore v. Hagge*, 158 Wn.App. 137, 241 P.3d 787 (2010) the Plaintiff had no memory and there were no witnesses. In *Miller v. Likins* 109 Wash.App. 140, 146, 34 P.3d 835 (2001) the defendant driver in a pedestrian accident died before testifying, so no one could say whether he had been deceived by the road conditions alleged to have caused him to strike the plaintiff on the shoulder of the road.

Those conditions do not exist here.

B. WALKER DID REMEMBER THE ACCIDENT

1. Prior Recollection

Mr. WALKER recalled the accident when he was in the

hospital soon after it happened. In his recorded statement after the accident, and in sworn interrogatory statements, Mr.

WALKER recalls not seeing the stop sign or any other traffic signs, although by the time of deposition he no longer had a recollection. [CP 287]

His prior testimony based on the recorded statement he gave in the hospital is admissible.

a. Not Hearsay

His prior statement was admissible under ER 801:

- (d) Statements Which Are Not Hearsay. A statement is not hearsay if-
 - (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

The Defendants now are making an implied, if not explicit charge against him of recent fabrication. His prior statement made at the Hospital is therefore not hearsay and is admissible to prove the truth of the matter asserted.

b. Recorded Recollection

The statement is also admissible under ER 803(a)(5):

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

WALKER's prior testimony is admissible under this flexible standard:

Admission is proper when the following factors are met: (1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) the record reflects the witness's prior knowledge accurately.

State v White, 152 Wn.App. 173, 183, 215 P.3d 251 (2009).

WALKER establishes each of the four elements. First, Mr. WALKER made the statement based on his personal knowledge. WALKER provided his name, date of birth,

address, cell number, the date of the accident (July 26, 2013), and the time of the accident. He describes the type of intersection and that day's hot weather. (CP 140, 143, 147-151) He also recalls nearing the poorly designed intersection. He stated that he was unsure which way to turn at the intersection. (CP 148) Within weeks of the accident, Mr. WALKER opined the intersection was poorly designed. (CP 151)

Second, he now lacks sufficient recollection.

Third, the statement was made on August 15, 2013, about three weeks after the accident.

Fourth, Mr. WALKER concluded his statement confirming that it accurately reflected his memory. (CP 151)

The rule prohibiting a party from negating a *prior* statement at deposition, *See Marshall v. AC & S, Inc.*, 56 Wash.App. 181, 185, 782 P.2d 1107 (1989), is inapplicable where he references a clear prior statement but has since lost his recollection. There is no contradiction, merely a subsequent

loss of memory.

Finally, experts are entitled to rely on hearsay statements. ER 703.

C. 'LACK OF MEMORY' CASES ARE INAPPLICABLE

Miller and *Moore* have since been qualified.

1. Experts' Opinions

A plaintiff who does not have a clear recollection or even no recollection of the accident may prove proximate cause with expert testimony that a safety violation proximately caused the accident. *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn.App.2d 115, 404 P.3d 97 (2017). As she was leaving the Mariners store in Seattle, Mehlert walked down a ramp to walk outside. She pushed the door open and fell. She does not recall how she fell. *Id.* at 119.

Mehlert recalled trying to grab something to prevent her fall. Mehlert's human factors expert opined that the store violated safety codes because there were no handrails on

adjacent to the stairs. *Id.* at 119.

The trial court granted summary judgment because Mehlert could not recall why she fell. The court of appeals reversed the trial court.

Her theory of causation rests on (her expert's) opinion that the absence of handrails "presented a safety hazard and was a contributing factor" in her fall. Code required handrails on each side of the two narrow staircases as well as on the ramp. Without handrails, any path from the store to the sidewalk was unsafe. According to (her expert), if appropriate handrails had been present, Mehlert would have been able to reach out to grasp one, thereby lessening or preventing her injuries.

...

(her expert's) testimony together with the rest of the evidence would allow reasonable jurors to **infer causation without speculating**. Mehlert has submitted proof that the placement of the ramp without handrails was a but-for cause of her injuries notwithstanding her inability to recall how or why she fell. (Emphasis added)

Id. at 121.

Here, Human Factors expert Gill emphasizes that a visible stop sign is designed to alert WALKER of a hazard. WALKER had not been on Ford-Wellpinit Road before and

would have relied heavily on a visible stop sign to alert him he needed to stop. (CP 223)

WALKER criticized the hidden stop sign. He described it as "way over to one side and you had to get up really close to it and then you had to look over to one side in order to see it so it was very, very blocked." (CP 142-43)

Accident reconstruction expert Steve Harbinson opines the hidden stop sign was a proximate cause of the accident. WALKER and Schildt testified WALKER was traveling at or below the 50 mph speed limit. Schildt testified WALKER slowed slightly before the intersection. (CP 29)

If WALKER was traveling at 50 mph when he first saw the stop sign, WALKER required 214 feet to stop. As the stop sign was visible only about 125 feet before the intersection, WALKER could not have stopped before the intersection. (CP 134-135)

If WALKER was traveling at 45 mph when he first saw

the stop sign, WALKER required 183 feet to stop. As the stop sign was visible only about 125 feet before the intersection, WALKER could not have stopped before the intersection. (CP 135)

Harbinson further opined if WALKER was traveling 40 mph when he first saw the stop sign, WALKER required 154 feet to stop. As the stop sign was visible only about 125 feet before the intersection, WALKER could not have stopped before the intersection. (CP 135) Proximate cause is even stronger if the stop sign was visible 100 feet away as eyewitness Schildt testified. (CP 34) Thus, WALKER could not have stopped before the intersection if the stop sign were visible 100 feet away. (CP 135)

Gill agrees the hidden stop sign did not allow WALKER time to stop. Thus, the hidden stop sign was a proximate cause of this accident. (CP 224)

In sum, the hidden stop sign was a proximate cause of this accident. The hidden stop sign prevented WALKER from

recognizing the intersection ahead in time to safely stop.

Conflicting expert opinions regarding causation creates a question of fact which precludes summary judgment. *Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn.App. App. 2d 613, 633, 418 P.3d 175 (2019).

It really comes down to proving a negative. Mr. WALKER's failure to remember is not significant because there *was nothing for him to remember*. There *was no* stop sign visible; there *was no* 'stop ahead' sign. Our experts say this negative was a causal factor in the accident. Our theory of causation rests on our experts' opinions that 'absence of a visible stop sign presented a safety hazard and was a contributing factor' in the crash.

2. Following Rules of the Road

Rashoff v. State, No. 45919-1-II (unpublished 10/20/2015)² involved an accident where Lamotte was driving,

² GR 14.1 (a) provides that Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court.

Rashoff was a passenger. Lamotte stopped at a stop sign, then entered an intersection and was hit by a truck that was not facing a stop sign. Lamotte had no memory of the collision. Plaintiff argued that there should have been a signal or a 4-way stop so the truck would have stopped or slowed. The Court held that evidence that Lamotte stopped before entering the intersection was “strong circumstantial evidence that, had there been a traffic signal or a four-way stop in place,” he “would not have crossed until it was his turn.” The Court said,

Here, the evidence shows that **Lamotte followed the rules of the road** by stopping at the stop sign on Williams Street. Lamotte then traveled into the intersection, maybe pausing in the eastbound lane, before traveling into the path of Steen's log truck. The evidence also shows that Steen followed the rules of the road by traveling at, or close to, the speed limit, having his headlights on, and watching Lamotte's actions. Given these facts, **we cannot say as a matter of law that the causal connection between WSDOT's alleged breach**

However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

of its duty to maintain the intersection in a reasonably safe condition for ordinary travel (by installing further safety measures to control vehicle travel) and the collision is "'so speculative and indirect that reasonable minds could not differ.'" [Emphasis Added]

In our case, WALKER obeyed the speed limit, had his headlight on, and followed the path of the highway. But he couldn't see the stop sign or the approaching traffic from the left until too late. Just like *Rashoff* we cannot say that the causal connection between The State and Stevens County's breach of their duty to maintain the intersection in a reasonably safe condition for ordinary travel and the collision is so speculative and indirect that reasonable minds could not differ.

3. Inference Based on Normal Conduct

Another case dovetails with the rule in *Rashoff*. In *Rashoff* the Court focused on the Plaintiff following the Rules of the Road, which made it likely that his failure to avoid an accident was because the intersection was improperly signed. This Court in *Tapken v. Spokane* No. 329097-III (1/12/16)

(unpublished) and in *Tapken v. Spokane County*, (6/13/19 no. 35473-3, Division III) (unpublished) (*Tapken II*), faced a situation that was remarkably similar to Mr. WALKER's. This Court in *Tapken* found that the second driver, Malinak, testified he only slows for a yield sign if there is converging traffic and there was no converging traffic, so the yield sign hidden by a bush could not have proximately caused his failure to slow down. "*But the bush obscured both the yield sign to the right and the sharpness of the right hand turn.*" Malinak would have slowed more had he been able to perceive the sharpness of the right turn sooner. That was substantial evidence of proximate cause.

The reason that this is sufficient to show proximate cause, echoed what the Court said in *Rashkoff*:

One does not need to take judicial notice of the fact that **drivers routinely slow to safely navigate a sharp curve when the sharpness of the curve is apparent.** A jury is entitled to decide whether Malinak, had the intersection been unobstructed so he could have earlier seen the sharpness of the curve, would have sufficiently slowed or

whether he would have launched himself and his passenger off the road. Because our standard of review requires us to assume the facts and inferences in the light most favorable to Malinak, **we must presume that he would have done what almost every other driver does when perceiving a sharp curve: slow down sufficiently rather than wreck.**

Similarly with Mr. WALKER: we must presume that he would have done what almost every other driver does when perceiving a stop sign at an intersection; he would be expected to slow down sufficiently rather than wreck. Drivers normally slow for a stop sign even if they don't completely stop. Mr. WALKER didn't slow down, presumably because he didn't see the stop sign, couldn't see crossing traffic, hadn't been warned there was a stop ahead.

4. Defendant Burden to Provide Alternate Theory

Only if it is as likely that an event happened from one cause as another, is the proof is speculative. *Rasmussen v. Bendotti*, 107 Wn.App. 947, 959, 29 P.3d 56 (2001).

So, if the Plaintiff's theory of causation is no more plausible or

likely than the Defense theory, the Defense wins. But *Tubbs v. Estate of Vail*, No. 67201-1-I, (Court of Appeals Division 1, February 19, 2013)(unpublished) involved a motorcycle accident where the plaintiff could not remember why the accident occurred. The Court notes that the burden of persuasion is on the Defendants to show some equally plausible explanation for the accident other than their negligence:

Tubbs's case is distinguishable from *Gardner* and *Marshall*. In those cases, it was equally plausible that the plaintiff's own mistake caused the accident rather than any defect of the equipment or premises. In contrast, **the Estate has not put forth any equally plausible explanations for the motorcycle accident other than Vail's negligence.**

In our case there is no equally plausible explanation why an experienced and safe rider would ignore a stop sign, if the sign was visible. That would not be a mistake; it would be an uncharacteristic, improbable and utterly unbelievable failure to follow the most basic thing any driver does: when the sign says stop, you stop – or at least slow down and look for cross traffic.

You don't proceed through an intersection and get in an accident.

5. Conclusion

In a road design case where the Plaintiff has imperfect, or no recollection of the precise events of the accident, the Court must give the non-moving party the benefit of all reasonable inferences from the evidence. Causation may not be speculative. But a theory of causation based on Expert opinions that a safety hazard existed which was a contributing factor to the accident is not speculative. [*Behla, Mehlert*] Evidence that the Plaintiff obeyed the rules of the road prior to the accident, is circumstantial evidence that a dangerous road condition caused the accident. [*Rashoff*] If the nature of the dangerous condition was something that would have impaired the Plaintiff's ability to avoid the accident, the court should infer that it may have caused the accident, which is not speculation. [*Rashoff*] The Court must recognize what drivers routinely do

when faced with traffic signs, namely, react to them; [*Rashoff, Tapken*] and if the Plaintiff did not react normally, there is an inference that the dangerous condition caused the accident, sufficient to create a question of fact regarding proximate cause. The Defendants must show an equally plausible explanation.

Mr. WALKER could not see the stop sign in time to react, as he said in the hospital; Plaintiffs' Experts agree this intersection made it difficult or impossible for him to see and react to the stop sign until it was too late, foreseeably causing an accident; Mr. WALKER was following the rules of the road in all other aspects, so would be expected to react to the stop sign if he saw it; It does not require judicial notice to see that normal drivers react to a stop sign, so failure to react probably stemmed from failure to see the sign, which in this case means the obscured sign caused the accident, and finally the State and County have failed to advance an equally plausible

explanation. Summary judgment on proximate cause was in error.

CONCLUSION

Summary Judgment was incorrect as to both issues, the County's duty and proximate cause. Both present questions of fact.

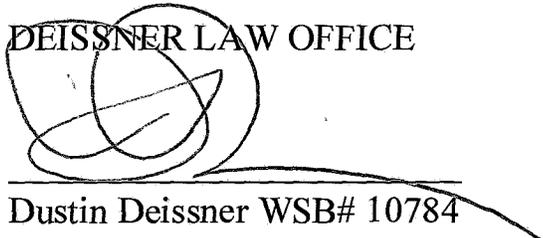
Wutherich v. King County establishes the County's duty.

The Division III cases of *Behla v. R.J. Jung, LLC*, and the two unpublished decisions in *Tapken v. Spokane County*, along with *Mehlert v. Baseball of Seattle* and the other cited, make it clear that the 'lack of memory equals speculation' rule of *Moore v. Hagge* and *Miller v. Likins* applies only in very unusual cases where there is almost no evidence of causation.

This Court is requested to reverse the trial court decision and remand this case for further proceedings.

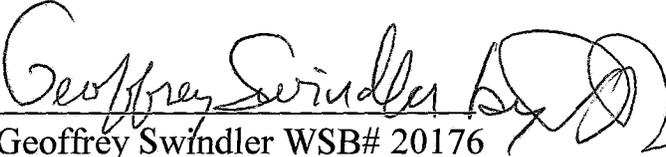
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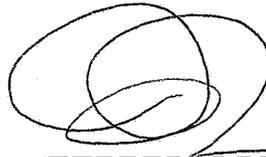
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2019, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to the following:

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