

FILED

MAY 27 2020

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 369871

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

JAMES WALKER, et ux,

Appellant,

v.

WASHINGTON STATE DEPT. OF TRANSPORTATION, et al,

Respondents/Cross-
Appellants.

**BRIEF OF RESPONDENT/CROSS-APPELLANT WASHINGTON
STATE DEPT. OF TRANSPORTATION**

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¹ WSDOT filed color copies with the Spokane Superior Court as trial exhibits and provided color copies to the trial judge. However, the Clerk’s Papers were produced in black and white which affects legibility. Accordingly, WSDOT has provided color copies for this Court in the appendix.

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I. INTRODUCTION

Appellant James Walker lacks sufficient, competent evidence to establish that any reduced visibility of a stop sign at the intersection of Ford-Wellpinit Road and State Route 231 (“SR 231”) was the but-for cause of his collision. No genuine dispute exists that James Walker had 980 feet to react to the environmental cues that signaled the upcoming intersection as he drove his motorcycle towards the intersection. No genuine dispute exists that Walker had 325 feet or more to observe and react to the stop sign that was visible at that distance. No genuine dispute exists that Walker had an additional 26 feet past the stop sign to observe and react to the stop bar painted across the roadway at the entrance to SR 231. Walker did not react appropriately to any of these cues. Instead, Walker drove directly into the intersection and in front of a motorist traveling on SR 231, without braking and without taking any evasive maneuvers. Given these undisputed facts, this Court should affirm the trial court’s dismissal of Walker’s negligence claims because no reasonable jury could conclude that any additional sight distance of the stop sign would have prevented his accident.

Although the trial court properly dismissed Walker’s claims in their entirety, it made two legal errors warranting reversal by this Court. First, the trial court erred in shifting Stevens County’s legal duty to address hazardous conditions along county roadways to WSDOT. RCW 36.75.020

and case law clearly assign responsibility to Stevens County to maintain county roadways in a reasonably safe condition for ordinary travel and the hazardous condition alleged by Walker (obstructed visibility of the stop sign) occurred on Stevens County's roadway. Second, the trial court erred in failing to dismiss one of Walker's discrete theories of liability, that WSDOT's placement of the stop sign in 2004 lacked adequate sight distance at the time. Walker failed to provide sufficient, competent evidence that WSDOT failed to provide adequate sight distance. Not only did two of Walker's forensic experts admit to a lack of evidence, a third testified the vegetation of which Walker complains would not have posed any obstruction to the sight distance of the stop sign in 2004.

For these reasons, this Court should affirm the trial court in part and reverse the trial court in part.

II. ASSIGNMENTS OF ERROR AND ISSUES ON CROSS APPEAL

- A. The Trial Court Properly Dismissed Walker's Negligence Claims Because Walker Failed to Produce Sufficient, Competent Evidence to Establish That an Additional 25 Feet of Sight Distance of the Stop Sign Would Have Prevented the Collision. (Counter-statement to Issue for Review No. 1)
- B. The Trial Court Erred (1) By Ruling That Stevens County Had No Legal Duty To Address An Alleged Sight Obstruction For Users Of The County Roadway and (2) By Shifting That Duty To WSDOT.
- C. The Trial Court Erred By Failing To Dismiss Walker's Theory Of Liability That WSDOT Breached A Duty Regarding The 2004

Placement Of The Stop Sign Because Walker Failed To Produce Sufficient Competent Evidence That WSDOT's 2004 Placement Of The Stop Sign Lacked Adequate Sight Distance.

III. COUNTER STATEMENT OF THE CASE

A. Substantive Facts

1. The July 26, 2013 Collision

On July 26, 2013, Plaintiff James Walker was riding his 2012 Kawasaki motorcycle eastbound on Ford-Wellpinit Road in Stevens County, Washington towards State Route 231. CP at 4.² Uli Schildt, Walker's riding partner, was riding his own motorcycle behind Walker. CP at 408. As a rider approaches the intersection, the road rises and curves slightly to the right. From the direction Walker was traveling, the intersection at Ford-Wellpinit Road and SR 231 is controlled by a stop sign, followed 26 feet later by a painted stop bar. Even before the stop sign, as Uli Schildt explained, the approach to the intersection made it obvious to a motorist that the roadway was changing. CP at 432-33.

However, Walker failed to stop before he entered the controlled intersection. CP at 5. According to Uli Schildt, who was approximately 50-100 feet behind Walker, Walker did not brake as he entered the intersection.

² WSDOT filed color copies with the Spokane Superior Court as trial exhibits and provided color copies to the trial judge. However, the Clerk's Papers were produced in black and white which affects legibility. Accordingly, WSDOT has provided color copies for this Court in the appendix.

CP at 408, 424, 429. In the intersection, Walker's motorcycle was struck by a car traveling southbound on SR 231. CP at 5, 408. Walker took no evasive maneuvers to avoid the collision. CP at 408, 424, 429. Schildt was able to bring his motorcycle to a controlled stop before entering the intersection. CP at 420-21.

When Walker regained consciousness at the scene, he had no memory of the events leading up to the collision. CP at 412-13. Similarly, at his deposition, Walker testified he lacked any independent memories of the events leading up to the collision. CP at 403-05.

Beginning approximately 980 feet before the intersection, environmental cues signal to motorists traveling eastbound on Ford-Wellpinit Road that an intersection is ahead. CP at 627, 635. The image below illustrates that an attentive motorist would see the change in roadway dynamics and field in the background that frame the upcoming intersection. CP at 599.



Walker's 2014 images below³ illustrate how the stop sign (and green street sign for the intersecting road) became progressively more visible for eastbound motorists. CP at 443-446.

³ Walker admits that his 2014 images are at a minimum a fair and accurate depiction of the conspicuousness of the stop sign in 2013. CP at 438-449. Walker, through the forensic arborist he hired, also admits that the vegetative growth seen in the 2014 images would have been 20 inches shorter in 2013, CP at 546, making the stop sign even more conspicuous than the 2014 images. (As noted above in footnote 1, WSDOT has provided color copies for this Court in the appendix.)





At 50 mph, Walker needed 214 feet to bring his motorcycle to a controlled stop. CP at 134. According to John Hunter, an expert in accident reconstruction, in 2013 the face of the stop sign would have been fully visible for eastbound motorists for at least the last 325 feet of the approach to the stop sign. CP at 595-596, 593-613. Hunter calculated the 2013 sight distance of the stop sign based upon (1) Walker's 2014 images of the roadway and (2) the testimony of James Flott, Walker's forensic arborist, that the vegetation shown in the 2014 images would have been 20 inches shorter in 2013 when the accident occurred. CP at 542, 546, 556, 559-60.

None of Walker's expert witnesses personally measured the scene, except William Skelton. CP at 71-72, 802, 986, 996, 1001-03, 1007, 1198. Skelton, however, did not take any measurements to specifically determine where the stop sign could actually first be seen (CP at 1198); rather, his estimate of the sight distance of the stop sign is based upon his "personal observation." CP at 1197. Additionally, Skelton did not undertake any analysis to determine what the sight distance of the stop sign would have been in 2013; his testimony relates only to the conditions that existed in 2014. CP at 1195, 1198.

The sight distance of the stop sign is a different measurement than the measurement of where the intersection actually began. In 2013, motorists traveling eastbound on Ford-Wellpinit Road had an additional 26 feet past the

stop sign before encountering the stop bar painted across the roadway that marked the entry to the traveled portion of SR 231. CP at 594, 771, & 1004. The image below, a WSP photograph taken of the accident scene, illustrates the stop bar as it existed on the day of the collision. CP at 530 (arrow added for clarification).



Walker's 2013 collision was the only one of its kind at the intersection of Ford-Wellpinit Road and SR 231 in the nine-year period between 2004 and 2013. CP 1077-1104. Of the reported collisions at or near the intersection, only two involved motorists traveling eastbound on Ford-Wellpinit Road who failed to stop before entering the intersection. CP at 1089-92. One of those

collisions occurred in April 2009, four years before Walker's collision. In that incident, the motorist who ran the stop sign fled the scene of the collision, before his arrest for driving under the influence. CP at 1090. The other collision occurred in March 2012. In that single car accident, a motorist lost control of his vehicle while attempting to elude a police officer. CP at 1092. Neither of the documented accident reports reference obstructed sight distance of the stop sign as a contributing factor. CP at 1089-92.

2. The Intersection of Ford-Wellpinit Road and SR 231

Ford-Wellpinit Road is a roadway within the jurisdiction of Stevens County. CP at 482, 492. Stevens County acknowledges, through its speaking agent, that Stevens County (1) determines the placement and location of any stop ahead signs along Ford-Wellpinit Road and (2) maintains vegetation along Ford-Wellpinit Road that does not fall within WSDOT's right-of-way. CP at 466, 469-70, 472-73, 480-81, 483, 484-86. Stevens County concedes that WSDOT had no responsibility to install a "stop ahead" sign along Ford-Wellpinit Road, CP at 474-75, or to perform vegetation maintenance outside of the State right-of-way. CP at 472-473, 475. This is consistent with the Stevens County Department of Public Works' website, which explains in express terms that the County performs vegetation management along its roadways. CP at 524.

SR 231, on the other hand, is a state route within the jurisdiction of

WSDOT. WSDOT relocated an existing stop sign at the intersection of Ford-Wellpinit Road and SR 231 to a new location in 2004. CP at 519, 521-22. At that time, the WSDOT design manual required sight distance for a stop sign on an existing roadway was 350 feet. CP at 86, 161, 220; *see also* CP at 21, 106, 111, 115, 118-20. The relocated stop sign remained in the same place through the date of Walker's July 26, 2013 collision. CP 521-22. Walker's forensic expert for roadway design issues, admitted there was no evidence that the 2004 placement of the stop sign failed to provide the required sight distance. CP 509-510. Similarly, Walker's forensic expert on accident reconstruction conceded there was no evidence to establish that the 2004 placement of the stop sign failed to provide the required sight distance. CP at 99. Finally, Walker's forensic arborist affirmatively testified that vegetation in 2004 would not have created any issues with the visibility of the stop sign. CP at 549.

B. Procedural Facts

Walker's suit alleges that WSDOT and Stevens County were negligent in the design and maintenance of their roadways and their negligence proximately caused his July 26, 2013 collision in the intersection of Ford-Wellpinit Road and SR 231. CP at 5-6. More specifically, Walker identifies the negligent acts as (1) an improper placement of a stop sign in 2004, (2) a lack of advisory and/or warning signs in advance of the intersection, and (3) a

failure to address vegetation that impaired the sight distance of the stop sign for travelers using Ford-Wellpinit Road. CP at 5-6, 21-22, *see also* CP at 515-16.

The parties filed competing motions for summary judgment on the issues of duty, breach of duty, and proximate cause. CP at 21-22, 242-43, 375, and 385. Walker moved for summary judgment against both WSDOT and Stevens County on the issue of breach of duty. CP at 21-22. WSDOT and Stevens County separately moved for summary judgment on the issues of duty and/or breach of duty, CP at 242-43, 375, and jointly moved for summary judgment on the issue of proximate cause. CP at 385.

On April 29, 2019, the trial court entered its Order on the Parties' Summary Judgment Motions, disposing of all the issues raised in the competing motions. CP at 1138-43. The trial court ruled that (1) Stevens County owed Walker no legal duty; (2) WSDOT owed Walker a legal duty, but questions of fact precluded summary judgment on whether WSDOT breached that legal duty; and (3) Walker failed to present "any admissible, non-speculative evidence creating a genuine issue of material fact" on the question of proximate cause. CP at 1142-43. On July 22, 2019, the court denied timely motions for reconsideration. CP at 1212-14.

Walker filed a Notice of Appeal on August 5, 2019 seeking review of the trial court's April 29, 2019 summary judgment order and July 22,

2019 order on reconsideration. CP at 1212-14. On August 16, 2019, WSDOT filed a Notice of Cross Appeal seeking review of the same trial court orders, as far as those orders denied WSDOT's motion for summary judgment on the issue of duty and breach of duty.

IV. ARGUMENT

A. Standard of Review

“Summary judgment is proper if the record before the court shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Swinehart v. City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345 (2008). When reviewing a trial court's summary judgment decision, an appellate court conducts a *de novo* review taking the evidence and all reasonable inferences in a light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). The appellate court can affirm the trial court on any basis supported in the record. *Swinehart*, 145 Wn. App. at 844.

B. The Trial Court Properly Concluded That Walker Failed To Present Sufficient, Competent, Evidence To Establish But-For Causation.

Washington law precludes recovery by a plaintiff who is unable to establish that a defendant's conduct proximately caused his or her injury. *Garcia v. State, Dep't of Transp.*, 161 Wn. App. 1, 270 P.3d 599 (2011). The two pillars of proximate cause are legal cause and cause in fact.

Channel v. Mills, 77 Wn. App. 268, 272, 890 P.2d 535 (1995). Legal cause “involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact;” whereas, “[c]ause in fact refers to the ‘but for’ consequences of an act—the physical connection between an act and an injury.” *Hartley v. State*, 103 Wn.2d 768, 778–79, 698 P.2d 77 (1985) (emphasis added). A plaintiff must be able to prove that the defendant’s negligence is “a cause which in a direct sequence [unbroken by any new independent cause,] *produces the [injury] complained of and without which such [injury] would not have happened.*” 6 Wash. Practice: Wash. Pattern Jury Instrs.: Civil 15.01 (emphasis added).

Here Walker lacks sufficient, competent evidence to meet his but-for cause burden as a matter of law. No genuine dispute exists that Walker had 980 feet to observe and react to environmental cues that signaled the coming intersection. CP at 627, 635. Further, no genuine dispute exists that Walker had at least 325 feet to observe and react to the stop sign itself. CP at 595-96. Even further, Walker had an additional 26 feet from the stop sign until the beginning of the intersection to observe and react to the stop bar painted across the entry to SR 231. CP at 594, 771, 1004. Had Walker reacted to these prompts, he could have brought his motorcycle to a controlled stop before entering the intersection like his riding partner did; instead, Walker drove straight into the intersection into the path of another vehicle without braking

or taking any evasive maneuvers. CP at 408, 424, 429. Thus, Walker cannot support his contention (1) that the lack of an additional 25 feet of sight distance of the stop sign is why he drove directly into the intersection without braking or (2) that had another 25 feet of sight distance existed, he would have stopped before entering the intersection.

1. No Genuine Issue Exists That Walker Had At Least 325 Feet of Sight Distance Because Walker’s Own Photographs and Expert Testimony Establish This Fact.

Walker attempts to create a genuine issue regarding the actual sight distance of the stop sign in 2013. Specifically, he relies on testimony by himself, Uli Schildt, and William Skelton⁴ to claim that in 2013, vegetation reduced the sight distance of the stop sign to 100 to 125 feet.⁵ Br. of Appellants at 6-9. Walker’s claim is the same type of “visual fiction” the United States Supreme Court rejected in *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

⁴ Walker claims that Skelton “carefully determined the stop sign was visible only 125’.” Br. of Appellants at 9. This claim is inconsistent with Skelton’s deposition testimony. Skelton expressly admitted in his deposition that he did not take any measurements to specifically determine where the stop sign could first be seen, CP at 1198. Skelton also expressly admitted his estimate of the sight distance of the stop sign was based upon his “personal observation.” CP at 1197. Most importantly, Skelton did not attempt any analysis to determine what the sight distance of the stop sign would have actually been in 2013. CP at 1198. Skelton’s testimony relates to the condition of the stop sign in 2014 only.

⁵ Walker also cites to the deposition testimony of WSDOT maintenance supervisor Samuel Jennings who visited the site. Br. of Appellants at 9. Inexplicably, Walker fails to mention that Jennings testimony about the conditions came from his 2015 observations. CP at 1016-17. According to Flott’s testimony, the vegetation in question would have grown 40 additional inches between 2013 and 2015. CP at 542.

In *Scott*, the United States Supreme Court considered whether plaintiff's testimony in a police pursuit case, which conflicted with visual evidence presented by the officer's dash camera video, created a genuine issue of material fact. *Id.* at 378-80. The Supreme Court determined that the video "so utterly discredited" the plaintiff's version of events that the Court of Appeals erred by finding that a genuine issue of material fact existed. *Id.* at 380. The Court admonished, "The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id.* at 380-81.

Here the testimony relied upon by Walker is the same type of visible fiction offered by the plaintiff in *Scott*. Walker took photographs of the approach to the intersection in 2014, a year after his accident. CP at 438-449. Walker admits the stop sign in 2013 was at least as conspicuous as it appears in the 2014 photographs. CP at 438-449. Like the video in *Scott*, the 2014 photographs here provide a visual baseline for determining the actual conspicuousness of the stop sign and a basis for rejecting testimony that is blatantly inconsistent with the 2014 photographs. Undisputed evidence by Walker's own forensic arborist, James Flott, establishes that the vegetation at issue in the 2014 photographs would have been 20 inches shorter in 2013 when Walker approached the intersection. CP at 542, 546, 556, 559-60. Using the 2014 photographs and Flott's testimony that the

vegetation would have been 20 inches shorter in 2013, John Hunter, an expert in the field of accident reconstruction, performed an analysis of the sight distance as of 2013. CP at 593-601. Through that analysis, Hunter determined the actual sight distance of the stop sign in 2013 would have been at least 325 feet or more. CP at 596-97. None of Walker's expert witnesses attempted to determine what the sight distance of the stop sign would have been in 2013. CP at 71-72, 133, 802, 986, 996, 1001-03, 1007, 1198. Thus, no genuine issue exists that in 2013 the stop sign was conspicuous from at least 325 feet away.

2. Walker Is Not Able to Offer Competent Testimony Related to the Cause of the Accident.

Walker offers his own testimony hoping to create a genuine issue regarding the conspicuousness of the stop sign. Br. of Appellants at 5-7, 34-38. However, Walker's testimony is incompetent for at least two reasons. First, he lacks personal knowledge for the testimony he offers. Second, his prior statement is inadmissible hearsay.

First, as WSDOT and Stevens County asserted below, Walker lacks personal knowledge for the testimony he offers. CP at 1027-31, 1143. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602. At his deposition, Walker unequivocally testified that he lacks any

independent memories of the events leading up to the collision. CP at 403.

Specifically, Walker testified as follows:

Q: What is your last independent memory before the collision, or the impact, occurs?

A: My independent memory would have been leaving Wellpinit and getting back up to highway speed. And I don't recall anything after that.

...

Q: And, then, do you have an independent memory or recollection of approaching the intersection where the collision occurred?

A: No.

CP at 403. Walker also testified that he does not recall ever having an independent recollection of approaching the intersection. CP at 403-04. Uli Schildt, Walker's friend and riding partner, talked to him immediately after the accident. CP at 412. During his deposition, Schildt testified as follows:

Q: Was Jim conscious at all after the accident while he was still at the scene?

A: Yes.

Q: And did you speak with him?

A: Yes.

Q: What did he tell you?

A: He didn't know at all what happened. He had no recollection at all. As a matter of fact, he said that, what

happened? Obviously, he was in a lot of pain because he was injured.

CP at 412-13. For these reasons, Walker's proffered testimony regarding the conspicuousness of the stop sign is incompetent as a matter of law.

Second, Walker's attempt to rely on a transcript of an interview between himself and an insurance adjuster as a recorded recollection is improper. *See* Br. of Appellants at 36. In order to qualify as a recorded recollection, the transcript must be "concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" ER 803(a)(5) (emphasis added). Here, Walker has testified unequivocally in his deposition that he does not know if he ever had a memory of the events leading up to the collision, CP at 403-05. Schildt testified that from the moment Walker was conscious at the scene he had no memory of what occurred. CP at 412-13. Thus, despite Walker's current claims to the contrary, he cannot establish the elements for admission of a recorded recollection.⁶

3. Speculation Is Incompetent To Establish A Genuine Issue As To Causation.

Walker cannot rely on speculation about what might have been to

⁶ It bears noting that during his interview with an insurance adjuster, the adjuster did not ask Walker to restrict his answers to his personal knowledge only, CP at 147-151, and at one point Walker referenced a description of the intersection that was based upon statements by his riding partner. CP at 148. There is thus no basis to assume that Walker was describing his own personal recollections during the interview.

defeat summary judgment. The mere fact that an accident and an injury have occurred does not necessarily lead to an inference of negligence. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999).

The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture In applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference.... The burden of proving proximate cause is not sustained unless the proof is sufficiently strong to remove that issue from the realm of speculation by establishing facts affording a logical basis for all inferences necessary to support it

Gardner v. Seymour, 27 Wn.2d 802, 808–09, 180 P.2d 564 (1947) (internal citations omitted). Walker agrees this is the proper legal standard:

Only if it is as likely that an event happened from one cause as another, is the proof 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.

Br. of Appellants at 46-47.

The undisputed, admissible evidence points to Walker's inattentive driving as the cause of the accident; that same evidence precludes him from arguing otherwise. As discussed *supra*, Walker had 980 feet to react to environmental cues that signaled the coming intersection (CP 627, 635), at least 325 feet to react to the stop sign itself (CP at 595-96), and an additional 26 feet between the location of the stop sign and the beginning of the

intersection to react to the stop bar painted across the roadway. CP at 594, 771, 1004. Walker failed to heed any of these warnings and bring his motorcycle to a controlled stop before entering the intersection, as his riding partner did. CP at 408, 424, 429. Rather, Walker drove straight into the intersection without braking or taking any evasive maneuvers. CP at 408, 424, 429. Thus, Walker cannot establish a legitimate inference that the collision would not have occurred with an additional 25 feet of sight distance when he was so clearly inattentive to the warnings that existed.

a. *Miller and Moore Provide the Applicable Rule Regarding Speculation by Experts; Behla and Mehlert Are Inapplicable.*

“It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.” *Moore v. Hagge*, 158 Wn. App. 137, 155, 241 P.3d 787, 796 (2010). Further, *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001) and *Moore*, 158 Wn. App. 137 describe when expert testimony is too speculative to submit to a jury.

In *Miller*, a pedestrian walking along the shoulder of a city roadway was struck by an inattentive motorist. Recognizing that the accident might have been avoided if the City had installed warning devices or taken other precautions prescribed by plaintiff’s expert, the court nevertheless held that evidence that the accident “*might* not have happened had the City installed additional safeguards” was nothing more than impermissible speculation,

insufficient to establish the element of proximate cause. *Miller*, 109 Wn. App. at 147. The Court reached a similar result in *Moore*.

In *Moore*, the court upheld the dismissal of a pedestrian's claim that the City's failure to provide a sidewalk along a busy street caused him to be hit by a car and seriously injured. Even though plaintiff's expert in *Moore* opined that the roadway at the location of the accident was "inherently dangerous" due to traffic volumes and narrow lanes and shoulders and that the accident would "more probably than not" have been avoided if safeguards had been provided by the City, the court found these conclusions to be inadmissible speculation based on assumptions about how the accident happened. *Moore*, 158 Wn. App. at 156. With no evidence that the condition of the roadway was the cause in fact of the accident, the court upheld summary judgment, finding, "As in *Miller*, the most that Moore can show is that the accident might not have happened if the City had installed additional safeguards." *Moore*, 158 Wn. App. at 152.

Similar to the experts in *Miller* and *Moore*, the most Walker's forensic experts can say is what *might* have happened if an additional 25 feet of sight distance had existed. This is true because Walker cannot competently testify about what he did or did not observe. CP at 403-05, 412-13.

To avoid the result reached in *Miller* and *Moore*, Walker relies on *Behla v. R.J. Jung, LLC*, 11 Wn. App. 2d 329, 453 P.3d 729 (2019) and

Mehlert v. Baseball of Seattle, Inc., 1 Wn. App. 2d 115, 404 P.3d 97 (2017).⁷ See Appellant's Br. at 29, 38. *Behla*, however, provides Walker no relief. In *Behla*, the plaintiff successfully presented sufficient, competent evidence both to support his theory of causation and to call into question the alternative defense theories. See *Behla*, 11 Wn. App. 2d at 343-44. As this Court explained,

When taking the facts in the light most favorable to James Behla, we conclude that a jury should decide causation. A reasonable juror could conclude that the black cable more likely than not caused the fall. Behla presents evidence discounting the snowfall as a cause because of its small depth and because no ice formed. Because of the gravel lot, Behla's footing would be firm. Behla was in good health and physique. No evidence suggests that Behla was clumsy and tripped over his own feet. Behla discounts the possibility that a stone or stick or even some other foreign object caused his fall because he looked and no such object was present. Behla presents evidence dismissing the lip of the shed slab as the cause because of the location of his body on the lip of the concrete slab. After reducing the likelihood of other causes being the true cause, Behla provides testimony that he saw the cable in a coiled position that could have caused someone to trip. He came to his conclusion, at the scene of his tumble, of the cord causing his fall rather than later deducing the cable as a cause in order to sue for his injuries.

Unlike in *Gardner v. Seymour*, James Behla survived the accident. Unlike in *Marshall v. Bally's Pacwest* and *Little v. Countrywood Homes*, the injured party, when gaining

⁷ Walker also relies on two unpublished cases. See Appellant's Br. at 42-46. In those cases the court concluded that evidence of a driver adhering to the rules of the road was sufficient evidence to create a question of fact about whether additional warnings would have prevented the injuries suffered. See Appellant's Br. at 42-46. Neither case helps Walker, however, because the undisputed evidence here establishes his inattentiveness in the moments preceding the collision.

awareness, immediately scanned the environment to determine the cause of his fall. In *Marshall v. Pacwest*, plaintiff did not know at what speed the machine started. We know, assuming James Behla to be believed, that a cord lay in the pathway where he walked.

Id.

The plaintiff in *Behla* presented evidence that Walker cannot in two different ways. First, the plaintiff in *Behla* presented sufficient competent evidence of the dangerous condition, a cord laying in his pathway. Here Walker lacks sufficient, competent evidence that the sight distance in 2013 was restricted to 100 to 125 feet.

Walker summarizes his reliance on expert testimony to prove causation as follows:

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.

Br. of Appellants at 42. Specifically, Walker relies on Joellen Gill (human factors) and Steve Harbinson (accident reconstruction) to establish that the assumed 100-to-125 feet of stopping sight distance of the stop sign in 2013 provided insufficient perception-reaction time for Walker to come to a complete stop before entering the intersection. Br. of Appellants at 11-13, 33-34, 39-42. However, these conclusions fail because the factual record does not support the assumption that the sight distance was limited to 100 to 125 feet in 2013. As discussed *supra*, Walker's 2014 photographs, along

with Walker's admission that they were a fair and accurate depiction of the minimum conspicuousness of the stop sign in 2013, conclusively prove Uli Schildt's estimate of 100 feet of sight distance to be a "visible fiction." Said another way, Schildt's testimony is incompetent to create a genuine issue that the sight distance in 2013 was anything less than 325 feet. Also as discussed *supra*, Skelton's 2014 estimate of 125 feet of sight distance was not an actual measurement of the sight distance that existed in 2014, but was his estimate based upon his "personal observation," and did not take into account the 20 inches of vegetative growth that occurred in the year following Walker's accident. In fact, the only competent evidence of what sight distance existed in 2013 is Hunter's testimony that the sight distance was at least 325 feet. That sight distance allowed Walker 1 ½ times the stopping distance necessary to come to a controlled stop. CP at 134.

Second, Behla was able to present sufficient competent evidence that called into question alternative defense theories of causation. Here, it remains undisputed that Walker failed to brake or take any evasive maneuvers prior to the collision despite 980 feet of environmental cues, 325 feet of sight distance of the stop sign, and the additional 26 feet between the stop sign and stop bar painted across the roadway – all while Walker's riding partner, Schildt, came to a controlled stop before entering the intersection. Walker's experts' opinions as to the cause of the accident are

speculative and lack an adequate foundation; accordingly, they should not be considered. *See Moore*, 158 Wn. App. at 155. These undisputed facts preclude Walker from reasonably challenging the defense theory of inattentive driving.

Similar to *Behla*, *Mehlert* provides Walker no relief. In *Mehlert*, the plaintiff presented sufficient, competent evidence that (1) a handrail was required but missing, (2) the plaintiff would have reached for a handrail, but none was present and (3) a handrail would have lessened or prevented the injury. *Mehlert*, 1 Wn. App. 2d at 119-20. Here Walker lacks evidence of the same nature. Walker lacks sufficient, competent evidence that (1) the sight distance was anything less than 325 feet, (2) with additional sight distance, he would have seen the stop sign, and (3) additional sight distance would have changed his driving.

C. The Trial Court Erred by Ruling That Stevens County Had No Legal Duty to Address the Growth of Vegetation That Allegedly Reduced the Sight Distance for Motorists Using Ford-Wellpinit Road in 2013.

RCW 36.75.020 requires counties to maintain public roads falling within their jurisdiction.

All of the county roads in each of the several counties shall be established, laid out, constructed, altered, repaired, improved, and maintained by the legislative authority of the respective counties as agents of the state, or by private individuals or corporations who are allowed to perform such work under an agreement with the county legislative authority. Such work

shall be done in accordance with adopted county standards under the supervision and direction of the county engineer.

RCW 36.75.020 (emphasis added). The duty that sounds in tort is well settled: A government entity that manages a roadway must “build and maintain its roadways in a condition that is reasonably safe for ordinary travel.” *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002); *see also Wuthrich v. King Cty.*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016); *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). There is “no categorical exemption for unsafe conditions caused by roadside vegetation.” *Wuthrich*, 185 Wn.2d at 25.

Here, Walker alleges that vegetation reduced his sight distance while he was traveling on Stevens County’s Ford-Wellpinit Road in 2013. CP at 5. Thus, the trial court erred by ruling as a matter of law that Stevens County owed no legal duty under the facts of this case.

1. The Trial Court Erred by Disregarding the Division of Responsibility Established by the Legislature and Placing the Legal Duty on WSDOT.

The Legislature has divided the responsibility for roadways in the State of Washington. *See* RCW 36.75.020; RCW 47.01.260. RCW 36.75.020 squarely places the responsibility for maintaining county roadways on the shoulders of the counties.

All of the county roads in each of the several counties shall be established, laid out, constructed, altered, repaired, improved,

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RCW 36.75.020. Similarly, RCW 47.01.260 squarely places the responsibility for maintaining state roadways on the State.

The department of transportation shall exercise all the powers and perform all the duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways, including bridges and other structures, culverts, and drainage facilities and channel changes necessary for the protection of state highways, and shall examine and allow or disallow bills, subject to the provisions of RCW 85.07.170, for any work or services performed or materials, equipment, or supplies furnished.

RCW 47.01.260. The Legislature's division of responsibility is consistent with the plain language repeatedly used in case law to describe the duty sounding in tort, "It is well established that a municipality has the duty "to maintain its roadways in a condition safe for ordinary travel." *Wuthrich*, 185 Wn.2d at 25 (internal citation omitted)(emphasis added); *see also Keller*, 146 Wn.2d at 244-49; *see also* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 140.01 (7th ed.).

To sidestep the division of responsibility described above, Stevens County attempts to characterize the vegetation in question as a WSDOT stop sign maintenance issue because the vegetation grew in some proximity to the

WSDOT stop sign. CP at 245-67. This argument was erroneous for at least two reasons. First, Stevens County's argument improperly places the focus on where the vegetation grew, not where the user of the roadway encountered the hazardous condition. Here, Walker alleges that vegetation in question obscured his sight distances at least 325 feet back from the intersection. CP at 595-96, 593-613. Stevens County's road crews, who are expected to travel the county roadways year round, CP at 479, would be in the best position to discover a hazard occurring 325 feet back from the intersection. In contrast, WSDOT road crews would not be in a position to discover a hazard occurring more than 325 feet back from the intersection because WSDOT road crews do not travel county roadways. CP at 926-27.

Second, if the vegetation in question is characterized as a stop sign maintenance issue, it does not necessarily follow that the vegetation in question could not also present a County vegetation management issue. In other words, something more is required to demonstrate the legal duty would rest with only one party. Here, that something more is the statutory and common law division of responsibility that places the legal burden on the County alone.

2. The Court Should Disregard The Testimony Of Lay And Forensic Witnesses Who Offer Opinions On The Existence Of Legal Duties.

The court determines the existence of a legal duty as a question of law. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 763–63, 344 P.3d 661 (2015); *see also Wuthrich*, 185 Wn.2d at 25. The touchstone for determining the existence of legal duties is the common law, statutory law or regulations carrying the force and effect of law. *Linville v. State*, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007). “[M]ixed considerations of logic, common sense, justice, policy and precedent” guide the court. *Murphy v. State*, 115 Wn. App. 297, 305, 62 P.3d 533 (2003). In contrast to the existence of a legal duty being a question of law, the question of whether a particular harm falls within the scope of the duty owed is a fact question. *Meyers v. Ferndale Sch. Dist.*, _ Wn. App. 2d __, __, 457 P.3d 483, 488 (2020).

The trial court erred in ruling that Stevens County had no duty as a matter of law for at least three reasons. First, as illustrated by *Linville*, the common law, statutes and regulations determine whether a legal duty exists⁸, *Linville*, 137 Wn. App. at 208 and common law decisions, like *Wuthrich*, have

⁸ Below, Stevens County referenced policy manuals to support their claim of a legal duty owed by the WSDOT. CP at 256, 836. An agency’s internal policies, procedures and expectations do not create legal duties. *Joyce v. State, Dep’t of Corr.*, 155 Wn.2d 306, 323–25, 119 P.3d 825 (2005). Moreover, Glenn Wagemann explained how Walker and Stevens County are misconstruing his testimony and the application of internal Department policies. CP at 923-34.

already recognized a legal duty sounding in tort if counties fail to address vegetation that creates a hazard for users of their roadways. *Wuthrich*, 185 Wn.2d at 25. Second, the competing testimony from 30(b)(6) witnesses and forensic witnesses is incompetent to establish the existence of a legal duty because the existence of a legal duty is a question of law.⁹ *Tortes v. King Cty.*, 119 Wn. App. 1, 12–13, 84 P.3d 252 (2003), *as amended* (Sept. 22, 2003) (rejecting legal conclusions offered by forensic expert); *see also Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985) (noting conclusions of law by a forensic witness are improper); *see also Eriks v. Denver*, 118 Wn.2d 451, 458, 824 P.2d 1207, 451 (1992) (noting trial court properly disregarded expert affidavits containing conclusions of law); *Simmons v. City of Othello*, 199 Wn. App. 384, 391-92, 399 P.3d 546 (2017) (observing that statements of a former mayor regarding the duty of a City are inadmissible); *Ebel v. Fairwood Park II Homeowners' Ass'n.*, 136 Wn. App. 787, 150 P.3d 1163 (2007) (striking statements regarding the authority of homeowner's association and rights of home owners as impermissible legal conclusions). Third, the competing testimony offered below largely focused on whether the

⁹ Below, Walker, the County, and WSDOT all provided various excerpts of CR 30(b)(6) testimony to support their respective legal duty arguments. CP at 40-50, 52-68, 300-326, 453-58, 460-86, 760-67, 781-83, 865-78, 892-98, 923-28, 1176-1180, 1191-92. The County also offered opinions by a forensic witness to support their legal duty arguments, CP at 337-56, and WSDOT provided testimony to challenge the opinions expressed by the County's forensic witness. CP at 923-34, 939-70.

vegetation in question should have been addressed as part of stop sign maintenance (WSDOT) or as part of roadside vegetation maintenance (County). CP at 40-50, 52-68, 300-326, 337-356, 453-58, 460-86, 760-67, 781-83, 865-78, 892-98, 923-34, 939-970, 1176-1180, 1191-92. At best, this type of evidence *might* bear on the scope of the duty owed, but that is a question of fact for the jury. *See Meyers*, 457 P.3d at 488.

For all these reasons, the trial court erred in shifting Stevens County's legal duty to WSDOT.

D. The Trial Court Erred By Failing To Dismiss Walker's Claim That WSDOT Failed To Provide Adequate Sight Distance Of The Stop Sign In 2004 Because Walker Failed To Present Any Evidence To Support This Claim.

The parties agree that WSDOT owed a duty to provide motorists adequate sight distance of the stop sign at the intersection of Ford-Wellpinit Road and SR 231 when WSDOT initially relocated the stop sign in 2004. To recover on this theory, Walker must be able to prove WSDOT breached this duty. *See Steinbock v. Ferry Cty. Pub. Util. Dist. No. 1*, 165 Wn. App. 479, 489, 269 P.3d 275 (2011). However, at summary judgment Walker failed to present any evidence to establish that WSDOT breached that duty. In this regard, Ed Stevens, Walker's forensic expert on highway design issues, admitted a lack of knowledge:

Q: Do you know if in 2004 when this was originally placed if there was a lack of adequate site distance?

A: I guess I've been asked to answer that question. I do not.

CP at 90-91, *see also* CP at 87. Similarly, William Skelton, Walker's forensic expert on accident reconstruction, also admitted a lack of knowledge:

Q: And you didn't do any type of analysis as to what the sight distance to the stop sign was at the time it was placed in 2004?

A: At the time it was placed?

Q: Correct.

A: No, sir. I don't have any information on that.

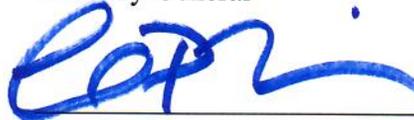
CP at 99. The only witness who was capable of providing an opinion regarding the 2004 sight distance of the stop sign was James Flott, an arborist Walker hired as a forensic expert. CP at 539-561. Flott testified that the sight distance of the stop sign in 2004 would have been good, CP at 547-48, and that the vegetation in question would not have created any issues with the visibility of the stop sign in 2004. CP at 549. Thus, this Court should reverse the trial court's failure to grant WSDOT's motion for summary judgment on Walker's claim that the 2004 relocation of the stop sign failed to provide adequate sight distance.

V. CONCLUSION

For the reasons discussed above, the Court should affirm the trial court in part and reverse the trial court in part. The Court should affirm the dismissal of Walker's claim based upon a lack of proximate cause, but should reverse the trial court's shifting of Stevens County's legal duty to WSDOT.

RESPECTFULLY SUBMITTED this 26 day of May, 2020.

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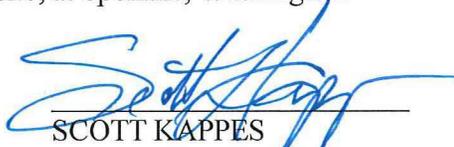
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of May 2020, at Spokane, Washington.



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