No. 91555-5

NO. 44019-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GUY WUTHRICH,

Appellant,

v.

KING COUNTY and CHRISTA GILLAND,

Respondents.

Appeal from the Superior Court of Pierce County
Honorable Garold E. Johnson
NO. 11-2-10263-2

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The County's response brief primarily discusses the many factual disputes in this case, underscoring (a) the fact that the trial court erred in granting summary judgment and (b) the need for a jury trial to resolve these disputed questions of fact. Rather than viewing the evidence and reasonable inferences therefrom in a light most favorable to Mr. Wuthrich, as the law requires, the County spins all of the evidence in its own favor. In some instances, the County goes beyond spinning the facts and actually misrepresents the record. Ultimately, however, the County's recitation of the evidence supporting its position merely underscores the fact that there are material questions of fact for a jury to decide, and that it was therefore error for the trial court to grant summary judgment.

Because the trial court clearly erred in granting summary judgment based on language from *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995), that was overruled by the Supreme Court in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), and because there are many disputed questions of fact as to whether the intersection was reasonably safe and as to whether the dangerous condition of the intersection was a proximate cause of the subject collision, this Court should reverse the trial court's summary judgment in favor of King County and remand this case for trial.

II. THERE ARE QUESTIONS OF FACT FOR A JURY TO RESOLVE AS TO WHETHER OFFICER GILLAND'S VIEW OF APPROACHING TRAFFIC WAS OBSTRUCTED.

The County's liability turns in part on where Officer Gilland stopped before entering the intersection. Shortly after the collision, Officer Gilland told the investigating police officer that she stopped ***at the stop line***. CP 432. A driver stopped at the stop line had a severely obstructed view of approaching traffic due to the wall of overgrown vegetation at the northwest corner of the intersection. CP 445, CP 1265, CP 439.

At best, the fact that Officer Gilland could not remember, at the time of her deposition over three years after the collision, where exactly she stopped, creates a disputed question of fact for a jury to resolve. The best evidence is what she told the police officer immediately after the collision – that she stopped at the stop line.

Not only is Officer Gilland stopping at the stop line the most probable scenario based on her statement to the police immediately after the crash, but it is also the most probable scenario based on the testimony of the eyewitnesses to the collision. Officer Gilland and Mr. Wuthrich both testified that they did not see each other until a moment before impact,[1] which is consistent with Officer Gilland being stopped at the stop line, where their view of each other was obstructed by the overgrown vegetation, when she began moving toward the intersection. Further, Mr.

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[1] *See* CP 394-396 (Wuthrich Dep.); CP 402 (Gilland Dep.); CP 432 (Recorded Statement by Officer Gilland taken by King County Detective James Leach a few hours after the collision).

Wuthrich's testimony that Officer Gilland's vehicle was "coming fast" when he first saw it means that she must have been far enough back from the intersection when she began accelerating (i.e., at or near the stop line) to have picked up speed by the time she entered the intersection.[2]

A reasonable jury could easily find that Officer Gilland's statement to the police officer immediately after the collision -- that she stopped at the stop line -- is the most reliable evidence and is, in fact, what actually happened. Only by ignoring Officer Gilland's statement immediately after the collision can the County claim that "Officer Gilland had over 700 feet of unobstructed visibility to her left." *Brief of Respondent* at 2. The County misleadingly relies on the sight distance Officer Gilland would have had at a location closer to the intersection than where the County placed the stop line. Again, the County improperly spins the facts in its favor rather than taking the facts in a light most favorable to Mr. Wuthrich, as the law requires. Officer Gilland's statement to the police immediately after the collision is the evidence most favorable to Mr. Wuthrich as to her stopping point and must be taken as true for purposes of reviewing the trial court's summary judgment ruling.

Ultimately, where Officer Gilland stopped is a question of fact for a jury to decide. If the jury finds that Officer Gilland stopped at the stop line, as she stated immediately after the collision, and which is consistent

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[2] *See* CP 394 (Wuthrich Dep.); CP 440-441 (deposition of accident reconstruction expert Paul Olson).

with the testimony of both Officer Gilland and Mr. Wuthrich that they did not see each other until a moment before the crash, then Plaintiff's expert testimony[3] supports the overgrown vegetation being a sight obstruction and a proximate cause of the collision:

> It is my opinion that the overgrown vegetation (blackberry vines) in the northwest corner of the Avondale Road/159th Street intersection obstructed drivers' view of traffic conditions on Avondale Road and 159th Street at the intersection. . . . These sight obstructions in the northwest quadrant of the intersection created an inherently dangerous condition at the intersection. From the location of an eastbound motorist stopped at the stop line placed by King County on 159th Street, southbound motorists on Avondale Road and eastbound motorists on 159th Street would not have adequate sight distance to see each other in time to avoid a collision.

CP 1265 (Declaration of Edward Stevens); CP 1527 (Olson Dep. at 95).[4]

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[3] The County criticizes Transportation Engineer Edward Stevens for not performing an accident reconstruction, determining the actions of Officer Gilland and Mr. Wuthrich before the collision, and opining as to whether the sight obstruction caused by the overgrown vegetation was a proximate cause of the collision. *Brief of Respondent* at pp.19-20, 22. But Mr. Stevens' role was to evaluate whether the intersection was reasonably safe or not, from a transportation engineering perspective. He is not an accident reconstruction expert. His testimony stayed within the scope of his expertise. The questions of where Officer Gilland stopped and whether the sight-obstructing vegetation was a proximate cause of the collision are questions of fact for the jury to decide. They do not require expert testimony. The expert testimony as to why the intersection was unsafe and how the vegetation obstructed drivers' sight lines will assist the jury in deciding those factual questions.

[4] Accident reconstruction expert Paul Olson testified that "clearly the sight line for drivers pulling up to this intersection was obstructed." CP 439; CP 1501-1502 (Exhibit 9 to the Deposition of Paul Olson at 1) ("A person stopping at or on top of the stop bar simply could not see far enough to the North to safely pull out onto Avondale Road.").

III. THE COUNTY'S ANALYSIS OF DUTY IS WRONG.

While the County acknowledges that it has a common law duty to provide roads that are reasonably safe for ordinary travel, including a duty to eliminate inherently dangerous or misleading conditions (*Brief of Respondent* at p.25), the County confuses the issue by arguing that, in addition to proving a breach of that duty, a plaintiff must also somehow prove breach of a "standard of care," which the County claims is defined by *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995). The "standard of care" is simply that a governmental entity must exercise reasonable care to design and maintain its roads in reasonably safe condition. *See* WPI 140.01; *Berglund v. Spokane County*, 4 Wn.2d 309, 315-316, 103 P.2d 355 (1940) ("the determination of whether or not a municipality has exercised reasonable care in the performance of its duty to maintain its public ways in a reasonably safe condition must in each case necessarily depend upon the surrounding circumstances").

The County's claim that a plaintiff must show that a governmental entity violated a statute or ordinance to establish that a road is unsafe (*Brief of Respondent* at p.39) was rejected by the Supreme Court in *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005), and by the Court of Appeals in *Chen v. City of Seattle*, 153 Wn. App. 890, 894, 223 P.3d 1230 (2009). *See Owen*, 153 Wn.2d at 787

("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"); *Chen*, 153 Wn. App. at 908.

The County also claims that it must be put on notice, "through significant accident history or the like, that a dangerous condition existed prior to the accident." *Brief of Respondent* at p.28. No case law supports the County's claim.[5] In fact, case law is directly to the contrary. As stated by the court in *Tanguma v. Yakima County,* 18 Wn. App. 555, 569 P.2d 1225 (1977), a governmental entity "is no more entitled to one free accident [at a road location] than a dog is entitled to one free bite." *Tanguma,* 18 Wn. App. at 563. The *Tanguma* court further emphasized this point by stating that "[w]hen negligent conduct produces a foreseeable risk of injury, the actor may not find refuge in a 'long history of good fortune.'" *Ibid. (quoting Butler v. L. Sonneborn Sons, Inc.,* 296 F.2d 623, 626 (2nd Cir. 1961)).

The County is asking this Court to change the law and require proof of prior accidents as a prerequisite to governmental liability for an

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[5] The County misrepresents *Berglund*, *Owen*, and *Chen*. While there were prior accidents in *Chen, there was no evidence that the governmental defendants in Berglund and Owen* had "actual notice" of the allegedly dangerous conditions involved in those cases. The conditions cited by the County were simply the plaintiffs' claims as to why the road locations at issue in those cases were not reasonably safe.

unsafe road.[6] A history of prior accidents is simply part of the totality of the circumstances to be considered in evaluating whether a road location is reasonably safe; it is not a requirement for showing that a road location is unsafe. The County's duty is to anticipate foreseeable dangers, not to wait until people are killed or injured before taking action to maintain its roads in a reasonably safe condition.

The only notice that might be required in this case is notice of the overgrown vegetation, which is definitively established by the fact that the County photographed the overgrown vegetation nine months before this collision (CP 477-479), as well as the fact that the County had been out several times over the years to cut back the wall of blackberries:

> I have lived at 19140 NE 159th Street, Woodinville since 1980.
>
> The overgrown blackberries at the northwest corner of the Avondale Road – 159th Street intersection are always a problem there, and have been for years.
>
> King County workers have been to the intersection and cut back vegetation five to 10 times during the past 20 years.

CP 1166-1167 (Declaration of Ronald Wipf, the former owner of the property where the overgrown blackberries were located). Not only did

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[6] As with much of its factual discussion, the County's discussion of the accident history at the intersection is misleading. The County cites traffic volumes for vehicles entering the intersection from all directions. *Brief of Respondent* at 31. The only leg of the intersection that would have been affected by the overgrown vegetation is the west side of 159th Street, where Ms. Gilland entered the intersection.

the County have constructive notice of the dangerous condition, based on its years of having been to the intersection to cut back the vegetation, but it had actual knowledge of the hazard as documented in the photograph County employees took of the wall of blackberries in 2007.

The County's duty is straightforward: to provide a reasonably safe road, which includes the "duty to eliminate an inherently dangerous or misleading condition." *Owen*, 153 Wn.2d at 788 (*citing Keller*, 146 Wn.2d at 249). The trial court erred in ruling that the County's common law duty was negated because of Officer Gilland's negligence. This Court should reverse the trial court's summary judgment ruling and remand this case for trial consistent with applicable law.

IV. "ORDINARY" TRAVEL MEANS "FORESEEABLE" ACTS OF MOTORISTS; FORESEEABILITY IS A QUESTION OF FACT.

The County attempts to defend the trial court's ruling by arguing that because Officer Gilland was negligent, her actions do not constitute "ordinary" travel, and that the County only has a duty to provide reasonably safe roads for "ordinary" travel. That is how the trial court defined "ordinary travel" – as requiring a "prudent driver." VRP 73 (7/27/12). It is clear from case law, however, that "ordinary" travel means "foreseeable" acts of motorists. *Keller*, 146 Wn.2d at 252 (a governmental entity has a "duty to exercise ordinary care to build and maintain its

roadways in a reasonably safe manner for the foreseeable acts of those using the roadways").[7]

As pointed out in Appellant Wuthrich's Opening Brief, violations of the rules of the road by motorists are foreseeable. In *Keller*, the plaintiff was speeding. In *Owen*, the plaintiffs stopped on railroad tracks. In *Unger*,[8] the plaintiff was speeding, swerving, crossing center lines, and driving with his headlights off at night in severe wet weather. In *Chen*, a driver hit a pedestrian in a crosswalk. In *Berglund*, a driver crossed the center line and hit a pedestrian on the opposite side of the road. In all of these cases, the appellate courts held that the drivers' negligence was foreseeable and that the governmental entities involved in those cases therefore had a duty to provide reasonably safe roads.

Officer Gilland simply stopped where the County directed her to stop – at the stop line painted on the road by the County. It was clearly foreseeable that drivers would stop at the stop line. Applicable highway safety standards require that stop lines be placed based on an engineering analysis. CP 469-470; WAC 468-95-017 ("The decision to use a

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[7] The County continues to rely upon case law that has been overruled. The County cites *Klein v. City of Seattle*, 41 Wn. App. 636, 705 P.2d 806 (1985) twice, but *Klein* and a later case that relied on *Klein*, *Braegelmann v. County of Snohomish*, 53 Wn. App. 381, 766 P.2d 1137 (1989), were effectively overruled by the Supreme Court's decision in *Keller*, as recognized in *Unger v. Cauchon*, 118 Wn. App. 165, 173-176, 73 P.3d 1005 (2003). The County's legal causation defense based on *Klein* therefore fails.

[8] 118 Wn. App. 165, 73 P.3d 1005 (2003).

particular [traffic control] device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment."). The stop line on 159th Street was 14.5 feet back from the intersection. CP 469. Presumably, the County placed it at that location based on an engineering analysis that determined that that particular location was the safe place for motorists to stop. If an engineering analysis did not require the stop line to be so far back from the intersection for safety reasons, the County should have placed the stop line closer to the intersection.[9] But having determined that the stop line should be placed at that location, the County should have maintained the vegetation at the corner of the intersection to provide adequate sight distance from the location of the stop line. MUTCD (2003 Edition) Section 3B.16 (CP 485-486) ("Stop lines should be placed to allow sufficient sight distance to all other approaches to an intersection."); *see also* WAC 468-95-220 (same) (CP 488).

The Manual on Uniform Traffic Control Devices (MUTCD) states that stop lines should be placed "at the desired stopping or yielding point."

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[9] The fact that the County put the stop line so far back from the intersection contradicts the County's argument that it was safe for drivers to move forward from the location of the stop line. Why did the County direct motorists to stop so far back from the intersection if it was safe for motorists to be two feet from the edge of traveled way, as the County claims Officer Gilland should have been? Why didn't the County put the stop line two feet from the edge of traveled way if that was where drivers needed to stop to have adequate sight distance?

CP 486; CP 692 (WAC 468-95-220). It further states that "[s]top lines should be placed to allow sufficient sight distance to all other approaches to an intersection." CP 468; CP 692; WAC 468-95-220. King County's own road standards do not address sight distance requirements when a stop line is used; they only provide a generic default rule for assessing sight distance in the ***absence*** of a stop line.[10] CP 188. The State of Washington's highway safety standards, like the MUTCD, also call for adequate sight distance from a stop line and state that vegetation that obstructs sight distance should be removed. CP 704-705.

It was foreseeable that motorists like Officer Gilland would stop at the stop line, because they are required by law to do so. RCW 46.61.190. By placing a stop line at the intersection, the County directed Officer Gilland to stop at that location. In the terminology used by the MUTCD, the location of a stop line is the "desired stopping point" – the location that the road authority has determined, based on engineering judgment, to be the place where it wants motorists to stop before entering an intersection. And by failing to provide adequate sight distance from the location of the stop line, Defendant County violated applicable highway safety

[10] The County's claim that it complied with its own standard is meaningless because the County's standard does not address a situation where a stop line is used.

standards.[11] MUTCD (2003 Edition) Section 3B.16 (CP 485-486); WAC 469-95-220.

The County claims that it is not "legally required" to follow highway safety standards. The County ignores its common law duty to provide a reasonably safe road. Evidence of violations of highway safety standards is relevant to whether or not the County breached its common law duty. The evidence here shows that Defendant King County violated applicable highway safety standards by failing to provide adequate sight distance from the designated stop line. *See* Appellant's Opening Brief at 22-28. The County simply ignores this evidence.

Defendant County's statement that it had no duty to "make this safe road safer" ignores the evidence that the road was unsafe because the

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[11] The County misrepresents WSDOT sight distance standards at p.34 of its brief. The minimum setback distance for measuring sight distance under WSDOT standards is 18 feet from the edge of traveled way (in the absence of a stop line). CP 704. The provision allowing for reduced sight distance cited by the County only applies to intersections at which "sight obstructions within the sight triangle cannot be removed due to limited right of way." CP 704. Here, the sight obstruction – the wall of vegetation – could have been removed by the County. The County simply failed to do so. WSDOT standards call for vegetation to be maintained so that it does not degrade available sight distance. CP 704-705. Moreover, the County could have moved the stop line closer to the intersection if an engineering analysis determined that it was safe to do so. Finally, WSDOT standards state that if a stop bar is placed more than 10 feet back from the edge of traveled way, as was the case at the subject intersection (CP 469), the road authority should consider providing adequate sight distance to a point eight feet back from the stop line. CP 704. Again, the County misrepresents WSDOT standards in claiming that sight distance need only be evaluated 10 feet back from the edge of traveled way, even if there is a stop line. *Brief of Respondent* at p.35.

sight distance was inadequate from the designated stop line. CP 1265. Likewise, Defendant King County's claim that it is only required to follow its own road design standards ignores the fact that King County's generic sight distance standard does not address a situation like this intersection, where there is a painted stop line (CP 307, Stevens Dep. at p.157), and also ignores established Washington law holding that industry standards are relevant to the issue of negligence, as well as the fact that the MUTCD has been adopted as law in Washington. *See, e.g.*, RCW 47.36.030(2); RCW 47.36.060; RCW 36.86.040; WAC 468-95-010. In *Owen*, the Supreme Court specifically recognized the relevance of the MUTCD in highway safety cases like this. *Owen*, 153 Wn.2d at 787 ("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. The MUTCD provides at least some evidence of the appropriate duty.").

Defendant County apparently misunderstood the testimony of Transportation Engineer Edward Stevens. Mr. Stevens specifically stated that his opinion regarding sight distance requirements for a painted stop line is based on "the MUTCD, which is state law." CP 307 (Stevens Dep. at p.159). The MUTCD applies because a stop line is a traffic control

device, and the MUTCD governs traffic control devices.[12] CP 307 (Stevens Dep. at 160); CP 676-677. The sight distance standard cited by Mr. Stevens is not Mr. Stevens' "self-created" standard as claimed by the County. It is based on the MUTCD and WSDOT standards. CP 307 (Stevens Dep. at 158-159).

As discussed above, the MUTCD requires that adequate sight distance be provided from the location of a stop line, and WSDOT standards state that sight distance should be evaluated eight feet back from a given location, because a driver's eye is approximately eight feet back from the bumper of a vehicle. CP 704. In this case, these standards require that adequate sight distance be provided from a point 22.5 feet back from the edge of traveled way, because the County put a stop line 14.5 feet back from the edge of traveled way, and the proper location for assessing sight distance is eight feet back from that location, to account for the position of a driver sitting in a vehicle at the stop line. The County's own sight distance standard requires 555 feet of sight distance for a 40-mph road. CP 644. There was only 191 feet of sight distance from the location of the stop line. CP 461. Again, the County simply ignores

[12] The County's argument that the MUTCD is not a "road design manual" shows a lack of understanding of road safety standards. The MUTCD governs traffic control devices. CP 676-677. It is not a "design manual" in the sense that it does not deal with the design of road structures. It addresses signs, stop lines, traffic signals, and other devices used to direct and control traffic.

evidence contrary to its position and puts its own spin on the evidence, rather than viewing the evidence in a light most favorable to the Plaintiff, as required by law.

Defendant County claims the MUTCD provision relied upon by Mr. Stevens does not apply because it was "not adopted [as law in Washington] until seven months after the 2005 road re-design was complete." *Brief of Respondent* at p.38. The County ignores the fact that the MUTCD provision had been adopted as a national highway safety standard in 2003 (CP 694-696) and the law in Washington in October 2005 (CP 690), and was the law in Washington at the time of the collision in this case.[13] CP 1708-1710; CP 692; CP 700. The only thing the County needed to do to make the intersection reasonably safe and comply with the MUTCD was to maintain the overgrown vegetation that obstructed the sight distance from the designated stop line. The County did not need to re-design the intersection to make it reasonably safe and comply with the MUTCD.

Defendant King County had a common law duty to provide a reasonably safe road. Whether its admitted failure to provide adequate sight distance from the designated stopping point, in violation of the

[13] The effective date of the rule adopting the 2003 Edition of the Manual on Uniform Traffic Control Devices was December 4, 2005. CP 690.

MUTCD, constitutes a breach of its common law duty is a question of fact for a jury to decide. Whether it was foreseeable – and therefore within the scope of "ordinary travel" – for a driver to stop at the designated stop line and look for traffic, be misled into thinking they could safely enter the intersection because their sight line was obstructed at the designated stop line, and then pull out into the path of an unseen vehicle, is also a question of fact for a jury to decide. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997).

The County makes the same error as the trial court in arguing that "ordinary travel" means that a driver will comply with the "clear stretch of road doctrine." *Brief of Respondent* at p.44. The first problem with the County's argument is that *Keller* specifically held that governmental entities have a duty to provide reasonably safe roads, even if drivers are negligent and fail to comply with the rules of the road. As long as a driver's negligence is foreseeable, it is within the scope of "ordinary travel." For example, drivers also have a duty not to speed, to yield to pedestrians in a crosswalk, not to cross the center line, and to follow other rules of the road, but that does not mean that a governmental entity's negligence in failing to provide a reasonably safe road cannot combine with a driver's negligence to cause a collision. Many cases have recognized comparative fault on the part of both the defendant-driver and

the governmental entity under these circumstances, including *Chen*, *Unger*, *Berglund*, and *Keller*, as discussed above.

The second problem with the County's "clear stretch of road doctrine" argument is that it is questionable whether it applies in a case like this, in which a governmental entity places a stop line on the road to direct motorists where to stop before entering an intersection. The case law cited by the County involved an uncontrolled intersection with no stop line. *Sanders v. Crimmins*, 63 Wn.2d 702, 703, 388 P.2d 913 (1964). In this case, Defendant King County painted a stop line 14.5 feet back from the edge of traveled way. The stop line designated the location where Defendant King County wanted Officer Gilland and other drivers to stop before entering the intersection, presumably for safety reasons based on an engineering analysis. When a governmental entity directs drivers to stop at a particular location before entering an intersection, drivers may reasonably assume that the sight distance at that location is adequate for them to assess whether it is safe to enter the intersection. In fact, as discussed above, the MUTCD requires that governmental entities provide adequate sight distance at stop lines. It was clearly foreseeable, and therefore within the scope of a governmental entity's duty to provide a reasonably safe road, that motorists such as Officer Gilland would stop at

the designated stop line and evaluate whether it was safe to enter the intersection from that location.

V. THE COUNTY'S LEGAL CAUSE ARGUMENT IS INVALID AS A MATTER OF LAW.

Based on the same invalid, pre-*Keller* law relied upon by the trial court, the County argues that Plaintiff cannot show legal cause. When the County's attorney asked the trial court to dismiss Plaintiff's case on the basis of legal cause because of Officer Gilland's "extreme negligence," the trial court simply referred back to its erroneous understanding of the law based on the overruled language from *Ruff*: "that a reasonably prudent driver is required in the first place, the county is entitled to rely upon that before they're liable." VRP 64-65 (7/27/12); *id.* at 67-68 (7/27/12) ("that eliminates that causation issue in this case because she wasn't reasonably prudent"). As previously noted in Appellant's Opening Brief, the trial court's reasoning in this regard was overruled in *Keller*. The County's legal cause argument is invalid as a matter of law.

VI. THERE ARE QUESTIONS OF FACT AS TO PROXIMATE CAUSE

With regard to cause in fact, the County argues that because there are other possible causes of the collision besides the sight obstruction

created by the County, Plaintiff cannot establish proximate cause.[14] First, the County ignores the fact that there can be more than one cause of a collision. *See* WPI 15.01. Indeed, both of the possible causes cited by the County relate to Officer Gilland's alleged failure to detect Mr. Wuthrich's motorcycle,[15] and the sight-obstructing wall of overgrown vegetation clearly would have played a role in Officer Gilland's ability to see Mr. Wuthrich. Second, the County ignores the evidence showing that Officer Gilland stopped at the stop line, where her view of Mr. Wuthrich's motorcycle was obstructed by the overgrown vegetation. As discussed above, both Officer Gilland and Mr. Wuthrich testified that they did not see each other until a moment before the collision. Their testimony is inconsistent with the County's theory that Officer Gilland stopped and entered the intersection from a location where their ability to see each

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[14] The County misrepresents Officer Gilland's testimony in claiming that "Officer Gilland agrees that her failure to look left again prior to initiating her start was the cause of this accident." *Brief of Respondent* at p.25. What Officer Gilland actually stated at CP 265, the cite given by the County, is that she stopped and looked but did not see Mr. Wuthrich's motorcycle. In response to badgering by defense counsel, Officer Gilland said "I suppose," in response to a question asking whether it was "a possibility" that Mr. Wuthrich was actually there to have been seen and she just missed him. She did not say anything close to what the County claims she said.

[15] Defendant King County refers to Ms. Gilland changing a setting on her cell phone prior to stopping at the intersection in order to suggest that Ms. Gilland was inattentive. *Brief of Respondent* at p. 13. Like many of the claims made by the County, this is misleading. Officer Gilland testified that she was not looking at her phone when she got to the intersection. She was looking at traffic. CP 1567 (*Gilland Dep.* at 58-60).

other was unobstructed. Their testimony makes it more likely than not that the overgrown vegetation caused the collision, because neither one of them could see the other until a moment before impact.

Proximate cause is a question of fact for the jury to decide. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982). ("[T]he question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court."). The mere fact that there are other possible causes does not defeat a plaintiff's claim. *See, e.g., Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 163, 106 P.2d 314 (1940) ("if 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"); *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 281, 78 P.3d 177 (2003) (a plaintiff need only show "a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable"). Here, as the County's brief makes clear, there are disputed questions of fact as to proximate cause.

As discussed in Appellant's Opening Brief, there is sufficient

evidence[16] for a jury to determine that Officer Gilland stopped at the designated stop line and was misled into thinking it was safe to enter the intersection because of the sight obstruction caused by the overgrown wall of vegetation. CP 1265. Detective Leach, who investigated the collision, commented on the sight obstruction caused by the wall of blackberries in his report. CP 1261. There is no question but that, if the wall of vegetation had been cut back, Officer Gilland would have had adequate sight distance from the stop line. The trial court acknowledged in oral argument that, viewing the evidence in a light most favorable to the Plaintiff, there are questions of fact as to proximate cause. VRP 62-64 (7/27/12).

The trial court's ruling as to proximate cause was based on its erroneous belief that Officer Gilland's negligence somehow eliminated negligence on the part of the County being a proximate cause of the collision, not based on an absence of material questions of fact as to

[16] The evidence includes the fact that both Officer Gilland and Mr. Wuthrich testified they did not see each other until a moment before impact, which indicates that Officer Gilland was back at the stop line location, such that both of their views were obstructed by the wall of blackberries. The County's theory that Officer Gilland was closer to the intersection is inconsistent with the eyewitness testimony that neither of them saw the other until a moment before impact. Unlike the cases relied upon by the County, in this case there is eyewitness testimony that establishes what happened, and the eyewitness testimony is consistent in establishing that the wall of overgrown blackberries caused a sight obstruction that prevented both drivers from seeing each other until it was too late to avoid a collision.

proximate cause. VRP 67-68 (7/27/12) ("that eliminates that causation issue in this case because she wasn't reasonably prudent"). The trial court therefore erred in granting summary judgment and should be reversed.

VII. THE COURT SHOULD DISREGARD THE CONTRIBUTORY FAULT AND LANDOWNER DUTY ISSUES RAISED BY THE COUNTY OR GIVE APPELLANT AN OPPORTUNITY TO RESPOND.

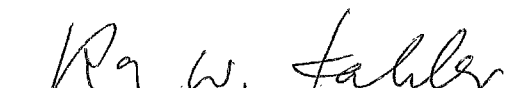
As the record in this case will show, Defendant County opposed Appellant's request to have the trial court's rulings on summary judgment motions relating to contributory fault and landowner duty reviewed as part of this appeal. Yet Defendant County injected both of these issues into its response brief. *See Brief of Respondent* at 11-12 and 40-41. This Court should either disregard those portions of Defendant County's brief, given the fact that those issues are not presently before the Court, or should agree to resolve those issues as part of this appeal and give Appellant Wuthrich an opportunity to submit a brief on those issues. Appellant Wuthrich is prepared to brief the issues of contributory fault and landowner duty on appeal if requested to do so by this Court. A motion for discretionary review on these issues was argued on April 24, 2013. These issues were discussed in Appellant Wuthrich's Motion for Discretionary Review (pp. 12-20) and Appellant Wuthrich's Reply in Support of Motion for Discretionary Review (pp. 4-10).

VIII. CONCLUSION

The trial court clearly erred in granting summary judgment to Defendant King County on the basis of language in *Ruff v. King County* that was overruled in *Keller v. City of Spokane*. The trial court likewise erred in failing to view the facts in a light most favorable to Plaintiff Guy Wuthrich in ruling on the County's motion for summary judgment.

When viewed in the light most favorable to Mr. Wuthrich, there are questions of fact for a jury to decide as to whether the County breached its common law duty to provide a reasonably safe road and as to whether the County's breach of duty was a proximate cause of the collision. This Court should reverse the trial court and remand this case for trial so that a jury can decide these material questions of fact.

Respectfully submitted this 9th day of May, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2013, I served the foregoing via JIS to the Clerk's Office of the Court of Appeals Division II and provided a copy of the document via email to all counsel of record as follows:

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