NO. 44019-9

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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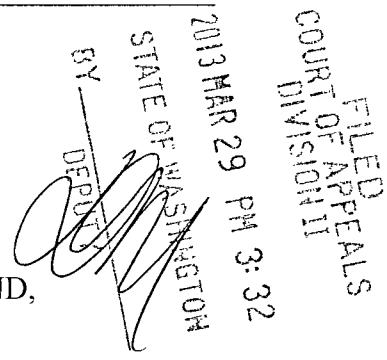
GUY WUTHRICH,

Appellant,

v.

KING COUNTY AND CHRISTA GILLAND,

Respondents.

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APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

THE HONORABLE GAROLD E. JOHNSON

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# BRIEF OF RESPONDENT KING COUNTY

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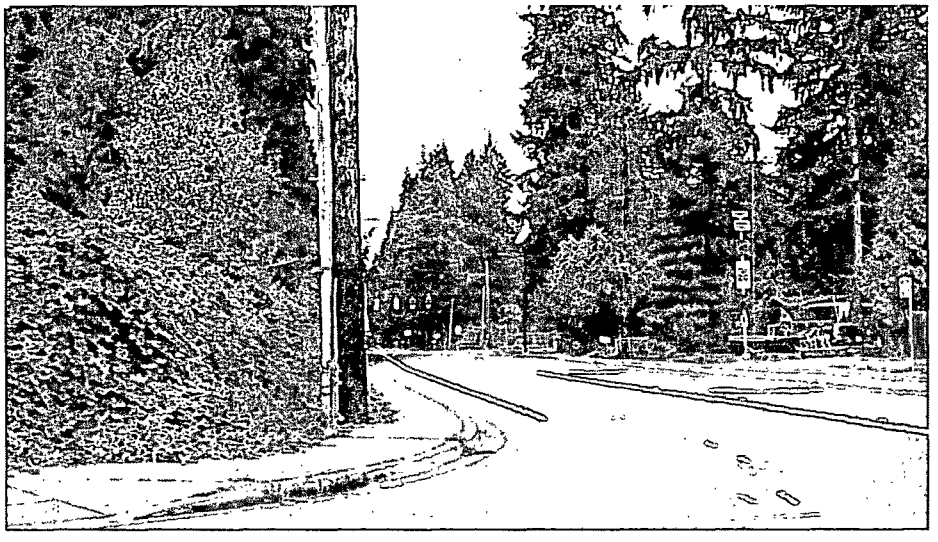
## I. INTRODUCTION

On the sunny day of June 20, 2008, off-duty Kirkland Police Officer Christa Gilland drove up to and then stopped at the intersection of Avondale Road and NE 159th Street in Woodinville, WA. She looked left, then right, waited several seconds for cars to pass from her right, and then she pulled into the intersection *without looking left again*. Due to her failure to yield the right of way, Officer Gilland unfortunately collided with plaintiff, Guy Wuthrich, who was approaching on Avondale from her left. While there is no doubt that Officer Gilland is at fault in the accident, plaintiff is unsatisfied with the amount of her insurance coverage and therefore seeks to pin blame on King County, hoping that, as the road owner, the county will have to pay the bulk of damages caused by Officer Gilland.

Plaintiff's case against King County is premised on the theory that Officer Gilland's view was "obstructed by an overgrown wall of blackberry bushes." Yet plaintiff has nothing beyond speculation that the bushes actually obstructed Officer Gilland's view. Officer Gilland can only guess where she stopped at the intersection, how far down Avondale she could see to her left and whether the bushes obstructed her view. As a result, plaintiff's experts have no opinion regarding whether Officer Gilland's sightline was actually obstructed or whether the intersection was inherently dangerous to Officer Gilland.

These evidentiary voids are fatal to plaintiff's case. Just as his experts refused to speculate about what actually happened, a jury should not be asked to guess whether the intersection's design played any role in this accident.

Plaintiff fails to disclose the sightline that was provided to Officer Gilland on June 20, 2008. As shown below, Officer Gilland had over 730 feet of unobstructed visibility to her left:



Similarly, plaintiff fails to disclose that a significant re-design of this intersection was completed 37 months before this accident in response to the county receiving notice of numerous rear-end collisions on Avondale. The re-design produced the sightline shown above. This sightline exceeded the mandatory King County Road Design Standards. After these substantial improvements were completed, King County

received no notice that further modifications were necessary. Instead, the accident history showed that the King County Road Design Standards produced an extraordinarily safe roadway. In the relevant 37 month period, there was an estimated 15-20 million cars that entered the intersection. Out of those millions of cars, there was only one accident which was quite different than plaintiff's. Stated differently, if the one dissimilar accident is considered relevant, then only .00000005 to .000000067 percent of cars entering this intersection was involved in an accident. Therefore, no further modifications were necessary because King County was not required to make this safe road safer.

Finally, plaintiff fails to disclose that his own accident reconstructionist, Mr. Olson, could not reconstruct where plaintiff was on Avondale when Officer Gilland looked left or where plaintiff was on Avondale when Officer Gilland initiated her turn *without looking left again.* Because Mr. Olson cannot provide these critical details, plaintiff's engineering expert, Mr. Stevens, provided no opinion that this accident would not have occurred if his self-created sightline had been in place.

## II. PROCEDURAL HISTORY

The trial court granted King County's motion for summary judgment, ruling that the county did not breach its duty of care and was not a proximate cause of this accident. The court also denied plaintiff's

motion for reconsideration of that order.[1] The trial court then entered final judgment as to King County, stayed the trial against co-defendant Officer Gilland, and issued what this court has determined to be sufficient CR 56(d) findings. This court accepted review of the summary judgment order as a matter of right under RAP 2.2(d).[2]

## III. STATEMENT OF THE ISSUES

**A. ISSUE: Should this court affirm the trial court's ruling that King County met its duty of care by providing a reasonably safe roadway for ordinary travel?**

**ANSWER: Yes.** The trial court properly granted King County's motion for summary judgment , ruling that the county met its duty of care when it provided a reasonably safe roadway for ordinary travel by constructing an intersection which complied with its binding road design standards, had proven to be extraordinarily safe, there was no notice that it was inherently dangerous, and it was not foreseeable that Officer Gilland would

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[1] Plaintiff sought reconsideration, claiming that the court failed to consider *Keller v. City of Spokane,* 146 Wn.2d 237, 44 P.3d 845 (2002). The trial court expressly assured the parties it had read and applied *Keller.* VRP 6 (8/24/12). It then affirmed the dismissal of King County based on "numerous issues." *Id.* at 11-13.

[2] The trial court also denied plaintiff's two motions for partial summary judgment and denied his motions for reconsideration of those orders. Plaintiff did not seek CR 54(b) findings on these orders and did not seek discretionary review before the deadlines set forth in the Rules of Appellate Procedure. Instead, plaintiff improperly attempted to obtain direct review under RAP 2.2(d) by joining these orders with the order dismissing King County. On February 21, 2013, Commissioner Schmidt correctly denied direct review of these orders. Plaintiff has now sought discretionary review, and oral argument on that petition is scheduled for April 24, 2013.

inexplicably fail to pull forward on 159th Street to use the clearly available and unobstructed sightline.

The *Keller* court ruled that municipalities owe a duty to provide reasonably safe roadways for ordinary travel to both negligent and fault-free drivers. *Keller v. City of Spokane,* 146 Wn.2d 237, 44 P.3d 845 (2002) (citing omitted). *Keller* also re-affirmed the longstanding rule that municipalities are not insurers against accidents or the guarantors of public safety. They are, therefore, not required to "anticipate and protect against all imaginable acts of negligent drivers." *Id.* at 252. The Washington Supreme Court also re-affirmed that a municipality "only has a duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the *foreseeable acts* for those using the roadways." *Id.* (emphasis added) (citing *Bergland v. Spokane County,* 4 Wn.2d 309, 319-21, 103 P.2d 355 (1940)). Because the court acknowledged that municipalities only have a duty to exercise ordinary care for *foreseeable* acts, the court "decline[d] to remove the modifier 'ordinary' from travel," as that would have changed the scope of a municipality's duty. *Id.* at 254.

The trial court properly followed *Keller* when it ruled that "ordinary" travel means that a motorist will comply with the "clear stretch of road

doctrine."[3] Therefore, the trial court correctly concluded that it was not foreseeable that Officer Gilland would fail to pull forward to look for traffic from the completely unobstructed and clearly available vantage point. Because King County provided an unobstructed sightline that fully complied with its binding road design standards, and because those standards and the re-design have proven to be reasonably safe based on the lack of complaints and near complete lack of accident history, the trial court properly ruled that the intersection was not inherently dangerous and that the county met its duty of care to provide a reasonably safe roadway for ordinary travel.

**B. ISSUE: Should the court affirm the trial court's ruling when plaintiff filed to produce sufficient evidence that the accident was proximately caused by any negligence of King County?**

**ANSWER: Yes.** The trial court properly ruled that plaintiff had insufficient evidence to show that King County was a proximate cause of his injuries.

First, plaintiff failed to produce evidence that the bushes or pole had any role in this accident or that an alternate sightline would have made any difference in the accident.

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[3] "A disfavored driver's obstructed view of a favored vehicle does not constitute deception. It is the duty of the disfavored driver approaching an obstructed intersection to make his observations from a point at which he can clearly observe, not from a point back from the intersection where his view is materially impaired." *Sanders v. Crimmins*, 63 Wn.2d 702, 706, 388 P.2d 913 (1964) (citations omitted).

Second, logic, common sense, justice, policy, and precedent dictate that King County should not be the legal cause of this accident. Municipalities cannot make motorists pull forward to use an available, unobstructed view of on-coming traffic. Nor can they make motorists turn their heads to make sure the intersection is clear before entering. King County should not be deemed the legal cause of plaintiff's injuries when it had no control over Officer Gilland's failure to pull forward to view traffic from the available, unobstructed sightline or her failure to look left again to make sure the intersection was clear before entering, after waiting several seconds for cars to pass from her right.[4] *See e.g. Klein v. City of Seattle,* 41 Wn. App. 636, 705 P.2d 806 (1985).

## IV. STATEMENT OF THE CASE

To correctly analyze whether King County's motion for summary judgment was properly granted requires an understanding of the facts related to the history of the intersection and the accident, beyond those selectively chosen by the plaintiff. The actual undisputed facts are as follows.

### A. HISTORY OF THE INTERSECTION.

By 2005, King County learned that there had been a high number of rear-end collisions on Avondale at the intersection of Avondale Road NE and NE 159th Street. CP 177-191. The county responded by re-

[4] No witness can testify where Officer Gilland stopped. Therefore, it is unknown if she availed herself of the unobstructed sightline.

designing the intersection to make it safer. *Id.* These substantial improvements were completed on May 2, 2005. *Id.* Plaintiff's expert agrees that there were no other relevant road alterations to the intersection in the 37 months between May 2, 2005 and June, 20, 2008, the date of this accident. CP 294.

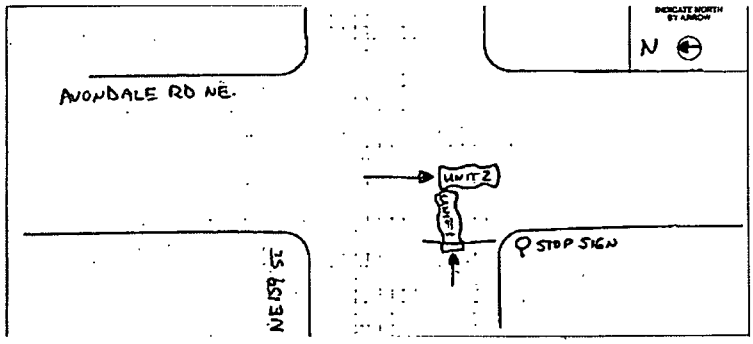
Plaintiff is correct that there are blackberry bushes and a power pole at the northwest corner of Avondale and 159th Street. What is not disclosed in plaintiff's brief is that as motorists pull forward on NE 159th Street, their sightline to the left improves to a point where the bushes and pole are irrelevant. This is best described in the declaration of investigative officer, Detective James Leach. CP 1241-46. The actual sightline available for motorists at this intersection is shown above on page two. CP 222-34.

This sightline fully complied with King County's lawfully promulgated road standards. CP 177-191. It provided Officer Gilland with over 730 feet of unobstructed visibility, measured 10 feet back from the edge of the traveled way (i.e., the fog line). CP 177-191, 301. Although King County is not required to follow other road design manuals, the sightline nevertheless complied with both state and federal road design manuals. CP 303, 703-707.

Officer Gilland and plaintiff's accident reconstructionist, Mr. Olson, two experienced police officers with a combined 45 years of service, agree

that Washington's rules-of-the-road require motorists to stop at a stop sign or stop bar, and then move ahead and stop again, regardless of how many times it takes, to confirm that the roadway is clear of on-coming motorists before proceeding into an intersection. CP 243, 247, 281 and 283. Officer Gilland also testified that if a power pole is in a driver's sightline, the driver is obligated to pull forward to eliminate the obstruction. CP 257-58. Nothing prevented Officer Gilland from pulling safely forward in order to comply with the rules of the road and the "clear stretch of road doctrine" so that she could have the above pictured, completely unobstructed view of oncoming traffic from her left. CP 222-23, 258, 284, and 1241-46.

The re-design of this intersection proved to be remarkably successful. In the 37 months from the date the re-design was completed until the date of the accident, there was only one other accident at the intersection, out of the 15 to 20 million cars that were estimated to have entered it. CP 192-222. As is shown below, the one accident, which occurred on July 12, 2007, was not "identical" to this accident as claimed by plaintiff. *Plaintiff's Brief, p. 31.* In the July 12, 2007 accident, an at-fault driver entering the intersection hit the back end of a car that had already passed in front him. The investigating officer's accident sketch is shown below:




CP 201. Even if this one other accident is considered relevant, then only .00000005 to .000000067 percent of the cars that entered this intersection, during the relevant 37 month period, was involved in a remotely similar accident.

There was also no other notice that this safe intersection was somehow inherently dangerous. Plaintiff's road design expert, Mr. Stevens, testified that during the relevant 37 month period there were three ways that King County could have been placed on notice that further modifications were necessary: (1) citizen complaints; (2) self-reported information from King County employees; and (3) accident history. CP 298. After examining the available accident history, 10 years of citizen action requests and thousands of pages of King County records, Mr. Stevens concluded that he found no evidence that King County had notice that the intersection was inherently dangerous or contained a misleading condition. *Id.*

## B. PLAINTIFF'S ROLE IN THIS ACCIDENT.

Plaintiff was very familiar with Avondale and the crossing at 159th because he drove it once or twice a month. CP 239. He knew the speed limit was 40 mph and is certain he was going 35 mph. *Id.* He did not see Officer Gilland's car until her bumper was suddenly about six feet away from him. CP 240. He claims that he had a second at most to react and that he turned his motorcycle to the left and hit the gas in an effort to lessen the blow. CP 239. The next thing he remembered was waking up in the hospital. *Id.* Plaintiff never testified or provided any evidence as to where Officer Gilland stopped and has no personal knowledge whether the bushes or pole played any role in the accident.

Although plaintiff had the right of way, the evidence shows he was contributorily negligent as a result of driving while impaired. At least three years prior to this accident, plaintiff was declared disabled due to a back condition. CP 562-72. Plaintiff suffered from chronic pain and insomnia and was prescribed Methadone[5] and Gabapentin.[6] *Id.* While he

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[5] Methadone causes side effects of lightheadedness, dizziness, and sedation. CP 562-72. It has a very long half-life and is not safe to take while engaging in safety-sensitive tasks like driving. *Id.* It is the only prescription drug absolutely contraindicated for commercial drivers by the Federal Department of Transportation. *Id.*

[6] Gabapentin is used to treat and prevent seizures and neuropathic pain. *Id.* Its side effects include dizziness, somnolence, inability to maintain balance while walking, and blurry vision. *Id.* Like Methadone, Gabapentin can render the user at risk in safety-sensitive situations such as driving. *Id.* Providers who prescribe the combination of Methadone and Gabapentin are cautioned because the combination increases the risk of central nervous system depression and psychomotor impairment. *Id.*

testified that he does not think he took Methadone before driving on June 20, 2008, he concedes that he may have. CP 561. In fact, plaintiff tested positive for Methadone after the accident. CP 558. Plaintiff was not tested for Gabapentin. *Id.* Dr. Darby, an expert in toxicology, opined that, if plaintiff had not been driving while impaired, his injuries would have been less severe or avoided altogether. CP 562-57.

### C. OFFICER GILLAND'S TESTIMONY SHOWS THAT SHE CAN ONLY GUESS WHY SHE PULLED OUT IN FRONT OF PLAINTIFF.

Officer Gilland has been an officer with the Kirkland Police Department since March of 2000. CP 243. She was off-duty when the accident occurred. CP 250. She is an expert driver and is entrusted to train new police officers regarding the rules of the road.[7]

Officer Gilland lives a little less than a mile from the accident intersection and drove through it every day. CP 248. Her divorce had recently become final and, on the day of the accident, she changed her name

[7] Officer Gilland received specialized training at the police academy on an emergency vehicle operations course, including how to safely operate a motor vehicle under extreme circumstances. She also received similar ongoing training through the Kirkland Police Department. CP 243-44. She is involved in approximately 40 calls per year that require her to respond with full lights and sirens. CP 247. She applies the defensive driving tactics she has learned to her driving at work as well as her personal life. *Id.*
Officer Gilland has also received specialized training regarding the rules of the road, infractions, and on the driving laws of the State of Washington. CP 244. She took a week-long basic collision investigation course, has investigated between 150-200 accidents, and writes about 100 traffic citations per year. CP 244 and 246. She is a field training officer who is entrusted by Kirkland PD to give on-the-job training to new and transferring officers, and she specifically trains them on investigating accidents, writing citations, and enforcing the rules of the road. CP 245.

back to her maiden name on her driver's license. CP 249 and 254. She then went out to lunch with friends, drove home, went for a run, showered and then left to pick up her children from the babysitter. CP 249. As she drove eastbound on 159th, she was changing a "favorite" setting on her cell phone. CP 253. She still had her cell phone in her right hand when she came to the intersection. *Id.*

Plaintiff's brief only discloses selective portions of Officer Gilland's testimony. The undisclosed reality is that Officer Gilland does not know where she stopped. CP 256. She does not know how far down Avondale she could see when she stopped. CP 258. And she has no idea whether the bushes or pole actually blocked her view of oncoming traffic or even played any role in the accident. CP 261-62. In fact, Officer Gilland's attorney aptly described her testimony on these critical issues as "guestimates." CP 710.

During her deposition, Officer Gilland testified that prior to the accident, she was stopped at the intersection preparing to turn left. She recalls that she had a "clear view down Avondale to [her] left" and that she "stopped at a point where [she] believed [she] could see far enough down the roadway and the roadway was clear." CP 250-51.

Officer Gilland also provided the following testimony confirming that she was speculating where she stopped and how far down Avondale she could see:

Q: So you do not know where you stopped?
A: I am not exactly certain where I stopped?
Q: And to -- so you'd be speculating as to where you stopped?
A: Yes.
CP 251.

Q: And your best estimate, which you just testified to would be that you would be near this position but slightly forward of the position, correct? ...
A: I'm speculating. I don't recall exactly where I was.
CP 256.

Q: And you believe that you had a clear view down Avondale to your left?
A: Yes.
Q: So you pulled far enough ahead so you had no obstructions to look down Avondale? ...
A: I don't know what -- I don't know what that distance is.
CP 251.

Q: So you've previously testified that you pulled to a position where you assured yourself that there were no motorists coming to your left. Do any of these photographs [Exhibit 4] accurately depict where -- what your sightline would have been that day?
A: I don't recall.
Q: And to say otherwise would be to speculate?
A: Yes.
CP 258.

Officer Gilland was also questioned about the three statements she gave prior to her deposition. She was first questioned about her tape-recorded statement that she gave to King County Sheriff Detective Leach at the scene. That statement reads:

I was stopped at the intersection of Avondale and NE 159th at the stop line looking for traffic. I sat there for quite awhile, I waited until it was really wide open. And I pulled out to make a left turn

> onto Avondale and when I got probably half-way through the lane closest to me there was a motorcyclist in front of me and I hit him. I didn't see him till he was right in front of me.

CP 271. Because Officer Gilland used the same descriptor of "at" when she testified that she stopped "at the intersection," she was asked to clarify what she meant by her statement that she stopped "at the stop line" (i.e., whether she meant behind, on top of or in front of the stop bar). Just as Officer Gilland could not identify where she stopped when she stated that she stopped "at the intersection," she could not identify where she stopped when she stated that she stopped "at the stop line." She did not know what she meant by the descriptor "at." CP 260 ("I don't recall. I don't know.")

Officer Gilland was then asked about the following statement that she gave over the telephone to Det. Leach on July 1, 2008, eleven days after the accident:

> Received a call from Crista Gilland (Price). ...
> I asked her if she remembered where she stopped. Christa stated that she stopped next to the stop sign and then said at the stop bar. Christa stated that she may have stopped at the stop bar first then maybe creped [sic] forward so that she could see better but is not sure exactly where she was stopped. Christa stated that she looked left and that it was "wide open" so she looked right and then went. She does not think she looked left again because there are no nearby intersections for anybody to start southbound from. I asked Christa Gilland if she recalls how far north she could see and she was not sure of the distance.

CP 275. When she reviewed Det. Leach's report of their conversation from July 1, 2008, Officer Gilland confirmed that "it's accurate." CP 261. She

then confirmed that she is "not exactly sure where [she] stopped" prior to entering the intersection. *Id.*

Officer Gilland was then questioned about her third statement, a declaration that she gave to plaintiff's counsel on March 2, 2011, almost three years after the accident. CP 261-62. This declaration was provided after plaintiff promised not to go after the officer's personal assets. CP 726. This is the first statement Officer Gilland made speculating that the blackberry bushes or power pole *might have* obstructed her view:

> 4. Considering that I know I stopped and looked both ways I am baffled by why I did not see Mr. Wuthrich. On June 20, 2008 I contemplated the intersection and noted the large growth of blackberry bushes at the northwest corner of the intersection. This is the growth of bushes that I was looking through to observe southbound traffic on Avondale Rd. There is also a large telephone pole at the edge of the road (NW corner). I am not an expert, but *I can only think* that at the moment I was looking to the north (left) on Avondale Rd while stopped my vision was obstructed by these bushes or telephone pole, and I did not see Mr. Wuthrich approaching on his motorcycle. In addition, I do not believe there are any direct witnesses to this accident. This may show that there were not any other vehicles in the immediate area coming from either direction that I could see. Again, I did not see Mr. Wuthrich at all until he was right in front of me.

CP 277-78 (emphasis added).

Officer Gilland was asked at her deposition about this new speculative theory that the bushes and pole might have played a role. She confirmed that she was only "speculating" and "guessing" that the bushes or pole *might have* obstructed her view of plaintiff on June 20, 2008. CP 261-

62. Plaintiff's brief fails to disclose or address any of the following testimony:

> Q: And when you use the words I only -- "I can only think," you're speculating that they [bushes and pole] caused an obstruction?...
> A: Yes.

CP 261.

> A: It's the only reason I can come up with. Because I stopped and I looked and I used caution and I did not see him.
> Q: Okay. But you are speculation that they [bushes and pole] are the reason why you did not see him, correct? ...
> A: If you would like to use the word speculate.
> Q: No. I'm asking you, are you speculating that they are the reason why you did not see him?
> A: Yes. ...
> Q: And those are your words?
> A: My words were, "I can only guess."...
> Q: And do you stand by that statement today, that it's a guess?
> A: Yes.

CP 262.

## D. PLAINTIFF'S EXPERTS HAVE NOT PROVIDED ANY OPINIONS THAT THE BUSHES OR POLE OBSTRUCTED OFFICER GILLAND'S SIGHTLINE OR THAT THE INTERSECTION WAS INHERENTLY DANGEROUS TO OFFICER GILLAND.

Plaintiff's brief fails to disclose that his own accident reconstructionist, Mr. Olson, admits that he cannot provide an opinion that the bushes or pole actually played any role in this accident. CP 998. He does not know where Officer Gilland stopped. CP 994. He has no opinion where plaintiff was on the road when she looked left. CP 992. He has no opinion where plaintiff was on the road when she initiated her turn. CP

1000. And he has no opinion whether the bushes or pole actually obstructed Officer Gilland's view of plaintiff to any degree at all during these critical moments. CP 1000.

Mr. Olson testified as follows:

> A:... --the driver of the Honda may have been able to see him, may not have been able to see him depending on where she parked her car and where her position is looking from.

CP 985.

> Q: So in order to answer my question of when was her car available to have been seen [by Mr. Wuthrich], you would only be able to speculate in order to answer that because you do not know where Ms. Gilland stopped her vehicle? ...
> A: That is pretty much the answer.
> Q: Is that correct? ...
> A: Yes.

CP 992.

> Q: So you don't know where Ms. Gilland stopped, correct?
> A: Correct.

CP 994.

> Q: So you do not know whether there was an obstruction for Ms. Gilland that day when she stopped her vehicle on 159th?...
> A: That is correct.

CP 998.

> Q: Now, can you say on a more probable than not basis that Mr. Wuthrich was there to have been seen by Ms. Gilland when she stopped at 159th and looked left? Yes or no? ...
> A: Not unless you tell me where she was stopped.

CP 1000.

> Q: Can you say on a more probable than not basis that Mr. Wuthrich was on Avondale available to have been seen without any obstructions from the pole or bush by Ms. Gilland when she initiated her turn?

A: Can I say that?
Q: Can you say that on a more probable than not basis? ...
A: That he is visible, and the pole and the buses didn't affect her vision when she started accelerate? Is that the question?
Q: Yes. ...
A: I cannot answer that.

*Id.*

Mr. Olson went on to explain the "flaw in the logic" of completing an accident reconstruction in this case. CP 1006-07. He explained that he could not complete a reconstruction because he is missing the critical piece of evidence of where Officer Gilland stopped:

A: ... But here's the danger with this. We could put up any hypothetical and calculate answers for it and have it mesh because we're using the same time. So we can have them move back and they'll always come back together again.
Q: Right. That's the flaw in this logic?
A: It is the flaw in this logic.
Q: And that's why we can't really say for certainty what happened in this accident because we don't know the critical piece of evidence of where she stopped? ...
Q: Correct?
A: Correct. ...

CP 1006-07.

Plaintiff's brief also fails to disclose that his road design expert, Mr. Stevens, evaluated the intersection without considering any details of what occurred in the accident.[8] In fact, plaintiff's counsel confirmed that Mr.

[8] Mr. Stevens admits he did not consider plaintiff's driving speed, what he did moments before the accident, whether he had methadone in his system at the time of the accident, vision issues of either driver, both drivers' familiarity with the intersection, what Officer Gilland was doing before she stopped, where she stopped at the intersection, whether or not her sightline was obstructed, her movements looking for traffic, how long she had to wait before initiating her turn, or how quickly she pulled from the intersection. CP 299-300.

Stevens was "not relying on anything [Officer Gilland] had to say in his analysis." CP 306. This was confirmed by Mr. Stevens:

> Q: And does where she stopped have any relevance as to your opinions of the intersection?
> A: No.

CP 299. While Mr. Stevens' untimely declaration asserts that the intersection had "an inherently dangerous condition" for all motorists, he has never claimed that the supposed condition caused this accident or affected Officer Gilland's driving in any manner.[9] CP 1265, 1331- 1335. More specifically, Mr. Stevens has never provided an opinion that Officer Gilland's view of plaintiff was obstructed on June 20, 2008.

> Q: And so you have no testimony whether the pole or the bushes actually obstructed Ms. Gilland's view of Mr. Wuthrich at the moment she started her turn? ...
> A: That is correct.

CP 305. He, therefore, has not provided an opinion that the intersection was inherently dangerous *to Officer Gilland* on June 20, 2008.

## E. EVEN USING PLAINTIFF'S SPECULATIVE EVIDENCE, PLAINTIFF WAS CLEARLY AVAILABLE TO BE SEEN IF ONLY OFFICER GILLAND HAD LOOKED.

While Officer Gilland knows that she stopped somewhere at the intersection, she can only speculate where she stopped. CP 251 and 256. She did, however, guess that she might have stopped directly over the stop

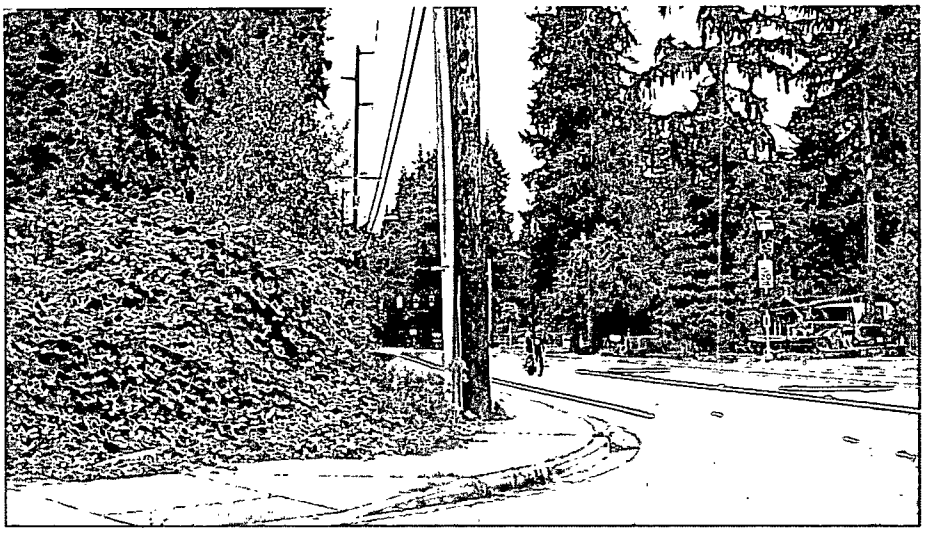
[9] Mr. Stevens' unsupported opinion that the intersection was inherently dangerous to all motorists is directly refuted by the lack of accident history.

bar. CP 256 and 267. If this is accurate, it places her line of sight approximately 15 feet behind the edge of the traveled way (i.e., the extended fog line). *Id.*

Officer Gilland testified that, prior to entering the intersection, she looked left and then right. CP 250. She had to wait for some cars to pass going right to left. *Id.* She was uncertain how many cars she had to wait for, but it was at least one and maybe more. CP 250 and 252. She guesses that she waited "three to five seconds" for traffic to clear. *Id.* She does not believe she looked left again before initiating her left turn. CP 252. She had just started her turn and the plaintiff was in front of her. CP 250.

Plaintiff fails to disclose Mr. Olson's response when he was asked to assume Officer Gilland's "guestimated" stop location and plaintiff's testimony regarding his speed down Avondale. Under that hypothetical scenario, Mr. Olson testified that plaintiff was 117 feet away and would have been clearly visible, without any obstruction from the pole or bushes, when Officer Gilland initiated her turn without looking left again to check for oncoming traffic.[10] CP 290-91. The picture below accurately depicts Mr. Olson's opinion regarding this hypothetical. CP 222-34.

[10] This opinion was given within the confines of a hypothetical, because Mr. Olson was clear that there was a "flaw in the logic" in completing this type of analysis because he could only speculate where Officer Gilland actually stopped. CP 287-88.



Mr. Olson provided no other hypothetical estimates of where plaintiff was on Avondale using Officer Gilland's "guestimated" stopping location. Therefore, Mr. Olson provided no evidence that the bushes or pole obstructed Officer Gilland's view of plaintiff when she looked left, using the assumption that she stopped on top of the stop bar.

Mr. Stevens also provided no opinions on what Officer Gilland's sightline would have been if it was assumed that she stopped on top of the stop bar:

> Q: What evidence do you have that Ms. Gilland's sightline was obstructed based on her deposition testimony that her best estimated stop was on top of the stop bar?
> A: I didn't even go there. I didn't try to do any reconstruction of this thing.

CP 305.

Finally, neither expert provided any evidence or opinion, even within the confines of a hypothetical, that Officer Gilland would have been able to

see plaintiff if she had stopped behind the stop bar and Mr. Stevens' proposed sightline had been in place on June 20, 2008.

## F. MR. OLSON AND OFFICER GILLAND AGREE THAT THERE ARE TWO OTHER PLAUSIBLE CAUSES FOR THIS ACCIDENT: HUMAN ERROR AND OFFICER GILLAND'S FAILURE TO LOOK LEFT A SECOND TIME AS SHE SHOULD HAVE.

Officer Gilland and Mr. Olson agree there are two other possible causes for the accident that had nothing to do with King County: (1) Officer Gilland's human error of failing to detect plaintiff on the roadway because he was riding a motorcycle; and (2) Officer Gilland's failure to look left again before pulling into the intersection. CP 265 and 285.

Regarding human error, Mr. Olson testified that a "predominating cause" for accidents between motorcyclists and other vehicles is a motorist's failure to detect the motorcycle on the roadway. CP 286-87. He testified that motorcycles "blend in with the background for whatever reason." *Id.* He testified that "there are all kinds of publications" in the literature that talk about the conspicuity of motorcycles and that many states have therefore passed laws (such as requiring motorcycles to have their headlights on) to make motorcycles more visible. CP 284. Therefore, Mr. Olson did not rule out that the cause of the accident was Officer Gilland's simple failure to see plaintiff, even though he was fully visible:

> Q: We talked briefly about the literature, and there's a lot out there, about motorists failing to see motorcycles. Have you ruled out that the cause of this accident was Ms. Gilland's simple human failure to see the motorcycle regardless of any obstructions?
> A: No, I have not ruled that out.

CP 285.

Officer Gilland agrees that her human error in failing to see plaintiff's motorcycle on the roadway may have caused of this accident. CP 265.

Regarding Officer Gilland's admitted failure to look to the left again before initiating her turn, Mr. Olson testified that she "should have" done so prior to entering the intersection. CP 285. He testified that "looking left to right is perfectly proper, but then you need to look back to the left because the first danger coming to you will be from your left." *Id.* Mr. Olson conceded that, based on Officer Gilland's "guestimated" stop location, plaintiff would have been clearly visible (according to the diagrams), without any obstruction from the pole or bushes, when Officer Gilland initiated her turn without looking left a second time to check for oncoming traffic. CP 290-91. Mr. Olson, therefore, did not rule out that Officer Gilland's failure to look left again prior to entering the intersection caused the accident:

> Q: Now, because she didn't look left again, how did that, if at all, did it contribute to this accident? ...
> A: That would have been her last chance to see that motorcycle with the exception of seeing it directly in front of her, she accelerated.

> Q: And do you know if Mr. Wuthrich, based on all of the speed calculations of his vehicle was there to have been seen without any obstructions if she had looked left before initiating her turn?
> A: It depends on where she's at when she starts.

CP 285.

Officer Gilland agrees that her failure to look left again prior to initiating her start was the cause of this accident. CP 265.

## IV. ARGUMENT

In this case, King County met its legal duty of providing a reasonably safe roadway for ordinary travel, and plaintiff has produced insufficient evidence to show that King County was a proximate cause of the accident. Therefore, this court should affirm the trial court's order granting King County's motion for summary judgment.

### A. THIS COURT SHOULD AFFIRM THE TRIAL COURT BECAUSE KING COUNTY MET ITS DUTY OF CARE BY PROVIDING A REASONABLY SAFE ROADWAY FOR ORDINARY TRAVEL.

Municipalities have a duty to build and maintain roadways that are reasonably safe for ordinary travel. This includes a duty to eliminate inherently dangerous or misleading conditions. *Owen v. Burlington Northern and Santa Fe Railroad Company,* 153 Wn.2d 780, 786-88, 108 P.3d 1220 (2005) (*overruled on other grounds*). While municipalities owe this duty to both negligent and fault-free travelers, they are not required to "anticipate and protect against all imaginable acts of negligent drivers."

*Keller v. City of Spokane*, 146 Wn.2d at 249; *Ruff v. King Co.*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995) (citations omitted). The law is clear: "...there is no duty to make a safe road safer." *Ruff*, 125 Wn.2d at 707.

In order to defeat summary judgment, plaintiff had the burden of showing that King County (1) failed to follow a binding statute, ordinance, or regulation concerning the design or maintenance of the road; (2) failed to correct a physical defect in the road;[11] or (3) failed to keep the road "reasonably safe for ordinary travel" based on the totality of the surrounding circumstances. *See e.g. Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2008). Plaintiff has not met his burden on any of these elements.

**1. King County followed all binding statutes, ordinances, and regulations regarding the design and maintenance of this intersection.**

"Whether a municipality owes a duty in a particular situation is a question of law." *Keller*, 146 Wn.2d at 243 (citations omitted). The scope of a municipality's duty is limited by the question of to whom the duty is owed, and the nature of the duty. *Id.* (citations omitted). Therefore, before evaluating if King County may have breached its duty of care, the court should determine, as an issue of law, the standard of care required of

[11] Plaintiff has never claimed there was a physical defect in the roadway.

King County in designing and maintaining the intersection. *Chen*, 153 Wn. App. at 908; *Ruff*, 125 Wn.2d at 705. After determining the standard of care, the court should then decide whether there are any disputed issues of material fact with respect to whether King County failed to meet that standard.

*Ruff* clearly defines the standard of care. *Ruff*, 125 Wn.2d at 705. If a municipality has road design standard, those standards set the standard of care required in designing and maintaining the intersection. *Id.* Here, RCW 36.86.080 requires King County to adopt uniform road design standards for all *new* road construction. King County complied with this statute when the King County Council enacted an ordinance adopting the 1993 King County Road Standards. CP 177-191.

The King County Road Design Standards required an entering sightline of 685 feet of visibility, measured 10 feet back from the edge of the traveled way, regardless of the placement of a stop bar. *Id.* The county exceeded this requirement by providing over 730 feet of unobstructed visibility, measured 10 feet back from the edge of the traveled way. *Id.* As shown on page two, this sightline is completely unobstructed by the power pole and bushes. CP 222-34. This exact sightline was provide to Officer Gilland on June 20, 2008.

### 2. The intersection was also reasonably safe for ordinary travel based on the totality of the surrounding circumstances.

Where, as here, the plaintiff cannot show that a municipality failed to follow binding design requirements; the plaintiff may attempt to show that the roadway was inherently unsafe for ordinary travel under the totality of the surrounding circumstances. *Chen,* 153 Wn. App. at 890. In such cases, however, the municipality must be put on notice, through significant accident history or the like, that a dangerous condition existed prior to the accident.[12] Stated another way, a municipality cannot build a roadway in compliance with mandated design requirements and then ignore actual notice that the roadway is not reasonably safe for ordinary travel.

The reverse is also true. If a municipality builds and maintains a roadway that complies with its standards, proves to be reasonably safe for

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[12] *See e.g., Bergland v. Spokane County,* 4 Wn.2d 309, 103 P.2d 355 (1940) (county had actual notice that cars had nearly hit pedestrians on several occasions); *Owen,* 153 Wn.2d at 789-90 (city had actual notice that the crossing had a high volume of high-speed train and car crossings, that the timing of nearby traffic lights frequently forced vehicles to stop on the railroad tracks, that an incline in the road that limited motorists' ability to see traffic signals and approaching trains, and that there were a multitude of remedial measures available to rectify the dangerous condition); *Chen,* 153 Wn. App. at 910 (city had actual notice of (1) several accidents and near-accidents in the crosswalk before plaintiff was struck; (2) public requests for traffic signal at the intersection: (3) multiple accidents before the pedestrian island was put in and after it was removed and no accidents while the pedestrian island was in place; and (4) road design studies, which the city partially incorporated into its own road standards, suggesting modifications to the crosswalk were required).

ordinary travel and the municipality receives no notice that a dangerous condition exists, then the municipality has met its duty of care. *Owen,* 153 Wn.2d at 790 ("If the corrective actions are adequate, then the [municipality] has satisfied its duty to provide reasonably safe roads."); *Ruff,* 125 Wn.2d at 707 ("there is no duty to make a safe road safer").

It is undisputed that King County exceeded its sightline standards when it re-designed and maintained the intersection, that the lack of accident history shows that the re-design produced an extraordinarily safe roadway for ordinary travel and that King County received no notice that this safe intersection was dangerous. CP 177-91, 192-221, and 298. Therefore, under the totality of the circumstances, the legal analysis should end and the trial court's order granting King County's summary judgment should be affirmed.

Regarding the notice issue, plaintiff's brief fails to disclose that his own expert, Mr. Stevens, agrees that there was no notice of an inherently dangerous condition. CP 298. Contrary to that correct opinion, plaintiff argues in his brief that King County was placed on notice by (1) one other accident at this intersection on July 12, 2007; and (2) a photograph taken on October 5, 2007 by a King County employee. Counsel's arguments fail on both counts. The inescapable and undisputed evidence from Mr.

Stevens is that King County had no notice of an inherently dangerous condition. *Id.*

Regarding accident history, the July 12, 2007 accident was not "identical" to this accident. The at-fault driver in the July 17, 2007 accident hit the back end of a car that had already passed in front of him. *See diagram on page 10.* Even if that one dissimilar accident is considered, Mr. Stevens testified that it would take at least 3-5 accidents in a 12 month period to place King County on notice that the intersection was inherently dangerous. Mr. Stevens testified as follows:

> Q: So stated another way, for King County to be put on notice that Avondale and 159th was an inherently dangerous condition based solely on accident history, King County would have to have at least three to five accidents documented at that intersection in a 12-month calendar year? ...
> A: Let me see if I can say it better. It's not the accident history that considers it to be an inherently dangerous condition.
> ...
> A: It's the study of accidents, the type [of] accidents that takes you out to the intersection to do an engineering study to determine whether you have an inherently dangerous condition or not. But what should get you out there, what should raise a flag, is somewheres between three and five over a 12-month period.
> Q: And if there was not three to five over a 12-month period between post road revision in '05 up till the accident of June 20, 2008, then King County would not have been put on notice?
> ...
> A: Relative to the accident history.

CP 296-97. Mr. Stevens, therefore, correctly rejected plaintiff's theory that this one accident -- out of 15-20 million cars -- placed King County on notice. *Id.*

The notice that King County did receive was that this intersection was extraordinarily safe. In the relevant 37 month period, there was only one dissimilar accident out of 15-20 million cars entering this intersection. CP 192-221. So even if one accident is considered relevant, only .00000005 to .000000067 percent of the cars that entered this intersection was involved in an accident after the 2005 road re-design. The intersection therefore had proven itself to be reasonably safe for ordinary travel. *Id.*

Mr. Stevens also rejected plaintiff's argument that the October 5, 2007 photograph somehow placed King County on notice. CP 298. The facts surrounding that photograph are as follows. On October 1, 2007, a citizen contacted King County, stating as follows:

> On the *southeast* corner of the intersection of Avondale and 159th in Woodinville is a lot that the county owns that is infested with Scotch broom. Please remove it immediately so that our neighborhood is not overrun with this noxious weed.

CP 945 (emphasis added.) Mr. Stevens testified that King County's removal of the scotch broom four days later was "prompt." *Id.* Mr. Stevens examined the photograph taken on October 5, 2007 of the *northwest* corner of Avondale and 159th and testified as follows:

> Q: And do you see anything in the ten years' worth of citizen action requests prior to this accident on June 20, 2008, that notified the county of a dangerous condition at the northwest corner of Avondale and 159th?
> A: No.

CP 298.

Mr. Stevens then identified all the other ways that King County could be placed on notice of an inherently dangerous condition. *Id.* He correctly testified that King County could be put on notice by its own employees. *Id.* After Mr. Stevens could not think of any additional way that King County could receive notice and after reviewing the October 5, 2007 photograph taken by a King County employee, Mr. Stevens gave the following testimony:

> Q: And did you see any evidence in the materials that were provided to you to review that King County had any advance notice of a potentially dangerous condition at the intersection of 159th and Avondale? ...
> A: No.

*Id.*

Therefore, plaintiff's own expert agrees that King County did not receive any notice that the northwest corner of Avondale and 159th contained an inherently dangerous condition. *Id.* This conclusion is correct.

The evidence shows, based on the totality of the surrounding circumstances, that King County met its duty of care, and this court should affirm the trial court's dismissal of King County. *Owen,* 153 Wn.2d at 790

("If the corrective actions are adequate, then the [municipality] has satisfied its duty to provide reasonably safe roads."); *Ruff,* 125 Wn.2d at 707 ("there is no duty to make a safe road safer").

**3. King County has no duty to make this safe road safer.**

It is undisputed that King County complied with its mandatory road design standards when it re-built the intersection in 2005. CP 177-91. The county, therefore, does not have to comply with the road design guidelines of other entities. *See e.g. Ruff,* 125 Wn.2d at 705 (holding that the county does not have to follow the federal design manual); *Chen,* 153 Wn. App. at 910 (ruling that road design literature did not carry the "force of law"). Furthermore, King County received no notice that the intersection contained an inherently dangerous condition. It therefore satisfied the totality of the circumstances test because it had no legal duty to make this safe road safer. CP 298; *Owen,* 153 Wn.2d at 790; *Ruff,* 125 Wn.2d at 707.

Despite the clear case law establishing the methodology that must be followed in analyzing road design cases, and the undisputed evidence that King County met its duty of care, plaintiff wants this court to overrule precedent and hold that a jury should be allowed to examine other ways in which this safe intersection *could have* been constructed. Even though the law or facts do not support such an inquiry, King County will nevertheless respond to plaintiff's theories.

**a. While King County is not required to follow state (WSDOT) or federal (AASHTO) road design manuals, the intersection nevertheless complied with both.**

It is undisputed that King County was not legally required to follow either the WSDOT or AASHTO road design manual. *See e.g. Ruff,* 125 Wn.2d at 705 (holding that the county does not have to follow the federal design manual); *Chen,* 153 Wn. App. at 910 (ruling that road design literature did not carry the "force of law.") Plaintiff makes no argument to the contrary. Mr. Stevens agrees:

> Q: Is King County required to follow the AASHTO guidelines?...
> A: No.
> Q: Is King County required to follow the DOT guidelines as respect to sightline? ...
> A: No. No. They are just exactly that. They are nothing more that help. ...

CP 967.

In fact, the county's measuring point for sightlines is exactly the same as one of the measuring points found in the WSDOT road design manual: 10 feet.

> At existing intersections, when sight obstructions within the sight triangle cannot be removed due to limited right of way, the intersection sight distance may be modified. A driver that does not have the desired sight distance will creep out until the sight distance is available; therefore, the 10 ft. stopping distance from the edge of traveled way may be reduced to 2 ft., reducing the setback to 10 ft.

CP 703-07.

As for AASHTO, it requires only 445 feet (instead of 665 feet) of visibility, measured 14.5 feet (instead of 10 feet) behind the edge of the traveled way. Mr. Stevens agrees that the intersection met AASHTO's shorter, but wider, sightline:

> Q: And how much visibility to the east of the power pole is there from 14.5 feet back?
> A: Well, I don't know how much there is but I can guarantee you that it's greater than 445 feet. ...

CP 303.

Furthermore, WSDOT's sightline quoted above is a permissible sightline even if a stop bar is placed at an intersection. CP 703-707. And Mr. Stevens concedes that AASHTO's sightline does not require a modification due to the placement of a stop bar. CP 703-07 and 961.

Therefore, even if the case law allowed a jury to consider how King County *could have* made a safe intersection safer (which it does not), King County still met the non-binding sightline standards found in WSDOT and AASHTO's road design manuals. Plaintiff makes no argument to the contrary.

**b. King County has no duty to follow Mr. Stevens' self-created sightline.**

Instead of looking to the binding King County road design standards or the non-binding WSDOT or AASHTO's road design manuals, plaintiff argues King County should have disregarded all three and instead

implemented Mr. Stevens' self-created sightline. Mr. Stevens claims that King County should have provided motorists on 159th Street a sightline 8 feet behind the stop bar, therefore claiming that King County should have provided 445 feet of visibility measured 23 feet from the edge of the traveled way. CP 964. King County had no duty to follow Mr. Stevens' self-created sightline for the following four reasons.

First, as stated previously, King County is required to follow its lawfully promulgated road design standards. RCW 36.86.080. The county exceeded those standards when it re-designed this intersection in 2005. CP 177-191. The subsequent lack of accident history and the lack of notice showed that the re-design produced a reasonably safe road for ordinary travel. CP 192-221 and 298. King County had no duty to make this safe road safer. *Owen,* 153 Wn.2d at 790; *Ruff,* 125 Wn.2d at 707.

Second, given that King County is not legally required to follow other government's road design manuals, it logically follows that it cannot be required to follow Mr. Stevens' proposed sightline, which he acknowledges is not even in any known road design manual. CP 307-08. *Ruff,* 125 Wn.2d at 705; *Chen,* 153 Wn. App. at 910.

Third, the premise upon which Mr. Stevens' self-created sightline is based is an erroneous guess of what is legally required of motorists. Mr. Stevens claims that the county should have provided a sightline from 8

feet behind the stop bar because motorists *may be prohibited* from stopping in front of a stop bar. CP 961-62. Mr. Stevens' fundamental premise is wrong. The undisputed evidence provided by Officer Gilland and Mr. Olson is that RCW 46.61.190(2) requires motorists to stop at a stop sign or stop bar, *and move ahead and then stop again*, regardless of how many times it takes, to confirm the roadway is clear of on-coming motorists before proceeding into an intersection. CP 243, 247, 258, 281 and 283. Mr. Stevens' erroneous premise about the rules of the road also contradicts the "clear stretch of road doctrine."

> A disfavored driver's obstructed view of a favored vehicle does not constitute deception. It is the duty of the disfavored driver approaching an obstructed intersection to make his observations from a point at which he can clearly observe, not from a point back from the intersection where his view is materially impaired.

*Sanders v. Crimmins,* 63 Wn.2d 702, 706, 388 P.2d 913 (1964) (citations omitted). Mr. Stevens also admits that RCW 46.61.190(2) says nothing about sightline distances or sightline triangles and is not a road design manual. CP 304.

Fourth, Mr. Steven claims that King County was required to apply his self-created sightline that he bases in part on a "guidance" provision found in the U.S. Department of Transportation Manual on Uniform Traffic Control Devices (MUTCD), which reads as follows:

> Guidance:
> If used, stop and yield lines should be placed a minimum of 1.2 m (4 ft) in advance of the nearest crosswalk line at controlled intersections, except for yield lines at roundabout intersections a provided in Section 3B.24 and at midblock crosswalks. In the absence of a marked crosswalk, the stop line or yield line should be placed at the desired stopping or yielding point, in no case less than 4 feet from the nearest edge of the intersecting roadway. Stop lines should be placed to allow sufficient sight distance to all other approaches to an intersection.

CP 690-96. King County had no duty to create a sightline of 445 feet, measured 8 feet behind the stop bar based on this "guidance" provision for the following five reasons.

First, as Mr. Stevens concedes, the MUTCD is not a road design manual and is not referenced in the King County's sightline standards. CP 304 and 307. Instead, it controls the uniform application of traffic control devices, such as the color, size and shape of traffic control devises. King County has no obligation to follow outside road design manuals. It therefore follows that the county has no obligation to follow a reference found in a traffic control device manual. *Ruff,* 125 Wn.2d at 705; *Chen,* 153 Wn. App. at 910.

Second, the MUTCD manual that contains this "guidance" provision was not adopted until seven months *after* the 2005 road re-design was complete. CP 596-98 and 679-96. King County had no obligation to go back later to make this safe road safer or update it to

present-day standards. *Owen,* 153 Wn.2d at 790; *Ruff,* 125 Wn.2d at 706 (holding the county's duty does not require it to update every road and roadway structure to present-day standards.).

Third, while the King County Road Design Standards do adopt the MUTCD's "standards," they do not adopt the MUTCD's "guidance" provisions. CP 595 and 649-697. Therefore, King County was not required to follow the "guidance" provision cited above. *Ruff,* 125 Wn.2d at 705; *Chen,* 153 Wn. App. at 910.

Fourth, plaintiff has no evidence that Mr. Stevens' self-created sightline has been studied for its safety.[13] Therefore, King County had no

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[13] The MUTCD "guidance" provision does not define what it means by the term "sufficient sight distance to all other approaches to the intersection." CP 690-96. Yet, Mr. Stevens makes up a sight distance of 445 feet of visibility, measured 23 feet behind the edge of the traveled way. Thus, even though it would take a motorist longer to get through the intersection than it would under the King County, WSDOT, or AASHTO sightline standards, Mr. Stevens claims only 445 feet of visibility is needed. It should be noted that Mr. Stevens' self-created sightline provides 220 feet less of visibility than the King County sightline standards.

During his deposition, Mr. Stevens provided his rationale for arriving at 445 feet.

> Q: And how do you determine at 23 feet that it has to be 445 feet of visibility?
> A: That's the standard. I read it to you here today.
> Q: What standard says from 23 feet back it has to be 445 feet?
> A: It doesn't go 23 and it doesn't say 21 and it doesn't say 19 and it doesn't say 40 feet. It doesn't say 50 feet. It says 7.5 seconds. *From wherever you are,* you have to have 7.5 seconds of clear visibility. That's what it says.

CP 305 (emphasis added). Therefore, Mr. Stevens thinks that motorists only need 445 feet of visibility *no matter where they stop.* King County had no legal duty to install this untested, self-created, and possibly dangerous sightline. Mr. Stevens' opinion on this issue should not be considered. *See e.g. Safeco Ins. Co. v. McGrath,* 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *review denied,* 118 Wn.2d 1010, 824 P.2d 490 (1992) ("It is well-established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.")

legal obligation to follow such an untested and potentially dangerous sightline.

Fifth, plaintiff has never produced any evidence or opinion that Mr. Stevens' self-created sightline would have prevented this accident. In fact, Mr. Olson and Mr. Stevens have not opined that Officer Gilland's sightline was actually obstructed. They have no opinion regarding where plaintiff was on the road when Officer Gilland looked left. And they have no opinion whether plaintiff would have been visible to Officer Gilland, if she had stopped 23 feet from behind the edge of the traveled way. Therefore, King County had no duty to implement a sightline that may not have prevented this accident.

**c. King County does not have a duty to maintain vegetation off the roadway.**

There are two Supreme Court decisions that delineate a municipality's duty to maintain vegetation within its right-of-way. These cases are *Barton v. King County,* 18 Wn.2d 573, 577, 139 P.2d 1019 (1943) and *Bradshaw v. City of Seattle,* 43 Wn.2d 766, 774, 264 P.2d 265 (1953). These cases hold that "where a street itself is reasonably safe for public travel, it is not rendered inherently dangerous solely because a municipality fails to cut down natural vegetation which tends to obstruct the view of an intersection." *Bradshaw,* 43 Wn.2d at 774.

The court in *Barton* held that vegetation cases fall inside of the "general rule" that municipalities are only liable for maintaining the width of the road, and that they have no duty with respect to the portion of the street allowed to remain in a state of nature. *Barton,* 18 Wn.2d at 576. The court also ruled that natural vegetation obscuring the view of a motorist does not render an intersection inherently dangerous to travelers exercising reasonable care. *Id.* The court reasoned that to hold otherwise "would be to hold, literally, that thousands of county road intersections are inherently dangerous. To so hold would impose an imponderable responsibility upon counties." *Id.*

Plaintiff argues that these cases are no longer good law due to the waiver of sovereign immunity in 1961. Plaintiff's argument ignores the fact that well prior to the waiver of sovereign immunity, municipalities could already be sued for their failure to build and maintain roadways that were reasonably safe for ordinary travel. This duty has remained unchanged since 1940.[14] The waiver of sovereign immunity, therefore, had no effect on this controlling and well-reasoned case law.

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[14] In *Barton,* the Supreme Court refused to dismiss King County from the action based on sovereign immunity. Instead, the court ruled "that a municipality must maintain the improved portion of the highway in a reasonably safe condition for ordinary travel" applied. *Barton,* 18 Wn.2d at 578 (re-affirming the standard announced in *Bergland v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940)). In *Bradshaw,* the City of Seattle requested dismissal of the action based on sovereign immunity. The Supreme Court disagreed, holding that "a municipality may be held liable for injuries resulting from ministerial acts relating to the improvement and maintenance of public streets." *Bradshaw,* 43 Wn.2d at

### 4. The trial court correctly followed *Keller* in ruling that King County only had a duty to exercise ordinary care to build and maintain this intersection in a reasonably safe manner for the foreseeable acts of motorists.

Plaintiff claims that the trial court relied on the incorrect legal standard when it granted King County's motion for summary judgment. This claim is contradicted by the record and the applicable case law.

First, plaintiff fails to disclose that the trial court twice stated that there were "numerous" reasons why it was granting King County's motion for summary judgment, not just the one attacked by plaintiff. VRP 61 (7/27/12); VRP 12 (8/24/12). In fact, the trial court ruled that King County did not breach its duty of care and that it was not a proximate cause of this accident. CP 1279-80.

Second, plaintiff erroneously attacks the trial court's use of the word "prudent" in its oral rulings. The *Keller* court re-affirmed that municipalities are neither insurers against accidents nor the guarantors of public safety and are not required to "anticipate and protect against all imaginable acts of negligent drivers." *Keller*, 146 Wn.2d at 252 (citing *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979)). *Keller* also re-

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773. Therefore, the Supreme Court found in 1943 and again in 1953 that governmental entities owe a duty to motorists to build and maintain a reasonably safe roadway for ordinary travel. Neither case was dismissed on sovereign immunity, even though sovereign immunity existed at the time. Therefore, the change in law regarding sovereign immunity did not affect the precedential value of these cases. *See McGough v. City of Edmonds*, 1 Wn. App. 164, 169, 460 P.2d 302 (1970).

affirmed that a municipality "only has a duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the *foreseeable acts* for those using the roadways." *Keller,* 146 Wn.2d at 252 (emphasis added) (citing *Bergland v. Spokane County,* 4 Wn.2d 309, 319-21, 103 P.2d 355 (1940)). Because the Supreme Court acknowledged that municipalities only have a duty to exercise ordinary care for foreseeable acts, the court "decline[d] to remove the modifier 'ordinary' from travel," as that would have changed the scope of a municipality's duty. *Keller,* 146 Wn.2d at 254.

Consistent with *Keller*, the trial court correctly reasoned as follows:

> If you can't see where you're going you don't go into the lane of traffic. It's fundamental. It's not a -- something you can be deceived upon by the designs of the road. You know, you just simply don't go into the lane of traffic where you can't see to travel. A prudent driver would not do that.
> ...
> It would be different if there's a big hill there or something where you can't see anything, I suppose. But this is a situation if you did edge out into the traffic, you can see. It's not a situation where someone is roaring down the street at 75 miles an hour and there's a big dip or something there, which would create a deceptive or dangerous condition even to a reasonably prudent driver. That's not the condition here. The facts in this case, I think support very much the county. I will grant the summary judgment on both grounds [no breach of duty and no proximate cause].

VRP 60-61, 68 (7/27/12).

In his motion for reconsideration, plaintiff claimed the trial court was either not aware of or improperly applied the *Keller* decision when it granted King County's motion for summary judgment. In denying the motion, the trial court assured the parties it had read and applied *Keller*. VRP 6 (8/24/12). The court reiterated that it did not see any evidence that King County failed to provide a reasonably safe roadway for ordinary (foreseeable) travel. The court stated as follows:

> That was something that focused on my mind, and I'm still not persuaded that it isn't a valid point even re-reading *Keller,* because the point I was really making is that the public entities are not here to ensure that our roads are always safe against any conduct that happens on the road. It's to design a road that is not inherently dangerous.
>
> And the evidence I had in this case I did not see evidence that road, line of travel, was inherently dangerous or provided a -- was built in a negligent manner or maintained in a negligent manner.
> All of the above reasons, the motion for reconsideration is denied.

VRP 12-13 (8/24/12).

Therefore, the trial court properly followed *Keller,* ruling that "ordinary" travel means that a motorist will comply with the "clear stretch of road doctrine"[15] and that it was not foreseeable that Officer Gilland would fail to pull forward to look for traffic from a clearly available place where

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[15] "A disfavored driver's obstructed view of a favored vehicle does not constitute deception. It is the duty of the disfavored driver approaching an obstructed intersection to make his observations from a point at which he can clearly observe, not from a point back from the intersection where his view is materially impaired." *Sanders v. Crimmins,* 63 Wn.2d 702, 706, 388 P.2d 913 (1964) (citations omitted).

her view would be completely unobstructed. The reality is that King County provided an unobstructed sightline that fully complied with its lawfully adopted standards. And that sightline proved to be reasonably safe based on the lack of complaints and infinitesimal accident history. The trial court therefore correctly determined that the intersection was not inherently dangerous and that the county had met its duty of care to provide a reasonably safe roadway for ordinary travel. The trial court correctly applied the *Keller* case and its ruling should be affirmed.

## B. THIS COURT SHOULD AFFIRM THE TRIAL COURT BECAUSE PLAINTIFF CANNOT SHOW THAT KING COUNTY WAS A PROXIMATE CAUSE OF HIS INJURIES.

Even if plaintiff could show breach of duty, he has failed to produce sufficient evidence on proximate cause. *Pratt v. Thomas,* 80 Wn.2d 117, 119, 491 P.2d 1285 (1971). Proximate cause has two elements: legal causation and cause in fact. Legal causation rests on policy considerations as to how far the consequences of a defendant's acts should extend, and it involves a determination of whether liability *should* attach as a matter of law given the existence of the cause in fact. *Hartley v. State,* 103 Wn.2d 768, 776, 698 P.2d 77 (1985) (emphasis added). If the factual elements of the tort are proved, determination of legal liability depends on "mixed considerations of logic, common sense, justice, policy, and precedent." *King v. Seattle,* 84 Wn.2d 239, 250, 525 P.2d 228 (1974)

*(quoting 1 T. Street, Foundations of Legal Liability 110 (1906)).* Cause in fact refers to the "but for" consequences of an act -- the physical connection between an act and the injury. *Hartley,* 103 Wn.2d at 778. Plaintiff cannot show that King County was the legal cause or a cause in fact of his injuries.

This court should affirm the trial court's finding that plaintiff failed to establish legal causation. Logic, common sense, justice, policy, and precedent dictate that King County should not be the legal cause of this accident. Municipalities cannot make motorists pull forward to use an available, unobstructed view of on-coming traffic. Nor can they make motorists turn their heads to make sure the intersection is clear before entering. King County should not be deemed the legal cause of plaintiff's injuries when it had no control over Officer Gilland's failure to pull forward to view traffic from the available, unobstructed sightline or her failure to look left again to make sure the intersection was clear before entering, after waiting several seconds for cars to pass from her right.[16] *See e.g. Klein v. City of Seattle,* 41 Wn. App. 636, 705 P.2d 806 (1985).

Second, plaintiff cannot show that King County was a cause in fact of his injuries. A plaintiff's showing of cause in fact must be based on more than mere conjecture or speculation. *Ruff,* 125 Wn.2d at 703. "The

[16] No witness can testify where Officer Gilland stopped. Therefore, it is unknown if she availed herself of the unobstructed sightline.

cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another." *Moore v. Hagge,* 158 Wn. App 137, 148, 241 P.3d 787 (2010) (citation omitted). Therefore, plaintiff must show more than that King County's breach of duty *might* have caused the injury. *See e.g. Miller v. Linkins,* 109 Wn. App. 140, 145, 34 P.3d 835 (2001). Yet all plaintiff has regarding cause in fact is speculation. Officer Gilland confirms that she does not know where she stopped, she does not know how far down Avondale she could see when she did stop and she does not know if the bushes or pole obstructed her view. CP 251, 256, 258, 261-62.

This is not just King County's assessment of plaintiff's evidence. Plaintiff's own expert, Mr. Olson, conceded he did not complete an accident reconstruction because there was a "fault in the logic" of completing an accident reconstruction based on speculation. CP 1006-07. Therefore, Mr. Olson could not to opine that the bushes or pole obstructed Officer Gilland's view of plaintiff, where plaintiff was on the road when Officer Gilland looked left, or where he was when she initiated her turn. CP 992, 994, 998 and 1000. Mr. Olson also correctly conceded that there are two other possible causes of the accident that had nothing to do with King County: human error in detecting plaintiff on the roadway, and

Officer Gilland's failure to look left again before initiating her turn. CP 285. Plaintiff's other expert, Mr. Stevens, also gave no opinion that the bushes or pole obstructed Officer Gilland view or that the intersection was inherently dangerous to Officer Gilland on June 20, 2008.

As a direct result of this evidentiary void, plaintiff has insufficient evidence to prove that King County was a cause in fact of his injuries. Plaintiff has nothing more to offer than his argument that the bushes or pole *might have* obstructed Officer Gilland's view. Therefore, a jury should not be allowed to speculate how this accident happened.[17]

Furthermore, plaintiff does not even make the argument that Mr. Stevens' self-created and un-vetted sightline *might have* prevented this accident. This single evidentiary void is fatal to plaintiff's case, because such an argument, even if it were made, is based on speculation that Officer Gilland *might have* reacted differently if given an alternative sightline.[18]

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[17] *See e.g. Gardner v. Seymour,* 27 Wn.2d 802, 809, 180 P.2d 564 (1947) (holding a jury will not be permitted to conjecture how the accident happened if there is nothing more than two or more conjectural theories under one or more of which a defendant would be liable); *Johanson v. King County,* 7 Wn.2d 111, 122, 109 P.2d 307 (1941) (holding plaintiff's case failed because he could only show that the at-fault driver "might have been deceived and misled by the yellow line"); *Nakamura v. Jeffery,* 6 Wn. App. 274, 276, 492 P.2d 244 (1972) (affirming trial court's judgment of dismissal, because it would be mere guessing that the at-fault driver was deceived or misled by the existence of the garage, bulkhead and hedge).

[18] *See e.g. Kristijanson v. City of Seattle,* 25 Wn.App. 324, 326, 606 P.2d 283 (1980) (holding there was insufficient evidence to prove cause in fact when plaintiff's contentions are based on speculation and conjecture that an at-fault driver *might have* reacted in a way to avoid the accident if he had been given additional sight distance or additional warning signs); *Ruff,* 125 Wn.2d at 706-07 (affirming the trial court's order

Judge Johnson's well-supported and correct order granting summary judgment on the claims against King County should, therefore, be affirmed.

## V. CONCLUSION

KingCounty did not breach its duty of care. After King County received notice of a high number of accidents on Avondale, it responded by re-designing the intersection. In doing so, the county complied with binding and non-binding road design standards. During the 37 months between the road re-design and this accident, the county received no notice that the intersection was dangerous. Instead, the re-designed intersection proved to be extraordinarily safe. Under these facts, King County had no duty to make this safe road safer and it had no duty to install Mr. Stevens' self-created sightline which cannot be found in any known road design manual, has not been vetted for its safety, and may not have prevented this accident.

Plaintiff cannot prove King County was a proximate cause of his injuries. First, King County should not be the legal cause of this accident because it could not make Officer Gilland avail herself of the unobstructed sightline or turn her head to look for oncoming traffic before entering the intersection. Second, there is insufficient evidence that King County was a cause in fact of plaintiff's injuries. Officer Gilland does not know where she

granting summary judgment, in part, because plaintiff's expert provided no evidence or opinion that a guardrail would have prevented plaintiff's injury).

stopped or whether her sightline was obstructed by the pole or bushes. And plaintiff's experts offered no opinion that the bushes or pole actually played a role in the accident or that the intersection was inherently dangerous to Officer Gilland.

The Honorable Garold E. Johnson correctly granted King County's motion for summary judgment. King County respectfully requests that this court affirm that correct order.

DATED this 29th day of March, 2013.

RESPECTFULLY submitted,

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Certificate of Service

On March 29, 2013, I served the foregoing Original and 1 copy via legal messenger to the clerk's office of the WA Court of Appeals Division II and served the same via email to the following attorneys:

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

Liah Travis, Paralegal — 3/29/13 Date
Done in Seattle, Washington