FILED
JULY 15, 2015
Court of Appeals
Division III
State of Washington

No. 32909-7

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION III

MADELYNN M. TAPKEN,

Appellant,

v.

SPOKANE COUNTY, a municipal corporation,

Respondent

and

CONRAD MALINAK,

Appellant.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
Honorable John O. Cooney

REPLY BRIEF OF APPELLANT MADELYNN M. TAPKEN

FELICE LAW OFFICES, P.S.
Roger A. Felice
505 W. Riverside Ave, Suite 210
Spokane, Washington 99201-0518
(509) 326-0510

CARNEY BADLEY SPELLMAN, P.S.
Nicholas P. Scarpelli, Jr.
Jason W. Anderson
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Appellant Madelynn M. Tapken

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. REPLY ON STANDARD OF REVIEW 2

III. REPLY TO "ARGUMENT IN SUPPORT OF JUDGMENT" 3

IV. REPLY TO "ARGUMENT IN RESPONSE TO APPELLANTS' BRIEF" 4

A. The trial court erred in entering judgment as a matter of law. 4

1. Substantial evidence was presented from which a jury could find that Spokane County failed to eliminate or safeguard against an inherently dangerous or misleading condition. 4

2. Substantial evidence was presented from which a jury could find that an inherently dangerous and misleading condition was a proximate cause of the accident in that it caused Malinak's failure to reduce his speed sufficiently for the curve. 14

B. The trial court erred in excluding the evidence of dozens of prior accidents as not relevant. 20

C. The trial court erred in excluding Mr. Harbinson's causation opinion. 22

D. The trial court erred in denying summary judgment to strike the County's allegation that Tapken was contributorily negligent. 24

V. CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Barton v. King County,
18 Wn.2d 573, 139 P.2d 1019 (1943) 10, 11

Berglund v. Spokane County,
4 Wn.2d 309, 103 P.2d 355 (1940) 11

Bradshaw v. City of Seattle,
43 Wn.2d 766, 264 P.2d 265 (1953) 10, 11

Bunnell v. Barr,
68 Wn.2d 771, 415 P.2d 640 (1966) 7

Chen v. City of Seattle,
153 Wn. App. 890, 223 P.3d 1230 (2009),
review denied, 169 Wn.2d 1003 (2010) 5, 11, 13, 21

Davis v. Baugh Indus. Contractors, Inc.,
159 Wn.2d 413, 150 P.3d 545 (2007) 22, 23

Eichler v. Yakima Valley Transp. Co.,
83 Wn.2d 1, 514 P.2d 1387 (1973) 17

Faust v. Albertson,
167 Wn.2d 531, 222 P.3d 1208 (2009) 2

Goodman v. Goodman,
128 Wn.2d 366, 907 P.2d 290 (1995) 2

Harris v. Burnett,
12 Wn. App. 833, 532 P.2d 1165 (1975) 17

Hough v. Ballard,
108 Wn. App. 272, 31 P.3d 6 (2001) 17

In re Dependency of C.B.,
61 Wn. App. 280, 810 P.2d 518 (1991) 2

Johnson v. Rothstein,
52 Wn. App. 303, 759 P.2d 471 (1988) 24

Page(s)

Kappelman v. Lutz,
167 Wn.2d 1, 217 P.3d 286 (2009) 18

Keller v. City of Spokane,
146 Wn.2d 237, 44 P.3d 845 (2002) 12

Meabon v. State,
1 Wn. App. 824, 463 P.2d 789 (1970) 13

Osborn v. Lake Wash. Sch. Dist. No. 414,
1 Wn. App. 534, 462 P.2d 966 (1969) 2

Owen v. Burlington N. & Santa Fe R.R. Co.,
153 Wn.2d 780, 108 P.3d 1220 (2005) 11, 12, 13

Paetsch v. Spokane Dermatology Clinic, P.S.,
182 Wn.2d 842, 348 P.3d 389 (2015) 2

Provins v. Bevis,
70 Wn.2d 131, 422 P.2d 505 (1967) 5

Raybell v. State,
6 Wn. App. 795, 496 P.2d 559 (1972) 5

Schmidt v. Coogan,
162 Wn.2d 488, 173 P.3d 273 (2007) 2

Schneider v. Yakima County,
65 Wn.2d 352, 397 P.2d 411 (1965) 5, 6

Simmons v. Cowlitz County,
12 Wn.2d 84, 120 P.2d 479 (1941) 6

Tanguma v. Yakima County,
18 Wn. App. 555, 569 P.2d 1225 (1977) 11, 21

Toftoy v. Ocean Shores Props., Inc.,
71 Wn.2d 833, 431 P.2d 212 (1967) 22

Tyler v. Pierce County,
188 Wash. 229, 62 P.2d 32 (1936) 13

Page(s)

Ulve v. City of Raymond,
51 Wn.2d 241, 317 P.2d 908 (1957) 16

Weber Constr., Inc. v. County of Spokane,
124 Wn. App. 29, 98 P.3d 60 (2004) 2

Wojcik v. Chrysler Corp.,
50 Wn. App. 849, 751 P.2d 854 (1988) 16, 17

Wright v. City of Kennewick,
62 Wn.2d 163, 381 P.2d 620 (1963) 21

Zukowsky v. Brown,
1 Wn. App. 94, 459 P.2d 964 (1969),
aff'd, 79 Wn.2d 586, 488 P.2d 269 (1971) 24

Constitutional Provisions, Statutes and Court Rules

CR 50(a)(1) 2

ER 103(a)(2) 23

RCW 46.61.190(3) 12, 20

RCW 46.61.400(3) 12, 17

Treatises

TEGLAND, 14A WASH. PRAC., CIV. PROC. § 24:1 (2d ed. 2009) 2

TEGLAND, 14A WASH. PRAC., CIV. PROC. § 24:13 (2d ed. 2009) 7

TEGLAND, 14A WASH. PRAC., CIV. PROC. § 33:17 (2d ed. 2009) 2

Other Authorities

MUTCD §§ 2B.08, 2B.09 (2003 ed.) 20

I. INTRODUCTION

The County fails to demonstrate that this is one of the rare instances where it was appropriate to take a case from the jury at trial.

The County recognizes that the trial court's rationale for dismissing the case reads as if the liability theory against the County was premised on the bare fact that the yield sign on the right leg of the Waverly 'Y' was obscured by vegetation. Half of the County's argument is written under the presumption that the trial court was correct in this assessment. It was not. The lack of visibility of the yield sign was but one factor that contributed to create an inherently dangerous or misleading condition.

The other half of the County's argument mischaracterizes the evidence actually presented at trial and misstates or misapplies the law. Substantial evidence was presented that (1) the County failed to eliminate or safeguard against an inherently dangerous or misleading road condition at the Waverly 'Y' and (2) because of such condition, Malinak was surprised by, and thus unprepared for, the sharpness of the curve to the right in that he failed to reduce his speed sufficiently for the curve. This created the necessity for evasive maneuvers, or the appearance of such necessity, leading to the accident. A jury could find the elements of breach and proximate cause satisfied. This Court should reverse the judgment and remand for trial, with directions as requested.

II. REPLY ON STANDARD OF REVIEW

The County incorrectly suggests that the trial court exercises discretion in ruling on a motion for judgment as a matter of law. *Respondent's Brief* at 12-13. Under Washington law, "[n]o discretion is involved." *Osborn v. Lake Wash. Sch. Dist. No. 414*, 1 Wn. App. 534, 535, 462 P.2d 966 (1969).[1] *See Appellant Tapken's Opening Brief* at 2. A judgment as a matter of law is reviewed de novo. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 848, 348 P.3d 389 (2015), citing *Faust*, 167 Wn.2d at 539 n.2; *see also Weber Constr., Inc. v. County of Spokane*, 124 Wn. App. 29, 33, 98 P.3d 60 (2004).

A motion for judgment as a matter of law "admits the truth of the opponent's evidence and all inferences which can reasonably be drawn." *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009). "Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists to sustain a verdict for the nonmoving party." *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007); *see also* CR 50(a)(1).[2]

---

[1] *See also Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995); TEGLAND, 14A WASH. PRAC., CIV. PROC. § 24:1 (2d ed. 2009).

[2] "Substantial evidence" is such a low threshold that it is "sometimes referred to, only partly in jest, as the 'any evidence' rule." TEGLAND, 14A WASH. PRAC., CIV. PROC. § 33:17 (2d ed. 2009). Distinguished from a mere scintilla, it is the nominal quantum of evidence necessary to satisfy the burden of production, *i.e.*, evidence from which the jury *could* find a fact by a preponderance of the evidence. *In re Dependency of C.B.*, 61 Wn. App. 280, 285, 810 P.2d 518 (1991). The evidence can be direct or circumstantial. *Faust*, 167 Wn.2d at 538.

III. REPLY TO "ARGUMENT IN SUPPORT OF JUDGMENT"

The County divides its argument into two main sections. The County acknowledges that the first section, entitled "Argument in Support of Judgment," is not responsive to the arguments in Appellant Tapken's Opening Brief. Instead, the County attempts in this section to justify the trial court's dismissal ruling by presuming, as did the trial court, that the liability theory against the County was premised on the bare fact that Malinak was deprived of adequate sight distance to the yield sign on the right leg of the intersection. *See Respondent's Brief* at 15 ("The court's remarks reflect Plaintiffs' [sic[3]] trial theory that the cause of the accident was Mr. Malinak's failure to slow because there was not enough sight distance to a yield sign[.]"). The fatal defect in this theory, according to the County and the trial court, is that a visible yield sign on the right would not have affected Malinak's speed because he testified that a yield sign alone would not cause him to slow down absent cross traffic.

This constrained view of the evidence and theories presented is not consistent with the record. As the County acknowledges in its second main argument section, Tapken and Malinak presented evidence that (1) the road configuration and signage could mislead motorists to conclude that the right leg of the 'Y' was the main roadway, and not to expect a sharp curve, *Respondent's Brief* at 36-37; (2) the bush obscured not only

[3] The County incorrectly refers to Defendant and Cross-Claimant Conrad Malinak as a "plaintiff." Tapken is the named plaintiff.

the yield sign on the right but the curve's sharpness, *id.* at 30; and (3) the signage on other curves leading up to the Waverly 'Y' led motorists to expect to be warned of sharp curves. *Id.* at 38. There was also substantial evidence of a causal link between these defects and the accident.

Most of the arguments in the County's first argument section warrant no further response because, like the trial court's stated rationale, they ignore the evidence and theories presented at trial. For instance, there is no point in responding to the argument that "Plaintiffs [sic] failed to present evidence [that] the lack of visibility of the yield sign caused Mr. Malinak's purported excess speed for the turn[,]" *Respondent's Brief* at 24, because visibility of the yield sign alone is not determinative of the County's liability. *See, e.g., Appellant Tapken's Opening Brief* at 35-39. The arguments that the County repeats in both of its argument sections or that otherwise warrant a response are addressed below.

IV. REPLY TO "ARGUMENT IN RESPONSE TO APPELLANTS' BRIEF"

A. The trial court erred in entering judgment as a matter of law.

1. Substantial evidence was presented from which a jury could find that Spokane County failed to eliminate or safeguard against an inherently dangerous or misleading condition.

Substantial evidence was presented at trial from which the jury could have found the existence of at least three inherently dangerous or misleading conditions, already listed above and in Appellant Tapken's Opening Brief, that could cause motorists not to slow down sufficiently to negotiate the right-hand curve at the Waverly 'Y': (1) misleading

configuration and inadequate signage, (2) obscured sharpness of the curve, and (3) expectation of a warning.

A plaintiff need not establish the existence of a physical defect in the roadway itself to establish an inherently dangerous or misleading condition. *Chen v. City of Seattle*, 153 Wn. App. 890, 902, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010). A roadway may instead be dangerous or misleading by its design or signage:

> A roadway may be just as hazardous and deceptive by its design as by its surface. A roadway may be rendered as hazardous and deceptive by the placement of its signs…as it is by an obstruction in its traveled portion.

Raybell v. State, 6 Wn. App. 795, 802, 496 P.2d 559 (1972), citing *Provins v. Bevis*, 70 Wn.2d 131, 138-39, 422 P.2d 505 (1967) (holding that the trial court properly submitted to the jury the claim that a dead-end warning sign was negligently placed). Whether a roadway is inherently dangerous or misleading is determined in light of all the surrounding circumstances. *Chen*, 153 Wn. App. at 902-04.

The County cites a particularly analogous case of inherently dangerous or misleading design: *Schneider v. Yakima County*, 65 Wn.2d 352, 397 P.2d 411 (1965). *See Respondent's Brief* at 18. In that case, like here, the driver was misled by a road configuration involving a sharp, hidden curve immediately following a 'Y' intersection. 65 Wn.2d at 354-55. The road curved sharply to the right and dipped before curving back to the left, such that a motorist could be misled to perceive that the road was straight. *Id*. at 355. Affirming the judgment on a verdict for the

plaintiff, a passenger, the Supreme Court held that "the jury could conclude that the County was responsible for a lethal trap in not placing signs indicating a safe speed, or in cautioning drivers to drastically reduce speed[.]" *Id*. at 357.[4]

Here, as in *Schneider*, substantial evidence was presented from which a jury could find the existence of an inherently dangerous or misleading condition, resulting in excessive speed, which the County failed to eliminate. Malinak testified that, when he saw the yield sign on the left leg and no visible yield sign on the right leg, it appeared to him that "the main part of the highway went to the right." RP 967. Tapken's experts confirmed that the road configuration, limited visibility, and signage could mislead motorists not to expect a sharp curve. RVPD[5] 20-22, 31-34, 66-70, 85-86, 153-54; RP 885-86. Indeed, similar to the "lethal trap" in *Schneider*, Mr. Stevens testified that the visibility of the yield sign on the left leg, and the lack of visibility of the yield sign on the right leg, was "an entrapment to a vehicle who wants to go to the right." RPVD 68.

The posted speed limit for Prairie View Road was 45 miles per hour. RVPD 38-39. Malinak was traveling at about the speed limit until he slowed down 5 or 10 miles per hour in anticipation of the intersection and curve. RP 968, 1022-23. The undisputed maximum reasonable safe

---

[4] *See also Simmons v. Cowlitz County*, 12 Wn.2d 84, 89, 120 P.2d 479 (1941) (reversing JNOV for county where misleading appearance of unsafe shoulder "was such as to invite its use").

[5] Redacted Videotaped Perpetuation Deposition of Edward M. Stevens ("Volume 10"). *See Appellant Tapken's Opening Brief* at 6 n.4.

speed for the curve is 20 miles per hour. RVPD 64, 84; RP 767. Approaching the curve at 35 to 40 miles per hour, a motorcycle operator would have insufficient perception-reaction time, after the sharpness of the curve became visible past the bush, to slow down enough to make the curve. RP 767-72, 777-78, 791-92, 1379. There was no warning of the curve's sharpness or to slow down. RP 826-29. Compounding the problem, the destination sign pointing right to Spangle and left to Waverly was posted beyond the 'Y,' rather than 200 feet in advance, as the MUTCD requires. *See* Exh. P129 (Appx. 4 to *Appellant Tapken's Opening Brief*). RP 550-52; *see also* RVPD 72-73; MUTCD § 2D.35 (Exh. D108).

The County does not address the misleading configuration or inadequate signage in the context of its argument on breach of duty. Instead, it addresses only one condition: visibility of the *presence* of a curve. The County asserts that photographs contradict the notion that the hawthorn bush "obscured visibility of the turn itself." *Respondent's Brief* at 30. The County relies upon the physical facts doctrine, which is "a variation on the notion of judicial notice." TEGLAND, 14A WASH. PRAC., CIV. PROC. § 24:13 (2d ed. 2009). It requires that the physical facts be undisputed and "manifestly irreconcilable" with the contrary testimony. *Bunnell v. Barr*, 68 Wn.2d 771, 776, 415 P.2d 640 (1966). This Court should reject the County's invitation to find facts based on still photographs, contrary to the testimony of eyewitnesses and of experts who did extensive testing and analysis.

In any event, the County attacks a straw man. No one has claimed that the curve was *completely* obscured. It is undisputed that Malinak could see there was a curve to the right—that was why he slowed down:

> Q. And so on your approach were you doing the speed limit?
>
> A. Yes. And then ***as I saw the road looked like it went to the right, I slowed down a little bit***.

RP 1022 (emphasis added). He also started leaning right because he saw the curve. RP 968. The problem was not visibility of the curve's *presence*, but its *sharpness*, *i.e.*, one could not see the sharpness of the curve until it was too late to slow down adequately. Malinak testified that his first opportunity to view the sharpness of the curve was as he passed the unmaintained hawthorn bush. RP 967-68.

Mr. Stevens testified repeatedly that the hawthorn bush obscured the *sharpness* of the curve until a motorist was into the curve:

> Q. In your observation at the scene and relative to the brush or the tree that you were just describing, was the obstruction also to the abruptness of the curve in addition to the yield sign?
>
> A. ***Well, you don't see the curve until you're well on it <u>in terms of how sharp it is</u>.***
>
> …
>
> Q. … I want to talk about the abruptness of the curve because we've already talked about the vegetation and the hedgerow blocking the yield sign. ***But it's your opinion, isn't it, that the <u>abruptness</u> of the curve was also obstructed by that hedgerow, correct?***
>
> A. ***Absolutely.***

Q. So a motorist has two things going against him coming down that hill at 45 miles an hour: He can't see the yield sign on the right because of the obstruction ***and he can't see the curvature of the road because of the obstruction, correct?***

A. If you're just talking about if your intention is to go to the right, ***I would agree.***

RPVD 22, 86 (emphasis added). In addition, referring to exhibit P129 (Appx. 4 to *Appellant Tapken's Opening Brief*),[6] a photograph taken 200 feet from the yield sign, Mr. Stevens testified, "[Y]ou certainly can't appreciate the *sharpness* of the curve because you can't see enough of it." RPVD 32 (emphasis added); *see also* RP 742-43 (Harbinson).

The County asserts that Mr. Stevens did not testify that the obscured visibility to the curve's sharpness was dangerous or misleading. This is incorrect. Mr. Stevens' testimony about the sharpness being obscured was given in the context of his overall opinion that the intersection was inherently dangerous and misleading. *See* RVPD 22, 32, 66-70, 86, 93. Moreover, he testified specifically that the lack of visibility through the curve was "one of the problems" with the Waverly 'Y':

Q. … Do not the rules of the road require all drivers to reduce their speed as they approach and enter an intersection?

…

A. Well, it has to be—it has to be an intersection that they can see. … Here, ***you can't see all of this intersection. That's one of the problems.***

---

[6] Exhibit P129 is referenced as Exhibit 54D in the Redacted Video Perpetuation Deposition of Edward Stevens.

RPVD 93 (emphasis added). Relatedly, Mr. Stevens testified that that the Waverly 'Y' had the most confusing layout he had seen in his 40-plus year career and that "speed is the main problem." RVPD 86-88.

And far from contradicting the lay and expert testimony, the photographs admitted at trial confirm that the full sharpness of the 90-degree curve was obscured on approach by the hawthorn bush. *See, e.g.,* Exh. P129 (Appx. 4 to *Appellant Tapken's Opening Brief*). Of course, the problem would be magnified when approaching at 35 to 40 miles per hour. *See* RP 770-72 (Harbinson).

The County contends that limitation of sight distance caused by vegetation is "a common condition drivers can account for" and thus, as a matter of law, is not an inherently dangerous or misleading condition. *Respondent's Brief* at 32, citing *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943), and *Bradshaw v. City of Seattle*, 43 Wn.2d 766, 264 P.2d 265 (1953). But *Barton* and *Bradshaw* merely held that, without more, a roadway that was otherwise safe was not rendered inherently dangerous or misleading by the presence of adjacent vegetation. Under the particular circumstances of those cases, which evaluated an unimproved 'T' intersection in a quiet, suburban neighborhood (*Barton*) and a seldom-used, urban railroad crossing (*Bradshaw*), under road standards existing several decades ago, no fact question was raised based on the presence of vegetation alone.

More recently, limited sight distance has been recognized as one of the surrounding circumstances properly considered in determining

whether a roadway is inherently dangerous or misleading. For instance, in *Owen v. Burlington N. & Santa Fe R.R. Co.*, where the plaintiff presented evidence that motorists had limited ability to see traffic signals or approaching trains because of an incline in the road approaching the railroad crossing, the Supreme Court held that this was one of the material facts the jury could consider in determining whether the roadway was inherently dangerous or misleading. 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). *See also Tanguma v. Yakima County*, 18 Wn. App. 555, 558, 569 P.2d 1225 (1977) (holding that a fact question existed whether a warning was needed because sight distance was limited by a crown in the road).

And neither *Barton* nor *Bradshaw* modified the longstanding principle that the analysis of whether a roadway is inherently dangerous or misleading must take into account all the surrounding circumstances. *See Chen*, 153 Wn. App. at 902-04, citing *Berglund v. Spokane County*, 4 Wn.2d 309, 315-16, 103 P.2d 355 (1940). *See also Owen*, 153 Wn.2d at 789-90. "[T]he analysis of whether a dangerous condition at a roadway exists and, in turn, whether a municipality has breached its duty to maintain the roadway in a reasonably safe condition, does not begin and end with consideration of only the physical characteristics of the roadway at issue." *Chen*, 153 Wn. App. at 903. Thus, although the hawthorn bush was not a physical characteristic of the roadway itself, the sight distance limitation it caused was one of the surrounding circumstances the jury may consider in determining whether the roadway was inherently dangerous or misleading.

To be sure, the rules of the road require motorists to account for sight distance limitations at intersections and to drive at an "appropriate reduced speed." RCW 46.61.400(3). In addition, a motorist approaching a yield sign is required to "slow down to a speed reasonable for the existing conditions and if required for safety to stop." RCW 46.61.190(3). Unfortunately, and despite Malinak's reduction of speed on approach to the curve, no warning was provided of the curve's sharpness or the speed at which it could be safely negotiated. In any event, the rules of the road do not absolve the County of a breach of its duty to maintain its roadways in a condition safe for ordinary travel. The County's duty is owed to all persons, whether negligent or fault free. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). The question before the Court on review of the CR 50 dismissal is whether Tapken and Malinak presented sufficient evidence to find negligence by the County, and not any question of comparative fault of Malinak or Tapken. *See Owen*, 153 Wn.2d at 786. The rules of the road do not relieve the County of liability or determine this appeal.

Regardless of motorists' duties, the County must ensure that sight limitations, hidden conditions, and signage are not such that motorists cannot account for and react to them; otherwise, the roadway is inherently dangerous or misleading. *See Owen*, 153 Wn.2d at 789; *Tanguma*, 18 Wn. App. at 558. The County concedes that turns and curves may be inherently dangerous or misleading unless they are "visible to drivers and without deceptive characteristics." *Respondent's Brief* at 32. The County

has a duty to eliminate or safeguard against inherently dangerous or misleading conditions. *Owen*, 153 Wn.2d at 788. Where substantial evidence is presented of conditions that a jury could find were inherently dangerous or misleading, the question of liability is for the jury. *Id*.

The County maintains that curve-warning and advisory-speed signs ahead of the curve would conflict with the yield sign and violate the MUTCD. *Respondent's Brief* at 19. While the lack of any warning of the curve's hidden sharpness is one of the reasons the Waverly 'Y' is inherently dangerous or misleading, no suggestion was made at trial that the County could or should have addressed the hazards by installing warning signs alone. If the intersection as configured could not be made reasonably safe with signage allowed by the MUTCD, then the County had a duty to eliminate the hazard by reconfiguring the intersection. *See Meabon v. State*, 1 Wn. App. 824, 827-38, 463 P.2d 789 (1970) (observing that the state has "the alternative duty either to eliminate a hazardous condition, or to adequately warn the traveling public of its presence").[7] Mr. Stevens testified that the intersection could easily have been made reasonably safe by converting it into a 'T' intersection with a stop sign for at least one leg. RVPD 75-76. The County's traffic engineer acknowledged this was feasible. RP 564.[8]

---

[7] Compliance with the MUTCD is not dispositive of whether an inherently dangerous or misleading condition exists. *Chen*, 153 Wn. App. at 908.

[8] Contrary to the County's assertion, finding liability in this case would not run afoul of *Tyler v. Pierce County*, 188 Wash. 229, 62 P.2d 32 (1936), where the court merely held that municipalities need not "fence their roads with barriers" absent an inherently dangerous or misleading condition. *Id*. at 232-33.

Substantial evidence was presented from which a jury could find that the County breached its duty to keep its roads in a condition reasonably safe for ordinary travel. It was error to grant judgment as a matter of law on the issue of breach of duty.

2. Substantial evidence was presented from which a jury could find that an inherently dangerous and misleading condition was a proximate cause of the accident in that it caused Malinak's failure to reduce his speed sufficiently for the curve.

Tapken's causation theory against the County is simple: because of inherently dangerous or misleading road conditions that existed as a result of the County's negligence, Malinak was surprised by, and thus unprepared for the sharpness of the curve in that he failed to reduce his speed sufficiently. In other words, but for the County's failure to keep the roadway in a condition reasonably safe for ordinary travel, Malinak would not have been put in the position of approaching a 20 mile-per-hour curve at 30 to 35 miles per hour, surprised and unprepared, and the accident would not have occurred.

A jury need not speculate to find that Malinak was surprised by, and thus unprepared for, the curve's sharpness and the necessity to reduce his speed to 20 miles per hour. Substantial evidence was presented that would support such a finding. Malinak testified to his perception, and identified three reasons why he did not anticipate the sharpness. His reasons matched the inherently dangerous or misleading conditions identified by Tapken's experts. First, having seen a yield sign only for the

left leg of the 'Y,' Malinak perceived that the right leg was the main part of the highway. RP 967. Second, the road configuration and hawthorn bush obscured Malinak's view of the curve's sharpness. RP 967-68. Third, because warning signs were posted on prior curves on the roadway, Malinak justifiably expected to be warned of sharp curves. RP 1015.

The County asserts that Malinak "did not testify these road features misled him" and that he "gave no explanation for why he was unprepared for the turn." *Respondent's Brief* at 37. This is incorrect. Malinak's testimony makes clear that he felt misled by the roadway configuration and visible signage. Malinak explained how the curve was much sharper than he had anticipated, leaving him unprepared:

> As I came to the intersection, I do remember seeing one yield sign on the left-hand side of the intersection and I remember seeing a large bush on the right side. And the way that the road appeared, it appeared that the main part of the highway went to the right. … Well, as I came to the intersection, as I got closer and closer as my view was past the bush, I could see that the way to the right was actually an extremely sharp curve, a curve that I was not prepared for. I realized that I was going way too fast to make that curve….

RP 967-68. In light of these facts, it is not surprising that Malinak was unprepared for a 90-degree curve and going too fast to negotiate it. As soon as Malinak could see the curve's sharpness, he determined it was too late to slow down enough for the curve, and took evasive action. RP 968.

Contrary to the County's assertion, there was no need to have an expert "reconstruct" the accident or pinpoint the precise locations where Malinak started his right or left lean, or first perceived the curve's sharpness. Malinak's testimony was itself sufficient to support a finding

that he was surprised by, and thus unprepared for, the sharpness of the curve. "[A] witness who has had means of personal observation may state his opinion, conclusion, and impression formed from such facts and circumstances as came under his observation." *Ulve v. City of Raymond*, 51 Wn.2d 241, 253, 317 P.2d 908 (1957). In addition, Malinak's testimony was corroborated by the expert testimony, discussed above, regarding the roadway and surrounding circumstances. *See Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 857-58, 751 P.2d 854 (1988) (driver and expert testimony supported proximate causation).

The County simply ignores Malinak's testimony when it attempts to analogize to cases where causation was unprovable because the motorists were unavailable to testify or could not recall the accident. *See Respondent's Brief* at 35-36. Malinak testified specifically how the accident occurred and why he was unprepared for the curve's sharpness. It is for a jury, not a court, to decide whether to credit Malinak's perception of the situation. *See Wojcik*, 50 Wn. App. at 857.

The County incorrectly asserts that *Wojcik* supports its contention that there can be no liability absent evidence of the precise locations of Malinak's maneuvers. In *Wojcik*, where improper striping was alleged to have caused an accident during a passing maneuver, the defense maintained that the driver was unaware of the striping, defeating causation. 50 Wn. App. at 856-57. As a result, the location where the driver began his passing maneuver became a critical fact. The court of

appeals held that summary judgment was improper because the driver testified he began passing at the end of the double-yellow lines. *Id*. at 857.

Here, Malinak testified specifically that he initiated his right lean as he approached the start of the curve, first saw the curve's sharpness as he passed the bush, and immediately reversed his lean from right to left. RP 968-69. In any event, unlike the circumstances of *Wojcik*, the precise location where Malinak leaned right or left is not essential to causation. The issue is not the timing or location of Malinak's movements, but that he approached the curve too fast. That he felt compelled to take evasive action when he could first see the sharpness of the curve, because he was going too fast, is sufficient to support a finding that the County's failure to eliminate or safeguard against an inherently dangerous or misleading condition was a cause of the accident.

The "appropriate reduced speed" to which Malinak was required to slow for an intersection under RCW 46.61.400(3) goes to comparative fault and is a question of fact for the jury based on all the surrounding circumstances, including the 45 mile-per-hour speed limit, signage, sight distance, and other factors. *Eichler v. Yakima Valley Transp. Co.*, 83 Wn.2d 1, 4, 514 P.2d 1387 (1973); *Harris v. Burnett*, 12 Wn. App. 833, 836-37, 532 P.2d 1165 (1975).[9] Malinak testified that he slowed down 5 to 10 miles per hour for the intersection and curve. RP 968, 1022-23,

---

[9] This is so even if, *unlike here*, the driver does not slow down for the intersection. *See Hough v. Ballard*, 108 Wn. App. 272, 284-87, 31 P.3d 6 (2001).

1159, 1162-63.[10] It is admitted that he did not slow down sufficiently to be able to negotiate the curve safely and that this led to the necessity of evasive maneuvers and, ultimately, the accident. Indeed, the point of this case is to determine who is at fault for Malinak's failure to slow down sufficiently—the County, Malinak, or both.

To get to a jury, Tapken was not required to rule out the possibility that Malinak misjudged the situation and could have managed to negotiate the right curve, had he continued in that direction. Nor was Tapken required to rule out that Malinak could have avoided going over the embankment had he taken a different evasive action, such as braking harder or attempting to stop in a straight line rather than to go left. Malinak's comparative fault, if any, is a matter for the jury, properly evaluated under the sudden emergency doctrine.[11] An emergency instruction is appropriate if the evidence is conflicting. *Kappelman v. Lutz*, 167 Wn.2d 1, 10, 217 P.3d 286 (2009).

In any event, the County cannot avoid a trial on liability by attacking the defensive maneuvers Malinak took after the County's negligence put him in a position where he was unprepared and going too

[10] Contrary to the County's assertion, Malinak never testified that his general practice was to take every intersection and curve at the speed limit. *See Respondent's Brief* at 4, 20. While Malinak testified that he would have traveled Prairie View Road at the posted speed limit "[u]nless indicated otherwise," RP 1020, he further testified that he would slow down appropriately for curves and intersections. RP 1118, 1161-62.

[11] Under the sudden emergency doctrine, a person "who is suddenly confronted by an emergency through no fault of his own and chooses a damaging course of action in order to avoid the emergency is not liable for negligence although the particular act might constitute negligence had no emergency been present." *Kappelman v. Lutz*, 167 Wn.2d 1, 10, 217 P.3d 286 (2009).

fast for a sharp curve. Had the County satisfied its duty to maintain its roads in a condition reasonably safe for ordinary travel, Malinak never would have been put in the position of having to choose instantaneously how best to avoid an accident.

While Malinak's comparative fault does not determine this appeal, the County is incorrect that Mr. Harbinson's testing proved that Malinak could have slowed down enough to make the right curve. *See Respondent's Brief* at 27. Mr. Harbinson explained that he was able to slow down from 45 miles per hour on approach and make the curve because, unlike Malinak, he knew what to expect: "[W]alking through this intersection prior to actually driving it, I knew the confines of the intersection itself and was aware of what I was getting myself into as I drove through the intersection." RP 768; *see also* RP 826. Mr. Harbinson confirmed that "the bush…prevents you from seeing all the way through the curve" and that a motorist traveling 35 to 40 miles per hour at the point where the apex of the curve can first be seen would have insufficient time to slow down and make the curve. RP 768, 772, 777-78.

Nor was causation speculative because Malinak said he "couldn't figure out why" the accident happened when he visited the scene with his parents after being released from the hospital. RP 1025; *Respondent's Brief* at 24, 35. Although Malinak was unsure why his motorcycle did not go left when he reversed his lean direction from right to left, RP 969, he was certain why he arrived at the curve going fast to negotiate it—it was because of the misleading configuration and signage, obscured sharpness

of the curve, and lack of warning. *See* RP 967-68. To the extent there is a question about "what really led to Mr. Malinak's decision to turn left," *Respondent's Brief* at 36, it is a question for a jury, not a court, to decide.

The County persistently focuses on the lack of visibility of the yield sign on the right. This fact is relevant to this appeal only in that it was one of the factors that misleadingly indicated that the main part of the highway went to the right. *See* RVPD 68; RP 967. There is no issue of whether a yield sign alone could or should have provided Malinak a warning to slow down for a 20 mile-per-hour curve. *See Appellant Tapken's Opening Brief* at 35-39. The County does not dispute that a yield sign may not properly be used to slow traffic for a condition other than cross traffic. *See* RVPD 68, 85; RP 512-13. *See also* MUTCD §§ 2B.08, 2B.09 (2003 ed.) (Exh. P86). Nor does the County dispute that a yield sign does not necessarily require a motorist to stop. *See* RCW 46.61.190(3).

It is a question of fact whether the County's negligence was a proximate cause of Malinak's being unprepared for an obscured 20 mile-per-hour curve and approaching it at an excessive speed. It was thus error to grant judgment as a matter of law to the County on proximate causation.

B. The trial court erred in excluding the evidence of dozens of prior accidents as not relevant.

Where the dangerous condition alleged is one that the municipality did not create, the plaintiff must establish that the municipality had actual or constructive notice and a reasonable opportunity to correct the problem.

Wright v. City of Kennewick, 62 Wn.2d 163, 167, 381 P.2d 620 (1963); *see also* WPI 140.02. Notice is not presumed.

The County is incorrect that each factor contributing to a condition alleged to be dangerous or misleading is viewed by the trier of fact in isolation, for purposes of notice. This would be at odds with the requirement to consider all the surrounding circumstances in determining whether a roadway is inherently dangerous or misleading. *See Chen*, 153 Wn. App. at 902-04. The court did not hold otherwise in *Tanguma*, 18 Wn. App. at 563. There, the court explained that a defendant that has actual or constructive notice of the *existence* of a particular condition may not avoid liability by asserting that it lacked notice that the condition met the *legal standard* of inherently dangerous. *Id*. That is not the issue here.

Here, while the County purported to admit notice that the bush obscured the yield sign on the right (though its witnesses testified otherwise, *see Appellant Tapken's Opening Brief* at 19), the County never admitted notice of the existence of the conditions alleged to be inherently dangerous or misleading. For instance, the County never admitted that (1) the road configuration and signage could mislead motorists to conclude that the right leg of the 'Y' was the main roadway, and not to expect a sharp curve, or (2) the hawthorn bush obscured not only the yield sign but the curve's sharpness. These conditions had at least one common contributing factor that the County did not create or admit should have been discovered or anticipated, *i.e.*, the overgrowth of the hawthorn bush. Accident history was thus relevant to prove notice to the County of the

existence of a dangerous condition, and the trial court erred in concluding that it was not relevant. *See Toftoy v. Ocean Shores Props., Inc.*, 71 Wn.2d 833, 835-36, 431 P.2d 212 (1967).

Even assuming that accident history otherwise would have been irrelevant, it became relevant when the County's traffic engineer, Mr. Greene, testified that accident history was one of the factors he considered in reaching his post-accident conclusion that the intersection was safe. RP 547-48. The trial court's refusal to allow Tapken to present evidence of the actual accident history, based on a determination that it was not relevant, resulted in significant prejudice. Mr. Greene's testimony left the jury with the mistaken impression that the accident history was minimal, given his conclusion that the intersection was safe.[12]

Because notice was disputed, accident history was relevant and the trial court abused its discretion in excluding the number of prior accidents and evidence of the specific accidents it determined were substantially similar to the subject accident.

C. The trial court erred in excluding Mr. Harbinson's causation opinion.

An expert's use of the term "proximate cause" is not a proper basis to exclude his opinion. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007). Although "proximate cause" is

---

[12] Compounding the prejudice, the trial court instructed the jury not to consider accident history for any purpose "except in making a decision as to how he formed the basis for his opinion that it is a relatively safe intersection." RP 670. The trial court also planned to instruct the jury that all evidence regarding prior accident history was "irrelevant to any claim or defense in this case." CP 2143, 2184.

"legal jargon," ER 704 allows a witness to state opinions that embrace the ultimate issue to be decided by the jury, including opinions that help establish the elements of negligence. *Id.*

The County is incorrect that there was "no foundation" for Mr. Harbinson's opinion that speed was a proximate cause. *Respondent's Brief* at 48. He did not need to "reconstruct" the accident to be able to provide that opinion.[13] Based on his investigation, he determined the approximate speed of the motorcycle as it left the roadway—between 35 and 40 miles per hour. RP 747-55. He also determined that the curve to the right could not be safely negotiated at that speed, and that the maximum reasonable safe speed was 20 miles per hour. RP 755-67.

While the County claims that no offer of proof was made regarding Mr. Harbinson's opinion on causation, the County acknowledges that Mr. Harbinson testified, immediately before its objection, that "[t]he proximate cause of the collision is speed." RP 781. This satisfied or obviated the requirement of an offer of proof under ER 103(a)(2), and Tapken was not required to have Mr. Harbinson repeat this opinion or elaborate without using the word "proximate." It was error to exclude Mr. Harbinson's opinion on causation on the basis that causation is "the ultimate question for the jury to decide." RP 782.

---

[13] The facts not known with sufficient precision to "reconstruct" the accident—including the motorcycle's location and orientation when it left the roadway and the riders' lean angles—all pertained to Malinak's evasive maneuvers after he determined that he could not make the curve to the right because of excessive speed. *See* RP 745-46. Those facts were not essential to the opinion that speed was a proximate cause.

D. The trial court erred in denying summary judgment to strike the County's allegation that Tapken was contributorily negligent.

The denial of summary judgment on contributory negligence is properly reviewable. The denial of summary judgment based on disputed fact issues ordinarily is not reviewable following a trial. This makes sense because, *after the jury has determined the facts*, the final judgment should be tested on the record made at trial, rather than the summary judgment record. *See Johnson v. Rothstein*, 52 Wn. App. 303, 306-07, 759 P.2d 471 (1988). In addition, the purpose of summary judgment is to avoid a useless trial, which post-trial review ordinarily cannot do. *Id*. at 307. But here, the trial was aborted before the jury made any determinations, and must begin anew. Thus, a useless trial on contributory negligence *can* be avoided by review of the denial of summary judgment on that issue.

On the merits, the County asserts that Tapken can be found contributorily negligent because she was an "experienced motorcycle rider" and was instructed by Malinak to lean with him. *Respondent's Brief* at 46, 47. The County confirms that its contributory negligence theory requires a determination that Tapken was entitled to no time to perceive and react to Malinak's reversal of lean direction, but was required to "mirror" his movements simultaneously. *Id*. at 47. The County fails to show that any motorcycle passenger, regardless of experience, could match opposite lean directions in a fraction of a second.

In addition, the County does not dispute that there is no evidentiary basis on which to determine whether Tapken's leaning farther right (if she

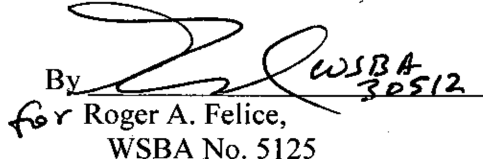
did so) was voluntary or was instead an involuntary movement caused by Malinak's sudden reversal of lean direction. Even assuming that Tapken's lean direction was a factor in causing the accident, as the court observed in *Zukowsky v. Brown*, 1 Wn. App. 94, 99, 459 P.2d 964 (1969), *aff'd*, 79 Wn.2d 586, 488 P.2d 269 (1971): "Not every action by a plaintiff, even though it be a cause of the mishap, can be characterized as negligent action." Because no basis exists to find that Tapken was negligent, this Court should direct entry of partial summary judgment striking the County's affirmative defense of contributory negligence on her part.

V. CONCLUSION

This Court should reverse the judgment and remand for trial with directions to (1) admit the number of prior accidents and evidence of the specific ones the trial court found were substantially similar to the subject accident, (2) admit Mr. Harbinson's testimony on causation, and (3) enter summary judgment striking the County's affirmative defense of contributory negligence by Tapken.

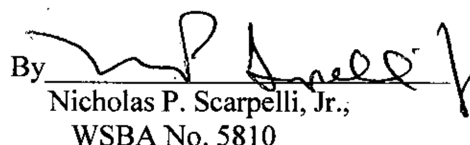
Respectfully submitted this 14th day of July, 2015.

FELICE LAW OFFICES, P.S.

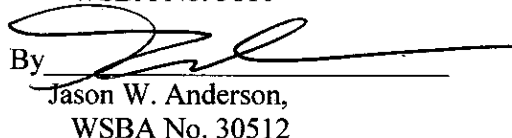


By____________________
for Roger A. Felice,
WSBA No. 5125

CARNEY BADLEY SPELLMAN, P.S.



By____________________
Nicholas P. Scarpelli, Jr.,
WSBA No. 5810



By____________________
Jason W. Anderson,
WSBA No. 30512

Attorneys for Appellant Madelynn M. Tapken

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused true and correct copies of *Appellant's Reply Brief* and this Certificate of Service to be served on the below-listed attorney(s) of record by the method(s) indicated:

☒ Email and U.S. Mail , to the following:

Michael E. Tardif
Gregory E. Jackson
John R. Nicholson
Freimund, Jackson & Tardif, PLLC
701 Fifth Ave., Suite 3545
Seattle, WA 98104
Email: miket@fjtlaw.com
grege@ftjlaw.com
johnN@fjtlaw.com

David E. Michaud
11306 N. Whitehouse St.
Spokane, WA 99218
Email: davemeshow@msn.com

DATED this 15th day of July, 2015.

Patti Saiden, Legal Assistant