NO. 929084

Court of Appeals, Division III No. 32909-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MADELYNN TAPKEN,

Respondent,

v.

SPOKANE COUNTY, a municipal corporation,

Petitioner,

and

CONRAD MALINAK,

Respondent.

SPOKANE COUNTY'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Spokane County (hereinafter "the County") was a defendant in the trial court and respondent in the Court of Appeals below.

II. CITATION TO COURT OF APPEALS DECISION

Pursuant to RAP 13.4, the County seeks review of the two-judge majority opinion of the Court of Appeals[1], which reversed and remanded the trial court's CR 50 dismissal of all claims against the County by Respondents Madelyn Tapken and Conrad Malinak.[2] The County asks that this Court accept review, reverse the Court of Appeals, and reinstate the trial court's decision.

III. ISSUES PRESENTED FOR REVIEW

(1) Did the Court of Appeals depart from well settled Washington case law when it created a previously unrecognized "presumption" in favor of the plaintiffs and reversed the trial court's determination under CR 50 that evidence of proximate cause was completely lacking at the close of the plaintiffs' case in chief?

(2) When ruling on a motion for judgment as a matter of law under CR 50, may a court give a "presumption" in favor of a plaintiff that the plaintiff would follow the rules of the road and exercise ordinary care

[1] Copies of both the majority and dissenting opinions of the Court of Appeals are attached to this Petition as Appendix (App.) A.

[2] At times, Tapken and Malinak are jointly referred to as "plaintiffs" herein.

where that plaintiff's unrebutted testimony is that he misunderstood his obligations under the rules of the road and routinely did not follow them?

(3) Did the Court of Appeals commit reversible error when it reversed the trial court's decision that the plaintiffs presented no evidence of proximate cause in response to the County's motion for judgment as a matter of law under CR 50?

IV. STATEMENT OF THE CASE

This is a tort action against the County by two riders on a sport motorcycle who drove off the road at an intersection north of the town of Waverly in rural Spokane County. Both Malinak, the driver of the motorcycle, and Tapken, his passenger, asserted claims against the County for negligent road design or maintenance.[3] Tapken also sued Malinak for negligently operating the motorcycle.[4]

A. Proceedings in the Trial Court Culminating in Dismissal of all Claims Against the County Pursuant to CR 50

On September 28, 2011, Tapken rode with Malinak on his Suzuki sport motorcycle on farm roads in the Palouse area of Spokane County.[5] The day of the ride was sunny and dry.[6] Malinak planned to travel in a loop southbound on Prairie View Road to the Y-shaped intersection with

[3] App. C (CP 1-11; CP 18-27).
[4] App. C (CP 8-9).
[5] App. C (CP 7); App. D (RP 957).
[6] App. D (RP 964).

Spangle-Waverly Road, where he could turn right on Spangle-Waverly to northbound State Route (SR) 195, or turn left to continue toward SR 195 further south to return to Spokane.[7] Malinak had previously taken the first route, turning right at the Y, three or four times, and often taken the second route turning left to SR 195 further south to get to school in Pullman.[8] In previous travels through this Y intersection, Malinak did not crash.[9]

As the plaintiffs drove at the 45 mph speed limit southbound on Prairie View towards the Y intersection, they passed a "yield ahead" sign.[10] The sign was approximately 775 feet before the intersection.[11] Photographs admitted at trial show the visibility of the intersection from the yield ahead sign and south, both in 2012[12] and at the time of the accident in 2011.[13] A motorist can also see the intersection by observing a break in the Prairie View centerline, which is visible at a distance of 400 to 425 feet.[14] A yield sign on the left is also visible to motorists travelling southbound on Prairie View, likewise cueing them to the existence of an

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[7] App. D (RP 1071-72, 1101). These routes are shown in Exhibit (Ex.) D208, attached as App. E.

[8] App. D (RP 960-62; 1071-72).

[9] App. D (RP 1114-15). An aerial view of the intersection with signs is illustrated in Ex. D104, attached as App. F.

[10] App. G (Ex. P126); App D (RP 1116).

[11] App. D (RP Vol. 10, p. 43).

[12] App. G – L (Ex. P126–P131).

[13] App. M (Ex. P8).

[14] App. D (RP Vol. 10, pp. 126-27).

intersection ahead.[15]

At trial, the plaintiffs focused on a theory of the County's negligence based on the assertion that the yield sign to Malinak's right was obscured by a black hawthorn bush, resulting in his speed being too high to negotiate the right turn.[16] Although the "yield ahead" sign provided warning of the allegedly obstructed yield sign, Malinak testified that he did not remember seeing the "yield-ahead" sign.[17] Malinak testified that he believed "yield ahead" signs do not indicate the existence of intersections.[18] Malinak acknowledged seeing the yield sign on the left as he approached the intersection, but he did not slow in response to it, either.[19] Malinak believed that the intersection of Prairie View and Spangle-Waverly could be driven at the 45 mph speed limit unless either a sign advised that a slower speed was required or he needed to yield to oncoming vehicles.[20] Thus, Malinak testified that he would only reduce his speed at the intersection if he saw conflicting traffic or if he were warned to slow down by an advisory speed sign.[21] No other traffic was present at the time of the accident. Rather than going either left or right at

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[15] App. D (RP 1117-18); *see also* App. I – J (Ex. P128-P129).
[16] App. D (*See* RP Vol. 10, pp. 22-25; 145-48).
[17] App. D (RP 965).
[18] App. D (RP 1017-19).
[19] App. D (RP 1117-18). As the trial court and the dissent in the Court of Appeals recognized, yield signs signal the existence of an intersection. App. A (*Tapken, v. Spokane County*, No. 32909-7 (Korsmo, J., dissenting at p. 2)).
[20] App. D (RP 1020, 1114).
[21] App. D (RP 1113-14).

the intersection at the time of the accident, Malinak's motorcycle went through it in a straight path, departing the roadway and crashing into a ravine south of the intersection.[22]

Importantly, Malinak's testimony established that due to his misunderstanding of the rules of the road, he routinely did not comply with his legal obligations at intersections and in response to yield signs. The rules of the road require motorists to reduce speed as they approach an intersection and drive through it.[23] The rules also require motorists to determine the correct, appropriate, and safe speed for turns.[24] The speed limit is the maximum speed for a road set by legal authority.[25] The posted speed does not authorize driving that speed at all times.[26] A motorist must reduce speed when required by circumstances and cannot assume the speed limit is safe for a turn.[27] Moreover, a yield sign, such as the one controlling the right turn, requires an approaching motorist to "slow down to a speed reasonable for the existing conditions and if required for safety to stop."[28]

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[22] App. D (RP 972-73).
[23] App. D (RP Vol. 10, p. 94); RCW 46.61.400(3).
[24] App. D (RP Vol. 10, p. 128).
[25] RCW 46.61.400(2).
[26] App. D (RP 634); RCW 46.61.400(1) and RCW 46.61.445.
[27] App. D (RP 571, 634).
[28] RCW 46.61.190 (3).

The expert witnesses called by the plaintiffs did not offer any opinion that the County's conduct was a proximate cause of the accident. Steve Harbinson, an accident reconstructionist, testified that he could not reconstruct the accident due to the lack of data.[29] Additionally, the road design expert called by plaintiffs, Ed Stevens, specifically testified that he was not offering an opinion on what the cause of the accident was.[30]

On September 25, 2014, after the plaintiffs had rested, the County moved for judgment as a matter of law pursuant to CR 50.[31] On September 29, 2014, the trial court granted the County's CR 50 motion based on the fact that the visibility of the yield sign would have made no difference to Malinak, given his undisputed testimony and the absence of any other evidence showing that the County's conduct was a cause of the accident:

> ...[T]o hold a governmental body liable for an accident based upon its failure to provide a safe roadway, the plaintiff must establish more than that the government's breach of duty might have caused the injury. Rather, the plaintiff must show that, but for the County's negligence, she would not have been injured.
>
> Here, the substantial evidence of Mr. Malinak's actions are the cause in fact of the plaintiff's injuries. According to Mr. Malinak's own testimony, he failed to see the yield-ahead sign, he did not believe it gave notice of an upcoming intersection; and once he saw the yield sign on the left, he failed to reduce his speed. Even if the bush was

[29] App. D (RP 745-46, 781).
[30] App. D (RP Vol. 10, p. 140).
[31] App. D (RP 1696-1716).

> removed and the yield sign and curve on the right was open and apparent, Mr. Malinak did not believe he had a duty to slow unless other vehicles were present. This is contrary to his statutory duties under RCW 46.62.290, 46.61.400, and 46.61.005.
>
> After the plaintiff submitted all of her evidence, the only reasonable conclusion that may be reached is that Mr. Malinak's actions were the cause in fact of the plaintiff's injuries, not the County's actions.
>
> The court has the authority to dismiss one tortfeasor where there is substantial and compelling evidence that one tortfeasor's actions were the cause in fact of the plaintiff's injuries and the other's conduct is speculative or conjectural. That is exactly the case here.[32]

The trial court denied plaintiffs' oral request for reconsideration.[33] Tapken then voluntarily dismissed her remaining claim against Malinak, and both of the plaintiffs appealed the trial court's CR 50 dismissal along with several other rulings.[34]

B. Reversal by the Court of Appeals

Whereas at trial the plaintiffs focused on the theory that the County was liable based on the black hawthorn bush allegedly obstructing the visibility of the yield sign, on appeal they focused on an alternative theory that the bush obstructed the abruptness of the right turn. Accepting this theory, the majority in the Court of Appeals reversed without disturbing the trial court's reasoning on plaintiff's original theory:

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[32] App. D (RP 1754-56); *See also* App C (CP 2126-27).
[33] App. D (RP 1768-69).
[34] App. C (CP 2128-30, 2134-42).

> The plaintiffs note that the hawthorn bush obscured both the yield sign to the right *and the sharpness of the right hand turn.* They persuasively argue evidence establishes that Malinak would have slowed more had he been able to perceive the sharpness of the right turn earlier. We hold that plaintiffs presented substantial evidence of proximate cause.[35]

In contrast, the dissent indicated that it would have affirmed the trial court's dismissal of the case based on the lack of any evidence of proximate cause.[36]

In reaching its decision, the majority did not identify what evidence it relied upon to find a fact question on causation. Instead, in a footnote it indicated that it "presumed" that Malinak would have slowed down at the intersection but for the black hawthorn bush:

> One does not need to take judicial notice of the fact that drivers routinely slow to safely navigate a sharp curve when the sharpness of the curve is apparent. A jury is entitled to decide whether Malinak, had the intersection been unobstructed so he could have earlier seen the sharpness of the curve, would have sufficiently slowed or whether he would have launched himself and his passenger off the road. Because our standard of review requires us to assume the facts and inferences in the light most favorable to Malinak, we must presume that he would have done what almost every other driver does when perceiving a sharp curve: slow down sufficiently rather than wreck.[37]

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[35] App. A (*Tapken v. Spokane County, et. al.*, No. 32909-7 (Wash. Div. 3, January 12, 2016) (Majority Opinion at p. 11))

[36] App. A (*Tapken v. Spokane County, et. al.*, No. 32909-7 (Wash. Div. 3, January 12, 2016) (Korsmo, J. dissenting)).

[37] App. A (*Tapken v. Spokane County, et. al.*, No. 32909-7 (Wash. Div. 3, January 12, 2016) (Majority Opinion, p. 11 fn. 4)).

On February 18, 2016, the Court of Appeals denied the County's motion to reconsider its decision.[38]

V. ARGUMENT

A. The Washington Supreme Court's Review of the Court of Appeals' Majority Decision is Proper Under RAP 13.4

This Court's review of a decision by the Court of Appeals is appropriate, *inter alia*, where the Court of Appeals' decision is in conflict with either a decision of this Court or another decision of the Court of Appeals. RAP 13.4 (b). Here, the holding of the Court of Appeals is inconsistent with both this Court's prior decisions and prior decisions by the Court of Appeals, which require that a plaintiff come forward with evidence showing cause in fact. As explained more fully in the following section, the Court of Appeals incorrectly "presumed" that Malinak would have slowed down to an appropriate speed but for the existence of the black hawthorn bush. The theory on which the majority reversed the trial court is not only speculative, but also irreconcilable with the undisputed testimony of Malinak that conclusively established the lack of proximate cause.

[38] App. B (Order Denying Motions to Reconsider).

B. The Court of Appeals' Majority Opinion is Inconsistent with Prior Washington Case Law Requiring Evidence of Proximate Cause

This Court should accept review, because the majority in the Court of Appeals committed error when it "presumed" that but for the black hawthorn bush, Malinak would have reduced the speed of his motorcycle to "an appropriate speed" to safely negotiate the right hand turn at the intersection as required by RCW 46.61.400. Troublingly, the majority reversed the trial court based on this unsupported "presumption" rather than on evidence, and it ignored the unrefuted testimony of Malinak showing the clear absence of proximate cause.

The standard on a motion for judgment as a matter of law mirrors that of summary judgment. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 752-53, 310 P.3d 1275 (2013). A court must grant a CR 50 motion when the non-moving party was fully heard and did not present sufficient evidence to persuade a rational, unbiased jury of the truth of the conclusions necessary to support a verdict for that party. *Davis v. Microsoft,* 149 Wn.2d 521, 79 P.3d 126 (2003). A CR 50 motion should be granted in favor of a defendant when the undisputed evidence shows that a plaintiff can present only conjectural theories of liability or causation. *Cowsert v. Crowley Maritime Corp.,* 101 Wn.2d 402, 680 P.2d 46 (1948); *Miller v. Dep't. of Labor & Indus.,* 1 Wn. App. 473, 462 P.2d

558 (1969). The appellate court applies the same standard as the trial court when reviewing a decision on a CR 50 motion. *Hiner v. Bridgestone/ Firestone, Inc.*, 91 Wn. App. 722, 731, 959 P.2d 1158 (1998) *reversed on other grounds*, 138 Wn.2d 248 (1999).

Here, the trial court's CR 50 dismissal was proper, because there was no evidence that the County's failure to remove the black hawthorn bush was a proximate cause of the plaintiffs' accident. Proximate cause is divided into two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). "'Cause in fact' refers to the actual, 'but for,' cause of the injury, i.e., 'but for' the defendant's actions the plaintiff would not be injured." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). Thus, according to the Washington Pattern Instructions:

> The term "proximate cause" means a cause which in a direct sequence [unbroken by any new independent cause] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

WPI 5th ed. 15.01. "Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend." *Hartley*, 103 Wn.2d at 778. Proximate cause is an essential element in a negligence case, which a plaintiff bears the burden of proving. *Fabrique v. Choice Hotels, Inc.*, 144 Wn. App. 675, 683, 183 P.3d 1118 (2008). Where there was is complete failure of proof of an

essential element of the plaintiff's case, judgment in favor of the defendant as a matter of law is required. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *see also Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) (holding that standard on motion under CR 50 mirrors standard for summary judgment under CR 56).

1. Washington Law Requires a Plaintiff to Present Evidence that An Alleged Road Hazard Was a Cause of an Accident, Not Simply That a Road Hazard Was Present and Might Have Been a Cause

Washington courts have been clear that plaintiffs must present evidence that an alleged road hazard was a proximate cause of a collision, not simply that a road hazard was present and might have been a cause. *Johanson v. King County,* 7 Wn.2d 111, 123, 109 P.2d 307 (1941); *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001); *Garcia v. State*, 161 Wn. App. 1, 15, 270 P.3d 599 (2011). Consistently, Washington courts have held that they will not allow a road negligence case to proceed to the jury if the plaintiff must ask the jury to speculate about whether the defendant's conduct was a proximate cause of an accident:

> "'The cause of an injury is speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another.'" Stated differently,
>
> > [I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or

> more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

Moore v. Hagge, 158 Wn. App. 137, 148, 241 P.3d 787 (2010) (citations omitted).

The majority's opinion does not merely allow a jury to speculate, it invites a jury to find in plaintiffs' favor despite the undisputed testimony of Malinak that he would only reduce his speed if he saw conflicting traffic or if he were warned to do so by an advisory speed sign:

> THE WITNESS: As I've testified before and as I'm testifying now, yes, I would not have exceeded the speed limit but I would have traveled at or near. Yes, coming to a curve with no traffic impeding it, I would only know to slow down if there was an advisory sign. But I believe you're implying that if I saw other traffic, I would not slow down. And that's not true, sir. It wasn't indirect, but if there was another hazard or another obstruction, I would slow down in the same manner. If there was another vehicle, I would not simply blow past them or run into the rear end of them. That would be irresponsible.[39]

It is undisputed that there was no advisory speed sign. There is no requirement to place such a sign at the intersection, because the right turn was controlled by a yield sign that required approaching motorists to "slow down to a speed reasonable for the existing conditions and if required for safety to stop." RCW 46.61.190 (3). Even if the black

[39] App. D (RP 1113-14 (emphasis added)).

hawthorn bush were not present at the intersection and Malinak could appreciate the sharpness of the turn as alleged, the undisputed evidence is that he would not have piloted his motorcycle through the intersection at "an appropriate reduced speed," because there was no advisory speed sign telling him to do so. The trial court's CR 50 dismissal of the County should have been affirmed based on the plaintiffs' failure to establish any evidence of proximate cause or to contradict Malinak's testimony showing the clear absence of proximate cause.

2. The Court of Appeals Erroneously Created a Previously Unrecognized "Presumption" to Hold that a Jury Must Decide this Case Despite the Unrefuted Testimony Showing the Absence of Proximate Cause

The Court of Appeals majority justifies its conclusion that a jury should decide whether the County's conduct was a proximate cause of the accident by observing that "drivers routinely slow to safely navigate a sharp curve when the sharpness of the curve is apparent."[40] Its conclusion is thus premised exclusively on supposition that is unsupported by any evidence in the record. Indeed, the majority notes that its conclusion requires it to "presume that [Malinak] would have done what almost every other driver does when perceiving a sharp curve: slow down sufficiently

[40] App A (*Tapken v. Spokane County, et. al.*, No. 32909-7 (Wash. Div. 3, January 12, 2016) (Majority Opinion, p. 11, fn.4)).

rather than wreck."[41] As plaintiffs who bear the burden of proving negligence, neither Tapken nor Malinak is entitled to a presumption. A presumption is an evidentiary device created by the law in specific situations. *See, e.g., State v. Savage*, 94 Wn.2d 569, 572-73, 618 P.2d 82 (1980). The fact that the Court of Appeals "presumed" facts to reverse the trial court highlights the lack of evidence to support this theory:

> Presumptions are indulged when certain proof is wanting; they are never allowed to displace facts. "Presumptions," as happily stated by a scholarly counselor, ore tenus, in another case, "may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts. . . . To give place to presumptions, on the facts of this case, is but to play with shadows and reject substance."

Beeman v. Puget Sound Traction Light & Power Co., 79 Wash. 137, 139, 139 P. 1087 (1914) (emphasis added; citations omitted).

While the plaintiffs are entitled to have all evidence and reasonable inferences drawn in their favor as non-moving parties here, any such reasonable inferences must be drawn from the evidence and not be based on speculation. *See, e.g., Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 99-100, 882 P.2d 703 (1994). "[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of

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[41] App A (*Tapken v. Spokane County, et. al.*, No. 32909-7 (Wash. Div. 3, January 12, 2016) (Majority Opinion, p. 11, fn. 4 (emphasis added)).

which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred." *Gardner v. Seymore*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947) (citations omitted). The mere supposition that the majority relied upon here – that many drivers appropriately slow for roadway conditions when the conditions are visible to them – is precisely the type of speculation that Washington appellate courts have consistently rejected.

Moreover, the evidence at trial showed that Malinak was not like other drivers, and thus "presuming" that Malinak would have behaved like "almost every other driver" under different circumstances is completely unwarranted. As the dissent in the Court of Appeals correctly observes, the undisputed testimony at trial established that Malinak had a basic and fundamental misunderstanding of his obligations under the rules of the road at intersections, and the only evidence or testimony presented by the plaintiffs was that the accident resulted from this misunderstanding.[42]

There is no dispute that Malinak was on notice of the intersection, because he saw the yield sign on the left as he approached it.[43] A break in

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[42] App. A (*Tapken v. Spokane County, et. al.*, No. 32909-7 (Wash. Div. 3, January 12, 2016) (Korsmo, J., dissenting, pp. 2-3)).

[43] App. D (RP 1117-18). As the trial court and the dissent correctly point out, yield signs are only utilized when an intersection is present. RCW 46.61.180; RCW 46.61.190; RP 1748, 1751-52; App. A (*Tapken v. Spokane County, et. al.*, No. 32909-7 (Wash. Div. 3, January 12, 2016) (Korsmo, J., Dissenting, p. 2)).

the centerline also reflected that an intersection was present.[44] While Malinak failed to see it, the yield sign on the right was signaled in advance by a "yield-ahead" sign approximately 775 before the intersection.[45] Under these facts, the rules of the road required Malinak to slow down to an appropriate speed when crossing the intersection:

> The driver of every vehicle shall . . . drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic by reason of weather or highway conditions.

RCW 46.61.400 (emphasis added). Given that the right turn at the intersection was controlled by a yield sign (which was, in turn, signaled in advance by a "yield-ahead" sign), the rules of the road also required Malinak to slow down and if necessary stop:

> The driver of a vehicle approaching a yield sign shall in obedience to such sign slow down to a speed reasonable for the existing conditions and if required for safety to stop, . . .

RCW 46.61.190 (3) (emphasis added).

The rules of the road outlined above required Malinak to slow down in response to the intersection and the yield sign, but Malinak testified that he would only slow down at the intersection if there was conflicting traffic or an advisory speed sign telling him that he should

[44] App. D (RP Vol. 10, pp. 126-27).
[45] App. G (Ex. P126); App. D (RP 1116; RP Vol. 10, p. 43).

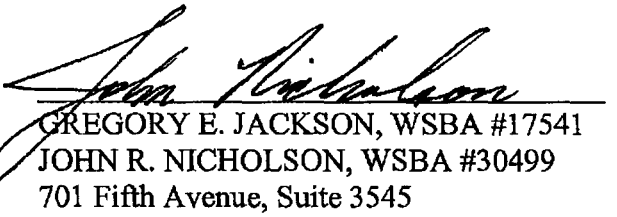
slow.[46] According to Malinak's own testimony, then, removal of the hawthorn bush would have had no effect on his driving behavior at the intersection. As the dissent correctly observed, "the county had no liability with respect to the actual cause of the accident – the failure of the motorcycle to slow sufficiently to make a turn at the intersection."[47] The "presumption" relied upon by the majority is thus not an appropriate or legally recognized presumption, but rather an improper assumption that is not supported by evidence.

VI. CONCLUSION

For all the above reasons, the County respectfully requests the Court to accept review of the Court of Appeals' reversal of the trial court's CR 50 dismissal. On review, this Court should reverse the Court of Appeals and reinstate the decision of the trial court.

RESPECTFULLY SUBMITTED this 18th day of March, 2016.

FREIMUND JACKSON & TARDIF, PLLC



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[46] App D (RP 1113-14).

[47] App. A (*Tapken v. Spokane County, et. al.*, No. 32909-7 (Wash. Div. 3, January 12, 2016) (Korsmo, J., Dissenting, p. 3)).

CERTIFICATE OF SERVICE

On said day below I emailed a courtesy copy and delivered via legal messenger for service a true and accurate copy of Spokane County's Petition for Review to the following parties:

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

DATED this 18th day of March, 2016, at Seattle, Washington.

Kath. Sisson

KATHRINE SISSON

APPENDIX A

FILED
Jan. 12, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MADELYNN M. TAPKEN, a single person, Appellant, v. SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation, Respondent, CONRAD MALINAK, a single person, et al., Appellant.	)	No. 32909-7-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Madelynn Tapken was a passenger on a motorcycle driven by Conrad Malinak. She suffered serious injuries and paralysis as a result of Malinak not perceiving the sharpness of a right turn and crashing his motorcycle.

Tapken brought this personal injury action against Malinak and Spokane County. Tapken premised the County's liability on its failure to design and maintain a safe

roadway. Malinak asserted a similar cross-claim against the County.[1] At the conclusion of plaintiffs' evidence to the jury, the County moved for judgment as a matter of law on the issues of liability and proximate cause. The trial court granted the County's motion. The trial court determined as a matter of law that the County was not negligent; but even if it was, that its negligence was not the proximate cause of plaintiffs' injuries.

Tapken and Malinak appeal. They assert various errors. We agree with only one of their assertions. We hold that the trial court erred by granting the County's motion for judgment as a matter of law. We therefore reverse and remand for a new trial.

FACTS

In the summer of 2011, Malinak and Tapken met while working at Red Robin in downtown Spokane. At the time, Malinak had owned his motorcycle for a few months and had previously owned a similar bike. When Tapken learned Malinak had a motorcycle, she told him that she enjoyed taking rides and had frequently ridden with her father and ex-boyfriends. Tapken knew how to ride as a passenger, including that she should match and not resist the operator's leaning of the motorcycle on turns. The two arranged to take a ride together, and the first time out was uneventful.

On their second ride, they left Spokane to drive on the Palouse. The weather was

[1] The parties at trial and in their briefs refer to Tapken and Malinak as plaintiffs.

sunny and approximately 60 degrees. The two rode to Fairfield and then took Prairie View Road out of town toward Waverly, driving at approximately the speed limit of 45 m.p.h.

Just before Waverly, the road forks into a "Y" intersection, known as the "Waverly Y." It is a triple intersection, in that each of the three intersecting roads splits into two legs as they converge, forming a triangle of unused roadway at the convergence of the intersection. The convergence of these three roads creates a need to regulate the traffic. Spokane County elected to regulate the converging traffic with various signs. Specifically, for a driver coming from the north and driving toward Waverly, there is a yield ahead warning sign 800 feet from the intersection, and two yield signs in the intersection—one for a driver veering right and another for a driver veering left. As a driver passes the yield ahead warning sign (800 feet from the intersection), a driver sees a large hawthorn bush located on the right side of the road several hundred feet toward the intersection. Because of its close proximity to the road and the contour of the road bending to the left near it, the large hawthorn bush obscures both the yield sign for traffic veering right and a portion of the road to the right. This makes it difficult for a driver approaching from the north to gauge the sharpness of both the right and the left turn

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For ease of reference, we will also.

choices until the driver is much closer to the large bush and intersection. There is no sign warning a driver to reduce speed below the posted speed of 45 m.p.h.

As he approached the intersection from the north, Malinak slowed to 35-40 m.p.h., anticipating he would veer to the right.[2] Malinak began to lean right. But almost immediately, he realized that the right turn was sharper than he had earlier perceived. Believing that he was going too fast to veer right, he braked and leaned left, trying to make the more gradual left turn. Tapken did not follow the lean, resulting in the motorcycle running straight through the intersection, traveling in the air for over 50 feet and into a quarry. Tapken was severely injured and permanently paralyzed. She initiated the present action.

At trial, the plaintiffs presented testimony from three County employees about the design and maintenance of the road, followed by testimony from three experts and then testimony from Malinak. Of the experts, Andrew Harbinson testified first as a collision analyst. Although he was unable to reconstruct the accident because there was insufficient physical evidence at the scene, he did state that there was no evidence of excess speed. He testified that the motorcycle travelled approximately 56 feet in the air

[2] Because of her head injury, Tapken does not remember the events of the day and did not testify at trial. Since there were no other witnesses, Malinak was the only source of information about the events that transpired.

before landing off the roadway and therefore was traveling between 35 and 43 m.p.h. when it departed from the roadway.

Next, the plaintiffs presented testimony from Dr. Richard Gill, a human-factors engineering consultant. He testified how a reasonable motorist would respond to the intersection. In his opinion, the intersection was misleading and needed to be reconfigured. Primarily he took issue with the triple-"Y" having three points where traffic crosses, one of which has no form of traffic control. He then testified that because there were speed warnings around previous curves, a driver would have expected there to be a speed warning here if the maximum safe speed was less than the speed limit. Finally, he testified that the yield ahead sign was too far from the intersection, and that people were likely to forget about it in the 12 seconds between seeing the yield ahead sign and seeing the yield sign near the intersection.

After this, the plaintiffs presented a videotaped deposition of Transportation Engineer Edward M. Stevens. He testified that a yield sign is an inappropriate sign to control speed and that a driver would not have been able to see the yield sign to the right in time to actually yield. He also calculated that the reasonable safe speed for a right turn there was approximately 20 m.p.h.

At the conclusion of the plaintiffs' evidence, the County orally moved for

judgment as a matter of law, both on liability and on proximate cause. The trial court looked to the duties imposed on drivers under chapter 46.61 RCW: to slow when approaching a yield sign, to drive at an appropriate reduced speed when approaching and crossing an intersection, and to see what would be seen by a person exercising ordinary care. The trial court then looked at testimony establishing that yield signs are only used at intersections, and that any reasonable person seeing a yield ahead sign would expect an intersection and for those duties under chapter 46.61 RCW to apply. Because Malinak testified that he did not believe a yield sign imposed any obligation to slow down absent conflicting traffic, the trial court determined as a matter of law that the obscured yield sign and corner did not contribute to the accident. The court also stated that there was insufficient evidence that the County violated its duty to exercise ordinary care in the design and maintenance of its public roads. At best, the evidence allowed the jury to speculate as to breach and causation. For these reasons, the trial court granted the County's motion for judgment as a matter of law. Tapken and Malinak appeal.

ANALYSIS

1. *Standard of review: Evidence must be viewed most favorable to the nonmoving party*

"When reviewing a trial court's decision on a motion for judgment as a matter of law, the appellate court applies the same standard as the trial court and reviews the grant

or denial of the motion de novo." *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007). Such a motion must be granted "'when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.'" *Id.* (quoting *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003)).

2. *Whether the trial court erred when it granted the County's motion for judgment as a matter of law*

To prevail on a claim of negligence against the County, the plaintiffs were required to show a duty owed, breach of that duty, a resulting injury, and that breach proximately caused that injury. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (quoting *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998)). Only breach of duty and proximate cause are issues on appeal.

a. *Breach of duty*

A county owes a duty generally to design and maintain roads in a reasonably safe condition for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 246, 44 P.3d 845 (2002). Whether roadway conditions are reasonably safe for ordinary travel, or instead are inherently dangerous or misleading, is usually a question of fact. *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). In *Owen*, a train hit a car blocked by traffic on a railroad crossing, killing its two passengers. *Id.* at 784-85. Jean

Owen, individually and as personal representative of the estates of the deceased persons, brought suit against the railroad and the City of Tukwila. *Id.* at 783. Owen settled with the railroad. *Id.* Subsequently, the city moved for summary judgment, and argued that it complied with all statutes, ordinances, and the manual on uniform traffic control devices. *Id.* at 785. The trial court granted the city's motion. *Id.* In reversing, the *Owen* court noted "'issues of negligence and proximate cause are generally not susceptible to summary judgment.'" *Id.* at 788 (quoting *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)). Moreover, violation of a statute, regulation, or other positive enactment need not be shown to establish liability, although compliance may help in defining the scope of a duty for providing reasonably safe roads. *Id.* at 787. "A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon." *Id.* at 788. "[T]he existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings." *Id.*

The *Owen* court then reviewed the various conditions present that contributed to the collision. These conditions included high traffic volume, a crown in the roadway, and traffic signals located just beyond the tracks, which combined to cause frequent queuing of vehicles on the tracks. *Id.* at 784, 789. The *Owen* court then reviewed the testimony

from Owen's expert, who opined that the conditions were unsafe and described how the conditions could be mitigated. *Id.* at 789-90. The *Owen* court reversed the trial court's order of dismissal, concluding that "reasonable minds may differ as to whether the roadway was reasonably safe for ordinary travel, inherently dangerous, or misleading, and whether appropriate corrective action has been taken." *Id.* at 790.

Here, the presence of the large hawthorn bush that obscured the roadway to the right and one of the two yield signs created a situation that arguably required the County to do more than simply comply with positive regulations. Plaintiffs presented evidence that a driver approaching from the north would be unable to appreciate the sharpness of the road, which veered right, until too late.[3] Plaintiffs also presented evidence that the yield ahead sign, 800 feet from the intersection, would not satisfactorily warn of the degree to which a person might be required to reduce his or her speed to safely veer right. Plaintiffs also presented evidence of how the intersection could be easily made safer. We conclude that plaintiffs presented substantial evidence that the County breached its duty to design and maintain a safe intersection.

[3] The County argues that the hazards were open and apparent, and that Malinak knew of the hazards. Viewing the evidence most favorably to the plaintiffs, however, creates issues of fact of how familiar Malinak was with the intersection, how clearly and quickly a reasonable driver should perceive the sharp right curve, and whether Malinak's failure to slow beyond his already reduced speed was reasonable in light of what a

b. *Proximate cause*

Proximate cause has two elements: cause in fact and legal causation. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998). Legal causation involves a legal determination of whether liability should exist. *Petersen v. State*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983). Only the first element, factual causation, is at issue here.

Substantial evidence of factual causation exists if the jury could find that, but for the defendant's actions, the plaintiff would not have been injured. *Schooley*, 134 Wn.2d at 478. "Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury." *Id.* Causation need not be proved to a certainty. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947) (quoting *Home Ins. Co. of New York v. N. Pac. Ry.*, 18 Wn.2d 798, 802, 140 P.2d 507 (1943)). It is sufficient that plaintiff's evidence allows a jury to find that the harm more probably than not happened in such a way that defendant's negligence played a role. *Id.* (quoting *Home Ins.*, 18 Wn.2d at 802). An accident can have more than one proximate cause. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 676, 709 P.2d 774 (1985).

The trial court determined that plaintiffs failed to establish proximate cause

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reasonable person should perceive.

because Malinak testified that he only slows for a yield sign if there is converging traffic, and because there was no converging traffic, the yield sign hidden by the hawthorn bush could not have proximately caused Malinak's failure to slow down. The plaintiffs note that the hawthorn bush obscured both the yield sign to the right *and the sharpness of the right hand turn*. They persuasively argue evidence establishes that Malinak would have slowed more had he been able to perceive the sharpness of the right turn earlier. We hold that plaintiffs presented substantial evidence of proximate cause.[4]

3. *Whether the trial court abused its discretion in excluding evidence of prior accidents at the "Waverly Y"*

During discovery, the plaintiffs developed evidence of over two dozen prior accidents near the "Waverly Y" in less than 20 years—all involving single vehicles leaving the roadway. Plaintiffs contended that the number of prior road-departure

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[4] The dissent concedes that "the cause of the accident was the failure to slow sufficiently to make the turn." Dissent at 1. It then concludes that the obstruction that prevented Malinak from seeing the sharpness of the curve was not a proximate cause of his failure to slow sufficiently.

One does not need to take judicial notice of the fact that drivers routinely slow to safely navigate a sharp curve when the sharpness of the curve is apparent. A jury is entitled to decide whether Malinak, had the intersection been unobstructed so he could have earlier seen the sharpness of the curve, would have sufficiently slowed or whether he would have launched himself and his passenger off the road. Because our standard of review requires us to assume the facts and inferences in the light most favorable to Malinak, we must presume that he would have done what almost every other driver does when perceiving a sharp curve: slow down sufficiently rather than wreck.

accidents at that location, regardless of the causes or the similarity of those accidents to theirs, was admissible to establish the County should have conducted a road study. Tapken made an offer of proof that the County's own road standards manual required the County to study any location with a history of road departures and mitigate the problem. However, the plaintiffs fail to provide authority or argument that the County's failure to perform a study violates a duty owed to them. We therefore decline to review this issue. *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002); RAP 10.3(a)(6).

In addition, the plaintiffs sought admission of historical accidents that were substantially similar to theirs at the "Y" intersection to establish that the County was on notice not only of the conditions near the intersection, but also that those conditions were dangerous. The County argued that evidence of even substantially similar accidents was not admissible because it admitted it had notice of the conditions near the intersection, specifically that the hawthorn bush obscured one of the yield signs.

Prior to trial, the trial court ruled that evidence of three substantially similar accidents would be admissible, but only if the County presented evidence that it lacked notice that the intersection was dangerous. The trial court later modified its ruling and excluded all evidence of prior accidents. The trial court explained:

> [P]rior collisions don't decide whether or not the roadway was unsafe. That's for the experts to decide. Both sides have their experts talking about

> how safe the condition of the roadway is, which is the ultimate question, and all these accidents don't help the jury understand that at all.
>
> When I went through all the accidents that were presented, some of them were deer, some of them were snow and ice, some were at night, some were off the roadway. There's really no uniformity as to how these accidents occur.
>
> So at this point once and for all I'm going to decide this issue. There won't be any testimony regarding prior accidents. They're not at all relevant to whether or not this was properly designed and maintained, and any such testimony would be prejudicial.

Report of Proceedings (RP) at 866-67.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). A trial court abuses its discretion when it renders a decision that is "'manifestly unreasonable or based upon untenable grounds or reasons.'" *Id.* at 669 (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). "'A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.'" *Id.* (quoting *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009)).

Prior to determining whether evidence was properly excluded as irrelevant, we examine the nature of the notice that the plaintiffs must establish. A municipality is deemed to have notice of an unsafe condition created by its employees or agents. *Wright v. City of Kennewick*, 62 Wn.2d 163, 167, 381 P.2d 620 (1963). But to establish liability

for a condition not created by the municipality, the plaintiff must prove that the municipality knew or should have known of the condition before the accident. *Russell v. City of Grandview*, 39 Wn.2d 551, 554-55, 236 P.2d 1061 (1951). The dangerous condition alleged here is the large hawthorn bush and how it obscures the intersection so that a person veering right could not gauge the severity of the turn until too late to slow to a safe speed. This is a condition not created by the County. Therefore, unless admitted by the County, the plaintiffs were required to establish knowledge of the condition.

Prior to trial, the County admitted that it had notice that the large hawthorn bush obscured the intersection, although it disputed that this condition was dangerous. At trial, the County equivocated somewhat. It disputed the degree to which the hawthorn bush actually obscured the yield sign and the intersection, but it certainly did not claim to have lacked notice of the condition.

The trial court correctly concluded that the prior accidents were irrelevant. The relevant notice is notice of the alleged dangerous condition—which the County admitted—not whether the condition actually was dangerous. *See Tanguma v. Yakima County*, 18 Wn. App. 555, 562-63, 569 P.2d 1225 (1977). Under these facts, the County's admission of notice was sufficient.[5] We hold that the trial court did not abuse

[5] If the County's evidence at trial leaves the jury with the false impression that

its discretion in excluding evidence of prior accidents.

4. *Whether the trial court abused its discretion in excluding certain expert testimony*

Plaintiffs argue that the trial court erred by excluding Mr. Harbinson's testimony concerning causation of the accident. Tapken's counsel asked Mr. Harbinson his opinion of the particular cause of the accident. Mr. Harbinson answered, "I've got three." RP at 781. "The proximate cause of the collision is speed." RP at 781. Defense counsel objected on the grounds that "[i]t's improper for any witness to talk about the proximate cause of an accident," arguing that proximate cause is "beyond the expertise of an expert witness." RP at 781-82. Meanwhile, Tapken's counsel clearly believed that the objection was to the witness testifying to causation generally, pointing to opinions Mr. Harbinson had previously given in his deposition. The trial court ruled using the unreferenced demonstrative pronoun "that," and concluded that "that" was an ultimate issue of fact reserved for the jury. RP at 781-82. While the County believes "that" referenced proximate cause, plaintiffs believe "that" referenced causation in general. This uncertainty was never resolved because following the ruling, Tapken's counsel moved on to a separate line of questioning. However, because the exclusion is premised on the objection, and the objection was to proximate cause—not causation in general—we deem

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there has never been any similar accidents at the intersection, the trial court may

it unnecessary to review plaintiffs' assigned error.

5. *Whether the trial court erred in denying Tapken's motion for partial summary judgment*

Tapken argues that the trial court erred in denying her motion for partial summary judgment, which sought to dismiss the County's claim that she was contributorily at fault for her injuries. Tapken's argument is premised on her assertion that there was insufficient time for her to react to Malinak's sudden attempt to turn left instead of right, and if she failed to lean left, or even if she leaned further right, her act was not volitional and therefore not negligent. Alternatively, Tapken argues that the County has no evidence what she did, and therefore its claim that she was contributorily at fault must fail because it is pure speculation.

Decisions on summary judgment are reviewed de novo. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Evidence is reviewed in the light most favorable to the nonmoving party, and summary judgment is appropriate where there is not substantial evidence or a reasonable inference to support a finding of liability. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484-85, 258 P.3d 676 (2011).

Preliminarily, the County cites *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988), and argues that this court may not review a denial of summary judgment after

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reevaluate the relevance and admissibility of the substantially similar accidents.

a trial on the merits. *Johnson* is inapposite. Here, there has not been a trial on the merits; rather, the trial court granted the County's motion for judgment as a matter of law.

In its substantive response to this issue, the County quotes a portion of Detective David Thornburg's interview with Malinak at the hospital, recorded in his accident report.

> [Malinak] started to lean right to make a right turn and so did [Tapken]. He then decided to go left instead, so he leaned back to the left, but [Tapken] leaned even farther right. [Malihak] stated this made the bike unstable and they ended up going straight off the road.

Clerk's Papers (CP) at 691. The County then takes issue with applying the rule that allows disfavored drivers a reasonable reaction time to this case. The County argues that reasonable care in the context of experienced motorcycle riders and passengers "requires [both] riders to closely mirror the movements of each other so they move in synch." Resp't's Br. at 47.

First, neither we nor the County need speculate on why the motorcycle did not veer left once Malinak leaned left after deciding to veer that direction: Tapken did not match his movement. Moreover, construing the evidence in the light most favorable to the County, the nonmoving party at summary judgment, we must accept the truth of Malinak's statement to the deputy: "[Tapken] leaned even farther right." CP at 691. Again, assuming these facts in the light most favorable to the County, if Tapken had sufficient time to lean farther right, she also may have had sufficient time to lean to the

left. Despite Malinak's sudden and unexpected weight shift to the left, it is a genuine issue of material fact what a reasonable motorcycle passenger would have done in Tapken's situation. Just as the reasonableness of the County's conduct must be evaluated by a jury, so must Tapken's and Malinak's. The trial court did not err in denying Tapken's motion for partial summary judgment.

CONCLUSION

Although we affirm the trial court's other challenged rulings, we reverse the trial court's order granting the County's motion for judgment as a matter of law and remand for trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

I CONCUR:

Fearing, J.

KORSMO, J. (dissenting) — While the majority nicely analyzes the appellants' theory of the case, it misses the fact that led the trial court to dismiss this action—the appellants did not prove that the supposedly dangerous interchange caused the accident. The trial court concluded, and I agree, that the evidence did not support their case. Since we should be affirming that ruling, I respectfully dissent.

Viewing the evidence in the light most favorable[1] to the appellants, as the trial court did and as we must do at this juncture, shows that while there was a factual dispute whether the intersection design was dangerous, the cause of the accident was the failure to slow sufficiently to make the turn. Mr. Malinak and Ms. Tapken never showed that it was some feature of the intersection that led to the failure to sufficiently navigate the turn. If, for instance, the motorcycle had struck another vehicle due to the design, the appellants would have a case. However, the accident occurred because Mr. Malinak treated the intersection as if it were a mere curve in the road subject to the posted highway speed rather than an intersection.[2]

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[1] Two otherwise salient facts that therefore are not relevant are that (1) Mr. Malinak had driven this road on several prior occasions and (2) that he realized when entering the turn that Waverly, his destination, was to the left, not the right.

[2] Particularly telling is this testimony: "Well, what I understand about this roadway, and I guess any roadway but particularly this roadway, is that any, anytime that I was supposed to slow down for a curve, I was told to. But, you know, whenever I was meant to deviate from the posted speed limit, also I was told which direction I would have to go." Report of Proceedings (RP) at 1015.

In examination by his own attorney, Mr. Malinak agreed that he was driving the posted speed limit and, when shown other types of road signs from this highway such as "curve ahead" or cautionary speed posting, agreed that he would slow down in accordance with the dictates of those signs. RP at 1015-1016. Here, he did not see the "yield ahead" sign. RP at 965. He also believed that a yield sign did not indicate an upcoming intersection and meant slow down only if needed. RP at 1019. Since he did not see any other traffic, he did not slow down when he saw the yield sign on his left. RP at 1117-1118. His misunderstanding of his obligations when approaching an intersection led to this tragic accident.

As the trial judge correctly analyzed, yield signs govern intersections, not curves. RCW 46.61.180; .190. All drivers are required to drive at a speed that is "reasonable and prudent under the conditions." RCW 46.61.400(1). A driver approaching a yield intersection has an obligation to slow and/or stop:

> The driver of a vehicle approaching a yield sign shall in obedience to such sign slow down to a speed reasonable for the existing conditions and if required for safety to stop, shall stop.

RCW 46.61.190(3).

Mr. Malinak did not stop or even slow down for the intersection both because he missed the sign alerting him to the upcoming intersection and he did not know his driving

obligation with respect to the yield sign.[3] The county properly signed the intersection by notifying drivers of a yield ahead. The motorcyclist then had the duty to slow sufficiently or stop in order to make a turn. Thus, the county had no liability with respect to the actual cause of the accident—the failure of the motorcycle to slow sufficiently to make a turn at the intersection.

The trial court correctly realized there was no basis, other than speculation, for the county to be held liable. This was not the case of an improperly signed curve in the road. It was the case of a properly signed intersection that was not timely comprehended by the driver. That was the only cause of the accident. The trial court thus correctly dismissed the action after the plaintiff's case.

I respectfully dissent.

Korsmo, J.

[3] Even under his own theory that he slowed, albeit insufficiently, to make the unexpectedly sharp right turn, he was in violation of his basic duty to drive slowly enough for the conditions. RCW 46.61.400(3). He blames this failure on the county in a dubious attempt to delegate his own driving responsibility.

APPENDIX B

FILED
February 18, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

MADELYNN M. TAPKEN, a single person, **Appellant,** **v.** **SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation,** **Respondent,** **CONRAD MALINAK, a single person, et al.,** **Appellant.**	**No. 32909-7-III** **ORDER DENYING MOTIONS FOR RECONSIDERATION**

The court has considered Madelynn Tapken's motion for reconsideration and Spokane County's motion for reconsideration. The court is of the opinion the motions should be denied. Therefore,

IT IS ORDERED that both Ms. Tapken's and Spokane County's motions for reconsideration of this court's decision of January 12, 2016, are denied.

PANEL: Judges Lawrence-Berrey, Fearing, and Korsmo

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN, a single person, Plaintiff, v. SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person, et al., Defendants.	NO.: 13201216-7 SUMMONS (20 Days)

TO: SPOKANE COUNTY, Public Works/Dept. of Engineering & Roads, a Municipal Corporation:

A lawsuit has been started against you in the above-entitled court by MADELYNN M. TAPKEN. Plaintiff's claim is stated in the Complaint, a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the Complaint by stating your defense in writing, and by serving a copy upon the person signing this Summons, within twenty (20) days after the service of this Summons,

FELICE LAW OFFICES, P.S.
506 W. RIVERSIDE AVE., SUITE 210
SPOKANE, WA 99201-0208
(509) 326-0510

excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where the plaintiffs are entitled to what they ask for because you have not responded. If you serve a Notice of Appearance upon the undersigned person, you are entitled to notice before a default judgment may be entered.

You may demand that the plaintiff file this lawsuit with the Court. If you do so, the demand must be in writing and must be served upon the person signing this Summons. Within fourteen (14) days after you serve the demand, the plaintiff must file this lawsuit with the Court or the service on you of this Summons and Complaint will be void.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time.

This Summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the State of Washington.

DATED this 26TH of March, 2013.

FELICE LAW OFFICES, P.S.

By: Roger A. Felice

Roger A. Felice, WSBA #5125
Attorney for Plaintiff

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SPOKANE, WA 99201-0208
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FILED

MAR 26 2013

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN, a single person, Plaintiff, v. SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person; et al., Defendants.	NO.: 13201216-7 SUMMONS (20 Days)

TO: CONRAD MALINAK, a single person:

A lawsuit has been started against you in the above-entitled court by MADELYNN M. TAPKEN. Plaintiff's claim is stated in the Complaint, a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the Complaint by stating your defense in writing, and by serving a copy upon the person signing this Summons, within twenty (20) days after the service of this Summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where the plaintiffs are entitled to what

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they ask for because you have not responded. If you serve a Notice of Appearance upon the undersigned person, you are entitled to notice before a default judgment may be entered.

You may demand that the plaintiff file this lawsuit with the Court. If you do so, the demand must be in writing and must be served upon the person signing this Summons. Within fourteen (14) days after you serve the demand, the plaintiff must file this lawsuit with the Court or the service on you of this Summons and Complaint will be void.

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This Summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the State of Washington.

DATED this 26th of March, 2013.

FELICE LAW OFFICES, P.S.

By: Roger A. Felice

Roger A. Felice, WSBA #5125
Attorney for Plaintiff

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FILED
MAR 26 2013
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN, a single person, Plaintiff, v. SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person; et al, Defendants.	NO.: 13201216-7 COMPLAINT FOR PERSONAL INJURIES

COMES NOW the plaintiff MADELYNN M. TAPKEN, by and through counsel, and for a cause of action against defendants alleges as follows:

I.PARTIES

Plaintiff

1.1 MADELYNN M. TAPKEN is a single person who at all times set forth was a resident of Spokane County, State of Washington.

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(509) 328-0510

Defendants

1.2 SPOKANE COUNTY is a governmental entity operating as a municipal corporation under the laws of the State of Washington. Through its Public Works Department/Division of Engineering & Roads, SPOKANE COUNTY is responsible for safe signing, maintenance, operation and design of those roadways under its control and jurisdiction.

1.2 CONRAD MALINAK, is a single person who at all times set forth was a resident of Spokane County, Washington.

II. JURISDICTION AND VENUE

2.1 Jurisdiction. The superior courts of the State of Washington have jurisdiction over the parties and the subject matter of this litigation.

2.1 Venue is properly set in Spokane County, Washington.

III. SERVICE OF CLAMS

3.1 On January 16, 2013 Plaintiff filed a Claim for Damages in this matter with the Office of Risk Management for Spokane County. More than sixty (60) days have elapsed since the Claim was filed with this Defendant.

3.2 The filing of the Claim for Damages has been properly perfected as to defendant Spokane County operating through its Public Works Department/Division of Engineering & Roads.

IV. FACTS

4.1 Spokane County through its Department of Public Works/Division of Engineering & Roads (hereinafter County) is exclusively responsible for design, safe operational signing/placement and safe maintenance for the roadway convergence

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of South Prairie View Road and East Spangle Waverly Road in Spokane County, Washington.

4.2 The convergence of South Prairie View Road and East Spangle Waverly Road is located at the bottom of a decline from three approach angles and is somewhat of a "Y" intersection to vehicles entering from all three different directions.

4.3 The posted safe speed for vehicles approaching and entering the convergence is 45 mph.

4.4 Relative to road users proceeding in a southerly direction on South Prairie View Road at the time of this incident and approaching the convergence, there was no advisory speed sign or warning sign of the abrupt horizontal change in the roadway at the convergence.

4.5 Road users proceeding in a southerly direction on South Prairie View Road and entering the convergence at East Spangle Waverly Road cannot safely negotiate the abrupt horizontal changes to the right and left at the posted safe speed of 45 mph.

4.6 Posting of an advisory speed sign and warning sign(s) for road users approaching the convergence in a southerly direction on South Prairie View Road was a feasible precautionary safety measure.

4.7 At approximately 4:00 pm on Tuesday, September 28, 2011 Madelynn Tapken (age 20) was a passenger on a motorcycle being operated by Conrad Malinak in a southerly direction on South Prairie View Road approaching the location of East Spangle Waverly Road in Spokane County, Washington.

4.8 As Malinak reached the convergence at the right he was traveling at or below the posted safe speed limit of 45 mph when he decided that his intended destination at the convergence was on the left.

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4.9 As Malinak adjusted for the move to the left he lost control of the motorcycle causing Madelynn Tapken to be thrown from the bike.

V.LEGAL DUTY

5.1 The County has a legal responsibility to exercise ordinary care to maintain its roadways in a reasonably safe condition for ordinary travel.

5.2 The County's legal responsibility to exercise ordinary care to maintain its roadways in a reasonably safe condition for ordinary travel includes the following duties:

a) to provide against possible dangers which should be reasonably anticipated at the point in question.

b) to erect and maintain proper advisory and warning signs where necessary.

5.3 Operators of motor vehicles have a legal duty to maintain control of their vehicle.

VI. LIABILITY

6.1 The County failed to provide adequate advisory signing and warning to road users approaching the convergence in a southerly direction on South Prairie View Road.

6.2 Conrad Malinak failed to maintain control of his motor vehicle.

6.3 Negligence of the defendants includes but is not necessarily limited to such respective failures.

VII. PROXIMATE CAUSE

7.1 The negligence of the defendants, including the respective failures, was a

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direct and proximate cause of the incident and ensuing injuries to Madelynn Tapken.

VIII. INJURIES

9.1 As a result of the incident Madelynn Tapken sustained life threatening and other injuries including a severed spinal cord at or near T-5 resulting in paraplegia and paralysis which will substantially confine her to a wheelchair for the rest of her life;

9.2 As a further result of the incident Madelynn Tapken sustained traumatic brain injury resulting in cognitive deficits;

9.3 The injuries sustained by Madelynn Tapken in the incident will require medical care, attendant treatment and monitoring for the rest of her life.

IX. DAMAGES

10.1 As a direct and proximate result of the injuries sustained, Madelynn Tapken sustained damages in amounts to be proven at trial for personal losses which include the following:

Economic Damages

a) Past Earnings;

b) Future Earnings;

c) Impairment to Earning Capacity;

d) Past and Future medical and rehabilitation expenses and related incidental costs, attendant care, assistance, and necessities.

Non Economic Damages

a) Loss of Enjoyment of Life;

b) Physical Pain and Suffering;

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c) Mental and Emotional Suffering including Embarrasment and Humilitation;

d)Permanent Injuries, Disfigurement and Disability.

XI. LIMITED PHYSICIAN-PATIENT PRIVILEGE WAIVER

Pursuant to RCW 5.60.060 as amended by the laws of 1986, Madelynn Tapken hereby grants limited waiver of the physician-patient privilege. The scope of this waiver is as follows:

11.1 This waiver shall take effect regarding his lawsuit for personal injuries on the 89th day from the date the action is filed;

11.2 This waiver shall be subject to limitations as the court may impose. The waiver shall at all times be limited by an order entered in connection therewith by the Court;

11.3 This waiver shall only apply to the privilege which exists under RCW 5.60.060 and shall not be deemed to be broader in its scope nor applied to physician-patient privileges not governed by RCW 5.60.060. Constitutional rights to privacy, impairment or interference with a doctor/patient relationship and other rights not governed by RCW 5.60.060 regarding physician-patient relationships are not waived. This waiver is made solely to comply with the legal obligation required by the 1986 amendment to RCW 5.60.060 requiring such waiver within 90 days of filing of an action for personal injuries.

XII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Madelynn Tapken prays for joint and several judgment against Defendants Spokane County, Public Works Department of Engineering & Roads, and Conrad Malinak as follows:

12.1 Judgment of liability against all Defendants, jointly and severally;

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12.2 Judgment for all special losses and damages sustained by Plaintiff, both past and future;

12.3 Judgment for all general losses and damages sustained by the Plaintiff, both past and future;

12.4 Assessment of reasonable attorney fees and costs such as allowed by law;

12.5 Pre-judgment interest on all economic damages, and , to the extent allowed by law, on all non economic damages; and

12.6 Such other and further relief and compensation as warranted or allowed by law.

DATED this 26TH day of March, 2013.

FELICE LAW OFFICES, P.S.

Roger A. Felice

Roger A Felice, WSBA # 5125
Attorney for Plaintiffs

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SPOKANE, WA 99201-0208
(509) 326-0510

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN, a single person,

Plaintiff,

v.

SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person; et. al,

Defendants.

NO. 13-2-01216-7

DEFENDANT MALINAK'S ANSWER, AFFIRMATIVE DEFENSES AND CROSS CLAIM

COMES NOW the Defendant, CONRAD MALINAK, by and through counsel, and answers the Plaintiff's Complaint as follows:

GENERAL DENIAL

Except as otherwise admitted, alleged, qualified, or state herein, Defendant denies each and every allegation, averment, matter and thing contained in Plaintiff's Complaint.

ANSWER

In specific answer to Plaintiff's Complaint, and with respect to each enumerated paragraph therein, the Defendant admits, denies, and alleges as follows:

David E. Michaud
Attorney at Law
11306 N. Whitehouse Street
Spokane, WA 99218
509-321-7526

I. PARTIES

Plaintiff

1.1 Admit.

Defendants

1.2 Admit.

1.3 Admit.

II. JURISDICTION

2.1 Admit.

2.1 Admit.

III. SERVICE OF CLAIMS

3.1 Admit.

3.2 Admit

IV. FACTS

4.1 Admit.

4.2 Admit.

4.3 Admit.

4.4 Admit.

4.5 Admit.

4.6 Admit.

4.7 Admit.

4.8 Deny that Defendant Malinak was traveling at the posted speed limit. Admit that Defendant Malinak was traveling below the posted speed limit. Admit that Defendant Malinak's destination at the convergence was on the left.

4.9 Admit that Defendant Malinak lost control of the motorcycle. Defendant Malinak denies that this caused Plaintiff to be thrown from the motorcycle.

David E. Michaud
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V. LEGAL DUTY

5.1 Admit.

5.2(a) Admit.

5.2(b). Admit.

5.3 No response is required as this allegation is a legal conclusion to which no response is required.

VI. LIABILITY

6.1 Admit.

6.2 Admit that Defendant Malinak failed to maintain control of his motorcycle but denies that his actions were negligent or the proximate cause of Plaintiff's injuries.

6.3 Defendant Malinak denies any negligence or wrongful conduct on his part.

VII. PROXIMATE CAUSE

7.1 Defendant Malinak denies any negligence or wrongful conduct on his part.

VIII. INJURIES

9.1 Defendant Malinak admits that the Plaintiff sustained life threatening injuries and other injuries but denies any legal responsibility for said injuries.

9.2 Admit.

9.3 Admit

IX. DAMAGES

10.1 Defendant Malinak admits the Plaintiff sustained damages as a proximate result of her injuries, but denies any legal responsibility for said damages.

XI. LIMITES PHYSICIAN-PATIENT PRIVILEGE WAIVER

11.1 No response is required as this is not an allegation requiring a response.

11.2 No response is required as this is not an allegation requiring a response.

11.3 No response is required as this is not an allegation requiring a response.

XII. PRAYER FOR RELIEF

12.1 Deny.

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11306 N. Whitehouse Street
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12.2 Deny that the Plaintiff is entitled to judgment against this Defendant.

12.3 Deny that the Plaintiff is entitled to judgment against this Defendant.

12.4 Deny that the Plaintiff is entitled to judgment against this Defendant.

12.5 Deny that the Plaintiff is entitled to judgment against this Defendant.

12.6 Deny that the Plaintiff is entitled to judgment against this Defendant.

DEFENSES AND AFFIRMATIVE DEFENSES

Since this Defendant must raise all affirmative defenses at the time of answer and prior to the completion of formal discovery, this Defendant asserts the following affirmative defenses to the extent that they are factually and/or legally supportable through subsequent discovery and/or the trial process:

1. To the extent Plaintiff has failed to properly and reasonably mitigate her damages and injuries as required by Washington law, she is barred from recovery for any such damages.

2. Plaintiff has failed to state a claim on which relief may be granted as to this Defendant.

3. Plaintiff's injuries or damages were proximately caused by the negligent actions and/or omissions of third party over which this Defendant had no control, and for whom this Defendant is not responsible, namely the Defendant Spokane County.

4. If liability is assessed against this Defendant and the Co-Defendant, Spokane County, this Defendant is entitled to contribution from Co-Defendant Spokane County if he pays more than his allotted share.

5. To the extent that discovery reveals the existence of any other affirmative defenses not presently known to this Defendant, Defendant reserves the right to amend his answer and to include any such affirmative defenses in the interests of justice.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant prays for relief as follows:

1. That Plaintiff's Complaint be dismissed with prejudice and that Plaintiff take

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Attorney at Law
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nothing against this Defendant.

2. That this Defendant be awarded judgment for his costs and expenses herein including attorney fees authorized by law.

3. For such other relief as the Court may deem just, equitable, and appropriate in favor of Defendant.

CROSS CLAIM

COMES NOW the cross-claimant, CONRAD MALINAK, by and through his attorney of record and for cause of action alleges the following:

I. Parties

Cross-claimant

1.1 Conrad Malinak , Cross-Claimant, is a single person who at all times set forth was a resident of Spokane County, Washington

Defendants

1.2 Spokane County is a governmental entity operating as a municipal corporation under the laws of the State of Washington. Through its Public Works Department/Division of Engineering & Roads, Spokane County is responsible for safe signing, maintenance, operation and design of those roadways under its control and jurisdiction.

Plaintiff

1.3 Madelynn M. Tapken is a single person who at all times set forth herein was a resident of Spokane County, Washington.

II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction over the parties and the subject matter of this litigation.

2.2 Venue is properly set in Spokane County, Washington.

III. SERVICE OF CLAIMS

3.1 On May 21, 2013, Cross-Claimant Malinak filed a Claim for Damages in this matter with the Office of Risk Management for Spokane County. More than sixty (60) days

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have elapsed since the Claim was filed with the Defendant.

3.2 The filing of the Claim for Damages has been properly perfected as to Defendant Spokane County operating through its Public Works Department/Division of Engineering and Roads.

IV. FACTS

4.1 Spokane County through its Department of Public Works/Division of Engineering & Roads (hereinafter County) is exclusively responsible for design, safe operational signing/placement and safe maintenance for the roadway convergence of South Prairie View Road and East Spangle Waverly Road in Spokane County, Washington.

4.2 The convergence of South Prairie View Road and East Spangle Waverly Road is located at the bottom of a decline from three approach angles and is somewhat of a "Y" intersection to vehicles entering from all three directions.

4.3 The posted speed for vehicles approaching and entering the convergence is 45 miles per hour.

4.4 Relative to road users proceeding in a southerly direction on South Prairie View Road at the time of this incident and approaching the convergence, there was no advisory speed sign or warning sign of the abrupt horizontal change in the roadway at the convergence.

4.5 Road users proceeding in a southerly direction on South Prairie View Road and entering the convergence of East Spangle Waverly Road cannot safely negotiate the abrupt horizontal changes to the right and left at the posted safe speed of 45 miles per hour.

4.6 Posting of an advisory speed sign and warning sign(s) for road users approaching the convergence in a southerly direction on South Prairie View Road was a feasible and precautionary safety measure.

4.7 At approximately 4:00 p.m. on Tuesday, September 28, 2011, Cross-Claimant, Malinak was legally and properly operating his motorcycle in a southerly direction on South Prairie View Road approaching the location of East Spangle and Waverly Road near Waverly,

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Washington in the County of Spokane, State of Washington.

4.8 Plaintiff, Madelynn M. Tapken, was a passenger on the motorcycle driven by the Cross-Claimant Malinak.

4.9 As Cross-Claimant Malinak approached the curves at the South Prairie View Road and East Spangle Waverly Road, he was operating his motorcycle below the posted speed limit of 45 miles per hour.

4.10 Cross-Claimant Malinak's intended destination was Waverly, Washington.

4.11 Due to the negligence of the Defendant, Spokane County, Cross-Claimant Malinak lost control of the motorcycle he was safely and legally operating.

V. LEGAL DUTY

5.1 The County had a legal responsibility to exercise ordinary care to maintain its roadways in a reasonably safe condition for ordinary travel.

5.2 The County's legal responsibility to exercise ordinary care to maintain its roadways in a reasonably safe condition for ordinary travel includes the following duties:

(a) to provide against possible dangers which should be reasonably anticipated at the point in question; and

(b) to erect and maintain proper advisory and warning signs where necessary.

VI. LIABILITY

6.1 The County failed to provide adequate advisory signing and warning to road users approaching the convergence in a southerly direction on South Prairie View Road.

6.2 The negligence of the County includes but is not limited to such failures.

VII. PROXIMATE CAUSE

7.1 The negligence of the County was a direct, sole and proximate cause of Cross-Claimant Malinak losing control of his motorcycle and the injuries he suffered as a result.

VIII. INJURIES

8.1 As a result of the County's negligence, Cross-Claimant Malinak suffered serious injuries and permanent injuries.

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8.2 As a result of the County's negligence, Cross-Claimant Malinak has required and will require medical care and treatment.

IX. DAMAGES

9.1 As a direct and proximate result of the injuries suffered by Cross-Claimant Malinak, he has sustained general and special damages in an amount to be proven at trial including, but limited to past earnings, future earnings, impairment to earning capacity, past and future medical expenses, loss of enjoyment of life, and mental and emotional suffering.

X. LIMITED PHYSICIAN-PATIENT PRIVILEGE WAIVER

Pursuant to RCW 5.60.060, Cross-Claimant Malinak hereby grants limited waiver of the physician-patient privilege. The scope of this waiver is as follows:

10.1 This waiver shall take effect regarding this lawsuit for personal injuries on the 89th day from the date this action is filed.

10.2 This waiver shall be subject to limitations as the Court may impose. The waiver shall at all times be limited by an order entered in connection therewith by the Court.

10.3 This waiver shall only apply to the privilege which exists under RCW 5.60.060 and shall not be deemed to be broader in its scope nor applied to the physician-patient privilege not governed by RCW 5.60.060. Constitutional rights to privacy, impairment or interference with a doctor/patient relationship and other rights not governed by RCW 5.60.060 regarding a physician-patient relationship s are not waived. This waiver is made solely to comply with the legal obligations required by RCW 5.60.060 requiring such waiver within 90 days of filing of an action for personal injuries.

XI. PRAYER FOR RELIEF

WHEREFORE, Cross-Claimant, Conrad Malinak, prays for judgment against the Defendant, Spokane County as follows:

1. Judgment of liability against the Defendant, Spokane County;

2. Judgment for all special losses and damages sustained by the Cross-Claimant, Conrad Malinak;

David E. Michaud
Attorney at Law
11306 N. Whitehouse Street
Spokane, WA 99218
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3. Assessment of reasonable attorney fees and costs such as allowed by law;

4. Pre-judgment interest on all economic damages and, to the extent allowed by law, on all economic damages; and

5. Such other relief and compensation as warranted or allowed by law.

DATED this 13th day of November, 2013.

By: _____
DAVID E. MICHAUD, WSBA# 13831
Attorney for Defendant Malinak

David E. Michaud
Attorney at Law
11306 N. Whitehouse Street
Spokane, WA 99218
509-321-7526

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by the method indicated below to the following this ____ day of November, 2013.

☐ **U.S. MAIL**	Roger A. Felice
☒ HAND DELIVERED	Felice Law Offices, P.S.
☐ OVERNIGHT MAIL	505 W. Riverside Avenue, Suite 210
☐ TELECOPY (FAX) to:	Spokane, WA 99201-0208
☐ **Email to:**	

☐ **U.S. MAIL**	Peter J. Johnson
☒ HAND DELIVERED	Johnson Law Group
☐ OVERNIGHT MAIL	103 E. Indiana, Suite A
☐ TELECOPY (FAX) to:	Spokane, WA 99207-2317
☐ **Email to:**	

David E. Michaud

David E. Michaud
Attorney at Law
11306 N. Whitehouse Street
Spokane, WA 99218
509-321-7526

FILED

SEP 30 2014

SPOKANE COUNTY CLERK

Honorable John O. Cooney

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN, a single person, Plaintiff, v. SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person, et al., Defendants.	NO. 2013-02-01216-7 STIPULATION AND ORDER FOR VOLUNTARY NONSUIT CR 41(a)(1)(A)

STIPULATION

Prior to the case being submitted to the jury, defendant Spokane County moved under CR 50 (a) for judgment as a matter of law as to the claim of plaintiff Tapken and cross claim of co-defendant Malinak.

The Court granted Spokane County's Motion For Judgment as a matter of law under CR 50(a) as to the claim of plaintiff Tapken and cross claim of co-

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defendant Malinak.

The remaining parties to this action, by their attorneys of record, hereby stipulate that as to plaintiff's claim against defendant Malinak, voluntary dismissal shall be granted without prejudice and without an award of costs to either party.

Plaintiff Tapken and defendant Malinak, as aggrieved parties, intend to pursue all available remedies through the appellate process.

Dated this 30th day of September, 2014.

FELICE LAW OFFICES, P.S.

Roger A. Felice, WSBA #5125
Attorney for Plaintiff Tapken

MICHAUD LAW FIRM, PLLC

David E. Michaud, WSBA# 13831
Attorney for Defendant and Cross-Claimant Malinak

ORDER

IT IS HEREBY ORDERED:

Stipulation of the parties for voluntary dismissal as referenced above is hereby approved. Pursuant to CR 41, plaintiff's claim against Conrad Malinak is dismissed without prejudice and without an award of costs to either party.

DATED: September 30, 2013.

Honorable John O. Cooney

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505 W. Riverside Ave., Suite 210
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(509) 326-0510

Presented by:

FELICE LAW OFFICES, P.S.

Roger A. Felice, WSBA # 5125
Attorney for Plaintiff

APPROVED AS TO FORM & CONTENT;
NOTICE OF PRESENTATION WAIVED:

MICHAUD LAW FIRM, PLLC

David E. Michaud, WSBA# 13831
Attorney for Defendant and Cross- Claimant Malinak

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(509) 326-0510

Honorable John O. Cooney

FILED

OCT 27 2014

SPOKANE COUNTY CLERK

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN,

Plaintiff,

v.

SPOKANE COUNTY, PUBLIC WORKS/DEPARTMENT OF ENGINEERING & ROADS, a Municipal Corporation; CONRAD MALINAK, a single person,

Defendants.

No. 2013-02-01216-7

NOTICE OF APPEAL TO THE COURT OF APPEALS

Plaintiff Madelynn M. Tapken seeks review by the designated appellate court of the Order Granting Judgment as a Matter of Law entered on September 30, 2014, and any other rulings or orders that became final upon entry of the judgment and prejudicially affect the judgment. A copy of the Order Granting Judgment as a Matter of Law is attached to this notice.

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CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

DATED this 23rd day of October, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By: _____
Nicholas P. Scarpelli, Jr., WSBA No. 5810

By: _____
Jason W. Anderson, WSBA No. 30512

FELICE LAW OFFICES, P.S.

By: _____
Roger A. Felice, WSBA No. 5125
per email approval to sign ups

Attorneys for Plaintiff

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

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 to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, 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 gregj@fjtlaw.com johnN@fjtlaw.com	David E. Michaud 11306 N. Whitehouse St. Spokane, WA 99218 Email: davemeshow@msn.com
Roger A. Felice Felice Law Offices, P.S. 505 W Riverside Ave., Suite 210 Spokane, WA 99201 Email: Roger@felice-law.com michelle@felice-law.com	

DATED this 23rd day of October, 2014.

Patti Saiden, Legal Assistant

WORKING COPY

FILED

SEP 30 2014

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN, a single person,

Plaintiff,

v.

SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person; et al.,

Defendants.

NO. 13-2-01216-7

ORDER GRANTING MOTION FOR JUDGMENT AS A MATTER OF LAW

THIS MATTER came before the Court on defendant Spokane County's Motion for Judgment as a Matter of Law and the Court having reviewed the record herein, including evidence presented at trial, heard oral argument, and, to the extent deemed relevant and admissible, reviewed the material submitted by the parties concerning this motion,

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///

FREIMUND JACKSON & TARDIF, PLLC
701 FIFTH AVENUE, SUITE 3545
SEATTLE, WA 98104
TELEPHONE: (206) 582-6001
FAX: (206) 466-6085

WORKING COPY

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Spokane County's Motion for Judgment as a Matter of Law is GRANTED, and all claims against defendant Spokane County are dismissed with prejudice.

DONE IN OPEN COURT this 30 day of September, 2014.

HONORABLE JOHN O. COONBY
Spokane County Superior Court Judge

Presented by:
FREIMUND JACKSON & TARDIF, PLLC

GREGORY E. JACKSON, WSBA #17541
701 Fifth Avenue, Suite 3545
Seattle, WA 98104
(360) 534-9960 Telephone
(360) 534-9959 Fax
gregj@fjtlaw.com
Attorneys for Defendant Spokane County

FELICE LAW

ROGER A. FELICE, WSBA #5125
Attorneys for Plaintiff

DAVID MICHAUD

DAVID MICHAUD, WSBA #13831
Attorney for Defendant Conrad Malinak

FILED

OCT 28 2014

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN, a single person, Plaintiff, v. SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person, et al., Defendants.	NO. 2013-02-01216-7 NOTICE OF APPEAL TO WASHINGTON STATE COURT OF APPEALS, DIVISION III

Defendant and Cross Claimant Conrad Malinak seeks review by the designated appellate court of that Order entered on September 30, 2014 Granting Judgment as a Matter of Law, and all other rulings or orders that became final upon entry of that judgment and which prejudicially affect the judgment. A copy of the Order Granting Judgment as a Matter of Law is attached to this notice.

DATED this 27th day of October, 2014.

MICHAUD LAW FIRM, PLLC

David E. Michaud, WSBA #13831

MICHAUD LAW FIRM, PLLC
11306 N. Whitehouse Street
Spokane, WA 99218-2693
509-321-7526

Attorney for Defendant and Cross Claimant Malinak

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that I caused to be served a copy of the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY MANNER
Defendant Spokane County Michael E. Tardif, Gregory E. Jackson John R. Nicholson Attorneys at Law ***FREIMUND, JACKSON & TARDIF, PLLC*** 701 Fifth Avenue, Suite 3545 Seattle, WA 98104 Fax. 206-466-6085 E-mail: miket@fjtlaw.com E-mail: gregj@fjtlaw.com E-mail: JohnN@fjtlaw.com	☒ Via U.S. Mail, First Class ☐ Hand Deliver ☐ Via Facsimile ☐ Via Overnight Mail ☐ Via E-Mail, per prior agreement
Nicholas P. Scarpelli, Jr Jason W. Anderson ***CARNEY BADLEY SPELLMAN, P.S.*** 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010 Fax. E-mail: scarpelli@carneylaw.com E-mail: anderson@carneylaw.com	☒ Via U.S. Mail, First Class ☐ Hand Deliver ☐ Via Facsimile ☐ Via Overnight Mail ☐ Via E-Mail, per prior agreement
Roger A. Felice, WSBA #5125 ***Felice Law Offices, P.S.*** 505 W Riverside Ave., Suite 210 Spokane, WA 99201-0518 509-326-0510 509-326-1720 Fax E-mail: roger@felice-law.com	☐ Via U.S. Mail, First Class ☒ Hand Deliver ☐ Via Facsimile ☐ Via Overnight Mail ☐ Via E-Mail, per prior agreement

Dated this 27th day of October, 2014, at Spokane, Washington.

David Michaud

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FILED

SEP 30 2014

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MADELYNN M. TAPKEN, a single person,

Plaintiff,

v.

SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person; et al.,

Defendants.

NO. 13-2-01216-7

ORDER GRANTING MOTION FOR JUDGMENT AS A MATTER OF LAW

THIS MATTER came before the Court on defendant Spokane County's Motion for Judgment as a Matter of Law and the Court having reviewed the record herein, including evidence presented at trial, heard oral argument, and, to the extent deemed relevant and admissible, reviewed the material submitted by the parties concerning this motion,

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IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Spokane County's Motion for Judgment as a Matter of Law is GRANTED, and all claims against defendant Spokane County are dismissed with prejudice.

DONE IN OPEN COURT this 30 day of September, 2014.

HONORABLE JOHN O. COONEY
Spokane County Superior Court Judge

Presented by:
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APPENDIX D

A. Yes.
Q. Are you aware of any rule, any manual, or any statement of common sense that a motorist can assume that the posted speed limit is the speed limit at which they must make a right-Hand turn?
MR. FELICE: Objection. It's leading.
THE COURT: Overruled. It's cross-examination.
THE WITNESS: I know of no -- can you repeat the question. Sorry. I'm going to try to answer it correctly.
BY MR. JACKSON:
Q. Sure. Are you aware of any rule that a motorist can assume that the posted speed limit is also the safe speed at which to make a right-hand turn?
A. No.
Q. Now, if you can next turn to section 2B.09 of the MUTCD.
A. "Yield Sign Application." "Applications," plural.
Q. And specifically can you read that portion to the jury.
A. "Option." Yield signs may be used instead of a stop sign if engineering judgment indicates that one or more of the following conditions exist: the ability to see all potential conflicting traffic is sufficient to allow a road user traveling at the posted speed, the 85th percentile speed, or the statutory speed to pass through the intersection or stop in a reasonably safe manner; if

A. I did not testify to that.
Q. Was it 1990 or you just didn't know?
A. We do not have records back that far.
Q. Back to when, like 1996, was it?
A. I believe it was 1996 we started keeping all records.
Q. All right. And the yield-ahead sign is supposed to tell a motorist that there's an obstruction to the yield sign ahead, correct?
A. They're giving them warning that there is a yield sign ahead.
Q. All right. And a tree grows, unless it's cut back or dead, from 1996 to 2011, doesn't it?
A. I would assume so, yes.

MR. MICHAUD: That's all I have.

THE COURT: Mr. Jackson, do you have any questions?

MR. JACKSON: Yes, Your Honor.

RECROSS-EXAMINATION

BY MR. JACKSON:

Q. Mr. Greene, the posted speed limit for any roadway does not authorize the driver to drive at that speed all the time, does it?
A. That is correct.
Q. And it's up to the driver to reduce his speed in appropriate circumstances, is it not?
A. That is correct.

deposition, Deputy Depriest's deposition, the police photographs, Ed Stevens's deposition with all of his attachments and his workup on the roadway and what he considers a safe, advisable speed for the corner.

Q. Based upon all the information that you reviewed, were you able to reconstruct this accident?

A. No, I was not.

Q. Can you share with the jury why you're not able to reconstruct.

A. Yes. To do a reconstruction, some of the things that we need to know is the location where the motorcycle in this particular case left the roadway. The motorcycle leaves the roadway, goes airborne and comes down into a rock quarry some 17 to 19 feet below the level it took off at. I need to know where it actually first contacted the ground too prior to where it came to a rest.

As they were trying to get Ms. Tapken out of the scene, I guess a helicopter landed and erased any possible tire mark where the motorcycle left the roadway, which limits my ability to reconstruct where it left -- where it actually first touched the ground and its travel path backwards from where it left the roadway. Without knowing where it left the roadway, everything else at that point has to be -- try to be determined and I can come up with ranges for some things. Other things like

its travel path are all speculation on how he got to where he got because we don't know where he took off from the roadway at.

Q. How important is orientation of the front wheel of the bike as it departs from the roadway in determining path of travel before it leaves the roadway?

A. The orientation is very critical. If the bike is in a, say, 30-degree lean angle, I can then back that motorcycle up to its travel path coming to the point of takeoff. If it's in a 15-degree lean angle, I can then back it up. But not knowing where it actually left from, I can't also tell you how that bike was either standing upright, leaned over 5, 10, 15, 20, 25, 30 degrees. There's no way to know. There's no way to actually calculate that backwards from the information we have.

Q. What additional information do you need in order to reconstruct what happened?

A. The main information I need to reconstruct is when the passengers are leaning, what lean angle each passenger's doing, how much force is being applied to the handlebars to move the motorcycle left or right, the speeds at which the motorcycle is traveling at different stages throughout its cornering prior to leaving the roadway.

One of the other key aspects of knowing speed is the final -- or the first point of contact with the ground

A. There is going to be a time delay between her head and shoulders catching up to the rest of her torso.

MR. FELICE: May I have a moment, Your Honor?

THE COURT: Yes.

(Pause)

BY MR. FELICE:

Q. Mr. Harbinson, given all of what you have --

THE COURT: Mr. Felice, the jury's vision is blocked.

MR. FELICE: I'm sorry. We can take that down.

BY MR. FELICE:

Q. You have reviewed -- Mr. Harbinson, given the information that you have reviewed, including the accident reports and your follow-up investigation, do you have an opinion within a reasonable degree of professional probability as to the particular cause of this accident?

A. I do.

Q. And what is that?

A. I've got three. The proximate cause of the collision is speed.

MR. JACKSON: Your Honor, I object. It's improper for any witness to talk about the proximate cause of an accident.

THE COURT: Mr. Felice?

MR. FELICE: Your Honor, I think it's entirely appropriate. He's expressed those opinions in

deposition. We also indicated that he would be giving those opinions in court.

MR. JACKSON: Your Honor, that is beyond the expertise of an expert witness.

THE COURT: That's the ultimate question for the jury to decide. So the Court will sustain the objection.

MR. FELICE: Thank you, Your Honor.

Mr. Harbinson, that's all I have. Thank you.

THE COURT: Mr. Michaud, do you have any questions for this witness?

MR. MICHAUD: I do. And I'm going to have to go get an exhibit. I believe it's already been marked.

Do you know which one that is?

THE CLERK: Yes. It is D138, Your Honor.

MR. MICHAUD: D138.

CROSS-EXAMINATION

BY MR. MICHAUD:

Q. You've seen these before, correct?

A. Yes, sir, I have.

Q. I'll show it to the jury. If you're on your motorcycle patrol as a police officer and there's --

MR. JACKSON: Your Honor, I object. We covered this in the motions in limine. He's going to ask him about citing an individual. We've already discussed whether or not citing an individual for an infraction is admissible.

do on that motorcycle?

A. No, sir. She behaved very appropriately for a passenger.

Q. She had leaned properly, knew all of the appropriate maneuvers to make --

A. Yes, sir.

Q. -- as a passenger?

What was the plan -- did you have a plan for the ride in terms of where you were going to go or were you just heading out?

A. For the second motorcycle ride?

Q. Yes, talking about the second ride.

A. So the plan for the motorcycle ride was to avoid any potential construction. And so we decided to head into the South Spokane County in between the farm towns on the Palouse.

Q. All right. And had you been there before?

A. I have been on the roads in between those farm towns.

Q. Which way would you generally go?

A. Well, it depends. So during my time at WSU, I would drive between Spokane and Pullman in both directions, and the route changed whether I was going to go from Spokane to Pullman or from Pullman to Spokane.

MR. FELICE: Let's pull up that -- can we have D208. And turn the light off.

THE COURT: Is there any objection?

MR. JACKSON: Well, it hasn't been admitted.

BY MR. FELICE:

Q. Do you recognize this exhibit?

THE COURT: Before you publish it, can you have him look at it in the book.

MR. FELICE: Yes.

BY MR. FELICE:

Q. Would you look at D208.

THE CLERK: It's in the smaller one.

MR. MICHAUD: In the small one on the right.

MR. FELICE: Excuse me.

MR. MICHAUD: I believe.

BY MR. FELICE:

Q. Can you identify that, this map here?

A. Yes, I can.

Q. Okay. Would that particular map be able to show us the various ways you had gone through that area?

A. Yes, it would.

MR. FELICE: We'd offer Exhibit D208.

THE COURT: Any objection?

MR. MICHAUD: I have none.

MR. JACKSON: No, Your Honor.

THE COURT: D208 will be admitted.

(EXHIBIT D208 WAS ADMITTED INTO EVIDENCE)

MR. FELICE: Okay. If you could -- can we enlarge

that. I'd like to enlarge -- if we can have this up center, perhaps.

MR. BODEY: That area right in there?

MR. FELICE: Yeah, I'd like to have this centered.

MR. BODEY: Okay.

MR. FELICE: Can we bring it up.

BY MR. FELICE:

Q. All right. Mr. Malinak, could you tell us where your home was located in relationship to this map?

MR. FELICE: And you may have to drop it down.

THE WITNESS: I can.

MR. FELICE: Drop it down a little bit. More. A little bit more. Okay.

BY MR. FELICE:

Q. Does this indicate approximately where your point of origin was?

A. Yes, it does.

Q. Where would that have been?

A. May I stand?

Q. Sure.

MR. FELICE: I mean -- Your Honor?

THE COURT: Go ahead.

THE WITNESS: On this map here, my home would have been right about here, lower South Hill.

///

BY MR. FELICE:

Q. All right.

A. My home is north of 29th Avenue, but this road would head directly to my home.

Q. Okay. And so how would you get -- which way would you generally go if you were going to go into the Palouse area?

A. I would go to the top of the South Hill -- I believe this is 57th Avenue -- and I would take the Old Palouse Highway out across over to Highway 27.

MR. FELICE: Okay. Let's pull that up.

BY MR. FELICE:

Q. All right. And then which way?

A. I would continue south on Highway 27.

Q. Okay. And then which way would you go?

A. I would continue south further.

MR. FELICE: All right. And then if we could pull that up to the top.

BY MR. FELICE:

Q. Did you always take the same route?

A. No, I didn't.

Q. What were the options that you would take?

A. So the quickest way when I was traveling from Spokane to Pullman was actually to go on I-90 and down Highway 195. Oftentimes there's construction on that highway or heavy

traffic, so I would take Highway 27 down to this intersection here. I would go through this town and continue down this section of Prairie View Road. It converges with Highway 195.

MR. FELICE: Can we pull that up.

THE WITNESS: Here.

BY MR. FELICE:

Q. All right. And then which way would you go from 195 --

A. Well --

Q. -- once you reached -- back to 195?

A. If I was going for a pleasure ride while I was in Spokane, I would head back towards Spokane; or if I was going to WSU in Pullman, I would continue south towards Pullman.

Q. How many times would you say you had been in this vicinity, this area?

A. Throughout the several years that I rode and traveled to Pullman and back, probably three to four times.

Q. What was your most frequent route when you would go to Pullman if you were going to go on what we will call the County roads as opposed to the 195?

A. Sure. It was the second route that I described where I would come down Highway 27, I would take this road and then down this section of Prairie View Road to intersect with Highway 195 and then take that south to Pullman.

Conversely, if I was coming from Pullman to Spokane, I would take the same route in reverse.

Q. Okay. And that's also -- you go through Waverly on that particular route, correct?

A. I believe so, yes.

Q. All right. And then that's also Prairie View Road that you get back on? You go from 27 to Waverly Road and then back on Prairie View Road, in other words?

A. Yes.

Q. And do you know what the name of that -- is it South Prairie View Road or just Prairie View Road there also?

A. I don't know. As far as I know, it's just Prairie View Road.

MR. FELICE: Okay. All right. Okay. We can put that down.

BY MR. FELICE:

Q. When you left on that particular day, was there a particular route that you had planned on taking?

A. No.

Q. All right. As you approached Fairfield, do you recall there being curves in the road?

A. Yes, on Highway 27.

Q. All right. And after you got to Fairfield, do you remember additional curves in the roadway?

A. Yes, I do.

Q. Do you remember whether or not those curves were ever marked or signed with arrows or reduced advisory speeds?
A. I believe every curve has a directional arrow and a speed that you're supposed to slow down to.
Q. And do you know what the speed limit was on that road, generally?
A. Forty-five miles an hour unless it advised you to slow down.
Q. And did you have any trouble negotiating any of those curves that were posted with an advisory speed as you moved from Fairfield towards where this accident happened?
A. No, I didn't.
Q. Do you recall what the -- you've gone back and looked at those signs, have you not?
A. I have, yes.
Q. Do you recall what some of the signage is there relative to curvature or reduced advisory speeds?
A. Sure. The various signs would indicate how sharp the corner was, and then there's a small yellow box that says what speed you should go around the corner.
Q. All right. And did you have any trouble negotiating those?
A. No, I did not.
Q. Did Madelynn Tapken have any difficulty in terms of her

leaning and going with you into those curves?
A. No, she didn't.
Q. All right. As you headed out that day -- now, this accident happened about 4:00 o'clock in the afternoon, somewhere around that time, 4:00, 4:15 in the afternoon. Do you remember that?
A. I believe that was about the time it happened, yes.
Q. Do you recall what kind of a day it was?
A. It was a gorgeous day. It was bright-blue skies, sunny, moderate temperatures, probably 60 degrees.
Q. How were the roadway conditions?
A. Dry.
Q. And your bike was in what kind of shape?
A. My motorcycle -- kind of a bit of pride I take in maintaining my vehicles. My motorcycle was in excellent shape.
Q. How about the tires?
A. The tires were in good shape.
Q. As you headed down between Fairfield and the location of this accident, were you thinking or did you remember this intersection at all?
A. No, I don't have a particular memory of, you know, anticipating the intersection, no.
Q. Were you even thinking about this intersection?
A. No, I wasn't.

Q. All right. Why don't you describe -- let me go ask you this. Had you consumed any alcohol that day at all?
A. Absolutely not.
Q. And Madelynn Tapken, any alcohol?
A. No, sir.
Q. No marijuana, even if it's legal now?
A. Absolutely not.
Q. All right. All right. As you approached where this accident happened, did you remember seeing a yield-ahead sign?
A. I don't remember seeing it on the day of the ride. The next day when I went back, I saw the sign.
Q. All right. Do you know how far -- did you -- after this accident happened, were you told about how far that sign was back from where the Y was?
A. I have learned that since the accident has happened, yes.
Q. When you went back and looked at that sign the day after, did it say anything about there being two yield signs ahead?

MR. JACKSON: Your Honor, I object. I don't mind some leading, but this is suggesting an answer, and that's too far. So I object.

MR. FELICE: Your Honor, I'm entitled to cross-examine this witness adversely.

MR. JACKSON: This witness has not appeared to be

A. I don't particularly, no.
Q. Are you able to give a range or an area, an estimate?
A. Even after I went back to look at the intersection to try to piece it together, I couldn't. I know that I must have gone off over the edge of the roadway where there's a cliff because we landed in the bottom of the rock quarry.
Q. Did you know that there was a cliff?
A. No, I didn't.
Q. Do you know what, if any, input you made to the handlebars or the bar -- the steering mechanism after you leaned left?
A. I'm not sure I understand the question. I'm sorry.
Q. Yeah. Do you remember if you turned left?
A. Oh. Most of the turning done on a motorcycle is done primarily with the lean. The handlebars are utilized not in a fashion that a car is. It's actually called a counter steer. So I would have used the handlebars but not to turn the handlebars towards the curve, but actually you turn the handlebars in the opposite direction of the curve you're trying to take. But that's proper and that's the way you're supposed to.
Q. So when you -- what was your -- do you know what your orientation was as far as the front of your bike when you left the roadway?

A. At the moment I left the roadway, the motorcycle was pointing straight.
Q. All right. And did you -- then what happened?
A. Well, as the motorcycle left the -- left the roadway, we went off over the cliff. And I remember -- I remember Maddy squeezing me very tight and I remember her screaming and I remember that it was a feeling of weightlessness as the motorcycle fell out from under me.
Q. At the point of departure, was Maddy still on the bike?
A. Yes, she was.
Q. Do you remember how your bike first struck the surface of the pit?
A. I don't.
Q. All right. But she was on the bike as it became airborne off the edge?
A. Yes, she was.
Q. As were you?
A. Yes, sir.
Q. Then what do you recall?
A. Everything went white. I couldn't describe it to you. Everything kind of went to a white blur. The next thing I do remember though is that I was laying on my back looking up at the sky, and I didn't -- I couldn't even collect my thoughts. I didn't understand what had happened. I didn't -- I didn't realize it. It was a

A. The arrow on this side is certainly not as sharp as the curve at the intersection I ...
Q. Was it more in line with the 15-mile-an-hour curve sign?
A. Yes. The curve at the intersection was nearly 90 degrees, very similar to the curve on the 15-mile-an-hour warning sign.
Q. And the next one. Could the same be said for this as you said for the other signs?
A. Yes, sir.
Q. And what would that be, briefly? Tell the jury, because you've already gone through that.
A. That there's a left-hand curve approaching that I should slow to 40 miles an hour for.
Q. And then the next one I believe is a sign that we spent much time talking about here today.

MR. MICHAUD: Can that go up or -- like the last one. It's the yield-ahead sign. You got that on there?

MR. BODEY: The next one.

MR. MICHAUD: Is there any more?

MR. BODEY: This is the next one.

MR. MICHAUD: Is that the last one you have?

MR. BODEY: And then the last one I have would be the yield-ahead sign.

MR. MICHAUD: Okay. Go ahead and put that up there, please.

MR. BODEY: Okay.

BY MR. MICHAUD:

Q. While he brings that up, Conrad, would you take a look at that. You have it in front of you, so you can review that while he brings that up, puts that on the screen.

(Pause)

MR. MICHAUD: Are we going to be able to make it?

With the Court's permission, there's another -- a sign like that in the back that's been used.

MR. FELICE: Do you want the yield-ahead sign?

MR. MICHAUD: Yeah, the yield-ahead sign. I'm glad you're getting it because I don't think -- there we go. We got it. Okay.

BY MR. MICHAUD:

Q. Now, Conrad, have you had a chance to take a look at this sign?

A. I have, yes.

Q. Does this sign tell you what speed you should reduce to?

A. No, it does not.

Q. Does it tell you that there's a curve ahead?

A. No, this sign doesn't.

Q. Okay. Does it tell you that there are two yield signs ahead?

A. No, sir, it does not.

Q. Does it tell you that you should pay more attention to

one of the yield signs than the other?

A. No, it doesn't.

Q. Does it tell you that there's an intersection ahead?

A. No, it doesn't.

Q. Does it give you any directional advice on which way the roads go?

A. No, it doesn't.

Q. I think that Mr. Felice asked you about a Y sign. And do you know what that means, a Y sign?

A. Sure.

Q. Have you seen them -- I believe you said on the other two approaches if you're coming from Spangle to the city of Waverly or from Waverly to the city of Spangle that there are those type of signs?

A. Yes, I've seen a sign like that on both parts of the roadway.

Q. Does this sign indicate that to you?

A. No, it does not.

MR. MICHAUD: Okay. All right. I'm finished with those. If you could turn that off and the lights, please. Thank you very much.

BY MR. MICHAUD:

Q. Now, Conrad, while you were traveling between Fairfield and the intersection -- and when I say "the intersection," I mean the Waverly -- people call it the

Waverly Y or the T or the triangle, but we've been, in this case, calling it the Waverly Y. I think the jury and everybody understands that.

So when you're on your way between --

MR. MICHAUD: You can turn that off, if you can.

MR. BODEY: Working on it.

BY MR. MICHAUD:

Q. Okay. We'll just go ahead and plug along. That's not distracting you, is it?

A. No, sir.

Q. All right. As you traveled from Fairfield to the intersection to the Waverly Y, what was the posted speed limit? I think Mr. Felice asked you, but what was your understanding of the posted speed limit?

A. The posted speed limit on that roadway was 45 miles an hour.

Q. And did you travel that roadway at 45 miles an hour?

A. Yes, I did.

Q. Unless indicated otherwise?

A. Yes.

Q. Okay. Now, I want to talk to you about -- you mentioned that you saw the bush. And it's been described by an expert witness for the County as a thick, dense, black hawthorn tree or shrub, something like that. You mentioned that you saw the one on the right; is that

BY MR. JACKSON:

Q. Had you taken that particular route many times in the past?

A. As I have testified in my deposition, I'm not exactly sure what Mr. Thornburg -- excuse me, Deputy or Detective Thornburg meant by "many times." I've been on that particular route maybe three or four times.

Q. And you told Detective Thornburg that your particular route was home, that would be your house, to the Palouse Highway, to Highway 27; is that correct?

A. As I've answered before, yes, that is the route we took that day.

Q. And you told Detective Thornburg from Highway 27 you went to Prairie View; is that correct?

A. Again, yes.

Q. And then from Prairie View you went to Spangle-Waverly; is that correct?

A. I don't think I actually made it to Spangle-Waverly but yes.

Q. Well, I'm sorry, sir. I'm asking you about the route that you told Detective Thornburg that you had taken many times.

A. Yes, sir.

MR. MICHAUD: Again I'll object. He answered that question about that route. It's been asked and answered.

THE COURT: Overruled.

BY MR. JACKSON:

Q. And then you told the detective from Spangle-Waverly you go to Highway 195 and then back home; is that correct?

A. Those are the words that are in his report, yes, sir.

Q. Prior to this date, September 28th, 2011, had you taken that route before?

A. I believe I have, as I've answered, again, probably three or four times.

Q. Now, you told the detective that you were traveling, quote, around 45 miles per hour; is that correct?

A. I don't remember the exact words I spoke to Deputy Thornburg that night.

Q. Would it be inaccurate if Detective Thornburg says that you told him you were traveling at around 45 miles per hour?

MR. MICHAUD: Objection. Speculation.

THE COURT: Sustained.

BY MR. JACKSON:

Q. Do you disagree with the assertion that on this day, on September 28th, 2011, when Ms. Tapken was on the back of your bike and you were traveling down South Prairie View Road towards the Waverly Y that you were traveling at approximately 45 miles an hour?

A. I believe, sir, that I've testified that I was traveling

correct?
A. Yes, sir.
Q. Now, here's the question. You next write: As I got closer to the curve, I saw that Waverly, where I wanted to go, was to the left. Was that your statement?
A. Yes, sir.
Q. Was that true?
A. Yes, sir.
Q. By the time I made the adjustment left, we were already in the curve to the right. Did I read that correctly?
A. Yes, sir.
Q. And is that true?
A. Yes.
Q. I could not make the curve at the -- at or near the posted speed. Did I read that correctly?
A. Yes, sir.
Q. All right. Mr. Malinak, did you tell Detective Thornburg that, as you got closer to the Waverly Y, that you wanted to go to Waverly to the left?
A. As I've testified already, I don't remember exactly what I said to Deputy Thornburg because of the effects of the medication I was on and the trauma I had just sustained.
Q. The medications that -- let me make sure I understand this. So you're saying on September 11th -- I'm sorry, September 28th, 2011, when you spoke to Detective

I don't remember that intersection specifically. I don't remember what the conditions were. I don't remember if there was, you know, farm equipment or some other impedence on the roadway that day. I know that I could not have taken either curve at 45 miles an hour.

Q. If your direct testimony is true --

MR. MICHAUD: Again I'll object. If your testimony is true is clearly improper and it -- we just keep coming back to it, Your Honor.

THE COURT: Sustained. If you'll rephrase the question.

MR. JACKSON: Sure.

BY MR. JACKSON:

Q. You testified on direct that, when you traveled that route before, and that would be before September 28th, 2011, you traveled at or near the posted 45-mile-an-hour speed limit unless you saw an advisory speed sign or a curve sign; is that correct?

A. I believe that is what I told Mr. Michaud yesterday, yes.

Q. Okay. Then when you traveled through that intersection the three or four times prior to September 28th, 2011, regardless of whether or not you were traveling on a motorcycle or in an automobile, were you going at or about the posted speed limit?

MR. MICHAUD: I'll object. It's vague. He didn't ask

him who was driving, whether he was in a car. You know, if he's a passenger in a car, it has -- it's a lot different than if he's driving a car.

THE COURT: Overruled.

THE WITNESS: As I've testified before and as I'm testifying now, yes, I would not have exceeded the speed limit but I would have traveled at or near. Yes, coming to a curve with no traffic impeding it, I would only know to slow down if there was an advisory sign. But I believe you're implying that if I saw other traffic, I would not slow down. And that's not true, sir. It wasn't indirect, but if there was another hazard or another obstruction, I would slow down in the same manner. If there was another vehicle, I would not simply blow past them or run into the rear end of them. That would be irresponsible.

BY MR. JACKSON:

Q. When you traveled through this intersection and you were traveling southbound on South Prairie View Road and you reached the Waverly Y at or about the posted speed limit of 45 miles an hour and you turned either left or right on those three or four previous occasions, did you crash?

A. No, sir.

Q. Did your vehicle leave the runway -- or the roadway?

A. No, sir.

Q. Did you lose control of your vehicle?
A. No, I didn't.
Q. When you went through this intersection three or four times in the past prior to September 28th, 2011, did you think that this intersection was dangerous?
A. Well, I've already testified that I have no specific memory of that intersection. As I was traveling on that roadway that day, the intersection wasn't on my mind. I'm not familiar with the roadway, sir.
Q. If you thought that this intersection, the Waverly Y, as you were traveling southbound on South Prairie View, if you thought that that intersection were dangerous, would you have elected to go that way on September 28th, 2011, with Ms. Tapken as the passenger on the back of your motorcycle?

MR. MICHAUD: Objection. Speculation. Hypothetical question.

THE COURT: Overruled.

THE WITNESS: Can you please rephrase the question.

BY MR. JACKSON:
Q. Sure.
A. I was confused by it. I'm sorry.
Q. That's okay. I'll try to ask it again.

If you believed or thought that the intersection of South Prairie View and the Waverly Y as you were

traveling southbound on South Prairie View was dangerous, would you have elected to take Ms. Tapken on that route on the back of your motorcycle?

A. No.

Q. If you thought that this intersection at South Prairie View as you're traveling southbound on South Prairie View where it meets the Waverly Y was confusing to you, would you have elected to take Ms. Tapken on that route on September 28th, 2011?

A. No, sir. But I didn't remember that that intersection was there.

Q. Do you recall seeing the yield-ahead sign on South Prairie View Road?

A. Not until I returned the next day. When I went back with my mom and step dad, that's the first time I can remember seeing that yield-ahead sign.

Q. So on September 28th, 2011, when Ms. Tapken was on the back of your motorcycle and you were traveling down South Prairie View Road at approximately 45 miles an hour, you did not see the yield-ahead sign; is that correct?

A. I remember on that day, the incident in question, I remember seeing a sign, but I couldn't remember what it was after the accident. I didn't know what the sign was. I remember seeing a sign. I didn't know what the specific sign was until I went back the next day and

looked at it again.

Q. On September 28th, 2011, when you were traveling down South Prairie View Road with Ms. Tapken on the back of your motorcycle, did you see the yield sign that was to your right?

A. No, sir.

Q. When you were traveling down South Prairie View Road on September 28, 2011, with Ms. Tapken on the back of your motorcycle, did you see the bush that was to the right?

A. As I've already testified, yes, I remember seeing the bush.

Q. On September 28th, 2011, when you were traveling down South Prairie View with Ms. Tapken on the back of your motorcycle, did you see the yield sign to the left?

A. Again, as I've already testified, yes, I did.

Q. And to your understanding, Waverly would be to the left; is that correct?

A. I didn't remember which way Waverly was. At the present time I know now that Waverly is off of the -- off to the left of that intersection traveling in that direction.

Q. All right. Did you in any way respond to that yield sign to the left?

A. There was no traffic on the roadway. There was no purpose for responding to any yield sign. And I was not intending to go to the left. So no, sir, I did not

respond to that yield sign. There was no reason to.

Q. Now, sir, you took a motorcycle-safety course after you received your motorcycle endorsement, did you not?

A. That is incorrect.

Q. Did you take one before you received your motorcycle endorsement?

A. Yes, sir. That's how I was certified to get my motorcycle endorsement was with the motorcycle-safety course.

Q. And do you recall when that was?

A. I don't remember exactly when it was. I know that it would have been in the spring of 2010 though.

Q. And during this motorcycle-safety course they gave you specific instruction and training on how to properly turn a motorcycle; is that correct?

A. Yes, sir.

Q. And one of the principles that they taught you was that you are supposed to slow down before you reach a turn; is that correct?

A. Yes, sir.

Q. And do you follow that rule when you are riding your motorcycle?

A. Yes, sir.

Q. And one of the reasons that you are supposed to slow down before you reach a turn is to make sure that you can

THE COURT: Okay. Why don't we wait on that until after we hear the motion, and you can address it.

MR. MICHAUD: Fair enough. Thank you, Judge.

THE COURT: We'll give you time to be heard.

It looks like we're just waiting on briefing.

Mr. Jackson, if you would like to go ahead with your argument.

MR. JACKSON: Your Honor, the County is moving under CR 50 to dismiss the plaintiff's claim against the County and also the cross-claim of Mr. Malinak. They have been completely heard on their cases. There is no more evidence.

And essentially the argument surrounds the four elements of negligence, which are duty, breach, proximate cause, and the damages that are a result or proximately caused.

The first issue of duty -- and I will speak of the County's duty and then Mr. Malinak's duty. The general duty is to maintain the roads in a condition that is reasonably safe for ordinary travel. But this duty has been restricted or limited by the cases and the case law over the years, and the responsibility for restricting this duty rests with the Court as a matter of law.

One of the restrictions on the duty is cited in Wessels v. Stevens County, 110 Wn., and that is, I

believe, at page 196, and the specific page cite is 198. And it's a 1920 case. And it states on the general duty that the alleged hazard cannot be a common and ordinary hazard encountered by road users. And so it cannot be common and it cannot be ordinary.

In this case they are alleging that it was a right-hand turn in an intersection that was the hazard. Turning right in an intersection is the same thing that drivers do every day, making a right-hand turn in an intersection. They are alleging that that was one of the hazards. That is not an extraordinary hazard. That is common and ordinary. That is encountered by road users every day.

And the fact that the corner is blind or may be partially blind, even under their argument, does not make it a hazard. That is a common thing that all drivers face every day on almost every roadway.

Next. They're alleging that the Y intersection itself was somehow a hazard. Well, it's not. There's nothing in the MUTCD that says a Y intersection is a hazard. In fact, they have configurations of Y intersections in the MUTCD. Mr. Stevens, who is their expert, testified that there is nothing inherently dangerous about a Y intersection, period. And so a Y intersection is a common thing that road users drive through every day.

All right. The next. The Court continued to modify the duty in Owens vs. Seattle, 49 Wn.2d 187. It is a 1956 case. And in that case the Court stated that there is no duty to guard the public from normal hazards. Again, a right-hand turn in an intersection is a normal condition. It is not an extraordinary hazard.

In Hansen vs. Washington National Gas Co., that's 95 Wn.2d 773, specific page number is 778, and it's a 1981 case, it continues to modify the duty, and it states: A warning sign is not required if an alleged hazard is open and apparent or known to the road user.

In this case there is testimony -- and there isn't any contrary evidence. There is testimony from Mr. Malinak himself that he had been down that roadway three or four times before and that he turned right at the same intersection where he made the right-hand turn this time. And he testified that he made that right-hand turn without any problems and that when he rode that roadway, he rode it at 45 miles an hour.

So the bush was there, the yield sign behind the bush was there, and the yield-ahead sign was there. And in each of those occasions that he traveled that road down that route, he went the same way. And so there isn't any evidence to the contrary. That's his testimony. And so whatever existed at the Waverly Y when he made his

right-hand turn was certainly known to him at least three or four times before.

And so under Owens vs. Seattle, the County has no duty to guard the public from these sorts of dangers and there is no duty to warn of this because it was known to Mr. Malinak. There isn't any evidence to the contrary. It was his testimony.

And then finally -- and this goes back to Owens, and this is at page 198 and 199. Again restricts the general duty because it says if there is an unusual or extraordinary hazard, the government can satisfy its duty by repairing or warning. But the critical part here is, when they say what the remedy is to repair or warn, they specifically state that it must be an unusual or extraordinary hazard. So an unusual or extraordinary condition. In this case, once again, it is a right-hand turn at an intersection that is neither unusual nor is it extraordinary.

Finally -- and this is a 1977 case -- there is -- I'll spell it. It's T-a-n-g-a-m-e-r vs. Yakima County. That's at 18 Wn.App. 555, 1977. It indicates that a person cannot complain of lack of warning of a danger of which he has knowledge.

In this case the evidence from Mr. Malinak is that he has knowledge of that intersection at least three or four

times before this date. And so that defines the duty. And the duty in this case must be decided by the Court. And based upon the record, the Court does not have any evidence to make a finding that Mr. Malinak was unaware of the intersection or was unaware of the right-hand turn, because his testimony was that he had been through the same right-hand turn on the same approach three or four times.

And so there is insufficient evidence for the Court to make a finding that he did not have knowledge of the turn. And if he had knowledge of the turn, then he can't complain of the lack of a warning. So that's the duty for the County.

Now I'd like to go to the duty of Mr. Malinak. And the purpose of raising the duty of Mr. Malinak is because the uncontradicted evidence in this case establishes that the verdict should be directed against Mr. Malinak as a matter of law.

Mr. Malinak testified that he traveled down that roadway at 45 miles an hour. He testified, his expert Mr. Harbinson testified, his expert Mr. Stevens testified, and his expert Mr. Gill testified that, all of them in sync, that he did not have any duty whatsoever to slow down as he approached the intersection in response to the yield-ahead sign or in response to the yield sign.

They all testified to that multiple times, that he had absolutely no duty to slow down whatsoever unless he saw there was traffic in what he put the conflict point, and then he would have a duty to slow down. But each of the witnesses and Mr. Malinak himself testified that there were not any vehicles on the roadway except for his.

So that brings us to RCW 46.61.190. The title of the RCW is "Vehicle Entering Stop or Yield Intersection." It is contained in the statute of RCW 46.61, and the title of RCW 46.61 is, "Rules of the Road." So in Washington the rules of the road are codified in RCW 46.61.

46.61.005 states that these rules apply to all motorists on the highways of the state of Washington. So every driver on every roadway in the state of Washington is required to comply with RCW 46.61 and all of the chapters within it.

Specifically RCW 46.61.190 subsection (3) states: The driver of a vehicle approaching a yield sign shall, in obedience to such sign, slow down to a speed reasonable for the existing conditions and -- not disjunctive, conjunctive -- and, if required for safety, to stop.

And so Mr. Malinak was required by law to slow down when he approached the yield sign. And not just slow down to any degree. He was required to slow down to a speed reasonable for the existing conditions. It is

undisputed in this case that he did not and it's undisputed because he lost control of his motorcycle before he ever reached the intersection and he went off the roadway.

So it is undisputed that he was required by the law to slow down, that he did not slow down, and it's also undisputed that, under his interpretation of it and what he testified to, even if he had seen the yield sign, he wasn't going to slow down unless he saw other cars. Now, that was his testimony. So that's just one of his duties.

The second duty for Mr. Malinak is contained in RCW 46.61.400. Again this is a rule of the road, and the title of it is, "Basic Rule in Maximum Limits." Subsection (3) states as follows: The driver of every vehicle shall, consistent with the requirements of subsection (1) -- that's the maximum speed -- drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing or when approaching and going around a curve.

So Mr. Malinak had a duty under the rules of the road that are codified in Washington in RCW 46.61, when approaching the intersection and when going around a curve, to slow down to an appropriate speed so that he, the driver, could safely negotiate the turn. It is

undisputed in this case that (1) Mr. Malinak did not do that because he crashed and went off the roadway, but (2) he testified that he would not slow down at this intersection and this right-hand turn because he believed that all of the signs on the roadway prior to getting there gave him a directional arrow and gave him a posted speed. And he assumed that he could, therefore, make every other corner on that roadway at the posted speed. So he, under his own testimony, was going to attempt to take that turn at that intersection at the posted speed limit of 45 miles an hour.

And based upon his undisputed testimony, he violated RCW 46.61.400 because he did not slow down to an appropriate speed in order to make the right-hand turn. And it wasn't that he couldn't slow down to an appropriate speed. He testified that he didn't think he had to. That was his testimony.

The next statute that is applicable and indicates that Mr. Malinak violated it is RCW 46.61.445. Mr. Malinak's testimony and the testimony of his experts Mr. Stevens and Mr. Gill and Mr. Harbinson was that the posted speed limit was 45 miles an hour and that he could, therefore, proceed on that roadway at 45 miles an hour until the speed changed or until there was another advisory sign that said he should go slower.

RCW 46.61.445 says that's wrong. The statute says that compliance with speed requirements of this chapter under the circumstances here above set forth shall not relieve the operator of any vehicle from further exercise of due care and caution as further circumstances shall require.

So his testimony that he could travel on the roadway at 45 miles an hour when approaching an intersection or entering an intersection or making a right-hand turn ignores his obligation under RCW 46.61.445 to exercise due care regardless of what the speed limit is. He still had to slow down to make that right-hand turn.

The next statute is 46.61.445. And this specifically deals with his statement and the statement of his experts about he could travel at 45 miles an hour even through a yield sign unless there was another car there.

The statute states: Compliance with speed requirements of this chapter under the circumstances here above set forth shall not relieve the operator of any vehicle from further exercise of due care and caution.

And so he could not rely upon the posted speed limit when he entered that corner because the rules of the road in RCW 46.61 says that you must slow down when approaching and entering an intersection, you must slow down when you are making a right-hand turn and when going

around the curve. And it's undisputed that he did not.

Next. If there is a claim that there is a road hazard and that the County breached its duty to warn of the hazard, the plaintiff must first identify what the hazard was. In this case the allegations from Mr. Stevens and apparently from the plaintiff and the cross-claimant is that the bush, the black hawthorn bush was the hazard. That's the claim. Presumably the testimony of their expert Mr. Stevens -- at least that's what they're arguing to the Court -- was that the County somehow breached the MUTCD with the placement of either the yield sign or the yield-ahead sign, because the testimony of Mr. Stevens was that the location of the yield sign to the left and the location of the yield sign to the right were both proper and that they were placed in the right space.

So in order to get to the issue of whether or not there was a violation of the MUTCD, we have to -- and I apologize for this, but we have to go through the MUTCD and specifically the testimony of Mr. Stevens.

And so the first part of this deals with the MUTCD and the introductions that are on page 1.1. And I will point to you in a few seconds to the testimony of Mr. Stevens where he testified about this portion of the MUTCD.

On page 1-1 and page 1-3, it contains the applicable

definitions that are used in this manual. And number one on page 1-1 talks about a standard. And the standard says it's a statement of required, mandatory, or specific prohibitive practices regarding a traffic control device.

And if you go to page 1-3, it talks about the other -- two, three, and four. It talks about the other information that the MUTCD gives to engineers. And it states guidance. And that's a statement of recommended but not mandatory practice. And it speaks of an option. And an option is a statement or practice that is a permissive condition but carries no requirement or recommendation. In other words, it gives you an option. If you don't follow it, you cannot claim that someone did not follow the MUTCD. And that's because it doesn't carry a requirement or recommendation. And then the final one is support. And that's an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. And so you cannot be said to have violated the MUTCD if the instructions it gives you say it is an option or it is support.

That takes us to yield signs. And so if we go to page 2B-8, and it talks about yield-sign applications --

THE COURT: 2B?

MR. JACKSON: Yes, it's 2B and then dash 8.

THE COURT: All right.

MR. JACKSON: Okay. And so the 2B-8 should be at the top of the page, and then towards the bottom of the page it will be 2B.09, and it says, "Yield Sign Applications."

Mr. Stevens testified that this intersection should have been reconfigured with a stop sign, and in his opinion, if it was not reconfigured with the stop sign, the MUTCD was violated.

Section 2B-09 for "Yield Sign Applications" states: "Option." And, again, option means a statement or practice that is a permissive condition but carries no requirement or recommendation. And this says under "Options": Yield signs may be used instead of stop signs if engineering judgment indicates that one or more of the following conditions exist.

So it gives the engineer, specifically the County, the option of using a yield sign instead of a stop sign that Mr. Stevens says the County should have used.

May I?

THE COURT: Yes.

MR. JACKSON: Next. Yield signs. And that is contained in 2B-10. And it specifically says, "Yield Sign Placement." And this is standards, so this is something that you have to do. And it says: The yield sign shall be installed on the right side of the approach

to which it applies. And then it says -- which isn't applicable. It says, Yield signs shall be placed on both the left and the right sides of the approaches to the roundabout intersection with more than one lane of the signed approach when raised split or islands are available to the left side of the approach. But here is the important part of this provision of the MUTCD. It says, When the yield sign is installed at this required location and the sign's visibility is restricted, a yield-ahead sign -- and then they give you the section, 2C-29 -- shall be installed in advance of the yield sign.

So even if Mr. Stevens testified that, under this provision, the yield signs that were placed on the left and the right were in the appropriate place but because there was a bush blocking the yield sign, the appropriate step to mitigate the bush was to use a yield-ahead sign. And so according to the testimony of Mr. Stevens, that is undisputed, that the County used the appropriate application of the yield-ahead sign and the placement of the yield sign because the bush blocked the sight.

This takes us to advanced traffic control signals, which is the yield-ahead sign. And that's contained in section 2C-29. And by -- if you search for it in the book, it will say -- at the top it will say 2C-15.

THE COURT: It goes to 2C?

MR. JACKSON: Dash 15. Those would be page numbers in the top in the upper right-hand --

THE COURT: Oh, you're at 2C-15.

MR. JACKSON: Yeah. And that would be the page number, but the specific section, it says section 2C-29.

THE COURT: I got it.

MR. JACKSON: It mirrors the previous section of the MUTCD. And it says, "Standard," and it says, These signs shall be installed on an approach to a primary traffic control device that is not visible for a sufficient distance to permit the road user to respond to the device. And then they cite 2C-04.

And so the County, because it could not cut the bush because it wasn't completely in the right-of-way, but even if it were in the right-of-way, the MUTCD says that you mitigate this condition by using a yield-ahead sign. So the County has the option -- even if they could cut the tree, they had the option of using the yield-ahead sign. And they did. So there's no violation of the MUTCD here.

Then the next part that goes specifically to the page number will be 2C-03. And that's at the top. It will say 2C-03.

THE COURT: I have it.

MR. JACKSON: Okay. And this says 2C-05, "Placement

of Warning Signs," and under it says, "Support." And, again, support, according to the MUTCD, says it's an informational statement that does not convey any degree or mandate, recommendation, authorization, prohibition, or enforceable condition. So it is support. It states: The table in 2C-04 lists suggested sign-placement distances for two conditions. This table is provided as an aid for determining warning-sign locations.

And so the location of the yield-ahead sign, by the definitions of the MUTCD, this table and location of them is for support only. It's not a standard. You can't say that the MUTCD was violated because it is support, period.

And I will also point you to the definition -- deposition of Mr. Stevens where he says specifically if it's not a guide -- if it's not a standard, it cannot be violated, when he's talking about the MUTCD.

The reason that that provision is important is because it talks about the table that's contained at 2C-04, and that's specifically on page number 2C-06. That's the page number at the upper right-hand corner. It gives you a table. And this is the table that Mr. Stevens testified about where he said that the distance for placing the advanced warning sign was 175 feet. But what's important is that the section says that these are

suggested distances under "Support."

And so this takes me to there is no breach of the MUTCD under the testimony of Mr. Stevens. But this gets us to proximate cause and whether there has been a breach and that the breach is a proximate cause of damages to either the plaintiff or Mr. Malinak.

The undisputed testimony in this case from Mr. Harbinson, from Mr. Stevens, from Mr. Gill, and from Mr. Malinak himself was that he did not believe that he had an obligation to slow down in response to a yield sign. So if we're talking about cause in fact, the but-for test, then here's the but-for test. If the County had cut down the bush completely and everything else about the intersection was the same, can the plaintiff establish that this accident would not have occurred, because they're alleging that the bush is the hazard. The undisputed testimony of Mr. Malinak and all of his experts is this: that he did not feel that he had a duty or an obligation to slow down in response to a yield sign unless there was traffic.

So if we assume that that's true and he was going down South Prairie View, when he reached the Waverly Y, even if he had seen the yield sign, he still would have proceeded through that intersection at 45 miles an hour because he did not have, in his opinion, any duty to slow

down in response to a yield sign unless there was traffic, and there was no traffic. So plaintiff in this case has failed to establish proximate cause and, frankly, can't establish proximate cause because the but-for test or the cause-in-fact test has not been met. He can't establish that, if he had seen the yield sign, he would have slowed down, because his testimony, his undisputed testimony is that he would not have. His testimony is that he would not have slowed down unless he saw traffic, and there was no traffic.

And so they cannot establish proximate cause based on his testimony as a matter of law even if the bush which they say is the hazard wasn't there. It's just that simple.

The next point. And this deals with an -- I'll cite you to two cases on proximate cause. The first is Miller vs. Likins. That's L-i-k-i-n-s. That's 109 Wn.App. 140. It's a 2001 case. And the next is Moore vs. Hagge, H-a-g-g-e. That's 158 Wn.App. 137, and that's a 2010 case. And this talks specifically about proximate cause. And in those cases the plaintiff put on evidence that, and I quote, that they might have been injured by the negligent conduct of the defendant. And the appellate courts said that, when the cause of an injury is more likely to be caused by one thing, or it's just as likely

to be caused by one theory as another theory, it is speculative and it should not go to the jury at all.

In this case plaintiff's accident reconstructionist Mr. Harbinson testified that, not only could he not reconstruct the accident, he testified that no one could. He testified that he did not know the path of travel of Mr. Malinak's motorcycle, he did not know which portion of the roadway it was in, he did not know when Mr. Malinak lost control, and he specifically testified that he did not know the speed of the vehicle when it lost control. The only thing that he could determine was the departure speed at the point where the vehicle left the road. So he did not offer any testimony about the proximate cause of this accident. And the only evidence that he offered was contrary to the plaintiff's theory.

Mr. Harbinson testified that the plaintiff's theory that he went into the corner too fast and lost control because he could not make the corner was inconsistent with the physical evidence because Mr. Malinak's motorcycle did not leave the roadway in the last third of the turn, which is the most common trajectory for vehicles that are traveling into a corner too fast. That was all of which he said in proximate cause.

Mr. Stevens, their expert, said that he did not offer any opinions whatsoever on proximate cause. He said he

was not an accident reconstructionist. He could not tell you what occurred. He could not tell you why it occurred. So he offered nothing on proximate cause.

Mr. Gill did not -- oh, and there's one other thing. Mr. Stevens also testified that he couldn't tell you what Mr. Malinak was thinking when he lost control. But their theory, not their evidence but their theory is, is that he lost control when he attempted to make a right-hand turn. They have not offered any testimony as to why he lost control. And in order for them to prove proximate cause and specifically prove that the roadway or the absence of signing was a proximate cause, they would have to offer direct evidence that the jury could consider as to why he lost control. And they didn't offer any of that evidence.

The only witness who testified as to why Mr. Malinak lost control was Mr. Neale. No other witness testified to it. And Mr. Neale testified that Mr. Malinak's statement that he leaned to the right and then he leaned to the left and that the passenger leaned harder to the right was completely consistent with the trajectory of the vehicle and where it landed and, in his opinion, was the cause of the accident. So that's the only evidence that is the cause of the accident. The plaintiff has not offered any evidence on proximate cause. Zero. Not from

any source.

And so at the summary judgment motion, the Court ruled that, based upon the testimony of Mr. Harbinson, a reasonable jury could determine that speed was the proximate cause. And based upon that, the Court denied the motion for summary judgment. But here, before the jury, Mr. Harbinson did not offer that evidence, none of it.

And so they have not established that anything even remotely related to the conduct of the County, either in signing, either in striping of the roadway, or, in fact, they allege failure to cut the bush, was a proximate cause of this accident, because even if the bush had been cut, Mr. Malinak's testimony is that he would have gone into the intersection at the same speed and the same angle to make that same right-hand turn that he had made before, and the accident would have happened the same. And so there isn't any evidence of proximate cause that the defendant's conduct caused the accident.

And do you wish for me to reserve the portion regarding the medical bills until ...

THE COURT: No. If you would like to go ahead with that as well.

MR. JACKSON: Okay. Before I get there I would like to refer the Court to the specific pages of Mr. Stevens's

deposition that supports the County's motion, CR 50 motion.

Mr. Stevens speaks of the definitions of the MUTCD, and that's, "Guidance," "Options," and "Support." He speaks to that at page number 125, page 126 of his deposition. Mr. Stevens also speaks about the rules of the road, specifically whether or not the driver is required to slow down when approaching an intersection. And he agrees with the County in this respect at page number 130. He states specifically at that page: If you're on a major roadway and you see a break in a line, you slow down.

The testimony regarding the proper place of the yield signs -- and that would be the left yield sign and the right yield sign -- that's on page 134 and 135 of Mr. Stevens's deposition. The testimony regarding the proper placement of a yield sign instead of a stop sign and that it is not mandatory that you put a stop sign in there is at page 135 and 136 of Mr. Stevens's deposition. At page 136 of Mr. Stevens's deposition he states specifically that the placement of the right yield sign was within the judgment of the engineer, specifically Mr. Greene. At page number 139 of Mr. Stevens's deposition he agrees that the yield-ahead sign was the proper use of the sign under the MUTCD to mitigate the

lack of sight distance. At page 140 and page 141 of Mr. Stevens's deposition he admits that the warning sign, which is the yield-ahead sign, alerts the driver that he may need to reduce speed. At page 141 of Mr. Stevens's deposition he also admits that the County engineer -- that would be Mr. Greene -- gave the drivers along the roadway notice that he may need to reduce his speed.

And the table that I gave you that said it's for support, placement of a warning sign, Mr. Stevens admits this at page 142 and 143 of his deposition. And that will be that placement of a warning sign is support.

At page 151 of his deposition Mr. Stevens admits that placement of the advanced warning sign, which is the yield-ahead sign, is not a standard. You can violate it. You can't violate it.

And so the testimony of Mr. Stevens that the County properly followed the MUTCD, the signs were properly placed, his only disagreement is that the yield-ahead sign was placed, in his opinion, too far away, but he admits that the placement of the yield-ahead sign is not required and it's merely for support and it has no recommendation. Then it can't be a violation of the MUTCD.

So let's go to Mr. Malinak's claim for medical expenses. The seminal case on this issue is Patterson v.

(JURY OUT)

THE COURT: Please be seated.

MR. MICHAUD: Morning, Judge.

THE COURT: Good morning.

MR. FELICE: Morning, Your Honor.

THE COURT: Good morning.

MR. FELICE: I think my phone is off. I can't find it, so I'm assuming I left it at the office.

MR. MICHAUD: And I shot mine the last time it went off in here, so I know it won't be a problem.

THE COURT: Thank you. The first issue before the Court this morning is the County's motion that was brought up last Thursday at the end of the day.

Defendant Spokane County moved for judgment as a matter of law under CR 50. The Court took this under advisement, spent some time reviewing the evidence and indicated I would give a ruling this morning.

CR 50 provides that, during a jury trial, if a party has been fully heard with respect to an issue and there's no legally sufficient evidentiary basis for a reasonable jury to find for that party, with respect to that issue, the Court may grant the motion for judgment as a matter of law against the party on any claim.

A judgment as a matter of law requires the Court to conclude, as a matter of law, that there is not substantial evidence, or reasonable inferences from the evidence, to sustain a verdict for the nonmoving party. Therefore, a motion for judgment as a matter of law can be denied only when there is competent and substantial evidence on which the verdict can rest. If evidence is conflicting, the Court must view all of the conflicting evidence in favor of the nonmoving party.

It's undisputed that the County has a duty to exercise ordinary care in the maintenance and design of its public roads to keep them reasonably safe for ordinary travel. Under RCW 47.36.040, one of these duties includes the duty to erect traffic-control devices. RCW 47.36.020 requires the secretary of transportation to adopt specifications for a uniform system of traffic-control signals. In compliance with this statute, the secretary of transportation adopted the Manual on Uniform Traffic Control Devices under Washington Administrative Code 468-95-010.

Mr. Malinak, as a driver, also owed a duty to both other motorists as well as his passenger. Mr. Malinak owed a duty to see what could be seen by a person exercising ordinary care; a duty to follow the rules of the road -- that's the duty under 46.61.005; a duty to

slow when approaching a yield sign, under 46.61.190; a duty not to drive at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing -- that's under RCW 46.61.400; and under that same statute, a duty to drive at an appropriate reduced speed when approaching and crossing an intersection and when approaching and going around a curve.

The plaintiff's evidence has shown that Mr. Malinak was traveling south on Prairie View Road from Fairfield on September 28, 2011. He was riding a Suzuki motorcycle and had Ms. Tapken as his passenger. As he traveled down Prairie View Road, he never exceeded the maximum posted speed limit of 45 miles per hour and adhered to all warning signs of curves with reduced speeds. Mr. Malinak had traveled this portion of roadway a couple of times in the past but was unaware of the details of the roadway or signage.

Approximately 700 feet north of the Waverly Y is a yield-ahead sign. Mr. Malinak passed this yield-ahead sign but testified that he did not remember seeing it. As Mr. Malinak approached the Waverly Y intersection, he noticed the yield sign to the left. He did not see any conflicting traffic at the intersection, so he maintained his speed of approximately 45 miles per hour as he

entered the intersection. Mr. Malinak attempted to turn right at the intersection but was unable due to his speed, resulting in both he and Ms. Tapken going straight through the intersection and into a ravine. Mr. Malinak and Ms. Tapken left the roadway traveling between 35 to 40 miles per hour.

The Waverly Y intersection is a Y intersection with two yield signs for drivers traveling south on Prairie View Road. The yield sign on the left is for drivers wishing to turn left to Waverly. The yield sign on the right is obstructed by a bush and is intended for drivers wishing to turn right to Spangle. Prairie View Road is striped with a double yellow centerline. The centerline comes to an end on the north side of the intersection, signaling the intersection.

The plaintiff claims that the intersection is inherently dangerous. In support of her position, the plaintiff claims that the signage does not provide appropriate notice as to the sharp right-hand turn that is obscured by the bush. The plaintiff also claims the yield sign on the left is confusing, as a driver intending to go right may tend to believe that the sign on the left is the sign that they were warned of some 700 feet earlier. The plaintiff also claims that the bush obstructs the yield sign on the right to the extent

that a driver would lack available time to adhere to it.

The plaintiff presented expert testimony from Mr. Gill. Mr. Gill opined that a yield sign does not require a motorist to slow down. Rather, he stated on many occasions a yield sign signals to a driver to speed up. The plaintiff offered expert testimony from Mr. Harbinson. Mr. Harbinson opined that Mr. Malinak's vehicle left the roadway traveling between 35 and 40 miles per hour.

The plaintiff also presented expert testimony from Mr. Stevens. Mr. Stevens opined that he would not sign the Waverly Y intersection the same way the County did but all of the traffic-control signals that were in place on September 28th, 2011, in the area of the Waverly Y were placed in compliance with the requirements of the MUTCD. Mr. Stevens took exception to the yield-ahead sign being placed some 700 feet in advance of the intersection but conceded that was allowed under the MUTCD. Mr. Stevens concluded that the configuration of the Waverly Y intersection is inherently dangerous. In coming to this conclusion, Mr. Stevens also asserted that yield signs are not supposed to be used to slow down motorists.

Under RCW 46.61.005, Mr. Malinak owed a general duty to follow the rules of the road. He also owed a specific

duty to see what would be seen by a person exercising ordinary care. Mr. Malinak testified that he did not see the yield-ahead sign on his approach to the Waverly Y. When cross-examined by Mr. Michaud, Mr. Malinak testified that a yield-ahead sign does not provide notice of an upcoming intersection.

The yield-ahead warning sign was placed beyond the minimum distance of 175 feet as required by the MUTCD but was not placed in violation of the standards of the MUTCD. This is important because the yield-ahead sign places drivers on notice of an upcoming intersection. Section 2B.08 of the MUTCD states that the yield sign assigns right-of-way to traffic on certain approaches to an intersection.

Mr. Malinak is incorrect in his assumption that a yield-ahead sign does not give a motorist a warning of an upcoming intersection. Yield signs are only used when paths of vehicles intersect. In passing a yield-ahead sign, a reasonable motorist would expect an upcoming intersection. Regardless of the location of the yield-ahead sign, Mr. Malinak's driving behavior would have remained unchanged had he seen it as he does not believe a yield-ahead sign warns of an upcoming intersection.

Mr. Malinak testified that as he approached the

intersection, he saw the yield sign on the left. He testified that he did not reduce his speed in response to the yield sign as no conflicting traffic was approaching. He testified that if he saw another vehicle, then he may have slowed down. According to Mr. Malinak, because there was no other traffic, there was no reason to slow down. Mr. Malinak's belief that a motorist is not required to slow at yield signs is consistent with Mr. Gill's and Mr. Stevens's. However, all of these assumptions are incorrect. RCW 46.61.190 provides the driver of a vehicle approaching a yield sign shall, in obedience to such sign, slow down to a speed reasonable for the existing conditions and, if required for safety, to stop; and then after slowing and stopping, the driver shall yield the right-of-way to any vehicle in the intersection or approaching. The first and second prong of the statute are conjunctive. The second part of the statute infers that the driver has already slowed or stopped.

When Mr. Malinak saw a yield sign on the left, he was on notice that not only was he approaching an intersection but was required to slow or stop to accommodate not only other traffic but also other existing conditions. No such attempt was ever made. Rather, Mr. Malinak maintained approximately the maximum

speed allowed of 45 miles per hour.

Lastly, under RCW 46.61.400, Mr. Malinak owes a duty to drive at an appropriate reduced speed when approaching and crossing an intersection and when approaching and going around a curve. Mr. Malinak testified that a yield sign does not provide notice of an intersection; therefore, as he approached the Waverly Y and saw the yield sign on the left, he did not believe he had a duty to drive at an appropriate reduced speed as required by 46.61.400. The conclusions of the plaintiff's expert, Mr. Harbinson, confirmed Mr. Malinak's speed being five to ten miles per hour under the maximum speed of 45 miles per hour at the time he departed the roadway.

The Supreme Court in Sortland v. Sandwick, 63 Wn.2d 207, a 1963 case, held that a verdict cannot be founded on mere theory or speculation. When dealing with codefendants where one tortfeasor's negligence is based on speculation and conjecture and the other tortfeasor's negligence is based on substantial evidence, the Court may dismiss one of the defendants. This principle was reiterated in Keller, 146 Wn.2d. 252. The Court still retains its gatekeeper function and may determine that a municipality's actions were not the legal cause of the accident.

The County's motion under CR 50 is partially premised

on the plaintiff's inability to prove the County's negligence, if any, was the proximate cause of the plaintiff's injury. Proximate cause has two elements: cause in fact and legal causation. Cause in fact refers to the but-for consequences of an act; that is, the physical connection between the act and an injury. Ordinarily, cause in fact is a question for the jury; however, the Court may decide this question as a matter of law if the causal connection between the act and the injury is speculative.

Here, the plaintiff has provided substantial and compelling evidence that both the County and Mr. Malinak owed her a duty. The plaintiff has also provided substantial and compelling evidence that Mr. Malinak breached this duty by failing to adhere to the requirements of RCW 46.61.190, 46.61.400, and 46.61.005. The plaintiff has provided substantial and compelling evidence that, but for Mr. Malinak's actions, she would not have been injured.

Conversely, the plaintiff has failed to provide substantial and compelling evidence that the County violated its duty to exercise ordinary care in the maintenance and design of its public roads to keep them reasonably safe for ordinary travel. At best, the Court or a jury would be called to speculate that the bush

impeded Mr. Malinak's sight distance. However, to hold a governmental body liable for an accident based upon its failure to provide a safe roadway, the plaintiff must establish more than that the government's breach of duty might have caused the injury. Rather, the plaintiff must show that, but for the County's negligence, she would not have been injured.

Here, the substantial evidence of Mr. Malinak's actions are the cause in fact of the plaintiff's injuries. According to Mr. Malinak's own testimony, he failed to see the yield-ahead sign, but even had he seen the yield-ahead sign, he did not believe it gave notice of an upcoming intersection; and once he saw the yield sign on the left, he failed to reduce his speed. Even if the bush was removed and the yield sign and curve on the right was open and apparent, Mr. Malinak did not believe he had a duty to slow unless other vehicles were present. This is contrary to his statutory duties under RCW 46.61.190, 46.61.400, and 46.61.005.

After the plaintiff submitted all of her evidence, the only reasonable conclusion that may be reached is that Mr. Malinak's actions were the cause in fact of the plaintiff's injuries, not the County's actions.

The Court has the authority to dismiss one tortfeasor where there is substantial and compelling evidence that

one tortfeasor's actions were the cause in fact of the plaintiff's injuries and the other's conduct is speculative or conjectural. That is exactly the case here. There is substantial and compelling evidence that Mr. Malinak's actions were the cause in fact of the plaintiff's injuries. The plaintiff has failed to provide any evidence that, but for the County's negligence, she would not have been injured. Therefore, the County's motion for judgment as a matter of law will be granted.

With that, Mr. Felice, I'd like to know how you would like to proceed. I anticipate you'd like to see the trial through and probably go across the street.

MR. FELICE: I can't get over there quick enough, Your Honor.

MR. MICHAUD: Could I walk over there with him too, Judge?

MR. FELICE: Your Honor, I would like some time to think. I know that the County has witnesses scheduled for this morning. Obviously they will not be calling them. So I think at this point I would like to have the rest of the day to process this and then advise the Court perhaps this afternoon. And then -- I mean -- I'm just trying to think of the witnesses. This is their case. We would proceed with -- I just think I need some time to

economy, to come back and retry this case, I don't even want to get into the amount of money that it costs. I think that would be the appropriate thing to do. And so I'm -- my first motion is to ask the Court to reconsider that motion.

THE COURT: Thank you.

Mr. Michaud?

MR. MICHAUD: Yes, I do, Your Honor. Good morning.

THE COURT: Morning.

MR. MICHAUD: Because -- I move for reconsideration of the Court's ruling. I do not have the transcript in front of me -- and that's being ordered -- so I'm going by my notes concerning your decision on your CR 50. And I wanted to go through, as briefly as I can, because I know the jury's here, some of the issues that I believe the Court should reconsider.

The yield-ahead sign. I believe it's a fact for the jury whether or not it's too far back to remember. That evidence that it's too far back for a motorist such as Mr. Malinak to remember is supported by Mr. Stevens, Mr. Gill, Mr. Harbinson. Deputy Depriest, when he was on the stand, did -- went back -- and Deputy Thornburg would have testified yesterday, at least via his deposition, under cross-examination that he trusts Deputy Depriest to take a picture of all relevant signage in the road that

pertains to the accident when they do their investigation. Deputy Depriest did not go back up and take a photograph of the yield-ahead sign. He went back up the road and walked forward, the same direction that Mr. Malinak was traveling, but apparently he didn't think it was germane to this.

Deputy Thornburg's deposition testimony is something that would have come out yesterday, is that he's been through the Y intersection coming from Fairfield at least two dozen times; he thinks there's a Y warning sign up the road, not a yield-ahead sign, or that there's an intersection-ahead sign. Obviously he can't remember what was up there either, and he's a police-trained driver that's been through there 24 times.

So I believe with respect to the yield-ahead sign, there's plenty of factual issues that should have went to the jury.

Secondly, the yield-ahead sign does not warn a motorist that there's two yield-ahead signs (sic). It does not say which sign should be paid the most attention to, which was the testimony of the chief engineer for the Road Department, that Mr. Malinak was supposed to pay a little bit of attention to the yield sign on the left which he could see but he was to pay more attention to the yield sign on the right, which of course the County

already admitted he could not see because it was obstructed.

The sign does not warn a motorist to slow down, it does not warn of a curve ahead, and it does not warn of an intersection ahead.

Next is the yield sign. It's confusing to a motorist to have two yield signs when and if they were properly warned by the sign being placed in the proper location, or at least some semblance of a proper location, that there's two yield signs. It's confusing to a motorist that sees a yield sign to the left, is not intending to turn to the left. There is absolutely zero evidence in this case that there was any other traffic out there to yield to, which I believe also made an intersection-yield-sign jury instruction that was proposed confusing in and of itself. And of course there's the issue of whether or not the yield sign on the right was obstructed and the nature and extent of that obstruction.

Next is the issue of speed that I believe the Court spoke about. Deputy Depriest's testimony was that a motorist should obey the last speed limit sign they saw. Here, it's uncontroverted that the last speed limit sign that Mr. Malinak saw was 45 miles an hour. There's ample evidence that Mr. Malinak did, in fact, slow down.

That's supported by Mr. Harbinson, Mr. Depriest, Mr. Thornburg. Mr. Greene testified that he, the chief engineer for the County Road Department, did not know what a safe speed is for that curve even as he sat here during trial and that he never measured the radius of the curve to find out. So it's a factual question on what warning that Mr. Malinak had.

Next is the confusion created by the signage in that location: the yield sign -- the yield-ahead sign being too far back to remember, the two yield signs, and the brush obstructing not only the yield sign on the right -- and now I'll go into the brush.

It's pure factual conjecture to speculate at what rate of speed Mr. Malinak would have or could have seen the right yield sign if it were not for the obstruction in the roadway. Even the jury is instructed not to speculate. And I believe that's what happened here.

The yellow double stripes, the indentation -- I'm just paraphrasing because I can't remember exactly what the Court said -- is an issue of fact. Does it warn that there's an intersection ahead or is it just part of the worn striping on the roadway?

The jury was shown a picture that happened the day after the accident and the day of the accident, not a year later when it was chip sealed and re-striped, that

oftentimes there are indentations in double stripes. For example, if someone's turning left into their farm out there, they can do so without being warned that there's an intersection somewhere. The white fog lines on that roadway were clearly worn away.

And so the -- it's an issue of fact whether the double yellow stripes warned someone that there's an intersection ahead. I heard no law from any expert witness up to this point that that should have been the case.

What does it mean if there's a broken-yellow-line stripe going down the roadway? I heard no evidence to say that that's a warning that there's an intersection ahead. There may be -- I'm going from my memory -- but I cannot remember anybody saying that.

I believe that all of the issues that the Court spoke of are clearly factual issues that should have been placed in front of this jury that sat here and listened to the facts of this case for going on four weeks now.

For those reasons -- and I'm -- if I had the transcript in front of me of the entire trial, there's -- I believe that the Court was in error on its ruling, and I would ask that it reconsider it. Thank you very much, Your Honor.

THE COURT: Thank you.

I guess what I'll start with is, I understand the impact of this ruling, and I wanted it to go to the jury as well. Courts are reluctant to grant CR 50 motions, especially after three weeks of trial.

This decision has kept me up every night. I worked on this all day Friday, all day Saturday, and all day Sunday. I reviewed testimony of the witnesses and the exhibits that had been admitted. What I was looking for is substantial and compelling evidence that, but for the County's negligence, the plaintiff and cross-claimant would not have suffered injury. All I was able to find after both the plaintiff and cross-claimant rested was speculation of the County's negligence.

In reviewing the evidence in a light most favorable to the nonmoving party, the Court was unable to find any substantial and compelling evidence to support the County's actions were the cause in fact of the plaintiff's and cross-claimant's injuries. Rather, what the Court found was speculation. The Court's ruling will lie as it was given yesterday. The plaintiff's and the cross-claimant's motion for reconsideration is denied.

Mr. Felice, I understand the impact this has on you. I apologize for the impact this decision has but not for the decision.

With that, what did you want to do for purposes of

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

MADELYNN M. TAPKEN, a single person, Plaintiff/Appellant, vs. SPOKANE COUNTY, Public Works/Department of Engineering & Roads, a Municipal Corporation; CONRAD MALINAK, a single person, et. al., Defendants/Respondents.	SPOKANE COUNTY SUPERIOR COURT NO. 2013-02-01216-7 COURT OF APPEALS NO. 329097

REDACTED VIDEOTAPED PERPETUATION DEPOSITION OF

EDWARD M. STEVENS

SEPTEMBER 3, 2014, 9:59 A.M.

VOLUME 10, PGS. 1 - 164

TRANSCRIBED BY:

TERRI S. ROSADOVELAZQUEZ, Transcriber
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MR. FELICE: I have asked for his observations at the scene.

BY MR. FELICE:

Q. You can continue on.

A. The -- what I saw was the fact that there was a hazard in the way of vegetation. There's a very, very large bush that occurs right in the northwest corner of the intersection. And this is what is the obstruction to sight visibility of seeing the yield sign.

I think that's predominantly what I was able to gain from my observations at the scene.

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 in terms of how sharp it is.

Q. All right. Okay. Would it be beneficial to the jury to see a diagram of the intersection and relative to your survey?

A. I would think so, yes.

MR. FELICE: All right. Let's take a break and we'll set up exhibit ...

THE VIDEOGRAPHER: It's 10:25. We are off the record.

(Pause)

THE VIDEOGRAPHER: It's 10:26 a.m. We are on the record.

BY MR. FELICE:

Q. Mr. Stevens, we're going back on the record.

I handed you, or set up there what's been marked as Plaintiff's Exhibit Number 39A. Can you -- would this be beneficial to you in terms of explaining to the jury what the diagram is as far as the location?

A. Yes, sir.

Q. All right. And who prepared this?

A. This was prepared by -- the survey was done by the survey crew, as I said before. The drawing was actually drawn by Mr. McKenzie who is the AutoCAD operator in my office.

Q. Okay. So this is based upon the survey that was actually performed?

A. Yes, sir.

Q. All right. Why don't you take us through that and -- first of all, when was the survey conducted?

A. The survey was actually done on this part of it in April -- excuse me, August 8th, 2012.

Q. All right. And was it done under your supervision?

A. Yes, sir.

Q. All right. And have you checked the accuracy of this particular diagram?

A. I have. This is the diagram in a much smaller form that

I actually had with me.

Q. All right. Would you please explain this to the jury.

A. Sure. First of all, there's a north arrow in the lower right-hand corner. The exhibit is in -- actually in two parts, the -- what we call a plan view which is like looking down from an airplane, if you were to look down at it, and then on the bottom and the top gives the relative profile of the road, in other words, elevation at any given point in time.

The scale of this drawing is one inch equal 10 feet. So it takes 10 inches to be 100 feet. And you can see a series of red numbers along the bottom portion of this. These -- they correspond to a series of red pluses that are put -- placed on the centerline of the road. That's the exact location that the measurement was made from which the rest of the drawing was put together.

The -- as you come downhill, as you can see from upper -- upper portion -- you can see it goes down. As you go down, you -- first of all, as I said before, you go by the yield-ahead sign and you continue on to a point to where the roadway now splits.

The yield sign that I talked about that you can see at first is placed right in the corner of the intersection if you were to go on towards Waverly. As you go southbound and you wanted to go towards Spangle, you

would then make a -- you would make a turn to the right. The problem is, is that there's this piece of vegetation that sticks out very close to the edge of the road. So as you come along there -- if I would just place it like that -- you don't see this yield sign until you're well in. And in fact, 123 feet away is when you first see the yield sign. At that point in time, if you're going at any highway speed, you're never going to be able to stop. And you're not going to stop for two reasons. One is because of the sharpness of this curve; the second is because you do not see the yield sign.

There is no requirement that you slow down on a yield intersection unless traffic is coming and you have to yield to traffic. As you're coming down into this intersection, the only yield sign you see is the one here. And you can see down South Prairie Road a considerable distance. You cannot see back up this way at all. But, of course, if you're coming in here, the traffic that's going to conflict first is going to be coming this way.

So it's a -- if there's no traffic coming, then you're okay. The problem is, is this piece of vegetation that sits right in here.

Q. All right. Now, if -- so when the operator is, I take it, is heading, in this particular case, from that

different shapes to make you be able to function and realize what type of sign you're coming into.

So 175 feet in advance. Then we come to the two and a half seconds of perception -- what I call perception, decision, reaction time.

Q. Can I just interrupt you for one moment. You're referring to the placement of the yield-ahead sign which was 700 some feet back, correct?

A. 775. That's correct.

Q. All right.

A. The two and a half seconds -- now, so you're starting all of this 175 feet before you get to the sign. For the next two and a half seconds is when you make -- you're making up your decision as to what to do. A yield-ahead sign is placed because you can't see the yield sign. That's why it's there. But at two and a half -- at the end of that two and a half seconds, now, you're supposed to be able to see it because that's when the braking begins. And the braking begins at a deceleration rate of 11.2 feet per second squared. What that is, is a good, solid pedal pressure equal to about a third of a G. Acceleration of gravity is 32.2 feet per second squared. So 11 of those is about one third. So it's about a third of a G.

And what it is, is just about to the point to where,

driver according to the rules of the road has an obligation to reduce their speed as they approach and as they proceed through the intersection; is that correct?

A. I would agree with that.

Q. Okay. According to the rules of the road, a reasonably prudent driver also has the responsibility to reduce their speed when they are approaching a curve; is that correct?

A. If that curve -- if that curve is signed in such a way that requires reduction of speed, I would agree.

I will guarantee you that if you go out in the urban area of any place in this nation and there's a curve that's safe at 70 miles an hour and it's posted at 50, you're not going to find people getting on the brakes to slow down before they enter the curve. If that curve then had a reduction or required reduction by advisory speed by an engineering study that says you should slow down to 30 in that 50-mile-an-hour zone, I would agree with you.

Q. I'm trying to understand this correctly. So is it your testimony that the rules of the road in Washington do not require a driver to reduce his or her speed when they are approaching a curve or a turn?

A. Not -- not unless -- not unless it is signed for a requirement to reduce their speed. We would have nothing

Q. Okay.
A. I don't know what that alignment is but yes.
MR. JACKSON: Mr. Felice, one more.
BY MR. JACKSON:
Q. I've handed you an additional photograph, sir. Is it your testimony that you still cannot see the intersection from there?
A. I would agree.
Q. I need you to say if you can't -- if you're claiming you can't see.
A. You cannot.
Q. Okay. How many feet is that?
A. I would say about 675, something like that.
Q. Okay. Then one more. No, I need you to show that to the videographer so that he can focus in on that.
And one more 54, sir. And can you tell us how far away that is from the intersection.
A. It's about 425 to 400.
Q. Can you see the intersection in that photograph?
A. I can see a break in the line, but I do not see the intersection as such.
Q. And you testified previously that, if a motorist, a reasonably prudent motorist was looking at the yellow centerline and he saw it break and saw another yellow centerline break, that would be an indication to the

reasonably prudent motorist that there was an intersection there, correct?

A. Yes, this would be an indication physically where it is. It's the intersection in the intersection, so to speak. You can't see the -- you can't see the intersection with Spangle-Waverly Road, however. You can see what I refer to as the -- as the second intersection within the intersection.

Q. Can you show the photograph to the videographer, please.

And, Mr. Stevens, when that -- those double yellow lines veer to the left or arc to the left, is that an indication to the driver that the main portion of the roadway is going to the left?

A. There's no -- there's no arcing to the left beyond the break here.

Q. I'm talking about before you get to the break, sir. Is that an indication to the driver that is going southbound on Prairie View that southbound Prairie View goes to the left?

A. No.

Q. Okay.

A. All I see is -- all I see is two lines and a break, and they both go towards Spangle.

Q. Okay. So it's your testimony that the double lines that arc around to the left do not give the driver, a

reasonably prudent driver any information about the direction of Spangle-Waverly?

A. No, sir.

Q. Okay. Mr. Stevens, this intersection, that is, if Mr. -- or if a reasonably prudent driver is traveling to the right, the yield sign that is there controls whether or not the reasonably prudent driver will have to stop or yield the right-of-way; is that correct?

A. Yes, sir.

Q. The rules of the road rely upon the driver to determine the correct and appropriate and safe speed to negotiate a turn; is that correct?

A. I would agree with that.

Q. So the reasonably prudent driver that is approaching this intersection has two, perhaps overlapping but two obligations; one is to obey the yield sign if the situation is required, but they independently have the individual responsibility to reduce their speed to an appropriate level so that they can safely negotiate the turn; is that correct?

A. I would go back and say if the highway is reasonably safe in terms of its design, traffic operations, striping, and signing, I would agree with you.

Q. Okay.

A. I won't agree if it's an inherently dangerous condition

were based on the 2009 version of the MUTCD; is that correct?

A. And they were at that time.

Q. Okay.

A. But there's no difference between that and the 2003. And they were all in my file.

Q. Now, Mr. Stevens, when you did your diagram such as the one that is currently displayed, did you determine whether or not the roadway of South Prairie View or East Spangle-Waverly was within the original right-of-way for the road?

A. I did not.

Q. And I take it then that you did not calculate whether or not the road had shifted over the years to encroach upon the owner's property on either side of the roadway?

A. I would have no idea. But it would have been done for years and years, I'm sure of that.

Q. All right. All right. Mr. Stevens, can you tell the jury, are you an accident reconstructionist?

A. No, sir.

Q. Have you rendered any opinions in this case as to the cause of this accident?

A. No, sir.

Q. Are you a human-factors expert?

A. That's a little gray area. I'm a human-factors expert

intersection were being operated and maintained properly.

Q. Tell me why it is you cannot abide by the yield signs. I don't understand that.

A. Well, we spent a lot of time on that. I'm sorry that I wasn't able to satisfy that. But as you -- as you come down the road after -- after seeing the yield sign -- let's assume it's in your head, I got a yield ahead here, and you look to the left and there's the yield sign. So you say, well, I don't want to go to the left, I want to go to the right. So you start around to the right. You don't see that yield sign until you're 123 feet away from it, which is -- which is not the stopping sight distance, not safe to be able to make a stop, and you're in a very sharp curve and the yield sign is obstructed by the vegetation. That's -- that's the hazard. I don't know if I can make it any plainer than that.

Q. Well, let's separate it then. As a driver is going down South Prairie View, regardless of whether the driver is doing 25, 35, or 45, when the driver reaches the Y intersection, the driver is going to have to make a decision whether or not they are going to go to the left on South Prairie View Road or whether they're going to the right on East Spangle-Waverly Road; is that correct?

A. You seem to understand that okay.

Q. Okay. Thank you. I'm trying. So if the driver is going

to go left on South Prairie View Road, they have a yield sign alerting them of the possibility that they may need to yield and stop; is that correct?

A. Well, they also need to yield to the -- to the first intersection they come to, which is unmarked, which they can't see anybody coming.

Q. We'll get back to that. So the driver that's traveling on South Prairie View Road can comply with the yield sign to the left, correct?

A. Can comply with the yield sign to the left. The one that's there.

Q. And there isn't a sight-visibility problem with that yield sign; is that correct?

A. I would agree.

Q. Okay. And so because there isn't a sight-visibility problem with the yield sign to the left, then the reasonably prudent driver would know that the yield-ahead sign does not apply to that yield sign, correct?

A. You can't see the yield ahead -- I mean, you can't see the yield sign from where the yield-ahead sign is posted. We went through that.

Q. If you can see the yield-ahead sign from where the -- if you could see the yield sign from where the yield-ahead sign is posted, you don't need a yield-ahead sign, do you?

A. Well, they did it. Are you saying -- are you really saying that if you come down the roadway and you see the yield-ahead sign and you get down to about where it says Prairie View Road there and you see the yield sign, you automatically know now that that yield-ahead sign applied to the right-hand turn?

Q. Let me try to ask you the question again.

A. I'm sorry. Go ahead.

Q. According to the 2003 version of the MUTCD or according to the 2009 version of the MUTCD, if you have appropriate sight distance to a yield sign, you do not use a yield-ahead sign, correct?

A. I would agree with that.

Q. Okay. So the reasonably prudent driver -- well, let me strike that.

All right. So let's continue. So it is your testimony that the driver, a reasonably prudent driver driving down South Prairie View Road could comply with the yield-ahead sign to the left that continues on South Prairie View Road; is that correct?

A. I would agree.

Q. All right. I'll clean it up. It's your testimony that the southbound driver on South Prairie View Road, and that is a reasonably prudent driver, could not comply with the yield-ahead sign for the right-hand turn to East

Spangle-Waverly Road because the yield sign is obscured by the brush; is that correct?

A. Correct.

Q. All right. And when a -- the visibility to a yield sign is obscured by natural conditions, turn in the roadway, or brush, it is appropriate to use a yield-ahead sign; is that correct?

A. I would agree.

Q. And so in this case your testimony is that it was appropriate for Spokane County to place a yield-ahead sign on southbound Prairie View; it's just that the location that they placed the yield-ahead sign was inappropriate?

A. Well, that -- that and you can't comply in terms of slowing down enough time to get stopped at the yield-sign location because there's not enough visibility. As long as we add that we're good.

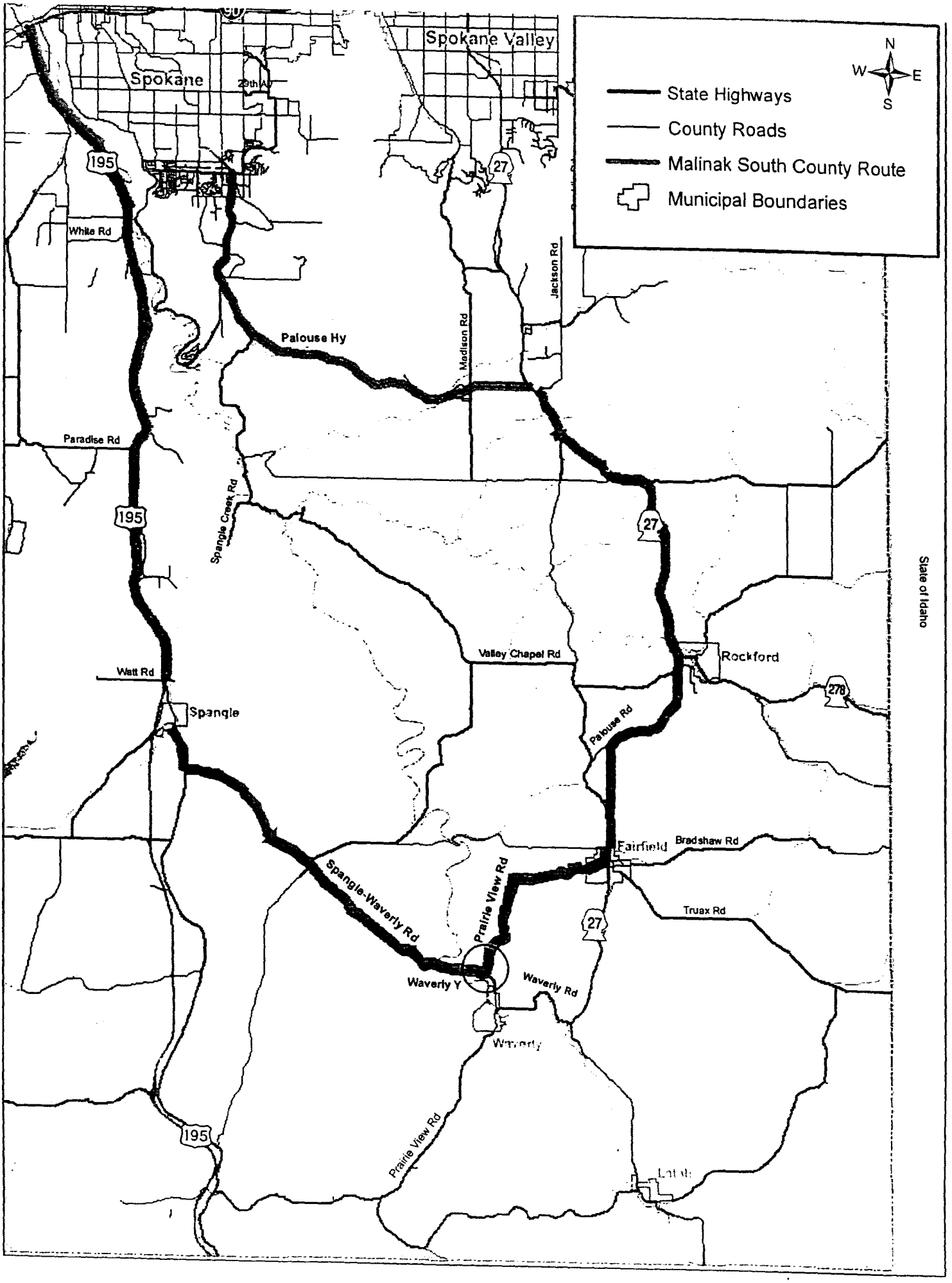
Q. You do agree that the MUTCD allows you to mitigate the lack of sight distance to the yield sign by placing a yield-ahead sign on the roadway?

A. I would agree.

Q. Okay. Did I miss any of your opinions as to why you believe that this road is inherently dangerous?

MR. FELICE: I'm going to object to the question. He has given his opinions, and I'm not going to limit his

APPENDIX E


Spokane
Spokane Valley
29th Av
195
27
White Rd
Jackson Rd
Madison Rd
Palouse Hy
Paradise Rd
Spangle Creek Rd
195
27
Valley Chapel Rd
Rockford
Watt Rd
Spangle
278
Palouse Rd
Fairfield
Bradshaw Rd
Spangle-Waverly Rd
Prairie View Rd
Truax Rd
27
Waverly Y
Waverly Rd
Waverly
195
Prairie View Rd
State of Idaho
N
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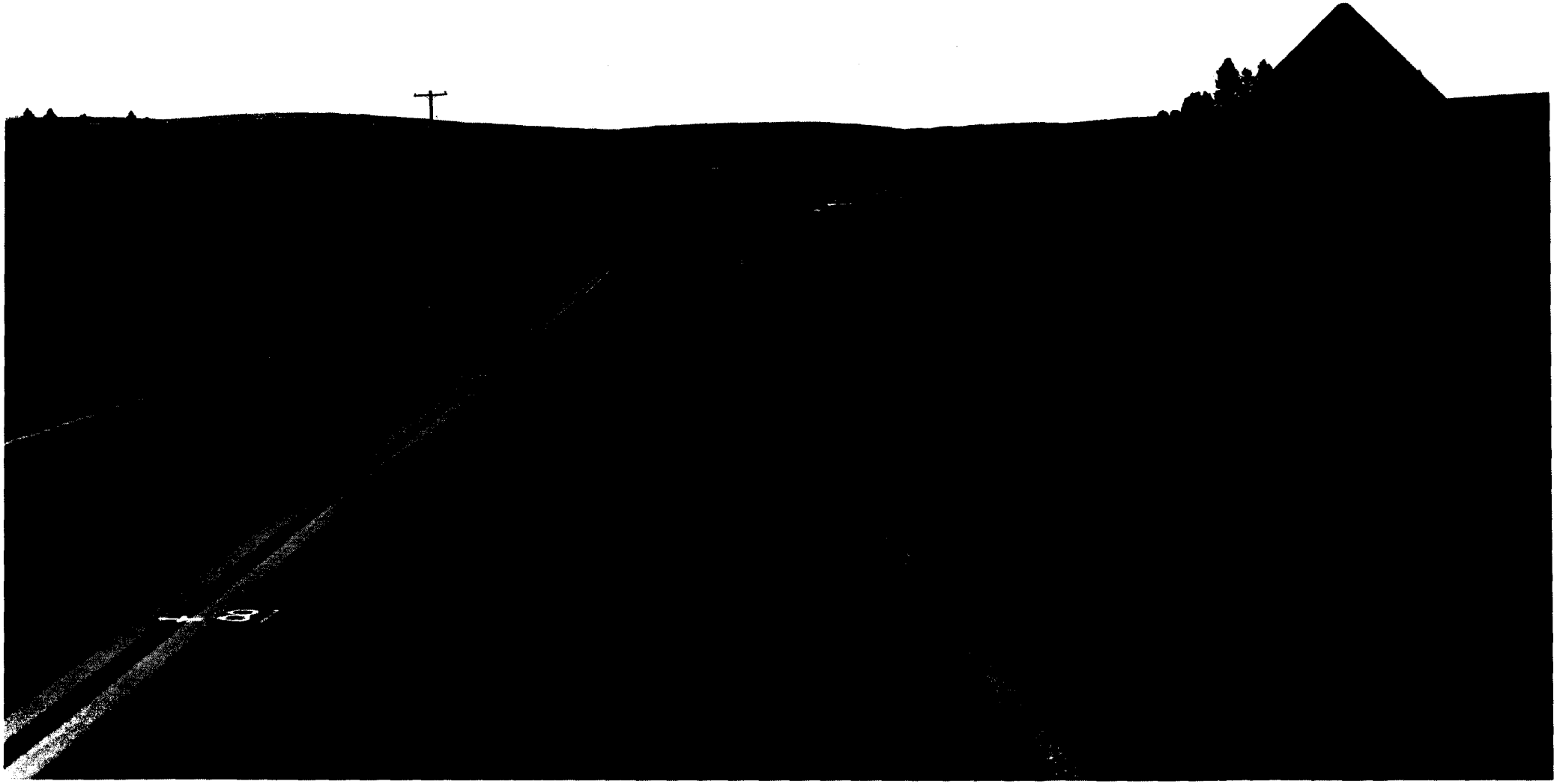
State Highways
County Roads
Malinak South County Route
Municipal Boundaries

APPENDIX F

SPEED LIMIT 45
YIELD

APPENDIX G



APPENDIX H

APPENDIX I

APPENDIX J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APPENDIX K

APPENDIX L

APPENDIX M