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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____



NO. 32909-7

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

MADELYNN TAPKEN,

Plaintiff-Appellant,

v.

SPOKANE COUNTY, a municipal corporation,

Defendant-Respondent,

and

CONRAD MALINAK,

Cross Claimant-Appellant.

BRIEF OF RESPONDENT SPOKANE COUNTY

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I. INTRODUCTION

This is a tort action against Spokane 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. Appellants seek review of the trial court's dismissal of their road negligence claims against Respondent Spokane County pursuant to CR 50. The Court of Appeals should affirm the dismissal because the trial court properly determined that Appellants failed to present substantial evidence that (1) the County breached a duty to maintain its roadway in a condition reasonably safe for ordinary travel or (2) that an act or omission of the County was a cause in fact of Appellants' injuries.

II. STATEMENT OF THE CASE

A. Facts¹

1. Plaintiffs' Motorcycle Ride

On September 28, 2011, Ms. Tapken rode with Mr. Malinak on his Suzuki sport motorcycle on farm roads in the Palouse area of Spokane County. CP 7; RP 957. The day of the ride was sunny and dry. RP 964.

Mr. Malinak planned to travel in a loop southbound on Prairie View Road to the Y intersection with Spangle-Waverly Road, where he

¹ The facts are solely evidence Plaintiffs presented at trial. Ms. Tapken and Mr. Malinak are denoted "Plaintiffs" because each of them sued the County and Ms. Tapken dismissed her claim against Mr. Malinak, who adopted her appellate brief.

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. RP 1071-72, 1101. These routes are shown on Exhibit (Ex.) D208 (Appendix (App.) A).² Mr. 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. RP 960-62; 1071-72. In previous travels through this Y intersection, Mr. Malinak did not crash. RP 1114-15. An aerial view of the intersection with signs shown is Ex. D104 (App. B).

2. The Accident

As Plaintiffs drove at the 45 mph speed limit southbound on Prairie View towards the Y intersection, they passed a “Yield Ahead” sign. Ex. P126 (App. B); RP 1116. The sign was approximately 775 feet before the intersection. RP Vol. 10, p. 43. The visibility of the intersection from the yield ahead sign and south is shown (in 2012) in Exhibits P126–P131 (App. C-H) and in 2011 (at the time of the accident) in Exhibit P8 (App. I). A driver sees the intersection at a distance of 400 to 425 feet, where a break in the Prairie View centerline is visible. RP Vol. 10, pp.

² Certain exhibits introduced in Plaintiffs’ case are attached to this brief as appendices for ease of reference by the Court when reading facts or argument relating to what is shown in those exhibits. Several of these appendices are enlargements of the exhibits for better detail and clarity, which consist of two 8½ x 11 inch pages that must be placed together to view to the best advantage.

126-27.

While on Prairie View, Mr. Malinak testified he slowed to 35-40 miles per hour (mph) and began to shift his weight right to turn right onto Spangle-Waverly. RP 967-68, 1023, 1129. Alternatively, he testified he maintained a 45 mph speed with the intent of taking the turn close to the 45 mph speed limit.³ RP 1020, 1112, 1114.

As Mr. Malinak shifted his weight to lean right, he thought he was going too fast and immediately leaned left to take a left at the Y. RP 967-68. Alternatively, Mr. Malinak testified his intended destination was to turn left to Waverly at the Y, but he had started turning to the right before he leaned left to turn left. RP 1101. He cannot say where on Prairie View he leaned right or left. RP 1128-29. Mr. Malinak also cannot say how close to the intersection he first appreciated the sharpness of the right turn. RP 970-71.

When Mr. Malinak leaned left, the motorcycle came upright, running straight through the intersection⁴ into a ravine south of Spangle-Waverly. RP 969, 973. Mr. Malinak braked and let off the throttle through the intersection. *Id.* 970-71, 1077. Despite braking, the motorcycle

³ Mr. Malinak testified to alternative versions of his actions. The different versions are stated to accurately summarize testimony in the record.

⁴ The term “intersection” includes the triangle of land lying between the point where Mr. Malinak attempted his turns right and left, and the points where the two branches of Prairie View intersect Spangle-Waverly. *See* Ex. D104 (App. B).

departed the road travelling at a speed of 35-43 mph,⁵ only slightly different from Mr. Malinak's testimony stating a 35-40 mph speed, or 45 mph speed, when he initiated his turns on Prairie View. RP 754 (departure speed calculated based on flight distance and landing spot).

Motorcycles turn primarily by riders leaning. RP 972. Ms. Tapken held Mr. Malinak around his waist, following his movements as he leaned. RP 968, 1073. If the motorcycle would not turn left as Mr. Malinak leaned left, someone leaned the other way. RP 1076. When Mr. Malinak went to the scene after the accident, he could not figure out how the accident happened. RP 1025.

3. Rules Of The Road And Signing Requirements

Rules of the road require drivers to reduce speed as they approach an intersection and drive through it. RP Vol. 10, p. 94; RCW 46.61.400(3). Rules of the road require drivers to determine the correct, appropriate, and safe speed for turns. RP Vol. 10, p. 128. The speed limit is the maximum speed for a road set by legal authority. RCW 46.61.400(2). The posted speed does not authorize driving that speed at all times. RP 634; RCW 46.61.400(1) and 46.61.445. The driver must reduce speed when required

⁵ Ms. Tapken's reconstruction expert, Mr. Harbinson, calculated this speed and Mr. Malinak presented no expert or other testimony to dispute it.

by circumstances and cannot assume the speed limit is safe for a turn. RP 571, 634.

Road signs in Washington State are governed by the Manual on Uniform Traffic Control Devices (MUTCD). RP Vol. 10, pp. 16-17. The Legislature adopted the MUTCD, which applies to county roads. *Id.*; RCW 47.36.030(1); WAC 468-95-010.

Under the MUTCD, a yield sign assigns right of way at an intersection. Ex. D108 (§2B.08).⁶ Southbound Prairie View drivers had yield signs on the leg intersecting eastbound Spangle-Waverly and the leg intersecting westbound Spangle-Waverly. Ex. D104 (App. B).

A yield ahead sign is used where visibility of yield signs is restricted. Ex. D108 (§2B.10). The visibility of the yield signs on southbound Prairie View is restricted at different points by road alignment, topography, and foliage. *See* Exs. P126–P131 (App. C-H). The yield ahead sign on Prairie View mitigates the restricted view to the yield signs. Ex. P126; RP Vol. 10, p. 110. The yield ahead sign tells drivers to prepare for a yield sign and an intersection, and notifies of an upcoming need for reduced speed. RP 511; Vol. 10, p. 111. The yield ahead sign does not tell drivers to slow to a particular speed because drivers must

⁶ Exhibit D108 is the entire 2003 MUTCD, which was applicable in September 2011. The section numbers refer to sections within the MUTCD.

determine the safe speed for approaching an intersection. RP 511; RCW 46.61.400(3).

Mr. Malinak believed yield ahead signs do not indicate an intersection. RP 1017-19. He believed the intersection of Prairie View and Spangle-Waverly could be driven at 45 mph unless a sign advised a slower speed or he needed to yield to oncoming vehicles. RP 1020, 1114. Alternatively, he testified he followed his motorcycle training and slowed for the right hand turn on the day of the accident. RP 1118, 1162-63.

B. Response To Plaintiffs' Statement Of Facts

Plaintiffs' claim is the County failed to warn of the right turn at the intersection. CP 7, 23-24. At trial, Plaintiffs' testimony was that a roadside bush interfered with sight distance to a yield sign at the turn, producing inadequate stopping distance. *See* RP Vol. 10, pp. 22-25; 145-48. In its CR 50 ruling, the trial court concluded there was no evidence that Mr. Malinak would have slowed for the yield sign, so his ability to see the sign was irrelevant. RP 1751-53.

Plaintiffs' appeal no longer focuses on the bush interfering with the view of the yield sign. Now, Plaintiffs' primary claim is that, as a result of the bush, "the curve's sharpness was obscured, and by the time he [Mr. Malinak] could fully appreciate the curve's 90-degree bend, it was too late to slow down enough to negotiate the curve safely." Opening Brief of

Appellant Tapken (App. Br.) 1. In support of this claim, Plaintiffs cite testimony purporting to show the bush obscured the turn.

Plaintiffs' references to the record in support of the proposition the bush obscured the turn are often not to testimony about visibility of the turn, but to testimony about yield signs being obscured, or the intersection itself being obscured at a distance. *See* App. Br. 12; Stevens RP Vol. 10, 31-34 (mostly yield signs), 77 ("intersection"); Gill RP 885 (yield sign and intersection). This testimony inaccurately states photographic and survey evidence showing the turn's visibility to drivers.

The 2012 photographs, and survey by Mr. Stevens, show that all but the last few feet of the right turn is visible from several hundred feet south of the intersection. *See* Exs. P126-P131 (App. C-H); Ex. P8 (App. I). The record also contains photographs of the turn that were taken within a day of the accident. Those photographs, taken before the bush grew another year, show the entire turn and part of intersecting Spangle-Waverly visible from a long distance up Prairie View. *See* P8 (App. I). Exhibit P94, taken from the west intersection with Spangle-Waverly, shows Prairie View Road visible to the horizon from the end of the right turn. *See* App. J. Insofar as Plaintiffs rely on testimony that the bush obscured the turn, they submitted physical evidence refuting their new obscured turn theory.

C. Procedure

Plaintiff Tapken filed a Complaint against Mr. Malinak and the County on March 26, 2013. CP 1-11. Mr. Malinak answered and filed a cross-claim against the County on November 13, 2013. CP 18-27.

On June 23, 2014, the County filed a summary judgment motion against Plaintiffs on the grounds that undisputed facts showed the County did not violate a duty to Plaintiffs and the alleged negligence of the County did not cause Plaintiffs' crash. CP 28-61. The parties argued the summary judgment motion on July 18, 2014, and the superior court issued a written decision denying the motion on August 1, 2014. CP 1020-21.

Ms. Tapken brought a motion for partial summary judgment seeking dismissal of the County's comparative fault affirmative defense. CP 176-85. The court denied the motion on the grounds that genuine issues of material fact required a trial. CP 1022-24; RP 101-02.

After Plaintiffs rested at trial, the County argued its CR 50 motion on September 25, 2014. RP 1696-1716. The trial court considered the motion and trial evidence for three days. RP 1746. On September 29, 2014, the court issued an oral decision finding substantial evidence Mr. Malinak breached his duties as a driver but no substantial evidence the County violated its duty to exercise ordinary care in the maintenance and design of the road or was a cause of the accident. RP 1746-56. The court

issued an order granting judgment dismissing the County. RP 2126-27.

III. ISSUES

A. Did the trial court correctly grant the CR 50 motion based on lack of evidence that the County breached its duty to maintain the roadway in a reasonably safe condition for ordinary travel, where: (1) there is no dispute that intersection signage complied with the MUTCD; (2) there is no evidence that the bush obstructed a view of the right turn at the intersection; and (3) vegetation affecting visibility at intersections is not an “inherently dangerous” or “misleading” condition as a matter of law?

B. Did the trial court properly grant the CR 50 motion based on lack of proximate cause where: (1) undisputed evidence established that an unimpeded view of the yield sign would not have changed the driver’s speed or driving behavior; and (2) there is no evidence that the driver departed the road due to inability to make a right turn?

C. Did the trial court properly act within its discretion to exclude evidence of prior accidents and collisions where (1) they were not substantially similar; and (2) the County was not raising lack of notice of any conditions at the intersection as a defense?

D. Should this Court decline to review denial of Ms. Tapken's partial summary judgment motion because a denial based on disputed issues of fact is not appealable after trial?

E. Was Ms. Tapken's partial summary judgment motion properly denied, where the County submitted: (1) expert testimony that a motorcycle rider must lean with the driver; (2) testimony Ms. Tapken leaned in the wrong direction; and (3) expert testimony Ms. Tapken's counter-lean caused the motorcycle crash?

F. Should this Court decline to review the trial court's evidentiary ruling regarding the testimony of Mr. Harbinson on proximate cause because Appellants made no offer of proof?

G. Did the trial court properly prohibit Mr. Harbinson from stating an opinion on "proximate cause" of the accident, because an expert's opinion on a mixed question of law and fact is inadmissible and the jury had not yet been instructed on this legal term?

H. Was any error in restricting Mr. Harbinson's proximate cause opinion harmless, because his undisputed testimony showed that he had no foundation to formulate such an opinion?

IV. STANDARD OF REVIEW

A court can 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 the non-moving party. *Davis v. Microsoft*, 149 Wn.2d 521, 79 P.3d 126 (2003). A CR 50 motion should be granted when undisputed evidence shows the moving party violated no duty to the non-moving party or shows 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). The appellate court must review evidence in detail to determine if that evidence is sufficient to support a verdict on the specific claim alleged by the non-moving party. *See, e.g., Cowsert*, 101 Wn.2d at 412; *Johanson v. King Cty.*, 7 Wn.2d 111, 123, 109 P.2d 307 (1941).

A trial court's appraisal of the evidence has "great value" when reviewing a judgment as a matter of law because the trial judge "saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 215, 67 S. Ct. 752, 91 L.Ed.2d 849 (1947). "Exercise of this discretion presents to the trial judge an opportunity, after all his rulings

have been made and all the evidence has been evaluated, to view the proceedings in a perspective available to him alone.” *Id.*

A trial court can deny a summary judgment motion but grant a CR 50 motion after hearing the trial evidence and reconsidering legal authorities. *Ramey v. Knorr*, 130 Wn. App. 672, 124 P.3d 314 (2005). An appellate court can affirm a CR 50 dismissal on any correct grounds and is not confined to the trial court’s grounds. *Rawlins v. Nelson*, 38 Wn.2d 570, 578, 231 P.2d 281 (1951).

V. ARGUMENT IN SUPPORT OF JUDGMENT

A. The Trial Court Made The Correct Decision Based On Plaintiffs’ Claim And Evidence Presented At Trial

Plaintiffs’ Complaints alleged inadequate signing for road users turning at the Waverly Y intersection.⁷ Ms. Tapken’s claim was:

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

CP 8. Ms. Tapken described the road hazard as being a lack of advisory speed or warning signs for right and left turns, which allegedly could not be negotiated at the posted speed of 45 mph.⁸ Mr. Malinak’s Complaint

⁷ In their pleadings, Plaintiffs refer to the intersection as a “convergence.”

⁸ Ms. Tapken’s Complaint states:

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

makes identical allegations.⁹ See CP 23-24. Plaintiffs alleged in their pleadings that Mr. Malinak intended to turn left at the intersection to Waverly and lost control of the motorcycle. CP 8, 23-24.

At trial, Ms. Tapken's experts did not testify there should be an advisory speed sign or a warning sign for the "abrupt horizontal change in roadway" at the intersection. Instead, Ms. Tapken's road expert claimed the hazard at the intersection was a bush that interfered with sight distance to a yield sign, producing inadequate stopping sight distance for vehicles to yield to conflicting traffic. RP Vol. 10, p. 68.

Ms. Tapken's road and accident reconstruction experts provided no opinions that the lack of sight distance to the yield sign caused the accident. See RP Vol. 10, p. 170; 745-48, 781. Her reconstruction expert testified there were no skid marks, scrapes, or other data allowing reconstruction of the cause of the accident. RP 745-48. In addition, there were no third party witnesses to this accident, Ms. Tapken had no memory of the accident, and Mr. Malinak testified he could not figure out why the accident happened. RP 1025-26; RP Vol. 11, p. 15.

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." CP 7 (emphasis added).

⁹ Mr. Malinak's Complaint is his cross-claim against the County.

The trial court dismissed this case because the court determined Ms. Tapken presented substantial evidence Mr. Malinak failed to comply with his statutory duty to slow, but no evidence, only speculation, the alleged deficiency in sight distance to the yield sign caused this accident. RP 1747-1748. The court based its decision on undisputed evidence Mr. Malinak would have slowed for the intersection only if there was no conflicting traffic regardless of whether he saw a yield sign. RP 1748-1749. Thus, the sight distance issue was irrelevant. RP 1751.

The trial court summarized its reasons for dismissing the case in the following remarks. The court's remarks reflect Plaintiffs' trial theory that the cause of the accident was Mr. Malinak's failure to slow because there was not enough sight distance to a yield sign, a different claim from that pled in their Complaints:

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.

RP 1754-55 (emphasis added).

In response to Plaintiffs' motion for reconsideration, the trial court explained the process and reasoning for its CR 50 decisions:

I guess 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.

RP 1769 (emphasis added). The trial court followed the correct process by carefully reviewing testimony and exhibits, and made its ruling based on the evidence presented by Plaintiffs before they rested.

B. There Is No Evidence The County Breached A Duty To Post Warnings Of The Right And Left Turns At The Intersection

The foundation for a road hazard claim is the existence of an unusual or extraordinary road condition “not reasonably to be anticipated by users of the street.” *Owens v. Seattle*, 49 Wn.2d 187, 191, 297 P.2d 560 (1956). If there is a road hazard, a state or local government has the option to repair the hazard or post a warning sign. *Holmquist v. Grant Cty.*, 54 Wn.2d 376, 340 P.2d 788 (1959); *Meabon v. State*, 1 Wn. App. 824, 827-28, 463 P.2d 789 (1970).

Warning signs are required when mandated by statute, when road users cannot appreciate a hazard because it is misleading, or when road users cannot avoid a hazard because it is inherent and they cannot account for it. *Tyler v. Pierce Cty.*, 188 Wash. 229, 62 P.2d 32 (1936) (no liability for common and known road conditions, or for curve sign obscured by foliage).¹⁰ Warning signs are not required if road conditions are open and apparent, or known. *Hansen v. Wash. Natural Gas Co.*, 95 Wn.2d 773, 780, 632 P.2d 504 (1981); *Tanguma v. Yakima Cty.*, 18 Wn. App. 555, 559, 569 P.2d 1225 (1977) (“a person cannot complain of a lack of

¹⁰ Concerning misleading conditions, see *Lucas v. Phillips*, 34 Wn.2d 591, 209 P.2d 279 (1949) (liability because width of narrow bridge deceptive on approach at night); and concerning inherently dangerous conditions, see *Berglund v. Spokane Cty.*, 4 Wn.2d 309, 103 P.2d 355 (1940) (potential liability because young children walking to school cannot avoid danger from cars on narrow bridge without sidewalks).

warning of a danger of which he has knowledge”). If a plaintiff presents substantial evidence of a misleading or inherently dangerous condition, the fact-finder determines whether the road is in a condition reasonably safe for ordinary travel and, if not, whether the road’s condition was a cause of an accident. *Keller v. Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002).

Plaintiffs presented evidence the MUTCD is adopted by the Legislature, applies to counties, and establishes the mandatory rules for signing Washington roads. RP Vol. 10, pp. 16-17; *see also Schneider v. Yakima Cty.*, 65 Wn.2d 352, 356-57, 397 P.2d 411 (1964); RCW 36.86.040. Plaintiffs presented no testimony suggesting the intersection signing violated the MUTCD or statutes. *See* RP 1750. The trial court noted Ms. Tapken’s expert, Mr. Stevens, opined that the yield ahead sign was too far from the intersection, but conceded it was placed consistent with the MUTCD. RP Vol. 10, pp. 111, 122-23; RP 1750. The court also noted the location of the yield ahead sign was irrelevant because Mr. Malinak testified he did not see it and, if he had seen it, he did not believe the sign warned of an intersection. RP 1751.

Plaintiffs’ claim in their pleadings that the turns for the intersection should have been signed as curves with speed advisories conflicts with the MUTCD. CP 7. “Horizontal alignment warning signs” are designated for use on “roadways.” Ex. D108 (§2C.06). The MUTCD defines the location

where two roads meet at an angle as an “intersection.” A turn from one roadway to another at an intersection is not a change in horizontal alignment for a “roadway.”¹¹

County road signs must conform with the MUTCD. *Kitt v. Yakima Cty.*, 93 Wn.2d 670, 675-76, 611 P.2d 1234 (1980); RCW 36.86.040. The County could not sign intersection turns as curves in a continuing road because the MUTCD does not allow for such signing. *Id.* Treating intersections as roadway curves would improperly imply that vehicles could proceed through intersections without yielding to traffic with the right of way.¹² RP 580.

Plaintiffs’ undisputed evidence of the intersection’s visibility, and turns, are photographs and a survey. The photos are Exhibits P126–P131 (App. C-H), which were taken by Ms. Tapken’s expert, Mr. Stevens, of the view of the intersection, and the left and right turns, when driving south on Prairie View. The survey is Exhibit P86 (App. K), which was done by Mr. Stevens and shows sight lines to the yield sign and the right

¹¹ The MUTCD defines intersection as:

94. Intersection – intersection is defined as follows

(a) The area embraced within the prolongation or connection of the lateral curb lines, or if none, the lateral boundary lines of the roadways of two highways that join one another at, or approximately at, right angles, or the area within which vehicles traveling on different highways that join at any other angle might come into conflict. Ex. D108 (§1A.11 (94(a))) (emphasis added).

¹² In *Kitt*, Yakima County was held liable for using an intersection sign, specified for use on “through” roads, for an uncontrolled intersection where the plaintiff driver failed to yield to a vehicle on the right.

turn from Prairie View. Exhibit P126 (App. C) shows the yield ahead sign advising of the intersection and the need to reduce speed. RP Vol. 10, p. 111; RP 587. In Exhibit P126, the left turn is hidden by foliage and topography, but the right turn is already visible because Prairie View angles to the intersection from northeast to southwest, providing a view of the right turn as the road descends. RP Vol. 10, p. 31.

In Exhibit P127 (App. D), at 450 feet from the intersection, the left turn remains unseen but the right turn is visible, and in Exhibit P128 (App. E) at 300 feet, the left turn becomes partly visible along with its yield sign. RP Vol. 10, pp. 31-32. In Exhibits P129 and P130 (App. F and G), at distances of 200 and 175 feet, the left and right turns are visible along with the crossing road and directional signs. RP Vol. 10, pp. 32-33.

Mr. Malinak repeatedly testified he approached the turn too fast because he believed he could travel at 45 mph through the intersection, unless there was a sign advising a slower speed. RP 1020, 1114, 1129. The trial court accepted this testimony, but emphasized Mr. Malinak erred because the rules of the road do not allow motorists to drive at the maximum speed limit irrespective of road features and conditions requiring lower speeds, including approaching and turning at intersections. RP 1751-1752. RCW 46.61.400(3) provides:

(3) The driver of every vehicle shall, consistent with the requirements of subsection (1) of this section, 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 or by reason of weather or highway conditions.

(Emphasis added.)

Mr. Malinak also testified he could see the turn beyond the bush as he approached the intersection (consistent with the photographs and survey of the road that are Exhibits P126-P131 (App. C-H) and P86 (App. K)), and slowed to a speed of 35-40 mph, but he still considered that speed too fast for the turn. RP 967-68, 1020-26, 1062. He did not explain why he did not slow more, before or after he shifted weight for the turn. *See* RP 967-68, 1020-26, 1062.

Plaintiffs ultimately did not present evidence supporting their initial claim that the County violated a duty to post warning signs for the turns at the intersection. Instead, Plaintiffs presented expert testimony contending that the intersection was inherently dangerous, misleading, and should be redesigned because a bush impeded stopping sight distance to a yield sign. RP Vol. 10, pp. 67-68, 85. As discussed in the next section, the trial court correctly observed this evidence was irrelevant because Plaintiffs presented testimony yield signs are not used for speed control

and, in any event, Mr. Malinak would not have slowed for the yield sign because there were no vehicles to which he needed to yield.¹³ RP 1746-55.

C. There Is No Evidence A Lack Of Warning About Turns At The Intersection Caused Plaintiffs' Motorcycle Accident

Claims that roadway hazards caused an accident are governed by the same causation rules as vehicle collisions. Plaintiffs must present evidence an alleged road hazard caused a collision, not simply that a road hazard is present and might be a cause. *Johanson*, 7 Wn.2d 111 at 122-23.

In *Johanson*, the county widened a road from two lanes to four, opening the road with two lanes in each direction before removing the old yellow stripe between lanes 1 and 2. A car, in a string of cars northbound in lane 3, suddenly moved into southbound lane 2, collided with a southbound car, killing the driver. Plaintiff obtained a verdict, claiming that the old yellow stripe misled the driver. On appeal, the court held:

Appellants cannot recover herein because of what they claim might have happened, or because the driver of the Rian car might have been misled by the location of the yellow line, or because there was no evidence upon which the jury could have found that Rian was not deceived. The burden is upon appellants to establish, by direct or circumstantial evidence, that the location of the yellow line

¹³ The yield sign claim lacks merit in its own right because it finds sight distance is deficient based on the assumption drivers would approach this yield sign at 45 mph. The right turn before the yield sign, and the requirement for drivers to slow at intersections, would reduce the speed of vehicles approaching the yield sign and thereby the distance ordinarily needed to react to the sign. *See* chart on Exhibit P86 (App. K).

did, in fact, deceive and mislead the driver of the Rian car, to his injury.

Id. at 122 (emphasis added). The court reversed because there was no evidence the road misled the deceased driver. A jury cannot speculate on accident cause. *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 27 P.2d 1312 (1981); *Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953). Later cases follow *Arnold*, *Sanchez*, and *Johanson* in requiring: (1) evidence an alleged road hazard caused, rather than might have caused, an accident, or (2) evidence an alleged improvement or warning sign would, rather than might, prevent an accident.¹⁴

Here, Plaintiffs' causation theory is speculative. Plaintiffs' Complaints alleged they lost control of their motorcycle in a left turn at the intersection. CP 7. Mr. Malinak, the sole witness to the accident, testified that when he attempted to turn left, the motorcycle went through the intersection without turning. RP 969. With respect to the cause of the accident, Mr. Malinak testified:

¹⁴ See, e.g., *Nakamura v. Jeffrey*, 6 Wn. App. 274, 276-77, 492 P.2d 244 (1972) (no evidence that warning signs for intersection sight distance would have prevented speeding, disfavored drivers from failing to yield); *Kristjanson v. Seattle*, 25 Wn. App. 324, 606 P.2d 283 (1980) (no evidence that foliage blocking curve and speed advisory signs caused head-on collision by driver who was familiar with the road); *Miller v. Likins*, 109 Wn. App. 140, 145-47, 34 P.3d 835 (2001) (no evidence that driver drove off of road because he was misled or that additional signs or markings would have kept him on the road); *Moore v. Hagge*, 158 Wn. App. 137, 150-54, 241 P.3d 787 (2010) (no evidence about how or where car struck plaintiff pedestrian and how road features or improvements would affect accident with unknown cause); *Garcia v. State.*, 161 Wn. App. 1,15-16, 270 P.3d 599 (2011) (no evidence that a pedestrian warning device would have prevented driver from hitting plaintiff).

I couldn't figure out why it happened. I mean, you know, my family loves me and they took me home and they wanted to understand. And I know that it gave them some peace of mind that I wasn't messing around, I wasn't drinking, but, you know, they wanted to know why. And to be honest, so did I. I couldn't figure it out.

RP 1025 (emphasis added). Mr. Malinak provided no further testimony about the cause of his loss of control other than “if the motorcycle would not go all the way to the left, it’s reasonable to imagine that there’s someone leaning the other way.” RP 1076.

Plaintiffs presented no evidence road conditions caused Plaintiffs’ failure to complete the left turn and their crash. Thus, Plaintiffs provided no evidence to support their claim that failure to warn of the left turn caused their accident.

Plaintiffs claimed the left turn was provoked by Plaintiff Malinak’s decision not to turn right because he was going too fast. RP 968-70. Plaintiffs asserted the cause of Mr. Malinak’s excess speed for the turn was the bush limiting sight distance to the yield sign for the right turn. RP Vol. 10, pp. 68, 85; RP 1749-50. However, Plaintiffs failed to present evidence the lack of visibility of the yield sign caused Mr. Malinak’s purported excess speed for the turn or that Mr. Malinak would have been unable to complete the right turn.

Plaintiffs presented evidence yield signs require vehicles to slow only if there are vehicles on the intersecting road. RP Vol. 10, pp. 25, 82. Mr. Malinak testified he saw no vehicles, meaning he would not have slowed for the yield sign had he seen it on the day of the accident. RP 1114, 1117-18. Based on this undisputed evidence, the court correctly concluded the lack of visibility of the yield sign could not have caused Mr. Malinak's excess speed because Mr. Malinak would not have slowed if he had seen the sign in the absence of conflicting traffic. RP 1755.

In addition to the lack of causation evidence cited by the trial court related to the yield sign issue, Plaintiffs also failed to present evidence Mr. Malinak would have been unable to complete his purported right turn. A necessary predicate to Plaintiffs' causation theory is that he was going too fast to make the right turn, which caused him to turn left. Absent proof he was going too fast to make the right turn, this causation theory fails.¹⁵

Mr. Malinak testified he was still on Prairie View when he started to shift weight to the right, and then turned left, but was unable to say where on Prairie View and how close to the intersection he was when he slowed for the right turn or attempted the left turn. RP 971, 1128, 1161. He testified when he and Ms. Tapken leaned for their turns they were not

¹⁵ In its CR 50 motion the County argued lack of evidence to support Mr. Malinak's claim he could not make the right turn, but the trial court did not reach this issue because the court accepted the County's arguments on duty and causation. *See* RP 1711-14.

yet into the right turn. RP 968. He testified he believed he was going too fast for the right turn when he saw the turn beyond the bush. RP 967. The scene photographs and the survey done by Ms. Tapken's expert Stevens indicate that, while the yield sign is off the right shoulder and behind the bush, the turn to the right can be seen (in Exs. P127-P131) (App. D-H) at distances of 450, 300, 200 and 175 feet, and the turn to the left at 300, 200, and 175 feet. RP Vol. 10, pp. 31-33.

Although Mr. Malinak testified several times he would not slow from 45 mph for the intersection, curves, or turns, he also testified he habitually slowed for intersections, slowed to 35-40 mph for the turn at this intersection, and was still slowing as he initiated the turn. RP 1020, 1112, and 1114 (maintained 45 mph); RP 968, 1023, and 1163 (slowed to 35-40 mph and continued to slow). Mr. Malinak presented no reconstruction, testimony, or calculations showing it was not possible to slow sufficiently on Prairie View to make the right turn. There was no foundation for expert testimony or calculations because Mr. Malinak did not know his location on Prairie View and how far he was from the intersection when he initiated the turns or appreciated the sharpness of the turns. RP 971, 1128, 1161.

Ms. Tapken provided testimony from Mr. Stevens, who presented a survey and calculations showing alleged inadequate stopping sight

distance to the right yield sign from Prairie View. RP Vol. 10, pp. 68, 85. He provided no calculations showing there was inadequate sight distance to the right turn.

Ms. Tapken provided testimony from accident reconstruction expert Harbinson, but he provided no calculations showing Plaintiffs' motorcycle approaching on Prairie View at 35-40 mph (or at 45 mph), could not slow sufficiently for this turn. Mr. Harbinson testified there was not enough data to reconstruct the accident. RP 745-46, 781.

The only evidence presented about the ability of Mr. Malinak to complete a right turn from Prairie View at his estimated speed of 35-40 mph (or at 45 mph), was testimony by Mr. Harbinson about his tests of the speed for right turns done with a passenger on Mr. Malinak's Suzuki model motorcycle. RP 793. As part of his field work, Mr. Harbinson tested the ability of the Suzuki motorcycle to approach the right turn initiation point at 45 mph, and then slow to a speed allowing the turn.¹⁶ RP 793. Mr. Harbinson testified he was able to slow the motorcycle to a speed of 33 mph and made the right turn, with an exit speed of 30 mph. *Id.* The only reasonable inferences to be drawn from Mr. Harbinson's testimony are

¹⁶ Mr. Malinak testified that one cannot do hard braking with a motorcycle in a turn, but did not testify that one cannot do hard braking of a motorcycle going straight or normal braking of a turning motorcycle. RP 971. Mr. Harbinson testified the procedure for motorcycle riders who approach turns too fast is to keep the motorcycle in a straight line and brake to the speed at which the turns can be initiated. RP 793.

either that Mr. Malinak was wrong about his ability to turn right, or that Mr. Malinak's speed was greater than the 45 mph speed at which Mr. Harbinson ran his test.

The record contains no evidence supporting Plaintiffs' claim they would have been unable to complete their right turn. Substantial evidence of inability to make the right turn is a necessary foundation for the first part of their multi-part theory that a failure to warn of an alleged right turn caused their crash in a failed left turn.

VI. ARGUMENT IN RESPONSE TO APPELLANTS' BRIEF

A. Plaintiffs Did Not Present Evidence Of An Inherently Dangerous Or Misleading Condition Creating An Issue Of Fact On Breach Of Duty

Plaintiffs agree municipalities have the alternative duty of either repairing an alleged hazardous road condition or posting a warning sign. App. Br. 24-25. *See Holmquist v. Grant Cty.*, 54 Wn.2d 376, 340 P.2d 788 (1959); *Meabon*, 1 Wn. App. at 827-28. Plaintiffs acknowledge warning signs are required only for inherently dangerous or misleading conditions, or if otherwise required by law. *Id.*; *see Tyler v. Pierce Cty.*, 188 Wash. 229, 62 P.2d 32 (1936).

The breach of duty question is whether Plaintiffs presented evidence of an inherently dangerous or misleading condition that would create an issue of fact concerning the reasonable safety of the road for

ordinary use. Ms. Tapken's road expert, Mr. Stevens, opined that the inherently dangerous and misleading condition was the lack of visibility of the yield sign on the right turn, which Mr. Stevens' testified was impeded by a roadside bush at distances of 123 feet or greater (based on his survey a year after the accident).¹⁷ RP Vol. 10, pp. 22, 53-59, 67-68; Ex. P129 (sight distance to yield sign). Mr. Stevens described the offending condition as follows:

[I]f you intend to go around to the right, you don't see a yield sign. And it's the lack of that visibility of that yield sign is what is an entrapment to a vehicle who wants to go to the right.

RP Vol. 10, pp. 10, 68 (emphasis added).

In their breach of duty argument on appeal, Plaintiffs no longer claim the obscured yield sign was inherently dangerous or misleading, causing Mr. Malinak's excess speed. *See* App. Br. 23-31. Plaintiffs' latest argument is the bush obscured the turn itself, making the obscured turn an inherently dangerous or misleading condition. *Id.* at 1, 10-15, 28-31. Significantly, in response to the County's CR 50 motion, premised on Plaintiffs' prior theory at trial, counsel for both Ms. Tapken and Mr. Malinak argued briefly that the bush obscured not only the yield sign, but

¹⁷ There was no evidence presented concerning whether the bush was a sight impediment in September 2011. The bush had a year of growth before Mr. Stevens performed his survey.

the right turn, and argued both were a misleading condition.¹⁸ Therefore, when the trial court reviewed the record, the court had notice Plaintiffs contended the bush hid the turn and was a misleading condition, even though Ms. Tapken's road expert did not offer that opinion.

There are several reasons the trial court properly rejected Plaintiffs' argument that the evidence showed an obscured and misleading right turn. The most obvious reason is the alleged obscurity of the turn did not cause this accident because Mr. Malinak testified he would only have slowed had there been an advisory speed sign. RP 1020, 1114. Additionally, while Mr. Stevens testified two or three times that the bush obscured visibility of the turn itself, his own scene photographs and survey contradicted that testimony. *See* Exs. P126-P131 (App. C-H) and P86 (App. K). Moreover, the photographs taken at the time of the accident show a smaller bush and visibility of two lanes of Prairie View to the

¹⁸ Ms. Tapken argued:

"[The bush] obscures – at least it's for the jury to determine whether it obscured not only the sign, but at 45 miles per hour, it obscured the abruptness of the curve. And it impeached – impaired his sight distance, not only to the yield sign which is invisible but to the abruptness of the curve. And the jury can find that it's because he was going too fast.

So we have misleading and deceptive information and a lack of information if that curve cannot be taken at 45 or 40 or 35 safely...."

RP 1721 (emphasis added).

Mr. Malinak argued:

"What confused you about it? He said, everything confused me about it. And everything is the tree blocked the yield sign on the right; it blocked the fact that there was a curve there; it blocked the fact that there was an intersection there."

RP 1728 (emphasis added).

horizon from the end of Prairie View's turn to join westbound Spangle-Waverly. Ex. P8 and P94 (App. I and J).

Plaintiffs assert Mr. Malinak testified he first observed the sharpness of the turn after he passed the bush. App. Br. 8. Mr. Malinak's testimony was he saw the turn "as [his] view was past the bush." The 2011 scene photos, and 2012 Stevens' photos, verify that southbound Prairie View drivers see the right turn despite the bush. (Ex. P8, P94, and P126-P131) (App. C-J). The trial court and a fact-finder could not give credence to Mr. Stevens' testimony at odds with his own photos and survey, the accident scene photos, and Mr. Malinak's first-hand testimony. *Bohnsack v. Kirkham*, 72 Wn.2d 183, 189-90, 432 P.2d 554 (1967) (testimony cannot overcome uncontradicted physical facts in auto accident at an intersection); *Mouso v. Bellingham & N. Ry. Co.*, 106 Wash. 299, 303, 179 P. 848 (1919) (same in truck-train accident at rail crossing).

Plaintiffs cite cases holding testimony from a road expert is sufficient to create evidence a road condition is inherently dangerous or misleading. App. Br. 28. In this case, Mr. Stevens testified the obscured yield sign was inherently dangerous and misleading, but not the allegedly obscured turn his field work shows was not obscured.¹⁹ See RP Vol. 10,

¹⁹ At various parts of their argument, Plaintiffs attempt to rely on opinions from their human factors expert, Mr. Gill, that the intersection or turn was evidence of a dangerous road condition. See App. Br. 29. The trial court ruled that Mr. Gill was not an

pp. 67-70. The trial court properly evaluated this testimony.

Even if foliage obscured the turn, the trial court must follow law holding this condition is a common condition drivers can account for. The Supreme Court long ago concluded foliage limiting sight distance along roads is not an inherently dangerous or misleading condition. *Barton v. King Cty.*, 18 Wn.2d 573, 577, 139 P.2d 1019 (1943); *Bradshaw v. Seattle*, 43 Wn.2d 755, 774-75, 264 P.2d 265 (1953). Drivers have the duty to operate their vehicles with regard for sight distance limitations at intersections. *Id.*; *Delsman v. Bertotti*, 200 Wash. 380, 389, 93 P.2d 371 (1939); *Sanders v. Crimmins*, 63 Wn.2d 702, 706, 388 P.2d 913 (1964).

Plaintiffs' argument erroneously assumes turns at intersections (and curves) require a warning and speed advisory even if they are in view and do not have unusual or deceptive characteristics. Turns and curves visible to drivers and without deceptive characteristics are not inherently dangerous or misleading conditions requiring a warning. *See Tyler*, 188 Wash. at 232-33.

Plaintiffs rely heavily on two cases to support their argument that they made a sufficient showing of a dangerous condition for this case to

expert in traffic engineering (signing and warning) or road design, and was unqualified to render opinions on such issues, including whether features of the intersection were inherently dangerous. RP 853. In view of this unappealed ruling, the trial court could not have relied on Dr. Gill's opinions to determine whether Plaintiffs presented evidence that the right turn was a dangerous road condition requiring a warning.

go to a fact-finder. *See Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005); *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.2d 1230 (2009) *rev. denied*, 169 Wn.2d 1003 (2010). These cases, neither of which determined factual causation, are not comparable to this case.

In *Owen*, the court found an incline in the road at railroad tracks hid a traffic backup at a stoplight on the other side of the tracks. *See Owen*, 153 Wn.2d at 789-80. This caused cars to queue across the tracks, leading to a high speed train striking a car trapped on the tracks in the backup frequently caused by the traffic signal location and road design. *Id.* *Owen* is similar to *Schneider v. Yakima Cty.*, 65 Wn.2d 352, 397 P.2d 411 (1964) and *Wojcik*, 50 Wn. App. 846, in which road dips were misleading and “traps” for drivers.²⁰ Plaintiffs in this case have presented no evidence that the right turn was hidden or deceptive similar to the road in *Owen*.

In *Chen*, a car struck a pedestrian crossing a busy downtown arterial intersection, at which there were no signals and insufficient traffic gaps to allow pedestrians to cross safely. *Chen*, 153 Wn. App. at 909-911. Pedestrian accidents increased markedly after the city removed a center

²⁰ Defects in a road for which a county may be liable are traditionally called “traps,” which is a descriptive characterization helping to define the kind of condition required. *See Leiva v. King Cty.*, 38 Wn.2d 850, 233 P.2d 532 (1951).

pedestrian refuge island in favor of a left turn lane. *Id.* The court held this was sufficient evidence of an inherent danger to allow the case to go to the fact-finder. *Id.*

Chen is similar to *Berglund v. Spokane Cty.*, 4 Wn.2d 309 (a case the *Chen* court heavily relied on), which concluded that “infant” pedestrians walking to school in heavy traffic on a narrow county bridge without sidewalks faced an unavoidable hazard (inherent danger), allowing the case to survive a demurrer as pled. Plaintiffs in this case show no similar kind of unavoidable hazard facing drivers making turns at the Waverly intersection. Mr. Malinak successfully drove through both legs of the Y intersection numerous times before he crashed on this occasion (RP 1114-15), which further shows the intersection was not inherently dangerous or misleading.

B. Plaintiffs Did Not Present Evidence To Show Their Crash During A Left Turn Was Caused By A Failure To Warn Them Of A Right Turn

1. There Is No Evidence To Reconstruct This Accident Or Show Its True Cause

Plaintiffs agree a road claim requires evidence a road condition misled a driver who would have heeded warning signs. App. Br. 31; *see Miller*, 109 Wn. App. at 147. A jury must have substantial evidence supporting a conclusion that a road hazard probably caused an accident.

Wojcik, 50 Wn. App. at 856-67 (testimony that no pass stripe violated MUTCD, and driver testimony about precise location of passing maneuver).

Plaintiffs seek to distinguish accident cases dismissed based on lack of causation evidence. *See* App. Br. 32. Plaintiffs emphasize drivers were unavailable or could not recall the accident in many of those cases. *Id.* In those cases, there was also no testimony from other witnesses or circumstantial evidence allowing accident causation to go to the fact finder.

Yet, Plaintiffs provided no third party testimony or circumstantial evidence about the accident cause. Mr. Malinak testified he was unable to figure out what caused the accident. RP 1025, 1062. Plaintiffs provided no data about where Mr. Malinak saw the sharpness of the turn, or where on Prairie View he attempted his right and left turns. Plaintiffs provided no expert testimony or calculations showing drivers could not see the right turn from an adequate distance, or could not complete a right or left turn from the distance at which Mr. Malinak perceived the right turn. Ms. Tapken's reconstruction expert testified lack of data prevented reconstruction of the accident. RP 745-747.

This case is nearly identical to the cases Plaintiffs try to distinguish. There is no evidence from which a jury could determine the

cause of this accident without speculating about what really led to Mr. Malinak's decision to turn left, where he was when he made that decision, and whether something different would have happened if he continued the right turn. In prior lack of warning cases, vehicles left the road while making actual turns, which established the cause of crashes.²¹ Here, Plaintiffs seek County liability for a crash in a left turn, based only on Mr. Malinak's unsupported claim that he would have been unable to complete a right turn that he never made.

2. Plaintiffs Did Not Present Evidence Any Misleading Road Condition Requiring A Warning Caused Plaintiffs' Accident

Plaintiffs claim there is evidence three specific road features may have caused Plaintiffs' accident. App. Br. 33-35. The evidence is not as claimed. There is no evidence these road features are misleading conditions that caused Plaintiffs' alleged excess speed.

Plaintiffs' first claim there is a question whether Mr. Malinak was misled by seeing the left yield sign, but not the right yield sign, and by perceiving the main road went right. The cited testimony contains

²¹ See *Wessels v. Stevens Cty.*, 110 Wash. 196, 188 P. 490 (1920) (departed road at sharp curve over ridge crest); *Davison v. Snohomish Cty.*, 149 Wash. 109, 270 P. 422 (1928) (departed road at ninety degree turn); *Tyler v. Pierce Cty.*, 188 Wash. 229, 62 P.2d 32 (1936) (departed road at ninety degree turn); *Schneider v. Yakima Cty.*, 65 Wn.2d 352, 397 P.2d 411 (1964) (departed road at sharp curve hidden in dip in straight road); *Bartlett v. N. P. R. Co.*, 74 Wn.2d 331, 447 P.2d 735 (1968) (departed road at ninety degree turn).

statements he saw the yield sign to the left and believed the main road went right. *See* RP 967. Mr. Malinak did not testify these road features misled him, or caused his failure to slow sufficiently for the right turn. *See id.* Mr. Malinak's gave no explanation for why he was unprepared for the turn and believed he was going too fast for it. *See id.* Ms. Tapken presented testimony from Mr. Stevens that sight distance to the yield sign was inadequate, but no testimony that the differing visibility of the two yield signs, or Mr. Malinak's perception of the main road, were misleading conditions related to Plaintiffs' speed.²² *See* RP Vol. 10, pp. 67-68, 82-87, 140-150.

Plaintiffs next allege Mr. Malinak testified the bush obscured the turn until it was too late for him to slow. App. Br. 34. This allegation is inaccurate because Mr. Malinak did not testify the bush blocked the view of the turn. He testified he saw the curve past the bush but could not testify how far he was from the intersection when he appreciated the sharpness of the turn. RP 967, 971. Further, the scene photographs and survey belie the claim that the bush obscured the turn, rather than the yield sign. *See* Exs. P126-P131; Exs. P8 and P94, P86 (App. C-K).

²² Mr. Malinak's alleged perception that the main road went right is, itself, inconsistent with the photographs. The freshly painted Prairie View centerline plainly curves left towards Waverly before it breaks for the intersection with the cutoff to go right. *See* Ex. P8 (App. I). The edge stripes on Prairie View also curve left. *Id.* The cutoff to go right intersects Prairie View at an angle and has no edge stripes, indicating a lesser road or a cutoff. *Id.*

Finally, Plaintiffs allege a lack of warning for the right turn is misleading because curves on the highway prior to the intersection had speed advisories. App. Br. 34. This erroneously turns liability for road conditions on its head by positing that lack of warning is a misleading condition rather than that a misleading condition is a prerequisite for a duty to warn. The duty to warn is premised on the nature of the road condition at the accident site, not a driver's expectation that a warning should be given based on warnings given for different conditions at other locations. *See Tyler v. Pierce Cty.*, 188 Wash. 229, 62 P.2d 32 (1936). Plaintiffs' argument ignores that the alleged cause of this accident was a turn at an intersection rather than a curve on a highway, that a sign warned of the upcoming intersection (which was visible on approach), and that the rules of road place the responsibility for appropriate speed at intersections on drivers. RCW 46.61.400(3).

Plaintiffs argue Mr. Stevens' calculations showing a "reasonable safe speed" of 20 mph, and Mr. Malinak's testimony he was traveling 35 to 40 mph, are evidence that a failure to recommend a slower speed caused this accident. *See App. Br. 34-35*. The shortcoming in this argument is Plaintiffs did not have an accident while making the right turn. Their causation argument is not based on a crash while traversing a 20 mph turn at 40 mph, but only on Mr. Malinak's claim an accident would have

happened if Plaintiffs had made a right turn they never made.

As noted several times, Plaintiffs provided no testimony, reconstruction, or calculations to show Mr. Malinak could not have slowed sufficiently for the right turn. At the point he perceived the sharpness, he could brake in a straight line and then re-initiate the turn left or right. *See* RP 67-68 (Harbinson). Ms. Tapken provided no calculations from Mr. Stevens showing drivers are unable to see the sharpness of the right turn in sufficient time to adjust their speed for the turn.

Plaintiffs' lacked substantial evidence to prove their claim that their crash during a left turn was precipitated by a crash certain to occur in a right turn. When no data allows determination of accident cause, a jury cannot speculate about why the accident occurred or its connection to a road condition. *Johanson*, 7 Wn.2d at 122; *Miller*, 109 Wn. App. at 145-47; *Moore*, 158 Wn. App. at 150-54.

3. Lack Of Visibility Of The Yield Sign Did Not Cause The Accident

Plaintiffs based their response to the County's CR 50 motion almost exclusively on their claim that lack of sufficient sight distance to the yield sign caused Plaintiffs' alleged excess speed in a planned right turn. *See* RP 1718-27 (Ms. Tapken's CR 50 argument); 1728-31 (Mr. Malinak's CR 50 argument). Plaintiffs take issue with the court's

discussion of Mr. Malinak's failure to slow for the left yield sign because Mr. Malinak testified he intended to turn right, and because he testified he did slow for the intersection. *See App. Br. 35-39.* Plaintiffs are incorrect on both legal and factual grounds.

The court's discussion of Mr. Malinak's duty to slow for intersections under RCW 46.61.400, and for yield signs under RCW 46.61.190 referred to his breach of duty and causation. The court emphasized these statutes because they establish the duty of drivers to slow for turns at intersections and not a duty for counties to provide warnings about such turns. The County has a duty to provide a warning if required by the MUTCD, or a misleading condition existed, but not simply because there is a turn at a rural intersection. Plaintiffs did not present evidence the MUTCD or a misleading condition required a warning. They presented irrelevant evidence of alleged deficient sight distance to a yield sign.

Plaintiffs claim Mr. Malinak's breach of duty does not relieve the County of its duty. *App. Br. 37-38.* This is not what the trial court determined. The court did not say Mr. Malinak's mistakes excused mistakes by the County. The trial court concluded there was evidence Mr. Malinak violated his statutory duties as a driver, but no evidence the County violated its duty to provide a reasonably safe road.

With respect to evidence about Mr. Malinak's speed and intended destination, Plaintiffs overlook their Complaints, which stated the turns at the intersection could not be negotiated at the 45 mph speed limit and their intended destination and turn was to the left. CP 7, 22-23. These allegations, and related evidence in the record, explain why the court discussed Mr. Malinak's duty under RCW 46.61.190 as well as RCW 46.61.400.

While Mr. Malinak testified several times he slowed at the intersection, he repeatedly insisted, consistent with his Complaint, that he would not have slowed unless there was a reduced speed advisory. *See, e.g.*, RP 1129. Furthermore, while he testified he intended to turn right, he also verified facts in his Complaint and tort claim stating he turned left after starting to turn right because he desired to go left to Waverly. RP 1101. Thus, the yield sign on the left was not only notice to Mr. Malinak he was at an intersection, but, insofar as he testified he intended to go left, RCW 46.61.190(3) also required him to slow as he neared the yield sign to the left. The court correctly emphasized that RCW 46.61.190 requires slowing for a yield even if there is no conflicting traffic.

Although Plaintiffs presented testimony yield signs do not require drivers to slow absent conflicting traffic (RP Vol. 10, pp. 81-82, 85), they argue a fact question exists for the jury whether an unobscured yield sign

would have provided Mr. Malinak adequate warning to slow. App. Br. 38. This ignores Mr. Malinak's unequivocal testimony that he does not slow for yield signs unless there are conflicting vehicles, and that he did not see conflicting vehicles on September 28, 2011. RP 1023-24, 1114, 1117.

There must be evidence that a warning sign would have caused the driver to avoid an accident. *Kristjanson*, 25 Wn. App. at 325-26; *Garcia*, 161 Wn. App. at 15-16. The trial court properly concluded that Mr. Malinak's testimony that he does not slow for yield signs absent conflicting traffic meant a yield sign would not have slowed Plaintiffs. RP 1755. Therefore, substantial evidence is lacking that an alleged deficiency in sight distance to the yield sign caused this accident.

C. The Trial Court Did Not Abuse Its Discretion In Excluding Evidence Of Other Accidents

Plaintiffs argue the trial court should have admitted evidence of prior accidents because they show the County had notice of dangerous conditions. App. Br. 39-42. The court originally excluded all but three accidents because it determined that they were not substantially similar to Plaintiffs' accident. RP 422-23. The court later excluded all accidents, including the three, because the County did not raise lack of notice as a defense to liability for any road condition. *Id.* Still later, the court broadened the basis for the ruling excluding all prior accidents, stating:

[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. It's also substantive evidence and it creates a collateral issue that the defense won't be allowed to rebut.

RP 866-67.

Plaintiffs appeal only the trial court's exclusion of the accident reports based on the lack of notice issue and do not challenge the court's exercise of its discretion on the other grounds for exclusion. Plaintiffs assert prior accidents provide notice to the County of road conditions that are hazardous. App. Br. 40.

The elements Plaintiffs would be required to prove to establish negligent road maintenance or design are: (1) the existence of a duty; (2) breach of that duty; (3) a resulting injury; and (4) proximate cause. There is no requirement for a plaintiff to prove notice as part of her case. *Ruff v. King Cty.*, 125 Wn.2d 597, 887 P.2d 886 (1995). The jury instruction on municipal duty for a road, WPI 140.01, also does not include any element

of notice to prove a municipality's duty. Lack of notice is a defense to road liability, as stated in WPI 140.02. This instruction would not have been given in this case because the County informed the court that it was not raising lack of notice as a defense. RP 425, 428-29. Thus, there was no need for Plaintiffs to present prior accident reports, especially considering all of the collateral issues raised and prejudice highlighted by the trial court's remarks on its final ruling about the accident reports. RP 866-67.

Notice is also irrelevant because all of the road conditions--the design of the intersection, the signs, the bushes in the right of way-- are long term features of the road that were designed or maintained by the County and not temporary or transitory features. The County does not have a notice defense for such road conditions. *See Russell v. Grandview*, 39 Wn.2d 551, 554, 236 P.2d 1061 (1951); *Tanguma v. Yakima Cty.*, 18 Wn. App. 555, 562-63, 569 P.2d 1225 (1977).

Plaintiffs argue that prior accidents show notice that the conditions are inherently dangerous or a dangerous combination of conditions. App. Br. 40, 42. The notice required is notice of the specific road conditions themselves, not notice that they would be dangerous based on engineering or legal analysis. *See Tanguma*, 18 Wn. App. at 562-63.

D. Ms. Tapken’s Motion For Partial Summary Judgment Is Not Properly Before This Court And Was Correctly Denied Below

“[A]ppellate review of the denial of a summary judgment motion is inappropriate after a trial unless the motion turned on pure issues of law.” *Washburn v. City of Federal Way*, 178 Wn.2d 732, 754 fn.8, 310 P.3d 1275 (2013) (citing *University Vill. Partners v. King Co.*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001)). The trial court denied Ms. Tapken’s motion for partial summary judgment based on disputed issues of fact. This denial is not appealable following a trial on the merits and is not properly before the Court.²³ *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988).

If this Court accepts the appeal of this issue, the denial of Ms. Tapken’s motion was correct. Washington courts have long recognized that “every person has a duty of care for his or her own health and safety.” *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 648, 244 P.3d 924 (2010). “As to the degree of care, the rule is that it must be reasonable

²³ The impropriety of appeal of the denial of Ms. Tapken’s summary judgment motion after trial is highlighted by the evidence cited in her opening brief. Ms. Tapken relies on testimony by Mr. Harbinson, but this testimony was not part of her summary judgment motion. App. Br. 49. If this Court reviews the summary judgment ruling, it must limit review to evidence before the trial court at that time.

The Court cannot review sufficiency of evidence for the County’s affirmative defense at trial, because the trial court granted the County’s CR 50 motion before it rested. The County did not present its evidence on the issue of Ms. Tapken’s comparative fault. Had the CR 50 motion been denied, the County would have called Detective Thornburg, Ms. Tapken, Mr. Malinak, and a motorcycle expert before the County rested.

care. The amount of care may vary under different circumstances. Each case must depend largely upon its own facts.” *Thockmorton v. City of Port Angeles*, 193 Wash. 130, 132, 740 P.2d 890 (1930) (emphasis added).

Ms. Tapken was an experienced motorcycle rider, previously instructed by Mr. Malinak that she must follow his leans. Deputy Thornburg, who investigated the accident, recounted his interview of Mr. Malinak as follows:

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

CP 691 (emphasis added).

Ms. Tapken relies on inapposite cases involving multi-vehicle accidents to argue she had no reason to anticipate Mr. Malinak’s sudden lean and that the County must prove that she had a “reasonable reaction time.”²⁴ The rule that a “favored driver” is entitled to reasonable reaction time before reacting to “disfavored driver actions” is borne out of the status of “favored drivers” under rules of the road.²⁵ Ms. Tapken was not

²⁴ See App. Br. 46-47, fn. 8.

²⁵ “A favored driver is entitled to a reasonable reaction time after it becomes apparent in the exercise of due care that the disfavored driver will not yield the right-of-way. Until he has been allowed that reaction time, he is not chargeable with contributory negligence from omissions or acts regarding his failure to observe or respond to the conduct of the disfavored driver.” *Poston v. Mathers*, 77 Wn.2d 329, 335, 462 P.2d 222 (1969).

a “favored driver,” but a co-rider with Mr. Malinak. Unlike car or truck passengers, a motorcycle rider participates in turning and stability of the vehicle through her movements. CP 638-39, 777-81, 783-84. Reasonable care requires two motorcycle riders to closely mirror the movements of each other so they move in synch. *Id.*

The Court should likewise reject Ms. Tapken’s strained comparison to *Zukowsky v. Brown*, 1 Wn. App. 94, 459 P.2d 964 (1969), *aff’d*, 79 Wn.2d 586, 488 P.2d 269 (1971). There, the plaintiff was a first-time passenger on defendant’s boat, injured when a helm seat collapsed. *Zukowski*, 1 Wn. App. at 96-98. Here, Ms. Tapken rode on Mr. Malinak’s motorcycle previously, and on other motorcycles. Prior to her first ride, Mr. Malinak gave Ms. Tapken instructions, including “make sure to lean with me” and “when you’re turning you are leaning with the turn with [me] so that...you stay on the bike and you’re not kind of leaning the opposite and dragging it a different direction....” CP 736, 738-39. Ms. Tapken’s prior experiences are the kind of facts missing in *Zukowsky* that dictated the outcome.

E. The Trial Court’s Ruling Regarding Mr. Harbinson’s Testimony On Proximate Cause Was Not Preserved For Appeal And Was Not An Abuse Of Discretion

Ms. Tapken mischaracterizes the court’s ruling regarding Mr.

Harbinson's testimony. Ms. Tapken's counsel asked Mr. Harbinson if he had any opinions about "the particular cause of this accident." CP 781. The County did not object to this question, but did object to Mr. Harbinson's answer to the question when he phrased his opinion in terms of the "*proximate* cause of the collision," which he indicated was "speed." *Id.* (emphasis added). The court properly sustained the objection, given that "proximate cause" is a legal term for which the jury had not yet been instructed. *See, e.g., Hiskey v. Seattle*, 44 Wn. App. 110, 113, 720 P.2d 867 (1986) (holding that "experts are not to state opinions of law or mix fact and law, such as whether X was negligent...") (citing Comment, ER 704; *Orion Corp. v. State*, 103 Wn.2d 441, 461, 693 P.2d 1369 (1985)).

After the court sustained the County's objection, counsel did not follow up by asking Mr. Harbinson to express opinions about the cause of the accident without using the legal term "proximate cause." Further, Ms. Tapken made no offer of proof regarding Mr. Harbinson's opinions regarding cause. ER 103 (a) requires an offer of proof before error can be predicated on such a ruling. The trial court's ruling on Mr. Harbinson's testimony was not preserved and is not properly before this Court.

Additionally, Mr. Harbinson had no foundation for opinions on the cause of the accident. Mr. Harbinson testified he was unable to reconstruct the accident. RP 745. He explained that, "things like [the motorcycle's]

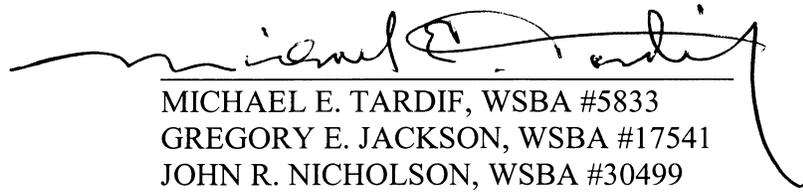
travel path are all speculation on how [Malinak] got to where he got because we don't know where he took off from the roadway at." RP 745-46. Given that Mr. Harbinson stated he could not reconstruct the accident, opinions of Mr. Harbinson about the accident cause would have been inadmissible speculation. *Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 102-03, 882 P.2d 703 (1994).

VII. CONCLUSION

Spokane County respectfully requests the Court to affirm the superior court's order dismissing Plaintiffs' claims against the County.

RESPECTFULLY SUBMITTED this 12th day of May, 2015.

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CERTIFICATE OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of Brief of Respondent Spokane County to the following parties:

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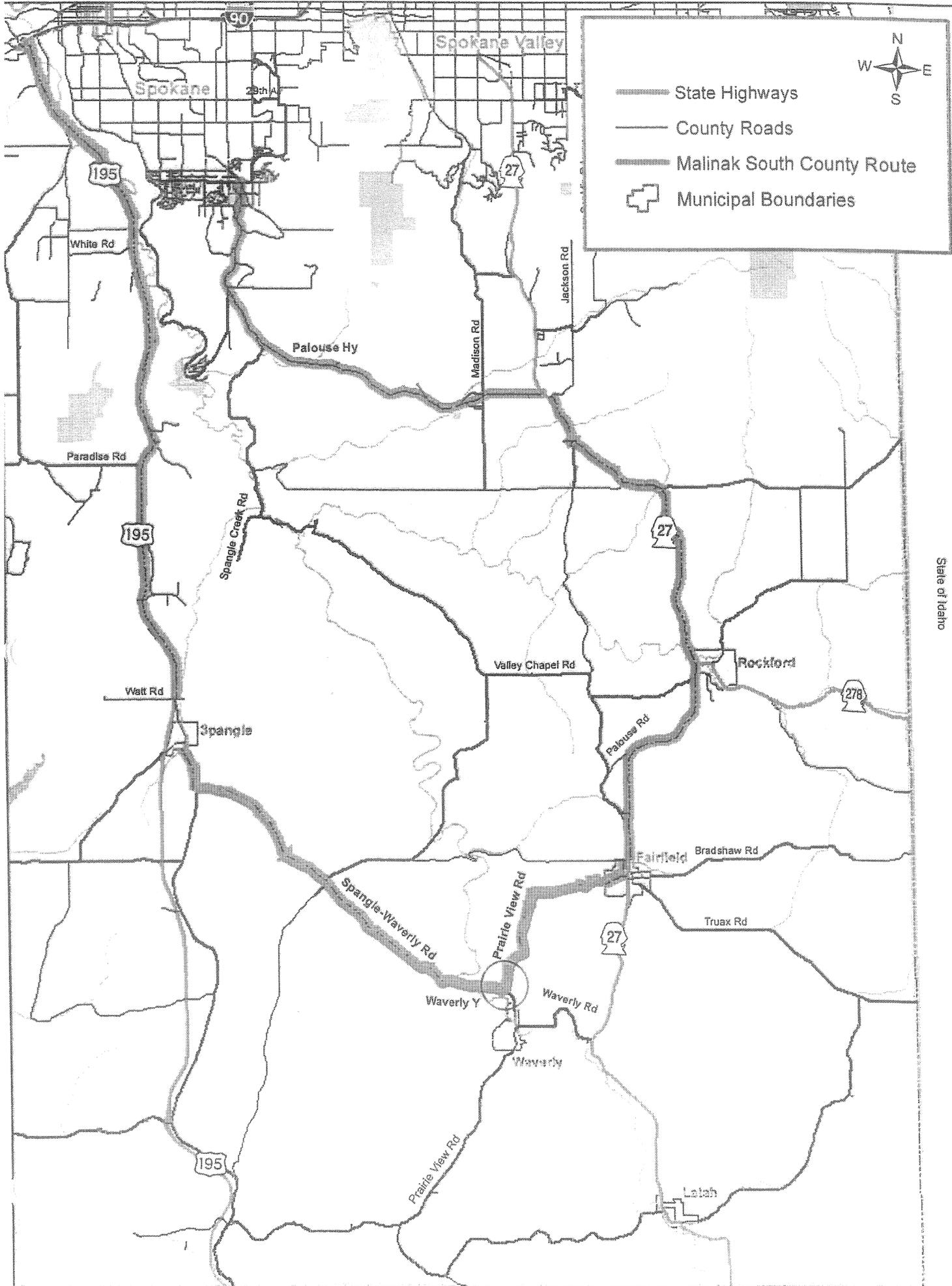
I declare under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 12th day of May, 2015, at Olympia, Washington.



KRISTI JENNE

APPENDIX A



Spokane Valley

Spokane

28th A

195

27

White Rd

Jackson Rd

Palouse Hy

Madison Rd

Paradise Rd

195

Spangle Creek Rd

27

Watt Rd

Spangle

Valley Chapel Rd

Rockford

278

Palouse Rd

Fairfield

Bradshaw Rd

Spangle-Waverly Rd

Prairie View Rd

27

Truax Rd

Waverly Y

Waverly Rd

Waverly

195

Prairie View Rd

Latah

State of Idaho

State Highways

County Roads

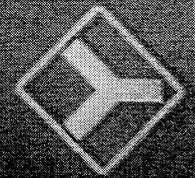
Malinak South County Route

Municipal Boundaries

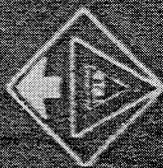


APPENDIX B

SCALE:
1"=200'



W. 70th ST
S. 10th AVE



SPEED
LIMIT
45

W. 70th ST
S. 10th AVE



70th

67th



W. 70th ST
S. 10th AVE

SPEED
LIMIT
45



W. 70th ST
S. 10th AVE

APPENDIX C





08.08.2012

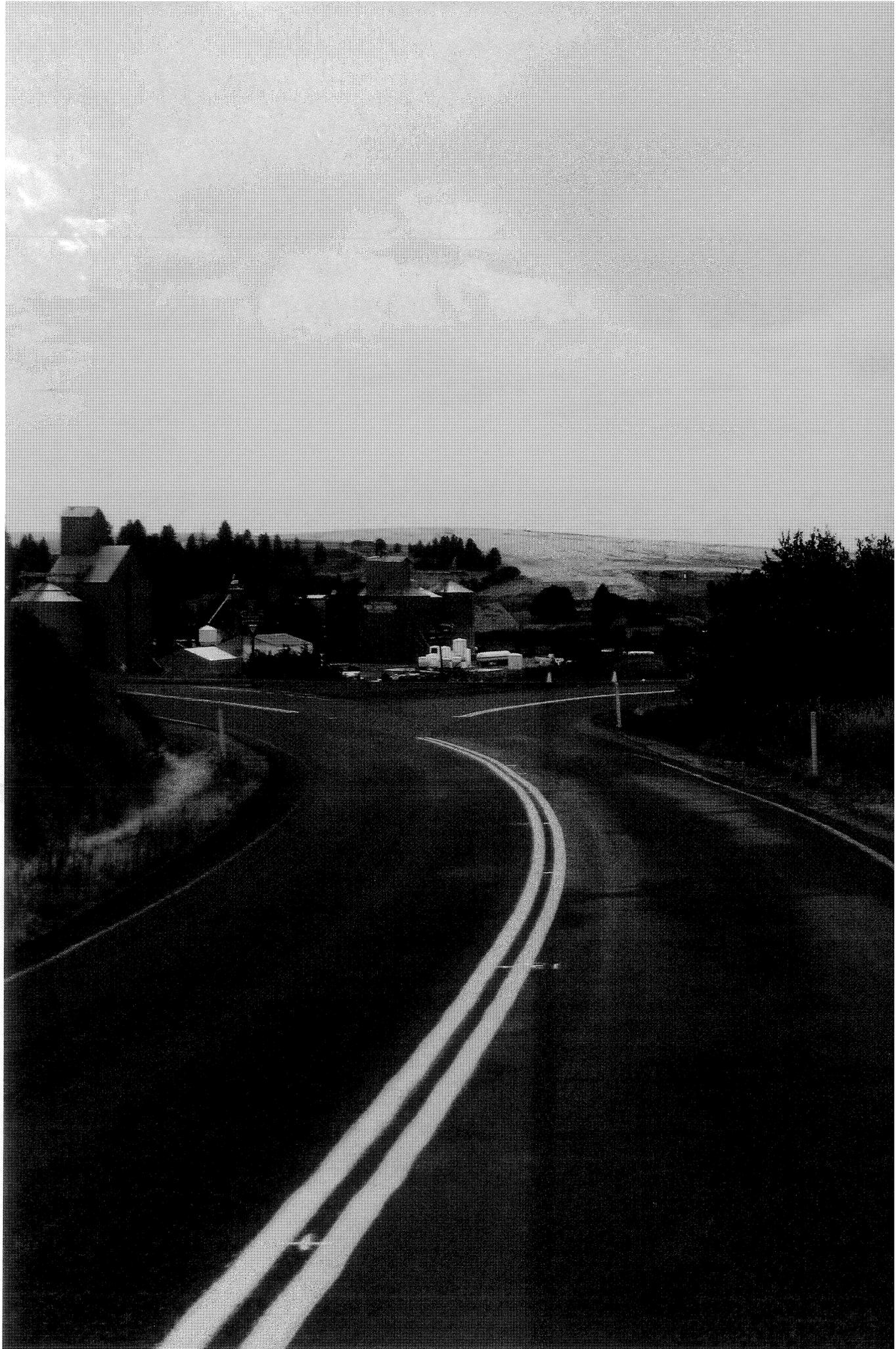
APPENDIX D





08.08.2012

APPENDIX E

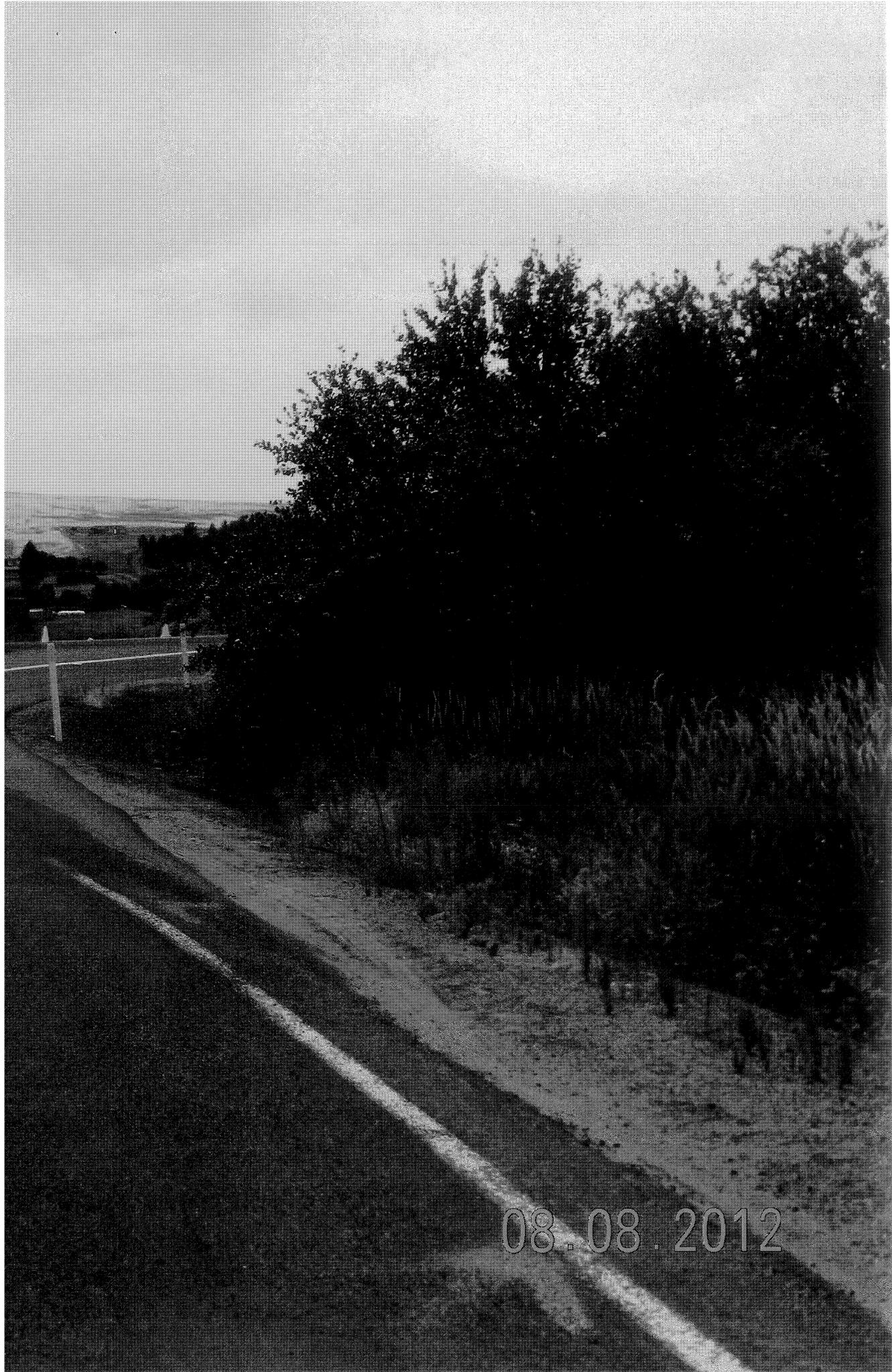




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APPENDIX F

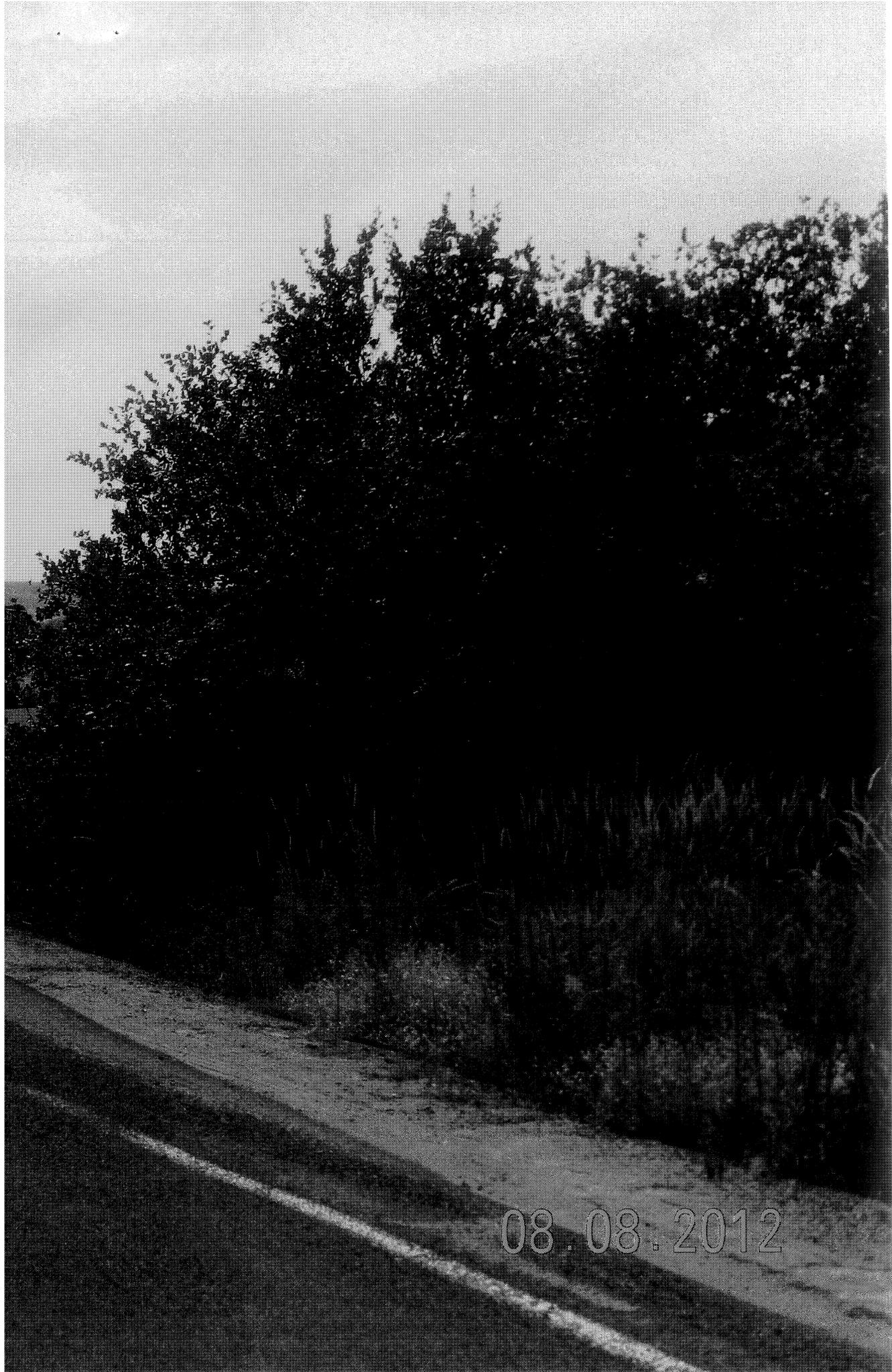




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APPENDIX G

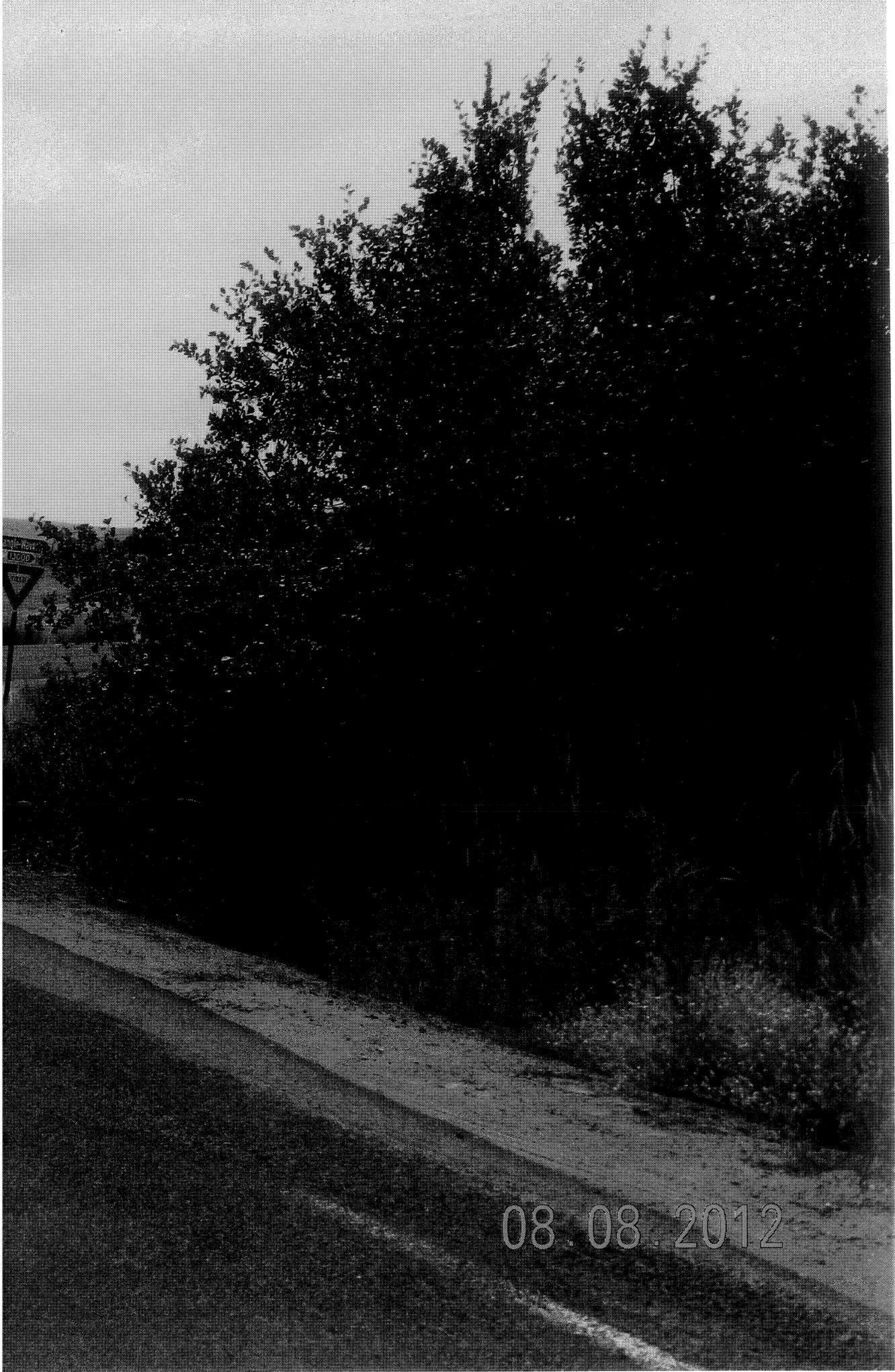




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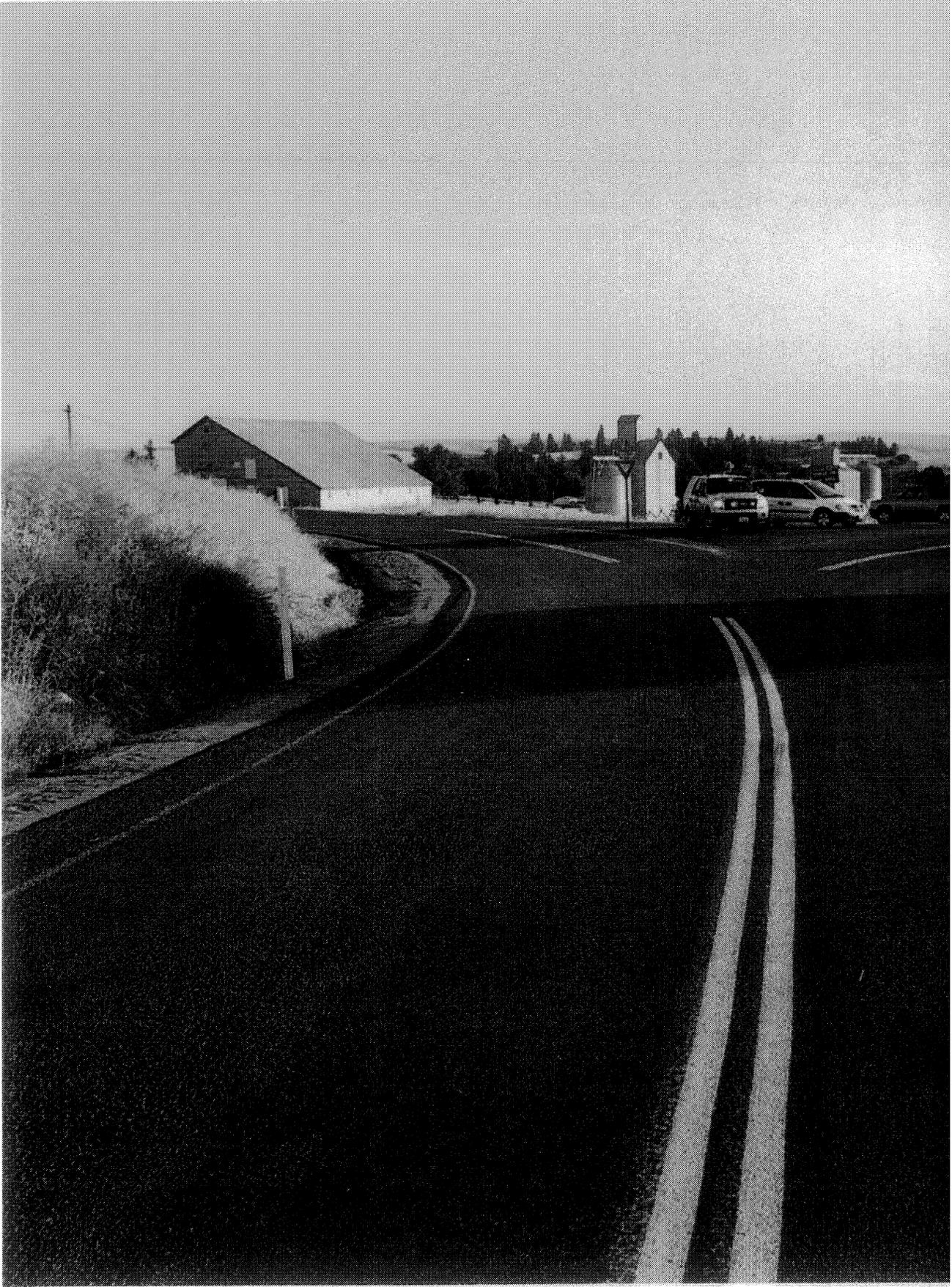
APPENDIX H





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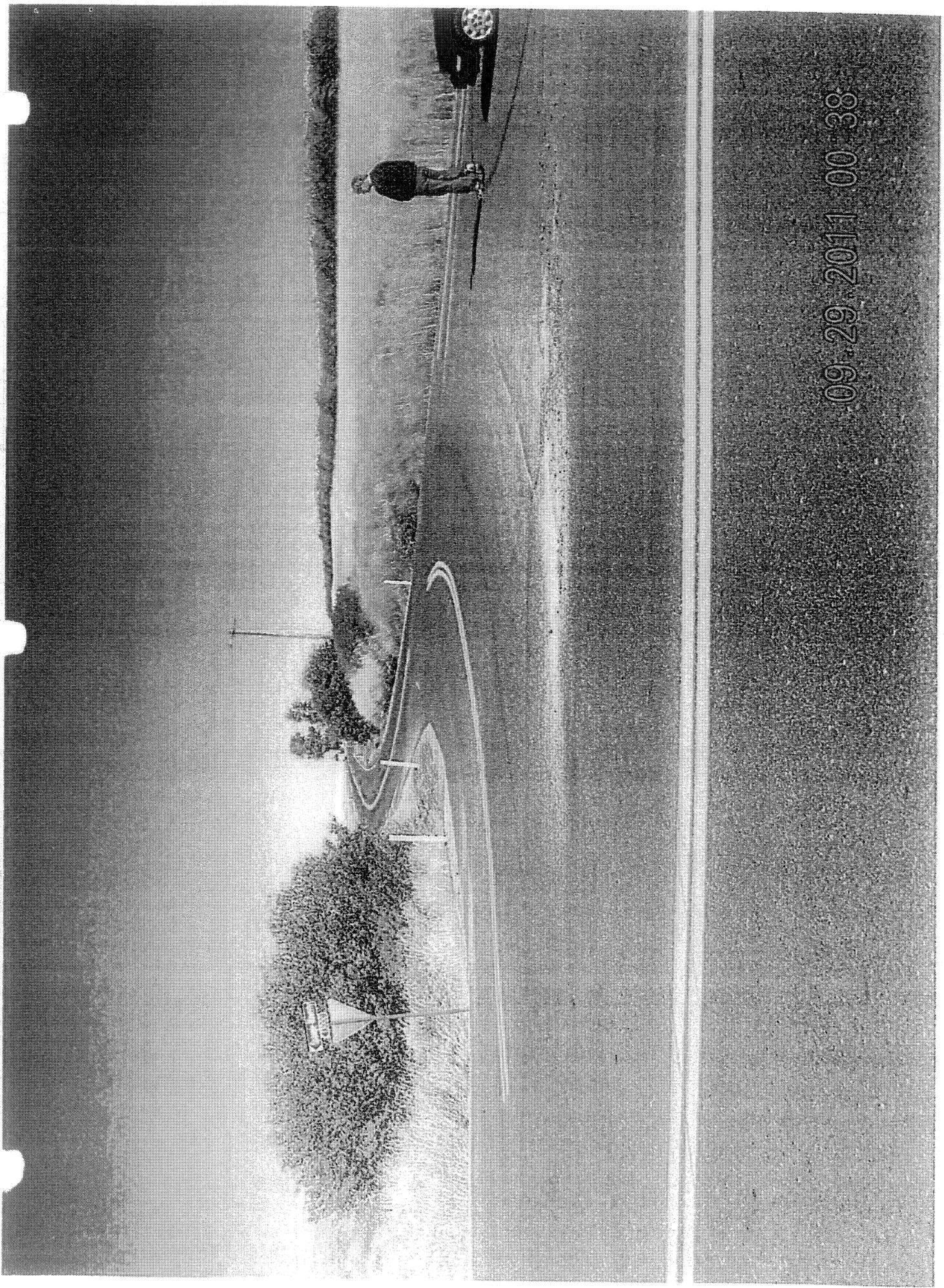
APPENDIX I





COLE #2

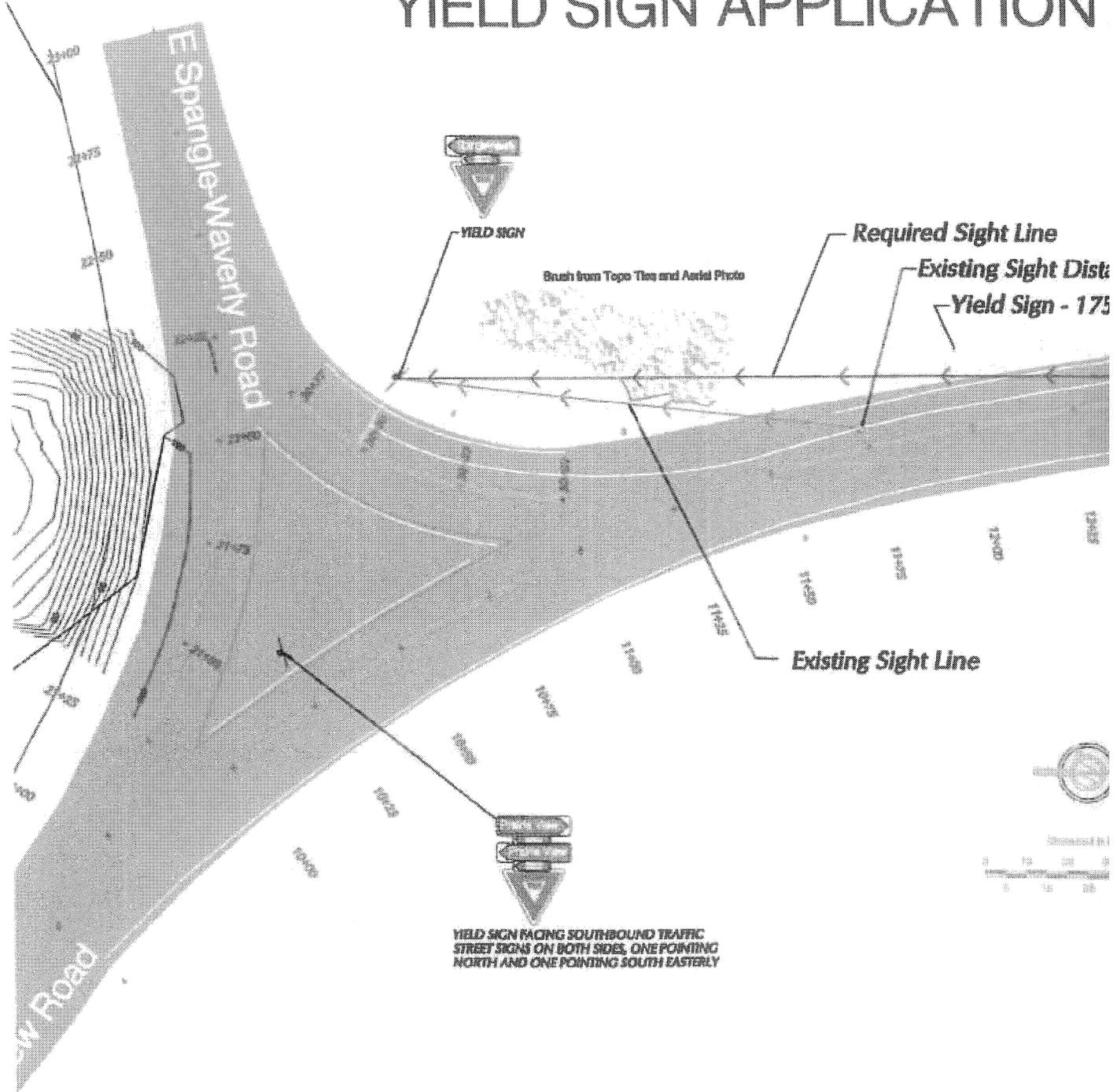
APPENDIX J



09.29.2011 00.38

APPENDIX K

YIELD SIGN APPLICATION



LAND PLACEMENT

123.1 Ft.

Begin Required Stopping Distance - 194 Ft.

S Prairie View Road

SPEED LIMIT SIGN

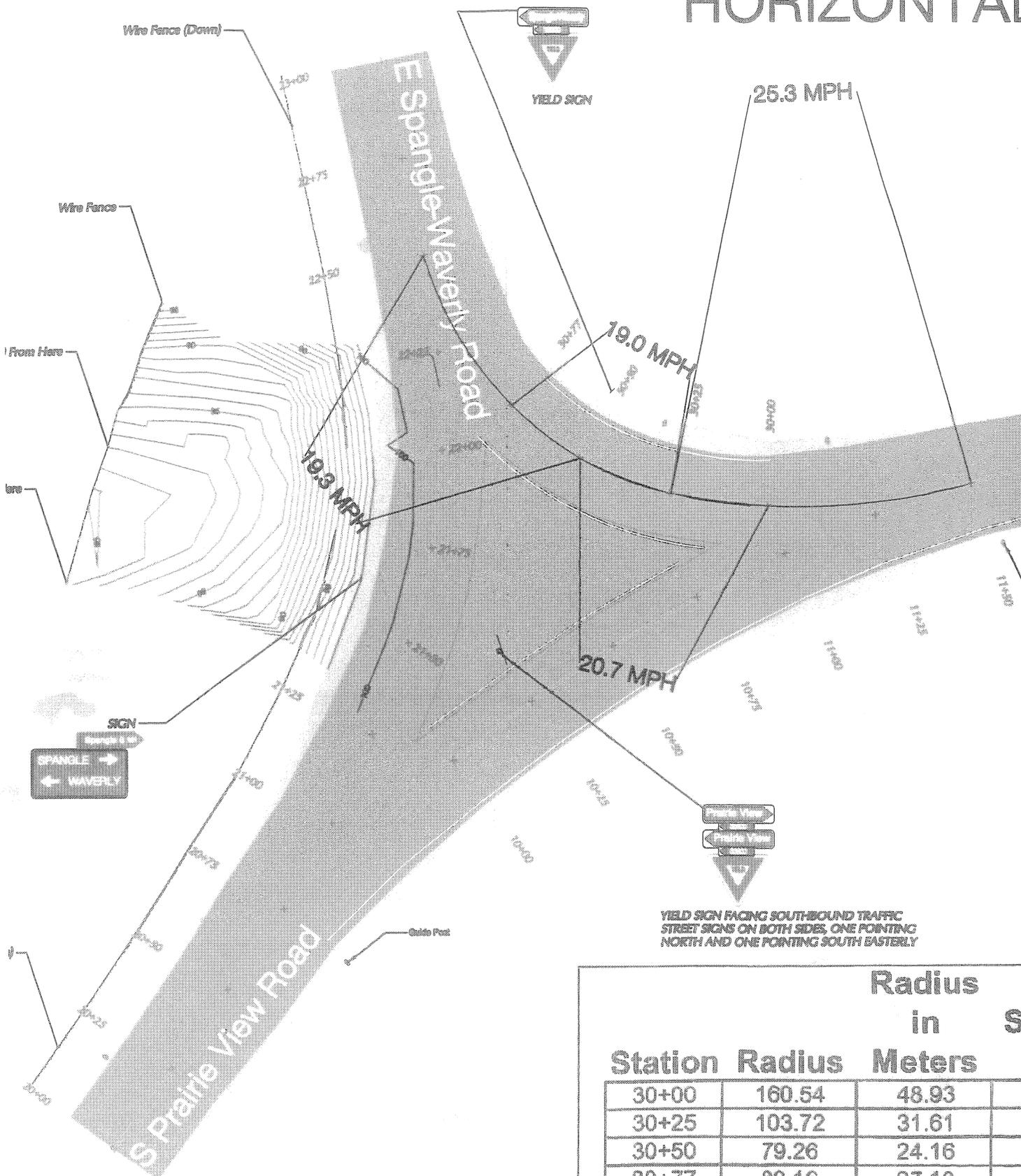


FOR INFORMATION ONLY
SEE SHEET 39
10/20/10



APPENDIX L

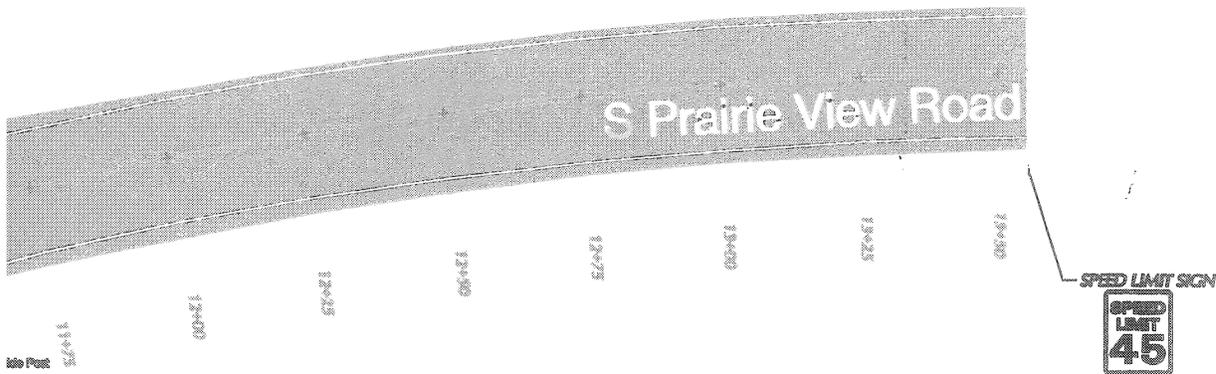
HORIZONTAL



YIELD SIGN FACING SOUTHBOUND TRAFFIC
STREET SIGNS ON BOTH SIDES, ONE POINTING
NORTH AND ONE POINTING SOUTH EASTERLY

Station	Radius in Meters	Radius in Feet
30+00	160.54	48.93
30+25	103.72	31.61
30+50	79.26	24.16
30+77	89.16	27.18

SAFE SPEED



Station	f	+/- e	MPH	Dir.
0371	0.2288	0.2659	25.3	RT
0117	0.2644	0.2761	20.7	RT
0236	0.2800	0.3036	19.0	RT
0005	0.2780	0.2785	19.3	RT

PRELIMINARY
SUBJECT TO
REVIEW



360, 15