No. 96798-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 76376-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GREGORY REGELBRUGGE et al.,

Appellants/Petitioners,

vs.

SNOHOMISH COUNTY,

Defendant/Respondent.

RESPONSE TO MOTION TO STRIKE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

RULES AND REGULATIONS

A. The County's Motion to Strike Should be Denied.

The County has moved to strike Petitioners' Appendix B and provided a comparison of some of the documents provided therein. Answer, p. 6 footnote 4, Appendix 4. This case is extremely factually intense and the photographs are offered as an aid to the Court's quick understanding of the facts. The only authority provided in the motion to strike is RAP 13.4(c)(9), which lists mandatory items that must be included in an appendix such as the Court of Appeals' decision and cited statutes. The rule does not prohibit providing other documents useful to the Court.

It is asserted that Clerk's Papers may not be included especially ones that have been copied and numbered so the Plaintiffs' could avoid the prohibitive cost of purchasing them at $0.25 a page, which in this case would have been $2,200 to be split by only four families. It is true that the numbering is incorrect by eight-page numbers on two photographs and two pages from a river modeling document.[1] We apologize for the mis-numbering and ask the Court to accept the correct page numbers for the following documents, which are all part of the record: B.1.2, the second photograph of the cribwall is CP 1410; B2, the photograph outlining the five acres of trees is CP 1357; B 8.1 shows the velocity of a 5-year flood, which is CP 1375; and B8.2 shows the velocity of a 100-year flood, which is CP 1373. We submit the corrected documents at Appendix C and submit corrected pages of the Petition where it references them.

Two of the construction photographs, CP 41 and corrected number CP 1410, had red highlighting outlining the people who were standing near the cribwall. The Court was advised the highlighting had been added "to provide the scale of the project." Petition, p. 13, n. 9. No "bolstering" of the evidence occurred. Similar to the cribwall photographs, that of the trees (corrected CP 1357), was outlined in red in order to allow

[1] In Appendix 4 and the footnote, the County makes no reference or objection to the other three construction photographs which were correctly numbered, CP 46, CP 47 and CP 48. There is no objection to Dr. Miller's photographs of the natural curve of the River over the decades (CP 99) or the comparison on the County's lots at B7 (CP 847).

for quick comprehension of the acreage involved.

The final three photographs the County moves to strike, B3 (CP 2272), B5 and B6, all relate to the new theory that it improperly raised for the first time on appeal. *White v. Kent Medical Ctr. Inc.,* 61 Wn. App. 163, 810 P.2d 4 (1999). At the trial court level, the County primarily argued that riparian strict liability could not apply in a wrongful death case and it did not have sufficient riparian title through its tax foreclosures. CP 2130-4. It also relied upon the **dissent** in *Fitzpatrick v. Okanagon County,* 169 Wn2d 598, 624, 239 P.3d 1129 (2010) for the proposition that no riparian rights existed because of the water appropriation Codes of 1917 and 1932. BOR, p. 36 n. 38. On appeal, it first raised the issue of whether the Petitioners were rightful riparian owners. *Id.* Division One adopted the County's new theory finding the evidence insufficient to prove the Petitioners were "riparian owners." *Regelbrugge v. Snohomish County*, No. 76376-8-I, 432 P.3d 859 (December 31, 2018), Appendix A, Op. 17. The County also used *Richert v. Tacoma,* 179 Wn. App. 694, 319 P.3d 882, *rev. denied* 181 Wn.2d 1021, 337 P.3d 326 (2014), to support its theory that one had to be immediately adjacent to a river to recover under riparian law. BOR at 36.

In its motion to dismiss the Regelbrugge Plaintiffs' strict liability claims, the County submitted "a true and correct copy of an aerial map of the Steelhead Haven vicinity with superimposed lot lines and property owner name." CP 2165. The map is in color with more than 100 lots identified in yellow with small lettering. CP 2272. The Regelbrugge Plaintiffs owned only nine of the lots depicted. To pick them out would have been an arduous task. Using a black and white copy of CP 2272, we outlined in red with yellow our clients' nine properties and placed blue along the shores of the river. The two Harris lots straddle the river; the Hargrave lot is directly adjacent to the river; two of the Slauson lots are adjacent to sandbars in the river with four lots directly adjacent to the river. Only the one Regelbrugge lot lacks adjacency. There is no basis for the County to strike its own aerial map.

At oral argument, with no objection from the County, Division One was provided the Post-Oso photograph (B5) and the map of the Richert properties (B6). The County's attorneys were also provided copies of the photograph and map. The Post-Oso photograph was repeatedly in the news and the County makes no argument that it is not a fair representation of conditions. The photograph shows the river is still out of its channel and has formed a lake were the Steelhead Haven community existed. This Court was advised that the Richert map was "illustrative" and it clearly shows parcels that were adjacent and non-adjacent to the river referred to as "twenty two additional parcels" by Division Two. AOP, p. 18 *citing Richert*, 179 Wn. App. at 700, fn. 2. The County's motion is misplaced.

B. **Conclusion.**

The County's motion to strike should be denied in its entirety. In the alternative, its new argument on appeal should not be considered, rendering its objections to B3, B5 and B6 moot.

Dated this 15th day of April, 2019.

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Appendix C

B 1.2	Photographs of cribwall with woman to the left	CP 1410
B 2.	Photograph showing outline of 5 acres of trees	CP 1357
B 8.1	River modeling of 2-year flooding event	CP 1373
B 8.2	River modeling of 100-year flooding event	CP 1375

Corrected pages 13 and 19 of Regelbrugge Petition

Clos up look at log jam revetment. Notice per n on left for scale.

SC_PDR_WARCO_000159

Legend
2 year velocity
ft/sec
0 - 1
2
3 - 4
5 - 6
7 - 8
9 - 10
20 - 10
20 - 10
20 - 20
30 - 20
0
100
200
400
Feet

Legend
100 yr velocity
ft/sec
0-1
1.1-2
2.1-4
4.1-6
6.1-8
8.1-10
10.1-12
12.1-14
14.1-16
16.1-24
0
100
200
400
Feet

received and reviewed the JARPA detailing its size and scale. CP 2723;1446.

By 2012, there still were no adopted guidelines, although three versions existed. CP 3244. A State fish biologist warned the Program Manager that the more lenient 2012 guidelines carried too much risk for landowners and the river. *Id.* She stated it was especially true if the project contained "100 pieces of wood or remove[d]1000 cubic feet of sediment." *Id.* It was "clear" to her that Snohomish County and the tribes "are the groups pushing for these revised [2012] guidelines because they have tried to get around their own SEPA/grading fees under our process." *Id.* She stated that it is "ill-advised" to allow "large scale projects to be squeezed into a process designed for small scale projects with minimal impact to surrounding resources." *Id.*[9] The cribwall project required ripping five acres of trees out by their roots (App. B 2), which conservatively would equal 653,000 square feet of sediment.[10] The size and scale of the cribwall project violated public health and safety and resulted in 43 fatalities.

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[9] The cribwall project contained hundreds of pieces of wood. App. B 1 (five construction photographs). Two photographs have men in them (CP 41; CP 1410) which we have highlighted to provide the scale of the project.

[10] Division One erroneously referred to this work as "clear cutting." (Op. 16). The trees were removed with their rootballs intact in order to encourage their growth elsewhere. Rootballs are several feet deep in the soil. An acre has 43,560 square feet multiplied by 5 acres is 217,800 square feet. Conservatively assuming a three-foot depth for the rootballs, the tree removal resulted in 653,000 cubic feet of sediment removal.

County had actual notice of the plan to move the River **away** from the landslide complex. It reviewed the JARPA with the redesigned project which described ripping out trees by the roots in order to artificially move the River to the landslide's base. CP 261. The ninety-degree turn is obvious in its River modeling. App. B 8 (CP 1373; 1375). The County's Chief Engineering Officer acknowledged a ninety-degree bend is not natural, is known to create higher velocities and the velocities were right in the location of the cribwall. CP 1594. A supervising engineer for the County was so concerned about the project that he asked what the "confidence level" was in the "design and liabilities." CP1273. Finally, the County took photographs of the hazardous conditions and sent them to the State. CP 1277-81. These facts are a far cry from the constructive knowledge that defeated summary judgment in *Albin* where the bank knew it had hired loggers to clear cut its land. [15]

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[15] Petitioners, who were part of the consolidated motions below, rely upon and incorporate the briefing of the *Pzonka* petitioners on the failure to warn issue with one caveat. Division One quoted petitioner Davis Hargraves, who attended the March 11, 2006 meeting. *Regelbrugge* at 21 ("One of them testified, "The meeting didn't affect me much in any way except I know some people later talked about getting flood insurance. I don't – I don't recall anything but discussion about flooding, possible flooding."). Division One invaded the province of the jury by ignoring this testimony.

Division One did not address petitioners' motion to strike the County's "act of God" defense. *Regelbrugge* at 26; AOB pp. 39-44. The trial court's decision is misplaced and allows apportionment of damages to a "force of nature." *Hume v. Fritz Construction Co.,* 125 Wn. App. 477, 491 105 P.3d 1000 (2005). If this Court accepts review, it should address this issue and reverse the trial court, or, alternatively, remand the issue to Division One pursuant to RAP 13.7(b).

CERTIFICATE OF SERVICE

I, Michael Daudt, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 18 and not a party to this action.

2. On April 15, 2019, I caused a copy of the foregoing document to be served on counsel of record in the following manner:

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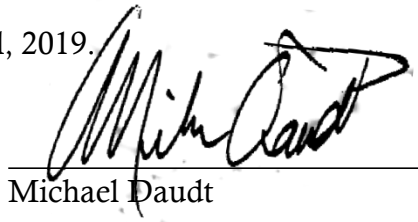
DATED this 15th day April, 2019.



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