NO. 100197-5

SUPREME COURT OF THE STATE OF WASHINGTON

DEIRTRA WILLIAMS, ET AL.,

Petitioner,

v.

KING COUNTY, ET AL.,

Respondents.

RESPONDENT KING COUNTY'S ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
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I. IDENTITY OF RESPONDENT

King County is the respondent in this case.

II. SUMMARY AND COURT OF APPEALS DECISION

This case arises from a fatality caused when a tree, located on private property, fell onto a county road during a windstorm on November 13, 2017 and struck decedent Diertra Clark's car. In July 2018, Clark's estate (hereafter "plaintiffs") brought this action for negligence, negligent hiring and supervision, negligent infliction of emotional distress, and loss of consortium against the tree owner (Candlewood Ridge Homeowner's Assocation) the landscape contractor for Candlewood Ridge (Canber Corporation), Issaquah Tree Care (the company allegedly hired to maintain trees on the Candlewood Ridge property), and King County. *See* Fourth Amended Complaint, at 3-4.

King County moved for summary judgment, arguing, in part, that it had no actual or constructive notice of the tree's concealed decay. The trial court agreed and dismissed plaintiffs'

claims against the County. Plaintiffs appealed to the Court of Appeals, Division One. By the time of oral argument, defendants Candlewood Ridge HOA, Canber Corporation, and Issaquah Tree Care had all settled with plaintiffs, leaving King County as the only defendant. *See* COA decision at 3, note 2.

In an unpublished decision, *Deirtra Williams, et al., v. King County*, 18 Wash.App.2d 1043, 2021 WL 3289-69 (8/2/2021), the Court of Appeals correctly determined that King County did not have actual or constructive notice that the tree posed a hazard to users of a county roadway. The tree, located on private property, apparently broke some 12 feet up the stem due to hidden decay caused by a few small fungus growths. These growths were partially concealed by ivy and required specialized tree knowledge to identify after close inspection from a short distance away.

Because there is no evidence King County knew of the tree's concealed decay, the Court of Appeals properly affirmed the trial court's dismissal of plaintiffs' claims against King

County on summary judgment. This ruling does not conflict with any decision of this Court or the Court of Appeals. *See* RAP 13.4(b)(1)-(4). King County therefore asks the Court to deny plaintiffs' Petition for Review.

III. COUNTERSTATEMENT OF THE ISSUES

1. Muncipalities have a duty to maintain their roadways in a condition reasonably safe for ordinary travel; however, this duty arises only where the municipality (a) has notice of a hazard and a reasonable time to correct it; (b) the hazard would be readily apparent to a reasonable person having no specialized knowledge, and (c) the duty does not require municipalities to proactively search for hidden dangers on private property near its roadways. The accident in this case occurred when a tree – located on private property – failed during a windstorm due to concealed decay caused by a specific fungus, obscured by ivy, that only an expert would recognize on a close-up inspection. Where King County had no notice of the tree's concealed decay, can it be held liable for injuries caused by the fallen tree?

2. Did the Court of Appeals properly disregard portions of the report of plaintiffs' expert, Galen Wright, where they lacked foundation and were based on speculation?

IV. STATEMENT OF THE CASE

A. During a Windstorm on the Evening of November 13, 2017, a Tree located on Private Property Failed, falling across a County Roadway near Renton, Washington, Striking Plaintiffs' Car.

At about 6:00 PM on November 13, 2017, in the Fairwood area of unincorporated King County, near Renton, Deidra Clark (now deceased) was driving her Lexis SUV on a suburban residential street in the Candlewood Ridge housing development. CP 1-2. With Clark in the SUV were her child (plaintiff A.M.C.) and Clark's twin sister, Deirtra Clark. *Id*. The National Weather Service had a high-wind warning in effect for this date and the area was likely experiencing gale-force winds with gusts of up to 35-45 miles per hour. CP 333-334.

As they entered the intersection of 159th Avenue SE and SE 179th Street, a black cottonwood tree adjacent to the roadway fell

and struck Ms. Clark's SUV. CP 239-241. The impact killed Deidra Clark and injured her sister Deirtra. *See* CP 1-2. A.M.C. was not injured. The cottonwood tree was located off the public right-of-way – on a private parcel known as "Tract B" – held jointly by the members of the Candlewood Ridge Homeowners Association ("HOA"). CP 246-249; 233-235. "Appendix A" (attached to the back of this Answer) shows the approximate location of the tree in "Tract B."

B. The King County Road Services Division Never Received any Notice of the Tree or its Alleged Defects.

King County has a Road Services Division (RSD) that is responsible for all county roads, bridges, and related infrastructure in unincorporated King County. CP 163. Its area of responsibility includes about 1500 miles of roads and bridges supporting more than one million trips daily. CP 163. There is no known record of RSD ever receiving a complaint about the black cottonwood tree that fell in this case prior to the accident date - November 13, 2017. CP 217; 323. The intersection where

the accident occurred is a surburban residential street in the Candlewood Ridge development with no history as a high-accident location. CP 217.

RSD has ten "planning units" having specialized functions, one of which is a "tree of concern" program. *See* CP 214. A "tree of concern" is a standing tree on or near a county roadway that may pose a hazard to a roadway. CP 215. RSD maintains a "Road Helpline" that allows citizens, county employees, and "partner agencies" (such as the King County Sheriff's Office) to raise concerns about county roadways, including "trees of concern." CP 214-215. While plaintiffs contend that the County's reliance on "untrained members of the public" to report concerns is inherently flawed (PFR at 8, 15), municipalities routinely rely on such citizen complaints for notice of roadway hazards.[1] This is appropriate as "[t]here is no common law,

[1] *Nguyen v. City of Seattle*, 179 Wn.App. 155, 171 (2014) ("To report unsafe or defective trees, SDOT provides an email address and telephone number on its website" and receives complaints "from citizens, public utilities, police, and street

statutory, or regulatory authority requiring a municipality to inspect its street infrastructure as a component of its duty to provide streets that are reasonably safe for ordinary travel." *Nguyen v. City of Seattle*, 179 Wn.App. 155, 171 (2014).

When notified of a tree of concern, RSD Customer Service Specialists first determine if the tree impacts a county road. CP 214. If it does, RSD dispatches personnel to investigate. *See* CP 214-215. RSD employs an arborist – known as a "vegetation specialist" – who assesses the risk of "trees of concern" located near county roads. CP 215. If the vegetation specialist recommends removal of a tree, RSD typically hires a contractor

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users, including King County Metro. . ."); *Almo v. City of Seattle*, 174 Wn.App. 1015, 2013 WL 1164408 *1 (2013) ("the City does not routinely inspect sidewalks but relies on citizens, including property owners with property adjacent to public places, to report unsafe conditions."); *Albin v. National Bank of Commerce of Seattle,* 60 Wn.2d 745, 748 (1962), quoting *Mead v. Chelan County*, 112 Wash. 97, 191 P. 825 (1920) ("the commissioners could not be required to give [the road] constant or even frequent inspection, but might rely upon the users of the road, or those living in the neighborhood, to give them notice of any unusual conditions which would render the road unsafe.").

to handle the removal. CP 215. For trees located on private property, RSD may contact the property owner to correct the concern. CP 216. RSD employees ordinarily do not enter private property to examine or remove trees or vegetation. CP 216.

The phrase "tree of concern" refers to trees that are still standing – trees that have already fallen are usually coded as "vegetation in the roadway." CP 216. The County's arborist ("vegetation specialist") does not inspect all downed trees ("vegetation in roadway"), and there is no known authority or standard requiring such inspections. CP 216. When trees obstruct the road or county right of way, Road crews are dispatched to remove the debris. CP 216. Roads crews are expected to use common sense and report obvious roadway hazards, but they do not inspect trees and they do not receive arboricultural training. CP 216. Plaintiffs cite no local, state, or national standard requiring Roads crew members to have arboricultural training or to search trees for hidden decay. CP 216.

RSD records reflect one service request for the intersection – placed in January 2017. CP 217; 507. An RSD crew chief, Terry DePriest, went out to look at what was described as a fallen "small dead tree." *Id.* Because the tree was located off the roadway, he took no further action. *Id.* And on November 8, 2017, RSD received a service request concerning downed trees over a half-mile away from the accident site on Petrovitsky Road. CP 672.

Contrary to plaintiffs' contentions (*see* PFR at 8), the evidence does not show that the tree which fell on January 20, 2017 was located in "Tract B" about "30-40 feet from the subject tree." The service request for the January 20, 2017 incident does not state whether the tree was on the south side of SE 179th Street (where "Tract B" is located) or the north side. *See* "Appendix A" (showing "Tract B" on south side of SE 179th Street); CP 507 (service request for January 20, 2017 tree fall). And there is no evidence regarding concerning the type of tree that fell, or whether it was leaning or diseased.

C. The Tree's Concealed Decay was not Readily Visible from the County Right of Way, and the Significance of any Decay Would not have Been Apparent to a Layperson.

After the accident, James Kotarski, King County RSD's arborist ("vegetation specialist") visually inspected the remaining snag of the cottonwood tree. CP 223. Because he believed the snag to be located on private property, he observed it from the sidewalk (about 10.5 feet away), which is part of the right-of-way administered by King County. CP 223. What he saw was a snag covered with English Ivy. CP 223; "Appendix B" (photo of remaining snag). After several minutes of close observation he also saw a "conk" (or fungal fruiting body) on the southwest side of the snag. CP 223. Such conks can indicate decay that structurally weakens the trunk of a tree. CP 224.

According to Kotarski, the conk would not have been easily visible to a passerby on the sidewalk or street. And even if the conk had been spotted by a layperson having no arboricultural training, s/he would not understand that the conk could signal

hidden decay. *See* CP 225. Kotarski believed the tree likely failed due to hidden decay, at the point of failure on the tree trunk, in combination with high winds at the time of the accident. CP 224. It was early in the windy season and the tree had leaves, which would have acted as a sail, putting more stress on the trunk. CP 224. The presence of leaves also indicates the tree was alive and would not have appeared dead or dying to a casual observer. *See* CP 224-225; 430 ("there were still leaves on the canopy of the tree, indicating that it was still alive.").

D. Plaintiffs' Expert, Galen Wright, Could Only See the Conks during a Close Up Inspection of the Tree, and He Agreed that Other Signs of Decay Could not be Observed from the County Right of Way.

Plaintiffs retained an expert arborist, Galen Wright, who entered Tract B on December 4, 2017 to inspect what remained of the tree. *See* CP 515. In his April 2019 report, Wright identified the tree as a Black Cottonwood about 26.2 inches in diameter. CP 495. Wright estimated that the tree broke at a height of 12 feet above the groundline (CP 495) on HOA

property (Tract B) (CP 517), and he saw decayed wood at the breaking point. CP 495. The stem of the tree was still partially covered by English Ivy. CP 497. Wright stated that three small (CP 526) "conks" of stem decay fungi were present at some distance "above six feet." CP 495. He also observed some decay in one "lateral root anchor" and some bark separation just above the "root collar." CP 498.

Wright's photos of the "conks" (*see* CP 317-319 and "Appendix C") only show them from close-up, about an arm's length away from the tree (CP 515), while on private property (Tract B) belonging to the HOA. CP 517. There are no known photographs showing whether the conks would have been visible from the right of way (sidewalk).

Wright concluded that, had a "level one" inspection been done of the tree by a person walking on the sidewalk or driving by the tree, a number of factors would have triggered a closer inspection of the tree (i.e. a "level 2" inspection). *See* CP 498. He identified these factors as (1) an "obvious lean" of the tree

over the bus stop; (2) the "conks" on the bark of the tree's lower stem; (3) the visible root decay and bark separation; (4) the tendency of Black Cottonwoods to fail even in non-storm conditions, and (5) the recent (January 2017) failure of a nearby Cottonwood tree. CP 498. The tree's defects, Wright believed, could have been detected "by a qualified arborist or forester working for the HOA or King County." CP 502.

Wright also claimed that the January 2017 Cottonwood failure "should have stimulated a review of other trees in the vicinity," and that had this been done, it is likely the defects in the tree would have been seen. CP 498. The same type of review, Wright believed, should have been done after two other Black Cottonwood failures on November 8, 2017 – one week before the accident. CP 498. Wright concluded that the tree in this accident fell primarily due to the fungal decay, the tree's lean, and the "wind event of whatever magnitude." CP 518.

Wright was unable to cite any treatise or other authority stating that a tree failure in one area should trigger an

examination of other trees in the area (CP 524), nor was he able to say how far from a failed tree any such inspections should cover. *See* CP 524-525. Wright acknowledged that he inspected the remains of the subject tree from a distance of one-to-three feet (a "level 2" inspection), and that he did not notice the conks immediately. *See* CP 515 (Wright first noticed the conks "within minutes" of walking up to the tree.).

Wright took no measurements of how much the tree leaned, so he was unable to say at what height the tree stem may have crossed the plane of the right-of-way. CP 519. Wright agreed that the missing bark he noted would not have been visible from the roadway, nor would the root defects he identified. CP 521. He also acknowledged that there are thousands of trees along the 1500 miles of county roads that lean toward the roadway (CP 521), and the evidence indicates trees naturally lean toward the roadway to capture more sunlight. *See* CP 429.

E. Plaintiffs' contentions regarding other tree falls in the area misstate the evidence in the record.

As part of their "constructive notice" claim, Plaintiffs maintain that "On October 16, 2016, a tree fell onto SE Petrovitsky Road" which was ".6 miles away from the subject incident." PFR at 9. But their citation to "CP 672" for that proposition says nothing about a tree fall on October 16, 2016; rather, that portion of the record discusses a tree fall on November 8, 2017. Plaintiffs next allege that "less than four months later, on February 2, 2017, a second tree fell across Petrovitsky Road at the exact same location as the October tree fall." PFR at 9. But their citation to "CP 615-616" says nothing about a February 2017 tree fall. Instead, again, the service request at CP 615-616 refers to the tree falls that occurred .6 miles away from the subject tree on November 8, 2017.

Finally, plaintiffs allege that three additional cottonwood trees fell onto the County right of way "a few blocks" from the subject tree on November 8, 2017. PFR at 10. This time they accurately cite to the service request for this incident, which

appears at CP 615-616. But these trees were not "a few blocks away" as plaintiffs contend – they were actually over a half-a-mile away. CP 672.

Plaintiffs falsely contend that the county "ignored this incident entirely" (PFR at 10) when, in reality, a Roads crew quickly came out to clear the roadway. CP 615-616. Finally, plaintiffs appear to contend that the November 8, 2017 incident should have caused the county (1) to immediately inspect every tree within a .6 mile radius, (2) locate the tree that fell in this case, and (3) remove it, all before the November 13, 2017 accident. But municalities must have *notice* and a *reasonable opportunity to cure* the unsafe roadway conditions. *See Helmbreck v. McPhee*, 15 Wn.App.2d 41, 50 (2020). The November 8, 2017 tree falls did not provide the County with notice that the subject tree .6 miles away was defective, nor did it provide a reasonable amount of time to search, locate, and remove the tree.

V. ARGUMENT

Plaintiffs do not dispute the legal principles the Court of Appeals applied in analyzing this case. *See* COA opinion, at 10-17. Municipalities have a duty to maintain their roads so that they are reasonably safe for ordinary travel. *Keller v. City of Spokane,* 146 Wn.2d 237, 249 (2002). The duty is conditional, however, and arises only when the municipality has notice of and time to correct the hazard in question. *Helmbrck v. McPhee*, 15 Wn.App.2d 41, 50 (2020).

Accordingly, the government must have notice of a dangerous condition which it did not create, and a reasonable opportunity to correct it before liability attaches. *See id*. The notice may be actual or constructive. *Id.* Constructive notice may be inferred when a known dangerous condition is permitted to continue. *See id*.

A. Issues of actual and/or constructive notice may be determined as a matter of law.

Plaintiffs complain that questions of actual notice,

constructive notice, foreseeability, and what constitutes "reasonable care" are fact questions that the Court of Appeals erroneously determined as a matter of law. *See* PFR at 11-15. In this case, however, the Court of Appeals properly determined that plaintiffs failed to produce sufficient evidence "to create a genuine issue of material fact" showing that the County was on actual or constructive notice of the alleged dangerous condition of the subject tree. COA decision, at 15. Courts may properly decide questions of actual and/or constructive notice as a matter of law. *See Havens v. C&D Plastics, Inc.,* 124 Wn.2d 158, 181 (1994) ("when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law."); *Niebarger v. City of Seattle*, 53 Wn.2d 228, 230 (1958) (constructive notice determined as a matter of law).

B. Plaintiffs fail to show the Court's decision in this case conflicts with any decision of this Court or any published Court of Appeals decision.

Plaintiffs assert that the facts of *Albin v. National Bank of Commerce of Seattle*, 60 Wn.2d 745 (1962) "could not be more

different than the case at bar." PFR at 16. In *Albin,* a car was struck by a falling tree during a wind storm, killing one occupant and injuring the other. 60 Wn.App. at 747. This happened on a rural Columbia County road, in a wooded area, that saw its major use during hunting season. *Id.* The tree fell from private timber land onto the car traveling on the county road. *Id.*

The trial court dismissed defendant Columbia County because it did not have notice of the dangerous tree next to its road. *Id.* at 748. The Supreme Court upheld that dismissal, and in the absence of actual notice, reasoned that it can "of course, be foreseen that trees will fall across tree-lined roads;" but short of cutting a tree-length-wide swath along the entire length of such roads, there was no way of safeguarding against the danger. *Id.* at 748-49. The Court went on to note that "this is neither practical, nor desirable" and that the "financial burden would be unreasonable, in comparison with the risk involved." *Id.* While certainly there are factual differences between *Albin* and the present case, the cases are not in conflict, and plaintiffs make no

claim that they are. Thus, a comparison of *Albin* with this case provides no basis for review under RAP 13.4(b)(1).

Plaintiffs next contend that the Court of Appeals' decision conflicts with *Conine v. County of Snohomish*, 138 Wn.App. 1039, 2007 WL 1398846 (Div. I 2007). *See* PFR at 17. Their citation of *Conine* is improper because it is an unpublished decision issued six years before March 1, 2013. *See* GR 14.1. And while review may be warranted under RAP 13.4(b)(2) where a Court of Appeals' decision conflicts with another *published* decision of the Court of Appeals, that criteria is not satisfied here because *Conine* is an unpublished, non-precedential decision. Moreover, the Court's decision here does not conflict with *Conine*. In that case, the Court found a fact issue regarding the State's constructive notice because the evidence showed that the tree, which was adjacent to a state highway, "was obviously dead or dying and leaning for two years, . . .". Conine, 2007 WL 1398846 *5. In this case, there were no "obvious" signs that the tree was dead or dying. *See* CP 224; 430-431.

C. King County does not have a legal duty to inspect all trees located near county roads absent a complaint or other notice of a concern with a particular tree.

Plaintiffs' expert suggested that to fulfill its duty of ordinary care, King County should have had a proactive annual inspection program for all trees located along all county roads. *See* CP 521. He is mistaken. King County is under no statutory or common law duty to affirmatively inspect its roadway or the areas abutting its right-of-way for hazardous trees. *See Nguyen v. City of Seattle*, 179 Wn.App. 155, 171-172 (2014) ("Nguyen cites no common law, statutory, or regulatory authority requiring a municipality to inspect its street infrastructure as a component of its duty to provide streets that are reasonably safe for ordinary travel."). Moreover, as argued at the Court of Appeals, King County is immune from liability for its discretionary decisions regarding how to allocate limited funds to roadway projects. *See Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253 (1965). Thus, the County is entitled to discretionary immunity for not allocating funds to create the proactive tree inspection

program suggested by expert Galen Wright. *See* CP 162-167 (RSD safety improvement projects and priority hierarchy).[2]

D. The Court of Appeals Properly Disregarded Portions of the Report of plaintiffs' Expert, Galen Wright, as Speculative and Lacking Foundation.

An expert opinion must be based on facts, not speculation or conjecture. *Time Oil Co. v. City of Port Angeles*, 42 Wn.App. 473, 479-480 (1985). Such facts must be actual facts, not assumed facts. *Riccobono v. Pierce Cty*., 92 Wn.App. 254, 266-269 (1988). And it is not enough to offer testimony that an accident might not have happened if a government entity had installed additional safeguards. *Moore v. Hagge*, 158 Wn.App.

[2] Kotarski testified that, during his time with the County, "this case is the only time anyone has been killed by a falling tree on a county road." CP 428. The parties appear to agree that the risk of such an incident is comparable to the risk of being struck by lightening. *Id*. Given the remote risk of such tragic occurrences, annually inspecting all trees in the County that lean towards the roadway is neither practical nor justified by the accident data. CP 424. In the event the Court grants review in this case, King County asks the Court to consider its discretionary immunity argument as permitted by RAP 13.4(d).

137, 151-152 (2010); *Miller v. Likins*, 109 Wn.App. 140, 149-150 (2001).

Plaintiffs' tree expert, Galen Wright, testified that other tree failures in the region should have "stimulated a review" of trees in the wider area. CP 498. Had this been done, Wright stated, it is "likely the fungal conks would have been noticed triggering a more detailed assessment of the subject tree." CP 498. The Court of Appeals properly disregarded this opinion as speculative. *See* COA decision, at 6-8. Wright was unable to cite any treatise or other authority stating that a tree failure in one area should trigger an examination of other trees in the area (CP 524), nor was he able to say how far from a failed tree any such inspections should cover. *See* CP 524-525.

The January 2017 tree failure, Wright believed, was among the incidents that should have "stimulated a review" of surrounding trees. CP 498 and 524. But Wright never inspected this tree. CP 525. And the evidence does not establish that this tree was even in "Tract B." Wright had no idea why it fell,

whether it had any fungus or disease, or whether it was leaning.[3] Wright conceded that there was no evidence of conks impacting this tree, and he saw no evidence of any contagious disease impacting the surrounding trees. CP 525.

Wright also pointed to two tree failures on November 8, 2017 – a week before the incident in this case. CP 498. These trees were over a half-a-mile away from the subject tree. CP 672. Wright never inspected these trees and he did not know whether they were diseased. CP 661. Wright's claim that these tree failures should have triggered an inspection of all trees in the vicinity, and that had this occurred, the small fungal growths on the subject tree would have been detected, is speculative and Court of Appeals properly disregarded it.

[3] *See* CP 525 ("It's *highly likely* that the January tree was leaning. It's *highly likely* that it was diseased[;]" "*It could have been* Ganoderma (fruiting fungus) as well[;]" and "*Maybe* that's why it fell.").

VI. CONCLUSION

Plaintiffs fail to show that the Court of Appeals' unpublished decision in this case conflicts with any decision of this Court or any published decision of the Court of Appeals. Thus, the criteria for review under RAP 13.4(b)(1)-(2) are not satisfied, and King County asks the Court to deny plaintiffs' Petition for Review.

This document contains 4,419 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 3rd day of December, 2021.

DANIEL T. SATTERBERG
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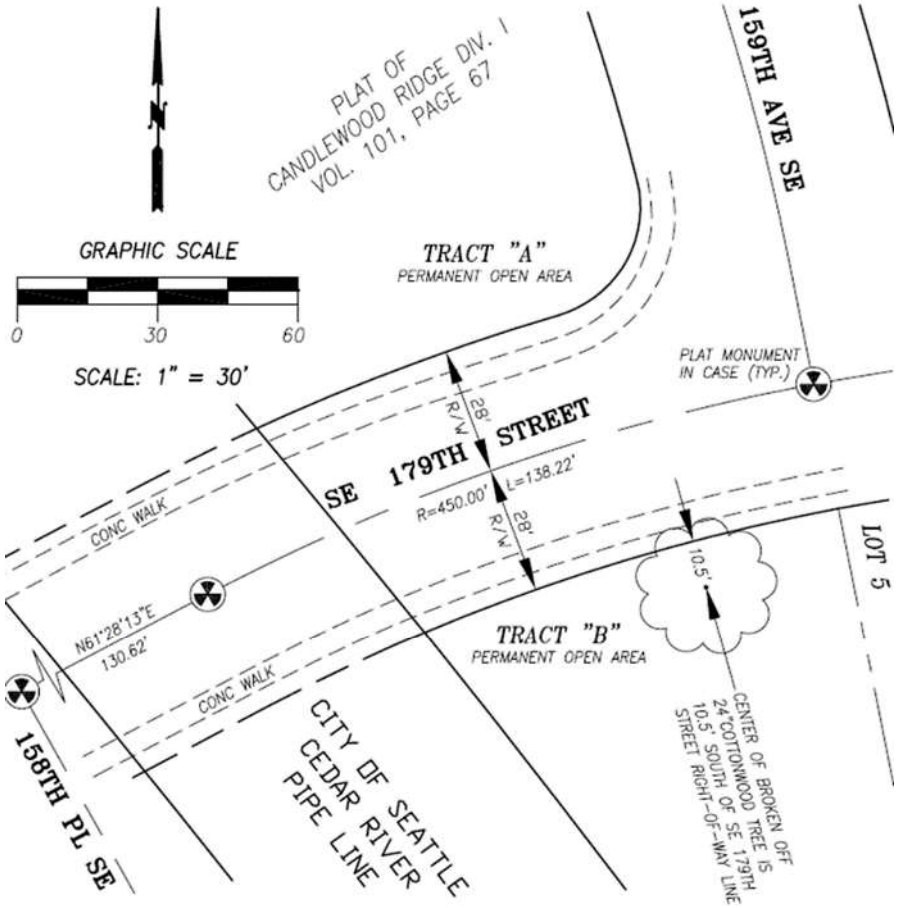
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CANDLEWOOD RIDGE DIV. I
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PIPE LINE
CENTER OF BROKEN OFF
24" COTTONWOOD TREE IS
10.5' SOUTH OF SE 179TH
STREET RIGHT-OF-WAY LINE

- APPENDIX A -

- APPENDIX B -

- APPENDIX C -

DECLARATION OF FILING AND SERVICE

I, Helen Fung, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein; That on December 3, 2021, I caused the foregoing document to be e-filed and e-served electronically through Washington State Appellate Court's portal as follows:

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

Dated this 3rd day of December, 2021.

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KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION

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