No. 320006

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

RAYMOND COOK and ARLENE COOK

Appellants,

v.

STEVENS COUNTY, a local governmental entity; TARBERT LOGGING, INC. a Washington corporation; and SHANE BEAN and JANE DOE BEAN, husband and wife;
Respondents.

BRIEF OF RESPONDENT TARBERT LOGGING, INC.

GORDON THOMAS HONEYWELL LLP
Stephanie Bloomfield, WSBA No. 24251
sbloomfield@gth-law.com
Attorneys for Respondents
Tarbert Logging, Inc. and Shane Bean
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402
(253) 620-6514

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

OTHER CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

On February 6, 2009, Tarbert Logging's driver, Shane Bean, was driving an empty log truck up Dead Medicine Road in Stevens County for his second load of logs. It had snowed that morning, so the primitive road was covered with packed snow and ice. As Bean approached a corner, he saw Raymond Cook's pickup heading down the hill towards him. Bean slowed further, feathering his brakes while moving as far to the right as he could without going over the steep embankment to his right. Cook, who was traveling too fast for the conditions and not to the far right side of the road, was unable to stop and the front corner of his pickup truck hit the drop axle of the Tarbert's log truck just behind and below Bean's door. Cook later sued Bean and Tarbert Logging – as well as Stevens County for negligence in how it plowed the road. After a two week trial the jury returned defense verdicts in favor of all Defendants.

Cook was driving a GMC truck owned by Golden Opportunity, LLC. Cook was the President of Golden Opportunity, LLC and had control over the damaged GMC after the accident. Cook and his attorney hired an accident reconstruction expert, Richard Gill, who examined Cook's GMC truck about six weeks after the accident in a building where it was being stored by Cook's son, Josh Cook. Gill, who provided a variety of opinions about the accident, including opinions as to the speed

of the two vehicles, recognized that the GMC had an airbag control module that would have recorded Cook's actual speed in the five seconds leading up to impact. However, Gill did not arrange to secure or preserve this important evidence from the airbag control module.

During the winter of 2009-2010 Josh Cook obtained permission from Ray Cook's attorney to dispose of the GMC truck, which he then sold off for parts. Cook did not notify either Tarbert Logging or Stevens County of the pending destruction of the vehicle. By the time this lawsuit was filed in December 2010, the GMC and its airbag control module data regarding Cook's speed were gone. However, Cook's accident reconstruction expert (Gill) planned to offer a variety of opinions on how the accident occurred and causes of the accident, including opinions as to the relative speeds of the two vehicles.

When Stevens County learned that the GMC's airbag control module had not been preserved by Cook, it brought a spoliation motion seeking sanctions against Cook for destroying this evidence. Tarbert and Bean joined in this motion. The trial court ruled that Gill would not be permitted to testify as to approximately a half dozen speed-related opinions. Cook was free to call Gill to testify to his remaining 25 opinions regarding how the accident occurred, the plowing of the roadway, Bean's driving across the centerline and being inattentive. See Appendix A.

Cook argues that the trial court erred in excluding some of Gill's opinions as a spoliation sanction because neither Cook nor his counsel acted in bad faith in destroying the airbag control module. However, a showing of bad faith is not required to impose a sanction for spoliation. Therefore, the absence of bad faith does not present a reason to reverse the trial court's sanction, which considered the importance of this evidence as well as Cook's degree of culpability in fashioning an appropriate remedy.

Cook then chose **not** to have Gill testify at trial as to his remaining opinions. During trial, the court also ruled that the Defendants could cross-examine Cook as to the fact that he retained an expert to examine the truck shortly after the accident. Defendants' experts testified that Cook's GMC truck had an airbag control module that had not been preserved and the information it would have provided regarding Cook's speed. Cook now claims that the trial court abused its discretion by allowing mention of his expert (whom Cook chose not to call to testify at trial), ignores the evidence from numerous other witnesses contradicting Cook's version of events, and asserts he was unfairly prejudiced by the brief mention of his expert examining the truck, which he argues caused the jury to find in the Defendants' favor.

What Cook ignores, is the overwhelming evidence in the case showing that Defendant Tarbert Logging's driver Shane Bean, was not

negligent and that Cook was the negligent pary. Through the testimony of Ray Cook and his son Josh Cook, Plaintiffs offered a version of the accident that was completely inconsistent with: (1) the physical evidence at the accident scene, (2) Shane Bean's version of the accident, (3) Cook's own version of the accident on the day it happened, and (4) the observations of law enforcement and other witnesses at the scene. The trial court's exclusion of certain limited opinions by Cook's expert as a sanction for spoliation of evidence was not an abuse of discretion, nor was the trial court's decision to allow limited evidence that Cook had an expert examine his vehicle shortly after the accident. Even if this was an error, it was harmless because of the overwhelming evidence supporting Defendants' version of events. The jury's verdict should be affirmed.

II. ASSIGNMENTS OF ERROR AND ISSUES

1. Did the trial court properly exercise its discretion in excluding certain opinions of Cook's accident reconstruction expert as a sanction for Cook's spoliation of key evidence?

2. After Cook decided not to call his accident reconstruction expert, did the trial court properly exercise its discretion in admitting evidence that an expert retained by Cook inspected and photographed his vehicle shortly after the accident?

3. Even had the trial court abused its discretion in admitting testimony that Cook had an expert examine his vehicle after the accident, was such error harmless, in light of the overwhelming physical evidence and eyewitness testimony in the record supporting the jury's verdict?

III. COUNTERSTATEMENT OF THE CASE

The circumstances leading to this accident are known firsthand only to Cook and Bean. However, multiple witnesses present at the scene immediately after the accident – including two law enforcement officers – provided testimony as to what they observed and to statements made by Cook and Bean. Moreover, four experts, (two accident reconstructionists and two snow plowing experts) also testified as to their opinions about the contributing causes of the accident and the failures (or lack thereof) in Stevens County's plowing of Dead Medicine Road. A fifth expert retained by Cook, Richard Gill, provided three main general opinions with 10-12 sub-opinions under each general opinion. As a result of the Court's pretrial rulings, based on spoliation of evidence the Court fashioned a remedy where Gill would not be permitted to testify on some of his opinion relating only to speed. For unknown reasons, Cook elected not to call Gill to testify to his numerous opinions that the Court did not exclude, including opinions about Stevens County's negligence, Bean's inattention, and Bean driving across the centerline. Cook, having made that strategic

choice, now claims it was error for the court to allow the jury to hear that Cook had an expert examine and photograph his truck after the accident, and take crush depth measurements used to calculate speed.

A. Pretrial Spoliation Motion.

About six weeks after the accident on March 25, 2009, Cook, his attorney, expert Richard Gill and Cook's son Josh Cook met at Josh Cook's shop where the wreckage of Cook's GMC truck was being stored. CP 107, 115. Cook filed suit in December 2010. CP 3. In February 2012 Stevens County wrote asking Cook to make the vehicle available for inspection by its accident reconstruction expert, Jon Hunter. CP 32. Later that same day, Cook's attorney responded stating that the vehicle had been sold off for scrap the winter following Gill's March 2009 inspection. CP 33, 110-11.

Josh Cook explained that he asked his father's attorney for permission before disposing of the GMC truck. CP 108-09. He sought permission because he had previously been instructed to keep the truck intact and indoors. CP 112. As Stevens County's accident reconstruction expert Jon Hunter explained, the disposal of the truck was significant because Cook's 2006 GMC Sierra was equipped with an airbag control module that preserves five seconds of pre-crash data including the speed of the vehicle, brake usage, and speed at impact. CP 13-14. With this

information Hunter would have been able to determine not only Cook's exact speed at impact, but Bean's speed as well as other key facts about the collision. CP 16. Based on Cook's failure to preserve evidence he and his expert knew was material, and his failure to notify Defendants of the proposed disposal of Cook's GMC so they would have the opportunity to inspect the truck, Stevens County filed a motion seeking sanctions for Cook's spoliation of evidence. CP 38-51. Tarbert and Bean joined in the motion. CP 52-54.

The trial court, after considering the evidence presented and hearing argument, found that

- Cook's counsel directed that Cook's GMC be preserved inside in one piece so Cook's retained expert could inspect it.
- Cook's expert inspected Cook's GMC on March 26, 2009.
- At the time of the March 26, 2009, inspection Cook was represented by counsel.
- Cook's GMC was equipped with an airbag control module that would have recorded data as to Cook's speed at the point of impact and for several seconds before impact.
- Cook's counsel subsequently advised Josh Cook that he could sell parts off Cook's GMC.
- Cook did not notify either Stevens County or Tarbert Logging that the GMC was going to be sold off for parts.
- Gill issued a report dated September 29, 2012, including opinions about the Cook's speed and testified at deposition to that Bean was going faster than Cook.

CP 121-22.[1]

While the trial court did not find bad faith, it concluded that Cook knew the vehicle was relevant and important evidence, Cook had a duty to preserve the Cook vehicle so the defendants in the anticipated lawsuit could have the opportunity to inspect it. Because the evidence was destroyed without giving Defendants that opportunity for an inspection, Cook obtained an advantage in the litigation and the defense was prejudiced. CP 122-23. The trial court considered the least severe remedy to cure the prejudice to the Defendants, and ordered that six of Gill's opinions on speed would be excluded at trial along with his opinion that Bean was traveling faster than Cook. CP 123-24 and Appendix A (Gill Report). The trial court also reserved the right to consider giving a spoliation instruction at trial. CP 124.

B. Pretrial Motions in Limine Addressing Mention of Gill.

Cook brought a pretrial motion in limine seeking to exclude testimony or argument about Gill's precluded speed opinion testimony. CP 138.[2] During pretrial motions in limine, Cook's counsel noted he had no concern with the jury learning that Cook disposed of the GMC before the lawsuit was filed. RP 762-63. His sole concern was any mention to

[1] Gill's full report is provided as Appendix A to this brief. The supplemental excerpt of record designation has not yet been provided, but the number is expected to be approximately CP 365.

[2] At no point during trial did any party discuss Gill's opinions on speed or their exclusion, other than to note that Plaintiff had an expert examine the vehicle and take photographs and measurements used to calculate speed before it was destroyed.

the jury that Cook had an expert examine the truck before it was parted out. However, Cook elected not to call his expert who had opinions about the cause of the accident, Stevens County's actions, Bean's negligent driving (inattention and travel over the centerline) and various other issues. See Appendix A (Gill Report).

Tarbert Logging disagreed, noting that the fact that Cook had an expert examine the truck without preserving the airbag control module was important to the jury in evaluating the weight to give to the missing evidence, Cook's culpability, as well as any inference to give the evidence. CP 282-83; RP 55-57. Stevens County made similar arguments with respect to the mention of Cook having an expert examine his truck before it was parted off and disposed of. CP 242. The trial court reserved ruling on this issue initially, ultimately allow this limited testimony, but declining to give a spoliation instruction. RP 57-58, RP 746-774.

C. The Evidence at Trial.

At trial substantial evidence was presented on liability issues regarding the condition of the roadway, the speeds of the two vehicles, witness observations at the scene of the accident, law enforcement investigation, photographs and various other information. To put the alleged errors in context, it is important to review the broader testimony offered on the liability issues.

Cook's neighbor Del Hallum, who had lived on Dead Medicine Road for 46 years, testified. CP 285-86. Hallum stated that traveling southbound (Cook's direction of travel) approaching the blind corner where this accident occurred he would not go more than 10-15 miles per hour. CP 286. However, going northbound (Bean's direction of travel) you can go about 25 miles per hour. *Id.*

Two law enforcement officers arrived in response to calls for aid, Sergeant Loren Erdman and Deputy Julie Melby. Deputy Melby spoke to Cook at the hospital to get his statement about how the accident occurred. RP 309. Ray Cook told Deputy Melby:

> [H]e was driving at approximately 20 miles per hour. When he came around the corner, he saw the logging truck in the middle of the road. Ray states he drove as far as he could to the right side of the road. He believes the logging truck also tried to pull as far as possible to the right but was near a steep embankment. Ray also states he doesn't think there's anything else they could have done to prevent hitting each other.

RP 309.

Erdman also confirmed that Cook was not traveling to the far right side of the roadway, and while he was "somewhat to the right" Cook's tire tracks confirmed that he "was more toward the middle." RP 548. Cook told Erdman "he was across the center and then tried to get over once he did see the logging truck and didn't have time before impact." RP 553. Contrary to his later testimony, Cook never reported to Melby that he

struck the embankment to his right and was at a complete stop before the log truck hit him. RP 317. Erdman, who photographed the scene stated that there was no physical evidence at the scene or recorded in his photographs that was consistent with a scenario where Cook's GMC was pushed back 47 feet by the impact as Cook claimed at trial. CP 560. Erdman also testified that there was no evidence to suggest Cook hit the embankment to his right and came to a complete stop before impact, for example there were no marks in the soft fresh snow in that area. CP 564.

Melby also interviewed Tarbert Logging driver Shane Bean, who reported that he was traveling slowly and was as far to the right as possible. RP 315. Bean also explained that he had backed his truck up and away from Cook's GMC immediately after the accident. RP 315. Deputy Melby found no evidence at the scene to suggest that the actual point of impact was some 47 feet to the south of where the vehicles came to rest as Cook later claimed. RP 315. The small amount of debris in the roadway was in the area between where the two vehicles came to rest consistent with the impact occurring in that area. RP 316 and Trial Ex. 16. Sergeant Erdman also testified that the only debris field at the scene was in the area near the front of the log truck. CP 557-58. Deputy Melby estimated that Cook's vehicle was pushed back a "very short" distance. RP 323. The other officer, Sergeant Erdman, concurred with Melby's

estimate, explaining that Bean had moved the log truck back "maybe six feet." RP 521, 557.

> Q. Mr. Cook has also asserted that as he approached the scene of the accident, he pulled so far to the right that he essentially drove his pickup into the uphill embankment attempting to avoid the collision. Did you observe any evidence at the scene that would support that contention?
>
> A. No. My recollection from the scene is that he was in the roadway and pushed back into that location, because I believe we could see -- because once that vehicle or the logging truck hit his front driver's side wheel, cocked his wheel sideways, and you could see where it slid back into that bank. And it -- and if I recall correctly from looking at scene, like I say it's been a long time, but if I remember right it appeared to push it back and the back end popped out when it came to rest. So it was like we discussed the stud marks on the road before, where they kind of went back, and it's like when it came to rest it -- the back end popped out slightly from there. So, it was consistent with that front end being pushed back into the bank at an angle is what it appeared.
>
> Q. And approximately what distance would you describe that being pushed back? Are we talking a few feet, a few yards?
>
> A. A few feet. I couldn't see where it started because of everything that had happened right around that area with the activity, but a few feet. It didn't look very far to me.

RP 561-62.

Sergeant Erdman ultimately testified that based on his investigation he was of the opinion that one or both of the vehicles involved were traveling too fast for conditions, but based on what he

reviewed he could not say who was traveling faster, or how fast either vehicle was traveling. RP 575-76.

Tarbert's driver, Shane Bean, also testified as to what he observed. He was traveling about 20 miles per hour uphill as he approached the corner. RP 646, 657, 675. Bean saw Cook's GMC truck about 300-400 feet away and started braking and moving as far to the right as possible. RP 644-45, 685-86. Bean initially "feathered" his brakes and at no time did his trailer slide or fishtail. RP 688-889. Bean saw Cook was braking, but his truck was sliding on the snow and not slowing down. RP 654. Bean estimated Cook's speed at 25-30 miles per hour and Cook was not hugging the inside of the curve. RP 659, 678. It took Bean about six seconds to close the gap with Cook's vehicle and he was traveling at a speed that would allow him to stop within about 150-200 feet. RP 647-48.

The Tarbert log truck was empty at the time of the accident but weighed 32,000 pounds, almost five times as much as Cook's GMC that weighed only about 6,500 pounds. RP 621-22, 1225-26. By the point of impact Bean had nearly stopped the log truck, but Cook was moving faster and when Cook hit the log truck the rear of his GMC truck bounced slightly over toward the uphill bank. RP 656, 680. This was corroborated by Sergeant Erdman who also described how it looked as if the back of Cook's GMC truck had "popped out" when it came to rest. RP 561-62.

Because the two vehicles were touching after the impact, Bean backed the log truck away a short distance so he could have access to check on the other driver. RP 657, 702.

At no time before the impact did Bean observe Cook driving off to the right side and into the uphill embankment as Cook described. RP 679. Further, Cook was still moving and had not come to a stop at the moment of impact. RP 679. Bean also confirmed that his log truck's right side tires were within six to eight inches of the very steep drop off at the time of the accident. RP 693. In other words, Bean could not have moved any farther to the right without going down the steep hillside. While Bean initially though they might miss one another, they did not because although Bean was as far to the right as possible, Cook was not. RP 694. Bean believes Cook could have avoided the accident by turning to his right into the uphill berm. RP 655.

Shannon Wolfrum, a plow driver for Stevens County, was one of the first to arrive at the scene after the accident. Wolfrum noted about 40-50 feet of skid marks leading down the hill to where Cook's GMC truck was resting. RP 718. Wolfrum noted about 10-15 feet of skid marks under Bean's truck, which had been moved back about four feet. RP 719. Like Bean and Erdman, Wolfrum also noted that the impact had moved Cook's truck "sideways a little bit" so its back passenger wheel had

moved sideways toward the hillside berm RP 718, 720. Essentially, the impact moved Cook's vehicle a little bit back and a little bit to the side. RP 723.

Wolfrum described that on the hillside to Cook's right there was fresh snow from that morning and there were no marks to suggest that Cook had driven his truck up onto the hillside or scraped along it. RP 720. Don Larson, another logger working for Tarbert that day also arrived shortly after the accident and saw the same thing: fresh undisturbed snow on the hillside to the right of Cook's truck and the truck pushed slightly back with its rear tires angled toward the hillside. RP 1131-32.

Contrasting this testimony is Cook's testimony at his deposition – which he repeated at trial – asserting that he was driving 20 miles per hour when he saw the Tarbert truck 300-400 feet away and began braking. RP 1047-48. Cook claimed, quite differently from what he reported the day of the accident, that he hit the bank to his right and came to a complete stop before the log truck hit him. RP 1050-51.

Tarbert's expert Ed Pool testified regarding his opinions as to the range of speed for the two vehicles at impact, placing Cook's speed at 17 to 21 miles per hour and Bean's speed at 5 to 9 miles per hour. RP 1143. He also noted that the force of the impact with Cook's much smaller vehicle and the Tarbert 32,000 pound log truck only moved Cook's GMC a few feet backwards while slightly rotating the rear of Cook's GMC toward the hillside. RP 1148-49. Pool found no evidence consisted with Cook's claim that he was pushed back 47 feet by the force of the impact. RP 1149. Pool also explained that Bean would have been able to first see Cook's truck when it was about 320 feet away. CP 1152. Cook, on the other hand, first saw Bean when he was about 132 feet away. CP 1152. Taking into account sight distance and stopping distance at various speeds and under the snowy conditions at the time, Pool concluded that a safe speed for Bean as he approached the curve was 25 miles per hour, and for Cook was 14 miles per hour. CP 1154. Based on all of the evidence, Pool concluded that Cook was traveling too fast for conditions. CP 1153. Pool also explained that the Cook vehicle's airbag control module would have provided important information allowing an accident reconstructionist to more accurately estimate the speed of the vehicles. CP 1155-56.

Stevens County's accident reconstruction expert, Jon Hunter had similar opinions. Hunter opined that the speed of one or both of the

vehicles was the cause of the accident, not the plowing of the roadway. RP 1201-02. Hunter estimated Cook's speed at 12 to 22 miles per hour at impact and the Tarbert log truck at 8 to 15 miles per hour at impact. RP 1203-04, 1208. Like Pool, he explained that Cook's GMC had an airbag control module, which would have provided five seconds of detailed pre-crash information including Cook's speed. RP 1205-06. Hunter was emphatic, that under any scenario Cook's GMC had to be going faster than the log truck. RP 1207-08. Moreover, Tarbert's 32,000 pound log truck weighed five times as much as Cook's 6,500-7,000 pound GMC truck. RP 1225. Hunter further explained that the slower Cook was going, the slower the Tarbert truck would be going. For example, if Cook was going 12 miles per hour at impact, then Bean in the Tarbert truck was going 8 miles per hour. RP 1208.

In forming his opinions Hunter viewed photos of Cook's damaged truck that were taken shortly after the accident along with crush profile measurements by "one of the experts." RP 1202-03. Hunter explained that he would have had exact speeds, rather than broad ranges, had data from the airbag control module in Cook's truck been available. RP 1240. Hunter asked to inspect Cook's truck when he was hired by Stevens County in February 2012, but he was unable to perform an inspection because the truck was no longer available. RP 1240-41.

The closing arguments focused primarily on the varying accounts of the circumstances of the accident, and only briefly touched on the expert Cook chose not to call. Tarbert Logging's counsel argued:

> [I]n March of 2009. Josh Cook was storing this truck and an expert came out and took photos and measurements, an expert who didn't download the data from that airbag control module that would have told you exactly how fast Ray Cook was going in the five seconds leading up to the impact. The lawsuit was later filed in December of 2010, and the Cook family disposed of the pickup, parted it out, sold it off, before either of the defense experts were able to access it and download that airbag control module data.

RP 1308.

Stevens County also briefly noted in closing argument the lack of any expert refuting the opinions of Pool and Hunter with respect to the speed of the vehicles.

> Now, you have heard some testimony about an expert witness, and Ms. Bloomfield went over this and I'm not going to belabor the point, but in March of 2009 you heard that Mr. Cook had an expert examine his vehicle. You heard that Mr. Cook, in March of 2009, knowing that he was going to bring a lawsuit, had the expert photograph his vehicle and take measurements of the crush depth of his vehicle. And you recall I asked Mr. Hunter, I said, Why would an expert take measurements of the crush depth? And he told you that's how experts determine speed upon impact.
>
> You also heard that Mr. Cook's vehicle was equipped with an airbag control module when the expert reviewed or looked at that truck back in March of 2009. You heard that that airbag control module would have told us exactly how fast Mr. Cook was going the five seconds before this collision and at the point of impact. But

> unfortunately, as you also heard, that truck, after plaintiff's expert examined it, was disposed of. It was parted off and sold, so the defense experts didn't have the opportunity to look at that airbag control module. When you go to the jury room to deliberate, you can take whatever inference you want from Mr. Cook's actions in having an expert examine that vehicle and then sell that vehicle.
>
> I'm getting close. We've talked a lot about experts and there were two people and only two people that were eyewitnesses to this accident. Those two people are Shane Bean and Ray Cook. So, ladies and gentlemen, if you want to throw out all the expert testimony about what caused this accident, let's look at the two eyewitnesses' testimony in this case.

RP 1332-33.

D. The Trial Court Denied the Proposed Spoliation Instruction and Did Not Instruct the Jury to Make Any Adverse Inference.

During trial Stevens County, joined by Tarbert and Bean, renewed its request that the trial court instruct the jury that it should make an adverse inference from the fact that Cook had allowed relevant evidence to be destroyed after he had a duty to preserve the evidence. RP 746-52; CP 342-350. Tarbert Logging joined in that argument and also asked that the trial court give the jury a spoliation instruction. CP 335-37, 342-45; RP 752-56. Ultimately the trial court disagreed and the only sanction for the spoliation was the earlier order excluding certain opinions of Cook's expert Richard Gill and allowing the defense to elicit testimony that Cook had an expert examine the vehicle before it was destroyed. RP 771-74; CP

119-25 (Order excluding certain opinions by Cook's expert); 351-353 (Order denying requested spoliation instruction and permitting testimony about expert inspection and destruction of truck).

IV. ARGUMENT

This court reviews "a trial court's decisions regarding sanctions for discovery violations for abuse of discretion." *Homeworks Constr., Inc. v. Wells,* 133 Wn. App. 892, 898, 138 P.3d 654 (2006). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Similarly, this court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Gresham,* 173 Wn.2d 405, 419, 269 P.3d 207 (2012). However, error in admitting evidence is harmless "'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State v. Bourgeois,* 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting *State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Thus, Cook bears the burden of proving both that the trial court abused its discretion in excluding certain opinions by Cook's expert Gill as a sanction for spoliation and in admitting evidence that Cook had an expert who examined his vehicle and did not preserve its airbag control

module, and he must also establish the prejudicial effect of that evidence. *State v. Brown,* 113 Wn.2d 520, 554, 787 P.2d 906 (1989). In other words, even if the evidence was admitted in error, Cook must show a substantial likelihood that the evidence at issue affected the jury's verdict. *Id.* at 561. This court evaluates the challenged evidence in the context of the entire body of evidence admitted in the case, the issues in the case, and the instructions given to the jury. *Id.*

A. The Trial Court Properly Found Spoliation by Cook.

Spoliation is a legal conclusion finding that "a party's destruction of evidence was in bad faith or under other circumstances such that admissibility and the other negative consequences . . . should follow." 5 WASHINGTON PRACTICE: EVIDENCE § 402.6 at 286 (5th ed. 2007). While Cook focuses on the trial court's finding that his destruction of evidence was not intentional or in bad faith, he ignores Washington cases explaining that "spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith." *Homeworks,* 133 Wn. App. 900 (citing *Henderson v. Tyrell,* 80 Wn. App. 592, 605, 910 P.2d 522 (1996)). As explained in *Henderson*,

> We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be

> unfavorable to him. In so holding, we have noted, "'[t]his rule is uniformly applied by the courts and is an integral part of our jurisprudence.'"

80 Wn. App. At 606-07 (citations omitted).

A party may be responsible for spoliation of evidence without a finding of bad faith if the party had a duty to preserve the evidence at the time it was destroyed. *Homeworks,* 133 Wn. App. at 900. To assess a party's culpability for spoliation the trial court can consider, in addition to bad faith, "whether that party had a duty to preserve the evidence, and whether the party knew that the evidence was important to the pending litigation." *Homeworks,* 133 Wn. App. at 900. Here, Cook knew this evidence was important and had control of the vehicle – he preserved the vehicle indoors and in one piece for his own expert to examine it. CP 107-09; RP 1068. Josh Cook, who was storing the vehicle, spoke to Cook to obtain permission from Cook's attorney before disposing of it. CP 111-12. Cook claimed he had no idea it was parted out until later. RP 1068.

In *Henderson v. Tyrell,* the spoliation issue was the destruction of a car two years after the accident **without either party having had an expert examine the car**. The investigative value of the car was "questionable" and numerous photos of the car were available to both parties' experts. *Henderson*, 80 Wn. App. At 608-09. Here, the investigative value of the GMC's airbag control module was critical. The

main dispute was the speed of the two vehicles and which of the two vehicles was traveling too fast for conditions. The testimony was clear that this airbag control module would have allowed exact determination of Cook's speed at the moment of impact (and in the five seconds leading up to impact) as well as a precise calculation of the log truck's speed once Cook's actual speed was known. RP 1205-06, 1240. The trial court expressly found that Cook did not act in bad faith, but also found that Cook had a duty to preserve the evidence in question at the time it was destroyed. CP 124-25.

In determining the appropriate sanction for Cook's spoliation of evidence, the trial court weighed (1) the potential importance or relevance of the missing evidence and (2) Cook's culpability or fault. "After weighing these two general factors, the trial court uses its discretion to craft an appropriate sanction." *Homeworks,* 133 Wn. App. at 899. Here because the speed of each vehicle was a hotly contested issue, the missing evidence was "undeniably" of critical importance. RP 766. The trial court stated, "I understand the centrality of the issue on the speed. That's quite clear. I think that factor's well satisfied." RP 761-62. But another important consideration for the trial court was "whether the loss or destruction of the evidence has resulted in an investigative advantage for one party over another, or whether the adverse party was afforded an

adequate opportunity to examine the evidence." *Henderson,* 80 Wn. App. at 607 (citations omitted).

Without a doubt, Cook's expert, who examined his GMC and ignored the airbag control module data which would have provided Cook's exact speed, intended to opine that there was "no physical evidence" to contradict Cook's statement that he was stopped at the time of the accident. *See* Appendix A (Gill Report Opinion 3, subopinion 6). In addition, Cook was going to be testifying that he was traveling slowly and came to a complete stop before he was hit by the logging truck. Gill also testified that he knew that Cook's vehicle had an airbag control module that would provide speed data when he inspected it. CP 283-84. The airbag control module data would have provided conclusive evidence to refute Cook's testimony that he was stopped at impact.

B. The Trial Court Correctly Assessed the Proper Sanction for Cook's Spoliation of Evidence.

Federal court decisions in the Ninth Circuit parallel Washington's approach to addressing spoliation issues, outlining a range of available sanctions including (1) exclusion of evidence, (2) admission of evidence of the circumstances of the spoliation, (3) instructing the jury that it may infer that the spoiled evidence would have been unfavorable to the responsible party, or even (4) dismissing claims. *See Peschel v. City of Missoula,* 664 F. Supp. 2d 1137, 1141 (D. Mont. 2009) (citing *Glover v.*

BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). Here, the trial court carefully considered Cook's culpability, the relevance of the evidence, and crafted a remedy that was the least severe – excluding certain opinions of Cook's expert and considering a spoliation instruction. CP 123-24. Ultimately, the trial court declined to instruct the jury that it should take a negative inference against Cook as to the destroyed airbag control module, but allowed the defense to question witnesses to establish that Cook had an expert examine his vehicle, the vehicle was later destroyed without defense experts having examined it, and the vehicle had an airbag control module that would have provided definitive information about Cook's speed. CP 351-53l; RP 765-74. Cook's only objection was that the jury should not be allowed to hear that Cook had an expert inspect the truck, complaining that mere mention of that fact would be "highly prejudicial." RP 764, 773-74.

The circumstances in this case are straightforward: after inspection by the plaintiff's expert key evidence ---- the airbag control module from Cook's GMC ----- was intentionally or negligently destroyed before defense experts had the opportunity to examine it. Cook knew it was relevant in March 2009 when he had his own expert examine the vehicle for the purpose of calculating the speed at the time of impact. There is no dispute that Cook's speed was an issue, the airbag control module would

have provided Cook's precise speed at impact and in the five seconds before impact, and would have allowed a precise calculation of the other vehicle's speed at impact. RP 1240. Thus, Stevens County and Tarbert established that: (1) the destroyed evidence was highly relevant; (2) Cook's expert had an opportunity to examine the unaltered evidence; and (3) even though Cook was contemplating litigation against the Defendants and knew the evidence was relevant, Cook allowed the evidence to be intentionally destroyed without providing an opportunity for inspection by either Defendant.

Federal courts in Washington apply similar standards and *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368–70 (9th Cir. 1992) (Wash.) is instructive. In *Unigard*, a boat was destroyed by fire and the owner's insurer (Unigard) had experts investigate the cause and origin of the fire. The experts concluded that an unattended heater on the boat was the cause. After paying the owner for the loss, Unigard's adjuster authorized disposing of the heater and salvage sale of the boat believing there was no viable claim against the heater manufacturer. Two years later Unigard hired a lawyer who decided the heater manufacturer had not adequately warned of the danger of operating the heater unattended and Unigard filed suit against the heater manufacturer. Even though there was no bad faith involved in the destruction of the heater, the

trial court excluded the opinions of the insurer's experts as a sanction for spoliation because the heater manufacturer's experts were unable to examine the heater and provide a full defense. Lacking any other causation evidence against the heater manufacturer Unigard's claims were then dismissed on summary judgment. In affirming the trial court's spoliation sanction of excluding the experts' opinions, the Ninth Circuit noted that there was no dispute that the insurer had destroyed evidence and had also precluded the defense from having any opportunity to inspect the evidence. *Id.* at 369. Those are the essentially the same facts the trial court faced here. The trial court properly, for similar reasons, fashioned the same sanction as in *Unigard.*

Cook argues that the defense was not prejudiced by the destruction of the evidence and he obtained no "investigative advantage." The test for prejudice is whether there is a reasonable possibility, based on concrete evidence, that access to the evidence which was destroyed or altered, and which was not otherwise obtainable, would produce evidence favorable to the objecting party." *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.,* 174 F.3d 801, 804 (6th Cir. 1999), citing *Bright v. Ford Motor Co*, 578 N.E.2d 547 (Ohio App. 1990). While Cook claims he was stopped, the expert testimony of Hunter and Pool confirmed he was moving at the time of impact – and was moving faster than the Tarbert Logging truck

was moving. Nonetheless, Cook claimed that he was completely stopped when the Tarbert Logging truck hit him and pushed him back 47 feet. The data from the airbag control module could have proved conclusively Cook's speed – and indirectly would have established the other vehicle's speed. Because that data was lost, the Defendants lost the ability to use this key information to rebut Cook's testimony or provide more definitive speed testimony than the experts' ranges.

Cook suggests that it was somehow unfair that other experts relied on the photographs and measurements Gill obtained before the vehicle was destroyed. (App. Br. at 20) To the extent Cook argues this was somehow improper, he never raise this objection at trial. Appellate courts will generally not consider issues raised for the first time on appeal. *Brundridge v. Fluor Fed. Servs., Inc.,* 164 Wn.2d 432, 441, 191 P.3d 879 (2008); *In re Guardianship of Cornelius*, ____ Wn.2d ___, 326 P.3d 718, 728 (2014); RAP 2.5(a). Moreover, Gill was a testifying expert who was deposed and the facts and data he gathered before Cook destroyed the vehicle would have been discoverable under Civil Rule 26(b)(5), since it would have been not only impracticable, but impossible to obtain the data by other means after the vehicle was destroyed. *In re Detention of West*, 171 Wn.2d 383, 408-09, 256 P.3d 302 (2011); *Harris v Drake*, 152 Wn.2d, 480, 486, 99 P.3d 872 (2004).

Here, the trial court properly considered the spectrum of potential remedial sanctions, including exclusion or a spoliation instruction (the most severe sanction of dismissal was not requested) and chose the middle ground. Where a party controls evidence and fails to preserve it without satisfactory explanation, the only inference the finder of fact may draw is that such evidence would be unfavorable to that party. *Pier 67, Inc. v. King County,* 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977). While the trial court could also properly have instructed the jury on this negative inference, it declined to do so limiting the sanction to excluding certain speed opinions by Cook's accident reconstruction expert and allowing the Defendants to establish minimal facts surrounding the examination and destruction of Cook's vehicle.

C. Even if the Trial Court Erred in Allowing Reference to Cook's Expert's Examination of the Vehicle, the Error Was Harmless.

Even assuming, for purposes of argument, that it was an abuse of discretion and error to admit evidence that Cook had an expert examine the vehicle before it was destroyed, any such "error" was harmless. Thus, the jury's verdict should be affirmed. ER 103, RAP 2.4(b). Cook could have called his accident reconstruction expert Gill to testify as to numerous other opinions, but elected not to do so. Although "speed related" opinions were excluded, Cook was also arguing that Tarbert's driver Bean was negligent in crossing the centerline and being inattentive.

See CP 1278-79 (Court's Instruction No. 2). None of Gill's opinions regarding his reconstruction of the accident (other than opinions about the relative speeds of the two vehicles) were excluded. These included Opinion 1 and all sub-opinons, Opinion 2 and all sub-opinions and Opinion 3 and sub-opinions 1-3 and 5. *See* Appendix A. Thus, Gill could have offered his expert opinions that Bean was over the centerline, Bean's testimony that he was traveling 25-30 was too fast for conditions, Bean should have been driving with emergency flashers, and Bean was not able to stop safely if he was traveling 25-30 when he first saw Cook. *Id.* For strategic reasons, Cook decided not to call Gill to testify.

However, that does not mean that the fact that Cook had an expert inspect the vehicle and take photographs and measurements before destroying it was not relevant. Cook claimed he had no idea that there was an airbag control module with speed data at the time the truck was destroyed. RP 1067. Cook also tried to suggest it was not his truck and claimed he asked several times whether it should be retained. CP 1068. Without the jury hearing that an expert inspected the vehicle on Cook's behalf, the jury could conclude he was completely innocent and would leave the jury with the impression that Cook had no idea that there was any need for an expert to examine the truck. Excluding that key information would prevent the jury from assessing what importance or

weight it should give the fact that key evidence was not preserved by Cook.

When a trial court makes an erroneous evidentiary ruling, the question on appeal becomes "whether the error was prejudicial, for error without prejudice is not grounds for reversal." *Brown v. Spokane County Fire Prot. Dist. No. 1,* 100 Wn.2d 188, 196, 668 P.2d 571 (1983). An error will be considered not prejudicial and harmless unless it affects the outcome of the case. *Brown,* 100 Wn.2d at 196. "[I]mproper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole." *Hoskins v. Reich,* 142 Wn. App. 557, 570, 174 P.3d 1250 (2008). Essentially, Cook asserts the mere mention of the fact that he had an expert examine the vehicle and take measurements for calculating speed was so prejudicial that it should, on balance, have been excluded and was the reason he lost.

This limited evidence was not unduly prejudicial under ER 403, especially in light of the overwhelming evidence offered to show Cook's speed was excessive, he was across the centerline and he was not being truthful about the circumstances of the accident. The trial court was acted well within its discretion in allowing this limited information without providing an instruction that the jury should take a negative inference from the fact that Cook had destroyed key evidence. The trial court

carefully considered and balanced the appropriate factors, and none of the parties made any reference or allusions to any "opinions" by Cook's expert.

Based on the evidence admitted at trial, both defense counsel noted in closing argument that the airbag control module was destroyed after Cook's expert examined the vehicle. RP 1308, 1332-33. Neither argued about "lack of opinions" from the expert in question, but only pointed out that Cook had an expert examine the vehicle right after the accident, key evidence about Cook's speed had not been preserved, and the jury could "take whatever inference you want" from those facts. *Id.*; RP 1333. While it was not openly argued in this case, it would have been proper to comment on Cook's failure to provide expert testimony to rebut evidence in the record. *See, e.g., State v. Bebb,* 44 Wn. App. 803, 815–16, 723 P.2d 512 (1986) (not improper to comment on defendant's failure to call handwriting expert or lay witness familiar with his handwriting to rebut State's expert testimony on handwriting). Similarly, Cook was perfectly capable of arguing, as defense counsel did – you don't need to rely upon experts, we have eyewitness testimony from the two drivers about speed.

Error in admitting evidence is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *State v. Brown,* 113 Wn.2d 520, 554, 782

P.2d 1013, 787 P.2d 906 (1989) (quoting *State v. Smith,* 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Here, there was eyewitness evidence from both drivers regarding speed, as well as expert testimony from Hunter and Pool regarding speed range estimates of the two vehicles. Cook was also confronted with the fact that he gave one version of events the day of the accident, and a different version at his deposition. While Cook could have called Gill to provide other opinions, and to explain that he was not qualified to download airbag control module data, he elected not to do so either in his case in chief or in rebuttal. In light of the entire evidence on this issue and other evidence on liability admitted in this case, the fact Cook had an expert examine the vehicle was of little significance in the light of the evidence as a whole.

D. Tarbert Is Entitled to Fees on Appeal Under RAP 18.1.

Tarbert was the prevailing party in this action having obtained affirmative relief below. Should Tarbert prevail on appeal, pursuant to RAP 18.1, and RCW 4.84.010, Tarbert requests an award of its costs including statutory attorneys' fees incurred in this appeal.

V. CONCLUSION

The trial court carefully and with serious consideration fashioned a limited remedy for Cook's spoliation of evidence weighing the critical nature of the evidence, as well as the level of culpability for its

destruction. This was not an abuse of discretion and the jury heard all of the conflicting evidence and found in favor of Defendants. There is no suggestion that a brief mention of the fact that plaintiff had an expert examine the vehicle and take photographs and measurements before it was destroyed was somehow unfairly prejudicial. Plaintiff chose not to call that expert for the many other opinions he had provided other than the relative speed of the vehicles, because the trial court did not exclude those opinions. Plaintiff's failure to convince a jury on hotly disputed facts was not the result of some unfair prejudice, but the reasoned consideration of the substantial evidence contrary to Plaintiff's view of events. The decisions of the trial court should be affirmed because there was no abuse of discretion.

Dated this 28th day of July, 2014.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By Stephanie Bloomfield
Stephanie Bloomfield, WSBA No. 24251
sbloomfield@gth-law.com
Attorneys for Respondents Tarbert and Bean

CERTIFICATE OF SERVICE

I, Gina Mitchell, declare under the penalty of perjury of the laws of the State of Washington that on July 28, 2014, I caused the Brief of Respondent Tarbert Logging, Inc. to be served via email, pursuant to the parties' mutual consent for service by email, and by first-class mail as follows:

Attorneys for Appellants:

Anderson Law Office
Dayle Anderson
Ken Kato
1020 N. Washington
Spokane WA 99201
dayleandersen@gmail.com
khkato@comcast.net

Attorneys for Respondent Stevens County:
Michael McFarland
1250 Pacific Ave., Suite 105
Spokane, WA 99201
mmcfarland@ecl-law.com

Gina Mitchell
Gina Mitchell

APPENDIX

Applied Cognitive Sciences
Human Factors Engineering
A CONSULTING GROUP

September 29, 2012

F. Dayle Anderson
c/o Andersen Stabb
Hilo Lagoon Centre
120 North Washington
Spokane, Washington 99201

Re: Cook vs. Stevens County

Dear Mr. Anderson:

As you requested, I have reviewed the file information your office provided concerning the above referenced collision. In addition, I had the opportunity to inspect the site of the subject collision, as well as Mr. Cook's pickup, wherein I took a number of photographs and measurements that were relevant to understanding the underlying causes of this collision.

The purpose of this report is to briefly summarize my findings and opinions to date. It is my understanding that discovery on this matter is continuing. As such, I reserve the right to expand and/or modify my analysis and opinions based on any additional discovery material that I am provided.

Opinion 1: At the time of the collision, the condition of the subject roadway created an unreasonable risk of harm to the traveling public; this inherently dangerous condition was the primary cause of the collision.

1. Stevens County made the decision to maintain/plow the roadway during the winter months so as to keep it open for travel by the public; as such, it had an obligation to maintain/plow the road in a reasonably safe manner.
2. The roadway width in the immediate area of the collision had only been plowed to a width of approximately 15 feet; yet the travel portion of the roadway was 20 feet or more, plus approximately 1 foot wide shoulders on either side. In other words, the roadway should have been plowed 50% wider than it was.
3. A plowed width of only 15 feet is too narrow to permit safely two-way traffic, particularly if one or more of the vehicles are commercial vehicles.
4. Motorists were not warned that the roadway narrowed to a single lane of travel.
5. The county knew or should have known that commercial vehicles were using the subject roadway (e.g. ongoing logging operations); use of the subject roadway by commercial vehicles exacerbated the hazardous condition created by the narrow road.

6. Given the nominal width of 8 feet for a commercial vehicle, even if the passenger side tires were at the extreme right hand of the roadway, the vehicle would still be over the "centerline" of the roadway.
7. The roadway leading up to the collision site had been plowed to a wider width sufficient to allow for two-way traffic; this would have created a false sense of security in drivers as they approached the area where the roadway narrowed to the point that it would no longer support two-way traffic.
8. The immediate area of collision was on a blind corner, which further exacerbated the hazardous condition created by the deficient plowing. Drivers would have less of an opportunity/advance warning to view oncoming vehicles, as well as to observe the narrowing of the roadway. In fact the curvature of the roadway would naturally "camouflage" the narrowness of the roadway.
9. The steep bank on one side of the roadway, along with the steep drop-off on the other side of the roadway, would tend to direct drivers more towards the center of the roadway (e.g. avoidance of a roadside hazard); as such, given the 15 foot width of the roadway, drivers would naturally be pushed over the "centerline" of the roadway. In other words, it would be expected that even passenger vehicle drivers (i.e. nominal width of 6 feet) would be crowding the centerline of the roadway.
10. The steep bank on one side of the roadway, along with the steep drop-off on the other side of the roadway, along with narrow shoulders (i.e. approximately 1 foot) meant drivers had virtually no escape route if oncoming traffic was over the centerline of the roadway.
11. The roadway was icy and had not been sanded; as such, the stopping distances would have been significantly increased, which is particularly dangerous on a blind curve on a roadway that is not plowed wide enough to support two-way traffic.

Opinion 2: Mr. Bean was driving across the centerline of the roadway, too fast for the conditions, and/or inattentive to his driving; such actions/inactions where a significant contributing factor to this collision.

1. Mr. Bean was a trained professional driver with a CDL; his training included training in safe driving and defensive driving. As such, he should have been better able to appreciate the hazardous conditions associated with the subject roadway than the general public.
2. As the operator of a large, commercial vehicle, Mr. Bean had an increased obligation to drive in a safe and defensive manner.
3. This was the third time Mr. Bean had driven over this portion of the roadway that morning (the collision occurred just after 10 AM); as such, he knew that the roadway narrowed to one-way traffic at the site of the collision.
4. Mr. Bean knew that he was coming into a blind curve, with a roadway that was not wide enough to support two-way traffic.
5. Given this knowledge, Mr. Bean knew that the only way for him to drive through the narrow passageway on the blind curve was to cross the centerline of the roadway, which was in direct violation of Tarbert Logging's safety rules.
6. At the time of the collision, Mr. Bean's truck was across the centerline.

7. Mr. Bean entered the blind curve at an excessively high rate of speed given the conditions; in his deposition, Mr. Bean estimated his speed at 25 to 30 MPH as he entered the blind curve; a blind curve where he knew that the roadway was not wide enough for two-way traffic.
8. Not only should Mr. Bean have decreased his speed to a very slow rate, he should have also activated his emergency flashers to alert other drivers to the hazard created by his vehicle (i.e. driving over the centerline; driving at an excessively slow speed the he should have been going), yet he failed to do so.
9. The physical evidence (e.g. the collision scene photographs), as well as the eyewitness testimony support the conclusion that Mr. Bean was not stopped at the time of the collision.
10. Mr. Bean knew that a Tarbert Logging safety rule required him to drive at a speed that would enable him to stop within one-half of the site distance; Mr. Bean violated this rule knowing that he was entering a blind curve that was not plowed wide enough to support two-way traffic.
    a. Based on my site inspection, the nominal site distance at the scene was approximately 200 feet; clearly it was significantly less than 300 feet. As such, Mr. Bean should have been driving at a speed that would have enabled him to stop with 100 feet; certainly less than 150 feet.
    b. Given Mr. Bean's testimony that he was driving at 25 to 30 MPH, along with the icy road conditions (i.e. an effective deceleration rate of 0.2 to 0.3 for a commercial vehicle), he would have needed approximately 190 to 250 feet to stop.
    c. Alternatively, Mr. Bean testified that when he first observed Mr. Cook's vehicle he reacted by feathering the brakes for 6 to 7 seconds; using the same assumptions as above, along with an average deceleration from feathering the brakes of 0.15g, in 6.5 seconds Mr. Bean would have traveled approximately 215 feet and his speed at the end of that 6.5 seconds would have been 10 MPH.

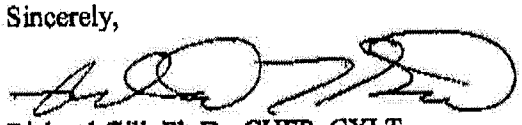
Opinion 3: Based on the information that is available to me, there is insufficient information to conclude that Mr. Cook's actions and/or inactions were a significant contributing factor to this collision.

1. There is no evidence to suggest that Mr. Cook knew that roadway was not properly plowed that morning; that is, he did not know that the roadway would not support the passage of two vehicles at the same time. As such, Mr. Cook had no reason to be abnormally vigilant as he approached the collision scene.
2. Mr. Cook testified that he had slowed to 20 MPH as he approached the collision scene; he also testified that he was looking for a Tarbert Logging truck having just been passed by another one coming uphill. As such, Mr. Cook's total stopping distance for his pickup would have been approximately 65 feet. In other words, Mr. Cook would have been able to stop well short of half the nominal viewing distance.
3. In light of the foregoing, it was reasonable for Mr. Cook to approach the collision scene at 20 MPH.
4. There is no physical evidence that is contradictory to Mr. Cook's estimate of an approach speed of 20 MPH.

5. Mr. Bean estimated Mr. Cook's approach speed at 25 to 30 MPH, which would correspond to a total stopping distance of approximately 100 feet, which is not unreasonable.
6. Mr. Cook testified that he was fully stopped at the time of the collision, which is consistent with the foregoing analysis; furthermore, I am not aware of any physical evidence to the contrary.
7. In light of all of the foregoing, there is no basis to conclude that the speed at which Mr. Cook was driving was a significant contributing factor to this collision.
8. Mr. Cook testified that he was as far to the right hand side of the roadway as possible at the time of the collision; I know of no physical evidence to the contrary.
9. Given a plowed roadway width of 15 feet, and a nominal width of 6 feet for Mr. Cook's pickup, if his vehicle was to the far right hand side of the roadway, then he would not have been across the centerline of the roadway at the time of the collision.
10. In light of all of the foregoing, there is no physical basis to conclude that Mr. Cook's lateral lane position was a significant contributing factor to this collision.

Please let me know if you have any questions or if I can be of any further assistance in this matter. I look forward to continuing to work with you on this matter.

Sincerely,



Richard Gill, Ph.D., CHFP, CXLT
President and Chief Scientist