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No. ~~82248-4~~

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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TIMOTHY J. RUIZ,

Appellant.

vs.

STATE OF WASHINGTON; WASHINGTON STATE PATROL;  
HANCOCK TIMBER RESOURCE GROUP, a division of  
Hancock Natural Resource Group, Inc., a Delaware  
corporation; HANCOCK FOREST MANAGEMENT INC.; a  
Delaware corporation; HANCOCK NATURAL RESOURCE  
GROUP, INC., a Delaware corporation; WHITE RIVER  
FORESTS LLC, a Delaware corporation; and WHALEN  
TIMBER, Inc., a Washington corporation,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR KING COUNTY

Cause No. 07-2-084746-KNT

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REPLY BRIEF

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STATEMENT OF THE CASE

Appellant adopts the statement of the case set forth in his opening brief.

ARGUMENT

The respondents claim immunity from liability based upon RCW 76.09.330, and also claim that the holdings in Albin v. National Bank of Commerce, 60 Wn.2d 745, 375 P.2d 487 (1962) and Lewis v. Krussel, 101 Wn.App. 178, 2 P.3d 486 (2000) support summary judgment in this case. However, because the respondents created the danger by cutting down the surrounding trees - with full knowledge that the remaining trees in the RMZ would become significantly more likely to fall without the protection of the trees that they cut - RCW 76.09.330 does not provide immunity and holdings in Albin and Lewis actually favor Mr. Ruiz.

A. Because Respondent Negligently Cut Trees That Would Have Shielded Rmz Trees from the Wind, Respondents Are Not Immune under RCW 76.09.330.

Because respondents knew or should have known that they would have to leave standing trees in the RMZ, they were negligent when they cut down

surrounding trees that would have protected the RMZ trees from the wind. As stated above, respondents are immune from lawsuits stemming from dangerous trees in RMZ's notwithstanding common law or statutory violations. In his original brief, Mr. Ruiz outlined the elements of a common law claim for negligence: Duty, breach and injury proximately caused by the defendant. Because material facts exist which suggest that respondents may have breached their common law duty of due care - and that breach was the proximate cause of Mr. Ruiz's injuries - respondents are not immune.

As Mr. Ruiz has argued all along, the issue isn't whether the respondents were negligent in allowing the trees to continue standing in the RMZ, *the issue is whether the respondents negligently caused the trees in the RMZ to become more dangerous than they otherwise would have been.* As stated in Mr. Ruiz's original brief, genuine issues of material fact support Mr. Ruiz's claim that respondents were aware that cutting trees surrounding the RMZ might cause the RMZ trees to be vulnerable to high winds. The

evidence suggests that, had the respondents not cut every last tree surrounding the RMZ border, a protective group of trees could have been left to ensure that the RMZ trees were guarded from the wind. Respondents are not immune if they made the RMZ trees more dangerous, just as they would be if they dumped chemicals into the nearby soil and caused the roots of the RMZ trees to weaken or acted in any other manner increasing the likelihood that RMZ trees would cause injury.

Mr. Ruiz has outlined the duty owed by the State and by those who own land adjacent to public roads. Additionally, he has identified several witnesses who have testified regarding their concerns about the trees left standing on the Bridgecamp plat. Respondents' claim of immunity is therefore nullified because evidence exists that they created a situation where the RMZ trees became more dangerous. Because genuine issues of material fact exist which support a prima facie case of negligence, summary judgment was inappropriate in this case.

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B. Because Respondents Had Actual or Constructive Notice That the Rmz Trees Would Become Dangerous Without Trees Protecting Them from the Wind, Albin and Lewis Support Petitioner's Claim.

In Mr. Ruiz's original brief, he outlined the rules from both Albin and Lewis, where the court held that a governmental entity or landowner may be liable if it has actual or constructive notice of a dangerous condition and held that a landowner who alters the natural condition of trees on his/her property is responsible for any damage caused by those trees if they fall.

The requirement of actual or constructive knowledge is satisfied by a review of the expert testimony of Galen Wright. Mr. Wright reviewed the accident scene and after observing the condition of the area, opined that the RMZ trees - including the tree that struck Mr. Ruiz's vehicle - were predisposed to failure because all the trees surrounding the RMZ were cleared. Mr. Golden, of the Department of Transportation was also aware of the hazards created by logging an entire area and leaving RMZ trees vulnerable to the wind. Because the State had actual notice

that the trees that were left were more dangerous than other trees along the area and were subject to being blown down by the wind, the State cannot claim protection under Albin and Lewis.

Additionally, respondents Hancock had notice based upon Mr. Golden's communication with Mr. McBride as well as Mr. McBride's knowledge as to the dangerous condition created by leaving an unprotected stand of trees. Mr. McBride's understanding is acknowledged by Mr. Whalen's testimony that leaving an open, unprotected strand of trees vulnerable to the winds creates a foreseeable danger. Accordingly, both respondents owed a duty to Mr. Ruiz which they breached and which breach proximately caused his injuries. Because these material facts exist, summary judgment should have been denied.

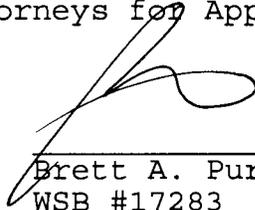
#### CONCLUSION

Because respondents created a situation where trees in an RMZ became more dangerous than they would have been if respondents had acted with ordinary care, they cannot claim immunity under RCW 76.09.330. Additionally, because they had both actual and constructive knowledge of the

possible dangers, the holdings from Albin and  
Lewis do not protect respondents from liability.

RESPECTFULLY SUBMITTED this 11th day of June,  
2009.

HESTER LAW GROUP, INC. P.S.  
Attorneys for Appellant

By: 

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CERTIFICATE OF SERVICE

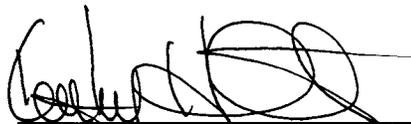
Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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