

64829-2

64829.2

No. 64829-2

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION ONE**

---

RONALD W. MOE, Respondent,

v.

GARY D. GRABER and JANE DOE GRABER, husband and wife  
and the marital community composed thereof; and JOHN DOES  
and JANE DOES 1 through 10, Appellants.

2010 OCT 7 AM 10:18  
COURT OF APPEALS  
STATE OF WASHINGTON  
CLERK

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR SNOHOMISH COUNTY  
#08-2-08349-5

**OPENING BRIEF OF RESPONDENT**

---

Law Office of Ben W. Wells, P.S.

By Ben W. Wells  
WSBA #19199  
210 E Third Street  
Arlington, WA 98223  
(360) 435-1663

**TABLE OF CONTENTS**

**I. INTRODUCTION ..... 1**

**II. RESTATEMENT OF THE ISSUES..... 2**

**III. STATEMENT OF THE CASE..... 3**

**A. THE INJURY..... 3**

**B. MR. GRABER’S NEGLIGENCE..... 4**

**C. THE BENCH TRIAL..... 7**

**IV. SUMMARY OF ARGUMENT..... 8**

**V. STANDARD OF REVIEW..... 9**

**VI. ARGUMENT ..... 11**

**A. ISSUES OF SEGREGATION OF DAMAGES OR ALLOCATION OF  
    FAULT WERE NEVER RAISED AT TRIAL ..... 11**

**B. TEGMAN COULD NOT APPLY – THIS IS A CASE OF SEVERAL  
    LIABILITY AND THE TRIAL COURT WAS ASKED TO FIND ONLY THE  
    AMOUNT OF DAMAGES PROXIMATELY CAUSED BY MR. GRABER’S  
    NEGLIGENCE ..... 13**

**C. MR. GRABER’S FAILURE OF PROOF ..... 16**

        1. *Mr. Graber Cannot Meet His Burden of Proof, He Lacks  
        Sufficient Evidence ..... 16*

        2. *The Trial Court Held that as a Matter of Law There Were  
        No Superseding Causes to Mr. Graber’s Negligence ..... 21*

**D. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL  
    COURT’S FINDINGS OF FACT..... 22**

        1. *There Is Substantial Evidence of Mr. Graber’s Negligence.  
        ..... 22*

2. *There Is Substantial Evidence to Support the Court's Allocation of Fault between Mr. Graber and Mr. Moe*..... 26

**E. THE REMEDY REQUESTED BY MR. GRABER EXCEEDS ANY ERROR ALLEGED**..... 29

**VII. CONCLUSION**..... 30

**VIII. APPENDIX**.....A1

## TABLE OF AUTHORITIES

### Washington Supreme Court

<i>Adcox v. Children’s Hosp. &amp; Med. Ctr.</i> , 123 Wn.2d 15, 864 P.2d 921 (1993) .....	17
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992) .....	10
<i>France v. Peck</i> , 71 Wn.2d 592, 430 P.2d 513 (1967) .....	29
<i>Goldberg v. Sanglier</i> , 96 Wn.2d 874, 639 P.2d 1347 (1982).....	20
<i>Lawson v. Helmich</i> , 20 Wn.2d 167, 146 P.2d 537 (1944) .....	10, 13
<i>Merriman v. Cokeley</i> , 168 Wn.2d 627, 230 P.3d 162 (2010) .	10, 22, .....28
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007) .....	13
<i>Sunnyside Valley Irr. Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003) .....	10, 22
<i>Tegman v. Accident &amp; Medical Investigations, Inc.</i> , 150 Wn.2d 102, 75 P.3d 497 (2003).....	8, 13, 14

### Washington State Court of Appeals

<i>In re A.V.D.</i> , 62 Wn. App. 562, 815 P.2d 277 (1991) .....	11, 22, 28
<i>Jane Doe v. Latter Day Saints</i> , 141 Wn. App. 407, 167 P.3d 1193 (2007) .....	14
<i>Johnson v Aluminum Precision Products, Inc.</i> , 135 Wn. App. 204, 143 P.3d 876 (2006).....	16
<i>Rollins v. King County Metro Transit</i> , 148 Wn. App. 370, 199 P.3d 499 (2009) .....	14, 15, 16
<i>State v. Vazquez</i> , 66 Wn. App. 573, 832 P.2d 883 (1992).....	28

**Statutes**

RCW 4.22.070..... 2, 8, 16, 17, 20

**Regulations and Rules**

RAP 12.2..... 29

RAP 2.5..... 10, 13

**Other Authorities**

WPI 15.05 ..... 22

WPI 21.10 ..... 17

## I. INTRODUCTION

Respondent Ronald Moe was driving home at night, when he crashed into a cow wandering free on State Route 530. The impact caused Mr. Moe to suffer permanent injuries and destroyed his pickup truck. The cow belonged to Appellant Gary Graber, the absentee owner of the property adjacent to the highway. After a three-day bench trial, the trial court rejected Mr. Graber's argument that unknown third parties, or Mr. Moe, were solely responsible for the collision, finding Mr. Graber 85 percent at fault, and Mr. Moe 15 percent at fault for what the court found to be "devastating" injuries. (12/07/09 RP 102).

For the first time on appeal, Mr. Graber raises issues of allocation of fault to unnamed third parties and segregation of damages. But the only argument Mr. Graber raised at trial was that he was not, as a matter of law, responsible for an open gate – a gate that could have been left open for days, weeks, or months, and that could have been opened by anyone, including a cow. The trial court heard all the facts, and found that the only parties at fault were Mr. Graber and Mr. Moe. The trial court's Findings of Fact are supported by substantial evidence and its legal determination of

liability is supported by basic principles of tort law. This Court should affirm.

## II. RESTATEMENT OF THE ISSUES

The issues raised on appeal by Mr. Graber are more properly characterized as follows:

1. Should this court address Mr. Graber's legal arguments relating to the segregation of damages and allocation of fault to unknown third parties under RCW 4.22.070, where Mr. Graber did not raise these issues in his pleadings or at trial?

2. Does the trial court have an obligation to segregate damages between negligent and intentional tortfeasors in the absence of any evidence that the plaintiff's injuries were proximately caused by an intentional tortfeasor and the sole negligent defendant's liability is several, not joint?

3. Are the trial court's findings that Mr. Graber did not meet his burden of proof and failed to show that any unknown third parties were at fault or intentionally caused harm to Mr. Moe, supported by substantial evidence?

4. Are the trial court's factual findings allocating fault between Mr. Graber and Mr. Moe supported by substantial evidence?

### III. STATEMENT OF THE CASE

#### A. The Injury

On the night of August 29, 2007, Mr. Ronald Moe was driving home from work on State Route 530. (12/01/09 RP 31). The sky was overcast and the night was dark. (12/03/09 RP 29). There was a vehicle about 150 feet in front of his pickup truck; therefore Mr. Moe had his headlights on low beams. (12/03/09 RP 30). He came around a left corner and suddenly saw the white face of a brown cow heading towards Mr. Graber's property. (12/03/09 RP 31). Mr. Moe could not avoid the cow. (12/03/09 RP 31). His truck crashed into the 1,600 pound animal. (12/02/09 RP 26). The cow smashed the front of the pickup truck, rolled over the hood, crashed into the windshield, and then came rolling back down again while Mr. Moe's truck was coming to a stop. (12/02/09 RP 26-27).

The accident reconstruction experts at trial had different theories regarding the point of perception of the cow and the point of impact. However, the trial court found that their disputes were irrelevant because it found that Mr. Moe was faced with an unusual emergency and could not avoid the collision:

THE COURT: [N]otwithstanding some minor issues, in general, the testimony of the plaintiff was very credible, including when he asserted that it was

essentially pitch black that night. Further, it makes sense that the cow was not loitering in the middle of the highway, but instead came from off the road from out of the dark on the left. This plaintiff was faced with an unusual emergency.

(12/07/09 RP 105).

Mr. Moe's pickup truck was a total loss and had to be towed away. (12/03/09 RP 49-50). Mr. Moe's knees were injured in the collision (12/03/09 RP 54) and he will require a surgical total knee replacement for his right knee and possibly for his left knee. (12/02/09 RP 154, 156). The injuries had a significant impact on Mr. Moe's daily living. (12/03/09 12-13, 58).

#### **B. Mr. Graber's Negligence**

Gary Graber was the owner of the property adjacent to State Route 530, and of the cow involved in the collision. (12/01/09 RP 47-48). Mr. Graber invests in real estate, and his primary source of income is rental property. (12/03/09 RP 189). He also owns beef cattle that he keeps on his agricultural land. (12/03/09 RP 104). At the time of the collision, Mr. Graber kept a herd of beef cattle on his property adjacent to SR 530, also known as the Vos property. (12/01/09 RP 47-48). Mr. Graber lived 45 minutes from the Vos property (12/03/09 RP 186), and would seldom check on the property or on the cattle. (12/03/09 RP 102, 139).

Mr. Graber's neighbors, on three sides of the Vos property including across the highway, had often complained to Mr. Graber that his cows were trespassing on their property or were wandering free on the highway, posing a danger to traffic. (12/01/09 RP 65-66, 105-106, 131). Mr. Graber's neighbors had asked him on several occasions to fix his fencing to prevent the cows from leaving the Vos property. (12/01/09 RP 65, 89, 134, 135). They had also asked him to secure his gates and to discourage vandals from using the property. (12/01/09 RP 67-68). At the time of the collision Mr. Graber's fencing needed repair and cows were still able to get out of the property. (12/01/09 RP 145-146, 12/03/09 RP 167). In spite of the advice of his neighbors and prior instances of burglary, Mr. Graber refused to use locks on his exterior gates, or to make the area safer through lighting, a chain across the entrance roadway, or a property manager. (12/03/09 RP 158, 160-61, 185).

Around the time of the collision, the Vos property was unoccupied. (12/03/09 RP 185). The primary residence on the Vos property had burned down. (12/03/09 RP 185). There was still garbage from the prior tenant sitting on the property. (12/02/09 RP 119-120, 12/03/09 RP 175). The main driveway to the property

was unlit, without a chain barrier at the entrance. (12/03/09 RP 185).

Prior to the collision, Mr. Graber had complained to his neighbors that vandals would sometimes open the gates of the Vos property. (12/01/09 RP 67). There had been burglaries on the property. (12/03/09 RP 176). Just one week before the collision, Mr. Graber found that someone had set up a "chop shop" in one of the property's buildings. (12/03/09 RP 157-158). Prior to the collision Mr. Graber had ample notice of the need to secure his property and beef cattle.

Mr. Graber never used locks on any of the gates on the Vos property, even though he admitted it was feasible, because he found locked gates to be inconvenient. (12/03/09 RP 160/161). Instead, he used bailing twine to tie most of the gates, including the external gates towards the highway. (12/03/09 RP 132).

Mr. Graber could not recall the last time he visited the Vos property before the collision. (12/03/09 RP 139). It took a few weeks after the collision before Mr. Graber talked to the investigating Washington State Patrol Trooper (12/01/09 RP 48).

Mr. Graber alleged that some unknown rustlers had left the gates open on his property. (12/01/09 RP 29). Nobody witnessed

the alleged incident. Because Mr. Graber was seldom on the Vos property, he had no way of knowing when the alleged incident happened or how long the gates had been open. (12/03/09 RP 139, 147). He did not report any theft of cattle to the Sheriff or to the investigating Trooper from the Washington State Patrol. (12/03/09 RP 171, 176). His neighbor testified that it would have been virtually impossible to rustle Mr. Graber's wild cattle at night without preparation, that the beef cattle were wild animals that would scatter away from approaching people. (12/01/09 RP 144-145).

### **C. The Bench Trial**

Mr. Moe's action for personal injuries was tried to the Honorable Judge David Kurtz in the Snohomish County Superior Court ("the trial court") in a bench trial lasting three days. Both Plaintiff and Defendant argued that they should be found to be free of fault, and that the other side should be found to be 100 percent at fault. (12/04/09 RP 91-92, 12/04/09 RP 82). Judge Kurtz allocated 85 percent of the fault to Mr. Graber and 15 percent of the fault to Mr. Moe, for a total of 100 percent. (12/07/09 RP 108-109).

Mr. Graber never pled or argued either segregation of damages under *Tegman v. Accident & Medical Investigations, Inc.*,

150 Wn.2d 102, 75 P.3d 497 (2003), or allocation of fault to unknown third parties under RCW 4.22.070. (Answer & Affirmative Defense; CP 402-405). Instead, Mr. Graber consistently argued that he could not be at fault as a matter of law because unknown third parties were the sole cause of the injury to Mr. Moe. (12/04/09 RP 87-88). Mr. Graber moved for summary judgment on that ground and that motion was denied. (Order Denying Defendant's Motion for Summary Judgment; CP 337-239). Mr. Graber argued that legal theory at trial and in closing. (12/04/09 RP 87-88). After the trial court's oral decision, and prior to the presentation of the Findings of Fact and Conclusions of Law, Mr. Graber never asked the court to segregate any of the damages, or to allocate any of the fault. (12/04/09 RP 110-111). The first time these theories were ever raised was on appeal, in Appellant's Opening Brief.

#### **IV. SUMMARY OF ARGUMENT**

There is substantial evidence in the record to support the trial court's Findings of Fact, Conclusions of Law, and Judgment. This matter was tried before the bench. Mr. Graber had the opportunity to present all evidence in support of his theory of the case. The trial court heard all testimony, determined the weight of the evidence and the credibility of the witnesses, and found that the

only parties at fault in this matter were Mr. Graber and Mr. Moe. The trial court's judgment is supported by substantial evidence.

For the first time in his appeal, Mr. Graber now asserts the affirmative defense of allocation of damages to unknown third parties and segregation of damages to intentional tortfeasors. Even were these issues subsumed in Mr. Graber's argument at trial regarding unknown third parties as the sole cause of Mr. Moe's injuries, Mr. Graber had the burden of proving causation. He failed to meet that burden. Mr. Graber also failed to establish that any of Mr. Moe's damages were caused by an intentional tort. Even if Mr. Graber had not waived those affirmative defenses by failing to raise them at trial, the trial court's findings establish that Mr. Graber did not meet his burden of proof. In the absence of any reversible error, Mr. Moe respectfully asks the Court to affirm the trial court's Judgment.

## **V. STANDARD OF REVIEW**

This Court does not consider legal arguments made for the first time on appeal:

“(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.”

RAP 2.5. See, e.g., *Lawson v. Helmich*, 20 Wn.2d 167, 179, 146 P.2d 537 (1944). Mr. Graber also raises numerous assignments of error that are not supported by any pertinent authority, references to the record, or meaningful analysis. Those unchallenged findings should be deemed verities on appeal and those assignments of error should be abandoned. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The assignments of error that are actually addressed in Mr. Graber's brief do not raise any legal issues, but are instead challenges to the trial court's Findings of Fact accompanying the Judgment, which this Court reviews for substantial evidence. Under this standard, any evidence, although contested, that a reasonable fact finder may deem credible, is sufficient to the findings:

“a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.”

*Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003) (internal citations omitted); See *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010) (“A reviewing

court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.”). The trier of fact is in the best position to decide factual issues and evaluate the credibility of witnesses, and an appellate court will nearly always refuse to weigh the evidence and re-evaluate the credibility of witnesses. *In re A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991).

## VI. ARGUMENT

### **A. Issues of Segregation of Damages or Allocation of Fault Were Never Raised at Trial**

While on appeal Mr. Graber challenges the trial court’s failure to allocate a percentage of fault, or alternatively to segregate a percentage of damages, to unknown third parties, he raised no issues of allocation of fault or segregation of damages at trial. Mr. Graber also did not plead nonparty at fault as an affirmative defense in his Answer as required by CR 8(c) and CR 12(i). (Answer & Affirmative Defense; CP 404-405). The only reference to alleged “vandals” in the Answer is found in Mr. Graber’s denials that he breached any duty of care. (Answer & Affirmative Defense ¶¶ VI, XIII; CP 403). Mr. Graber never asked Judge Kurtz to allocate a percentage of fault to unknown third parties. Instead he argued

that as a matter of law, the actions of unknown third parties were the sole cause of Mr. Moe's injuries.<sup>1</sup>

MR. WOLFF: And I submit that if cows got out through open gates, then there's an intervening act, and that the defendant, Mr. and Mrs. Graber are not liable.

(12/01/09 RP 117)

MR. WOLFF: If the cows came through that gate, then somebody had to have opened it. Not only that gate but the other gates, and that is an intervening cause. It was not Mr. Graber or anybody that had anything to do with him that opened those gates. Not only that, the evidence says that at that time of night, the cows were down in the field and, you know, they are sort of sleeping and watching and milling. But it took something to bring them up to the road again, some kind of intervening cause. There is no evidence and certainly if -- I will just make this statement: Being victimized is not an act of negligence.

(12/04/09 RP 87-88)

Following the trial court's ruling, Mr. Graber's counsel did not ask the trial court to allocate a percentage of fault or an amount of damages caused by unknown third parties. After he was presented with the Proposed Findings of Fact and Conclusions of Law, counsel for Mr. Graber did not object or ask for additional Findings

---

<sup>1</sup> Mr. Graber never articulated the legal basis to find that an unknown third party was liable to Mr. Moe. He did not show a duty that had been breached by unknown third parties. Any intentional tort would have been against Mr. Graber, and not against Mr. Moe. To prove an intentional tort, Mr. Graber would have had to prove the element of intent.

of Fact or Conclusions of Law, but simply signed them. (Findings of Fact & Conclusions of Law; CP 19).

This court should not review legal arguments raised by Mr. Graber for the first time on appeal, arguments that he never raised at trial. RAP 2.5. *E.g., Lawson v. Helmich*, 20 Wn.2d 167, 179, 146 P.2d 537 (1944). Exceptions to this rule are construed narrowly and require the error to be manifest and truly of constitutional magnitude. *E.g., State v. Kirkman*, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007). As this civil case does not involve any manifest error of constitutional magnitude, this court should disregard these issues that were never raised at trial.

**B. *Tegman* Could Not Apply – This Is a Case of Several Liability and the Trial Court Was Asked to Find Only the Amount of Damages Proximately Caused by Mr. Graber’s Negligence**

Even had Mr. Graber raised the issue of allocation of damages based on the acts of intentional tortfeasors under *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003) there could be no allocation in the instant case for any of three reasons: 1) Mr. Graber was severally liable, and not jointly and severally liable; 2) Mr. Graber failed to prove that an intentional tort occurred; and 3) Mr. Graber failed to prove at trial

that an intentional tort was the proximate cause of Mr. Moe's injuries.

*Tegman* deals with the segregation of damages where there is joint and several liability, a mixture of negligence and intentional torts, and the intentional tortfeasor **caused** some of plaintiff's damages. In *Tegman*, the Washington Supreme Court held that a negligent tortfeasor could not be liable for damages caused by an intentional tortfeasor. *Tegman* at 119. In *Jane Doe v. Latter Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007), the Court of Appeals held that "[i]t was inappropriate to hold negligent defendants (the LDS Church) jointly and severally liable for damages **caused by** the intentional acts of Taylor." 141 Wn. App. 407 at 438 (emphasis added).

Most recently, in *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499 (2009), this Court held that the question of segregating damages did not arise where the plaintiff's claim was only against the negligent tortfeasors, joint and several liability did not apply, and the recovery sought was only for damages proximately caused by the defendant's negligence:

Where there is no issue of joint and several liability and plaintiffs seek damages only for injuries caused by a single defendant's negligence, there is no need

to instruct the [trier of fact] to segregate damages caused by intentional conduct.

148 Wn. App. 370 at 372. The *Rollins* court held that the trial court had properly placed upon the plaintiff the burden of proof to show which damages were proximately caused by the negligent defendants, and that the trier of fact had been properly instructed accordingly. *Id.* at 500. Because *Rollins* was a case with only several liability, and the trier of fact had been asked to determine only those damages proximately caused by the defendant, there was no need for the trier of fact to also determine the amount of additional damages caused by intentional tortfeasors. *Id.* at 382.

The same is true in the present case. At trial the court was only asked to determine the amount of damages proximately caused by the negligence of Mr. Graber. That is what it did:

THE COURT: In short, the Court respectfully concludes that the primary negligence here is that of the defendant and that those actions proximately caused plaintiff's damages. Of the 100 percent combined negligence, the Court ultimately finds that 85 percent is attributable to the defendant's negligence and that only 15 percent is attributable to the plaintiff's negligence in proximately causing his own injuries.

(12/07/09 RP 108)

Under RCW 4.22.070, Mr. Graber's liability was several only. The trial court was never asked to determine the amount of damages caused by intentional torts. Furthermore, and as analyzed below, Mr. Graber presented only speculative, and disputed, evidence that any intentional tort caused any damages to Mr. Moe – evidence that the trial court properly rejected. Just as in *Rollins*, the trial court's determination of the amount of damages proximately caused by Mr. Graber's negligence and Mr. Moe's comparative negligence should be affirmed.

### **C. Mr. Graber's Failure of Proof**

#### **1. Mr. Graber Cannot Meet His Burden of Proof, He Lacks Sufficient Evidence**

Mr. Graber cannot prove that anybody besides himself and Mr. Moe were at fault for Mr. Moe's injuries. Mr. Graber was allowed to present all of the evidence in support of his theory at trial, and it was simply too speculative to meet his burden of proof. See *Johnson v Aluminum Precision Products, Inc.*, 135 Wn. App. 204, 209, 143 P.3d 876 (2006).<sup>2</sup>

---

<sup>2</sup> Furthermore, Mr. Graber failed to make a *prima facie* case of third party negligence or third party intentional tort. It is unclear which duty if any was owed by any unknown third parties to Mr. Moe and how they breached that duty, and which intentional tort unknown third parties committed against Mr. Moe.

Assuming that Mr. Graber properly raised the issue of negligence of unknown third parties, he still had the burden of proving that an unnamed third party “caused the claimant’s damages” under RCW 4.22.070:

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity **which caused the claimant's damages** except entities immune from liability to the claimant under Title 51 RCW. **The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. ...**

RCW 4.22.070 (emphasis added).

The burden of proof to show that unknown third parties were at fault is on the defendant, Mr. Graber:

Before a percentage of negligence may be attributed to any entity that is not a party to this action, **the defendant has the burden** of proving each of the following propositions:  
First, that the entity was negligent; and  
Second, that the entity’s negligence was a proximate cause of the *[injury] [damage]* to the plaintiff

WPI 21.10 (emphasis added). See *Adcox v. Children’s Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25-26, 864 P.2d 921 (1993) (“it is incumbent upon the defendant to provide proof that more than one entity was at fault.”).

Mr. Graber alleged at trial that he was “victimized” by unknown third parties who left his gates open. (12/03/09 RP 161-162). However, nobody, including Mr. Graber himself, witnessed the alleged incident. Nobody saw and nobody knows how the gates were opened, one can only speculate – they could have been left open by Mr. Graber, they could have been opened by cows, or they could have been opened by strangers. Nobody knows or could tell when the alleged event happened. No one could say how long those gates had been left open, and for how long Mr. Graber’s cattle had been able to get out of his property before the collision took place.<sup>3</sup>

MR. WOLFF: Prior to the 29<sup>th</sup>, can you remember the last time that you have been on your – on the Vos farm?

MR. GRABER: I wouldn’t have any way of identifying that

(12/03/09 RP 139)

MR WOLFF: ... in fact, the testimony was [Mr. Graber] hadn't been at his farm for several days. And no one has said those gates were open for several days, and no one has testified that any of the cows got out on the road that day.

(12/03/09 RP 95) (replacing “he” with “Mr. Graber”)

---

<sup>3</sup> Because Mr. Graber had an opportunity to check on the gate after the opening and prior to the incident and failed to do so, Mr. Graber could be not just the primary but also a superseding cause of all damages.

During its oral ruling, the trial court expressly rejected Mr. Graber's factual contention that he was victimized by unknown third parties who were responsible for leaving his gates open:

THE COURT: Indeed, one of the most critical bits of testimony came at 2:06 on last Thursday afternoon when Mr. Graber was asked by his own attorney when he remembered last being on the property prior to the accident. Mr. Graber responded that he didn't have any way of identifying that, that essentially, he did not know.

...

But the evidence before me is that in the area where the cows were and where they presumably escaped, there were no human beings regularly present, and there is no evidence that Mr. Graber or anyone had recently inspected the fences or gates. Based on the evidence in the trial record, which is what this court must decide this case upon, that main gate in question could, indeed, have been open for weeks, if not months. Mr. Graber describes himself as a victim. But there is no evidence that he was actually victimized on August 29, 2007, or for that matter on July 29 or June 29 or May 29 or so on. We don't know that because there is no evidence in the record that he or anyone ever checked on things. Instead, the testimony at trial leads one to conclude that these beef cattle were, essentially, left free to run wild by themselves on Mr. Graber's property. That may well be okay within his own boundaries, but reasonable care was not taken to make sure that the cows did not run off of it, onto the property of others or onto SR 530. In short, the Court respectfully concludes that the primary negligence here is that of the defendant and that those actions proximately caused plaintiff's damages.

(12/07/09 RP 107-108)

Part of the trial court's oral ruling was summarized in Finding of Fact No. 17, which states that "[t]here is no evidence that Defendant Gary D. Graber was actually victimized on the day of the collision or on any other day prior to the collision." Mr. Graber had often used the words "victim" and "victimized" at trial to describe the fact that his gates had been allegedly opened by "rustlers" or vandals. (12/03/09 RP 95, 161, 162). That provides the context and defines how the word was used in the Finding of Fact – in other words, the trial court found no evidence beyond speculation that Mr. Graber's gates were actually opened by rustlers or vandals on the day of the collision or on any other day prior to the collision.

The trial court's Findings of Fact establish that Mr. Graber failed to meet his burden of proof. Even if this Court were to conclude that Finding of Fact No. 17 is insufficient to address Mr. Graber's legal argument, the lack of a finding as to a material fact is deemed a finding against the party having the burden of proof of the material fact. *See, e.g., Goldberg v. Sanglier*, 96 Wn.2d 874, 880, 639 P.2d 1347, 1351 (1982).

The trial court complied with RCW 4.22.070 by allocating 100 percent of fault to Mr. Moe and Mr. Graber, the parties found to

be at fault, and by finding the amount of damages that were proximately caused by the negligence of the parties at fault. Even had Mr. Graber raised in the trial court the issues of allocation of fault and segregation of damages he now argues on appeal, the trial court made no error of law and its decision was supported by substantial evidence.

2. The Trial Court Held that as a Matter of Law There Were No Superseding Causes to Mr. Graber's Negligence

The trial court properly rejected Mr. Graber's argument that a superseding cause broke the chain of causation and excused Mr. Graber from all liability. The trial court found that "[a]ny unknown defendants were **at most** an intervening and not a superseding cause of Plaintiff's injuries." (Conclusions ¶ 9; CP 16) (emphasis added).<sup>4</sup> The use of the words "at most" is key. The trial court did not make a finding that any unknown defendants were at fault. The trial court simply made the legal distinction between intervening and superseding cause – the former is foreseeable and does not break the chain of causation, the latter is unforeseeable and would have

---

<sup>4</sup> That conclusion was also supported by the substantial evidence at trial that open gates were a foreseeable consequence of the fact that Mr. Graber was an absentee owner who would only seldom check on his property, who had notice of the need to secure his property, and who failed to secure the perimeter of his property. In fact, it is possible that Mr. Graber had the opportunity to close any gates after they were open and before the collision and failed to do so.

broken the chain of proximate causation. WPI 15.05. The trial court properly found that no superseding causes relieved Mr. Graber of his responsibility for Mr. Moe's injuries and damages.

**D. There Is Substantial Evidence to Support the Trial Court's Findings of Fact**

1. There Is Substantial Evidence of Mr. Graber's Negligence

Mr. Graber's factual challenges focus on conflicting evidence and the credibility of the witnesses. "A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). The trier of fact is in the best position to decide factual issues and evaluate the credibility of witnesses, and an appellate court will nearly always refuse to weigh the evidence and re-evaluate the credibility of witnesses. *In re A.V.D.*, 62 Wn. App. 562, 568, 815 P.2d 277 (1991). The correct standard of review is whether there is substantial evidence to support the trial court's Findings and Conclusions. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003).

The Vos Ranch is about 125 acres (not the 500 acres alleged by Mr. Graber) and surrounded on all sides by property that

does not belong to Mr. Graber. (12/03/09 RP 150). Mr. Graber is not a farmer and a rancher, but an absentee owner whose main source of income is rental properties. (12/03/09 RP 189). At the time of the collision, Mr. Graber was living far from the Vos Property; his residence was 45 minutes away. (12/03/09 RP 186). He would only seldom check on his cattle in the summer months. (12/03/09 RP 172).

The neighboring property owners all testified in this lawsuit about the poor fencing conditions of Mr. Graber's property, and their frequent problems with Mr. Graber's cattle escaping from the property or wandering free on the highway. (12/01/09 RP 65-66, 105-106, 131). One of the neighbors, Mr. Soler, owns dairy cows on the 70 acres neighboring Mr. Graber's property (12/01/09 RP 123-124), lives on his property, maintains his fences, and through the exercise of reasonable care has prevented his cows from escaping on to the adjacent highway (12/01/09 RP 128).

At the time of the collision, Mr. Graber did not have any tenant living on the property where Trooper Eagle found the open external gate. (12/03/09 RP 185). The main building had recently burned down, and the nearby rental property was being shown to prospective tenants. (12/03/09 RP 185).

Mr. Graber had ample notice of the need to secure his property, and of the fact that his cattle were escaping from his property and wandering on the adjacent highway. There is testimony from all of his neighbors that they called Mr. Graber on several occasions because his cattle had left his property and was on the neighbor's land or on the highway. (12/01/09 RP 65-66, 105-106, 131). Mr. Gabriel, the neighbor across the highway, would often find Mr. Graber's cattle on his land, and even had to shoot one of Mr. Graber's bulls to protect his property. (12/01/09 RP 66-67).

Around the time of the collision, the Vos property did not have a chain on the main roadway, did not have locks on the exterior gates, had a burned down house, and still housed garbage from the tenant that lived there before the house burned down. (12/02/09 RP 119-120, 12/03/09 RP 175, 12/03/09 RP 185). Mr. Graber's milk barn had already been burglarized and stripped of all stainless steel in the spring of 2007 (12/03/09 RP 126), and just one week before the collision Mr. Graber had discovered a "chop shop" in a building on the neighboring property lot. (12/03/09 RP 157-158). In spite of the discovery of a burglar and of a chop shop on his property just a week earlier, and in spite of the fact that the

burglar had escaped, Mr. Graber had not made any changes to increase the security of the property (12/03/09 RP 160), and did not come back to check on the property until days after the collision. (12/03/09 RP 139).

Mr. Graber complained with his neighbors on several occasions that strangers had opened his gates (12/01/09 RP 67), and therefore knew of the need to lock those gates. Almost every witness testified that it was unreasonable for Mr. Graber not to use locks on his external gates, including Trooper Eagle, his neighbors, and Mr. Graber's own witness, Mr. Hillis.

TROOPER EAGLE: I just stated that I wondered why he hadn't thought of having a more secure system to keep his gates closed or his property closed up. In my opinion it was -- he should probably have some chain and some locks. I guess what I said: If it was my property, I would have a chain and lock if I lived nowhere near that property so, at least, I could say that I made the effort to keep my animals contained.

(12/01/09 RP 49-50)

MR. GABRIEL: He said people kept coming down letting his cows out.

MR. WELLS: Was that before Mr. Moe's motor vehicle collision?

A: Yes.

Q: What did you tell him when you heard him say that to you?

A: I said, I really don't know what to tell you other than lock your gate and put a cable up over the other one.

...

Q: Did he say something to you when you said you should put up a cable?

A: He said it would be too much trouble to lock it and unlock it every time he went in and out. ...

(12/01/09 RP 67-68); *see also* (12/03/09 RP 126)

MR. WOLFF: Based on your years of experience in the farming business, do you believe that closing a gate like that with several strands of twine wrapped around there is reasonable, is it a reasonable practice?

Mr. HILLIS: Yeah, especially, on an interior gate. It's not a problem. We do it all the time. On a gate right on the highway, you know, right adjacent to 530 or something, that's a little shaky. Somebody can come in there and cut that and go right through it, but a cow is not going to open that.

(03/12/09 RP 114-115)

The record makes it absolutely clear that there is substantial evidence to support the trial court's Findings of Fact.

2. There Is Substantial Evidence to Support the Court's Allocation of Fault between Mr. Graber and Mr. Moe

While the trial court could have found that Mr. Moe was free of fault, there is substantial evidence to support its finding that "he was only slightly negligent, to a very modest degree." (Findings of Fact ¶ 8; CP 11). Mr. Steve Harbinson, an accident reconstruction expert, testified that Mr. Moe could not have seen the cow in time to

stop and avoid the collision. (12/02/09 RP 25). Mr. Graber did not object to Mr. Harbinson's qualifications to testify as an expert, or to the foundation of his expert opinions. Washington State Patrol's Trooper Eagle, who investigated the collision, also testified that Mr. Moe could not have seen the cow in time to avoid the collision. (12/01/09 RP 44). Finally, Mr. Moe testified at trial that he was not able to see the cow in time to avoid the collision. (12/03/09 RP 31).

It is undisputed that the collision happened at night, and that the cow was dark except for some white on its face. (12/03/09 RP 31). Mr. Moe testified that the cow was heading towards Mr. Graber's farm, in other words that it was moving from left to right. (12/03/09 RP 31). Mr. Moe testified that he could not have stopped in time to avoid the collision. (12/03/09 RP 31). The trial court found his testimony credible:

THE COURT: After due deliberation, I did not find either expert to be totally convincing in their respective conclusions. For example, Mr. Norton may be, at least, partially correct in disputing Mr. Harbinson's point of impact conclusion. Likewise, Mr. Norton challenged Harbinson's calculations of the distance of when the corner was sufficiently rounded so that an object in Mr. Moe's lane would have come into view. However, one notes that notwithstanding some minor issues, in general, the testimony of the plaintiff was very credible, including when he asserted that it was essentially pitch black that night. Further, it makes sense that the cow was not loitering in the

middle of the highway, but instead came from off the road from out of the dark on the left. This plaintiff was faced with an unusual emergency. In sum, I conclude that, while perhaps Mr. Moe could have been a bit more alert, and that he was slightly negligent, it was only to a very modest degree.

(12/07/09 RP 105)

The trial court was in the best position to make determinations on the credibility of witnesses. “A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.” *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). An appellate court will nearly always refuse to re-evaluate the credibility of witnesses. *In re A.V.D.*, 62 Wn. App. 562, 815 P.2d 277 (1991); *State v. Vazquez*, 66 Wn. App. 573, 832 P.2d 883 (1992).

In arguing that any finding of negligence on the part of Mr. Moe must result in an equal allocation of negligence between Mr. Graber and Mr. Moe, Mr. Graber asks this court, with no supporting legal authority, to retry this case based on its own *de novo* view of the evidence. The trial court properly determined the appropriate amount of comparative negligence between Mr. Graber and Mr. Moe as a question of fact. Substantial evidence supports its finding that “in spite of the unusual emergency Plaintiff Ronald W.

Moe could have been a bit more alert, but he was only slightly negligent, to a very modest degree” -- In other words, 15 percent.

**E. The Remedy Requested by Mr. Graber Exceeds Any Error Alleged**

Mr. Graber requests that this Court remand this case to the Superior Court for retrial, but provides no legal argument to support that requested remedy. Assuming that Mr. Graber were to prevail in his contention that the trial court erred in failing to rule on his defenses, he has already had the opportunity to present the evidence to support his case at trial – this is not an appeal based on the improper exclusion of evidence. At most, there might be some missing Findings of Fact that need to be supplemented by the trial court that has already spent several days listening to the testimony of many witnesses, lay and expert, and weighing all evidence presented at trial.

Under RAP 12.2, this Court has the authority to remand a case for determination only on a specific issue. *See, e.g., France v. Peck*, 71 Wn.2d 592, 430 P.2d 513 (1967). While the trial court’s findings dispose of the issues raised on appeal, should this Court determine that the Findings of Fact are inadequate to address Mr. Graber’s legal arguments, it should remand with clear instructions

to the trial court to make findings that explicitly address any allocation of fault and damages to unknown third parties.

## VII. CONCLUSION

THE COURT: Of course, this case is also about beef cattle, specifically, a large, three-quarter-ton cow. Human beings are generally fond of cows, and we depend upon them for much of our sustenance. But we also want cows to know their place, so to speak. As written in Boswell's Life of Johnson, "A cow is a very good animal in the field, but we turn her out of a garden." People also make fun of cows, such as in the satirical song: "Cows With Guns." But Ronald Moe's bovine encounter in August 2007 was no laughing matter and had devastating consequences.

(12/07/09 RP 101, 102)

The trial court deeply reflected about the facts of this case before rendering Judgment. Ronald Moe's high speed collision with Mr. Graber's wandering cow was no laughing matter, he carries the scars of it. Mr. Moe is asking for closure now, the closure that this Court can give him by affirming the trial court's Judgment.

This is a case about failure of proof and verities on appeal. To this day, Mr. Graber denies all liability for Mr. Moe's injuries. He blames it all on the open gate found by Trooper Eagle on his property – a gate that could have been left open for days, weeks, or months, and that could have been opened by anyone, including a

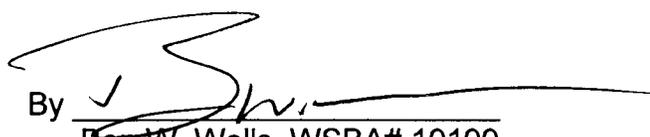
cow. A gate that wasn't locked because Mr. Graber found locks to be inconvenient.

Mr. Graber was allowed to present all evidence in support of his theory, and it was not enough to meet his burden of production or proof. It is time for him to accept responsibility for his actions. Mr. Moe respectfully requests that this Court affirm the Judgment of the trial court.

DATED this 6<sup>th</sup> day of October, 2010

Respectfully submitted,

Law Office of Ben W. Wells, P.S.

By 

Ben W. Wells, WSBA# 19199  
210 E Third Street  
Arlington, WA 98223  
(360) 435-1663  
Attorney for Respondent

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the Opening Brief of Respondent to:

Buri Funston Mumford, PLLC  
1601 F Street  
Bellingham, WA 98225

DATED this 6<sup>th</sup> day of October, 2010

  
Elizabeth Minish

## VIII. APPENDIX

Answer & Affirmative Defenses	CP 402-405
Findings of Fact and Conclusions of Law	CP 9-31

**SUPERIOR COURT OF WASHINGTON FOR COUNTY OF SNOHOMISH**

2009 APR -3 PM 12:15

RONALD W. MOE and JAMES L. PILON,

Plaintiffs,

NO. 08-2-08349-5

vs.

ANSWER

GARY D. GRABER and JANE DOE  
GRABER. Husband and wife and the marital  
Community composed thereof; and JOHN  
DOES and JANE DOES 1 through 10

Defendants

---

Comes now the defendants and in answer to plaintiff's complaint allege and plead as follows:

I.

Admit the allegations of paragraph I.

II.

Admit that the marriage exists and deny the balance of the paragraph II.

III.

Object to the form of the allegation as there are two plaintiffs and neither is specified and deny the balance of the paragraph III.

IV.

Lack information as to Moe, and therefore deny the balance of the paragraph IV.

V.

Admit the allegations of paragraph V.

VI.

The defendant admits he has a duty to keep livestock in an enclosed area and was faithfully discharging this duty. The cow was loose and on the roadway because vandals had trespassed and committed malicious mischief by opening four of the cattle gates that the defendant keeps closed.

VII.

Deny

VIII.

The defendant denies paragraph VIII.

IX.

Deny paragraph IX.

X.

Deny plaintiff's paragraph X

XI.

Admit defendant had duty to secure cattle and alleges that all his fences were secure, all of his gates were closed, and all of his cows accounted for and none of them were injured.

XII.

Deny

XIII.

Deny. The defendant's cow was on the roadway as a result of acts of vandalism by third parties. None of defendant's cows were involved in the second accident. The defendant objects to the claim of Pilon being added because the cases are not connected in any way other than the stretch of highway involved.

XIV.

Deny. See the answer to number XIII.

XV.

Deny. See the answer to number XIII.

XVI.

Deny.

XVII.

Lack knowledge and therefore deny.

XVIII.

Lack knowledge and therefore deny.

XIX.

Lack knowledge and therefore deny.

XX.

Lack knowledge and therefore deny.

XXI.

Deny

XXII.

Defendant doesn't understand the last allegation of the complaint.

#### AFFIRMATIVE DEFENSE

By way of affirmative defense, the defendant alleges and pleads the following.

1. That the plaintiff, Pilon, has been improperly joined in this case and should be dismissed.
2. That Pilon's claim involves a ghost cow that no one has yet found, and was not one of the defendant's. His claim has been joined with Moe's so that Pilon would have his missing cow that caused his one-car accident.
3. The plaintiff's had the last clear chance to avoid the accident.

Wherefore; defendant prays

That Pilon's claim be dismissed and that plaintiff Moe take nothing by way of his complaint and that the defendant be awarded his cost and his disbursements including reasonable attorney's fees.

Dated this 3rd day of April, 2009



GARY D. GRABER

Pro se litigant

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH**

RONALD W. MOE and JAMES L. PILON,  
Plaintiffs,

vs.

GARY D. GRABER and JANE DOE  
GRABER, husband and wife and the marital  
community composed thereof; and JOHN  
DOES and JANE DOES 1 through 10,  
Defendants.

NO. 08-2-08349-5

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
REGARDING PLAINTIFF  
RONALD W. MOE

This matter was tried to the Court, without a jury, from December 1, 2009 to  
December 7, 2009. The Court's oral decision was given on December 7, 2009. The  
undersigned judge presided at the trial. The claims presented at trial for adjudication were  
as follows:

Plaintiff Ronald W. Moe claimed that he sustained injuries and damages as a result  
of the negligence of Defendant Gary D. Graber.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

**LAW OFFICE OF BEN W. WELLS, P.S.**  
ATTORNEY AT LAW  
210 E. Third St.  
Arlington, WA 98223  
PHONE (360) 435-1663 - FAX (360) 474-9751

~~FILE COPY~~

**ORIGINAL**

1  
2  
3 Plaintiff Ronald W. Moe appeared personally at the trial and through his attorney  
4 of record, Mr. Ben W. Wells. Defendant Gary D. Graber appeared personally at trial and  
5 through his attorney of record, Mr. T.R.G. Wolff.

6 The witnesses, who were called and testified at the trial, are identified in the  
7 witness list attached as Exhibit A.

8 The exhibits, which were offered, admitted into evidence and considered by the  
9 court, are set out in the list attached as Exhibit B.

10 Based on the evidence presented at trial, the Court makes the following Findings  
11 of Fact:

12  
13 **I. FINDINGS OF FACT**

14  
15 1. Defendant Gary D. Graber owns the property located at 20020 SR 530 in  
16 Snohomish County, Washington, hereinafter the "property."

17 2. The property is adjacent to a public highway, SR 530.

18 3. Prior to and on the date of Plaintiff's injury, August 29, 2007, Defendant Gary  
19 D. Graber kept a herd of beef cattle on the property.

20  
21 4. On August 29, 2007, at approximately 11:30 PM, a large, three-quarter-ton cow  
22 belonging to Defendant Gary D. Graber was on SR 530 near Defendant Gary D. Graber's  
23 property and constituted a hazard to drivers.

24  
25 **FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 2**

**LAW OFFICE OF BEN W. WELLS, P.S.**  
ATTORNEY AT LAW  
210 E. Third St.  
Arlington, WA 98223  
PHONE (360) 435-1663 - FAX (360) 474-9751

1  
2  
3 5. Plaintiff was driving eastbound on SR 530 on August 29, 2007 at  
approximately 11:30 PM and suddenly faced an unusual emergency.

4 6. Plaintiff collided with Defendant Gary D. Graber's cow on the eastbound lane  
5 of SR 530 and the collision happened at night.

6 7. The cow was not loitering, it came from off the road, from out of the dark, from  
7 Plaintiff's left.

8 8. In spite of the unusual emergency Plaintiff Ronald W. Moe could have been a  
9 bit more alert, but he was only slightly negligent, to a very modest degree.

10 9. There is an abundant wealth of evidence from Defendant Gary D. Graber's  
11 neighbors – Mr. Gabriel, Ms. Moffett, Ms. Arney, and Mr. Soler – that prior to August 29,  
12 2007, cattle were escaping off of Defendant Gary D. Graber's property, and it was a  
13 frequent problem, and that Defendant Gary D. Graber was aware of that problem.

14 10. Defendant Gary D. Graber was an absentee owner of his property located at  
15 20020 SR 530.

16 11. Defendant Gary D. Graber admitted during his testimony that he did not know  
17 when he was last on the property prior to the collision.

18 12. The evidence shows that in the area where the cows were and presumably  
19 escaped there were no human beings regularly present.  
20  
21  
22  
23  
24

25 **FINDINGS OF FACT AND  
CONCLUSIONS OF LAW – 3**

**LAW OFFICE OF BEN W. WELLS, P.S.**  
ATTORNEY AT LAW  
210 E. Third St.  
Arlington, WA 98223  
PHONE (360) 435-1663 - FAX (360) 474-9751

1  
2  
3 13. There is no evidence that Defendant Gary D. Graber or anyone else had  
4 recently inspected the fences or the gates prior to the collision.

5 14. The evidence shows that the main gate could have been open for weeks, if not  
6 for months, prior to the collision.

7 15. Defendant Gary D. Graber's overall method of securing his gates by using  
8 twine was not reasonable or adequate, especially for an absentee owner.

9  
10 16. Defendant's own witness, Mr. Hillis, admitted that a reasonable owner of  
11 property adjacent to a public highway should have put locks on his outside gates.

12 17. There is no evidence that Defendant Gary D. Graber was actually victimized  
13 on the day of the collision or on any other day prior to the collision.

14 18. The evidence shows that Defendant Gary D. Graber's beef cattle were  
15 essentially left free to run wild by themselves on Defendant Gary D. Graber's property,  
16 without reasonable supervision.

17  
18 19. The evidence shows that Defendant Gary D. Graber failed to take reasonable  
19 care to make sure that his cattle did not run off the property, onto the property of others or  
20 onto SR 530.

21  
22  
23  
24  
25 **FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 4**

**LAW OFFICE OF BEN W. WELLS, P.S.**  
ATTORNEY AT LAW  
210 E. Third St.  
Arlington, WA 98223  
PHONE (360) 435-1663 - FAX (360) 474-9751

1           20. The Court excluded evidence of a second collision involving a cow that took  
2 place near 20020 SR 530 on September 13, 2008, and did not consider it in reaching its  
3 decision on the merits of this case.  
4

5           21. The evidence shows that Plaintiff was 15% comparatively negligent, and  
6 Defendant Gary D. Graber was 85% negligent, for a total combined negligence of 100%.

7           22. As a result of the collision Plaintiff's truck was totaled.

8           23. The fair cash market value of Plaintiff's truck immediately before the collision  
9 was \$1,375.00 plus Plaintiff incurred damages in the form of a tow bill of \$154.00.  
10

11           24. The reasonable value of earnings and employment lost by Plaintiff due to the  
12 collision to the present time is \$8,632.00.

13           25. As a result of the collision Plaintiff was severely injured. Plaintiff fractured  
14 the patella on his right knee and injured his left knee.

15           26. Plaintiff had to undergo arthroscopic surgery for his right knee injury, and will  
16 require future surgery, including a total right knee replacement, on a more probable than  
17 not basis. Plaintiff also injured his left knee in the collision and it currently continues to  
18 cause pain and disability.  
19

20           27. Plaintiff's right knee injuries are permanent and debilitating.

21           28. Plaintiff was born on October 20, 1945, and is currently 64 years old.  
22  
23  
24

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

29. The reasonable value of necessary medical care, treatment, and services received by Plaintiff to the present time is \$56,474.07. These charges were reasonable and necessary charges to treat injuries proximately caused by the motor vehicle collision of August 29, 2007. Furthermore the charges are customary charges for health care in this community.

30. The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required by Plaintiff in the future is \$60,000.00 for the total right knee replacement. The future medical care was proximately caused by the motor vehicle collision of August 29, 2007. The charges for the future total right knee replacement are customary charges for the procedure in this community.

31. The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required by Plaintiff in the future is \$30,000.00 for the care of the injuries to his left knee. The left knee injuries were proximately caused by the motor vehicle collision of August 29, 2009. The charges for the future treatment for the left knee are customary charges for the care of those injuries in this community.

32. The evidence shows that prior to August 29, 2007, Plaintiff Ronald W. Moe was a very active man with no physical problems, and that now he is severely limited in what he can do.

1 33. To the extent that future medical treatment and expenses are not incurred, they  
2 will result in greater pain and suffering and noneconomic damages for Plaintiff.  
3

4 34. Plaintiff's damages for the loss of enjoyment of life experienced and with  
5 reasonable probability to be experienced in the future, for the subjective pain and  
6 suffering, both mental and physical, experienced and with reasonable probability to be  
7 experienced in the future, are equal to \$300,000.00.

8 35. Plaintiff's total damages are equal to \$456,635.07.

9  
10 36. Defendant Gary D. Graber is responsible for 85% of the total amount of  
11 damages awarded to Plaintiff, which is equal to \$388,139.81.

12 Based on the above findings, the Court makes the following Conclusions of Law:  
13

## 14 II. CONCLUSIONS OF LAW

15  
16 1. Both attorneys cited the Supreme Court of Washington's case of *Scanlan v*  
17 *Smith*, 66 Wn.2d 601, 404 P.2d 776 (1965).

18 2. Plaintiff proved by a preponderance of the evidence that Defendant Gary D.  
19 Graber was negligent, and failed to take reasonable precautions to protect the travelling  
20 public on SR530 from his livestock roaming at large.  
21  
22  
23  
24

1  
2  
3  
4 3. Defendant Gary D. Graber failed to show that ordinary and reasonable care had  
been exercised, under the circumstances, to prevent his livestock from getting onto the  
highway adjacent to his property

5 4. Defendant Gary D. Graber was 85% negligent.

6 5. Plaintiff Ronald W. Moe was 15% comparatively negligent.

7  
8 6. Defendant Gary D. Graber's failure to take reasonable precautions was the  
9 direct and proximate cause of Plaintiff's injuries and damages.

10 7. Plaintiff's injuries and damages were foreseeable.

11 8. The injury caused by the collision with Plaintiff's vehicle was a foreseeable  
12 consequence of Defendant's failure to reasonably supervise his cattle and reasonably  
13 secure his property.

14 9. Any unknown defendants were at the most an intervening and not a superseding  
15 cause of Plaintiff's injuries.

16  
17 10. Defendant Gary D. Graber is responsible for 85% of damages caused by the  
18 collision, and Plaintiff for 15% of damages, for a total of 100% of damages.

19 11. The total loss of Plaintiff's truck was proximately caused by Defendant Gary  
20 D. Graber's negligence. Plaintiff is entitled to the fair cash market value of Plaintiff's  
21 truck immediately before the collision, which is equal to \$1,375.00, plus tow bill of  
22 \$154.00.  
23

24  
25 **FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 8**

**LAW OFFICE OF BEN W. WELLS, P.S.**  
ATTORNEY AT LAW  
210 E. Third St.  
Arlington, WA 98223  
PHONE (360) 435-1663 - FAX (360) 474-9751

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

12. Plaintiff's loss of earnings was proximately caused by Defendant Gary D. Graber's negligence. Plaintiff is entitled to the reasonable value of earnings and employment lost by Plaintiff due to the collision to the present time, which is equal to \$8,632.00.

13. Plaintiff suffered permanent injuries and is entitled to future damages caused by the collision.

14. Plaintiff is currently 64 years old and his life expectancy is 17.13 years according to the Life Expectancy Table.

15. Plaintiff's past medical expenses were reasonable, necessary, and customary expenses proximately caused by Defendant Gary D. Graber's negligence. The reasonable value of necessary medical care, treatment, and services received by Plaintiff to the present time is \$56,474.07.

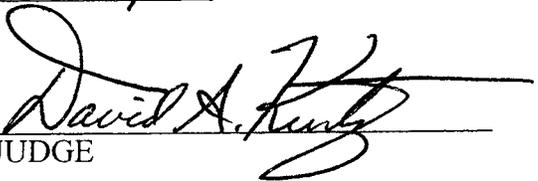
16. Plaintiff's future medical expenses are reasonable, necessary, and customary expenses that Plaintiff will incur in the future on a more likely than not basis and the future medical expenses were proximately caused by Defendant Gary D. Graber's negligence. The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required by Plaintiff in the future is \$60,000.00 for the total right knee replacement and \$30,000.00 for the care of the injuries to his left knee.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

17. Plaintiff loss of enjoyment of life, experienced and with reasonable probability to be experienced in the future, his subjective pain and suffering, both mental and physical, experienced and with reasonable probability to be experienced in the future, were proximately caused by Defendant Gary D. Graber's negligence. Plaintiff's noneconomic damages are equal to \$300,000.00.

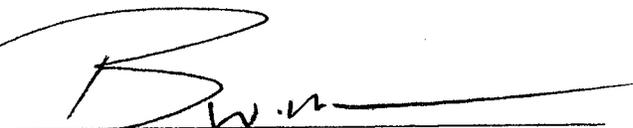
18. Judgment should be entered in favor of Plaintiff and against Defendant Gary D. Graber and Defendant Ruth A. Graber, husband and wife, and the marital community composed thereof, on Plaintiff's negligence claim against Defendants, in the amount of \$388,139.81.

DONE IN OPEN COURT this 11<sup>th</sup> day of January, 2010.

  
JUDGE

Presented by:

LAW OFFICE OF BEN W. WELLS, P.S.



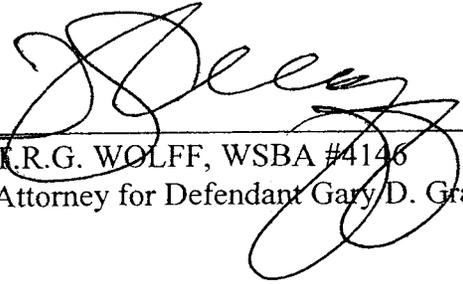
BEN W. WELLS, WSBA# 19199  
Attorney for Plaintiffs

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 10

LAW OFFICE OF BEN W. WELLS, P.S.  
ATTORNEY AT LAW  
210 E. Third St.  
Arlington, WA 98223  
PHONE (360) 435-1663 - FAX (360) 474-9751

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Copy Received; ~~Approved as to Form and~~  
~~Entry~~; Notice of Presentation Waived:



---

T.R.G. WOLFF, WSBA #4146  
Attorney for Defendant Gary D. Graber

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 11**

**LAW OFFICE OF BEN W. WELLS, P.S.**  
ATTORNEY AT LAW  
210 E. Third St.  
Arlington, WA 98223  
PHONE (360) 435-1663 - FAX (360) 474-9751

# Moe v. Graber

## Testifying Witnesses

### Plaintiff's Witnesses:

Trooper Samuel Eagle  
Cheryl Arney  
Byron Gabriel  
Gail Moffett  
Alfred Soler  
Jennifer Crichton  
Steve Harbinson  
Ron Moe  
Judy Moe  
Merle McCaulley  
Sandi McCaulley  
Darren Moe  
Tony Snyder  
Dr. Jeff Cartwright

### Defendants' Witnesses:

Gary Graber  
John Hillis  
Bryan Norton



CL12817123

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

FILED IN OPEN COURT

December 7 2009

Sonya Kraski County Clerk

By: Eileen McLachlan Deputy Clerk

LIST OF EXHIBITS FILED

PAGE 1 of 11

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

Ben W. Wells

T. Reinhard Wolff

Attorney's Name

Attorney's Name

PLTF/PTNR'S EXHIBITS

DFTD/RESP'S EXHIBITS

Table with 2 main columns: PLTF/PTNR'S EXHIBITS and DFTD/RESP'S EXHIBITS. Each column has sub-columns for No., Description, A, R, N, W. Includes a 'Column Totals' row and a 'Total No. Exhibits Filed THIS Page' row.

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

ORIGINAL

Exh. B 72

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

PLTF/PTNR'S EXHIBITS

DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
9	4" X 6" color photo copy of a man and woman facing trees/mountainside	X									
10	4" X 6" color photo copy of people on snowy mountain	X									
11	4" X 6" color photo copy of a man going down a water slide	X									
12	4" X 6" color photo copy of a man and a woman on a mountainside	X									
13	4" X 6" color photo copy of a man and a woman in front of snowy mountainside	X									
14	4" X 6" color photo copy of two people by seaside	X									
15	4" X 6" color photo copy of a man leaning down	X									
16	4" X 6" color photo copy of the upper portion of a man in front of trees	X									
17	8½" X 11" color photo copy of two men beside two motorcycles	X									
18	8½" X 11" color photo copy of a man standing beside two motorcycles	X									
19	8½" X 11" color photo copy of two men standing in front of a mountainside with trees	X									
Column Totals		1	0	0	0	Column Totals		0	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		11				Total No. Dfdt/Resp's Exhibits Filed THIS Page		0			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

PLTF/PTNR'S EXHIBITS

DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
20	8½" x 11" color photo copy of a smashed front end of a vehicle	X									
21	8½" x 11" color photo copy of the right side of a vehicle with the front smashed in	X									
22	8½" x 11" color photo copy of the left side of a vehicle with the front end smashed in	X									
23	8½" x 11" color photo copy of a road with liquid spot and the front of a patrol car	X									
24	8½" x 11" color photo copy of a road with a liquid spot, a car's fender and a patrol car	X									
25	8½" x 11" color photo copy of a road	X									
26	8½" x 11" color photo copy of the back of patrol car and another vehicle	X									
26A	4" x 6" color photo copy of the back of patrol car and another vehicle	X									
27	8½" x 11" color photo copy of a metal fence and a field	X									
28	6½" x 11" color photo of barbed wire fence on grassy land		X								
29	6½" x 11" color photo of closer view of barbed wire fence on grassy land			X							
30	6½" x 11" color photo of barbed wire fence leaning to the left over grass			X							
Column Totals		9	1	2	0	Column Totals		0	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		10				Total No. Dfdt/Resp's Exhibits Filed THIS Page		0			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

PLTF/PTNR'S EXHIBITS

DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
31	6½" x 11" color photo of a wooden building with a metal fence			X							
32	6½" x 11" color photo of a metal fence leaning to the right on a yard		X								
33	6½" x 11" color photo of wooden fence with barbed wire; building in background	X									
34	6½" x 11" color photo of trees with a house to the left			X							
35	6½" x 11" color photo of wooden fence with barbed wire in trees	X									
36	6½" x 11" color photo of the end post of a fence surrounded by trees			X							
37	6½" x 11" color photo of bush tops and the post of a fence			X							
38	6½" x 11" color photo of a grassy field with a small wooden building	X									
39	4" X 6" color photo of a road with a metal fence	X									
40	4" X 6" color photo of a road with a large metal container on it	X									
Column Totals		5	1	4	0	Column Totals		0	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		6				Total No. Dfdt/Resp's Exhibits Filed THIS Page		0			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

PLTF/PTNR'S EXHIBITS

DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
41	4" X 6" color photo of a yard with trees and a burned down building	X									
42	4" X 6" color photo of an awning and a yard	X									
43	4" X 6" color photo of an open enclosure with overflowing trash cans	X									
44	4" X 6" color photo of overflowing trash cans	X									
45	4" X 6" color photo of a gate with red twine tied around it	X									
46	4" X 6" color photo of a red barn door	X									
47	4" X 6" color photo of two red barns	X									
48	8½" X 11" blurry color photo of aerial view of landscape/buildings	X									
49	8½" X 11" color photo copy of rocky ground with yellow measuring tape ending with .3	X									
50	8½" X 11" color photo copy of road with two cars with headlights on	X									
51	8½" X 11" color photo copy of road with cars traveling in both directions	X									
Column Totals		1	0	0	0	Column Totals		0	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		11				Total No. Dfdt/Resp's Exhibits Filed THIS Page		0			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

PLTF/PTRN'S EXHIBITS

DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
52	8½" X 11" color photo copy of road curving to the left	X									
53	8½" X 11" color photo copy of road curving to the left; back of silver car	X									
54	8½" X 11" color photo copy of rocky ground with yellow measuring tape and an orange object	X									
55	8½" X 11" color photo copy of road and back of a white car on right side	X									
56	8½" X 11" color photo copy of rocky ground and yellow measuring tape	X									
57	8½" X 11" blurry color photo copy of road/trees/telephone pole	X									
58	8½" X 11" color photo copy of a road with two cars on left and reflective marker on right	X									
59	8½" X 11" color photo copy of road with reflective marker on left side	X									
60	8½" X 11" color photo copy of a road and back/side view of gold vehicle	X									
61	8½" X 11" color photo copy of a road with two cars on left side of road	X									
62	8½" X 11" view 1 color photo copy of a road with silver car on right side of road	X									
Column Totals		1	0	0	0	Column Totals		0	0	0	0
Total No. Pltff/Ptnr's Exhibits Filed THIS Page		11				Total No. Dfdt/Resp's Exhibits Filed THIS Page		0			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe  
PLTF/PTNR'S EXHIBITS

VS

Gary D. Graber, et ux  
DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
63	8½" X 11" view 2 color photo copy; silver car on right side of road	X									
64	8½" X 11" view 1 color photo copy; road with an orange object on roadside	X									
65	8½" X 11" view 2 color photo copy; road with an orange object on roadside	X									
66	8½" X 11" view 3 color photo copy; road with an orange object on roadside	X									
67	8½" X 11" view 1 color photo copy; road and a truck with headlights on/orange object on road	X									
68	8½" X 11" view 2 color photo copy; road and a truck with headlights on/orange object on roadside	X									
69	8½" X 11" view 3 color photo copy; road and a truck with headlights on/orange object on roadside	X									
70	8½" X 11" view 4 color photo copy; road and a truck with headlights on/orange object on road	X									
71	8½" X 11" view 5 color photo copy; road and a truck with headlights on/orange object on road	X									
72	8½" X 11" view 6 color photo copy; road and a truck with headlights on/orange object on road	X									
73	8½" X 11" view 7 color photo copy; road and a truck with headlights on/orange object on road	X									
Column Totals		11	0	0	0	Column Totals		0	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		11				Total No. Dfdt/Resp's Exhibits Filed THIS Page		0			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

PLTF/PTRN'S EXHIBITS

DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
74	8½" X 11" view 8 color photo copy of a road and a truck with headlights on/orange object on road	X									
75	8½" X 11" view 9 color photo copy; road and a truck with headlights on/orange object on roadside	X									
76	8½" X 11" view 10 color photo copy; road and a truck with headlights on/orange object on roadside	X									
77	8½" X 11" view 11 color photo copy; road and a truck with headlights on/orange object on roadside.	X									
78	8½" X 11" view 12 color photo copy; road and a truck with headlights on/orange object on roadside	X									
79	1 CD paper case containing one CD labelled "Moe v. Graber - video"	X									
80	1 pg color copy; Illustration of knee titled "Total Knee Replacement Surgery"	X									
81	1 CD paper case containing one CD labelled "Ron Moe Op Video"	X									
82	3 pg copy; Medical Specials Calculation RE: Ronald Moe dated 10-16-09	X									
83	Multiple pg copy; Cascade Valley Hospital Statement for Ronald Moe For date 8-3-07 with attachments	X									
						84	Posterboard drawing in blue and red ink	X			
Column Totals		10	0	0	0	Column Totals		1	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		10				Total No. Dfdt/Resp's Exhibits Filed THIS Page		1			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

PLTF/PTRN'S EXHIBITS

DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
85	1 pg copy; Wage Loss Calculations Re: Ronald Moe	X									
86	1 pg copy; Wage Loss and Earnings Statement Re: Ronald Moe dated 11-19-09	X									
87	1 pg copy; Brunswick; Special Information Re: Ron Moe	X									
88	2 pg copy; Washington State Patrol; Statement Form by Ronald Moe	X									
89	5 pg copy; Allegis Transcript Re: Ronald Moe	X									
90	1 paper CD case containing on DVD labelled "Video at Moe Residence"	X									
91	1 pg copy; Four Seasons Towing and Recovery, Inc. for Invoice #5813	X									
92	4 pg website copy; Kelley Blue Book Pricing Report for 1993 Toyota Pickup Short Bed	X									
93	8½" X 11" color photo copy of a portion of a red barn; door open			X							
94	8½" X 11" color photo copy of barns and buildings next to a field			X							
95	8½" X 11" color photo copy of close up of red barn; woman to the right			X							
Column Totals		8	0	3	0	Column Totals		0	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		8				Total No. Dfdt/Resp's Exhibits Filed THIS Page		0			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe

VS

Gary D. Graber, et ux

PLTF/PTNR'S EXHIBITS

DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
96	8½" X 11" color photo copy of a red barn with door open; gate open on left			X							
97	8½" X 11" color photo copy of enclosed gated area			X							
98	8½" X 11" color photo copy of a closed metal gate; field in background			X							
99	8½" X 11" color photo copy of section of gate tied with red twine			X							
100	8½" X 11" color photo copy of road with metal fence; bottom portion smashed	X									
101	8½" X 11" color photo copy of a gate; bottom portion sticking out; white vehicle on road	X									
102	8½" X 11" color photo copy of a gate; left section sticking out	X									
103	8½" X 11" color photo copy of a gate secured to a wooden post with twine and metal hinges	X									
104	8½" X 11" color photo copy of a gate secured to a wooden post with red twine; barns in background	X									
105	8½" X 11" color photo copy of a gate; wooden fencing; barns and mountain	X									
106	8½" X 11" color photo copy of a gate with mountain in background	X									
Column Totals		7	0	4	0	Column Totals		0	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		7				Total No. Dfdt/Resp's Exhibits Filed THIS Page		0			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

LIST OF EXHIBITS FILED

CASE NO. 08-2-08349-5

Ronald Moe  
PLTF/PTNR'S EXHIBITS

VS Gary D. Graber, et ux  
DFDT/RESP'S EXHIBITS

No.	Description	A	R	N	W	No.	Description	A	R	N	W
107	8½" X 11" color photo copy of a wooden fence; telephone post; barns			X							
108	8½" X 11" color photo copy of an open gate at the end of a road			X							
109	8½" X 11" color photo copy of a road; building; trees and field			X							
110	8½" X 11" color photo copy of a gravel road; trees; and grass			X							
111	1 posterboard sized handdrawing of property labelled "Gary D. Graber"	X									
						112	8½" X 11" color photo copy of road with a man in red shirt on right side	X			
						113	8½" X 11" color photo copy; of blue gate next to building overhang	X			
						114	8½" X 11" color photo copy of pasture; building on the left with metal fence	X			
						115	1 posterboard sized color photo of aerial view of farmland with houses	X			
						116	4 pg copy; Curriculum Vitae of Bryan Norton	X			
Column Totals		1	0	4	0	Column Totals		5	0	0	0
Total No. Pltf/Ptnr's Exhibits Filed THIS Page		1				Total No. Dfdt/Resp's Exhibits Filed THIS Page		5			

CODES: A = Admitted; R = Rejected; N = Not Offered; W = Withdrawn

TOTAL NO. PLTF/PTNR'S EXHIBITS	90	TOTAL NO. DFDT/RESP'S EXHIBITS	6
TOTAL NUMBER OF EXHIBITS SUBMITTED TO DOCUMENT CONTROL:	96		
TYPE OF HEARING:	Non-jury trial		
Judge:	David A. Kurtz	Agency	N/A