

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.

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

OPENING BRIEF OF APPELLANT

BURI FUNSTON MUMFORD, PLLC

By PHILIP J. BURI
WSBA #17637
1601 F Street
Bellingham, WA 98225
(360) 752-1500

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 AUG 11 AM 10:10

ORIGINAL

TABLE OF CONTENTS

INTRODUCTION	1
I. ASSIGNMENTS OF ERROR	2
II. STATEMENT OF FACTS.	6
A. The Accident	6
B. The Bench Trial	9
ARGUMENT	11
III. STANDARD OF REVIEW	11
IV. THE TRIAL COURT COMMITTED THREE ERRORS THAT REQUIRE A RETRIAL.	11
A. Gary Graber Is An Experienced Rancher Who Took All Reasonable Precautions	11
B. The Person Who Opened The Gate Bears Responsibility For Moe's Injuries	16
1. The Trial Court Must Segregate Damages From An Intentional Tortfeasor.	16
2. An Intervening Cause Requires An Allocation of Fault.	19
C. Mr. Moe Had Time To Avoid The Collision.	20
CONCLUSION	23

TABLE OF AUTHORITIES

Washington Supreme Court

Merriman v. Cokeley, 168 Wn.2d 627, 230 P.3d 162 (2010) 11

Tegman v. Accident & Medical Investigations, Inc.,
150 Wn.2d 102, 75 P.3d 497 (2003) 1, 5, 16, 17, 18

Washington State Court of Appeals

Doe v. Corporation of President of Church of Jesus Christ
of Latter-Day Saints, 141 Wn. App. 407, 167 P.3d 1193
(2007) 18

Rollins v. King County Metro Transit 148 Wn. App. 370, 199
P.3d 499 (2009) 18

Other Authorities

16 Washington Practice, Tort Law and Practice § 12.12A
(3rd Ed) 18

Codes and Regulations

RCW 4.22.070 1, 5, 20

INTRODUCTION

This appeal is about causation and fault. On August 29, 2007 at 11:30 p.m., Plaintiff Ronald Moe hit a three-quarter-ton cow that belonged to Defendant Gary Graber. Moe was driving on State Route 530 near Oso and suffered injuries to his knees.

After a three-day bench trial, Snohomish County Superior Court Judge David Kurtz found Graber 85% at fault for Moe's injuries and Moe 15% at fault. But the trial judge did not consider or assign fault to a third entity involved in this accident – whoever opened the gate that allowed the cows out. The court found it irrelevant whether the cows escaped through an open gate or a broken fence.

I am not making necessarily a specific finding. I think that either way, whatever the circumstances regarding that gate, I find, as I was reciting, that there was a lack of reasonable care in inspecting the gate over the course of time.

(12/07/09 VRP at 111).

Graber now appeals the court's allocation of fault. Under RCW 4.22.070 and the Supreme Court's decision in Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 105, 75 P.3d 497 (2003), the trial court had to exclude any damage caused by an intentional tortfeasor and then allocate fault to all

negligent entities. Because it did not do this, its judgment was in error.

I. ASSIGNMENTS OF ERROR

The Grabers assign error to the Superior Court's January 11, 2010 Judgment (CP 6-8) and January 11, 2010 Findings of Fact and Conclusions of Law (CP 9-31). Specific assignments of error are:

A. The trial court erred by awarding judgment to Ronald Moe against the Grabers for \$388,139.81 (Judgment ¶ 1; CP 7).

B. The trial court erred by awarding costs to Mr. Moe based on the improper judgment. (Judgment ¶ 2; CP 8).

C. The trial court erred by awarding interest on the improper judgment. (Judgment ¶ 3; CP 8).

D. Substantial evidence does not support Finding of Fact ¶ 4 and it is an error of law. (Findings ¶ 4; CP 10).

E. Substantial evidence does not support Finding of Fact ¶ 5 and it is an error of law. (Findings ¶ 5; CP 11).

F. Substantial evidence does not support Finding of Fact ¶ 7 and it is an error of law. (Findings ¶ 7; CP 11).

G. Substantial evidence does not support Finding of Fact ¶ 8 and it is an error of law. (Findings ¶ 8; CP 11).

H. Substantial evidence does not support Finding of Fact ¶ 9 and it is an error of law. (Findings ¶ 9; CP 11).

I. Substantial evidence does not support Finding of Fact ¶ 10 and it is an error of law. (Findings ¶ 10; CP 11).

J. Substantial evidence does not support Finding of Fact ¶ 11 and it is an error of law. (Findings ¶ 11; CP 11).

K. Substantial evidence does not support Finding of Fact ¶ 12 and it is an error of law. (Findings ¶ 12; CP 11).

L. Substantial evidence does not support Finding of Fact ¶ 13 and it is an error of law. (Findings ¶ 13; CP 12).

M. Substantial evidence does not support Finding of Fact ¶ 14 and it is an error of law. (Findings ¶ 14; CP 12).

N. Substantial evidence does not support Finding of Fact ¶ 15 and it is an error of law. (Findings ¶ 15; CP 12).

O. Substantial evidence does not support Finding of Fact ¶ 16 and it is an error of law. (Findings ¶ 16; CP 12).

P. Substantial evidence does not support Finding of Fact ¶ 17 and it is an error of law. (Findings ¶ 17; CP 12).

Q. Substantial evidence does not support Finding of Fact ¶ 18 and it is an error of law. (Findings ¶ 18; CP 12).

R. Substantial evidence does not support Finding of Fact ¶ 19 and it is an error of law. (Findings ¶ 19; CP 12).

S. Substantial evidence does not support Finding of Fact ¶ 21 and it is an error of law. (Findings ¶ 21; CP 13).

T. Substantial evidence does not support Finding of Fact ¶ 22 and it is an error of law. (Findings ¶ 22; CP 13).

U. Substantial evidence does not support Finding of Fact ¶ 25 and it is an error of law. (Findings ¶ 25; CP 13).

V. Substantial evidence does not support Finding of Fact ¶ 27 and it is an error of law. (Findings ¶ 27; CP 13).

W. Substantial evidence does not support Finding of Fact ¶ 30 and it is an error of law. (Findings ¶ 30; CP 14).

X. Substantial evidence does not support Finding of Fact ¶ 31 and it is an error of law. (Findings ¶ 31; CP 14).

Y. Substantial evidence does not support Finding of Fact ¶ 32 and it is an error of law. (Findings ¶ 32; CP 14).

Z. Substantial evidence does not support Finding of Fact ¶ 33 and it is an error of law. (Findings ¶ 33; CP 15).

AA. Substantial evidence does not support Finding of Fact ¶ 34 and it is an error of law. (Findings ¶ 34; CP 15).

BB. Substantial evidence does not support Finding of Fact ¶ 35 and it is an error of law. (Findings ¶ 35; CP 15).

CC. Substantial evidence does not support Finding of Fact ¶ 36 and it is an error of law. (Findings ¶ 36; CP 15).

DD. Conclusions of Law ¶¶ 2-13 are errors of law. (Conclusions ¶¶ 2-13; CP 15-17).

EE. Conclusions of Law ¶¶ 15-18 are errors of law. (Conclusions ¶¶ 15-18; CP 17-18).

Issues pertaining to these assignments of error are:

1. “The damages due to intentional acts must be segregated from damages caused by fault-based acts or omissions because RCW 4.22.070(1)(b) only addresses liability for *at-fault* entities.” Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 115, 75 P.3d 497 (2003). Here, the trial court did not decide whether an unknown actor intentionally opened Graber’s exterior gates, allowing cows to escape. Did the trial court err by not segregating damages caused by an intentional actor?

2. Under RCW 4.22.070, the trial court must assign fault “to every entity which caused the claimant’s damages.” The trial court did not determine whether an unknown actor negligently

opened the exterior gates and was an at-fault entity. Did the trial court err by not allocating fault to all at-fault entities?

3. The court's sole finding on Ronald Moe's negligence is that he "could have been a bit more alert, but he was only slightly negligent, to a very modest degree." (Findings, ¶ 8; CP 11) Significant evidence at trial established that Moe had changed his testimony on the accident, had nearly 400 feet to stop, and had light from a waning moon. Does substantial evidence prove that Moe was more than "slightly" negligent?

II. STATEMENT OF FACTS

A. The Accident

On the night of August 29, 2007, Ronald Moe was driving eastbound on State Route 530. It was the night after a full moon. Moe had just finished working the swing shift at US Marine Bayliner in Arlington, Washington and was driving home. (12/03/09 VRP 28). According to Moe's testimony at trial, he was following a car 150 feet ahead of him and saw the car brake slightly. (12/03/09 VRP 30).

He came around a corner and saw something in the road.

And as I came around the corner and my headlights -- just barely got around the corner and just barely started on the straightaway, and there I saw

something in the road, and I just had time, just barely had time to see a cow. I could see the white on the side of his face, and he was facing towards the barns, towards Mr. Graber's barn. And I could -- then just as I saw it was a cow, I hit my brakes and said, oh, God, it's a cow, and I remember that. And at that same split second, that is when I hit the cow. And there was only the one cow.

(12/03/09 VRP 31). Moe got out of his damaged truck and waived down a passing driver. He used the driver's cell phone to call 911 and his wife. (12/03/09 VRP 34).

State Trooper Samuel Eagle was first on the scene. He saw Moe's pickup by the side of SR 530.

He had limped over, contacted me. I asked him what had happened, and he said he came around the curve. And I think he said there was around three or four cows in the road, and he had slammed on his brakes and tried to avoid hitting it, but struck one of the cows. I looked at his truck. It had pretty severe damage to the front, cow poo and blood on it...

(12/01/09 VRP 32). At the scene, Moe told Trooper Eagle that there were three or four cows on the road, not just one.

Trooper Eagle followed the sounds of a bellowing cow to find an exterior gate wide open.

[I] followed the cow tracks on the property to an open gate, and I saw several cows over a slight little hill. It was dark out, so I had the flashlight. But the gate was wide open, and I tied it shut with some, I believe it's bailing twine that I found on the ground, and tied it shut and proceeded with the rest of the crash. And I

just gathered the information and filled out my collision report.

(12/01/09 VRP 33).

The officer concluded that Moe did the best he could to avoid hitting the multiple cows in the road.

Q. Did you ask him about any evasive maneuvers that he took or couldn't take?

A. Well, we talked about it. And he basically told me there were three to four cows on the road, and he just jammed on the brakes the best he could. It was almost like: Which cow do you hit?

Q. So near if he missed this one, he would have hit this one?

A. That was my opinion at the time, he was going to crash no matter what.

Q. Let me ask you this: If there had been a vehicle ahead of him, would that have made a difference of how the accident occurred?

A. I don't know.

Q. Did he tell you that there was a vehicle ahead of him?

A. I don't believe so.

Q. Would you have found that significant?

A. That vehicle probably would have crashed into the cows had they been there.

(12/01/09 VRP 56).

Finally, Trooper Eagle did not see how the cows got on the road, but he confirmed that they returned to the pasture through the open gates.

Q. ...Did you at the time that you closed the gate, were you satisfied that that was the means through which the cows had exited?

MR. WELLS: Objection.

THE COURT: Basis of the objection?

MR. WELLS: Well, he has already testified he doesn't know where the cows got out.

THE COURT: Again, overruled, he may answer.

BY THE WITNESS:

A. At the time, I just assumed that's where they came out. That's where they went back in.

(12/01/09 VRP 52).

B. The Bench Trial

Mr. Moe sued, alleging that Mr. Graber was negligent in allowing his cows to escape. On December 1-4, 2009, Snohomish County Superior Court Judge David Kurtz held a bench trial on plaintiff's claims. On December 7, Judge Kurtz announced his judgment, finding Graber 85% at fault and Moe 15% at fault.

(12/07/09 VRP 108). He found damages equal to \$456,635.07, and awarded Moe \$388,139.81 plus costs. (12/07/09 VRP 110).

On January 11, 2010, the Court entered findings of fact and conclusions of law (CP 9-31) and a judgment summary (CP 6-8). The court's decision rests on three key findings and conclusions. First, the court found that Gary Graber was an absentee owner who did not take reasonable care to prevent cows from escaping. (Findings ¶¶ 10, 13, 15, 19) (CP 11, 12). Second, if someone opened the gates on the night of the accident, "any unknown defendants were at most an intervening and not a superseding cause of Plaintiff's injuries." (Conclusions ¶ 9; CP 16). The court found that who opened the gate was irrelevant to Graber's liability.

I am not making necessarily a specific finding. I think that either way, whatever the circumstances regarding the gate, I find, as I was reciting, that there was a lack of reasonable care in inspecting the gate over the course of time.

(12/07/09 VRP 110).

Third, Ronald Moe was only slightly negligent when he hit the cow. "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." (Findings ¶ 8; CP 11).

Because substantial evidence does not support these three premises, and they are erroneous as a matter of law, the Grabers now appeal. They respectfully request this Court to vacate the trial court's judgment and remand for a new trial.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's findings of fact for substantial evidence and conclusions of law *de novo*.

An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise.

Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

IV. The Trial Court Committed Three Errors That Require A Retrial

A. Gary Graber Is An Experienced Rancher Who Took All Reasonable Precautions

The trial court erred by finding that Gary Graber was an absentee owner who failed to exercise reasonable care. Graber grew up on a farm and has been a rancher for over 40 years. (12/3/09 VRP 104). As he testified at trial, "my family comes from a long line of farmers, and we got our first ranch in Oso and started raising cattle [in 1969]." (12/3/09 VRP 101). During that time, the

Grabers acquired ranchland piece-by-piece, culminating with purchasing the Vos farm in 1995. (12/3/09 VRP 104). The Grabers now own a ranch totaling 500 acres. (12/03/09 VRP 149).

At trial, Plaintiff argued and the trial court accepted that Graber was an absentee owner who negligently supervised his ranch. This was incorrect for three reasons. First, Graber was not an absentee owner --- he lived on another section of the ranch and leased the various farmhouses that dotted his land. As he noted on cross examination,

Q. if a property has livestock in it and there's no one living on the property, you should take extra particular caution to make sure those livestock stay in?

A. I don't know how a large ranch you could be living on all the property. If you have a thousand-acre ranch, you have a house in one lot, basically, of that ranch. It's unfair to say that you are living on your ranch and yet, you are -- I have 500 acres, how can I live on 500 acres?

(12/03/09 VRP 149).

To protect against vandalism, Graber had tenants living on different sections of his property.

Q. Did having tenants in these places prevent vandalism from occurring?

A. I am sure it prevented vandalism. More might have occurred had I not had it occupied.

Q. But the vandalism occurred anyway?

A. Yes, it did.

Q. What do you have to do to protect yourself from vandalism?

A. Go to heaven.

(12/03/09 VRP 184).

Second, Graber's ranching techniques were appropriate for the industry. John Hillis, a nearby rancher, has known the Grabers for 30 years. (12/3/09 VRP 110). In characteristically terse style, he complimented the Graber ranch.

Well, it looked pretty good to me. A lot of new fences. Somebody spend a lot of money there, a lot of time and effort. And there is, at least, like myself, at least two lines of defense before cattle can get to any highway.

(12/03/09 VRP 111-112).

Third, tying gates closed with bailing twine from hay bales is a common, accepted practice.

Q. I want to direct your attention to the method used to close those gates?

A. Oh, the twine?

Q. Yes. Is that an adequate way to close a gate?

A. Yeah. It looks like it's wrapped three or four times and tied off with a knot, you know, I mean it takes a quite a bit of tensile strength to break that twine.

Q. Is that an acceptable way of closing a farm gate?

A. I have done it myself many times.

(12/03/09 VRP 113-114).

The trial court cited Mr. Hillis' testimony as evidence that "a reasonable owner of property adjacent to a public highway should have put locks on his outside gates." (Findings of Fact ¶ 16; CP 12). His full statement, however, was different.

Q. 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?

A. 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.

Q. Okay. What does it take to open that gate?

A. Well, if the guy that tied that knot tied it very tight, you are going to fiddle around for a few minutes. It's going to be a pain in the butt, but if he has tied it loose, then you can usually just pull it, and it will come right open.

Q. And how does that appear to be tied to you?

A. It appears to me, my brother creating problems for and cinching her down good and tight.

(12/03/09 VRP 114-115).

In addition, Hillis testified that locks and chains are equally vulnerable to bolt cutters.

Q. Are you familiar with other farmers doing it [using bailing twine] besides Mr. Graber in your experience?

A. Oh, a lot of us do that. I personally have chains on mine because we have lawsuits and fights and all kinds of issues on my farm. And so we chain and lock everything. Like around every corner, there's a problem.

Q. And so, do you keep a whole ring of keys then?

A. No. I got a bolt cutter. My brother is the one with the locks.

Q. It's a huge inconvenience to have locks on gates, isn't it?

A. Yeah, pretty much.

Q. Because anybody that goes through it has to have a key or a bolt cutter?

A. Yeah. Yeah.

(12/03/09 VRP 114-115).

Maintaining a 500-acre ranch takes steady work, and the Grabers for 40 years invested the time and money necessary to keep the ranch operating. When a cow would escape, the Grabers would find out why and fix the problem.

B. The Person Who Opened The Gate Bears Responsibility For Moe's Injuries

The trial court's second error was disregarding how the Grabers' cows escaped from their pastures. The court concluded that because Graber could have foreseen someone opening the gate, he was negligent in not preventing it. But foreseeability did not make Graber liable for opening the gate. Instead, Washington law required the trial court to determine whether the unknown person was at fault or was an intentional tortfeasor.

1. The Trial Court Must Segregate Damages From An Intentional Tortfeasor

The Washington Supreme Court in Tegman requires trial courts to segregate damages caused by an intentional tortfeasor from those caused by at-fault parties.

This court has concluded that intentional torts are part of a wholly different legal realm and are inapposite to the determination of fault pursuant to RCW 4.22.070(1). In Welch, this court held that in light of the statutory definition of "fault," a defendant who was not an intentional actor could not apportion liability to a third party intentional tortfeasor under RCW 4.22.070.

Welch, 134 Wn.2d 629, 952 P.2d 162. In short, this court has consistently recognized that liability for intentional acts or omissions does not fall within RCW 4.22.070(1), because no "fault," as defined under RCW 4.22.015, is involved.

Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 110, 75 P.3d 497 (2003).

In light of Tegman, the Court of Appeals has reversed when a negligent tortfeasor is potentially held responsible for damages caused by an intentional actor.

It was *inappropriate* to hold negligent defendants (the LDS Church) jointly and severally liable for damages caused by the intentional acts of Taylor. See Tegman v. Accident & Medical Investigations Inc., 150 Wn.2d 102, 75 P.3d 497 (2003). The Tegman court examined the relevant sections of the Tort Reform Act pertaining to joint and several liability. Noting language in RCW 4.22.070 that reads " the trier of fact shall determine the percentage of the total fault ," the Tegman court concluded that "[i]ntentional acts are not considered and this determination of 'fault' percentages is thus limited to acts that are negligent, reckless, or that subject the actor to strict liability ." Tegman, 150 Wn.2d at 111, 75 P.3d 497 (emphasis added) (citations omitted). Accordingly, the Tegman court held that "under RCW 4.22.070 the damages resulting from negligence *must* be segregated from those resulting from intentional acts, and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence. *They are not jointly and severally liable for damages caused by intentional acts of others.*" *Id.* at 105, 75 P.3d 497 (emphasis added)

Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 438, 167 P.3d 1193 (2007); Rollins v. King County Metro Transit 148 Wn. App. 370, 381-382, 199 P.3d 499 (2009) (“the negligent defendant has no burden to segregate damages due to negligence from damages due to the intentional conduct of other defendants”).

Plaintiff argued, and the court accepted, that because someone had opened the gates before, the acts of the intentional tortfeasor was foreseeable. But this does not create an exception to Tegman.

The Tegman rule applies even where the damages inflicted intentionally would not have occurred but for the negligence of another defendant. In Tegman the supervising attorneys failed to prevent a paralegal from settling cases without the clients' consent and converting the funds to his own use; similarly, in Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints the church's failure to report child sexual abuse to authorities resulted in the continuation of the abuse. But in neither case could the negligent defendant be held jointly and severally liable for the damages caused by the intentional tortfeasor.

DeWolf, 16 Washington Practice, Tort Law and Practice § 12.12A (3rd Ed).

Furthermore, because the trial court expressly did not decide whether the cows escaped through a faulty fence or the open gates, it had no basis to rule “there 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.” (Findings ¶ 17; CP 12). In fact, substantial, undisputed evidence proves the opposite. Vandals had destroyed the farmhouse on the property, stolen metal machinery from the barn, and used the outbuildings to strip cars. (12/03/09 VRP 106-107, 156-159).

The trial court had the responsibility to determine whether an intentional actor caused some of the damages to Mr. Moe. Because it did not, even when Mr. Graber presented credible evidence that someone had opened the gate and was responsible, the trial court committed reversible error.

2. An Intervening Cause Requires An Allocation of Fault

The trial court also erred by failing to allocate fault to the unknown actors that were an intervening cause of injury. In its conclusions of law, the court ruled “any unknown defendants were at most an intervening and not a superseding cause of Plaintiff’s

injury.” (Conclusions ¶ 9; CP 16). This implies the unknown defendants were negligent.

Under RCW 4.22.070, the trial court should have allocated fault to all potentially at-fault entities, whether named as a defendant or not. “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.” RCW 4.22.070. Here, the unknown person who opened the gates was, at minimum, a potentially at-fault entity. The trial court's failure to allocate fault is reversible error, requiring a retrial.

C. Mr. Moe Had Time To Avoid The Collision

The court's finding that Mr. Moe was only 15% at fault does not have substantial support in the record. Mr. Moe offered conflicting versions of the accident, telling Trooper Eagle that he saw three cows and not mentioning that he was following another car. Later, Moe stated that there was only one cow and that he was following a car 150 feet ahead.

The trial court did not accept Mr. Moe's testimony that he was not at fault. Instead, the court apparently split the difference

between the parties' expert witnesses on accident reconstruction. Mr. Moe called Steven Harbison, who testified that "the first possible point of perception for [Mr. Moe] to see the cow is at the 175-foot mark or closer." (12/2/09 VRP 23). He concluded that at 50 miles per hour, Moe needed 211 feet to stop once he saw the cow. (12/2/09 VRP 24).

The Grabers called Bryan Norton, an accident reconstructionist and a police officer. (12/04/09 VRP 3). Norton took issue with a number of Harbison's conclusions. First, the point Mr. Moe could first see the cow was 400 feet before, not 175 feet.

One of the things that I found about the curvature of the roadway was that it allowed for a person traveling on that roadway to see objects ahead of the vehicle much sooner than Mr. Harbinson suggested. I believe Mr. Harbinson wrote in his report that there was something about an abstract point of 175 feet. I understand that since I have read that that changed some. But I wasn't quite sure exactly where he came up with the 175 feet. My measurement showed me that the curvature of the roadway would allow a person to see obstruction ahead of him approximately 400 feet ahead of the vehicle.

(12/04/09 VRP 9).

Second, Moe hit the cow further down the road than Harbison testified. Grooves in the road document where Moe's truck hit the cow, not, as Harbison believed, where the car stopped.

The energy of a 1600-pound cow, approximately, impacting a truck will be absorbed in part by the shocks and springs and body and frame of that vehicle. But after that absorption is done and there is no more absorption that can be done by that vehicle, what will happen is the vehicle will actually dive down further than it's designed to and that will, essentially, make parts of the vehicle that generally shouldn't be touching the roadway, touch the road.

And so this is almost a classic example of a large -- or a large object being struck and all of that energy being absorbed, as much energy as that vehicle can absorb and not having anywhere else to go. And so what happens is pieces of that vehicle then dig into the roadway.

(12/04/09 VRP 13-14).

Contrary to Harbison's opinion, the grooves could not be the location of where the truck stopped.

Gouge marks are caused by a loading of the vehicle. Not by a vehicle coming to rest and unloading. In my 13 years in law enforcement and in -- I have seen in all of the accidents that I have investigated such a result as you are explaining.

(12/04/09 VRP 16).

Third, given Harbison's errors calculating the line of sight and point of impact, Mr. Moe had much more time to react and stop before hitting the cow.

the result was that if he was able to see the cow at 405 feet, he should be able to have both perceived the cow and reacted to the cow and have stopped his

vehicle at about 247 feet which is approximately 157 feet short of impacting the cow.

(12/04/09 VRP 23). Furthermore, Mr. Moe knew this road well. When he saw a car brake in front of him, "that should have alerted him to something out of the ordinary because there are no stop signs in this part of the roadway." (12/04/09 VRP 24). In sum, Mr. Moe had sufficient time to see the cow, react, brake, and stop. His failure to do so was negligent.

The trial court implicitly accepted this analysis by finding Moe 15% at fault. But this was not a factual dispute that allowed the court to split the difference. Either Moe had time to stop or not. Because the court found he had time to stop, and did not, Moe was at least equally responsible for the accident as the other at-fault entities. The trial court erred by finding 15% rather than 50%.

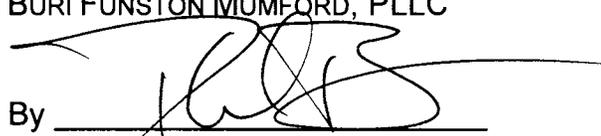
CONCLUSION

Cases involving multiple causes of injury are complicated, both in allocating liability and calculating damages. Here, the trial court failed to segregate damages caused by an intentional tortfeasor or to allocate fault to a potentially at-fault party. Because defendants Gary and Ruth Graber are liable only for their proportion of fault and damages, they respectfully request this

Court to vacate the Superior Court's judgment and remand for
retrial.

DATED this 10th day of August, 2010.

BURI FUNSTON MUMFORD, PLLC

By 

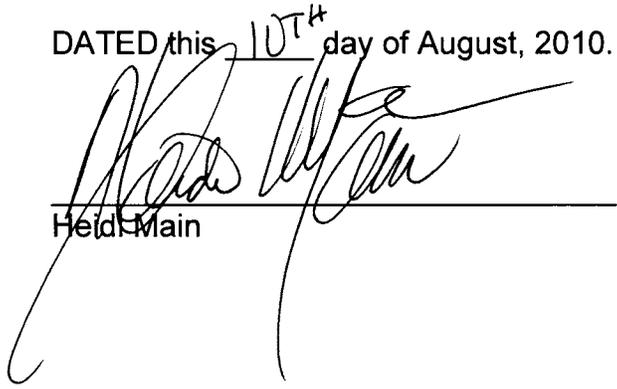
Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

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 Appellant to:

Law Office of Ben W. Wells, P.S.
210 E. Third St.
Arlington, WA 98223

DATED this 10th day of August, 2010.


Heidi Main