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STATE OF WASHINGTON  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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NO. 36540-5-II

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STEVEN JAEGER and SUSAN STEVENS-JAEGER,  
husband and wife,

Appellants,

vs.

CLEAVER CONSTRUCTION, INC.,  
AND ERIC AND JILL CLEAVER

Respondents.

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REPLY BRIEF OF STEVEN JAEGER  
AND SUSAN STEVENS-JAEGER

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## I. REBUTTAL OF SPECIFIC ACTS OF CONTRIBUTORY NEGLIGENCE

In our opening brief, we explained that Cleaver Construction (“Cleaver”) had used a scatter-shot approach during trial, picking away at Jaegers’ actions in a multitude of categories. We addressed fourteen of them in discrete subsections of our opening brief (at 29-55). As to each, we demonstrated that there was either no substantial evidence of negligence by the Jaegers, no substantial evidence of causation, or (most commonly) no substantial evidence of either one.

In Cleaver’s response brief, the issues are (thankfully) narrowed. Cleaver asserts only five areas in which the Jaegers are claimed to have acted negligently. We address each of these five remaining issues in the following subsections of this brief.

Initially, though, we address issues common to several or all of these claims. One, Cleaver never acknowledges that he had the burden of proof in establishing both that the Jaegers acted negligently and that the alleged negligence contributed to their injuries. Joyce v. Dept. of Corrections, 116 Wn. App. 569, 595, 75 P.3d 548 (2003).

Two, it bears repeating that the word “substantial” in the phrase “substantial evidence” has meaning. A shred of evidence (a “mere scintilla”)

is not “substantial.” Nor is testimony that is based on mere “theory or speculation.” Hojem v. Kelly, 93 Wn.2d 143, 606 P.2d 275 (1980).<sup>1</sup>

Three, on technical issues like understanding what caused a pump to fail or a slide to occur, Cleaver needed to present more than lay testimony. Technical issues like these require analysis by persons trained in these technical fields. Lay opinion testimony on technical issues is not allowed.<sup>2</sup>

Certainly, lay testimony is sufficient to establish that, for instance, the pump stopped working or that water was seen flowing *into* the Jaeger’s septic system. But that lay evidence is not sufficient to establish the cause of the pump failure or that water flowing *into* the septic system was the cause of a slide (on the other side of the house). Notably absent in Cleaver’s brief are citations to expert testimony substantiating any of the engineering or geohydrology theories advanced by Cleaver’s counsel at trial or in his brief here. Without technical evidentiary support, such theories constitute

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<sup>1</sup> Cleaver’s efforts to distinguish Hojem are unavailing. Hojem demonstrates the detail with which a reviewing court will review the record to determine whether evidence supporting a verdict rises to the “substantial” level - despite the deference that a reviewing court must provide to a jury verdict -- and that just *some* evidence of negligence is not necessarily *substantial* evidence of negligence.

<sup>2</sup> ER 701, 702; Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 50-51, 738 P.2d 665 (1987) (expert required for “reverse engineering” testimony); Stone v. Sisters of Charity, 2 Wn. App. 607, 611, 469 P.2d 229 (1970) (expert testimony “essential” in medical malpractice cases); Murphy v. Pac. Tele. & T., 68 Wash. 643, 652, 124 P. 114 (1912) (strength of materials in a pulley “is a thing not open to common knowledge, but requires special skill, experience and investigation”).

impermissible speculation, not competent, substantial evidence.

Four, Cleaver does not dispute that an injured party may rely on the advice of an expert consultant (though Cleaver does dispute whether a jury instruction on that issue was warranted); he does not dispute that injured parties are spared from the “20-20 hindsight” rule; and that “*if a choice of two reasonable courses presents itself, the person whose wrong forced the choices cannot complain that one rather than the other is chosen.*” Hogland v. Klein, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956) (quoting *McCormick on Damages* § 35) (emph. in orig.). Nor does Cleaver contest that the consultants the Jaegers retained to assist them with protecting their property were not highly competent. Rather, Cleaver contends that the Jaegers installed a drain without consulting with their experts. Cleaver also contends that the consultants directed the Jaegers to obtain borings and stabilize the slope and that the Jaegers failed to timely implement those recommendations. See Cleaver Br. at 39-41, 46, n. 19. We demonstrate in §§ I.D. and E., infra, that there was no substantial evidence to support those claims.

A. Removal of Native Vegetation from the Slide Zone

The “standard of care” that Cleaver invoked was the advice in Mr. Thomas’ geological report about maintaining vegetation on the slopes. But Mr. Thomas did not advise that vegetation should not be removed. Indeed,

he opined the lot could be cleared for development. Ex. 7. He simply stated that if vegetation is removed, that the area should be replanted. *Id.* (last page, ¶4). That is exactly what the Jaegers did. Mr. Koloski did not testify otherwise. There is no evidence (let alone substantial evidence) that the Jaegers acted contrarily to Mr. Thomas' recommendations.

There was evidence that the Jaegers removed some blackberries and weeds, but it was undisputed that the Jaegers immediately replanted the area with grass - consistent with Mr. Thomas' advice. RP 22-23; 283; 684; Ex. 10A(1); Ex. 134. Cleaver cites *no evidence* that the Jaegers failed to replant as called for by Mr. Thomas.<sup>3</sup>

Instead of addressing the re-planting issue, Mr. Koloski testified that "removing the vegetation . . . is a quantifiable cause of the 2001 slide." RP 1445. Cleaver's brief ignores the disconnect between Mr. Koloski's testimony and the "standard of care" created by Mr. Thomas' earlier advice.

There was no substantial evidence on the causation issue either. On direct, Mr. Koloski did not even testify that vegetation removal (let alone re-planting) caused the slide. RP 1375. He merely explained the benefit of

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<sup>3</sup> Ironically, to the extent that Mr. Koloski was concerned about *removal* of vegetation, his focus should have been on his own client. It was Mr. Cleaver who had cleared the heavily timbered land, stripping it of all trees to create a building site and views. RP 1566-67; 1593. All the Jaegers did was replace blackberries and other weeds with the grass lawn. RP 22-23. The Jaegers did not even remove shrubs, merely pruning them. *Id.*

maintaining grass on the slope, i.e., - exactly what the Jaegers had done. On cross examination, when asked to confirm that he was not attributing the replanted grass as a cause of the slide, he changed course and asserted for the first time that it was a “contributing cause.” RP 1445. He claimed that the immature grass would not “have any benefit at that point in time” and was a “quantifiable cause” of the slide. Id. Yet, he made no effort to “quantify” the extent to which the new grass had (supposedly) contributed to the slide.

Earlier, he had testified that the benefit of grass is that it absorbs water, but only during the warmer months “when actively growing.” RP 1375. The slide occurred in December. This “water-uptake” function would have been absent in December in any event.<sup>4</sup> In sum, there was no evidence that replacing blackberries with a lawn constituted negligence or that the Jaegers’ newly planted lawn was a significant contributing factor to the landslide. Cleaver had the burden of proving both; he proved neither. This issue provides no basis for the jury’s verdict or the trial court’s refusal to grant a new trial.

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<sup>4</sup> Koloski also mentioned in passing that grass protects the surface of the soil from erosion and holds the soil together. RP 1375. But he acknowledged that surface erosion is a different phenomenon from a landslide. RP 1422. While there may be greater erosion off a recently planted lawn, there was no evidence that any erosion had occurred, let alone that it contributed to the landslide. See also RP 452, 584, 680-81, 967.

B. Failure to Maintain the Sports Court Sump Pump

Cleaver's sump pump argument includes three parts:

1. The Jaegers were negligent in failing to maintain the pump;
2. The pump failed because the Jaegers failed to maintain it properly;
3. The pump's failure contributed to the slide.

The second and third items above are what we referred to in our opening brief as the "two-step" causation issue. Both the cause of the pump's failure and the issue whether that failure contributed to the slide were technical issues, beyond the ken of lay witnesses. Cleaver had the burden of proving both parts of the causation issue with competent, expert testimony. Joyce, supra.; ER 701, 702; Boeing Co., supra.; Stone, supra. But Cleaver provided zero expert testimony on either point.

Cleaver attempted to have his geologist, Koloski, provide expert testimony regarding the cause of the pump's failure. The trial court properly precluded that attempt. RP 1368-70. Cleaver made no effort to offer any other expert testimony on this key issue. He simply invited the jury to speculate, impermissibly.

While it is easiest to dispose of the pump issue by focusing on that second element, Cleaver fares hardly any better on the first or third element.

Cleaver's brief asserts that the evidence of the Jaegers' failure to maintain was in the form of photographs of the pump after it was removed *after the slide*, showing the pump caked with mud. Cleaver Br. at 33 (citing Koloski testimony based on Ex. 65A). See RP 1179 (Ex. 65A photo taken *after* pump removed). Of course, after the slide (and the flooding of the sports court), the pump was caked with mud. The only substantial evidence *pre-slide* indicated that the pump was maintained and working properly. RP 1521-22; 290-91, 1741, 1760-61. There was no substantial evidence to the contrary.<sup>5</sup>

Regarding the third element, Cleaver's geologist admitted "where the water did go remains a mystery to me." RP 1419. Without any expert evidence, Cleaver cannot prevail on this third element either.

Without an expert of his own, Cleaver tries to rely on Dr. McCabe's testimony, but Cleaver's efforts are unavailing. Dr. McCabe explained that when the pipe stopped passing water, that water would back up and cause the pump to work too hard and fail. RP 685-86. (The pump was not designed for continuous use. Id.) Thus, it was easy to understand how Cleaver's negligence in damaging the pipe ultimately led to the pump's failure.

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<sup>5</sup> There was a scintilla of evidence - but not substantial evidence - in the form of Mr. Cleaver's testimony that Sue Jaeger supposedly admitted to him that she had failed to maintain the pump. This wholly self-serving testimony, uncorroborated from any other source, does not by itself constitute substantial evidence. See also RP 1534.

The reverse was not true. No one could imagine any scenario that would explain how the failure of the pump (lower on the hillside, on the sports court) could have caused the pipe (higher up in Norbut's front yard) to suddenly fail. Id. (McCabe); 743 (Reynolds).

C. High Water Usage in the Jaegers' Drainfield

On this issue, Cleaver had the burden of proving two elements: (1) that the Jaegers were negligent in using an excessive amount of water and (2) that the excessive (negligent) water use contributed to the slide.

On the first point, Cleaver cites some evidence that the Jaeger water use was excessive. We anticipated this and addressed it in our opening brief (at 53). For the reasons stated there, this evidence is not "substantial."

On the second mandatory element, there is no issue. While Cleaver asserts "that the Jaegers' high water usage which went into their septic drainfield migrated east contributing to the cause of the landslide," Cleaver Br. at 35, that assertion is followed by no citation to the record. This is not surprising because there was absolutely no evidence to support that claim. Cleaver needed expert testimony on this technical issue and he had none. See, e.g., RP 1310 (Koloski: "never performed that evaluation"); 1419. See also RP 503 (McCabe: Jaeger drainfield not a significant contributor). With

no expert testimony to support this technical claim, it cannot provide support for the jury verdict or denial of the new trial motion. See supra at 2.

Because he lacked an expert on this issue, Cleaver cites Dr. McCabe's testimony – but the portion concerning the potential linkage of flow from *Norbut's* drainfield, not into *Jaeger's*. No one testified the two situations were comparable. Cleaver installed Norbut's drainfield too close to the slope, in violation of Thomas' recommendations and County subdivision requirements. RP 912-13, 917-18; ER 168. In contrast, the Jaegers' drainfield was set back the proper distance. RP 444, 940-41. Also, Cleaver did not install a required drain to intercept water from Norbut's drainfield, RP 918-19, 475-76. There was no evidence Jaeger's drainfield, set back further from the slope, required a cutoff drain, but there were intervening drain lines to collect excess water from Jaegers, anyway. RP 503. Dr. McCabe's testimony regarding the potential contribution of *Norbut's* drainfield to the slide had nothing to do with issues regarding the Jaegers' drainfield.

Cleaver's other attempt to find expert support for his theory is to cite Mr. Cousin's testimony regarding groundwater flowing *into* the Jaegers' septic system (not treated, domestic use water flowing out of it). Cleaver Br. at 36-37. This testimony is irrelevant for multiple reasons. One, it deals with natural groundwater occurring on the site. It has nothing to do with the

Jaegers' water usage or alleged contributory negligence. Two, the *only* day this was observed was the day of the first slide when the drain system failed, precluding it from its normal function of capturing excess groundwater. RP 1531-32. It was not evidence of excessive water use by the Jaegers. Three, Mr. Cousins' testimony was simply that the groundwater "could . . . have contributed to the landslides." RP 1003. He did not testify that it "would" or "would on a more probable than not basis" have contributed to the slides. As such, it is merely speculation and it does not provide substantial evidence to support the jury verdict. Bruns v. PACCAR, Inc., 77 Wn. App. 201, 215, 890 P.2d 469 (1995).

D. "Failure to Effectively Accomplish Repairs" (The Curtain Drain East of the Sports Court)

We explained in our opening brief, with specific citations to the record, that the Jaegers followed their consultants' advice to the letter regarding efforts to stabilize the slope. They repaired the damaged drainage system, installed new drains, installed an emergency overflow, covered the entire slope and adjacent yard with plastic, and made various other repairs. See Op. Br. at 27, 37-45.

Cleaver now has abandoned most of his attacks on these efforts. He does continue to claim, though, that the Jaegers installed a drain without

permission (discussed in this section) and failed to follow their consultants' advice to build a wall in a timely manner and to do the borings (discussed in the next section).

Cleaver claims that "the Jaegers were negligent in failing to involve their experts during the construction of the ill-conceived curtain drain [east of the sports court] which contributed to the cause of further sliding in 2003." Cleaver Br. at 38-39. There was no substantial evidence to support this claim. The undisputed facts revealed that:

- Shannon & Wilson recommended installing as much drainage as reasonably possible. RP 67, 738.
- Sue Jaeger conferred with her geotech consultant, Bruce Reynolds, before adding the curtain drain east of the sports court. RP 67, 1030-31.
- Mr. Reynolds approved installation of the curtain drain east of the sports court. RP 738-39.
- Mr. Reynolds did not believe it was necessary for him to be present during installation of the drain. RP 790.

Rather than being evidence of negligence by the Jaegers, this incident exemplifies the care with which the Jaegers complied with the advice they were receiving from the expert consultants. As both Mrs. Jaeger and the consultants testified repeatedly, the Jaegers never did anything without checking with the consultants and never did anything the consultants told her

not to do. “The amount of care required [of an injured plaintiff] is not to be measured by *ex post facto* wisdom; and a plaintiff is not bound at his peril to know the best thing to do.” Hogland v. Klein, *supra.*, 49 Wn.2d at 221 (internal citation and quotation omitted).

Cleaver claims that Mr. Reynold’s testimony that he had a conversation with Mrs. Jaeger and approved installation of the drain was “self-serving” and “contrary to the facts.” Cleaver Br. at 38. We understand that all the testimony of Mrs. Jaeger and Mr. Cleaver might be viewed as “self-serving,” but that description cannot be applied to the testimony from Mr. Reynolds, RP 738, or contractor Bill Hill who also corroborated Sue Jaeger’s testimony, RP 1032-33. Even Mr. Koloski ultimately concurred, referencing a confirming memorandum he found in Mr. Reynolds’ file. RP 441-42. Further, while Cleaver claims that Reynolds’ and Hill’s testimony was “contrary to the facts,” Cleaver does not cite any contrary facts. No one testified directly or indirectly that Sue Jaeger neglected to consult with Shannon & Wilson before authorizing this drain. Three people (Sue Jaeger, Bruce Reynolds and the contractor, Bill Hill) all testified that the consultation did occur. Cleaver’s argument that all of this testimony was “self-serving”

and “contrary to the facts” is so much hot air.<sup>6</sup>

E. Failure to Timely Evaluate and Stabilize the Slide

Analysis of this issue varies over time. Initially, from the slide in 2001 until the slides in 2003, the Jaegers were following the “wait and see” advice provided by their consultants. See e.g. Ex. 11 at 6. Later, after the 2003 slides, when the consultants recommended construction of a wall, the price was too great for the Jaegers (absent a recovery in this litigation). When, in 2003, the consultants recommended a wall, they also recommended borings *to assist with the design of the wall*. They did not recommend borings if the Jaegers were not financially able to build the wall at that time.

Cleaver claims that there was substantial evidence that the consultants directed the Jaegers to obtain soil borings earlier; to stabilize the slope immediately after the initial slide; and that these failures by the Jaegers contributed to their harm. Cleaver weaves together various scraps of evidence to support these claims, but when reviewed carefully, it is clear the evidence does not stand for the propositions asserted and it is not

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<sup>6</sup> Koloski inaccurately described this additional drain as a substitute for a drain that Shannon & Wilson proposed beneath the sports court. See Op. Br. at 37-38. Further, there was no “bow” in the line when it was installed. RP 1030. When a concern later developed that the drain might be collecting water, Dr. McCabe suggested that plastic sheeting (covering much of the Jaegers’ property) be extended to cover the area around the drain, too, RP 570, and this was done, Ex. 70, 80, 100, 117, 120. But Dr. McCabe believed this pipe was not a cause of any slide. RP 471-72, 571.

“substantial.”

1. 2001-2003: The Jaegers Followed their Consultants’ Initial Advice Which Included Installation and Repair of Drains, But Did Not Include a Wall or Borings

From the initial slide in 2001 until the slides in 2003, the Jaegers consultants were not recommending a wall, but rather a “wait and see” approach. See Op. Br. at 35-36. Cleaver contends otherwise, but cites no substantial evidence in support of his claim. The only documentary evidence cited by Cleaver prior to the March 2003 slides is Shannon & Wilson’s initial letter report (January 9, 2002, Ex. 11). See Cleaver Br. at 11. We addressed Cleaver’s mischaracterization of this document in our opening brief (at 35).

Cleaver now also cites seven pages of the cross-examination of Mr. Reynolds (Shannon & Wilson). See Cleaver Br. at 11. But nowhere in those pages (or elsewhere) does Mr. Reynolds say that he recommended a wall prior to the 2003 slides. Rather, he re-stated that his recommendation for borings (to design a wall, RP 808) came *after* the 2003 slide. RP 811:12. In that cross-examination, Mr. Reynolds also explained (consistent with other evidence discussed in our opening brief at 35) that a wall installed after the first slide would simply have been for “re-leveling the yard and supporting the loose” fill, RP 808, i.e., that wall would “have the purpose of only stabilizing soils *east* of the sports court.” Id. at 809 (emphasis supplied). He

and Sue Jaeger had explained earlier, on direct examination, that the small patch of lawn *east* of the sports court did not warrant installation of a wall. RP 746 (Reynolds); 258-60 (Jaeger). On cross, Reynolds also repeated the gist of his earlier direct testimony (RP 746) that in the 2002 letter he also was not then recommending a more substantial wall to protect the rockery or the house to the *west*. *Id.* at 809.<sup>7</sup>

At various points in his brief, Cleaver cites testimony about “standard procedures” or what would be done “generally” or “usually,” by geotechnical engineers. This evidence is irrelevant to the issue at hand. It does not describe the specific recommendation the Jaegers’ consultants provided *to the Jaegers* to deal with their situation. The Jaegers had no knowledge about what actions were “typical” or “generally” used in other situations. They only knew what their consultants proposed to them in this situation and they followed those recommendations precisely. Cleaver’s argument based on “standard procedures” and “typical” situations does not demonstrate the existence of substantial evidence that such recommendations were made here.

In sum, there is absolutely no evidence that the Jaegers’ consultants

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<sup>7</sup> Cleaver also cites Mr. Reynolds’ response to a juror question (RP 863), but the juror does not ask Reynolds about his pre-2003 recommendation and he provides no such testimony in response.

(or Koloski) made a recommendation to the Jaegers prior to the 2003 slides for either borings or a wall. While in hindsight Mr. Koloski (and maybe even the Jaegers' consultants themselves) might second-guess the advice given to the Jaegers *in this case, at that time*, the Jaegers cannot -- as a matter of law -- be contributorily negligent for following that advice. Hogland, supra.

2. Post-2003 Slides: There Was No Substantial Evidence That the Jaegers Could Afford the Wall That their Consultants Proposed After the 2003 Slides

Following the 2003 slides, Shannon & Wilson provided cost estimates for two types of walls, a cantilevered wall and a more substantial tie-back wall. Ex. 13. But they did not recommend either wall at that time. RP 750:21. A short time later, though, Shannon & Wilson concluded that the more substantial tie-back wall would be necessary and so advised the Jaegers. "Based on our observations of the landslide area, it is likely that wall No. 2 [the tie-back wall] would be required to retain landslide deposits." Ex. 14.

Jaegers acknowledge they did not follow Shannon & Wilson's 2003 advice to construct a tie-back wall. But contrary to Cleaver's claim that the Jaegers "refused to proceed without any explanation," (Cleaver Br. at 11), the Jaegers forthrightly testified that their financial position precluded construction of such an expensive wall. RP 205, 1087-88. The expense of a tie-back wall initially was estimated by Shannon & Wilson to be almost

\$300,000 (\$291,680). Ex. 13 at 2. Cleaver's claim that there was no evidence that the cost of a soldier pile wall in 2003 would be as high as \$300,000 (Cleaver Br. at 40: source "unknown") is flatly wrong.<sup>8</sup>

Cleaver misleads by citing a separate estimate in the same exhibit for a less substantial, cantilever wall (and excluding geotechnical study and other services). Cleaver ignores Exhibit 14, which established that Reynolds was not recommending the cheaper, less substantial, cantilever wall and Reynolds' testimony (in response to a juror) that the less substantial wall would not have prevented future slides. RP 861. Cleaver also cites an estimate from Dr. McCabe (Ex. 28) that was for the less substantial, cantilever wall, one without tie-back anchors. Cleaver ignores that Dr. McCabe, like Mr. Reynolds, concluded that the cantilever design was not appropriate and a more substantial tie-back design should be installed. RP 695. See also RP 896 (McCabe: later slides would have "deformed" cantilever wall with "significant movement").

Finally, Cleaver asserts that the Jaegers did not produce any financial information to corroborate their oral assertion that they could not afford the

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<sup>8</sup> The estimate included the expense of the wall plus associated geotechnical services. Several months later, Shannon & Wilson advised that the estimate might need to be increased by 20 to 25% because of difficult access. Ex. 14 at 1.

\$300,000 wall. Cleaver Br. at 41. We addressed this issue in our opening brief at 30. But even more decisively, Cleaver now concedes he “did not argue or defend” at trial on the issue of whether Jaegers had “sufficient funds for the expensive wall.” Cleaver Br. at 48. We agree. Thus, there was no need for the Jaegers to document the claim further - especially because *Cleaver* had the burden to prove that the Jaegers had the financial wherewithal to incur a \$300,000 expense to mitigate their damages. Cleaver provided no evidence that the Jaegers had those kinds of funds available. (Further, Cleaver had the opportunity to cross-examine the Jaegers on this issue, but he declined to do so.)

3. In Terms of Mitigating Damages, the Borings Have No Utility Until and Unless the Jaegers Were Ready to Build a Wall

After the 2003 slides, when the consultants decided that a wall was necessary, they recommended borings to assist in the design of a wall. Ex. 13; RP 808, 821. But they did not recommend that expense be incurred until the Jaegers were financially able to build the wall. As Mr. Reynolds explained:

Q: When you provided . . . the estimate in that letter [Ex. 13], with the boring, how much it would cost to do the borings, were you telling Sue she should do the borings at that time?

A: No.

Q: Okay. Was it necessary for Sue to do the borings before she was ready and had the money to build the wall?

A: No, it wasn't.

RP 821. Cleaver (at 10) quotes Dr. McCabe saying he did not know why the borings were delayed, but a few seconds later, he clarified:

Q: In your opinion, is there any reason why it was a prudent thing to obtain the soil borings right after the December 2001 slide?

A: There's benefits and drawbacks to deciding how to time borings. And some people would recommend that the borings be delayed until you're ready to take action and that's what I think Shannon & Wilson recommended to Sue Jaeger.

RP 713.<sup>9</sup>

Cleaver totally misrepresents the testimony of Mr. Reynolds, asserting twice that Mr. Reynolds warned the Jaegers of the risk of not proceeding with the borings at an early date. See Cleaver Br. at 11, 40. To support this claim, Cleaver cites two letters Mr. Reynolds wrote (Ex. 11 and Ex. 169), neither of which criticizes the Jaegers in any way, let alone regarding the borings.

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<sup>9</sup> Before trial, Koloski did not think borings had any value either. RP 1404-05.

Cleaver also cites a portion of Reynolds' testimony, but there Mr. Reynolds only addresses efforts to stabilize a slide, not the need or timing of borings. RP 863-64. Notably, Cleaver does not cite Mr. Reynolds' testimony on the prior page where he is asked (by a juror) to identify the "standard procedures when investigating or determining a slide." He provides a response that does not include the need for borings (generally or in this specific case). RP 862. (The next juror question inquires about the information obtained from a boring, but does not address the timing issue. Id.) See also supra at 14 -15 (discussing RP 806-811).

Cleaver's claim that the Jaegers "prevented" their experts from doing borings, Cleaver Br. at 12, is flat wrong. There is no evidence that the Jaegers did anything other than follow their consultants' advice. If Cleaver thought the consultants' advice was faulty, he could have filed third party claims against them, but because the Jaegers followed their expert consultants' advice, Cleaver had no claims against the Jaegers. See Op. Br. at 65-69.

## II. THERE WAS NO SUBSTANTIAL EVIDENCE THAT THE JAEGER'S SHARE OF THE TOTAL NEGLIGENCE WAS 85%

Even if there had been substantial evidence that the Jaegers failed to responsibly mitigate after the initial slide, such evidence would not support

a finding of 85% contributory negligence given that most of the damage was done at the time of the initial slide. See Op. Br. at 57-59. Cleaver argues that the Jaegers “did not [provide] evidence that ‘most of the geologic damage occurred at the time of the initial slide.’” Cleaver Br. at 43. This assertion ignores the evidence we cited. (Op. Br. at 58). It also ignores that even Mr. Koloski admitted that the lightweight “mechanically stabilized earth” (MSE) wall he advocated at trial only and “about a fifty/fifty possibility” of stopping later slides. RP 1469. The Jaegers’ consultants also testified an MSE wall would not have been sufficient. RP 695 (McCabe); 753 (Reynolds). While the jury award might have been “within a range of numbers” necessary for the inexpensive MSE wall, Cleaver Br. at 44, the Jaegers were not obligated to take a 50/50 risk (even if it had been recommended at the time, which it was not). See Hogland v. Klein, supra.; Cox v. Keg Restaurants U.S. Inc., 86 Wn. App. 239, 244, 935 P.2d 1377 (1977).

### III. THE TRIAL COURT ERRED IN REFUSING TO GIVE JAEGER’S PROPOSED JURY INSTRUCTION NO. 24

CR 51(f) generally requires explicit exceptions be made to a failure to give a proposed instruction. “However, under some circumstances compliance with the purpose of the rule will excuse technical non-compliance.” Queen City Farms, Inc. v. Central National Insurance Company

of Omaha, 126 Wn.2d 50, 63, 822 P.2d 703 (1994). The purpose of the rule is “to assure that the trial court be informed of the exact points of law and precise reasons” for the proposed instruction. Favors v. Matzke, 53 Wn. App. 789, 798, 770 P.2d 686 (1989). Where “there is no question but what the trial court was aware of the points of law and precise grounds” of the exception, the issue will be considered on review. Id. Thus, in Wood v. Postelthwaite, 82 Wn.2d 387, 390, 510 P.2d 1109 (1973), the appellate court considered the challenge to an omitted instruction where the party’s “proposed instructions, plus case citations and argument, well advised [the trial judge] of his theory of the case . . .” In Queen City, supra, the purpose of the rule had been satisfied by arguments presented in pre-trial motions. In Wickswat v. Safeco Insurance, 78 Wn. App. 958, 904 P.2d 767 (1995), the purpose of rule was satisfied by off-the-record discussions.

Here, the trial court clearly was fully apprised of Jaegers’ position regarding the need to give Proposed Jury Instruction No. 24. An entire legal memorandum was presented for that purpose alone. CP 347-53. The record also reflects that there was a prior off-the-record discussion regarding the jury instructions. RP 1554:16; 1556:2. The issue was preserved for review.

On the merits, Cleaver argues that proposed JI 24 would have “unduly emphasized” the Jaegers’ theory of the case. Cleaver Br. at 46. Had there

been another instruction that adequately addressed the issue, Cleaver might have a point. But there was no other instruction that addressed this issue.

Cleaver also assert that proposed Jury Instruction 24 “would have been difficult and confusing” to apply. *Id.* But he does not provide analysis to support this claim. Instead, he reverts to arguing whether there was evidence the Jaegers failed to act responsibly. He does not demonstrate that the jury instruction was “difficult” or “confusing.”

#### IV. THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE OF INSURANCE INFORMATION

Earlier in the brief, Cleaver argued that the Jaegers failed to adequately establish their inability to pay for a \$300,000 wall. But here, Cleaver claims he did not dispute that issue at trial. Cleaver Br. at 48. Given the jury instruction that the Jaegers’ effort to mitigate damages had to be “reasonable,” it certainly was possible that the jury would consider the Jaegers’ financial circumstances and, in particular, assume that their homeowners insurance would provide them with the wherewithal to pay for the expense wall. Cleaver’s concern about arguments Jaegers might have made if the evidence were admitted (*id.* at 49) could have been addressed by admitting the evidence but limiting counsel’s argument. The trial court reflexively excluded the insurance evidence without considering that the

evidence fell squarely within an exception to the general rule.

V. THE TRIAL COURT IMPROPERLY DENIED THE  
JAEGERS' MOTION FOR *ADDITUR*

Cleaver argues that the jury “may well have determined that [the remedial expenses incurred to date] were not reasonably incurred.” Cleaver Br. at 51. But Cleaver cites no evidence that the jury could have relied on to reach that conclusion. The jury would have had to rely on impermissible speculation. Because the evidence of these expenses was undisputed, *additur* is appropriate.

Cleaver argues there was a dispute as to whether the house was at risk and, therefore, uncertainty whether the tie-back retaining wall was necessary. But the tie-back wall was deemed necessary in 2004 (Ex.14 ) *before* the risk to the house was recognized in 2006, RP 192-94; 473-74. The tie-back wall was necessary to protect the rockery, the sports court, and the patio immediately east of the house. RP 807. These facts were *not* disputed. Nor does Cleaver demonstrate any dispute regarding the expense of the tie-back wall and related items. (As to Cleaver’s “betterment” claim, see Op. Br at 31 -34 and *supra* at 17 -1 8.

Cleaver claims that Mrs. Jaeger contradicted herself regarding the double housing and travel expenses. She did not. She explained the family

wanted a home of their own near family, but that if Steve was on a long assignment, for instance, on the East Coast, they still “would go onsite with him and lease the house out unfurnished.” RP 7. There was no effort to rent the house after the slides because it was un-rentable. RP 219-200. Ex. 59, 60.

## VI. CONCLUSION

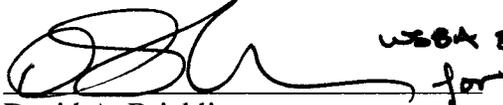
With regard to Cleaver’s arguments not expressly addressed herein, we rely on our opening brief. For the reasons stated in that brief and this one, the Court should provide the relief stated in the conclusion of our opening brief.

Dated this 30 day of June, 2008.

Respectfully submitted,

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DATED this 30<sup>th</sup> day of June, 2008, at Seattle,

Washington.



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KATHLEEN M. MILLER