

NO. 43715-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON, TACOMA

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TRACY HELM,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF TRANSPORTATION,

Respondent.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION & SUMMARY OF ARGUMENT

The State of Washington throughout this case has consistently argued that its discretionary immunity defense is a total and complete bar to Helms complaint. This defense totally misses the mark because Helm did not contend that the deferred remediation of slope 1867 was negligent. Helm opposed the Departments Summary Judgment motions because of the Department's position that Helm's claim should be dismissed if their Motion was granted. The insertion of this defense into the legal instructions and Verdict Form is error. It is not harmless error. The jury was informed as a matter of law that the Department was immune from claims that the Department was negligent in slope remediation. The court also repeatedly told the jury that any activity "touching the slope" involved geology and slope remediation. The combinations of instructions advising the jury that the Department was immune and the Courts ruling in the presence of the jury that anything related to the slope was geology was erroneous, confusing to the jury and prejudicial to Helm.

The Department in its brief correctly points out that Helm did not attach the Jury Instructions and Verdict Form as an appendix to Appellants Opening Brief as required by RAP 10.4(c). Helm corrects this oversight by attaching all of the challenged Instructions and Verdict Form as an appendix to this Reply Brief. In In Re Marriage of Stern, 57 Wn.App. 707,

789 P.2d 807 (1990) the court stated the purpose of RAP 10.4(c) is to “expedite appellate procedure” by not requiring this court to search the record to find the [Instructions] claimed to be in error. The attachment of the challenged instructions to this reply brief should cover this.

## **II. ARGUMENT**

### **A. The Trial decision to instruct the jury on Discretionary Immunity is error as a matter of law.**

The Appellate Court reviews errors of law de novo. The applicability of the discretionary immunity defense to Helms claim in this case is a legal question. See Lobdell v. Sugar ‘N Spice, Inc., 33 Wn.App.881, 658 P. 1267 (1983) for standard of review.

#### **1. The Department argues that Helm did contend at trial that the Department was negligent in deferring slope remediation. Resp. Br. page 17-22.**

The Department claims Helm pled in the complaint in paragraph 19 and 34 that the Department was negligent in deferring slope remediation. However, paragraph 19 is simply a fact statement from the Department’s report on the I-90 pass. The Department had determined this stretch of I-90 from MP 58 to MP 66 needed slope stabilization. Paragraph 34 is under the caption “Negligent Failure to Maintain.” Nowhere does the Complaint allege the Department “negligently deferred remediation of Slope 1867.”

The Department next argues that because Helm argued against the Department's second and third Summary Judgment Motion for dismissal of Helms case that this supports giving an instruction on the defense to the jury at trial. Ms. Helm responded to the Second Motion for Summary Judgment pro se and prevailed. CP 340-347. Helm's current counsel appeared after the Departments Second Summary Judgment Motion was denied. In response to the Departments third Motion for Summary Judgment, Mr. Borden made it clear that it was interim solutions he would testify to. His opinion as to possible remedies only addressed interim solutions, including the failure to properly maintain the rock fall ditch. CP 458-461.

Next, the Department argues that in Helms opening statement it was claimed the Department was negligent in deferring remediation of the slope. Resp. Br. page 19.

Helm's opening discussed in general terms the Departments duty and responsibility to protect users of the State's highways. RP 110. Nowhere in the opening is a claim that evidence will be presented that the State negligently deferred remediation of the slope.

The Department Claims the Issue of Slope Remediation was brought up through their witness Mr. Badger. The Departments witness, Tom Badger testified the current rock fall ditch on slope 1867 did not meet

design standards for rock fall ditches. It was too narrow. Resp. Br. page 20. However, it was the Department, not Helm, that elicited testimony from Badger that the way to widen the ditch was to move the highway or excavate part of the slope. It was the Department who introduced the remedy of slope remediation; not Helm. The Department missed Helms point on this testimony. The significance of a substandard (too narrow) ditch is that it is necessary to be more attentive to this ditch because the margin of error is reduced. Mr. Badger was asked the following questions on direct examination by Helm.

“Q: Would you further agree if the maintenance folks did not keep this substandard rock fall ditch cleaned out that that would further compound the problem - - potential problem of rocks enter the roadway?  
A: It could.”

This question and answer was consistent with Badgers statement in his 2004 e-mail that the catchment basin needed to be cleaned regularly to optimize that protection. Ex. 18, RP 398-402.

In Helms closing there was no claim that the Department was negligent in deferring slope remediation. Helm had the burden of proving the State had notice of an unsafe condition and the rock fall onto the west bound lanes of I-90 in 2004 provided the notice.

The critical question was what did Helm argue that the State should have done. Helm argued that cleaning out the ditch, putting up a concrete

barrier, and other protective devices should have been used to prevent rocks from reaching the roadway. RP 708-709.

Further, Helm made no argument with respect to the first question on the Jury Verdict Form which addressed the issue of deferred remediation of the slope. RP 719. If Helm was arguing this issue, the jury would have been asked to enter no as the answer to question number one.

Finally, the Department argues that it was proper to give the immunity instructions because Helm argued slope 1867 was dangerous. The Department determined slope 1867 was dangerous, not Helm. Helm argued that because it was dangerous and because the State had notice that “numerous” rocks reached the roadway that interim safety measures should have been taken.

**2. The Courts Instruction on Discretionary Immunity was not harmless error.**

The jury was presented with inconsistent standards in Instruction #27, in the Verdict Form and in the ordinary negligence instructions.

Instruction #27 states in the final paragraph:

“The State of Washington is immune for liability for decisions in which it is determining basic government policy.” What “decisions” are included in basic governmental policy? Could the decision not to install concrete barriers, rock fences and rock fall netting at slope 1867 be a “governmental policy.”

No other instructions inform the jury that Helms claims of negligence were not encompassed within Instructions 27 and Question 1 of the Jury Verdict form. Allowing the State to insert an absolute defense is prejudicial to Helm when the jury is not clearly instructed that it does not bar Helms theory of the case.

In Smith v. Aberdeen 7 Wn.App 664, 502 P2d 1084 (1972) Division II held that the giving of two inconsistent instructions on the duty of care, one which was erroneous and one which was correct, could have confused the jury. The question the appellate court must determine is whether the jury might be confused or misled (emphasis added). If the jury might be confused or misled then the giving of the improper confusing instructions is prejudicial error.

Jury instructions should be logical and coherent to the lay person. There is no way to read this Verdict Form and be confident the jury understood that even if the Department was immune that it also could be negligent. The giving of Instruction 27 along with the confusing Jury Verdict Form is prejudicial error.

**B. Reply to the Limitation of Expert Highway Engineer Henry Borden's Testimony**

A degree is not necessary to be qualified as an expert sufficient to give opinions on a particular subject matter. The record is replete with the Department's objections to Mr. Borden's opinions based on Mr. Borden's

lack of a degree in geology, even going so far as to suggest that his testimony would be tantamount to the unlawful practice of geology under RCW 18.220.020. RP 31-35. In truth, licensed Engineers, like Mr. Borden, are a specific exception from the statute under RCW 18.220.190(6).<sup>1</sup>

Mr. Borden's declarations and trial testimony clearly established his expertise in protecting highways from rock fall. CP 501-502; CP 458-461; CP 42-43. Specifically, Mr. Borden was trained in rock-slope engineering while employed with the Washington State Department of Transportation (WSDOT), had experience in slope remediation, soil stability, and slope failure with WSDOT. He had testified in numerous cases with similar subject matter in the past. Id. Mr. Borden's testimony established experience in all phases of highway engineering, from design to final construction, spanning twenty-five (25) years. Additional experience was established through Mr. Borden's work with Ed Stevens & Associates where Mr. Borden worked for fifteen (15) years performing forensic engineering studies. He worked with protective devices to prevent rocks from coming onto the highway "very frequently." RP 438. These devices included concrete barriers, rock fall ditches, and rock fences. RP 434-439. Mr. Borden testified that "[s]afety goes into all highway designs" and that

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<sup>1</sup> "The following activities do not require a certificate of licensing under this chapter...: (6) The practice of engineering or other licensed professions...."

part of safety design was keeping foreign objects, like rocks, off of the highway”. RP 18.

Practical experience is sufficient to qualify a witness as an expert. State v. Yates, 161 Wn.2d 714, 765, 168 P.3d 359 (2007), cert. denied, 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008). Any issue with Mr. Borden’s educational background was properly an issue of weight and not admissibility of his opinion.

Slope 1867, was a known, quantified geological risk. Evidence established that Slope 1867 was scored by WSDOT as a high-hazard, high-risk slope. RP 382. It was known that rock fall was reaching the roadway numerous times each year. RP 397. In formulating his opinion, Mr. Borden therefore already knew the degree of risk posed by Slope 1867. It was error for the court to limit his opinion as to interim measures that should have been used to protect the roadway while Slope 1867 awaited full remediation.

The court took issue with Mr. Borden even attempting an opinion on the utility of a rock fall fence in this case. RP 447-448; See also Helms Exhibit 12 (picture depicting rock fall fence along roadway). Further, though the risk posed by the slope was already established, the court determined that “[t]his witness is not qualified to express an opinion as to the degree of risk presented by the hillside” and that “[i]n order for him

(Borden) to determine if they're adequate he has to decide what the risk was. Some devices would be adequate for some risks, not others. This witness is not able to make that analysis." RP 451-453. Again, Mr. Borden's testimony was not offered to establish the degree of risk. Rather, Mr. Borden's testimony was necessary to explain to a jury what protective devices should have been employed along the highway to protect the highway. Mr. Borden was qualified to give an opinion based upon his experience, background and education. See e.g. Goodman v. Boeing Co., 75 Wn.App. 60, 877 P.2d 703, 3 A.D. Cas. (BNA) 983 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 4 A.D. Cas. (BNA) 1397 (1995), amended, (Sept. 26, 1995) (a nurse specializing in rehabilitations was qualified to testify that the plaintiff's physical condition would deteriorate over time, and that he would need a personal assistant).

Whether Mr. Borden actually visited the site of the rock fall likewise does not disqualify his opinion regarding protective devices. Experts are allowed to base their opinions on facts or data "perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." ER 703; see also State v. Groth, 163 Wn.App. 548, 261 P.3d 183 (Div. 1, 2011), review denied, 173 Wn.2d 1026, 272 P.3d 852 (2012), (first hand

examination by expert isn't necessary). Mr. Borden based his opinion on review of numerous documents regarding Slope 1867 and videos of the rock fall ditch both before and after the crash at issue. RP 444-446.

Finally, Helm has shown significant prejudice to its case due to the trial court's limitation of Mr. Borden's testimony.

When Mr. Borden was asked about safety of this area (in light of the rocks reaching the road way), the court ruled Mr. Borden's testimony inadmissible because "[t]he question asked him to express an opinion as to a degree of risk to the highway. He's not qualified to express an opinion as to degree of risk presented by the slope." RP at 451-452.

A court abuses its discretion in admitting or excluding expert testimony when its decision is manifestly unreasonable or based on untenable grounds or reasons. Hall v. Sacred Heart Med. Ctr., 100 Wn.App. 53, 64, 995 P.2d 621 (2000). The trial record establishes that the Department was allowed to openly express opinions about the safety of Slope 1867 (RP 410) while Helm was affectively foreclosed from responding. Further, Helm was foreclosed from arguing whether rock fences should have been installed as a preventative measure (RP 447-448), why the concrete barrier was not extended to cover Slope 1867 (RP 448), and crucially whether the highway was adequately protected. RP 452. Mr.

Borden's training and experience was more than sufficient to offer opinions on all of these questions.

### **C. Reply Regarding the Exclusion of Trial Exhibit 15**

The Department contends that the court committed no error in excluding Exhibit 15, a Computer-Aided Dispatch (CAD) log generated by the Washington State Patrol.<sup>2</sup> The Department submits two grounds for exclusion: (1) the probative value of the evidence was outweighed by the danger of unfair prejudice if Exhibit 15 was admitted and (2) Exhibit 15 contains hearsay statements.

Considering unfair prejudice, The Department submits first that the log would have led to jury speculation because about what notes on the log meant. Resp. Br. page 38-39. The trial record reflects that this basis objection was not made and it should therefore not be addressed before the Court of Appeals. See Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

Second, The Department submits that the danger of unfair prejudice and confusion was high because there was no testimony to tie together the

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<sup>2</sup> A CAD log is a record of police officers' radio transmissions and computer entries for a given incident.

earlier rockslide evidenced in Exhibit 15 to the rockslide at issue in the case. The Department quotes the trial court's concerns in its brief:

“[t]o assume that a rock fall in one location creates a likelihood of a rock fall in another location,... a geologist might be able to testify to that, but the jury can't make that conclusion.” RP 276.

In fact, according to the WSP the accident 15 hours before Ms. Helms accident occurred at the same location, MP 58. However, where exactly the previous rock fall occurred is irrelevant in the context of the variable message sign notices and Highway Advisory Radio transmissions as testified to by the Department's witness Teresa McCoy. The utility to the Department of Ms. McCoy's testimony was summed up in The Department's closing argument:

“The testimony we heard was from Teresa McCoy. She's the radio log operator... And she testified that the morning of November 6, 2006, at exactly 9:47 she got word that there was a rock in the roadway. Immediately she notifies her team. Four minutes later at 9:51 Ms. McCoy documents that Ms. Helm has struck the rock. The exhibit that you're going to be looking at is Exhibit 86. Look at those entries. Look at Exhibit 86, at the time, 9:47. Look at 9:51. There is no notice. Four minutes is not reasonable opportunity to correct a condition.”

Ms. McCoy, the variable message sign and HAR operator testified that the variable message sign warnings covered specific distances. RP 265. The signs are placed to warn of possible upcoming hazards to drivers over a distance of many miles. In this case, Ms. McCoy testified that the

variable message sign at MP 61 warned travelers of road and weather conditions from MP 61 until MP 54. RP 265-6. Therefore, regardless of whether a rockslide occurred at MP 58 as reported in Exhibit 15, or at MP 58.31 as in the case at issue, the variable message sign at MP 61 would have warned motorists of falling rock. All of those locations exist within the distance the variable message sign located at MP 61 was supposed to cover. If Exhibit 15 had been admitted, it would have shown that a rockslide occurred at MP 58 the night before the accident at issue. It would have allowed Helm to argue the Department had 15 hours of notice, not 4 minutes. In addition to signage, the HAR radio warnings also did not warn of a danger of falling rocks over this stretch of road. The HAR warned only of standing water on road way. Had the jury heard testimony that, in fact, the Department of Transportation had fifteen hours of notice of a rock fall issue, rather than merely four minutes, and in spite of this notice failed to warn travelers of the danger using the variable message sign at MP 61 or the Highway Advisory Radio, result of the trial would likely have been different.

The Department cites In Re Detention of Coe, 175 Wn.2d 482, 505, 286 P.3d 29 (2012) as support for their argument that even though the log may satisfy an exception to the hearsay rule as a certified public record,

the entries within the log must also satisfy a hearsay exception to be admissible. Resp. Br. at 39.

Pursuant to ER 803(a)(8), certified public records are an exception to the hearsay rule of exclusion.<sup>3</sup> That Exhibit 15 was a certified record was a fact acknowledged by both the court and Defense Counsel. RP 58-61. Id. at 505. Unlike the HITS records in Coe, Exhibit 15 is not a record that is subjective in nature. Rather, it is simply an objective recording of facts as they are witnessed or reported to an officer.

The evidence contained in Exhibit 15 likewise does not reflect the exercise of judgment or discretion on the part of the officer, unlike the HITS evidence in Coe. Objective records taken by police officers have been routinely held as admissible in this State. See e.g. State v. Iverson, 126 Wn.App. 329, 108 P.3d 799 (2005) (jail booking records and photographs); State v. Hines, 87 Wn. App. 98, 941 P.2d 9 (1997) (police records of arrests and bookings); State v. King, 9 Wn. App. 389, 512 P.2d 771 (1973) (same).

Finally, Exhibit 15 does not contain “double hearsay” or “hearsay-within-hearsay.” There are no quotations from third parties. Rather, Exhibit 15 is a simply a record of an officer’s objective reports to dispatch recorded the day before Ms. Helm’s accident.

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<sup>3</sup> “The following are not excluded by the hearsay rule, even though the declarant is available as a witness:…Public Records and Reports.” ER 803(a)(8).

The trial court abused its discretion in ruling Exhibit 15 inadmissible as the ruling was manifestly unreasonable and based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

#### **D. Reply Regarding Cumulative Error**

Ms. Helm submits the cumulative effect of the many errors denied her a fair trial. See State v. Russell, 125 Wn.2d 24, 93–94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004. Due process protections and considerations of fundamental fairness require the application of the rule of cumulative error in civil cases as well as criminal cases. Generally, a rule that assures fundamental fairness applies to all cases, civil as well as criminal. Bonhiver v. Rotenberg, Schwartzman & Richards, 461 F.2d 925 (7th Cir. 1972).

The application of the doctrine of cumulative error is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. See, e.g., Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal).

In this case, even if this Court were to find that the exclusion of Exhibit 15 or the limitations imposed on Helm's expert independently did

not reach the level of a denial of a fair trial, this Court must intervene if the *cumulative* effect of the rulings below had a substantial influence on the ability of Helm to receive a fair trial. The combined effect of the various rulings of the trial court in this case substantially and impermissibly denied Helm's right to a fair trial by preventing Helm from presenting her theory of the case.

Helm submits that the following erroneous trial court decisions should also be considered the court's cumulative error analysis:

#### **1. Exclusion of Trial Exhibit 13**

The Department submits that the trial court was correct in excluding Helms Exhibit 13 on the grounds that the document included material that was "hearsay...irrelevant, prejudicial, and violative of earlier rulings regarding exclusion of evidence regarding other unrelated incidents...cumulative and unnecessary for the reason Helm claimed she needed the Trial Exhibit." Resp. Br. page 43.

Regarding hearsay, Exhibit 13 does not qualify as hearsay as it is an admission by party-opponent under ER 801(d)(2). Exhibit 13 was authored by Tom Badger, and admissions by agents and employees are admissible against a party if the employee was acting within the scope of his authority in making the statement. Tom Badger was acting within the

scope of his employment with Washington Department of Transportation when he assisted in authoring Exhibit 13. RP at 372.

Even assuming arguendo that Exhibit 13 was hearsay, it satisfies multiple exceptions to the hearsay rule of admissibility. Under ER 803(a)(6),(7) and RCW 5.45.020, Exhibit 13 qualifies as a business record as a record of an act, condition or event that was not made in preparation for litigation. The brief testimony the court allowed regarding the background of the creation of Exhibit 13 was sufficient to establish Exhibit 13 as a viable business record. Mr. Badger testified that the record was compiled as part of his employment with the department of transportation and that it was accurate to the best of his knowledge. RP 365-371. Furthermore, Mr. Badger's testimony was clear that the DOT had an incentive to produce an accurate record. RP 365-371. Likewise, the document qualified as an exception to the hearsay rule under 803(a)(17) as a commercial publication.

Exhibit 13 was also relevant on multiple grounds. The Department contends that "the only legitimate reason that Trial Exhibit 13 would have been admitted would have been with respect to the reasoning behind the Department's decision to defer slope remediation." In fact, many of these slopes, just like the slope at issue, 1867, were "deferred" for purposes of remediation. However, decidedly unlike slope 1867 every other slope in

Exhibit 13, even those that the department considered lower risks for rock fall, had better rock fall protection than 1867. Helm did not offer Exhibit 13 to argue the department's decision to defer remediation on Slope 1867. Rather, Helm offered Exhibit 13 to support its argument that the road beneath Slope 1867 should have been better protected by the Department using interim precautions while it awaited full remediation.

For example, page 30 of Exhibit 13 portrays a photograph of Slope 2586 which lies between MPs 50.32 and 50.58. Slope 2586 has a risk rating of 285- a full 66 points lower than slope 1867's rating of 351. Even though Slope 2586 was considered less of a risk for rock fall, and even though it hadn't been remediated yet by DOT, the road beneath Slope 2586 was protected by a concrete barrier. The brief description of Slope 2586 on page 30 states that "[m]aintenance reported that rock fall debris infrequently reached the shoulder...."

The same holds true for Slope 2968, found on page 39 of Exhibit 13 and Slope 2966, found on page 32 of Exhibit 13. Both slopes had not been remediated, had lower risk ratings and yet each had concrete barriers.

Exhibit 13 was clearly relevant to show that without exception, when a concrete barrier was used to protect the roadway between MP 36 and MP 68 on Snoqualmie pass, there were infrequent or no cases of rock fall reaching the roadway. It was also relevant to show that DOT used

concrete barriers to protect roadways beneath slopes they had designated as deferred for remediation and that the concrete barriers were successful at protecting the roadways.

The court incorrectly determined Exhibit 13 was unfairly prejudicial to the Department. The court stated that “to invite the jury to believe that because something was used on another slope it should have been used on this slope...I think confuses them and ...prejudices the state.” RP 355.

In fact, the opposite is true. One of the main issues in the case concerned whether WSDOT had properly protected the roadway beneath Slope 1867 while the slope awaited remediation. The Department's acts or omissions in protecting Slope 1867 cannot be considered in a vacuum, but must be judged in relation to how The Department used interim protective devices on other slopes. Evidence of the Department's use of concrete barriers beneath other, less dangerous slopes, and the failure of DOT to use concrete barriers beneath Slope 1867 tends to show that the roadway along 1867 was inadequately protected and that the Department breached its duty.

Helm submits that Exhibit 13 was admissible for all of the foregoing reasons, and its exclusion by the trial court materially affected Helm's ability to argue her theory of the case. Each party to a lawsuit is entitled to

have its theories presented to the jury if such theories are supported by the evidence. Gammon, 104 Wn.2d at 616. An evidentiary error is not harmless “if, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’ ” Neal, 144 Wn.2d at 611. The reasonable probability that the erroneous withholding of evidence affected the outcome of this case is apparent as Helm was foreclosed from showing that concrete barriers and rock fences were used with regularity on Snoqualmie pass and that these devices successfully prevented rock fall from reaching the roadway.

**2. Failure to Allow Helm to Refresh Tom Badger’s Memory with Exhibit 13 is Error.**

The Department contends that “Helm did not need to refresh Mr. Badger’s recollection on a collateral fact” and that “[i]t made no difference in this lawsuit what specific section of I-90 Slope 1867 was contained in.”

Mr. Badger wrote the section 2 of the Exhibit 13 (Report to the Governor). In fact, the purpose of Helm in attempting to refresh Mr. Badger’s memory was to have him recall his report which stated, “Maintenance reported that rockfall impacts both westbound lanes numerous times per year; no rockfall-related accident are reported through this section,” because during trial he couldn’t recall what he had written. The Department’s assertion is incorrect that there was “no reason” for

Helm to refresh the witnesses' memory. ER 612 provides an unqualified right to introduce writings used to refresh memory while witnesses are testifying. State v. Savaria, 82 Wn.App. 832, 842, 919 P.2d 1263 (1996), overruled on other grounds by State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003). "Writings used while testifying are per se admissible." Id.

The trial court's refusal to allow Helm to refresh Badger's memory was in error and should be considered as a factor in Helm's cumulative error analysis.

### **3. Erroneously Excluding Ms. Sohneronne's Testimony**

The Department replies that the court did not error in sustaining objections to Ms. Sohneronne's testimony as conclusory. Resp. Br. page 45. However, the testimony was (1) not conclusory and (2) even if it was, that was not the basis of the Department's objection at trial and is thus not an argument reviewable on appeal. See Guloy (supra), 104 Wn.2d at 422 (a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial).

Rather, the court sustained objections because it incorrectly believed Ms. Sohneronne was expressing a medical opinion as a lay witness. RP 464. As previously argued in Helm's Brief of Appellant, such testimony was properly admissible through Ms. Sohneronne even though she was a lay witness.

#### **4. Erroneously Excluding Helm's Photographic Exhibits 24**

The Department replies that the court did not error in sustaining objections to Exhibit 24, 26, and 27, depictions of Helm's family on vacation. Evidence that strengthens or bolsters existing evidence is corroborative evidence and corroborative evidence is not cumulative evidence. Each Exhibit depicted a different activity in Helm's life and deserved consideration by the Jury. While the Department is correct that the Exhibits were not offered, the record is clear the trial court sua sponte objected to their admissibility prior to Counsel even having a chance to offer them.

#### **5. Admitting Jury Instructions 7, 8, 13, 15, 21, 23 Regarding Contributory Negligence**

The Department contends that the "jury could have reasonably concluded that Helm was not paying adequate attention in the minutes preceding her accident." Resp. Br. page 47. Therefore, the Department argues, Jury Instructions 7, 8, 13, 15, 21, and 23 regarding contributory negligence were properly admitted to the jury.

Jury Instructions must permit each party to argue the theory of their case as long as substantial evidence supports the instruction. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The jury instructions on Contributory Negligence were unsupported by substantial evidence.

The Department argues that because Ms. Helm was not listening to the advisory radio, had several passengers in her car, and did not see the permanent signs warning of rocks in a driving rainstorm- that sufficient facts were alleged to offer the instructions. However, without any evidence of actual breach of a duty, such facts do not provide and delete evidence that Ms. Helm breached any duty.

When negligence is alleged as a fact, it must be proved as a fact. These Jury Instructions opened the door to pure speculation by the jury, and as our Supreme Court curtly noted in Samardege, “[w]e have too many cases holding that juries may not speculate as to causes of injury where negligence is alleged to even make reference to them helpful.” Samardege v. Hurley-Mason Co., 72 Wa. 459, 461, 130 P. 755 (1913).

#### **6. Admitting Jury Instruction 12 Regarding Superseding Cause**

The Department contends that Helm’s alleged degenerative disc disease was sufficient evidence to support a jury instruction on “superseding cause.” Jury instructions must be supported by substantial evidence. Leavitt v. De Young, 43 Wn.2d 701, 708–09, 263 P.2d 592 (1953). Degenerative disc disease, allegedly diagnosed by the Respondent’s medical witness, Dr. McLaughlin, existed *prior* to the accident at issue and does not constitute a superseding cause. Rather, degenerative disc disease, when alleged, would fall under Washington

Pattern Jury Instruction (WPI) 30.17, Aggravation of a Pre-Existing Condition. Helm is unaware of any case in Washington State which has applied a superseding cause instruction to facts alleging preexisting degenerative disc disease. Degenerative disc disease does not constitute a “new independent cause that breaks the chain of proximate causation between the Department’s negligence and an injury.” WPI 15.05. To give the instruction was error.

#### **7. Errors Regarding Damages and Causation Are Reviewable**

Generally in Washington, error relating solely to the issue of damages is harmless when a proper verdict reflects nonliability. American Oil Co. v. Columbia Oil Co., 88 Wn.2d 835, 842, 567 P.2d 637 (1977). Courts have, however, adopted an exception to this general rule in cases where errors are “so pervasive and prejudicial as to create the likelihood that they may have affected a jury’s decision on the issue of liability.” See e.g. Hall v. Dumitru, 250 Ill.App.3d 759, 766-767, 620 N.E.2d 668 (1993); McDonnell v. McPartlin, 192 Ill.2d 505, 531-533, 736 N.E.2d 1074 (2000). Such is the case before this court.

Helm submits that that the improper admission of Instructions 7, 8, 13, 15, 21, and 23 regarding the Department’s contention of Helm’s comparative negligence and Instruction 12 regarding a “superseding cause” shifted the jury's attention away from the separate question of

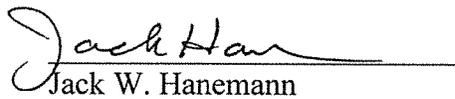
defendant's liability. While the Department argues that such errors do not show prejudice (Resp. Br. page 47-49) as the jury did not find the Department liable, it would not be unreasonable or surprising that a juror would take the erroneously applied instructions imposed on Helm and relate them directly to liability.

This court should find that the errors committed by the trial court regarding damages and causation were so pervasive and prejudicial that they created a likelihood that they affected a jury's decision on the issue of liability.

### **III. CONCLUSION**

For the forgoing reasons, in the matter of Tracy Helm versus the State of Washington, Department of Transportation, considering the multitude of errors by the trial court Ms. Helms reduced a fundamentally unfair trial. Accordingly, a new trial is required.

Dated this 6th day of January 2014.

  
Jack W. Hanemann  
Attorney for Appellant  
WSBA #6609

INSTRUCTION NO. 7

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

INSTRUCTION NO. 8

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

## INSTRUCTION NO. 12

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury.

If you find that defendant was negligent but that the sole proximate cause of the injury was a later independent intervening cause that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of the defendant is superseded and such negligence was not a proximate cause of the injury. If, however, you find that the defendant was negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening act, then that act does not supersede defendant's original negligence and you may find that the defendant's negligence was a proximate cause of the injury.

It is not necessary that the sequence of events or the particular resultant injury be foreseeable. It is only necessary that the resultant injury fall within the general field of danger which the defendant should reasonably have anticipated.

### INSTRUCTION NO. 13

(1) Mrs. Helm claims that the Department of Transportation was negligent in the following respects:

- The Department of Transportation failed to maintain the ditch adjacent to slope 1867 in a reasonably safe manner.
- The Department of Transportation had notice of and a reasonable opportunity to remove the fallen rock.
- The Department of Transportation failed to warn Mrs. Helm that a rock could be present in the roadway adjacent to slope 1867.
- The Department of Transportation failed to maintain slope 1867 in a reasonably safe manner.

The plaintiff claims that The Department of Transportation's conduct was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims.

(2) In addition, the Department of Transportation claims as an affirmative defense that the plaintiff was contributorily negligent in the following respect:

- Mrs. Helm failed to observe a proper look out when traveling near slope 1867.
- The defendant claims that Mrs. Helm's conduct was a proximate cause of her own injuries and damage.

The plaintiff denies these claims.

(3) In addition, the Department of Transportation claims and plaintiff denies the following affirmative defense:

- The Department of Transportation exercised policy level judgment in managing the slopes which included slope 1867.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

INSTRUCTION NO. 15

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that the plaintiff was injured and the plaintiff's property was damaged;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff and the damage to plaintiff's property.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and property damage and was therefore contributory negligence.

INSTRUCTION NO. 21

The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.

## INSTRUCTION NO. 23

A statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing.

The statute provides that a driver shall drive at an appropriate reduced speed when special hazard exists by reason of weather or highway conditions.

## INSTRUCTION NO. 27

The system for managing slopes along roadways involves a basic governmental policy of the Department of Transportation.

The prioritization was essential to determining how to mitigate dangers with limited resources.

The prioritization involved the exercise of policy-level judgment.

The Department of Transportation has the authority to make this type of decision.

The State of Washington is immune from liability for decisions in which it is determining basic governmental policy.

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA  
2013 MAR 19 PM 3:55  
BETTY J. GOULD, CLERK

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR THURSTON COUNTY

Tracy Helm, )  
 )  
 Plaintiff, ) No. 09-2-02582-4  
 )  
 vs. ) VERDICT FORM  
 )  
 )  
 State of Washington, Department of )  
 Transportation, )  
 Defendant. )

We, the jury, answer the questions submitted by the court as follows:

**QUESTION 1:** Does the evidence establish that the Department of Transportation balanced the risks and advantages of delaying remediation of slope 1867?  
**ANSWER:** (Write "yes" or "no") YES

*(DIRECTION: If you answered "yes" to this question then answer Question 2. If you answered "no" to this question then answer Question 2A.)*

**QUESTION 2:** Apart from its decisions regarding slope remediation, was the State of Washington negligent in this case?  
**ANSWER:**  
**ANSWER:** (Write "yes" or "no") NO

*(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)*

**QUESTION 2A:** Was the defendant negligent?  
**ANSWER:** (Write "yes" or "no") \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)*

**QUESTION 3:** Was the defendant's negligence a proximate cause of injury to the plaintiff?  
**ANSWER:** (Write "yes" or "no") \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 4.)*

**QUESTION 4:** What do you find to be the plaintiff's amount of damages? Do not consider the issue of contributory negligence, if any, in your answer.  
**ANSWER:** \$

*(DIRECTION: If you answered Question 4 with any amount of money, answer Question 5. If you found no damages in Question 4, sign this verdict form.)*

**QUESTION 5:** Was the plaintiff also negligent?  
**ANSWER:** (Write "yes" or "no") \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)*

**QUESTION 6:** Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?  
**ANSWER:** (Write "yes" or "no") \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 6, sign this verdict form. If you answered "yes" to Question 6, answer Question 7.)*

**QUESTION 7:** Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury and damage. What percentage of this 100% is attributable to the defendant's negligence, and what percentage of this 100% is attributable to the negligence of the plaintiff? Your total must equal 100%.

**ANSWER:**  
To defendant Department of Transportation: \_\_\_\_\_ %  
To plaintiff Tracy Helm: \_\_\_\_\_ %  
**TOTAL:** 100%

*(DIRECTION: Sign this verdict form and notify the bailiff.)*

**DATE:** 2-19-13  
Presiding Juror

JOHN PORTER



# JACK W HANEMANN PS

## January 06, 2014 - 6:40 PM

### Transmittal Letter

Document Uploaded: 447151-Helm v. State - Reply Brief of Appellant~2.pdf

Case Name: Tracy Helm vs. Department of Transportation

Court of Appeals Case Number: 44715-1

**Is this a Personal Restraint Petition?** Yes  No

#### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: \_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: REPLY BRIEF OF APPELLANT \_\_\_\_\_

#### Comments:

No Comments were entered.

Sender Name: Karen E Neill - Email: [kayla@hbjlaw.com](mailto:kayla@hbjlaw.com)

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