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No. 36495-0-III

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

CARLTON EVANS and MARGARET EVANS,
husband and wife,

Appellants,

v.

SPOKANE COUNTY, a local governmental entity
doing business in Spokane County, Washington,

Respondents.

BRIEF OF APPELLANTS

Janelle Carney, WSBA #41028
Alex French, WSBA #40168
Jeff Comstock, WSBA #41575
GLP Attorneys, P.S., Inc.
601 W. Main Avenue, Suite 305
Spokane, WA 99201-0613
(509) 455-3636

Philip A. Talmadge, WSBA #6973
Gary Manca, WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Appellants Evans

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A. INTRODUCTION

Spokane County (“County”) did not cut down an 80-foot Ponderosa pine tree that was leaning over its road. The tree stood on County-owned land, but the County never inspected it. An arborist later concluded that it was decaying and should have been removed. Meanwhile, the County dug a ditch by the tree and sprayed toxic herbicides into the roadside. The tree eventually crashed onto a car during a storm, injuring the driver badly. The driver, Carlton Evans, and his wife filed a claim for negligence.

For over 75 years, counties operating public roads have been liable for “possible or common dangers.” *Berglund v. Spokane Cty.*, 4 Wn.2d 309, 314, 103 P.2d 355 (1940) (quotation omitted). And for over 55 years, the owners of land by such roads have had a duty to inspect for hazardous trees of which they have constructive notice. *Albin v. Nat’l Bank of Commerce of Seattle*, 60 Wn.2d 745, 751, 754, 375 P.2d 487 (1962).

Contrary to this established law, the trial court instructed the jury that the “[t]he county cannot be negligent if it only knew that an unsafe condition might, or even probably will, develop.” Perhaps unsurprisingly, the jury found no negligence after a trial where the Evanses’ case rested entirely on foreseeability, constructive notice, and imputed knowledge.

Before jury deliberations even began, the Evanses faced a stacked

deck. The trial court had dismissed their negligence theory that was based on the County's failure to provide a roadside "clear zone" in accordance with its own road standards. The trial court also had excluded the testimony of two of their expert witnesses and sharply limited the testimony of another. Other jury instructions detracted from the County's duty of care. These compounding errors—each sufficient on their own to be prejudicial—resulted in a one-sided picture being presented to the jury.

The Evanses should be awarded a new trial.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting summary judgment to the County on October 12, 2018 with respect to its duty to provide a clear zone under its 2010 County Road Standards.

2. The trial court erred in giving Instruction 13 to the jury.

3. The trial court erred in giving Instruction 14 to the jury.

4. The trial court erred in giving Instruction 21 to the jury.

5. The trial court erred in excluding and limiting the expert testimony of Timothy Wright, James Valenta, and Joellen Gill.

6. The trial court erred in entering judgment on the jury's verdict on November 30, 2018.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in ruling as a matter of law that a county owed no duty to provide a “clear zone” from a tree leaning from the shoulder of the county roadway’s right-of-way that ultimately fell over and impaled a motorist when the County’s own modern road standards provided for such a zone? (Assignments of Error Numbers 1, 6)

2. Did the trial court err in instructing the jury that the County cannot be negligent for failing to mitigate dangerous road conditions that it knew will probably develop, despite the County having a dual duty of care as a road operator and landowner to take reasonable steps to remove hazards which it creates, may be reasonably anticipated, or ought to have known about? (Assignments of Error Numbers 4, 6)

3. Did the trial court err in instructing the jury on an “act of God defense”? (Assignments of Error Numbers 3, 6)

4. Did the trial court err in instructing the jury on superseding causation where the putative basis for such an instruction did not involve an extraordinary intervening act that created a type of harm different from the County’s original negligence or that operated independently of it? (Assignments of Error Numbers 2, 6)

5. Did the trial court abuse its discretion in excluding the testimony of well-qualified experts? (Assignments of Error Numbers 5, 6)

C. STATEMENT OF THE CASE

The County operates Big Meadows Road, a roadway in North Spokane carrying traffic to and from Highway 2. Ex. P-16; CP 42, 873, 879. An average of 1,336 vehicles, including school buses, use it daily. CP 883, 910-11. On a stretch near the intersection with Yale Road, the County owns land on the roadside with a patch of trees. Ex. P-16; CP 42.

Before July 23, 2014, a Ponderosa pine tree leaned towards Big

Meadows Road from this County-owned land. CP 42; RPII 894.¹ The tree was about 80 to 100 feet tall, and its base was only about 12 feet from the road. RP 479; RPII 974, 978. The tree leaned at what a County-hired arborist later called “a pretty steep angle” at the trunk’s base, with the trunk curving gradually more vertically. RPII 894.

The County admitted responsibility for maintaining the right of way there, including the land where the tree stood. CP 42; RPII 302-03, 973. Its roads department acknowledged the County was required to “review the roadways for safety,” and to maintain Big Meadows Road “in a reasonably safe condition.” RPII 292, 343. The County admitted that it had the authority as well as “the means and funding to remove” the leaning Ponderosa pine if it chose. CP 916; RPII 302-04.

The County knew that leaning or diseased roadside trees can endanger the public, and its County Engineer attested the County “should remove trees that are a hazard to falling on the roadways.” RPII 290, 292, 312, 452. But the County did not have a written tree-maintenance plan. RPII 603. The County also did not assign any particular employee to inspect county roads for hazardous trees, despite having 300 employees in its roads department, 26 of whom performed maintenance in the district

¹ A portion of the report of proceedings was prepared by court reporter Jody Dashiell and another by reporter Amy Wilkins. The former will be RP throughout this brief, and the latter RPII.

encompassing Big Meadows Road. RP 289, 292-93, 296. The County insisted its maintenance workers were instead all asked to watch out for hazardous trees. RPII 293-94. But the County did not have any written materials for training maintenance employees on how to assess whether roadside trees are unhealthy or pose a risk. RPII 289, 292, 294. County maintenance workers also admitted they had not been told to look for hazardous trees or trained how to spot them. RPII 353, 394.

Normal weather conditions for Spokane include windstorms with gusts up to 50 miles per hour. RPII 767-68. When winds blow at greater speeds, even healthy Ponderosa pine trees can fall, but diseased or structurally unsound pine trees are more likely to fall. RPII 767, 793-94. A manager for the County's roads department acknowledged "that one of the most significant hazards" from windstorms "is trees that fall." RPII 345-46. Major wind storms have increased in frequency in the Spokane area in recent years, prompting the Spokane Conservation District's arborist "to look at more trees." RPII 768.

Meanwhile, the County altered the land on the roadside by that leaning pine tree. Maintenance employees used a truck with a road-grading blade, digging and maintaining a ditch. Ex. D-229; RP 466, 472-73; RPII 927-28, 1010. This ditch digging and maintenance piled soil and risked disturbances to the roots. RP 466, 472-73.

At least twice per year, a County employee used truck-mounted sprayers to spray herbicides into the roadside in the area in question. RPII 237-84. Although this County employee claimed to have turned off the sprayers when close to a tree, RPII 242, the labels for the herbicides admonished users to avoid drift and to keep the toxins away from trees' roots. Exs. P-69, 71, 72. The label for one of these chemicals, Tordon 22K, describes the active ingredient as "highly active," warns even "[t]iny amounts may cause damage to plants," and states "it usually requires up to five years for herbicides containing picloram to be deactivated from the soil." P-72. Just as water from a sprinkler or a garden hose drifts through the air, herbicide sprayed even in windless conditions can vaporize and float onto vegetation away from the intended target. RP 456:12-57:2. Pine trees absorb floating herbicide vapor through their needles and buds. RP 457.

On July 23, 2014, one of the increasingly common windstorms hit the Spokane area. That afternoon, Carlton Evans was out driving to do errands. RPII 637-38. As he made his way home at 4:35 pm, he drove on Big Meadows Road near the intersection with Yale. CP 1025; RPII 638. The leaning Ponderosa pine tree crashed down onto his car, impaling him through his hip and severing his left hand. Ex. P-103; CP 42; RPII 638-39. His left arm was later amputated. RPII 644.

Although the County never inspected the tree before it fell, two arborists did afterwards, one hired by the Evanses (Mark Webber) and the other by the County (Scott Baker). RP 424-507, 515-91, 648-53; RPII 861-99, 922-80, 985-1017, 1231-40. They agreed the tree had been leaning. RP 468; RPII 894. Otherwise they had different conclusions regarding the degree of the lean, evidence of herbicide damage, disease decay, and the need for an inspection. RP 424-507, 515-91, 648-53; RPII 861-99, 922-80, 985-1017, 1231-40.

Carlton and Margaret Evans filed the present personal injury action against the County in the Spokane County Superior Court. CP 1-11, 31-39. The County denied negligence. CP 12-19, 40-47. The case was assigned to the Honorable Timothy Fennessy.

The County moved for summary judgment. CP 524-50. It argued that, among other things, its duty of care to the public on Big Meadows Road did not require it to comply with its own road standards that provided for a “clear zone” on each side of the road. CP 531, 533-37. The County argued that the Road is old and does not need to meet modern standards. CP 533-37. The trial court agreed and dismissed that negligence theory, but otherwise denied the motion. CP 3619.

The County brought 30 defense “motions in limine” in a 32-page filing on September 28, 2018. CP 2920-51. Among these, the County

tucked in a single paragraph requesting the exclusion of the plaintiffs' expert meteorologist, Timothy Wright, for purported discovery violations without citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). CP 3650-51. In May 2018, the Evanses first disclosed Wright. CP 3650-51. In explaining his expected testimony, the disclosure stated, "The statistical data indicates wind speeds ... were between 50 to 55 mph ... not unusual or extreme" CP 3651. The trial court excluded Wright, RPII 406-27, 1102-10, even though the Evanses disclosed him months before trial, CP 3650-51; even though the County never asked to depose Wright, never asked for a conference under CR 26(i), and never filed a motion to compel, CP 3638, 4146; RPII 1104. The County had its own meteorologist and arborist to testify about windspeeds, RPII 478-524, 870-71, 925-26, 932, 969; and even though the County waited until the eve of trial to request exclusion of Wright, CP 2943, 2951.

The trial court then further restricted the Evanses' evidence. It limited James Valenta, a road engineer and former transportation-department director, from testifying that the County should have (1) "train[ed] their employees to identify hazards located within the right-of-way," and (2) used available budget funds to mitigate roadside hazards. CP 3764-72, 3779-80; RPII 812-30. Next, the trial court excluded Joellen Gill, a certified safety professional. RP 266-69, 324-25. Gill's opinion

had been that the County's safety programs were deficient and a cause of the County's failure to realize the tree was dangerous and remove it. CP 3098; RP 276-77. The trial court thus silenced three of the Evanses' experts, but none of the County's.

After having excluded the Evanses' meteorologist, the trial court permitted countervailing testimony about high winds. The jury heard from two County experts—their meteorologist, Bryan Rappolt, who claimed that the wind was a 100-year event, and Baker, their arborist. RPII 478-524, 870-71, 925-26, 932, 969. The trial court also took judicial notice, over the Evanses' objection, that the maximum windspeed that day at Spokane International Airport (over 15 miles away) was 67 mph. CP 4197-99, 4260; RPII 1248, 1252-58.

The trial court gave three jury instructions—11, 16, and 21—on the County's duty of care as a road operator and one—Instruction 19—on its duty as a landowner. CP 4245, 4252-53, 4256. The trial court also gave instructions on superseding cause and an “act of God” defense—Instructions 13 and 14, respectively. CP 4247-48. The Evanses took exception to Instructions 13, 14, and 21. RPII 1316-20.

After a three-week trial, the jury rendered a defense verdict on the issue of negligence, with two dissenting jurors. CP 4263-64, 4267; RPII 1424-27. Judgment was entered, and this timely appeal followed. CP

4286-87, 4289-93.

D. SUMMARY OF ARGUMENT

The trial court erred in ruling as a matter of law that ancient road safety standards, rather than the County's 2010 safety standards required by RCW 36.75.020, applied in this case as to a clear zone on Big Meadow Road.

The trial court erred in instructing the jury on the County's duty to Carlton Evans both as a road operator and property owner. The court's instructions on acts of God and superseding cause were improper and prejudicial, unduly emphasizing the County's defense of the Evanses' claims.

The trial court abused its discretion in excluding and/or limiting the testimony of three of the Evanses' key witnesses. In particular, it excluded the Evanses' meteorological expert as a discovery sanction without properly applying the *Burnet* protocol for such a severe sanction. The trial court's treatment of the Valenta and Gill testimony was equally erroneous, again depriving the Evanses of admissible evidence necessary for a fair trial of their claims.

This Court should reverse the trial court's judgment and order a new trial.

E. ARGUMENT

(1) The Trial Court Erred in Rejecting the County’s Duty to Provide a Clear Zone on Big Meadow Road as Required by Its Road Standards

The trial court erroneously dismissed the Evanses’ claim against the County for not creating a clear zone by the crash site as required by its own road standards. Whether the County could forever confine Big Meadows Road to century-old design standards was a jury question. The partial summary judgment should be reversed and a trial ordered on this claim.²

As required by RCW 36.75.020, the County adopted road standards in 2010 (“2010 Standards”). These standards describe “clear zones” as “roadside safety improvements.” CP 876, 1041-1228. The standards require “clear zones” on rural arterials and collectors³ to conform to the “[c]riteria set forth in the latest edition of the AASHTO Roadside Design Guide.” CP 1069. The standards provide that “[f]or safety, it is desirable to provide a roadside recovery area that is as wide as practical.” CP 1080.

² This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Summary judgment is a drastic remedy “appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). In determining whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the non-moving party. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

³ Big Meadows Road was classified by the County as a “Rural Major Collector.” CP 879.

The County's violation of this "clear zone" mandate created a jury question on two separate grounds. First, an expert road engineer testified on summary judgment that preventing trees from falling on the roadway is a benefit of removing trees to create a clear zone. CP 1396-97, 1399. This expert criticized the County for failing to remove the tree in what should have been a clear zone of up to 12 feet there. CP 1399. This expert opinion was alone sufficient to create a jury question on this theory of negligence.

Second, our Supreme Court has repeatedly held that a government agency's own internal standards are evidence of what reasonable care requires and thus evidence upon which a jury may find negligence.⁴ The 2010 Road Standards establish that the County should have had a clear zone on the section of the Road where Carlton was impaled.

The 2010 Standards apply by their own terms to "reconstruction, resurfacing, restoration, and rehabilitation of old roads."⁵ CP 1045 § 1.01.

The terms "resurfacing" and "rehabilitation" are defined as follows:

"Resurfacing" shall mean the addition of a layer or layers of paving material to provide additional structural integrity or improved profile and serviceability....

⁴ See, e.g., *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323-24, 119 P.3d 825 (2005) (agency's policy directive); *Bishop v. Miche*, 137 Wn.2d 518, 531, 973 P.2d 465 (1999) (agency's internal manual).

⁵ Such projects are referred to in the 2010 Standards as "RRR" or "3-R" road projects. CP 1045.

“Rehabilitation” shall mean work similar to restoration except the work may include but is not limited to the following:

- Reworking or strengthening the base or sub base
- Recycling or reworking existing materials to improve their structural integrity
- Adding underdrains
- Replacing or restoring malfunctioning joints
- Substantial pavement undersealing when essential for stabilization
- Grinding of pavements to restore smoothness, providing adequate structural thickness remains
- Removing and replacing deteriorated materials
- Crack and joint sealing but only when required shape factor is established by routing or sawing
- Improving or widening shoulders....

CP 1047. The County Engineer acknowledged that paving or resurfacing work falls under the definition of “rehabilitation” under the 2010 Standards. CP 1357. The County admitted that it had “paved and resurfaced the road surface of Big Meadows Road.” CP 1322-23. And according to an expert witness, the County’s fiscal-year 2014 expenditures indicated 3-R project work on Big Meadows Road. CP 1404. Viewed in the light most favorable to the Evanses, the evidence showed a jury question whether a 3-R project occurred, triggering the 2010 Standards.

Even though the 2010 Standards impose cost constraints, there was a jury question on their significance for this road. The 2010 Standards apply to 3-R projects only “as far as practicable and feasible” and if not “unreasonable.” CP 1045, 1079. Here, the County had to remove only

three trees to provide a “clear zone” on that stretch of the road. CP 1402. The County admitted that it “had the means and funding to remove” the dangerous tree that fell on Carlton Evans. CP 916. Yet the County “did nothing to implement what’s a reasonable and inexpensive removal of tree obstructions in the clear zone,” according to an expert. CP 1403.

The 2010 Standards dictate that the County “give particular attention to the clear zone at identified high roadside accident locations.” CP 1080. In 1993, a man died when his car collided with a tree standing in the “clear zone” on the side of Big Meadows Road. CP 714, 874, 924, 928. At least five times since 1985 motorists have collided with trees on the side of Big Meadow Road. CP 971, 980, 982, 999, 1006.

All this evidence, viewed in the Evanses’ favor, as it must be, demonstrated a jury question on whether a clear zone was “practicable” and “feasible” or instead “unreasonable.” CP 1045.

Ruff v. King County, 125 Wn.2d 697, 887 P.2d 886 (1995) is not to the contrary. In *Ruff*, the plaintiff claimed negligence because, in part, the county did not provide a 10-foot wide “recovery area” along the road in accordance with AASHTO standards. *Id.* at 705. King County had not yet adopted AASHTO standards, and the plaintiff did not present expert testimony or otherwise contend that King County had violated its own road standards. *Id.* at 706. Without that critical evidence, summary

judgment was appropriate because the record otherwise disclosed no evidence that the road was unsafe. *Id.* at 706. Here, however, the County *did* adopt AASHTO standards. CP 1069. Moreover, the County’s admissions and the Evanses’ expert testimony showed the 2010 Standards applied and were violated. CP 916, 1069, 1322-23, 1357, 1399, 1402-04. Below, the County argued that it “does not owe a duty to update older roadways to current design standards.” CP 1545. The *Ruff* court did not make such a sweeping statement. And that that cannot be the rule; otherwise, counties would never have to improve unsafe older roads to protect the traveling public.

Perhaps summary judgment would have been appropriate if the proposed standard of care were that counties must rebuild every single existing road right now to current standards, regardless of cost, or that 100-foot clear cuts must be created on each roadside along all roads with trees.⁶ But that is *not* what is at issue here. Instead, a jury question was whether one particular section of one particular road needed to meet one particular county standard. It was for the jury to decide⁷ whether the

⁶ See, e.g., *Albin*, 60 Wn.2d at 748-49 (cautioning that it is “neither practicable nor desirable” to have a standard of care for road safety requiring counties to “cut[] a swath through wooded areas” as wide as trees are tall); *Tanguma v. Yakima Cty.*, 18 Wn. App. 555, 560, 569 P.2d 1225 (1977), *review denied*, 90 Wn.2d 1001 (1978) (“There is no duty to replace every highway structure not conforming to present-day standards.”).

⁷ “Negligence is generally a question of fact for the jury, and should be decided

County violated its 2010 Standards or whether concerns about “feasibility” or “practicability” made a clear zone optional.

According to the County, because clear zones are meant to avoid “road departure accidents,” the collision here was not “within the field of danger contemplated by this duty.” CP 1546. The Supreme Court long ago rejected this argument:

In other words, respondent contends, in effect, that negligence can be predicated only upon ability to foresee the exact manner in which injury may be sustained. That is not the correct test. The formula applicable to a finding of negligence is whether or not the general type of danger involved was foreseeable.

Berglund, 4 Wn.2d at 319.⁸ This Court has agreed that a jury question arises on foreseeability even though “the precise manner in which this accident occurred may not have been foreseeable to [the defendant].”

as a matter of law only in the clearest of cases and when reasonable minds could not have differed in their interpretation' of the facts.” *Bodin v. City of Stanwood*, 130 Wn.2d 726, 741, 927 P.2d 240 (1996) (quotation omitted).

⁸ Since *Berglund*, courts have repeatedly held the specific mechanism of injury is irrelevant; what matters is the general danger. See, e.g., *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 322, 255 P.2d 360 (1953); 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* § 2:5 at 47-48 (4th ed. 2013) (discussing cases). In one case, for example, the defendant was negligent as a matter of law when he put a screwdriver into high-voltage electrical equipment, causing a loud sound known as an “electric arc blast” to injure the hearing of a bystander. *Lee v. Willis Enterprises, Inc.*, 194 Wn. App. 394, 398-99, 403, 377 P.3d 244, 249 (2016). Even though no one specifically anticipated the loud sound, the Court held “it is foreseeable as a matter of law that serious injury could result from careless behavior while working in and around energized high-voltage electrical equipment.” *Id.* at 402-03. The “general field of danger,” not the specific mechanism of injury (there, a loud sound) is what mattered. *Id.* at 402.

Anderson v. Dreis & Krump Mfg. Corp., 48 Wn. App. 432, 445, 739 P.2d 1177, *review denied*, 109 Wn.2d 1006 (1987).

Here, the general field of danger was serious injury from cars and trees colliding. The specific mechanism of injury—the tree falling—was irrelevant. A jury may thus reasonably find the harm was a foreseeable harm of violating the “clear zone” provisions in the 2010 Standards.

In sum, there was a jury question on the negligence claim based on the lack of a “clear zone.” The trial court was wrong to dismiss this claim on summary judgment.

(2) The Trial Court Erred in Instructing the Jury on the County’s Duty to Evans as the Operator of a Public Roadway and as the Owner of Land Adjacent to the Roadway

The trial court erroneously instructed the jury on the County’s dual duty of care. Although the trial court recognized that the County was under a duty both as the operator of a public road and as the owner of land next to the road, the jury instructions misstated the law on the dangers that are included within the scope of the duty. The trial court also gave instructions detracting from the County’s duty and illegitimately emphasizing the County’s position. A new trial is required.

(a) Standard of Review

Although trial courts have discretion in some respects when crafting jury instructions, they do not when stating the law. Legal errors in jury instructions are reviewed *de novo*. *E.g.*, *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 767, 389 P.3d 517 (2017); *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).⁹

For a jury instruction on a party's theory of the case to be justified, there must be substantial evidence supporting it. *E.g.*, *Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978).

The remedy for prejudicial errors is a new trial. *Joyce*, 155 Wn.2d at 310, 325. The trial court's instructional errors here were prejudicial to the Evanses.¹⁰

⁹ Trial courts have discretion in deciding whether to give a particular instruction, the number of instructions on a given theory, and word choice. *See, e.g.*, *Taylor*, 187 Wn.2d at 767 ("In general, whether to give a particular instruction is within the trial court's discretion." (citation omitted)); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994) ("The number and specific language of jury instructions is a matter within the trial court's discretion."). However, trial courts abuse this discretion when the instructions, read as a whole, mislead the jury, do not allow each party to argue their theory of the case, or do not inform the jury of the law to be applied. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991); *Seattle W. Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 9-10, 750 P.2d 245 (1988).

¹⁰ An instructional error is prejudicial if it "affects the outcome of the trial." *Easley v. Sea-Land Serv., Inc.*, 99 Wn. App. 459, 467, 994 P.2d 271, *review denied*, 141 Wn.2d 1007 (2000). Instructions that misstate the law are presumed prejudicial "unless it can be shown that the error was harmless." *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Error is harmless if it is "trivial, formal, or academic." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 36, 864 P.2d 921, 934 (1993) (quotations omitted).

(b) The County's Dual Duty Required It to Mitigate All Roadside Hazards Which It Created, Were Reasonably Foreseeable, or of Which It Had Constructive Notice

Washington cases make plain that a government owes a duty of care to the traveling public both in the capacity as the operator of public roads and, where it also owns the land adjacent to the road, as a property owner. Here, Spokane County acted under both capacities. It admitted that the tree was in the County right-of-way and that it owned the land where the tree had stood. CP 42; RPII 301-02.

Washington counties owe a duty of “ordinary care” as a public-road operator “to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.” *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 253-54, 44 P.3d 845, 852 (2002). This duty of “reasonable care” is “well established.” *Lowman v. Wilbur*, 178 Wn.2d 165, 170, 309 P.3d 387, 390 (2013); *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 786, 108 P.3d 1220 (2005). It encompasses roadside hazards, such as vegetation and utility poles. *Wuthrich v. King Cty.*, 185 Wn.2d 19, 27, 366 P.3d 926, 929 (2016) (holding hazards from roadside vegetation must be guarded against); *cf. also, Lowman*, 178 Wn.2d at 171-72 (holding that the dangerous placement of a roadside utility pole may be the legal cause of damages in a

negligence claim against a county). Roadside trees therefore fall within the County's duty as a road operator.

Reasonable care means "the care an 'ordinarily reasonable person would exercise under the same or similar circumstances.'" *Keller*, 146 Wn.2d at 248 (quoting *Berglund*, 4 Wn.2d at 315). Road operators must act affirmatively to protect the public and mitigate hazards that fall within the duty of care: "a municipality has a duty to take reasonable steps to remove or correct for hazardous conditions that make a roadway unsafe for ordinary travel." *Wuthrich*, 185 Wn.2d at 27.

Local governments' duty of care to mitigate roadside trees typically arises from their capacity as public-road operators, not as landowners. *Nguyen v. City of Seattle*, 179 Wn. App. 155, 171-72, 317 P.3d 518, 526 (2014). In *Nguyen*, however, the parties agreed the government did not own the land. *Id.* at 172. Here, by contrast, the County *admitted* that it owned the land. CP 42. So the County stands on a different footing than in the typical case involving road operators. The County was therefore liable also to the same extent as a private landowner.

Landowners have a duty to travelers on adjacent public roads. When a landowner in an urban or residential area has actual or constructive notice of a defective tree, the owner "has a duty to take corrective action." *Lewis v. Krussel*, 101 Wn. App. 178, 187, 2 P.3d 486,

review denied, 142 Wn.2d 1023 (2000). This duty of care would apply with equal force here even if the crash site were considered rural or non-residential. In *Albin*, our Supreme Court held the owners of rural land next to a remote public road owe a duty to road users in some circumstances. 60 Wn.2d at 751-52. When the owners of such land disturb the land instead of leaving it in a natural state, the owners owe a duty to inspect and mitigate unsafe conditions of which they have actual or constructive knowledge. *Id.* at 751-52.

(c) Jury Instruction 21 Erroneously and Prejudicially Misstated the Law on the County’s Duty of Care by Misinforming the Jury that Actual Knowledge and Certainty of the Danger Were Required

The trial court committed reversible error in its jury instructions on the duty of care. The trial court’s instructions faltered from the start. After giving the correct instruction based on WPI 140.01 regarding the County’s general duty as a road operator (Instruction 11), CP 4245, the trial court gave a watered-down instruction on the specific duty where actual knowledge is not claimed (Instruction 18), CP 4252. It omitted the language from the pattern instruction that would have informed the jury that notice is not required when the dangerous condition is one that may be “reasonably anticipated.” *Compare* WPI 140.02 *with* CP 4252.

From this faulty foundation, the trial court then gave an erroneous statement of law (Instruction 21) taken from the County. CP 4136, 4256. Instruction 21 misinformed the jury that the County had to have actual knowledge of an unsafe condition: “The county cannot be negligent if it only knew that an unsafe condition might, or even probably will, develop.” CP 4256. Instruction 21 erroneously stated the law.

Contrary to Instruction 21, since at least *Berglund*, our Supreme Court has held public road operators must give “reasonable regard for *possible or common* dangers that may be expected.” *Berglund*, 4 Wn.2d at 314 (quotation omitted) (emphasis added). When an unsafe condition is “reasonably to be anticipated, it would be the county’s duty to exercise reasonable care to protect the public against the resulting danger.” *Id.* at 361. Instruction 21 collided with this foundational law, misinforming the jury that the County’s duty did not extend to an unsafe condition that “probably” would develop. CP 4256. The instruction mistakenly pulled language from *Laguna v. Washington State Department of Transportation*, 146 Wn. App. 260, 265, 192 P.3d 374 (2008), a case that turned only on actual notice. *See id.* at 263 n.5 (“Only actual notice is at issue here.”).¹¹

¹¹ *Laguna* is also distinguishable on its facts. That case was about rapidly forming ice on the road resulting from a fleeting weather event. *Id.* at 261 (“The State’s duty to maintain roads in a reasonably safe condition does not include the duty to prevent ice from forming on the roadway.”). Given the weather on that particular day, meteorologists testified that “icing would have been rapid.” *Id.* at 262. By contrast, this

Since *Berghund*, doctrine on public road operators’ duty has developed further, identifying three scenarios in which actual notice is not a precondition for counties to take affirmative steps to mitigate hazards:

1. The actions of the County’s employees created the dangerous condition. *See, e.g., Nguyen*, 179 Wn. App. at 165-66 (“[T]he notice requirement does not apply to dangerous conditions created by the governmental entity or its employees or to conditions that result from their conduct.” (citations omitted)).

2. The dangerous condition was “reasonably foreseeable” or one that should have been “reasonably anticipated.” *See, e.g., Albin*, 60 Wn.2d at 748 (“A county’s liability to the users of its roads is predicated upon its having notice, either actual or constructive, of the dangerous condition which caused injury, unless the danger was one it should have foreseen and guarded against.” (citations omitted)); *Nguyen*, 179 Wn.

case is about a dangerous condition – an unhealthy tree – that was known by the County to have existed for a long period of time.

Laguna did not override age-old tort law on governmental liability and constructive notice. Public road operators have a duty to exercise reasonable care to mitigate dangerous road conditions of which they have constructive notice. Division II did not express or imply that it was revisiting this well-established law. To the contrary, *Laguna* decided a dispute about *actual* notice, not *constructive* notice. In this limited context, the Court stated, “There is a difference between liability based on knowledge that a dangerous condition actually exists and knowledge that a dangerous condition might, or even probably will, develop.” *Id.* at 265. That language formed the basis of the Instruction 21: “The county cannot be negligent if it only knew that an unsafe condition might, or even probably will, develop.” CP 4256. Instruction 21 was an erroneous statement of law.

App. at 165 (“Nor is notice required where the City should have reasonably anticipated the condition would develop.” (citations omitted)).

3. Even if the dangerous condition was not one that was created by a County employee and was not one that should have been reasonably anticipated, the County had constructive notice of it. *See, e.g., Niebarger v. City of Seattle*, 53 Wn.2d 228, 230, 332 P.2d 463 (1958) (defining constructive notice); *Nguyen*, 179 Wn. App. at 165 (“Notice may be actual or constructive.”); WPI 140.02 cmt. (commenting that WPI 140.02 is used only in when actual or constructive notice is necessary for a government entity to be liable for an unsafe road condition).

Under *Berglund* and its progeny, Instruction 21 misstated the law. If the County “knew an unsafe condition ... probably will develop,” as provided in Instruction 21, then certainly the jury could reasonably have found at a minimum that the County “ought to have known about the condition,” *Niebarger*, 53 Wn.2d at 230, and thus had constructive notice. Washington law plainly provides a road operator is required “to take reasonable steps to remove or correct for hazardous conditions” within its duty of care. *Wuthrich*, 185 Wn.2d at 27. Thus, the County could have been negligent if it knew an unsafe condition probably would develop, contrary to Instruction 21.

Because the County also owned the land where the tree stood, the undisputed facts triggered the duty to exercise reasonable care for inspection and mitigation upon having constructive notice of the danger. Big Meadows Road is not a remote byway, but a “Rural Major Collector,” carrying an average of 1,336 vehicles every day to and from Highway 2. Ex. P-16; CP 873 879, 883. It is a school-bus route. CP 910-11. The County therefore owed a duty of care under *Lewis*, 101 Wn. App. at 187. Even if Big Meadows Road were considered a remote road as in *Albin*, a duty still attached because the County altered the natural condition of its roadside property. Indeed, the County used trucks to dig ditches and spray herbicides into the roadside twice per year. RPII 237-84, 927-28, 1010. Although a County employee claimed she turned off the sprayers when close to a tree, RPII 242, the County’s combined actions could hardly be counted as leaving its land in a “natural state.” *Albin*, 60 Wn.2d at 751. Upon having constructive notice of the dangerousness of the tree, the County therefore had a duty to exercise reasonable care to inspect and mitigate the condition. *See id.* at 751-52.

As a landowner, then, the County could be negligent for failing to mitigate a hazard that it knew would probably develop. Instruction 21 conflicted with the law and its own instruction on the County’s duty as the possessor of the land where the tree stood (Instruction 19). CP 4253.

As misstatement of law, Instruction 21 is presumed prejudicial. *See Fergen*, 182 Wn.2d at 803. The presumption of prejudice cannot be rebutted because Instruction 21 conflicted with Instructions 11, 18, and 19. As our Supreme Court has held, “Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial, for the reason that it is impossible to know what effect they may have on the verdict.” *Hall v. Corp. of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972) (citation omitted). In such a circumstance, this Court should find prejudice without even reviewing the evidence. *See Coyle v. Municipality of Metro. Seattle*, 32 Wn. App. 741, 743, 649 P.2d 652, *review denied*, 98 Wn.2d 1005 (1982). Based on Instruction 21 alone, this Court should reverse and order a new trial and may do so without sifting through the evidence or reaching other issues.

Even if there were not conflict among the instructions, Instruction 21 would still be prejudicial because of the County’s closing argument and Instruction 18. Even when a closing argument is not itself error, it may be the source of prejudice from an erroneous jury instruction. *See Anfinson*, 174 Wn.2d at 876 (“The closing argument was not the *error*, it was the source of *prejudice* ...” (emphasis in original)). Here, the County’s attorney told the jury during closing argument that Instruction 21 was “important.” RPII 1394. The County’s attorney criticized the Evanses’

negligence claim as being about “what might be possible, what could have happened,” and pointed to Instruction 21 to argue that the Evanses needed to show “the county had notice that this specific tree was going to fall on this specific road on this specific day at this specific time.” *Id.* But actual notice of the danger at that specific time and place was not the sole basis to trigger the duty to exercise reasonable care in mitigating the danger. *See, e.g., Albin*, 60 Wn.2d at 748; *Berglund*, 4 Wn.2d at 361; *Nguyen*, 179 Wn. App. at 165-66. As our Supreme Court observed elsewhere, “This argument took what had been a mere latent possibility of misunderstanding and actively encouraged the jury to apply an erroneous legal standard.” *Anfinson*, 174 Wn.2d at 876.

Without these closing remarks, the instructions still were prejudicial when read as a whole because Instruction 18 made it impossible to correct Instruction 21, even if the problem was no worse than ambiguity. *See Anfinson*, 174 Wn.2d at 874-76 (discussing how an instruction may be erroneously misleading if it is ambiguous enough to allow both correct and incorrect interpretations of the law). Instruction 18 left out language from WPI 140.02 that might have helped inform the jury that the County could be negligent under Instruction 11 for not addressing dangers that may be “reasonably anticipated.” *Compare* WPI 140.02 *with*

CP 4252. In any event, because Instruction 21 conflicted with Instructions 11, 18, and 19, it was irredeemable.

(d) Instruction 14, the “Act of God” Instruction, Erroneously and Prejudicially Detracted from the Already-Flawed Instructions on the County’s Duty of Care

The trial court further undercut its erroneously diluted instructions on the County’s duty by instructing the jury on an “act of God” as a defense to liability in Instruction 14. CP 4248. This was error.

Generally, the proper constraining principle on the scope of a duty of care is foreseeability.¹² Harm is foreseeable “if the risk from which it results was known or in the exercise of reasonable care should have been known.” *Travis v. Bohannon*, 128 Wn. App. 231, 238, 199 P.3d 417 (2005). Instructions 11, 18, and 19 on the County’s duty of care would have allowed the County to argue foreseeability, but, in conjunction with Instruction 21, the “act of God” instruction overemphasized the County’s theory of the case.

Below, the County did not cite any appellate decision approving an “act of God” instruction in a case involving a government entity’s duty of care as a public-road operator. The decision in *Wells* is not to the

¹² See, e.g., *Wells v. City of Vancouver*, 77 Wn.2d 800, 802, 467 P.2d 292 (1970) (stating that foreseeability is “useful in determining the limits of the defendant’s duty”); *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 544, 184 P.3d 646 (2008) (affirming summary judgment dismissal of a claim of negligence because there was no evidence that the harm was foreseeable).

contrary. Although an “act of God” instruction was approved in a negligence claim against a municipality, the alleged negligence there arose from the construction of an airport hangar, not the operation of a public road. *Wells*, 77 Wn.2d at 801. In any event, the approved instruction in *Wells* included a critical preamble that was missing here: *Compare Wells*, 77 Wn.2d at 803 (“One who is under a duty to protect others against injury cannot escape liability for injuries to the person or property of such others on the ground that it was caused by an act of God, unless”) (quoting record)), *with* Instruction 14. CP 4248.

The “act of God” instruction here was like the one disapproved in *Burton v. Douglas County*, 14 Wn. App. 151, 539 P.2d 97, *review denied*, 86 Wn.2d 1007 (1975), which involved a flood. Because the flooding concurred with improper design of a roadway to cause harm, the county was liable, regardless of “whether the rainstorm was an ordinary freshet or an unprecedented flood.” *Id.* at 156. As in *Burton*, regardless of whether the tree here fell during a wind gust qualifying as an “act of God,” the County’s liability would be predicated on the underlying negligence in leaving the dangerous tree there in the first instance. At most, then, even if the winds reached the level of an “act of God,” they would have been a concurring cause. That is not a sufficient ground to warrant an “act of God” instruction. *Tope v. King County*, 189 Wash. 463, 471-72, 65 P.2d

1283 (1937) (“[T]he defendant is liable for such loss as is caused by his own act concurring with the act of God, provided the loss would not have been sustained by plaintiff but for such negligence of the defendant.”).

Instruction 14 was error also because it was not supported by substantial evidence. The County’s meteorologist testified that there was a 1.25% chance of winds reaching 68 mph in a year, and he admitted that wind gusts reached 71 mph in 2005 and 2015. RPII 498, 503. Testimony established that wind gusts up to 50 mph were normal for the area, and windstorms have occurred more frequently in recent years in Spokane. RPII 767-68. At most, the wind speeds were merely an “unusual or rare occurrence,” CP 4248, which Instruction 14 specified was not enough to constitute an “act of God.” Serious earthquakes in San Francisco are rare but within the range of ordinary human experience there. The same is true in Spokane for high winds. Gusts of up to 68 mph cannot be an “act of God” in Spokane.

Even in that day’s winds, there was no evidence that an “act of God” was the “sole proximate cause” as Instruction 14 provided. CP 4248. The County’s experts acknowledged their opinions did not include any opinion that the tree actually fell during the claimed maximum wind gust of 68-70 mph. RPII 513, 970. In fact, the meteorologist testified that the claimed maximum gust occurred “between 4:00 and ... 4:20 p.m.,” RPII

498, but the collision did not occur until 4:35 p.m., CP 1025. Instruction 14 was thus impermissibly founded on nothing more than speculation and conjecture about the impact of the maximum wind gusts. This flaw constitutes reversible error.¹³

In sum, because Instruction 14 improperly detracted from the County's duty of care, overemphasized the County's theory, and rested on speculation and conjecture, it was prejudicial error.

(3) The Trial Court Erred in Instructing the Jury on Superseding Cause

Compounding the unfair emphasis on the County's theory of the case, the trial court's Instruction 13 on superseding cause, CP 4247, was error.

A superseding cause can break the causal chain of causation in a negligence case. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 813, 733 P.2d 969 (1987). Our Supreme Court has adopted the analysis of superseding causation from the *Restatement (Second) of Torts*. *Campbell*, 107 Wn.2d at 812-15. A superseding cause is an intervening force "which by its intervention prevents the [defendant] from being liable for harm to another which [the defendant's] antecedent negligence is a substantial

¹³ See *Board of Regents*, 90 Wn.2d at 86 ("The supporting facts for a theory and instruction must rise above speculation and conjecture."); *Albin*, 60 Wn.2d at 754 ("[I]t is prejudicial error to submit an issue to the jury when there is no substantial evidence concerning it.").

factor in bringing about.” *Id.* at 812 (quoting *Restatement (Second) of Torts* § 440). Intervening acts which are reasonably foreseeable cannot be superseding causes. *Id.* at 814. In determining whether an act constitutes a superseding cause, the relevant factors “are, *inter alia*, whether (1) the intervening act created a *different type of harm* than otherwise would have resulted from the actor’s negligence; (2) the intervening act was *extraordinary* or resulted in extraordinary consequences; (3) the intervening act *operated independently* of any situation created by the actor’s negligence.” *Id.* at 812-13 (citing *Restatement (Second) of Torts* § 442 (emphasis in original)).

Where there is no evidence of these factors, the trial court commits reversible error in instructing the jury on superseding cause. *Campbell*, 107 Wn.2d at 817. For example, in *Albertson v. State*, 191 Wn. App. 284, 361 P.3d 808 (2015), CPS investigated a report of potential child abuse but concluded no abuse occurred and returned the child to the biological father. *Id.* at 290-92. After the child was left with him, the father again abused the child. *Id.* at 290, 292. The negligence alleged was that CPS’s investigation and placement decision allowed the second abuse. *Albertson*, 191 Wn. App. at 298-99. Division II concluded the intervening act of the father “was precisely the kind of harm that would ordinarily occur as a result of [CPS’s negligence].” *Id.* at 298. The trial court

therefore erred in instructing on superseding cause. *Id.* at 298-99.

As in *Albertson*, the record here did not justify the instruction on superseding cause. The harm here was the same as what otherwise would have resulted from the County's negligence: a tree could not withstand high winds and collided with a passing motorist. *See Campbell*, 107 Wn.2d at 812-13. High winds also did not "operate[] independently of any situation created by the [the County]'s negligence." *Id.* (quoting *Restatement (Second) of Torts* § 442 (emphasis removed)). Rather, the high winds operated in conjunction with the situation created by the County's failing to inspect a suspicious tree and damaging the tree with herbicides.

As discussed already, there also was no evidence that the maximum wind gust in the area was the event that caused the tree to fall. Therefore, even in that day's high-wind conditions, there was no evidence, only speculation, for the jury to find a break in the chain of causation.

This error was prejudicial because, as with the "act of God" instruction, it improperly detracted from the County's duty of care, overemphasized the County's theory, and was predicated on speculation. It is no answer to argue that the instruction was harmless in light of the jury not reaching the question of causation. Prejudice occurred because the instruction echoed and reinforced the trial court's erroneous instructions

on foreseeability (Instruction 21, CP 4256) and acts of God (Instruction 14, CP 4248) and its taking of judicial notice on the maximum windspeeds at Spokane airport (Instruction 25, CP 4260). “It is a well established rule that jury instructions must be considered in their entirety.” *Brown v. Spokane Cty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 194, 668 P.2d 571 (1983). Read with other instructions, the instruction on superseding cause pushed the jury to find that the County was not negligent.

(4) The Trial Court Erred in Excluding and Limiting the Testimony of the Evanses’ Expert Witnesses

The trial court abused its discretion in limiting and excluding the expert testimony of Timothy Wright, James Valenta, and Joellen Gill. That error was prejudicial, hamstringing the presentation of the Evanses’ negligence claims to the jury.

(a) The Trial Court Erred in Excluding the Evanses’ Meteorologist Under CR 26(b)(5) and *Burnet*

Instead of denying the County’s boilerplate motion to exclude Wright (the plaintiffs’ meteorologist), the trial court directed the Evanses on October 8 to “provide[] all the statistical raw data relied upon by Mr. – or compiled by Mr. Wright.” RP 204. The Evanses promptly disclosed several computer files, including weather data and a spreadsheet containing wind calculations. CP 3639, 3655-64. Still, the County then filed a lengthy follow-up motion to exclude Wright, which the trial court

granted. CP 3537-3616, 3621-70, 4139-51; RPII 406-27, 1102-10. The trial court abused its discretion under *Burnet*.

Because “the law favors resolution of cases on their merits,” *Lane v. Brown & Haley*, 81 Wn. App. 102, 106, 912 P.2d 1040, *review denied*, 129 Wn.2d 1028 (1996), courts presume that witnesses will be allowed to testify despite discovery violations, *Jones v. City of Seattle*, 179 Wn.2d 322, 343, 314 P.3d 380 (2013). This presumption may be rebutted, but only upon specific findings under the *Burnet* factors: “(1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the opponent’s ability to prepare for trial, and (3) the court explicitly considered less severe sanctions.” *Teter v. Deck*, 174 Wn.2d 207, 216–17, 274 P.3d 336 (2012) (citing *Burnet*, 131 Wn.2d at 494). To exclude a witness, the trial court must make on-the-record findings for all three *Burnet* factors, or else it abuses its discretion. *Jones*, 179 Wn.2d at 344. An abuse of discretion occurs also when a decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Burnet*, 131 Wn.2d at 494 (quotation omitted).

The Evanses did not commit any violation here, let alone a willful violation, because they complied with the October 8 order by disclosing several computer files with weather data and windspeed calculations. CP 3655-56; RP 204. The trial court later criticized the Evanses for not

disclosing more, such as the computer program used by Wright and an elaboration of how he used any applicable algorithms. RPII 422-23. But the trial court had ordered disclosure only of “statistical raw data,” not details about Wright’s methodology or his substantive opinions. RP 194-204. The Evanses complied with the order as given.

The trial court also punished the Evanses for not responding earlier to the County’s request for production. That request had sought “all material created by ... each expert” and “all material relied on by each expert.” CP 3555-56; RPII 419-20, 1108-09. Over the Evanses’ objection, CP 3627-29, the trial court ruled that requests for production are a permissible method for discovering expert work product, RPII 419-20, 1108-09. The trial court was wrong.

CR 26(b)(5) does not allow such requests for production, as is made clear by the rule’s text and the decision in *In re Detention of West*, 171 Wn.2d 383, 410, 256 P.3d 302 (2011). CR 26(b)(5) provides, “[d]iscovery of facts known and opinions held by experts ... and acquired or developed ... for trial, may be obtained *only* as follows,” then lists only two permissible discovery methods for testifying experts. CR 26(b)(5) (emphasis added). The permissible methods are the limited interrogatories described in (b)(5)(A)(i) and depositions as set out in (b)(A)(ii), but not requests for production. *See West*, 171 Wn.2d at 408 (“CR 26(b)(5)(A)

explicitly permits only interrogatories and depositions, not requests for production of documents”). Documents are discoverable, but only in conjunction with a subpoena duces tecum for a deposition *Id.* at 408-09.

The County’s request for production also impermissibly avoided the cost-shifting mechanism for expert discovery. CR 26(b)(5)(C) requires the requesting party to “pay the expert a reasonable fee for time spent in responding to discovery under subsection[] (b)(5)(A)(ii),” which is the provision for depositions. The rule assumes that depositions are the only method for discovering documents in a testifying expert’s file and obtaining detailed information about their opinions.¹⁴ The County tried to sneak a peak at Wright’s file without paying for his time.

CR 26(b)(5)(A) and (b)(5)(C) provided no grounds for the County’s request for production directed at the Evanses’ experts or for the trial court’s order for disclosure of statistical data. Trial courts abuse their discretion when they misinterpret CR 26(b)(5). *West*, 171 Wn.2d at 410. Trial courts do not have inherent authority to prescribe discovery methods. *Sastrawidjaya v. Mughal*, 196 Wn. App. 415, 420, 384 P.3d 247 (2016). Lacking a legal basis for its order and its conclusion that the Evanses committed a discovery violation, the trial court abused its discretion.

¹⁴ Interrogatories are logically omitted from the cost-shifting mechanism of CR 26(b)(5)(C), because the permissible interrogatories are limited and answered easily by the party without needing to employ much, if any, of the expert’s time.

Even if the Evanses were mistaken in ignoring the request for production, any violation could not be classified as willful. A discovery violation is not willful if there is “reasonable justification.” *Jones*, 179 Wn.2d at 345 (citing *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009)). The Evanses had reasonable justification under CR 26(b)(5)(A) and *West* to believe they had no duty to respond to the County’s request for production. The record did not show willfulness.

The trial court erred also in finding substantial prejudice. RPII 425, 1109. Any prejudice could not have been “substantial” because the County had two experts testify about wind speeds and weather data, RPII 478-524, 870-71, 925-26, 932, 969. Any prejudice also would have been known to the County since May 2018, five months before trial. CP 3650-51. As stated in *Burnet*, substantial prejudice is more likely if a violation occurs “on the eve of trial,” and less likely if it occurs earlier. *Burnet*, 131 Wn.2d at 496. Despite knowing about Wright and the substance of his opinions for months, the County chose not to depose him. CP 3638. The court heard several discovery motions before trial, but none concerned Wright. CP 48-50, 52-69, 71-75, 76-92, 170-99, 200-29, 355-76, 862-71, 1485-95, 1573-82, 1913-15, 2170-90, 2636-44, 2823-36. So the County knew how to voice concerns, if it genuinely had any. The cursory nature of the County’s one-paragraph motion “in limine” shows the County was not suffering

prejudice and was instead trawling for tactical advantage. The trial court was wrong to bite; the trial court's finding of substantial prejudice was based on untenable grounds.

Also untenable was the trial court's finding on lesser sanctions. The trial court stated that it "just can't conceive of a different or less severe sanction than excluding the testimony of Mr. Wright." RP 425. But the trial court was required to actually weigh lesser alternative sanctions "that could have advanced the purposes of discovery and yet compensated [the opposing party] for the effects of the ... discovery failings." *Burnet*, 131 Wn.2d at 497. The trial court did not consider ordering payment of a fine, requiring the Evanses to pay for Rappolt to fly back to Spokane for any rebuttal, or limiting Wright's testimony to strictly rebuttal of Rappolt's testimony. RPII 406-27. The trial court seemed to believe there was not enough time to squeeze in a deposition. RPII 425-26, 1110. But the County had five months to note Wright's deposition and chose not to do so. CP 3637-38. Even still, after the County filed its one-paragraph motion *limine* on September 28, there were 18 more days until the day when the trial court finally excluded Wright—ample time for the County's team of lawyers to conduct a deposition and consult with Rappolt about it. CP 2943; RPII 406-27. The finding on lesser sanctions failed to rebut "the presumption of admissibility required under *Burnet*." *Jones*, 179 Wn.2d at

345.

Wright's exclusion was not harmless. An error is prejudicial if it "materially affect[ed] the substantial rights of a party." *Jones*, 179 Wn.2d at 356 (quoting *Teter*, 174 Wn.2d at 220 (internal quotation omitted)). Of course, "[a]n erroneous exclusion of evidence is harmless where that evidence is merely cumulative." *Id.* at 360 (citation omitted). Here, however, the Evanses had no other meteorologist available to testify that the windspeeds, though high, were in fact within a normal range.

The Evanses faced a one-sided barrage. After denying the Evanses' cross-motion to exclude Rappolt (the County's meteorologist), CP 3633-35, RPII 426-27, the trial court permitted testimony about high winds from two County experts—Rappolt, who claimed that the wind was a 100-year wind event, and Baker, the County's arborist. RPII 478-524, 870-71, 925-26, 932, 969. Tilting the balance further, the trial court took judicial notice—over the Evanses' objection—that the maximum windspeed that day at Spokane International Airport (over 15 miles away) was 67 mph, CP 4197-99, 4260; RPII 1248, 1252-58. Without Wright, the jury heard only one side of the story.

Wright's testimony would have been crucial, because windspeeds were central to the issue of negligence, as set out in the court's instructions on constructive notice. CP 4252-53. In closing argument, the County

emphasized the testimony of its experts that wind speeds above 50 mph are abnormal for Spokane. RPII 1401-04. The County’s attorney noted Rappolt’s expert testimony “was un rebutted by anything,” RPII 1403—a claim that could be true only because the trial court excluded Wright. The prejudice was multiplied by the trial court’s prejudicial rulings allowing jury instructions on foreseeability (Instruction 21), CP 4256, Acts of God (14), CP 4248, and superseding cause (13), CP 4247.

When a trial court abuses its discretion under *Burnet* and that error is prejudicial, the trial court must reverse and remand for a new trial. That is the proper result here based on the exclusion of Wright alone.

(b) The Trial Court Erred in Limiting the Testimony of the Expert Road Engineer and Transportation Department Director

The trial court abused its discretion in limiting the testimony of James Valenta, the road engineer and former transportation-partment director under ER 702.¹⁵ The trial court then further restricted the plaintiffs’ evidence, prohibiting James Valenta, a road engineer and former transportation-department director, from testifying that the County

¹⁵ “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ER 702. Expert opinions offered under ER 702 generally are admissible where the (1) the witness is qualified, (2) the opinions rest on generally accepted theories, and (3) the opinions are helpful to the jury. *In re Marriage of Katore*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013).

should have (1) “train[ed] their employees to identify hazards located within the right-of-way,” and (2) used available budget funds to mitigate roadside hazards. CP 3764-72, 3779-80; RPII 812-30. The trial court believed that Valenta was unqualified to give these opinions, that Valenta lacked a factual foundation for them, and that the opinion on training was irrelevant. RPII 829-30, 1161-62. While trial courts have discretion under ER 702, our courts recognize a liberal policy favoring admission of expert testimony.¹⁶

The County argued incorrectly that Valenta was only an engineer and his opinions had to be based on engineering principles, not on program-level topics such as training and budget spending. RPII 815. As Division I has admonished, “[i]t is beyond cavil that ‘an expert may be qualified’ to testify ‘by experience alone.’” *Taylor v. Bell*, 185 Wn. App. 270, 285, 340 P.3d 951 (2014), *review denied*, 185 Wn.2d 1012 (2015) (quoting *Katara*, 175 Wn.2d at 38). The trial court was required to consider the breadth of Valenta’s experience.

¹⁶ See, e.g., *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 354, 333 P.3d 388, 394 (2014) (“[T]he rules of evidence reflect the widely held view that a reasoned evaluation of the facts is often impossible without the proper application of scientific, technical, or specialized knowledge.”). Indeed, courts have repeatedly approved testimony under ER 702. See, e.g., *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 229, 393 P.3d 776 (2017) (holding an advanced registered nurse practitioner may qualify to testify on proximate cause in a medical negligence case); *L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 135-38, 436 P.3d 803 (2019) (engineer on the biomechanical forces present in child birth in negligence action against a midwife).

Valenta was not simply an engineer; he had deep experience qualifying him to give his expert opinions on program-level issues such as training and budget allocation. He was in charge of street maintenance for two municipal governments in the Midwest for 14 years as the director of public works and transportation, supervising as many as 214 employees. RP 615, 618; RPII 1144-46. In each of those positions, he prepared and managed operating budgets for the local government's road-maintenance programs. RPII 1146-47, 1173-76. Before that, he researched highway safety for the Federal Highway Administration. RPII 1144. He specialized in municipal engineering when he obtained his master's degree. RP 613. Any weaknesses in his qualifications were grounds for cross examination, not exclusion. *See Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 333 n.1, 364 P.3d 129, 136 (2015), *review denied*, 185 Wn.2d 1022 (2016) ("Once a witness is qualified as an expert, any deficiencies in that qualification go to the weight, not the admissibility of the testimony.").

Besides questioning Valenta's qualifications, the trial court incorrectly excluded Valenta's opinions as lacking a factual basis and not being helpful to the jury. RPII 830, 1161-62. Of course, "it is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861, 865 (1991), *review denied*, 118 Wn.2d

1010 (1992). But to have a basis in fact for his opinions, Valenta did not need to have worked at the County. As our Supreme Court has observed, an “expert is not always required to personally perceive the subject of his or her analysis.” *Katare*, 175 Wn.2d at 39 (citing ER 703). ER 703, which operates in conjunction with ER 702, provides that “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.”

Under these standards, Valenta’s factual foundation was sufficient. Valenta reviewed County budget documents, including information on budget allocations for tree removal and maintenance training. RP 616-22. Specifically, he gathered facts showing the road budget included funds of between \$300,000 and \$370,000 for training. *Id.* at 621-22. From his review of the record, he had information showing the County had removed trees in the past and had available funds for tree removal as of July 2014. *Id.* at 619-20. To the extent that the County believed Valenta should have had more facts than these to support his opinions, the County could have cross-examined Valenta on his opinion, but the opinion was not inadmissible. *See Katare*, 175 Wn.2d 23 at 39 (“That an expert’s testimony is not based on a personal evaluation of the subject goes to the testimony’s weight, not its admissibility.”).

“Courts find an expert’s testimony to be helpful if it helps ‘the jury’s understanding of a matter outside the competence of an ordinary layperson.’” *L.M.*, 193 Wn.2d at 137 (quoting *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995)). Courts “construe helpfulness to the trier of fact broadly.” *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). The County’s internal operations are not within the understanding of an ordinary layperson. In a case like this, the only people who may competently offer opinions about such matters are County employees themselves or outside experts such as Valenta. Given County employees’ inherent biases in these circumstances, the jury would have benefited greatly from hearing an independent outside expert’s opinions on the County’s operations and alternative approaches to road safety. Among other specifics, the trial court should have permitted Valenta to testify about the contents of four other Washington counties’ written vegetation-management plans for road maintenance, which included provisions for arborists or road-maintenance employees to inspect for dangerous trees. RPII 1182-85. That information, which underlaid Valenta’s opinions, would have heled the jury understand what would have constituted “reasonable care” in light of “the surrounding circumstances.” *Keller*, 146 Wn.2d at 253-54; *Berglund*, 4 Wn.2d at 315-16.

Valenta offered unique opinions that went directly to the question

of negligence. The exclusion of his opinions affected the outcome of the trial and were thus prejudicial.¹⁷

(c) The Trial Court Erred in Excluding the Evanses' Expert on Risk Management

After *voir dire* of expert Joellen Gill, the trial court ruled her testimony was not helpful to the jury under ER 702. RP 266-317, 324-30. Gill would have testified that the County's safety and risk-management programs were deficient and a cause of the County's failure to realize the tree was dangerous and remove it. CP 3098; RP 276-77. By excluding this testimony, the trial court erred and dealt yet another blow to the Evanses' ability to try their case to the jury.

The trial court ruled correctly that Gill was qualified to give such an opinion. RP 316-17. Her areas of expertise are human factors (the discipline of how human beings interact with a system) and safety and risk management (the system for identifying and protecting against dangers to people). RP 267-69. Safety is a generalist professional where universal principles of risk management are applied to a given industry. *Id.* at 276. Gill earned her bachelor's degree in human-factors engineering in 1979. *Id.* at 271. She has since been certified as a human-factors professional

¹⁷ An erroneous evidentiary ruling is prejudicial if it "affects, or presumptively affects, the outcome of the trial." *Brown*, 100 Wn.2d at 194; *see also*, ER 103(a) (providing that an error in admitting testimony is reversible if "a substantial right of the party is affected").

and as a safety professional. *Id.* at 272. Her experience includes years working at a large aerospace company and a federal agency in safety programs both proactively and reactively identifying and mitigating safety hazards. *Id.* at 273-74. She has consulted for 13 years in the safety field. *Id.* at 267. She has testified as an expert witness in 49 cases in matters ranging from construction to motor-vehicle collisions. *Id.* at 268. As the trial court found, she was well qualified to give opinions on human-factors engineering and safety and risk-management systems.

Her opinion—that the County “lack[ed] an effective safety and risk management program ... specific to the hazard of trees,” *id.* at 277—would have been helpful to the jury. In concluding otherwise, the trial court interpreted the helpfulness requirement of ER 702 too narrowly. The “helpfulness” prong of ER 702 must be construed “broadly.” *Philippides*, 151 Wn.2d at 393 (citation omitted)). The trial court mistakenly believed that a safety expert such as Gill could offer helpful testimony only if the County decided for itself to have a system in the first instance: “[W]ithout some testimony from the county witnesses that implies their method of satisfying the obligation to maintain the roadways in a safe condition is a tree removal or maintenance plan, then I don’t think Ms. Gill’s testimony is relevant.” RP 324.

The trial court’s analysis improperly turned the duty of care on its

head, allowing the County to first set the standard of care and only thereafter for a safety expert to weigh in on the County's program. The jury system would be distorted if defendants decided what the duty requires. Instead, the question was for the finder of fact what constituted "reasonable care" in light of "the surrounding circumstances." *Keller*, 146 Wn.2d at 253-54; *Berglund*, 4 Wn.2d at 315-16.

Gill would have helped the jury understand the system-level techniques that the County could have and should have used to identify and mitigate hazards to road users. She testified in *voir dire* about a five-step safety system used across industries: first, identify potential hazards; second, develop a plan for protecting people from these hazards; third, train personnel and communicate about the plan; fourth, implement and re-evaluate the plan; and fifth, document the plan. RP 274-75. In support of this opinion she drew on her own training and experience, her work in another case involving a municipality and a falling tree, and her review of materials in this case, including depositions of County witnesses, the Spokane County Hazard Mitigation Plan, WSDOT's Area One Vegetation Management Plan, and tree-management plans from other counties. RP 276-77. Her opinion bore on the questions (1) whether the County used reasonable care in understanding and mitigating the hazards that it was creating through its own conduct, (2) whether the County could have

reasonably anticipated the danger, (3) whether the County should have known about it, and (4) whether the County exercised ordinary care in making Big Meadows Road safe from that hazard. In short, Gill's testimony would have helped the jury determine whether a county exercising "ordinary care" would have implemented the standard safety practices used across various industries.

The trial court's reasoning was flawed particularly because the County seemed to admit it had a program for identifying road hazards. When the County Engineer admitted that "trees can be dangerous," he said that "does have a plan to deal with that possibility." RPII 321. He identified two components to this "plan": responding to citizen complaints, and telling maintenance personnel to watch for road hazards. *Id.* at 312-14. Given the trial court's apparent belief that Gill's testimony would be relevant if the County had a plan, the rationale for the trial court's exclusion collapses on itself. And given the County's evidently faulty training for this "plan," with no written training materials and no communication to maintenance personnel about looking for hazardous trees specifically or how to spot them, RPII 289, 292, 294, 353, 394, Gill's expertise and opinions on the importance of training would have been particularly helpful to the jury.

The exclusion of Gill's testimony was prejudicial. There was no

other independent, external witness who testified about the County's safety plan for hazardous trees. Gill's opinions bore directly on the reasonableness of the County's actions and the question of what hazards it should have foreseen. The error was reversible.

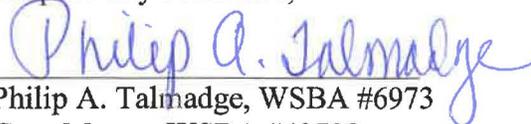
F. CONCLUSION

Carlton Evans, an innocent user of the County's Big Meadows Road, lost his arm due to the County's negligence as the Road's operator and as a premises owner in failing to properly address the obvious hazards of trees in the Road's right-of-way. By numerous decisions, the trial court unduly benefitted the County's position before trial and before the jury, depriving Carlton of a fair trial. This Court should remedy those trial court errors.

This Court should reverse the judgment on the jury's verdict and order a new trial. Costs on appeal should be awarded to the Evanses.

DATED this 7th day of June, 2019.

Respectfully submitted,


Philip A. Talmadge, WSBA #6973
Gary Manca, WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Janelle Carney, WSBA #41028
Alex French, WSBA #40168
Jeff Comstock, WSBA #41575
GLP Attorneys, P.S., Inc.
601 W. Main Avenue, Suite 305
Spokane, WA 99201-0613
(509) 455-3636

Attorneys for Appellants
Evans

APPENDIX

Court's Instruction 13:

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 the defendant was negligent but that the sole proximate cause of the injury was a later independent intervening force 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 force, 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 of 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.

CP 4247.

Court's Instruction 14:

An "act of God" is a natural phenomenon which caused the injury and which is so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against. Merely because a natural phenomenon is unusual or of rare occurrence is not sufficient to find that such natural phenomenon constituted an "act of God." If you find from the evidence that the defendant has proved that an "act of God" was the sole proximate cause of the plaintiff's injuries and damages, then the plaintiffs cannot recover.

CP 4248.

Court's Instruction 18:

In order to find a county liable for an unsafe condition of a road that was not created by its employees, you must find that the county had notice of the condition and that it had a reasonable opportunity to correct the condition.

A county is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

CP 4252.

Court's Instruction 19:

A possessor of land who has actual or constructive knowledge of dangerous conditions on the land has a duty to take action to correct the dangerous condition or warn of its existence. A possessor's duty attaches if the landowner knows or by the exercise of reasonable care should know of the condition and should realize that it involves an unreasonable risk. If the possessor of land caused the dangerous condition, then knowledge is established.

CP 4253.

Court's Instruction 21:

The county cannot be negligent if it only knew that an unsafe condition might, or even probably will, develop.

CP 4256.

Court's Instruction 25:

The highest wind speed measured at Spokane International Airport on July 23, 2014 was 67 miles per

hour.

CP 4260.

Plaintiff's Proposed Instruction 9 (P-9):

In order to find a county liable for an unsafe condition of a road that was not created by its employees, and that was not a condition which its employees or agents should have reasonably anticipated would develop, you must find that the county had notice of the condition and that it has a reasonable opportunity to correct the condition.

A county is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

CP 2581.

Plaintiff's Proposed Instruction 10 (P-10):

The obligation to exercise ordinary care in maintaining its roads in a reasonable safe condition includes the obligation to inspect trees when the County has actual or constructive knowledge that the roadway is inherently dangerous.

A County is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under the circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

CP 2582.

Plaintiff's Proposed Instruction 13 (P-13):

The County here is the property owner/possessor of the right of way, where the subject tree was. A possessor

of land who has actual or constructive knowledge of defects affecting its trees has a duty to take corrective action. A possessor's duty attaches only if the landowner knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk.

Reasonable care requires the possessor of land to inspect for dangerous conditions followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.

CP 2585.

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FILED
OCT 12 2018

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

CN: 201702006267
SN: 256
PC: 4

Judge Timothy Fennessy
Hearing Date and Time: August 24, 2018 at 1:30 p.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

CARLTON EVANS and MARGARET EVANS,
husband and wife,

Plaintiffs,

v.

SPOKANE COUNTY, a local governmental entity
doing business in Spokane County, Washington,

Defendant.

NO. 17-2-00626-7

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
SPOKANE COUNTY'S MOTION FOR
SUMMARY JUDGMENT

THIS MATTER came on for hearing before the undersigned Judge of the above-entitled Court on Defendant Spokane County's Motion for Summary Judgment. In addition to reviewing the pleadings and the Court's file herein, the Court heard oral arguments of counsel on August 24, 2018 and has considered the following materials and evidence, to the extent admissible, which were brought to its attention by the parties:

1. Defendant Spokane County's Motion for Summary Judgment;
2. Declaration of John R. Nicholson with Exhibits 1 – 13;

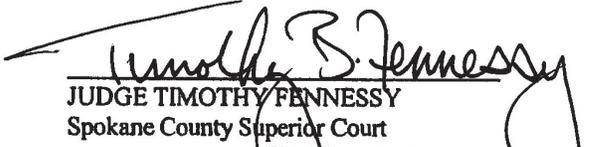
ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT SPOKANE COUNTY'S MOTION FOR SUMMARY JUDGMENT
No. 17-2-00626-7

FREIMUND JACKSON & TARDIF, PLLC
701 FIFTH AVENUE, SUITE 3545
SEATTLE, WA 98104
TELEPHONE: (206) 582-6001
FAX: (206) 466-6085

- 1 3. Declaration of Chad Coles with Exhibit 1;
- 2 4. Supplemental Declaration of John R. Nicholson with Exhibits 1 – 2;
- 3 5. Supplemental Declaration of Chad Coles;
- 4 6. Declaration of Gregory E. Jackson Re Supplemental Production of Herbicide
- 5 Records with Exhibit A thereto;
- 6 7. Defendant Spokane County’s Reply in Support of Motion for Summary Judgment,
- 7 Motion to Strike, and Response to Motion for CR 56 (f) Continuance;
- 8 8. Defendant Spokane County’s Reply in Support of Motion to Strike Inadmissible
- 9 Evidence and Motion to Strike Plaintiffs’ Supplemental Statement of Authorities
- 10 in Violation of GR 14.1;
- 11 9. Defendant Spokane County’s Supplemental Reply Brief in Support of Motion for
- 12 Summary Judgment and Motions to Strike;
- 13 10. Second Supplemental Declaration of John R. Nicholson with Exhibits 1 – 6
- 14 thereto;
- 15 11. Plaintiffs’ Opposition to Defendant Spokane County’s Motion for Summary
- 16 Judgment and Cross-Motion for CR 56 (f) Continuance;
- 17 12. Declaration of Jeff Comstock and Exhibits 1 – 22 thereto;
- 18 13. Plaintiff’s Opposition to Defendant Spokane County’s Motion to Strike and Reply
- 19 in Support of Cross-Motion for CR 56 (f) Continuance;
- 20 14. Declaration of Jeff Comstock in Opposition to Defendant Spokane County’s
- 21 Motion to Strike and Reply in Support of Cross-Motion for CR 56 (f) Continuance
- 22 with Exhibits 1 – 3;
- 23 15. Supplemental Declaration of Mark Webber with Exhibit A thereto;
- 24 16. Plaintiffs’ Statement of Supplemental Authorities;
- 25 17. Plaintiffs’ Supplemental Memorandum in Opposition to Defendant Spokane
- 26 County’s Motion for Summary Judgment;
18. Declaration of Alex French in Support of Plaintiffs’ Supplemental Memorandum
- in Opposition to Defendant Spokane County’s Motion for Summary Judgment
- with Exhibits 1 – 13.

1 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
2 the County's Motion for Summary Judgment on Plaintiffs' claim based on the allegation the
3 County had a duty to implement a clear zone on Big Meadows Road is GRANTED and this claim
4 is DISMISSED with prejudice. The remainder of the County's Motion for Summary Judgment is
5 DENIED.

6
7 SIGNED this 9th day of October, 2018.

8
9 
10 JUDGE TIMOTHY FENNESSY
11 Spokane County Superior Court
12 **TIMOTHY B. FENNESSY**

13 Presented by:

Approved as to Form; Notice of Presentation
Waived:

14 FREIMUND JACKSON & TARDIF, PLLC
15 
16 GREGORY E. JACKSON, WSBA No. 17541
JOHN R. NICHOLSON, WSBA No. 30499
Attorneys for Defendant Spokane County

TALMADGE/FITZPATRICK/TRIBE
17 
18 PHILIP A. TALMADGE, WSBA No. 6973
Attorney for Plaintiffs

GLP ATTORNEYS, P.S., Inc.
19 
20 JANELLE CARNEY, WSBA No. 41028
JEFF COMSTOCK, WSBA No. 41575
Attorneys for Plaintiffs

Kathie Fudge

From: GAIL SAUERLAND <eastsideprocess@comcast.net>
Sent: Friday, September 21, 2018 3:19 PM
To: Kathie Fudge
Subject: RE: Evans v. Spokane County_ProposedOrder

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From: Kathie Fudge <KathieF@fjtlaw.com>
Sent: Friday, September 21, 2018 3:17 PM
To: Gail Sauerland (gsauerland@comcast.net) <gsauerland@comcast.net>; eastsideprocess@comcast.net
Subject: Evans v. Spokane County_ProposedOrder

Hi –

This order needs to be sent to Judge Fennessy for his consideration, it must be printed out in color as it is being considered as an original order. It can be delivered on Monday if needed. No rush. 😊

Thanks and have a good weekend!

*Kathie Fudge, Legal Assistant to
Gregory E. Jackson
John R. Nicholson*

 **Freimund Jackson & Tardif**
Attorneys at Law P.L.L.C.

www.fjtlaw.com

701 Fifth Avenue, Suite 3545 • Seattle, WA 98104
206.582.6001

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellants* in Court of Appeals, Division III Cause No. 36495-0-III to the following:

Janelle Carney, WSBA #41028
James Gooding, WSBA #23833
GLP Attorneys, P.S., Inc.
601 W. Main Avenue, Suite 305
Spokane, WA 99201-0613

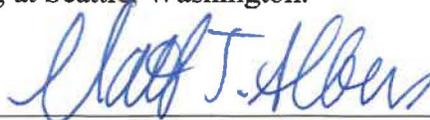
Gregory Jackson, WSBA #17541
John Nicholson, WSBA #30499
Amanda C. Bley, WSBA #42450
Freimund Jackson & Tardif, PLLC
900 SW 16th St., Suite 215
Renton, WA 98057

Mark P. Scheer, WSBA #16651
Scheer Law Group LLP
701 Pike Street, Suite 2200
Seattle, WA 98101-2358

Original electronically served to:
Court of Appeals, Division III
Clerk's Office
Spokane, WA 99260

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 7, 2019, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

June 07, 2019 - 11:51 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36495-0
Appellate Court Case Title: Carlton Evans and Margaret Evans v. Spokane County
Superior Court Case Number: 17-2-00626-7

The following documents have been uploaded:

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- gm@manca-law.com
- gregj@fjtlaw.com
- jcarney@glpattorneys.com
- jgooding@glpattorneys.com
- johnn@fjtlaw.com
- matt@tal-fitzlaw.com
- mscheer@scheerlaw.com

Comments:

Brief of Appellants

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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Phone: (206) 574-6661

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