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

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CARLTON EVANS and MARGARET EVANS, husband and wife,

Plaintiffs-Appellants,

v.

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

Respondent-Cross Appellant.

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**BRIEF OF RESPONDENT/CROSS-APPELLANT  
SPOKANE COUNTY**

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## I. INTRODUCTION

This is a personal injury action by Carlton and Margaret Evans (“Evans”) against Spokane County (“the County”) arising out of a tree that was blown down during a severe windstorm, injuring Mr. Evans as he drove home along a County road. The trial court properly granted partial summary judgment in favor of the County on Evans’ theory that the County should have implemented a clear zone, a multimillion-dollar capital improvement project that would require removal of all obstructions within the right-of-way on all County roads. The jury returned a defense verdict on Evans’ remaining claims that the County was negligent for either making the tree weak through the application of herbicides or not removing the tree after having notice it was dangerous. The instructions and evidentiary rulings Evans now challenges were well within the trial court’s broad discretion. Judgment in the County’s favor should therefore be affirmed.

The County makes a conditional cross-appeal on certain jury instructions in the event the Court orders a new trial. Should a new trial be necessary, this Court should direct the trial court to instruct the jury the County’s duty to Evans, as a motorist, is to maintain the road in a reasonably safe condition for ordinary travel, but is not based on its possession of land such that premises liability could attach. It should also direct the trial court to instruct the jury the County does not have a duty to inspect roadside trees.

Further, it should require the trial court to give an instruction that notice that a tree is dangerous can only be imputed if the danger is patent and readily observable to a layperson. The County prevailed at trial even without these necessary instructions. Were a new trial required, such instructions would be essential for the County fully to argue its defenses to Evans' claims.

## **II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL**

- A.** The trial court erred by giving Instruction 19.
- B.** The trial court erred by refusing to give the County's proposed instructions D-18, D-19, D-27, and D-28.

## **III. ISSUES PRESENTED**

### **A. Restatement of Appellant's Issues**

1. Was Evans' claim that the County owed a duty to implement a clear zone properly dismissed on summary judgment where (a) there is no common law duty to implement a clear zone or to bring old roads up to modern design standards; (b) the statutory clear zone standards Evans relied upon did not apply to Big Meadows Road as a matter of law; (c) a blown-down tree is outside the scope of any hypothetical statutory duty to implement a clear zone; and (d) the County's legislative and/or discretionary immunity precludes Evans' clear zone theory?
2. Should the jury instructions Evans appeals be affirmed where (a) he did not raise the same arguments he makes now in the trial court and did not preserve the claimed errors; (b) the jury did not reach the issues to which the instructions relate and any error is harmless; and (c) the instructions correctly stated the law and allowed Evans to argue both of his theories of the case?

3. Did the trial court act within its discretion when it (a) excluded Evans' meteorologist as a discovery sanction where Evans did not answer the County's discovery requests for his opinions, the grounds for them, or the records and data supporting them before trial; and (b) was any error in the exclusion harmless where the jury did not reach the issue of proximate cause or make any finding that an "act of God" caused the accident?
4. Did the trial court act within its discretion when it excluded the opinions of Evans' risk management expert and limited the testimony of his traffic engineering expert based on lack of relevant qualifications or helpfulness to the jury?

**B. Statement of County's Conditional Cross-Appeal Issues**

1. Where a motorist is injured by a roadside tree and the County does not own the right-of-way in fee simple but rather only has an easement by virtue of its operation of the road, should the trial court refrain from giving jury instructions stating the County owes premises liability duties based on land ownership or possession?
2. Where Evans argued and presented testimony that the County should conduct inspections of trees, must the court give an instruction stating the County has no such duty as a matter of law?
3. Where Evans argued and presented testimony that dangerousness of the subject tree should have been detected by the County, must the court give an instruction stating notice of the danger can only be imputed to the County if it was patent and readily observable by a layperson?

**IV. STATEMENT OF THE CASE**

On the afternoon of July 23, 2014, Evans was driving east on Big Meadows Road in Chattaroy, Washington when a portion of a nearby Ponderosa pine tree snapped during a severe windstorm and landed on his

vehicle. RP II 637-39<sup>1</sup> The break in the tree's trunk occurred at a point approximately twelve feet above ground level. RP II 871; Exh. 254, 289-91. The tree fragment crashed through Evans' windshield, severed his left hand, and impaled his hip. RP II 638-39. Extreme winds and associated damage were widely reported across the County at the time. RP II 497-98; Exh. 332. Evans sued the County for negligence. CP 31-39.

Evans premised his liability case on opinions by three expert witnesses: James Valenta, a traffic engineer; JoEllen Gill, who professes expertise in the fields of safety and risk management; and Mark Webber, an arborist. Mr. Valenta's primary opinion was the County should have implemented a clear zone by removing all obstructions from the right-of-way, not just on Big Meadows Road but on all roads within the County. CP 663. Mr. Webber's opinion was that the County weakened the tree through its application of herbicides to the roadside. RP 457-58. Additionally, Mr. Webber asserted the tree displayed signs of danger that should have been detected by the County through inspections. RP 466-67, 480-81, 483-84, 588-89. Although Ms. Gill had no expertise in either trees or road hazards, she asserted the County's risk management program was deficient. RP 276-

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<sup>1</sup> Four different court reporters were responsible for the record in this case. The County uses the following designations in citing to the report of proceedings prepared by each of them: Jody Dashiel (RP), Amy Wilkins (RP II), Tracie Blocker (RP III), and Janet Wittstock (RP IV).

77. The County moved for summary judgment on all Evans' claims. CP 524-25. The court granted the County's summary judgment motion in part to dismiss Evans' clear zone theory based on the opinions of Mr. Valenta, but otherwise denied the motion. CP 3617-19; RP IV 62-65.

Because the trial court dismissed Evans' claim based on an alleged duty to implement a clear zone, opinions by Mr. Valenta on this issue were excluded. Over the County's objection, the trial court allowed Mr. Valenta to testify that a County budget surplus existed. RP 830, 1179. However, it precluded him from going further and testifying about how this alleged budget surplus could have been spent, because he lacked relevant qualifications and liability for such decisions is protected by discretionary immunity. RP 830.

When it ruled on the County's summary judgment motion, the trial court expressed significant concerns that there was insufficient foundation for Ms. Gill's opinions, and it questioned whether her testimony would be admissible at trial. RP III 63. Following a *voir dire* hearing outside the presence of the jury, the trial court excluded her testimony, finding it not relevant or helpful. RP 324-25; RP II 906-07.

While the trial court initially reserved on the County's motion *in limine* to exclude Evans' meteorologist, Timothy Wright, it eventually granted the motion. RP 204; RP II 425. After performing the required

analysis under *Burnet v. Spokane Ambulance*,<sup>2</sup> it held Evans' failure to disclose before trial Mr. Wright's opinions or the grounds for them, including the records and data supporting them, was willful. RP II 418-26. Although it considered the possibility of a mid-trial deposition of Mr. Wright as a lesser sanction, it held this remedy would not cure the extreme prejudice to the County. RP II 424-25. That very day, the County's out-of-state meteorologist, whose opinions and complete file were disclosed to Evans months before trial, was scheduled to testify. RP II 403-04, 478-524. The County was already being required to take mid-trial depositions of two of Evans' other experts due to similar discovery violations. RP 763-68; RP IV 32-33; CP 1911-12. Later in the trial, the court denied Evans' motion to reconsider the exclusion of Mr. Wright, again articulating its rationale under *Burnet* and finding that prejudice to the County had only increased. RP 1110.

The County presented evidence that there were no complaints about the tree prior to the accident. RP II 347. Indeed, not even Mr. Evans or his family members, who for twelve years preceding the accident lived on Big Meadows Road approximately two miles from the tree and drove by it multiple times per day, ever recognized it as a danger or made a complaint

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<sup>2</sup> *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

about it. RP II 683-85.

The County's evidence showed the tree was not defective and that the sole cause of its failure was extreme wind. NOAA records showed maximum windspeeds at the Spokane County International Airport, located 18.59 miles from the accident, were 67 miles per hour.<sup>3</sup> RP II 506-08. Bryan Rappolt, the County's meteorologist, testified high winds and associated damage were widely reported across the County.<sup>4</sup> Based on an analysis of doppler data, Mr. Rappolt's opinion was that a "microburst," or "a thunderstorm that has a very strong downdraft," struck the specific area where the accident occurred. RP II 485-86. His analysis showed the maximum wind gusts at the accident location were between 68 and 70 miles per hour. RP II 498. The probability of a 70 mile per hour wind gust is .71 percent on an annual basis. *Id.*

The County's arborist, Scott Baker, testified the tree exhibited no signs of disease nor any structural defect. RP II 870, 876, 882-84. Mr. Baker also explained the Beaufort scale, which categorizes windspeeds on a scale of 1 to 12. RP 925-26. At level 11 and above, when winds are greater than

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<sup>3</sup> At the County's request, the court took judicial notice of this fact based upon a certified NOAA report. CP 4170-4223, 4260; RP II 1256-1258. Evans objected to the court's decision to take judicial notice, yet Evans himself included the same NOAA report in his ER 904 notice. RP II 1252-54.

<sup>4</sup> There were sixteen reports by official weather spotters of severe winds of 60 miles per hour or greater with wind damage, such as fallen trees and utility poles. RP II 497.

64 miles per hour, they are considered “abnormal, and at these wind velocities the failure of defect-free trees can be widespread.” RP II 926. Mr. Baker opined the tree’s failure was caused by “the severe winds that blew through the area on that day and the tree experienced an overwhelming load, and it basically snapped at the point about 12 feet off the ground . . .” RP II 870-71.

The County also called James Zahand, a plant pathology expert who had a fifty-year career in the agricultural chemical industry. RP II 1061. Similar to Mr. Baker, he testified the tree exhibited no signs of herbicide injury. RP II 1069, 1076-78, 1082-83. Mr. Zahand also opined it would have been almost impossible for the herbicide products used by the County to penetrate the bark of the subject tree, which was approximately three inches thick. RP II 1070.

The trial court gave several instructions relating to the County’s duty. Instruction 11, taken from WPI 140.02, stated the County’s general duty to motorists to maintain reasonably safe roads. CP 4245.<sup>5</sup> Additionally, the court gave Instruction 18, based on WPI 140.02, which states the circumstances under which the County must have notice of a dangerous condition before having a duty to correct it. CP 4252. Instruction 18

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<sup>5</sup> Copies of all jury instructions being challenged by the parties, as well as instructions that are related to them, are included as **Appendix A** to this brief.

specifically excludes from this notice requirement any conditions created by the County's employees. *Id.*

Over the County's objection, the trial court also gave Instruction 19,<sup>6</sup> which stated the County could be liable as a "possessor" of the right-of-way where the tree was located. CP 4253; RP II 1324-28, 1337. Similar to Instruction 11, Instruction 18 included the requirement that the County must have actual or constructive knowledge of a dangerous condition before having a duty to correct it, subject to the caveat that if the County "caused the dangerous condition, then knowledge is established." *Id.*

Evans objected to Instruction 21, which informed the jury, "The county cannot be negligent if it only knew that an unsafe condition might, or even probably will, develop." CP 4256; RP 1318-20. This instruction, which was a modified version of one proposed by the County, was based on language taken directly from a published Court of Appeals decision.<sup>7</sup> CP 2626.

The County asserted an affirmative defense under the "act of God" doctrine. CP 44. Over Evans' objection, the trial court gave Instruction 14

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<sup>6</sup> The trial court decided to add Instruction 18 after the parties took formal objections and exception to the other jury instructions. RP II 1335-36. As a result, the numbering of the court's final instructions differed from the numbers referred to during objections and instructions. The court noted the change on the record in order to preserve the objections and rulings previously made: "After [Instruction] 18 everything will advance one number, and the record should accurately reflect the appropriate numbers – or objections." RP II 1336.

<sup>7</sup> *Laguna v. State*, 146 Wn. App. 260, 265, 192 P.3d 374 (2008).

stating the law applicable to this defense. CP 4248; RP II 1322-23.

Evans also objected to Instruction 13, which is based on WPI 15.05, stating the law on superseding causation. CP 4247; RP II 1317-18. Importantly, the court also gave Instruction 12, based on WPI 15.04, allowing Evans to argue that the County's negligence was a proximate cause of the accident that concurred with other causes. CP 4246.

Much of the questioning and argument by Evans at trial suggested the County should have proactively conducted inspections of roadside trees.<sup>8</sup> As a result, the County proposed Instruction D-19<sup>9</sup> stating there was no such duty to inspect. CP 2625. The County took exception to the court's refusal to give this instruction. RP II 1330-31.

Because Evans' experts testified about alleged signs of defects in the tree that would not have been detectible by a layperson upon casual observation,<sup>10</sup> the County proposed instructions D-18, D-27, and D-28, all

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<sup>8</sup> Mr. Webber claimed the County should have conducted inspections of any tree that was leaning, even though he conceded that all trees lean. RP 539-42. Evans' counsel also asked many witnesses questions about whether the County does or should conduct inspections of trees. *See, e.g.*, RP II 346-47 (Randy Moran); RP II 398 (Dee Howe-Willer); RP II 625 (Bob Wilske); RP II 763 (Garth Davis).

<sup>9</sup> Copies of proposed instructions that the trial court declined to give despite the County's exceptions are attached as **Appendix B**.

<sup>10</sup> Mr. Webber testified the tree had fungal mats, fungal cankers, fungal fruiting bodies, pocket rot, red rot, and/or epinasty. *See, e.g.*, RP 440-41, 484-85, 517-23, 532-36, 543, 550-56, 576, 579, 582; RP II 1232. Arborists or plant pathologists may be able to detect these symptoms, but they are beyond what an ordinary layperson is capable of recognizing or observing. Exhs. 305, 309. Further, many of these alleged signs of tree weakness would have existed only in the tree's interior or near the point of breakage, which was twelve feet off the ground. *See, e.g.*, RP 464 ("pocket rots inside the tree"); RP 485

of which state notice of a tree defect can only be imputed if it the defect was patent and readily observable to a layperson. CP 2624, 4134-35. The County took exception to the court's refusal to give any of these instructions. RP II 1331-33.

On October 26, 2018, after deliberating for one hour and forty minutes, the jury rendered its verdict in favor of the County, finding it was not negligent. CP 4263, 4267. The court entered judgment in favor of the County on November 30, 2018, and Evans appealed on December 4, 2018. CP 4286-87, 4289-93. The County filed its notice of conditional cross-appeal on December 17, 2018. CP 4344-63.

## **V. ARGUMENT IN RESPONSE TO EVANS' APPEAL**

### **A. Partial Summary Judgment Was Properly Granted on Evans' Clear Zone Theory**

Review of a summary judgment motion is *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is appropriate if, viewing all facts in the light most favorable to the non-moving party, there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); CR 56(c). The appellate court may affirm the trial court on any ground supported by the record. *Pac. Marine Ins.*

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(“fungal fruiting body growing . . . near the break point.”). Mr. Webber conceded many of these symptoms would not be visible upon casual inspection. RP 572.

*Co. v. Dept. of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (2014); *see also* RAP 9.12. The trial court correctly granted partial summary judgment on Evans' clear zone theory for multiple reasons.

**1. Evans' Clear Zone Theory is Outside the Scope of a Municipality's Common Law Duty to Maintain Reasonably Safe Roads**

Municipalities owe motorists a duty to maintain roads in a reasonably safe condition for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 254, 44 P.3d 845 (2002). "This duty does not, however, require a county to update every road and roadway structure to present-day standards." *Ruff v. King County*, 125 Wn.2d 697, 795, 887 P.2d 886 (1995). This limitation is necessitated by the practical and financial inability of municipalities to bring all their existing roads up to current modern design standards or to keep them in perfect condition. *Id.* at 705. Requiring local governments ensure all older infrastructure is compliant with modern design standards would "place an imponderable burden" on municipalities. *Lucas v. Phillips*, 34 Wn2d 591, 596, 206 P.2d 279 (1949).

Evans' clear zone theory posits that the County should be liable for a tree blown down by severe winds absent any evidence the County was on notice the tree was defective or in any way unhealthy. In *Albin v. Nat'l Bank of Commerce*, 60 Wn.2d 745, 748, 375 P.2d 487 (1962), the Washington Supreme Court long ago rejected this contention. Like this case, *Albin*

involved a tree located alongside a rural, heavily-wooded county road that was blown down “during a windstorm of disputed force,” injuring the plaintiff motorist. *Id.* at 747. The Court upheld summary judgment in favor of Columbia County, because there was “no evidence that the county had actual notice that the tree which fell was any more dangerous than any one of the thousands of trees which line our mountain roads, and no circumstances from which constructive notice might be inferred.” *Id.* at 748. While noting it was foreseeable that trees will fall across tree-lined roads, the Court held liability would not attach because “short of cutting a swath through wooded areas, having a width on each side of the traveled portion of the road equivalent to the height of the tallest trees adjacent to the highway,” there was “no way of safeguarding against the foreseeable danger.” *Id.* at 748-49. The Court found this option “neither practical nor desirable. The financial burden would be unreasonable in comparison with the risk involved.” *Id.* at 749. Thus, there is no common law duty to implement a clear zone on all roads.

**2. The Statutory Standards Evans Relies Upon Do Not Apply to Big Meadows Road and Do Not Create a Duty to Make a Clear Zone**

A clear zone is a design concept that is applied to a road based on applicable standards that exist at the time of construction. CP 552. Here, the clear zone standards Evans relies upon are statutory; the 2010 Spokane

County Road standards are adopted by ordinance. Spokane County Code § 9.12.030.<sup>11</sup> Normal rules of statutory interpretation apply to them. *Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). The court’s objective is to carry out the legislative body’s intent. *Caldwell v. City of Hoquiam*, 194 Wn. App. 209, 215-16, 373 P.3d 271 (2016).

The standards apply only to “all new construction of public and private roads in Spokane County and as far as practicable and feasible to reconstruction, resurfacing, restoration, and rehabilitation of old roads comprising the Spokane County road system.” CP 560 (emphasis added). Big Meadows Road has existed over 100 years is not “new construction.” CP 552. Obviously Big Meadows Road has been re-paved since it was first constructed more than a century ago. But Evans makes no showing the road was reconstructed, resurfaced, or rehabilitated between 2010, when the standards at issue were adopted, and the date of Evans’ accident.

The maintenance records submitted by Evans on summary judgment showed only that routine maintenance work, such as “culvert repair,” “bush clearing,” “weed control,” “ditch clearing,” and “pothole patching,” was performed between 2010 and the time of the accident in July of 2014. CP 1229-41. None of these recurring maintenance activities constitutes

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<sup>11</sup> Mr. Valenta’s report also referred to the Washington State Department of Transportation design manual. However, at his deposition Mr. Valenta conceded this manual does not apply to County roads. CP 655, 658.

reconstruction, resurfacing, or rehabilitation of the road. As Evans' counsel conceded at the summary judgment argument, the only work shown by these records that could be construed as "resurfacing" did not occur until after Evans' accident. RP III 44.

The standards also provide, "In case of any ambiguity or dispute over interpretation of the provision of these road standards, the decision of the county engineer shall be final." CP 560. Here, the County engineer, Chad Coles, testified the standards did not apply to Big Meadows Road. CP 552. Thus, objectively the language of these standards did not apply to the road, and by law the County Engineer's declaration conclusively resolved any supposed ambiguity or dispute about this issue.

**3. An Injury Caused by a Tree Blown Down in Severe Winds Is Not Within the Field of Danger that a Clear Zone is Intended to Address**

Where a plaintiff alleges a duty arises from a statute, the court must determine whether the harm is within the "general field of danger" which the statute is intended to address. *See, e.g. Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 479 (1989); *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). "It is not . . . the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of hazards covered by the duty imposed upon the defendant." *Christen*, 113 Wn.2d at 492-93 (quoting *Rikstad v.*

*Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969)). Further, where a plaintiff alleges a duty arises based on statutory requirements, “[o]nly persons in the class for whose protection a statute was enacted can claim its benefits.” *Morgan v. State*, 71 Wn.2d 826, 828, 430 P.2d 947 (1967).

Mr. Valenta agreed the purpose of a clear zone is not to prevent trees from falling onto motorists. CP 660, 666. Rather, the purpose of clear zone standards is to mitigate accidents that occur when motorists depart the roadway. CP 656, 661. Evans did not have a road departure accident. CP 656. The harm to Evans was therefore outside the relevant field of danger.<sup>12</sup>

Evans’ reliance on *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940), a case never cited to the trial court, is misplaced. In *Berglund*, a child walking across a bridge that had no sidewalk was struck by a motorist. *Id.* at 312. On appeal following a dismissal on demurrer, the Court rejected the defendant’s argument that the child’s injury was not foreseeable as a matter of law because the vehicle had left its lane and struck the child while travelling on the wrong side of the bridge. *Id.* at 319. The Court reasoned “the exact manner in which injury may be sustained” need not be foreseeable. *Id.* Years later, the Washington Supreme Court clarified

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<sup>12</sup> Further illustrating this point, Mr. Valenta testified the County could have satisfied the ostensible duty he is claiming it breached – a duty to mitigate hazards resulting from collisions with fixed objects within a clear zone to the side of the roadway – by installing a guardrail. CP 665. He concedes the accident in this case still would have occurred had the County erected a guardrail. *Id.*

the principal holding of *Berglund* was that a municipality's duty to maintain reasonably safe roads sometimes requires it to account for predictable and foreseeable negligent behavior of drivers. *Keller*, 146 Wn.2d at 249 (citing *Berglund*, 4 Wn.2d at 321).

*Berglund* did not involve a claim that a duty arose due to a statute or regulation. More importantly, the *Berglund* court agreed there can be no liability "where the harm is unforeseeable, if 'foreseeability' refers to the general type of harm sustained. It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent." *Berglund*, 4 Wn.2d at 319. A long line of cases since *Berglund* have upheld this rule. *See, e.g., Christen*, 113 Wn.2d at 492-93; *Wells v. City of Vancouver*, 77 Wn.2d 800, 803, 467 P.2d 292 (1970); *Mortensen v. Moravec*, 1 Wn. App.2d 608, 620-21, 406 P.3d 1178 (2017). Road safety standards, such as those calling for clear zones, require governments to account for predictable driver behavior, not severe and unpredictable weather events. The fact that preventing falling tree accidents is an added "benefit" of clear zones does not bring Evans' accident within the field of danger the standard is intended to address. Thus, prevention of the blown-down tree in this case is outside the scope of any hypothetical statutory duty to implement a clear zone on County roads.

**4. The County Has Legislative and Discretionary Immunity to Any Claim Based on Its a Failure to Implement a Clear Zone**

Even with the waiver of sovereign immunity in Washington, governmental tort liability remains limited by legislative immunity. *Miller v. Pacific County*, 91 Wn.2d 744, 747, 592 P.2d 639 (1979). “In *Miller*, our Supreme Court held that when a governmental act is a purely legislative act, it can never face liability for torts, including intentional torts.” *Fabre v. Town of Ruston*, 180 Wn. App. 150, 162, 321 P.3d 1208 (2014) (citing *Miller*, 91 Wn.2d at 746-48). To determine whether legislative immunity applies, courts look to “the nature of the function performed, not the identity of the actor who performed it.” *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1220 (9<sup>th</sup> Cir. 1996)(quoting *Forrester v. White*, 484 U.S. 219, 229, 98 L.Ed.2d 555 (1988)).

Contrary to Evans’ mischaracterization, the clear zone opinions of Mr. Valenta, who had no training in identifying hazardous trees, were not focused on the subject tree. Rather, he testified the County is required to implement a clear zone within which all trees and other obstructions are removed from the right-of-way, not just on Big Meadows Road but on all roads within the County. CP 663. Mr. Valenta testified this program would cost “[m]ultiple millions of dollars on a program of from 10 to 15 years in length.” *Id.* He concedes this County-wide clear zone would be a major

capital improvement project, and that implementing it would require a legislative act by the County Board of Commissioners to authorize “a major budget allocation.” *Id.* Mr Valenta acknowledged approval of this County-wide clear zone would be “a legislative function.” CP 657. This fact was confirmed by the County Engineer, who explained that the Board of County Commissioners makes these determinations based on a priority array and recommendations from the County Public Works Department. CP 552-53.

Even assuming this theory is not precluded by legislative immunity, it would be precluded by discretionary immunity. The Washington Supreme Court established the framework for determining whether discretionary immunity applies in *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). As the Court explained, “in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability.” *Id.* at 254. In other words, “it is not a tort for government to govern.” *Id.* at 253 (quoting *Dalehite v. United States*, 346 U.S. 15, 57, 97 L.Ed.2d 1427, 73 S.Ct. 956 (1953)(Jackson, J., dissenting)). The test the Court must apply has four factors.<sup>13</sup>

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<sup>13</sup> “(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy

For example, in *Avellaneda v. State*, 167 Wn. App. 474, 273 P.3d 477 (2012), the Court of Appeals affirmed summary judgment in favor of the State of Washington, holding it was entitled to discretionary immunity for an executive-level decision to exclude SR 512 from the budgetary priority array for implementation of guardrails. *Id.* at 480-481. In a more recent unpublished decision, Division I also recognized that a county’s “choice to use a priority array or its budget decision for guardrail implementation . . . are the kind of conscious balancing of risks and advantages by high level executives that discretionary immunity applies to.” *Fuda v. King County*, No. 74033-4-I, 2017 WL 4480779 \*3 (Wash. App. Oct. 9, 2017).

Here, the process of implementing a County-wide clear zone for old roads is a planning decision by high-level County officials and similarly meets all four *Evangelical* factors. The County maintains 2,527 miles of roads. CP 552-53. Because funds are limited, the County uses a priority array process for selecting capital improvement projects to be funded, such as which older roads should be updated to meet current design standards. *Id.* The County Engineer with the assistance of other administrators in the

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evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?” *Evangelical*, 67 Wn.2d at 255.

Public Works Department formulate this priority array by considering traffic crash history, severity of accidents, pavement condition, service rating, and local priorities. *Id.* Based on this priority array, the County develops a six-year transportation improvement plan, which ultimately must be adopted by the Board of County Commissioners. CP 552-53, 689. Just as the State in *Avellaneda*, here the County is entitled to discretionary immunity for its policy-making and budgetary decisions for capital on improvements based on a priority array analysis.

**B. The Court Should Affirm the Jury Instructions Evans Challenges on Appeal**

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Bodin v. City of Stanwood*, 130 W.2d 726, 732, 927 P.2d 240 (1996). “A trial court’s decision to give a jury instruction is reviewed *de novo* if based upon a matter of law, or for abuse of discretion if based upon a matter of fact.” *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Any erroneous instruction is reversible only where it prejudices a party. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). “Prejudice is presumed if the instruction contains a clear misstatement of the law; prejudice must be demonstrated if the instruction is merely misleading.” *Anfinson v. FedEx*

*Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

Evans has assigned error to three instructions: 21, 14, and 13.<sup>14</sup> However, Evans' arguments about these instructions should not be reviewed, either because he did not make the same objections during trial that he makes on appeal or because the jury did not reach the issue to which the instructions relate. In any event, all three of the challenged instructions were correct statements of the law and should also be affirmed on the merits.

**1. Instruction 21 (County's Notice of Possible or Probable Dangers That May Develop in the Future Insufficient)**

In reviewing Evans' challenge to Instruction 21, which clarifies notice requirements that a plaintiff must prove to establish that the County breached its duty in certain circumstances, the Court should first define the nature and scope of the County's duty. As discussed above, municipalities owe motorists the duty to maintain roadways in a reasonably safe condition for ordinary travel. *Keller*, 146 Wn.2d at 254. Evans wrongly argues the County also owed a separate premises liability duty arising out of its alleged ownership of the land on which the tree was located. While the County's answer to Evans' complaint stated the tree was located on land "owned and maintained" by the County, the County clarified multiple times before trial that its interest in the land was merely that of an easement or right-of-way

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<sup>14</sup> Evans also complains Instruction 18 was "watered down," but he did not object to this instruction at trial and has not assigned error to it on appeal.

held by virtue of its operation of the road. The County made this position clear in its answers to Evans' requests for admission in April 2018. CP 2877. When the County moved for summary judgment in July 2018, it specifically asserted it did not own the property on which the tree was located in fee simple, but rather only had rights to use the right-of-way alongside the road. CP 1544-45; RP III 5-6, 46-47.<sup>15</sup> The County again made this issue clear in its trial brief. CP 2913-14. This has been the law since before statehood.<sup>16</sup>

Even if the County's statement in its answer could be misconstrued as an admission of fee simple ownership, "an admission may be waived, and there may be such a waiver where the entire case is thereafter tried as if admitted facts were in issue." *Spangler v. Glover*, 50 Wn.2d 473, 482, 313 P.2d 354 (1957)(citing *Turner v. McCready*, 190 Ore. 28, 222 P.2d 1010 (1950)). Here, the jury heard testimony about the County's right-of-way. RP II 301-02. But, there was no evidence nor any supposed admission presented to the jury allowing it to conclude the County owned the property. Indeed, the trial court granted the County's motion *in limine* 11, holding the

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<sup>15</sup> At the summary judgment oral argument Evans' counsel asserted premises liability duties applied because the County "possessed" the right-of-way, even if it did not own the property in fee simple. RP III 31-34, 42.

<sup>16</sup> "Since *Burmeister v. Howard*, 1 Wash. Terr. 207 (1867), this court has not departed from the rule established in that case, that the fee in a public street or highway remains in the owner of the abutting land, and the public acquires only the right of passage, with powers and privileges necessarily implied in the grant of easement. *Puget Sound Alumni of Kappa Sigma, Inc. v. Seattle*, 70 Wn.2d 222, 422 P.2d 799 (1967)." *Finch v. Matthews*, 74 Wn.2d 161, 167, 443 P.2d 833 (1968).

County was not an owner of the property and prohibiting Evans from making any argument that it was. RP 119-26. Evans has not assigned error to this ruling, and it is the law of the case on appeal. *See, e.g., Detonics “.45” v. Bank of Cal.*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982).

With two narrow exceptions discussed below, before a municipality can be liable to motorists who are harmed by a dangerous roadway condition it must have notice of the condition and a reasonable opportunity to correct it. *Niebarger v. Seattle*, 53 Wn.2d 228, 229, 332 P.2d 463 (1953). Notice may be actual or constructive. *Id.* at 229-20. Constructive notice arises if the condition has existed for such a period of time that the municipality should have known of its existence. *Id.* at 230.

Instruction 21, which Evans wrongly claims misstated the law and precluded him from arguing his theories of the case, stated:

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

CP 4256. The language of the instruction was taken from a case in which motorists sued the State of Washington based on an accident that occurred as a result of ice that had accumulated on Interstate 90. *Laguna v. State*, 146 Wn. App. 260, 192 P.3d 374 (2008). Reversing the denial of the State’s summary judgment motion, the Court rejected the argument that the plaintiffs needed only establish the State knew of the existence of moisture

combined with below-freezing air and ground temperatures, because “these conditions do not make road travel treacherous.” *Id.* at 265. Even though ice was foreseeable the Court reasoned, “foreseeability of harm does not create the duty to prevent it.” *Id.* The Court further observed, “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.*(emphasis added).<sup>17</sup>

The Court’s rationale in *Laguna* applies equally to roadside trees. Over time all trees eventually fail and die. Any large roadside tree presents a potential for danger to motorists that may arise at some point in the future. However, until there is some reason for a municipality to know a tree is structurally unsound, the mere knowledge that a tree will fail at some future time is insufficient to establish liability for failing to remove it. The trial court properly instructed the jury the County was not responsible for potential or probable dangers related to the natural decay of trees.

Evans correctly points out that the notice requirement does not apply to situations where the municipality caused the dangerous condition. *Batten v. S. Seattle Water Co.*, 65 Wn.2d 547, 550-51, 398 P.2d 719 (1965). But, contrary to Evans’ arguments the instructions allowed him to argue his

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<sup>17</sup> An instruction based on the same language has been approved by Division I in an unpublished case *Fuda v. King County*, No. 74033-4-I, 2017 WL 4480779 \*8 (Wash. App. Oct. 9, 2017).

theory that no notice was required if the County created the danger through its application of herbicides. “Challenged instructions are not to be singled out or read alone, but are to be considered as a whole in conjunction with all of the other instructions.” *Hayden v. Ins. Co. of N. America*, 5 Wn. App. 710, 712, 490 P.2d 454 (1971)(citing *Shasky v. Burden*, 78 Wn.2d 193, 470 P.2d 544 (1970)). Instruction 18 stated the notice requirement applied only to conditions “not created by [the County’s] employees.” CP 4252. Additionally, Instruction 19 stated actual or constructive knowledge of a dangerous condition generally must be proved, but if the County “caused the dangerous condition, then knowledge is established.” CP 4253.

Instruction 21 did not conflict with the other instructions on duty. The instructions are easily reconciled by recognizing the difference between a dangerous condition that actually exists and one that does not yet exist but might develop in the future. If a condition presently existed, which the County either created itself or else should have been aware of, it did not “only [know] that an unsafe condition might, or even probably will, develop,” as described by Instruction 21. CP 4256 (emphasis added). Evans ignores this simple distinction on appeal, but he fully explained it to the jury in his closing argument:

There is an instruction in here, and that’s Number 21, which says the county cannot be negligent if it only knew that an unsafe condition might – or I’m sorry even probably will

develop. Now the key word here is “develop.” So, if – if the unsafe condition of the tree just happened a couple of days before it fell on Mr. Evans and hadn’t developed, then we lose. But this says that the county cannot be negligent if it just thought something might develop. That’s not the case here. I think the proof we brought you is that the county created a problem, and if they created a problem, we don’t have to show they had any notice or knowledge of that problem other than the fact they were creating it.

RP II 1364. Other segments of Evans’ closing show he freely argued his theory that the County created a danger and no notice was required. *See, e.g.*, RP II 1360, 1417. Attempting to show prejudice, Evans exaggerates the brief part of the County’s closing argument referencing Instruction 21, which its counsel concluded as follows:

And so the instruction tells you the county cannot be negligent if it only knew that windstorms happen, if only knew that trees can fall in windstorms. And that’s all. That’s all they provide is the county is aware that trees can fall in a windstorm.

RP II 1394-95. Again, if the County “only knew” trees can fall in windstorms, then it did not create the danger, did not have notice of it, and could not be liable for it. The argument was consistent with the law.

Evans’ argument that Instruction 21 misstated the law because the County need not have notice of conditions it “should have reasonably anticipated would develop” is misguided. In any event, Evans did not preserve this issue for appeal. Evans acknowledges in his opening brief that WPI 140.02 contains optional bracketed language setting forth this

exception to the notice requirement for use in appropriate cases. Yet, Evans did not object to the trial court's failure to include this optional language in Instruction 18. Nor did Evans specifically raise this limited exception to the general rule requiring notice when he made his objections to Instruction 21. RP II 1318-20. "An appellate court may consider a claimed error in a jury instruction only if the appellant raised the specific issue by exception at trial." *VanHout v. Celotex Corp.*, 121 Wn.2d 697, 703, 853 P.2d 908 (1993). "An appellate court 'will not consider a new basis for an exception which is raised for the first time on appeal.'" *Sulkosky v. Brisebois*, 49 Wn. App. 273, 276, 742 P.2d 193 (1987)(quoting *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 193 (1987); *see also* CR 51(f)).

This exception to the notice requirement does not apply under the facts of this case. As the comments to WPI 140.02 indicate, the seminal case recognizing this exception is *Argus v. Peter Kiewit Sons' Co.*, 49 Wn.2d 853, 307 P.2d 261 (1957), where a contractor barricaded a section of a highway upon which maintenance was being performed, diverting traffic to an adjacent gravel-surfaced detour. *Id.* at 854. A motorcyclist leaving the detour to return to the paved portion of the highway was thrown from his vehicle when the front wheel struck a depression three to four inches deep between the edge of the pavement and the gravel. *Id.* at 854-55. The court held the defendant's duty "involved the anticipation of defects that were the

natural and ordinary result of use by vehicular traffic.” *Id.* at 856.

In contrast, established caselaw makes clear this exception to the notice requirement does not apply where the alleged dangerous condition is a roadside tree. In *Albin*, where the material facts are virtually identical to those here, the Washington Supreme Court affirmed summary judgment in favor of Columbia County, because there was “no evidence that the county had actual notice that the tree which fell was any more dangerous than any one of the thousands of trees which line our mountain roads, and no circumstances from which constructive notice might be inferred.” *Albin*, 60 Wn.2d at 748. The Court observed “[i]t can, of course, be foreseen that trees will fall across tree-lined roads,” but it did not find a duty by the County to anticipate which specific trees would fall absent notice one was dangerous. *Id.* at 748-49.

Evans’ argument is also contrary to *Nguyen v. City of Seattle*, 179 Wn. App. 155, 165-66, 317 P.3d 518 (2014), another case involving a roadside tree. A municipal duty to anticipate which roadside trees will become dangerous in the future would necessarily imply a duty for municipalities to inspect trees. In *Nguyen*, the Court rejected the argument that municipalities have any duty to inspect roadside trees as part of their duty to maintain safe roads. *Id.* at 171. Here, the trial court recognized Instruction 21 was necessary, because testimony by Evans’ expert witnesses and arguments by his counsel inaccurately suggested the County had such

a duty to inspect trees. RP II 1323-24.

Even a private landowner must have notice of a danger that is “patent” and “readily observable” before having duty to remove a tree. *Lewis v. Krussel*, 101 Wn. App. 178, 186-87, 2 P.3d 486 (2000). “Absent such notice, the landowner is under no duty to ‘consistently and constantly’ check for defects.” *Id.* at 187 (citing cases).<sup>18</sup> Thus, even for private landowners, a tree being blown down by wind is not a type of danger that must be anticipated absent clear notice. Certainly, then, a municipality will not be liable for injuries caused by a blown-down roadside tree absent evidence it either (1) made the tree dangerous through its own conduct or else (2) had actual or constructive notice of the danger and an opportunity to remove it.<sup>19</sup> The instructions correctly stated the law and allowed Evans to argue both of these theories to the jury.

## **2. Instruction 14 (“Act of God”)**

Evans next assigns error to Instruction 14, which stated the law applicable to the County’s “act of God” defense. Again, Evans has not preserved the arguments he now makes about this instruction on appeal. The

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<sup>18</sup> This issue is also addressed as part of the County’s conditional cross-appeal, because the trial court did not give any instruction to tell the jury that this type of special notice was required.

<sup>19</sup> These are the two theories Evans consistently argued throughout the case. *See, e.g.*, RP II 1243-45 (Responding to the County’s CR 50 motion, Evans’ counsel stating plaintiffs had “two separate theories”)

only objection Evans made to this instruction at trial was that the “act of God” defense has been subsumed by the doctrine of unavoidable accident. RP II 1316-17. Evans has abandoned that objection and now makes several new ones for the first time in this Court.<sup>20</sup> The Court should decline to review Evans’ new arguments. *VanHout v. Celotex Corp.*, 121 Wn.2d at 703; *Sulkosky*, 49 Wn. App. at 276.

Additionally, any claimed error in Instruction 14 is harmless, because the jury found the County not negligent and did not reach the issue of proximate cause. A claimed error in an instruction is harmless when it is clear from the record that the instruction did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002)(citing *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The jury would have applied Instruction 14 only if it determined an “act of God” was the “the sole proximate cause” of the accident. CP 4248. The jury never reached the question whether the County’s conduct was a proximate cause. CP 4263. Even if the jury had reached this issue, Evans did not propose a special verdict form requiring the jury to state whether it found the wind to be an “act of God.” The court should also decline to reverse on

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<sup>20</sup> Evans instead argues the instruction was error because (1) it was not supported by substantial evidence; (2) the winds at issue were foreseeable; (3) the language of the instruction was incorrect; and (4) the “act of God” doctrine should not apply to a governmental entity operating a road. Evans’ Opening Brief, pp. 28-31.

this basis for the additional reason that the record is insufficient and any claimed prejudice is speculative. *See, e.g., McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 11, 882 P.2d 157 (1994)("[B]ecause of the general nature of the verdict it is impossible to know whether the jury found liability based on the failure to warn or the failure to resurface or construct a barrier. We cannot now dissect the jury's general verdict, nor can we disregard it.")

In any case, Instruction 14 is a correct statement of the law. High winds have previously been recognized to be an "act of God" that may relieve a defendant of liability. *See, e.g., Wells*, 77 Wn.2d at 803; *Grant v. Libby*, 160 Wash. 138, 143, 295 P. 139 (1931)(recognizing acts of God may include "violence of the winds or seas, lighting, or other natural accident."); *Lehman v. Maryott & Spencer Logging Co.*, 108 Wash. 319, 184 P.323 (1919)(strong wind but for which no loss would have occurred which caused fire to spread was an intervening act of God). Whether a natural phenomenon is unusual or rare enough to qualify as an "act of God" is a question of fact properly submitted to the jury where the evidence is disputed. *Wells*, 77 Wn.2d at 803; *Sado v. Spokane*, 22 Wn. App. 298, 302-03 fn.5, 588 P.2d 1231 (1979). As explained above, Evans never objected to any specific language in Instruction 14, but any such objection would have been properly overruled. The language is virtually identical to the instructions approved in both *Wells* and *Sado*. *Wells*, 77 Wn.2d at 803;

*Sado*, 22 Wn. App. at 303-04.

This Court should reject Evans' contention, supported by no authority, that an "act of God" defense is not available to municipal defendants whose liability arises out of their maintenance of public roads. Time and again, Washington courts have emphasized that municipalities are held to liability standards consistent with those applied to private parties. *See, e.g., Wuthrich v. King County*, 185 Wn.2d 19, 26, 366 P.3d 926 (2016); *Keller*, 146 Wn.2d at 242-43. If a private defendant's liability is limited by unforeseeable extreme weather events, the government's liability to motorists is limited in the same manner. *See, e.g., Wells*, 77 Wn.2d at 803; *Sado*, 22 Wn. App. at 303-04.

Evans' newly raised challenge that Instruction 14 was not supported by substantial evidence likewise lacks merit. Evans has not appealed the trial court's admission of Mr. Rappolt's opinions, and their admissibility is not properly before the Court. RAP 10.3(g); *Mickelson v. Williams*, 54 Wn.2d 293, 300, 340 P.2d 770 (1959). The criticisms Evans now raises go to the weight of Mr. Rappolt's opinions, not their admissibility. *See, e.g., Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 920, 296 P.3d 860 (2013); *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). A reasonable jury could have found, based on the testimony of Mr. Rappolt and Mr. Baker, that extreme winds, and specifically a microburst at the

location of the accident, were unforeseeable and the sole proximate cause of the failure of an otherwise healthy and structurally sound tree. Under these facts, the “act of God” instruction was proper.

Evans’ reliance on *Burton v. Douglas County*, 14 Wn. App. 151, 539 P.2d 97 (1975), a case not cited when Evans objected to Instruction 14, is likewise misplaced. *Burton* involved a homeowner whose property was flooded who sued Douglas County based on a special rule of water law: “Liability arises if surface water is artificially collected and discharged on surrounding properties in a manner different from the natural flow of water onto those properties.” *Id.* at 154 Because “[t]here was no dispute among the experts who testified that the road acted to channel the surface waters during the storm” *id.* at 155, the Court held that whether the flood was an “act of God” made no difference. *Id.* at 156.

This case is analogous to this Court’s more recent decision in *Sado*. Similar to *Burton*, *Sado* involved property owners who sued a municipality for damage that resulted from flooding. However, in *Sado* there was conflicting testimony about the City’s fault in the construction and maintenance of an embankment, and the City presented evidence the flooding was unprecedented. *Sado*, 22 Wn. App. at 302-03. The Court approved of an instruction on the City’s “act of God” defense. *Id.* at 303-04. Just as in *Sado*, the jury was properly instructed here.

### 3. Instruction 13 (Superseding Cause)

Evans next challenges Instruction 13, which is WPI 15.05, regarding superseding causation. Again, any claimed error in giving this instruction is harmless, since the jury did not reach the question of proximate cause. *Brown*, 147 Wn.2d at 340-41.

Giving Instruction 13 was proper. “The doctrine of superseding cause . . . limits the situations in which legal causation can be held to exist between two events.” *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 433, 442, 739 P.2d 1117 (1987). “Where such intervening act or force is not reasonably foreseeable, it must be regarded as a superseding cause negating the claim of proximate or legal cause.” *Maltman v. Sauer*, 84 Wn.2d 975, 982, 530 P.2d 254 (1975)(quoting *Cook v. Seidenverg*, 36 Wn.2d 256, 264, 217 P.2d 799)). A finding of superseding cause is proper where a plaintiff’s injuries “resulted not directly from the defendant’s negligence, but, rather, from an intervening cause only tenuously related and totally unforeseeable, in a causal sense, to the original condition attributable to the defendant’s conduct.” *Maltman*, 84 Wn.2d at 982-83. “Whether an independent cause is reasonably foreseeable is generally a question for the jury.” *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 358, 961 P.2d 952 (1998) (citing *Maltman*, 84 Wn.2d at 982).

Evans relies on inapposite cases that do not involve severe weather events to claim that high winds cannot be a superseding cause. Longstanding case law in Washington holds to the contrary. *See, e.g., Lehman*, 108 Wash. at 232; *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 7 P.2d 19 (1932); *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 235, 212 P. 174 (1923). Mr. Baker testified the subject tree was completely healthy and snapped solely because of an “overwhelming load” resulting from extreme winds. Additionally, both Mr. Rappolt and Mr. Baker gave testimony that the intervening winds were extraordinary. Even if the jury accepted Evans’ claim that the County was negligent for not inspecting the tree, a reasonable jury could conclude the winds were both unforeseeable and superseded any negligence by the County.

The instructions also permitted Evans to argue his causation theory. Instruction 13 was given in conjunction Instruction 12, based on WPI 15.04, which addresses situations where there are concurring proximate causes of an event. Read together, these instructions allowed Evans to argue the County could be liable if it was negligent and its negligence was a proximate cause of the accident that was concurrent with the high winds.

**C. The Trial Court Properly Acted Within Its Broad Discretion in Ruling on the Admissibility of the Testimony of Evans’ Expert Witnesses**

The Court should reject Evans' challenges to the trial court's rulings on the admissibility of testimony by three of his experts. The trial court has broad discretion in these decisions, which will not be disturbed absent a clear abuse of discretion. *Mayer v. Sto. Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Myers v. Harter*, 76 Wn.2d 772, 781, 459 P.2d 25 (1969). Here, the trial court's rulings were well within its discretion.

**1. Timothy Wright**

This Court need not review whether the exclusion of Mr. Wright was proper, because the record shows any claimed error was clearly harmless. *Jones v. City of Seattle*, 179 Wn.2d 322, 356, 314 P.3d 380 (2013) (holding erroneous exclusion of witnesses as discovery sanction harmless where proffered testimony was cumulative). Evans claims Mr. Wright's opinions would rebut testimony regarding the severity of the winds, particularly the opinions of Mr. Rappolt. But this testimony was entirely focused on the County's "act of God" defense. Since the jury did not reach the issue of proximate cause, no prejudice resulted from Mr. Wright's exclusion. CP 4263.

Exclusion was the only remedy that would not have caused extreme prejudice to the County. Evans did not respond to the County's interrogatory seeking Mr. Wright's opinions and grounds for them until after the discovery cut-off and approximately a week before trial. CP 3601-

05. Even then, Evans still did not explain the grounds for Mr. Wright's opinions, such as his methodology or calculations, nor did he provide or identify the data relied upon. *Id.*

Rather than show he timely responded to the County's discovery requests, Evans relies on his earlier witness disclosure, which did not answer the County's interrogatory. CP 3650-52. That disclosure was at best misleading and at worst false. It stated another witness, Dr. Charles Pyke, would be providing opinions, and Mr. Wright simply "may assist" him in performing a statistical analysis to support them. *Id.* The language of the disclosure also made clear this statistical analysis had not been completed and represented that opinions would be supplemented later.<sup>21</sup>

Even after the court ordered Evans to supplement his responses to the County's discovery requests during trial, Evans did not provide the grounds for Mr. Wright's opinions. CP 3610. Nothing in Evans' mid-trial supplemental responses stated what methodology Mr. Wright used to reach his calculations. *Id.*; CP 3669. Evans produced 51.1 megabytes of previously undisclosed data at that time, but no doppler radar data or information was

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<sup>21</sup> The disclosure stated the statistical analysis Mr. Wright "may assist" Dr. Pyke in performing "will assist [Dr. Pyke] in determining whether or not the weather conditions on July 23, 2014 were objectively high, and whether the wind conditions would have brought down healthy trees." CP 3650. The trial court agreed Evans' disclosure was insufficient: "[T]he statement that the statistical data indicates the wind speeds were between 50 and 55, and not unusual or extreme, that's not ascribed as an opinion. That's apparently what the plaintiffs are counting on, the results of statistical data yet to be performed by Mr. Wright in support of Dr. Pyke." RP 201.

provided. CP 3550-51, 3669. Mr. Rappolt relied on doppler data, and Evans' claim that Mr. Wright relied on the same data was therefore necessarily false. CP 3669. The trial court agreed it remained entirely unclear what data Mr. Wright relied on and what computation method he used to reach his opinions. RP 421-23.

A court may exclude a witness as a discovery sanction if (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. *Burnet*, 131 Wn.2d at 494-97. The trial court performed the *Burnet* analysis on the record twice: once when the County's motion was granted and a second time on Evans' motion for reconsideration. RP II 418-26, 1107-11. Evans faults the trial court for not permitting a deposition of Mr. Wright to take place during the second week of trial, but the court considered this option and rejected it. RP 425-26. By then, there was insufficient time for the County to subpoena and take Mr. Wright's deposition, provide the deposition to Mr. Rappolt for analysis, and produce Mr. Rappolt at trial a second time for responsive testimony. *Id.*

All this conduct by Evans must be viewed against the backdrop of his repeated discovery violations leading up to the exclusion of Mr. Wright. Evans had previously disclosed a different meteorologist, and when the County moved to compel that expert's undisclosed opinions, Evans

withdrew the expert. CP 76-90, 158-60, 185. Over the course of the litigation before trial, the court granted three separate motions to compel by the County, each of which arose out of Evans' failure to produce documents his experts created or relied upon.<sup>22</sup> Further, the County was already being required to take depositions during the middle of trial of two of Evans' other out-of-state experts, Mr. Valenta and Mr. Webber, due to other discovery violations. RP 763-68; RP IV 32-33.

This Court should reject Evans' argument that CR 26(b)(5)(A) precludes a party from making a request for production for another party's testifying expert's file materials. In *In re Detention of West*, 171 Wn.2d 383, 256 P.3d 302 (2011), the Court recognized that even though the rule does not mention requests for production or subpoenas duces tecum, "the history and purposes of CR 26(b)(5)(A), as well as the overall structure of the

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<sup>22</sup> On December 1, 2017, the trial court granted the County's first motion to compel, ordering Evans to provide all materials Mr. Valenta considered or relied upon in response to the County's request for production within fourteen days and to pay the County \$1,000 in sanctions. CP 48-50; RP II 30-32. On April 6, 2018, the trial court granted a second motion to compel by the County, which was precipitated by the fact that the night before Mr. Webber's deposition Evans made a document dump on the County of materials from Mr. Webber's file: 201 electronic files containing over one gigabyte of data and another hundred plus pages of notes. RP II 86-88. The Court advised Evans' counsel as follows: "I am sharing with plaintiff's counsel my belief that when these depositions are noted that Mr. Jackson is entitled to an update of the discovery responses relative to the expert's opinions, the substance and information relied upon, including any information that has been provided to that expert by plaintiff's counsel sufficiently in advance of the deposition date that Mr. Jackson can be prepared." RP II 113. The trial court's order on this motion reiterated this expectation. CP 1913-15. On August 10, 2018 the trial court granted a third motion to compel by the County, this time because Mr. Webber did not produce his billing records at his second deposition. RP IV 32-33.

discovery rules, suggest that the drafters of CR 26(b)(5)(A) intended to allow discovery of a testifying expert's written work product." *Id.* at 408. Evans reads *West*, a case he never cited to the trial court, more expansively than its holding. In *West*, the court held it was error to quash a subpoena duces tecum for an expert's written work product, but it did not hold that requests for production were not a permitted alternative discovery device to obtain expert documents. *Id.* at 408-09.

As early as December 1, 2017 and many times thereafter, the trial court made its holding clear to Evans that the parties must answer and supplement discovery requests, including requests for production, relating to expert opinions. *See, e.g.*, CP 48-50, 1913-15; RP II 30-32, 113. Evans' disagreement with this early ruling by the trial court did not give him the right to continue disobeying it. *See, e.g., Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 733, 812 P.2d 488 (1991)("In general a court order which is 'merely erroneous' must be obeyed . . ."). Had Evans believed the trial court's decision was an abuse of discretion, he had the option of seeking interlocutory review of it long before trial. *See, e.g., Sastrawidjaya v. Mughal*, 196 Wn. App. 415, 384 P.3d 247 (2016)(plaintiffs obtained discretionary review of trial court's order compelling them to sign medical records releases). Instead, he engaged in another eleven months of discovery and now challenges this longstanding

ruling only after a three-week trial resulted in a jury verdict adverse to him. Under these circumstances, this Court should reject Evans' assertion that his disagreement with the trial court was a reasonable justification for his conduct. In any case, as explained above, Evans' discovery misconduct was not limited to his failure to respond to the County's request for production. Because of Evans' complete failure to answer the County's discovery requests regarding Mr. Wright prior to trial, the trial court's decision excluding him should be affirmed.

## **2. JoEllen Gill**

Ms. Gill's disclosed opinions were (1) that the subject tree was "a life-threatening hazard" and (2) "the failures and deficiencies in Spokane County's safety and risk management program" were an "underlying root cause" of the accident. CP 711-12. The trial court properly excluded both. "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 392, 333 P.3d 388 (2014)(quoting *Stedman v. Cooper*, 172 Wn. App. 9, 18, 292 P.3d 764 (2012)). "The broad standard also means that courts can reasonably reach different conclusions about whether an expert is qualified." *L.M. by and through Dussault, v. Hamilton*, 193 Wn.2d 113, 136, 436 P.3d 803 (2019). "If the reasons for admitting or

excluding the opinion evidence are ‘fairly debatable,’ the trial court’s exercise of discretion will not be reversed on appeal.” *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). Further, the trial court’s evidentiary rulings may be affirmed on any basis supported by the record. *Spencer v. Badgley Mullins Turner, PLLC*, 6 Wn. App. 2d 762, 785, 432 P.3d 821 (2018).

Ms. Gill is not a civil or traffic engineer. RP 280-81. She conceded she cannot comment on the design, maintenance, or operations of a road. RP 281. Likewise, she has no training as an arborist. RP 282. “An expert must stay within the area of his expertise.” *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 103-04, 882 P.2d 703 (1994). “[T]he expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness’ area of expertise.” *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 924, 15 P.3d 188 (2000) (quoting *State v. Farr Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999)). Ms. Gill’s testimony has been excluded in numerous courts both in Washington and elsewhere either for lack of qualifications or inadequate foundation. CP 807-42. Ms. Gill was similarly not qualified to give her first opinion here.

The factual support for Ms. Gill’s second opinion was that County employees were inadequately trained, because they did not look for hazardous trees while performing maintenance work on the road. Ms. Gill

testified she read deposition testimony by County employees wherein they stated “they were unaware of that requirement, they did not perform that task, they weren’t trained to do that, they knew nothing about trees, had no information as to how to identify a tree that was a hazard from a tree that was not a hazard.” RP 287. Even though Ms. Gill conceded she was not qualified to opine on what constituted a hazardous tree, she intended to offer an opinion criticizing the County based on its employees’ inability to do so. RP 288. Plainly, given her lack of qualifications to address road or tree hazards, Ms. Gill was not qualified to render her second opinion, either.

Further, Ms. Gill’s second opinion was neither relevant nor helpful to the jury. *See* ER 702 (expert testimony must “assist the trier of fact”). Evans did not allege a negligent training claim in his complaint. Negligent training is an actionable theory only when one of the defendant’s employees has acted outside the scope of employment. *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 361, 423 P.3d 197 (2018); *LaPlant v. Snohomish County*, 162 Wn. App. 476, 478-79, 271 P.3d 254 (2011); *Gilliam v. DSHS*, 89 Wn. App. 569, 584-85, 950 P.2d 20 (1998); *see also Shielee v. Hill*, 47 Wn.2d 362, 287 P.2d 479 (1955). Where an employer concedes the acts or omissions of its employees were within the scope of their employment, any claim that the employees were negligently trained is redundant. *LaPlant*, 162 Wn. App. at 480. Here, the jury was instructed that “[a]ny act or

omission of an officer or employee is the act or omission of [the County].” CP 4239.

Ms. Gill’s testimony about a risk management program was also inadmissible, because it was premised on the assertion that the County must conduct inspections of trees. RP 291-93. Municipalities do not have a duty to inspect roadside trees. *Nguyen*, 179 Wn. App. at 171.

Moreover, the trial court also correctly held Ms. Gill’s second opinion was irrelevant because the County had not asserted that it had implemented a safety or risk management program as a defense. RP 324-25. Simply put, the County’s liability must be premised either on its creation of a dangerous condition through its own conduct or its notice that a dangerous condition existed. Ms. Gill’s testimony would have been unhelpful to the jury, because a risk management program is neither an element of Evans’ negligence claim nor a defense to it. The trial court’s exclusion of her opinions should be affirmed.

### **3. James Valenta**

Despite the dismissal of Evans’ clear zone theory, over the County’s objections Mr. Valenta was still permitted to testify the County had a budget surplus. RP II 830-31, 1179. Evans claims Mr. Valenta should further have been permitted to testify that: (1) the County should have trained its employees to identify hazards in the right-of-way; (2) the County should

have used the surplus funds to otherwise mitigate roadside hazards; and (3) other counties in Washington had vegetation management plans. The trial court correctly ruled this testimony was inadmissible.

Again, Evans did not allege negligent training, and the jury was instructed the County would be vicariously liable for all acts and omissions of its employees. CP 4239. For the same reasons Ms. Gills' opinions about inadequate training were irrelevant, so too were Mr. Valenta's

Mr. Valenta's opinion about how the County's budget could have been spent was also irrelevant, because the County admitted it could have removed the subject tree if it had known it was dangerous. CP 2886; RP 121-22, 145-50; RP II 295. Allowing testimony criticizing program-level budget choices by high-level County executives is also improper, because the County has discretionary immunity for such policymaking decisions. *See, e.g., Taggart v. State*, 118 Wn.2d 195, 215, 822 P.2d 243 (1992)(discretionary immunity applies "to basic policy decisions made by a high-level executive."); *Fuda v. King County*, No. 74033-4-I, 2017 WL 4480779 \*3 (Wash. App. Oct. 9, 2017) (unpublished opinion holding County's budget decision for guardrail implementation protected by discretionary immunity).

The court initially permitted Mr. Valenta to testify that he was aware that four other counties had vegetation management plans, but only for

purposes of rebutting the County's expert, Tom Ballard, who testified by perpetuation deposition that he was not aware of other counties having such plans. RP II 1181-82. Eventually, the court instructed the jury to disregard Mr. Valenta's testimony regarding vegetation management plans, because at least one of the plans he was relying on was not a county plan and the voluminous plan documents had not been marked as exhibits or otherwise made available for the court to review before he testified. RP 1183-85, 1193-1211. Under the case scheduling order, the deadline for marking and supplying exhibits to counsel and the court had passed weeks before.

Importantly, at the time of Mr. Valenta's testimony, the videotaped perpetuation deposition of Mr. Ballard had not yet been played to the jury, and thus Evans sought to introduce rebuttal testimony into the record before the jury had ever heard Mr. Ballard's testimony. In order to avoid the issue altogether, the County had previously asked the Court to strike from Mr. Ballard's deposition the testimony Evans wished to rebut. RP 756-60. But, Evans insisted on including it in order to inject Mr. Valenta's testimony on the issue into the case. *Id.*; CP 3346. The trial court's ruling on this proffered rebuttal evidence was within its discretion. *See State v. White*, 74 Wn.2d 386, 394, 444 P.2d 661 (1968). Furthermore, Evans cannot establish prejudice, and even if he could it was entirely self-inflicted.

## VI. CONDITIONAL CROSS-APPEAL ARGUMENT

A party who prevails at trial may file a conditional cross-appeal on issues the appellate court need only reach if it remands the case based on claimed errors raised by the appellant. *See, e.g., Mut. of Enumclaw v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 732, 315 P.3d 1143 (2013). The County prevailed despite instructional errors committed by the trial court, which precluded it from fully arguing its defenses. If a new trial is necessary, it should correct them.

### A. **The Trial Court Erred by Instructing the Jury the County Owed Premises Liability Duties as a Possessor of Land**

The trial court erred by giving Instruction 19.<sup>23</sup> This instruction incorrectly stated that in addition to owing Evans, as a motorist, the duty to maintain a reasonably safe road, the County owed a separate premises liability duty as a “possessor” of the right-of-way. CP 4253. In *Nguyen* Division I rejected the argument that a municipality could be liable to a motorist under a premises liability theory: “The City’s duty to persons using public roads derives from its status as a municipality, not as a landowner.” *Nguyen*, 179 Wn. App. at 171. Should a remand be necessary based on any issues challenged by Evans, consistent with *Nguyen* this Court should direct the trial court not to instruct the jury on premises liability duties.

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<sup>23</sup> This instruction appears to be a modified version of WPI 120.07, which is used in cases involving invitees of owners or occupiers of premises.

**B. The Trial Court Erred by Refusing to Instruct the Jury the County Has No Duty to Conduct Inspections of Roadside Trees**

As already explained, as a matter of law the County has no duty to conduct inspections of roadside trees. *Nguyen*, 179 Wn. App. at 171.<sup>24</sup> Particularly given that Evans' witnesses gave testimony and his counsel argued that the County should have conducted inspections, an instruction informing the jury of this limitation on its duty was required in order for it to argue its defense to Evans' claims. CP 2625.

**C. The Trial Court Erred by Refusing to Instruct the Jury that a Tree's Dangerousness Cannot Be Imputed to the County Unless the Danger is Patent and Readily Observable by a Layperson**

Even for private landowners, before constructive notice of a tree's dangerousness can be imputed, a plaintiff must show the danger was "patent" and "readily observable." *Lewis*, 101 Wn. App. at 187. In an unpublished opinion the Court has clarified that such dangers must be detectable by a layperson, not an arborist. *Gaona v. Glen Acres Golf & Country Club*, 2014 WL 6439921, \*4 (Wash. App. Nov. 17, 2014). Instructing the jury on this essential limitation on the County's duty is required for it to argue its defense to Evans' claims. CP 2624, 4134-35.

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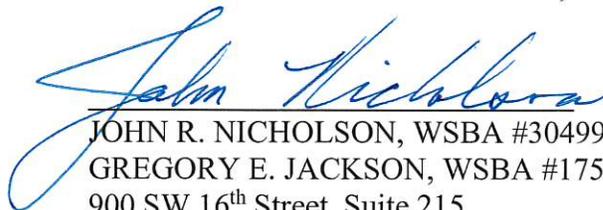
<sup>24</sup> See also *Fuda v. King County*, No. 74033-4-I, 2017 WL 4480779 \*8 (Wash. App. Oct. 9, 2017) (unpublished decision holding the jury was properly instructed that a County has no duty to inspect the road).

## VII. CONCLUSION

For all the foregoing reasons, the trial court's judgment in the County's favor should be affirmed. Should, however, this Court hold a new trial is necessary, it should correct the instructional errors identified by the County in its conditional cross-appeal.

RESPECTFULLY SUBMITTED this 7th day of August, 2019.

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**CERTIFICATE OF SERVICE**

On said day below, I electronically served a true and accurate copy via the Washington State Appellate Court's Portal the *Brief of Respondent/Cross-Appellant Spokane County* to the following parties:

Janelle Carney	<input type="checkbox"/>	U.S. Mail
Alex French	<input type="checkbox"/>	Facsimile
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2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126		

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 this 7th day of August, 2019, at Olympia, Washington.

  
\_\_\_\_\_  
KATHRINE SISSON, Legal Assistant  
FREIMUND JACKSON & TARDIF, PLLC

# APPENDIX A

**INSTRUCTION NO. 5**

**Spokane County is a governmental entity. A governmental entity can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the governmental entity.**

**INSTRUCTION NO. 7**

**Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful governmental entity would not do under the same or similar circumstances or the failure to do some act that a reasonably careful governmental entity would have done under the same or similar circumstances.**

**INSTRUCTION NO. 8**

**Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.**

**INSTRUCTION NO. 11**

**Spokane County has a duty to exercise ordinary care in the maintenance of its public roads to keep them in a reasonably safe condition for ordinary travel.**

**INSTRUCTION NO. 12**

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury. If you find that the defendant was negligent and that such negligence was a proximate cause of injury or damage to plaintiffs, it is not a defense that some other force may also have been a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the Plaintiffs was some other force then your verdict should be for the defendant.

### INSTRUCTION NO. 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.

**INSTRUCTION NO. 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 plaintiffs' injuries and damages, then the plaintiffs cannot recover.

**INSTRUCTION NO. 15**

(1) The plaintiffs claim that the defendant was negligent in maintaining East Big Meadows Road in a reasonably safe condition for ordinary travel by creating a dangerous condition or by failing to remove the tree that struck Carlton Evans on the date of the accident. The plaintiffs claim that the defendant's conduct was a proximate cause of injuries and damage to plaintiffs. The defendant denies these claims.

(2) In addition, the defendant denies the extent of the nature and extent of the claimed injuries and damage.

### INSTRUCTION NO. 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.

**INSTRUCTION NO. 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.

**INSTRUCTION NO. 21**

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

**INSTRUCTION NO. 25**

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

## **APPENDIX B**

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**INSTRUCTION NO. D-18**

The county has a duty to take corrective action with respect to a roadside tree only if it has notice of a patent danger that is readily observable to a layperson. The county's duty does not require it to consistently and constantly check for defects in roadside trees.

*Lewis v. Krussel*, 101 Wn. App. 178, 186-87, 2 P.3d 486 (2000)

**INSTRUCTION NO. D-19**

The county's duty does not require it to inspect roadside trees for defects.

*Nguyen v. City of Seattle*, 179 Wn. App. 155, 171-72, 317 P.3d 518 (2014); *see also Fuda v. King County*, 2017 LEXIS 2357, 2017 WL 4480779 (Wash. App. Oct. 9, 2017)(upholding jury instruction stating that a municipality has no duty to inspect its roadways)(unpublished case cited in accordance with GR 14.1 allowing the court to accord "such persuasive value as the court deems appropriate.")

**INSTRUCTION NO. D-27**

A patently dangerous tree, or one with a readily observable defect, must be the type of defect or deficiency in a tree that does not require professional training or an arborist to discern.

*Gaona v. Glen Acres Golf & Country Club*, 2014 Wash. App. LEXIS 2676, \*\*9-10 (Wash. App. Nov. 17, 2014)(citing *Lewis v. Krussel*, 101 Wn. App. 178, 186-87, 2 P.3d 486 (2000))(unpublished opinion, see GR 14.1).

**INSTRUCTION NO. D-28**

The county has a duty to take corrective action with respect to a roadside tree only if it has notice of a patent danger that is readily observable to a layperson. The county's duty does not require it to consistently and constantly check for defects in roadside trees and it does not require an arborist's inspection.

*Lewis v. Krussel*, 101 Wn. App. 178, 186-87, 2 P.3d 486 (2000); *Gaona v. Glen Acres Golf & Country Club*, 2014 Wash. App. LEXIS 2676, \*\*9-10 (Wash. App. Nov. 17, 2014)(unpublished opinion, see GR 14.1)

**FREIMUND JACKSON & TARDIF P.L.L.C**

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