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NO. 36495-0-III

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

CARLTON EVANS and MARGARET EVANS, husband and wife,

Appellants-Cross Respondents,

v.

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

Respondent-Cross Appellant.

**REPLY BRIEF OF CROSS-APPELLANT
SPOKANE COUNTY**

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I. INTRODUCTION

This reply brief addresses the three instructional errors raised by Respondent/Cross-Appellant Spokane County (“the County”) in its conditional cross-appeal. These errors need only be addressed by the Court if it first determines that Appellants/Cross-Respondents Carlton and Margaret Evans (“Evans”) have established any reversible error in their underlying appeal of the jury verdict in favor of the County. Should remand for a new trial be required, consistent with established case law the Court should direct the trial court (1) not to instruct the jury that the County could be liable as a possessor of land that has premises liability duties; (2) to instruct the jury that the County has no duty to inspect roadside trees as part of its duty to maintain reasonably safe roads; and (3) to instruct the jury that notice that a tree is dangerous can only be imputed to the County if the dangerousness is patent and readily observable by a layperson.

II. REPLY ARGUMENT ON CONDITIONAL CROSS-APPEAL

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

Evans fails to establish that Instruction 19, which stated the County could be liable as a “possessor” of the right-of-way, was proper. Claiming the trial court “reversed course” during trial, Evans mischaracterizes its rulings regarding the County’s interest in the property adjacent to Big

Meadows Road where the tree was located. At the outset of trial when the trial court granted the County's motion *in limine* 11, it expressly held the County did not own the land in fee simple but instead only had a right-of-way or easement:

I don't believe that the county owns the right-of-way as fee simple. I do think that they have rights on that easement. One of those rights would be to cut down a tree if they thought that it threatened the motoring public, and that's the obligation I am focused on in trial of this case.

RP 119.¹ The entire three-week trial then proceeded subject to this ruling.

The trial court never changed its mind, as Evans suggests, to hold the County owned the land in fee simple. During the jury instruction conference, the County objected to Instruction 19, specifically reminding the trial court of its earlier ruling that the County did not own the property. RP II 1325. In response, the trial court stated it believed the language of the instruction was nevertheless appropriate based on its reading of language from *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996). RP II 1333. Portions of *Iwai* refer to premises liability duties owed by an "occupier" of land to invitees. *Iwai*, 129 Wn.2d at 102-03 (Alexander, J. concurring). *Iwai* also discusses Restatement (Second) of Torts §§ 343 and 343A (1965),

¹ Again, for the Court's convenience, the transcripts from the four court reporters who prepared the Verbatim Report of Proceedings are cited to in this brief with the following designations: Jody Dashiell (RP), Amy Wilkins (RP II), Tracie Blocker (RP III), and Janet Wittstock (RP IV).

which refer to duties owed by a “possessor” of land to invitees. *Id.* at 103. Based on this language, the trial court concluded the County could have premises liability duties with respect to the right-of-way as a “possessor” or “occupier,” even though the County was not a fee simple owner of the property:

[T]he language that I have looked at and included actually comes from the case involving the state as a defendant. It’s *Iwai, I-W-A-I v. State*, 129 Wn.2d 84, and there it was a state-owned building or state-occupied building, and the conversation is all about the owner, slash, occupier, so I believe that the “possessor of land” terminology is accurate and appropriate.

RP II 1333. During the earlier summary judgment arguments Evans had previously made the same argument that the County could be a “possessor” of the right-of-way, even though it did not own the property in fee simple.

RP III 31.

Again, the trial court should reject Evans’ claim that the County’s answer to the complaint established property ownership in fee simple, particularly given the court expressly ruled the opposite at the outset of trial. Evans notes that admissions in pleadings are binding and remove the need for proof, but “language used in a pleading must be construed in the sense in which it was used. It should be construed as a whole to determine the intention of the pleader.” *Spangler v. Glover*, 50 Wn.2d 473, 313 P.2d 354 (1957)(citing *Jorgenson v. Dahlstrom*, 53 Cal.App.2d 322, 127 P.2d 551

(1942)). Furthermore, even if facts are admitted in an answer, they may be denied in a pretrial proceeding, such as occurred here during motions *in limine*. See *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 680, 440 P.2d 442 (1968)(“Allegations of fact not effectively denied, either by pleadings or in a pretrial hearing or otherwise, are deemed admitted for the purposes of the cause on trial.”) Regardless of the imprecise language in its answer, the County clarified multiple times before trial that its interest in the right-of-way was that of an easement, not fee simple ownership. CP 1544-45, 2877, 2913-14, 2936-37. The trial court’s pre-trial rulings recognized and accepted the County’s denial of fee simple ownership.

Further, even though matters which are admitted do not require evidence, admissions in pleadings are not self-executing in jury trials. WPI 6.10.02, “Use of Admissions or Binding Stipulations Under CR 26(b),” provides litigants with the proper vehicle for instructing the jury about an admission. During trial, Evans never once requested that the trial court instruct the jury that the County was a fee simple owner of property. Indeed, the only instruction Evans ever requested on this topic was that the County admitted that “[t]he tree that fell and hurt Mr. Evans was located on Spokane County’s right of way.” CP 2870. Under these circumstances, Evans has waived any argument of fee simple ownership by the County. *Spangler*, 50 Wn.2d at 482 (citing *Turner v. McCready*, 190 Ore. 28, 222 P.2d 1010

(1950))(reliance on an admission is waived “where the entire case is . . . tried as if admitted facts were in issue.”).

The trial court’s reliance on *Iwai* to instruct the jury that the County was a non-owner “possessor” of land was misguided, because that case has no application here. *Iwai* did not involve a motorist suing a governmental entity based on its maintenance of a public road. As the trial court itself explained in the passage above, *Iwai* involved a slip-and-fall accident that occurred in a parking lot of a State-owned building. *Iwai*, 129 Wn.2d at 87. The State disputed neither its ownership of the property nor that the plaintiff, who was visiting an Employment Security office to check job postings, was its invitee. *Id.* at 90. In contrast, here the trial court determined the County did not own the property in fee simple, and there was never any determination by the court or the jury that Evans was an invitee of the County.

The trial court’s decision to give Instruction 19 is directly contrary to *Nguyen v. City of Seattle*, 179 Wn. App. 155, 317 P.3d 518 (2014). In *Nguyen*, which involved injuries to a motorist caused by a roadside tree, Division I rejected the plaintiff’s arguments that premises liability duties applied to the City, holding that “[t]he City’s duty to persons using public roads derives from its status as a municipality, not as a landowner.” *Id.* at 171. When the County objected to Instruction 19, it specifically called

Nguyen to the trial court's attention, but the court neither addressed the case nor explained how giving Instruction 19 could be reconciled with its holding. RP II 1325, 1333-34. *Nguyen*, subsequent appellate cases,² and the Washington Pattern Jury Instructions³ all make clear that premises liability duties are inapposite where a motorist is suing a municipality for an allegedly unsafe road.

In his reply brief, Evans argues *Nguyen* was wrongly decided, citing the Washington Supreme Court's recent decision in *Adamson v. Port of Bellingham*, 193 Wn.2d 178, 438 P.3d 522 (2019), for the proposition that the County's right-of-way renders it a possessor of land that owes a motorist premises liability duties. This argument is without merit. In *Adamson*, the Court answered questions certified to it from a federal district court about the Port of Bellingham's status in a premises liability case where it owned the property on which the plaintiff was injured, but had leased it to the State of Alaska to dock and unload passenger ferries. *Id.* at 180-81. *Adamson* did

² This Court's recent unpublished decision in *Tapken v. Spokane County*, 9 Wn. App. 2d 1027, 2019 WL 2476445 (2019), also supports the County's objection to Instruction 19. There, this Court rejected arguments by the County that premises liability concepts, specifically that there is no duty to warn of a danger that is open and obvious, should apply in the municipal road liability context: "We again reject the invitation to analyze the county's duty as if the county acted as a product manufacturer, supplier of a chattel, or private landowner." *Id.* at *19 (emphasis added). By the same token, here the trial court's decision to superimpose premises liability duties was improper.

³ There are separate and distinct pattern jury instructions describing the duties owed by a municipality to motorists on public roads and the duties owed by landowners to individuals on the land. Compare WPI Chapter 140, "Governmental Entities," with WPI Chapter 120, "Trespasser-Licensee-Social Guest-Invitee."

not involve a claim that a governmental entity was negligent in the maintenance of a public road, and it contains no reference to *Nguyen* nor any other authorities on public road liability. *Adamson* is inapposite for the same reasons as *Iwai*.

Further, Evans' argument that the County's use of its right-of-way renders it a possessor of land is contrary to fundamental principles of property law. Evans has never disputed that the County's right-of-way along Big Meadows road is an easement. *Puget Sound Alumni of Kappa Sigma, Inc. v. Seattle*, 70 Wn.2d 222, 226, 422 P.2d 799 (1967) (quoting *Burmeister v. Howard*, 1 Wash. Terr. 207, 211 (1867)); *see also Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 739 P.2d 668 (1987). "An 'easement' is a nonpossessory right to use the land of another." *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183, 401 P.3d 468 (2017)(emphasis added)(citing *Maier v. Giske*, 154 Wn. App. 6, 15, 223 P.3d 1265 (2010); *see also Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012)("An easement provides the right to use real property of another without owning it."); *State v. Newcomb*, 160 Wn. App. 184, 191, 246 P.3d 1286 (2011)("Easements are property rights or interests that give their holder limited rights to use but not possess the owner's land.")). *Adamson* did not change the longstanding rule that an easement is a non-possessory right of use rather than a possessory interest in land. As a matter of law the trial

court's instruction that the County's right-of-way or easement results in it being a non-owner "possessor" of land was error. 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.

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

By failing to give the County's proposed instruction D-19, the trial court erred and allowed Evans to argue the County had a duty to inspect roadside trees. The Court should reject Evans' assertion that whether the County had a duty to inspect trees is a question of fact for the jury. "The existence and scope of a duty are questions of law." *Wuthrich v. King County*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016)(citing *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002)).

In *Nguyen*, Division I rejected as a matter of law the plaintiff's argument that a municipality had a duty to inspect trees as part of its duty to maintain reasonably safe roads. *Nguyen*, 179 Wn. App. at 171. In a more recent unpublished opinion, *Fuda v. King County*, 200 Wn. App. 1064, 2017 WL 4480779 (2017), Division I reaffirmed this rule. There, a motorist who sued King County after losing control and crashing her vehicle on a curved County road alleged the County had been negligent in several ways,

including “allowing trees to overhang the road” and “failure to sweep wet leaves . . .” *Id.* at *6. Citing *Nguyen*, the Court held that a jury instruction like the County’s proposed instruction D-19 stating there was no duty to inspect was proper. *Id.* at *7.

Evans argues *Nguyen* and *Fuda* should not be followed, because their holdings are based on the Court’s observation that the plaintiffs in those cases had cited “no common law, statutory, or regulatory authority requiring a municipality to inspect its street infrastructure as a component of its duty to provide streets that are reasonably safe for ordinary travel.” *Nguyen*, 179 Wn. App. at 171; *Fuda*, 2017 WL 4480779 at *8. But the only authorities Evans currently cites to support his claim that the County had a duty to inspect are cases stating a municipality (1) owes a duty of reasonable care to correct hazardous conditions on its roads and (2) will be deemed to have constructive notice of hazardous conditions if it should have discovered them. Reply Brief of Appellants, pp. 12-13 (citing *Wuthrich*, 185 Wn.2d 27, and *O’Neill v. City of Port Orchard*, 194 Wn. App. 759, 773-74, 375 P.3d 709 (2016)). Plainly, the Court in *Nguyen* and *Fuda* were aware of these general statements of a municipality’s duty when it rendered its decisions in those cases.

A duty to inspect is not implied by the general duty of ordinary care owed by municipalities to correct road hazards about which they know or

should know. For example, even though a landowner owes a duty of ordinary care to licensees to remedy dangerous conditions about which the landowner knows or should know, a landowner does not owe licensees a duty to “affirmatively seek out and discover hidden dangers.” *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975). Thus, a duty of inspection is a distinct and separate aspect of a defendant’s duty that, if it exists, must be defined by the court as a matter of law. Just as the plaintiffs in *Nguyen* and *Fuda*, here Evans fails to point to any authority establishing the County, as a municipality responsible for maintaining a road, had a duty to inspect roadside trees. The only authorities that specifically address this question, *Nguyen* and *Fuda*, hold there is no such duty.

Jury instructions must provide a legally correct statement of the law and permit the parties to argue their theories of the case. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Here, an instruction stating the County had no duty to inspect was required in order to respond to the legally incorrect assertions by Evans and his witnesses that the County had such a duty. Without an appropriate instruction from the court correcting these misstatements, the County was deprived of the ability to fully argue that the scope of its duty did not require inspections as a matter of law. If this case is remanded for a new trial, this Court should instruct the trial court to give an appropriate instruction stating this limitation on the County’s duty and

permitting it fully to argue its defense to Evans' claims.

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

Likewise unavailing are Evans' arguments that the trial court did not commit error when it refused to give any of the County's proposed instructions D-18, D-27, or D-28, which would have informed the jury that notice that a tree is dangerous can only be imputed when the danger is patent and readily observable by a layperson. *Lewis v. Krussel*, 101 Wn. App. 178, 2 P.3d 486 (2000), which involved a suit by a homeowner against adjacent property owners for damage caused by a tree that was blown down during a windstorm, governs the proper standard for constructive notice here. *Id.* at 179. Affirming summary judgment in favor of the defendant property owners, Division II concluded that in this context "[a]ctual or constructive notice of a 'patent danger' is an essential component of the duty of reasonable care" and that "[a]bsent such notice, the landowner is under no duty to 'consistently and constantly' check for defects." *Lewis*, 101 Wn. App. at 186-87 (emphasis added; citations omitted). Additionally, "absent such knowledge, an owner/possessor does not have a duty to remove healthy trees merely because the wind might knock them down." *Id.* at 187 (emphasis added).

Evans' attempt to distinguish *Lewis* by claiming it "involved a landowner's duty to a neighbor, not an invitee" fails. Reply Brief of Appellants, p. 14, fn. 8. Evans was not an invitee of the County by virtue of its operation of the road,⁴ and motorists travelling on public roads are not invitees of the owners of adjacent parcels of land.⁵ Although *Lewis* involved the duty owed by a property owner to a neighboring property owner for damage caused by a falling tree, the Court stated its analysis was consistent with *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 375 P.2d 487 (1962), which involved duties of a county and an adjacent landowner for injuries caused by a tree that fell on a public road. *Lewis*, 101 Wn. App. at 187 ("The reasoning of the above courts is consistent with *Albin* . . ."). Additionally, in a subsequent unpublished decision involving a landowner's duty to an invitee, Division I cited *Lewis* and applied its special constructive

⁴ Again, the liability of municipalities to motorists using public roads is not based upon land ownership. *Nguyen*, 179 Wn. App. at 171. Thus, premises liability concepts, such as the distinction between trespassers, licensees, and invitees, are irrelevant.

⁵ The County did not own the land adjacent to Big Meadows Road, but even if it did, the duty owed to a motorist by the owner of land adjacent to a public road is not based upon the motorist having the status of invitee:

An [owner] [occupier] of property adjacent to a public [road][street][sidewalk] has a duty to exercise ordinary care in connection with the use of the property so as not to make, or create conditions that make, the adjacent way unsafe for ordinary travel or to cause injury to persons using the [road][street][sidewalk].

WPI 135.01, "Duty of Owner or Occupier of Property Adjacent to a Public Way." *Cf.*, WPI 120.06, "General Duty to Business or Public Invitee-Activities or Condition of Premises"; WPI 120.07, "Liability to Business or Public Invitee-Condition of Premises-Condition Not Created by the Owner or Occupier."

notice standard for trees to affirm summary judgment in favor of the landowner. *Gaona v. Glen Acres Golf & Country Club*, 184 Wn. App. 1036, 2014 WL 6439921, *4 (2014)(citing *Lewis*, 101 Wn. App. at 186-87). Thus, *Lewis* establishes the proper standard for constructive notice that a tree is dangerous.

In reaching its holding in *Lewis*, Division II surveyed and relied upon cases from numerous other jurisdictions across the nation. *Lewis*, 101 Wn. App. at 186-88. These cases also support the instructions proposed by the County. For example, the Georgia Court of Appeals held that constructive notice that a tree is dangerous is established only where the danger is patently visible: “We are specifically limiting liability in this case to patent visible decay and not the normal usual latent micro-non-visible accumulative decay. In other words, there is no duty to consistently and constantly check all pine trees for non-visible rot as the manifestation of decay must be visible, apparent, and patent so that one could be aware that high winds might combine with visible rot and cause damage.” *Cornett v. Agee*, 237 S.E.2d 522, 524 (Ga. App. 1977).

Lewis also makes clear that the dangerousness of a tree must be detectible to a layperson rather than an arborist or other expert before notice can be imputed. The Court cited a New York case rejecting the notion that constructive notice of a tree’s danger can be imputed where an expert

inspection of a tree would be required to detect the danger: “[T]he concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently and constantly check all trees for nonvisible decay. Rather, the manifestation of said decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm. . . . Although there may have been evidence that would have alerted an expert, upon close observation, that the tree was diseased, there is no evidence that would put a reasonable landowner on notice of any defective condition of the tree.” *Ivancic v. Olmstead*, 488 N.E.2d 72, 74 (N.Y. App. 1985). A Georgia decision cited by the Court in *Lewis* articulated the same rule: “The expert witness presented testimony from which a jury could find the tree was in fact diseased. However, the testimony of the expert witness did not establish that a layman should have reasonably known the tree was diseased.” *Willis v. Maloof*, 361 S.E.2d 512, 513-14 (1987)(emphasis added). Indeed, in its unpublished decision in *Gaona*, Division I held that under *Lewis*, “requiring an arborist’s inspection would greatly exceed the lay inspection for ‘patent danger’ or ‘readily observable’ defects that is currently required under Washington law.” *Gaona*, 2014 WL 6439921 at *4 (citing *Lewis*, 101 Wn. App. at 186-87)(emphasis added).

Evans misconstrues both the County’s arguments and this Court’s holding in *Tapken v. Spokane County*, 2019 WL 2476445 (Wash. App. June 13, 2019), an unpublished case involving a motorcyclist and his passenger

who lost control and crashed when they failed to negotiate a partially obscured sharp turn at the intersection of two County roads. *Id.* at *2. In *Tapken*, the County did not dispute it had a duty to maintain its roads in a reasonably safe condition, but it argued the trial court’s jury instructions were insufficient because they did not reflect this duty did not require it to warn of road hazards that are open, obvious, and known to motorists. *Id.* at **15, 19. This is a well-established limitation on the duty owed by landowners in premises liability cases.⁶ This Court rejected application of this doctrine in the public road liability context: “We again reject the invitation to analyze the county’s duty as if the county acted as a product manufacturer, supplier of a chattel, or private landowner.” *Id.* at *19 (emphasis added). The issues in *Tapken* were whether the motorist knew of the road hazard at issue and whether the County had to warn of the hazard if the motorist did know of it. Here, the County never asserted the alleged hazard was known to Evans, and the jury was never instructed the County had a duty to warn. Thus, neither the

⁶ *See, e.g.*, Restatement (Second) Torts § 342 (1965) (possessor of land liable to licensees for harm caused by dangerous condition on the land only if “licensees do not know or have reason to know of the condition and the risk involved.”); Restatement (Second) Torts § 343A (1965) (possessor of land not liable to invitees based on “any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.”); *see also Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 P.2d 621 (1994) (citing Restatement § 342); *McDonald v. Cove to Clover*, 180 Wn. App. 1, 6, 321 P.3d 259 (2014) (summary judgment to landowner affirmed where invitees knew of wet grass and there was no evidence that landowner should have expected they would fail to protect themselves from this condition.)

arguments nor the holding in *Tapken* are pertinent to this case. If anything, the Court's rejection of premises liability concepts when analyzing the County's duty in *Tapken* supports the County's arguments that its duty is not governed by them here.

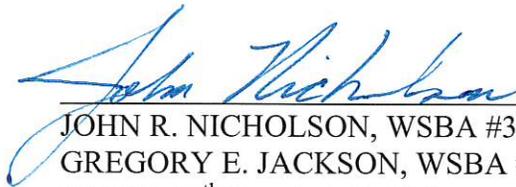
Evans fails to show that the trial court did not err by refusing when to give any instruction on the special notice standard adopted by the Court in *Lewis*, which applies in cases involving allegedly dangerous trees. Should remand for a new trial be necessary as a result of Evans' assignments of error, the Court should also direct the trial court to give an appropriate instruction on this standard to the jury.

III. CONCLUSION

For all the foregoing reasons, if this Court finds that a new trial is required based upon Evans' assignments of error, it should correct the errors raised by the County in its conditional cross-appeal.

RESPECTFULLY SUBMITTED this 21st day of October, 2019.

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CERTIFICATE OF SERVICE

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

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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 21st day of October, 2019, at Olympia, Washington.



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