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Division III
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No. 365808

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

From Walla Walla County Superior Court No. 13-2-00226-5
Hon. John W. Lohrmann

RICHARD and SHANNON EGGLESTON,

Appellant,

vs.

ASOTIN COUNTY, et al,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

After carefully listening to the evidence in this trial for five days, the learned trial judge took the extraordinary but sometimes necessary step of setting aside the jury verdict because the damages awarded were outside the range of the evidence. The trial judge commented that “[t]he verdict amount was substantially greater than what was requested in closing argument and was not supported by the evidence.” CP 75-77; APX. 29-31. The Plaintiffs asked the jury for \$1,000,000 which was the maximum damages incurred based on their expert’s testimony. The jury awarded the Plaintiffs a total of \$1,650,000. The trial judge cogently noted “[t]here was no testimony about a loss of \$1,650,000.” (*Id.*) Importantly, the trial judge noted that Plaintiffs deliberately drove home the point that Asotin County (County) had treated the Plaintiffs badly. Having heard the evidence first hand, the trial judge concluded that “the jury based their damage awards[,] at least in part[,] on a desire to punish the County for its bad treatment of one of its own citizens.” (*Id.*) To remedy the problem, the trial judge ordered a remittitur of the verdict to \$1,000,000, which was the top of the range of amount of loss testified to by Plaintiffs expert. The Plaintiff refused to accept the remittitur, so the

trial judge granted Asotin County a new trial. (CP 78-79; CP ____, Order Granting New trial, APPX. at 19-20.¹

The unsupported jury verdict included an award for \$800,000 for a breach of contract. The trial judge determined that “there is no evidence to support a breach of contract damages of \$800,000;” noting that the Plaintiffs’ counsel had only asked the jury for \$250,000 for these damages. The jury awarded Plaintiff \$600,000 for inverse condemnation based on Plaintiffs’ claim that the County failed to replace a business access drive. The jury awarded \$250,000 for water trespass even though the Plaintiffs expert testified that diminution in value for the water runoff was between \$50,000 to \$100,00. The jury verdict was clearly outside of the range of the evidence.

A review of the factual record wholeheartedly supports the trial judge’s decision to set aside this verdict as being excessive and outside the range of the evidence. Since Plaintiff has refused a remittitur, this Court should affirm the trial court’s grant of a new trial and remand the case for trial.

¹ The County submitted a supplemental designation of clerk’s papers on June 9, 2020 but has not yet received the Clerks Index of the page numbers.

II. ASSIGNMENTS OF ERROR

- A. Was the jury verdict outside of the evidence?
- B. Did the trial court properly order a new trial?

III. COUNTER STATEMENT OF THE CASE

The County needed to replace the Ten-mile bridge on Snake River Road; the bridge was too narrow to accommodate the increasing traffic on Snake River Road. Plaintiffs property was adjacent to Snake River Road and abutted the north end of the bridge. Plaintiffs were in favor of the upgrade of the bridge and modification of the roadway. RP 51:7-52:16. This lawsuit arose out of the construction of the bridge and its impact on Plaintiffs' property. CP ___ Amended Complaint, APPX. at 5-18.

Plaintiff claimed damages based on three theories of recovery submitted to the jury; (1) breach of contract;² (2) inverse condemnation; and (3) water trespass. Plaintiffs alleged that the County had breached its contract with Plaintiff by "failing to perform." *Id.* at ¶ 4.1.2. The Plaintiffs allegations for inverse condemnation claim that their property has been devalued by the failure of the County to replace their business driveway. *Id.* at ¶ 6.1.2. Their water trespass claim was based on

² The Amended Complaint is titled a Complaint for Breach of Contract but includes allegations of breach of contract (First Cause of Action), damage

allegations that the construction of the new 10-mile bridge channeled storm water onto Plaintiffs' property. *Id.* at ¶¶ 7.1.2 – 7.1.8.

The Plaintiffs' complaint did not clearly set out the basis for their claim of a breach of contract. In their opening statement Plaintiffs claim that they had an agreement that the County would provide three access approaches, terraced retaining walls, and a replacement water line. RP 13:14-25, 17:6-18:22. Plaintiffs claimed that their contract rights were set forth in a temporary construction agreement, a Construction Memorandum and other additional verbal agreements they made with Linda Raber, an employee of the Washington State Department of Transportation. RP 83:22 – 93:27; CP EX. 6, 50, 51, 203 at APX 25-26. The heart of the contract was set forth in the Construction Memorandum. It provided (1) that the County would replace their waterline and install a six-inch sleeve to encase their waterline in the approximate location where the line existed; (2) the County would construct three approaches (driveway entrances) in specified locations, (3) the County would build a retaining wall between approaches 2 & 3 constructed in a terraced design of native rock; (4) the pig pen would remain in the same location on Plaintiffs' property; (5) the County would have the right to enter Plaintiffs' property

to waterline (Second Cause of Action), inverse condemnation (Third Cause of Action), and water trespass (Fourth Cause of Action).

to perform necessary work. Ex. 203 at APX. 25-26. Later in the project, the parties agreed to two approaches; RP 115:15-23; 129:10-15. One approach would be near the bridge and was referred to as the business driveway, the other was north of the business driveway and was referred to as the residence driveway. RP 134:1-138:18.

The breach of contract related to the failure to install the business driveway approach as Plaintiffs had envisioned it, the failure to install two terraced rock retaining walls, and the location of the waterline. The business approach was also the basis of the inverse condemnation claim. The water trespass claim was related to the water runoff after the project was completed. CP ____, Amended Complaint at APX 1-4.

Construction started around July 10, 2010. RP 174:6-175:4. In October 2010, the construction uncovered artifacts and cultural resources in the construction area resulting in a shut down of the project. RP 189:1-191:7. Because the project was delayed, Plaintiffs decided that they could not open their boat rental business in the Spring of 2011. That spring, Plaintiffs sold the boats and closed their boat rental business. RP 191:8-195:15. The County offered to provide a temporary gravel driveway to assist Plaintiffs in keeping open their business, but the Plaintiffs rejected the offer. RP 196:7-198:12; EX. 20 at APX. 21; RP 538:12-539:14. The County worked with the Nez Perce Tribe and agreed that when

construction resumed the County would not be able to excavate any soil on the project site. RP 207:11-208:21; EX 32. The plan was revised in September 2012. To comply with the agreement to not excavate and to reduce costs, the County eliminated all terraced rock retaining walls except the agreed upon one between the two drives. RP 209:21-211:17; Ex. 34; Ex. 41 at APX. 22-23).

The project resumed in late 2012 under the new design. RP 215:21-25. On April 2, 2013, the County's contractor was ready to provide the business approach on Plaintiffs' property. RP 236:8-22. The business approach was going to be "field fit" in an area north of the bridge. Plaintiffs wanted the access built closer to the bridge so they would not have to use their pasture for part of the drive. The plans had the bridge located north of the Plaintiffs desired location. Plaintiffs parked heavy equipment in their pasture to prevent the contractor from building the approach as designed. The contractor agreed to Plaintiffs request even though the designed guard rail would cut off access to that approach. RP 236:8-242:7. Plaintiffs knew that the guard rail would be required, but steadfastly insisted that they cut the approach in an area that would ultimately be blocked by the guard rail. RP 369:13-372:21; 550:8-551:7; EX. 37. The County's project manager, Craig Miller, was concerned about the Plaintiffs' requested location of the business access and had Plaintiffs'

sign a note indicating that they agreed to the field fit location of the business approach. RP 242:8-245:15; 534:25-536:15; EX. 52 at APX 24. Once the guard rail was staked it was obvious that Plaintiffs' desired location of the approach was useless. Nevertheless, Plaintiffs refused to move their equipment or permit the contractor to move the approach to a more useable location. RP 245:16-247:24; 374:10-376:17; 387:14-388:8; 533:3-534:24; 627:1-628:3.

Craig Miller tried to get Plaintiffs to change their minds and allow an approach that would provide access. RP 537:13-19. He offered to modify the guard rail slightly to minimize the amount of pasture that would be involved. Plaintiffs refused and said they did not want a useable drive installed. RP 537:20-538:5.

The lack of a business driveway is a temporary condition. The contractor could have easily built the access so that the guard rail would not hinder access. RP 378:8-25; 403:18-404:11; 522:12-24; 538:6-9; 545:12-25. Plaintiffs refused to give him access to their property to make the road accessible. RP 629:18-630:15; 643:25-635:15.

Plaintiffs retained an expert appraiser, Steve Knight. Mr. Knight was the only witness to testify specifically on Plaintiffs' claimed damages. He testified that the failure to install the business drive resulted in damages in the reduction of the value of the property by \$450,000 to

\$650,000. He opined that the failure to install the rock retaining walls diminished the value of the property by \$150,000 to \$250,000. RP 470:20 – 475:18. Finally, he estimated that the location of the water line and the runoff occurring after the construction diminished the value of the property by \$50,000 to \$100,000. RP 474:2-475:6.

Mr. Knight's testimony was brief and conclusory but is the only damages testimony upon which the jury could formulate a verdict.

Regarding the loss of the business drive he testified as follows:

Q. Were you able to come up with a value range if the business drive were in place and they were able to have that beach business running?

A. Yes.

Q. And what is the value range for the property with the business drive?

A. 750 to a million dollars.

Q. What is it worth without the business drive?

A. 350.

Q. 350. So it had 450 to 650 depreciation?

A. For sure.

RP 472:9-22

Regarding the failure to install the terraced retaining wall Plaintiffs wanted he testified:

Q. How much would a rockery add to, if you had the privacy from the rockery, you had the beauty from that, how much value would it add?

A. 150 to \$250,000 probably.

RP 473:23 – 474:1.

Regarding the buried waterline and the storm water intrusion (runoff) he testified:

Q. Now, as you were there, you also had a few -- well, we've talked about some problems. We have talked about a water line that is buried up in the right-of-way, and you don't have access to the water line. Is that a problem?

A. Absolutely. If you go to sell a property that has what we call a latent defect, which is not a defect that's readily apparent to a buyer but is known by an agent or an owner, it has to be disclosed; termites, maybe you know about some termites in your house, but somebody is going to have a rough time finding them, might be back in a corner. Having a water line that's buried nine feet under the ground that's got rocks right on top of it is a latent defect that's not if, it's when that has a problem, and, you know, whoever owns the property owns that problem then and what do you do about it? So it needed to be disclosed if you ever sold the property.

Q. Does that reduce the fair market value?

A. Definitely. Doesn't help. Definitely reduces your property value.

Q. What about, we talked about storm water intrusion. Is that considered a latent defect as well?

A. Absolutely. On every Washington State property disclosure they ask you if there are any site drainage problems or issues, and that has some site drainage problems and issues, and you would have to disclose that.

Q. With those two latent defects how much would that affect or would you anticipate that would affect the fair market value of the land?

A. I'm not sure that I looked at those things as a value before, but, you know, 50 to \$100,000 at least.

RP 474:2-475:6.

Mr. Knight then recapped his valuation testimony as follows:

Q. Okay. So with the business drive, 750,000 to one million dollars is the property value; is that correct?

A. Yes.

Q. And without, you said 350?

A. Yes.

Q. You said, and I want to make sure I have it correct, the rockeries would have added value of 150 to \$250,000; is that correct?

A. Yes.

Q. And then the latent defects -- I'm sorry, you said how much?

A. 50 to \$100,000

RP 475:7-18

Finally, Mr. Knight admitted that the values he provided had not been adjusted for appreciation over time since the damages were incurred, when he testified:

Q. 50 to 100. And you have been selling property in the Lewis and Clark Valley for many years. Would the values you've talked about here be the same in 2013 as in today?

A. No.

Q. How much different in 2013?

A. Our market is definitely up from what it was in 2013. But I can't really give you a good answer today unless I did some research.

Q. Okay.

A. If you want me –

Q. But these would be the fair values as of today?

A. Today.

RP 475:19-476:5.

In final argument, Plaintiffs asked the jury for the exact amounts that Mr. King testified were the Plaintiffs' damages. RP 706-709. Their counsel argued that every penny of what they were entitled to would total \$1,000,000 when he stated:

So I come to you. Please, be interested. Award Rich and Shannon every penny. \$650,000 was taken from the value of their land, another \$250,000 by the breach of contract. Another \$100,000 for putting a water line -- you heard it today, under the road, two feet just to get to a manhole.

RP 709.

The jury rendered a verdict of \$1,650,000, which was well in excess of the evidence and the request of Plaintiffs. CP 1-2. The trial

judge ordered a remittitur of the verdict to \$1,000,000. CP 75-77 at APX 29-31. When the Plaintiffs declined the remittitur the trial judge granted the County's motion for a new trial.

IV. ARGUMENT

A. Standard of Review

While the standard of review in cases of remittitur has been subject to much discussion, it appears that the rule is that a trial court order remitting a jury's award of damages is reviewed *de novo* since it substitutes the court's finding on a question of fact. Trial court orders denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent. This rule harmonizes the statute, our case law, and the jury's constitutional role. *Bunch v. King Cnty. Dep't of Youth Servs.*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005).

Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) cogently held that:

If a jury's verdict is tainted by passion or prejudice, or is otherwise excessive, both the trial court and the appellate court have the power to reduce the award or order a new trial. Because of the favored position of the trial court, it is accorded room for the exercise of its sound discretion in such situations. The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents. The appellate court, on the other hand, is

tied to the written record and partly for that reason rarely exercises this power.

An appellate court will not disturb an award of damages made by a jury **unless it is outside the range of substantial evidence in the record**, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice. (Footnotes omitted) (Emphasis added)

Here, the trial court ordered a remittitur of the verdict, concluding that the verdict was outside the range of the evidence and likely the result of prejudice (anger) directed at the County. The trial court was in the best position to make this determination.

When an appellate court reviews the trial court's decision to grant a new trial the standard is an abuse of discretion. *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 178, 116 P.2d 381 (2005).³ The appeals court should give greater deference to a trial court's decision to *grant* a new trial than a decision to deny one because a new trial places the parties where they were before, while a decision denying a new trial concludes their rights. . *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997); *Mega v. Whitworth Coll.*, 138 Wn.App. 661, 671, 158 P.3d 1211 (2007). *See also*, *State v. Taylor*, 60 Wn.2d 32,

³ When the Plaintiffs rejected the remittitur the trial court granted a new trial. It is important to note that here the Plaintiffs are appealing the trial court's decision granting a new trial. They are not appealing the remittitur since they rejected it. Therefore, the standard of review should be based on an abuse of discretion.

41–42, 371 P.2d 617 (1962); *Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn.App. 48, 81, 231 P.3d 1211 (2010), *as corrected on denial of reconsideration* (Apr. 20, 2010). One valid basis to grant a new trial is where “there is no evidence or reasonable inference from the evidence to justify the verdict.” CR 59(a)(7).

Where the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict. *McUne v. Fuqua*, 45 Wn.2d 650, 652, 277 P.2d 324 (1954); *Ide v. Stoltenow*, 47 Wn.2d 847, 848, 289 P.2d 1007 (1955); Philip A. Trautman, *Motions Testing the Sufficiency of Evidence*, 42 Wash. L.Rev. 787, 811 (1967). Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial. Conversely, it is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 637, 865 P.2d 527 (1993) (trial court abused its discretion when it denied a new trial on the basis of inadequate damages in wrongful death case because damages were not within the range of substantial evidence), *rev. denied* 124 Wn.2d 1005, 877 P.2d 1288 (1994). *See also Lanegan v. Crauford*, 49 Wn.2d 562, 568, 304 P.2d 953 (1956). In accord, *Palmer v. Jensen*, 132 Wn.2d 193, 197–98, 937 P.2d 597 (1997).

The difference in standards of review may be largely semantic. Here, the trial court offered Plaintiffs a remittitur and when they declined the trial court granted the County's motion for a new trial. On appeal, Plaintiffs argue that the trial court erred in granting a new trial. Therefore, the ultimate decision for review is the granting of a new trial, which is reviewed on an abuse of discretion standard. However, as the Court in *Bunch* so cogently noted:

. . . . The court [in *Hendrickson v. Konopaski*, 14 Wn.App. 390, 541 P.2d 1001 (1975)] is right to note that much of the haggling over the proper standard of review when the trial court grants a new trial or a remittitur is semantics. . . . The substance of the review for substantial evidence remains the same. This case does not require us to sort out the conflicting authority, however, since the trial court denied the remittitur and the standard for that situation is much clearer. An abuse of discretion standard is appropriate where, as here, the trial court refused remittitur.⁷

Bunch v. King Cty. Dep't of Youth Servs., 155 Wn.2d 165, 178, 116 P.3d 381 (2005) Under either standard, the result in the same. The jury awarded economic damages that were outside the range of the evidence requiring a new trial.

B. An award of economic damages that is outside the range of the evidence in the record requires a new trial.

Here, the trial judge felt compelled to allow a remittitur or a new trial because the verdict was clearly outside of the range of the evidence in the record. The only claim for damages was for diminution to the value of

Plaintiffs' real estate. The entire verdict was for **economic damages** in the form of a diminution of the value of Plaintiffs home.⁴ The trial court instructed the jury that on the contract claim the jury could award actual damages in the amount of the difference between the value of the construction if fully performed and the value actually received by the owner. (CP 43). Regarding the trespass claim the trial court instructed the jury that the measure of damages would be the "cost of restoration and the loss of use." (*Id.*) The jury was instructed that any award for inverse condemnation should be limited to "those factors that will actually affect the fair market value of the property and that are established by the evidence." They were instructed that they could not consider any factors that a prudent person would find to be remote, imaginary, or speculative. (*Id.*) The entire award was for discernable economic damages.

The jury awarded \$800,000 for breach of contract. The contract claim was based entirely on the County's failure to provide agreed upon rockeries, and a replacement water line.⁵ The undisputed evidence in the

⁴ Some courts have indicated that the "range of the evidence" rule is of little help in cases awarding noneconomic or general damages because they are less amenable to mathematical calculation. However, the rule especially applies to economic damages. *Bingaman*, 103 Wn.2d at 835; *Bunch*, 155 Wn.2d at 180.

⁵ Plaintiffs claimed that the loss of the business drive was both a breach of contract and the basis for their inverse condemnation claim. The court

record on that claim was the testimony of Plaintiffs' appraiser, Steve Knight. **Mr. Knight concluded that the Plaintiffs' property had been devalued by \$150,000 to \$250,000 by the failure of the County to install the rockeries and properly place the waterline.** RP 473:23 - 474:1 Plaintiffs asked the jury for \$250,000 for the breach of contract claim. RP 709. Understandably, the trial court found that "there is no evidence to support a breach of contract damages of \$800,000[.]" CP 76 at APX 75-77.

The jury awarded Plaintiffs \$600,000 on their inverse condemnation claim. CP 1 at APX 27-28. The trial court instructed the jury that the inverse condemnation claim was based on the loss of their business drive and the channeling of storm water onto their property and any corresponding loss of value to the real estate. (CP 26)⁶ **The Plaintiffs' expert testified that the loss of the business driveway devalued the property by \$450,000 to \$650,000 and that the storm runoff reduced the value of the property by \$50,000 to \$100,000.** RP 472:9-22; 474:2-

instructed the jury that to the extent damages overlapped on more than one theory they could only award the damages to the first theory addressed. (CP 44)

⁶ At trial the Plaintiffs included the storm water runoff claim under their water trespass claim and did not argue that it was part of the inverse taking claim. (RP 474:2-475:6)

475:6⁷ Plaintiffs' counsel asked the jury for an award of \$650,000. RP 709.

The jury awarded Plaintiffs \$250,000 for water trespass which was based on the claim that the County had channeled storm water onto their property. Plaintiffs' expert included the property devaluation for the runoff claim along with the devaluation of the property because of the location of the waterline. **He testified that the total diminution in value of the property for those two events was \$50,000 to \$100,000.** RP 474:2-475:6. Plaintiffs' counsel asked for an award of \$100,000.

Here, the Plaintiffs' expert, Mr. Knight, the only witness to testify about economic damages, concluded that **the total economic loss** was \$1,000,000. The jury awarded \$1,650,000 in economic damages, far more than the expert's testimony or the evidence supported. The trial judge was right in granting a new trial.

The award in this case was for economic damages which, unlike noneconomic damages, are more amenable to mathematical calculation. "Economic damages" are defined as objectively verifiable monetary losses. RCW 4.56.250. Washington Pattern Jury Instructions define economic damages to include the difference between the fair cash market

⁷ This award appears to be duplicative of the award for water trespass, making the jury verdict even more egregious.

value of the property immediately before the occurrence and the fair cash market value of the unrepaired property immediately after the occurrence, WPI 30.10. The measure of damages in a “taking” case is economic and includes the diminution in the fair market value of the property caused by the governmental taking. *Hoover v. Pierce Cnty.*, 79 Wn.App. 427, 431, 903 P.2d 464 (1995), *rev. denied* 129 Wn.2d 1007, 917 P.2d 129 (1996), *citing Petersen v. Port of Seattle*, 94 Wn.2d 479, 482, 618 P.2d 67 (1980). *See also, Olympic Pipe Line Co. v. Thoeny*, 124 Wn.App. 381, 393, 101 P.3d 430 (2004), *rev. denied* 154 Wn.2d 1026, 120 P.3d 577 (2005).

Plaintiffs agree that where the verdict is outside of the range of the evidence a remittitur or new trial is appropriate. Appellant Brief at 34. To remit the Court needs only to find that the verdict is outside of the range of the evidence. It does not also need to find that the verdict is shocking or the result of passion or prejudice.⁸ Here the award was clearly outside of any evidence in this record.

A jury damage award should be overturned if the award lies outside the range of the evidence. *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 138, 856 P.2d 746 (1993). *See also, Miller v. Dalton*, 5

⁸ The cases cited and relied upon by Plaintiffs are “passion and prejudice” cases not cases where the economic damages were outside the range of evidence. These cases offer little help in resolving this issue.

Wn.App.2d 1029, 2018 WL 4488317, *19 (2018) (an economic damages award that did not deduct the amount of the mortgage from the total judgment was outside the range of the evidence).⁹ *McNabb v. Metro. Prop. & Cas. Ins. Co.*, 9 Wn.App.2d 1002, 2019 WL 2285482, *2 (Wn.App. 2019). (emphasis in original; concluding that the jury award was outside the range of the evidence where the total economic damage award supported by the evidence was \$3,855,735.83 but the jury awarded \$ 4,731,323.93).¹⁰

In this case, viewing the evidence most favorably to the Plaintiffs, there is no substantial evidence or reasonable inference to sustain a verdict of \$1,650,000. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). *See also, State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968); *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). Where economic damages are undisputed the court has little hesitancy in granting a new trial when the jury does not award these amounts. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 279–80, 840

⁹ *Miller* is an unpublished opinion of this court and is not cited as precedent, but only as an example of a case where the verdict was overturned because it was outside of the range of the evidence.

¹⁰ This is an unpublished opinion and is not cited as precedent, but only as an example of a case where economic loss was outside of the range of the evidence.

P.2d 860 (1992). *See also, Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 636, 865 P.2d 527 (1993), *rev. denied* 124 Wn.2d 1005, 877 P.2d 1288 (1994).

Hill. supra at 138–39 is instructive. There the jury awarded \$40,000 in economic damages. However, Plaintiff Hill’s witness, Clarence Barnes, an economic expert, testified she was deprived of \$16,367 in direct income. Ms. Hill’s co-worker testified he earned a bonus for 1987 of between \$1,000 and \$1,400 -- he did not recall the exact amount. The jury could reasonably have concluded from that evidence that Ms. Hill would have qualified for a similar bonus had she been trained and treated equally. The jury awarded Plaintiff \$40,000 in economic damages. Division 3 of Court of Appeals, in upholding the trial court’s remittitur to \$19,000, determined that \$19,000 was the maximum amount of economic loss established in the record and that “[t]he jury’s \$40,000 verdict was clearly outside the range of the evidence.” *Id.* 139.¹¹ In accord, *Herriman*

¹¹ The *Hill* court was also persuaded, in part by the excessive award of economic damages, that the noneconomic damages were the result of passion and prejudice. The Court noted: “In light of the meager evidence and the jury’s award of excessive economic damages . . . , we agree the \$410,000 award clearly indicates passion or prejudice, or an attempt to award punitive damages. The trial court was in the better position to make that determination and is to be accorded room for the exercise of its sound discretion. *Washburn*, 120 Wash.2d at 279, 840 P.2d 860; *Bingaman*, 103 Wash.2d at 835, 699 P.2d 1230.” *Hill v. GTE Directories Sales Corp.*, 71 Wn.App. 132, 140, 856 P.2d 746 (1993).

v. May, 142 Wn.App. 226, 231, 174 P.3d 156 (2007) (noting that Ms. Herriman's total medical expenses were \$9,919.79 and that prior to trial she had lost wages in the amount of \$34,103.86; the trial judge found her past economic damages were \$44,023.65 and concluded that the jury's award of \$16,000 for past economic damages was “outside the reasonable bounds of the evidence, not supported by the evidence and shocking”); *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 851, 792 P.2d 142 (1990) (finding damages of \$12,500 within the evidence but reducing it by \$8,525 which defendant was not required to pay).

In a similar case outside of Washington, the Vermont Supreme Court ruled that where the expert testimony for the value of land taken by condemnation ranged from \$42,250 to \$21,536, but the jury awarded \$116,800 for damages for land taken, the verdict was outside of the range of the evidence and must be reversed. *Kilfasset Farms Dairy, Inc. v. State Highway Bd.*, 376 A.2d 340, 341 (Vt. 1977).¹²

Plaintiffs impliedly concede that the jury’s verdict exceeded the range of the evidence when they argue that the verdict could be supported on an alternative theory based upon the argument of the County’s counsel when

¹² The *Kilfasset* court reversed the award even though the total verdict for all losses was within the range of the evidence.

he argued that the Plaintiffs did not suffer any injury because the property was worth \$800,000 before the bridge construction and still worth \$800,000 after the construction.¹³ Plaintiffs' counsel then argued that the bridge construction reduced the property value by nearly 1/3 when it lost the business drive and if it is worth \$800,000 without the business drive, then the real value of the property before construction was \$2.4 million (\$800,000 times 3).¹⁴ However, this argument totally ignores the fact that the Plaintiffs' own expert testified that the property **with a business drive before construction**, was worth \$750,000 to \$1,000,000. There is no evidence in the record to justify a claim that the property was ever worth \$2,400,000. The trial court soundly rejected this argument and characterized it as "bad logic."¹⁵ (CP 76). Plaintiffs are bound by the

¹³ The argument was not based on any actual testimony as to value.

¹⁴ Counsel's argument is not evidence.

¹⁵ Plaintiffs make a similar illogical argument in their opening brief. Plaintiffs desperately try to save this excessive verdict by arguing that since the County paid them \$132,000 for 0.38 acres of land needed to improve the bridge, that his property must have been worth \$2,785,000 total. (Appellants brief at 38) They never made this argument to the jury and no witness testified that the value of Plaintiffs property was \$2,785,000. The only witness to testify to the actual value of the Plaintiffs property was Mr. Knight, their appraiser. He set the total value of the property at \$750,000 to \$1,000,000. There is no basis on which a jury could decide that the offer, in lieu of condemnation, of a small part of the Plaintiffs property in order to complete this construction, could reasonably

testimony in the record and the jury is not allowed to conjecture or speculate. Clearly, the jury award was outside the range of the evidence in this record entitling the County to a new trial.

C. This not a question of passion or prejudice.

A verdict is excessive if (1) it is outside the range of the evidence, or (2) shocks the conscience of the court or (3) is the result of passion or prejudice. The County is arguing that the verdict is excessive because it is outside of the range of the evidence. Plaintiffs' arguments that the verdict is not shocking, or the result of passion or prejudice miss the point. Plaintiffs attempt to justify the excessive verdict that is clearly outside the range of the evidence by arguing that it was not the result of passion and prejudice citing, *inter alia*, *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 699 P.2d 1230 (1985). In *Bingaman*, the jury awarded the plaintiff in a medical malpractice claim, \$1,002,089.03 that included noneconomic damages of \$410,000 for pain and suffering. The Court of Appeals remitted the pain and suffering award to \$206,000. The Supreme Court reversed the Court of Appeals, properly concluding that when reviewing a noneconomic damages case, before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to

be extrapolated to conclude that the entire parcel was worth in excess of \$2,700,000.

make it unmistakable. *Id.* 836. The case did not involve an award of economic damages that was outside the range of the evidence. The same can be said for *Bunch v. King Cnty. Dep't of Youth Servs.*, 155 Wn.2d 165, 183, 116 P.3d 381 (2005) where the Court of Appeals remitted the jury award of \$260,000 in noneconomic damages to \$25,000.

The County agrees with Plaintiffs argument that the Court must give Plaintiffs all the reasonable inferences from the evidence. Plaintiffs cite *Chapman v. Black*, 49 Wn.App. 94, 97, 741 P.2d 998 (1987), *rev. denied* 109 Wn.2d 1005 (1987), for the proposition that when there is conflicting evidence, once the jury has reached its verdict, any inquiry by the court is foreclosed, unless, as a matter of law, the court can say that there is no competent evidence or reasonable inference therefrom to support the jury's finding in favor of the nonmoving party. However, the argument disregards the fact that the economic damages testimony in this case is not conflicted. It is undisputed that the Plaintiffs own expert, and sole witness on damages, testified that **the total economic damage** in this case was \$1,000,000. The jury's verdict of \$1,650,000 was outside the range of the evidence.

The trial court did find that the verdict was the result of passion and prejudice (or in this case anger) against an overbearing government agency. The trial judge found that:

As the Plaintiffs presented their case, they deliberately drove home the point that Asotin County treated Mr. Eggleston badly throughout the entire project. There was testimony that a county commissioner openly disparaged Mr. Eggleston at a public hearing. Exhibit 94. There was testimony that the dirt slope was constructed instead of the designed and promised rockeries to minimize construction costs. The County ignored Mr. Eggleston's concern about drainage issues and refused to make any concessions to adjust the guardrail blocking the business driveway. While the County belatedly offered to widen the driveway, the testimony was that the fix would have created a structural weakness in the driveway. The Court can only conclude from the above facts and circumstances that the jury based their damage awards at least in part on a desire to punish the County for its bad treatment of one of its own citizens.

CP 76 at APX 29-31. While it was not necessary to find prejudice since the verdict clearly was outside of the range of the evidence, the trial judge's findings demonstrate why the verdict was so excessive. The experienced trial judge heard the evidence and determined that the jury was motivated by anger. The trial court's findings must be given great deference by this Court, and unless this Court determines that the trial court's findings are entirely unsupported in the evidence, they cannot be set aside. *See Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). The Court of Appeals does not

weigh the evidence under any circumstance. *Id.* at 575; *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710, 717, 225 P.3d 266 (2009), *rev. denied* 168 Wn.2d 1041, 233 P.3d 888 (2010). This Court should not substitute its judgment for that of the trier of fact. *Thorndike*, 54 Wn.2d at 575. This jury's verdict was the result of prejudice against the County.

Plaintiffs rely on *Collins v. Clark Cnty. Fire Dist. No. 5, supra*, to support their argument that the verdict was within the range of the evidence and not excessive. In *Collins*, a jury awarded four different plaintiffs substantial sums for economic and noneconomic damages in a sex-based harassment and hostile work environment claim. Plaintiffs' expert testified that Plaintiff Larwick's economic damages ranged from \$628,676 for 3 years, \$720,441 for 5 years and \$929,771 for 10 years if she left the work force and \$521,388 for 3 years, \$554,731 for 5 years, and \$626,377 for 10 years if she returned to the work force. *Id.* at 70. The trial judge reduced the economic damages award to Plaintiff Larwick from \$626,000 to \$150,000 and reduced her noneconomic damages award from \$875,00 to \$250,000. *Id.* at 76. The Court of Appeals determined that the economic damages awarded were within the range provided by the economist and therefore justified. *Id.* at 85. In reversing the trial court's order remitting the economic

damages to \$150,000, the Court of Appeals reiterated that “we will disturb the jury's verdict only if it is outside the range of substantial evidence, shocks the conscience, or appears to have resulted from the jury's passion or prejudice. *Id.* at. 88. The *Collins* court reviewed the evidence and determined that the award was within the range of the evidence and not the product of prejudice. The expert’s testimony established a range of economic loss from \$929,771 to \$521,388. The jury’s award was within that range. At bar, the jury’s verdict was far outside of the range of the evidence.

Plaintiffs argue that the jury verdict is inviolate, and this Court should uphold the verdict at all cost. The law does not support their argument. This verdict was more than the evidence would allow and more than the Plaintiffs asked for or expected. It is the job of the trial court and the appellate courts to ensure that excessive verdicts are not sustained. A verdict that is far outside of the range of the evidence is an excessive and improper verdict. Here, the maximum amount of economic loss established in the evidence was \$1,000,000. The jury’s verdict exceeded the maximum allowable damages by \$650,000. It cannot be sustained.

D. Plaintiffs are not entitled to attorney fees.

Plaintiffs make an argument for the first time on appeal that they are entitled to attorney fees pursuant to RCW 8.25.075 -- part of the eminent domain statutes in RCW Ch. 8.25. The chapter is entitled **Additional Provisions Applicable to Eminent Domain Proceedings**. Plaintiffs' argument is procedurally defective and substantively disingenuous since it is raised for the first time on appeal and this is not an eminent domain proceeding. Issues not raised in the trial court may not be raised for the first time on appeal. *State v. DeVore*, 2 Wn. App.2d 651, 659, 413 P.3d 58 (2018), *rev. denied*, 191 Wn.2d 1005, 424 P.3d 1216 (2018). Furthermore, this statutory process does not apply to the facts of this case. RCW 8.25.075 allows the court having jurisdiction over a condemnation suit to award the condemnee fees if there is a final adjudication of condemnation. The argument does not deserve any serious consideration by this Court.

V. CONCLUSION

The issue before this Court is straight forward. The only witness to testify on the issue of damages was the Plaintiffs' own appraiser. He testified that the range of the economic loss in this case was from a low of \$650,000 to a high of \$1,000,000. The jury disregarded this evidence and awarded Plaintiff \$1,650,000, which was clearly outside the range of the

evidence. The trial court held that the jury's award was clearly outside of the range of the evidence and was the product of the jury's passion and prejudice against the County. While jury verdicts are presumed correct, the law protects the County against an unjust and excessive verdict. That is precisely what the trial court did here. This Court should affirm the trial court's order granting a new trial and remand this case to the lower court for a new trial.

VI. APPENDIX

1. Complaint
2. Amended Complaint
3. Order Granting Motion for New Trial
4. Trial Exhibit No. 20
5. Trial Exhibit No. 41
6. Trial Exhibit No. 52
7. Trial Exhibit No. 203
8. Verdict Form
9. Judge's Letter Ruling

RESPECTFULLY SUBMITTED this 12th day of June 2020.

MOBERG RATHBONE KEARNS, P.S.



JERRY J. MOBERG, WSBA No. 5282
Attorneys for Respondent Asotin County

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the foregoing via JIS/ACCORDS. I further certify that I emailed a copy of this document to:

Todd S. Richardson
Law Office of Todd S. Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
todd@myattorneytodd.com

Dated this 12th day of June 2020 at Ephrata, WA.

MOBERG RATHBONE KEARNS, P.S.



DAWN SEVERIN, Paralegal

APPENDIX 1

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SUPERIOR COURT OF WASHINGTON
WALLA WALLA COUNTY

SUPERIOR COURT OF WASHINGTON FOR WALLA WALLA COUNTY

RICHARD EGGLESTON, and)	No. 19 2 00226 5
SHANNON EGGLESTON,)	
husband and wife,)	COMPLAINT FOR BREACH OF
)	CONTRACT AND INJUNCTIVE
Plaintiffs,)	RELIEF
)	
vs.)	
)	
ASOTIN COUNTY, a public agency; and)	
ASOTIN COUNTY PUBLIC WORKS)	
DEPARTMENT, a public agency,)	
)	
Defendants.)	

Come now Plaintiffs, Richard Eggleston and Shannon Eggleston, by and through their attorney of record, David A. Gittins, of the Law Offices of David A. Gittins, and allege the following:

I. Jurisdiction

- 1.1 This court has jurisdiction over the parties and of the subject matter.
- 1.2 This action is against a county. Actions against a county may be brought in the Superior Court of either of the two nearest judicial districts in accordance with RCW

COMPLAINT FOR BREACH OF
CONTRACT AND INJUNCTIVE RELIEF 1

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COPY

1 36.01.050. Walla Walla County is one of the two nearest judicial districts to Asotin County,
2 Washington.

3
4 II. Parties

5 2.1 Plaintiffs are husband and wife and are residents of Asotin County,
6 Washington.

7 2.2 Defendants Asotin County and Asotin County Public Works Department are
8 political subdivisions of the State of Washington.

9 III. Factual Allegations

10 3.1 Plaintiffs own real property in Asotin County, Washington, which is subject
11 to both a right-of-way acquisition together with a temporary construction easement in
12 connection with defendant's Ten-Mile Bridge Project.

13
14 3.2 Plaintiffs incorporate Paragraphs 2 through 15 of the Affidavit of Richard
15 Eggleston dated March 19, 2013 filed concurrently with this complaint.

16 3.3 Plaintiffs incorporate all exhibits attached to the March 19, 2013 Affidavit of
17 Richard Eggleston filed concurrently.

18
19 IV. Cause of Action

20 4.1 Breach of Contract.

21 4.1.1 The parties entered into an agreement regarding the nature and extent
22 of a temporary construction easement upon Plaintiffs' real property and the restoration of that
23 real property following completion of the Ten-Mile Bridge Project.

24 4.1.2 Defendants, through their actions and correspondence, have told
25 Plaintiffs that they intend to breach that contract in the manner as set forth in the factual
26 allegations.
27
28

COMPLAINT FOR BREACH OF
CONTRACT AND INJUNCTIVE RELIEF 2

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7.5 That Plaintiffs' complaint be deemed amended to conform to the proof presented at trial.

7.6 Such other and further relief as the Court deems just and equitable.

Dated this 20th day of March, 2013.

LAW OFFICES OF DAVID A. GITTINS

By: *David A. Gittins*
DAVID A. GITTINS, WSBA #7796
Attorney for Plaintiffs

STATE OF WASHINGTON)
) : ss
County of Asotin)

Richard Eggleston, being first duly sworn, on oath depose and state: I am the one of the Plaintiffs above named. I have read the foregoing instrument, know the contents thereof, and believe the same to be true.

Richard Eggleston
Richard Eggleston

Signed and sworn to before me this 20th day of March, 2013.



Vonda K. Gittins
Notary Public for Washington
Residing at Clarkston
My appointment expires: 9-17-2013

COMPLAINT FOR BREACH OF
CONTRACT AND INJUNCTIVE RELIEF 4

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RECEIVED

FEB 01 2017

JERRY MOBERG
& ASSOCIATES

COPY

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

RICHARD EGGLESTON, and
SHANNON EGGLESTON, husband and
wife

Petitioners,

v

ASOTIN COUNTY, a public agency; and
ASOTIN COUNTY PUBLIC WORKS
DEPARTMENT, a public agency,

Respondents.

No. 12-2-00459-6

AMENDED COMPLAINT FOR BREACH
OF CONTRACT

COMES NOW Plaintiffs, Richard Eggleston and Shannon Eggleston, by and through their attorney of record, Todd S. Richardson, of the Law Offices of Todd S. Richardson, PLLC, and allege the following:

I. Jurisdiction

1.1 This court has jurisdiction over the parties and of the subject matter.

1.2 This action is against a county. Actions against a county may be brought in the

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Amended Complaint -1

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Superior Court of either of the two nearest judicial districts in accordance with RCW 36.01.050. Walla Walla County is one of the two nearest judicial districts to Asotin County, Washington

II. Parties

- 2.1 Plaintiffs are husband and wife and are residents of Asotin County, Washington.
- 2.2 Defendants Asotin County and Asotin County Public Works Department are political subdivisions of the State of Washington.

III. Factual Allegations

- 3.1 Plaintiffs own real property in Asotin County, Washington, which is subject to both a right-of-way acquisition together with a temporary construction easement in connection with defendant’s Ten-Mile Bridge Project.
- 3.2 Between January and April 2009, there was a negotiated land sale between the County and Plaintiffs, for a “right-of-way” acquisition. The County hired WSDOT to handle the negotiations. The lead negotiator was Melinda Raber. While the negotiations and agreements were verbal, Ms. Raber kept a daily journal/notes of the discussions and included the agreements reached. Ms. Raber’s journal/notes is the most complete record of the agreements reached and is attached hereto as Exhibit A and incorporated herein as though set forth at length. In addition to Ms. Raber’s journal/notes, there were emails between Ms. Raber and the parties that further detailed agreements made by the parties.

For example, on page 5 of the notes, looking at the first two complete paragraphs, we

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see that the temporary easement was based on a one year time frame. Then there is a discussion about the retaining wall. These are issues which were of importance from the outset of the negotiations, and which were resolved early in the negotiations.

On page 8 at paragraph 2, the discussion turned again to the time frame for the construction easement. The representation was: "You will be paid based on a twelve month time frame but the construction memo will only be in effect for the amount of time it will take to construct the approach and feather into existing driveways." The entire construction time frame was represented to be 90 - 120 days.

On page 8 at paragraph 5, the discussion about the retaining walls was revisited. "Mr. Eggleston's comments: This is less optional than it sounds. ..." "County comments: A native rock retaining wall will be ok. You can drive along the R/W on your property but there will not be an easement in place to use the county R/W. ..."

On page 9 at paragraph 9: "Can they [Egglestons] have some kind of trees along the road for privacy issues? County comments: Can plant along the R/W but can't interfere with site distance."

On page 15, about 3/4 of the way down the page, in setting forth the agreements which had been reached: "We also talked again about the rock retaining wall. They want the wall out of rip/rap type rock under State spec. #9-13.7. It was understood and agreed as to the spec. The wall would be terraced to whatever height deemed necessary at the time of construction. Cliff took notes as to how it would be on the final construction plans and Eggleston's were in agreement."

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3.3 One of the primary issues was the location of driveways for Plaintiffs, and the nature of the slopes at the County right-of-way adjacent to us and along those drives. The parties eventually agreed to the location of the drives, generally keeping them as they were pre-construction. Both sides also agreed to having all slopes on and adjacent to the drives (including the drives) retained with a terraced rockery wall. During the negotiations regarding the terraced rockery walls, the County indicated they were unsure of what Plaintiffs would want, and requested that Plaintiffs provide a specification. Plaintiff did provide the specification (State spec. #9.13.7, as noted above in Ms. Raber's journal/notes) and requested the drawings (project drawings) be made available as soon as possible so Plaintiffs could confirm that the agreement was accurately represented on the drawings.

3.4 There was also significant discussion regarding Plaintiffs' water line. The residential water line has historically run under the road, along the right-of-way, and then turns and runs into Plaintiffs' home. The importance of protecting the water line, and having access to maintain the water line, was made very clear in the negotiations and agreements. As a result, it was agreed that the line would be protected, but no work would be done on the line without Plaintiffs' presence, and that Plaintiffs would have access to the line for maintenance purposes.

3.5 As the negotiations came to a successful conclusion, there were some details and last-minute items needed to be finalized and resolved; these minor, last-minute items were addressed in a Construction Memorandum at the time of signing. A true and correct copy of the Construction Memorandum is attached hereto as Exhibit B and is incorporated herein by this reference. The Construction Memorandum, by its own terms, is a "special consideration [] made as partial consideration of the negotiated

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settlement.” It reflects only a portion of the agreement.

3.6 On June 10, 2010, the week the project went to bid, Plaintiff, Richard Eggleston, was called to the County office to review the drawings and ensure they complied with the agreement. Mr. Eggleston reviewed the drawings and notified the County of a few discrepancies, which they indicated they would correct. The County had unilaterally changed the design of the rockery terrace; however, Mr. Eggleston was satisfied with what they proposed in their plans, and therefore accepted it as a counteroffer, or the County’s clarification of the agreement that had been reached. Mr. Eggleston noted specifically that the rockeries needed to extend the length of the slope and the County Engineer (Joel Ristau) agreed.

3.7 The rockery that Mr. Eggleston specified was from the WSDOT 2008 standard specifications number 9-13.7, which includes specifications for the type of rock, chinking material, and the backfill for the rock wall. The rockery detail in the June, 2010, plans (which was accepted as the County’s counter-offer when Mr. Eggleston approved the plans (with corrections) as consistent with the agreement) was found at Page 16 of 32; and called for keyed quarry spalls with dimensions and details as noted in those plans. A true and correct copy of that rockery wall detail and relevant pages from those plans are attached hereto as Exhibit C is incorporated herein by this reference.

3.8 After the parties had reached their agreement, and after the County presented the 2010 Construction Plans to Mr. Eggleston for review and approval (which approval was given, with noted changes), the County confirmed on numerous occasions that they intended to honor all terms of the agreement, and would perform according to

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the agreement and plans. However, despite their assurances, the County chose to unilaterally change the plans and change what they would provide to Plaintiffs.

3.9 In April of 2012, Mr. Eggleston went into the public works office to discuss the plans. Plaintiff and representatives of the County had a discussion regarding the rockeries, their detail and extent. They discussed the need for the rockery to extend through the entirety of the slope of the drive, and not just to the end of the right-of-way. Although Defendants assured Plaintiff they would keep their word, they refused to provide the “current plans” for Plaintiffs’ review. The “April Plans” were not provided to Plaintiffs until December, when they were provided as part of a Public Records Act lawsuit.

3.10 Defendants knew and understood their duty to properly build the rockery walls. Correct versions of the rockery walls were included in the “Nez Perce Submittal” set of drawings which were provided to Plaintiffs in July, 2012. A true and correct copy of relevant pages of the Nez Perce Submittal set of plans are attached hereto as Exhibit D and are incorporated herein by this reference as though set forth at length.

Despite knowing and understanding their duty to properly build the rockeries, Defendants schemed to breach the contract. Between May of 2012, (the time of the production of the Nez Perce Submittal set of plans) and July of 2012, Defendants unilaterally decided to remove the rockeries. This is evidenced by the July Plans, which were requested by Plaintiffs as public records, but which Defendants refused to provide (claiming they did not exist). The July Plans were obtained by Plaintiffs in January of 2013, during a deposition which was part of the Public Records Act litigation brought by Plaintiffs to force the production of the April and July plans.

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604 Sixth Street
Clarkston, WA 99403
(509) 758-3397, phone
(509) 758-3399, fax

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A true and correct copy of the relevant portions of the July Plans are attached hereto as Exhibit E and incorporated herein by this reference.

3.11 Between the production of Exhibit E (the “July Plans”) and the September Plans, which became the Construction Plans, the County eliminated the rockery between driveway C and D. A true and correct copy of the relevant pages of the September 2012 plans are attached hereto as Exhibit F and are incorporated herein by this reference. The September Plans document the Defendants’ unilateral decision to remove the rockery, replace it with an unretained slope and with grasses and forbs.

3.12 Page C9.1 of 42 of the September Plans shows the Defendants designed to have their storm water directed onto Plaintiffs’ land. As shown on the September Plans there was planned for a 12 inch culvert to funnel the storm water onto Plaintiffs’ horse pasture. This feature was modified, slightly, after the Plaintiff attempted to obtain a temporary injunction. Defendants added a small catch basin on the edge of the road above driveway D; while much of the storm water collected on the project follows the designed course on to Plaintiffs’ land, this catch basin does catch a small percentage of the storm water.

3.13 In 2010, the initial construction began on the project. At some point following the commencement of the project, the contractor removed Driveway C (the “Business driveway”). Prior to the business season of 2011, Plaintiffs contacted Defendants about installing the driveway so that Plaintiffs could arrange for advertising, insurance, and necessary requirements for running their business; Defendants failed or refused to put in the driveway. The driveway remained unusable until April 2, 2013, when the contractor installed it pursuant to agreement. That same day,

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1 Defendants provided a written Construction Memorandum to Plaintiffs to sign,
2 setting forth an agreement to build the business driveway; Plaintiff added language
3 that the driveway was to be where it was built on April 2, 2013. A true and correct
4 copy of the memorandum as written and signed on April 2, 2013 is attached hereto
5 as Exhibit G, and incorporated herein by this reference as though set forth at length.
6 Despite the signed construction memorandum, on April 3, 2013, Defendants placed
7 a guardrail extending from the bridge north and east across the business driveway.
8 Since the removal of the driveway in 2010 until present day, Plaintiffs have been
9 deprived of the use of the business driveway.

10 3.14 During the completion of the construction of the project, the Defendants again
11 decided to unilaterally change the work to be done. Attached hereto as Exhibit H,
12 and incorporated by this reference, is a true and correct copy of a letter from Jim
13 Bridges, County Engineer for Asotin County, dated March 6, 2013. The letter was
14 from Defendants to inform Plaintiffs that Defendants had decided not to move
15 Plaintiffs' water line as had been agreed. The result is that Plaintiffs cannot access
16 the junction and shut off for the water line as it is now located under the new road,
17 with no manhole or other access provided; further the water line is now buried
18 somewhere under the fill brought in for the unretained slope, making it difficult to
19 find the line, and very expensive to maintain it.

20 IV. First Cause of Action

21 Breach of Contract

22 4.1 Plaintiffs reallege each paragraph 1.1 - 3.17, inclusive, as though set forth at length.

23
24 4.1.1 The parties entered into a valid contract. The contract is evidenced by the
25 contemporaneous writings of Linda Raber, and provided for the Defendants
26

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to purchase real property from Plaintiff for a sum of money and other good and valuable consideration.

4.1.2 Defendants, breached that contract by failing to perform; Defendants paid the money they were obligated to pay, but failed and refused to perform the other terms as required.

4.1.3 Plaintiff performed his part of the contract in that Plaintiff conveyed the real property and a construction easement to Defendants.

4.1.4 Plaintiff has been damaged by said breach in an amount to be proven at trial.

V. Second Cause of Action

Damage to Water Line

5.1 Plaintiffs reallege each paragraph 1.1 - 3.17, inclusive, as though set forth at length.

5.1.1 As part of the contract for the purchase of land from Plaintiffs, Defendants agreed to coordinate any work on the Plaintiffs' water line with Plaintiffs in an effort to mitigate disruption of service, and to allow Plaintiff to observe the work and ensure that his water line was undamaged.

5.1.2 Defendants, in breach of this duty owed to Plaintiffs, caused and allowed work to be done on and around Plaintiffs' water line without prior notification to Plaintiffs. Through Defendants' neglect, the water line was struck and damaged by Defendants, causing Plaintiffs to have to replace a section of the waterline.

5.1.3 Defendants then excessively compacted the ground over Plaintiffs' water line, causing the line to plug. Plaintiffs were forced to rent equipment and spend many hours of labor digging out the line and clearing the plug from the line so that Plaintiffs could have water in their home.

5.1.4 This plug was the direct and proximate result of Defendants breach of a duty

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owed to Plaintiffs. Plaintiffs were damaged by the breach.

5.1.5 Defendants are liable to Plaintiffs for the damages suffered and in an amount to be proven at trial.

VI. Third Cause of Action

Takings - Inverse Condemnation

6.1 Plaintiffs reallege each paragraph 1.1 - 3.17, inclusive, as though set forth at length

6.1.1 Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.

6.1.2 Defendants have taken in fact land owned by Plaintiffs, by first refusing to build the "business driveway" to allow access to Plaintiffs' business, and then by putting a guardrail across the driveway, thereby preventing the driveway from being used by Plaintiffs' business and customers. In the Spring of 2011, Plaintiffs contacted Defendants and asked for a temporary access to be put in place, and Defendants refused. Once the driveway was built, on April 2, 2013, it was then blocked by a guardrail put in place by Defendants on April 3, 2013.

6.1.3 Defendants have not engaged in any formal exercise of the power of eminent domain to acquire the business nor the driveway.

6.1.4 As a result of Defendants taking of the business driveway, and blocking access to Plaintiffs' business, Plaintiffs were forced to close their business which had been open since 2000, and included boat rental. Due to the inability of Plaintiffs to open their business, they had to sell their boats. Plaintiffs have continuously been denied use of their land and their business

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driveway by Defendants actions in tearing out and failing or refusing to put in a temporary access, and then blocking the driveway by putting a guardrail across the driveway.

6.1.5 Defendants have further taken land owned by Plaintiffs by running their storm water onto Plaintiffs land, and thereby taking a flowage easement over the property of the Plaintiffs.

6.1.6 Both the taking in fact and the flowage easements are in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, section 16 of the Washington Constitution.

6.1.7 Defendants know they blocked off Plaintiffs' business driveway.

6.1.8 Defendants know that the water is in quantities greater than and in a manner different than either the natural flow or the conditions which existed prior to the construction of the project. The difference includes changes in quantity, quality, and the fact that the storm water has now been designed to run off onto specific locations of Plaintiffs' property.

6.1.9 Plaintiff has been damaged by these takings in an amount to be proven at trial and is entitled to an award of damages to compensate him for the takings, including an award of treble damages as authorized by law.

6.1.10 Plaintiff had to hire the services of the Law Offices of Todd S. Richardson, PLLC, to represent him in this matter. Plaintiff is entitled to an award of attorney fees and costs as authorized at law.

VII. Fourth Cause of Action

Water Trespass - Past and Future

7.1 Plaintiffs reallege each paragraph 1.1 - 3.17, inclusive, as though set forth at length

7.1.1 Plaintiffs properly and timely filed a Notice of Tort claim with Defendants,

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and this action is timely brought before the Court.

7.1.2 As the design and construction of the Ten Mile Bridge Project progressed, Plaintiff warned Defendants that if the project were to be completed as designed, it would channel Defendants' storm water onto Plaintiffs' property and damage Plaintiffs.

7.1.3 In an effort to mitigate the damages that were about to be caused to their land, Plaintiffs brought before the Court seeking a Temporary Restraining Order. The motion was denied and Defendants proceeded with the project.

7.1.4 Defendants completed the road as designed, with the addition of a small catch basin near the upper end of Plaintiffs' driveway. The catch basin, however only captures a small portion of the run off, the balance of the water flows on the road, as designed, and channels off onto Plaintiffs' property.

7.1.5 The project had been designed to run into a rockery area on Plaintiffs' land, and then through a culvert running under Plaintiffs' driveway and then to flood onto Plaintiffs' horse pasture. The changes in the project changed the storm water runoff locations, but the water still flows onto Plaintiffs' property.

7.1.6 The channeled storm water now flows at various locations onto Plaintiffs' property, including but not limited to, down Plaintiff's driveway. The channeled storm water now courses down the driveway and on either side thereof, causing significant erosion and damage to Plaintiffs, including the washing out of the driveway base, eroding the asphalt drive, and causing accumulations of gravel, rock ,dirt and debris on the driveway and into the pasture area; carrying oil, dirt, herbicides and other unknown chemicals and pollutants onto Plaintiffs property killing trees and vegetation on Plaintiffs' property.

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7.1.7 Defendants have a duty to properly design the roadway and to properly contain and control their storm water runoff in such a manner so that it does not trespass on Plaintiffs' land, nor cause damage thereto. Defendants breached this duty.

7.1.8 Plaintiffs have been damaged by Defendants breach, suffering on-going water trespass, having their land carry the burden of Defendants storm water and the chemical and pollutants therein, having trees and vegetation killed and sickened by the polluted storm water, suffering erosion, and additional damages as will be proven at trial.

7.1.9 Plaintiffs' damages have been directly and proximately caused by Defendants' breach of their duty.

7.1.10 Defendants are liable to Plaintiffs in an amount to be proven at trial. Plaintiffs assert that, consistent with Defendants' own storm water regulations and laws, that Defendants are liable in the amount of \$1000 per day for this violation.

IX. Prayer

Now, therefore, Plaintiffs pray for the following relief:

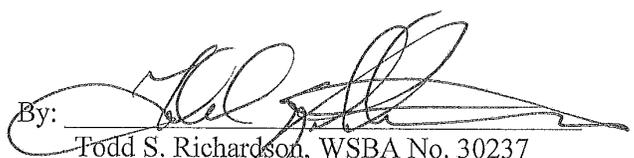
- 9.1 Damages in the amount to be specified at the time of trial.
- 9.2 Costs and attorney fees.

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Dated this 27 day of January, 2017

LAW OFFICES OF TODD S. RICHARDSON, PLLC

By: 
Todd S. Richardson, WSBA No. 30237
Attorney for the Plaintiffs

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APPENDIX 3

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FILED
MAR 25 2019
KATHY MARTIN
WALLA WALLA COUNTY CLERK

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

RICHARD EGGLESTON, and
SHANNON EGGLESTON, husband and wife,

NO. 13-2-002265-5

Plaintiffs,

**ORDER GRANTING MOTION FOR
NEW TRIAL**

v.

ASOTIN COUNTY, a public agency; and
ASOTIN COUNTY PUBLIC WORKS
DEPARTMENT, a public agency,

Defendants.

This matter came before the above-titled Court, on Defendants' Motion for a new trial. The Court being fully apprised, and after reviewing the record, and having examined the written arguments of counsel, the Court being fully advised in the premises finds that:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Defendants' motion be and is GRANTED.

SO ORDERED MAR 25 2019, 2019.

JOHN W. LOHRMANN

/s/

JUDGE JOHN W. LOHRMANN
SUPERIOR COURT JUDGE

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Presented by:

JERRY MOBERG & ASSOCIATES, P.S.

BRIAN A. CHRISTENSEN, WSBA No. 24682
Attorneys for Defendants

Approved as to form and notice of presentation waived;

TODD S. RICHARDSON, WSBA No. 30237
Attorney for Plaintiffs

APPENDIX 4

Craig Miller

From: Joel Ristau
Sent: Wednesday, June 8, 2011 7:47 AM
To: Craig Miller; Harold Beggs
Subject: Fw: Access / Schedule/ Rockeries

Fyi below.

I will be discussing Rich's approach accommodation today during the consultation meeting with the tribes. Harold, fyi this is the first communication I've received from Rich since your and Jim's visits with him.

Craig, please check with TDH to check on the location of planned rockeries along Rich's property to see if anything planned has changed since the original construction drawings. If not, we can just give him the original plan sheet.

I will tell Rich that I will respond next week when I'm back in the office.

Thanks.

From: Rich Eggleston <rje@tds.net>
To: Joel Ristau
Sent: Tue Jun 07 22:58:08 2011
Subject: Access / Schedule/ Rockeries

Hello Joel,

I see that there has been no recent progress at the Ten Mile Bridge construction site. As you know from our many conversations, having the Aardvark's business access (creek drive) separate from our personal family access has always been of utmost concern to us. In fact, I previously attempted to address the county commissioners relative to this issue a couple of months ago, but was disallowed an opportunity to speak at the commission meeting.

As I have made clear on a number of occasions; we are not willing to jeopardize the safety and wellbeing of our children by allowing uncontrolled public access to our business through our private drive. We simply cannot control who might come in, what their state of sobriety may, or the speed with which they may travel. Our experience over the years has led us to the conclusion it would be unwise to trust the general public's "good judgment", and that separation is the best policy.

Therefore, we have foregone a number of rentals so far this spring, and we have decided we are unable to open for business this summer because of the failure of the County to provide us with adequate business access. We have missed several advertising and insurance deadlines because of the uncertainty. You may recall that during our land purchase negotiation, we were told that the construction interruption would be 90-110 days; and we were willing to sell our land at the negotiated price with the understanding that that timeframe would be the limit of the disruption to our lives, property, and business. We are approaching 300 days with no approved plan to date, and no plan to finish construction. Please let me know what the County plans to do to make us whole on our loss of income, and what the plan for completion of the project is, especially the portion of the project on and adjacent to our property that is unaffected by Indian graves.

Also, it seems to me there may be some misunderstanding as to what the scope of work is relative to the "rockery walls" adjacent to, and on, our property. Could you please provide me a sketch showing your interpretation of the location and extent of the required rockeries? Also, if you plan details other than those previously approved and shown on the construction drawings, I would appreciate a sketch of your plans there. Is there any reason I cannot pick this sketch up next Monday? What I'm looking for is a simple plan view with a penned in line showing location of the rockeries... something off the photocopy machine at 11x17 would be acceptable.

Thank you for your attention to these matters.

Rich



APPENDIX 5



Asotin County
PUBLIC WORKS DEPARTMENT
P.O. Box 160
Asotin, Washington 99402-0160
Phone: (509) 243-2074
Fax: (509) 243-2003

County Roads
Solid Waste Department

December 3, 2012

Mr. Rich Eggleston
7357 Snake River Road
Asotin, WA 99402

Dear Rich;

As a follow up to our meeting held Tuesday, November 6, 2012, in my office, and a review of the April 16, 2009 construction memorandum for the 10 Mile No. 1 project, the County is ready to move forward with the construction of all of the items as described below, if and when you agree to let us on your property. It is the County's position that we have 365 days of construction easement to use your property to complete the projects you want done, but if you don't want us on your land, we can save time and tax payer money by eliminating any work on your property.

Regarding other issues you raised during that meeting, the County position is as follows:

1) Waterline

Per the agreed upon construction memorandum, right to enter on to your property was granted to make the necessary connections to relocate your private waterline. However, since you determined that the County and its contractor cannot enter on to your property these connections cannot be completed.

Asotin County will direct the contractor to install and extend the dry waterline under all county road improvements for future connection. No work will be performed to make the upstream or downstream connections without your permission to enter the land under the terms of the construction easement

2) Fences

Per the Construction Memorandum we paid you \$20,450, at your request, to construct the fences and gates along your westerly property line. There is no basis to give you more money, we stand by the agreement

3) Terraced Rockery Walls

Per the agreed upon construction memorandum, the only terraced walls to be constructed were between driveways #2 and #3 which is shown on the current construction plan set.



RECYCLED PAPER

**PLAINTIFF'S
TRIAL EXHIBIT**

41

ASOTIN CO 4024 - 001118

APPENDIX 022

APPENDIX 6

Asotin County
P.O. Box 864 - 101 2nd Street
ASOTIN, WA 99402
1-509-243-2065
Fax 1-509-243-4978

Memo

TO: Rich Eggleston
and Asotin County

DATE 4/2/13

SUBJECT: Ten Mile Bridge Project

It has been agreed upon by the undersigned to field fit Driveway "C" to move it closer to its pre-construction location near Ten Mile Creek.

- As generally set & Located 4/2/13.

Craig S. Miller

SIGNED

Please reply

No reply necessary

MLCC-800-2
PRINTED IN U.S.A.

PLAINTIFF'S
TRIAL EXHIBIT

52

ASOTIN CO 4024 - 001184

APPENDIX 024

APPENDIX 7



Date: , 2009

To: Asotin County

FROM: Linda Raber, Property & Acquisition Specialist
South Central Region, WSDOT

SUBJECT: Construction Item
10 Mile Bridge No.1, CRP 238

Richard J. Eggleston and Shannon M. Eggleston
FA No. BRS-C023(008)
Right of Way Plan Sheet 2 of 3 Sheets
Parcel Numbers: 5-00105 (tax parcel #) 1-049-00-054-0000-0000

In the transaction with Richard J. Eggleston and Shannon M. Eggleston, husband and wife, Parcel No. 5-00105, on the above-referenced project, the following special consideration was made as partial consideration of the negotiated settlement.

It is understood and agreed that Asotin County or its assigns, agrees to install a six inch SDR 35 PVC sleeve for a private water line that now exists under the B Line Road and under the Snake River Road. Both lines will be in the approximate location as the existing lines. The lines will be replaced with like materials and reconnected on both sides of the road at the approximate location of the existing connection approximately at Station 15+60.

All future maintenance of said lines will be the obligation of the property owner, their heirs, successors, or assigns. Any future repairs of the PVC sleeve will be the responsibility of the County of Asotin. It is further understood and agreed that any future replacements of said water line under said roadway will require the property owners to comply with County requirements.

The grantors herein further grant to the County of Asotin or its agents, the right to enter upon the grantors' remaining lands where necessary, to connect the water lines.

It is also understood and agreed that the County of Asotin, or its assigns, agrees to construct three road approaches at the approximate location of:

Driveway approach #1 (+/- Station 14+10) Most southerly approach

Driveway approach #2 (+/- Station 15+50) Center approach (primary approach)

Driveway approach #3 (+/- Station 16+04) Most northerly approach

Retaining wall between approach #2 and #3 to retain the integrity of the approaches constructed in a terraced design of native rock or rip/rap stated in DOT standard 9-13.7 or like material.

Page 2
Construction Memorandum

The "pig pen" located approximately at Station 17+40 will remain in the same location. The property owner will be allowed to use the portion of right of way necessary to maintain the integrity of said pig pen. Notification will be given to the property owner if the pigs need to be temporarily moved during road construction.

This encroachment that is being allowed is subject to the future needs of Asotin County. The county reserves the right to use the subject right of way if a future need arises.

~~This encroachment of the county right of way is being permitted to the present owners. Said permission of encroachment will be terminated upon any change of ownership.~~

4/16/09 [Signature]

The grantors herein further grant to the County of Asotin or its agents, the right to enter upon the grantors' remaining lands where necessary, to perform any work necessary for the construction of said approaches.

This memorandum is required for the following reasons:
Part of Negotiations

Asotin County
By: [Signature] 4/16/09
Joel M. Ristan, PE Asotin County Engineer Date

Property Owners
By: [Signature] 4/16/09
Richard J. Eggleston Date

By: [Signature] 4/16/09
Shannon M. Eggleston Date

APPENDIX 8

FILED
KATHY MARTIN
COUNTY CLERK

2018 OCT -8 A 11: 34

WALLA WALLA COUNTY
WASHINGTON

BY Palmer

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

RICHARD EGGLESTON, and SHANNON
EGGLESTON, husband and wife

No. 13-2-00226-5

Plaintiffs,

SPECIAL VERDICT FORM

v

ASOTIN COUNTY, a public agency; and
ASOTIN COUNTY PUBLIC WORKS
DEPARTMENT, a public agency,

Defendants.

WE, the Jury, answer the questions submitted by the Court as follows:

QUESTION 1: Was there a breach of contract by Defendants?

ANSWER: Yes (write "yes" or "no")

(INSTRUCTION: if you answered "no" to Question 1, go to question 3. If you answered "yes" to Question 1, then go to Question 2.)

QUESTION 2: What is the total amount of the Plaintiff's damage caused by the breach of contract?

ANSWER: \$ 70,000 ~~70,000~~ off 800,000 a

(INSTRUCTION: go to Question 3)

13-2-00226-5
VRD 65
Verdict Form
3986690



ORIGINAL

1 QUESTION 3: Was there an inverse condemnation by the Defendants?

2 ANSWER: Yes (write "yes" or "no")

3
4 (INSTRUCTION: if you answered "no" to Question 3, go to question 5. If you answered "yes"
5 to Question 3, then go to Question 4.)

6
7 QUESTION 4: What is the total amount of the Plaintiff's damage caused by the inverse
8 condemnation?

9 ANSWER: \$ ~~750,000~~ ^{600,000} ~~ee~~

10
11 QUESTION 5: Was there a Water Trespass committed by the Defendants?

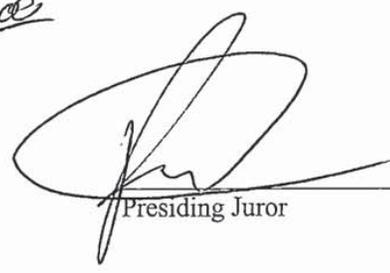
12 ANSWER: Yes (write "yes" or "no")

13
14 (INSTRUCTION: if you answered "no" to Question 5, sign this verdict form. If you answered
15 "yes" to Question 5, then go to Question 6.)

16 QUESTION 6: What is the total amount of the Plaintiff's damage caused by the water
17 trespass?

18 ANSWER: \$ 250,000 ~~ee~~

19
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21 DATE: 10/8/18



Presiding Juror

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APPENDIX 9

S

FILED
BATHY MARTIN
COUNTY CLERK

WALLA WALLA COUNTY SUPERIOR COURT

Judge John W. Lohrmann
315 West Main Street
PO Box 836
Walla Walla, Washington 99362

2018 DEC 31 P 2:45

WALLA WALLA COUNTY
WASHINGTON

Fax: (509) 524-2777

Phone: (509) 524-2790

December 31, 2018

Mr. Brian A. Christensen, Esq.
Jerry Moberg & Associates, P.S.
PO Box 130
Ephrata, WA 98823

Mr. Todd S. Richardson, Esq.
Law Office of Todd S. Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403

Re: Eggleston v. Asotin County
Walla Walla County Superior Court Cause No: 13-2-00226-5

Counsel:

Please accept this letter as the decision of the court regarding the Defendants' Motion for New Trial. The Court has reviewed the file, including the memoranda and declarations provided by counsel respectively, the jury instructions, the Special Verdict Form returned by the jury, the testimony, and counsels' respective closing arguments.

B

At the outset, the Court acknowledges that there is a presumption that the jury followed the instructions and that the verdict is correct. RCW 4.76.030. Neither party objected to any of the court's instructions, nor did either complain about any omissions. There were no obvious errors that would justify granting a new trial to readdress liability issues. There was ample basis in the facts for the jury to conclude that the Defendants breached the County's contract with the Plaintiffs by not building the rockeries as the parties had earlier agreed; that the Defendants inversely condemned Plaintiffs' property by rendering useless their business driveway; and that Defendants committed a trespass by improperly directing water onto the Plaintiffs' land.

The Plaintiffs called an experienced real estate agent, Steven Knight, to testify regarding the quality and condition of the property and its market value. Mr. Knight opined that with the business driveway the property was worth \$750,000 up to \$1 million. Without the business driveway the market value is reduced to \$350,000. However, upon cross-examination he testified that neighboring property had sold for \$100,000 per acre which defense counsel pointed out should mean that the Eggleston's eight-acre property -- which is more desirable because of the beach and river access -- should be worth at least \$800,000 in its current condition. During closing argument, Plaintiffs' counsel turned the tables somewhat, reasoning to the jury that

13-2-00226-5
LTR 75
Letter
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because Mr. Knight had testified that the current market value was only approximately one-third of what it would otherwise be, that the jury might therefore infer that the property with the driveway should have been worth as much as \$2.4 million (3 x \$800,000). Mr. Knight himself did not so testify. While it is true that a party is entitled to the benefit of all the evidence whether or not that party introduced it (Instruction No. 1), a jury is not entitled to conjecture. The Plaintiffs now again rely upon this bad logic to justify the verdict. The verdict amount was substantially greater than what was requested in closing argument and was not supported by evidence.

The Plaintiffs did prove that they sustained damages because of the Defendants' wrongful acts. After the County cut off the business access to the river and beach, the Egglestons closed their boat business for safety reasons. They were deprived of income from the business because of the lack of the business driveway, both before the construction began as well as after the road construction was completed, with the new business driveway blocked by a newly installed guardrail. Also, instead of getting the attractive rockeries that they had expressly bargained for they got poorly landscaped dirt slopes. Mr. Knight testified that rockeries would add to the value of the property "150 to \$250,000." He further testified that latent defects such as the improperly buried water line and drainage that improperly directed water onto the land had a further negative impact of 50 to \$100,000. Except for effect on property value, the Plaintiffs made little effort either to otherwise quantify the loss of business income, the loss due to flooding, and the loss caused by the breach of contract. There was no testimony about a loss of \$1.65 million.

As the Plaintiffs presented their case, they deliberately drove home the point that Asotin County treated Mr. Eggleston badly throughout the entire project. There was testimony that a county commissioner openly disparaged Mr. Eggleston at a public hearing. Exhibit 94. There was testimony that the dirt slope was constructed instead of the designed and promised rockeries to minimize construction costs. The County ignored Mr. Eggleston's concern about drainage issues and refused to make any concessions to adjust the guardrail blocking the business driveway. While the County belatedly offered to widen the driveway, the testimony was that the fix would have created a structural weakness in the driveway. The Court can only conclude from the above facts and circumstances that the jury based their damage awards at least in part on a desire to punish the County for its bad treatment of one of its own citizens.

The Court has considered the question whether the jury verdict was excessive and has further considered possible exercise of the inherent right of courts to require remittitur. *See DeWolf and Allen*, 16 Wash. Prac., *Tort Law and Practice* § 6:37 (4th ed.). Applying the applicable principles as summarized by DeWolf and Allen, and as mandated by CR 59(a)(5), to overcome a verdict there must be an "unmistakable" indication that the verdict is excessive. Here there is no evidence to support breach of contract damages of \$800,000; the Plaintiffs asked for \$250,000. Such award was surprising to say the least, and it does appear to have been arrived at as the result of passion (in this case, anger) or prejudice against an overbearing government agency.

It is impossible to discern from the Special Verdict Form how and to what extent the jury adjusted its damage amounts on the next interrogatories to exclude overlapping or repetitive damages as it was instructed. One might consider in hindsight whether the Special Verdict Form

could have included more specifically-worded interrogatories that would have itemized and calculated damages with more exactitude, but neither party offered such.

The statute governing a possible increase or reduction of verdict as an alternative to a new trial is RCW 4.76.030. It provides:

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, *the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict*, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such a verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

Emphasis added. In his closing argument counsel for the Plaintiffs properly reviewed the testimony as to how the Defendants' wrongful acts impacted the value of the Plaintiffs' property. The inverse condemnation caused by the blocked business driveway resulted in a loss of value as much as \$650,000. Properly constructed rockeries would have added a value of as much as \$250,000. The existence of latent defects including water drainage had a negative impact of as much as \$100,000. While arguably not strictly within the definitions of damages described in Instruction No. 24, these amounts, totaling \$1 million, are within the range of credible evidence.

The Court therefore finds, under the authority of RCW 4.76.030, that the Defendants' Motion for New Trial should be granted unless the Plaintiffs consent to a reduction of the judgment amount by \$650,000, to a judgment of \$1 million. Appropriate orders should be presented in accordance with LR 52.

Sincerely,

WALLA WALLA COUNTY SUPERIOR COURT



John W. Lohrmann, Judge

Cc: Clerk

MOBERG RATHBONE KEARNS

June 12, 2020 - 2:59 PM

Transmittal Information

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