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NO. 82248-4

SUPREME COURT OF THE STATE OF WASHINGTON

TIMOTHY J. RUIZ,

Appellant,

v.

STATE OF WASHINGTON; WASHINGTON STATE PATROL;
HANCOCK TIMBER RESOURCE GROUP, a division of Hancock
Natural Resource Group, Inc., a Delaware corporation; HANCOCK
FOREST MANAGEMENT INC., a Delaware corporation; HANCOCK
NATURAL RESOURCE GROUP, INC., a Delaware corporation; WHITE
RIVER FORESTS LLC, a Delaware corporation; and WHALEN
TIMBER, Inc., a Washington corporation,

Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION..... | 1 |
| II. | NATURE OF CASE AND DECISION | 1 |
| III. | ISSUE PRESENTED FOR REVIEW | 3 |
| IV. | COUNTERSTATEMENT OF THE CASE | 4 |
| | A. Procedural Posture | 4 |
| | B. Counterstatement Of Facts..... | 5 |
| | 1. The Windstorm..... | 5 |
| | 2. The Riparian Management Zone | 9 |
| V. | ARGUMENT | 11 |
| | A. Standard Of Review..... | 11 |
| | B. The State Has Statutory Immunity Under The Circumstances Of This Case..... | 12 |
| | C. Even If The State Did Not Have Immunity Under RCW 79.09.330, The Applicable Case Law Requires Judgment For The State | 15 |
| | 1. The Applicable Standard Of Care | 16 |
| | 2. A Property Owner Who Has No Actual Or Constructive Notice Of A Dangerous Condition On The Land Has No Duty To Take Corrective Action To Prevent Harm To Others | 17 |
| VI. | CONCLUSION | 22 |

TABLE OF AUTHORITIES

Cases

| | |
|--|------------|
| <i>Albin v. National Bank of Commerce</i> , 60 Wn.2d 745, 375 P.2d 487 (1962) | passim |
| <i>Bird v. Walton</i> , 69 Wn. App. 366, 848 P.2d 1298 (1993)..... | 17 |
| <i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999)..... | 16 |
| <i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003)..... | 11 |
| <i>Keller v. City of Spokane</i> , 104 Wn. App. 545, 17 P.3d 661 (2001)..... | 16 |
| <i>Leroy v. State</i> , 124 Wn. App. 65, 98 P.3d 819 (2004)..... | 17 |
| <i>Lewis v. Krussel</i> , 101 Wn. App. 178, 2 P.3d 486 (2000)..... | 17, 20, 21 |
| <i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000)..... | 11 |
| <i>Nibarger v. City of Seattle</i> , 53 Wn.2d 228, 332 P.2d 463 (1958) | 16 |
| <i>Sattler v. City of Mukilteo</i> , 124 Wn. App. 1048 (2004), <i>review denied</i> , 155 Wn.2d 1004, 120 P.3d 578 (2005)..... | 17 |
| <i>Wright v. Kennewick</i> , 62 Wn.2d 163, 381 P.2d 620 (1963) | 17 |

Statutes

| | |
|---------------------------------------|--------|
| Forest Practice Act (RCW 76.09) | 1 |
| RCW 4.24.210 | 14 |
| RCW 4.24.210(4)..... | 14 |
| RCW 4.92.090 | 16 |
| RCW 47.32.130 | 7, 10 |
| RCW 47.32.130(1)..... | 10 |
| RCW 76.09..... | 3 |
| RCW 76.09.330 | passim |
| RCW 90.58 | 3 |
| RCW 90.82.050 | 2 |

Rules

| | |
|--------------------|----|
| ER 201 | 7 |
| ER 407 | 10 |
| GR 14.1(a)..... | 17 |
| RAP 4.2(a)(4)..... | 5 |

Constitutional Provisions

| | |
|----------------------------|----|
| Const. art. II, § 26 | 12 |
|----------------------------|----|

I. INTRODUCTION

The legislature grants the State of Washington immunity for personal injury under RCW 76.09.330 when trees are left unharvested by a forest landowner in riparian or upland areas in order to protect fish and wildlife habitats. In this case, the trial court correctly found that the unharvested tree which injured Timothy J. Ruiz had been left standing in accordance with the Forest Practice Act (RCW 76.09) and, consequently, that RCW 76.09.330 granted the State immunity under the circumstances of Mr. Ruiz's personal injury case.

The State of Washington respectfully requests that this Court affirm the trial court's decision and dismiss Mr. Ruiz's appeal.

II. NATURE OF CASE AND DECISION

Mr. Ruiz was injured when the top of a healthy evergreen fir tree blew across the cab of his truck during a fierce winter storm on SR 410. The fir tree which injured Mr. Ruiz was included within a Riparian Management Zone (RMZ), a buffer zone required under Federal, State, and County forest practice rules and regulations to protect rivers and streams. In this instance, the RMZ at issue protected the White River

channel and the perennial streams that border SR 410 southeast of Enumclaw.¹

RCW 76.09.330² provides that:

The legislature hereby finds and declares that riparian ecosystems on forest lands in addition to containing valuable timber resources, provide benefits for wildlife, fish, and water quality. The legislature further finds and declares that leaving riparian areas unharvested and leaving snags and green trees for large woody debris recruitment for streams and rivers provides public benefits including but not limited to benefits for threatened and endangered salmonids, other fish, amphibians, wildlife, and water quality enhancement. The legislature further finds and declares that leaving upland areas unharvested for wildlife and leaving snags and green trees for future snag recruitment provides benefits for wildlife. Forest landowners may be required to leave trees standing in riparian and upland areas to benefit public resources. It is recognized that these trees may blow down or fall into streams and that organic debris may be allowed to remain in streams. This is beneficial to riparian dependent and other wildlife species. Further, it is recognized that trees may blow down, fall onto, or otherwise cause damage or injury to public improvements, private property, and persons. Notwithstanding any statutory provision, rule, or common law doctrine to the contrary, the landowner, the department, and the state of Washington shall not be held liable for any injury or damages resulting from these actions, including but not limited to wildfire, erosion,

¹ The section of SR 410 where Mr. Ruiz was injured is the Chinook Scenic Byway, one of the most beautiful scenic highways in Washington. It has been designated an All-American Road and provides access to Crystal Mountain Ski Resort year round. In the summer months, SR 410 is a primary access to Mount Rainier National Park (and the Sunrise Visitors Center) and serves as a major link, via Chinook and Cayuse passes, between eastern and western Washington.

² RCW 76.09.330 is one of a number of environmental statutes that provide immunity in order to ensure the protection of natural resources. See, e.g., RCW 90.82.050 (Watershed planning / Limitations on Liability). The text of the primary statutes referred to in the State's brief are included in Appendix A.

flooding, personal injury, property damage, damage to public improvements, and other injury or damages of any kind or character resulting from the trees being left (emphasis added).

At summary judgment the trial court concluded that the State and its agencies were immune from liability under RCW 76.09.330:

Assuming the trees in the Bridgecamp located on either side of the stream were required to be left standing pursuant to RMZ rules under the Forest Practices statute, then the State is immune from liability to plaintiff for his injuries and damages caused by the tree falling pursuant to RCW 76.09.[330].³

III. ISSUE PRESENTED FOR REVIEW

1. Did the trial court correctly hold that the State of Washington was immune from liability under RCW 76.09.330 where Mr. Ruiz was injured by the top of healthy tree falling from a stand of trees that had been protected under the Forest Practices Act (RCW 76.09, et seq.)?

2. In the alternative⁴, does the long existing precedent of Washington's courts⁵ bar liability for personal injuries to a motorist struck

³ The trial court's assumption is correct. It is uncontested that the tree at issue in this case was left standing in accordance with forest practice rules in order to protect the White River. CP at 82-102. As with all state shorelines, logging was prohibited within two hundred feet. RCW 90.58, et seq.

⁴ The Court does not need to reach this issue because Mr. Ruiz does not contest that the stand of trees at issue in this case was preserved in accordance with the Forest Practices Act or that RCW 76.09.330 provides immunity for the State and its agencies.

⁵ The natural growth of native fir trees adjacent to highways in the state of Washington that might fail and fall across the highway during a major windstorm is not an unsafe, dangerous condition requiring removal of the tree. *Albin v. National Bank of Commerce*, 60 Wn.2d 745, 375 P.2d 487 (1962). See also, *Lewis v. Krussel*, 101 Wn. App. 178, 2 P.3d 486 (2000).

by a segment from a healthy fir tree broken off during a major winter windstorm on a two-lane, forested mountain highway where the State had no actual or constructive notice of an unsafe, dangerous condition on its highway at this location before the accident?

IV. COUNTERSTATEMENT OF THE CASE

A. Procedural Posture

Mr. Ruiz filed this case on March 9, 2007, and filed an amended complaint on October 25, 2007. CP at 1-10, 21-36.

The State of Washington moved for summary judgment on June 27, 2008. CP at 60-65, 82-102, 103-18, 119-62, 163-82. The State's motion identified alternative grounds for dismissal: (1) immunity under RCW 76.09.330 and (2) the Washington common law precedent that bars liability for personal injuries from falling trees. CP at 163-79. Co-defendants White River Forests LLC, Hancock Natural Resource Group, Inc., Hancock Forest Management, Inc., and the "Hancock Timber Resource Group" (Hancock) filed a motion for summary judgment on similar grounds that was heard on the same date. CP at 183-99.

The trial court granted both motions on October 9, 2008, finding that the State defendants and Hancock were immune from liability under RCW 76.09.330. CP at 490-92, 493-96. The trial court denied Mr. Ruiz's motion for reconsideration. CP at 487-88.

Mr. Ruiz then sought direct review by this Court arguing no prior case addresses immunity under RCW 76.09.330. CP at 497-507. The State of Washington and Hancock have opposed direct review on the grounds that Mr. Ruiz fails to demonstrate that his case is one “involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination” by this Court and, consequently, cannot meet the criterion for direct review under RAP 4.2(a)(4). Answer to Statement of Grounds for Direct Review.

B. Counterstatement Of Facts

1. The Windstorm

On Saturday, December 11, 2004, the National Weather Service (NWS) issued a High-Wind Watch for the Central Cascade Foothills in eastern King and Pierce Counties, including the cities of Enumclaw, North Bend, and Gold Bar for Sunday, December 12, 2004. CP at 138. Gusts to 65 MPH were predicted. CP at 138.

That Sunday morning, Mr. Ruiz and three friends drove to the Greenwater Snowmobile Park to go snowmobiling. CP at 123. The Snowmobile Park is approximately twenty miles east of Enumclaw on SR 410, the highway to Crystal Mountain. ER 201. Mr. Ruiz was driving a full size, extended-cab Chevrolet Silverado pick-up towing four snowmobile sleds in an enclosed trailer. CP at 8. At 5:00 p.m. that

evening, after a day of snowmobiling, when Mr. Ruiz and his companions were driving westbound on SR 410 on their way home, a tree top broke off in a gust of wind and fell onto the windshield and hood of Mr. Ruiz's truck while it was traveling at highway speed. CP at 116. After the tree top hit, the vehicle traveled 400 feet down the highway, crossed the center line, crossed the eastbound lane, went 50 feet down a slope, and came to rest after it collided with a stump in a recently logged area. CP at 104-05, 113-18.

At the time of the accident, SR 410 had been closed for the winter just past the turn-off to Crystal Mountain. CP at 61. SR 410 is a rural, mountain highway surrounded by evergreen forests. CP at 61. Due to the nature of the landscape, every year during winter storms, trees adjoining SR 410 have been known to be blown down across the highway in a random, unpredictable fashion. CP at 61. To reduce this risk, the Washington State Department of Transportation (WSDOT) Maintenance Area for this highway conducts a periodic / annual danger tree survey of its right of way on SR 410 in conjunction with the private, State, and Federal landowners adjacent to highway 410. CP at 61. In addition, throughout the year, maintenance crews and the Washington State Patrol watch for danger trees while on patrol. CP at 61. When danger trees posing a risk of collapsing or falling during a storm are identified,

WSDOT maintenance crews make arrangements to remove the trees. CP at 61; RCW 47.32.130. The owner of the tree is contacted for permission before the tree is removed. CP at 61; RCW 47.32.130.

The predicted windstorm occurred as forecast on Sunday, December 12, 2004, while Mr. Ruiz was snowmobiling with his friends. CP at 121-22, 161-62. *The Seattle Times* and the National Climatic Data Center confirmed the magnitude of the storm. CP at 121-22, 161-62. Residents in eastern Pierce and King Counties from Enumclaw to North Bend lost power due to trees falling across power lines. CP at 121. Sixteen thousand (16,000) customers were affected. CP at 121, 161. The highest gust recorded was 75 mph at the Buckley Station in Pierce County. CP at 121-22, 162. Buckley is located four miles south of Enumclaw. ER 201. The strongest wind gust recorded in King County was 57 mph at Cumberland Weather Station. CP at 122, 162. A tree fell on the westbound lanes of I-90 at North Bend blocking two lanes for ninety minutes. CP at 122, 162. Several roads were blocked by downed trees and property damage was estimated to be \$450,000. CP at 121-22, 161, 554-55.

Trooper Mark Soper investigated Mr. Ruiz's accident and prepared the Police Traffic Collision Report. CP at 103-18. He walked the shoulder to examine the tree that Mr. Ruiz's companions identified as

having fallen on their pick-up. CP at 105. He observed that the accident occurred in a recently logged area located on the down hill slope next to the eastbound lane. CP at 105. Mr. Ruiz was driving westbound. CP at 105. A stand of healthy trees, approximately 100 feet in total width, had been left standing adjacent to the eastbound shoulder. CP at 105. A stream flowed under the highway at this point and continued to flow through these trees down the slope to the White River in the valley below the highway. CP at 105. The pick-up went off the highway approximately 400 feet from this stream. CP at 105. There was a fluid mark on the highway's westbound lane immediately west of the stand of trees. CP at 105. Just east of the fluid mark, Trooper Soper found what appeared to be a tree top. CP at 105. Broken glass was in that area. CP at 105. This tree top was on the shoulder and not blocking the highway. CP at 105. The vegetation on its limbs indicated that it was a tree top from an Evergreen Fir tree. CP at 105. It appeared broken on one end. CP at 105. Trooper Soper was able to move this piece by hand further off the shoulder. CP at 105. It did not appear to be diseased or dead. Its vegetation was fresh. CP at 105. He looked at the stand of trees on the eastbound side of the highway and saw a standing tree broken off at its top where the segment could possibly have originated. CP at 105. There were other tree segments with vegetation on them located off of the westbound

shoulder on the side of the road. CP at 105. They did not appear to be dead tree segments and had fresh vegetation on them. CP at 105.

2. The Riparian Management Zone

The stand of trees identified by Trooper Soper was part of an RMZ required to be left in place, under the terms of the landowner's application for timber harvest, by Federal, State and County forest practice rules and regulations. CP at 83. The RMZ is identified on the map accompanying the Forest Practices Application as Stream Segment A. CP at 87. There are no forest practice rules or regulations that govern the intersection of an RMZ with a State highway, and this issue was not discussed or addressed when the Forest Practices Application for the timber harvest was discussed on site by representatives of Natural Resources and Fish & Wildlife with Hancock. CP at 83. In accordance with forest practices rules and regulations, tree harvest was barred within two hundred feet of the White River channel. CP at 83. Compliance with the RMZ environmental regulations was mandatory for all parties.⁶ RCW 76.09.330; CP at 83.

⁶ Stream Segment A on the Setting Map was a perennial non-fish stream that separated the timber harvest unit from SR 410. CP at 83. Stream Segment A had a fifty foot no harvest Riparian Management Zone adjacent to both sides to the stream channel. CP at 83. At the conclusion of the site review, Mr. Nauer (of Washington Fish & Wildlife) and Mr. Moya (of Washington Natural Resources) concluded that the proposed harvest by Hancock Forest Management met or exceeded forest practice rules and regulations. CP at 83.

The WSDOT is “empowered” to take the steps necessary to abate a “public nuisance” which endangers a state highway. RCW 47.32.130(1).⁷ If the nuisance makes the highway “immediately” or “eminently” dangerous, the State may trespass on private property to abate the nuisance. RCW 47.32.130. This provision is applicable *only* where the State Department of Transportation has notice of a dangerous condition. *Albin v. National Bank of Commerce*, 60 Wn.2d 745, 748-49, 375 P.2d 487 (1962).

On December 22, 2004, several days after Mr. Ruiz’s accident occurred, at the request of WSDOT Maintenance Supervisor Mike Golden, representatives of the Department of Natural Resources, Fish & Wildlife, and Hancock--all of the parties involved in the original timber harvest--agreed to make an exception to the RMZ requirements as an after-the-fact remedial measure. CP at 53, 84; *see also*, ER 407. The parties agreed to cut back the trees remaining in the RMZ 120 feet from SR 410 in order to prevent another healthy tree from being blown down across the highway in a major winter storm. CP at 84.

⁷ The full text of RCW 47.32.130 is included in Appendix A.

V. ARGUMENT

A. Standard Of Review

On appeal of summary judgment, the standard of review is de novo. An appellate court performs the same inquiry as the trial court. When ruling on a summary judgment motion, this Court views all facts and reasonable inferences in the light most favorable to Mr. Ruiz, the nonmoving party. This Court may grant or affirm the trial court's award of summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

In the present case, RCW 76.09.330 immunizes the State for a personal injury where trees have been left standing in accordance with the Forest Practices Act. In the alternative, the well-established case law presented at summary judgment also supports a determination that the State is not liable for a personal injury resulting from a falling tree in a rural area where the State had no actual or constructive notice of a dangerous condition. *Albin*, 60 Wn.2d at 748-49. This Court may affirm a lower court's ruling on any ground adequately supported by the record. *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). In

this case, both theories were presented on summary judgment, although the immunity provided for under RCW 76.09.330 ensures that this Court need not reach the applicability of *Albin* and case law regarding falling trees in rural areas.

The State defendants respectfully request that this Court affirm the trial court's decision.

B. The State Has Statutory Immunity Under The Circumstances Of This Case

The present version of RCW 76.09.330 was adopted by the Legislature in 1999 under the authority of Const. art. II, § 26.⁸ The State of Washington has immunity under the plain language of RCW 76.09.330:

Forest landowners may be required to leave trees standing in riparian and upland areas to benefit public resources. It is recognized that these trees may blow down or fall into streams and that organic debris may be allowed to remain in streams. This is beneficial to riparian dependent and other wildlife species. Further, it is recognized that trees may blow down, fall onto, or otherwise cause damage or injury to public improvements, private property, and persons. Notwithstanding any statutory provision, rule, or common law doctrine to the contrary, the landowner, the department, and the state of Washington shall not be held liable for any injury or damages resulting from these actions, including but not limited to wildfire, erosion, flooding, personal injury,

⁸ Prior versions were adopted in 1987 and 1992. The 1992 version of the statute barred liability for the landowner: "The landowner shall not be held liable for damages resulting from the leave trees falling from natural causes in riparian areas." The immunity afforded by the statute has never been challenged. The legislature has the exclusive power to direct by law in what manner and in what courts suits may be brought against the State. Const. art. II, § 26.

property damage, damage to public improvements, and other injury or damages of any kind or character resulting from the trees being left (emphasis added).

The statute recognizes that, under the Forest Practices Act, forest landowners may be required to:

- Leave riparian areas unharvested and leave snags and green trees for large woody debris recruitment for streams and rivers;
- Leave upland areas unharvested for wildlife and leave snags and green trees for future snag recruitment; and
- Leave trees standing in riparian and upland areas to benefit public resources.

Because forest landowners may be required to leave trees in order to comply with permit restrictions, RCW 76.09.330 eliminates liability for both forest landowners and the State for “any injury or damages” that may result from leaving trees unharvested. The legislature specifically held that neither the State nor the forest landowner would be liable for a personal injury—like the injury Mr. Ruiz experienced—that was the result of leaving trees standing in riparian and upland areas.

The legislative immunity provided for in RCW 76.09.330 recognizes that protecting riparian management zones—and therefore protecting the environment and wildlife—has the potential to cause many

different kinds of injury. The immunity it provides is absolute. It protects the State under the specific circumstances of this case because there is no dispute that the Department of Natural Resources and the Washington State Department of Fish & Wildlife informed the landowner that the applicable environmental regulations required that the stand of trees at issue in this case be left in order to protect wildlife species near stream segment A of the White River channel. CP at 82-102; Appellant's Brief, pp. 5-9, 24-27⁹.

In this context, Mr. Ruiz's comparison of RCW 76.09.330 with the recreational use immunity statute (RCW 4.24.210)¹⁰ is inapt.

RCW 4.24.210(4) includes a *legislatively* defined exception that is missing in RCW 76.09.330:

(4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.

Mr. Ruiz errs in suggesting that *courts* have created an exception to the recreational use immunity statute, where, in fact, the exception was created by the legislature. RCW 76.09.330 does not include an exception.

⁹ Appellant does not argue that the terms of RCW 76.09.330 were not fully satisfied. He argues that this Court should create an exception not authorized by the legislature.

¹⁰ The full text of RCW 4.24.210 is included in Appendix A.

Mr. Ruiz's analogy to the recreational use immunity statute demonstrates that the legislature defines an exception to an immunity statute when it chooses to do so. In the case of RCW 76.09.330, the legislature identified the risks that would be inherent in requiring trees to be left in riparian management zones and then—because of the public benefits to the environment identified—immunized all parties for the well defined harms that might occur.

In RCW 76.09.330, the legislature provided immunity for the landowner and the State in order to encourage application of the forest practices rules that require trees to be left because leaving trees ensures that wildlife habitat is protected. The State respectfully requests that this Court affirm the trial court's finding that—under the uncontested circumstances of this case—it is immune from liability.

C. Even If The State Did Not Have Immunity Under RCW 79.09.330, The Applicable Case Law Requires Judgment For The State

In its motion for summary judgment, the State also argued that the case law applicable to trees falling in rural areas requires judgment for the State. CP at 163-82. This Court does not need to reach this issue, because of the immunity provided under RCW 79.09.330, but it does provide an alternative basis for affirming judgment for the State.

1. The Applicable Standard Of Care

The State of Washington and its agencies are subject to liability for “tortious conduct to the same extent as if it were a private person or corporation.” RCW 4.92.090.

In order to establish that the State is liable for his injury, Mr. Ruiz must establish the State was negligent. The elements of negligence are (1) the existence of a duty owed by the State to Mr. Ruiz, (2) a breach of that duty, and (3) an injury to Mr. Ruiz that was, (4) proximately caused by the breach. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

The State’s “duty of ordinary care to maintain reasonably safe [roadways] extends as a matter of law to the traveling public.” *Keller v. City of Spokane*, 104 Wn. App. 545, 552, 17 P.3d 661 (2001) (citing *Bradshaw v. City of Seattle*, 43 Wn.2d 766, 773, 264 P.2d 265 (1953)).

Where there are temporary, unsafe conditions on the sidewalk, street, or highway that have not been created or caused by the government entity, the rule that is generally applicable to business premises applies. The governmental entity must have actual or constructive notice of the unsafe condition on its sidewalks, street, or highway before the state, county, or city has a duty to act to correct the condition. *See Nibarger v. City of Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958); *Wright v. Kennewick*, 62 Wn.2d 163,

167, 381 P.2d 620 (1963); *Leroy v. State*, 124 Wn. App. 65, 98 P.3d 819 (2004); *Bird v. Walton*, 69 Wn. App. 366, 848 P.2d 1298 (1993).

Although under the circumstances of this case, the State is immune from liability, Mr. Ruiz would also have no claim if existing case law were applied.

2. A Property Owner Who Has No Actual Or Constructive Notice Of A Dangerous Condition On The Land Has No Duty To Take Corrective Action To Prevent Harm To Others

Washington law regarding trees falling in well forested rural areas like the area surrounding SR 410 has been well settled for more than forty-five years. Had the immunity provision of RCW 76.09.330 not existed, Mr. Ruiz's claims would have been decided, in the State's favor, by the trial court under *Albin v. National Bank of Commerce, supra*, and *Lewis v. Krussel*, 101 Wn. App. 178, 2 P.3d 486 (2000). *See, e.g., Sattler v. City of Mukilteo*, 124 Wn. App. 1048 (2004), *review denied*, 155 Wn.2d 1004, 120 P.3d 578 (2005).¹¹

In *Albin*, this Court upheld the dismissal of Columbia County, as a matter of law, in a wrongful death action in which a car proceeding along a county road during a windstorm was struck by a falling tree. One occupant

¹¹ This unpublished case is referenced for its illustrative rather than its precedential value. GR 14.1(a). It is an example of the way a personal injury case resulting from a falling tree is handled by the intermediate appellate courts under existing common law precedent.

of the car was killed, the other seriously injured. The tree was located on land owned by a bank. The accident occurred on a heavily forested mountain road during a windstorm. 60 Wn.2d at 747. The segment that broke off was 25 feet above the ground on a 95 foot tree and was therefore approximately 70 feet in length. 60 Wn.2d at 747, n. 1. The area had been logged three weeks before the accident. “Three dead trees or snags were left standing. The tree in question stood only 43 feet from the center of the roadway.” 60 Wn.2d at 758. On the basis of these facts, the *Albin* Court concluded: “The Trial Court did not error in dismissing Columbia County from the consolidated actions.” 60 Wn.2d at 749.

In this case, the record on summary judgment confirmed that there is no genuine issue of fact that the State lacked actual or constructive notice of a dangerous condition prior to Mr. Ruiz’s accident, and the record demonstrates the fact even more clearly than that in the *Albin* case. The tree fragment that injured Mr. Ruiz was not previously broken and was not described as a snag, as the tree was in *Albin*. The *Ruiz* tree was not dead or diseased and its vegetation was “fresh.” CP at 105. It was described as an Evergreen Fir tree. CP at 105. The tree segment that fell came from a healthy 100 foot stand of trees which grew on a hillside adjacent to the White River. CP at 105. By contrast, the tree discussed in *Albin* was one of three single, solitary, unharvested snags. 60 Wn.2d at 759.

Although maintenance personnel and the Washington State Patrol agree that winter storms on SR 410 result in trees falling across the highway, there had been no prior closures at this location during this particular windstorm in the 24-hour period before Mr. Ruiz's accident. CP at 60-65, 103-118, 119-62. It is not the practice of Washington State Department of Transportation or the Washington State Patrol to close State highways to prevent the possibility of a tree being blown down across the highway during a winter windstorm. CP at 62, 106.

The *Albin* plaintiffs alleged, as Mr. Ruiz does in the present case, that the county (which had responsibility for maintaining the road, as the State does with SR 410) was liable for their injuries because it permitted the tree to stand in proximity to its road. The *Albin* court affirmed the dismissal of all claims against the county, reasoning:

There is no evidence that the county had actual notice that the tree which fell was any more dangerous than any one of the thousands of trees which line our mountain roads, and no circumstances from which constructive notice might be inferred. *It can, of course, be foreseen that trees will fall across tree-lined roads; but short of cutting a swath through wooded areas, having a width on each side of the traveled portion of the road equivalent to the height of the tallest trees adjacent to the highway, we know of no way of safeguarding against the foreseeable danger.* At the present time this is neither practicable nor desirable. The financial burden would be unreasonable in comparison with the risk involved. [Citations omitted; emphasis added.]

The trial court did not err in dismissing Columbia County from the consolidated actions.

60 Wn.2d at 748-749.

This Court's decision in *Albin* provides that neither a property owner nor the governmental entity responsible for the operation and maintenance of a roadway can be held liable for the fall of a tree absent actual or constructive notice of the dangerous condition. *Albin*, 60 Wn.2d at 748-49. In the present case, there was no notice that trees tops might be torn off by the wind until the storm began on December 12, 2004. Under *Albin*, dismissal of Mr. Ruiz's case would also be required as a matter of law because the material facts are not in dispute.

In the other primary case concerned with a landowner's responsibility for a falling tree, *Lewis v. Krussell*, 101 Wn. App. at 187-88, the court of appeals applied *Albin* in determining that an abutting landowner had no duty to remove trees from his or her property simply because they swayed in the wind and it was foreseeable that one or more could fall on an abutter's property. As the *Lewis* opinion emphasized "Actual or constructive notice of a 'patent danger' is an essential component of the duty of reasonable care . . . Absent such notice, the landowner is under no duty to 'consistently and constantly' check for defects . . . The alleged defect must be 'readily observable' so that the

landowner ‘can take appropriate measures to abate the threat.’”

101 Wn. App. at 186-87.

Relying upon *Albin* and subsequent cases from other jurisdictions, the Lewis court held:

One whose land is located in or adjacent to an urban or residential area and who has actual or constructive knowledge of defects effecting his trees has a duty to take corrective action . . . Conversely, absent such knowledge, an owner / possessor does not have a duty to remove healthy trees merely because the wind might knock them down.

Lewis, 101 Wn. App. at 187.

The duty of the State concerning trees located in the right of way can be no greater than that of a landowner in an urban or residential area. Under the *Albin / Lewis* standard, Mr. Ruiz fails to state a claim for negligence.

Were this Court to determine that the State is not immune under RCW 76.09.330, this Court should still affirm the summary judgment under the well-settled case law regarding falling trees in forested areas and the absence of any evidence that the State had notice, prior to December 12, 2004, that the trees remaining along Stream A on SR 410 posed a hazard to the traveling public. CP at 60-65, 103-18, 119-62.

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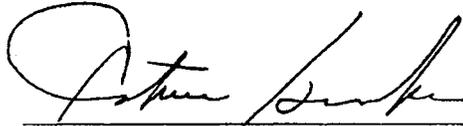
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VI. CONCLUSION

The State of Washington requests that this Court affirm the trial court's dismissal of Mr. Ruiz's case against the State of Washington. Mr. Ruiz was injured by a fir tree growing within a Riparian Management Zone (RMZ). The landowner was required to leave the tree that injured Mr. Ruiz under the applicable environmental laws. The State is immune from liability for having required that this stand of trees be left unharvested.

RESPECTFULLY SUBMITTED this 9th day of April, 2009.

ROBERT M. MCKENNA
Attorney General



CATHERINE HENDRICKS, WSBA #16311
Senior Counsel
Attorneys for the State of Washington and the
Washington State Patrol

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington, that on the undersigned date the original of the preceding Brief of Respondents State Of Washington and Washington State Patrol was filed in the Washington State Supreme Court according to the Court's Protocols for Electronic filing, as a PDF e-mail attachment, at the following e-mail address: Washington State Supreme Court (Supreme@courts.wa.gov)

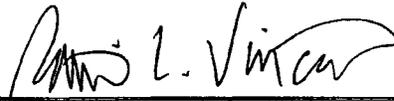
That an electronic courtesy copy of the preceding Respondents State Of Washington, Washington State Patrol's Answer To Statement Of Grounds For Direct Review was e-mailed to counsel at the following e-mail addresses: brett@montehester.com (for Brett Purtzer, counsel for appellant) and Jacobi@wscd.com (for David Jacobi, counsel for respondents Hancock Timber Resource Group, Hancock Forest Management, Inc., Hancock Natural Resource Group, Inc., and White River Forests LLC).

And finally, that a hard copy was served on counsel, by legal messenger, at the following addresses:

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DATED this 10th day of April, 2009, at Seattle, WA.



PATTI L. VINCENT

APPENDIX A

RCW 4.24.210

RCW 47.32.130

RCW 76.09.330

RCW 90.82.050

RCW 4.24.210

Liability of owners or others in possession of land and water areas for injuries to recreation users — Limitation.

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, hanggliding, paragliding, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

(2) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowner or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who offer or allow such land to be used for purposes of a fish or wildlife cooperative project, or allow access to such land for cleanup of litter or other solid waste, shall not be liable for unintentional injuries to any volunteer group or to any other users.

(3) Any public or private landowner, or others in lawful possession and control of the land, may charge an administrative fee of up to twenty-five dollars for the cutting, gathering, and removing of firewood from the land.

(4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted. A fixed anchor used in rock climbing and put in place by someone other than a landowner is not a known dangerous artificial latent condition and a landowner under subsection (1) of this section shall not be liable for unintentional injuries resulting from the condition or use of such an anchor. Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance. Usage by members of the public, volunteer groups, or other users is permissive and does not support any claim of adverse possession.

(5) For purposes of this section, the following are not fees:

(a) A license or permit issued for statewide use under authority of chapter 79A.05 RCW or Title 77 RCW; and

(b) A daily charge not to exceed twenty dollars per person, per day, for access to a publicly owned ORV sports park, as defined in RCW 46.09.020, or other public facility accessed by a highway, street, or nonhighway road for the purposes of off-road vehicle use.

[2006 c 212 § 6. Prior: 2003 c 39 § 2; 2003 c 16 § 2; 1997 c 26 § 1; 1992 c 52 § 1; prior: 1991 c 69 § 1; 1991 c 50 § 1; 1980 c 111 § 1; 1979 c 53 § 1; 1972 ex.s. c 153 § 17; 1969 ex.s. c 24 § 2; 1967 c 216 § 2.]

Notes:

Finding – 2003 c 16: "The legislature finds that some property owners in Washington are concerned about the possibility of liability arising when individuals are permitted to engage in potentially dangerous outdoor recreational activities, such as rock climbing. Although RCW 4.24.210 provides property owners with immunity from legal claims for any unintentional injuries suffered by certain individuals recreating on their land, the legislature finds that it is important to the promotion of rock climbing opportunities to specifically include rock climbing as one of the recreational activities that are included in RCW 4.24.210. By including rock climbing in RCW 4.24.210, the legislature intends merely to provide assurance to the owners of property suitable for this type of recreation, and does not intend to limit the application of RCW 4.24.210 to other types of recreation. By providing that a landowner shall not be liable for any unintentional injuries resulting from the condition or use of a fixed anchor used in rock climbing, the legislature recognizes that such fixed anchors are recreational equipment used by climbers for which a landowner has no duty of care." [2003 c 16 § 1.]

Purpose – 1972 ex.s. c 153: See RCW 79A.35.070.

Off-road and nonhighway vehicles: Chapter 46.09 RCW.

Snowmobiles: Chapter 46.10 RCW.

RCW 47.32.130

Dangerous objects and structures as nuisances — Logs — Abatement — Removal.

(1) Whenever there exists upon the right-of-way of any state highway or off the right-of-way thereof in sufficiently close proximity thereto, any structure, device, or natural or artificial thing that threatens or endangers the state highway or portion thereof, or that tends to endanger persons traveling thereon, or obstructs or tends to obstruct or constitutes a hazard to vehicles or persons traveling thereon, the structure, device, or natural or artificial thing is declared to be a public nuisance, and the department is empowered to take such action as may be necessary to effect its abatement. Any such structure, device, or natural or artificial thing considered by the department to be immediately or eminently dangerous to travel upon a state highway may be forthwith removed, and the removal in no event constitutes a breach of the peace or trespass.

(2) Logs dumped on any state highway roadway or in any state highway drainage ditch due to equipment failure or for any other reason shall be removed immediately. Logs remaining within the state highway right-of-way for a period of thirty days shall be confiscated and removed or disposed of as directed by the department.

[1984 c 7 § 184; 1961 c 13 § 47.32.130. Prior: 1947 c 206 § 3; 1937 c 53 § 80; Rem. Supp. 1947 § 6400-80.]

Notes:

Severability — 1984 c 7: See note following RCW 47.01.141.

Obstructing highway, public nuisance: RCW 9.66.010.

Placing dangerous substances or devices on highway: RCW 9.66.050, 46.61.645, 70.93.060.

RCW 76.09.330

Legislative findings — Liability from naturally falling trees required to be left standing.

The legislature hereby finds and declares that riparian ecosystems on forest lands in addition to containing valuable timber resources, provide benefits for wildlife, fish, and water quality. The legislature further finds and declares that leaving riparian areas unharvested and leaving snags and green trees for large woody debris recruitment for streams and rivers provides public benefits including but not limited to benefits for threatened and endangered salmonids, other fish, amphibians, wildlife, and water quality enhancement. The legislature further finds and declares that leaving upland areas unharvested for wildlife and leaving snags and green trees for future snag recruitment provides benefits for wildlife. Forest landowners may be required to leave trees standing in riparian and upland areas to benefit public resources. It is recognized that these trees may blow down or fall into streams and that organic debris may be allowed to remain in streams. This is beneficial to riparian dependent and other wildlife species. Further, it is recognized that trees may blow down, fall onto, or otherwise cause damage or injury to public improvements, private property, and persons. Notwithstanding any statutory provision, rule, or common law doctrine to the contrary, the landowner, the department, and the state of Washington shall not be held liable for any injury or damages resulting from these actions, including but not limited to wildfire, erosion, flooding, personal injury, property damage, damage to public improvements, and other injury or damages of any kind or character resulting from the trees being left.

[1999 sp.s. c 4 § 602; 1992 c 52 § 5; 1987 c 95 § 7.]

Notes:

Part headings not law — 1999 sp.s. c 4: See note following RCW 77.85.180.

RCW 90.82.050
Limitations on liability.

(1) This chapter shall not be construed as creating a new cause of action against the state or any county, city, town, water supply utility, conservation district, or planning unit.

(2) Notwithstanding RCW 4.92.090, 4.96.010, and 64.40.020, no claim for damages may be filed against the state or any county, city, town, water supply utility, tribal governments, conservation district, or planning unit that or member of a planning unit who participates in a WRIA planning unit for performing responsibilities under this chapter.

[1997 c 442 § 106.]