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Court of Appeals
Division III
State of Washington

No. 92482-1

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 32000-6-III)

TARBERT LOGGING, INC. AND SHANE BEAN,

Appellants,

v.

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

RAYMOND COOK AND ARLENE COOK,

Respondents.

TARBERT LOGGING, INC. AND SHANE BEAN'S PETITION FOR SUPREME COURT REVIEW

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I. IDENTITY OF PETITIONER

Petitioners are Defendants Tarbert Logging, Inc. and its driver, Shane Bean (collectively referred to as "Tarbert").

II. CITATION TO COURT OF APPEALS DECISION

Tarbert seeks review of the Published Opinion of the Court of Appeals, Division III, filed on October 1, 2015. This decision reversed the jury's verdict in favor of Tarbert and the trial court's finding of spoliation. A copy of the Opinion is in Appendix A. A copy of the Trial Court's February 2013 Order on Spoliation of Evidence is in Appendix B. The trial court's instructions to the jury are in Appendix C.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by concluding that, contrary to Washington law, a party on notice of a claim does not have a duty to preserve relevant evidence?

2. Whether the Court of Appeals erred by concluding that a party cannot be sanctioned for spoliation absent bad faith or gross negligence?

3. Whether the Court of Appeals erred in finding the trial court's necessary exercise of discretion in its evidentiary rulings at trial was the same as an adverse presumption instruction?

IV. STATEMENT OF THE CASE

This lawsuit involved a collision on a snow covered primitive road in Stevens County in February 2009. The front driver's side of Plaintiff Raymond Cook's ("Cook") GMC truck impacted the Tarbert logging truck (driven by Bean). Bean testified that he was almost stopped and was as far to the right as he could be without going over the steep hillside when Cook, who was over the center line, hit his driver's side. RP 654-57. The speed of Cook's vehicle was a critical issue because Cook claimed he was completely stopped before the impact. RP 973.

In March 2009, the month following the accident, Cook had already hired an attorney and retained an accident reconstruction expert (Rick Gill) to examine Cook's 2006 GMC Sierra truck and offer opinions, including opinions about the speed of the vehicles involved in the accident. RP 1066-67; 1070-72; CP 382-85. As of March 2009, when Cook's expert examined the truck involved in the accident, Cook admits he knew there would be a lawsuit. RP 1070-71.

Airbags have been required in vehicles for decades, and this technology is accompanied by data stored on the vehicle's event data recorder ("EDR"),[1] which can later be downloaded for evaluation. In 2006

[1] EDR's are also referred to in GM vehicles, such as Plaintiff's GMC truck, as a "Sensory Data Module Recorder" or "SDM-R". Every GM vehicle manufactured since 1995 contains a SDM-R.

the National Highway Traffic and Safety Association established standardized minimum requirements for data to be collected in vehicles with EDR's. *See* 49 CFR §563. In 2009, the same year as this accident, our Legislature passed laws relating to EDR data. *See* RCW Chapter 46.35 Recording Devices in Motor Vehicles (effective July 1, 2010). EDR's, like a "Black Box" in an airplane, preserve a variety of data for the five seconds before impact including speed and braking data. This technology is not particularly "novel", and courts have long found such information reliable and admissible.[2]

Notwithstanding, Cook's expert did not download or preserve the data from the EDR in Cook's GMC truck, which would have provided accurate information about the critical issue in this case – Cook's exact speed leading up to impact. In the winter of 2009-2010, Cook's GMC truck was "parted-out" and sold with the permission of his attorney and without notice to the defendants. CP 109-10.

This lawsuit was filed in December 2010, and when defendants' later asked that their experts be allowed to inspect the vehicle to obtain

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[2] *See e.g., Bachman v. General Motors Corp.*, 776 N.E.2d 262, 272 (Ill. App. 2002) (EDR data has been received into evidence as "generally accepted as reliable and accurate by the automobile industry and the [National Highway and Traffic Safety Administration]"); *People v. Hopkins*, 800 N.Y.S.2d 353 (2004) (EDR data admissible and showed defendant traveling over 100 mph before fatal impact); *Matos v. State*, 899 So.2d 403 (Fla. App. 2005) (EDR data admitted showing defendant traveling over 100 mph in the five seconds before the crash, not 56 mph as defendant claimed).

EDR data, they learned it was no longer available and had not been preserved. CP 1155-56; 1204-07; 1240.

Defendants then sought spoliation sanctions against Cook. In granting the motion for spoliation, the trial court made the following factual findings, which were not challenged:

- The speed of the Cook vehicle, both immediately prior to and at the point of impact is a central, critical and disputed fact in this case.
- When counsel for Plaintiffs instructed Plaintiffs to maintain the vehicle pending an inspection by Dr. Gill, a duty arose for Plaintiffs to maintain the vehicle until the defendants in the anticipated litigation had the opportunity to inspect the vehicle.
- The fact that Plaintiffs had their own expert inspect the vehicle, and that Defendants have not had that opportunity, have given Plaintiffs a litigation advantage which prejudices Defendants.
- As a result of the spoliation of evidence, in the absence of the remedies ordered by the Court, the defense in this matter would be prejudiced.
- The remedies ordered herein are the least severe remedies to cure the prejudice to Defendants in this case arising from the spoliation.

Appx. B; CP 120-22. The trial court ordered that Cook's expert would not be allowed to offer certain "speed" opinions, including opinions that "there is no physical evidence" to contradict Cook's testimony that he was stopped at the time of impact. CP 385-87. Defendants were unable to attack those opinions because Cook destroyed the very physical evidence (data from the EDR in his truck) that would contradict this assertion.

Although the trial court excluded some opinions of Cook's expert

on speed, the expert's dozens of other opinions about the negligence of the parties were not excluded. *See* CP 385-87. Cook could have hired another speed expert, who would have to use the same limited information the defense reconstruction experts had available to provide opinions on speed, but he chose not to do so. Cook also decided not to call his expert to offer numerous other opinions relating to the defendants' negligence that the trial court did not exclude. CP 385-87. Instead, Cook went forward without expert testimony on his speed, relying on his own testimony that he was completely stopped at the time of impact. RP 971-73. Cook also explained to the jury the circumstances of the accident and the destruction of his truck. *Id.*; RP 1068-69.

At trial, the trial court declined to impose a rebuttable presumption that the destroyed evidence would have been adverse to Cook and declined to instruct the jury that it could infer that the evidence would have been adverse to Cook. RP 772-73; Appx. C. The parties were allowed to argue to the jury the significance (or lack of significance) of the destroyed evidence, Cook's testimony, Bean's testimony and the defense experts' opinions on speed. The trial court provided the parties with its instructions, and Cook made no objections or exceptions to those instructions. Appx. C; RP 1271. The jury returned a defense verdict and Cook appealed.

The Court of Appeals reversed the jury's verdict, holding that Cook had no duty to preserve evidence, and that a party cannot be sanctioned for spoliation absent a finding of bad faith or gross misconduct. The Court of Appeals further held that the trial court abused its discretion by allowing the defendants to elicit evidence that Cook had someone take photos of the truck and measure crush depth, but did not preserve the EDR so the defendants' experts could examine it. Allowing defendants to argue those facts to the jury, including Cook's failure to provide any expert testimony on speed, and not allowing Cook to put on evidence that the expert's opinions would have been favorable to Cook, was "tantamount to a 'missing witness' argument." RP 1065-72; Appx. A at 27.

While the Court of Appeals wrote: "Given developments in the federal courts and elsewhere, it might be time for Washington to reexamine whether it should recognize the existence of a general duty to preserve evidence," (Appx. A at 24-25) it did not follow this Court's applicable precedent. Tarbert seeks review because under existing Washington law, Cook had a duty to preserve evidence that he knew was relevant and important in this case. He preserved that evidence for his own expert to evaluate, and then destroyed that key evidence without notice to the defendants. This case also involves an issue of substantial public interest, and this Court should provide clear guidance to the courts and

litigants because spoliation issues arise frequently and should be dealt with uniformly and properly, with the trial court allowed the necessary discretion to fashion appropriate sanctions.

V. ARGUMENT IN SUPPORT OF REVIEW

This Court should accept review because the Court of Appeals' decision, holding there is no duty to preserve evidence in Washington before a lawsuit is filed, conflicts with this Court's decision in *Pier 67*, which held that a party who is on notice of a lawsuit has a duty to preserve evidence that is properly part of the case and within his or her control. *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977). Contrary to *Pier* 67, the Court of Appeal's decision essentially authorizes plaintiffs who know they intend to file suit to destroy, without consequences, evidence they know to be relevant – after their own expert selectively examines the evidence.

The Court of Appeals' published opinion also ignored Washington precedent in holding that courts cannot sanction a party for spoliation of evidence, absent a finding of bad faith or gross negligence. Appx. A at 25 ("there can be no suggestion of an adverse inference absent "bad faith or, at a minimum, gross negligence."). Washington law has long recognized that spoliation encompasses a much broader range of conduct than gross negligence or bad faith and allows the trial court discretion to fashion a

remedy after weighing the applicable factors.

Finally, the Court of Appeals recognized that there is little authority in Washington outlining the obligations and standards applicable to spoliation of evidence issues. This "dearth of authority" resulted in a published opinion holding that there is no duty to preserve evidence where a party knows it is relevant to pending litigation – contrary to virtually every other jurisdiction, federal precedent and this Court's decision in *Pier 67*. This case presents an issue of substantial public interest that this Court should address.

A. Review is Warranted Under RAP 13.4(b)(2) Because this Decision Conflicts with Established Washington Supreme Court and Court of Appeals' Precedent.

Here, the Court of Appeals held that Cook had no duty to preserve evidence even though he admitted he knew that he was going to file suit when his attorney instructed him to retain the truck so the expert he hired could examine the vehicle. Cook and his expert failed to preserve the airbag control module with the EDR containing critical evidence relating to Cook's speed.[3] In addition, the Court of Appeals held, "there can be no suggestion of an adverse inference absent "bad faith or, at a minimum,

[3] Although Cook denied having "control" of the vehicle, the Court of Appeals found substantial evidence supported the trial court's determination that Cook and his lawyer had control of the truck, which was destroyed with their approval. Appendix A at A-7, n. 5.

gross negligence." Appx. A at 25. This is also contrary to Washington precedent.

Recognizing the need for guidance from this Court, the Court of Appeals quoted other published Washington cases noting the lack of clarity on spoliation issues observing: "'Washington case law on spoliation is sparse.' *Homeworks,* 133 Wn. App. at 898. In outlining a framework for identifying spoliation and framing related sanctions, "*Henderson* looked to contemporary cases from other jurisdictions, evidence treatises, and law review articles. In the 19 years since *Henderson* was decided, the federal courts and some state courts have recognized a general duty to preserve important evidence." The Court of Appeals referencing *Henderson* concluded: "**There is no way to read that statement other than as the rejection of a general duty to preserve evidence**." Appx. A at 18 (emphasis added).

However, *Henderson* found that there were discretionary factual evaluations to be made and that "for a direct sanction to apply the spoliation must in some way be connected to the party against whom the sanction is directed." Which is exactly what the trial court and the Court of Appeals found here. Appx. A at 7 n. 5. The Court of Appeals mistakenly ignored the analytical framework underpinning this duty, and factual determinations by the trial court as to the relevance of the evidence and

the culpability of the party who destroyed the evidence in holding there was no duty to preserve evidence in this case as a matter of law.[4]

After finding the trial court committed an "error of law" by finding that Cook had a duty to preserve evidence, and then based its discretionary rulings on this error of law, the Court of Appeals held that this was an abuse of discretion. *Id.* at 13. This is contrary to Division I's holding in *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2009), Division II's holdings in *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999) and *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 138 P.3d 654 (2006), and is inconsistent with Division III's holding in *Henderson v. Tyrrell,* 80 Wn. App. 592, 605, 910 P.2d 522 (1996). Most recently in *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 307 P.3d 811 (2013), Division II rejected a defendant's assertion that it would have no duty to preserve video evidence of a fall unless it knew of pending litigation. Division II held, consistent with the vast majority of jurisdictions, once there is an accident and the defendant is on notice of a reported accident the defendant "must act with good faith concerning the preservation of direct video evidence of a reported accident or fall." *Id.* at

[4] The Court of Appeals apparently knew it was acting in conflict with other Washington decisions pointing out its "disapproval" of the view of the rebuttable sanction presumption in spoliation cases espoused in *Marshall v. Bally's Pacwest, Inc.* Appendix A at 14, n. 14.

136 n.4. This same rule applies to a party who is aware of key evidence, preserves it for its own expert to examine, then fails to notify other parties before destroying it.

Since this Court's brief analysis in *Pier 67* nearly 40 years ago, this Court has not evaluated any spoliation issues. The jurisprudence from the Court of Appeals is sparse, and now conflicting. There are only six published decisions, including the Court of Appeals' decision that is the subject of this petition for review. This most recent decision recognizes that there can be a duty to preserve evidence, but ignores the trial court's factual findings and determines, as a matter of law, that a party who hires an attorney and an expert to examine key evidence has no duty to preserve evidence. This was error and contrary to Washington law. Accordingly, review is warranted.

1. Washington Common Law, Consistent With Virtually Every Other Jurisdiction, Imposes a Duty to Preserve Relevant Evidence Upon a Party Who Knows of Pending Litigation.

This Court will accept review under RAP 13.4(b)(1) and (2) when (1) "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals". Because the Court

of Appeal's decision both conflicts with this Court's precedent, and with other decisions from the Court of Appeals, review is warranted.

A party may be responsible for spoliation if it had a duty to preserve the evidence. *See Henderson,* 80 Wn. App. at 610. This duty arises when a party knows, or should know, that evidence is relevant to litigation. To evaluate whether a potential litigant has a duty to preserve evidence, Washington courts look to case-by-case factors. *See, e.g., Homeworks,* 133 Wn. App. at 901 (control over the evidence or knowledge of its impending destruction); *Henderson,* 80 Wn. App. at 611 (passage of time and lack of relevance); *Hampson v. Ramer,* 47 Wn .App. 806, 812, 737 P .2d 298 (1987) (opposing party's request for retention of the evidence); *Pier 67,* 89 Wn.2d at 385 (sufficient notice of a pending lawsuit).

Washington federal decisions are in accord. "Sanctions for spoliation are appropriate only if the party had notice that the evidence is potentially relevant to a claim. *Leon v. IDX Sys. Corp.,* 464 F.3d 951, 958 (9th Cir.2006). Thus, the duty to preserve evidence is triggered when a party knows or reasonably should know that the evidence may be relevant to pending or future litigation." *EEOC v. Fry's Electronics,* 874 F. Supp. 1042, 1044 (W.D. Wash. 2012).

2. There Is No Dispute that the Truck and Its EDR Were of Critical Importance in this Case.

The Court of Appeals looked primarily to *Henderson* in evaluating the issues presented. Henderson was injured in a single car accident and plaintiff alleged that he was the passenger in his own car and that the defendant was actually the driver which, Henderson denied. *Id.* at 596-97. Two years after the accident, plaintiff had the car salvaged and destroyed even though the defendant's attorney had requested that the car be preserved. *Id.* at 603–04. The trial court declined to sanction the plaintiff, stating that the evidence was not that critical and there was no culpability because the real culprit was the passage of time. *Id.* at 604. It is critical to note that the plaintiff in *Henderson* never had his own expert examine the car before it was destroyed.

As *Henderson* explains, the importance of the evidence depends on the particular circumstances of the case. An important consideration is whether the loss or destruction of the evidence results in an investigative advantage for one party over another, and whether the adverse party was afforded an adequate opportunity to examine the evidence. In *Henderson* the trial court found that there was no investigative advantage because the plaintiff had not examined the vehicle and the parties were both on equal footing in attempting to reconstruct the accident with the limited evidence

available. In this case, the evidence was of great relevance and its destruction left Cook with an investigative advantage that prejudiced the defendants. Cook's expert examined the vehicle, ignored critical data, and then asserted Cook was traveling 20 mph as he approached the scene and was stopped by the time of the collision and he was "not aware of any physical evidence to the contrary." CP 384-85. The vehicle's EDR was destroyed, denying defendants access to the most accurate data as to Cook's speed in the moments leading up to the accident and provided an investigative advantage to Cook. Defendants had no means of accessing critical EDR evidence that they believed would conclusively show Cook was lying about his speed.

In developing factors to guide courts in assessing both the importance of lost or destroyed evidence and the culpability of the party responsible for the loss or destruction, our courts have looked at a variety of out of state cases with remarkably similar facts to this case. For example in *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995), the plaintiff's investigators destroyed parts of the gas grill that they alleged was the cause of the fire before defendant's investigators could inspect it. The court affirmed the trial courts dismissal of the case as sanction for spoliation despite finding no bad faith. The plaintiff, like Cook, had a duty to preserve the evidence even though a suit had not yet

been filed, because the plaintiff "knew or should have known" that the product was crucial evidence that should have been preserved.

Similarly in *Dillon v. Nissan Motor Co. Ltd.*, 986 F.2d 263 (8th Cir. 1993), the plaintiff retained three experts to examine the car, which then was destroyed before the defendants' experts could examine it. The Eighth Circuit affirmed the trial court's exclusion of plaintiff's expert and its decision to give a negative inference instruction to the jury.

The common pattern that emerges is that a party, who later is bringing a lawsuit, has an expert examine key evidence but does not preserve the evidence for evaluation by defense experts. In *American Family Ins. Co. v. Village Pontiac–GMC, Inc.*, N.E.2d 1115 (Ill. App. 1992), the plaintiff's expert examined a car that was the alleged cause of a fire, but the car was destroyed seven months later before a defense expert was able to inspect it. Once again the court affirmed the trial court's decision to exclude plaintiff's expert testimony that the car had caused the fire because of the spoliation of evidence, even though this sanction resulted in the summary judgment dismissal of plaintiff's claim.

Spoliation issues are discretionary with the trial court, who is in the best position to weigh the facts and make a decision based on the circumstances presented by a particular case. However, in Washington's seminal case, *Pier 67*, this court was so troubled by the destroyed records

critical to plaintiff's claims, that it reversed the trial court for failing to impose an adverse presumption against the defendant who destroyed the records and entered judgment in plaintiff's favor. 89 Wn.2d at 385-86.

In cases where a plaintiff deemed evidence important enough to have its own expert examine the evidence before destruction, Courts universally impose sanctions for spoliation. *See e.g. Graves v. Daley,* 526 N.E.2d 679 (Ill. App. 1988) (Insurance company authorized destruction of furnace after its experts inspected it, but before defendants could inspect it in investigation of fire); *Fire Ins. Exch. v. Zenith Radio Corp.,* 747 P.2d 911 (Nev. 1987) (Insurance company's expert determined television was cause of fire, but authorized destruction before filing complaint).

3. Bad Faith Is Not Required for Spoliation Sanctions and Trial Courts Have Broad Discretion to Fashion an Appropriate Sanction.

Washington courts have long held that "spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith." *Homeworks,* 133 Wn. App. 900 (citing *Henderson,* 80 Wn. App. at 605). Nevertheless, the Court of Appeals, after finding no duty to preserve evidence existed, held it was error to sanction Cook because there was no finding of intentional or bad faith action. This is also contrary to Washington law and in conflict with long established precedent. Moreover, *Henderson* included Washington in these "modern"

jurisdictions that broadly define spoliation, but, inexplicably, ignored this holding. Appx. A at 14.

Every reported Washington spoliation decision following *Pier 67*, until the Court of Appeals' decision in this case, has affirmed the trial court's discretionary decision with respect to the spoliation issue involved. *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (Div III 1996) (affirming trial court's decision not to impose spoliation sanctions where evidence was not critical and it had been lost due to passage of time rather than any intentional destruction); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (Div. II 1999) (affirming trial court's decision not to impose spoliation sanctions where there was no reason to know treadmill was relevant, treadmill remained in use for years until discarded, and examination was not requested by plaintiff until four years after the incident); *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 138 P.3d 654 (Div. II 2006) (affirming trial court's finding that there was no spoliation where party did not have control over evidence that was destroyed when home repaired); *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (Div. I 2009) (affirming trial court's determination that there was no spoliation where defendant admitted that a scalpel handle it destroyed was defective and the handle itself had no relevance to any remaining issue); *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 307

P.3d 811 (Div. II 2013) (affirming trial court's finding that defendant had no duty to preserve video that did not show the area of plaintiff's fall, but recognizing that if video had encompassed the area of the fall there would be a duty to preserve the evidence even before litigation commenced).

Here, the trial court carefully crafted an appropriate sanction and did not provide an adverse inference instruction. The trial court properly allowed Tarbert to point out the fact that the plaintiff knew he was filing suit and had an expert examine the truck before he allowed it to be destroyed, but declined to give a negative inference instruction. The only "inference" argued was that there was likely evidence that would conclusively answer the question of Cook's speed and that evidence was destroyed before Tarbert could examine the truck. Cook could have pursued different options, but he chose to rely on his own testimony that he was stopped before impact and that he did not know there was an EDR in the truck when it was destroyed. There was no missing witness instruction or adverse inference instruction, so with reevaluation of the duty to preserve evidence and trial court's appropriate spoliation sanction, this issue is also eliminated.

B. This Court Should Accept Review Because this Case Presents Important Issues of Public Interest Under RAP 13.4(b)(4)

Review is also appropriate here under RAP 13.4(b)(4), which

provides for review by this Court "If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Because this case presents issues of substantial public interest, and these issues should be defined and determined consistently by this Court, review should be granted to provide guidance to trial courts exercising their discretion to weigh the various factors and fashion remedies when there has been spoliation of evidence. Here, finding Washington law "sparse" and acknowledging that perhaps it should be consistent with virtually every other jurisdiction evaluated, the Court of Appeals failed to recognize the legal duty clearly established by this Court in *Pier 67*.

The trial court properly found Cook had a duty to preserve evidence sufficiently important for his own expert to examine, and excluded only those opinions from that expert that were related to this investigative advantage. The trial court did not instruct the jury that it could take a negative inference from the Plaintiff's destruction of key evidence, nor did it give a missing witness instruction. *See* Appx. C (Court's Instructions). Nevertheless, based on brief closing argument by one defendant that Cook had not called any expert to testify about speed, that was not objected to by Cook's counsel and from which the jury could take whatever inference it deemed appropriate from that lack of evidence, the Court of Appeals reversed the jury's verdict and found that the trial

court abused its discretion by finding a duty to preserve evidence existed and then allowing argument on the issue of destruction.

This was not a situation where a "free floating" general duty to preserve evidence is being imposed, but the long-recognized duty of a party who knows he is filing suit, knows he has critical evidence, has his expert examine the evidence, and then destroys it without notice to defendants. This is not the law in Washington. Even the Court of Appeals recognized that its holding was likely problematic, noting that "Given developments in the federal courts and elsewhere, it might be time for Washington to reexamine whether it should recognize the existence of a general duty to preserve evidence." Appx. A at 24-25. This Court should exercise its discretion and take this opportunity to provide clear guidance on this important issue for litigants and judges in Washington.

VI. CONCLUSION

For the foregoing reasons, Tarbert requests that this Court grant discretionary review of the Court of Appeal's decision. The trial court properly concluded that Cook had a duty to preserve evidence, and any confusion in the various cases since *Pier 67* should be clarified. The Court of Appeals decision should be reversed and the verdict reinstated.

Dated this 30th day of October, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gina Mitchell, declare under penalty of perjury of the laws of the State of Washington that on October 30, 2015 I caused Tarbert Logging, Inc. and Shane Bean's Petition for Supreme Court Review to be served via email, pursuant to the parties' mutual consent for service by email, and by first-class mail as follows:

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RAYMOND COOK and ARLENE COOK, husband and wife and the marital community comprised thereof, Appellants, v. TARBERT LOGGING, INC., a Washington Corporation, and SHANE BEAN and JANE DOE BEAN, husband and wife and the marital community comprised thereof, and STEVENS COUNTY, a local governmental entity, Respondents.	)	No. 32000-6-III PUBLISHED OPINION

SIDDOWAY, C.J. — The jury trial of Raymond and Arlene Cook's claims arising out of a collision between a pickup truck driven by Mr. Cook and a logging truck driven by an employee of Tarbert Logging Inc. resulted in a defense verdict in favor of Tarbert, its driver, and Stevens County. The Cooks appeal, arguing that the trial court abused its discretion in making erroneous spoliation-based rulings that excluded the testimony of their expert on the key issue of the drivers' speeds at the time of impact, allowed defense experts to testify to the drivers' speeds using the Cooks' expert's photographs and measurements, and allowed the defense to invite a negative inference from the fact that the Cooks engaged an expert whom they did not call to testify.

The trial court erred in concluding that Washington has recognized a general duty to preserve evidence; it has not. For that reason, and because only intentional spoliation logically supports an adverse inference, the trial court erred when it ruled in limine that it would admit evidence and allow defense argument in support of such an inference. The trial court also abused its discretion in ruling in limine that the defense could present evidence to support argument of what was tantamount to a missing witness inference from the Cooks' failure to call their expert witness on speed to testify at trial.

The error is reversible except as to Stevens County, which was sued for its negligent plowing of the road. Since the jury's special verdict found that the county was not negligent, any error in the evidence and argument on speed—which bore, in the county's case, only on comparative fault—was harmless as to the county.

We affirm the judgment in favor of Stevens County, reverse the judgment in favor of Tarbert and its driver, and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

For the judges on this panel and many participants in the trial below, this case brought to our attention for the first time the existence of event data recorders in modern cars and trucks that not only continually monitor data about a vehicle's operation but also can retain data about its operation in the seconds before a crash. In this case, the event data recorder was an airbag control monitor (ACM) in Raymond Cook's 2006 GMC Sierra pickup truck.

As explained by the experts who testified at trial, the airbag icon that lights up on the dashboard during a vehicle's operation indicates that the ACM is working, streaming data about the key aspects of the vehicle's operation that inform whether to trigger the explosion that will deploy airbags. Among operating information continually being streamed through an ACM are the vehicle's speed, the engine's speed, the percent throttle, the brake switch circuit status, and the driver's seat belt status. An ACM is programmed with an algorithm that determines within milliseconds whether the operating information collectively signals a crash, in which case airbags will be deployed. After deployment, the ACM retains information that was streaming through it for up to five seconds "before algorithm enable." Clerk's Papers (CP) at 14. If the vehicle is one for which software and hardware for reading retained data is available to the public, then according to experts in the trial below, the data is "very useful" in determining precrash speed. Report of Proceedings (RP) (Aug. 27, 2013) at 1207.[1]

In this case, Mr. Cook's pickup truck collided with a Tarbert logging truck being driven by Shane Bean on a primitive road[2] in Stevens County one morning in February

[1] We note that there is overlapping numbering in some of the reports of proceedings.

[2] "Primitive roads" are roads that are not classified as part of a county primary road system, have a gravel or earth driving surface, and have an average daily traffic of 100 or fewer vehicles. RCW 36.75.300. By statute, counties are relieved of certain road design, signage, and maintenance standards with respect to primitive roads. *Id.*

2009. It is undisputed that the accident occurred on a particularly narrow stretch of the road on a blind curve, and that packed snow and ice on the road was very slippery that morning.

Mr. Cook was badly injured in the accident, and his pickup truck was totaled. He retained a lawyer to explore the possibility of legal action. By March 17, 2009, American Forest Casualty Insurance Company, which insured Tarbert, had received a letter from Mr. Cook's lawyer F. Dayle Andersen providing notice of a claim. A claims administrator for the insurer acknowledged the claim on March 18 and stated that a liability investigation was underway.

At the time, the GMC truck—which was registered in the name of Mr. Cook's sister, Gina Cook, and was owned by her limited liability company—was being stored in a shed belonging to Mr. Cook's son, Joshua.[3] Mr. Andersen told Joshua to maintain the vehicle as it was and to keep it indoors until further notice. On March 25, 2009, Mr. Cook and Mr. Andersen traveled to the shed with Dr. Richard Gill, a mechanical engineer and human factors specialist retained on Mr. Cook's behalf by Mr. Andersen, to inspect the truck. Dr. Gill took crush measurements and photographs.

Dr. Gill did not remove the ACM from the truck or download any data from it. When later deposed, he testified that he was familiar with event data recorders such as the

[3] We refer to Joshua by his first name to avoid confusion with his father. We mean no disrespect.

ACM and with "the improvements that have been made over time with them[,] . . . the variability in terms of the types of data that's recorded[, and] . . . the limitations of them," but that he was not qualified to download their data. CP at 284. He testified that he had become more familiar with them between 2009 and the 2012 date of his deposition, but that he had worked on cases even before March 2009 in which one of the experts had downloaded data from an event data recorder. He testified that while he was not qualified to download such data, he "certainly considered it both pro and con" when the data had been downloaded by someone else. *Id.*

In February 2010, Mr. Andersen served Stevens County with the statutorily required presuit notice that the Cooks asserted a tort claim against the county for negligent plowing of the road. *See* RCW 4.96.020. The Cooks contended that the county had failed to plow a swath through the snow and ice that was as wide as the roadway, leaving the plowed roadbed too narrow for the traffic for which the road was designed.

The county did not acknowledge liability in response to the statutory notice, and in December 2010 Mr. Cook filed his complaint for negligence against Tarbert, Mr. Bean, and Stevens County.[4]

[4] Tarbert's counsel represented Mr. Bean at trial. For simplicity, we will refer to Tarbert and Mr. Bean collectively as "Tarbert" in discussing their participation in the litigation.

Stevens County initially defended with a motion for summary judgment, evidently based on the "primitive" status of the road on which the accident occurred. After that motion was denied, the county asked the Cooks for the opportunity to examine the GMC pickup truck, through electronic mail sent by the county's lawyer in February 2012.

By the time of the county's request, the pickup truck had been "parted out" and sold. In a deposition later taken of Joshua, he testified that he could not recall precisely when he sought permission from Mr. Andersen to get rid of the truck. He provided two inconsistent answers that were never clarified. Based on those inconsistent answers, his parting out and selling of the truck took place either during a one-year period that began in the winter of 2009-10 or during a one-year period that began in August or September 2010.

Dr. Gill prepared a written report in September 2012 that included his opinion that Mr. Cook was traveling at a slower and safer speed than Mr. Bean at the time of the accident. Accusing the Cooks of spoliation, Stevens County filed a motion asking the trial court to preclude Dr. Gill from offering opinion testimony about Mr. Cook's speed before and at the time of the collision and to instruct the jury that the parting out of the pickup mandated an inference that the evidence, had it been preserved, would have been unfavorable to the Cooks' position. Tarbert joined in Stevens County's motion.

In support of the spoliation motion, Stevens County and Tarbert contended that Mr. Cook's lawyer gave Joshua permission to part out the truck and sell it for no good

reason, aware that the defendants would probably want to examine it. They also contended that Dr. Gill's awareness of the ACM as a source of valuable information on speed should be imputed to the Cooks and their lawyer.

The Cooks argued that they retained the pickup for years, that neither defendant sent them a litigation hold or otherwise indicated interest in examining the pickup during the years it was retained, and that the defendants had not identified any duty on the part of Mr. Cook to retain it. They also argued that the ACM was not as critical as claimed by the defendants, since one defense expert had already prepared a report expressing defense-favorable opinions on the drivers' speeds based on other available evidence.[5]

The court concluded that the Cooks had a duty to retain the pickup truck, explaining in its oral ruling that the duty arose because Dr. Gill had the opportunity to examine the truck and "[i]t would likely be a quick jump to recognize that on down the line at some point the . . . defense might want to have the opportunity to have an examination independently conducted of the vehicle and more specifically as to the [ACM]." RP (Feb. 8 & Aug. 19, 2013) at 33-34. It found no duty on the part of the

[5] Mr. Cook also argued below and argues on appeal that the truck belonged to his sister's company, not to him. As pointed out by the defense, Mr. Cook was the president of his sister's company, the truck was assigned to him, and he described it as "my truck." RP (Aug. 26, 2013) at 971-72. Even more importantly, after the collision, family members relied in all of their postaccident dealings with the totaled truck on Mr. Andersen's directions. Substantial evidence supported the trial court's implicit conclusion that the Cooks and their lawyer had sufficient control over the totaled truck to bear responsibility for the disposal. We do not consider this argument further.

defendants "to demand access instantly to the item." RP (Feb. 8 & Aug. 19, 2013) at 34. While the court stated it did not find any purposeful intentional destruction, "common sense should have caused the parties on the plaintiff side to say, this item needs to be preserved and there needs to be some notice to the other side." *Id.* It granted the defendants' motion to exclude Dr. Gill's opinions on the drivers' speed at the time of the collision. Opinions Dr. Gill had expressed on other matters were not excluded.

The findings, conclusions, and order later entered by the court included its determination that "[p]laintiffs did not act in bad faith or with deliberate intention to destroy the evidence" and its conclusion that they were nonetheless culpable for violating a duty to preserve the evidence because they were "aware of its importance and relevance." CP at 123. The court reserved ruling on whether it would give a spoliation instruction to the jury.

Among matters considered at a pretrial hearing on August 19, 2013, and revisited during trial were two spoliation instructions proposed by the defense and a request by Tarbert and Stevens County that they be allowed to question Mr. Cook not only about disposing of the truck but also about retaining Dr. Gill and Dr. Gill's examination of the truck. Mr. Cook had cross moved for an order in limine precluding any mention of Dr. Gill, whom the Cooks decided not to call as a witness.

On August 19, Mr. Andersen explained his concern about the defendants' request to tell the jury that an expert (who would not appear at trial) had been hired by the Cooks and was the only expert who had examined the truck before it was parted out:

> [M]y biggest problem is, Your Honor, what basically defendants are trying to do is create an inference that Dr. Gill's opinions were bad, because we can't address the nature of his opinions. I can't say: Well, he was going to say that Tarbert and Stevens County were at fault, because those opinions have been excluded. So then to sit there and say plaintiffs had an expert, where is he, where's the truck? . . .
>
> There's going to be an inference that he created a negative opinion about the case. I don't know how you remove that by saying this gentleman examined the truck, the truck was destroyed, and now Mr. Gill is not here to testify about it. Even if they don't say Mr. Gill is not here to testify about it, the jury is going to recognize that this person who examined the truck never testified. So basically it's highlighting the testimony of a witness who wasn't called, whose opinions have been excluded under order of limine, and who I'm prohibited from addressing whatsoever because of the order in limine.

RP (Feb. 8 & Aug. 19, 2013) at 68. The trial court reserved ruling on whether the defense would be allowed to question Mr. Cook about his engagement of an expert, stating that it would be revisited before the conclusion of Mr. Cook's testimony.

That issue and the issue of whether a spoliation instruction would be given were revisited on August 22, at which point Mr. Andersen proposed what he "hop[ed would] be a resolution" by stating he would not object to the defense examining Mr. Cook about the fact that the truck was parted out before the lawsuit was filed and before the defense had an opportunity to inspect it. RP (Aug. 22, 2013) at 762. He conceded the jurors

might draw an adverse inference on their own. Mr. Andersen's "main difficulty," in the parlance of the court, was with the giving of a spoliation instruction and any mention of Dr. Gill. RP (Aug. 22, 2013) at 763.[6]

The trial court gave extensive consideration to whether to instruct on spoliation and ultimately decided not to. It concluding that it was sufficient that Dr. Gill's testimony was excluded and the defense would be free to elicit testimony from parties concerning the existence of the ACM, the authorization of its disposal by agents of the plaintiff, and the fact that the defense never had the chance to examine it. Mr. Andersen acknowledged this to be a "fair resolution." RP (Aug. 22, 2013) at 773.

But then, the following exchange occurred:

> [STEVENS COUNTY'S LAWYER]: Point of clarification, Your Honor.
> THE COURT: Yes, sir.
> [STEVENS COUNTY'S LAWYER]: May we establish that an expert hired by the plaintiff examined the vehicle before the vehicle was --
> THE COURT: Yes.
> [STEVENS COUNTY'S LAWYER]: -- parted off? Thank you.
> THE COURT: Any other questions on that, Counsel?
> MR. ANDERSEN: I have a question, Your Honor. If, in fact, they can establish it, then I would think the plaintiff would have the right to

[6] Stevens County argues that with this proposal, Mr. Andersen created invited error. Br. of Resp't Stevens County at 28. But as discussed in the analysis section below, the Cooks' assignments of error are to the threshold finding of spoliation and to the court's in limine rulings permitting evidence and argument suggesting what amounted to a "missing witness" inference. The Cooks preserved error in the spoliation finding, and it was not invited error for Mr. Andersen to try to persuade the court to impose what he considered to be the least harmful consequences to his clients.

> indicate to the jury that the expert's opinions were not negative towards Mr. Cook. Because the --
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> . . . .
>
> . . . [b]ecause if the parties are allowed to say the plaintiff hired an expert to inspect this vehicle, the jury is going to say, well, where is this expert[?] So, there's clearly going to be some negative inference derived from the plaintiff to indicate that the expert is going to have a negative opinion against the plaintiff.
>
> THE COURT: I would disagree with that. I've already made the ruling on Mr. Gill, and there won't be any reference to Mr. Gill apart from the fact that there was an expert who evaluated the vehicle at the instance of the plaintiff.

RP (Aug. 22, 2013) at 773-74.

Relying on the trial court's ruling, both defense lawyers established through cross-examination of Mr. Cook that an expert for the Cooks had examined the truck and taken measurements on the Cooks' behalf at a time when they knew they were going to bring a lawsuit. Anticipating the examination, Mr. Andersen even touched in direct examination on the fact that "someone" had looked at the truck after the collision and had taken measurements. RP (Aug. 26, 2013) at 1023. Mr. Cook's testimony established that a couple of years after the accident, Joshua had sold the truck by parting it out.

In closing argument, Tarbert's lawyer argued:

> Also, we learned, going chronologically, something else happened in March of 2009. Josh Cook was storing this truck and an expert came out and took photos and measurements, an expert who didn't download the data from that airbag control module that would have told you exactly how fast Ray Cook was going in the five seconds leading up to the impact. The lawsuit was later filed in December of 2010, and the Cook family disposed of the pickup, parted it out, sold it off, before either of the defense experts were able to access it and download that airbag control module data.

RP (Aug. 28, 2013) at 1308.

In his closing argument, Stevens County's lawyer mentioned the testimony of the defense experts that Mr. Cook had been driving too fast, and then told the jury:

> And contrary to that, plaintiff hasn't called an expert to tell you what caused this accident. Plaintiffs called Mr. Keep to tell you how the road should be plowed, but there's not one bit of expert testimony from anyone in this trial to suggest that the accident was caused by anything other than Mr. Cook's speed.
>
> Now, you have heard some testimony about an expert witness, and Ms. Bloomfield went over this and I'm not going to belabor the point, but in March of 2009 you heard that Mr. Cook had an expert examine his vehicle. You heard that Mr. Cook, in March of 2009, knowing that he was going to bring a lawsuit, had the expert photograph his vehicle and take measurements of the crush depth of his vehicle. And you recall I asked Mr. Hunter, I said, Why would an expert take measurements of the crush depth? And he told you that's how experts determine speed upon impact.
>
> You also heard that Mr. Cook's vehicle was equipped with an airbag control module when the expert reviewed or looked at that truck back in March of 2009. You heard that that airbag control module would have told us exactly how fast Mr. Cook was going the five seconds before this collision and at the point of impact. But unfortunately, as you also heard, that truck, after plaintiff's expert examined it, was disposed of. It was parted off and sold, so the defense experts didn't have the opportunity to look at that airbag control module. When you go to the jury room to deliberate, you can take whatever inference you want from Mr. Cook's actions in having an expert examine that vehicle and then sell that vehicle.

RP (Aug. 28, 2013) at 1331-32.

The jury returned a defense verdict. The Cooks appeal.

ANALYSIS

The Cooks contend that the trial court erred or abused its discretion at three stages in addressing the spoliation issue. They argue first, that the court abused its discretion when it assumed, in error, that the Cooks had a duty to preserve the evidence and found spoliation as a result; second, that it abused its discretion by allowing the defendants to present evidence about a nontestifying witness, creating an adverse implication from his absence; and third, that it abused its discretion and compounded the harm when it refused to allow the Cooks to rebut the false inference by demonstrating that their expert's opinions would have supported their claim. Both defendants deny any error or abuse of discretion but argue that if one occurred, it was harmless.

Whether a duty to preserve evidence exists is a question of law. We review questions of law de novo. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). We review a trial court's decision imposing sanctions for spoliation for abuse of discretion. *Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 898, 138 P.3d 654 (2006). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). Untenable reasons include errors of law. *Estate of Treadwell v. Wright*, 115 Wn. App. 238, 251, 61 P.3d 1214 (2003).

We first address the Cooks' arguments in the order stated, and finding error, we then address whether it was harmless.

I. The spoliation finding and sanctions

Did the Cooks commit sanctionable spoliation?

Washington cases have not recognized a general duty to preserve evidence

In *Henderson v. Tyrrell*, this court cited the definition of spoliation as "'[t]he intentional destruction of evidence'" but at the same time observed that jurisdictions modernly treat the term as "encompass[ing] a broad range of acts." 80 Wn. App. 592, 605, 910 P.2d 522 (1996) (quoting BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)). Adopting an approach for determining when spoliation is sanctionable from an Alaska case, *Sweet v. Sisters of Providence in Washington*, 895 P.2d 484 (Alaska 1995),[7] *Henderson* held that the "severity of a particular act (in terms of the relevance or importance of the missing evidence or of the culpability of the actor) determines the appropriate remedy." 80 Wn. App. at 605. Its subsequent discussion of culpability illuminates the "range of acts" the court recognized as spoliation.

[7] *Henderson* adopted only *Sweet*'s approach to determining a sanction; it explicitly refused to reach *Sweet*'s identification of a rebuttable presumption as an appropriate remedy. 80 Wn. App. at 612 n.8. Washington courts have preferred instructing a jury on a permissible inference rather than a presumption in the analogous context of missing witnesses. *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 345-46, 109 P.2d 542 (1941); *State v. Davis*, 73 Wn.2d 271, 281, 438 P.2d 185 (1968), *overruled on other grounds by State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012). The issue is not presented in this appeal, but we note our disagreement with the suggestion in *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999) that *Henderson* approved a rebuttable presumption as a remedy for spoliation.

The culpable conduct relied on in seeking a sanction must be connected to the party against whom a sanction is sought. *Id.* at 606. In *Henderson*, the court applied the "connection" requirement as meaning that the act of destruction was by someone over whom the potentially sanctioned party had some control. And in *Henderson*, the court charged the plaintiff with his lawyer's knowledge that the defense had requested that evidence be preserved. *Id.* at 611.

In weighing the importance of the destroyed evidence, the fact that the culpable party itself investigated the evidence is relevant but not determinative. *See id.* at 607-09. Whether destruction of the evidence gave the culpable party an investigative advantage is a consideration; conversely, the fact that neither party presents the testimony of an expert who examined the evidence before its destruction diminishes its importance. *Id.* at 607-08. In *Henderson*, in which a car involved in a one-car accident was destroyed, the "many photographs available to the experts" supported the court's decision that no sanction was appropriate. *Id.* at 609.

In considering culpability, courts examine whether the party acted in bad faith or with conscious disregard of the importance of the evidence, or whether there was some innocent explanation for the destruction. *Id.* "Another important consideration is whether the actor violated a duty to preserve the evidence." *Id.* at 610. In *Henderson*, the plaintiff's duty to preserve his car arose from an explicit request by the defendant to preserve it. Even the violation of the duty to preserve was excused in *Henderson*,

however, because the defendant had almost two years before the car was destroyed, which the court characterized as "ample opportunity" to examine it. *Id.* at 611.

In *Homeworks*, Division Two of our court observed that Washington cases had so far not held that a potential litigant owes a general duty to preserve evidence but it allowed that the appellants in the case "may be correct that a party has [such a duty] on the eve of litigation." 133 Wn. App. at 901. In two relatively recent cases, our court has found that no duty to preserve evidence arises where a person has been injured by an arguably negligent act and a lawsuit is a possibility. In *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2009), the trial court refused to impose a sanction against medical providers who threw away a defective scalpel handle, knowing that it had been the cause of a broken blade that lodged in a patient's knee. Our court concluded that the evidence might not have been important and "we see no bad faith or other reason to show that this act was intended to destroy important evidence." *Id.* at 326. In *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 136, 307 P.3d 811 (2013), in which the plaintiff sought an adverse inference instruction against a retailer that destroyed surveillance video that might have recorded when and how water came to be on the floor where she fell, our court "decline[d] to require store premises to retain all video anytime someone slips and falls and files an accident report."

Stevens County suggests that *Henderson* recognized a general duty to preserve evidence by "quot[ing] with approval" the discussion of such a duty in *Fire Insurance*

Exchange v. Zenith Radio Corp., 103 Nev. 648, 747 P.2d 911 (1987). Br. of Resp't Stevens County at 21. But *Henderson* did not quote the language in discussing the existence of a general duty. Rather, in a footnote in which the court explained why an explicit request to preserve evidence can give rise to a duty even if made before a lawsuit is filed, *Henderson* cites *Zenith Radio* as supporting the proposition that "a party's disregard of an opposing party's informal request could be viewed as an indication of bad faith." 80 Wn. App. at 611 n.7. The language that Stevens County characterizes *Henderson* as "approving" is merely parenthetically included as support for this different proposition.

Read as a whole, *Henderson*'s discussion of culpability as a factor implicitly holds that a party's negligent failure to preserve evidence relevant to foreseeable litigation is not sanctionable spoliation. The discussion of the defendant's culpability begins with the observation that many courts examine "whether the party acted in bad faith or conscious disregard of the importance of the evidence." *Id.* at 609. Negligence is not mentioned.

Henderson then turns to a discussion of violation of a duty as a form of culpability, but the examples it gives are all of legal duties unrelated to foreseeable litigation. As observed by the court in *Homeworks*, "Significantly, in *Henderson*, the court did not suggest that potential plaintiffs have a general duty to preserve all evidence. Instead, the *Henderson* court looked to other sources for duty such as the duty of a

partner to preserve records or the duty of a medical provider to save medical information." 133 Wn. App. at 901.

Having identified those sorts of sources for duty, *Henderson* states, "Here, the Hendersons have not established . . . any similar duty to retain the 1972 Camaro." 80 Wn. App. at 610. There is no way to read that statement other than as the rejection of a general duty to preserve evidence. The court's consideration of spoliation continued in *Henderson* only because the Hendersons could point to their lawyer's letter to the defendant's lawyer explicitly asking that the car be preserved until further notice. The defense did not make a request that evidence be preserved here.

While defendants cite federal cases that recognize a general duty to preserve evidence, federal law does not help them

"Washington case law on spoliation is sparse." *Homeworks*, 133 Wn. App. at 898. In outlining a framework for identifying spoliation and framing a sanction, *Henderson* looked to contemporary cases from other jurisdictions, evidence treatises, and law review articles. In the 19 years since *Henderson* was decided, the federal courts and some state courts have recognized a general duty to preserve important evidence. Both Tarbert and Stevens County cite to federal decisions postdating *Henderson* as additional support for the court's findings and sanctions here, suggesting that we should follow the federal trend. Br. of Resp't Tarbert at 26 (citing *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368-70 (9th Cir. 1992)); Br. of Resp't Stevens County at 21

(citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003)). The federal cases do not support the trial court's rulings, however—or at least do not support its in limine ruling permitting the defendants to present evidence and argument of an adverse inference.

In *Zubulake*, the case cited by Stevens County, the court held that the party seeking instruction on an adverse inference for merely negligent spoliation must show that the destroyed evidence was "relevant" in a heightened sense: it must adduce sufficient evidence that a reasonable trier of fact could infer that the evidence *would* have—not *might* have—been helpful to its case. As the federal court explained:

> [I]n order to receive an adverse inference instruction, Zubulake must demonstrate not only that UBS destroyed relevant evidence as that term is ordinarily understood, but also that the destroyed evidence would have been favorable to her. This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him. This is equally true in cases of gross negligence or recklessness; *only in the case of willful spoliation is the spoliator's mental culpability itself evidence of the relevance of the documents destroyed.*

220 F.R.D. at 221 (some emphasis added) (footnotes omitted) (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 77 (S.D.N.Y. 1991)); *accord Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 439-40 (S.D.N.Y. 2010); *cf. Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 627 (C.D. Cal. 2013) (while the Ninth Circuit Court of Appeals has not clearly articulated the degree of culpability necessary to warrant

an adverse inference instruction, courts in the circuit have found willfulness or gross negligence to suffice).[8]

In addition to recognizing that negligence does not logically support an adverse inference, the court observed in *Zubulake* that "[i]n practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. . . . When a jury is instructed that it may 'infer that the party who destroyed potentially relevant evidence did so out of a realization that the [evidence was] unfavorable,' the party suffering this instruction will be hard-pressed to prevail on the merits." 220 F.R.D. at 219-20 (third alteration in original) (internal quotation marks omitted) (quoting *Linnen*

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[8]In reexamining its approach to spoliation in 2014, the Texas Supreme Court observed that its position that an adverse inference sanction is available only for intentional, bad faith spoliation "aligns with a majority of the federal courts of appeals." *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 24 (Tex. 2014) (citing cases). As a further reason weighing against giving such an instruction, the Texas Supreme Court expressed concern about distracting jurors from the historical evidence:

> [T]he imposition of a severe spoliation sanction, such as a spoliation jury instruction, can shift the focus of the case from the merits of the lawsuit to the improper conduct that was allegedly committed by one of the parties during the course of the litigation process. The problem is magnified when evidence regarding the spoliating conduct is presented to a jury. Like the spoliating conduct itself, this shift can unfairly skew a jury verdict, resulting in a judgment that is based not on the facts of the case, but on the conduct of the parties during or in anticipation of litigation.

Id. at 13-14.

v. A.H. Robins Co., No. 97-2307, 1999 WL 462015, at *11 (Mass. Super. Ct. June 16, 1999) (court order)).

The most recent federal development is recently approved amendments to the Federal Rules of Civil Procedure relating to electronically stored information that permit a court to give an adverse inference instruction only if it finds intentional destruction and prejudice. Proposed Amendments to the Federal Rules of Civil Procedure, 305 F.R.D. 457, 485-86 (2015).[9] Amended Federal Rule of Civil Procedure 37(e), which will take effect on December 1, 2015, absent legislation to reject, modify, or defer the rules, reads in its entirety:

> **Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> **(A)** presume that the lost information was unfavorable to the party;
>
> **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> **(C)** dismiss the action or enter a default judgment.

[9] Also available at http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf.

Comments to the 2015 proposed amendments, approved by the Judicial Conference of the United States at its September 2014 session, recognize that "[m]any court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable" and base regulation of sanctions on the existence of a federal common law duty. Proposed Amendments to the Federal Rules of Civil Procedure, Rule 37 committee note, 305 F.R.D. at 570.[10] The comments explain that in creating a uniform standard for imposing severe sanctions when addressing a failure to preserve electronically stored information, the intent was to reject federal decisions that, under some circumstances, authorize the giving of adverse inference instructions based on a finding of negligence or gross negligence. *Id.* at 575-76. The comments offer the following explanation:

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

[10] Also available at http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014 (last visited Sept. 4, 2015).

Id. at 576.

Federal cases view a federal common law duty to preserve evidence as well established. *See, e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) ("The common law duty to preserve evidence relevant to litigation is well recognized.") (abrogated on other grounds by *Chin v. Port Auth. of N.Y.*, 685 F.3d 135 (2d Cir. 2012)); Joshua M. Koppel, *Federal Common Law and the Courts' Regulation of Pre-Litigation Preservation*, 1 STAN. J. OF COMPLEX LITIG. 101 (2012) (identifying sources of authority for a federal common law duty to preserve evidence); Proposed Amendments to the Federal Rules of Civil Procedure, Rule 37 committee note, 305 F.R.D. at 569-78.

There is no such uniformity in the states' views of their common law. Most states have refused to identify a tort duty to preserve evidence whose breach will support an action for damages. *See, e.g.*, Benjamin J. Vernia, Annotation, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R. 5th 61 (collecting cases); *id.* §2[a] ("The majority of jurisdictions considering the actionability of negligent spoliation . . . have not recognized the tort, either for parties or nonparties to the underlying dispute." (citations omitted)); *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, 303 A.D.2d 30, 753 N.Y.S.2d 272, 276 (2002) ("The great weight of authority runs against recognizing a common-law duty to preserve evidence or a cause of

action for spoliation of evidence/impairment of claim or defense under almost any circumstances." (collecting cases), *aff'd*, 1 N.Y.3d 478, 807 N.E.2d 865, 775 N.Y.S.2d 754 (2004). The federal courts have been able to avoid dealing with state substantive law in making spoliation rulings in diversity cases by viewing such rulings as evidentiary in nature and thereby not subject to the *Erie* doctrine.[11] *See Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009); *Sherman v. Rinchem Co.*, 687 F.3d 996 (8th Cir. 2012).

Even if we were to consider the federal cases cited by Stevens County and Tarbert as supporting a trend toward recognizing a duty to preserve evidence, *Henderson* would compel us to follow their companion holdings that the merely negligent destruction of evidence cannot support an adverse inference. As *Henderson* recognized, "[U]nless there was bad faith, there is no basis for 'the inference of consciousness of a weak cause,'" which is "the evidentiary inference that spoliation creates." 80 Wn. App. at 609 (quoting 2 MCCORMICK ON EVIDENCE § 265, at 191 (John William Strong ed., 4th ed. 1992). Since the Cooks' parting out of the pickup truck did not support an adverse inference, the trial court abused its discretion when it ruled in limine that the defendants could present evidence and argument suggesting such an inference.

Given developments in the federal courts and elsewhere, it might be time for Washington to reexamine whether it should recognize the existence of a general duty to

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[11] *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

preserve evidence. But a request for such reexamination should address many issues that the parties here did not view as presented and therefore did not brief. Those issues include (1) the source of the duty, (2) if it is proposed to be found in the exercise of the court's inherent authority, the admonition that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion," *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980), and (3) whether it is better to leave the recognition of any such duty to rule making. We will not reexamine the duty issue further where the parties have not briefed such issues.

In summary, *Henderson* did not recognize a general duty to preserve evidence. We need not consider whether federal authority offered by Tarbert and Stevens County is persuasive support for finding a general duty to preserve evidence because the federal cases, like *Henderson*, would not support the suggestion of an adverse inference absent bad faith or, at a minimum, gross negligence. In light of the Cooks' merely negligent actions, it is clear that the trial court abused its discretion in permitting evidence and argument suggesting the inference.

II. Did the trial court abuse its discretion in admitting evidence about the plaintiffs' absent expert and denying the Cooks' request to offer rebuttal evidence that the expert's opinions would have supported their position?

The Cooks' most fervent objection to the trial court's spoliation rulings was to its decision to allow the jury to learn about their early retention of an expert on speed whom

they had not called as a witness. In briefing the parties' cross motions in limine on this issue, Tarbert explained its reasons for wanting the jury to know about the expert:

> Defendants should be allowed to show that this was not an "innocent" mistake, but that Plaintiff and his lawyer hired an expert to examine the vehicle for purposes of assessing the speed of the collision, but the expert, Plaintiffs and their attorney failed to preserve this critical evidence.
>
> . . . .
>
> It is abundantly clear that Dr. Gill knew of the importance of the black box and its data . . . . The fact that Plaintiffs and their attorney did not ensure that this information was preserved is something the jury needs to be informed of in assessing what weight to give the presumption.

CP at 283-85.

Stevens County's objective was reflected in its proposed spoliation instruction. While its proposed instruction was not given, it illustrates what the county intended to demonstrate to jurors. The instruction would have informed the jury, in part:

> Shortly after the accident, Mr. Cook hired an expert witness to examine the vehicle and render an opinion regarding the cause of the accident, including the speed involved in the collision. Mr. Cook's vehicle contained a "black box" which recorded the speed of Mr. Cook's vehicle at the time of the accident. However, the expert witness, although aware that the "black box" could provide the speed of Mr. Cook's vehicle immediately prior to impact, did not check the black box to determine the speed of Mr. Cook's vehicle. After Mr. Cook's expert witness examined the vehicle, and before the defense was allowed to examine the vehicle, Mr. Cook allowed the vehicle to be destroyed.

CP at 337.

As Mr. Andersen explained in response, he was less concerned about evidence of the pickup truck's destruction than he was about disclosure of the existence of a

nontestifying expert for the plaintiff, which he argued would be "highly prejudicial at this point, specifically given the fact that the court has made a finding of no bad faith." RP (Aug. 22, 2013) at 764. Mr. Andersen argued that if the jury learned that an expert for the Cooks had examined the truck, "the jury is going to say, well, where is this expert[? T]here's clearly going to be some negative inference . . . that the expert is going to have a negative opinion against the plaintiff." RP (Aug. 22, 2013) at 773. Mr. Andersen finally asked, after the court ruled that the evidence and argument would be permitted, whether his client would "have the right to indicate to the jury that the expert's opinions were not negative towards Mr. Cook." *Id.* Under the circumstances, as the Cooks recognized, the evidence and argument the defense was asking court permission to advance would be tantamount to a "missing witness" argument as to Dr. Gill. The Cooks' request to rebut the implication was denied.

It is the general rule that failure to call a witness under a party's control who could testify to material facts justifies an inference that the witness would have testified adversely to the party. *Wright*, 7 Wn.2d at 346. A jury may draw such an inference only when under all the circumstances of the case the failure to produce the witness, unexplained, creates a suspicion that the failure to produce was a willful attempt to withhold competent testimony. *State v. Baker*, 56 Wn.2d 846, 850-60, 355 P.2d 806 (1960) (citing *Wright*). While Tarbert and Stevens County were offering different reasons for presenting evidence that the Cooks had retained an expert who examined the

truck, a simple fact remains: if jurors were informed that the Cooks had retained an expert on crash speed, the expert had performed an examination, and the Cooks did not call him to testify, the inference that the law of evidence would expect jurors to draw is that the expert's testimony would not have been helpful to the Cooks. *Price v. United States*, 531 A.2d 984, 993 (D.C. 1987) ("By pointing out a witness' absence, counsel is plainly suggesting that if that witness were produced the resulting testimony would be adverse to the other party."); *In re Gonzalez*, 409 S.C. 621, 763 S.E.2d 210, 218 (2014) (prejudice from missing witness inference arose as soon as the existence of a nontestifying expert came out in cross-examination; any harm when inference was argued in closing was merely cumulative). Yet as the lawyers and the court knew, Dr. Gill's testimony would have been favorable, not adverse, to the Cooks.

The error was compounded when the court refused to allow the Cooks to rebut the inference. "A permissive inference is subject to reasonable rebuttal." *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 750 (8th Cir. 2004); *Webb v. District of Columbia*, 331 U.S. App. D.C. 23, 146 F.3d 964, 974 n.20 (1998) (observing that where one party, Webb, was entitled to argue for an adverse inference, "the District, likewise, would be entitled to attempt to rebut it"); *cf. Krieger v. McLaughlin*, 50 Wn.2d 461, 462, 313 P.2d 361 (1957) (where party's lawyer asked and was granted permission to rebut his adversary's missing witness argument, he waived any error). The need to provide an opportunity to rebut the

missing witness inference was critical here because everyone but the jurors knew that their natural inference from this particular missing witness would be a false one.

We realize that allowing the rebuttal would have enabled the Cooks to present evidence of an opinion that had been excluded. But once the court decided that examination about the expert would be permitted,[12] the defendants should have been required to decide whether their interest in telling the jury about the expert's examination was more important than having it revealed that his opinion would have supported the Cooks. What was intolerable, and an abuse of discretion, was to allow the defendants to present evidence of the absent expert's existence and at the same time deny the Cooks the opportunity to rebut a false inference, naturally to be drawn by the jury, that the expert's opinion was unfavorable to the Cooks.

Harmless error

Both Stevens County and Tarbert contend that even if the court abused its discretion, the error was harmless.

An erroneous evidentiary ruling is not grounds for reversal absent prejudicial error. Error will be harmless "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403,

[12] It is not clear why the court viewed evidence playing up Dr. Gill's asserted culpability as relevant. The court had already made a finding of no bad faith on the part of the Cooks that is well supported by the record.

945 P.3d 1120 (1997). An erroneous evidentiary ruling "is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Stevens County was sued for negligently plowing too narrow a traversable roadway. The speeds at which Mr. Cook and Mr. Bean were driving were irrelevant to that issue. Evidence of Mr. Cook's speed was relevant only to the issue of his comparative fault for his injury. In completing the special verdict form, jurors stopped with their finding that Stevens County was not negligent. As to Stevens County, then, the court's error was harmless.

In completing the special verdict form, the jury similarly found that Tarbert was not negligent, but in Tarbert's case, the jury's determination as to negligence necessarily turned on what the jury concluded about the speeds at which Mr. Cook and Mr. Bean were driving beginning with their approach to the blind curve and up to the time of the collision. Speed was relevant to negligence in Tarbert's case. It nonetheless argues that the fact that the Cooks had an uncalled expert who examined the vehicle "was of little significance in the light of the evidence as a whole." Br. of Resp't Tarbert at 33. We disagree.

While the Cooks did not call an expert to testify to the speeds at which Mr. Cook and Mr. Bean were driving, Mr. Cook was an experienced heavy equipment and commercial vehicle driver whose home was on the primitive road, about a mile-and-a-

half from where the collision occurred. He provided a detailed account of how he was driving leading up to the collision and how it occurred. It is likely because of Mr. Cook's demonstrable familiarity with the road and extensive driving experience that Mr. Andersen was willing to try the case without an expert witness to support his client's version of events.

The defense argued that Mr. Cook's statements to deputies contradicted the testimony he gave at trial, but both deputies' reports were very brief and we cannot say that the jury would not have credited Mr. Cook's testimony. One of the deputies testified that based on the investigation, one or both of the drivers were traveling too fast for conditions, but he was unable to determine who. Jurors were instructed that they were the sole judges of the credibility of the witnesses and the value or weight to be given to their testimony, and that they were not required to accept the opinions expressed by experts. 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL § 1.02, at 24, § 2.10, at 53 (6th ed. 2012).[13]

The case was well defended by Tarbert's veteran lawyer, but considering all, there is a reasonable probability that the two negative inferences that the defendants were permitted to invite, in error, had a material effect on the outcome of trial. Because the

[13] Although the court's instructions to the jury are not in our record, the parties' joint trial management report indicates that the standard expert witness and closing instructions would be given. CP at 145-49.

court's errors were not harmless in the case of the Cooks' claims against Tarbert and Mr. Bean, a new trial of those claims is required.[14]

We affirm the judgment in favor of Stevens County, reverse the judgment in favor of Tarbert Logging and its driver, and remand for a new trial.

Siddoway, C.J.

WE CONCUR:

Brown, J.

Korsmo, J.

[14] Stevens County's and Tarbert's briefs request awards of attorney fees and costs. No basis for an award of reasonable attorney fees is identified. Under RAP 14, the prevailing parties are entitled to costs upon compliance with RAP 14.4.

APPENDIX B

FILED

FEB 1 8 2013

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

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

RAYMOND COOK and ARLENE COOK, husband and wife and the marital community comprised thereof, Plaintiffs, vs. TARBERT LOGGING, INC., a Washington Corporation, and SHANE BEAN and JANE DO BEAN, husband and wife and the marital community comprised thereof, STEVENS COUNTY, a local governmental entity, Defendants.	No. 10-2-05353-5 ORDER GRANTING DEFENDANTS' MOTION RE: SPOLIATION OF EVIDENCE

THIS MATTER came before the above-entitled Court for hearing on February 8, 2013 on Defendants' Motion for Finding Spoliation of Evidence. Defendant Stevens County appeared through its attorney Michael E. McFarland, Jr. of Evans, Craven & Lackie, P.S. Defendants Tarbert Logging, Inc. and Shane Bean appeared through their attorney Bradley A. Maxa of Gordon Thomas Honeywell LLP. Plaintiffs Raymond Cook and Arlene Cook appeared through their attorney F. Dayle Anderson of Anderson Staab, PLLC.

The Court considered the arguments of counsel, the records and files herein, and specifically the following:

1. Defendant Stevens County's Memorandum in Support of Motion to Preclude Certain Opinions of Witness Rick Gill Due to Plaintiffs' Spoliation of Evidence;

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2. Affidavit of Michael E. McFarland, Jr. in Support of Spoliation Motion, with attachments;

3. Declaration of John Hunter, with attachments;

4. Defendants Tarbert Logging/Bean's Joinder of Motion Re: Spoliation of Evidence;

5. Plaintiffs' Memorandum in Response to Defendant Stevens County's Motion for Spoliation;

6. Reply Memorandum in Support of Stevens County's Motion to Preclude Opinions of Rick Gill Due to Spoliation of Evidence;

7. Affidavit of Michael E. McFarland, Jr. in Support of Spoliation, with attachments.

Having reviewed the foregoing records and files, and having heard the argument of counsel, the Court GRANTS Defendants' Motion and makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. The accident giving rise to this lawsuit occurred on February 6, 2009.

2. Shortly after the accident, Plaintiff Ray Cook retained counsel to represent him in anticipated litigation arising out of the accident.

3. Mr. Cook's counsel directed that the vehicle being driven by Mr. Cook (the "Cook vehicle") at the time of the accident be preserved inside and in one piece so that an expert retained by Plaintiffs could inspect it.

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4. On March 26, 2009, Plaintiffs' liability expert, Dr. Rick Gill, performed an inspection of the Cook vehicle.

5. Dr. Gill subsequently issued a report, dated September 29, 2012, in which he renders opinions regarding the relative speeds of the vehicles, including the Cook vehicle, at and immediately prior to impact. Those opinions are set forth under the section "Opinion 3" of Dr. Gill's September 29, 2012 report. Dr. Gill also testified in deposition regarding the relative speeds of the vehicles (i.e., that the Cook vehicle was traveling slower than the logging truck involved in the collision).

6. At the time of the March 26, 2009 inspection of the Cook vehicle by Dr. Gill, Plaintiffs were represented by counsel.

7. Some time after Dr. Gill's March 26, 2009 inspection of the Cook vehicle, counsel for Plaintiffs advised Plaintiffs that they could sell off parts of the Cook vehicle.

8. Plaintiffs' son, Joshua Cook, testified in deposition that he began selling off parts of the truck in September 2010. Joshua Cook also testified in deposition that he began selling off parts of the truck "the following winter" after Dr. Gill's inspection of the truck. It took approximately one year for Joshua Cook to sell off all of the parts of the Cook vehicle.

9. Before Joshua Cook began selling off parts of the Cook vehicle, Plaintiffs did not give notice to either Stevens County or Tarbert Logging that the Cook vehicle was being sold off for parts. Regardless of when Joshua Cook began selling off parts of the Cook vehicle, the vehicle was disposed of before Stevens County or Tarbert Logging had the opportunity to inspect the vehicle.

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10. The Cook vehicle was no longer available for inspection as of the date this lawsuit was filed.

11. The Cook vehicle was equipped with an Airbag Control Module, from which the speed of the Cook vehicle, both at the point of impact and for several seconds before impact, could have been obtained.

II. CONCLUSIONS OF LAW

1. The speed of the Cook vehicle, both immediately prior to and at the point of impact is a central, critical and disputed fact in this case.

2. The Cook vehicle, and in particular the Airbag Control Module, were important and relevant evidence which should properly be part of this litigation. In particular, this evidence was important and relevant to the relative speeds of the vehicles involved in the February 6, 2009 accident.

3. The importance and relevance of the Cook vehicle as evidence were such that Plaintiffs had a duty to preserve the Cook vehicle in order to give the defense in the anticipated litigation the opportunity to inspect the Cook vehicle.

4. When counsel for Plaintiffs instructed Plaintiffs to maintain the vehicle pending an inspection by Dr. Gill, a duty arose for Plaintiffs to maintain the vehicle until the defendants in the anticipated litigation had the opportunity to inspect the vehicle.

5. At the time Plaintiffs sold off the parts to the truck, Plaintiffs had knowledge of the importance and relevance of the Cook vehicle as evidence, as demonstrated by their preservation of the vehicle until it was inspected by Dr. Gill, and by the fact that Plaintiffs had

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the inspection performed by Dr. Gill.

6. Plaintiffs did not act in bad faith or with deliberate intention to destroy the evidence.

7. Notwithstanding the absence of bad faith or deliberate intention to destroy the evidence, Plaintiffs are culpable for the destruction of the evidence, as Plaintiffs had a duty to preserve the evidence and were aware of its importance and relevance.

8. The fact that Plaintiffs had their own expert inspect the vehicle, and that Defendants have not had that opportunity, have given Plaintiffs a litigation advantage which prejudices Defendants.

9. In selling off the Cook vehicle and making it unavailable to the defense for inspection, Plaintiffs have engaged in spoliation of evidence.

10. As a result of the spoliation of evidence, in the absence of the remedies ordered by the Court, the defense in this matter would be prejudiced.

11. Prior to ordering the below-identified remedies, the Court considered whether less severe remedies would cure the prejudice created by Plaintiffs' spoliation of evidence. The Court specifically finds that the remedies ordered herein are the least severe remedies to cure the prejudice to Defendants in this case arising from the spoliation.

III. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court GRANTS Defendants' Motion Re: Spoliation of Evidence. Having found spoliation of evidence, the Court orders the remedies identified below.

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1. Dr. Rick Gill is precluded from testifying at trial regarding the speeds of the vehicles involved in the accident. This includes, but is not limited to, those opinions set forth as opinions Nos. 4, 5, 6, 7, 8 and 10 of "Opinion 3" of Dr. Gill's September 29, 2012 report (attached to the Affidavit of Michael McFarland). Dr. Gill is likewise precluded from testifying to the speed-related opinions to which he testified during his deposition (i.e., that the Cook vehicle was traveling slower than the Tarbert Logging vehicle).

2. The parties shall submit with their proposed jury instructions a spoliation instruction. The Court will determine at that time whether a spoliation instruction is proper, or whether it would be an impermissible comment on the evidence.

DONE IN OPEN COURT this 12th day of February, 2013.

HONORABLE GREGORY D. SYPOLT

Presented by:

Evans, Craven & Lackie, P.S.

By: _____
Michael E. McFarland, Jr. #23000
Attorneys for Defendant

Notice of Presentment Waived:

Andersen - Staab

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APPENDIX C

WORKING COPY

FILED

AUG 29 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

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

RAYMOND COOK and ARLENE COOK, husband and wife and the marital community comprised thereof, Plaintiffs, vs. TARBERT LOGGING, INC., a Washington Corporation, and SHANE BEAN and JANE DO BEAN, husband and wife and the marital community comprised thercof, STEVENS COUNTY, a local governmental entity, Defendants.	No. 10-2-05353-5

COURT'S INSTRUCTIONS TO THE JURY

Aug 28, 2013
DATED

GREGORY D. SYPOLT
SUPERIOR COURT JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of

the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In

the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

I will now describe for you the basic elements of the claims and defenses that the parties intend to prove in this case. I am doing so for only one purpose: to help you evaluate the evidence as it is being presented.

Ray and Arlene Cook claim that Tarbert Logging and its employee, Shane Bean, were negligent and that their alleged negligence was a cause of the February 6, 2009 accident. Specifically, the Cooks alleged that Mr. Bean was driving too fast for conditions and was driving down the center of Dead Medicine Road.

The Cooks further claim that Stevens County was negligent in its snow plowing of Dead Medicine Road, and that the same was a cause of the collision between Mr. Cook's vehicle and Mr. Bean's vehicle. Specifically, the Cooks allege that Stevens County had failed to plow Dead Medicine Road wide enough for two vehicles to safely pass.

Defendants deny the Cooks' claims and allege that the accident was caused by Mr. Cook driving too fast for conditions and driving down the center of Dead Medicine Road.

The Cooks allege that Mr. Cook sustained injuries in the collision. Defendants deny the nature and extent of Mr. Cook's alleged injuries.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

The law treats all parties equally whether they are corporations, municipalities or individuals. This means that corporations, municipalities and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

INSTRUCTION NO. 7

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

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

INSTRUCTION NO. 8

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

INSTRUCTION NO. 9

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. 10

Every person has the right to assume that others will exercise ordinary care and comply with the law, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

Every person has a duty to see what would be seen by a person exercising ordinary care.

INSTRUCTION NO. 11

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the damage complained of and without which such damage would not have happened.

INSTRUCTION NO. 12

The plaintiff, Raymond Cook, claims that defendants were negligent in one or more of the following respects:

Defendant Tarbert Logging's driver Shane Bean was negligent in the operation of his vehicle by traveling too fast for conditions and in the center of the road.

Defendant Stevens County was negligent by failing to properly plow the roadway to a safe width.

The plaintiff claims that one or more of these acts was a proximate cause of injuries and damage to plaintiff. The defendants deny these claims.

In addition, Plaintiff Arlene Cook claims that she lost the consortium of her husband, Raymond Cook, as a result of her husband's alleged injuries. The defendants deny this claim.

In addition, the defendants claim as an affirmative defense that the plaintiff Raymond Cook was contributorily negligent in the operation of his vehicle by traveling too fast for conditions and in the center of the road.

The defendants also claim that plaintiff Raymond Cook's conduct was a proximate cause of the plaintiffs' own injuries and damage. The plaintiffs deny this claim.

The defendants further deny the nature and extent of the plaintiffs' claimed injuries and damages.

The foregoing summary is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

INSTRUCTION NO. 13

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 14

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

INSTRUCTION NO. 15

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence.

If you find for the plaintiff Raymond Cook, your verdict must include the following undisputed items:

Past medical bills:	$107,021.65
Past household help expenses:	$ 6,875.00

If you find for the plaintiff Raymond Cook you should consider the following future economic damage elements:

(1) The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future.

(2) The reasonable value of necessary nonmedical expenses that will be required with reasonable probability in the future.

If you find for the plaintiff Raymond Cook, you should also consider the following noneconomic damages elements:

(1) The nature and extent of the injuries;

(2) The disability or loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.

(3) The pain and suffering experienced and with reasonable probability to be experienced in the future.

Plaintiff Arlene Cook has a separate claim for the loss of the consortium of her husband, Raymond Cook. If you find for the plaintiff Arlene Cook on her loss of consortium claim you should consider the following in awarding noneconomic damages:

The term "consortium" means the fellowship of husband and wife and the right of one spouse to the company, cooperation, and aid of the other in the matrimonial relationship. It includes emotional support, love, affection, care, services, companionship, including sexual companionship, as well as assistance from one spouse to the other.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular elemcnt has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 16

You should decide the case of each plaintiff separately as if it were a separate lawsuit. The instructions apply to each plaintiff unless a specific instruction states that it applies only to a specific plaintiff.

INSTRUCTION NO. 17

If you find for more than one plaintiff, you should determine the damages of each plaintiff separately.

INSTRUCTION NO. 18

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

INSTRUCTION NO. 19

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include defendant Tarbert Logging, defendant Stevens County and plaintiff Raymond Cook.

INSTRUCTION NO. 20

Defendant Tarbert Logging, Inc. is a corporation. A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

INSTRUCTION NO. 21

A statute provides that:

> Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except when an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard.

The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.

Such a violation may be excused if it is due to some cause beyond the violator's control, and that ordinary care could not have guarded against.

INSTRUCTION NO. 22

It is the duty of every person using a public road to exercise ordinary care to avoid placing himself or others in danger and to exercise ordinary care to avoid a collision.

INSTRUCTION NO. 23

A statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing. The driver shall control speed to avoid colliding with others who are complying with the law and using reasonable care.

The statute provides that a driver shall drive at an appropriate reduced speed when approaching and going around a curve, when traveling upon any narrow or winding roadway and when special hazard exists by reason of weather or road conditions.

INSTRUCTION NO. 24

Every person using a public road has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

INSTRUCTION NO. 25

You are instructed that Dead Medicine Road is a "primitive road." Pursuant to a Washington statute, Stevens County had no legal duty to widen the roadway surface of Dead Medicine Road, make any repairs to Dead Medicine Road, or post any signs on Dead Medicine Road.

INSTRUCTION NO. 26

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reaehed a verdict. The bailiff will bring you back into court where your verdict will be announced.

GORDON THOMAS HONEYWELL

October 30, 2015 - 2:45 PM

Transmittal Letter

Document Uploaded:	320006-Tarbert - Petition for Supreme Court Review 4812-0209-9497 v.1.pdf
Case Name:	Tarbert Logging, Inc. v Raymond Cook
Court of Appeals Case Number:	32000-6
Party Respresented:	Tarbert Logging, Inc.
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: Spokane - Superior Court # 10-2-05353-5

Type of Document being Filed:

FILED
Oct 30, 2015
Court of Appeals
Division III
State of Washington

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: Petition for Supreme Court Review

Comments:

No Comments were entered.

Sender Name: Stephani Bloomfield - Email: sbloomfield@gth-law.com

GORDON THOMAS HONEYWELL

October 30, 2015 - 2:47 PM

Transmittal Letter

FILED
Oct 30, 2015
Court of Appeals
Division III
State of Washington

Document Uploaded:	320006-Appendix A.pdf
Case Name:	Tarbert Logging, Inc. v Raymond Cook
Court of Appeals Case Number:	32000-6
Party Respresented:	Tarbert Logging, Inc.
Is This a Personal Restraint Petition?	☐ Yes ☑ No

Trial Court County: Spokane - Superior Court # 10-2-05353-5

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: Attachment A to Petition for Review

Comments:

There are Attachments A, B and C to be uploaded

Sender Name: Stephani Bloomfield - Email: sbloomfield@gth-law.com

FILED
Oct 30, 2015
Court of Appeals
Division III
State of Washington

GORDON THOMAS HONEYWELL

October 30, 2015 - 2:48 PM

Transmittal Letter

Document Uploaded:	320006-Appendix B.pdf
Case Name:	Tarbert Logging, Inc. v Raymond Cook
Court of Appeals Case Number:	32000-6
Party Respresented:	Tarbert Logging, Inc.
Is This a Personal Restraint Petition?	☐ Yes ☑ No

Trial Court County: Spokane - Superior Court # 10-2-05353-5

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: Attachment B to petition for review

Comments:

No Comments were entered.

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October 30, 2015 - 2:48 PM

Transmittal Letter

FILED
Oct 30, 2015
Court of Appeals
Division III
State of Washington

Document Uploaded:	320006-Appendix C.pdf
Case Name:	Tarbert Logging, Inc. v Raymond Cook
Court of Appeals Case Number:	32000-6
Party Respresented:	Tarbert Logging, Inc.
Is This a Personal Restraint Petition?	☐ Yes ☑ No

Trial Court County: Spokane - Superior Court # 10-2-05353-5

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: Attachment C to Petition for Review by Supreme Court

Comments:

No Comments were entered.

Sender Name: Stephani Bloomfield - Email: sbloomfield@gth-law.com