No. 99283-5

SUPREME COURT
OF THE STATE OF WASHINGTON

CARLTON EVANS and MARGARET EVANS,
husband and wife,

Respondents,

v.

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

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Other Cases

Rules and Regulations

Other Authorities

A. INTRODUCTION

Paying little attention to the criteria of RAP 13.4(b), and ignoring the fact that Division III's unpublished opinion rested upon well-developed Washington law principles, the County fails to establish that this Court should grant review.

The Court of Appeals, Division III, correctly determined in its unpublished opinion that the trial court deprived Carlton Evans, who was impaled by the tree falling from the right-of-way of the County's road, of a fair trial. The County had responsibilities to Evans both in its capacity as the operator of the roadway and as the owner of the premises from which the tree fell on Evans, who was innocently driving down Big Meadows Road. The trial court did not correctly instruct the jury on the County's duty in Instructions 18 and 21, given this Court's well-developed principles on its roadway safety duty.

Moreover, because that instructional error required a remand for a new trial, Division III correctly ruled that the trial court's Instruction 14, on the so-called act of God defense, and Instruction 13, on intervening cause constituted error because they misstated Washington law and unfairly emphasized the County's position on liability.

This Court should deny review. RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW[1]

The County indiscriminately raises multiple arguments in its petition for review as to Division III's unpublished opinion, both as to instructions actually given by the trial court that were the predicate for Evanses' appeal, as well as more theoretical issues the County raised on cross-appeal that are pertinent only to trial on remand. In fact, the County seeks review on issues that *may* come up on retrial. Pet. at 5. These issues do not merit review. RAP 13.4(b).[2]

C. STATEMENT OF THE CASE

Division III's opinion does an excellent job of setting forth the facts in this case. By contrast, the County's statement of the case offers a truncated version of the facts that omits facts unfavorable to it. Pet. at 2-4. Evans will not repeat the facts here, but several points bear emphasis.

Big Meadows Road is a busy County road serving a growing area

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[1] The County has *abandoned* certain issues such as the admissibility of the testimony of experts Mark Webber, Evans' arborist, and James Valenta, a civil engineer, by not raising the admissibility of their opinions on remand. RAP 13.7(d). *See* Op. at 4-6, 40-45.

[2] Respondent Evans believes that this Court should deny review because a new trial is fully in order. However, were this Court to conclude that review is proper (which it is not), this Court should grant review on the question of whether the trial court erred in granting summary judgment to the County on the applicable standard to be applied in assessing the hazardous nature of the County's Big Meadows Road. Op. at 7-14. Division III erred in concluding that a clear zone was not required under the County's own statutorily-mandated road standards. Br. of Appellant at 11-17; reply br. at 24-32. To be clear, this issue is only a *conditional* issue for review. *State v. Grott*, 195 Wn.2d 256, 265, 458 P.3d 750 (2020) (recognizing that issues may be raised conditionally); *Gerlach v. Cove Apts., LLC*, 196 Wn.2d 111, 119 n.4, 471 P.3d 181 (2020) (same).

of North Spokane, connecting to U.S. Highway 2. Ex. P-16; CP 42, 873, 879, 883, 910-11. Its traffic includes school buses. *Id*. County road maintenance personnel were *frequently* on that road, and knew, or should have known, of hazards on or near the Road.[3]

Before Carlton's July 23, 2014 injury, a Ponderosa pine tree leaned from the County right of way at a steep angle over the road, a point deliberately ignored by the County in its petition. CP 42; RP 468; RPII 894. The tree was about 80 to 100 feet tall, and its base was only about 12 feet from the road. RP 479; RPII 974, 978. Trees in the County right-of-way had leaned over the roadway *for years* and the County knew trees in the right-of-way presented an actual or potential hazard to motorists. Br. of appellants at 3-4, 7; reply br. at 6. For example, motorists collided with trees on the side of Big Meadows Road on *five occasions* prior to Carlton Evans' injury. CP 971, 980, 982, 999, 1006.

In its answer, the County *admitted* responsibility for maintaining the right of way there, including the land where the tree stood. CP 42 ("Defendant admits that the tree was on property owned and maintained by the Defendant."); RPII 302-03, 973. Its roads department

[3] The County's road maintenance personnel were on Big Meadows Road every month. RPII 398. In fact, shortly before the tree fell here, a team of County employees was on Big Meadows Road for four days clearing brush and trimming trees. Ex. P-198; RPII 348-52.

acknowledged the County was required to "review the roadways for safety," and to maintain Big Meadows Road "in a reasonably safe condition." RPII 292, 343. The County admitted that it had the authority as well as "the means and funding to remove" the leaning Ponderosa pine, had it chosen to do so. CP 916; RPII 302-04.[4]

Normal weather conditions for Spokane include windstorms with gusts up to 50 miles per hour. RPII 767-68. A County roads department manager acknowledged "that one of the most significant hazards" from windstorms "is trees that fall." RPII 345-46. Major wind storms have increased in frequency in the Spokane area in recent years, prompting the Spokane Conservation District's arborist "to look at more trees." RPII 768.

The County added to the hazard of leaning trees in its right of way by altering the land on the roadside by that leaning pine tree, digging and grading around it, disturbing the tree roots. Ex. D-229; RP 466, 472-73; RPII 927-28, 1010. The County also sprayed toxic herbicides along the

[4] The County knew that leaning or diseased roadside trees can endanger the public, and its County Engineer attested the County "should remove trees that are a hazard to falling on the roadways." RPII 290, 292, 312, 452. But the County did not have a written tree-maintenance plan. RPII 603. The County also did not assign any particular employee to inspect County roads for hazardous trees, despite having 300 employees in its roads department, 26 of whom performed maintenance in the district encompassing Big Meadows Road. RP 289, 292-93, 296. The County did not have any written materials for training its maintenance employees on how to assess whether roadside trees are unhealthy or pose a risk. RPII 289, 292, 294. County maintenance workers also admitted they had not been told to look for hazardous trees or trained how to spot them. RPII 353, 394.

Road, damaging the trees, making them weaker. RPII 237-84.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

(1) Division III Correctly Concluded that the Trial Court Erred in Instructing the Jury on the County's Duty to Evans as the Operator of a Public Roadway and as the Owner of Land Adjacent to the Roadway

Division III properly concluded that the trial court erroneously instructed the jury on the County's dual duty of care to Evans. Op. at 17-22. The trial court's instructions misstated the law on the dangers that are included within the scope of the duty. In making its decision, Division III relied upon well-established authority of this Court. Review is not merited. RAP 13.4(b).

In general, a government owes a duty of care to the traveling public both in the capacity as the operator of public roads and, where it also owns the land adjacent to the road, as a property owner. Here, the County acted in both capacities, and the jury should have been properly instructed accordingly.

(a) County's Duty as Road Operator

Division III applied this Court's well-developed precedents that the County owed a duty of "ordinary care" as a public-road operator "to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel." *Keller*

v. City of Spokane, 146 Wn.2d 237, 249, 253-54, 44 P.3d 845 (2002).[5] Op. at 15-16 (citing *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995)). This duty of "reasonable care" is "well established," *Lowman v. Wilbur*, 178 Wn.2d 165, 170, 309 P.3d 387 (2013); *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 786, 108 P.3d 1220 (2005). The duty extends to hazards on the side of the actual roadway. *See, e.g.*, *Wuthrich v. King County*., 185 Wn.2d 19, 27, 366 P.3d 926 (2016) (holding hazards from roadside vegetation must be guarded against). Road operators must act affirmatively to protect the public and mitigate hazards that fall within the duty of care: "a municipality has a duty to take reasonable steps to remove or correct for hazardous conditions that make a roadway unsafe for ordinary travel." *Id.*; *Lowman*, 178 Wn.2d at 171-72 (holding that the dangerous placement of a roadside utility pole may be the legal cause of damages in a negligence claim against a county). Roadside trees fall within the County's duty as a road operator. In *Wuthrich*, this Court recognized that there is no "vegetation exception" to roadway operators' duty to road users; the county there had a duty to address blackberry obscuring road visibility. 185 Wn.2d at 25 ("There is no

[5] The *Keller* court established the instruction that is now WPI 140.01. *See* 146 Wn.2d at 252-54.

categorical exemption for unsafe conditions caused by roadway vegetation.").[6]

The trial court gave Instruction 11, the correct *Keller* instruction based on WPI 140.01, regarding the County's general duty as a road operator. But it also gave an erroneous instruction, Instruction 18 (*see* Appendix), on the specific duty where actual knowledge of the road hazard is involved. That instruction omitted language from the pattern instruction that would have informed the jury that notice is not required when the dangerous condition is one that may be "reasonably anticipated." *Compare* WPI 140.02 *with* CP 4252.

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[6] The County relies upon *Helmbreck v. McPhee*, __Wn. App. 2d __, 476 P.3d 589 (2020) for the proposition that the City had no duty to anticipate danger posed by vegetation. Pet. at 10-11. That is a *vast* misstatement of the case. Division I specifically ruled that notice of a hazard, actual or constructive, is not required if "the government entity created the unsafe condition either directly or through negligence, or *if it was a condition it should have anticipated*," *id.* at 598 (emphasis added). Constructive notice is also inferred if, as here, the hazard is allowed to continue over a long period of time. *Id.* at 596. Division I found that the city there had no notice of the vegetation problem on the specific facts of that case.

Indeed, where a public road operator "exercising ordinary care would have discovered the defective roadway condition," *O'Neill v. City of Port Orchard*, 194 Wn. App 759, 773-74, 375 P.3d 709 (2016), *review denied*, 187 Wn.2d 1003 (2017), the jury may find constructive notice. In other words, if a public road operator knows a dangerous condition *probably* will develop, the jury may conclude that ordinary care requires a follow-up inquiry. But Instruction 21 told the jury that, *as a matter of law*, the County could turn a blind eye to the danger.

As shown in *Helmbreck*, *O'Neill*, and Division III's opinion here, this Court's precedents up to and including *Wuthrich* are consistent. The Court of Appeals has properly applied them, reaching different results based on different factual situations. Review under RAP 13.4(b)(2) is not merited, contrary to the County's argument.

From this faulty foundation, the trial court then compounded its error by giving Instruction 21 (*see* Appendix), an instruction the County created by taking language from a Division III decision that Division III itself recognized was taken out of context. Op. at 19 ("Aside from being dicta, the problem with this language from *Laguna* is that it is an inaccurate statement of the law, or, at best, incomplete.").[7] Instruction 21 misinformed the jury that the County had to have *actual knowledge* of an unsafe condition: "The county cannot be negligent if it only knew that an unsafe condition might, or even probably will, develop." CP 4256. Instruction 21 erroneously stated the law.

Despite the bracketed language of WPI 140.02 based on well-developed authority, the County posits the proposition that it has no duty to anticipate road hazards. Pet. at 6-9. But its own discussion in its petition acknowledges it *did* have such a duty.

Moreover, its argument constitutes bad public policy. As a road operator, the County should not be allowed to open its roads to the public

[7] *Laguna v. Wash. State Dep't of Transp.*, 146 Wn. App. 260, 192 P.3d 374 (2008) was limited to the issue of *actual notice*, as this Court acknowledged in its opinion. *Id.* at 263 n.5 ("Only actual notice is at issue here."). Evans did not argue that the County had actual notice. *Laguna*, as only an actual notice case, offered nothing relevant to the jury instructions here. This Court has long frowned on instructions excerpting portions of opinions. *Turner v. City of Tacoma*, 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967) (though the Court "may have used certain language in an opinion," it "does not mean that it can be properly incorporated into a jury instruction." The danger is that a "rhetorical sentence" from an opinion might be taken out of context, or it might overemphasize a party's theory of the case.).

and then stand mute while clear hazards develop on them that it is in the best position to discern and abate. Just as a landowner has a duty to inspect its premises for hazards and abate such hazards or warn invitees of them, as will be noted *infra,* a road operator like the County has the analogous duty, WPI 140.01 and 140.02, embodying this Court's principles of road operator liability require no less. That is why Instruction 21 is error. The County's position is contrary to this Court's decisions going back to 1962.

Contrary to Instruction 21, this Court has long held public road operators must give "reasonable regard for *possible or common* dangers that may be expected." *Berglund v. Spokane County*, 4 Wn.2d 309, 314, 103 P.2d 355 (1940) (quotation omitted) (emphasis added). The County neglects to cite *Berglund*, a seminal road liability case. When an unsafe condition is "reasonably to be anticipated, it would be the county's duty to exercise reasonable care to protect the public against the resulting danger." *Id.* at 361.[8] As Division III concluded, op. at 19-23, Instruction 21 collided with this foundational law, misinforming the jury that the

[8] *See also, Argus v. Peter Kiewit Sons Co.*, 49 Wn.2d 853, 856, 307 P.2d 261 (1957) ("The duty of the appellate contractor to use ordinary care in keeping detour in a safe condition for proper travel involved the anticipation of the defects that were the natural and ordinary result of use by vehicular traffic."); *Ogier v. City of Bellevue*, 12 Wn. App. 2d 550, 459 P.3d 369 (2020) (summary judgment for city reversed because fact question existed as to whether it should have reasonably anticipated development of manhole hazard).

County's duty did not extend to an unsafe condition that "probably" would develop, and omitting key language from WPI 140.02 on the County's plain duty to anticipate harm.

Since *Berglund*, it is also clear that actual notice is not a precondition for counties where (1) the actions of the County's employees created the dangerous condition;[9] (2) the dangerous condition was "reasonably foreseeable" or one that should have been "reasonably anticipated.";[10] or (3) the County had constructive notice of the dangerous condition.[11]

Instruction 21 misstated the law because if the County "knew an unsafe condition … probably will develop," as provided in Instruction 21,

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[9] *See, e.g., Nguyen v. City of Seattle*, 179 Wn. App. 155, 165-66, 317 P.3d 518 (2014) ("[T]he notice requirement does not apply to dangerous conditions created by the governmental entity or its employees or to conditions that result from their conduct." (citations omitted)).

[10] In addition to the cases cited *supra* for this point, *see also*, *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 748, 375 P.2d 487 (1962) ("A county's liability to the users of its roads is predicated upon its having notice, either actual or constructive, of the dangerous condition which caused injury, unless the danger was one it should have foreseen and guarded against." (citations omitted)); *Nguyen*, 179 Wn. App. at 165 ("Nor is notice required where the City should have reasonably anticipated the condition would develop." (citations omitted)).

[11] *See, e.g., Niebarger v. City of Seattle*, 53 Wn.2d 228, 230, 332 P.2d 463 (1958) (defining constructive notice); *Nguyen*¸ 179 Wn. App. at 165 ("Notice may be actual or constructive."); WPI 140.02 cmt. (commenting that WPI 140.02 is used only in when actual or constructive notice is necessary for a government entity to be liable for an unsafe road condition). "[C]onstructive notice arises where the defective condition has existed for such time that a municipality in *exercising ordinary care would have discovered* the defective roadway condition." *O'Neill*, 194 Wn. App. at 773-74 (emphasis added).

then certainly the jury could reasonably have found at a minimum that the County "ought to have known about the condition," *Niebarger*, 53 Wn.2d at 230, and thus had constructive notice. Washington law plainly provides a road operator is required "to take reasonable steps to remove or correct for hazardous conditions" within its duty of care. *Wuthrich*, 185 Wn.2d at 27. The County could have been negligent if it knew an unsafe condition probably would develop, contrary to Instruction 21.[12] Division III correctly applied Washington law on a roadway operator's duty to the motoring public. Review is unmerited. RAP 13.4(b).

Not content to misstate the law on a roadway operator's duty to anticipate hazards on its roadway, the County doubles down by contending that the risk, in this case, the tilting Ponderosa pine must be visible to a *layperson*. Pet. at 14-15.[13] The County apparently surmises

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[12] And Instruction 21 was plainly prejudicial because of the County's closing argument and Instruction 18. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876, 281 P.3d 289 (2012) ("The closing argument was not the *error*, it was the source of *prejudice* …." (emphasis in original)). The County's attorney told the jury during closing argument that Instruction 21 was "important." RPII 1394. The County's attorney criticized the Evanses' negligence claim as being about "what might be possible, what could have happened," and pointed to Instruction 21 to argue that the Evanses needed to show "the county had notice that this specific tree was going to fall on this specific road on this specific day at this specific time." *Id.* But actual notice of the danger at that specific time and place was not the sole basis to trigger the duty to exercise reasonable care in mitigating the danger. *See, e.g.*, *Albin*, 60 Wn.2d at 748; *Berglund*, 4 Wn.2d at 361; *Nguyen*, 179 Wn. App. at 165-66. "This argument took what had been a mere latent possibility of misunderstanding and actively encouraged the jury to apply an erroneous legal standard." *Anfinson*, 174 Wn.2d at 876.

[13] In *Tapken v. Spokane County*, 9 Wn. App.2d 1027, 2019 WL 2476445 (2019) at *19 the County told Division III that it has no duty of care to the traveling public if a

that the motoring public is going to slow down or stop to inspect the facilities the County chooses to provide on its roadway and make available to the public. Its position is unsupported by any case authority. *Nothing* in *Wuthrich*, this Court's recent roadway vegetation case, suggests that only a layperson must detect a hazard to road operations posed by vegetation.[14] The County's position is bad public policy, yet again.[15]

Division III did not err in rejecting this contention. Op. at 39-40. Review is not merited on the error in the trial court's instructions on the County's roadway safety duty.

(b) County Duty as Landowner

Notwithstanding the County's carping about its distinct liability as a landowner where the tree that fell on Carlton Evans emanated from its right of way, pet. at 16-18, Division III applied principles long ago established by this Court holding that a landowner owning property

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condition is known or obvious. After losing both appeals in *Tapken*, the County argued here that its duty of care is limited to conditions that are known or obvious. Resp. Br. at 49. The County wants it both ways: "If the condition *is* known and obvious, we shouldn't have to do anything. But also if the condition is *not* known and obvious, we shouldn't have to do anything." Essentially, the County wants the people of Washington to travel their roadways entirely at their own risk.

[14] The County only cites *Wuthrich* in passing and does not analyze it. Pet. at 15.

[15] Reasonable care requires public road operators to know no more than a "layperson" would. Public road operators are liable for any condition if they created the condition, whether appreciable by a layperson or not. Plus, for all other conditions, the matter is for the jury. *Wuthrich*, 185 Wn.2d at 27, and "technical considerations" and "[t]he financial burden" are among the circumstances for a jury to consider, *Berglund*, 4 Wn.2d at 319.

abutting a roadway may have liability to roadway users if negligent. The County did not merely have an easement for a right of way, it owned the land where the trees stood, as the County *admitted*, CP 42; RP 11: 301-02. Given the County's property ownership and the well-established precedents that applied, the trial court properly instructed the jury on that principle in Instruction 19 (*see* Appendix). Op. at 31-34. Review is not merited. RAP 13.4(b).

In general terms, possessors of land owe a duty to invitees to inspect their premises for hazards and to make them safe for invitees by abating the hazard or warning invitees of them. *Adamson v. Port of Bellingham*, 193 Wn.2d 178, 188, 438 P.3d 522 (2019) ("a possessor of property [must] exercise reasonable care to protect an invitee against a condition that creates an unreasonable risk of harm, including inspecting for said conditions.").

Landowners have a well-established common law duty to travelers on adjacent public roads, as this Court plainly held in *Mills v. Orcas Power & Light Co.*, 56 Wn.2d, 807, 818-19, 355 P.2d 781 (1960) ("… one must exercise reasonable care to maintain his property so as not to injure those using the adjacent highway."). Although *Mills* involved the duty of an electric power company to users of a public airport, this Court re-

affirmed the principle in *Albin*.[16] There, this Court held the owners of rural land next to a remote public road owe a duty to road users when they disturb the land instead of leaving it in a natural state; the owners owe a duty to inspect and mitigate unsafe conditions of which they have actual or constructive knowledge. 60 Wn.2d at 751-52. The County *admitted* in its answer that the tree was in the County right-of-way and that it owned the land where the tree had stood. CP 42; RPII 301-02. This duty of care would apply with equal force here even if the crash site were considered rural or non-residential.[17] When a landowner in an urban or residential area has actual or constructive notice of a defective tree, the owner "has a duty to take corrective action." *Lewis v. Krussel*, 101 Wn. App. 178, 187, 2 P.3d 486, *review denied*, 142 Wn.2d 1023 (2000).

Because the County owned and thus had control over the land where the tree stood,[18] the undisputed facts triggered the duty to exercise reasonable care for inspection and mitigation upon having constructive

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[16] This duty is well-understood in premises liability law. *See, e.g.*, *Restatement (Second) of Torts* § 362(2) ("A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway); *Restatement (Second) of Torts* § 368 (possessor of land that creates artificial condition near to existing highway involving unreasonable risk to other brought into contact with risk while traveling on highway is subject to liability).

[17] Big Meadows Road was a significant urban artery, as noted *supra*.

[18] Indeed, as this Court opined in *King County v. King County Water Dists. Nos. 20, 45, 49, 90, 111, 119, 125*, 194 Wn.2d 830, 453 P.3d 681 (2019), counties have *broad* control over rights-of-way allowing them to charge fees for their use.

notice of the danger. As noted *supra*, Big Meadows Road is not a remote byway, but a "Rural Major Collector," and is a school-bus route. The County owed a duty of care to Carlton Evans under *Lewis*, 101 Wn. App. at 187; the Road was not remote as in *Albin*. Moreover, the County altered the natural condition of its roadside property, using trucks to dig ditches and spray herbicides into the roadside twice per year. RPII 237-84, 927-28, 1010. The County's combined actions could hardly be counted as leaving its land in a "natural state." *Albin*, 60 Wn.2d at 751. Upon having constructive notice of the dangerousness of the tree, the County therefore had a duty to exercise reasonable care to inspect and mitigate the condition. *See id.* at 751-52.

The County's petition largely ignores this Court's controlling decision in *Albin*, holding that a landowner abutting a roadway may have liability to motorists in favor of *Nguyen*, a Court of Appeals decision. Division III correctly applied this Court's precedents in *Mills* and *Albin*, and the well-established common law principle they articulated to conclude that the County had a premises liability duty to Evans. Review is not merited. RAP 13.4(b).

(2) Division III Correctly Ruled that Instruction 14, the "Act of God" Instruction, Erroneously and Prejudicially Detracted from the Already-Flawed Instructions on the County's Duty of Care

Division III determined that the trial court further diluted instructions on the County's duty by instructing the jury on an "act of God" as a defense to liability in Instruction 14. Op. at 27-31. The trial court put its thumb additionally on the scales when it gave Instruction 25, (*see* Appendix), telling the jury about facts on wind that were in dispute. In rejecting Instruction 14, Division III again applied well-developed legal principles. The County cannot show how Division III's decision on Instruction 14 conflicts with *any* appellate decision. Instead, it resorts to a vague argument that the law is "unclear." Pet. at 18-20. Review is not merited. RAP 13.4(b).

Generally, the proper constraining principle on the scope of a duty of care in the road liability setting is *foreseeability*. *Travis v. Bohannon*, 128 Wn. App. 231, 238, 199 P.3d 417 (2005); *Wells v. City of Vancouver*, 77 Wn.2d 800, 802, 467 P.2d 292 (1970) (stating that foreseeability is "useful in determining the limits of the defendant's duty"). Instructions 11, 18, and 19 on the County's duty of care would have allowed the County to argue foreseeability, but, in conjunction with Instruction 21, the "act of God" instruction overemphasized the County's theory of the case.

No appellate decision has approved of an "act of God" instruction in a case involving a government entity's duty of care as a public road operator. Although an "act of God" instruction was approved by this

Court in *Wells*, the alleged municipal negligence there had nothing to do with the operation of a public road, and the approved instruction included a critical preamble that was missing here: *Compare Wells*, 77 Wn.2d at 803 ("'One who is under a duty to protect others against injury cannot escape liability for injuries to the person or property of such others on the ground that it was caused by an act of God, unless ….'" (quoting record)), *with* Instruction 14. CP 4248.[19]

Division III correctly concluded that Instruction 14 was contrary to *Wells* and *Burton* where the issue was properly duty/foreseeability. The language of that instruction pertained to causation, an issue already addressed in Instruction 12; the court further noted that it might be construed as another superseding causation instruction, an issue not properly before the jury. Op. at 30-31. In all, the instruction was "confusing and improper." *Id*. at 31.[20]

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[19] In *Burton v. Douglas County*, 14 Wn. App. 151, 539 P.2d 97, *review denied*, 86 Wn.2d 1007 (1975), a flood case, the flooding concurred with improper design of a roadway to cause harm, the county was liable, regardless of "whether the rainstorm was an ordinary freshet or an unprecedented flood." *Id*. at 156. As in *Burton*, regardless of whether the tree here fell during a wind gust qualifying as an "act of God," the County's liability would be predicated on the underlying negligence in leaving the dangerous tree there in the first instance. At most, even if the winds reached the level of an "act of God," they would have been a concurring cause. That is not a sufficient ground to warrant an "act of God" instruction. *Tope v. King County*, 189 Wash. 463, 471-72, 65 P.2d 1283 (1937) ("[T]he defendant is liable for such loss as is caused by his own act concurring with the act of God, provided the loss would not have been sustained by plaintiff but for such negligence of the defendant.").

[20] An "act of God" was not present here in any event. *See, e.g., Head v. De*

Review of this issue is not merited. RAP 13.4(b).

(3) Division III Correctly Concluded that the Trial Court Erred in Instructing the Jury on Superseding Cause

Recognizing the utter baselessness of its contention, the County fails to even offer *any* authority or substantive argument on superseding cause. Pet. at 18-20. Division III did not err in concluding that the trial court erred in giving Instruction 13 on superseding cause where the giving of that instruction constituted a further unfair emphasis on the County's theory of the case, even though the jury did not reach causation. CP 4263. Op. at 23-27. Review is not merited. RAP 13.4(b).

Division III applied this Court's well-established rule set forth in *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 813, 733 P.2d 969

Souse, 836 S.E.2d 227 (Ga. App. 2019) (act of God is present only if event in nature was so extraordinary that the history of climatic conditions in the locality affords no reasonable warning of them; the occurrence must be totally unexpected in the natural world). The County's meteorologist testified that there was a 1.25% chance of winds reaching 68 mph in a year, and he admitted that wind gusts reached 71 mph in 2005 and 2015. RPII 498, 503. Wind gusts up to 50 mph were normal for the area, and windstorms have occurred more frequently in recent years in Spokane. RPII 767-68. At most, the wind speeds were merely an "unusual or rare occurrence," CP 4248, which Instruction 14 specified was *not* enough to constitute an "act of God." Gusts of up to 68 mph cannot be an "act of God" in Spokane.

Even in that day's winds, there was no evidence that an "act of God" was the "sole proximate cause" as Instruction 14 provided. CP 4248. The County's experts acknowledged their opinions did not include any opinion that the tree actually fell during the claimed maximum wind gust of 68-70 mph. RPII 513, 970. In fact, the meteorologist testified that the claimed maximum gust occurred "between 4:00 and … 4:20 p.m.," RPII 498, but the collision did not occur until 4:35 p.m., CP 1025. Instruction 14 was thus impermissibly founded on nothing more than speculation and conjecture about the impact of the maximum wind gusts, compounded by the trial court's comment on the evidence in Instruction 25.

(1987). Op. at 24. Intervening acts which are reasonably foreseeable cannot be superseding causes. 107 Wn.2d at 814. In determining whether an act constitutes a superseding cause, the relevant factors "are, *inter alia,* whether (1) the intervening act created a *different type of harm* than otherwise would have resulted from the actor's negligence; (2) the intervening act was *extraordinary* or resulted in extraordinary consequences; (3) the intervening act *operated independently* of any situation created by the actor's negligence." *Id.* at 812-13 (citing *Restatement (Second) of Torts* § 442 (emphasis in original)).[21]

The record here did not justify the instruction on superseding cause. The harm here was the same as what otherwise would have resulted from the County's negligence: a tree could not withstand high winds and collided with a passing motorist. *See Campbell*, 107 Wn.2d at 812-13. High winds also did not "'operate[] independently of any situation created by the [the County]'s negligence.'" *Id.* (quoting *Restatement (Second) of Torts* § 442 (emphasis removed)). Rather, the high winds operated in conjunction with the situation created by the County's failing to inspect a

[21] *Accord*, *Albertson v. State*, 191 Wn. App. 284, 361 P.3d 808 (2015) (CPS investigated a report of potential child abuse but concluded no abuse occurred and returned the child to the biological father. After the child was left with him, the father again abused the child. Division II concluded the intervening act of the father "was precisely the kind of harm that would ordinarily occur as a result of [CPS's negligence]."); *Pamplin v. Safway Scaffolding*, 198 Wn. App. 1045 (2017) (superseding causation instruction should not have been given where an alleged change to scaffold was not a different type of harm than defendant's original negligence involving the scaffold).

suspicious tree and damaging the tree with herbicides.[22]

A superseding cause instruction is not warranted on principles this Court articulated in *Campbell* because "a stronger than expected wind is not a cause that will supersede County negligence." Op. at 27.[23] Review is not merited. RAP 13.4(b).

E. CONCLUSION

Carlton Evans, an innocent motorist on the County's Big Meadows Road, was impaled by a tree leaning over the roadway from the County's right-of-way. The County as road operator and landowner was negligent in allowing that to happen. Because the trial court's instructions unduly weighed the trial in the County's favor, Division III's unpublished opinion correctly determined that the trial court deprived Carlton of a fair trial, requiring a new trial.

---

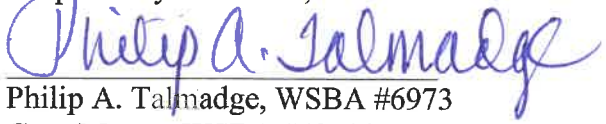
[22] As discussed *supra*, there also was no evidence that the maximum wind gust in the area was the event that caused the tree to fall. Therefore, even in that day's high-wind conditions, there was no evidence, only speculation, compounded by the trial court's Instruction 25, for the jury to find a break in the chain of causation.

[23] This error was prejudicial because, as with the "act of God" instruction, it improperly detracted from the County's duty of care, overemphasized the County's theory, and was predicated on speculation. The instruction was prejudicial as to the County's liability as a roadway operator and property owner because the instruction echoed and reinforced the trial court's erroneous instructions on foreseeability (Instruction 21, CP 4256) and acts of God (Instruction 14, CP 4248) and its taking of judicial notice on the maximum windspeeds at Spokane airport (Instruction 25, CP 4260). "It is a well established rule that jury instructions must be considered in their entirety." *Brown v. Spokane County. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 194, 668 P.2d 571 (1983). Read with other instructions, the instruction on superseding cause pushed the jury to find that the County was not negligent.

The County throws the proverbial platter of spaghetti against the wall, hoping that something might stick, but its petition, in fact, fails to offer any substantive reason for this Court's review. Division III's unpublished decision was based upon well-established principles established by this Court. This Court should deny review. RAP 13.4(b).

DATED this 12th day of January, 2021.

Respectfully submitted,



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APPENDIX

Court's Instruction 13:

> A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury.
>
> If you find that the defendant was negligent but that the sole proximate cause of the injury was a later independent intervening force that the defendant, in the exercise of ordinary are, could not reasonably have anticipated, then any negligence of the defendant is superseded and such negligence was not a proximate cause of the injury. If, however, you find that the defendant was negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening force, then that act does not supersede defendant's original negligence and you may find that the defendant's negligence was a proximate cause of the injury.
>
> It is not necessary that the sequence of events of the particular resultant injury be foreseeable. It is only necessary that the resultant injury fall within the general field of danger which the defendant should reasonably have anticipated.

CP 4247.

Court's Instruction 14:

> An "act of God" is a natural phenomenon which caused the injury and which is so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against. Merely because a natural phenomenon is unusual or of rare occurrence is not sufficient to find that such natural phenomenon constituted an "act of God." If you find from the evidence that the defendant has proved that an "act of God" was the sole proximate cause of the plaintiff's injuries and damages, then the plaintiffs cannot recover.

CP 4248.

Court's Instruction 18:

> In order to find a county liable for an unsafe condition of a road that was not created by its employees, you must find that the county had notice of the condition and that it had a reasonable opportunity to correct the condition.
>
> A county is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

CP 4252.

Court's Instruction 19:

> A possessor of land who has actual or constructive knowledge of dangerous conditions on the land has a duty to take action to correct the dangerous condition or warn of its existence. A possessor's duty attaches if the landowner knows or by the exercise of reasonable care should know of the condition and should realize that it involves an unreasonable risk. If the possessor of land caused the dangerous condition, then knowledge is established.

CP 4253.

Court's Instruction 21:

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

CP 4256.

Court's Instruction 25:

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

hour.

CP 4260.

Plaintiff's Proposed Instruction 9 (P-9):

> In order to find a county liable for an unsafe condition of a road that was not created by its employees, and that was not a condition which its employees or agents should have reasonably anticipated would develop, you must find that the county had notice of the condition and that it has a reasonable opportunity to correct the condition.
>
> A county is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

CP 2581.

Plaintiff's Proposed Instruction 10 (P-10):

> The obligation to exercise ordinary care in maintaining its roads in a reasonable safe condition includes the obligation to inspect trees when the County has actual or constructive knowledge that the roadway is inherently dangerous.
>
> A County is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under the circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

CP 2582.

Plaintiff's Proposed Instruction 13 (P-13):

> The County here is the property owner/possessor of the right of way, where the subject tree was. A possessor

> of land who has actual or constructive knowledge of defects affecting its trees has a duty to take corrective action. A possessor's duty attaches only if the landowner knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk.
>
> Reasonable care requires the possessor of land to inspect for dangerous conditions followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.

CP 2585.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 99283-5 to the following:

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Original electronically served to:
Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 12, 2021, at Seattle, Washington.

Frankie Wylde, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

January 12, 2021 - 10:31 AM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Carlton and Margaret Evans v. Spokane County
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Answer to Petition for Review

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