

NO. 35264-8-II

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

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SCOTT ALPRIN, Appellant,

v.

CITY OF TACOMA, Respondent.

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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**BRIEF OF RESPONDENT**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court did not err by granting Respondent's Motion for Summary Judgment that the Appellant was negligent by allowing his sailboat to collide with the Respondent's overhead power transmission lines.

2. The trial court did not err by granting Respondent's Motion for Summary Judgment that the Petitioner's negligence was the sole proximate cause of the Appellant's damages.

3. The trial court did not err by granting Respondent's Motion for Summary Judgment that the Respondent had fulfilled any duty to warn of the existence of the transmission lines by having them depicted on charts published by the federal government.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. The trial court correctly found that as a matter of law the Respondent fulfilled any duty it had to warn of the transmission lines by having them depicted on government issued charts used for navigation.

B. The trial court correctly found that the Appellant failed to establish the existence of a material issue of fact to overcome the Appellant's presumption of negligence by allowing his sailboat to

collide with the Respondent's transmission lines, a stationary object.

C. The trial court correctly found that the Appellant failed to establish the existence of a material issue of fact that the Appellant was negligent by failing to maintain a proper lookout at the time of the collision.

D. The trial court correctly found that the Appellant failed to establish the existence of a material issue of fact that the Appellant's negligence was the sole proximate cause of the Appellant's damages.

### **III. STATEMENT OF THE CASE**

On or about August 10, 2004, at approximately 4:30 p.m., the Appellant, Scott Alprin, was alone and operating his 1977, 29' Ericson sailboat northward in Henderson Bay towards Burley Lagoon, near the town of Purdy, when the mast<sup>1</sup> of the vessel made contact with the Respondent City of Tacoma's ("City") overhead power-transmission lines crossing the Bay, resulting in Mr. Alprin allegedly suffering injuries and property damage. (See deposition of Katherine Welker, pp. 9, 10 and 11, CP190-192; see

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<sup>1</sup> According to the Affidavit of Bruce King, the designer of the sailboat (attached as Exhibit A to the City's Motion, CP 177-180), the distance from the water to the top of the mast of the sailboat was in excess of 40 feet.

Deposition of Chelsie Chulich, pp. 10 and 19, CP 202, 205; also see Plaintiff's answer to Interrogatory Number 23, CP 246.)

The towers and six power transmission lines in question had been constructed during 1925, pursuant to a permit issued to the City by the War Department of the United States on December 3, 1924, and have been in their current location since that time. (See Declaration of Joseph Rempe, CP 251-253 and Permit No. 287 attached thereto, CP 255-259.)

At the time of the accident, the transmission lines were required to have a 30-foot clearance above mean-high water and had been depicted on the current edition as well as previous editions of the Coast Survey published by the United States Department of Commerce National Oceanic and Atmospheric Administration ("NOAA"); a document typically used for navigational purposes. (See Declaration of Cecil Gray, CP 263, 264, NOAA Chart CP 268, 269; also see Deposition of Scott Alprin, CP 330, 331.) It was also depicted on the map that Mr. Alprin had used to plan his trip. (See Deposition of Rear Admiral Shelley, CP 239, 240, lines 12 and 13.)

At the time of the accident, there were two cylindrical buoys positioned approximately 150 to 200 feet south of the transmission

lines. They were white in color with an orange stripe at the top and one at the bottom, with the statement "Danger Overhead Lines," and a lightening bolt on the two opposite sides of both buoys. The design of the buoys had been approved by the United States Coast Guard and voluntarily installed by the City pursuant to a permit granted by the United States Coast Guard. (See Declaration of Steven Fischer, CP 271; Declaration of Jeffrey Singleton, CP 280, 281; and Deposition of Katie Welker, CP 190-192, pages 22 and 23.)

The day prior to the accident, Mr. Alprin had visited the Beach House Restaurant located on property adjacent to Henderson Bay and the accident scene. Before leaving the restaurant, the owner invited him to return to the restaurant the following day, showed Mr. Alprin the buoys through the window of the restaurant, and warned Mr. Alprin not to go beyond the buoys. (See Deposition of Scott Alprin, CP 318, 319.) The buoys had not been moved between the time the buoys were brought to Mr. Alprin's attention and the time of the accident. (See Declaration of Steven Fischer, CP 272.)

Mr. Alprin admitted that the buoys were present at the time of the accident but denies the existence of written warnings on the

buoys and the position of the buoys. (See Alprin Deposition, CP 319-321.)

#### **IV. ARGUMENT**

##### **A. Introduction**

The City provided three points to support its Motion for Summary Judgment:

1. Because the City had its power transmission lines depicted on government issued maps used for navigation, the City fulfilled any obligation it had to warn the Appellant of the location of the power lines.

2. The Appellant failed to overcome the presumption of negligence against the Appellant's vessel because the vessel collided with the City's transmission lines, a stationary object.

3. The Appellant failed to overcome the presumption of negligence against the Appellant's vessel for failure to maintain a proper lookout.

All three are proper for summary judgment and each independently supports the trial courts decision.

##### **B. Standard of Review**

Summary judgment orders are reviewed de novo by the Court of Appeals. *Hayden v. Mut. Of Enumclaw Ins. Co.*, 141

Wn.2d 55, 63-64, 1 P.3d 1167 (2000). The Court of Appeals may affirm an order granting summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 904, 973 P.2d 1103 (1999), (Citing CR 56(c); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

The function of a motion for summary judgment is to avoid a useless trial. *Wheeler v. Ronald Sewer Dist.*, 58 Wn.2d 444, 446, 364 P.2d 966 (1961). Summary judgment is a procedure for testing the existence of a party's evidence. *Landberg v. Carlson*, 108 Wn. App. 749, 753, 33 P.3d 406 (2001). The moving party is entitled to summary judgment if the pleadings and affidavits on file show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Neff v. Allstate Insurance Company*, 70 Wn. App. 796, 799, 855 P.2d 1223 (1993). The moving party may also rely upon answers to interrogatories and depositions to show the absence of a material issue of fact. *Bernal v. American Honda Motor Company*, 11 Wn. App. 903, 907, 527 P.2d 273 (1974).

The non-moving party attempting to preclude summary judgment may not rely on argumentative assertions or on having its affidavits considered at face value, but must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine material issue of fact exists. *Island Air v. LeBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). Affidavits in opposition to a motion for summary judgment do not raise a material issue of fact unless they set forth facts that would be admissible as evidence during trial. *Curran v. City of Marysville*, 53 Wn. App. 358, 367, 766 P.2d 1141 (1989).

Furthermore, affidavits containing unsupported, conclusional statements alone are insufficient to prove the existence or non-existence of issues of fact. *Hash v. Children's Orthopedic Hospital & Medical Center*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987).

It is well settled that for purposes of any summary judgment analysis all facts and reasonable inferences are to be considered in the light most favorable to the nonmoving party. *Mountain Park Homeowner's Ass'n v Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994). For purposes of a summary judgment procedure, an appellate court is required, as was the trial court, to review material submitted for and against a motion for summary judgment in the

light most favorable to the party against whom the motion is made. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 503 P.2d 108 (1972). The Appellant has relied upon argument and has not produced any facts that establish the existence of triable issues of material fact that would preclude summary judgment.

**C. The Appellant's Claim Arose Under Admiralty Law, Therefore, Admiralty Law Applies to the Claim:**

1. The Appellant acknowledges this case is governed by admiralty law. 28 USC §1333.

Admiralty and maritime jurisdiction extends to all navigable water within the United States. 46 USC §740, *Wilder v. Placid Oil Company*, 611 F. Supp. 841, 844 (1985), *Guidry v. Durkin*, 834 F.2d 1465, 1469, (9<sup>th</sup> Cir. 1987). For purposes of admiralty jurisdiction, the United State Supreme Court has defined navigable waters as follows:

We have extended that term to include not simply the tide-waters, as is understood by it in England, but also the great fresh-water rivers and lakes of our country; and, in a still broader sense, we apply it to every stream or body of water, susceptible of being made, in its natural condition, a highway for commerce, even though that trade be nothing more than the floating of lumber in rafts or logs.

*The Daniel Ball*, 77 U.S. 557, 559, 19 L. Ed. 999 (1870).

In Admiralty cases filed in state courts, substantive admiralty and maritime law applies. *U.S. Express Lines, LTD, et al. v. Higgins*, 281 F.3d 383, 390 (3<sup>rd</sup> Cir. 2002), *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 444-445, 121 S. Ct. 993, 148 L.Ed.2d 931 (2001).

## 2. Liability Presumption Arising From a Vessel Allision:

In admiralty, liability attaches to a vessel when, as a result of the negligent operation of the vessel, an “allision” (the contact between a vessel and a stationary object) occurs. *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1349, 1353 (9<sup>th</sup> Cir. 1986). Liability was established on the part of the vessel “Cynthia” for negligently failing to take proper precautions in the face of an approaching storm, resulting in an allision, and damage to a dock. *Id.* It is well-established law that when a moving vessel collides with an anchored vessel or a fixed object, such as a bridge, there is a presumption that the moving vessel is at fault. *The Oregon*, 158 U.S. 186 (1895), *Bunge Corp. v. Freemont Marine Services*, 240 F.3d 919, 923 (11<sup>th</sup> Cir. 2001). This presumption is enough to establish a prima facie case of negligence against the moving vessel. *Brown and Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724, 726 (5<sup>th</sup> Cir. 1967). The burden of proof

is upon the moving vessel, which can only rebut the presumption by proving: 1) that it was without fault, i.e., used all reasonable care to avoid the collision; 2) the stationary object was at fault; or 3) the collision/collision was the result of an "inevitable event." *Bunge Corp. at 923; Bunge Corp. v. M/B Furness Bridge*, 558 F.2d 790, 795 (5<sup>th</sup> Cir. 1977). The presumption is universally described as "strong" and one that places a "heavy burden" on the moving ship to overcome. *Bunge Corporation v. Freeport Marine Repair, Inc.* 240 F.3d 919, 923 (11<sup>th</sup> Cir. 2001).

3. The Inland Rules of Navigation Require that Every Vessel Maintain a Proper "Lookout".

Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

33 USCA §2005.

It is well-established law that the obligation to maintain a proper lookout cannot be satisfied by a person on a vessel having more than one duty. *Hercules Carriers, Inc. v. Claimant State of Florida, Department of Transportation*, 768 F.2d 1558, 1569 (1985). The failure to maintain a proper watch by assigning a person with other duties amounts to negligence. *Id.*, also see *Circle*

*Line Sightseeing Yachts, Inc. v. City of New York*, 283 F.2d 811, 814-815 (1960). It is also well-established law that the failure to maintain a proper lookout places upon the negligent party the burden of showing that such a failure did not cause and could not have caused the accident. *Hercules*, *id.* citing to *The Pennsylvania*, 86 U.S. 125, 22 L. Ed. 148, and *Merritt-Chapman & Scott Corp. v. Cornell S.S. Co.*, 265 F.2d 537, 539 (2<sup>nd</sup> Cir. 1959).

**D. The Appellant Failed to Establish a Material Issue of Fact or Law Rebutting the City's Contention that the Depiction of the Power Lines on NOAA Charts Satisfied any Duty to Warn the Appellant of the Power Lines.**

The established law holds that if the power lines were deemed to be a hazard to navigation, the City's duty to warn of the hazard was satisfied by the depiction of the transmission lines on the NOAA charts. *Liner, et al. v. Dravo Basic Materials Company*, 162 F. Supp. 2d 499, 506 (2001). In *Liner, id.*, the plaintiff claimed that the United States Coast Guard was negligent because the measures it took to mark a sunken barge were inadequate and the marker was improperly maintained. *Id.* at 501. The Court in *Liner, id.*, citing to the holdings of the cases *Gemp v. United States*, 684 F.2d 404, 408 (6<sup>th</sup> Cir. 1982), and *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148-149 (5<sup>th</sup> Cir. 1971), held that the

Government's duty to warn of a navigational hazard is satisfied by accurately noting the hazard on the appropriate navigational chart, which in that case was a chart published by NOAA. *Liner*, id.

In another sailboat mast impact to cable crossing case in which the War Department issued a permit for the crossing of a river, the court, in addressing the argument that the owner had a duty to place signs on the cable, stated:

Hindsight is proverbially better than foresight and it is certainly desirable that since the accident signs have been placed on the cable warning the public of the possible danger therefrom. It is not necessary in this case to hold that under no circumstances would there be liability on the owner or maintainer of such a cable over navigable water if proper warning were not given. It would seem that the proper place for such a warning would be in the navigational charts issued by the Coast and Geodetic Survey. **The navigator is chargeable with the information contained on such charts and the prudent navigator will, of course, consult such charts before a contemplated voyage by vessel.**

Emphasis added.

*Thompson v. Consolidated Gas and Electric Light & Power Company of Baltimore*, 111 F. Supp. 719, 731 (1953).

Accordingly, this is not a question on which reasonable minds could differ. Furthermore, in his Response to the City's Motion for Summary Judgment, Mr. Alprin only submitted his own Declaration and that did not dispute the fact that the City's

transmission lines had been depicted on NOAA charts. CP 295-296. Though Mr. Alprin claimed he had relied upon a chart, it was established that he had relied upon a “Fish-n-Map” that was not to be relied upon for navigational purposes. (See Deposition of Rear Admiral Shelley, 238-240.)

But the Appellant in his Brief, as he did in his Response to the City’s Motion, has confused the imputed knowledge issue alluded to in *Graves v. United States*, 872 F.2d 133 (6<sup>th</sup> Cir. 1989) with the authorities cited by the City establishing that any duty owed to the Plaintiff was satisfied by the City depicting the transmission lines on the NOAA charts. Furthermore, the Appellant has incorrectly stated that the *Graves* case was not an admiralty case when in fact the Court in *Graves*, clearly states that it is an admiralty case. *Id.* at 136. In fact, *Graves* is another admiralty case that supports and is consistent with the rule that any duty to warn of hazards to navigation are satisfied by having them depicted on navigational charts issued by the federal government and that the boating public are charged with having knowledge of what is depicted on the charts. *Id.* at 136.

In addition to the *Graves* case, the overwhelming weight of authority establishes that the trial Court correctly concluded that

depicting the overhead transmission lines on charts published by NOAA satisfied any duty the City owed to Mr. Alprin: *Liner, et al v. Dravo Basic Materials Company*, 162 F.Supp. 2d 499, 506 (2001), *Gemp v. United States*, 684 F.2d 404, 408 (6<sup>th</sup> Cir.1982), *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148-149 (5<sup>th</sup> Cir. 1971), and *Thompson v. Consolidated Gas and Electric Light & Power Company of Baltimore*, 111 F.Supp. 719, 731 (1953).<sup>2</sup>

In *Thompson, id.*, the court found that the defendant electric company's cable had been depicted on a United States Government issued chart, that it was the proper place for the warning of the location of the cable to be, and that the sailboat was charged with knowledge of the location of the cable on the chart. *Id.* Obviously, the defense of the warning being placed on charts and surveys is a defense available to both federal agencies and non-federal agencies.

The City cited to *Graves v. United States*, 872 F2d 133, 136 (6<sup>th</sup> Cir. 1989), for the proposition that some courts charge recreational boaters with knowledge of information shown on

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<sup>2</sup> Because the trial court correctly concluded that the City had satisfied its duty as a matter of law, there can be no "issue" of contributory negligence.

navigational charts. *Id.* However, the City also cited to *Teriot*, *id.* at 402 for the proposition that some courts view the failure to consult NOAA charts when navigating unfamiliar waters as negligence. Accordingly, once government depicts the potential hazard on the NOAA charts, the vessel can either be charged with knowledge of its location, or deemed negligent for failing to consult the charts. In any event, it is undisputed that the transmission lines were depicted on the NOAA charts and the authorities cited by the City clearly establish as a matter of law that any duty owed by the City to Mr. Alprin regarding the location of the transmission lines in question had been satisfied by depicting the transmission lines on the NOAA charts.<sup>3</sup> Therefore, the Trial Court's grant of the City's Motion for Summary Judgment was appropriate.

**E. Appellant Cannot Produce Facts To Create Any Material Issues Of Fact To Rebut The Presumption of Negligence on His Part As A Matter Of Law, As Established By The City's Motion.**

In its Motion for Summary Judgment, the City established the lack of a material issue of fact that the sailboat operated by Mr. Alprin collided with the City's stationary overhead transmission

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<sup>3</sup> The Appellant appears to argue that the negligence issue in this case should be analyzed as if it were a street case. Even if this newly raised argument could be

lines; therefore, as reflected by the authorities cited above, a **prima facie case of negligence** on the part of the Mr. Alprin had been established simply by operation of his boat colliding with a fixed object. *Brown and Root Marine Operators*, id.

The City also established that even if Mr. Alprin were to try to rebut the presumption by arguing that he could not see the overhead lines, there is no material issue of fact because the lines were depicted on official NOAA navigation charts, as well as the map the Appellant had used to plan his trip, a map not published for navigational purposes. This map had explicit warnings that it was not to be used for navigational purposes. (See Gray Declaration, CP 263-268; also see "Fish-n-Map" CP 241, 242, Exhibit 4 to the Deposition of Rear Admiral Shelley.)

Furthermore, though no statute or regulation may require that a recreational boater have or consult a NOAA chart, the failure to do so when navigating unfamiliar waters amounts to negligence. *Teriot v. United States*, 245 F.3d 388, 402 (5<sup>th</sup> Cir. 1998). According to Mr. Alprin, he had not previously operated a boat in the area of the accident and therefore was not aware of the

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considered for the first time on appeal, it has no merit because this case is governed by admiralty law.

overhead transmission lines. (Alprin Deposition, Exhibit B 3 pp. 40 and 72.) CP 225, 231. The map Mr. Alprin claims he did consult when planning his trip was not a chart published by NOAA. (See Fish-n-Map, CP 241, 242.)

As stated above, some courts have held that even recreational boaters, such as Mr. Alprin, are actually charged with knowledge of information shown on navigational charts. *Graves v. United States*, 872 F.2d 133, 136 (6<sup>th</sup> Cir. 1989).

Even if Mr. Alprin were not charged with having knowledge of the overhead transmission lines, however, there is no material issue of fact to rebut the presumption of negligence because the facts show that Mr. Alprin was advised by the restaurant owner on the previous day not to go beyond the buoys. CP 219. It is undisputed that at the time of the accident the buoys were at least 150 feet south of the transmission lines Mr. Alprin's sailboat contacted. (See Declaration of Jeffrey Singleton, CP 280, 281, also see Appellant's Brief, page 9.)

In his Brief, as in his opposition to the City's Motion below, the Appellant has cited the cases *Casement v. Brown U.S.*, 148 U.S. 615, 13 S. Ct. 672 (1893), and *Woodford v. Carolina Power and Light Company*, 779 F. Supp. 827 (1991) for the proposition

that a person or entity who places an obstruction over navigable waterway has a duty to mark it. However, the facts of both *Casement* and *Woodford* are dramatically distinguishable from the case at hand. In *Casement*, there is no indication that the hazard to navigation had been depicted on any navigation chart. In fact, the hazardous pier for the railroad bridge was under construction at the time of the accident. *Id.* at 616. In *Woodford*, *id.* there is no indication that the hazardous tower in question had been depicted on any navigation charts and, in fact, the owner of the hazardous tower had failed to apply to the Coast Guard for its approval of its lights and signals. *Id.* at 830-831. By contrast, in the case at hand, the City's power transmission lines had been in their location more than 70 years prior to the accident in question, they were there pursuant to a government issued permit, and were depicted on NOAA charts as well as the Fish-n-Map Mr. Alprin claims he consulted prior to the accident.

The City has also established for the Court that there is no material issue of fact that at the time of the accident Mr. Alprin was not providing a lookout. Instead, he was operating the 29-foot sailboat alone and laying out the vessel anchor with the vessel drifting towards the buoys. (Alprin Deposition, CP 215, 220, 221,

and 222.) As reflected by the authorities cited above, Mr. Alprin had a duty to maintain a proper lookout to prevent the type of accident that, in fact, occurred. As a matter of law, it is negligent to have the person who serves as lookout to have other duties, particularly if the other duties would interfere with the function of the lookout.

The City established for the Court that there was no dispute that at the time of the accident Mr. Alprin was attempting to anchor the drifting sailboat and was the only person on board. Therefore, there was no one to serve as lookout. Accordingly, Mr. Alprin had the burden of proving that the failure to maintain a proper lookout could not have been the cause of the accident. He failed to produce any facts or evidence that would create a material issue of fact on this point.

1. A Proper Lookout Is Required Even With A Clear Unobstructed View.

In his Brief, as in his Response to the City's Motion for Summary Judgment, Mr. Alprin argues that in situations in which there is a clear unobstructed view, a single individual does not have to be dedicated to the lookout role. Mr. Alprin has cited the case *Schumacher v. Cooper*, 850 F. Supp. 438,448-449 (1994), for the

proposition that the rule requiring a proper lookout does not apply where there is a clear and unobstructed view, and the case *Cenac Towing Co. v. Keystone Shipping Co.* 404 F.2d 689 (5<sup>th</sup> Cir. 1968) for the proposition that an adequate lookout must be determined in the totality of the circumstances. However, these cases do not relieve the Appellant of his duty to maintain a proper lookout. The issue in these cases is “who” is to maintain the lookout. Where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as lookout. *Schumacher*, id. 449. These cases also stand for the proposition that the duty of vessel operators to maintain a proper lookout by sight and sound is enhanced if special circumstances warrant increased vigilance, but no special lookout is necessary if a vessel pilot can see everything that a bow lookout could see. Also, when circumstances demand unusual care in navigation, such care should be used. *Schumacher*, id. at 450, *Cenac*, id at 702.

Though it remains the City’s position that the authorities cited in its Motion establishing that it amounts to negligence to assign a person responsible for watch to other duties, for purposes of argument the City will apply the holdings of *Schumacher*, id., and

*Cenac*, id. to the facts at hand. Even assuming, however, that immediately before the accident Mr. Alprin had a clear view, the City established by its Motion there was no material issue of fact that Mr. Alprin simply was not “looking out.” Mr. Alprin admitted that he was operating the 29’ sailboat alone, (Alprin Deposition CP 215, 222), looking at the buoys while approaching the transmission lines from the south, (Alprin Declaration and Alprin Deposition, CP 221, 222, and CP 296 Lines 9 and 10), was preparing to get close to buoys to anchor there, (Alprin Deposition, CP 219), was busy laying anchor while approaching the transmission lines, (Alprin Deposition, CP 220-221), that had he seen the transmission lines on the chart, he would have looked up, not down as he had been doing (Alprin Deposition, CP 228-230), and that he did not see the transmission lines until he returned to the accident scene the following day. (Alprin Declaration, CP 296.)

Even assuming for purposes of argument that the transmission lines could not be easily seen, Mr. Alprin has admitted that he should have looked up to see the transmission lines, and that they were depicted on the NOAA chart, (Alprin deposition, CP228, also see Declaration of Cecil Gray, CP 23-269, also see Shelley deposition, CP 237, 238.) Furthermore, notwithstanding

the statements contained in his Declaration, Mr. Alprin has admitted in his deposition testimony that he was specifically warned, by the restaurant owner the day before the accident, not to go beyond the buoys. (Alprin Deposition, CP 219.) Mr. Alprin cannot use his Declaration to contradict his earlier sworn testimony or to create an issue of fact as to where he was looking prior to the accident. *Disc Golf Association, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1008 (9<sup>th</sup> Cir. 1998).

Accordingly, the City established for the Court, that Mr. Alprin has failed to create any issue of fact that could be used to overcome the presumption of negligence on his part for failure to maintain a proper lookout based upon the undisputed circumstances.

2. The Appellant Failed To Establish The Existence Of A Material Issue Of Fact To Rebut The Presumption Of His Negligence Arising From His Vessel's Collision (Allision) With The Power Lines.

In an effort to create a material issue of fact, Mr. Alprin's Response to the City's Motion included characterizations of the purported testimony of his expert witness, Rear Admiral Mark Shelley (CP 292-294). However, he relied solely upon argument. Rear Admiral Shelley's statements were not in the form of a

Declaration, Affidavit, or testimonial in nature, and therefore cannot be used to oppose a motion for summary judgment. *Curran*, id.

Mr. Alprin also submitted his own Declaration (CP 295, 296) in an attempt to establish the existence of a material issue of fact that: (1) the Beach House Restaurant owner only cautioned him to be careful because at low tide the channel was very shallow, (2) the following day he could not read what was on the buoys, (3) that he presumed the buoys to be no wake markers, (4) that he was unable to see the transmission lines because they were “masked” by tree foliage, and (5) that the chart he reviewed lead him to conclude that the transmission lines were not in the vicinity of where he would be sailing.

None of the statements contained in Mr. Alprin’s Declaration raised a material issue of fact as to the transmission lines being depicted on the NOAA charts, or that he could have seen the power lines had he looked up when approaching them.

### 3. Opinions Cannot Trump The Law.

The opinions of the Appellant, Mr. Alprin, and his expert, Rear Admiral Shelley, cannot trump the law. Though they may contend the “Fish-n-Map” was a reasonable map used by recreational boaters, the law is that it amounts to negligence for

even recreational boaters not to rely upon NOAA charts when navigating in unfamiliar waters. *Teriot v. United States*, 245 F.3d 388, 402 (5<sup>th</sup> Cir. 1998). Mr. Alprin has already admitted that he was in unfamiliar waters and that he had relied upon a “Fish n Map” that on its face states that it is not to be relied upon for navigational purposes. (See Fish n Map, CP 232, 241, and 242.) There remains no material issue of fact that the transmission lines are accurately depicted on the NOAA charts, the charts he should have relied upon. (See Gray Declaration, CP 263-268 and Shelley Deposition, CP 236.)

Because there are no material issues of fact to rebut the presumption of negligence, Mr. Alprin was negligent as a matter of law due to: 1) the presumption of negligence in colliding with a fixed object; 2) notice of the overhead lines depicted on the NOAA charts Mr. Alprin had a duty to review; 3) being actually charged with knowledge of the overhead transmissions lines as depicted on the NOAA navigational charts; and 4) his negligence in failing to stop the sailboat south of the buoys, as the restaurant owner had advised him the day before the accident, and 5) his failure to maintain a proper look-out.

**F. The City established for the Court that the Plaintiff's Negligence was the Sole Proximate Cause of his Injuries and Loss and, Therefore, the City was not Liable.**

1. Introduction

The Appellant's proximate cause argument is not relevant since the trial Court appropriately found that any duty owed to Mr. Alprin had been satisfied by the City having the transmission lines depicted on NOAA charts. Furthermore, the Appellant's argument that the trial Court erred in granting summary judgment because proximate cause is always an issue, ignores the point that summary judgment is proper when a plaintiff cannot establish the essential elements of his claim. Here, the City established its prima facie case that Mr. Alprin's negligence was the sole proximate cause of his loss and injuries.

2. Proximate cause as it relates to the Appellant.

The proximate cause of an injury is, "that cause which in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred." *Wojcik v. Chrysler Corporation*, 50 Wn. App. 849, 856, 751 P.2d 854 (1988). If the event would have occurred regardless of the defendant's conduct, that conduct is not the proximate cause of the plaintiff's injury. *Id.*

According to Mr. Alprin, he would have looked up if the map he reviewed had depicted the overhead lines. (Alprin Deposition, CP 229, 230.) There is no material issue of fact that the NOAA

chart depicted the transmission lines, and on previous occasions, he relied upon NOAA charts. (Alprin Deposition, CP 227, 229 and Shelley Deposition CP 237, 238.) Even the non-NOAA map Mr. Alprin claims he consulted depicted the overhead transmission lines CP 295, 296; therefore, Mr. Alprin's negligence was the sole proximate cause of his damages.

Regarding the failure to maintain a proper lookout, there is no material issue of fact that immediately prior to the accident Mr. Alprin was busy laying anchor and had been looking at the buoys for a distance of 100 feet. (Alprin Deposition, CP 220-222.) Therefore, Mr. Alprin is unable to satisfy the burden of proving that had a lookout been properly stationed, the overhead lines would not have been seen by him. Mr. Alprin has not produced evidence that would create a material issue of fact on these points upon which he bears the burden of proof.

**G. Any Status The City's Permitted Interest In Henderson Bay May Conceivably Have As Recreational Property, Does Not Enhance Its Duty To The Appellant**

Though this issue was not raised by Mr. Alprin in the trial Court, he suggests on pages 13 and 14 of his Brief, that the power lines in question were a "latent condition" and therefore the adequacy of the warnings would be a jury question. Because this issue was not raised with the trial Court, it should not be considered

by the Court on appeal. Even if the Court were to consider this argument, it has no merit.

As indicated earlier, the City does not own Henderson Bay. The power transmission lines are there by permit only. CP 255-259. Even if the City did own Henderson Bay, Mr. Alprin has misapplied the recreational immunity statute by singling out only one of the four required elements of the test to determine whether an exception is to be made to the rule that a property owner who holds his property open for recreational use will not be liable for injuries sustained as a result of such recreational use. RCW 4.24.210. RCW 4.24.210(4) imposes potential liability for injury occurring by reason of “a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” All four elements: known, dangerous, artificial, and latent, must be present in the condition causing the injury. *Van Dinter v. City of Kennewick*, 121 Wn. 2d 38, 46, 846 P.2d 522 (1993); *Davis v. State*, 102 Wn. App. 177, 185, 6 P.3d 1191 (2000). The existence of the transmission lines is not a “latent” condition. To be latent means the condition is not readily apparent to the recreational user. *Van Dinter*, id. at 45.

In the case at hand, the transmission lines had been positioned across Henderson Bay since 1925. Furthermore, as stated by the authorities above, it is well-established law that by depicting the transmission lines on NOAA charts, the City fulfilled

any duty to warn it may have owed to Mr. Alprin. There is no dispute that the City's transmission lines were depicted on NOAA charts and Mr. Alprin admitted having seen the transmission lines depicted on his Fish-n-Map, though not accurately. (Alprin Declaration, CP 295, 296.) Mr. Alprin also admitted that he simply was not looking up prior to the allision. (Alprin Deposition, CP 229, 230.)

Because the transmission lines were depicted on NOAA charts and could have been seen had Mr. Alprin looked up, the power lines were not a "latent condition". Accordingly, RCW 4.24.210 entitled, "Liability of owners or others in possession of land and water areas for injuries to recreation users," provides immunity to the City from Mr. Alprin's claim.

## V. CONCLUSION

For all of the foregoing reasons, the City of Tacoma respectfully requests that the Court affirm the Trial Court's grant of the City's Motion for Summary Judgment.

Respectfully submitted this 27 day of December 2006.

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### CERTIFICATE OF SERVICE

I certify that on the 27th day of December, 2006, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

Thomas D. Dinwiddie Attorney at Law 902 S. 10 <sup>th</sup> St. Tacoma, WA 98405 (Attorney for Appellant)	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> <u>ABC Legal</u> <u>Svs</u>
Andrew J. Makar Attorney at Law 1404 54 <sup>th</sup> Ave. E. Fife, WA 98424 (Attorney for Appellant)	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> <u>ABC Legal</u> <u>Svs</u>

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

DATED this 27<sup>th</sup> day of December, 2006, in Tacoma, Pierce County, Washington.

Diane Jensen  
Diane Jensen, Legal Assistant

BY Diane Jensen  
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