

SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY J. RUIZ,

Appellant.

vs.

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

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR KING COUNTY

Cause No. 07-2-084746-KNT

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted respondents' summary judgment motions based upon immunity pursuant to RCW 76.09.330.

II. ISSUES PERTAINING TO ASSIGNMENTS OF
ERROR

1. Whether the trial court erred in granting respondents' summary judgment motions when the immunity pursuant to RCW 76.09.330 does not apply when the respondents create the dangerous condition that was a proximate cause of appellant's injuries?

2. Whether the trial court erred in granting respondents Hancock's summary judgment motion pursuant to RCW 76.09.330 when respondents Hancock were not landowners pursuant to RCW 76.09.020(10)?

III. STATEMENT OF THE CASE

A. Procedural History

Appellant Timothy J. Ruiz filed a lawsuit against respondents on March 9, 2007, alleging that they negligently cut trees from a parcel of property along Highway 410 called the Bridgecamp development. CP 3-10.

Respondent State of Washington [hereafter State] originally answered the complaint on May 8, 2007, CP 11-15, but amended its answer on November 2, 2007 to allege as an affirmative defense that appellant's cause of action was barred by the immunity set forth in RCW 76.09.330. CP 37-40.

The Hancock respondents originally filed their answer on June 1, 2007, CP 16-20, but they also amended their answer on January 8, 2008, to add an affirmative defense that appellant's cause of action was barred by the immunity set forth in RCW 76.09.330. CP 43-48.

Respondent White River Forests, LLC filed its answer on August 26, 2008, which contained this same affirmative defense. CP 470-476.

On June 27, 2008, respondent State filed a summary judgment motion. CP 60-179. On July 7,

2008, respondents Hancock and White River Forests filed a summary judgment motion. CP 183-362. Plaintiff filed a response on August 1, 2008. CP 365-448. The respondents replied to said response on August 11, 2008. CP 454-468, 449-453. Oral argument was held on August 14, 2008. CP 469, RP 1-41. At that time the court indicated it would take the matter under advisement and issue a ruling at a later date. Id. On August 25, 2008, the court issued a ruling via email and requested the preparation of orders. That ruling stated:

1. Assuming the trees in the Bridgecamp are on either side of the stream were required to be left standing pursuant to RMZ rules under the Forest Practices statute*, then the State is immune from liability to plaintiff for his injuries and damages caused by the tree falling. RCW 76.09.330
2. Hancock is also immune from liability because it is a "forest landowner" in that although it had neither a legal or equitable title to the forest land, it did have a contractual right to act on behalf of White River to "sell or otherwise dispose of any or all of the timber on such forest land." RCW 76.09.020 (10).
3. White River currently lacks standing to bring a motion for

summary judgment because it has been defaulted. Assuming the order of default is ultimately vacated, it would also be entitled to immunity under the same statute.

*I note this caveat because while the parties do not dispute the RMZ requirements, the record before me does not definitively establish that the RMZ rules required the land to be left in this configuration.

CP 484.

On August 26, 2008, appellant filed a motion to reconsider the court's summary judgment ruling. CP 477-86. The court entered an order denying the motion to reconsider on September 15, 2008. CP 487-88. A hearing was held on October 9, 2008, CP 489, at which time the court entered orders granting respondent's motions for summary judgment. CP 490-492, 493-496.

On October 14, 2008, appellant timely filed a notice of appeal. CP 497-507.

B. Facts

On December 12, 2004, Timothy Ruiz, his fiancée Ericka Lindstrom (now Ruiz), and two friends, Jeremy Kushner and Tiffany Kushner, were returning from a day of snowmobiling by Crystal Mountain. On their return home, while traveling

along Highway 410, their vehicle's front windshield was shattered by a falling tree. CP 369-71.

As a result of the collision, Mr. Ruiz lost control of the vehicle and it went over an embankment alongside the road. CP 372-73, 413-15. All of the individuals exited the vehicle except for Mr. Ruiz who was pinned inside the vehicle. CP 374-75. The damage to the vehicle also caused substantial injuries to Mr. Ruiz' right wrist and hand, causing substantial pain and injury. The vehicle he was driving, a 2001 Chevrolet K-2 pickup truck, was also substantially damaged, as was the snowmobile trailer he was towing. CP 414. After emergency personnel attended to Mr. Ruiz, he was transported from the scene to the hospital where his injuries were addressed. Id.

Upon returning to Highway 410, Tiffany Kushner noticed a large section of the tree lying on the road. CP 378-79. Washington State Patrol Trooper Mark Soper, who responded to the scene, also noted where the tree struck the vehicle. CP 382-83. Trooper Soper also noticed a stand of trees with many broken tops which appeared to be

where the tree that struck the vehicle Mr. Ruiz was driving came from. Id.

The cause of the falling tree arose from the following events.

In approximately September 2004, Timothy C. McBride of Hancock Forest Management, Inc. submitted a Forest Practices Application to harvest a stand of trees along Highway 410 commonly referred to as the Bridgecamp development. Mr. McBride was hired by Hancock Forest Management as a forester to handle the day-to-day management of the White River Forest. CP 386-87. Hancock Timber managed the timber land for White River, which was the landowner of the Bridgecamp timber stand. CP 388. During the course of obtaining the harvesting permit, Mr. McBride met with Michael Golden, State Department of Transportation Maintenance Supervisor, who discussed general safety issues with him and also stated that he wanted to have all trees that were standing along Highway 410 removed. CP 389-92, 398-400. Independently, Mr. McBride was aware that removing certain trees increases the chance for the remaining trees to be knocked down by wind.

CP 393. Importantly, Mr. Golden believed that based upon his discussion with Mr. McBride, he understood that the trees along the highway right-of-way needed to be removed and he expected the removal would occur. CP 401.

Whalen Timber conducted the logging operation and Kenneth Bradley Whalen cut the trees along the boundary that was established by the State. CP 410. Because of the boundaries established by the State, a stand of trees was left along the riparian zone which was adjacent to Highway 410. Mr. Whalen, who has substantial logging experience, was aware that leaving the stand of trees in an area open to wind can cause them to blow over. CP 406-08. Further, it is commonly understood that leaving a stand of trees in an open area creates a potential for danger of the trees blowing down. Id. Unfortunately, Mr. McBride did not tell Mr. Whalen that Mr. Golden had concerns about leaving the trees along Highway 410, although he understood the dangerous condition created by leaving an unprotected stand of trees. CP 408-09.

On December 22, 2004, after Mr. Ruiz' accident, the State, through its various agencies, including the Department of Transportation, met and decided to remove the trees within the riparian zone that were within 120 feet of Highway 410. The reason for the trees' removal was because of Mr. Ruiz' accident and resultant injuries. CP 84, 394-95, 410-11.

IV. ARGUMENT

"Summary judgment is a drastic means of disposing of litigation and should be granted only when the right of the moving party is clear and free from doubt." Poelker v. Warrensburg Latham School Dist., 621 N.E.2d 940, 945 (1993).

The trial court may grant a summary judgment only if the pleadings, affidavits, depositions, and the admissions on file demonstrate there is no genuine issue concerning any material fact, and the moving party is entitled to judgment as a matter of law. Doherty v. Seattle, 83 Wn.App. 464, 468, 921 P.2d 1098 (1996). The moving party has the burden of showing there is no issue of material fact, which is one upon which the outcome of the litigation depends, in whole or in part.

Ford v. Hagel, 83 Wn.App. 318, 321, 920 P.2d 260 (1996).

The court must accept the non-moving party's evidence as true and must consider all the facts and all reasonable inferences therefrom in the light most favorable to him. Fairbanks v. J.B. McLoughlin Co., 131 Wn.2d 96, 929 P.2d 433, 435-36 (1997). An inference is a process of reasoning by which a fact or proposition sought to be established is deduced as a *logical consequence* from other facts, or a state of facts, already proved or admitted. Fairbanks at 435-36.

(Emphasis in original). It is not the court's function to resolve existing factual issues, nor can the court resolve a genuine issue of credibility such as is raised by reasonable contradictory or impeaching evidence. Id. at 436.

This court reviews summary judgments de novo. Ranger Insurance Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Based upon such appropriate review, this court should reverse the trial court's orders and remand this matter for trial.

A. THE RESPONDENTS' NEGLIGENCE
PROXIMATELY CAUSED PLAINTIFF'S
INJURIES.

As this court is aware, "[t]he elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to plaintiff proximately caused by the breach." Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). "Existence of a duty is a question of law." Id. Additionally, RCW 4.92.090 holds the State of Washington "liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090. Here, Mr. Ruiz brought an action against the State of Washington, the Hancock companies, and White River Forest LLC for their tortious conduct that resulted in Mr. Ruiz' injuries.

1. The State of Washington and the Hancock Companies Breached Their Duty of Care to Plaintiff by Creating a Dangerous Condition That Was a Proximate Cause of his Injuries.

As this court is aware, the State is obligated to keep its roads in a reasonably safe condition

for ordinary travel. McDonald v. Spokane County, 53 Wn.2d 685, 336 P.2d 127 (1959). "A [State'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 is one it should have foreseen and guarded against." Id. Further, what constitutes constructive notice varies with time, place and circumstance. Mead v. Chelan County, 112 Wash. 97, 191 Pac. 825 (1920).

A governmental entity must have actual or constructive notice of an unsafe condition before it has a duty to correct the condition. See Niebarger v. City of Seattle, 53 Wn.2d 228, 332 P.2d 463 (1958).

Additionally "the owner of land located in or adjacent to an urban or residential area has a duty of reasonable care to prevent defective trees from posing a hazard to others on the adjacent land." Lewis v. Krussell, 101 Wn.App 178, 186, 2 P.3d 486 (2000). "The alleged defect must be 'readily observable' so that the landowner can take appropriate measures to abate the threat." Id. at 187.

Here, all respondents had both actual and constructive notice of the dangerous condition that was created by the logging of the Bridgecamp plat that was adjacent to Highway 410 and leaving, unprotected, the stand of trees in the RMZ. Clearly, a hazardous condition was caused by the logging of the area as noted in the deposition testimony of Mr. Golden, Mr. McBride and Mr. Whalen. This dangerous condition was succinctly testified to by Mr. Whalen:

Q Sure. And with respect to that group of trees in that particular area, was there any concern that you had of the potential being that you have an open space in here of the -- of wind causing a problem with that small stand of trees?

MR. FRITTS: Just a second. Objection. Form of the question.

Actually, could you read the question back, please.

(Question on Page 24, Lines 10 through 14, read by the reporter.)

Q (By Mr. Purtzer) You can go ahead and answer the question.

A Oh, me answer it?

Q Yeah.

A I've been -- you know, this has been going on for years. I mean, leaving -- anywhere you log a stand of timber, you log all the way up to a leave area.

You've opened a whole stand of timber up, subjected to wind, and it's not -- the trees are not, you know, going to -- they're not strong enough or used to being -- they're in a stand of timber, and all of a sudden, now they're open to face the wind.

I mean, you can drive through all of these -- anywhere you see a creek through here, there's leave areas, no matter -- wherever the water is, there's leave areas, and the wind can come through there and blow them down, but -- you know. If you leave a leave area here, go up there -- say, for example, they're logging a unit here, and they leave another leave area here, another one here, another one here. A storm comes through and blows them over. I mean, you can drive up in the woods, and it's everywhere.

Q All right. Now --

A But for me -- yeah, in my mind, I -- they leave these strips all the time, and they blow over. I knew that, but, I mean, that's not my deal.

CP 406-07. Mr. Whalen's knowledge of the problem was confirmed by Mr. Golden of the State Department of Transportation.

Q You were familiar with the winds in that particular area?

A I was familiar with some of the winds. I've only -- I was only up there ten years.

Q Okay.

A I know guys that have been up there 30 years that -- it's amazing how they can call it.

Q Sure.

A Yeah.

Q But you were familiar enough with the winds that you brought it to Mr. McBride's attention that these particular trees could be a problem?

A This particular area, I was a little bit concerned about. That's correct.

Q All right. And you passed that along to Mr. McBride?

A Well, that was one of our concerns for leaving our trees along the right-of-ways, that we didn't want them being blown out into the road at that point.

CP 402-03.

Further, Mr. McBride of Hancock was also aware of the danger of leaving these exposed trees standing:

Q (By Mr. Purtzer) I'll re-ask it.

What I'm interested in is, before the loggers get to the site to start logging, did you have any discussions with any person, Mr. Malgarini or any other individual, regarding safety issues surrounding the harvesting of logs along 410?

A Yes. That was, again, with the Department of Transportation area supervisor about what concerns we need to address during the active operations.

Q Okay. When do you recall those conversations occurring with Mr. Golden?

A Sometime before the contract was signed, sometime before the operation

started. It wasn't part -- it wasn't -- it wasn't a necessary piece for the forest practice application, and so maybe early September.

Q Okay.

A Maybe August.

Q All right. So you had discussion with him before you even made the permit request?

A Right.

Q Tell me about those discussions. What did he tell you about?

A I believe that he -- well, my questions of concern were, what do I need to address while the harvest activity is going on within this harvest plant? So when the machines are actively working, what do I need to do? And his response was that the contractor or --

I guess it would be the contractor -- that the contractor needed to supply flaggers at the down -- or the most western end and the most eastern end of the harvest unit for traffic control while they were working within tree length of the highway.

Q All right. And was there -- did you have more -- well, strike that.

Was that one discussion you had with him, or was that over a period of time?

A Boy, I can't remember. He's a difficult guy to get ahold of. Did I -- phone conversation or not? I do remember that we met on site, and that was the nature of my request to him: "What do we need to supply, or what do we need to do?"

Q Okay. And just so I understand, the only thing he told you that you needed to

inform the contractor was to have flaggers at both the east and west -

A That is what he told me to meet traffic safety requirements --

Q Okay.

A -- during operations, yes.

Q Did he say anything else to you regarding the logs alongside 410 and the harvesting of those?

A Mike Golden had a concern about the entire highway, and he asked if we could take all of the trees down against the highway.

Q Okay.

A Every one from the ownership at the far western end to the ownership to the far eastern end.

Q All right. When you say the entire -- you mean ownership of Hancock or --

A Ownership of White River Forest, LLC, yes.

Q All right. Why was he concerned about that?

A Probably the general nature of standing trees and accidents that revolve around trees.

Q Such as what?

A Theft, people stealing them, cutting them into the highway right-of-away, blow, wind throw, landslides, any type of environmental factors where trees could become lodged into the highway right-of-way.

CP 389-92.

Accordingly, all respondents had both actual and constructive notice of this dangerous condition.

The decisions in Albin v. National Bank of Commerce of Seattle, 60 Wn.2d 745, 375 P.2d 487 (1962) and Lewis v. Krussel, 101 Wn.App. 178, 2 P.3d 486 (2000) are instructive in this case.

In Albin, a motorist was killed when a tree fell on his vehicle while he traveled on a rural, but heavily forested mountain road during a wind storm. In Lewis, a tree fell on plaintiff's residence, also during a wind storm, causing property damage.

In Albin, the road was remote, closed by snow during the winter, but was used somewhat extensively during hunting season. Plaintiff brought the wrongful death action against Columbia County for permitting the tree to stand in proximity to its road and against the National Bank of Commerce, the owner of the property on which the tree stood. The court, in upholding the trial court's ruling, but reversing against the property owner because of an improper jury instruction, stated as follows:

There is no evidence that the county had actual notice that the tree which fell was any more dangerous than any one of the thousands of trees which line our mountain roads, and no circumstances from which constructive notice might be inferred. It can, of course, be foreseen that trees will fall across tree-lined roads; but short of cutting a swath through wooded areas, having a width on each side of the traveled portion of the road equivalent to the height of the tallest trees adjacent to the highway, we know of no way of safeguarding against the foreseeable danger. At the present time this is neither practicable nor desirable. The financial burden would be unreasonable, in comparison with the risk involved. Chambers v. Whelen (1930), 44 F.2d 340, 72 A.L.R. 611; Zacharias v. Nesbitt 150 Minn. 369, 185 N.W. 295, 19 A.L.R. 1016 (1921).

Id. at 748-49.

Significantly, Albin acknowledged that a defendant governmental entity or landowner may be liable if it has notice, actual or constructive, of a dangerous condition, and held that a material fact existed with respect to the landowner's liability based upon a hazardous condition caused by the logging operation.

We deem it to be a jury question as to whether the bank had constructive notice of the hazardous condition *caused by the logging operation*, which involved the further jury question of whether there was any duty on the bank to have informed itself as to the status in which its property along the road was being left by the logging operation.

Id. at 60 Wn.2d 745, 751-52. The court found the following important:

The trial court properly concluded that there was no duty to inspect and no liability so far as the owner was concerned (absent knowledge of a hazardous condition) *so long as the forest remained in its natural condition; that the liability of the owner, if any, must be predicated on a dangerous condition created on its land, as a result of a logging operation, of which the owner knew or should have known; and presented the case to the jury on that theory.*

Id. at 752. Clearly liability can be imposed under such circumstances.

Lewis emphasizes Albin's holding that a landowner is responsible for damages caused by falling trees *if the landowner alters the natural condition that resulted in injury.* Lewis, 101 Wn.App. at 186 (emphasis added). The Lewis court also found Albin to be consistent with the law's evolution regarding trees adjacent to other property.

In general, the owner of land located in or adjacent to an urban or residential area has a duty of reasonable care to prevent defective trees from posing a hazard to others on the adjacent land.

Lewis, 101 Wn.2d at 186. The Lewis court went on, however, to outline the parameters of notice. "Actual or constructive notice of a 'patent

danger' is an essential component of the duty of reasonable care." Id. at 186. "Absent such notice, the landowner is under no duty to 'consistently and constantly' check for defects. Id. at 187. "The alleged defect must be 'readily observable' so that the landowner can take appropriate measures to abate the threat." Id. Relying on Albin, the Lewis court went on to state as follows:

The reasoning of the above courts is consistent with Albin, the only authority in this State, and persuades us that one whose land is located in or adjacent to an urban or residential area and who has actual or constructive knowledge of defects *affecting* his trees has a duty to take corrective action.

Id. at 187.

"Conversely, absent such knowledge, an owner/possessor does not have a duty to remove healthy trees merely because the wind might knock them down." Lewis, at 187. The Lewis court stated that the defendants were not liable for plaintiff's damage because there was no evidence contradicting the defendant forester's statement that the tree he inspected was free of defects. Although the evidence indicated that the defendants were aware of the plaintiff's general

concern that defendant's trees swayed in the area, could hit plaintiff's house if they fell, and that other trees had fallen in the area, these facts did not put the defendant on actual or constructive notice of a defect requiring removal of the trees. Id.

As set forth above, Albin establishes that logging an area that creates a defect affecting the trees may put the landowner/State on notice of a dangerous condition depending on the "time, place and circumstance." Albin, 60 Wn.2d at 748.

The law set forth above is also supported by the expert testimony of Galen M. Wright, certified forester. Mr. Wright reviewed the Ruiz accident scene and after observing the areas' condition, opined that the trees, including the tree that struck the Ruiz vehicle, were predisposed to failure because of the clearing of all trees east of the RMZ buffer. Further, he opined that all of the trees within the RMZ within a tree length of the Washington Department of Transportation rights-of-way should have been cut during the felling operation of the logging job, particularly given the season of harvest and the period when

fall storms and high winds occur. Since the State of Washington and Hancock had pre-existing notice of this dangerous condition, their conduct deviated from the appropriate standard of care. CP 419-23.

Here, the acts of respondents and the omissions of the State establish that all respondents breached the duty of care owed to Mr. Ruiz. Mr. Golden of the Department of Transportation was aware of the hazards that would be created when the logging operation began. Whereas in Albin the road was a rarely traveled road, Highway 410 is a major highway that is traveled year round. Additionally, the State had actual notice that the trees that were left were more dangerous than the other trees along the area and were subject to being blown down in a high wind, which is a likely occurrence in this area. Accordingly, the State should not be allowed to disregard a known and foreseeable clear and present danger that it failed to remedy.

Additionally, respondents Hancock had notice based upon Mr. Golden's communication with Mr. McBride as well as Mr. McBride's knowledge as to

the dangerous condition created by leaving an unprotected stand of trees. Mr. McBride's understanding is acknowledged by Mr. Whalen's testimony that leaving an open, unprotected strand of trees that will be buffeted by the winds creates a foreseeable danger. Accordingly, both the respondent State of Washington and respondents Hancock, owed a duty to Mr. Ruiz which they breached and which breach proximately caused his injuries. Accordingly, their breach proximately caused the injury to Mr. Ruiz and, therefore, the trial court should have denied their summary judgment motions.

B. THE IMMUNITY IN RCW 76.09.330 DOES NOT APPLY.

At the trial court, the respondents asserted that RCW 76.09.330 creates absolute immunity for the injuries caused to Mr. Ruiz because respondents contended, the Department of Natural Resources' regulations "required" a 50' buffer stand of trees on the RMZ because of the type of stream that was in the area. CP 190-93. The immunity relied upon is set forth in RCW 76.09.330 which provides:

Notwithstanding any statutory provision, rule, or common law doctrine to the contrary, *the landowner, the department, and the state of Washington* shall not be held liable for any injury or damages resulting from these actions, including but not limited to wildfire, erosion, flooding, personal injury, property damage, damage to public improvements, and other injury or damages of any kind or character resulting from the trees being left.

Although the statute is clear as to the immunity it provides, nothing within the statute allows the respondents to create a dangerous condition and then stand behind the immunity granted by the statute to absolve them of responsibility.

By analogy the applicability of the immunity in RCW 76.09.330 can be compared to that as allowed in RCW 4.24.210(1), the recreational use statute. Under the recreational use statute, landowners generally are not liable for injuries incurred by recreational users of land except under three limited circumstances. See Davis v. State, 144 Wn.2d 612, 30 P.3d 460 (2001). One of the exceptions to immunity is if "the injuries were sustained by reason of a known dangerous artificial latent condition for which no warning signs were posted." Davis, 144 Wn.2d at 616 (citing RCW 4.24.210(c)(3)). Here, the same type

of exemption should apply, particularly since the respondents created the dangerous condition they now seek to claim immunity for.

No cases exist interpreting RCW 76.09.330. But it would be nonsensical to allow the respondents to create a dangerous condition and then invoke the statute's immunity provision and then attempt to harmonize it with the case law established by Albin and Lewis. Further, the facts here do not afford the respondents the statutory immunity because there was no requirement that the respondents leave the trees standing in the RMZ to benefit public resources.

As is acknowledged by respondents, after Mr. Ruiz' accident, a meeting occurred between Mr. McBride, Mr. Golden and other State officials to modify the Forest Practices Application submitted by Hancock. As a result, all of the timber within 120 feet of Highway 410 within the riparian management zone was cut. Although ER 407 states that evidence of remedial measures is inadmissible as proof of negligence, such conduct is admissible as proof of feasibility of precautionary measures

which could have been taken, but were not taken, as is the case here.

Additionally, the trial court, in her ruling, qualified her decision and stated that the immunity applied only if the trees were "required" to be left standing. Based upon the respondents' conduct of removing trees within the RMZ, no such requirement existed. Accordingly, RCW 76.09.330 does not apply in this case because respondents were not "required" to leave the trees standing in the RMZ and upland areas to benefit public resources.

C. HANCOCK IS NOT ENTITLED TO ANY IMMUNITY PROTECTION.

Respondents Hancock's argued that they also entitled to the immunity provisions as they are a landowner pursuant to RCW 76.09.020(10). Such argument fails, however, because they are not within the class of entities the statute seeks to protect. RCW 76.09.020(10) defines a landowner as follows:

"Forest landowner" means any person in actual control of forest land, whether such control is based either on legal or equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or all of the timber on such land in any manner. However, any

lessee or other person in possession of forest land without legal or equitable title to such land shall be excluded from the definition of "forest landowner" unless such lessee or other person has the right to sell or otherwise dispose of any or all of the timber located on such forest land.

Based on the definition above, the Hancock respondents are not "landowners" pursuant to the statute and are not entitled to its immunity as respondents Hancock presented no evidence that they had an interest in the land that entitled them to sell or dispose of the timber in any manner. Rather, the Hancock respondents were the management company for the landowner, White River Forests. As such, the trial court should have denied respondents Hancock's summary judgment motion based upon this basis as well.

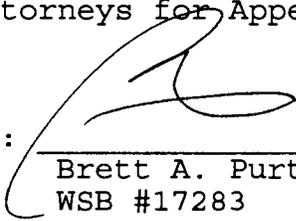
V. CONCLUSION

Based upon the aforementioned, the appellant respectfully urges this court to reverse the trial courts' orders granting respondents' summary judgment motions as material issues of fact exist surrounding the notice, both actual and constructive, that the respondents had regarding the dangerous condition created from the logging operation. Further, the immunity statute, RCW

76.09.330, does not absolve respondents of liability as they created the dangerous condition that they now seek to claim immunity for, and, finally, respondents Hancock are not entitled to claim immunity as they are not in the class of entities, i.e., landowners, that can be granted immunity for injuries suffered by Mr. Ruiz.

RESPECTFULLY SUBMITTED this 30 day of January, 2009.

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By: 

Brett A. Purtzer
WSB #17283

CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 30th day
of January, 2009.


Kathy Herbstler