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SUPREME COURT OF THE
STATE OF WASHINGTON

TIMOTHY J. RUIZ,

Plaintiff/Appellant,

v.

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

Respondents/Defendants

**BRIEF OF RESPONDENTS HANCOCK NATURAL RESOURCE
GROUP, INC., HANCOCK FOREST MANAGEMENT INC.,
"HANCOCK TIMBER RESOURCE GROUP" and WHITE RIVER
FORESTS LLC**

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I. INTRODUCTION

Defendant/respondent White River Forests LLC (“White River Forests”) owned timber located on forested land in King County, about ten miles east of Enumclaw, known as “the Bridgecamp property.” Defendant/respondent Hancock Natural Resource Group, Inc. (“Hancock Natural Resource Group”) is White River Forests’ statutory Manager. Hancock Forest Management Inc. (“Hancock Forest Management”) is a wholly owned subsidiary of Hancock Natural Resource Group. Together, they manage and control this investment property on behalf of White River Forests, including the right to cut and sell the timber.¹

The plaintiff/appellant, Timothy Ruiz, alleges that he was injured by a large branch that broke off a healthy tree during a major windstorm and struck his car. The tree allegedly came from a “Riparian Management Zone” (“RMZ”) – that is, a stand of trees along the banks of a river or stream that the Hancock entities were required by law and their Forest Practices Act permit to leave standing to protect the environment.² Mr. Ruiz alleges that the trees in

¹ Hereafter, the related defendants/respondents White River Forests, Hancock Natural Resource Group and Hancock Forest Management are referred to collectively as “the Hancock entities,” or simply “Hancock.” The named defendant identified as “Hancock Timber Resource Group” is an assumed business name for Hancock Natural Resource Group and is not a separate legal entity amenable to suit.

² The Forest Practices Board has adopted a comprehensive set of forest practices rules, pursuant to chapter 76.09 RCW, the Forest Practices Act (“FPA”). The FPA is intended to create “a comprehensive statewide system of laws and forest practices rules...” RCW 79.09.010(2). The forest

the RMZ were vulnerable to damage in strong winds and that Hancock negligently contributed to his injury by leaving those trees standing. (CP 21-36).

Mr. Ruiz's negligence claim against Hancock fails as a matter of law because Hancock is immune from suit under RCW 76.09.330. When the Legislature authorized the Forest Practices Board to promulgate regulations requiring landowners and timber harvesters to protect the environment by leaving trees standing in an RMZ, the Legislature specifically recognized the risk of falling trees in an RMZ. Recognizing that risk, the Legislature granted unlimited immunity to any person who owns, or controls, or has the right to sell or dispose of timber on forest land, from suit for personal injury and property damage caused by falling trees in an RMZ. Specifically, RCW 76.09.330 provides:

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

The legislature hereby finds and declares that riparian ecosystems on forest lands in addition to containing valuable timber resources, provide benefits for wildlife, fish, and water quality. The legislature further finds and declares that leaving riparian areas unharvested and leaving snags and green trees for large woody debris recruitment for streams and rivers provides public benefits including but not limited to benefits for threatened and endangered salmonids, other fish, amphibians, wildlife, and water quality enhancement. The legislature further finds and declares that leaving upland areas unharvested for

practices rules are promulgated in part to ensure that "compliance with such... rules will achieve compliance with the water quality laws." WAC 222-12-010. "The goal of riparian rules is to protect aquatic resources and related habitat..." WAC 222-30-010(2).

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

(Emphasis added.)

Mr. Ruiz's personal injury claim against the Hancock entities falls squarely within this broad statutory immunity from suit. The Legislature knew full well that trees left standing in an RMZ might break or fall and cause personal injury or property damage. It has decreed that if a private landowner – and those who harvest and sell timber on her behalf – are to be required by regulations and applicable permits to leave trees standing in an RMZ to protect the environment – which they otherwise would likely cut down for profit and to eliminate potential liability for falling trees – they “shall not be held liable” when a tree falls from the RMZ.³

³ *Even in the absence of this broad statutory immunity, the Hancock entities would not be liable here, because under controlling Washington law, Hancock never had a duty to remove healthy trees from its property merely because*

The statutory immunity under RCW 76.09.330 applies here and forecloses Mr. Ruiz's negligence claim against Hancock. In view of that statutory immunity, Judge Sharon Armstrong properly granted summary judgment and dismissed Mr. Ruiz's claims against Hancock as a matter of law. (CP 484, 493-496).

II. RESPONDENTS' STATEMENT OF THE ISSUES

1. Whether the trial court properly granted Hancock's motion for summary judgment, because Hancock is immune from suit under RCW 76.09.330 for personal injury that resulted when a portion of a healthy tree blew onto the road from the Riparian Management Zone on its property; and because the statute does not contain any limitation on the immunity granted when a defendant allegedly "creates a dangerous condition" by leaving healthy green trees or "snags" standing in an RMZ.

2. Whether the trial court properly granted Hancock's motion for summary judgment, because the Hancock entities are "persons 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" -- and thus are landowners entitled to immunity under RCW 76.09.330.

an extreme windstorm could cause one of the trees to break or fall onto adjoining public or private property. Albin v. National Bank, 60 Wn.2d 745, 375 P.2d 487 (1962); Lewis v. Krussel, 101 Wn. App. 178, 2 P.3d 486 (2000). See Section IV, "Argument," subsection 5, below.

3. Whether the trial court properly granted Hancock's motion for summary judgment, because even if there were no statutory immunity, Hancock had no duty to remove healthy trees from the RMZ merely because one such tree might break or fall onto a nearby road in an extreme windstorm.

III. RESPONDENTS' STATEMENT OF THE CASE

Mr. Ruiz has accurately stated the procedural history leading up to Judge Sharon Armstrong's grant of summary judgment for the Hancock entities. However, his Statement of the Case, section B, "Facts," overlooks the following undisputed and dispositive facts in the record on review.

1. **Hancock was required to preserve trees in the RMZ under applicable Forest Practices Rules and the terms of its permit from the Department of Natural Resources.**

Mr. Ruiz himself alleges that White River Forests has a legal right to harvest timber located on property along SR 410 in King County, called the Bridgecamp development. (CP 26.) He also alleges that Timothy McBride, an employee of Hancock Forest Management, properly submitted a Forest Practices Application to the Department of Natural Resources of the State of Washington ("DNR" or "the Department"), the agency charged with enforcement of the Forest Practices Act and the rules promulgated under that Act. (CP 26.) The application, executed by Timothy McBride on behalf of the "Landowner," White River Forests LLC, is in the record on review. (CP 298-318.)

Mr. Ruiz also alleges that the Department approved the application, which Mr. McBride submitted on behalf of White River Forests LLC. (CP 26-27.)

Cyril Moya, formerly of the DNR, testified that he reviewed and approved the Hancock application and explained how he had performed his evaluation, with assistance from Don Nauer of the Department of Fish & Wildlife. Messrs. Moya and Nauer visited the site and were particularly concerned about the Riparian Management Zones adjacent to the White River in the area to be logged. On this visit, Moya and Nauer marked boundary lines required to meet the RMZ "no harvest" requirements under the applicable environmental rules and regulations for the proposed timber sale. Mr. Moya was certainly aware that wind was an issue in the area and that a portion of the RMZ was close to the highway. (CP 353-356.) However, Mr. Moya also testified that there are no environmental rules or regulations that made an exception for the RMZ requirements because of the proximity of a state highway. (CP 82-83.)

The relevant forest practice rules included the riparian management rules at WAC 222-30-021 and WAC 222-30-022. As stated in the application, those rules called for a "total RMZ width" of 170 feet around stream segments B & C on the Bridgecamp property. Furthermore, the application itself warned that a landowner could not remove any tree within 75 feet of any

"Type 1, 2 or 3 water" unless he could demonstrate this would not violate WAC 222-30-040.⁴ (CP 309-310.)

Based on his observations in the field and the application that Mr. McBride submitted on behalf of White River Forests, Mr. Moya concluded that the proposed harvest – with trees left standing in a "no harvest zone" in the RMZ, shown in black at CP 87 – would meet or exceed the applicable environmental rules and regulations. (CP 82-83; *see also* CP 303, 312, 326-329.)

When the trial court considered Hancock's summary judgment motion, Ben Cleveland was Assistant Regional Manager of the DNR. He was responsible for compliance with DNR rules and regulations and had 34 years of experience working for the State. Mr. Cleveland testified that clearing timber in the RMZ would have been a violation of applicable environmental regulations and could only be done legally if the DNR granted a formal waiver of the regulatory requirements. (CP 358-362.)

Mr. Ruiz never offered any evidence to refute the DNR's conclusion that the applicable Washington regulations required Hancock to leave trees standing in the RMZ. Nor did he ever offer any evidence to show that Hancock failed to comply with the requirements of its DNR-approved Forest

⁴ WAC 222-30-040 governs "shade requirements to protect water temperature." The regulation expressly provides it may be waived only when a waiver will not affect water temperature. It says nothing about waiving the limitation on cutting trees near streams because the trees are close to a roadway.

Practices Application when it contracted with Whalen Timber to log the Bridgecamp property so Hancock could sell the timber. (CP 23-24). Instead, Mr. Ruiz appears to argue that Hancock was negligent for following the requirements of its DNR-approved Forest Practices Application and the applicable Washington regulations.

2. **Mr. Ruiz allegedly was injured by a perfectly healthy tree that broke or fell from the "no harvest" area in the RMZ during an extreme and devastating windstorm, with gusts as high as 75 miles per hour.**

On December 11, 2004, the National Weather Service cautioned that winds of 40 to 45 miles per hour would reach the Highway 10 corridor east of Enumclaw, Washington. By late that evening, a "high wind watch" was in effect with gusts of 65 miles per hour expected. (CP 512-517.)

On December 12, 2004, the day of the accident, the Weather Service upgraded the "watch" to a "high wind warning" and predicted gusts of up to 65 miles per hour. Peak gusts of up to 75 miles per hour were recorded. Electrical service to 16,000 customers in the area was knocked out by trees that had fallen on power lines. There had been substantial wind related property damage in the area. (*Id.*)

On the same date, King County Road Department personnel reported three trees were blocking SR 169 near Maple Valley, Washington. To the north, trees were down on the highway near Marysville. SR 410, the highway Ruiz was traveling at the time of his accident, had been blocked by falling trees on three occasions before his accident occurred at 5:00 pm., December

12, 2004. About two hours later, seven trees were reported down on the roadway one mile to the east of the Ruiz accident location. (*Id.*) In short, there is no question that Mr. Ruiz had chosen to travel on a day when virtually any tree standing, healthy or not, could be vulnerable to the wind.⁵

There also is no question that Hancock complied with state regulations in leaving the trees standing. Mr. Ruiz's own expert opined that the tree that allegedly struck the Ruiz vehicle was "*alive when it failed. There was no decay or evidence of disease.*" (CP 420.) Mr. Ruiz's own expert also admitted that the decision to leave these trees standing in the RMZ pursuant to state regulations had been made by "Washington Department of Natural Resources forestry and wildlife professionals who have many years of experience." (CP 422-423.) Notwithstanding those regulations, Mr. Ruiz's expert opined that because trees in an RMZ near a road may fall in high winds and cause personal injury and property damage, an effort should have been made to circumvent the environmental regulations in this instance and to cut

⁵ *Indeed, meteorologist S. Edward Boselly opined: "At the time of a major wind storm, common sense dictates that motorists should not travel on mountain forest highways for recreational purposes when there is a high probability that trees will blow down blocking travel on the highway and in rare instances striking traveling motorists." (CP 516-517). The Court may also wish to take judicial notice of the "Beaufort scale," a standard scale from 0 to 12 that has been used since 1805 for estimating wind speed by observation of the wind's effects on land and sea. At "10" on the Beaufort scale, wind speeds reach 55-63 miles per hour (48-55 knots), with large branches or entire trees typically broken off or uprooted. See, e.g., National Weather Service, Storm Prediction Center web site:*

<http://www.spc.noaa.gov/faq/tornado/beaufort.html>.

down all trees in a 135 foot swath along the highway, healthy or not. (CP 423.)

In summary, on Hancock's motion for summary judgment, the undisputed facts showed that: (1) applicable Washington forest practices regulations *required* Hancock to leave trees in the RMZ on the Bridgecamp property, as did the specific direction Hancock received from the DNR for harvesting trees on the Bridgecamp property; (2) Hancock was prohibited from cutting those trees unless the DNR decided to waive or modify the applicable regulations; (3) DNR forestry and wildlife professionals with many years of experience were aware the RMZ on the Bridgecamp property was near SR 410, but did not choose to waive the environmental regulations or direct Hancock to harvest trees in the RMZ prior to Mr. Ruiz's accident; and, (4) the tree that hit Mr. Ruiz's vehicle allegedly fell or broke from a location in the RMZ and was "alive," with "no decay or evidence of disease of any kind."

IV. ARGUMENT

1. **The construction of RCW 76.09.330 is a question of law this Court reviews de novo.**

As Mr. Ruiz states in his opening brief, this Court reviews an order on summary judgment *de novo*, and engages in the same inquiry as the trial court did when deciding the motion for summary judgment. The appellate court may affirm an order granting summary judgment on any basis supported by

the record on review. *Swineheart v. City of Spokane*, 145 Wn. App. 836, 843-44, 187 P.3d 345 (2008).

The construction of a statute, such as the grant of immunity provided in RCW 76.09.330, is a question of law reviewable *de novo*. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, the Court must give effect to that meaning as a clear expression of legislative intent. *Id.* at 9-10. The plain meaning of a statute is determined by consideration of the ordinary meaning of the words, the legislative purpose, and closely related statutes. *Id.* The Court will not resort to aids of construction unless after such consideration, the statute remains susceptible to more than one reasonable meaning. *Id.* at 12.

However, in undertaking a "plain meaning" analysis of a legislative enactment, the reviewing Court must remain careful to avoid unlikely, absurd or strained results. *Internet Community and Entertainment Corp. v. State*, ___ Wn. App. ___, 201 P.3d 1045, 1049 (2009).

2. **RCW 76.09.330 is an unequivocal statement of the Legislature's intent to bar claims for personal injury "resulting from the trees being left" in a Riparian Management Zone subject to DNR regulation; and does not require resort to "aids of construction" to determine its meaning.**

Even Mr. Ruiz must concede, as he does at page 25 of his opening brief, that "the statute [RCW 76.09.330] is clear as to the immunity it provides." Indeed, it would be difficult to draft a statute providing immunity

from liability more clearly and broadly than the statute our Legislature drafted as RCW 76.09.330.

To begin with, the statute contains a very clear statement of the Legislature's purpose – to encourage the protection of the riparian environment by requiring foresters to leave "snags"⁶ and "green trees for large woody debris recruitment for streams and rivers." RCW 76.09.330 includes these specific legislative findings:

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

The legislature hereby finds and declares that riparian ecosystems on forest lands in addition to containing valuable timber resources, provide benefits for wildlife, fish, and water quality. The legislature further finds and declares that leaving riparian areas unharvested and leaving snags and green trees for large woody debris recruitment for streams and rivers provides public benefits including but not limited to benefits for threatened and endangered salmonids, other fish, amphibians, wildlife, and water quality enhancement. The legislature further finds and declares that leaving upland areas unharvested for wildlife and leaving snags and green trees for future snag recruitment provides benefits for wildlife. ...

The statute goes on to acknowledge that by requiring foresters to leave "snags and green trees" standing around rivers and streams, while harvesting timber around such riparian management zones, the regulations may create an increased risk from falling trees:

⁶ *A snag is "a standing dead tree." See Webster's Ninth New Collegiate Dictionary, at 1114 (Merriam-Webster, 1983 ed.). Thus, the Legislature recognized that in a riparian management zone, the rules require forest landowners to leave standing dead trees that are prone to fall and could otherwise be considered "defective."*

Forest landowners may be required to leave trees standing in riparian and upland areas to benefit public resources. It is recognized that these trees may blow down or fall into streams and that organic debris may be allowed to remain in streams. This is beneficial to riparian dependent and other wildlife species. **Further, it is recognized that trees may blow down, fall onto, or otherwise cause damage or injury to public improvements, private property, and persons.**

(Emphasis added.) Finally, RCW 76.09.330 contains a broad and unlimited immunity from suit for "any injury or damages... of any kind or character" resulting from trees being left in a riparian management zone as required by regulations promulgated under the Forest Practices Act:

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.

(Emphasis added.)

The Legislature has left no room for controversy about its intent. The plain terms of RCW 76.09.330 bar liability for personal injury under any statutory provision, rule, or common law doctrine. The statute applies to trees left in an RMZ on "forest lands," whether they are "snags" or "green trees."

The Forest Practices Act, RCW 76.09.020(6), defines "forest land" as land that is capable of supporting a merchantable stand of timber, like the Bridgecamp property at issue in our case:

"Forest land" shall mean all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which is incompatible with timber growing.

A "merchantable stand of timber" is defined in the forest practices regulations, WAC 222-16-010(27):

"Merchantable stand of timber" means a stand of trees that will yield logs and/or fiber:

Suitable in size and quality for the production of lumber, plywood, pulp or other forest products; of sufficient value to least to cover all costs of harvest and transportation to available markets.

No one disputes these definitions apply to the Bridgecamp property.

RCW 76.09.330 shows the Legislature knew that trees left standing in an RMZ could be prone to fall and cause harm – especially snags that are left precisely because they are a desired source of "debris" that is beneficial to the riparian ecosystem. The drafting history of the current statute also demonstrates the Legislature knew that FPA regulations may require landowners to leave trees standing in Riparian Management Zones sited where falling trees could cause injury to persons, public improvements, and private property. Yet precisely because of that knowledge, the Legislature took steps to *expand* the statutory immunity to encompass that risk.

Prior to 1999, RCW 76.09.330 provided immunity against:

... any injury or damages resulting from these actions, including but not limited to wildfire, erosion, flooding and other damages from the trees being left.

Laws 1999, Sp. Sess., ch. 4, § 602, rewrote the statute to extend broadly to *"personal injury, property damage, damage to public improvements, and other injury or damages of any kind or character"* resulting from the trees being left in an RMZ per regulatory requirements.

In drafting RCW 76.09.330, the Legislature expressly stated its understanding that leaving trees standing in an RMZ, while harvesting trees around the RMZ, would entail a risk from falling trees. Indeed, the statute provides immunity from liability for healthy "green trees" and ailing or dead "snags" that the statute itself acknowledges may be likely to fall. The Legislature determined that the risk posed by falling trees – including possible injury to persons and private property – did not outweigh the environmental benefits of leaving green trees and snags along streams and rivers under FPA riparian management regulations. It also recognized the liability that might flow from leaving trees in an RMZ and decreed that the State, the DNR and forest landowners should be broadly immunized against all such liability.

3. **There is no exception to immunity under RCW 76.09.330 for "dangerous conditions" allegedly created by the defendants when they left trees standing in the RMZ.**

Turning the legislative intent and the statutory language upside down, Mr. Ruiz attempts to argue that RCW 76.09.330 does not provide immunity when a defendant has "created a dangerous condition" by leaving standing trees – including sound and healthy trees – exposed to the wind in an RMZ. The statute does not contain any such exception. To judicially engraft that

exception onto the statute as a matter of "statutory construction" would virtually nullify the broad immunity the Legislature intended to create.

The immunity provided under RCW 76.09.330 applies to any "dangerous condition" that may result when trees are left in an RMZ during a timber harvest. The statute expressly creates immunity from claims for personal injury, as well as damage to private property and public improvements. The Legislature chose to provide a broad grant of immunity with a clear understanding of the risk. The Legislature chose to balance the risk of harm, versus the benefit of protecting riparian environments, by tipping the balance in favor of extending a broad and unqualified immunity to encourage protection of the environment.

Engrafting an unwritten "dangerous condition" exception on the statute as a matter of "statutory construction" would essentially nullify the statutory immunity and the Legislature's judgment. This would contravene the most basic rules of statutory construction: if a statute's meaning is plain on its face, the Court must give effect to that meaning as a clear expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d at 9-10.

The plain text of RCW 76.09.330 is enough to defeat Mr. Ruiz's suggestion that the Court should impose a "dangerous condition" exception on the statutory grant of immunity. However, there are at least two other good reasons to conclude that Mr. Ruiz's attempt to engraft a "dangerous condition" exception onto RCW 76.09.330 is directly contrary to the Legislature's intent.

First, Ruiz's comparison between RCW 76.09.330 and the "recreational use" statute, RCW 4.24.010(1), only proves that when the Legislature wants to carve out exceptions to an immunity provision, it knows how to do so and will indeed do it.

RCW 4.24.010 grants Washington landowners immunity from premises liability to public invitees, to encourage landowners to open their property to the public for recreational purposes. *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001). However, the statute itself contains this specific exception:

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

RCW 4.24.210(4). Thus, Mr. Ruiz's effort to import the exception applied in cases decided under the recreational use statute into his own appeal, involving the very different RCW 76.09.330, is simply illogical. The recreational statute itself contains an exception from immunity "for injuries sustained to users by reason of a known dangerous condition." RCW 76.09.330 does not. The Legislature knows how to draft a statute including this exception. It chose not to do so when it drafted RCW 76.09.330.

Second, the Court can simply look to other provisions of the Forest Practices Act itself for proof that the Legislature knew how to limit a grant of immunity when it chose to do so – but consciously chose not to limit the

immunity provided under RCW 76.09.330. For example, in RCW 76.09.315, the FPA provides that forest landowners who elect to implement certain hazard reduction measures on their property will be immune from liability for "any personal injuries or property damage... arising from mass earth movements or fluvial processes associated with the hazard-reduction site reviewed." However, like the recreational use statute, RCW 76.09.315 contains a specific exception to the grant of immunity when the landowner knows of dangerous artificial conditions on the property:

Notwithstanding the foregoing provisions of this subsection, a landowner may be liable when the landowner had actual knowledge of a dangerous artificial latent condition on the property that was not disclosed to the department.

Both the FPA itself, in RCW 76.09.315, and the recreational use statute, RCW 4.24.210, contain an express exception to immunity when the landowner creates a dangerous condition on his property. RCW 76.09.330 does not contain any such exception. Now Mr. Ruiz asks the Court to redraft RCW 76.09.330 so that it will include an exception that does not appear in the statute as the Legislature wrote it – as a matter of "statutory construction."

The Court should reject Mr. Ruiz's request to rewrite RCW 76.09.330 in a manner that would nullify its basic purpose – to broadly immunize those who harvest trees on Washington timber land and leave trees standing in a Riparian Management Zone to comply with environmental regulations promulgated to protect the riparian ecosystem.

4. **Hancock was not required to seek a waiver or exemption from the applicable environmental regulations in order to benefit from immunity under RCW 76.09.330.**

By enacting the Forest Practices Act and authorizing the Forest Practices Board to adopt forest practice rules consistent with all applicable environmental regulations, our Legislature created a comprehensive statutory and regulatory scheme governing the commercial timber industry in Washington:

The Forest Practices Act is a statewide system of laws designed to manage and protect the State's natural resources and to ensure a viable commercial timber industry." *Johnson Forestry Contracting, Inc. v. Dep't of Natural Res.*, 131 Wn.App. 13, 23, 126 P.3d 45 (2005); see also RCW 76.09.010(1). Forest practices are "any activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber." RCW 76.09.020(11). The Forest Practices Board is responsible for adopting all forest practice rules, which DNR then enforces and administers. RCW 76.09.040(1).

Alpine Lakes Preservation Society v. Washington State Dep't of Ecology, 135 Wn. App. 376, 388, 144 P.3d 385 (2006); *rev. denied*, 162 Wn.2d 1014, 178 P.3d 1032 (2008) (footnote omitted).⁷

The record on review shows that Hancock Forest Management submitted a Forest Practices Application on behalf of White River Forests that

⁷ *The Department of Ecology must also approve all rules that relate to water quality before they are adopted by the Forest Practices Board. RCW 90.48.420-90.48.425; RCW 76.09.040. WAC 222-30-021, the "Western Washington riparian management zone rules," relate to water quality and apply to "all typed waters on forest land in Western Washington, except as provided in WAC 222-30-023." WAC 222-30-023 provides separate rules for exempt parcels of less than 20 acres and does not apply here.*

included the retention of trees in an RMZ along stream segments on the Bridgecamp property. The proposed harvesting plan was approved by the DNR as consistent with the forest practices rules and regulations, after DNR's "forestry and wildlife professionals who have many years of experience" had reviewed the application with a close eye to compliance with the riparian management rules. (CP 82-84; 422-23.) The Bridgecamp property timber harvesters conducted themselves in accordance with the direction they received from the DNR and left "no harvest" zones along stream segments A through C on the Bridgecamp property, as shown on the "setting map" included in Hancock's application. (CP 83; 87.)

The record on review shows that Hancock did what the DNR concluded was required to comply with the riparian management zone rules and other applicable forest practices and environmental rules and regulations. That, standing alone, triggered application of the immunity provided under RCW 76.09.330.

Yet according to Mr. Ruiz, RCW 76.09.330 does not apply because the DNR subsequently decided to *wave* the RMZ rules, apparently in response to this accident, and eventually permitted tree cutting in the RMZ near SR 410. This proposed construction of the immunity statute is not supported by the text of the statute itself. It is also inconsistent with the public policy behind the Riparian Management Zone rules, the immunity statute, and the Rules of Evidence.

Nothing in RCW 76.09.330 says that a landowner will only be immune from suit if he has first sought a waiver or variance of the rules that require him to leave trees standing in an RMZ, and will have statutory immunity only if the DNR refuses to waive or alter the rules.

A moment's reflection reveals this would also be terrible public policy, putting both the applicant and the DNR on the horns of an untenable dilemma. Knowing that it might face suits from persons who, like Mr. Ruiz, claim the State "negligently" declined to waive the rules designed to protect the riparian environment, the DNR would be hard pressed to tell a landowner the rules must hold and the trees must stand. Knowing that they must seek a waiver of the RMZ rules or forfeit their statutory immunity, every landowner would seek an exemption from the RMZ "no harvest" rules, whenever there was the remotest chance that a tree falling from an RMZ might cause personal injury or property damage. This would create an administrative nightmare for the DNR; substantially undermine its authority to make independent judgments under the rules to protect the environment, rather than to avoid liability; and discourage the timber industry from willing compliance with the Forest Practices Board's strict rules for protection of riparian management zones.

The fact that the DNR, the Department of Ecology and the Department of Transportation ("DOT") later took administrative action to alter what the DNR had required Hancock to do prior to Mr. Ruiz's accident does not mean that Hancock was not "required" to leave trees in the RMZ prior to and at the

time of the accident, within the meaning of RCW 76.09.330. The statute cannot be applied through hindsight. Hancock did what the DNR told it to do, under authority granted to the DNR by the Legislature, the Forest Practices Board, the Department of Ecology and the applicable forest practices and environmental rules.⁸

Furthermore, the DNR's subsequent modification of its RMZ requirements is a classic "subsequent remedial measure" that cannot be used, *post hoc*, to abrogate the immunity expressly granted by the statute – much less as "evidence of negligence" on the part of either the DNR or Hancock. The evidence is irrelevant and inadmissible under ER 407. *See Hyjek v. Anthony Industries*, 133 Wn.2d 414, 949 P.2d 1036 (1997) (ER 407 ensures that "hindsight" may not be used to determine whether product was reasonably safe as designed, whether liability is predicated on negligence or strict liability; evidence of subsequent modification was properly excluded as irrelevant).

The record supports only one conclusion. The DNR determined Hancock was required to leave trees standing in the RMZ under the forest practices rules that existed when Hancock Forest Management submitted a

⁸ *Similarly, the fact that Mr. Golden of the Department of Transportation or Mr. Whalen, the logger, thought all of the trees along the road should simply come down, regardless of the applicable environmental rules, is of no significance. The Forest Practices Act, the Forest Practices Board, the rules promulgated by the Forest Practices Board, and the DNR as the state agency charged with enforcement of the rules, all governed Hancock's conduct -- not the personal views of DOT personnel or contract loggers.*

Forest Practices Application on behalf of White River Forests and when trees were harvested on the Bridgecamp property prior to the accident. The fact that the DNR subsequently altered or waived its requirements to permit further harvest in the RMZ is irrelevant and inadmissible on the question whether RCW 76.09.330 applied on the date of the accident.

5. **The Hancock entities are "forest landowners" granted immunity under RCW 76.09.330.**

Mr. Ruiz alleged that defendant White River Forests "possessed a *profit à prendre*, a legal right to harvest timber located on forest land owned by Weyerhaeuser in King County, Washington." (CP 26). He further alleged that Hancock Natural Resource Group is a property manager acting on behalf of White River Forests, with Hancock Forest Management as its subsidiary. (CP 23).

The record on summary judgment showed that Tim McBride, an employee of Hancock Forest Management, prepared, signed and submitted the Forest Practices Application as "Landowner." (CP 89).

The immunity statute, RCW 76.09.330, recognizes that "forest landowners may be required to leave trees standing in riparian and upland areas to benefit public resources." It goes on to extend immunity from suit to "the landowner, the department [of Natural Resources] and the state of Washington."

RCW 76.09.020(10) broadly defines the term "forest landowner":

"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.

(Emphasis added.)

The record on review shows that while White River Forests held a legal interest in the timber located on the Bridgecamp property, Hancock Natural Resource Group and Hancock Forest Management were in actual control of the forest land. Hancock Forest Management performed all essential timber management services for White River Forests under contract, and all three Hancock entities had full authority to sell or otherwise dispose of the timber on the land in any manner. As a result, the trial court correctly concluded that Hancock was a "forest landowner" within the meaning of RCW 76.09.020(10).

Hancock Forest Management was responsible for and performed the hands-on, day-to-day timber management function, including obtaining all necessary permits. In its capacity as agent and property manager, Hancock Forest Management managed all timber harvest and management activities on the Bridgecamp property and was authorized to subcontract for, oversee, and monitor all contractual services in connection with such timber harvest and management activities. Its employees were authorized to execute the Forest

Practices Application on behalf of White River Forests, the landowner. Mr. McBride, a Hancock Forest Management employee, exercised control over the property and the timber to be harvested and sold, with actual or apparent authority from White River Forests. McBride had signing authority for White River Forests and prepared and submitted the Forest Practices Application on its behalf. He acted on behalf of White River Forests to coordinate the timber harvest with the DOT and the DNR. McBride's employer, Hancock Forest Management, on behalf of White River Forests, contracted with Whalen Timber to do the actual tree cutting. (CP 452).

As a result, Judge Armstrong properly concluded:

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 Forests to "sell or otherwise dispose of any or all of the timber on such forest land." RCW 76.09.020(10).

(CP 484).

Judge Armstrong's conclusion is the only conclusion supported by the record.

6. **Even absent the immunity afforded under RCW 76.09.330, the trial court properly granted Hancock's motion for summary judgment because, as a matter of Washington common law, Hancock had no duty to clear all healthy trees along SR 410 that could possibly fall or drop debris on the road during an extreme windstorm.**

Even in the absence of Hancock's statutory immunity from suit, the Court still should affirm the trial court's grant of summary judgment, because

Hancock had no common law duty to protect Mr. Ruiz against the possibility that a live and healthy tree might break or fall in an extreme windstorm and blow onto SR 410. Thus, although Mr. Ruiz's expert urged the trial court to find that Hancock had an obligation to cut all healthy trees "within 135 feet of the roadway" to entirely eliminate the risk that any tree could fall on SR 410 (CP 422), his suggestion was completely inconsistent with Hancock's duties under Washington law.

Our courts have consistently rejected a proposed duty to cut all healthy trees along a roadway, along a swath equal to the height of the tallest tree, in order to safeguard against the foreseeable danger that, under the most extreme circumstances, even a perfectly healthy tree can fall in the wind:

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.

Albin v. National Bank Of Commerce, 60 Wn.2d 745, 748-49, 375 P.2d 487 (1962) (emphasis added; citations omitted).

Nearly 40 years later, Division II affirmed the same basic principle in a case involving a private landowner, *Lewis v. Krussel*, 101 Wn. App. 178, 2 P.3d 486 (2000). In that case, Krussel had a number of tall hemlock trees on their property, located in an urban residential area. More than one of these

trees had fallen in previous years. During a moderate windstorm, with a maximum gust of just over 35 miles per hour, one of the hemlocks fell on the Lewis house. After this occurred, Krussel removed other hemlock trees on his land, as recommended by the local utility district.

On these facts, Division II still found, as a matter of law, that even in a densely populated urban residential area, Krussel's only duty was to take corrective action if he had actual or constructive knowledge of "defects affecting his trees." However, the alleged defect must be "readily observable so that the landowner can take appropriate measures to abate the threat." *Lewis v. Krussel*, 101 Wn. App. at 187. "[A]bsent such knowledge, an owner/possessor does not have a duty to remove healthy trees merely because the wind might knock them down." *Id.*⁹

Mr. Ruiz argues that there *was* a defect affecting the tree that blew down (or broke) during the 75 mile per hour windstorm of December 12, 2004 – that it had been left standing at all, within a 135 foot distance from a highway, after the timber around it had been cut down. He claims that as a result of this "defect," Hancock had a duty to cut down any and all trees

⁹ The *Lewis v. Krussel* panel made clear what it meant by a "readily observable defect," citing *Albin* (noting "tree was probably dead because loggers left it standing"); *Dudley v. Meadowbrook, Inc.*, 166 A.2d 743, 743-44 (D.C. App. 1961) (noting "tree 'full of decay'"); *Burke v. Briggs*, 239 N.J. Super. 269, 571 A.2d 296, 297 (1990) (noting "tree showed evidence of past treatment for disease or carpenter ant damage"); *Barker v. Brown*, 236 Pa. Super. 75, 340 A.2d 566, 567 (1975) (noting "tree decayed and rotten"); and *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123, 127 (1987) (noting "offending limb 'partially decayed'").

within 135 feet of the highway, dead or alive. According to Mr. Ruiz, that is what *Albin* required Hancock to do. But a more careful reading of *Albin* proves that Mr. Ruiz is simply wrong.

In *Albin*, the plaintiffs were injured or killed when one of three isolated roadside "snags," which loggers had left standing less than 25 feet from the County road, fell on their car. The top of the tree had already broken off prior to the day of the accident. The defendants included the owner of the land (the Bank), the County (for allowing the tree to remain near the road) and a timber purchaser who had "bare legal title in the merchantable timber for security purposes." *Albin*, 60 Wn.2d at 747, 749, 758. The Court held that the County and the purchaser/security holder had no duty to the plaintiffs. However, the Court held there was a jury question whether the Bank, as landowner, knew or should have known that isolated dead trees had been left standing where they could fall on the adjacent road. The jury returned a verdict for the Bank. *Id.* at 751.¹⁰

The facts in *Albin* were nothing like the facts in our case. Hancock left a 100 foot wide strip of healthy, natural growth running from SR 410 to the White River, as required under forest practices rules mandated by the State.

¹⁰ *Albin* was decided decades before our current environmental statutes and regulations came into play. Thus, it appears from the reported case that the loggers had removed all healthy trees up to the roadway and left isolated dead and decayed "snags" standing near the road, because "there was testimony that if it had been 'good timber' the loggers would have taken it." *Id.* at 752. Ironically, in our own case Hancock was required to leave "good timber" standing to comply with environmental regulations and is now facing this lawsuit solely because it did what the regulations required.

In *Albin*, the loggers left an isolated, dead and decaying tree standing close to the road simply because it had no economic value to them. In our case, there is no evidence that any trees, dead or alive, had fallen or broken prior to the day of the violent windstorm that caused Mr. Ruiz's accident. In *Albin*, the tree that fell on the plaintiffs' car had already snapped once before.

Albin does not stand for the proposition that Hancock had a common law duty to remove all of the trees near the road, including the one healthy tree that snapped and fell in a violent, 75 mile per hour windstorm and struck his car. Yet under Ruiz's theory of the case, that would have been Hancock's *only* way to avoid liability, because the particular live and healthy tree that fell had no readily observable defect or disease, other than the fact it had been left standing at all rather than "clear cut" with all of the neighboring trees.

The tree that fell was no more or less likely to fall than any of the other healthy trees that stood in the 100 foot swath of trees standing around it. As *Albin* specifically held, removing every healthy tree along the side of a highway, in a swath "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," is neither practicable nor desirable. *Albin*, 60 Wn.2d at 748-49.

This Court should reject Mr. Ruiz's proposal to modify or overrule *Albin* and *Lewis v. Krussel*, and to impose a novel, common law duty on forest landowners: to clear-cut all trees standing along public roadways that run adjacent to harvested timber land, in a swath equivalent to the height of the

tallest trees, to eliminate all risk that a tree, healthy or not, could fall on the road. This was impractical, unreasonable, and undesirable back in 1962, when the Court decided *Albin*. It is even more so today, when environmental regulations may *require* the landowner to leave the trees standing, as occurred in this case.

V. CONCLUSION

The Forest Practices Act created a comprehensive scheme for the regulation of timber harvesting and reforestation in Washington. The Forest Practices Board has promulgated detailed forest practice rules that control timber harvesting in our State. Some of those rules, like the Riparian Management Rules, are designed to protect the environment by requiring timber owners and harvesters to leave trees standing along rivers and streams to protect water quality and wildlife. Those rules were also drafted to comply with other environmental statutes and regulations, such as the Clean Water Act, which requires the Board to coordinate with the Department of Ecology. The Department of Natural Resources implements and enforces the regulations.

When Hancock Forest Management submitted a Forest Practices Application on behalf of White River Forests, prior to cutting and selling timber from the Bridgecamp property, it did so subject to the FPA regulations. The DNR required Hancock to leave trees standing in a Riparian Management Zone along the White River, and Hancock did what was required.

A healthy tree standing in the RMZ broke in a gale force wind on December 12, 2004. A piece of that tree blew over SR 410 and struck Mr. Ruiz's vehicle. Mr. Ruiz's own expert has opined that the only way to protect Mr. Ruiz from that risk would have been to clear cut all trees in a 135 foot swath along the highway – something this Court has held no landowner should be required to do. As a matter of law, Hancock cannot be held liable for Mr. Ruiz's injuries under Washington common law.

Furthermore, Hancock could not have cut those trees unless the DNR and the Department of Ecology decided to relieve Hancock from its obligation to comply with the Riparian Management Rules that compelled Hancock to leave the trees standing in the first place.

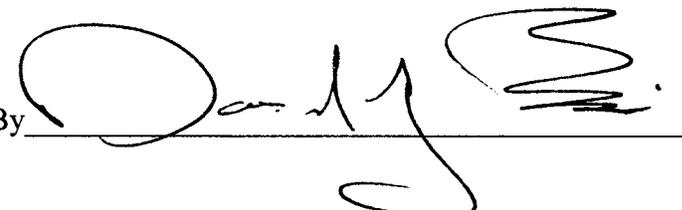
Thus, even if Hancock might otherwise have potential liability under common law, our Legislature has decreed, in RCW 76.09.330, that no forest landowner should be held liable for leaving trees standing in an RMZ in order to comply with the Riparian Management Rules. White River Forests owned the timber on the Bridgecamp property. Hancock Natural Resource Group and Hancock Forest Management had the right to cut and sell the timber. All three of these Hancock entities are "forest landowners" subject to statutory immunity.

Furthermore, there is no exception to that immunity for "dangerous conditions" that result from leaving trees standing in an RMZ. To the contrary, RCW 76.09.330 expressly acknowledges the risk that trees left

standing in an RMZ may fall and cause personal injury and property damage - and nevertheless grants full immunity from suit.

Judge Armstrong properly granted Hancock's motion for summary judgment. The Hancock entities respectfully ask this Court to affirm that judgment.

Respectfully submitted this  day of April, 2009

By 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused to be filed with the Supreme Court of the State of Washington, via hand delivery, and arranged for delivery of true and correct copies of the foregoing document upon the following:

VIA HAND DELIVERY

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Betty J. Dobbins