

Hearing Date: October 30, 2023  
Hearing Time: 1:30 p.m.

**STATE OF WASHINGTON  
MASON COUNTY SUPERIOR COURT**

BRAD CAREY, PAMELA ROGERS,  
LIBERTY MANAGEMENT LLC  
(WADE ANDERSON),

Plaintiffs,

vs.

WASHINGTON STATE  
DEPARTMENT OF NATURAL  
RESOURCES, a public agency,

Defendant.

NO. 19-2-00737-23

DEFENDANT'S CR 56(f) RESPONSE  
TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT WITH  
SUBJOINED DECLARATION OF W.  
SEAN HORN BROOK

COMES NOW the Defendant, Washington State Department of Natural Resources, by and through counsel, W. Sean Hornbrook, and offers the following CR 56(f) Response to Plaintiffs' Motion for Summary Judgment and respectfully requests to continue Plaintiffs' present motion due to Defendants' inability to adequately respond. Plaintiffs have disclosed expert opinion for the first time in their Motion for Summary Judgment, though Defendant has pending on point discovery regarding expert opinions in this matter, as well as a number of follow-up emails requesting Plaintiffs' expert opinions.

Additionally, defense counsel has been in trial in two separate – and now consolidated matters – in Thurston County Superior Court since August of 2023, which is expected to last through October 31, 2023. The consolidated matter is *M.S.* and *D.E.*, et al., and is presided over by the Honorable Indu Thomas. Defense counsel is the only Assistant Attorney General in the above-captioned matter, is lead counsel in the *M.S./D.E.* matter, and has served a Notice of Unavailability.

## I. INTRODUCTION

Defendants respectfully requests the Court set Plaintiffs' Motion for Summary Judgment for an additional 30 to 45 to days in order to afford the State Defendant the opportunity to conduct the deposition of Plaintiffs' newly disclosed expert regarding his opinions, as well as to have the Defendant's expert to evaluate and rebut Plaintiffs' newly disclosed expert and opinions.

## II. STATEMENT OF FACTS

This matter arises out of Plaintiffs' allegations that the Department of Natural Resources (DNR) negligently removed debris blocking a culvert, which resulted in the release of water downstream causing damage to Plaintiffs' property. DNR denies it was negligent. *See Plaintiffs' Complaint* and *Defendant's Answer to Plaintiffs' Complaint*. Plaintiffs' recently disclosed expert opinion in the context of their Motion for Summary Judgment, despite Defendant's on point discovery and subsequent requests for expert opinion disclosure. *See Subjoined Declaration of W. Sean Hornbrook*. It is necessary for the Defendant to have the opportunity to conduct the deposition of Plaintiffs' expert regarding his opinions, as well as obtaining a rebuttal opinion from Defendant's disclosed expert. *Id.* Defendant has served a Notice of Unavailability in this matter due to a current trial and it is anticipated that defense counsel will remain in trial through the end of October. *Id.*

1 Defense counsel has no availability to conduct Plaintiffs' expert deposition and requires time for  
2 the Defendant's expert to review and prepare a rebuttal report. *Id.*

### 3 **III. STATEMENT OF ISSUE**

4 1. Whether Plaintiffs' Motion for Summary Judgment should be continued or set  
5 over pursuant to CR 56(f).  
6

### 7 **IV. EVIDENCE RELIED UPON**

8 1. The Subjoined Declaration of W. Sean Hornbrook.

### 9 **V. ARGUMENT AND AUTHORITIES**

10 CR 56(f) provides as follows:

11 When Affidavits Are Unavailable. Should it appear from the affidavits of a  
12 party opposing the motion that for reasons stated, the party cannot present by  
13 affidavit facts essential to justify the party's opposition, the court may refuse  
14 the application for judgment or may order a continuance to permit affidavits to  
be obtained or depositions to be taken or discovery to be had or may make such  
other order as is just.

15 Pursuant to CR 56(f), Plaintiffs' Motion for Summary Judgment should be continued or re-noted.

### 16 **VI. SUBJOINED DECLARATION OF W. SEAN HORNbrook**

17 I, W. Sean Hornbrook Declare that I am the attorney assigned to this matter, am over the  
18 age of 18, and that the following is true under the penalty of perjury. Plaintiffs recently disclosed  
19 expert opinion in the context of their Motion for Summary Judgment, despite Defendant's on point  
20 discovery and subsequent requests for expert opinion disclosure. It is necessary for the Defendant  
21 to have the opportunity to conduct the deposition of Plaintiff's expert regarding his opinions, as  
22 well as obtaining a rebuttal opinion from Defendant's disclosed expert. Defendant has served a  
23 Notice of Unavailability in this matter due to a current trial and it is anticipated that defense counsel  
24 will remain in trial through the end of October. Defense counsel has no availability to conduct  
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1 Plaintiffs' expert deposition and requires time for the Defendant's expert to review and prepare a  
2 rebuttal report.

3  
4 **VII. CONCLUSION**

5 Based on the foregoing, Defendant respectfully requests that Plaintiffs' Motion for  
6 Summary Judgment should be continued or re-noted.

7 DATED this 18<sup>th</sup> day of October, 2023.

8  
9 ROBERT W. FERGUSON  
10 Attorney General

11 s/W. Sean Hornbrook  
12 W. SEAN HORNBROOK, WSBA No. 31260  
13 Assistant Attorney General  
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<u>Party</u>	<u>Method of Service</u>
<p><i>Attorney for Plaintiffs</i></p> <p>James P. Grifo, WSBA #45192  The Law Office of James P. Grifo, LLC  164 Dougherty Lane  Friday Harbor, WA 98250</p> <p>Nicholas Power, WSBA #45974  Law Office of Nicholas Power  540 Guard St, Ste 150  Friday Harbor, WA 98250</p>	<p><input checked="" type="checkbox"/> Electronic Mail by Agreement at:</p> <p><a href="mailto:jpg@grifolaw.com">jpg@grifolaw.com</a>  <a href="mailto:nickedpower@gmail.com">nickedpower@gmail.com</a></p>

DATED this 18<sup>th</sup> day of October, 2023, Seattle, Washington.

DEFENDANT'S CR 56(f) RESPONSE  
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