

Opinions can be expensive

By Jessica Dedman

It isn't news to anyone that claims values are skyrocketing in today's climate. The impact of objective fact-based documentation plays a significant role in claim values and defensibility of a case.

Regardless of the role you play within your municipality, it is fair to assume that some of your daily tasks become second nature and it is natural that you feel like you are going through the motions. As a public works employee, documenting your observation of a street tree or sidewalk feels like part of a normal Tuesday. A manager might have a crucial conversation in development with an employee but forget to follow up in writing or document the conversation. A public works employee may send an email to staff regarding a road that is known for accidents, mistaking it for another road. These are all things that reasonably could happen in the course of any day. The impacts later down the line should a claim arise from one of these scenarios drastically impact value.

A City received notice of a claim where a drunk driver traveling northbound at a high rate of speed hit another vehicle turning left onto a street. The allegation was that hedging in the median was not properly maintained by the City and was blocking the driver's view. The plaintiff alleged that because of the failed maintenance, the drunk driver and the other driver failed to see each other, contributing to the collision. The couple that was turning left sustained life-threatening injuries and had both incurred over \$400,000 in medical expenses each. They waited 60 days and added the City to the existing lawsuit.

Wuthrich v. King County affirmed a duty on cities to maintain roadside vegetation. The WA State Supreme Court explained: "We reaffirm that a municipality has a duty to take reasonable steps to remove or correct for hazardous conditions that make a roadway unsafe for ordinary travel and now explicitly hold this includes hazardous conditions created by roadside vegetation."

When the City was brought in, the plaintiff's attorney had already obtained an expert that opined the City's hedges did not impact visibility. WCIA quickly obtained our own expert, who agreed with the plaintiff's reconstruction expert that the hedging had no impact. Given the agreement, we viewed this case as a very defensible road design claim and filed a motion for summary judgment to dismiss the case. Prior to the hearing, a public works employee was deposed, and an email obtained through the public records act was introduced as an exhibit. In the email, the employee was asked about the maintenance records for the vegetation on the island. In response, the employee provided an objective reply on the maintenance of the vegetation but went a step further providing their opinion of the collision history in the area, calling it "extensive" and that "folks had driven up and over the vegetation before." This accident history was not

documented elsewhere and may not have been factual. The added unrequested commentary damaged the integrity of the summary judgement motion, as plaintiff keyed in arguing that though the experts do not think the vegetation had an impact, there is a history of accidents in the area “due to the vegetation.” As a result of this exhibit, WCIA had to reconsider the potential outcome of getting the file dismissed. Our previous position of a positive dismissal reduced our odds to a 50/50 shot or less on having a judge dismiss the City. This commentary negatively affects the value of the claim and the cost of defending it, as this case was now likely going to trial.

One email from one employee can substantially change the posture of a claim when it is revealed in a lawsuit. WCIA risk guidance, and the WCIA Claims Manual both urge with great importance that incident reports and decision documentation stay factual. In this case, the employee may walk back that commentary at their deposition but in the eyes of the plaintiff and the court, a credibility issue now exists. In this scenario, the employee should have commented solely on what they knew to be fact, which was the vegetation maintenance they had performed, and left out their commentary on the history of the intersection.