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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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SUPREME COURT NO. 90759-5
COURT OF APPEALS NO. 71430-9-I

JEROME C. HURLEY and BESSIE M. HURLEY; WESLEY A.
STANCIL and ZELLA E. MORAN; FRANK J. METTLER and LINDA
E. METTLER; SHAWN HAMPTON and CHARITY HAMPTON;
ANTON K. SWAFFORD and DOROTHY E. SWAFFORD; MARK
DANTINNE; JON and DAGNE NORD; DEANNA LESTER; DE LILA
E. WALKER; JAMES K. REDMON and BETTY REDMON; ALICE
REDMON; MICHAEL WOOD and KIMBERLY WOOD; EDWARD
THOMAS and MARTHA THOMAS; MARTIN E. SPRINKLE; LINDA
SPRINKLE; MARTIN L.J. SPRINKLE; AARON SPRINKLE; and
STEPHEN P. REA,

Petitioners,

v.

CAMPBELL MENASHA, LLC; MENASHA FOREST PRODUCTS
CORPORATION; and DON ZEPP, d/b/a DON ZEPP LOGGING,

Respondents,

B & M LOGGING, INC.; RAINIER TIMBER COMPANY, INC.;
RAINIER LOG COMPANY, INC.; RAINIER TIMBER COMPANY, LLC;
PORT BLAKELY TREE FARMS L.P.; ISLAND TIMBER COMPANY;
and POPE RESOURCES,

Defendants.

OLYMPIC FOREST COALITION, SEATTLE AUDUBON SOCIETY,
10,000 YEARS INSTITUTE, GREAT OLD BROADS FOR
WILDERNESS AND WASHINGTON FOREST LAW CENTER'S
AMICUS CURIAE MEMORANDUM IN SUPPORT
OF THE PETITION FOR REVIEW

 ORIGINAL

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I. INTRODUCTION

Amici Olympic Forest Coalition, Seattle Audubon Society, 10,000 Years Institute, Great Old Broads for Wilderness, and the Washington Forest Law Center urge the Court to accept review and reverse the court of appeals because this case concerns an environmental justice issue of “substantial public interest.” RAP 13.4(b)(4). Logging on steep and unstable slopes, even in complete compliance with the forest practices rules, dramatically increases the risk of harmful landslides. When logging causes a landslide that damages nearby life or property, application of strict liability is appropriate and fair: those who create and profit from an inherently dangerous situation, not those who were victimized by it, bear responsibility. The court of appeals placed an unfair burden on rural Washingtonians by requiring those individuals to fully bear the consequences of other parties’ dangerous activities.

The Petition for Review also merits acceptance because the court of appeals’ analysis plainly conflicts with Washington Supreme Court precedent. RAP 13.4(b)(1). The court of appeals held that strict liability does not apply in large part based on the finding that “many causes may contribute to the risk of landslides,” including “the occurrence of an exceptional storm event.” *Hurley v. Port Blakely Tree Farms L.P.*, 332

P.3d 469, 476 (2014) (citing *Crosby v. Cox Aircraft Co.*, 109 Wn.2d 581, 746 P.2d 1198 (1987)). But *Crosby* related to third-party negligence, not natural forces. And this Court has applied strict liability where an activity creates dangerous conditions in which natural forces ultimately trigger damages. In *Johnson v. Sultan Ry. & Timber Co.*, 145 Wash. 106, 258 P. 1033 (1927), this Court held a logger liable for damages to downstream properties, “regardless of the question whether the logging operations were conducted in a negligent manner,” where the logging dammed a stream and later heavy rains broke the dam and triggered a flood.

II. REGULATION OF LOGGING ON STEEP SLOPES

The Restatement (Second) of Torts, § 520, factor (c), requires the court to consider the “inability to eliminate the risk by the exercise of due care” in determining whether strict liability applies. Because the exercise of due care in general includes compliance with applicable law, the operation and effectiveness of the forest practices regulatory scheme is relevant.

The Forest Practices Act, RCW Ch. 76.09 and implementing regulations, Title 222 WAC, regulate forest practices in Washington. Prior to logging, a landowner must submit a forest practices application (“FPA”) to the Department of Natural Resources (“DNR”). DNR reviews FPAs and enforces the forest practices rules. RCW 76.09.040.

Nothing in the Forest Practices Act or rules directly prohibits logging on steep slopes. However, the forest practices rules enumerate certain landforms that present a high risk of landslides. If proposed logging on these “rule-identified landforms” has the potential to deliver sediment to fish-bearing waters or threaten public safety, State Environmental Policy Act (“SEPA”) review is required. WAC 222-16-050(1)(d); WAC 222-10-030.

Some landowners elect to avoid SEPA by not logging rule-identified landforms. But a landowner may lawfully log such areas by preparing an environmental impact statement or by hiring experts to identify mitigating prescriptions. The latter process is subjective: the expert must determine (a) the likelihood that logging will cause slope movement; (b) whether the landslide will deliver sediment to water or in a way that threatens human safety; (c) and any possible mitigation. WAC 222-10-030(1)(a)-(c). In sum, the forest practices rules and SEPA may discourage, but do not prohibit, logging on steep and unstable slopes.

III. LOGGING ON STEEP AND UNSTABLE SLOPES GREATLY INCREASES THE RISK OF LANDSLIDES

The court of appeals correctly determined that “it is not possible to eliminate the risk of harm caused by logging...regulatory and technological improvements in forestry have not appreciably reduced the increased risk of landslides that occur when heavy rain falls on areas

where logging has occurred.” *Hurley*, 332 P.3d at 476. Based on this conclusion, the court should have concluded its analysis of factor (c) and held that this factor weighs heavily in favor of strict liability. Instead, the court did not assign this factor its due weight on the grounds that other external factors also contributed to landslides.

A. Logging on steep slopes increases the risk of landslides, even where the logger or landowner exercises due care.

Logging on steep and unstable slopes, regardless of whether the regulations are followed, is an ultrahazardous activity. Scientists have recognized for over 150 years that landslides are associated with logging on steep slopes.¹ In the Pacific Northwest, landslide frequencies in logged areas are up to thirty-four times higher than natural background rates.² Timber harvest is the primary factor responsible for this difference.³ Recent work by Dr. David Montgomery, a MacArthur “Genius Grant” recipient, confirms that clearcutting renders a steep area three to nine times more likely to slide within the first decade after harvest.⁴

While logging with due care may somewhat reduce the risk of

¹ Charles Lyell, *Principles of geology; or, the modern changes of the Earth and its inhabitants* (D. Appleton & Co., 9th ed. 1853).

² Kara A. Whittaker and Dan McShane, *Comparison of slope instability screening tools following a large storm event and application to forest management and policy*, 145-146 *Geomorphology*, 115, 122 (2012) (citing (Rood, 1984)).

³ *Id.* (citing Sidle et al., 1985).

⁴ David R. Montgomery, *Forest clearing and regional landsliding*, 28 *Geology*, 311, 314 (2000).

landslides, it does not and cannot eliminate the risk of harm. Indeed, Washington's federal habitat conservation plan, on which the forest practice rules are based, specifically acknowledges that the regulations only "reduce" the occurrence of landslides.⁵ The rules also state that logging some landforms causes a risk to public safety, which constitutes an administrative acknowledgement that such logging is inherently dangerous. WAC 222-16-050(1)(d) (logging on steep and unstable slopes that "has the potential to threaten public safety" requires SEPA review); *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 7-8, 810 P.2d 917 (1991).

Two recent studies from the State's official forest practices adaptive management program (WAC 222-10-045) confirm that the forest practices rules only marginally reduce the probability and severity of landslides. In 2007, heavy rain in southwest Washington's industrial forest landscape triggered at least 2,500 landslides. "*The Mass Wasting Effectiveness Monitoring Project: An examination of the landslide response to the December 2007 storm in Southwest Washington*" analyzed 1147 slides from a 91-square mile study area.⁶ The study concluded that

⁵ Final Forest Practices Habitat Conservation Plan, Chapter 4c Upland Strategy, 220 (December 2005), http://www.dnr.wa.gov/Publications/fp_hcp_13ch4c.pdf.

⁶ Gregory Stewart et al., *The Mass Wasting Effectiveness Monitoring Project: An examination of the landslide response to the December 2007 storm in Southwestern Washington - Cooperative Monitoring Evaluation and Research Review Draft Version 8a*, Washington State Department of Natural Resources (2012).

approximately 45 percent of landslides initiated in areas not recognized or regulated as unstable slopes.⁷ The study further found that even where the rules correctly identified high-risk slide areas, and the landowner elected to limit logging in those areas, such limits only served to reduce the amount of sediment delivered by landslides. Application of the rules did not appreciably reduce the occurrence of landslides.⁸

The “Southern Willapa Hills Retrospective Study,” a follow-up study commissioned by DNR, confirmed the Mass Wasting study’s results: after field reviewing 103 logging-related landslides, DNR’s geologists found that 69 percent of the landslides that occurred following logging initiated outside of an area considered unstable under the rules.⁹

Together, these two studies demonstrate that a landowner’s compliance with the law and regulations do not eliminate the risk of harm from logging-related landslides. Consequently, factor (c) of the Restatement of Torts weighs strongly in favor of strict liability. *See Klein*, 117 Wn.2d at 8 (finding strict liability for fireworks displays because

⁷ *Id.* at 49. The results cited herein reflect the interpretation of the majority of the stakeholders in the adaptive management program.

⁸ *Id.* at 56-57.

⁹ Blake O. Murphy et al., *Southern Willapa Hills Retrospective Study*, Washington State Department of Natural Resources (2013), at 1. The results cited herein reflect the interpretation of the majority of the stakeholders in the adaptive management program.

“[a]lthough we recognize that the high risk can be reduced, we do not agree that it can be eliminated.”).

B. Logging creates dangerous conditions in which rain and gravity will trigger landslides.

Instead of holding that factor (c) weighs in favor of strict liability, the court of appeals held that factor (c) weighs *against* strict liability because landslides are triggered by numerous factors. *Hurley*, 332 P.3d at 476 (citing *Crosby*, 109 Wn.2d 581). That analysis plainly conflicts with this Court’s well-settled jurisprudence.

In *Johnson v. Sultan Ry. & Timber Co.*, a logging company’s operations caused woody debris and sediment to create a dam in a stream. A “heavy and unusual rainfall” later caused water to accumulate behind the dam, and when the dam gave way the resulting flood damaged a downstream farm. 145 Wash. at 107-08. Even though there were multiple natural causes of damage, the court applied strict liability. *Id.*; *see also Wilber v. Western Properties*, 14 Wash.App. 169, 173, 540 P.2d 470 (1975) (strict liability where restricting a drainage pipe allowed heavy rains to cause flooding). In *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 862, 567 P.2d 218 (1977), this Court applied strict liability to aerial spraying, even though “natural atmospheric forces” ultimately cause pesticide drift. And this Court affirmatively discussed the application of

strict liability to the owner of a boat moored to a dock before a storm, because, while wind and waves ultimately pushed the boat against the dock, the boat owner created the dangerous condition. *Siegler v. Kuhlman*, 81 Wn.2d 448, 459, 502 P.2d 1181 (1973) (citing *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (Minn. 1910)).

The court of appeals ignored all of the case law cited above, and instead misinterpreted *Crosby* to mean that injuries stemming from multiple causes are *exempt* from strict liability. *Hurley*, 332 P.3d at 476. But such an exemption would swallow the rule, and moreover, confuses the issues of causation and standard of care. *Crosby* instead held that strict liability is inappropriate where injury is generally caused by third party negligence, such as a drunken pilot, because “[i]n such circumstances the imposition of liability should be upon the blameworthy party who can be shown to be at fault.” 109 Wn.2d at 588.

In the case of landslides, third-party supervening negligence is not a factor. Rather, logging on steep slopes creates unstable conditions that increase the likelihood that foreseeable natural conditions will trigger a landslide. When trees are cut, their roots die and rot, which reduces soil cohesion.¹⁰ Logging also reduces canopy cover thereby decreasing the

¹⁰ David R. Montgomery, *Regional test of a model for shallow landsliding*, 12 *Hydrological Processes*, 943, 955 (1998).

amount of precipitation intercepted by the forest, which increases the amount of rainfall reaching the forest floor and soil saturation.¹¹ As a result of both processes, logging renders slopes unstable, precarious, and dangerous. Particularly in the decade following logging, before regrowth stabilizes soil and replaces the lost canopy, rain storms regularly trigger destructive landslides.¹² *Crosby* is inapt because rain is not a negligent third party.

If the court of appeals was concerned that complex causation makes it difficult to determine negligence, that concern weighs in *favor* of establishing strict liability. In *Siegler*, this Court established strict liability for freight hauling of gasoline, in part because of the challenges in proving negligence:

The rule of strict liability rests not only upon the ultimate idea of rectifying a wrong and putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible, but it also rests on problems of proof...for example, the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred, other than that the activity was being carried on.

Siegler, 81 Wn.2d at 455-56; *see also Klein*, 117 Wn.2d at 11-12.

Landslides also often obliterate the very evidence that would be necessary

¹¹ Keim, R.F. and A.E. Skaugset, 2003. Modelling Effects of Forest Canopies on Slope Stability. *Hydrological Processes* 17:1457- 1467.

¹² Montgomery (2000) at 314.


to prove liability, which weighs in favor of strict liability.¹³

Application of the doctrine will not open the flood gates to litigation or unfairly prejudice the timber industry. Where strict liability governs, the plaintiff must still prove causation. *Fabrique v. Choice Hotels Intern., Inc.*, 144 Wn. App. 675, 682, 183 P.3d 1118 (2008); *Klein*, 117 Wash.2d at 17. Therefore, strict liability applies only in the narrow circumstances presented herein, *i.e.*, logging on steep and unstable slopes that causes landslides that damage property downslope. *Foster v. Preston Mill Co.*, 44 Wn.2d 440, 444-45 (1954).

IV. CONCLUSION

Fairness and legal precedent dictates that the party who carries out and profits from logging on steep and unstable slopes should be strictly liable in the event that a resulting landslide destroys private property. The Supreme Court should accept review and reverse the decision below.

Dated this 7th day of November, 2014.



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¹³ Murphy et al. (2013) at 12.

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Dear Supreme Court Clerk,

Please find attached the following documents for filing in the above-captioned matter:

1. Olympic Forest Coalition, Seattle Audubon Society, 10,000 Years Institute, Great Old Broads For Wilderness and Washington Forest Law Center's Motion For Leave to File *Amicus Curiae* Memorandum In Support of the Petition For Review
2. *Amicus Curiae* Memorandum In Support of the Petition For Review
3. Certificate of Service

Sincerely,

Tina Kaps
Legal Assistant

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