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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 90759-5

COURT OF APPEALS NO. 7143-9-I

Don Zepp, d/b/a Don Zepp Logging,
Respondent,

vs.

Jerome C. Hurley and Bessie M. Hurley, et al.,
Petitioners.

**ANSWER TO *AMICUS CURIAE* BRIEFS IN SUPPORT OF THE PETITION FOR
REVIEW**

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 ORIGINAL

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I. INTRODUCTION

Respondent Don Zepp, d/b/a Don Zepp Logging (“Zepp”) opposes the *amici curiae* briefs submitted by Olympic Forest Coalition, *et. al.* (“OFC”) and Dr. David Montgomery, *et. al.* (“Montgomery”) in support of Jerome C. Hurley and Bessie M. Hurley, *et. al.*’s (“Hurley”) Petition for Review. The *amici* do not provide sufficient argument showing that the lower court’s decision conflicts with any decision of this Court. This Court should not accept the Petition for Review based on the argument provided by the *amici*.

II. ARGUMENT

1. **The briefs of the *amici curiae* present evidence that was not before the trial or appellate courts.**

As discussed in Zepp’s Objection to the Motions for Leave to File *Amicus Curiae* Briefs in Support of Petition for Review at 2-4, incorporated by reference herein: Under RAP 9.1, “[t]he ‘record on review’ may consist of (1) a ‘report of proceedings’, (2) ‘clerk’s papers’, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.” Thus, the *amicus* briefs submitted in support of Hurley’s Petition for Review are defective as they provide facts and evidence that are not part of the record under RAP 9.1. The *amici* also do not provide material portions of the academic papers, studies and textbook excerpts

cited, save for one appended exhibit, which is not compliant with RAP 10.4(c).

2. ***Amicus* Montgomery provides new argument on whether the matter is of substantial public interest, which was not argued by Hurley.**

Amicus Montgomery also provides argument, without supporting evidence, on RAP 13.4(b)(4), whether the issue is a matter of substantial public interest. Montgomery Brief at 10. Hurley had the opportunity provide argument on this matter in the Petition and failed to do so. Zepp's Response to Petition for Review at 18. Hurley should not be permitted to provide new argument on the public interest prong of RAP 13.4(b) through the proposed *amici* when they failed to provide it. *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wash. App. 720, 749, 218 P.3d 196, 210 (Div. 2, 2009), citing *State v. Gonzalez*, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925 (1988) (arguments raised only by *amici curiae* need not be considered).

3. **The *amici* provide general statements on the effects of logging that are not applicable to this case for the purposes of strict liability analysis.**

OFC and Montgomery presume that the logging activities in question here were related to steep or unstable slopes as defined by Washington forest practice regulations. *See, e.g.*, OFC Memorandum at 1, Montgomery Brief at 2, 4. However, the evidence in this case showed that

the areas logged on the Menasha property were not “steep” or “unstable” as defined by Washington State’s analysis. See Menasha’s Response to Petition for Review at 4-5. Menasha avoided logging any areas defined as such on the area. *Id.* In addition, Zepp’s logging was performed in full compliance with a forest practices application approved by Department of Natural Resources experts. *Hurley v. Port Blakely Tree Farms, L.P.*, 182 Wn. App. 753, 332 P.3d 469, 479 (Div. 1, 2014). There is no evidence here showing that any defendant’s forest practices caused or contributed to the landslides. There is no evidence that either *amicus* reviewed or analyzed the expert opinions provided in this case. There is no evidence either *amicus* visited the site of the subject slides or performed any investigation specifically related to the facts of this case. As noted by Menasha, expert testimony must be related to the specific facts of a case. Menasha’s Response to Petition for Review at 6, citing *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961) (general statement by expert on causation of condition found to be not related to case and expert testimony thus inadmissible). It would be inappropriate to impose a general rule of strict liability for logging based on hypothetical situations and inapplicable models that are inapposite to the particular facts of a case. Neither Montgomery nor OFC have applied their general propositions to the facts of the present case, so they should not be considered.

4. The *amici* do not provide full analysis of the lower court's ruling on imposing strict liability.

The *amici* do not correctly analyze the Restatement of Torts § 520 (1977) as applied by the *Hurley* court. The *amici* ignore that six factors are considered and focus only on § 520(c). Moreover, the *amici* conflate the risk of *occurrence* of landslides with the *risk of harm* from landslides. For example, Montgomery cites data that purports to show an increase in the frequency of landslides in connection with logging steep and unstable slopes. Montgomery at 4. The analysis provides no data on increased risk of *harm*, which is required for analysis of § 520(c). Similarly, OFC acknowledges that “in most situations, the companies can take the risk without triggering a slide that actually causes harm to anyone,” thus supporting the *Hurley* court’s analysis of Restatement of Torts 520(b). OFC Memorandum at 8. The statement acknowledges that landslides may occur without harm. The *amici* provide no argument on the analysis of the other Restatement factors. Thus, the *amici*’s arguments are not helpful in determining whether the law articulated by the Court of Appeals is in conflict with a decision of this Court.

The *amici* also ignore that the Court of Appeals has already found that the risk of harm may not be appreciably reduced or eliminated by due care (Zepp disagrees with this finding). *Hurley*, 332 P.3d at 475-76. Thus,

the *amici*'s briefing is not helpful to this Court as to whether it should review the case. Even if this Court accepted the *amici*'s interpretation of §520(c), it would have no effect on the overall §520 analysis, as the *amici* provide no insight as to the lower court's analysis of factors a,b,d,e or f.

5. OFC's interpretation of this Court's decisions is incorrect in the context of RAP 13.4(b).

The *Hurley* court cited *Crosby v. Cox Aircraft Co. of Washington*, 109 Wn.2d 581, 746 P.2d 1198 (1987) for the proposition that where "many causes may contribute to the risk" of an event, "the imposition of strict liability is inappropriate." *Hurley*, 332 P.3d at 476. OFC states that this proposition should not apply because "*Crosby* related to third-party negligence, not natural forces." Review of *Crosby*, which involved the question of imposing strict liability for ground damage caused by owners and operators of flying aircraft, shows that this Court analyzed natural forces such as "[l]ightning, wind shear and other acts of God" as possible causes that would preclude imposition of strict liability. *Crosby*, 109 Wn.2d at 588. Here, the court correctly followed *Crosby* in citing "the steepness of the slope, the presence of a 'rain on snow' zone, the occurrence of an exceptional storm event" as potential natural causes for a landslide that would preclude application of strict liability. *Hurley*, 332 P.3d at 476.

Langan v. Valicopters, Inc., 88 Wn.2d 855, 862, 567 P.2d 218 (1977) is inapposite. In that case, this Court found that the risk of harm from crop-dusting was unable to be eliminated in part because of “natural atmospheric forces” that caused drift of chemicals. Here, the *Hurley* court decided that the risk of landslides, although not possible to be eliminated, is caused by many other factors, including, but not limited to, weather conditions. *Hurley*, 332 P.3d at 476. *Langan* had only to do with one additional natural factor, that of wind. Because the facts in the present case are so different, application of *Langan* would be inappropriate. The *Hurley* court was correct in applying *Crosby*.

OFC’s application of *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910) is inappropriate. That case involved a sea captain’s deliberate act of remaining moored to a dock despite a heavy storm. While the act was found to be lawful and in accord with good seamanship, it caused damage to the dock. *Id.* The trigger for the damage was not the weather, but the captain’s decision to remain moored. Here, there is no such deliberate act that Zepp initiated, such as blocking waterways with débris, that could be said to have caused the landslides such that imposing strict liability would be appropriate under *Vincent*.

6. **The *amicus* briefs are redundant and confuse the issues before the Court.**
 - a. **The *amici* provide redundant facts that have been vigorously argued and supported by expert testimony at trial and on appeal.**

The Montgomery *amici* claim that “their interest is in assuring that the Court’s review of this matter is based on scientifically correct fundamentals, not scientific misimpressions or misunderstandings.” Montgomery Brief at 1. However, all parties presented extensive discussion of the scientific and geological issues at trial and on appeal through expert testimony, so the brief is merely repetitive of what was already provided. The record is filled with evidence from both sides as to the effect of logging and environmental factors on the geologic areas in question, previously discussed in Zepp’s Objection to the Motions for Leave to File *Amicus Curiae* Briefs in Support of Petition for Review at 5-7, incorporated by reference herein.

The *amici* provide no evidence that any of the experts whose testimony or related exhibits were admitted at trial were unqualified to analyze the evidence in the record and provide opinions in their areas of expertise. The *amici* make the identical factual arguments that were provided by Hurley at trial and on appeal. The *amici* shed no new light on the facts before the Court. Notably, the *amici* provide no evidence

whatsoever that reasonable care cannot reduce or eliminate the risk of logging on steep, unstable slopes, other than through unsupported contentions.

Experts from all sides presented vigorous argument below on the scientific issues that the *amici* re-iterate in their briefs. Moreover, the *amici* show that they are advocating for Hurley to prevail by avoiding discussion of contrary expert evidence in the record as to causation of the landslides. The briefs are thus factually redundant and provided only to advocate for one party in the case. They shed no light on whether the lower court's decision conflicts with a decision of this Court.

b. The *amicus* briefs are redundant with respect to the legal issues requested to be reviewed.

Hurley argues in the Petition for Review that the Court of Appeals erred when it applied the Restatement of Torts § 520 factors to the facts of this case, focusing on § 520 (c). (“inability to eliminate the risk [of harm] by the exercise of reasonable care”). Petition for Review at 16-20.

The *amici* make identical legal arguments that have already been presented at trial, appeal, and in the Petition for Review. Montgomery Brief at 7-9, OFC Brief at 7-10. Thus, their input as to the legal issues is redundant and should not be considered, where the parties have adequately argued their positions on the legal issues.

The OFC brief cites one Washington case purporting to hold that logging activities are subject to strict liability. OFC Brief at 7; *Johnson v. Sultan Ry. & Timber Co.*, 145 Wash. 106, 258 P. 1033, 1034 (1927).

However, casual review of the case reveals that its facts and holding are inapplicable here. The holding does not conflict with *Hurley* under RAP 13.4(b)(1). In *Johnson*, the defendants logged an area such that

[i]n logging the land near the creek the branches of trees, tops, and other débris were permitted to remain in the creek. When rain would come or the snow in the mountains melt, the waters in the creek would rise and it would carry this débris down, forming from time to time a jam or small dam.

Johnson, 145 Wash. at 107. The *Johnson* court found that where a party blocked or altered the natural flow of water that caused flooding to an adjoining property, liability would be found without negligence. OFC is citing well-settled riparian law, not this Court's application of strict liability to logging activities. See *Wilber v. W. Properties*, 14 Wn. App. 169, 173, 540 P.2d 470 (Div. 2,1975), citing *Johnson v. Sultan Ry. & Timber Co.*, 145 Wash. 106, 258 P. 1033 (1927) ("landowner who would impede or obstruct the flow of water through a natural drainway must provide adequate drainage to accommodate the flow during times of ordinary high water," and duty is "akin to strict liability"). The evidence here did not show that Zepp or Menasha caused such obstructions. Thus,

the *Johnson* holding is not relevant and confuses rather than clarifies the legal issues before the Court.

Here, there was no evidence that the logging activities or leftover debris from the logging activities that took place years before the landslides led to any blocking or damming of water flow that would open the defendants to strict liability. Menasha's Response Brief at 15-16. (Plaintiff's experts admitting no evidence of logging debris and that debris dams were caused by landslide, not logging activities. CP 966, 975, 660). Thus, the *Johnson* case is factually unrelated to this case as well.


The *amici* provide no new insight or clarification into the legal issues of the case. Review of the only significant additional authority provided by either *amicus* shows that it will confuse the issues before the Court. The *amicus* briefs would thus not be proper under RAP 13.4(b) and should not be considered by the Court.

III. CONCLUSION

Based on the foregoing, Zepp respectfully requests that this Court deny Hurley's Petition for Review.

DATED this 23rd day of December, 2014.

Respectfully submitted,


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JEROME C. HURLEY and BESSIE M.
HURLEY, husband and wife, et al.,

Appellants,

v.

CAMPBELL MENASHA, LLC., et al.,

Respondents.

NO. 90759-5

Court of Appeals No. 71430-9-I

DECLARATION OF
SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I, CAROL MANOS, under penalty of perjury under the laws of the
State of Washington, declare as follows:

I am the legal assistant for Dynan & Associates, P.S., attorneys for
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Case Number: 90759-5
(Court of Appeals No. 7143-9-I)

Answer to *Amicus Curiae* Briefs in Support of the Petition for Review
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