IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 90759-5

COURT OF APPEALS NO. 7143-9-I

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

Petitioners

vs.

CAMPBELL MENASHA, LLC, et al.,

Respondents.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Menasha Forest Products Corporation logged a 118 acre parcel of property it owned in Glenoma, Washington, pursuant to a Forest Practices Application ("FPA") approved by the Department of Natural Resources. After a six-week trial it was determined the flood-event underlying Petitioners' claims had no causal connection to Menasha's logging activities. Having failed to convince a jury, the trial court, and the Court of Appeals that logging hillsides "necessarily" results in a "high risk of devastating landslides," Petitioners continue to ignore the *actual* facts and science *applicable in this case* in favor of the presentation of a one-sided theory based on some studies addressing the impact of logging on root strength *in general.* Petitioners' position assumes that logging hillsides constitutes an "abnormally dangerous activity" that cannot be neutralized by the Department of Natural Resources' regulatory efforts. The lower courts rejected this assumption based on the *actual evidence,* and this Court should do the same.

This is not an urban v. rural debate, the State does not allow loggers to "bet" on logging risky hillsides, and the Petitioners were not denied their day in court. Mere theory is not a sound basis on which to construct new law on strict liability. Petitioners' unsound and hyperbolic assertions were properly rejected by the Court of Appeals, and its decision

should be affirmed.

II. COURT OF APPEALS' DECISION

Petitioners seek review of that portion of the opinion issued by Division I of the Court of Appeals in *Hurley v. Port Blakely Tree Farms L.P.*, -- Wn. App. --, 332 P.3d 469 (2014), pertaining to strict liability. Petitioners do not challenge Division I's rejection of their claims of nuisance and trespass.

III. ISSUES FOR REVIEW

Did the Court of Appeals properly determine that logging is not inherently an "ultra-hazardous activity" subject to strict liability under Restatement 2nd of Torts § 519 and § 520 when logging, even on steep slopes, is a highly regulated, "anticipated and routine use of the land," when several factors unrelated to logging contribute to the risk, when the risk of "injury...can be sufficiently reduced by the exercise of due care,"[1] and when, under these circumstances, the "imposition of strict liability is inappropriate and any liability should fall upon the party shown to be at fault?"[2]

IV. STATEMENT OF THE CASE

Petitioners do not dispute that Menasha adhered completely to

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[1] *Crosby v. Cox Aircraft Co. of Washington*, 109 Wn.2d 581, 587, 746 P.2d 1198 (1987).

[2] *Hurley*, 332 P.3d at 476.

Washington State's regulatory requirements in preparing its February, 2000, Forest Practices Application ("FPA"). CP 779-822. Menasha provided water and wetlands information, road construction and logging method information, as well as details and maps describing topography, landing locations, reforestation methods, and areas that would not be logged in accordance with applicable logging prescriptions. Menasha's FPA was thoroughly reviewed and approved by the Department of Natural Resources. CP 788, 820.

Logging was completed in 2001 and Petitioners have conceded it was done perfectly.[3] On January 7, 2009, a combination of severe rain and snowstorms caused over 1500 landslides throughout Western Washington. Flooding closed I-5 at Chehalis. Massive flooding occurred on this mountainside causing erosion of stream beds where the trees were not logged per DNR regulations. Separate slide events also occurred there, but none of those actually reached Petitioners' property.

Petitioners contend this state-approved logging unit was located on a "steep and unstable slope" in a "rain on snow zone" directly above "residential areas," and that logging such property constitutes an "ultra-hazardous activity" for which Menasha should be strictly liable. However, they presented no evidence to show that this site was any different than the

[3] Timber is a renewable resource and the harvested trees were replaced three to one.

thousands of acres of timber growing on Washington's mountainsides. Petitioners agree Menasha's methods were not negligent, and that it did nothing to violate the FPA, state regulations, industry standards or applicable logging prescriptions.

There is no precedent in Washington, or any other state, declaring logging an "ultra-hazardous activity" subject to strict liability, even logging on a hillside in a rain-on-snow zone above private property—and for good reason. The Court should decline Petitioners' invitation to stand alone among the 50 states and saddle logging companies with strict liability standards based on disputed science, insufficient causal evidence, and a putative obligation to override the Department of Natural Resources.

A. LOGGING ON STEEP SLOPES IS HIGHLY REGULATED IN THE STATE OF WASHINGTON

Under regulations in place at the time, the Department of Natural Resources categorized applications to log potentially unstable slopes as "Class IV," which required an environmental checklist in compliance with the State Environmental Policy Act (SEPA). CP 824-826. Menasha's FPA was "classified" as "Class III-14." CP 779. Class III applications did not require additional geotechnical review for the purpose of analyzing the site for potentially unstable slopes. CP 824-826. In this case Menasha's unit was located in an area that had previously been analyzed

for "mass wasting" or landslide potential, under the 1996 Kosmos Watershed Analysis. CP 781, 784, 832-886. Menasha's FPA proactively disclosed two "mass wasting map unit areas," or "MWMU #1" areas. CP 781, 784, and 805. Washington State's "prescriptions" for "MWMU 1" areas are as follows:

> - No harvest in high mass wasting hazard units (MWMU #1 and #2). This is the preferred prescription.
> - Harvesting may occur within portions of these units if a finer-scale (secondary) slope stability assessment delineates areas that do not exhibit the mass wasting characteristics described above...

CP 837. Menasha's FPA confirmed the two MWMU #1 areas in its unit – the "steep slopes" in question -- would **not** be logged. CP 781, 784, and 805.

On summary judgment Petitioners offered no evidence whatsoever that there *were other MWMU #1 areas that were not field identified* and that *were present* and *should not have been logged.* By all means, Petitioners' theory fails at this first step. Their "ultra hazardous activity" designation is grounded in the assumption that Menasha was logging inherently unstable and risky steep slopes when in fact the opposite was true. Menahsa identified and avoided these areas in accordance the State's cautious and exacting regulations. CP 888-899, 901-910.

B. EVIDENCE ESTABLISHED THE SLIDES WERE CAUSED BY AN UNUSUALLY MASSIVE RAINSTORM EVENT, NOT THE METHOD OR MANNER OF MENASHA'S LOGGING

Petitioners want the Court to believe that it was inherently "risky" to log the harvest units in question because logging hillsides in general increases the risk of landslides. CP 763. However, Petitioners must still prove a causal relationship between Menasha's **specific actions** and their claimed damages in order to impose liability, even strict liability. *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 333 (1961); *Carlos v. Cain*, 4 Wn.App. 475, 477, 481 P.2d 945 (1971).[4] Plaintiffs' one-sided presentation of some studies addressing the impact of logging on root strength *in general* is not a sound basis on which to construct new law.[5]

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[4] Expert testimony is required to establish causation when an injury involves scientific factors that would compel an ordinary lay person to speculate or engage in conjecture in making a finding. *Bruns v. PACCAR, Inc.*, 77 Wn.App. 201, 214, 890 P.2d 469 (1995). The required expert testimony must provide proof that Menasha "more probably than not" caused the Petitioners' claimed injuries "to a reasonable degree of certainty." 5B *Wash. Prac., Evidence Law and Practice* § 702.30 (5th ed.). Here, the question of causation depends on considerations of geotechnical analysis, engineering, hydrology, and logging expertise that are outside the knowledge of an average layperson. Petitioners were required to establish expert testimony linking their damages to something Menasha allegedly did or did not do. On this point they failed utterly, and for that reason Petitioners seek to avoid the *causation* issue, framing it as a trivial factor to be addressed "down the road."

[5] Indeed, the "science behind" Petitioners' "loss of root cohesion" theory is not "established," especially at the location of the logging unit in question:

> Root cohesion is a factor in shallow slides on the order of about three feet deep because tree roots in the Cascade Range average 24 to 36 inches in depth according to studies the plaintiffs' expert relies upon. The slides...observed at the unit above Martin Road were much deeper

This is especially true when Petitioners completely ignore expert evidence establishing that the slides and debris flows that damaged their properties **would have occurred regardless of whether the hillside was logged simply because of the overwhelming amount of water eroding the soil from an extraordinary and exceptional storm event.** CP 497-503, 964-969.[6]

> ...Landslides occurred in areas that had recently been logged, in areas of young forests, and in areas of mature forest which haven't been logged for many years. Logging in and of itself clearly is not the answer. In my opinion, flooding/earth movement event would have occurred here whether or not the property had been logged 9 years prior...
> ...
> Some landslides occurred in places where a thin layer of soil covered the bedrock surface where no trees grew and

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> than 36 inches. In some cases, the slides were as deep as 10-20 feet, beyond the reach of any tree roots.

CP 502. In fact, one of the authors of the very studies Petitioners rely on notes "evapo-transpiration is not significant in the winter or during one short-term event," like the event in January, 2009. Id.

[6] The rainstorms that occurred between January 6, 2009 and January 9, 2008 were unprecedented. CP 499. Nearly five inches of rain fell on January 7, 2009, alone, with two-day totals as high as 10-15 inches. CP 499, 1032. Rivers throughout Western Washington reached record flood levels, and nearby Tilton River exhibited the highest estimated discharge on record. *Id.* In addition, higher than average temperatures caused more than 12.5 inches of snow to melt, leading to ground saturation. CP 500. As a result, *over 1500* landslides in Western Washington were attributed to the storm, concentrated in areas that received *the most precipitation,* not, as Petitioners suggest, the most *logging*. *Id.* Photos of this site document the damage caused by flood water as it roared down the mountainside, causing massive erosion of stream beds carrying tons of earth, huge boulders, and uprooted full grown trees in its path. The slide events were much deeper than the root zone of the trees and in fact did not actually reach Petitioners' property. The damages to the Petitioners' property was actually caused by the flood water which gouged out deep channels and spread the earth and water across the property. CP 132A. This event was a flood.

> no logging was done. It also appears that the depth of soil that moved was in some places is much greater than the depth of tree roots. The mechanism triggering the earth movement was pore pressure build up in the ground caused by water saturating the ground. Failure actually occurred near the soil/rock interface. In my opinion, the amount of water that infiltrated into the ground from the rain and snow melt was of such volume that the landslides would have occurred whether large trees were there or not. It is true that a tree canopy can result in less water concentrated on the ground and in the ground but in this case, the amount of that water entering the ground was so great that the trees would not have prevented what occurred. This same thing occurred in many areas where the trees had not been harvested.

CP 967, 968-969.

In other words, the presence of trees and "tree roots" would have made no difference at the Martin Road logging site in light of the deluge introduced by this unprecedented storm.[7] Petitioners' treatise on the hazards of mountain logging, however lovely the prose, must be disregarded in the absence of any actual evidence of a causal connection to *this logging unit*. Even Petitioners' experts admit the studies they rely on were intended for *regional* application; they do not address the unique topography and geology of the Glenoma region. CP 498. Hypothetical suggestions, leadings questions, and inapplicable statistical studies do not

[7] This is further supported by the fact that the Martin Road logging unit had been harvested at least four times in the last 80 years, as acknowledged by the Court of Appeals. CP 966. In the last century, there were no known flood/earth movement events like the one that occurred in January 2009, despite the fact that many major rain on snow events occurred. *Id.*

substitute for actual evidence that *this logging site was abnormally hazardous,* that *DNR's regulations were insufficient,* or that *clearcutting was the proximate cause* of *these slides in question. Boeing Co. v. Heidy,* 147 Wn.2d 78, 85, 51 P.3d 793 (2002).[8]

Subjecting timber owners to nebulous strict liability standards pursuant to unclear criteria is unrealistic and would have a chilling effect on the logging industry. Washington State responded to the normal question of everyday risk by imposing logging regulations and prescriptions that are re-examined and updated regularly. Menasha followed precisely the regulations and prescriptions in place at the time the Martin Road unit was logged and a jury found it was not negligent. Petitioners present a policy argument about clear-cutting in general. The correct forum for their complaint is the legislature, not the court.

C. PROCEEDINGS BELOW

Petitioners' filed their initial Complaint on November 4, 2010. CP 1-12. On May 4, 2012, Petitioners' filed a Motion for Partial Summary Judgment on Strict Liability, Causation, and Breach of Duty. CP 285-327. Petitioners' first attempt to obtain a ruling on this issue was on a "Cross Motion" submitted in response to Defendant Don Zepp Logging's Motion

[8] Disapproved of on other grounds in *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009).

for Summary Judgment. CP 579. The trial court denied Petitioners' motion because they had not plead that logging was an ultra-hazardous activity. *Id.* On June 5, 2012, the trial court denied Petitioners' second Motion for Partial Summary Judgment on Strict Liability, and denied their concurrent Motion to Amend to correct their pleading. CP 1231-1238.

Petitioners' tested their negligence claim in a six-week jury trial. The trial court declined to reverse its summary judgment rulings and it rejected Petitioners' jury instruction on strict liability. On December 14, 2012, the jury found Menasha was not negligent. CP 1536.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioners submit their petition under RAP 13.4(b)(1) and (b)(4), which provide for review only if a decision of the Court of Appeals "is in conflict with a decision of the Supreme Court," or if the "petition involves an issue of substantial public interest that should be determined by the Supreme Court." In this case, the Court of Appeals correctly applied established Supreme Court precedent to circumstances that are commonplace. Logging on hillsides in rural areas occurs in Washington, and that logging is heavily regulated. The Court of Appeals correctly determined that logging on hillsides, even on "steep hills" in "rural areas," does not constitute an "abnormally dangerous" activity justifying the

imposition of liability without a showing of negligence.

A. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH A DECISION OF THE WASHINGTON SUPREME COURT

1. Petitioners cannot narrowly define an activity as "abnormally dangerous."

Petitioners' Second Amended Complaint asserts that:

> Defendants are strictly liable to plaintiffs for damages resulting from their activities which obstructed creeks. Those obstructions then gave way, flooding downstream property.

CP 765. Relying on this, Petitioners' argue that clearcut logging on "steep, unstable slopes," is an "abnormally dangerous" or an "ultra-hazardous" activity imposing strict liability standards on logging companies. As Petitioners recognize, there is no authority for this unprecedented claim in Washington or any other state.

Washington has long since recognized the doctrine of "strict liability" as established in the Restatement 2nd of Torts § 519 and § 520. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6, 810 P.2d 917, *amended*, 117 Wn.2d 1, 817 P.2d 1359 (1991). Under § 519:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.
>
> (2) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

Restatement 2nd of Torts § 519 (1977).[9]

The Restatement 2nd of Torts § 520 lists six factors for the Court to consider in determining whether an activity is "abnormally dangerous:"

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement 2nd of Torts § 520 (1977). "[A]ny one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability." *Klein,* 117 Wn.2d at 7, quoting Restatement (Second) of Torts § 520, comment f (1977).

> The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.

Id.[10]

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[9] Determination of whether an activity is an "abnormally dangerous activity" is a question of law. *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 500, 687 P.2d 212 (1984); *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 567 P.2d 218 (1977).

2. The Court of Appeals correctly determined that logging is not an "abnormally dangerous" activity under the six-part test in the Restatement (Second) of Torts § 520.

Petitioners argue the Court of Appeals erred in deciding that "activities in 'rural' areas are immune to strict liability," but that is a mischaracterization of the Court of Appeals' decision. *Petitioners' Brief at p. 12.* The court wasn't considering "activities in rural areas," it was considering *logging.* In recognition of the Reporter's Notes from Restatement (Second) of Torts § 520, cmt. g (compiling groups of cases from various jurisdictions and showing that strict liability for activities such as blasting, storage of inflammable liquids, oil and gas drilling, and

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[10]"Conduct that in and of itself is not *abnormally dangerous* does not become so simply because it can be performed negligently in defined circumstances. *See Doe v. Johnson,* 817 F.Supp. 1832, 1385 (1993), in which the plaintiff argued the defendant was strictly liable for engaging in unprotected sexual activity with her when he had HIV. The Court ruled that strict liability does not apply to sexual activity, and conduct that is not abnormally dangerous does not become so simply because the defendant engaged in that activity negligently. *Id.* at 1399. Petitioners do not argue that *logging* itself is an *abnormally dangerous* activity, but that logging an allegedly "steep unstable slope in a 'rain-on-snow' zone above residential properties" is *abnormally dangerous.* Petitioners' artificial attempt to narrowly define the activity in question "would, in effect, enable plaintiffs to invoke strict liability for all negligently-conducted activity." *Arlington Forest Assoc.,* 774 F.Supp at 392.

> ...Performing a dangerous activity in a negligent manner cannot be made safe except by ceasing to behave negligently. Any plaintiff in a negligence action could simply characterize the offending behavior as incapable of being safely performed even with due care, thus bringing it within the scope of strict liability. For example, the activity of "driving a car" can be made sufficiently safe by the exercise of reasonable care. But "driving a car at an excessive rate of speed" cannot be made safe except by ceasing to drive too fast. Clearly this approach would extend the reaches of strict liability far beyond the bounds of the law and of common sense.

water storage is often imposed in thickly settled areas but not rural areas), the Court observed that the "extent of risk of harm from a particular activity cannot be divorced from the location in which the activity occurs," and "it is entirely appropriate to conduct commercial logging operations in a rural area, particularly one that has been logged at least twice during the past century. *Hurley,* 332 P.3d at 475, 477.

Rather, the Court correctly followed this Court's decision in *Crosby v. Cox Aircraft Co. of Washington*, 109 Wn.2d 581, 746 P.2d 1198 (1987), in which the Court considered the imposition of strict liability on aviation. After all, there is no doubt that the "risk of harm" created by the danger of an aircraft crashing to the ground is great, however, airplane crashes, like the landslides at issue in this case, can be caused by a multitude of factors unrelated to the "activity" at issue:

> The causes of aircraft accidents are legion and can come from a **myriad of sources**. Every aircraft that flies is at risk from every bird, projectile and other aircraft. Accidents may be caused by improper placement of wires or buildings or from failure to properly mark and light such obstructions. The injury to the ground dweller may have been caused by faulty engineering, construction, repair, maintenance, metal fatigue, operation or ground control. Lightning, wind shear and other acts of God may have brought about a crash. **Any listing of the causes of such accidents undoubtedly would fall short of the possibilities. In such circumstances the imposition of liability should be upon the blameworthy party who can**

Id. at 392-393. Similarly, "logging steep, unstable slopes" can be made safe by adherence to regulations ensuring "unstable" slopes are not logged.

be shown to be at fault.

Crosby, 109 Wn. 2d at 587-88 (emphasis added). The Court of Appeals directly applied the analysis in *Crosby* to this case, observing "that many causes may contribute to the risk of landslides. The steepness of the slope, the presence of "rain on snow" zone, the occurrence of an exceptional storm event, the effectiveness of applicable governmental logging regulations, and the extent to which those regulations are adhered to, together or individually, may cause a landslide." *Hurley,* 332 P.3d at 476.

> The record shows that the occurrence of landslides is seldom the work of one factor. As the *Crosby* Court noted, under these circumstances the imposition of strict liability is inappropriate and any liability should fall upon the party shown to be at fault. We conclude that this factor weighs against imposing liability without the need for a finding of negligence.

Hurley, 332 at 476. The reason for this conclusion is cast in stark relief by the facts in this case. Petitioners' want the Court to determine that logging "steep, unstable slopes" is an "abnormally dangerous" activity only *how steep is "steep?" How unstable is "unstable?" What about the facts of this case, which show the landslide would have occurred regardless of whether the hillside was clearcut because of the overwhelming amount of water eroding the soil from an extraordinary and exceptional storm event?* CP 497-503, 964-969.

The problem is, landslides aren't just caused by *logging*, even

when they happen to occur at an area that was logged. For this reason the Court of Appeals adhered to the Supreme Court's prior statement in *Crosby,* that "[i]n such circumstances the imposition of liability should be upon the blameworthy party who can be shown to be at fault." *Crosby*, 109 Wn.2d at 588.

Petitioners rely on *Klein v. Pyrodyne*, supra, under which the Court subjected public fireworks displays to strict liability, despite the fact that fireworks activities are highly regulated. *Klein* is nothing like the case at bar. *Klein,* 117 Wn.2d at 8. As Petitioners concede, the regulations considered in *Klein* were *intended* to promote public safety and prevent the very injury that occurred. In contrast, logging regulations are designed to protect *public resources* such as water quality and fish habitat. *See* WAC 222-22-010(1) (purpose of the logging industry regulations is to protect public, not private resources). More importantly, there was no doubt in *Klein* that the harm was caused by the singular activity at issue: fireworks. Here there are multiple possible causes of landslides, and no guarantee that the "activity," logging, can be connected to the purported harm at all.

Petitioners' reliance on *Langan v. Valicopters, Inc.,* 88 Wn.2d 855, 567 P.2d 218 (1977), is similarly misplaced. In *Langan* the Court imposed strict liability on crop dusters who sprayed property adjacent to

an organic farm after the wind carried the chemicals to the organic crop. *Langan,* 88 Wn.2d at 857. *Langan* does not fit the facts of this case. Menasha was not using chemicals subject to the whims of the wind and its operations were approved and monitored by the Department of Natural Resources. Moreover, the alleged harm did not occur instantly as it did in *Langan,* (and *Klein*), but nearly a decade later after a record-setting storm generated landslides and flooding throughout half the state, many occurring in forest land that had not been logged in over 100 years. CP 498, 500. The Petitioners here were not harmed by Menasha's *actual operations*, as the organic farmers were harmed by the crop dusters' *actual operations* in *Langan.* CP 500, 666. The Martin Road unit was regularly logged for nearly a century, pre-dating the construction of Plaintiffs' residences. Imposing strict liability under Plaintiffs' theory would render economically viable timberland unusable as soon as anyone builds downhill. Nor were Petitioners exposed to risks "inherent" in the logging industry, especially where the ground movement was far below the level to which tree roots grow. Thus, there was no factual support for the "tree roots" theory that forms the basis for Petitioners' "logging is inherently dangerous" argument. CP 502.

In *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983, 93 S.Ct. 2275, 36 L.Ed.2d 959 (1973), also relied on

by Petitioners, strict liability was imposed on the act of hauling gasoline in commercial quantities as freight upon public highways. Even in that case, however, the Court recognized that where there is the intervention of an "outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling [the gasoline]", the rule of strict liability **should not apply**. *Siegler*, at 460. Here there were many, many forces outside the control of Menasha that caused or contributed to the flood and damage at issue, and the Court of Appeals correctly found the imposition of strict liability inappropriate.

B. PETITIONERS' CLAIM DOES NOT INVOLVE SUCH AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT IT SHOULD BE DETERMINED BY THE SUPREME COURT

Like aviation in *Crosby,* logging, forestry and timber products comprise an integral part of modern society. As the Court of Appeals recognized, "[s]trict liability is appropriate where the 'dangers and inappropriateness for the locality are so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.'" *Hurley,* 332 P.3d at 477, citing Restatement (Second) Torts § 520, cmt. f

Logging mountainsides above residential property is not uncommon in Lewis County or Washington State. Detailed regulations

governing timber harvests on hillsides confirm that logging such slopes is both anticipated and routine. *See* WAC 222-10-030. The Court of Appeals' decision is not a "matter of public import" so much as a recognition that so many factors contribute to landslides and the question of the *logging industry's* contribution is a matter properly handled by the Legislature and the Department of Natural Resources, which have the resources to investigate and study all the issues attendant to logging *risks* and logging *regulation.*

In *In re Flood Litig.*, 216 W. Va. 534, 607 S.E.2d 863 (2004), the Court found that various defendant coal companies, timbering companies, railroads, and gas companies could *not* be held strictly liable for damages sustained from flooding allegedly caused by extraction of resources from land. *In re Flood Litig.*, 607 S.E.2d at 873, Appendix 7. After considering the § 520 provisions the Court in *In re Flood Litig.* soundly refused to declare logging an abnormally dangerous activity, and for good reason:

> When we apply these factors to the facts before us, we find that Defendants are not strictly liable for their activities or the conditions their activities create. This Court simply does not believe that the day to day activities of Defendants necessarily create a high risk of flash flooding. Also, we are convinced that any increased risk of flooding which results from Defendant's extractive activities can be greatly reduced by the exercise of due care. In addition, extractive activities such as coal mining and timbering are common

> activities in southern West Virginia. **Finally, we are unable to conclude that the great economic value of some of these extractive activities, such as coal mining, is outweighed by their dangerous attributes. Accordingly, we answer question 4, as reformulated, in the negative.**

In re Flood Litig., 607 S.E.2d at 874 (emphasis added).

The same reasoning applies to the logging industry in Washington and explains why other courts have declined to take up the matter. There is no basis to single out *logging* as more hazardous than other industries. Petitioners' request for review should be declined.

VI. REQUEST FOR FEES AND REASONABLE EXPENSES

Menasha respectfully requests the Petition for Review be denied and that the Court issue an order awarding its costs under RAP 14.3.

DATED this 8th day of October, 2014.

Respectfully submitted:

FALLON & McKINLEY

By: _____

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Attorneys for Respondent/Defendant
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CERTIFICATE OF SERVICE

Sandy Cartwright, being first duly sworn on oath, deposes and states:

That on the 8th day of October, 2014, she caused to be sent a copy of Respondent's Response to Petition for Review; and this Certificate of Service to the below listed party of record in the above-captioned matter, as follows:

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DATED this 8th day of October, 2014 at Seattle, Washington.

Sandy Cartwright

OFFICE RECEPTIONIST, CLERK

To: Sandy Cartwright
Subject: RE: Hurley, et al. v. Campbell Menasha, LLC, et al. - Court No. 90759-5

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Dear Court Clerk:

Attached for filing is Respondent, Campbell Menasha, LLC's Response to Petition for Review with regard to the above matter.

Please advise if you need any further information.

Thank you,

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