IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 44568-9-II

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

Appellants,

v.

CAMPBELL MENASHA, LLC, et al.,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. STRICT LIABILITY

In our opening brief, we demonstrated that clearcutting steep hillsides directly above a small residential community is abnormally dangerous under Section 520 of the Restatement (Second) of Torts. *See* Op. Br. at 13–29. Clearcutting these slopes increases the risk of devastating "debris flow" landslides by as much as 200 to 3,300 percent. *Id.* at 6 (CP 3:1185, 1195). The risk cannot be eliminated with the exercise of due care. *Id.* at 21–24 (CP 1:88–87, 1:244). And the value to the community of logging such steep slopes is far outweighed by the serious risk of harm to life and property. *Id.* at 29. In short, the defendants took a big risk when they logged the hills above Glenoma. They should be held strictly liable for the ensuing damage to innocent third parties.

Defendants Menasha and Zepp disagree. They argue that logging the hills above Glenoma was not abnormally dangerous, and Menasha argues that we define the challenged activity too narrowly (Menasha says we must challenge *all* logging practices or none at all). We address these contentions in the subsections below. But first, we address several irrelevant arguments advanced by Menasha and Zepp.

First, we are not arguing, as Zepp implies, that steep slopes "should not be logged." Zepp Br. at 20. The purpose of strict liability is to ensure that between two *innocent* parties, the party responsible for the loss bears it. *Siegler v. Kuhlman*, 81 Wn.2d 448, 455, 502 P.2d 1181 (1972). This reflects equitable considerations, and also considerations of proof — often, "the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities . . . destroy all evidence of what in fact occurred, other than that the activity was being carried on." *Id.*

But allocating loss is a far cry from prohibiting logging companies from engaging in risky behavior. Indeed, the theory of strict liability recognizes that some activities, while highly dangerous, may also have a great deal of utility. It is not negligent or blameworthy to engage in them, even though strict liability is imposed. *See* Restatement (Second) of Torts § 520 cmt. b (1977). Simply put, we do not expect this Court to prohibit the logging practices that caused the landslides. A ruling in our favor would merely require the logging industry to internalize the costs it now inflicts on innocent neighbors.

Second, there is no evidence to support Menasha's alarmist claims that strict liability "would have a profound and chilling effect" on the

industry, or expose it to "infinite liability." Menasha Br. at 36, 37. Has strict liability crippled any other industry? No. Dynamite is still used. Fireworks are still exploded on the 4th of July. And crop dusting is common. Yet these activities — and many more — are subject to strict liability.[1] Logging will undoubtedly continue whether or not this Court holds the defendants strictly liable for their risky actions. But when the lives of innocent third parties are destroyed, the industry should pay its way instead of externalizing its costs on others. What could be fairer?

The third irrelevant argument is that strict liability cannot be determined because we failed to prove causation. *See e.g.* Menasha Br. at 14–17, 18, 33–34, 39 n. 16; Zepp Br. at 17, 21. This argument betrays a fundamental misunderstanding of the nature and scope of a strict liability ruling. Strict liability eliminates a plaintiff's burden to prove duty and breach, not the burden to prove causation. *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 682, 183 P.3d 1118 (2008). But unlike the question of strict liability (which the court decides[2]), causation is for the jury.[3] Here, the jury

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[1] As noted in *Siegler v. Kuhlman*, rules of strict liability have been applied to activities as diverse as harm done by trespassing animals, on a bailee for misdelivery of bail, innkeepers, awning keepers, and for damage inflicted by a ship moored to a dock during a storm. *Siegler*, 81 Wn.2d at 455.

[2] *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6, 810 P.2d 917 (1991).

never reached the issue of causation because it found no breach of duty on our negligence claim. If this Court rules in our favor on strict liability, then a jury should address causation in the first instance.[4]

A. Appellants Are Not Required to Prove That Logging is Abnormally Dangerous Everywhere. It Is Sufficient to Prove That Logging Is Abnormally Dangerous Where It Occurs and Causes Damage.

As a threshold issue, Menasha complains that we define the challenged activity too narrowly. According to it, the question is not whether it was abnormally dangerous to clearcut the steep hills high above Glenoma, but whether "logging," in the most generic and abstract sense of the term, is always abnormally dangerous. *See* Menasha Br. at 27–29. For Menasha, a plaintiff can challenge a logging practice only if she can show that all logging is abnormally dangerous, no matter where it takes place.[5]

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[3] *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 194 n. 4, 252 P.3d 914 (2011).

[4] Defendants also argue that strict liability is inappropriate because Plaintiffs knowingly "chose" to live in a landslide-prone area. *See* Menasha Br. at 33; Zepp Br. at 20. But they cite no evidence that logging in the hills above Glenoma predates the community itself, and the issue is irrelevant. Assuming *arguendo* that plaintiffs knowingly built their homes in a dangerous area, this should be dealt with under the rubric of comparative fault. *See* RCW 4.22.015 (defense of comparative fault applies to all claims based on "strict tort liability"). The issue is simply not relevant to decide whether it was abnormally dangerous to clearcut the hills above Glenoma. As with causation, the jury should address the defense of comparative fault in the first instance, not this Court.

[5] Zepp does not join Menasha in this argument, but Zepp does appear to argue that "logging is not subject to strict liability" as a matter of law. Zepp Br. at 13. Zepp

Obviously, Menasha would saddle us with an impossible burden (not all logging is abnormally dangerous). But contrary to Menasha's argument, whether an activity is abnormally dangerous depends largely on whether it is conducted in a particularly dangerous place. As the Restatement explains, collecting "large quantities of water in irrigation ditches or in a reservoir in open country usually is not a matter of any abnormal danger," but it is abnormally dangerous to collect water "on a bluff overhanging a large city." Restatement (Second) of Torts § 520 cmt. j (1977).[6] Indeed, some activities

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cites the Washington Practice Series on Environmental Law for this sweeping claim. *Id.* But this introductory hornbook contains no such statement about logging.

[6] In addition to the Restatement, there is no shortage of authority for the proposition that location matters when determining whether an activity is abnormally dangerous. For example, impounding water is not, in itself, abnormally dangerous. But impounding water where it might spill into an active mine is abnormally dangerous. *Fletcher v. Rylands*, L.R. 1 Ex. 265, 278 (1866), affirmed, House of Lords, 3 H.L. 330 (1868). Drilling for oil is not abnormally dangerous. But it is abnormally dangerous to drill for oil above a dangerous gas deposit. *Green v. Gen. Petrol. Corp.*, 205 Cal. 328, 331, 270 P. 952 (1928). Storing explosives is not abnormally dangerous. But it is abnormally dangerous to store them in a populated area. *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203, 1207, 1207 (E.D. Cal. 1976). Fireworks are not abnormally dangerous. But "special fireworks displays" set off "near large crowds of people" are abnormally dangerous. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 810 P.2d 917 (1991). Mining is not abnormally dangerous. But it can be when done beneath an impoundment of water. *Pinnacle Min. Co., LLC v. Bluestone Coal Corp.*, 624 F. Supp. 2d 530, 538 (S.D.W. Va. 2009). Indeed, even *Crosby v. Cox Aircraft Company of Washington*, which Menasha cites, asked whether aircraft can be safely flown "over populated areas." 109 Wn.2d 581, 588, 746 P.2d 1198 (1987). *Crosby* did not ask whether aircraft can be safely flown at all, or whether they can be safely flown over a desolate wilderness. Similar holdings may be found in the multitude of cases cited in the Reporter's Note following Comment j to Section 520 of the Restatement (Second) of Torts.

are abnormally dangerous *only* when they are carried on in certain locations, and yet they are subject to strict liability nonetheless.[7]

It is common sense that an activity may be abnormally dangerous in one place but not in another. After all, *any* activity could be conducted safely by moving it far enough away from humans. This includes blasting, fireworks, and all the other activities that courts routinely find to be abnormally dangerous. We are not asserting, and we need not prove, that logging is abnormally dangerous everywhere. It is sufficient to prove that it is abnormally dangerous where it occurs and causes damage. Here, the defendants clearcut the steep hillsides high above the small community of Glenoma. *That* activity was abnormally dangerous, just as it would be to impound water "on a bluff overhanging a large city."

Finally, taking cognizance of the *place* where the challenged activity occurs is not simply a way of camouflaging a negligence claim, as Menasha asserts. Menasha cites three cases for the proposition that "[n]arrowly defining the 'activity' subjected to analysis under § 520 is improper": *Doe v.*

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[7] The Restatement explains that some activities "such as the operation of a ten-ton traction engine on the public highway, which crushes conduits beneath it, involve such a risk *only* because of the place where they are carried on. In determining whether there is such a major risk, it may therefore be necessary to take into account the place where the activity is conducted, as to which see Comment j." Restatement (Second) of Torts § 520 cmt. g (emphasis added).

Johnson, 817 F. Supp. 1831 (N.D. Ga. 1993); *Arlington Forest Association v. Exxon Corporation*, 774 F. Supp. 387 (E.D. Va. 1991); and *Jackson v. Hearn Brothers, Inc.*, 212 A.2d 726 (Del. 1965). We do not quarrel with these authorities. But none stand for the novel proposition that an activity should (or even can) be evaluated divorced from its location.[8] To our knowledge, no case has ever reached such a sweeping and counterintuitive conclusion.

In short, we ask only that this Court do as every court has done before it. Evaluate the challenged activity in the place where it occurred. Menasha and Zepp clearcut the steep hills above Glenoma. That is the activity (and the place) at issue, and the defendants' actions were abnormally dangerous as demonstrated in our opening brief.[9]

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[8] Each of the cases cited by Menasha held that the plaintiffs characterized the challenged activity too narrowly, but none dealt with the relationship between activities and the locations where they are carried out—in *Doe* it was sexual intercourse while infected with HIV (rather than sexual intercourse); in *Arlington Forest Association* it was storing gasoline in "moribund" tanks (rather than storing gasoline); and in *Jackson* it was using shopping carts in a negligent manner (rather than using them at all).

[9] Menasha also argues that logging steep slopes is no riskier than any other industry. *See* Menasha Br. at 39. Menasha cites no evidence to support this claim. And we are aware of no other industry or practice that increases the risk of devastating landslides by 200% to 3,300%.

B. There Is a High Degree of Risk in Clearcutting Steep Hillsides Above Residential Communities and the Risk Cannot Be Eliminated

As we discussed in our opening brief, clearcutting steep hillsides (such as the 87% to 97% slopes above Glenoma) presents a grave risk of devastating landslides below. Op. Br. at 15–21. Worse, the risk cannot be eliminated, in part because of the inherent inability to identify and avoid the riskiest areas for logging on a steep hillside. *Id.* at 21–24. Defendants disagree, but their scattershot arguments miss the mark.

For example, Zepp's arguments about risk of harm all focus on the issue of causation and are, therefore, irrelevant. *See* Zepp Br. at 15–17. And Menasha confuses the issue early on in its brief by mischaracterizing our argument. We are not arguing, as Menasha asserts, that it "*should have divined* that the Martin Road logging unit was some sort of 'ultrahazardous, unstable slope.'" Menasha Br. at 14. Nothing could be further from the truth. The point of strict liability (and our opening brief) is that while Menasha was aware of the risks, it *could not have divined*, with any certainty, which slopes would fail. *See, e.g.,* Op. Br. at 21–24. That is what makes the activity so dangerous.[10]

[10] Menasha argues in passing that "the multitude of state-wide studies, analyses, statutes, regulations and prescriptions mean that 'overall risk of serious injury . . .

We are also baffled by Menasha's statement that we failed to discuss the weather's role in causing the landslides. *See* Menasha Br. at 32 (arguing that the allegedly "myriad" factors contributing to the landslides "have gone unmentioned by Plaintiffs, including most obviously, ***the weather***.") (emphasis in original). As we discussed extensively in our opening brief, one of the main factors that made Menasha's logging so dangerous was its location in the "rain on snow" zone, a climatological feature that greatly increased the risk of landslides. *See* Op. Br. at 4, 18, 25. The impossibility of predicting whether a large storm will hit before a new forest takes root is part of what makes this activity ultrahazardous.

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can be sufficiently reduced by the exercise of due care.'" Menasha Br. at 32. But Menasha cites no evidence that following the regulations and exercising due care eliminates the risks of logging steep slopes. To the contrary, the scores of landslides that occur on recently logged land, the vastly higher incidence of slides on those lands, and the devastating magnitude of the slides, belies the assertion that logging companies can eliminate the risk or reduce it sufficiently to make the practice safe. Indeed, Menasha even undermines its own argument when it admits that logging regulations are not designed to prevent the type of harm that occurred. *See* Menasha Br. at 32. Menasha cannot have it both ways, and as we demonstrated in our opening brief, there simply is no way to avoid the dangers inherent in logging such steep slopes in light of the limited predictive capacity of geologic investigations. *See* e.g. Op. Br. at 21–24.

Relatedly, Zepp claims that "regulations do not permit logging everywhere." Zepp Br. at 24. But Zepp fails to support this claim with any analysis of the applicable rules. The reality is that the rules do not prohibit logging on steep, unstable slopes. Rather, they require analysis and precautions to be used, but do not preclude the logging company from taking the risk. *See* RCW 76.09.050; WAC 222-10-010, -030. As we demonstrated in our opening brief, these precautions do not eliminate the risk or reduce it to a safe level. The landforms that make the practice so dangerous are often hidden beneath the ground, and it is difficult for even the most experienced professionals to detect them before a catastrophic landslide. CP 1:88.

As we understand it, Menasha argues that logging the steep slopes above Glenoma was not abnormally dangerous because the prime factor making it dangerous (the weather) is beyond control. *See* Menasha Br. at 35. Menasha cites *Siegler v. Kuhlman* for this proposition, arguing "the Court recognized that where there is the intervention of an 'outside force beyond the control of the [defendant],' the rule of strict liability **should not apply**." *Id.* (emphasis in original). But the language Menasha quotes from *Siegler* was not the opinion of "the Court," as it asserts, but only the concurring opinion of Justice Rosellini. That concurring opinion did not command a majority. *See Siegler*, 81 Wn.2d at 460.

It is for good reason that Justice Rosellini's opinion did not command a majority. One of the core attributes of an abnormally dangerous activity is that it cannot be made safe with reasonable care. If one of the prime factors making an activity dangerous cannot be controlled, this element is obviously satisfied. Crop dusting is a prime example. *See Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 862, 567 P.2d 218 (1977). In *Langan*, the Court held that crop dusting is abnormally dangerous precisely because the factors making it so dangerous, including "natural atmospheric forces," are uncontrollable. *Id.*

Because these forces cannot be controlled or predicted, the risk of pesticide drift remains no matter how much care is used. *Id.* at 864.

So too here. The unpredictable rainstorms in western Washington, just like the unpredictable wind in *Langan*, support a finding that the activity is abnormally dangerous, not that it is safe.[11]

C. Logging Steep, Unstable Slopes Has Little Value to the County or State

Menasha argues that we "undervalue the economic importance of logging to Lewis County and Washington State under parts (d)-(f) of the Restatement 2nd of Torts § 520."[12] *See* Menasha Br. at 35. To support this

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[11] Menasha attempts to distinguish *Langan* on the grounds that the winds caused instantaneous damage, while in this case the unpredicted rainstorm caused damage years after the logging ended. Menasha Br. at 33. Menasha offers no explanation as to why the delay negates our argument. To the contrary, logging steep slopes increases the risk of devastating landslides from the day the roots begin to die until the day when new roots are sufficiently developed to take their place. *See* Op. Br. at 3–4. This process takes years. Because the risk persists for such a long time (as opposed to a short window of risk in the case of crop dusting), it should be easier, not harder, to conclude the practice is abnormally dangerous.

[12] Menasha cites parts (d)-(f) of Section 520 of the Restatement, but devotes the majority of its argument to part (f) ("extent to which [the activity's] value to the community is outweighed by its dangerous attributes"). We deal with part (f) in the text following this note. But it is telling that Menasha cites no evidence whatsoever that logging steep hills like the ones above Glenoma is "a matter of common usage" under part (d). For example, Menasha cites CP 500 (declaration of Richard Rinne) for the proposition that the Martin Road area "has been logged several times in the last 100 years." Menasha Br. at 37. *See also id.* at 34 (asserting the area has been "regularly logged for nearly a century."). Yet, Mr. Rinne opined only that some unidentified person told him the area was logged two or three times in the past century, and even that is uncertain. *See* CP 500. And while Menasha argues that "detailed regulations governing timber harvests on hillsides confirm that logging such slopes is both anticipated and routine," the regulations are irrelevant to show common

argument, Menasha attaches to its brief a number of extra-record documents that were not before the Superior Court, and are, therefore, not properly before this Court. RAP 9.12. They should be stricken or ignored.

For example, Menasha cites a webpage documenting historic logging camps, saw mills, and mill fires in Lewis County. *See* Menasha Br., App. 3. The webpage also contains links to various "resources" on logging folklore and other quaint historical factoids. *See id.*, App. 3.[13] Without explaining the relevance of these "resources," Menasha cites the entirety of this webpage for the blanket proposition that plaintiffs "seriously underestimate the utility and

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usage. Commercial fireworks and blasting are also heavily regulated (*see* chapters 212-17 and 296-52 WAC), but they are not "common." *See Klein*, 117 Wn.2d at 921; *Erickson Paving Co. v. Yardley Drilling Co.*, 7 Wn. App. 681, 683, 502 P.2d 334 (1972). The same goes with logging steep slopes above residential communities. *See* Op. Br. at 25.

Similarly, Zepp argues the Port Blakely tract has been logged since World War II, but cites no evidence. *See* Zepp Br. at 19. Zepp also argues that logging is important to the economy, but much like the rest of its brief, Zepp fails to cite any evidence whatsoever. *See* Zepp Br. at 19–21. (Zepp does cite RCW 7.48.310 as circumstantial evidence that the Legislature would not want logging subjected to strict liability. *See* Zepp Br. at 14. But the statute expressly contemplates that logging practices *do* constitute a nuisance when they adversely affect health and safety *See* RCW 7.48.305(1). The statute provides no evidence that the Legislature would not also approve of strict liability for dangerous logging practices that cannot be made safe.)

[13] One of these "resources" is as an article titled "Lumberjack Legends," a collection of "tall tales, legends, and myths" about the logging industry. *See* http://www.narhist.ewu.edu/pnf/articles/s1/i-4/lumberjack1/lumberjack1.html. Another "resource" is a Wikipedia entry for the Loyal Legion of Loggers and Lumbermen, a "patriotic company union" that was disbanded in 1938. *See* http://en.wikipedia.org/wiki/Loyal_Legion_of_Loggers_and_Lumbermen.

economic position of logging in Lewis County, and indeed the entire state." *Id.* at 35, n. 11.

We admit we have not studied the local logging folklore. Nor have we counted the old logging camps and saw mills in Lewis County. But this has nothing to do with the question before the Court. What is the value to the community of logging steep hills above a residential community?

Menasha also cites a number of documents that report the number of board feet harvested each year in Washington (*see* Menasha Br., App. 4), and gross logging revenues across the State (*see id.*, App. 5 & 6). But this information is far too broad to assess the communal value of logging steep hills above homes. Addressing that issue requires more than counting board feet and gross logging revenue statewide.

As we demonstrated in our opening brief, of all the timber land in Washington, only a small fraction consists of steep hillsides above residential communities. *See* Op. Br. at 25. Menasha's extra-record documents notwithstanding, there is no evidence that logging these hills has any significant value to the community (let alone a value that would outweigh the risk of devastating debris flow landslides). As we stated in our opening brief, the issue before this Court is who should bear the loss. In light of the

unrebutted rarity of the defendants' practice, "there could be an equitable balancing of social interests only if [the defendants] are made to pay for the consequences of their acts." *Langan*, 88 Wn.2d at 865.

Finally, Menasha argues our standard would have drastic impacts on the logging industry because it is so unworkable. To demonstrate, Menasha attempts to stump the Court with what it believes is a series of imponderable questions, such as what is a "residential" community, what is a "steep slope," and "[w]hat liability does a logging company have when residences are built below property previously logged?" Menasha Br. at 37. Menasha also asks "[w]hat about residential property that might be located above a commercial forest?" *Id.* at 36–37.[14]

These questions are not imponderable at all. They simply show that line-drawing is inherent in any legal standard. There should be no problem in defining a "residential" community. Courts routinely distinguish between

[14] In addition to these questions, Menasha suggests that strict liability would be gratuitous because the standard of care of uphill landowners has already been defined in the negligence context. *See* Menasha Br. at 39 (*citing Price ex re. Estate of Price v. City of Seattle*, 106 Wn. App. 647, 24 P.3d 1098 (2001)). But all activities are subject to a negligence standard, whether or not they are also abnormally dangerous. The fact that uphill landowners are subject to a negligence standard says nothing of whether specific practices are also abnormally dangerous and should be subject to strict liability.

"populated" and "unpopulated" areas when ruling on strict liability.[15] What is a steep slope? Here, the slopes had a grade of 87% to 97%. CP 1169. "These are incredibly steep slopes that cannot be maintained without adequate soil cohesion provided mostly by roots from trees and other vegetation." *Id.* And portions of these slopes approached "cliff-like proportions, yet were logged." *Id.* What happens when someone moves in after logging takes place? As discussed in note 4, *supra*, this can be dealt with under the rubric of comparative fault. And what about residences *above* a logged area? If they are put at risk by same landslides that make the practice so dangerous, strict liability would apply there, too. But that factual question need not be decided here.

The defendants fail to demonstrate that the grave risks associated with their actions can be eliminated with reasonable care. And they fail to cite any evidence that the value of clearcutting the steep hills above Glenoma outweighed the risks to the community. That activity was, therefore,

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[15] Curiously, Menasha poses the conundrum of what is a "residential" community to highlight the allegedly inscrutable distinction between "residential" and "commercial." *See* Menasha Br. at 37. Any land use code ought to tell Menasha the distinction is not so unworkable. Nevertheless, we admit that under our theory it would likely be just as dangerous to clearcut steep, unstable hills above a commercial community as it is above a residential one.

abnormally dangerous and the defendants should be held strictly liable under Section 520 of the Restatement (Second) of Torts.

II. NUISANCE AND TRESPASS

A. RCW 7.48.305 Is Inapplicable Because That Statute Was Enacted to Protect Forest Practices in Urbanizing Areas.

Zepp asserts that, pursuant to RCW 7.48.305, logging is not a nuisance and it is presumed to be reasonable. Zepp Br. at 33. This statute grants nuisance immunity to forest practices, but only in those cases where the nuisance suit arises because of urban encroachment into an established forestry area. *Buchanan v. Simplot Feeders Ltd. Partnership,* 134 Wn.2d 673, 952 P.2d 610 (1998) (statutory shield to be applied narrowly; intent is to provide protection in urbanizing areas); *Vicwood Meridian Partnership v. Skagit Sand and Gravel,* 123 Wn. App. 877, 882, 98 P.3d 1277 (2004) (statute was enacted in response to urban dwellers moving into agricultural areas and then filing nuisance suits); *Alpental Community Club v. Seattle Gymnastics Society,* 154 Wn.2d 313, 111 P.3d 257 (2005) (legislative amendments expanded protections to forest practices in urbanizing areas); *Davis v. Taylor,* 132 Wn. App. 515, 132 P.3d 783 (2006) (statute was a direct response to the urbanization of rural communities).

The plaintiffs' residential community in Glenoma is not an urban or "urbanizing" area. The plaintiffs' properties have been and remain rural to this day. CP 1:67, 132-133, 227. Zepp even concedes that the area is "a rural community." Zepp Br. at 34.

RCW 7.48.305 was intended to protect existing forest practices from the pressures associated with urbanization. Urbanization is not at issue in this case. The statute neither expressly nor impliedly applies to this situation.

Even if plaintiffs' property could be classified as urban, immunity under RCW 7.48.305 can if three conditions are met. The activity must (1) be consistent with good forest practices; (2) have been established prior to surrounding non-forestry (residential) activities; and (3) not have a substantial adverse effect on public health and safety. *Davis v. Taylor, supra,* 132 Wn. App. at 519 (*citing Buchanan, supra,* 134 Wn.2d at 680). There were disputed facts in the record regarding each of these conditions. The declarations of Chris Brummer and Paul Kennard provided credible evidence that logging steep slopes has a substantial adverse effect on public health and safety and that they were not consistent with good forest practices.[16] And Zepp provided no evidence to meet its summary judgment affirmative

defense burden of demonstrating that logging preceded residential use in this area. There was no basis in the summary judgment record to dismiss the nuisance claim on the basis of Zepp's statutory affirmative defense.

B. Plaintiff's Nuisance and Intentional Trespass Claims Are Independent of Its Negligence Claim

Menasha's primary defense of the summary judgment dismissal of the nuisance and trespass claims is that those claims were subsumed by the negligence claims. According to Menasha, to the extent plaintiffs' nuisance and trespass claims are premised on negligent conduct, they are barred under the doctrine of collateral estoppel because the jury has already decided the claim of negligence. Menasha Br., at 40-42, 49. Zepp similarly contends these claims are an "in garb" negligence claim. Zepp Br. at 32, 34. In support, Menasha and Zepp cite to cases finding that when a plaintiff's negligence, nuisance, and trespass claims all stem from a single set of facts, there is essentially a single negligence claim with multiple theories. Menasha Br. at 41-42; Zepp Br., at 34-35 (both *citing Pepper v. J.J. Welcome Construction Co.*, 73 Wn. App. 523, 546-47, 871 P.2d 601 (1994)).

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[16] CP 1:37-38 (Brummer Declaration); CP1:110-113, 114-116 (Brummer 2nd Declaration); CP 3:1169-1171 (Brummer 3rd Declaration); CP 3:1162 (Kennard 2nd Declaration).

The defendants ignore that nuisance and trespass actions can arise from *either* intentional or negligent conduct. *Peterson v. King County,* 45 Wn.2d 860, 863-864, 278 P.2d 774 (1954) (nuisance does not refer to any particular kind of conduct, it may be alleged independent of negligence); *Grundy v. Brack Family Trust,* 151 Wn. App. 557, 567, 213 P.3d 619 (2009) (four-part test for intentional trespass with no negligence requirement). *If* plaintiffs had only pursued nuisance and trespass claims arising from negligent conduct, Menasha's estoppel argument would be correct. But the plaintiffs pursued their nuisance and trespass claims below on grounds that the defendants had acted intentionally.[17] Thus, while a claim against Menasha that the nuisance and trespass arose out of negligent conduct would be barred, the claim that these torts stemmed from intentional acts is not. Consequently, the jury's verdict on the negligence claim has no bearing on the resolution of these intentional torts claims.

Moreover, Menasha's estoppel argument (Menasha Br. at 49) fails because Menasha has made no effort to meet its burden of proof. With the

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[17] Menasha contends that the plaintiffs' complaint alleged only negligent trespass, not intentional trespass. Menasha Br., at 40-41. We addressed this in our opening brief. Op. Br. at 33, n.3; 37, n 4. Our intentional conduct claim was made clear during the litigation, including in the summary judgment briefing. That was sufficient to overcome the lack of an explicit reference in the complaint. *Schoening v. Grays Harbor Community Hospital,* 40 Wn. App. 331, 337, 698 P.2d 593 (1985).

exception of stating that the doctrine seeks to prevent re-litigation of an issue and that the claims arise from similar facts, Menasha neither cites to nor makes any attempt to establish the required elements of collateral estoppel, *Olympic Tug & Barge v. Washington State Dept. of Revenue,* 163 Wn. App. 298, 303 n. 1, 259 P.3d 338 (2011) (party seeking application of the doctrine has burden to establish four elements of collateral estoppel). With no substantive argument to support its claim, Menasha's argument as to the application of collateral estoppel should fail.[18]

Thus, the issue is not whether a trespass or nuisance claim premised on negligent conduct is subsumed within the negligence claim. We agree it would be. The issue is whether materials facts were in dispute regarding the intent element. They were, as we show for each tort in the following subsections.

1. Material facts were in dispute regarding the defendants' intent to create a nuisance

Nuisance is a condition, not an act or failure to act by the responsible person. When considering a claim of nuisance, the fundamental inquiry always should be whether the use of land can be considered as reasonable in

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[18] Because the trial did not involve the Lunch Creek slide, estoppel would not apply to bar negligent trespass and nuisance claims against Zepp anyway. *See* note 22, *infra.*

relation to all the facts and surrounding circumstances. *Lakey v. Puget Sound Energy Inc.,* 176 Wn.2d 909, 923-24, 296 P.3d 860 (2013) (*citing Highline School District No. 401 v. Port of Seattle,* 87 Wn.2d 26, 548 P.2d 1085 (1976), *Morin v. Johnson,* 49 Wn.2d 275, 300 P.2d 569 (1956)).[19]

Thus, because nuisance is a condition, the intent needed for this tort is satisfied when the creator *intends to bring about conditions that lead to the nuisance* . Thus, one who builds a reservoir above a neighborhood may have no animus to the residential neighbors below and may be doing everything possible to avoid a failure of the reservoir's retaining walls. But a nuisance may nonetheless exist even if the reservoir owner intends no harm. *Ferry v. Seattle,* 116 Wash. 648, 203 P. 40 (1922). *See also, Densmore v. Evergreen Camp No. 147, Woodmen of the World,* 61 Wash. 230, 112 P. 255 (1910) (undertaking establishment could be a nuisance even thought the defendant employed "every sanitary precaution known to the profession of morticians"); *Grundy v. Brack Family Trust, supra;* (issue is not intent to cause damage, but whether defendant's action "substantially and unreasonably interferes"

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[19] *Lakey* also holds that an intentional nuisance requires proof that the activity is "unreasonable" taking into account the risks created and its social utility. *Id.* at 923. But the defendants focused on the intent element in their summary judgment motion (and here), not the reasonableness element, and so that issue is not before the court. In any event, there were disputed facts regarding the reasonableness of the defendants' conduct. *See, e.g.,* evidence cited in note 16, *supra.*

with plaintiff's property). Thus, the intent inquiry goes to whether the defendant intended to create the condition that unreasonably interfered with the neighbors' peaceful use of their property, not whether the defendant intended to harm them.

Here, there was no dispute that the defendants intended to clear cut a steep slope and leave it with no mature trees, vulnerable to sliding if a large storm hit in the next ten to twenty years. Plaintiffs' burden was not to prove that the defendants intended to harm them or knew that the slope would slide. As evident from the cases cited above, as long as the defendants intended to create the condition which posed the peril to their neighbors, the intent element is satisfied.

That does not mean that the defendants would be absolutely liable. It is still for a jury to decide whether the condition created by the defendants unreasonably interfered with the plaintiffs peaceful enjoyment of their property.[20] But the intent element should not have been used as a basis for preventing the jury from deciding that issue.

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[20] *See* Op. Br. at 32. Whether a business has created a nuisance (*e.g.*, whether it is reasonable and compatible) and damaged adjacent property is a factual question for the jury. *Tiegs v. Watts*, 135 Wn.2d, 1, 13, 954 P.2d 877 (1998).

2. Material facts were in dispute regarding the defendants' intent to trespass

Menasha argues that to avoid summary judgment, plaintiffs must have some evidence that Menasha knew that there was a substantial certainty that its clearcuts would result in the invasion of land owned by others. Menasha Br. at 44. Even if that were the standard (not the "reasonable foreseeability" standard we discussed in our Opening Brief), there was evidence that should have precluded summary judgment. Menasha's error is in its unstated assumption that the plaintiffs had to have evidence that Menasha knew that the particular clearcut at issue would slide. In *Bradley,* Asarco emitted countless particles into the air, only some of which came to rest on the plaintiffs' property (giving rise to the trespass claim). Asarco did not know that any given particle would land on private property or which ones would do so in sufficient quantity to give rise to more than a *de minimus* intrusion. But the court stated that Asarco knew or, with substantial certainty, should have known that *some of them would do so.*

"The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it". *Bradley v. ASARCO*, 104 Wn.2d 677, 683, 709 P.2d 782 (1985) (*quoting* W. Prosser, *Torts* § 8, at 31–32 (4th ed. 1971)).

A similar situation is present here. Menasha and Zepp are involved in countless logging operations on steep slopes. The evidence shows that scores of landslides emanate from these clearcut steep slopes—and that clearcutting increases that risk by 200% to 3300%. While the defendants may not have known which particular clearcut would slide, they knew with substantial certainty that some of them would. That knowledge should be sufficient to support an intentional tort claim. The defendants can no more claim they did not know some slides would result from their practice of cutting steep slopes than the shooter of buckshot into a crowd can claim that he did not know which specific piece of shot would lodge in a person.

The defendants also rely on a case involving an irrigation district which held that an irrigation district is not liable for an intentional trespass if the trespass was due to the original design and construction of the ditch and all the district did was operate and maintain it. *Seal v. Naches-Selah Irrigation District,* 51 Wn. App. 1, 751 P.2d 873 (1988)). *See also, Jackass Mt. Ranch v. South Columbia Basin Irrigation District,* 2013 WL 3422678 (July 9, 2013). But those cases have no relevance here. First, this case does not involve an irrigation district and, in this state, only negligence claims can be asserted against an irrigation district for its maintenance of a ditch. *Seal,*

supra at 6 (rejecting intentional tort theories employed in other states: "our courts have adopted a rule of negligence with regard to damage resulting from the maintenance, construction or operation of irrigation works"). Moreover, in *Seal* (and *Jackass Mountain*), there was no factual evidence to support the intent element in any event. *Id.*

Here, in contrast, there is no special rule shielding loggers or timber companies from an intentional trespass claim. Thus, these irrigation district cases do not support the trial court's summary judgment dismissal. Rather, as in *Grundy* (cited by the defendants), the intent issue should have been decided by the jury.[21]

Finally, we note that the defendants have not responded to our claim that regardless whether they had the intent to deposit the mud on the plaintiffs' property, they certainly intended to leave it there once the slides occurred. *See* Op. Br. at 36-37.

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[21] Zepp asserts that a release absolves him of liability to the plaintiffs. Zepp Br. at 38. Zepp fails to include a citation to the record where this release might be found. Lacking any factual support (or legal analysis), this defense must be rejected.

III. THE NEGLIGENCE CLAIMS AGAINST ZEPP SHOULD NOT HAVE BEEN DISMISSED

A. Compliance with the Contract is Not a Defense

Zepp cites *Hull v. Enger,* 15 Wn. App. 511, 550 P.2d 692 (1976) for the rule that a contractor who flawlessly installs a poorly designed threshold is not liable for an injury arising from the poor design. But that case has never been cited for the principle advocated by Zepp and was effectively overruled when the Supreme Court adopted Restatement of Torts, §385 in 2007. *See* Op. Br. at 44 *et seq. (*discussing *Davis v. Baugh Ind. Contr.,* 159 Wn.2d 413, 150 P.3d 545 (2007) and its progeny). Zepp makes no effort to distinguish the several more recent cases we cited (and discussed at length) which clearly hold that a contractor who creates a dangerous condition can be liable in negligence, even if he was following directions. Zepp also totally ignores the words of his own contract wherein he took responsibility for the conditions on site and assumed all risks. *Id.* at 47 – 49. But ignoring those words does not make them go away. Zepp's contract defense is flawed, factually and legally.

B. Plaintiffs Presented Evidence of Zepp's Negligence

Zepp (at 28) claims plaintiffs presented no affirmative evidence of Zepp's negligence. Apart from the procedural flaw in this argument

(plaintiffs had no burden to come forward with evidence of Zepp's negligence, *see* Op. Br. at 37 -38, 42 -43), Zepp is wrong because the plaintiffs did present evidence of Zepps' negligence, *see* Op. Br. at 43-44 (citing record)).

C. The Common Enemy Rule is Not Applicable

Zepp raises a new argument on appeal: that his actions are insulated by the common enemy rule. Zepp. Br. at 29 – 31. But the common enemy rule applies where surface water is diverted. *See, e.g., Currens v. Sleek,* 138 Wn.2d 858, 861, 983 P.2d 626 (1999). It does not apply to landslides caused by logging.

Zepp also asserts that there is no duty to stabilize a slope where instability is a natural condition. Zepp Br. at 29 (*citing Price v. Seattle,* 106 Wn. App. 647, 24 P.3d 1098 (2001)). But the issue here is not whether the defendants had a duty to take affirmative steps to stabilize a precarious slope. The issue is whether the defendants took steps that *increased* the instability of an already unstable slope. The plaintiff in *Price* failed to show that the defendant city's action had caused the slope "to become unnaturally vulnerable to the natural forces at work." *Id.* at 656. While the plaintiff had

evidence that the city had changed the slope, it had no evidence that those actions *increased* the instability. "That showing was not made here." *Id.*

Here, the plaintiffs had reams of evidence that the clearcutting increased the instability of the slopes for a decade or longer after the trees were removed. *Price* is distinguishable on its facts. Indeed, *Price* demonstrates that when plaintiffs have evidence — as we do — that the defendants' actions increase instability, liability in negligence can result and the issue should go to the jury. [22]

IV. THE REQUEST FOR ATTORNEYS FEES IS DEFECTIVE SUBSTANTIVELY AND PROCEDURALLY

Menasha includes a one line request for an award of reasonable attorneys' fees in its brief. A request for reasonable attorneys' fees pursuant to RAP 18.1(b) "requires argument and citation to authority to advise us of the appropriate grounds for an award of attorney fees and costs." *Osborne v. Seymour*, 164 Wn. App. 820, 866, 265 P.3d 917 (1994). "This requirement is mandatory. This requirement also demands more than a bald request for

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[22] Zepp makes the outlandish claim (at 37) that the jury's verdict finding no negligence in the Martin Road case somehow estops the Lunch Creek plaintiffs (who did not participate in the Martin Road trial) from demonstrating negligence as to the Lunch Creek slide. The Lunch Creek slide involved different property owned and logged by different entities. The studies of that property and the timing of the logging were different. *See, e.g.*, CP 78-80. There is no way the claims could be said to arise from the same facts giving rise to an estoppel claim.

attorney fees on appeal." *Id.* (internal citations omitted). Menasha's one line request does not comply with the rule and should be denied.[23]

V. CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, the challenged summary judgment orders should be reversed.

DATED this 1st day of August, 2013.

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[23] Because Menasha fails to provide a basis for its fee request, we are at a loss to respond to it on substantive grounds. Suffice it to say that there was no contract between the parties creating a basis for fees and none of the equitable grounds for a fee award (*e.g.*, bad faith, common fund) have been invoked nor is it possible to conceive how they might apply.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JEROME C. HURLEY and BESSIE M. HURLEY, husband and wife, et al., Appellants, v. CAMPBELL MENASHA, LLC, et al., Respondents.	NO. 44568-9-II (Lewis County Superior Court Cause No. 10-2-01546-7) DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for appellants herein. On the date and in the manner indicated below, I caused the Reply Brief of Appellants and Motion for Leave to File Overlength Brief to be served on:

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Peggy S. Cahill

PEGGY S. CAHILL

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