IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 90759-5

COURT OF APPEALS NO. 71430-9-I
(Previously 44568-9-II)

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

Petitioners,

v.

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

Respondents,

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

Defendants.

PETITION FOR REVIEW

David A. Bricklin, WSBA No. 7583
Bryan Telegin, WSBA 46686
BRICKLIN & NEWMAN, LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154
(206) 264-8600

Robert A. Wright, WSBA #4158
4621 Village Circle SE
Olympia, WA 98501

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Rules Page

Other Authority.....Page

I. IDENTITY OF THE PETITIONERS

The petitioners are fourteen families whose properties were heavily damaged when a series of landslides thundered through the small community of Glenoma, Washington, in eastern Lewis County.

II. CITATION TO COURT OF APPEALS DECISION

Petitioners seek review of the opinion issued by the Court of Appeals for Division I in *Hurley, et al. v. Port Blakely Tree Farms L.P., et al.* (June 30, 2014) (2014 WL 3953473) (App. A hereto). On August 7, 2014, the Court of Appeals granted motions to publish the opinion filed by respondent Menasha Forest Products Corporation and the Washington Forest Protection Association, a nonparty (App. B hereto).

III. ISSUES PRESENTED FOR REVIEW

Under Section 520 of the Restatement (Second) of Torts, an activity is subject to strict liability when it presents an ineliminably high risk of serious injury to the person or property of others. Should respondents be held to a strict liability standard when they clearcut the steep hillsides above Glenoma, which necessarily resulted in a high risk of devastating landslides? Conversely, should petitioners be denied recovery simply because they live in a "rural" area, as the Court of Appeals held?

IV. STATEMENT OF THE CASE

A. The Landslides

Starting shortly after dawn and continuing for much of the day on January 7, 2009, the small community of Glenoma was rocked by a series of landslides. The slides began on the steep hills above the community, in in or adjacent to areas that had been clear-cut and stripped of their trees. CP 117. Some of the initial landslides dammed the small streams leading to the community. CP 108. When the dams broke, even more torrents of mud, rain, trees, rocks, and other debris were unleashed on the homes below. CP 109. A 30- to 40-foot wall of debris scoured the hillside and buried several residential properties in a thick layer of mud. *Id.*[1]

The physical destruction was immense. As shown in a photograph taken of petitioners Jerome and Bessie Hurley's home shortly after January 7, 2009, the landslides gauged and pitted the small stream flowing through the community.[2] They deposited a thick layer of mud everywhere, together with fallen trees, logs, boulders, and other debris. They caved in buildings and eroded foundations. The landslides left residents of modest

[1] A Department of Natural Resources aerial photograph, reproduced at Appendix C, depicts the aftermath (the photograph may also be found at CP 288). The Martin Road landslide may be seen coursing through Glenoma in the middle of the picture. Some of the precipitating landslides can be seen in the clearcut area above the runout.

[2] The photograph of the Hurley's residence is attached at Appendix C, and may be found at CP 109. Despite the inaccurate time-stamp, the photograph was taken shortly after January 7, 2009, when the landslides occurred. *See* CP 109.

means with the impossible task of restoring their properties to any semblance of what they once were.

Later, it was determined that the Martin Road slides were "debris flows," a term denoting the large, rain-saturated mass of dirt and debris that roared through the community. CP 29. These are "the most destructive type of landslide [and have] caused the most deaths worldwide." CP 186 (citations omitted). Debris flows "bulk up" as they move downhill, enabling them to travel "long distances from the point of initiation." *Id.* "Their volumes increase by thousands of percent, resulting in escalating downstream destructiveness." *Id.*

So it was in Glenoma. The landslides did not stop at the base of the mountain. They gathered momentum and left a swath of destruction in their wake. One eye witness described the landslides as the loudest thing he had ever heard — louder than a freight train or a jet plane. CP 109.

B. The Science Behind the Landslides

The landslides came as a dreadful shock to the individuals who lived through them. But they likely would not have surprised anyone versed in the underlying science of landslides. Nor should they have come as a surprise to the companies that clearcut the hills several years earlier and set the stage for the resulting catastrophe.

It is well recognized in the scientific community that clearcutting has an unavoidable and de-stabilizing effect on steep slopes. As one scientist explained, "Trees cannot be logged without killing their roots. No amount of due care can avoid that biological consequence . . . As their roots die, their binding effect dies with them increasing landslide risk." CP 87. The roots die slowly over many years, so the loss of root strength increases in the years following the clearcut. Over time, this destabilizing effect is offset by the growth of new trees. But it can take 20 years for the slope to regain its stability. CP 112. Until then, the slope is highly vulnerable to sliding if hit by heavy winter rains. CP 1170–71.

Clearcutting also significantly increases the amount of water entering the ground, which also increases the probability of slope failure. CP 111–12. As explained in Washington's Forest Practices Watershed Manual, "A rain-on-snow event on slopes with immature forests will produce significantly greater volumes of runoff than an event on slopes with mature forests." CP 111. Studies have shown that clearcutting increases runoff from melting snow packs by 50 to 400 percent. *Id.* "The increase is due both to greater snow accumulation on logged slopes than heavily forested slopes and by a more rapid melting of snow on logged slopes than forested slopes." *Id.*

The risks associated with clearcutting steep slopes cannot be eliminated with due care. The destabilizing effects of root death and altered hydrology are natural consequences of clearcutting — they cannot be avoided. CP 87. In addition, there is an inherent inability to identify and avoid the riskiest areas for logging on a steep hillside. Landslide "initiation zones" are not spread uniformly across the landscape. And they "are difficult for those even with specialized slope stability expertise to field identify from surficial characteristics. This is because [they] may not have surface expression." CP 88. The attributes that make clearcutting steep, unstable slopes so dangerous are often hidden below the surface.

In short, landslide risk necessarily increases when slopes are clearcut. Depending on the study, the risk may increase by as much as 200 to 3,300 percent. CP 111. Logging companies may attempt to avoid the riskiest sites. But when slopes are clearcut, there is always is at least a doubling of risk that a devastating landslide will ensue. In more concrete terms, logging steep slopes increases the risk of debris flows from a natural event occurring once every several centuries to a man-made event occurring once every decade or two. CP 86.[3]

[3] The Court of Appeals confused the natural incidence of landslides which occur at a given site once every several **centuries** to landslides caused by logging which may occur every few decades. *Compare* App. A at 7-8. The court failed to comprehend the

The risks associated with clearcutting steep slopes are not borne primarily by the companies benefitting from the logging. The harms are externalized – imposed primarily on those unfortunate third parties living downhill of a clearcut.

The destabilizing effects of clearcutting steep slopes was drawn into sharp relief on January 7, 2009, when a "pineapple express" brought warm rains to the snow-covered hills of Glenoma. The storm caused numerous landslides, "the vast number [of which] originated in recently logged areas, at [logging] roads, or in second growth areas below recently logged areas." CP 111–12. As discussed above, some of the landslides roared through Glenoma. The others bear testament to the risk of clearcutting steep, unstable slopes at an elevation were "rain-on-snow" storms are common.[4] During a similar storm in 1996, sixty-four landslides were identified in the area. All but five were linked to clearcutting and logging roads. CP 1196–97.

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distinction between natural landslide frequency "endemic" in "geological time" with unnatural (logging-induced) landslide frequency measured in decades. There were no disputed facts — just incredibly different time scales depending on whether slopes are clearcut or left alone.

[4] *See* CP 110, 113 (explaining that the Department of Natural Resources has classified the hills above Glenoma as highly unstable and erodible slopes in the "rain-on-snow zone," a term denoting an elevated risk of landslides).

Virtually all of the harm was suffered by strangers to the logging operations. The companies that profited from the clearcuts suffered little harm — but it was their mud that covered the private properties below.

C. Proceedings Below

On November 4, 2010, fourteen families filed suit against the logging companies that clearcut the areas where the landslides began. *See* CP 1. Three of those companies are the respondents here: the Campbell and Menasha forestry companies (responsible for clearcutting the area where the Martin Road landslide originated); and Don Zepp Logging (responsible for logging the area where the Lunch Creek landslide began).

In their first cause of action, the families alleged that by clear-cutting the steep hills above Glenoma, the defendants engaged in an "abnormally dangerous activity" within the meaning of Section 520 of the Restatement (Second) of Torts. CP 10. The families moved for summary judgment on the issue of strict liability, citing the many reasons why logging steep hills is so dangerous. CP 285–387. Respondents opposed, but failed to dispute the inherent riskiness of their actions. Their own expert agreed that clearcutting invariably results in decreased slope stability, and that it increases the risk of landslides by 200 to 3,300 percent. *See* CP 1185–95.

Nevertheless, the superior court denied the motion for summary judgment, and granted the defendants' cross motions. CP 1236. (Later, the ruling proved fatal. After a six-week jury trial, the families were denied recovery under their secondary negligence claim.) The Court of Appeals subsequently upheld the superior court's ruling, finding four of the six Restatement factors were not satisfied. *See* App. A at 5–13.[5]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court has adopted Section 520 as a guide for deciding what activities should be held to a standard of strict liability when they cause harm to others. *See, e.g., Pac. Nw. Bell Tel. Co. v. Port of Seattle*, 80 Wn.2d 59, 64, 491 P. 2d1037 (1971).

Section 520 lists six factors that a court must consider in determining whether to impose strict liability. Among them, courts must determine whether there is a "high degree of risk of harm to the person, land or chattels of others"; whether "the harm that results [from the challenged activity] will be great"; and whether there is an "inability to eliminate the risk by the exercise of reasonable care." *See* Restatement

[5] The Court of Appeals did, however, find that two factors weigh in favor of strict liability. First, it held that the risk of harm caused by Menasha and Zepp outweighs any benefit of their actions to the community. App. A at 12. Second, logging steep slopes is not a matter of "common usage," thus any harm caused by the practice is abnormal. *Id.* at 10–11. *See also* Restatement (Second) of Torts, § 520 (factors d and f). We do not challenge these findings on here. The value to the community of logging steep, unstable slopes is far outweighed by the risk to life and home posed by devastating landslides.

(Second) of Torts, § 520 (factors a, b, and c). In essence, when an activity "presents an ineliminably high risk of serious bodily injury or property damage," those engaging in the activity should be held to a standard of strict liability. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 11, 810 P.2d 917 (1991). In that case, injured parties need not prove negligence — the risk cannot be eliminated even with utmost care. *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 682, 183 P.3d 1118 (2008).

Section 520 of the Restatement reflects the truism that those who engage in inherently risky behavior — like Menasha and Zepp — ought to bear the costs of their actions. Clearcutting steep slopes greatly increases the risk of landslides. No amount of care can eliminate the risk. Thus, logging companies must take a calculated risk when they log steep slopes that new forests will regenerate before a large storm hits a vulnerable hillside. Many times the companies win that bet. But when they do not, "there could be an equitable balancing of social interests' only if [the defendants] are made to pay for the consequences of their acts." *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 865, 567 P.2d 218 (1977).[6]

[6] Strict liability does not, however, imply that an activity is "bad" or undesirable from a social perspective. *See* Restatement (Second) of Torts, § 520, cmt. b (explaining that activities subject to strict liability may have a great deal of social utility and value, just not enough to justify subjecting others to uncompensated injury). Rather, the purpose of strict liability is to ensure that between two innocent parties, the party responsible for

The Court of Appeals' decision conflicts with this well-established precedent. At its core, the court held that logging steep, unstable slopes is immune to strict liability because clearcutting steep slopes poses less risk in "rural" areas than it would in "thickly-settled" areas. App. A. at 8, n. 8. In essence, the court would deny every resident of rural Washington the right to invoke strict liability in defense of life and home. But every activity — no matter how dangerous — poses more of a risk in the midst of a city than in a more "rural" area.

This Court may grant review and consider a Court of Appeals opinion if it involves an issue of substantial public interest or if the decision conflicts with other decisions of this Court. RAP 13.4(b)(1), (4). The opinion below conflicts with this Court's decisions finding strict liability in "rural" settings. The Court of Appeals' decision also raises an issue of substantial public importance in that it would deny every citizen of rural Washington from invoking the theory, regardless of the

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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.*

dangerousness of the challenged activity. This Court should accept review and correct the Court of Appeals' erroneous application of the law.[7]

Review is also warranted under the public import test in light of the paucity of case law on strict liability in the forestry context. The decision below is only the second appellate decision in the United States to address the issue (the other is from a coal-mining state and concerned logging attendant to coal mining). *See* App. A at 6, *citing In re Flood Litigation*, 216 W.Va. 534, 607 S.E.2d 863 (2004). As Menasha accurately observed in its motion to publish, "in an era where climate change may result in even more dramatic shifts in our natural landscape . . . [t]his case is not, and will not be, the only claim addressing what liability standards will be imposed on those engaged in or regulating logging on steep slopes in rural areas."[8] This Court should make clear that companies engaged in ultrahazardous activities are strictly liable for the damage they cause others, regardless of whether the victims live in an urban or rural area.

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[7] While we request review of the Court of Appeals' decision, this Court's review likely will not resolve the issue of Menasha or Zepp's actual liability. Instead, if this Court grants review, and determines that Menasha and Zepp are subject to strict liability, this Court would remand the issue of causation to the superior court for further fact-finding. *See* App. A at 13 n. 11 (observing that appellants raised an issue of material fact regarding causation). At that time, we also expect that Menasha and Zepp may present their defense of comparative fault. *See* Response Brief of Campbell Menasha, LLC at 33 (June 19, 2013) (arguing that families were partially to blame because they "chose" to reside on an "alluvial fan"). Those issues, however, are not before this Court.

[8] *See* Campbell Menasha, LLC's Motion to Publish at 3 (July 17, 2014).

A. The Court of Appeals Erred in Deciding that Activities in "Rural" Areas are Immune to Strict Liability. Its Decision Conflicts with the Law of This Court and Rests on an Unworkable Standard.

The first Restatement factor is whether there is a "high degree of risk of harm to the person, land or chattels of others." Restatement (Second) of Torts, § 520 (factor a). The second is whether "the harm that results from [the activity] will be great." *Id.* (factor b). Both factors were clearly present. But both were misconstrued when the Court of Appeals held that "rural" activities are immune to strict liability.

When Menasha and Zepp clearcut the steep, unstable hills above Glenoma, they increased the risk of a devastating landslide by some 200 to 3,300 percent. *See* Section IV.B, *supra*. They killed the roots that held the hill together. *Id.* And they necessarily altered the hydrology in a way that increased the landslide risk dramatically. *Id.* The companies were betting that a new forest would adequately re-establish itself in the next decade or two, before the next big storm would bring down the hillside on the residents below. Because the landslide risk was high (due, in part, to the unpredictability of the ensuing weather and unknowns about the underlying geology), the "degree of risk" factor was clearly present. *See, e.g., Langan*, 88 at 863–65, 567 P.2d 218 (1977) (holding that crop

dusting is subject to strict liability due to the inevitability and uncontrollability of pesticide drift).

In turn, it is beyond dispute that the magnitude of the threatened harm was great. Fourteen properties at the base of the hill were buried to varying degrees by the landslides' wide swath of destruction.

The Court of Appeals acknowledged these risks. *See* App. A at 10 ("[e]ven when following regulations and exercising due care, it is not possible to eliminate the risk of harm caused by logging."). Nor did the court question the severity of harm befalling Glenoma. Nevertheless, the court held that even if Menasha's and Zepp's actions dramatically increased the risk of a devastating landslide, strict liability would not attach because Glenoma is a "rural" area. In the court's words, "to the extent logging increases the risk of landslides, the risk of harm from those landslides is lower when the activity is conducted in a rural area as compared to a densely populated area." App. A. at 8. For this reason, the court also dismissed the severity of harm as irrelevant. *See id.* at 9 (concluding that "when logging occurs in rural, less populated areas, to the extent landslides result, there is less potential for great harm to occur"). In essence, the court ignored the grave risk to life and property simply

because logging the steep hills above Glenoma put fewer lives at risk than if Menasha and Zepp clearcut a hill in a dense city. [9]

The court's reasoning conflicts with the principles in the Restatement and this Court's decisions. First, we are aware of no other cases (in Washington or elsewhere) that have disregarded a clear risk of harm to the life or property of others simply because the challenged activity occurred in a rural area. Instead, strict liability has clearly been applied to rural activities.

For example, in *Langan* this Court held that crop dusting in the Yakima Valley was subject to strict liability when it resulted in harm to an organic farm. *See Langan*, 88 Wn.2d at 865. In *Siegler*, this Court held that the hauling of gasoline by truck is subject to strict liability regardless of whether it occurs on city streets or "on secondary roads in rural areas." *Siegler*, 81 Wn.2d at 445.[10] Indeed, the very case credited for creating the

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[9] The court also reasoned that the magnitude of the increased risk from logging was "fairly debatable." App. A 1t 8. But the only "debate" was whether the increase in landslide risk was two-fold or something greater still (as high as 33 times). The defendants' expert did not deny these numbers. *See* CP 1185, 1195. Even the lowest calculation of increased risk — a doubling — is profound. Likewise, there is no support in the record for the Court of Appeals' statement that on January 7, 2009, there were hundreds of landslides throughout Western Washington "apparently unrelated to logging." App. A at 8. Yes, there were hundreds of slides that day (and during the similar storm in 1996), but the vast majority of the slides were related to logging activity. CP 111-12 (¶ 13); CP 1196-97.

[10] *See also Foster v. Preston Mills Co.*, 44 Wn.2d 440, 268 P.2d 645 (1954) (recognizing theory of strict liability as applied to blasting operations in a "rural area one and one-half miles east of North Bend," but denying recovery because plaintiff's injuries

concept of an "abnormally dangerous activity" concerned the impoundment of water in rural England, which spilled into adjacent mine shafts. *See Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866). A grave risk of harm must not be ignored simply because it threatens a rural area.[11]

Nor are we aware of any cases rejecting strict liability simply because the challenged activity would pose a greater risk if conducted in the midst of a "thickly settled area[]."App. A at 8 n. 6. If that were the standard, no activity would ever be subject to strict liability in a rural area because, no doubt, it would be more dangerous in the midst of a city. It is for that reason that the Restatement places no lower limit on the number of persons who must be put at risk before strict liability will attach.[12] Courts must ask whether the risk may be "eliminated," not simply whether it may

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were among the "normal risks" attendant to blasting); *Patrick v. Smith*, 75 Wash. 407, 134 P.1076 (1913) (blasting subject to strict liability for harm done on the "outskirts of the city of Seattle," an undoubtedly rural area in 1913).

[11] We are aware of cases that have held that, in rural areas, a risky activity may be immune from strict liability where its value to the community greatly outweighs the risk of harm. *See* Restatement (Second) of Torts, § 520, cmt. f. Here, however, the Court of Appeals held that the value of logging steep, unstable slopes does *not* outweigh the risk of devastating debris flow landslides. *See* App. A at 12.

[12] *See, e.g.,* Restatement (Second) of Torts, § 520, cmt. j (explaining that "[e]ven a magazine of high explosives, capable of destroying everything within a distance of half a mile, does not necessarily create an abnormal danger if it is located in the midst of a desert area, *far from human habitation and all property of any conceivable value. . . .* Blasting, even with powerful high explosives, is not abnormally dangerous if it is done on an uninhabited mountainside, so far from *anything of considerable value* likely to be harmed that the risk if it does exist is not a serious one") (emphasis added).

be "reduced" by harming comparatively few individuals rather than a great many. *See* Restatement (Second) of Torts, § 520 (factor c).

Finally, if the Court of Appeals' decision is allowed to stand, it would impose an unworkable standard and deprive thousands of rural Washingtonians of their right to invoke strict liability in defense of their homes and lives. No doubt many dangerous activities occur outside large cities. But what is "rural?" To the Court of Appeals, Glenoma was "rural" because only fourteen properties were buried in mud and debris. It is unclear what else the court will consider "rural" in years to come (*e.g.*, Were the subdivisions destroyed in Oso rural?), but whether fourteen or forty properties are damaged, those suffering harm should not be deprived of a viable theory of recovery simply because they do not live in a city.

B. The Court of Appeals Misapplied This Court's Opinion in *Crosby v. Cox Aircraft Company of Washington.*

In addition to holding that Menasha and Zepp are immune from strict liability because they clearcut a rural hillside (not a city hillside), the Court of Appeals held that appellants failed to satisfy the third Restatement factor — "inability to eliminate the risk by the exercise of reasonable care." *See* Restatement (Second) of Torts, § 520 (factor c).

Initially, the court noted this case's similarity with *Langan* and *Klein*, where this factor was satisfied, and stated that "even when

following regulations and exercising due care, it is not possible to eliminate the risk of harm caused by logging." Opinion at 10. But then the court held that because many natural conditions and other factors might combine to cause a landslide (*e.g.*, steepness of the slope, its elevation in the "rain-on-snow" zone, the weather, and the efficacy of the regulations), this factor did not apply. *Id.*, *citing Crosby v. Cox Aircraft Company of Washington*, 109 Wn.2d 581, 746 P.2d 1198 (1987). The court's reference to *Langan* and *Klein* was apt. Its reference to *Crosby* was not.

In *Crosby*, this Court held that owners and operators of airplanes are not strictly liable for ground damage when planes crash. *See Crosby*, 109 Wn.2d at 582. In so holding, this Court reasoned that many airplane crashes result from ordinary negligence (e.g., "improper placement of wires," "failure to properly mark and light . . . obstructions," and "faulty engineering, construction, repair, [and] maintenance"), while other causes may not be eliminated with even the utmost care (e.g., "wind shear and other acts of God"). *Id.* Because strict liability is not appropriate in each instance, "the imposition of liability should be upon the blameworthy party who can be shown to be at fault." *Id. Crosby* stands for the principle that when the causes of injury lend themselves predominately to a negligence theory of recovery, strict liability will not apply.

Focusing on *Crosby's* statement that the causes of airplane crashes are "legion,"[13] the Court of Appeals held that any time injury results from multiple causes, strict liability will not apply. App. A at 10. But unlike *Crosby,* there is no evidence that negligence is the predominate cause of clearcut-induced landslides. (The jury found none in this case, and industry has not suggested otherwise.) Rather, the factors recited by the court reflect the natural conditions that, when triggered by logging, result in landslides.[14] These are nothing like the acts of negligence discussed in *Crosby*. The Court of Appeals' decision is inconsistent with *Crosby* and this Court should accept review to correct the error. *See* RAP 13.4(b)(1).[15]

C. The Court of Appeals Erred in Holding that it is Appropriate to Clearcut Steep, Unstable Slopes above a Residential Community.

Finally, the Restatement requires the reviewing court to assess the "inappropriateness of the activity to the place where it is carried on." *See*

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[13] In *Crosby*, this Court also explained that technological advances have made aviation much safer than it was in its infancy — safer, even, than driving a car. That is not the case here, as the Court of Appeals acknowledged. *See* App. A at 10.

[14] The court listed the site's geology, its elevation, the degree of slope, the timing of a large storm *vis-a-vis* the logging, and even the strictness or laxity of applicable forestry regulations among the factors the can cause a landslide. App. A at 10.

[15] The only human act of negligence referenced by the Court of Appeals was the possibility that a logger, in addition to taking a reasonably calculated risk in logging a steep slope, might actually violate applicable forestry regulations. But simply because a person engaged in an ultrahazardous activity might also undertake it carelessly does not immunize the activity from strict liability. The helicopter pilot in *Langan* and the fireworks operator in *Klein* might have *also* violated applicable rules, but that would not make either of those activities any less ultrahazardous under Section 502 and *Crosby*.

Restatement (Second) or Torts, §520 (factor e). Below, the Court of Appeals held that this factor weighs against strict liability, but the sole rationale for its holding is that state forestry regulations do not outright prohibit the logging of steep slopes. *See* App. A at 11–12. The court erred.

The logging industry is heavily regulated, with logging on steep slopes subject to particularly detailed regulations that require such things as certification of watershed resource specialists and experts; two levels of assessments; special rules developed on a case-by-case basis; and enhanced monitoring requirements. *See* WAC 222-22-030; -050; -060; and -070. But as Menasha observed below, these regulations are not designed to protect private residences. They are designed, instead, to protect "*public resources* such as water quality and fish habitat." Resp. Br.of Campbell Menasha, LLC at 32 (June 19, 2013) (emphasis in original). Further, state forestry regulations simply do not appreciably reduce the risk of landslides. "[R]egulatory and technological improvements in forestry have not appreciably reduced the increased risk of landslide that occurs when heavy rain falls on areas where logging has occurred." App. A at 10.

We are not aware of a case holding that a dangerous activity may "appropriately" be conducted in a populated area simply because the government has issued ineffective regulations. Indeed, this Court has held

just the opposite — compliance with state law does not *ipso facto* insulate an activity from private causes of action. *See Tiegs v. Watts*, 135 Wn.3d 1, 15 (1998) ("The fact that governmental authority tolerates a nuisance is not a defense if the nuisance injures adjoining property").[16]

Menasha and Zepp may have complied with rules designed to protect water quality and fish (and which do not appreciably reduce the risk of devastating landslides). But that does not make clearcutting appropriate on steep slopes above a residential community. This Court should accept review to correct the Court of Appeals' clear error of law.

VI. CONCLUSION

Logging on steep slopes in Western Washington is risky. Fortunately, most times the forests regrow before a large storm hits or a landslide occurs. But when the risk materializes and innocent neighbors are harmed, equity and this Court's prior decisions demand that the cost should be borne by those who profited, not those who were innocently living nearby. This Court should accept review and hold Menasha and Zepp strictly liable for the great harm they have caused in Glenoma.

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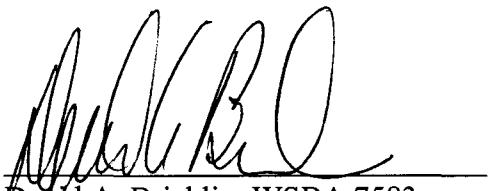
[16] Indeed, if the state's detailed forestry regulations are relevant at all, they are evidence of the risk of the risks inherent in clearcutting steep hillsides. *See Klein*, 117 Wn.2d at 7 (holding fireworks displays to a standard of strict liability and observing that the "dangerousness of fireworks displays is evidenced by the elaborate scheme of administrative regulations with which pyrotechnicians must comply").

DATED this 8 day of September, 2014.

BRICKLIN & NEWMAN, LLP



David A. Bricklin, WSBA 7583
Bryan Telegin, WSBA 46686
Attorneys for Appellants

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

JEROME C. HURLEY and BESSIE M. HURLEY, husband and wife; WESLEY A. STANCIL and ZELLA E. MORAN, husband and wife; FRANK J. METTLER and LINDA E. METTLER, husband and wife; SHAWN HAMPTON and CHARITY HAMPTON, husband and wife, individually, and as guardians for their minor children EMARY and ELEXCIOUS HAMPTON; ANTON K. SWAFFORD and DOROTHY E. SWAFFORD, husband and wife; MARK DANTINNE, a single man; JON and DAGNE NORD, husband and wife; DEANNA LESTER, a single woman; DE LILA E. WALKER, a widow; JAMES K. REDMON and BETTY REDMON, husband and wife; ALICE REDMON, a widow; MICHAEL WOOD and KIMBERLY WOOD, husband and wife, individually, and guardians for their minor child, Bryce Wood; MARTIN E. SPRINKLE, a single man and LINDA SPRINKLE, a single woman; MARTIN L.J. SPRINKLE, a single man; AARON SPRINKLE, a single man; and STEPHEN P. REA, a single man; ANNA GAY GAROUTTE, a single woman; APRIL HURLEY, a single woman; and EDWARD THOMAS and MARTHA THOMAS, husband and wife Plaintiffs/Appellants, v. PORT BLAKELY TREE FARMS L.P. a Washington limited partnership; B & M LOGGING, INC., a Washington corporation; RAINIER TIMBER COMPANY, INC., an inactive Delaware corporation; RAINIER LOG COMPANY,	)	No. 71430-9-I UNPUBLISHED OPINION FILED: June 30, 2014

APPENDIX A

INC., an inactive Delaware corporation; RAINIER TIMBER COMPANY, LLC, a company managed by THE CAMPBELL GROUP, LLC that is not registered with the Washington Secretary of State; ISLAND TIMBER COMPANY,

Defendants.

THE CAMPBELL GROUP, LLC, a Delaware corporation; MENASHA FOREST PRODUCTS CORPORATION, an inactive Delaware corporation; a Washington limited partnership; DON ZEPP, d/b/a/ DON ZEPP LOGGING, and POPE RESOURCES, a Delaware Limited Partnership

Defendants/Respondents.

SPEARMAN, C.J. — This appeal concerns a lawsuit filed by 14 families (Appellants) against Menasha Forest Products Corporation (Menasha)[1] and Don Zepp Logging (Zepp) (collectively "Respondents") after their properties in or near Glenoma, Washington were damaged by three landslides that occurred during a storm on January 7, 2009. The trial court dismissed the Appellants' claims for strict liability, trespass, and nuisance against Menasha and Zepp on summary judgment, as well as their negligence claims against Zepp. We affirm.

FACTS

On January 7, 2009, a warm and unusually heavy rain storm (commonly known as a "Pineapple Express") occurred throughout Western Washington,

[1] At the time of the 2009 slide, the Martin Road logging unit was owned by Menasha Forest Products Corporation. The Campbell Group formed Campbell Menasha, LLC in 2007 to purchase Menasha Forest Products Corporation, and it subsequently managed the property on behalf of the LLC. The legal owner of the property is still Menasha Forest Products Corporation. The Appellants stipulated to dismissal of the Campbell Group prior to trial. Campbell Menasha, LLC and Menasha are hereinafter referred to as "Menasha."

aimed mainly at the Central Cascade Range. Over 1500 landslides in Western Washington were associated with the event. This lawsuit arises out of three such slides that occurred in Lewis County, in or near Glenoma, Washington: (1) the "Martin Road Slide," (2) the "Lunch Creek Slide," and (3) the "Rainey Creek Slide." Each Appellant owns property that was damaged by one of those landslides or a combination thereof. Menasha logged an area associated with the Martin Road Slide in 2001.[2] Zepp logged an area associated with the Lunch Creek Slide between January and April of 2006.[3]

The Appellants filed a complaint against a number of defendants, including Menasha and Zepp, on November 4, 2010 and an amended complaint on July 28, 2011, alleging causes of action for negligence, nuisance, trespass, and strict liability. On May 4, 2012, they moved for summary judgment on their strict liability claim. The trial court denied the motion and effectively dismissed the strict liability claim. Menasha then filed a motion for partial summary judgment to dismiss the plaintiffs' nuisance and trespass claims. Defendants Pope Resources, Port Blakely-Island Timber, and Zepp joined the motion. The trial court dismissed the Appellants' claims for nuisance and trespass. It later granted Zepp's separate motion for summary judgment on the negligence claim.

In February 2012, the trial court bifurcated for trial the negligence claims related to the Martin Road Slide from the claims related to the Lunch Creek and Rainey Creek slides. The 11 plaintiff families impacted only by the Martin Road

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[2] More specifically, Menasha applied for the permits to log the land and hired defendant B&M Logging, Inc. to perform the cutting.

[3] The logging was done on land owned by Port Blakely Tree Farms, L.P. pursuant to a contract with Island Timber Company.

slide were scheduled to be in trial first against Menasha and B&M Logging, Inc. The second trial would have included the remaining plaintiffs and all defendants. B&M Logging settled prior to trial. The first trial against Menasha lasted six weeks. On December 14, 2012, the jury found that Menasha was not negligent and returned a verdict in Menasha's favor. Menasha then settled the claims made against it by the plaintiffs who were to be involved in the second trial. Defendants Port Blakely and Pope Resources also settled following the first trial with plaintiffs who had made claims against them. Because all of the claims to be heard in the second trial were either settled, or in the case of Zepp, dismissed on summary judgment the second trial was not necessary.

The Appellants appeal from the trial court's orders dismissing their claims for strict liability, nuisance, and trespass against Menasha and Zepp and their claims for negligence against Zepp. They do not appeal the verdict finding that Menasha was not negligent.

DISCUSSION

This court reviews summary judgment de novo. Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c). "The initial burden is on the moving party to show there is no genuine issue of material fact." American Exp. Centurion Bank v. Stratman, 172 Wn. App. 667, 673, 292 P.3d 128 (2012) (citing Vallindigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)). If the moving party makes this showing, "the burden shifts to the nonmoving party to establish specific facts which demonstrate the existence

of a genuine issue for trial." Kendall v. Douglas, Grant, Lincoln, and Okanogan Counties Public Hosp. Dist. No. 6., 118 Wn.2d 1, 8-9, 820 P.2d 497 (1991). "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party." Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "[W]here reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is appropriate." Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66-67, 837 P.2d 618 (1992).

Strict Liability

Appellants argue that clearcutting steep, unstable slopes directly above residential properties is an abnormally dangerous activity subject to strict liability. Washington courts recognize the doctrine of strict liability as set forth in RESTATEMENT (SECOND) OF TORTS §§ 519 and 520 (1977). Klein v. Pyrodyne Corp., 117 Wn.2d 1, 6, 810 P.2d 917 (1991). "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 the harm." RESTATEMENT (SECOND) OF TORTS § 519(1) (1977). Whether an activity is "'abnormally dangerous'" is a question of law. Klein, 117 Wn.2d at 6. We consider six factors 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 (SECOND) OF TORTS § 520 (1977). Furthermore,

> [a]ny one of [the six factors] is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. 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.

Klein, 117 Wn.2d at 7 (quoting RESTATEMENT (SECOND) OF TORTS § 520, cmt. f (1977)).

No court in Washington or elsewhere has imposed strict liability for timber harvest activities. The only known case to consider the question is In re Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004). There, the Supreme Court of Appeals of West Virginia, applying the six Restatement (Second) of Torts § 520 factors, summarily rejected plaintiffs' claim that extracting and removing coal and timber produced conditions that created an abnormally high risk of flash flooding for which defendants should be strictly liable for damages:

> 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 is outweighed by their dangerous attributes.

216 W.Va. at 545, 607 S.E.2d at 874.

Here, Appellants argue that all six RESTATEMENT (SECOND) TORTS § 520 factors weigh in favor of strict liability. Defendants contend that all six factors weigh against strict liability.

(a): Existence of a high degree of risk of some harm to the person, land or chattels of others.

Appellants urge us to define the activity subject to strict liability as "clearcutting on steep, unstable slopes directly above a residential area." They contend that this narrowly defined activity carries a high risk of causing landslides and resulting harm. But cases applying the six RESTATEMENT (SECOND) TORT § 520 factors in Washington and other jurisdictions define the activity broadly [4] and then consider the nature of the locality where the activity is conducted in determining whether the risk of harm is high.[5] Thus, the operative question is whether logging carries a high degree of risk of harm from landslides given the characteristics of the area where it was conducted.

The parties dispute whether logging creates a risk of landslides in general and specifically whether it did so in this case. Appellants have presented evidence, that logging can increase the risk of landslides through loss of root strength, hydrological affects caused by removal of the tree canopy, and the inability of forestry scientists to accurately identify the riskiest areas for logging. In contrast, Respondents have presented evidence that landslides are endemic to the Glenoma area, that Appellants' homes are built on an "alluvial fan" consisting of the sediments derived from landslides and debris flows over many years, and that "landslides and debris flow have and will continue to occur [in the

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[4] See Langan v. Valicopters, Inc., 88 Wn.2d 855, 567 P.2d 218 (1977) (crop dusting); Erickson Paving Co. v. Yardley Drilling Co., 7 Wn.App. 681, 502 P.2d 334 (1972) (blasting); Vern J. Oja & Assoc. v. Washington Park Towers, Inc., 89 Wn.2d 72, 569 P.2d 1141 (1977) (pile driving); Siegler v. Kuhlman, 81 Wn.2d 448, 502 P.2d 1181 (1972) (transporting gas as freight by truck); and Klein v. Pyrodyne Corp., 117 Wn.2d 1, 810 P.2d 917, op. amended, 817 P.2d 1359 (1991) (fireworks displays).

[5] See RESTATEMENT (SECOND) TORTS § 520 cmt. g.

Glenoma area] fairly frequently in geological time." CP at 966. The record also shows there were hundreds of landslides throughout Western Washington associated with the January 7, 2009 storm event that were apparently unrelated to logging because they occurred in areas of mature forest that had not been logged for many years.

However, even accepting appellants' contention that logging increases the risk that a landslide may occur, the extent of that risk is fairly debatable in light of other contributing factors. Moreover, to the extent logging increases the risk of landslides, the risk of harm from those landslides is lower when the activity is conducted in a rural area as compared to a densely populated area.[6] Given the totality of the circumstances, we conclude that any additional landslide risk caused by logging in a remote area does not favor imposing liability without the need for a finding of negligence.

(b): Likelihood that the harm that results from it will be great

"If the potential harm is sufficiently great, however, as in the case of a nuclear explosion, the likelihood that it will take place may be comparatively slight and yet the activity be regarded as abnormally dangerous. Others, such as the storage of explosives, necessarily involve major risks unless they are conducted in a remote place . . . ." RESTATEMENT (SECOND) TORTS § 520, cmt. g. Appellants argue that the magnitude of the harm resulting from landslides is necessarily severe. We agree that this is so in some instances. But the extent of the risk of harm from a particular activity cannot be divorced from the location in which the

[6] RESTATEMENT (SECOND) TORTS § 520 cmt. g and Reporter's Notes (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 water storage is often imposed in thickly-settled areas but not rural areas.

activity occurs. Generally, when logging occurs in rural, less populated areas, to the extent landslides result, there is less potential for great harm to occur. We conclude that this factor weighs against imposing liability without the need for a finding of negligence.

(c): Inability to eliminate the risk by the exercise of reasonable care

"Most ordinary activities can be made entirely safe by the taking of all reasonable precautions; and when safety cannot be attained by the exercise of due care there is reason to regard the danger as an abnormal one." RESTATEMENT (SECOND) TORTS § 520 cmt. h.

Appellants argue that it is not possible to eliminate or sufficiently reduce the increased risk of landslides caused by clearcutting on steep, unstable slopes. But as previously noted, the proper question is whether it is possible to eliminate or sufficiently reduce the risk of landslides caused by logging in rural areas. Respondents, citing Crosby v. Cox Aircraft Co. of Washington, 109 Wn.2d 581, 746 P.2d 1198 (1987), contend that logging risks can be sufficiently minimized by the exercise of due care. In Crosby, the Washington Supreme Court held that in light of extensive government regulation of aviation and continuing technological improvements in aircraft manufacture, maintenance, and operation, the overall risk of serious injury from ground damage resulting from a plane crash can be minimized by the exercise of due care. Crosby,109 Wn.2d at 587-88. The Court also observed that because the causes of airplane accidents are legion and can come from a myriad of sources, "[a]ny 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 be shown to be at fault." Id.

Here, there is evidence in the record that even when exercising the highest degree of due care, logging in rural areas may increase the risk of landslides. Similar to the risk of spray drift when applying pesticides by helicopter[7] or the risk that a spectator will be injured by fireworks,[8] even when following regulations and exercising due care, it is not possible to eliminate the risk of harm caused by logging. Unlike the risk at issue in Crosby, regulatory and technological improvements in forestry have not appreciably reduced the increased risk of landslide that occurs when heavy rain falls on areas where logging has occurred.

But, as in Crosby, there is also evidence that many causes may contribute to the risk of landslides. The steepness of the slope, the presence of a "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. 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.

(d): Extent to which the activity is not a matter of common usage

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[7] Langan, 88 Wn.2d at 864.

[8] Klein, 117 Wn.2d at 7.

"An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community." RESTATEMENT (SECOND) TORTS § 520 cmt. i. Certain activities, such as driving a car, are in such general use that they are not considered abnormally dangerous despite the unavoidable risk of serious harm. Id. Activities that are not a matter of common usage include "driving a tank, blasting, the manufacture, storage, transportation, and use of high explosives, and drilling for oil. The deciding characteristic is that few persons engage in these activities." Klein, 117 Wn.2d at 9.

Commercial logging requires specialized equipment, skills, and permits. Logging is a commercially significant industry in Washington. But people not employed in the industry do not customarily engage in this activity. Similarly, in Langan, the Court held that this factor weighed in favor of strict liability because even though crop dusting is prevalent in the Yakima area, few people engage in it. Langan, 88 Wn.2d at 864. This factor weighs in favor of imposing strict liability.

(e): Inappropriateness of the activity to the place where it is carried out

This factor takes into consideration the nature of the locality where the activity is taking place. For example, blasting operations or storage tanks filled with flammable liquids may create an abnormal danger if located in a city, but not in the midst of a remote desert. RESTATEMENT (SECOND) TORTS § 520 cmt. j.

Appellants argue that clearcutting on steep, unstable slopes is an inappropriate activity when performed directly uphill of a residential area. However, it is entirely appropriate to conduct commercial logging operations in a rural area, particularly one that had likely been logged at least twice during the past century. Moreover, Washington State forestry laws and regulations provide a detailed set

of forest practices rules that permit logging under a wide variety of conditions. See Forest Practices Act, chapter 76.09 RCW and Forest Practices Board, Title 222 WAC.[9] This detailed regulatory regime indicates that logging in Washington State, even on steep slopes, is an anticipated and routine use of the land. This factor weighs against imposing strict liability.

(f): Extent to which its value to the community is outweighed by its dangerous attributes

"Even though the activity involves a serious risk of harm that cannot be eliminated with reasonable care and it is not a matter of common usage, its value to the community may be such that the danger will not be regarded as an abnormal one. This is true particularly when the community is largely devoted to the dangerous enterprise and its prosperity largely depends upon it." RESTATEMENT (SECOND) TORTS § 520, cmt. k.

Appellants argue that any economic impact would be very small because only a small fraction of Washington timberland consists of steep, unstable slopes above residential communities. Respondents contend that the chilling effect on Washington's logging industry would be severe. But no evidence in support of the Respondents' contention appears in the record before us.[10] Accordingly, we conclude that this factor weighs in favor of imposing strict liability.

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[9] Logging is even allowed in areas with "potentially unstable slopes and landforms," although additional analysis and precautions are required to carry out these Class IV forest practices. WAC 222-16-050(1)(d); WAC 222-10-030. The Department of Natural Resources classified and approved Respondents' logging proposal as Class III, which is less restrictive than Class IV.

[10] The Defendants rely primarily on appendices 3-6 to Menasha's response brief but these documents were not before the trial court and we do not consider them. RAP 9.12; Washington Fed'n of State Employees v. Office of Fin. Management, 121 Wn.2d 152, 156-57, 849 P.2d 1201 (1993). "[W]e 'will consider only evidence and issues called to the attention of the trial court.'")

In sum, four out of six section 520 factors weigh against imposing strict liability for logging. Strict 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." RESTATEMENT (SECOND) TORTS § 520, cmt. f. The remaining two factors do not weigh heavily enough to overcome our conclusion that logging is not an activity subject to strict liability. We therefore hold that the trial court did not err in dismissing Appellants' strict liability claim.[11]

Nuisance

Plaintiffs argue that the trial court erred in dismissing their nuisance claim as duplicative of their negligence claim.

A nuisance is "an unreasonable interference with another's use and enjoyment of property. . . ." Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 592, 964 P.2d 1173 (1998). Nuisance "consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency ... or in any way renders other persons insecure in life, or in the use of property." RCW 7.48.120.

Nuisance can be based upon intentional, reckless, or negligent conduct. Hostetler v. Ward, 41 Wn. App. 343, 357, 704 P.2d 1193 (1985). "[I]t is, of course, possible for the same act to constitute negligence and also give rise to a nuisance." Peterson v. King County, 45 Wn.2d 860, 863, 278 P.2d 774 (1954) (citing Kilbourn

[11] Respondents further argue that imposing strict liability is improper because Appellants have no evidence that Respondents' logging activities caused the landslides. We disagree that Appellants failed to raise an issue of material fact on this question. However, because we hold that logging is not an activity subject to strict liability, causation is not at issue.

v. City of Seattle, 43 Wn.2d 373, 382, 261 P.2d 407 (1953)). However, "[s]eparate legal theories based upon one set of facts constitute 'one claim' for relief under CR 54(b)." Snyder v. State, 19 Wn. App. 631, 635, 577 P.2d 160 (1978). "A single claim for relief, on one set of facts, is not converted into multiple claims, by the assertion of various legal theories." Pepper v. J.J. Welcome Const. Co., 73 Wn. App. 523, 546, 871 P.2d 601 (1994) overruled on other grounds by Phillips v. King County, 87 Wn. App. 468, 943 P.2d 306 (1997). Thus, "'a negligence claim presented in the garb of nuisance' need not be considered apart from the negligence claim." Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co., 115 Wn.2d 506, 527, 799 P.2d 250 (1990) (quoting Hostetler, 41 Wn. App. at 360.). "In those situations where the alleged nuisance is the result of defendant's alleged negligent conduct, rules of negligence are applied." Atherton, 115 Wn.2d at 527.[12]

Appellants argue that they asserted a nuisance claim independent of their negligence claim because the nuisance was the result of Respondents' intentional act of cutting down trees. Appellants misinterpret the meaning of "intentional act" in this context. "[N]uisance dependent upon negligence consists of anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm which, in due course, results in injury to another."

[12] See also Lewis v. Krussel, 101 Wn. App. 178, 183, 2 P.3d 486 (2000) ("Lewis and Teitzel ground their nuisance claim on the Krussels' inaction with regard to the fallen trees. In other words, the nuisance is the result of negligence. . . . Accordingly, we do not consider the nuisance claim apart from the negligence claim."); Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wn.App. 260, 282, 23 P.3d 529 (2001) (Plaintiff "alleged that stray voltage escaped from faulty insulators and damaged his dairy herd. Thus, the same set of facts supports claims of negligence, nuisance, and trespass."); Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 515, 182 P.3d 985 (2008) ("Because Sourakli's nuisance theory against Titan and Diamond rests on the same facts as his negligence theory against those defendants, it does not provide an alternative basis to proceed against them in a suit for damages.").

Hostetler, 41 Wn. App. at 359. In contrast, tortious intent is found where "the actor desires to cause the consequences of his act, or ... believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) TORTS § 8A (1965); Bradley, 104 Wn.2d at 682.

Appellants' second amended complaint alleged that "[t]he manner in which Defendants clearcut and built roads on the slopes above the plaintiffs' residences constituted a nuisance to the plaintiffs" and proximately caused their properties to be inundated by landslides and debris flows. CP at 25. Appellants asserted that "the flooding was caused by a series of unintended debris jams formed by logging debris and other materials that accumulated water and then violently exploded into flash floods" and that "defendants failed to use due care in managing their properties and conducting their logging and related activities." CP at 6 (emphasis added).

"A party's characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls." Pepper, 73 Wn. App. at 546. Nowhere in the second amended complaint did appellants allege that Respondents' logging activities were unlawful or that Respondents intended to cause harm. Rather, the nuisance claim was grounded in the same facts and allegations as the negligence claim. The trial court did not err in dismissing the nuisance claim as duplicative.

Trespass

Appellants argue that the trial court erred in dismissing their trespass claim as duplicative of their negligence claim.

"Trespass occurs when a person intentionally or negligently intrudes onto or into the property of another." Jackass Mt. Ranch, Inc. v. South Columbia Basin Irr. Dist., 175 Wn. App. 374, 401, 305 P.3d 1108 (2013) (citing Borden v. City of Olympia, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002)). "'Negligent trespass' requires proof of negligence (duty, breach, injury, and proximate cause)." Pruitt v. Douglas County, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003) (quoting Gaines v. Pierce County, 66 Wn. App. 715, 719-20, 834 P.2d 631 (1992)). "To establish intentional trespass, a plaintiff must show (1) an invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest; and (4) actual and substantial damages." Wallace v. Lewis County, 134 Wn. App. 1, 15, 137 P.3d 101 (2006) (citing Bradley, 104 Wn.2d at 692-93).

Here, Appellants' second amended complaint alleged in part that "Defendants' negligent logging activities precipitated the physical invasion of plaintiffs' properties by landslides, logging debris, boulders, mud, rocks, gravel, and water." CP at 25. The claim was grounded in negligence. As with nuisance, "[w]e treat claims for trespass and negligence arising from a single set of facts as a single negligence claim." Pruitt, 116 Wn. App. at 554 (citing Pepper, 73 Wn. App. at 546-47.

As with the nuisance claim, Appellants argue that they satisfied the requirements for intentional trespass based on Respondents' intentional act of

cutting down trees. We disagree. The "intent element of trespass can be shown where the actor 'knows that the consequences are certain, or substantially certain, to result from his act." Price ex rel. Estate of Price v. City of Seattle, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001) (citing Bradley, 104 Wn.2d at 691). Even viewed in the light most favorable to Appellants, the nonmoving party, there is no evidence in the record that Respondents knew or were substantially certain that their logging activities would result in a landslide. The trial court did not err in dismissing the trespass claim as duplicative of the negligence claim.[13]

Negligence – Zepp

The Plaintiffs argue that the trial court erred in dismissing their negligence claim against Zepp on summary judgment. They assert that Zepp's compliance with laws, permits, industry standards, and the terms of his contract does not shield him from liability for negligence as a matter of law.

To prove negligence, a plaintiff must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach is a proximate cause of the injury. Crowe v. Gaston, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998). The existence of a duty is a question of law. Suter v. Virgil R. Lee & Son, Inc., 51 Wn. App. 524, 528, 754 P.2d 155 (1988).

[13] Appellants further argue that in the absence of intention, Respondents trespassed by failing to remove landslide debris from their properties. "One is subject to liability to another for trespass... if he intentionally...fails to remove from the land a thing which he is under a duty to remove." Restatement (Second) Torts § 158. Appellants, however, do not dispute Menasha's assertion that they did not advance this argument to the trial court. "Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal." Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) (citing Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)).

Zepp points out that he is a logger, not a geomorphologist or hydrologist. He contends that he did not have a duty to take additional steps to ensure that logging the land was reasonable because he lacks the expertise (and is not, as a logger, expected to have the expertise) to know whether logging the land would have caused landslides. Rather, it was reasonable for him to log in accordance with a forest practices application that was reviewed and approved by experts at the Department of Natural Resources. We agree.

Initially, appellants are correct that compliance with applicable regulations, industry customs, permits, and contracts does not per se excuse a defendant from a claim of negligence and entitle the defendant to summary judgment as a matter of law.[14] But in cases holding that the defendant's duty of care required more, the defendant possessed the specialized knowledge, skills, and expertise to assess the situation and take reasonable additional action.[15] Here, the Appellants did not put forth evidence indicating that Zepp breached the duty of care owned by a reasonable logger.[16] We cannot conclude as a matter of law that Zepp had a duty

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[14] See RESTATEMENT (SECOND) TORTS § 288C ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 553, 192 P.3d 886 (2008) ("[A] simple statement indicating an individual acted according to the customs of the industry is not always determinative."); Helling v. Carey, 83 Wn.2d 514, 519, 519 P.2d 981 (1974).

[15] See Helling, 83 Wn.2d at 519 (reasonable prudence required ophthalmologist to give glaucoma test to 32-year-old plaintiff, notwithstanding standard practice of routinely testing for glaucoma after age 40, where testimony indicated that standards of profession required test if patient's symptoms revealed suspicion of glaucoma and where glaucoma test was simple and harmless); Ranger, 164 Wn.2d at 544 (jury could find that reasonably prudent court clerk had a duty to verify that a bond was underwritten by a surety before allocating surety's funds to forfeited bond, where county had written notice of which bonds were underwritten).

[16] At summary judgment, the Plaintiffs presented the declaration of Mike Jackson, a certified forester, who opined that "a prudent logger would have recognized he was taking a significant risk if he logged the unit [at issue] to the specified boundary." CP at 1410. But the trial court granted Zepp's motion to strike Jackson's declaration; thus, it was not considered.

to take additional steps to know and ensure that logging the land was reasonable given its geological and hydrological features. Because there was no material question of fact for a jury to decide, the trial court properly dismissed Appellants' negligence claim against Zepp.

Pursuant to RAP 14.2 and RAP 18.1(b), Menasha requests an award of reasonable attorney's fees, costs, and expenses on appeal as allowed under RAP 14.3. RAP 14.2 provides for an award of costs to the party that substantially prevails on review, and RAP 14.3 defines which types of expenses are allowed as costs. RAP 18.1(b) requires "more than a bald request for attorney fees." Richards v. City of Pullman, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006). Menasha makes no argument as to why attorney fees under RAP 18.1 are proper. Therefore, Menasha is entitled only to an award of allowable costs and expenses under RAP 14.2 and 14.3.

Affirmed.

Spearman, C.J.

WE CONCUR:

Leach, J.

Grosse, J.P.T.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

JEROME C. HURLEY and BESSIE M. HURLEY, husband and wife; WESLEY A. STANCIL and ZELLA E. MORAN, husband and wife; FRANK J. METTLER and LINDA E. METTLER, husband and wife; SHAWN HAMPTON and CHARITY HAMPTON, husband and wife, individually, and as guardians for their minor children EMARY and ELEXCIOUS HAMPTON; ANTON K. SWAFFORD and DOROTHY E. SWAFFORD, husband and wife; MARK DANTINNE, a single man; JON and DAGNE NORD, husband and wife; DEANNA LESTER, a single woman; DE LILA E. WALKER, a widow; JAMES K. REDMON and BETTY REDMON, husband and wife; ALICE REDMON, a widow; MICHAEL WOOD and KIMBERLY WOOD, husband and wife, individually, and guardians for their minor child, Bryce Wood; MARTIN E. SPRINKLE, a single man and LINDA SPRINKLE, a single woman; MARTIN L.J. SPRINKLE, a single man; AARON SPRINKLE, a single man; and STEPHEN P. REA, a single man; ANNA GAY GAROUTTE, a single woman; APRIL HURLEY, a single woman; and EDWARD THOMAS and MARTHA THOMAS, husband and wife Plaintiffs/Appellants, v. PORT BLAKELY TREE FARMS L.P. a Washington limited partnership; B & M LOGGING, INC., a Washington corporation; RAINIER TIMBER COMPANY, INC., an inactive Delaware	)	No. 71430-9-I ORDER GRANTING MOTIONS TO PUBLISH OPINION

APPENDIX B

corporation; RAINIER LOG COMPANY, INC., an inactive Delaware corporation; RAINIER TIMBER COMPANY, LLC, a company managed by THE CAMPBELL GROUP, LLC that is not registered with the Washington Secretary of State; ISLAND TIMBER COMPANY,

Defendants.

THE CAMPBELL GROUP, LLC, a Delaware corporation; MENASHA FOREST PRODUCTS CORPORATION, an inactive Delaware corporation; a Washington limited partnership; DON ZEPP, d/b/a/ DON ZEPP LOGGING, and POPE RESOURCES, a Delaware Limited Partnership

Defendants/Respondents.

The respondent, Menasha Forest Products Corporation, and nonparty applicant, Washington Forest Protection Association, both having filed a motion to publish opinion, and a panel of the court having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore, it is hereby:

ORDERED that the unpublished opinion filed June 30, 2014, shall be published and printed in the Washington Appellate Reports.

DATED this 7th day of August, 2014.

For the Court:

Judge

APPENDIX C