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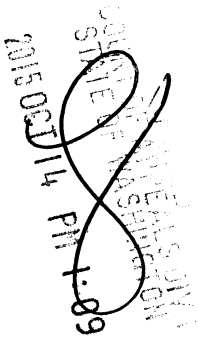
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 73528-4-I



HOLDEN-McDANIEL PARTNERS, LLC,

Appellant,

v.

CITY OF ARLINGTON; WOODLAND RIDGE; KAJIMA DEVELOPMENT CORP.; ARLINGTON COUNTRY CLUB, INC.; BNSF RAILWAY COMPANY,

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Plaintiff Holden-McDaniel Partners, LLC owns industrial property in Arlington, Washington. The property is located on the west side of 67th Avenue NE, which runs south to the city of Marysville. A large hill rises to the east of Holden-McDaniel's property (on the east side of the 67th). To the west, the BNSF railroad tracks run north-south parallel to the road. The property is sandwiched between 67th Avenue and the hill to the east, and the tracks to the west.

Until recently, the property was used to manufacture steel buildings — first by Holden-McDaniel itself, and more recently by its tenant, BlueScope, which took over the steel fabrication business in 2007.[1] The principals of Holden-McDaniel Partners, Joe Holden and Lee McDaniel, have owned the property since 1986. They built their business with hard work and grit.

Beginning in the 1980s, the hill to the east of Holden-McDaniel's property was gradually developed into a large residential community and golf course known as Gleneagle. Prior to Gleneagle, the hill was forested. But with development came clear-cutting, grading, and not surprisingly, increased stormwater runoff. For decades, Holden-McDaniel has been

[1] During many of the events described in this brief, Holden-McDaniel's steel fabrication business was known as HCI Steel. For simplicity, we refer to both entities as "Holden-McDaniel" or "Holden-McDaniel Partners."

plagued by flooding from Gleneagle's runoff and poorly designed infrastructure. Despite the many failed attempts by the city and Gleneagle developers to fix these problems, the flooding persists. In 2012, the floodwaters caused Holden-McDaniel to lose its lease with BlueScope, costing it millions in damages.

In this lawsuit, Holden-McDaniel seeks to finally put an end to the floodwaters that have burdened its land for decades. But it was denied that opportunity when, on April 24, 2015, the trial court granted summary judgment against Holden-McDaniel and in favor of the City of Arlington, the Gleneagle developers, and the BNSF Railway Company.[2]

The superior court's ruling on summary judgment reflects a fundamental misunderstanding of the law and facts. It also relies on theories that no party advanced on summary judgment. For example, the court held that Holden-McDaniel's tort claims are precluded by a prior settlement agreement (which expressly *reserved* Holden-McDaniel's right to bring its current claims). The court held that the settlement agreement has res judicata effect — a theory that no party had advanced — despite there being no "final judgment on the merits" in the prior lawsuit. The court also misconstrued the report of plaintiff's stormwater expert and

[2] The City of Arlington, Gleneagle developers, and BNSF are listed as "defendants" in the notice of appeal. Other entities are listed as "other defendants," but were variously dismissed from the superior court lawsuit or settled.

held, erroneously, that the flooding has only gotten *better* since the settlement was signed. Like the court's res judicata analysis, no party had advanced this theory on summary judgment.

Because the superior court erred in its analysis of these and other issues, we ask this Court to reverse the order on summary judgment. It is time for Holden-McDaniel to have its day in court. And it is time for the defendants to end the repeated flooding of Holden-McDaniel's land.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in granting summary judgment against Holden-McDaniel on the affirmative defense of release, CP I:56–58 (Conclusion of Law No. XVIII).

2. The superior court erred in granting summary judgment against Holden-McDaniel on the affirmative defense of res judicata, CP I:58–59 (Conclusion of Law No. XIX).

3. The superior court erred in granting summary judgment against Holden-McDaniel on the issue of damages, CP I:59–61 (Conclusion of Law No. XX).

4. The superior court erred in granting summary judgment against Holden-McDaniel on its claims for intentional trespass and nuisance, CP I:54–55 (Conclusion of Law No. VIII).

5. The superior court erred in granting summary judgment against Holden-McDaniel on its claims against the BNSF Railway Company, CP I:55 (Conclusion of Law No. XI).

6. The superior court erred in its evidentiary ruling excluding Exhibit II to the Declaration of Bryan Telegin (CP II:693–96), a letter from BlueScope's counsel to counsel for Holden-McDaniel, CP I:14 (Conclusion of Law No. III).

7. The superior court erred in ruling that the limitations period for Holden-McDaniel's tort claims is two years, CP I:55 (Conclusion of Law No. IX).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the parties' 1998 Release of All Claims — a settlement agreement that disposed of two prior lawsuits concerning the city's unlawful withholding of a building permit and flooding of Holden-McDaniel's land — precludes Holden-McDaniel's tort claims.

2. Whether a settlement agreement, by itself, gives rise to res judicata, or whether res judicata requires a final "judgment on the merits."

3. Whether disputed issues of material fact exist regarding the severity of damages caused, over time, by Gleneagle's stormwater runoff, precluding summary judgment.

4. Whether there is a material dispute of fact regarding the element of intent precluding summary judgment on Holden-McDaniel's trespass and nuisance claims.

5. Whether Holden-McDaniel's claims against the BNSF Railway Company are barred by the statute of limitations, RCW 4.16.080(1).

6. Whether BNSF owed a duty to Holden-McDaniel to maintain the ditch on the west side of the BNSF railroad tracks, which BNSF voluntarily allowed the city to use as a stormwater disposal facility.

7. Whether the BlueScope letter is admissible under RCW 5.45.020, Washington's Uniform Business Records as Evidence Act.

8. Whether Washington's three-year statute of limitations, RCW 4.16.080(1), governs Holden-McDaniel's claims for trespass and nuisance against the city and Gleneagle developers.

IV. STATEMENT OF FACTS

A. Origin of the Flooding Problem

Between the 1980s and 2002, Gleneagle — and the various stormwater facilities that serve Gleneagle — were designed, approved, and constructed by several entities, including the Woodland Ridge Joint Venture,

the principle developer of Gleneagle,[3] and the City of Arlington. From its inception, Gleneagle has created storm drainage problems for Holden-McDaniel. The first flooding of the Holden-McDaniel property was reported in 1990 and has continued in the years since, including 1994, 1995, 1996, 1998, 2000, 2002, 2009, 2011, and 2012. *See* CP V:2038, ¶ 5 (Declaration of Joseph Holden); CP II:673–77 (deposition testimony of Joseph Holden).

Until 2002, excess stormwater generated by the western portion of Gleneagle flowed into two detention ponds at Gleneagle's entrance on 67th Avenue. CP V:2058, ¶ 8 (Declaration of Tom Holz). The lower pond ("pond W1") is located to the immediate east of the Holden-McDaniel property, on the east side of 67th, and the second (Pond W2) is located further east and slightly uphill. *See id.* Stormwater flowed from W2 to W1 and then through a pipe underneath 67th Avenue and into a culvert under the Holden-McDaniel property. *Id.*, ¶ 9. Ultimately, Gleneagle's stormwater flowed west into a second culvert under the BNSF tracks, and then south via the BNSF ditch. *Id.* All of the stormwater generated by the western portion of Gleneagle flowed through the culvert under Holden-McDaniel's property.

During this time period, Gleneagle's stormwater flooded Holden-McDaniel's property from two directions. First, water often overtopped the

[3] The Woodland Ridge Joint Venture is a joint venture of two other defendants to this lawsuit — Kajima Development Corporation and the Arlington Country Club. For simplicity, we refer to these three entities collectively as the "Joint Venture."

detention ponds near Gleneagle's entrance on 67th. The water then flowed across 67th Avenue and flooded Holden-McDaniel's property from the east. As explained in the report of stormwater expert Tom Holz, this was due in large part to the increased volume of stormwater runoff generated by Gleneagle — which, in turn, was a consequence of replacing hundreds of acres of forest with the many impervious surfaces, lawns, houses, and golf course greens. *See* CP III:1201 (report of Tom Holz). This runoff, coupled with the inadequate sizing of ponds W1 and W2, led to the repeated flooding of Holden-McDaniel's land via 67th Avenue. *Id. See also* CP V:2062, ¶ 19.

Runoff from Gleneagle also flooded Holden-McDaniel's property from the west, where it backed up from the BNSF ditch. As discussed above, runoff from Gleneagle crosses Holden-McDaniel's property in an underground culvert. From there, the runoff is discharged to the ditch where (at least in theory) it is supposed to flow south and *away* from Holden-McDaniel. But the ditch is virtually flat; it has limited infiltration capacity; and it has been ill-maintained for many years. *See* CP V:2060, ¶ 14. In other words, the ditch is a "closed basin" where, instead of conveying stormwater south and safely away from Holden-McDaniel, the water pools and can only dissipate by infiltrating into the ground. *Id.* When too much runoff is discharged to the ditch, it backs up and spills onto Holden-McDaniel's property from the west. *See id.*, at 2061, ¶ 16.

These two problems (inadequate sizing of the ponds and backwater from the BNSF ditch) both stem, in part, from a common design flaw — a myopic focus on the *rate* of stormwater discharge (measured in cubic feet per second, or "cfs") rather than on the total *volume* of discharge. In essence, the former is a measurement of how *fast* water leaves Gleneagle, while the latter is a measurement of how *much* water is released. As Mr. Holz explained, the rate of discharge is relevant primarily to the issue of erosion, a non-issue in this case. *See id.* at 2069–60, ¶ 13. Instead, total volume is the core issue affecting the capacity of the ponds and the BNSF ditch to accept Gleneagle's runoff, and should have been the driving factor in designing the system. *Id.*

But neither the city nor the Joint Venture ever assessed the impact of the total volume of Gleneagle's runoff on downstream facilities, including the ditch. *See* CP III:1197–98. Instead, they only considered the rate of discharge, measured in terms of matching "pre-development peak flow." *Id.* According to Mr. Holz, that mistake was fatal and represents a persistent "blind spot" that has plagued the design of Gleneagle since its inception:

> Instead of adhering to arbitrary design standards, the proponents of [Gleneagle] should have acknowledged reality. As the proponents and the city well knew (or should have known), the BNRR ditch did not have infinite capacity to accept higher peak flows and *greatly increased volume of runoff.* The proponent should have tailored its discharge to

> actual conditions in the BNRR ditch. Instead, they attempted to meet an arbitrary and inappropriate standard of "pre-development peak flow" (using now discredited methodology). *Discharge of "predevelopment peak flow" assumes that the discharge is to a stream or river with adequate capacity to absorb the increased duration and volume of peak flow. Clearly this project did not discharge to such a waterbody.*

Id. at 1198 (emphasis added).

The Joint Venture (and the city) used the wrong model for evaluating Gleneagle's runoff. The result: undersized detention ponds and the use of a low capacity ditch, and consequent flooding of Holden-McDaniel's property.

B. The Building Permit Lawsuit and the 1995 Flooding Lawsuit

In the mid-1990s, Joe Holden and Lee McDaniel expanded their operations with a new steel fabrication building on the northern half of their property. *See* CP V:2038, ¶ 6. They applied for and received permission from the City of Arlington. *Id.*, ¶ 7. As a pre-condition to obtaining the permit, Holden-McDaniel agreed to relocate the culvert leading from 67th Avenue to the BNSF Ditch (so that it would not be underneath the new building). *Id.*, ¶ 6.

But the city later demanded that Holden-McDaniel not only relocate the culvert, but also that they enlarge the diameter of the culvert to handle increased runoff from Gleneagle. *Id.*, ¶ 7. Holden-McDaniel

refused on the basis that the larger pipe would protrude above ground; create an obstruction across the entire width of the property; and seriously impede or prevent forklifts, semi-trucks, and other wheeled vehicles from using the site. *Id.* In essence, the larger culvert would have significantly degraded the utility of Holden-McDaniel's land. *Id.*

On May 5, 1995, Holden-McDaniel sued the city for withholding the building permit. The suit sought injunctive relief (issuance of the permit) and damages. We refer to that lawsuit — Snohomish County Cause No. 95-2-03498-3 — as the "building permit lawsuit." The complaint initiating that lawsuit may be found at CP III:1073–76.

A few days later, Holden-McDaniel sued the Gleneagle developers for trespass by water (owing to the repeated flooding of their land), and later amended its complaint to add tort claims against the city. *See* CP III:1078–81 (complaint); CP III:1093–97 (second amended complaint). We refer to that lawsuit — Snohomish County Cause No. 95-2-03599-8 — as the "1995 flooding lawsuit."

The two lawsuits were consolidated and, ultimately, the city issued Holden-McDaniel's building permit (without requiring Holden-McDaniel to destroy the value of its land with a large, protruding stormwater pipe). *See* CP III:1104–05; CP V:2039–40, ¶ 11. Issuance of the permit effectively resolved the core dispute in the building permit lawsuit.

But while Holden-McDaniel had (belatedly) received its building permit, the flooding of Holden-McDaniel's land was clearly far from over. Consequently, when the parties drafted a settlement agreement disposing of both suits, Holden-McDaniel expressly *reserved* its right to sue the city (and others) for future flood damages *except* to the extent such damages arose out of the conduct challenged in the building permit lawsuit (*i.e.*, the withholding of Holden-McDaniel's permit and replacement of the culvert under Holden-McDaniel's land). In particular, the parties' "Release of All Claims" provided:

> This Release *does not release any future claims* which the Plaintiff may have, whether asserting relief in the form of an injunction or other damages, against the City of Arlington, its agents, servants, successors, heirs, executors or administrators, or any other person, firm, corporation, association or partnership relating to the flooding on Plaintiff's property, *except to the extent said claims arise out of the conduct described in the Complaint and Amended Complaints in Snohomish County Cause No. 95-2-03498-3* [the building permit lawsuit].

CP III:1107 (first paragraph; emphasis added).

As part of the settlement, the city agreed to pay Holden-McDaniel $750,000. *Id.* This figure represented *half* of Holden-McDaniel's claimed damages in the building permit lawsuit, which flowed from the loss in productivity and increased costs associated with the city's decision to withhold Holden-McDaniel's permit. *See* CP I:389, ¶¶ 4–7 (Declaration of

Joe Holden). In consideration for that compromise — and as stated in the release of all claims — Holden-McDaniel expressly reserved its right to bring future claims for flood damage. CP III:1107.

On January 3, 2000, the consolidated lawsuits were dismissed *without* prejudice. *See* CP III:1111.

C. Current Status of the Flooding Problem

The building permit lawsuit and the 1995 flooding lawsuit came in the midst of a programmatic effort by the City of Arlington to solve Gleneagle's many persistent stormwater problems. The history of that effort explains Holden-McDaniel's willingness to settle the lawsuits for half its claimed damages in the building permit lawsuit. *See* CP I:390–91, ¶¶ 12–15. It also reflects the tangled relationship between the city, the Joint Venture, and BNSF.

The city's effort to solve Gleneagle's stormwater problems began with the document that spelled out the Joint Venture's development obligations — the "Rezone Contract" executed in 1991. According to that document, the Joint Venture would fund, and the city would carry out, improvements to mitigate Gleneagle's downstream impacts. *See* CP III:1328–29, ¶ 19; CP I:390–91, ¶¶ 12–14.[4] The city's effort continued

[4] *See also* CP II:603 (deposition testimony of George Brown, President of the Arlington Country Club and one of the Joint Venture's 30(b)(6) deponents, lines 19–21).

with its decision to lease the BNSF ditch for disposal of Gleneagle's stormwater (and re-lease it in 1998 after the initial lease was cancelled). *See* CP VII:2615–18 (lease dated February 1985); CP II:769–77 (pipeline license dated Dec. 2, 1998). And it continued further with the city's actions that formed the heart of the building permit lawsuit — the unlawful withholding of Holden-McDaniel's building permit and attempt to force Holden-McDaniel to accept more runoff from Gleneagle.

Following settlement and dismissal of the building permit lawsuit and the 1995 flooding lawsuit — and consistent with the parties' agreement and understanding that the city would remain "on the hook" for future flood damage — the city substantially modified the stormwater system serving Gleneagle. This project, known as the 67th Avenue "Phase II" project, involved a substantial re-grading of 67th Avenue; the installation of curbs and gutters; and, relevant here, the installation of a new detention pond (the "triangle pond") near the northwest corner of Gleneagle. *See* CP V:2059, ¶ 10; CP I:391, ¶ 14; CP II:667 (deposition testimony of Lee McDaniel, lines 13–24). To reduce the flow of runoff from Gleneagle across the Holden McDaniel property, the city also

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According to the city's enforcement officer and 30(b)(6) deponent, the city's decision to take on responsibility for Gleneagle's stormwater impacts stands in stark contrast to its established policy that developers — not the city — must compensate for adverse downstream impacts. *See* CP II:606–607 (deposition testimony of Marc Hayes).

installed a pipe connecting Pond W1 to the new triangle pond. That pipe split the flow from Gleneagle in two directions, allowing some runoff to continue across Holden-McDaniel's property to the BNSF ditch, and the remainder going to the new triangle pond. CP III:1195, 1202.

Fatally, however, the city's project also involved lowering 67th Avenue in front of Holden-McDaniel's property and the installation of catch basins there. As a result, when the triangle pond fills up, stormwater from Gleneagle runs backwards in the pipes beneath 67th Avenue and erupts out of the catch basins directly in front of Holden-McDaniel's driveway. *Id.* at 1200. *See also* CP V:2063, ¶ 22. The water then floods Holden-McDaniel's property from that new, lower location along 67th Avenue. CP V:2041, ¶ 15.

In addition, the city's triangle pond failed to comply with the Washington Department of Ecology's 1992 Stormwater Manual. *See* CP I:73, ¶5 (Declaration of Thomas W. Holz in Support of Plaintiff's Response to City's Motion for Summary Judgment). In particular, the city failed to equip the pond with an overflow path. CP I:74, ¶ 6. As a result, when the triangle pond fills beyond capacity, the excess water backs up onto Holden-McDaniel's property instead of being discharged to some other, safer location. *Id.*, ¶ 7.

There is no doubt that the current configuration and design of the various stormwater facilities serving Gleneagle (including the city's triangle pond) cause or contribute to flooding on 67th Avenue and Holden-McDaniel's property. Indeed, the defendants' primary stormwater expert, Bruce Dodds, explains that

> . . . the reason flooding occurs on 67th is a combination of inadequate infiltration capacity and storage volume in the regional storage/detention/infiltration facility, the catch basin grate elevations near the north end of the [Holden-McDaniel] fabrication building, the configuration of structures in both ponds W1 and W2 and the distribution of flows leaving those ponds. . .

CP IV:1601. Experts retained by the defendants have also opined that, based on the current configuration of the various stormwater facilities, flooding may be expected to recur "approximately once every ten (10) years on average." CP II:528. In short, the flooding persisted despite the many failed attempts to cure the problem and, by the defendants' own admissions, will continue for the foreseeable future.

D. Proceedings Below.

On January 5, 2011, Holden-McDaniel initiated the current lawsuit. Among other claims, the complaint alleged negligence, trespass, and nuisance against the City of Arlington, the Joint Venture, and others involved in Gleneagle's development. *See generally* CP V:2123–32. The

lawsuit was filed less than two years after a major flood event in 2009, which precipitated BlueScope's decision to break its lease with Holden-McDaniel. *See* CP 669–671: CP II:693. Later, on May 10, 2012, Holden-McDaniel added tort claims against the BNSF Railway Company, which had agreed to accept Gleneagle's stormwater in the ditch adjacent to the railroad tracks. *See* CP V:2065–77.

On April 24, 2015, and following four years of extensive discovery, expert analysis, and negotiations, the superior court issued its Omnibus Order resolving the parties' cross-motions for summary judgment. *See generally* CP I:41–62.

First, the court held that Holden-McDaniel is precluded from challenging any aspects of the negligent design of Gleneagle that predate the complaint in the prior building permit lawsuit. *See id.*, at 56–58. These aspects include the design and construction of Pond W1 and the first phase of Gleneagle known as "Sector I." *See id.*, at 56. To reach that conclusion, the court purported to interpret the parties' 1998 Release of All Claims, which, on its face, only precludes Holden-McDaniel from re-litigating the claims at the heart of the building permit lawsuit (e.g., the illegal withholding of Holden-McDaniel's permit). In doing so, the court ignored the plain language and context of the Release of All Claims.

Second, the court held that the Release of All Claims has res judicata effect, precluding any claim challenging aspects of Gleneagle that predate November 24, 1998 (the date the release was signed), including Pond W2. *See* CP I:58–59. *See id.* In doing so, the court ignored the uncontested fact that no "final judgment on the merits" was entered in the prior lawsuits. Thus, a fundamental element of res judicata is lacking.

Third, the trial court held that Holden-McDaniel's damages claims are barred because the flooding has only gotten better since the parties settled the prior building permit lawsuit and the 1995 flooding lawsuit. *See* CP I:59–61. On this point, the court again misconstrued the parties Release of All Claims, but also fundamentally misunderstood the expert report of Dr. Malcolm Leytham, one of Holden-McDaniel's stormwater experts. According to Dr. Leytham, the runoff from Gleneagle has increased at every phase of the project's development. To the extent that it has lessened, that is only because Holden-McDaniel was able to mitigate a portion of its damages.

Finally, the court dismissed Holden-McDaniel's tort claims for intentional trespass and nuisance (CP I:54–55); it dismissed Holden-McDaniel's claims against BNSF (CP I:55); it excluded a letter from BlueScope explaining why BlueScospe broke its lease (CP II:693–96); and it applied the wrong statute of limitations (CP I:55).

On May 18, 2015, the court denied Holden-McDaniel's motion for reconsideration. *See* CP I:34–35. Later, the court dismissed the lawsuit with prejudice. *See* CP I:38–40; CP I:36–37.

V. ARGUMENT

A. Summary Judgment Standard

Summary Judgment is appropriate when there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). On appeal, the appellate court sits in the same position as the trial court and conducts its review *de novo*. *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).

The usual summary judgment standards apply. This Court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Wilson*, 98 Wn.2d at 437. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.*

B. The Trial Court Erred in Granting Summary Judgment Against Holden-McDaniel on the Affirmative Defense of Release.

The superior court erred, first, in its interpretation of the Release of All Claims that resolved the building permit lawsuit and the 1995 flooding lawsuit. *See* CP I:56–58 (Conclusion of Law No. XVIII). The court

interpreted the release in a manner that precludes Holden-McDaniel from asserting claims relating to Pond W1 and the first phase of Gleneagle, in violation of the plain terms of the agreement and its context.

The interpretation of a contract is an issue of fact, which this Court must consider in light of the context surrounding its creation. *See, e.g., Columbia Asset Recovery Group, LLC v. Kelly*, 177 Wn. App. 475, 484, 312 P.3d 687 (2013) ("Determining what the parties to a contract intended is generally a question of fact"). In turn, Washington courts have adopted Section 212 of the Restatement (Second) of Contracts. *See Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Section 212 of the Restatement provides, in part:

> A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence *or on a choice among reasonable inferences to be drawn from extrinsic evidence.* Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

Restatement (Second) of Contracts, § 212(2) (1981) (emphasis added). As with any other contract, the Release of All Claims must be interpreted under these rules. *Stottlemyre v. Reed*, 35 Wn. App. 169, 655 P.2d 1383 (1983) ("releases and compromise and settlement agreements are considered to be contracts, their construction is governed by the legal principles applicable

to contracts"). If there are doubts about the meaning of the release based on extrinsic evidence, they must be resolved by the jury — not the court.

Here, the Release of All Claims expressly reserved Holden-McDaniel's right to bring future tort claims based on flood damage, "*except to the extent said claims arise out of the conduct described in the Complaint . . . in Snohomish County Cause No. 95-2-03498-3*" (the building permit lawsuit). CP III:1107. Under the plain language of this provision, if the claims in this case arise from the "conduct described" in the prior building permit complaint (CP V:2065), then the claims are barred. But if the current claims do not arise from the conduct described in that document, they are not barred.

Looking only at the complaint in the building permit lawsuit (as the release requires), it is clear that Holden-McDaniel's tort claims are not barred. The claims in this case allege property damage from the repeated flooding of Holden-McDaniel's land. *See* CP V:2065–2077. In contrast, the building permit complaint alleged economic damage arising from the City of Arlington's wrongful withholding of Holden-McDaniel's building permit (no trespass or nuisance was alleged). *See* CP III:1078–97. For this reason alone, the trial court erred in holding that the Release of All Claims precludes Holden-McDaniel from bringing its current tort claims.

The superior court side-stepped the plain language of the Release of All Claims, however, by looking at *extrinsic* evidence: *i.e.,* a document *other than the complaint* in the building permit lawsuit. Specifically, the court looked to a second document (the "Claim for Damages") which Holden-McDaniel filed as a separate docket entry in the building permit lawsuit. An official copy of that document may be found at CP II:660–61.

Unlike the complaint in the building permit lawsuit, the Claim for Damages contained tort allegations against the City of Arlington for the repeated flooding of Holden-McDaniel's land. *See id.* Thus, the superior court reasoned, because the Claim for Damages was filed with the court in the building permit lawsuit, and later, allegedly, stapled to the copy of the complaint that was served on the city (a fact that the city alleged only *after* the summary judgment hearing below[5]), "the Claim for Damages introduced flooding allegations to the [building permit] complaint." CP I:57, ¶ 2. For several reasons, the court's reasoning is erroneous.

1. The superior court misconstrued the context surrounding the claim for damages.

First, the superior court erred in its analysis of the context and import of the Claim for Damages. There is substantial evidence that the Claim for damages was *not* part of the complaint in the building permit

[5] *See* CP I:63–65 (Second Supplemental Declaration of Steven J. Peiffle).

lawsuit (and, by extension, did not "introduce flooding allegations" into that lawsuit). Rather, the Claim for Damages was filed for the sole purpose of providing notice to the City of Arlington of Holden-McDaniel's intent to allege tort claims against the city in the 1995 flooding lawsuit. In this way, the court misconstrued the Claim for Damages, but more fundamentally, because the court considered extrinsic evidence in construing the release, the court should not have granted summary judgment.

To understand the purpose of the Claim for Damages, it is necessary, first, to understand the timing of Holden-McDaniel's prior tort allegations against the city. As noted above, the complaint in the building permit lawsuit was filed on May 5, 1995. *See* CP III:1073. That complaint did not contain tort claims relating to the flooding of Holden-McDaniel's land. Instead, it alleged economic damages flowing from the city's unlawful withholding of Holden-McDaniel's building permit. *See* CP III:1075, ¶ VII. *See also* CP I:389, ¶ 6 (describing damages alleged in the Building Permit Lawsuit). That same day, Holden-McDaniel filed the Claim for Damages, alleging the city acted negligently in its review and approval of Gleneagle's stormwater infrastructure. *See* CP II:660–61.

Just over 60 days later, on July 7, 1995, Holden-McDaniel amended its complaint in the 1995 flooding lawsuit (originally naming

only private defendants, *see* CP III:1078–81) to add tort claims against the City of Arlington. *See* CP III:1093–97. Those new claims mirrored the allegations in the Claim for Damages — *i.e.*, that the city acted negligently in its review and approval of Gleneagle's stormwater infrastructure causing flood damage to Holden-McDaniel.[6]

Holden-McDaniel's filing of the claim notice (the Claim for Damages) more than 60 days prior to amending its complaint in the 1995 flooding lawsuit points to a singular conclusion. Rather introduce tort claims into the building permit lawsuit (as the superior court construed it), the Claim for Damages served only to satisfy the statutory prerequisite for notice prior to amending the 1995 flooding lawsuit to add tort claims against the city. In other words, the Claim for Damages satisfied the requirements of then-RCW 4.96.020, Washington's notice-of-claim statute for municipal tort claims. That statute required Holden-McDaniel to first present its tort claims against the city — in a "claim for damages" — at least 60 days before formally alleging those claims in the 1995 flooding lawsuit.[7]

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[6] *Compare, e.g.,* CP II:660, ¶ 1 (Claim for Damages: asserting the city "negligently approved the storm water collection, retention and discharge system for the Eagle Ridge [Gleneagle] Development") *with* CP III:1096, ¶ 13 (Second Amended Complaint in the 1995 flooding lawsuit; alleging the city "negligently permitted and approved the storm water retention and drainage system on the property of Woodland Ridge").

[7] In 1995, RCW 4.96.020 provided, in part:

> (1) The provisions of this section apply to claims for damages against all local governmental entities.

The Release of All Claims states that Holden-McDaniel is releasing claims alleged in the *complaint* in the building permit lawsuit. *See* CP III:1107. Only if the Claim for Damages is viewed as part of the complaint in the building permit lawsuit would there be any basis for concluding that the release precludes Holden-McDaniel from asserting its current tort claims. The foregoing demonstrates that the superior erred in its conclusion and, in particular, in granting summary judgment based on its interpretation of extrinsic evidence.

The true purpose of the Claim for Damages is further buttressed by its language and content, which track the requirements of then-RCW 4.96.020. For example, the Claim for Damages contains a precise, itemized list of money damages as required by then-RCW 4.96.020(3), an element that has never been required by the Civil Rules governing complaints. The

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> (2) All claims for damages against any such entity for damages shall be presented to and filed with the governing body thereof within the applicable period of limitations within which an action must be commenced.
> (3) All claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place of the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose. . . .
> (4) No action shall be commenced against any local governmental entity for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. . . .

Laws of 1993, ch. 449, § 3 (underline and strikethrough text omitted).

Claim for Damages identifies the claimant's principal place of business *for the past six months* — a unique requirement of then-RCW 4.96.020. Indeed, even the name of the document ("*Claim for Damages*") tracks the statutory language at then-RCW 4.96.020(1) ("The provisions of this section apply to *claims for damages* against all local governmental entities") (emphasis added). In short, the plain language of the Claim for Damages supports the view that, rather than inject new claims into the building permit lawsuit, it merely satisfied the requirements of Washington's notice-of-claim statute and notified the city of Holden-McDaniel's claims in the 1995 flooding lawsuit.

Finally, the following contextual elements support the reasonable inference that the Claim for Damages did not introduce tort claims into the complaint initiating the building permit lawsuit:

- The Claim for Damages and complaint were filed as separate docket entries, indicating that they are two separate documents. *Compare* CP III:1073 *with* CP II:660.[8]

[8] Below, the superior court premised its analysis on a second copy of the Claim for Damages that was allegedly stapled to the copy of the complaint that was served on the city in 1995. *See* CP I:57, ¶ 2. But as the Civil Rules provide, a lawsuit may be initiated by either *filing or serving* the complaint. *See* CR 3. Here, the City of Arlington failed to offer any evidence that its copy of the complaint (allegedly stapled to the Claim for Damages) initiated the building permit lawsuit (i.e., that the complaint was served before it was filed). Accordingly, the superior court had no legal basis for concluding (implicitly) that the city's stapled copy of the Claim for Damages is the official copy governing construction of the parties 1998 Release of All Claims (i.e., that the city's

- Had the Claim for Damages introduced tort claims into the building permit complaint, it would have been redundant for Holden-McDaniel to later add *those same claims* against the city in its amended complaint in the 1995 flooding lawsuit;

- If the claim for damages introduced tort claims into the complaint, Holden-McDaniel would have *violated* then-RCW 4.96.020 (i.e., by asserting those claims on May 5, 1995 — the date of the Claim for Damages itself — *without* the requisite 60 days' notice);

- Finally, Holden-McDaniel never sought flood damages in the building permit lawsuit. *See* CP I:397–98 (Holden-McDaniel's mediation brief in the Building Permit Lawsuit; describing elements of damage claims); CP 402–03 (interrogatory answers in the building permit lawsuit; same). If the Claim for Damages introduced tort claims into the building permit lawsuit, one would have expected Holden-McDaniel to also seek damages or other relief relating to those claims. The absence of such damage claims speaks volumes.

Below, the superior court initially rejected Holden-McDaniel's view of the Claim for Damages on the erroneous ground that Holden-McDaniel added the City of Arlington to the 1995 flooding lawsuit less than 60 days

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version is the "complaint" referenced in the settlement agreement).

after filing the Claim for Damages (in apparent violation of then-RCW 4.96.020).[9] The court later retracted this finding in its order on reconsideration, acknowledging, instead, that Holden-McDaniel "waited 60 days before adding the City to the flooding complaint in 1995, *in keeping with RCW 4.96.020.*" CP I:35 (emphasis added). In this way, the court tacitly acknowledged that the Claim for Damages was filed to comply with Washington's notice-of-claim statute, RCW 4.96.020.

But the court's failure to also recognize, in keeping with RCW 4.96.020, that the Claim for Damages did not introduce tort claims to the building permit lawsuit, is reversible error. At the very least, that question should have been put to the jury. As documents *extrinsic* to the Release of All Claims, any and all reasonable inferences to be drawn from the Claim for Damages, and the complaints underlying the prior lawsuits, must be resolved by the trier of fact. *See Berg*, 115 Wn.2d at 667 ("'A question of interpretation . . . is to be determined by the trier of fact if it depends on . . . *a choice among reasonable inferences to be drawn from extrinsic*

[9] *See* CP I:57, ¶ 3 (holding that "[t]he plaintiff has argued that the affixed Claim for Damages was not incorporated into the 498-3 cause because it was only intended to operate as notice to the municipality under RCW 4.96.020 of the plaintiff's intent to file a suit sounding in tort 60 days later. *However, the plaintiff actually filed its lawsuit alleging the very flooding that formed the basis of the aforementioned Claim for Damages only five days later* in Cause number 95-2-03599-8 (599-8 cause number), *rather than wait 60 days, so this argument is unpersuasive*") (emphasis added).

evidence.'") (quoting Restatement (Second) of Contracts, § 212(2)). By taking these issues away from the jury, the superior court erred.[10]

2. Civil Rule 10(c) demonstrates that the Claim for Damages is not part of the complaint underlying the building permit lawsuit.

The superior court's interpretation of the Release of All Claims is also inconsistent with Civil Rule 10(c), which details the circumstances under which a secondary document (here, the Claim for Damages) may be deemed to be part of a pleading. That rule provides:

> Adoption by Reverence; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. *A copy of*

[10] In support of its holding on the affirmative defense of release, the superior court also reasoned that "the allegations contained in the attached Claim for Damages tends [*sic*] to explain why a release for claims inside a permit complaint settlement would require an exception for flooding in the first place." CP II:57, ¶ 4. But there is a far more ordinary explanation than the court's erroneous reasoning that Holden-McDaniel brought tort claims in the building permit lawsuit (by filing the claim for damages) and then, inexplicably, amended it complaint in the 1995 flooding lawsuit 62 days later to add those very same claims against the city. As we discussed above, the building permit lawsuit involved the city's attempt to force Holden-McDaniel to install an over-sized drainage pipe across its property. *See* Section IV.B, *supra*. The city ultimately relented and allowed Holden-McDaniel to proceed with its original plan of simply relocating its existing, smaller pipe. *Id.* But in return, the city required Holden-McDaniel to sign a hold-harmless agreement and was plainly fearful that relocating the pipe would give rise to future tort claims based on the repeated flooding of Holden-McDaniel's land. *See* CP III:1364. Further, where the original hold-harmless agreement applied only to future *damage* claims against the city, *see id.*, the 1998 Release of All Claims effectively extended that agreement to future claims for injunctive relief, too. *See* CP II:660. The release also extended the hold-harmless agreement to claims against the city's "agents, servants, heirs, executors or administrators, or any other person, firm, corporation, association or partnership." *Id.* In other words, these extensions of the hold-harmless agreement (not the Claim for Damages) explain why the release prohibits Holden-McDaniel from pursuing future "flooding" claims arising from the dispute in the building permit lawsuit. As above, this competing view of the Release of All Claims should have been put to the jury. *Berg*, 115 Wn.2d at 667.

> *any written instrument which is an exhibit to a pleading is a part thereof for all purposes.*

CR 10(c) (emphasis added). To our knowledge, CR 10(c) is the only provision of Washington codified law that could have supported the superior court's holding.

But CR 10(c) proves just the opposite — the Claim for Damages *was not* part of the complaint in the building permit lawsuit. Not only was the Claim for Damages not labeled as an "exhibit" to the complaint, the phrase "written instrument," as used in CR 10(c), has "a specific legal meaning: 'A written legal document *that defines rights, duties, entitlements, or liabilities*, such as a contract, will, promissory note, or share certificate.'" *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 204, 289 P.3d 638 (2012) (emphasis added; quoting Black's Law Dictionary at 869 (9th ed. 2009)). Here, unlike a contract, will, or promissory note, the Claim for Damages did not define or create a right, duty, or entitlement. Instead, it *alleged the violation* of a right (something yet to be proved). In this way, the Claim for Damages is not a "written instrument" and, absent the support CR 10(c), the court's ruling has no basis in law.

This view is further supported by case law interpreting Rule 10(c) of the Federal Rules of Civil Procedure, on which CR 10(c) was based.[11] For

[11] Like CR 10(c), Rule 10(c) of the Federal Rules of Civil Procedure provides, in

example, as the Second Circuit explained in *Rose v. Bartle* (a civil rights case cited approvingly by the Supreme Court in *P.E. Systems*, *supra*), the purpose of Rule 10(c) is to allow incorporation of documents that *support* a party's pleading. [12] The purpose of Rule 10(c) is not to allow incorporation of documents that assert *wholly new* allegations.

Indeed, in one recent decision from the United States District Court for the District of Arizona, the court rejected the very reasoning underlying the superior court's order. *See Foust v. City of Page*, 2014 WL 3340916 (D. Ariz., July 8, 2014). In *Foust*, the plaintiffs filed a civil rights lawsuit against the City of Page, alleging the wrongful killing of their husband and father. On summary judgment, the court dismissed the lawsuit on the basis that the only plaintiff named *in the complaint* was the decedent's estate. *See generally Foust v. City of Page*, 2014 WL 1791250 (D. Ariz. May 6, 2014).

The mother and children then moved for reconsideration, arguing that the claim notice attached to the complaint did allege injury specific to them. *See Faust*, 2014 WL 3340916 at *1. The court rejected their argument.

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part, that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c).

[12] *See Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3rd Cir. 1989) ("The case law demonstrates. . . that the types of exhibits incorporated within the pleadings by Rule 10(c) consist largely of documentary evidence, specifically, notes, and other "writing[s] *on which [a party's] action or defense is based.*") (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1327; emphasis added, brackets in original). *See also Hoak v. Idaho*, 2013 WL 5410108, *4 (D. Idaho Sept. 25, 2013) ("A 'written instrument' is a document *essential to the elements of the cause of action* in the Complaint, such as a copy of a contract or negotiable instrument at issue") (emphasis added).

In the process, the court explained why a "notice of claim" is not a "written instrument" for purposes of Rule 10(c):

> "A 'written instrument' within the meaning of Rule 10(c) 'is a document evidencing legal rights or duties or giving formal expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement.'" *DeMarco v. DepoTech Corp.*, 149 F.Supp.2d 1212, 1220 (S.D.Cal.2001) (citing *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108, 1115 (W.D.N.Y.1996); *Black's Law Dictionary* 801, 1612 (6th ed.1990)). The notice of claim was a letter sent to Defendants in compliance with A.R.S. § 12–821.01(a), an Arizona statute requiring advance written notice that a person intends to assert a claim against a public entity or public employee. *The notice of claim is intended to put the recipient on notice of the claims to be asserted. It does not memorialize legal rights or duties or give formal expression to a legal act or agreement, and is unlike executed agreements, contracts, deeds, leases, or policies.* Plaintiffs have cited no case law that would indicate that a notice of claim fits the description of a written instrument under Rule 10(c), and the case law Plaintiff does cite involves documents that clearly fit the definition of written instrument. *See, e.g., Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d 426, 429–30 (9th Cir. 1978) (considering the contents of a promissory note attached to a complaint).

Id., 2014 WL 3340916 at *2 (emphasis added).

Here, far from *supporting* the claims in the building permit complaint, the Claim for Damages asserted wholly new tort claims that are not asserted in the Complaint itself. (The superior court acknowledged this

fact in its Omnibus Order.[13]) Nor did the Claim for Damages define, create, or memorialize any rights or duties. Rather, it gave notice of *future* claims that Holden-McDaniel brought 62 days later in the flooding lawsuit. Simply put, not only did the superior court misconstrue the context surrounding the Claim for Damages (i.e., by failing to recognize its status under Washington's notice-of-claims statute), there is no basis in the Civil Rules for its ruling that the Claim for Damages was (as a matter of law) part of the complaint in the building permit lawsuit. Its ruling on the issue of release must be reversed.

C. The Trial Court Erred in Its Ruling on Res Judicata — No "Final Judgment on the Merits" Was Issued in the Prior Lawsuits.

In addition to holding that the Claim for Damages was part of the complaint in the building permit lawsuit, the superior court also held that the Release of All Claims gives rise to res judicata. Specifically, the court held that the release bars all claims that could have been brought before the release was signed on November 24, 1998 (regardless of whether those claims were asserted in either of the prior lawsuits). *See* CP I:58 (Conclusion of Law No. XIX). On this basis, the court held that Holden-McDaniel may not challenge the design of pond W2. *See* CP I:59, ¶ 2.

[13] *See* CP I:57, ¶ 2 ("The Claim for Damages alleged flooding. Otherwise, the 498-3 cause number [the building permit lawsuit] presented a claim alleging wrongful denial of a building permit").

But is black-letter law that res judicata requires a final judgment on the merits. *See, e.g., Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 933 P.3d 108 (2004) ("The threshold requirement of res judicata is a final judgment on the merits in the prior suit."); *Muma v. Muma,* 115 Wn. App. 1, 6, 60 P.3d 592 (2002) ("The purpose of res judicata is to ensure the finality of judgments"). In turn, while a dismissal "with prejudice" is a final decision on the merits for purposes of res judicata, a dismissal "without prejudice" is not. *See, e.g., Bates v. Drake*, 28 Wash. 447, 454, 68 P. 961 (1902) ("[a] judgment of dismissal of an action without prejudice is not a bar to another action between the same parties for the same cause of action"); *Zarbell v. Bank of America Nat. Trust and Sav. Ass'n*, 52 Wn.2d 549, 554, 327 P.2d 436 (1958) ("A dismissal without prejudice is not res judicata"). In essence, res judicata requires (1) a judgment, and (2) that the judgment be "with prejudice."

Here, the 1998 Release of All Claims simply cannot give rise to res judicata. First, it is beyond dispute that the release is not a "judgment." Thus, the first element of res judicata is lacking. Second, the final order disposing of the prior lawsuits was not "on the merits." As discussed above, those lawsuits were dismissed on January 3, 2000 *without prejudice*. *See* CP III:1111. For both of these reasons, the superior court erred as a matter of law and its ruling on the affirmative defense of res judicata must be reversed.

In support of its holding, the superior court cited a single case — *Pederson v. Potter*, 103 Wn. App. 62, 11 P.3d 833 (2001) — which addressed whether a "confession of judgment" may give rise to res judicata. *See* CP I:19. Quoting *Pederson*, the court provided the following rationale for its holding:

> "In order that a judgment or decree should be on the merits. . . it is sufficient that the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases." *Pederson v. Potter*, 103 Wn. App. 62, 70, 11 P.3d 833 (2000). . . . The Release of All Claims signed by the plaintiff operates in the same way as the Confession of Judgment signed by the plaintiff in *Pederson*. Plaintiff could have litigated the lawsuit but chose to exchange their claims for money instead of seeking a judicial determination.

CP I:22–23, ¶ 1.

But *Pederson* does not support the superior court's ruling. Consistent with the established law of res judicata, the *Pederson* court addressed *two* issues in its analysis. First, it addressed the predicate issue of whether a confession of judgment is a "judgment":

> No case deals precisely with whether a confession of judgment is a final judgment for the purposes of res judicata. But there are cases involving 'consent judgments.' A confession of judgment requires the consent of both parties to the judgment. . . . Because the confession of judgment *is a type of consent judgment*, the cases dealing with consent *judgments* are persuasive.

See Pederson, 103 Wn. App. at 68. This portion of the *Pederson* opinion is notably absent from the superior court's opinion.

After the *Pederson* court resolved the predicate issue of whether there was a "judgment," the court went on to hold that the judgment was "on the merits" for the reasons quoted in the superior court's opinion. *See Pederson*, 103 Wn. App. at 70. In essence, *Pederson* held that the judgment was "on the merits" because the plaintiff chose to abandon his case, and sign the judgment, rather than continue to litigate. *See id.*

In this case, the superior court addressed the second issue (whether the Release of All Claims was "on the merits"), but failed to ask the threshold question — was the release a judgment? It was not. The release was not incorporated into a consent decree. It was followed by an order dismissing the case "without prejudice." And contrary to the court's holding, the doctrine of res judicata cannot be used to enlarge the scope of the release beyond the plain terms of that agreement. *See Stottlemyre*, 35 Wn. App. at 655 ("releases and compromise and settlement agreements are considered to be contracts, *their construction is governed by the legal principles applicable to contracts*") (emphasis added). The release is a contract, not a judgment, and the court's ruling on res judicata must be reversed.

D. The Trial Court Erred in Its Ruling on Damages

The superior court erred in its ruling on damages. *See* CP 23–25 (Conclusion of Law No. XX). Based on the report of Dr. Malcolm Leytham, one of Holden-McDaniel's stormwater experts, the court held that the flooding of Holden-McDaniel's property has only gotten better (*i.e.*, less frequent) since the 1995 building permit lawsuit was filed. *See* CP I:61, ¶¶ 4, 5. This, together with its erroneous view of the Release of All Claims, led to the dismissal of Holden-McDaniel's damage claims in their totality.

The heart of the superior court's ruling on this issue is contained in the following excerpt:

> According to the plaintiff's expert, Malcolm Leytham, the development of Sector I, together with the construction of [Pond] W-1, resulted in the plaintiff's being flooded every third year instead of every twenty-five years. *It was for this harm that the plaintiff was paid $750,000 pursuant to the 1998 settlement.* According to the Release of All Claims, the plaintiff has no claim against the City or anyone else for flooding damage *except as to post-1995 conduct that resulted in more flooding than that for which the plaintiff received compensation in 1998.*

CP I:60, ¶ 1. The court went on to hold (as a matter of law) that the installation of pond W2 and the triangle pond benefitted Holden-McDaniel by reducing the frequency of flooding below the level experienced in 1995. *See* CP I:61, ¶ 4 ("According to Plaintiff's expert . . . the conduct of

the City in the years immediately following the settlement ameliorated the flooding"). On these bases, the court held that Holden-McDaniel has not suffered compensable injury. *See id.*

The court's ruling on damages rests on two fundamental misunderstandings. (Tellingly, no defendant advanced the court's stated rationale in their summary judgment papers.)

First, the court's ruling on damages is predicated on its earlier ruling on the affirmative defense of release — *i.e.*, that Holden-McDaniel gave up its right to sue for future flood damages when it signed the 1998 Release of All Claims. *See* CP 1:60, ¶ 1. But as explained in Section V.B, *supra*, that ruling must be reversed.

Second, the court fundamentally misunderstood Dr. Leytham's report, which may be found at CP III:1182–87. The report analyzes the frequency of flooding at four distinct stages of Gleneagle's development: *scenario 1*, prior to Gleneagle (with an estimate flood frequency of once every 20 to 30 years); *scenario 2*, with build-out of the first sector of Glenegale and pond W1 (resulting in a flood frequency of once every three years); *scenario 3*, with build-out of the remainder of Gleneagle and pond W2 (resulting in flooding every 15 years); and *scenario 4*, after construction of the city's triangle pond (with flooding every ten years). *See generally* III:1182–87. Here, the court attributed the decrease in

flooding between Dr. Leytham's second and third scenarios to the city. *See* CP I:61, ¶ 4. Reasoning further that the city had already compensated Holden-McDaniel for the harm occurring under Dr. Leytham's scenario 2 via the Release of All Claims, the court ruled that no further flooding under scenarios 3 or 4 is actionable. *See id.*

But in addition to being wrong about the Release of All Claims, a careful reading of Dr. Leytham's report indicates that it was mitigation efforts by *Holden-McDaniel* that reduced the frequency of flooding between scenarios 2 and 3. In particular, the graph appended to Dr. Leytham's report indicates that the rate of stormwater flowing out of Gleneagle (and across Holden-McDaniel's land) *increased* at every stage of its development, including between scenario 2 and scenario 3.[14] *See* CP III:1188. But between scenario's 2 and 3, Holden-McDaniel relocated the existing culvert under its property — and re-laid it at a steeper grade — resulting in an increased conveyance capacity for Gleneagle's runoff. *See* CP III:1185 (increased conveyance capacity from 13 to 22 cfs). In light of the ever-increasing discharge from Gleneagle, that mitigation *by Holden-*

[14] For example, the graph shows that in just under a 50-year storm, approximately 15 cfs would be discharged in the predevelopment condition (scenario 1); just under 35 cfs would be discharged with the build-out of sector 1 (scenario 2); and 40 cfs would be discharged with full build-out of the remainder of Gleneagle and pond W2 (scenario 3). *See* CP III:1188. *See also* CP III:1187 (first full paragraph; stating that Gleneagle's stormwater infrastructure, added in Scenario 3, resulted in *increased* discharge during events exceeding the 25-year storm).

McDaniel is the *only* factor mentioned in Dr. Leytham's report that could possibly explain the decrease in flooding between scenarios 2 and 3.

In all, Dr. Leytham's report does not indicate that the City of Arlington "ameliorated" the flooding problem. CP I:61, ¶ 4. Instead, his report indicates that Holden-McDaniel took it upon itself to mitigate its damages by reinstalling the culvert at a steeper grade, but flooding *attributable to the defendants* has increased at every stage of Gleneagle's development. Because the superior court's ruling on damages is premised on a misunderstanding of Dr. Leytham's report and on an erroneous view of the Release of All Claims, the ruling must be reversed.

E. The Trial Court Erred in Its Dismissal of Plaintiff's Intentional Tort Claims.

Holden-McDaniel's current tort claims sound in trespass and nuisance, both of which may be premised on intentional or negligent conduct. *See Phillips v. King Cy.,* 87 Wn. App. 468 (1997), *aff'd on other grounds* 136 Wn 2d. 946 (1998) (trespass); *Hostetler v. Ward*, 41 Wn. App. 343, 357, 704 P.2d 1193 (1985) (nuisance). Washington has long recognized the tort of trespass by water. *See Hedlund v. White*, 67 Wn. App. 409, 836 P.2d 250 (1992); *Buxel v. King County*, 60 Wn.2d 404, 374 P.2d 250 (1962). Moreover, when the elements of both trespass and nuisance are present, "the plaintiff may have his choice of one or the other, or may

proceed upon both." *Bradley v. Am. Smelting & Ref Co.*, 104 Wn.2d 677, 689, 709 P.2d 782 (1985).

The superior court dismissed Holden-McDaniel's intentional tort claims on the alleged basis that the city and Gleneagle developers did not intentionally flood Holden-McDaniel's land. *See* CP I:55 (Conclusion of Law No. VII). But because material facts were in dispute, the court erred in granting summary judgment.

A plaintiff may prove intent for purposes of an intentional tort by demonstrating that the defendant "desired" to bring about the result of his actions *or* that the results were "substantially certain" to occur:

> 'Intent, however, is *broader than a desire to bring about physical results.* It must extend not only to those consequences which are desired, *but also to those which the actor believes are substantially certain to follow from what he does.* . . . 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. *The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it.*'

Bradley, 104 Wn.2d at 683 (emphasis added; quoting Prosser, *Torts* § 8, at 31–32 (4th ed. 1971)). *See also id.* at 683–84 ("[I]ntent to trespass may also include an act that the actor undertakes realizing there is a *high probability*

of injury to others and yet the actor behaves with disregard of those likely consequences") (emphasis added).

Here, there was substantial evidence that the city and Gleneagle developers knew that their actions were "substantially certain" to result in flooding of Holden-McDaniel's property (or that there was a "high probability" of flooding). Indeed, when Gleneagle was developed, the city and developers knew that the discharge of stormwater would be *greater* than the culvert across Holden-McDaniel's property could bear.

For example, when the city provided the Joint Venture with discharge rates for Pond W2, it authorized the pond to discharge at a rate of up to 28 cfs. *See* CP IV:1577 (memo from Ed McMillan, Director of Public Works for the City of Arlington). This was *greater* than the known capacity of the culvert crossing Holden-McDaniel's property and the BNSF ditch.[15]

In turn, the city was presented with a plan by the Joint Venture's engineer to reduce the flow from Gleneagle to match that of the culvert — but the city declined. *See* CP II:780. In the hold-harmless agreement that Holden-McDaniel and the city signed in 1995, discussed *infra* at note 10, the

[15] *See, e.g.,* CP III:1378, 1382 (Drainage Report for Pond W2 at Gleneagle; discussing flow of water across Holden-McDaniel's property at rates greater than the culvert across the property could handle); CP IV:1706 (letter report from Triad Associates to representatives of the Joint Venture; noting that portions of the drainage system downstream from Gleneagle have a maximum infiltration capacity of 7 cfs). *See also* CP IV:1740–42 (infiltration analysis of BNSF ditch by Terra Associates; noting limitations); CP IV:1593 (report of Bruce Dodds; summarizing limited ability of BNSF to infiltrate Gleneagle's stormwater).

parties acknowledged that the culvert was insufficient to accommodate Gleneagle's stormwater. *See* CP III:1364. Indeed, the Gleneagle developers were warned early on — *by their own engineers* — that elimination of downstream flooding would likely require detention facilities large enough to swallow the golf course.[16]

The city and Joint Venture can hardly claim that having allowed *more* water to be discharged to Holden-McDaniel's property than the culvert and BNSF ditch could handle, they were not "substantially certain" that flooding would ensue. Because a material dispute of fact exists on the issue of intent, the superior court's dismissal of Holden-McDaniel's intentional trespass and nuisance claims must be reversed.

F. The Trial Court Erred in Dismissing Plaintiff's Claims Against BNSF.

The superior court also erred in dismissing Holden-McDaniel's tort claims against the BNSF Railway Company. *See* CP I:55 (Conclusion of Law No. XI).

As discussed in the declaration of Tom Holz, Holden-McDaniel's trespass and nuisance claims against BNSF flow from BNSF's failure to

[16] *See* CP III: 1706 (Memo from Jon Nelson to George Brown and Ross Adachi of the Joint Venture; stating, in part, that "As the developer, you are at risk for any downstream consequences of the drainage from Gleneagle. You can reduce those risks by making additional improvements to the downstream drainage system. Alternatively, the detention systems for the project could have been enlarged to only utilize the existing downstream capacity. *The size of the resulting detention facilities would have prohibited use of all of the golf course and decreased your lot count significantly.*") (emphasis added).

maintain the ditch on the west side of Holden-McDaniel's property. *See* CP V:2060–61, ¶¶ 14–16; CP V:2033–34, ¶ 23. The ditch is the only outlet for water flowing down the west slope of Gleneagle and across Holden-McDaniel's property. *See* CP V:2058, ¶ 9. The ditch has been leased twice by the City of Arlington for use as a stormwater disposal facility (with BNSF's consent). *See* CP *See* CP VII:2615–18; CP II:769–77. But the ditch has fallen into a state of disrepair. As a result, runoff in the ditch often backed up and flooded Holden-McDaniel's property — that is, until Holden-McDaniel built a berm in 2009 to stop the floodwaters. *See* CP V:2062, ¶ 18.

Here, the court dismissed Holden-McDaniel's claims against BNSF on two grounds. First, the court held that BNSF was served outside the limitations period. *See* CP I:55. Second, the court held that "BNSF owed no statutory or common law duty to accept water from upstream entities in its ditch." *Id.* Both rulings are in error.

1. The superior court erred in its ruling on the statute of limitations — BNSF failed to meet its burden and the harm is ongoing.

With respect to the statute of limitations, BNSF was served with Holden-McDaniel's amended complaint in May of 2012. *See* CP V:2036. And as the superior court notes in its opinion, the last time water entered Holden-McDaniel's property — from the BNSF ditch — was in of 2009.

CP I:55. On its face, this represents a potential violation of the three-year statute of limitations. *See* RCW 4.16.080(1).

But as BNSF noted in its motion for summary judgment, flooding from the BNSF ditch may have occurred as recently as "the fall of 2009" — *less* than three years before BNSF was served with the complaint. *See* CP V:2654 ("Other witness testimony in this case indicates that another flood event *from the BNSF ditch* may have occurred in the fall of 2009") (emphasis added). It is axiomatic that BNSF bears the burden of proof on this affirmative defense. *Fulle v. Boulevard Excavating, Inc.*, 20 Wn. App. 741, 743, 582 P.2d 566 (1978) ("The statute of limitations is an affirmative defense, and its elements must be proved by the party asserting it"). BNSF cannot meet its burden while, simultaneously, acknowledging the existence of floods within the limitations period.[17]

Even assuming, *arguendo*, that the last flood from the BNSF ditch occurred more than three years before BNSF was served with the complaint, the court's ruling must still be reversed. As discussed above, in 2009 Holden-McDaniel built a berm on its property to stop the ditch from overflowing. *See* CP V:2062, ¶ 18. In this way, Holden-McDaniel was

[17] Indeed, other harm occurring within the limitations period includes BlueScope's decision to break its lease, as a result of prior flooding, which occurred in 2012. *See* CP II:693. This harm falls squarely within the three-year limitations period predating Holden-McDaniel's amended complaint naming BNSF.

forced to dedicate its own property to eliminate the flooding and continues to be denied the reasonable use of its land.

Holden-McDaniel would like to have the full use and enjoyment of its property *for its own purposes*, not to remedy BNSF's failings. Simply because Holden-McDaniel has, figuratively, stuck its finger in the dike does not mean that it should be required to stand there with its finger in the dike for all time. The harm caused by BNSF's failure to maintain the ditch is ongoing and the claims against BNSF are timely.

2. The superior court erred in its alternative ruling dismissing BNSF — BNSF has a duty to maintain the ditch.

With respect to the superior court's second ruling — that BNSF "owed no . . . duty to accept water from upstream entities" — we agree. But the court's ruling misses the point. While BNSF did not *initially* have a duty to accept Gleneagle's stormwater, having voluntarily allowed the city and Gleneagle to use the ditch as a stormwater disposal facility, and having creating an artificial condition on its land, BNSF *assumed* a duty to maintain the ditch in good repair.

When a landowner allows an artificial condition to arise on its property, it has a duty to maintain its property to assure that the artificial condition does not cause unreasonable harm to neighbors:

> A possessor of land is subject to liability to others outside of the land for physical harm caused by the disrepair of a structure or other artificial condition thereon, if the exercise of reasonable care by the possessor or by any person to whom he entrusts the maintenance and repair thereof
>
> (a) would have disclosed the disrepair and the unreasonable risk involved therein, and
>
> (b) would have made it reasonably safe by repair or otherwise.

Restatement (Second) of Torts, § 365 (1965). Relevant here, the Restatement makes clear that the word "disrepair" includes "dilapidations caused by the usual forces of nature [and] by wear and tear, . . ." *Id.*, comment a. *See also id.*, § 364 (providing that a possessor of land may be liable for harm to others by a dangerous condition when "the condition is created by a third person with the possessor's consent or acquiescence while the land is in his possession. . .").

Washington authorities are in accord with the Restatement. For example, in *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998), King County allowed part of a drainage system for a private development to be constructed on county land. The county did not construct the drainage system, nor did it generate the stormwater that flowed into the system. But the county could nevertheless be held liable for damage to a neighbor's property when water spilled out of the system and flooded adjacent land. In the Court's words, "[t]he County acted as a direct participant *in allowing its*

land, or land over which it had control, to be used by the developer." *Phillips*, 136 Wn.2d at 967 (emphasis added). The Court concluded that "[i]f it is proven at trial that the County participated in creation of the problem, it may participate in the solution." *Id.*, at 968.

Similarly, in *Rothweiler v. Clark County*, 108 Wn. App. 91, 29 P.3d 758 (2001), the Court of Appeals held that a county may be liable for failure to maintain a public drainage. Having designed a drainage system (and allowed the public to use it) the county assumed "the duty to maintain the level of stormwater drainage it had developed in its stormwater drainage system. *This includes the duty to use reasonable care in inspecting the drainage pipes and keeping them clear from debris*." *Rothweiler*, 108 Wn. App. at 105 (emphasis added).

These Washington cases concern municipal action, not private action — but the distinction is without a difference. *Phillips*, 136 Wn.2d at 958 ("Generally, municipal rights and liabilities as to surface waters are the same as those of private landowners within the city"). Here, BNSF (a private entity) allowed the drainage ditch to be constructed on its land. *See* CP VII:2612. It contracted *twice* with the city of Arlington to accept Gleneagle's stormwater. *See* CP VII:2615–18; CP II:769–77. Subsequently, BNSF allowed the ditch to fall into disrepair, in violation of its duty to maintain the ditch. *See* CP V:2060–61, ¶¶ 14–16. Consistent with all of the authorities

above, the superior court erred in dismissing BNSF simply because it did not have a "duty to accept water from upstream entities." CP I:55.

G. The Superior Court Erred in Its Evidentiary Ruling on the BlueScope Letter.

Next, the superior court erred in its exclusion of Exhibit II to the Declaration of Bryan Telegin in Support of Plaintiff's Response to Defendants' Motions for Summary Judgment. *See* CP I:54 (Conclusion of Law No. III). That exhibit (which may be found at CP II:693–96) consists of a letter from BlueScope's counsel to counsel for Holden-McDaniel. It states that BlueScope broke its lease with Holden-McDaniel due to the ongoing flooding of the property. *See* CP II:693.

The superior court excluded the letter as hearsay. *See* CP I:54. This ruling is reviewed *de novo*. *See Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) ("'[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.'") (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

Here, the relevant exception to the hearsay rule is RCW 5.45.020, the business records exception:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of

> business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Where these elements are satisfied, the document is admissible. *Id.*

The letter was sent by BlueScope's counsel. *See* CP II:693. The letter communicates BlueScope's intent to withhold lease payments due to the flooding (thus, it was drafted *at the very same time* that the act in question occurred — *i.e.*, breaking the lease). *Id.* The letter was made in the ordinary course of the author's business (here, a law firm). *Id.* Finally, BlueScope's 30(b)(6) representative testified at his deposition that he was not aware of any other reason for BlueScope's decision to break the lease other than the reasons enumerated in the letter itself. *See* CP II:703 (lines 21–25). Under these circumstances, the exhibit should have been admitted as a business record pursuant RCW 5.45.020.

H. The Superior Court Erred in Its Ruling on the Statute of Limitations.

Finally, the court erred in its ruling that Holden-McDaniel may only seek damages for injuries sustained within two years prior to this lawsuit. *See* CP I:55 (Conclusion of Law No. IX). Below, Holden-McDaniel moved for summary judgment on the statute of limitations, arguing that the doctrine of continuing torts applies. *See* CP III:1227–29. *See also Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 126, 977

P.2d 1265 (1999) (applying doctrine). The court denied the motion in part, but agreed, in the alternative, that each flood is a separate tort. *See* CP I:55. On that basis, the court held (correctly) that Holden-McDaniel may seek damages for injuries sustained within the limitations period. *Id.*

But the limitations period for trespass (including intentional *and* negligent trespass) is *three* years. RCW 4.16.080(1); *see also Zimmer v. Stephenson*, 66 Wn.2d 477, 483, 403 P.2d 343 (1965) (applying three-year period to claim of negligent trespass). For this reason, the court's ruling on the statute of limitations should be reversed.

VI. CONCLUSION

In sum, the superior court misperceived the context and import of the Claim for Damages, and erred in taking a critical issue of extrinsic evidence away from the jury. The court's ruling on res judicata — premised on a settlement agreement that clearly is not a "judgment" — has no basis in the law. And the court fundamentally misunderstood the expert report of Dr. Leytham, Holden-McDaniel's stormwater expert. For these and other reasons discussed above, Holden-McDaniel respectfully requests reversal of Conclusions of Law Nos. III, VIII, XVIII, XI, XIX, IX, and XX of the superior court's memorandum and order on summary judgment.

DATED this 9th day of October, 2015.

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