No. 73528-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HOLDEN-McDANIEL PARTNERS, LLC,

Appellant,

vs.

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

Respondents.

BRIEF OF RESPONDENTS WOODLAND RIDGE JOINT VENTURE, KAJIMA DEVELOPMENT CORP., AND ARLINGTON COUNTRY CLUB, INC.

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I. INTRODUCTION

Water from natural forested lands that would become the Gleneagle Development historically flowed to and across Appellant Holden-McDaniel Partners, LLC's ("Holden-McDaniel's") property, causing flooding every 20-30 years. This was the condition of the property when Holden-McDaniel purchased it in 1986 and development of Gleneagle was underway. When the original developer went bankrupt, Woodland Ridge Joint Venture ("WRJV")[1] purchased the unconstructed portions of the partially-completed project in 1989, and negotiated a "Rezone Contract" with the City of Arlington (the "City"), under which it paid the City substantial sums for the specific purpose of upgrading the City's downstream drainage facilities to accommodate stormwater flows from Gleneagle. WRJV commissioned an extensive master drainage report and downstream analysis in 1995 as part of its effort to exceed Arlington's then-existing "25-year storm" design standard.

The downstream study determined an existing 36" drainage pipe under Holden-McDaniel's property was undersized and insufficient to handle even 25-year *pre-development* runoff from the Gleneagle site property without causing flooding. When the City approached Holden-

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[1] WRJV is comprised of two party defendants/respondents: Kajima Development and Arlington Country Club. For purposes of this appeal, all three entities are referenced as "WRJV."

McDaniel about upgrading its drainage capacity, however, Holden-McDaniel refused. Holden-McDaniel sued the City and WRJV claiming the Gleneagle development caused flooding to their property and that the City wrongfully conditioned the construction of Holden-McDaniel's new building on replacement of the undersized pipe. The lawsuit was eventually settled, a *written* prescriptive drainage easement was recorded, and the defendants were released. As part of that settlement, Holden-McDaniel promised to hold the City (and WRJV) harmless for any problems caused by its decision to not upgrade the stormwater conveyance capacity across its site.

Holden-McDaniel's current claims against WRJV are premised on a stormwater system that (1) WRJV designed to exceed the City standards, (2) was approved by the City, and (3) was installed prior to the 1998 settlement agreement which extinguished flooding claims related to that very same system. WRJV moved for summary judgment on the issues of *release* and *res judicata* accordingly. Contrary to Holden-McDaniel's assertions on appeal, clear Washington precedent *confirms* that "[a] compromise or settlement is *res judicata* of all matters relating to the subject matter of the dispute." *In re Phillips Estate,* 46 Wn.2d 1, 278 P.2d 627 (1955).

Moreover, Holden-McDaniel's primary expert determined that flooding is *less* frequent as a result of defendants' efforts since the last lawsuit. The trial court correctly determined that Holden-McDaniel is not damaged, as it is experiencing *less* flooding than that for which it was compensated in 1998. Holden-McDaniel's claims against WRJV have no merit. The trial court's rulings should be upheld.

II. ASSIGNMENTS OF ERROR

WRJV does not assign error to the trial court's Omnibus Order on Summary Judgment, to its Order Denying Holden-McDaniel's Motion for Reconsideration, or to its Dismissal with Prejudice. CP 41-62; CP 34-35; CP 36-37.

III. STATEMENT OF THE ISSUES

WRJV submits the following Statement of the Issues which more appropriately reflects the questions before this Court:

1. Did the trial court correctly dismiss Holden-McDaniel's claims under the doctrine of release, when Holden-McDaniel sued WRJV for flooding caused by the Gleneagle Development in 1995 and signed a Release of All Claims in 1998 *after* construction of WRJV's portion of the Gleneagle stormwater system was complete?

2. Did the trial court correctly determine that the 1998 Release of All Claims is *res judicata* as to all claims related to WRJV's pre-1998 actions?

3. Did the trial court correctly determine that Holden-McDaniel has no compensable claim for damages when flood frequency has only improved since to Holden-McDaniel's last lawsuit?

4. Did the trial court correctly determine that Holden-McDaniel's trespass and nuisance claims were duplicative of its negligence claim and subject to summary judgment dismissal?

5. Did the trial court correctly strike the "BlueScope attorney letter" as impermissible hearsay?

6. Did the trial court correctly apply the statute of limitations, rejecting Holden-McDaniel's "continuing tort" theory?

IV. STATEMENT OF THE CASE

A. WRJV PURCHASED THE GLENEAGLE DEVELOPMENT AFTER IT WAS PARTIALLY COMPLETE AND EXTENSIVELY INVESTIGATED THE DOWNSTREAM SYSTEM.

Water from the future Gleneagle development area flowed to and across Holden-McDaniel's property for *decades* before Holden-McDaniel purchased it. CP 1251-1254. Holden-McDaniel's expert, hydrologist Dr. Malcolm Leytham, testified that Holden-McDaniel's property flooded on a frequency of once every 20-30 years prior to Gleneagle's development. CP 854-855.[2] By 1976, a 36" diameter underground pipe had been installed to handle the flows from Gleneagle and 67th, although even then the pipe was undersized and incorrectly sloped. CP 1606-1607.

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[2] Holden-McDaniel does not dispute that "storm water received by the HCI property always flowed in that direction ... and has been a historic problem in that area." CP 1251-1254; *see also* CP 1590-1604 and CP 1559-1566. *See Wilber v. W. Properties,* 14 Wn. App. 169, 540 P.2d 470 (1975) (where it was uncontroverted that open ditch had been storm drainway for more than 30 years, court was justified in determining that ditch became "natural" channel as a matter of law). Historic photos show the HCI ditch existed prior to 1950. CP 1251-1254.

WRJV did not purchase and had nothing to do with the design of the first phase (Sector 1) of the Gleneagle Development, completed in the 1980's before the prior developer, Canus, went bankrupt. CP 1631. The storm water system for Sector 1 discharged to detention "pond W-1," located across the street from Holden-McDaniel's property,[3] from which water combined with natural, pre-developed WRJV flows to discharge through an existing 18" culvert under 67th and then flowed west across Holden-McDaniel's parcel through the aforementioned underground 36" pipe to a ditch running parallel and adjacent to the BNSF railroad tracks. CP 1590-1604; CP 1631. The water then flowed south and west through a 24" pipe under the tracks to disperse and infiltrate south in a ditch on the west side of the tracks. *Id.*

In 1989 WRJV, through one-half of the joint venture Gleneagle Country Club, purchased the undeveloped portions of Gleneagle upstream and separate from Sector 1. CP 1264-1286. In June, 1991, the City and WRJV entered into an amended Rezone Contract, which replaced the original rezone contract (and amendments thereto) between the City and the prior developer. CP 1310-1340. Under the new Rezone Contract, WRJV paid the City of Arlington a substantial sum to upgrade the City's

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[3] The storm water system for Sector 1, including W-1, was dedicated to the City long before WRJV purchased the remainder of the development. CP 1256.

downstream storm water system to accommodate the developed flows from the Gleneagle project:

> 19. Storm Drainage Impacts and Fees: It is understood and mutually agreed by the Applicant and the City that the direct impacts of the Gleneagle development on the storm drainage system of the City requires mitigation in excess of the site specific drainage improvements to be constructed or mitigated. In order to mitigate those impacts the Applicant agrees to pay to the City of Arlington an amount equal to $0.01 per square foot of all land located within the proposed development, excluding that portion of Sector I developed as of February 1, 1991.

CP 1328-1329.

Holden-McDaniel's assertion that WRJV "never properly assessed" the downstream system or the capacity of the BNSF ditch is factually baseless and demonstrably untrue. WRJV engineer Triad prepared a master drainage plan in May, 1994, and determined that the existing facilities *downstream* of 67th Avenue were insufficient to convey even *allowable* predevelopment flows from significant rainfall events. CP 1640-1709. Triad acknowledged the City of Arlington required storm water conveyance systems at that time to be designed to handle at least a "25-year storm"[4] which it calculated would generate approximately 35 cfs

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[4] In the mid-1990's, a "25-year storm event" or a "100-year storm event" was calculated using the Santa Barbara Urban Hydrograph ("SBUH") methodology, which incorporated the then-accepted 24-hour single event standard model. Engineers today use "continuous modeling methods," which generally produce lower allowable undeveloped outflow design rates and higher developed runoff rates than the SBUH single event method because the continuous models contemplate actual

(cubic feet per second) of runoff and more than 45 cfs for a 100-year event, using the then-existing SBUH methodology. CP 1712. Holden-McDaniel's stormwater engineer, Tom Holz, calculated the allowable pre-development flow for a 100-year storm to be 29 cfs under current, more conservative continuous modeling methods. CP 1590-1604; CP 1294-1295.

Triad's analysis of the Holden-McDaniel's 36" pipe revealed it could handle, at most, **15 cfs**, barely half of what Holz calculated to be the allowable 100-year flow, and *less* than half of the Triad-calculated 45 cfs. CP 1705-1709. Triad advised WRJV that the downstream system would need to be revised and it recommended that WRJV pay the additional cost to install an upgraded system across Holden-McDaniel's property capable of handling a "100-year storm" under the SBUH methodology.[5] **WRJV agreed to do this.** CP 1719.

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historical record rainfall events over multiple days as opposed to theoretical events lasting only 24 hours. At the time Triad conducted its work in the mid-1990's, however, continuous event modeling software was not available for Snohomish County or Washington State and the SBUH method was the accepted standard. CP 1582.

[5] Holden-McDaniel's expert Malcolm Leytham agrees that the generally accepted design standard in the 1980's-mid 1990's required that stormwater systems be designed to handle 10-year to 25-year storms under the single-event model. CP 851-853. **At the time Gleneagle was designed, Arlington City Code required engineers to design for a 25-year event.** CP 1831.

B. HOLDEN-MCDANIEL SUED AND RELEASED WRJV FOR FLOOD CLAIMS RELATED TO THE DEVELOPMENT OF GLENEAGLE.

On February 2, 1995, Triad wrote a letter to the City of Arlington suggesting that advancement of funds for future mitigation payments under the Rezone Contract could be used for construction of an enhanced downstream drainage system Triad designed to cross Holden McDaniel's parcel—at no expense to Holden-McDaniel. CP 1721.[6] Holden-McDaniel refused, claiming the proposed larger pipe would protrude aboveground, creating a "mound" rendering its property unusable. CP 1342-1344. Holden-McDaniel agreed to move the existing, undersized 36" pipe south and the City issued a building permit for the Holden-McDaniel's proposed new building; however, construction was delayed when Holden-McDaniel refused to allow the City to enlarge or otherwise increase the underground pipe's conveyance capacity. *Id.* Holden-McDaniel consequently sued both the City and WRJV. CP 1346-1357.

The "Claim for Damages" attached to Holden-McDaniel's 1995 Complaint against the City asserts the same "claim" reprised in the instant suit:

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[6] Triad commissioned a **complete downstream geotechnical analysis and infiltration study of the BNSF ditch** from Terra Associates, Inc., as part of its work to design an upgraded conveyance system across Holden-McDaniel's property in 1995. CP 1739-1749.

> The City of Arlington negligently approved the storm water collection, retention and discharge system for the Eagle Ridge [Gleneagle] Development which conduct has resulted in damages to HCI Steel Products, Inc. in that its property located at 18520 – 67th Avenue N.E., Arlington, Washington has been flooded and will flood in the future unless and until the surface waters which reach HCI's property as above described are otherwise disposed of.

CP 1350-1351.[7]

Holden-McDaniel's separate suit against WRJV claimed WRJV violated City ordinances and violated common law by "diverting surface water, which would not reach Holden-McDaniel's property under natural conditions, and is discharging said water on the property of Plaintiff, resulting in damage to Plaintiff...." CP 1355. Holden-McDaniel asserted causes of action for negligence, intentional and negligent trespass, and it asserted a cause of action against the City of Arlington for "negligent trespassing." CP 1356.

The two lawsuits were consolidated under Cause No. 95-2-03599-8. CP 1359. The City allowed Holden-McDaniel to move forward with construction of its building in exchange for acknowledgement of a prescriptive drainage easement across its property:

> 4. To the extent there exists a prescriptive right to drain surface water which naturally flows to the HCI property

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[7] The question of whether the Claim for Damages was attached to the "building permit" Complaint was thoroughly addressed before the trial court on summary judgment. *See, e.g.,* CP 2185-2188; 2290-2294.

> through the existing culvert on the HCI property, said right shall be preserved through the relocated culvert to the same extent as if the culvert had not been relocated.

CP 1362. Of course, surface water flowing naturally to Holden-McDaniel's property, pre-development of Gleneagle, was up to 29 cfs for a 100 year event, according to Holden-McDaniel's expert. Holden-McDaniel was the architect of its own harm when it chose to keep its too-small pipe, which could not handle even the standard range of pre-development flows. CP 1364.[8] Holden-McDaniel agreed, however, to

> ...hold Arlington harmless from any damages occurring to HCI as result of Arlington authorizing HCI to ... reinstall a 24" x 36" drain pipe across HCI's property ... to the extent that a 24" x 36" drain pipe is inadequate to handle the flow of surface water legally conveyed to the HCI property in accordance with the common law of the state of Washington and statutory provisions of the Arlington City Code.

CP 1364.[9] The litigation was settled and Holden-McDaniel released the City and:

> **all other persons, firms, corporations, associations or partnerships** of and from any and all claims, actions, expenses and compensation whatsoever, which the undersigned now has on account of or in any growing out of any and all known or unknown, foreseen and

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[8] Holden-McDaniel actually installed a 24" x 36" "squash pipe," which is smaller than the previously-installed 36" diameter pipe. CP 1583.

[9] Holden-McDaniel concedes that the hold harmless agreement extended to WRJV via operation of the 1998 Release of All Claims. *See* App. Brf. at 28, n. 10 ("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.**").

> unforeseen...property damage, and/or any financial loss of any kind and the consequences thereof relating to all claims set forth in and described in Plaintiff's Complaint and Amended Complaints in Snohomish County Cause Nos. 95-2-03599-8 and/or 95-2-03498-3.

CP 1366 (emphasis added). The release preserves Holden-McDaniel's right to bring future flood claims "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." *Id.* The trial court determined Holden-McDaniel released *all* claims related to flooding caused by pre-1995 development by virtue of consolidation and incorporation of the attachment to Cause No. 95-2-03498-3, which included the claim that "the storm water collection, retention and discharge system for the Eagle Ridge [Gleneagle] Development ... resulted in damages to HCI Steel Products, Inc. in that its property located at 18520 – 67th Avenue N.E., Arlington, Washington has been flooded...." CP 1350.

C. WRJV INSTALLED A STORMWATER SYSTEM THAT COMPLIED WITH CITY DIRECTIVES, STATE AND LOCAL REGULATIONS, AND INDUSTRY STANDARDS.

WRJV retained Higa Engineering to design an additional upstream detention facility when it became clear that Holden-McDaniel would not upgrade its system: pond W-2, which flows, in part, into pond W-1 (owned by the Homeowners' Association). CP 1378-1400. On

September 6, 1995, Higa issued a Drainage Report for pond W-2, which acknowledged that:

> Although the Master Plan agreement which Gleneagle has executed with the City of Arlington requires storm water runoff controls to be designed to accommodate a twenty-five year design event, this analysis provides for a far more conservative **one hundred year design event** as requested by the owners, Woodland Ridge JV.

CP 1380.

Higa met with City engineers and Public Works staff several times throughout the course of the project to discuss the design parameters for pond W-2. CP 1719, CP 1402. The criteria for allowable outflow rates from Pond W-2 was provided by Barrett Consulting Group, retained by the City of Arlington, in a letter dated December 4, 1995. CP 1576-1578. Barrett determined that **the allowable 100-year peak outflow rate from pond W-2 was 28 cfs** (by SBUH methodology, see footnote 4). CP 1578. This was, according to Barrett, **equal to the pre-development rate of stormwater runoff at that location**, excluding Sector 1 and 67th Avenue, which are non-contributory to W-2. *Id.* Higa's post construction calculations confirm W-2 restricted flows to the prescribed amount: 28 cfs, the allowable predevelopment rate. CP 1834.

D. HOLDEN-MCDANIEL'S EXPERT REJECTED ITS "CLOSED SYSTEM" THEORY, WHICH HAS NO BASIS IN EVIDENCE.

Holden-McDaniel has a rate of flow (measured in cubic feet per second, "cfs") problem when it comes to WRJV, because it is undisputed that WRJV met or exceeded its rate requirements. To avoid this, Holden-McDaniel misinterprets a phrase in the second exception to the common enemy doctrine, which states that landowners may not "collect and discharge water onto their neighbors' land in quantities greater than, or in a manner different from, it's natural flow,"[10] to argue that no developer, including WRJV, may cause *more* stormwater to flow downstream (even at the appropriate rate and in the right direction) than flowed pre-development.

Holden-McDaniel ignores both industry practice and logic by interpreting the term *quantity* to be *total volume over time* instead of *rate of flow* (i.e. the quantity of water flowing over the property at any given time). *Virtually all impervious surface development in Western Washington* increases the *total volume* of surface water runoff (which is why stormwater management manuals set standards for the control of *rate* and not *total volume*). Holden-McDaniel's "volume" complaints are dependent on its "closed system" idea, which is completely undone by the

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[10] *Currens v. Sleek*, 138 Wn.2d 858, 862-65, 983 P.2d 626 (1999).

actual evidence. *One* of Holden-McDaniel's experts, Tom Holz, opines that the downstream BNSF ditch doesn't have the capacity to take the increased *volume* of water from Gleneagle because it is a "closed system" akin to a water glass with finite capacity, which fills to the brim and overtops when too much *volume* is directed to it. Mr. Holz either didn't read or doesn't understand the record, because Triad concluded in 1995 that the ditch was not a "closed system." CP 1705-1708 (Triad's January 6, 1995, memo to WRJV reporting back on its downstream study, which confirmed the BNSF ditch was *infiltrating, detaining, and conveying,* not *capturing and retaining* water).

More importantly, recent expert modeling endorsed by Holden McDaniel's *other* expert, Dr. Malcolm Leytham, *undisputedly confirms* that the ditch is not a "closed system," as it both conveys, detains *and* infiltrates water to this day. CP 240-241; 284-286. Dr. Leytham certainly treated the ditch as capable of conveying and infiltrating water in his own study, and he did not criticize the defense experts' conclusion that the ditch could convey up to 30 cfs even *excluding* infiltration. CP 289-290. In fact, the repair plan devised by defense experts will send *more* Gleneagle water down the BNSF ditch, not less, which Dr. Leytham

acknowledges will considerably *improve* current conditions, an impossibility if the ditch constituted a "closed system." CP 196.[11]

Stormwater systems are not designed to magically eliminate the inevitability of increased volume caused by development. Rather, they are designed to release that water at "allowable" rates so the *quantity* of water traveling through usual routes across downstream properties *at any given time* is no greater than the *quantity* that traveled across those properties, *at any given time*, prior to development. The total *volume over time* will always be higher unless the volume in excess of pre-development levels is infiltrated prior to leaving the developed site.[12] Holden-McDaniel just wants the court to ignore the undisputed fact that WRJV's system discharges just what the City required: 28 cfs, the allowable, pre-development, 100-year flow rate for water discharging from WRJV's portion of the development. Unfortunately, Holden-McDaniel defied its prescriptive easement by installing a relocated pipe that could handle just 16-18 cfs, even though Triad had calculated the allowable, pre-

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[11] One of Holden-McDaniel's other catchy but unsupported descriptive phrases deserves scrutiny: with the exception of one pond in the golf course's stormwater system, the "upstream ponds" are not "ornamental." Rather, they are functional detention systems and were analyzed extensively by hydraulic engineer Doug Beyerlein (based on parameters agreed to by Holden-McDaniel's expert). CP 231-276; CP 287-294. The stage-storage-discharge capacities of these ponds are detailed in Mr. Beyerlein's reports. *Id.*

[12] This kind of permeable soil is not present at Gleneagle. CP 1613; 1617

development flow to its property at 45 cfs for a 100-year storm. CP 1712; 1727; 1759; 1601.[13]

E. HOLDEN-MCDANIEL INCORRECTLY INSTALLED AN INADEQUATELY DESIGNED ONSITE STORM WATER INFILTRATION SYSTEM.

Holden-McDaniel retained Concept Engineers to design a new onsite storm water infiltration system in conjunction with its new building in 1995. Concept submitted calculations for a new ditch and pipe system sized to match the existing 36" pipe's capacity (18 cfs). CP 1723-1730. Concept knew and acknowledged the existing pipe allowed flooding to occur on Holden McDaniel's property in a letter dated January 6, 1995. CP 1732. Nevertheless, it designed the new conveyance system to handle **only 50%** of Triad's calculated allowable outflow for a 100 year event, event, and Holden-McDaniel, according to notes on Concept's plan, designed the pipe according to its own specifications. CP 1594, CP 1737.

Holden-McDaniel also failed to follow through with Concept's design for the HCI onsite infiltration system, which called for a 20 foot wide vegetative (grass) filter strip and a safety/exclusion fence along the east edge of the filter strip. *Id.* These elements were designed to filter out silt and dust generated from trucks and vehicles driving through Holden-

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[13] Again, Holden-McDaniel's pipe is too small even for modern calculations of the allowable, pre-development 100-year flow, which is 29 cfs according to Holden-McDaniel's own expert. CP 1590-1604; CP 1294-1295.

McDaniel's unpaved yard, but Holden-McDaniel didn't bother to incorporate these elements. CP 1376. The result was a slow decline of the system's ability to properly infiltrate storm water. *Id.* Moreover, "the system was insufficient to accommodate a rainfall event exceeding a 5- to 10-year event without surface ponding." CP 1377. Holden-McDaniel's inadequately designed and constructed system contributed to flooding on Holden-McDaniel's property caused by its *own* water.

F. THE CITY SUBSTANTIALLY REVISED THE DOWNSTREAM SYSTEM BY CONSTRUCTING THE 67TH AVENUE IMPROVEMENT PROJECT.

After construction of pond W-2, the City took steps to upgrade the stormwater system between Gleneagle and Holden-McDaniel's property. In 1999 the City installed a second culvert under the railroad tracks to alleviate "backwatering." CP 1751-1755. In 2001, the City retained Earth Tech to design the "67th Ave. Improvement Project," which involved both widening the roadway and significantly revising the storm water outflows from pond W-1. CP 1378. Earth Tech's design assumed pond W-1 would discharge a peak of 36 cfs for a 100-year event. CP 1759. As the pipe under the HCI property *at most* conveys 16-18 cfs, Earth Tech designed a "v"-notched weir to limit flows to Holden-McDaniel's pipe to that amount. CP 1596-1597. Excess water was re-routed to a new regional

infiltration/detention facility north of 188th street (the "triangle pond"). CP 1757-1811. WRJV had no involvement whatsoever in the project.

Holden-McDaniel experienced no flooding *at all* between 2003 and 2009, though a handful of storm events after 2009 led to minor flooding on 67th which reached Holden-McDaniel's property. CP 1409-1413. This occurs when the triangle pond fills to above its 100-year design level, at which point water pools on 67th at its low point near the east entrance to the HCI fabrication building. CP 1597-1598.[14]

The lowered profile of the roadway is directly attributable to Holden-McDaniel, which insisted that the City lower the road during its 67th Ave. Improvements to accommodate its trucks. CP 1417-1418. Of course, Holden-McDaniel blames the City, but there is no dispute that the condition has nothing to do with WRJV. Although stormwater from WRJV's portion of Gleneagle discharges to the City's system (where it joins City water from Sector 1, pond W-1, and 67th Avenue to flow to either to the City's infiltration pond, or through the Holden-McDaniel pipe to the BNSF ditch), WRJV did not design the system downstream of W-2 and had no involvement in the 67th Avenue Improvement Project, which utterly and completely changed how Gleneagle and City stormwater

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[14] Holden-McDaniel's claim that the triangle pond has "no overflow" is flatly contradicted by the photos of the triangle pond's overflow pipe, which was supplied to the trial court by City engineer Jim Kelly. CP 216 and 222.

interacts with downstream conveyance facilities and Holden-McDaniel's property. CP 317-318.

G. HOLDEN-MCDANIEL REPLACED ITS CLOGGED INFILTRATION SYSTEM WITH AN UNDERSIZED INFILTRATION SYSTEM.

Holden-McDaniel undertook to replace its onsite infiltration system in 2009 pursuant to a design by HN Lenhtinen. CP 1374-1375; CP 1813. Prior to this replacement, Holden-McDaniel sold its HCI metal building fabrication business to BlueScope, and it leased the HCI premises back to BlueScope in 2007. CP 1421-1441. Before the new infiltration system was installed, several bids were solicited from local contractors to pave HCI's "yard area," which ranged from $507,788.50 to $1,264,276.72. CP 1443-1457. Holden-McDaniel and/or BlueScope decided not to pave, and the new HL Lenhtinen infiltration system was designed assuming exactly the same soil, storage, operational and infiltration parameters employed by Concept in 1995, resulting in a similarly undersized system still unprotected from deterioration by sedimentation. CP 1600. As a result, Holden-McDaniel continues to experience standing, silty water which is unable to properly infiltrate even in minor rainfall events, resulting in flooding. CP 1815-1829.

Holden-McDaniel made no effort whatsoever to respond on summary judgment to Respondents'/Defendants' observations that its

current and prior stormwater infiltration systems are and were undersized, inadequately designed, and improperly installed. Nor could Holden-McDaniel respond: its experts were never asked to investigate the systems and have no idea if the installations even complied with the plans. CP 295; CP 326. Had they scrutinized the systems in operation they would have observed the stark difference between the standing, silty and turbid water on Holden-McDaniel's property discharging to the clear water flowing from Gleneagle to the BNSF ditch. CP 1600-1601; CP 1815-1829.

H. HOLDEN-MCDANIEL CANNOT SHOW IT SUFFERED COMPENSABLE DAMAGES AS A RESULT OF WRJV'S ACTION.

Relying on the conclusions of Holden-McDaniel expert Malcolm Leytham, the trial court correctly determined that Holden-McDaniel cannot show that it has suffered any compensable damages as a result of WRJV's actions, as alterations to the Gleneagle stormwater system occurring after 1995 only *improved* the flood frequency experienced by Holden-McDaniel.

1. Holden-McDaniel's Expert Concluded Holden-McDaniel's Property Experienced a 25-Year Flood Frequency Prior to Development.

Dr. Leytham confirmed Holden-McDaniel's property flooded on a frequency of once every 20-30 years prior to development:

Q. What level of protection would have to be provided today to provide Holden-McDaniel or to put Holden-McDaniel in the position they were predevelopment? 20 to 30 percent or 20- to 30-year flooding frequency?

A. Well, it would be -- well, again, you can't really -- you'd have to model the entire system again, but are you asking for specific flow rate or –

Q. Well, I'm asking for a level of protection to put the Holden-McDaniel in a position they were prior to the Gleneagle development.

A. Well, we were estimating that the predevelopment state, flooding occurred about once every 20 to 30 years average so presumably that would be the figure that you'd use.

CP 854-855.

2. <u>Holden-McDaniel's Expert Agreed That Rules, Regulations and Industry Standards Required WRJV to Design and Install a System Performing Up To a 25-Year Flood Frequency</u>.

Dr. Leytham agreed that the industry standard for stormwater design at the time Gleneagle was to design to a 10- or 25-year event:

Q. Do you have any knowledge or understanding of what the generally accepted design standards were in the 1980s and early to mid 1990s?

A. Yes.

Q. And what were the generally accepted design standards imposed on stormwater system designers in the 1980s and early to mid 1990s?

...

> THE WITNESS: Well, it depended – it varied by jurisdiction. It was fairly common to have a standard that controlled say the 10-year post development flow to predevelopment rate. Sometimes it was the 25-year to the predevelopment rate.

CP 851-852; *see also* CP 1706 ("...the City of Arlington's minimum requirements for conveyance piping ... dictates that the system components be capable of conveying the 25-year design storm runoff from the site.").

3. Holden-McDaniel's Expert Agreed That the Post-Sector 1 Stormwater System Installed by WRJV Performs Up To a 25-Year Flood Frequency.

Dr. Leytham agreed that the stormwater system installed by WRJV (the post-Sector 1 system) performs up to a 25-year event.

> Q. Okay. What is the post Sector 1 development? What did you mean when you -- well, let's go back to Page 6 of your report, Exhibit 261. Do you see where you say, "It would appear" -- in the first full paragraph, "It would appear that the stormwater detention facility constructed post Sector 1 are effective in controlling runoff from the post Sector 1 development to the predevelopment rates up to about the 25-year event"; do you see that?
>
> A. Yes.
>
> Q. Can you -- can you dumb that down for me so I understand what you're saying there?
>
> A. Well, the post Sector 1 development includes all the residential development that wasn't part of Sector 1 plus all of the additional detention facilities, so all the detention facilities other than W1, so what I'm

saying is that the provision of those additional detention facilities was enough to control the runoff from the post Sector 1 residential development for flood events up to about the 25-year event.

Q. Okay. And the predevelopment flood frequency was 20 to 30 years?

A. For the entire site.

CP 856.

Dr. Leytham concluded that during the window between the development of Sector 1 and before WRJV completed the stormwater system for the rest of Gleneagle, Holden-McDaniel's property flooded once every three years on average. CP 1185.[15] Holden-McDaniel sued WRJV and the City for this flooding in 1995, and that lawsuit was resolved in 1998 when Holden-McDaniel compromised its claim in exchange for a monetary payment. Since that time, as confirmed by Dr. Leytham, WRJV's efforts have only improved the flood situation. CP 1182-1188.

Holden-McDaniel's argument on appeal is that the improvement in flood frequency was the sole result of its own decision to increase the slope of its new pipe, despite Dr. Leytham's failure to make any such distinction in his report. A lack of expert support ultimately doesn't matter, however. Whether the result of the new slope or the construction

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[15] Sector 1 was constructed by WRJV's predecessor, Canus. CP 1265.

of W-2, there is no dispute that Holden-McDaniel experienced less flooding after WRJV completed its work than it did before.

V. PROCEDURAL HISTORY

Holden-McDaniel filed its initial Complaint on January 5, 2011. CP 2126-2132. On May 10, 2012, Holden-McDaniel filed an Amended Complaint identifying BNSF as an additional defendant. CP 2030-2036.

After four years of extensive expert discovery, investigation, modeling and analysis, the parties filed various cross motions for summary judgment. *See, e.g.,* CP 2488-2531; 2559-2586; 2710-2720; 2536-2558, and 2648-2663. The trial court issued its Omnibus Order on April 24, 2015, correctly recognizing that Holden-McDaniel's current claims against WRJV are premised on a stormwater system WRJV designed and installed prior to the 1998 settlement agreement which extinguished flooding claims related to that very same system: "According to the Release of All Claims, Holden-McDaniel has no claim against the City of anyone else for flooding damage except as to post-1995 conduct that resulted in more flooding than that for which the Holden-McDaniel received compensation in 1998," which was "flooding every third year." CP 41-62.

Holden-McDaniel's Motion for Reconsideration was denied. CP 34-35. This appeal followed.

VI. ARGUMENT

A. THE STANDARD OF REVIEW IS DE NOVO.

An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The Court must examine the entire record.

> An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The *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. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party... and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). CR 56(c) provides for judgment if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Seven Gables Corp. v. MGM/UA Entertainment Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A cause of action must be dismissed if the defendant can demonstrate that the Holden-McDaniel is unable to establish a critical element of its claim. *Celotex v. Catrett,* 477 U.S. 317, 322, 106 S. Ct.

2548, 2552, 91 L. Ed. 2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (1988). Summary judgment should be granted if, from all the evidence, a reasonable person could reach but one conclusion. *Folsom*, 135 Wn.2d at 663.

B. THE TRIAL COURT CORRECTLY DETERMINED THAT THE 1998 SETTLEMENT AGREEMENT AND RELEASE PRECLUDES LIABILITY FOR CONDUCT OCCURING BEFORE MAY 5, 1995.

Holden-McDaniel's 1995 lawsuits against the City and WRJV were resolved and released in 1998 when Holden-McDaniel executed a broadly worded release, in which Holden-McDaniel agreed to:

> ...release, acquit and forever discharge The City of Arlington, or its agents, servants, successors, heirs, executors, administrators and **all other persons, firms, corporations, associations or partnerships** of and from any and all claims, actions, expenses and compensation whatsoever, which the undersigned now has on account of or in any way growing out of any and all known or unknown, foreseen and unforeseen ... property damage, and/or financial loss of any kind and the consequences thereof relating to all claims set forth in and described in Holden-McDaniel's Complaint and Amended Complaints in Snohomish County Cause **Nos. 95-2-03599-8 and/or 95-2-03498-3**.

CP 1366-1367.

Holden-McDaniel now contends it did not release claims for *future* flood damages purportedly caused by the Gleneagle stormwater system because of the following language:

> This Release does not release any future claims which the Holden-McDaniel may have, whether asserting relief in the form of an injunction 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 flooding on Holden-McDaniel'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**.

CP 1366. Attached to the "building permit" Complaint, Cause No. 95-2-03498-3, was a "Claim for Damages," which asserted that "the storm water collection, retention and discharge system for the Eagle Ridge [Gleneagle] Development ... resulted in damages to HCI Steel Products, Inc. in that its property located at 18520 – 67th Avenue N.E., Arlington, Washington has been flooded...." CP 1350-1351. The trial court concluded the "Claim for Damages" was part of the 95-2-03498-3 Complaint. Holden-McDaniel argues it was not.

Holden-McDaniel's position makes no sense. First, Holden-McDaniel litigated both the permitting and flooding issues vigorously, for three years, in the context of the prior suits. It makes no sense that Holden-McDaniel agreed to release "all other persons, firms, corporations, associations or partnerships of and from ... all claims set forth in and described in Holden-McDaniel's Complaint and Amended Complaints in Snohomish County Cause Nos. **95-2-03599-8** and/or 95-2-03498-3" if

Holden-McDaniel did not intend to release WRJV from the claims asserted in Holden-McDaniel's lawsuit against it: **Cause No. 95-2-03599-8.** *Seattle-First Nat. Bank v. Westlake Park Associates*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985) (contracts should be construed to avoid an interpretation which renders some of the language meaningless or ineffective).

Second, Holden-McDaniel's argument that the Claim for Damages was a separate document not intended to be "attached" to the building permit Complaint is not supported by the objective record. Courts interpret settlement agreements as they interpret other contracts. *Marshall v. Thurston County*, 165 Wn. App. 346, 351, 267 P.3d 491 (2011), citing *McGuire v. Bates*, 169 Wn.2d 185, 188, 234 P.3d 205 (2010). "This means that [courts] attempt to determine the parties' intent by focusing on their objective manifestations as expressed in the agreement." *Id.* The parties' subjective intent is generally irrelevant if courts "can impute an intention corresponding to the reasonable meaning of the actual words used." *McGuire*, 169 Wn.2d at 189. In this case there is no dispute that the Claim for Damages was attached to the City's copy of the building permit Complaint via staple. CP 63-67. There is no dispute that the building permit Complaint and the Claim for Damages were filed with Snohomish County Superior Court simultaneously under the building

permit cause number, 95-2-03498-3. CP 1346, 1350. The *objective* record indicates Holden-McDaniel intended flood claims to be part of its 95-2-03498-3 suit, which is why both lawsuits were eventually consolidated.

Holden-McDaniel argues that the Claim for Damages was filed to satisfy statutory claim requirements, not to establish causes of action against the City. However, Holden-McDaniel cannot subjectively decry what the release objectively states: that claims for "conduct described in Snohomish County Cause No. 95-2-03498-3," including flood claims, were released because the Complaint and Claim for Damages were filed and served *attached* to one another. CR 10 states:

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

CR 10(c). In a unanimous decision, Washington's Supreme Court made it clear that a document attached to the Complaint that pertains to "rights, duties, entitlements, or liabilities" is *part* of the Complaint:

> The Court of Appeals held the contract is not part of the pleadings, and "you do not make it so by simply attaching it to an answer or complaint." *P.E. Sys.*, 164 Wash.App. at 365, 264 P.3d 279. PES argues this holding is correct: that the trial court erred in considering matters outside the pleadings without converting the motion to a summary judgment motion. CPI argues that this holding is incorrect:

> that the contract does become part of the pleadings simply by attaching it to the answer or complaint.
>
> CPI is correct: **the contract does become part of the pleadings by simply attaching it.** Multiple lines of authority support this conclusion.

P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 204, 289 P.3d 638 (2012).

Contrary to plaintiff's assertions, courts do not narrowly construe this rule to apply only to "contracts, wills, promissory notes, or share certificates." *Id.,* citing *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002) ("Because the **letter** was attached to the complaint, it became a part of it for all purposes, Fed.R.Civ.P. 10(c)."). Moreover, it is hard to imagine a document *more* fitting to be considered part of the claims asserted in a Complaint than an attachment asserting *more claims*.

Settlement agreements between private parties are viewed with finality. *Or. Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 414, 36 P.3d 1065 (2001); *Paopao v. State, Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 48, 185 P.3d 640 (2008); *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978) ("The law favors the amicable settlement of disputes, and is inclined to view them with finality."). There can be no doubt in this case that the objective language of the 1998 settlement agreement released both the City and WRJV from claims related to flooding from Gleneagle, which the parties had been litigating for three years. Holden-McDaniel does not get a second bite at the apple now,

especially after it accepted $750,000 in exchange for a release of those same claims.

C. RES JUDICATA BARS HOLDEN-MCDANIEL'S CLAIMS AGAINST WRJV.

Whether an action is barred by res judicata is a question of law that this Court reviews de novo. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 836, 125 P.3d 202 (2005). Under the doctrine of *res judicata*, or claim preclusion, a party is barred from re-litigating "claims and issues that were litigated, or might have been litigated, in a prior action." *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). The doctrine "puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982).

1. The Four Elements of *Res Judicata* Are Satisfied.

Res Judicata applies "where a prior final judgment is identical to the challenged action in "(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." *Lynn*, 130 Wn. App. at 836, quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

a. The subject matter of the two suits are identical.

Holden-McDaniel's 1995 suit against WRJV claimed the development of Gleneagle violated City ordinances and violated common

law by "diverting surface water, which would not reach Holden-McDaniel's property under natural conditions, and is discharging said water on the property of Holden-McDaniel, resulting in damage to Holden-McDaniel...." CP 1353-1357. Holden-McDaniel also claimed the WRJV was "channeling and collecting surface water ... allowing it to be dumped on Holden-McDaniel's real property by increased flow and in a manner and in quantities other than the water would have naturally reached Holden-McDaniel's property, all resulting in damage...." *Id.*

Holden-McDaniel's current suit claims "[t]he development activities undertaken by the Gleneagle Developers have changed the direction, volume and peak flows of the storm water runoff that reaches the Holden-McDaniel Property," causing flooding and damage to the Holden-McDaniel's property. CP 1568-1574. The subject matter of the two suits are identical.

b. The causes of action asserted in the two suits are identical.

Causes of action are identical for purposes of *res judicata* if "(1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is [or would have been] substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts."

Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn. App. 304, 328, 237 P.3d 316 (2010). Holden-McDaniel asserted causes of action against WRJV in 1995 for negligence and trespass in connection with floodwaters allegedly diverted as a result of WRJV's development of Gleneagle, and it *specifically* asked the court for injunctive relief for future acts of trespass resulting from flooding.

Holden-McDaniel's current causes of action against WRJV include negligence, nuisance and trespass in connection with floodwaters allegedly diverted as a result of WRJV's development of Gleneagle, and Holden-McDaniel *specifically* asks the court for injunctive relief for future acts of nuisance and trespass resulting from flooding. The causes of action are identical and there can be no doubt, at least with regard to claims against WRJV, that the two suits arise out of the same nucleus of operative facts and involve the same allegations and same evidence.

c. The parties and "quality of persons" for or against which the claims are made are identical.

The plaintiff in the 1995 lawsuits, HCI Steel Products, was and is the predecessor in interest to the plaintiff in the current suit, Holden-McDaniel. CP 1371. The "defendants" in the 1995 suits included the Woodland Ridge Joint Venture, the entities comprising the joint venture: Arlington Country Club, Inc. and Kajima Development Corporation, and

the City of Arlington—the same defendants identified in the current suit. The "persons and parties" are identical.

2. A Compromise or Settlement Is *Res Judicata* of All Matters Relating to the Subject Matter of the Dispute.

Holden-McDaniel litigated its 1995 "flooding" suit against WRJV for nearly three years before the 1998 Settlement Agreement was executed. WRJV's construction of pond W-2 was completed during the early stages of that litigation, and "any conduct which supported [Holden-McDaniel's] claims could have been a part of the lawsuit," including the construction of pond W-2 and the upstream system. CP 56-59. Consequently, the trial court found Holden-McDaniel's current claims are barred under the doctrine of *res judicata*, because "[i]n 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." CP 58-59, citing *Pederson v. Potter*, 103 Wn. App. at 70.

Holden-McDaniel argues that the 1998 settlement agreement and subsequent clerk's dismissal without prejudice (for want of prosecution) do not amount to a "final judgment," which Holden-McDaniel believes is a condition precedent to the application of the doctrine of *res judicata*. Holden-McDaniel's argument misinterprets Washington's application of

the rule. "A compromise or settlement is *res judicata* of all matters relating to the subject matter of the dispute." *In re Phillips Estate,* 46 Wn.2d 1, 14, 278 P.2d 627 (1955), citing *McClure v. Calispell Duck Club*, 157 Wash. 136, 288 P. 217 (1930).

> **This compromise agreement constitutes a merger and bar of all existing claims and causes of action and is as binding and effective as a final judgment itself.** *Gregory v. Hamilton*, 77 Cal.App.3d 213, 142 Cal.Rptr. 563 (1978); 15A Am.Jur.2d Compromise and Settlement § 24 (1976). **It is *res judicata* of all matters relating to the subject matter of the dispute.** *Handley v. Mortland*, 54 Wash.2d 489, 342 P.2d 612 (1959); *In re Estate of Phillips*, 46 Wash.2d 1, 278 P.2d 627 (1955).

Rasmussen v. Allstate Ins. Co., 45 Wn. App. 635, 637, 726 P.2d 1251, 1253 (1986).[16]

Courts apply the doctrine of *res judicata* to prevent repetitive litigation of claims or causes of action arising out of the same facts. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 54 P.3d 687 (2002), *aff'd*, 151 Wn.2d 853, 93 P.3d 108 (2004). Allowing parties to sue again for the same claims that were litigated extensively up until settlement would be a powerful *disincentive* to settle and are an improper use of the

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[16] *See also McClure v. Calispell Duck Club*, 157 Wash. 136, 139, 288 P. 217 (1930). ("We are, however, satisfied that the defense of compromise and settlement and *res judicata* was also established. Briefly stated, that issue was raised by pleading and proof to the effect that a prior suit of similar nature between the same parties (though charging loss of crops in previous years) was settled and compromised in the year 1921 by the payment of a substantial sum of money.")

courts and judiciary. *See Hisle,* 113 Wn. at 410 (one of the purposes of *res judicata* is "conserve judicial resources...").

Holden-McDaniel sued WRJV in 1995 for flooding arising out of the design and construction of the Gleneagle stormwater system, the relevant portions of which were completed during the pendency of that suit. *No new actions* were taken by WRJV to alter the stormwater system at issue after the 1998 settlement of that litigation. Holden-McDaniel's current claims against WRJV arise out of the same conduct it sued WRJV for in the mid-1990's. Holden-McDaniel settled the prior lawsuit and its current suit is now *barred* under the doctrine of *res judicata.* Determination of finality is a matter of substance and not form." *Gazin v. Hieber,* 8 Wn. App. 104, 113, 504 P.2d 1178 (1972). The trial court's determination of this issue was correct.

D. HOLDEN-MCDANIEL CANNOT SHOW THAT CONDUCT UNDERTAKEN AFTER 1995 RESULTED IN PROVABLE DAMAGES.

Relying on the conclusions of Holden-McDaniel's expert, Malcolm Leytham, the trial court correctly determined Holden-McDaniel cannot show that it has suffered any compensable damages as a result of WRJV's actions, as alterations to the Gleneagle stormwater system occurring after 1995 only *improved* the flood frequency. In 1995, Dr. Leytham concluded that Holden-McDaniel's property flooded once every

three years on average subsequent to the build-out of Sector 1 of the Gleneagle Development (which was built by WRJV's predecessor in interest, Canus). Holden-McDaniel sued WRJV and the City for this flooding, and that lawsuit was resolved in 1998 when Holden-McDaniel compromised its claim in exchange for a monetary payment. According to Dr. Leytham, the "[f]ull build-out of the Gleneagle site tributary to the Holden-McDaniel property including completion of all additional stormwater detention ponds, along with the "relocation of the 36-inch by 24-inch pipe arch culvert across the Holden-McDaniel property" actually *improved* the flood frequency experienced by Holden-McDaniel to once every 15 years on average. CP 1186.

Holden-McDaniel's argument is that the improvement in flood frequency was the sole result of its prescient decision to increase the slope of its new pipe. This was not a distinction made by Dr. Leytham in his report. He ascribed the improvement in flood frequency to "all additional stormwater detention ponds," in addition to the downstream systems including the pipe. *Id.* In fact, not one of the many experts studying this matter concluded that the reason for the improvement in flooding after 1995 was Holden-McDaniel's new (but still undersized) pipe. *See* CP 2194.

Nevertheless, Holden-McDaniel's unsupported claim is inconsequential. Whether the result of the new slope or the construction of W-2 and the rest of Gleneagle, there is no dispute that Holden-McDaniel experienced *less* flooding after WRJV completed its work and the prior lawsuit was resolved. Stated another way, Holden-McDaniel advanced *zero* evidence (or argument) that anything WRJV did made the flood frequency *worse*. The only argument even vaguely lobbied against WRJV is that post-Sector 1 development increased the *amount* of water sent downstream, but again, an increase in volume does not necessarily (and obviously did not) result in an increase in flooding. Dr. Leytham concluded that "the stormwater detention facilities constructed post-Sector 1 [pond W-2 and the upstream ponds] are effective in controlling runoff from the post-Sector 1 development to pre-development rates up to about the 25 year event," the precise design standard required by the City of Arlington, and the precise "flood frequency" that occurred pre-development. CP 1187; CP 854-855. It is undisputed that *flooding* only *improved* after WRJV's work.

If a plaintiff on summary judgment:

> "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S.Ct.

> 2548, (1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-32 (9th Cir. 1987). In *Celotex*, the United States Supreme Court explained this result: "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.' 477 U.S. at 322–23 [(quoting Fed.R.Civ.P. 56(c))].

Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). In this case the trial court correctly determined that no rational trier of fact could find that Holden-McDaniel suffered flooding damage more severe than that which was negotiated for in the prior litigation: flooding every three years. *Omnibus Decision at 20:23-24.* Nothing *WRJV* did made that flooding worse and Holden-McDaniel consequently cannot establish the essential element of damages. The trial court's ruling on this issue should be upheld.[17]

E. THE TRIAL COURT CORRECTLY HELD THAT HOLDEN-MCDANIEL'S NUISANCE AND TRESPASS CLAIMS ARE SUBSUMED INTO ITS NEGLIGENCE CLAIM.

Holden-McDaniels' causes of action for negligence, trespass, and nuisance are all premised on tort law. Washington has consistently recognized the general rule that when a party brings an action in tort, he or she has the burden of showing that:

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[17] For some incomprehensible reason, Holden-McDaniel claims that no defendant advanced the argument that it could not prove damages. *App. Brf. at p. 37.* This is not true. *See, e.g.,* CP 2541; CP 2575-2581, 2583.

> (1) there is a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff against harm of the general type; (2) the defendant's conduct violated the duty; and (3) there was a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff.

Hansen v. Washington Natural Gas Co., 27 Wn. App. 127, 129, 615 P.2d 1351 (1980); *McLeod v. Grant County School Dist. 128,* 42 Wn.2d 316, 255 P.2d 360 (1953).

1. Holden-McDaniel's Nuisance Claim Is Duplicative of Its Negligence Claim.

A nuisance is "an unreasonable interference with another's use and enjoyment of property...." *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 769, 332 P.3d 469 (2014); *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998); *Bodin v. City of Stanwood*, 79 Wn. App. 313, 318, n.2, 901 P.2d 1065 (1995). 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).

It is "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 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). In other words, "[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).

Washington courts treat *nuisance* just like any other negligence claim when it is premised on an unlawful act or omission of a duty. *See Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002) (landowners brought action against city for inverse condemnation, trespass, nuisance, negligence, and waste after their property flooded; the court recognized that the nuisance claim "is simply a negligence claim presented in the garb of nuisance.").

> ...we are convinced that the trial court properly dismissed Owners' nuisance claim. In Washington, a "negligence claim presented in the garb of nuisance" need not be considered apart from the negligence claim. *Hostetler v. Ward*, 41 Wn.App. 343, 360, 704 P.2d 1193 (1985), *review*

> *denied*, 106 Wn.2d 1004 (1986). See also *Re v. Tenney*, 56 Wn. App. 394, 398 n.3, 783 P.2d 632 (1989). In those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied. *Hostetler*, 41 Wn.App. at 360, 704 P.2d 1193. Cf. *Albin v. National Bank of Commerce*, 60 Wn.2d 745, 753, 375 P.2d 487 (1962) (trial court properly refused to give a proposed instruction on nuisance which was based on the same omission to perform a duty which allegedly constituted negligence).

Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 527-28, 799 P.2d 250 (1990).

"[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." *Hostetler*, 41 Wn. App. at 359. Holden-McDaniel's First Amended Complaint asserts that:

> The Gleneagle Developers were **negligent** in their design of the Gleneagle development and the storm water system serving the development. Their activities constitute an ongoing **nuisance**; have resulted in the **trespass** of surface waters onto the Holden-McDaniel Property; and create an immediate and concrete threat of future trespass.

CP 1571. There is no real distinction between Holden-McDaniel's nuisance claim and its trespass claim. The Court should dismiss Holden-McDaniel's separately-alleged nuisance claim as duplicative because 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.

2. Holden-McDaniel Did Not Allege and Cannot Prove Intentional Trespass.

"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,* 113 Wn. App. at 373. "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 plaintiff's possessory interest; and (4) actual and substantial damages." *Wallace v. Lewis County*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006).

Holden-McDaniel tries to conjure an *intentional* trespass claim not present in its Complaint, which contends, once again:

> The Gleneagle Developers were **negligent** in their design of the Gleneagle development and the storm water system serving the development. Their activities constitute an ongoing **nuisance**; have resulted in the **trespass** of surface waters onto the Holden-McDaniel Property; and create an immediate and concrete threat of future trespass.

CP 1571. Nowhere in the Complaint does Holden-McDaniel allege "intentional" conduct. On this issue Holden-McDaniel finds itself in the

precise situation the plaintiffs in *Hurley v. Port Blakely Tree Farms L.P.* were in:

> 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 Wash.App. 647, 660, 24 P.3d 1098 (2001) (citing *Bradley,* 104 Wash.2d at 691, 709 P.2d 782). 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.

Hurley, 182 Wn. App. at 771-72.

The exact same result must be reached in this case. Holden-McDaniel's Complaint doesn't say a thing about intentional conduct. Rather, Holden-McDaniel argues the "intent" element is satisfied because WRJV *must have known* that waters from Gleneagle would cause flooding because it knew Holden-McDaniel's pipe was undersized, but of course, that's why WRJV hired two sets of engineers to design a new downstream system upsizing that pipe (rejected by Holden-McDaniel) as well as the alternative pond W-2—the output of which was limited to pre-development flows (which Holden-McDaniel **agreed to accept** by virtue of its prescriptive easement). CP 1362; CP 1834.

Oddly, Holden-McDaniel concedes WRJV presented the City with "a plan by the Joint Venture's engineer to reduce the flow of Gleneagle to match that of the culvert, but **the city declined**." *App. Bef. at 41*, citing CP 780. If nothing else, this should satisfy the Court that WRJV maximized its efforts to design and install a stormwater system that complied with all applicable codes and requirements, but it did not own and could not modify the downstream system. That was the purpose of the Rezone Contract, under which WRJV funded *the City's* necessary revisions to that system. CP 1328-1329. There is NO support for the argument that WRJV's *intentional plan* was to flood Holden-McDaniel's property, especially when Holden-McDaniel's own expert agreed that WRJV's design restricted the flow of water to its predevelopment rate. CP 854, 856, 1187.

This is the death knell of Holden-McDaniel's "intentional" trespass claims against WRJV. The only *intentional* misconduct was Holden-McDaniel's *intentional* installation of a pipe that was too small to accept historical pre-development flows—a decision entirely out of WRJV's control.

F. THE TRIAL COURT CORRECTLY EXCLUDED THE "BLUESCOPE ATTORNEY LETTER" AS HEARSAY.

Holden-McDaniel's tenant, BlueScope, shut down operations at the HCI site in December, 2011, nearly three years *after* the January 2009 storm precipitating this lawsuit (and after two record dry seasons). CP 1510. Holden-McDaniel claims BlueScope left because of flooding caused by the Defendants, based on a letter BlueScope's *attorney* issued in the context of settlement negotiations over BlueScope's breach of its lease. *BlueScope*, however, clearly indicated that it decided to close the business and shutter the HCI brand as a result of the "GFC," or Global Financial Crisis, not incidental flooding on the HCI property. CP 1512; 2137-2138, 2143-2152.

On summary judgment, the trial court properly excluded the letter from BlueScope's attorney as unauthenticated hearsay. ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See Moss v. Vadman*, 77 Wn.2d 396, 404, 463 P.2d 159 (1969) (disallowing admission of letter signed by non-parties); *Boyer v. State*, 19 Wn.2d 134, 146, 142 P.2d 250 (1943). As the City aptly pointed out below, the letter was sent by BlueScope's paid advocate for the purpose of posturing in the context of ongoing settlement negotiations.

CP 2311. It is not actual evidence, does not carry the requisite indicia of reliability, and *certainly* may not be offered for the "truth of the matter asserted."

Moreover, the *actual* evidence (documents issued by BlueScope and the testimony of BlueScope's 30(b)(6) witness) confirms that BlueScope ceased operations at Holden-McDaniel's property because of the downturn in the global economy, not because of flooding. CP 2137-2138, 2143-2152 (flooding caused BlueScope no damage, monetary loss, or quantifiable fiscal impact). In fact, BlueScope's representative could not say if the decision to stop paying rent had anything to do with flooding at all. CP 699-700. *This* is evidence. An advocacy letter from BlueScope's attorney is not.

Declarations on summary judgment must be made on personal knowledge, set forth facts that would be admissible in evidence, and show the affiant is competent to testify on the matter. CR 56(e). A trial court may not consider inadmissible evidence when ruling on a summary judgment motion. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). The trial court's rejection of the BlueScope attorney letter was correct.

G. THE TRIAL COURT'S APPLICATION OF THE STATUTE OF LIMITATIONS AND REJECTION OF HOLDEN-MCDANIEL'S CONTINUING TORT THEORY WAS CORRECT.

At the trial court level, Holden-McDaniel tried to "solve" it's statute of limitations problem by characterizing its claim as a "continuing tort," accruing anew upon "each successive date where injury is suffered." CP 1228, citing *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006). The trial court rejected Holden-McDaniel's continuing tort theory, finding "the alleged floods are more properly analyzed as discrete claims for negligence." CP 55.

On appeal Holden-McDaniel does not challenge the trial court's rejection of its continuing tort theory. *App. Brf. at 50.* Rather, Holden-McDaniel merely argues that the three-year statute of limitations for trespass under RCW 4.16.080(1) should apply rather than the two-year statute of limitations under RCW 4.16.130, which apples to actions asserting **negligent** injury to real property. *Wolfe v. State Dep't of Transp.*, 173 Wn. App. 302, 306, 293 P.3d 1244, *review denied sub nom. Wolfe v. State of Washington Dep't of Transp.*, 177 Wn.2d 1026, 309 P.3d 504 (2013) (citing *Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006)). For the reasons stated above, Holden-McDaniel's trespass claim is subsumed into its negligence claim, and RCW 4.16.130 provides

the correct limitations period. The trial court's ruling was correct and it should not be disturbed.

H. REQUEST FOR FEES AND REASONABLE EXPENSES.

RAP 14.2 allows for costs and reasonable expenses to be awarded to the prevailing party on appeal. Pursuant to RAP 18.1(b), WRJV respectfully requests that the Court issue an order awarding the reasonable attorneys' fees, costs, and expenses allowed under RAP 14.3 should it prevail.

VII. CONCLUSION

Holden-McDaniel's arguments were thoroughly briefed, argued, and rejected by the trial court, and the trial court's decisions should not be revisited. The court zeroed in on the critical issues rendering Holden-McDaniel's lawsuit against WRJV moot: Holden-McDaniel sued WRJV for the same flood claims in 1995, and ended that litigation via settlement agreement and release *after* WRJV had completed its work on the stormwater system, which only improved the flood situation. Holden-McDaniel may not sue WRJV all over again for the same, baseless claims. The trial court's dismissal of Holden-McDaniel's meritless claims should be upheld

RESPECTFULLY SUBMITTED this 7th day of December, 2015.

FORSBERG & UMLAUF, P.S.

By: _____

Kimberly A. Reppart, WSBA #30643
Attorney for Respondents Woodland Ridge Joint Venture, Kajima Development Corp., and Arlington Country Club, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF RESPONDENTS WOODLAND RIDGE JOINT VENTURE, KAJIMA DEVELOPMENT CORP., AND ARLINGTON COUNTRY CLUB, INC. on the following individuals in the manner indicated:

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SIGNED this 7th day of December 2015, at Seattle, Washington.

Shawn G. Menning