No. 96796-2

SUPREME COURT
OF THE STATE OF WASHINGTON

RYAN PSZONKA, *et al.*,

Appellants,

v.

SNOHOMISH COUNTY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. COURT OF APPEALS' DECISION

On December 31, 2018, the Court of Appeals issued a single decision on two linked appeals from a case consolidated at the trial court (Decision). The Decision is reported at 432 P.3d 859.

II. COUNTERSTATEMENT OF ISSUES PLAINTIFFS PRESENTED FOR REVIEW AND CONTINGENT ISSUES

For each claim, Snohomish County first restates the issues presented by plaintiffs. If the Court grants review on an issue, the County asks the Court to consider or, if necessary, remand (*see* RAP 13.7(b)) the italicized conditionally raised issues that also pertain to that claim.

A. Issues regarding March 2006 Meeting Claims

1. Whether any plaintiff presented sufficient evidence to create a material issue of fact of detrimental reliance on warnings the County provided at a March 2006 community meeting about landslide and flooding hazards (plaintiffs' Issue A, A1 here).

2. *Whether the Flood Control Act, RCW 86.12.037, which immunizes a county's acts or omissions related to flood protection, immunizes the County's communications at the March 2006 meeting because the County held the meeting for flood protection purposes* (A2).

3. *Whether the County's warnings at a meeting about future landslide and flooding risks, made 8 years before an unforeseen natural disaster, may nonetheless be the legal cause of plaintiffs' injuries* (A3).

B. Issues regarding Revetment Claims

Plaintiffs' Issue B takes issue with a ruling never made.[1]

1. Whether the Fish Habitat Projects Act (RCW 36.70.982), which immunizes a county for any adverse impacts resulting from a fish habitat project that has been permitted by the State, immunizes the County because the revetment was such a project and the State issued a permit for it (plaintiffs' Issue C, B1 here).

2. *Whether there was a triable issue of fact about whether the County could bear liability for a project when plaintiffs did not dispute that the County did not fund, design, permit, construct, inspect, or maintain the project, and the County's incidental actions related to it were insufficient as a matter of law to make the County liable* (B2).

3. *Whether the Flood Control Act, RCW 86.12.037, which immunizes a county's acts or omissions related to flood protection, immunizes the County for any acts or omissions related to the Tribe's revetment when it is undisputed that the revetment also was designed to*

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[1] Plaintiffs' Issue B concerns the affirmative acts doctrine, a basic principle of negligence law, and claims that the Court of Appeals erred in holding that it did not apply to the revetment claim. But the Court of Appeals was not asked to address, and did not address, whether the affirmative acts doctrine applied to the revetment claim. Instead, the Court of Appeals held that the affirmative acts doctrine did not apply to the March 2006 meeting claim. Decision at 25 ("Pszonka invokes the affirmative act doctrine as another basis for penalizing the County's alleged failure to provide an adequate warning."). Plaintiffs did not seek review of that issue.

prevent flooding (B3).

III. STATEMENT OF THE CASE

The Decision contains a fair statement of the case (pp. 4-10).[2] In the next section, the County provides citations to the evidence discussed.

IV. REASONS FOR DENYING THE PETITION

A. Plaintiffs Fail to Justify Review.

Plaintiffs fail to justify review under the only bases they invoke, that the *issue* (not the case) is "of substantial public interest that should be determined by the Supreme Court" or the decision conflicts with decisions of this Court. RAP 13.4(b)(1), (4). Regarding the latter (a claimed conflict), the Court of Appeals applied established Supreme Court precedent in holding that the County did not create a duty to warn by holding a meeting with community residents to discuss ongoing landslide and flooding risks posed by a nearby hazard. *See* Decision at 23-25. The holding plaintiffs criticize as involving improper fact finding (Decision at 21-22) was an alternative holding and grounded in the County's arguments that liability cannot attach for what someone allegedly failed to say *eight years before* an unforeseen natural disaster.

Nor is the issue about statutory immunity for fish habitat projects

[2] With the exception that the County flood plan did not refer to the County as having any role in the Tribe's project. *Compare* Decision at 6 (flood plan "recommended that the County should implement a stabilization project") *with* CP 742, 894-95.

of "substantial public interest." RCW 36.70.982 says a county "is not liable" for projects described by the statute and permitted by the State, and it is only through adding words, speculation, and supposed intent that plaintiffs claim it does not apply. *See* Decision at 16 ("Because the statute's meaning is clear based on its text, our inquiry is at an end.").

While this case involves a nationally publicized natural disaster and a significant loss of life, it does not present legal issues justifying review. This Court does not accept review of cases solely because they involve extraordinary events or tragic outcomes. *E.g., Karr v. State*, 112 Wn.2d 1011 (1989) (denying review of decision affirming summary judgment against personal representatives of 14 of the 60 people killed in Mount St. Helens eruption). Because the issues do not meet "one or more of the tests" of RAP 13.4(b) (*see* RAP 13.4(c)(7)), review is unwarranted.

B. Review Is Not Warranted of the Issues Related to Dismissal of Claims Arising from the March 2006 Meeting.

1. The court did not err in applying settled law (Issue A1).

Plaintiffs do not seek a new rule of law about the rescue doctrine. Instead, they ask the Court to correct perceived errors by the Court of Appeals in evaluating evidence. "As the highest court in the state, the Supreme Court is a court of law, 'not a court of error correction.'" 2 *Washington Appellate Practice Deskbook* § 18.2(5) (4th ed. 2016) (citation omitted).

a. Plaintiffs ignore clear statements of law in *Brown* and *Osborn* that were dispositive because plaintiffs failed to offer evidence of reliance.

Plaintiffs erroneously claim that the court's application of the rescue doctrine "conflict[s]" with *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975). It does not. The Court of Appeals correctly recognized that plaintiffs failed to prove the necessary requirements for the rescue doctrine to apply. Under *Brown* and the subsequent case construing it, *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.3d 197 (2006), a "duty exists under the rescue doctrine only if an injured party reasonably relies on the assurances" made and is harmed as a result. *Osborn*, 157 Wn.2d at 23, 25; *see Brown*, 86 Wn.2d at 300 (duty arises from "promises which induce reliance, causing the promisee to refrain from seeking help elsewhere and thereby worsening his or her situation"). "[R]eliance is the linchpin of the rescue doctrine." 157 Wn.2d at 25. Plaintiffs all but ignore this independent basis for the court's decision affirming dismissal of their duty to warn claim (and fail even to cite *Osborn*), that plaintiffs failed to present *any* evidence of reliance.

Plaintiffs claim the County provided inadequate information about landslide risks at a meeting the County held in March 2006 after a large landslide dammed the North Fork Stillaguamish River and moved it 700 feet southward, causing widespread flooding and property damage. *E.g.*,

CP 376, 944, 1528, 6746, 6756-58. The County invited the community to the meeting by letter, stating that the purpose was "to discuss *some of the* short term and long term *risks* to the area associated with the recent slide and *to facilitate the community planning* to address these issues." CP 5540 (emphasis added). At the meeting, a County geologist warned audience members that landslides and flooding would continue on a "sporadic and unpredictable" basis and explained a LIDAR image that showed that the valley was full of historic landslides of great magnitude. *E.g.*, CP 5552, 5555-58, 5563-64, 5579, 5861. Other presenters urged the community to protect themselves. CP 5578-79, 5586-90, 6746. Plaintiffs nonetheless allege that the County did not provide enough information about the risks, and that the meeting created a duty to everyone for all time, even to people who never lived in the community, did not attend or hear about the meeting, moved into the community years later, or simply traveled on Highway 530.

The County's meeting was entirely unlike what was alleged to have happened in *Brown*, where this Court held that the State could be liable if the State's statement that there was no avalanche danger "caus[ed appellants' broker] to refrain from action on appellants' behalf he otherwise would have taken." 86 Wn.2d at 299. A plaintiff relying on the rescue doctrine must prove reliance, and in *Osborn* the Court explained

why cases interpreting *Brown* otherwise were wrong: "in *Brown*, a duty existed because the injured parties reasonably relied on their broker to warn them of danger . . . and the public entity caused the broker to believe no danger existed." 157 Wn.2d at 26. Absent proof of reliance on the warning, there is no duty. 86 Wn.2d at 300 (rescue doctrine requires "reliance," *i.e.*, that the promised action "worsen[ed] his or her situation"); 157 Wn.2d at 25 ("reliance is the linchpin of the rescue doctrine").

Plaintiffs offered no evidence the County's meeting made anyone's situation worse than had the County held no meeting at all. For instance, the meeting dissuaded no one from investigating the landslide risks or the Tribe's proposed project, and caused no one to stay in the neighborhood when he or she otherwise would have left. The Court of Appeals recognized that

> [t]he County did not deprive the attendees of the opportunity to be informed about the risks of landslides and in fact encouraged them to seek out more information. The County's warnings of the danger of future slides did not make the situation of the Steelhead Haven residents worse than if the County had not held a meeting.

Decision at 25. This lack of evidence of reliance is dispositive: the County owed no duty to any person because none presented evidence of reliance.

The Court of Appeals correctly applied *Brown* and *Osborn*. The court considered plaintiffs' interpretation of *Brown*, took account of

Osborn which interpreted *Brown*, and rejected plaintiffs' attempt to ignore the reliance element. The Court of Appeals' decision is not "in conflict with a decision of the Supreme Court." RAP 13.4(b)(1). To the contrary, the decision is entirely consistent with prior rulings of the Court.

b. Review is not warranted of the Court of Appeals' alternative holding that the County's conduct was reasonable.

Plaintiffs seek review primarily based on their contention that the Court of Appeals erred in evaluating the facts in determining that plaintiffs failed to present evidence that the County acted unreasonably at the March 2006 meeting. There is no reason to review this issue, for the primary reason that without evidence of reliance (discussed *supra*) it is immaterial whether plaintiffs could prove breach. But there also is no basis under RAP 13.4(b) to review this determination.

Plaintiffs do not allege that the court's decision *conflicts* with this Court's prior decisions (*see* RAP 13.4(b)(1)), but instead argue that the court erred in determining that facts were not in dispute. That is not a basis for discretionary review. Plaintiffs point to *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 317 P.3d 987 (2014), and *Staats v. Brown*, 139 Wn.2d 757, 991 P.2d 615 (2000), as justifying review here, but in those cases the Court did not grant review to correct a perceived error in application of the summary judgment standard. Rather, in each,

the Court accepted review to issue new rules of law about the scope of immunity. Here, plaintiffs identify no issue of law to be decided: they merely claim that the Court of Appeals misinterpreted the evidence.

In addition, the court's holding was independent of, and alternative to, its holding that no duty existed because no plaintiff relied on the warnings the County provided at the meeting (*see* previous section). Because the County owed no duty, the reasonableness of the County's communications is not material. Indeed, the County never sought summary judgment on the reasonableness of its conduct (*i.e.*, breach) and did not argue that issue on appeal. While the County did not seek that ruling, the County did seek summary judgment on legal causation. The County's legal causation argument (presented on appeal as an alternative basis to affirm and discussed in the next section) is echoed in the Court of Appeals' analysis of the reasonableness of the County's actions.

Finally, the Court of Appeals was correct, the warnings at the meeting *were*, as a matter of law, reasonable. The court was entitled to rely on this alternative ground because it was supported by the record. *See Otis Hous. Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). The meeting's purpose was not to instill a sense of safety, but the opposite, "to discuss . . . risks to the area associated with the recent slide and to facilitate the community planning to address these issues." CP

5540. Plaintiffs identify two alleged omissions: (1) a statement from a 1999 report that a future slide could involve "an order of magnitude" more material (a possibility the report itself characterized as "speculative"); and (2) that a County hydrologist had questioned whether the County should study or monitor the slide. Pet. at 8-9. As to the first, the Court of Appeals rightly recognized that the report—prepared seven years before the meeting—characterized the possibility of a larger volume slide as "speculative."[3] As to the second, there is *always* something more that could be done to study or monitor *any* natural hazard. Failure to note those facts is not unreasonable particularly when the County *did* warn those that attended the March 2006 meeting that it intended to take no future action.[4] As the Court of Appeals held, "The record does not support the allegation that the County lulled residents into believing they were safe and that there was no need to take action." Decision at 19.

Because "the tests established in section (b)" of RAP 13.4 do not

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[3] Dr. Miller, the report's author and geologist most knowledgeable about the landslide, testified that he never anticipated a slide with a runout like the Oso Landslide. CP 5639. He visited the Steelhead Haven community after the January 2006 slide and, even then, neither perceived nor warned the community that the landslide posed any greater risk than he described in his 1999 report. CP 5510-24, 5637-39, 5475-76.

[4] *E.g.*, CP 5578-79 ("I remember [the speaker] very clearly stating that . . . the residents needed to get together and [take] . . . some sort of effort to save themselves, because this event would happen again, and they needed to be able to protect themselves."); CP 6746 ("The gist of what they told us was that the community could not expect . . . the County and the Army Corps of Engineers to come to the rescue in the future.").

include review of a claimed error in applying the summary judgment standard, discretionary review is unwarranted. *See* RAP 13.4(c)(7).

2. Additional bases support dismissal of these claims.

Review also is unwarranted because additional and independent bases support the dismissal of claims related to the March 2006 meeting, making review futile. But, if the Court takes review of the rescue doctrine issue, the Court should review these bases as well.

a. The County's warnings at a meeting eight years before the March 2014 landslide were not a legal cause of plaintiffs' injuries (Issue A2).

The County's warnings at a meeting held in 2006, eight years before the 2014 landslide, were not a legal cause of plaintiffs' injuries. *See McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 360, 961 P.2d 952 (1998) (consideration of legal causation allows the court to "exercise[] its gatekeeper function . . . if the defendant's actions are too remote a cause of plaintiff's injuries"); *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985) (legal causation "involves a determination of whether liability *should* attach as a matter of law" based on "mixed considerations of logic, common sense, justice, policy, and precedent"). The Court of Appeals did not reach this independent basis to affirm.

Of the dozens of people whose claims are prosecuted in this appeal, only five lived in Steelhead Haven at the time of the meeting or

had a relative who did. CP 5808-14, 5817. Many were in or near the community by chance when the Oso Landslide happened, including one driving on Highway 530. *E.g.*, CP 4552, 4554, 4555. The evidence was uncontroverted that none heeded the warnings the County *did provide* or its recommendation that the community take action to protect itself. *E.g.*, CP 5016-17. Those warnings left one attendee concerned about the safety of persons living in the area. CP 5579, 5581. In addition, plaintiffs argued that it was the Tribe's redesign and siting of the revetment, installation of sediment ponds, and channelization of runoff that made the slide so dangerous. CP 8782-83. All of this happened months and years *after* the County's meeting and with the knowledge and assent of the State on whose land it was built.[5] *See* Restatement (Second) of Torts § 433 cmt. f (no legal cause when the act was "unsubstantial as compared to the aggregate of the other factors which have contributed"). Finally, plaintiffs acknowledged that no one, including leading geologists familiar with the site, did or could have predicted the Oso Landslide. CP 5691, 5699-5700.

Those facts, and the eight-year gap between the 2006 meeting and the 2014 landslide, make any alleged County omissions in its meeting far

[5] The State had a judgment entered against it in this case for $50 million and the timber company defendant settled for $10 million. *See* No. 14-2-18401-8, Dkt. Nos. 1084, 1085 (King Cty. Sup. Ct. Oct. 10, 2016).

too attenuated from the injuries to be the legal cause. As the Court of Appeals held, "If liability could so easily be imposed for things unsaid at public safety meetings, governmental entities would cease holding meetings about natural and manmade disasters altogether, leaving communities worse off." Decision at 25. Imposing liability for these alleged omissions in a meeting eight years before the Oso Landslide discourages *anyone*—not just governments—from educating a community about known hazards. It would be illogical, unjust, and contrary to public policy to impose responsibility on the County for the deaths, injuries, and property damage caused by an unforeseen natural disaster which even the foremost geologists did not predict, not on its own land and not of its own making, solely because *eight years earlier* it allegedly provided incomplete information while trying to convince the community to act.

b. Flood Control Act immunity applies to the communications at the meeting (Issue A3).

The Court of Appeals did not reach the question of whether the Flood Control Act (RCW 86.12.037) immunized the County's communications at the March 2006 meeting. RCW 86.12.037 provides:

> No action shall be brought or maintained against any county . . . for any noncontractual acts or omissions of such county . . . relating to the improvement, protection, regulation, and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks, and waters thereof . . . .

Because communicating or leaving something out of a communication is an act or omission,[6] and the County's meeting related to protection from, or prevention of, floods, the statute immunizes the County for what it said or allegedly failed to say at the meeting.

Plaintiffs *agree* that the meeting's purpose was to communicate the risks of flooding and encourage residents to act to protect themselves from those risks. The stated reason for the meeting was "to inform the community about current and future risks at the site, such as additional land slides, flooding and erosion." CP 5540. The County's Public Works Department Director, who led the meeting, testified, "I was concerned there could be another slide that would block the river and expose the community to more flooding." CP 1482. Attendees were told "that the landslide and flooding risks were not over and that there could be landslides and flooding in the future." CP 6746. The County urged the community to act to protect itself from future flooding, recommending specific measures to address the flood risks, including applying for federal flood buyouts and forming a flood control district. CP 5587. Plaintiffs concede these facts. Apps.' Reply Brief, p. 13 (Sept. 5, 2017) ("The

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[6] *E.g.*, Restatement (Second) of Torts § 2 cmt. b ("act" includes "speaking of words"); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 115, 285 P.3d 34 (2012) ("deceptive act[s]" under CPA include representations and omissions); *Black's Law Dictionary* at 1260 (10th ed. 2014) (defining "omission" as the "act of leaving something out").

County instead told those who attended the March 11, 2006 meeting that they should prepare only for future *flooding*.").

Although a similar federal flood immunity statute differs in a significant way from the state statute,[7] this Court cited the federal law in explaining the purpose of RCW 86.12.037. *See Paulson v. Pierce County*, 99 Wn.2d 645, 654, 664 P.2d 1202 (1983) (citing *Nat'l Mfg. Co. v. United States*, 210 F.2d 263, 270 (8th Cir. 1954)). Notably, the federal case relied on (*National Manufacturing Co.*) held that the federal statute immunized communications about flood risks, concluding that the government was immune for claims it "negligently assured the plaintiffs that the river would not overflow its banks and negligently failed to warn the plaintiffs." *Graci v. United States*, 456 F.2d 20, 23-24 (5th Cir. 1971).

A county that recommends measures to protect against flood risks (whether measures it will undertake or is encouraging others to undertake) or acts or chooses not to act to control flooding must communicate those facts. RCW 86.12.037 immunizes those communications.

C. Review Is Not Warranted of the Court's Holding That the County Could Not Be Liable for the Tribe's project.

1. The court applied settled law in interpreting the grant of immunity to mean what it says: that a county "is not

[7] 33 U.S.C. § 702c immunizes based on the *cause of the injury* ("for any damage from or by floods or flood waters") while RCW 86.12.037 immunizes based on the *acts or omissions* alleged to be tortious.

liable" for a project meeting the criteria of the statute and permitted by the State (Issue B1).

The Fish Habitat Projects Act, Laws of 1998, ch. 249, enacted in response to the threat of listing Chinook as endangered, streamlined the permitting process for projects to enhance fish habitat by eliminating all regulatory requirements other than a permit from the Department of Fish and Wildlife (DFW). RCW 77.55.181(4). The statute immunizes a county from liability for these projects: "A county is not liable for adverse impacts resulting from a fish enhancement project that meets the criteria of RCW 77.55.181 and has been permitted by the department of fish and wildlife." RCW 36.70.982. The Court of Appeals correctly ruled that the immunity applied, making the County "not liable" for the Tribe's project, no matter the extent of its alleged involvement. Decision at 13-16.

Plaintiffs argue that the project did not "meet[] the criteria of RCW 77.55.181" because the State had not "develop[ed] size or scale threshold tests" as required by RCW 77.55.181(1)(b). But the requirement that the *project* meet the criteria of the statute has to do with the characteristics of the project (*e.g.*, that it "accomplish one or more of the following tasks," RCW 77.55.181(1)(a)), not whether the State did or did not meet its obligation to develop tests to *evaluate* the projects. Plaintiffs' related argument concerns RCW 77.55.181(1)(b), which states that a "project

proposal shall not be reviewed under the process created in this section *if the department determines* that the scale of the project raises concerns regarding public health and safety." *Id.* (emphasis added). Plaintiffs argue that the Tribe's project *should have* raised those concerns and therefore the project did not meet this "criteri[on]." But the Legislature assigned that determination to DFW's discretion, and DFW determined it was met. Decision at 14-15 ("The approval of the permit indicates that, in the department's view, the scale of the cribwall project did not make it potentially threatening to public health or safety.").

Plaintiffs claim the "the petition involves an issue of substantial public interest that should be determined by the Supreme Court," but do not explain how that is so. *See* Pet. 3. Plaintiffs fail to "discuss why th[ese] particular issue[s] ha[ve] ramifications beyond the particular parties and the particular facts of" this case. 2 *Washington Appellate Practice Deskbook* § 18.2(3). As in *Snowden v. Kittitas County School District*, 38 Wn.2d 691, 231 P.2d 621 (1951), concerning a similarly worded statute, "[t]here is nothing whatever in the language of the statute indicative of the more restricted scope which" plaintiffs urge. *Id.* at 698.

2. Additional bases support the dismissal of these claims.

Review also is not warranted because additional bases support the dismissal of claims related to the Tribe's project. But, if the Court reviews

the immunity issue, the Court should review these bases as well.

a. The County cannot be liable for a project funded, designed, permitted, constructed, inspected, and maintained entirely by others (Issue B2).

The Court of Appeals did not reach the question of whether "the County's involvement in building the cribwall was sufficient to give rise to liability." Decision at 13 (question "may be a factual issue"). Plaintiffs presented inconsequential facts to argue the County was involved[8] but have never established why the County could bear legal liability for a project funded, designed, permitted, constructed, inspected, and maintained by others. Unlike in *Borden v. City of Olympia*, where the city "was engaging in a proprietary function" by designing, engineering, and paying for the project, 113 Wn. App. 359, 371, 53 P.3d 1020 (2002), plaintiffs offered no evidence that the County did anything of the sort.

Plaintiffs continue to argue the inverse condemnation standard of *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998). *Phillips* underscores that inverse condemnation and negligence claims require

[8] An analysis of those facts is at the County's opening brief below, including the fact that most of the County's "involvement" was in its governmental role. Resp. Brief, pp. 45-49 & nn. 30-32 (June 12, 2017). Plaintiffs did not appeal the trial court's dismissal of claims predicated on those actions as barred by the public duty doctrine (*see* CP 2724, 2747) and cannot now rely on them to establish a duty. *See Hoffer v. State*, 110 Wn.2d 415, 422, 755 P.2d 781 (1988) (distinguishing between proprietary and non-proprietary acts of government as determining applicability of public duty doctrine).

different proof, and evidence sufficient for one may be insufficient for the other. *See id.* at 950 (declining to review dismissal of negligence claim). But even if applicable, "active, proprietary participation—participation *without which the alleged taking or damaging would not have occurred*—. . . is required under *Phillips* before liability can attach." *Halverson v. Skagit County*, 139 Wn.2d 1, 13, 983 P.2d 643 (1999). Plaintiffs presented no evidence that, had the County not done what it allegedly did, the Tribe's project would not have been built.

At every step the Tribe, not the County, made decisions about the design, construction, siting, and maintenance of the project; the State and federal government, not the County, approved the project; and the State, not the County, paid for it. The County's actions, construing every inference in plaintiffs' favor, do not evidence that the County had *any* authority over, responsibility for, or even a say in the project. Because no individual could be liable for the Tribe's project if it had done what the County did, the claim fails. *See Robb v. City of Seattle*, 176 Wn.2d 427, 438, 295 P.3d 212 (2013) (government has no duty "to foresee and eliminate dangers everywhere"); RCW 4.96.010 (municipal entity liable only "to the same extent as if [it] were a private person").

b. Flood Control Act immunity applies given the unrebutted evidence that the revetment was also designed to prevent flooding (Issue B3).

The Court of Appeals also did not reach the question of whether the revetment was built as a flood prevention project, immunizing the County under RCW 86.12.037. The trial court found a fact dispute about whether flood immunity applied, because the "first page" of the Tribe's application "only identifies fish habitat rehabilitation as the purpose of the project." CP 4342. But the trial court's focus on the first page ignored that the first page was a State *form*. CP 3022. It is undisputed that the project was also intended to reduce flooding risks (*e.g.*, CP 2948 ("[r]educe floodplain encroachment" listed in the proposal as a "project objective[]")) and the rest of the application described how the project was designed to reduce flooding risks (*e.g.*, CP 3027 (the January 2006 landslide "has confined the river such that a large scale flood event will likely result in some flooding of homes"); CP 3025 (tree removal to reduce likelihood that "a 2-year recurrence flow will cause flooding of [occupied] adjacent properties"; "[o]nce the proposed project is completed, flooding will be reduced")). If the County potentially bears liability for the project based on its alleged involvement, then it is entitled to immunity given the project's goal to reduce flooding.

V. CONCLUSION

For the foregoing reasons, the Court should deny review.

RESPECTFULLY SUBMITTED this 22nd day of March, 2019.

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CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On March 22, 2019, I caused a true and correct copy of the foregoing document to be served on the parties listed below in the manner indicated:

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APPENDIX 1 (FISH HABITAT PROJECTS ACT)

RCW 36.70.982

A county is not liable for adverse impacts resulting from a fish enhancement project that meets the criteria of RCW 77.55.181 and has been permitted by the department of fish and wildlife.

RCW 77.55.181

(1)(a) In order to receive the permit review and approval process created in this section, a fish habitat enhancement project must meet the criteria under this section and must be a project to accomplish one or more of the following tasks:

(i) Elimination of human-made or caused fish passage barriers, including:

(A) Culvert repair and replacement; and

(B) Fish passage barrier removal projects that comply with the forest practices rules, as the term "forest practices rules" is defined in RCW 76.09.020;

(ii) Restoration of an eroded or unstable stream bank employing the principle of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; or

(iii) Placement of woody debris or other instream structures that benefit naturally reproducing fish stocks.

(b) The department shall develop size or scale threshold tests to determine if projects accomplishing any of these tasks should be evaluated under the process created in this section or under other project review and approval processes. A project proposal shall not be reviewed under the process created in this section if the department determines that the scale of the project raises concerns regarding public health and safety.

(c) A fish habitat enhancement project must be approved in one of the following ways in order to receive the permit review and approval process created in this section:

(i) By the department pursuant to chapter 77.95 or 77.100 RCW;

(ii) By the sponsor of a watershed restoration plan as provided in chapter 89.08 RCW;

(iii) By the department as a department-sponsored fish habitat

enhancement or restoration project;

(iv) Through the review and approval process for the jobs for the environment program;

(v) Through the review and approval process for conservation district-sponsored projects, where the project complies with design standards established by the conservation commission through interagency agreement with the United States fish and wildlife service and the natural resource conservation service;

(vi) Through a formal grant program established by the legislature or the department for fish habitat enhancement or restoration;

(vii) Through the department of transportation's environmental retrofit program as a stand-alone fish passage barrier correction project;

(viii) Through a local, state, or federally approved fish barrier removal grant program designed to assist local governments in implementing stand-alone fish passage barrier corrections;

(ix) By a city or county for a stand-alone fish passage barrier correction project funded by the city or county;

(x) Through the approval process established for forest practices hydraulic projects in chapter 76.09 RCW; or

(xi) Through other formal review and approval processes established by the legislature.

(2) Fish habitat enhancement projects meeting the criteria of subsection (1) of this section are expected to result in beneficial impacts to the environment. Decisions pertaining to fish habitat enhancement projects meeting the criteria of subsection (1) of this section and being reviewed and approved according to the provisions of this section are not subject to the requirements of RCW 43.21C.030(2)(c).

(3)(a) A permit is required for projects that meet the criteria of subsection (1) of this section and are being reviewed and approved under this section. An applicant shall use a joint aquatic resource permit application form developed by the office of regulatory assistance to apply for approval under this chapter. On the same day, the applicant shall provide copies of the completed application form to the department and to each appropriate local government. Applicants for a forest practices hydraulic project that are not otherwise required to submit a joint aquatic resource permit application must submit a copy of their forest practices application to the appropriate local government on the same day that they submit the forest practices application to the department of natural resources.

(b) Local governments shall accept the application identified in this

section as notice of the proposed project. A local government shall be provided with a fifteen-day comment period during which it may transmit comments regarding environmental impacts to the department or, for forest practices hydraulic projects, to the department of natural resources.

(c) Except for forest practices hydraulic projects, the department shall either issue a permit, with or without conditions, deny approval, or make a determination that the review and approval process created by this section is not appropriate for the proposed project within forty-five days. The department shall base this determination on identification during the comment period of adverse impacts that cannot be mitigated by the conditioning of a permit. Permitting decisions over forest practices hydraulic approvals must be made consistent with chapter 76.09 RCW.

(d) If the department determines that the review and approval process created by this section is not appropriate for the proposed project, the department shall notify the applicant and the appropriate local governments of its determination. The applicant may reapply for approval of the project under other review and approval processes.

(e) Any person aggrieved by the approval, denial, conditioning, or modification of a permit other than a forest practices hydraulic project under this section may appeal the decision as provided in RCW 77.55.021(8). Appeals of a forest practices hydraulic project may be made as provided in chapter 76.09 RCW.

(4) No local government may require permits or charge fees for fish habitat enhancement projects that meet the criteria of subsection (1) of this section and that are reviewed and approved according to the provisions of this section.

(5) No civil liability may be imposed by any court on the state or its officers and employees for any adverse impacts resulting from a fish enhancement project permitted by the department or the department of natural resources under the criteria of this section except upon proof of gross negligence or willful or wanton misconduct.

APPENDIX 2 (FLOOD CONTROL ACT)

RCW 86.12.037

No action shall be brought or maintained against any county, city, diking district, or flood control zone district when acting alone or when acting jointly with any other county, city, or flood control zone district under any law, or any of its or their agents, officers, or employees, for any noncontractual acts or omissions of such county or counties, city or cities, diking district or districts, flood control zone district or districts, or any of its or their agents, officers, or employees, relating to the improvement, protection, regulation, and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks, and waters thereof: PROVIDED, That nothing contained in this section shall apply to or affect any action now pending or begun prior to the passage of this section.

APPENDIX 3 (TITLE 4 RCW)

RCW 4.96.010

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

HARRIGAN LEYH FARMER & THOMSEN LLP

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