No. 96796-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 77787-4-I

RYAN M. PSZONKA as personal representative of the ESTATES OF KATIE RUTHVEN, HUNTER RUTHVEN, and WYATT RUTHVEN; AMY S. THOMPSON as personal representative of the ESTATES OF SHANE RUTHVEN, LEWIS VANDENBURG and JUDEE VANDENBURG; SONJA M. REW as personal representative of the ESTATE OF GLORIA HALSTEAD; STEVEN L. HALSTEAD as personal representative of the ESTATE OF JERRY HALSTEAD; and JAMIE A. LENNICK as personal representative of the ESTATE OF AMANDA LENNICK

TIM WARD, individually and as the personal representative of the Estate of BRANDY WARD; GERALD F. FARNES, individually, and as the personal representative of the ESTATES OF JULIE FARNES and ADAM FARNES; DAYN BRUNNER and JASON BRUNNER, as personal representatives of the ESTATE OF SUMMER RAFFO; DEBORAH L. DURNELL, individually, and as the personal representative of the ESTATE OF THOMAS P. DURNELL; MARALEE HALL, individually, and as the personal representative of the ESTATE OF JOSEPH R. MILLER; SETH JEFFERDS, individually, and as the personal representative of the ESTATE OF CHRISTINA ANNETTE JEFFERDS; BRENDA NEAL, individually, and as the personal representative of the ESTATE OF STEPHEN NEAL; MINDI PEAKE, individually, and as the personal representative of the ESTATE OF MARK GUSTAFSON; JONIELLE SPILLERS, individually, and as personal representative of the ESTATES OF BILLY LEE SPILLERS, KAYLEE B. SPILLERS, BROOKE SPILLERS, and JOVON MANGUAL; JONIELLE SPILLERS as guardian of JACOB SPILLERS; and ABBIE PEARSON, individually and as the personal representative of the Estate of MICHAEL PEARSON; DIANA BEJVL as the personal representative of the Estate of ALAN BEJVL; LARAE DEQUILETTES as the personal representative of the Estate of RON DEQUILETTES; NATASHA HUESTIS as the personal representative of the Estate of SANOAH HUESTIS; AMANDA

SUDDARTH, individually; TY SUDDARTH and AMANDA SUDDARTH, as guardians of DUKE SUDDARTH, a minor; and BARBARA WELSH as the personal representative of the Estate of WILLIAM WELSH
RANDI LESTER, individually, and as Personal Representative for the Estate of DENVER HARRIS; ROBIN YOUNGBLOOD, individually; and, MARK LAMBERT, individually

Appellants

v.

SNOHOMISH COUNTY

Respondent/Cross Appellant,

PETITION FOR REVIEW

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I. INTRODUCTION & IDENTITY OF PETITIONERS

Petitioners are three groups of plaintiffs ("Plaintiffs"), representing 34 individuals who died or were injured in the largest fatality landslide in Washington state history, the "Oso Landslide." This tragedy should not have happened, and Snohomish County bears significant responsibility for Plaintiffs' avoidable losses. The County played a central role in negligently safeguarding and warning the Steelhead Haven community with respect to the failing hillside that became the March 22, 2014 Oso Landslide. The Court of Appeals rejected Petitioners' negligence claims against Snohomish County through misapplication of Washington tort and immunity law and through highly flawed fact-finding of its own on the issue of "reasonable care" and "causation," which this Court has repeatedly held present jury questions. Notwithstanding the waiver of sovereign immunity, a private plaintiff faces many hurdles in suing a County for its negligence. One such hurdle should not be inappropriate fact-finding by an appellate court. This Petition asks the Court to take review and to allow a jury of Plaintiffs' peers to decide whether the County was negligent, and whether that negligence harmed Plaintiffs.

II. COURT OF APPEALS' DECISION

The Court of Appeals' decision dated December 31, 2018, No. 77787-4-I, linked with Case No. 76376-8-I, is attached as Appendix A to this Petition.

III. ISSUES PRESENTED FOR REVIEW

A. Does the Court of Appeals' decision conflict with *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975), and this Court's instruction that an appellate court, on summary judgment, should not resolve disputed material facts or draw reasonable factual inferences against the non-moving party? *See Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693-94, 317 P.3d 987 (2014) (where material facts are disputed, trial is needed); *Staats v. Brown*, 139 Wn.2d 757, 764, 991 P.2d 615 (2000) (on summary judgment, all facts and inferences are construed most favorably to nonmoving party).

B. Does the Court of Appeals' decision regarding the affirmative acts doctrine conflict with the principle that "[a]ll persons have a duty to others to refrain from engaging in acts "which involve[] an unreasonable risk of harm to another." Restatement (Second) of Torts §§ 284 & 302 (1965), and with this Court's instruction that an appellate court, on summary judgment, should not resolve disputed material facts or draw reasonable factual inferences against the non-moving party? *See Camicia*

v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693-94, 317 P.3d 987 (2014) (where material facts are disputed, trial is needed); *Staats v. Brown*, 139 Wn.2d 757, 764, 991 P.2d 615 (2000) (on summary judgment all facts and inferences are construed most favorably to nonmoving party).

C. Does the Court of Appeals' decision to grant Snohomish County broader immunity than afforded under Washington's Fish Habitat Enhancement law (RCW 36.70.982) in order to deny Plaintiffs' negligence claim against the County "involve[ ] an issue of substantial public interest," and does that decision violate this Court's instruction that an appellate court should resolve all reasonable factual inferences in favor of the non-moving party? *Staats v. Brown*, 139 Wn.2d 757, 764, 991 P.2d 615 (2000) (statutory immunity claims are determined under summary judgment standard; all facts and inferences are construed most favorably to nonmoving party)?

IV. STATEMENT OF THE CASE

On March 22, 2014, a catastrophic landslide near Oso, Washington, destroyed the Steelhead Haven neighborhood, killing 43 people and injuring others. In two ways, the County's wrongdoing harmed Plaintiffs and contributed to the devastation of their lives. First, the County promised to warn the Steelhead Haven community at a March 11, 2006 meeting about future landslide risks, and then concealed from the

community what the County had decided just weeks before the meeting – that the next slide could kill people, that the County would not know the scope of the potential devastation unless it studied and monitored the hillside across the river, and that the County had decided to pursue neither of those things. See Appendix B (Appellants' Opening Brief (Mar. 29, 2017) at 17-22; Appellants' Response and Reply Brief (Sept. 5, 2017) at 12-17 and evidence cited therein. Second, the County actively participated in erecting a huge 1,500 foot Log Crib Wall ("Log Wall") project that trapped thousands of tons of loose debris at the bottom of an unstable hillside across from Steelhead Haven, thus making the March 22, 2014 Oso Landslide more explosive and deadly, and thus more likely to bury the community. Appellants' Opening Br. at 3-16; Appellants' Response and Reply Br. at 10-12 and evidence cited therein.

The Superior Court found triable questions of negligence against the County. Applying the rescue doctrine, it held that the County undertook a duty to warn Plaintiffs of the risks associated with future landslides, and that as to some Plaintiffs (those present at and those who spoke with those present about the March 11, 2006 meeting), there was a triable question whether the County acted with reasonable care toward Plaintiffs. Appellants' Opening Br. at 24 and evidence cited therein (CP 6979, CP 6728); Opening Br. at 40-41 and evidence cited therein (CP

7696). The Superior Court also held that Plaintiffs presented a triable case regarding the County's negligence in promoting, overseeing construction of and monitoring the Log Wall built on the river bank across from Steelhead Haven without considering whether storage of thousands of tons of loose debris behind the Log Wall could be unleashed in a lethal slurry when the next slide occurs. Appellants' Opening Br. at 23 and evidence cited therein (CP 2772-73; 4341); Appellants' Response and Reply Br. at 12 and evidence cited therein. The Superior Court nonetheless held that the County was immune from liability for such negligence under the Fish Habitat Enhancement Project statute, RCW 36.70.982; Appellants' Opening Br. at 24 (CP 4344-46).

Without even acknowledging that the trial court found a triable rescue claim as to some Plaintiffs, the Court of Appeals held that no Plaintiff had a triable claim under the rescue or affirmative acts doctrines. Op. at 19-25. The Court of Appeals also affirmed the Superior Court's holding that under RCW 36.70.982 the County was immune from accountability for its negligent conduct regarding the Log Wall project. Op. at 14-16.

1. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court Should Accept Review to Correct the Court of Appeals' Misapplication of the Rescue Doctrine to Plaintiffs' Claims.

The Court of Appeals recognized the centrality of *Brown v. McPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975), which the Court described as "a close precedent factually" to Plaintiffs' rescue doctrine claim against the County. Op. at 23. The Court of Appeals also correctly described *Brown* as recognizing a claim by owners and visitors to ski huts who died in an avalanche against the State where the State, with knowledge of the avalanche risk to the occupants of the ski huts:

> met with William MacPherson, a real estate broker associated with the [ski hut] development, and led him "to erroneously believe that . . no avalanche danger existed." Brown, 86 Wn.2d at 298. The plaintiffs claimed that [the State's] omissions deprived them of the opportunity to be forewarned of their danger by . . . MacPherson, and they were unable to avoid the losses they suffered when the avalanche that had been predicted actually occurred.

Op. at 24. Such facts "stated a claim of negligence by malfeasance and nonfeasance, both arising from the rescue doctrine." Op. at 24.

The Court of Appeals then proceeded to conduct its own fact-finding to conclude that the County's conduct at the March 11, 2006, meeting was "reasonable" and that such conduct did not cause Plaintiffs' injuries. Op. at 18. To make this factual finding the Court of Appeals had to ignore the critical evidence of what the County withheld from the

community and sworn testimony of residents that they would have warned the community had the County shared what it actually knew. The trial court, looking at the same evidence, found it created a jury question on the issues of negligence and causation as to some Plaintiffs. Opening Br. at 24 and evidence cited therein (CP 6979, CP 6728).

In finding the County acted reasonably, the Court of Appeals noted there was no evidence that "County representatives sa[id] that the risk of danger from future slides was minimal or that the cribwall was a guarantee against a catastrophic event." Op. at 22. This statement utterly mischaracterizes the factual basis for Plaintiffs' rescue claim, and it exposes why appeals courts should not be in the business of fact-finding. Plaintiffs' rescue claim is not grounded on the County having minimized slide risk or describing the Log Wall as a guarantee against a catastrophic event. Those who attended the meeting understood that slides would occur unpredictably in the future, as they had in the past, potentially blocking the river and creating a flood risk as had happened six weeks earlier. Appellants' Opening Br. at 17-22; Appellants' Response and Reply Br. at 12-14, and evidence cited therein. But the County said nothing about human life being at risk from future slides, and no resident walked away from the meeting believing that anyone's life was at risk from future sliding. *Id.* Past slides had not injured anyone or reached any

homes, and the County gave attendees no reason to think otherwise – despite its own knowledge to the contrary, and its knowledge that the risk could be managed with a geotechnical study and monitoring, which it had elected not to do. *Id.*

In service of its fact-based opinion, the Court of Appeals further mangled Plaintiffs' rescue claim by asserting the claim was limited to the County's failure to "specifically discuss the catastrophic possibility identified in the 1999 Miller report – that a future landslide could be an order of magnitude larger than the previous one, as catastrophic and life threatening as the Oso slide that actually occurred on March 22, 2014." Op. at 22.[1] This is an inaccurate and reductionist description of the evidence presented by Plaintiffs – the non-moving parties. While Plaintiffs did allege that the County should have discussed the possibility of a future slide being ten times larger than recent past slides, that claim was made in the context of the County's knowledge that the neighboring Rowan Landslide had crossed the entire valley in a fast-moving –

[1] Along the same lines, the Court of Appeals concluded that the County acted reasonably because "Plaintiffs have not shown that anything said at the meeting could reasonably be interpreted as a promise that the cribwall would confine the debris runout from future slides so that residents would be safe in their homes." Op. at 25. This statement again exposes the Court of Appeals' overreach. As detailed on pp. 9-12 below, Plaintiffs did not allege that the County so promised. Plaintiffs claimed that the County promised to warn of future landslide risks, and then concealed critical facts that would have heightened concern for loss of human life. Appellants' Opening Br. at 17-22; Appellants' Response and Reply Br. at 12-14, and evidence cited therein.

inescapable – debris flow. Appellants' Opening Br. at 13 and evidence cited therein. The Court of Appeals found that it was reasonable for the County not to discuss a catastrophic slide that would kill everyone in the neighboring community, but the County failed to discuss *any* risk to human life at all.

Most critically – and again, completely ignored by the Court of Appeals – a few weeks before the March 11, 2006 meeting, County personnel had concluded that the January 2006 slide might have made the hill more unstable, that it might now pose a danger to human life in Steelhead Haven, that a geotechnical study of the hillside was necessary to better understand the real danger to Steelhead Haven given the potential danger to human life, that the hillside should be monitored for physical movement so as to provide early warning of the next failure, and most gallingly, that the County had elected to do nothing about it. Appellants' Opening Br. at 11-13 (CP 6002; 6136-38; 6141; 6143-47; 6230-32; 6236; 6239; 6241; 6263-64; 6259-60; 6279). In pivotal disregard of Plaintiffs' safety, the County said nothing at the March 11, 2006 community meeting about what it knew and what it had decided <u>not</u> to do about future landslide risks. CP 6002; 6233-35; *see also* CP 6005; CP 6233-35. Demonstrating why appellate courts are ill-suited to the fact-finding

process, the Court of Appeals failed to discuss any of this critical and damning evidence.

On the question of the County's negligent omissions causing Plaintiffs' harm, the Court of Appeals made the even more egregious fact-finding that "[t]he record does not support that the allegation that the County lulled residents into believing they were safe and that there was no need to take action." Op. at 19. Yet John Pennington, the County's own former Emergency Management Director, admitted that the County's actions in sponsoring the Log Wall and communicating with Steelhead Haven made the community "feel safe." CP 5954. That makes sense when the County uttered not a word about risk to human life, and community members were accustomed to dealing with occasional river blockage and flooding.

Mr. Pennington's admission was echoed by Plaintiff Seth Jefferds, a volunteer firefighter known to all in the community, who attended the meeting and walked away believing that the slide did not pose a danger to the lives of his family or his neighbors. Appellants' Opening Br. at 21 (CP 6257-58). Mr. Steven Sewell, a fire department professional, also attended the March 11, 2006 meeting, and believed he and his family were safe even though he knew that future slides were likely to occur. *Id.* (CP 6264). Mr. Ron Thompson, the self-styled "Mayor of Steelhead Haven,"

also attended and left the meeting feeling content and safe. *Id.* (CP 6873-77). Again, he understood that future slides were likely to occur, but he had no understanding that human life was at risk. *Id.*

Messrs. Thompson, Jefferds and Sewell testified that had the County not concealed what the County knew – that after the 2006 slide the hillside across from them may pose a danger to human life when the next slide happened, that no one would know the true scope of the danger without a study and monitoring of the hill which the County had decided not to pursue – those leaders of their small community would have forced action and warned the community. Appellants' Opening Br. at 21 and evidence cited therein. The Court of Appeals cited *none* of this evidence in contradicting the trial court's orders that questions of material fact existed (Appellants' Opening Br. at 40-41 (CP 7696)) and concluding that the County's omissions did not cause Plaintiffs' harm.[2]

Yet in misleading them into feeling safe, the County "depriv[ed] the [Messrs. Thompson, Sewell and Jefferds] of the possibility of help from other sources." *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958

[2] The Court of Appeals also found that "the 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." Op. at 25. Cherry-picking the record, the Court of Appeals simply ignored that the County concealed that the hillside may have become dangerous to human life, that the hillside needed a geotechnical investigation and physical monitoring, and that County had decided to do nothing. No one encouraged residents to conduct their own study or monitoring, and the residents had no idea such study and monitoring were necessary to understand the true danger to them.

P.2d 301 (1998). Messrs. Jefferds, Sewell and Thompson stood in precisely the same relation to the other Plaintiffs as did Mr. MacPherson to the plaintiffs in *Brown*. The County's negligence thus made all Plaintiffs' situation worse in the same manner as plaintiffs in *Brown*, and, with substitution for characters, the *Brown* holding applies directly to the full record before the Court:

> If the [County's] agents, acting out of concern for the safety of appellants and others similarly situated, negligently or intentionally conveyed the impression that the danger of [landslides] was less than it was to [those attending the March 11, 2006 meeting] (or anyone else), causing [them] to refrain from action on [plaintiffs'] behalf [they] otherwise would have taken, the [County] is answerable for any damage caused by that misimpression.

86 Wn. 2d at 299-300.[3]

A robust record exists that the County's omissions caused Plaintiffs' harm, none of which the Court of Appeals cited, and the determination of whether negligent omissions cause harm is generally the province of the jury, not a court of appeals reviewing fragments of the

[3] The Court of Appeals also "found" that 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." That finding contradicts the evidence. Messrs. Jefferds, Sewell and Thompson all went to the meeting because they were concerned about future landslide risks. They left the meeting assuaged in their knowledge that future sliding would pose no danger to life and that the County and Tribe were building a wall on the other side. Had they not been misled, a jury could infer that they would have sought more information about the risk to human life. They were in at least as strong a position as Mr. MacPherson in *Brown* who – along with the plaintiffs in *Brown* – were placed in a worse position than if the government had not spoken to them at all.

record. *Schooley v. Pinch's Deli Market, Inc.*, 80 Wn. App. 862, 868-69, 912 P.2d 1044 (1996).

B. This Court Should Accept Review to Correct the Court of Appeals' Misapplication of the Affirmative Acts Negligence Doctrine to Plaintiffs' Claims.

Plaintiffs also asserted that the County was negligent in affirmatively and actively participating in the huge 1500 foot Log Wall project that trapped thousands of tons of loose debris at the bottom of an unstable hillside across from Steelhead Haven, without considering whether that loose debris could be unleashed in a lethal slurry when the next slide occurs – precisely what happened on March 22, 2014.

> It is a fundamental principle of Washington law that all persons have a duty to others to refrain from engaging in acts "which involve[] an unreasonable risk of harm to another." Restatement (Second) of Torts §§ 284 & 302 (1965). If one "acts at all, [he or she] must exercise reasonable care to make his [or her] acts safe for others." *Id.* § 4 cmt. b. This principle is part of the very foundation of Washington tort law: By creating the risk of harm to others, the defendant is charged with a duty to use reasonable care to see that injury to others does not occur. This principle encompasses the vast majority of tort cases, and because of its intuitive simplicity, no one gives a second thought to whether the defendant owed a duty to use reasonable care.

16 DeWolf, Wash. Prac., § 2:4 (4th ed. 2015) (citations omitted)

In evaluating Plaintiffs' affirmative acts negligence claim, the Court of Appeals first erred in assuming that Plaintiffs' affirmative acts negligence claim was based on Section 302B of the Restatement (Second) of Torts (Am. Law Inst. 1965), which involves the highly particularized

circumstance where a defendant (usually the government) creates an unreasonable risk of harm to another through the criminal conduct of a third party. Op. at 26. While Section 302B has been adopted by this Court, it does not define the limits of the affirmative acts doctrine, which states a general rule of Washington negligence law. With the waiver of sovereign immunity, the County is subject to the general principle that when taking affirmative action, a person (whether an individual, corporation or the government) must not create an unreasonable risk of harm to another. Here, the County acted unreasonably through its affirmative support for the Log Wall without giving the slightest consideration to whether storing thousands of tons of loose debris at the bottom of an unstable slope might make the next slide event far more dangerous to the people across the river.

Second, the Court of Appeals erred in unfairly narrowing Plaintiffs' affirmative acts negligence claim. The Court of Appeals found "that there has been no showing that the County's act of distributing information at the community meeting exposed the residents to the risk of the coming slide." Op. at 26. Even if one were to accept the conclusion that a defendant must unreasonably increase the physical risk to the plaintiff, the Court of Appeals failed entirely to address Plaintiffs' additional claim that the County exposed them to an unreasonable risk of

harm by actively participating in the Log Wall project without considering whether storage of loose debris at the bottom of an unstable hill would load the barrel of the next slide. The County's negligence increased the physical risk to Plaintiffs because the mass of loose debris stored at the bottom of the unstable slope across the river caused the Oso Slide to become more explosive and deadly. Appellants' Opening Br. at 46; Appellants' Response and Reply Br. at 12 and evidence cited therein. See *Phillips v. King County*, 136 Wn.2d 946, 950, 968 P.2d 871 (1998); *Borden v. City of Olympia*, 113 Wn. App. 359, 371, 53 P.3d 1020 (2002). At minimum, Plaintiffs' evidence creates a triable question whether the County's affirmative conduct in actively supporting the Log Wall project exposed Plaintiffs to the risk of a far more dangerous and devastating landslide.

C. This Court Should Accept Review to Correct The Court of Appeals' Unauthorized Expansion of the Limited Statutory Immunity Conferred by RCW 36.70.982.

Notwithstanding the Superior Court's conclusion that Plaintiffs presented a triable negligence claim regarding the County's active participation in the Log Wall project, both the Superior Court and the Court of Appeals granted the County immunity under the Fish Habitat Enhancement statute. Granting the County immunity was inconsistent with the plain language of the statute. Plaintiffs argued, *inter alia*, the

County was not entitled to immunity under the Fish Habitat Enhancement statute because the County failed to meet the two statutory prerequisites for immunity under that law. RCW 36.70.982 plainly sets forth those two prerequisites:

> A county is not liable for adverse impacts resulting from a fish habitat enhancement project that meets the criteria of RCW 77.55.181 *and* has been permitted by the department of fish and wildlife." (Emphasis added).

One criterion of RCW 77.55.181 is set forth in RCW 77.55.181(1)(b), which provides:

> *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.* (Emphasis added.)

The Court of Appeals acknowledged that at the time that the Department issued a permit for the Log Wall construction, the Department had not even established size and scale criteria for evaluating fish habitat enhancement projects. Op. at 13. The Court of Appeals then departed from the record and engaged in more fact-finding:

> Even if no size or scale tests were in place at the time the Tribe applied for a permit, the department reviewed the cribwall as a fish enhancement project and approved it. 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 safety.

Op. at 14-15. There is absolutely no record of the Department concluding anything about the size or scale of the 1500 foot long Log Wall project, how it related to still unpromulgated criteria for size and scale, or that the project did not present a public health and safety risk. The permit says nothing on the subject. Nor does the Court of Appeals cite any evidence for its invention.

To the extent the Court of Appeals did not seek to conduct fact-finding but simply sought to infer from the Department's issuance of the permit that the Department must have concluded that "the scale of the cribwall project did not make it potentially threatening to public safety," then the Court of Appeals' reasoning collapses the two statutory criteria for granting County immunity – that the project both met the criteria of RCW 77.55.181 *and* that the project had been permitted – into just one: that the project had been permitted. If one can infer from the fact a project has been permitted that the size and scale of the project must not present a public safety risk, why didn't the legislature require only one prerequisite – that the project be permitted – for the County to qualify for immunity? The Legislature instead granted the County immunity not when the project has been permitted but when the project "meets the criteria of RCW 77.55.181 *and* has been permitted." RCW 36.70.982. As the Court of Appeals observed in a different context, "[b]ecause the statute's meaning

is clear based on its text, our inquiry is at an end. *O.S.T. v. Regence BlueShield*, 181 Wn.2d 691,696, 335 P.3d 416 (2014)." *See* Op. at 16.

With the waiver of sovereign immunity, the enactment of governmental immunities are construed narrowly to effectuate only the specific purpose of the statute that carves an exception from waiver of sovereign immunity. *E.g.*, *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 600, 257 P.3d 532 (2011) ("Statutory grants of immunity in derogation of the common law are strictly construed." (citing *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437-39, 824 P.2d 541 (1992) ("[S]ociety generally assumes persons and entities should be accountable for their negligence.")). The Court of Appeals' re-write of RCW 36. 70.982 to confer broader immunity than authorized by the statute itself violated these prescriptions.

At minimum, material factual questions pervade whether a 1,500 foot Log Wall built at the bottom of an unstable slope to store thousands of tons of loose debris across from an occupied community presented a public safety risk. *Staats v. Brown*, 139 Wn.2d 757, 764, 991 P.2d 615 (2000) (claims of state law immunity "are subject to the ordinary summary judgment standard which requires all facts and inferences to be construed most favorably to the nonmoving party").

This Court should take review and remand Plaintiffs' triable claim of negligence.

V. CONCLUSION

For the foregoing reasons, this Court should grant this Petition.

DATED this 29th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I served by EMAIL, a copy of the foregoing this 30th day of January. 2019, to the following counsel of record at the following addresses:

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GREGORY REGELBRUGGE, as the Personal Representative of the Estates of L. John Regelbrugge III and Molley (Kris) Regelbrugge; RON SLAUSON, Individually and as the Personal Representative of the Estate of Lon E. Slauson; KRISTINA HARRIS, Individually and as the Personal Representative of the Estate of Stephen Harris and Theresa Harris; HENRIETTA A. OTTERSEN, Individually; DAVIS HARGRAVE and RUTH HARGRAVE, individually and through their marital community; and IRVIN WOOD and JUDITH WOOD, Individually and through their marital community, Appellants/Cross Respondents, v. STATE OF WASHINGTON; GRANDY LAKE FOREST ASSOCIATES, LLC, a Washington Limited Liability Company; and SNOHOMISH COUNTY, Respondent/Cross Appellants.	No. 76376-8-I DIVISION ONE PUBLISHED OPINION
RYAN M. PSZONKA as personal representative of the ESTATES OF SHANE RUTHVEN, KATIE RUTHVEN, HUNTER RUTHVEN, and WYATT RUTHVEN; AMY S. THOMPSON as personal representative of the ESTATES OF LEWIS VANDENBURG and JUDEE VANDENBERG; SONJA M. REW as personal representative of the ESTATE OF GLORIA HALSTEAD; STEVEN L. HALSTEAD as personal	Linked with No. 77787-4-I FILED: December 31, 2018

representative of the ESTATE OF JERRY HALSTEAD; and JAMIE A. LENNICK as personal representative of the ESTATE OF AMANDA LENNICK,

Appellants,

v.

SNOHOMISH COUNTY and WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondents.

TIM WARD, individually and as the personal representative of the estate of BRANDY WARD; GERALD F. FARNES, individually and as the personal representative of ESTATES OF JULIE FARNES and ADAM FARNES; DAYN BRUNNER and JASON BRUNNER, as personal representatives of the ESTATE OF SUMMER RAFFO; DEBORAH L. DURNELL, individually and as the personal representative of the ESTATE OF THOMAS P. DURNELL; MARALEE HALL, individually and as the personal representative of the ESTATE OF JOSEPH R. MILLER; SETH JEFFERDS, individually and as the personal representative of the ESTATE OF CHRISTINA ANNETTE JEFFERDS; BRENDA NEAL, Individually and as the personal Representative of the ESTATE OF STEPHEN NEAL; MINDI PEAKE, individually and as the personal representative of the ESTATE OF MARK GUSTAFSON; JONIELLE SPILLERS, individually and as the ESTATES OF BILLY LEE SPILLERS, KAYLEE B. SPILLERS, BROOKE SPILLERS, and JOVON MANGUAL;

JONIELLE SPILLERS as guardian of JACOB SPILLERS; and ABBIE PEARSON, individually and as the personal representative of the ESTATE OF MICHAEL PEARSON,

Plaintiffs,

v.

SNOHOMISH COUNTY; STATE OF WASHINGTON; and the GRANDY LAKE FOREST ASSOCIATES, LLC, a Washington Limited Liability Company,

Defendants.

RANDI LESTER, individually, and as Personal Representative for the Estate of DENVER HARRIS; ROBIN YOUNGBLOOD, individually; and MARK LAMBERT,

Appellants,

v.

SNOHOMISH COUNTY; STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES; and GRANDY LAKE FOREST ASSOCIATES, LLC, a Washington Limited Liability Company,

Respondents.

BECKER, J. — These linked appeals were brought by survivors of the 2014 Oso Landslide and representatives of those who died. They challenge summary judgment orders by which the trial court dismissed their tort claims against Snohomish County. We conclude that the trial court reached the correct result. It is beyond question that appellants suffered terrible losses, but their theories

and evidence do not establish a basis for holding the County liable for those losses. Accordingly, we affirm.

FACTS

The site of the Oso Landslide is a hill alongside the North Fork of the Stillaguamish River. Landslides have occurred there for decades. In 1967, a major slide destroyed cabins in the area and pushed the river channel southward 700 feet. The river gradually moved back to the base of the hill in later years.

The area was the subject of considerable research. In a 1999 report, geologist Daniel Miller explained that the interaction between the river and the "landslide toe" caused erosion and instability. Miller said he "had no basis for estimating the probable rate or timing of future landslide activity." He said, "The primary conclusion to be drawn is that mass wasting activity will persist for as long as the river remains at the toe of the landslide." Miller's report discussed protection of the toe as a means of slope stabilization, but noted concern about the potential for another landslide that would overrun the diversion structure, as occurred in the 1967 event. He described a model that estimated "the volume that could be mobilized in a large, catastrophic slump" as producing a debris runout of 880 feet, comparable to the area affected in 1967. Miller explained that this analysis did "not account for progressive failure that may occur as landsliding alters slope geometry." The report included an illustration showing even larger volumes that "could be mobilized by further destabilization," although Miller explained that such "results are largely speculative." In this illustration, according

to Miller's report, the estimated volumes "increase by an order of magnitude." Miller's report ultimately recommended diverting the river away from the toe:

> Diversion of the mainstem will act both to stabilize the landslide (by protecting the toe) and add storage area for sediment shed from the landslide, which will reduce delivery of sediment to the river. The simple analysis presented above suggests that the diversion should be located to direct the channel course at least 900 feet, at its farthest extent, from the current base of the landslide to accommodate runout of landslide debris.

The Stillaguamish Tribe of Indians, in collaboration with the United States Army Corps of Engineers, commissioned additional reports on the landslide. In a report completed in 2000, engineer Tracy Drury proposed building a "series of revetments" that "would eliminate toe cutting of the slide and create setting ponds for fine materials delivered to the mainstem from the multiple streams that drain the slide area." In another report, completed in 2001, Drury cited Miller's estimation that the current runout potential of the slide was around 900 feet. The 2001 report explained that slides harmed the river ecosystem and posed "a significant risk to human lives and private property." The neighborhood of Steelhead Haven, home to many full-time residents, lay directly across the river. The report identified various options for mitigating the slide risks. The recommended option was construction of "wood revetments" on state-owned land between the river and the base of the hill. According to the report, this structure would reduce erosion of the landslide toe and capture sediment that would otherwise travel downstream and destroy fish habitat. The Tribe decided to undertake a project to carry out Drury's recommendation. The parties call this project the "revetment" or "cribwall."

In February 2004, the County enacted an ordinance adopting a "Comprehensive Flood Hazard Management Plan" concerning the Stillaguamish River. Counties are granted authority to enact flood hazard management plans by RCW 86.12.200. The County's plan stated "recommended actions." These included, "Implement Steelhead Haven Landslide stabilization project to meet public safety goals." The plan explained that there were proposals under development by tribal, state, and federal agencies, with estimated costs "between 1 million to 10 million depending on which alternative is selected." Another section recommended that the County should implement a stabilization project through the authority of the Corps "that meets public safety and environmental restoration goals of this plan." The plan stated, "As part of this project, the landslide and flood risk to residents can also be reduced or eliminated."

The County and the Tribe were co-coordinators of the "Stillaguamish River Salmon Recovery Lead Entity," and they had been for several years at the time the cribwall project was conceptualized. A state publication describes lead entities as "community-based groups that develop salmon habitat restoration strategies and recruit organizations to implement projects." Lead entities are required by statute to "establish a committee that consists of representative interests of counties, cities, conservation districts, tribes, environmental groups, business interests, landowners, citizens, volunteer groups, regional fish enhancement groups, and other habitat interests." RCW 77.85.050(1)(b). "The

purpose of the committee is to provide a citizen-based evaluation of the projects proposed to promote salmon habitat." RCW 77.85.050(1)(b).

Consistent with these requirements, the Stillaguamish River Salmon Recovery Lead Entity included the Stillaguamish Implementation Review Committee, established in 1990. Each year, the Committee created a list of prioritized projects to submit to the Salmon Recovery Funding Board, a body that administers state and federal funds for salmon recovery efforts. The Committee included the cribwall project on the list sent to the Board in 2004. The Board agreed to grant funding for the project. The Tribe obtained additional funding through other sources.

In January 2006, before construction of the cribwall began, another large slide occurred at the site. The runout was approximately 700 feet. Debris blocked the river channel. The Snohomish County Department of Emergency Management worked to protect Steelhead Haven from flooding. This work involved creating a new river channel to the south of the old channel. County workers also placed sand bags near residences.

The Snohomish County Department of Public Works decided to hold a community meeting in March 2006, one month after the slide, to apprise Steelhead Haven residents of future flood and landslide risks. One claim asserted by the plaintiffs is that the information provided at this meeting did not alert them to the extent of the landslide danger, and instead it lulled them into a false sense of security.

The cribwall was constructed later in 2006 after the Tribe obtained permitting required by the State Department of Fish and Wildlife.

The catastrophic Oso Landslide occurred eight years later, on March 22, 2014. It was a clear day during a period of heavy rainfall. The slide was unprecedented in its size and mobility. Debris quickly traveled 3,000 feet, burying Steelhead Haven and a nearby highway, SR 530. The slide killed 43 people, injured others, and destroyed the property in its path. It was among the most destructive landslides in United States history.

Lawsuits followed. Survivors of the slide and personal representatives of the estates of decedents sued Snohomish County, the State of Washington, and a timber company that owned property above the landslide area. Four suits, each involving numerous plaintiffs, were consolidated for trial. The plaintiffs remained in four groups—"Regelbrugge," "Pszonka," "Ward," and "Lester"—each with separate counsel. The gravamen of their complaints was that the defendants contributed to and could have prevented the devastation of the slide. They alleged that the timber company increased the slide risk by harvesting trees in the landslide area. They asserted the State was negligent for granting permits to the timber company and for allowing construction of the cribwall, which, plaintiffs alleged, was faulty and not an appropriate remediation measure. Other claims included that the State negligently investigated conditions after the 2006 slide and failed to warn community members about future slide risks. Against the County, the plaintiffs asserted negligence and strict liability claims based

primarily on the 2004 flood plan, the 2006 community meeting, and the construction of the cribwall.

In a series of summary judgment orders issued in 2015 and 2016, the trial court dismissed virtually all claims of County liability. The court facilitated immediate appeal by entering judgments under CR 54(b) on September 14 and September 23, 2016.

The Pszonka, Ward, and Lester groups (hereinafter "Pszonka") challenged orders dismissing claims against the County in a motion for review filed in the Supreme Court. Meanwhile, the plaintiffs' claims against the State and the timber company were resolved by settlements. The Supreme Court transferred the Pszonka appeal to this court. We linked it with an appeal filed in this court by the Regelbrugge group. We address both appeals in this opinion.

Issues resolved on summary judgment are reviewed de novo. Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). We consider the evidence in the light most favorable to the party who opposed summary judgment. We will affirm only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The aim is to avoid a useless trial. Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). Trial is not useless but absolutely necessary when there are issues for a jury to resolve. Preston, 55 Wn.2d at 681.

> "Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if *they*

> *really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*"

Preston, 55 Wn.2d at 683, quoting Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940). Applying this standard, we conclude Snohomish County is entitled to judgment as a matter of law.

ANALYSIS

1. The County's adoption of the flood control plan is immunized.

Pszonka challenges the trial court's dismissal of claims that were based on the "Flood Hazard Management Plan" adopted by the County in 2004. The plan identified the cribwall project as a means of achieving certain environmental and safety objectives. Pszonka contends that the County undertook a "legislative duty to warn" and that "the County's duty to protect Steelhead Haven through construction of a cribwall, necessarily included the duty to warn the community of the danger it faced until such protective construction occurred."

The trial court determined that claims based on the flood plan were barred by former RCW 86.12.037 (2004). The statute precludes suits against counties for acts or omissions "relating to the improvement, protection, regulation and control for flood prevention":

> No action shall be brought or maintained against any county alone or when acting jointly with any other county under any law, its or their agents, officers or employees, for any noncontractual acts or omissions of such county or counties, 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.[1]

This statute was enacted "to shield counties from liability for their efforts to protect the public from flood damage." Paulson v. Pierce County, 99 Wn.2d 645, 649, 664 P.2d 1202 (1983), citing Short v. Pierce County, 94 Wash. 421, 430-31, 78 P.2d 610 (1938).

The 2004 flood plan is rightly and fairly characterized as a flood control effort covered by the statute. The title was "Comprehensive Flood Hazard Management Plan." It was enacted under the authority of chapter 86.12 RCW—Flood Control by Counties. The ordinance adopting the plan states, "floods on the Stillaguamish River floodplain have historically presented serious threats to public health and safety and have caused millions of dollars worth of damage to public and private properties." It also states "the Snohomish County Department of Public Works has developed a Stillaguamish River Comprehensive Flood Hazard Management Plan, the purposes of which are to reduce the threat to public health and safety, minimize property damage from floods, and reduce costs of flood protection to the greatest extent feasible." The plan established various "goals" for addressing "flood hazards."

Pszonka contends that a project is not entitled to immunity "unless the actions are specifically and exclusively related to flood control." Pszonka asserts that the version of the cribwall project in the 2004 Flood Plan had nothing to do

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[1] We quote the version of the statute in effect in 2004, when the County adopted the flood plan. It has since been amended.

with flooding. In Pszonka's view, the project pertained solely to landslide prevention and protection of fish habitat.

The immunity statute requires that an act relate to flood control. It does not require that flood control be the exclusive purpose. It is appropriate to describe the County's adoption of the cribwall project in the flood plan as an act "relating to" flood control. The plan specifically stated that the "slide stabilization project" (i.e., the cribwall) would reduce or eliminate the "flood risk to residents." Slide and flood risks are closely related. The plan explained, for instance, that slides could "block the current flow of the river forcing the river into a new pathway, which would again threaten life and property on the south bank." This is exactly what happened in 2006—a landslide caused a flood emergency in Steelhead Haven.

Pszonka argues that immunity under the statute applies "only to the construction and maintenance of flood control devices that cause damage to private property during installation or later flood events." Pszonka contends that because the plaintiffs in this case suffered losses resulting from a landslide, not a flood, the immunity statute does not apply. We disagree. The immunity statute does not contain such a limitation.

We conclude that the County's adoption of the flood plan and its selection of the cribwall as a recommended action are acts immunized by former RCW 86.12.037 (2004). The claims arising from these acts were properly dismissed.

2. The County's actions related to constructing the cribwall are immunized.

Appellants maintain that a jury should decide whether the County is liable for its involvement in the construction of the cribwall. They contend that the cribwall project was not properly evaluated, that it was not an appropriate landslide remediation measure, and that it contributed to the devastation of the slide.

The County defends against these claims by arguing that its involvement in the cribwall project was minimal and in addition that its actions are immunized under RCW 36.70.982 because the cribwall was a "fish enhancement project."

Whether the County's involvement in building the cribwall was sufficient to give rise to liability may be a factual issue. A government entity "undertakes to act," and thereby has a duty to follow through with reasonable care, when the entity "actively participates in designing and funding" a project. Borden v. City of Olympia, 113 Wn. App. 359, 369-70, 53 P.3d 1020 (2002), review denied, 149 Wn.2d 1021, 72 P.3d 761 (2003), citing Phillips v. King County, 136 Wn.2d 946, 967-68, 968 P.2d 871 (1998). There is evidence that the Stillaguamish Implementation Review Committee—a group co-led by the County—helped the Tribe obtain funding for the cribwall and evaluated designs for the project, and that County employees were involved in the construction process.

But even if the County was sufficiently involved, it is immune from suit for that involvement. 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 cribwall

is a fish enhancement project. And it is undisputed that the Tribe received permitting for the cribwall under the streamlined process available through RCW 77.55.181.[2]

Appellants claim the project did not meet the criteria set forth in RCW 77.55.181(1)(b). That section requires the state to develop "size or scale threshold tests" to determine if projects should be evaluated under the process created by the statute. "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." RCW 77.55.181(1)(b). When the permit for the cribwall was issued in 2006, the department had not yet adopted the size and scale threshold tests required by the statute. Regelbrugge contends that the large cribwall—measuring 1,500 feet long, 30 feet in width, and 15 feet high—was therefore not properly evaluated with regard to size and safety. Pszonka argues, relatedly, that the permitting process available through chapter 77.55 RCW was inappropriate for large-scale projects.

These arguments do not show noncompliance with RCW 77.55.181(1)(b). Even if no size or scale tests were in place at the time the Tribe applied for a permit, the department reviewed the cribwall as a fish habitat enhancement project and approved it. The approval of the permit indicates that, in the

[2] Formerly RCW 77.55.290 (2004), recodified as RCW 77.55.181, LAWS OF 2005, ch. 146, § 1001.

department's view, the scale of the cribwall project did not make it potentially threatening to public health or safety.

Another criterion for eligibility for the streamline permit process is that a project must be designed to accomplish one or more of the tasks enumerated in the statute:

> (i) Elimination of human-made or caused fish passage barriers . . .;
> (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.

RCW 77.55.181(1)(a). The Tribe's permit application stated that the cribwall project was aimed at restoring "an eroded or unstable stream bank using bioengineering techniques" and placing "woody debris or other in-stream structures that benefit naturally reproducing fish stocks." Regelbrugge contends that the project was nonetheless ineligible for permitting because another purpose of the cribwall was landslide remediation. But the statute does not foreclose eligibility for a project that accomplishes one of the identified tasks, such as fish habitat restoration, and also serves some other purpose, such as landslide prevention.

Appellants also contend that the legislature, in crafting RCW 36.70.982, intended to protect counties only against claims arising from their inability to issue permits for fish habitat enhancement projects. RCW 77.55.181(4) removes their discretion to do so, reserving this authority to the state. This argument tries to read into the statute an intention not found there. The statute simply gives

immunity for "adverse impacts resulting from a fish enhancement project." RCW 36.70.982. Because the statute's meaning is clear based on its text, our inquiry is at an end. O.S.T. v. Regence BlueShield, 181 Wn.2d 691, 696, 335 P.3d 416 (2014). We conclude that the immunity provided by RCW 36.70.982 applies to plaintiffs' claims that are based on construction of the cribwall.

3. The strict liability claims are untenable.

Regelbrugge asks for reinstatement of two strict liability claims brought against the County in its role as a proponent of the cribwall project and as a landowner, "because it violated riparian rights and created hazardous conditions." These claims are based on Regelbrugge's assertion that during construction of the cribwall, the Tribe removed trees from property owned by the County along the river. According to Regelbrugge, the clear-cutting on the property caused a change in the river's course that contributed to the landslide.

The County disputes that it owned the property, an issue we need not resolve. Even assuming the County is the owner, Regelbrugge's strict liability claims are untenable.

Regelbrugge invokes riparian law. "Riparian rights, where they exist, derive from the ownership of land contiguous to or traversed by a watercourse." Dep't of Ecology v. Abbott, 103 Wn.2d 686, 689, 694 P.2d 1071 (1985). These rights of the owner include the right to have water flow past the owner's property in its natural condition. Richert v. Tacoma Power Utility, 179 Wn. App. 694, 703, 319 P.3d 882, review denied, 181 Wn.2d 1021, 337 P.3d 882 (2014)). See also Judson v. Tide Water Lumber Co., 51 Wash. 164, 169, 98 P. 377 (1908) (riparian

proprietors on a river "have the right to prevent the obstruction of the flow or the diversion of its waters, and to have the same continue to flow in a natural way by their lands. This is a right inseparably annexed to the soil itself"). "A riparian owner may not divert water in a natural watercourse without facing liability for damages caused to other riparian owners." Richert, 179 Wn. App. at 703, citing Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 608, 238 P.3d 1129 (2010).

Regelbrugge contends that because the County allowed the Tribe to remove trees on its land, the County is liable for diverting the river and thereby contributing to the plaintiffs' damages. This theory does not depend on the plaintiffs having riparian rights. Rather, Regelbrugge contends that riparian law creates a right to recover personal injury damages caused by diversion of a river regardless of whether the plaintiffs are riparian landowners. We decline to extend riparian law in this manner. The law is clear that riparian rights derive from property ownership. Abbott, 103 Wn.2d 686. Regelbrugge asserts, in a footnote, that four plaintiffs "had property immediately adjacent to the river." But Regelbrugge does not point to evidence sufficient to prove that these plaintiffs were riparian owners, nor does Regelbrugge argue that their ownership status is the reason they are entitled to relief.

Regelbrugge also contends the County is liable because the clear-cutting created a hazardous condition about which the County knew or should have known. Regelbrugge cites Albin v. National Bank of Commerce, 60 Wn.2d 745, 375 P.2d 487 (1962) and Price v. City of Seattle, 106 Wn. App. 647, 24 P.3d 1098, review denied, 145 Wn.2d 1011, 37 P.3d 291 (2001). Those cases show

that a landowner may be liable for damage caused by a dangerous condition on the land when the owner knew or should have known about the hazard. Albin, 60 Wn.2d at 752; Price, 106 Wn. App. at 656. Regelbrugge argues that the County had "actual knowledge of the cribwall" and that the record contains "ample evidence of what the County did to increase the risk of the Oso Landslide." Regelbrugge has not shown, however, that the County had actual or constructive knowledge that the Tribe's removal of the trees created a hazardous condition.

In any event, there is another reason to dismiss claims based on the clear-cutting: they are barred by RCW 36.70.982, the statute conferring immunity for adverse effects of fish enhancement projects. There is no dispute that the Tribe removed the trees in connection with construction of the cribwall. The Tribe's permit application explains that trees "currently located between the river and the landslide will be cleared and stockpiled for use in the cribwall structures." Because the cribwall was a fish enhancement project, the immunity statute precludes claims against the County based on the removal of trees used for the cribwall.

In sum, the strict liability theories asserted by Regelbrugge do not provide a basis on which reasonable jurors could render a verdict in their favor.

4. The rescue doctrine does not provide a basis for County liability.

The rescue doctrine is an exception to the traditional rule that there is no duty to come to a stranger's aid. Folsom, 135 Wn.2d at 674. "One who undertakes, albeit gratuitously, to render aid or to warn a person in danger is

required by our law to exercise reasonable care in his efforts, however, commendable." Brown v. MacPherson's, Inc., 86 Wn.2d 293, 299, 545 P.2d 13 (1975). "If a rescuer fails to exercise such care and consequently increases the risk of harm to those he is trying to assist, he is liable for any physical damages he causes." Brown, 86 Wn.2d at 299.

Appellants contend that at the community meeting held by the County in March 2006, the County undertook a duty to warn residents that they were in danger of future landslides. They argue that the County's warning negligently downplayed the risk. They say that if the County had informed the attendees of the full extent of the danger, a jury could find that the attendees would have shared that information with other residents and the community as a whole would have "demanded action by the County." They contend the County's communications lulled those who attended the meeting into believing they were safe and that there was no need to "galvanize the Steelhead Haven community into action." They say that everyone in the community "would have assessed their risk if they had accurate information from the County."

Without deciding the issue, we will assume that by holding the meeting, the County undertook to warn the Steelhead Haven community about the danger of future landslides and consequently had a duty to use reasonable care in doing so. We conclude the appellants have not demonstrated that the County failed to act with reasonable care in a way that caused their damages.

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.

According to the meeting notice, the very purpose of the event was to "inform the community about current and future risks at the site" and to stir the community to "assess the on-going risks and to make appropriate choices on how to deal with those risks":

> Dear Landowner,
>
> Snohomish County will hold a community meeting on March 11th, 2006 at 10:00 AM at the Oso Fire Station 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.
>
> The intent of this meeting is to inform the community about current and future risks at the site, such as additional land slides, flooding and erosion.
>
> This was an extraordinary event and many agencies came together in a very short amount of time to clear a path for the river once it was blocked. It is now time for the community to assess the on-going risks and to make appropriate choices on how to deal with those risks.
>
> Thank you in advance and I hope to see you at the meeting.

The notice was signed by the County's Director of Public Works.

The meeting occurred as planned on March 11, 2006. According to the meeting outline, one topic was "Landslide - geology and future risks." The speaker on this topic was County geologist Jeffrey Jones. According to Jones's deposition testimony, he gave a presentation on the slide's history and geology and showed a geologic map of the area. Jones testified that his intent was to help residents make "decisions on their own, help to evaluate the risks." He recalled telling attendees that the landslide "was unpredictable and activity on the

slide could be expected in the future. As it had demonstrated in the past, it was active intermittently and that activity was likely to continue."

An individual who attended the meeting recalled hearing from Jones "that it was a landslide prone area and that landslides could be expected in the future." This person said, "I cannot recall any speaker at the meeting making assurances that there would not be any further flooding or landslide risks in the Steelhead Haven neighborhood." Another individual who attended the meeting recalled hearing "that the community could not expect the County and Army Corps of Engineers to come to the rescue in the future. They recommended that we get organized and form something like a flood control district or homeowner's association."

In response to the County's motion for summary judgment, the plaintiffs introduced testimony from other individuals who attended the 2006 meeting. They said that the cribwall project, which was discussed at the meeting, made them feel safer and that they believed the cribwall would prevent landslide activity. One of them testified, "The meeting didn't affect me much in any way except I know some people later talked about getting flood insurance. I don't -- I don't recall anything but discussion about flooding, possible flooding." Another testified that she walked away from the meeting believing that the County "had everything under control." Another attendee similarly stated, "I took away from the presentations that the County had a game plan for dealing with the risk of another slide/flood. . . . I left the meeting with the understanding that the County wanted us to know that they had looked at the reasons for the slide and flood and

that . . . the plan they outlined would prevent that situation from ever being an issue again." The attendee said, "I felt safe living in Steelhead Haven after the March 11, 2006, meeting. . . . They were building the cribwall so the river would not erode the toe of the hillside. I believed my family was safe." This evidence shows what attendees felt and believed, but it is not evidence of what the County representatives actually said. No one recalled hearing County representatives say that the risk of danger from future slides was minimal or that the cribwall was a guarantee against a catastrophic event.

Appellants contend the discussion of future risks was negligent because the County's speakers did not specifically discuss the catastrophic possibility identified in the 1999 Miller report—that a future landslide could be an order of magnitude larger than the previous one, as catastrophic and life-threatening as the Oso slide that actually occurred on March 22, 2014. Jones had read the 1999 report in which Miller mentioned the possibility of the large volumes of debris that "could be mobilized by further destabilization." According to Jones's deposition testimony, he did not talk about this portion of Miller's report at the meeting because "in Miller's paper, he described what he was able to state as being largely speculative, quote/unquote."

Jones recommended Miller's report to meeting attendees as an additional resource and offered to make copies for anyone who followed up with him. No one did. Given the voluminous amount of technical information the County was attempting to summarize and communicate to the meeting attendees in a limited amount of time, the exercise of reasonable care did not require the County to

predict a scenario that Miller regarded as speculative. Miller himself testified in deposition that he did not anticipate a slide the size of the 2014 event and that he was surprised by what occurred. He testified that nothing in his 1999 report warned of the risk of a landslide "with a runoff that would go into the Steelhead Haven neighborhood to the extent that the 2014 slide did."

And even if a jury were to find that the County in the exercise of reasonable care should have highlighted the worst case scenario imaginable, the question still remains whether the County's presentation induced reliance by anyone who heard it or heard about it. "A person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promisee to refrain from seeking help elsewhere." Folsom, 135 Wn.2d at 676 (emphasis added). "Even where an offer to seek or render aid is implicit and unspoken, a duty to make good on the promise has been found by most courts if it is reasonably relied upon." Brown, 86 Wn.2d at 301 (emphasis added).

Brown, the case on which the appellants primarily rely, is a close precedent factually because it involved application of the rescue doctrine to claims of loss of life and property arising from an avalanche. The avalanche occurred in January 1971 in a developed area of Stevens Pass known as Yodelin. The State of Washington was among the defendants. Plaintiffs alleged that avalanche expert Dr. Edward LaChapelle warned a Mr. Tonnon, an agent of the Real Estate Division of the Department of Licensing, that the Yodelin development was in an area of high risk for avalanches. Tonnon allegedly

"responded in a manner which led Dr. LaChapelle justifiably to believe that the division would deal with the matter and convey his warning to appellants." Brown, 86 Wn.2d at 298. The State did not pass on the warning. Tonnon met with William MacPherson, a real estate broker associated with the development, and led him "to erroneously believe that . . . no avalanche danger existed." Brown, 86 Wn.2d at 298. The plaintiffs claimed that Tonnon's omissions deprived them of the opportunity to be forewarned of their danger by either Dr. LaChappelle or MacPherson, and they were thus "unable to avoid the losses they suffered when the avalanche that had been predicted actually occurred." Brown, 86 Wn.2d at 298-99. At the trial court level, the State's motion to dismiss under CR 12(b)(6) was granted, but the Supreme Court reversed and allowed the claim against the State to go forward. The court concluded that the facts alleged in the complaint stated a claim of negligence by malfeasance and nonfeasance, both arising from the rescue doctrine. Brown, 86 Wn.2d at 299-300.

In Brown, the court characterized the rescue doctrine as arising from "promises which induce reliance, causing the promisee to refrain from seeking help elsewhere and thereby worsening his or her situation." Brown, 86 Wn.2d at 300. The court later referred to "reliance" as "the linchpin of the rescue doctrine." Osborn, 157 Wn.2d at 25. In Brown, the State's duty to act arose from "reliance by another"—by Dr. LaChappelle, who refrained from warning the plaintiffs as a result of Tonnon's promise that he would communicate the warning, and by MacPherson, who refrained from warning the plaintiffs because Tonnon told him no avalanche danger existed.

Here, appellants claim the County's duty to act arose because the County's negligent warning induced them to feel secure. They say that as a result of the County's presentation, those at the meeting refrained not only from acting to protect themselves but also from acting to warn other community members who were not in attendance.

Appellants have not shown that anything said at the meeting could reasonably be interpreted as a promise that the cribwall would confine the debris runout from future slides so that residents would be safe in their homes. The 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.

Reliance is not established by asserting that residents would have escaped the path of the landslide if the County had depicted the risk in the most extreme terms possible. The County argues, "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." We agree and conclude that the appellants are not entitled to relief under the rescue doctrine.

5. The County had no duty under the affirmative undertaking doctrine.

Pszonka invokes the affirmative act doctrine as another basis for penalizing the County's alleged failure to provide an adequate warning. Under that doctrine, an act or omission "may be negligent if the actor realizes or should

realize that it involves an unreasonable risk of harm to another person through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." RESTATEMENT (SECOND) OF TORTS § 302B (AM. LAW INST. 1965). For example, a bus driver's act of getting off the bus while keys were in the ignition and a visibly erratic passenger was onboard created liability to plaintiffs who were injured when the passenger took control of the bus and drove it into their car. Parrilla v. King County, 138 Wn. App. 427, 430, 157 P.3d 879 (2007).

In this case, there has been no showing that the County's act of distributing information at the community meeting exposed the residents to the risk of the coming landslide. The trial court correctly determined that the affirmative act doctrine does not apply.

Regelbrugge contends that the trial court erred by refusing to strike an "act of God" defense asserted by the County. Our conclusion that the appellants cannot proceed to trial against the County makes it unnecessary to address this issue.

Affirmed.

Becker, J.

WE CONCUR:

Andrus, J.

APPENDIX B

Supreme Court No. 93728-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 14-2-18401-8 SEA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

RYAN M. PSZONKA as personal representative of the ESTATES OF KATIE RUTHVEN, HUNTER RUTHVEN, and WYATT RUTHVEN; AMY S. THOMPSON as personal representative of the ESTATES OF SHANE RUTHVEN, LEWIS VANDENBURG and JUDEE VANDENBURG; SONJA M. REW as personal representative of the ESTATE OF GLORIA HALSTEAD; STEVEN L. HALSTEAD as personal representative of the ESTATE OF JERRY HALSTEAD; and JAMIE A. LENNICK as personal representative of the ESTATE OF AMANDA LENNICK

TIM WARD, individually and as the personal representative of the Estate of BRANDY WARD; GERALD F. FARNES, individually, and as the personal representative of the ESTATES OF JULIE FARNES and ADAM FARNES; DAYN BRUNNER and JASON BRUNNER, as personal representatives of the ESTATE OF SUMMER RAFFO; DEBORAH L. DURNELL, individually, and as the personal representative of the ESTATE OF THOMAS P. DURNELL; MARALEE HALL, individually, and as the personal representative of the ESTATE OF JOSEPH R. MILLER; SETH JEFFERDS, individually, and as the personal representative of the ESTATE OF CHRISTINA ANNETTE JEFFERDS; BRENDA NEAL, individually, and as the personal representative of the ESTATE OF STEPHEN NEAL; MINDI PEAKE, individually, and as the personal representative of the ESTATE OF MARK GUSTAFSON; JONIELLE SPILLERS, individually, and as personal representative of the ESTATES OF BILLY LEE SPILLERS, KAYLEE B. SPILLERS, BROOKE SPILLERS, and JOVON MANGUAL; JONIELLE SPILLERS as guardian of JACOB SPILLERS; and ABBIE PEARSON, individually and as the personal representative of the Estate of MICHAEL PEARSON; DIANA BEJVL as the personal representative of the Estate of ALAN BEJVL; LARAE DEQUILETTES as the personal representative of the Estate of RON DEQUILETTES; NATASHA HUESTIS as the personal representative of the Estate of SANOAH HUESTIS; AMANDA

SUDDARTH, individually; TY SUDDARTH and AMANDA SUDDARTH, as guardians of DUKE SUDDARTH, a minor; and BARBARA WELSH as the personal representative of the Estate of WILLIAM WELSH

RANDI LESTER, individually, and as Personal Representative for the Estate of DENVER HARRIS; ROBIN YOUNGBLOOD, individually; and, MARK LAMBERT, individually

Appellants

v.

SNOHOMISH COUNTY

Respondent

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

On March 22, 2014, a catastrophic landslide near Oso, Washington, destroyed the Steelhead Haven neighborhood, killing 43 people and injuring others. Plaintiffs-Appellants (hereinafter "Plaintiffs") are the survivors and representatives of those who perished in the landslide.[1] The trial court properly concluded that the County had a legislative duty to exercise reasonable care to protect those in the path of the Hazel Landslide, that the County could be liable for its active participation in the cribwall project at the base of the deadly landslide, that the County made the situation worse for those made aware of the County's inadequate warnings, and that Plaintiffs presented facts allowing a jury to find that the County was negligent in failing to warn and inform Plaintiffs, leaving them complacent and unknowing in the face of mortal danger.

Despite these holdings, the trial court nonetheless limited the paths to liability and granted broad immunity, shielding the County from liability for its negligence. In dismissing Plaintiffs' claims the court erred by refusing to apply the affirmative acts doctrine (where no reliance is required) and in creating an improper and unattainable standard of reliance for rescue doctrine claims. The trial court further erred in concluding that the County was immune for its misconduct under RCW 86.12.037 ("Flood Control Immunity") and RCW 36.70.982 ("Fish Habitat Enhancement Project Immunity"). This Court should reverse and remand for trial.

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[1] Appendix APP-1 to APP-2 lists persons and entities involved in this case.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering the following orders granting summary judgment, limiting Plaintiffs' claims against Snohomish County:

1. June 1, 2015, CP 1873-84 ("Flood Control Immunity Order")

2. September 11, 2015, CP 2769-77 ("Flood Control Immunity Reconsideration Order");

3. December 14, 2015, CP 4335-46 ("Fish Habitat Enhancement Project Immunity Order");

4. February 8, 2016, CP 4540-43 ("Fish Habitat Enhancement Project Immunity Reconsideration Order").

5. June 27, 2016, CP 6714-30 ("Affirmative Acts/Rescue Doctrine Order")

6. August 11, 2016, CP 7401-14 ("Privity of Reliance Order")

7. August 11, 2016, CP 7415-19 ("Negligence Claims Order")

8. August 11, 2016, CP 7420-23 ("Judgment")

9. September 6, 2016, CP 7688-701 ("Slauson Summary Judgment Order")

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err in dismissing Plaintiffs' negligence claims for failing to exercise reasonable care for the County's affirmative acts which increased the risk of harm? (Assignments of error 5 and 8)

2. Did the trial court err in dismissing Plaintiffs' negligence claims under the rescue doctrine where the County's warning created a false sense of security and increased the risk of harm to the entire community, by

erroneously restricting the claim to those few Plaintiffs who attended a meeting or directly heard about the substance of the meeting from an attendee? (Assignments of error 5, 6, 7, 8 & 9)

3. Given that statutory immunities are narrowly construed in derogation of the common law:

a. Did the trial court err in applying Flood Control Immunity (RCW 86.12.037) to the County's adoption of a project to stabilize the Hazel Landslide as part of its flood control plan? (Assignment of error 1)

b. Did the trial court misinterpret the requirements for Fish Habitat Enhancement Project Immunity (RCW 36.70.982) contrary to its plain meaning and legislative intent? (Assignments of error 3 & 4)

c. Did the trial court err in resolving genuine issues of material fact to immunize the County's negligent active participation and sponsorship of the cribwall under the Flood Control Immunity statute (RCW 86.12.037) and the Fish Habitat Enhancement Project Immunity statute (RCW 36.70.982) to the County's negligent active participation and sponsorship of the cribwall? (Assignments of error 1, 3 & 4)

IV. STATEMENT OF THE CASE

A. The County Actively Led the SIRC, the Organization Responsible for the Cribwall.

A massive cribwall, constructed directly across the Stillaguamish River from Steelhead Haven, dramatically increased the risk of harm to Plaintiffs, who lived directly in the path of the 2014 landslide. The County

participated extensively in planning, building and monitoring the cribwall from its earliest inception.

The County partnered with the Stillaguamish Tribe in creating Stillaguamish Implementation Review Committee ("SIRC") in 1990 to address declining water quality and salmon populations. The County drafted the bylaws for SIRC, CP 3918, and administered SIRC grants. CP 3880-81. In its role as the co-lead entity of SIRC along with the Stillaguamish Tribe, the County:

- "served as the primary point of contact for the lead entity organization with regards to state grant funding to support lead entity administrative functions";
- "share[d] those grant resources with the Stillaguamish Tribe for the co-lead entity administration";
- "generally took the lead on staffing or providing staff support for the SIRC as well as the TAG [Technical Advisory Group]";
- "work[ed] with the co-chairs of the SIRC to set agendas, document the meetings in the form of meeting summaries, and … to set up the meetings";
- "administer[ed] the annual SRF Board grant process, which included soliciting proposals for new projects or grant applications for the SRF Board funding";
- "facilitate[d] that review process for presentation of a prioritized projects list recommendation to the SIRC"; and
- "package[d] [the prioritized project list] up and submitting the prioritized projects list to the state".

CP 3862-63; CP 3859-61; 3873-74; CP 3857-58; CP 3679-854; 3886-87; 3896-97. With respect to grant applications, the County helped assemble

teams that reviewed concept drawings (30% design), proposed budgets and various documents concerning landownership. CP 3868-71. The County also played a lead role in assembling and publishing various reports for SIRC, including the June 2005 Salmon Recovery Plan (which sets out SIRC's approved projects for habitat restoration including "Landslide Remediation at Steelhead Haven"). CP 3875-78.

1. The County was deeply involved in protecting Steelhead Haven from the Hazel Landslide, including participating in studies of the Hazel Landslide.

The catastrophic 2014 slide was not the first serious Hazel Landslide. Significant prior failures of the Hazel Landslide occurred in at least 1951, 1967, and 1988, which spurred numerous studies. In 1988, geologist Lee Benda from the University of Washington oversaw an investigation of the Hazel Landslide, which concluded that the hillside was triggered by groundwater and had the potential for long runout as a mudflow. CP 2382-97. In 1999, the U.S. Army Corps of Engineers spearheaded the Steelhead Haven Landslide Remediation Project, commissioning geologist Daniel Miller to prepare the "Hazel/Gold Basin Landslides: Geomorphic Review Report." CP 631-56. Miller built upon the 1988 Benda study to conclude that the Hazel Landslide can be "sudden, fast, and over a large scale," citing the 1967 slide as a "spectacular example." CP 634.

Miller warned that if the next slide was a large catastrophic slump, the total volume mobilized in such a slide could have an estimated runout

distance of 880 feet, a clear threat to the Steelhead Haven Community. CP 642. However, in an eerily accurate prediction of what later tragically occurred, Miller further stated that the 880-foot runout estimate "does not account for progressive failure that may occur as landsliding alters slope geometry [through further sliding, such as occurred in 2006]." If further changes in slope geometry were to occur (with the slide zone migrating back into the Whitman Bench, as later occurred in 2006), "estimated volumes increase by an order of magnitude," or in other words, ten times larger. CP 642. A ten-fold increase would destroy the Steelhead Haven Community, precisely what occurred in the 2014 Oso Landslide. *See* CP 1194.

The U.S. Army Corps of Engineers followed Miller's 1999 Report with a study titled "Steelhead Haven Landslide: Remediation Study," authored by Tracy Drury (the ultimate engineer of the cribwall that was constructed at the base of the Hazel Landslide). CP 1200-49. Mr. Drury evaluated five remedial alternatives for a catastrophic failure of the Hazel Landslide: 1) no action; 2) stabilize the slide's toe; 3) provide storage area for landslide materials; 4) protect area equivalent to landslide run out potential; and 5) buying out the people living in Steelhead Haven. Drury concluded that taking no action, or stabilizing the toe of the slide with a wood cribwall without adequate storage area, would not address the "catastrophic failure potential [that] places human lives and properties at risk." CP 1204.

In November 2000, the U.S. Army Corps of Engineers, with the County as project sponsor, capitalized on these studies and jointly published

the "Stillaguamish River Ecosystem Restoration Final Feasibility Report." CP 3930-53. The Feasibility Report focused on restoration of 10 sites that provide salmon habitat, including the Hazel Landslide. As the local project sponsor, the County committed to finance approximately one-third of the project costs through cash or in-kind services, land rights, engineering, construction and monitoring. CP 3955-56. The County stated it would "seek salmon recovery and other grants to assist in providing our local match to the project, as well as funding from interested parties listed above," which included the Tribe. CP 3955-56.

The Feasibility Report also reiterated the devastating consequences of a "catastrophic failure" of the Hazel Landslide: a "slide through an area which is currently owned and occupied by private citizens" and "places current residents at risk." CP 3940. The Feasibility Report concluded that "[b]ased on available data, and assuming the future resembles the past, [the Hazel Landslide] poses a significant risk to human lives and private property . . . . The persistence of this landslide, failure potential, and detrimental effects it induces emphasizes the assertion that immediate attention is given to addressing the current conditions." CP 3940. The Feasibility Report examined the five previously identified remedial alternatives for addressing the risks posed by the Hazel Landslide and elected to provide a 500 foot storage area for landslide materials, behind a log cribwall holding back the river, and buttressing the toe of the landslide slope. CP 3950. Nowhere in the Feasibility Report is there any discussion that the cribwall was needed to address flooding concerns from the Hazel

Landslide. Indeed, the only discussion of flooding was concern that building the cribwall could itself create a flooding risk.

From 2000 until 2004, SIRC, Snohomish County, the Stillaguamish Tribe, and the U.S. Army Corps of Engineers agreed to implement the remedial option to provide a storage area for landslide materials behind a cribwall. CP 3958 (detailing a "Stillaguamish River Ecosystem Project" meeting between the County, the Tribe, and the Corps). For its part, "SIRC identified the Steelhead Haven slide as a priority project for the purpose of reducing sediment inputs to the river which impact salmon." CP 3864. In December 2001, SIRC discussed the chronic landslide activity from Steelhead Haven and another landslide area, Gold Basin, which were contributing large amounts of sediment into the Stillaguamish River. CP 3918. The SIRC noted that the "Stillaguamish Tribe has identified preferred alternatives for each site and will be taking the lead on the two projects." CP 3918. "SIRC will support outreach to the landowners at Steelhead Haven" and "[i]f a grant application is to be developed this summer, then landowner permissions, project design and partnerships will need to progress quickly." CP 3918. Initially, "[d]escriptions of restoration project alternatives for the Hazel Slide (a.k.a., Steelhead Haven) were . . . sent to local property owners . . . ." *See, e.g.*, CP 6028. Thereafter, SIRC sent letters to at least 35 local landowners announcing a public meeting in Oso "to discuss the situation and identify options for addressing the problem." *See, e.g.*, CP 6028 (describing purpose for holding meeting); CP 6033.

2. The County legislated the duty to protect Steelhead Haven from the landslide danger across the river.

On January 18, 2004, the Snohomish County Council approved the landslide remediation project of choice—a cribwall with storage area—by passing Amended Ordinance No. 03-150 ("Ordinance") for the express purpose "to reduce the threat to public health and safety[.]" CP 940. The Ordinance incorporated and adopted the "Stillaguamish River Comprehensive Flood Hazard Management Plan" ("2004 Flood Plan"). CP 940-41, the first goal of which was to "[s]ave lives and reduce public exposure to risk," and which stated that the Plan's "success . . . should be judged on how well the recommended actions achieve" that goal. CP 737. While the Executive Summary states that "[f]ull implementation of this plan will take time . . . those actions that directly impact lives and property [will be] **initiated quickly** following adoption" of the Plan. CP 739 (emphasis added).

Chapter 7 of the 2004 Flood Plan identified "a slide stabilization project that meets public safety as well as environmental restoration goals," CP 893-95, prioritizing the project as one that needed to be "initiated quickly" because of its "direct impact [to] lives and property" at Steelhead Haven. Chapter 7 warned that, "A risk to life and property on the opposite river bank [from the Hazel Landslide] may exist should another major slide occur." CP 893. While the Flood Plan recognized that "voluntarily purchasing all the property and relocating structures would eliminate the

threat to life and property," the Plan emphasized a preference for slide stabilization over a voluntary buyout.

3. The County actively sought funding for the cribwall.

After approving the Hazel Landslide stabilization project, the County, as co-lead of SIRC, continued to pursue its legislative obligation to protect Steelhead Haven. CP 1181. In the February 23, 2004 Stillaguamish Lead Entity Strategy, published by the County, SIRC recommended "engineered slope stabilization to reduce direct inputs from chronic and deep-seated landslides that are active near main river channels" and identified the "Steelhead Haven Landslide" as one of its first priority projects. CP 4001. While the Tribe was the project sponsor for the cribwall, the County was involved every step of the way. County personnel actively lobbied congressional representatives to secure federal funding for the project and also facilitated grants from the Salmon Recovery Funding Board ("SRFB"). CP 3866-67; 3892-93; 3903; 4024.

In its application to SRFB, the Tribe reported it was "currently working with Snohomish County and the Corps to finalize a local sponsor agreement and funding request to Congress." CP 3397; 3404-06. On February 7, 2005, the "lead entity: Stillaguamish Tribe/Snohomish County," submitted a "cost change request" for the Steelhead Haven Landslide Remediation Project reflecting the extent of the County's collaboration in the effort to construct the cribwall by securing funding paid to the Tribe, as project sponsor:

> The Tribe and County have been working with staff from Senator Patty Murray's office and Congressman Rick Larson's office to bring needed funds to the Stillaguamish project.… We have secured funding through the Washington Department of Ecology to cover a large portion of the original Army Corps match ($503,000).

CP 4026.

4. The County did nothing after a 2006 failure of the Hazel Landslide signaled the need to investigate and monitor slope stability to protect Steelhead Haven.

Before the landslide stabilization cribwall could be built, the Hazel Landslide failed again on January 25, 2006, resulting in debris run-out that crossed the river into an uninhabited flood plain blocking the river. CP 944-45. Because the debris had blocked the Stillaguamish River, occupied sections of Steelhead Haven began to experience flooding. The County declared a flood emergency, and in the week following: (1) cleared a new temporary channel for the river to flow through, and (2) placed rock and an engineered log jam along the South bank of the new channel to protect properties along that bank. CP 944-45. These actions abated the flood emergency.

Thereafter, Snohomish County engineer Vaughn Collins proposed that the County undertake several additional precautionary steps to determine if the 2006 slide had made the hillside more dangerous to people in Steelhead Haven. Mr. Collins' proposals, designed to address "public safety primarily" for residents of the Steelhead Haven community, included:

> 1) Have a geotechnical evaluation of the slide done. Could additional slides runout further? Has this slide created additional instabilities at the upper end where further movement would be closest to existing homes?-the very upper end of the slide did not move in this event but is opposite the homes u/s of the new channel.
>
> 2) Mapping: Look into getting an aerial photogrammetry flight done ASAP. Set permanent control in the area so we can get additional flights done on short notice in future years. Also consider putting targets on the slide which could be monitored to detect long term slide movement.

CP 6002.

The County initially pursued Mr. Collins' recommendations after its Director of Public Works, Steven Thomsen, stated that Mr. Collins' recommendations were "valid points that we should follow up on." CP 6002; 6233-35; *see also* CP 6005 (Snohomish County Public Works was "interested in monitoring the recent landslide at Oso," asking for suggestions for "instrumentations and conditions to monitor"). However, the County did nothing to address Mr. Collins' concern for the public safety of Steelhead Haven. It undertook no geological evaluation and took no steps to monitor the slide for early warning signs. CP 6233-35.

In the same week that Mr. Collins expressed the need to monitor the slide for public safety, the County issued a press release to the community assuring Plaintiffs the hillside had "been monitored for several years because of smaller slides in the past" and the County was assessing the situation along with the U.S. Army Corps of Engineers to formulate "a plan to deal with the slide." CP 6052. But, as the County's Ms. Badger, the

drafter of the press release conceded, there was no factual basis for the statement that Snohomish County had been monitoring the slide for years. CP 6079-80.

The County obtained new LiDAR[2] mapping following the 2006 slide, which confirmed to the County that Dr. Miller's concern about a landslide ten times larger than the largest historical slides was credible. When David Lucas, an engineer in the Public Works department, reviewed the LiDAR, he discovered that directly west of the Hazel Landslide another slide (later described as the Rowan Landslide) had run across the entire valley floor. *See, e.g.*, CP 6181-83; 6007 (map with Mr. Lucas' identification of Rowan Landslide). Mr. Lucas' discovery of the sheer size and scope of the landslide to the west hit him as a "wow" moment that he raised with his supervisor, John Engel. CP 6183. At the same time, other engineers at the County were having the same "wow" moment as Mr. Lucas. CP 6184-85.

Moreover, the County's comparison of the 2006 LiDAR with the earlier 2003 LiDAR showed the very circumstances that Dr. Miller warned could lead to a landslide ten times larger, with a runout that would bury Steelhead Haven. CP 6009-12 (comparison of 2003 and 2006 LiDAR demonstrating reduction of support along the northwest edge of Hazel and same with 2003 and 2013 LiDAR). Nonetheless, the County did nothing to

[2] LiDAR (Light Detection and Ranging) is a sophisticated method of aerial photography and geographic measurement that maps the contours of a bare geographic area, stripping features such as trees, homes, and other topography from the mapped image.

study or monitor the increased danger to the community and did not share what it knew with the Steelhead Haven residents.

5. SIRC and the County abandoned the plan to build a cribwall that would help protect Steelhead Haven.

Following the 2006 slide and abatement of the flood emergency, SIRC reevaluated the cribwall project. A redesign of the project was required because the 2006 failure had pushed the toe of the landslide several hundred feet south. *See* CP 1344-45. The 2006 slide runout also made it impossible to construct, as planned, a storage area behind the wall to protect Steelhead Haven. Instead, the cribwall was built in the debris field of the 2006 slide, so that it would hold back three stories of loose landslide debris. *See* CP 1345.

In SIRC's review of the 2006 landslide remediation, it considered only whether remediation would address erosion of the toe of the slope by the river and thus minimize sediment in the river that might interfere with the salmon habitat. CP 1186-87. Despite its public statements recognizing the need to protect Steelhead Haven from the Hazel Landslide, the County knew the redesigned cribwall could not prevent a future landslide or protect the community. CP 1342-43; 1345-46. Further, no geotechnical evaluation was performed to determine whether constructing the cribwall would make a future slide *more dangerous* to Steelhead Haven. CP 1352. The County's failure to examine the increased danger to Steelhead Haven was critical; the

loose debris trapped behind the 2006 log cribwall became the "killing force" in the 2014 Oso Landslide. *See* CP 7977 *et seq.*[3]

6. The County actively participated in overseeing the design, construction, and monitoring of the cribwall.

It was not uncommon for the County and Tribe to cooperate during the construction of SIRC projects, and the cribwall was no exception. CP 3894-95; 4053. The County allowed its land to be used for a portion of the cribwall, to build a bridge to access the construction site, and to provide timber for use in the construction. CP 4073-76; 4078-123; 4133-98 (photographs from August 2006 show that these trees were cut as part of constructing the cribwall); 4210-49 (detailing construction of cribwall); 4273. To assist in the redesign after the 2006 slide, Snohomish County provided the lead engineer, Tracy Drury, with a survey of the new river channel. CP 1344; 4055. The Tribe also approached the County for assistance with sourcing wood for the cribwall. CP 4051. The County offered wood for the cribwall but also wanted to discuss the confidence level in the design and potential liabilities. CP 4057 ("The county has wood but I am supposed to talk to John Engel today about [the County's] needs and he wants to know my confidence level in the design and liabilities oh boy!!..."). The County's request to evaluate the cribwall design and

[3] This citation incorporates materials that were part of a supplemental designation of clerks papers made on March 22, 2017, which had not resulted in an update from the Superior Court Clerk at the time this brief was filed. For ease of reference, the following portions of the supplemental CPs support this statement: May 11, 2016 Order on State's Motion for Summary Judgment at 8-9; *see* Jan. 22, 2016 Phillips Decl., Ex. A at 156:5-18 & Ex. C at 5; Apr. 26, 2016 Supp. Phillips Decl., Ex. A at 25:21-26:8; 30:8-15; 30:22-31:16; 32:3-8; 82:18-83:5; 223:18-225:5.

consideration of liabilities is consistent with the County's role in SIRC to advise and consult with affected residents:

> SIRC recognizes that some individual habitat restoration actions can have potential liabilities. Impacts on adjacent or downstream properties should be analyzed and addressed in project design and monitored during project implementation. Adjacent property owners and other stakeholders should be informed during feasibility and design phases to ensure broad-based community support and appropriate project design.

CP 3176.

The County's Mr. Edwards and others from SIRC conducted a site visit "to discuss what needed to be done, given the changed conditions of the site from when the 2004 SRF Board application was submitted" and to examine the redesign after the 2006 slide. CP 3869-72; 3879; 4044; 4048. SIRC members were also kept updated on the project, including discussions of the river channel, the potential for a breach of the cribwall by a future slide, and the risks of continued residential construction at Steelhead Haven. CP 1358-60.

The County arranged for the Tribe's representative, Mr. Stevenson, to describe the cribwall plan at a March 11, 2006, meeting of the Steelhead Haven community to warn of future landslide risks. *See* CP 1329. And in August 2006, County representative Vaughn Collins and Tracy Drury met with a group at the home of one of the Steelhead Haven residents at the outset of construction to describe the details of the project. CP 1362; 6045 (approving Vaughn Collins' participation in the meeting because it was "a

good partnership opportunity and I think the [residents] would appreciate hearing from someone of your caliber and competence").

The massive cribwall—1500 feet long, 30 feet wide, and 15 feet tall—was installed in late summer 2006. CP 3026. County staff visited the cribwall during and after its construction. CP 3902; 4053; 3232. Indeed, the County reported problems with the cribwall to the Washington Department of Fish and Wildlife, CP 4059, and to federal officials and the Tribe. CP 3905-07; 4061-65. Also during 2010, the County found several big logs with cables, believed to be from the cribwall, wrapped around a bridge downstream and contacted Tracy Drury about them. CP 3908-11; 4067-68. Concerned that the logs became dislodged in a partial failure of the cribwall, John Engel from the County asked his colleague what the Tribe's plan was for repair. CP 3909-11. The County discovered and reported further problems as it continued to monitor the cribwall in 2011, reflecting the County's continuous participation, starting from the cribwall's conception, through its funding, design, construction and monitoring. CP 3911-13; 4070-71.

B. The County Told the Community It Would Educate and Warn Them about Future Landslide Risks, and then Obscured Critical Information Necessary to Understand the Danger.

Following the January 2006 landslide, the County organized a "Steelhead Drive Landslide Community Meeting" for March 11, 2006. CP 6014. The County notified landowners of the meeting, stating its express purpose was to fully inform Steelhead Haven residents about current and

future landslide risks so people could make educated decisions. CP 6014; 6085-87; 6139-40. A community meeting of this type, and the County's decision to take any affirmative action with regard to the Hazel Landslide was unusual, if not unique, in the County's history. CP 6230-32. As Mr. Thomsen pointed out in an internal memo circulated within the County: "[W]e typically do not respond to private property issues but I feel this case it's a bit different. One key difference between this situation and others (say on the Sauk River) is the obvious public safety issue of a community threatened by a very large and active slide . . . ." CP 6002-03. John Engel and Steven Thomsen, among others, discussed internally that the County entering the fray had created "enhanced expectations from others in the community for future help from the County" and warranted the consideration of initiating buyouts of the area or ceasing the issuance of building permits in "risky locations" like Steelhead Haven. CP 6017-18.

Despite promising to inform Plaintiffs "of current and future risks" so that they could "make appropriate choices on how to deal with these risks," and knowing of increased expectations of the community, the County communicated almost nothing meaningful about the real danger Hazel posed. CP 6014. Jeff Jones, the Snohomish County geologist charged with educating those at the meeting about future landslide risks, told those present that the landslide was "sporadic and unpredictable." CP 6015; 6139-40. He posted on the wall a 2003 Lidar image of the Hazel Landslide area, but did not explain its significance or how to interpret it. He told those in attendance that there were two past scientific studies of the

landslide (Benda and Miller), but said nothing about the substance of the studies, telling those in attendance to call him at his office if they wanted a copy. CP 6140-42; 6146; 6155-56. While Mr. Jones knew that the "slide will reactivate sometime in the future, and maybe before we get to retire from the county," CP 6020-21, he was instructed by another County employee not to pass on this important information. CP 6151-53.

The County did not tell the community about: (1) the risks of a catastrophic slide at Hazel threatening lives in the community that the County had identified in the past studies of the Hazel Landslide; (2) the likelihood of a future landslide at Hazel in the relatively near future; (3) the volume of material that could be mobilized in the next slide and potential runout distances; (4) the runout distance of the neighboring Rowan Landslide that had crossed the entire valley, and the possibility that Hazel could unleash a similar runout, thereby burying the community; (5) future Hazel slides might occur (like Rowan) as an inescapable, fast-moving debris flow; (6) County personnel's conclusion that a geotechnical study of the slide was necessary to better understand the real danger to Steelhead Haven, but the County decided to do nothing; (7) the same County personnel recommended monitoring of the slide to detect early warnings signs but again did nothing; or (8) people in Steelhead Haven should themselves undertake their own geological evaluation and monitoring to protect themselves from the next landslide. CP 6136-38; 6141; 6143-47; 6230-32; 6236; 6239; 6241; 6263-64; 6259-60; 6279.

Directly following Mr. Jones' presentation at the March 11th community meeting, the County presented the Tribe's Mr. Stevenson to discuss the "Restoration Project"—the cribwall that the County had identified in its 2004 Flood Plan as necessary to protect the safety of Steelhead Haven. The County repeatedly advertised the cribwall as designed to prevent sliding at Hazel. CP 6037-38; 5998-6000. Indeed, John Pennington, the County's former Emergency Management Director, admitted after the 2014 Oso Landslide that the County's actions in sponsoring the cribwall and communicating with Steelhead Haven made the community "feel safe." CP 5954. Yet no one explained to people attending that: (1) the 2006 landslide eliminated any possibility of creating a storage area for future landslide debris; (2) the cribwall would not protect the community when the next slide occurred; or (3) no one had examined whether trapping massive amounts of 2006 landslide debris behind a cribwall would make a future slide more dangerous to the community.

Most fundamentally, the County did not tell anyone attending the meeting that the Hazel Landslide endangered lives in the community. Plaintiffs' expert Mr. Porter concluded—based on information available to the County in March 2006—that Steelhead Haven Plaintiffs faced a *one in nine* risk of dying from the next landslide, but the community had no idea that was the case. *See* CP 5901-02.

While many of those who attended the meeting on March 11, 2006 died on March 22, 2014, and thus cannot speak for themselves, those who attended and survived felt safe remaining in Steelhead Haven based on the

County's presentation at the March 11, 2006 meeting. Plaintiff Seth Jefferds, a volunteer firefighter known to all in the community, attended the meeting and walked away believing that the slide did not pose a danger to his family or the community. CP 6257-58. Mr. Sewell, a fire department professional, attended and believed he and his family were safe. CP 6264. Mr. Ron Thompson, the self-styled "Mayor of Steelhead Haven," also attended and left the meeting feeling content and safe. CP 6873-77.

Other than relying on attendees to pass the word, the County did nothing to actually inform or warn Plaintiffs who could not attend the meeting, or who later moved to Steelhead Haven. CP 6242-44; 6154; 6156-57. Yet, because of the lack of content in the County's warning, the meeting virtually assured that attendees would not tell neighbors that the hillside presented a danger to human life in the community, would not push for geotechnical studies, would not demand monitoring of the slide to provide advance warning, or push for buyouts, or simply leave the endangered community.[4]

[4] *E.g.*, CP 6264 ("If I had been told by the County that the slide presented a danger to human life in Steelhead Haven, I would have told the buyers [victims of the slide Shane, Katie, Hunter & Wyatt Ruthven] about that risk."); 6258-59 ("I spoke about what I learned at the meetings with neighbors and family[.]"); 6253 (recounting that before the 2014 Oso Landslide, she learned from her step-father that the cribwall was built to protect against future landslides); 6282 ("[Huestis] told me that there had been a landslide in the past, and that it [the cribwall] was to stabilize the hill, and that the risk of any more landslides was 'slim to none.'"). Ron Thompson, who "knew everybody [in Steelhead Haven] personally" (CP 6866), testified that he attended the March 11, 2006 meeting, had follow-up conversations with his neighbors about that meeting, and spoke with most neighbors about the risk associated with landslide. CP 6857-59; 6862; 6864-72. He expected that someone was monitoring movement on the landslide. CP 6878-79; 6881-82; 6884. Mr. Thompson testified that had the County told him what the County actually knew—that the next slide could have a longer run out, that a geotechnical study was needed to understand the real

By including Mr. Stevenson on the agenda for the March 11, 2006 meeting to discuss the cribwall plan, the County created the false impression that the County was taking care of the problem. Mr. Thompson testified—consistent with Plaintiff Seth Jefferds and former resident Richard Sewell—that he believed the cribwall had two purposes—the first was to reduce sediment load to the water to protect the fishery and the second was to stabilize the hillside by preventing the river from undercutting the slope. CP 6860-61; 6863; 6885-86; 6263; 6258.

Thus, after the March 11, 2006 meeting, none of the attendees signaled an alarm, and business resumed as usual. While the County briefly delayed issuance of building permits in the area following the 2006 landslide—claiming that it was waiting for "the best available science in this matter" to "make sure that we keep the safety of Snohomish County citizens our highest priority", CP 6054, the County evaluated **nothing** related to the Hazel Landslide itself and allowed building to proceed after a short moratorium. When real estate brokers or new residents moving into the community checked with the County about hazards in the area after being put on notice by a Form 17 disclosure or in search for flood elevation certificates, the County provided only information related to flooding—not landslides. CP 6286; 6313; 6276-77.

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danger, that no one was going to undertake such a study, and that monitoring for early warning signs was needed but that no one was going to do that either (CP 6002-03)—he would have been alarmed and sprung into action on behalf of the community. CP 6879-83.

Even diligent home buyers such as Amanda Lennick—who had previously rejected buying another home because it was at the base of a hill that she thought might be dangerous, and instead bought her home in Steelhead Haven just weeks before March 22, 2014—were left with no way of knowing that the best available science strongly warned against buying in Steelhead Haven. CP 6312-14; 6872; 6914-15.

C. Procedural History.

The trial court held that "Ordinance 03-150 [adopting the 2004 Flood Plan] does create an actionable duty, the breach of which can constitute a cause of action," CP 2736, and then found sufficient evidence of the County's breach of duty as an active participant in the cribwall to support the Plaintiffs' claim of negligence. CP 2772-73; 4341. Even so, the trial court dismissed all claims based on the cribwall, concluding that the County was immune from any breach of its legal duties under the Flood Control statute, RCW 86.12.037, and the Fish Habitat Enhancement Project statute, RCW 36.70.982. CP 4344-46.

The trial court held that this statutory immunity did not shield the County from liability for its communications about the landslide danger:

> [T]his Court distinguishes between acts designed to improve the county's response to flood dangers at Hazel and the county's communication about what it decided to do to Steelhead Haven Plaintiffs and others. ... [T]he act of communicating its decisions to Plaintiffs in the area of the slide and the effect such communication may have had on the Plaintiffs' decisions, are not immunized. Communications with the Steelhead Haven community about what it intended to do to prevent landslides in the

> future, does not constitute an act/omission **related to** improvement regulation, control and protection of the river for flood prevention as contemplated by the legislature. The legislature was not concerned with the government's communication of its intentions and decisions to the affected communities.

CP 1883. *See also* CP 2776. Nonetheless, the court dismissed most of the Plaintiffs' remaining negligence claims against the County in a series of summary judgment orders. CP 6714-30; 6979-80; 7420-23; 7688-701.

First, the court held that Plaintiffs' negligent affirmative undertaking claim required Plaintiffs to have suffered harm from third-party criminal conduct. CP 6719-21. Second, the trial court concluded that there was evidence to support Plaintiffs' theory of negligent voluntary rescue because the County's attempts to warn attendees at the March 11, 2006 meeting had "made the situation worse," CP 6979, but dismissed the rescue claims of any Plaintiffs who had not attended the March 11, 2006 meeting or who had not relied on the "substance" of the meeting heard from an attendee, reasoning that they could not establish privity of reliance on the County's negligent warning. CP 6728. The three Plaintiffs who retained a rescue doctrine claim against the County voluntarily dismissed that remaining claim, and all Plaintiffs stipulated with the County to a CR 54(b) judgment for immediate review of the court's rulings. CP 7836-44.

The Plaintiffs timely appealed the CR 54(b) judgment, which is now the final judgment in this action.[5]

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[5] The Plaintiffs settled their claims against Washington State and Grandy Lake.

V. SUMMARY OF ARGUMENT

The County is liable for its tortious conduct "to the same extent as if [it] were a private person or corporation." RCW 4.96.010(1). Here, the trial court correctly concluded that a jury could hold the County accountable to Plaintiffs because it breached (1) a legislative duty to protect Steelhead Haven under its 2004 Flood Plan, including a duty to warn, CP 2736; 2772-73; (2) a common law duty to Steelhead Haven based on its active participation in the log cribwall project, including a duty to warn, CP 4341; (3) the common law duty to Steelhead Haven based on the County's affirmative undertaking to educate and warn, CP 6719; and (4) the common law duty to Steelhead Haven under the rescue doctrine, CP 6726. When viewed in the light most favorable to Plaintiffs the trial court correctly determined that a jury could find that the County breached each of these acknowledged duties.

Yet, through a series of disjointed and contradictory summary judgment rulings spanning fifteen months, the trial court managed to dismiss or undermine all of Plaintiffs' claims against the County. The court misapplied the rescue doctrine by requiring a narrow type of privity between Plaintiffs and the County that proved insurmountable given that so many residents of Steelhead Haven had perished. The court also misconstrued the duty flowing from the County's affirmative undertaking to warn and educate Plaintiffs, so as to read it out of the case.

The trial court also erred as a matter of law in applying statutory Flood Control and Fish Habitat Enhancement immunities to relieve

Snohomish County of liability for what the trial court correctly held were the County's legislative and common law duties to the Plaintiffs. CP 2736. Ignoring the narrow application of Flood Control Immunity, the trial court improperly concluded that the County's conduct related to the "creation and implementation" of a flood hazard management plan was immunized, no matter how tangential the project is to flooding. And despite the County's active sponsoring, adoption and promotion of, and participation in the cribwall built across the river from Steelhead Haven, CP 4341, the court improperly concluded the County was immune from liability under the Fish Habitat Enhancement Act because the cribwall was a fish habitat enhancement project. The trial court erroneously rejected clear legislative history and intent to limit the immunity to small projects without any public health or safety risks that are exempt from County permitting requirements. Instead, the court gave immunity to a massive cribwall project intended to stabilize a huge landslide, but which only made the slide more dangerous to the neighboring community.

On *de novo* review of these grants of summary judgment, this Court stands in the position of the trial court and considers all issues anew, viewing the evidence and inferences in Plaintiffs' favor. Plaintiffs ask this Court to reverse the erroneous summary judgment orders and remand for trial against the County.

VI. ARGUMENT

A. The Trial Court Properly Recognized, but then Erroneously Abandoned without Explanation, the County's Broad Legislative Duty to Warn and Protect the Steelhead Haven Community.

The trial court correctly ruled that the County had a legislative duty to protect the Steelhead Haven community from the Hazel Landslide based on its participation in the SIRC and its Council's adoption of Ordinance No. 03-150 and the 2004 Flood Plan authorizing a cribwall for the express purpose of reducing "the threat of public health and safety" and to protect "life and property on the opposite river bank [from the Hazel Landslide (Steelhead Haven)]." CP 2734-36. Indeed, even after incorrectly applying Flood Control Immunity to much of that legislative duty, the Court specifically found that communications regarding the cribwall project were not entitled to any statutory immunity. CP 1883 ("Communications with the Steelhead Haven community about what it intended to do to prevent landslides in the future, does not constitute an act/omission **related to** improvement regulation, control and protection of the river for flood prevention as contemplated by the legislature."). The trial court, through its later rulings, inexplicably curtailed and then abandoned this previously acknowledged source of liability. *See* CP 2736; 2771-76; 6729. This Court should hold that the County's duty to protect Steelhead Haven through construction of a cribwall, necessarily included the duty to warn the community of the danger it faced until such protective construction occurred and that those warnings were "[c]ommunications with the

Steelhead Haven community about what it intended to do to prevent landslides . . . ." CP 1883.

It is axiomatic that where a duty to protect exists, that duty necessarily includes a duty to warn. This is because a warning either provides protection itself, or the warning enables the warned party to protect themselves. *McKown v. Simon Property Group Inc.*, 182 Wn.2d 752, 767-70, 344 P.3d 661 (2015) (adopting Restatement (Second) of Torts § 344 cmt. d (1965): "[i]n many cases a warning is sufficient" to satisfy "a duty to exercise reasonable care to give . . . protection."); *Passovoy v. Nordstrom Inc.*, 52 Wn. App. 166, 173, 758 P.2d 524 (1988) (based on duty to exercise reasonable care and diligence to protect, question of fact existed as to whether retailer had sufficient time to warn customers so as to enable customers to protect themselves).[6] This Court should hold, as did the trial court in a different context,[7] that the legislative duty arising from the 2004

[6] *Accord Petersen v. State*, 100 Wn.2d 421, 427-29, 671 P.2d 230 (1983) (because patient-psychiatrist relationship was sufficient to impose an affirmative duty on physicians "to take **reasonable precautions to protect** anyone who might be foreseeably endangered by [patient's drug-related problems,]" those precautions could include "warning the intended victim or notifying law enforcement officials" (emphasis added)); *CJC v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 727, 985 P.2d 262 (1999) (Church's "duty of reasonable care to affirmatively act to prevent the harm" included a duty to warn).

[7] Consistent with Washington law, the trial court correctly rejected another defendant's summary judgment motion, ruling that the duty to protect necessarily includes the duty to warn:

> Common sense tells us that a duty to prevent harm is a higher burden than a duty to simply warn of potential harm. . . . In *Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 943 P.2d 286 (1997) . . . the Washington State Supreme Court discussed the myriad duties owed by a landowner. In that discussion, it made clear that the duty to warn is a precursor, or part of, of a duty to use reasonable care to prevent harm.

Flood Plan included a duty to warn that was separate and apart from the other duties that the trial court later recognized arose from the County's active participation in the cribwall and its failed voluntary undertaking to warn in 2006.

B. The County Had a Duty to Plaintiffs Under the Rescue Doctrine and Ordinary Negligence Principles When it Promised to Warn Steelhead Haven of Future Landslide Risks, But Instead Misled Steelhead Haven about the Danger It Faced and Increased the Peril to the Entire Community.

The trial court correctly held that the County may be liable as a private person for its active participation in the creation of the cribwall that increased the harm to Plaintiffs and properly found for purposes of summary judgment that the County had promised to warn and educate Steelhead Haven about future landslide risks, had done so negligently, and that its negligence caused those who heard the deficient warning to remain in harm's way. *E.g.*, CP 6726; 6979; 7696. Even so, the trial court dismissed most Plaintiffs' "rescue doctrine" claims on the ground that they lacked "privity of reliance" on the County's negligent warning. And, the trial court discarded Plaintiffs' parallel ordinary negligence claim based on the County's affirmative undertaking to warn and educate Steelhead Haven on the false grounds that the affirmative undertakings doctrine applies only to third-party criminal conduct. The Court should reverse dismissal of

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CP 7977 *et seq.* (forthcoming supplemental CPs, which includes cited Order from October 30, 2015 at 3-5).

Plaintiffs' negligence claims under these principles and remand for trial of those claims.

1. The County, which is liable as a private party for failing to act with ordinary care, breached its duty under the rescue doctrine by increasing the risk of harm to Plaintiffs.

All persons have a duty to others to refrain from engaging in acts "which involve[] an unreasonable risk of harm to another." Restatement (Second) of Torts §§ 284 & 302 (1965). If one "acts at all, [he or she] must exercise reasonable care to make his [or her] acts safe for others." *Id.* § 4 cmt. b. This principle is ubiquitous in Washington law:

> By creating the risk of harm to others, the defendant is charged with a duty to use reasonable care to see that injury to others does not occur. This principle encompasses the vast majority of tort cases, and because of its intuitive simplicity, no one gives a second thought to whether the defendant owed a duty to use reasonable care.

16 DeWolf, Wash. Prac., § 2:4 (4th ed. 2015) (citations omitted); *see Price v. City of Seattle*, 106 Wn. App. 647, 658, 24 P.3d 1098 (2001) (liability may be imposed where the actor "**either** increased the risk of harm to [plaintiffs], **or** induced the [plaintiffs] to rely on the [actor's] assistance" (emphasis added)); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 42 cmts. d, e (2012).

It is a bedrock principle of Washington tort law that persons have a duty to others to refrain from engaging in acts, "which involve[] an unreasonable risk of harm to another." Restatement (Second) of Torts § 4. All persons, individuals and governmental entities alike, are liable for

affirmative acts that increase the peril faced by those with whom they interact.[8] This principle is reflected in the rescue doctrine: "[o]ne who undertakes, albeit gratuitously, to render aid to or warn a person in danger is required by law to exercise reasonable care in his efforts, however commendable. If a rescuer fails to exercise such care and consequently increases the risk of harm to those he is trying to assist, he is liable for any physical damages he causes." *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975). "Typically, liability for attempting a voluntary rescue has been found when the defendant makes the plaintiff's situation worse by: (1) increasing the danger; (2) misleading the plaintiff into believing the danger had been removed; or (3) depriving the plaintiff of the possibility of help from other sources." *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998); CP 6726.

Particularly relevant here is the Supreme Court's application of the rescue doctrine in *Brown*, where plaintiffs claimed that an avalanche expert informed the State that plaintiffs' cabins were in a high-risk avalanche area, and the State led the expert to believe that it would warn plaintiffs. Instead,

[8] This principle is the basis for several of the recognized exceptions to the public duty doctrine, including the rescue doctrine. It is not necessary to address the public duty doctrine or its exceptions directly in this case since they merely serve as a focusing tool to assist courts in making the broader determination of whether the government owes a duty of care. *See Osborn v. Mason Cnty.*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). Importantly, this focusing tool neither touches on nor diminishes the common law duties that a government shares with its private citizens. *See, e.g.*, *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 886, 288 P.3d 328 (2012) (Chambers, J., concurring) ("This court has never held that a government did not have a common law duty solely because of the public duty doctrine."). The duties which the trial court failed to apply in this case are purely common law in nature.

the State met with the developer (MacPherson's) and led the developer to believe that the danger was not great. The State then terminated its involvement without informing cabin owners of the real danger. *Brown*, 86 Wn.2d at 299-300. Accordingly, plaintiffs claimed that "they were deprived of the opportunity to be forewarned of their danger" and "were thus unable to avoid the losses they suffered when the avalanche that had been predicted actually occurred." *Id.* at 298-99. The Court held these allegations stated a valid negligence claim against the State:

> If the State's agents, acting out of concern for the safety of appellants and others similarly situated, negligently or intentionally conveyed the impression that the danger of avalanches was less than it was to [the developer] (or anyone else), causing him to refrain from action on appellants' behalf he otherwise would have taken, the State is answerable for any damage caused by that misimpression.

Id. at 299-300; *see also* Restatement (Third) of Torts § 42 cmt. f (2012) (requirement of increased risk of harm is often met when plaintiff declines to pursue alternative course of action).

Other cases illustrate that liability attaches to a negligent undertaking. In *Borden v. City of Olympia*, the court held that the city owed plaintiffs a duty of reasonable care when it affirmatively undertook to "actively participate in designing and funding" a water drainage project that increased the risk of flooding. 113 Wn. App. 359, 369-72, 53 P.3d 1020 (2002). And in *Phillips v. King Cnty.*, the county owed a duty to plaintiffs based on actions that increased the flood peril to plaintiffs' property because the county "acted as a direct participant in allowing its land, or land over

which it had control, to be used by the developer" for a water redirection project. 136 Wn.2d 946, 951-52, 967-68, 968 P.2d 871 (1998). Thus, when the government affirmatively undertakes to involve itself with a project (as to which it might otherwise limit itself to purely governmental functions such as permitting), it is subject to liability just as if it were a private person.

The trial court appeared to initially agree with these principles underlying the rescue doctrine to correctly find that the County's actions increased the risk of harm to individuals, thereby subjecting the County to tort liability. *See* CP 4326. The trial court held that "[e]vidence exists such that a jury could find that Snohomish County employees were aware, or should have known, that a life-endangering landslide could occur," (CP 6980), and that "[e]vidence exists from which a jury could find that an inadequate warning to Steelhead Haven Plaintiffs by Snohomish County employees made the situation worse for those made aware of the substance of those warnings." CP 6979. *See also* CP 7696.

2. The trial court misapplied the rescue doctrine by holding that the County's duty extended only to those in attendance at the meeting at which the County misrepresented the danger to residents.

After correctly finding that Plaintiffs presented a triable rescue doctrine claim based on the County's promise to warn, the court then crippled Plaintiffs' rescue doctrine claim by erroneously holding that the County's duty extended only to those who attended the County's March 11, 2006 meeting or those who discussed that meeting with an attendee. The court reasoned that those who did not attend the meeting could not

prove privity of reliance on the County's negligent warning because they did not hear the "substance" of the County's negligent warning. CP 6728. The trial court's ruling created an impossible evidentiary hurdle, requiring Plaintiffs to prove that specific decedents attended a meeting that occurred eight years before they (and in some cases entire families) were killed or that they somehow heard the "substance" of the County's shockingly inadequate warning. This Court should hold that all Plaintiffs had privity of reliance on the County's negligent warning of future landslide risks and reverse and remand for trial.

a. The County's duty extended to the entire Steelhead Haven community.

The trial court erroneously held the County had no obligation to warn those who did not or could not attend the County's March 11, 2006 meeting or those who moved to Steelhead Haven after that meeting occurred. CP 6726-27. The court also erroneously held that the County had no obligation "to engage in further affirmative acts to improve its ability to warn" and ensure that the County's warning would be accurate and meaningful. CP 6729. The court's narrow view of the County's duty cannot be squared with Washington law for several reasons.

First, the court's circumscription of the County's duty to warn to those who attended the March 11, 2006 meeting ignores the court's previous and correct holding that the County had a legislative duty to protect Steelhead Haven, and that the County's communications in furtherance of that legislative duty were not immune from tort liability. *See supra* pp. 26-

28. The County's duty was not circumscribed solely by what it supposedly "volunteered" to do in 2006 since it had already adopted a duty to protect the entire community in 2004.

Second, it matters not whether the County's actions were "voluntary" or compelled by its prior legislative intent. Washington law requires that a rescuer employ reasonable care, as the court itself recognized: "When one voluntarily undertakes to warn, that person must exercise reasonable care in carrying out the warning." CP 6726 (citing *Brown* at 299). Reasonable care required the County to reach the entire community with its warning and to study and prepare in order to ensure that its warning would not be negligent and misleading. Determining what reasonable care required in this specific context is inherently a jury question. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 735-36, 927 P.2d 240 (1996) (plurality) (whether City's response to flooding satisfied reasonable care was a jury question) (citing *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967)).

Finally, the scope of the County's duty to warn "includes all persons foreseeably put at risk by the defendant's negligent conduct. In effect, the defendant's conduct creates a 'general field of danger,' and all persons within the 'field' belong to the protected class." *Schooley v. Pinch's Deli Market, Inc.*, 80 Wn. App. 862, 868-69, 912 P.2d 1044 (1996); *see also McKown*, 182 Wn.2d at 762-64 (foreseeability is both a "question of whether a duty exists and also a question of whether the harm is within the scope of the duty owed"); *Keller v. City of Spokane*, 146 Wn.2d 237, 243,

44 P.3d 845 (2002) (en banc) (duty includes defining class protected by the duty, which generally includes anyone foreseeably harmed by the defendant's conduct regardless of that person's own fault).

In this case, the County's legislative duty was to a community—Steelhead Haven—not to specific individuals who attended the March 11 meeting. The cribwall was proposed to protect the community, not specific individuals. Similarly, the County's promised warning about future landslide risks related to the entire community. As the Restatement (Third) of Torts § 42 cmt. d (2012), provides, "[t]he undertaking may be on behalf of a specific individual or a **class of persons**." (emphasis added).

Having promoted the cribwall as a means of protecting public safety and having promised to warn the entire community, the County's obligation continued as long as the danger to the community persisted. *See, e.g.*, *Ronkosky v. City of Tacoma*, 71 Wn. 148, 153, 128 P. 2 (1912) (while city had no obligation to "furnish drainage" in the first place, its affirmative act of constructing the drain imposed a continuing duty upon the city to maintain the drainage to prevent the foreseeable harm that would occur to upstream properties if it were not maintained); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 856-62, 5 P.3d 49 (2000) (defendant had a "continuing duty, based upon Washington common law, ... to exercise reasonable care in the development, formulation and dissemination" of warnings because it

was foreseeable that the plaintiff would continue to act in accordance with the warnings).[9]

b. The trial court misinterpreted prior rescue doctrine cases to apply an overly narrow interpretation of that common law duty.

In the distinguishable case of *Osborn v. Mason Cnty.*, the Court commented that "reliance is the linchpin of the rescue doctrine." 157 Wn.2d 18, 25, 134 P.3d 197 (2006). There, a County employee initially promised a third party to distribute flyers to the community notifying them of the residence of a sex offender. The County employee then revoked the promise to the third party, stating that distributing flyers would be a bad idea. The plaintiff parents of a girl murdered by the sex offender had no relationship with the third party and the third party did not rely on the promise to distribute flyers because that promise had been withdrawn by the county employee. Plaintiffs could prove no causal link between the promise and any action negatively affecting the plaintiff. *Id.* at 26-27. The trial court here noted this important distinction between this case and *Osborn* when it observed that the promise in *Osborn* was "explicitly withdrawn" before the criminal event occurred. CP 6725.

[9] In a related context, the trial court recognized that the subject of the warning—a future landslide—required use of a longer time frame than in other contexts. "[T]he Court must also take into consideration the type of event about which Defendants undertook to warn. They intended to warn about huge geological events involving earth, water, and time. The warnings themselves reflected the time frame about which they intended to warn." CP 7699-700.

Osborn nonetheless provides insight into the kind of "reliance" a plaintiff must prove under the rescue doctrine. The Court described the reliance needed as "privity of reliance." *Osborn*, 157 Wn.2d at 27. All Plaintiffs here had "privity of reliance" on the County's negligent warning, because (a) just as in *Brown*, they were deprived of the opportunity to obtain a real warning about the danger they faced because those attending the meeting were lulled by the County into believing they were safe and thus did not pass on any warning to or otherwise galvanize the Steelhead Haven community into action; and (b) the County's negligent warning made each Plaintiff's situation worse and caused them harm, as they were deprived of an effective warning that would have allowed them to escape the path of a deadly landslide. The trial court's conclusion to the contrary reflects a misunderstanding and overly narrow interpretation of the concept of privity of reliance.

i. All Plaintiffs had privity of reliance on the County's negligent warning because those who attended the March 11, 2006 meeting would have warned the entire community had they not been misled.

The privity of reliance deemed sufficient in *Brown* closely parallels Plaintiffs' "privity of reliance" on the County's negligent warning. In *Brown*, the State promised to warn and here, the County promised to warn and educate the community about future landslide risks. CP 6726. In *Brown*, the State employee never spoke to any cabin owner or their visitors. *Brown*, 86 Wn.2d at 295-97; CP 6978. Those plaintiffs had "privity of reliance" with the State, because the State did speak to the developer and

misled him, which led the developer to believe that no warning to property owners was needed.

This case is no different. Like the developer in *Brown*, those who attended the March 11, 2006 meeting were lulled into believing that the slide presented no danger to lives in the community and so did not warn their neighbors of that danger. *See supra* pp. 19-23, discussing record evidence. Had those attending the March 11, 2006 meeting been informed of the danger and the County's decisions not to conduct a necessary geotechnical investigation or monitor the slide, those attendees would have warned their neighbors and demanded action by the County. *Id.* Messrs. Jefferds, Sewell and Thompson stood in precisely the same position as the developer in *Brown*, and every Plaintiff's situation was made worse by the County's stunningly negligent warning at the March 11, 2006 meeting. *Accord Meneely*, 101 Wn. App. at 860-62 (consumers had privity of reliance with a trade association with whom they had no contact, because the trade association did communicate safety standards to manufacturers and manufacturers relied on standards to build consumers' pools).

The trial court assumed any persons who did not attend the March 11, 2006 meeting could not have privity of reliance because they did not hear the "substance" of the warning. CP 6728. Plaintiffs in *Brown* never heard the substance of the State's warning, either. It is both the "substance" of what the County said at the meeting and what the County **did not say** that constitutes the "substance" of what induced "reliance" in this case. In *Brown*, for example, the State employee promised to warn but did not or did

so inadequately. *Brown*, 86 Wn.2d at 299-300. The plaintiffs who died in *Brown* were placed in a worse situation because of what the State **did not say** to the developer. In *Meneely*, the trade association published swimming pool safety standards but the plaintiff's situation was made worse because the trade association **failed to update** those standards. 101 Wn. App. at 858-60. And in *Sheridan v. Aetna Cas. & Sur. Co.*, the defendant agreed to inspect elevators, but the plaintiff's situation was made worse because the company "did not actually report to the city the conditions as found from time to time." 3 Wn.2d 423, 435, 100 P.2d 1024 (1940).

The same is true here. Privity of reliance inheres in what was "announced at the meeting" and **what was not said,** and it is the latter that "prevented or discouraged [the Plaintiffs] from" taking actions to protect themselves. *Price*, 106 Wn. App. at 659. *See supra* pp. 19-23, and evidence cited therein.

In a later order, on September 6, 2016, the court concluded that Plaintiff Amanda Suddarth's rescue doctrine claim could be tried even though she did not attend the March 11, 2006 meeting and did not move to Steelhead Haven until years later. The court reasoned that Plaintiff Seth Jefferds told Ms. Suddarth that he had learned at the March 11, 2006 meeting that the cribwall would protect the community from future slides:

> The fact that Ms. Suddarth . . . did not learn about the potential for a slide the size of the 2014 Oso slide, is what allows the Court to find privity of reliance. She relied on the fact that the county came out to talk about landslide risks and, during the course of that discussion, the county never told those present that a geological expert had raised the

> specter of a slide an order of magnitude larger than the 2006 slide. She relied on the fact that the county never told those at the meeting about the limitations of what they knew and what further investigation they would need to do in order to provide a complete education to those present. . . . [S]he relied on information from that meeting- information that told her she did not need to worry about a slide the size of the one that occurred on March 22, 2014.

CP 7697.

The court's analysis of Ms. Suddarth's reliance demonstrates why **all** Plaintiffs had privity of reliance upon the County's negligent warning, and that they are all entitled to try their rescue doctrine claims. Mr. Jefferds, Mr. Sewell and Mr. Thompson attended the March 11, 2006 meeting. They felt safe and secure from the landslide and thus had no reason to discuss the March 11, 2006 meeting with their neighbors or those who would move into the community years later. They believed the cribwall would have a protective effect. They did not know that the next slide could bury the community. They did not know that no one had studied whether trapping the 2006 landslide debris behind the cribwall would make a future slide more explosive (which is exactly what happened on March 22, 2014). They did not know that the County knew that a geotechnical investigation and monitoring of the slide were necessary to understand the danger to the community, but that the County had dropped the ball. And each of those gentlemen testified that they would have notified their neighbors of the danger had these critical omissions been disclosed by the County on March 11, 2006. *See supra* pp. 19-23, and evidence cited therein. Thus, all Plaintiffs had privity of reliance on the County's negligent warning.

ii. All Plaintiffs were placed in a worse situation by the County's negligence.

"Privity of reliance" does not mean "individualized reliance." "Privity" in the context of a duty is not a requirement for one-on-one contact; instead "privity is used in the broad sense of the word and refers to the relationship between the [defendant] and any 'reasonably foreseeable plaintiff.'" *Chambers-Castanes v. King Cnty.*, 100 Wn.2d 275, 286, 669 P.2d 451 (1983).

Brown held that people who were injured or killed by an avalanche could pursue a claim even though none of them spoke individually with the State or claimed to have any individualized reliance on the State's actions, because their claim was that the State's actions increased the danger that they would be in the path of the destruction when an avalanche occurred. 86 Wn.2d 295-97. In *Parrilla v. King Cnty.*, the county's duty extended to all bystanders in the path of a bus after a county employee abandoned the bus to a disturbed person, although no individualized reliance analysis was conducted. 138 Wn. App. 427, 439-41, 157 P.3d 879 (2007). In *Meneely*, the Court held that a trade association had a duty to consumers with whom it had no contact, because it was on notice that its standards created a grave risk of harm to end-users and, by undertaking to promulgate those standards, it was "foreseeable that harm might result to the consumer if it did not exercise due care." 101 Wn. App. at 860-62. In contrast to *Osborn*, where there was no foreseeability linking the action to the harm, these cases demonstrate that evidence pertaining to a class of persons is actionable so

long as that group is foreseeable. S*ee also* Restatement (Third) of Torts § 42 cmt. d (2012) (a duty arising out of an undertaking "may be on behalf of a specific individual or a class of persons.").

To show "reliance" in this context, a plaintiff must show only that he or she acted or did not act to his detriment due to the defendant's actions. *Brown*, 86 Wn.2d at 299-300 (describing reliance as "causing him to refrain from action . . . he otherwise would have taken"). Saying that a plaintiff "relied" on the County's negligent warning thus is no different than saying that he was in a less favorable position because of the County's negligent warning than if the County had not acted at all. *See id.*; *Cummins v. Lewis Cnty.*, 156 Wn.2d 844, 867, 133 P.3d 468 (2006) (Chambers, J., concurring) ("The failure to do what is gratuitously promised, followed by injury stemming from the failure, is the very essence of these types of torts.").

Reliance under the rescue doctrine is thus the element by which a plaintiff must demonstrate causal linkage between defendant's conduct and plaintiff's harm. Plaintiffs presented triable evidence of that causal linkage, and our courts appropriately leave it to the jury to decide such factual disputes. *E.g., Hartley v. State,* 103 Wn.2d 768, 775, 698 P.2d 77 (1985) (whether negligence caused injury is a factual question). This Court should reverse and remand for trial of Plaintiffs' rescue doctrine claim against the County.

3. The County had a duty to Steelhead Haven based on its affirmative undertaking to warn and educate the community of future landslide risks, thereby increasing the risk of harm to Steelhead Haven.

Having correctly determined that a jury could find that the County failed to exercise ordinary care in its affirmative undertaking to warn, CP 6719, the trial court then erred in concluding that the County could only be liable if its "negligent act . . . create[d] an unreasonable risk of harm to another through the conduct of a third person which is intended to cause harm, even though such conduct is criminal." CP 6720.[10] Liability for negligence in an affirmative undertaking exists where the actor's failure to exercise reasonable care increases the risk of harm; it does **not** require an increase to the dangerousness of the agent of destruction itself. *See* Restatement (Second) of Torts § 323(a). In *Brown*, for example, the State's negligence did not make an avalanche more likely; instead, the increased danger was that plaintiffs had been deprived of a meaningful warning, making it more likely that cabin owners and their visitors would be in the line of fire to be injured or killed by the avalanche. 86 Wn.2d at 299-300.

While a defendant's negligence can increase the risk that the plaintiff will be victimized by the intentional or criminal conduct of a third party, Restatement (Second) of Torts § 302B, [11] such liability is but a narrow

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[10] Citing *Parrilla*, 138 Wn. App. at 427 (Metro bus driver's act of leaving bus running with crazed passenger alone, which the passenger then stole and crashed into bystanders, created a dangerous situation to foreseeable bystanders).

[11] *See Parrilla*, *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013), and *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013), which rely on §302B.

application of the principle that one is responsible for negligent acts that expose another to an unreasonable risk of harm through "the foreseeable action of the other, a third person, an animal or a force of nature." Restatement (Second) of Torts § 302(b). The touchstone is foreseeability. Here, the trial court inexplicably would impose liability for third party criminal conduct, but not for the direct and foreseeable consequences of the defendant's own actions, in disregard of the fundamental principle that everyone is responsible for the foreseeable results of their actions. *See Brown*, 86 Wn.2d at 299-300.

The court also dismissed Plaintiffs' claim based on its flawed observation that "every time an appellate court addresses an 'affirmative promise to warn' case, the court analyzes it under the voluntary rescue doctrine." CP 6721. Washington law does not set up an either/or test for application of negligence for one's affirmative acts or the rescue doctrine. The two are complementary and grounded in the same principle that an actor may be accountable for negligence when his affirmative actions increase the risk of harm to another.

In *Phillips*, the County's affirmative act—allowing a water drainage system to be built on land that it owned or controlled—increased the risk of harm to plaintiffs because the drainage system enabled storm waters to flood plaintiffs' property. 136 Wn.2d at 951-52. In *Borden*, the City's affirmative participation in a development contributed to the increased risk of harm to the neighbors whose properties were flooded. 113 Wn. App. at 369-72. In *Brown*, the State's affirmative undertaking to warn dissuaded others from

delivering the warning and made cabin owners' situation worse. 86 Wn.2d at 299-300.

Here, Plaintiffs established—and the trial court specifically found—that the County's active participation in the cribwall project physically increased the danger that a future slide would devastate the community. *See, e.g.*, CP 4329 ("[S]ufficient evidence exists such that a fact-finder should determine whether the County was 'actively involved' in the revetment project."); CP 7977 *et seq.* (forthcoming supplemental CPs, which includes May 12, 2016 Order on State's Motion for Summary Judgment at 8-9 ("As it relates to construction and maintenance of the cribwall and sediment ponds, the Court finds that a material issue of fact exists as to whether these admittedly man-made alterations . . . made the slide itself more vulnerable to potential landslides.")). The entire Steelhead Haven community faced increased peril because of the County's misleading and woefully inadequate warning to the community, which inspired only complacency and a sense of security. CP 6719-22.

The trial court correctly held the County to a duty based upon its affirmative acts in connection with the cribwall, although there was no third-party criminal conduct and no rescue doctrine claim. CP 4329. Six months later, the trial court then erred in holding that Washington law does not recognize a duty from affirmative acts in providing misleading and inadequate warnings to the community. CP 6721. This Court should reverse and remand for trial of Plaintiffs' negligence claims based on the

County's breach of its duty to exercise reasonable care in undertaking the affirmative act of warning.

C. Flood Control Immunity did not Immunize the County for Breaches of its Legislative Duty to Protect Steelhead Haven from the Hazel Landslide.

The trial court erred in holding that statutory immunity under the Flood Control Act insulated the County from liability for its negligent acts and omissions. With the waiver of sovereign immunity, the enactment of governmental immunities are construed narrowly to effectuate only the specific purpose of the statute that carves an exception from waiver of sovereign immunity. *E.g.*, *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 600, 257 P.3d 532 (2011) ("Statutory grants of immunity in derogation of the common law are strictly construed." (citing *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437-39, 824 P.2d 541 (1992) ("[S]ociety generally assumes persons and entities should be accountable for their negligence.")). This Court has limited the immunity to bar claims for flood damage that allege governmental negligence in attempting to control floods. The County's conduct here—related to a landslide stabilization project (*i.e.*, the cribwall)—is not immune from suit merely because it was listed in the 2004 Flood Plan and may have had a side-effect of potentially reducing flood risk.

Moreover, because the facts were disputed on summary judgment, the court erred in resolving as a matter of law questions of breach of duty, harm and immunity. *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d

684, 693-94, 317 P.3d 987 (2014) ("When the facts are undisputed, immunity is a question of law for the court. . . . But where material facts are disputed, a trial is needed to resolve the issue."); *Staats v. Brown*, 139 Wn.2d 757, 764, 991 P.2d 615 (2000) (claims of state law immunity "are subject to the ordinary summary judgment standard which requires all facts and inferences to be construed most favorably to the nonmoving party"). The trial court undermined these principles in concluding that Flood Control Immunity protected the County from its breach of duty to protect Steelhead Haven, a legislative duty adopted in the 2004 Flood Plan.

1. RCW 86.12.037 is a limited immunity covering negligence during flood control projects that result in flood damage.

Counties have authority to conduct a variety of operations so long as those operations are "for the control of waters subject to flood conditions." RCW 86.12.020. The counties' authority carries with it an immunity "where their negligence in the construction and maintenance of flood control devices results **in damage to private property during floods or other periods of high water."** *Paulson v. Pierce Cnty.*, 99 Wn.2d 645, 649, 664 P.2d 1202 (1983) (emphasis added). Specifically, the immunity statute states that:

> No action shall be brought or maintained against any county . . . 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 . . . **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 . . .

RCW 86.12.037 (emphasis added).

The trial court erroneously concluded that the legislature, by placing this immunity provision within the same chapter as RCW 86.12.200 (authorization to create comprehensive flood management plans), demonstrated an intent to immunize "acts/omissions related to the adoption and implementation of a flood control management plan." CP 1881. That broad reading of the immunity provision, however, is contrary to the principle of narrow interpretation of legislation exonerating persons and entities from the consequences of their negligence. *Michaels*, 171 Wn.2d at 600.

The Legislature granted counties immunity to encourage them to build dams and dikes to prevent flooding and to keep rivers navigable. The Legislature's clear intent was to "shield counties from liability for their efforts to protect the public from flood damage." *Paulson*, 99 Wn.2d at 649 & 654. The Supreme Court held that this balance between encouraging action by a county and providing immunity is a rational tradeoff that prevents the costs of flood damages from being added to the costs of constructing flood control facilities. *Id.* at 654.

The handful of published cases on Flood Control Immunity demonstrate its intended limited scope. Notably, immunity has been granted only where a plaintiff suffers flood damage from the failure of a county's flood control device. In *Short v. Pierce Cnty.*, this Court concluded that Pierce County was entitled to immunity from negligence claims where a plaintiff's property was damaged by floodwaters that had

come through breaks in the County's poorly maintained bulkhead. 194 Wn. 421, 424, 78 P.2d 610 (1938). The Court held, however, that the plaintiff **could** recover for the County's extended use of his property as a staging area for five months long after the flood subsided, though the purpose of continued use of the property was to construct flood control improvements. *Id.* at 424.

In *Paulson v. Pierce Cnty.*, immunity attached where a dike constructed by the county for flood control was breached and caused extensive flooding damage. 99 Wn.2d at 649. Critically, in both *Short* and *Paulson*, a flood control device built by the county failed, and plaintiffs' damages were caused by flooding due to that failure. These cases—the only reported decisions to apply Washington's flood prevention immunity—do not anticipate or embrace a broader application of the Flood Control Immunity to county conduct that is not for flood prevention and that does not cause flooding damage.[12]

In contrast, no immunity applies where negligent acts do not involve floods or flood control. In *Hamilton v. King Cnty*., the case relied on by the trial court, the Court concluded Flood Control Immunity did not attach

[12] Flood Control Immunity also does not apply when a county does not engage in a flood control action. In an overbroad interpretation of RCW 86.12.037, the County contended below that it has Flood Control Immunity for any "omissions" or failures to act that it deems related to flood control. *See, e.g.*, CP 1085; 1093. While a county is immunized for any actions or omissions that occur during "improvement, protection, regulation, and control for flood prevention," the immunity presupposes that a county has undertaken some sort of action. The legislature did not contemplate that a county would be immunized by simply choosing not to act at all. If the County ventured nothing, it should gain nothing via Flood Control Immunity.

because the county's actions involved a drainage ditch, not a flood control project:

> The construction of the ditch by the county was a drainage project, rather than one involving flood control, and for this reason, Rem. Rev. Stat. § 9663, prohibiting actions against a county for non-contractual acts or omissions in work designed to prevent flood, or for purposes of navigation, need not be considered.

195 Wn. 84, 91, 79 P.2d 697 (1938), *abrogated on other grounds Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008). *Hamilton* thus holds that a project is not entitled to immunity unless the actions are specifically and exclusively related to flood control.

Further, this Court has not applied Flood Control Immunity in lawsuits for damages that were not caused by flood waters, even when the negligent acts took place under the auspices of flood control. *McHugh v. King Cnty.*, 14 Wn.2d 441, 443, 128 P.2d 504 (1942). In *McHugh*, the County was "engaged in certain work designed to control the flood waters" and had rented construction equipment to complete the project. *Id.* During construction, workers for the county negligently damaged rental equipment by causing a boulder to fall on it. *Id.* at 444-45. The Court held that the County was liable for its agents' negligent acts, though the decision explicitly notes the acts occurred during a flood control project. *Id.* at 447. *Hamilton* and *McHugh*, as compared to *Short* and *Paulson*, demarcate the narrow bounds of Flood Control Immunity.

The legislative history of RCW 86.12.037 also supports a narrow application of Flood Control Immunity. The County argued to the trial court that RCW 86.12.037 was introduced to abrogate *Conger v. Pierce Cnty*., a case where two counties had been held liable for river improvements. *Conger v. Pierce Cnty.*, 116 Wn. 27, 198 P. 377 (1921). While *Conger* led to a bill authorizing all-encompassing immunity related to rivers, the Legislature chose to temper and narrow the proposed immunity. Wash. H. Journal, 16th Leg., Ex. Sess., 261 (1921) ("Journal") (voting on House Bill No. 119), CP 1366-70; *see also Short*, 194 Wash. at 431 (*Conger*'s holding was narrowed but not abrogated by Flood Control Immunity). When the immunity bill was first presented to the House, it provided immunity for acts "relating to the improvement, protection, regulation, control and flood prevention of any river . . . ." Journal at 261 (reconstructed from amendments); CP 1370. Under this language, counties would have complete immunity when it came to any actions related to a river, whether for flood prevention or otherwise. This broad grant of immunity was voted down. Journal at 163-64 (1921); CP 1367-68. After failing, the bill was revived and sent to the House Judiciary Committee for review. Journal at 165; CP 1369. While the minority of the House Judiciary Committee recommended indefinitely postponing the bill, the majority recommended passage with amendments that would significantly limit its scope. Journal at 261; CP 1370. In particular, the majority made several amendments that limited a county's immunity only to those acts performed on rivers that were for flood prevention or navigation. Journal at 261; CP 1370. After these

amendments, the bill was enacted with the language that remains to this day, providing immunity for acts "relating to the improvement, protection, regulation and control for flood prevention and navigation purposes of any river." Thus, not only was the bill originally limited to acts related to the alteration of rivers, its breadth was significantly reduced to only apply to alterations of rivers that were undertaken for flood prevention or navigation.

Contrary to the trial court's holding (CP 1881-82), cases regarding the far-more analyzed federal flood immunity statute lead to the same conclusion of limited flood immunity, even though the federal statute's language is much broader. *See* 33 U.S.C. § 702c ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."). In particular, the trial court and the County relied on federal cases for the proposition that flood immunity serves an essential purpose of providing "absolute freedom of the government from liability" that is a "factor of the greatest importance in the extent to which" government "has been and is willing to make appropriations for flood control and to engage in costly undertakings to reduce flood damages." CP 1087 (citing *Peterson v. United States*, 367 F.3d 271, 272 (9th Cir. 1966) and *Garci v. United States*, 456 F.2d 20, 26 (5th Cir. 1971)). However, these cases ultimately denied immunity because the statute "should not be construed to be a wholesale immunization of the Government from all liability for floodwater damage unconnected with flood control projects." *Garci*, 456 F.2d at 27; *Peterson*, 367 F.3d at 275-

76 (trial court "painted with too broad a brush in its conclusions that [immunity] applies to all floods and flood waters").

These cases confirm the rationale for the federal flood immunity statute is identical to the rationale for RCW 86.12.037. *Compare Paulson*, 99 Wn.2d at 649 & 654 (explaining that immunity is balanced by the motivation it provides for counties to engage in flood control) *with Garci*, 456 F.2d at 23-28 (reviewing the application and legislative history of the federal flood immunity statute, determining that "when, as here, the plaintiffs allege that they have suffered floodwater damage as a result of the negligence of the United States unconnected with any flood control project, [the statute] does not bar an action"). Thus, the federal flood immunity statute shares with RCW 86.12.037 a narrow application that is limited to those acts and damages underlying the rationale for the immunity itself.

The trial court's opposite conclusion is based almost entirely on a misreading of the federal cases. The trial court held that the federal statute has been interpreted as granting immunity "even though a federal project has multiple purposes and is not intended exclusively for flood control" and then adopted that reasoning to apply to the differently worded state statute. CP 1882. Though immunity may apply when a project has multiple purposes, the injury sustained must have some connection with flood control. *See, e.g.*, *Kennedy v. Texas Utils.*, 179 F.3d 258 (5th Cir. 1999) (no immunity where injury occurred at reservoir created as a flood control project, but was on dry land due to a condition not associated with flood control); *Henderson v. United States*, 965 F.2d 1488 (8th Cir. 1992) (no

immunity in death of fisherman where drowning was caused by release of water at direction of private power company from dam operated for hydroelectric power generation, though dam also served as a flood control device); *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity for allegedly negligent failure to warn swimmers of hazard from boats in death of snorkeler at flood control lake).[13]

In sum, judicial application of Flood Control Immunity, the legislative history of RCW 86.12.037, and the similar application of the federal flood immunity statute demonstrate that the immunity applies only to the construction and maintenance of flood control devices that cause damage to private property during installation or later flood events. *Paulson*, 99 Wn.2d at 649.

2. Plaintiffs' claims arise from a landslide, not flooding.

Plaintiffs' claims are not based on the County's emergency response to the 2006 flood. CP 944-45; 1882. Plaintiffs' claims are based on the County's adoption, promotion, active participation in, and communication about the cribwall project that though intended to protect a community from a landslide, instead manifestly increased the landslide danger to that community. *See* CP 1083.

[13] The unpublished decision relied on by the trial court is no different. *See Merritt v. United States*, 121 F.3d 716, 1997 WL 458600 (9th Cir. 1997) (unpublished). That case granted immunity, in part, because the water levels created by a flood control project played a role in a boater's crash. *Id.* at *2. Notably, the court was "not altogether comfortable about the outcome in this case" because it appeared unjust. *Id.* at *3. However, the court felt bound by the broad language of the federal statute that granted immunity to damage from flood waters, a problem that does not face this Court in the application of the Washington statute. *Id.*

The trial court granted the County immunity for the "recommended alternative of a slide stabilization project in lieu of pursuing a voluntary acquisition of nearby properties." CP 1083; 1883. But immunity cannot be stretched to a purpose that went well beyond flood control.

Moreover, Plaintiffs do not seek to recover flood damages. They died from or were injured by a massive landslide. CP 1372-78. This is not a case in which a County's flood control device failed and caused a flood, which is the reason the Legislature granted limited Flood Control Immunity in the first place.[14] The County's complete failure to act and its exacerbating actions regarding the landslide are not entitled to "flood" immunity.

3. Adoption of a landslide remediation project in a flood plan does not grant immunity.

The trial court erred in granting flood control immunity where nothing in the 2004 Flood Plan addressing the Hazel Landslide was done for the purpose of flood control. A county may not immunize all of its actions simply because they are published in a "flood plan." The moniker given to a county's actions is unimportant; it is the substance of the acts that receive immunity.

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[14] *See Paulson*, 99 Wn.2d at 649 (dike constructed by the county was breached and caused extensive flooding damage); *Short*, 194 Wn. at 424 (property damaged by floodwaters that had come through breaks in a poorly maintained bulkhead). Instead, this is a case where the County's acts/omissions led to deaths and serious injury from a massive landslide, which is not entitled to immunity even if the County was engaged in a "flood fight" eight years earlier. *Cf. McHugh*, 14 Wn.2d at 443 (no immunity for damage to machinery during construction of a flood control device); *see also Short*, 194 Wn. at 424 (County's use of plaintiff's land for emergency response to flooding was immune, but not its continued use of the property for five months afterward).

Counties are empowered with authority to undertake any number of actions, but the immunity extends only so far as those actions are "for the control of waters subject to flood conditions." RCW 86.12.020. This means that counties are not entitled to immunity for removing logs for beautification purposes, even if that same action would be immunized if it were done for flood control purposes. *See Hamilton*, 195 Wn. at 91 (ditch construction was a drainage project, "rather than one involving flood control," so immunity did not attach). Inconsistently, the trial court narrowly construed the County's Flood Control Immunity when it held that "construction" of the cribwall and "communications" about the cribwall were not subject to Flood Control Immunity. CP 1882; 1884; 4330.[15]

However, the trial court erred in adopting the County's theory that it was otherwise entitled to immunity for the 2004 Flood Plan because it weighed the alternatives for the landslide remediation project as part of a larger statutorily required comprehensive flood control plan. CP 1091-93. Including a landslide stabilization project within the 2004 Flood Plan does not clothe the project with immunity. Indeed, the project was first designed, with the County as sponsor, through the Corps' Stillaguamish Ecosystem Restoration Plan, which had nothing to do with flood prevention, but

[15] "The Court agrees that [flood] immunity attaches if one of the purposes of the project was flood control. The Court does not, however, agree that immunity attaches if one of the benefits of a project initiated for a different purpose happens to also have an impact on flood prevention. *See Hamilton v. King County*, 195 Wash. 84[, 79 P.2d 697] (1938). In this case, **genuine issues of fact exist as to whether the post-2006 revetment was built as a flood prevention project or not**." CP 4330 (emphasis added).

focused on "ecosystem restoration." The County itself recognized that there were multiple purposes for the landslide remediation, with flooding only being a secondary effect of a future landslide. CP 894 ("Smaller failures **could also block the current flow of the river** forcing the river into a new pathway, which would again threaten life and property on the south bank." (emphasis added)). Simply incorporating the same project into the County's 2004 Flood Plan does not transform the essential character of the project.

The trial court erred in applying flood immunity to the County's selection of a cribwall to protect Steelhead Haven from landslides, and not for the purpose of flood control. Because the County's actions were aimed at reducing landslide danger to people in Steelhead Haven, they were not acts relating to the "improvement, protection, regulation, and control for flood protection." RCW 86.12.037. At a minimum, the multiple and changing purposes behind the project present a material question of fact as to whether Snohomish County's acts were primarily or exclusively for flood control purposes, requiring reversal of the trial court's grant of summary judgment. *Staats*, 139 Wn.2d at 764.

D. The Trial Court Incorrectly Applied Fish Habitat Enhancement Project Immunity to the County's Active Participation in the Cribwall.

Again violating the principle that statutory immunities should be construed narrowly, the trial court concluded that the County's negligence in actively participating in the cribwall project was entitled to Fish Habitat

Enhancement Project Immunity under RCW 36.70.982. The court erroneously held as a matter of law that the cribwall was permitted as a fish habitat enhancement project, and therefore the County was entitled to immunity for any damages arising from the project.

RCW 36.70.982 provides: "A county is not liable for adverse impacts resulting from a fish habitat enhancement project that meets the criteria of RCW 77.55.181 and has been permitted by the department of fish and wildlife." The statute's plain language and legislative history demonstrate that the Legislature never intended immunity to apply to the type of affirmative involvement the County performed in a major project like the cribwall.

1. RCW 36.70.982 addressed counties' concern that they would be held liable for not acting when counties had been removed as the permitting agency.

RCW 36.70.982's legislative history demonstrates that the immunity extends only to protect counties from liability resulting from their inability to conduct the normal permitting for projects entitled to streamlining. The bill proposing streamlining was submitted in 1998, without any immunity language. CP 4251-57. The bill's stated purpose was to dispense with local permits and fees for projects carried out to enhance salmon and steelhead habitat. CP 4251.

The only relevant testimony against the proposed bill came from counties concerned that they could be held liable for failing to conduct the permitting that would otherwise be required and that this raised a

"[q]uestion of liability with regard to the county's duty to protect and the possibility that an expedited project would result in an untoward effect." CP 4262. In response to this concern, the bill was amended to add immunity for local governments, including counties, for those liabilities that may arise from not applying the traditional permitting scheme. RCW 36.70.982. The amendment's scope was quite narrow and specific:

> Counties . . . are not held responsible for adverse impacts resulting from a fish enhancement project that has been approved for expedited approval and has been exempted from the normal approval processes.

CP 4266.

Accordingly, the plain language and legislative history shows that the purpose of the Act was to expedite the review process of fish habitat enhancement projects and to ensure that counties would not be liable for the jurisdiction's inability to conduct permitting for those projects.[16] This immunity exists only because RCW 77.55.181 severely restricts the ability of a county to review and attach conditions to a fish habitat enhancement project. The provision does not immunize claims against a county when it actively participates in conceiving, adopting and implementing a fish habitat enhancement project. By both its structure and plain language, the

[16] This immunity is similar to the protection afforded municipalities by the public duty doctrine when acting in a regulatory capacity. *See, e.g.*, *Phillips*, 136 Wn.2d at 968. A municipality is generally considered to lack liability when its only involvement in a private project is in an entirely governmental capacity required by statute, such as through permitting. *Id.* However, when the municipality's participation becomes more active and goes beyond its statutory mandate, then it is acting in a private capacity and subject to a duty to protect those who may be harmed by its affirmative acts. *Id.*

immunity does not extend to entities that are actively involved in constructing fish habitat enhancement projects. *See* RCW 36.70.982 (providing immunity to counties for lack of permitting control); RCW 35.21.404 (same for cities).

Plaintiffs did not allege that the County is liable because it failed to permit the cribwall; rather, the evidence demonstrates that the County participated in sponsoring, adopting and constructing a cribwall, which increased the danger of the Hazel Landslide and thus imposed a duty to mitigate that danger.[17] *See, e.g.*, *Phillips*, 136 Wn.2d at 967-69.

2. Fish Habitat Enhancement Project Immunity attaches only if a project is small and presents no risk to public health and safety.

The trial court erroneously agreed with the County's argument that the approval of the project is all that is required to invoke Fish Habitat Enhancement Project Immunity. But the immunity attaches only where a project "meets the criteria of RCW 77.55.181 **and** has been approved for permitting by the department of fish and wildlife." RCW 36.70.982 (emphasis added). To obtain immunity, the County has the burden to demonstrate that the cribwall met the criteria of RCW 77.55.181. The County made no attempt to meet this burden below, nor could it.

In particular, RCW 77.55.181 mandates that a "project proposal shall not be reviewed under the process created in this section if the

[17] Relying on *Phillips* and *Borden*, the trial court had no difficulty concluding that the record supported the County's duty to Plaintiffs based on its active participation in the cribwall. CP 4341.

department determines that the scale of the project raises concerns regarding public health and safety." The streamlined process anticipated by RCW 36.70.982 was never appropriate for large-scale projects such as stabilizing the largest landslide on the river; the State was required to reject projects that did not meet these criteria. This limited scope of fish enhancement streamlining and corresponding limited immunity is exemplified in the only ruling on this issue known to the Plaintiffs: a Hydraulic Project Approval Appeals Board ruling on Leque Island that ruled that a dike removal or setback was larger than intended by the legislature. *Snohomish Cnty. Farm Bureau v. State of Wash.*, HAB No. 09-001 (Sept. 11, 2009), *available at* http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=261. That decision noted that projects with a "more complex set of competing interests [which] generates more environmental and land use impacts than relatively simple activities" were not to be approved under RCW 77.55.181. *Id.* at 9.

The cribwall was a large-scale project and very obviously raised concerns regarding public health and safety, as admitted by everyone involved. *E.g.*, CP 3938 (describing dangers of Hazel Landslide). The project plainly did not meet the statutory criteria, and thus immunity does not attach.

3. Immunity extends only to the "adverse impacts" not associated with a large project that has public health and safety risks.

A corollary to the requirement that fish habitat enhancement projects that are streamlined must be small in scale, the immunity is limited to "adverse impacts" that would arise from a properly streamlined project. These adverse impacts cannot include, by statutory definition, "public health and safety" concerns raised by the large "scale of the project." RCW 77.55.181.

"Adverse impacts" in RCW 36.70.982 has the same meaning as in RCW 77.55.181, which was enacted in 1998 as part of the same legislation. RCW 36.70.982 is a "statute of specific reference", *i.e.*, a statute that "refers specifically to a particular statute [RCW 77.55.181] by its . . . section number." *E.g.*, 2B Sutherland, Statutes and Statutory Construction § 51:07 (Norman J. Singer ed., 7th ed. 2012) (citing, *e.g.*, *State ex rel. Ostrowski v. Haguewood*, 56 Wn. App. 37, 41, 782 P.2d 213 (1989)). Statutes of specific reference adopt the parts of the statute to which they refer, and become part of the adopting statute. *Id.* at § 51:8. Thus, the phrase "adverse impacts" as used in RCW 77.55.181 has the same meaning as the phrase "adverse impacts" in RCW 36.70.982.

In RCW 77.55.181, "adverse impacts" do not include "public health and safety" concerns raised by the large "scale of the project." RCW 77.55.181(1)(b). If such "public health and safety" concerns exist, the project should never get beyond the threshold considerations in RCW 77.55.181(1). Once a project meets the threshold criteria of RCW

77.55.181(1), the applicant may submit a Joint Aquatic Resource Permit Application ("JARPA"), which "[l]ocal governments shall accept[.]" RCW 77.55.181(3)(a) & (b). The phrase "adverse impacts" does not occur in the statute until subsection (3)(c), where the department is to consider "adverse impacts" identified during the comment period on the JARPA. In this case, the Tribe submitted a JARPA for the cribwall project. As the County described it below:

> The Tribe's permit application stated that the project was designed to accomplish the tasks listed in RCW 77.55.181(1)(a)(ii) ("restoration of an eroded or unstable stream bank employing the principle of bioengineering") and (iii) ("placement of woody debris or other instream structures that benefit naturally reproducing fish stocks")[.]

CP 3452.

Given this statutory framework, "adverse impacts" are those resulting from a specific small scale fish enhancement project. Thus, with respect to the Tribe's JARPA, if the logs used to "restore an eroded or unstable stream bank using bioengineering techniques" were part of a small scale project and were to dislodge and travel downriver, that would be an "adverse impact" to which the statutory immunity applies. Further, if in-stream placement of "woody debris" were to result in movement of that woody debris downriver, that also would be an "adverse impact" to which the statutory immunity applies. This is precisely the kind of narrow "adverse impact" reflected in the legislative history for the statutory immunity. "Adverse impacts" do not include "public health and safety"

concerns raised by large projects for which a JARPA should not be permitted in the first place. RCW 77.55.181(1)(b).

In passing RCW 36.70.982 at the same time as RCW 77.55.181, the Legislature gave the County immunity for the same "adverse impacts" identified in and delimited by RCW 77.55.181 ("[County] is not liable for adverse impacts resulting from a fish enhancement project[.]"). Statutes are considered as a whole and "by using related statutes to help identify the legislative intent embodied in the provision in question." *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 797, 246 P.3d 768 (2011) (citation omitted); 2B Sutherland, Statutes and Statutory Construction § 51:07. "Related statutory provisions are interpreted in relation to each other and all provisions harmonized." *CJC v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999).

It is inconsistent with the statutory structure under which the phrase "adverse impacts" arises to conclude that immunity applies when a project is erroneously included in the streamlining process and its scale raises "public health and safety" concerns. If the Legislature had intended to grant such broad immunity, it needed to do so explicitly, which it did not do in RCW 77.55.181 or RCW 36.70.982. Based on the plain meaning of the phrase "adverse impacts" under the statutory scheme enacted in 1998, including RCW 77.55.181 and RCW 36.70.982, immunity does not apply to the "public health and safety" concerns raised by a large project that implicates public safety, such as the cribwall.

4. The trial court incorrectly relied on erroneous interpretations of other statutes to inform its misconstruction of RCW 36.70.982.

The trial court supported its broad interpretation of the Fish Habitat Enhancement Project Immunity by latching, *sua sponte*, on to two erroneous legal conclusions: (1) the trial court incorrectly interpreted the Growth Management Act to support a broad immunity for counties; and (2) it drew the exact opposite conclusion than was warranted from the comparison of the immunities granted to the State and counties under the fish enhancement statute.

The trial court concluded the immunity covers all County conduct relating to the cribwall, because "the county was likely to be an active participant in many, if not all, fish enhancement projects around the State." CP 4344. The court drew this conclusion from the fact that RCW 36.70.982 falls within "the Planning Enabling Act, Ch. 36.70, et seq." which is "interrelated with the Growth Management Act," ("GMA") both of which contemplate extensive county involvement in projects. CP 4344-46. The County had made no such argument, and for good reason.

There is no doubt that when the GMA was first instituted in 1990, it gave counties a great deal of control and responsibility of critical areas, including fish habitat. *See Whatcom County v. Brisbane*, 125 Wn.2d 345, 354, 884 P.2d 1326 (1994). The GMA intended that counties be involved in "guiding and regulating the physical development of [the] county" and mandates the passage and enforcement of development regulations. *Id.*; *see* RCW 36.70A.040(3) (requiring counties to adopt a comprehensive plan and

development regulations consistent with the GMA). This ability to control, permit, and charge fees for fish habitat enhancement projects was the exact impetus for the 1998 bill, which sought to make it easier for small projects to be instituted in the face of such massive bureaucracy. CP 4251. To implement this streamlined process, the bill removed the power to regulate fish habitat enhancement projects from a number of statutes, including a county's power under the GMA. CP 4266.

Accordingly, the GMA now expressly states that "[a] fish habitat enhancement project meeting the criteria of RCW 77.55.181 shall be reviewed and approved according to the provisions of RCW 77.55.181." RCW 36.70A.460(2). Under this statutory structure, construing immunity to cover every conceivable action by the County with respect to the cribwall makes no sense.

On reconsideration, the trial court retreated from reliance on the GMA, but again *sua sponte* reached for a different and equally flawed legal ground for its holding. CP 4541-42. The court noted that the State's immunity under RCW 77.55.181 was in the streamlining statute itself while the county immunity was contained in another statute. From this, the court inferred that the County's immunity is not limited to statutory withdrawal of its permitting authority. *Id.* But the State's immunity is for actions its employees take under the statute's streamlining process. RCW 77.55.181(5). This explains why the State's immunity was included in the streamlining statute while the County's immunity was contained in other statutes to protect the County with respect to its failure to permit the project.

This also explains why a county's immunity is general (because it is not allowed to conduct any permitting and will not be involved in its governmental capacity), while the State's immunity ends "upon proof of gross negligence or willful or wanton conduct" (because the State is required to participate in the streamlining process). *Id.* Both of the trial court's *sua sponte* justifications for its Fish Habitat Enhancement Project Immunity ruling should have led the court to the opposite conclusion.

For these reasons, this Court should reverse the trial court's grant of Fish Habitat Enhancement Project Immunity to the County's extensive and active participation in conceiving, sponsoring, constructing and monitoring the cribwall project.

VII. CONCLUSION

The trial court erred by narrowing Plaintiffs' claims in an erroneous and contradictory string of summary judgment rulings. The trial court then compounded its error by granting the County inapplicable immunities to bar liability on the numerous duties the County had to those who were killed and injured by the 2014 Oso Landslide. This Court should reverse the overbroad protection that the County has received, which is an anathema to the waiver of sovereign immunity and the basic tort principles of being held to account for the harm one causes.

DATED this 29th day of March, 2017.

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APPENDIX

PLAINTIFFS-APPELLANTS KILLED/
PHYSICALLY INJURED BY OSO LANDSLIDE

Alan Bejvl, 21

Ron DeQuilettes, 52

Tom Durnell, 65

Julie Farnes, 59

Adam Farnes, 23

Mark Gustafson, 54

Gloria Halstead, 67

Jerry Halstead, 74

Denver Harris, 14

Sanoah Huestis, 4 months

Christina Jefferds, 45

Jovon Mangual, 13

Mark Lambert (Injured)

Amanda Lennick, 31

Joseph R. Miller, 47

Stephen Neal, 55

Michael W. Pearson, 74

Summer Raffo, 36

Katie Ruthven, 34

Shane Ruthven, 43

Hunter Ruthven, 6

Wyatt Ruthven, 4

Billy Spillers, 30

Brooke Spillers, 2

Kaylee Spillers, 5

Jacob Spillers (Injured)

Amanda Suddarth (Injured)

Duke Suddarth (Injured)

JuDee Vandenburg, 64

Lou Vandenburg, 71

Brandy Ward, 58

Tim Ward (Injured)

William Welsh, 66

Robin Youngblood (Injured)

KEY PERSONS/ENTITIES[18]

Christine Badger – Director, Snohomish County Department of Emergency Management.

Lee Benda – Geologist. Leader of 1988 investigation of Hazel Landslide, which resulted in the Report of the I.D. Team Investigation of the Hazel Landslide on the North Fork of the Stillaguamish River (1988).

Vaughn Collins – Hydraulic Engineer, Snohomish County Public Works.

Tracy Drury – Engineer. Lead engineer of cribwall constructed at the base of the Hazel Landslide. Author of multiple reports on Hazel Landslide, including: Steelhead Haven Landslide: Remediation Study (2000).

Sean Edwards – Senior Planner, Snohomish County Public Works. Served as Lead Entity Coordinator for SIRC.

John Engel – Supervising Engineer, Snohomish County Public Works.

Jeff Jones – Geologist, Snohomish County Public Works.

David Lucas – Engineer, Snohomish County Public Works.

Daniel Miller – Geologist. Author of multiple reports on Hazel Landslide, including: Hazel/Gold Basin Landslides: Geomorphic Review Report (1999).

Pat Stevenson – Environmental Manager, Stillaguamish Tribe. SIRC's representative for Stillaguamish Tribe.

Stillaguamish Implementation Review Committee ("SIRC") – Studied Hazel Landslide and sponsored cribwall constructed at the base of the hillside, with the support of co-lead entities Snohomish County and Stillaguamish Tribe.

Steven Thomsen – Director, Snohomish County Public Works.

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[18] Titles and background provided for the period relevant to this case and may not reflect subsequent changes.

RCW 36.70.982 - Fish enhancement projects—County's liability.

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 - Fish habitat enhancement project—Permit review and approval process—Limitation of liability.

(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 culvert repair and replacement;

(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; and

(x) 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.

(b) Local governments shall accept the application as notice of the proposed project. The department shall provide a fifteen-day comment period during which it will receive comments regarding environmental impacts.

(c) Within forty-five days, 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. 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.

(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 under this section may appeal the decision as provided in RCW 77.55.021(8).

(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 under the criteria of this section except upon proof of gross negligence or willful or wanton misconduct.

RCW 86.12.037 - Liability of counties, cities, and other special purpose districts to others.

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.

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys for *Pszonka* Plaintiffs herein.

2. On March 29, 2017, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: March 29, 2017, at Seattle, Washington.

/s/Leslie Nims
Leslie Nims

APPENDIX C

Supreme Court No. 93728-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 14-2-18401-8 SEA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

RYAN M. PSZONKA as personal representative of the ESTATES OF KATIE RUTHVEN, HUNTER RUTHVEN, and WYATT RUTHVEN; AMY S. THOMPSON as personal representative of the ESTATES OF SHANE RUTHVEN, LEWIS VANDENBURG and JUDEE VANDENBURG; SONJA M. REW as personal representative of the ESTATE OF GLORIA HALSTEAD; STEVEN L. HALSTEAD as personal representative of the ESTATE OF JERRY HALSTEAD; and JAMIE A. LENNICK as personal representative of the ESTATE OF AMANDA LENNICK

TIM WARD, individually and as the personal representative of the Estate of BRANDY WARD; GERALD F. FARNES, individually, and as the personal representative of the ESTATES OF JULIE FARNES and ADAM FARNES; DAYN BRUNNER and JASON BRUNNER, as personal representatives of the ESTATE OF SUMMER RAFFO; DEBORAH L. DURNELL, individually, and as the personal representative of the ESTATE OF THOMAS P. DURNELL; MARALEE HALL, individually, and as the personal representative of the ESTATE OF JOSEPH R. MILLER; SETH JEFFERDS, individually, and as the personal representative of the ESTATE OF CHRISTINA ANNETTE JEFFERDS; BRENDA NEAL, individually, and as the personal representative of the ESTATE OF STEPHEN NEAL; MINDI PEAKE, individually, and as the personal representative of the ESTATE OF MARK GUSTAFSON; JONIELLE SPILLERS, individually, and as personal representative of the ESTATES OF BILLY LEE SPILLERS, KAYLEE B. SPILLERS, BROOKE SPILLERS, and JOVON MANGUAL; JONIELLE SPILLERS as guardian of JACOB SPILLERS; and ABBIE PEARSON, individually and as the personal representative of the Estate of MICHAEL PEARSON; DIANA BEJVL as the personal representative of the Estate of ALAN BEJVL; LARAE DEQUILETTES as the personal representative of the Estate of RON DEQUILETTES; NATASHA HUESTIS as the personal representative of the Estate of SANOAH HUESTIS; AMANDA

SUDDARTH, individually; TY SUDDARTH and AMANDA SUDDARTH, as guardians of DUKE SUDDARTH, a minor; and BARBARA WELSH as the personal representative of the Estate of WILLIAM WELSH

RANDI LESTER, individually, and as Personal Representative for the Estate of DENVER HARRIS; ROBIN YOUNGBLOOD, individually; and, MARK LAMBERT, individually

Appellants

v.

SNOHOMISH COUNTY

Respondent

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TABLE OF AUTHORITIES

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I. INTRODUCTION AND SUMMARY OF RESPONSE AND REPLY ARGUMENT

Snohomish County tries to avoid accountability through contradictory positions, mischaracterization of the record, and distancing itself from County misconduct that led to the plaintiffs' devastating losses. The County asks for broad protections for its actions under flood control and fish habitat enhancement project immunities, but simultaneously disclaims that it had any role in the massive log wall built in the debris field of the 2006 landslide. The County claims that it had no duty to warn the people in Steelhead Haven, but simultaneously asserts that it gave them adequate warnings. Neither the County's attempt to portray itself as a hapless bystander nor its attempts to obtain broad spectrum immunity withstand scrutiny. Viewing the evidence and reasonable inferences in favor of Plaintiffs, the Court should reverse the erroneous summary judgment dismissal of Plaintiffs' claims against the County, affirm the rulings challenged by the County on cross-appeal, and allow the jury to hear the evidence.

This is not a case that opens the floodgates to government liability. Rather, reversal would allow a jury to determine if the County should be held accountable for making the community feel safe when it should have been in mortal fear. No one—whether an individual or government—is entitled to cast away reasonable care when they warn others of dangers. No one is entitled to make a physical danger more precarious under the guise of making it safer. In reversing summary judgment, this Court will do no

more than render the County answerable for its misconduct in the same manner as any other negligent citizen under our laws.

II. RESPONSE AND REPLY ARGUMENT

A. The County Had a Legislative Duty to Protect Steelhead Haven, Which it Breached (Cross-Appeal Issue No 1)

Ignoring the trial court's inexplicable failure to apply the duty it recognized, App. Br. 27-29, the County instead attacks the trial court's ruling that the County had a legislative duty in the first place,[1] which included the duty to warn the community. On both fronts the County is wrong. SCC 03-150, the County Ordinance at issue ("Ordinance") adopting the Flood Plan, singled out the Steelhead Haven community for the County's protection and planned the "Slide Stabilization Project" as the means for doing so. The County's claim that its legislative duty did not include a "duty to warn" contradicts the trial court's proper conclusion (CP 7981) that when a party has a duty to protect via a project that will take time to implement, that duty logically subsumes a duty to accurately warn of the danger until the protective implementation occurs. Thus, when the County acted to warn Steelhead Haven on March 11, 2006, its conduct was not simply that of a volunteer, but a party charged with a legislative duty to warn the community.

[1] The County also misrepresents (Opp. Br. at 22) that the Superior Court held that the County was immunized for breaches of its legislative duty. The record is just to the contrary. CP 2736.

1. The County Ordinance Imposes a Legislative Duty to Protect Steelhead Haven

The legislative intent exception applies in a tort action against a governmental entity where (1) there is a "clear legislative intent to identify and protect a particular and circumscribed class of persons" and (2) the lawsuit is brought by "a member of the identified class[.]" *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 929, 969 P.2d 75 (1998) (citation omitted). As the trial court correctly observed, the County Ordinance specifically "identifies Steelhead Haven Landslide" as "a risk to life and property on the opposite river bank . . . should another major slide occur." CP 2772-73. Chapter 7 of the Plan specifically recommended that the County "implement a stabilization project . . . that meets public safety and environmental restoration goals of the plan." CP 2773 (citing SCC 03-1550, pp. 7-46), and the County Council accepted that recommendation by adopting the Ordinance "specifically intended to protect the people of Steelhead Haven Community from flood risks associated with a landslide." *Id*. Because Plaintiffs were indisputably members of that "particular and circumscribed class", the trial court held that the "Ordinance does create an actionable duty, the breach of which can constitute a cause of action," CP 2736, and then found sufficient evidence of the County's breach of duty. *See* CP 2772-73; 4341.

The County contends the trial court erred in finding "legislative intent" because the Ordinance does not focus on a specific circumscribed group but rather generally on public welfare. Opp. 32. Chapter 7

specifically calls out the Steelhead Haven community for protection, identifying a specific danger to the Steelhead Haven community and endorsing the Steelhead Haven Landslide Stabilization Project to protect those individuals from the dangers posed by the hill across the river. The County's Ordinance thus reflects a "clear legislative intent to identify and protect a particular and circumscribed class of persons," the people in Steelhead Haven, as the trial court concluded.

This Court's holding in *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978) supports the trial court's ruling. In *Halvorson*, the Supreme Court reversed dismissal of plaintiff's complaint for damages when her husband died in a hotel fire, holding the "legislative intent" exception applied to the Seattle Housing Code. *Id.* at 676. The Court noted that the Code focused on "dwellings and other buildings [in Seattle that] . . . are unfit for human habitation" and recognized the "conditions and circumstances [as] dangerous [to] . . . the occupants of such buildings and of the public[.]" *Id.* at 677 n.1. Halvorson occupied one such building:

> While most codes are enacted merely for purposes of public safety or for the general welfare . . . [t]he Seattle Housing Code is an ordinance enacted for the benefit of a specifically identified group of persons *as well as, and in addition to, the general public*.

Id. at 677 (emphasis added). Thus, a law may contain both general public welfare language that does not qualify for the "legislative intent" exception, and targeted language protecting a particularized class.

Like the Seattle Housing Code, the County Ordinance is intended to

protect public safety generally, but also quite specifically the residents of Steelhead Haven. While the Code addressed in *Halvorson* did not identify a particular unit or neighborhood, the County Ordinance here plainly does so and explicitly singles out the residents of Steelhead Haven for protection. Thus, the Ordinance here is far more detailed than the Seattle Housing Code in "identify[ing] and protect[ing] a particular and circumscribed class of persons."[2]

The County next claims that even if one can glean from the Ordinance a legislative intent to protect a specific and circumscribed class, the Court should ignore that "intent" because it is not contained within the Ordinance's "declaration of purpose." Opp. 32. The argument misstates Washington law. While a declaration of purpose in a statute may be *sufficient* to find legislative intent to protect a specific population, it is not a *necessary* criterion to meet the exception. As the Court qualified in *Washburn v. City of Federal Way*, "*[t]ypically*, we look to the legislature's statement of purpose to discover its intent. . . . This statement of purpose *satisfies* the requirements of the legislative intent exception." 178 Wn.2d

[2] *Accord Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013) (legislative intent to protect persons who obtain anti-harassment orders); *Yonker v. Dep't of Soc. & Health Servs.*, 85 Wn. App. 71, 79–80, 930 P.2d 958 (1997) (duty arises from RCW 26.44.010, safeguarding welfare of abused and neglected children); *Donaldson v. City of Seattle*, 65 Wn. App. 661, 667–68, 831 P.2d 1098 (1992) (duty arises from RCW 10.99.010's stated purpose "to assure the victim of domestic violence the maximum protection from abuse")(emphasis omitted); *cf. Stannik v. Bellingham-Whatcom District Board of Health*, 48 Wn. App. 160, 737 P.2d 1054 (1987) (sewage control rules enacted for general public health did not identify circumscribed group for protection).

732, 754-56, 310 P.3d 1275 (2013) (emphasis added); *see also Hannum v. Washington State Dept. of Licensing*, 144 Wn. App. 354, 360, 181 P.3d 915 (2008) ("A court *may* look to a statute's declaration of purpose to ascertain legislative intent." (citations omitted; emphasis added)). As with any legislation, the Court is free to examine the entire statute and its history to determine legislative intent. *See Baerlein v. State*, 92 Wn.2d 229, 595 P.2d 930 (1979) (examining entire statutory scheme to determine whether there was clear intent to protect a particular class).[3] The Ordinance details a legislative purpose to protect the Steelhead Haven community.

The County also contends it had no legislative duty to Steelhead Haven because the Ordinance imposing that duty did not mandate specific action, but made only a "recommendation." Opp. 31. This mischaracterization does not negate the duty but simply goes to the character of the duty owed. The County's Ordinance adopted Chapter 7's "recommendation" for a Slide Stabilization project to protect the Steelhead Haven community, to be prioritized and implemented. CP 1284; 735. The Ordinance provided that actions having a "direct impact on saving life and property," such as the Steelhead Haven Landslide Stabilization project, will be "initiated quickly" following the County's adoption of the Plan through its Ordinance. CP 739.

The fact that the legislative mandate to implement the Steelhead

[3] *Donohoe v. State*, 135 Wn. App. 824, 142 P.3d 654 (2006), cited at Opp. 32, is not to the contrary. There, the Court examined the entire nursing home regulatory scheme to conclude the legislature imposed actionable duties on nursing homes, but not the State in regulating them.

Haven Slide Stabilization Project was "Priority 2," subject to financing, goes to the scope of the County's duty. Plaintiffs did not argue that the County was too slow in implementing the Plan or in obtaining funding. Plaintiffs argued that the County negligently warned of the danger Plaintiffs faced pending implementation, breaching the County's legislative duty to protect Steelhead Haven.

In any event, Washington law does not require a specific mandatory action for the legislative intent exception to apply. In *Washburn*, relied upon by the County, the Court held "that the legislature *may* impose legal duties on persons or other entities *by proscribing or mandating* certain conduct." *Washburn*, 178 Wn.2d at 755 (citation omitted; emphasis added). This permissive language establishes that the legislature must impose the duty but does not mandate action. What the government must do or not do, and whether it is contingent, informs the scope of that legislative duty and whether it has been breached. The County's suggestion that the legislative intent must be accompanied by a directive to act would conflate the legislative intent exception to the public duty doctrine with the "failure to enforce" exception. Statutorily mandated duties to act are an explicit element of the failure to enforce exception, not legislative intent. *E.g.*, *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987), *amended by* 753 P.2d 553 (1988).

2. The County's Legislative Duty to Protect Includes the Duty to Warn of Future Landslide Danger

The County argues that even if it had a legislative duty to protect

Steelhead Haven, that duty did not include warning about future landslide dangers. First, the County claims the Ordinance imposed a duty to protect through specific implementation of the Steelhead Haven Slide Stabilization project, not through warning. Opp. 34. That duty, however, came with knowledge that implementation would not be immediate. Any rational tort system that imposes a duty upon a party to take future action to protect a specific group also imposes a duty to warn that specific group until such protective implementation takes place. As the trial court correctly held, "*Nivens v. 7-11 Hoagy's Corner,* 133 Wash.2d 192, 943 P.2d 286 (1997) . . . made clear that the duty to warn is a precursor, or part of, of a duty to use reasonable care to prevent harm." CP 7981.

The County attempts to distinguish the many Washington cases that illustrate this basic tort principle (Opp. 33), but fails to cite any authority holding a duty to prevent harm excludes warning. The source of a specific duty does not alter the principle that a duty to protect subsumes a duty to warn, as *Washburn*—a legislative duty case—illustrates. *Washburn* involved the duty of an officer to serve an anti-harassment order. The Court held that this legislative duty included protecting the complaining ex-girlfriend from criminal conduct by her ex-boyfriend. While serving the order on the ex-boyfriend, the officer observed the ex-girlfriend at the home. After the officer left, the ex-boyfriend killed the woman. Would not this legislative duty to serve the anti-harassment order also include the duty to warn the complainant? Of course it would, and any tort system that did not impose such a duty to warn would be nonsensical.

Without citation to any authority, the County contends that if its legislative duty to protect Steelhead Haven through implementation of a Slide Stabilization Project were to include a duty to warn, then every municipality that identifies a "risk" would be required to warn. Opp. 34-35. To the contrary, as the trial court held, the Ordinance does far more than identify a "risk." It identifies a landslide danger and then adopts a Slide Stabilization Project to protect a specific population of people. Nor is a duty to warn an added burden to the Ordinance's legislative duty to protect, as the trial court observed. CP 7981.

When the County announced the March 11, 2006 meeting, it was charged with a legislative duty to warn of future landslide risks. Because there are genuine issues of material fact as to whether the County breached that duty (*see* App. Br. 40-43, below at pp. 11-18), a jury must decide if the breach harmed Plaintiffs.

B. The County Had a Duty to Plaintiffs Through its Affirmative Undertaking and Under the Rescue Doctrine

The County's affirmative undertaking concerning its March 11, 2006 meeting also establishes triable common law claims regarding its negligence to the community. As detailed below, the County's negligence at that meeting made all Plaintiffs' circumstances worse and increased their peril. The County's argument to the contrary is based on a disputed record for the jury to resolve.

1. Genuine Issues of Material Fact Exist as to Whether the County's Negligent Affirmative Undertaking Caused Plaintiffs' Injuries

The County concedes the trial court erred in ruling that the affirmative undertaking doctrine applies only to third party criminal conduct. *See* App. Br. 46; Opp. 52 n.34. While a number of such cases arise under Restatement (Second) of Torts § 302B (specifically addressing responsibility for harm from, *e.g.*, third party criminal conduct), the affirmative undertaking doctrine underlies all of Washington tort law and is not circumscribed by Section 302B. *See* App. Br. 30; 16 DeWolf, Wash. Prac. § 2:4 (4th ed. 2015).

Ignoring the trial court's actual ruling, the County argues that the Court should reject Plaintiffs' "affirmative undertaking" claim for the alternative reason that there is no evidence the County's misconduct "create[d] a new risk of harm." Opp. 52.[4] This misstates the law and is not supported by Washington cases.[5] The risk of harm created does **not** require

[4] Citing *Robb v. City of Seattle*, 176 Wn.2d 427, 439, 295 P.3d 212 (2013), which involves Section 302B and "nonfeasance:" The city's officers took no action at all (failing to pick up shotgun shells discarded by the criminal at the scene of a traffic stop), and the city thus was not subject to affirmative undertaking liability. This case involves far more than nonfeasance: the County affirmatively undertook to organize a meeting to warn of future landslide risks and delivered that warning—which it knew would have long term consequences—negligently.

[5] The County cites the inapposite case of *Binschus v. State*, 186 Wn. App. 77, 100, 343 P.3d 818 (2015), *rev'd*, 186 Wn.2d 573, 380 P.2d 468 (2016). *Binschus* is like *Robb* in holding that the county's failure to treat the prisoner was an "omission" outside Section 302B, and there was no evidence that the failure to treat increased the peril. Here, the record contains genuine issues of material fact as to whether the County's affirmative act of warning about future landslide risks negligently caused Plaintiffs' complacency in the face of danger, thus increasing the peril to them.

an increase to the dangerousness of the agent of destruction itself. *See* Restatement (Second) of Torts § 323(a). In *Brown v. McPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975), for example, the State's negligence did not make an avalanche more likely; instead, the increased peril was that plaintiffs had been deprived of a meaningful warning, making it more likely that cabin owners and their visitors would be injured or killed by the avalanche. 86 Wn.2d at 299-300. Here, Plaintiffs would not have been injured by the 2014 Oso Landslide had the County not fostered the impression that lives were not in danger and that their only concern should be with future flooding.[6]

The County's argument disputes the evidence, which amply demonstrates that the County's negligence created a new risk of harm to Plaintiffs in at least two ways. First, on March 11, 2006, the County made the community feel "safe" by failing to tell them about what the County knew and what needed to be done, and instead presenting the Tribe's Mr. Stevenson to discuss the "Restoration Project" involving the log wall. App. Br. 19-20. The County's Emergency Management Director admitted the County's actions in sponsoring the log wall and communicating with Steelhead Haven in 2006 made the community "feel safe." CP 5954. The County's negligent affirmative undertaking thus created community complacency in the face of danger—a *new* risk of harm.

[6] The County suggests (Opp. 52) that Plaintiffs concede the physical peril must objectively have increased (citing CP 5926), but Plaintiffs made precisely the opposite point. *E.g.*, CP 5925-26.

Second, the County's affirmative undertaking to participate in the log wall (see Section F below) increased the objective peril to Plaintiffs from the 2014 Oso Slide. The evidence demonstrates not only that the log wall would provide no safety from the next landslide, because it provided no storage space, but the log wall also made the 2014 slide more dangerous—in fact lethal—to the community, a consideration the County had failed to study, consider or describe at the 2006 meeting. *See* CP 1351-53; 8020-23; 8029-36; 8257-90; 8303-08; 8344-47. Thus, the County created complacency while objectively increasing the landslide peril to Plaintiffs. App. Br. 21-23. Because genuine issues of material fact exist, summary judgment dismissal should be reversed and Plaintiffs' affirmative undertaking claim should proceed to trial.

2. Genuine Issues of Material Fact Exist as to Whether the County's Negligence Under the Rescue Doctrine Caused Plaintiffs' Injuries (Cross-Appeal Issue No. 4)

The trial court's conclusion that *some* plaintiffs' situation was made worse by the County's negligence demonstrates that *all* Plaintiffs were placed in a worse situation by the County's negligent warning. App. Br. 39-43. When the County undertook to warn Steelhead Haven about "future landslide risks," it was well aware of the deadly danger posed by the hillside. *See, e.g.*, App. Br. 6, 11-13 (knowledge of necessity of a geotechnical investigation and monitoring, the potential that the 2006 slide made the hill more dangerous, the "wow" moment when recognizing the runout potential of the hill). The County knew that the log wall would not

protect the community from the next slide, and was aware that no one had studied whether the log wall would make the next slide more explosive and deadly. CP 1351-53; 8020-23; 8029-36; 8257-90; 8303-08; 8344-47. The people whose lives hung in the balance knew none of these critical facts.

The County instead told those who attended the March 11, 2006 meeting that they should prepare only for future *flooding*. But that anemic warning had the effect of cabining the community's risk to flooding, a known risk for those who live along rivers.[7] Quite the opposite from ignoring the warnings they received, surviving attendees testified they believed—based on the County's non-warning—their families were not in grave danger and their neighbors did not need to be warned their families were in danger. Plaintiff Seth Jefferds, a volunteer firefighter known to all in the community, attended the meeting and walked away believing that the slide did not pose a danger to his family or the community. CP 6257-58. Mr. Sewell, a fire department professional, attended and believed he and his family were safe. CP 6264. Mr. Ron Thompson, the self-styled "Mayor of Steelhead Haven," also attended and left the meeting feeling content and safe. CP 6873-77. And the County's Emergency Management Director testified the meeting made residents "feel safe." CP 5954.

Those same individuals testified that if the County had disclosed what it concealed from the community in 2006, both they and the

[7] The County says property buyouts were discussed at the March 11, 2006, meeting (Opp. 50), but that discussion arose solely in the context of the flood risk, and any buyout would have been through federal flood control monies. *See* CP 6237-38.

community would have been galvanized into action. Each of those gentlemen (two of whom are not plaintiffs) testified that had the County told them in 2006 what the County knew, they would have acted to protect the community. *See* CP 6002-03; 6264. Indeed, the County's Ms. Badger believed that residents of Steelhead Haven would have heeded adequate warnings and did not put themselves unnecessarily at risk. CP 6083 (39:15-40:11). All of this testimony raises genuine issues of material fact as to whether the undertaking to warn was negligent, which must go to the jury.

The County's negligence thus made all Plaintiffs' situations worse in the same manner as plaintiffs in *Brown*, and, with substitution for characters, the *Brown* holding applies directly here:

> If the [County's] agents, acting out of concern for the safety of appellants and others similarly situated, negligently or intentionally conveyed the impression that the danger of [landslides] was less than it was to [those attending the March 11, 2006 meeting] (or anyone else), causing [them] to refrain from action on [plaintiffs'] behalf [they] otherwise would have taken, the [County] is answerable for any damage caused by that misimpression.

86 Wn.2d at 299-300.

The County argues this case is somehow different, claiming Plaintiffs cannot show their situation was made worse than if the County had done nothing at all. Opp. 51. That position is untenable under the County's legislative duty to the community; it is also factually wrong. In *Brown*, had the State done nothing, the avalanche expert would have warned the community himself, and a jury could have inferred that plaintiffs would

have heeded the warning. Here, Messrs. Thompson, Sewell and Jefferds sought information about future landslide risks by attending the March 11, 2006 meeting. The County's Ms. Badger testified that people in Steelhead Haven were rational and heeded adequate safety warnings. The evidence raises genuine issues of material fact for the jury: a reasonable person could easily conclude that had the County done nothing at all, those who attended the March 11, 2006 meeting would have sought information about future landslide dangers from another source (such as Dr. Miller, who was vehemently against construction continuing after the 2006 slide). And reasonable persons could conclude from the testimony of Messrs. Thompson, Sewell and Jefferds that had the County told the community the truth about the danger,[8] they would have sought out more information and solutions, warned their neighbors, and ultimately escaped if no solutions were available. App. Br. 21-22.

The County says that it had no duty to improve its ability to warn by conducting necessary investigations and monitoring. Opp. 61. But anyone who undertakes to warn of future landslide risks is charged with acting reasonably. App. Br. 35. Reasonable conduct, at minimum, required the County to tell folks it knew a geotechnical investigation and monitoring was necessary, without such work the County was not qualified to warn them,

[8] The County implies that there is uncontroverted testimony that the danger of a landslide crossing the valley was described at the March 11, 2006 meeting. Opp. 60. Not only did the County's Mr. Jones admit he said nothing about the subject (App. Br. 18-19), but the community members who are still alive and attended testified the County did not describe any risk of a landslide entering the community and taking lives. *Id*. 21-23.

and the County had elected to drop the ball in pursuing both an investigation and monitoring. All the County's arguments in this regard mischaracterize a disputed record, which is not a basis to dismiss Plaintiffs' claims on summary judgment.[9]

The County declines to directly confront the trial court's contradiction in concluding that some, but not all, Plaintiffs could pursue a rescue claim based on whether they attended or heard the substance of the March 11, 2006 meeting. In *Brown*, none of the plaintiffs ever spoke to the State but all of them had claims because they were harmed by the State's negligent warning, which led others to fail to warn them. Messrs. Thompson, Sewell and Jefferds testified they would have spoken to all their neighbors if the County had come clean about what it knew. *See* App. Br. 21-23. Those neighbors are the plaintiffs in this case and, as in *Brown*, no authority requires them to have met with the County to be harmed by its negligent warning.

Instead of addressing the trial court's reasoning, the County argues this Court should conclude *all* Plaintiffs' situations were not made worse by the County's negligent warning and should reverse *Brown* or decide that *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 134 P.3d 197 (2006) somehow did so *sub silentio*. *Brown* and *Osborn*, however, are consistent in requiring

[9] For example, the County claims, without citing any evidence, that no one who attended the meeting was dissuaded from investigating landslide risks or from obtaining an adequate warning. Opp. 51. That is precisely what the record shows. Concerned citizens who attended or heard about a meeting were led to believe that they were safe, and became complacent instead of pursuing the matter. CP 6257-58; 6264; 6873-77.

causal linkage between the government's negligence in worsening a plaintiff's circumstance and the harm to a plaintiff. In *Brown*, causal linkage existed because had the State not failed to warn, others would have warned cabin dwellers, and a jury could have inferred that those who died would have heeded that warning and avoided the avalanche catastrophe. In *Osborn*, plaintiffs could not prove a causal link between a detective's promise to warn and any action negatively affecting the plaintiffs, because the detective revoked that promise well before the sex offender raped and killed the Osborns' child. *Id.* at 26-27; *see also* CP 6725 (trial court reached the same conclusion).[10] The Court of Appeals in *Osborn* had determined all a plaintiff must prove is that the County "increased the risk" to the plaintiff; the Supreme Court concluded a plaintiff also must prove the increased risk caused plaintiff's injury. 157 Wn.2d at 25.[11]

As shown in *Brown*, such causal linkage can be proven by demonstrating that third parties relied on the defendant's negligent warning (or promise to warn), and that had they not so relied, plaintiffs would have been saved even though they never spoke with the defendant. *Brown*, at

[10] The County (Opp. 57) mischaracterizes *Osborn* in claiming that the case holds it was "immaterial" that the detective had promised a third party that the detective would warn the community, and that the third party then declined to warn herself. The difference in *Osborn* was that the detective had revoked his promise to the third party before the murder, and thus the third party did not rely and any such reliance would have been unreasonable.

[11] The County claims (Opp. 55) that *Osborn* also rejected Court of Appeals' holding that a false assurance could meet the element of increasing the danger to a plaintiff. *Osborn* did nothing of the sort. *Osborn* instead focused on whether such a plaintiff or intermediary relied on such false assurance, creating the necessary causal linkage for a rescue doctrine claim.

299 (citing, *e.g.*, Restatement (Second) of Torts § 323(a) (1965) (duty to render services to another for their protection));[12] *id.* at 301 (citing, *e.g.*, Restatement (Second) of Torts § 324A (duty to render services to another, necessary to protect a third person)).[13]

Rather than reverse *Brown*, this Court in *Osborn* affirmed the form of reliance presented in *Brown* and here as an appropriate means of proving rescue doctrine liability. 157 Wn.2d at 26. Messrs. Thompson, Sewell and Jefferds relied on the County's negligent warning on March 11, 2006. They became complacent, felt safe, and did not believe that they needed to warn their neighbors—just as the developer in *Brown* did not believe after speaking with the State that he needed to warn cabin residents. And Messrs. Thompson, Sewell and Jefferds testified they would have warned their neighbors, and clamored for protection and study of the hill across the river had they been told the truth.

3. The County's Duty Extended to the Entire Steelhead Haven Community

The County's claim that any duty it had was only to those who attended the March 11, 2006 meeting is akin to the State arguing in *Brown*

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[12] *Accord* Restatement (Third) of Torts § 42.

[13] *See Sheridan v. Aetna Cas. & Surety Co.*, 3 Wn.2d 423, 100 P.2d 1024 (1940). Restatement (Second) of Torts § 323 and Restatement (Third) of Torts § 42 provide for a duty to render services to another for their protection; and Restatement (Second) of Torts § 324A and Restatement (Third) of Torts § 43 provide for a duty to render services to another which is necessary to protect a *third person***.** *See also* Christopher City, *Duty and Disaster: Holding Local Governments Liable for Permitting Uses in High-Hazard Areas*, 78 N.C.L.Rev. 1535, 1554 (June 1, 2000) (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955); discussing *Brown v. MacPherson's*).

that its duty should be limited to the avalanche expert and developer because the State spoke only with them. First, as discussed in Section A above, the County had a legislative duty to warn that cannot be restricted to those who attended its March 11, 2006 meeting. Second, the County fully understood that the March 11, 2006 meeting was a watershed moment with lasting implications to the entire community: "[T]he meeting is to inform the community of current and future [landslide] risks . . . . It is now time for the community to assess the on-going risks and to make appropriate choices on how to deal with those risks." CP 6014. The County hoped and expected that those who attended would speak to their neighbors. App. Br. 21. Third, Messrs. Thompson, Sewell and Jefferds each testified that had the County told them what the County knew, they would have informed all their neighbors. Finally, the scope of the County's duty to warn "includes all persons foreseeably put at risk by the defendant's negligent conduct. In effect, the defendant's conduct creates a 'general field of danger,' and all persons within the 'field' belong to the protected class." *Schooley v. Pinch's Deli Market, Inc.*, 80 Wn. App. 862, 868-69, 912 P.2d 1044 (1996). Both cabin owners and visitors were entitled to sue in *Brown*, because they were foreseeable victims of the State's negligent warning, as were Plaintiffs here the foreseeable victims of the County's negligent warning.

C. The County Was Not Immunized From Liability for Its Negligent Failure to Warn (Cross-Appeal Issue No. 5)

Because Washington law and the evidentiary record plainly authorize Plaintiffs' negligent warning claim, the County argues the March

11, 2006 meeting was clothed with Flood Control Immunity. Opp. 63-65. While the trial court's application of "flood immunity" was unduly broad (*see* App. Br. 47-58, Section E.1 below), it plainly recognized the County's "communications" regarding the landslide risk to Steelhead Haven were not clothed with immunity:

> If Defendants had a duty to accurately communicate the danger of a mudslide to the people of Steelhead Haven and either failed to do so or did so negligently in the context of the flood hazard management plan, then the flood immunity statute does not protect Defendants from that set of facts. Nor does the public duty doctrine.

CP 2776.

The County's remarkable assertion that the "trial court correctly ruled that the County was statutorily immune from claims that the County [Ordinance] created a duty to . . . warn plaintiffs" is demonstrably false. Opp. 1. The trial court ruled just the opposite. CP 2775-76. The County cites *National Mfr. Co. v. United States*, 210 F.2d 263 (8th Cir. 1954) (Opp. 64) to claim that its warning regarding "future landslide risks" is somehow entitled to flood immunity. *National Mfr. Co.*, however, addressed federal immunity regarding claims for actual flood damage caused by allegedly inadequate flood warnings to the community.[14] Even if the Washington flood immunity statute applied to claims that do not involve flood damage or flood control projects—and it does not (*see* App. Br. 48-56)—no case

[14] The County also quotes from *Graci v. United States*, 456 F.2d 20 (1971), but *Graci* reinforces that no flood immunity applies to the County's negligent warning about future landslide risks. *Graci* rejected flood immunity for flood damage caused by a government navigation project unconnected to flood control.

has ever granted *flood* immunity for alleged inadequate warnings about future *landslides*, and the County cites no authority for that proposition. It is undisputed that the County's March 2, 2006 meeting notice addressed two topics—future landslide risks and future flood planning. CP 6014.

Moreover, the County's entire evidentiary presentation (*see, e.g.*, Opp. 11-15) was that the County attempted on March 11, 2006, to foist responsibility for flood control on the community. Flood immunity "shields counties from liability for their efforts to protect the public from flood damage" so that counties are not faced with both the cost of building flood control devices and the cost of any resulting liability. *Paulson v. Pierce Cnty.*, 99 Wn.2d 645, 649 & 654, 664 P.2d 1202 (1983). Thus, even if the County's negligence were based on its discussion of flood planning on March 11, 2006 (and it is not), the Court should reject the County's suggestion that flood immunity applies to a county's attempt to *avoid* flood control responsibilities.

D. The Trial Court Correctly Ruled that a Jury Should Decide if the County's Negligence Caused Plaintiffs' Injuries (Cross-Appeal Issue No. 6)

The County contends that even assuming its negligence was the "cause-in-fact" of Plaintiffs' injuries, this Court should conclude the County's negligence cannot be the proximate cause of their injuries because of passage of time and for policy reasons. Opp. 65. The County's argument ignores the sources of the County's duty (both legislative and common law) and the long-term significance the County itself placed on the March 11,

2006 warning meeting. At bottom, the County's argument is a debate with the trial court's proper conclusion that the record presents evidence sufficient for a jury to find the County's negligence was the "cause-in-fact" and proximate cause of Plaintiffs' injuries. This is a jury issue.

1. Genuine Issues of Material Fact Exist For the Jury as to Whether the County Caused Plaintiffs' Injuries

Legal causation can be an issue of law only when the relevant facts are not in dispute. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). The County attempts to reduce its tort liability to "two alleged omissions:" the statement in Dr. Miller's report that a future slide could be "an order of magnitude" larger[15] and the County hydrologist's proposal that the County should "study or monitor the slide." Opp. 66. The County contends the Court can ignore the County's omissions because "no

[15] The County's claim that Dr. Miller believed that the change in slope geometry as a result of the 2006 landslide did not implicate the Figure 9 "order of magnitude greater" landslide of which Dr. Miller was concerned is simply false. *See* CP 7472 ("Please compare those images to the last two figures in my 1999 report. What do you think. It seems uncanny how accurately that model I wrote pegged the area that failed both in the 2006 event and in the 2014 event."). While Dr. Miller testified that his 1999 report did not include a specific estimate of the run-out that such a slide would generate, the implications were clear to any geologist worth his or her salt. *See* CP 7474-76 (Dr. Miller's explanation of the basic calculation to determine the potential run-out of a future slide based on the volume predicted in the 1999 report). Dr. Miller also did not testify that he believed the Steelhead Haven Community was not at risk after the 2006 slide. To the contrary, Dr. Miller repeatedly testified that he was "shocked" and "surprised" that the County allowed homes to continue to be built in Steelhead Haven after the 2006 landslide precisely because of the risk to human life that the landslide posed. *See* CP 6190 (355:15-356:21). Dr. Miller did not know whether the 2006 slide created the preconditions for an order of magnitude increase only because he was never asked to conduct a geotechnical investigation after the 2006 slide.

one heeded the warnings the County did provide or the recommendation to take action to protect themselves." *Id.* This distorts the record and ignores disputed facts which are for the jury.

A robust record demonstrates that the County's liability rests upon a series of critical concealments from Steelhead Haven about the true danger the community faced. App. Br. 11-13, 18-23. And contrary to the County's defensive rhetoric, Messrs. Thompson, Sewell and Jefferds were materially affected by the County's negligent warning, felt safe, and did not pursue the community's safety further as a consequence of the County's negligent warning. CP 6257-58; 6264; 6873-77. A jury is entitled to decide if the County's warning was negligent and proximately caused Plaintiffs' injuries.

Two of the four cases cited by the County for a lack of legal causation depend on the intervening criminal acts of an independent third party. *See Hartley v. State*, 103 Wn.2d 768, 784, 698 P.2d 77 (1985) (State's failure to revoke driver's license was "too remote and insubstantial to impose liability for [third party's] drunk driving"); *Kim v. Budget Rent a Car Sys., Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2013) (following "unsecured vehicle" cases to conclude defendant was not legal cause of plaintiff's injury where it left keys in ignition of rental car stolen by third party who used car to commit assault). In contrast, the other two cases conclude there was legal causation based on "significantly different analytical underpinnings [that do] not provide a proper basis for comparison [to cases] involving the criminal acts of third parties." *See Kim*, 143 Wn.2d at 205. In *McCoy v. Am. Suzuki Motor Corp.*, for example, the plaintiff was a rescuer present at

the scene of an accident, and was injured in a foreseeable manner when a third party swerved to the freeway shoulder and struck him. 136 Wn.2d 350, 359-60, 961 P.2d 952 (1998). The Court held "it is foreseeable a rescuer will come to the aid of the person imperiled by the tortfeasor's actions." *Id.* at 355. Similarly, in *Schooley v. Pinch's Deli Market, Inc.*, plaintiff injured herself by diving into the shallow end of a pool after getting intoxicated with alcohol another minor had purchased from defendant. 134 Wn.2d at 480. The Court concluded the scenario was entirely foreseeable. *Id.* at 480-83.

Plaintiffs' claims against the County here have much more in common with *McCoy* and *Schooley* than *Hartley* or *Kim*. Instead of third party criminal conduct, this case presents a disputed factual jury question whether it was foreseeable that the County's "warning" about "future" landslides" would affect those below the landslide mass. On *de novo* review, this Court should affirm the trial court's conclusion a jury could find the County's negligent warning caused Plaintiffs' injuries.

2. Passage of Time Does Not Make Plaintiffs' Injuries Remote or Speculative

Contrary to the County's suggestion (Opp. 68), the passage of time is not, by itself, a barrier to a finding of legal causation:

> The defendant who sets a bomb which explodes ten years later, or mails a box of poisoned chocolates from California to Delaware, has caused the result, and should obviously bear the consequences.

Theurer v. Condon, 34 Wn.2d 448, 460, 209 P.2d 311 (1949) (intervening

period of several years between installing oil burner that posed a fire hazard and the resulting fire did not control question of causation; quoting Prosser on Torts 349, § 48). Washington cases, especially those involving warnings, find legal causation even when the injury did not occur until many years after the inadequate warning was given. *See, e.g.*, *Brown*, 86 Wn.2d at 298-99 (failure to warn two years earlier "deprived [plaintiffs] of the opportunity to be forewarned of their danger . . . and . . . avoid the losses they suffered"); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 865-66, 5 P.3d 49 (2000) (rejecting defendant's argument against legal causation despite its decades-long failure to update safety standards); *accord* Restatement (Third) of Torts § 39; Restatement (Third) of Torts § 7 cmt. k ("[I]n some cases an actor's conduct may create a continuing risk of harm and the question arises whether the actor has a duty later with regard to that continuing risk.)

The relevant question is whether anything occurred over a period of time that made the sequence of events too attenuated to connect defendant's breach of duty with a plaintiff's injury. *See Kim*, 143 Wn.2d at 205-06. No intervening acts occurred between the County's negligent warning to the community in 2006 and the 2014 Oso Landslide, which destroyed it. The County did not correct its omissions. No one else warned the community that the next slide could destroy the area. No one began to study or monitor the hill across from the community, as the County knew needed to be done. Instead, the County helped build the log wall—without analyzing its potential to exacerbate the next slide event—and Plaintiffs continued to

prepare for possible flooding, believing the hill presented no danger to their lives.

The County points out that some Plaintiffs did not live in Steelhead Haven at the time of the County's 2006 negligent warning. Opp. 67. But Mr. Thompson and others testified they would have warned new residents if the County had not concealed in 2006 critical information about the danger to the community. CP 6258-60; 6264. Plaintiff Amanda Lennick, for example, moved into Steelhead Haven just weeks before the 2014 slide that killed her, having conducted an investigation—including talking to Mr. Thompson—to satisfy herself that she would be safe living there. CP 6312-14; 6872; 6914-15. A jury could reasonably conclude that, had the County not concealed critical information from the community, Amanda and all the other community members would not have been in harm's way on March 22, 2014.

The County also says when it provided its negligent warning to the community in March 2006, the Tribe had not re-designed the log wall in light of the 2006 slide. Opp. 68. But the County had a Tribal representative at the March 11, 2006 meeting to discuss the log wall "restoration" project, and the County knew any log wall construction would, in light of the 2006 slide, not provide storage area for future slide materials. App. Br. 14. The County scoffs, "it defies credibility that [its] omissions in a presentation would continue to ripple through the community years later and serve as the seminal decision point for plaintiffs to remain" in the community (Opp. 67), but utterly ignores that it had a legislative duty to protect and that the County

itself intended its March 11, 2006 meeting to be a watershed moment with lasting impact. CP 6002-03; 6014; 6017-18. Whether the County's negligent warning to Steelhead Haven foreseeably caused Plaintiffs' injuries is a fact question for the jury. *See McKown v. Simon Prop. Grp., Inc.,* 182 Wn.2d 752, 762-64, 344 P.3d 661 (2015). The trial court erred in granting summary judgment dismissal.

3. No Policy Consideration Should Prevent the County from Being Accountable in the Same Manner as Private Citizens

The County argues that if a jury could find proximate cause in this case, "governments . . . will no longer hold informational meetings about natural and manmade disasters." Opp. 68. The County's argument again rests on a highly skewed version of a disputed record. The County's wrongdoing was not limited to two narrow omissions, and the County itself admitted that the March 2006 meeting was not simply "informational" but was intended to warn the community about future landslide risks and have long-lasting implications. CP 6014. The meeting was thus highly unusual in the County's experience (CP 6002; 6230-32), both because of the County's underlying legislative duty to protect Steelhead Haven (*see* Section A above) and the County's acknowledgment of the palpable danger to a very specific community that needed to be warned.

There is no basis for the County's claim (Opp. 68) that a finding of legal causation here would result in withholding warnings about hazards due to fear of unlimited liability. A municipality's liability for negligent

warnings is the same as that of any private individual, and dependent on either a legislative duty or long-standing common law doctrines with numerous analytical underpinnings that hold every actor responsible for its affirmative acts, whether a government or private citizen. *See, e.g.*, Restatement (Second) of Torts § 4 cmt. b, at 8 (if an individual "acts at all, [he or she] must exercise reasonable care to make his [or her] acts safe for others"). Moreover, the alleged "fear of unlimited liability" defense is not reasonable given the ease with which the County could have met its duty to warn.

E. Granting Snohomish County Immunity in This Case Would Insulate the County from Misconduct Well Beyond the Intended Scope of Statutory Immunities

The County's argument regarding its liability for the log wall reduces to the principle that a county can effectively grant itself immunity whenever its misconduct involves a river. It asks for Flood Control Immunity regarding a log wall that was conceived as a landslide prevention tool long before the flood plan was created, constructed years later in a manner far different than articulated in the flood plan. And it seeks Fish Habitat Enhancement Immunity for its active participation, both before and after the log wall was permitted, when such immunity is limited to the County's absence from the permitting process.

A brief analogy demonstrates the fallacy of the County's sweeping immunity argument. Imagine a dilapidated bridge on the brink of collapse. The county is aware the bridge will fail and that many people will be injured

or die as a result. The county includes a plan to fix the bridge in its flood hazard management plan because the bridge spans a river, and a collapse (in addition to injuring or killing those on or under the bridge) could also flood the river below. In repairing the bridge, the county realizes it has further deteriorated in a way that renders the original fix obsolete. Instead, the county abandons its attempt to prevent the bridge from falling and installs a net below the bridge, which will not prevent collapse but will catch smaller parts falling off, so they do not interfere with the fish habitat below. The county holds a community meeting to discuss the fix, but neglects to tell residents that the bridge will fail and lives could be lost. Unfortunately, the net is negligently anchored directly to the supports for the bridge, further weakening the bridge and increasing the likelihood and severity of its failure. When the bridge ultimately collapses and several dozen people die from the fall, the county claims Flood Control and Fish Habitat Enhancement immunities. A claim of total immunity under these circumstances would be astonishing, but that is exactly what the County seeks in this case. The County cannot circumvent accountability for its sponsorship and active participation in the failure of a dangerous structure—whether it be a bridge, log wall or hillslide—simply because it is tangentially connected to a river and fish.

The log wall was neither conceived nor built as a flood control device, and it did not meet the express criteria that would have allowed it to be "streamlined" as a fish enhancement project. To argue otherwise, the County contradicts itself and misunderstands the scope of the statutory

immunities it invokes. Indeed, the County's claim to both immunities proves the inapplicability of either. The two immunities cannot co-exist because the log wall cannot simultaneously be a fish habitat project with no public health and safety concerns and a flood control project meant to protect the public from flooding. Moreover, the County only receives Flood Control Immunity when it is "acting alone or when acting jointly with" another Washington municipality on a flood control project, while the Fish Habitat Enhancement Project Immunity applies to the County only when it is not involved at all. By arguing for both immunities, not even in the alternative, the County demonstrates that neither immunity attaches to the County's long and active participation in the log wall project.

The trial court granted immunity based on its misunderstanding that its hands were tied by broad statutory immunities. CP 1879; 4344. The immunities at issue, however, are narrowly construed and do not provide blanket protection to the County for activities undertaken near rivers. *E.g.*, *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 600, 257 P.3d 532 (2011) (statutory immunity is strictly construed). At the very least, applicability of immunities must be decided by the trier of fact given the disputed record. *Camicia v. Howard S. Wright Constr. Co.,* 179 Wn.2d 684, 693-94, 317 P.3d 987 (2014) (where material facts are disputed, trial is needed); *Staats v. Brown*, 139 Wn.2d 757, 764, 991 P.2d 615 (2000) (statutory immunity claims are determined under summary judgment standard; all facts and inferences are construed most favorably to nonmoving party). Either way, this Court should reverse the trial court's grant of immunity to the County.

1. The County Is Not Entitled to Flood Immunity for Misconduct Tangentially Connected to Flooding

The Legislature granted counties Flood Control Immunity under RCW 86.12.037 to encourage them to build dams and dikes to prevent flooding and to keep rivers navigable. The Legislature's clear intent was to "shield counties from liability for their efforts to protect the public from flood damage." *Paulson*, 99 Wn.2d at 649. The *Paulson* Court held that this balance between encouraging action by a county and providing immunity is a rational tradeoff that prevents the costs of flood damages from being added to the costs of constructing flood control facilities. *Id.* at 654. The County attempts to expand this balanced immunity past its breaking point by asking the Court to ignore that no flood control device was built and Plaintiffs incurred no flood damages. Instead, the County asks the Court to base the application of Flood Control Immunity on a county's unilateral claim of a tangential relationship to flooding, arguing that the connection flows from two facts: 1) an earlier and ultimately unused proposal for the project at the base of the hillside was included in the 2004 Flood Plan; and 2) the permit application for constructing the log wall in 2006 included a request to remove nearby trees to increase area for future flood conveyance. *See* Opp. 25, 42. However, the record belies a conclusion that the project contemplated by the County in 2004 or the log wall actually built in 2006 were for the purpose of flood control.

The unused version of the log wall project in the 2004 Flood Plan had nothing to do with flooding. The 2004 Flood Plan did not create the

proposed project out of whole cloth; it copied from the U.S. Army Corps of Engineers' "Stillaguamish River Ecosystem Restoration Final Feasibility Report" sponsored by the County (CP 3930-53), which in turn copied from a previous U.S. Army Corps of Engineers' "Steelhead Haven Landslide: Remediation Study" (CP 1200-49). Both reports focused on the dangers of landsliding and ecosystem restoration. The only discussion of flooding was concern that building a log wall could itself increase the risk of flooding. *See* CP 3944 ("It would be the objective of this alternative to isolate [Steelhead Haven Landslide] from the river without increasing the frequency and magnitude of flood inundation on the floodplain terrace."). Moreover, the measures copied into the 2004 Flood Plan identify flooding risk as being only a secondary potential effect of a future landslide rather than a motivating purpose of the project. *See* CP 894 ("Smaller failures *could also block the current flow of the river* forcing the river into a new pathway, which would again threaten life and property on the south bank." (emphasis added)). Indeed, the alternative actions considered by the County demonstrate that it was primarily concerned with a landslide and fish habitat, not a flood. The risks listed for taking no action included that the landslide would not stabilize naturally and would continue to harm fish habitat, but did not mention flood. *Id.* The alternative of voluntary acquisition of properties was limited to the "runout area" of a potential landslide, not a potential flooding area. *Id.* Finally, a slide stabilization project would be aimed at preventing a landslide, which would only secondarily have the potential to reduce flood risk. CP 894-95. An ancillary

and potential benefit to flood control does not transform the County's actions in 2004 aimed at reducing landslide dangers and damage to fish habitats into acts relating to the "improvement, protection, regulation, and control for flood protection." RCW 86.12.037.

Similarly, the log wall actually constructed in 2006 had no connection with flood control (Cross-Appeal Issue No. 2). The County originally admitted before the trial court that the as-built log wall was not the project contemplated in the County's 2004 Flood Plan and was not entitled to immunity. *See* CP 1882 ("Defendants conceded at oral argument that the construction of the woody crib wall (log revetment) months after the 2006 flood fight, is not subject to immunity pursuant to RCW 86.12.037."). Even when the County reversed course a year later to seek immunity for the as-built log wall, it admitted that was not the same project contemplated in the 2004 Flood Plan. CP 3439; 3445. In attempting to roll back these concessions, the County selectively excerpts a portion of the log wall's permit application to give the impression that the log wall had some link to flood control. Opp. 42-43. A review of the application demonstrates no such thing; it notes only that clearing trees near the log wall may have some impact on future flooding, while the use of those trees in the log wall itself would add "ecological value to the project" because it would "enhance the riparian growth along with the log wall and jumpstart the development of the functional riparian." CP 3025-26. Tellingly, everyone involved with the 2006 log wall that was built acknowledged it was not intended to have any influence on a landslide or flood. *See, e.g.*, CP 4201-06 (50:2-11,

86:16-87:11, 96:1-98:16 (statements by Tracy Drury, log wall's lead engineer, that the project was not intended to stabilize the Hazel Landslide or protect Steelhead Haven)). Indeed, protection from floods or landslides was so far from the purpose of the as-built log wall that the lead engineer testified the project was "very, very successful at meeting its primary objectives" despite playing a part in killing 43 people in the 2014 landslide. CP 2924-35; 3445. The record is clear and undisputed that the log wall was never intended to act as a flood control device, either by allowing for flood conveyance or by stabilizing the Hazel Landslide. Flood immunity does not apply where negligent acts do not involve flood control, even if they may be closely related. *See Hamilton v. King County*, 195 Wash. 84, 91, 79 P.2d 697 (1938) (no immunity for construction of a ditch in a "drainage project, rather than one involved in flood control"). Accordingly, the log wall cannot be subject to Flood Control Immunity.

The County's reliance on *Snowden v. Kittitas County School District* does not alter the conclusion that referencing "flooding" is insufficient to invoke Flood Control Immunity. 38 Wn.2d 691, 231 P.2d 621 (1951). First, *Snowden* pre-dates the state-wide legislative waiver of sovereign immunity and the accompanying mandate that immunities be narrowly interpreted in light of that broad waiver. *See, e.g.*, *Michaels*, 171 Wn.2d at 600. Second, *Snowden* simply stands for the proposition that the original purpose of a structure does not change when the structure injures someone outside the scope of that purpose. 38 Wn.2d at 697-98 (baseball backstop created as an athletic apparatus did not lose that purpose and related immunity when it

fell on a passerby child). However, *Snowden* does not hold that some ancillary or potential benefit of a structure separate from its original purpose has any impact on the application of immunity. In fact, *Snowden* holds the exact opposite. The principle purpose of the structure analyzed in *Snowden* was an athletic apparatus as a convenience to those playing baseball, so the defendant school district was entitled to immunity. *Id.* at 695. It was of no import that the backstop also served an ancillary benefit of protecting spectators from stray balls, because that was not its motivating purpose. *Id.*

The Flood Control Immunity cases agree that the purpose of the act or omission must be for flood control, and immunity does not attach merely because it may have some potential or logically related impact on flooding. *See, e.g., Hamilton*, 195 Wash. at 91 (no immunity where ditch was part of drainage project, not for flood control). This is exactly why the trial court rejected immunity for the as-built log wall: it was not created for flood control purposes even if it mentioned potential impacts on flooding. S*ee* CP 4330 ("The Court does not, however, agree that immunity attached if one of the benefits of a project initiated for a different purpose happens to also have an impact on flood prevention. . . . Certainly the JARPA's first page only identifies fish habitat rehabilitation as the purpose of this project.").

At the very least, the multiple and changing purposes proffered for the project planned or built at the base of the hillside across from Steelhead Haven present a material question of fact as to whether Snohomish County's acts were for flood control purposes, making summary judgment

inappropriate. *Staats*, 139 Wn.2d at 764. Accordingly, the trial court's ruling dismissing Plaintiffs' claims pursuant to Flood Control Immunity must be reversed.

2. Fish Habitat Enhancement Immunity Does Not Attach to Large Scale Projects Raising Public Safety Concerns or For the County's Active Participation in Sponsoring a Project

The plain language and legislative history of the Fish Habitat Enhancement Immunity, RCW 36.70.982, demonstrate that the Legislature never intended immunity to apply to damages arising from a massive landslide or to a County's active involvement in a log wall project both before and after it was permitted as a fish enhancement project. Rather, the immunity was created to assuage the specific fear by counties that they should not be liable for fish enhancement permitting when the law excluded counties from making the permitting decision. The County, however, seeks inappropriately to turn this narrow immunity into blanket immunity for its affirmative actions that kill or injure citizens.

The failure of the County's argument is best summed up in its selective quotation of a statement by the Washington Association of Counties when it requested the immunity at issue in 1998. The County notes that the Association requested immunity for "adverse impacts, [such as] woody debris that's placed and ends up in somebody's living room after the next 50-year flood event . . . ." Opp. 42 (quoting *Hearing on HB 2879 Before S. Nat. Res. & Parks Comm.*, at 46:04-46:41 (Feb. 20, 1998), http://podcasts.tvw.org/199802/1998021135.mp3). The County

conveniently leaves off the end of that sentence, which states, ". . . if there's somebody that's going to be sued it's not going to be [counties] for failing to look at the project and commenting to the Department of Fish and Wildlife during the HPA process." *Id.* The County also neglects the specific discussion of the immunity amendment by the Senate Committee, clarifying that the immunity was limited to the permitting decision that the County could no longer make:

> **Senator Hargrove**: [The counties] came in and said: "look, you know at least if you're gonna do this, eliminate our liability, since we're not going to be part of the permitting process here. You're going to take these small projects and basically move quickly and go around us and not allow us to have any input, remove liability from us if . . . projects are permitted under this section." I think that's perfectly reasonable because they're not part of the loop anymore on these projects so we need to eliminate their liability.
>
> . . . .
>
> **Senator Swecker**: Yes, I do [like this amendment]. The issue here is we're trying to fix fish habitat. There is hydrologic approval of the proposals [by the State Department of Fish and Wildlife]. In general they will be making all the determinations about flood impacts [and] fish impacts. But, I also agree that the counties will be out of the loop and so they shouldn't take responsibility for it.
>
> . . . .
>
> **Senator Stevens**: I'm just real curious here. If [the counties] aren't in the loop, why would they be liable?
>
> **Senator Hargrove**: Yeah, well there's a potential that they could be liable because it's happening within the county. And there could be some question as to whether they should

> have been involved even though we've specifically . . . kind of . . . removed them from that process. So, I think that this is just a safety factor for them. It makes them feel comfortable because they typically have input into these decisions.
>
> **Senator Stevens**: So it really does something? It's not just a feel good? It really does do something?
>
> **Senator Hargrove**: Well, that's my understanding. You'd have to talk to an attorney someplace, I guess.
>
> . . . .
>
> **Senator Jacobsen**: If the counties aren't going to be liable, then who is liable?
>
> **Senator Hargrove**: The State. Alright . . . because the State Fish and Wildlife Department is going to be permitting these projects now without your normal county involvement. And these are the fish enhancement projects, they are relatively minor and we're saying that the whole county permitting process is cumbersome and expensive and it isn't necessary for these. Counties made the point that: "what happens if something downstream occurs that, you know, that is a problem? We didn't have any say in the original project." I think it's a reasonable amendment.

Hearing on HB 2879 Before S. Nat. Res. & Parks Comm., at 58:21-1:01:08 (Feb. 20, 1998), http://podcasts.tvw.org/199802/1998021204.mp3.

While governments do possess some protection for their permitting decisions, that protection is not absolute and liability can be imposed where a government fails to protect certain classes of people or to enforce mandatory provisions of its code. *Id.* (statement by Senator Hargrove noting that the immunity is to cover liability stemming from the fact that the counties "could be liable because it's happening within the county . . .

and there could be some question as to whether they should have been involved even though we've specifically . . . kind of . . . removed them from that process"); *see also Halvorson*, 89 Wn.2d at 673 (duty existed for city to protect individual who died in house fire under Seattle Housing Code because it was "enacted for the benefit of a specifically identified group of persons as well as, and in addition to, the general public"); *Campbell v. Bellevue*, 85 Wn.2d 1, 13, 530 P.2d 234 (1975) (city liable for failing to enforce its electrical code to require removal of a faulty electrical system in a neighborhood stream). Given this potential exposure and the fact that counties were no longer allowed to issue permits for fish habitat enhancement projects, the Legislature provided counties with exactly what they requested: immunity from liability for permitting decisions counties were no longer allowed to make.

The County's ancillary arguments fare no better in establishing immunity. First, the claim that Plaintiffs cannot sue for the County's negligent "active participation" because they did not appeal the Department of Fish and Wildlife decision to approve the installation of the log wall within 30 days is nonsense. Opp. 37. There is a fundamental difference between challenging the State's land use decision and suing over negligent acts by third parties before and after that decision. Plaintiffs are not seeking to reverse or modify a land use decision, and as such the rules governing an appeal of land use decisions do not apply. *See, e.g.*, *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 926-27, 296 P.3d 860 (2013) (claim for monetary damages for inverse condemnation not governed by statutory

requirement to seek immediate judicial review to reverse land use determinations); *Maytown Sand & Gravel, LLC v. Thurston County*, 198 Wn. App. 560, 579-580, 395 P.3d 149 (2017) (allowing claim for monetary damage that could not have been raised at the time of permitting); RCW 77.55.181(3)(b) (2005) (setting appeal process for those "aggrieved by the approval, denial, conditioning, or modification of a permit", but making no reference to monetary damages arising from a third party's actions in implementing the permit). Second, the County's attempt to distinguish *Snohomish Cnty. Farm Bureau* is myopic. The Board certainly concluded that removing a dike did not satisfy the purposes of RCW 77.55.181, but did so because it found that streamlined permitting should be rare and only for small projects that raised no complex competing interests. *See, e.g.*, *Snohomish Cnty. Farm Bureau v. State of Wash.*, HAB No. 09-001, 2009 WL 2943171, *9 (Sept. 11, 2009). The massive 1500 feet long log wall posed obvious public safety risks, and the County sponsored it both before and after it was inappropriately permitted by the State for fish enhancement. It is that conduct, and not the County's lack of involvement in permitting on which Plaintiffs seek to hold the County accountable. At minimum, the question presents a triable question.

In short, there is no ground to protect the County for its active participation in the log wall project, spanning many years, through Fish Habitat Enhancement Immunity. The trial court erred in granting immunity, and this Court should reverse.

F. The Trial Court Correctly Ruled There are Triable Factual Questions Regarding the County's Active Participation in the Log Wall Project (Cross-Appeal Issue No. 3)

Recognizing it cannot be immune for its "active participation" in the log wall project, the County challenges the trial court's conclusion that the record presents a triable jury question concerning the County's active participation in the project. The County's argument ignores disputed evidence, downplays its documented involvement, and misreads the case law on active participation. The trial court properly concluded the record establishes a disputed issue of material fact about the County's active participation in the log wall project. *See, e.g.*, *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013).

When the government affirmatively undertakes to involve itself with a private project, it is subject to liability just as if it were a private person. For example, in *Phillips v. King County*, a developer submitted plans to King County for a drainage system on his plat. 136 Wn.2d 946, 950, 968 P.2d 871 (1998). The developer's first drainage plan relied upon obtaining an easement from the adjoining property owner, but unable to obtain the easement, he revised this plan and proposed use of the "County's right of way." *Id.* at 951-52. King County neither prepared nor revised the plans, but approved the changed drainage plans, which located the project on its right of way. *Id.* When the project damaged adjoining property, the Court in *Phillips* found that the County "acted as a direct participant in allowing land, or land over which it had control, to be used by the developer" and this constituted "actual involvement" in the project. *Id.* at 967-69.

Accordingly, the Court concluded if the facts at trial established "that the County participated in creation of the problem, it may participate in the solution." *Id.* Similarly, in *Borden v. City of Olympia*, the Court refused to apply the public duty doctrine where the City of Olympia "helped private developers design, engineer, and pay for a new stormwater drainage system." 113 Wn. App. 359, 371, 53 P.3d 1020 (2002). The Court determined that not only did the City help secure funds for the project, but it also participated in a consulting role by providing technical reviews and hydrological modeling. *Id.* at 365. Thus, the Court concluded the City "essentially was aiding and cooperating with [the] private developers[]", which meant it was "engaging in a proprietary function" and was responsible for a reasonable duty of care in its actions. *Id.* at 371. Notably, neither *Phillips* nor *Borden* sets a minimum level of participation to prevent dismissal under the public duty doctrine. All that was required in *Phillips* was use of county land.[16] In applying *Phillips* and *Borden*, the trial court

[16] The County is flatly incorrect when it attempts to limit *Phillips* to inverse condemnation claims where the Supreme Court did not grant review to the dismissal of an accompanying negligence claim. The Supreme Court's reasoning in *Phillips* acknowledges that "active participation" is not subject to the public duty doctrine, a doctrine applying equally to negligence and inverse condemnation. *See Phillips*, 136 Wn.2d at 950. Indeed, the Supreme Court reinstated a claim for a tort of trespass along with inverse condemnation, and did not raise the specter of the public duty doctrine for either claim given the County's proprietary actions. *Id.* at 957 n.4, 969. Moreover, a year after *Phillips*, the Supreme Court adopted a negligence cause of action against landowners who altered the flow of water on their property and thereby caused damage to neighboring properties, thus eliminating any remaining vitality for the Court of Appeals' 1997 negligence holding in *Phillips*. *See Currens v. Sleek*, 138 Wn.2d 858, 859, 868, 983 P.2d 626 (1999). Finally, three years later, the Court of Appeals recognized that the Supreme Court's decision in *Phillips*

determined "sufficient evidence exists such that a fact-finder should determine whether the County was 'actively involved' in the revetment project." CP 4329; *see also* CP 2772-73; 4341.

Plaintiffs' Opening Brief documents in detail the record demonstrating the County actively participated in the log wall project. *See* App. Br. 3-5 (sponsoring Corps study recommending log wall, and serving as co-lead of SIRC, the organization that adopted and pursued funding for log wall), 9-10 (adopting first version of log wall in the County's 2004 Flood Plan and classifying its creation as a priority), 10-11 (lobbying for funding), 15 (providing County land and materials for construction), 15-17 (County overseeing design, construction, and monitoring). The level and duration of the County's participation belies the County's claim that it was merely a passive observer being kept abreast of developments. *Compare*

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governs negligence claims and explicitly relied on the Supreme Court's reasoning in *Phillips* and *Currens* to analyze a negligence duty of care arising from active participation. *Borden*, 113 Wn. App. at 371. *Borden's* holding and reasoning are completely contrary to the County's argument, which would require this Court to hold that the *Phillips* Court of Appeals' flawed analysis was correct—despite subsequent contrary caselaw—when it concluded a government's active participation in a private project beyond its regulatory functions cannot impose a duty on municipalities. *Compare Phillips*, 87 Wn. App. 468, 482, 943 P.2d 306 (1997) ("Phillips fails to demonstrate, however, that actively participating in a challenged action is a fifth exception to the public duty doctrine."), *with Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 886, 288 P.3d 328 (2012) (Chambers, J., concurring) ("This court has never held that a government did not have a common law duty solely because of the public duty doctrine."). Given that the Court of Appeals in *Borden* explicitly relies on the Supreme Court's holding in *Phillips* regarding active participation, there is no basis for the County's claim of a stealth holding in *Phillips* based on a failure to accept review of the negligence claim in that case. *Borden*, 113 Wn. App. at 371, n.20-24.

Opp. 48 *with* CP 3940 & 3955-56 (sponsored studies regarding the feasibility of the log wall and promised funding for the resulting construction projects); CP 3958 & CP 3918 (participated in years of planning sessions for the log wall); CP 1362, 6028, 6033 & 6045 (reached out to community members about the construction of the log wall); CP 739 & CP 893-95 (adopted the log wall as a priority for the County to prevent risk to life and property); CP 3397, 3404-06, 3866-67, 3892-93, 3903 & 4024 (provided personnel to support the funding, design, construction, and maintenance of the log wall); CP 4057, 4073-76, 4078-123 & 4133-98 (provided modeling, land, and materials for the log wall); CP 1358-60, 3232, 3869-72, 3879, CP 3902, 4053, 4044 & 4048 (and provided design reviews and construction oversight for the log wall).

The record also negates the County's contention that its co-lead position in SIRC is irrelevant because other entities worked on SIRC projects and the County cannot be held liable for SIRC's duties required by the Salmon Recovery Act. *See* Opp. at 45. As an initial matter, there is no evidence that any other entities or individuals in SIRC besides the other co-lead (the Stillaguamish Tribe) participated in the log wall project to the same degree as the County, and there is no basis for the County's unspoken assumption that those other entities or individuals would be free from liability if they had. Further, the County's role in the log wall, both on its own and as the co-lead entity, was far more extensive than the Salmon Recovery Act mandates (*i.e.* to compile, prioritize, and submit a list of potential projects in the area). The County was involved in nearly every

aspect of the log wall from its inception, including seeking funding, assistance and cooperation during construction and providing County land for development and construction. The County provides no support for the inference that it is entitled to an extra level of protection because some of its active participation came through its participation in SIRC. Since the County cannot avoid liability under the public duty doctrine when it acts in a proprietary capacity, it makes no difference if it engages in those proprietary acts on its own or under the auspices of a semi-governmental group. Moreover, it is particularly irrelevant in these circumstances where SIRC was operating beyond its mandate and engaging in its own proprietary acts. Acting beyond governmental mandates is exactly how the active participation duty arises under *Phillips* and *Borden*. The County is liable whether it acted solely on its own or in concert with SIRC.

Finally, the County attempts to discount two of its undisputed contributions to the log wall—river modeling and land—arguing these are trivial matters because the modeling could have been released through the Public Records Act and the County owned only a 2/56th interest in the land used for the log wall. *See* Opp. 47-48. This stance ignores both the significance of the acts themselves and the cumulative effect of the County's overall participation. Importantly, the provision of hydrologic modeling to a private project was one of the acts that supported the duty in *Borden,* and the use of a county's right-of-way to build a project was the only act supporting the duty in *Phillips.* *See id.*, 136 Wn.2d at 967-69; *Borden*, 113 Wn. App. at 365. It is irrelevant that the County could have

been required to release the modeling through the PRA when that is not what occurred. The County cannot rely on what it could have been required to do in the face of a PRA request to erase voluntary actions the County undertook in a proprietary capacity. Similarly, that the County only owned a partial interest in the land used for the log wall is no different than the finding in *Phillips* that a county had actively participated whether it owned the land in fee or only via a right-of-way—*see* 136 Wn.2d at 967-69—and once again ignores that the County's accumulated participation puts it on a different footing than if the only participation was land ownership.

Reviewing the disputed record and reasonable inferences in the light most favorable to Plaintiffs, the Court should affirm the trial court's conclusion that the County's active participation in the log wall project presents a triable jury question.

III. CONCLUSION

The County had a duty to the people of Steelhead Haven and no immunity shields it from the consequences of its negligent conduct. The trial court properly found that a legislative duty existed to protect the people of Steelhead Haven. And at the very least, there are triable jury questions on each and every other issue before the Court. A jury could conclude from the evidence in the record that the County owed a duty to the people of Steelhead Haven through its negligent undertaking to warn, which pacified a community that should have been on alert, or its participation in the log wall at the base of the hill, which increased the likelihood and severity of the devastation that followed. Similarly, a jury could conclude from the

evidence in the record that none of the factual prerequisites for the Flood Control or Fish Habitat Enhancement immunities are met. These issues should not be taken from the jury. Because there are material questions of fact, the Court should reverse summary judgment granted to the County and return this case to the trial court for a jury trial.

DATED this 5th day of September, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys for *Pszonka* Plaintiffs herein.

2. On September 5, 2017, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

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DATED: September 5, 2017, at Seattle, Washington.

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