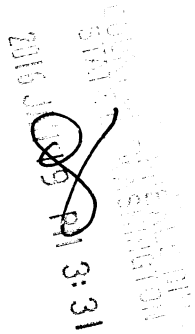
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 73528-4-I



HOLDEN-McDANIEL PARTNERS, LLC,

Appellant,

v.

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

Respondents.

AMENDED REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The defendants cast many stones in their briefs. They play loose with the law. And they fault Holden-McDaniel at length for declining to ruin the utility of its industrial yard with a protruding, oversized culvert to accommodate Gleneagle's increased stormwater. *See* JV Br. at 8; City Br. at 11.[1] But that issue could have been averted had they simply offered a reasonable alternative. They knew of other options for dealing with Gleneagle's increased stormwater (some of which involved their own land), but they declined to pursue them. *See, e.g.,* CP II:780 (enlarging Gleneagle's pond W2). The Joint Venture also dismisses the notion that it may be liable for increasing the total volume of stormwater flowing across Holden-McDaniel's land to the BNSF ditch. But its discussion of this issue lacks a single citation to authority. *See* JV Br. at 13.[2]

In a misguided attempt to uphold the superior court's order on summary judgment, the defendants stray into many areas of disputed fact. But in doing so, they succeed only in illustrating that this case must be resolved after trial, not on summary judgment. The defendants also raise

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[1] As used in this brief, the abbreviations "JV Br.," "City Br.," and "BNSF Br." refer, respectively, to the response briefs filed by the Woodland Ridge Joint Venture, the City of Arlington, and the BNSF Railway Company. We use the abbreviation "Op. Br." to refer to Holden-McDaniel's opening brief.

[2] Contrary to the Joint Venture's assertion, increased volume is not foreign to the law of Washington. *See Patterson v. City of Bellevue*, 37 Wn. App. 535, 537, 681 P.2d 266 (1984) (rejecting liability for increased rate where the defendant did not also increase the total quantity of runoff).

many issues that are tangential to Holden-McDaniel's assignments of error and make other allegations that lack any support. Before addressing the merits of this appeal, we address some of these areas of disputed fact in the note below.[3]

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[3]For example, the Joint Venture blames the entirety of the flooding problem on Holden-McDaniel's infiltration system. *See* JV Br. at 17. But the Joint Venture is belied by the very document it cites. *See* CP IV:1734, ¶ 10 ("For other parties to blame this system for all of the site's flooding problems is improper. . . . The infiltration system is not designed to dispose of off-site runoff"). *See also* CP V:2040, ¶ 13. Similarly, the Joint Venture faults Holden-McDaniel for replacing its culvert with a 24" x 36" pipe. *See* JV Br. at 4, 10 n.8, & 15. But the city agreed to that size in 1995 and it existed even before that date. *See* CP III:1364. The Joint Venture also blames Holden-McDaniel for demanding the lowering of 67th Avenue during the city's 2002 improvement project, *see* JV Br. at 18, but that too is false. *See* CP I:391–92, ¶ 16. Indeed, while the Joint Venture argues it cannot be liable for any floods post-dating the city's triangle pond, *see* JV Br. at 18, the superior court denied its motion for summary judgment on that issue and the Joint Venture did not assign error. *See* CP I:56 (Conclusion of Law No. XVII).

More relevant but equally false, the Joint Venture attempts to distance itself from the most poorly designed phase of Gleneagle when it asserts that it "did not purchase and had nothing to do with the design of the first phase (Sector 1) of the Gleneagle Development." JV Br. at 5. In reality it purchased much of Sector I, developed it, and rebuilt its original stormwater system. *See* CP III:1280 (purchase and sale agreement); CP II:601 (Joint Venture's 30(b)(6) representative admitting the Joint Venture "rebuilt the surface water management systems" and "tie[d] the pipes" into pond W1). Indeed, the Joint Venture's responsibility for Sector I is apparent from the deal it struck with the City of Arlington, in which the two agreed, following Holden-McDaniel's rejection of the enlarged culvert across its property, that the city would fulfill the Joint Venture's pre-existing obligation to mitigate Sector I's downstream impacts. *See* CP III:1402.

As for Sector II, the Joint Venture argues it met the city's then-existing 25-year design standard. *See* JV Br. at 23. But Sector II likely does not meet that standard due, in part, to groundwater and lack of capacity in Gleneagle's upper ponds. *See* CP III:1187. Relatedly, the Joint Venture argues that we misspeak when we call the BNSF drainage ditch a closed basin. *See* JV Br. at 14. But regardless of its limited capacity, the ditch clearly has insufficient capacity. *See* CP V:2060–61, ¶¶ 14–16. *See also* JV Br. at 6 (explaining that Triad called this to the Joint Venture's attention before it built Gleneagle); CP IV:1705–09 (same). *See also* I:240–41 (reducing model inputs from 12.88 cfs to 5 cfs in response to Dr. Leytham's infiltration rates for the BNSF ditch). For all practical purposes, it is a closed basin. *See* CP III:1199. In turn, the Joint Venture argues that the frequency of flooding from Gleneagle today, minus the triangle pond, is the same as it was pre-development. *See* JV Br. at 21. But current estimates likely overstate pre-development floods. The prior owner did not experience any floods before

II. REPLY TO THE CITY OF ARLINGTON AND WOODLAND RIDGE JOINT VENTURE

A. This Court Should Reject the Defendants' Erroneous Arguments Concerning the Affirmative Defense of Release.

In 1998, Holden-McDaniel and the City of Arlington settled two lawsuits involving the Gleneagle residential community and golf course — the building permit lawsuit and the 1995 flooding lawsuit. *See* Op. Br. at 9–12. The settlement itself reserved Holden-McDaniel's right to bring future tort claims for flood damage. *See* CP III:1107 (Release of All Claims). The release could have explicitly barred future tort claims arising from the facts underlying the claims in the 1995 flooding lawsuit, but it did not. *See id.*

The city claims that the settlement would not have been fair if it is construed to leave Holden-McDaniel in possession of claims for future flood damage. But while the city paid Holden-McDaniel $750,000 to drop the lawsuits, *see* CP III:1997, it did not pay "full freight." City Br. at 31. Instead, this figure represented half of Holden-McDaniel's economic

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Gleneagle was built. *See* CP V:2044–45, ¶¶ 6–7.

In turn, BNSF asserts that Holden-McDaniel installed the original culvert across its yard. *See* BNSF Br. at 4. But the culvert was installed prior to 1976, *see* JV Br. at 4, more than ten years before Holden-McDaniel purchased the property. *See* CP V:2037, ¶ 2. Likewise, the city asserts that its triangle pond was designed solely to collect stormwater from 67th Avenue. *See* City Br. at 10. But reflecting its contract with the Joint Venture, *see* JV Br. at 5–6, the city's 30(b)(6) representative confirmed the city built that pond in part to solve Gleneagle's stormwater problems and to compensate for Gleneagle's poor soils. *See* CP II:612–14 (lines 60:8–25 and 61:21–62:4).

damages in the building permit lawsuit and had nothing to do with permanent flood damage. *See* CP I:389–90 (¶¶ 4–10) (declaration of Joe Holden); CP I:393–405 (detailing Holden-McDaniel's damages in the building permit lawsuit).[4]

Reflecting Holden-McDaniel's compromise on damages, the city remained vulnerable to suit for future floods. *See* CP III:1997 (reserving Holden-McDaniel's right to bring future flood claims). In hindsight, the city likely miscalculated its potential exposure. But from the perspective of 1998, the city acted reasonably and bought the peace it desired. The lawsuits ended, the city began work to resolve the flooding problems on 67th Avenue, and its plan to control Gleneagle's stormwater obviated the need to preclude future flood claims in the parties' settlement. In short, the city believed it could stop the flooding. *See, e.g.,* CP I:390–91 (¶¶ 11–14)

[4] Arguing that it paid full freight to end the lawsuits, the city cites the $750,000 figure in the Claim for Damages (discussed more fully below). *See* City Br. at 7. But the Release of All Claims does not explain how the parties arrived at the settlement figure or what it represents. *See* CP III:1107. Clarifying that issue, Holden-McDaniel testified from its earlier involvement in the lawsuits, and supported by its contemporaneous pleadings, that the payment represented less than half its economic damages in the permit dispute. *See* CP I:389–90. In turn, Holden-McDaniel's testimony is confirmed by the parties' actions subsequent to the settlement. Consistent with its contract with the Joint Venture and for the Joint Venture's benefit, the city installed major upgrades to the Gleneagle system in 2002. *See supra*, note 3; CP II:612–14 (lines 60:8–25 and 61:21–62:4). In turn, Holden-McDaniel did not use the $750,000 to mitigate future floods because the city took on that task itself. To rebut Holden-McDaniel, the city relies on its current damages expert who opines that the settlement payment monetized Holden-McDaniel's property damages in the 1995 flooding lawsuit. *See* City Br. at 8; CP IV:1925. But the city's expert has no first-hand knowledge of the prior lawsuits and clearly no knowledge of the parties' transaction.

(discussing the city's plans and assurances). In turn, the settlement guaranteed that if the city's plans fell through and more floods ensued, Holden-McDaniel would not be without a remedy. *See* CP III:1997.

Indeed, the city failed to control Gleneagle's stormwater and now, years later, the defendants urge this Court to expand the scope of the settlement. *See* City Br. at 25–37. *See also* JV Br. at 26–31. But the centerpiece of their argument — the Claim for Damages (CP II:660–61) — provides no basis for doing so.

1. The city's arguments about rewriting our position on appeal misrepresent the record.

The superior court upheld the defendants' affirmative defense of release on the sole basis that the settlement released claims asserted in the building permit complaint and that included the claims for future flood damages in another document, the Claim for Damages. Claims set forth in the Claim for Damages were relevant, reasoned the court, because it decided the Claim for Damages was attached to the complaint and, thus, part of it. *See* CP I:56–18 (Conclusion of Law No. XVIII). In doing so, it considered extrinsic evidence and took a vital issue from the jury — namely, whether the parties intended to preclude re-litigation of the claims asserted in the Claim for Damages, or only claims in the complaint. *See* Op. Br. at 21–28.

Notwithstanding the city's many opportunities to find any evidence for its position, in the many versions of the complaint and Claim for Damages submitted below, it could not find any evidence until after the hearing on summary judgment. To the extent the jury issue has now crystallized on appeal, that is a consequence of the city's belated discovery, not a change in Holden McDaniel's position.

The city presented the first version of the complaint and Claim for Damages with its motion for summary judgment. There, the city relied exclusively on an unofficial fax of those documents that it received sometime in 1995. *See* CP V:2005–13. The fax was the product of a malfunctioning machine and the entirety of the fax, including the complaint, was labeled as an exhibit to some other, unknown document. *See* CP V:2008.[5] On the sole basis of this fax, the city argued that the complaint was affixed to the Claim for Damages because the two were sent in a single electronic transmission. *See, e.g.,* CP VII:2571–72. But faxing two documents does not affix them together any more than mailing them in the same envelope or filing them in the same file cabinet. And

[5] We say the machine was malfunctioning because the fax contains two transmission dates — "8-23-85" and "May 16, 85," *see* CP V:2011 (top and bottom notations) — both of which predate the building permit lawsuit by a decade. *See* CP III:1073–76 (complaint filed May 5, 1995). In addition to printing the wrong year, the later date (August of 1985) appears to be a re-fax of some other version that was faxed in May, the pagination of which is nonsensical. *See* CP V:2008–15 (bottom notation reading "P.05," "P.08," "P.07," "P.08," "P.08," and "P.10" in that order).

automated page numbers imprinted by the fax machine do not change that simple fact. *See* City Br. at 4 (citing the fax machine's "continuous pagination" as evidence the documents were affixed together); CP VII:2571–72 (same).

In contrast to the city's fax, the official version of the complaint in the building permit lawsuit, filed with the court, did not have the Claim for Damages attached to it. *See* CP III:1073–76. The two documents could not have been attached. As Holden-McDaniel noted in its response to the city's motion, the Claim for Damages was filed with the court, but as a separate docket entry. *See* Supp. CP X:2858; CP II:660–61. Relying on the filed copy of the complaint, Holden-McDaniel disputed the city's contention that the Claim for Damages was attached to the complaint and argued that the claims asserted in the complaint alone should control the scope of the release — not the claims in a fax copy of the Claim for Damages. *See* Supp. CP X:2857–58. The city now says that we "swung for the fences." City Br. at 22. But we were just arguing the obvious.[6]

In its summary judgment reply, the city countered with yet another, third copy of the complaint and Claim for Damages — this time, paper

[6] The Joint Venture also relied on the filed copies of the complaint and Claim for Damages in its motion for summary judgment. *See* CP III:1350–51. But its only evidence that they were affixed together was that it chose to present them as a single exhibit. *See* CP III:1346–51. Remarkably, the Joint Venture takes the same tack on appeal. *See* JV Br. at 8–9, 27.

versions lacking the court's official stamp. *See* CP I:151–58. But as before, the city failed to adduce any evidence that they were physically attached to each other. Instead, the city continued to base its argument on the fax version that it introduced at the start of the briefing process. *See* CP VII:2293 (asserting, again, that faxing the documents "in one transmission" affixed them together). If there were any doubt that the fax still formed the bedrock of the city's argument, the city amended its prior discovery responses to cement that point.[7]

Thus, the court faced two opposing views of the Claim for Damages at the end of the briefing process below — Holden-McDaniel's view that it was irrelevant (based on the official, filed copy of the complaint), and the city's view, on a dearth of evidence, that it was affixed to the complaint by a fax machine. On that record, there was no need, as the city observes, to "dilute [Holden-McDaniel's] arguments with counterproductive claims about 'factual issues.'" City Br. at 24. There were no factual issues. The city's argument was frivolous.

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[7] In its prior interrogatory answers, the city admitted that the building permit lawsuit did not contain allegations of tortious flooding, and hence had nothing to do with the claims asserted in the Claim for Damages. *See* CP II:878 (explaining that the building permit lawsuit contained claims alleging wrongful withholding of the permit, not flooding of Holden-McDaniel's land). In response to Holden-McDaniel's own motion (CP III:1225), and realizing the city's position on summary judgment conflicted with its prior, sworn answers, the city's attorney quickly drafted a new answer. *See* CP I:441–51. The new answer relied on the fax to rationalize the city's new position. The city's attorney signed the new answer. But tellingly, the city did not. *See* CP I:445.

But the landscape changed dramatically when, eight days after the close of briefing and five days after the parties' oral argument, the city's attorney submitted a new declaration asserting that the third, paper version of the complaint and Claim for Damages were affixed — not by a fax machine, but by a staple in 1995.[8] For the first time, there was a modicum of support for the city's argument. But it was too late for Holden-McDaniel to respond.

Because the city's belated declaration created a factual dispute concerning whether the complaint and Claim for Damages were affixed to one another, a trial was necessary to resolve the issue.[9] Holden-McDaniel has timely raised the issue of extrinsic evidence and the need for disputed facts to be resolved at trial. *See* Op. Br. at 19–20. The trier of fact (judge

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[8] *See* CP I:63–65 (reasoning that because he found the third version of the Claim for Damages stapled to the complaint in 2015, they were likely stapled in 1995, too). In his declaration, the city's attorney opined that it would "not have been expected or appropriate" for anyone at the city to staple the two documents together. *See* CP I:64, ¶ 5. But he had no recollection of the condition of the documents when they were received, or who stapled them. *See id.* In contrast to his new-found reliance on the staple, the attorney's prior description of the documents was much more ambiguous and far less committal — they had always been "presented together." *See* CP I:148. By whom or how, he could not say.

[9] The city makes the odd argument that Holden-McDaniel waived its right to a jury trial on the affirmative defense of release. *See* City Br. at 19, 22. In part, the city premises that argument on Holden-McDaniel's own motion for summary judgment. *Id.*, at 22. But unlike the city, Holden-McDaniel did not premise its motion on the Claim for Damages. *See* CP III:1223–25. Further, we continue to believe that if the Claim for Damages is disregarded (as it should be), then there is no material dispute of fact and Holden-McDaniel is entitled to judgment dismissing the defense. Nonetheless, Holden-McDaniel clearly disputed the city's factual interpretation of the Claim for Damages below, *see* Supp. CP X:2859–65, and the court was well aware that any material dispute of fact required a jury trial, *see* Supp. CP X:2856. *See also* Supp. CP X:2920–22 (jury demand).

or jury) should have heard all the evidence in court, reviewed the Release of All Claims, and determined whether its preclusive effect is measured by the Claim for Damages, or only by the complaint referenced in the Release. The city's shifting position and tardy disclosures should not foreclose this issue on appeal. *See Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) (in its discretion, court may consider new issues on appeal). If the city has been prejudiced all, it invited that prejudice with its long delay at finding any support for its argument.[10]

2. The affirmative defense of release fails as a matter of law under CR 10(c).

But before this Court reaches the meaning of the parties' settlement (and the proper role of judge and jury), the release defense must fail as a matter of law. The defendants premise their defense on CR 10(c). *See* City Br. at 31–36; JV Br. at 28–30. But the alleged staple in the city's copy notwithstanding, their reliance on that rule is misplaced.

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[10] Confusingly, the city argues that Holden-McDaniel's arguments about the Release prejudice its ability to conduct discovery. *See* City Br. at 23. But it moved for summary judgment long after discovery had closed. Thus, it was not Holden-McDaniel who deprived the city of its ability to conduct more depositions or pose more interrogatories, it was the city itself, which neglected to raise any issue concerning the Claim for Damages until long after the record closed below. Moreover, even if the city had more time for discovery, it is doubtful the city would have used it. The city maintained throughout discovery that a clear demarcation existed between the prior lawsuits — the flooding lawsuit involved flooding, the permit lawsuit did not. *See infra*, Note. 9; CP II:878. It takes another tack now, but even the city did not believe the permit lawsuit involved flood allegations until its attorney began work on its motion for summary judgment. And it did not find any evidence for its argument until much later.

Whether the city's documents were stapled together is irrelevant if this Court applies CR 10(c) to the version filed with the court — there is not a shred of evidence that the Claim for Damages was attached to the complaint filed with the court. Likewise, if this Court applies CR 10(c) to the city's fax, it must still reject the defense — faxing two documents does not make them one. It is only if this Court considers the city's third version of the complaint and Claim for Damages (and only the third version) that the defense has any factual support.

As we noted before, the filed copy of the complaint should control this Court's analysis as a matter of law. *See* Op. Br. at 25 n.8. Moreover, the city has not produced any evidence that the parties, or even the city, relied on its third version of the complaint and Claim for Damages when they settled the prior lawsuits. Indeed, the city did not discover the third version until mid-way through the briefing process below. *See* CP I:151–58. And it did not discover the alleged staple until even later. *See* CP I:63–65. Under these circumstances, the city has not carried its burden on a critical element of its defense: That the parties relied — objectively or subjectively — on the city's third version rather than the official copy of

the complaint, filed with the court, or the fax that was the centerpiece of the city's argument below.[11]

The staple controversy is irrelevant not only because the filed, unstapled version should control this Court's analysis, but because CR 10(c) applies only to "written instruments" that are attached as "exhibits" to a pleading. *See* CR 10(c). Unlike the city's fax, the Claim for Damages itself was never identified as an exhibit to anything. Moreover, it is not a "written instrument," a technical term denoting documents like contracts, wills, and promissory notes "'that define[] rights, duties, entitlements, or liabilities.'" *P.E. Systems, LLC v. CPI Corp.,* 176 Wn.2d 198, 204, 289 P.3d 638 (2012) (quoting Black's Law Dictionary at 869 (9th ed. 2009)).

Significantly, while the city argues that the phrase "written instrument" includes all documents without limit — including affidavits, *see* City Br. at 36 — the Washington Supreme Court has adopted a

[11] Attempting to downplay the filed copies of the complaint and Claim for Damages, the city asserts that "it is undisputed. . . that nobody actually saw what was in the court file until after 2011." City Br. at 5. But this is speculation of counsel. In reality, the city has not produced any evidence that the parties to the 1998 settlement relied on any one version of the complaint and Claim for Damages to the exclusion of any other. There is certainly no evidence that Holden-McDaniel — the sole signatory of the Release of All Claims — was unaware of the copies filed with the court, or that it relied upon a fax or the city's paper copies of those documents. Nor is there any evidence that Holden-McDaniel (or anyone else) was aware of the staple that the city discovered less than a year ago. Moreover, the city's disavowal of the official, filed pleadings in the building permit dispute runs counter to its sworn interrogatory answers, in which it explained that it was premising its defense on the pleadings on file at the Snohomish County Superior Court. *See* CP II:879 (paragraph e).

different rule: "exhibits that stretch the definition of a 'written instrument,' such as affidavits, are extrinsic evidence that may not be considered as part of the pleadings." *P.E. Systems, supra*, 176 Wn.2d at 205 (citing *Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3rd Cir. 1989)). Like an affidavit, the Claim for Damages made factual allegations about the city, Gleneagle, and flooding. *See* CP II:660. But unlike a contract, will, or promissory note, it did not give rise to liability or the rights that were violated. *See Faust v. City of Page*, 2014 WL 3340916 at *1 (D. Ariz., July 8 2014) (notice-of-claim letter was not a written instrument because it did not "memorialize legal rights or duties or give formal expression to a legal act or agreement"). The Claim for Damages was not a written instrument and CR 10(c) does not apply.[12]

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[12] In support of its argument that every document is a written instrument under CR 10(c), the city relies primarily on *Tierny v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002), for the proposition that even a "personal letter" is included. *See* City Br. at 35. But even the letter in *Tierny* hews closer to the traditional notion of a written instrument than the Claim for Damages in this case. The letter, authored by a judge, was alleged to be an act of defamation and retaliation violating the plaintiff's constitutional rights. *See* 304 F.3d at 740. Thus, unlike the Claim for Damages which includes only allegations, the letter itself, like a contract or promissory note, allegedly gave rise to liability.

The city's other cases are even less persuasive. In *Hartmann v. California Department of Corrections and Rehabilitation*, the documents attached to the complaint represented the defendant's official denial of the plaintiffs' request for a Wiccan prison chaplain (an act that allegedly deprived the prisoners of their constitutional right to equal protection). *See* 707 F.3d 1114, 1124 (9th Cir. 2013). In *Amini v. Oberlin College*, the document was an EEOC charge (a legal prerequisite for the plaintiff's lawsuit). *See* 259 F.3d 493, 503 (6th Cir. 2001). In *Gant v. Wallingford Board of Education*, the document was an investigation report, but no party disputed its incorporation into the complaint (they disputed whether the plaintiff, by appending the report, was bound to accept its truth). *See* 33 F.3d 669, 674 (2nd Cir. 1995). And in *Song v. City of Elyria*, the document

Second, the purpose of CR 10(c) is to allow parties to incorporate documents that support claims in their pleadings. *See* Op. Br. at 29–30, n.12.[13] In contrast, the defendants have not cited a single authority, and we are aware of none, that the rule also encompasses documents asserting wholly new allegations that are disconnected from the complaint. Indeed, in every opinion cited to this Court, the document was central to the claims in the complaint to which it was attached. *See supra*, note 12. *See also P.E. Systems, LLC,* 176 Wn.2d at 204 (contract attached to complaint alleging breach of contract).

Below, the superior court observed the inherent disconnect between the Claim for Damages and the complaint in the building permit dispute: "The Claim for Damages alleged flooding. Otherwise, the

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was an affidavit. *See* 985 F.2d 840, 842 (1993). But the affidavit was redundant (it did not add anything "new" to the complaint, *see id.*) and the Washington Supreme Court has rejected the inclusion of affidavits under the plain language of CR 10(c). *See P.E. Systems, supra,* 176 Wn.2d at 205. In each of these cases, the attached documents either fell closer too, or squarely within, the traditional notion of a written instrument (*Tierny*, *Hartmann*, and *Amini*); the relevant issue was not disputed (*Gant*); or the court's holding was squarely rejected by the Supreme Court (*Song*).

Further, the city argues that *Foust* (discussed more fully in our opening brief) has never been cited by another decision and is "against the weight of authority in even the federal system." City Br. at 36. But despite its recent vintage, *Foust* is cited in Section 1327, note 3, of Wright and Miller's Federal Practice and Procedure (3rd ed.). There, *Foust* is listed with other cases that represent the stricter approach to FRCP 10(c) in the federal system. *See id.*, § 1327 n.3. In *P.E. Systems*, the Washington Supreme Court endorsed the Third Circuit's approach to this issue in *Rose v. Bartle*, a leading case in this stricter line of authority. *See* 176 Wn.2d at 205.

[13] *See also, e.g., Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3rd Cir. 1989) ("[T]he types of exhibits incorporated within the pleadings by Rule 10(c) consist largely of documentary evidence, specifically, notes, and other writing[s] *on which [a party's] action or defense is based.*") (internal quotation omitted; emphasis added).

[complaint] presented a claim alleging wrongful denial of a building permit." *See* CP I:17, ¶ 2. In turn, the defendants agree that the Claim for Damages asserted wholly new allegations not found in the complaint.[14] The city even offers an explanation for the disconnect that contradicts its position — rather than inject new claims into the permit lawsuit, the Claim for Damages was attached "to secure early leverage by threatening *additional* claims." City Br. at 34 (emphasis added).

But that is just a partisan gloss on Holden-McDaniel's theory throughout this dispute. Stapled or not, the Claim for Damages put the city on notice of future claims that Holden-McDaniel formally initiated 62 days later when it added the city to the 1995 flooding lawsuit. *See* Op. Br. at 21–28. The Claim for Damages did not support the complaint in the building permit lawsuit and the two cannot be merged under CR 10(c).[15]

In sum, the affirmative defense of release must fail as a matter of law for three independent reasons: (1) there is no evidence that the parties

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[14] *See, e.g.,* City Br. at 34 (admitting the city "has no idea why [Holden-McDaniel] chose to attach an exhibit discussing flooding allegations to its first complaint"); JV Br. at 30 (characterizing the Claim for Damages as including "*more claims*" that were not included in the complaint) (emphasis in original).

[15] Indeed, given the superior court's observation that the Claim for Damages is disconnected from the substance of the prior building permit dispute, and the fact that the official, filed copy of the complaint was not stapled to the Claim for Damages, the stapling of the city's third version of those documents appears to be an administrative error. Forfeiting a valuable right (or claim) because of an errant staple on a single copy by staff hardly seems equitable or in line with authorities interpreting CR 10(c) or its federal counterpart.

relied on the third version of the Claim for Damages when they settled the prior lawsuits; (2) the Claim for Damages is not a written instrument; and (3) the Claim for Damages is wholly disconnected from the complaint in the building permit lawsuit and falls outside the ambit of CR 10(c).

3. This Court should not re-write the Release of All Claims based on the defendants' current misgivings about the prior agreement.

Finally, we address the city's and Joint Venture's arguments concerning the text and context of the 1998 settlement. *See* City Br. at 25–31; JV Br. at 27–28. On that issue, the defendants trumpet the common truism that settlements are "viewed with finality." City Br. at 25; JV Br. at 30. But finality is only relevant when finality is challenged — namely, when a party seeks to vacate or void the settlement contract.[16]

Here, Holden-McDaniel is not asking to vacate or void the settlement. It simply disagrees with the defendants about the scope of the

[16] *See Paopao v. State Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 48, 185 P.3d 640 (2008) (denying request to vacate settlement in light of intervening case law); *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 414, 36 P.3d 1065 (2001) (denying request to void settlement based on misrepresentation); *Stottlemyre v. Reed*, 35 Wn. App. 169, 173, 665 P.2d 1383 (1983) (denying request to vacate settlement based on newly discovered injuries); *Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 395–96, 739 P.2d 648 (1987) (same); *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978) (denying request to vacate settlement signed by party's attorney); *Wool Growers Serv. Corp. v. Simcoe Sheep Co.*, 18 Wn.2d 655, 690, 696, 140 P.2d 12 (1943) (recognizing principle of finality but denying affirmative defense of release because the settlement was not supported by full disclosure and consideration); *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 697, 926 P.2d 923 (1996) (recognizing presumption of finality, but voiding release in light of intervening case law); *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 513, 983 P.2d 1193 (1999) (recognizing presumption of finality, but holding the release nevertheless did not shield the defendant).

release — *i.e.,* that by referencing the complaint in the building permit dispute, the settlement precludes claims described in the Claim for Damages, a separate document.

The city and Joint Venture argue that it "makes no sense" for the parties to have precluded future flood claims arising from the permit dispute with the city, but not claims arising from the 1995 flooding lawsuit. *See* JV Br. at 27; City Br. at 27. But that division made imminent sense. The building permit lawsuit settlement involved relocating a culvert across Holden-McDaniel's storage yard in a manner that did not interfere with its use of the yard. But the city was concerned that Holden-McDaniel's solution would lead to more flooding. *See* Op. Br. at 28 n.10. Thus, it made imminent sense for the city to obtain a release of flood claims related to settling the building permit lawsuit on those terms. [17]

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[17] As we discussed in our brief, the building permit lawsuit resulted in a hold-harmless agreement whereby Holden-McDaniel agreed not to sue the city for flood damage arising from the relocated culvert. *See* Op. Br. at 28 n.10. *See also* CP III:1364. Thus, the city was plainly fearful that resolution of the building permit lawsuit could result in future liability for flood damage even if such claims were not alleged in the complaint. In response to this theory, the city argues that "[t]here would have been no reason to redundantly single [*sic*] this category of claims and re-release them, when the City was already held-harmless." City Br. at 29. But this ignores the fact that the parties' settlement expanded upon the hold-harmless agreement (applying it to future equitable claims) and provided additional protection to third parties like the Joint Venture. *See* Op. Br. at 28 n.10. The city also argues that we belatedly raised this argument in our motion for reconsideration. City Br. at 29. But as above, the delay is due to the city's shifting position on summary judgment. There was no need to advance an "alternative" theory of the Claim for Damages until after the parties' oral argument. Prior to that time, the city had not produced a scintilla of evidence that the Claim for Damages was affixed to the complaint, or that the document had any relevance whatsoever. *See supra*, Section A.1.

In turn, it also made imminent sense in 1998 to preserve Holden-McDaniel's remedy for future floods arising from Gleneagle's poorly designed infrastructure. The city was planning to fix Gleneagle's stormwater problems under its contract with the Joint Venture, and was confident it would succeed. *See* Op. Br. at 12; JV Br. at 5–6. Those efforts would later fail, but the trade-off was reasonable in 1998. Thus, releasing some future flood claims, but not all of them, made sense given the other elements of the settlement agreement. [18]

Finally, the defendants fail to address the parties' dealings during the prior lawsuits. As we discussed in our opening brief, the tort claims in

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The parties' extension of the hold-harmless agreement also answers the Joint Venture's concern that the settlement's reference to third parties is meaningless unless Holden-McDaniel intended to release the Joint Venture from claims in the 1995 flooding lawsuit. *See* JV Br. at 27–28. Clearly, Gleneagle was the primary (if not exclusive) contributor to stormwater flowing through Holden-McDaniel's culvert. Thus, just as Holden-McDaniel released the city from liability over the relocated culvert, the settlement's reference to third parties extended that same protection to the Joint Venture. That protection does not apply here because the Joint Venture increased the flow above natural conditions. *See* CP I:62, ¶ 2. *See also* CP II:1362, ¶ 2 (limiting allowable flow to water "naturally" crossing Holden-McDaniel's land). But it explains the text and context of the settlement nonetheless.

[18] The city observes that its promise to end the flooding was not consideration supporting the 1998 settlement contract. *See* City Br. at 28. We agree. The city was obligated to fix the flooding problem under its rezone contract with the Joint Venture. *See* JV Br. at 5–6; Op. Br. at 12, n.4. Thus, its promise reflected a pre-existing duty incapable of serving as valid consideration. *Harris v. Morgensen*, 31 Wn.2d 228, 240, 196 P.2d 317 (1948) ("As a general rule the performance of, or promise to perform an existing legal obligation is not a valid consideration") (internal quotation omitted). Here, we are not suing the city for breach of contract. But the city's promise to fix the flooding problem explains why it would settle the two lawsuits for $750,000 (half of Holden-McDaniel's damages in the building permit dispute) and at the same time leave itself open to potential liability for future floods (*i.e.,* it believed it would make good on its pre-existing promise to the Joint Venture to stop the flooding).

the Claim for Damages mirror Holden-McDaniel's claims against the city in the 1995 flooding lawsuit. *See* Op. Br. at 22–23, n. 6. Under RCW 4.96.020, Washington's notice-of-claim statute, Holden-McDaniel was obliged to present those claims to the city 60 days in advance of suit. Had Holden-McDaniel or any other party believed the Claim for Damages injected tort claims into the building permit dispute, those claims would have violated the 60-day wait period. *See* Op. Br. at 26. Likewise, had the Claim for Damages injected tort claims into the permit dispute, it would have been nonsensical for Holden-McDaniel to later add those same claims against the city in the flooding lawsuit. *Id.* Not surprisingly, the superior court recognized the Claim for Damages' obvious connection to the notice-of-claim statute, describing it conspicuously as "the RCW 4.96.020 Claim for Damages." CP I:34, ¶ 2.[19]

In 1995, everyone understood that the Claim for Damages put the city on notice of Holden-McDaniel's future claims in the flooding lawsuit. This is confirmed by its text, structure, and timing, which track the requirements at RCW 4.96.020. *See* Op. Br. at 24–25. It was only later,

[19] Contrary to court's description, the city argues that the Claim for Damages could not have satisfied RCW 4.96.020 because the statute does not require notice to be filed with the court. *See* City Br. at 5. But the city ignores the obvious. The Claim for Damages was also sent to the city independently of the court filing, which would have complied with the statute. *See* CP I:151–58. Even if the parties had not treated the filed version as sufficient notice of Holden-McDaniel's future claims in the flooding lawsuit, the city's copy clearly satisfied the presentation requirements at RCW 4.96.020.

when the city's attorney discovered a staple, that the city produced any evidence to the contrary. But a staple attached to one version of the documents cannot undo the entirety of the parties' past dealings. Nor can a last-minute change to the city's position. *See supra,* note 7.

It is possible, as the city observes, that not every word of the settlement makes sense. *See* City Br. at 27.[20] But the city bought the peace it desired: total immunity from the remainder of Holden-McDaniel's steep damages in the permit dispute (totaling more than $1.5 million), reprieve from the 1995 flooding lawsuit, and an opportunity to fix Gleneagle's stormwater problems outside the press of litigation. If the city desired more — to preclude future claims for future floods — then it should have bargained for more in 1998. For the reasons above, the superior court's ruling on the affirmative defense of release should be reversed.

B. The Defendants' Arguments on Res Judicata Find No Support in the Law.

The city and Joint Venture join the superior court in its view that the law of res judicata applies to the parties' 1998 settlement contract. *See* City Br. at 37–42; JV Br. at 31–36. But the settlement is not a judgment, a

[20] For example, in addition to referencing permanent and progressive "property damage" — a phrase the city emphasizes repeatedly — the settlement also purported to resolve claims concerning "bodily and/or personal injuries" (which were never alleged) and warranted that Holden-McDaniel did not consult its "physician or surgeon" (a nonsensical warranty under any interpretation). *See* CP III:1107 (first and third paragraphs).

necessary prerequisite for res judicata to attach. *See Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 933 P.3d 108 (2004). Nor was the order dismissing the prior lawsuits on the merits, another prerequisite. *See* CP III:1111 (dismissal "without prejudice"); *Sarbell v. Bank of America Nat. Trust and Sav. Ass'n*, 52 Wn.2d 549, 554, 327 P.2d 436 (1958) ("A dismissal without prejudice is not *res judicata*").

The defendants first argue again about finality and assert that the prior settlement "ended the litigation for all intents and purposes." *See* City Br. at 37–38; JV Br. at 36. But they confuse finality for res judicata and finality for appealing orders from lower tribunals.[21] We do not dispute that the settlement was final on the points it addressed. But we are not appealing it.

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[21] For example, the city misquotes *Gazin v. Heiber*, 8 Wn. App. 104, 113, 504 P.2d 1187 (1972), for the proposition that "'Determination of what constitutes a final judgment in the context of *res judicata* has always been 'a matter of substance and not form.'" City Br. at 38. This sentence does not appear in *Gazin*, which addresses the issue of finality for purposes of appealability, not res judicata. *See also* JV Br. at 36 (also misconstruing *Gazin*). Similarly, the city argues that the order dismissing the prior lawsuits was final because the statute of limitations had run on Holden-McDaniel's claims. *See* City Br. at 38 (citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 44 711 P.2d 295 (1985)). Consistent with *Munden*, we agree that when a dismissal is entered after the limitations period expires, it is appealable — in that sense, it is final. *See* 105 Wn.2d at 44. But like *Gazin*, *Munden* is silent on res judicata.

Indeed, the city's only authority on the issue of finality for res judicata is *Ensley v. Pitcher*, 152 Wn. App. 891, 222 P.3d 99 (2009). *See* City Br. at 38. But the issue in *Ensley* was whether a judicial order on summary judgment gave rise to res judicata despite the lack of a formal judgment. *See* 105 Wn.2d at 899. That issue is very unlike the situation in this case where the settlement was never adopted or endorsed by a court as an order or a judgment. Moreover, by the time the Court of Appeals wrote *Ensley*, the trial court had entered final judgment. *See id.*, at 901–02. Thus, the issue was moot and the cited portion of *Ensley* was dicta.

Next, the city makes equitable arguments for applying res judicata to settlement agreements. *See* City Br. at 41. But regardless of the city's perception of the equities, litigants should be free to resolve disputes as they see fit. If they wish to resolve all claims for all time, they may do so. But if they wish to resolve some claims and reserve others, they should be free to do that, too. Here, the 1998 settlement contained exceptions to the general release. *See* CP III:1107. The city disputes the meaning of those exceptions, but they are exceptions nonetheless. *Id.* To apply principles of res judicata here, where the parties did not agree to extinguish all claims, would offend fundamental principles of freedom of contract.[22]

Finally, the defendants argue that Washington law has long applied res judicata to private settlements. *See* JV Br. at 34–35; City Br. at 38–40. But they do not cite a single persuasive authority. In all but one of the cited decisions, the settlement was embodied in a decree or other judicial order on the merits. They stand for the unassailable but irrelevant proposition that judgments, not contracts, are governed by principles of res judicata.[23]

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[22] *See* 15B Am. Jur. 2d Compromise and Settlement, § 24 (2015) (observing that "A settlement agreement supersedes and extinguishes all preexisting claims the parties intended to settle, and is effective except as to those claims or elements of a claim specifically reserved. Being contractual in nature, a settlement agreement may create new rights between the parties and/or settle future claims between them").

[23] For example, in *In re Phillips' Estate*, the plaintiffs brought suit to set aside a

The defendants' only authority concerning a purely contractual settlement is *Rasmussen v. Allstate Insurance Company*, 45 Wn. App. 635, 637, 726 P.2d 1251 (1986). *See* City Br. at 38–39; JV Br. at 35. But even there the court's reference to res judicata was unnecessary. The unconditional language of the release made clear that all claims of every kind were extinguished. *See Rasmussen*, 45 Wn. App. at 637 (expressly settling all claims, known and unknown, current and future). Given the broad language in the *Rasmussen* release, the Court's discussion of res judicata was dicta.

In all, the defendant's lack of authority confirms the obvious. Settlements are contracts and they are governed by the law of contracts, not res judicata and the law of judgments. *Stottlemyre v. Reed*, 35 Wn. App. 169, 655 P.2d 1383 (1983) ("releases and compromise and settlement agreements are considered to be contracts, their construction is

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settlement that was adopted by judicial decree. *See* 46 Wn.2d 1, 3, 278 P.2d 627 (1955) ("There is also a suit in equity . . . brought by Verona Phillips and the three older Children of S. Ward Phillips, in which they seek the *vacation of the decrees* of distribution. . . .") (emphasis added); *id.*, at 11 (setting aside trial court's order "set[ting] aside the *decrees* of distribution") (emphasis added). Similarly, in *McClure v. Calispell Duck Club*, the settlement was followed by a dismissal with prejudice. *See* 157 Wash. 136, 288 P. 217 (1930) ("Upon this stipulation a judgment of dismissal with prejudice was entered"). Thus, *Phillips' Estate* stands for proposition judicial decrees may give rise to res judicata. And *McClure* is in accord with the unremarkable rule of law that "[a] dismissal with prejudice as part of a settlement . . . [is] a final judgment and *res judicata* in a subsequent action." *State Dept. of Ecology v. Yakima Reservation Irr. Dist.*, 121 Wn.2d 257, 290, 850 P.2d 1306 (1993). Neither principle applies here where the court did not endorse the settlement and the prior lawsuits were dismissed without prejudice.

governed by the legal principles applicable to contracts"). Even the etymology of the phrase "res judicata" — literally "a thing adjudicated" — confirms that the doctrine applies to judgments, not contracts. *See* Black's Law Dictionary at 1425 (9th ed. 2009). The court's ruling on res judicata should be reversed.

C. The Defendants Fail to Support the Superior Court's Novel Ruling on Damages, Which No Party Advanced Below.

Like the superior court, the defendants next assert that Holden-McDaniel has not suffered compensable injury because the frequency of flooding is less today than it was in 1995. *See* City Br. at 42–47; JV Br. at 46–48. *See also* CP I:59–61 (Conclusion of Law No. XX). But the defendants did not advance that theory on summary judgment. Instead, the court developed this rationale on its own. In doing so, it attempted to interpret the report of Dr. Leytham, one of Holden-McDaniel's stormwater experts, without the aid of advocacy or briefing by any party.[24] Several responses are in order.

[24] Attempting to align its current position with its position below, the Joint Venture cites portions of the city's summary judgment motions. *See* JV Br. at 39 n.17. But the city's motions did not advance the court's stated rationale for dismissing Holden-McDaniel's damages — namely, that they were precluded by the "three-year baseline" measured from 1995. *See* CP I:60, ¶ 2. Instead, the city argued that the triangle pond improved things vis-à-vis the state of affairs in 1998, when the settlement was signed. *See* CP VII:2577 (arguing that "there is absolutely no credibility to a claim that the City made things worse—*after 1998*—by adding an additional facility) (emphasis added).

First, the city argues that Dr. Leytham "admitted that he was *unable* to say that the City's 2002 improvements made things worse." City Br. at 43 (emphasis in original). But the city relies on Dr. Leytham's draft deposition transcript, which he later clarified and explained. *See* CP I:409–21. In his declaration, Dr. Leytham clearly testified that the current system, inclusive of the city's 2002 improvements, increased flooding to approximately every ten years (more that the estimated fifteen-year frequency before that time).[25] *See* CP III:1186; CP 1:410–11, ¶¶ 7–8. Thus, the city's road improvements and construction of the triangle pond in 2002 clearly "made things worse" for Holden-McDaniel. This was further confirmed by the city's 30(b)(6) representative, who testified that while the triangle pond is adequate to handle runoff from 67th, it is not

[25] The city cites *McCormick v. Lake Washington School District*, 99 Wn. App. 107, 992 P.2d 511 (1999), for the proposition that "affidavits contradicting depositions cannot be used to create issues of fact." City Br. at 43. But unlike *McCormick*, the city seeks to bind Dr. Leytham to his draft deposition transcript, which he had not reviewed when the city filed its motion for summary judgment. *See* CP I:409. Even if the transcript had been final, Dr. Leytham was not barred from filing a subsequent declaration explaining and clarifying this testimony. *See Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 175, 817 P.2d 861 (1991) (allowing supplemental testimony that was not in "flat contradiction" to prior testimony, and which explained the testimony); *McCormick, supra,* 99 Wn. App. at 111 (rule barring subsequent testimony is reserved for situations where it "merely contradicts, *without explanation*, previously given testimony") (emphasis added). Dr. Leytham's declaration subsequent to his deposition provided a cogent explanation for his disagreement with the city's characterization of his draft transcript. *See* CP I:409–412. The city made no effort to resume Dr. Leytham's deposition after receiving corrections to the draft.

adequate to handle stormwater from Gleneagle. *See* CP II:626 (lines 2–7).[26]

Second, while the frequency of flooding may be less today than it was in 1995, that does not erase the defendants' contribution to the floods that persist to this day. Subsequent to 1995, Holden-McDaniel relocated the culvert across its yard and re-installed it at a steeper slope, thereby reducing the flooding. *See* Op. Br. at 38. But the defendants also increased the flow with more development within Gleneagle and the city's botched triangle pond. *See* CP III:1182–90. Thus, there is more flooding today (not less) than there would have been had the defendants capped their discharge at 1995 levels. They are liable for the result.

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[26] Citing Dr. Leytham's qualified conclusion that Gleneagle's "post-Sector 1 detention ponds perform satisfactorily up to the 25-year event," CP III:1187, the city also argues that its "good public works [*i.e.,* the triangle pond] completely negated the impact of private development on the Partnership." City Br. at 13. But the city confuses its terminology. The city's triangle pond is not a detention pond — it does not "detain" water like Gleneagle's ponds W1 and W2, and then release that water to a downstream location. Rather, it is an infiltration or retention pond — it was designed to retain stormwater and allow it to infiltrate into the ground. *See* CP III:1186. *See also* City Br. at 11, ¶ 2 (referring to the triangle pond as a "retention" pond, not a "detention" pond). It is clear from Dr. Leytham's report and subsequent declaration that the triangle pond increased the rate of flooding of Holden-McDaniel's land. *See id.* (ten-year frequency); CP 1:410, ¶ 3. The impact of Gleneagle's detention ponds are treated separately. *See* CP III:1187.

Similarly, the city alleges that Dr. Leytham admitted that the triangle pond "was a net benefit, because the water in it would otherwise continue toward the Partnership's property." City Br. at 43. But the triangle pond was only one part of a larger set of modifications, and the city did not ask Dr. Leytham whether the entire package of improvements, including the piping leading to and from the triangle pond, was a net benefit. *See* CP 1:173 (lines 12–14). In contrast, Dr. Leytham testified in his declaration and report that the 2002 work *in toto* made the situation worse. *See* CP I:412, ¶ 11; CP III:1186.

The defendants dispute this issue on substantive, procedural, and relevance grounds. Substantively, they attribute the post-1995 decrease in flood frequency to the stormwater system as a whole, not Holden McDaniel's relocated culvert. *See* JV Br. at 37; City Br. at 43–44. At best, their argument creates an issue of fact precluding summary judgment. While Dr. Leytham did analyze the Gleneagle system as a whole, it is clear from his calculations that the culvert was the only factor associated with a decrease in flooding after 1995.

To illustrate the effect of the culvert's new slope, we are reproducing Figure 1 to our motion for reconsideration, in which we included the graph appended to Dr. Leytham's report. *See* Supp. CP X:2794; CP 1188. In the figure below, the y-axis represents the rate of discharge from Gleneagle in cfs, and the x-axis represents storms of increasing magnitude.[27] The graph also depicts the various discharge rates under Dr. Leytham's scenarios 1, 2, and 3 (represented by the blue, green, and red curved lines, respectively). For each scenario, the curve represents

[27] The Court will note that the x-axis in the figure below has both top and bottom notations. For example, the numerals 5, 20, and 100 at the top of the figure correlate with the numerals 20, 5, and 1 at the bottom. The top numbers refer to the storm's return period (*e.g.*, the 5-, 20-, or 100-year storm) while the bottom numbers reflect the probability that the storm will recur in a given year. For example, a 5-year storm has a 20% chance of occurring in a given year, a 20-year storm has a 5% chance, and a 100-year storm has a 1% chance.

the amount of water flowing out Gleneagle (the y-axis) during a storm of that size (the x-axis).

Figure 1

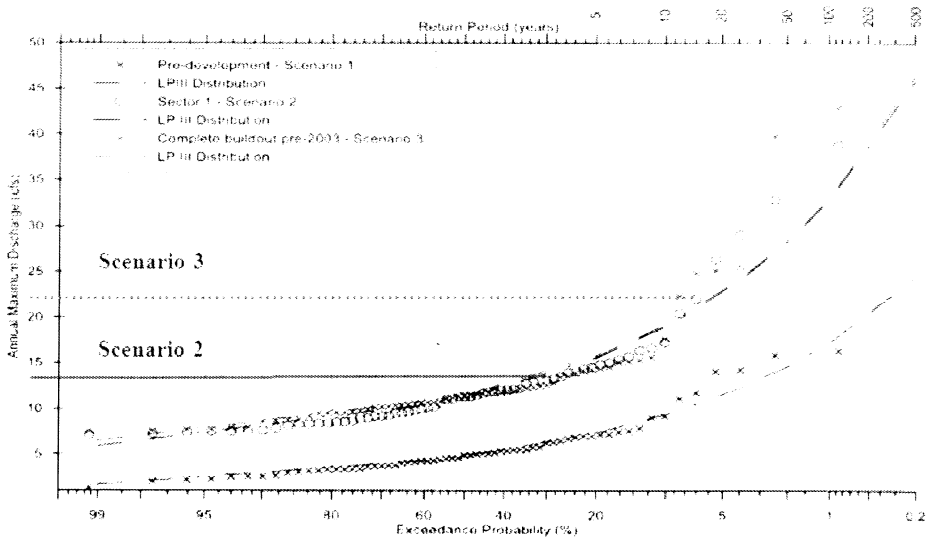

Figure 1: Annual Frequency Analysis, Gleneagle Development Site (based on HSPF simulations Oct 1948 - Sep 2013)

In his report, Dr. Leytham explains that under scenarios 2 and 3 (representing pre- and post-1995 conditions) flooding ensues when Gleneagle's discharge exceeds the conveyance capacity of Holden-McDaniel's culvert. *See* CP III:1185. Thus, to see the effect of the culvert's new slope after 1995, we have added the horizontal solid green line (representing the capacity of the original pipe — 13 cfs), and the horizontal dotted green line (representing the capacity of the relocated pipe — 22 cfs). *See* CP III:1185. Critically, both lines intersect the curves for both scenarios at exactly the same point — *i.e.,* the line representing

the old culvert intersects both curves at the return period for pre-1995 flooding (every three years) and the line for the new culvert intersects both curves at the return period for post-1995 flooding (every 15 years). *See* CP III:1185–86. Thus, it was the relocation of the culvert, not the construction of pond W2 or any other improvements after 1995, that reduced the frequency of flooding. The superior court erred not only by inventing a theory to dismiss Holden-McDaniel's damages, but also in attempting to resolve complex, disputed, material facts in the process.

Procedurally, the city asserts that our argument about the relocated pipe is "a lawyer's claim" that was raised for the first time on reconsideration. *See* City Br. at 44. *See also* JV Br. at 37. But the lack of expert testimony on this point is not surprising. Not a single party to this dispute ever advanced the superior court's rationale for rejecting Holden-McDaniel's damages. *See supra*, note 24. And no expert was ever asked to isolate the cause of the reduction between 1995 and 1998 (due, in large part, to the city's prior position, *see supra*, note 7). Instead, the superior court chose that baseline on its own, erroneous view of the facts and of the parties' 1998 settlement. It did so without the aid of briefing or expert analysis. Holden-McDaniel should not be precluded from raising this issue simply because the court departed from the defendants' stated grounds for

summary judgment and divined its own theory for rejecting Holden-McDaniel's damages.[28]

On the issue of relevance, the Joint Venture argues that even if Holden-McDaniel reduced the frequency of flooding, this lawsuit is still precluded because, regardless of the cause, flooding is less frequent today than it was in 1995. *See* JV Br. at 38–39. On this theory, the city purchased an absolute right to flood Holden-McDaniel's property every three years when it settled the prior lawsuits. *See* JV Br. at 38; CP I:60, ¶ 2. In other words, even if Holden-McDaniel could prevent the flooding entirely (*e.g.,* by installing a super-sized culvert to convey all of Gleneagle's stormwater to the BNSF ditch), the defendants could simply turn on the fire hoses and continue to flood Holden-McDaniel every three years. And even if Holden-McDaniel had used the $750,000 to protect itself from flooding (as the city argues it should have, *see* City Br. at 41) doing so would have been a fool's errand.

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[28] The city also argues that even if the new culvert improves the situation, the city deserves the credit for requiring Holden-McDaniel to move the culvert in the first place. *See* City Br. at 44. But while the city attempted to force Holden-McDaniel to relocate the culvert, and to enlarge it so much that it would have destroyed the utility of Holden-McDaniel's yard, Holden-McDaniel resisted with a lawsuit. *See* CP V:2038–40, ¶¶7–11. Later, Holden-McDaniel agreed to move the pipe. *See* CP III:1364. But that was an agreement — not an exercise of the city's regulatory authority — and the agreement did not require Holden-McDaniel to re-install the pipe at a steeper grade. That change may only be credited to Holden-McDaniel.

This Court should reject the Joint Venture's radical view of the settlement. At most, the settlement allowed the city and the Joint Venture to continue what they were doing in 1995 — namely, to discharge at 1995 levels. The settlement did not allow them to also increase the flow from Gleneagle every time Holden-McDaniel attempted to convey more water safely across its property. Prescient or not, Holden-McDaniel reduced the flooding when it relocated the pipe, but the defendants also increased the flow of stormwater above 1995 levels and they are liable for the result.

Last, the city argues that Holden-McDaniel cannot prove causation because it cannot link any particular flood to the city's botched triangle pond. *See* City Br. at 46. On this issue, it misunderstands the scope of its own liability.[29] More importantly, it ignores the record. In January of 2009, Joe Holden and Lee McDaniel watched the water gushing from the city's new catch basins, installed in 2002 with the triangle pond, and inundating their property. *See* CP V:2041, ¶ 15; CP II:668–71. Lee McDaniel's recollection is especially vivid:

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[29] The city's focus on the triangle pond appears to presume that it cannot be liable for Gleneagle's on-site stormwater system, including ponds W1 and W2. But the city made that argument below, *see* CP VII:2551–52, to which Holden-McDaniel compiled a detailed catalog of the city's tangled relationship with the Joint Venture and design of Gleneagle's on- and off-site stormwater system. *See* Supp. CP X:2827–38. The superior court did not rule on that issue and the city does not raise it here. For purposes of this appeal, and like the Joint Venture (*see supra*, note 3), the city may be held liable for all of Gleneagle, not just the triangle pond.

> The streets were full. The water was pumping up out of the catch basins — shooting — coming up out of the catch basins, the pressure, and then ultimately running in the street. I mean, they were right near — it was right along the property and the curb, and just pumping out of there and right into our yard.

CP II:679 (lines 5–11). As Holden-McDaniel's meteorologist would later observe, the storm that generated this event was decidedly less than extraordinary. *See* CP II:814 (two- to three-year event). The city hired its own expert to argue this event was an "act of God," but that theory was rejected. *See* CP I:54 (Conclusion of Law No. VII).[30]

Similarly, a member of the local homeowner's association observed water from the triangle impacting Holden-McDaniel's property even when Gleneagle's other stormwater ponds were far from overflowing. *See* Supp. CP XII:2933, ¶5.[31] The city cannot credibly argue that these events had nothing to do with its botched triangle pond. [32]

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[30] The city also suggests that the lack of flooding in the years following the triangle pond's construction is a testament to its effectiveness at preventing floods. *See* City Br. at 11. But the lack of floods between 2002 and 2009 was due to a string of unusually mild winters, not to the botched design of the triangle pond. *See* CP II:812–29.

[31] On January 4, 2016, Holden-McDaniel filed its second supplemental designations of clerk's papers, identifying this additional declaration. Pursuant to note 31 of our reply brief, we are filing this amended brief to fill in the citation.

[32] Indeed, as we observed in our opening brief, *see* Op. Br. at 14, any flooding from the triangle pond is clearly attributable to the city. As observed by Tom Holz, the pond was constructed without an overflow path in violation of Washington Department of Ecology's Stormwater Manual. *See* CP I:73–74, ¶¶ 4–7. Thus, rather than flow to some other, safer location, excess water that overwhelms the pond's infiltration capacity is directed to Holden-McDaniel's land. *See id.* The Joint Venture disputes Mr. Holz's analysis on this point. *See* JV Br. at 18 n.14. In support it cites the declaration of the city's engineer, who observes that the pond contains a mechanism routing excess water

Holden-McDaniel has raised material issues of fact on causation and this Court should reverse the superior court's ruling on damages. [33]

D. The City and Joint Venture Fail to Defend the Dismissal of Holden-McDaniel's Intentional Tort Claims.

In our opening brief, we argued that the city and Joint Venture knew the discharge from Gleneagle was greater than the capacity of the culvert crossing Holden-McDaniel's property. *See* Op. Br. at 41–42. On that basis, we argued that the superior court erred in dismissing Holden-McDaniel's intentional trespass and nuisance claims on the prima facie element of intent. *See* CP I:55 (Conclusion of Law No. VII). By directing more stormwater to the culvert than it could bear, the defendants were, at the very least, "substantially certain" that flooding would ensue. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 689, 709 P.2d (1985).

Now, the city and Joint Venture all but confirm our argument. For example, the Joint Venture argues that the flooding was so inevitable that

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into the earth directly beneath the triangle pond. *See id.* (citing CP I:216). But whether that mechanism complies with the Department of Ecology's standards has yet to be adjudicated.

[33] In addition to its general arguments on causation, the city also disputes specific elements of Holden-McDaniel's damages. *See* City Br. at 45–46 (discussing stigma damages, Holden-McDaniel's on-site infiltration system and cleanup costs, and the BlueScope lease). But the city did not seek summary judgment on Holden-McDaniel's claims concerning its infiltration system and clean-up costs. Holden-McDaniel is no longer pursuing its claim for stigma damages. And with respect to the BlueScope lease, the city argues that "[t]he Partnership offers no evidence or argument that it would not have sustained lost rent, or that BlueScope would have stayed, under 1995 conditions." *Id.* At 45. But for all of the reasons above, that is a false comparison premised on the superior court's novel, unsolicited, and erroneous interpretation of the parties' 1998 settlement and Dr. Leytham's expert report.

it paid the city to take care of the problem after Gleneagle was built. *See* JV Br. at 45. But it is axiomatic that the Joint Venture cannot contract away its tort liability. [34] As for the city, it does not dispute that it wrote the document authorizing Gleneagle to discharge more than the culvert could bear[35] (even if it did believe the system was designed to a 100-year standard, *see* City Br. at 48). The city can hardly claim that by doing so, it did not know flooding would ensue.

Tellingly, the defendants' arguments do not negate the prima facie element of intent, the only issue for which they sought summary judgment below. *See* CP VII:2546–47; CP VII:2521–24. Instead, they raise affirmative defenses — *e.g.,* that they met regulatory standards,[36] that Holden-McDaniel consented to the floods,[37] and that the flooding was

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[34] Building on its argument that it may contract away its tort liability, the Joint Venture argues that it could not have intended to flood Holden-McDaniel because, as we discussed in our opening brief, it presented a low-cost plan to the city to solve the flooding problem. *See* JV Br. at 45 (arguing that "[i]f nothing else, this should satisfy the Court that WRJV maximized its efforts to design and install a stormwater system that complied with all applicable codes and requirements, but it did not own and could not modify the downstream system"). But the solution did not involve the downstream system — it involved expanding pond W2 within Gleneagle. *See* CP II:780. Moreover, just as the Joint Venture may not contract away its tort liability, it may not resort to self-help. If downstream improvements were necessary, but it lacked the authority to carry them out, the Joint Venture should not have built Gleneagle. At the very least, the Joint Venture cannot rely on self-help to negate the prima facie element of intent.

[35] *See* Op. Br. at 41, n. 15; CP IV:1577.

[36] *See* JV Br. at 20–21; City Br. at 48.

[37] *See* JV Br. at 44 (arguing that Holden-McDaniel agreed to accept Gleneagle's stormwater in the acknowledgement of prescriptive easement, CP III:1362).

unavoidable if Gleneagle was to be built.[38] They also blame Holden-McDaniel for resisting their plans. But none of that negates intent.

Finally, the Joint Venture argues that Holden-McDaniel failed to plead intentional trespass and nuisance in its complaint. JV Br. at 40–44. But Holden-McDaniel clearly argued those claims in its response to the city's prior motion for summary judgment in 2012. *See* Supp. CP X:2804; Supp. CP X:2911–15. That alone was sufficient to put the defendants on notice and to preserve Holden-McDaniel's intentional tort claims for trial. *See Shoening v. Grays Harbor Comm. Hosp.*, 40 Wn. App. 331, 337, 698 P.2d 593 (1985) (sufficient to clarify claims on summary judgment).

The only argument about intent is provided by the city when it argues that Holden-McDaniel's claims are precluded by *Hurley v. Port Blakely Tree Farms, L.P.,* 182 Wn. App. 753, 332 P.3d 469 (2014). *See* City Br. at 47. But again, the city confuses the issues. In *Hurley*, the plaintiffs' intentional tort claims stemmed from a landslide, which they alleged was caused by clear-cutting a hill near their homes. The court rejected their trespass claim on the basis that even if the timber company intended to cut the trees, it did not intend to cause the landslide. *See*

[38] *See, e.g.,* JV Br. at 4, 10 n.8, & 15 (arguing that the culvert crossing Holden-McDaniel's property was inadequate to handle stormwater from Gleneagle); JV Br. at 15 n.12 (arguing that the Joint Venture could not have reduced the total volume of runoff due to Gleneagle's impermeable soils).

Hurley, 182 Wn. App. at 772. In contrast, there is evidence that the city and Joint Venture knew Gleneagle would flood Holden-McDaniel's land by directing too much water to its culvert. *See* Op. Br. at 41–42. The city's reliance on *Hurley* is misplaced.

Regardless of whether the city and Joint Venture believed their actions were privileged; regardless of their alleged attempts to prevent the flooding under alternatives that were never carried out; they knew Gleneagle would flood Holden-McDaniel's land. They may raise their defenses at trial, but they are not entitled to summary judgment on the prima facie element of intent.

E. The Defendants Fail to Justify the Superior Court's Exclusion of the BlueScope Letter.

In our opening brief, we challenged the superior court's exclusion of a letter from BlueScope's attorney to Holden-McDaniel as hearsay. *See* CP I:54 (Conclusion of Law No. III). The letter states that BlueScope broke its lease because of flooding. CP II:693–96. The letter is an admissible business record under RCW 5.45.020. *See* Op. Br. at 48–49.

The city and Joint Venture defend the court's ruling but cite no authority for it.[39] Instead, the Joint Venture argues that BlueScope "ceased

[39] The city and Joint Venture rely on two cases for the proposition that letters by third parties can never be business records under RCW 5.45.020. *See* City Br. at 48 (citing *Moss v. Vadman*, 77 Wn.2d 396, 463 P.2d 159 (1969) and *Boyer v. State*, 19

operations" due to the economy, "not because of flooding." JV Br. at 47. But that is a red herring. Even though the economy forced BlueScope to stop production in 2011, that caused Holden-McDaniel no harm; BlueScope continued its lease payments. It was not until later, in September of 2012, that it began withholding lease payments.[40] The factual issue, therefore, is not why did production stop, but why did BlueScope stop making payments (the decision that impacted Holden-McDaniel)? On that issue, BlueScope's 30(b)(6) representative confirmed he was not aware of any reasons for the broken lease other than the reasons in the letter, which included flooding. *See* CP II:703 (lines 21–25). This was not surprising. The flooding clearly impacted BlueScope's operations. *See* CP II:701–702 (lines 57:23–58:3); CP II:830–32.

In turn, the city argues categorically that "lawyer letters" are not business records and by Holden-McDaniel's logic, "almost nothing is hearsay" — including books like *Jurassic Park*. *See* City Br. at 49. To be clear, we are not arguing that commercial works of fiction (about

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Wn.2d 134, 142 P.2d 250 (1943)); JV Br. at 46 (same). But in *Moss*, the letters were excluded because they were cumulative, not because they were hearsay. *See* 77 Wn.2d at 404. In *Boyer*, the court neither cited nor discussed the business records rule. *See* 19 Wn.2d at 146. Thus, these cases are irrelevant to this Court's review of the BlueScope letter.

[40] *See, e.g.*, CP II:693 (letter dated September 12, 2012, refusing to make further payments); CP II:699 (lines 8–14; when shuttered plant in 2011 intended to continue making lease payments); CP II:704 (lines 21–24; 2011 financial analyses assessing expenses of closing facility included continuing to make lease payments); CP II:705 (lines 22–25; same); CP II:707 (same); CP II:709–11 (same).

dinosaurs) are business records. Nor are we arguing that every letter satisfies RCW 5.45.020. But BlueScope's 30(b)(6) representative authenticated the letter. *See* CP II:702–03 (lines 58:5–59:3).[41] The letter purports to convey BlueScope's real-world reasons for breaking its lease. *See* CP II:693–96. And despite the city's pessimistic view of our profession, BlueScope's attorney was duty-bound to convey its reason for withholding lease payments. *See* RPC 4.1(a).[42] The superior court's evidentiary ruling on the BlueScope letter should be reversed.

F. The Joint Venture Fails to Justify the Superior Court's Use of the Two-Year Statute of Limitations in Violation of Clear Supreme Court Precedent.

In our opening brief, we challenged the superior court's application of Washington's two-year statute of limitations to Holden-McDaniel's negligent trespass claim. *See* Op. Br. at 49–50; CP I:55 (Conclusion of Law No. IX). We relied on *Zimmer v. Stephenson*, in which the Court held that the three-year statute applies to negligent trespass. *See* 66 Wn.2d 477,

[41] We also note that while it briefly argues the authenticity issue, *see* City Br. at 50, the city did not challenge the letter's authenticity below. Thus, it is not properly raised on appeal and should not be considered at this late stage when Holden-McDaniel has no opportunity to cure any defects with regard to the letter's authenticity. *See* RAP 2.5(a).

[42] The city argues that the letter is the product of over-zealous posturing during negotiations between counsel. *See* City Br. at 49. Clearly, lawyers are allowed some leeway to embellish (*e.g.,* for estimates of price and value). *See* RPC 4.1 (comment 2). But such leeway does not extend to material facts at the heart of the transaction. *Id.* The city's suggestion that BlueScope's lawyer fabricated its reason for breaking the lease almost certainly could constitute an ethical violation and, most likely, fraud. Such conduct should not be presumed of any attorney, including BlueScope's.

483, 403 P.2d 343 (1965) ("[P]laintiff alleged an action for negligent trespass . . . . [W]e conclude that this action should be governed by the 3-year statute of limitations").

In response, the Joint Venture relies on two Court of Appeals decisions that stated or assumed that Washington's two-year statute at RCW 4.16.130 applies to negligent trespass. *See* JV Br. at 48 (citing *Wolfe v. State Dep't of Transp.*, 173 Wn. App. 302, 293 P.3d 1244 (2013) and *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006)). Notwithstanding these opinions (which do not even cite *Zimmer*), this Court is bound by Supreme Court precedent. The superior court's holding on this issue should be reversed.

III. REPLY TO THE BNSF RAILWAY COMPANY

In our opening brief, we explained that BNSF's liability arises from: (1) its authorizing the City of Arlington to discharge Gleneagle's excess stormwater into the ditch along the BNSF tracks on the west side of Holden-McDaniel's property; and (2) its failure to maintain the ditch. *See* Op. Br. at 42–43. Due to its dilapidated state, the ditch would fill with Gleneagle's water and spill onto Holden-McDaniel's land. The flooding continued until 2009 when Holden-McDaniel built a berm on its land to prevent the overflow. *See id.*, at 43.

A. BNSF Materially Misrepresents the Summary Judgment Record.

In its response, BNSF makes several false statements that materially misrepresent the summary judgment record. First, BNSF asserts that its ditch was not constructed by a third party with BNSF's consent. *See* BNSF Br. at 10–11 ("BNSF owns and operates its own ditches and there are no artificial conditions on its property or consent to conditions created by third parties on its property"). This statement is false. In 1975, BNSF signed an agreement with the J.H. Baxter Company allowing Baxter to construct the drainage ditch at issue in this lawsuit. *See* CP VII:2612 (Agreement dated Jan. 16, 1975 — authorizing Baxter to "construct, maintain and use a drainage ditch . . . upon the right of way of the Railroad located at Edgecomb, Snohomish County, Washington").

Second, BNSF asserts that it does not currently have an agreement with the City of Arlington allowing the city to discharge stormwater to the ditch. *See* BNSF Br. at 5. Again, this is false. In 1998, BNSF granted a license to the city allowing the city to discharge stormwater into and through a new pipe to the ditch. *See* CP II:769 (Pipe Line License dated Jan. 28, 1999 — providing, *inter alia*, that "[the city] shall use the PIPE LINE solely for carrying STORM WATER and shall not use it to carry any other commodity or for any other purpose whatsoever") (emphasis in

original). BNSF authorized the city to discharge stormwater through the pipe and, *a fortiori*, into the ditch at the end of the pipe. BNSF can hardly pretend that it thought the water would vanish before emerging in the ditch a few feet away.[43]

Third, BNSF asserts that "[n]o evidence exists that the BNSF ditch does not maintain its original efficacy when it was constructed over a half century ago." BNSF Br. at 12. This statement is false and patently so. Plaintiff submitted evidence showing that the ditch has not been maintained and, as a result, it has become clogged with soil, trees, and other debris. *See, e.g.*, CP V:2060–61 (declaration of Tom Holz — describing the dilapidated nature of the ditch and attaching photo); CP III:1198 (same).

In all, the ditch — an artificial condition — was created by a third party with BNSF's consent (CP VII:2612); BNSF has and continues to authorize the City of Arlington to discharge stormwater to the ditch (CP II:769; CP VII:2615–18); and BNSF has allowed the ditch to become dilapidated and clogged with debris, thus failing to maintain its original efficacy (*see, e.g.,* CP V:2060–61).

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[43] Unlike BNSF's earlier license to the city which expired in 1990, *see* BNSF Br. at 4–5, the 1998 pipeline license is still in effect. *See* CP II:641 (lines 3–4). Moreover, BNSF has admitted that it made absolutely no inquiry into the ditch's ability to convey or infiltrate Gleneagle's stormwater before signing its various leases with the city. *See* CP II:639 (lines 10–15).

B. The Common Enemy Doctrine Does Not Shield BNSF.

BNSF argues that the common enemy doctrine immunizes it from liability and that it has no duty to maintain its ditch or to prevent it from overflowing onto adjacent properties. *See* BNSF Br. at 9–10, 12–17. BNSF's reliance on the common enemy doctrine is misplaced.

As BNSF notes, the common enemy doctrine has governed the law of surface water since statehood. *See Cass v. Dicks*, 14 Wash. 75, 78, 4 P. 113 (1896). "In its strictest form, the common enemy doctrine allows landowners to dispose of unwanted surface water in any way they see fit, without liability for resulting damage to one's neighbor." *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626 (1999). More precisely, "[i]f a landowner 'in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is *damnum absque injuria*." *Halvorson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999) (quoting *Cass, supra,* 14 Wash. at 78).

But not all waters are "surface waters" under the common enemy doctrine. Instead, surface waters include only those diffuse, unconfined waters that spread out over the ground in an uncontrolled manner — this is

why they are called "outlaw" waters.[44] In contrast, surface waters do not include waters that have been collected and channelized. *See, e.g., Pruitt v. Douglas County*, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003) ("Surface water is 'waters of a casual or vagrant character having a temporary source, and which diffuse themselves over the surface of the ground, following no definite course or defined channel'") (quoting *Dahlgren v. Chicago, Milwaukee & Puget Sound Ry.*, 85 Wash. 395, 405, 148 P. 567 (1915)).[45] In Washington, the characterization of surface waters is a question of fact. *Fitzpatrick v. Okanogan County,* 143 Wn. App. 288, 294, 177 P.3d 716 (2008), *aff'd at* 169 Wn.2d 598, 238 P.3d 1129 (2010) ("If there is a dispute regarding the 'nature or classification' of the water at issue, it is a question of fact and therefore improper for resolution on summary judgment") (quoting *Snohomish County v. Postema*, 95 Wn. App. 817, 820, 978 P.2d 1101 (1998)).

Here, the waters entering the BNSF ditch are not diffuse surface waters. Rather than spreading out over the ground in an uncontrolled

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[44] *See, e.g., Fitzpatrick v. Okanogan County,* 169 Wn.2d 598, 607, 238 P.3d 1129 (2010) ("Water that meets the definition of surface water 'is regarded as an outlaw and a common enemy against which anyone may defend himself[.]'") (quoting *Cass, supra,* 14 Wash. at 78).

[45] *See also Grundy v. Thurston County*, 155 Wn.2d 1, 10, 117 P.3d 1089 (2005) ("'The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in its natural course or collected into and forming a definite and identifiable body, such as a lake or pond'") (quoting *Halverson v. Skagit County*, 139 Wn.2d 1, 15, 983 P.2d 643 (1999)).

manner, stormwater flowing down from Gleneagle enters the BNSF ditch through a confined channel. Indeed, in an aerial photograph submitted by BNSF's attorney, the channel flowing down from Gleneagle, across Holden-McDaniel's property, and into the BNSF ditch was clearly visible as early as 1967. *See* CP VII:2596–97. Since that time, the conveyance has only become more channelized with additions to the BNSF ditch, installation of culverts and pipes, and ponds constructed by the Joint Venture and the City of Arlington. Under these circumstances — where there is no evidence that the ditch defends BNSF from diffuse surface waters — the common enemy doctrine does not apply. Moreover, where, as here, there is a factual dispute regarding the nature of the waters, summary judgment is precluded. *See Fitzpatrick, supra,* 143 Wn. App. at 288.[46]

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[46] BNSF appears to acknowledge that the ditch does not defend its property from diffuse surface waters. Instead, it invokes the common enemy doctrine on the confusing basis that the ditch itself "diffuses" Gleneagle's stormwater. *See, e.g.,* BNSF Br. at 16–17 (arguing that "[t]he ditch operated for BNSF's benefit to *diffuse* water that was channeled to its property") (emphasis added); *id.*, at 15 (arguing that the ditch "collected and *diffused* surface water in a greater manner than natural diffusion of the water table") (emphasis added). Not only are these statements unsupported by any cited authority, they are premised on a fundamental misunderstanding of the verb "diffuse." The term does not simply mean "to dispose" or to "carry away," as BNSF uses it in its brief. Instead, "diffuse" means "to pour out and permit or cause to *spread freely* (as a fluid out of a container)." Webster's Third New International Dictionary, Unabridged at 630 (2002) (emphasis added). *Accord Sund v. Keating*, 43 Wn.2d 36, 45, 259 P.2d 1113 (1953) (holding that waters spilling over the banks of a stream, and allowed to spread across the ground in an unconfined manner, are "diffused" for purposes of the law of surface water). In this way, BNSF's invocation of the common enemy doctrine appears to be the product of a simple definitional misunderstanding. The ditch does not diffuse surface water by

C. BNSF May Be Liable for Failure to Maintain the Ditch.

Outside the common enemy doctrine, ordinary negligence principles apply to Holden-McDaniel's claims against BNSF. In particular, BNSF has a duty to prevent injury to third persons from an artificial condition on its land — here, the drainage ditch that BNSF leased to the City of Arlington for disposal of Gleneagle's stormwater.

In our opening brief, we relied on the Restatement (Second) of Torts to demonstrate that BNSF has a duty to maintain the ditch. *See* Op. Br. at 45–46. Sections 364 and 365 of the Restatement provide, in essence, that a person may be liable to third parties for injuries sustained by the disrepair of a structure or other artificial condition. *See* Restatement (Second) of Torts, §§ 364, 365 (1965). In Washington, courts have applied the reasoning of these provisions to establish liability for defective or ill-maintained stormwater infrastructure. *See Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998) (county vulnerable to liability for water spilling out of drainage system onto adjoining land); *Rothweiler v. Clark County*, 108 Wn. App. 91, 29 P.3d 758 (2001) (county vulnerable to liability for failure to maintain original efficacy of artificial drain).

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allowing it to spill out and flow freely across the ground — it collects non-diffuse water from, and discharges it into, a defined channel. *See* CP VII:2596.

BNSF makes two arguments against these authorities. First, BNSF argues that this Court should disregard the Restatement because it conflicts with the common enemy doctrine. *See* BNSF Br. at 10. But as discussed above, that doctrine has no applicability where, as here, the waters entering the ditch from Gleneagle are not diffuse surface waters. Moreover, the Restatement is consistent with the established law of Washington. The release of stormwater from BNSF's dilapidated ditch is no different from the escape of horses from a dilapidated corral[47], or trees falling onto adjacent land after a logging operation.[48] Where injury results from an artificial condition on the defendant's land, the defendant may be held liable upon the principles in the Restatement.

Second, BNSF attempts to distinguish *Phillips* and *Rothweiler*. *See* BNSF Br. at 11–12. For example, BNSF argues against *Phillips* on the basis that the county volunteered its land for a portion of the developer's stormwater system. In contrast, BNSF argues that it "had no involvement in the design, creation, or maintenance of Gleneagle's stormwater system." *Id.*, at 11. But this is demonstrably false. BNSF admits it leased the ditch to the City of Arlington for the disposal of Gleneagle's

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[47] *See Misterek v. Wash. Mineral Products, Inc.*, 85 Wn.2d 166, 170, 531 P.2d 805 (1975) (landowner liable for horses escaping from dilapidated fence).

[48] *See Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 750, 375 P.2d 487 (1962) (holding that landowner's liability for fallen trees on adjacent land, after logging operation, was a jury question).

stormwater. *Id.*, at 4. Later, in 1999, BNSF authorized the city to install a culvert through the tracks to allow more stormwater to reach the ditch. *See* CP II:769. Just as the county in *Phillips* was vulnerable to liability for volunteering its land for the developer's stormwater system, BNSF is potentially liable for volunteering its land for a portion of Gleneagle's. *See Phillips, supra,* 136 Wn.2d at 968 ("If it is proven at trial that the County participated in the creation of the problem, it may participate in the solution").

In turn, BNSF tries to distinguish *Rothweiler* on the basis that the defendant was a municipality, not the railroad. *See* BNSF Br. at 11–12. But while the defendant was a county, the rule in *Rothweiler* — that a municipality "has the duty, once it constructs a drain, to exercise reasonable care to maintain the drain's original efficacy" — traces its origin to the general law of nuisance.

The rule in *Rothweiler* about maintaining drainage was first announced in *Ronkosky v. City of Tacoma*, 71 Wash. 148, 128 P. 2 (1912). *See Rothweiler, supra*, 108 Wn. App. at 104. *Ronkosky* concerned Tacoma's liability for failing to maintain a culvert, which resulted in a flood. After rejecting Tacoma's common enemy defense, the Court held that even if that doctrine applied, Tacoma could still be liable for not maintaining the culvert:

> [T]he city, while under no primary obligation to furnish drainage for the surface water, . . . had a discretionary power so to do. Having constructed this drain and undertaken the performance of this discretionary duty, the obligation to maintain the drain in a safe and suitable condition was no longer a matter of mere discretion. . . . 'After the construction of drains and sewers, although originally this was a discretionary duty, yet the obligation to maintain them in a safe and suitable condition is not one of that character, and the authorities must perform their duty in these respects, or become liable for any injuries suffered. *A municipal corporation cannot, in respect to the construction or maintenance of a drainage or sewage system, especially in its discharge,* ***create either a public or private nuisance***. . . .'

Ronkosky, supra, 71 Wn.2d at 153–54 (quoting 3 Abbott, Mun. Corp. at 2233, 2234, 2235). In the quote above, *Ronkosky* did not saddle Tacoma with a special duty for municipalities. Tacoma was obligated to maintain its culvert under the law's general prohibition of public and private nuisances. The latter applies to all defendants, municipal and private alike.

Here, there is clearly a factual dispute regarding BNSF's failure to maintain its drainage ditch and the impact on Holden-McDaniel. *See* CP V:2060–61. Under the Restatement and the common law of Washington, including *Phillips*, *Rothweiler*, and *Ronkosky*, BNSF may be liable for the flooding of Holden-McDaniel's land, for creating a nuisance, and the superior court's order dismissing all claims against BNSF should be reversed.

D. Holden-McDaniel's Claims Are Not Barred by the Statute of Limitations.

Finally, BNSF argues that the two-year statute of limitations at RCW 4.16.130 bars the claims against it. *See* BNSF Br. at 17 (citing *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006)). But as discussed above, Supreme Court precedent forecloses the two-year statute. *See supra,* Section II.F. The three-year statute at RCW 4.16.080(1) governs Holden-McDaniel's claims and BNSF has admitted to flooding within that time period. *See* CP V:2654. For these reasons alone, BNSF's statute of limitations defense must fail.

In addition, BNSF relies on *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006), for the proposition that a plaintiff's right to compensation ends when the tort is abated. *See* BNSF Br. at 18. But this rule has never been applied to preclude liability where the plaintiff abates the tort, at the plaintiff's sole expense, and to the detriment of the plaintiff's use of his or her own property. Indeed, the rationale for the abatement rule flows from the principle that the defendant should be allowed to abate the tort, thereby mitigating his or her own liability. *See Woldson, supra,* 159 Wn.2d at 220 (disallowing damages past trial because they would "den[y] the defendant the right to mitigate damages by abating the tortious encroachment").

In this case, flooding from the BNSF ditch forced Holden-McDaniel to build and maintain a protective berm on its property. Accordingly, the nuisance has not been abated within the meaning of *Woldson.* If BNSF were a pig farmer in the middle of Seattle, surely it could not escape liability by forcing its neighbors to keep the stench from their homes by nailing their windows shut (thereby "abating the nuisance"). In that case, being forced to keep one's windows closed would clearly be an element of the plaintiff's damages, not a get-out-of-jail-free card for the defendant.

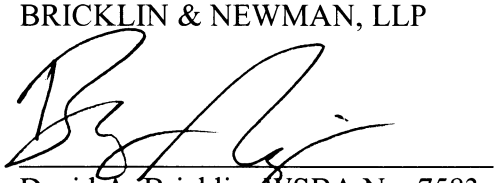
Here too, the berm on Holden-McDaniel's land does not abate the nuisance within the meaning of *Woldson* — it is an element of Holden-McDaniel's damages and a deprivation of the free use of its property. The claims against BNSF are not barred by the statute of limitations.

IV. CONCLUSION

For the reasons above, and for the reasons in its opening brief, Holden-McDaniel requests reversal of Conclusions of Law Nos. III, VIII, XVIII, XI, XIX, IX, and XX of the superior court's memorandum and order on summary judgment.

DATED this 19th day of January, 2016.

BRICKLIN & NEWMAN, LLP



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

HOLDEN-McDANIEL PARTNERS, LLC,

Plaintiff/Appellant,

v.

CITY OF ARLINGTON, a municipal corporation; WOODLAND RIDGE, a joint venture; KAJIMA DEVELOPMENT CORP., a joint venture; ARLINGTON COUNTRY CLUB, INC., a joint venture; BNSF RAILWAY COMPANY, a Delaware corporation,

Defendants/Respondents,

HOMESTREET BANK, formerly known as CONTINENTAL SAVINGS BANK; BANNER CORPORATION, formerly known as FIRST SAVINGS BANK OF WASHINGTON; VINE STREET FUND, LLC; U.S. BANK NATIONAL ASSOCIATION a subsidiary of U.S. BANCORP; SEATTLE MORTGAGE COMPANY; PBW, LLC; GLENEAGLE COUNTRY CLUB ASSOCIATION;

Other Defendants..

NO. 73528-4-I

(Snohomish County Superior Court Cause No. 11-2-02031-1)

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

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DATED this 19th day of January, 2016, at Seattle, Washington.

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

NO. 73528-4-I

HOLDEN-McDANIEL PARTNERS, LLC,

Appellant,

v.

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

Respondents.

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I. INTRODUCTION

The defendants cast many stones in their briefs. They play loose with the law. And they fault Holden-McDaniel at length for declining to ruin the utility of its industrial yard with a protruding, oversized culvert to accommodate Gleneagle's increased stormwater. *See* JV Br. at 8; City Br. at 11.[1] But that issue could have been averted had they simply offered a reasonable alternative. They knew of other options for dealing with Gleneagle's increased stormwater (some of which involved their own land), but they declined to pursue them. *See, e.g.,* CP II:780 (enlarging Gleneagle's pond W2). The Joint Venture also dismisses the notion that it may be liable for increasing the total volume of stormwater flowing across Holden-McDaniel's land to the BNSF ditch. But its discussion of this issue lacks a single citation to authority. *See* JV Br. at 13.[2]

In a misguided attempt to uphold the superior court's order on summary judgment, the defendants stray into many areas of disputed fact. But in doing so, they succeed only in illustrating that this case must be resolved after trial, not on summary judgment. The defendants also raise

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[1] As used in this brief, the abbreviations "JV Br.," "City Br.," and "BNSF Br." refer, respectively, to the response briefs filed by the Woodland Ridge Joint Venture, the City of Arlington, and the BNSF Railway Company. We use the abbreviation "Op. Br." to refer to Holden-McDaniel's opening brief.

[2] Contrary to the Joint Venture's assertion, increased volume is not foreign to the law of Washington. *See Patterson v. City of Bellevue*, 37 Wn. App. 535, 537, 681 P.2d 266 (1984) (rejecting liability for increased rate where the defendant did not also increase the total quantity of runoff).

many issues that are tangential to Holden-McDaniel's assignments of error and make other allegations that lack any support. Before addressing the merits of this appeal, we address some of these areas of disputed fact in the note below.[3]

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[3]For example, the Joint Venture blames the entirety of the flooding problem on Holden-McDaniel's infiltration system. *See* JV Br. at 17. But the Joint Venture is belied by the very document it cites. *See* CP IV:1734, ¶ 10 ("For other parties to blame this system for all of the site's flooding problems is improper. . . . The infiltration system is not designed to dispose of off-site runoff"). *See also* CP V:2040, ¶ 13. Similarly, the Joint Venture faults Holden-McDaniel for replacing its culvert with a 24" x 36" pipe. *See* JV Br. at 4, 10 n.8, & 15. But the city agreed to that size in 1995 and it existed even before that date. *See* CP III:1364. The Joint Venture also blames Holden-McDaniel for demanding the lowering of 67th Avenue during the city's 2002 improvement project, *see* JV Br. at 18, but that too is false. *See* CP I:391–92, ¶ 16. Indeed, while the Joint Venture argues it cannot be liable for any floods post-dating the city's triangle pond, *see* JV Br. at 18, the superior court denied its motion for summary judgment on that issue and the Joint Venture did not assign error. *See* CP I:56 (Conclusion of Law No. XVII).

More relevant but equally false, the Joint Venture attempts to distance itself from the most poorly designed phase of Gleneagle when it asserts that it "did not purchase and had nothing to do with the design of the first phase (Sector 1) of the Gleneagle Development." JV Br. at 5. In reality it purchased much of Sector I, developed it, and rebuilt its original stormwater system. *See* CP III:1280 (purchase and sale agreement); CP II:601 (Joint Venture's 30(b)(6) representative admitting the Joint Venture "rebuilt the surface water management systems" and "tie[d] the pipes" into pond W1). Indeed, the Joint Venture's responsibility for Sector I is apparent from the deal it struck with the City of Arlington, in which the two agreed, following Holden-McDaniel's rejection of the enlarged culvert across its property, that the city would fulfill the Joint Venture's pre-existing obligation to mitigate Sector I's downstream impacts. *See* CP III:1402.

As for Sector II, the Joint Venture argues it met the city's then-existing 25-year design standard. *See* JV Br. at 23. But Sector II likely does not meet that standard due, in part, to groundwater and lack of capacity in Gleneagle's upper ponds. *See* CP III:1187. Relatedly, the Joint Venture argues that we misspeak when we call the BNSF drainage ditch a closed basin. *See* JV Br. at 14. But regardless of its limited capacity, the ditch clearly has insufficient capacity. *See* CP V:2060–61, ¶¶ 14–16. *See also* JV Br. at 6 (explaining that Triad called this to the Joint Venture's attention before it built Gleneagle); CP IV:1705–09 (same). *See also* I:240–41 (reducing model inputs from 12.88 cfs to 5 cfs in response to Dr. Leytham's infiltration rates for the BNSF ditch). For all practical purposes, it is a closed basin. *See* CP III:1199. In turn, the Joint Venture argues that the frequency of flooding from Gleneagle today, minus the triangle pond, is the same as it was pre-development. *See* JV Br. at 21. But current estimates likely overstate pre-development floods. The prior owner did not experience any floods before

II. REPLY TO THE CITY OF ARLINGTON AND WOODLAND RIDGE JOINT VENTURE

A. This Court Should Reject the Defendants' Erroneous Arguments Concerning the Affirmative Defense of Release.

In 1998, Holden-McDaniel and the City of Arlington settled two lawsuits involving the Gleneagle residential community and golf course — the building permit lawsuit and the 1995 flooding lawsuit. *See* Op. Br. at 9–12. The settlement itself reserved Holden-McDaniel's right to bring future tort claims for flood damage. *See* CP III:1107 (Release of All Claims). The release could have explicitly barred future tort claims arising from the facts underlying the claims in the 1995 flooding lawsuit, but it did not. *See id.*

The city claims that the settlement would not have been fair if it is construed to leave Holden-McDaniel in possession of claims for future flood damage. But while the city paid Holden-McDaniel $750,000 to drop the lawsuits, *see* CP III:1997, it did not pay "full freight." City Br. at 31. Instead, this figure represented half of Holden-McDaniel's economic

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Gleneagle was built. *See* CP V:2044–45, ¶¶ 6–7.

In turn, BNSF asserts that Holden-McDaniel installed the original culvert across its yard. *See* BNSF Br. at 4. But the culvert was installed prior to 1976, *see* JV Br. at 4, more than ten years before Holden-McDaniel purchased the property. *See* CP V:2037, ¶ 2. Likewise, the city asserts that its triangle pond was designed solely to collect stormwater from 67th Avenue. *See* City Br. at 10. But reflecting its contract with the Joint Venture, *see* JV Br. at 5–6, the city's 30(b)(6) representative confirmed the city built that pond in part to solve Gleneagle's stormwater problems and to compensate for Gleneagle's poor soils. *See* CP II:612–14 (lines 60:8–25 and 61:21–62:4).

damages in the building permit lawsuit and had nothing to do with permanent flood damage. *See* CP I:389–90 (¶¶ 4–10) (declaration of Joe Holden); CP I:393–405 (detailing Holden-McDaniel's damages in the building permit lawsuit).[4]

Reflecting Holden-McDaniel's compromise on damages, the city remained vulnerable to suit for future floods. *See* CP III:1997 (reserving Holden-McDaniel's right to bring future flood claims). In hindsight, the city likely miscalculated its potential exposure. But from the perspective of 1998, the city acted reasonably and bought the peace it desired. The lawsuits ended, the city began work to resolve the flooding problems on 67th Avenue, and its plan to control Gleneagle's stormwater obviated the need to preclude future flood claims in the parties' settlement. In short, the city believed it could stop the flooding. *See, e.g.,* CP I:390–91 (¶¶ 11–14)

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[4] Arguing that it paid full freight to end the lawsuits, the city cites the $750,000 figure in the Claim for Damages (discussed more fully below). *See* City Br. at 7. But the Release of All Claims does not explain how the parties arrived at the settlement figure or what it represents. *See* CP III:1107. Clarifying that issue, Holden-McDaniel testified from its earlier involvement in the lawsuits, and supported by its contemporaneous pleadings, that the payment represented less than half its economic damages in the permit dispute. *See* CP I:389–90. In turn, Holden-McDaniel's testimony is confirmed by the parties' actions subsequent to the settlement. Consistent with its contract with the Joint Venture and for the Joint Venture's benefit, the city installed major upgrades to the Gleneagle system in 2002. *See supra*, note 3; CP II:612–14 (lines 60:8–25 and 61:21–62:4). In turn, Holden-McDaniel did not use the $750,000 to mitigate future floods because the city took on that task itself. To rebut Holden-McDaniel, the city relies on its current damages expert who opines that the settlement payment monetized Holden-McDaniel's property damages in the 1995 flooding lawsuit. *See* City Br. at 8; CP IV:1925. But the city's expert has no first-hand knowledge of the prior lawsuits and clearly no knowledge of the parties' transaction.

(discussing the city's plans and assurances). In turn, the settlement guaranteed that if the city's plans fell through and more floods ensued, Holden-McDaniel would not be without a remedy. *See* CP III:1997.

Indeed, the city failed to control Gleneagle's stormwater and now, years later, the defendants urge this Court to expand the scope of the settlement. *See* City Br. at 25–37. *See also* JV Br. at 26–31. But the centerpiece of their argument — the Claim for Damages (CP II:660–61) — provides no basis for doing so.

1. The city's arguments about rewriting our position on appeal misrepresent the record.

The superior court upheld the defendants' affirmative defense of release on the sole basis that the settlement released claims asserted in the building permit complaint and that included the claims for future flood damages in another document, the Claim for Damages. Claims set forth in the Claim for Damages were relevant, reasoned the court, because it decided the Claim for Damages was attached to the complaint and, thus, part of it. *See* CP I:56–18 (Conclusion of Law No. XVIII). In doing so, it considered extrinsic evidence and took a vital issue from the jury — namely, whether the parties intended to preclude re-litigation of the claims asserted in the Claim for Damages, or only claims in the complaint. *See* Op. Br. at 21–28.

Notwithstanding the city's many opportunities to find any evidence for its position, in the many versions of the complaint and Claim for Damages submitted below, it could not find any evidence until after the hearing on summary judgment. To the extent the jury issue has now crystallized on appeal, that is a consequence of the city's belated discovery, not a change in Holden McDaniel's position.

The city presented the first version of the complaint and Claim for Damages with its motion for summary judgment. There, the city relied exclusively on an unofficial fax of those documents that it received sometime in 1995. *See* CP V:2005–13. The fax was the product of a malfunctioning machine and the entirety of the fax, including the complaint, was labeled as an exhibit to some other, unknown document. *See* CP V:2008.[5] On the sole basis of this fax, the city argued that the complaint was affixed to the Claim for Damages because the two were sent in a single electronic transmission. *See, e.g.*, CP VII:2571–72. But faxing two documents does not affix them together any more than mailing them in the same envelope or filing them in the same file cabinet. And

[5] We say the machine was malfunctioning because the fax contains two transmission dates — "8-23-85" and "May 16, 85," *see* CP V:2011 (top and bottom notations) — both of which predate the building permit lawsuit by a decade. *See* CP III:1073–76 (complaint filed May 5, 1995). In addition to printing the wrong year, the later date (August of 1985) appears to be a re-fax of some other version that was faxed in May, the pagination of which is nonsensical. *See* CP V:2008–15 (bottom notation reading "P.05," "P.08," "P.07," "P.08," "P.08," and "P.10" in that order).

automated page numbers imprinted by the fax machine do not change that simple fact. *See* City Br. at 4 (citing the fax machine's "continuous pagination" as evidence the documents were affixed together); CP VII:2571–72 (same).

In contrast to the city's fax, the official version of the complaint in the building permit lawsuit, filed with the court, did not have the Claim for Damages attached to it. *See* CP III:1073–76. The two documents could not have been attached. As Holden-McDaniel noted in its response to the city's motion, the Claim for Damages was filed with the court, but as a separate docket entry. *See* Supp. CP X:2858; CP II:660–61. Relying on the filed copy of the complaint, Holden-McDaniel disputed the city's contention that the Claim for Damages was attached to the complaint and argued that the claims asserted in the complaint alone should control the scope of the release — not the claims in a fax copy of the Claim for Damages. *See* Supp. CP X:2857–58. The city now says that we "swung for the fences." City Br. at 22. But we were just arguing the obvious.[6]

In its summary judgment reply, the city countered with yet another, third copy of the complaint and Claim for Damages — this time, paper

[6] The Joint Venture also relied on the filed copies of the complaint and Claim for Damages in its motion for summary judgment. *See* CP III:1350–51. But its only evidence that they were affixed together was that it chose to present them as a single exhibit. *See* CP III:1346–51. Remarkably, the Joint Venture takes the same tack on appeal. *See* JV Br. at 8–9, 27.

versions lacking the court's official stamp. *See* CP I:151–58. But as before, the city failed to adduce any evidence that they were physically attached to each other. Instead, the city continued to base its argument on the fax version that it introduced at the start of the briefing process. *See* CP VII:2293 (asserting, again, that faxing the documents "in one transmission" affixed them together). If there were any doubt that the fax still formed the bedrock of the city's argument, the city amended its prior discovery responses to cement that point.[7]

Thus, the court faced two opposing views of the Claim for Damages at the end of the briefing process below — Holden-McDaniel's view that it was irrelevant (based on the official, filed copy of the complaint), and the city's view, on a dearth of evidence, that it was affixed to the complaint by a fax machine. On that record, there was no need, as the city observes, to "dilute [Holden-McDaniel's] arguments with counterproductive claims about 'factual issues.'" City Br. at 24. There were no factual issues. The city's argument was frivolous.

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[7] In its prior interrogatory answers, the city admitted that the building permit lawsuit did not contain allegations of tortious flooding, and hence had nothing to do with the claims asserted in the Claim for Damages. *See* CP II:878 (explaining that the building permit lawsuit contained claims alleging wrongful withholding of the permit, not flooding of Holden-McDaniel's land). In response to Holden-McDaniel's own motion (CP III:1225), and realizing the city's position on summary judgment conflicted with its prior, sworn answers, the city's attorney quickly drafted a new answer. *See* CP I:441–51. The new answer relied on the fax to rationalize the city's new position. The city's attorney signed the new answer. But tellingly, the city did not. *See* CP I:445.

But the landscape changed dramatically when, eight days after the close of briefing and five days after the parties' oral argument, the city's attorney submitted a new declaration asserting that the third, paper version of the complaint and Claim for Damages were affixed — not by a fax machine, but by a staple in 1995.[8] For the first time, there was a modicum of support for the city's argument. But it was too late for Holden-McDaniel to respond.

Because the city's belated declaration created a factual dispute concerning whether the complaint and Claim for Damages were affixed to one another, a trial was necessary to resolve the issue.[9] Holden-McDaniel has timely raised the issue of extrinsic evidence and the need for disputed facts to be resolved at trial. *See* Op. Br. at 19–20. The trier of fact (judge

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[8] *See* CP I:63–65 (reasoning that because he found the third version of the Claim for Damages stapled to the complaint in 2015, they were likely stapled in 1995, too). In his declaration, the city's attorney opined that it would "not have been expected or appropriate" for anyone at the city to staple the two documents together. *See* CP I:64, ¶ 5. But he had no recollection of the condition of the documents when they were received, or who stapled them. *See id.* In contrast to his new-found reliance on the staple, the attorney's prior description of the documents was much more ambiguous and far less committal — they had always been "presented together." *See* CP I:148. By whom or how, he could not say.

[9] The city makes the odd argument that Holden-McDaniel waived its right to a jury trial on the affirmative defense of release. *See* City Br. at 19, 22. In part, the city premises that argument on Holden-McDaniel's own motion for summary judgment. *Id.*, at 22. But unlike the city, Holden-McDaniel did not premise its motion on the Claim for Damages. *See* CP III:1223–25. Further, we continue to believe that if the Claim for Damages is disregarded (as it should be), then there is no material dispute of fact and Holden-McDaniel is entitled to judgment dismissing the defense. Nonetheless, Holden-McDaniel clearly disputed the city's factual interpretation of the Claim for Damages below, *see* Supp. CP X:2859–65, and the court was well aware that any material dispute of fact required a jury trial, *see* Supp. CP X:2856. *See also* Supp. CP X:2920–22 (jury demand).

or jury) should have heard all the evidence in court, reviewed the Release of All Claims, and determined whether its preclusive effect is measured by the Claim for Damages, or only by the complaint referenced in the Release. The city's shifting position and tardy disclosures should not foreclose this issue on appeal. *See Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) (in its discretion, court may consider new issues on appeal). If the city has been prejudiced all, it invited that prejudice with its long delay at finding any support for its argument.[10]

2. The affirmative defense of release fails as a matter of law under CR 10(c).

But before this Court reaches the meaning of the parties' settlement (and the proper role of judge and jury), the release defense must fail as a matter of law. The defendants premise their defense on CR 10(c). *See* City Br. at 31–36; JV Br. at 28–30. But the alleged staple in the city's copy notwithstanding, their reliance on that rule is misplaced.

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[10] Confusingly, the city argues that Holden-McDaniel's arguments about the Release prejudice its ability to conduct discovery. *See* City Br. at 23. But it moved for summary judgment long after discovery had closed. Thus, it was not Holden-McDaniel who deprived the city of its ability to conduct more depositions or pose more interrogatories, it was the city itself, which neglected to raise any issue concerning the Claim for Damages until long after the record closed below. Moreover, even if the city had more time for discovery, it is doubtful the city would have used it. The city maintained throughout discovery that a clear demarcation existed between the prior lawsuits — the flooding lawsuit involved flooding, the permit lawsuit did not. *See infra*, Note. 9; CP II:878. It takes another tack now, but even the city did not believe the permit lawsuit involved flood allegations until its attorney began work on its motion for summary judgment. And it did not find any evidence for its argument until much later.

Whether the city's documents were stapled together is irrelevant if this Court applies CR 10(c) to the version filed with the court — there is not a shred of evidence that the Claim for Damages was attached to the complaint filed with the court. Likewise, if this Court applies CR 10(c) to the city's fax, it must still reject the defense — faxing two documents does not make them one. It is only if this Court considers the city's third version of the complaint and Claim for Damages (and only the third version) that the defense has any factual support.

As we noted before, the filed copy of the complaint should control this Court's analysis as a matter of law. *See* Op. Br. at 25 n.8. Moreover, the city has not produced any evidence that the parties, or even the city, relied on its third version of the complaint and Claim for Damages when they settled the prior lawsuits. Indeed, the city did not discover the third version until mid-way through the briefing process below. *See* CP I:151–58. And it did not discover the alleged staple until even later. *See* CP I:63–65. Under these circumstances, the city has not carried its burden on a critical element of its defense: That the parties relied — objectively or subjectively — on the city's third version rather than the official copy of

the complaint, filed with the court, or the fax that was the centerpiece of the city's argument below.[11]

The staple controversy is irrelevant not only because the filed, unstapled version should control this Court's analysis, but because CR 10(c) applies only to "written instruments" that are attached as "exhibits" to a pleading. *See* CR 10(c). Unlike the city's fax, the Claim for Damages itself was never identified as an exhibit to anything. Moreover, it is not a "written instrument," a technical term denoting documents like contracts, wills, and promissory notes "'that define[] rights, duties, entitlements, or liabilities.'" *P.E. Systems, LLC v. CPI Corp.,* 176 Wn.2d 198, 204, 289 P.3d 638 (2012) (quoting Black's Law Dictionary at 869 (9th ed. 2009)).

Significantly, while the city argues that the phrase "written instrument" includes all documents without limit — including affidavits, *see* City Br. at 36 — the Washington Supreme Court has adopted a

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[11] Attempting to downplay the filed copies of the complaint and Claim for Damages, the city asserts that "it is undisputed. . . that nobody actually saw what was in the court file until after 2011." City Br. at 5. But this is speculation of counsel. In reality, the city has not produced any evidence that the parties to the 1998 settlement relied on any one version of the complaint and Claim for Damages to the exclusion of any other. There is certainly no evidence that Holden-McDaniel — the sole signatory of the Release of All Claims — was unaware of the copies filed with the court, or that it relied upon a fax or the city's paper copies of those documents. Nor is there any evidence that Holden-McDaniel (or anyone else) was aware of the staple that the city discovered less than a year ago. Moreover, the city's disavowal of the official, filed pleadings in the building permit dispute runs counter to its sworn interrogatory answers, in which it explained that it was premising its defense on the pleadings on file at the Snohomish County Superior Court. *See* CP II:879 (paragraph e).

different rule: "exhibits that stretch the definition of a 'written instrument,' such as affidavits, are extrinsic evidence that may not be considered as part of the pleadings." *P.E. Systems, supra*, 176 Wn.2d at 205 (citing *Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3rd Cir. 1989)). Like an affidavit, the Claim for Damages made factual allegations about the city, Gleneagle, and flooding. *See* CP II:660. But unlike a contract, will, or promissory note, it did not give rise to liability or the rights that were violated. *See Faust v. City of Page*, 2014 WL 3340916 at *1 (D. Ariz., July 8 2014) (notice-of-claim letter was not a written instrument because it did not "memorialize legal rights or duties or give formal expression to a legal act or agreement"). The Claim for Damages was not a written instrument and CR 10(c) does not apply.[12]

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[12] In support of its argument that every document is a written instrument under CR 10(c), the city relies primarily on *Tierny v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002), for the proposition that even a "personal letter" is included. *See* City Br. at 35. But even the letter in *Tierny* hews closer to the traditional notion of a written instrument than the Claim for Damages in this case. The letter, authored by a judge, was alleged to be an act of defamation and retaliation violating the plaintiff's constitutional rights. *See* 304 F.3d at 740. Thus, unlike the Claim for Damages which includes only allegations, the letter itself, like a contract or promissory note, allegedly gave rise to liability.

The city's other cases are even less persuasive. In *Hartmann v. California Department of Corrections and Rehabilitation*, the documents attached to the complaint represented the defendant's official denial of the plaintiffs' request for a Wiccan prison chaplain (an act that allegedly deprived the prisoners of their constitutional right to equal protection). *See* 707 F.3d 1114, 1124 (9th Cir. 2013). In *Amini v. Oberlin College*, the document was an EEOC charge (a legal prerequisite for the plaintiff's lawsuit). *See* 259 F.3d 493, 503 (6th Cir. 2001). In *Gant v. Wallingford Board of Education*, the document was an investigation report, but no party disputed its incorporation into the complaint (they disputed whether the plaintiff, by appending the report, was bound to accept its truth). *See* 33 F.3d 669, 674 (2nd Cir. 1995). And in *Song v. City of Elyria*, the document

Second, the purpose of CR 10(c) is to allow parties to incorporate documents that support claims in their pleadings. *See* Op. Br. at 29–30, n.12.[13] In contrast, the defendants have not cited a single authority, and we are aware of none, that the rule also encompasses documents asserting wholly new allegations that are disconnected from the complaint. Indeed, in every opinion cited to this Court, the document was central to the claims in the complaint to which it was attached. *See supra*, note 12. *See also P.E. Systems, LLC,* 176 Wn.2d at 204 (contract attached to complaint alleging breach of contract).

Below, the superior court observed the inherent disconnect between the Claim for Damages and the complaint in the building permit dispute: "The Claim for Damages alleged flooding. Otherwise, the

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was an affidavit. *See* 985 F.2d 840, 842 (1993). But the affidavit was redundant (it did not add anything "new" to the complaint, *see id.*) and the Washington Supreme Court has rejected the inclusion of affidavits under the plain language of CR 10(c). *See P.E. Systems, supra,* 176 Wn.2d at 205. In each of these cases, the attached documents either fell closer too, or squarely within, the traditional notion of a written instrument (*Tierny*, *Hartmann*, and *Amini*); the relevant issue was not disputed (*Gant*); or the court's holding was squarely rejected by the Supreme Court (*Song*).

Further, the city argues that *Foust* (discussed more fully in our opening brief) has never been cited by another decision and is "against the weight of authority in even the federal system." City Br. at 36. But despite its recent vintage, *Foust* is cited in Section 1327, note 3, of Wright and Miller's Federal Practice and Procedure (3rd ed.). There, *Foust* is listed with other cases that represent the stricter approach to FRCP 10(c) in the federal system. *See id.*, § 1327 n.3. In *P.E. Systems*, the Washington Supreme Court endorsed the Third Circuit's approach to this issue in *Rose v. Bartle*, a leading case in this stricter line of authority. *See* 176 Wn.2d at 205.

[13] *See also, e.g., Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3rd Cir. 1989) ("[T]he types of exhibits incorporated within the pleadings by Rule 10(c) consist largely of documentary evidence, specifically, notes, and other writing[s] *on which [a party's] action or defense is based.*") (internal quotation omitted; emphasis added).

[complaint] presented a claim alleging wrongful denial of a building permit." *See* CP I:17, ¶ 2. In turn, the defendants agree that the Claim for Damages asserted wholly new allegations not found in the complaint.[14] The city even offers an explanation for the disconnect that contradicts its position — rather than inject new claims into the permit lawsuit, the Claim for Damages was attached "to secure early leverage by threatening *additional* claims." City Br. at 34 (emphasis added).

But that is just a partisan gloss on Holden-McDaniel's theory throughout this dispute. Stapled or not, the Claim for Damages put the city on notice of future claims that Holden-McDaniel formally initiated 62 days later when it added the city to the 1995 flooding lawsuit. *See* Op. Br. at 21–28. The Claim for Damages did not support the complaint in the building permit lawsuit and the two cannot be merged under CR 10(c).[15]

In sum, the affirmative defense of release must fail as a matter of law for three independent reasons: (1) there is no evidence that the parties

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[14] *See, e.g.,* City Br. at 34 (admitting the city "has no idea why [Holden-McDaniel] chose to attach an exhibit discussing flooding allegations to its first complaint"); JV Br. at 30 (characterizing the Claim for Damages as including "*more claims*" that were not included in the complaint) (emphasis in original).

[15] Indeed, given the superior court's observation that the Claim for Damages is disconnected from the substance of the prior building permit dispute, and the fact that the official, filed copy of the complaint was not stapled to the Claim for Damages, the stapling of the city's third version of those documents appears to be an administrative error. Forfeiting a valuable right (or claim) because of an errant staple on a single copy by staff hardly seems equitable or in line with authorities interpreting CR 10(c) or its federal counterpart.

relied on the third version of the Claim for Damages when they settled the prior lawsuits; (2) the Claim for Damages is not a written instrument; and (3) the Claim for Damages is wholly disconnected from the complaint in the building permit lawsuit and falls outside the ambit of CR 10(c).

3. This Court should not re-write the Release of All Claims based on the defendants' current misgivings about the prior agreement.

Finally, we address the city's and Joint Venture's arguments concerning the text and context of the 1998 settlement. *See* City Br. at 25–31; JV Br. at 27–28. On that issue, the defendants trumpet the common truism that settlements are "viewed with finality." City Br. at 25; JV Br. at 30. But finality is only relevant when finality is challenged — namely, when a party seeks to vacate or void the settlement contract.[16]

Here, Holden-McDaniel is not asking to vacate or void the settlement. It simply disagrees with the defendants about the scope of the

[16] *See Paopao v. State Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 48, 185 P.3d 640 (2008) (denying request to vacate settlement in light of intervening case law); *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 414, 36 P.3d 1065 (2001) (denying request to void settlement based on misrepresentation); *Stottlemyre v. Reed*, 35 Wn. App. 169, 173, 665 P.2d 1383 (1983) (denying request to vacate settlement based on newly discovered injuries); *Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 395–96, 739 P.2d 648 (1987) (same); *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978) (denying request to vacate settlement signed by party's attorney); *Wool Growers Serv. Corp. v. Simcoe Sheep Co.*, 18 Wn.2d 655, 690, 696, 140 P.2d 12 (1943) (recognizing principle of finality but denying affirmative defense of release because the settlement was not supported by full disclosure and consideration); *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 697, 926 P.2d 923 (1996) (recognizing presumption of finality, but voiding release in light of intervening case law); *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 513, 983 P.2d 1193 (1999) (recognizing presumption of finality, but holding the release nevertheless did not shield the defendant).

release — *i.e.*, that by referencing the complaint in the building permit dispute, the settlement precludes claims described in the Claim for Damages, a separate document.

The city and Joint Venture argue that it "makes no sense" for the parties to have precluded future flood claims arising from the permit dispute with the city, but not claims arising from the 1995 flooding lawsuit. *See* JV Br. at 27; City Br. at 27. But that division made imminent sense. The building permit lawsuit settlement involved relocating a culvert across Holden-McDaniel's storage yard in a manner that did not interfere with its use of the yard. But the city was concerned that Holden-McDaniel's solution would lead to more flooding. *See* Op. Br. at 28 n.10. Thus, it made imminent sense for the city to obtain a release of flood claims related to settling the building permit lawsuit on those terms. [17]

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[17] As we discussed in our brief, the building permit lawsuit resulted in a hold-harmless agreement whereby Holden-McDaniel agreed not to sue the city for flood damage arising from the relocated culvert. *See* Op. Br. at 28 n.10. *See also* CP III:1364. Thus, the city was plainly fearful that resolution of the building permit lawsuit could result in future liability for flood damage even if such claims were not alleged in the complaint. In response to this theory, the city argues that "[t]here would have been no reason to redundantly single [*sic*] this category of claims and re-release them, when the City was already held-harmless." City Br. at 29. But this ignores the fact that the parties' settlement expanded upon the hold-harmless agreement (applying it to future equitable claims) and provided additional protection to third parties like the Joint Venture. *See* Op. Br. at 28 n.10. The city also argues that we belatedly raised this argument in our motion for reconsideration. City Br. at 29. But as above, the delay is due to the city's shifting position on summary judgment. There was no need to advance an "alternative" theory of the Claim for Damages until after the parties' oral argument. Prior to that time, the city had not produced a scintilla of evidence that the Claim for Damages was affixed to the complaint, or that the document had any relevance whatsoever. *See supra*, Section A.1.

In turn, it also made imminent sense in 1998 to preserve Holden-McDaniel's remedy for future floods arising from Gleneagle's poorly designed infrastructure. The city was planning to fix Gleneagle's stormwater problems under its contract with the Joint Venture, and was confident it would succeed. *See* Op. Br. at 12; JV Br. at 5–6. Those efforts would later fail, but the trade-off was reasonable in 1998. Thus, releasing some future flood claims, but not all of them, made sense given the other elements of the settlement agreement. [18]

Finally, the defendants fail to address the parties' dealings during the prior lawsuits. As we discussed in our opening brief, the tort claims in

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The parties' extension of the hold-harmless agreement also answers the Joint Venture's concern that the settlement's reference to third parties is meaningless unless Holden-McDaniel intended to release the Joint Venture from claims in the 1995 flooding lawsuit. *See* JV Br. at 27–28. Clearly, Gleneagle was the primary (if not exclusive) contributor to stormwater flowing through Holden-McDaniel's culvert. Thus, just as Holden-McDaniel released the city from liability over the relocated culvert, the settlement's reference to third parties extended that same protection to the Joint Venture. That protection does not apply here because the Joint Venture increased the flow above natural conditions. *See* CP I:62, ¶ 2. *See also* CP II:1362, ¶ 2 (limiting allowable flow to water "naturally" crossing Holden-McDaniel's land). But it explains the text and context of the settlement nonetheless.

[18] The city observes that its promise to end the flooding was not consideration supporting the 1998 settlement contract. *See* City Br. at 28. We agree. The city was obligated to fix the flooding problem under its rezone contract with the Joint Venture. *See* JV Br. at 5–6; Op. Br. at 12, n.4. Thus, its promise reflected a pre-existing duty incapable of serving as valid consideration. *Harris v. Morgensen*, 31 Wn.2d 228, 240, 196 P.2d 317 (1948) ("As a general rule the performance of, or promise to perform an existing legal obligation is not a valid consideration") (internal quotation omitted). Here, we are not suing the city for breach of contract. But the city's promise to fix the flooding problem explains why it would settle the two lawsuits for $750,000 (half of Holden-McDaniel's damages in the building permit dispute) and at the same time leave itself open to potential liability for future floods (*i.e.*, it believed it would make good on its pre-existing promise to the Joint Venture to stop the flooding).

the Claim for Damages mirror Holden-McDaniel's claims against the city in the 1995 flooding lawsuit. *See* Op. Br. at 22–23, n. 6. Under RCW 4.96.020, Washington's notice-of-claim statute, Holden-McDaniel was obliged to present those claims to the city 60 days in advance of suit. Had Holden-McDaniel or any other party believed the Claim for Damages injected tort claims into the building permit dispute, those claims would have violated the 60-day wait period. *See* Op. Br. at 26. Likewise, had the Claim for Damages injected tort claims into the permit dispute, it would have been nonsensical for Holden-McDaniel to later add those same claims against the city in the flooding lawsuit. *Id.* Not surprisingly, the superior court recognized the Claim for Damages' obvious connection to the notice-of-claim statute, describing it conspicuously as "the RCW 4.96.020 Claim for Damages." CP I:34, ¶ 2.[19]

In 1995, everyone understood that the Claim for Damages put the city on notice of Holden-McDaniel's future claims in the flooding lawsuit. This is confirmed by its text, structure, and timing, which track the requirements at RCW 4.96.020. *See* Op. Br. at 24–25. It was only later,

[19] Contrary to court's description, the city argues that the Claim for Damages could not have satisfied RCW 4.96.020 because the statute does not require notice to be filed with the court. *See* City Br. at 5. But the city ignores the obvious. The Claim for Damages was also sent to the city independently of the court filing, which would have complied with the statute. *See* CP I:151–58. Even if the parties had not treated the filed version as sufficient notice of Holden-McDaniel's future claims in the flooding lawsuit, the city's copy clearly satisfied the presentation requirements at RCW 4.96.020.

when the city's attorney discovered a staple, that the city produced any evidence to the contrary. But a staple attached to one version of the documents cannot undo the entirety of the parties' past dealings. Nor can a last-minute change to the city's position. *See supra,* note 7.

It is possible, as the city observes, that not every word of the settlement makes sense. *See* City Br. at 27.[20] But the city bought the peace it desired: total immunity from the remainder of Holden-McDaniel's steep damages in the permit dispute (totaling more than $1.5 million), reprieve from the 1995 flooding lawsuit, and an opportunity to fix Gleneagle's stormwater problems outside the press of litigation. If the city desired more — to preclude future claims for future floods — then it should have bargained for more in 1998. For the reasons above, the superior court's ruling on the affirmative defense of release should be reversed.

B. The Defendants' Arguments on Res Judicata Find No Support in the Law.

The city and Joint Venture join the superior court in its view that the law of res judicata applies to the parties' 1998 settlement contract. *See* City Br. at 37–42; JV Br. at 31–36. But the settlement is not a judgment, a

[20] For example, in addition to referencing permanent and progressive "property damage" — a phrase the city emphasizes repeatedly — the settlement also purported to resolve claims concerning "bodily and/or personal injuries" (which were never alleged) and warranted that Holden-McDaniel did not consult its "physician or surgeon" (a nonsensical warranty under any interpretation). *See* CP III:1107 (first and third paragraphs).

necessary prerequisite for res judicata to attach. *See Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 933 P.3d 108 (2004). Nor was the order dismissing the prior lawsuits on the merits, another prerequisite. *See* CP III:1111 (dismissal "without prejudice"); *Sarbell v. Bank of America Nat. Trust and Sav. Ass'n*, 52 Wn.2d 549, 554, 327 P.2d 436 (1958) ("A dismissal without prejudice is not *res judicata*").

The defendants first argue again about finality and assert that the prior settlement "ended the litigation for all intents and purposes." *See* City Br. at 37–38; JV Br. at 36. But they confuse finality for res judicata and finality for appealing orders from lower tribunals.[21] We do not dispute that the settlement was final on the points it addressed. But we are not appealing it.

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[21] For example, the city misquotes *Gazin v. Heiber*, 8 Wn. App. 104, 113, 504 P.2d 1187 (1972), for the proposition that "'Determination of what constitutes a final judgment in the context of *res judicata* has always been 'a matter of substance and not form.'" City Br. at 38. This sentence does not appear in *Gazin*, which addresses the issue of finality for purposes of appealability, not res judicata. *See also* JV Br. at 36 (also misconstruing *Gazin*). Similarly, the city argues that the order dismissing the prior lawsuits was final because the statute of limitations had run on Holden-McDaniel's claims. *See* City Br. at 38 (citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 44 711 P.2d 295 (1985)). Consistent with *Munden*, we agree that when a dismissal is entered after the limitations period expires, it is appealable — in that sense, it is final. *See* 105 Wn.2d at 44. But like *Gazin*, *Munden* is silent on res judicata.

Indeed, the city's only authority on the issue of finality for res judicata is *Ensley v. Pitcher*, 152 Wn. App. 891, 222 P.3d 99 (2009). *See* City Br. at 38. But the issue in *Ensley* was whether a judicial order on summary judgment gave rise to res judicata despite the lack of a formal judgment. *See* 105 Wn.2d at 899. That issue is very unlike the situation in this case where the settlement was never adopted or endorsed by a court as an order or a judgment. Moreover, by the time the Court of Appeals wrote *Ensley*, the trial court had entered final judgment. *See id.*, at 901–02. Thus, the issue was moot and the cited portion of *Ensley* was dicta.

Next, the city makes equitable arguments for applying res judicata to settlement agreements. *See* City Br. at 41. But regardless of the city's perception of the equities, litigants should be free to resolve disputes as they see fit. If they wish to resolve all claims for all time, they may do so. But if they wish to resolve some claims and reserve others, they should be free to do that, too. Here, the 1998 settlement contained exceptions to the general release. *See* CP III:1107. The city disputes the meaning of those exceptions, but they are exceptions nonetheless. *Id.* To apply principles of res judicata here, where the parties did not agree to extinguish all claims, would offend fundamental principles of freedom of contract.[22]

Finally, the defendants argue that Washington law has long applied res judicata to private settlements. *See* JV Br. at 34–35; City Br. at 38–40. But they do not cite a single persuasive authority. In all but one of the cited decisions, the settlement was embodied in a decree or other judicial order on the merits. They stand for the unassailable but irrelevant proposition that judgments, not contracts, are governed by principles of res judicata.[23]

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[22] *See* 15B Am. Jur. 2d Compromise and Settlement, § 24 (2015) (observing that "A settlement agreement supersedes and extinguishes all preexisting claims the parties intended to settle, and is effective except as to those claims or elements of a claim specifically reserved. Being contractual in nature, a settlement agreement may create new rights between the parties and/or settle future claims between them").

[23] For example, in *In re Phillips' Estate*, the plaintiffs brought suit to set aside a

The defendants' only authority concerning a purely contractual settlement is *Rasmussen v. Allstate Insurance Company*, 45 Wn. App. 635, 637, 726 P.2d 1251 (1986). *See* City Br. at 38–39; JV Br. at 35. But even there the court's reference to res judicata was unnecessary. The unconditional language of the release made clear that all claims of every kind were extinguished. *See Rasmussen*, 45 Wn. App. at 637 (expressly settling all claims, known and unknown, current and future). Given the broad language in the *Rasmussen* release, the Court's discussion of res judicata was dicta.

In all, the defendant's lack of authority confirms the obvious. Settlements are contracts and they are governed by the law of contracts, not res judicata and the law of judgments. *Stottlemyre v. Reed*, 35 Wn. App. 169, 655 P.2d 1383 (1983) ("releases and compromise and settlement agreements are considered to be contracts, their construction is

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settlement that was adopted by judicial decree. *See* 46 Wn.2d 1, 3, 278 P.2d 627 (1955) ("There is also a suit in equity . . . brought by Verona Phillips and the three older Children of S. Ward Phillips, in which they seek the *vacation of the decrees* of distribution. . . .") (emphasis added); *id.*, at 11 (setting aside trial court's order "set[ting] aside the *decrees* of distribution") (emphasis added). Similarly, in *McClure v. Calispell Duck Club*, the settlement was followed by a dismissal with prejudice. *See* 157 Wash. 136, 288 P. 217 (1930) ("Upon this stipulation a judgment of dismissal with prejudice was entered"). Thus, *Phillips' Estate* stands for proposition judicial decrees may give rise to res judicata. And *McClure* is in accord with the unremarkable rule of law that "[a] dismissal with prejudice as part of a settlement . . . [is] a final judgment and *res judicata* in a subsequent action." *State Dept. of Ecology v. Yakima Reservation Irr. Dist.*, 121 Wn.2d 257, 290, 850 P.2d 1306 (1993). Neither principle applies here where the court did not endorse the settlement and the prior lawsuits were dismissed without prejudice.

governed by the legal principles applicable to contracts"). Even the etymology of the phrase "res judicata" — literally "a thing adjudicated" — confirms that the doctrine applies to judgments, not contracts. *See* Black's Law Dictionary at 1425 (9th ed. 2009). The court's ruling on res judicata should be reversed.

C. The Defendants Fail to Support the Superior Court's Novel Ruling on Damages, Which No Party Advanced Below.

Like the superior court, the defendants next assert that Holden-McDaniel has not suffered compensable injury because the frequency of flooding is less today than it was in 1995. *See* City Br. at 42–47; JV Br. at 46–48. *See also* CP I:59–61 (Conclusion of Law No. XX). But the defendants did not advance that theory on summary judgment. Instead, the court developed this rationale on its own. In doing so, it attempted to interpret the report of Dr. Leytham, one of Holden-McDaniel's stormwater experts, without the aid of advocacy or briefing by any party.[24] Several responses are in order.

[24] Attempting to align its current position with its position below, the Joint Venture cites portions of the city's summary judgment motions. *See* JV Br. at 39 n.17. But the city's motions did not advance the court's stated rationale for dismissing Holden-McDaniel's damages — namely, that they were precluded by the "three-year baseline" measured from 1995. *See* CP I:60, ¶ 2. Instead, the city argued that the triangle pond improved things vis-à-vis the state of affairs in 1998, when the settlement was signed. *See* CP VII:2577 (arguing that "there is absolutely no credibility to a claim that the City made things worse—*after 1998*—by adding an additional facility) (emphasis added).

First, the city argues that Dr. Leytham "admitted that he was *unable* to say that the City's 2002 improvements made things worse." City Br. at 43 (emphasis in original). But the city relies on Dr. Leytham's draft deposition transcript, which he later clarified and explained. *See* CP I:409–21. In his declaration, Dr. Leytham clearly testified that the current system, inclusive of the city's 2002 improvements, increased flooding to approximately every ten years (more that the estimated fifteen-year frequency before that time).[25] *See* CP III:1186; CP 1:410–11, ¶¶ 7–8. Thus, the city's road improvements and construction of the triangle pond in 2002 clearly "made things worse" for Holden-McDaniel. This was further confirmed by the city's 30(b)(6) representative, who testified that while the triangle pond is adequate to handle runoff from 67th, it is not

[25] The city cites *McCormick v. Lake Washington School District*, 99 Wn. App. 107, 992 P.2d 511 (1999), for the proposition that "affidavits contradicting depositions cannot be used to create issues of fact." City Br. at 43. But unlike *McCormick*, the city seeks to bind Dr. Leytham to his draft deposition transcript, which he had not reviewed when the city filed its motion for summary judgment. *See* CP I:409. Even if the transcript had been final, Dr. Leytham was not barred from filing a subsequent declaration explaining and clarifying this testimony. *See Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 175, 817 P.2d 861 (1991) (allowing supplemental testimony that was not in "flat contradiction" to prior testimony, and which explained the testimony); *McCormick, supra*, 99 Wn. App. at 111 (rule barring subsequent testimony is reserved for situations where it "merely contradicts, *without explanation*, previously given testimony") (emphasis added). Dr. Leytham's declaration subsequent to his deposition provided a cogent explanation for his disagreement with the city's characterization of his draft transcript. *See* CP I:409–412. The city made no effort to resume Dr. Leytham's deposition after receiving corrections to the draft.

adequate to handle stormwater from Gleneagle. *See* CP II:626 (lines 2–7).[26]

Second, while the frequency of flooding may be less today than it was in 1995, that does not erase the defendants' contribution to the floods that persist to this day. Subsequent to 1995, Holden-McDaniel relocated the culvert across its yard and re-installed it at a steeper slope, thereby reducing the flooding. *See* Op. Br. at 38. But the defendants also increased the flow with more development within Gleneagle and the city's botched triangle pond. *See* CP III:1182–90. Thus, there is more flooding today (not less) than there would have been had the defendants capped their discharge at 1995 levels. They are liable for the result.

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[26] Citing Dr. Leytham's qualified conclusion that Gleneagle's "post-Sector 1 detention ponds perform satisfactorily up to the 25-year event," CP III:1187, the city also argues that its "good public works [*i.e.,* the triangle pond] completely negated the impact of private development on the Partnership." City Br. at 13. But the city confuses its terminology. The city's triangle pond is not a detention pond — it does not "detain" water like Gleneagle's ponds W1 and W2, and then release that water to a downstream location. Rather, it is an infiltration or retention pond — it was designed to retain stormwater and allow it to infiltrate into the ground. *See* CP III:1186. *See also* City Br. at 11, ¶ 2 (referring to the triangle pond as a "retention" pond, not a "detention" pond). It is clear from Dr. Leytham's report and subsequent declaration that the triangle pond increased the rate of flooding of Holden-McDaniel's land. *See id.* (ten-year frequency); CP 1:410, ¶ 3. The impact of Gleneagle's detention ponds are treated separately. *See* CP III:1187.

Similarly, the city alleges that Dr. Leytham admitted that the triangle pond "was a net benefit, because the water in it would otherwise continue toward the Partnership's property." City Br. at 43. But the triangle pond was only one part of a larger set of modifications, and the city did not ask Dr. Leytham whether the entire package of improvements, including the piping leading to and from the triangle pond, was a net benefit. *See* CP 1:173 (lines 12–14). In contrast, Dr. Leytham testified in his declaration and report that the 2002 work *in toto* made the situation worse. *See* CP I:412, ¶ 11; CP III:1186.

The defendants dispute this issue on substantive, procedural, and relevance grounds. Substantively, they attribute the post-1995 decrease in flood frequency to the stormwater system as a whole, not Holden McDaniel's relocated culvert. *See* JV Br. at 37; City Br. at 43–44. At best, their argument creates an issue of fact precluding summary judgment. While Dr. Leytham did analyze the Gleneagle system as a whole, it is clear from his calculations that the culvert was the only factor associated with a decrease in flooding after 1995.

To illustrate the effect of the culvert's new slope, we are reproducing Figure 1 to our motion for reconsideration, in which we included the graph appended to Dr. Leytham's report. *See* Supp. CP X:2794; CP 1188. In the figure below, the y-axis represents the rate of discharge from Gleneagle in cfs, and the x-axis represents storms of increasing magnitude.[27] The graph also depicts the various discharge rates under Dr. Leytham's scenarios 1, 2, and 3 (represented by the blue, green, and red curved lines, respectively). For each scenario, the curve represents

[27] The Court will note that the x-axis in the figure below has both top and bottom notations. For example, the numerals 5, 20, and 100 at the top of the figure correlate with the numerals 20, 5, and 1 at the bottom. The top numbers refer to the storm's return period (*e.g.*, the 5-, 20-, or 100-year storm) while the bottom numbers reflect the probability that the storm will recur in a given year. For example, a 5-year storm has a 20% chance of occurring in a given year, a 20-year storm has a 5% chance, and a 100-year storm has a 1% chance.

the amount of water flowing out Gleneagle (the y-axis) during a storm of that size (the x-axis).

Figure 1

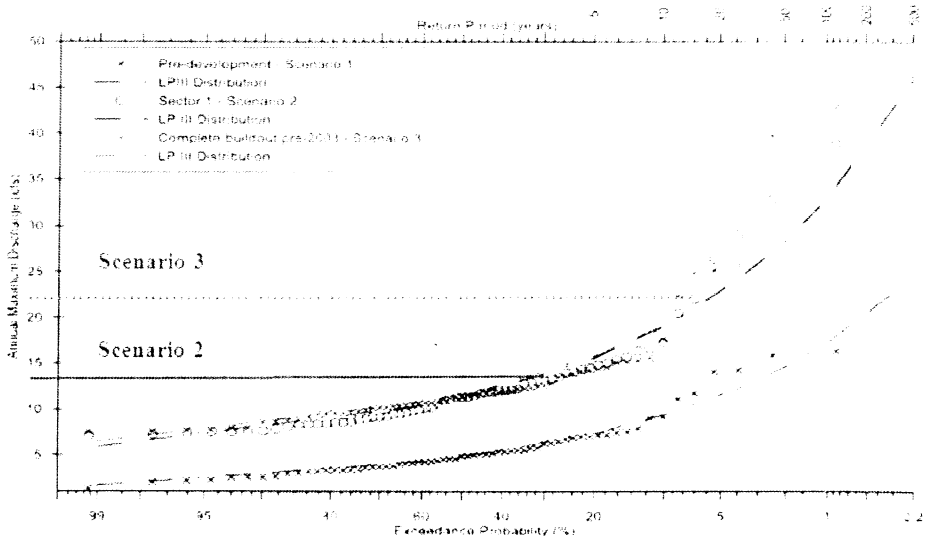

Figure 1: Annual Frequency Analysis, Gleneagle Development Site (based on HSPF simulations Oct 1948 - Sep 2013)

In his report, Dr. Leytham explains that under scenarios 2 and 3 (representing pre- and post-1995 conditions) flooding ensues when Gleneagle's discharge exceeds the conveyance capacity of Holden-McDaniel's culvert. *See* CP III:1185. Thus, to see the effect of the culvert's new slope after 1995, we have added the horizontal solid green line (representing the capacity of the original pipe — 13 cfs), and the horizontal dotted green line (representing the capacity of the relocated pipe — 22 cfs). *See* CP III:1185. Critically, both lines intersect the curves for both scenarios at exactly the same point — *i.e.*, the line representing

the old culvert intersects both curves at the return period for pre-1995 flooding (every three years) and the line for the new culvert intersects both curves at the return period for post-1995 flooding (every 15 years). *See* CP III:1185–86. Thus, it was the relocation of the culvert, not the construction of pond W2 or any other improvements after 1995, that reduced the frequency of flooding. The superior court erred not only by inventing a theory to dismiss Holden-McDaniel's damages, but also in attempting to resolve complex, disputed, material facts in the process.

Procedurally, the city asserts that our argument about the relocated pipe is "a lawyer's claim" that was raised for the first time on reconsideration. *See* City Br. at 44. *See also* JV Br. at 37. But the lack of expert testimony on this point is not surprising. Not a single party to this dispute ever advanced the superior court's rationale for rejecting Holden-McDaniel's damages. *See supra*, note 24. And no expert was ever asked to isolate the cause of the reduction between 1995 and 1998 (due, in large part, to the city's prior position, *see supra*, note 7). Instead, the superior court chose that baseline on its own, erroneous view of the facts and of the parties' 1998 settlement. It did so without the aid of briefing or expert analysis. Holden-McDaniel should not be precluded from raising this issue simply because the court departed from the defendants' stated grounds for

summary judgment and divined its own theory for rejecting Holden-McDaniel's damages.[28]

On the issue of relevance, the Joint Venture argues that even if Holden-McDaniel reduced the frequency of flooding, this lawsuit is still precluded because, regardless of the cause, flooding is less frequent today than it was in 1995. *See* JV Br. at 38–39. On this theory, the city purchased an absolute right to flood Holden-McDaniel's property every three years when it settled the prior lawsuits. *See* JV Br. at 38; CP I:60, ¶ 2. In other words, even if Holden-McDaniel could prevent the flooding entirely (*e.g.,* by installing a super-sized culvert to convey all of Gleneagle's stormwater to the BNSF ditch), the defendants could simply turn on the fire hoses and continue to flood Holden-McDaniel every three years. And even if Holden-McDaniel had used the $750,000 to protect itself from flooding (as the city argues it should have, *see* City Br. at 41) doing so would have been a fool's errand.

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[28] The city also argues that even if the new culvert improves the situation, the city deserves the credit for requiring Holden-McDaniel to move the culvert in the first place. *See* City Br. at 44. But while the city attempted to force Holden-McDaniel to relocate the culvert, and to enlarge it so much that it would have destroyed the utility of Holden-McDaniel's yard, Holden-McDaniel resisted with a lawsuit. *See* CP V:2038–40, ¶¶7–11. Later, Holden-McDaniel agreed to move the pipe. *See* CP III:1364. But that was an agreement — not an exercise of the city's regulatory authority — and the agreement did not require Holden-McDaniel to re-install the pipe at a steeper grade. That change may only be credited to Holden-McDaniel.

This Court should reject the Joint Venture's radical view of the settlement. At most, the settlement allowed the city and the Joint Venture to continue what they were doing in 1995 — namely, to discharge at 1995 levels. The settlement did not allow them to also increase the flow from Gleneagle every time Holden-McDaniel attempted to convey more water safely across its property. Prescient or not, Holden-McDaniel reduced the flooding when it relocated the pipe, but the defendants also increased the flow of stormwater above 1995 levels and they are liable for the result.

Last, the city argues that Holden-McDaniel cannot prove causation because it cannot link any particular flood to the city's botched triangle pond. *See* City Br. at 46. On this issue, it misunderstands the scope of its own liability.[29] More importantly, it ignores the record. In January of 2009, Joe Holden and Lee McDaniel watched the water gushing from the city's new catch basins, installed in 2002 with the triangle pond, and inundating their property. *See* CP V:2041, ¶ 15; CP II:668–71. Lee McDaniel's recollection is especially vivid:

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[29] The city's focus on the triangle pond appears to presume that it cannot be liable for Gleneagle's on-site stormwater system, including ponds W1 and W2. But the city made that argument below, *see* CP VII:2551–52, to which Holden-McDaniel compiled a detailed catalog of the city's tangled relationship with the Joint Venture and design of Gleneagle's on- and off-site stormwater system. *See* Supp. CP X:2827–38. The superior court did not rule on that issue and the city does not raise it here. For purposes of this appeal, and like the Joint Venture (*see supra*, note 3), the city may be held liable for all of Gleneagle, not just the triangle pond.

> The streets were full. The water was pumping up out of the catch basins — shooting — coming up out of the catch basins, the pressure, and then ultimately running in the street. I mean, they were right near — it was right along the property and the curb, and just pumping out of there and right into our yard.

CP II:679 (lines 5–11). As Holden-McDaniel's meteorologist would later observe, the storm that generated this event was decidedly less than extraordinary. *See* CP II:814 (two- to three-year event). The city hired its own expert to argue this event was an "act of God," but that theory was rejected. *See* CP I:54 (Conclusion of Law No. VII).[30]

Similarly, a member of the local homeowner's association observed water from the triangle impacting Holden-McDaniel's property even when Gleneagle's other stormwater ponds were far from overflowing. *See* Supp. CP XII:2933, ¶5.[31] The city cannot credibly argue that these events had nothing to do with its botched triangle pond. [32]

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[30] The city also suggests that the lack of flooding in the years following the triangle pond's construction is a testament to its effectiveness at preventing floods. *See* City Br. at 11. But the lack of floods between 2002 and 2009 was due to a string of unusually mild winters, not to the botched design of the triangle pond. *See* CP II:812–29.

[31] On January 4, 2016, Holden-McDaniel filed its second supplemental designations of clerk's papers, identifying this additional declaration. Pursuant to note 31 of our reply brief, we are filing this amended brief to fill in the citation.

[32] Indeed, as we observed in our opening brief, *see* Op. Br. at 14, any flooding from the triangle pond is clearly attributable to the city. As observed by Tom Holz, the pond was constructed without an overflow path in violation of Washington Department of Ecology's Stormwater Manual. *See* CP I:73–74, ¶¶ 4–7. Thus, rather than flow to some other, safer location, excess water that overwhelms the pond's infiltration capacity is directed to Holden-McDaniel's land. *See id.* The Joint Venture disputes Mr. Holz's analysis on this point. *See* JV Br. at 18 n.14. In support it cites the declaration of the city's engineer, who observes that the pond contains a mechanism routing excess water

Holden-McDaniel has raised material issues of fact on causation and this Court should reverse the superior court's ruling on damages. [33]

D. The City and Joint Venture Fail to Defend the Dismissal of Holden-McDaniel's Intentional Tort Claims.

In our opening brief, we argued that the city and Joint Venture knew the discharge from Gleneagle was greater than the capacity of the culvert crossing Holden-McDaniel's property. *See* Op. Br. at 41–42. On that basis, we argued that the superior court erred in dismissing Holden-McDaniel's intentional trespass and nuisance claims on the prima facie element of intent. *See* CP I:55 (Conclusion of Law No. VII). By directing more stormwater to the culvert than it could bear, the defendants were, at the very least, "substantially certain" that flooding would ensue. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 689, 709 P.2d (1985).

Now, the city and Joint Venture all but confirm our argument. For example, the Joint Venture argues that the flooding was so inevitable that

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into the earth directly beneath the triangle pond. *See id.* (citing CP I:216). But whether that mechanism complies with the Department of Ecology's standards has yet to be adjudicated.

[33] In addition to its general arguments on causation, the city also disputes specific elements of Holden-McDaniel's damages. *See* City Br. at 45–46 (discussing stigma damages, Holden-McDaniel's on-site infiltration system and cleanup costs, and the BlueScope lease). But the city did not seek summary judgment on Holden-McDaniel's claims concerning its infiltration system and clean-up costs. Holden-McDaniel is no longer pursuing its claim for stigma damages. And with respect to the BlueScope lease, the city argues that "[t]he Partnership offers no evidence or argument that it would not have sustained lost rent, or that BlueScope would have stayed, under 1995 conditions." *Id.* At 45. But for all of the reasons above, that is a false comparison premised on the superior court's novel, unsolicited, and erroneous interpretation of the parties' 1998 settlement and Dr. Leytham's expert report.

it paid the city to take care of the problem after Gleneagle was built. *See* JV Br. at 45. But it is axiomatic that the Joint Venture cannot contract away its tort liability. [34] As for the city, it does not dispute that it wrote the document authorizing Gleneagle to discharge more than the culvert could bear[35] (even if it did believe the system was designed to a 100-year standard, *see* City Br. at 48). The city can hardly claim that by doing so, it did not know flooding would ensue.

Tellingly, the defendants' arguments do not negate the prima facie element of intent, the only issue for which they sought summary judgment below. *See* CP VII:2546–47; CP VII:2521–24. Instead, they raise affirmative defenses — *e.g.*, that they met regulatory standards,[36] that Holden-McDaniel consented to the floods,[37] and that the flooding was

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[34] Building on its argument that it may contract away its tort liability, the Joint Venture argues that it could not have intended to flood Holden-McDaniel because, as we discussed in our opening brief, it presented a low-cost plan to the city to solve the flooding problem. *See* JV Br. at 45 (arguing that "[i]f nothing else, this should satisfy the Court that WRJV maximized its efforts to design and install a stormwater system that complied with all applicable codes and requirements, but it did not own and could not modify the downstream system"). But the solution did not involve the downstream system — it involved expanding pond W2 within Gleneagle. *See* CP II:780. Moreover, just as the Joint Venture may not contract away its tort liability, it may not resort to self-help. If downstream improvements were necessary, but it lacked the authority to carry them out, the Joint Venture should not have built Gleneagle. At the very least, the Joint Venture cannot rely on self-help to negate the prima facie element of intent.

[35] *See* Op. Br. at 41, n. 15; CP IV:1577.

[36] *See* JV Br. at 20–21; City Br. at 48.

[37] *See* JV Br. at 44 (arguing that Holden-McDaniel agreed to accept Gleneagle's stormwater in the acknowledgement of prescriptive easement, CP III:1362).

unavoidable if Gleneagle was to be built.[38] They also blame Holden-McDaniel for resisting their plans. But none of that negates intent.

Finally, the Joint Venture argues that Holden-McDaniel failed to plead intentional trespass and nuisance in its complaint. JV Br. at 40–44. But Holden-McDaniel clearly argued those claims in its response to the city's prior motion for summary judgment in 2012. *See* Supp. CP X:2804; Supp. CP X:2911–15. That alone was sufficient to put the defendants on notice and to preserve Holden-McDaniel's intentional tort claims for trial. *See Shoening v. Grays Harbor Comm. Hosp.*, 40 Wn. App. 331, 337, 698 P.2d 593 (1985) (sufficient to clarify claims on summary judgment).

The only argument about intent is provided by the city when it argues that Holden-McDaniel's claims are precluded by *Hurley v. Port Blakely Tree Farms, L.P.*, 182 Wn. App. 753, 332 P.3d 469 (2014). *See* City Br. at 47. But again, the city confuses the issues. In *Hurley*, the plaintiffs' intentional tort claims stemmed from a landslide, which they alleged was caused by clear-cutting a hill near their homes. The court rejected their trespass claim on the basis that even if the timber company intended to cut the trees, it did not intend to cause the landslide. *See*

[38] *See, e.g.*, JV Br. at 4, 10 n.8, & 15 (arguing that the culvert crossing Holden-McDaniel's property was inadequate to handle stormwater from Gleneagle); JV Br. at 15 n.12 (arguing that the Joint Venture could not have reduced the total volume of runoff due to Gleneagle's impermeable soils).

Hurley, 182 Wn. App. at 772. In contrast, there is evidence that the city and Joint Venture knew Gleneagle would flood Holden-McDaniel's land by directing too much water to its culvert. *See* Op. Br. at 41–42. The city's reliance on *Hurley* is misplaced.

Regardless of whether the city and Joint Venture believed their actions were privileged; regardless of their alleged attempts to prevent the flooding under alternatives that were never carried out; they knew Gleneagle would flood Holden-McDaniel's land. They may raise their defenses at trial, but they are not entitled to summary judgment on the prima facie element of intent.

E. The Defendants Fail to Justify the Superior Court's Exclusion of the BlueScope Letter.

In our opening brief, we challenged the superior court's exclusion of a letter from BlueScope's attorney to Holden-McDaniel as hearsay. *See* CP I:54 (Conclusion of Law No. III). The letter states that BlueScope broke its lease because of flooding. CP II:693–96. The letter is an admissible business record under RCW 5.45.020. *See* Op. Br. at 48–49.

The city and Joint Venture defend the court's ruling but cite no authority for it.[39] Instead, the Joint Venture argues that BlueScope "ceased

[39] The city and Joint Venture rely on two cases for the proposition that letters by third parties can never be business records under RCW 5.45.020. *See* City Br. at 48 (citing *Moss v. Vadman*, 77 Wn.2d 396, 463 P.2d 159 (1969) and *Boyer v. State*, 19

operations" due to the economy, "not because of flooding." JV Br. at 47. But that is a red herring. Even though the economy forced BlueScope to stop production in 2011, that caused Holden-McDaniel no harm; BlueScope continued its lease payments. It was not until later, in September of 2012, that it began withholding lease payments.[40] The factual issue, therefore, is not why did production stop, but why did BlueScope stop making payments (the decision that impacted Holden-McDaniel)? On that issue, BlueScope's 30(b)(6) representative confirmed he was not aware of any reasons for the broken lease other than the reasons in the letter, which included flooding. *See* CP II:703 (lines 21–25). This was not surprising. The flooding clearly impacted BlueScope's operations. *See* CP II:701–702 (lines 57:23–58:3); CP II:830–32.

In turn, the city argues categorically that "lawyer letters" are not business records and by Holden-McDaniel's logic, "almost nothing is hearsay" — including books like *Jurassic Park*. *See* City Br. at 49. To be clear, we are not arguing that commercial works of fiction (about

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Wn.2d 134, 142 P.2d 250 (1943)); JV Br. at 46 (same). But in *Moss*, the letters were excluded because they were cumulative, not because they were hearsay. *See* 77 Wn.2d at 404. In *Boyer*, the court neither cited nor discussed the business records rule. *See* 19 Wn.2d at 146. Thus, these cases are irrelevant to this Court's review of the BlueScope letter.

[40] *See, e.g.*, CP II:693 (letter dated September 12, 2012, refusing to make further payments); CP II:699 (lines 8–14; when shuttered plant in 2011 intended to continue making lease payments); CP II:704 (lines 21–24; 2011 financial analyses assessing expenses of closing facility included continuing to make lease payments); CP II:705 (lines 22–25; same); CP II:707 (same); CP II:709–11 (same).

dinosaurs) are business records. Nor are we arguing that every letter satisfies RCW 5.45.020. But BlueScope's 30(b)(6) representative authenticated the letter. *See* CP II:702–03 (lines 58:5–59:3).[41] The letter purports to convey BlueScope's real-world reasons for breaking its lease. *See* CP II:693–96. And despite the city's pessimistic view of our profession, BlueScope's attorney was duty-bound to convey its reason for withholding lease payments. *See* RPC 4.1(a).[42] The superior court's evidentiary ruling on the BlueScope letter should be reversed.

F. The Joint Venture Fails to Justify the Superior Court's Use of the Two-Year Statute of Limitations in Violation of Clear Supreme Court Precedent.

In our opening brief, we challenged the superior court's application of Washington's two-year statute of limitations to Holden-McDaniel's negligent trespass claim. *See* Op. Br. at 49–50; CP I:55 (Conclusion of Law No. IX). We relied on *Zimmer v. Stephenson*, in which the Court held that the three-year statute applies to negligent trespass. *See* 66 Wn.2d 477,

[41] We also note that while it briefly argues the authenticity issue, *see* City Br. at 50, the city did not challenge the letter's authenticity below. Thus, it is not properly raised on appeal and should not be considered at this late stage when Holden-McDaniel has no opportunity to cure any defects with regard to the letter's authenticity. *See* RAP 2.5(a).

[42] The city argues that the letter is the product of over-zealous posturing during negotiations between counsel. *See* City Br. at 49. Clearly, lawyers are allowed some leeway to embellish (*e.g.*, for estimates of price and value). *See* RPC 4.1 (comment 2). But such leeway does not extend to material facts at the heart of the transaction. *Id.* The city's suggestion that BlueScope's lawyer fabricated its reason for breaking the lease almost certainly could constitute an ethical violation and, most likely, fraud. Such conduct should not be presumed of any attorney, including BlueScope's.

483, 403 P.2d 343 (1965) ("[P]laintiff alleged an action for negligent trespass . . . . [W]e conclude that this action should be governed by the 3-year statute of limitations").

In response, the Joint Venture relies on two Court of Appeals decisions that stated or assumed that Washington's two-year statute at RCW 4.16.130 applies to negligent trespass. *See* JV Br. at 48 (citing *Wolfe v. State Dep't of Transp.*, 173 Wn. App. 302, 293 P.3d 1244 (2013) and *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006)). Notwithstanding these opinions (which do not even cite *Zimmer*), this Court is bound by Supreme Court precedent. The superior court's holding on this issue should be reversed.

III. REPLY TO THE BNSF RAILWAY COMPANY

In our opening brief, we explained that BNSF's liability arises from: (1) its authorizing the City of Arlington to discharge Gleneagle's excess stormwater into the ditch along the BNSF tracks on the west side of Holden-McDaniel's property; and (2) its failure to maintain the ditch. *See* Op. Br. at 42–43. Due to its dilapidated state, the ditch would fill with Gleneagle's water and spill onto Holden-McDaniel's land. The flooding continued until 2009 when Holden-McDaniel built a berm on its land to prevent the overflow. *See id.*, at 43.

A. BNSF Materially Misrepresents the Summary Judgment Record.

In its response, BNSF makes several false statements that materially misrepresent the summary judgment record. First, BNSF asserts that its ditch was not constructed by a third party with BNSF's consent. *See* BNSF Br. at 10–11 ("BNSF owns and operates its own ditches and there are no artificial conditions on its property or consent to conditions created by third parties on its property"). This statement is false. In 1975, BNSF signed an agreement with the J.H. Baxter Company allowing Baxter to construct the drainage ditch at issue in this lawsuit. *See* CP VII:2612 (Agreement dated Jan. 16, 1975 — authorizing Baxter to "construct, maintain and use a drainage ditch . . . upon the right of way of the Railroad located at Edgecomb, Snohomish County, Washington").

Second, BNSF asserts that it does not currently have an agreement with the City of Arlington allowing the city to discharge stormwater to the ditch. *See* BNSF Br. at 5. Again, this is false. In 1998, BNSF granted a license to the city allowing the city to discharge stormwater into and through a new pipe to the ditch. *See* CP II:769 (Pipe Line License dated Jan. 28, 1999 — providing, *inter alia*, that "[the city] shall use the PIPE LINE solely for carrying STORM WATER and shall not use it to carry any other commodity or for any other purpose whatsoever") (emphasis in

original). BNSF authorized the city to discharge stormwater through the pipe and, *a fortiori*, into the ditch at the end of the pipe. BNSF can hardly pretend that it thought the water would vanish before emerging in the ditch a few feet away.[43]

Third, BNSF asserts that "[n]o evidence exists that the BNSF ditch does not maintain its original efficacy when it was constructed over a half century ago." BNSF Br. at 12. This statement is false and patently so. Plaintiff submitted evidence showing that the ditch has not been maintained and, as a result, it has become clogged with soil, trees, and other debris. *See, e.g.*, CP V:2060–61 (declaration of Tom Holz — describing the dilapidated nature of the ditch and attaching photo); CP III:1198 (same).

In all, the ditch — an artificial condition — was created by a third party with BNSF's consent (CP VII:2612); BNSF has and continues to authorize the City of Arlington to discharge stormwater to the ditch (CP II:769; CP VII:2615–18); and BNSF has allowed the ditch to become dilapidated and clogged with debris, thus failing to maintain its original efficacy (*see, e.g.*, CP V:2060–61).

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[43] Unlike BNSF's earlier license to the city which expired in 1990, *see* BNSF Br. at 4–5, the 1998 pipeline license is still in effect. *See* CP II:641 (lines 3–4). Moreover, BNSF has admitted that it made absolutely no inquiry into the ditch's ability to convey or infiltrate Gleneagle's stormwater before signing its various leases with the city. *See* CP II:639 (lines 10–15).

B. The Common Enemy Doctrine Does Not Shield BNSF.

BNSF argues that the common enemy doctrine immunizes it from liability and that it has no duty to maintain its ditch or to prevent it from overflowing onto adjacent properties. *See* BNSF Br. at 9–10, 12–17. BNSF's reliance on the common enemy doctrine is misplaced.

As BNSF notes, the common enemy doctrine has governed the law of surface water since statehood. *See Cass v. Dicks*, 14 Wash. 75, 78, 4 P. 113 (1896). "In its strictest form, the common enemy doctrine allows landowners to dispose of unwanted surface water in any way they see fit, without liability for resulting damage to one's neighbor." *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626 (1999). More precisely, "[i]f a landowner 'in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is *damnum absque injuria*." *Halvorson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999) (quoting *Cass, supra,* 14 Wash. at 78).

But not all waters are "surface waters" under the common enemy doctrine. Instead, surface waters include only those diffuse, unconfined waters that spread out over the ground in an uncontrolled manner — this is

why they are called "outlaw" waters.[44] In contrast, surface waters do not include waters that have been collected and channelized. *See, e.g., Pruitt v. Douglas County*, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003) ("Surface water is 'waters of a casual or vagrant character having a temporary source, and which diffuse themselves over the surface of the ground, following no definite course or defined channel'") (quoting *Dahlgren v. Chicago, Milwaukee & Puget Sound Ry.*, 85 Wash. 395, 405, 148 P. 567 (1915)).[45] In Washington, the characterization of surface waters is a question of fact. *Fitzpatrick v. Okanogan County,* 143 Wn. App. 288, 294, 177 P.3d 716 (2008), *aff'd at* 169 Wn.2d 598, 238 P.3d 1129 (2010) ("If there is a dispute regarding the 'nature or classification' of the water at issue, it is a question of fact and therefore improper for resolution on summary judgment") (quoting *Snohomish County v. Postema*, 95 Wn. App. 817, 820, 978 P.2d 1101 (1998)).

Here, the waters entering the BNSF ditch are not diffuse surface waters. Rather than spreading out over the ground in an uncontrolled

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[44] *See, e.g., Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 607, 238 P.3d 1129 (2010) ("Water that meets the definition of surface water 'is regarded as an outlaw and a common enemy against which anyone may defend himself[.]'") (quoting *Cass, supra,* 14 Wash. at 78).

[45] *See also Grundy v. Thurston County*, 155 Wn.2d 1, 10, 117 P.3d 1089 (2005) ("'The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in its natural course or collected into and forming a definite and identifiable body, such as a lake or pond'") (quoting *Halverson v. Skagit County*, 139 Wn.2d 1, 15, 983 P.2d 643 (1999)).

manner, stormwater flowing down from Gleneagle enters the BNSF ditch through a confined channel. Indeed, in an aerial photograph submitted by BNSF's attorney, the channel flowing down from Gleneagle, across Holden-McDaniel's property, and into the BNSF ditch was clearly visible as early as 1967. *See* CP VII:2596–97. Since that time, the conveyance has only become more channelized with additions to the BNSF ditch, installation of culverts and pipes, and ponds constructed by the Joint Venture and the City of Arlington. Under these circumstances — where there is no evidence that the ditch defends BNSF from diffuse surface waters — the common enemy doctrine does not apply. Moreover, where, as here, there is a factual dispute regarding the nature of the waters, summary judgment is precluded. *See Fitzpatrick, supra,* 143 Wn. App. at 288.[46]

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[46] BNSF appears to acknowledge that the ditch does not defend its property from diffuse surface waters. Instead, it invokes the common enemy doctrine on the confusing basis that the ditch itself "diffuses" Gleneagle's stormwater. *See, e.g.*, BNSF Br. at 16–17 (arguing that "[t]he ditch operated for BNSF's benefit to *diffuse* water that was channeled to its property") (emphasis added); *id.*, at 15 (arguing that the ditch "collected and *diffused* surface water in a greater manner than natural diffusion of the water table") (emphasis added). Not only are these statements unsupported by any cited authority, they are premised on a fundamental misunderstanding of the verb "diffuse." The term does not simply mean "to dispose" or to "carry away," as BNSF uses it in its brief. Instead, "diffuse" means "to pour out and permit or cause to *spread freely* (as a fluid out of a container)." Webster's Third New International Dictionary, Unabridged at 630 (2002) (emphasis added). *Accord Sund v. Keating*, 43 Wn.2d 36, 45, 259 P.2d 1113 (1953) (holding that waters spilling over the banks of a stream, and allowed to spread across the ground in an unconfined manner, are "diffused" for purposes of the law of surface water). In this way, BNSF's invocation of the common enemy doctrine appears to be the product of a simple definitional misunderstanding. The ditch does not diffuse surface water by

C. BNSF May Be Liable for Failure to Maintain the Ditch.

Outside the common enemy doctrine, ordinary negligence principles apply to Holden-McDaniel's claims against BNSF. In particular, BNSF has a duty to prevent injury to third persons from an artificial condition on its land — here, the drainage ditch that BNSF leased to the City of Arlington for disposal of Gleneagle's stormwater.

In our opening brief, we relied on the Restatement (Second) of Torts to demonstrate that BNSF has a duty to maintain the ditch. *See* Op. Br. at 45–46. Sections 364 and 365 of the Restatement provide, in essence, that a person may be liable to third parties for injuries sustained by the disrepair of a structure or other artificial condition. *See* Restatement (Second) of Torts, §§ 364, 365 (1965). In Washington, courts have applied the reasoning of these provisions to establish liability for defective or ill-maintained stormwater infrastructure. *See Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998) (county vulnerable to liability for water spilling out of drainage system onto adjoining land); *Rothweiler v. Clark County*, 108 Wn. App. 91, 29 P.3d 758 (2001) (county vulnerable to liability for failure to maintain original efficacy of artificial drain).

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allowing it to spill out and flow freely across the ground — it collects non-diffuse water from, and discharges it into, a defined channel. *See* CP VII:2596.

BNSF makes two arguments against these authorities. First, BNSF argues that this Court should disregard the Restatement because it conflicts with the common enemy doctrine. *See* BNSF Br. at 10. But as discussed above, that doctrine has no applicability where, as here, the waters entering the ditch from Gleneagle are not diffuse surface waters. Moreover, the Restatement is consistent with the established law of Washington. The release of stormwater from BNSF's dilapidated ditch is no different from the escape of horses from a dilapidated corral[47], or trees falling onto adjacent land after a logging operation.[48] Where injury results from an artificial condition on the defendant's land, the defendant may be held liable upon the principles in the Restatement.

Second, BNSF attempts to distinguish *Phillips* and *Rothweiler*. *See* BNSF Br. at 11–12. For example, BNSF argues against *Phillips* on the basis that the county volunteered its land for a portion of the developer's stormwater system. In contrast, BNSF argues that it "had no involvement in the design, creation, or maintenance of Gleneagle's stormwater system." *Id.*, at 11. But this is demonstrably false. BNSF admits it leased the ditch to the City of Arlington for the disposal of Gleneagle's

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[47] *See Misterek v. Wash. Mineral Products, Inc.*, 85 Wn.2d 166, 170, 531 P.2d 805 (1975) (landowner liable for horses escaping from dilapidated fence).

[48] *See Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 750, 375 P.2d 487 (1962) (holding that landowner's liability for fallen trees on adjacent land, after logging operation, was a jury question).

stormwater. *Id.*, at 4. Later, in 1999, BNSF authorized the city to install a culvert through the tracks to allow more stormwater to reach the ditch. *See* CP II:769. Just as the county in *Phillips* was vulnerable to liability for volunteering its land for the developer's stormwater system, BNSF is potentially liable for volunteering its land for a portion of Gleneagle's. *See Phillips, supra,* 136 Wn.2d at 968 ("If it is proven at trial that the County participated in the creation of the problem, it may participate in the solution").

In turn, BNSF tries to distinguish *Rothweiler* on the basis that the defendant was a municipality, not the railroad. *See* BNSF Br. at 11–12. But while the defendant was a county, the rule in *Rothweiler* — that a municipality "has the duty, once it constructs a drain, to exercise reasonable care to maintain the drain's original efficacy" — traces its origin to the general law of nuisance.

The rule in *Rothweiler* about maintaining drainage was first announced in *Ronkosky v. City of Tacoma*, 71 Wash. 148, 128 P. 2 (1912). *See Rothweiler, supra*, 108 Wn. App. at 104. *Ronkosky* concerned Tacoma's liability for failing to maintain a culvert, which resulted in a flood. After rejecting Tacoma's common enemy defense, the Court held that even if that doctrine applied, Tacoma could still be liable for not maintaining the culvert:

> [T]he city, while under no primary obligation to furnish drainage for the surface water, . . . had a discretionary power so to do. Having constructed this drain and undertaken the performance of this discretionary duty, the obligation to maintain the drain in a safe and suitable condition was no longer a matter of mere discretion. . . . 'After the construction of drains and sewers, although originally this was a discretionary duty, yet the obligation to maintain them in a safe and suitable condition is not one of that character, and the authorities must perform their duty in these respects, or become liable for any injuries suffered. *A municipal corporation cannot, in respect to the construction or maintenance of a drainage or sewage system, especially in its discharge,* ***create either a public or private nuisance***. . . .'

Ronkosky, supra, 71 Wn.2d at 153–54 (quoting 3 Abbott, Mun. Corp. at 2233, 2234, 2235). In the quote above, *Ronkosky* did not saddle Tacoma with a special duty for municipalities. Tacoma was obligated to maintain its culvert under the law's general prohibition of public and private nuisances. The latter applies to all defendants, municipal and private alike.

Here, there is clearly a factual dispute regarding BNSF's failure to maintain its drainage ditch and the impact on Holden-McDaniel. *See* CP V:2060–61. Under the Restatement and the common law of Washington, including *Phillips*, *Rothweiler*, and *Ronkosky*, BNSF may be liable for the flooding of Holden-McDaniel's land, for creating a nuisance, and the superior court's order dismissing all claims against BNSF should be reversed.

D. Holden-McDaniel's Claims Are Not Barred by the Statute of Limitations.

Finally, BNSF argues that the two-year statute of limitations at RCW 4.16.130 bars the claims against it. *See* BNSF Br. at 17 (citing *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006)). But as discussed above, Supreme Court precedent forecloses the two-year statute. *See supra,* Section II.F. The three-year statute at RCW 4.16.080(1) governs Holden-McDaniel's claims and BNSF has admitted to flooding within that time period. *See* CP V:2654. For these reasons alone, BNSF's statute of limitations defense must fail.

In addition, BNSF relies on *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006), for the proposition that a plaintiff's right to compensation ends when the tort is abated. *See* BNSF Br. at 18. But this rule has never been applied to preclude liability where the plaintiff abates the tort, at the plaintiff's sole expense, and to the detriment of the plaintiff's use of his or her own property. Indeed, the rationale for the abatement rule flows from the principle that the defendant should be allowed to abate the tort, thereby mitigating his or her own liability. *See Woldson, supra,* 159 Wn.2d at 220 (disallowing damages past trial because they would "den[y] the defendant the right to mitigate damages by abating the tortious encroachment").

In this case, flooding from the BNSF ditch forced Holden-McDaniel to build and maintain a protective berm on its property. Accordingly, the nuisance has not been abated within the meaning of *Woldson.* If BNSF were a pig farmer in the middle of Seattle, surely it could not escape liability by forcing its neighbors to keep the stench from their homes by nailing their windows shut (thereby "abating the nuisance"). In that case, being forced to keep one's windows closed would clearly be an element of the plaintiff's damages, not a get-out-of-jail-free card for the defendant.

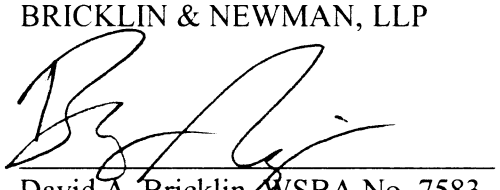
Here too, the berm on Holden-McDaniel's land does not abate the nuisance within the meaning of *Woldson* — it is an element of Holden-McDaniel's damages and a deprivation of the free use of its property. The claims against BNSF are not barred by the statute of limitations.

IV. CONCLUSION

For the reasons above, and for the reasons in its opening brief, Holden-McDaniel requests reversal of Conclusions of Law Nos. III, VIII, XVIII, XI, XIX, IX, and XX of the superior court's memorandum and order on summary judgment.

DATED this 19th day of January, 2016.

BRICKLIN & NEWMAN, LLP



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

HOLDEN-McDANIEL PARTNERS, LLC,

Plaintiff/Appellant,

v.

CITY OF ARLINGTON, a municipal corporation; WOODLAND RIDGE, a joint venture; KAJIMA DEVELOPMENT CORP., a joint venture; ARLINGTON COUNTRY CLUB, INC., a joint venture; BNSF RAILWAY COMPANY, a Delaware corporation,

Defendants/Respondents,

HOMESTREET BANK, formerly known as CONTINENTAL SAVINGS BANK; BANNER CORPORATION, formerly known as FIRST SAVINGS BANK OF WASHINGTON; VINE STREET FUND, LLC; U.S. BANK NATIONAL ASSOCIATION a subsidiary of U.S. BANCORP; SEATTLE MORTGAGE COMPANY; PBW, LLC; GLENEAGLE COUNTRY CLUB ASSOCIATION;

Other Defendants..

NO. 73528-4-I

(Snohomish County Superior Court Cause No. 11-2-02031-1)

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for plaintiff Holden-McDaniel Partners, LLC herein. On the date and in the manner indicated below, I caused the Amended Reply Brief of Appellants to be served on:

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DATED this 19th day of January, 2016, at Seattle, Washington.

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