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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 94282-0

COURT OF APEALS 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.

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Plaintiff Holden-McDaniel Partners LLC, appellant below, hereby petitions for review of a portion of the Court of Appeals decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Holden-McDaniel seeks review of a portion of the opinion issued by the Court of Appeals for Division I in the case of *Holden-McDaniel Partners, LLC v. City of Arlington, et al.*, No. 73528-4-I (Jan. 9, 2017) (App. A hereto).[1] On February 8, 2017, the Court of Appeals denied a timely motion to publish (App. B), thereby resetting the 30-day deadline for this petition for review. *See* RAP 13.4(a).

III. ISSUES PRESENTED FOR REVIEW

1. Under the established law of Washington, a person "intends" to cause a particular result if he or she acts with knowledge, to a substantial certainty, that the result will obtain. Where the defendants designed and constructed a large housing development and golf course with knowledge that it would cause flooding on Holden-McDaniel's land, did they intend to cause the resulting nuisance and trespass by water?

[1] Appendix A contains the Court of Appeals' revised opinion dated January 9, 2017, following its partial granting of Holden-McDaniel's motion for reconsideration. Appendix A also contains the Court of Appeals' order on that motion. We refer to these two documents as "App. A, Opinion" and "App. A, Order" respectively.

2. This Court has said that "intent to trespass may . . . include an act that the actor undertakes realizing there is a high probability of injury to others and yet the actor behaves *with disregard* of those likely consequences." *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 682, 709 P.2d 782 (1985) (emphasis added). Where the defendants knew their actions would cause flooding on Holden-McDaniel's land, but "ignored" that risk and proceeded anyway (App. A, Opinion at 19), may they be liable for the resulting trespass and nuisance?

IV. STATEMENT OF THE CASE

A. Overview of the Issues

This petition for review raises a fundamental issue of the law of tort: What is "intent"? Until now, the answer to that question has been clear and unambiguous. "Intent" refers not only to an actor's desire to bring about a particular result, but also knowledge, to a substantial certainty, that the result will obtain. In other words, if you know the consequences of your actions, then you "intend" those consequences even if you do not desire them or act for that purpose.

This has been the law of Washington at least since *Bradley v. American Smelting and Refining Company*. There, this Court held definitively that "'[i]ntent is not. . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially

certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.'" *Bradley*, 104 Wn.2d at 682 (quoting Restatement (Second) of Torts, § 8A, cmt. b (1965) and collecting authorities). Under *Bradley*, intent is broader than desire. It is knowledge, too.

Here, the controversy over the issue of intent arises in the context of a large residential development and golf course known as Gleneagle, which sits high on a hill above Holden-McDaniel's property in Arlington, Washington. *See generally* App. A, Opinion at 2–3. For many years, Gleneagle's excess stormwater has caused the repeated flooding of Holden-McDaniel's land. *Id.*

Critically, the defendants knew — when they undertook the project — that its excess stormwater would far exceed the capacity of the downstream conveyance system across Holden-McDaniel's property, and that flooding would be the inevitable result. This was known to defendant Woodland Ridge Joint Venture, the private developer responsible building much of Gleneagle, and the City of Arlington, which participated extensively in Gleneagle's design. But they proceeded nonetheless.[2]

[2] The City of Arlington has, at times, denied that it actively participated in the design of Gleneagle. Because that was not addressed by the Court of Appeals and is not germane to the issues in this petition for review, we do not discuss it here. Should the city raise that issue in its response, we note it was dealt with extensively in our summary

On January 5, 2011, Holden-McDaniel initiated the current lawsuit to finally end the repeated flooding of its land. Among other claims, the complaint alleged trespass and nuisance against the City of Arlington, the Joint Venture, and others involved in the project's development. *See generally* CP V:2123–32. The lawsuit involves many issues and defenses. *See, e.g.*, App. A, Opinion at 6–19. But for this petition for review, the only relevant issue concerns the superior court's dismissal, on summary judgment, of Holden-McDaniel's intentional tort claims. The court dismissed those claims on the false basis that Holden-McDaniel failed to submit evidence on the *prima facie* element of intent. *See* CP I:54–55. The Court of Appeals affirmed the superior court's ruling on that issue. App. A, Opinion at 18–19.

The superior court and Court of Appeals got it wrong. Further, their decisions on the intent issue conflict with the unambiguous holding of *Bradley* and its progeny. The defendants knew Gleneagle would flood Holden-McDaniel, but proceeded anyway. They acted with "intent."

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judgment papers and reply brief before the Court of Appeals. *See* CP X:2827–38; Amended Reply Brief of Appellant at 31 n. 29 (Jan. 19, 2016).

We also note that the Joint Venture has questioned its scope of liability for Gleneagle, arguing that it cannot be responsible for shortcomings in the project's "Sector 1." That, too, is meritless and was addressed below. Amended Reply Brief of Appellant at 2 n.3 (noting, inter alia, that the Joint Venture "'rebuilt the surface water management systems" tied to that phase of Gleneagle'" (quoting CP II:601)). The Joint Venture is responsible for all of Gleneagle, not just a part of it. *Id. See also* Appellant's Answer to Woodland Ridge Joint Venture, Kajima Development Corp., and Arlington Country Club, Inc.'s Motion for Reconsideration at 7–10 (Dec. 12, 2016).

B. Origin of the Flooding Problem and the Defendants' Prior Knowledge.

At all times relevant to this lawsuit, Holden-McDaniel owned industrial property in Arlington, Washington. Until recently, the property was used to manufacture steel buildings, first by Holden-McDaniel itself and, more recently by its tenant, BlueScope, which took over Holden-McDaniel's steel fabrication business in 2007.[3]

Beginning in the 1980s, the hill to the east of Holden-McDaniel's property was gradually developed for the Gleneagle project. Prior to Gleneagle, the hill was forested. But with development came clear-cutting, grading, and not surprisingly, increased stormwater runoff. CP III:1196. For decades, Holden-McDaniel has been plagued by flooding from Gleneagle's runoff and poorly designed infrastructure. The first flooding of the Holden-McDaniel property occurred in 1990 soon after the first phase of the project was complete. Since that time, the flooding has continued, including in 1994, 1995, 1996, 1998, 2000, 2002, 2009, 2011, and 2012. *See* CP V:2038, ¶ 5; CP II:673–77. In 2009, the floodwaters caused Holden-McDaniel to lose its lease with BlueScope, costing it millions in damages. *See* CP II:669–71; CP II:701–03; CP II:830–32.

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

According to the defendants, the flooding problem has a singular point of origin. All of the water generated by the western half of Gleneagle flows into a culvert that passes beneath Holden-McDaniel's property. *See* V:2058, ¶¶ 8–9.[4] From there, it flows into a ditch on the opposite side of the property and then, in theory, south to the City of Marysville. *Id.*[5] But the culvert across Holden-McDaniel's property is too small to accommodate all of the excess stormwater. Historically, when its capacity was exceeded, flooding ensued. *See* CP III:1198–99 (expert report of Tom Holz: "for a period of 30 years, . . . discharges from Gleneagle often exceeded the diameter of the culvert and HCI's yard was consequently flooded").

These facts are perhaps best expressed in the Joint Venture's motion for summary judgment, in which it argued that Holden-McDaniel "install[ed] a pipe that that was too small to even convey pre-development flows across its property," and that "Plaintiff should not be allowed to create

[4] In reality, there are many causes that contributed to the flooding in addition to the restricted flow across Holden-McDaniel's property, discussed below. *See generally* CP III:1194–1203; CP II:835–37; CP I:72–79. Nonetheless, we focus on the restricted flow across Holden-McDaniel's land in this petition because the defendants clearly knew that problem would lead to flooding when they undertook the Gleneagle development, satisfying the *prima facie* element of intent.

[5] We say "in theory" because the ditch on the west side of Holden-McDaniel's property has proven incapable of accommodating Gleneagle's increased stormwater. In turn, when its capacity is exceeded, it has historically backed up and flooded Holden-McDaniel's property from the west. *See*, e.g., CP 1197–98. This additional source of flooding is included in Holden-McDaniel's negligence claims. Flooding from the ditch on the west side of Holden-McDaniel's property was cured in 2009 when Holden-McDaniel built a berm on its property to keep the floodwaters at bay. *See* CP V:2062, ¶ 18.

a bottleneck *causing flooding* for the purpose of extracting 'damages' from fault-free upstream entities." CP VII:2535 (emphasis added). Obviously, there is no evidence Holden-McDaniel installed the culvert "for the purpose of extracting damages."[6] But the point remains: According to the Joint Venture, the party with principle responsibility for designing and constructing Gleneagle, this "bottleneck" is the root cause of the repeated flooding that has plagued Holden-McDaniel's land for decades. *Id.*[7]

It is also clear the defendants knew about this bottleneck problem from the beginning. For example, when the Joint Venture took over the project in the 1990s, when only a small portion of the project had been built, the City of Arlington attempted to compel Holden-McDaniel into increasing the size of its culvert to accommodate Gleneagle's increased stormwater runoff. *See* App. A, Opinion at 3–4. When Holden-McDaniel refused

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[6] Nor is there evidence that Holden-McDaniel installed the culvert at all. It was installed in 1976, long before Holden-McDaniel acquired the property. CP V:2037, ¶ 2.

[7] In addition to this bottleneck problem, the Joint Venture has argued that the current flooding problem is caused principally by a new stormwater facility that the city installed in 2002 — the so-called "triangle pond." *See* CP VII:2529–32. We agree that facility has many problems and contributes to the current flooding problem. *See, e.g.*, CP II:835–37. But it also is clear that the triangle pond's purpose was to remedy the flooding problem that Gleneagle created. *See* CP II:612–14 (city's 30(b)(6) representative confirming the city built the triangle pond in part to solve Gleneagle's stormwater problems). *See also* Amended Reply Brief of Appellant at 3, n.3 (Jan. 19, 2016). In that way, the triangle pond represents a failed attempt, on the part of the city, to remedy the problem that Gleneagle and the Joint Venture created. Because the problem persists and the fix has failed, the Joint Venture may still be liable for its original knowledge that construction of Gleneagle would flood Holden-McDaniel's land. Notably, the Court of Appeals also rejected the Joint Venture's argument when it denied its motion for reconsideration. *See* App. A, Order at 2.

because the larger pipe would diminish the utility of its land, the city illegally withheld its approval to expand Holden-McDaniel's business. *See* CP V:2038, ¶ 7. (That dispute lead to a lawsuit, which the parties later settled. *See* CP III:1107.)

The city's demand to install a larger pipe across Holden-McDaniel's property for Gleneagle's benefit demonstrates that the defendants knew the existing culvert was too small to carry all of Gleneagle's excess stormwater. As the Joint Venture has explained, its engineers "determined the 36[-inch] pipe under [Holden-McDaniel's] property was undersized and . . . [was] insufficient to handle even 25-year *pre-development* flows *without causing flooding*." CP VII:2489 (second emphasis added; first in original). The defendants knew Gleneagle would send more water to Holden-McDaniel's property than the culvert could bear and that flooding would be the inevitable result.

The defendants' prior knowledge that Gleneagle would cause flooding is apparent from several other facts, too. For example, when the defendants signed a rezone contract concerning the Gleneagle project, the Joint Venture agreed to pay the city to mitigate the effects of downstream flooding, thereby acknowledging the reality that downstream systems could not handle Gleneagle's runoff. *See* App. A, Opinion at 2 ("Respondent City of Arlington (City) and [the Joint Venture] entered into a rezone contract

where [the Joint Venture] paid the City to upgrade the downstream stormwater system to accommodate the increased stormwater runoff from the project"). *See also* CP III:1328–29, ¶ 19; CP I:390–91, ¶¶ 12–14.

Later, when the city gave its final approval for the project, it expressly authorized Gleneagle to discharge more stormwater to Holden-McDaniel's culvert than the culvert could bear. *See* CP IV:1577 (city allowing Gleneagle to discharge at a rate of up to 28 cfs (cubic feet per second), nearly double the culvert's known capacity); CP III:1364 (discussing culvert's limitations); CP III:1378, 1382 (drainage report from the Joint Venture's engineer; discussing flow of water across Holden-McDaniel's property at rates greater than the culvert could handle).

The defendants also designed alternatives to prevent Gleneagle from flooding Holden-McDaniel's property, but notably chose to forego them. *See, e.g.*, CP II:780 (discussing alternatives to prevent flooding by limiting the flow of water into Holden-McDaniel's culvert to 16 cfs, matching the pipe's limited capacity); CP II:786–91 (discussing possibility of installing a box culvert across Holden-McDaniel's land, preventing flooding and allowing a larger-capacity pipe to be installed without damaging the utility of Holden-McDaniel's industrial yard — an option never presented to Holden-McDaniel). Not only did the defendants know Gleneagle would flood Holden-McDaniel, they jettisoned suggestions to avoid that result.

Finally, the Joint Venture was warned early on that if it wanted to prevent downstream flooding, it would need to greatly expand Gleneagle's on-site stormwater ponds. *See* CP III:1364. But it chose not to heed that advice, likely because doing so would have forced the Joint Venture to give up its golf course and reduced the number of new residential lots.[8]

In sum, the evidence presented below demonstrates that the defendants (a) knew, to a substantial certainty, that the "bottleneck" problem would result in flooding, and (b) they built Gleneagle with full knowledge of that inevitable result. In all of the briefing before the superior court and Court of Appeals below, the defendants have never asserted — or credibly argued — that they did not know flooding would result.

C. Proceedings Below

In March of 2015, the Joint Venture and City of Arlington moved for summary judgment. Their motions raised many issues, including res judicata, release, the statute of limitations, and the common enemy doctrine. *See generally* CP VII:2536–58; CP VII:2488–2535. They also challenged Holden-McDaniel's claims for intentional trespass and nuisance. On that

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

issue, they asserted the intentional tort claims should be dismissed because Holden-McDaniel did not satisfy the *prima facie* element of intent. *See* CP VII:2546 at 9 (arguing that "[t]here is no basis for trespass or nuisance, because there is zero evidence that the City 'intended' to cause flooding problems on plaintiff's property"); CP VII:2359 (arguing that "the only intentional misconduct was Plaintiff's intentional installation of a pipe that was too small to accept historical pre-development flows — a decision entirely out of [the Joint Venture's] control").

In support, the city and Joint Venture argued, *inter alia*, that they hired many engineers to solve the bottleneck problem, that they met industry and regulatory standards (*e.g.*, by allegedly designing Gleneagle's stormwater infrastructure to handle a "100-year event"), and that Holden-McDaniel acted unreasonably when it refused to install a larger, protruding culvert across its property. *See* CP VII:2546; CP VII:2359. But none of that negates intent. They may have *tried* to solve the problem, and they may have *tried* to force Holden-McDaniel to install a larger culvert for Gleneagle's stormwater, but they knew those efforts failed *before* they undertook their respective actions. *See supra*, Section IV.B. Their arguments aside, the Joint Venture and City of Arlington still knew

Gleneagle would send far more water to Holden-McDaniel's culvert than it could bear.[9]

On April 24, 2015, the superior court granted the defendants' motions for summary judgment and later dismissed Holden-McDaniel's case in its entirety. *See* CP I:41–62 (order on summary judgment); CP I:36–37 (order of dismissal). In major part, that decision flowed from the court's ruling on the defendants' affirmative defenses of res judicata and release, which were, in turn, premised on a dispute over a prior settlement agreement between the parties. *See* CP I:56–61. On Holden-McDaniel's intentional tort claims, however, the superior court held more specifically that the *prima facie* element of intent was lacking. CP 54–55, ¶ VIII. The Court provided little rationale for that ruling, explaining only that "[t]he evidence in this case, construed in favor of Plaintiff, does not establish intentional conduct as defined by applicable Washington law." CP I:55.

On appeal, Holden-McDaniel succeeded in overturning the superior court's ruling on the affirmative defenses of res judicata and release, which will now allow trial on its negligence claims. *See* App. A, Opinion at 7–18. But the Court of Appeals affirmed the superior court's dismissal of Holden-

[9] The Joint Venture also argued that Holden-McDaniel did not plead intentional trespass or nuisance in its complaint. Neither the superior court nor the Court of Appeals addressed that argument. And for good reason, it is meritless. *See* Amended Reply Brief of Appellant at 35 (Jan. 19, 2015); *Shoening v. Grays Harbor Comm. Hosp.*, 40 Wn. App. 331, 337, 698 P.2d 593 (1985) (sufficient to clarify claims on summary judgment).

McDaniel's intentional tort claims. *Id.* at 19. And it did so on an entirely new basis that was not advanced by the parties — instead of addressing whether Holden-McDaniel had evidence sufficient to avoid summary judgment on the issue of intent, the Court of Appeals characterized the dispute as a "failure to act" case that sounds only in negligence:

> [Holden-McDaniel] argues that the City and [Joint Venture] had "intent" because they knew that their actions were "'substantially certain'" to result in flooding because the City authorized the W2 pond to discharge at a rate greater than the known capacity of the culvert located on the Property. [Holden-McDaniel] is essentially arguing that the City and [Joint Venture] knew that the culvert was insufficient and failed to take that into account when it designed and implemented the various elements of a stormwater management system. A claim for failure to act sounds in negligence and does not support the intentional act needed for trespass. Estate of Price v. City of Seattle, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001).

App. A, Opinion at 18–19.

Notably, the Court of Appeals did not hold that the defendants were ignorant of the culvert's limited capacity, or that they did not know, to a substantial certainty, that flooding would result from exceeding that capacity. Instead, it held that when the defendants "designed and implemented" the stormwater system that flooded Holden-McDaniel's property, they were not taking action and that, therefore, the case was properly characterized as a "failure to act" case. This petition for review seeks to reverse that illogical conclusion.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Under RAP 13.4, this Court may grant review and consider a Court of Appeals opinion if it conflicts with a decision of the Supreme Court, if it conflicts with a published opinion of the Court of Appeals, or if "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1–4). All three of these factors warrant review in this case.

A. The Decision Below is in Conflict with *Bradley v. American Smelting Company* and Court of Appeals Decisions on the Meaning of "Intent."

First, on the issue of intent, the Court of Appeals decision conflicts with this Court's opinion in *Bradley*, which held that a plaintiff may prove intent for purposes of an intentional tort by demonstrating the defendant desired to bring about the result of his actions, or that the results were substantially certain to occur. On this point, *Bradley* could not be clearer:

> 'Intent, however, is *broader than a desire to bring about physical results*. It must extend not only to those consequences which are desired, *but also to those which the actor believes are substantially certain to follow from what he does*. . . . The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it. *The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it.*'

Bradley, 104 Wn.2d at 683 (emphasis added; quoting Prosser, *Torts* § 8, at 31–32 (4th ed. 1971)). *See also Brutsche v. City of Kent*, 164 Wn.2d 664, 674 n.7, 193 P.3d 110 (2008) ("Intent is not limited to consequences that are desired. . . . Instead, if the actor knows that the consequences are certain or substantially certain to result and still goes ahead, he is deemed to have desired to produce that result").

Since *Bradley*, many Court of Appeals decisions have echoed this clear, unambiguous statement of the law. *See, e.g., Hurley v. Port Blakley Tree Farms L.P.*, 182 Wn. App. 753, 770, 332 P.3d 469 (2014) ("tortious intent is found where 'the actor desires to cause the consequences of his act, or . . . believes that the consequences are substantially certain to result from it'") (quoting Restatement (Second) of Torts, § 8A (1965)); *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 569, 213 P.3d 619 (2009) ("the defendant need not have intended the trespass; he need only have been substantially certain that the trespass would result from his intentional actions"); *Seal v. Naches-Saleh Irr. Dist.*, 51 Wn. App. 1, 5–6, 751 P.2d 873 (1988) (same).

Of course, simply stating the rule does not prove it applies and, in the Court of Appeals decisions above, the defendants were ultimately not held liable for intentional trespass. But those opinions clearly acknowledged the rule that intent may be established by proving the defendant knew the consequences of its action (even if they were not desired) *and* provided

cogent explanations for why that standard was not met — for example, because the defendant only learned of the consequences after the action was taken (*see Seal, supra*), or because the defendant simply did not know the result would occur (*see Hurley, supra*).

Here, in contrast, the decisions below all but ignore the rule that intent includes knowledge of consequences and made no meaningful attempt to apply that rule to the facts of this case. As noted above, there is much evidence that the defendants knew Gleneagle would flood Holden-McDaniel's property. This is evident, *inter alia*, from the city's attempt to force Holden-McDaniel to install a larger culvert to accommodate Gleneagle's stormwater; from the city's decision to allow Gleneagle's stormwater to exceed the culvert's known capacity; and most importantly, from the defendants' decision to proceed with Gleneagle despite knowledge of these facts. *See supra*, Section IV.B. The city and Joint Venture can hardly claim that having allowed more water to be discharged to Holden-McDaniel's property than the culvert could handle, they were not "substantially certain" that flooding would ensue. Yet these issues were simply ignored.

On these facts, the decisions below conflict with *Bradley* and every Court of Appeals decision that has quoted *Bradley* as the black-letter law of Washington. We also respectfully submit that this conflict involving the meaning of "intent" — an issue that lies at the very core of the law of

intentional tort in Washington — is an issue of substantial public interest that should be fully and finally resolved by this Court.

B. The Court of Appeals Erred in Sustaining the Trial Court's Dismissal of Plaintiff's Intentional Tort Claims as "Failures to Act."

Second, the Court of Appeals decision goes far beyond simply conflicting with *Bradley* and its progeny. The opinion carves out an exception that, if followed, would swallow the rule in its entirety.

As noted above, the Court of Appeals held that Holden-McDaniel's intentional trespass and nuisance claims are not cognizable because they are premised on the defendants' decision to "ignore" the unassailable fact that Gleneagle would discharge more water than the culvert across Holden-McDaniel's property could handle. *See* App. A, Opinion at 18–19. For this reason, the court held, those claims are predicated on a "failure to act" — presumably, a failure to take measures to prevent flooding altogether — which sounds only in negligence. *Id.*

As an initial matter, the Court of Appeals' reasoning is surprising because no party advanced this argument on summary judgment or on appeal. It is also surprising because it is based on a dearth of support. The one case cited by the Court of Appeals — *Estate of Price v. City of Seattle*, *see* App. A, Order at 19 — bears no relation to the facts of this case.

In *Estate of Price*, the plaintiffs sued the City of Seattle for a landslide that damaged their homes. The city owned a park at the top of the hill and made improvements, which the plaintiffs believed played a causal role in the slide. *See* 106 Wn. App. at 656. But they could not prove that theory. Thus, they developed an alternative; the city should be liable for not coming to their rescue and stabilizing the hill, before the landslide occurred, when they informed the city of initial slope movements. *See id.* at 660.

Rejecting the plaintiffs' alternative "rescue" theory of liability, the Court of Appeals reasoned that intentional trespass cannot be based solely on a failure to act. *See id.* at 660 ("[Plaintiffs] have provided no authority for the proposition that an 'act', as used in defining the elements of trespass, means a failure to act"). Thus, because the only wrong allegedly committed by the city was its failure to come to the plaintiffs' rescue — *and because it had done nothing to affirmatively cause the landslide* — the intentional trespass claim was dismissed. *Id.*

Here, in contrast, the city and Joint Venture clearly engaged in affirmative acts; they increased the stormwater runoff from the Gleneagle by removing trees, re-grading the land, and converting pervious land to impervious pavement, and then piped that increased runoff to Holden-McDaniel's culvert. *See* CP III:1201; CP V:2062, ¶ 19. In the words of the Court of Appeals when characterizing the case as a failure to act, the

defendants "designed and implemented the various elements of a stormwater management system." App. A, Opinion at 19. And they did so with full knowledge of the consequences of their action. *See supra*, Section IV.B. On these facts, *Estate of Price* does not support the Court of Appeals' decision and no other support is apparent.

The Court of Appeals' decision is also alarming because it would, if followed, effectively gut this Court's holding in *Bradley*. At the very core of *Bradley* is the recognition that a tortfeasor cannot ignore the known consequences of its actions and thereby escape liability for an intentional tort. Instead, if it knows its actions will result in injury, it may ignore them at its peril, but will still be treated by the law as if it desired them. This is clear from the language of *Bradley* itself: "[I]ntent to trespass may also include an act that the actor undertakes realizing there is a high probability of injury to others and yet the actor *behaves with disregard* of those likely consequences." *Bradley*, 104 Wn.2d at 683–84 (emphasis added).[10] In short, *every* case in which a tortfeasor acts with knowledge that injury will result is a case where the tortfeasor "ignored" the consequences of its actions. The point of *Bradley* is to punish such behavior, not to exonerate it.

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[10] *See also Bradley*, 104 Wn.2d at 682 ("If the actor knows that the consequences are certain, or substantially certain, to result from his act, *and still goes ahead*, he is treated by the law as if he had in fact desired to produce the result") (emphasis added; internal quotation omitted).

In this respect, the Court of Appeals decision is not only in conflict with *Bradley*, but antithetical to it. The Court of Appeals recognized that Holden-McDaniel contended that the defendants acted while disregarding the known consequences of their actions: "[Holden-McDaniel] is essentially arguing that the City and [Joint Venture] knew that the culvert was insufficient *and failed to take that into account* when it designed and implemented the various elements of a stormwater management system." App. A, Opinion at 19 (emphasis added). Yet somehow, with no explanation, the court then converted this into a failure to act case simply because the defendants "ignored" those known consequences. *Id.*

As above, we respectfully submit that the Court of Appeals' disregard for *Bradley* and its progeny warrants review in this case. Because this issue strikes at the heart of *Bradley's* definition of "intent," the Court of Appeals' decision also raises concerns of substantial public interest that should be resolved by this Court.

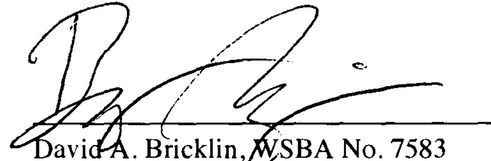
VI. CONCLUSION

For the reasons above, Holden-McDaniel respectfully requests that this Court grant review, reverse the Court of Appeals' decision on the intentional tort claims, and allow those claims to proceed to trial. "Intent" includes knowledge, and the defendants knew that constructing Gleneagle — an affirmative act — would flood Holden-McDaniel's land.

DATED this 10th day of March, 2017.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

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Attorneys for Appellant Holden-McDaniel, LLC

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

HOLDEN-MCDANIEL PARTNERS, LLC, 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, Respondents. HOMESTREET BANK, formerly known as CONTINENTIAL SAVINGS BANK; BANNER CORPORATION, formerly known as FIRST SAVINGS BANK OF WASHINGTON; VINE STREET FUND, LLC; U.S. BANK NATI isONAL ASSOCIATION, a subsidiary of U.S. BANCORP; SEATTLE MORTGAGE COMPANY; PBW, LLC; GLENEAGLE COUNTRY CLUB ASSOCIATION; Petitioners	No. 73528-4-I DIVISION ONE ORDER DENYING WOODLAND RIDGE'S MOTION FOR RECONSIDERATION AND HOLDEN-McDANIEL'S MOTION FOR COSTS AND GRANTING IN PART HOLDEN'S McDANIEL'S MOTION FOR RECONSIDERATION

Respondents, Woodland Ridge Joint Venture, Kajima Development Corp., and Arlington Country Club, Inc. (WRJV) and appellant Holden-McDaniel Partners, LLC (HM) filed motions for reconsideration of the opinion filed in the above matter on October 31, 2016. The panel called for an answer to respondent's motion for reconsideration and an answer to appellant's motion for reconsideration only on the issues of whether appellant asked the City to lower 67th Avenue and costs.

A majority of the panel has determined WRJV's Motion for Reconsideration and HM's Motion for Costs is denied as neither party substantially prevailed on appeal.

However, the panel has determined that HM's motion for reconsideration is granted in part as follows:

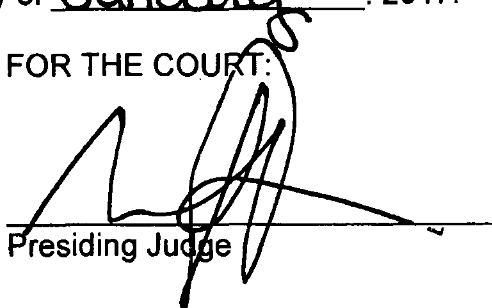
The last sentence at the first paragraph on page 5 of the opinion is stricken and replaced with the following sentences:

> As part of the improvements, the City lowered the road near HM's north building. The City claims this was done at HM's request. HM disputes this claim.

HM's motion to reconsider is otherwise denied.

DATED this 9th day of January, 2017.

FOR THE COURT:



Presiding Judge

2017 JAN -9 AM 11:0

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

HOLDEN-MCDANIEL PARTNERS, LLC, 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, Respondents. HOMESTREET BANK, formerly known as CONTINENTIAL 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; Petitioners	No. 73528-4-I DIVISION ONE UNPUBLISHED OPINION FILED: January 9, 2017

2017 JAN -9 AM 11:0

SPEARMAN, J. — Appellant Holden McDaniel Partners, LLC (HM) brought claims against the City of Arlington, Burlington Northern Santa Fe (BNSF) Railway Company, and the developers of the neighboring property, Gleneagle, for designing, developing, operating and maintaining a stormwater management

system that caused stormwater runoff and flooding on HM's property. The trial court dismissed HM's claims on summary judgment based on a release agreement executed by the parties, the statute of limitations, and HM's failure to establish damages. Because the trial court erred in dismissing HM's claims based on the release agreement and because there are disputed issues of material fact as to whether HM established its claimed damages, we reverse the trial court on those issues. We otherwise affirm.

FACTS

Appellant Holden-McDaniel Partners, LLC ("HM") owns property in Arlington, Washington, at 18520 67th Avenue North (Property). HM purchased the Property in 1986 and manufactured steel under the company name HCI Steel Products, Inc. The Property was bordered by a forested hill to the east and by railroad tracks on the west. There was a culvert on the Property that carried drainage from the eastern slope across the Property and discharged it into a ditch near a right-of-way belonging to respondent BNSF. The water then passed through a culvert under the right-of-way and flowed to the south.

Beginning in the 1980s, the area east of the Property was being developed into a residential community and golf course known as Gleneagle. In 1989, respondents Woodland Ridge, Kajima Development Corp., and Arlington Country Club, Inc. (WRJV) purchased the development rights to Gleneagle. Respondent City of Arlington (City) and WRJV entered into a rezone contract where WRJV paid the City to upgrade the downstream stormwater system to accommodate the increased stormwater runoff from the project. The Property flooded in November 1990, when

the stormwater retention pond to the east (W-1) overflowed. The same thing happened in December 1994, November 1995, and December of 1996.

In 1994, WRJV enlisted Triad Engineering (Triad) to develop a master drainage plan for Gleneagle. Triad determined that the existing facilities were insufficient and on February 2, 1995, contacted the City to suggest that an enhanced system be constructed on HM's property. At that time, HM had submitted plans for a new manufacturing building. It is unclear from the record whether HM had agreed to accommodate the runoff from Gleneagle as well as its own stormwater issues. Eventually HM agreed to move the existing culvert south and installed it "at a steeper slope and with an inlet configuration which allowed for greater surcharging at the upstream end. . . ." Clerk's Papers (CP) at 1185. But it refused to install a larger pipe because it would protrude above ground and make the area unusable.

The City issued a permit for HM's proposed new building but withheld authorization to begin construction because HM would not install a pipe with greater carrying capacity. On May 5, 1995, HM filed suit under Snohomish County Superior Court cause No. 95-2-03498-3 against the City for damages resulting from the delay in permitting and withholding of construction (Permit Lawsuit). HM brought statutory claims under RCW 64.40.020, which allows an action "for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority," and under 42 U.S.C. § 1983 for denial of substantive due process. Id. At the same time HM filed the complaint, it also filed a "Claim for Damages" which alleged that the City negligently approved the stormwater

collection, retention, and discharge system for Gleneagle, causing damage to the Property in the amount of $750,000. CP at 660. The Claim for Damages referenced a letter to the City dated March 20, 1995, wherein HM informed the City that it "may very well have liability" for the flooding on HM's property. CP at 663.

A few days later, HM filed suit against WRJV and other developers under cause No. 95-2-03599-8 for failing to implement an appropriate stormwater collection, retention, and discharge system and causing surface water to be discharged onto the Property (Flooding Lawsuit). On July 7, 1995, HM added the City as a defendant in the Flooding Lawsuit, in which its claims against the City mirrored those contained in the Claim for Damages. On August 31, 1995, the court granted the City's motion to consolidate the two lawsuits under cause No. 95-2-03599-8.

In September 1995, the City granted HM's building permit in exchange for a prescriptive drainage easement across the Property. On September 26, 1995, HM executed a hold harmless agreement in favor of the City "to the extent that a 24" x 36" drainpipe is inadequate to handle the flow of surface water legally conveyed to [HM's] property. . . ." CP at 1364. Also in 1995, WRJV enlisted Higa Engineering to design an additional upstream detention facility known as pond W-2. The pond was constructed and finished in 1996.

On November 24, 1998, HM and the City reached a settlement in which HM agreed to release certain of its claims against the City (Release). On motion of the court clerk, the consolidated lawsuit was dismissed without prejudice for want of prosecution in 2000.

In 1999 the City installed a second culvert under the railroad tracks to alleviate backwatering. In 2001, the City retained Earth Tech to design a 67th Avenue improvement project that involved widening the roadway and redirecting the outflows from W-1. Earth Tech designed a v-notched weir that would limit the flow to HM, and excess water was rerouted to a new facility north of 188th Street known as the Triangle pond. As part of the improvements, the City lowered the road near HM's north building. The City claims this was done at HM's request. HM disputes this claim.

HM experienced no flooding at all on its property from 2003 until 2009, when flooding occurred after a series of storms. Also in that year, HM replaced its onsite filtration system. In 2007, the business was sold to Bluescope Buildings North America, Inc. (BBNA). BBNA leased the Property and facilities from HM until 2012 when the parties reached an agreement releasing BBNA from the lease in exchange for $2.6 million.

In January 2011, HM filed suit against the City, WRJV and other Gleneagle investors, alleging that the developers were negligent in their design and maintenance of Gleneagle's stormwater system. HM also claimed that the City was negligent in its design, construction, and maintenance of the stormwater facilities that receive water from Gleneagle, and for reviewing and approving Gleneagle's permit and design. HM also brought an inverse condemnation claim against the City.

HM alleged that the City's negligence had caused increased flooding of the Property, which constituted an ongoing nuisance as well as past trespass of surface

waters and the threat of future trespass. HM claimed that it had incurred clean up and restoration costs for past floods and was facing a loss of over $6 million if it were to lose its lease with BBNA due to flooding. In 2012, HM added BNSF as a defendant, claiming that BNSF had contributed to the increased flooding by failing to maintain its portions of the stormwater system.

The parties brought multiple motions for summary judgment in early 2015. The trial court dismissed each of HM's claims that arose from alleged conduct by the City and WRJV that occurred before May 5, 1995, concluding that the Release precluded any liability on those claims. The court also found that res judicata barred the assertion of HM's claims against the City and WRJV that arose before November 24, 1998, the date the Release was signed. The court also dismissed HM's claims against the City and WRPV because it found that HM's evidence failed to establish an issue of material fact as to its claimed damages. The court dismissed HM's intentional tort claims for nuisance and trespass, concluding that those claims were subsumed within HM's negligence claims. It also dismissed the claims against BNSF, finding that they were precluded by the statute of limitations. Finally, the court excluded a letter offered by HM in support of its damages claim, concluding that it was inadmissible hearsay. HM appeals these rulings.

DISCUSSION

We review a trial court's grant of summary judgment de novo. Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See

CR 56(c); Camicia, 179 Wn.2d at 693. When making this determination, we consider all the facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

The Scope of the Release

The Release first states that for the sole consideration of $750,000, HM discharges:

> The City ... and all other persons ... from any and all claims ... relating to all claims set forth in and described in Plaintiff's Complaint and Amended Complaints in Snohomish County Cause No. 95-2-03599-8 and/or 95-2-03498-3.[1]

CP at 1107. Next, the Release explicitly provides that any claims related to future flooding on HM's property are excluded from the release, unless they fall within a specific exception. It states:

> This Release does not release any future claims which the Plaintiff may have... against the City of Arlington, ... or any other person, ... relating to flooding on Plaintiff's property, except to the extent said claims arise out of the conduct described in the Complaint and Amended Complaints in Snohomish County Cause No. 95-2-03498-3. Id.

It is abundantly clear from this language that the Release does not apply to any future claims that HM might have regarding flooding on its property, unless the claims arise from conduct described in the cause No. 95-2-03498-3 complaint. At

[1] As previously noted, cause No. 95-2-03498-3 was the original cause number of the Permit Lawsuit which was consolidated with the Flooding Lawsuit under cause No. 95-2-03599-8. There was no amended complaint filed in the Permit Lawsuit, however, there were two amended complaints filed in the Flooding Lawsuit.

issue is what conduct the parties intended to describe by reference to that complaint.

We interpret settlement agreements the same way as other contracts. McGuire v. Bates, 169 Wn.2d 185, 188, 234 P.3d 205 (2010) (citing Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008)). We attempt to determine the parties' intent by focusing on their objective manifestations as expressed in the agreement. Id. at 189. We generally give words their ordinary and usual meaning unless the entirety of the agreement clearly demonstrates a contrary intent. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005). But we interpret only that which was written, not what was intended to be written. Id. The parties' subjective intent is generally irrelevant if "an intention corresponding to the reasonable meaning of the words used" can be imputed. Id.

HM contends that the reference in the Release to the Permit Lawsuit complaint is to the conduct described in the complaint, that is, claims for flooding damages arising out of the City's alleged wrongful withholding of HM's authorization to begin construction. The City and WRJV contend the reference is to the conduct described in the complaint and the Claim for Damages that was filed at the same time. They contend the Claim for Damages was attached to the complaint when it was filed and served on the City. Citing Superior Court Civil Rule (CR) 10(c), they argue that as a result, the Claim for Damages became a part of the complaint. The City and WRJV also contend that the settlement agreement makes no sense unless it is read to include future flooding damages.

HM disputes that the Claim for Damages was attached to the complaint. And even if it was attached, HM disputes that the document falls within the reach of CR 10(c). They also contend the Claim for Damages was filed for the sole purpose of providing the City with the statutorily required 60-day notice of HM's claims against it. (See former RCW 4.96.020 (1995), in effect at the time.)[2] HM points out that just over 60 days following service of the Claim for Damages, it amended the complaint in the Flooding Lawsuit adding the City as a defendant.[3] HM further points out that had the Claim for Damages actually been part of the Permit Lawsuit, the claims would have violated former RCW 4.96.020 and been barred as a result. HM also argues that the language of the Release is plain and unambiguous and should be given effect as written.

---

[2] Former RCW 4.96.020 provided as follows:

> (1) The provisions of this section apply to claims for damages against all local governmental entities.
>
> (2) All claims for damages against any such entity for damages shall be presented to and filed with the governing body thereof within the applicable period of limitations within which an action must be commenced.
>
> (3) All claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place of the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose ....
>
> (4) No action shall be commenced against any local governmental entity for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof ....

[3] The trial court initially determined that HM filed the Flooding Lawsuit only five days later, instead of waiting 60 days. On HM's motion for reconsideration, the court acknowledged its error on this point, but it concluded that "the result is the same." CP at 35.

We first address the City and WRJV's reliance on CR 10(c) to argue that as a matter of law the Claim for Damages was incorporated into the Permit Lawsuit complaint. We conclude that their reliance is misplaced. CR 10(c) states:

> **Adoption by Reference; Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Citing P.E. Systems, LLC v. CPI Corp., 176 Wn.2d 198, 289 P.3d 638 (2012), the City and WRJV argue that our supreme court "made it clear" that a document attached to the complaint is part of the complaint. Br. of WRJV at 29, Br. of the City at 20. But the holding of the case does not stretch the application of CR 10(c) nearly so far as that. At issue in P.E. Systems, was whether a contract attached to an answer to a complaint became a part of the pleading. The court noted that the rule expressly states that it applies to "written instruments" and that "'[i]nstrument' has a specific legal meaning: 'A written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificates.'" Id. at 204 (quoting BLACK'S LAW DICTIONARY 869 (9th ed. 2009)). The court easily concluded that the purported contract fell within the meaning of a "written instrument" and held that under CR 10(c) "the contract does become part of the pleadings by simply attaching it. . . ." Id. The court cautioned, however, that "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." Id. at 205 (citing Rose v. Bartle, 871 F.2d 331, 339 n.3 (3d Cir. 1989)).

The City and WRJV nevertheless argue for an expansive view of the definition of "written instrument" as that term is used in CR 10(c), but they cite no Washington authority in support of that position. Instead, they rely on a number of federal cases citing to the similarly worded Fed. R. Civ. P. 10(c). For example, they note that in P.E. Systems, 176 Wn.2d at 204, our supreme court cited Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002) with approval. In that case, the court held that "[b]ecause the letter was attached to the complaint, it became a part of it for all purposes." Tierney at 738. But in indicating its approval of the case our supreme court noted only that Tierney held that the "weight of authority permits attachment of documents such as contracts to pleadings for federal rule 12(b) or 12(c) purposes." P.E. Systems, 176 Wn.2d at 204-05. (Emphasis added). The court clearly did not adopt the view advanced by the City and WRJV that any document attached to a pleading becomes a part of the pleading itself.[4]

Neither the City nor WRJV explain how the Claim for Damages purportedly attached to the Permit Lawsuit complaint falls within the definition of a written instrument as expressed by our supreme court in P.E. Systems. Neither suggests that it defines rights and duties like a contract, will, promissory note or share certificate or that it establishes any entitlements or liabilities. It is a claim for

[4] Indeed, following its limited approval of Tierney's apparently expansive reading of the federal rule, the P.E. System court cited approvingly the narrow approach taken in Rose, 871 F.2d at 339 n.3. There the Rose court noted "[t]he case law demonstrates, however, that the types of exhibits incorporated within the pleadings by Rule 10(c) consist largely of documentary evidence, specifically, contracts, notes, and other 'writing[s] on which [a party's] action or defense is based'," (citing 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1327, at 489). And interestingly, although the court in Tierney spoke in expansive terms about the scope of federal Rule 10(c), the letter at issue in that case is actually consistent with the view expressed in Rose. The plaintiffs in that case claimed the letter was both defamatory and retaliatory against the plaintiffs' exercise of their constitutional rights. Thus, the letter was a writing on which the plaintiffs' action was based.

damages but it is not by any stretch, documentary evidence that forms the basis for the claim. We conclude that the Claim for Damages is more akin to an affidavit and, as such, it is extrinsic evidence and not, as a matter of law, a part of the document to which it was attached.

Next, the City and WRJV argue vigorously that we should interpret the Release to include the claims in the Flooding Lawsuit because otherwise, in their view, "the settlement agreement makes virtually no sense[.]" Br. of the City at 27. See Br. of WRJV at 27-28. We turn first to the plain language of the Release. It unambiguously states that HM specifically reserved the right to bring future flooding claims "except to the extent said claims arise out of the conduct described in the Complaint ... in Snohomish County Cause No. 95-2-03498-3." CP at 1107. It is undisputed that the claims arising out the conduct in the Permit Lawsuit are unrelated to the claims alleged in the Flooding Lawsuit. It is also undisputed that the Claim for Damages, which does address the claims in the Flooding Lawsuit, is not explicitly mentioned anywhere in the Release.

Despite the unambiguous clarity of the language in the Release, the City and WRJV argue that we must take into account what, in their view, the settlement agreement was intended to accomplish. The City points out that in reaching the agreement it intended to "end[] the litigation, including future claims related to 'permanent or progressive damage' arising out of the litigated subject matter." Br. of the City at 30. But to the extent the City believed the Release included all future flooding damage on HM's property without exception, that belief is in direct contradiction to the plain language in the Release. The Release provides "[t]his

Release does not release any future claims which the Plaintiff may have ... against the City of Arlington ... or any other person ... relating to flooding on the Plaintiff's property" unless the claims arise out of the Permit Lawsuit. CP at 1107 (emphasis added). It is well settled that courts are not at liberty to rewrite contracts to reflect a party's unexpressed, subjective intentions. Hearst Commc'ns, 154 Wn.2d at 503. And that is what the City and WRJV ask us to do here.

Accordingly, we hold the trial court erred in denying HM's motion for summary judgment dismissal of the affirmative defense of release and in granting dismissal of HM's claims on that ground.

Res Judicata

Res judicata prohibits a party from bringing a claim already litigated or a claim that could have been litigated in a prior action. Pederson v. Potter, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). This doctrine prevents repetitive litigation of the same matter, ensuring integrity and finality in the legal system. Id. at 71. A threshold requirement of res judicata is a final judgment on the merits in the prior suit. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Once obtained, a prior judgment has preclusive effect when a second action is identical in: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) quality of persons for/against whom the claim is made. Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn. App. 304, 327-28, 237 P.3d 316 (2010). Whether res judicata bars an action is a question of law we review de novo. Kuhlman v. Thomas, 78 Wn. App. 115, 120, 897 P.2d 365 (1995).

The parties do not appear to dispute that there was no judgment on the merits entered in this case. After the Release was signed the parties took no further action with regard to obtaining a judgment. Instead, the case was dismissed without prejudice on the court clerk's motion "for want of prosecution" pursuant to CR 41(b)(2). It is well settled that a dismissal order entered without prejudice will not support a res judicata defense because it is not a final judgment.[5] Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 223, 770 P.2d 182 (1989)

Nevertheless, the City and WRJV argue that the prior settlement "ended the litigation for all intents and purposes." Br. of City at 37-38. Citing Rasmussen v. Allstate, 45 Wn. App. 635, 726 P.2d 1251 (1986), they contend that even in the absence of a final judgment on the merits, the Release triggered res judicata. In Rasmussen, following a car accident, a passenger secured partial payment from the tortfeasor and then brought suit against Allstate and Farmers seeking underinsured motorist (UIM) coverage. Allstate disputed that the policy included UIM coverage but the trial court ruled otherwise and Allstate appealed. While the appeal was pending, Allstate settled with the passenger, but apparently did not dismiss the appeal. Allstate then prevailed in an action seeking contribution from Farmers. Farmers appealed and the case was consolidated with Allstate's appeal challenging the coverage finding. In considering Allstate's appeal, the court reviewed the settlement agreement between Allstate and the passenger. The

[5] The City appears to argue that dismissal without prejudice can be a final judgment. Br. of the City at 38. It cites Gazin v. Hieber, 8 Wn. App. 104, 113, 504 P.2d 1178 (1972), for the proposition that a "[d]etermination of what constitutes a final judgment in the context of res judicata has always been a 'matter of substance and not form.'" Br. of the City at 38. But because it cites no authority holding that a dismissal without prejudice is a final judgment, we reject the argument.

agreement provided that, in consideration for the sum received, the passenger agreed to:

> release and forever discharge ALLSTATE INSURANCE COMPANY ... from any and all rights, claims, including claims for underinsured motorist benefits, or damages of any kind, known or unknown, existing or arising in the future, resulting from or related to injuries or damages arising from an accident that occurred on or about October 6, 1981.

Id. at 637. The court concluded that it need not reach Allstate's claim on appeal because the

> "compromise agreement constitutes a merger and bar of all existing claims and causes of action and is as binding and effective as a final judgment itself. Gregory v. Hamilton, 77 Cal.App.3d 213, 142 Cal.Rptr. 563 (1978); 15A Am.Jur.2d Compromise and Settlement § 24 (1976). It is res judicata of all matters relating to the subject matter of the dispute. Handley v. Mortland, 54 Wash.2d 489, 342 P.2d 612 (1959); In re Estate of Phillips, 46 Wash.2d 1, 278 P.2d 627 (1955). Therefore, the scope of the coverage by Allstate is no longer an issue." Id.

Despite its broad language, the City and WRJV's reliance on Rasmussen for the proposition that a settlement agreement is res judicata, in the absence of a judgment, is misplaced. First, the two cases cited in support of the assertion, Handley and Phillips, both involved settlement agreements that were followed by entry of judgments. In Handley, the court, in approving the settlement of a minor's claim entered "findings of fact, conclusions of law, and judgment." Id. at 491. In Phillips, the parties agreed to settle a dispute about the distribution of the decedent's estate. The court held that "[a]n order settling the final account of an administrator and a decree of distribution entered on the basis of such a compromise or settlement are res judicata of all matters relating to the subject matter of the controversy." Id. at 14 (citing McClure v. Calispell Duck Club, 157

Wash. 136, 288 Pac. 217 (1930)). In this case, because the settlement agreement was not followed by entry of either a judgment or a decree, we conclude that res judicata is inapplicable.[6]

Furthermore, regardless of whether res judicata applies, it is well settled that the law favors private settlements of disputes and is inclined to view them with finality. Stottlemyre v. Reed, 35 Wn. App. 169, 173, 665 P.2d 1383 (1983). But the finality of the Release at issue here is not in dispute. The parties disagree on the scope of the Release, specifically whether it includes damages for flooding as asserted in the Claim for Damages. That dispute is to be resolved by resorting to principles of contract interpretation, not according to the law regarding the enforceability of judgments. Id. at 171. We reverse the order granting the City and WRJV summary judgment on this issue.

HM's Claimed Damages From post-1995 Conduct

HM argues that the trial court erred when it entered partial summary judgment with regard to damages. The trial court concluded that HM could not establish any flooding damages because there was no net increase in frequency of flooding after 1995. Relying on HM's expert witness, Malcolm Leytham, the court found that prior to the development of Gleneagle, HM's property flooded at a rate of

[6] We also reject the argument by the City and WRJV that Pederson, 103 Wn. App. at 67 is controlling. That case considered whether the "confession of judgment" at issue in that case could qualify as a judgment on the merits. The court held that it could "because the Pedersons knew of their potential claims against the Potters when they settled and signed the confession of judgment. They had the opportunity to be heard on these claims, and have them disposed of, but chose not to do so." Id. at 71. But again, in Pederson, unlike this case, a judgment had in fact been entered. In addition, the confession of judgment reflected that the Pedersons had abandoned all of their claims against the Potters. Here, it is undisputed that HM reserved at least some of its claims.

once every 25 years. By 1995, however, after the development of Gleneagle and the construction of Pond W-1, HM's property flooded at a rate of once every three years. By 1998, following installation of Pond W-2 and the 36" x 24" pipe across HM's property, the flood rate was reduced to once every 15 years. But, after additional work by the City, including installation of Triangle Pond and lowering 67th Avenue, the flooding worsened to once every ten years by 2003 . The court concluded, however, that because flooding once every ten years was better than once every three years, "no rational trier of fact could find that [HM] suffered flooding damage more severe than was negotiated for in the prior litigation." CP at 24. The City and WRJV adopt this reasoning on appeal.

HM argues that there are disputed issues of material fact about whether the City is responsible for the improvement from every three year flooding to every fifteen year flooding. It points to evidence that the improvement was due primarily, if not solely, to HM's installation of the larger 36" x 24" pipe and relocating it to a steeper slope.[7] It further argues that the City's installation of Triangle Pond and

[7] The City argues that this theory was not argued below by HM until its motion for reconsideration. The City and WRJV also argue that Leytham's deposition testimony does not support the theory. HM argues that the reason for the improvement in flooding conditions from every three years in 1995 to every fifteen years in 1998 was not a contested issue until the trial court's summary judgment decision. HM contends that until then, the parties were using 1998 as the baseline for determining whether flooding conditions had worsened. The record supports HM's argument on this point. See CP at 2576; 2578-79. The City and WRJV are correct that Leytham did not specifically testify in support of the theory HM argued in the motion for reconsideration, i.e., that laying the culvert pipe at a steeper grade accounted for the improvement by 1998. But it is a reasonable inference from the evidence that was presented below. Viewing the evidence in the light most favorable to HM, as we must, it is sufficient to raise a material issue of fact as to HM's damages claim. We also note that in response to HM's motion for reconsideration, the City argued to the trial court, and does so here on appeal, that even accepting HM's new theory, the evidence of HM's damages claim was insufficient to survive its motion for summary judgment. See Br. of the City at 45-47. But these issues were not addressed by the trial court and we do not address them here.

lowering 67th Avenue is solely responsible for the increase to every ten-year flooding. If a rational factfinder were to credit HM's evidence it could conclude that the City and WRJV bore some liability for the five-year increase in flooding frequency. Because resolution of the damages issue turns on questions of credibility, the trial court erred when it granted summary judgment on this issue.

HM's Intentional Tort Claims

HM argues that its claims for trespass should not have been dismissed because there is an issue of material fact as to whether WRJV intended to flood the Property, stating that WRJV knew it's conduct was "'substantially certain'" to result in flooding, or that there was a high probability of increased flooding. Br. of HM at 41. To establish intentional trespass, a plaintiff must show (1) an invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability the act would disturb the plaintiff's possessory interest; and (4) actual and substantial damages. Bradley v. Am. Smelting & Refining Co., 104 Wn.2d 677, 692-93, 709 P.2d 782 (1985). Intent requires proof that the actor "desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Bradley, 104 Wn.2d at 682. At a minimum, this consists of proof that the actor has knowledge that the consequences are certain, or substantially certain, to result from his conduct and proceeds in spite of the knowledge. Id.

HM argues that the City and WRJV had "intent" because they knew that their actions were "'substantially certain'" to result in flooding because the City authorized the W2 pond to discharge at a rate greater than the known capacity of

the culvert located on the Property. HM is essentially arguing that the City and WRJV knew that the culvert was insufficient and failed to take that into account when it designed and implemented the various elements of a stormwater management system. A claim for failure to act sounds in negligence and does not support the intentional act needed for trespass. Estate of Price v. City of Seattle, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001).

HM's claims against BNSF

HM argues that the trial court erred when it found that BNSF had no statutory or common law duty to accept water from upstream entities and dismissed its negligence claims against BNSF. According to HM, by voluntarily allowing the City and Gleneagle to use the ditch as a stormwater disposal facility, BNSF assumed a duty to maintain the ditch in good repair. BNSF argues that it has no duty to HM nor did it assume one when it allowed the ditch to be used for disposal of surface water.

In order to bring a claim for negligence, a plaintiff must first establish that a legal duty exists. Christensen v. Royal School Dist. No. 160, 156 Wn.2d 62, 124 P.3d 283 (2005). HM argues that BNSF's duty arises under the RESTATEMENT (SECOND) OF TORTS § 365 (1965), where a possessor of land is liable for physical harm caused by the disrepair of a structure or other artificial condition if the exercise of reasonable care would have made it safe or disclosed the disrepair. BNSF argues that Washington courts have not adopted the Restatement and have declined to impose liability for dangerous disrepair.[8]

[8] Because we affirm the trial court on this ground, we do not reach the issue of whether HM's claims were also properly dismissed because they were filed outside the statute of limitations.

HM cites Phillips v. King County, 136 Wn.2d 946, 968 P.2d 871 (1998) and Rothweiler v. Clark County, 108 Wn. App. 91, 29 P.3d 758 (2001), as supporting the imposition of a duty to maintain a drainage system. But neither case advances HM's position; both address the responsibility of municipalities to maintain public drainage systems, not obligations of private landowners.

HM argues that the distinction makes no difference, quoting Phillips, 136 Wn.2d at 958, "'[g]enerally, municipal rights and liabilities as to surface waters are the same as those of private landowners within the city.'" Br. of HM at 47. This is not correct. The statement from Phillips pertains to the liability for trespass caused by surface water, not a duty to maintain public drainage systems. The Phillips court explained that "many municipalities in Washington accept private storm water facilities for maintenance or ownership after they are constructed in connection with a new development. This occurs because homeowner associations or other private owners do not have the funds or motivation to do necessary maintenance to keep the drainage facilities operating at their maximum efficiency." Id. HM cannot establish that a private landowner has the same duty as a municipality to maintain the stormwater drainage facility that serves its property. We find that the trial court did not err when it found that BNSF had no duty.

The Letter from BBNA's Counsel

HM argues that the trial court erroneously excluded a letter from BBNA's counsel that indicated that it would no longer make payments on its lease and notified HM of its potential claims related to flooding. HM argues that the letter falls

within the business records exception listed in RCW 5.45.020. The trial court was not persuaded that it was a business record.

We use the de novo standard of review when reviewing all trial court rulings made in conjunction with a summary judgment motion. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Washington's Uniform Business Records as Evidence Act "makes evidence that would otherwise be hearsay competent evidence." Cantrill v. Amer. Mail Line, 42 Wn.2d 590, 608, 257 P.2d 179 (1953). Under the statute, a record of a relevant act, condition, or event,

> shall ... be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. RCW 5.45.020.

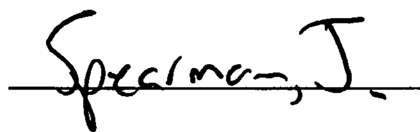
WRJV argues that the letter was properly excluded as hearsay and does not fall within the exception for business records. We agree. There is no statement from a records custodian or other qualified witness about its identity or that it had been made in the usual course of business at or near the time of the act in question. Neither the attorney's affidavit, nor the date of the letter, supply the missing pieces or provide the inherent reliability necessary to satisfy the exception. The trial court properly excluded the evidence as hearsay.

Fees and Costs

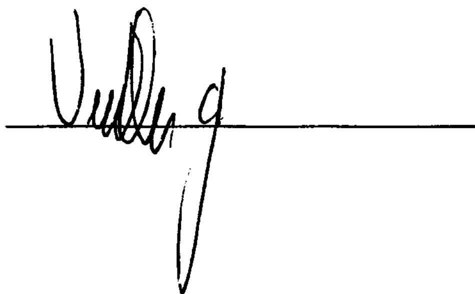
BNSF asks for an award of costs on appeal; upon submission of a cost bill, we award BNSF its costs under RAP 14.2. Because WRJV is not the prevailing party its request for fees and costs, pursuant to RAP 18.1 and RAP 14.3 is denied.

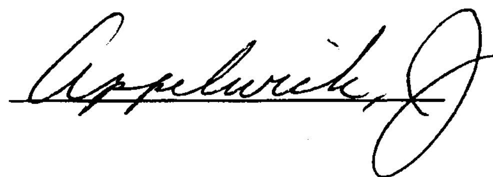
No. 73528-4-I/22

Reversed in part and remanded for further proceedings consistent with this opinion.



WE CONCUR:





APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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February 8, 2017

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CASE #: 73528-4-I
Holden-McDaniel Partners, Appellant v. City of Arlington et al, Respondents

Counsel:

Enclosed please find a copy of the Order Denying Motion to Publish entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Reporter of Decisions
Igor Lukashin

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

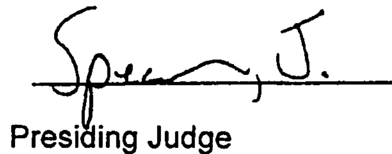
HOLDEN-MCDANIEL PARTNERS, LLC, Appellant, v. CITY OF ARLINGTON, a municipal corporation; WOODLAND RIDGE, a joint venture; KAJIMA DEVELOPMENT CORP., A JOINT VENTURE; ARLINGTON COUNTRY CLUB, INC., a joint venture; BNSF RAILWAY COMPANY, a Delaware corporation, Respondents.	)	No. 73528-4-I DIVISION ONE ORDER DENYING NON-PARTY APPLICANT'S MOTION TO PUBLISH

Igor Lukashin, a non-party applicant in the above matter filed a motion to publish the substituted opinion filed in the above matter on January 9, 2017. A majority of the panel has determined the motion should be denied.

Now therefore

IT IS HEREBY ORDERED that the non-party applicant's motion to publish is denied.

Dated this 8th day of February 2017.



Presiding Judge

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STATE OF WASHINGTON
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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

2017 MAR 10 PM 1:40

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, ANNE BRICKLIN, 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 Appellant's Petition for Review to be served on:

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DATED this 10th day of March, 2017, at Seattle, Washington.

ANNE BRICKLIN