No. 96796-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 77787-4-I

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

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

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

Appellants

v.

SNOHOMISH COUNTY

Respondent/Cross Appellant,

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

In tacit acknowledgement that the Court of Appeals' reasoning is indefensible, Snohomish County devotes half its Answer to supposed "alternative" bases for affirming the Court of Appeals, even though the Superior Court and Court of Appeals either rejected or ignored those "alternative" arguments. Plaintiffs file this reply in accordance with RAP 13.4(d) to address Snohomish County's "alternative" bases for affirming the Court of Appeals.

II. REPLY ARGUMENT

A. Plaintiffs Presented a Triable Question Whether the County's Negligent Warning Caused Their Injuries.

On March 6, 2006, the County purported to warn the entire community about future landslide risks. Plaintiffs presented evidence that the County's warning was negligent because the County did not tell people what it knew – that the next slide could kill people, that the scope of the mortal danger to the community could not be known without a study and monitoring of the hillside, and that the County had decided to do neither. The Superior Court held, after reviewing all the evidence, that whether the County's negligent warning to Steelhead Haven foreseeably caused Plaintiffs' injuries is a fact question for the jury, rejecting each of the County's legal causation arguments. CP_7698-7700. *See McKown v. Simon Property Group Inc.*, 182 Wn.2d 752, 762-64, 344 P.3d 661 (2015).

The County says here that the passage of eight years between the two slides somehow inoculates the County from liability for its negligence. Yet the trial court found no such barrier to liability, and the March 2014 Oso Landslide was in fact the very next event that could have produced harmful consequence to people in the Steelhead Haven area as a result of the County's negligence. The passage of time is not, by itself, a barrier to finding legal causation:

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

Theurer v. Condon, 34 Wn.2d 448, 460 (1949) (intervening period of several years between installing oil burner that posed a fire hazard and the resulting fire did not control question of causation; quoting Prosser on Torts 349, § 48). Washington cases, especially those involving warnings, find legal causation even when the injury did not occur until many years after the inadequate warning was given. *See, e.g., Brown v. McPherson's, Inc.*, 86 Wn.2d 293, 298-99, 545 P.2d 13 (1975) (failure to warn two years earlier "deprived [plaintiffs] of the opportunity to be forewarned of their danger ... and ... avoid the losses they suffered"); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 865-66, 5 P.3d 49 (2000) (rejecting defendant's argument against legal causation despite its decades-long failure to update

safety standards). *Accord* Restatement (Third) of Torts § 39; Restatement (Third) of Torts § 7 cmt. k ("[I]n some cases an actor's conduct may create a continuing risk of harm and the question arises whether the actor has a duty later with regard to that continuing risk.)

The relevant question is whether anything occurred during the intervening period that made the sequence of events too attenuated to connect defendant's breach of duty with a plaintiff's injury. *See Kim v. Budget Rent a Car Sys., Inc.*, 143 Wn.2d 190, 205-06, 15 P.3d 1283 (2013). No intervening acts occurred between the County's negligent warning to the community in 2006 about future landslides and the 2014 Oso Landslide, which destroyed it. The County did not correct its omissions. No one else warned the community that the next slide could kill people. No one began to study or monitor the hill across from the community, as the County knew needed to be done.

The County tries to make something of the fact that some Plaintiffs did not live in Steelhead Haven at the time of the County's 2006 negligent warning. Answer at 11-12. But Messrs. Thompson, Jefferds and Sewell who attended the 2006 meeting and were leaders of their small community each testified that had the County not concealed what the County knew – that after the 2006 slide the hillside across from them may pose a danger to human life when the next slide happened, that no one would know the

true scope of the danger without a study and monitoring of the hill which the County had decided not to pursue – they would have forced action and warned the community. Appellants' Opening Br. at 21 and evidence cited therein.[1] Even the County's own John Pennington, its former Emergency Management Director, admitted that the County's actions in communicating with Steelhead Haven in March 2006 and in supporting the Log Wall construction across the river made the community "feel safe." CP 5954.

Indeed, the impact of the County's 2006 negligence was manifested just weeks before the 2014 landslide when Plaintiff Amanda Lennick moved into Steelhead Haven, having conducted her own investigation – including talking to Mr. Thompson – to satisfy herself that she would be safe living there. CP 6312-14; 6872; 6914-15. She died on March 22, 2014.

The County next argues that an adequate warning regarding landsliding would not have mattered because the residents did not heed the County's warning to protect themselves from flooding (Answer at 12).

[1] As shown in *Brown*, causal linkage can be proven by demonstrating that third parties relied on the defendant's negligent warning (or promise to warn), and that had they not so relied, plaintiffs would have been saved even though they never spoke with the defendant. *Brown,* at 299 (citing, *e.g.,* Rest. 2d § 323(a) (1965) (duty to render services to another for their protection);[1] *id.* at 301 (citing, *e.g.,* Rest. 2d § 324A (duty to render services to another, necessary to protect a third person).

But these river residents understood flooding and its risks, which did not endanger their lives. They did not know that the next slide could kill them, and the County's Christine Badger (contrary to the County's argument here) believed that residents of Steelhead Haven would have heeded adequate warnings and were not people who put themselves unnecessarily at risk. CP 6083 (39:15-40:11).

The County next argues that everyone agrees that the precise scale of the Oso landslide could not be predicted (Answer at 12), which, while true, is irrelevant. The County was negligent, not for failing to warn of the precise scale of the Oso Slide, but in failing to tell residents that lives were at risk, that study and monitoring were necessary to understand that true danger, and that no one was going to study or monitor the slide.

Finally, the County claims that construction of the Log Wall was an alleged intervening event, such that the County's 2006 negligent warning cannot be a legal cause of Plaintiffs' harm. Answer at 12. Putting aside the County's own active sponsorship of the Log Wall (see pp. 13-14 below), the fact that the wall made the next slide more lethal does not negate the County's 2006 negligent warning about future landslide risks. The County's negligent warning *and* the increased danger posed by the Log Wall were concurrent causes of Plaintiffs' injuries, but one does not supercede the other. *See* WPI 15.04 and 15.05.

In sum, legal causation does not afford an alternative basis for affirming the Court of Appeals' defective decision.

B. Flood Control Immunity Does Not Apply to the County's Communications About Future Landslide Risks.

The County says that because the agenda for the March 6, 2006, community meeting addressed multiple topics, including the topics of flooding *and* future landslide risks (CP 6014) everything the County said at the meeting is entitled to flood immunity. The County argues, for example, that the County recommended forming a flood district and considering applying for a federal flood buyout (Answer at 14), so anything it said about future landslide risks is entitled to flood immunity. But Plaintiffs' negligence claim against the County has nothing to do with what the County said about "flooding." It has everything to do with what the County did not say about future landsliding: that the next slide could cross the river and kill people, and that the scope of the danger could not be known without study and monitoring, which were not going to be done. These subjects have nothing to do with flooding.[2]

[2] Moreover, the County attempted on March 11, 2006, to foist responsibility for flood control on the community. Flood immunity "shields counties from liability for their efforts to protect the public from flood damage." *Paulson v. Pierce Cnty.*, 99 Wn.2d 645, 649, 654, 664 P.2d 1202 (1983). Thus, even if the County's negligence were based on its discussion of flood planning on March 11, 2006 (and it is not), flood immunity does not apply to a county's attempt to *avoid* flood responsibilities.

As noted in Plaintiffs' Petition, governmental immunities are construed narrowly to effectuate only the specific purpose of the statute that carves an exception from the waiver of sovereign immunity. Petition at 20. Nonetheless, the County seeks expansive flood immunity protection to cover its negligent statements about landslide risks. The County cites as its sole authority a federal case (*Graci v. United States,* 456 F.2d 20 (5th Cir. 1971)) interpreting the federal flood immunity statute, where the court held that the government had flood immunity for its statement that the river would not overflow its banks to flood private property. Answer at 15. Plaintiffs here do not allege that the County negligently warned about flooding risks. The County's negligence lay solely in its misleading omissions about future landside risks. No case has ever broadly construed flood immunity to cover negligent warnings about future landslide risks, and to do so here would be entirely inconsistent with a narrow construction of statutory immunities in light of waiver of sovereign immunity.[3]

C. Plaintiffs Presented a Triable Question Whether the County's Active Participation in the 1500 Foot Log Wall Project Was Negligent.

In addition to ignoring the plain language of RCW 77.55.181, and attempting to limit the statutory term "criteria" to just those statutory

[3] Even *Graci* reinforces that no flood immunity should apply to the County's negligent warning about future landslide risks. *Graci* rejected flood immunity for flood damage caused by a government navigation project unconnected to flood control.

criteria it likes (Answer at 15-16), the County also tells the Court that it can affirm because -- contrary to the Superior Court's finding -- the evidence is insufficient for a jury to conclude that the County may be held accountable for its negligent active participation in the Log Wall project. Answer at 18. The County's argument ignores disputed evidence, downplays its documented involvement, and misreads the case law on active participation. The trial court properly concluded the record establishes a disputed issue of material fact about the County's active participation in the Log Wall project. CP 2772-73; CP 4341. *See, e.g.*, *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013).

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

participant in allowing land, or land over which it had control, to be used by the developer" and this constituted "actual involvement" in the project. *Id.* at 967-69. Accordingly, the Court concluded if the facts at trial established "that the County participated in creation of the problem, it may participate in the solution." *Id.* Similarly, in *Borden v. City of Olympia*, the court refused to apply the public duty doctrine where the City of Olympia "helped private developers design, engineer, and pay for a new stormwater drainage system." 113 Wn. App. 359, 371, 53 P.3d 1020 (2002). The court determined that not only did the City help secure funds for the project, but it also participated in a consulting role by providing technical reviews and hydrological modeling. *Id.* at 365. Thus, the court concluded the City "essentially was aiding and cooperating with [the] private developers[]", which meant it was "engaging in a proprietary function" and was responsible for a reasonable duty of care in its actions. *Id.* at 371. Notably, neither *Phillips* nor *Borden* sets a minimum level of participation to prevent dismissal under the public duty doctrine.[4] All that

[4] The County erroneously suggests that Plaintiffs did not ask the Court of Appeals to review its affirmative conduct negligence claim in relation to the Log Wall. Answer at 2, n. 1. Plaintiffs raised the issue directly on appeal. *See* Plaintiffs' Reply Br. at 12.

was required in *Phillips* was use of county land.[5] Nor, as the County erroneously suggests, does a plaintiff in a multi-tortfeasor case need to show that without the County's participation alone, no harm would have occurred.[6]

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[5] The County is incorrect when it attempts (Answer at 18) to limit *Phillips* to inverse condemnation claims where the Supreme Court did not grant review to the dismissal of an accompanying negligence claim. The Supreme Court's reasoning in *Phillips* acknowledges that "active participation" is not subject to the public duty doctrine, a doctrine applying equally to negligence and inverse condemnation. *See Phillips*, 136 Wn.2d at 950. Indeed, the Supreme Court reinstated a claim for a tort of trespass along with inverse condemnation, and did not raise the specter of the public duty doctrine for either claim given the County's active participation. *Id.* at 957 n.4 & 969. Moreover, a year after *Phillips*, the Supreme Court adopted a negligence cause of action against landowners who altered the flow of water on their property and thereby caused damage to neighboring properties, thus eliminating any remaining vitality for the Court of Appeals' 1997 negligence holding in *Phillips*. *See Currens v. Sleek*, 138 Wn.2d 858, 859, 868, 983 P.2d 626 (1999). Finally, three years later the Court of Appeals recognized that the Supreme Court's decision in *Phillips* governs negligence claims and explicitly relied on the Supreme Court's reasoning in *Phillips* and *Currens* to analyze a negligence duty of care arising from active participation. *Borden*, 113 Wn. App. at 371. *Borden's* holding and reasoning are completely contrary to the County's interpretation of *Phillips*.

[6] The County cites *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999) (Answer at 19), but the plaintiff in *Halverson* sought inverse condemnation based on the existence of levees the County did not own and did not bring into existence. Nothing in *Halverson* wrote out of Washington law the principle that multiple factors may contribute to the harm caused a plaintiff. In any event, it was for the jury to decide if the wall would have been built but for the County's active sponsorship.

In applying *Phillips* and *Borden*, the trial court determined "sufficient evidence exists such that a fact-finder should determine whether the County was 'actively involved' in the revetment project." CP 4329; *see also* CP 2772-73, CP 4341. The County sponsored the Corps of Engineers study recommending a log wall. It served as the co-lead of the SIRC, the organization that adopted and pursued funding for log wall. It lobbied for funding of the wall. It provided County land and materials for construction of the Log Wall, and it oversaw the design and construction of the wall, and monitored its performance over the years. The level and duration of the County's participation belies the County's claim that it had no authority or was operating solely as a governmental actor. *See* Plaintiffs' Opening Br. at 3-17 and CP 3940, 3955-56, 3958, 3918, 1362, 6028, 6033, 6045, 739, 893-95, 3397, 3404-06, 3866-67, 3892-93, 3903, 4024, 4057, 4073-76, 4078-123, 4133-98,1358-60, 3232, 3869-72, 3879, 3902, 4053, 4044, 4048. Indeed, the County's argument that others (the Tribe, the State) had governmental authority over the Log Wall demonstrates that the County was acting as a volunteer and thus in its proprietary capacity.

There is no reason to question the trial court's conclusion that the County's active participation in the log wall project presents a triable question.

D. Flood Immunity has no Application to the County's Active Involvement in the Log Wall, which was a Fish Enhancement Project.

Finally, the County argues that if it is not entitled to fish enhancement immunity it must be given flood immunity for its active participation in the Log Wall project. The Court should reject this alternative argument for affirmance. The County only receives Flood Control Immunity when it is "acting alone or when acting jointly with" another Washington municipality on a flood control project. The Legislature granted counties Flood Control Immunity under RCW 86.12.037 to encourage them to build dams and dikes to prevent flooding and to keep rivers navigable. The Legislature's clear intent was to "shield counties from liability for their efforts to protect the public from flood damage." *Paulson v. Pierce Cnty.*, 99 Wn.2d 645, 649, 664 P.2d 1202 (1983). The *Paulson* Court held that this balance between encouraging action by a county and providing immunity is a rational tradeoff that prevents the costs of flood damages from being added to the costs of constructing flood control facilities. *Id.* at 654.

The Log Wall was neither conceived nor built as a flood control device.[7] In attempting to link the Log Wall to flood prevention, the

[7] The County originally admitted before the trial court that the as-built 2006 Log Wall was not the project contemplated in the County's 2004 Flood Plan and was not entitled to flood immunity. *See* CP 1882

County selectively excerpts a portion of the Log Wall's permit application to give the impression that the it had some link to flood control. A review of the application demonstrates no such thing; it notes only that clearing trees near the Log Wall may have some impact on future flooding, while the use of those trees in the Log Wall itself would add "ecological value to the project" because it would "enhance the riparian growth along with the log wall and jumpstart the development of the functional riparian." CP 3025-26. Tellingly, everyone involved with the 2006 Log Wall that was built acknowledged it was not intended to have any influence on a landslide or flood. *See, e.g.*, CP 4201-06 at 50:2-11, 86:16-87:11, 96:1-98:16 (statements by Tracy Drury, Log Wall's lead engineer, that the project was not intended to stabilize the Hazel Landslide or protect Steelhead Haven). The record is clear and undisputed that the Log Wall was never intended to act as a flood control device, either by allowing for flood conveyance or by stabilizing the Hazel Landslide.

Flood immunity does not apply where negligent acts do not involve flood control, even if they may be closely related. *See Hamilton v.*

("Defendants conceded at oral argument that the construction of the woody crib wall (log revetment) months after the 2006 flood fight, is not subject to immunity pursuant to RCW 86.12.037."). Even when the County reversed course a year later to seek immunity for the as-built Log Wall, it admitted that was not the same project contemplated in the 2004 Flood Plan. CP 3439.

King County, 195 Wash. 84, 91, 79 P.2d 697 (1938) (no immunity for construction of a ditch in a "drainage project, rather than one involved in flood control"). This is exactly why the trial court rejected flood immunity for the as-built Log Wall: it was not created for flood control purposes even if it mentioned potential impacts on flooding. S*ee* CP 4330 ("The Court does not, however, agree that immunity attached if one of the benefits of a project initiated for a different purpose happens to also have an impact on flood prevention. ... Certainly the JARPA's first page only identifies fish habitat rehabilitation as the purpose of this project.").

The Court should reject this last "alternative" basis for affirming the Court of Appeals and grant review.

III. CONCLUSION

For the foregoing reasons, this Court should grant this Petition and reject the County's "alternative" arguments for affirmance.

DATED this 4th day of April, 2019.

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