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No. 642448

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

JAMES H. JACKSON and C.R. HENDRICK,
a marital community,

Plaintiffs-Appellants,

v.

TRENCHLESS CONSTRUCTION SERVICES, L.L.C., a Washington
Limited Liability Company, and QPS, INC., a Washington Corporation
doing business as "QUALITY PLUMBING",

Defendants-Respondents,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Michael Trickey)

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR.....3

III. ISSUES PRESENTED.....3

 1. Whether genuine issues of material fact exist that preclude summary judgment.....3

 2. Whether contractors, in performing the work on their contracts, owe a duty of care to third persons who are not parties to the contract but who may foreseeably be injured or damaged as a result of the contractors’ negligence4

 3. Whether there is any basis in tort law or other applicable principle of law whereby negligent contractors do not owe a duty of care because the injuries suffered by plaintiff were to property rather than personal injuries4

IV. STATEMENT OF THE CASE.....4

 A. Background Facts.....4

 B. Installation of New Waterline on the Steep Slope5

 C. The Landslide.....8

 D. The Negligence of Trenchless and QPS Caused the Landslide and Injury to the Property9

 E. Appellants’ Tort Claims.....11

 F. Dismissal on Summary Judgment Based on Lack of Duty12

V. ARGUMENT13

 A. Standard of Review.....13

B.	Contractor Respondents Owed Appellants A Duty of Care Under Both Statute and Common Law	14
a.	Contractor Respondents Owed Appellants a Duty of Care Under the Seattle Municipal Code	14
b.	Contractor Respondents Also Owed Appellants A Duty of Care Under Common Law	18
c.	The Court Erroneously Invoked “Privity” and <i>Burg v. Shannon & Wilson, Inc.</i> To Deny Respondents’ Duty	21
d.	Trenchless And QPS Owed A Duty Of Care Regardless Of Whether The Appellants Suffered Personal Injuries Or Property Damage	25
C.	Public Policy Dictates That Construction Contractors Owe A Duty Of Care To Third Persons Why May Be Foreseeably Injured As A Result of Negligent Work.....	27
VI.	CONCLUSION.....	29

APPENDIX OF SEATTLE MUNICIPAL CODE PROVISIONS

TABLE OF AUTHORITIES

Cases

Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007).....1, 27

Anderson v. State Farm Ins. Co., 101 Wn. App. 323,
2 P.3d 1029 (2000).....13

Bernethy v. Walt Failor’s, Inc., 97 Wn.2d 929, 653 P.2d 280 (1982).....14

Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 43 P.3d 526 (2002)
.....21, 22, 23, 24

Davis v. Baugh Indus. Contrs., Inc., 159 Wn.2d 413, 150 P.3d 545 (2007)
..... passim

Genie Indus., Inc. v. Market Transp., Ltd., 138 Wn. App. 694, 158 P.3d
1217 (2007).....13

Johnson v. Oman Const. Co., Inc., 519 S.W.2d 782 (Tenn.1975).....26

Jones v. Allstate Ins. Co., 146 Wn.2d 291, 45 P.3d 1068 (2002)13

McDonough v. Whalen, 365 Mass. 506, 313 N.E.2d 435 (1974)26

McLeod v. Grant County School Dist. No. 128, 42 Wn.2d 316, 255 P.2d
360 (1953).....21

Minahan v. Western Washington Fair Assoc., 117 Wn. App. 881, 73 P.3d
1019 (2003).....13

Morgan v. State, 71 Wn.2d 826, 430 P.2d 947 (1967)17

Raffensperger v. Towne, 59 Wn.2d 731, 370 P.2d 593 (1962).....17

Rikstad v. Holmberg, 76 Wn.2d 265, 456 P.2d 355 (1969).....14

Stieneke v. Russi, 145 Wn. App. 544, 190 P.3d 60 (2008)27

Wells v. Vancouver, 77 Wn.2d 800, 467 P.2d 292 (1970)..... passim

Yong Tao v. Heng Bin Li, 140 Wn. App. 825, 166 P.3d 1263 (2007)13

Statutes

S.M.C. 22.808.090(A)(5).....11

S.M.C. 22.800.020(A)(1).....18

S.M.C. 22.802.015(C)(3)11, 15

S.M.C. 22.808.09015

Other Authorities

Restatement (Second) of Torts § 385 (1965).....19, 25, 26

Restatement (Second) of Torts §§ 394, 396 (1965).....19

Restatement (Second) of Torts §§ 395 (1965)26

I. INTRODUCTION

This appeal from a summary judgment tests the duties owed by construction contractors to third parties for injury to property caused by negligent construction practices. It also involves defining the boundaries of the “economic loss” rule articulated by the Supreme Court in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), to the extent the trial court also improperly based its summary judgment on the idea that one cannot recover damages for injury to property alone (as distinct from personal injury) when a contractor commits negligence.

Appellants James H. Jackson and his wife, C.R. Hendrick, had owned their West Seattle home for approximately two weeks when it was severely damaged on the evening of December 14, 2006, by a landslide of mud and debris from a steep slope above the house. After the landslide, Mr. Jackson and Ms. Hendrick learned that ten months prior to their purchase of the house, two contractors—respondents Trenchless Construction (“Trenchless”) and Quality Plumbing (“QPS”)—had been retained by the previous owner of the house to install a new main water service line. The appellants also discovered that the respondents had done their work in a careless and illegal manner without obtaining required permits on the dangerously steep slope, and had failed to comply with important basic safety ordinances mandated for such construction by the

Seattle Municipal Code. The respondents lied to the City permit officials, and concealed the true nature of their work which, upon subsequent inspection by experts in this litigation, proved demonstrably careless and a direct cause of the landslide. CP 360-62, 476-80.

Regardless, on summary judgment before the trial court, respondents Trenchless and QPS successfully argued that there were no issues of material fact despite the damning evidence and expert testimony against them. They successfully persuaded the court to rule that, as a matter of law and public policy, contractors such as respondents owe no duty of care to parties such as Mr. Jackson and Ms. Hendrick merely because appellants bought the house from the original landowner who had contracted with respondents. The court also ruled that there is no duty here because the appellants suffered only property injury, not personal injury, apparently accepting at face value the distortion of the “economic loss” rule argued by respondents.

On appeal, we urge that this is a tort case, not a contract case. Because this is a tort case, it is irrelevant whether the Jacksons bought the house from the prior owner who contracted for the awful work and it is irrelevant that there was no privity between the appellants and the respondent contractors. Ruling otherwise would be contrary to public policy in that negligent and sloppy contractors would be insulated from the

consequences of their negligent acts simply because the injured plaintiffs have no rights or remedies against them based on contract. Furthermore, there is not and there should not be a legal distinction between personal injury and property injury when it comes to assessing duty and thus liability for damages resulting from the negligence of a construction contractor. Neither the economic loss rule nor any applicable principle in tort law bars claims by such plaintiffs for injury to property distinct from personal injury.

II. ASSIGNMENTS OF ERROR

The trial court erred:

- 1) In determining there are no genuine issues of material fact precluding summary judgment (CP 519);
- 2) In granting Trenchless' and QPS' motions for summary judgment dismissing the complaint of appellants on the legal grounds that respondents owed no duty of care to the appellants (CP 512-14, RP 33:20-24); and
- 3) In ruling that appellants' rights turn on whether they suffered personal injury or property damage (RP 33:25-34:12).

III. ISSUES PRESENTED

The issues presented are:

- 1) Whether genuine issues of material fact exist that preclude

summary judgment;

2) Whether contractors, in performing the work on their contracts, owe a duty of care to third persons who are not parties to the contract but who may foreseeably be injured or damaged as a result of the contractors' negligence; and

3) Whether there is any basis in tort law or other applicable principle of law whereby negligent contractors do not owe a duty of care because the injuries suffered by plaintiff were to property rather than personal injuries.

IV. STATEMENT OF THE CASE

A. Background Facts

The appellants, James H. Jackson and his wife, C.R. Hendrick, moved into their home at 4321 SW Thistle Street in West Seattle, near Lincoln Park, in late November 2006. CP 433, 457. The house is located on a steep slope designated as an environmentally critical area ("ECA") by the City of Seattle. CP 457. Because of the steep slope, Mr. Jackson and Ms. Hendrick had a thorough pre-purchase inspection done of the house, including a full geotechnical engineering report. CP 433. Through their due diligence, they learned that in the forty-six years the house was owned by the seller, Corrine Otakie and her late husband, there had never been a landslide or erosion event which caused damage to the house. CP 433.

B. Installation of New Waterline on the Steep Slope

In February 2006, less than a year before the landslide, Mrs. Otakie, the previous owner of the house, had discovered that her water bill was exceptionally high. CP 434, 457-58. She was informed by the City of Seattle that she had a possible water leak and that she needed to have it repaired. CP 434. Mrs. Otakie was referred to and retained respondent QPS to repair her water line. CP 434, 458. When QPS representatives discovered how steep the slope was and how far the City water meter was from the house, they decided not to undertake the task of replacing the water service to the house out of concern for the safety of their employees and the risk of excavated soil sliding down the slope. CP 434, 458. Instead, QPS referred Mrs. Otakie to another company, respondent Trenchless, to install an entirely new water line rather than repairing the existing water line. CP. 434, 458. Trenchless contracted directly with Mrs. Otakie to install a new 150 foot long main waterline by use of underground directional or “trenchless” drilling, while QPS contracted to hook up the new water line to both the City water meter at the top of the slope and the home at the bottom of the slope. CP 434, 458. Although Trenchless ordinarily subcontracted with QPS, in this instance, QPS arranged for Mrs. Otakie to contract directly with Trenchless. CP 434, 459.

In the February 20, 2006 written contract between Trenchless and Mrs. Otakie, all permits and easements were excluded. CP 170. From that point forward, Trenchless never again considered whether it needed permits, easements, or permission from the City or from private property owners whose land they would be drilling across. CP 434-35.

Prior to beginning the work to replace the water line, QPS sent its warehouse employee to obtain a street use permit that would allow QPS to work in the right of way of the City of Seattle. CP 435, 459. This warehouse employee, Gary Hauser, knew nothing about the work or the plan to carry out the work, and did not disclose to the City the fact that underground directional boring was going to be done on the site. CP 435, 459. For this reason, the City never knew the full extent of the work to be done at the site. 435, 460. Furthermore, the street use permit that was obtained by QPS only authorized QPS to repair a 50 foot long stretch of copper water service. CP 435, 460. In fact, contrary to the permit, no repair was ever done; rather, QPS and Trenchless installed an entirely new main water line and left the original water line in place. CP 434, 458. No permit was ever obtained for the actual work that was done by Trenchless. CP 435, 460. Trenchless and QPS did the work by excavating deeply, without permission or proper construction controls, on, over, and under the property of the City and of several landowners whose consent was not

asked for or obtained. CP 436, 460-61.

Rex Stratton, the head of the City of Seattle's street use permit section, testified that had the City known that Trenchless was going to drill into the City right of way without a permit, the City would not have allowed Trenchless to proceed with the work unless they underwent a detailed review process. CP 436-37, 460. In fact, had the City been made aware of the fact that directional boring would be done on the environmentally critical slope, it would have subjected the project to rigorous scrutiny, including an environmental review through the City's Department of Planning and Development, and it would have closely monitored the progress of the drilling. CP 437, 460. The absence of such scrutiny and control was a direct cause of the landslide. CP 478-80.

In addition to the dangers associated with performing trenchless drilling on steep, environmentally critical slopes without permits or engineering oversight and approval, Mr. George Kraft, a neighbor of Mr. Jackson and Ms. Hendrick, witnessed QPS employees digging a large hole at the top of the slope above the appellants' home which was "at least 6 feet deep in places and which had approximately rectangular dimensions of 15 feet by 12 feet by 20 feet by 10 feet." CP 351-54, 462. The purpose of this excavation was to connect the new waterline installed by Trenchless to the City water meter. CP 361. Mr. Kraft vividly remembers

the size and depth of the hole because he looked down on the top of two or three workers' heads and the hole was deep enough so that he saw that the workers were actually underneath the City sidewalk. CP 351-54, 462. In reviewing QPS' work, expert engineer Edward McCarthy rendered the opinion that QPS' backfilling the huge hole with native soils combined with mere hand compaction rendered the slope susceptible to storm water runoff and groundwater percolation. CP 476-77. Mr. McCarthy further testified that proper soil compaction was especially important at the location in question because of the steep slope, the threatening presence of surface water from the street, and the erosive nature of the native soils, poor compaction of backfill initiated debris flow down the slope. CP 477. Appellants' experts rendered the opinions that the acts and omissions of both respondents were a cause of the damaging landslide. CP 360-62; 476-80.

C. The Landslide

On December 14, 2006, after heavy rains, tons of sand, mud and other debris inundated Mr. Jackson and Ms. Hendrick's house in a landslide down the steep slope. CP 433, 457. The landslide was caused by stormwater escaping into a sinkhole where QPS had previously filled its large access hole, and flowed down the underground channel improperly bored by Trenchless without proper engineering control. CP

361-62, 477-80. The landslide erupted first at the appellants' north patio wall and later engulfed the patio, gardens, and the basement and main floor of their home. CP 433, 457. The total damages, including the cost of repair and irreparable damage to the value of the hand-built, custom Pearse-designed classic home, is estimated at \$289,000. CP. 457. For purposes of this appeal it is uncontroverted that the landslide was caused by the negligence of the contractor respondents. CP 360-62, 476-80.

D. The Negligence of Trenchless and QPS Caused the Landslide and Injury to Property

Experts reviewing the work of Trenchless and QPS agree that Trenchless and QPS acted negligently in carrying out their work for Mrs. Otakie and that their negligence caused the landslide and damage to Mr. Jackson's and Ms. Hendrick's property. CP 360-62, 476-80.

Moin Kadri, a licensed engineering geologist retained by the appellants testified, based on his firsthand review of the damage following the landslide and his review of all of the deposition testimonies and exhibits, that both Trenchless and QPS were negligent in performing their work. CP 360-61. Concerning QPS, Mr. Kadri believes that the large hole dug by QPS to join the new water line to the City water meter was in the direct path to intercept storm water runoff from the adjacent intersection, leading to a scour channel that eventually resulted in the

massive erosion event. CP 361. Concerning Trenchless, Mr. Kadri believes that the alignment of the new water line installed by Trenchless coincided with the scour channel. In his opinion, it was more likely than not that the directional drilling of Trenchless provided a path of least resistance for storm water running down the slope which caused the landslide. CP 362.

A second expert retained by appellants, Edward McCarthy, a registered professional engineer specializing in water resource engineering, hydrology and hydraulics, performed a similar review of the facts of the case and reached the same conclusions as Mr. Kadri. CP 476-80. In particular, Mr. McCarthy believes that the soil excavation performed by QPS left the site with unstable soil conditions because backfilling by QPS was not done in conformity with existing standards created to ensure that soil is compacted to safe densities. CP 477. Mr. McCarthy noted that QPS apparently compacted the backfill using hand labor rather than proper compaction equipment and that there was no record of QPS taking any of the necessary measures to ensure safe and proper compaction. CP 477. In addition, Mr. McCarthy noted that QPS backfilled using native soils, which were erosive in nature and would only have been allowed with prior approval from a City inspector or soils engineer. CP 477.

Mr. McCarthy also believes that Trenchless failed to recognize the propensity of the site conditions to create potential for groundwater flow along the pathway of their boring and failed to take greater precautions to prevent groundwater flow. CP 479. Concerning both Trenchless and QPS, Mr. McCarthy believes that there was a lack of planning and a deficiency of reasonable care demonstrated by the contractors' failure to investigate or willful ignorance of the site's sensitivities and their failure to identify boundaries of property ownership and easements. CP. 478

In short, these experts' declarations show that Trenchless and QPS were careless and cavalier in drilling and excavating on the environmentally critical slope and that their negligent and illegal acts caused the property damaging landslide.

E. Appellants' Tort Claims

In their Complaint for Damages, Mr. Jackson and Ms. Hendrick brought claims of negligence against both Trenchless and QPS for breaching their duties under the common law of negligence and Seattle Municipal Code provisions S.M.C. 22.802.015(C)(3)(b)-(c), **Error! Bookmark not defined.** which require contractors to stabilize all exposed soils disturbed by digging or drilling in order to prevent the transport of sediment from a digging or drilling site, and S.M.C. 22.808.090(A)(5), which holds contractors liable for causing or contributing to dangerous

conditions relating to storm water or erosion that are likely to endanger the public health, safety or welfare, or public or private property.¹ CP 7-9. Mr. Jackson and Ms. Hendrick further alleged that the respondents were negligent in failing to adequately stabilize the land on and above the slope, rendering it vulnerable to sinkholes, erosion, channeling, and landslides in the event of heavy rainfall. CP 8-9. Mr. Jackson or Ms. Hendrick have never claimed any special standing to sue because they were successors in the ownership of the house; nor did they claim that their claims arose out of the contractors' contract with Ms. Otakie. CP 3-14.

F. Dismissal on Summary Judgment Based On Lack of Duty

At the hearing on the respondents' motions for summary judgment, the Court focused primarily on the issue of whether the contractors owed any duty to Mr. Jackson and Ms. Hendrick. RP 12:5-12. During the hearing, the court also focused on the fact that Mr. Jackson and Ms. Hendrick owned the house subsequent to the owner who contracted with the respondents: "What I take the argument here to be is, if you do work on someone's property, you have a duty to subsequent owners of the property." RP 29:8-10. In reaching its ruling, the court found that there was no duty owed by either of the contractors to Mr. Jackson and Ms.

¹ In addition to their claims against the respondents, the appellants also alleged numerous causes of action against the City of Seattle which were later voluntarily dismissed when the appellants reached a settlement with the City.

Hendrick “as successor landowners in interest to the individuals, who contracted with Trenchless and QPS to do this work.” RP 33:20-24. The court also ruled that as a matter of public policy, where there is only property damage and not physical injury to persons, there is no duty in situations such as this. RP 33:25-34:12.

V. ARGUMENT

A. Standard Of Review

The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Genie Indus., Inc. v. Market Transp., Ltd.*, 138 Wn. App. 694, 700, 158 P.3d 1217 (2007) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). All facts and all inferences must be viewed in the light most favorable to the nonmoving party. *Anderson v. State Farm Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). The existence of a legal duty is generally a question of law. *Minahan v. Western Washington Fair Assoc.*, 117 Wn. App. 881, 890, 73 P.3d 1019 (2003). To the extent duty includes foreseeability, the question of foreseeability is ordinarily one of fact. *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 833, 166 P.3d 1263 (2007).

B. Contractor Respondents Owed Appellants A Duty Of Care

Under Both Statute And Common Law.

“A cause of action founded in negligence requires that a plaintiff establish that: (1) there is a statutory or common-law rule that imposes a *duty* upon defendant to refrain from the complained-of conduct that is designed to protect the plaintiff against harm of the general type....” *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 932, 653 P.2d 280 (1982) (quoting *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969)).

Here, Mr. Jackson and Ms. Hendrick’s negligence claims against Trenchless and QPS are based upon violations of provisions of the Seattle Municipal Code as well as a common law rule that impose a duty on contractors to refrain from negligent performance of their work and that were designed to protect people in the place of Mr. Jackson and Ms. Hendrick from the harm that they suffered.

a. Contractor Respondents Owed Appellants A Duty Of Care Under The Seattle Municipal Code

First, the respondent contractors owed a duty of care to Mr. Jackson and Ms. Hendrick under the Seattle Municipal Code. “The scope of the duty imposed by statutory rule is a matter of law. The duty extends only to persons in the class intended to be protected by the statute or ordinance, and only to those persons who suffer harm from a hazard which was intended to be prevented by compliance with the statute or

ordinance.” *Wells v. Vancouver*, 77 Wn.2d 800, 804, 467 P.2d 292 (1970).

Here, Trenchless and QPS demonstrably violated the provisions of the Seattle Municipal Code that pertain to building codes and preventing erosion and landslides. CP 360-62, 449-51, 476-80. In particular, S.M.C. 22.802.015(C)(3) states that “[d]uring land disturbing activities ... , temporary and permanent construction controls shall be used to accomplish the following.... (b) Before the completion of the project, permanently stabilize all exposed soils that have been disturbed during construction.... (c) Prevent the transport of sediment from the site....”

Moreover, S.M.C. 22.808.090, listing civil violations of S.M.C. 22.800, explicitly states: “Dangerous Condition. It is a violation of this subtitle to allow to exist, or cause or contribute to ... a condition related to ... stormwater, drainage or erosion that is likely to endanger the public health, safety or welfare ... or public or private property.”

Both of these ordinances set forth the statutory duty of care that Trenchless and QPS owed to Mr. Jackson and Ms. Hendrick, not because they were the successor owners of the individual with whom Trenchless and QPS contracted with, but because they were landowners who owned land down slope of the area where Trenchless and QPS conducted their land disturbing activities and because their safety, welfare, and property were at risk due to the negligent acts of the respondent contractors. Under

these ordinances, Trenchless and QPS, who were both involved in land disturbing activities which had the potential to create a dangerous landslide hazard in the environmentally critical slope, owed a duty of care not to create such a dangerous condition and to use permanent controls to stabilize soil on the slope so as not to endanger the life and private property of Mr. Jackson and Ms. Hendrick, whose house was located immediately below the slope upon which the work was done. There is no issue of fact, based on expert and eyewitness testimony, that they failed to comply with these standards. CP 351-54, 360-62, 462-63, 476-80.

Wells v. City of Vancouver, supra, describes the duty we urge applies here. In *Wells*, the plaintiff was injured when he was hit by a piece of falling plywood that had come loose off of a hangar at the municipal airport. *Wells*, 77 Wn.2d at 801. The plaintiff brought suit against the city for negligent structural design of the hangar. *Id.* The plaintiff argued that the hangar was not erected in compliance with the applicable building code in effect at the time of construction that required a minimum vertical parts wind resistance factor. *Id.* At the conclusion of all of the evidence at trial, the city moved for directed verdict but the motion was denied and the case submitted to the jury, which found for the plaintiff. *Id.* at 802.

One of the issues considered by the *Wells* court was whether the city owed the plaintiff a duty imposed by a statutory rule. In analyzing the

scope of the duty imposed by statutory rule, the court stated: “The duty [imposed by statutory rule] extends only to persons in the class intended to be protected by the statute or ordinance, and only to those persons who suffer harm from a hazard which was intended to be prevented by compliance with the statute or ordinance.” *Id.* at 804 (citing *Morgan v. State*, 71 Wn.2d 826, 430 P.2d 947 (1967); *Raffensperger v. Towne*, 59 Wn.2d 731, 370 P.2d 593 (1962)). The court next looked to the language of the City of Vancouver building code, which provided in part:

Sec. 2307. (a) General. Buildings and structures and every portion thereof shall be designed and constructed to resist the wind pressure as specified in this Section. All bracing systems both horizontal and vertical shall be designed and constructed to transfer the wind loads to the foundations.

(b) Wind Pressure. For purposes of design the wind pressure shall be taken upon the gross area of vertical projection of buildings and structures at not less than 15 pounds per square foot for those portions of the building less than sixty feet (60) above ground...

Id. at 804. Although the city tried to argue that these provisions were only intended to protect persons injured by toppling or collapsing buildings, the court disagreed and found that “the provisions were intended to protect all persons who might be injured by flying debris as a result of a building’s failure to withstand wind pressure below the minimum resistance factor....” *Id.*

In like manner, the Seattle Municipal Code provisions listed above

are intended to impose a duty on contractors who are engaging in land-disturbing activities on steep and environmentally critical slopes to take the necessary precautions both during and after completion of their work so as to avoid creating a dangerous condition that could lead to landslides. The scope of these provisions should also be read to extend, as in *Wells*—that they are intended to protect all persons who might be injured or suffer damages as a result of a landslide or erosion. Indeed, the purpose of the subtitle of the applicable Seattle Municipal Code provisions is to “[p]rotect, to the greatest extent practicable, life, property ... from loss, injury or damage by ... erosion, flooding, landslides, strong ground motion, soil liquefaction ... and other potential hazards, whether from natural causes or from human activity.” S.M.C. 22.800.020(A)(1). Based on the foregoing, this Court should find that the trial court erred in failing to find that the respondent contractors owed these statutory duties to appellant landowners.

b. Contractor Respondents Also Owed Appellants A Duty Of Care Under Common Law.

In addition to owing Mr. Jackson and Ms. Hendrick a duty of care under the Seattle Municipal Code, Trenchless and QPS also owed them a duty of care under common law. The clearest statement of the existence of the common law duty that should be applied in this case is set forth in

Davis v. Baugh Indus. Contrs., Inc., 159 Wn.2d 413, 150 P.3d 545 (2007).

In *Davis*, our state Supreme Court was asked to reconsider the common law doctrine of completion and acceptance, which shielded contractors from liability for negligent work after that work had been completed and accepted by the property owner. *Davis*, 159 Wn.2d at 415. Finding that this doctrine is outmoded, incorrect, and harmful, the court adopted the rule that “a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence.” *Id.* at 417 (citing Restatement (Second) of Torts §§ 385, 394, 396 (1965)), 420. The court also quoted Section 385 of the *Restatement*, which provides:

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

Id. at 417 n.1 (quoting Restatement (Second) of Torts § 385 (1965)).

Based on the fact that our state’s highest court has adopted the approach embodied in the *Restatement*, it is clear that respondent contractors owed a duty of care not to injure the property of others who

might be injured as a result of their negligent work, even after the work was completed and accepted by the previous owner. In other words, the fact that their work was completed and accepted by the previous owner does not now bar Mr. Jackson and Ms. Hendrick from bringing this negligence action where any down slope homeowner was a foreseeable plaintiff.²

Like *Davis*, the court in *Wells v. City of Vancouver*, already discussed above, also emphasized the relationship between foreseeability and the common law duty of care. One of the City of Vancouver's contentions in *Wells* was that it could not reasonably have foreseen that the building would be struck by such a violent windstorm and, therefore, any negligence which might have occurred could not be a legal or proximate cause of plaintiff's injury. *Wells*, 77 Wn.2d at 802. Rejecting the application of foreseeability as an element of proximate cause, the court stated: "While foreseeability is not appropriately considered as part of the causation issue, it is useful in determining the limits of the defendant's duty and the reasonableness of the defendant's conduct." *Id.* The court also tied together the concepts of foreseeability and the duty of ordinary care by stating that "the duty to use ordinary care is bounded by the

² It may be important to re-emphasize that in this tort case the Jacksons are not seeking recovery for the costs of repairing the defects in the water line installed by respondents for Mrs. Otakie. Rather, they are seeking recovery of damages for injury to other property caused by the negligence of the respondents.

foreseeable range of danger. It is for the jury to decide whether a general field of danger should have been anticipated.” *Id.* at 803 (citing *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953)). By the application of foreseeability to duty, the court determined that the City of Vancouver had a duty of care imposed by common law. *Id.*

Thus, both *Davis* and *Wells* stand for the rule that a construction contractor has a common law duty of care toward third persons with whom it has no privity, where the third person may be foreseeably injured or damaged as a result of the contractor’s negligence. In this case, Trenchless and QPS, who were engaged in land-disturbing activities on a steep, environmentally critical slope, owed a common law duty of care towards all down slope and adjacent property owners who could foreseeably be injured or suffer property damage should Trenchless or QPS carry out their work in a negligent manner, or act negligently while carrying out their work.

c. The Court Erroneously Invoked “Privity” and *Burg v. Shannon & Wilson, Inc.* to Deny Respondents’ Duty

At the hearing on Trenchless’ and QPS’ summary judgment motions, much was made of the fact that Mr. Jackson and Ms. Hendrick were the subsequent or successor owners of the house and did not have a contract with Trenchless and QPS. RP 29:8-13, 33:20-24. However, the

presence or absence of a contract between the parties or the appellants' "successor" or "subsequent owner" status should have no bearing on the existence of a legal duty in tort. In fact, to take those facts into consideration while deciding the existence of Trenchless' and QPS' duty towards Mr. Jackson and Ms. Hendrick is the analytical equivalent of resurrecting the "long abandoned privity rule that a negligent builder or seller of an article [is] liable to no one but the purchaser" and such reasoning "does not accord with currently accepted principles of liability...." *Davis*, 159 Wn.2d at 417-18. In fact, "the privity requirement in tort law has been abandoned not just in Washington but in all United States jurisdictions...." *Id.* at 418.

Second, the trial court also erroneously relied upon *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 43 P.3d 526 (2002), to deny the existence of duty. RP 33:19. In that case, plaintiff landowners, whose homes were damaged in a landslide, sued the defendant engineering firm which had previously been retained by the City of Seattle to make recommendations to the city about the stability of the cliff above the plaintiffs' homes, which was city property. *Burg*, 110 Wn. App. at 800.

After the plaintiffs' homes were subsequently damaged by a landslide which was preceded by a severe rain and snow storm, the plaintiffs sued the city for failure to prevent the landslide. *Id.* at 803.

After the suit against the city failed, the plaintiffs sued the engineering firm for failing to warn the plaintiffs of the remedial measures it had recommended to the city to increase the stability of the bluff property above the plaintiffs' homes. *Id.* The action against the engineering firm failed on summary judgment, the trial court ruling that the engineering firm owed no duty to the homeowners. *Id.* Thus, the central question on appeal was whether the engineering firm owed the homeowners a legal duty to be warned of its recommendations. *Id.*

Burg is markedly distinguishable from the present case because the engineering firm in *Burg* took no action which actually disturbed the slope above the plaintiffs' homes and did nothing to create or increase the vulnerability of the slope to landslides. Rather, the plaintiffs in *Burg* tried to claim that the engineering firm owed them a duty to warn of remedial measures it recommended to the city based upon four different reasons, none of which are asserted by Mr. Jackson and Ms. Hendrick in the present case.

First, the *Burg* homeowners contended that the engineering firm owed them a legal duty "embodied" by professional engineering standards set forth in Washington statutes and regulations. *Id.* at 804-05. Second, they argued that they were owed a duty as third party beneficiaries to the contract between the city and the engineering firm. *Id.* at 807-08. Third,

they argued that the engineering firm owed them a gratuitous duty to act on their behalf. *Id.* at 808-09. Finally, they argued that there was a duty under some direct contractual obligation with one of the homeowners. *Id.* at 810.

None of the four reasons asserted for the existence of a duty by the homeowners in *Burg* matches or is analytically similar to the reasons there is a duty in this case. Mr. Jackson and Ms. Hendrick do not contend that Trenchless and QPS owed them a duty “embodied” by some general professional contracting or directional boring standards. Rather, Mr. Jackson and Ms. Hendrick have proven that specific provisions of the Seattle Municipal Code which create a statutory duty of care were breached by respondent contractors. Likewise, appellants do not claim they were owed a duty as third party beneficiaries to the contract between the previous owner and the respondents. Neither do they claim that the respondents owed them a gratuitous duty or a duty arising out of a contractual relationship between them and respondents.

Instead, unlike the plaintiffs in *Burg*, appellants here claimed and proved they were owed a duty by respondents because the contractors engaged in land-disturbing activities that were improperly done and which caused the property injury in question. There is sufficient evidence to show that the respondent contractors failed to comply with important

ordinances designed to protect against the exact harm that occurred and that they acted negligently, thus also breaching the duty of care which was established in *Davis*. For all of the foregoing reasons, this Court should find that Trenchless and QPS owed a duty of care to Mr. Jackson and Ms. Hendrick under the common law.

d. Trenchless And QPS Owed A Duty Of Care Regardless Of Whether The Appellants Suffered Personal Injuries Or Property Damage.

The trial court also erroneously based its ruling on the idea that the existence of duty depends on the fact that appellants only suffered property damages rather than personal injury. RP 31:10-22, 34:2-12. While not explicitly stating so, the trial court appeared to find that while there was no duty in the case of property damage, there may be a duty in the case of physical injury to the plaintiff. RP 34:2-12. We urge the court not to follow this incorrect reasoning, if in fact it defines the court's ruling below. Under *Davis* such a distinction does not exist.

In *Davis*, the court adopted Section 385 of the Restatement (Second) of Torts, which imposes a duty of reasonable care upon contractors. The Restatement mentions neither personal injury nor property damage but uses the broader term "physical harm" to define the scope of liability. *Davis*, 159 Wn.2d at 417 n.1. Although the *Davis* case did not involve property damage, the Restatement itself confirms that the

term “physical harm” includes injury to property in a contractor negligence case.

Specifically, Section 385, Comment a states: “The rules determining the liability as [sic] one who as manufacturer or independent contractor makes a chattel for the use of others (the operative standard of section 385 invoked by our Court in *Davis*), are stated in §§ 394-398....” In defining the scope of a contractor’s negligence, Comment n to Section 395 states: “The rule stated in this Section applies where the only harm which results from the manufacturer’s failure to exercise reasonable care is to the manufactured chattel itself.”

In short, the trial court erroneously chose to draw an analytical line between personal injury and property injury in assessing the scope of respondents’ duties.

Indeed, other jurisdictions also adopting Section 385 have included both personal injury and property damage as “physical harm” under Section 385. *See McDonough v. Whalen*, 365 Mass. 506, 512, 313 N.E.2d 435, 439 (1974) (“There is no sound reason why [the plaintiff] should be prevented from recovering for property damage or personal injury merely because he is not in privity with the builder or contractor responsible for such work”); *Johnson v. Oman Const. Co., Inc.*, 519 S.W.2d 782, 788 (Tenn.1975) (“In our opinion, if an independent contractor is guilty of

negligence in performing his work in such a way that it could reasonably be foreseen that the owner or third parties would sustain personal injury or property damage as a result of the negligent condition, then the independent contractor should not, as a matter of law, be discharged merely because his work has been accepted and delivered to the owner”).

Moreover, even cases discussing the economic loss rule, which was vigorously argued by respondents in their summary judgment motions as barring the appellants’ claims, do not make any distinction between property damage and personal injury when it comes to deciding the scope of non-economic losses upon which plaintiffs may seek tort remedies. *Stieneke v. Russi*, 145 Wn. App. 544, 556, 190 P.3d 60 (2008) (“when a defective product injures something other than itself, such as a person or other separate property, the loss is not merely an economic loss and tort remedies are appropriate”); *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) (“The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property”).

C. Public Policy Dictates That Construction Contractors Owe A Duty Of Care To Third Persons Who May Be Foreseeably Injured As A Result of Negligent Work.

Even if this Court should find that there is no duty under the Seattle Municipal Code or common law, public policy dictates that

contractors such as Trenchless and QPS owe a duty of care to third persons such as Mr. Jackson and Ms. Hendrick who may foreseeably be injured or suffer property damage as a result of the contractors' negligent work.

The *Davis* court, for example, stated that the doctrine of completion and acceptance is "harmful because it weakens the deterrent effect of tort law on negligent builders. By insulation of contractors from liability, the completion and acceptance doctrine increases the public exposure to injuries caused by negligent design and construction of improvements to real property and undermines the deterrent effect of tort law." *Davis*, 159 Wn.2d at 419-20. This reasoning also best summarizes an important policy consideration in the present case. Without such a duty, contractors such as Trenchless and QPS could negligently carry out their work or act in a reckless and negligent manner, without even getting permits designed to assure safe performance of the work, and remain insulated from liability for injury to the property of others by virtue of the fact that their work has already been completed and accepted by the owner. Such a result would weaken the deterrent effect of tort law, and it would expose the public to both injuries and damage caused by contractor negligence.

As a matter of public policy, how dare contractors come to court

and claim that they can ignore building codes, drill through the land of others without permission, and forsake important standard construction landslide prevention practices without having a duty to pay for the consequences? Such a result defies common sense as well as the clear public policy summarized in the case law and the Seattle Municipal Code provisions discussed above, which are in favor of holding negligent contractors liable for injuries to persons and property resulting from their negligent acts for the purpose of deterring such negligence.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order granting the respondents' motions for summary judgment and dismissing the appellants' complaint; hold that as a matter of law, contractor respondents owed a duty of care to the appellants under provisions of the Seattle Municipal Code and under common law; and remand for trial on Mr. Jackson and Ms. Hendrick's negligence claims against Trenchless and QPS.

Respectfully submitted this 31st day of December, 2009.

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APPENDIX OF SEATTLE MUNICIPAL CODE PROVISIONS

(RAP 10.3(a)(8) and 10.4(c))



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*Title 22 - BUILDING AND CONSTRUCTION CODES
Subtitle VIII Grading and Drainage Control
Chapter 22.800 - Title, Purpose, Scope and Authority*

SMC 22.800.020 Purpose.

A. The provisions of this subtitle shall be liberally construed to accomplish its remedial purposes, which are:

1. Protect, to the greatest extent practicable, life, property and the environment from loss, injury and damage by pollution, erosion, flooding, landslides, strong ground motion, soil liquefaction, accelerated soil creep, settlement and subsidence, and other potential hazards, whether from natural causes or from human activity;
2. Protect the public interest in drainage and related functions of drainage basins, watercourses and shoreline areas;
3. Protect surface waters and receiving waters from pollution, mechanical damage, excessive flows and other conditions in their drainage basins which will increase the rate of downcutting, streambank erosion, and/or the degree of turbidity, siltation and other forms of pollution, or which will reduce their low flows or low levels to levels which degrade the environment, reduce recharging of groundwater, or endanger aquatic and benthic life within these surface waters and receiving waters of the state;
4. Meet the requirements of state and federal law and the City's municipal stormwater NPDES permit; and
5. Fulfill the responsibilities of the City as trustee of the environment for future generations.

B. It is expressly the purpose of this subtitle to provide for and promote the health, safety and welfare of the general public. This subtitle is not intended to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefitted by its terms.

C. It is expressly acknowledged that water quality degradation can result either directly from one discharge or through the collective impact of many small discharges. Therefore, the water quality protection measures in this subtitle are necessary to protect the health, safety and welfare of the residents of Seattle and the integrity of natural resources for the benefit of all and for the purposes of this subtitle. Such water quality protection measures are required under the federal Clean Water Act, 33 U.S.C. Section 1251, et seq., and in response to the obligations of the City's municipal stormwater discharge permit, issued by the State of Washington under the federal National Pollutant Discharge Elimination System program.

(Ord. 119965 Section 2, 2000; Ord. 116425 Section 2(part), 1992.)

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Title 22 - BUILDING AND CONSTRUCTION CODES

Subtitle VIII Grading and Drainage Control

Chapter 22.802 - Storm water, Drainage, and Erosion Control

SMC 22.802.015 Drainage, erosion control, and source control requirements for all land disturbing activities or addition or replacement of impervious surface.

A. Compliance Required. All land disturbing activities or addition or replacement of impervious surface are required to comply with this section, even where drainage control review is not required.

Exception: Maintenance, repair, or installation of underground or overhead utility facilities, such as, but not limited to, pipes, conduits and vaults, is not required to comply with the provisions of this section except subsection C3 of this section.

B. Approval of Exceptions Required. Exceptions to the requirements of this subtitle may not be used on any projects, including those that do not require drainage control review, unless allowed by this subtitle, by rule promulgated jointly by the Director of SPU and the Director of DCLU, or approved by the Director of DCLU. Approval shall be obtained prior to initiating land disturbing activities or adding or replacing impervious surface. Approvals are required for exceptions to any and all requirements of this subtitle, including but not limited to the requirement that natural drainage patterns be maintained and the requirement that watercourses not be obstructed.

C. Requirements of All Projects.

1. Discharge Point. The discharge point for drainage water from each site shall be selected as set forth in rules promulgated jointly by the Directors of SPU and DCLU specifying criteria, guidelines, and standards for determining drainage discharge points to meet the purposes of this subtitle. The criteria shall include, but not be limited to, preservation of natural drainage patterns and whether the capacity of the drainage control system is adequate for the additional volume. For those projects meeting the drainage review threshold, the proposed discharge point shall be identified in the drainage control plan required by Section 22.802.020 , for review and approval or disapproval by the Director of DCLU.

2. Flow Control. The peak drainage water discharge rate from the portion of the site being developed shall not exceed 0.2 cubic feet per second per acre under twenty-five (25)-year, twenty-four (24)-hour design storm conditions or 0.15 cubic feet per second per acre under two (2)-year, twenty-four (24)-hour design storm conditions unless the site discharges water directly to a designated receiving water or to a public storm drain which the Director of SPU determines has sufficient capacity to carry existing and anticipated loads from the point of connection to a designated receiving water body. Projects with more than two thousand (2,000) square feet of new and replaced impervious surface shall be required to install and maintain a flow control facility, in accordance with rules promulgated by the Director, that is sized for the volume of runoff routed through the facility. Approved exceptions and flow control methods may be prescribed in rules promulgated by the Director.

3. Construction Stormwater Control. During land disturbing activities or addition or replacement of impervious surface, temporary and permanent construction controls shall be used to accomplish the following (a - g). Rules promulgated jointly by the Directors of SPU and DCLU specify the minimum required controls as well as additional controls that may be required by the Director of DCLU when minimum controls are not sufficient to prevent erosion or transport of sediment or other pollutants from the site.

a. Prevent on-site erosion by stabilizing all soils, including stock piles, that are temporarily exposed. Methods such as, but not limited to, the installation of seeding, mulching, matting, and covering may be specified by rules promulgated by the Director. From October 1st to April 30th, no soils shall remain unstabilized for more than two (2) days. From May 1st to September 30th, no soils shall remain unstabilized for more than seven (7) days.

b. Before the completion of the project, permanently stabilize all exposed soils that have been disturbed during construction. Methods such as permanent seeding, planting, and sodding may be specified by rules promulgated by the Director.

c. Prevent the transport of sediment from the site. Appropriate use of methods such as, but not limited to, vegetated buffer strips, stormdrain inlet protection, silt fences, sediment traps, settling ponds, and protective berms may be specified in rules promulgated by the Director.

d. During construction, prevent the introduction of pollutants in addition to sediment into stormwater. Appropriate methods, as prescribed in rules promulgated by the Director, include operational source controls such as, but not limited to, spill control for fueling operations, equipment washing, cleaning of catch basins, treatment of contaminated soils, and proper storage and disposal of hazardous materials.

e. Limit construction vehicle access, whenever possible, to one route.

Stabilize access points as specified in rules promulgated by the Director to minimize the tracking of sediment onto public roads.

f. Inspect and maintain required erosion and sediment controls as prescribed in rules promulgated by the Director to ensure continued performance of their intended function.

g. Prevent sediment from entering all storm drains, including ditches, which receive runoff from the disturbed area.

4. Source Control.

a. Effective January 1, 2001, structural source controls shall be installed for high-risk pollution generating activities to the maximum extent practicable to the portion of the site being developed, in accordance with rules promulgated by the Director, except in the following circumstances:

i. When that portion of the site being developed discharges only to the public combined sewer; or

ii. For normal residential activities unless the Director determines that these activities pose a hazard to public health, safety or welfare; endanger any property; or adversely affect the safety and operation of city right-of-way, utilities, or other property owned or maintained by the City.

b. The structural source controls shall include, but not be limited to, the following, as further defined in rules promulgated jointly by the Directors:

i. Enclose, cover, or contain within a berm or dike the high-risk pollution generating activities;

ii. Direct drainage from containment area of high-risk pollution generating activity to a closed sump or tank for settling and appropriate disposal, or treat prior to discharging to a public drainage control system;

iii. Pave, treat, or cover the containment area of high-risk pollution generating activities with materials that will not interact with or break down in the presence of other materials used in conjunction with the pollution generating activity; and

iv. Prevent precipitation from flowing or being blown onto containment areas of high-risk pollution generating activities.

5. Flood-prone Areas. On sites within flood prone areas, responsible parties are required to employ procedures to minimize the potential for flooding on the site and for the project to increase the risk of floods on adjacent or nearby properties. Flood control measures shall include those set forth in other titles of the Seattle Municipal Code and rules promulgated thereunder, including, but not limited to, SMC

Chapter 25.06 (Floodplain Development) and Chapter 25.09 (Environmentally Critical Areas), and in rules promulgated jointly by the Directors of SPU and DCLU to meet the purposes of this subtitle.

6. Natural Drainage Patterns. Natural drainage patterns must be maintained.

7. Obstruction of Watercourses. Watercourses shall not be obstructed.

8. Water Quality Sensitive Areas. The Director of SPU may impose additional requirements for areas determined to be water quality sensitive areas.

D. The Director of DCLU may require sites with addition or replacement of five thousand (5,000) square feet or less of impervious surface and with less than one (1) acre of land disturbing activity to comply with the requirements set forth in Section 22.802.016 ~~EE~~, in addition to the requirements set forth in this section, when necessary to accomplish the purposes of this subtitle. In making this determination, the Director of DCLU may consider, but not be limited to, the following attributes of the site: location within an Environmentally Critical Area; proximity and tributary to an Environmentally Critical Area; proximity and tributary to an area with known erosion or flooding problems.

(Ord. 119965 Section 28, 2000; Ord. 118396 Section 179, 1996; Ord. 117697 Section 3, 1995; Ord. 117432 Section 15, 1994; Ord. 116425 Section 2(part), 1992.)

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*Title 22 - BUILDING AND CONSTRUCTION CODES
Subtitle VIII Grading and Drainage Control
Chapter 22.808 - Administration and Enforcement*

SMC 22.808.090 Violations.

A. Civil Violations.

1. General. It is a violation of this subtitle to not comply with any requirement of, or to act in a manner prohibited by, this subtitle, or a permit, approval, rule, manual or order issued pursuant to this subtitle.
2. Aiding and Abetting. It is a violation of this subtitle to aid, abet, counsel, encourage, commend, incite, induce, hire or otherwise procure another person to violate this subtitle.
3. Alteration of Existing Drainage. It is a violation of this subtitle to alter existing drainage patterns which serve a tributary area of more than five (5) acres without authorization or approval by the Director.
4. Obstruction of Watercourse. It is a violation of this subtitle to obstruct a watercourse without authorization or approval by the Director.
5. Dangerous Condition. It is a violation of this subtitle to allow to exist, or cause or contribute to, a condition of a drainage control facility, or condition related to grading, stormwater, drainage or erosion that is likely to endanger the public health, safety or welfare, the environment, or public or private property.
6. Interference. It is a violation of this subtitle for any person to interfere with or impede the correction of any violation, or compliance with any notice of violation, emergency order, stop work order, or the abatement of any nuisance.

B. Criminal Violations.

1. Failing to Comply with Orders. Failing to comply with an order properly issued pursuant to this subtitle by the Director of Engineering, the Director of Construction and Land Use, the Hearing Examiner, or a Judge is a criminal violation, punishable upon conviction by a fine of not more than Five Thousand Dollars (\$5,000.00) per day of each violation or imprisonment for each violation for not more than three hundred sixty (360) days, or both such fine and imprisonment.

2. Tampering and Vandalism. Tampering with or vandalizing a drainage control facility or other best management practice, a public or private drainage control system, monitoring or sampling equipment or records, or notices posted pursuant to this subtitle is a criminal violation, punishable upon conviction by a fine of not more than Five Thousand Dollars (\$5,000) or imprisonment for not more than three hundred sixty (360) days, or both such fine and imprisonment.

3. Repeat Violations. Anyone violating this subtitle who has had a judgment or Hearing Examiner's order against them pursuant to this subtitle in the preceding five (5) years, shall be subject to criminal penalties for the present violation, and, upon conviction thereof, be fined in a sum not to exceed Five Thousand Dollars (\$5,000), or imprisonment for not more than three hundred sixty (360) days, or both such fine and imprisonment.

(Ord. 117432 Section 27, 1994; Ord. 116425 Section 2(part), 1992.)

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