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## **I. INTRODUCTION**

Plaintiffs Wood request this court reverse the dismissal of their case against Mason County. There were genuine issues of material fact.

## **II. ASSIGNMENTS OF ERROR**

1. Did the trial court err in dismissing Plaintiffs' claims for negligence, statutory waste, trespass and civil conspiracy?

### **Issues Pertaining to Assignments of Error**

1. Is the County liable for landslide damage caused by its negligence in managing its road stormwater, which is a proprietary function? *Yes.*
2. Did the County have a duty to enforce its Critical Areas Ordinance to protect landowners in the landslide hazard area? *Yes.*
3. Does RCW 4.24.630 apply where the County built a culvert it knew, or should have known, would unnaturally discharge water onto private property, which was likely to, and did, damage that property? *Yes.*
4. Is the County liable for damages caused by its co-conspirator/agent building a drainage system on Plaintiffs' land without authorization? *Yes.*
5. Is there circumstantial evidence of civil conspiracy? *Yes.*
6. Has the County waived the affirmative defense of prescription by failing to plead it in its answer or raise it in a CR 12(b) motion? *Yes.*
7. Has the County failed to prove a prescriptive easement? *Yes.*

8. Is the discharge of public road stormwater into a Landslide Hazard Zone and into Puget Sound, a public nuisance defeating prescription? *Yes.*
9. If the County had an easement to discharge stormwater, was that easement held in its proprietary capacity? *Yes.*
10. Did the County negligently misuse any easement it had? *Yes.*
11. Do Woods have any standing to raise these issues? *Yes.*

### **III. STATEMENT OF THE CASE**

Woods own a house on Bloomfield Road in Mason County on Totten Inlet. The Woods' property slopes from the road to a 60-foot high marine bluff, which drops to the beach below. (CP at 240, 276, 296.) In June 2007, the Woods' neighbor, Michael Dermond ("Dermond"), cut trees, brush and excavated on the property line without required permits. Mason County ("the County") inspected but did not require permit or remediation.

The County collects stormwater from its road and dumps it on Wood's property through a culvert under the road near the Dermond property line. Dermond's illegal grading created a swale that carried the County's overflow stormwater down to the Marine bluff. 1/6/09, the County's water, flowing down the swale, caused a landslide on the common boundary that took some of Woods' land and rendered their house unmarketable.

Dermond blamed the County's stormwater for the slide, so to avoid a

claim from Dermond, the County conspired with Dermond to construct a drainage system partially on Woods' property, without Woods' permission, to carry the County's stormwater from the culvert to the bay, and waived all permit requirements and never inspected the work. Dermond built the drainage system, trespassing and causing damage to the Woods' property.

Woods sued Dermond and the County, for negligence, trespass, statutory waste (under RCW 4.24.630), failure to enforce, and civil conspiracy. The trial court dismissed Woods' claims against the County. Woods settled with Dermond and now appeal the dismissal of the County.

**A. Dermond's Land Clearing**

In June, 2007, Dermond cleared vegetation on the Marine Bluff at Woods' property line. (CP at 231-32.) He personally cleared trees and brush on and near the bank. (CP at 232.) On 6/13/07, his crew bulldozed the Marine Bluff, (CP at 232.), and cut down a cherry tree and other large trees on the Marine Bluff face. (CP at 115: Dermond Dep. 51:9-12; CP at 213: Waters Dep. 14:1-7; CP at 232.) His crew bulldozed along the property line, pushed a large stump over the bank, tore out blackberries, brush, and trees and dumped it over the cliff onto the beach. (CP at 116-17: Dermond Dep. 58:6-10, 60:8-23; CP at 232.) The heavy equipment compacted the ground along the property line, creating a channel that caused stormwater to flow down the

property to the bluff. (CP at 233, 244, 277-78.) A friend of Woods called the County for Woods to complain about Dermond's land clearing, but neither the Woods nor their friend were ever contacted by the County. (CP at 232.)

**B. The County's Failure to Enforce**

One week after the land clearing Stephanie Pawlawski, the County's code enforcement officer, responded and inspected the Dermond property. (CP at 182: Pawlawski Dep. at 24:20-21.) She observed exposed soil from the land clearing. (CP at 185: Pawlawski Dep. at 40:11-12.) She left a complaint letter on Dermond's door and spoke with Dermond over the phone the next day. (CP at 118: Dermond Dep. at 73:7-25, 74:9-21.)

The two properties are within Shoreline Setbacks (under the Shoreline Management Act and the Mason County Shoreline Master Program) and a Landslide Hazard Area (under the Mason County Resource Ordinance). (CP at 183: Pawlawski Dep. at 28:18-22; CP at 191: Clark Dep. at 17:17-20; CP at 296.) Cutting a tree on a marine bluff in Mason County requires an environmental permit. (CP at 178-79, 182-83: Pawlawski Dep. at 8:9-23, 10:23-11:19, 13:7-19, 27:25-28:7; CP at 161-62: Borden Dep. at 111:23-112:3; CP at 191-92: Clark Dep. at 18:18-19:1, 24:23-25:5.) Even with a permit, replanting is required at three-to-one. (CP at 183, 185: Pawlawski Dep. at 30:20-31:2, 41:16-21; CP at 161-62: Borden Dep. at 111:23-112:3.)

Clearing of vegetation is prohibited to prevent erosion and slope instability—i.e., to prevent landslides. (CP at 143: Borden Dep. at 38:7-39:1; CP at 185: Pawlawski Dep. at 40:19-41:15)

Despite requirements of the County's Resource Ordinance, Ms. Pawlawski did not require Dermond to do anything to mitigate the effects of his unpermitted clearing. (CP at 184-85: Pawlawski Dep. at 38:2-20, 43:13-23.) She recommended he plant native vegetation but did nothing to follow up to see that such planting was done. (CP at 118: Dermond Dep. at 74:9-21; CP at 184-85: Pawlawski Dep. at 38:2-20, 43:13-23.) Dermond never replanted the cleared area. (CP at 191: Clark Dep. at 17:21-18:14.)

**C. The County's Collection and Discharge of Stormwater**

Years ago, the County built a ditch on the north side of its road to collect stormwater, and a culvert to carry that stormwater under the road to be dumped on the downhill properties. The County's ditch and culvert collect water from a broad tributary area north of the road (CP at 170: Halbert Dep. at 24:4-19) and discharge it onto the properties at a larger volume and rate than the natural flow. (CP at 169-70: Halbert Dep. at 19:4-17, 24:4-19.) Mr. Halbert stated: "And with the installation of the culvert the flow would be—it would be more concentrated in that one spot than if there were no Bloomfield Road and no culvert." (CP at 169: Halbert Dep. at 19:4-17.)

The culvert dumped stormwater into a small ditch, inadequate to prevent that water from entering the soil or flowing over the surface to the bluff. (CP at 146: Borden Dep. at 49:17-21, 50:12-21, 51:5-15; CP at 243.) The County's own senior planner, Allan Borden, with a masters degree in hydrology, acknowledged the danger to the properties: "The problem was that the ditch that was there was inadequate. It just wouldn't have conveyed an average flow. . . . For sure on a pretty good flow that it would go out of the ditch and go wherever it could." (CP at 146: Borden Dep. at 50:12-21, 51:5-15.) Mr. Borden concluded that the stormwater from the County's culvert was the cause of the landslide event in January 2009:

Q And the erosion runoff you're talking about is the runoff from the county road culvert that was causing erosion and slope instability on the Dermond property; is that right?

A Correct.

\* \* \*

Q All right. And he showed you that landslide in front of his house which he also attributed to county road water, didn't he?

A I believe he did. Yeah. It was easy to conclude that.

Q All right. You concluded that as well?

A I did.

\* \* \*

Q \* \* \* "The heavy rains in 2008 and the runoff from the county road via the culvert contributed to surface erosion and bank instability and slumping to the beach on these lot numbers;" right?

A Mm-hmm.

Q That's your statement?

A That's correct.

Q That's your conclusion. That's your finding. And you stand by it today?

A Yeah. Observed. Yeah.

(CP at 148-49, 154-55; Borden Dep. at 58:15-18, 61:9-14, 83:20-84:4.)

Mr. Halbert, the geologist hired by Dermond, also concluded that the stormwater discharged from the County's culvert was a primary or contributory cause of the landslide. (CP at 170; Halbert Dep. at 27:3-14.)

**D. The Landslide Event of January 2009**

In January of 2009, a landslide occurred in precisely the area that Dermond had cleared and where stormwater discharged from the County's culvert flowed. (CP at 232-33, 244.) The landslide removed about 100-200 cubic yards of earth from the edge of the bluff immediately adjacent to Woods' home, including a triangular portion about 7-10 feet wide from Woods' property. (CP at 232-34, 244.) The Woods realtor said the landslide rendered their property unmarketable. (CP at 233.) If the causes of the landslide are not addressed, the slide will grow to endanger both the Wood and Dermond houses. (CP at 250.) In December, 2009, the slide in fact expanded, causing further damage to the Woods' property. (CP at 234.) Woods' appraiser, Dr. John Kilpartick, says the property is stigmatized, and devalued at least 50%. (CP at 279).

**E. The Conspiracy Between the County and Dermond**

Shortly after the landslide, Dermond had an on-site meeting with Mr. Borden, the County's planner, and Mr. Halbert, his geologist, to work out a

beneficial solution to Dermond and the County's mutual problem:

I thought, well, you know, it would be a good idea to get the county guy out here at the same time the geologist is here so everybody could, you know, be on the same page and make sure that what we're going to do here is the best thing and, you know, be okay with the county and be what would work best.

(CP at 119: Dermond Dep. at 89:5-13; *see* CP at 172: Halbert Dep. at 52:23-53:7.)

Mr. Borden, on behalf of the County, recognized the danger posed by the County's culvert and stormwater. (CP at 146, 148-49, 154-55: Borden Dep. at 50:12-21, 51:5-15, 58:15-18, 61:9-14, 83:20-84:4.) He acknowledged the County benefitted if the water was properly dealt with:

A Not so directly. I mean by dealing with the water as it flowed on property adjacent to the county road, in essence you're protecting county improvements as well, because then you don't have undermining or deterioration of the road.

Q So there is some benefit to the county for dealing correctly with this water?

A Mm-hmm.

Q And you were aware of that?

A Yeah.

(CP at 141: Borden Dep. at 26:14-27:1.)

Dermond also benefitted by the County not requiring permits and engineering. It made the project easier and less costly. (*See* CP at 171: Halbert Dep. at 34:20-35:2; CP at 248-50.)

Dermond, Borden, and Halbert walked around the property for two hours discussing what could be done. (CP at 120-21, 123: Dermond Dep. at 110:3-7, 95:4-6, 96:11-18.) “And at that point, they - you know, we agreed - everybody agreed that we had to collect the water coming out of the culvert.” (CP at 120: Dermond Dep. at 95:4-6.) They decided to do a drainage project to capture stormwater from the County’s culvert (as well as some of Dermond’s own groundwater) in a catch basin and convey it by tight line to Puget Sound. (CP at 123: Dermond Dep. at 109:11-111:6.)

[A]t that point, I [Dermond] asked Mr. Borden, “Well, would I need a permit to run water from the road clear to the bay? Would that run afoul of shoreline management stuff?” Because I don't know anything about that. And Mr. Borden said, “No. You don't need a permit to do that.”

(CP at 122: Dermond Dep. at 106:10-20.)

Without requiring engineered plans or an estimate of the cost of the project, Borden told Dermond that no permits or SEPA review would be required. (CP at 140, 149, 153, 155: Borden Dep. at 76:12-22, 77:13-78:17, 23:6-16, 85:5-9, 20:9-15, 60:2-5.) This agreement between Dermond and the County, by which Dermond would build a drainage system to manage the County’s stormwater in exchange for not having to conform to land use regulations requiring engineering and permits, was a civil conspiracy to solve the County’s stormwater problem and save Dermond time and money.

All Mason County officials, including Mr. Borden, testified in depositions that the County should have required permits for Dermond's drainage project. The project was built in both the shoreline and landslide hazard zones, which are critical areas requiring review under the Resource Ordinance. (CP at 141-42: Borden Dep. at 27:3-28:2, 28:10-15, 29:15-16, 29:20-25; CP at 191, 194: Clark Dep. at 17:17-20, 35:13-23; CP at 179: Pawlawski Dep. at 14:11-15.) A project in a critical area or changing the natural flow of water, as Dermond's project did, requires SEPA review. (CP at 139-40: Borden Dep. at 17:6-8, 17:24-18:10, 19:12-17, 22:7-13.) There is no statutory SEPA exception for the drainage project. (CP at 140: Borden Dep. at 22:21-24.) A shoreline substantial development permit should be required for any project in the shoreline zone that costs over \$5,700—this project cost Dermond about \$15,000. (CP at 141: Borden Dep. at 24:7-13; CP at 181: Pawlawski Dep. at 22:4-20; CP at 128: Dermond Dep. at 142:14-143:8.) Discharging storm water at the ordinary high water mark requires a JARPA application. (CP at 162: Borden Dep. at 112:15-113:10, 114:4-8; CP at 181: Pawlawski Dep. at 20:25-21:8, 21:13-19.)

Dermond should have been required to submit an engineered site plan, with review by appropriate County and State agencies, and with final inspection of the as-built structure by the County. (CP at 204-06: Coker Dep.

at 20:12-21:2, 23:12-24:4, 21:22-22:1, 26:13-22, 27:3-15, 28:2-9.) The County never received an engineered site plan for review, and never inspected the work. (CP at 155-56: Borden Dep. at 86:4-19, 87:14-88:6.)

Construction, grading, or clearing in a landslide area or shoreline buffer requires planning department permits. (CP at 144-45, 156-57: Borden Dep. at 42:15-43:15, 44:22-45:3, 91:9-92:2; CP at 194: Clark Dep. at 35:13-23.) The County never received any plans demonstrating that the project would be exempt from permit requirements. (CP at 153: Borden Dep. at 76:12-22, 77:13-78:17.) Mr. Borden testified in his deposition:

Q Okay. All right. Now, the drainage structure that was proposed included not just the catch basin at the county culvert and not just the 12-inch pipe that ran the 700 feet to the beach, but it also included at least two laterals, didn't it?

A I believe . . . I stated that a curtain drain near the top of the slope would help. Yeah.

Q Okay. And so that curtain drain near the top of the slope requires new construction, grading and clearing within a landslide hazard area and a shoreline buffer, doesn't it?

A Yeah.

\* \* \*

Q Okay. And grading and construction of a drainage system in a landslide hazard area and on - within the shoreline and shoreline buffer generally would require permits, would it not?

A Yeah, it would.

Q And in this case, you did not require any?

A Correct.

(CP at 144-45: Borden Dep. at 42:15-43:15, 44:22-45:3.)

Borden should have required Dermond to submit a geologists' report

as required by the Resource Ordinance, to obtain a permit. (CP at 150: Borden Dep. at 66:4-15.) Halbert's 2/26/09 report did not satisfy ordinance requirements. No permit was issued to Dermond for anything. (CP at Clark Dep. at 33:1-9; CP at 150: Borden Dep. at 67:1-13.) The County never got any other report from Halbert. (CP at 159-60: Borden Dep. at 103:8-105:4.) Borden admitted he didn't require the report:

Q So are you saying that the requirement that the report must include all these ordinance requirements and a checklist, you never intended him to submit a report that addressed those ordinance requirements?

A Well, the bottom line is that's correct. No, I did not ask for a report that met all of the ordinance requirements.

(CP at 152: Borden Dep. at 72:24-73:5.)

**F. Dermond, Acting in Concert With the County, Trespassed Woods and Damaged the Woods' Property**

The location of the proposed catch basin at the outlet of the County's culvert was not on Dermond's land. It was on Woods' land. Dermond built his drainage project anyway, causing injury to the Woods' property. (See CP at 233-34.) Dermond had seen the stakes marking the property line between his parcel and the Woods' when he purchased his land. (CP at 111: Dermond Dep. at 13:14-14:19.) Larry Forsman, from the County's public works department, told Dermond that the proposed location of the catch basin might not be in the County's road right-of-way. (CP at 223: Forsman Dep. at 24:17-

25:16.) Dermond, Borden, and Halbert made no attempt to locate the property boundaries. (CP at 147: Borden Dep. at 53:6-15.) Nor did Dermond make any efforts to make sure the catch basin location was on his land. (CP at 126: Dermond Dep. at 121:6-122:5, 123:3-5.) Dermond never sought Woods' permission to work on their land. (CP at 126: Dermond Dep. at 122:12-20. The catch basin and part of the drainage pipe are on Woods' property. (CP at 130-31: Dermond Dep. at 159:3-160:3; CP at 234.)

Dermond's construction caused injury to Woods' land, and damaged a curtain drain that protected Woods' septic system. (CP at 233-34.)

Dermond knew where Woods' septic system was located. (CP at 113-14: Dermond Dep. at 23:7-11, 25:3-9.) He was also aware of the curtain drain. (CP at 123-24: Dermond Dep. at 111:7-112:6, 112:14-20, 113:14-20, 114:9-12.) Dermond destroyed Woods' curtain drain, and intentionally plugged it. (CP at 125: Dermond Dep. at 116:20-117:13; CP at 241.)

#### **G. The Superior Court Case**

8/12/09, Woods sued Dermond and Mason County. (CP at 4.) The complaint raised claims against the County for negligent failure to enforce, trespass by water, and statutory waste under RCW 4.24.630. (CP at 4-8.) 6/14/10 Woods filed a Supplemental Complaint for civil conspiracy for the County illegally letting Dermond construct without permits. (CP at 13-23.)

The County sought dismissal, arguing the public duty doctrine barred liability for failure to enforce; the waste statute did not apply; and there was no civil conspiracy. (CP at 28.) The trial court dismissed Woods' claims of waste, civil conspiracy, and failure to enforce, (CP at 362-63), but not Woods' trespass by water claim. (RP Dec. 3, 2010, at 38-41; RP Dec 10, 2010, at 6-7.) Woods' motion for reconsideration was denied. (CP at 375, 434-36.) The County's second motion to dismiss the trespass by water claim was granted. (CP 365, 437-439). This appeal follows.

#### **IV. SUMMARY OF ARGUMENT**

The County was not entitled to dismissal. This Court should reverse. The Public Duty Doctrine does not shield the County from liability for negligent stormwater management, a proprietary, as opposed to a governmental, function. Even if stormwater management was not a proprietary function, exceptions to the Public Duty Doctrine apply to remove the bar to the County's liability for its failure to enforce its Critical Areas Ordinance. There is legislative intent, a duty to enforce, and a special relationship. The waste statute applies, both for the landslide damage and for the damage caused by the County/Dermond construction project on the Woods' land. Sufficient circumstantial evidence of a civil conspiracy exists.

\\

V. **ARGUMENT**

A. **Standard For Summary Judgment.**

Summary judgment is only proper where there is no genuine issue of material fact. CR 56(c); Harden v. City of Spokane, 135 Wn. App. 742, 746, 145 P.3d 1244 (2006). “A material fact is one that affects the outcome of the litigation.” Morgan v. Kingen, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). All facts, and inferences drawn therefrom, are viewed in a light most favorable to the nonmoving party. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). On appeal, this Court reviews the matter de novo.

B. **The Public Duty Doctrine Does Not Apply To The County When Acting In Its Proprietary Capacity Managing Its Stormwater.**

In 1967, the state legislature abolished sovereign immunity for local governments by enacting RCW 4.96.010. *See Cummins v. Lewis County*, 156 Wn.2d 844, 862, 133 P.3d 458 (2006) (concurring). The statute reads:

All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person or corporation. RCW 4.96.010.

Following this legislation, Washington courts adopted the public duty doctrine as a “focusing tool” to determine whether a duty was owed to a particular plaintiff. *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 303-05, 669 P.2d 468 (1983). A rigid set of rules has evolved that provide special

treatment to government defendants, contrary to the intent of the legislature. *See Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 798-800, 30 P.3d 1261 (2001) (concurring). The Public Duty Doctrine should be applied only where appropriate, and not over used. Some jurists even advocate abandoning the rule and relying only on traditional tort principles.<sup>1</sup>

The Public Duty Doctrine does not apply when a government performs a proprietary function, such as designing and building a stormwater drainage system. *Borden v. City of Olympia*, 113 Wn.App. 359, 371, 53 P.3d 1020 (2002). The government owes the same duty of care as a private individual engaged in the same activity. *Borden*, 113 Wn.App. at 371.

The Common Enemy Rule generally “allows landowners to dispose of unwanted surface water in any way they see fit, without liability for resulting damage to one’s neighbor.” *Currens v. Sleek*, 138 Wn.2d 858, 861,

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“The modern public duty doctrine ignores Washington’s legislative waiver of sovereign immunity by creating a backdoor version of government immunity unintended by the legislature. It directs this court’s attention away from its proper considerations of policy, foreseeability, and proximate cause in favor of a mechanical test that will inevitably lead us to absurd results.” *Cummins*, 156 Wn.2d at 861 (concurring). “It is contrary to fundamental principles of law that one party be granted a special set of rules not afforded to others.” *Id.* at 863. “By implying that not all parties are to be treated equally, the public duty doctrine injects confusion into the law and shakes the foundations of our legal system.” *Babcock*, 144 Wn.2d at 802 (concurring). “The standard rationales offered to support . . . the public duty doctrine are the risk of excessive governmental liability and the need to prevent interference with government process.” *Bailey v. Town of Forks*, 108 Wn.2d 262, 267, 737 P.2d 1257 (1987). “But operational decisions and actions implementing policy, should be, and are, subject to objective standards of care and fall outside the scope of discretionary immunity.” *Cummins*, 156 Wn.2d at 863 (concurring).

983 P.2d 626 (1999). The rule also applies to groundwater. *Wilkening v. State*, 54 Wn2d 692, 698, 344 P.2d 204 (1959). Two of the three exceptions to the Common Enemy Rule under which the landowner *will be liable* apply here. *See Borden*, 113 Wn.App. at 367.

Under the “channel and discharge” exception, “an uphill landowner cannot lawfully collect water in an artificial channel, then discharge it upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof.” Borden, 113 Wn.App. at 367. The County’s drainage ditch collects uphill water from a large tributary area in an artificial channel, carries it to a culvert under the road and discharges it in greater quantities, more concentrated, than its natural flow. Deposition of Halbert at 19:13-17, 24:9-19. Under this exception, the County is liable.

Under the “due care” exception, a landowner is liable for failure to exercise “such care as to avoid unnecessary damage to the property of adjacent owners.” Borden, 113 Wn.App. at 367. Normal negligence applies: the County owed a duty of care; the County breached that duty; the breach caused damage. Borden, 113 Wn.App. at 368-69. Stormwater management is a proprietary function. Therefore the County “owes the same duty of care as a private individual engaged in the same activity”—the public duty doctrine does not apply. Borden, 113 Wn.App. at 371. The County breached that duty

by constructing a culvert that discharges large quantities of water in excess of the natural flow into a landslide hazard area, in violation of its own ordinances. The Landslide Hazard Section of the Resource Ordinance provides:

Surface drainage, including downspouts and runoff from paved or unpaved surfaces up slope, shall not be directed onto or within 50 feet above or onto the face of a Landslide Hazard Area or its associated buffer. If drainage must be discharged from the top of a Landslide Hazard Area to below its toe, it shall be collected above the top and directed to below the toe by tight line drain and provided with an energy dissipating device at the toe.

MCRO § 17.01.100(D)(3)(a)(emphasis added).

The County's breach caused the landslide, which damaged the Woods' property. Mr. Halbert testified that excessive drainage onto the property from the County's culvert was a contributory cause of the landslide. Deposition of Halbert at 27:3-14. In fact, in Mr. Halbert's original report, he identified water from the County's culvert as the *primary* cause. Mr. Borden, the County's Senior Planner, agreed. (CP at 148-49, 154-55; Borden Dep. at 58:15-18, 61:9-14, 83:20-84:4.)

Under either exception to the Common Enemy Rule, the County is liable for damages caused by the stormwater it discharged from its culvert. Since the water caused the landslide, which has damaged the Woods'

property, the County should be liable to Woods for that damage.

**C. Even If the Public Duty Doctrine Applies, Exceptions Take This Case Outside the Public Duty Doctrine.**

Under the Public Duty Doctrine, a government entity is presumed to owe its duties to the public in general, not to any particular plaintiff. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). The presumption is overcome, and an enforceable duty of care will be owed to a particular plaintiff, by proving one of four exceptions: 1) legislative intent; 2) failure to enforce; 3) the rescue doctrine; or 4) a special relationship. *Babcock*, 144 Wn.2d at 785-86 (majority). Here, the legislative intent and failure to enforce exceptions clearly apply, and the special relationship arguably applies. The County owed a duty of care to the Woods as members of the class intended to be protected by the Landslide Hazard Section of the Resource Ordinance.

The County may be liable for failure to perform a duty imposed on it by statute or local ordinance. *J & B Dev. Co.*, 100 Wn.2d at 311 (concurring). The existence and extent of the duty depend on the purpose and policies underlying the statute or ordinance in question. *Id.* at 311. The duty runs to all persons within the protected class. *Bailey*, 108 Wn.2d at 269-70.

**1. Legislative intent**

The “legislative intent” exception applies when a statute or ordinance “evidences a clear legislative intent to identify and protect a particular and

circumscribed class of persons.” *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 929, 969 P.2d 75 (1998). The intent must be clearly expressed within the statute or ordinance. *Id.* at 930.

Under Washington’s Growth Management Act and Shorelines Management Act, the state delegated to local governments the power to enact local ordinances, consistent with the requirements of the statutes, to protect the state’s natural resources, restrict the use of land in critical areas, and protect landowners from natural hazards. With this delegation of power comes a duty to enforce. Surely the state would not delegate power to regulate in its stead without requiring enforcement of the regulations.

As an exercise of this power, the County enacted its Resource Ordinance. *See* Mason County Resource Ordinance (hereafter, “MCRO”) 17.01.010. The Resource Ordinance designates critical areas and resource lands in order, among other purposes, to “protect public *and private* property.” MCRO 17.01.040(A) (emphasis added). The Landslide Hazard Section of the Resource Ordinance was enacted, among other reasons, “to prevent the acceleration of natural geological hazards . . . and to minimize the risk to the property owner or adjacent property owners from development activities.” MCRO 17.01.100. The purpose and policy of the Landslide Hazard Section of the Resource Ordinance is to protect the private property

of landowners and adjacent landowners from the risk of damage from landslides occasioned by development activities. This ordinance protects owners of property in a landslide hazard zone. The Woods are landowners within the class of persons protected by the Landslide Hazard Section.

It is a violation of the Landslide Hazard Section to engage in land clearing within a landslide hazard zone. The Landslide Hazard Section defines “Land clearing” as “the cutting or harvesting of trees or the removing or cutting of vegetation so as to expose the soil.” MCRO 17.01.100(D)(2)(a). A permit is *required* prior to any land clearing. MCRO 17.01.100(C)(2).

“Structures or activities which were made or conducted without a permit, when a permit was required at the time of first action, do not vest and *require* current permits.” Mason County Code 15.13.020(a). County enforcement officials testified they require permits after discovery of a violation.

To get a permit for land clearing in a landslide hazard zone, one must: show that the clearing complies with development standards, MCRO 17.01.100(D)(2); submit a Geotechnical Report with a revegetation plan and plans for structural mitigation, MCRO 17.01.100(E); and accept responsibility for adverse effects to other properties as a result of the development activity, MCRO 17.01.100(F).

The Landslide Hazard Section of the Resource Ordinance creates a duty, owed by the County to landowners in a landslide hazard zone, particularly to owners of property adjacent to development activity, to take reasonable care to enforce the requirements of the ordinance for the protection of the landowners' property. The Landslide Hazard Section of the Resource Ordinance clearly identifies a circumscribed class which it protects: landowners engaged in development activity in a landslide hazard zone and owners of property adjacent to such development activity. The Landslide Hazard Section clearly evidences legislative intent to protect these landowners from the risk of damage from the "acceleration of natural geologic hazards" by development activities.

Woods are within this class of landowners or adjacent landowners, and have suffered precisely the kind of damage that the ordinance was intended to protect against. The legislative intent exception applies. The County owed Woods a duty of reasonable care enforcing the ordinance.

## **2. Failure to enforce**

The "failure to enforce" exception applies where (1) a governmental agent with a duty to enforce a statute or local ordinance (2) has actual knowledge of a violation, (3) fails to take corrective action, and (4) the plaintiff is within the class the ordinance intended to protect. *Smith v. City of*

*Kelso*, 112 Wn.App. 277, 282, 48 P.3d 372 (2002); *Bailey*, 108 Wn.2d at 268-69. “When a governmental agent knows of the violation, a duty of care runs to all persons within the protected class.” *Bailey*, 108 Wn.2d at 269-70.

The statute creating the government agent’s duty to enforce must use language that is mandatory, not discretionary. *Halleran v. Nu West, Inc.*, 123 Wn.App. 701, 714, 98 P.3d 52 (2004); *Smith*, 112 Wn.App. at 282; *McKasson v. State*, 55 Wn.App. 18, 25, 776 P.2d 971 (1989). This does not require a formulaic expression such as “when you observe X you must do Y.” But where the regulations are “replete with ‘mays’” and the government agent has broad discretion about whether and how to act, there is no duty to enforce. *McKasson*, 55 Wn.App. at 25; *Halleran*, 123 Wn.App. at 714.

The Landslide Hazard Section and the County’s enforcement ordinances do not vest any discretion in the enforcement officer. “Permits are *required*” for land clearing. MCRO 17.01.100(C)(2) (emphasis added). Activities conducted without the required permits “do not vest and *require* current permits.” Mason County Code 15.13.020(a) (emphasis added).

The permit requirements do not vest discretion in the planning department. The land clearing activity “shall conform” to the development standards. MCRO 17.10.100(D). The required Geotechnical Report “shall include” thirteen specific requirements, including a revegetation plan and

plans for structural mitigation. MCRO 17.01.100(E)(5). Land clearing must be consistent with the Geotechnical Report. MCRO 17.01.100(D)(2). “Hazards *must* be mitigated in such a manner as to prevent harm to property.” MCRO 17.01.100(E)(7).

This language is all mandatory and vests no discretion in the enforcement officer. The mandate for the enforcement officer is clear: If inspection reveals land clearing that was performed without a permit, the enforcement officer must require the owner to obtain an after-the-fact permit, which will require compliance with the development standards. Thus the ordinance creates a duty to enforce under the failure to enforce exception.

The County has argued that the failure to enforce exception requires that the government agent have knowledge of not only a violation, but one that creates an inherently dangerous condition. This argument is not supported by the case law. In *Taylor v. Stevens County*, the court held: “*As to the performance of building code inspections, a duty shall continue to be recognized where a public official knew of an inherently dangerous and hazardous condition.*” *Taylor*, 111 Wn.2d at 171-72 (emphasis added).

Subsequent decisions have limited *Taylor* to its facts, only requiring an inherently dangerous condition in the context of building code

inspections<sup>2</sup>. This case does not involve building code inspections, where the purpose is to protect the health and safety of the general public. It involves the County's failure to enforce an ordinance that was enacted for the specific purpose of protecting private property owners from damage to their property caused by land development activities that fail to meet the ordinance's requirements. The County must only have had knowledge of a violation (such as unpermitted land clearing), not an inherently dangerous condition.

Even if the "inherently dangerous condition" requirement applies, it is met. The requirement exists to ensure that a duty will only arise when the inspector had actual knowledge of a real threat of the kind of harm the code attempts to prevent. *See Taylor*, 111 Wn.2d at 171-72; *Bailey*, 108 Wn.2d at 270. In the building code context, it is personal safety. In this context, it would be the risk of damage to property from accelerated geological hazards. The County had knowledge Dermond cleared the marine bluff without permits or mitigation, creating a risk of damage to neighboring property.

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*See Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990) ("As to the performance of building code inspections, the failure to enforce exception to the public duty doctrine recognizes a duty where a public building official has actual knowledge of an inherently dangerous and hazardous condition"); *Smith*, 112 Wn.App. at 282 ("Where the plaintiff alleges a breach of a duty to enforce a building code, the plaintiff must establish actual knowledge that the violation is an inherently dangerous condition."); *Moore v. Wayman*, 85 Wn.App. 710, 722-23, 934 P.2d 707 (1997) ("In cases involving the building code, the plaintiff must also show that the code violation constituted 'an inherently dangerous and hazardous condition.'").

Stephanie Pawlowski, the County's enforcement officer, knew Dermond had removed vegetation, including trees, from his land, and exposed the soil, when he did not have a permit to conduct this otherwise prohibited land clearing. This was a violation of the Landslide Hazard Section, creating an inherently dangerous condition.

Ms. Pawlowski admits she had a duty to enforce the requirements of the Landslide Hazard Section of the Resource Ordinance. (*See* CP at 193: Clark Dep. at 28:3-17 (“Q: So as the enforcement person, it’s your duty to enforce the Resource Ordinance; is that right? A: Yes.”) Every other County official deposed confirmed they had a duty to enforce the critical areas ordinances, and should have done so in this case. (CP at 193: Clark Dep, at 28:3-17; CP at 200: Coker Dep.).

Further, Ms. Pawlowski failed to take the remedial action required by the ordinance—to require Dermond to obtain an after-the-fact permit. The Woods are within the class of landowners or adjacent landowners intended to be protected by the Landslide Hazard Section. Thus the elements of the failure to enforce exception to the public duty doctrine are all met, and the County owed a duty to the Woods to properly enforce the requirements of the Landslide Hazard Section. If these elements are disputed, there are disputed issue of material fact precluding summary judgment.

### 3. Special relationship

The County argued duties under the ordinance are owed by developing landowners, but once the County inspects a violation of the ordinance, for the protection of adjacent landowners, it has a duty to those landowners of due care in conducting its inspection and enforcing the ordinance. The County's failure to enforce the ordinance after verifying Dermond's unpermitted land clearing activities was a breach of that duty.

Arguably, when Woods, acting through their friend, complained in June 2007 to the County about the excavation on top of the Marine Bluff, and Ms. Pawlawski came out, a special relationship was established. But surely a special relationship was created after the actual landslide, when Mr. Borden came out to review the water problem with Dermond, and when Christine Clarke and another County official, at Wood's request, came out to review the landslide, and none of the County officials thereafter took any steps to protect Woods, who were later subject to a trespass destroying their curtain drain during the drainage project undertaken by Dermond and the County.

#### D. Statutory Waste.

The waste statute RCW 4.24.630, provides, in pertinent part:

Every person who goes onto the land of another and . . . wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the

land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.

RCW 4.24.630.

The statute requires a physical trespass on land, rather than a mere interference with a property interest. Colwell v. Etzell, 119 Wn.App. 432, 439, 81 P.3d 895 (2003). Such a trespass can occur when the defendant causes a person or thing to enter the land of another. See Standing Rock Homeowners Ass’n v. Misich, 106 Wn.App. 231, 243-46, 23 P.3d 520 (2001) (defendant held liable under RCW 4.24.630 for directing others to enter land and destroy gates). The concept of trespass includes trespass by water. Hedlund v. White, 67 Wn.App. 409, 417, fn. 12, 836 P.2d 250 (1992).

The act or acts that cause the injury must be intentional, by operation of the term “wrongfully”. Borden v. City of Olympia, 113 Wn.App. 359, 374, 53 P.3d 1020 (2002) (“By that statute’s plain terms, a claimant must show that the defendant ‘wrongfully’ caused waste or injury to land, and a defendant acts ‘wrongfully’ only if he or she acts ‘intentionally.’”); Colwell, 119 Wn.App. at 442. Intent is not required for the act of going onto the land of another. Clipse v. Michels Pipeline Const., Inc., 154 Wn.App. 573, 577,

225 P.3d 492 (2010) (“There is no way to read ‘wrongfully’ as describing the mere act of coming onto the land.”). The defendant must also have known or had reason to know that he or she lacked authority to do the intentional act or acts that caused injury. Clipse, 154 Wn.App. at 580.

RCW 4.24.630 has four essential elements.<sup>3</sup> A person is liable under the statute who: 1) enters onto the land of another; 2) intentionally and unreasonably commits some act or acts; 3) knows or has reason to know that he or she lacks authority to do the act or acts; and 4) the act or acts cause injury to land, personal property on the land, or improvements to real estate. Mason County’s culvert under the road, despite the prohibitions of the Landslide Hazard Section of the Resource Ordinance, meets all four elements, as does the joint drainage project. To the extent the elements remain disputed, summary judgment of dismissal was improper.

**1. The County, through its stormwater discharge, entered onto the Woods’ land.**

Under Clipse, *intent* to enter the land of another is not required, only the fact of entry. Clipse, 154 Wn.App. at 577. The County sent water onto the Woods property by its culvert under the road, establishing this element. It

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Note that where the defendant “removes timber, crops, minerals, or other similar valuable property,” an alternative not applicable here, the elements will be somewhat different due to the lack of the “wrongfulness” requirement. See Clipse, 154 Wn.App. at 578 (“By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives.”).

also conspired with Dermond to build a drainage system on Woods' land.

**2. The County intentionally and unreasonably saturated the land, causing waste.**

a. The County intended the acts that caused waste.

The acts that cause injury must have been intentional. Borden, 113 Wn.App. at 374; Colwell, 119 Wn.App. at 442. Where a reasonable person would believe a particular consequence is substantially certain to result from an act, he is deemed to have intended the consequence. Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 683, 709 P.2d 782 (1985).

The County knew that its drainage ditches and culvert collected, channeled, and discharged unnatural amounts of water onto the property. A reasonable person would believe that over-saturation of the land by that water was substantially certain to result from the culvert. A reasonable person with the knowledge and skill of the County would believe a landslide was substantially certain to result. This is evident in the treatment of drainage in the County's own Resource Ordinance:

*Surface drainage*, including downspouts and runoff from paved or unpaved surfaces up slope, *shall not be directed onto or within 50 feet above or onto the face of a Landslide Hazard Area* or its associated buffer. If drainage must be discharged from the top of a Landslide Hazard Area to below its toe, it shall be collected above the top and directed to below the toe by tight line drain and provided with an energy dissipating device at the toe. MCRO § 17.01.100(D)(3)(a).

Because a reasonable person with the knowledge and skill of the County would be substantially certain that a landslide would result from the County's operation of the culvert, the County should be deemed to have intended not only its trespass but also the resulting waste or injury to the land. Clearly the County intended the damages caused by the drainage system built on the Woods' land in conspiracy with Dermond.

b. The term "unreasonably" refers to the third element.

The case law on RCW 4.24.630 provides no direct guidance as to any independent meaning of the term "unreasonably" as used in the statute. In general, a person acts unreasonably when he or she commits an act that a reasonably prudent person would not, in light of the circumstances. White River Estates v. Hiltbruner, 134 Wn.2d 761, 769, 953 P.2d 796 (1998). It is likely that the term, as used in this statute, is a reference to the third element—that a person acts unreasonably when he or she acts without authorization, while knowing or having reason to know that he or she acts without authorization. *See* Standing Rock, 106 Wn.App. at 244 (affirming the trial court's conclusion that "Defendant's actions in destroying the gates were wrongful in that defendant acted intentionally and while having reason to know that he lacked authorization to so act," without any independent consideration of unreasonableness). A reasonably prudent person would not

commit the act if she had reason to know that she lacked authorization.

An interpretation of “unreasonably” in RCW 4.24.630 as referring to the third element—“while knowing, or having reason to know, that he or she lacks authorization”—is consistent with related statutes that establish similar penalties for similar conduct.<sup>4</sup> This element applies equally to the discharge of stormwater, and to the trespass by the drainage system construction.

**3. The County knew or had reason to know it lacked authority.**

The Common Enemy Rule and its exceptions delineate when a trespass by water is authorized and when it is not. Under the “channel and discharge” exception, “an uphill landowner cannot lawfully collect water in an artificial channel, then discharge it upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof.” Borden, 113 Wn.App. at 367. The roadside drainage ditch collects uphill water from a large tributary area in an artificial channel running to the culvert, which carries the water under the road and discharges it in greater quantities and a

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Following the lead of the Court of Appeals in Clipse, this court could also look to “related statutes” that “establish similar penalties for similar conduct.” *See Clipse*, 154 Wn.App. at 578-79. Those related statutes require, in order to activate treble damages, that the person acted intentionally and had reason to know that the act was unauthorized. *See* RCW 79.02.300 (waste or injury to public lands, referred to by the court in Clipse; single damages if the person did not know or have reason to know he or she was unauthorized); RCW 64.12.030-.040 (timber trespass; single damages if the person had probable cause to believe that land was his own).

different manner than its natural flow. The County had reason to know it lacked authority to unreasonably discharge its water onto the properties since at law this would lead to liability. As to the joint drainage the County knew the location of the planned drainage improvements was not on its right-of-way, but on Wood's land.

**4. The County's acts caused waste or injury to the land.**

The County's discharge of stormwater caused the landslide, which damaged Woods' property. Mr. Halbert testified excessive drainage onto the property from the County's culvert was a contributory cause of the landslide. In his original report, he identified water from the County's culvert as the *primary* cause. Mr. Borden agreed.

The County's culvert under the road meets the elements of the waste statute. The County acted intentionally when it built the culvert that discharges water onto the property. That intentional act was unreasonable under the exceptions to the Common Enemy Rule. The County had reason to know that the culvert would discharge water onto property without authority. It also had reason to know, based on both the Common Enemy Rule and the Landslide Hazard Area Section of its own Resource Ordinance, that the amount of water that would be discharged would be unreasonable and illegal. The County intentionally and wrongfully caused a thing (water) to "go on to

the land”. The County’s water was a cause of the landslide that injured the Woods’ land.

The statute applies to the damage caused by the joint construction of the drainage system. Dermond entered onto Woods’ land and wrongfully injured the curtain drain protecting Woods’ septic field. Dermond acted intentionally and unreasonably to cover the drain pipe. Dermond admits that he knew the drain pipe belonged to Woods, and the curtain drain and outlet pipe were not on his land. The County had a plan in its files that showed the location of the curtain drain. CP at 68: Jon Cushman Dec. Further, the County did go on Wood’s land when planning the drainage project, if not when Dermond performed it.

**E. Civil Conspiracy.**

The County is liable for Dermond’s acts because Dermond acted as the County’s agent to manage the County’s stormwater, building the drainage project pursuant to an agreement with the County’s representative, Mr. Borden, who gave Dermond authority to do so without a permit. *See Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984) (A relationship may be implied when one party acts at the instance of and under the direction of another). Agency makes the County a co-conspirator.

Woods must show (1) the County and Dermond combined to

accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. *See All Star Gas, Inc. of Washington v. Bechard*, 100 Wn.App. 732, 740, 998 P.2d 367 (2000). The burden of proof is clear, cogent, and convincing evidence. *All Star*, 100 Wn.App. at 740. The facts and circumstances must be more consistent with an unlawful undertaking than with a lawful purpose. *All Star*, 100 Wn.App. at 740.

Circumstantial evidence is sufficient. In *Lewis Pacific Dairymen's Ass'n v. Turner*, 50 Wn.2d 762, 314 P.2d 625 (1957), the court found circumstantial evidence sufficient to establish by clear, cogent, and convincing evidence that the Turners conspired. There was no direct evidence of an agreement between the Turners, but circumstantial evidence was sufficient.

Here, there was abundant circumstantial evidence, on both elements, that the County conspired with Dermond to construct the drainage system, to take the County's stormwater from the culvert at Bloomfield Road down to the bay without requiring Dermond to obtain necessary permits. While the construction of such a drainage system may be a lawful undertaking when done "by the book", the County and Dermond conspired to accomplish that purpose by unlawful means, by circumventing the permits required by law.

The County and Dermond entered into this conspiracy to obtain mutual benefits at the lowest possible cost. Mason County knew that its stormwater, discharged from the culvert onto the properties, caused the landslide. It knew that if that system was not fixed, it could be liable for future problems, including damage to its own road. Dermond also wanted the water off his land. He approached the County with a solution. He proposed to build a drainage system that would take water from the County's culvert down to the bay, as well as draining groundwater from his own property. Dermond, geologist Bill Halbert, and Mason County Senior Planner Allan Borden met on the Dermond property to discuss the project. After walking the properties for two hours discussing the problem, they agreed to collect the water from the County's culvert and direct it to the shore. Mr. Borden approved the project without requiring any permits, saving Dermond a great deal of money, and solving the County's stormwater problem at no cost to the County. Borden says he conditioned approval on submission of a geotechnical report, but never got the report or inspected the project.

Multiple planners at Mason County, particularly Mr. Borden himself, testified in depositions that Dermond's drainage project should have required permits. The project was built in both the shoreline and landslide hazard zones, which are critical areas requiring review under the Resource

Ordinance. It changed the natural flow of water, which should have required SEPA review. A shoreline substantial development permit should have been required since the drainage project cost about \$15,000, above the statutory threshold. Discharging storm water at the ordinary high water mark should have required a JARPA application. The planning department's review process should have included the submission of engineered site plans, which would also be reviewed by the building department, with final approval of the as-built structure on inspection at completion. Any new construction, grading, or clearing in a landslide area or shoreline buffer, such as would be required for the drainage project, should have required planning department permits to ensure compliance with the Resource Ordinance.

The testimony of the County's own planners, particularly Mr. Borden himself, that permits should have been required, is strong circumstantial evidence that Dermond was being given special treatment by the County in exchange for helping the County solve its water problem. Dermond and Borden agreed that the County water would be captured and diverted to the bay without permits, an unlawful means (circumventing the permitting process).

The facts and circumstances are not at all consistent with a lawful purpose. If Dermond and the County intended to undertake this project in

compliance with the law, Borden would have collected the information necessary to a full review under the Resource Ordinance, shoreline requirements, SEPA, and JARPA. He never required any plans, engineering, or any information normally collected by the County that might demonstrate either the need for a permit or an exception to permit requirements. Despite his thorough knowledge of the requirements of the Resource Ordinance and other permitting requirements, he let the project move forward without any review. This is entirely inconsistent with a lawful purpose.

The facts and circumstances viewed in the light most favorable to the Woods support an inference that the County and Dermond conspired to build Dermond's drainage project by unlawful means. The County would be liable as co-conspirator for all of Dermond's acts in the construction of the project, including statutory waste. Dermond entered onto the Woods' land and wrongfully injured the land by constructing his catch basin and drain pipe on the Woods' property, and wrongfully damaging improvements on Woods' land (the curtain drain that protected the Woods' septic field). The circumstantial evidence of the conspiracy defeats summary judgment.

**F. Trespass By Water.**

**1. The County's breach of its duty caused the landslide.**

In order for the County to be liable for its breach of duty, the damage

must have been reasonably foreseeable and, without the breach, the damage would not have occurred. The damage was clearly foreseeable, and there is at least a dispute of fact as to whether the landslide would have occurred without the County's breach. The County could easily foresee that a failure to enforce the requirements of the Landslide Hazard Section would result in a landslide. The Landslide Hazard Section was adopted for the express purpose of protecting landowners against landslides occasioned by development activity. The very existence of the ordinance is evidence that the County could foresee landslides being caused by development activity that violates the requirements of the ordinance. Further, the ordinance requires that landowners who engage in permitted development in a landslide hazard zone take legal responsibility for any effects of their development activity. In enacting the ordinance, the County knew that even permitted development activity could create a risk of harm to others. The County could have foreseen the damage Woods suffered by its failure to require Dermond to obtain an after-the-fact permit and conduct the mitigation required by that permit.

The parties dispute whether the landslide would have occurred without the County's breach. The County has argued that replanting would not have created enough structural support to prevent the landslide, but the ordinance requires much more than just replanting. The Geotechnical Report

that the County should have required Dermond to conduct would have included requirements for structural mitigation or other mitigation techniques, in addition to replanting, in order to mitigate hazards “in such a manner as to prevent harm to property.” Proper enforcement of the ordinance would have required Dermond to comply with these mitigation requirements, which would have been designed to prevent the landslide.

Dr. McClure testified that on a more likely than not basis, Dermond’s unpermitted land clearing and failure to mitigate (which the County would have prevented by living up to its duty) exacerbated the timing and size of the slide. (CP at 247.) This is sufficient to support a finding that the County’s failure to enforce was a but-for cause of at least a portion of the landslide damage. The County should be liable for its fault. To the extent the County provided evidence to contest causation, there is a dispute of material fact. Summary judgment in the County’s favor was improper.

**2. The Woods’ claim for water trespass is not barred by a right in the County by easement, whether written or by prescription.**

The claim for water trespass is not barred by a claim of right. The County failed to plead easement, prescriptive or otherwise, as an affirmative defense. Further, the County failed to carry its burden on summary judgment to establish facts supporting all of the elements of prescription. Further, a public nuisance, such as discharging stormwater at the top of a landslide

hazard area to flow untreated into the bay, can never ripen into a prescriptive right. Even if the County does have a prescriptive easement for its water to flow across the Wood/Dermond properties, it negligently misused the easement, causing damage to the underlying land.

**a. The County failed to plead easement as an affirmative defense.**

Under CR 8 a party must plead its affirmative defenses and failure to do so bars them from asserting such defenses later. The County did not plead that it had a right, by way of easement or otherwise, written or prescriptive, to dump water onto Wood's property, or to build drainage facilities on Woods' property. It just did so, intentionally, through its agent and co-conspirator, Dermond, ignoring all applicable rights and legal requirements. In doing so, its water in the first instance caused a landslide; and it's "fix" in the next instance trespassed Wood's property and destroyed the curtain drain protecting Woods' septic system.

**b. The County has failed to establish all the elements of a prescriptive easement.**

"The burden of proving the existence of a prescriptive right always rests upon the one who is to benefit by its establishment. This burden of proof never shifts. An easement by prescription must be established by facts." *Anderson v. Secret Harbor Farms*, 47 Wn.2d 490, 493, 288 P.2d 252 (1955).

The County did not produce evidence on all the elements of a prescriptive easement, failing to meet its burden of production.

The County oversimplified the requirements for establishing a prescriptive easement. Washington courts require more:

Although prescriptive rights are not favored in law, a claimant can establish a prescriptive easement upon proof of: (1) use adverse to the right of the servient owner; (2) open, notorious, continuous, and uninterrupted use for the entire prescriptive period; and (3) knowledge of such use at a time when the owner was able to assert and enforce his or her rights.

*Pedersen v. Dept. of Transp.*, 43 Wn.App. 413, 417, 717 P.2d 773 (1986).

The County presented very few facts to support its claim of a prescriptive easement. It pointed to the Deposition of Dermond, in which he testified that the culvert was there before he bought his first lot in 1988. It pointed to the Declaration of Rick Blake, who testified that the culvert was there and draining water some unknown amount of time before his employment with the County, which began 28 years ago.

These facts are insufficient to prove all of the elements to establish a prescriptive easement. The County did not prove that the use was: adverse rather than permissive; open and notorious over the entire period; or that the owner had knowledge of the use in time to assert his rights. The County did

not present a shred of evidence as to what any previous owner knew or when. It cannot establish the required elements. The County cannot rely on inferences from the few facts it has presented, because inferences must be drawn in a light favorable to the Woods. The motion for summary judgment should have been denied.

**c. A public nuisance can never ripen into a prescriptive easement.**

The County's stormwater is also a public nuisance, affecting the rights of the entire neighborhood. *See* RCW 7.48.130. No matter how long the County's water has been flowing onto the properties, a public nuisance never ripens into a prescriptive easement, RCW 7.48.190.

"Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either *annoys, injures or endangers the comfort, repose, health or safety of others . . .* or in any way renders other persons insecure in life, or in the use of property." RCW 7.48.120 (emphasis added). In addition, a *public* nuisance must similarly affect the rights of an entire neighborhood, "although the extent of the damage may be unequal." RCW 7.48.130. Some specific public nuisances are enumerated in RCW 7.48.140, but these do not limit the general definition.

Courts determine whether a particular use of property is a nuisance based upon the reasonableness or unreasonableness of making the use

complained of in the particular place and in the manner and under the circumstances of the case. *Shields v. Spokane Sch. Dist. No. 81*, 31 Wn.2d 247, 257, 196 P.2d 352 (1948). “Each case must be decided on its own peculiar facts.” *Id.* at 259. It is unreasonable, especially in light of the prohibition in the Landslide Hazard Section of the Resource Ordinance<sup>5</sup>, for the County to channel and discharge stormwater at the top of a Landslide Hazard Zone, to flow down the dangerous slope between two occupied homes, and run, untreated, complete with contaminants into Totten Inlet.

The County discounts the applicability of *Elves v. King County*, 49 Wn.2d 201, 299 P.2d 206 (1956). *Elves* illustrates the rule, enacted by statute, that a right to continue a public nuisance cannot be obtained by prescription. It is true that the court in *Elves* based its finding of public nuisance on the presence of excreta in the water, but such is not required in order to find a public nuisance. The statutory definition of nuisance, *supra*, controls that determination, based on the facts of each case. It is also instructive to note that in *Elves*, the contaminated water was discharged onto only one property, yet the court found it a sufficient “menace” to the neighborhood as to

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“Surface drainage, including downspouts and runoff from paved or unpaved surfaces up slope, shall not be directed onto or within 50 feet above or onto the face of a Landslide Hazard Area or its associated buffer. If drainage must be discharged from the top of a Landslide Hazard Area to below its toe, it shall be collected above the top and directed to below the toe by tight line drain and provided with an energy dissipating device at the toe.” MCRO § 17.01.100(D)(3)(a).

constitute a public, rather than merely private, nuisance. Similarly, this discharge of large amounts of stormwater at the top of a Landslide Hazard Zone, significantly increasing the risk of landslides, flowing, untreated, into Puget Sound, constitutes a public, rather than merely private, nuisance.

**3. Even if the County has an easement, its negligent misuse of the easement damaged the underlying land and the County is still liable.**

Whether the County's alleged prescriptive easement can serve as a defense to the Woods' claim depends entirely upon the scope of the easement acquired. Trespass occurs upon the misuse or overburdening of an easement. *Sanders v. City of Seattle*, 160 Wn.2d 198, 215, 156 P.3d 874 (2007). If the County exceeded the scope, misused, or overburdened the easement, it trespassed on the Woods' land and is liable for damages. If an easement has been negligently used causing unnecessary damage to the servient estate, it is recoverable in an action for damages. *Berryman v. E. Hoquiam Boom & Logging Co.*, 68 Wn. 657, 660, 124 P. 130 (1912).

The County failed to carry its burden of proof on the scope of the easement. "The extent of the rights acquired through prescriptive use is determined by the uses through which the right originated. The easement acquired extends only to the uses necessary to accomplish the purpose for which the easement was claimed." *Lee v. Lozier*, 88 Wn.App. 176, 187, 945

P.2d 214 (1997). The County failed to provide any evidence from which the court could determine the extent of the use. It did not demonstrate where the water flowed, in what quantities, or how often. It did not demonstrate the degree of burden the use imposed on the servient estate.

In ascertaining whether a particular use is permissible under a prescriptive easement the court should compare that use with the uses leading to the prescriptive easement in regard to: (a) their physical character, (b) their purpose, and (c) the relative burden caused by them upon the servient tenement.

*Lee v. Lozier*, 88 Wn.App. 176, 187-88, 945 P.2d 214 (1997).

It should nonetheless be clear that the discharge that caused the landslide exceeded the scope and was a misuse of the alleged easement. An easement is a right to use land and does not convey any right to possess or control the underlying land. Under the due care exception to the Common Enemy Rule, the County owed a duty of due care to avoid unnecessary damage to the property of others, including damage to the underlying land over which the alleged easement flowed. *See Borden v. City of Olympia*, 113 Wn.App. 359, 367, 53 P.3d 1020 (2002). Any use that damages the underlying land in a manner not consistent with the scope of the easement would be an actionable trespass. Despite the County's lack of evidence establishing the scope of the alleged easement, it is clear that damage by landslide exceeds the scope, misuses, and overburdens the easement. The

County failed to exercise due care to avoid the possibility of this foreseeable damage caused by its water. In negligently misusing the alleged easement, the County trespassed and damaged the Woods' land.

**G. The Woods' Claim of Water Trespass Is Not Barred By Lack of Standing.**

The County erroneously claimed that Woods lack standing to bring an action for damages arising from the culvert. The County relied entirely on *Hoover v. Pierce County*, 79 Wn.App. 427, 903 P.2d 464 (1995), for this lack of standing argument. *Hoover* simply does not apply to this case.

*Hoover's* rule of standing is based on the special nature of an inverse condemnation claim. Since the "measure of damage in a taking case is the diminution in the fair market value of property," *Hoover*, 79 Wn.App. at 431, "no taking damages should be awarded to plaintiffs who acquired property for a price commensurate with its diminished value." *Hoover*, 79 Wn.App. at 434. Thus, "[o]rdinarily, a grantee or purchaser cannot sue for a taking or injury occurring prior to his acquisition of title." *Hoover*, 79 Wn.App. at 433. Since the rule of standing in *Hoover* by its own terms applies only to takings, it cannot apply to bar the Woods' trespass claim against the County.

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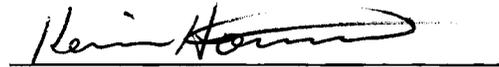
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**VI. CONCLUSION**

This court should reverse the trial court's erroneous summary judgment dismissal of the Woods' claims against Mason County and remand for further proceedings.

Respectfully Submitted this 22<sup>nd</sup> day of August, 2011.

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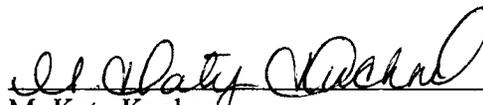
**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the State of Washington, that on August 22<sup>nd</sup> 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
copy:	Mark R. Johnsen Karr Tuttle Campbell 1201 Third Avenue, Suite 2900 Seattle, WA 98101-3028	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail
copy:	R Alan Swanson Swanson Law Firm, PLLC 908 5 <sup>th</sup> Avenue SE Olympia, WA 98501	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 22<sup>nd</sup> day of August, 2011 in Olympia, Washington.

  
\_\_\_\_\_  
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