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DIVISION II

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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Jerome C. Hurley and Bessie M. Hurley, et al.,  
Appellants,

vs.

Campbell Menasha, LLC, et al.,  
Respondents.

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**BRIEF OF RESPONDENT DON ZEPP**

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ORIGINAL

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## I. STATEMENT OF THE CASE

### A. Introduction

Don Zepp performed logging work on a hillside in rural Lewis County near Glenoma, Washington. A winter storm hit the area almost three years after Don Zepp completed his work. The storm caused numerous debris flows and flooding throughout Lewis County. One of these debris flows originated on or near the hillside that Don Zepp had logged. This debris flow has been named the “Debris Flow Above Lunch Creek” for purposes of litigation.

Two or three of the fourteen plaintiff families in this case alleged that they were damaged as a result of the Debris Flow Above Lunch Creek; eleven or twelve families made claims that did not involve Don Zepp. The applicable plaintiffs alleged that logging may have been a proximate cause of the debris flow and/or that logging may have increased the volume/intensity of the debris flow. The plaintiffs assert that the hillside should not have been logged (at least not in the manner that it was logged) and/or that plaintiffs’ alleged damages should be paid by logging companies as a cost of doing business. The causes of action alleged by plaintiffs were negligence, nuisance, trespass, and strict liability.

Regarding the “Debris Flow Above Lunch Creek”, the applicable plaintiffs filed suit against Don Zepp as the logger who harvested the

timber and against Port Blakely Tree Farms, L.P., which owned and managed the land. The plaintiffs did not sue the Department of Natural Resources, which was involved in reviewing and approving Port Blakely's logging permit application.

Don Zepp defended this case on two fronts: (1) plaintiffs presented no evidence that the Debris Flow Above Lunch Creek was proximately caused by logging; and (2) plaintiffs failed to establish what duty Don Zepp owed to plaintiffs and/or that Don Zepp breached any duty owed to plaintiffs. On October 5, 2012, the Trial Court Judge granted Don Zepp's Motion for Summary Judgment based on plaintiffs' failure to present evidence that Don Zepp breached his duty. The Trial Court Judge had previously dismissed plaintiffs' claims for nuisance, trespass, and strict liability.

**B. Don Zepp's Logging Work**

Don Zepp, a lifelong logger, entered a contract with Island Timber Company on January 5, 2006 to log land owned by Port Blakely Tree Farms, L.P. Don Zepp performed the work between January 2006 and April 2006. Don Zepp complied with the Forest Practices Act and terms of the contract. The logging was properly permitted and reported. Don Zepp used a cable logging technique involving 100 foot towers to suspend

timber in the air. Don Zepp did not construct logging roads. CP 1616 – 1617.

Expert Jon Koloski testified that Don Zepp's actions when logging the Port Blakely tract in 2006 were reasonable. CP 1404. Additionally, the highest rating given by the Department of Natural Resources to any of the areas logged by Don Zepp was only a Category 3, which reflects that the areas logged by Don Zepp have less of a slope than steeper areas in other locations the Department would permit logging on. CP 814 – 816. Jon Koloski's report confirms that the soil types prevalent in the area are consistent with slopes suitable for logging purposes. CP 1654.

Plaintiffs have no evidence to refute that Don Zepp logged in accordance with his contract, the Forest Practices Act, and industry standards. Plaintiffs' expert Chris Brummer stated he is not qualified to opine regarding logging practices and he deferred to plaintiffs' other expert, Paul Kennard. CP 1367 – 1368. Paul Kennard testified, "I didn't see anything in the materials I reviewed that [Don Zepp] violated the FPA." CP 1370. Mr. Kennard also admitted that he does not know whether a logger is even supposed to identify possible slope stability issues or defer to experts, but Mr. Kennard suspected the landowner, not the logger, would typically be responsible for ensuring proper studies/permits are obtained. CP 955.

Offered testimony from Michael Jackson, plaintiffs' forestry expert, was stricken by the Trial Court Judge due to Mr. Jackson being untimely disclosed—plaintiffs did not appeal the order striking Mr. Jackson's testimony. CP 1493 – 1496. The order striking plaintiffs' forestry expert, Mr. Jackson, also struck the testimony of Paul Kennard offered in regards to logging industry standards because Mr. Kennard is not qualified to give opinions about a logger's duty of care. CP 1493 – 1496. During the October 5, 2012 hearing on Don Zepp's Motion for Summary Judgment and Don Zepp's Motion to Strike, plaintiffs' counsel admitted that the only way plaintiffs might be able prove Don Zepp breached any duty of care would be through the testimony of Mr. Jackson. RP (10/5/12 Hearing) at page 39, lines 1-9.

The Trial Court Judge, in dismissing Don Zepp on summary judgment, commented, "there does not seem to be even a hint that there was any negligence in the way that [Don Zepp] went about his business." RP (10/5/12 Hearing) at page 54, lines 14-16. Plaintiffs' counsel argued that it should not matter whether a logger follows a permit that has been approved by the Department of Natural Resources' foresters and other experts and it should not matter whether a logger follows his contract—plaintiffs' counsel proposed that if a logger removes timber from a steep slope then the logger should be responsible if anything goes wrong. RP

(10/5/12 Hearing) at page 51, line 13 – page 53, line 15. The Trial Court Judge correctly recognized that this was not a negligence argument, but a strict liability argument. RP (10/5/12 Hearing) at page 55, lines 5-13. The Trial Court Judge had previously dismissed plaintiffs' strict liability cause of action finding that strict liability does not apply to this case. CP 1231 – 1238.

Don Zepp was not the first logger to have logged the land owned by Port Blakely. A 1948 photograph indicates the area that Don Zepp logged in 2006 had been logged for probably close to a century prior to Don Zepp stepping foot there. Clearly, the Don Zepp tract was surface logged in about 1948. Numerous logging roads and skid trails are apparent within the tract as of 1948. See CP 1631 – 1736, but specifically CP 1657 – 1660 (written description of photographs) and CP 1668 – 1676 (photographs).

A 1988 photograph shows that the old logging roads were reused in the 1980's to log the area directly south of the tract owned by Port Blakely that Don Zepp logged in 2006. This 1980's harvest included complete removal of trees from all watercourses in the subject forest area, which is owned by Campbell/Menasha. See CP 1631 – 1736, but specifically CP 1657 – 1660 (written description of photographs) and CP 1668 – 1676 (photographs).

A 2006 photograph shows the area where timber was harvested by Don Zepp. The visual evidence confirms aerial cable yarding as compared to ground-skidding logging. The photograph reflects that Don Zepp's equipment was positioned on a landing about 1,000 feet upslope/north of where land would later slide away after a winter storm in January 2009. The 2006 picture also confirms that Don Zepp did not construct new roads or re-open logging roads below the landing. See CP 1631 – 1736, but specifically CP 1657 – 1660 (written description of photographs) and CP 1668 – 1676 (photographs).

It is also relevant to point out that the areas where the landslides in this case occurred are areas where the undisputed geological evidence suggests landslides have been occurring naturally for thousands of years. See CP 1655.

**C. The January 2009 Weather Event and Corresponding Land Events**

Plaintiffs' claims stem from a weather event that occurred almost three years after Don Zepp had completed his work. Over five inches of rain fell on January 7, 2009 in the vicinity of the "Above Lunch Creek" slide. This is the second highest daily rainfall total recorded since 1948. Further, higher than average temperatures caused snow melt. This combination caused the ground in the area to be saturated. See CP 1631 –

1736, but specifically CP 1656 – 1657 (discussion of weather data and news reports) and CP 1677 – 1712 (weather data).

The weather resulted in hundreds of landslides and debris flows wherever heavy rain occurred, and particularly where heavy rain fell on existing snow pack. The distributions of landslide and debris flow events throughout the storm track area are not concentrated on where Don Zepp worked. There were weather/land events in many other places, including areas that had not been logged. See CP 1631 – 1736, but specifically CP 1657 (news reports), 1662 – 1664 (conclusions), and CP 1713 – 1731 (DNR Report).

The parties in this case agree that trees can hold soil together and absorb water. Fewer trees can mean more groundwater. Deforestation can in some instances contribute to land events such as a debris slide. However, several other factors not related to Don Zepp's work were/are present in the Glenoma area that, in addition to the amount of rainfall and snow melt saturating the ground in January 2009, led to the Debris Flow Above Lunch Creek. Such factors include the geology of the soil, the topography of the land, and logging activities that pre-dated Don Zepp's work. See CP 1642 – 1664.

Expert Jon Koloski concluded that the "Debris Flow Above Lunch Creek" would have occurred even if the Port Blakely tract had not been

logged in or around 2006. It is a fact that hundreds of debris slide events happened in both logged and unlogged areas in the path of the January 2009 winter storm. Like in unlogged areas that experienced slides, the presence of trees on the Don Zepp tract would have been insufficient to make any difference due to the amount of water that was introduced by the storm. See CP 1642 – 1664.

Mr. Koloski also opined that the debris flow would not have occurred without adverse weather of extraordinary dimensions, even with the logging. There was no debris flow during a large storm in December 2007 and there was no evidence of debris flows during the last sixty years of logging activity on or around the Port Blakely tract. See CP 1642 – 1664.

Moreover, plaintiffs have presented no evidence regarding the specific increase in the amount of groundwater possibly caused by Don Zepp's work. The opinions that plaintiffs offer from their experts are all based on generalities and studies that are not site specific. And plaintiffs' experts fail to reconcile their opinions that logging is a proximate cause of the Debris Flow Above Lunch Creek with the fact that debris flows occurred in unlogged areas during the same January 2009 storm. See CP 1793 – 1810.

**D. Don Zepp's Limited Role in the Case**

Dozens of individuals were named as plaintiffs in this lawsuit. The plaintiffs are Lewis County landowners. The parcels plaintiffs respectively own are in or near Glenoma. Each of plaintiffs' respective parcels is unique. And collectively, the parcels stretch over a vast area. CP 1 – 26.

Plaintiffs' Complaint designated three separate land/weather events that have been segregated into three specific sectors: (1) "Debris Flows and Debris Floods Above Martin Road"; (2) "Debris Flow Above Lunch Creek"; and (3) "Rainey Creek Debris Floods." Different plaintiffs alleged to have been affected by different events or combinations of events. Stephen Rea was the only plaintiff property owner affected exclusively by the "Debris Flow Above Lunch Creek." The only other property owners affected by the "Debris Flow Above Lunch Creek" were the Sprinkle family, but their land was allegedly impacted by a combination of debris flows and floods. CP 1 – 26.

Plaintiffs insinuate that property owned by Alice Redmon was also affected by Lunch Creek. However, Plaintiffs' Complaints do not include Alice Redmon among the Lunch Creek plaintiffs. CP 1 – 26.

Further, there were multiple named defendants. And plaintiffs' allegations attributed the three separate land events to various different defendants respectively. For instance, plaintiffs alleged that Don Zepp Logging and Port Blakely contributed to the "Debris Flow Above Lunch Creek," but plaintiffs did not allege that Don Zepp had anything to do with the other debris flows and floods. CP 1 – 26.

The following graph depicts the alignment/interplay of the claims and parties:

PARTY	SECTOR(S) INVOLVED		
	<i>Above Martin Road</i>	<i>Above Lunch Creek</i>	<i>Rainey Creek</i>
<b>Plaintiffs:</b>			
Hurley	X		
Stancil and Moran	X		
Mettler	X		
Hampton	X		
Swafford	X		
Dantine	X		
Nord	X		
Lester	X		
Walker	X		
Wood	X		
Thomas	X		
Sprinkle	X	X	X
Redmon	X	?	X
Rea		X	
<b>Defendants:</b>			
Campbell/Menasha	X	?	X
B&M Logging, Inc.	X		
Pope Resources			X
Port Blakely		X	
Don Zepp		X	

**E. Bifurcated Trials and Settlements**

In February 2012, The Court split the plaintiffs' claims into two trials. The eleven plaintiff families who were impacted only by the Martin Road slides were scheduled to be in trial first against Defendants Campbell/Menasha and B&M Logging, Inc. The second trial would have included the remaining plaintiffs (Sprinkle family, Redmon, and Rea) and all defendants.

B&M Logging, Inc. settled out of the case prior to any trials. The first trial went forward against Campbell/Menasha. A defense verdict was returned on December 14, 2012. CP 1536 – 1537. Defendant Campbell/Menasha then settled claims with plaintiffs who were set to be involved in the second trial and had made claims against Campbell/Menasha. Defendants Port Blakely and Pope Resources also settled following the first trial with plaintiffs who had made claims against those two entities.

Port Blakely and Don Zepp, by virtue of being involved with the same timber tract and Don Zepp contracting to log timber on Port Blakely's land, were in the exact same position in this lawsuit as far as which plaintiffs were alleging claims against them. The plaintiffs who settled with Port Blakely signed agreements releasing Port Blakely and "all persons, entities, and insurers in interest with them." In addition to

the release agreements, Don Zepp had previously been dismissed on summary judgment. Therefore, the second trial was not necessary.

## **II. Summary of Argument**

Logging is not an activity to which strict liability applies. Strict liability only applies to a very limited number of activities, which are distinguishable from logging. Moreover, plaintiffs' argument is not that strict liability should always apply to logging, but only that strict liability might apply to logging in specifically defined areas. The area Don Zepp logged was a Category 3 area and is not even in the same class as other areas (i.e. Category 4) that are more sensitive to the possible effects of logging as determined by the Department of Natural Resources. Strict liability does not apply to Don Zepp's logging activity even if strict liability could apply to some logging activities.

Plaintiffs' alleged causes of action other than strict liability are all negligence based. There are a variety of reasons why plaintiffs cannot prevail on their negligence claims (e.g. they cannot prove proximate cause). But the one undeniable and confirmed failure in plaintiffs' case against Don Zepp is the lack of evidence establishing Don Zepp's duty and/or that Don Zepp breached any duty. The trial court struck plaintiffs' proposed evidence in this regard and plaintiff did not appeal the order striking such evidence. Summary judgment was properly granted in favor

of Don Zepp and that decision cannot be overturned in light of the fact that plaintiff has no admissible evidence to support plaintiffs' negligence claims against Don Zepp.

### III. Argument

#### A. **Strict liability does not apply to logging—and more specifically does not apply in this case.**

##### 1. Strict liability does not apply to logging.

Washington Courts have found trucking gasoline, pile driving, blasting, crop dusting, and firework displays to warrant imposition of strict liability. See 23 Wash. Prac., Environmental Law And Practice § 4.5 (2d ed.). Logging is not subject to strict liability. *Id.*

Washington imposes strict liability for abnormally dangerous activities consistent with the Restatement (Second) of Torts. See *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 102 Wn.2d 495, 500, 687 P.2d 212 (1984). The Restatement (Second) of Torts at Section 520 establishes several factors to be considered in determining whether the activity is abnormally dangerous: (1) the existence of a high degree of risk of some harm; (2) the likelihood that the harm that results will be great; (3) the inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where

it is carried out; and (6) the extent to which the activity's value to the community is outweighed by its dangerous attributes. All of the factors should be considered and there must ordinarily be at least several factors present for a court to impose strict liability. Restatement (Second) of Torts at Section 520, comment f.

All of the factors go against finding that logging is an ultra-hazardous activity. Obviously, logging is prevalent in Washington and highly valued. This is reflected by RCW 7.48.305 and comments thereto.

Commercial forestry produces jobs and revenue while also providing clean water and air, wildlife habitat, open space, and carbon storage. Maintaining a base of forest lands that can be utilized for commercial forestry is of utmost importance for the state.

As the population of the state increases, forest lands are converted to residential, suburban, and urban uses. The encroachment of these other uses into neighboring forest lands often makes it more difficult for forest landowners to continue practicing commercial forestry. It is the legislature's intent that a forest landowner's right to practice commercial forestry in a manner consistent with the state forest practices laws be protected and preserved.

RCW 7.48.305, Notes [2009 c 200 § 1.]

Logging is appropriate in Lewis County where that industry has been in existence since statehood and before. The Port Blakely tract logged by Don Zepp in 2006 has been logged since at least 1948 and probably even longer. The six strict liability factors were explained to the

Trial Court Judge when he dismissed plaintiffs' strict liability cause of action. Plaintiffs cite no new case law now and there has been no change in the Washington Legislature's stance on protecting commercial forestry. The following explains how all six strict liability factors support the Trial Court Judge's decision.

a. There was minimal risk of harm.

Plaintiffs admit that debris flows occur naturally. But plaintiffs argue that clearcutting on steep and unstable slopes increases the incidence of debris flows. However, plaintiffs' argument does not appear to account for the fact that the logging accomplished by Don Zepp left timber in certain areas, left slash on the ground, and was performed in an area with terrain and soils suitable for logging. Plaintiffs admit that Don Zepp followed the permits that were approved by the Department of Natural Resources.

Plaintiffs' misinformation regarding the Port Blakely tract is evidenced by their argument that logging on "steep, unstable slopes increases the risk of debris flows from a natural event occurring once every several centuries to a man-made event occurring once every decade or two." *Page 18 of Appellant's Brief*. If plaintiffs' argument were true, then why were there not any debris flows in this area between 1948 and 2009? Based on plaintiffs' arguments, there should have been at least

three debris flows between 1948 and 2009 if logging increased the risk of landslides in the amount plaintiffs would have the Court believe it does.

The simple answer is that logging does not increase the risks of land slides to the degree argued by plaintiffs—at least not in areas where the Department of Natural Resources has studied the land and approved a logging permit. It is clear that the Debris Flow Above Lunch Creek was caused by an unusual weather event and not because of logging.

b. There was minimal risk of harm results.

Landslides have been occurring in the Glenoma, Washington area hills for thousands of years. The plaintiffs in this case built their residences on top of an alluvial fan, which is the geological remnant of past landslides. The Debris Flow Above Lunch Creek was triggered by a rain on snow event. The landslide could have been a natural reoccurrence of historical landslides. Moreover, plaintiffs' experts did not investigate the amount of water that was added to the ground as a result of logging and thus have no basis, other than rampant speculation, to opine whether logging contributed to the force or volume of the Debris Flow Above Lunch Creek in any significant way.

The risk of a landslide is not inherent to logging practices as all of the experts agree that landslides occur naturally and even plaintiffs' experts had to admit that landslides occurred in Lewis County in January

2009 in areas where there had not been recent logging. Thus, while debris flows have the potential to cause damage, there is no evidence here that logging caused or increased that potential.

Don Zepp further denies that the harm allegedly attributable to the Debris Flow Above Lunch Creek was significant. However, Don Zepp was dismissed before damage claims were completely evaluated.

c. Risks are reduced by use of care.

Plaintiffs claim the landslides are evidence that risks could not be eliminated even by the use of reasonable care. However, plaintiffs' argument presupposes that logging was a proximate cause of the landslide. Plaintiffs lack evidence with which to prove this claim and thus their argument is a non-starter.

Moreover, the voluminous amount of materials (e.g. watershed analysis studies, forest practices regulations, etc.) dedicated to reduce the impact logging has on the environment is predicated on the fact that there are ways to reduce risks associated with logging. For instance, the logging accomplished by Don Zepp in 2006 did not include some areas that had been logged in years past (e.g. 1948) because there were portions within the Port Blakely tract that current science dictated should not be logged.

Courts in other states analyzing the same six strict liability factors that Washington courts are to consider have held that risks associated with

removing natural resources, such as timber, can be reduced by using due care. See *In re Flood Litigation*, 216 W.Va. 534, 607 S.E.2d 863 (2004).

d. Logging activity is common in Lewis County.

Even plaintiffs admit that logging is prevalent in Lewis County. Plaintiffs attempt to narrowly define the facts in this case to argue that the logging in this case was somehow different from other logging. However, plaintiffs' argument is not logically relevant and is based on a misconception of facts.

First, plaintiffs argue that the areas logged in this case were made up of steep and unstable slopes. This is not true. As explained more fully below, the tract Don Zepp logged was categorized as only a Class 3 area. Class 3 areas are appropriate to log and are not even as heavily regulated as areas with a higher classification.

Second, the statistical fact that there are thousands of acres of logging land and there is not a residence next to every tract does not make logging the Port Blakely tract an uncommon occurrence. The better question to ask would be how many timber tracts have been left untouched just because a new residence was constructed nearby despite ready to harvest timber. There is no evidence that any timber land has been left untouched in similar circumstances, therefore, it is actually very common

if not universal for logging to occur in areas similarly situated to the Port Blakely tract.

e. Logging was appropriate on the Port Blakely tract.

The Port Blakely owned tract logged by Don Zepp has been a timber tract since the World War II era and probably before. It has been logged a few times in the last hundred years. It is in rural Western Washington. This land is not on the edge of urban sprawl. It has been specifically owned by timber companies since before most of the plaintiffs in this case were born. There is not a more appropriate place to log. The plaintiffs all knew that the area where they lived was an area where logging was prevalent.

Moreover, the Department of Natural Resources agreed that logging was appropriate on the Port Blakely tract. Port Blakely submitted an application, the Department of Natural Resources reviewed the application, and the application was approved.

f. Logging is of great value to Lewis County.

Logging is of great benefit to Lewis County as it is in many Western Washington locations. Numerous towns in Western Washington exist because of logging. Even some of the plaintiffs involved in this case have ties to the logging industry. The importance of logging, which cannot be ignored, has even been codified by the Legislature. See RCW

7.48.305. It is a fact that logging creates jobs and provides an influx of revenue to Lewis County through the collection of taxes and wages paid to workers.

The area where Don Zepp logged is an area where logging has been an ongoing operation for several decades. The tract that Don Zepp logged had been cultivated for the purpose of logging. Now, plaintiffs say that the tract should not be logged if there is a residence anywhere in the path of a potential landslide. Plaintiffs argue the logging companies should shoulder the risk of landslides instead of people who decide to move out to remote areas near where logging has been ongoing for years. The present case is far from the situation where a large town eventually stretches out to surround areas that were previously suited for other uses. The plaintiffs in this case specifically chose to move to remote, forested areas. A person should not be allowed to render a valuable piece of timber real estate useless by building a small residence next to it.

Environmentalists and the logging industry could debate the issue. However, the Court must look to prior case law and statutes, which plainly settle this issue in favor of the defendants in this matter. The benefits of logging outweigh any potential risk. Moreover, all of the plaintiffs in this case built their houses on alluvial fans where landslides are known to have

occurred in the past—this risk of landslide was there even if no logging had taken place.

2. Case specific facts confirm this is not a strict liability case.
  - a. Plaintiffs cannot prove logging caused the landslides.

“When there could be more than one cause of an injury, the testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on.” *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn.App. 275, 285, 78 P.3d 177 (Div. 3 2003) (citing *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968)).

Here, plaintiffs allege that logging is a proximate cause of the Debris Flow Above Lunch Creek. However, plaintiffs’ experts did not bother to calculate the increase in water volume attributable to logging. Plaintiffs’ experts also failed to exclude that the Port Blakely tract was simply due for another landslide as that is an area where multiple landslides have occurred over the course of thousands of years. Plaintiffs’ experts also failed to explain how landslides occurred in similar areas of Lewis County where there had not been recent logging. Plaintiffs’ experts admitted that about one-third of the landslides that occurred in Lewis County did not appear to have anything to do with recent logging activity. In other words, plaintiffs attempt to disregard without justification that the

weather caused this landslide and that it would have happened whether the tract had been logged or not. Plaintiffs refused, or at least failed, to conduct an appropriate investigation into the landslides that would allow them to exclude other causes—it seems likely that plaintiffs were afraid to find out what additional investigation would reveal.

Imagine, for example, 100 cases of food poisoning in Tacoma. Imagine that sixty-seven of these hypothetical food poisoning cases ate at fast food restaurant A and thirty-three ate at restaurant B. In this hypothetical, a person trying to determine the cause of the food poisoning would not just blame restaurant A and neglect to investigate the cases of food poisoning at restaurant B. The only reasonable assumption in this hypothetical is that there was some underlying cause of the food poisoning, such as a bad shipment of food that went to both stores. It would be unreasonable and shortsighted to speculate that some activity at restaurant A was the cause of all food poisoning in Tacoma.

The assertion made by plaintiffs that strict liability should apply to this case is unreasonable and shortsighted because plaintiffs have failed to prove that logging is a proximate cause of the Debris Flow Above Lunch Creek in the first place. Moreover, a blanket application of strict liability to logging practices is inconsistent with the facts of this case—i.e. it is undisputed that these landslides were triggered by the weather (even if one

assumes logging contributed). There is no rational basis to apply strict liability to an activity (e.g. logging) where the alleged resulting damages are only likely to be triggered by some possible future Act of God (e.g. large rain on snow event).

b. Plaintiffs mischaracterize the land that was logged.

Plaintiffs would have the Court believe that the Port Blakely tract logged by Don Zepp was a “steep and unstable slope.” Plaintiffs never bother to mention the fact that the Department of Natural Resources categorized the land as Class 3 as opposed to Class 4. Class 4 land is land upon which logging may be permitted, but more in depth studies are required. Class 3 land is less susceptible to be adversely affected by logging in the opinion for the Department of Natural Resources. Thus, the Port Blakely tract of land is not even in the same class as the most scrutinized land that may be logged.

Obviously, Class 3 land is not likely to be a flat field—it is, after all, more closely watched than Class 1 or Class 2 land. But the soils in the area were appropriate for logging and the slope was not so steep that logging was prohibited. In fact, the Port Blakely tract of land had been logged for several decades and this historical logging pre-dated any of the plaintiffs building houses in the path of the debris flows.

The defendants do not debate that some land should not be logged—regulations do not permit logging everywhere. But even if strict liability were to apply to logging, it would not apply on Class 3 lands.

3. Strict liability is not needed because there is already case law establishing the duty of care in landslide cases.

This is not the first landslide case in Washington where a plaintiff has alleged property damage and tried to blame that damage on changes to other property on higher ground. See e.g. *Price ex rel. Estate of Price v. City of Seattle*, 106 Wn.App. 647, 652-58, 24 P.3d 1098 (Div. 1 2001); *Currens v. Sleek*, 138 Wn.2d 858, 859, 983 P.2d 626 (1999). In *Price*, supra., the plaintiff's claims were unsuccessful where the plaintiff alleged that replacing trees with grass led to slope instability. The *Price* Court specifically held there is no duty to take measures to stabilize a slope where instability is a natural occurrence. *Price*, 106 Wn.App. at 657. In *Currens*, supra., the Court stated that a landowner is not responsible for potential consequences of increased water flow when the landowner clear cuts and grades its land so long as the natural watercourse is not altered, water is not artificially collected, and activities were performed in good faith. Washington Courts have held that the flow of surface water may be increased so long as water is not diverted from its natural flow—e.g. downhill. *Dickgieser v. State*, 153 Wn.2d 530, 543, 105 P.3d 26 (2005)

(citing *Phillips v. King County*, 136 Wn.2d 946, 958-59, 968 P.2d 871 (1998)). Strict liability was not applied in previous landslide cases allegedly due to clear cutting as the Courts instead recognized limited duties involving the prevention of landslides. *Price*, supra.; *Currens*, supra. Plaintiffs are seeking to reverse established precedent and recognize, for the first time, an ill defined and unmitigated expansion of the strict liability standard. The Court should decline such an invitation.

As explained more fully in Section III.B.2. below, Don Zepp's duty was to act in good faith and avoid unnecessary damage to plaintiffs' properties. Don Zepp acted in accordance with that duty and is not liable, strictly or otherwise. There would be drastic consequences if the Court changed the law and applied strict liability to logging. For example, it would be tantamount to a taking if forest land owners were essentially prohibited from logging valuable timber (that has been maturing for decades) just because new residential developments are built nearby. This is exactly the scenario the legislature has expressly stated its intent to avoid. See RCW 7.48.305. Logging is not an activity to which strict liability applies—certainly not in rural areas of Western Washington.

**B. Don Zepp's actions were reasonable—he was NOT negligent.**

1. Plaintiffs have no evidence that Don Zepp acted unreasonably.

In order to prove negligence, a plaintiff must show (1) the existence of a duty, (2) breach of that duty, (3) a resulting injury, and (4) the breach is a proximate cause of the injury. *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998); *Hostetler v. Ward*, 41 Wn.App. 343, 349, 704 P.2d 1193 (Div. 2 1985). Issues of negligence are properly decided on summary judgment when reasonable minds could reach but one conclusion. *Hartley v. State*, 103 Wash.2d 768, 778, 698 P.2d 77 (1985). Moreover, the existence of a duty is a question of law for the court. *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn.App. 524, 528, 754 P.2d 155 (Div. 2 1988).

A laborer who contracts for work has a duty to follow the contract. If the work is performed as specified in the contract, then the laborer cannot be held liable for injuries that may result from such work. See *Hull v. Enger Constr. Co.*, 15 Wn.App. 511, 512-15, 550 P.2d 692 (Div. 2 1976) (absent evidence of improper installation, contractor which installed threshold in school building could not be held liable for injuries sustained when school teacher's heel became lodged in threshold and she fell). The Georgia Supreme Court succinctly stated this rule of law as follows:

“where a contractor who does not hold itself out as an expert in the design of work such as that involved in the controversy, performs its work without negligence, and the work is approved and accepted by the owner or the one who contracted for the work on the owner's behalf, the contractor is not liable for injuries resulting from the defective design of the work.” *David Allen Co., Inc. v. Benton*, 398 S.E.2d 191, 193 (Ga. 1990).

It is an undisputed fact that Don Zepp conducted his logging activities in accordance with the requirements established by his contract and permits that were approved by the Department of Natural Resources based on applicable laws and regulations. The only admissible expert testimony regarding the reasonableness of Don Zepp’s actions in the record before the Court of Appeals, in addition to Don Zepp’s testimony, is Jon Koloski’s opinion that it was reasonable for Don Zepp to act as he did—i.e. rely on the judgment of scientists and foresters employed by the State of Washington that logging was appropriate.

Here, Don Zepp has held himself out as an experienced logger only. He knows how to operate logging equipment, remove timber, and follow the directives identified in permits. Don Zepp is not a geomorphologist, geologist, climatologist, or hydrologist. When Don Zepp is given a permit that has been applied for based on guidance from a

scientist and approved after review by a forester employed with the Department of Natural Resources, Don Zepp assumes logging is appropriate if performed in the manner specified in the permit.

Plaintiffs argue that logging should not have occurred on the Port Blakely owned tract or at least that the logging technique specified in the permit was not appropriate. However, this argument merely signifies that plaintiffs' claims should be against the Department of Natural Resources and/or Port Blakely because the permit was allegedly erroneous in regards to geological decisions. (Plaintiffs have already settled with Port Blakely and all persons in interest with Port Blakely). A normal logger cannot reasonably be expected to himself be a geological and/or hydrological expert.

Jon Koloski, for one, opined that Don Zepp's actions were reasonable. Plaintiffs have no evidence to rebut this opinion. And plaintiffs offer no guidance regarding what they expected Don Zepp to do that would have made his actions reasonable in their minds. Was he supposed to hire his own expert to review the studies already conducted by Port Blakely and the Department of Natural Resources? If so, what was supposed to happen based on the results of another study?

Plaintiffs' argument is simply that Don Zepp should be liable for landslide damages to surrounding lands after logging operations have

commenced. However, as the Trial Court Judge noted, this is a strict liability argument and not a line of reasoning applicable to a negligence claim.

Relying on a contract and following industry standards may not always be the definition of reasonable care, but in this case it is. There is no evidence upon which any other conclusion can be reached.

2. It is a moot point because Don Zepp used reasonable care, but Washington law does not require reasonable care in landslide damage cases—this reinforces the Trial Court Judge’s decision to dismiss claims against Don Zepp.

There is no duty of reasonable care in property damage cases arising from landslides alleged to be the result of activities taking place on another’s land. *Price ex rel. Estate of Price v. City of Seattle*, 106 Wn.App. 647, 652-58 (2001). The *Price* Court specifically rejected the plaintiffs’ assertion that there was a duty of reasonable care. *Id.* The *Price* Court specifically held there is no duty to take measures to stabilize a slope where instability is a natural occurrence. *Price*, 106 Wn.App. at 657.

The issue in *Currens v. Sleek* was “whether liability may arise for property damage caused by an increased flow of surface water onto the [plaintiffs’] property after [defendant] clear-cut and graded her land.” *Currens v. Sleek*, 138 Wn.2d 858, 859 (1999). The *Currens* Court applied

the common enemy doctrine to answer this question and address the duty issue. *Currens*, supra.

The common enemy doctrine is the law in Washington when it comes to cases involving damages allegedly caused by increased water flow produced by rain or melting snow, such as in the present matter. See *Currens*, 138 Wn.2d at 861 (citing *Cass v. Dicks*, 14 Wash. 75, 44 P. 113 (1896); *King County v. Boeing Co.*, 62 Wn.2d 545, 550, 384 P.2d 122 (1963)).

In its strictest form, the common enemy doctrine allows land to be used without regard to the drainage consequences to other landowners. However, a strict interpretation of this rule is widely regarded as inequitable and so three exceptions have developed. *Currens*, 138 Wn.App. at 861-62.

Two long recognized exceptions to the common enemy doctrine are: (1) the flow of a watercourse or natural drain-way cannot be inhibited; and (2) water cannot be artificially collected and discharged in quantities greater than or in a manner different from the natural flow thereof. A third exception, which was expressly ratified in *Currens*, is the “due care” exception. The due care exception provides that altering the flow of surface water requires one to act in good faith and to avoid unnecessary damage to the property of others. *Currens*, 138 Wn.App. at 862-65.

In the *Currens* case, like in the present matter, the first two exceptions to the common enemy doctrine obviously did not apply because there was no damming or artificial collection of water—“In grading her land, [defendant] caused water that otherwise would have been absorbed into the ground to runoff onto [plaintiffs’] property. She did not...artificially channel the water in any way. Rather, the water flowed in a diffuse fashion, by force of gravity, from a higher elevation.” *Currens*, 138 Wn.App. at 868. But in overturning the trial court’s dismissal of the case, the Supreme Court said there was a question of fact regarding the due care exception because in *Currens* the defendant did not comply with an environmental checklist. *Id.* There is no such issue of fact in the present case because the undisputed evidence is that Don Zepp followed the Forest Practices Act and complied with all legal requirements.

In summary, Don Zepp’s duty was to act in good faith and avoid unnecessary damage to plaintiffs’ properties. Don Zepp had no duty to prevent the natural occurrence of water flowing down slope with the force of gravity. Don Zepp did not breach his duty because he logged in accordance with his contract and the Forest Practices Act. Moreover, plaintiffs’ alleged experts did not make any effort to calculate the increase in water volume caused by the logging and therefore could not state

beyond speculation whether any increase related to logging activities was a proximate cause of plaintiffs' alleged damages.

**C. Plaintiffs have no viable nuisance or trespass claims as these claims are merely restatements of plaintiffs' negligence cause of action. Those claims also fail on the merits even if they are distinct causes of action.**

1. Nuisance

a. Plaintiffs' nuisance claims are merely negligence claims in the garb of nuisance.

A negligence claim presented in the garb of nuisance need not be considered apart from the negligence claim. *Lewis v. Krussel*, 101 Wn.App. 178, 183, 2 P.3d 486 (Div. 2 2000); *Atherton Condominium Apartment Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990); *Hostetler v. Ward*, 41 Wn.App. at 360. "In those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied. *Atherton*, 115 Wn.2d at 527 (citing *Hostetler*, 41 Wn.App. at 360).

Plaintiffs' alleged nuisance claim against Don Zepp is predicated entirely upon Don Zepp's alleged negligent conduct—i.e. Don Zepp's logging activities. Don Zepp does not dispute that he intentionally logged the Port Blakely tract. And there is no dispute that Don Zepp logged in accordance with his contract and the applicable permits. But plaintiffs

alleged that the very act of logging was negligent in itself. Plaintiffs cannot also bring a separate nuisance claim based on the intentional act of logging because the nuisance claim is entirely subsumed within the negligence claim. See *Lewis*, supra.

The Trial Court Judge properly dismissed plaintiffs' nuisance cause of action because the nuisance claim was legally indistinguishable from plaintiffs' negligence claim.

b. Logging is not a nuisance.

The Trial Court Judge dismissed plaintiffs' nuisance claim because it is subsumed in plaintiffs' negligence claim. Whether defendants could reasonably be found negligent was not considered by the Trial Court Judge when the nuisance claim was dismissed. Thus, arguing whether there was any merit to plaintiffs' failed claims based on the facts is irrelevant. But plaintiffs have argued the merits and so Don Zepp will respond.

Plaintiffs argue that logging was a nuisance because it increased the possibility of a landslide. However, logging is presumed reasonable according to statute. RCW 7.48.305.

It has been said that a nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303

(1926). Conversely, most activities, except those positively forbidden by law, are not nuisances if conducted in the right place. The Port Blakely tract logged by Don Zepp in 2006 was the right place for logging. It is part of the same area that has been logged for several generations and is in a rural community where logging has long been prevalent.

2. Trespass

a. Plaintiffs' trespass claim is also a negligence claim.

A party's characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls. See *New York Underwriters Ins. Co. v. Doty*, 58 Wash.App. 546, 794 P.2d 521 (Div. 1 1990); *Boyles v. Kennewick*, 62 Wash.App. 174, 813 P.2d 178 (Div. 3 1991). “[T]hree separate legal theories based upon one set of facts, constitute one ‘claim for relief’ under CR 54(b).” *Snyder v. State*, 19 Wash.App. 631, 635, 577 P.2d 160 (Div. 1 1978). For purposes of CR 54(b), a single claim for relief, on one set of facts, is not converted into multiple claims, by the assertion of various legal theories. *Doerflinger v. New York Life Ins. Co.*, 88 Wash.2d 878, 881–82, 567 P.2d 230 (1977). Where a plaintiff’s negligence, nuisance, and trespass claims all stem from a single set of facts, there is essentially a single negligence claim with multiple theories. *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn.App. 523, 546-47, 871 P.2d 601 (Div. 1 1994).

Here, plaintiffs' trespass claim, like plaintiffs' negligence and nuisance claims, is based exclusively on the fact that Don Zepp logged the Port Blakely tract, and then three years later a landslide occurred during a rain storm. Thus, plaintiffs' trespass claim is properly dealt with as a negligence claim and the trial court was correct to dismiss the trespass cause of action as a matter of law.

b. Plaintiffs failed to support their trespass claim.

Like their nuisance claim, plaintiffs' trespass claim was properly dismissed as a matter of law without addressing the merits. But also like the nuisance claim, plaintiffs' trespass claim could have also been dismissed based on the evidence.

The law in Washington is that "trespass can be shown where the actor 'knows that the consequences are certain, or substantially certain, to result from his act.'" *Price*, 106 Wn.App. at 660 (quoting *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 691, 709 P.2d 782 (1985)). Plaintiffs cite an Alabama case (*Borland v. Sanders Lead Co.*, 369 So.3d 523, 529 (Ala. 1979)) for the proposition that reasonable foreseeability, as opposed to substantial certainty, is the proper analysis for a trespass claim, but plaintiffs make no effort to reconcile their argument with Washington case law.

There is no evidence that Don Zepp was “certain or substantially certain” that logging would lead to landslides (even assuming for arguments sake that logging was a proximate cause of the Debris Flow Above Lunch Creek). Don Zepp did not believe that his logging would lead to landslides because he believed the Department of Natural Resources addressed those concerns when the logging permit was issued. Moreover, Don Zepp could definitely not be “certain or substantially certain” that a significant rain on snow event was going to occur a few years after he logged the Port Blakely tract.

The number of variables and what ifs at play make it impossible to support a trespass claim in this case as there is insufficient evidence to establish that Don Zepp was certain or reasonably certain that landslides would occur. This point is buttressed by the fact that plaintiffs continued to live in their homes after the logging. For example, Steve Rea knew the hillside above his house was logged—so if he was certain a landslide was the inevitable result of logging, then why did he not attempt to get an injunction to stop the logging or move out of his house to avoid the danger? Plaintiffs seem to be arguing that they should be able to enjoy their lands as they want and maintain their homes, but the logging companies should have to restrict how forest land can be used. This is

completely inequitable in light of the fact that logging had been going on prior to plaintiffs moving to the area.

**D. Issues concerning Don Zepp have already been adjudicated or settled.**

In the first trial associated with this case, a Lewis County jury found that Campbell/Menasha was not negligent in obtaining permits to log land that allegedly contributed to causing a landslide that affected multiple plaintiffs in this case. This verdict was based in part on evidence generally describing the permitting process and forest practices. These same issues would have been applicable to the second trial in this case had there needed to be a second trial. In fact, Campbell/Menasha was expected to participate in the second trial as a defendant against plaintiffs who alleged claims against Campbell/Menasha identical to the claims the jury turned down. There would have been no difference in the testimony at the second trial in regards to the permitting process and forest practices (actually, the plaintiffs would have had even less evidence to present at the second trial because their forestry expert had been stricken from testifying against Don Zepp).

The main reason the case was bifurcated was to save time talking about different damages issues, including descriptions of the different landslides. But these damage issues had no impact on how the logging

was permitted and performed several years before the 2009 winter storm. The jury's decision after the first trial reinforces the Trial Court Judge's determination that no reasonable jury could conclude that Don Zepp was liable. Summary judgment is appropriate where reasonable minds could reach but one conclusion. See *Alexander v. County of Walla Walla*, 84 Wn.App. 687, 692, 929 P.2d 1182 (Div. 3 1997).

Additionally, the plaintiffs with claims allegedly related to the Debris Flow Above Lunch Creek entered a Release Agreement after the first trial, which released their claims against Port Blakely and all persons and entities in interest with Port Blakely. The Release includes language indicating that by signing the Release the plaintiffs understood that the subject lawsuit would be "entirely concluded...once and for all."

#### **IV. Conclusion**

The Trial Court Judge and Jury were right to find in favor of defendants. On appeal, plaintiffs have repeated the same arguments they previously made and have failed to cite to any new legal authority or concepts that would alter the state of the law. The Court of Appeals should affirm the trial court's orders—especially as those orders relate to Don Zepp. First, strict liability is not applicable to logging. Second, and finally, Don Zepp was not negligent and there is no evidence in the record that he may have even arguably been negligent.

DATED this 18<sup>th</sup> day of June, 2013.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date given below I caused to be served via email per prior agreement, the foregoing **Brief of Respondent Don Zepp** upon the following persons:

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