

FILED

JUL 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE NO. 30270-9-III

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

JACKASS MT. RANCH INC. and DAVID and AMI MACHUGH, dba
JACKASS MT. RANCH,

Appellants,

vs.

SOUTH COLUMBIA BASIN IRRIGATION DISTRICT, et al.,

Respondent,

BRIEF OF APPELLANTS

John C. Riseborough, WSBA No. 7740
Vicki Mitchell, WSBA No. 31259
PAINE HAMBLÉN LLP
717 West Sprague, Suite 1200
Spokane, WA 99201-3505
Telephone: 509-455-6000
Facsimile: 509-838-0007
Attorneys for Appellants MacHughs &
Jackass Mt. Ranch, Inc

FILED

JUL 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE NO. 30270-9-III

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

JACKASS MT. RANCH INC. and DAVID and AMI MACHUGH, dba
JACKASS MT. RANCH,

Appellants,

vs.

SOUTH COLUMBIA BASIN IRRIGATION DISTRICT, et al.,

Respondent,

BRIEF OF APPELLANTS

John C. Riseborough, WSBA No. 7740
Vicki Mitchell, WSBA No. 31259
PAINE HAMBLÉN LLP
717 West Sprague, Suite 1200
Spokane, WA 99201-3505
Telephone: 509-455-6000
Facsimile: 509-838-0007
Attorneys for Appellants MacHugh &
Jackass Mt. Ranch, Inc

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENT OF ERROR	1
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
IV.	STATEMENT OF THE CASE.....	3
	A. FACTUAL BACKGROUND.....	3
	1. The Repayment Contract	6
	2. Ringold Wasteway and Drainage Facilities.....	12
	3. The Drainage Works	15
	B. PROCEDURAL HISTORY.....	17
V.	LEGAL ARGUMENT	19
	A. STANDARD OF REVIEW.....	19
	B. INVERSE CONDEMNATION/TAKING.....	21
	1. An Inverse Condemnation Claim Does Not Require Negligence and Can be Based on Operation and Maintenance – Not Just Construction and Design.....	22
	2. SCBID Can Be Liable for Inverse Condemnation Based on Operation of the Transferred Works	27
	C. THE NEGLIGENCE CLAIM.....	30
	D. RES IPSA LOQUITUR	35

1.	Irrigation Districts Do Not Damage The Property of Others Absent Negligence	38
2.	Under the Repayment Contract, SCBID Exercised Exclusive Control Over Operation of the Ringold Wasteway	42
E.	THE TRESPASS CLAIM.....	44
VI.	CONCLUSION.....	48

TABLE OF AUTHORITIES

Cases

<u>A.C. v. Bellingham School Dist.</u> , 125 Wn.App. 511, 105 P.3d 400 (2004).....	40
<u>Balise v. Underwood</u> , 62 Wn.2d 195, 381 P.2d 966 (1963).....	19
<u>Barber v. Bankers Life & Cas. Co.</u> , 81 Wn.2d 140, 500 P.2d 88 (1972).....	19
<u>Barker v. Advanced Silicon</u> , 131 Wn. App. 616, 128 P.3d 623 (2006).....	20, 44
<u>Boitano v. Snohomish Cy.</u> , 11 Wn.2d 664, 120 P.2d 490 (1941).....	22,23,24,29
<u>Bradley v. American Smelting & Ref. Co.</u> , 104 Wn.2d 677, 709 P.2d 782 (1985).....	44, 45, 46
<u>Bruskland v. Oak Theater, Inc.</u> , 42 Wn.2d 346, 254 P.2d 1035 (1953).....	
<u>Byrne v. Boadle</u> , 159 Eng. Rep. 299 (1863).....	40
<u>Clark v. Icicle Irrigation Dist.</u> , 72 Wn.2d 201, 432 P.2d 541 91967)	39
<u>Curtis v. Lein</u> , 169 Wn.2d 884, 239 P.3d 1078 (2010).....	36,37,40,41
<u>Dalton v. Selah Water Users' Ass'n.</u> , 67 Wn. 589, 122 P. 4(1912).....	39
<u>Douglas v. Bussabarger</u> , 73 Wn.2d 476, 438 P.2d 829 (1968).....	36,37,40,41
<u>Emerick v. Mayr</u> , 39 Wn.2d 23, 234 P.2d 1079 (1951).....	37

<u>Fitzpatrick v. Okanogan Cy,</u> 169 Wn.2d 598, 238 P.3d 1129 (2010).....	19
<u>Halverson v. Skagit Cy,</u> 139 Wn.2d 1, 983 P.2d 643 (1999).....	21,23,26,28
<u>Hertog v. City of Seattle,</u> 138 Wn.2d 265, 275 979 P.2d 400 (1999).....	30
<u>Highline Sch. Dist. 401 v. Port of Seattle,</u> 87 Wn.2d 6, 548 P.2d 1085 (1976).....	26
<u>Holland v. Columbia Irrigation Dist.,</u> 75 Wn.2d 302, 450 P.2d 488 (1969).....	31,32,34,38, 39,47
<u>Jones v. Allstate Ins. Co.,</u> 146 Wn.2d 291, 45 P.3d 1068 (2002).....	19
<u>Kennedy v. Sea-Land Services, Inc.,</u> 62 Wn. App. 839, 816 P.2d 75 (1991).....	30
<u>Kincaid v. Seattle,</u> 74 Wn. 617, 134 P. 504 (1913).....	23
<u>Lambier v. Kennewick,</u> 56 Wn. App. 275, 783 P.2d 596 (1989).....	20,21,25,26, 27
<u>Lamon v. McDonnell Douglas Corp.,</u> 91 Wn.2d 345, 588 P.2d 1346 (1979).....	19
<u>Martin v. Port of Seattle,</u> 64 Wn.2d 309, 391 P.2d 540 (1964).....	20,21,26
<u>Metro. Mortgage & Sec. Co. v. Washington Water Power,</u> 37 Wn. App. 241, 679 P.2d 943 (1984).....	36
<u>Miles v. St. Regis Paper Co.,</u> 77 Wn.2d 828, 467 P.2d 307 (1970).....	40

<u>Morner v. Union Pac. R.R.</u> , 31 Wn.2d 282, 196 P.2d 744 (1948).....	35
<u>Morris v. McNicol</u> , 83 Wn.2d 491, 519 P.2d 7 (1974).....	19,44
<u>Pacheco v. Ames</u> , 149 Wn.2d 431, 69 P.3d 324 (2003).....	35,36,37,38, 40, 41
<u>Phillips v. King Cy</u> , 136 Wn.2d 946, 968 P.2d 871 (1998).....	21,26,27,28, 29
<u>Pierce v. Northeast Lake Wash. Sewer & Water Dist.</u> , 69 Wn. App. 76, 847 P.2d 932 (1993).....	21
<u>Preston v. Duncan</u> , 55 Wn.2d 678, 349 P.2d 605 (1960).....	19
<u>Reter v. Talent Irrig. Dist.</u> , 256 Or. 140, 482 P.2d 170 (1971)	47
<u>Ripley v. Lanzer</u> , 152 Wn. App. 296, 215 P.3d 1020 (2009).....	36,37
<u>Robinson v. Cascade Hardwoods, Inc.</u> , 117 Wn. App. 552, 72 P.3d 244 (2003).....	35,36,37,38, 40, 42, 43
<u>Seal v. Naches-Selah Irrigation Dist.</u> , 51 Wn. App. 1, 751 P.2d 873 (1988).....	22,25,26,31, 33,39,44,45, 46,47,48
<u>State v. Williams</u> , 12 Wn.2d 1, 120 P.2d 496 (1941).....	22,23,26
<u>Tinder v. Nordstrom, Inc.</u> , 84 Wn.App. 787, 929 P.2d 1209 (1997).....	40

<u>Welling v. Mount Si Bowl, Inc.</u> , 79 Wn.2d 485, 487 P.2d 620 (1971).....	19
<u>Wong Kee Jun v. Seattle</u> , 143 Wn. 479, 255 P. 645 (1927).....	22,23,25
<u>Zukowsky v. Brown</u> , 79 Wn.2d 586, 488 P.2d 269 (1971).....	37,38,40,42, 43

Statutes

RCW Chapter 4.96.....	16
-----------------------	----

Other Authorities

Rem Rev. Stat. §4007	22
Restatement (Second) of Torts. §8A)1065	44
W. Prosser, Torts 222 (3d ed. 1964).....	40

Rules

CR 56	1
CR 56(c)	18, 19
RAP 10.3(a)(3).....	1

I. INTRODUCTION

This lawsuit involves partial destruction of a cherry orchard by a landslide that occurred on or about June 20, 2006, along the Columbia River approximately 13 miles north of Richland, Washington. The landslide destroyed several acres of a cherry orchard belonging to Appellants Jackass Mt. Ranch and David and Ami MacHugh, dba Jackass Mt. Ranch [hereafter collectively "the MacHughs"].

The trial court has granted summary judgment in this matter to Respondent South Columbia Basin Irrigation District [SCBID], dismissing all of the MacHughs' claims against SCBID. However, such decision and memorandum opinion by the trial court misapplied the controlling law for the MacHughs' claims and impermissibly overlooked the disputed issues of material fact established in the record before the trial court – which should have gone to the jury for determination.

The trial court therefore committed reversible error under the CR 56 requirements for summary judgment. Accordingly, its August 30, 2011 Order granting SCBID's summary judgment motion and dismissing the MacHughs' claims should be reversed.

II. ASSIGNMENT OF ERROR

Pursuant to RAP 10.3(a)(3), Appellants assign error to the following actions by the trial court:

1. The trial court erred in determining the MacHughs could not claim inverse condemnation against the SCBID because the SCBID did

not design or construct the Ringold Wasteway, thus dismissing the MacHughs' inverse condemnation claim.

2. The trial court erred in applying a fictional "standard of care" to the MacHughs' negligence claim against the SCBID and in resolving disputed facts against the MacHughs, thus dismissing the MacHughs' negligence claim.
3. The trial court erred in holding that the MacHughs could not utilize the doctrine of *res ipsa loquitur* to raise an inference of negligence, and defeat a summary disposition of their negligence claim.
4. The trial court erred in determining that SCBID's knowledge of prior landslides caused by operation of the Ringold Wasteway in the same area as the MacHughs' property did not satisfy the intent requirement for a trespass claim, thus dismissing the MacHughs' claim for trespass.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, taking all evidence and inferences in the light most favorable to the MacHughs as the non-moving party, there are material disputed facts regarding the MacHughs' claim for inverse condemnation against SCBID based on its *operation and maintenance* of the Ringold Wasteway – not construction and/or design.
2. Whether, taking all evidence and inferences in the light most favorable to the MacHughs as the nonmoving party, there are

issues of material fact regarding the MacHughs' negligence claim against SCBID.

3. Whether the requirements for application of the doctrine of *res ipsa loquitur* were met and thus available to the MacHughs in support of their negligence claim.
4. Whether, taking all evidence in the light most favorable to the MacHughs as the nonmoving party, there are issues of material fact regarding the MacHughs' trespass claim and, specifically, regarding the intent element.

IV. STATEMENT OF THE CASE

The MacHughs are seeking review of the trial court's erroneous decision dismissing their inverse condemnation, negligence and trespass claims against the SCBID for damages from a landslide that destroyed a portion of the MacHughs' cherry orchard – and that the SCBID agrees it proximately caused. Under the following applicable facts, the trial court committed reversible error in dismissing the MacHughs' claims and should be reversed on appeal.

A. FACTUAL BACKGROUND

The trial court's memorandum opinion provides a partial summary of the broad facts and relevant players at issue in this matter: 73 Wn.2d 476, 484, 438 P.2d 829 (1968)

The Columbia Basin Project was established by Congress and constructed to provide water for agricultural irrigation to semi-arid land in southeastern Washington. The Columbia Basin Project consists of three separate

irrigation districts, one of which is Defendant [Respondent] SCBID. SCBID and the other irrigation districts of the Columbia Basin Project have contracted with the Federal Bureau of Reclamation (BuRec) to provide maintenance and operation services for the Columbia Basin Project. The irrigation system consists of a storage facility called Banks Lake from which water is conveyed through a canal system and delivered to the irrigated lands. As originally planned, designed, engineered and constructed by BuRec, the system operated by SCBID returned water to the Columbia River via what is known as the Ringold Wasteway and down a 350-foot high erosion escarpment of the Ringold formation through a flume. The flume was constructed on the south edge of an ancient landslide.

In the late 1960s, a landslide destroyed the flume. In response, BuRec placed a dike on the west end of the wasteway to terminate discharge into the Columbia River. BuRec also redesigned the wasteway as to cause water within it to flow back to the east, away from the bluff. BuRec also constructed a series of underground drains in the irrigation fields and orchards to move excess water from irrigation back into the Ringold Wasteway. These modifications, done by the BuRec, resulted in the Ringold Wasteway being used as a combined water delivery and drainage system. The system has remained essentially the same since that time. SCBID contracted with BuRec to operate and maintain the system. Despite the redesign and modifications of the system outlined above, another major landslide occurred in 1996. This landslide occurred just south of the plaintiffs' property and did not involve the land owned by defendant Conrad.

Plaintiffs own an orchard at the base of steep hills just south of Ringold, in Franklin County [*sic*] Washington. Defendant Conrad owns land that is situated above and east of that owned by plaintiffs. Water for irrigation for the Conrad's property is provided from the BuRec system operated and maintained by Defendant [Respondent] SCBID.

In 2006 a major landslide occurred, which entered upon the plaintiffs' property and destroyed a portion of the plaintiffs' orchard. This lawsuit resulted.

CP 15-16.

However, the trial court's memorandum opinion omitted several other relevant and material facts established by the record. The trial court was correct that the BuRec and SCBID contracted for SCBID to operate and maintain the irrigation facilities located in its district – including the Ringold Wasteway. In its argument for summary judgment, though, SCBID relied upon only limited portions of that contract and failed to paint a complete picture of the hybrid relationship that existed between BuRec and SCBID thereunder.

More importantly, SCBID's argument – and the trial court's decision based thereon – failed to establish by undisputed facts that SCBID could not be held liable for its operation and maintenance of the Ringold Wasteway. This question defines the disputed facts that existed in the record before the trial court and should have defeated SCBID's motion for summary judgment.

1. The Repayment Contract.

The final and controlling contract between BuRec and SCBID was the "Amendatory, Supplemental, and Replacement Repayment Contract Between the United States of America and the South Columbia Basin Irrigation District" [hereafter "Repayment Contract"]. CP 312-314; 1005. The Repayment Contract was entered into by the parties on December 18, 1968 and provided, among other things, the details of how operation and

maintenance of the irrigation facilities built by BuRec would be transferred to the SCBID. Id.

The transferred works consisted of "all irrigation and drainage works, constructed or to be constructed, serving or to serve lands within the District" and the transfer occurred at midnight on January 25, 1969. CP 320, 351. Certain portions of the irrigation project were reserved for operation and maintenance by BuRec, but not the Ringold Wasteway. CP 319; 1006-1007; 1029. Thus, SCBID has been in charge of maintenance and operation of the Ringold Wasteway and other transferred works in its district since 1969. CP 1006-1007.

SCBID argued on summary judgment – and the trial court agreed – that despite SCBID being in charge of the operations and maintenance of the Ringold Wasteway, the MacHughs' only recourse for their loss was really against BuRec because BuRec designed, built, owned and controlled the maintenance of the Ringold Wasteway and any irrigation water therefrom. CP 481, 484-487, 491-492.

SCBID failed to present any evidence on summary judgment establishing that they did not operate the Ringold Wasteway; on the contrary, they submitted deposition testimony from their Secretary Manager that the SCBID had been in charge of operation of the wasteway per the Repayment Contract since 1969. CP 1005-1007.

Instead, SCBID's argument on summary judgment was, again, that it was actually BuRec that was in charge and in control, because BuRec designed, built, owned, and controlled everything per the Repayment

Contract. CP 481. However, reading the Repayment Contract as a whole establishes disputed issues of material fact regarding each of SCBID's assertions thereunder:

- SCBID contended that the Federal Government was in charge of designating irrigation blocks and individual farm units for irrigation. CP 486 (citing Repayment Contract, CP 322, 336). However, the Repayment Contract also provides that such designations shall be subject to public examination and comment – which would include comment and input by the SCBID – and no revisions or changes to the plat can occur "except with the consent of the District and where deemed necessary by the Secretary." CP 335-336.

In addition, the SCBID could revise the irrigation area within its district by substituting, adding to, or reducing the land for irrigation within the District – with or without the approval of the Secretary or BuRec. CP 337-338. Thus, there were disputed issues of material fact regarding SCBID's assertion BuRec was exclusively in charge of setting or determining the irrigation districts and irrigation area

- SCBID contended the Federal Government how much water each farm unit would get, based on a land classification system also created by the Federal Government. CP 486 (citing Repayment Contract, CP 324, 332-333). The Repayment Contract does provide that BuRec shall determine the "normal annual water requirement" for each farm unit – although it does not state that BuRec shall determine how much each farm unit actually *receives*. CP 324.

However, it also provides that SCBID and the other two irrigation Districts in the region shall establish a Reserved Works Committee that shall, among other things, "determine the dates when water deliveries shall be made to the respective Districts both as to the commencement and the termination of each season's deliveries and shall advise the [BuRec] of such determination and request the [BuRec] to operate and maintain the project and special reserved works involved so as to make deliveries possible on the dates indicated annually." CP 346-347. Thus, BuRec may determine how much each farmer requires, but SCBID was in charge of determining when it was delivered – i.e. of operations. This creates a disputed issue of material fact regarding SCBID's argument that it was just a passive player and BuRec was in control of the irrigation system.

- SCBID contends the Federal Government determined whether drainage works were economically feasible and should be built – and if so, designed and constructed the same itself. CP 486 (citing Repayment Contract, CP 325-330). The portion of the Repayment Contract relied upon by SCBID contradicts this assertion. First, it lists all of the project works "constructed or to be constructed" – but does not state who determined that the works already constructed were necessary or needed. CP 325-327. Thus, it does not state or establish that BuRec alone determined what Project works – including drainage – were necessary and/or economically feasible.

Further, the Repayment Contract states that for works planned but not yet built, they may be "modified in design or location, or works may

be eliminated from or added to them as determined by the Secretary, after consultation with the District, if it would be affected thereby." CP 327. The Repayment Contract therefore expressly provides that SCBID shall be consulted and involved in decisions regarding design, location, inclusion or exclusion of works that affect its District. Id. (This would seem to at least imply that it had already been as involved for the works already constructed and in existence, too.)

Finally and specific to drainage works, the Repayment Contract expressly recognized and preserved the express authority of the SCBID to construct drainage works. CP 317, 330, 410. In addition, the District can have BuRec "modify, improve, or replace, or construct future works" by requesting the same through the Secretary. CP 396. Taken all together, these portions of the Repayment Contract create a disputed issue of material fact regarding SCBID's assertion that BuRec alone was in charge of design, location, and construction of the project works, and specifically of drainage works, and that SCBID was without authority or power to do anything to modify or change the irrigation works and system.

- SCBID contended the water belonged to BuRec at all times – including all seepage. CP 486 (citing Repayment Contract, CP 362). However, as noted above, SCBID was in charge of deciding when that water was received by the farmers and that BuRec provided it on time. CP 346-347. What is more, SCBID assumed the performance obligations under the contracts between BuRec and the farmers for the irrigation services. CP 374. Thus, SCBID may not have owned the water but it was

in charge of providing and delivering it – again, of operating the irrigation system. This creates an issue of material fact regarding SCBID's contention that BuRec was in sole or exclusive control of the irrigation system.

- SCBID contended that the Federal Government retained title and ownership of the irrigation facilities, including the Ringold Wasteway, and retained control over the maintenance of the wasteway by means of regular inspection. CP 485-486 (citing Repayment Contract, CP 353, 400-401.) It is true that the Repayment Contract expressly provides that title for the irrigation works shall remain in the United States, "notwithstanding transfer of care, operation, and maintenance of any transferred works to the District." CP 400-401.

The Repayment Contract also provides that the Secretary *or the District* may initiate a "Review of Maintenance" and inspection of the transferred works. CP 353. Such review and inspection is to be done by the Secretary "in conjunction with the District" and for the purposes of "assisting the District in determining the adequacy of the current maintenance program." Id.

Thus, the Review of Maintenance and corresponding inspection is a joint venture by BuRec and SCBID together to "assist" SCBID with the maintenance program. In addition, either the SCBID or BuRec can make any repairs determined by the Secretary and SCBID to be needed – but SCBID pays the costs of all repairs, regardless of who makes them. CP 352-353. This creates a disputed issue of material fact regarding SCBID's

assertion that BuRec maintains all control over its operation and maintenance.

Taken as a whole, the above portions of the Repayment Contract make it clear that, while the United States owns the project facilities and the water itself, the SCBID had broad discretion and authority in its operation and maintenance of the transferred works to monitor, consult, request and make – or have the United States make – any changes necessary to the project and its facilities, including the Ringold Wasteway.

Such facts directly dispute SCBID's argument on summary judgment that it was unable to do anything to or about the seepage from the Ringold Wasteway and the resulting landslide. They alone create genuine issues of material fact sufficient to preclude summary judgment. However, there were other disputed material facts outside the Repayment Contract as well.

2. Ringold Wasteway and Drainage Facilities.

The Ringold Wasteway has had a controversial history, especially with regard to its impact and effect on the surrounding Ringold Formation and the White Bluffs area where the 2006 landslide occurred. Unfortunately, the trial court failed to consider several relevant facts surrounding this history and the SCBID's role therein.

The Ringold Wasteway runs parallel to the White Bluffs and it was a portion of this bluff that failed, causing the landslide in June of 2006 that damaged the MacHughs' orchard. The White Bluffs region is described as starting approximately five miles north of Pasco, Washington and running

up along the east side of the Columbia River past Lock Island, for about 30 miles total. CP 1020.

In 1969, the end of the Ringold Wasteway that emptied out over the White Bluffs into the Columbia River was destroyed by a massive landslide – approximately 4,000 feet south of the location of the 2006 landslide. CP 755. This was the same year SCBID took over operation of the Ringold Wasteway under the Repayment Contract. CP 351, 1007.

Within the next year or so, BuRec built a dike at the end of the Ringold Wasteway to prevent any future landslides and re-graded the wasteway so that water would flow away from the dike and in the opposite direction than prior to the 1969 landslide. CP 1012, 1016, 1026-1027. SCBID contends it had no say in these changes or improvements to the Ringold Wasteway by BuRec, but this contention is disputed by the provisions of the Repayment Contract requiring SCBID consultation and approval for future works and improvements. CP 327, 396.

In addition to the dike and re-grading in the Ringold Wasteway itself, improvements were made to the irrigation system overall that ultimately "permitted carriage of operational waste northward into PE46A wasteway (a tributary of the PE16.4 wasteway) and into the Mesa Wasteway (which flows into the Esquatzel Coulee)." CP 66-67. These improvements, combined with improved control facilities, were thought by some to "have obviated the need for the failed [Ringold Wasteway] structure." Id.

However, from an operation and maintenance point of view, the Ringold Wasteway has continued to operate the same way it always has. CP 1025. Correspondingly, the concern over and occurrence of landslides has continued as well.

After the Ringold Wasteway was diked, various investigations and development proposals were explored and discussed regarding further irrigation and farming in the White Bluffs area. CP 414-423. Contrary to its argument that it was only a passive observer and only BuRec knew or could do anything about the landslides, SCBID has provided various memos in its possession discussing these investigations and development proposals – including one by SCBID itself – that detail the ongoing drainage and landslide problems and concerns surrounding the White Bluffs region during the 1970's and 1980's. Id.

Thus, there are disputed material issues of fact regarding SCBID's knowledge that BuRec had investigated the instability of the White Bluffs region and had designated it a Red Zone or "Red Line Area...within which any contributions to the upper ground water aquifer would be expected to directly affect the White Bluffs landslide problem." CP 422; 1020-1021.

Despite this knowledge and the designation by BuRec, the SCBID continued to operate the Ringold Wasteway – and landslides continued to occur. Between 1981 and 1986, three slides occurred just to the north of the 2006 landslide. CP 755, 109. In 1995, another landslide occurred about 1,500 feet south of the 2006 slide. On November 11, 1996, a huge

landslide occurred immediately southwest of the 2006 landslide location and two months later, in January of 1997, that same landslide reactivated. Id. Finally, on August 20, 2008 – two years after the 2006 landslide – another large landslide occurred about 6 miles south of the 2006 location. Id.

Thus, there was evidence in the record that disputed SCBID's argument on summary judgment that it knew nothing and, more importantly, could do nothing about the landslides along the White Bluffs area. What is more, there was evidence that despite its knowledge and authority to act under the Repayment Contract, SCBID failed to do anything about the landslide problem caused by the Ringold Wasteway. CP 1017-1018. Again, this evidence created a disputed issue of material fact regarding SCBID's assertion that it was helpless and did nothing wrong.

3. The Drainage Works.

One repeated observation in the BuRec studies and investigation summaries SCBID had in its possession was that the White Bluffs area had poor drainage and landslides would continue absent thorough drainage investigation and drainage works. CP 414, 420,422.

However, the SCBID never built or had BuRec build any drainage works to address the landslide problems along the Ringold Wasteway. CP 1009. Instead, BuRec built and eventually turned over to SCBID for operation and monitoring a limited drainage system and series of monitoring wells that were solely intended "to maintain the **agricultural**

viability of the project lands." CP 438-440, 447, 749, 1009 (emphasis added). This system monitored and maintained the upper end of the water table level at between four and eight feet of ground level – thus preventing oversaturation or rot in the root systems for the fruit trees in the region. CP 441, 749, 1009.

On summary judgment, SCBID argued that this drainage system to prevent root rot was actually supposed to prevent the landslides – and SCBID therefore took preventative measures by maintaining the system after BuRec abandoned it. CP 488. This argument is not only disputed but contradicted by the testimony of SCBID's own officers and employees – who acknowledge the drainage system was not intended to address or prevent the landslides. CP 442, 1009, 1017. In addition, the drainage facility and the wells were too shallow to monitor or drain off the seepage causing the landslide and thus SCBID's monitoring of the wells failed to detect or prevent anything – including the 2006 landslide. Further, many of the original monitoring wells were not intended to survive past the completion of the project and were destroyed or closed up. CP 451-453. Those that did remain were not anywhere near the edge of the bluff where the landslides kept occurring; the closest one to the scene of the 2006 landslide was west of (but not on) Conrad Orchards. CP 445.

SCBID's Secretary Manager and Drainage Program Manager both verified that the SCBID never did anything to prevent or address the landslide problem. CP 442, 1009, 1017. Instead, the only thing SCBID did was install a new monitoring well inside the Ringold Wasteway itself to

monitor water levels in the wasteway – and that occurred sometime after the 2006 landslide. CP 742.

Thus, neither BuRec nor SCBID has ever installed a drainage system in the Ringold Wasteway region to prevent landslides or drain off waters causing the slides. CP 441-442, 459, 1009, 1017. The SCBID had the authority and ability to install additional monitoring wells – but failed to do so at any time prior to the 2006 landslide. *Id.* SCBID failed to provide any evidence that it did anything else regarding either the seepage from the Ringold Wasteway or the consequent landslides.

These relevant facts from the record, combined with the specific provisions of the Repayment Contract detailed above, create disputed issues of material fact regarding SCBID's argument that it was powerless to do anything about the seepage, the drainage, or the resulting 2006 landslide – or that it took affirmative measures to alleviate or prevent the same by monitoring the existing drainage system. CP 488.

Unfortunately, the trial court did not recognize any of these disputed facts and, contrary to the record and the requirements for summary judgment, granted SCBID's motion to dismiss the MacHughs' claims. Accordingly, the MacHughs have filed this appeal and pray that the trial court be reversed so that they may obtain just compensation for their losses.

B. PROCEDURAL HISTORY.

On February 28, 2007 the MacHughs filed a claim for damages with the SCBID pursuant to RCW Chapter 4.96. CP 603-607. After sixty

(60) days had expired without the claim being accepted or paid, the MacHughs filed suit in Franklin County Superior Court against SCBID and Dick Conrad d/b/a Conrad Orchards.¹ CP 601-603.

SCBID filed its Answer and affirmative defenses on September 21, 2007 and then filed a motion for summary judgment on October 13, 2010. CP 509-510, 588-592. For purposes of summary judgment, SCBID stipulated that seepage from the Ringold Wasteway was a proximate cause of the 2006 landslide. CP 500-501; RP 19.

To support its motion, SCBID also filed the affidavit of its operations and maintenance expert, Robert Montgomery. CP 473-479. In his affidavit, Mr. Montgomery offered expert opinions on SCBID's maintenance of the Ringold Wasteway and the drainage system for the orchards. Id. However, he did not address or offer any opinions regarding whether either of these facilities – the wasteway or the drains – were sufficient to prevent landslides, why they had not prevented landslides, or why the SCBID had failed to do anything to prevent landslides. CP 473-478.

The MacHughs filed their Response opposing SCBID's summary judgment on December 1, 2010 and provided therewith the expert report and portions of the deposition transcript of their expert, Dr. Ted Vinion. CP 82-174. Dr. Vinion offered opinions on seepage and causation that

¹ The MacHughs voluntarily dismissed their claims against Dick Conrad d/b/a Conrad Orchards and thus Defendant Conrad is not a party to this appeal. Thus, Defendant Conrad is not included in the full procedural history of the case – only Respondent SCBID.

disputed those of Mr. Montgomery. CP 105, 112-120. For the rest of their arguments opposing summary judgment, the MacHughs relied upon the evidence already on file before the trial court – which established all of the facts discussed above. Id.

SCBID's reply brief was filed on January 26, 2011 and additional supplemental pages from Dr. Vinion's depositions were filed by Defendant Conrad on January 26, 2011 – completing the record before the trial court and now on review. CP 612-623. The hearing on SCBID's summary judgment motion occurred on February 3, 2011. The trial court issued its Memorandum Decision and Order on August 22, 2011, granting SCBID's motion in its entirety. CP 13-40, 68-71, 82-98. The actual Order dismissing the case was entered on August 30, 2011 and this appeal was timely filed on September 27, 2011. CP 5-12.

V. LEGAL ARGUMENT

The trial court's decision granting SCBID's motion for summary judgment should be overturned on review because the trial court 1) misapplied the controlling law for each claim now on appeal and 2) impermissibly overlooked the extensive disputed material facts detailed above and established in the record. Ultimately, SCBID failed to meet its requirements under CR 56(c) and summary judgment was therefore inappropriate. The trial court's decision granting SCBID's motion should therefore be reversed on appeal and SCBID's motion for summary judgment should be denied.

A. STANDARD OF REVIEW

The Court of Appeals reviews a summary judgment order de novo, performing the same inquiry as the trial court and considering the facts and reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); Fitzpatrick v. Okanogan Cy, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010).

"The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue **as to any material fact.**" Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (emphasis added) (citing Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960)); quoted in Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

"Moreover, the burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact and **all reasonable inferences from the evidence must be resolved against him.**" Morris v. McNicol, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974) (emphasis added) (citing Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 500 P.2d 88 (1972); Welling v. Mount Si Bowl, Inc., 79 Wn.2d 485, 487 P.2d 620 (1971)); quoted in Lamon, 91 Wn.2d at 349.

Thus, summary judgment is only proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c); Fitzpatrick, 169 Wn.2d at 605. In making that

determination, the trial court "does not weigh evidence or assess witness credibility." Barker v. Advanced Silicon, 131 Wn. App. 616, 624, 128 P.3d 623 (2006).

Here, the trial court misapplied the controlling law for each of the MacHughs' claims and impermissibly weighed the disputed material facts and evidence before it, often commenting that it was "not persuaded" by the evidence presented. However, it was not the trial court's role to weigh or be persuaded by the evidence; the trial court was only charged with determining if material issues of fact existed. Barker, 131 Wn. App. at 624. Accordingly, its decision granting summary judgment and dismissing the MacHughs' inverse condemnation, negligence, and trespass claims should be reversed on appeal.

B. INVERSE CONDEMNATION/TAKING

The MacHughs presented sufficient evidence to create a disputed issue of material fact regarding whether the SCBID's operation and maintenance of the Ringold Wasteway constituted a taking of the MacHughs' property. Thus, summary judgment on the MacHughs' inverse condemnation claim was inappropriate and the trial court committed reversible error in dismissing this claim. CR 56(c). Accordingly, its decision should be reversed on appeal.

A "taking" occurs when government conduct interferes with the use and enjoyment of private property. Lambier v. Kennewick, 56 Wn. App. 275, 279, 783 P.2d 596 (1989) (citing Martin v. Port of Seattle, 64 Wn.2d 309, 320, 391 P.2d 540 (1964)). Inverse condemnation is the legal

action alleging a taking and it is brought to recover for "property which has been appropriated in fact, but with no formal exercise of power." Lambier, 56 Wn. App. at 279 (quoting Martin, 64 Wn.2d at 310 n. 1); quoted in Phillips v. King Cy, 136 Wn.2d 946, 957, 968 P.2d 871 (1998).

A claim for inverse condemnation is based upon Washington State Const. Art. 1, §16 (amend 9), which provides in pertinent part:

No private property shall be taken or damaged for public or private use without just compensation having been first made....

Thus, a party claiming inverse condemnation must establish (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings. Phillips, 136 Wn.2d at 957 (citing Pierce v. Northeast Lake Wash. Sewer & Water Dist., 69 Wn. App. 76, 79, 847 P.2d 932 (1993)).

1. **An Inverse Condemnation Claim Does Not Require Negligence and Can Be Based on Operation & Maintenance – Not Just Construction & Design.**

The trial court's memorandum decision² recited the above elements and also the requirement that "[t]o have a taking, some governmental activity must have been the direct or proximate cause of the landowner's loss." CP 32 (quoting Halverson v. Skagit Cy, 139 Wn.2d 1, 12-13, 983 P.2d 643 (1999)). Given the stipulation on summary judgment by SCBID

² The trial court's August 30, 2012 Order that is on appeal expressly references and relies upon the trial court's previously filed Memorandum Opinion and Order as the basis for the trial court's decision.

that the landslide was proximately caused by seepage from the Ringold Wasteway that SCBID operated, the above elements and requirements recited by the trial court should have been met – or at the very least, established as disputed issues of material fact defeating summary judgment.

However, after reciting the elements for inverse condemnation, the trial court failed to apply or discuss them. Instead, the trial court analyzed and applied Seal v. Naches-Selah Irrigation Dist., 51 Wn. App. 1, 751 P.2d 873 (1988) and determined that SCBID was entitled to summary judgment dismissing its claim because the MacHughs' were arguing construction and design – which was done by BuRec, not SCBID – and had failed to produce evidence of any negligence by SCBID to survive summary judgment on their inverse condemnation claim. CP 32-34.

This discussion and determination by the trial court misinterpreted and misapplied both the controlling law and the evidence before it. First, negligence is not part of an inverse condemnation claim. See Boitano v. Snohomish Cy, 11 Wn.2d 664, 120 P.2d 490 (1941) (recognizing that inverse condemnation is a constitutional claim, not a negligence or tort claim, and thus does not require compliance with the then tort claim statute, Rem. Rev. Stat. §4007); see also Wong Kee Jun v. Seattle, 143 Wn. 479, 255 P. 645 (1927) ("If the state or its agent, in the prosecution of a public work, takes no more than is necessary, and prosecutes its work without negligence, it is neither a trespasser nor a tort feisor [*sic*]...We hold that the right to recover compensation for property taken by a city for

a public use under §16, art. I of the constitution, is not a claim sounding in tort[.]") (quoting Kincaid v. Seattle, 74 Wn. 617, 134 P. 504 (1913)); quoted in State v. Williams, 12 Wn.2d 1, 11, 120 P.2d 496 (1941); accord Halverson, 139 Wn.2d at 11 (quoting Kincaid, 74 Wn. at 620-621).

Thus, negligence is not an element or requirement for a taking under the constitution. Id. "[W]henver property is thus taken, voluntarily or involuntarily, by the sovereign state or by those to whom it has delegated this sovereign power, the courts must look only to the taking, and not to the manner in which the taking was consummated." Wong Kee Jun, 143 Wn. at 505.

Second, the trial court failed to discuss – let alone apply or analyze – the controlling case law regarding inverse condemnation by *operation* of a government entity or property, rather than design and/or construction.

Specifically, in Boitano v. Snohomish Cy, *supra*, the Washington State Supreme Court found a taking by the County's *operation* of a gravel pit:

In the case at bar, the county was engaged in operating a gravel pit for public use. **In that operation** it encountered and uncovered a large spring, and in order to rid its premises of the water from this spring it constructed a channel and through it precipitated the water upon appellants' land, thus effecting a direct and permanent invasion of appellants' premises and inflicting upon them a lasting damage of substantial proportions.

Boitano, 11 Wn.2d at 671 (emphasis added). The County attempted to draw a distinction between damages resulting from construction work and

damages resulting from operation after construction has been completed – as the trial court did here between BuRec and SCBID.

However, the Washington State Supreme Court has rejected such a distinction. It noted that while most takings or inverse condemnation cases come within the construction category, any factual difference between construction and operation cases "does not affect the principle underlying the constitutional provision here involved." Boitano, 11 Wn.2d at 672. The Court then cited other Washington State cases where inverse condemnation claims were based on the operation and maintenance of a public facility or property for public use. Id., at 672-673 (and cases cited therein).

Finally, the Supreme Court in Boitano recognized that there never was "any 'formal plan' for the improvement of the gravel pit, and, in the very nature of the adventure, there was no occasion for any such plan." Id., at 676. Thus, instead of falling within the principles and requirements of the plan-and-construction cases, the Court held that that case came "within the principle of those cases where private property has been damaged through the maintenance or operation of property devoted to a public use." Id., at 676-677. Under such operation or maintenance cases and the principles therein, the Court concluded that a taking had occurred and thus the private property owners were entitled to damages on their inverse condemnation claim. Id. at 677.

Like Boitano, the MacHughs' claim for inverse condemnation against SCBID is a case based on operation and maintenance, not

construction or design. The trial court acknowledged this. However, instead of applying the controlling law regarding inverse condemnation by government operation and maintenance, the trial court focused on design and construction under the Seal opinion – apparently because it involved an irrigation district. Unfortunately, the portion of Seal that the trial court quoted is no longer authoritative or good law.

As the trial court correctly noted, in Seal Division III of the Washington State Court of Appeals cited and relied upon case law establishing that no taking can occur if the result or damages caused by the government action were neither contemplated in the plan nor necessarily incident to construction performed by the government. CP 32-33; Seal, 51 Wn. App. at 9-10.

This same court – Division III of the Court of Appeals – subsequently recognized that the inverse condemnation portion of its decision in Seal relied upon case law that had been abandoned by the Washington State Supreme Court in Wong Kee Jun v. Seattle, *supra*, and thus concluded that to the extent Seal relied upon the abandoned law, it was no longer authoritative. Lambier v. Kennewick, *supra*, 56 Wn. App. at 280-281. Accordingly, in Lambier the Court concluded that "[t]he unintended results of a governmental act may constitute a 'taking'." Id., at 281.

Here, the trial court's decision inappropriately used the requirement under Seal that a result or damage must be intended by the government's plan or construction in order for a taking to occur and determined there

was no taking by SCBID – because it was not part of or responsible for the plan and/or construction of the Ringold Wasteway. CP 33-34. Again, this portion of Seal relied upon by the trial court was not authoritative and no longer good law. Lambier, 56 Wn. App. at 280-281.

Instead, the intended OR unintended results of ANY governmental act may constitute a taking – including operations. Id. (citing Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 548 P.2d 1085 (1976); Martin, 64 Wn.2d 309; accord Williams, 12 Wn.2d 1.

2. **SCBID Can Be Liable for Inverse Condemnation Based on Operation of the Transferred Works.**

In addition to focusing the argument on summary judgment to *just* construction and design of the Ringold Wasteway, SCBID also argued that "a government entity, like SCBID, that inherits another's project, cannot be held liable under the doctrine of inverse condemnation." CP 492. However, the cases relied upon by SCBID in support of this argument do not actually reach this conclusion and are factually distinct from this case.

SCBID relied upon Phillips v. King Cy., and Halverson v. Skagit Cy., *supra*, for its contention that inverse condemnation cannot apply to it because it inherited the transferred works from BuRec. CP 492. Neither of those cases stand for that proposition. Both were decided on the unremarkable principle that the claimants had failed to argue a specific government activity that was the direct or proximate cause of their loss – and thus had failed to establish a constitutional taking. SCBID's argument,

ignores this. Instead, SCBID takes one line from Phillips and attempts to create a new rule of law.

SCBID's assertion arises from the argument made by the County in Phillips that it (the County) should not be liable for a design defect in a drainage system that the County accepted after construction for purposes of providing maintenance. Phillips, 136 Wn.2d at 966.

The Court agreed that the County should not be liable for the negligent design defect of the third party – but did not hold that inverse condemnation could not apply to the County because it inherited the works, as SCBID contended. Id. Instead, the Court recited the well established law requiring that "[t]o have a taking, some governmental activity must have been the direct or proximate cause of the landowner's loss." Id. (citing Lambier, 56 Wn. App. at 283, n. 4).

The Court then went on to analyze whether the Plaintiffs had provided any evidence of a taking based on the County's maintenance of the drainage system OR contribution of County-owned land to the drainage system and project. Id., at 966-967. The Court ultimately concluded that there was no governmental activity due to the maintenance of the drainage system – because the County had not yet actually taken over maintenance of the system – but that there was sufficient governmental activity based on the County's contribution of its own land to the drainage system that allegedly damaged the Plaintiffs' property. Id.

Thus, in Phillips the Court actually concluded that a government entity CAN be liable under inverse condemnation for a project or system it

inherits or assumes – so long as there is evidence of a specific government activity that was a direct or proximate cause of the Plaintiffs' loss. Phillips, 136 Wn.2d 946. The Court applied this same law in Halverson and concluded there was no inverse condemnation claim there because Plaintiffs' claims were based solely on the existence of the dike levees built by third party diking districts – not on any maintenance or other governmental activity by the County. Halverson, 139 Wn.2d 1.

Here, the MacHughs presented evidence establishing the operation and maintenance of the Ringold Wasteway by SCBID was the direct or proximate cause of their injury – and SCBID stipulated to the same. Thus, both Phillips and Halverson **support** recovery by the MacHughs. The trial court erred because it focused only on the construction, design and ownership of the wasteway by BuRec and concluded no claim for inverse condemnation could lie against SCBID for those three government activities alone.

While BuRec may maintain ownership of the project works themselves and the water therein, the SCBID is responsible for operating the transferred works in its District, including making sure that water gets to the farmers under the irrigation contracts and directing BuRec on when to send it. CP 346, 374. In other words, absent operation by the SCBID, no water gets to the Ringold Wasteway and no seepage occurs, causing no landslides. Unlike Phillips and Halverson, SCBID's operation of the Ringold Wasteway was the "governmental activity" that was "the direct or

proximate cause of the [MacHughs'] loss." Phillips, 136 Wn.2d at 966; Halverson, 139 Wn.2d at 12-13.

Thus, the trial court committed reversible error by failing to analyze or examine SCBID's operation of the Ringold Wasteway as a basis for the MacHughs' inverse condemnation claim and by relying exclusively on inapplicable – and in the case of Seal, no longer authoritative or controlling – case law regarding only construction, design and/or ownership.

Under the controlling case law for inverse condemnation based on operation and maintenance and taking the facts in the light most favorable to the MacHughs as the nonmoving party, the MacHughs suffered a permanent invasion of their private property from the landslide caused by SCBID's operation and maintenance of the Ringold Wasteway. Boitano, 11 Wn.2d at 676-677. SCBID was not entitled to summary judgment on the MacHughs' inverse condemnation claim and the trial court's decision granting the same should be reversed on appeal.

C. THE NEGLIGENCE CLAIM

As an alternate theory of recovery, the MacHughs also alleged that the SCBID was negligent in causing their damages or loss. Specifically, the MacHughs presented evidence that the SCBID knew operation of the Ringold Wasteway without a proper drainage system would cause landslides just like the one that damaged the MacHughs' orchard – but despite this knowledge and authority to act, SCBID did nothing.

Under the controlling case law and the general duty of an irrigation district to exercise reasonable care so as to avoid causing damage to the property of others, such evidence that SCBID knew it was going to cause harm or loss to the MacHughs but did nothing should have been sufficient to defeat SCBID's summary judgment motion.

Unfortunately, the trial court determined otherwise and granted SCBID's motion, dismissing the MacHughs' negligence claim on summary judgment. Such decision was contrary to the disputed evidence and the controlling case law establishing the duty owed by SCBID.

To defeat summary judgment in a negligence action, the plaintiff must show that a genuine issue of material fact exists with respect to any element of a negligence claim: duty, breach of duty, causation, and injury/damage. Kennedy v. Sea-Land Services, Inc., 62 Wn. App. 839, 856, 816 P.2d 75 (1991).

Negligence claims are generally not subject to determination on summary judgment because the breach and proximate cause elements are generally fact questions, but "if reasonable minds could not differ, these factual questions may be determined as a matter of law." Hertog v. City of Seattle, 138 Wn.2d 265, 275 979 P.2d 400 (1999).

The trial judge determined that summary judgment dismissing the MacHughs' negligence claim was appropriate by applying an incorrect standard of care that was argued by SCBID. Specifically, the trial court incorrectly concluded that the MacHughs could only survive summary judgment if they had an expert who could testify as to some specific

operations and maintenance standard or requirement that the SCBID failed to follow. Absent such an expert, the trial court concluded the MacHughs could not establish negligence as a matter of law and thus dismissed their negligence claim.

The trial court accepted an argument by SCBID that puts the cart before the horse – determining the MacHughs lacked expert testimony to prove a unique standard of care, without first determining whether such special standard of care actually existed.

While arguing that it had met the operation and maintenance “standard of care” applicable to irrigation districts, SCBID failed to cite the standards, principles or regulations that establish such theoretical standard. The SCBID's own expert, Mr. Montgomery, gave the conclusory opinion that SCBID's operation and maintenance standards were reasonable and well within the standard of practice – but then failed to articulate *what* the actual standard of practice was or *how* SCBID actually met it. CP 473-476. This is because there is no such special standard and, correspondingly, the MacHughs' lack of an expert to testify on this non-existent standard of care is nondispositive.

Instead, irrigation districts in Washington State have the duty to exercise reasonable care in the operation of their facilities so as to avoid causing damage to the property of others. Holland v. Columbia Irrigation Dist., 75 Wn.2d 302, 450 P.2d 488 (1969); Seal, 51 Wn. App. 1. These two cases, Holland and Seal, are the two seminal cases on the duty owed by irrigation districts to other landowners – and neither case discusses or

relies upon some industry-wide "operation and maintenance" standard or practice to determine or define the duty of reasonableness.

Both cases, though, turn on whether or not the irrigation district was negligent in harming the property of another *by its operation* of the irrigation facility itself. For example, in Holland, a severe wind storm deposited a large number of tumbleweeds in an irrigation ditch operated by the defendant irrigation district, clogging the ditch. Holland, 75 Wn.2d at 303. The defendant irrigation district received notice that the ditch was clogged with the weeds and going to overflow – and had two turnouts available where water in the clogged ditch could have been diverted. Id. However, the defendant irrigation district did nothing until after the ditch had overflowed, causing damage to surrounding property owners. Id., at 303-304.

Thus, the irrigation district had notice of the problem, had a solution available for the problem, but did nothing about the problem until it was too late and operation of its irrigation ditch caused damage to the property of others. Id. On a challenge to the sufficiency of this evidence, the Washington State Supreme Court determined that such evidence was sufficient to present inferences, and thus a question of fact for the jury, regarding whether the defendant irrigation district was negligent in the operation and maintenance of the irrigation ditch – *without any expert or other testimony that the irrigation district had actually violated any "operation and maintenance" standards or practices.* Id., at 304-305.

Similarly, in Seal the irrigation district knew that operation of its facility was causing seepage into a neighboring orchard and, while the irrigation district tried various means of stopping or abating the seepage, it continued. Seal, 51 Wn. App. at 2-3. The Plaintiffs eventually alleged damages to their orchard caused by the seepage and at trial, the jury determined that the irrigation district was negligent. Id., at 3-4.

Again, no evidence or argument was presented that the irrigation district was negligent as to some special standard based solely on operations and maintenance standards and practices. Seal, 51 Wn. App. 1. Instead, the jury found that the irrigation district was negligent *by its operation* of the drainage ditch that was seeping and causing injury to the orchard. Id. The Court of Appeals affirmed on appeal that there was sufficient evidence in the record (again, without an operation and maintenance expert) to support the jury's decision. Id.

Thus, these two cases establish that an irrigation district such as SCBID owes a general duty to exercise reasonable care in operation of its facilities so as to avoid causing harm or damage to the property of others. They do not discuss or establish any special standard of care based solely on operations and maintenance procedures or practices nor require expert testimony on the same for a negligence claim. Accordingly, the trial court here erred in applying a fictitious "operations and maintenance" standard of care and requiring expert testimony by plaintiffs on the same.

The trial court also erred by granting SCBID's summary judgment motion despite the extensive disputed issues of material facts regarding

whether or not the SCBID had authority to do anything about the landslides caused by its operation of the Ringold Wasteway. Applying the correct duty of reasonable care, and taking the facts detailed above and inferences therefrom in the light most favorable to the MacHughs as the non-moving party, there was abundant evidence to establish that the SCBID:

- knew operation of and seepage from the Ringold Wasteway caused landslides (and stipulated to the same for purposes of the 2006 landslide);
- knew that the current drainage system was intended and operated to prevent root rot in the orchards, not prevent landslides;
- had authority under the Repayment Contract to construct additional drainage works for purposes of preventing landslides or, alternatively, could request that the BuRec construct additional drainage works or take other steps to address the seepage issue; BUT
- did nothing and continued to operate the Ringold Wasteway, causing the 2006 landslide that damaged the MacHughs' orchard.

At the least, this was sufficient evidence to create potential inferences – and thus a jury question – regarding whether or not the SCBID was negligent. Holland, 75 Wn.2d at 305. As in Holland, the SCBID knew of the problem, had authority to potentially do something about it, but chose not to and thus (by its stipulation) caused the landslide that damaged the MacHughs' land. Under these disputed facts and

evidence, summary judgment was not appropriate and the trial court erred in dismissing the MacHughs' negligence claim.

D. RES IPSA LOQUITUR.

With their claim for negligence, the MacHughs asserted application of the doctrine of res ipsa loquitur. CP 594-595; 602-603. The trial court, however, concluded that the elements for application of the doctrine were not met and declined to apply it to provide the MacHughs with an inference of negligence to which they were entitled. Again, the trial court's decision on the doctrine of res ipsa loquitur misapplied the controlling law and thus should be reversed.

Whether res ipsa loquitur applies to a particular case is a question of law that the court reviews de novo. Robinson v. Cascade Hardwoods, Inc., 117 Wn. App. 552, 563, 72 P.3d 244 (2003) (citing Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)).

Res ipsa loquitur "is a rule of evidence that allows an inference of negligence from circumstantial evidence to prove a defendant's breach of duty where (1) the plaintiff is not in a position to explain the mechanism of injury, and (2) the defendant has control over the instrumentality and is in a superior position to control and to explain the cause of the injury." Robinson, 117 Wn. App. at 563 (citing Morner v. Union Pac. R.R., 31 Wn.2d 282, 291-92, 196 P.2d 744 (1948)). In other words, res ipsa loquitur substitutes an inference of negligence for the unknown negligent act or omission by the defendant in cases where the defendant is in the better position to explain what really happened and/or plaintiff cannot. Id.

Once it is determined that the doctrine applies, the defendant has "the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part." Ripley v. Lanzer, 152 Wn. App. 296, 307, 215 P.3d 1020 (2009) (quoting Metro. Mortgage & Sec. Co. v. Wash. Water Power, 37 Wn. App. 241, 243, 679 P.2d 943 (1984)); see also Curtis v. Lien, 169 Wn.2d 884, 894, 239 P.3d 1078 (2010) ("Once the plaintiff establishes a prima facie case, the defendant must then offer an explanation, if he can.") (quoting Pacheco, 149 Wn.2d at 441-442).

However, such alternative explanations by Defendant do not defeat application of the doctrine in the first place and "a plaintiff is not bound by the testimony of the defendant or his witnesses." Pacheco, 149 Wn.2d at 441; see also Curtis, 169 Wn.2d at 895 (holding the trial court erred when it concluded *res ipsa loquitur* was inapplicable as a matter of law because of other possible reasons for the occurrence at issue).

Thus, *res ipsa loquitur* preserves a Plaintiff's claim of negligence from dismissal on nonsuit or summary judgment based on circumstantial evidence – even if the Defendant can present conflicting evidence that an event occurred without its negligence. Id.; Curtis, 169 Wn.2d 884; Robinson, 117 Wn. App. 552; see also Douglas, 73 Wn.2d 476, 484, 487, 438 P.2d 829 (1968) ("[T]he function of the doctrine of *res ipsa loquitur* is only to prevent a nonsuit, not to decide the case.")

In order to establish the necessary inference of negligence required for application of the doctrine of *res ipsa loquitur*, there must be evidence that:

"(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff."

Pacheco, 149 Wn.2d at 436 (quoting Zukowsky v. Brown, 79 Wn.2d 586, 593, 488 P.2d 269 (1971)); quoted in Ripley, 152 Wn. App. at 307; accord Douglas v. Bussabarger, 73 Wn.2d 476, 484, 438 P.2d 829 (1968) (citing Emerick v. Mayr, 39 Wn.2d 23, 234 P.2d 1079 (1951)).

Thus, since the MacHughs presented evidence on each of these three elements, they established a *prima facie* case for negligence under the doctrine of *res ipsa loquitur* and their claim should go forward to the jury – regardless of whether or not SCBID can present evidence or offer an alternative explanation for how the landslide occurred that does not involve negligence by the irrigation district. Pacheco, 149 Wn.2d at 440; Curtis, 169 Wn.2d 884; Robinson, 117 Wn. App. 552.

There is no dispute that the third element above is met in this matter. However, the trial court determined that the MacHughs failed to present evidence on the first and second elements, and thus refused to apply the doctrine. Close examination of both the trial court's decision and the disputed facts in the record establish that this determination by the trial

court was unsupported by either controlling law or the requirements for summary judgment and should be reversed on appeal. CR 56(c).

1. **Irrigation Districts Do Not Damage The Property of Others Absent Negligence.**

"Whether an injury supports a reasonable and legitimate (as opposed to conjectural) inference of negligence requires that the context, manner, and circumstances of the injury are 'of a kind that do not ordinarily happen in the absence of someone's negligence.'" Robinson, 117 Wn. App. at 565-566 (quoting Zukowsky, 79 Wn.2d at 594-595). The law recognizes three situations where this requirement is met:

(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

Pacheco, 149 Wn.2d at 438-439 (quoting Zukowsky, 79 Wn.2d at 595); quoted in Robinson, 117 Wn. App. at 566.

The trial court did not discuss these three scenarios in its determination or decision. Instead, it stated that it was not persuaded that landslides on or along irrigation drainage system are the type of accident or occurrence that does not happen absent negligence and relied upon the language in Holland stating that an irrigation district is not an insurer against damage, but is only liable for negligence. CP 28 (citing Holland, 75 Wn.2d at 304).

However, Holland and the other irrigation district cases dispute this very conclusion by the trial court. While the Washington State Supreme Court did observe in Holland that an irrigation district is not an insurer, in that case and every other case where the operation of the irrigation system caused damage to the property of another, the irrigation district has been found negligent and thus liable. Holland, 75 Wn.2d 302; Seal, 51 Wn. App. 1; Clark v. Icicle Irrigation Dist, 72 Wn.2d 201, 432 P.2d 541 (1967). Be it because of a sudden wash out of the irrigation ditch side, clogging by tumbleweeds or even seepage – if the irrigation district was operating the system and it caused injury or damage to the property of another, then the irrigation district was negligent. Id.

Case law therefore establishes that when an irrigation district causes damage to the property of another, negligence is most likely involved – be it a washout, a flood or seepage. Id. However, when the plaintiff does not know specifically *how* the irrigation district was negligent, then the doctrine of *res ipsa loquitur* seems "particularly appropriate" and should be applied. Clark, 72 Wn.2d at 204 (citing Dalton v. Selah Water Users' Ass'n, 67 Wn. 589, 122 P. 4 (1912)).

Thus, both common sense and existing case law under Clark and the other irrigation district cases establishes that damage to the property of others caused by operation of an irrigation district generally does not occur absent negligence by the irrigation district. Clark, 72 Wn.2d 201; Holland, 75 Wn.2d 302; Seal, 51 Wn. App. 1. The MacHughs are not required to show or establish that such damage *cannot* occur absent

negligence. See Miles v. St. Regis Paper Co., 77 Wn.2d 828, 467 P.2d 307 (1970) (recognizing that under application of the doctrine of res ipsa loquitur, "the plaintiff who was injured...is not bound to shew [*sic*] that it could not [have occurred] without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.") (quoting Byrne v. Boadle, 159 Eng. Rep. 299 (1863)).

Nor are they required to eliminate with certainty all other possible causes or inferences in order for res ipsa to apply; all that is needed "is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not." Douglas, 73 Wn.2d at 486 (quoting W. Prosser, Torts 222 (3d ed. 1964)); accord Robinson, 117 Wn. App. at 569; quoted in Pacheco, 149 Wn.2d at 440-441.

Instead, the first element for application of res ipsa loquitur is met "if, 'in the abstract, there is a reasonable probability that the incident would not have occurred in the absence of negligence.'" A.C. v. Bellingham School Dist., 125 Wn. App. 511, 517, 105 P.3d 400 (2004) (quoting Tinder v. Nordstrom, Inc., 84 Wn. App. 787,792, 929 P.2d 1209 (1997)); see also Curtis, 169 Wn.2d at 894 (recognizing that "general experience tells us that wooden docks ordinarily do not give way if properly maintained" and thus collapse of a portion of the dock was "an event that would not be expected without negligence on someone's part.") (quoting Zukowsky, 79 Wn.2d at 596).

Again, common sense and case law establish that if an irrigation system is properly operated and maintained, then damage to the property of others does not occur. Id. This presumption – and the application of *res ipsa loquitur* – does not make the irrigation district an insurer for all damages caused by operation because the irrigation district still has the opportunity to argue and present evidence that the injury was caused by something or someone other than its own negligence. Pacheco, 149 Wn.2d at 440-441; see also Douglas, 73 Wn.2d at 487 ("It is important to emphasize that the effect of our decision [permitting application of *res ipsa loquitur*] is not to make doctors 'insurers', nor make it impossible for them to defend themselves . . . Doctors still have an opportunity if they so choose to come forward with evidence as to exactly what did take place . . . and thereby seek to avoid liability.")

Thus, under the controlling case law on liability by irrigation districts for causing damage to the property of others and the evidence on the record before the trial court, the MacHughs presented sufficient evidence to establish a presumption of negligence under the first element for application of the doctrine of *res ipsa loquitur*. SCBID's arguments and any opinions by their expert, Mr. Montgomery, to the contrary are simply disputed evidence that should be weighed and determined by the jury – not by the trial court on summary judgment. Pacheco, 149 Wn.2d at 441; Curtis, 169 Wn.2d at 895. The trial court's decision that the MacHughs failed to meet the first element for the doctrine of *res ipsa loquitur* was therefore error and should be reversed on review.

2. **Under The Repayment Contract, SCBID Exercised Exclusive Control Over Operation of the Ringold Wasteway.**

Under the second requirement for *res ipsa loquitur* to apply, “the defendant must have exclusive, ‘actual or constructive control’ of the ‘instrumentality’ to the extent that it caused the injury.” Robinson, 117 Wn. App. at 568 (quoting Zukowsky, 79 Wn.2d at 595). Again, SCBID has stipulated that the landslide was caused by seepage from the Ringold Wasteway – and operation of the wasteway is inherently necessary for any seepage that occurs. Put another way, if the wasteway is not operating, then there is nothing to seep and no landslide caused by seepage.

Thus, as the party in charge of the operation of the Ringold Wasteway, the SCBID had “exclusive actual or constructive control” of the seepage – the instrumentality that somehow caused the landslide. Taking the evidence in the light most favorable to the MacHughs, the second element for application of *res ipsa loquitur* was met.

The trial court concluded otherwise by relying on the portions of the Repayment Contract that provided for ongoing ownership by BuRec of the irrigation facilities and the water itself. CP 30-32. However, design, construction and ownership of the irrigation facilities and the water therein does not cause seepage if the system is not operating – and both the language of the Repayment Contract and the testimony of SCBID’s Secretary Manager clearly established that SCBID alone was operating the Ringold Wasteway. CP 351, 1005-1007.

Thus, taking the evidence in the light most favorable to the MacHughs as the nonmoving party, the Repayment Contract and SCBID's manager established that SCBID had exclusive control over the Ringold Wasteway as the instrumentality that caused the injury – whether it owned the water or not. As with the first element discussed above, the MacHughs presented sufficient evidence to establish a prima facie case “that ‘the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it.’” Robinson, 117 Wn. App. at 570 (quoting Zukowsky, 79 Wn.2d at 595)).

The three requirements for application of the doctrine of *res ipsa loquitur* were met. As established by case law and common sense, operation of an irrigation system such as the Ringold Wasteway does not cause damage to the property of another absent negligence, the SCBID had exclusive control over operation of the wasteway, and the MacHughs were not responsible in any way for the landslide caused by SCBID's operation of the wasteway. Under these three elements, an inference of negligence is appropriate and thus the doctrine of *res ipsa loquitur* should apply. The trial court erred both in denying application of the doctrine and dismissing the MacHughs' negligence claim. Accordingly, its decision should be reversed on appeal.

E. THE TRESPASS CLAIM

Finally, the trial court dealt with the MacHughs' claim of trespass by summarily stating that it was not persuaded by the evidence before it.
CP 35.

However, the trial court is not permitted to pass upon or evaluate the evidence before it on summary judgment. Barker, 131 Wn. App. at 624. Instead, the trial court is to take the evidence and all inferences therefrom in the light most favorable to the MacHughs as the nonmoving party – which the trial court failed to do. Morris, 83 Wn.2d at 494-495. Thus, the trial court failed to follow the applicable standard for summary judgment with regard to the MacHughs' trespass claim as well.

The elements for a claim of intentional trespass are:

(1) an invasion affecting an interest in the exclusive possession of property; (2) an intentional doing of the act which results in the invasion; (3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and (4) substantial damages to the res.

Seal, 51 Wn. App. at 5 (citing Bradley v. American Smelting & Ref. Co., 104 Wn.2d 677, 691, 709 P.2d 782 (1985)).

The first and fourth elements above were not in dispute – the landslide caused by the Ringold Wasteway seepage was clearly an invasion affecting the MacHughs' interest in exclusive possession and use of their property and caused damage to the property. The trial court based its decision on the second element, intent, and the discussion and decision in the Seal case regarding that element. CP 34-35.

In Seal, the court recognized that the Washington State Supreme Court had previously adopted the Restatement (Second) of Torts §8A (1965) in defining "intent" under the elements for an intentional trespass claim and thus had expanded the element to include more than just desired

consequences. Seal, 51 Wn. App. at 5 (quoting Bradley, 104 Wn.2d at 682). In addition to consequences that are desired, if an actor "knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the results." Id.

This is the language the trial court relied upon in determining it was "not persuaded" that SCBID's knowledge of previous landslides in the area meant SCBID meant to cause the 2006 landslide onto the MacHughs' property. CP 34-35. This is a factual determination based on the disputed evidence and should have been made by the jury – not the trial court on summary judgment.

As noted above, SCBID knew a good deal more than just that other landslides had occurred in the area. The evidence before the trial court established that the SCBID knew that operation of the Ringold Wasteway caused landslides in the White Bluffs area and would continue to do so without a proper drainage system – and SCBID knew the existing drainage system was to prevent orchard root rot, not landslides. CP 414-423. Specifically, SCBID produced two documents *in its possession* providing ongoing acknowledgement and discussion in the 1970's and 1980's of the landslide problems posed by ongoing development and operation of the irrigation system *without sufficient drainage* in the White Bluffs and Ringold Wasteway region. Id.

At the very least these documents, taken with the SCBID's stipulation that seepage from the Ringold Wasteway caused the 2006

landslide, create a disputed issue of material fact regarding whether or not the SCBID knew the landslides were certain or substantially certain to occur and still went ahead with operating the seeping Ringold Wasteway – thus to be "treated by the law as if [it] had in fact desired to produce the result." Seal, 51 Wn. App. at 5.

The trial court also mischaracterized the Court's decision in Seal as requiring a showing of more than just knowledge of seepage to establish intent and ultimately holding that irrigation district liability can only be based on negligence. CP 34-35. This is an inaccurate interpretation of the Court's decision in Seal.

In that case, the irrigation district presented evidence that not only it knew about the seepage, but took steps to try to prevent or stop the seepage; such steps just proved ineffective. Seal, 51 Wn. App. at 2-3. *Based on that evidence*, the Court concluded that the Plaintiffs could not establish the intent element under their intentional trespass claim – because the District had tried to fix the problem, instead of doing nothing as required by the intent test under Bradley and the Restatement (Second) of Torts. Id., at 5-6. Thus, the Court held that the "evidence indicates only negligence on the part of the District" and accordingly the Plaintiffs' "claim of **intentional** trespass must fail." Id., at 6 (emphasis added).

Next, the trial court declined to apply a strict liability standard for trespass and nuisance claims, based on an Oregon case cited and relied upon by the Plaintiffs. Id., at 6. In declining to adopt strict liability, the Court recognized the negligence standard for irrigation districts adopted in

Holland and other Washington case law. Id. Based on this established standard of negligence in Washington, the Court stated that it declined "to adopt the contrary view of the Oregon Supreme Court in Reter v. Talent Irrig. Dist., 256 Or. 140, 482 P.2d 170 (1971), as urged by the Seals." Id.

Thus, the Court in Seals denied the intentional trespass claim because there was evidence that the irrigation District did not intend to cause the invasion and damage that occurred, and then also declined to enforce a standard of strict liability for either the intentional trespass or nuisance claims. Id. The Court did not, however, combine the two issues and hold, as the trial court here stated, that intentional trespass claims were barred by the negligence standard for irrigation districts. CP 35.

Unlike in Seal, SCBID failed to provide any evidence that it attempted to do anything about the seepage that caused the landslide – despite knowing about it and the certainty that it would cause landslides. (In fact, such evidence would have been a direct contradiction to the SCBID's argument that it was powerless to do anything.) Instead, taking the facts and inferences therefrom in the light most favorable to the MacHughs as the non-moving party, there was evidence to create inferences that the SCBID knew of the problem, had the authority under the Repayment Contract to do something about it or have BuRec do something about it, but failed to act.

Under the law as stated in Seal, such evidence was sufficient to create a disputed issue of material fact regarding intent under the MacHughs' intentional trespass claim and thus preserve that issue for the

jury. Seal, 51 Wn. App. at 5. Accordingly, the trial court erred in dismissing the MacHughs' trespass claim and that decision should be reversed on appeal.

VI. CONCLUSION

The trial court's decision granting SCBID's motion for summary judgment and dismissing the inverse condemnation, negligence and trespass claims of the MacHughs should be reversed on appeal because the trial court failed to properly apply or follow the controlling law and disregarded the disputed material facts on the record before it.

Instead, the trial court went out of its way to try to convince or persuade the parties that the SCBID did nothing wrong and the MacHughs really should have sued the Federal Bureau of Reclamation instead. However, a motion for summary judgment is not the appropriate place for a trial court to make such factual determinations. The trial court did not follow the applicable law and standards governing summary judgment and thus arrived at an erroneous decision.

The trial court's decision should be reversed.

DATED this 9th day of July, 2012.

PAINE HAMBLEN LLP

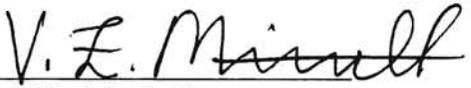
By: V. L. Mitchell

Vicki Mitchell, WSBA No. 31259
John C. Riseborough, WSBA No. 7740
717 West Sprague, Suite 1200
Spokane, WA 99201-3505
Attorneys for Appellants MacHughs &
Jackass Mt. Ranch, Inc.

CERTIFICATE OF SERVICE

I certify that on the 9th day of July, 2012, I caused a true and correct copy of this Brief of Appellants to be served on the following in the manner indicated below:

Andrew C. Bohrsen, P.S. Law Office of Andrew C. Bohrsen, PS 505 W. Riverside Avenue, Suite 400 Spokane, WA 99201 Attorneys for South Columbia Basin Irrigation District	<input checked="" type="checkbox"/> HAND DELIVERY <input type="checkbox"/> U. S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> VIA FACSIMILE
--	---


Vicki L. Mitchell