IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 90759-5

COURT OF APPEALS NO. 7143-9-I

Don Zepp, d/b/a Don Zepp Logging,
Respondent,

vs.

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

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. 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.

II. ISSUES PRESENTED FOR REVIEW

1. Is the decision of the Court of Appeals in conflict with a previous decision of the Supreme Court?
2. Does the petition involve an issue of substantial public interest that should be determined by the Supreme Court?

III. STATEMENT OF THE CASE

i. 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.

ii. 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.

iii. 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.

iv. 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 but that case settled before the second trial. A defense verdict was returned on December 14, 2012. CP 1536 – 1537. 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. Plaintiffs appealed and the Court of Appeals, Division One, affirmed.

IV. SUMMARY OF ARGUMENT

Plaintiffs have not fulfilled the factors required under RAP 13.4(b) for acceptance of review by this Court. Plaintiffs allege that the court of

appeal's decision was in conflict with a decision of this Court and that the decision below was related to a matter of significant public interest. Plaintiffs point to no case on point that is in conflict with a case of this Court. Plaintiffs fail to provide any argument whatsoever regarding the public interest test. Plaintiffs do not submit argument that the trespass and negligence holdings of the lower court were in error. The Petition should be denied.

The Court of Appeals correctly found that 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. In addition, the Court of Appeals correctly found that Don Zepp had no duty to take additional steps beyond relying on the Department of Natural Resources report confirming that the subject land was safe to be logged. Summary judgment was properly granted in favor of Don Zepp. Plaintiffs do not challenge the court's rulings with respect to trespass and Zepp's negligence, so should not be considered as issues submitted for review.

I. ARGUMENT

A. Plaintiffs Fail to Fulfill the Factors Required for Supreme Court Review.

Under Rule of Appellate Procedure 13.4(b),

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)

Here, Plaintiffs cite only (1) and (4) as factors supporting review. Petition at 10. Thus, Plaintiffs must concede that factors (2) and (3) are not to be considered in its Petition.

1. **Plaintiffs have not Shown that the Decision of the Court of Appeals is in Conflict with a Decision of this Court.**

Plaintiffs allege that the decision of the Court of Appeals refusing to impose strict liability on logging activities in Washington State was error, and requests review. *Hurley v. Port Blakely Tree Farms, L.P.* ___ Wn. App. ___, 332 P.3d 469 (Div. 1, 2014). Plaintiffs misstate the lower court's holding. Plaintiffs characterize the opinion as turning only on whether logging took place in an urban or rural location. However, the *Hurley* court found, after careful analysis of all six Restatement factors, that strict liability should not be imposed. *Id.* Thus, the *Hurley* court properly applied the Restatement factors and followed previous case law of this court.

Plaintiffs point to no case showing that the court of appeal's decision is in conflict with a decision of this Court. Petition at 12. First,

Plaintiffs apparently argue that this Court holds that strict liability must be found whether an activity occurs in populated or unpopulated areas. Petition at 13. However, Plaintiffs point to no decision supporting such a holding. Plaintiffs cite *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 567 P.2d 218 (1977), which only contains a factual situation that involved organic farming without analyzing its urban or rural location. It does not follow from this case that Washington courts must find strict liability without distinguishing between populated and unpopulated places. Plaintiffs also cite *Siegler v. Kuhlman*, 81 Wn.2d 448, 459, 502 P.2d 1181, 1187 (1972) for the contention that location or population levels may not be considered in determining whether strict liability applies. This Court found in *Siegler* that transporting gasoline in large quantities was an ultra-hazardous activity on all roads and highways in Washington State. *Id.* However, the finding of the Court cited by Plaintiffs is *dicta* and does not support Plaintiffs' argument. *Id.* In addition, the case states nowhere that location is not to be considered in analyzing whether to impose strict liability. *Id.* Thus, the *Hurley* decision does not conflict with this Court's decision in *Siegler*.

In contrast to Plaintiffs' position, this Court adopts the rule that location is always a factor that must be considered in imposing strict liability. *Pacific Northwest Bell Tel. Co. v. Port of Seattle*, 80 Wn.2d 59,

64, 491 P.2d 1037 (1971) (adopting Restatement of Torts with respect to strict liability analysis). It cannot be disputed that court must consider place when considering whether an activity is abnormally dangerous under the Restatement. Under each factor of the analysis, population levels and the presence of property that may be injured or damaged are necessary factors for determining strict liability. RESTATEMENT (SECOND) OF TORTS § 520 (1977). For example, under § 520(e), "inappropriateness of the activity to the place where it is carried on" must be considered. Thus, population levels should be analyzed in determining strict liability's application. Location and population must also be considered in connection with § 520 (a) and (f) as well. A court must look at that area surrounding an activity in order to assess both the "...degree of risk of some harm to the person, land or chattels of others", and "the extent to which its value to the community is outweighed by its dangerous attributes." *Id.* Activity in a more populated area may be more risky in than in unpopulated areas, which the Restatement and this Court contemplate. Each community may also place different weight on the value of an activity, so location is necessarily a part of the analysis. Plaintiffs would have this Court hold that analysis of place would not be allowed in any Washington decision on strict liability. Such a holding

would be contrary to this Court's long-standing adoption of the Restatement factors with respect to strict liability.

Moreover, Plaintiffs make the assertion that no court has ever determined whether to apply strict liability based on location or population levels. Petition at 14-15. Plaintiffs ignore the appellate court's citation to the Restatement and the cases annotated in its comments supporting urban/rural analysis. *Hurley v. Port Blakely Tree Farms L.P.*, 332 P.3d at 475, fn. 6. The urban/rural distinction discarded in *Hurley* clearly contemplates population levels and the presence of property that may be damaged. In contrast to Plaintiffs' assertion, many cases deciding strict liability analyze whether an area is populated.

> Typically, [strict liability] has been found applicable when an activity, not regularly engaged in by the general public, is conducted in or near a heavily populated area, such that it necessarily subjects vast numbers of persons to potentially serious injury in the event of a mishap.

Levenstein v. Yale Univ., 40 Conn. Supp. 123, 126, 482 A.2d 724, 726 (Super. Ct. 1984). See *McLane v. NW. Natural Gas Co.*, 255 Or. 324, 328, 467 P.2d 635, 638 (1970) (storage of natural gas in a populated area found to be ultra-hazardous). Thus, population levels, and thus an urban/rural analysis, are a necessary part of strict liability analysis.

Plaintiffs also ignore that the Court of Appeals found persuasive a West Virginia case explicitly finding that logging was not subject to strict

liability under the Restatement factors. *Hurley* 332 P.3d at 474, citing *In re Flood Litigation*, 216 W.Va. 534, 607 S.E.2d 863 (2004). Thus, Plaintiffs are in error in stating that no court supports the lower court's holding.

Plaintiffs erroneously cite *Crosby v. Cox Aircraft Co. of Washington*, 109 Wn.2d 581, 588, 746 P.2d 1198 (1987), as a Washington Supreme Court case potentially conflicting with the *Hurley* court's holding. *Crosby* stands in part for the proposition that where numerous other causes of an activity's potential for injury or damage are present, strict liability should not be imposed. *Id.* The *Hurley* court correctly cited *Crosby* in finding against strict liability here, citing the many factors that can cause a landslide other than logging itself:

> [t]he steepness of the slope, the presence of a "rain on snow" zone, the occurrence of an exceptional storm event, the effectiveness of applicable governmental logging regulations, and the extent to which those regulations are adhered to, together or individually, may cause a landslide.

Hurley at 476. Thus, the lower court's decision follows, rather than conflicts, with *Crosby*. Plaintiffs point to no other case of this Court conflicting with the *Hurley* opinion in connection with strict liability jurisprudence. The Petition for Review should thus be denied under RAP 13.4(b)(1).

Plaintiffs also state that they are unaware of any case that a dangerous activity can be conducted in a populated area "simply" because the government has issued "ineffective" (sic) regulations. The issuance of governmental regulations is just another consideration. The *Hurley* court did not rely on this prong alone. The *Crosby* court also took this into consideration. *Crosby*, 109 Wn. 2d at 587-88.

2. **Plaintiffs have not Shown that the Decision Involves an Issue of Substantial Public Interest that Should be Determined by the Supreme Court.**

Plaintiffs cite RAP 13.4(b)(4), in passing, for the argument that the *Hurley* case should be reviewed by this Court as it involves matter of substantial public interest. Petition at 10. However, casual review of the Petition reveals no argument in connection with the claimed public interest. In the absence of argument on the cited rule, this Court should deny the Petition.

3. **Plaintiffs have not Requested Review of the *Hurley* Court's Other Holdings.**

Plaintiffs have presented no argument that the *Hurley* court's holdings with respect to trespass and Don Zepp's alleged negligence were error. Thus, this Court should not consider those holdings as submitted for review. RAP 10.3(a)(5)-(6); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.2d 418 (Div. 2, 2002).

II. CONCLUSION

Based on the foregoing, Don Zepp respectfully requests that this Court deny Plaintiffs' Petition for Review.

DATED this 8 day of October, 2014.

Respectfully submitted,

MARK J. DYNAN, WSBA# 12161
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On or about the 8th day of October, 2014, the undersigned served pursuant to RAP 18.5(b) all parties listed below with copies of the foregoing to the following via ABC Legal Messenger Service, with instructions for delivery and/or by U.S. Mail and/or by e-mail:

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I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 8th day of October, 2014.

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RE: *Don Zepp, d/b/a Don Zepp Logging, Respondent, vs. Jerome C. Hurley and Bessie M. Hurley, et al., Petitioners*

Case Number: 90759-5
(Court of Appeals No. 7143-9-I)

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