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

NO. 44568-9-II

JEROME C. HURLEY and BESSIE M. HURLEY, et al.,

Appellants,

v.

CAMPBELL MENASHA, LLC, et al.,

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This case was filed on behalf of fourteen families impacted by three sets of slides that hit their properties on January 7, 2009. A Department of Natural Resources aerial photograph shows the large brown runout from Menasha's Martin Road landslides coursing through the Glenoma residential area in the middle of the picture. (A couple of the precipitating landslides can be seen in the area clearcut by Menasha above the runout.) The brown runout from the Lunch Creek landslide is on the right or easterly side of the picture. (Zepp Logging's triangular shaped clearcut is at the head of that slide.)



Prior to trial, the plaintiffs' strict liability, trespass and nuisance claims were dismissed on summary judgment. So, too, the trial court dismissed negligence claims against one of the logging companies (Don Zepp Logging). This appeal concerns only those summary judgment rulings.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to grant summary judgment to plaintiffs on their ultra-hazardous activity strict liability claim and granting the defendants' cross-summary judgment motion to dismiss those claims. CP 3:1231-1238.

2. The trial court erred in granting the summary judgment motion dismissing plaintiffs' trespass and nuisance claims. CP 3:1340-1345.

3. The trial court erred in granting defendant Zepp's motion for summary judgment. CP 4:1488-1492.

III. STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether clearcut logging on steep, unstable slopes constitutes an abnormally dangerous activity subjecting the defendants to strict liability?

2. Whether material facts were in dispute with regard to whether clearcutting a steep, unstable slope above a residential community constitutes a nuisance?

3. Whether a trespass occurs when logging causes a steep, unstable slope to slide onto adjacent properties?

4. Whether negligence claims can be dismissed on summary judgment if the defendant only shows it complied with regulations, contract provisions and industry custom, but does not provide evidence that it acted with reasonable care?

5. Whether the facts were in dispute even as to Zepp's claim that it acted in conformance with regulations, its contract, and industry custom?

IV. STATEMENT OF FACTS

A. The Impact of Clearcutting and Logging Roads on Slope Stability

Clearcutting and logging roads have an unavoidable, de-stabilizing effect on steep slopes. The cause and effect relationship is well recognized in the scientific community and was summarized by Dr. Brummer, a highly qualified geomorphologist who has studied the issue extensively. CP 27-67; 106-131; 1166-1172. Clearcutting kills trees. When the roots die, the stability the roots provided is lost, too. The roots

die slowly over many years, so the loss of root strength increases in the years following the clearcut. Over time, the loss of root strength from the cut trees is offset by the growth of new roots from re-planted trees. Root strength reaches its lowest point about ten years after the clearcut. Depending on growing conditions, the new tree roots have restored root strength approximately 20 years after the clearcut. CP 1:112 (¶ 14). Until then, the slope is highly vulnerable to sliding if hit by heavy winter rains. CP 3:1170-1171.

Clearcutting also significantly increases the amount of water entering the ground which significantly increases the probability of slope failure. CP 1:111-12 (¶¶ 10-14). As John LaManna, one of the defendants' consultants, explained in the State's Forest Practices Watershed Manual, "A rain-on-snow event on slopes with immature forests will produce significantly greater volumes of runoff than an event on slopes with mature forests." CP 1:111 (¶ 10). Studies have shown that clearcutting increases the runoff from water from melting snow packs by 50 to 400 percent. *Id.* "The increase is due both to greater snow accumulation on logged slopes than heavily forested slopes and by a more rapid melting of snow on logged slopes than forested slopes." *Id.*

These facts were not in dispute. For instance, the geologist retained by Menasha's logger, Ed Heavey, testified that scientific studies have established the mechanisms by which clearcutting impacts the amount of water reaching the soil:

Q And are you aware that there are studies that indicate that the amount of water running off a clearcut slope is going to be greater than the amount coming off of a forested slope?

A Yes, I am aware of those studies.

Q And would you dispute those studies in any way?

A No, I would not.

Q Are you aware that there are studies that indicate that the amount of snow on a clearcut slope is going to be greater than the amount of snow in a forested slope?

A Yes, I'm aware of those studies.

Q Do you know of anything to the contrary?

A No, I don't know of anything to the contrary.

Q Are you aware of the studies that indicated that the rate of melting of that snow tends to be greater on a clearcut slope than in a forested environment?

A I am aware of those studies.

Q Are you aware of anything to the contrary?

A No, I'm not.

CP 3:1189-1190 (Heavey Dep. at 47:18 – 48:11).

Because of the unavoidable physical impacts resulting from logging (*e.g.*, loss of root strength; change in hydrology), slope instability necessarily increases when slopes are clearcut. Various studies have documented this indisputable cause and effect relationship. Depending on the study, the increase in landslides may double or may increase as much

as 33-fold (compared to the landslide rates in forests that have not been clearcut). CP 1:111. But there always is at least a doubling of the risk.

The defendants did not dispute the numerous studies which document that the rate of landsliding in areas that have been clearcut is anywhere from double to 33 times greater than the rate of landsliding in mature forests. Indeed, they concurred. CP 3:1185, 1195 (agrees studies have shown logging increases landslide risks and he has “no reason to doubt” that those studies show two-fold to 33-fold increase in landslides associated with clearcutting).

Moreover, data specific to the Glenoma area bears out this relationship. Mr. Heavey acknowledged that after a different large storm in 1996, a landslide inventory in the Kosmos watershed (which includes the plaintiffs’ properties) identified 64 new slides. All but five were linked to clearcutting and logging roads. CP 3:1196-1197

Likewise, in the ten years following completion of the Kosmos Watershed Analysis, there were eight additional slides in the Kosmos unit. Every single one was linked to clearcutting, as Mr. Heavey acknowledged:

Q I think in your file there was a copy of the 10-year review on the Kosmos Watershed, is that right?

A Correct.

Q Did you notice in there that there had been a number of landslides in the five years immediately preceding this report?

A Yes.

Q Did you notice that the report said that all of the landslides were associated with young, second growth forests, 5 to 20 years of age?

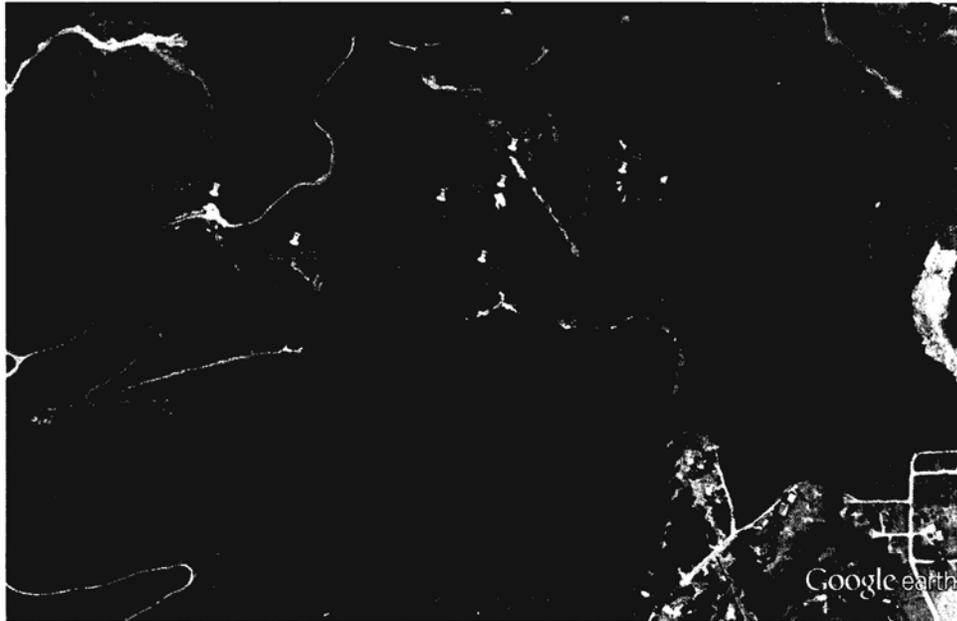
A Yes.

Q All of them, right?

A Yes.

CP 3:1185-86. Thus, there is no factual dispute. Clearcutting on steep slopes creates a much greater risk of landslides compared to natural conditions.

Logging roads are another cause of increased landsliding. The logging road at issue here was cut into a steep hillside, resulting in an over-steepened embankment on the uphill side. “The over-steepened embankment is more prone to sliding than the land in its natural condition.” CP 1:112-113 (¶ 16). An example of this is seen in this picture of one of the roads used by Menasha to log the land above the Martin Road plaintiffs’ homes.



CP 1:132 (Ex. B). (Part of the Glenoma community is visible in the bottom right portion of the photo.)

It is also undisputed that the landslides that occurred on the mountainside resulted in dams forming on the small streams that drain that area. CP 1:108-110 (¶¶ 5 -7) and 1:123. The dams formed as a result of the landslides sliding into the stream channels bringing with them logs, logging debris, uprooted trees that had been left in the stream buffers, boulders, rocks, soil, and other debris. Water would pond behind these un-engineered dams. When the force of the water became too great, the dams gave way creating what are known as “dam break floods.” *Id.* These floods released torrents of water, debris, boulders, logs, standing

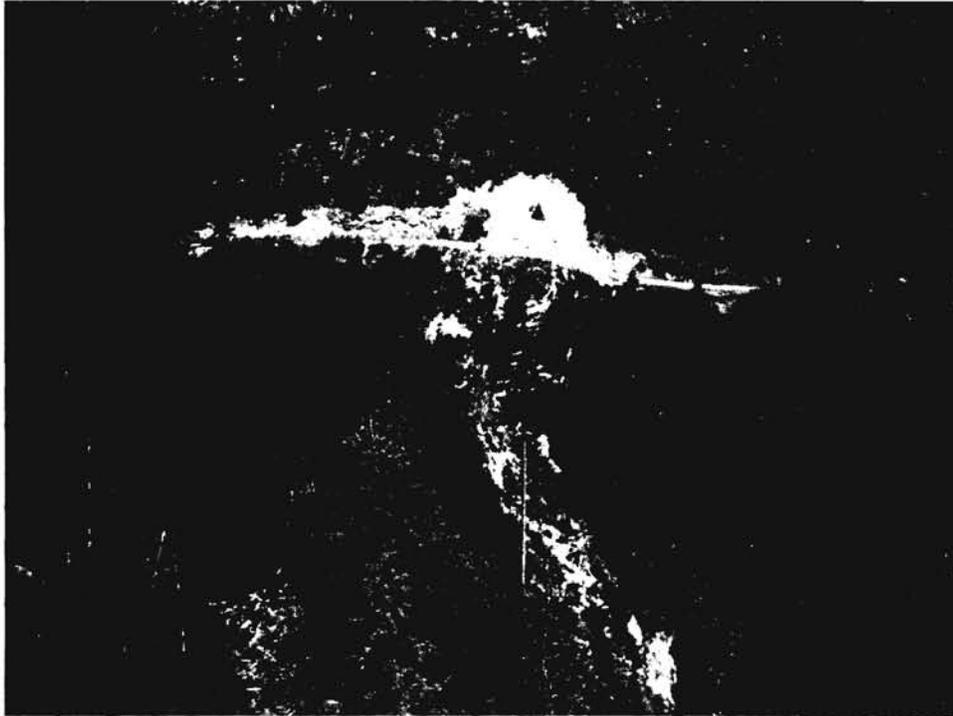
CP 1:111-112 (¶ 13).

B. Menasha's Clearcut Was the Site of Numerous Landslides and Debris Flows During a Storm on January 7, 2009

Menasha clearcut the hillside above Glenoma in 2000.¹ It is undisputed that seven landslides occurred within that 117 acre clearcut during a storm on January 7, 2009 (right when root strength would be at its weakest). Attached to the Second Declaration of Chris Brummer as Exhibit B and reproduced here is an aerial photograph on which the top of each landslide is identified by a “push pin” marker:

¹ The so-called “Martin Road slides” originated on land now owned by the defendant, Campbell Menasha LLC. But at the time of the logging, the land was owned by the defendant, Menasha Forest Products. Subsequently, The Campbell Group purchased Menasha. We refer to the two companies interchangeably.

Menasha applied for the permits to clearcut the land and then hired defendant B & M Logging to do the cutting. We refer to The Campbell Group, Menasha and B & M Logging, collectively, as “the Martin Road defendants.” B&M has settled out.



CP 1:112-113 (¶ 13 and Ex. F thereto).

The storm at issue in this case occurred in January of 2009. It resulted in numerous landslides in and immediately downhill of clearcuts and logging roads, consistent with the scientific studies that have associated increased landslides with logging activities:

The vast number of slides that occurred [during the January 2009 storm] originated in recently logged areas, at roads, or in second growth areas below recently logged areas, even though most of the landscape was not recently logged. In other words, a greatly disproportionate number of slides were associated with recent logging which is consistent with the science that indicates that logging increases the amount of water entering the ground, increasing the propensity of unstable slopes to slide.

trees, and everything else that was in its way down the mountainside and onto the property of the plaintiffs below. The wall of debris and other water reached a height of 30 to 40 feet, scouring the tiny channels into small gorges. *Id.* The plaintiffs report four separate dam break torrents inundating their properties during the course of the day and night of January 7, 2009. *Id.*

The adjacent Lunch Creek slide emanated directly below a clearcut logged by Don Zepp Logging between January and April of 2006. CP 5:1617. The land was owned by Port Blakely which has settled.

C. Course of Proceedings

The lawsuit was filed on November 4, 2010. CP 1:1-12. An amended and second amended complaint were also filed. CP 1:13-26 and CP 2:754-767. The plaintiffs moved for summary judgment on their strict liability claim. CP 285-327. The motion was denied and the Court dismissed the claim instead. CP 1231-1238. Defendant Campbell-Menasha filed a summary judgment motion to dismiss plaintiffs' nuisance, and trespass claims. CP 3:1239-1261. The other defendants joined the motion (Pope Resources, CP 3:1284-1286; Port Blakely-Island Timber, CP 3:1281-1283; Zepp Logging, 3:1277-1280). The defendants' motion was granted in part and denied in part on July 6, 2012. CP 3:1340-1345.

Subsequently, Don Zepp Logging's summary judgment motion to dismiss the negligence claims against it (CP 3:1356-1362) was granted, too, CP 4:1488-1492.

Subsequent to the summary judgment rulings, the negligence case was bifurcated for trial. The eleven plaintiff families who were impacted only by the Martin Road slides (the slides precipitating the large runout in the middle of the picture on page 1 of this brief) were in trial against Menasha only for six weeks. A defense verdict was returned on December 14, 2012. The other cases have been settled with the exception of claims against the Lunch Creek slide logger, Don Zepp Logging.

V. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate when the court finds there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). On appeal, the appellate court sits in the same position as the trial court and conducts its review *de novo*. *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).

The usual summary judgment standards apply. The court must consider all facts submitted and all reasonable inferences from the fact in the light most favorable to the non-moving party. *Wilson v. Steinbach, supra*. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.*

B. Clearcut Logging on Steep, Unstable Slopes Constitutes an Abnormally Dangerous Activity Subjecting the Defendants to Strict Liability

Any person carrying on an “abnormally dangerous activity” is strictly liable for ensuing damages. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6, 810 P.2d 917, 817 P.2d 1359 (1991). Whether an activity is “abnormally dangerous” is a question of law for the court to decide. *Siegler v. Kuhlman*, 81 Wn.2d 448, 473 P.2d 445 (1972). *See also Patrick v. Smith*, 75 Wash. 407, 134 P. 1076 (1913) (vibration damage to adjacent buildings caused by blasting).

In *Pacific Northwest Bell Tel. Co. v. Port of Seattle*, 80 Wn.2d 59, 49 P.2d 1037 (1971), Washington adopted Restatement (Second) of Torts § 520 (1977) as a guide for deciding what activities should be considered abnormally dangerous. Section 520 states:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Comment f to § 520 states that all six factors are to be considered, but it is not necessary that all factors be present. Ordinarily, though, at least several are present when a court applies strict liability principles:

Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.

Restatement (Second) of Torts § 520, comment f (1977).

In *Klein v. Pyrodyne Corp.*, *supra*, 117 Wn.2d at 11, the Court found a fireworks event at a Fourth of July program at the county fairgrounds to be subject to strict liability, even though only four of the six enumerated factors were present:

In sum, we find that setting off public fireworks displays satisfies four of the six conditions under the Restatement test; that is, it is an activity that is not “of common usage” and that presents an ineliminably high risk of serious bodily injury or property damage. We therefore hold that conducting public fireworks displays is an abnormally dangerous activity justifying the imposition of strict liability.

Id.

We address each of the Restatement factors in the following subsections of this brief.

1. The existence of a high degree of risk of some harm to the person, land or chattels of others

In *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 863-65, 567 P.2d 218 (1977), a case involving harm to an organic farm from drift of an aerial pesticide application, the Supreme Court discussed the applicability of the “high degree of risk” factor:

It is undisputed among the authorities cited to us that crop dusting involves an element of risk of harm. In Note, Crop Dusting: Legal Problems in a New Industry, 6 Stan.L.Rev. at 72-75, the author points out that the drift of chemicals is virtually unpredictable due to three “uncertain and uncontrollable factors: (1) the size of the dust or spray

particles; (2) the air disturbances created by the (applying aircraft); and (3) natural atmospheric forces.” The author discusses these three factors in detail and notes:

In the opinion of leading scientists who are working to alleviate the dangers of crop dusting, it is impossible to eliminate drift with present knowledge and equipment. Experience bears this out.

6 Stan.L.Rev.at 75. The author states further that the problem of drift is reduced but not eliminated by the use of helicopters. Subsequent commentators have made the same observations about the uncontrollability of drift. *See, e. g., Comment, Crop Dusting: Two Theories of Liability?*, *supra* at 477-79. In this case, there is no evidence that it is possible to eliminate the risk of drift in crop spraying.

Likewise, the evidence here (discussed above and below) establishes that it is impossible to eliminate the landslide risks associated with clearcutting on steep, unstable slopes. Among other things, increasing slide risks by 200% to 3300% demonstrates the high degree of risk associated with clearcutting steep slopes.

Evidence of the high risk is also provided by the State’s regulations of clearcutting on steep slopes. The court in *Klein v. Pyrodyne Corp.*, *supra*, 117 Wn.2d at 7-8 found evidence that firework displays involved a high degree of risk by noting the stringent regulation of firework activities. The “dangerousness of fireworks displays is evidenced by the elaborate scheme of administrative regulations with which pyrotechnicians must comply.” *Id.* at 7. “Pyrotechnician must take

and pass a written examination . . .” *Id.* “Regulations also govern such matters as the way in which the fireworks at public displays are constructed, stored, installed, and fired.” *Id.* at 8. The Court concluded that “the necessity for such regulations demonstrates the dangerousness of fireworks displays.” *Id.*

Moreover, while heavily regulated, the court noted that the regulations did not eliminate the risks:

Although we recognize that the high risk can be reduced, we do not agree that it can be eliminated. Setting off powerful fireworks near large crowds remains a highly risky activity even when the safety precautions mandated by statutes and regulations are followed. The Legislature appears to agree, for it has declared that in order to obtain a license to conduct a public fireworks display, a pyrotechnician must first obtain a surety bond or a certificate of insurance, the amount of which must be at least \$1,000,000 for each event. RCW 70.77.285, -.295.

Id. at 8.

Likewise, the logging industry is heavily regulated. *See, e.g.*, chapters WAC 222-10 (environmental review); WAC 222-22 (watershed analysis); WAC 222-24 (road construction and maintenance); WAC 222-30 (timber harvesting); WAC 222-34 (reforestation); WAC 222-46 (enforcement). Logging on steep slopes is subject to particularly detailed regulations, requiring such things as certification of watershed resource specialists and experts; two levels of assessments; special rules developed

on a case-by-case basis; and enhanced monitoring requirements. *See* WAC 222-22-030; -050; -060; and -070. As in *Pyrodyne*, these extensive regulations provide evidence of the high risks associated with this activity.

But, ultimately, as with the fireworks regulations, these logging regulations do not preclude loggers from taking the risk of logging on steep unstable slopes, even those in the most vulnerable part of the “rain-on-snow” zone and directly above private residences. (The State’s rules are aimed at protecting public resources, not private property. WAC 222-22-010(1).) The numerous landslides that occur at and immediately below logging sites each time Western Washington is hit by heavy winter rains is testament to the risks that remain, despite the regulatory scheme.

Paul Kennard, another highly qualified geomorphologist, CP 1:68-71, set forth volumes of evidence to support the proposition that clearcutting on steep, unstable slopes directly above a residential area creates “a high degree of risk of harm.” CP 1:68-94; 1:226-259; 3:1162-1163. Simply put, logging on these slopes is risky business. Logging and road building on these steep, unstable slopes increases the risk of debris flows from a natural event occurring once every several centuries to a man-made event occurring once every decade or two. CP 1:86.

Moreover, when logging activities are undertaken on steep slopes in drainages that lead directly to residential areas below, the risk of harm to residential properties is heightened. The debris flows follow the drainageways down to the valley floor where residential areas exist. A slide that begins in any of the many small headwater drainages will inevitably work its way into the main stream system – gathering bulk along the way – before landing on and burying the residential property below. *Id.* The funneling effect of the drainages, heightens the risk to valley residential properties from landslides initiated in any of the innumerable small drainages on the mountainside.

2. The likelihood that the harm that results from it will be great

No one disputed that debris flows cause great harm. “Debris flows are the most destructive type of landslide and have caused the most deaths worldwide.” CP 1:86 (citations omitted). “[D]ebris flows bulk up as they course long distances from the point of initiation. Their volumes increase by thousands of percent, resulting in escalating downstream destructiveness.” *Id.* These highly destructive landslides are recognized in the literature to “present the most risk to lives and property.” *Id.* (quoting Benda, et al., *Slope Stability for Forest Land Managers, A Primer and Field Guide* (1997)).

The Supreme Court explained in *Langan* (the pesticide spray case) that in assessing the magnitude of the possible harm, it is appropriate to focus on the nature of the surrounding land uses:

Whether there will be great harm depends upon what adjoining property owners do with their land. For example, one property owner may grow wheat (a narrow-leaved crop) and his neighbor may grow peas (a broad-leaved crop). The wheat farmer may wish to spray his crop with the chemical herbicide (weed killer) 2,4-D, which kills only broad-leaved plants. If the 2,4-D drifts onto the pea farmer's property, his entire crop could be destroyed since peas are broad-leaved plants. Frear, *Chemistry of Insecticides, Fungicides and Herbicides* 316 (2d ed. 1948). The reported cases are illustrative of the many possible fact situations which indicate that neighboring property may be sensitive to and damaged by the spraying activity of an adjoining landowner. *See* Comment, Crop Dusting: Two Theories of Liability?, 19 *Hastings L.J.* 476, 479, n. 38. . . . The extent of damage can be very high. *See, e. g., Crouse v. Wilbur-Ellis Co.*, 77 *Ariz.* 359, 272 P.2d 352 (1954) (plaintiff recovered \$10,000 when his cantaloupe crop was damaged by insecticide containing sulphur); *Sanders v. Beckwith*, 79 *Ariz.* 67, 283 P.2d 235 (1955) (plaintiff recovered \$10,000 when his dairy herd was injured by DDT and benzene hexachloride).

Langan, supra, 88 Wn.2d at 863 (emphasis supplied).

As this case demonstrates, many forest lands are bordered by lands with uses that are not compatible with landslides. Whether it is private residential development, mountain cabins, or the State's interest in the natural resources in its streams, many adjacent uses are "sensitive to and damaged" when landslides occur. Homes and cabins are not built to

withstand the force of a mighty debris flow. “Debris flows can break and toss mature conifer trees and mobilize truck-size boulders. Typical rural dwellings are not designed to withstand the impulse of forces from debris flow impacts.” CP 1:87. Even less developed uses like pastures, fields and salmon streams cannot be defended from the thick flow of mud, debris, and sediment.

Further magnifying the harm is that there typically is “virtually no warning to downstream residents, once the debris flow starts, that they are in harm’s way.” *Id.*

Thus, there is a great likelihood that debris flows will cause great harm. The second factor applies in this situation, too.

3. Whether the risk cannot be eliminated by the exercise of reasonable care

The summary judgment record provides un-contradicted evidence of the inability of even careful loggers to eliminate the high degree of risk associated with logging on steep slopes. Clearcutting inevitably results in the death of the tree roots that tend to hold the slope in place:

Trees cannot be logged without killing their roots. No amount of due care can avoid that biological consequence. Living roots bind the soil and reduce instability. As the roots die, their binding effect dies with them, increasing landslide risks. Numerous studies document that certain types of slope failures increase when tree roots decay after logging.

CP 1:87.

Another inevitable consequence of clearcut logging on these slopes is the impact to hydrology. “It is impossible to cut trees without modifying the amount of water entering the soil by several processes, including altering snow accumulations and melting patterns, and so-called rain-on-snow events. The altered slope hydrology increases landslide risks.” *Id.*

As Kennard explains, clearcutting results in greater snow depths accumulating on the mountainside than would accumulate if a mature forest were in place. Furthermore, warm winds will more rapidly melt exposed snow than snow beneath a heavy forest canopy. These processes inevitably result in larger amounts of water running off at a faster rate from a recently logged slope compared to one in its mature forest state.

Also, there is an inherent inability to identify and avoid the riskiest areas for logging on a steep hillside. Logging companies, of course, make some effort to avoid the riskiest sites. But the science of predicting landslides is far too uncertain to rely on those predictions with any certainty. CP 1:88. As Kennard, the geomorphologist explained, landslide risks and initiation zones are not spread uniformly across a steep mountainside. There are certain areas that are more prone to initiate a

landslide than others. But the unavoidable problem is that these extremely high risk areas cannot be identified through the exercise of reasonable care. “Unmapped steep bedrock hollows [particularly susceptible to sliding] are difficult for those even with specialized slope stability expertise to field identify from surficial characteristics. This is because hollows may not have surface expression.” CP 1:88.

Yet other unavoidable risks were identified in a geotechnical report prepared for defendant Pope Resources (implicated in the Rainey Creek slide (now settled)) by geologist, Lee Benda. In 2006, in support of Pope’s planned logging, Mr. Benda warned about the uncertainties inherent in trying to predict the impact of logging on already unstable slopes:

The slope stability assessment is based on up-to-date scientific information on landsliding and the effects of forestry activities on landslide initiation. However, any slope stability investigation may contain some inaccuracies and limitation because of 1) the relatively short and unique history of storms that triggered the landslides used to create the mass wasting map units (e.g. longer and different time periods and larger storms than what occurred during the aerial photo record may yield landslides in areas previously mapped as relatively stable) and 2) the incomplete scientific understanding of all landslide mechanisms. **For these reasons, the mass wasting map units many not in all cases completely identify all of the potentially unstable areas.**

CP 1:244 (emphasis supplied).

In *Langan*, the Court found that this ‘unavoidable risk’ factor was satisfied because “the uncontrollability of dust or spray drift . . . cannot be eliminated by the exercise of reasonable care.” 88 Wn.2d at 864. The same circumstances are present here. No amount of reasonable care can eliminate the risk associated with clearcut logging on steep, unstable slopes. The third factor is present, too.²

4. Whether the activity is not a matter of common usage

Again, reference to *Langan* is useful to understand how this factor is utilized:

The Restatement (Second) of Torts, s 520(i) (Tent. Draft No. 10, 1964), observes “An activity is a matter of common usage if it is customarily carried on by the great mass of mankind, or by many people in the community.” Although we recognize the prevalence of crop dusting and acknowledge that it is ordinarily done in large portions of the Yakima Valley, it is carried on by only a comparatively small number of persons (approximately 287 aircraft were used in 1975) and is not a matter of common usage.

Id.

Even something as commonplace as setting off fireworks on the Fourth of July is not deemed to be “a matter of common usage” as that

² The jury’s verdict makes clear that even with the exercise of reasonable care, the risks associated with clearcut logging on steep, unstable slopes cannot be eliminated.

factor is used in determining strict liability. As the Court explained in *Klein v. Pyrodyne Corp., supra*:

Pyrodyne argues that the factor stated in clause (d) is not met because fireworks are a common way to celebrate the 4th of July. We reject this argument. Although fireworks are frequently and regularly enjoyed by the public, few persons set off special fireworks displays. Indeed, the general public is prohibited by statute from making public fireworks displays insofar as anyone wishing to do so must first obtain a license. RCW 70.77.255.

Id., 117 Wn.2d at 9.

Certainly logging is a common activity in eastern Lewis County and in some other portions of Western Washington. But logging on steep, unstable slopes in areas prone to rain-on-snow storms directly above residential areas is very *uncommon* in Lewis County (and elsewhere in the State). “[T]he vast majority of the timberlands [in the Glenoma area] are remote from houses . . .” *Id.* at 5. “[D]ebris flows from most forested land would not directly affect dwellings.” *Id.* Having reviewed the relationship of slide-prone timberlands to residential areas in the Glenoma area and elsewhere, Mr. Kennard concludes:

A review of multiple watershed analysis units reveals that only a small portion of the timberland base has the potential to impact homes, if debris flows were generated. This trend also holds for the Kosmos watershed analysis area. Because of this, I conclude that logging in areas with potential to generate debris flows that hit residential areas is not an activity of common usage.

CP 1:89.

Thus, the fourth factor is present here, too.

5. Whether the activity is inappropriate to the place where it is carried on

In *Langan*, the Court decided that even in a heavily agricultural area, crop dusting was not an appropriate activity when done in an area where organic farms or other incompatible uses were nearby:

Given the nature of organic farming, the use of pesticides adjacent to such an area must be considered an activity conducted in an inappropriate place.

Langan, supra, 88 Wn.2d at 864.

Likewise, logging on steep, unstable slopes is not “an appropriate activity” when done in an area just uphill of residential areas. This fifth factor is satisfied in this case, too.

6. The value of the activity to the community in comparison with its dangerous attributes

The “value to the community factor” has been applied to render even an activity as beneficial as pest control subject to strict liability:

As a criterion for determining strict liability, this factor has received some criticism among legal writers. In 2 Harper & James, *Law of Torts*, Comment to s 14.4 (Supp. 1968), the authors suggest that section 520(f) is not a true element of strict liability: “The justification for strict liability, in other words, is that useful but dangerous activities must pay their own way.” *See also* Note, Regulation and Liability in the

Application of Pesticides, 49 Iowa L.Rev. 135, 144-45 (1963).

There is no doubt that pesticides are socially valuable in the control of insects, weeds and other pests. They may benefit society by increasing production. Whether strict liability or negligence principles should be applied amounts to a balancing of conflicting social interest the risk of harm versus the utility of the activity. **In balancing these interests, we must ask who should bear the loss caused by the pesticides.** See Note, Regulation and Liability in the Application of Pesticides, *supra*; Prosser, Law of Torts s 59 (2d ed. 1955); *Siegler v. Kuhlman*, 81 Wash.2d 448, 502 P.2d 1181 (1972) (Rosellini, J., concurring).

In the present case, the Langans were eliminated from the organic food market for 1973 through no fault of their own. **If crop dusting continues on the adjoining property, the Langans may never be able to sell their crops to organic food buyers. Appellants, on the other hand, will all profit from the continued application of pesticides. Under these circumstances, there can be an equitable balancing of social interests only if appellants are made to pay for the consequences of their acts.**

We realize that farmers are statutorily bound to prevent the spread of insects, pests, noxious weeds and diseases. RCW 15.08.030 and RCW 17.10.140-. 150. But the fulfillment of that duty does not mean the ability of an organic farmer to produce organic crops must be destroyed without compensation.

Langan, supra at 865 (emphasis supplied).

Consistent with this analysis, the Supreme Court found that strict liability should be imposed for aerial spraying. *See also, Vern J. Oja &*

Associates v. Washington Park Towers, Inc., 89 Wn.2d 72, 76-77, 569 P.2d 1141 (1977) (strict liability imposed for socially useful pile driving).

A similar result should be reached here. We do not question that logging provides various benefits to the community. But “[w]hether strict liability or negligence principles should be applied amounts to a balancing of conflicting social interests the risk of harm versus the utility of the activity.” *Langan, supra*. In balancing these interests, the Supreme Court in *Langan* stated: “[W]e must ask who should bear the loss caused by the pesticides.” *Id.* That should be the central question here, too. Unlike the farmer in *Langan* who was “statutorily bound” to control pests (and yet was strictly liable anyway), the defendants here were not complying with any statutory mandate. They were simply out to make money cutting trees. In that pursuit, they took a calculated risk in logging steep, unstable slopes directly above residential areas. Whether the slopes slid or not, the defendants were sure to realize a profit for their activities. If the risk did not materialize, then so much the better. But if the risk did materialize – if the hillside gave way and destroyed the homes and lives of people below – is there any question “who should bear the loss caused by” that logging? “Under these circumstances, there could be an equitable balancing of social interests only if [the defendants] are made to pay for the

consequences of their acts.” *Langan, supra*. For all these reasons, the Court should find that the slide risks associated with clearcut logging on steep slopes makes it an ultra-hazardous activity and strict liability applies when clearcutting causes landslides.

C. Plaintiffs’ Nuisance Claims Should Not Have Been Dismissed

The tort of nuisance focuses on whether the activity or use of property is reasonable in the particular setting. “A nuisance is an unreasonable interference with another's use and enjoyment of property.” *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998). RCW 7.48.120 defines nuisance as “unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property.” A second statutory definition is provided in RCW 7.48.010 which states:

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

In the classic formulation, maintaining a pig farm is reasonable in

an agricultural district, but not in a residential district. Or, as seen in Washington's cases, perching a large reservoir on a hillside above a residential area and building a sanitarium or a gas plant in a residential neighborhood are all classified as nuisances. See *Ferry v. Seattle*, 116 Wash. 648, 203 P. 40 (1922); *Everett v. Paschall*, 61 Wash. 47, 50–53, 111 P. 879 (1910); *Champa v. Washington Compressed Gas Co.*, 146 Wash. 190, 262 P. 228 (1927). To be actionable, the nuisance must be “injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property.” *Grundy v. Thurston County*, 155 Wn.2d 1, 7, 117 P.3d 1089 (2005) (quoting RCW 7.48.010).

For purpose of the tort of nuisance, the actor's conduct, intent, or carelessness is irrelevant. It does not matter for the purpose of establishing liability why, in *Ferry*, the City of Seattle planned to build the reservoir or why, in *Champa*, the gas company built the gas plant. Likewise, it does not matter why Menasha or Zepp chose to log these steep parcels above Glenoma or that they had no ill intent. The issue is simply whether their use of those lands unreasonably interfered with the plaintiffs' “comfortable enjoyment of their life and property.” RCW 7.48.010.

The facts establishing the existence of a nuisance are independent

of allegations of negligence:

[T]he alleged existence of a nuisance refers to the interests invaded, and not to any particular kind of conduct which has led to the invasion. Facts establishing the existence of a nuisance may be alleged independent of allegations of negligence. The allegation of facts establishing negligence does not foreclose the allegation of facts establishing a resultant nuisance, for it is, of course, possible for the same act to constitute negligence and also give rise to a nuisance. *Kilbourn v. City of Seattle*, 1953, 43 Wash.2d 373, 382, 261 P.2d 407, 413.

Peterson v. King County, 45 Wn.2d 860, 862-863, 278 P.2d 774 (1954).

In some instances, a nuisance arises from negligent conduct and, in such a case, the nuisance claim is subsumed within the negligence claim. *Lewis v. Krussel*, 101 Wn. App. 178, 183, 2 P.3d 486 (2000). But the plaintiffs here asserted nuisance independent of any negligence. In particular, plaintiffs alleged that the nuisance was the result of the defendants' intentional (not negligent) acts. CP 1:21-25 (¶¶ 42-56).

Menasha and Zepp intentionally clearcut the steep slopes above Glenoma and, thereby, created a nuisance – *i.e.*, an incredibly steep, unstable slope that was poised to slide if a large rainstorm hit in the next 10-20 years, before new trees could re-establish adequate root strength. The nuisance existed once the slope was cut and the roots began to die. From that point on, the down-slope neighbors were exposed to hazards that a jury could find were unreasonable. But the trial court did not allow

the jury to decide this claim.

In *Ferry v. Seattle, supra*, the nuisance was prospective. An injunction was issued before the reservoir was constructed to eliminate the risk that it would fail. Likewise, the sanitarium in *Paschall, supra*, was deemed a nuisance when it came into existence, not when disease organisms escaped. Likewise, the steep slope above Glenoma, shorn of all its trees, with roots dying and losing their strength to hold the slide prone slope in place, was a nuisance. All it took to trigger multiple landslides was one large rainstorm before the new trees grew substantial roots. Menasha and Zepp were playing with fire – hoping that one of our periodic Pineapple Expresses would not hit before the new forest matured enough to re-stabilize the slope.

The reasonableness of Menasha's and Zepp's use of the land is judged by the compatibility of the clearcut on a steep, unstable slope with the adjacent residential uses on the lands below, not the good faith, due care, or regulatory compliance of Menasha's activities:

A person who conducts a business or a plant lawfully and in the best manner practicable with a sound operation may still commit a nuisance if the operation interferes unreasonably with other persons' use and enjoyment of their property. An actionable nuisance must either injure the property or unreasonably interfere with enjoyment of the property. No one has a right to pursue even a lawful business if that person injures a neighbor without

compensating the neighbor for the damages sustained.

Tiegs v. Watts, 135 Wn.2d 1, 13 -14, 954 P.2d 877 (1998).

A sanitarium or reservoir might be built with due care, but that does not mean that such a use is appropriate in every setting. Thus, while clearcutting flat or gently sloping lands would not create a nuisance, a jury could determine that, even if Menasha and Zepp used due care, leaving a steep slope shorn of its trees in this particular location for twenty years constituted a nuisance. The trial court erred in taking this claim from the jury.³

D. Plaintiffs' Trespass Claims Should Not Have Been Dismissed

Plaintiffs alleged that Menasha's and Zepp's actions resulted in a trespass on the plaintiffs' properties when the steep hillsides they clearcut

³ Below, Campbell Menasha argued that plaintiffs' complaint only alleged a negligence-based form of trespass and, therefore, could not defend the motion to dismiss by recasting the claim as an intentional trespass. But our second amended complaint clearly alleges a nuisance separately from the negligence cause of action. CP 1:21-25, (Second Amended Complaint, ¶¶ 42-56).

Moreover, in evaluating a claim at the time of a summary judgment motion or at trial, the focus is not on the description of the claims in the complaint; plaintiffs' claims are to be evaluated by other evidence adduced in the course of the litigation. "It is not fatal that the complaint does not use the word 'nuisance;' for the true nature of a cause of action, stated in a complaint, must be determined by its allegations and the evidence offered in support of its prayer for relief." *Peterson v. King County*, *supra*, 45 Wn. 2d at 862. See also *Schoening v. Grays Harbor Comm. Hosp.*, *supra*, 40 Wn. App. 331, 337, 698 P.2d 593 (1985) ("Even if a plaintiff's theory was not made clear in their pleading, it certainly was made clear before argument on defendant's motion for summary judgment"). If it was not clear in the complaint, it certainly was clear during the summary judgment briefing that plaintiffs were alleging an intentional nuisance. The intentional nuisance claim should not have been dismissed because of any ambiguity in the earlier pleadings.

ended up in the plaintiffs' yards and fields. CP 1:13-26 (¶ 55). An action for trespass includes trespass by landslides and water. *Hedlund v. White*, 67 Wn. App. 409, 418 n. 12, 836 P.2d 250 (1992) (citing *Buxel v. King County*, 60 Wn.2d 404, 409, 374 P.2d 250 (1962)).

One who enters land (or causes an object, like debris and water to enter the land of another) without the owner's consent or other privilege is liable for trespass. Restmt. (2d) of Torts § 158. Trespass is an intentional tort. *Bradley v. American Smelting and Ref. Co.*, 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985). But "[t]he intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm." *Id.*, at 683, quoting W. Prosser, *Torts*, § 8 at 31 - 32 (4th ed. 1971). It is not necessary that the person intend to be trespassing. Restmt.(2d) of Torts § 163, cmt. b; W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 13, at 73 (5th ed. 1984). Thus, trespass occurs although the trespasser enters in good faith, by mistake, or without understanding that what he is doing is wrong. *Id.*, § 13 at 75.

Moreover, the intent element is linked to the event that leads to the invasion, here, clearcutting the slope. The defendant need not have intended that action to result in the invasion as long as there was a "reasonable foreseeability" that the invasion "could result" from the

intended action:

Under the modern theory of trespass, the law presently allows an action to be maintained in trespass for invasions that, at one time, were considered indirect and, hence, only a nuisance. In order to recover in trespass for this type of invasion [i.e., the asphalt piled in such a way as to run onto plaintiff's property, or the pollution emitting from a defendant's smoke stack, such as in the present case], a plaintiff must show 1) an invasion affecting an interest in the exclusive possession of his 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*.

Id. at 691 (quoting and adopting language from *Borland v. Sanders Lead Co.*, 369 So.3d 523, 529 (Ala. 1979) (emphasis supplied).

Here, there is no dispute that Menasha and Zepp intended to shorn the trees from the steep slopes above Glenoma. Those intentional acts satisfy the intent element of the tort.

The next issue is whether it was “reasonably foreseeable” that the clearcutting “could result in an invasion of the plaintiff’s property.” There was ample evidence in the declarations of Chris Brummer and Paul Kennard to support the plaintiffs’ view that the invasions (the slides) were “reasonably foreseeable,” *i.e.*, that landslides were reasonably foreseeable if a “Pineapple Express” hit the area before the new forest grew in. *See* CP 1:27-67; CP 1:106-225; CP 3:1166-1172; CP 1:68-94; CP 1:226-259;

CP 3:1162-1163. Indeed, as Menasha has partially acknowledged, CP 3:1241, the 2009 storm generated dozens of slides – nearly all of which were linked to logging activities. While the defendants were free to present contrary facts at trial to try to persuade a jury that the “reasonably foreseeable” element was not satisfied, the disputed facts in this case should have precluded the trial court from determining the issue as a matter of law. The trespass claims should not have been dismissed.

Moreover, even if there was no intent (or reasonable foreseeability) regarding the initial trespass, once the slides deposited thick mud and debris on the plaintiffs’ property, the defendants had a duty to remove it.

As explained in the Restatement:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

a) enters land in the possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

Restmt. (2d) of Torts, § 158 (emphasis supplied). Regardless whether Menasha and Zepp had the intent to deposit the mud on the plaintiffs’ property, they certainly intended to leave it there once the slides occurred.

There is no evidence that either of them removed their mud and debris from the plaintiffs' properties. This provided an independent basis for not dismissing the trespass claim.⁴

E. Plaintiffs' Negligence Claims Against Don Zepp Logging Should Not Have Been Dismissed on Summary Judgment

Three plaintiffs (Steve Rea, Alice Redmon, and the Sprinkle family) also had negligence claims against Don Zepp Logging arising out of the so-called "Lunch Creek" slide. Zepp asserted affirmative defenses that because the company had complied with regulatory and contractual requirements and industry custom, it could not be negligent. In its summary judgment motion, the issue presented was "whether Don Zepp should be dismissed from this case because he complied with the law/permits, industry standards, and the applicable contract?" CP 3:1358. Zepp asserted that because there is no law, industry standard, or contract provision which the company violated, it could not have breached its duty of care. *Id.*

Zepp's motion was premised on a fundamental misunderstanding of negligence law. A plaintiff need not establish a violation of a law, permit, industry standard, or contract to establish negligence. Instead,

⁴ As with the trespass claim, Menasha argued below that the pleadings were defective. But the subsequent briefing and declarations cured any possible defect in the earlier pleadings. *See* note 3, *supra*.

negligence is defined by a failure to exercise due care. *Jackson v. City of Seattle*, 158 Wn.App. 647, 659, 244 P.3d 425 (2010). Zepp's motion should have been denied because it was based on a fundamentally flawed legal premise.

Moreover, Zepp's reliance on his contract as a basis to avoid liability was particularly misplaced because his contract expressly provided that Zepp assumed responsibility for damage to third parties resulting from his logging activities. Thus, Zepp's reliance on his contract was wrong both as a matter of law and as a matter of fact.

1. Compliance with permit requirements and other laws does not insulate a defendant from a negligence claim

Zepp repeatedly asserted that because the company allegedly complied with the terms of the DNR permit, it could not be found to have breached its duty of care. This assertion is clearly wrong as a matter of law. Applicable regulations set minimum standards, but circumstances may require a greater degree of care. "Compliance with the legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable person would take additional precautions." Restmt. of Torts (2d) § 288C. *See also Phillips v. King County*, 136 Wn.2d 946, 963, 968 P.2d 871 (1998) (developer may need to exceed minimum county stormwater standards to avoid harm to adjacent property); *Estate of*

La Montagne v. Bristol-Myers Squibb, 127 Wn. App. 335, 345, 111 P.3d 857 (2005) (federal drug regulations provide “only the minimum requirements for drug manufacturers, [therefore] compliance with those regulations does not necessarily establish warnings were adequate”); *Curtis v. Perry*, 171 Wash. 542, 18 P.2d 840 (1933) (compliance with regulations “does not necessarily fulfill the obligation to exercise reasonable care under given circumstances”).

Thus, Zepp’s assertion that its compliance with the terms of the DNR permit exculpates or shields it from any potential liability was wrong as a matter of law and did not entitle it to summary judgment.

2. Compliance with industry customs does not insulate a defendant from liability for breaching the duty of care

Zepp’s contention that its alleged compliance with industry customs insulates him from a negligence claim is equally mistaken. The law has long recognized that while others in an industry may conduct their affairs in a certain way, there is no guarantee that the customary method of doing business is not negligent. As Justice Learned Hand stated years ago:

In most cases, reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what

is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

T.J. Hooper v. Northern Barge Corp., 60 F.2d 737, 740 (2nd Cir. 1932).

This passage and the rule it sets forth was quoted and adopted in *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974). In that case, the plaintiffs brought a negligence action against an ophthalmologist for failing to diagnosis glaucoma in a 32 year old woman. Uncontradicted expert testimony established that the universal custom among ophthalmologists was to forego glaucoma tests in patients under 40 (because the incidence of glaucoma at younger ages was small). Nonetheless, the Court held that the ophthalmologist was negligent as a matter of law for failing to administer a simple glaucoma test. Compliance with industry custom was no defense.

More recently, this concept was reiterated in *Ranger Insurance Company v. Pierce County*, 164 Wn.2d 545, 192 P.3d 886 (2008). In that case, a bail bond company posted appearance bonds on behalf of two corporate surety companies, Ranger Insurance Company and Granite State Insurance Company. Ranger sent a check for \$35,000 to the court clerk. Later, the bail bond company asked the clerk to apply \$20,000 of Ranger's funds to three forfeited bonds written on Granite State paper. The clerk complied. Ranger sued Pierce County alleging the clerk negligently

handled Ranger's \$35,000 deposit.

The Pierce County Clerk moved for summary judgment arguing it met the industry standard of care. The clerk's declaration stated that the clerk's actions "were fully consistent with the standard of care concerning receipt, allocation, and disbursement of funds as those exist in clerks' offices today and in 2000." *Id.* at 549. The trial court granted summary judgment in favor of Pierce County, holding that the declaration "resolves the issue in the County's favor on the question of violation of duty or failure to provide the requisite standard of care. . . ." *Id.*

The Supreme Court reversed. The Court explained that if the clerk's declaration had demonstrated that the clerk "acted as a 'reasonably prudent clerk' and did not breach its duty, then summary judgment is appropriate, as Ranger did not submit any evidence to rebut this declaration." *Id.* at 553. But the Supreme Court held that the declaration was not a sufficient basis for entering summary judgment against Ranger:

[A] simple statement indicating an individual acted according to the customs of the industry is not always determinative. In the words of Justice Oliver Wendell Holmes, "what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Helling v. Carey*, 83 Wn.2d 514, 518-19, 519 P.2d 981 (1974). Likewise, Judge Learned Hand opined a defendant "never may set its own tests . . . Courts must in the end say what is required. . . ." *Id.* at

519, 519 P.2d 981 (*quoting T.J. Hooper*, 60 F.2d 737, 740 (2nd Cir. 1932)). [The clerk's] declaration asserting the Pierce County Clerk acted according to the custom in its industry, does not establish the applicable standard of care as a matter of law.

Id. at 553-54.

Likewise, even if Zepp had filed a declaration demonstrating it complied with industry custom, that declaration would not have met his burden to demonstrate that it was entitled to judgment as a matter of law. Complying with the “custom in his industry” is not the same as meeting a standard of reasonable prudence. In *Ranger Insurance*, Pierce County argued that verifying a bond was underwritten by a surety before allocating the surety's funds to the forfeited bond is an “onerous obligation,” but the Court determined that “a reasonable jury could find a reasonably prudent clerk is required to verify the obligation nonetheless.” *Id.* Likewise, while Zepp claimed that there is “no duty for a logger to second guess the permitting process and regulations promulgated by a government agency,” CP 3:1158; a jury could determine that a careful logger would recognize that clearcutting steep slopes directly above a residential area was not a “reasonably prudent” course of action. The issue should not have been decided on summary judgment.

Moreover, unlike in *Ranger Insurance* when the clerk filed a

declaration setting forth the industry's customary practices, Zepp did not file a declaration in support of his motion setting forth an affirmative case of compliance with industry standards. Thus, there is not even a factual basis here for Zepp's claim that he complied with industry customs or standards. Its motion is fatally flawed legally and factually.

Finally, here, unlike in *Ranger Insurance*, the plaintiffs are not simply demonstrating the lack of legal and factual sufficiency in Zepp's declaration regarding compliance with custom (or regulations or contract terms). Rather, the plaintiffs also provided affirmative evidence of Zepp's lack of due care. Paul Kennard, the geomorphologist, identified actions taken by Zepp during the logging operation which contributed to the slope's instability. In particular, Zepp used a form of logging whereby one end of the felled tree is suspended in the air, but the tail of the log drags along the ground as it is pulled to the landing. This technique creates grooves in the soil ("tracks") which "typically reduce infiltration of water into the soil and instead, funnel[ed] surface water flows directly to the failure site. It was not prudent to . . . use partial suspension on these unstable slopes directly above Glenoma residences." CP 1:87. Kennard's report identifies other acts of negligence, but for present purposes, the point simply is that Zepp's reliance on "industry custom" is in error both

legally (because compliance with industry custom does not establish a lack of negligence) and factually (because Zepp has not offered evidence of industry customs and there is evidence from which a jury could conclude Zepp acted without due care).

3. Compliance with the contract does not shield Zepp from liability

Zepp's final claim was that as long as he complied with the terms of his contract, it could not be held liable for injuries resulting from its logging. CP 3:1361-62. But the law does not allow a person to voluntarily enter into a contract to do work that creates an unreasonable risk of harm to a third party, and then deny liability on the basis that he was contractually obligated to undertake the work. To the contrary, the rule adopted by the Supreme Court in *Davis v. Baugh Ind. Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007) stands for the exact opposite proposition. In that case (*id.* at 420), the Supreme Court adopted Restatement (Second) of Torts, § 385, which states:

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

Here, Zepp's actions allegedly "create[d] [a] condition" which caused "physical harm" to "others . . . outside of the land" resulting from "the dangerous character of the . . . condition after his work has been accepted by the possessor [Port Blakely]." Therefore, Zepp would be liable for harm proximately caused by any negligence involved in undertaking that work, regardless of its contract with Port Blakely.

The rule adopted in *Davis* was applied in *Jackson v. City of Seattle*, *supra*, a case with some similarity to the present case. In *Jackson*, a homeowner sued two construction contractors whose allegedly negligent installation of a water line caused a landslide, damaging a house. The contractors, like Zepp, claimed all they did was follow the terms of the contract. But the Court of Appeals held that "the contractors are liable in tort if their negligence caused the landslide." *Id.* at 649. Applying *Davis*, the Court held that not only the landowner, but also "the contractors owed [the plaintiff] the common law duty of care recognized in *Davis*." *Id.* at 655. After quoting Restatement § 385, the Court quoted *Davis*: "[A] builder or construction contractor is liable for injury or damage to a third party as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third party would be injured due to that negligence." *Id.*

The Court then reviewed the evidence in the light most favorable to the non-moving party, the plaintiff, which established that **“the installation of the water line created a dangerous condition on the hillside land above the residence;”** that the “land had previously been designated a potential landslide area by the City of Seattle;” and that it “was reasonably foreseeable that drilling and connecting the new water line would cause damage to third persons if done without sufficient attention to compacting disturbed soil or stabilizing the newly bored water line.” *Id.* at 656-57 (emphasis supplied). The Court also noted that “foreseeability is a question of fact for the jury unless reasonable persons could reach but one conclusion.” *Id.* at 657 (citing *Schneider v. Strifert*, 77 Wn. App. 58, 63, 888 P.2d 1244 (1995)). The Court held that the evidence was sufficient for the trial court to deny defendant’s summary judgment motion, even though the work performed by the contractor was done in compliance with the contract (“the new waterline remained intact and functioned as promised,” *id.*). “Contractors who install a waterline on a steep slope have to be concerned about the condition in which they leave the slope, not just the condition of the waterline.” *Id.*

So, too, Zepp had “to be concerned about the condition in which” he left the slope – barren – and whether the clearcut “created a dangerous

condition on the hillside land above the residences,” “not just” whether he cut the trees specified in the contract. “[A] contractor is not privileged to go about the contract work with blinders on.” *Williamson v. Allied Group, Inc.*, 117 Wn. App. 451, 460, 72 P.3d 230(2003).

The common law duty of care is also imposed by Restatement (Second) of Torts, § 383 (emphasis supplied), which provides:

One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon **and outside the land** as though he were the possessor of the land.

See id. at 456 (applying Restatement § 383).

Zepp’s reliance on compliance with its contract as shielding the business from liability is mistaken not only as a matter of law, but also given the specific terms of the contract at issue here. Zepp entered a contract with Island Timber Company on January 5, 2006 to log the Port Blakely land at issue here. CP 5:1612-1630. In that contract, Zepp acknowledged that it had inspected the land, that it entered into the contract with full knowledge of the condition of the land, and that it accepted all inherent risks “as is.” CP 5:1619, (Ex. A, ¶2). Further, and dispositively, Zepp stated that it was relying solely on its own inspection and own knowledge, judgment, and experience – not that of Island

Timber:

Logger acknowledges that it has inspected the Land and Timber, knows the condition thereof and is entering into this Contract with full knowledge of the state and condition of the Land and Timber, and accepts them "AS IS" with all inherent risks. Island Timber makes no warranty or representation as to the present or future condition of the Land or Timber or there adequacy. Logger is relying solely upon such inspection and its own knowledge, information, judgment, and experience in entering into this Contract and is not relying on any representations of any employees or agents of Island Timber.

Id. Thus, contrary to Zepp's claims in its motion that it reasonably relied on Island Timber's or Port Blakely's assessment of the stability issues, Zepp signed a contract in which it expressly stated that it was taking that responsibility on itself and in which it expressly stated it was not relying on the representations of Island Timber. Moreover, in the contract, Zepp went on to agree as follows:

Logger . . . expressly assumes all risks associated with all activity hereunder related to the Timber and harvesting and removal of same or to the Land or Logger's operations thereon. Logger understands and agrees that Island Timber would not have entered into this Contract without an express assumption of all risks by Logger.

Id.

These concepts are reflected in other portions of the contract as well:

By its commencement of operations hereunder, Logger

shall be deemed to have sole responsibility [underlining in original] to ensure that the operations hereunder are properly performed and do not in any manner adversely affect . . . slope stability . . .

Id. (§ 1).

Likewise, Zepp agreed to indemnify Island Timber for any damage done to adjacent property arising from the logging operation and to maintain insurance for “all liability for loss or damage for injury to person or property for all operations hereunder performed by or at the direction of Logger, or any of Logger’s Responsible Party.” CP 5:1623-1625 (§§ 16, 17).

Thus, Zepp was wrong in suggesting that it was somehow forced to enter into the contract and had no opportunity to exercise independent judgment. Zepp claimed it “was given a contract telling him where and how to cut.” CP 3:1358. Likewise, it asserted it simply “did what he was told to do.” CP 3:1361. But no one forced Zepp to enter into this contract wherein it committed to clearcut a steep, unstable slope. Zepp voluntarily entered into that contract for its own economic benefit.⁵

⁵ Moreover, contrary to Zepp’s contention that the company took no responsibility for evaluating the geology, geomorphology, hydrology, or slope stability of the land, CP 3:1362, Zepp had inspected the land, accepted it “as is” with all “inherent risks,” and expressly assumed all risks associated with logging this particular parcel. Zepp knew that Island Timber would not have entered into the contract without Zepp’s express assumption of “all risks.” Zepp recognized that these risks included “slope stability” risks and damage to the “adjacent property.”

There is ample evidence from which a jury could conclude that Zepp could not “go about the contract work with blinders on,” *Williams, supra, i.e.*, or turn a blind eye to the landslide risks associated with clearcutting this steep, unstable slope directly above Glenoma. Contrary to Zepp’s argument invoking the contract as a shield, the contract terms provide factual support for plaintiffs’ claim. A jury could find Zepp failed to exercise reasonable prudence in voluntarily agreeing to clearcut this steep slope directly above the Rea, Redmon, and Sprinkle residences.

VI. CONCLUSION

For the foregoing reasons, the Court should make the following determinations:

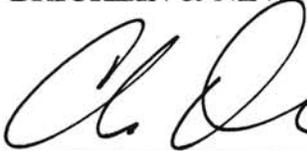
1. Reverse the Superior Court and find that the clearcut logging on the steep, unstable slopes above Glenoma was an ultra-hazardous activity resulting in strict liability for the Menasha and Don Zepp Logging for any damage that was proximately caused by their logging.

2. Reverse the Superior Court and find that disputed facts precluded dismissal of the trespass and nuisance claims against both Menasha and Don Zepp Logging and the negligence claims against Don Zepp Logging.

DATED this 20th day of May, 2013.

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Sprinkle\Appeal\Opening Brief-Final

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DATED this 20th day of May, 2013, at Seattle,
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Decsv