

WASHINGTON CASE UPDATE

The Landslide Brought it Down

case in point...

From the desk of Kyle D. Riley: Are lumber harvesters strictly liable for harm caused by landslides from a tree harvesting operation? Read on to see how the Washington Court of Appeals ruled on this salient question.

Claims Pointer: The Pacific Northwest is known for wet weather. In recent weeks, hazardous conditions such as mudslides, flooding, and washouts have occurred due to large amounts of rain. In this case, the Court of Appeals held that clearcutting on a steep slope above residential property is not an abnormally dangerous activity that merits strict liability. In other words, the Court of Appeals held that plaintiffs must plead and prove that a person was negligent in such claims.

Hurley v. Campbell Menasha, LLC, No. 71430-9-I, Court of Appeals of Washington, Division I (published August 7, 2014).

On January 7, 2009, a heavy rainstorm bowled across Western Washington dropping huge amounts of rain. Over 1,500 landslides resulted from the storm in Washington. This case arose out of damage to a number of homes caused by three landslides near Glenoma, Washington. The landowners (collectively "the plaintiffs") in this area filed a suit against a dozen companies who were involved in logging operations on the slopes above and around the slides. Among these companies were Zepp Logging (Zepp) and Menasha Forest Products Corporation (Menasha).

The plaintiffs alleged a number of claims including negligence, nuisance, trespass, and strict liability against the several defendants, including Menasha and Zepp. The defendants moved for summary judgment on the strict liability claim and the trial court granted the motion. Menasha moved for summary judgment to dismiss the nuisance and trespass claims and Zepp joined the motion. The trial court granted the motion, dismissing the claims. Zepp also filed a motion for summary judgment on the negligence claim, which the trial court granted.

The trial was (bifurcated) split to address claims specific to each slide. The first trial was against Menasha and another company. The second trial was set to occur after the first trial and would have included all of the

plaintiffs and defendants. The first trial lasted six weeks and resulted in a defense verdict for Menasha. The remaining plaintiffs settled their claims against the defendants and the second trial did not occur. The plaintiffs in the first trial ("the appellants") appealed the dismissal of their strict liability, nuisance, and trespass claims against Menasha and Zepp. They also appealed the dismissal of the negligence claim against Zepp.

The Court of Appeals first held that a logger is not strictly liable for clearcutting a steep hill because it is not an "abnormally dangerous" activity. The court noted that no court has ever imposed strict liability on timber harvesters. The Court examined six factors to determine that strict liability was inappropriate.

In examining the factors, the Court held that five of the six factors weighed against strict liability: (1) logging does not sufficiently increase the risk of landslides; (2) logging generally occurs in rural areas, so the potential for harm is not great; (3) that while it is not possible to reduce the risks of logging through the exercise of reasonable care, logging is only one of many factors that contribute to the risk of landslides; (4) clearcutting on steep slopes is routine and expected for loggers; and (5) that the value to the community far outweighs the risk of logging activities. The only factor that weighed in favor of the appellants was that logging is not a matter of "common usage," which is what driving a car or landscaping a yard would be. The Court affirmed dismissal of the nuisance claim because it was duplicative of the

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negligence claim. The appellants argued that their nuisance claim (which requires an “unreasonable interference with another’s use and enjoyment of property”) was based on an entirely different theory. However, the Court found that they relied on the same allegations and facts as the negligence claim, and that the nuisance claim was unnecessary.

In regards to the trespass claim, the Court held that there was absolutely no evidence that Menasha and Zepp knew or were substantially certain that their logging would create a landslide. Because there was no proof of intentional or knowing conduct, the trespass action—like the nuisance claim—was duplicative because it relied on principles of negligence.

Finally, the Court affirmed the trial court’s dismissal of the negligence claim against Zepp. Zepp argued that he owed no duty as a logger to assure that his activities would not cause a landslide. In other words, he argued that loggers are not expected to be geophysicists. He further argued that he relied on the expertise of experts at the Department of Natural Resources to let him know if his logging could be dangerous. The Court agreed with Zepp. Because the appellants failed to present evidence that Zepp breached the duty of care of a reasonable logger, summary judgment was appropriate.

Ultimately, the Court of Appeals affirmed the trial court’s dismissal of the appellants’ strict liability, nuisance, trespass, and negligence claims.



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