DUTY EXISTS TO PREVENT HARM CAUSED BY NATURALLY OCCURRING DANGEROUS CONDITIONS ON THE LAND

PARTIES / BACKGROUND

Plaintiffs filed a lawsuit against the City of Burlington, alleging that the acts or omissions of these Defendants caused their injuries. Defendants have raised numerous affirmative defenses, deny they had a duty to Plaintiffs, deny they breached any duty, and deny any of their acts caused the damages to Plaintiffs.

There have been several previous motions for partial summary judgment, and the Court has issued written orders related to those motions.

Defendant City of Burlington, who "permitted" the overall approval of the subdivision occurred haphazardly, and that the City of Burlington did not properly take the project through the approval process as required under Washington law. Defendant City of Burlington claimed that it did not owe a duty to prevent harm to, and argued that Washington law protects the Defendants under the umbrella of the GMA and other statutes pursuant to the public duty doctrine.

ANALYSIS

Both parties agree to at least one aspect of the law regarding landowner liability. They agree that in Washington, landowners who alter the natural condition of their land and thus knowingly make the land more dangerous to those outside the land, owe those neighbors a duty to use reasonable care in preventing harm. ***Price ex. rel. Estate of Price v. City of Seattle***, 106 Wn.App. 647, 654-5 (2001). From this general agreement, however, the parties' respective positions diverge dramatically.

Plaintiffs argue that the duty described above should also include a duty to warn of the potential danger. Defendants would disagree, and argue that nowhere does ***Price*** or any other related Washington' case require a duty to warn.

Plaintiffs further argue that landowners who know of or should know of an alteration to their land, even if they themselves did not conduct or order the alteration, should also be subject to a duty to prevent harm and to warn. Defendants would disagree.

Plaintiffs further argue that the Supreme Court case upon which ***Price*** relies, does not distinguish between naturally dangerous conditions and man-made dangerous conditions. See ***Albin v. National Bank of Commerce***, 60 Wn.2d 745 (1962). Thus, they argue, landowners owe a duty to prevent harm to neighbors that arises from natural conditions on their land about which they know or should know. Defendants would disagree.

Finally, Plaintiffs argue that, even if no duty exists to prevent harm caused by naturally occurring dangerous conditions on the land, a lesser duty to warn of such dangers does exist. Defendants would disagree.

Washington State's Court's decisions, have determine issues of breach, causation or damages. Ruling's being strictly limited to the question of whether the City of Burlington owed a duty of reasonable care to protect and to warn its neighbors in the Burlington Hill development.

LEGAL FRAMEWORK

Washington State's case law concurs with the parties that a landowner owes a duty to its neighbors to prevent harm arising from conditions on its land that they themselves altered, and that they knew or should have known would increase the vulnerability of their land to a dangerous condition.

This duty is clearly established by the Washington State Supreme Court in ***Albin v. National Bank of Commerce***, 60 Wn.2dr745 (1962) and the Division I Court of Appeals in ***Price***, supra.

Common sense tells us that a duty to prevent harm is a higher burden than a duty to simply warn of potential harm. Many cases require landowners to warn of potentially dangerous conditions as opposed to fixing them. The specific language in ***Price***, combined with the facts of *Price,* also make clear that the duty to, "***take timely corrective measures,"*** includes a duty to warn. The *Price* court did not need to address the duty to warn because Defendants in that case

actually did warn the residents below their land, that a landslide would likely ensue. Thus the court in *Price* did not need to address whether the duty to take timely corrective measures also included a duty to warn.

In ***Nivens v. 7-11 Hoagy's Corner***, 133 Wash.2d 192, 943 P.2d 286 (1997), in a different context reflecting different circumstances, the Washington State Supreme Court discussed the myriad duties owed by a landowner. In that discussion, it made clear that the duty to warn is a precursor, or part of, of a duty to use reasonable care to prevent harm:

> "A possessor of land ... is not an insurer of ... safety .... [for] the acts of third persons or animals. He is, however, under a duty to exercise reasonable care to give them protection. In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. ***There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available,*** or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor."

Thus, Washington State Courts agree that any duty to take, ***"timely corrective actions,"*** includes a duty to warn.

The next question is whether the landowner's duty exists when it knows or should know that an alteration to its land increases a risk, even if the current owner is not the entity that actually altered the land. ***None*** of the cases cited by any of the parties directly addresses this situation. However, in ***Rosengren v. City of Seattle***, 149 Wash.App. 565 (2013), Division I cited language that makes clear it intends the existence of a duty when the landowner knows of an artificial condition on the land created by another. Specifically, the court found a duty when a landowner creates or permits to remain thereon an ***excavation*** or other artificial condition ... ***Rosengren***, at 573, citing, Restatement (Second) Torts § 368.

Given this language, combined with commonsense and logic, along with Washington State Courts rulings, that a landowner who knows or should know that a prior alteration to its land, achieved by a third party, makes its property more susceptible to a hazardous site condition owes a duty to its neighbors. This is consistent with the binding language in ***Price***: ***"duty of possessors of land to prevent … is limited to situations where the possessor of land has actual or constructive notice of a hazard produced by an alteration to the natural condition of the land."*** ***Price***, supra at 656.

Defendant the City of Burlington would argue that such a rule would subject landowners to liability for previously altered conditions on their land about which they could not know. Washington Courts would disagree. ***Price*** requires that landowners know, or should reasonably have known, about ***the dangerous altered condition of their land before a duty attaches.*** That requirement, combined with the ***Price*** court's further holding that landowners do not owe a ***"duty to inspect,"*** 106 Wn.App. at 654-5, extinguishes the fear that landowners will be held liable for unknown or unknowable dangerous conditions on the land.

Finally, the Washington Courts are persuaded by the logic for a more uniform existence of landowner duty to its neighbors, the Courts are in no position to decide that the Court of Appeals in ***Price*** mis-read or mis-applied ***Albin***. Certainty, if the Supreme Court makes that decision, then the Courts will happily comply. Until that happens, however, the Courts are bound by the ***Price*** decision. That decision makes clear that a landowner owes ***no*** duty to its neighbors for ***naturally occurring dangerous conditions*** on its land. While it may owe a duty for naturally occurring dangers on its land to invitees and licensees who enter the premises, it does not owe a duty of any kind, ***including a duty to warn,*** to its neighbors. See ***Cardinal v. Long Island Power Authority***, 309 F.Supp.2d 376, 382 (E.D.N.Y. 2004) (Clearer description of rule described in ***Price***).

APPLICATION OF LEGAL FRAMEWORK TO SUMMARY JUDGMENT

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). If the moving party meets its burden by showing no genuine issue of material

fact, the burden shifts to the non-moving party which must set forth facts that rebut the moving party's contentions. ***White v. State***, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). A nonmoving party in a summary judgment may not rely on speculation or argumentative assertions that unresolved factual issues remain. ***Price***, at 657, citing ***Seven Gables* v. *MGM/UA Entertainment***, 106 Wash.2d 1, 13, 721 P.2d 1 (1986). (also citing ***Melville v. State***, 115 Wash.2d 34, 41, 793 P.2d 952 (1990), "An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury."

Defendant the City of Burlington contend that, (1) alteration of its land did not increase risk, and (2) did not know, nor should it have known, that its alteration of the land increased the risk. If no genuine issue of material fact exists as to these contentions, then the Court must grant summary judgment.

DID THE CITY OF BURLINGTON KNOW, OR SHOULD IT HAVE KNOWN, OF THE INCREASED RISK IN THE APPROVAL OF THE SUBDIVISION?

Questions about whether someone knew or should have known a fact are generally reserved to the fact-finder. This case is no exception.

Significant evidence exists from which a jury could determine. In order to find a duty, the Court must find that the negligent actions of the Defendants approving the alteration haphazardly to the land increased the risk of danger, or a duty to warn of danger, than if it had remained in its natural condition. ***Price***, supra, at 655.

The City of Burlington argues that they complied with all applicable regulations and prescriptions and thus should be absolved of liability. However, "[c]ompliance with applicable regulations, industry customs, permits, and contracts does not per se excuse a defendant from a claim of negligence." ***Hurley v. Port Blakely Tree Farms L.P.***, 182 Wn. App. 753, 773, 332 P.3d 469 (2014) review denied sub nom. ***Hurley v. Campbell Menasha, LLC***, 182 Wn.2d 1008, 344 P.3d 688 (2015).

Defendants can argue forcefully that the modelling used of the 2006 (ZZA) Report may not be conclusive in determining fault, or implicate the contributory factors, or question whether someone knew or should have known a fact. It is very clear that the Court would generally

reserve to the fact-finder. This case is no exception. Significant evidence exists from which a jury could determine a duty to the Plaintiffs.

Liability is predicated on whether "a *reasonable* man would take additional precautions." Restatement (Second) of Torts § 288C (1965) (emphasis added). Reasonable, in this case, refers to a person in similar circumstances.

A defendant is held to a higher standard if he possesses "specialized knowledge, skills, and expertise to assess the situation." ***Hurley v. Port Blakely Tree Farms L.P.***, 182 Wn. App. at 773-74.

Therefore, adherence to GMA, and SEPA regulations will not immunize an individual from liability if a reasonable person with the same level of expertise and knowledge would take ***"reasonable additional action"*** to protect against harm. *Id.* at 774.

Despite the Defendant the City of Burlington, claims otherwise, a reasonable juror could hold that the Defendants position with their adherence to GMA, SEPA, RCW, WAC, and WSDOT regulations would have established a higher level of knowledge, and thus a duty to guard against harmful or dangerous activities that would increase the risk of future harm.

Considering the evidence in favor of the non-moving party Defendant the City of Burlington, was aware that historic activities in the Burlington Hill development would directly contributed to the Plaintiffs damages, and increasing vulnerability now and into the future.

Defendant the City of Burlington, makes much of the fact that it is shielded from liability for its role in creating the Burlington Hill development under umbrella of the GMA and other statutes pursuant to the public duty doctrine.

While this is a facially enticing argument, it fails when held to inspection. The City of Burlington owes a duty to the general welfare of the community and have greater responsibilities to those who interact with their land.

A governmental body such as the City of Burlington, has much better access and information about land they own and manage, along with having to adhere to a much broader responsibility. Specific duties to those around it, and a duty to the general public. Legislature and common law have set out the duties. There is no inconsistency in the law.

" Defendant the City of Burlington, had no reason to attempt years after the completion of the development to find what scientific literature might exist regarding their responsibilities and duty in approving the development; its job was to follow the GMA, RCW, WAC and WSDOT rules as written."

Genuine issues of material fact exist with regard to the existence of a duty.