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

STEVEN JAEGER and SUSAN STEVENS-JAEGER, husband and wife;

Appellants
v.

CLEAVER CONSTRUCTION, INC.

Respondent

Case No. 36540-5-II

ON APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY, WASHINGTON

BRIEF OF RESPONDENT CLEAVER CONSTRUCTION, INC.

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Respondent Cleaver Construction, Inc. ("Cleaver") submits this brief and the appended exhibits in response to Appellants Steven and Susan Jaegers' ("Jaegers") Opening Brief.

A. INTRODUCTORY SUMMARY.

1. Short Statement of Subject Matter.

This case started with a "shallow, surficial" landslide that occurred on the Jaegers' high-bank waterfront slope in 2001. [Ex. 134, attached hereto as Appendix "1"; Ex. 11 attached hereto as Appendix "2"; RP 772:9-25; 773:1-21] The slide occurred in fill soils just below a concrete sports court which had been built on a natural bench of the slope. [Fig. '2', pg. 6 of Ex.11; 600:9-25; 601-602] A sump pump designed to move water from the court failed allowing rain to pond on the court. [Ex. 134]. The rainwater eventually flowed off the court into the soils supporting the court causing them to move downhill. [RP 1302-1303; 510:16-25; 511-512]

Cleaver contends that the slide could have been promptly repaired in 2001 at a cost inside $50,000. [RP 1374; 1384-1385] The Jaegers, however, against their experts' advice delayed repair efforts facing a known risk that further ground loss and sliding in the same area could occur. [Exs. 11, 12 and169. RP 561-563; 767; 863:6-20; 864:6-8]

For three and one-half years, the Jaegers refused to even authorize soil testing, a fundamental first step to a stabilization process. [RP 710:1-24; 806-812; 863:6-20. Exs. 11; 169 and 187] During that time, the area where the surficial slide occurred in 2001 continued to deteriorate resulting in further sliding in 2003, as well as in 2006. [RP 546:23-25; 547:1-16; 560-562; 710:1-24; 863:6-20; 864:6-8; 1373-1376; 1383-1386; 662:5-25; 663-665] At trial in 2007, the Jaegers' experts testified that an expensive retaining wall would be required to repair the additional sliding that occurred in early 2006. [Exs. 13 and 14]

At trial, the Jaegers and Cleaver blamed each other for causing the landslide(s).[1] The jury listened to testimony of three geological/geotechnical experts called by the Jaegers (Martin McCabe; Bruce Reynolds and Robert Cousins) and one called by Cleaver (Jon Koloski). By verdict dated February 12, 2007, the jury found that the Jaegers had incurred damages of $438,112 but were eighty-five per cent responsible for them because of their contributory negligence. [CP 395]

[1] The Jaegers also suggest that their house has been damaged. [Jaegers' Brief, pgs.12] However, there is no evidence to support the claim. [RP 558-560; 999; 812:3-25; 813-815; 795-797; Ex. 170] The Jaegers' house is located on a plateau of competent ground located above the slope where the sliding occurred. [RP 1285-1298; Exs. 7; 200; 201 and 11] The slide area is in a steeply sloped area east of the Jaegers' house used primarily as a 'view corridor' for sight to the Puget Sound waterfront. [RP 1112; Ex. 134].

Judgment was entered against Cleaver Construction, Inc. in the amount of $65,716.80. [CP 398]

2. A Preview of Argument and Supporting Evidence.

The Jaegers use approximately fifty-eight pages of an eighty-three page opening brief largely characterizing testimony received by a twelve-person jury over the span of a three-week trial. The Jaegers' then posit that 'substantial evidence' did not support jury instructions on contributory negligence; did not support the jury's verdict and did not support the trial court's rulings denying the Jaegers' post-trial motions (e.g., motion for judgment or new trial).

In Washington, a request to overturn a jury verdict is unusual and is rarely granted. A request to reverse a trial court's decision to uphold a jury verdict is even more circumspect. This is due in no small measure to the immediacy of the trial experience and the ability of the jury and trial court judge to stare down the witnesses and judge their credibility. What happened 'at trial' simply does not transfer that well to the written page for subsequent review, especially for lengthy and factually complex cases.

Nonetheless, the record in this case has several strengths for showing the truth, two of which Cleaver will highlight from the outset here. As reflected in the report of proceedings, the jurors, besides

listening to witness testimony upon questioning by counsel, also received answers to their own written questions. The pointed nature of the jurors' questions and the apparent candor of the trial witnesses in responding to them, reveals the jury's attention, insight, and power in this case.

A second very telling quality of the report of proceedings is how clearly the testimony of the Jaegers' own experts serves to rebut the arguments the Jaegers make on appeal. For example, counsel for the Jaegers repeatedly asserts that his clients followed their experts' advice "faithfully", "meticulously" and "dutifully implemented their recommendations" concerning mitigation. (Jaegers' Brief, pgs. 4, 5 and 25). However, these endorsements do not ring true in light of the testimony.

As explained by the Jaegers' lead expert, W. Martin McCabe of URS Corporation, soil borings were recommended to the Jaegers soon after the 2001 slide because: *"That's standard procedure, when you have a slide and you need to fix it, to figure out what's the nature of the slide, what's the nature of the material you will have to deal with and how to design whatever feature you're going to pick as the solution."* [RP 561:8-14] Mr. McCabe further explained that a methodology for repair was proposed *"anticipating that the homeowner, Mrs. Jaeger,*

would want to keep the instability from extending and enlarging and continuing, and providing then a repair of the useful area of the yard." [RP 562:3-8]

When asked why the Jaegers did not promptly authorize soil testing McCabe replied: *"I don't know exactly why. They were eventually obtained.*

Q: Right. Except for three years later, right, three-and-a-half years later. What happened to that slope in three-and-a-half years?

A: *Continued to deteriorate."*

[RP 710:8-24]

The Jaegers' other experts concurred with Mr. McCabe's opinion(s) that timely evaluation and repair of landslides is critical to mitigation efforts. Notably, in response to juror question(s), Bruce Reynolds of Shannon & Wilson, Inc. emphasized that it is important to try and promptly determine all conditions of a slide and stabilize it early to prevent further ground loss. [RP 863:8-17]. Mr. Reynolds stated that this is especially true in the case of a surficial or surface slide. [RP 863:14-17] Mr. Reynolds confirmed that he conveyed to the Jaegers the risks associated with their sloped land and the need for stabilizing the subject damage. [RP 864:6-8; 820; Exs. 11 and 169] In 2002 and 2003, Mr. Reynolds submitted recommendations and proposals to the Jaegers

to start the stabilization process but the Jaegers' refused to proceed without any explanation. [RP 806-811; 863:6-17; Ex. 11 and 169].

The Jaegers argue that it was "undisputed that most of the geologic damage occurred at the time of the initial (2001) slide" [Jaegers' Brief, pg. 57] and that Cleaver claimed the Jaegers should have built an expensive retaining wall to fix it. [Jaegers' Brief, pg. 3]. However, nothing could be further from the truth. The parties' experts agreed that absent efforts to stabilize the 2001 damage that the slope would only deteriorate over time with a likely corresponding increase in the cost of repair. [Reynolds: 863:6-20; 864:6-8. Cousins: 1723:21-25; 1724:1-3; McCabe: RP 562:3-8; 709:11-25; 710:1-24. Koloski: RP 1382-1383]

At trial, because the Jaegers did not pursue soil testing for three and one-half years they were stuck with the arguments that "most of the geologic damage occurred in 2001" and that an "expensive" retaining wall was required to repair that damage from the start. These claims were the only means by which the Jaegers could also contend that they could not "afford" to mitigate their damages. However, the Jaegers could not go back in time to acquire the information they needed for their arguments to make sense.

When the Jaegers finally authorized soil testing in June 2005, the so-called 'slide zone'[2] had deteriorated to the extent that the surficial slide conditions that existed in 2001 could not be examined. [RP 836; 1382-1383] The Jaegers' expert, Bruce Reynolds, when asked what it was about the soil borings that his firm performed in 2005 that might allow him to evaluate the 2001 slide and the depth of it, Reynolds simply replied: "*Nothing*." [RP 836:6-12].

The fact that the Jaegers prevented their experts from collecting soils data for so many years after the 2001 slide also allowed the jury to draw the adverse inference that had the Jaegers' obtained and presented the information in a timely manner that such evidence would have proved unfavorable to their case. See British Columbia Breweries (1918), Ltd. v. King Co., 17 Wn.2d 437 (1943); Henderson v. Tyrell, 80 Wn.App. 592 (1996).

Cleaver's response focuses upon the Jaegers' behavior which increased their risk of injury, as well as their acts and omissions which caused their own damages. Even though the record is long and lacks the personality of the trial 'experience', it nonetheless strongly supports

[2] Mr. McCabe described the Jaegers' 2001 'slide zone' as extending from the crest of the steep bluff up to somewhere beneath the sports court and possibly below the rockery wall just west of the sports court. [RP 546:23-25; 547:1-16; 560-561. Ex. 11].

the conclusion that there is no reason to disturb the jury's and the trial court's hard work and judgment in this case.

B. ISSUES.

1. Whether there was 'substantial evidence' of the Jaegers' contributory negligence or fault to justify the trial court's decisions to instruct the jury on contributory negligence and to deny the Jaegers' motion for judgment not withstanding the verdict?

2. Whether the trial court properly denied the Jaegers' motion for a new trial?

3. Whether the trial court erred in refusing to give the Jaegers' proposed supplemental jury instruction number 24?

4. Whether the trial court properly excluded evidence of insurance information?

5. Whether the trial court properly denied the Jaegers' motion for additur?

6. Whether any new trial should be limited to certain issues?

7. Whether the judgment should have included Eric Cleaver as a judgment debtor?

C. STATEMENT OF THE CASE.

1. Eric and Jill Cleaver Develop the Property.

In 1990, Eric and Jill Cleaver retained a geologist named Will Thomas of Geological Consulting Services to study whether property they owned on high-bank Puget Sound waterfront could be short-platted to accommodate several single-family homes. [RP 1570-1582] Mr. Thomas performed his study over time and issued a series of

reports the first of which was dated September 5, 1990. [Exs. 7 and 8] Mr. Thomas warned that the property was within an area of shoreline designated "unstable and/or within an old slide area" and that "local recent slides" had occurred. [Ex. 7] However, Mr. Thomas advised that the property could be developed so long as means were provided to mitigate potential movement of the slopes. One recommendation of Mr. Thomas was for the provision of a drainage system serving the properties. [Ex. 7] Another recommendation was to *"Plant and maintain vegetation on bare slopes."* [Ex. 7]

In 1991, the Cleavers obtained short-plat approval to develop three lots (designated A, B and C) and began by installing a drainage system as guided by Mr. Thomas's input and recommendations. [Exs. 7, 8, 46, 47 and 49. RP 1588; 1591-1592]

2. <u>The Cleavers Build on Lot A.</u>

In or about 1992, the Cleavers built a house on Lot "A" (now the Jaegers' property). In 1994, Cleaver constructed a "sports court" on the upper bench of Lot "A". [RP 1592-1593; 1598-1599] Surface waters[3] from the areas of the house and the sports court on Lot A were collected by drains and then transported via an underground tight-line

[3] "Surface water" has been defined as vagrant or diffuse water produced by rain, melting snow or springs. See King County v. Boeing Co., 62 Wn.2d 545, 550 (1963).

pipe across Lot "B" to the north (the Norbuts) and eventually to the Sound. [Exs. 49 and 8]

3. The Cleavers Sell Lot B to the Norbuts.

In 1997, the Cleavers sold Lot B to Greg and Marguerite Norbut who began constructing a house in 1999. [RP 1602] Mr. Norbut acting as his own general contractor hired Cleaver Construction, Inc. to design and install the Norbuts' septic system. [Ex. 1] A back-hoe operator employed by Cleaver Construction, Inc. while excavating a space for the septic tank unknowingly lifted and damaged the underground drainage tight-line pipe which transported surface waters from Lot A across Lot B. [RP 1620:6-17; 1621-1622] Although the damage reduced the circumference of the pipe it did not impair its ability to pass storm water. [RP 495:15-25; 496:1-11]

4. The Jaegers' Purchase the Cleavers' Home on Lot A.

In May 2001, the Jaegers purchased the Cleavers' residence on Lot A for a contract sales price of $383,000. (Ex. 5) On April 20, 2001, the Preliminary Title Report for the transaction was issued to the Jaegers by First American Title. The title report included the geological studies of the property prepared by Mr. Thomas which the County required to be recorded. [Exs. 129; 7 and 8] The Jaegers also received a copy of Mr. Thomas' geological report(s) from realtors handling the

transaction. [Ex. 9] The Jaegers do not recall if or when they read the information. [RP 271]

5. The Jaegers Clear Their Slope.

Shortly after taking possession of the property, the Jaegers built fences and a railroad tie staircase on their slope, as well as cleared the slope in front of the sports court of native vegetation and planted the slope with grass. [Exs. 11 and 134; RP 1158-1161] The Jaegers' neighbors were concerned that the Jaegers' action in clearing the slope would harm it as Mr. Thomas' advice against such clearing was well known. [RP 1159:5-25; 1160:1-25; 1161:1-15; 1067:9-25; 1068:1-15; 1749:18-25; 1751:1-22. Exs. 134 and 7]

6. Wet Ground and the Jaegers' Drainfield.

In late November and early December 2001, the Jaegers and the Norbuts both separately invited Eric Cleaver to their properties. They wanted more information about the Jaegers' drainage system because there had been a noticeably wet ground on the western portions of the neighbors' properties. [RP 1633:12-25; 1634-1636]

Mr. Norbut was suspicious of a catch basin or 'vault' located on the Norbuts' land which served as a junction for the deposit of water from several drainage pipes which carried storm-water to the vault and

then across the Norbuts' lot via a single tight-line pipe. [RP 517:16-25; 518-522. Ex. 11]

Since February 2001, the Norbuts had also experienced soggy, wet ground in the southwest corner of their lot and along the south margin to the west. [RP 1146:12-25; 1147-1149; 1153 through 1157:1-12]. Mr. Norbut thought that the Jaegers likely had a leak in their water main or irrigation system. The water usage records (for the neighbors' shared well) revealed that the Jaegers were using extraordinary amounts of water. [RP 1146-1149; 1153-1157; 1252-1253].

On November 23, 2001, the Jaegers reportedly had ground water flowing into their septic system and a sump pump serving the system failed. [RP 503:17-25; 504:1-25; 505; 1002:16-25; 1003:1-6] The vault and tight-line for the Jaegers' storm-water drainage were checked at that time and no problems were observed. [505:7-11] On December 17, 2001, Mrs. Jaeger again observed water in and about the ground of the Jaegers' septic system. [RP 1097:24-25; 1098:1-8] It appeared to be coming from the Jaegers' drainfield just west of the septic tanks. [RP 1098:4-8; 512:11-25; 513:1-4].

In late 2003 and 2004, standing water was found in the west crawlspace of the Jaegers' house and a sump pump was used to remove it. [RP 1250:20-25; 1251:1-24; 839-840].

When Mr. Cleaver met with Mr. Norbut in late November 2001, he tested the operation of the drainage tight-line by introducing dye-colored water and tracing its exit from the system. [RP 1164-1167] The test confirmed that the line was working. [RP 1164-1167]

Next, Mr. Cleaver met with Mrs. Jaeger in early December 2001. Because of the recent failure of the Jaegers' septic system pump, Mrs. Jaeger questioned Cleaver about the age of the sump pump which served to drain the Jaegers' sport court. [RP 288-289] When Cleaver confirmed that the pump had never been replaced, Mrs. Jaeger made immediate plans to have it serviced or changed out if necessary. [RP 287:20-23; 288:14-25; 289-291; 25] Mr. Cleaver, as he had done previously when the Jaegers purchased the property, emphasized the importance of maintaining the pump free of any obstructions including leaves and other debris that might enter the catch basin impair the workings of the sump pump. [RP 1740- 1747].

7. **The December 17, 2001 Landslide.**

On December 17, 2001, a landslide occurred on the back-yard slope just in front or east of the Jaegers' sports court following heavy rainfall. [Ex. 134; RP 1342:5-18; 1366:15-25; 1367:1-5] A small slide or slump at the top of the Norbuts' bluff also occurred that day. [Ex. 134, foreground of photo attached hereto as Appendix "1"] The Jaeger and Norbut properties were examined by investigator(s) who examined the drainage system. It appeared that a pump designed to move storm-water off the Jaegers' sport court had failed at some point allowing water to pond on the court. [Exs. 11 and 134] Further, high and stagnant water in a vault suggested that the drainage line crossing the Norbuts' property may have become obstructed or blocked. [Ex. 11]

8. **The Jaegers Consult Shannon & Wilson, Inc.**

The Jaegers hired the geotechnical consulting firm of Shannon & Wilson, Inc. who examined landslide and surrounding site the same day the slide occurred. [Ex. 11] By a written report dated January 9, 2002, Mr. Reynolds, a geologist, and Thomas Gurtowski, a geotechnical engineer, issued their findings that the slide observed was a *"shallow, surficial"* one involving primarily *"weathered and/or fill soils that mantle the slope west of the top of the steep bluff"*. [Ex. 11; RP 773:6-21; 810:23-25 and 811:1-11]. Mr. Reynolds and Mr. Gurtowski

listed things that they believed may have impacted the site or caused the slide to occur and noted, among other things[4], that: *"The slide area was recently cleared of native vegetation and seeded with grass"* [Ex. 11, pg. 3].

Mr. Reynolds and Mr. Gurtowski informed the Jaegers that in order *"[t]o improve stability of the slope soils east of the sports court and re-level the area would require construction of a retaining wall such as soldier piles or a mechanically stabilized earth (MSE) system. Soil borings would be required to evaluate potential earth systems."* [Ex. 11, pg. 6]. Other remedial recommendations of Shannon & Wilson included that:

1. The *"area should be planted with rapid growing plants with moderately deep root structures. Sitka Willow planted every 6 feet for rooted plants and every 2 feet for cuttings along with vine maple every 8 feet or salmonberry every 4 feet are plants suggested for this area."* [Ex. 11, pg. 6. See also Ex. 12, pg. 2 (other types of "native vegetation" providing a "dense, deep-rooted ground cover" could be used']

[4] Mr. Reynolds and Mr. Gurtowski noted that primary contributing factor may have included: 1) *steep topography. 2) loose colluvial/fill soil. 3) rainfall. 4) surface runoff and concentration of water onto the upper bench east of the rockery. 5) subsequent saturation and loss of strength of the near-surface slope soils at the top of the steep bluff.* [Ex. 11, pg. 4]

2. A trench sub-drain be installed across the western portion of the upper bench (at a location across and underneath the center of the sports court). [Fig. 3 of Ex. 11]. In this regard, Shannon & Wilson warned that no fill (nor anything of weight) be added to the slide zone east of the sports court.[5]

3. Site drainage for the Jaeger property be separated from the property to the north. [Ex. 11, pg. 5]

4. The locations of all drainage pipes, catch basins and outfalls for the Jaeger property and the property to the north be established. [Ex. 11, pg. 5]

9. <u>The Further Movement.</u>

In or about early March 2003, Mrs. Jaeger observed additional movement or sliding on her slope. [RP 317-318; 321; 332-336] However, Mrs. Jaeger covered it with plastic and did not look at it again or contact Shannon & Wilson until August 2003. [RP 321-327] In September 2003, Bruce Reynolds observed the new movement, but did not photograph it or otherwise document it. (RP 806-808; 810-811] Mr. Reynolds simply returned to his office and dispatched a letter

[5] In September 2002, however, the Jaegers hired a contractor named William Hill to install a shallow curtain drain just east of the sports court. [RP 332-336; 350; 1028-1044]. The drain was criticized by the geological experts that testified at trial and it was cited as a contributing cause of the further movement occurring in 2003. [<u>See</u> Section 1(b)(5) <u>infra</u>]

recommending once again that the Jaegers obtain soil borings to evaluate an immediate fix. [Ex. 169; 828] The Jaegers declined Mr. Reynolds' proposal.[6] [RP 811:12-17].

In or about 2004, the Jaegers installed new landscaping on the west side of their property; installed a water feature with a water fall; and replaced their footing drains. [Ex. 34; RP 1247-1250] At trial, Mrs. Jaeger did not know what these items cost.

10. <u>The Litigation.</u>

A rash of lawsuits followed the 2001 slides on the Norbuts' and the Jaegers' properties. The Norbuts sued the Jaegers challenging the drainage easement across the Norbuts' land. [CP 1 and 14] When that suit was resolved, the neighbors also sued each other for allegedly causing the slides. [CP 813 and 825]

In 2003, when it was determined that Cleaver Construction, Inc. had damaged the tight-line crossing the Norbuts in the course of installing the Norbuts' septic system both the Norbuts and the Jaegers sued the company, as well as Eric Cleaver[7] and Jill Cleaver, individually

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[6] In June 2005, when the Jaegers finally authorized Shannon & Wilson to perform soil borings to evaluate their slide damage the cost was $8,000. [RP 344; 1242-1243. Ex. 187]

[7] The Jaegers' complaint did not identify or distinguish Eric Cleaver in any corporate capacity or as an officer of Cleaver Construction, Inc., but rather as an individual and the seller and developer of the Jaegers' property. [CP 825]

and as husband and wife. [CP 813 and 825] Finally, the Jaegers sued Zoeller Pump the manufacturer of the sports court sump pump that failed. [RP 1540]

In August 2004, Cleaver Construction retained geologist Jon Koloski of GeoEngineers, Inc. as an expert for the litigation. [RP 1283] Mr. Koloski is the founding principal of GeoEngineers, Inc. with over forty-five years experience as an engineering geologist. [RP 1276-1277] Mr. Koloski has investigated thousands of landslides during his long career typically also advising his clients on how to remediate them. [RP 1276-1283] In March 2005, GeoEngineers, Inc. (under the direction of Mr. Koloski and his staff including a geotechnical engineer) obtained hand-augered soil borings at and around the locations of the Jaegers' slide area. [RP 1297-1302] With soil data obtained from the borings Mr. Koloski was able to determine, among other things, that native soils underlying the slide area were intact. [1299:10-25; 1300-1302]

Mr. Koloski with the assistance of his staff developed a fix for the slide (that would return the Jaegers' slope to its pre-2001 slide level of stability) that consisted of recompacting and reinforcing the damaged soil. [RP 1373:1-25; 1374:1-25; 1375:1-25; 1376:1-23] Mr. Koloski estimated a repair cost for the damaged soil between $10-20,000 with related drainage improvements and re-landscaping estimated at an

additional $20,000. [RP 1373-1374] Mr. Koloski testified that even if a retaining wall were employed to repair the damage that it should cost no more than $37,500 in order to return the slope to its pre-2001 slide level of stability. [RP 1385]

It was also Mr. Koloski's opinion that the more expensive retaining wall repair(s) proposed by Shannon & Wilson, Inc. in or about 2003/2004 were intentionally "conservative" with an objective to restore the slope to a degree of stability that far exceeded the pre-2001 slide conditions. [RP 1498:25; 1499. Ex. 13 and 14 attached hereto as Appendix "3"]

D. ARGUMENT.

1. 'Substantial evidence' of the Jaegers' contributory negligence or fault justified the trial court's decisions to instruct the jury on contributory negligence and to deny the Jaegers' motion for judgment not withstanding the verdict.

The Jaegers contend that the trial court erred in denying their motion for judgment not withstanding the verdict and in instructing the jury on contributory negligence. The Jaegers assert that there was not 'substantial evidence' of contributory negligence on their part. [Jaegers' Brief, pgs. 15-48].

A. Standards of Review.

Motions for judgments as a matter of law are reviewed de novo applying the same legal standard used by the trial court in deciding

the motion. Hume v. Am. Disposal Co., 124 Wn.2d 656, 667-68. A motion for judgment notwithstanding a verdict admits the truth of the opponent's evidence. Id. Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in its favor, substantial evidence exists to sustain the verdict. Id.

Similarly, jury instructions are reviewed on appeal de novo. Each instruction must be supported by substantial evidence. Enslow v. Helmcke, 26 Wn.App. 101, 104 (1980). Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the declared premise. Bryant v. Palmer Coking Coal Co., 86 Wn.App. 204, 210 (1997).

B. Evidence of the Jaegers' Contributory Negligence.

In determining contributory negligence or fault, the inquiry is whether a person exercised the reasonable care for his own protection that a reasonable person would have used under the existing facts or circumstances, and, if not, whether such conduct was a contributing cause of the injury. See Huston v. First Church of God, 46 Wn.App. 740, 747 (1987). See also RCW 4.22.015 ("fault" includes an unreasonable failure to avoid an injury or to mitigate damages). In Washington, a plaintiff who "has voluntarily engaged in behavior which increases the

risk of injury . . . may be held to be predominantly liable for the injuries occurring as a result thereof." Geschwind v. Flanagan, 121 Wn.2d 833, 839 (1993). Also, a plaintiff who does not directly cause the injury-producing event may be held more liable for his or her injuries than the tort-feasor. Shorter v. Drury, 103 Wn.2d 645, cert. den., 474 U.S. 827 (1985).[8] See also F.W. Woolworth Co. v. City of Seattle, 104 Wn. 629 (1919) (property owner contributorily negligent for allowing backwater valve to become unclean and clogged); Clark v. City of Seattle, 156 Wn. 319 (1930) (property owner contributorily negligent for cutting toe of slope that contributed to cause of a landslide). Ordinarily, the issue of contributory negligence is a factual question to be resolved by the jury. See Young v. Caravan Corp., 99 Wn.2d 655 (1983).

The facts of the present case are unlike the Hojem v. Kelly, 93 Wn.2d 143 (1980) case discussed by the Jaegers. In Hojem, the Court considered the largely unknown propensities of riderless horse(s) in evaluating a stable owner's corresponding duty of care. In the instant case, the Jaegers received a lot of specific information about the sensitive geological nature of their property including, among other things, geological reports on title. (Exs. 7, 8 and 129). In the context of

[8] In Shorter, for example, the court held that a patient who refused to accept blood transfusions may be more at fault than a doctor who negligently performed an operation and the patient bled to death as a result of both her injuries and her refusal to accept a transfusion. 103 Wn.2d at 657.

the real estate transaction, the Jaegers also inspected the property and received disclosures and advice concerning how to inspect, care for and maintain their property. [RP 244-261; 1632] This included instructions about their storm-water drainage system which served to protect their slope from water intrusion associated with causing landslide activity. (Exs. 4 and 5).

However, the Jaegers demonstrated a palpable nonchalance in the real estate transaction and an apparent disregard for information about the possible risks of buying and owning a geologically sensitive piece of property. [RP 1270-1275] Mr. Jaeger did not read Mr. Thomas's reports or even any of the closing documents. [RP 1270 - 1275] Similarly, Mrs. Jaeger does not recall reading the geological reports on title at any time prior to the 2001 landslide or learning much, if anything, about the property except that it had a "good view" and was "undervalued".[9] [RP 242-261]

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[9] The Jaegers seek to characterize Mrs. Jaeger as naïve of the process and someone who didn't "know what a geotech was." (Brief, pg. 9) Mrs. Jaeger, however, holds a Masters Degree in Education from Northern Illinois University and the evidence at trial painted another picture. [RP 225] Even if naivety was an issue she had no problem telling her geological experts what to do or from disregarding their advice altogether. For example, in a July 18, 2005 e-mail to Shannon & Wilson about a draft report discussing possible remedies for the landslides, Mrs. Jaeger wrote: *"As I mentioned before, this lists two wall prices, we wanted just one. Even if the cheaper wall can be accomplished, I would prefer to go forward with the tieback wall. That would give us a financial buffer for negotiations."* [Ex. 186; RP 1243-1245; 1264-1265].

The Jaegers' apparent disinterest in and admitted failure to learn about the features of their property increased the risk that they would harm their land and that is exactly what they did.

(1) Removal of Native Vegetation from the Slide Zone.

In 2001, shortly after purchasing Lot A, the Jaegers removed the native vegetation on the very area where the landslide occurred in December 2001 and planted grass. [RP 1159:5-25; 1160:1-25; 1161:1-15; 1067:9-25; 1068:1-15; 1749:18-25; 1751:1-22. Exs. 7; 11 and 134] The Jaegers' knew or should have known from Mr. Thomas' geological reports that stripping the slope made it vulnerable to sliding. [Ex. 7] There was neighborhood concern about the Jaegers' actions as Mr. Thomas's advice about maintaining vegetation on the slopes was well known.[10] [RP 1159:5-25; 1160:1-25; 1161:1-15; 1067:9-25; 1068:1-15; 1749:18-25; 1750; 1751:1-22. Exs. 7; 11 and 134]

Cleaver's expert, Jon Koloski, testified that the Jaegers' removal of native vegetation from the slide zone was a quantifiable cause of the 2001 slide because it allowed rainfall direct access to the

[10] The Jaegers' neighbor to the south, Marc Bissonette, testified that in 1994, that he consulted Mr. Thomas when a tension crack opened up on his slope. [RP 1068:1-15]. Bissonette stated that Mr. Thomas opined that Bissonette had caused the crack when he "cleared" the area of vegetation. [RP 1068:1-15]. Mr. Bissonette testified that since then, that he had made efforts to maintain and add native vegetation on his slope to maintain stability in accordance with Mr. Thomas' advice. [RP 1067:9-25; Ex. 7].

ground surface. (RP 1444:25; 1445:1-12). The Jaegers' expert, Mr. McCabe, acknowledged that removal of dense vegetation on a slope can be associated with a greater incidence of sliding and that vegetation can retard deterioration of "slide materials" like those found on the Jaegers' slope. [891:17-25; 892:1-12] Shannon & Wilson recommended that the Jaegers replant the slope with native vegetation, but the Jaegers' skirted the advice. [Exs. 11 and 12]

The evidence supported that the Jaegers removal of native vegetation in the slide zone was negligent in that they knew or should have known that stripping the slide zone of native vegetation increased the risk of sliding on the slope. The Jaegers' also unreasonably failed to mitigate their damages by restoring the vegetation once the damage was done.

(2) Failure to Maintain the Sports Court Sump Pump.

The parties' experts who opined about the cause of the December 17, 2001 landslide on the Jaegers' property seemed to agree that the slide was primarily triggered by rain water ponding on the sports court and rolling off of it into the soils located beneath and at the front of the sports court. [RP 1302-1303; 511:14-25; 512-515; 886:17-25; 888:1-3; 1342-1344; 1364-1368. Exs. 207; 208; and 215] They also agreed that the 'ponding' occurred, at least in part, because the sump pump

designed to move water from the court had failed. [RP 510:16-25; 511-512; 1368:10-25; 1369:18-25; 1370].

At trial, the Jaegers employed Mr. McCabe to testify about the two theories he had developed opining that Cleaver's actions may have caused the 2001 landslide. [RP 538:19-25] However, neither of McCabe's theories concerned why or how the sump pump had stopped. [RP 538:19-25; RP 510:16-24] Mr. McCabe's first theory was that the drainage tight-line crossing the Norbuts' property (damaged by Cleaver's backhoe) had become blocked at the time of the slide and storm-water had 'backed up' in the system to the Jaegers' sports court and slide zone. However, even though Mr. McCabe spent years investigating the theory, it was evident at trial that he had no direct evidence to support it.[11] Nonetheless, Mr. McCabe struggled to support his 'backing up' theory at trial.[12]

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[11] However, Mr. McCabe also had to admit that he was not able to confirm that the damaged tight-line on the Norbut property was even blocked prior to the slide [RP 510:2-15] let alone that any water 'backing up' made its way back to the sports court area. [RP 611-642; 886:1-17; 887:1-13; 1317-1334]. The fact that Shannon & Wilson found little water seepage/ground moisture on the east side of the Jaegers' property also appeared to conflict with the notion. [Ex. 11, pg., Fig. 1; 1332:15-25; 1333].

[12] First, Mr. McCabe tried to explain a route for storm water "backing up" from the point of the blockage all the way back to the sports court. [RP 611-642]. A direct route from the blockage to the court was negated by a "check valve" in the pipe that carried water from the court to the Norbuts' vault. [RP 506] The 'check valve' prevented surface waters from returning to the court and was operating as intended the day of the slide. [RP 506] Consequently,

The jury members were allowed the final questions of Mr. McCabe. Focusing upon the weaknesses of McCabe's 'backing up' theory, the jury asked McCabe how any water backing up from the vault appeared at the sports court and slide zone if a drain McCabe he traced to the Bissonette's property (south of the Jaegers) was connected and unobstructed and when the sports court drain had a functioning check valve. [RP 886:17-21] In response, Mr. McCabe suddenly opined that the suspected blockage may have caused the sump pump on the sports court to 'overwork' and fail thereby preventing rain landing on the court from leaving. [RP 886:17-25; 888:1-3].

Mr. McCabe, by his response essentially gave up trying to explain or evidence how any water "backing up" may have found its

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Mr. McCabe tried to obtain elevation readings of the various drains and outlets of the system to try to determine where water may exit first if it was 'backing up' from a blockage in the Norbuts' tight-line. [RP 611-642; 1485-1487] In this manner, Mr. McCabe hoped to find a more circuitous route for storm water to get back to the sports court and the slide zone if it 'backed up'. [RP 1485-1487] Mr. McCabe believed that the lowest exit point in the system was a pipe which he called the "discharge pipe" running from the Jaegers' footing drain at the southeast corner of their home. [611-624] However, Mr. McCabe traced the pipe to a dead end approximately eighteen feet onto the Bissonette property and directly above a curtain drain installed by the Bissonettes before giving up. [RP 623 - 634]. Mr. McCabe left the pipe buried at that location. [RP 621-625]. Nonetheless, at trial Mr. McCabe testified that he thought that the pipe "passed water freely" because Mrs. Jaeger (when he was not present) had blasted water down it from a hose for twenty minutes and she had reported that the water had not come back, but rather had traveled to points unknown. [RP 623-625; 627] Mr. McCabe testified that based upon Mrs. Jaeger's test that the 'discharge pipe' contributed to the cause of the 2001 slide. [627]

way to the sports court or the slide zone. In its place and in response to the juror's question, McCabe instead belatedly adopted a *new* theory that the suspected blockage caused the sump pump to break. Mr. McCabe's testimony in this regard, however, was not credible given his earlier testimony:

Q: Were you able to learn when that pump stopped working?

A: Exactly when that pump stopped working, I do not know.

Q: And do you personally know the reason why it stopped working?

A: I don't know the reason why it stopped working.

[RP 510:16-24].

Mr. McCabe had also testified earlier that the last date that anyone had observed the sports court sump pump in operation was on December 14, 2001, three days prior to the slide. [RP 505:7-12].

Mr. McCabe's attempt to suggest a link between Cleaver's conduct and the failed sump pump offered nothing more that speculation and an unsupported theory which contradicted even his own testimony.

However, in contrast there was strong circumstantial evidence that the Jaegers caused the sump pump to fail, namely, by failing to periodically clean and clear both the pump and the catch basin

of debris.[13] [RP 1368:10-25; 1369:18-25; 1370; 1744; 1745:1-16; Ex. 65] In early December 2001, Mrs. Jaeger informed Mr. Cleaver that she intended on having the pump inspected and likely replaced due to its age. [RP 288-292; 1746-1747] At that time, Mr. Cleaver, as he had warned at the time of the Jaegers' purchase, again emphasized the importance of keeping the workings of the pump clean and free of debris. [RP 1740-1741] When the pump was removed from the sports court catch basin following the 2001 slide it was caked with mud and debris indicating that the pump's 'intake screen' and 'float switch' were impaired. [RP 1368-1370] Mrs. Jaeger recognized that her failure to act to maintain the pump allowed it to fail and cause the slide. Mrs. Jaeger admitted her fault to Mr. Cleaver. [RP 1746-1747].

The jury could reasonably conclude and infer from the evidence that the Jaegers were negligent in that they increased their risk of injury and unreasonably failed to avoid injury by failing to timely learn about, as well as maintain the sump pump free of debris (or alternatively having it replaced because of its age and condition).

[13] The Jaegers showed little interest in learning about the drainage system which served and protected their slope until they had a problem with their septic pump. [RP 250:18-25; 251- 259] In fact, at the time of trial, Mrs. Jaeger denied having any knowledge about the system until weeks before the 2001 slide occurred. This is true even though Eric Cleaver emphasized to the Jaegers and their home inspector, Ron Perkewicz, the importance of keeping the sports court sump pump free of debris and operational (in order to protect the slope from surface waters). [RP 1631:23-25; 1632:1-21].

The experts agreed that an owner(s) of a slide prone property such as the Jaegers should be especially careful and responsible for maintaining drainage. [RP 885:20-25; 886:1-5; 895] However, the record was replete with evidence of the Jaegers' disregard of information concerning their property (e.g., the Will Thomas reports) including drainage. The evidence was that the Jaegers' failure to maintain the pump in good working order caused it to fail and that the failure of the pump, in turn, caused the 2001 slide. [RP 1328; 886-887]

(3) **High Water Usage and Jaegers' Drainfield.**

Both before and throughout the period of landslide activity on the Jaegers' property, there was evidence that the Jaegers used an extraordinary amount of water. [RP 1349-1360; Norbut] The Jaegers' water usage was recorded because several homes in the area known as 'Paradise Cove' shared a well and each home was charged more for 'excess' use. [RP 1349-1360]. Every drop of water used by the Jaegers went into the ground. [RP 1496:20-22; 1479:24-25; 1480:1-5] All the geologic experts agreed that this water would migrate east through the Jaeger slide zone. [RP 667:10-15]

There was also direct evidence that water from the Jaegers' drain-field was moving from west to east in large quantities because the Jaegers reportedly pumped water out of their crawlspace (a location just

east of the Jaegers' septic system) in 2001 (prior to the landslide) and in 2004. [RP 839:21-25; 840:1-4] The direct and circumstantial evidence proved that the Jaegers' high water usage which went into their septic drain-field migrated east contributing to the cause of the landslides.

At trial, Mr. McCabe tried to blame the Norbuts' septic drainfield for the sliding on the Jaegers' property.[14] Ironically, however, the attempt only served to reinforce the evidence that the Jaegers' water usage and septic drainfield were causing the damage.

Mr. McCabe recalled his deposition testimony of April 2006 that the Norbut drain-field was an "unlikely" contributor to any landslide activity. [RP 874:10-18]. Mr. McCabe, however, noted that he had "corrected" his opinion during the same deposition testifying that "it was likely a small contributor." [RP 874:10-18]. When asked whether the Jaegers' attorney, Mr. Bricklin, had prompted the change or 'correction' [RP 874:19-21] during a break in the deposition, Mr. McCabe responded:

> "Well, probably what happened was he reminded me that I had expressed an opinion early on, during these other

[14] The Jaegers theorized that Cleaver had allegedly installed the Norbuts' septic drain-field too close to the Norbuts' 'steep' slope and thereby violated County restrictions. [RP 538:19-25] Mr. McCabe opined that effluent from the Norbuts' drain-field somehow traveled east and south into the Jaegers' slide zone contributing to the cause of landslide(s) even though the alleged flow pattern was contradicted by all the evidence. [RP 874-876; 877:1-17; 838:16-25].

> conversations that I didn't have any written notes on, that it was a likely contributor, and then all of a sudden, during the deposition, he noted that I was saying it wasn't and that was inconsistent with what I had been talking about previously in our meeting, and I mentioned, I mean it – the fact that it was reasonably close to the slide zone, I mean it would have to be considered a *potential contributor*." [RP 874:22-25; 875:1-6].

Plainly, Mr. McCabe only speculated that the Norbuts' drain-field might be a "potential contributor" to slide activity on the Jaegers' property. The record also supports the conclusion that Mr. McCabe performed no investigation to support any suspicion he may have had in this regard (if he truly had one). [RP 643-650] See also RP 836:13-25; 837-840 re: Reynolds]

It was also curious, given Mr. McCabe's testimony, why he had not (at least in any obvious way) evaluated the strong evidence that the Jaegers' septic drain-field was a 'contributor'. This point, however, was not lost on the jury. When the Jaegers called their next 'geological' expert, Mr. Cousins, a juror's question elicited the following exchange:

> THE COURT: Earlier testimony stated ground water was observed pouring into the Jaeger's septic system in November of 2001, could this water activity have contributed to the landslides?
>
> *THE WITNESS: Pouring into the Jaeger septic system. As far as I recall, it was natural run off, water that was going into the septic system, whether ground water or surface water.*
>
> THE COURT: Do you understand the question?

THE WITNESS: I think unless I didn't answer it correctly.

THE COURT: Earlier testimony stated ground water was observed pouring into the Jaeger's septic system in November of 2001, could this water activity have contributed to the landslides?

THE WITNESS: Yes.

[RP 1002:16-25; 1003:1-6].

Also, even though Mr. McCabe initially downplayed the contribution of groundwater in causing the 2001 slide [RP 641-642] by the time Mr. McCabe finished testifying, he had come 'full circle' testifying to his opinion that the further movement in 2003 through 2006 was caused by "groundwater". [RP 665:10-23] The evidence supported that the Jaegers' high water usage impacting their septic drain-field and flowing east through the slide zone caused the subject landslides. The Jaegers knew or should have known that their conduct was causing damage to their slope but they (apparently) did nothing about it.

(4) Failure to Effectively Accomplish Repairs.

In October 2002, the Jaegers installed a shallow curtain drain of improper design just east of the sports court further disturbing and weighing upon the earth that had moved in 2001. Bruce Reynolds testified that he had a brief conversation with Mrs. Jaeger the same day the Jaegers' planned to have their contractor install the drain, but

nothing else was exchanged and there were no design document(s). Shannon & Wilson did not participate. The Jaegers' argument that Mr. Reynolds 'blessed' the project is self-serving and contrary to the facts.[15] [RP 789].

In March 2003, Mr. McCabe was the first 'expert' to see the ill-conceived drain. [RP 567] Mrs. Jaeger complained to Mr. McCabe that the drain was slumping and falling down. [RP 569:15-20] Mr. McCabe criticized the location and design of the drain testifying that he told Mrs. Jaeger to immediately cover it so that rainfall did not enter it from the top. [RP 567:4-25; 568:1-11; 569:15-25; 570:1-13]. The jury examined photos of the drain which revealed that it had slumped near its center and appeared to be gathering water and weight at its center. [Exs. 79 and 80. RP 569:15-25; 570:1-4].

According to Mr. Koloski, the drain was placed in the worst possible location, exacerbating disturbance of soils that had already moved and contributing to the cause of the further movement noticed in 2003. [RP 1391-1394]. Plainly, the Jaegers were negligent in failing

[15] The drain as installed by the Jaegers' contractor, William Hill, was too shallow and not bedded in an impervious layer of soil thereby allowing groundwater to go underneath it. [RP 783-792] The drain was not capped by impervious soil or built to catch groundwater passing into its side from uphill. Rather, the drain was open at the top so that any migrating surface water and unwanted direct rain fell into it. [RP 783-792] At trial, Mr. Reynolds explained in detail why the drain installed by the Jaegers was not consistent with requirements of Shannon & Wilson. [RP 783-792. Ex. 11]

to involve their experts during the construction of the ill-conceived curtain drain which contributed to the cause of further sliding in 2003.

(5) Failure to Timely Evaluate and Stabilize the Slide.

As explained at the outset of this brief, the Jaegers were negligent for failing to move to stabilize the soils damaged in the 2001 slide as recommended by their experts. [RP 832:21-24, Ex. 11 and 169] All of the geological experts who testified at trial said that absent some effort to actually *stabilize* the ground that the same area would continue to deteriorate over time. (McCabe: RP 471:7-19, 562:3-8; 709:11-25; 710:1-24. Reynolds: RP 742:20-25; 743:1-3. Koloski: RP 1402:8-17).

Robert Cousins, the only expert that the Jaegers called in both their case-in-chief and on rebuttal testified that "it's like a freight train that will keep going down hill" unless prompt measures to repair the soil were implemented. [RP 1723:18-25; 1724:1-3]. Mr. Cousins further stated that in his experience the investigation and repair of a landslide, beginning with soil boring(s) at no later than six to eight weeks after the slide, would commonly be completed within a one-year period. [RP 1723:2-17]

The Jaegers' lead geological expert, W. Martin McCabe of URS Corporation testified that investigating a slide "early on" by soil testing was generally favorable. [RP 900:9-10] Mr. McCabe agreed that

the benefit of obtaining soil borings right after a slide occurs is that one can determine the nature of the slide and the scope of the fix that one might need. [RP 561:8-14; 562:3-8; 713:15-19]. Mr. McCabe testified that removing and replacing soil or reinforcing damaged soil with an MSE wall could repair a 'surficial' and 'shallow' slide like the one identified on the Jaegers' property in 2001. [714:15-25; 715:1-7; 773:6-21; Exs. 11; 153, 154, and 155] Mr. Reynolds agreed testifying that all the conditions of a particular slide should be determined as soon as possible so that a means of stabilization can be chosen. [RP 863] Mr. Reynolds advised the Jaegers about the risks of doing nothing.[16] [RP 864; Exs. 11 and 169]

Mrs. Jaegers' testimony that she did not authorize soil testing before 2005 because she could not afford a repair cost exceeding $300,000 was incredible because there was no evidence that the cost of repairing the 2001 or 2003 movement would be that high even if a soldier pile was chosen as the remedy.[17] [RP 205-206; 1257:14-25;

[16] Mr. McCabe's and Mr. Reynolds' testimony is consistent with that of Mr. Koloski who testified that the 2001 slide should have promptly been repaired to at least that degree of stability present prior to the 2001 event at an estimated cost of less than $50,000. [RP 1374-1386]

[17] Mr. Koloski testified that if a soldier pile wall was chosen as a remedy to fix the movement he observed before 2006 that a suitable wall would cost no more than $37,500 to return the Jaegers to a comparable pre-2001 slide position. [RP 1384 - 1385]

1258:1-4; 1529; 585]. In 2005, Shannon & Wilson estimated a soldier pile wall for the Jaegers' site costing $104,000. [Ex. 13, Appendix "2"] In 2003, Mr. McCabe provided an estimate for a retaining wall for the site costing $140,000. [RP 585; Ex. 28]. Where Mrs. Jaeger got the notion that Shannon & Wilson was recommending as early as 2002 that a wall was required to 'save her house' at a cost exceeding $300,000 is unknown, but from questioning at trial it appears to have come from her lawyer. [205-206; 1529]

Further, the Jaegers did not produce any financial information at trial to corroborate their bald assertion that they could not afford repairs (whatever those might have been at a given point in time). Both Mr. McCabe and Mr. Norbut testified that the Jaegers never mentioned that they could not afford to pay for repairs. [RP 1191:12-15; 712:13-20]. Mrs. Jaeger repeatedly testified that she could not afford repairs, but she never divulged what amount the Jaegers could have afforded or specifically what they had spent. Plainly, the Jaegers created both the ruse that a very expensive fix was needed in 2001 or even in 2005 and the ruse that they could not afford one in an attempt to excuse their failure to take reasonable action (consistent with expert advice) to avoid the risk of injury and to mitigate damages.

2. The trial court properly denied the Jaegers' motion for a new trial.

The Jaegers alternatively moved for a new trial pursuant to Civil Rule 59 once again arguing that the evidence at trial (i.e., on contributory negligence) did not support the jury's determination of contributory negligence and that "substantial justice" therefore was not afforded them.

The Jaegers also claim that a new trial should be granted because of the trial court's refusal to give the Jaegers' supplemental jury instruction number "24" (Issue "3", infra); because the trial court excluded evidence of certain insurance information (Issue "4", infra) and because their motion for additur should have been granted. (Issue "5", infra).

Finally, the Jaegers argue that any new trial should be limited to the issue of the Jaegers' contributory negligence. (Issue "6", infra).

A trial court may vacate a verdict and order a new trial if there is no evidence or reasonable inference from the evidence to justify it [CR 59(a)(7)]; if damages awarded are so excessive or inadequate as unmistakably to indicate that the verdict was the result of passion or prejudice [CR 59(a)(5) and/or that substantial justice has not been done. [CR 59(a)(9)]. A trial court's decision to deny a plaintiff's motion for

new trial under Civil Rule 59 is reviewed for any 'abuse of discretion' in applying Civil Rule 59 to the record. Review is 'narrow' and the reviewing court will rarely exercise its power to order a new trial. See Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 330 (1993); Ma'Ele v. Arrington, 111 Wn.App. 557 (2002).

The jury had ample evidence (including reasonable inferences) to conclude that the Jaegers were at fault for most of the damages they incurred and that evidence will not be repeated here. The fallacy of the Jaegers' argument that the amount of the judgment negates 'substantial justice', however, must be emphasized. [Jaegers' Brief, pg. 60] First, the Jaegers simply did not evidence that "most of the geologic damage occurred at the time of the initial slide" or that it did not matter what the Jaegers "did or did not do" to mitigate that damage. (Jaegers' Brief, pg. 57). The overwhelming evidence was that the Jaegers failed to take reasonable action to avoid further injury after the 2001 slide by failing to move to stabilize the damage quickly. When damage is temporary and the land or property can be restored to its prior condition, the measure of damages is the reasonable cost of restoration and loss of use during the restoration. See Pepper v. J.J. Welcome Constr. Co., 73 Wn.App. 523 (1994). The Jaegers contend that they are out-of pocket over $200,000 and "are still" confronted with the need to install "a

substantial wall and underpinnings beneath [their] house" that will cost an additional $421,000. [Jaegers' Brief, pg. 60]. However, the evidence proved that these alleged damages had nothing to do with the slides occurring in 2001 or even 2003.

It appears reasonable that the jury may well have found Cleaver liable for some part of the cost of repair associated with the early sliding. This would make some sense because Cleaver's potential liability associated with the damaged drainage tight-line arguably ended when the pipe was decommissioned the day of the 2001 slide. Also, the Jaegers presented no evidence that the Norbuts' septic drain-field contributed to the cause of any of the sliding (at any time). The amount of the award against Cleaver seems to be within a range of numbers deemed sufficient to repair the early landslide damage occurring in 2001-2003.[18] [RP 1373:1-25; 1374:1-25; 1375:1-25; 1376:1-23]

[18] Under Civil Rule 59(a)(5), a court can order a new trial where the damages awarded are so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice. Alleged 'passion or prejudice' on the part of the jury is not grounds for granting a new trial under CR 59(a)(5) unless the record indicates that *the verdict was not within the range of proven damages*. See James v. Robeck, 79 Wn.2d 864, 870-871 (1971).

3. The Jaegers did not except to the form of the instruction on contributory negligence. In any event, the trial court properly refused to give the Jaegers' proposed supplemental jury instruction number 24.

The Jaegers did not object to the trial court's instructions on contributory negligence other than upon the basis that 'substantial evidence' did not support any instruction whatsoever. [RP 1552-1558] The Jaegers did except to Cleaver's proposed pattern instruction on 'avoidable consequences',WPI 33.03, but the trial court declined to give the instruction as proposed by Cleaver or at all. [CP 346; 369-394; CP 346]. Consequently, the issue now presented by the Jaegers (i.e., proposed tailored instructions concerning contributory negligence) for the first time on appeal was not preserved or properly raised for review.

However, if this Court reviews the issue as presented by the Jaegers, Cleaver submits that the trial court's instructions on contributory negligence or fault were proper. The trial court instructed the jury concerning Cleaver's claim that the Jaegers were contributorily negligent in that they caused their own damages and failed to act reasonably to mitigate their damages. [Instr. No. "2", CP 369] The trial court gave the pattern instruction on "contributory negligence" (WPI 11.01) and related instructions on negligence and duty of care. [Instr. Nos. 7, 8 and 9, CP 369] The instructions correctly

stated the law concerning contributory negligence without undue emphasis or detail "which might subject the trial judge to the charge of commenting on the evidence" [Laudermilk v. Carpenter, 78 Wn.2d 92, 100 (1969)] or by unfairly emphasizing one party's theory of the case. See Watson v. Hockett, 107 Wn.2d 158 (1986).

In contrast, the Jaegers sought instructions on mitigation that not only would have unfairly emphasized a theory of their case, (i.e., that a duty to mitigate damages can be satisfied by reasonable reliance upon expert advice) but in application would have been difficult and confusing given facts of the case.[19] The Jaegers cite various cases, mostly from other jurisdictions, wherein court(s) have declined to give a 'failure to mitigate damages' instruction where it was beyond dispute that a plaintiff had acted reasonably in following an expert's advice (typically a physician) concerning treatment. See e.g., Cox v. Keg Restaurants U.S., Inc., 86 Wn.App. 239 (1997); Kelty v. Best Cabs, Inc., 481 P.2d 980 (Ks. 1971).

In contrast, in the present case there was ample evidence that the Jaegers did not act reasonably in response to expert advice

[19] For example, what "two reasonable choices" were presented to the Jaegers on any given issue of mitigation. Shannon & Wilson presented a lot of mitigation advice to the Jaegers over time and much of it did not include choices or options. For example, Shannon & Wilson advised the Jaegers in 2002 and 2003 that they needed to stabilize the slide area [RP 832:21-24] and that the action required soil testing. [Exs. 11 and 169]

about their slope. In particular, the Jaegers' refusal to authorize both diagnosis and treatment of the slide damage via soil testing caused the Jaegers substantial damages. Bruce Reynolds of Shannon & Wilson emphasized that it was important to try and promptly determine all conditions of a slide and stabilize it early to prevent further ground loss. [RP 863:8-17] This is especially true in the case of a surficial slide where further ground loss can be prevented or mitigated. [RP 863:8-17]. Mr. Reynolds testified that he communicated the risks of foregoing a stabilization process but the Jaegers failed to act. [RP 832; 863:8-17; Exs. 11 and 169]

The Jaegers would like to be able to argue and prove that mitigation in 2002 with something less than a $300,000 soldier pile wall would have been futile. However, the Jaegers' own failure to timely explore a reasonable fix precludes the claim. Cleaver was entitled to a jury instruction on mitigation provided by the trial court because the jury could reasonably conclude from the evidence that the Jaegers unreasonably failed to avoid their injuries and/or or failed to

mitigate damages. See Fox v. Evans, 127 Wn.App. 300 (2005).[20]

4. **The trial court properly excluded evidence of insurance information.**

A trial court has "broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63 (1997).

The Jaegers claim that the trial court improperly excluded evidence that their homeowners' insurance would not pay for certain retaining wall repairs. [RP 1781] They argue that they needed the insurance evidence to meet Cleaver's defense that the Jaegers "should have spent several hundred thousand dollars building a retaining wall after an initial landslide to ward off future slides" and where "plaintiffs claim...that they did not have sufficient funds for the expensive wall." [Jaegers' Brief, pg. 2; RP 1781]

However, Cleaver did not argue or defend on the foregoing factual basis asserted by the Jaegers. Rather, Cleaver contended that the Jaegers should have promptly moved to stabilize the initial landslide at a reasonable cost indicated by conditions and without the expense of a

[20] In Fox, the plaintiff Ms. Fox refused to recognize a diagnosis of depression and refused proposed medical treatment for it. The trial court found that Ms. Fox' unwillingness to authorize recommended treatment impeded her recovery. The Court of Appeals in Fox distinguished the facts of Cox and held that a mitigation instruction was appropriate because the evidence raised an issue as to whether Fox's treatment decisions were reasonable. 127 Wn.App. at 306.

retaining wall. The trial court properly excluded the evidence of insurance because it was not probative or relevant to the issue presented. [ER 401, 402]

Further, the Jaegers improperly sought to introduce the insurance information as evidence that they should have no liability for causing their own damages (i.e., contributory negligence). The Jaegers would have argued that they should be excused from protecting themselves from harm because they could not afford to do so for lack of insurance. Consequently, the information was properly excluded under Evidence Rule 411.

The trial court had good reason to exclude the insurance information at issue and did not abuse its discretion.

5. The trial court properly denied the Jaegers' motion for additur?

The Jaegers' also move for a new trial under Civil Rule 59 and/or for additur under Revised Code of Washington 4.76.030 claiming that the jury's verdict must be erroneous and a product of passion or prejudice because of the amount of the award (and the calculation of certain components of the award).

The instant case is unlike Ide v. Stoltenow, 47 Wn.2d 847 (1955) or Hills v. King, 66 Wn.2d 738 (1965) cited by the Jaegers. In Ide and Hills, items of special damages were "conceded, undisputed, and

beyond legitimate controversy." In the instant case, however, the categories of alleged damages at issue (e.g., cost of retaining wall; remedial expenses to date; and double housing/travel expenses) were contested by Cleaver with evidence that they were not or could not be reasonably incurred by the Jaegers.

Cost of Retaining Wall

For example, with respect to "cost of a retaining wall", Cleaver presented and emphasized evidence that any retaining wall engineered to support ground under or near the Jaegers' house was unreasonable. There was no evidence that the Jaegers' house was vulnerable to or compromised by the landslide activity. [RP 558-560; 999; 812:3-25; 813-815; 795-797; Ex. 170] Mr. McCabe testified that he "guessed" that one would pay "at least $50,000" for some underpinning piers or pin piles "envisioned" to secure the house. [RP 487-488] But, again, there was no evidence (credible or otherwise) that the Jaegers' house needed securing; was impacted by landslide activity or that 'pin piles' would address any damages incurred by the Jaegers or were otherwise relevant. [RP 893-895]

In a similar vein, Cleaver also presented evidence that the wall proposed as the 'fix' of the slide damage would constitute a betterment exceeding the applicable measure of damages. [RP 565] See

Pepper v. J.J. Welcome Constr. Co., 73 Wn.App. 523 (1994). Mr. Koloski opined that more expensive retaining wall repair(s) proposed by Shannon & Wilson, Inc. in or about 2004/2005 were intentionally "conservative" with an objective to restore the slope to a degree of stability that far exceeded the pre-2001 slide conditions. [RP 1498:25; 1499]

Finally, the jury was also not obliged to just accept the testimony of the Jaegers or their experts on issues of damage. It is the jurors' exclusive power to judge, among other things, the credibility of witnesses claiming to be damaged and determine whether the alleged damages are proven. See James v. Robeck, 79 Wn.2d 864, 870-871 (1971). See also, Burnside v. Simpson Paper Co., 123 Wn.2d 93 (1994). A verdict must be accorded a strong presumption of validity. Beam v. Beam, 18 Wn. App. 444 (1977), rev. den., 90 Wn.2d 1001 (1978).

Remedial Expenses Incurred to Date.

To the extent that the damages cited by counsel under this category are even discernable, once again the jury did not just have to accept all of the items mentioned by the Jaegers. The jury may well have determined that certain items were not reasonably incurred as damages for repair or a result of the landslide but were rather common homeowner upgrades or maintenance items. The jury may also have

found repair efforts and related costs that were detrimental and/or duplicative.

The amount of $10, 612 on the verdict appears to closely correspond to invoices and testimony or match the amounts paid to William Hill of Sound Integrity for drainage and earthwork repairs around the sports court. [RP 1029-1036]

Double Housing and Travel Expenses.

This is another category of alleged damage that the jury undoubtedly found were not proven. Mrs. Jaeger testified that when her family purchased the property that they were tired of moving (and storing their possessions) and that the family just wanted to stay put in one place for the children. [RP 6] Mrs. Jaeger's contradictory testimony that the family desired to rent their new home, store all their possessions and rent another house in Connecticut in order to be by her husband was not credible, hence the "0" award. There was also no evidence of any attempt to rent the house; determine the feasibility of moving school aged kids to the East Coast or other similar planning prior to the 2001 slide.

6. **If a new trial were ordered it should not be limited to issues of contributory negligence.**

There is no reason for any new trial. This case was already tried at great effort and expense. However, in the event that a new trial

was granted, as requested by the Jaegers, it would be unfair to re-try any issues of contributory negligence in isolation especially given the Jaegers weak case against Cleaver. Contrary to the Jaegers' assertions, this is also not a case where factual and legal theories of liability and damages of the parties are distinct and separable. Many of them revolve around the same causation (e.g., how the sump pump failed) and certainly damage issues (e.g., landslides between 2001 and 2006).

7. **The trial court properly refused the Jaegers' request to include Eric Cleaver as a judgment debtor.**

In 2003, when it was determined that Cleaver Construction, Inc. had damaged the drainage pipeline, the Jaegers also sued Cleaver Construction, Inc. [CP 825] Mr. Eric Cleaver is the President of Cleaver Construction, Inc. [RP 1563] The Jaegers' Complaint, however, does not identify or distinguish Eric Cleaver in any corporate capacity. [CP 825] In fact, in response to the Norbuts' complaint, the Jaegers deny any knowledge concerning Eric Cleaver's position in Cleaver Construction, Inc. [CP 813, para. 1.3 and CP 825, para. II].

It is undisputed that Cleaver Construction, Inc. contracted with Norbut for the septic system work at issue and that one of Cleaver Construction's crew members was operating the back-hoe which damaged the subject drain-line not Eric Cleaver. [Ex. 1; RP 1609:23-25; 1610:1-11; 1619-] At trial, there was no evidence or finding of

negligence on the part of Eric Cleaver, individually, or in any capacity as an officer of Cleaver Construction, Inc. [CP 395]. There was also no attempt by the Jaegers to "pierce the corporate veil" to reach Eric Cleaver personally nor was an action for 'respondeat superior' pled or pursued. Nonetheless, the Jaegers now want to add Eric Cleaver to the judgment claiming that he should have personal liability by virtue of certain activities he performed on behalf of the corporation. However, as noted above, the Jaegers did not advance such a claim by pleading or at trial.

The Jaegers cite Vanderpool v. Grange Ins. Assn., 110 Wn.2d 483 (1988) apparently to try and advance a late claim or ability to look to both master and servant for recovery when recovery has been accepted from one by agreement [e.g., settlement with Eric Cleaver, individually] and the other has paid a judgment.

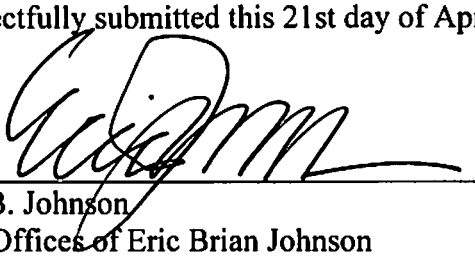
It is undisputed that the Jaegers pled and pursued recovery against a single entity at trial, namely Cleaver Construction, Inc. The trial court allowed the Jaegers to establish their case against the corporation via evidence of activities of agents working with the scope of their duties for the company. However, this did not provide a reason to name a specific employee such as Eric Cleaver as a judgment debtor.

The trial court properly denied the Jaegers' request to name Eric Cleaver as a judgment debtor at the time judgment was entered. [CP 579; 580]

E. CONCLUSION.

For all of the foregoing reasons, Cleaver Construction, Inc. requests that this Court deny the Jaegers appeal in all respects.

Respectfully submitted this 21st day of April, 2008.



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