STATE OF IDAHO)
County of KOOTENAI)ss

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

ROBERT KOBRICK and AMY KOBRICK, husband and wife; and ROBERT BURNETT and RITA BURNETT, husband and wife,

Plaintiffs,

vs.

SAWMILL POINT DEVELOPMENT INC., an Idaho Corporation; GEORGE D. HAMILTON and RITA HAMILTON, husband and wife; ROBERT L. HAMILTON; SYRINGA GROVE, LLC, an Idaho Limited Liability Company, CHARLIE R. NIPP and SUSAN NIPP, husband and wife; RYAN C. NIPP and TERI NIPP husband and wife; LOIS BRUCE, and SCHARELANT 7, LLC, an Idaho Limited Liability Company,

Defendants.

Case No. **CV 2011 2494**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART SAWMILL POINT DEVELOPMENT DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Summary Judgment filed May 30, 2014, by the "Sawmill Point" defendants (defendants Sawmill Point Development, Inc., George D. Hamilton, his wife Rita Hamilton, and Robert L. Hamilton). The following summary of facts is from this Court's August 11, 2014, "Memorandum Decision and Order Granting in Part and Denying in Part Syringa Grove Defendants' Motion for Summary Judgment":

> This action arises out of a landslide that occurred in January 2011, which caused damage to real properties owned by the plaintiffs Robert and Amy Kobrick and Robert and Rita Burnett. Complaint, p. 7, ¶ 2.9.

Plaintiffs' property is located in Kootenai County, Idaho, downhill from a plateau. Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), p. 1; Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), p. 2. Situated on the plateau was a parcel of land approximately 14.69 acres in size. Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), p. 2. In 2007, that parcel of land was owned by the defendant Lois Bruce (Bruce). *Id.;* Affidavit of Lois Bruce, p. 2 ¶ 3. That parcel contained one residence, Bruce's home. *Id.* This land was conveyed to Bruce by her ex-husband John Bruce, by a Warranty Deed subject to a Deed of Trust for the benefit of John in the amount of $1,120,000.00. Affidavit of Lois Bruce, p. 2 ¶ 3. In 2007, the assessed valuation for the 14.69-acre parcel of land, including Bruce's home, was $1,428,000.00. Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief Pursuant to I.C. § 55-916 and IRCP 65(e), p. 2; Affidavit of Lois Bruce p. 3 ¶ 6.

In 2006, Bruce met with Charlie Nipp, Susan Nipp, and Ryan Nipp to discuss the potential development of Bruce's property to pay the debt to John Bruce. Affidavit of Charlie Nipp, p. 3 ¶ 10. A limited liability company entitled Syringa Grove, LLC (Syringa Grove) was formed by Bruce, Charlie Nipp and Ryan Nipp. *Id.,* p. 3, ¶12(1). On March 25, 2007, Bruce, Charlie Nipp and Ryan Nipp adopted the "Operating Agreement of Syringa Grove, LLC, a Member-Managed Limited Liability Company" (Operating Agreement), under the terms of which Bruce deeded the parcel of land to the defendant Syringa Grove, who would then plat the property into seven residential lots. Affidavit of Lois Bruce, p. 4 ¶ 9. Under the Operating Agreement, Bruce's existing home would be included on one of the seven lots created by the plat, and when the plat was approved, Syringa Grove agreed it would title Lot 6 and Lot 7 to her by quitclaim deed. *Id.* On June 4, 2007, Bruce conveyed by Warranty Deed the 14.69-acre property to Syringa Grove, LLC. *Id.*, p. 4 ¶ 10.

The Operating Agreement identifies Syrninga Grove, LLC as being "[m]anaged exclusively by all of its members." Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit A, p. 2. The "Articles of Organization" filed with the Idaho Secretary of State also states the LLC was to be managed by its members. Second Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit B.

Syringa Grove member Lois Bruce received a fifty percent voting interest in the LLC, payment of the sum owed on the land, and an interest to receive a distribution of Lots 6 and 7 in exchange for her capital contribution of 14.69 acres to the LLC. Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit A, pp. 5-6. The Operating Agreement further stated "[a] distribution of Lots 6 and 7, to [Bruce] will terminate her interest in the LLC partnership and the transfer of real property will be in exchange for her LLC partnership interest." *Id.,* p. 6. At the time of the signing of the Operating Agreement, Bruce owed to her ex-husband "[t]he sum of $1,120,000 plus 8% interest owed on the

principal balance accruing from April 1, 2006, (the debt) which sum is secured by the property." *Id.,* p. 5. Syringa Grove identified the Lois Bruce property payment as totaling $1,227,727 once interest was accounted for. Second Affidavit of Charlie R. Nipp in Support of Motion for Summary Judgment, Exhibit I.

On May 31, 2007, Syringa Grove executed a Promissory Note for the benefit of Washington Trust Bank (WTB) in the amount of $1,840,000.00. Affidavit of Charlie Nipp, p. 6, ¶ 18. The Promissory Note was secured by a Deed of Trust executed for the benefit of WTB, on June 24, 2007. *Id.,* pp. 6-7, ¶ 21. Subsequently, Syringa Grove took steps to develop the property. *Id.,* p. 7, ¶24. By the end of 2008, Syringa Grove had drawn all available sums against the WTB line of credit and Charlie Nipp began loaning Syringa Grove money, pursuant to the Operating Agreement. *Id.,* p. 8, ¶ 28.

The Final Plat was recorded with Kootenai County on October 8, 2009. *Id.,* p. 8, ¶ 35. The Plat created seven residential lots and one "Conservation Tract" (Tract A). *Id*., p. 8, ¶ 9. Even though the plat was approved, for some reason two years passed before Syringa Grove conveyed Lot 6 and Lot 7 to Bruce via quitclaim deed on October 24, 2011. Affidavit of Lois Bruce, p. 5, ¶ 12. Bruce attempted to sell Lot 7 but was unable to do so. *Id.,* p. 5, ¶ 13. In the fall of 2012, Bruce informed Charlie Nipp of this and he agreed to purchase the lot from her for $250,000.00. *Id*., p. 5, ¶¶ 14-18. On November 14, 2012, Bruce sold Lot 7 to Scharelant 7, LLC, a company owned by Charles Nipp. *Id.,* p. 5, ¶ 17.

In January 2011, a landslide occurred, causing damage to the plaintiffs' property. Memorandum in Support of Plaintiffs' Motion for Injunctive Relief Pursuant to Idaho Code § 55-916 – Uniform Fraudulent Transfer Act and IRCP 65(e), pp. 1-2. On March 23, 2011, plaintiffs commenced this action by filing a Complaint and Summons. Complaint. At the time the action was filed, Syringa Grove was the owner of Lots 1 through 7. Affidavit of Charlie Nipp, p. 20 ¶ 83. Lots 1 through 5 were eventually sold between March 25, 2013, and July 25, 2013, to third parties who are not affiliated with Syringa Grove. *Id*. Syringa Grove had attempted to sell Lots 1 through 5 for several years prior to the landslide but, because of the downturn in the real estate market, was unable to sell those lots until 2013. *Id.,* p. 18, ¶ 74. The lots were sold for net sales proceeds of $1,128,890.50, all of which was paid to WTB to satisfy the debt still owing. *Id.,* p. 21, ¶ 84. The five lots were sold for $275,644.50 more than the assessed value of the five lots. *Id.* Syringa Grove used the proceeds from the sale to satisfy its obligation to WTB. *Id.* There was no excess money for Syringa Grove or Charlie Nipp. *Id.* Prior to the sale of these lots, Charlie Nipp advanced $1,339,122.00 to Syringa Grove to satisfy its obligation to WTB. *Id*., pp. 11-12, 18, ¶¶ 46, 49, 73. In total, Charlie Nipp advanced $1,538,614 to Syringa Grove either directly through loans or by payments of obligations made on behalf of the company. Second Affidavit of Charlie Nipp, p. 10, 18 ¶ 32. An Amended Complaint was filed on March 18, 2013. A Second Amended Complaint and Renewed Demand for Jury Trial was filed on July 17, 2013.

Memorandum Decision and Order Granting in Part and Denying in Part Syringa Grove Defendants' Motion for Summary Judgment, pp. 1-5.

Plaintiffs' real property and improvements are located on a grade facing Lake Coeur d'Alene in Kootenai County, Idaho, downhill from a plateau. Defendant Sawmill Point Development's Memorandum in Support of Motion for Partial Summary Judgment, p. 2. The landslide is alleged to have occurred after snow was melted by a warming trend that included the falling of rain. *Id.* The effect of the storm water runoff is alleged to be ongoing, with the potential for future land deformity. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, p. 19 (citing Affidavit of Chris Comstock, Exhibit D).

Uphill from the plaintiffs' real property are the developments of Syringa Grove (developed by defendant Syringa Grove, LLC) and Syringa Heights (developed by defendant Sawmill Point, Inc.). Defendant Sawmill Point Development's Memorandum in Support of Motion for Partial Summary Judgment, pp. 2-3. Robert and George Hamilton are officers and shareholders of Sawmill Point. Second Amended Complaint and Renewed Demand for Jury Trial, ¶ 10. The Syringa Heights development is known as the "Fifth Addition" and the "Sixth Addition Conservation Design Subdivision." Defendant Sawmill Point Development's Memorandum in Support of Motion for Partial Summary Judgment, p. 3. Storm water from the two developments is handled separately, with the storm water from Syringa Grove designed to flow down the uphill side ditch of Hillcrest Drive to a natural channel and the majority of storm water from Syringa Heights 5th Addition intended to flow east down Dewey Drive and eventually to Lake Coeur d'Alene. *Id.* Storm water from the Syringa Heights 6th Addition is allegedly handled on the site of each individual lot. *Id.* At least two lots in the Syringa Heights

development drain storm water on to Hillcrest Drive, the same channel intended to be used by Syringa Grove. *Id.* Regatta Way runs north to south and separates plaintiffs' property from the Syringa Grove and Syringa Heights developments. Affidavit of Julie A. Simaytis Re: Plaintiffs' Response to Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, Exhibit C. Hillcrest Drive travels in a generally north to south direction and connects Regatta Way to the uphill development. *Id.* Dewey Drive travels in a northerly direction, eventually looping away from the properties in question. *Id.* Plaintiffs dispute the accuracy of the Sawmill Point defendants' description of the storm water handling. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, pp. 6-7.

The defendants George and Robert Hamilton are alleged to have performed some work on the Syringa Grove and Syringa Heights stormwater drainage system as private individuals. *See* Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development Inc., George D. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment, p. 8. George Hamilton stated in a deposition that he regraded Regatta Way and cleaned the ditch in early 2009 to repair wash-out damage. Affidavit of Julie A. Simaytis Re: Plaintiffs' Response to Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, Exhibit E, p. 101, Ll. 5-19. Robert Hamilton stated during testimony that other property owners had complained of increased water runoff in 2009. *Id.,* Exhibit F, pp. 72, 76, 86. Additionally, he was seen with a shovel in his hands in the vicinity of a catch basin after the washout of Regatta Way in 2009. *Id.,* Exhibit G, p. 2.

On May 30, 2014, the Sawmill Point defendants filed the present Motion for Partial Summary Judgment, moving for summary judgment on the following counts found in the Second Amended Complaint: Count One, regarding individual liability of

Defendants George Hamilton and Robert Hamilton; Count Three, negligence per se of Defendant Sawmill; Count Seven, trespass; Count Eight, nuisance; Count Ten, punitive damages; and "[a]ny measure of damages not allowed under Idaho law in a case involving damage to property without personal injury." Defendant Sawmill Point Development and Hamilton's Motion for Partial Summary Judgment, pp. 1-2. There appears to be a typographical error in the present motion, as the defendants have listed Count Nine of the Second Amended Complaint as being for punitive damages. *Id.,* p. 2. In actuality, punitive damages are Count Ten of the Second Amended Complaint. Second Amended Complaint, at p. 17. For consistency, plaintiffs' punitive damages claim will be referred to as Count Ten throughout this memorandum.

In support of the motion for summary judgment, on May 30, 2014, the Sawmill Point defendants "Statement of Undisputed Facts Re: Defendant Sawmill Point and Hamilton's Motion for Partial Summary Judgment", "Defendant Sawmill Point Development's Memorandum in Support of Motion for Partial Summary Judgment" and "Affidavit of Patrick M. Risken Re: Motion for Partial Summary Judgment by Defendants Sawmill Point Development and Hamiltons." The Sawmill Point defendants have indicated that they have also based their present motion upon the "Affidavit of Darin Krier" and attached exhibits. Defendant Sawmill Point Development and Hamiltons' Motion for Partial Summary Judgment, p. 2.

The Sawmill Point defendants were joined in their Motion for Partial Summary Judgment by the Syringa Grove defendants (Syringa Grove, LLC, Charlie R. Nipp and Susan Nipp, Ryan C. Nipp and Teri Nipp, Lois Bruce, and Scharelant 7, LLC), when on June 2, 2014, the Syringa Grove defendants filed "Joinder In (and Adoption of) Motion for Partial Summary Judgment by Defendants Sawmill Point Development, Inc., George D. Hamilton, and Robert L. Hamilton." Specifically, the Syringa Grove defendants join

and adopt all the arguments advanced by Sawmill Point with the exception of Count One, that being the individual liability of Defendants George Hamilton and Robert Hamilton. *Id.,* p. 2. The Syringa Grove defendants have previously advanced their own motion regarding individual liability, which was heard by this Court on June 30, 2014. *Id.*, pp. 2-3. The joinder of the Syringa Grove defendants is opposed by plaintiffs via "Plaintiffs' Memorandum in Opposition to Syringa Grove Defendants' Joinder in Sawmill Point Development Inc., George C. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment." Plaintiffs have given no legal basis to object to Syringa Grove's joinder. Plaintiffs have pointed out that the Syringa Grove defendants have submitted no facts of their own and appear to only be joining in the legal arguments. *Id.,* p. 2. However, that is quite frequently the case when one party joins in another party's motion or briefing. *Ramos v. Dixon,* 144 Idaho 32, 33, 156 P.3d 533, 533 (2007), certainly indicates plaintiffs' objection to the Syringa Grove defendants' joinder in the Sawmill Point defendants' Motion for Partial Summary Judgment is misplaced.

Plaintiffs responded on June 30, 2014, with the "Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development Inc., George D. Hamilton and Robert L. Hamilton's Motion for Summary Judgment" and "Affidavit of Julie A. Simaytis Re: Plaintiffs' Response to Sawmill Point and Hamiltons' Motion for Summary Judgment." Plaintiffs contend material issues of fact remain regarding all counts, excepting Count Ten, which was not pled in accordance with statutory requirements and thus is not properly before the court.

On July 8, 2014, the Sawmill Point defendants filed "Defendant's Reply Brief in Support of Motion for Partial Summary Judgment".

Hearing on the Sawmill Point defendants' Motion for Partial Summary Judgment was held July 15, 2014. At that hearing the Court struck plaintiffs' claim for punitive

damages (Count Ten), as a matter of law due to plaintiffs' failure to comply with I.C. § 6-1604. In this case, no claim for punitive damages is properly before the Court. Idaho Code § 6-6104(2) states, "In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages." I.C. § 6-1604(2). Plaintiffs have prematurely included a claim for punitive damages without having complied with the procedural components of the statute. *See* Second Amended Complaint and Renewed Demand for Jury Trial, pp. 17-19. In both their sections for "Causes of Action" and "Prayer for Relief" the plaintiffs made mention of punitive damages, going so far as to add emphasis to "punitive damages" whenever it appeared. *Id. Mikesell v. Newworld Dev. Corp.,* 122 Idaho 868, 878, 840 P.2d 1090,1100 (Ct.App. 1992) indicates striking the offending cause of action for punitive damages is the appropriate response to plaintiffs' failure to comply with 6-1604(2).

Also, at that June 15, 2014, hearing the Court overruled plaintiffs' objections to the Syringa Grove defendants joining in on the Sawmill Point defendants' Motion for Partial Summary Judgment, as such objection was without basis. At the conclusion of the July 15, 2014, hearing, the remaining issue of the Sawmill Point defendants' Motion for Partial Summary Judgment was taken under advisement.

II. STANDARD OF REVIEW.

Summary judgment is proper "[i]f the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that 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." *See* I.R.C.P. 56(c). The moving party carries the burden of proving the absence of genuine issues of material fact. *Rouse v. Household Finance Corp.*, 144 Idaho 68, 70,

156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)). Any facts in dispute are liberally construed in favor of the nonmoving party, with any inference reasonably drawn from the record done so in favor of the nonmoving party. *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007) (citing *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006)).

The establishment of an absence of a genuine issue of material fact by the moving party shifts the burden to the nonmoving party to provide specific facts showing there is a genuine issue for trial. 144 Idaho 225, 228, 159 P.3d 862, 865 (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (citing *Atwood v. Smith*, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). The nonmoving party may use circumstantial evidence to create a genuine issue of material fact. *Edged In Stone, Inc. v. Northwest Power Systems, LLC*, 156 Idaho 176, 321 P.3d 726, 730 (2014) (citing *ParkWest Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)). To create a genuine issue, "[h]owever, the [nonmoving] party may not rest on a mere scintilla of evidence." *ParkWest Homes, LLC. v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013) (citing *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991)). The nonmoving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts

showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If reasonable people might reach conflicting inferences about the evidence, the motion for summary judgment must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979) (citing *Otts v. Brough*, 90 Idaho 124, 409 P.2d 95 (1965)).

III. ANALYSIS OF THE SAWMILL POINT DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. George (and Rita) Hamilton and Robert Hamilton Are Not Personally Liable.

"A limited liability company is an entity distinct from its members." I.C. § 30-6-104. "The debts, obligations or other liabilities of a limited liability company" do not become the debts, obligations, or liabilities of an individual member unless the company is an alter ego of that member. I.C. § 30-6-304(1). "This is the equivalent of piercing the corporate veil for a limited liability company. Piercing the corporate veil imposes personal liability on otherwise protected corporate officers, directors, and shareholders for a company's wrongful acts allowing the finder of fact to ignore the corporate form." *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, No. 40124, 2014 WL 2765956, at *7 (Idaho June 18, 2014) (internal citations omitted).

To prove that a company is the alter ego of a member, and pierce the corporate veil, "there must be (1) a unity of interest and ownership to a degree that the separate personalities of the corporation and individual no longer exist and (2) if the acts are treated as acts of the corporation an inequitable result would follow." *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 556-57, 165 P.3d 261, 270-71 (2007) (citing *Surety Life Ins. Co. v. Rose Chapel Mortuary,* 95 Idaho 599, 601, 514 P.2d 594, 596 (1973)). The court should consider several factors when deciding whether to pierce the

corporate veil, including, but not limited to: "the level of control that the shareholder exercises over the corporation, the lack of corporate formalities, the failure to operate corporations separately, keeping separate books, and the decision-making process of the entity." *Wandering Trails*, at *7 (citing *Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc.,* 95 Idaho 599, 602, 514 P.2d 594, 597 (1973)). However, "the failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company." I.C. § 30-6-304(2).

The Sawmill Point defendants argue there is no evidence present to support the claim that the distinction between Sawmill Point and the Hamiltons has ceased. Defendants Sawmill Point Development, Inc., George D. Hamilton and Robert L. Hamilton's Memorandum in Support of Motion for Partial Summary Judgment, at p. 7. Further, the Sawmill Point defendants state there is no evidence to suggest a fraud or injustice would result from recognizing the corporate form. *Id.* Any alleged duties owed individually by the Hamiltons is alleged to extend only to Sawmill Point and not to downhill property owners. *Id.*

In response, plaintiffs argue that alter ego is not the only way in which a negligence claim may reach the defendants individually. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development Inc., George D. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment, p. 8. Plaintiffs assert that the Hamiltons undertook acts as individuals distinct from Sawmill Point that give rise to a cause of action for negligence. *Id.,* pp. 8-10. Plaintiffs state that the Hamiltons as individuals had a duty of reasonable care as a result of their acts and that a jury could

reasonably determine that duty was breached. *Id.,* p. 8. Further, plaintiffs argue that "[t]he Hamilton brothers could have and should have reasonably done more to prevent injury to Plaintiffs' property given their knowledge of complaints about increased runoff and the actions they took to address those concerns . . . ." *Id.,* pp. 10-11. Plaintiffs do not discuss in briefing why the alter ego theory itself should be preserved for trial. Instead, plaintiffs obliquely mention alter ego is not the only theory plaintiffs proceed upon against the Hamiltons. *Id.,* pp. 7-8.

In this case, the Sawmill Point defendants' Motion for Partial Summary Judgment must be granted to the extent that Sawmill Point is not the alter ego of George and Robert Hamilton, and must be granted regarding the individual liability of the Hamiltons.

By pointing to the absence of evidence in the record, the Sawmill Point defendants have established that there is no genuine issue of material fact regarding the alter ego theory. The burden thus shifts to plaintiffs to establish a genuine issue of material fact. The plaintiffs have failed to meet this burden. At oral argument, counsel for plaintiffs essentially conceded the point, stating, "I am not relying on the alter ego theory." As such, the Court finds that Robert and George Hamilton (and George's wife Rita) are not the alter ego of Sawmill Point.

The Court must next determine whether Robert Hamilton and/or George Hamilton were individually negligent, apart from the actions of Sawmill Point. A cause of action for negligence has four elements: "'(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage.'" *Grabicki v. City of Lewiston*, 154 Idaho 686, 691, 302 P.3d 26, 31 (2013) (quoting *Fragnella v. Petrovich*, 153 Idaho 266, 272, 281 P.3d 103, 109

(2012)). A sufficient showing must be made to establish the essential elements of negligence that a party will have to prove at trial in order to survive summary judgment. *Jones v. Starnes*, 150 Idaho 257, 259-60, 245 P.3d 1009, 1011-12 (2011) (citing *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)).

In *Grabicki v. City of Lewiston*, the Supreme Court of Idaho held that "[e]very person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property to avoid such injury." *Grabicki*, 154 Idaho at 691, 302 P.3d at 31 (citing *Brian & Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 29, 244 P.3d 166, 173 (2010)). In that case the Court stated the plaintiff had presented sufficient evidence to state a cause of action for negligence because the defendant had performed an affirmative act by constructing a storm drain system, the design of the system was done negligently, and that the defendant's negligence was the proximate cause of the damages. *Id.* Thus, performing work that installs or affects a stormwater system may establish a duty to those served by the drainage system.

Moreover, voluntarily performing an act may create a legal duty, even if the individual had no prior duty to do so. *Baccus v. Ameripride Services, Inc.*, 145 Idaho 346, 350, 179 P.3d 309, 313 (2008) (citing *Featherston v. Allstate Ins. Co.*, 125 Idaho 840, 843, 875 P.2d 937, 940 (1994)). "[W]hen a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed." *Id.* (citing *Martin v. Twin Falls School Dist. No. 411*, 138 Idaho 146, 150, 59 P.3d 317, 321 (2002)). Because liability for an assumed duty is limited, there must in fact be an undertaking. *Id.* (citing *Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072-73 (2001). "[P]ast voluntary acts do not entitle the

benefited party to expect assistance on future occasions, at least in the absence of an express promise that future assistance will be forthcoming." *Udy*, 136 Idaho 386, 390, 34 P.3d 1069, 1073.

In *Udy*, a Sheriff had previously removed debris from State highways. 136 Idaho 386, 387, 34 P.3d 1069, 1070. The night before an accident where a vehicle struck a rock and subsequently rolled over, the Sheriff had observed small rocks along the fog line in the vicinity of the later accident, but had not stopped to remove them nor notified anyone else of the presence of the rocks. 136 Idaho 386, 390, 34 P.3d 1069, 1073. The Idaho Supreme Court held that the prior acts of removal by the Sheriff did not impose a duty to remove the rocks he saw the night before the accident because "[t]o hold otherwise would be tantamount to holding that [the Sheriff] had a permanent duty to remove obstructions from the highway." *Id.* The Court pointed out that there "[was] nothing in the record indicating that [the Sheriff] increased the risk created by the rocks on Highway 75; instead, the risk created by the rocks remained unchanged." *Id.* Thus, a duty does not arise unless there is evidence that the voluntary actions of an individual increased the risk of injury.

Here, there is evidence that the Hamiltons voluntarily performed affirmative acts prior to the landslide in 2011. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development Inc., George D. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment, pp. 8-10. This Court agrees with the observation by counsel for Sawmill Point defendants, that the actions plaintiffs complain of the Hamiltons (First Amended Complaint, p. 5, Count One, ¶¶ 25, 26) are identical to the actions plaintiffs complain of Sawmill Point Development, Inc. *Id.,* p. 7, Count Two, ¶¶ 33, 34. Plaintiffs now more specifically claim, "George testified that Regatta Way

'washed out' in 2009, and in response to that, he took a tractor and graded Regatta Way and 'cleaned' the ditch. (Ex. E, p. 101, lines 5-15)." Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, p. 9. Plaintiffs claim, "[George] testified the [sic] he also performed work on Hillcrest Drive in 2009. He testified he graded Hillcrest, cleaned the ditch, and cleaned a plugged culvert on Hillcrest where the Syringa Grove water was supposed to go. (Ex. E, p. 103, Line 13 – p. 104, line 4)." *Id.* Plaintiffs claim, "As to Robert Hamilton, he testified that he personally was aware that water flowed from his home down to what is now the Syringa Grove property and into the ditch on Hillcrest Drive. He testified he personally took steps to maintain that ditch between 1997 and 2005. (Ex. F, R. Hamilton Depo, p. 36, line 25 – p. 38, line 8)." *Id.* Finally, plaintiffs claim, "Robert Kobrick observed Bob Hamilton with a shovel in his hands working in the vicinity of the catch basis that is located just downhill from the green gate on Hillcrest Drive after the washout of Regatta Way in 2009." (Exhibit G, Affidavit of Robert Kobrick, ¶ 4)."

However, unlike the facts in *Grabicki*, where the affirmative acts of the defendant involved removing an old storm water system and designing, installing, and maintaining a new one, the facts in this case evidence only minimal involvement in removing debris from an existing drainage ditch and the regrading of a road. The evidence before the court does establish an issue of fact that the acts of the Hamiltons created or contributed to a landslide. Neither of the experts appear to have commented in any way on how removing debris or regrading the road could have caused or contributed to any injury or landslide. Affidavit of Chris Comstock Re: Plaintiffs Response to Sawmill Point and Haimlton Defendants' Motion for Summary Judgment, pp. 1-2. Rather, the plaintiffs' expert believes "[t]he stormwater runoff from the Syringa Grove and Syringa Heights 6th Addition was not retained and conveyed per the intended design, which

resulted in the runoff reaching and infiltrating into the soil on S. Regatta Way at the location of the northerly slide limits . . . ." Affidavit of Thomas Arnold Re: Plaintiffs' Response to Sawmill Point and Hamilton Defendants' Motion for Summary Judgment, p. 2. At the July 15, 2014, oral argument, counsel for plaintiffs complained that the plaintiffs' expert had not had the opportunity to review the deposition transcript of George and Robert Hamilton, as they were just recently deposed. Such objection rings hollow for several reasons. First, as of the time of oral argument on the Sawmill Point defendants' Motion for Partial Summary Judgment, that motion had been pending for more than six weeks. Second, the case was filed more than three years earlier, on March 23, 2011. Third, plaintiffs have filed no motion pursuant to I.R.C.P. 56(f).

Moreover, there is no evidence before the Court that any prior acts by the Hamiltons created a continuing duty or duty to do more in the future. This case is similar to *Udy v. Custer County*, where the Sheriff was aware of debris on the highway and did not voluntarily remove it as he had voluntarily done in the past. Here, other property owners had allegedly informed the Hamiltons of an increased amount of surface water runoff on their properties. Plaintiffs argue that based on this knowledge and the fact the Hamiltons had undertaken efforts several years prior to the landslide to remove debris from a drainage ditch and culvert, the Hamiltons had a duty to act in the future. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development Inc., George D. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment, p. 10. However, as stated by the plaintiffs' own expert, the source of the stormwater is allegedly Syringa Grove and Syringa Heights 6th Addition, not George or Robert Hamilton as individual property owners. *See* Affidavit of Thomas Arnold Re: Plaintiffs' Response to Sawmill Point and Hamilton Defendants' Motion for Summary Judgment, p. 2. Thus, causation is lacking as against the Hamiltons, as is

any duty. The Hamiltons were performing an act they had no duty to perform, and any duty that arises is limited to the duty performed. Like the fact in *Udy* that nothing in the record indicated the risk of injury was increased, there is a similar absence of evidence the risk increased as a result of the Hamiltons not doing more. Because the Idaho Supreme Court declined to impose a permanent duty on the Sheriff in *Udy* to remove debris from the highway when the acts were voluntarily assumed, so too here this Court declines to impose a permanent duty to abate stormwater runoff from corporate developments distinct from individuals acting in their private capacity when the actions undertaken were voluntary and no evidence exists that the risk of injury was increased.

Therefore, summary judgment is granted regarding Count One and the individual liability of George Hamilton (and his wife Rita) and Robert Hamilton because they owed no further duty to the plaintiffs as a result of their voluntary acts.

B. A Genuine Issue of Material Fact Exists Regarding Defendant Sawmill Point's Alleged Violation of Kootenai County Site Disturbance Ordinance No. 445, Which May Serve as the Basis for a Claim of Negligence Per Se.

Negligence as a matter of law is provided for when a statute meets four elements. *Munns v. Swift Transportation Co., Inc.*, 138 Idaho 108, 111, 58 P.3d 92, 95 (2002). To be negligence per se, "[t]he statute must (1) clearly define the required standard of conduct; (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation of the terms of the statute must have been the proximate cause of the injury." *Id.* (citing *Ahles v. Tabor*, 136 Idaho 393, 395, 34 P.3d 1076, 1078 (2001)). The burden on the plaintiffs is lessened by negligence per se as to "[t]he issue of the 'actor's departure from the standard of conduct required of a reasonable man.'" *O'Guin*

v. Bingham County, 142 Idaho 49, 52, 122 P.3d 308, 311 (2005). The effect of negligence per se is to remove the elements of duty and breach from the jury. *Id.* (citing *Ahles*, 136 Idaho 393, 395, 34 P.3d 1076, 1078).

The Sawmill Point defendants argue plaintiffs' negligence per se claim fails because the development plans were adopted prior to the adoption of Kootenai County Site Disturbance Ordinance No. 445. Defendants Sawmill Point Development, Inc., George D. Hamilton and Robert L. Hamilton's Memorandum in Support of Motion for Partial Summary Judgment, p. 8. Further, the Sawmill Point defendants state that the violation was errantly issued to Sawmill Point by Kootenai County and that it was later corrected to properly reflect the violator being Syringa Grove. *Id.,* p. 9. Finally, they claim that Site Disturbance Ordinance 445 is not intended to protect downhill property owners like the plaintiffs. *Id.,* p. 10.

In response, plaintiffs argue that Site Disturbance Ordinance 445 is a continuation of predecessor ordinances with nearly identical language. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development Inc., George D. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment, pp. 12-13. Further, the plaintiffs contend that the defendants have omitted the inclusion of a corrected copy of the violation that allegedly clarifies what entity the violation was issued to. *Id.*, pp. 13-14. Finally, the plaintiffs argue that the ordinance was expressly designed to prevent the type of harm to the class the plaintiffs belong. *Id.,* pp. 16-17.

In this case, the motion for summary judgment regarding negligence per se must be denied. Newly enacted sections of the Idaho Code are not retroactive unless the legislature included express language to the contrary. *See* I.C. § 73-101. County ordinances derive their authority from the Idaho Code. Kootenai County Site

Disturbance Ordinance No. 445 is authorized under Idaho Code Title 67, Chapter 65 and was adopted August 12, 2010. However, the Idaho Supreme Court has previously recognized the following rule:

> [W]here a statute is repealed and all of its provisions are at the same time re-enacted, such re-enactment is an affirmance of the old law so that the provisions of the repealed act which are thus re-enacted, continue in force without interruption and all rights and liabilities incurred thereunder are preserved and may be enforced.

Stafford v. Kootenai County, 150 Idaho 841, 846, 252 P.3d 1259, 1264 (2011) (quoting *Ellenwood v. Cramer*, 75 Idaho 338, 345, 272 P.2d 702, 706 (1954)).

The approval or preliminary approval for the Sawmill Point developments were given on October 22, 2003, and December 3, 2009, prior to the adoption of Site Disturbance Ordinance No. 445. *See* Affidavit of Patrick M. Risken Re: Motion for Partial Summary Judgment by Defendants Sawmill Point Development and Hamiltons, Exhibits 2 and 3. The enactment of Site Disturbance Ordinance No. 445 repealed Ordinance Nos. 251, 283, and 374, but retained much the same language in the sections relevant to this case. *See* Affidavit of Julie A. Simaytis Re: Plaintiffs' Response to Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, at Exhibit I. Thus, the earlier site disturbance ordinances in effect at the time Sawmill Point conducted its development activities were reaffirmed by the new ordinance and are properly applicable to the Syringa Heights and Syringa Grove developments.

In addition to being applicable to the developments at the time of the incident, Kootenai County Site Disturbance Ordinance No. 445 may properly serve as the basis for negligence per se. The first requirement for negligence as a matter of law is that the statute or ordinance clearly defines the standard of conduct. *Munns*, 138 Idaho 108, 111, 58 P.3d 92, 95. Site Disturbance Ordinance No. 445 exhaustively covers

applicability (Chapter 11-2-5), permit application and plan standards (Chapter 11-2-6), standards for storm water detention and conveyance (Chapter 11-2-7(C)), and prohibited conduct with associated penalties (Chapter 11-2-13). In particular, Chapter 11-2-13 provides a non-exhaustive violation list including:

> A. Failure to obtain a permit prior to the start of grading activity;
> B. Failure to call for inspections as required by this chapter;
> C. Once grading activity has begun, failure to complete the grading activity and install the necessary erosion and sedimentation control, stormwater management, and slope stabilization measures, in a timely manner;
> D. Failure to maintain temporary and permanent erosion and sedimentation control measures, the stormwater management system, or slope stabilization measures;
> E. Conduct work on a site which exceeds the scope of work outlined in the approved plans;
> F. Damage or otherwise impede the function of a stormwater system;
> G. Export sediment from a site in a manner not authorized by this chapter;
> H. Continue work at a site after a Stop Work order has been placed;
> I. Discharge stormwater in a manner not authorized by this chapter;
> J. Failure to correct a hazard as outlined in section 11-2-9 of this chapter.

Kootenai County Site Disturbance Ordinance No. 445, p. 18. Because the ordinance provides the requirement for approved permits and plans, as well as an extensive list of actions that would result in violation, the ordinance defines the required standard of conduct and satisfies the first element of negligence per se.

The second required element for negligence per se is that the statute or regulation be intended to prevent the type of harm that occurred. *Munns*, 138 Idaho 108, 111, 58 P.3d 92, 95. The stated purpose of Ordinance No. 445 is to:

> [P]rotect property, surface water, and ground water against significant adverse effects from excavation, filling, clearing, unstable earthworks, soil erosion, sedimentation, and stormwater runoff and to provide maximum safety in the development and design of building sites, roads, and other service amenities.

Kootenai County Site Disturbance Ordinance No. 445, p.2. Further, the ordinance

provides that stormwater must be detained and conveyed "[w]ithout causing flooding or other damage to public or private property, the stormwater management system, or other improvements." *Id.,* p. 11. The ordinance contemplates protection of private property from the effects of stormwater runoff, the source of the instant alleged injury.

The third requirement for negligence per se is that the plaintiff must be of the class of persons protected by the statute. *Munns*, 138 Idaho 108, 111, 58 P.3d 92, 95. As discussed above, one of the purposes of the statute is to prevent injury to private property. Someone must own property in order for it to be private. Thus, plaintiffs as owners of private property adjacent to development work are members of the class of persons the regulation was designed to protect.

The final requirement for negligence per se is that the regulatory violation be the proximate cause of the injury. *Munns*, 1138 Idaho 108, 111, 58 P.3d 92, 95. Expert opinion exists in the record that the storm water runoff "[w]as not retained and conveyed per the intended design, which resulted in the runoff reaching and infiltrating into the soil on S. Regatta Way . . . ." Affidavit of Thomas Arnold Re: Plaintiffs' Response to Sawmill Point and Hamilton Defenadnts' Motion for Summary Judgment, p. 2. Further, a "Notice of Site Disturbance Ordinance Violation" was issued against one of the lots in Syringa Heights 6th Addition as being out of compliance. Affidavit of Julie A. Simaytis Re: Plaintiffs' Response to Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, Exhibit H, p. 1. Specifically, Sawmill Point was alleged to be in violation of Sections E, F, and I of Site Disturbance Ordinance No. 445. *Id.* Thus, there appears to at least be a disputed fact whether the developments were both out of compliance with the relevant ordinance and responsible for the alleged injury itself.

Because the facts, when viewed in a light most favorable to the plaintiffs, raise a genuine issue of material fact regarding negligence per se, summary judgment

regarding Count Three must be denied.

C, A Genuine Issue of Material Fact Exists as to Whether Sawmill Point Trespassed on the Plaintiffs' Property.

The Sawmill Point defendants argue summary judgment should be granted regarding plaintiffs' alleged trespass. Defendants Sawmill Point Development, Inc., George D. Hamilton and Robert L. Hamilton's Memorandum in Support of Motion for Partial Summary Judgment, p. 11. The Sawmill Point defendants assert that there must be a willful or intentional intrusion on real property and plaintiffs have produced no evidence of an intentional or willful act by the Sawmill Point defendants. *Id.* Further, the Sawmill Point defendants state that there is no way of knowing whether water came down from either of the Sawmill Point defendants' properties or the Syringa Grove defendants' properties. *Id.* Finally, the Sawmill Point defendants argue that trespass must interfere with the exclusive right to possession. *Id.,* p. 12.

In response, plaintiffs argue they have not asserted a claim of statutory trespass, but rather a claim of common law trespass claim. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development Inc., George D. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment, p 17. Plaintiffs argue at this stage of the action they do not need to apportion fault in regards to where the water came from, but only simply show that the water entered the land without permission. *Id.,* p. 18.

Statutory trespass applies to "[a]ny person who, without permission of the owner …willfully and intentionally enters upon the real property of another person…" I.C. § 6-202. However, where there is a wrongful entry that "[i]s neither wilful or intentional, the plaintiff is entitled to recover his actual damages at common law, but he is not entitled to have those damages trebled." *Bumgarner v. Bumgarner*, 124 Idaho 629, 639, 862 P.2d 321, 331 (1993) (citing *Menasha Woodenware Co. v. Spokane International Ry.*

Co., 19 Idaho 586, 594, 115 P. 22, 24 (1911)). The common law requirements for trespass are: "(1) an invasion (2) which interferes with the right of exclusive possession of the land, and (3) which is a direct result of some act committed by the defendant." *Mock v. Potlatch Corp.*, 786 F. Supp. 1545, 1548 (D. Idaho 1992). An entry onto the land is an interference with exclusive possession and "[m]ay take the form of the defendant personally intruding on the land, causing another to intrude upon the land, or causing some tangible thing to intrude upon the land." *Id.* (citing *Restatement (Second) of Torts* § 158(1) (1965)). Damages are presumed when there is a direct and tangible invasion. 786 F. Supp. 1545, 1550.

The tangible nature of water is exhibited by Idaho's recognition of the civil rule regarding surface waters. The Idaho Supreme Court has recognized that the State adheres to the civil law rule regarding the drainage of surface water. *Dayley v. City of Burley*, 96 Idaho 101, 103, 524 P.2d 1073, 1075 (1974). Under the civil law rule, "[a] natural servitude of natural drainage [exists] between adjoining lands so that the lower owner must accept the 'surface' water which naturally drains onto his land." *Id.* (citing *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945)). Despite the natural servitude, a higher property owner cannot artificially accumulate surface water and then discharge it upon lower properties in unnatural concentrations. *Id.* (citing *Teeter v. Nampa and Meridian Irrigation Dist.*, 19 Idaho 335, 114 P. 8 (1911)). As a result, "[t]he owner of higher property cannot increase this burden by changing the natural system of drainage." *Smith v. King Creek Grazing Ass'n*, 105 Idaho 644, 646, 671 P.2d 1107, 1109 (1983). "This rule, broadly stated, is that a property owner may not so interfere with the natural flow of surface waters as to cause an invasion of a neighboring owner's interest in the use and enjoyment of his land." *Id.* Rain and melting snow are

considered to be surface water. *Dayley*, 96 Idaho 101, 103, 524 P.2d 1073, 1075.

An invasion of land does not require a personal entry by the actor. The United States District Court for the District of Idaho, exploring the common law principles behind trespass, wrote: "An entry may take the form of the defendant personally intruding on the land, causing another to intrude upon the land, or causing some tangible thing to intrude upon the land." *Mock*, 786 F. Supp. 1545, 1548. In *Mock*, the court held that an action for trespass could not be sustained when the invasion took the form of intangible noise and caused no damage. 786 F. Supp. 1545, 1551. However, the court also stated that "[i]f the intangible invasion causes *substantial damage* to the plaintiff's property, this damage will be considered to be an infringement on the plaintiff's right to exclusive possession, and an action for trespass may be brought." *Id.* (emphasis in original). Thus, even intangible entries may give rise to an action for trespass if substantial damage is done to a property.

Here, there was a tangible invasion of land that allegedly led to substantial damage. Unlike the fact in *Mock*, where the alleged entry took the form of noise and was intangible, the invasion here took the form of stormwater in liquid form. Water is a tangible substance with a well-known molecular structure, unlike noise, which is a vibration. Additionally, it is alleged and remains a question of material fact whether the errant stormwater is responsible for the landslide, an event that led to substantial damage on multiple properties belonging to the plaintiffs. As such, even if water were considered intangible, the substantial damage alone would be sufficient to proceed with a cause of action for trespass under the reasoning in *Mock*. Thus, the question remaining is whether the injury was a direct result of an action by the defendants, a point materially contended by both sides in this action.

Because a genuine issue of material fact remains as to the trespass claim, summary judgment is denied regarding Count Seven.

D. A Genuine Issue of Material Fact Exists as to Whether Sawmill Point Development, Inc. Obstructed the Free Use of Plaintiffs' Property.

The Sawmill Point defendants argue that nuisance should be subsumed into the plaintiffs' negligence claim. Defendant Sawmill Point Development, Inc., George D. Hamilton and Robert L. Hamilton's Memorandum in Support of Motion for Partial Summary Judgment, at p. 13. The Sawmill Point defendants maintain that nuisance is a continuing insult to property and that there is no continuing insult in this case because there has been no obstruction to the free use of the plaintiffs' property. *Id.* Further, they argue that there is no evidence of a continuing intrusion of water. *Id.*

In response, plaintiffs assert that the defendants have cited to no evidence that the injury was the result of a one-time event. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development, Inc., George D. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment, at p. 19. They further claim that expert opinion has been presented that indicates the landslide mass will continue to deform unless run-off control is improved. *Id.* They assert that the plaintiffs have suffered a continuing obstruction to the free use of their property because the plaintiffs have been ordered to evacuate the Kobrick home due to its distressed condition. *Id.* (citing Affidavit of Julie A. Simaytis Re: Plaintiffs' Response to Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, Exhibit J, p. 74, L. 22; p. 75, L. 5). Finally, the plaintiffs argue that that the Burnetts continue to suffer an obstruction to the free use of their property because they have no road access as a result of the landslide. *Id.* (citing Exhibit A, p. 89, L. 24; p. 90, L. 7).

Nuisance is defined by statute as "[a]n obstruction to the free use of property, so

as to interfere with the comfortable enjoyment of life or property…" I.C. § 52-101. A public nuisance affects an entire community or neighborhood at the same time, even if the annoyance or damage amongst individuals is unequal. I.C. § 52-102. In turn, a private nuisance is "[e]very nuisance not defined by law as a public nuisance or moral nuisance…" I.C. § 52-107. "The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence." I.C. § 52-110. "A nuisance per se is that which is a nuisance at all times and under all circumstances. A nuisance in fact is that which is not inherently a nuisance, or one per se, but which may become such by reason of surrounding circumstances, or the manner in which conducted." *McVicards v. Christensen*, 156 Idaho 58, 61, 320 P.3d 948, 951 (2014) (quoting *Rowe v. City of Pocatello*, 70 Idaho 343, 348, 218 P.2d 695, 698 (1950)). For any nuisance besides a moral nuisance, "[t]he action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." I.C. § 52-111.

Obstruction of a home's access may be a nuisance. *Benninger v. Derifield*, 142 Idaho 486, 491, 129 P.4d 1235, 1240 (2006). In *Benninger,* the Idaho Supreme Court held, "[t]he placement of vehicles and other items which obstructed the driveway did constitute a nuisance. The district court observed that the driveway itself was no longer obstructed or blocked but chose to enjoin Derifield from obstructing or blocking the driveway in the future." *Id.* Thus, obstructed access to a home may be a nuisance.

Moreover, actions that interfere with the use and enjoyment of property may be a nuisance if the conditions did not exist when the plaintiffs purchased a home. *See Crea v. Crea*, 135 Idaho 246, 250, 16 P.3d 922, 926 (2000). In *Crea*, the Idaho Supreme

Court affirmed the district court's decision that expansion of a hog operation was a nuisance because the expansion introduced offensive odors and flies to the neighboring residences. *Id.* The Idaho Supreme Court approvingly noted the district court considered:

> (1) when . . . [the plaintiffs] purchased their respective parcel, as opposed to [the defendants] more recent purchase; (2) the nature and extent of the hog operation at the time [the defendants] purchased the facility . . .; and (3) what [the defendants] should have known at the time they came to the property-namely that a property owner may not, as the district court stated, "with impunity, do whatever one wants, including putting an open septic tank across the fence from your relatives.

Id. Thus, subsequent changes to neighboring properties or local conditions may constitute a private nuisance.

In the present case, genuine issues of material fact remain regarding nuisance, precluding summary judgment. Like the fact in *Benninger*, where access to a home had been obstructed, in the present case there is an allegation that the plaintiff Burnetts have no access by roadway to their property because of the landslide. Burnetts allege they have no access to their home, and Kobricks allege they were forced to evacuate their home due to damage from the landslide and have not been able to return. If flies and odors are sufficient to constitute a nuisance and obstruction to free use of a residence in *Crea*, and actual obstruction to access to a home as in *Benninger* is sufficient, so too should a condition that prevents any use at all of a home as is alleged in the present case.

Moreover, examining the cited conditions in *Crea* reveal analogous circumstances in this case. Like the fact that the defendants in *Crea* purchased their property and expanded the hog operation after the plaintiffs had purchased their residence, the development activity undertaken by the defendants in this case occurred

after the plaintiffs had purchased their properties. Further, under both the Kootenai County ordinance requirements and the civil rule regarding surface water in Idaho, the defendants should have known that, like not putting an open septic tank across the fence from the neighbors, a property owner is under an obligation to not alter or increase the surface or stormwater runoff to another property. Thus, the plaintiffs have raised material issues of fact regarding the free use of their property and nuisance.

Because genuine issues of material fact remain for trial, summary judgment on Count Eight is denied.

E. The Sawmill Point Defendants' Motion for Summary Judgment Regarding the Measure of Damages is Denied as it is Not Allowed Under Idaho Law.

An aesthetic or personal use of property may justify a deviation from diminution-in-market-value. *Weitz v. Green*, 148 Idaho 851, 864-67, 230 P.3d 743, 756-59 (2010). In *Weitz*, a case about timber trespass, the Idaho Supreme Court found that "[w]here the trees are held on the property not for the purpose of harvesting them as timber, but rather for their aesthetic value, an award of damages based upon the market value of the trees as timber does not properly compensate the property owner for his loss." 148 Idaho 851, 864, 230 P.3d 743, 756. The Court went on to state that it had previously held that "the goal of the law of compensatory damages is reimbursement of the plaintiff for the actual loss suffered, the rule precluding recovery of restoration costs in excess of the diminution in value is not of invariable application." 148 Idaho 851, 865-66, 230 P.3d 743, 757-58 (quoting *Nampa & Meridian Irrigation District v. Mussell*, 139 Idaho 28, 33-34, 72 P.3d 868, 873-74 (2003)). Thus, it is not an absolute rule in Idaho that only diminution-in-market-value may serve as the basis for damages.

Further, the Court in *Weitz* cited favorably to a Supreme Court of Colorado decision, which provided several factors to consider when deciding whether a deviation

from diminution-in-market-value is necessary, including:

> [The] nature of the owner's use of the property—in particular, whether the owner uses the property as a personal residence, whether the owner has some personal reason for having the property in its original condition, or both—and the nature of the injury—in particular, whether the injury is reparable and at what cost.

148 Idaho 851, 866, 230 P.3d 743, 758 (quoting *Bd. of County Comm'rs v. Slovek*, 723 P.2d 1309, 1315 (Colo. 1986)). The Supreme Court of Colorado recognized that there was the potential for a windfall should a property owner choose not to remedy the injury, and indicated that "[t]hese possibilities suggest the need for careful evaluation by the trial court to assure that any damages allowed in excess of either of these two measures are truly and reasonably necessary to achieve the cardinal objective of making the plaintiff whole." *Id.* (quoting *Bd. of County Comm'rs*, 723 P.2d at 1317). Thus, if there is strong reason to believe that the repairs will be made, damages that exceed the diminution of market value may be allowed if they are within reason.

Moreover, in *Farr West Investments v. Topaz Marketing, L.P.*, the Idaho Supreme Court affirmed the judgment of a district court in awarding the lesser amount when the cost of rehabilitation exceeded the value of the property. *Farr West Investments*, 148 Idaho 272, 277, 220 P.3d 1091, 1096. In *Farr West Investments*, the injury occurred to land that had been listed for sale for five years. 148 Idaho 272, 275, 220 P.3d 1091, 1094. The Idaho Supreme Court explained the measure of damages applicable in the case as follows:

> If land is permanently injured, but not totally destroyed, the owner is entitled to the difference between the fair market value before and after the injury. However, if the land is only temporarily injured, the owner is entitled to recover the amount necessary to put the land in the condition it was immediately preceding the injury. In regard to temporary injury to property, "if the cost of restoration exceeds the value of the premises in their original condition, or in the diminution in market value, the latter are the limits of recovery."

Id. (quoting *Ransom v. Topaz Marketing, L.P.*, 143 Idaho 641, 644-45, 152 P.3d 2, 5-6 (2006)). Thus, in *Farr West Investments*, where the remedial damages to the land totaled $42,685 and the fair market value was $26,600, the district court properly awarded the lesser amount. *Id.*

The Sawmill Point defendants argue that they are entitled to a ruling by this Court because the "[p]laintiffs have presented a damages claim that is clearly overreaching…" Defendants Sawmill Point Development, Inc., George D. Hamilton and Robert L. Hamilton's Memorandum in Support of Motion for Partial Summary Judgment, pp. 18-19. They state that where land is "[p]ermanently injured, but not totally destroyed, the owner will be entitled to recover the difference between the actual value of the land at the time immediately preceding the consummation of the injury and the actual value of the land in the condition it was immediately after the injury…" *Id.,* p. 19 (citing *Falk v. Humbird Lumber Co.*, 36 Idaho 1, 208 P. 404, 406 (1922)). The Sawmill Point defendants argue that *Farr West Investments* is applicable and that "[b]ecause the [p]laintiffs here are claiming damages far exceeding the actual value of the properties themselves the [p]laintiffs should be limited to the difference in the market value of each real property from immediately before and immediately after the claimed landslide." *Id.,* p. 21. Further, the Sawmill Point defendants allege that both plaintiffs' properties have remaining value despite the landslide in 2011. *Id.*

In response, plaintiffs assert *Farr West Investments* is not the sole case in which the Idaho Supreme Court has contemplated damages in cases involving real property. Plaintiffs' Memorandum in Opposition to Defendants Sawmill Point Development Inc., George D. Hamilton and Robert L. Hamilton's Motion for Partial Summary Judgment, p. 21. Plaintiffs direct the court to *Weitz v. Green*, arguing damages in a real property

injury case that exceed the reduction in market value are allowed. *Id.,* p. 22. Further, plaintiffs argue that a portion of the restoration work and measures required to prevent ongoing injury will occur on property that is not owned by the plaintiffs and as such should not bear any relationship to the value of their properties. *Id.,* p. 24.

In this case, there is a genuine issue of material fact regarding factors that would allow for a deviation from the diminution-in-market-value limitation. The plaintiffs have claimed they have personal reasons for wanting the injured real property repaired. Plaintiff Burnett stated in a deposition that he planned to use the property as a summer residence for his father after the current tenant moved out. Affidavit of Julie A. Simaytis Re: Plaintiffs' Response to Sawmill Point and Hamiltons' Motion for Partial Summary Judgment, at Exhibit A, p. 79, L. 9; p. 80, L. 10. Plaintiff Kobrick used the property as a primary residence prior to the landslide and has indicated an intention to live on the property if it is repaired due to the uniqueness of the property and family history there. *Id.,* Exhibit J, p. 100, Ll. 1-22. Because the plaintiffs have demonstrated personal reasons for wanting the properties restored and kept within their possession, this case is unlike *Farr West Investments* where the property owner had actually been trying to sell the land for five years. Rather, like the facts in *Weitz* where the plaintiffs valued the trees for aesthetic reasons that far exceeded their timber value, the plaintiffs here have stated personal reasons for repairing the land beyond its market value. Thus, the plaintiffs have raised a question of material fact that the jury would have to weigh in deciding whether a deviation from diminution in market value is warranted, how much of a deviation is warranted, and the likelihood of the repairs actually being made to avoid a monetary windfall.

Because a question remains as to the exact measure of values, summary

judgment declaring the absolute limit is denied.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court grants the Sawmill Point defendants' Motion for Partial Summary Judgment that defendants George (and Rita) Hamilton and Robert Hamilton cannot be liable, and denies the Sawmill Point defendants' Motion for Partial Summary Judgment as to all other aspects.

IT IS HEREBY ORDERED Count Ten of plaintiffs' Amended Complaint is STRICKEN due to plaintiffs' failure to comply with I.C. § 6-1604;

IT IS FURTHER ORDERED plaintiffs' objection to Syringa Grove defendants' joinder in Sawmill Point defendants' Motion for Partial Summary Judgment is OVERRULED;

IT IS FURTHER ORDERED THAT the Sawmill Point defendants' Motion for Partial Summary Judgment that defendants George (and Rita) Hamilton and Robert Hamilton cannot be liable is GRANTED;

IT IS FURTHER ORDERED THAT all other aspects of Sawmill Point defendants' Motion for Partial Summary Judgment are DENIED.

Entered this 27th day of August, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Julie Simaytis	208-806-0210	Everett Coulter	509 455-3632
		Pat Risken	(509) 455-3632
Jason T. Piskel	509 321 5935	John F. Magnuson	667-0500

_____
Jeanne Clausen, Deputy Clerk