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Court of Appeals
Division II
State of Washington
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No. 96941-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 51025-1-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

SEATTLE TUNNEL PARTNERS, a joint venture; TUTOR PERINI CORPORATION; and DRAGADOS USA, INC.,

Defendants.

SEATTLE TUNNEL PARTNERS, a joint venture,

Third Party Plaintiff,

v.

HITACHI ZOSEN U.S.A., LTD., a Delaware corporation; HITACHI ZOSEN CORPORATION, a foreign corporation; and HNTB CORPORATION, a Delaware corporation,

Third-Party Defendants.

HITACHI ZOSEN USA, LTD., a Delaware corporation,

Fourth Party Plaintiff,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND; ZURICH AMERICAN INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; TRAVELERS CASUALTY AND SURETY

COMPANY OF AMERICA; FEDERAL INSURANCE COMPANY; and SAFECO INSURANCE COMPANY OF AMERICA,

Fourth Party Defendants.

HITACHI ZOSEN U.S.A., LTD.,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION and SHANNON & WILSON, INC.,

Defendants.

SEATTLE TUNNEL PARTNERS, a joint venture,

Plaintiff/Petitioner,

v.

SHANNON & WILSON, INC., a Washington corporation; and PARSONS BRINCKERHOFF, INC., a New York corporation;

Defendants/Respondents.

SEATTLE TUNNEL PARTNERS'
PETITION FOR REVIEW

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I. INTRODUCTION & IDENTITY OF PETITIONER

This case involves the proper allocation of liability for project delays and damages related to the construction of the State Route 99 tunnel in Seattle. Petitioner Seattle Tunnel Partners ("STP") brought tort and indemnity claims against Respondents Shannon & Wilson ("S&W") and WSP USA, Inc. ("WSP") (collectively, "Respondents")—two private consultants retained by the Washington State Department of Transportation ("WSDOT") to prepare geotechnical reports. Although the stated intent of these reports was to identify and advise potential bidders of subsurface conditions in the tunnel path, they failed to disclose a 119-foot steel well obstruction that was previously installed at S&W's direction.

In July 2013, STP began mining the tunnel. In early December 2013, STP stopped mining when its tunnel boring machine ("TBM") exhibited difficulty. Because the cause of the stoppage was unknown, STP embarked on a costly exploratory program to locate obstructions that might be hindering the TBM. The undisclosed 119-foot steel pipe, which the TBM had encountered on December 4, 2013, was one of many theoretical causes under evaluation. STP's working hypothesis at the time, however, was that a different obstruction sat in front of the TBM.

STP's exhaustive exploratory efforts failed to discover any obstruction or other reason for the stoppage, and it resumed mining on

January 28, 2014. STP stopped mining the next day after the TBM exhibited similar performance issues. STP discovered for the first time in early February 2014 that the TBM's outer seal system had suffered catastrophic damage, which resulted in lengthy delays.

Less than three years later, STP brought claims against Respondents related to their preparation of the geotechnical reports that failed to warn STP about the steel obstruction.[1] Respondents moved for summary judgment asserting STP's claims were untimely, which the trial court properly denied given the factual disputes in the record.

On discretionary review, the Court of Appeals erroneously reversed based on unsupported and inappropriate factual findings and its failure to follow established discovery rule precedent. Specifically, even though the record established that STP was engaged in an exhaustive investigation through February 2014 to discover the cause of the TBM stoppage, the Court of Appeals manufactured a baseless finding that STP had concluded by January 15, 2014 that the steel well obstruction "was the primary cause of the stoppage." The Opinion conflicts with this Court's consistent application of summary judgment standards requiring that all inferences

[1] STP also asserted separate claims for implied indemnity against both Respondents. The Court of Appeals correctly determined that Respondents had failed to properly bring any argument regarding STP's indemnity claims before the trial court on summary judgment, and it remanded those claims for further proceedings.

are drawn in favor of the non-movant. It further conflicts with this Court's precedent governing the proper application of the discovery rule, including *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006), establishing that summary judgment is inappropriate when multiple potential causes of a particular injury are under investigation, as was the case here. Given these conflicts with established authority, review is proper under RAP 13.4(b)(1) .

This case also presents issues of substantial public interest related to a significant public works project and whether Respondents should be accountable for their negligent actions. RAP 13.4(b)(4).

II. COURT OF APPEALS DECISION

The Court of Appeals issued its unpublished opinion in *Wash. St. Dept. of Transportation v. Seattle Tunnel Partners, et al.*, on February 5, 2019 ("Opinion" or "Op."), a copy of which is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

When the TBM stopped in early December 2013, the evidence in the record is that the cause was "unknown". STP mobilized an intensive effort to investigate the cause of the stoppage and, finding none, restarted the TBM in late January 2014. Based on mischaracterizing evidence in the record and impermissibly drawing all inferences in favor of Respondents, the Court of Appeals nonetheless determined as a matter of

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law that STP "had concluded TW-2 was the primary cause of the stoppage by January 15, 2014," and held that STP's tort claims accrued at that time. Given this clear departure from accepted standards under CR 56 and discovery rule precedent, is review warranted?

IV. STATEMENT OF THE CASE

A. Background of the Project and Installation of TW-2.

In the mid-1990s, WSDOT began evaluating options for the repair or replacement of the Alaskan Way Viaduct in Seattle. CP 293. WSDOT engaged WSP in 2001 to prepare conceptual engineering studies, and WSP, in turn, retained S&W to conduct testing near the anticipated project corridor. CP 292-93, 492, 1022-23, 1106. In 2002, this work included the installation of test wells, including "Test-Well 2" or "TW-2," which included a 119-foot long, 8-inch diameter steel casing installed <u>at S&W's direction and with its knowledge</u>. CP 493, 1106, 1112.

WSDOT's original path for the tunnel did not intersect with TW-2. Late in 2009, however, shortly before the Project went out to bid, WSDOT moved the tunnel closer to the waterfront as a cost saving measure, putting TW-2—and its 119-foot long steel casing—directly in the path of the TBM. CP 966. Respondents were responsible for preparing geotechnical reports to disclose subsurface conditions bidders should expect to encounter in the tunnel path, CP 1139, including the Geotechnical

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Baseline Report ("GBR"), which "set[] the baseline subsurface site conditions expected to be encountered in the performance of the Work . . ." CP 1011. The GBR undisputedly did not identify any steel obstruction at TW-2, and S&W admitted it never considered removing TW-2 during its preparation of the GBR. CP 1124, 1139, 1176.

After issuance of the misleading GBR to bidders, in May 2010, WSDOT issued a request for proposals ("RFP") for the construction of the tunnel to replace the Viaduct. CP 997. Relying on geotechnical information such as the GBR, STP prepared a proposal, and WSDOT ultimately awarded the contract to STP. WSDOT and STP executed a design-build contract on January 6, 2011 (the "Contract"). CP 1030-55.

B. The TBM Stoppage.

STP entered an agreement with Hitachi Zosen U.S.A. Ltd. ("Hitachi") for the design and manufacture of a TBM to mine the tunnel. CP 923. STP launched the TBM and began mining on July 30, 2013. CP 379. Early on December 4, 2013, STP observed a hollow steel casing that had emerged from the ground in the area above the location of the TBM. CP 379, 924. STP employees thought the casing had possibly been pushed up due to pressure exerted by the TBM and speculated the steel casing was an old water well or water utility. CP 924-25. The TBM excavated and built rings for the next two days, but the TBM's rate of

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progress began to slow for reasons unknown to STP. CP 925, 938. On December 6, 2013, STP stopped mining to investigate. *Id.* On December 9, 2013, WSDOT notified STP that the casing was TW-2, the well that S&W directed to be installed in 2002.

On December 11, 2013, STP's construction manager explained that STP did not know the cause of the TBM's difficulties or the extent of possible damage to the TBM. CP 892 ("we need to first see what is in there" and "assess and repair any damage which whatever is in there may have caused to the TBM") (emphasis added).[2] On December 12, 2013, STP sent a letter to WSDOT advising that STP was "in the process of developing and implementing a plan to investigate the cause of this stoppage in tunneling." CP 1061. Because the Contract required STP to provide notice within 14 days of any potential change order, CP 1039-55, STP notified WSDOT that it reserved its right to assert a change order "[i]n the event that the encountering of this pipe [TW-2] is determined to be, upon completion of STP's investigation, the cause of the stoppage in tunneling[.]" CP 1061 (emphasis added).[3]

[2] That same day, an S&W engineer speculated as to the cause of the stoppage, including that the TBM hit "a very large boulder." CP 1200. WSP also stated that "[n]o one knows" what happened and that STP "will dig shaft down . . . to have a look." CP 1198.

[3] In correspondence that same day, WSP acknowledged that the cause of the stoppage was a mystery. CP 1203 ("Any word on why TBM is stuck?" "No. All speculative.").

STP then carried out a plan to investigate "potential causes" of the TBM's stoppage, starting with depressurizing the ground and drilling exploratory holes in front of the TBM to locate obstructions. CP 925-26, 1068-69. STP notified WSDOT of its investigation. CP 1064, 1066.

C. Cause "May Be Anything."

In mid-December 2013, STP prepared a TBM Stoppage Report stating that the cause of the stoppage "may be anything" and that the role of TW-2 was "unknown" at that time. CP 927, 943. The report also explained a "hypothesis" that a physical obstruction (such as an unknown artifact from the historic Seattle waterfront) may be in front of the TBM cutterhead.[4]

STP then conducted a visual inspection in the excavation chamber, but discovered nothing of significance. CP 926-27. Later in December 2013, STP drilled a series of twelve 6" probe holes to look for potential obstructions, but found none of the suspected waterfront artifacts or boulders. CP 928. From January 8, 2014 to January 16, 2014, STP drilled large 5' diameter bore holes to see if it could locate what might be causing the TBM to stop mining—and again found no obstructions. CP 928. Starting on January 17, 2014, STP conducted 41 "hyperbaric" inspections over 10 days using professional divers, but again found nothing. *Id*.

[4] WSDOT's inspectors also speculated the TBM was obstructed by a boulder. CP 1207.

On January 15, 2014, STP responded to a letter from WSDOT requesting answers to questions regarding STP's mining operations, including questions regarding the functioning of the TBM. CP 1268-75. These questions included the following: "What are the potential causes of the experienced wear of the various cutting tools inspected and replaced since the start of mining?" CP 1269. In response, STP reported various impacts on the cutting tools since the TBM's launch, including encounters with various natural obstructions, as well as TW-2. *Id.* WSDOT's request and STP's response were not related to why the TBM had stopped mining, but were instead related to WSDOT's question of what had caused "wear" on cutting tools since the start of mining in July 2013. *Id.*[5]

In late January 2014—after STP's extensive investigation revealed no cause of the TBM stoppage—STP and Hitachi concluded the TBM was fit to resume mining on January 28, 2014. CP 928. On January 29, 2014, STP observed an increase in temperatures in the outer seals and stopped to investigate. CP 929. On February 4, 2014, after further investigation, STP and Hitachi observed contamination in the main bearing chamber of

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[5] In this same time period, WSDOT advised City leadership that, "[w]hile the inspections are underway, it is too early to speculate on what led to the tunneling stoppage." CP 1213. WSDOT's Strategic and Technical Advisory Team similarly concluded the "reason for the stoppage has not been determined," and further opined TW-2 was not a cause given that it "would present little challenge for [the] TBM cutterhead." CP 1217.

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the TBM. CP 929. It was only then that STP discovered the first of the severe damage that caused the prolonged delay. *Id.*

D. Procedural History and the Opinion.

Less than three years later, STP filed complaints against Respondents for negligence, negligent misrepresentation and indemnification based on their preparation of the faulty GBR, which did not disclose the steel obstruction that had been installed at S&W's direction. CP 292-305. On August 4, 2017, S&W sought dismissal of STP's claims on the ground that they were not timely. CP 473-90. On September 1, 2017, the trial court concluded that "there are material factual issues in dispute as to whether STP had factual knowledge as to the causation element prior to February of 2014." 9/1/17 VRP at 49. On that ground, the trial court denied summary judgment. *Id.*; CP 1318-21.

Respondents successfully sought discretionary review. On February 5, 2019, the Court of Appeals issued its opinion, making a series of factual findings to support its conclusion that STP's claims were untimely as a matter of law. Specifically, the Opinion incorrectly concluded that "between the date of the December 6, 2013 stoppage and early January, STP <u>routinely identified</u> the steel casings from TW-2 as the likely source of the obstruction." Op. at 13. The Opinion also erroneously characterized the mid-December 2013 TBM Stoppage Report—which

stated the cause "may be anything" and that the role of TW-2 was "unknown"—as having "affirmatively identified TW-2 as a contributing source of the TBM's troubles." *Id.* Finally, the Court found that STP had "concluded TW-2 was the primary cause of the stoppage by January 15, 2014," another finding wholly inconsistent with the record. Op. at 15.

V. ARGUMENT

The Opinion finding STP's tort claims untimely as a matter of law conflicts with this Court's precedent and presents issues of substantial public interest. In particular, the Opinion conflicts with cases establishing that (1) factual disputes on summary judgment must be construed in favor of the non-moving party, and (2) summary judgment is improper under the discovery rule when multiple potential causes are present and factual disputes exist as to the actual cause. The Court of Appeals' departure from precedent, and the public's interest in ensuring that the issue of who should bear liability in this case be decided on the merits, warrant review. RAP 13.4(b)(1), (4).

A. The Opinion Conflicts with this Court's Precedent.

The discovery rule is appropriately applied in situations, like here, "in which plaintiffs could not immediately know of the cause of their injuries." *Matter of Estates of Hibbard*, 118 Wn.2d 737, 750, 826 P.2d 690 (1992). A cause of action is deemed to accrue when a "plaintiff

knows or should know the <u>relevant facts</u> . . . ." *Allen v. State*, 118 Wn.2d 753,758, 826 P.2d 200 (1992) (emphasis added). The discovery rule thus focuses on "relevant facts," not mere possibilities or theories. *Id.*; *see also Green v. A.P.C. (American Pharmaceutical Co.)*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998). The determination of the causal connection between an action and injury "usually is a question of fact." *North Coast Air Services Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 319, 759 P.2d 405 (1988) ("[W]e hold that the claimant must know or should with due diligence know that the cause in fact was an alleged defect . . . That the causal connection usually is a question of fact is recognized."). Only when "reasonable minds can reach but one conclusion" can this question be resolved on summary judgment. *Allen*, 118 Wn.2d at 760.

1. The Opinion Conflicts with this Court's Precedent Governing Summary Judgment Standards.

The core question before the Court of Appeals—as it correctly ascertained—was whether STP had "actual knowledge" of the cause of the TBM stoppage at some point prior to January 27, 2014. Op. at 12, n.5 (recognizing that the "should have known" prong of the discovery rule "is not the issue in this case" because Respondents "argue that STP had actual knowledge of the essential facts"). Rather than applying an "actual knowledge" standard to evaluate that question, however, the Court of

Appeals repeatedly and inaccurately construed disputed evidence in a light most favorable to Respondents, not STP, in direct contradiction with established CR 56 standards. Specifically, the Opinion made critical and unsupported factual findings that (1) STP "routinely identified the steel casings from TW-2 as the likely source of the obstruction" between December 6, 2013 and early January 2014, (2) the TBM Stoppage Report "affirmatively identified TW-2 as a contributing source of the TBM's troubles," and (3) STP had "concluded TW-2 was the primary cause of the stoppage by January 15, 2014." Op. at 13, 15. It then relied on these improper findings to determine as a matter of law that STP's claims were untimely. This conflicts with established summary judgment standards.

First, the Opinion asserts that STP "routinely identified" TW-2 as the "likely source of the obstruction" between December 6, 2013 and early January. Op. at 13. The opinion cites no portions of the record to support this proposition, and there are none. The record establishes that—instead of "routinely" identifying TW-2 as the likely source of the obstruction—STP repeatedly told WSDOT that only "in the event" the investigation found the steel to be the cause would STP seek to hold WSDOT liable. CP1061, 1064, 1066. There is nothing in the record on which to base a pronouncement that STP "routinely identified" the steel casing as the

"likely source" of the stoppage obstruction between December 6, 2013 and early January, as the Opinion concludes.

Second, the Opinion asserts that the TBM Stoppage Report "affirmatively identified TW-2 as a contributing source of the TBM's troubles." Op. at 13. The TBM Stoppage Report stated just the opposite – first, that the cause "may be anything," and second, that "the damage that [the pipe] may have created to the TBM components is still unknown at this time." CP 943 (emphasis added).

Third, the Opinion finds STP "concluded TW-2 was the primary cause of the stoppage by January 15, 2014." Op. at 15. This is hard to fathom, because the letter on which the Court relies does not address the cause of the stoppage. It instead discusses damage to cutting tools in response to WSDOT's question about "wear" from the inception of tunneling. CP 1269. Nowhere in the record does STP offer a conclusion about the "primary cause of the stoppage" as the Opinion concludes.

This inappropriate slanting of the factual record continues throughout the Opinion. For example, the Opinion cites a December 9, 2013 email by STP's Project Manager in which he passed on to his superiors the disclosure from WSDOT that STP had struck a steel well casing that was not disclosed in the GBR, and finishes his email by stating "the obstruction has been identified." CP 872. But there is no statement

in this email that STP attributed the stoppage to this obstruction; in fact, the record evidence—most notably the TBM Stoppage Report drafted after this December 9 email—plainly indicates that the steel casing's role in the stoppage was then "unknown." The Opinion also cites to a December 31, 2013 letter in which STP states that "[i]t appears that this remaining length of this pipe is the obstruction that is preventing STP from advancing the casing." CP 920. The Opinion ignores another part of the record, however, which clarifies that this same late December incident did not involve hitting TW-2's steel casing as suspected, but instead related to the subcontractor hitting the TBM cutterhead itself (also made of steel). CP 928.

The Opinion exacerbates these errors by ignoring evidence that STP was still investigating the cause of the TBM stoppage through early February 2014 and, in fact, had restarted and continued mining with the TBM in late January, weeks after the Court of Appeals concluded STP's tort claims had fully accrued. This evidence included testimony from STP's construction manager, CP 923-30, as well as notes from STP's January 30, 2014 construction task force meeting stating that STP was continuing to "perform investigative efforts to diagnose the stoppage" as of that date, CP 1219-20.

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The Opinion thus violated the basic premises governing application of the summary judgment standard by repeatedly drawing inferences in the record in favor of Respondents and by ignoring evidence in the record that supports STP. As demonstrated above, the record simply does not say what the Opinion claims it does. The Opinion, therefore, conflicts with this Court's precedent and warrants review.

2. The Opinion Conflicts with Discovery Rule Precedent.

The Opinion further conflicts with this Court's precedent by relying on these unsupported findings to effectively conclude STP was on "inquiry notice," rather than answering the question the court itself identified as the sole issue before it: whether STP had <u>actual knowledge</u> of the cause of the stoppage. Op. at 14 ("[STP] had sufficient notice for its claims to accrue.").[6] The issue of whether STP "should have known" the cause of the TBM stoppage was not before the Court of Appeals. Op. at 12, n.5. Rather, as the court acknowledged, the only question was whether STP <u>actually knew</u> that TW-2 was the cause of the TBM stoppage.

This distinction between inquiry and actual notice is demonstrated by this Court's decision in *Vertecs*. In *Vertecs*, this Court unanimously

[6] The additional authority the Opinion cites on this point is equally inapposite. Op. at 12 (citing *Green*, 136 Wn.2d at 95 and *Am. Sur. Co. of N.Y. v. Sundberg*, 58 Wn.2d 337, 344, 363 P.2d 99 (1961)). Both cases are "inquiry notice" cases and simply recognize the inquiry notice rule. By the Court of Appeals' own determination, this authority has no any bearing on the question of issue here regarding STP's "actual knowledge."

held that summary judgment was improper where, as here, multiple potential causes of a particular injury were identified, including the actions of the defendant at issue. 158 Wn.2d at 588.[7] In that case, plaintiff 1000 Virginia sued Vertecs, a stucco subcontractor, in 2002, eight years after 1000 Virginia first observed leaks in the building and eight years after it specifically advised Vertecs that 1000 Virginia believed its work may be the cause of this damage.[8] In upholding the trial court's denial of summary judgment, this Court rejected the very premise on which the Court of Appeals based its Opinion, i.e., that 1000 Virginia "should have discovered its cause of action in 1994 because there was notice of leaks and thus of the breach." *Id.* at 588-89.

Indeed, subcontractor Vertecs argued that the statute had run because 1000 Virginia was aware of the leaks in 1994 and had expressly contended at that time that such leaks "may" be the fault of Vertecs. *Id.* This Court noted, however, that Vertecs (at the time) denied responsibility for the leaks, alleging they were due to "improper caulking and

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[7] The Justices who dissented from the majority's holding in the main issue in *Vertecs* (whether the discovery rule applies to latent construction defects) joined the majority's additional holding that the case be remanded due to factual disputes in the record.

[8] At the time of the 1994 leaks, 1000 Virginia sent Vertecs a letter stating in part: "We have been experiencing leaking on the west and south side of the above referenced project for some time. We are attempting to determine the exact cause. On January 8, 1994, we will be renting a lift to examine the caulking around the windows and the vents. We believe your company may be responsible for the deficiency." *See* App.'s Br., *1000 Virginia L.P. v. Vertecs Corp.*, 2004 WL 3775350, at *8 (Oct. 12, 2004).

unconnected ductwork that was not within the scope of its work." *Id.* The Court thus held that this dispute over the cause of the leaks precluded summary dismissal of 1000 Virginia's claim. *Id.* at 588-89.

Vertecs contains two separate analyses: First, whether the discovery rule should apply to latent defect cases; and second, how the discovery rule should be applied. In attempting to distinguish *Vertecs*, however, the Opinion cites solely—and irrelevantly—to the Court's first analysis, i.e. whether the discovery rule applies in the first instance.[9] But the issue here is not whether the discovery rule applies (it does), but how it ought to be applied where (as here) a harm has multiple potential causes. As a result, the Opinion reaches a conclusion that is in direct conflict with the principles this Court articulated in *Vertecs*—namely, that summary judgment is not proper when multiple potential causes of an injury exist but have not been verified, and where, as here, the parties dispute the role the defendant's actions played in the injury. *Id.* at 588.

The same factors present in *Vertecs* are equally present here: STP and the other project participants (including WSDOT and Respondents) articulated a number of different potential causes of the TBM stoppage

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[9] All of the references to *Vertecs* in the Opinion cite to the portion of the opinion addressing whether the discovery rule should be extended to latent defect cases as opposed to the relevant portion of the opinion related to how the discovery rule should be applied in situation such as that presented here. *See* Op. at 14-15.

throughout December 2013 and January 2014. STP investigated these potential causes through early February to determine the reason for the TBM stoppage. Certainly, had STP attempted to bring suit against Respondents in the time period in which the Court of Appeals concluded it had a fully accrued cause of action, Respondents would have asserted any such claim was premature given the ongoing investigative efforts and lack of knowledge regarding the cause of the TBM's stoppage.

The Opinion thus ignored this Court's conclusion in *Vertecs* to reach its result. Indeed, were the Court of Appeals' formulation correct, the *Vertecs* Court would have reached the opposite result: That there is no question that 1000 Virginia believed Vertecs' work might have been a potential cause of the damage to the building as soon as the leaks in the building appeared. 158 Wn.2d at 571-72. But this is not what this Court held, and the Court of Appeals' Opinion conflicts with this precedent.

The Opinion instead relies on *Beard v. King County*, 76 Wn. App. 863, 889 P.2d 501 (1995), claiming it is the more "applicable case." Op. at 15. But *Beard* presented a "narrow issue" that is not presented here: whether the statute is tolled under the discovery rule until a plaintiff has "conclusive" proof of specific allegations already set forth in a previous detailed administrative complaint. 76 Wn. App. at 867. The Court of Appeals rejected this premise on the ground that a claim accrues "whether

or not the party can conclusively prove the tortious conduct has occurred." *Id*. at 868. Significantly, here, STP never filed an administrative claim as in *Beard*, and to the contrary, the record demonstrates STP was continuing to investigate the cause of the TBM stoppage through February 2014 and had not reached any conclusion regarding the cause prior to this time, let alone asserted any type of formal claim. Indeed, in mid-February 2014, WSDOT advised STP that, because "at this time," STP's investigation was complete, STP should now submit its claim for a change order under the Contract. CP 1093. Again, the Court of Appeals ignored this evidence in concluding STP had already submitted this type of claim.

In sum, as a result of failing to follow this Court's established precedent, the Court of Appeals incorrectly ruled as a matter of law that STP had actual knowledge of the cause of the TBM's stoppage no later than January 15, 2014. This Court should grant review on the grounds that this Opinion is in direct conflict with this Court's precedent.[10]

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[10] Review is additionally warranted because the Opinion conflicts with Court of Appeals' discovery rule precedent. *See, e.g., Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 513-14, 63 P.3d 153 (2002) (reversing grant of summary judgment given existence of material questions of fact as to when the owner discovered the "true cause" of the water leaks that caused damage); *Mayer v. Sto Indus., Inc*., 123 Wn. App. 443, 463, 98 P.3d 116 (2004) (*aff'd in part, rev'd in part*, 156 Wn.2d 677, 132 P.3d 115 (2006)) (holding claim was timely because plaintiff did not discovery a "factual causal relationship" between the defective work and their injury more than three years prior to filing suit).

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B. This Case Presents Issues of Substantial Public Interest.

Review also is proper under RAP 13.4(b)(4) as this case involves questions of liability related to one of the largest public works project in Washington history, with claims asserted of more than $500,000,000. The public has a substantial interest in the determination of who should bear responsibility for the actions that caused the lengthy and expensive delays that are at issue in this case. STP has asserted claims against Respondents based on their negligence in failing to identify TW-2 in the relevant contract documents. These claims warrant review on their merits. The Court should grant review in order to address these important issues that directly impact who will bear liability for the damages at issue.

VI. CONCLUSION

Based on the foregoing, STP respectfully requests that the Court grant review of the Opinion pursuant to RAP 13.4(b)(1) and (4).

RESPECTFULLY SUBMITTED this 7th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a copy of the foregoing to be served via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of March, 2019.

PACIFICA LAW GROUP LLP

By *s/ John Parnass*
John Parnass, WSBA # 18582

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 5, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

<table>
<tr><td>WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

SEATTLE TUNNEL PARTNERS, a joint venture; TUTOR PERINI CORP.; and DRAGADOS USA, INC.,

Defendant.</td><td>No. 51025-1-II

UNPUBLISHED OPINION</td></tr>
<tr><td>SEATTLE TUNNEL PARTNERS, a joint venture,

Third Party Plaintiff/Respondent,

v.

HITACHI ZOSEN U.S.A., LTD., a Delaware corporation; HITACHI ZOSEN CORP., a foreign corporation; and HNTB CORP., a Delaware corporation.

Third Party Defendants.</td><td></td></tr>
</table>

HITACHI ZOSEN U.S.A., LTD., a Delaware corporation,

Fourth Party Plaintiff,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND; ZURICH AMERICAN INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; FEDERAL INSURANCE COMPANY; and SAFECO INSURANCE COMPANY OF AMERICA,

Fourth Party Defendants.

HITACHI ZOSEN U.S.A. LTD., a Delaware corporation,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION and SHANNON & WILSON, INC.,

Defendants.

SEATTLE TUNNEL PARTNERS, a joint venture,

Plaintiff/Respondent,

v.

SHANNON & WILSON, INC., a Washington corporation; and WSP USA, Inc., formerly known as PARSONS BRINCKERHOFF, INC., a New York corporation,

Defendants/Petitioners.

SUTTON, J. — In early 2011, Washington State Department of Transportation (WSDOT) contracted with Seattle Tunnel Partners (STP), Respondent, to construct an underground bored tunnel in Seattle. In December 2013, during excavation of the tunnel, the boring machine encountered the steel casing of an abandoned test well and could not continue its progress. WSDOT filed suit against STP for breach of contract related to the stoppage. STP investigated the boring machine's trouble and ultimately brought a counterclaim suit against WSDOT, in part, for failing to disclose the well. Six months later, STP filed suit against Shannon and Wilson (S&W) and WSP USA, Inc.[1] (Collectively, "Appellants").

On discretionary review, Appellants appeal the superior court's denial of their joint motion for summary judgment dismissal of STP's negligence and implied indemnity claims against them. Appellants argue that all of STP's claims against Appellants are barred by the three-year statute of limitations. STP responds that the discovery rule applied to toll the statute of limitations on its negligence claims because STP was unable to determine the necessary facts regarding causation until after it had completed its investigation into the boring machine's breakdown. STP also responds that Appellants never properly challenged STP's implied indemnity claims and therefore, the issue is not preserved for appeal.

We agree with Appellants that the superior court erred by denying their motion for summary judgment of STP's negligence claims. However, we also hold that Appellants failed to sufficiently challenge STP's implied indemnity claims before the superior court. Consequently, we reverse in part and remand for further proceedings.

---

[1] WSP USA, Inc. was formerly known as Parsons Brinckerhoff, Inc.

FACTS

I. BACKGROUND

In 2001, WSDOT engaged WSP, an engineering and design firm, as a consultant to assist in the process of evaluating the repair or replacement of the Alaskan Way Viaduct. As part of its contract with WSDOT, WSP engaged S&W, a Seattle based geotechnical engineering firm, to conduct geologic profile logs, groundwater pumping tests, and to prepare technical memoranda relating to the Alaskan Way Viaduct replacement alternatives and related geotechnical issues. Between 2001 and 2010, WSP and S&W conducted various investigative field explorations. In 2002, they installed a pumping well identified as Test Well 2 (TW-2). TW-2 had an eight-inch steel casing.

In 2009, WSDOT determined that a bored underground tunnel stretching approximately 1.7 miles long and 57 feet in diameter was the best option for the viaduct replacement project. In 2010, S&W and WSP jointly issued a geotechnical baseline report (GBR) for the tunnel project. The purpose of the GBR was for "[s]etting the baseline subsurface site conditions expected to be encountered in the performance of the [w]ork." Clerk's Papers (CP) at 1011. S&W additionally prepared a Geotechnical and Environmental Data Report, the stated purpose of which was to "present[] geotechnical and environmental data collected for the current and previous alignments of the project." CP at 1022.

In January 2011, WSDOT and STP entered into a design-build contract to execute the tunnel plan. As part of the contract, STP procured a tunnel boring machine (TBM). STP commissioned the TBM through Hitachi Zosen U.S.A., Ltd. (Hitachi). STP launched the TBM and started boring the tunnel on July 30, 2013.

On approximately December 4, 2013, STP employees observed that a hollow steel casing had emerged from the surface of the project site, directly above the TBM. The TBM continued tunneling, but the advance rate slowed and the temperature of the TBM rose until, on approximately December 6, STP stopped the TBM to investigate. That same day, Juan Luis Magro, a construction manager for STP, e-mailed other employees of STP about the problem, acknowledging that the TBM had encountered steel casings. He observed, "the extension of the damages in the cutterhead and/or screw conveyor produced by encountering these steel art[i]facts is unknown at this point, although it is a given that there will be some." CP at 893.

On December 9, STP project manager Chris Dixon sent an e-mail to STP's chief executive officer, stating:

> Matt Preedy just informed us that the obstruction encountered by the TBM is an 8 inch diameter steel pipe, 160 feet long, that was used by WSDOT as an observation well on a previous alignment.
>
> We hit it right where WSDOT left it in the ground.
>
> The [differing site condition[2]] has been identified.
>
> We (WSDOT and STP) have been receiving media questions all day about why [the TBM] is stopped and what [the TBM] has encountered.
>
> It will be interesting to see how WSDOT responds to these questions now that the obstruction has been identified.

CP at 872.

WSP seemed less sure as to what had caused the stoppage. On December 10, a WSP engineer responded, "[n]o one knows," when a WSP colleague asked "what's going on?" CP at 1198.

[2] Differing site condition, as defined in the design-build contract.

On December 12, 2013, STP wrote a letter to WSDOT explaining that STP was beginning an investigation into the cause of the stoppage. STP explained that it had learned on December 9 that the TBM had encountered an 8-inch diameter steel pipe that WSDOT installed in 2002. The letter stated:

> In the event that the encountering of this pipe is determined to be, upon the completion of STP's investigation, the cause for the stoppage in tunneling and/or the cause for an increase in STP's cost and time for performance, STP hereby reserves its right to request a Change Order to provide an extension of the Completion Deadlines and an increase in compensation.

CP at 866. That same day, e-mails between WSP engineers stated that theories as to why the TBM had stopped were "[a]ll speculative." CP at 1203.

On December 17, WSDOT wrote to STP identifying the steel pipe the TBM encountered as part of the casing for TW-2. On December 31, STP wrote to WSDOT describing the steel that had been removed from the TBM and the ground surface during investigation into the stoppage. Dixon explained that "there is almost sixty (60) feet of this pipe remaining below ground surface. It appears that this remaining length of this pipe is the obstruction that is preventing STP from advancing the TBM, resulting in the current stoppage to tunneling." CP at 920.

In mid-December, STP prepared a "TBM Stoppage Report" hypothesizing that "there is an obstruction preventing the normal operations of the machine. The obstructions may be in front of the TBM, within the cutterhead of the TBM or both." CP at 943. The report stated:

> Out of the 119 ft length of 8 inches diameter and ¼" inch thick TW-2 well left in place, only 50 ft were removed from the surface and two chunks of 2-3 ft length were screwed by the conveyors inside the machine. So over 65 ft of steel pipe are still between the excavation chamber in chunks and/or in a mess in front of the cutterhead.

> Regardless of the TBM blockage, the damage that the steel may have created to the TBM components is still unknown.

CP at 943. The report went on to identify that the obstruction *in front of* the TBM "may be anything" including several large boulders, a giant boulder, or steel manmade objects such as the identified steel well casing. CP at 943. The report also identified the obstructions *within* the TBM included, but were not limited to, steel entangled on and within the cutterhead, large boulders, and cobbles. The report concluded that the combination of obstructions in front of and within the cutterhead was the most reasonable theory as to the problems encountered by the TBM.

On January 11, 2014, STP laid out its plan to resume tunneling. The plan explained that STP had learned that the TBM had stopped after running through an abandoned investigation well made of steel, and that the first step in its plan to resume tunneling was to "[t]ry to retrieve what is left of the well casing TW-2 and/or any other potential obstruction in front of the cutterhead, preventing the TBM from mining, and putting the TBM in risk[.]" CP at 903-04.

On January 15, STP wrote to WSDOT responding to questions about the tunnel project. In response to WSDOT's question regarding the potential causes of the damage to the cutting tools, STP responded:

> We have found again normal wear and tear in some of the Precutting Bits replaced from within the cutterhead arms at atmospheric conditions since the TBM stopped during the excavation of ring #149. However, some other Precutting Bits have been dramatically damaged by what we classify as impact with man-made obstructions, such as steel, following a clear pattern in the cutterhead for localized damage. We believe that the 8 inch diameter well casing left in place is the most likely cause for such serious damage.
>
> STP was informed of the well casing's existence by WSDOT six days after the well casing was encountered by the TBM. It appears that a portion of the casing may have remained jammed right in front of the cutterhead during the last 12 rings of excavation and damaged the cutting tools during cutterhead rotation as the TBM moved forward.

> The TBM and its cutting tools were never designed to break up and mine through steel.
>
> While it is true that the initial launch of the TBM mined through concrete, boulders and cobbles, all of which accelerated the wear on some cutters, requiring them to be changed at Safe Haven #2, once the TBM entered native ground the ground conditions encountered are not considered sufficiently abrasive to cause the level of damage observed on some of the Precutting bits, as discussed above. *We believe that the steel pipe is the primary cause of the damage to the cutting tools.*

CP at 1269 (emphasis added).

An internal WSDOT memorandum created the following week questioned STP's conclusions about the impact of the steel well casing on the TBM. The memo noted:

> There has been much discussion related to the 8 inch diameter well casing encountered at Ring 137 on December 3 and the likely impact. At most 60 ft of pipe could have been ingested based on total casing length, less the amount removed from the surface. While the TBM is not designed for excavation of steel pipe, the 3/8 inch thick wall would present little challenge for a TBM cutterhead designed to mine 30,000 psi compressive strength rock boulders up to 8 ft in diameter. Impact damage to cutter carbides inserts is possible, as it is with strong boulders; however, other than local damage to cutters no permanent damage would be anticipated or has been revealed. Furthermore, after encountering the pipe the TBM advanced another 11 rings (or about 58 ft) before stopping on December 6 at Ring 149. During the advance of these 11 rings, no significant changes in the TBM performance were experienced until the last few rings (from about Ring 147 on).

CP at 1217.

On January 28, 2014, STP restarted the TBM and mined the remainder of Ring 149. The next day, STP noticed an increase in temperatures. After determining that several seals in the TBM's outer chambers had broken, STP shut it down indefinitely on February 2, 2014.

II. Procedural Facts

On October 9, 2015, WSDOT filed suit against STP in King County Superior Court for breach of the design-build contract related to the December 2013 TBM stoppage. WSDOT alleged that STP was at fault for the TBM's malfunction. The superior court dismissed the case for lack

of jurisdiction, based on the jurisdiction selection clause of the design-build contract, which designated Thurston County as having exclusive jurisdiction. In March 2016, WSDOT refiled its claims against STP in Thurston County Superior Court.

On July 6, 2016, STP answered and filed a counterclaim against WSDOT, alleging that WSDOT failed to adequately disclose TW-2 in the contract documents. STP also initiated a third-party complaint against Hitachi and HNTB Corporation, the designers and manufacturers of the TBM, alleging that they were alternatively liable for damages related to the TBM stoppage. Hitachi and HNTB filed counter claims for breach of contract against STP.

Six months later, on January 26, 2017, STP filed a complaint against S&W. The following day, STP filed an amended complaint adding WSP as a defendant. STP alleged three causes of action for professional negligence, negligent misrepresentation, and indemnification for "Third Party Incurred Costs" and "Third Party Claims." CP at 301. As damages for its negligence claims, STP sought a money judgment for damages "from hitting TW-2 (including direct physical property damage to the TBM and the resulting impacts and delays)." CP at 303.

On August 4, S&W filed a motion for summary judgment, which WSP joined, to dismiss STP's complaint as untimely pursuant to the three-year statute of limitations applicable to tort claims.[3, 4] During argument on the summary judgment motion, STP conceded that it identified TW-2 as a potential cause of the TBM stoppage almost immediately. However, the parties disputed when STP had sufficient knowledge of causation to trigger the statute of limitations. STP

[3] RCW 4.16.080.

[4] The joint motion does not explicitly address STP's indemnity claims but requests that STP's complaint be dismissed in its entirety.

argued that its indemnity claims should survive summary judgment regardless of the superior court's determination on the statute of limitations for the tort claims. S&W and WSP did not address the indemnity issues at the summary judgment hearing.

After hearing argument, the superior court entered an order denying S&W's and WSP's joint motion for summary judgment. It concluded that S&W and WSP met their burden with respect to establishing STP's knowledge of duty, breach, and damages, but that "there are material factual issues in dispute as to whether STP had factual knowledge as to the causation element prior to February of 2014." Report of Proceedings (RP) (9-1-17) at 49. The superior court did not specifically address the indemnity claims. S&W and WSP timely moved for reconsideration of the superior court's order under CR 59(a)(7) and (9), but the superior court denied their motion.

Appellants S&W and WSP moved this court for discretionary review of the superior court's denial of their joint motion for summary judgment and reconsideration. A commissioner of our court considered the superior court's decision denying summary judgment of the tort claims and granted review. Ruling Granting Review (Wash. Ct. App. Mar. 6, 2018). The commissioner's decision focused exclusively on the tort claims, but granted review of the indemnity claims "in the spirit of judicial economy." Ruling Granting Review at 14.

ANALYSIS

Summary judgment is only appropriate if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'" *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014) (quoting CR 56(c)). "The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party."

Christensen v. Grant County. Hosp. Dist. No. 1, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). "[W]hen reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005).

I. NEGLIGENCE CLAIMS

Appellants argue that the superior court erred by denying their motion for summary judgment because the record clearly shows that STP had sufficient knowledge that TW-2 was responsible for the TBM stoppage as early as December 2013 and no later than January 15, 2014, and therefore, STP's claims were barred by the statute of limitations. STP argues that the discovery rule tolled the statute of limitations because STP did not have sufficient knowledge of the cause of the TBM's damage until February 2014. We agree with Appellants.

Typically, tort claims are subject to a three-year statute of limitations. RCW 4.16.080. The statutory period begins to run as soon as the plaintiff's cause of action accrues and the plaintiff has the right to apply to a court for relief. *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975). For a tort claim, the requisite elements include: a duty the defendant owes to the plaintiff, a breach of that duty by the defendant, causation, and damages. *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998). In negligence actions, an aggrieved party need not know the full amount of damage sustained before a cause of action accrues; it need only know that some actual and appreciable damage occurred. *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 285, 864 P.2d 17 (1993).

"The discovery rule provides that a cause of action does not accrue until an injured party knows, or in the exercise of due diligence should have discovered, the factual bases of the cause

of action."[5] *Beard v. King Cty.*, 76 Wn. App. 863, 867, 889 P.2d 501 (1995). A party who has notice of facts that are sufficient to put it upon inquiry notice is deemed to have notice of all facts that a reasonable inquiry would disclose. *Green*, 136 Wn.2d at 96. "[N]otice sufficient to excite attention and put a person on guard, or to call for an inquiry is notice of everything to which such inquiry might lead." *Am. Sur. Co. of N.Y. v. Sundberg*, 58 Wn.2d 337, 344, 363 P.2d 99 (1961).

The discovery rule aims to avoid the injustice of having a statute of limitation terminate legal remedies before the claimant knows he has been injured. *Beard*, 76 Wn. App. at 867. Under this rule, "the plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period." *Clare*, 129 Wn. App. at 603.

Here, even taking the evidence in the light most favorable to STP, the record shows that STP had sufficient notice of TW-2's role in the TBM's damage by January 15, 2014. As early as December 6, 2013, the day of the TBM stoppage and two days after a steel well casing emerged from the ground above the TBM, a construction manager for STP recognized that the TBM had encountered steel casings and that "it [was] a given" that there would be some resulting damage to the TBM. CP at 893. By December 9, the STP project manager e-mailed STP's chief executive officer explaining that the steel casing that the TBM hit was part of an old observation well. In his e-mail, the project manager claimed, "We hit it right where WSDOT left it in the ground. . . . the obstruction has been identified." CP at 872.

[5] "Due diligence" is not at issue in this case. "The question of due diligence is only material when a party *should have known* the essential facts of a cause of action." *Beard v. King County.*, 76 Wn. App. 863, 867 n.2, 889 P.2d 501 (1995). Here, Appellants argue that STP *had actual knowledge* of the essential facts.

In a series of correspondence between STP and WSDOT between the date of the December 6, 2013 stoppage and early January, STP routinely identified the steel casings from TW-2 as the likely source of the obstruction. The mid-December TBM Stoppage Report prepared by STP identifies that the TBM had encountered TW-2 and ingested some steel. While the stoppage report hypothesized that the extent of damages to the cutterhead and further obstruction of the TBM could be exacerbated by additional roadblocks such as boulders, the stoppage report affirmatively identified TW-2 as a contributing source of the TBM's troubles.

By January 15, 2014, STP stated, "We believe that the 8 inch diameter well casing left in place is the most likely cause for such serious damage," and concluded that "the steel pipe is the primary cause of the damage to the cutting tools." CP at 1269. It is indisputable that by January 15, 2014, at the latest, STP knew that the factual elements of its claims against Appellants existed, thus its claims accrued at that point, and the statute of limitations began running.

STP argues that there are genuine issues of material fact as to when it became sufficiently aware of the cause of the TBM's stoppage, and relies heavily on internal correspondence between S&W, WSP, and WSDOT consultants, all of whom had an interest in mitigating TW-2's role in the stoppage. However, the issue here is what *STP* knew, not what other parties believed. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006) ("the action accrues when *the plaintiff* discovers the salient facts underlying the elements of the cause of action" (emphasis added)).

STP also argues that the statute of limitations was tolled until it determined whether TW-2 was the "true cause" of the TBM stoppage. Br. of Resp't at 17-18. STP contends that this case is similar to *1000 Virginia*, 158 Wn.2d 566. There, our Supreme Court held that the discovery

rule should apply to contract claims involving latent construction defects that the plaintiff would be unable to detect at the time of the breach. *1000 Virginia*, 158 Wn.2d at 578-79. STP contends that *1000 Virginia* stands for the idea that a claim cannot accrue if various potential causes of damage exist. STP is mistaken. The *1000 Virginia* court focused on situations in which "the defect was of a kind that the [plaintiff] would simply *never know* or have reason to know of the defect or that it would cause detectable damage years later." *1000 Virginia*, 158 Wn.2d at 580 (emphasis added).

1000 Virginia involved a situation in which the tortfeasing subcontractor initially misled the general contractor by telling it that the defects were outside the scope of its work and attributed the damage to other issues. 158 Wn.2d at 571-72. The court explained:

> There is little to distinguish a case involving latent defects in a building and a case where a surgical instrument is left in the plaintiff's body during surgery. In both cases, the plaintiff may have no way of knowing that a cause of action exists, i.e., no way of knowing the facts that show that the construction contract was breached in the first case or that a duty of care was breached in the latter.

1000 Virginia, 158 Wn.2d at 579.

Here, in contrast, the record shows that STP became aware of a problem with the TBM around the time the initial TBM stoppage occurred on December 6, 2013. Further, the record shows that STP identified TW-2 as "the primary cause of the damage" by January 15, 2014. CP at 1269. Neither the fact that STP initially considered the possibility that there may have been additional contributing factors to the TBM's damage nor that it continued its investigation of the stoppage beyond January 15, alters that it had sufficient notice for its claims to accrue. "A person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that reasonable inquiry would disclose." *1000 Virginia*, 158 Wn.2d at 581.

Further, the fact that WSDOT, S&W, and WSP disputed TW-2's role in the TBM stoppage and damage does not trigger a tolling of the statute of limitations. STP implies that *1000 Virginia* stands for the proposition that any time the parties dispute the cause of the alleged damage, summary judgment is inappropriate. We do not read *1000 Virginia* so broadly.

We agree with Appellants that *Beard* is the more applicable case. In *Beard*, Division One of our court held that the statute of limitations period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist, even if the party cannot yet conclusively prove the tortious conduct has occurred. *Beard*, 76 Wn. App. at 868. There, the plaintiffs suspected the defendant's wrongful conduct in 1989 but did not obtain proof until 1992. *Beard*, 76 Wn. App. at 868-69. Nonetheless, *Beard* held that the discovery rule did not apply to extend the commencement of the limitation period beyond 1989. *Beard*, 76 Wn. App. at 868-69.

The court explained:

> A smoking gun is not necessary to commence the limitation period. An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken. At that point, the potential harm with which the discovery rule is concerned—that remedies may expire before the claimant is aware of the cause of action—has evaporated.

Beard, 76 Wn. App. at 868. Similarly here, the potential harm that the discovery rule seeks to avoid is absent.

Even taking the evidence in the light most favorable to STP, the record shows that STP suspected that TW-2 caused the TBM's damage as early as December 9, 2013, and had concluded TW-2 was the primary cause of the stoppage by January 15, 2014. The record is inconsistent with STP's contention that it did not know what caused the stoppage until February 2014. The record

shows that STP had sufficient knowledge that its cause of action against Appellants had accrued by January 15, 2014, at the latest, and thus, the superior court erred in denying Appellants' motion for summary judgment dismissal of STP's negligence claims, which were not filed until January 26, 2017.

II. IMPLIED INDEMNIFICATION

STP argues that we should decline to consider Appellants' arguments regarding implied indemnity on appeal because Appellants failed to properly challenge the indemnity claims before the superior court. We agree.

"'It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.'" *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 637, 246 P.3d 822 (2011) (quoting *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991)). When the moving party raises new issues in its rebuttal materials, the nonmoving party has no opportunity to fully respond, and therefore it is improper. *Davidson Serles*, 159 Wn. App. at 637. Even where a moving party requests dismissal of all of the nonmoving party's claims, if the motion for summary judgment does not address one of the nonmoving party's claims, dismissal of that claim is erroneous. *Davidson Serles*, 159 Wn. App. at 638.

Appellants' motion for summary judgment asserted that all of STP's claims against them are barred by the three year statute of limitations, RCW 4.16.080. However, Appellants focused their motion and argument entirely on STP's tort claims and did not address STP's implied indemnity claims. Only in their reply on summary judgment did Appellants make any argument

that the indemnity claims should be dismissed because they were indistinct from the negligence claims and were otherwise barred by the Tort Reform Act of 1981.

At the hearing on the motion for summary judgment, Appellants did not address the indemnity claims whatsoever. In its response at the hearing, STP briefly addressed "this whole indemnity kerfuffle;" Appellants did not respond. RP (9-1-17) at 39. Consistent with Appellants' written and oral argument, the superior court's order denying summary judgment did not specifically address STP's indemnity claims.

Appellants argue that they did sufficiently challenge the alleged indemnity claims before the superior court by challenging the timeliness of STP's negligence claims because STP's alleged implied indemnity claims are indistinct from STP's negligence claims. Appellants acknowledge that Washington courts have recognized that implied indemnity claims are separate and distinct causes of action from the underlying wrong. *See* Opening Br. of Appellant WSP at 29 (referencing *Cent. Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 946 P.2d 760 (1997)). However, Appellants contend that the penultimate issue here is not whether a party *may* bring an implied indemnity claim separate from its negligence claims, but rather whether *in this case* STP has actually pleaded distinct implied indemnity claims.

We hold that Appellants insufficiently made this argument before the superior court. Because Appellants failed to adequately challenge STP's implied indemnity claims in their motion for summary judgment, we cannot consider whether the superior court's denial of summary judgment dismissal of those claims was erroneous, and consequently, whether the alleged implied indemnity claims remain intact. Because we cannot consider whether the superior court's denial of summary judgment dismissal of the implied indemnity claims was erroneous, discretionary

review of this issue was improvidently granted. *See* RAP 2.3(b)(1); *See also* RAP 7.3 ("The appellate court has the authority to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case.").

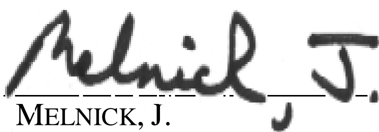
In summary, we hold that the superior court erred by denying Appellants' motion for summary judgment of STP's negligence claims, but that summary judgment dismissal of STP's implied indemnity claims is not properly before us. Consequently, we reverse in part and remand in part. Upon remand, Appellants are entitled to make arguments on implied indemnity to the superior court. *See White*, 61 Wn. App. at 169.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:

WORSWICK, P.J.



MELNICK, J.

PACIFICA LAW GROUP

March 07, 2019 - 2:53 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51025-1
Appellate Court Case Title:	State Department of Transportation v. Seattle Tunnel Partners
Superior Court Case Number:	16-2-00980-5

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