

64244-8

64244-8

No. 64244-8-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

JAMES H. JACKSON and C.R. HENDRICK, a marital community,

Petitioners,

vs.

TRENCHLESS CONSTRUCTION SERVICES, L.L.C., a Washington
Limited Liability Company, and QPS, Inc., a Washington Corporation
doing business as "QUALITY PLUMBING",

Respondents.

RESPONDENT QPS, INC.'S RESPONSE BRIEF

FILED
2015 FEB 22 PM 4:14
CLERK OF COURT
JULIE A. BROWN

Kathleen M. Boyle, WSBA # 8686
Law Offices of Kelley J. Sweeney
Attorneys for Defendant QPS, Inc.
1191 Second Avenue, Suite 500
Seattle, WA 98101
(206) 633-1310

ORIGINAL

I.	INTRODUCTION.....	1
II.	ANSWER TO ASSIGNMENTS OF ERROR.....	1
III.	ISSUES	1
IV.	STATEMENT OF THE CASE.....	2
	A. Contracts With Prior Homeowner For Installation Of New Water Line	3
	B. Work Performed Pursuant To Contracts With Prior Homeowner To Install New Water Line	5
	C. December 14, 2006 Landslide Event	9
	D. No Evidence Of Negligence, Or Proximate Cause.....	13
	E. Summary Judgment Arguments And Ruling.....	20
V.	ARGUMENT.....	22
	1. Standard of Review.....	22
	2. Appellants Failed To Establish That QPS Owed Them A Duty Under The Seattle Municipal Code, Common Law, Or Public Policy.....	23
	a. Appellants’ current argument based upon the Seattle Municipal Code is neither timely nor persuasive..	24
	b. Appellants’ have not shown that QPS owed them a duty of care under common law.....	25
	c. Appellants’ have not shown that public policy warrants a finding that QPS owed them a duty of care.....	27
	3. Appellants failed to establish that any breach of a duty owed by QPS was a proximate cause of the damage to	

Appellants’ residential property	27
4. The trial court correctly found the Appellants’ claim against QPS barred under the economic loss rule as Appellants sought recovery only for damage to the property on which work was performed pursuant to a contract with the previous homeowner	31
VI. CONCLUSION.....	37

TABLE OF AUTHORITIES

A. Table of Cases

Cases

<i>Alejandro v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007) ..	32, 33, 34, 35, 36
<i>Berschauer/Phillips Construction v. Seattle School District</i> , 124 Wn.2d 816, 881 P.2d 986 (1994)	32, 33, 34
<i>Burg v. Shannon & Wilson, Inc.</i> , 110 Wn. App. 798, 43 P.3d 526 (2002)	23
<i>Davis v. Baugh Indus. Contractors, Inc.</i> , 159 Wn.2d 413, 150 P.3d 545 (2007)	25, 26, 27
<i>Fabrique v. Choice Hotels International, Inc.</i> , 144 Wn.App. 675, 681, 183 P.3d 1118 (2008)	28
<i>Herberg v. Swartz</i> , 89 Wn.2d 916, 925, 578 P.2d 17 (1978)	24
<i>Howell v. Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1059 (1991)	22
<i>Kendall v. Public Hospital District</i> , 118 Wn.2d 1, 820 P.2d 497 (1991)	23

<i>Myer v. University of Washington</i> , 105 Wn.2d 847, 852, 719 P.2d 98 (1986).....	22, 23
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 358, 166 P.2d 667 (2007).....	22
<i>Rounds v. Nellcor Puritan Bennett, Inc.</i> , 147 Wn.App. 155, 194 P.3d 274 (2008).....	28, 29
<i>Schneider v. Strifert</i> , 77 Wn. App. 58, 888 P.2d 1244 (1995).....	23
<i>Stuart v. Caldwell Banker Comm'l Group, Inc.</i> , 109 Wn.2d 406, 745 P.2d 1284 (1987).....	32, 33
<i>Van Cleeve v. Betts</i> , 16 Wn.App. 748, 559 P.2d 1006 (1977).....	28
<i>Van Buskirk v. ConocoPhillips, Inc.</i> , 2009 WL 3784334 (W.D. Wash., November 10, 2009)	29
<i>Wells v. City of Vancouver</i> , 77 Wn.2d 800, 467 P.2d 292 (1970)	24
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)....	22

I. INTRODUCTION.

II. ANSWER TO ASSIGNMENTS OF ERROR.

- A. The trial court did not err when finding that Appellants had failed to establish any genuine issue of material fact with respect to the tort claim asserted against Respondent QPS, Inc. and granting summary judgment in favor of Respondent QPS, Inc.;
- B. The trial court did not err when ruling that Appellants had failed to establish that under the facts of this case Respondent QPS, Inc. owed them a duty of care;
- C. The trial court did not err when ruling that Appellants' claim against Respondent QPS, Inc. for damage to their residential property was barred under the economic loss rule.

III. ISSUES.

Was summary judgment in favor of Respondent QPS, Inc. properly granted, on one or more of the following grounds:

- (A) That Appellants failed to argue or establish that Respondent QPS, Inc. owed them a duty of care under the Seattle Municipal Code, common law, or public policy;

(B) That Appellants failed to establish a breach of a duty owed to them by Respondent QPS, Inc. was a proximate cause of the damage to their residential property as claimed; *and/or*

(C) That Appellants' claim against Respondent QPS, Inc. is barred under the economic loss rule as it seeks recovery of damages solely for damage to the property on which work was performed pursuant to a contract with the previous homeowner.

IV. STATEMENT OF THE CASE.

Appellants James H. Jackson and C.R. Hendricks ("Appellants") have appealed the trial court's decision to grant summary judgment dismissing their tort claims against Respondent QPS, Inc. (hereinafter "QPS") and Respondent Trenchless Construction (hereinafter "Trenchless"). Appellants contend that the trial court improperly dismissed their claims against Respondents QPS and Trenchless, arguing that Respondents owed them a duty of care based on contracts entered into between each of the Respondents and the previous homeowner, Corinne Otakie. The trial court granted summary judgment to both Respondents after finding that neither owed Appellants any duty of care, and that in any event, the Appellants' claims against Respondents were barred by the

economic loss rule.

A. Contracts With Prior Homeowner For Installation Of New Water Line.

In February 2006, QPS was contacted by Corinne Otakie regarding installation of a new water service line to her residence located at 4351 SW Thistle Street in West Seattle. CP 219. Ms. Otakie advised QPS that the City of Seattle had shut-off her water service after discovery of a significant leak in her existing water service line and needed to have a new waterline installed to restore water service to her home. CP 219. QPS determined that connecting Ms. Otakie's new water line to the main water line, referred to as the "City union", would require laying pipe for a significant distance down a steep slope, and did not have the expertise or equipment to properly perform this part of the installation work. CP 219; 522. QPS recommended Ms. Otakie consult with a company specializing in trenchless installation, which would reduce the costs to install the new water service line to her residence and would also reduce the impact to the hillside where the water line needed to be installed. CP 220. QPS recommended Respondent Trenchless, a company QPS had worked with on other jobs and knew to be skilled at performing directional drilling work. CP 220.

Although QPS and Trenchless had worked together on projects

prior to the installation of the new water service line to the Otakie residence, the usual practice was for QPS to contract separately from other contractors on a project and to contract directly with the owner of the property solely for the work QPS was expected to perform at the site. CP 523. Following consultation with Respondent Trenchless, Ms. Otakie entered into separate contracts with QPS and with Trenchless for work to be performed by each company with respect to installation of the new water service line to her residence. CP 523-524. Under the contract entered into between QPS and Ms. Otakie, QPS contracted to perform the following work: 1) install copper pipe from the city union on the west side of the sidewalk on Northrop Place SW, to the south to the point where the directional drilling started; 2) connect the copper pipe to the polyethylene pipe Trenchless had contracted to install from the top of the hillside approximately 160 feet down to the Otakie residence; 3) install copper pipe from the Otakie house to the point where the directional drilling ended near the Otakie residence; and 4) connect the copper pipe from the house to the end of the poly pipe installed by Trenchless. CP 221.

Respondents QPS and Trenchless provided bids and contracted to perform only that work which was required to install a new water service line in order to restore water service to Ms. Otakie's residence. CP 220; 59. Ms. Otakie requested bids from Respondents solely for the costs of

work to install a new water service line to her residence, and the contracts signed by Ms. Otakie based on those bids did not provide for any work other than the installation of the new water service line. CP 59; 170; 221; 523. Respondents did not include in their bids or contract to provide any work related to the existing (old) water service line or otherwise to investigate the source of the leak which had caused the City to shut-off water service to the residence. CP 59; 170. Respondents QPS and Trenchless did not have a duty under their (respective) contracts with Ms. Otakie either to locate the source of the prior water leak, or to repair or otherwise mitigate damage to the soils in the area where the leak occurred. CP 59; 170.

B. Work Performed Pursuant To Contracts With Prior Homeowner To Install New Water Line.

The work installing the new water line started on Northrop Place SW, where the city union was located on Northrup Place SW just to the north of the intersection of SW Thistle Street and Northrop Place SW, and approximately 200' feet northeast of the Otakie residence. CP 220. After Trenchless decided where to set up their drilling equipment on Northrop Way SW, QPS and Trenchless coordinated their respective work so that the two lines of pipe would intersect at a certain point. CP 220-221; 524. It was agreed that QPS would continue to install the copper pipe in a

straight line from the City union on the west side of the sidewalk, and that Trenchless would set up its equipment at an angle and begin drilling from an area about 2 feet south of the water meter on the east side of the sidewalk towards (the QPS pipe on) the west side of the sidewalk. CP 221. QPS was able to locate the pipe installed by Trenchless very near the point and depth it expected to find it: approximately 24" to 30" below the surface. CP 222. QPS did not experience any difficulties either locating the poly pipe, or in connecting the Trenchless and QPS lines. CP 524.

The work to install the new water service line to the Otakie residence took a total of three days: QPS began work on Friday, March 3, 2006, and completed all of its work the following Tuesday, March 7, 2006. CP 527; 535. Trenchless began its work on Monday, March 6, 2006, so that both QPS and Trenchless were on site that day and the following day, Tuesday March 7, 2006. CP 527. Trenchless completed its installation of the new polyethylene pipe on Tuesday, and then QPS completed the work required to connect the copper pipe it had installed at the top of the slope and at the residence to the poly pipe that had been installed by Trenchless. CP 527.

The City's records reflect that the City inspector performed his inspection of the completed installation work at 1:15 p.m. on Tuesday,

following completion of the work required to connect the Trenchless and QPS pipes at the top and at the bottom of the hillside. CP 535. After the City inspector completed his inspection and approved the installation work, QPS performed the work required to backfill the areas excavated during the installation of the new water service line. CP 527-528.

There was no evidence that the connection or backfill work done by QPS could have, or did, result in any alteration in the placement of the poly pipe installed by Respondent Trenchless. CP 526-527. The polyethylene pipe was installed using trenchless technology, which would have made it virtually impervious to movement after it was installed and nearly impossible to physically move. CP 526. The trenchless technology employed by Respondent Trenchless used a directional bore to drill through the subsurface soils with the pipe then being pulled back through the bore path; at the same time the pipe is pulled back along the bore path, the space between the bore hole and the newly installed pipe is filled with a substance used specifically to fill voids and to secure the pipe in place. CP 212-213; 526. This process of installation insures that pipe installed in this manner remains where it is placed, and as a result it would have been extremely difficult if not impossible for QPS to have physically moved the pipe installed by Respondent Trenchless. CP 526. Furthermore, there was no reason for Respondent QPS to have moved the poly pipe after it was

installed by Trenchless, since the equipment and materials available to connect the different plumbing pipe would have allowed QPS to connect the poly pipe with the copper pipe *regardless* of the position or angle of either pipe and without the need to move or change the placement of either line. CP 526-527.

The City performed two inspections of the work done by Respondents Trenchless and QPS to install the new water service line to the Otakie property: 1) the inspection on March 7, 2006, following completion of the installation work, in order to make sure that all connections for the new water service line were properly done and the new water service line was working properly, and which was required by the City prior to any backfill work at the site; and 2) an inspection of the completed backfill work, to make sure it had been properly performed. CP 176; 527-528. The records maintained by the City establish that the City knew that directional drilling work was performed at the site, and approved both that work as well as the work performed by QPS. CP 528; 535. The City inspector's notes regarding the March 7, 2006, inspection at the conclusion of the installation work and prior to backfill work being done, state:

Union connection o.k. Then 10' of copper to the south then over to 1.25" poly line. This poly-line was used a directional boring machine to near homes footprint. There

it the poly pipe connects to copper 4' out of footprint then 2' out of there is a new shut off valve. All o.k.
CP 535.

C. December 14, 2006 Landslide Event.

On September 11, 2006, approximately six months after completion of this work, Appellants purchased the residence located at 4351 SW Thistle Street from Corinne Otakie. CP 193-195. Appellants' residence was damaged on December 14, 2006, as a result of a massive landslide which occurred following the Hanukkah Eve storm. CP 163.

On November 5, 2006, the Puget Sound area experienced record-breaking rainfall measuring 1.91 inches which broke the prior record of 1.54 set in 1969. CP 66. On that date a sinkhole was reportedly seen at the intersection of Northrup Way SW and SW Thistle Street on the east side of the guardrail at the intersection. CP 70-71; 84. After the City was notified on November 5, 2006, the City conducted an investigation into the cause of the sinkhole working within the sinkhole to determine if one of the City pipes within the hole had developed a leak. CP 70; 84. After the various City departments were unable to find a cause for the sinkhole other than the drainage conditions at the site, the City backfilled the sinkhole on November 6, 2006. CP 70; 84. And a new sinkhole also formed in the area the City had backfilled sometime between November 6, 2006 and the December 14, 2006 landslide event . CP 70; 71.

On December 14, 2006, the day of the now infamous Hanukkah Eve storm, the Puget Sound area again experienced another record-breaking rainfall of 2.17 inches, breaking the previous record of 1.24 inches set in 2002. CP 67. In November and December of 2006, as a result of the record-breaking rainfall in the Puget Sound area, many locations in the City of Seattle were flooded and there were multiple landslides in many of those same areas, including in West Seattle where the landslide relevant in this matter occurred.¹ CP 116.

Following the landslide event, the City of Seattle hired Jeff Fowler to investigate the cause(s) of the December 14, 2006 landslide in West Seattle. CP 56; 69. Upon completion of his investigation, Mr. Fowler prepared a report dated February 20, 2007, which was intended to summarize his findings and conclusions regarding the cause(s) of the “erosion channel” which resulted in the December 14, 2006 landslide event (referred to by Mr. Fowler as a “washout”) and the damage to Appellants' residential property. CP 68-203. In his report (CP 71) Mr. Fowler summarizes his findings and conclusions as to the causes of the “washout” as follows:

- Storm water from the torrential December 14, 2006 storm

¹ One of these landslides resulted in the death of a Madison Valley woman, who became trapped in her basement by mud and debris from a landslide and who the Seattle Police and Fire Departments were unable to rescue before she drowned in the water and debris.

overflowed because the inlets and catch basins along the west side of the intersection of SW Thistle Street and Northrup Way SW clogged during the storm event.

- The storm water filled the new sinkhole which had formed between November 5, 2006 and December 14, 2006, and at first the storm water flowed down the hill and along the stairs to the west as evident by erosion along the slope to the south of the stairs.
- The sinkhole formed as a result of subsurface voiding caused by the water service leak for 4351 SW Thistle Street (Appellants' residence which they purchased from Corinne Otakie in the fall of 2006).
- When the water service was replaced, the subsurface voids were not detected since trenchless construction methods were used to replace the water service.
- The trenchless technology allowed for the water service to be installed without digging a trench and therefore, the subsurface voiding would not have been detected.
- The sinkhole, the voids in the subsurface soils around the abandoned water service and the relatively loose backfill for the abandoned water service created a preferential path

for the storm water to flow south and erode the channel on
December 14, 2006.

The conclusions as set out in this report establish that the work performed by Respondents QPS and Trenchless to install the new water service line under their (respective) contracts with Ms. Otakie would not have been a proximate cause of the December 14, 2006 “washout” and/or the damage to Appellants’ residential property as result thereof.

And the 12-20-06 email sent to the City following Mr. Fowler’s site inspection, summarizing his observations of the “erosion channel” and damage to adjacent properties including Appellants’ property, provides further clarification with respect to the opinions and conclusions later set out in his 2-20-07 report:

- Stormwater eroded the soil at the top of the slope and carried it south to Hendrick’s (Appellants’) property where it was deposited up to 3 feet deep around their house.
- The erosion appears to be the result of clogged street inlets along SW Thistle St. and Northrup Way SW and a damaged lateral that connects the inlet at SW Thistle St and Northrup Way SW to the maintenance hole at the top of the staircase just west of the intersection of SW Thistle and Northrup SW.

- Initially the stormwater could not enter the inlet at the top of the slope creating a pond that eventually overflowed onto the slope causing erosion.

CP 111-112.

D. No Evidence Of Negligence, Or Proximate Cause.

Appellants failed to produce evidence sufficient to establish that any work performed by Respondent QPS was negligent, or would have been a proximate cause of the 12-14-06 landslide event. No one involved in the inspections conducted after the December 14, 2006, landslide event reported seeing any copper piping and/or the brass pack joint fitting used to connect the poly pipe installed by Respondent Trenchless with the copper pipe installed from the City union by Respondent QPS. CP 532-533. In addition, there was no evidence of either the brass pack joint fitting Respondent QPS had used to connect the poly and copper pipes, or the copper pipe installed by Respondent QPS from the City union, was seen in any of the photographs taken after the 12-14-06 landslide event or within the “erosion channel” that was the source of the mud and debris which damaged Appellants’ property. CP 222-223; 524-525; 532-533.

Mr. Fowler, the City’s expert who was responsible for investigating the cause of the landslide event, testified in deposition that the only pipe seen in the erosion channel that appeared to have been

recently installed was the new black polyethylene pipe he observed coming out of the soil on the north side of the erosion channel at approximately 26” – 30” below the surface of the ground on the north side of the erosion channel. CP 532-533. This is the same level at which Respondent QPS had located the poly pipe installed by Trenchless, and the level at which Respondent QPS had installed the brass pack joint fitting in order to connect the poly pipe with the copper pipe QPS had installed from the City union. CP 222; 525; 533. In addition, Mr. Fowler testified he did not see any evidence of the “union” where the black poly pipe would have been connected to other plumbing pipe, and particularly did not see either the brass pack joint fitting or any copper plumbing pipe. CP 532. Of particular significance in terms of the lack of evidence of any negligence on the part of Respondent QPS is the fact, that despite extensive investigation and numerous photographs having been taken of the erosion channel and damage as a result of the landslide event, *the only new plumbing pipe observed in the erosion channel*, or which was seen in the mass of plumbing and other pipes visible within the erosion channel after the December 14, 2006 landslide event, *was the black polyethylene pipe which Mr. Fowler testified he observed coming out of soil which showed no signs of erosion*. CP 532-533. And of greatest significance in terms of the lack of evidence to support Appellants’ claims of negligence

against either Respondent QPS or Respondent Trenchless is the fact that the new water service line installed by Respondents remained connected and continued to supply potable water to Appellants' residence *after* the 12-14-06 landslide event, despite the fact that the poly pipe had been deformed by the large pieces of asphalt which had fallen into the erosion channel and were observed lying on top of the pipe. CP 525; 533; RP 21.

The evidence also established that Respondent QPS did apply for and was granted a permit for the work QPS had contracted to perform with respect to the installation of the new water service line. CP 61; 175-176. Furthermore, the evidence established that the City did know the nature of the work performed to install the new water service line at the Otakie residence, and did know that a significant portion of the new water service line was installed using trenchless methods and equipment. CP 535. And the witness for the City who testified regarding the applicable code provisions stated that if the City inspector knew about and approved the work which was done it would be "the end of the story" in terms of any permitting issue(s). CP 548; 547-552. The City inspector did conduct an inspection of all of the installation work for the new water service line, which included the work performed by Respondent QPS **and** the work performed by Respondent Trenchless, and the City inspector approved all of the installation work indicating "All o.k" at the conclusion of his

inspection. CP 535. Respondent QPS completed the work required to backfill the areas excavated during the installation of the new plumbing pipe following the City's inspection and approval of the installation work, and would have returned any excavated soils to the area where it had been removed. CP 177. And Respondent QPS performed compaction at six inch intervals during backfill which is the standard operating procedure for such work. CP 177. The City also inspected the backfill work after Respondent QPS was finished, and approved the backfill work as (also) having been properly completed. CP 176-177; 527-528.

To support the claim of negligence asserted against Respondent QPS, Appellants relied solely on the deposition testimony of George Kraft, a witness who claims to have observed an extremely large hole, in the same area where the erosion channel was later seen following the December 14, 2006 landslide event.² CP 462-463; 529. The testimony of Mr. Kraft is insufficient to establish that Respondent QPS would have created the hole Mr. Kraft claimed he saw sometime prior to the December 14, 2006 landslide event. In fact, the evidence before the trial court established that Respondent QPS could not have been responsible

² Mr. Kraft could not state exactly when he had observed this hole prior to the 12-14-06 landslide event; he testified that Mr. Otakie was still alive at the time he told Ms. Otakie about this hole, but Mr. Otakie died the year before the new water line was installed. CP

for creating the hole Mr. Kraft claimed to have seen: Appellants failed to provide proof that Respondent QPS would have excavated a hole larger than the 3 feet, the size which Respondent QPS would have needed in order to install the brass pack joint fitting and to connect the poly pipe installed by Respondent Trenchless with the copper pipe installed by QPS. CP 222; 529-530; 532-533; 535.

The testimony of George Kraft is insufficient to establish a genuine issue of material fact or to support Appellants' tort claim against Respondent QPS in this case. Mr. Kraft testified that he lived near the Otakie residence, and that he had observed a very large hole in the area near where the November 5, 2006 sinkhole later developed and also where the erosion channel was seen following the December 14, 2006 landslide. CP 462-463; 470-471; 529. Mr. Kraft testified this hole was (approximately) 12 feet by 20 feet by 15 feet and was over 6 feet deep, and that he was able to look down on (the heads of) two or three men who were wearing yellow hardhats and moving about inside the hole. CP 462-463; 529.

Many neighbors were interviewed by the City's geotechnical engineer Jeff Fowler following the December 14, 2006 landslide event, and no one told Mr. Fowler about having observed a hole similar to that described by Mr. Kraft. CP 70-71; 78; 80; 507. Such a massive hole

could not have gone unnoticed by the neighbors who provided information to the City's expert Jeffrey Fowler during the City's investigation into the landslide event and who spoke with Mr. Fowler immediately following the development of the erosion channel on December 14, 2006. CP 507. In addition, the notes made by the City inspector established that the access hole to install the brass pack joint fittings at the top of the slope and at the house remained open at the time of the inspection, and that he did inspect all of the connections during his inspection on March 7, 2006. CP 535. The evidence that the City inspector was able to observe the brass pack joint and inspect the connection between the Trenchless poly pipe and the copper pipe installed by QPS, together with the evidence that neither the brass pack joint fitting or any copper pipe were observed in the erosion channel following the landslide event, clearly establish the access hole created by Respondent QPS would not have been the hole described by Mr. Kraft.

The evidence before the trial court also established that Respondent QPS simply would *not* have been able to create a hole of the size Mr. Kraft claims to have seen within the available time QPS had to complete the work required to properly connect the poly and copper pipes at both the top of the slope and at the house prior to the inspection of the installation work by the City inspector on the afternoon of March 7, 2006.

CP 527-528; 535. It is clear from review of timeline previously established that it would have been virtually impossible for Respondent QPS to have dug a hole of the magnitude described by Mr. Kraft in the few hours available between completion of Trenchless's installation work earlier in the day and the inspection by the City at 1:15 p.m. that same day, at the same time completing the work required to connect the poly and copper lines at both the top of the slope and at the Otakie residence after Trenchless had finished installing the poly pipe. CP 527-528; 535. In addition, there was no indication in that City inspector's notes that he observed any unusually large hole (or anything unusual) during his inspection of the installation work in the early afternoon of 3-7-06. CP 535.

And at summary judgment, Appellants did not and could not dispute that:

- a. Ms. Otakie never complained of a problem with the installation work performed by either Respondent. CP 223.
- b. Respondent QPS was never advised of a problem with the new water line to the Otakie residence after installation was completed on March 7, 2006. CP 223.
- c. Respondents were not contacted regarding the development of the sinkhole on November 5, 2006. CP 223.

- d. The November 5, 2006, sinkhole was investigated and backfilled by the City. CP 223.
- e. After the December 14, 2006, landslide event, the new waterline to the residence at 4351 SW Thistle Street remained connected and continued to provide potable water to Appellants' residence. CP 525; RP 21.

E. Summary Judgment Arguments And Ruling.

Appellants filed this action to recover for the damage to their residential property as a result of the December 14, 2006, landslide event. CP 457. Initially, Appellants asserted tort claims only against the City of Seattle and Respondent Trenchless, but in September 2008 Appellants amended their complaint to include a tort claim against QPS. CP 23-35. In the tort claims asserted against Respondents, Appellants claimed that Respondents QPS and Trenchless were negligent in the performance of duties under their (respective) contracts with the prior homeowner Corinne Otakie. CP 23-35.

Respondents both moved for summary judgment, seeking dismissal on the basis that: 1) no duty was owed to Appellants for work performed under the contracts with the prior homeowner for work to install a new water service line to the residence, and 2) that Appellants could not provide proof of any genuine issue of material fact either that Respondents were negligent in the performance of work under their (respective)

contracts with Corinne Otakie and/or that the work performed under the contracts would have been a proximate cause of the damage to Appellants' property as a result of the landslide event. CP 113-134; 135-157.

Based on all of the evidence set forth above, the trial court properly concluded that Appellants had failed to provide sufficient proof to establish the existence of a duty owed to them by either Respondent. RP 11-34. The trial court held that Appellants failed to establish that they were entitled to assert claims which relied on duties owed under the contracts entered into with the prior homeowner and/or otherwise based on the work performed under the contracts entered into between Ms. Otakie and each of the Respondents. RP 29-34. The trial court also properly determined that the claims for damage to Appellants' residential property were economic losses which could not be recovered under the tort liability claims asserted by Appellants.

In addition to the economic loss rule argument which was the primary basis for the trial court's decision to grant summary judgment, Respondents also argued that that Appellants had failed to establish that the damages sought were caused by work performed by respondents, or that any work performed by either Respondent was a proximate cause of the December 14, 2006, landslide which damaged Appellants' property.

The evidence established that the landslide event was the result of

conditions of the subsurface soils caused by the leak in the original water service line to the Otakie residence and/or failure of the City's drainage system. CP 69-103; 494-496. The evidence also established other potential causes for the landslide event, including: 1) the City's failure to provide a proper drainage system; 2) the City's actions related to the installation of utilities and/or the public stairway in the area where the landslide originated; and/or 3) the City's actions in investigating and/or backfill of the 11-5-06 sinkhole. CP 78; 80; 111-112; 178; 492-496.

V. ARGUMENT.

1. Standard of Review.

The standard of review of an order granting a motion for summary judgment is *de novo*. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.2d 667 (2007). As in the trial court, to defeat summary judgment, Appellants must produce specific factual evidence sufficient to demonstrate the existence of a genuine issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Howell v. Blood Bank*, 117 Wn.2d 619, 818 P.2d 1059 (1991). Yet, as the Court held in *Myer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986), to meet this burden, Appellants cannot rely on declarations or affidavits of experts or other witnesses which are based on speculation or argumentative assertions of contrary facts. Rather, to avoid summary

judgment, Appellants must show provable facts which establish a prima facie case. *Myer*, at 852; *Kendall v. Public Hospital District*, 118 Wn.2d 1, 820 P.2d 497 (1991).

In this case, Appellants failed to meet this burden and the trial court properly granted QPS summary judgment.

2. Appellants Failed To Establish That QPS Owed Them A Duty Under The Seattle Municipal Code, Common Law, Or Public Policy.

"[T]o prove actionable negligence, a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury. The existence of a duty is a threshold question. If there is no duty, appellants have no claim. The plaintiff has the burden of establishing the existence of a duty." *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 43 P.3d 526 (2002)(citations omitted).

In addition, the applicable standard of care, or duty, is a question of law for the courts. *Schneider v. Strifert*, 77 Wn. App. 58, 888 P.2d 1244 (1995). A ruling that no duty exists is reviewed de novo. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).

In this case, Appellants assert that QPS owed them a duty of care pursuant to the Seattle Municipal Code, common law, and public policy. As discussed below, Appellants either failed to make these arguments to

the trial court, or when made, failed to provide sufficient evidence to establish a duty on the part of QPS. Accordingly, the trial court's decision to grant QPS summary judgment on this threshold issue should be affirmed.

a. **Appellants' current argument based upon the Seattle Municipal Code is neither timely nor persuasive.**

Appellants argue on appeal that the trial court erred when ruling that QPS did not owe them a statutory duty of care. This argument, however, was not made in the trial court in their opposition to the summary judgment motion filed by Respondent QPS.³ As such, Appellants failed to properly preserve this issue for appellate review, and it should not be considered on appeal. See, *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978).

Moreover, the legislative basis for Appellants' current argument – Seattle Municipal Code (“SMC”) ordinances 22.802.015(C)(3)(b)-(c), and 22.808.090(A)(5) – does not support their assertion of a statutory duty. As such, even if reviewed, this untimely argument should be rejected.

Appellants' concede that a duty of care imposed by ordinance “extends only to persons in the class intended to be protected by the ...ordinance”. Brief of Appellants, at 17, citing *Wells v. City of*

³ Appellants made this argument in the trial court only as to Respondent Trenchless. CP 113-134.

Vancouver, 77 Wn.2d 800, 467 P.2d 292 (1970). Yet, Appellants' argument that they are within a protected class ignores that the Subtitle containing SMC 22.802.015(C)(3)(b)-(c), and 22.808.090(A)(5) makes clear that such ordinances are intended to protect "the health, safety and welfare of the *general public*." SMC 22.800.020(B)(emphasis added). Indeed, SMC 22.800.020(B) goes on to provide that "[t]his subtitle is not intended to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by its terms." SMC 22.800.020(B). Thus, Appellants could not be within the "class intended to be protected by the ordinance" as they now assert because in unambiguous terms the SMC intentionally creates no such "class."

b. Appellants' have not shown that QPS owed them a duty of care under common law.

Appellants next assert that QPS owed them a duty under common law. Again, Appellants failed to raise this issue in the trial court. For this reason, as well as lack of merit, Appellants argument should be rejected.

Appellants assert that the holding in *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007), supports their argument that QPS owed them a common law duty of care when installing the new water line for the Otakie residence. Appellants' reliance on the

narrow ruling in *Davis* is misplaced.

The issue in *Davis* was whether the defendant in that matter had a complete defense to the plaintiff's negligence claim under the "completion and acceptance doctrine." In other words, the issue was whether the plaintiff's suit against the defendant could be barred regardless of the plaintiff's ability to otherwise show the elements of tort liability: duty, breach, damage, proximate cause. When finding no such defense, the *Davis* Court only held that the plaintiff was not precluded by the "completion and acceptance doctrine" from asserting a tort claim against the defendant. That is, the Court simply lowered the absolute shield to liability that contractors previously enjoyed and made them susceptible to the general tort standards of liability. *Davis*, at 415.

The Court did not discuss, much less hold, that as a matter of law a defendant such as QPS owes a common law duty to a plaintiff such as Appellants. The Court only held that QPS may not preclude such a discussion in the first instance by asserting the "completion and acceptance doctrine."

Past stating that QPS owed them a common law duty of care, Appellants provide no substantive argument to support such a finding under the facts of this case. Accordingly, even if this Court reviews this issue, Appellants' argument should be rejected.

c. **Appellants' have not shown that public policy warrants a finding that QPS owed them a duty of care.**

Appellants provide only minimal and conclusory argument that public policy dictates a finding that QPS owed them a duty. That is, Appellants' argument is limited to citing to *dicta* from the *Davis* opinion regarding the reasoning for abandoning the “completion and acceptance doctrine,” and an assertion that it would just be unfair to not find a duty in this case. Such slim argument hardly supports an assertion – much less a finding – that public policy requires imposing a duty upon QPS where neither statute nor common law is found to do so.

3. **Appellants failed to establish that any breach of a duty owed by QPS was a proximate cause of the damage to Appellants' residential property.**

Appellants failed to provide sufficient proof that the work performed by Respondent QPS was a proximate cause of the damage to their residential property as a result of the December 14, 2006 landslide event. Appellants attempted to claim that Respondent QPS failed to properly compact the soil that was excavated during the work to install the new water service line to the Otakie residence. As set forth above, Appellants failed to produce any evidence in the trial court to support this claim. Indeed, as shown by the facts set forth above, the overwhelming weight of the evidence allows for only one conclusion: that the work

performed by Respondent QPS was unrelated to the December 14, 2006 landslide event. Thus, even assuming that Appellants could provide sufficient proof to establish a duty of care owed to them by Respondent QPS, they failed to provide sufficient evidence in the trial court to defeat summary judgment on the issue of proximate cause.

An appellate court may affirm on any basis supported by the record, and therefore this court may affirm the trial court's decision to grant summary judgment in favor of Respondent QPS on any issue supported by the record. *Fabrique v. Choice Hotels International, Inc.*, 144 Wn.App. 675, 681, 183 P.3d 1118 (2008).

Proximate cause is defined as a cause which, in direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred. *Fabrique v. Choice Hotels International, Inc.*, *supra*; *Rounds v. Nelcor Puritan Bennett, Inc.*, 147 Wn.App. 155, 194 P.3d 274 (2008); *Van Cleeve v. Betts*, 16 Wn.App. 748, 559 P.2d 1006 (1977). Proximate cause has two elements, 1) cause in fact and 2) legal cause, and both of these elements must be satisfied. *Rounds v. Nelcor Puritan Bennett, Inc.*, at 161. Cause in fact concerns "the 'but for' consequences of an act, or the physical connection between an act and the resulting injury". *Id.*, at 162. Appellants failed to provide the proof necessary to establish that the work

by Respondent QPS to install the new water service line at the Otakie residence was a proximate cause of the damages claimed. The evidence argued to the trial court by Appellants simply failed to provide proof sufficient to establish that the December 14, 2006 landslide event and the damage to their residential property as a result thereof, would not have occurred in the absence of **specific** negligent conduct by Respondent QPS. *Van Buskirk v. ConocoPhillips, Inc.*, 2009 WL 3784334 (W.D. Wash., November 10, 2009).

The Washington courts have consistently held that proximate cause can be determined on summary judgment and/or as a matter of law where the undisputed evidence leads to only one reasonable conclusion. *Rounds v. Nellcor Puritan Bennett, Inc.*, *supra*; *Van Buskirk v. ConocoPhillips, Inc.*, 2009 WL 3784334 (W.D. Wash., November 10, 2009). The undisputed facts of this case do not allow for a question of fact, much less a finding by a reasonable person, that the contractual work performed by Respondent QPS proximately caused the December 14, 2006 landslide event.

As shown by the above Statement of Facts, the undisputed evidence establishes the following:

- The soil surrounding the repairs and work performed by QPS remained intact as no one involved with investigating the landslide event reported that the landslide had exposed either

the copper pipe or the brass pack joint fitting which QPS used to connect the Trenchless poly pipe with the copper pipe installed by QPS from the City union;

- The only new pipe visible in the numerous photographs taken of the erosion channel is the black polyethylene pipe installed by Trenchless, and can be seen coming out of soil which showed no signs of erosion at approximately 26” – 30” below the surface on the north side of the erosion channel;
- When QPS installed the brass pack joint fitting, QPS was able to locate the black polyethylene pipe installed by Trenchless where it was expected to intersect with the copper pipe installed by QPS from the City union: approximately 24” – 30” below the surface;
- The pipe large pieces of asphalt which fell into the erosion channel and directly on top of the black poly pipe, the water service line to the Appellants’ residence remained connected and continued to supply potable water to the residence *after* the landslide event;
- The City’s expert determined that the November 5, 2006, sinkhole had formed as a result of subsurface voiding caused by the water service leak at 4351 SW Thistle Street, and that when the water service was replaced the subsurface voids were not detected because trenchless technology was used which allowed the water service to be installed without digging a trench and therefore the subsurface voiding was not detected;
- The testimony of George Kraft, the witness who claims he had seen a massive excavation in the same area where neighbors had observed a sinkhole develop and where the erosion channel later developed during the landslide event, is insufficient to establish that the work performed by QPS was negligent;
- The excavations made to allow for installation of the new water service line to the Otakie residence remained open for inspection by the City before any backfill work was done, and the City inspector did not note any unusual hole or excavation during his inspection on March 7, 2006;

- The City approved the installation work after inspection of the work; and
- The City conducted another inspection following completion of the backfill work by QPS, and determined that this work had also been properly completed and approved the completed work at the site.

Such evidence negates the ability of Appellants to establish that work performed by Respondent QPS was a proximate cause of the damage to their property. Therefore, even should this Court find that Appellants have provided sufficient proof to create a genuine issue of fact on the issue of whether a duty was owed to them by Respondent QPS, the trial court's decision to grant summary judgment to Respondent QPS may be affirmed on the basis that Appellants' have failed to provide sufficient evidence on proximate cause to defeat summary judgment.

And the purported testimony of George Kraft does not change this conclusion as it is clear from a review that Appellants rely solely on this witness's testimony as the basis for the speculative assumption that the sinkhole he observed was created by Respondent QPS during the work QPS performed to install the new water service line at the Otakie residence.

4. The trial court correctly found the Appellants' claim against QPS barred under the economic loss rule as Appellants sought recovery only for damage to the property on which work was performed pursuant to a contract with the previous homeowner.

Washington Courts have long held that the “economic loss rule” prevents a party from asserting a tort claim in an attempt to recover economic losses from property damage arising out of an alleged breach of a contractual duty. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007); *Berschauer/Phillips Construction v. Seattle School District*, 124 Wn.2d 816, 881 P.2d 986 (1994); *Stuart v. Caldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987). Economic losses, or damages, are damages to property which arise out of work performed under contract with respect to the property. In this case, the trial court properly applied the economic loss rule when granting QPS summary judgment.

The Washington State Supreme Court decision in *Stuart v. Coldwell Banker* is the leading case on development of the economic loss rule. *Stuart* involved a claim for negligent construction by a condominium homeowners association against the builder-vendor, to recover the individual homeowner's costs to repair defects in construction of the decks and walkways of their residences. In an attempt to “fashion a remedy” for the individual homeowners, the trial court adopted the theory of negligent construction. The Supreme Court, however, rejected the trial court's attempt finding instead that Washington did not recognize a cause of

action for negligent construction and that the economic damages available to the plaintiffs were limited to contract damages.

Following the *Stuart* case, the economic loss rule was further clarified by the Court in *Berschauer/Phillips Construction v. Seattle School District*, 124 Wn.2d 816, 881 P.2d 986 (1994). In the *Berschauer*, the court applied the economic loss rule to bar the plaintiff general contractor from recovering economic damages in tort:

The economic loss rule is a conceptual device used to classify damages for which a remedy in tort or contract is deemed permissible, but which are more properly remediable only in contract.
Berschauer, at 822.

The court later went on to state:

We hold that when parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override tort principles.
[...]
There is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated.
Id.

Although the *Berchauer* case involved application of the economic loss rule to cases involving construction disputes between contractors, in *Alejandre v. Bull*, *supra*, a case decided by the Supreme Court in 2007, the court affirmed application of the economic loss rule to any case where a contractual relationship

exists and the losses claimed are economic losses:

The economic loss rule maintains the “fundamental boundaries of tort and contract law”. *Berschauer/Phillips*, 124 Wn.2d at 826, 881 P.2d 986. Where economic losses occur, recovery is confined to contract “to insure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract...If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity.

[...]

If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.

Alejandre, at 682-83.

By this ruling, the Supreme Court clearly established that the economic loss rule would apply under facts such as those in the present case. Indeed, the facts in *Alejandre* are strikingly similar to those presented in the case at bar.

In *Alejandre*, plaintiffs purchased a home from defendant a month prior to the failure of the septic system which caused the drain fields on the property to plug and resulted in significant damage to the plaintiffs’ residential property. In the subsequent lawsuit, the plaintiffs attempted to obtain property damages under a tort theory. That attempt, as well as their argument that the economic loss rule did not apply to the facts of their case, was firmly rejected:

Under Washington law, the defective septic system at the heart of Appellants’ claims is an economic loss within the

scope of the parties' contract, and the economic loss rule precludes any recovery under a negligent misrepresentation theory. There is no requirement that a risk of loss must be expressly allocated in the contract before a tort claim based on that loss will be precluded under the economic loss rule. *Alejandre*, at 677-78.

This holding makes clear that the economic loss rule is intended to apply to any claim for damages where the economic losses flowed from an alleged breach of a contractual duty. *Id.*, at 687. And, as Justice Chambers pointed out in his concurring opinion in the *Alejandre* case, the mere fact that damage occurs to property other than simply to the provided product claimed to have been defective (in this case the work installing the new water service line to the Otakie residence) does not remove a claim from the purview of the economic loss rule:

Often in the real property context, the breach of contract is revealed when the property suffers damage. Property damage often invokes tort remedies, but incidental property damage, however, will not take a commercial dispute outside of the economic loss doctrine; the tail will not be allowed to wag the dog. *Alejandre*, at 697.

Therefore, the trial court correctly decided that Appellants' damage claims against Respondents fell squarely within the economic loss rule and were barred as a matter of law.

The boundaries of the economic loss rule are defined by the nature of the damages claimed. If the damage claimed is economic loss and

results more from breach of a duty imposed by contract than a duty imposed by statute or common law, the economic loss rule controls. The Appellants in this case are in an identical position to the one in which the plaintiffs in *Alejandre* found themselves after purchasing their new home—and the only real difference between this case and the *Alejandre* case is that the plaintiffs in *Alejandre* filed their claims against the prior homeowner and did not attempt to pursue claims against the company who had repaired and tested the septic system shortly before the system failed.⁴ If this Court were to reverse the trial court and allow Appellants to continue to pursue their damage claims against these Respondents, it would result in significantly expanding the duties assumed by Respondents under their contracts with the prior homeowner—contracts which clearly were entered into by the homeowner with a concern for and a recognition of the costs involved in restoring water service to her home, as well as the potential risks in digging up the existing (old) water service line either to attempt to locate the source of the prior water leak or to restore water service to the property. Ms. Otakie would have known that her home would not have been considered “habitable” without a source of clean water, and it is clear that in seeking the bids from Respondents Ms. Otakie simply wanted to restore water service to her home so that the

⁴ Appellants have never attempted to assert claims against Corinne Otakie.

home would again be considered habitable and the value as residential property restored.⁵ There is no dispute that Respondents did not agree to assume any duties with respect to the existing (old) water service line and/or to determine the condition of that line or the surrounding soils as a result of the prior water leak under their respective contracts with Ms. Otakie. And it is equally clear that Ms. Otakie knew and understood the limited nature of the duties assumed by Respondents QPS and by Trenchless under their contracts, and that the work to be performed by Respondents would be limited solely to the work required to install the new water service line and restore water service to her home.

Therefore, under the facts of this case, the trial court correctly ruled that Appellants' tort claims against Respondents were barred by the economic loss rule.

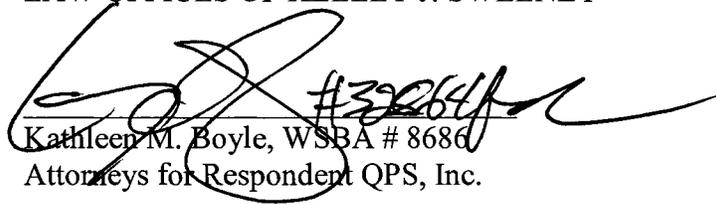
VI. CONCLUSION.

Based upon the foregoing, this Court should affirm the trial court's order granting summary judgment to QPS, Inc.

⁵ There can be no dispute that using trenchless technology to install the plumbing pipe down the steep slope in order to install the new water service line, and to connect the new waterline for the residence with the City main, was the least invasive and/or destructive means of restoring water service to the Otakie residence.

Respectfully submitted this 22nd day of February 2010.

LAW OFFICES OF KELLEY J. SWEENEY



Kathleen M. Boyle, WSBA # 8686
Attorneys for Respondent QPS, Inc.