

NO. 66176-1-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

JACK EVARONE,

Appellant/Plaintiff,

v.

LEASE CRUTCHER LEWIS, a Washington corporation; SENECA
REAL ESTATE GROUP, a Washington corporation; HORIZON HOUSE,
a Washington corporation; NUPRECON LP, a Washington corporation;
NUPRECON GP, a Washington corporation; FRUHLING, INC., a
Washington corporation; FRUHLING SAND AND TOPSOIL, INC., a
Washington corporation,

Defendants/Respondents.

BRIEF OF RESPONDENTS
FRUHLING, INC. AND FRUHLING SAND AND TOPSOIL, INC.

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I. INTRODUCTION

King County Superior Court properly dismissed on summary judgment the claims that plaintiff-appellant Jack Evarone alleged against defendants-respondents Fruhling, Inc. (“Fruhling”) and Fruhling Sand and Topsoil, Inc. (“FST”) where: (1) Evarone lacks testimony of an excavation expert to show breach in regard to Fruhling’s work; (2) Evarone’s experts do not relate Fruhling’s work to alleged damage; and (3) Evarone’s claims against Fruhling are barred by the applicable statutes of limitations, and the so-called “project completion rule,” in *Oja* relied upon by Evarone for a statute of limitations argument, does not apply to subcontractors.

The superior court properly struck Evarone’s untimely assertions of *res ipsa loquitur* and joint and several liability where, not only did Evarone fail to plead them, but concealed in discovery responses an intention to use the doctrine, failed throughout two years of litigation to assert them, and then revealed them only on the eve of trial to the prejudice of Fruhling. In addition, *res ipsa loquitur* and joint and several liability are both inapplicable to this case so even if it were error to strike them on grounds of being untimely, such error would be harmless.

The superior court also properly struck testimony by Evarone’s experts where they testified they were not competent to give certain testimony then submitted declarations in opposition to summary judgment

opining on these very subjects and contradicting prior testimony. Even if the testimony is considered, neither expert testified that Fruhling breached any standard of care, or that anything Fruhling did caused damage. Since Evarone's experts provided no testimony in regard to Fruhling, even if it were error to strike this self-contradictory testimony, such error would be harmless as to Fruhling.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Fruhling does not assign any error to the trial court's decisions.

Issues Pertaining to Assignments of Error

Fruhling disagrees with the statement of issues set forth by Evarone and believes that the primary issues on appeal are more properly stated as follows.

1. Whether the superior court properly dismissed on summary judgment Evarone's claims against Fruhling where: (1) Evarone lacks the testimony of an excavation expert to show breach as to Fruhling's work; (2) Evarone's experts do not relate Fruhling's work to alleged damage; and (3) Evarone's claims against Fruhling are barred by the applicable statutes of limitations.

2. Whether the superior court had discretion to strike untimely assertions of *res ipsa loquitur* and joint and several liability, where

Evarone did not plead them, concealed his intention to use the doctrines despite ample discovery requests and depositions, failed throughout two years of litigation to assert the doctrine, and revealed his intention to use the doctrines only on the eve of trial and to the prejudice of Fruhling.

3. Whether *res ipsa loquitur* and joint and several liability were inapplicable to this case so that, even if it were error to strike them as being untimely asserted, any order striking them for untimely disclosure was harmless error.

4. Whether the superior court had discretion to strike inadmissible and self-contradictory testimony by Evarone's experts.

5. Whether Evarone's experts failed to provide testimony as to Fruhling so that, even if it were error to strike the testimony as incompetent and self-contradictory, any order striking portions of their declaration was harmless error as to the dismissal of Fruhling.

III. STATEMENT OF THE CASE

A. Evarone had pre-existing cracks on his property, and did not offer evidence that Fruhling's work made any difference in regard to the condition of his property.

In 2005, Evarone owned a property called Terry Ann Apartments, located at 1331 Terry Ave., Seattle, WA (the "Property"). CP 156. The Property was built in the 1960's on a steep hillside and was over 40 years old. CP 404-05. The Property was of average repair for a building of that

age, but already had significant cracking which, according to Evarone's expert witness Dan Fenton, is not unusual for a 1960s building. *Id.*

On August 10, 2005, Fruhling signed a subcontract with general contractor Lease Crutcher Lewis ("LCL") to perform excavation and soil removal on a construction project for Horizon House, to expand its facility onto an adjoining property (the "Project"). CP 107-08, 110-29. Evarone alleges that the demolition and construction work for the Project caused additional cracking and other damage to the Property, primarily from vibrations and water runoff. CP 156-57.

On August 29, 2005, demolition of a pre-existing structure began at the Project. CP 156. Fruhling did not perform demolition, shoring, or pile driving for the Project. CP 108, 789.

October 7, 2005, Fruhling's excavation work commenced. CP 790.

B. Evarone was aware of all alleged damage by March 2005, and alleged damages never significantly increased.

On October 27, 2005, Vertical Transportation Services ("VTS"), who had been retained by Evarone to inspect elevators on the Property, sent a letter to Evarone which he read by December 2005. CP 180-82, 193-95. This letter informed Evarone of an inspection performed by VTS on October 26, 2005, and what it perceived as damage to an elevator and its components existing at that time. *Id.*

On October 28, 2005, Dan Fenton, a structural engineer retained by Evarone, made his first site visit to the Property. CP 394-95.

On November 22, 2005, VTS sent a letter that Evarone read by December 2005, regarding what VTS perceived as damage to an elevator and its components. CP 183-84, 197-98.

On February 1, 2006, VTS sent a letter that Evarone read by mid-February 2006, which informed him of what VTS perceived as damage to an elevator and its components. CP 184, 200-01. There is no additional alleged damage to the elevator in the record after this date.

On February 22, 2006, Mr. Fenton sent Evarone a memo titled "Observed Damage & Recommendations." CP 164-67, 185-86, 203-08.

On March 20, 2006, Fruhling completed the mass excavation for the Project. CP 790.¹ On March 20, 2006, the same date, Mr. Fenton also provided Evarone with a memo regarding conditions on the Property he believed to be due to demolition and construction at the Horizon House property, which was reviewed by Evarone. CP 170, 186-87, 210-12. According to Mr. Fenton, what he saw when he went back in 2008 was basically the same conditions he saw on the Property in 2005, except it had aged a little bit. CP 171-73.

¹ The declaration erroneously states the date as March 20, 2005, but it is clear from the start date and context that this is a typo and that the correct date is March 20, 2006.

On May 4, 2006, Evarone wrote a letter to LCL demanding payment for alleged damage to the Property. CP 188-89, 214-16. Evarone is an attorney that practiced law for 40 years in the fields of copyright and trademark infringement, bad faith defense work, personal injury, and business law. CP 177, 214-16. With this knowledge, Evarone is a sophisticated plaintiff and well-aware of his legal rights.

C. Evarone failed to provide responses to discovery and concealed the grounds for his claims; the superior court later properly granted summary judgment.

On October 23, 2008, Evarone filed his Complaint, CP 1-16, alleging: (1) loss of lateral support, (2) negligent destruction of property, (3) trespass to land, (4) nuisance, and (5) diminished value. CP 5-7.

On April 7, 2009, Evarone was permitted to file a First Amended Complaint. CP 58-65. In its order permitting the filing of an amended pleading, the superior court declined to relate the amended pleading back to the original complaint. CP 57. In its order, the superior court struck proposed language that would have related back claims against Fruhling to the initial complaint and tolled the statute of limitations. *Id.* This order denying relation back and tolling was not appealed. No subsequent motion was made to relate the amended complaint back. The law of the case, therefore, is that the first claim against Fruhling was brought on April 7, 2009.

On June 25, 2009, Evarone responded to discovery. CP 225-34. In regard to almost every question, Evarone responded with boilerplate objections, indicating that the request for a factual statement called for a legal conclusion, was vague and overbroad, and called for information “preempted by the case schedule.” CP 226-33. *See* Interrogatory No. 6, CP 227, (seeking nature of damages Evarone alleged were caused by Fruhling); Interrogatory No. 10, CP 230, (seeking information to support claim that Fruhling caused or contributed to vibrations or soil movement that caused loss of lateral support); Interrogatory No. 11, CP 231-32 (seeking information to supports claim that Fruhling caused negligent destruction of property); Interrogatory No. 12, CP 232-33 (seeking information to support factual basis for claim that Fruhling was guilty of intentional trespass). Evarone stated information would be provided as it became available, but Evarone did not supplement discovery response.

On July 1, 2010, Fruhling moved for summary judgment dismissal. CP 130-47. Fruhling’s motion was supported by the Declaration of Dan Fruhling, CP 105-06, Declaration of Rob Graeff, CP 107-29, and the Declaration of Marc Rosenberg. CP 151-234. Fruhling’s motion was made in conjunction with other motions by co-defendants Nupricon and LCL. CP 235-43, 310-33. These motions were also supported by declarations and additional substantial evidence related to the motions.

On July 19, 2010, Evarone filed several documents in opposition to the three joint summary judgment motions, including: (1) a response brief on statute of limitations, CP 640-61, (2) a response brief on “causation and other issues,” CP 664-86, (3) a declaration of counsel, CP 630-39, (4) a Declaration of Todd Wentworth, CP 689-91, and (5) a Declaration of Dan Fenton. CP 603-608. Neither Evarone’s structural engineer, Dan Fenton, nor his geotechnical engineer, Todd Wentworth, provided any testimony asserting that any work done by Fruhling was done improperly or caused any damage. *Id. See also* CP 174, 222-23. Evarone also requested a CR 56(f) continuance, despite the motion being made after the discovery cutoff and on the eve of trial.

On July 21, 2010, Fruhling moved to strike two legal theories that Evarone had not plead or disclosed in discovery responses. CP 706-08. LCL also moved to strike portions of the declarations of Evarone’s experts Dan Fenton and Todd Wentworth, CP 712-23. The motion was joined by Fruhling. CP 826. In its motion, LCL presented prior deposition testimony from Mr. Fenton and Mr. Wentworth that was contrary to their declarations. CP 727-45, 768-80.

On July 26, 2010, Fruhling replied to Evarone’s arguments, CP 783-88, and provided additional support to address issues raised by Evarone’s response briefs. CP 789-825. Evarone did not move to strike

these materials. Fruhling showed that it was undisputed that Evarone's experts admit to pre-existing conditions at the property, common for a building of over 40 years old; his experts did not take measurements, perform tests, or take adequate photographs showing the claimed conditions. CP 395-98, 400-05, 414, 421, 795-97, 800, 804-06, 809, 815-16, 819. Evarone had no pre-construction photographs and could not say damage was caused by the construction. CP 802-03, 817-22.

On July 27, 2010, Fruhling filed an opposition to Evarone's request for a CR 56(f) continuance, on the ground that Evarone had not shown a good reason for delay in seeking the requested discovery, nor what he expected to find in the requested discovery, nor how anything he might find in the requested discovery would raise a genuine issue of material fact. CP 874-902, 1781-88.

On July 30, 2010, at oral argument, the superior court granted the motions to strike by Fruhling and LCL. CP 956-58, 959-60; RP 4-5. The parties were permitted oral argument, with three defendants each having fifteen minutes to argue, and Evarone being provided 45 minutes. RP 3. At oral argument, Fruhling discussed how Evarone had failed, both in briefs and at oral argument, to set forth a standard of care for construction professionals, raise an issue of fact about breach or proximate cause, and that Evarone's claims against Fruhling were barred by the statute of

limitations. RP 21-26, 56-59. The superior court reserved ruling on all of the motions for summary judgment for the purpose of conducting additional review. RP 59-60.

On August 2, 2010, the superior court entered orders granting the motions for summary judgment. CP 961-69.

On August 12, 2010, Evarone moved for reconsideration. CP 970-91. The motion was accompanied by a dump of about 500 pages of documents, which had been available at the time of the summary judgment hearing, and which had not been offered by Evarone. CP 984-1483.

On August 30, the court ordered Fruhling to file a response to Evarone's motion for reconsideration. CP 1484.

On August 31, 2010, Fruhling moved to strike the documents submitted by Evarone in conjunction with his motion for reconsideration, because it was not "new evidence" as contemplated by CR 59(a)(4), and Evarone did not provide a reason the evidence could not have been offered earlier. CP 1485-91, 1721-23.

On September 7, 2010, Fruhling responded to Evarone's motion for reconsideration. CP 1631-42, 1649-1718. Fruhling pointed out that Evarone relied on self-contradicting testimony that had been stricken, did not raise issues of fact even if considered, and failed to meet the requirements of CR 59.

On September 30, 2010, the superior court entered orders granting Fruhling's motion to strike and denying Evarone's motion for reconsideration. CP 1741-42, 1743-46.

On October 29, 2010, Evarone appealed. CP 1747.

IV. SUMMARY OF ARGUMENT

Summary judgment dismissal as to Fruhling is properly affirmed where Evarone: (1) lacks testimony of an excavation professional to show breach as to Fruhling's work; (2) does not provide evidence relating Fruhling to the alleged damage; and (3) is barred by the applicable statutes of limitations in claims against Fruhling.

The superior court properly struck Evarone's untimely assertions of *res ipsa loquitur* and joint and several liability where, not only did Evarone fail to plead them, but concealed in discovery responses an intention to use the doctrine, failed throughout two years of litigation to assert them, and then revealed them only on the eve of trial to the prejudice of Fruhling. In addition, *res ipsa loquitur* and joint and several liability are both inapplicable to this case so even if it were error to strike them on grounds of being untimely, such error would be harmless.

The superior court also properly struck testimony by Evarone's experts where they themselves testified they were not competent to give certain testimony, and then submitted declarations in opposition to

summary judgment opining on these very subjects and contradicting prior testimony. However, even if the testimony is considered, neither expert testified that Fruhling breached any standard of care, or that anything Fruhling did caused damage. Since Evarone's experts provided no testimony in regard to Fruhling, even if it were error to strike this testimony, such error would be harmless as to Fruhling.

V. ARGUMENT

A. Evarone abandoned on appeal claims against FST.

Abandoned issues will not be addressed on appeal. *Green v. Normandy Park*, 137 Wash. App. 665, 688, 151 P.3d 1038 (2007). In his appeal brief, Evarone states: "Evarone does not appeal the Superior Court's entry of summary judgment against FST." App. Br. at 8, n1. Evarone has abandoned his claims against FST, dismissal against FST is final, and the court need not consider further issues related to FST.

B. The standard of review on summary judgment is *de novo*, the remaining decisions of the superior court should be reviewed for an abuse of discretion.

1. The court's review of an order granting summary judgment is *de novo*.

This court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 622 (2000). The standards for summary judgment are well established.

Summary judgment is proper if the papers on file show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the burden of producing evidence showing the absence of an issue of material fact. *Hash v. Children's Orthopedic Hosp. and Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). A moving defendant may also satisfy the initial burden by showing that there is an absence of evidence to support the nonmoving party's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, n.1, 770 P.2d 182 (1989).

If the moving party carries its burden, the burden shifts to the nonmoving party to set forth facts showing there is a genuine issue remaining for trial. *Hash*, 110 Wn.2d at 915. The nonmoving party may not rely on allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). A moving party is entitled to summary judgment when the non-moving party fails to make a sufficient showing on an essential element of its case in which it has the burden of proof. *Young*, 112 Wn.2d at 216.

2. The weight of authority reflects the standard of review on motions to strike made in conjunction with summary judgment motions are considered on an abuse of discretion standard.

Evarone cites *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 186 P.3d 1089 (2008), for the proposition that motions to strike made in conjunction with summary judgment motions are subject to a *de novo* standard. While Evarone does not misstate this case, the fact is that the Washington Supreme Court, and this court, almost always apply an abuse of discretion standard to motions to strike made in conjunction with summary judgment motions. See e.g., *King County Fire Prot. Districts No. 16, No. 36 & No. 40 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (superior court had discretion whether to strike declarations brought in conjunction with summary judgment motion); *Sherman v. Kissinger*, 146 Wn. App. 855, 870, 195 P.3d 539 (Div. I 2008) (reviewing summary judgment and holding: “admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion”); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (Div. I 2007) (same).

In a section of the opinion titled “Evidentiary Challenges to Summary Judgment,” this court, in *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (Div. I 2004), held:

A trial court's decision to admit or exclude evidence lies within its sound discretion. We will not overturn evidentiary rulings unless the trial court has manifestly abused its discretion. Although a "ruling on a motion to strike is discretionary with the trial court," a "court may not consider inadmissible evidence when ruling on a motion for summary judgment."

Id. at 744 (emphasis in original).

Even *Southwick*, which appears not to have been cited by another published case, affirmed the superior court striking a declaration on an abuse of discretion standard. *Southwick*, 145 Wn. App. at 301 ("Southwick asserts that the court erred in striking Dr. Fleet's declaration. We disagree. The trial court has discretion whether to accept or reject an untimely declaration"). It is appropriate for this court to follow the weight of authority, accord the deference of discretion to the superior court which this court usually recognizes in regard to such evidentiary rulings, and review the remaining decisions under an abuse of discretion standard.

3. This court should only consider what was before the superior court on summary judgment so should not consider Clerk Papers after CP 969.

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. ...

RAP 9.12.

It is the appellate court's task to review a ruling on a motion for summary judgment based solely on the record before the trial court. The purpose of RAP 9.12 is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.

Green, 137 Wn. App. at 678 (citation and quotation marks omitted). *See also Harris v. Kuhn*, 80 Wn. 2d 630, 631, 497 P.2d 164, 165 (1972) (“court can review only those matters that have been presented to the trial court for its consideration before entry of the summary judgment”).

In reviewing whether the superior court properly granted summary judgment to Fruhling, this court should only consider the documents listed in the orders granting summary judgment. CP 963-68. In the summary judgment order, the superior court also incorporated, and made review subject to review, its motion to strike portions of the Dan Fenton and Todd Wentworth declarations, CP 964, so the documents listed in the order striking this testimony is also part of the subject of review. CP 959-60. Finally, the documents listed in the order on Fruhling's motion to strike are also properly considered. CP 956-58.

Pursuant to RAP 9.12 and related legal authority, for purposes of this summary judgment review, this Court should not consider any Clerk's Paper above CP 969, as all such papers were filed subsequent to the orders granting summary judgment, and were not evidence and issues called to the attention of the trial court prior to the summary judgment hearing.

Evarone did not appeal denial of the reconsideration motion, as he did not assign error to the decision, raise it as an issue, or brief the issue. *See* RAP 10.3(a)(4), (6); *McKee*, 113 Wn.2d at 705 (appellate courts “will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority); *Ang v. Martin*, 154 Wn. 2d 477, 487, 114 P.3d 637, 643 (2005) (approving proposition that when appellant fails to raise issue in the assignments of error and fails to present argument on the issue or provide legal citation, an appellate court will not consider the merits of that issue).² Evarone did not assign error to denial of the CR 56(f) or reconsideration motions, raise the decisions as issues on appeal, or present argument as to these decisions. Therefore, these matters are not under review.

C. Evarone did not support the elements of breach and/or proximate cause in his claims against Fruhling.

Negligence is never presumed and the burden is upon one alleging such negligence to establish it by substantial evidence. *Charlton v. Baker*, 61 Wn.2d 369, 372, 378 P.2d 432 (1963). “To defeat summary judgment in a negligence case, the plaintiff must show an issue of material fact as to each element – duty, breach of duty, causation, and damages.” *Craig v.*

² Even if Evarone appealed denial of motion for continuance, the decision is properly affirmed. Evarone did not meet factors set forth in *Pitzer v. Union Bank*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000). *See* RP 4. Evarone did not articulate reasonable grounds for delay or state how more evidence would raise an issue of fact.

Wash. Trust Bank, 94 Wn. App. 820, 824, 976 P.2d 126 (1999). “When reasonable minds could reach but one conclusion regarding claims of disputed facts, such questions may be determined as a matter of law.” *Id.*

1. **Evarone failed to support the element of breach where: (a) he did not present a standard of care expert for an excavation subcontractor, and (b) even if they had not been stricken, his experts do not present any testimony regarding Fruhling.**

Fruhling sought dismissal of Evarone’s claims based, in part, on Evarone’s failure to present requisite expert testimony by a professional that practices in the same field as Fruhling. CP 145-146, 785. Evarone has not addressed this issue anywhere in his Appellate Brief. Even if Evarone’s experts Dan Fenton and Todd Wentworth were competent to testify as to proximate cause and/or damages, it remains unchallenged that: (1) neither was competent to offer testimony as to the standard of care of an excavation professional, and (2) neither presented evidence indicating that damages were related to Fruhling’s work.

As a contractor responsible for conducting excavation for a multi-story building, Fruhling is a “construction professional” as defined by statute. *See* RCW 64.50.010(4). The standard of care of a construction professional such a Fruhling must be shown by an expert familiar with the excavation of large construction projects, who must also explain how such standard was breached. As held by the Washington Supreme Court:

[T]he standard of care required of professional practitioners ... must be established by the testimony of experts who practice in the same field. The duty of physicians must be set forth by a physician, the duty of structural engineers by a structural engineer and that of any expert must be proven by one practicing in the same field -- by one's peer.

McKee v. American Home Prods. Corp., 113 Wn.2d 701, 706-08, 782 P.2d 1045 (1989) (physician may not define standard of care for pharmacist). *See also Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 229, 770 P.2d 182 (1989) (pharmacist may not define standard of care for physician); *Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 102-103, 882 P.2d 703 (1994) ("expert must stay within the area of his expertise").

Simply working near someone that works in a profession does not impart the knowledge necessary to opine on the standard of care. So, for example, a surgical nurse or anesthesiologist cannot opine on the standard of care of a brain surgeon simply because they have some general medical knowledge and observe him or her work every day.

Evarone's experts, Todd Wentworth (geotech) and Dan Fenton (structural engineer), admit that they are not excavation experts; they are not experts on earth vibrations; CP 691, 801, 810; and they did not observe Fruhling do anything out of the ordinary or that fell below the standard of care. CP 174, 222-23, 798-99, 811-12, 407; RP 21-22.

In addition, even if considered, the testimony offered by Evarone did not offer the standard of care for an excavation subcontractor or relate Fruhling's work to the alleged damage. CP 786. In their declarations offered in opposition to summary judgment, neither Mr. Fenton nor Mr. Wentworth testify that Fruhling breached a duty, relate Fruhling's work to any damage, or even mention Fruhling. CP 603-08, 689-91. Evarone fails to raise an issue of fact regarding the element of breach by failing to offer expert testimony as to Fruhling's standard of care or how it was allegedly breached. As such, all negligence-based claims made by Evarone against Fruhling fail as a matter of law, and dismissal is properly affirmed on this ground alone.

2. Evarone did not present evidence that Fruhling's work caused the alleged damage.

Fruhling showed that Evarone did not raise an issue of fact in regard to the element of causation. CP 139-45. If the moving party shows the absence of a genuine issue of material fact, the non-moving party must set forth specific facts showing a genuine issue for trial. *Young*, 112 Wn.2d at 225. The nonmoving party must present evidence sufficient to establish the existence of a disputed element essential to that party's case. *Celotex*, 477 U.S. at 322. A moving party is entitled to summary judgment when the non-moving party fails to make a sufficient showing on an essential element of its case. *Celotex*, 477 U.S. at 323; *Young*, 112 Wn.2d at 216.

Neither of Evarone's experts opined that any of Fruhling's work caused the alleged damage. CP 603-08, 689-91. Neither Evarone nor his experts examined the work of other trades, such as the pile driver subcontractor, and attempted to determine what the effect of this subcontractor's work was, if any. Evarone and his experts concede there was considerable cracking on the Property prior to commencement of the Project. *See e.g.*, CP 395-98, 400-05, 414, 421, 795-97, 800, 804-06, 809, 815-16, 819. Evarone's experts failed to preserve evidence to support their assertions, and their position was not based on testing or other scientific method. *Id.* Evarone's sole ground for his claim was based on the position that since he observed what appeared to be minor widening of some cracks during the year the Project continued, one of the contractors had to be responsible. RP 27-28. Evarone's case is based on speculation.

As Fruhling argued at the summary judgment hearing:

“[P]laintiff's experts, everyone agrees that the property had conditions on it, such as cracking in the slab on grade and a broken retaining wall and other conditions, which they're calling damages, which they claim were made worse by the construction next door.

Now, none of the experts explain what natural forces caused this retaining wall to break prior to the construction. None of them explained how the slab on grade cracked [prior to construction]. None of them explained the natural forces for those damages and don't take into account that these natural forces probably just made the damages worse over time. And, certainly, they don't take account of it, and

they can't show that Fruhling proximately caused the damages. They never testified to that at all. So there's no showing of breach or proximate cause.

RP 22-23.

It is somewhat a mystery why Fruhling was named in this lawsuit, since all it did was dig a hole and carry away dirt in trucks. There is no factual basis to show Fruhling created vibrations that caused damage to the Property.

A genuine issue of material fact exists only where reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695, 698 (2009). Once Fruhling submitted adequate affidavits, Evarone was required set forth specific facts which sufficiently rebutted Fruhling's contentions and disclose the existence of a genuine issue as to a material fact. *Id.* at 601-02. To establish the existence of a genuine issue of material fact, Evarone cannot not rely on speculation or argumentative assertions that unresolved factual issues remain. *Id.* at 602. Summary judgment in favor of Fruhling is appropriate because Evarone failed to establish a prima facie case concerning an essential element of his or her claim. *See Fabrique*, 144 Wn. App. at 688 (dismissing case for failure to support element of proximate cause). Evarone failed to show proximate cause and his negligence-based causes of action therefore fail.

D. Even if Evarone had supported his claims against Fruhling with evidence, his claims against Fruhling are barred by the applicable statutes of limitations.

1. Claims against Fruhling are controlled by a two-year statute of limitations, but even if some are three-years, the statute of limitations still passed.

The parties agree that actions for nuisance and negligent injury to real property are each subject to a two-year statute of limitations. CP 140, 144, App. Br. at 13, n4. *See also Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 684, 709 P.2d 782 (1985) (nuisance); *Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006) (negligent damage); *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 125, 89 P.3d 242 (2004) (same); *Mayer v. City of Seattle*, 102 Wn. App. 66, 75, 10 P.3d 408 (2000) (same).

Evarone claims trespass and loss of lateral support is controlled by a three-year statute of limitations. App. Br. at 13, n4. However, in cases such as this one, so long as an alleged trespass or loss of lateral support was not caused by “direct physical invasion of the real estate” or a taking by a sovereign power, the statute of limitations for these claims is two years. *See e.g., White*, 103 Wn. at 329; *State ex rel. Whitten v. Spokane*, 92 Wn. 667, 159 P. 805 (1916); *Island Lime Co. v. Seattle*, 122 Wn. 632, 635, 211 P. 285 (1922); *Denney v. Everett*, 46 Wn. 342, 89 P. 934 (1907); *Smith v. Seattle*, 18 Wn. 484, 51 P. 1057 (1898). There was no direct

physical invasion by Fruhling, as its actions were all outside the boundaries of Evarone's property. Therefore, a two-year statute of limitations applies.

2. Evarone was aware of the alleged damage by March 2006, but he did not file a lawsuit against Fruhling until April 2009.

Evarone was aware of his alleged damage between October 2005 and March 2006 through letters from VTS and memorandum from Dan Fenton. CP 164-67, 180-89, 193-95, 197-98, 200-01, 203-08, 214-16. Fruhling's mass excavation was complete by March 20, 2006. CP 790.

On April 7, 2009, Evarone was permitted to file a First Amended Complaint. CP 58-65. In the superior court's order permitting the filing of an amended pleading, the superior court struck out proposed language that would have related back claims against Fruhling to the original complaint and tolled the statute of limitations. CP 57. The superior court's order declining to relate the amended pleading back to the original pleading was not appealed, and Evarone did not make any subsequent motion to relate the amended complaint back. Therefore, the law of the case is that the first claims against Fruhling were brought on April 7, 2009.

Generally, a cause of action accrues as soon as plaintiff suffers some form of injury to his real property. RCW 4.16.005; *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997); *Wallace*, 134 Wn.

App. at 13. In this case, Evarone's claims accrued by March 2005, yet he did not file a lawsuit against Fruhling until April 2009. Therefore, all of Evarone's claims against Fruhling are barred, whether the claims are controlled by a two-year or three-year statute of limitations,

3. The discovery rule does not apply because Evarone was aware of his alleged damage by March 2005, but delayed bringing suit against Fruhling until April 2009.

In cases where a delay occurs between the injury and the plaintiff's discovery of it, the court may apply the discovery rule, which can postpone the running of a statute of limitations until a plaintiff should have discovered the basis for the cause of action. *Mayer*, 102 Wn. App. at 76. In order to invoke the discovery rule and toll the statute of limitations, a plaintiff must show that he or she could not have discovered the relevant facts earlier. *Giraud v. Quincy Farm and Chemical*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000). The discovery rule is thus unavailable if a plaintiff was merely "sleeping on his rights." *Id.*

The discovery rule does not require a plaintiff to understand all the legal consequences of the claim. *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998). A cause of action may accrue if a party *should have* discovered salient facts regarding a claim. *Id.* (emphasis in original). A party must exercise reasonable diligence in pursuing a legal claim, and if such diligence is not exercised in a timely manner, the cause of action will

be barred by the statute of limitations. *Id.* at 96. One who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose. *Id.* It is not material that all the damages resulting from an act have not been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. *Id.* The running of the statute is not postponed until the specific damages for which the plaintiff seeks recovery actually occur. *Id.*

Evarone is an attorney, and practiced law for 40 years in the fields of copyright and trademark infringement, bad faith defense work, personal injury, and business law. CP 177, 214-16. With this knowledge, Evarone is a sophisticated plaintiff and well-aware of his legal rights. Evarone was aware of the alleged damage by March 2005, so his claims accrued and the statute of limitations began to run against at that time. Therefore, Evarone may not invoke the discovery rule.

4. In *Oja*, the so-called “project completion rule” does not apply to subcontractors, and the subcontractors in *Oja* were all dismissed on summary judgment.

Evarone devotes the largest portion of his brief to arguing that the statute of limitations did not pass under the so-called “project completion rule” found in *Vern J. Oja & Associates v. Washington Park Towers, Inc.*, 89 Wn.2d 72, 569 P.2d 1141 (1977). Evarone inaccurately represents the

arguments made by Fruhling in regard to the *Oja* case. Fruhling's primary argument in response to Evarone's assertion that *Oja* applied is that, in *Oja*, all claims against the contractors were dismissed on statute of limitations grounds, so that *Oja* does not apply to subcontractors like Fruhling. CP 783-84, RP 24.

In *Oja*, an action was brought for damage to a building by reason of pile driving and other construction activity associated with a condominium apartment building. The pile drivers worked on the project primarily from August to September 1966, work resumed on the project in the fall of 1967, and some final pile driving was apparently completed around November 1967. *Id.* at 74. The building project was completed in 1969, and *Oja* filed the action on March 2, 1971. *Id.*

Based on these facts, the King County Superior Court dismissed the action against the pile driving subcontractors on summary judgment. The superior court then entered judgment against the owner of condominium building, finding that the dismissal of the subcontractor on statute of limitations grounds did not shield the building owner from liability. An appeal was taken. The Court of Appeals affirmed, as did the Supreme Court. *Id.* at 77.

The important point of *Oja* in regard to Fruhling is that the pile driving subcontractors were properly dismissed on summary judgment

based on the completion date of their work. Fruhling's mass excavation was complete by March 20, 2006. CP 790. Evarone first alleged claims against Fruhling on April 7, 2009. This is long past any two-year statute of limitations, and even past a three-year statute of limitations.

Evarone is aware from the record that, in the superior court, Fruhling argued *Oja* does not apply to subcontractors. CP 783-84, RP 24. Yet, Evarone has not included in his opening brief any recognition that the contractors were dismissed on summary judgment in *Oja*. It is the Respondent's responsibility to respond to arguments made by the Appellant. It is impossible for Fruhling to provide any additional response without additional argument from Evarone in his opening brief how *Oja* can apply to subcontractors. Therefore, Evarone should not be permitted to raise new contentions regarding *Oja* in his reply brief, where Fruhling would be denied the opportunity to provide a response. *See Lewis v. City of Mercer Island*, 63 Wn. App. 29, 31, 817 P.2d 408 (1991) ("The long standing Washington rule [is] that appellate courts will not consider contentions raised for the first time in reply briefs").

Oja does not apply to subcontractors, and the discovery rule does not apply where Evarone had knowledge of alleged damage as the events were unfolding back in March 2005. Therefore, Evarone's claims are barred by both the two-year and three-year the statutes of limitations

because, despite his knowledge, he did not file a complaint against Fruhling until April 2009.

E. The superior court did not abuse its discretion by striking theories not pled or disclosed in discovery, which were first raised on the eve of trial, and which, in any event, do not apply to the case.

1. Evarone failed to plead *res ipsa loquitur* and joint and several liability, withheld the theories in discovery, and disclosure was untimely.

Where a complaint fails to provide fair notice to a defendant, the trial court's decision to strike the claims or evidence is not an abuse of discretion. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 857, 22 P.3d 804, 810 (2001); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469-470, 98 P.3d 827 (2004) ("plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment"); *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986) ("inexpert pleading has been allowed under the civil rule, insufficient pleading has not").

The purpose of discovery is to make all relevant information available to all litigants. *Wash. State Physicians Ins. Exch. Ass'n. v. Fisons Corp.*, 122 Wn. 2d 299, 341, 858 P.2d 1054 (1993). The liberal discovery permitted under CR 26 ensures that litigants have "full access to all reasonable means of determining the truth." *Heidelbrink v. Moriwki*, 38 Wn. App. 388, 393, 685 P.2d 1109 (1984). Mutual knowledge of all

relevant facts gathered by the parties is essential. *Id.* at 395. To allow plaintiff to plead at trial theories not provided in answer to pretrial discovery may lead to injustice. *Stark v. Allis-Chalmers*, 2 Wn. App. 399, 404, 467 P.2d 854 (1970).

Evarone responded to discovery more than a year prior to dismissal of his claims. CP 225-34. In regard to almost every question, Evarone responded with boilerplate objections, indicating that the request for a factual statement called for a legal conclusion, was vague and overbroad, and called for information “preempted by the case schedule.” CP 226-33. *See*, Interrogatory No. 6, CP 227, (seeking nature of damages Evarone alleged were caused by Fruhling); Interrogatory No. 10, CP 230, (seeking information to support claim that Fruhling caused or contributed to vibrations or soil movement that caused loss of lateral support); Interrogatory No. 11, CP 231-32 (seeking information to supports claim that Fruhling caused negligent destruction of property); Interrogatory No. 12, CP 232-33 (seeking information to support factual basis for claim that Fruhling was guilty of intentional trespass). Evarone stated information would be provided as it became available, but Evarone did not supplement any discovery response despite more than a year to do so. Fruhling was prejudiced because it would have conducted crucial additional discovery had Evarone disclosed the theories. CP 945.

Evarone inserted into summary judgment briefing issues of *res ipsa loquiter* and joint and several liability, CP 672-75, 684-85, that he had never disclosed, CP 158-60, 227-33, and pretended that they has been in the case all along. Fruhling moved to strike these theories offered for the first time on the eve of trial, on the grounds that Evarone had failed to plead them or provide notice of them in discovery responses on the authority presented above. CP 706-08, 943-47.

Evarone argues that “the invocation of *res ipsa loquitur* for the first time in opposition to motions for summary judgment appears both routine and perfectly acceptable before the courts of this state.” App. Br. at 26. However, while *res ipsa loquitur* is present as an issue in cases cited by Evarone, the opinions do not support the proposition that the plaintiff in those cases did not disclose the intended use of the doctrine in discovery and concealed the intent to use it until the eve of trial. Evarone did not provide any legal authority to support the position that a plaintiff can conceal such a legal theory for almost two years until after the close of discovery, preventing the defending parties from engaging in relevant discovery, and then assert it a month or two before trial. To permit this would be unjust and a violation of the very first civil rule, CR 1. *See also Lybbert v. Grant County*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000).

2. Even if the superior court had not stricken the untimely assertion of *res ipsa loquitur*, this doctrine did not apply to this case.

Even if the superior court had not stricken Evarone's untimely assertion of *res ipsa loquitur*, the doctrine would not have applied in this case. Whether *res ipsa loquitur* applies in a given context is a question of law. *Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010) (citing *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)). The doctrine of *res ipsa loquitur* is "ordinarily sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential." *Id.* at 889. A plaintiff may rely upon *res ipsa loquitur*'s inference of negligence only if (1) the occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the occurrence. *Id.* at 891. Evarone has to support all of these factors to use the doctrine, but he cannot support any of them.

In regard to the first factor, even Evarone's experts concur that such events as cracking of concrete, settling of soil, and other such occurrences are common and occur naturally in a forty-year old building like the Property, and that, prior to any construction at the Property, there were substantial cracks in Evarone's concrete and the retaining wall had

already started to fall. *See e.g.*, CP 404-05. The occurrences that caused the conditions on the Property, which Evarone claims as damage, ordinarily happen in the absence of negligence.

Evarone argues that the court should find, presumably as a matter of law, that cracking to concrete “would not normally occur in the in the absence of someone’s negligence.” App. Br. at 29-30. But this is wrong. Mr. Fenton testified that such cracking is expected in a forty-year old property, CP 404-05, even without another’s negligence. And contrary to Evarone’s contention that the possibility of another cause for the condition raises an issue of fact, App. Br. at 29, “[t]he doctrine has no applicability when there is evidence that the accident *could* occur without negligence on the defendant’s part.” *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 177, 947 P.2d 1275 (1997) (emphasis added). Therefore, the possibility of another cause for the condition negates the use of *res ipsa loquitur*. If a question of fact remains, it is the question of what did, in fact, cause the damage and, without *res ipsa loquitur*, it remains plaintiff’s burden to then provide this proof as part of his *prima facie* case.

In regard to the second factor, Fruhling did not control the natural force that caused cracking in Evarone’s concrete, including the Nisqually earthquake that occurred just four years prior to the construction, the fall of the retaining wall prior to the construction, and other “damage” that

Evarone complained of. In addition to natural forces, there were other contractors and subcontractors on the worksite that would have potentially made more vibrations than Fruhling, such as the pile driving subcontractor. Such subcontractors were not in Fruhling's control, let alone exclusive control. *See Kempter v. City of Soap Lake*, 132 Wn. App. 155, 160-61, 130 P.3d 420 (2006) (*res ipsa loquitur* did not apply for lack of exclusive control because any number of persons could have dumped materials in the sewer that caused a blockage and led to water backing up on plaintiff's property); *Magerstaedt v. Eric Co.*, 64 Wn.2d 298, 306, 391 P.2d 533 (1964) (tenant could not rely on *res ipsa loquitur* against landlord for damage caused by falling plaster from ceiling where landlord did not exercise exclusive control of plaintiff's property).

In regard to the third factor, it is undisputed that cracks had been on the Property for a long time, that when cracks appear and water intrudes through the cracks, it leads to additional cracking, and that Evarone failed to repair the cracks that had been there for years, and perhaps decades. Therefore, Evarone's failure to take care of his own property prior to the construction contributed to the occurrence at issue.

Evarone relies in large part on *Curtis v. Lein*. However, *Curtis* is easily distinguishable both on the facts and law. In *Curtis*, the Leins had a wooden dock built over the pond. The Leins had sold the property, but

were still living in it when the girlfriend of their farm manager, Curtis, stepped out onto the dock. The boards underneath her feet gave way and her left leg fell through the dock up to her hip, which resulted in Curtis suffering a fracture to her tibia. When the Leins learned of the accident, they instructed their farm manager to remove the dock. The removal of the dock left no evidence as to what about the dock caused Curtis's fall.

In *Curtis*, a case based on premises liability, the Leins did not argue that anyone else had responsibility for the dock, and offered no evidence that the dock was not in their exclusive control prior to Curtis's accident. *Id.* at 893. Here, Fruhling did not have control of Evarone's property, natural forces that had previously caused the conditions on Evarone's property, nor did it have control of LCL, Nupricon, the pile driving subcontractor, or any of the other entities that Evarone alleges could have caused the condition.

Here, there was no destruction of evidence. Evarone simply failed to preserve potential evidence. Despite noting that there were vibrations during construction, neither Evarone nor Fenton used any device to measure the alleged vibrations. Despite noting existing cracks in the concrete, Mr. Fenton never measured the cracks or mapped them out to reflect any subsequent alleged widening. Despite the ability to use an adequate camera to record the existing cracks, Mr. Fenton did not use an

adequate camera, and so was not able to see any of the alleged damage in any of his photographs. Had the dock existed in *Curtis*, rather than being destroyed by the defendants, and Lein had merely chosen not to adequately examine it, the Court would not have found that it was a “peculiar and exceptional case . . . where the facts and the demands of justice [made] its application essential.” *Id.* at 889.

It was not error for the superior court to strike Evarone’s untimely assertion of *res ipsa loquitur*. However, *res ipsa loquitur* does not apply to this case, so even if it was error for the superior court to strike *res ipsa loquitur* as being untimely asserted, it was harmless error.

3. Joint and several liability is an exception to proportionate liability, and such provisions of RCW 4.22.070 are not self-executing.

Contrary to Evarone’s argument, there is both a logical and legal basis upon which the superior court properly denied the apply joint and several liability in the instant case. “RCW 4.22.070 is not self-executing.” *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993); *Henderson v. Tyrrell*, 80 Wn. App. 592, 623, 910 P.2d 522 (1996). RCW 4.22.070 requires a party seeking to enforce its provisions to invoke its procedure. *Id.* Joint and several liability under RCW 4.22.070(1)(a) and (b) set forth exceptions to the several liability imposed as part of the fault allocation procedure. *See* RCW 4.22.070(1).

Adcox and *Henderson* broadly state the rule, and do not indicate it applies only to defendants. Evarone makes several unpersuasive arguments in regard to this order these cases. First, Evarone argues that the trier of fact must determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability. App. Br. at 32 (citing RCW 4.22.070(1)). But a jury can determine the percentage of fault without joint and several liability so there is no effect on the juries deliberation in this regard.

Evarone next argues that nothing in the statute requires a plaintiff to plead joint and several liability, but there is also nothing in the statute itself requiring defendants to plead comparative fault. Yet *Adcox* and *Henderson* hold that comparative fault, as required under the statute, can be waived if not properly pled, so this is also not a persuasive argument.

Without citation to any authority, Evarone next argues that the rule relates only to defendants. Evarone does not suggest why plaintiffs should be favored above defendants in litigation to such an extent that unambiguous statements of law regarding pleading and discovery need not apply to him. Evarone argues that "defendants, not plaintiffs, must assert the fault of another as a defense and then show the existence of evidence to support that defense." App. Br. at 33. However, insert the word

“claim” for “defense” and it is clear that, in pleading, plaintiffs carry the same burden for their claims as defendants do for their defenses.

It is only reasonable that “comparative fault” and “joint and several liability” be treated in the same manner. In a standard case, a plaintiff and defendant oppose only each other with claims of fault and contributing fault. Where a defendant seeks to show the fault of others, he must disclose those that he asserts are at fault and how. Likewise, when a plaintiff seeks to show that multiple defendants are jointly and severally liable, it is incumbent upon him or her to inform the defendants of an intention to use this theory to permit sufficient discovery and avoid trial by ambush. As such, the court properly struck this untimely raised theory.

4. Joint and several liability does not apply to the instant case.

In addition to being untimely asserted, joint and several liability does not apply to the instant case, as it is not a method of proof to be used to relieve a plaintiff of the burden of showing proximate cause. Rather “joint liability exists between two wrongdoers only if they are defendants against whom judgment is entered.” *Gass v. MacPherson’s Inc. Realtors*, 79 Wn. App. 65, 69, 899 P.2d 1325 (1995). Joint and several liability does not arise unless judgment is entered against two or more defendants. *Id.* “[P]arties held jointly and severally liable will be jointly and severally liable only for the sum of their proportionate liability.” *Kottler v. State*, 5299600

136 Wn.2d 437, 446, 963 P.2d 834 (1998). RCW 4.22.070(1)(a) “requires the actors consciously act together in an unlawful manner.” *Id.* at 448. Here, neither Evarone nor his experts showed that Fruhling acted in an unlawful manner, breached the standard of care, related Fruhling’s work to any alleged damage, and judgment was not entered against Fruhling.

Evarone’s use of joint and several liability tracks his desire to shed every burden in proving his *prima facie* case. In the superior court, Evarone erroneously argued that defendants had the burden to apportion harm, primarily citing *Phennah v. Whalen*, 28 Wn. App. 19, 621 P.2d 1304 2479 (1980), and *Cox v. Spangler*, 141 Wn.2d 431, 5 P.3d 1265 (2000), in both of which a plaintiff was injured in two unrelated auto accidents, three of them rear-end collisions. CP 669-72, 786-87. In both cases, an individual person was unequivocally struck by two motor vehicles and it was undisputed that the plaintiff sustained at least some injures as a result of the motor vehicle accidents. Evarone did not even show he was “struck” by Fruhling.

It may have taken effort to conduct an adequate investigation, review voluminous construction documents produced by LCL, Fruhling, and Nupricon, and depose fact witnesses identified by the parties, but Evarone did not show it is impossible to determine whether a specific party caused alleged damage, if any. He and his experts simply chose not

to conduct a scientific investigation or take any depositions until that last few weeks of discovery, and simply did not do the work required to make determinations. The choice for Evarone not to conduct this discovery belies his intention to try to relieve himself of all evidentiary burdens by simultaneously alleging *res ipsa loquitur* (to relieve him of the burden of proving breach) and joint and several liability (to relieve him of the burden of proving proximate cause). Evarone should not be permitted to shift his entire evidentiary burden to defendants merely because he chose not to do the investigation necessary to support his case.

The exception codified in RCW 4.22.070(1)(b) is likewise unavailing. To qualify for this exception the original party must be fault-free and both parties to the contribution action must have been defendants against whom judgment was entered in the underlying action.

Kottler, 136 Wn.2d at 449.

Evarone claims to be fault-free. CP 672. But even according to his own experts, there was a great deal of pre-existing cracks on Evarone's property prior to construction that had been there for years. Failure to repair cracks leads to a worsening of the conditions on the property, so Evarone's failure to keep his property in sufficient repair to prevent naturally occurring cracking bestows on him some fault. And again, joint and several liability is not a method of proof, but applies only if judgment is already entered against more than one defendant. It has not been here.

It was not error for the superior court to strike Evarone's untimely assertion of joint and several liability. However, joint and several liability is not a method of proof and does not apply to a summary judgment motion, so even if it was error for the superior court to strike joint and several liability as being untimely asserted, it was harmless error.

F. The superior court did not abuse its discretion in striking incompetent testimony.

A trial court's decision to admit or exclude evidence lies within its sound discretion. We will not overturn evidentiary rulings unless the trial court has manifestly abused its discretion. Although a "ruling on a motion to strike is discretionary with the trial court," a "court may not consider inadmissible evidence when ruling on a motion for summary judgment."

Int'l Ultimate, Inc., 122 Wn. App. at 744.

Here, although the superior court indicated that motions to strike are disfavored, it struck specific inadmissible testimony on summary judgment. CP 713-23, 727-45, 768-80, 826, 956-58, 959-60; RP 5. Stricken testimony included that of Evarone's experts, who admitted that they did not have the expertise to testify on certain subjects and then submitted declarations addressing subjects upon which they were admittedly incompetent, contradicted their prior deposition testimony, and various other reasons. *Id.*

Evarone had no pre-construction photographs or other evidence to show damage was caused by the construction. CP 802-03, 817-22. His

experts admit to pre-existing conditions at the Property, that they did not take measurements, perform tests, or take adequate photographs showing the conditions claimed to exist. CP 395-98, 400-05, 414, 421, 795-97, 800, 804-06, 809, 815-16, 819. The superior court did not abuse its discretion in striking the objectionable testimony and, in fact, would have erred had it proceeded to consider inadmissible evidence on summary judgment.

Evarone argues that Mr. Fenton “was more than qualified to offer opinions as to the effect of vibration and soil movement during construction.” App. Br. at 36. Yet Mr. Fenton unambiguously testified that earth movement was not within his expertise, that he was not going to testify to it, and that answers on all such questions should be asked of Mr. Wentworth. CP 713-23, 727-45.

Evarone then argues: “both men were qualified to consult industry standards; to consult other experts; and to review the opinions of others.” However, both men testified that they were not going to testify as to industry standards or offer opinions in regard to Fruhling’s activities. CP 174, 222-23. In fact, in their declarations submitted in opposition to summary judgment, neither man offered any testimony regarding industry standards or the opinions of other experts in regard to Fruhling.

Evarone next argues that the declarations of Evarone's experts were not clearly contradictory. App. Br. at 37. LCL offered concise briefing, comparing Mr. Fenton's deposition testimony, CP 714-19, with his declaration testimony, CP 719-21, and reveals how Mr. Fenton clearly contradicted his prior deposition testimony. Likewise, LCL's motion offered concise briefing, comparing Mr. Wentworth's deposition testimony, CP 721-23, with his declaration testimony, CP 723, and reveals how Mr. Fenton clearly contradicted his prior deposition testimony.

The deposition testimony of Mr. Fenton and Mr. Wentworth is in clear contradiction to their declaration testimony. This court will easily see that this is no mere "potential inconsistency," as claimed by Evarone. App. Br. at 37-38. In addition, Evarone's claim that "a contradictory declaration should be considered in light of other evidence" is in direct contravention of *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002); *Mut. of Enumclaw Ins. Co. v. Archer Const.*, 123 Wn. App. 728, 734, 97 P.3d 751 (2004); *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999); *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

Evarone's citation to *State Farm Mutual Automobile Insurance Co. v. Treciak* and *Beers v. Ross* is not well founded. These cases discuss how a later declaration may be considered in light of other evidence presented

in the case to determine whether sufficient evidence raises a factual issue. 137 Wn. App. at 571, 117 Wn. App. at 408. Yet Evarone does not identify any other facts that existed such that an issue of fact would have arisen if the specific self-contradictory testimony had not been stricken. The depositions were conducted at excruciating length, reviewing practically every photograph and report by these experts. It even took two whole days to depose Mr. Fenton. The testimony of these experts in regard to every photograph and report was pinned down in deposition. There was no other evidence being considered. Therefore, the contradictions of these two witnesses, even if considered, would not have raised an issue of fact if other evidence was considered.

Even if no testimony had been stricken by the court, neither Mr. Fenton nor Mr. Wentworth offered any testimony in regard to Fruhling, so that any error has harmless as to the dismissal of Fruhling.

G. Fruhling moves for attorney fees and costs.

Pursuant to RAP 18.1, RAP 18.9(a), CR 11, and RCW 4.84.185, Fruhling requests an award of attorney's fees on appeal. An appeal is frivolous and a recovery of fees warranted "if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *In re Marriage of*

Greenlee, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992) (quoting *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985)).

Evarone's appeal as to Fruhling is frivolous. Evarone has never offered a standard of care expert as to an excavator's standard of care, and never presented any evidence that anything Fruhling did caused damage to him. As such, there is a complete failure by Evarone to make out a *prima facie* case against Fruhling. In addition, the rule expressed in *Oja* does not apply to subcontractors, the discovery rule does not apply in this case, and the statute of limitations had clearly otherwise passed in regard to claims against Fruhling.

VI. CONCLUSION

This court should affirm the rulings of the superior court dismissing Evarone's claims against Fruhling, striking untimely disclosed legal theories, and striking incompetent and self-contradictory portions of the declarations from Evarone's experts.

Summary judgment dismissal as to Fruhling is properly affirmed where Evarone: (1) lacks testimony of an excavation professional to show breach as to Fruhling's work; (2) does not provide evidence relating Fruhling to the alleged damage; and (3) is barred by the applicable statutes of limitations in claims against Fruhling.

The superior court properly struck Evarone's untimely assertions of *res ipsa loquitur* and joint and several liability where, not only did Evarone fail to plead them, but concealed in discovery responses an intention to use the doctrine, failed throughout two years of litigation to assert them, and then revealed them only on the eve of trial to the prejudice of Fruhling. In addition, *res ipsa loquitur* and joint and several liability are both inapplicable to this case so even if it were error to strike them on grounds of being untimely, such error would be harmless.

The superior court also properly struck incompetent and self-contradictory testimony by Evarone's experts. Even if the testimony is considered, neither expert testified that Fruhling breached any standard of care, or that anything Fruhling did caused damage. Since Evarone's experts provided no testimony in regard to Fruhling, even if it were error to strike this testimony, such error would be harmless as to Fruhling.

Respectfully submitted this 29th day of April, 2011.

LEE SMART, P.S., INC.

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on April 29, 2011, I caused service via legal messenger of the foregoing on each and every attorney of record herein:

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