

No. 66176-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JACK W. EVARONE

Appellant

v.

LEASE, CRUTCHER, LEWIS, SENECA REAL ESTATE GROUP,
HORIZON HOUSE, NUPRECON, FRUHLING INC., FRUHLING
SAND & TOPSOIL, INC.,

Respondents

BRIEF OF RESPONDENTS LEASE, CRUTCHER, LEWIS, SENECA
REAL ESTATE GROUP, AND HORIZON HOUSE

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I. Introduction

This Court should affirm the dismissal of appellant Jack W. Evarone's claims against respondents Lease Crutcher Lewis (LCL), Seneca Real Estate Group, and Horizon House.

On summary judgment, the trial court properly disregarded Evarone's arguments regarding *res ipsa loquitur* and joint and several liability. *Res ipsa loquitur* is inapplicable as a matter of law, and the doctrine of joint and several liability has no bearing on the summary judgment motion.

The trial court acted within its discretion by striking declarations from two of Evarone's expert witnesses. Portions of those declarations directly contradict the witnesses' prior testimony and are not within their expertise.

Evarone's claims for loss of support, negligence, and nuisance are time-barred because there is no evidence that actionable damages took place in the two years before he filed suit. Moreover, the claims accrued when actionable damage arose, and not when the construction project ended. Finally, Evarone's claims, even if timely, were properly dismissed because elements of each claim are unsupported by any evidence.

II. Statement of the Issues

1. The statute of limitations for negligence, nuisance, and loss of support is two years. While the project-completion rule states that property-damage claims arising from construction accrue at the end of construction, that rule has been superseded by cases stating accrual occurs when property is damaged. Evarone suffered no actionable damages in the two years before he filed suit. Are his claims are time-barred?

2. *Res ipsa loquitur* applies only if an injury-producing occurrence ordinarily does not happen without negligence and the injury is caused by an instrumentality in the defendant's exclusive control. The concrete slab and retaining wall on Evarone's property cracked long before the construction project began, his experts testified that concrete routinely cracks, and the respondents had no control over all potentially injury-causing instrumentalities. Did the trial court correctly determine that Evarone cannot rely on *res ipsa loquitur*?

3. The doctrine of joint and several liability addresses the apportionment of liability among defendants who have been found liable and against whom judgment has been entered. On summary judgment, the respondents argued that Evarone's claims were untimely and that no evidence supported essential elements of his claims. Did the trial court err

when it disregarded Evarone's arguments regarding joint and several liability?

4. On summary judgment, a court may disregard an expert-witness declaration that, without explanation, contradicts the expert's prior deposition testimony and that sets forth opinions outside the witness's expertise. Evarone's experts provided opinions about soil settlement, water runoff, and vibrations that directly contradicted their prior deposition testimony and on which they lacked expertise. Did the trial court abuse its discretion when it disregarded portions of those declarations?

5. To establish his claims for negligence, nuisance, trespass, and loss of support, Evarone had to come forward with evidence of each element of those claims. In the trial court, the respondents demonstrated an absence of admissible evidence to support essential elements of those claims. Should this court affirm the dismissal of Evarone's claims?

6. A plaintiff cannot maintain nuisance and trespass claims if those claims arise from the same facts as a negligence claim, even if the negligence claim is dismissed on other grounds. Evarone's negligence, nuisance, and trespass claims all arise from the respondents' construction activity, and all allege damage caused by soil movement or vibration. Did

the trial court properly dismiss Evarone's nuisance and trespass claims as duplicating his negligence claim?

III. Statement of the Case

1. **Horizon House made plans to build a new retirement facility on First Hill.**

Horizon House is a residential retirement community in Seattle's First Hill neighborhood.¹ Its property lies east of Freeway Park, north of University Street, and west of Terry Avenue.² The property slopes downhill from Terry Avenue.³ Until 2005, Horizon House's facility included a five-or six-story building.⁴ To the north of that building were, in order, the Le Roi Apartments, a parking lot, and the Terri Ann Apartments.⁵

Horizon House made plans to build an additional apartment complex and health center in a 20-story tower.⁶ The tower was to be built on the land occupied by the Le Roi Apartments and the adjacent parking lot.⁷ Horizon House retained Seneca Real Estate Group to serve as the

¹ CP 540.

² CP 338, 546.

³ CP 546.

⁴ CP 353, 355.

⁵ CP 346, 353-55, 546.

⁶ CP 541.

⁷ *Id.*

development manager and LCL to serve as the general contractor.⁸ LCL in turn entered into subcontracts with Fruhling, Inc. for excavation and soil removal and with Nuprecon LP for demolition work.

2. The Terri Ann Apartments are north of the construction site.

The Terri Ann is an eight-story, 24-unit apartment building that was built in the 1960s.⁹ Like Horizon House, the Terri Ann rests on a steep slope that runs downhill from east to west, so that the fifth story of the Terri Ann is at the same level as Terry Avenue.¹⁰

There are a number of structures near the southern edge of the Terri Ann property. The first of these is a concrete driveway that runs from Terry Avenue to a slab-on-grade parking area, at least part of which rests on fill.¹¹ A retaining wall runs along the southern edge of the driveway, very close to the property line.¹² On the property's southwest corner is a long-ago fractured retaining wall.¹³ Uphill and to the east of the fractured retaining wall are large rocks resting on the ground, which some witnesses referred to as a "rockery."¹⁴

⁸ *Id.*

⁹ CP 342–43, 345, 404–05.

¹⁰ CP 345, 404.

¹¹ CP 347, 447–49, 462, 467–68, 474, 477.

¹² CP 380–81, 383, 481–82.

¹³ CP 345, 439, 476.

¹⁴ CP 345–46, 437, 450.

3. Construction began in August 2005.

Construction on the Horizon House property started on August 29, 2005. Contractors began by demolishing the Le Roi and the old five- or six-story Horizon House building.¹⁵ The site of the new building was then excavated to a depth of 30–40 feet, with the edge of that excavation about 15 feet south of the Terri Ann property line.¹⁶

Before and during construction, Seneca's contractors, Hart Crowser and Bush Roed & Hitchings, monitored the movement of soils and structures around the site, including the retaining wall next to the Terri Ann's driveway.¹⁷ Those showed negligible movement.¹⁸ Hart Crowser measured for potential erosion, but detected none.¹⁹

Hart Crowser also prepared a geotechnical engineering design study of the site.²⁰ The study addressed various aspects of the project, including shoring selection and design, seismic considerations, and environmentally critical areas. The study recommended that the contractors who performed the construction take various steps to avoid

¹⁵ CP 354.

¹⁶ CP 417

¹⁷ CP 543, 598.

¹⁸ CP 598.

¹⁹ CP 543.

²⁰ *Id.*

erosion and soil movement. At the end of the project, Hart Crowser concluded that the contractors had followed those recommendations.²¹

The northern edge of the new building was approximately 15 feet south of the Terri Ann's southern property line.²² Near the end of construction, grass and trees were planted in the strip of land at the northern boundary of Horizon House's property.²³ Contractors installed a wall built of pre-formed concrete blocks on the Horizon House property, just south of the retaining wall on Evarone's property and east of the rockery.²⁴ Witnesses referred to that wall as a segmental block wall.²⁵

4. Evarone first complained about construction in October 2005.

Soon after the construction work began, on October 6, 2005, Evarone sent a letter to LCL stating that vibrations from heavy equipment were shaking the Terri Ann.²⁶ He also requested compensation for cleaning dust that he claimed drifted from the construction site onto his property.²⁷ On October 21, 2005, he met with two LCL employees and pointed out cracks in the driveway and building.²⁸ LCL concluded that the

²¹ *Id.*

²² CP 425-26.

²³ CP 495-500.

²⁴ CP 440-41.

²⁵ CP 744.

²⁶ CP 594, 596.

²⁷ *Id.*

²⁸ CP 594.

construction had not caused any of the alleged damage,²⁹ with the exception of cosmetic damage caused by a tree that fell from the Horizon House property in September 2005. LCL offered to repair the damage caused by the tree, but Evarone declined.³⁰

Around the same time he met with LCL employees, Evarone retained engineer Dan Fenton to monitor damage to the building. Fenton first visited the site on October 28, 2005.³¹ During that visit, he took photographs of “lots of cracks” that he believed were created well before the construction began,³² many of them years earlier.³³ He also saw what he perceived as evidence of cracks that had widened or lengthened by millimeters.³⁴ He suspected this because it seemed that portions of cracks were sharper and lighter in color.³⁵ Fenton admitted, however, that with one exception described below, he never measured the cracks.³⁶

In February and March 2006, Fenton sent memos to Evarone describing his findings.³⁷ Fenton continued to monitor the site through

²⁹ *Id.*

³⁰ CP 359–60, 414–15, 594.

³¹ CP 391, 395.

³² CP 394, 397–98, 400–02, 502–15.

³³ CP 1592–95.

³⁴ CP 401–02.

³⁵ CP 398–99.

³⁶ CP 1596.

³⁷ CP 365–68, 410–13, 416.

2008, but he observed no increased cracking.³⁸ In August 2009, he installed a measuring device on just one crack.³⁹ It registered no movement between then and April 2010, except for a movement of 0.5 millimeter (or about 1/64 inch) in October 2009.⁴⁰ Fenton did not attribute the crack's widening that month to the construction project.⁴¹ Fenton admitted he is not a vibrations expert.⁴²

5. Evarone filed suit in October 2008.

On October 23, 2008, Evarone filed a complaint against Horizon House, Seneca, LCL, Nuprecon LP, and Nuprecon GP for loss of lateral support, negligent destruction of property, trespass to land, nuisance, and diminished property value.⁴³ In August 2009, Evarone amended the complaint to add as defendants Fruhling Inc. and Fruhling Sand and Topsoil Inc.⁴⁴

During discovery, the respondents took the depositions of Fenton and Todd Wentworth, a geotechnical engineer Evarone retained in August 2009.⁴⁵ Wentworth testified that there were cracks in the concrete before

³⁸ CP 420–23.

³⁹ CP 429–31.

⁴⁰ CP 392–93, 430–31, 433.

⁴¹ CP 431.

⁴² CP 1597.

⁴³ CP 523–30.

⁴⁴ CP 532–39.

⁴⁵ CP 436, 438.

construction, but he could not determine how much wider, if at all, they became during or after construction.⁴⁶ He also did not know how much soil settlement or sloughing occurred beneath the slab on grade before construction.⁴⁷ In addition, he said that the construction caused only negligible change in the surface water flows onto the Terri Anne property.⁴⁸ Finally, Wentworth inspected the fractured retaining wall on the southwest corner of the Terri Ann property, but he had no opinion whether the construction caused any damage to that structure.⁴⁹

Fenton testified that at trial he would not express expert opinions on earth movement, including movement around the cracked retaining wall, the rockery, or the segmental block wall,⁵⁰ and that he would he not provide opinions about gravel washout.⁵¹ He admitted that he was not a geotechnical engineer and thus not qualified to address those issues.⁵²

⁴⁶ CP 463–66.

⁴⁷ CP 464–66.

⁴⁸ CP 458–61.

⁴⁹ CP 442–44.

⁵⁰ CP 736–45.

⁵¹ CP 732–34, 741–42. Witnesses used the term “washout” to refer to debris that allegedly collected near the base of the rockery as a result of water flow through the rockery. CP 424–25.

⁵² CP 390, 403, 736, 737, 743.

The respondents filed summary judgment motions.⁵³ They argued that the statute of limitations barred Evarone's claims and that there was no evidence to support elements of those claims.

Evarone filed two opposition briefs, as well as declarations from Wentworth and Fenton. Fenton's declaration stated that the construction had caused soil settlement and gravel washout.⁵⁴ Wentworth's declaration stated that, while he was not a vibration expert, he believed vibration from the construction widened cracks that could have allowed surface water to penetrate the underlying soil and cause settlement.⁵⁵ His declaration went on to state that the project's final grading increased water runoff onto the Terri Ann property by about 4 percent.⁵⁶

LCL, Seneca, and Horizon House moved to strike the portions of Wentworth's and Fenton's declarations that contradicted their prior testimony and that were outside their expertise.⁵⁷ The court granted that motion.⁵⁸ During the hearing on the summary judgment motion, the court stated it would "not consider any portions of the declarations for which

⁵³ CP 130, 235, 310.

⁵⁴ CP 605-07.

⁵⁵ CP 690-91.

⁵⁶ CP 691.

⁵⁷ CP 712-23.

⁵⁸ CP 959-60.

exclusion is sought, which in the Court's view, ultimately do, in fact, contradict clear deposition testimony.”⁵⁹

Fruhling moved to strike Evarone's arguments regarding joint and several liability and *res ipsa loquitur* because Evarone had not pleaded either theory.⁶⁰ LCL joined in the motion as to *res ipsa loquitur*.⁶¹ The court granted the motion because the defendants “did not have reasonable notice, based upon the pleadings.”⁶²

The court granted summary judgment to all defendants.⁶³ Evarone moved for reconsideration of the summary judgment orders.⁶⁴ On September 30, 2010, the court denied that motion.⁶⁵ Evarone filed a notice of appeal on October 29, 2010.⁶⁶

IV. Argument

1. Standard of Review

The standard of review on a motion for summary judgment is *de novo*.⁶⁷ A reviewing court will affirm an order granting summary

⁵⁹ RP 5:22–25.

⁶⁰ CP 706–08.

⁶¹ CP 781–82.

⁶² CP 957.

⁶³ CP 961–69.

⁶⁴ CP 970.

⁶⁵ CP 1743.

⁶⁶ CP 1747.

⁶⁷ *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.⁶⁸

A trial court's exclusion of evidence in a summary judgment motion is reviewed for abuse of discretion. Since 1989, the Washington Supreme Court and the Court of Appeals have applied that standard in at least ten published cases.⁶⁹ When interpreting the analogous federal rule,⁷⁰ the Ninth Circuit and other federal courts apply the same standard.⁷¹ This includes cases in which a trial court has stricken a declaration that contradicts prior deposition testimony.⁷²

⁶⁸ *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004).

⁶⁹ *King Cnty. Fire Prot. Dists. Nos. 16, 36 & 40 v. Housing Auth. of King Cnty.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Sherman v. Kissinger*, 146 Wn. App. 855, 870, 873 & n.8, 195 P.3d 539 (2008); *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007); *Am. States Ins. Co. v. Rancho San Marcos Props., LLC*, 123 Wn. App. 205, 214, 97 P.3d 775 (2004); *Int'l Ultimate*, 122 Wn. App. at 744; *Tortes v. King Cnty.*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003); *Stenger v. State*, 104 Wn. App. 393, 407–08, 16 P.3d 655 (2001); *Sun Mountain Prods., Inc. v. Pierre*, 84 Wn. App. 608, 616, 929 P.2d 494 (1997); *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995).

⁷⁰ Decisions interpreting Federal Rule of Civil Procedure 56 are persuasive authority in Washington. See *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

⁷¹ *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011); *Raskin v. Wyatt Co.*, 125 F.3d 55, 67 (2d Cir. 1997); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 824 (5th Cir. 1993).

⁷² See, e.g., *Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 813, 820 (9th Cir. 2002).

In arguing that this court should apply a de novo standard when reviewing the exclusion of evidence in a summary judgment motion, Evarone relies on *Southwick v. Seattle Police Officer John Doe Nos. 1–5*.⁷³ *Southwick* did note that a de novo standard applies to review of an order granting a motion to strike that is made in conjunction with a summary judgment motion.⁷⁴ But the court actually reviewed an order to strike for abuse of discretion.⁷⁵ Its statement regarding the de novo standard is therefore dicta. Moreover, no published Washington case has cited *Southwick*. The weight of authority thus supports reviewing a trial court's order on a motion to strike for abuse of discretion.

A reviewing court will not reverse a trial court decision if it is based on a harmless error.⁷⁶ An error is harmless if it is merely academic, does not prejudice a party's substantial rights, and in no way affects the case's outcome.⁷⁷

⁷³ 145 Wn. App. 292, 186 P.3d 1089 (2008).

⁷⁴ *Id.* at 297.

⁷⁵ *Id.* at 301–02.

⁷⁶ *E.g.*, *Spokane Research & Def. Fund v. Spokane Cnty.*, 139 Wn. App. 450, 459, 160 P.3d 1096 (2007).

⁷⁷ *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010).

2. The statute of limitations bars Evarone's claims for negligence, nuisance, and loss of support.

A. Evarone's claims are time-barred because they accrued more than two years before he commenced this suit.

Evarone's claims for negligence, nuisance, and loss of support should be dismissed as time-barred. The statute of limitations for these claims is two years.⁷⁸ The claims accrue when actionable damage occurs.⁷⁹ To recover, plaintiffs must show that they suffered damage during the limitation period.⁸⁰

These claims are time-barred because no actionable damages occurred within the two years before Evarone filed suit, that is, on or after October 23, 2006. He alleged that his negligence and loss-of-support claims were evidenced by cracks in the Terri Ann, movement of the

⁷⁸ See RCW 4.16.130; *Island Lime Co. v. City of Seattle*, 122 Wash. 632, 635, 211 P. 285 (1922); *White v. King Cnty.*, 103 Wash. 327, 329, 174 P. 3 (1918); *Smith v. City of Seattle*, 18 Wash. 484, 488, 51 P. 1057 (1898); *Wallace v. Lewis Cnty.*, 134 Wn. App. 1, 13, 19, 137 P.3d 101 (2006) (stating that statute of limitations for nuisance and negligent destruction of property is two years). Evarone claims that the statute of limitations for loss-of-support claims is three years. Appellant's Brief at 13 n.4. The one case he cites for that proposition held that the two-year period applied "where the taking is by reason of the sovereign power." *Marshall v. Whatcom Cnty.*, 143 Wn. 506, 507, 255 P. 654 (1927). The defendants are private entities.

⁷⁹ *Wallace*, 134 Wn. App. at 13, 19; *McCoy v. Emrich*, 72 Wn.2d 850, 851-52, 435 P.2d 550 (1968).

⁸⁰ See *Wallace*, 134 Wn. App. at 17.

rockery, soil erosion, and changes in water flow on his property,⁸¹ and that his claims for nuisance were evidenced by vibration and dust.⁸² No evidence shows, however, that these alleged damages arose or worsened during the relevant period.

The evidence did not establish that any cracks caused by construction developed after October 23, 2006. Evarone's engineering expert, Dan Fenton, testified that during his first site visit, on October 28, 2005, he saw concrete cracks that appeared to have been there for years.⁸³ He continued to monitor the cracks after October 28, 2005, but he detected no further cracking, apart from an inexplicable 0.5 millimeter growth that occurred two years after construction ended.⁸⁴ Evarone's geotechnical expert, Todd Wentworth—who was not on the site until August 2009⁸⁵—testified that there were cracks in the slab that pre-dated construction, and that he did not know how much wider, if at all, they became during or after construction.⁸⁶ The trial court properly struck statements in Wentworth's declaration that contradicted that testimony.⁸⁷

⁸¹ CP 536–37.

⁸² CP 538.

⁸³ CP 394, 397–98, 400–02, 502–15, 1592–95.

⁸⁴ CP 392–93, 420–23, 429–31, 433.

⁸⁵ CP 436, 446, 473.

⁸⁶ CP 463–66.

⁸⁷ CP 689–91, 960; section IV.5.

No evidence shows that the construction project changed the water flow on Evarone's property. Wentworth testified that the water-flow conditions and locations were largely the same before and after the construction.⁸⁸ Later, in his declaration, Wentworth stated that the final grading increased water runoff onto Evarone's property by 4 percent.⁸⁹ The court struck this statement because it contradicted Wentworth's prior deposition testimony.⁹⁰ Even if admissible, that statement does not show that the slight increase in water flow caused actual damage.

There is also no evidence the project caused movement in the rockery.⁹¹ Wentworth initially opined that "washout" around the rockery could have been caused by surface water runoff during construction or water infiltrating under or through the segmental block wall into the rockery.⁹² But he later testified that the construction caused little change in surface water flow, and that the upstream surface grading directed water *away* from the segmental block wall, which is directly uphill from the rockery.⁹³ In addition, Wentworth admitted that the segmental block wall

⁸⁸ CP 458-61.

⁸⁹ CP 691.

⁹⁰ CP 960.

⁹¹ CP 536.

⁹² CP 475.

⁹³ CP 458-61.

is on Horizon House's property,⁹⁴ so Evarone can hardly claim that he is injured by a loss of support for that structure.

Finally, Evarone felt vibrations for a few days during demolition, which occurred at the beginning of the project.⁹⁵ Evarone presented LCL with bills for cleaning dust from his property well before October 23, 2006.⁹⁶ In sum, Evarone's claims are time-barred because none of the alleged damage occurred in the two years before he filed suit.

B. Oja's project-completion rule does not delay the accrual of Evarone's claims.

Evarone contends that his claims did not accrue until the Horizon House construction project was completed, citing *Vern J. Oja & Associates v. Washington Park Towers, Inc.*⁹⁷ In that case, Washington Park retained a general contractor to construct a building next to Oja's building.⁹⁸ Subcontractors performed pile driving from 1966 to 1968, and the construction was completed in 1969. In 1971, Oja sued Washington Park and the contractors for damage caused by the pile driving. A jury returned a verdict against Washington Park. On appeal, Washington Park argued that Oja's claim was stale because it accrued when Oja learned of

⁹⁴ CP 440-41.

⁹⁵ CP 373-74.

⁹⁶ CP 245, 594, 596.

⁹⁷ 89 Wn.2d 72, 569 P.2d 1141 (1977).

⁹⁸ *Id.* at 74.

the damage in 1966, and Oja did not file for another five years.⁹⁹ The court disagreed, stating that in cases involving damage to real property arising out of construction or activity on adjacent property, the claim accrues when construction is completed. The court reasoned that “a different rule would force a plaintiff to seek damages in installments in order to comply with the statute of limitations.”¹⁰⁰

Oja is not binding here. First, *Oja* involved only a trespass claim, and not claims for negligence, nuisance, or loss of lateral support. The *Oja* opinion does not identify the claim before it, but in *Bradley v. American Smelting & Refining Co.* the Washington Supreme Court suggested that it was a trespass claim.¹⁰¹ *Oja* also applied a three-year statute of limitations, which applies to trespass claims but not claims for loss of support, negligent destruction of property, or nuisance.¹⁰² Moreover, in the 33 years since the *Oja* decision, no published Washington case has cited that decision for the project-completion rule, much less applied it.¹⁰³

While *Oja* has not been explicitly overturned, it has been superseded by the theory of continuing trespass as set forth in *Bradley*.

⁹⁹ *Id.* at 75.

¹⁰⁰ *Id.* at 76.

¹⁰¹ 104 Wn.2d 677, 692, 709 P.2d 782 (1985).

¹⁰² *See* footnote 78.

¹⁰³ Evarone notes that an unpublished 2003 case refers to *Oja*, but he cannot cite that case as authority. GR 14.1(a).

There, the Supreme Court held that a claim for continuing trespass accrues when the trespass causes substantial harm and is abatable.¹⁰⁴ A trespass is reasonably abatable if the defendant can take curative action to stop the continuing damage.¹⁰⁵ The alleged trespass here was a continuing one because it could have been cured during construction. Because the trespasser is under a continuing duty to end the trespass, sequential claims for continuing trespass persist until the trespass ceases.¹⁰⁶ Only damages occurring within the limitation period are actionable. This approach is contrary to *Oja*, which stated that, to avoid sequential claims, accrual does not occur until the trespass ends.

Evarone tries to distinguish *Bradley* by arguing that it involved the deposit of airborne particles, rather than, as here, a construction project. But *Bradley* did not limit its holding to the facts before it. And it has been cited in cases that are factually similar to this one.¹⁰⁷

¹⁰⁴ 104 Wn.2d at 693.

¹⁰⁵ See *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 125–26, 977 P.2d 1265 (1999). One example of a continuing trespass is periodic flooding due to defective construction of a drainage system. *Id.* at 126.

¹⁰⁶ See *Bradley*, 104 Wn.2d at 693–94; *Wallace*, 134 Wn. App. at 15.

¹⁰⁷ E.g., *Wallace*, 134 Wn. App. at 15 (involving operation of tire-disposal business); *Fradkin*, 96 Wn. App. at 124 (involving property owner’s claim for continuing trespass against contractor that had excavated property for sewer line).

Contrary to Evarone's arguments, *Pepper v. J.J. Welcome Construction Co.*¹⁰⁸ also supports the respondents' position. In *Pepper*, the plaintiff landowners sued their neighbors and others for trespass and nuisance, alleging that the construction of a drainage system, which was completed in 1983, had caused runoff onto plaintiffs' land.¹⁰⁹ The trial court dismissed as untimely claims for damages based on invasions occurring more than three years before plaintiffs filed suit.¹¹⁰ The Court of Appeals rejected the plaintiffs' argument that the statute of limitations should have been tolled until the construction project was complete so that they could determine the extent of their damages before filing suit—that is, the plaintiffs attempted to rely on the project-completion rule.¹¹¹ The court instead held that the claims of one plaintiff accrued when he first discovered damage in 1978,¹¹² and that the other plaintiff's claim accrued when he learned of damage in 1981.¹¹³

Evarone tries to distinguish *Pepper* by claiming that it involved two projects: a grading project begun in 1978 and a construction project begun in 1981 or 1982. But the court made no such distinction; in its

¹⁰⁸ 73 Wn. App. 523, 871 P.2d 601 (1994), *abrogated in part on other grounds, Phillips v. King Cnty.*, 87 Wn. App. 468, 943 P.2d 306 (1997).

¹⁰⁹ 73 Wn. App. at 528.

¹¹⁰ *Id.* at 538.

¹¹¹ *Id.* at 538–39.

¹¹² *Id.*

¹¹³ *Id.* at 539.

discussion of the claims' timeliness, it referred to "*the* construction project."¹¹⁴ Its opinion also made it clear that the claims of one of the plaintiffs, Pepper, were partly time-barred as to the entire project because he first learned of the damage in 1978:

Pepper/Jaffe's cause of action accrued when they discovered they had incurred substantial injury to their property caused by the flow of surface water from Novelty Hill. . . . There is no dispute that Pepper knew of this damage as early as 1978 and throughout the following years. Thus, the statute of limitations began to run as to Pepper's damages in 1978. He filed suit in October 1986; the statute had run as to damages that occurred prior to the 3 years preceding his filing suit (prior to October 1983).¹¹⁵

The other plaintiff, Jaffe, knew of the alleged damage in 1981, so his claim was similarly limited.¹¹⁶ Under *Pepper*, only damages occurring within the limitation period are actionable, and accrual takes place when damages occur or are discovered, not when a project is completed.

Evarone also claims that this court cannot disregard clearly binding authority from the state's highest court. That is true, as far as it goes. *Oja* is not, however, clearly binding authority. *Bradley* set forth a different approach to the accrual of claims for damage to property, and *Pepper* applied that approach in a construction case similar to the one here. Moreover, *Oja* runs counter to more recent precedent stating that a

¹¹⁴ *Id.* at 538.

¹¹⁵ *Id.* at 539 (citation omitted).

¹¹⁶ *Id.* at 539–40.

landowner's claims against an adjacent landowner for property damage accrue when damage occurs or is discovered.¹¹⁷ The trial court correctly determined that Evarone's claims accrued when the alleged damage occurred, and not when the construction project ended.

3. Evarone cannot rely on res ipsa loquitur to establish his claims.

A. The court did not err when it barred Evarone from relying on res ipsa loquitur.

The trial court correctly struck Evarone's arguments regarding res ipsa loquitur because Evarone had not put the defendants on notice that he would rely on that doctrine. Pleadings must give an opposing party notice of a claim and ground upon which it rests.¹¹⁸ In his pleadings, Evarone failed to put the defendants on notice that he would rely on res ipsa loquitur to establish his claims. Allowing Evarone to insert this theory into his summary judgment briefing would have prejudiced the defendants.

¹¹⁷ See, e.g., *Wallace*, 134 Wn. App. at 13 (stating that action for negligent injury to real property accrues "when the plaintiff suffers some form of injury to his real property"); *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000) (stating that plaintiff's claim for contamination caused by operation of cement kiln accrued on discovery of contamination); *Fradkin*, 96 Wn. App. at 122 (stating that claim for permissive waste accrued when plaintiff learned of damage); cf. *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 125, 89 P.3d 242 (2004) (stating, in construction-defect case, that negligence claim accrues when plaintiff suffers injury).

¹¹⁸ *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469–70, 98 P.2d 827 (2004).

B. Any error in striking res ipsa loquitur was harmless because that doctrine does not apply here.

Even if the court erred when it struck Evarone's arguments regarding res ipsa loquitur, that error was harmless because that doctrine is inapplicable here. Whether res ipsa loquitur applies to a particular case is a question of law.¹¹⁹ "The doctrine is to be used sparingly because it, in effect, spares the plaintiff the necessity of establishing a complete prima facie case against the defendant."¹²⁰ It applies only if (1) the occurrence producing the injury is of a kind that ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an instrumentality in the defendant's exclusive control, and (3) the occurrence is not due to any voluntary action or contribution on the part of the plaintiff.¹²¹

The first element is satisfied if one of three conditions is met: (1) the injury-causing act is so palpably negligent that it may be inferred as a matter of law, e.g., amputation of a wrong limb; (2) general experience teaches that the result would not be expected without negligence; and (3)

¹¹⁹ *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

¹²⁰ *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 177, 947 P.2d 1275 (1997).

¹²¹ *Id.*

proof by experts creates an inference that negligence caused the injuries.¹²²

In addressing the first element, Evarone devotes no argument to the first or third conditions. They are clearly not satisfied here. The acts allegedly causing the damage, unlike amputating the wrong limb, are far from palpably negligent. And Evarone has never offered expert opinion that would support an inference of negligence.¹²³

Evarone attempts to satisfy the first element's second condition by arguing that general experience shows that "fresh cracking and settlement on a property adjacent to a building site would not normally occur in the absence of someone's negligence."¹²⁴ As a preliminary matter, Evarone has not cited admissible evidence of soil settlement. He relies on Fenton and Wentworth's declarations, but the trial court correctly struck the portions of those declarations relating to soil settlement.¹²⁵ While there is evidence of cracks that grew by millimeters,¹²⁶ general experience shows that concrete often develops cracks in the absence of negligence. Long before the Horizon House construction began, the Terri Ann's concrete

¹²² *Pacheco*, 149 Wn.2d at 438–39.

¹²³ CP 406–07, 432, 445 (Wentworth testimony that report contained final opinions), 472–76 (Wentworth's final report).

¹²⁴ Appellant's Brief at 29–30.

¹²⁵ CP 603–08, 689–91, 959–60.

¹²⁶ CP 401–02.

slab had developed many large cracks¹²⁷ and the retaining wall on the property's southwest corner had toppled and fractured.¹²⁸ Moreover, both of Evarone's experts confirmed that concrete cracking is a normal process. Fenton noted in his declaration, "the physical properties of concrete are such that once concrete has been cracked, the cracks will continue to widen until the concrete is either repaired or replaced."¹²⁹ Wentworth similarly testified, "cracking is common in concrete, especially in large slabs."¹³⁰ The Terri Ann developed cracks long before the Horizon House construction took place, and those cracks grew over time because of natural forces and not because of anyone's negligence. Because Evarone cannot establish the first element of *res ipsa loquitur*, he cannot rely on that doctrine.

Evarone also fails to satisfy the second element, exclusive control of the injury-causing instrumentality. Any number of instrumentalities outside the respondents' control could have contributed to the alleged damages. Vibrations from traffic on Evarone's own property or the adjacent streets could have disturbed the Terri Ann, the Terri Ann's own

¹²⁷ CP 396–98, 400–02, 463–66, 502–15, 1592–95.

¹²⁸ CP 476 (noting that "the original site plan shown in [subcontractor Coughlin Porter Lundeen's] 2008 letter shows the 8-inch concrete wall as broken and located north of the property line, so the retaining wall may well have failed prior to construction."), 1592–95.

¹²⁹ CP 608. This portion of his declaration was not stricken. CP 960.

¹³⁰ CP 464.

weight could have caused underlying soils to settle, and rainfall could have caused settlement or sloughing. The second condition is also unsatisfied for another reason. To satisfy this element, “there must be a corresponding lack of control by the injured party to take action on his own behalf to avert the injury.”¹³¹ Evarone had control over his property, and he could have taken and did take measures to avert the alleged damage.¹³²

4. The trial court properly disregarded Evarone’s arguments regarding joint and several liability.

Any error in the trial court’s decision to strike Evarone’s arguments regarding joint and several liability is harmless because that doctrine would not have affected the outcome of the summary judgment motion.

In his appellate brief, Evarone does not address why the application of joint and several liability justifies reversing the trial court’s summary judgment orders. That doctrine had no bearing on summary judgment. Joint and several liability addresses how liability is apportioned among defendants against whom judgment has been entered.¹³³ Until

¹³¹ *Cusick v. Phillippi*, 42 Wn. App. 147, 155, 709 Wn. App. 1226 (1985).

¹³² CP 605 (referring to installation of steel support plate).

¹³³ *See* RCW 4.22.070(1)(b); *see also Kottler v. State*, 136 Wn.2d 437, 446, 963 P.2d 834 (1998).

judgment is entered against two or more defendants, there is no fault to apportion.

The two arguments Evarone made to the trial court regarding summary judgment also do not support reversal. Evarone first argued that the defendants had the burden of segregating damages between them,¹³⁴ citing *Phennah v. Whalen*¹³⁵ and *Cox v. Spangler*.¹³⁶ Both cases make it clear, however, that the burden of apportionment shifts to the defendants only after a plaintiff has established fault, proximate cause, and damage. *Phennah* held that “once a plaintiff has proved that each successive negligent defendant has caused some damage, the burden of proving allocation of those damages among themselves is upon the defendants; if the jury finds that the harm is indivisible, then the defendants are jointly and severally liable.”¹³⁷ Similarly, in *Cox*, the parties had stipulated that the defendant was negligent, and the instructions advised the jury that the burden would shift only after the plaintiff had shown proximate cause.¹³⁸ In contrast to *Phennah* and *Cox*, Evarone did not present admissible evidence showing that any defendant was negligent.¹³⁹

¹³⁴ CP 669–72.

¹³⁵ 28 Wn. App. 19, 621 P.2d 1304 (1980).

¹³⁶ 141 Wn.2d 431, 5 P.3d 1265 (2000).

¹³⁷ 28 Wn. App. at 29.

¹³⁸ 141 Wn.2d at 436, 442–43.

¹³⁹ Section IV.6.

Evarone also argued below that the defendants were jointly and severally liable because they acted “in concert” as that term is used in RCW 4.22.070(1)(a).¹⁴⁰ Acting in concert is, however, a narrower concept than Evarone realized; it means consciously acting together in an unlawful manner.¹⁴¹ A plaintiff must show a tacit agreement among the defendants to act in concert.¹⁴² In his appellate brief and in the trial court, Evarone did not even attempt to make that showing. Moreover, the combined negligence of the various responsible parties at a construction site does not constitute action in concert.¹⁴³

5. The trial court properly struck portions of the declarations of Evarone’s expert witnesses.

A. A trial court should disregard a declaration that contradicts a witness’s prior deposition testimony.

The court properly struck the portions of Fenton’s and Wentworth’s declarations that contradicted their prior testimony. When a party has given clear answers to unambiguous deposition questions that negate the existence of any genuine issue of material fact, that party cannot later create such an issue with an affidavit that merely contradicts,

¹⁴⁰ CP 671, 673–74.

¹⁴¹ *Kottler v. State*, 136 Wn.2d 437, 448, 963 P.2d 834 (1998).

¹⁴² *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 832, 166 P.3d 1263 (2007), *review denied*, 163 Wn.2d 1045, 187 P.3d 271 (2008).

¹⁴³ *See Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wn. App. 480, 486, 878 P.2d 1246 (1994), *rev’d on other grounds*, 128 Wn.2d 745, 912 P.2d 472 (1996).

without explanation, previously given clear testimony.¹⁴⁴ Similarly, a party opposing summary judgment cannot rely on a declaration from an expert witness that contradicts that witness's prior deposition testimony.¹⁴⁵ If a party files such a declaration, the court should disregard it.¹⁴⁶ A court should strike documents from a summary judgment record that do not conform to the rules.¹⁴⁷

Evarone argues that the trial court, rather than striking the declarations, should have considered them as well as other evidence to determine if there was a genuine issue of material fact. The only authority he cites for this contention is a series of cases from Division Two: *Beers v. Ross*,¹⁴⁸ *State Farm Mut. Auto. Ins. Co. v. Treciak*,¹⁴⁹ and *Schonauer v. DCR Entertainment, Inc.*¹⁵⁰ To the extent these cases are interpreted to hold that a declaration contradicting prior sworn testimony without explanation may create an issue of fact, they conflict with binding

¹⁴⁴ *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002); *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

¹⁴⁵ See *Marthaller v. King Cnty. Hosp. Dist. No. 2*, 94 Wn. App. 911, 918–19, 973 P.2d 1098 (1999).

¹⁴⁶ *Ramos v. Arnold*, 141 Wn. App. 11, 19, 169 P.3d 482 (2007); see also *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 112, 992 P.2d 511 (1999).

¹⁴⁷ *Raymond v. Pacific Chem.*, 98 Wn. App. 739, 744, 992 P.2d 517 (1999), *rev'd on other grounds*, 143 Wn.2d 349, 20 P.3d 921 (2001); *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987).

¹⁴⁸ 137 Wn. App. 566, 154 P.3d 277 (2007).

¹⁴⁹ 117 Wn. App. 402, 71 P.3d 703 (2003).

¹⁵⁰ 79 Wn. App. 808, 905 P.2d 392 (1995).

authority from this Court and the Washington Supreme Court.¹⁵¹ In fact, these cases hold that a declaration that is inconsistent with a witness's earlier deposition testimony and that was offered without explaining the inconsistency cannot create a genuine issue of fact.¹⁵² In this case, the trial court, in keeping with these cases, considered the declarations to determine if they contradicted prior deposition testimony without explanation. It concluded they did.¹⁵³

B. The court properly struck and disregarded the declarations because they contradicted prior deposition testimony.

The trial court properly disregarded portions of Fenton's and Wentworth's declarations because they flatly contradicted their prior deposition testimony. That decision is reviewed for abuse of discretion.¹⁵⁴

In his deposition, Fenton testified several times that he would not provide any opinions regarding earth movement because he lacked expertise in that subject:

Q. The movement of earth, would you say that is more for a geotech to opine on or is this something that you believe you have expertise on?

A. The geotech would be the person to really comment on that.

¹⁵¹ *Overton*, 145 Wn.2d at 430; *Ramos*, 141 Wn. App. at 19.

¹⁵² *Treciak*, 117 Wn. App. at 408; *Schonauer*, 79 Wn. App. at 818.

¹⁵³ CP 959-60; RP 5:22-25.

¹⁵⁴ See section IV.1.

Q. So in any of the pictures where there is what you claim to be washout or movement, that is something that you are not going to be giving an opinion on, right?

A. That is correct. What I would be doing is just saying what I see out there at the time I took the pictures, but not—yeah.¹⁵⁵

...

Q. You have neither done any measurements nor have the expertise to talk about earth movement, do you?

A. That is a fair statement.¹⁵⁶

...

Q. And again, not being a geotech, would you—you wouldn't be able to testify as to any earth movement that would be occurring two years after the finish of construction, would you?

A. The earth—I would not testify as to the earth movement. The geotech should testify to that.¹⁵⁷

More specifically, he testified that he would provide no opinions about earth movement around the cracked retaining wall, the rockery, or the segmental block wall,¹⁵⁸ and that he would not opine on gravel washout.¹⁵⁹

Although he repeatedly testified that he would not provide any opinions about earth movement, he did precisely that when he stated in his declaration that respondents' construction activity caused soil

¹⁵⁵ CP 736.

¹⁵⁶ CP 737.

¹⁵⁷ CP 743.

¹⁵⁸ CP 736–45.

¹⁵⁹ CP 732–34, 741–42.

settlement.¹⁶⁰ And although he testified he would not opine on washout or on settlement around the cracked retaining wall or the segmental block wall, he set forth opinions about those very subjects in his declaration.¹⁶¹ Evarone has never tried to explain these contradictions.

Wentworth's declaration also clearly contradicts his earlier testimony. During his deposition, he said he did not know how much the project caused cracks to widen.¹⁶² In his declaration, by contrast, he stated that he saw cracks that had opened wider because of construction vibration.¹⁶³ He also testified that he did not know if, before construction, the cracks in the slab on grade were large enough to allow water into the underlying soil and cause settlement.¹⁶⁴ But in his declaration, he stated that these openings could allow surface water runoff to infiltrate the underlying soil and cause settlement.¹⁶⁵ Evarone sets forth no explanation for these contradictions.

The statements in Wentworth's declaration regarding water-flow changes also contradict his deposition testimony. In his deposition, he agreed with another expert's statement that the construction caused only a

¹⁶⁰ CP 605–07 (Fenton decl. ¶¶ 9, 11, 17, 18, 20).

¹⁶¹ CP 606–07 (Fenton decl. ¶¶ 12–15).

¹⁶² CP 778–780.

¹⁶³ CP 690 (Wentworth decl. ¶ 4).

¹⁶⁴ CP 778–79.

¹⁶⁵ CP 690–91 (Wentworth decl. ¶ 6).

“negligible amount of additional surface flow onto the Terry Anne property” and that “[s]urface runoff from the re-development essentially mimics the original pre-developed flow conditions and locations.”¹⁶⁶ In his declaration, Wentworth states that the final grading of the project increased water runoff onto Evarone’s property by approximately 4 percent.¹⁶⁷ To the extent it was his opinion that the alleged 4 percent increase in water flow was significant, that opinion contradicted his deposition testimony and was properly stricken. If, however, he believed the change was insignificant, then it does not support Evarone’s claims.

C. The trial court properly struck portions of Fenton’s and Wentworth’s declarations because they lacked relevant expertise.

Evarone contends that Fenton’s experience as a structural engineer made him qualified to opine about vibration and soil movement. But Fenton’s deposition testimony belies this claim. He testified many times that, because he was not a geotechnical engineer, he was not qualified to discuss earth movement.¹⁶⁸ He also admitted he was not a vibration

¹⁶⁶ CP 769, 773–74.

¹⁶⁷ CP 691 (Wentworth decl. ¶ 7).

¹⁶⁸ CP 736, 737, 743.

expert.¹⁶⁹ The trial court had discretion to exclude testimony from Fenton regarding that issue.¹⁷⁰

Evarone further claims that Wentworth was qualified to address settling caused by vibration and its effect on nearby structures. As with Fenton, Wentworth's own statements undercut Evarone's position. Wentworth admitted that he is "not a vibrations expert[.]"¹⁷¹ He is therefore unqualified to express opinions about vibrations and any damage they may have caused to Evarone's property.

Evarone goes on to argue that Fenton and Wentworth were qualified to consult industry standards and other experts. But Evarone cites nothing in the record showing that either expert actually consulted other sources or what opinions they could render by doing so.

¹⁶⁹ CP 1597.

¹⁷⁰ See *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) (stating that trial court's determination of expert's qualifications will not set aside only for abuse of discretion); see also *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 51, 738 P.2d 665 (1987) (finding no error with trial court's exclusion of engineer's testimony in part because engineer had almost no experience with type of engineering at issue); *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 735–36, 959 P.2d 1158 (1998) (finding no abuse of discretion in excluding expert testimony regarding warnings in part because expert admitted he was not expert in warnings), *rev'd on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999).

¹⁷¹ CP 691 (Wentworth decl. ¶ 9).

6. The trial court properly entered summary judgment because the defendants demonstrated a lack of evidence to support elements of Evarone’s claims.

Evarone devotes almost no argument to whether there are genuine issues of material fact regarding each of his claims. A review of the record shows that there is an absence of evidence to support essential elements of those claims. The respondents were therefore entitled to summary judgment.¹⁷²

A. The trial court properly dismissed the negligence claim because no evidence established the standard of care or the breach of any standard.

The trial court properly dismissed Evarone’s claim for negligent destruction of property because no evidence supported two elements of that claim: the standard of care and the breach of that standard.¹⁷³ “In general, expert testimony is required when an essential element in the case is best established by opinion that is beyond the expertise of a lay person.”¹⁷⁴ The standard of care applicable to the demolition, excavation,

¹⁷² Evarone pleaded claims for negligence, trespass, nuisance, loss of support, and diminution in value. CP 536–38. Evarone has conceded that diminution in value is not a viable claim. Appellant’s Brief at 8 n.2.

¹⁷³ *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 566, 213 P.3d 619 (2009) (setting forth elements of negligence claim as duty, breach, causation, and damages), *review denied*, 168 Wn.2d 1007, 226 P.3d 781 (2010).

¹⁷⁴ *Ripley v. Lanzer*, 152 Wn. App. 296, 324, 215 P.3d 1020 (2009); *see also Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 494, 183 P.3d 283 (2008) (“The standard of care required of a professional practitioner must

and construction of multi-story buildings is beyond the expertise of a layperson.¹⁷⁵ Evarone therefore had to present expert testimony defining the standard of care and explaining how the defendants failed to meet that standard.

Evarone failed on both counts. In their depositions, Fenton and Wentworth expressed no opinions about the appropriate standard or its breach.¹⁷⁶ Their declarations are similarly lacking. In those declarations, the closest Fenton and Wentworth came to expressing opinions about the standard of care was to say that the defendants should have installed vibration sensors.¹⁷⁷ They cannot, however, provide such testimony about the standard of care because both testified that they would not do so.¹⁷⁸ Moreover, both admitted that they had no expertise in vibrations,¹⁷⁹ so the trial court properly disregarded their opinions on that issue. Even if their

be established by the testimony of an expert who practices in the same field.”).

¹⁷⁵ See *Hudson v. Santangelo*, 492 S.E.2d 673, 677 (Ga. Ct. App. 1997) (holding that standard of care for construction must be established through expert testimony); *Levy v. Schnabel Found. Co.*, 584 A.2d 1251, 1255 (D.C. 1991) (holding expert testimony required to establish the standard of care for “sheeting, shoring and underpinning” a building during construction).

¹⁷⁶ CP 406–07, 432, 445, 472–76.

¹⁷⁷ The trial court struck this portion of Wentworth’s declaration, paragraph 9, as without foundation. CP 960. It did not strike the analogous paragraph of Fenton’s declaration, paragraph 19. *Id.*

¹⁷⁸ See section IV.5.

¹⁷⁹ CP 691, 1597.

declarations were admissible, they fail to articulate how installing the sensors would have avoided the alleged damage, instead leaving it to the imagination. Fenton stated, “If [vibration] monitoring had occurred, one can imagine how the defendants could have adjusted their activities to prevent damages caused to Mr. Evarone’s property from the excessive vibrations.”¹⁸⁰ Such conclusory statements are insufficient to create a genuine issue of material fact.¹⁸¹ In any event, contractors did monitor the construction site before and during construction and detected negligible movement.¹⁸²

Evarone also argued below that the defendants breached the standard of care because they failed to install a drain in the segmental block wall.¹⁸³ To support that argument, he cited paragraphs 13 and 14 of Fenton’s declaration, the critical portions of which the trial court correctly struck.¹⁸⁴ Moreover, those paragraphs do not even mention installing a drain in that wall.¹⁸⁵

¹⁸⁰ CP 607, 691 (“I am not aware of any vibration monitoring done by any of the defendants in this case. It certainly appears that if such monitoring had occurred, the damages caused to Mr. Evarone’s property very well might have been avoided.”).

¹⁸¹ *See Overton*, 145 Wn.2d at 430.

¹⁸² CP 543, 598.

¹⁸³ CP 683–84.

¹⁸⁴ CP 960.

¹⁸⁵ CP 606.

The defendants not only showed an absence of evidence supporting Evarone's position, they also demonstrated that they acted with reasonable care. As noted above, Seneca's contractors detected only negligible movement in the Terri Ann and surrounding soils.¹⁸⁶ Hart Crowser measured for potential erosion, but detected none.¹⁸⁷ Hart Crowser's geotechnical site study recommended that the contractors who performed the construction take various steps to avoid erosion and soil movement.¹⁸⁸ At the project's end, Hart Crowser concluded that the contractors had followed those recommendations.¹⁸⁹ Given the evidence of the defendant's due care and the absence of evidence demonstrating a breach of any standard, Evarone's negligence claim fails as a matter of law.¹⁹⁰

B. The defendants demonstrated a lack of evidence to support Evarone's trespass claim.

The trial court correctly dismissed Evarone's trespass claim because he failed to come forward with evidence creating an issue of fact

¹⁸⁶ CP 598.

¹⁸⁷ CP 543.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 607, 779 P.2d 281 (1989) (upholding dismissal of negligence claim where testimony from plaintiff's expert did not set forth specific facts and opinions to support claim); *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 797-98, 929 P.2d 1209 (1997) (dismissing negligence claim because plaintiff "failed to make out a prima facie case of negligence against Nordstrom by alleging specific, nonconclusory facts" regarding the elements of her claim).

as to each element of that claim. Those elements are (1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages.¹⁹¹

In the trial court, Evarone maintained that the defendants acted with intent because they knew to a substantial certainty that their activity would damage his property.¹⁹² He did not, however, cite any evidence to show that any defendant knew the construction work would damage Evarone's property.¹⁹³

Evarone tried to establish an issue of fact as to the third element, foreseeability, by stating that the defendants could have anticipated that using large equipment to demolish concrete from the old Horizon House building would cause vibrations to travel into nearby fill soils.¹⁹⁴ The only evidence he cited was paragraph 10 of Wentworth's declaration, but that declaration has only nine paragraphs, and they do not discuss foreseeability or the use of large equipment.¹⁹⁵

¹⁹¹ *Grundy*, 151 Wn. App. at 567–68.

¹⁹² CP 675–76.

¹⁹³ *Id.*

¹⁹⁴ CP 676.

¹⁹⁵ CP 691.

Evarone also failed to establish the final element, actual and substantial damages.¹⁹⁶ Examples of non-actionable damages include minor water intrusion, the collection of debris, and yellowed grass.¹⁹⁷ None of his alleged damages rise to the level of actual and substantial damages:

- **Construction dust.** Like the debris and yellowed grass in *Grundy*, the dust was merely transitory and caused no lasting damage.¹⁹⁸
- **Cracks.** Fenton testified that the cracks grew only by millimeters,¹⁹⁹ and Wentworth does not know how much or when the cracks grew.²⁰⁰
- **Change in surface water flows.** Wentworth testified that the water flow conditions and locations were largely the same before and after the construction.²⁰¹
- **Soil movement.** Wentworth did not identify any soils that traveled from the Horizon House property onto the Terri Ann property. He noted that rebar or stakes driven into the ground were not vertical,

¹⁹⁶ *Grundy*, 151 Wn. App. at 567–68; *Bradley*, 104 Wn.2d at 692 (stating that plaintiff who cannot make this showing “should be subject to dismissal of his cause upon a motion for summary judgment”).

¹⁹⁷ *See Grundy*, 151 Wn. App. at 568.

¹⁹⁸ CP 369–70, 594, 596.

¹⁹⁹ CP 401–02.

²⁰⁰ CP 463–66.

²⁰¹ CP 458–61.

but he could not attribute that condition to soil movement.²⁰² He also did not know whether the construction caused any damage to the fractured retaining wall on the property's southwest corner.²⁰³

- **Overspray.** Evarone alleged that the defendants caused a waterproof sealant spray to drift onto his property and stick to the Terri Ann's awnings.²⁰⁴ He testified, however, that the sealant is colorless and that there is no evidence that it will shorten the awnings' useful life.²⁰⁵

The trial court correctly dismissed this claim because no evidence supported three of its elements.

C. No evidence supports Evarone's nuisance claim.

The trial court properly dismissed Evarone's nuisance claim because the defendants showed an absence of evidence to support that claim. To establish his nuisance claim, Evarone had to show that the defendants unlawfully did some act, or failed to perform a duty, that unreasonably interfered with his use and enjoyment of his property.²⁰⁶

²⁰² CP 456–57.

²⁰³ CP 442–44.

²⁰⁴ CP 348.

²⁰⁵ CP 370–71.

²⁰⁶ See RCW 7.48.120; *Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998).

Evarone did not establish that the defendants failed to perform some duty. In the trial court, he failed to define the specific standard applicable to the construction or show how the defendants' activity breached that standard. Evarone's expert witnesses have no opinions about whether the defendants fell below the standard of care.²⁰⁷ Without such a showing, Evarone cannot maintain his nuisance claim.²⁰⁸

He also failed to set forth evidence showing that the defendants interfered with his use and enjoyment of property:

- He first claimed that the defendants committed a nuisance by causing vibrations that disturbed residents and prompted them to move.²⁰⁹ The cited portion of Evarone's deposition only discusses his own perception of vibrations, not the residents'.²¹⁰ He cited no evidence of lost rent or complaints from residents.²¹¹
- Evarone argued that vibrations from the site caused soil movement and concrete cracks and that the defendants caused excess water

²⁰⁷ CP 406–07, 432, 445, 472–76.

²⁰⁸ *Cf. Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 487–88, 778 P.2d 534 (1989) (dismissing nuisance claim where plaintiff could not show that construction of adjacent building was unreasonable).

²⁰⁹ CP 681–82.

²¹⁰ CP 373–74.

²¹¹ CP 681–82.

runoff.²¹² The court properly struck the expert declarations he cited for this contention.²¹³

- He claimed that the defendants' activity created noise, citing the deposition of former LCL employee Larry Bjork.²¹⁴ Bjork testified that "[a] project like this would create noise, yes," which hardly shows that the noise amounted to a nuisance.²¹⁵
- He maintained that dust traveled onto his property,²¹⁶ citing Bjork's statement that "there was dust."²¹⁷ This does not show that the dust rose to the level of a nuisance.
- Finally, he maintains that overspray was a nuisance.²¹⁸ He cites no supporting evidence for this claim, and he testified that the overspray was colorless and did not shorten the awnings' life.²¹⁹

Because the record contains no evidence supporting either element of Evarone's nuisance claim, this Court should affirm summary judgment on that claim.

²¹² CP 681 (citing Fenton decl. ¶¶ 9, 13, 15, 18 and Wentworth decl. ¶¶ 5, 6, 10).

²¹³ CP 960.

²¹⁴ CP 681.

²¹⁵ CP 638.

²¹⁶ *Id.*

²¹⁷ CP 637

²¹⁸ *Id.*

²¹⁹ CP 370-71.

D. Evarone's claim for loss of lateral support was properly dismissed because there is no evidence showing his property would have subsided if it were in its natural state.

A landowner can recover for loss of lateral support only if his land subsides because of its own weight and not because of the weight of the buildings or other improvements on that land.²²⁰ The plaintiff has the burden of establishing the land would have subsided even without improvements.²²¹

Evarone's claim fails because there is no evidence that his property would have subsided even if there had been no improvements on it. Evarone has a right to support of his land only in its natural state, which excludes not only the apartment building, the rockery, the retaining wall, and other structures, but also much of the fill on which those structures rest.²²² Wentworth's final report does not address this issue at all, nor does his deposition testimony.²²³ Fenton is unqualified to testify about soil

²²⁰ *Klebs v. Yim*, 54 Wn. App. 41, 46, 772 P.2d 523 (1989); *Simons v. Tri-State Constr. Co.*, 33 Wn. App. 315, 319, 655 P.2d 703 (1982).

²²¹ See *Klebs*, 54 Wn. App. at 47; *Simons* 33 Wn. App. at 321 (reversing summary judgment on liability to plaintiff because plaintiff had failed to establish that his soil settled by its own weight and not because of superimposed weight of the buildings).

²²² CP 447-49, 467-68, 472-76 (stating that fill supported retaining wall and part of slab on grade); *Bay v. Hein*, 9 Wn. App. 774, 777, 515 P.2d 536 (1973) (stating that landowner lacks right to support of fill).

²²³ CP 445, 472-76.

movement and subsidence,²²⁴ and in any event, he presented no opinion about whether the land would have subsided in the absence of improvements.

7. The dismissal of Evarone's trespass and nuisance claims should be affirmed because they duplicate his negligence claim.

Evarone's claims for trespass and nuisance were properly dismissed not only because they lacked evidentiary support, but also because they restate his negligence claim. In several recent cases, Washington courts have dismissed nuisance or trespass claims where a plaintiff essentially alleged that the defendant's negligence had caused damage to real property.²²⁵ This is true even if a negligence claim is dismissed on other grounds.²²⁶

²²⁴ CP 428.

²²⁵ *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 527–28, 799 P.2d 250 (1990); *Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002); *Kaech v. Lewis Cnty. Pub. Util. Dist. No. 1*, 106 Wn. App. 260, 281, 23 P.3d 529 (2001); *Lewis v. Krussel*, 101 Wn. App. 178, 182–83, 2 P.3d 486 (2000); *see also Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 515, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009); *Pruitt v. Douglas Cnty.*, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003).

²²⁶ *See Atherton*, 115 Wn.2d at 526–28 (dismissing nuisance claim because it arose from same facts as negligence claim, even though negligence also barred on other grounds); *Lewis*, 101 Wn. App. at 182–83 (dismissing nuisance claim as duplicative and dismissing negligence claim because defendant had no duty to plaintiff); *see also Sourakli*, 144 Wn. App. at 507–15 (dismissing nuisance claim because it rested on same facts as negligence claim, and dismissing negligence claim because plaintiff could not establish that defendants had duty).

This principle is illustrated in *Pepper v. J.J. Welcome Construction Co.*,²²⁷ where the plaintiffs alleged that the defendants' construction activity had increased runoff and sediment deposits on the plaintiffs' property.²²⁸ The plaintiff sued the defendants for, among other things, trespass, nuisance, and negligence.²²⁹ The appellate court upheld the dismissal of the trespass and nuisance claims because they arose from the same facts as his negligence claim—the deposit of mud, gravel, and silt.²³⁰ The court concluded that the plaintiff had a single negligence claim with multiple theories.

Like the plaintiff in *Pepper*, Evarone asserted what amounts to a negligence claim under the guise of nuisance and trespass. All three claims arise from the defendants' construction activity, and all allege the same or similar damage. For instance, Evarone cited soil movement or erosion as a basis for both his trespass and negligence claims, and vibration as a basis for the nuisance and negligence claims.²³¹ The only allegation that supports trespass and nuisance but not negligence is that the construction

²²⁷ 73 Wn. App. 523, 547, 871 P.2d 601 (1994), *abrogated in part on other grounds*, *Phillips v. King Cnty.*, 87 Wn. App. 468, 943 P.2d 306 (1997).

²²⁸ 73 Wn. App. at 528.

²²⁹ *Id.* at 546.

²³⁰ *Id.* at 546–47.

²³¹ CP 537–38.

caused dust.²³² Because these claims are duplicative and the trespass and nuisance claims arise from allegedly negligent activity, the dismissal of the nuisance and trespass claims should be affirmed.

V. Conclusion

This court should affirm the order granting summary judgment to LCL, Horizon House, and Seneca. Evarone's claims are barred by the statute of limitations. Even if timely, his claims were properly dismissed because elements they are unsupported by admissible evidence. The trial court properly disregarded portions of the declarations of Evarone's experts that contradicted their prior testimony and were outside their expertise. Finally, Evarone cannot rely on *res ipsa loquitur* to cure the lack of evidence to support his claims, and joint and several liability is immaterial to the issues on summary judgment.

Respectfully submitted this 2nd day of May, 2011.


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²³² CP 658.

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JACK W. EVARONE,

Appellant,

v.

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

Respondents.

DECLARATION OF SERVICE

FILED
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I declare under penalty of perjury under the laws of the State of Washington I caused to be served by messenger on May 2, 2011 copies of the following pleading(s) on the following counsel:

1. Brief of Respondents Lease, Crutcher, Lewis, Seneca Real Estate Group, and Horizon House; and
2. Declaration of Service.

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Executed at Seattle, Washington this 2nd day of May, 2011.


Patti Novak