

68304-7

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No. 68304-7

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CITY OF MAPLE VALLEY, a Washington Municipality,

Appellant,

v.

BRUCE LAURENCE DISEND and JANE DOE DISEND,
his wife, and KENYON DISEND, PLLC, a Washington
Professional Limited Liability Company,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

This appeal arises from a baseless legal malpractice action brought by the City of Maple Valley against its former city attorneys at Kenyon Disend.¹ The trial court properly ruled that the City's claims are barred by the three-year statute of limitations. The City's claims are based upon legal advice given nearly six and eight years prior to the City's filing of its claims and the City was represented by new counsel for more than four years prior to the filing of its claims. Moreover, the City failed to meet its burden to show that the discovery rule tolled the statute of limitations. For these reasons, the trial court properly dismissed the City's claims as time-barred under the controlling authority of *Cawdrey v. Hanson Baker*, 129 Wn. App. 810, 817-18, 120 P.3d 605 (Div. I, 2005), a case that the City failed to address in any fashion. This Court should affirm on this basis.

This Court should also affirm because the claims fail on the merits. The City contends that the 2003 Ordinance and 2005 Resolution (known as the Four Corners special assessment district, or Four Corners SAD²) are void under *Woodcreek Land v. City of Puyallup*, 69 Wn. App. 1, 847 P.2d 501 (Div. II, 1993). But the Four Corners SAD is plainly authorized under the authority provided in the 1997 amendments to RCW 35.72.050. These

¹ Defendants Bruce Laurence Disend and Kenyon Disend PLLC are collectively referred to herein as "Kenyon Disend."

² See *infra*, Part III.A-B (describing the Four Corners SAD).

amendments were made four years after *Woodcreek Land* was decided to expressly allow the City to form a special assessment district on its own initiative. For this reason, the City's 2011 decision to repeal the Four Corners SAD—based upon its current attorney's opinion—was legally flawed. Quite simply, the City needlessly caused its own losses and should not be permitted to blame its former attorneys. This Court should affirm the dismissal for the additional reason that the City proximately caused its own alleged losses.

II. COUNTER STATEMENT OF THE ISSUES

1. Did the trial court properly conclude that the three-year statute of limitations bars the City's claims where (a) all facts upon which the City's cause of action are based were either known to the City or readily discoverable by the City more than three years prior to the date the City filed or served the Complaint, and (b) Kenyon Disend had stopped representing the City more than three years prior to the date the City filed or served the Complaint?

2. Should this Court affirm the trial court's ruling on the separate, independent grounds that the City cannot establish proximate cause between Kenyon Disend's actions and the City's self-inflicted injury as a matter of law?

3. Did the trial court properly decline to rule on the City's motion for partial summary judgment regarding the validity of the Four Corners SAD at issue where (a) it concluded that the statute of limitations bars the City's claims and (b) the City had already voluntarily repealed the Four Corners SAD prior to filing suit, rendering the issue moot?

4. Did the trial court properly award Kenyon Disend costs under RCW 4.48.080 and enter judgment for those costs where the City's claims were properly dismissed?

III. COUNTER STATEMENT OF THE CASE

The following facts are undisputed.

A. **The City Retains Kenyon Disend, Enacts Legislation in 2003 and 2004 to Lay the Groundwork for a Special Assessment District**

The City retained Kenyon Disend to act as its City Attorney for nearly ten years, from August 1997 until April 2007. CP 2 ¶ 2.0. Attorney Bruce Disend served as the primary point of contact during most of the pertinent events. *See, e.g.*, CP 2 ¶ 1.6. Mr. Disend has practiced exclusively in the field of municipal law for more than thirty years and is considered an expert in his field. CP 791 ¶ 3.

During the time that Kenyon Disend acted as the City Attorney, the City began to study statutory means by which assessments could be collected from property owners who would benefit from the construction

of new streets and related public improvements. *See* CP 233.

Specifically, on December 1, 2003, the City Council adopted Ordinance O-03-250, regarding special assessment districts (the “2003 Ordinance”). The City concluded a special assessment district was necessary as opposed to a more traditional “local improvement district” or “latecomers agreement”³ due to the City’s unique needs: the cost to fund the City’s capital improvement program exceeded its revenue base, and the City accordingly wanted to recover some of its planned investments for new streets and other public improvements—including investments at the commercial area commonly known as “Four Corners.” CP 227 ¶ 5; CP 232. Standing alone, the City could not collect any funds under the 2003 Ordinance; the 2003 Ordinance simply put the appropriate framework in place for future recoveries on future projects. CP 233.

The City took additional steps toward the creation of a specific special assessment district in 2004. On February 23, 2004, the City Council adopted Ordinance O-04-261, which is codified at Section 12.10.030 of the Maple Valley Code, titled “Responsibility to provide roadway improvements” (the “2004 Road Improvements Ordinance”).

³ The Municipal Research and Services Center (MRSC) website provides a helpful description of latecomers agreements and local improvement districts. *See* <http://www.mrsc.org/subjects/pubworks/latecomers.aspx>. MRSC is a non-profit organization well regarded among city staff, council members and directors. CP 227 ¶ 6.

See also CP 393. That legislation specifies that “Any land development which will impact the service level, safety, or operational efficiency of serving roads . . . shall improve those roads in accordance with these standards” and that “Any land development abutting and impacting the service level, safety, or operational efficiency of existing roads shall improve the frontage of those roads in accordance with these standards.” MVMC 12.10.030(A) and (B) (emphasis added). By requiring property owners to make certain improvements upon development, the 2004 Road Improvements Ordinance laid further groundwork for the creation of a specific special assessment district. The City has not contended that any of Kenyon Disend’s advice concerning the 2004 Ordinance was improper.

B. The City Enacts the 2005 Resolution to Create the Four Corners SAD

In late 2004 or 2005, the City began planning to improve the intersection at a commercial area commonly known as “Four Corners.” CP 250 ¶ 4. The City Manager assigned to the Public Works Director the job of establishing a special assessment district to meet the City’s needs. CP 250 ¶¶ 4-5. The Public Works Director “roughed out” implementing legislation, Resolution R-05-427 (the “2005 Resolution”) based upon the authority of the 2003 Ordinance and in line with the 2004 Road Improvements Ordinance. The purpose of the 2005 Resolution was to

define the parameters of the Four Corners SAD, give property owners notice of the preliminary calculation of their share of the assessment,⁴ and address any objections offered by the property owners. CP 250 ¶ 5; CP 255. In April 2005, the City held a public hearing to allow the affected property owners (including sophisticated land developers) an opportunity to be heard on the proposed special assessment district. CP 268-69. Following the hearing, adjustments to the legislation were made to reflect the property owners' concerns. CP 251 ¶ 7.

As the City acknowledges in its Complaint, the City Council members knew in 2005 that the Four Corners SAD was "quite uncommon, if not unique." CP 4 ¶ 2.12. The City consulted its attorneys at Kenyon Disend, including Mr. Disend, who had extensive experience with latecomer agreements, local improvement districts, and special assessment districts. CP 791 ¶ 3. Kenyon Disend advised the City that it was unusual, and the Public Works Director at the time cautioned the Council and provided written memoranda to that effect. CP 250 ¶ 6, CP 251 ¶ 8, CP 275. There was further discussion on that point at the November 28, 2005 City Council meeting. CP 530:20-22 (Public Works Director noting

⁴ It was not until construction on the Four Corners project was completed that the final figures for the assessments could or would be calculated. CP 256 at Section 3 (noting that the assessments were estimates and subject to a "final accounting of cost after completion of construction.").

“we did call other cities that have assessment districts and we concluded again that the special assessment district we are using here is a pretty unusual thing.”); CP 539:1-2 (Public Works Director noting “this is the first time we’ve really done it this way”); CP 539:19-22 (Public Works Director noting “I think we could go and defend ourselves very adequately on any assertion that this is breaking state law.”).

Despite its specific knowledge that the assessment scheme was uncommon, the City Council adopted the 2005 Resolution creating the Four Corners SAD that same day. CP 4 ¶ 2.10; CP 256; CP 539-40.

C. **In 2006 and 2008, Property Owners Pay Hundreds of Thousands of Dollars to the City Under the Four Corners SAD**

Following the 2005 adoption of the Four Corners SAD, the affected property owners paid to the City hundreds of thousands of dollars in assessments for the new street and related improvements. CP 6 ¶ 2.16 (acknowledging the City accepted payments from property owners whose properties had been liened), CP 8 ¶ 3.2 (claiming amount “invalidly collected,” with interest, totals \$410,457.00). Specifically:

- on January 10, 2006, the City received \$53,204 from SBI Developing;
- on May 1, 2006, the City received \$32,000 from the King County Fire District #43; and
- on May 5, 2008, the City received \$390,573 from Kite Realty Group under the Four Corners SAD, specifically referencing the 2005 Resolution, R-05-427.

CP 282, 284.⁵

Not one of these paying property owners—which included land developers with expertise and resources—ever challenged the validity of the Four Corners SAD in any way.

D. In Late 2010, the Current City Attorney Opines That the Four Corners SAD Was Invalid as Written, Even Though No Challenge Had Ever Been Raised

The Four Corners SAD was adopted on November 28, 2005, and Kenyon Disend stopped working as the City Attorney in April 2007. The City Attorney hired by the City in late 2007⁶ was Christy Todd, an attorney who had practiced municipal law for approximately five years. CP 286:24-287:7.

Ms. Todd started work at the City on December 3, 2007, CP 32, and the Four Corners SAD was brought to her attention on January 31, 2008. CP 290-291, CP 314-315. Despite the fact that the Four Corners SAD assessment was supposed to be completed by the end of 2008, CP 304, and City staff “kept bugging” Ms. Todd to complete the process, CP

⁵ These pre-payments were made before the Four Corners SAD was finalized, and before the assessments were technically due. CP 256. Payment from property owners was not due and owing under the Four Corners SAD unless and until the property owners developed the property, upon certain terms. *See id.*

⁶ The City initially hired Joe Levan, who served as City Attorney from April 2007 to December 2007.

296,⁷ it was not until late 2010 that Ms. Todd turned her attention to the Four Corners SAD. CP 42. Ms. Todd had no practical experience with either latecomer agreements or local improvements districts, CP 288:16-25, but nevertheless opined that the Four Corners SAD—which was a unique special assessment district—had “serious legal flaws” because it did not follow the statutorily defined process for creation of a developer-initiated latecomer agreement. CP 34:10-18, CP 35:21-22, CP 44:18-19. Specifically, she opined that the Four Corners SAD was invalid because she believed it did not comply with a case that was decided in 1993, *Woodcreek Land Limited Partnerships I, II, III and IV v. City of Puyallup*, 69 Wn. App. 1, 847 P.2d 501 (Div. II, 1993). *Woodcreek Land* addressed developer-initiated latecomer agreements under RCW 35.72.010. *See generally id.* It did not address special assessment districts such as the Four Corners SAD enacted by the City under RCW 35.72.050,⁸ nor could it have done so: RCW 35.72.050 was amended to provide for special assessment districts four years after *Woodcreek Land* was decided. CP 387-391 (legislative history showing amendments in 1997).

⁷ These facts are discussed in Part B.5. at 28-32, *infra*.

⁸ *See Woodcreek Land*, 69 Wn. App. at 8, n.1 (noting there had been no contention that the City of Puyallup followed RCW 35.72.050 in that case).

Ms. Todd nevertheless advised the City that the Four Corners SAD—which the City had debated and adopted in 2005—was “fatally flawed.” CP 33:13-16. She acknowledges that all the information she relied upon to form her opinion was available to her years prior. CP 301:8-302:7. The information was, of course, also available to the City before Ms. Todd began work as the City Attorney. *See generally, supra* and Part IV.B.3, *infra*. Notably, Ms. Todd did not analyze RCW 35.72.050 in her written memos to the City Council and does not recall advising the City Council on RCW 35.72.050 at that time. CP 299:6-300:15.

E. In 2011, the City Voluntarily Repeals the Four Corners SAD, Refunds Sums Collected, then Sues Kenyon Disend

Not one of the property owners who would be required to make, or did make, payments under the Four Corners SAD has challenged its validity in any way, shape, or form. No court has ruled the Four Corners SAD to be invalid.

Despite this absence of legal challenge, Ms. Todd “convinced” the City Council that the Four Corners SAD was “probably invalid under the applicable law.” CP 849. Without even making inquiry with Kenyon Disend or other City staff members who actually worked on the Four Corners SAD and without seeking a court declaration on the validity, the

City Council abandoned its prior plan under the Four Corners SAD, and voluntarily repealed both the 2003 Ordinance and the 2005 Resolution. The City then refunded the hundreds of thousands of dollars in assessments that property owners had already paid under the Four Corners SAD. CP 7 ¶¶ 2.19-2.20. Presumably looking to replace the lost revenue, the City filed this lawsuit against its former attorneys, Kenyon Disend.⁹

Nearly eight years after the City adopted the 2003 Ordinance, and nearly six years after it adopted the 2005 Resolution, on May 26, 2011 the City served its Complaint on Kenyon Disend. Again, the City did not consult with either of the Public Works Directors who were involved with the 2003 Ordinance and 2005 Resolution prior to filing suit, nor did the City make any inquiry of Kenyon Disend. CP 229 ¶10; CP 251-52 ¶10; CP 297:1-5.

F. Timeline Summary of Pertinent Facts

The following timeline summarizes the key events:

1993	<i>Woodcreek Land</i> case is decided.
1997	State Legislature amends RCW 35.72.050 to allow greater flexibility and “another alternative” for cities, counties and the DOT to implement assessment reimbursement area fees. CP 388, CP 390.

⁹ By doing so, the City needlessly sullied the stellar and untarnished reputation of Mr. Disend, a leading Washington municipal attorney for the past 32 years.

Aug. 1997	The City retains Kenyon Disend to act as its City Attorney. CP 2 ¶ 2.0.
Dec. 1, 2003	The City adopts Ordinance O-03-250, regarding special assessment districts. CP 237.
Feb. 23, 2004	The City adopts Ordinance O-04-261, codified at MVMC 12.10.030, titled "Responsibility to provide roadway improvements." CP 393.
2005	The City begins discussions about creating the Four Corners SAD under the 2003 Ordinance. CP 250 ¶¶ 4-5.
Nov. 28, 2005	The City adopts the Four Corners SAD by Resolution R-05-427. CP 4 ¶ 2.10, CP 256, CP 539-40.
Jan. 10, 2006	SBI Developing, LLC pays its preliminary assessment under the Four Corners SAD in the amount of \$53,204. CP 282.
May 1, 2006	King County Fire District #43 pays its preliminary assessment in the amount of \$32,000. CP 282.
April 2007	Kenyon Disend ceases acting as the City Attorney. CP 2 ¶ 2.0.
Dec. 3, 2007	City Attorney Christy Todd starts work. CP 32.
Jan. 31, 2008	City Attorney Christy Todd is advised regarding the Four Corners SAD by City Clerk Irvalene Moni. CP 290:20-291:9, CP 314-15.
May 5, 2008	Kite Realty Group pays its preliminary assessment in the amount of \$390,573. CP 284.
May 6, 2008	City staff "kept bugging" Ms. Todd to finalize the Four Corners SAD. CP 314-15, 304, 289:8-209:11, 296:12-18.
Oct. 2010	Ms. Todd examines the Four Corners SAD and opines that it is fatally flawed. CP 33:13-16.

Jan. 10, 2011	Ms. Todd and the consultant appointed by the City's insurer convince the City Council that the Four Corners SAD is "probably invalid under the applicable law." CP 849. The Council opts to repeal both the Ordinance and the Resolution and refund all assessments paid. <i>Id.</i> ; CP 7 ¶¶ 2.19-2.20.
May 26, 2011	The City effects service of the complaint on Kenyon Disend. CP 791.

G. The Trial Court Properly Concluded the City's Claims Are Time-Barred

The parties filed separate motions for summary judgment that were heard on January 23, 2012.¹⁰ Kenyon Disend's motion sought dismissal of all claims with prejudice on either of two independent bases: (1) that the City's claims were time barred and/or (2) that the City's decision to repeal the Four Corners SAD was an inexplicable rejection of the City's own authority and Kenyon Disend could not be the proximate cause of the City's losses as a matter of law. CP 190-225. The City filed a motion for partial summary judgment that purported to seek guidance on whether the now-repealed Four Corners SAD was valid from the outset. CP 101-130. Kenyon Disend opposed the City's motion both on the merits and on the basis that it sought an advisory opinion. CP 795-817.

¹⁰ Kenyon Disend initially responded to the Complaint with a Rule 12(b)(6) Motion to Dismiss, which was converted to a Rule 56(c) motion by the trial court on September 2, 2012. CP 92. The parties took additional discovery and the motion was rescheduled twice before it was heard on January 23, 2012.

The trial court granted Kenyon Disend's motion and entered summary judgment in its favor on February 3, 2012. The trial court explained as follows:

Defendant Disend stopped representing Plaintiff four and one half years before suit was filed. Plaintiff was represented by counsel continually from the time Mr. Disend left plaintiff's employ to the date of filing the Complaint. Therefore, the primary purpose for extension of the discovery rule to legal malpractice cases, to protect the consumer of professional services who does not have the means or ability to discover professional malpractice, does not apply here. Furthermore, more than three years before the filing of the Complaint Plaintiff knew the facts that gave rise to this cause of action. For these reasons the discovery rule does not apply and Plaintiff's claim is barred by the three year statute of limitations.

CP 788. The trial court thus did not reach any of the remaining issues: whether City's claims should also be dismissed for lack of proximate cause, whether the City's motion on the validity of the Four Corners SAD was ripe for adjudication, or whether the City's motion on the validity of the Four Corners SAD should be denied on the merits. The trial court thereafter entered judgment for Kenyon Disend, as requested in its cost bill. The City filed this appeal.

IV. ARGUMENT

A. Summary Judgment Standard

A motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and . . . the moving party is

entitled to a judgment as a matter of law.” CR 56(c); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *see also* RAP 9.12. To avoid summary judgment, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact. *Ranger Ins. Co.*, 164 Wn.2d at 552. Speculation or argumentative assertions that unresolved factual issues remain cannot defeat summary judgment. *See id.*; *see also Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 483 n.1, 260 P.3d 915 (2011). “A fact is an event, an occurrence, or something that exists in reality. . . . It is what took place, an act, an incident, a reality as distinguished from supposition or opinion.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (emphasis added). The trial court properly adhered to these principles when it granted Kenyon Disend’s motion for summary judgment.

B. The Three-Year Statute of Limitations for an Attorney Malpractice Action Bars the City’s Claims

As discussed in Part IV. G., *infra*, RCW 35.72.050 provided specific authorization for the Four Corners SAD. The City’s current attorney disagrees, but her opinion is just that—an opinion—and it is an opinion based on facts that the City admits were known or could have

been discovered more than three years before it filed suit. CP 301:8-302:7.

1. The City Cannot Meet Its Burden to Show That Material Facts Were Not Discoverable Within Three Years Prior to the Lawsuit

The statute of limitations for an attorney malpractice action is three years from the date of the allegedly wrongful act. RCW 4.16.080(3); *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268 (2005). The statute serves an important purpose in our judicial system: to “prevent stale claims and enable the defendant to preserve evidence.” *See, e.g., Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001).

In rare circumstances, if a plaintiff uses reasonable diligence but cannot discover the facts necessary to establish a claim for legal malpractice, the discovery rule may toll the statute of limitations. *See Richardson v. Denend*, 59 Wn. App. 92, 96, 795 P.2d 1192 (1990); *see also Burns v. McClinton*, 135 Wn. App. 285, 299, 143 P.3d 630 (2006). The discovery rule only applies in two scenarios: (1) when a defendant has fraudulently concealed a material fact from a plaintiff, depriving the plaintiff of the knowledge of the accrual of the cause of action, or (2) where the nature of the plaintiff’s injury makes it extremely difficult for the plaintiff to learn the factual elements of the cause of action. *Burns*,

135 Wn. App. at 299-300. In order to extend the limitations period under the discovery rule, it is the plaintiff's burden, here, the City, to prove that the necessary facts supporting its claim could not be discovered in time. *See Burns*, 135 Wn. App. at 300 (citing *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000)).

The City has never suggested there was fraudulent concealment of any material fact. To the contrary, Ms. Todd admitted at her deposition that the information available to her in 2010 was equally available to her shortly after she started as the City Attorney. CP 301:8-302:7. (Ms. Todd did not begin work as the City Attorney until December 2007, but the information was also available to the City years prior. *See* Parts III.A.-C., *supra* and Part IV.B.3, *infra*.) Ms. Todd further confirmed that there is no contention of concealment concerning the 2003 Ordinance, 2005 Resolution or its history. CP 301:8-302:7.

Thus, the sole issue before the trial court—and the sole issue before this Court—was whether the City met its burden to show the existence of some material fact that it could not have discovered until three years prior to the date it filed suit. *See Burns*, 135 Wn. App. at 300. As set forth below, the City did not and could not meet its burden. The trial court's entry of summary judgment in favor of Kenyon Disend was proper.

2. The Statute of Limitations Runs Regardless of When Independent Counsel Evaluated the Legal Issues Presented

The discovery rule does not allow the City to escape dismissal of a time-barred claim simply because it did not understand the legal issues presented by known or discoverable facts. This Court made that clear in *Cawdrey v. Hanson Baker*, 129 Wn. App. 810, 818, 120 P.3d 605 (2005) (copy provided to the trial court at CP 216-22).

In that case, plaintiff Cawdrey sued on behalf of his deceased mother, Elizabeth. In opposing the defendant's motion for summary judgment to dismiss based on the expiration of the statute of limitations, Cawdrey argued that his mother could not have known she had a claim—and thus the statute of limitations did not begin to run—until she (1) consulted independent counsel and (2) that counsel had an opportunity to fully assess the pertinent facts. The trial court rejected this argument, and dismissed Cawdrey's claims as being time barred.

The Court of Appeals affirmed. In so doing, it confirmed that ignorance of a cause of action does not excuse a plaintiff from filing suit more than three years after all pertinent events occurred and were known, or should have been known, by the plaintiff:

Cawdrey argues that “Elizabeth did not have a real understanding of the conflicted representation until, at the earliest, she consulted independent counsel and her counsel

received sufficient information to understand the conflict.”

...

* * *

[T]he discovery rule does not allow the plaintiff to wait until she knows the specific cause of action. Rather, it requires her to file suit within three years of the time when she knows the facts underlying the cause of action. Because Cawdrey knew, or should have known, of the facts underlying her cause of action at the time the events were occurring, the statute of limitations began to accrue when the events took place.

Cawdrey, 129 Wn. App. at 817 (emphasis added). Thus, even under the discovery rule, the statute of limitations begins to run as soon as all facts are known or should be known to the plaintiff; it is incumbent on the plaintiff to determine whether he or she wants to pursue a cause of action within three years of that time.

Kenyon Disend cited to and discussed *Cawdrey* in its motion for summary judgment, in its reply, and again at oral argument before the trial court. See CP 200, 216-22, 764-65; Verbatim Report of Proceedings at 31:8-32:2, 42:12-17, 43:9-15 (transcribed as “*Chaudrey v. Hansen Baker*”).

The City has not made any attempt to distinguish *Cawdrey* or argue that it does not apply—the City simply has not addressed *Cawdrey* in any manner at either the trial court level or on appeal. Instead, the City characterizes both the trial court’s ruling and Kenyon Disend’s position as

being dependent upon the outdated *Busk v. Flanders* case,¹¹ despite the fact that neither the trial court's ruling nor Kenyon Disend's position relies on *Busk*.

In *Busk*, the main issue was whether a three-year or six-year statute of limitations applies to claims of legal malpractice. The court confirmed it is three years. Then, because the appellant had conceded that his cause of action accrued on the date of his attorney's alleged negligence,¹² the court reiterated the general rule in effect at that time, that a cause of action for legal malpractice accrues at the time of the alleged breach of duty, not at the time when the alleged breach is discovered or actual damage results or is fully ascertained. *Busk*, 2 Wn. App. at 532.

In *Peters v. Simmons*,¹³ the Washington Supreme Court overruled *Busk* to the extent it rejected the discovery rule. In so doing, the *Peters* court stated: "The primary reason for extending and applying the [discovery] rule is because the consumer of professional services

¹¹ *Busk v. Flanders*, 2 Wn. App. 526, 468 P.2d 695 (1970). At oral argument before the trial court, after counsel for Kenyon Disend discussed the *Cawdrey* case, counsel for the City argued, "These Defendants are asking this Court to go back almost 30 years and adopt the rule in *Busk v. Flanders*." See Verbatim Report of Proceedings at 38:4-5; see also *id.* at 40:8-10. The City's opening brief on appeal continues to incorrectly assert that Kenyon Disend "asks the Court to return to the now abrogated 'occurrence rule' of *Busk v. Flanders*." See Appellant's Opening Br. at 12.

¹² *Busk*, 2 Wn. App. at 532.

¹³ *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976).

frequently does not have the means or ability to discover professional malpractice.” *Peters*, 87 Wn.2d at 405. Accordingly, the court held: “[T]he statute of limitations for legal malpractice should not start to run until the client discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action.” *Id.* at 406 (emphasis added). The Court remanded the matter for further consideration.

Consistent with *Peters*, the *Cawdrey* court recognized the purpose of the discovery rule, but held that it cannot extend the statute of limitations indefinitely where the plaintiff knows or should know all pertinent facts underlying his or her cause of action, but delays in reaching the conclusion that he or she has a cause of action. *See Cawdrey*, 129 Wn. App. at 817.

Here, the City has identified no facts that it did not know or should not have discovered sooner; the City simply delayed the process of reaching its (erroneous) conclusion that it had a claim against its former attorneys. Likewise, although the City faults the trial court for pointing out that the City had independent counsel for four years before it filed suit, the trial court’s observation in the summary judgment order is in line with *Peters* in that it recognized the City had the “means and ability to discover

the [alleged] professional malpractice.”¹⁴ The trial court’s decision is consistent with *Cawdrey* and *Peters*, and was in no way a dependent on *Busk*.

3. The City Filed Suit More Than Three Years After It Knew or Should Have Known All Pertinent Facts

In addition, the trial court properly determined that the City knew, or with the exercise of reasonable diligence should have known, all the pertinent facts underlying its cause of action more than three years before the City filed suit.

The City alleges that Kenyon Disend gave inadequate advice concerning the 2003 Ordinance and the 2005 Resolution related to the Four Corners SAD, allegedly contrary to “well-established case law from 1993,” such that the Four Corners SAD was invalid as written. The allegedly negligent advice and the existence of allegedly controlling authority are the two main facts upon which the City’s claims are based, and it is undisputed that (1) the allegedly negligent advice was given in 2003 and 2005, and (2) the laws purportedly governing the validity of the Ordinance and Resolution were in effect at that time.¹⁵ Moreover, it is undisputed that during the Council meetings discussing whether to enact the 2005 Resolution, the City discussed the legality of the Four Corners

¹⁴ See *Peters*, 87 Wn.2d at 405.

¹⁵ CP 4 ¶ 2.9, CP 5-6 ¶ 2.15, respectively.

SAD and the fact that it was untested.¹⁶ Finally, it is undisputed that the City knew the Ordinance and Resolution were “quite uncommon, if not unique” at the time of enactment in 2005.¹⁷

Again, there is no suggestion that Kenyon Disend fraudulently concealed a material fact from the City. Nor is there any evidence that it was “extremely difficult” for the City to learn the factual elements of its stated cause of action. The City therefore cannot meet its burden to show that the discovery rule should toll the statute of limitations. *See Burns*, 135 Wn. App. at 300.

Looking at the specific elements of its cause of action, the City alleges that (1) Kenyon Disend was its attorney at the time it enacted the Four Corners SAD (duty); (2) Kenyon Disend gave it incorrect advice in 2003 and 2005 regarding the Four Corners SAD (breach); (3) Kenyon Disend’s advice caused the City to enact the invalid Four Corners SAD (causation); and (4) the City lost the right to collect assessments under the Four Corners SAD as a result thereof (injury or damage).

Each one of these elements was known or readily discoverable by the City more than three years before it filed this suit. Ms. Todd’s “discovery” of the purported illegality (alleged to be plainly in existence

¹⁶ *See* CP 539:3-18.

¹⁷ CP 4 ¶ 2.12.

since the 2005 Resolution and 2003 Ordinance were enacted), her conclusion that there was a breach, and her belief that the Four Corners SAD had to be repealed constitute only her own subjective opinions, not facts of any type, and certainly not “material facts.”¹⁸ Put most plainly, Ms. Todd’s analysis of these issues was in no way dependent on any events that occurred after the enactment of the 2005 Resolution.¹⁹

Indeed, the subjectivity of Ms. Todd’s opinion is highlighted by the equivocation when she communicated her opinion. In one email, she stated, in part: “What about just finalizing the special assessment district according to the procedure in our code? It is cumbersome and odd, and there is risk of challenge, but I think we have to explore that option with the Council.” CP 846; *see also* CP 849 (email from consultant Dale Kamerrer stating in part, “[Ms. Todd and I] have convinced the [City] Council that the method of imposing assessments for what is known as the ‘Four Corners’ Special Assessment District is probably invalid under the applicable law.” (emphasis added)); CP 843-44 (email from Mr. Kamerrer outlining alternate legal analysis that would allow the City to move

¹⁸ “A material fact is one upon which the outcome of the litigation depends.” *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

¹⁹ At her deposition, Ms. Todd confirmed that the information available to her in 2010 was equally available to her in 2008. CP 301:8-302:7.

forward with the Four Corners SAD). An equivocal opinion is not a “fact” that is or can be discovered.

On the fourth element, injury, the City’s injury (if any) occurred the moment it (allegedly) lost the right to collect the assessments. *See, e.g., Huff*, 125 Wn. App. at 729-30 (noting that “Although ‘injury’ and ‘damages’ are often used interchangeably, an important difference exists in meaning. . . . In the legal malpractice context, injury is the invasion of another’s legal interest, while damages are the monetary value of those injuries.”). For purposes of determining when the statute of limitations begins running, the date of actual injury is determinative. *See Huff*, 125 Wn. App. at 730.

For the first time on appeal, the City argues that it did not sustain damages from Kenyon Disend’s alleged negligence until March 2011, at which time it voluntarily refunded the assessments it had collected in 2006 and 2008 from affected property owners. *See* Appellant’s Opening Br. at 18-19; *see also* CP 282, 284 (showing dates and amounts collected). The City has not properly raised this issue,²⁰ but even if it had, under the City’s own (albeit misinformed) theory of the case, it lost the right to collect any and all assessments under the allegedly “fatally flawed” Four Corners

²⁰ This Court, on appeal of a summary judgment, will consider only evidence and issues called to the attention of the trial court. RAP 9.12.

SAD the moment it was enacted in 2005. Indeed, the City’s complaint seeks monetary damages not just for the amounts it paid to the property owners as reimbursements, but also for lost future assessments that it claims it “would have collected”—under some hypothetical scheme that it has never articulated—“but for the negligence” of Kenyon Disend in 2003 and 2005. CP 8 ¶¶ 3.2, 3.3. Thus, assuming for the sake of argument that the City did sustain an injury, the injury occurred well before three years prior to May 26, 2011 when the City brought suit.

4. The Current City Attorney’s Delay in Forming an Opinion Is Irrelevant

The City attempts to avoid dismissal of its time-barred claims based on the argument that it did not “discover” the alleged invalidity of the Ordinance (enacted in 2003) and Resolution (enacted in 2005)—and thus did not know it had a cause of action against Kenyon Disend—until “late 2010.” CP 6 ¶ 2.18.

The City’s argument is based on its mistaken belief that the discovery rule allows a plaintiff to assert a malpractice claim whenever it decides to seek review of the advice given, regardless of how much time has passed since that advice was given, and regardless of how much time has passed since all pertinent facts supporting that cause of action were known to the plaintiff.

But, again, the discovery rule only applies when (1) facts supporting the cause of action could not be discovered through (2) reasonable diligence.²¹ The rule does not allow the City an indefinite period of time to determine that, based on already-known or discoverable facts, it may have a cause of action; the statute is not tolled indefinitely until the City obtains a “real understanding” of the legal issues through “consul[tation with] independent counsel.” That argument was rejected by the Court of Appeals in *Cawdrey*, and it is especially true here, where the City has had independent counsel of its own choosing since April 2007.²² *See Cawdrey*, 129 Wn. App. at 817.

To hold otherwise would necessarily mean that the statute of limitations does not start to run until the plaintiff decides to analyze a legal issue, whether that is four years, 10 years or even longer after the termination of the attorney-client relationship. This is neither fair, nor is it the law: the purpose of the statute of limitations is to “prevent stale claims

²¹ *See Richardson*, 59 Wn. App. at 96.

²² Notably, the City has conceded that it is not relying on the continuous representation rule, which tolls the statute of limitations until the end of an attorney’s representation of a client in the same matter in which the alleged malpractice occurred. *Janicki Logging & Constr. Co.*, 109 Wn. App. at 661. CP 24:11-18. The City hired its own in house City Attorney in April 2007. *See* CP 2 ¶ 2.0. Thus, the City would have had three years from April 2007 to file suit, or until April 2010. This action was neither filed nor served until May 2011, more than four years after Kenyon Disend stopped serving as the City Attorney.

and enable the defendant to preserve evidence.” *Janicki Logging & Constr. Co.*, 109 Wn. App. at 662. In this case, it is patently unfair for the City to bring these claims nearly six and eight years, respectively, after the adoption of the 2003 Ordinance and the 2005 Resolution. Memories fade, documents are lost, and a defendant’s ability to defend itself is impaired.²³

5. Even Under the City’s Own Theory, There Were Numerous Events that Should Have “Triggered” the Statute of Limitations More Than Three Years Before the City Brought Suit

As discussed in Part IV. B. 1., *supra*, the City has the burden to identify pertinent facts that it could not have discovered within three years of service or filing of suit. It was not, as the City repeatedly argues, incumbent on the trial court to identify a specific “triggering event” at which point the statute of limitations would begin to run. Appellant’s Opening Br. at 1, 15, 16, 19-20. Even so, and even under the City’s theory of the case, there are a number of events that would have “triggered” the statute of limitations more than three years before the City brought suit; the City had numerous opportunities to (incorrectly) conclude that it had a cause of action regarding the validity of the Four

²³ At his deposition, Mr. Disend noted the difficulties in recalling details of events that occurred many years ago. *See, e.g.*, CP 659:24-25; CP 609-11, 632:16-20.

Corners SAD but failed to do so. It is not necessary to confirm a precise date where, as here, all potential theories confirm the claim is time barred.

The Three-Year Statute of Limitations Began Running No Later Than 2006.

On February 9, 2006, the City recorded the “Notice of Estimated Lien” under the Four Corners SAD. CP 75. The City received hundreds of thousands of dollars without complaint or challenge from any of the affected property owners on **January 10, 2006, May 1, 2006, and May 5, 2008.** CP 282, 284. The City now alleges the liens were “clouds on title improperly recorded,” yet the City did nothing to investigate those payments until late 2010. *See* Appellant’s Opening Br. at 19.

The Statute of Limitations Began Running No Later Than 2007.

Kenyon Disend stopped serving as the City Attorney in April 2007; in-house counsel began serving as City Attorney thereafter. Finally, Ms. Todd began employment as the City Attorney on December 3, 2007. CP 32:23. This suit was brought four years later, in 2011, which explains the City’s concession in its summary judgment briefing²⁴ that the continuous representation rule does not apply to toll the statute of limitation. The City presumably knows this argument to be unavailing because it waited more than four years to bring this claim. Nevertheless,

²⁴ CP 24:11-18.

given that Kenyon Disend stopped serving as the City Attorney in April 2007, the statute of limitations should be deemed to have commenced no later than this date.

The Statute of Limitations Began Running No Later Than January 31, 2008, or at the Very Latest, on May 6, 2008.

The current City Attorney admitted she learned of the Four Corners SAD no later than **January 31, 2008**. E-mail correspondence on that date between Ms. Todd, then-City Clerk Irvalene Moni, and Finance Director Tony McCarthy, demonstrates Ms. Todd's knowledge of an issue with a special assessment district created for the Lake Wilderness Golf Course. CP 290:20-291:9; CP 314-15. In response, Ms. Moni advised that the City had previously created two other special assessment districts as well, including "a Special Assessment District for Four Corners street/frontage improvements to Highway 169 from SR 516 to SE 264th Street and that was established through Resolution No. R-05-427," the very Four Corners SAD at issue in this litigation. CP 291:10-22; CP 314. Finance Director Tony McCarthy and Community Development Director Ty Peterson also knew of the Four Corners SAD and the need to finalize it on **May 6, 2008** and "kept bugging" Ms. Todd to do so.²⁵

²⁵ CP 314-15, 304 ("This process should be completed before the end of 2008"), 289:8-209:11, 296:12-18.

Following that date, the City admits it “delayed the time period for determination of the final costs of capital Project T-6 [the Four Corners SAD], which was a requirement of the 2005 Resolution,” the 2003 Ordinance grew “dormant,” and the City’s poorly organized records required the City to “search for” paperwork related to the finalization process.²⁶

By its own admission reflected in its own documents, the City knew by May 6, 2008, that it needed to finalize the assessments for the Four Corner SAD. The City’s documents confirm Ms. Todd’s knowledge at that time. Despite this, she waited until October 2010 to begin her analysis of the issue.²⁷ Importantly, however, Ms. Todd admits that there was nothing she discovered in 2010 that she could not have discovered years prior; rather, it was simply her “workload” that prevented her from turning her attention to it sooner. CP 301:8-302:7.

Likewise, not one of the long-term staff members or City Council members testified that he or she could not discover the facts underlying this claim. In addition to the Finance Director, Community Development Director, and City Clerk identified above, the following City Council

²⁶ CP 6 ¶ 2.17; CP 43:7-16.

²⁷ CP 43:23-26, 42:6-7.

Members were on the Council for adoption of the 2003 Ordinance and/or 2005 Resolution, and for several years thereafter:

NAME	DATES ON CITY COUNCIL
Laure A. Iddings	May 2, 1997 to December 31, 2009
Victoria Laise Jonas	January 3, 2000 to at least November 2011 ²⁸
Dave Pilgrim	December 3, 2001 to December 31, 2009
Noel T. Gerken	April 14, 2003 to at least November 2011 ²⁹
Linda Johnson	January 5, 2004 to at least November 2011 ³⁰

CP 324; CP 298:10-11. Not one of these employees or council members stepped forward with testimony supporting the City's claim that it could not have discovered its cause of action. Indeed, the City did not offer any evidence or testimony from any of the employees or Council members present at the time of the enactment of the 2003 Ordinance or 2005 Resolution to support its claim that it could not have discovered this claim within the three year statute of limitations.

Moreover, there is no authority for the proposition that the common and unremarkable events of heavy workload and staff turnover

²⁸ Ms. Laise Jonas was still on the City Council at the time Kenyon Disend filed its motion for summary judgment with the trial court.

²⁹ Mr. Gerken was still on the City Council at the time Kenyon Disend filed its motion for summary judgment with the trial court.

³⁰ Ms. was still on the City Council at the time Kenyon Disend filed its motion for summary judgment with the trial court.

constitute legal justification for failing to timely pursue a malpractice action. The City could have retained outside counsel, or it could have simply directed Ms. Todd to analyze the “uncommon, if not unique” Four Corners SAD, instead of having her work on any one of the numerous other projects over the years (none of which apparently came with the cautionary flag of “uncommon if not unique”). Ms. Todd’s so-called “legality” analysis of the Four Corners SAD could have been performed—on her own volition or at the direction of the City Manager—at any point in time after the 2005 Resolution was in place.

Finally, the City’s status as a municipality does not, of course, entitle it to special treatment under the statute of limitations. RCW 35A.21.200. Here, under any theory, the applicable statute had run before this suit was filed or served. Kenyon Disend should not be forced to defend an untimely, aged claim because the City failed to exercise reasonable diligence in finalizing the Four Corners SAD. It would be unjust to allow the City to assert claims in 2011 that arise from allegedly faulty advice given nearly eight years earlier (in the case of the 2003 ordinance) and nearly six years earlier (in the case of the 2005 ordinance.) The City’s claims are time-barred and the trial court’s order of dismissal was proper.

C. **The Trial Court’s Ruling Should Also Be Affirmed on the Separate, Independent Grounds of Lack of Proximate Cause**

This court may affirm an order granting summary judgment on any theory established by the pleadings and supported by the proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); RAP 9.12 (on appeal of a summary judgment, appellate court will consider only evidence and issues called to the attention of the trial court). As Kenyon Disend specifically briefed and argued to the trial court, the City’s claims should also be dismissed with prejudice based on the fact that the City cannot establish proximate cause as a matter of law. The Four Corners SAD is specifically authorized by statute, and the City’s voluntary decisions to repeal the Four Corners SAD and refund unchallenged assessments were contrary to its own authority. The City proximately caused its own injuries.

1. **The Four Corners SAD was Specifically Authorized Under RCW 35.72.050**

Prior to 1997, RCW 35.72.050 authorized only developer-initiated reimbursement contracts or city/developer initiated reimbursement contracts for street projects like the one constructed at Four Corners in Maple Valley. In 1997, however, the Legislature created “another alternative”—which did not require developer participation—and which

authorized cities to create an assessment reimbursement area on its own initiative.³¹

The Four Corners SAD was created under this third “assessment reimbursement” alternative method. Notably, no court has addressed RCW 35.72.050 since its enactment. The City of Renton has also used this third, alternative method without legal challenge. *See* CP 239-48 (City of Renton Ordinance No. 4923, which is materially identical to the 2003 Ordinance); CP 792-93.

Nevertheless, without any challenge, and without any inquiry to Kenyon Disend or other City staff members who actually worked on the 2003 Ordinance or 2005 Resolution, the City voluntarily repealed the Four Corners SAD. The City then refunded the assessments paid without protest by the property owners. The City took these actions based solely on Ms. Todd’s mistaken view that the Four Corners SAD was required to comply with the 1993 *Woodcreek Land* case—a case that involved only a developer-initiated reimbursement contract that was decided four years prior to the 1997 amendments to RCW 35.72.050. *See Woodcreek Land*,

³¹ The 1997 amendment added the following language: “As another alternative, a county, city, or town may create an assessment reimbursement area on its own initiative, without the participation of a private property owner, finance the costs of the road or street improvements, and become the sole beneficiary of the reimbursements that are contributed.”

69 Wn. App. 1. The 1997 amendments authorize a special assessment district, like the Four Corners SAD, as “another alternative” to the two preexisting statutory alternatives (one of which was at issue in *Woodcreek Land*).

In response to Kenyon Disend pointing out this authority, and in a final effort to “save” its legal malpractice claim, the City argued only that the pre-1997 sections of RCW 35.72 must somehow still apply. No support—statutory or otherwise—exists for this argument.³²

If a statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Only if there is ambiguity may the courts resort to statutory construction, legislative history or relevant case law. *Diaz v. State*, 161 Wn. App. 500, 506, 251 P.3d 249 (2011).

Here, the 1997 Amendment to RCW 35.72.050 plainly provides “another alternative” to developer-initiated or city/developer-initiated

³² It appears that the City completely missed the 1997 amendments to RCW 35.72.050, which came four years after *Woodcreek Land*, 69 Wn. App. 1, before deciding to repeal the Four Corners SAD, refund the assessments, and then file this lawsuit. In this regard, Ms. Todd admitted at her deposition that she did not recall giving the City any advice on RCW 35.72.050 before the decision was made to repeal the Four Corners SAD. CP 300.

street improvement contracts. The only limitations placed on the City's authority under this new "alternative" are stated in RCW 35.72.050:

A county, city, or town may be reimbursed only for the costs of improvements that benefit that portion of the public who will use the developments within the assessment reimbursement area established pursuant to RCW 35.72.040(1). No county, city, or town costs for improvements that benefit the general public may be reimbursed.

RCW 35.72.040(1) in turn provides:

An assessment reimbursement area shall be formulated by the city, town, or county based upon a determination by the city, town, or county of which parcels adjacent to the improvements would require similar street improvements upon development.

At the trial court level, the City did not contend that the Four Corners SAD at issue here failed to comply with these provisions, nor did it argue that any aspect of RCW 35.72.050 is ambiguous. It nevertheless asked the trial court to read-in additional limitations and restrictions to RCW 35.72.050 that are simply not present in the plain language. As the City acknowledged, the 1997 amendment to RCW 35.72.050 was just that: an amendment, not a clarification. Thus, to say that the addition of "another alternative" to RCW 35.72.050 instead required the City to comply with the "same prior alternatives" is nonsensical. The newly created "another alternative" is, by definition, a third alternative to those

that pre-existed the 1997 amendments. The Legislature is presumed to know the content of existing legislation when it enacts new legislation.

The legislature must be presumed to know both the language employed in the former acts and the judicial construction placed upon them; and if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended . . .

Alexander v. Highfill, 18 Wn.2d 733, 742, 140 P.2d 277 (1943).

The City's argument is contrary to principles of statutory interpretation, contrary to the plain meaning of RCW 35.72.050, and contrary to the legislative history of RCW 35.72.050.

2. The Doctrine of *Ejusdem Generis* Does Not Apply to Code Cities

The City's argument against application of the 1997 amendments to RCW 35.72.050 is also inconsistent with the City's broad constitutional powers and the fact that the doctrine of *ejusdem generis*, which can result in a narrow reading of statutory delegations of power, does not apply to code cities. See CP 864 (Municipal Research and Services Center, *Code City Handbook*, Report No. 37, Revised June 2009 (citing statutory authority)). Washington law provides that specific grants of authority cannot be interpreted to limit the authority of code cities. RCW 35A.01.010 states:

The purpose and policy of this title is to confer upon two optional classes of cities created hereby the broadest

powers of local self-government consistent with the Constitution of this state. Any specific enumeration of municipal powers contained in this title or in any other general law³³ shall not be construed in any way to limit the general description of power contained in this title, and any such specifically enumerated powers shall be construed as in addition and supplementary to the powers conferred in general terms by this title.

(Emphasis added.) Under these principles, and by its own terms, *Woodcreek Land* applies only to the developer-initiated reimbursement contract contemplated by RCW 35.72.010; it cannot apply to an “alternative” method that was created by the Legislature four years later.

3. The Four Corners SAD Provided Due Process to the Affected Property Owners, None of Whom Has Raised a Challenge

Even if *Woodcreek Land* could somehow be interpreted to apply to RCW 35.72.050, as enacted four years after *Woodcreek Land* was decided, the Four Corners SAD did in fact satisfy the concerns expressed by the *Woodcreek Land* court regarding developer-initiated contracts. The Four Corners SAD did provide full and adequate notice to current owners and potential purchasers of the improvements required as a condition of development in Maple Valley: (1) the 2004 Road Improvement Ordinance laid out the requirements for street improvements as a condition of

³³ RCW 35A.01.050 provides, in part: “For the purposes of this optional municipal code, ‘the general law’ means any provision of state law, not inconsistent with this title, enacted before or after the enactment of this title, which is by its terms applicable or available to all cities or towns.”

development occurred in Maple Valley;³⁴ (2) the 2005 Resolution was adopted after a public hearing with the property owners present, and prior to the City making the traffic improvements at issue,³⁵ and (3) notice of the proposed assessments was recorded with the Office of King County Records to ensure that prospective purchasers knew that each specific property may be subject to assessment.³⁶

If anything, the process utilized in the creation of the Four Corners SAD afforded the affected property owners / future property owners more due process than what the City argues should have occurred under *Woodcreek Land*.³⁷ Thus, even assuming the Four Corners SAD was required to comply with the court's concerns in *Woodcreek Land* (which involved a developer-initiated reimbursement contract, which expressly declined to consider RCW 35.72.050, and which was decided four years prior to the 1997 amendment to RCW 35.72.050), it did.

In sum, the Four Corners SAD was well within the City's broad constitutional and specific statutory authority (under RCW 35.72.050) as a non-charter code city and was not challenged legally or otherwise. The

³⁴ See Ordinance O-04-261, codified at Section 12.10.030 of the Maple Valley Code; see also CP 393-94.

³⁵ See CP 268-69.

³⁶ See CP 256, Section 5.

³⁷ The City's argument to the contrary to the trial court, CP 756, failed to explain how the process followed did not provide adequate notice, etc.

City's voluntary decision to repeal the Four Corners SAD and refund the sums paid was not legally required, and was the sole cause of the City's claimed injuries. Given this, Kenyon Disend's actions cannot, as a matter of law, have proximately caused the City's alleged damages. This provides an independent but additional basis on which the trial court's dismissal should be affirmed.

D. The Trial Court Properly Declined to Rule on the City's Motion for Partial Summary Judgment

Because the trial court properly determined the City's claims are time barred, there was no need to rule on the City's motion for partial summary judgment regarding the legality of the Four Corners SAD. The trial court also could have declined to rule on the City's motion because the legality of the already-repealed Four Corners SAD is not a justiciable controversy, is a moot issue, and is not an issue of continuing and substantial public interest. The City's motion therefore sought an advisory opinion. See *First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd.*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996) ("A justiciable controversy must exist before this Court will review a declaratory judgment action challenging the constitutionality of an ordinance"); *Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994) (noting that where four elements of a

justiciable controversy are not met, the court “steps into the prohibited area of advisory opinions”); *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390 (1993), *order changing opinion at* 866 P.2d 1256 (1994) (an appeal is moot where it presents purely academic issues and where it is not possible for the court to provide effective relief).

In the event this Court determines it is appropriate to reach the merits, this Court should deny the City’s motion. As discussed herein, the Four Corners SAD adopted by the City was in fact specifically authorized by the state constitution and state law. The City rejected its own authority when it decided to repeal the 2003 Ordinance and 2005 Resolution and to refund the assessments it had received—without protest—from the affected property owners. *See* Part IV. C, *supra*. Therefore, this Court should affirm that the City is not entitled to judgment as a matter of law.³⁸

E. The Trial Court Properly Awarded Costs to Kenyon Disend

The trial court properly entered judgment and awarded costs in favor of Kenyon Disend, the prevailing party. *See* RCW 4.48.080; *see also City of Lake Forest Park v. State Shorelines Hearings Bd.*, 76 Wn. App. 212, 222, 884 P.2d 614 (1994). The City assigns error to the

³⁸ Again, this court may affirm an order granting summary judgment on any theory established by the pleadings and supported by the proof. *Wendle*, 102 Wn.2d at 382.

judgment, but fails to address the issue on the merits. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignments of error unsupported by reference to the record or argument will not be considered on appeal); *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration”). If this Court addresses this issue, it should conclude that the judgment entered was proper and should be affirmed.

V. CONCLUSION

The City Council was advised in 2005 that the Four Corners SAD was uncommon, but supported by existing law. The Council incorporated feedback from a public hearing and then adopted the Four Corners SAD. The affected property owners, including sophisticated land developers, paid their assessments in anticipation of substantial new street improvements. No property owner has challenged the Four Corners SAD or asked for a refund. Even so, the City voluntarily repealed the Four Corners SAD and refunded the assessments. It did so based upon the equivocal and legally incorrect opinion of its current City Attorney, Ms. Todd. Thereafter, in 2011, the City sued its former attorneys over advice given nearly six and eight years earlier.

Kenyon Disend respectfully requests that this Court adhere to established Washington law that prohibits the adjudication of stale claims, and affirm the trial court's order granting Kenyon Disend's motion for summary judgment.

Kenyon Disend further requests that the Court affirm on the alternative grounds that the Four Corners SAD was a proper exercise of the City's authority under RCW 35.72.050. The City needlessly repealed its unchallenged ordinance, needlessly refunded properly collected assessments, and needlessly caused the losses it seeks to recover in this lawsuit. By doing so, the City proximately caused the losses it claims in this lawsuit. The trial court should also be affirmed on this basis.

RESPECTFULLY SUBMITTED this 4th day of June, 2012.

COZEN O'CONNOR



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DECLARATION OF SERVICE

The undersigned states:

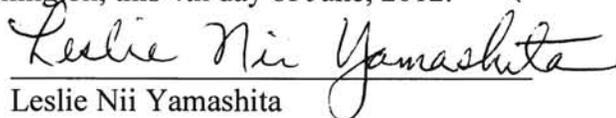
I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 4th day of June, 2012, I caused to be filed the foregoing RESPONDENTS' BRIEF by sending the original and one copy via U.S. Mail, First Class Postage Pre-Paid, to Division I of the Court of Appeals for the State of Washington. I also served copies of said document on the following parties as indicated below:

Parties Served	Manner of Service
<p><i>Counsel for Appellant:</i> Robert B. Gould, Esq. Law Offices of Robert B. Gould 2110 North Pacific Street, Suite 100 Seattle, WA 98103-9126</p>	<p>() Via Legal Messenger () Via Overnight Courier (X) Via U.S. Mail (X) Via Email</p>

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

Executed at Seattle, Washington, this 4th day of June, 2012.



 Leslie Nii Yamashita

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