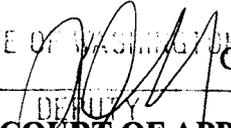


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  Court of Appeals No. 35722-4-II

DEPUTY
**COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON**

HON YOEUN, individually and as Guardian ad Litem for the minor
SUNNIE YOEUN,

Appellants,

v.

CHIN FAI NG and JUDITH ANN NG, husband and wife, individually,
and their marital community; CITY OF VANCOUVER, a Municipality;
ESTATE OF STAN HUDLICKY, SHIRLEY HUDLICKY and the
HUDLICKY MARITAL COMMUNITY; EVERGREEN STATE FENCE
COMPANY, formerly a Washington corporation, and "JOHN and JANE
DOE" shareholders of the dissolved corporation EVERGREEN STATE
FENCE COMPANY; ROGER and ESTELLA CHANNING, individually
and as husband and wife, dba EVERGREEN STATE FENCE,

Respondents

**BRIEF OF RESPONDENTS ROGER AND ESTELLA
CHANNING DBA EVERGREEN STATE FENCE**

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RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court correctly granted summary judgment for Channing/Evergreen on plaintiff's negligence claim based on the absence of any evidence of negligence in constructing the chain link fence and based on the absence of any municipal code violation for the height of the fence. Even if the trial court summary judgment was not correct on the cited grounds, the trial court's ruling would be correct because plaintiff's claim is barred by the applicable six-year statute of repose in RCW 4.16.310 for construction liability where the fence was completed in 1986 and the accident happened in 1997.
2. The trial court correctly granted summary judgment for City of Vancouver based on the absence of any municipal code violation.

RESPONSE TO THE ISSUES

1. Because plaintiff presented no evidence that Channing was negligent in any respect and because the trial court correctly concluded the Vancouver Municipal Code ("VMC") provision governing service driveways did not apply to the subject driveway, summary judgment of dismissal for Channing was proper and should be affirmed. (Issues A, B, C and E).

2. Even if plaintiff had presented evidence of negligence and resulting harm, plaintiff's claim would properly be dismissed on summary judgment because the applicable statute of repose bars plaintiff's claim where it accrued **after** the six year statute where the fence was constructed in 1986 and the accident happened in 1997.

I. STATEMENT OF THE CASE

A. Factual History

Plaintiff's statement of the facts contains no citation to any evidence of negligent construction by defendants because none was presented to the trial court. The sole basis of plaintiff's negligence claims against Channing is the asserted violation of Vancouver Municipal Code ("VMC") based on the fence height. According to plaintiff's argument, the subject fence (chain link with wood slats) could not lawfully be more than 30 inches tall.

Defendants Roger and Estella Channing, formerly dba Evergreen State Fence Company (hereafter "Channing") are sued for alleged negligence in constructing a fence in 1986 on property then owned by defendant Hudlicky and later sold to defendants Ng. Plaintiff seeks to hold Channing liable for

injuries suffered in 1997 when Sunnie Yoeun rode his bicycle past the fence allegedly built by Channing and struck the passenger side of a vehicle driven by Steiner. The basis of liability for the 1997 accident is alleged to be Channing's negligence in 1986 in constructing the fence too tall to conform to the VMC. CP 38.

Plaintiff alleges Channing's 1986 labor and materials contract for construction of a fence on Hudlicky's property creates liability for the 1997 injuries because of: 1. "Negligent construction and/or placement of the chain-link, slat-filled, fence"; 2. "Violation of city building and/or site-line right-of-way ordinances" for fences at the location; 3. "Breach of a contractual duty to plaintiff minor, as an intended beneficiary of building contract"; and 4. "Violation of duty to respond properly to 'correction notice' if sent to defendants". CP 38.

In August, 1986, Channing submitted a proposal for labor and materials to construct a 5 foot high fence on Hudlicky's property for a total price of \$753.35. CP 33. The amount of the bid would correspond to approximately 50 feet of fence. CP 30. Currently, the property has about 300 feet of chain link

fence on it and at least two other fence companies also did work for Hudlicky. CP 30.

For purposes of the summary judgment motion, Channing agreed to assume the subject fence was, in fact, built by Channing. If the summary judgment is reversed, Channing reserves the right to challenge plaintiff's proof that Channing even built the subject fence where Channing's proposal was for 50 feet of chain link fence and the subject property contains over 300 feet of chain link fence. At least two other contractors built fence for Hudlicky during the relevant time and could easily have built the subject fence. ¹ CP 30.

Plaintiff bases the allegations of VMC violations in substantial part on a notation that appeared on Hudlicky's building permit. CP 86. That notation, "CN" (apparently meaning correction notice) was hand-written in October 1986 on the building permit obtained by Hudlicky. CP 19; 86. Plaintiff offered no evidence of what the CN notation referred

¹ Channing's proposal was for labor and materials for a 5 foot high fence (CP 33) and plaintiff's brief argues the subject fence is 6 feet high. (App. Br., p. 13)

to, why a CN would have been issued, and no evidence the CN was unresolved.

Channing was never told about any changes needed to the fence and was never aware of any correction notice tied to the building permit. CP 30. The building permit was obtained by Hudlicky, the property owner, listing Hudlicky as the general contractor. CP 34. Hudlicky is no longer a party to the case because claims against him were dismissed on summary judgment.²

From a photograph of the fence in question, the City of Vancouver official responsible for VMC enforcement confirmed the fence running across the front of the property and parallel to the road is in compliance with the VMC applicable in 1986 and the then current code. (CP 101-105; Peterson Depo., pp. 26-32) The height limitation of 30 inches does not apply to the subject fence. (CP 101: “The code section did not apply to this fence that runs parallel to Carlson [Road].”) The corner site triangle requirement of 30 inch

² The summary judgment granted in favor of Hudlicky was based on *Porter v. Sadri*, 38 Wn.App. 174, 685. P2d 612 (1984) (rule that a vendor does not remain liable for injuries caused by open and obvious conditions on the premises once the property has passed from his possession or control). CP 22-23.

maximum height would not apply to this fence. CP 101-102.

The slats placed in the chain link fence are permissible and would not constitute a VMC violation. CP 105.

B. Procedural History

In 2004, plaintiff sued the Hudlicky estate (the former owners of the property); the Ng family (the current property owners); Steiner (the driver of the vehicle); and Anderson Glass Company (Steiner's employer). The claims against the Hudlicky estate, Steiner and Anderson Glass Company were all dismissed on summary judgment.

In 2005, plaintiff added claims against Channing and the City of Vancouver based on allegations of VMC violations for the fence height.

Channing and the City of Vancouver both moved for summary judgment. A common issue in the summary judgment motions was whether the subject fence was or was not in violation of any VMC provision. Plaintiff's argument that the fence could be no higher than 30 inches required plaintiff to establish that the driveway was a "service driveway" rather than a "private driveway" as those terms are

defined in VMC 11.20.010 – 1957. The trial court ruled that the driveway is not a service driveway. CP 496-97.

The Code definition is as follows: “**Service Driveway,**” as used in this chapter, means any driveway constructed in accordance with city standard specifications in or upon any street and intended for use and used by the public for access to any place of business or public use.” CP 61; Appellant’s Brief, Appendix A-1. In contrast, “Private driveway,” means “any driveway constructed in accordance with city standard specifications in or upon any street and intended for use by the occupant as a private driveway to the property.” Id.

The trial court ruled that the interpretation of the VMC is a matter of law, not of fact. CP 496. The court concluded the City code creating a “sight triangle” limitation of fence height to 30 inches did not apply because the subject driveway was not a “service driveway” as that term is defined in the Code. CP 497. Because there was no VMC violation and the subject fence was and still is in compliance with applicable codes, plaintiff’s negligence claim was dismissed on summary judgment. CP 498-99.

The trial court's conclusion regarding the fence was in accord with the testimony of the City of Vancouver official responsible for enforcing the code that the fence never violated the VMC. CP 101-105. The issues regarding the fence and the applicable codes are briefed extensively by the City and Channing incorporates the City's briefing on this issue. The City's briefing to the trial court is contained in the record from CP 40-77 and the supporting exhibits follow and include up to CP 189.

Besides finding that the fence was not in violation of the VMC because the subject driveway is used for residential access to the apartment building, the trial court concluded it is not reasonably foreseeable that a chain link fence constructed with the slats in question would be unlawful or would create a known hazardous condition.³ CP 498. Further, the court concluded that now, as in 1986 when Hudlicky asked Channing for a bid for labor and materials, the chain link fence was a lawful fence under the code. CP 498. Plaintiff appeals.

³ The court commented that the fence was an "open obvious condition," which was the same basis used by the court in granting Hudlicky's motion for summary judgment. CP. 498.

II. SUMMARY JUDGMENT STANDARD

A defense motion for summary judgment requires the plaintiff to come forward with evidence to prove the existence of a genuine issue of material fact for trial. *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) As the party opposing summary judgment, plaintiff was required to submit “competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993); CR 56(e).

Plaintiff is required to “set forth specific facts that sufficiently rebut the moving party’s contentions.” *Seven Gables Corp. v. MGM/USA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P2d 1 (1986). Plaintiff as the nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Id.* 106 Wn. 2d at 13. If plaintiff is unable to demonstrate each element of the claim, then summary judgment of dismissal is appropriate. *Howell v. Blood Bank*, 117 Wn. 2d 619, 625, 818 P.2d 1056 (1991).

This court may sustain a lower court summary judgment on any theory established by the pleadings and supported by the proof. *Mt. Park Homeowners Ass’n v. Tydings*, 125 Wn. 2d 337, 344, 883 P.2d 1383 (1994). Trial court rulings in conjunction with a motion for

summary judgment are reviewed de novo. *Folsom v. Burger Kind*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

III. ARGUMENT

A. Argument on Assignment of Error No. 1

The trial court properly granted summary judgment for Channing on one or more of the following bases:

1. There is no evidence of negligence by Channing and thus no negligence liability;
2. The cited VMC code provision does not apply as a matter of law;
3. The subject fence is in compliance with the VMC thus it would not constitute negligent construction;
4. Even if plaintiff could prove all of the elements of a negligence claim, such a claim would be barred by the six-year statute of repose in RCW 4.16.310, where the 1986 fence construction allegedly caused a 1997 accident.

First, Plaintiff presented no evidence of negligent construction by Channing. The sole basis of plaintiff's negligence claim against Channing is the asserted application of the VMC provision defining

“service driveway” and Channing’s alleged violation of that provision by having a chain link fence with slats within a proscribed sight triangle. The fence was open and obvious, and therefore not a dangerous condition that would support the negligence claim against Channing. CP 498.

Secondly, the cited VMC code provision relied upon by plaintiff does not apply. The VMC definition is as follows:

“Service Driveway,” as used in this chapter, means any driveway constructed in accordance with city standard specifications in or upon any street and intended for use and used by the public for access to any place of business or public use.”

Plaintiff produced no evidence in support of the application of the definition. The trial court rejected plaintiff’s argument based on the court’s interpretation of the VMC definition and based on the common understanding of “service driveway” as referring to a service entrance “set aside for supplying materials, commodities, garbage service, and other types of limited activity.” CP 496-97.

The trial court’s interpretation is correct and should be affirmed. The only evidence in the record is that the driveway provided egress from an apartment building onto Carlson Road. If that were sufficient to create a “service driveway”, then every residential driveway used by

more than one person would be subject to the limitation on fence height. Rather, the subject driveway meets the code definition of “private driveway” because it is “intended for use by the occupant as a private driveway to the property”.

The City presented evidence that the Code section relied on by plaintiff did not apply to the subject fence. CP 101-105. Plaintiff presented no contrary evidence but merely made unsupported assertions and argument. Plaintiff’s only attempt at qualifying for the “service driveway” definition was testimony that people used the driveway. “My mother entered and eventually existed [sic] on the driveways to the apartment complex’s parking lot.” CP 287. That is insufficient to get past summary judgment or to undermine the trial court’s conclusion that this was not a “service driveway”.

Therefore, the trial court’s conclusion that the subject fence was not in violation of VMC is supported by the record, is correct as a matter of law and should be affirmed. This court need go no further.

Lastly, to the extent the Washington Supreme Court recently expanded potential liability in negligence against contractors, it does not create liability for Channing for two reasons:

1. The record is devoid of any evidence of negligent construction by Channing other than the alleged code violation. Plaintiff

failed to prove Channing constructed the specific fence; failed to link that fence to a cause of harm to plaintiff; and failed to identify any negligence in the construction of the fence.

Plaintiff's failure of proof on these essential elements is sufficient to support the trial court conclusion; and

2. Channing has an absolute defense to negligence liability based on the applicable six-year statute of repose (RCW 4.16.310) which would have cut off Channing's exposure six years after the fence completion in 1986, or not later than 1992. It was five years later that the unfortunate accident occurred when Sunnie rode his bicycle into the roadway and struck Steiner's vehicle.

Because this court can affirm on any theory established by the pleadings and supported with proof, *Mt. Park Homeowners*, 125 Wn. 2d at 344, this court should affirm based on the statute of repose. This issue is raised in Channing's pleading as an affirmative defense (CP 15), and is established by the proof. Summary judgment for Channing should be affirmed.

RCW 4.16.310 "terminates a negligence claim six years after 'substantial completion of construction,' **even if the injury caused by contractor negligence has not yet occurred.**" *Davis v. Baugh*

Industrial Contractors, Inc., 159 Wn.2d 413, 419, 150 P.3d 545 (2007)(emphasis added)⁴. Thus, any negligence claim against Channing was terminated not later than August, 1992 (six years after completion of the fence). The statute of repose protects contractors from such “extended potential tort liability” by **barring forever claims that have not accrued within six years.** *Hudesman v. Meriwether Leachman Assoc.*, 35 Wn. App. 318, 321, 666 P.2d 937 (1983). Here, the undisputed facts establish that no claim against Channing accrued before 1992 and therefore plaintiff’s claim is forever barred by RCW 4.16.310.

The recent *Davis* case supports summary judgment for Channing based on the six year statute of ultimate repose, by confirming that any negligence claim is terminated if it has not accrued within six years from completion. *Davis*, 159 Wn. 2d at 419, citing RCW 4.16.310. In *Davis*, the Supreme Court overruled the long accepted doctrine of completion and acceptance, but commented that the “**statute of repose is a much clearer and simpler way to protect contractors from a long period of uncertainty.**” 159 Wn.2d at 419 (emphasis added). That protection

⁴ Plaintiff correctly points out that the Washington Supreme Court in *Davis v. Baugh Industrial*, recently rejected the “completion and acceptance doctrine” of non-liability for contractors whose negligence is a cause of harm to plaintiff. The court replaced the former “completion and acceptance doctrine” with the standard set forth in Restatement (SECOND) of Torts § 385. Under the Restatement test, defendant here would be entitled to summary judgment based on the absence of evidence of negligence.

applies on these facts and serves to immunize Channing from any claim where eleven years had passed between the fence work and the plaintiff's accident. Any potential claim against Channing was terminated by 1992, six years after construction of the fence. Where the injury did not occur until 1997, plaintiff's claim is forever barred.

In the final section of plaintiff's brief, plaintiff makes a general plea for reversal of summary judgment based on the asserted existence of material issues of fact. The brief states: "The trial court agreed that there were issues of fact present regarding safety. CP 559". Plaintiff's citation to CP 559 does not support this statement and it is an erroneous description of the state of the record.⁵

Plaintiff asserts there are "numerous issues of material fact that were before the trial court" but does not identify any. The record before the trial court and before this court establishes that plaintiff has not met the burden of coming forward with admissible evidence creating any issues of fact. Rather, the record establishes that Channing was not negligent, that even if Channing had been negligent, any claim would be

⁵ Clerk's Papers at 559 is page 3 of the trial court's Memorandum Decision on summary judgment. The discussion on that page concerns the court's analysis of the VMC and whether it applies to the subject fence. For example, the court states: "I am satisfied as a matter of law the fence as constructed was legal under the City code and that there was no violation of the side yard requirement." CP 559. Nowhere does the court state that there are issues of fact about safety. Rather, the court states that, as a matter of law, plaintiff's claim based on alleged code violations fails because the provisions do not apply to the subject fence.

barred by the applicable statute of repose and therefore Channing was entitled to summary judgment based on the record. As a matter of law, the subject fence was in compliance with VMC provisions at the time it was built and at other applicable times in this case. Plaintiff presented no contrary evidence and therefore the summary judgment should be affirmed.

For all of the reasons discussed above, the summary judgment of dismissal in favor of Channing should be affirmed.

B. Assignment of Error No. 2

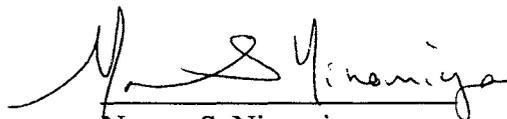
This assignment of Error concerns the liability of the City of Vancouver. Therefore, Channing does not address this assignment. To the extent the City's brief in response addresses the fence's compliance with applicable VMC provisions, Channing incorporates those arguments in support of the trial court's grant of summary judgment.

CONCLUSION

The trial court's decision should be affirmed in all respects.

Dated: This 17th day of April, 2007.

Respectfully submitted,



Norma S. Ninomiya
Attorney for Respondent,
Channing/Evergreen

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Certificate of Mailing

STATE OF WASHINGTON
BY [Signature]
DEPUTY

1. I, Melissa Tofell, declare under the penalty of perjury of the laws of the state of Washington that the following is true and correct.
2. I am over the age of 18 years and am not a party to this lawsuit.
3. On this day, I caused to be served on the counsel of record named below, postage paid, a true and correct copy of Brief of Respondents Roger and Estella Channing Db a Evergreen State Fence. I caused a copy of this document to be served by:

xx	US mail, postage prepaid;
	Overnight delivery;
	Next day hand delivery; or
	Other: facsimile

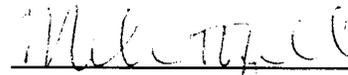
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Dated this 17th day of April, 2007

A handwritten signature in cursive script, appearing to read "Melissa Toffel", written over a horizontal line.

MELISSA TOFFEL