FILED
Court of Appeals
Division II
State of Washington
5/3/2018 4:24 PM

No. 51025-1-II
Thurston County Superior Court Case No. 16-2-00980-34

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

SEATTLE TUNNEL PARTNERS, a joint venture;
TUTOR PERINI CORPORATION; and DRAGADOS USA, INC.,

Defendant.

SEATTLE TUNNEL PARTNERS, a joint venture,

Third Party Plaintiff,

v.

HITACHI ZOSEN U.S.A. LTD., a Delaware corporation;
HITACHI ZOSEN CORPORATION, a foreign corporation; and
HNTB CORPORATION, a Delaware corporation,

Third Party Defendants.

HITACHI ZOSEN U.S.A. LTD., a Delaware corporation,

Fourth Party Plaintiff,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND;
ZURICH AMERICAN INSURANCE COMPANY;
LIBERTY MUTUAL INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY COMPANY OF
AMERICA; FEDERAL INSURANCE COMPANY; and SAFECO INSURANCE
COMPANY OF AMERICA,

Fourth Party Defendants.

HITACHI ZOSEN U.S.A. LTD.,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
and SHANNON & WILSON, INC.,

Defendants.

SEATTLE TUNNEL PARTNERS, a joint venture,
Plaintiff/Respondent,

v.

SHANNON & WILSON, INC., a Washington corporation; and WSP USA, Inc.,
formerly known as PARSONS BRINCKERHOFF, INC. a New York corporation,

Defendants/Appellants.

OPENING BRIEF OF APPELLANT
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I. INTRODUCTION

A party must exercise due diligence and may not delay filing a lawsuit more than three years after it has inquiry notice of the factual basis of its tort claim. In its own internal memoranda and letters, written more than three years before filing suit, Respondent Seattle Tunnel Partners' ("STP") affirmatively identified all the essential elements of its tort claims against Appellants Shannon & Wilson, Inc. and WSP USA, Inc., f/k/a Parsons Brinckerhoff, Inc. ("WSP")[1] following the stoppage of "Bertha," the massive, 57-foot diameter tunnel boring machine responsible for boring the State Route 99 tunnel to replace the Alaska Way Viaduct in Seattle. The trial court refused to grant summary judgment dismissing STP's untimely claims, erroneously reasoning that RCW 4.16.080's three-year statute of limitation continues to be tolled when plaintiff has inquiry notice, but lacks definitive proof, that a defendant may have breached a duty thereby causing the plaintiff's damages.

On December 4, 2013, Bertha mined through an eight-inch diameter steel well casing. Two days later, Bertha's forward advancement stalled, causing significant delay and repair costs to several parties involved on the project, including the project owner, Washington State Department of Transportation ("WSDOT"); its general contractor, STP; and Bertha's manufacturer, Hitachi Zosen, U.S.A. Ltd. Within three years, these parties all sued each other to recover their stoppage costs. Yet STP waited an additional six months before suing Shannon & Wilson and WSP, despite documenting its belief between December 2013 and mid-January 2014 that the well casing damaged Bertha and that Shannon & Wilson and WSP failed

[1] Pursuant to RAP 10.1(g), Shannon & Wilson files this separate brief and adopts by reference the Opening Brief of Appellant WSP.

to adequately disclose the steel well casing in the contract documents they prepared for this project. STP undeniably discovered all the essential elements of its claims against Shannon & Wilson and WSP more than three years before it filed suit; accordingly, its untimely complaint should have been dismissed on summary judgment as time-barred.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in denying Shannon & Wilson's and WSP's motions for summary judgment. CP 1318-21.

B. The trial court erred in denying Shannon & Wilson's and WSP's motions for reconsideration. CP 1408-10.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Did the trial court err in refusing to dismiss STP's Complaint in the face of conclusive documentary proof that STP was aware of potential claims against Shannon & Wilson and WSP over three years before it filed its lawsuit?

B. May STP recover the same damages alleged in its negligence claims against alleged joint tortfeasors under a theory of "tort indemnity"?

IV. STATEMENT OF THE CASE

Each of STP's claims against both Shannon & Wilson and WSP allege that these two defendants' supposed negligence caused Bertha to mine through the steel encased ground water test well ("TW-2") on December 4, 2013. On December 12, 2013, STP asserted that documents prepared by Shannon & Wilson and WSP, which were incorporated in STP's contract with WSDOT, were defective in failing to disclose TW-2. By at least January 15, 2014, STP publicly blamed TW-2 for damaging

Bertha and halting STP's work on WSDOT's deep bore tunnel. Inexplicably, STP waited more than three years before filing a lawsuit against Shannon & Wilson and WSP.

A. Shannon & Wilson and WSP installed TW-2 and drafted the corresponding Contract Documents, which STP certified it would comply with in its design-build contract with WSDOT.

In 2001, WSDOT engaged WSP as a consultant to assist in the process of evaluating the repair or replacement of the State Route 99 Alaskan Way Viaduct. CP 492 at ¶ 4; CP 539 at ¶ 2; CP 548-97. WSP specifically assisted in evaluating design options for this project. CP 539 at ¶ 2. It also helped in the compilation of an environmental impact statement. *Id*. Related to this work, WSP subcontracted with Shannon & Wilson to conduct geologic profile logs, groundwater pumping tests, and prepare technical memoranda relating to the Viaduct's replacement alternatives and related geotechnical issues. CP 492 at ¶ 4.

In performing its subcontract with WSP, Shannon & Wilson installed various field exploration wells. CP 493 at ¶ 5. Among those explorations, in 2002, Shannon & Wilson oversaw the installation of a pumping well identified as TW-2. *Id* at ¶ 6. TW-2 was constructed with an eight-inch diameter steel casing and was installed in a borehole extending to a total depth of 119 feet. *Id*.

In 2009, WSDOT determined the bored tunnel option was the most suitable replacement for the Viaduct ("the Project"). CP 17 at ¶ 59; CP 1022. That option involved constructing an underground tunnel approximately 1.7 miles long and 57 feet in diameter. *Id*. WSDOT consulted with WSP in the preparation of the Request for Proposals for the Project, including the accompanying technical requirements. *Id* at ¶ 5. In

turn, WSP consulted with Shannon & Wilson on the technical requirements. *Id* at ¶ 6. In addition to its subcontract work with WSP, Shannon & Wilson contracted directly with WSDOT for additional geotechnical engineering services. CP 493 at ¶ 7.

Together, WSP and Shannon & Wilson prepared the Geotechnical Baseline Report ("GBR"). CP 539 at ¶ 6. The GBR set the baselines for "subsurface site conditions expected to be encountered in the performance of the Work" on the Project. CP 1011. In addition, Shannon & Wilson also prepared the Geotechnical & Environmental Data Report ("GEDR"), which accompanied the GBR. CP 493 at ¶ 7; CP 1011. The GEDR's stated purpose was to "present[] geotechnical and environmental data collected for the current and previous alignments of the project" in the replacement of the Viaduct with the deep bore tunnel. CP 1022.

Together with WSDOT, Shannon & Wilson and WSP identified both the GBR and GEDR as Contract Documents in anticipation of WSDOT's Request for Proposals for design and construction of the replacement tunnel. The GBR expressly states that it is "contractually binding and must be read in conjunction with the RFP, including but not limited to the Geotechnical & Environmental Data Report (GEDR) included as Appendix G-2 of the RFP, which is also a contract document." CP 1011. In the spring of 2010, Shannon & Wilson and WSP jointly delivered the GBR for the Project and at that time, Shannon & Wilson also delivered the GEDR. CP 1005; CP 1014. The front page of the GBR notes that it was prepared by Parsons Brinckerhoff (now known as WSP) and Shannon & Wilson. CP 1005. Likewise, the front page of the GEDR identifies Shannon & Wilson as author of the document. CP 1014.

In May 2010, WSDOT issued its Request for Proposal for the design and construction of the tunnel, explicitly incorporating the GBR and GEDR as Contract Documents in the Request for Proposal. CP 17 at ¶ 62; CP 1038; *see* CP 1004 *and* CP 1011. That December, STP submitted its bid for the design-build contract to WSDOT. CP 17 at ¶ 63; *see also* CP 777-86. In its bid, STP certified that it would "design and construct the Project in accordance with the terms and conditions of the Contract Documents," which, again, included the GBR and GEDR. CP 782; *see* CP 1004 *and* CP 1011. Indeed, both the GBR and GEDR are listed as Contract Documents in Appendix A1 – List of RFP Documents, included in STP's conformed Request for Proposal bid, dated December 10, 2010. CP 777; CP 783.

WSDOT eventually awarded the Project to STP. In January 2011, WSDOT and STP executed the design-build contract in which STP agreed to be chiefly responsible for the design, engineering, and construction of the tunnel. CP 377 at ¶ 16; CP 1038. STP agreed to procure a tunnel boring machine ("TBM") to bore the tunnel alignment, which STP commissioned through Hitachi Zosen U.S.A. Ltd. ("Hitachi"). CP 377 at ¶ 17. Together with Hitachi, STP oversaw the design and construction of what was at the time the largest earth pressure balance tunnel boring machine in the world, with a diameter of 57.5 feet. *See* CP 923 at ¶ 5; CP 924 at ¶ 7; CP 377 at ¶ 17.

B. STP was aware that the TBM struck a steel well on December 4, 2013.

STP launched the TBM, commonly known as Bertha, and started boring the tunnel on July 30, 2013. CP 379 at ¶ 26. In the early morning of December 4, 2013, the TBM struck a steel well casing during excavation. *Id*. STP employees immediately learned of the existence of the casing, as it

was ejected from the ground, directly above the location where the TBM was mining. CP 812; CP 924 at ¶ 8. That same morning, STP geotechnical engineers determined that the TBM struck an eight-inch diameter hollow steel well casing, although they were unable to identify the specific name of the well at that time. CP 861-64. They suspected it was "likely an old water well." CP 862.

The TBM continued tunneling after hitting the steel well, but its rate of advancement eventually slowed. CP 969; CP 925 at ¶ 10. On December 6, 2013, TBM advancement stopped; the machine was unable to continue boring. CP 925.

C. STP immediately began collecting data to support a claim for differing site conditions that was premised on its TBM strike of TW-2.

On December 6, 2013, the same day that the TBM advancement stopped, STP Construction Manager, Juan Luis Magro, acknowledged that it was "a given" there was damage to the TBM resulting from its encounter with the steel casing, although the extent of damage was yet unknown. CP 893. Mr. Magro advised his colleagues that STP may want to begin collecting data to support a potential claim for a differing site condition, entitling STP to additional compensation under its design-build contract. CP 894.

On December 9, 2013, STP Project Manager, Chris Dixon, emailed STP's Chief Executive Officer regarding the "TBM Obstruction." CP 872. Mr. Dixon stated that Matt Preedy, a WSDOT employee, had identified the steel pipe as TW-2 and that the well strike gave STP grounds for asserting a differing site condition claim against WSDOT. *Id.*

To be sure, on or around December 10, STP opened Potential Change Order #250 for its claim against WSDOT for the "Steel Casing in

TBM Boring near STA 204+00." CP 896. STP instructed its employees to separately record any additional work performed by STP's subcontractors related to the stoppage so that STP could incorporate that work into its claim against WSDOT for the alleged differing site condition. *Id.*

On December 12, 2013, Mr. Dixon informed WSDOT that it was beginning its investigation into the root cause of the TBM stoppage. CP 866-67. He explained that STP had learned on December 3, 2013[2] that "the TBM had encountered an eight (8) inch diameter steel pipe, one-hundred nineteen (119) feet in length, which was left in place by WSDOT." CP 866. Mr. Dixon further notified WSDOT that:

> In the event that the encountering of this pipe is determined to be, upon the completion of STP's investigation, the cause for the stoppage in tunneling and/or the cause for an increase in STP's cost and time for performance, STP hereby reserves its right to request a Change Order to provide an extension of the Completion Deadlines and an increase in compensation.

Id.

Mr. Dixon reiterated STP's intention to establish that TW-2 was a differing site condition, claiming that the Contract Documents "are defective in that they did not show the existence of this pipe, although its existence was known by WSDOT, resulting in STP not being able to advance the TBM . . . ." CP 867.

STP then investigated the precise mechanics of its TBM stoppage, while continuing to assert its belief that the encounter with TW-2 was the source of Bertha's problems. By December 13, 2013, STP generated a TBM Stoppage Report, in which it hypothesized potential causes that prevented the TBM from advancing. CP 936-45. Specifically, STP

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[2] Despite Mr. Dixon's statement, the records show that the TBM actually encountered TW-2 early in the morning on December 4, not on December 3, 2013. *See, e.g.*, CP 924 ¶ 8.

hypothesized that there was either an obstruction in front of the TBM, obstructions within the TBM cutterhead, or a combination of both. CP 943-44. While the extent of damage to components of the TBM was still unknown, STP identified TW-2 as a cause of the stoppage in each of its hypotheses. *Id*. STP then conducted a series of investigative activities to determine the extent to which parts of TW-2 were stuck in the TBM cutterhead or remained in the ground, obstructing the TBM from advancing.[3] *See* CP 226-28.

Meanwhile, on December 17, WSDOT responded to Mr. Dixon's December 12 letter, pointing out that TW-2 was identified in the Contract Documents and therefore, STP knew or should have known of its existence prior to encountering it during tunneling. CP 916. WSDOT expressly confirmed that the steel well casing was TW-2, and informed STP that it was referenced numerous times in the GEDR Technical Requirements Appendix G2 and described in detail in Appendix F/4-03 and Technical Requirements Appendix G3. CP 916-17. Mr. Dixon responded three days later, disagreeing with WSDOT that TW-2 was adequately described in the GEDR appendices. CP 876-77.

Throughout December 2013 and early January 2014, STP continued to provide WSDOT with information regarding its claim for damages, citing TW-2 as a potential cause of the TBM stoppage. In a December 31, 2013, letter to WSDOT, Mr. Dixon repeated STP's claim that the exploratory

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[3] STP conducted a visual inspection of the TBM's excavation chamber on December 18. CP 927 at ¶ 20. In late December, STP's subcontractors drilled a series of six-inch probe holes three feet in front of the cutterhead. CP 928 at ¶ 22. Between January 8 and January 16, STP's subcontractor drilled five-foot exploratory observation piles in front of the TBM. *Id*. at ¶ 23. Finally, from January 17 through January 27, teams of professional scuba divers conducted hyperbaric inspections of cutterhead to determine the extent to which obstructions – including fragments of TW-2 – were caught in the TBM, hindering advancement. *Id*. at ¶ 24.

eight-inch steel cased pipe was left in the ground and responsible for TBM's break down and cessation of drilling:

> As discussed in previous correspondence, an eight (8) inch diameter steel pipe, one-hundred nineteen (119) feet long, which was installed and left in place by WSDOT as of previous explorations for the Alaskan Way Viaduct Replacement Program, was encountered by the TBM on December 3, 2013. Two pieces of the pipe, each approximately three (3) feet in length, were retrieved from the conveyer belt after they passed through the TBM, while another piece of this pipe, approximately fifty-five (55) feet in length, was removed from the ground surface, indicating that there is almost sixty (60) feet of this pipe remaining below ground surface.
>
> ***It appears that this remaining length of this pipe is the obstruction that is preventing STP from advancing the TBM, resulting in the current stoppage to tunneling***.

CP 919-20 (emphasis added).

By mid-January 2014, the TBM had been stopped for over a month. On January 15, at WSDOT's request, STP provided answers to several questions related to STP's differing site condition claim and the TBM obstruction. CP 1268-1275. In response to WSDOT's question regarding potential causes of the damage to the cutting tools on the face of the TBM, STP indicated that it believed "***the steel pipe is the primary cause of the damage to the cutting tools.***" CP 1269 (emphasis added).

Despite STP's consistent communications to WSDOT that TW-2 was the primary cause of the TBM stoppage and damage, WSDOT internally questioned the impact that an eight-inch hollow steel pipe could have had on the massive TBM. *See* CP 1216-17 (WSDOT internal memo addressing likely causes to the TBM stoppage). Similarly, WSP and Shannon & Wilson engineers were not convinced that striking TW-2 caused the TBM stoppage. *See* CP 1198; CP 1200. Nevertheless, STP was steadfast in its public theory that striking TW-2 caused damage to the TBM

and ultimately resulted in the stoppage. *See* CP 866-67; CP 876-77; CP 919-20; CP 1268-75. Furthermore, STP conceded at Summary Judgment that it "was generally aware during the course of the Project" that Shannon & Wilson and WSP drafted the allegedly "defective" Contract Documents. CP 988. *See also* CP 782 (certifying that STP would design and construct the Project in accordance with the Contract Documents); CP 777 (listing the GBR and GEDR as Contract Documents to STP's conformed Request for Proposal); CP 1005 (identifying Parsons Brinckerhoff (now known as WSP) and Shannon & Wilson as authors on the front page of the GBR); CP 1014 (identifying Shannon & Wilson as author on the front page of the GEDR).

After attempting to restart Bertha, STP was forced to shut down the TBM indefinitely on February 2, 2014. CP 928-29. It did not restart again for nearly two years.

D. Procedural Facts.

On October 9, 2015, WSDOT filed suit against STP in King County Superior Court for breach of the design-build contract related to stoppage of the TBM in December 2013. CP 7 at ¶ 2.14. On STP's motion, the trial court dismissed the case without prejudice because the parties' contract designated exclusive jurisdiction in Thurston County. *Id*. Later, in March 2016, WSDOT timely re-filed its claims against STP in Thurston County Superior Court. CP 1-8.

On July 6, 2016, STP timely answered WSDOT's Complaint and filed a counterclaim against WSDOT, alleging that WSDOT failed to adequately disclose TW-2 in the Contract Documents, and that STP was entitled to recover any damages resulting from the TBM's encounter with TW-2, which STP alleged to be a differing site condition under their design-build contract. CP 10-40. Along with its counterclaims, STP timely filed

third-party counterclaims against Hitachi[4] and HNTB Corporation, alleging they were alternatively liable for damages related to the 2013 TBM stoppage. CP 26-40. Conspicuously, STP did not file claims against either Shannon & Wilson or WSP at that time.

Although Hitachi had timely sued Shannon & Wilson related to TW-2 on December 2, 2016, STP did not file a complaint against Shannon & Wilson until January 26, 2017, approximately three years, one month, and three weeks after the TBM encountered TW-2. *See* CP 257-265 *and* CP 319-329. The following day, January 27, 2017, STP amended that complaint, adding WSP as a defendant. CP 375-88. STP alleged three causes of action for negligence, negligent misrepresentation, and tort-theory indemnification for "Third Party Incurred Costs." CP 380-88.

Subsequently, Shannon & Wilson and WSP each filed a Motion for Summary Judgment to Dismiss STP's Untimely Complaint pursuant to RCW 4.16.080, the three-year statute of limitation applicable to tort claims. CP 473-90; CP 525-33. They argued that STP's negligence and negligent misrepresentation claims, as well as its claims for "indemnity," were all, time-barred because STP irrefutably knew by December 2013 all the salient facts for all potential claims against Shannon & Wilson and WSP. *See* 473-90; CP 525-33; CP 1276-87; CP 1291-98, CP 1311-14.

STP conceded during oral argument on the motion that it had identified TW-2 as a potential cause of the TBM stoppage almost immediately. CP 1330. Nonetheless, the trial court entered an Order Denying Shannon & Wilson's and WSP's Motion for Summary Judgment, concluding that while Shannon & Wilson and WSP had met their burden to

[4] STP specifically filed third-party claims against Hitachi Zosen U.S.A., LTD. and its parent company, Hitachi Zosen Corporation. CP 10.

establish STP's knowledge of duty, breach, and damages, "there are material factual issues in dispute as to whether STP had factual knowledge as to the causation element prior to February 2014, and, therefore, the motion for summary judgment is denied." CP 1318-21; CP 1331.

Shannon & Wilson and WSP timely moved for reconsideration of the trial court's order under CR59(a)(7) and (9). CP 1334-45; CP 1349-53. The trial court denied that motion on September 22, 2017. CP 1408-10.

Shannon & Wilson and WSP timely sought discretionary review. On March 6, 2018, Commissioner Bearse granted review, noting that "[t]he record shows that STP suspected that TW-2 caused the TBM's damage as early as December 9 and had concluded TW-2 was the primary cause of the stoppage by January 15 [2014]." Ruling Granting Review at 13. Commissioner Bearse concluded that "even taking all the evidence in the light most favorable to STP, this court concludes review of the superior court's conclusion that disputed material facts exist as to whether STP's claims accrued before January 27, 2014, is warranted . . . ." *Id.*

V. ARGUMENT

This Court should reverse the trial court's denial of summary judgment and direct dismissal of STP's claims because Shannon & Wilson and WSP are entitled to judgment as a matter of law on STP's untimely claims under RCW 4.16.080. CR 56(c). The undisputed facts establish that STP was aware of its potential claims against Shannon & Wilson and WSP more than three years before filing suit.

This Court reviews the trial court's summary judgment decision de novo, reviewing the facts in the light most favorable to the nonmoving party. *Beard v. King Cnty.*, 76 Wn. App. 863, 866, 889 P.2d 501 (1995).

However, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. *See Clare v. Saberhagen Holdings, Inc*., 129 Wn. App. 599, 603, 123 P.3d 465 (2005) (affirming summary judgment dismissal of plaintiff's claims where plaintiff failed to exercise diligence in ascertaining the information necessary to timely proceed with claims); *Gevaart v. Metco Const. Inc.*, 111 Wn.2d 499, 500-01, 760 P.2d 348 (1988) (affirming summary judgment dismissal because no genuine issue of fact existed that plaintiff knew or could have reasonably discovered the essential elements of her negligence claim over three years before she filed suit.)

A. All of STP's tort-based claims accrued more than three years before STP filed its Complaint and are therefore time-barred.

STP's tort claims are subject to a three-year statute of limitation. *See* RCW 4.16.080; *see also Sabey v. Howard Johnson & Co*., 101 Wn. App. 575, 593, 5 P.3d 730 (2000) (negligence and negligent misrepresentation claims are subject to a three-year statute of limitation). The statutory period begins to run as soon as the plaintiff's cause of action accrues, and the plaintiff has the right to apply to a court for relief. *Gazija v. Nicholas Jerns Co*., 86 Wn.2d 215, 219, 543 P.2d 338 (1975). While the statute generally begins to run from the date the plaintiff first suffers injury, the discovery rule provides a limited exception, where the plaintiff may not know all the salient facts to support a cause of action. Under the discovery rule, the Washington courts will toll the statute of limitation until the party "knew or should have known all the essential elements of the cause of action." *Gevaart*, 111 Wn.2d at 501.

1. Under the discovery rule, STP's claims accrued by mid-January 2014, when it had inquiry notice of all the essential elements of its claim.

The discovery rule does not require the plaintiff's actual knowledge of all the essential elements of its claims. Rather, "[t]he ***plaintiff*** bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period." *Clare*, 129 Wn. App. at 603 (emphasis added). In applying the discovery rule, courts have consistently held that the injured party does not need access to or constructive knowledge of all the facts required to support its claim; rather, the claim accrues once a plaintiff has "inquiry notice" of its claim. "When a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm." *Green v. A.P.C. (American Pharmaceuticals Co.)*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998). "The plaintiff is charged with what a reasonable inquiry would have discovered." *Id.*; *see also Beard*, 76 Wn. App. at 868 ("[a] smoking gun is not necessary to commence the limitation period").

STP's internal records and letters to WSDOT conclusively show that STP identified all essential elements of its claims against Appellants between December 2013 and mid-January 2014, which is to say, more than three years before STP filed suit against Shannon & Wilson and WSP. While Shannon & Wilson and WSP maintain that their Contract Documents fully disclosed TW-2, STP took a contrary position beginning in December 2013, affirmatively alleging that:

- The Appellants failed to disclose TW-2 in the Contract Documents, *see* CP 988 (STP concedes it was "generally aware during the course of the Project that S&W and WSP had drafted the GBR and that S&W had drafted the GEBR [sic].") *and* CP 867 (STP asserts in December 2013 the Contract Documents are allegedly "defective" because they do not adequately disclose TW-2);
- The TBM mined through TW-2, *see* CP 861-864; CP 869-70; CP 872; *and* CP 874.
- STP believed TW-2 was a "primary cause" of significant damage to the cutter tools. CP 1269.[5]

Thus, STP unquestionably had the requisite inquiry notice of a potential claim against Appellants no later than mid-January 2014. The statute of limitation attached as of that date, and STP needed only to initiate its claims within that time frame and then was free to investigate whether evidence supported its suspicion. *See Beard*, 76 Wn. App. at 687 ("The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable.")

2. <u>Courts have consistently rejected STP's argument that its discovery of the "causation" element requires actual knowledge or proof of the causal relationship</u>.

In its opposition to summary judgment, STP claimed that it lacked knowledge of the "causation" element because, although it identified TW-2 as a *possible* cause of the stoppage, it supposedly did not discover *physical* evidence to support its claim until February 2014, when STP first examined the front of the TBM cutter head. CP 981-82. This argument ignores that the discovery rule tolls the three-year statute *only* until the plaintiff has inquiry notice, and not actual proof, of its claim.

[5] The evidence also indicates that STP believed TW-2 was a possible cause of the stoppage itself between December 2013 and mid-January 2014. *See* CP 869-70; CP 872; CP 874; CP 893; CP 896; CP 901-04; CP 908; CP 936-45.

In *Beard*, Division One rejected the very argument espoused by STP: "This appeal presents the narrow issue of whether the discovery rule continues to toll the commencement of the limitation period after the injured party has specifically alleged the essential facts, but does not yet possess proof of those facts. We hold that it does not." *Beard*, 76 Wn. App. at 867. (internal citations omitted). "[T]he limitation period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist, whether or not the party can then conclusively prove the tortious conduct has occurred." *Id*. at 868. "An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken." *Id*.

STP cannot dispute it had such notice *before* January 26, 2014, of a potential legal claim against Shannon & Wilson and WSP. As with the appellants in *Beard*, STP knew enough to suspect Shannon & Wilson and WSP of wrongdoing and specifically articulate the essential elements of its claims in its December 2013 letters, even if it lacked physical evidence regarding "causation." *See* CP 867 (STP's letter to WSDOT expressly alleging that the Contract Documents prepared by Shannon & Wilson and WSP were "defective" in failing to disclose TW-2, and that TW-2 may be a cause of the TBM stoppage). Moreover, on December 6, 2013, STP's Construction Manager emailed several STP team members stating he thought it was "a given" that the steel well casing caused at least some damage to the TBM. CP 893. Between December 2013 and mid-January 2014, STP issued numerous reports and memoranda revealing that STP immediately focused on TW-2 as a theoretical cause of the stoppage. CP 869-70; CP 872; CP 874; CP 893; CP 896; CP 901-04; CP 908; CP 936-45.

Most notably, on January 15, 2014, STP went so far as to inform WSDOT that it believed TW-2 the primary cause of damage to the TBM cutter tools. CP 1269. It is irrelevant whether STP possessed evidence to support this theory, so long as it could have discovered the evidence within the three-year statutory. *Beard*, 76 Wn. App. at 867-68. Thus, the trial court's ruling that STP's knowledge of "causation" was insufficient to trigger the three-year statute of limitation is irreconcilable with the court's holding in *Beard*.

In *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 835, 980 P.2d 809 (1999), the court similarly held that plaintiff need not affirmatively identify the causal connection between the defendant's alleged wrongdoing and its damages, so long as the plaintiff had sufficient inquiry notice. In *Germain*, plaintiffs sued a church more than three years after its pastor engaged in sexual misconduct, arguing the discovery rule tolled their cause of action until they sought counseling and discovered the causal connection between their psychological injuries and the pastor's misconduct. *Id*. at 828.

The Court of Appeals held the claim was time-barred, affirming a summary judgment of dismissal because the plaintiffs had knowledge of the wrongdoing and could have reasonably discovered the causal relationship within the three-year statute of limitations period. *Id*. at 835. The Court rejected the plaintiffs' argument that they could not have learned of the causation element of their claim until they had undergone treatment:

> Here, the plaintiffs were all adults at the time of the alleged wrongful acts. It is undisputed that they considered the conduct to be wrong, at least in the sense that it had the potential of damaging their families and their own reputations if it became public knowledge. They also experienced psychological problems during and after the sexual

> misconduct, and they could have discovered the causal link between it and their injuries had they diligently sought treatment.

Id. at 834. It is thus irrelevant for purposes of the discovery rule that a plaintiff lacks actual proof of a causal connection between alleged wrongdoing and damages if the plaintiff could have discovered evidence of the cause within the three years provided by the statute. *Id*.

Here, there is no dispute that STP had actual or constructive knowledge of the alleged "wrongfulness" of Shannon & Wilson or WSP's conduct in connection with TW-2. STP conceded in its opposition to summary judgment that it generally knew throughout the Project that Shannon & Wilson and WSP prepared the Contract Documents, and in December 2013, STP specifically alleged that these Contract Documents were "defective" because they did not adequately disclose TW-2. CP 867; CP 988.

Nor can STP legitimately claim that it could not have, in the exercise of reasonable diligence, discovered a causal connection within the three years allowed by the statute, particularly when STP filed a timely claim against WSDOT under the very theory of causation it later asserted against Shannon & Wilson and WSP.[6] Under *Germain*, it is irrelevant whether STP in fact made the causal connection between the wrongdoing and the TBM stoppage until February 2014 (even though STP's own internal emails and stoppage report, *actually demonstrates* that STP drew this causal connection immediately after the TBM mined through TW-2 in December 2013). It matters only that STP could have discovered a causal relationship within the three-year period. Because STP irrefutably could have identified an alleged causal relationship between Appellants' alleged negligence vis-à-vis TW-2

[6] Indeed, Hitachi also timely filed suit against Shannon & Wilson and WSP, by ensuring it commenced its action on December 3, 2016.

and the TBM damage, the trial court erred in refusing to dismiss STP's tort claims under RCW 4.16.080.

3. *Vertecs* does not support STP's broad articulation of the discovery rule.

None of the cases relied upon by STP on summary judgment support the trial court's reasoning that the discovery rule tolls the statute of limitation until the plaintiff has actual or conclusive knowledge of causation. Each case relied upon by STP—*Vertecs*, *Affiliated*, *Norris*, *Mayer*, *North Coast*, and *Gillespie*—involved plaintiffs who either (1) lacked any knowledge that the defendant had even breached its duty of care, or (2) were unaware that they had sustained any appreciable damage.[7] In each case, the court applied the discovery rule because the plaintiff lacked notice of the defendant's alleged wrongdoing.

For example, in *Vertecs*, the plaintiff-homeowner did not know whether the defendant had breached its duty of care. *See* 158 Wn.2d at 571-72. There, the homeowner had hired Vertecs as one of several subcontractors to do work on its building. *Id*. at 571. Vertecs was responsible for the stucco work, and but not for caulking, flashing, or weather protection on the windows or vents. *Id*. In 1994, the homeowner discovered that the windows and vents were leaking but was unable to ascertain the source of the leaks. *Id*. Vertecs assisted the homeowner with the inspection of the windows and vents, and informed him that the problems were not within the scope of its stucco work. *Id*. The windows

[7] *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.2d 423 (2006); *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 15 F. Supp. 3d 1116 (W.D. Wash. 2014); *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 63 P.3d 153 (2002); *Mayer v. Sto Industries, Inc.*, 123 Wn. App. 443, 98 P.3d 116 (2004); *North Coast Air Serv., Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 759 P.2d 405 (1988); *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 855 P.2d 680 (1993).

and vents continued to leak, but the homeowner did not file suit against Vertecs until 2002, unaware until then that Vertecs had even breached its duty under the contract.

In justifying its application of the discovery rule, the *Vertecs* court analogized the facts to a medical malpractice claim: "Just as a patient may lack the ability to know that a surgical sponge has been left in place which causes serious harm, so too an unsuspecting homeowner may lack the ability to know that an inferior product was used, such as a type of siding, which results in significant damage." *Id*. at 579. Under such circumstances, the plaintiff may have "**no way of knowing the facts that show that the construction contract was breached in the first case or that a duty of care was breached in the latter**. *Id.* (emphasis added).

The application of the discovery rule in *Vertecs* was appropriate because the plaintiff had no basis for drawing a connection between its injuries originating at the windows and Vertecs' siding work under the contract. *Id*. Here, however, STP had already affirmatively identified Shannon &Wilson's and WSP's supposed failure to disclose the presence of TW-2 in the Contract Documents as not only a possible cause of the TBM stoppage, but also asserted TW-2 was an *actual* and primary cause of significant damage to the TBM cutter tools. CP 1269. Thus, the trial court had no basis for relying on this strikingly distinguishable case to toll the statutory period.

B. STP's "tort indemnity" claim is indistinct from its other tort-based claims, and thus barred by the same statute of limitation, RCW 4.16.080.

In the absence of any contractual right to indemnity from Shannon & Wilson and WSP, STP's untimely complaint states an implied indemnity claim against each Appellant based on the same "tort duty of care" and

"special relationships" it alleges to support its claims for negligence and negligent misrepresentation. *See e.g.*, CP 380-88. STP claims that because of these duties and/or special relationships, Appellants somehow implicitly agreed to indemnify STP for its "Third Party Incurred Costs" and "Third Party Claims." CP 383-84; CP 387-88.

STP's "implied indemnity" claim fails on several fronts. Not only are these claims essentially re-pled negligence claims that seek the same "Third Party Incurred Costs" that STP seeks to recover under its negligence-based claims, STP's asserted right to common law indemnity cannot constitute a separate, cognizable claim in Washington, because Washington's Tort Reform Act eliminated the precise type of indemnity among joint tortfeasors. On either basis, these claims should also be dismissed.

1. <u>STP's implied indemnity claims for "Third Party Incurred Costs" are merely re-dressed negligence claims, and still subject to the three-year statutory bar</u>.

STP has no timely claim for "implied" or "tort" indemnity. STP seeks to recover indemnity for "Third Party Incurred Costs," which STP defines in its complaint as those costs that "STP has already paid […] to various third party Project participants for the delay, disruption, and related costs associated with the investigation of, access to and/or repair of damages to the TBM (or delays and disruptions)[.]" CP 379-80 at ¶ 32. These "Third Party Incurred Costs," which were allegedly paid to third parties as a result of the TBM breakdown, are the precise damages sought by STP in its negligence and negligent investigation claims.

In this sense, STP's implied indemnity claim is not a traditional "distinct" indemnity claim, as STP is not seeking to "transfer[] liability from

the one who has been compelled to pay damages to another who should bear the entire loss." *Sabey*, 101 Wn. App. at 588. An indemnity action does not accrue until *third party claims* result in *damages* via settlement or adjudication.[8] *See, e.g., Cent. Washington Refrigeration v. Barbee*, 133 Wn.2d 509, 512, 517, 946 P.2d 760 (1997). Instead, as stated in its own complaint, STP relies on a negligence theory to recover its *own* costs in hiring and allegedly paying third-party contractors to investigate the stoppage and repair the TBM. STP does not allege these damages resulted specifically from third party claims it has settled or been legally adjudged obligated to pay. *Cf. Sabey*, 101 Wn. App at 593.

STP cannot avoid RCW 4.16.080's time bar by simply recasting its negligence claim as an "indemnity" claim. Appellate courts look to the content of the cause of action and not the label the plaintiff gives it. "The essence of the case controls, not particular words in the pleadings." *Martin v. Patent Scaffolding*, 37 Wn. App. 37, 39, 678 P.2d 362 (1984). *See, e.g., Toste v. Durham & Bates Agencies, Inc.*, 116 Wn. App. 516, 519-520, 67 P.3d 506 (2003) (recognizing that plaintiff's CPA was actually an implied indemnity claim in disguise, and therefore barred under RCW 4.22.060(2)); *Gazija*, 86 Wn.2d at 218 ("Whether an action sounds in tort or contract is determined from the pleadings and complaint as a whole and the evidence relied upon, not by the particular words and allegations, the form adopted by the pleader, what the pleader calls it, or the understanding of the counsel or the trial court.")[9] STP's claim sounds in negligence, and therefore is subject

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[8] STP's definition of "Incurred Third Party Costs" equates "costs" with "damages." But "damages" are claim-specific. As defined in the legal community, they are "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014). STP's costs are, if anything, *its own damages*, not the damages claimed by third parties.

[9] *See also, Jain v. J.P. Morgan Securities, Inc.*, 142 Wn. App. 574, 584-86, 177 P.3d 117 (2008) (affirming the lower court's decision that "to the extent [plaintiff's claims] were

to the same statute of limitation analysis as its negligence claims no matter what label STP has given it.

STP's allegation that it also "may incur future liability" due to "third party claims" does not toll the three-year statute of limitations. CP 384 at ¶ 60; CP 388 at ¶ 88. Under Washington law, a claim accrues upon the first instance of appreciable damage and does not toll because actual or substantial damages occur later. *Steele v. Organon, Inc.*, 43 Wn. App. 230, 235, 716 P.2d 920, *review denied*, 106 Wn.2d 1008 (1986). For example, in *Steele*, the court held that plaintiff's malpractice claim was not tolled by the fact that she incurred her most significant damages *after* the statutory period already ran; her claim for any damages arising out of the same wrongdoing were triggered upon her first instance of appreciable damage. *Id*.

Similarly, in *Green*, the court held, "the running of the statute of limitations is not postponed until the specific damages for which the plaintiff seeks recovery actually occur." *Green v. A.P.C. (American Pharmaceuticals Co.)*, 136 Wn.2d 87, 97, 960 P.2d 912 (1998) (citations omitted). "To hold otherwise would run contrary to important policy consideration such as Washington's strong preference for avoiding the splitting of causes of action." *Id*. (citation omitted).[10] While the character of the claims involved in *Green* and *Steele* may differ from the indemnity claims asserted here, the court's rationale applies with equal force: if the

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disguised indemnity claims, they could not stand."); and *Murray v. Gen. Motors, LLC*, 478 F. App'x 175, 181 (5th Cir. 2012) (holding that "a party may not disguise a products liability claim as a negligence claim to avoid dismissal.")

[10] Both *Steele* and *Green* involved the application of the discovery rule under the medical malpractice claim statute, RCW 4.16.350, and the products liability claim statute, RCW 7.72.060(3), both of which effectively codified the discovery rule for medical malpractice and products liability claims. The *Steele* and *Green* courts acknowledged that the statutory discovery rules mirror the common law discovery rule. *Steele*, 43 Wn. App. at 233-34; *Green*, 136 Wn.2d at 95-96.

statute of limitation were restarted each time STP incurred a new or additional form of damage, it would "lead to the highly impractical consequence of multiple statute of limitations applying to the same allegedly wrongful conduct." *Id*. Courts rightfully reject this reasoning. *See id*.

Accordingly, all of STP's claims stated in its complaint should be dismissed as untimely. STP's asserted damages, regardless of how they are characterized, all arise from the same alleged wrongdoing by Shannon & Wilson and WSP related to TW-2. STP could have preserved its claim for damages by timely filing suit against Appellants in July 2016, when it brought claims against WSDOT and other parties related to TW-2, or certainly by January 2017, when Hitachi had already sued Shannon & Wilson on the same theory asserted by STP nearly two months later. *See* CP 10. STP's inexplicable delay cannot be cured by relabeling its claim as one for tort indemnity. Because all its damages arise out of the same incident, STP should not be permitted to assert "multiple statute of limitations […] to the same allegedly wrongful conduct" in order to end run the statute of limitation and deprive Appellants their statutory right to be free of stale claims. *Green*, 136 Wn.2d at 97. STP's untimely claims against Appellants should be dismissed in their entirety.

2. Washington does not recognize a claim for implied indemnity among joint tortfeasors.

Even if STP's implied indemnity claim were pled as a distinct claim from its other negligence-based causes of action, STP's claim would nevertheless be barred by Washington's 1981 Tort Reform Act, which expressly abolished the common law right of indemnity between joint tortfeasors and replaced it with the right to contribution. RCW 4.22.040(3);

Cf. Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 590-91, 5 P.3d 730 (2000) (holding that only implied indemnity claims between non-joint tortfeasors survive.) Implied indemnity cannot be used by a joint tortfeasor to recover a proportionate share of the loss. *Id.*; *see also Stevens v. Security Pac. Mortgage Corp.*, 53 Wn. App. 507, 517, 768 P.2d 1007 (1989) ("Indemnity requires full reimbursement and transfers liability from the one who has been compelled to pay damages to another who should bear the *entire loss*." (emphasis added)).

WSDOT's and Hitachi's "Third Party Claims" against STP allege clear instances of wrongdoing on STP's part. *See e.g.*, WSDOT's Amended Complaint, CP 1241 at ¶ 2.5 ("TBM damage was caused by factors for which STP is responsible, including design and operation, and not by any unanticipated conditions in the ground.") *and* CP 1243 at ¶ 3.3 ("STP fail[ed] to provide and properly operate equipment to complete its work under the Design-Build Contract[.]"); Hitachi's Answer and Counterclaims, CP 69 at ¶ 15 ("STP's movement of the TBM […] caused additional, extensive damage to the TBM, requiring repair.") *and* CP 71-74 (asserting a myriad of claims against STP related to STP's breaches of the supply contract for delayed payment and bad faith). STP seeks to recover against Shannon & Wilson and WSP for their alleged comparative negligence in supposedly failing to disclose TW-2. To the extent STP were to succeed in holding Shannon & Wilson and WSP responsible in tort for any damages it is forced to pay, these appellants are joint tortfeasors. *Contrast Sabey*, 101 Wn. App. at 591 (plaintiff is not a joint tortfeasor because none of the other parties allege plaintiff committed any wrongdoing); *Radach v. Gunderson*, 39 Wn. App. 392, 398 n.5, 695 P.2d 128 (1985) ("In view of [plaintiff's] 'innocence' as found by the trial court, this result would not be changed by

RCW 4.22.020 (the right of contribution among joint tortfeasors; common law indemnity abolished.)"). As recognized by the court in *Sabey*, this form of implied indemnity was expressly abolished by the Tort Reform Act. 101 Wn. App. at 590-91; RCW 4.22.040(3).

Thus, STP's implied indemnity claims are not cognizable let alone, "separate and distinct" causes of action as STP asserts. *Cf.* CP 989 (STP's Opposition to Summary Judgment, arguing that STP's implied indemnity claims should survive the time bar because implied indemnity claims constitute a "separate and distinct" cause of action under *Barbee*, 133 Wn.2d at 517-18). The *Barbee* case, which STP relied on repeatedly to assert implied indemnity constituted a "separate and distinct" claim, merely provides that contracts governed by the Uniform Commercial Code (U.C.C.) contain implied warranties, which creates a sufficient basis to state an implied indemnity claim. *Barbee*, 133 Wn.2d at 514. This case has no bearing here: Appellants lack contractual privity with STP, let alone a contract governed by the U.C.C. with its implied warranties. Thus, *Barbee* is inapposite. In fact, none of the Washington cases cited by STP in its summary judgment briefing establishes that STP's claim constitutes a "separate and distinct" implied indemnity claims from its other tort-based claims. Accordingly, STP's implied indemnity claims should also be dismissed.

VI. CONCLUSION

STP had inquiry notice of all the essential elements of its claims against Appellants over three years before it filed its complaint. Once on inquiry notice, the discovery rule does not toll the statutory period to allow STP additional time to gather evidence and crystalize its theory of recovery. Appellate courts have consistently rejected this argument. Shannon &

Wilson and WSP have a statutory right to be free of STP's stale claims and should not be compelled to defend against claims that STP knowingly allowed to lapse. This Court's should reverse and direct dismissal of STP's complaint.

Dated this 3rd day of May, 2018.

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THE UNDERSIGNED swears under penalty of perjury under the laws of the State of Washington as follows:

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May 03, 2018 - 4:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51025-1
Appellate Court Case Title:	State Department of Transportation v. Seattle Tunnel Partners
Superior Court Case Number:	16-2-00980-5

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Opening Brief of Appellant Shannon and Wilson

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