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Division II  
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No. 51025-1-II

(Thurston County Cause No. 16-2-00980-34)

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

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WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

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

Defendants.

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 USA, 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  
PARSONS BRINCKERHOFF, INC., a New York corporation;

Defendants/Petitioners.

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**BRIEF OF RESPONDENT SEATTLE TUNNEL PARTNERS**

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## I. INTRODUCTION

On the morning of December 6, 2013, Seattle Tunnel Partners (“STP”) stopped mining, believing its tunnel boring machine (“TBM”) might be blocked by an obstruction. Through December 2013 and January 2014, STP conducted an extensive investigation (mainly with probes in front of the TBM cutterhead) to test its hypothesis that the cause of the TBM’s issues was a large obstruction in front of the TBM’s cutterhead such as a historic waterfront artifact. After completing that investigation, STP resumed mining on January 28, 2014. STP stopped mining the next day, January 29, 2014, because of high outer seal temperatures. STP’s subsequent investigation led to the discovery—for the first time—that the TBM’s outer seal system had suffered catastrophic damage. Hitachi Zosen, the manufacturer of the TBM, instructed STP to stop mining so as to prevent further damage, and subsequently advised STP that an access shaft would be necessary to retrieve and repair the TBM.

Notwithstanding these facts, Appellants Shannon & Wilson, Inc. (“S&W”) and WSP USA, Inc. (“WSP”) argue that STP’s two tort claims accrued no later than mid-January 2014 and are therefore barred by the applicable statute of limitations as a matter of law. In other words, Appellants argue that STP had a fully matured cause of action in mid-January 2014 at a time when STP indisputably had no factual knowledge

of the catastrophic damage to the outer seal system or the actual cause of the damage to the TBM. In fact, STP had restarted the TBM on January 28, 2014 because it believed, following its investigation, that the TBM was not significantly damaged.

Given this record, the trial court properly found that Appellants failed to meet their burden of establishing there was no dispute of material fact as to when STP knew or should have known the causation element of its negligence and negligent misrepresentation claims. This Court must engage in the same inquiry and should affirm the trial court's denial of summary judgment with respect to the timeliness of STP's tort claims.

This Court also should reject Appellants' attempts to argue both the timeliness and merits of STP's separate indemnity claims as these arguments were not timely raised before the trial court and are not properly before this Court on appeal. To the extent the Court does reach this issue, it should find that STP's indemnity claims are separate causes of action subject to their own statutes of limitation, which had not run at the time STP brought its complaint against both S&W and WSP.

## **II. COUNTERSTATEMENT OF ISSUES ON APPEAL**

1. Whether the trial court properly denied Appellants' motions for summary judgment seeking to dismiss STP's tort claims as untimely where disputed issues of material fact prevent a finding as a

matter of law that STP knew or should have known the factual bases of each element of its causes of action prior to January 27, 2014?

2. Whether this Court should decline to consider Appellants' untimely arguments regarding STP's separate indemnity claims where Appellants failed to properly raise these arguments before the trial court and are foreclosed from doing so on appeal?

3. If this Court reviews Appellants' untimely arguments regarding STP's indemnity claims, whether this Court should reject these arguments on the grounds that Washington law recognizes indemnity claims as separate and distinct causes of action that are governed by a separate statute of limitations from the underlying wrongful conduct and where STP timely asserted these claims against Appellants?

### **III. STATEMENT OF THE CASE**

#### **A. Background of the Project and Installation of TW-2.**

In the mid-1990s, the Washington State Department of Transportation ("WSDOT") began evaluating options for the repair or replacement of the Alaskan Way Viaduct in Seattle. CP 293. As part of this process, in 2001, WSDOT engaged WSP to prepare various conceptual engineering studies. CP 293, 492. WSP, in turn, retained S&W to conduct geotechnical and hydrogeological tests and studies near the anticipated project corridor. CP 293, 1022-23, 1106. In September

2002, S&W retained a drilling company to install vertical wells near the existing Viaduct. CP 493. This included the installation of “Test-Well 2” or “TW-2,” a 119-foot long, 8-inch diameter steel well. CP 493, 1106.

After completing its study of potential options, WSDOT decided to replace the Viaduct with a deep bore tunnel. CP 1129. In late 2009, just months before the project went out to bid, WSDOT decided to move the tunnel’s launch portal from its original location in Pioneer Square to a location closer to Elliott Bay. CP 1235-36. As a result, the revised tunnel alignment was altered such that TW-2 was now in its path. This revision to the tunnel alignment created a rushed schedule for the completion of the final design plans. *See, e.g.*, CP 1133-35. Despite this change in the tunnel location, S&W never recommended to WSDOT or WSP that TW-2 be removed before the project commenced. CP 1123-24.

Appellants were tasked with preparing the Geotechnical Baseline Report (“GBR”), which Appellants issued on June 14, 2010. CP 1004-12. The purpose of the GBR included “setting the baseline subsurface site conditions expected to be encountered in the performance of the Work . . . .” CP 1011. The GBR was the primary means through which WSDOT advised bidders regarding the underground conditions to be expected in the tunnel path. CP 1139. While the GBR identified various subsurface obstructions such as boulders, timbers, cobbles, concrete and debris, the

GBR undisputedly did not identify TW-2 or any other subsurface steel obstructions. CP 1139, 1176. In May 2010, S&W also finalized the Geotechnical and Environmental Data Report (“GEDR”). CP 1014-28. The purpose of the GEDR was to present the geotechnical and environmental data that had been collected. CP 1022.

**B. Execution of STP’s Contract with WSDOT.**

In May 2010, WSDOT issued a request for proposals (“RFP”) for the project. CP 997. Relying on its review of the GBR and GEDR, STP prepared a proposal in response to WSDOT’s RFP. *Id.* WSDOT ultimately awarded the contract to STP, and WSDOT and STP executed a design-build contract on January 6, 2011 (the “Contract”). CP 1030-55. STP contracted with Hitachi Zosen U.S.A. Ltd. (“Hitachi”) for the design and manufacture of a TBM to complete the mining of the tunnel. CP 923. In February 2012, STP obtained a list of wells S&W had installed on behalf of WSDOT, which identified TW-2 as an approximately 107-foot deep well constructed of PVC (i.e. plastic) casing. CP 1184, 1187-88.

**C. The TBM Encounters TW-2.**

STP launched the TBM and began mining on July 30, 2013. CP 379. On the morning of December 4, 2013, STP employees observed a hollow steel casing that had emerged from the surface in the area directly above the location of the TBM. CP 379, 924. STP employees thought the

casing had possibly been pushed through the surface due to pressure exerted by the TBM. CP 924-25. STP employees speculated the steel casing was an old water well or water utility. *Id.*

**D. STP Investigates the TBM Stoppage.**

While the TBM continued to excavate and build rings for the next two days, the TBM rate of progress began to slow. CP 925, 938. STP did not know why the excavation progress was slowing. CP 925. The TBM was still in the commissioning or “learning curve” phase of the run, where TBMs routinely have issues with advancement. *Id.* Advancement problems can result from a variety of factors, including the presence of natural or manmade subsurface obstructions, the condition of the cutting tools on the cutterhead, a possible cutterhead blockage, the condition of the screw conveyor or any number of other issues with the TBM. *Id.* On December 6, 2013, STP stopped mining to investigate. *Id.*

WSP’s internal correspondence at the time corroborates that no one knew what was causing the slowing of the excavation rate of the TBM. For example, on December 10, 2013, a WSP engineer emailed a colleague stating that “[n]o one knows” what happened to the TBM and that STP “will dig shaft down – five foot dia – to have a look.” CP 1198. On December 11, 2013, STP’s construction manager, Juan Luis Magro, explained that STP did not know what was causing the TBM’s excavation

rate to slow or the extent of any possible damage to the TBM. CP 892 (“we need to first see what is in there” and “assess and repair any damage which whatever is in there may have caused to the TBM”) (emphasis added). That same day, a S&W engineer emailed his colleague laying out five different reasons why the TBM might be stopped, including that it hit “a very large boulder” or that the cutters were damaged such that the TBM could no longer advance forward. CP 1200.

After being advised by WSDOT on December 9 that the TBM had encountered a 119-foot steel pipe at the location of TW-2, STP sent a letter to WSDOT on December 12, 2013 advising that STP was “in the process of developing and implementing a plan to investigate the cause of this stoppage in tunneling.” CP 1061. Further, because the Contract required STP to provide notice to WSDOT within 14 days of any potential change order that it might make, CP 1039-55, STP reserved its right to assert a change order “*in the event* that the encountering of this pipe is determined to be, upon completion of STP’s investigation, the cause of the stoppage in tunneling[.]” CP 1061 (emphasis added). In internal correspondence that same day, WSP acknowledged that the cause of the TBM stoppage was a mystery. CP 1203 (WSP’s engineer Gordon Clark asked his colleague Rick Conte “Any word on why TBM is stuck?” to which Mr. Conte replied “No. All speculative.”) (emphasis added).

With the TBM buried underground, STP developed a detailed strategy to investigate “possible causes” of the TBM’s failure to advance at normal speeds. CP 926. This plan included five steps: (1) depressurize the ground via dewatering; (2) use TBM systems and soil additives to attempt to remove any potential unknown obstructions in front of the TBM cutterhead; (3) conduct visual inspections using specially trained “divers” to advance into the cutterhead chamber using a series of manlocks and hyperbaric chambers; (4) drill exploratory holes in front of the cutterhead in an effort to locate any potential obstructions; and (5) potentially drill a series of piles in front of the TBM to create a “safe haven” for further inspections. CP 925-26, 1068-69.

STP again wrote to WSDOT on December 12 and 13, 2013 to advise of the status of its investigation. CP 1064, 1066. These letters illustrated STP’s contemporaneous lack of knowledge of the cause of the TBM stoppage, as well as the diligence with which it was investigating. *Id.* In mid-December 2013, STP prepared a “TBM Stoppage Report” stating that the cause of the stoppage “may be anything” and explaining a working “hypothesis” that an obstruction was preventing the normal operation of the TBM. CP 927, 943. In this same time period, WSDOT’s inspectors also speculated the TBM was obstructed by a boulder. CP 1207. STP was concerned the TBM may have hit an unrecorded and

undisclosed artifact (i.e. wood pilings, rail cars, rails, etc.) left from the historic Seattle waterfront. CP 927.

Throughout December 2013, STP tested its hypothesis of an obstruction. Damage that the steel pipe at TW-2 may have created to the TBM was “still unknown” during this time period. CP 943. STP’s investigation started with dewatering the ground around the TBM in order to conduct a visual inspection of the top of the excavation chamber. CP 926-27. STP did not observe anything of significance. CP 927. In late December 2013, STP then drilled a series of twelve six-inch probe holes in front of the cutterhead to look for potential obstructions, and did not encounter any of the suspected waterfront artifacts or boulders. CP 928. On January 13, 2014, STP again advised WSDOT that STP was reserving its rights “[i]n the event” the encounter with TW-2 was the cause of the stoppage or of any damage to the TBM. CP 1073.

In mid-January 2014, STP drilled larger exploratory bores in front of the TBM in a continued effort to discover suspected boulders or artifacts. CP 928. STP found no such obstructions in front of the TBM that would have impeded its progress. CP 928. Starting on January 17, 2014, STP then conducted 41 hyperbaric inspections in order to determine what, if anything, was blocking the TBM. CP 928. These inspections did

not identify any apparent impediment to the TBM or any damage that would preclude mining. CP 928.

On January 21, 2014, WSDOT wrote to the Seattle Mayor and City Council stating that, “[w]hile the inspections are underway, it is too early to speculate on what led to the tunneling stoppage.” CP 1213. And during visits on January 21 and 22, 2014, WSDOT’s Strategic and Technical Advisory Team (“STAT”), after examining potential causes of the stoppage, stated that the “reason for the stoppage has not been determined,” but also opined TW-2 was not a cause given that it “would present little challenge for a TBM cutterhead designed to mine 30,000 psi compressive strength rock boulders up to 8 ft [sic] in diameter.” CP 1217.

The outcome of nearly two months of diligent investigation was this: STP saw no damage to the TBM that would prevent mining, and did not find any boulders, artifacts or waterfront debris that might be stopping the TBM’s advance. CP 928. Believing the TBM to be fit for its purpose, on January 28, 2014, STP resumed mining. CP 928. Had STP had any notion that the TBM was damaged in the manner later discovered, it would not have restarted the TBM at that time.

On January 29, 2014, however, STP observed an increase in temperatures in the outer seals and stopped to investigate. CP 929. On January 30, 2014, STP continued to perform investigative efforts to

diagnose the stoppage. CP 1220. On February 4, 2014, after removing drive motor 13 to investigate, STP and Hitachi observed contamination in the main bearing chamber of the TBM, indicating that the seal guarding the main bearing chamber was significantly damaged. CP 929. It was “only then” that STP became aware of the catastrophic damage to the TBM that necessitated extensive repairs. *Id.*

The evidence thus establishes that STP—despite an extensive and diligent investigation—had no actual knowledge of the true cause of the TBM stoppage before January 27, 2014. Indeed, STP resumed operation on January 28, 2014 in the (in hindsight) erroneous belief that the TBM had not suffered damage and was fit to mine. Given this, the trial court properly found there were disputed issues of material fact regarding when STP had sufficient facts with respect to the causation element of its tort claims.

**E. Trial Court Procedural History.**

On January 26, 2017, STP filed a complaint asserting three claims against S&W for negligence, negligent misrepresentation and indemnification. The following day, STP amended its complaint to assert the same three causes of action against WSP. Approximately seven months later, on August 4, 2017, S&W moved for summary judgment seeking to dismiss STP’s claims on the ground that they were not timely.

CP 473-90. Although it purported to seek dismissal of all of STP's claims, S&W's motion did not raise any argument with respect to the timeliness of STP's separate indemnity claims. *Id.* WSP's joinder in S&W's motion also did not raise any argument regarding the timeliness of STP's indemnity claims. CP 525-36.

In its opposition to Appellants' motions, STP pointed out that Appellants had failed to raise any argument regarding STP's separate indemnity claims. CP 989. Acknowledging this failure, for the first time on reply, both S&W and WSP belatedly argued that STP's indemnity claims were indistinct from its tort claims and, therefore, subject to the same statute of limitations. CP 1286-87, 1297. S&W further argued that STP's indemnity claims were barred by the Tort Reform Act, thereby raising an argument on the merits of this cause of action that was wholly outside the scope of S&W's original motion. *Compare* CP 473-90 with CP 1286. STP objected to WSP and S&W's belated arguments in a surreply. CP 1304-05. Although S&W objected to STP's surreply, it did not raise any arguments regarding STP's indemnity claims. CP 1312-13.

On September 1, 2017, the trial court heard oral argument on Appellants' motions. Although STP argued that its indemnity claims were distinct claims subject to a separate statute of limitations, and that the merits of its indemnity claims were not raised in Appellants' motions,

9/1/17 VRP at 39-41, neither S&W nor WSP addressed these arguments at all. *See generally* 9/1/17 VRP. At the conclusion of the hearing, the trial court concluded that “there are material factual issues in dispute as to whether STP had factual knowledge as to the causation element prior to February of 2014.” 9/1/17 VRP at 49. On that ground, the trial court denied Appellants’ motions. *Id.*; CP 1318-21.

On September 11, 2017, S&W moved for reconsideration, raising the same arguments as on summary judgment with respect to the timeliness of STP’s tort claims. CP 1336-45. S&W’s motion again did not address the timeliness of STP’s separate indemnity claims. *Id.* WSP subsequently joined S&W’s motion. CP 1351-53. STP opposed Appellants’ motions, CP 1359-71, and noted that STP’s indemnity claim (while not raised in the motion for reconsideration) would survive even if the court were to reconsider its order denying dismissal of the tort claims. CP 1371. On September 22, 2017, the trial court heard argument on reconsideration, which again addressed only the timeliness of STP’s tort claims. *See generally* 9/22/17 VRP. The trial court denied reconsideration. *Id.*; CP 1397.

**F. Appellate Procedural History.**

On November 7, 2017, Appellants jointly moved for discretionary review, arguing the trial court committed obvious error in denying

summary judgment on STP's two tort claims. *See* DR Mot. at 9-10. Appellants' motion also raised the untimely arguments made in their summary judgment reply that STP's indemnity claims were a "variation of [STP's] negligence claim" and not cognizable under Washington law. *Id.* at 9, 10 n.5. For the first time, Appellants additionally argued that STP's indemnity claims were time barred relying solely on authority discussing tort, not indemnity, actions. *Id.* & n.6.

On March 6, 2018, the Commissioner granted review. The Ruling's obvious error analysis focused solely on whether the trial court erred in finding a disputed issue of material fact regarding the application of the discovery rule to STP's tort claims. Ruling at 8-13. Despite not directly addressing STP's indemnity claims, the Ruling swept these claims into this appeal "in the spirit of judicial economy." *Id.* at 14-15.

STP filed a motion to modify the Ruling. *See* Mot. to Modify at 11-14. In their answer to STP's motion, Appellants attempted to raise more new arguments, claiming for the first time that STP's indemnity claims are not "traditional distinct indemnity claims" because STP seeks recovery of its own costs and not for "damages" claimed by third parties. *Opp. to Mot. to Modify* at 12. Appellants also raised a new "ripeness" claim, arguing that STP's Third Party Claims had not accrued because the liability had not been "realized as damage[s] via settlement or

adjudication.” *Id.* at 12 n.5. A panel of this Court declined to modify the Commissioner’s Ruling.

#### IV. ARGUMENT

##### A. Standard of Review.

This Court reviews the trial court’s order denying Appellants’ motions for summary judgment de novo. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The facts and all reasonable inferences therefrom must be considered in the light most favorable to STP as the non-moving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Olson v. Siverling*, 52 Wn. App. 221, 224, 758 P.2d 991 (1988), *review denied*, 111 Wn.2d 1033 (1989); CR 56(c). A denial of a motion for reconsideration is reviewed for abuse of discretion. *Nichols v. Peterson NW, Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2016).

It was the responsibility of Appellants to raise in their summary judgment motions all issues on which they believed they were entitled to summary judgment. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (“nothing in CR 56(c) . . . permits the party seeking summary judgment to raise issues at any time other than in its motion and opening memorandum”). On review of an order granting or denying a motion for summary judgment, appellate courts “will consider

only evidence and issues called to the attention of the trial court.” RAP 9.12; *see also* *1519-1525 Lakeview Blvd. Condo. Ass’n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932 & n.12, 6 P.3d 74 (2000), *aff’d*, 144 Wn.2d 570, 29 P.3d 1249 (2001); *Boyd v. Sunflower Props., LLC*, 197 Wn. App. 137, 147 n.3, 389 P.3d 626 (2016); *Cano-Garcia v. King Cnty.*, 168 Wn. App. 223, 248, 277 P.3d 34 (2012) (“Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal.”).

**B. The Trial Court Did Not Err in Concluding that Disputed Issues of Material Fact Precluded any Finding that STP’s Tort Claims Were Barred under the Statute of Limitations.**

There can be no dispute that the discovery rule is properly applied to negligence and negligent misrepresentation claims such as those STP pleaded here. *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 15 F. Supp. 3d 1116, 1128-29 (W.D. Wash. 2014) (applying Washington law, internal citation omitted); *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348 (1988). The discovery rule “is a court doctrine designed to balance the policies underlying statutes of limitations against the unfairness of cutting off a valid claim where the plaintiff, due to no fault of [its] own, could not reasonably have discovered the claim’s factual elements until sometime after the date of the injury.” *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997), as amended on denial of

reconsideration (Feb. 14, 1997). Thus the discovery rule applies to situations, like here, “in which plaintiffs could not immediately know of the cause of their injuries.” *Matter of Estates of Hibbard*, 118 Wn.2d 737, 750, 826 P.2d 690 (1992).

Below, S&W argued that the discovery rule “would only toll the statute of limitations until December 6, 2013,” CP 483, whereas now S&W instead maintains that STP’s tort claims accrued “no later than mid-January 2014.” S&W Br. at 15. Neither of these shifting formulations is correct, however, because both fail to apply the discovery rule’s central command: The cause of action accrues when “plaintiff knows or should know the relevant facts . . . .” *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992) (emphasis added). The discovery rule thus focuses on “relevant facts,” not mere possibilities or theories. *Id.*; see also *Green v. A.P.C. (American Pharmaceutical Co.)*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998). Appellants’ argument further ignores that “a cause of action accrues when its holder has the right to apply to a court for relief.” *Gaziji v. Nicholas Jern Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975).

The critical factual inquiry here, under authorities such as *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006), *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 63 P.3d 153 (2002) and other cases discussed herein, is when STP had knowledge of

the true cause of the TBM's stoppage. "Unless the evidence is undisputed or unless reasonable minds cannot differ, what a person knew or should have known at a given time is a question of fact." *August v. U.S. Bancorp*, 146 Wn. App. 328, 343, 190 P.3d 86 (2008), *as amended* (Sept. 4, 2008) (quoting *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 170, 855 P.2d 680 (1993) (emphasis added). Similarly, "[w]hether the plaintiff has exercised due diligence under the discovery rule is a question of fact." *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000); *see also Nichols*, 197 Wn. App. at 500-01 ("The diligence element of this test raises a question of fact, unless reasonable minds could reach but one conclusion."). Thus, the burden is on Appellants to establish there is no dispute of material fact as to when STP should have discovered the factual basis of its causes of action. *Green*, 136 Wn.2d at 99.

Below, Appellants repeatedly mischaracterized the facts as to what STP knew and when in an attempt to avoid the proper application of these legal standards. CP 976-979. On appeal, Appellants continue this dogged mischaracterization.<sup>1</sup> And in granting review, the Commissioner made

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<sup>1</sup> S&W begins down a slippery slope at page 7 of its brief where it states that STP was "continuing to assert its belief that the encounter with TW-2 was the source of Bertha's problems" in mid-December 2013 while the investigation was underway. There is no record citation for that statement and the next sentence of S&W's brief merely refers to the TBM Stoppage Report, which stated the opposite, i.e., that the cause "may be anything" and that STP would investigate its hypothesis of a large obstruction. Next, on page 8 of its brief, S&W claims that CP 943-44 is evidence that "STP identified TW-2 as a cause of the stoppage," but this is an excerpt from the same TBM Stoppage Report.

many of these same critical factual errors.<sup>2</sup> But the trial court properly found that there were disputed issues of material fact regarding when STP obtained facts establishing the true cause of the TBM's damage. This Court should hold the same.

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Next, S&W misrepresents on page 9 of its brief that STP made "consistent communications to WSDOT that TW-2 as the primary cause of the TBM stoppage and damage," but aside from the single January 15, 2014 letter – which refers only to cutting tools – there is no support in the record for this exaggerated hyperbole. S&W doubles down on this misstatement in the next sentence, stating "STP was steadfast in its public theory that striking TW-2 caused damage to the TBM and ultimately resulted in the stoppage," citing four excerpts from the Clerks Papers that do not in any way support such a conclusory argument: CP 866-67 is STP's December 12, 2013 reservation of rights letter; CP 876-77 is a December 20, 2013 letter that does not address cause in any way; CP 919-20 is a December 31, 2013 letter that as noted below was not verified; and CP 1268-75 is STP's January 15, 2014 letter that also does not address the cause of the TBM stoppage. S&W renews its misstatements in footnote 15 of its brief, which cites eight excerpts from the Clerks Papers to support the argument that "STP believed TW-2 was a possible cause of the stoppage itself between December 2013 and mid-January 2014." But 6 of the 8 references do not say anything about cause (CP 869-70; CP 872; CP 874; CP 896; CP 901-04; CP 908) and of the other two, one is the TBM Stoppage Report which stated the cause "may be anything" (CP 936-45) and the other is a December 6, 2013 email – the first day the TBM stopped – in which Mr. Magro stated the extent of damage is unknown. Finally, S&W cites CP 919-20 at page 9 of its brief (STP's December 31, 2013 letter), which refers to a "remaining length" of TW-2 but at the same time conveniently ignores that part of the record that clarifies that the six-inch probes in front of the cutterhead appear to have hit the cutterhead itself, not remaining parts of TW-2. CP 928. These repeated misstatements underscore the disputed factual record and the inappropriateness of summary judgment.

<sup>2</sup> For example, the Ruling stated that as of December 6, STP's construction manager had "recognized" that TW-2 "had damaged the TBM cutterhead." Ruling at 11. But there is undisputedly no way STP could have known this at that time given that the TBM was buried underground and not observable. CP 925. The Commissioner further stated (with no citation to the record) that STP had "routinely" identified TW-2 as "the likely source of the obstruction" between the date of the stoppage and early January 2014. Ruling at 11. But there is absolutely no such evidence in the record between the date of the stoppage and early January 2014. Further, the Ruling finds that by December 9, 2013 "STP suspected that TW-2 caused the TBM's damage...." Ruling at 13. But on December 9, STP had no knowledge the TBM was damaged, let alone by TW-2. The Ruling cites to no record authority. Finally, the Ruling finds that by January 15, 2014 STP "had concluded TW-2 was the primary cause of the stoppage...." Ruling at 13. Again, this is a finding without foundation – and the Commissioner's role was not to make factual findings in any event.

First, from December 6, 2013 through at least January 29, 2014, the record establishes that STP lacked factual knowledge of the true cause of the TBM's performance issues. In an effort to identify the cause of the TBM stoppage, STP instead outlined a working "hypothesis" in its December 2013 TBM Stoppage Report (i.e., that an obstruction such as boulders or a lost artifact was blocking the TBM), and then diligently investigated that hypothesis through the end of January. CP 943-45.

Second, because the TBM was buried underground, STP's investigation through the end of January 2014 was complex and multifaceted. *Id.* This case thus fits the purpose of the discovery rule as explained by *Estates of Hibbard* because STP "could not immediately know of the cause of [its] injuries." 118 Wn.2d at 750. When this investigation did not reveal any damage to the TBM that would prevent mining, STP restarted the TBM on January 28, 2014—a fact that shows that STP at the time believed the TBM was not damaged and was still fit for purpose and ready to finish the tunnel (i.e., the antithesis of a matured tort cause of action). And tellingly, no one else involved in the project knew the factual cause of the TBM stoppage at this time, which validates

the reasonableness of a jury finding that there was no basis on which STP “should have known” the facts regarding cause.<sup>3</sup>

Third, it was only after January 28, 2014 that STP ceased further tunneling after discovering significant damage to the TBM. Specifically, on February 4, 2014, STP and Hitachi discovered for the first time the severe damage to the TBM’s seal system and only then did Hitachi tell STP to stop tunneling, which in turn led to the prolonged repair period at issue in this litigation. All of this evidence must be construed in the light most favorable to STP, and it establishes that there are disputed issues of material fact regarding what facts STP knew or should have known and when that must be resolved by a trier of fact.

Ignoring this evidence, Appellants instead rely on a January 15, 2014 letter. Despite now making this letter a central focus of their arguments on appeal, Appellants did not even introduce this letter in the trial court until their reply and then only in a footnote. CP 1262-75, 1283.

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<sup>3</sup> None of the Project participants—including Appellants—had factual knowledge of the actual cause of the TBM stoppage at any point prior to February 2014. S&W’s engineer postulated (among other things) that the TBM had hit a boulder (CP 1203); WSP’s engineer described potential causes as “[a]ll speculative” (CP 1198). The STAT—WSDOT’s own hired tunneling experts—noted after investigation in late January 2014 that the cause of the stoppage had “not been determined” and expressly ruled out TW-2 as the cause. CP 1217. This evidence is directly probative to the core question before this Court: At the very least, there is a disputed issue of material fact over whether STP “should have” discovered the cause of the TBM stoppage in December 2013 and January 2014, when the collective engineering expertise of S&W, WSP, WSDOT and others had no apparent idea (other than a belief that it was not TW-2) as to what caused the TBM to experience performance issues.

This is for good reason: When the January 15 letter was written, STP thought that “a portion of the casing may have remained jammed” in front of the cutterhead and (as stated in the letter) believed the casing may have damaged the Precutting Bits during cutterhead rotation as the TBM excavated Rings 137 to 149. CP 1269. STP was unable to verify this theory, however, and found no large portion of casing in front of the TBM during its extensive investigation that took place through the end of January. CP 928 (¶¶ 22, 24). In fact, the January 15 letter reveals that STP had not discovered the TBM damage and was instead planning to resume mining (hence the statement by STP that there was no current need, as requested by WSDOT, to provide a schedule recovery plan). CP 1274-75. STP did not discover the fundamental damage that gave rise to this litigation until February 4, 2014 when drive motor 13’s removal revealed damage to the TBM’s seal system that led to the extensive project repair period. And there is no evidence in the record that STP discovered the cause of that catastrophic damage prior to the end of January 2014.

*Vertecs* is controlling. There, plaintiff 1000 Virginia sued *Vertecs*, a stucco subcontractor, in 2002, eight years after 1000 Virginia first observed leaks in the building in 1994. 158 Wn.2d at 588. *Vertecs* moved for summary judgment on the timeliness of 1000 Virginia’s claims, but the Washington Supreme Court held that disputed issues of material fact

precluded resolution of this issue as a matter of law. In so ruling, the Supreme Court rejected the very argument Appellants raise here, i.e., that 1000 Virginia “should have discovered its cause of action in 1994 because there was notice of leaks and thus of the breach.” *Id.*

Indeed, like here, Vertecs specifically argued that the statute had run because 1000 Virginia was aware of the leaks in 1994 and had expressly contended at that time that such leaks “may” be the fault of Vertecs. *Id.*<sup>4</sup> The Court noted, however, that Vertecs (at the time) denied responsibility for the leaks, alleging they were due to “improper caulking and unconnected ductwork that was not within the scope of its work.” *Id.* The Supreme Court thus held that this dispute over the cause of the leaks precluded summary dismissal of 1000 Virginia’s claim. *Id.* at 588-89. The Court of Appeals’ decision in *Vertecs*—upheld by the Supreme Court—bolsters the principle that mere knowledge of a potential cause of damage is insufficient to establish actual knowledge of causation for purposes of the discovery rule. *1000 Virginia L.P. v. Vertecs Corp.*, 127 Wn. App. 899, 911, 112 P.3d 1276, 1282 (2005). Just as here, the Court

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<sup>4</sup> At the time of the 1994 leaks, 1000 Virginia sent Vertecs a letter noting as follows: “We have been experiencing leaking on the west and south side of the above referenced project for some time. We are attempting to determine the exact cause. On January 8, 1994, we will be renting a lift to examine the caulking around the windows and the vents. We believe your company may be responsible for the deficiency. Please contact Ginny at 728-8116 to coordinate having your representative be present to review this problem.” See Appellant’s Brief, *1000 Virginia L.P. v. Vertecs Corp.*, 2004 WL 3775350 at \*8 (Oct. 12, 2004).

of Appeals noted that the water intrusion observed in 1994 was in an area where the work of several contractors (including Vertecs) could have contributed to the problem. This was in contrast to a situation where “there was only one potentially responsible contractor.” *Vertecs*, 127 Wn. App. at 910-11 (contrasting *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn. App. 855, 974 P.2d 1257 (1999)).

The same two salient factors that made the limitations issue in *Vertecs* a disputed issue of fact are equally present here: (1) there were multiple potential causes under investigation at the time; and (2) the parties themselves disagreed then (and still do today) on what caused the problem. Specifically, as in *Vertecs*, STP and the other project participants (including WSDOT and its consultants) articulated a number of different potential causes of the TBM stoppage throughout December 2013 and January 2014. WSDOT itself offered a competing theory and blamed the stoppage on factors other than the steel pipe. CP 1217. *Vertecs* is thus controlling, and there is a question of fact as to when STP should have known that the pipe was a cause in fact of the TBM damage that precludes summary judgment.

WSP argues that *Vertecs* is distinguishable on the ground that it allegedly involved a latent injury or defect that 1000 Virginia could not discover. WSP Br. at 26-28. But in *Vertecs*, the damage to the building

was known immediately in 1994 when the building envelope began to leak. 1000 Virginia thus knew of its injury at that time (water intrusion), expressly alleged that the leak might be connected to Vertecs' work, but (as here) did not have actual knowledge as to the cause of the injury (Vertecs' breach of its duty). Just as the evidence of leaks and knowledge of Vertecs' involvement in the construction of the building were insufficient to trigger the running of the statute of limitations there, the same is true here.

*Vertecs* is consistent with other authorities. In *Norris*, plaintiff's windows leaked in 1994 yet plaintiff did not file suit until 2000. 115 Wn. App. at 513-14. Plaintiff obviously knew something was wrong with the windows in 1994, but this Court reversed a grant of summary judgment on the grounds that there were material questions of fact as to when the owner discovered the "true cause" of the water leaks. *Norris* is instructive because it focuses on causation as a separate element, not to be collapsed into a finding of accrual when there is some known damage plus only a general recognition that something is wrong with the work.

In *Mayer v. Sto Indus., Inc.*, 123 Wn. App. 443, 463, 98 P.3d 116 (2004) (aff'd in part, rev'd in part, 156 Wn.2d 677, 132 P.3d 115 (2006)), plaintiff noticed rust spots appearing in windows and penetrating into the stucco finish in 1990, yet sued in 1995. Under Appellants' theory,

plaintiffs' suit would be untimely because plaintiffs could have theorized the possibility that the stucco contributed to water intrusion and dry rot. The court held the suit was timely because plaintiffs did not discover a "factual causal relationship" between the stucco and their injury more than three years prior to suit. *Id.*

In *Nichols*, plaintiff contracted with Home Depot to replace the roof on a home. 197 Wn. App. at 495. Home Depot hired a subcontractor (Peterson) who went to the home in 2006 and left the roof exposed to wind and rain. *Id.* at 496. When plaintiff complained, Home Depot sent an employee to tarp the roof. *Id.* Five years later, plaintiff went to the attic and found white patches of mold and wet wood that was attributed to the work in 2006 when the roof was exposed to rain. *Id.* Plaintiff filed suit in 2012, six years after the occurrence of the event causing the damage. *Id.* Under Appellants' theory, the claim in *Nichols* would have accrued in 2006 when the plaintiff sustained some damage and had notice of the potential cause of the damage (i.e., the exposed roof during rain). Plaintiff, on the other hand, submitted evidence that she believed the tarp over the roof solved any concern about the water intrusion (breaking any causal connection). *Id.* at 501. Looking at the facts in the light most favorable to the plaintiff, this Court reversed the trial court's grant of summary judgment on limitations grounds. *Id.*

In any airplane crash, the cause might be pilot error, mechanical failure, weather or other causes. If Appellants were correct, the cause of action would accrue at the time of the crash (i.e., damage) because everyone is on notice that a crash might be due to these factors. But that is not the law in Washington. *North Coast Air Services Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 319, 759 P.2d 405 (1988) (“[W]e hold that the claimant must know or should with due diligence know that the cause in fact was an alleged defect . . . That the causal connection usually is a question of fact is recognized.” (emphasis added)).

In *Crisman*, plaintiff knew in 1985 that the business was in “a precarious financial state” and that defendant had taken “financial records, display cases, customer lists, vendor lists, a company VISA card, and jewelry repair equipment from her store.” 85 Wn. App. at 18. In 1990, plaintiff was advised by the estranged wife of defendant that she had seen defendant “burning receipt books sometime in 1982 and in 1985 and that he had stored in his closet at home a bag of gems that he claimed constituted his share of [the] business.” *Id.* Plaintiff filed suit in 1992. Defendant argued the claim accrued in 1985 when plaintiff discovered the damage and missing assets. This Court affirmed a jury finding that the claim was timely, based on plaintiff’s discovery in 1990 that defendant had secreted jewelry. *Id.* at 22. *Crisman* again illustrates that a claim

does not accrue on damage alone—contrary to S&W’s ongoing effort to conflate the two elements—and that the question is for the jury to decide.

S&W argues these cases are distinguishable because they involved plaintiffs who either “(1) lacked any knowledge that the defendant had even breached its duty of care, or (2) were unaware of that they had sustained any appreciable damage.” S&W Brief at 19. But in each of these cases the element of causation was at issue and the question of what the plaintiffs knew when was before the court. The same is true here. And as in those cases, this Court should conclude that disputed issues of fact preclude a ruling on summary judgment on this issue.

Appellants commit the same error they made below: They seek to conflate mere awareness of the potential damage with awareness of the cause of the damage. The case law holds that the two elements are separate, and that a plaintiff’s knowledge of some damage does not prove the plaintiff’s knowledge of the cause of the damage. To hold otherwise would be inconsistent with the Washington Supreme Court’s holding *Vertecs* expressly rejecting the notion that knowledge of some damage and suspicion of a cause is sufficient to trigger the running of the statute of limitations. 158 Wn.2d at 588.

Appellants rely heavily on *Beard v. King County*, 76 Wn. App. 863, 889 P.2d 501 (1995). But *Beard* presented a “narrow issue” that is

not presented by this case. *Id.* at 867. This narrow issue was whether the statute is tolled under the discovery rule until a plaintiff has “conclusive” proof of specific allegations already set forth in a previous detailed administrative complaint. *Id.* In *Beard*, plaintiffs had filed an administrative claim that specifically alleged all the elements of the claims, but failed to bring suit within three years of filing that claim. To avoid summary judgment, plaintiffs argued that the claim did not accrue until they had specific proof to support their claim based on an admission in court in a related suit. *Id.* at 866. The Court rejected this premise on the ground that a claim accrues “whether or not the party can conclusively prove the tortious conduct has occurred. A smoking gun is not necessary to commence the limitation period.” *Id.* at 868.

*Beard* thus plainly addressed a “narrow” and unique fact pattern not presented here, and Appellants’ attempt to analogize *Beard* to this case is misplaced. WSP Br. at 21; S&W Br. at 16-17. STP never filed a detailed administrative claim as in *Beard*. Moreover, STP’s December 12, 2013 letter merely reserved STP’s rights to request a change order from WSDOT “in the event” the pipe was determined to have caused damage to the TBM. CP 1061. This is opposite of the specific claim for damages at issue in *Beard*. Instead, the STP communications on which Appellants rely are nearly identical in nature to those at issue in *Vertecs*. STP wrote

to WSDOT to preserve its rights in the event that TW-2 was in fact determined to be a cause, just as 1000 Virginia sent a letter notifying Vertecs that it believed Vertecs' work "may" be a cause of the leaking issue. *Vertecs*, 158 Wn.2d at 588.

In further argument that *Beard* controls, S&W attempts to argue that STP "specifically alleged" the essential facts in support of a claim in various correspondence. S&W Br. at 16-17. S&W first cites to a December 6 email from Mr. Magro regarding the TBM's performance issues observed the prior day, but Mr. Magro's email expressly states that STP does not know whether or to what extent there was any actual damage to the TBM as a result of its encounter with TW-2. CP 893 (extent of damage "is unknown at this point"). S&W further claims that STP issued various "reports and memoranda" that purportedly "focused" on TW-2, but the cited documents show nothing of the sort. *See, e.g.*, S&W Br. at 16 (citing CP 869-70 (figure showing test wells); CP 872 (documentation of WSDOT identifying the steel pipe as TW-2); CP 874 (further information regarding TW-2); CP 893 (Magro's 12/6/13 email); CP 896 (opening change order in the event TW-2 is determined to be cause of issues); CP 901-04 (email summary of STP's planned investigation efforts described above); CP 908 (email regarding STP's repair efforts with no discussion of potential cause of damage); CP 943

(Tunnel Stoppage Report stating blockage in front of TBM “may be anything” and that any damage to the TBM caused by TW-2 “is still unknown”). Thus, as before, Appellants mischaracterize the record. These documents don’t make out the narrow *Beard* defense; they instead reflect STP’s efforts to investigate unknown causes of the TBM stoppage.

Appellants’ other cited authority, *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 980 P.2d 809 (1999), involved claims of improper sexual conduct in pastoral counseling. All of the plaintiffs—who were adults at the time of the abuse—testified at deposition that they were aware the sexual conduct was wrong as it occurred and that such conduct caused them some harm. *Id.* at 831. Relying on cases involving similar abuse cases, the court held that plaintiffs’ claims accrued at the time of the counseling, and not later when (as plaintiffs urged) they came to understand that the conduct was a breach of the pastor’s duty or that the abuse had caused additional problems. The court held that plaintiffs “could have discovered the causal link between [the wrongful conduct] and their injuries had they diligently sought treatment” and on that basis declined to apply the discovery rule. 96 Wn. App. at 834. This case in which the plaintiffs were found to have slept on their rights is wholly unlike the circumstances here where STP diligently investigated the TBM stoppage. Due to the complex nature of the TBM and the multiple steps

necessary to complete this investigation, STP could not (and did not) discover the cause of the damage at the time Appellants allege. At a minimum, the question of whether STP diligently investigated causation during that time period is question of fact. *Mayer*, 102 Wn. App. at 76.

The trial court correctly denied summary judgment based on factual disputes in the record on the issue of causation. The evidence must be viewed in the light most favorable to STP. That evidence shows that STP (1) was still in the midst of investigating the potential cause of the TBM stoppage through January 2014, (2) restarted the TBM two weeks after Appellants claim STP should gone to court with a supposedly fully matured legal claim and (3) only discovered the catastrophic damage the necessitated the prolonged repair on February 4, 2014. Appellants' accrual argument amounts to a "shoot first, ask questions later" approach to instituting litigation. The record establishes that STP did not have an actionable claim against Appellants at the time Appellants contend or, at a minimum, that disputed issues of material fact preclude a contrary finding on summary judgment.

**C. STP's Separate and Distinct Indemnity Claims are Viable.**

Despite having never properly raised any argument regarding STP's separate indemnity claims, Appellants now ask this Court to rule as

a matter of law that these claims are not viable. But these issues are not properly before this Court on appeal, and otherwise lack merit.

First, Washington law expressly rejects Appellants' argument that STP's implied indemnity claims are duplicative of their tort claims. To the contrary, it is well-established that these claims are separate, distinct causes of action subject to separate statutes of limitations from any underlying tort claims. Second, STP's indemnity claims remain viable with respect to both its Incurred Third Party Costs and Third Party Claims.<sup>5</sup> Both are recoverable in indemnity as liabilities incurred due to Appellants' negligence, and both are timely asserted in this consolidated action. Third, no evidence in the record supports Appellants' new argument that STP is a "joint tortfeasor" and, therefore, barred under the Tort Reform Act from seeking indemnity. This Court should reject Appellants' arguments regarding STP's separate indemnity claims.

**1. This issue should not be reviewed on appeal.**

As an initial matter, this Court should decline to consider Appellants' arguments regarding either the merits or timeliness of STP's indemnity claims because Appellants failed to properly raise these issues before the trial court. It is "the responsibility of the moving party to raise

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<sup>5</sup> In its complaint, STP defined its Third Party Claims as the claims for damages brought against STP in this consolidated action and its Incurred Third Party Costs as those costs related to the investigation into and repair of the TBM. CP 323-24.

in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.” *White*, 61 Wn. App. at 168. Here, Appellants’ motions requested summary judgment dismissal only of STP’s allegedly “untimely tort claims.” CP 474, 526-33 (emphasis added). Although Appellants referred in passing to STP’s indemnity claims as “tort-theory indemnification” (*see* CP 482, 530), they presented no argument in their motions with respect to the timeliness of STP’s separate indemnity claims. *See* CP 473-90, 526-33. It was incumbent upon them to do so. *White*, 61 Wn. App. at 168.

In its opposition to Appellants’ motions, STP noted Appellants’ failure and went on to point to well-established authorities holding that indemnity claims are distinct and separate causes of action governed by separate statutes of limitations. CP 989. Only in their reply briefs did Appellants belatedly argue that STP’s indemnity claims should be dismissed because they were indistinct from STP’s negligence claims, were otherwise barred by the Tort Reform Act or were somehow untimely. CP 1285-87, 1297. STP objected to this untimely argument. CP 1304. This was simply too late for these arguments to be raised. *White*, 61 Wn. App. at 169 (“[W]e hold that it was error for the court to consider the proximate cause issue first raised in Defendants’ reply memorandum and to rely on that issue as a basis for granting summary judgment.”).

Because Appellants' arguments regarding the merits and timeliness of STP's indemnity claims were never properly asserted before the trial court, this Court should decline to consider this issue on appeal. *See, e.g., White*, 61 Wn. App. at 168-69.<sup>6</sup>

**2. Washington law establishes that STP's indemnity claims are separate and distinct from its negligence claims and subject to their own statute of limitations.**

Even if the Court elects to consider Appellants' untimely arguments, they fail on their merits. "The law has long recognized an implied right of indemnity when a party is subjected to liability for the wrongful conduct of another." *United Boatbuilders, Inc. v. Tempo Prods. Co.*, 1 Wn. App. 177, 179, 459 P.2d 958 (1969). Implied indemnity is rooted in principles of equity:

It is nothing short of simple fairness to recognize that "(a) person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity" (Restatement, Restitution, s 76). To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs[.]

*McDermott v. City of New York*, 50 N.Y.2d 211, 216-17, 406 N.E.2d 460 (1980) (quoted in *Cent. Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 513 n.2, 946 P.2d 760 (1997)); *see also Stevens v. Sec. Pac. Mortg.*

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<sup>6</sup> As described further below, Appellants also raise numerous new arguments and issues on appeal that were never raised at all before the trial court. This Court should decline to address them. RAP 9.12; *Cano-Garcia*, 168 Wn. App. at 248.

*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.”); *Barbee*, 133 Wn.2d at 513 (indemnity “in its most basic sense means reimbursement,” and arises when “one party incurs a liability the other party should discharge by virtue of the nature of the relationship between the two parties”); *Rufener v. Scott*, 46 Wn.2d 240, 243, 280 P.2d 253 (1955) (citing 27 Am. Jur. Indemnity § 18 for rule that “[O]ne constructively liable for a tort is generally held entitled to indemnity from the actual wrongdoer, regardless of whether liability is imposed on the person seeking indemnity by statute or by rule of the common law, and irrespective of the existence of an express contract to indemnify.”)

Washington courts recognize that implied indemnity claims are “distinct, separate causes of action from the underlying wrong and are governed by separate statutes of limitations.” *Barbee*, 133 Wn.2d at 517; *see also id.* at 514-15; *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 588, 5 P.3d 730 (2000) (“Indemnity sounds either in contract or in tort, and it is a distinct and separate equitable cause of action.”). “It is settled law that indemnity actions accrue when the party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party.” *Barbee*, 133 Wn.2d at 517; *see also Sabey*, 101 Wn. App. at 593

(same). As a result, such actions may be held timely even where the statute of limitations on the underlying claim has expired. *Barbee*, 133 Wn.2d at 517-18 (holding indemnity claim timely even where underlying U.C.C. claim was time barred).

Although Appellants have argued that the 1981 Tort Reform Act eliminated claims for indemnity in favor of those for contribution, the Act conclusively did not abolish implied indemnity rights between non-joint tortfeasors, as is the case here. See RCW 4.22.040(3); *Toste v. Durham & Bates Agencies, Inc.*, 116 Wn. App. 516, 520, 67 P.3d 506 (2003); *Kilgore v. Shriners Hosps. For Children*, 190 Wn. App. 429, 432-33, 360 P.3d 55 (2015); *Barbee*, 133 Wn.2d at 513 n.3; *Sabey*, 101 Wn. App. at 588-91; *Radach v. Gunderson*, 39 Wn. App. 392, 397-98, 695 P.2d 128 (1985).

In *Sabey*, Division I of this Court recognized a separate cause of action for indemnity grounded in negligence that was subject to a separate statute of limitations. 101 Wn. App. at 579-81. There, an investor brought negligence and indemnification claims against an actuarial firm, seeking reimbursement of a settlement payment he made after he incurred liability as a result of the actuarial firm's negligence. *Id.* The court recognized the investor's indemnity claim as a distinct and separate cause of action and rejected the actuarial firm's argument that the Tort Reform Act abolished all common law indemnity rights except those grounded in

contract. *Id.* at 592 (“Where a legal duty exists between non-joint tortfeasors, an indemnity right exists at common law.”).

Under these longstanding principles of Washington law, STP’s indemnity claims are undisputedly distinct causes of action subject to a separate statute of limitations. Appellants had an obligation to provide accurate information in the GBR and GEDR they prepared on behalf of WSDOT. Appellants were aware STP would rely upon these documents in bidding the Project. Appellants’ failure to accurately identify TW-2 has subjected STP to liability. CP 323-24. As such, STP has a separate cause of action for indemnity that accrues upon payment, or adjudication of liability for payment, of damages to third parties.

**3. STP’s indemnity claims are not duplicative of tort claims.**

Despite the above authority, Appellants argue STP’s indemnity claims are nothing more than “re-labeled” or “re-dressed” negligence claims. WSP Br. at 28-32; S&W Br. at 21-24. Appellants’ arguments fail.

An implied indemnity action is not a tort action. *See Toste*, 116 Wn. App. at 522 (“[I]mplied indemnity is an equitable action based on a party paying more than its fair share; it is not based on tort or contract, although either may be secondarily involved.”); *Sabey*, 101 Wn. App. at 588 (holding similarly); *Barbee*, 133 Wn.2d at 517 n.12 (holding similarly); 25 Wash. Prac., Contract Law and Practice § 1.12 (3d ed.

updated Nov. 2017) (“[I]t is not necessary for a claim of implied indemnity that the plaintiff establish the existence of a contractual duty owed directly to the plaintiff. Nor is it necessary to establish the elements of a cause of action in tort . . .” (emphasis added) (footnotes omitted)).

S&W cites *Toste* and *Jain v. J.P. Morgan Secs., Inc.*, 142 Wn. App. 574, 177 P.3d 117 (2008) to argue that STP’s indemnity claims are simply negligence claims in disguise, but those cases are not on point. *Toste* involved RCW 4.22.060(2)<sup>7</sup>, which is “broader” than RCW 4.22.040 in that it “releases a settling defendant from all indemnity and contribution liability, with the sole exception of contractual arrangements to indemnify.” 116 Wn. App. at 520. The issue before the court was whether the approval of the parties’ settlements as reasonable precluded a subsequent CPA claim seeking reimbursement for money paid to a third party. *See Toste*, 116 Wn. App. at 520-21; *see also Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 324, 858 P.2d 1054 (1993) (same). That issue is not present here, and the *Toste* decision provides no guidance.<sup>8</sup>

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<sup>7</sup> “A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides . . .”

<sup>8</sup> *Toste* also involved a CPA claim, not a negligence claim. *Id.* at 520-21.

*Jain* involved section 16(b) of the federal Securities Exchange Act, which prohibits corporate insiders from buying and selling their company's stock within a six-month period and requires violators to disgorge any profits they might gain. 142 Wn. App. at 580-81. Under federal law, the statute is a "strict liability provision" that prohibits violators from seeking indemnification for ensuing liability. *Id.* at 581-82. And to the extent a plaintiff's state law claims are found to be "de facto claims for indemnification," they are preempted by section 16(b). *Id.* at 582, 585. *Jain* depended heavily on federal securities law and the federal policy behind section 16(b), and therefore, is inapplicable here.

Similarly, the cases WSP cites in arguing that STP's indemnity claims are duplicative do not support its position. Most of the cases do not even involve indemnity.<sup>9</sup> One of the cited cases, *Jacob's Meadow Owners*

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<sup>9</sup> See, e.g., *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 772, 332 P.3d 469 (2014) (claims for trespass/nuisance and negligence arising from a single set of facts are treated as a single negligence claim); *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 547, 871 P.2d 601 (1994) (same); *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 527-28, 799 P.2d 250 (1990) (same); *Lewis v. Krussel*, 101 Wn. App. 178, 183, 2 P.3d 486 (2000) (same); *Hostetler v. Ward*, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985) (same); *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 864-65, 991 P.2d 1182 (2000) (involved claim for negligent infliction of emotional distress based on same facts that supported claim under Law Against Discrimination); *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977) (claims for breach of fiduciary duty, outrage, and negligent/intentional infliction of emotional distress based on one set of facts were treated as single claim); *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 474, 722 P.2d 1295 (1986) (noting duplication inherent in false light and defamation claims); *Boyles v. City of Kennewick*, 62 Wn. App. 174, 177-78, 813 P.2d 178 (1991) (plaintiff cannot amend complaint to state cause of action for negligence to avoid statute of limitations defense, where factual allegations in complaint are insufficient to state a negligence claim); *Warren v. Wash. Trust Bank*, 19

*Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P.3d 1153 (2007), involves contractual indemnity, not the implied indemnity at issue here. Regardless, that case supports STP's position in that it holds "a plaintiff may bring separate or alternative claims seeking compensation for the same damages or amounts, such as the breach of contract and indemnity claims at issue here, provided different evidence is available to prove each of the claims." *Id.* at 757. Here, different elements and evidence are at issue for STP's indemnity and negligence claims. Compare *Donald B. Murphy Contractors, Inc. v. King Cnty.*, 112 Wn. App. 192, 198, 49 P.3d 912 (2002) (elements of implied indemnity claim) with *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996) (elements of negligence claim).

In sum, Appellants' attempt to conflate STP's indemnity and negligence claims fails. The indemnity claims are separate causes of action and, as discussed below, remain valid with respect to both Incurred Third Party Costs and Third Party Claims.

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Wn. App. 348, 363, 575 P.2d 1077 (1978) (if the statute of limitations bars action for conversion, renaming the action one of recoupment or set off will not revive it so as to defeat the statute). WSP also cites *Reid v. Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349 (2004) and *City of Federal Way v. King Cnty.*, 62 Wn. App. 530, 536-37, 815 P.2d 790 (1991) for the "analogous example" that a party cannot avoid expiration of the statute of limitations by bringing an action for declaratory judgment rather than a time barred claim for relief. WSP Br. at 38. Both cases involved a special bright line time limit for elections challenges and are inapposite here.

**4. STP's indemnity claims are viable as to both Incurred Third Party Costs and Third Party Claims.**

Appellants further dispute both the Incurred Third Party Costs and the Third Party Claims components of STP's indemnity claims, claiming the former are time-barred and the latter are either time-barred or unripe. Appellants also characterize the Incurred Third Party Costs as STP's own costs and contend they are not recoverable in indemnity. These new arguments are not reviewable and, in any event, lack merit. *See White*, 61 Wn. App. at 168; *Cano-Garcia*, 168 Wn. App. at 248.

***a. STP's indemnity claims are not time barred.***

Neither STP's Incurred Third Party Costs nor its Third Party Claims are time-barred. With respect to the Incurred Third Party Costs, STP's complaint filed in January 2017 asserts that it "has already paid substantial costs in excess of \$50 million to various third party Project participants" and, thus, "STP has incurred liability in the form of Third Party Incurred Costs." CP 379-80 ¶ 32; CP 384 ¶ 59; CP 388 ¶ 87. While the record indicates that STP hired various third parties in late 2013 and early 2014, the statute of limitations is triggered by payment, not hiring. *Sabey*, 101 Wn. App. at 593; *Barbee*, 133 Wn.2d at 517; *Earley v. Rooney*, 49 Wn.2d 222, 228, 299 P.2d 209 (1956). Appellants presented no evidence to the trial court regarding actual payment of the Incurred Third Party Costs in 2014 or before. Accordingly, there was no basis upon

which the trial court—or this Court—could find that STP’s claims regarding the Incurred Third Party Costs are untimely. *See Olson*, 52 Wn. App. at 224.

Even if STP paid certain sums to third parties prior to January 27, 2014—an allegation that, again, finds no support in the record—the statute of limitations would at the most bar STP from seeking indemnification only for those specific sums. Such payment would not trigger the statute of limitations for the pending (and unpaid) Third Party Costs or any other potential indemnity claims for payments made within the three-year statutory period. Appellants cite no relevant authority so holding,<sup>10</sup> and authorities on point are to the contrary. Where there are multiple payments for which an indemnified party seeks indemnity, the statutory limitations period for an indemnification claim runs from the time of each payment. *See* Restatement (First) of Restitution § 77, cmt. b Reporters Notes (1937) (“Where there are several payments, the statute runs from time of each as to amount paid each time”); *cf. Dittmar v. Frye & Co.*, 200

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<sup>10</sup> The cases cited by Appellants in support of this argument involve negligence-based actions, not causes of action grounded in equity (such as implied indemnity claims). *See Steele v. Organon, Inc.*, 43 Wn. App. 230, 716 P.2d 920 (1986) (medical malpractice); *Green*, 136 Wn.2d at 93 (negligence). *See also First Maryland Leasecorp. v. Rothstein*, 72 Wn. App. 278, 285, 864 P.2d 17 (1993) (“In negligence actions, an aggrieved party need not know the full amount of damage before a cause of action accrues, only that some actual and appreciable damage occurred.” (emphasis added)); *State v. Superior Court for Ferry Cnty.*, 145 Wash. 576, 579, 261 P. 110 (1927) (“[W]hile the rule against splitting causes of action is applied with some strictness in actions arising upon contract or upon tort, it is not enforced with the same rigidity in actions of equitable cognizance or actions not clearly falling within its application.” (emphasis added)).

Wash. 467, 472, 93 P.2d 717 (1939) (“[A]n indemnity may be enforced upon part payment to the extent of the amount paid and if the debt is paid by installments, action may be brought for each installment as it is paid.”) (quoting Stearns Law of Suretyship, 4th ed., § 280).<sup>11</sup> STP’s action with respect to pending unpaid Third Party Costs and for Third Party Claims (none of which have been paid) is not time-barred.

***b. STP’s indemnity claims were properly pleaded in the context of this consolidated lawsuit.***

Second, with respect to Third Party Claims for which STP claims indemnity, Appellants argue that because no payment has yet been “compelled,” these claims are not yet the proper subject of an indemnity claim. *See* S&W Br. at 34-35. Appellants failed to raise this issue with the trial court, and this Court should decline to consider it. *See* RAP 9.12; *White*, 61 Wn. App. at 168; *Cano-Garcia*, 168 Wn. App. at 248.

Regardless, Appellants’ ripeness argument fails. CR 14(a) expressly permits a defending party such as STP to assert, as a third party

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<sup>11</sup> *See also, e.g., Chartis Specialty Ins. Co. v. United States*, No. C-13-1527 EMC, 2013 WL 3803334, at \*14 (N.D. Cal. July 19, 2013), modified on reconsideration, No. C-13-1527 EMC, 2015 WL 328523 (N.D. Cal. Jan. 26, 2015) (collecting law and noting statute of limitations on insurer’s indemnity cause of action “runs anew from each payment it makes to its insured”); *Schrader-Bridgeport Int’l, Inc. v. Arvinmeritor, Inc.*, No. 3:07CV138, 2008 WL 977604, at \*12 (W.D.N.C. Apr. 9, 2008) (indemnity claims for payments made within three year period not time barred); *Sherwin-Williams Co. v. ARTRA Grp., Inc.*, 125 F. Supp. 2d 739, 757 (D. Md. 2001) (statute of limitations for indemnification ran separately for each payment made in the course of multi-year cleanup of contaminated property); *Duke Univ. v. St. Paul Mercury Ins.*, 95 N.C. App. 663, 671-72, 384 S.E.2d 36, 41 (1989) (each payment triggered a separate limitations period).

plaintiff, claims against any party “who is or may be liable to the defending party for all or part of the plaintiff’s claim against the defending party” (emphasis added). Under the Rule, a defendant may bring in a third party “who may be liable to the defendant by way of indemnity, subrogation, contribution and warranty, as well as in other situations.” *Deutsch v. W. Coast Mach. Co.*, 80 Wn.2d 707, 717-18, 497 P.2d 1311 (1972 (emphasis added)). As such, indemnity claims need not technically “accrue” in order to be brought as third party claims. *See Thomas v. Przbylski*, 83 Wn.2d 118, 119-20, 516 P.2d 207 (1973) (defendants impleaded third party seeking recovery of any moneys paid in settlement or by judgment); *see also* Karl B. Tegland, 3A Wash. Prac., Rules Practice CR 14 (6th ed. 2018) (“Third-party practice provides a convenient vehicle for the assertion of claims for partial or total indemnity . . .”).<sup>12</sup>

Here, WSDOT, Hitachi and others have asserted claims against STP for over \$100 million. STP in turn has asserted indemnity claims against Appellants, in part on the basis that they are or may be liable for the WSDOT and Hitachi claims. Although STP brought these claims in a separate action against Appellants rather than impleading them under CR 14, STP’s amended complaint seeks amounts in recovery expressly

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<sup>12</sup> *Cf. United Mut. Sav. Bank v. Riebli*, 55 Wn.2d 816, 818, 350 P.2d 651 (1960) (defendant cross-complained against co-defendants for damages and “for indemnity for any damages it might be required to pay to [plaintiff].” (emphasis added)).

authorized by this rule. *See* CP 379 ¶ 31; CP 383 ¶ 57; CP 384 ¶¶ 60-61; CP 387 ¶ 85; CP 388 ¶¶ 88-89. STP brought its separate action against Appellants with the full understanding (and ultimately the consent of all parties) that the action would be transferred and consolidated with this existing action. CP 362, 370, 390-92. STP’s separate indemnity action was the functional equivalent of impleading Appellants under CR 14. As noted *Deutsch*, “[i]t would not only be most unfair to require the third party plaintiff to relitigate this case in another independent action, but it would be contrary to the doctrine that would avoid a multiplicity of suits.” 80 Wn.2d at 718. In sum, STP’s indemnity claims with respect to the Third Party Claims are ripe and properly before the trial court.

Finally, even if this Court holds that the Third Party Claims (which, as noted, have been consolidated with the Thurston County litigation) were not ripe as originally asserted, STP would move to amend its pleadings to assert the claims under CR 14. This would, of course, result in a lawsuit with the exact same posture as currently exists.

***c. STP’s Third Party Costs are recoverable in indemnity.***

Finally, Appellants argue that STP’s indemnity claim for Third Party Costs seeks to recover STP’s “own alleged costs,” which Appellants contend do not constitute recoverable “indemnity damages.” WSP Br. at 33; S&W Br. at 21-22. This argument is improperly raised for the first

time on appeal, and the Court should decline to consider it. *See* RAP 9.12; *White*, 61 Wn. App. at 168; *Cano-Garcia*, 168 Wn. App. at 248.

Regardless, the argument is inconsistent with both *Barbee* and *Sabey* and contrary to common sense.

At its core, Appellants contend that indemnity is appropriate only where third parties bring legal claims against STP for which STP is judicially compelled to pay damages (arguing, essentially, that payment absent a formal claim is “voluntary”). But *Barbee* and *Sabey* make clear that indemnity claims accrue when the party seeking indemnity “pays or is legally adjudged obligated to pay damages to a third party.” *Barbee*, 133 Wn.2d at 517 (emphasis added); *see also Sabey*, 101 Wn. App. at 593. A party “is not bound to submit to suit before paying the claim” for liabilities for which it seeks indemnity. *United Boatbuilders*, 1 Wn. App. at 181 (payment made in settlement is reimbursable in indemnity). Here, STP alleges it incurred (and paid) liabilities associated with the investigation and other costs related to the TBM stoppage and the TBM repair. STP is entitled to claim indemnification for all liability incurred as a result of Appellants’ acts, including payments made to third parties to satisfy debts.<sup>13</sup> To hold otherwise would incentivize (and in fact require) parties

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<sup>13</sup> To the extent Appellants claim that STP’s payments to third parties are not “indemnity damages,” this argument appears inconsistent with Washington law. *See Kathryn Learner Family Trust v. Wilson*, 183 Wn. App. 494, 499-500, 333 P.3d 552 (2014)

seeking indemnity to refuse to pay third party debts and wait for those parties to sue. Such a result would be untenable and absurd.

**5. The Tort Reform Act did not abolish the type of indemnity action STP brings here.**

Appellants now claim for this first time in this case that STP's own "wrongdoing" makes it a "joint tortfeasor" and precludes any recovery in indemnity. S&W Br. at 25; WSP Br. at 35 n.4. This argument is improperly raised for the first time on appeal, *see* RAP 9.12; *White*, 61 Wn. App. at 168, and otherwise lacks merit.

Joint tortfeasors either (1) must act in concert in committing the wrong, or (2) their acts, if independent of each other, must breach a joint duty and unite in causing a single injury. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 235, 588 P.2d 1308 (1978), *superseded by statute on other grounds as stated in Kottler v. State*, 136 Wn.2d 437, 963 P.2d 834 (1988); *Elliott v. Barnes*, 32 Wn. App. 88, 91, 645 P.2d 1136 (1982); *Rauscher v. Halstead*, 16 Wn. App. 599, 601, 557 P.2d 1324 (1976). Here, no evidence shows the collaboration, concerted action, or breach of duty needed to establish that relationship. Indeed,

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("General damages are those which are the natural and necessary result of the wrongful act or omission asserted as the basis for liability.").

none of the plaintiffs in this case alleges that STP has committed a tort.<sup>14</sup> Although S&W argues that WSDOT and Hitachi have alleged “clear instances of wrongdoing on STP’s part,” *see* S&W Br. at 25, a review of the record demonstrates those claims are based solely in contract. *See* CP 7-8, 71-74, 166-76, 1243-44. STP thus cannot conceivably become a joint tortfeasor with Appellants as to WSDOT, Hitachi, or any other party that has asserted claims against STP. *See Heights at Issaquah Ridge Owners Ass’n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 705-06, 187 P.3d 306 (2008) (where liability stemmed from statutory warranty and contract and not tort, defendant and third-party defendant were “not equal tortfeasors” and “[r]elative fault [was] not a factor”).

Appellants’ authority does not establish the contrary. *Sabey* stands for the principle that tort allegations must be made before a party will be deemed a joint tortfeasor. *See* 101 Wn. App. at 591 (“Howard Johnson makes no claim that Sabey is a tortfeasor, and certainly Sabey is not a joint tortfeasor with Howard Johnson as to the PBGC.”). And *Radach* in no way holds that a party may be considered a joint tortfeasor where there has been no claim or proof of any tortious act, as is the case here.

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<sup>14</sup> In any event, even if STP were somehow considered a joint tortfeasor, it would presumably have a right of contribution against Appellants under RCW 4.22.040(1), a circumstance Appellants ignore in their arguments.

Appellants' affirmative defenses claiming that STP's injuries were caused by its own negligence are also irrelevant.<sup>15</sup> There is no evidence establishing STP was negligent, and this Court cannot bar STP's claims on mere allegation. *See Baughn v. Malone*, 33 Wn. App. 592, 598, 656 P.2d 1118 (1983) (contributory negligence is generally a factual determination for the jury unless reasonable minds could not differ).

In sum, STP's indemnity claims are distinct from its tort claims and are governed by their own statute of limitations. This Court should reject Appellants' untimely and improper attempts to argue the contrary.

#### V. CONCLUSION

STP respectfully requests that the Court affirm the trial court's order denying Appellants' motions for summary judgment.

RESPECTFULLY SUBMITTED this 3rd day of October, 2018.

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<sup>15</sup> WSP makes this argument in a footnote, and for the first time on appeal. *See* WSP Br. at 35 n.4.

PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 3rd day of October, 2018, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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

DATED this 3rd day of October, 2018.

PACIFICA LAW GROUP LLP

By s/ John Parnass  
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