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No. 510251-1-II
Thurston County Superior Court Cause 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
PARSONS BRINCKERHOFF, INC. a New York corporation,

Defendants/Appellants.

OPENING BRIEF OF APPELLANT WSP USA, INC.,
f/k/a PARSONS BRINCKERHOFF, INC.

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I. INTRODUCTION

This action and the instant appeal arise from the Alaskan Way Viaduct Replacement Project (the Project), a major public construction project to replace the State Route 99 Alaskan Way Viaduct (AWV) in downtown Seattle with an underground bored tunnel. On December 4, 2013, “Bertha,” the tunnel boring machine (TBM) operated by Seattle Tunnel Partners (STP) hit an 8-inch diameter test well known as “TW-2.” On December 6, 2013, two days after the TBM hit TW-2, the TBM began to slow and eventually stopped. The TBM did not resume successful tunneling until nearly two years later, resulting in significant delay and repair costs.

Appellant WSP, Inc., f/k/a Parsons Brinckerhoff, was a consultant to WSDOT on the Project. WSP along with Co-Appellant Shannon & Wilson (S&W) authored the Geotechnical Baseline Report (GBR), a Contract Document outlining the subsurface conditions expected to be encountered in the Project work. S&W authored the Geotechnical & Environmental Data Report (GEDR), which accompanied the GBR. Both the GBR and GEDR were provided to STP by WSDOT during the 2010 bidding phase for the Project.

STP recognized all of the essential elements of its claims against WSP—duty, breach, causation, and harm—almost immediately after

hitting TW-2. As early as December 12, 2013, STP alleged that the GBR and GEDR were “defective” in that they did not adequately disclose TW-2. In this same letter, STP reserved its right to bring a Differing Site Condition (DSC) claim under its contract with WSDOT, relating to damages caused by TW-2. By January 15, 2014, STP asserted that its encounter with the steel casing was the primary cause of damage and delays to the TBM.

By January 15, 2014 at the latest, STP acknowledged all necessary elements to assert claims against WSP and S&W. Yet STP sat on its claims and did not file suit against WSP until January 27, 2017. All of STP’s claims against WSP, including its improper “implied indemnity” claim, are subject to a three-year statute of limitation, and are time barred as a matter of law.

S&W and WSP moved for summary judgment, seeking dismissal of all of STP’s claims pursuant to the applicable statute of limitation, RCW 4.16.080. The trial court erred in denying both summary judgment and subsequent motions for reconsideration. This Court should reverse the trial court and dismiss STP’s claims against WSP.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying S&W’s and WSP’s motions for summary judgment by order entered September 1, 2017.

2. The trial court erred in denying S&W's and WSP's motions for reconsideration by order entered September 22, 2017.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by declining to dismiss all of STP's negligence and negligent misrepresentation claims against WSP and S&W as time barred under RCW 4.16.080 when the record conclusively proves that STP had sufficient notice of those claims more than three years before it filed them?

2. Whether STP's claims for implied indemnity are duplicative of its negligence and negligent misrepresentation claims and therefore also time barred under RCW 4.16.080 when those claims are based on the same factual elements and seek STP's own damages resulting from WSP's alleged breach of a duty of care?

IV. STATEMENT OF THE CASE

A. The Parties

WSP, an engineering and design firm, served as a consultant to public owner WSDOT on the Project. Clerk's Papers (CP) at 292-93. S&W, a Seattle based geotechnical engineering firm, served as a sub-consultant to WSP, as well as a direct consultant to WSDOT for the Project. CP at 292-93.

STP is a joint venture composed of two of the world's largest construction companies, Dragados USA, Inc., and Tutor Perini Corporation. CP at 292. STP was the design-build contractor for the tunnel Project under contract with WSDOT. CP at 294.

B. The Contracts

On August 1, 2001, WSDOT engaged WSP as a consultant to assist in evaluating a number of potential design options to replace the aging Alaskan Way Viaduct. CP at 539, 548-97. Pursuant to its Agreement with WSDOT, around the same time, WSP sub-contracted with S&W to compile geological data on ground conditions relating to AWW replacement alternatives and related geotechnical issues. CP at 492. The scope of S&W's work as a sub-consultant to WSP in 2002 included the installation of various field exploration wells, including TW-2. CP at 493.

WSDOT ultimately selected the bored tunnel alternative as its preferred option for the Project. The bored tunnel alternative involved constructing an underground tunnel approximately 1.7 miles long and approximately 57 feet in diameter. CP at 539. Following WSDOT's selection of the bored tunnel alternative in 2009, WSP assisted WSDOT with its preparation of the Request for Proposals (RFP) to qualified bidders for the Project. CP at 539. This work included collaborating with

S&W on the Technical Requirements that accompanied the RFP with S&W—then operating under its own direct contract with WSDOT—and co-authoring the 2010 GBR which was incorporated into the RFP as a Contract Document. CP at 539, 691. The purpose of the GBR was for “setting the baseline subsurface site conditions expected to be encountered in the performance of the Work.” CP at 697. S&W also prepared the accompanying 2010 Geotechnical and Environmental Data Report (GEDR), itself a Contract Document. CP at 493. The GBR specifically states in the “Introduction” section of the document that it is “contractually binding and must be read in conjunction with the RFP, including but not limited to the GEDR included as Appendix G-2 of the RFP, which is also a Contract Document.” CP at 697.

In 2010, WSDOT issued its RFP for the Project, seeking proposals to design and construct, among other things, the tunnel. CP at 17. WSDOT’s RFP included the 2010 GBR and 2010 GEDR. CP at 294, 287. On October 28, 2010, STP submitted a proposal in response to WSDOT’s RFP. CP at 17. On January 6, 2011, WSDOT and STP entered into a contract for the engineering, procurement and construction of the SR 99 Bored Tunnel Alternative Design-Build Project (DB Contract). CP at 231. The DB Contract imposes numerous duties on STP, including the duty to provide a TBM suitable for the subsurface geological conditions in Seattle

and to properly operate the TBM to build a highway tunnel approximately 9,270 feet long. CP at 5.

STP procured the TBM for the Project from Hitachi Zosen U.S.A. LTD (Hitachi). CP at 19. STP commenced tunnel mining in July 2013. CP at 19.

C. The Pipe Strike

On the morning of December 4, 2013, the TBM hit a steel well casing. CP at 296. STP was immediately aware that the TBM hit the steel casing because the TBM physically ejected the casing from the ground, as STP observed. CP at 812. Within the next several days, STP identified the steel well casing as TW-2. CP at 866-67, 869, 874, 881.

The TBM continued productive tunneling, but on December 6, 2013, two days after hitting TW-2, STP observed that the TBM experienced abnormally high temperatures and thrust, and concluded that the machine was unable to advance any further without risking its integrity. CP at 880. STP Construction Manager Juan Luis Magro emailed several members of the STP team that same day to describe the TBM's encounter with an unanticipated "steel casing," stating that "TBM boring is becoming specially challenging in the last days . . . concurrently with steel casings showing up in the heading [.]" Magro continued:

To my knowledge *no steel casing was supposed to be in the path of the TBM*, especially now that full face is in natural ground. Our machine, as any other TBM is not designed to mine thru steel and *the extension of the damages in the cutterhead and/or screw conveyor produced by encountering these steel artefacts is unknown at this time, although it is a given that there will be some.* We may want to consider start collecting all data available to support a potential DSC [differing site condition] claim.

CP at 893-94 (emphasis added).

On December 9, 2013, STP's Project Manager, Chris Dixon, sent an email to STP's Chief Executive Officer (CEO), stating:

Matt Preedy just informed us that *the obstruction encountered by the TBM is an 8 inch diameter steel pipe, 160 feet long, that was used by WSDOT as an observation well on a previous alignment.* We hit it right where WSDOT left it in the ground. The DSC [differing site condition] has been identified. We (WSDOT and STP) have been receiving media questions all day about why Bertha stopped and what Bertha has encountered. It will be interesting to see how WSDOT responds to these questions now that the obstruction has been identified.

CP at 872 (emphasis added).

On December 10, 2013, consistent with Magro's and Dixon's statements, STP opened Proposed Change Order (PCO) #250, alleging the elements of a DSC claim against WSDOT for the "Steel Casing in TBM Boring near STA 204+00." CP at 896. This DSC was a contractual claim based on allegations that the TBM was damaged by its contact with TW-2, the presence of which STP alleged had not been disclosed in the Contract

Documents (including the GBR and GEDR). STP instructed its employees that any additional work performed by the subcontractors on the Project related to the stoppage needed to be separately recorded so that it could be incorporated into STP's claim against WSDOT for the alleged DSC. CP at 896.

By December 11, 2013, STP had internally confirmed that the steel casing was TW-2 by reviewing the 2010 GEDR authored by S&W. CP at 874. Two days later, on December 13, 2013, STP had generated a "TBM Stoppage Report" in which STP claimed that TW-2 damaged the TBM's cutterhead, and that pieces of TW-2 may be obstructing the TBM's forward advancement. CP at 898, 885.

On December 12, 2013, STP wrote to WSDOT stating that STP considered the steel well casing a differing site condition that had likely caused damage to the TBM and delayed tunneling. CP at 866-67. STP's letter stated that it understood that the well casing was installed by WSDOT in 2002 as part of previous explorations for the Alaskan Way Viaduct Replacement Program, and that WSDOT had failed to either remove the well casing, advise STP of its existence, or include the well in any of the Contract Documents *i.e.* the 2010 GBR and 2010 GEDR. CP at 866-67. STP wrote that it expected WSDOT to provide not only a time extension, but an increase in compensation as a result of the damage. *Id.*

STP wrote WSDOT again on December 20, 2013, asserting there was “nothing in the Contract Documents that indicate[d] that TW-2 was not abandoned or removed by WSDOT” and therefore that “STP was reasonable, in preparing its [2010] Proposal, to assume that WSDOT had not left TW-2 in place, directly in the path of the TBM.” CP at 876-77.

On December 31, 2013, Chris Dixon, STP’s Project Manager, confirmed to WSDOT STP’s position that TW-2 damaged the TBM and was the cause of the obstruction to the TBM’s advancement, writing “it appears that this remaining length of pipe is the obstruction that is preventing STP from advancing the TBM, resulting in the current stoppage to tunneling.” CP at 919-20.

On January 15, 2014, in response to WSDOT’s question regarding the potential causes of the damage to the cutting tools on the TBM, STP responded as follows:

[O]nce the TBM entered native ground the ground conditions encountered are not considered sufficiently abrasive to cause the level of damage observed on some of the Precutting bits, as described above. *We believe that the steel pipe is the primary cause of the damage to the cutting tools.*

CP at 1268-69 (emphasis added).¹

¹ WSP disputes that TW-2 caused the TBM to stop or damaged the TBM. This dispute, however, is immaterial to this analysis because STP was fully aware of all elements of its alleged claims against WSP, as indicated in its

D. Procedural History

On October 9, 2015, WSDOT filed suit against STP in King County Superior Court for breach of the DB Contract related to the December 2013 TBM stoppage. CP at 7. WSDOT alleged STP was at fault for the TBM's malfunction. CP at 7. Pursuant to a venue clause in the DB contract, WSDOT refiled its claims against STP in Thurston County Superior Court in March 2016. CP at 7.

On July 6, 2016, STP answered 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 the DB Contract and at least a partial cause of the December 6, 2013 stoppage. CP at 10. Along with its counterclaims, STP initiated third-party complaints against Hitachi and HNTB Corporation, STP's designer for the Project, alleging they were alternatively liable for damages related to the 2013 stoppage. CP at 26, 35.

On January 26, 2017—more than six months after STP filed its claims against WSDOT, and approximately three years, one month and

correspondence of December 2013 through January 2014, cited above. *See also* Commissioner's Ruling Granting Review, No. 51025-1-II, (Mar. 6, 2018), 10-11.

three weeks after the TBM encountered TW-2—STP filed its Complaint against S&W. CP at 375-88. The next day, it filed an Amended Complaint, adding Appellant WSP as a defendant. CP at 292. STP’s Amended Complaint alleges three tort causes of action—for negligence, negligent misrepresentation, and negligence-theory indemnification—against S&W and WSP each (six claims in total), all related to TW-2. CP at 292-305. Notably, Hitachi had timely filed negligence claims related to TW-2 against S&W on December 2, 2016, evidently aware that the limitation period was about to expire. CP at 257.

On August 4, 2017, WSP and S&W filed a Motion for Summary Judgment to Dismiss STP’s Untimely Complaint, pursuant to the three-year statute of limitation applicable to tort claims set forth in RCW 4.16.080. CP at 473, 525.

The trial court denied S&W’s and WSP’s Motions for Summary Judgment on September 1, 2017, finding: “there are material factual issues in dispute as to whether STP had factual knowledge as to the causation element prior to February of 2014.” Verbatim Report of Proceedings (VRP) (Sep. 1, 2017) at 49. The court further clarified that, as a matter of law,

for the purposes of the statute-of-limitations clock starting to run, all of the other elements were known to Seattle Tunnel Partners in December 2013. So it is only the

element of causation that the Court finds that there are material factual issues in dispute.

VRP (Sep. 1, 2017) at 50. During oral argument, however, STP explicitly conceded that it identified TW-2 as a potential cause of the TBM stoppage almost immediately. VRP (Sep. 1, 2017) at 27; *see also* CP at 988. STP also conceded that it was aware throughout the Project, including at the time of the TW-2 strike, that S&W and WSP authored the Contract Documents. VRP (Sep. 1, 2017) at 36. The trial court denied S&W's and WSP's subsequent motion for reconsideration on September 22, 2017. VRP (Sep. 22, 2017) at 32-33. Thereafter, on November 7, 2017, S&W and WSP sought discretionary review with this Court. In a 15-page opinion issued on March 6, 2018, the Commissioner found that the trial court had committed obvious error rendering further proceedings useless in denying the motions for summary judgment and reconsideration.

V. ARGUMENT

A. This Court's Review Is De Novo.

This Court reviews a trial court's ruling on summary judgment de novo. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230, 236 (2013). In so doing, this Court undertakes the same inquiry as the trial court. *Id.* "Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to

judgment as a matter of law.” *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015) (citing *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014)). “An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.” *Id.* (citing *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989)). Because the trial court erred in denying S&W’s and WSP’s motions for summary judgment and motions for reconsideration of that denial, this Court should reverse.²

B. STP’s Claims Are Time Barred under RCW 4.16.080.

All of STP’s tort claims against WSP are subject to the limitation period imposed by RCW 4.16.080. Under that statute, actions for negligence and negligent misrepresentation are time barred if not commenced within three years. *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 592, 5 P.3d 730 (2000). The limitation period starts to run when the plaintiff suffers some form of injury or damage, even if slight, as the plaintiff is on notice of its potential legal claim. *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988) (affirming summary judgment dismissal because plaintiff’s claim began to accrue at the time she injured herself on the staircase over three years prior, not

² In addition to the arguments and authorities herein presented, WSP adopts by reference the arguments and authorities stated by Co-appellant S&W in its Opening Brief pursuant to RAP 10.1(g)(2).

when plaintiff learned she might have a potential negligence claim against the staircase builder or architect).

“Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once.” *Steele v. Organon, Inc.*, 43 Wn. App. 230, 234, 716 P.2d 920, *review denied*, 106 Wn.2d 1008 (1986) (quoting *Lindquist v. Mullen*, 45 Wn.2d 675, 677, 277 P.2d 724 (1954)). “[N]either the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.” *Steele*, 43 Wn. App. at 235 (quoting *Davies v. Krasna*, 14 Cal.3d 502, 535 P.2d 1161, 121 Cal. Rptr. 705, 713, 79 A.L.R.3d 807 (1975)). Nor is the limitation period tolled by the fact that actual or substantial damages did not occur until a later date. *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975); *see also Steele*, 43 Wn. App. at 235. The limitation period begins as soon as the plaintiff is on notice of some appreciable harm. *Id.*

Here, STP was on notice of its potential claims against WSP as soon as it recognized that TW-2 may have damaged the TBM. “The elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to plaintiff proximately caused by the breach.” *Lewis v. Krussel*, 101 Wn. App. 178, 183, 2 P.3d 486 (2000) (quoting *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400

(1999)). The record clearly demonstrates that as early as December 12, 2013, STP was aware that it had suffered injury from the TW-2 strike and may have claims arising from alleged defects in the GBR and GEDR. CP at 866-67. At the time, it was also aware of WSP's and S&W's roles in creating those documents. VRP (Sep. 1, 2017) at 36. On January 15, 2014, STP asserted that it believed the TW-2 strike was the “primary cause” of damage to the TBM. Accordingly, STP possessed enough information regarding the elements of its negligence-based claims against WSP—duty, breach, causation, damages—to trigger the applicable three-year statute of limitation more than three years before it filed suit.

The evidence, even considered in the light most favorable to STP, conclusively shows that STP was aware of the following as of January 15, 2014, at the latest:

- The TBM hit TW-2 on the morning of December 4, 2014. CP at 296.
- Two days later on December 6, 2014, the TBM ceased forward progress. CP at 880.
- STP considered the TBM's encounter with the steel pipe “unexpected” and believed it was a “given” that there would be “some damage” to the TBM as a result of the incident. CP at 893-84.
- WSP and S&W authored the GBR (a Contract Document), and S&W authored the GEDR (a Contract Document). CP at 493, 689; VRP (Sep. 1, 2017) at 36.

- STP had possessed and utilized the GBR and GEDR since May 2010—while it developed and submitted its proposal for the Project work to WSDOT. CP at 17.
- WSDOT installed TW-2 in 2002 as part of its exploratory project-planning efforts. CP at 916.
- STP asserted that TW-2 constituted a potential DSC under STP’s DB Contract with WSDOT because the Contract Documents, which included the GBR and GEDR, did not adequately describe it. CP at 866-67, 896.
- STP asserted TW-2 was the cause of the TBM stoppage, blocking the TBM from tunneling forward and necessitating exploratory drilling and hyperbaric intervention in front of the cutter face. CP at 919-20.
- STP asserted that TW-2 was the “primary cause” of significant damage to the TBM’s cutter tools. CP at 1268-69.

The above information contains the elements of STP’s negligence claims against WSP. STP need not have known the exact scope of damage to the TBM nor the precise facts supporting its claims in order for the limitation period to begin running. *See Steele*, 43 Wn. App. at 235. Rather, STP need only have been aware of *some* harm and the *potential* viability of its claims. *Id.* The undisputed evidence noted above—much of which consists of STP’s own statements and conduct in the days following the TW-2 strike—plainly demonstrates that no later than January 15, 2014—and likely as early as December 12, 2013—STP possessed sufficient knowledge to pursue its claims against WSP and S&W. From that date at the very latest, the statute of limitation afforded

STP three years to investigate its claims and file timely suit. STP failed to do so. As a result, its claims against WSP and S&W are time-barred in their entirety.

C. Application of the Discovery Rule Does Not Render STP's Claims Timely.

The discovery rule affords STP no relief from the applicable time bar in this case. That rule applies to toll the beginning of the limitation period until “the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action.” *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 575–76, 146 P.3d 423 (2006) (citing *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998)). It does not toll the limitation period after the plaintiff has discovered the elements of its claim but has not yet fully investigated the claim or acquired all necessary evidence. Because STP knew all it needed to know to be on notice of its claims more than three years before it actually brought them, the discovery rule does not save STP’s claims from being time barred. To hold otherwise would expand the ambit of the discovery rule so far beyond its proper scope that it would swallow the statute of limitation and work a substantial injustice against WSP.

1. The discovery rule tolls the running of a limitation period only where the plaintiff could not reasonably discover the basis for its claims.

Under certain limited circumstances, when the “injured parties do not, or cannot, know they have been injured,” the courts may apply the discovery rule to postpone the statute of limitations period until such time that the plaintiff has knowledge that it might have a claim. *See In Re Estates of Hibbard*, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992). The rule recognizes that “in some circumstances where the plaintiff is unaware of harm sustained, a literal application of the discovery rule could result in grave injustice.” *Vertecs*, 158 Wn.2d at 575 (internal citation omitted); *Beard v. King County*, 76 Wn. App. 863, 868, 889 P.2d 501 (1995) (“This rule prevents the unconscionable result of barring an aggrieved party’s right to recovery before a right to judicial relief even arises.” (Internal citation and quotations omitted)).

The discovery rule is a narrow exception that will only toll the limitations period if certain requirements are met. Most importantly, *the discovery rule cannot be invoked to toll the limitation period if the plaintiff has actual or inquiry notice of the basis for the claim. See Hibbard*, 118 Wn.2d at 749-50; *Vertecs*, 158 Wn.2d at 576. “The 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 v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005); *Giraud v. Quincy Farm & Chemical*, 102 Wn. App. 443, 449-50, 6 P.2d 104 (2000).

Tolling under the discovery rule, if applicable, ends when the claimant has sufficient notice to reasonably suspect it may have a claim. When a party is placed on inquiry notice by some appreciable harm caused by another’s wrongful conduct, that party is “deemed to have notice of all acts which reasonable inquiry would disclose.” *Clare*, 129 Wn. App. at 603 (quoting *Hawkes v. Hoffman*, 56 Wn. 120, 126, 105 P. 156 (1909)). If, at that time, the party “reasonably suspects that a specific wrongful act has occurred” the party “is on notice that legal action must be taken.” *Beard*, 76 Wn. App. at 868. At that time, “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.” *Id.* “A smoking gun is not necessary to commence the limitation period.” *Id.*

The discovery rule does not materially affect the issues here because STP was almost immediately aware, and had least inquiry notice, of the essential facts supporting its claims against WSP. As early as December 6, 2013, STP knew (1) that the TBM had encountered the steel well casing, and (2) that it was “a given” there would be some damage to

the TBM as a result. CP at 893-94. Moreover, STP was aware of its harm and the basic facts underlying its claims on December 12, 2013 when it wrote to WSDOT alleging a DSC under the Design-Build Contract based on the damage caused by TW-2 and the alleged absence of adequate information about TW-2 in the Contract Documents authored by S&W and WSP. CP at 866-67. STP again confirmed its belief that TW-2 damaged the TBM on January 15, 2014, when it wrote to WSDOT that TW-2 was the “primary cause of the damage to the cutting tools.” CP at 1268-69. STP was able to and did in fact immediately discover the basic facts and the underlying injury supporting its claims against S&W and WSP. The discovery rule therefore cannot rescue STP’s stale claims.

The facts of this case are squarely on point with those presented in *Beard v. King County*, 76 Wn. App. 863. In that case, the plaintiff police officers filed an administrative claim (a prerequisite to filing a civil action against the county) alleging that their superiors wrongfully disclosed confidential information to a third party. *Id.* at 865. At that time, the former officers had no “direct evidence” to support their allegations. *Id.* They obtained proof several months later, but did not file a civil action against their superiors until more than three years after filing the administrative claim. *Id.* at 866. In the civil action, the officers recited allegations made in the administrative claim as well as more specific

allegations based on the later-obtained information. *Id.* On these facts, the Court of Appeals held that the officers' claims were time barred because the administrative claim "clearly indicate[d] appellants' understanding of [defendant's] wrongful conduct" and therefore that "the discovery rule cannot be invoked to excuse appellant's failure to take necessary legal actions within the ensuing time limitations periods." *Id.* at 868-69.

Much like the plaintiffs in *Beard*, STP asserted a potential claim alleging the same elements as its untimely Amended Complaint, filed more than three years later: on December 12, 2013, STP advised WSDOT of a DSC claim based on the allegations that TW-2 was undisclosed in the Contract Documents and caused damage to the TBM and delayed the Project. CP at 866-67. Because these allegations are the same as those underlying STP's Amended Complaint against WSP, those claims accrued no later than the date of the letter, and certainly no later than January 15, 2014, when STP definitively asserted its belief "that the steel pipe [was] the primary cause of the damage to the cutting tools." CP at 1268-69.

The discovery rule cannot render STP's January 27, 2017 suit against WSP and S&W timely because STP was aware of the key facts underlying its claims by January 15, 2014, at the latest. CP at 1268-69. On the date, STP affirmatively alleged a causal connection between TW-2

and damage to the TBM. CP at 1268-69. STP cannot point to any fact or facts that it was unable to discover before that date that would have tolled the limitation period. Indeed, the essential facts supporting STP's December 12, 2013 reservation of its DSC claim are the same as those that now support its untimely claims against WSP.

2. *The discovery rule does not toll the limitation period to allow for a full investigation into the facts.*

In an attempt to justify an impermissibly lengthy tolling of the limitation period under the discovery rule, STP argued to the trial court that it needed to first undertake significant investigation into the cause of the TBM damages and resulting stoppage in order for the limitation period to commence. But the discovery rule does not create an unlimited grace period for plaintiffs to identify their damages and formulate their claims with exactitude. *See Zaleck v. Everett Clinic*, 60 Wn. App. 107, 113, 802 P.2d 826 (1991) (emphasis added) (internal citation omitted) (finding that “the plaintiff need only have had, or should have had, information that the provider was possibly negligent.”). Such an interpretation of the discovery rule would erode the protection of the statute of limitations: “If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time-barred.” *Beard*, 76 Wn. App. at 868.

Accrual begins and tolling under the discovery rule ends as soon as the injured party has sufficient knowledge or notice of the underlying facts to support the essential elements of the cause of action. *See Gevaart*, 111 Wn.2d at 501. A plaintiff is not afforded unlimited leeway to investigate and determine the viability of its claim. Rather, “the 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.” *Beard*, 76 Wn. App. at 868. Here, as demonstrated above, STP knew the facts supporting the essential elements of its claims against WSP by at least January 15, 2014. Thus, the discovery rule requires no different outcome than results from the application of the three-year statute of limitation—STP’s claims against WSP are time-barred.

Any argument that the discovery rule affords plaintiffs time to investigate their tort claims where, as here, they allege the facts underlying those claims more than three years before bringing suit is defeated by *Beard*. In that case, Division Three of this Court squarely rejected the notion that the discovery rule affords plaintiffs additional time to investigate their claims *after* they are on inquiry notice of those claims:

“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). STP’s contention that, although it knew enough to state the basis for its DSC claim to WSDOT on December 12, 2013, it nonetheless needed to conduct further investigation to support its negligence-based claims against WSP is without merit, as shown by *Beard*.

Washington courts have held that plaintiffs are not entitled to a full investigation into the precise cause of their injury before the statute of limitations can commence. In *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 980 P.2d 809 (1999), the court considered whether the limitations period for a plaintiff’s claim would be tolled when the plaintiff had not discovered the causal connection between his psychological injury and defendant’s abusive behavior until many years after the abuse occurred. *Id.* at 827. The court held that a claim of this nature accrues when a plaintiff is aware of both wrongdoing and injury and should suspect a causal relationship between the two based on the circumstances. *Id.* at 835. The discovery rule does not toll the applicable limitation period until a plaintiff gains better proof of a causal connection. *See id.*

Similarly here, the discovery rule did not afford STP the opportunity to further investigate the specific cause of its harm before the

limitation period for tort claims arising from that harm commenced. In its communications with WSDOT, STP *affirmatively alleged* that TW-2 damaged and delayed the TBM and that the Contract Documents were defective for failure to adequately describe TW-2 on. CP at 866-67; *see also* CP at 919-20. By its own admission, STP was aware throughout the Project that S&W and WSP authored the Contract Documents. VRP (Sep. 1, 2017) at 36; CP at 988. There was nothing more for STP to discover for its claims against WSP to accrue.

STP's argument for the application of the discovery rule in this case is further belied by the evidence showing that prior to January 27, 2014 it was investigating the viability of claims it had already discovered. *See* CP at 866-67, 1073. STP began investigating whether TW-2 harmed the TBM and led to the Project stoppage immediately after the pipe strike precisely because it believed on the basis of facts it had already uncovered that TW-2 was the "primary cause" of its damage. CP at 1269. STP now seeks a formulation of the discovery rule that affords it additional time to investigate and develop its claims beyond that provided by the legislatively crafted three-year period. This is simply not the purpose of the discovery rule, which merely tolls accrual of a claim until the plaintiff can fairly know about it. *See Beard*, 76 Wn. App. at 868. It is the three-year limitation period chosen by the legislature, not the discovery rule,

which determined the amount of time STP had to fully investigate and develop its claims. *Id.*

In December 2013, STP was aware of both the content of the GBR and GEDR, CP at 867, and WSP's and S&W's role in producing those documents, VRP (Sep. 1, 2017) at 36. STP knew about its potential claims flowing from the TBM's encounter with TW-2 by December 12, 2013, and stated that it believed TW-2 to be the primary cause of its harm on January 15, 2014. Under RCW 4.16.080, STP was required to bring its claims within three years. It did not do so and may not now contend that the limitation period established by that statute was tolled until it could complete an in-depth investigation to its own satisfaction.

3. *Case law applying the discovery rule in cases involving latent injury is inapposite.*

Washington courts have applied the discovery rule to toll the running of applicable limitation periods in cases involving latent injury of which the plaintiff was not aware and could not reasonably have been expected to discover. This is because “[i]n circumstances where some harm is sustained, but the plaintiff is unaware of it, a literal application of the statute of limitations may result in grave injustice.” *Gazija*, 86 Wn.2d at 220. Here however, STP's awareness of alleged damage to the TBM was immediate. STP's claims are not based on any latent defect of which

it was unaware by mid-January 2014. Thus, case law applying the discovery rule in cases involving latent injury or defects is materially distinguishable.

In *Vertecs*, our Supreme Court found that “application of the discovery rule in construction cases involving latent defects that the plaintiff would be unable to detect at the time of breach is a logical and desirable expansion of the discovery rule.” 158 Wn.2d at 578-79. There, the defendant was one of several subcontractors that performed finishing work around windows installed in the plaintiff’s building, which began to leak after construction concluded. *Id.* at 571. The defendant inspected the leaky windows and informed plaintiff that the defects did not fall within its scope of work. *Id.* Thus, it was not until some time later that the plaintiff was actually able to discover the defendant’s duty with respect to the leaky windows. *Id.* The court recognized that under those circumstances the basic fairness principles underlying the discovery rule weighed in favor of tolling the limitations period to allow the plaintiff to pursue its claim. *Id.* at 580.

Here, STP cannot point to any genuine latent injury or defect that would justify tolling the statute of limitations under *Vertecs* or any other similar case. Unlike the plaintiff in *Vertecs*, STP knew that the TBM had been damaged no more than two days after the alleged triggering event—

the TBM's encounter with TW-2. CP at 880. Moreover, STP was aware at that time that S&W and WSP authored the Contract Documents which were allegedly defective for their failure to adequately describe TW-2. VRP (Sep. 1, 2017) at 36. Thus, there is simply no latent defect, either in the TBM itself³ or in the supposedly defective Contract Documents which would render *Vertecs* or other such case law analogous. STP almost immediately possessed sufficient knowledge to allege that (1) the TBM was been damaged by TW-2, and (2) WSP was potentially responsible for the non-disclosure of relevant information regarding TW-2. There is simply no latent injury in this case.

D. STP's Claims for Implied Indemnity Are Relabeled Negligence Claims Time Barred under RCW 4.16.080.

In addition to its overt claims for negligence and negligent misrepresentation, STP has brought disguised negligence claims in the form of claims for implied indemnity. Examination of the elements of these "indemnity" claims reveals that they are duplicative of STP's claims for negligence and negligent misrepresentation. Because STP actually seeks compensation for its own costs, rather than for liabilities to third

³ STP's claims do not allege that WSP or S&W is responsible for any defect in the TBM itself, latent or otherwise. Rather, STP's claims are grounded in the allegation that damage to the TBM and resulting delays were caused by an external factor—striking the TW-2 well pipe. STP's formal acknowledgement to WSDOT of that damage and reservation of claims that it was caused by TW-2 followed only nine days after the pipe strike occurred. CP at 866-67.

parties that have been settled or adjudicated, its claims sound in tort rather than indemnity and are subject to the same statutory time bar as STP's negligence and negligent misrepresentation claims.

1. STP's "indemnity" claims are simply relabeled negligence claims.

STP bases its claims for implied indemnity primarily on *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 946 P.2d 760 (1997), in which our Supreme Court held that contractual indemnity implied-in-fact is an equitable cause of action separate from breach of contract or breach of warranty. STP argued below that because the Court in *Barbee* recognized indemnity as a separate equitable cause of action, STP's indemnity claims are not duplicative of its negligence and negligent misrepresentation claims. But this argument puts the cart before the horse. STP's "implied indemnity" claims in fact are not implied indemnity claims at all. Examination of the elements of those claims as pleaded, in particular the damages sought, reveals that the claims are not materially distinct from the negligence and negligent misrepresentation claims.

a. STP's "indemnity" claims are duplicative of its negligence and negligent misrepresentation claims.

"A party's characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls." *Pepper v. J.J.*

Welcome Const. Co., 73 Wn. App. 523, 546, 871 P.2d 601 (1994),
abrogated on other grounds by Phillips v. King Cty., 87 Wn. App. 468,
943 P.2d 306 (1997). “A single claim for relief, on one set of facts, is not
converted into multiple claims, by the assertion of various legal theories.”
Hurley v. Port Blakely Tree Farms L.P., 182 Wn. App. 753, 769-70, 332
P.3d 469 (2014) (quoting *Pepper*, 73 Wn. App. at 546). Thus, a party may
plead alternative theories of recovery, *see* CR 8(e)(2), but this does not
make those alterative theories distinct claims. *Doerflinger v. New York
Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977). Only if alternative
theories are supported by different evidence are they separate claims. *See
Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743,
757, 162 P.3d 1153 (2007).

As noted above, the elements a negligence plaintiff must prove are
(1) the existence a legal duty owed by the defendant to the plaintiff, (2) the
defendant’s breach of that duty, and (3) injury to the plaintiff (4)
proximately caused by the breach. *Lewis*, 101 Wn. App. at 183. A claim
is duplicative of a negligence claim if the elements of the claim mirror
those of negligence and the claim is “grounded in the same facts and
allegations as the negligence claim.” *Hurley*, 182 Wn. App. at 771;
accord Pruitt v. Douglas Cty., 116 Wn. App. 547, 554, 66 P.3d 1111
(2003); *Pepper*, 73 Wn. App. at 547; *see also, e.g., Francom v. Costco*

Wholesale Corp., 98 Wn. App. 845, 865, 991 P.2d 1182 (2000). Where a claim requires proof of the same elements, such that the plaintiff's alleged injury "is the result of the defendant's alleged negligent conduct, rules of negligence are applied." *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 527, 799 P.2d 250 (1990); accord *Lewis*, 101 Wn. App. 178. Such a claim is nothing more than a "negligence claim presented in the garb" of another claim, and should not be treated separately from a claim for negligence. *Hostetler v. Ward*, 41 Wn. App. 343, 360, 704 P.2d 1193 (1985).

STP's "implied indemnity" claims are nothing more than negligence claims presented in the garb of indemnity. STP alleges that WSP had a "special relationship" with STP because it owed a duty of reasonable care to STP and the public, and an undefined "special duty" toward STP and other contractors on the Project. CP at 383, ¶ 56; 387, ¶ 84. STP then alleges that by breaching the duty of reasonable care or undefined special duty, WSP and S&W took on implied obligations to indemnify STP. CP at 383-84, ¶¶ 57-58; 387, 85-86. On this basis, STP asserts that it "is entitled to recover all damages, costs (both direct and indirect), expenses liabilities and claims it has or will incur as a result of [WSP's and/or S&W's] breach of its duties owed to STP." CP at 384, ¶ 61; 388, ¶ 89.

In other words, STP's indemnity claims as pleaded allege that WSP owed a duty to STP, breached that duty, and so should be liable for any injury to STP proximately caused by the breach of duty. STP dresses these claims in the language of special relationships and implied indemnity, but the actual elements are indistinct from those of a negligence claim.

b. STP does not seek indemnity for damages it has been compelled to pay on third-party claims.

The indistinct character of STP's indemnification claims is further illustrated by the nature of its alleged damages. STP alleges two categories of damages in its Amended Complaint: "Incurred Third Party Costs" and "Third Party Claims." The former consists of STP's own damages allegedly resulting from breaches of tort duties, rather than damages STP has been compelled to pay to resolve third party claims. The latter consists of speculative damages for claims currently pending in this litigation. As pleaded by STP, both categories of damages are the "result of [WSP]'s breach of its duties owed to STP." CP at 388, ¶ 89.

The first category of damages, which STP defines as "Incurred Third Party Costs," are

costs . . . to various third party Project participants for the delay, disruption and related costs associated with the investigation of, access to and/or repair of damage to the TBM (or delays and disruptions), including but not limited

to Ballard Diving & Salvage, Foss Maritime, Soldata and Malcolm Drilling

CP at 379-80, ¶ 32. STP alleges it has already paid “in excess of \$50 million” in such costs. *Id.* However, STP does not allege that any of these costs were paid in settlement of claims brought by third parties against STP, or that any such claims have been adjudicated.

This first category of damages consists solely of STP’s own costs in the form of voluntary payments made to its subcontractors, as opposed to compelled payments resolving third party claims. These costs cannot support a claim for indemnity because “[i]ndemnity requires full reimbursement and *transfers liability* from the one who has been *compelled to pay damages* to another who should bear the entire loss.” *Stevens v. Sec. Pac. Mortgage Corp.*, 53 Wn. App. 507, 517, 768 P.2d 1007 (1989) (emphasis added). STP’s creatively defined “Incurred Third Party Costs” are costs incurred by STP for services provided by third parties, presumably pursuant to contracts with those third parties. STP has not alleged that any of these third parties have brought claims against STP for which STP has been compelled to pay damages. Therefore, these damages are not indemnity damages at all, but are STP’s own alleged costs.

STP defines its second category of damages as “Third Party Claims.” These are claims asserted in this litigation by “WSDOT, Hitachi Zosen U.S.A and multiple STP subcontractors . . . against STP for damages . . . allegedly incurred as a result of the damage to the TBM and delay.” CP at 379, ¶ 31. STP alleges that these claims exceed \$100 million. *Id.* STP does not allege that any of these claims have been settled, adjudicated, or paid. Rather, it seeks to include all potential liabilities from those claims among the damages it asserts result from WSP’s alleged breach of a duty of care.

Like the “Third Party Incurred Costs,” this second category of damages is among those damages STP alleges have resulted from WSP’s alleged negligence. Because “the running of the statute is not postponed until the specific damages for which the plaintiff seeks recovery actually occur,” *Green*, 136 Wn.2d at 97, it is immaterial to a time bar analysis that they remain speculative. A plaintiff does not gain “a new action for damages for each new condition that bec[omes] manifest, ” as this would “lead to the highly impractical consequence of multiple statutes of limitations applying to the same allegedly wrongful conduct.” *Id.*

Further, because no payment for any pending “Third Party Claims” has yet been compelled, they are not the proper subject of an indemnity claim. *See Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449

(1998); *Barbee*, 133 Wn.2d at 517. Notably, STP did not implead WSP or S&W under CR 14 and cross-claim for indemnity as to any particular claims brought by the other parties to this litigation, as would be expected if it actually believed WSP or S&W had indemnified it as to any such claims. Instead, STP seeks these damages behind the mask of an implied indemnity action, which under *Barbee* would not even accrue until “the party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party.” 133 Wn.2d at 517. Consequently, it is clear that STP does not actually seek indemnity but instead simply seeks to recast a portion of its alleged negligence damages.⁴

This Court should see through STP’s misleading attempt to dress time barred negligence claims in the garb of indemnity without actually

⁴ Even if STP’s negligence-based indemnity claims were distinct from its negligence and negligent misrepresentation claims, they would be barred under the Tort Reform Act of 1981, which expressly abolished common law indemnity between joint tortfeasors. RCW 4.22.040. Our legislature replaced indemnity arising from joint wrongdoing with a contribution-based recovery regime:

In abolishing indemnity rights between joint tortfeasors, the Legislature intended such rights would be replaced with contribution rights. As the court observed in *Johnson v. Continental West, Inc.*, [99 Wn.2d 555, 560, 663 P.2d 482 (1983),] “the intended purpose was to simply substitute the right of contribution for the right of common law indemnity.”

Sabey, 101 Wn. App. at 589. Thus, indemnity claims based on comparative negligence are not proper under Washington law. Both WSP and S&W have asserted affirmative defenses claiming that STP’s injuries were caused by STP’s own negligence. CP at 451, ¶ 7; 467, ¶ 5. Because STP’s own negligence may have caused its damages or opened it to third party claims, the comparative negligence of another party may not give rise to indemnification for those damages or claims. This cause of action is no longer available in Washington.

seeking indemnity for compelled payments made to resolve third party claims. A comparison of the elements of STP's "indemnity" claims reveals that they are duplicative of the negligence claims: STP alleges that WSP and S&W (1) had a duty to STP, (2) breached that duty, and thereby (3) proximately caused STP to incur (4) injury in the form of (a) costs paid to third parties to investigate and repair the TBM and (b) speculative future damages arising from the TBM stoppage. STP's Amended Complaint makes this plain, as STP, under the umbrella of indemnity, expressly seeks "all damages, costs (both direct and indirect), expenses liabilities and claims it has or will incur as a result of PB's breach of its duties owed to STP." CP at 388, ¶ 89. As this language shows, STP's "implied indemnity" claims do not seek indemnity, but instead seek tort damages stemming from the same alleged wrongful conduct as its overt negligence claims.

2. STP's "indemnity" claims are subject to the statutory limitation period for negligence actions.

STP may not sidestep the statute of limitation on negligence actions by repackaging negligence claims as indemnity claims. Because STP's "indemnity" claims are duplicative of its negligence claims, they are subject to the same statute of limitation and accrued at the same time. But even if this Court determines that STP's indemnity claim for

“Incurred Third Party Costs” seeks only a subset of the damages STP seeks for its overt negligence claims, the evidence clearly shows that STP knew or anticipated those damages more than three years before bringing its Amended Complaint.

A claim that is factually duplicative of a negligence claim must be subject to the statute of limitation for negligence claims. *See Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986); *Boyles v. City of Kennewick*, 62 Wn. App. 174, 177, 813 P.2d 178 (1991). To hold otherwise would allow plaintiffs to circumvent RCW 4.16.080 by relabeling any negligence claim a tort-based implied indemnity claim, which would improperly elevate form over substance and thereby frustrate legislative intent. *See Warren v. Washington Tr. Bank*, 19 Wn. App. 348, 363, 575 P.2d 1077 (1978) (holding that renaming a claim as a defense to avoid a time bar would “defeat the statute”); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985) (holding that allowing a plaintiff to relabel contract claims as tort claims would “elevate form over substance and allow parties to evade the requirements of § 301 [of the Labor Management Relations Act]”); *cf. State v. N.S.*, 98 Wn. App. 910, 913, 991 P.2d 133 (2000) (“[T]he State should not be able to circumvent the statute of limitations by charging a greater crime and obtaining a conviction on a lesser included offense that is time

barred.”). As an analogous example, a party may not avoid expiration of a statutory limitation period by bringing an action for declaratory judgment rather than a time barred claim for direct relief. *Reid v. Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349 (2004); *City of Fed. Way v. King Cty.*, 62 Wn. App. 530, 536-37, 815 P.2d 790 (1991). Similarly, STP may not rely on implied indemnity claims that are duplicative of its negligence and negligent misrepresentation claims to circumvent the statutory time bar on negligence actions under RCW 4.16.080.

As discussed above, negligence actions accrue when the plaintiff discovers or should have discovered damages allegedly resulting from a breach of the defendant’s duty of care. *Gevaart*, 111 Wn.2d at 501. Accrual occurs as soon as the plaintiff has knowledge of some appreciable damage, even if the full extent of the damage is unknown. *Green*, 136 Wn.2d at 97; *Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000). Because the “Incurred Third Party Costs” and any speculative liability for “Third Party Claims” are among STP’s damages allegedly caused by the TBM breakdown and resulting delays to the Project, it is immaterial for purposes of determining the claim accrual date whether STP knew of *all* such damages. STP knew that it had incurred damages soon after the TBM stoppage in early December 2013, even if the full extent of those damages was, or remains, unknown.

Moreover, the undisputed evidence before the trial court showed that STP knowingly began to incur third party costs allegedly resulting from the TBM's impact with TW-2 in December 2013 and January 2014, including investigation and repair costs associated with third parties it specifically names in its Amended Complaint. By STP's own admission, Ballard Diving performed investigation services for 10 days beginning on January 17, 2014. CP at 974; *see also* CP at 903-04, 1207, 1078. Evidence also shows that Ballard Diving and other third parties were performing related investigation services in the immediate wake of the initial TBM shutdown in early December 2013. CP at 893, 1078. Malcolm Drilling also was providing investigation services in late December 2013. CP at 1207; *see also* CP at 891-92 (noting that Malcolm Drilling was "mobilized and waiting on site for directions" as of December 11, 2013). In order to support its DSC claim against WSDOT, STP tracked these third party costs beginning in early December 2013. CP at 896.

Accordingly, even if the court believes STP's third party payments are somehow distinct from the rest of its alleged negligence damages, this evidence shows that STP was aware it had incurred or would incur third party costs allegedly resulting from WSP's purported breaches of duty more than three years prior to bringing its "indemnity" claim against WSP.

And as discussed above, STP discovered all other facts material to its allegations of duty, breach, and causation—as well as the fact it would sustain other damages additional to its third party costs—prior to January 27, 2014. Consequently, STP’s indemnity claims against WSP accrued more than three years prior to the date of its Amended Complaint and are time barred under RCW 4.16.080.

Because STP’s indemnity claims are nothing more than relabeled negligence claims and STP incurred or knew it would incur the third party costs on which it bases its indemnity claims, those claims are time barred under RCW 4.16.080. The trial court erred in denying WSP’s and S&W’s motions to summarily dismiss those claims, and this Court should reverse and dismiss.

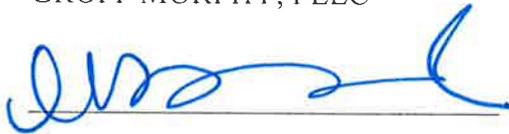
VI. CONCLUSION

All of STP’s tort claims against WSP—including its “indemnity” claim, which is merely a relabeled negligence claim—are time barred by the three-year statute of limitation prescribed by RCW 4.16.080. STP had sufficient notice of its potential claims against WSP as soon as it acknowledged that TW-2 may have damaged the TBM and alleged that the Contract Documents were defective for failure to adequately disclose information about TW-2. The undisputed evidence confirms that as early

as December 12, 2013 and certainly no later than January 15, 2014, STP had enough information regarding the elements of its negligence-based claims against WSP to trigger the statute of limitation. On these facts, the discovery rule does not revive STP's stale claims. STP had sufficient notice of the essential elements of its claims more than three years before it filed its Amended Complaint. Therefore, the trial court's denial of S&W's and WSP's motions for summary judgment and reconsideration should be reversed and STP's claims against WSP should be dismissed.

Dated this 3rd day of May, 2018.

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CERTIFICATE OF SERVICE

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

DATED this May 3, 2018, at Seattle, Washington.

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