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

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

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

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

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

Fourth-Party Plaintiff,

v.

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

Fourth-Party Defendants.

HITACHI ZOSEN U.S.A. LTD.,

Plaintiff,

v.

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

Defendants.

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

v.

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

Defendants/Petitioners.

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I. INTRODUCTION

STP's claims against Petitioners Shannon & Wilson and WSP are time barred in their entirety. STP argues otherwise based on a strained mischaracterization of the discovery rule that is neither established nor supported by Washington law. STP argues that, in addition to identifying all the essential elements of its claim, a plaintiff must also have some undefined degree of certainty that an identified, potential "cause" actually resulted in the plaintiff's damages before the claim can accrue. In conflict with existing case law, STP's argument would create an exception to the statute of limitation so expansive that virtually every stale claim would survive a summary judgment challenge. STP cannot avoid the reality that undisputed facts demonstrate that STP itself identified and affirmatively alleged the elements of its negligence-based claims against Petitioners more than three years before it filed them. STP's attempt to recast its negligence torts as tort-based implied indemnification claims cannot and should not allow it to evade operation of the statute of limitation. STP's claims for implied indemnity are nothing more than a duplicative restatement of its actual, time-barred negligence claims and, as such, are likewise time barred. The trial court committed obvious error in failing to dismiss STP's claims as untimely. This Court should therefore reverse and dismiss.

II. ARGUMENT

A. **STP Avoids the Threshold Issue: Whether STP is Entitled to *Any* Tolling under the Discovery Rule When it Knowingly Allowed the Statute of Limitation to Lapse.**

STP fails to acknowledge that, for purposes of calculating the statute of limitation period, a claim generally accrues when all the essential elements of the cause of action have occurred. *Gevaart v. Metco Constr. Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348 (1988). The discovery rule is an equitable, court-created exception that applies only where a literal application of the statute of limitation would result in a “grave injustice” because the facts constituting the claim were not and could not be discovered within the statutory period. *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.2d 423 (2006) (quoting *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 220, 543 P.2d 338 (1975)); *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2000).

STP has not, and cannot, meet this initial burden, and is therefore not entitled to any tolling under the discovery rule. STP filed an *identical* claim related to TW-2 against WSDOT over *five months* before the statute of limitation ran and *six months* before it filed against Petitioners. STP did not discover any information related to TW-2 in those intervening six months that it did not already possess within the statutory period.

To the contrary, STP admits that it knew throughout the Project (and before December 2013) that Shannon & Wilson and WSP prepared the Contract Documents that allegedly failed to disclose TW-2 (the very same claim STP timely alleged against WSDOT). *See Clerk’s Papers (CP)*

at 988. Yet, STP still knowingly declined to file claims against the Petitioners. The discovery rule has *never* applied, as STP proposes here, to save a commercially and legally sophisticated plaintiff who irrefutably asserted all the salient facts relevant to its claim within the statutory period, but then inexplicably allowed the statutory period to lapse. As a matter of law, STP is not entitled to benefit from the discovery rule. *See Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997) (holding that the plaintiff must prove that its failure to timely file its claims is related to the discovery of new information, and “not caused by the plaintiff sleeping on [its] rights”).

B. Even if the Discovery Rule Applied, STP Filed its Claims Over Three Years after it First Discovered its Potential Claims.

Even if the discovery rule were to apply, STP’s claims against Petitioners still accrued in early December 2013, and certainly no later than mid-January 2014, when STP affirmatively stated all of the essential elements of its claim.

1. The evidence conclusively establishes that STP had notice of its potential claims against Petitioners in December 2013.

The discovery rule tolls the limitation period only until the party “knew or should have known all the essential elements of the cause of action.” *Gevaart*, 111 Wn.2d at 501. Again, the purpose of the discovery rule is to avoid the injustice caused by a strict application of the statute of limitation where the plaintiff does not know, and cannot reasonably

discover within the statutory period, that it has a potential cause of action. *Vertecs*, 158 Wn.2d at 575-76. Even in *Vertecs*, the case frequently touted in Respondent’s Brief, the court held that once the plaintiff has inquiry notice of a claim, the claim accrues, and “the plaintiff is charged with what a reasonable inquiry would have discovered.” *Id.* at 581 (quoting *Green v. A.P.C. (American Pharmaceuticals Co.)*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998)). The discovery rule plainly requires only that the plaintiff have “inquiry notice” of a potential claim for it to accrue.

Thus, despite several gross mischaracterizations of the record and evidence below,¹ STP still cannot argue away the fact that it had *actual knowledge*, let alone inquiry notice, of its potential claims related to TW-2 more than three years before it filed suit. Between early December 2013 and mid-January 2014, STP expressly articulated all the essential elements of its claims: (1) **duty** (STP concedes it was aware throughout the Project that Petitioners prepared the Contract Documents and were involved with the installation of TW-2, CP at 988; Br. of Resp’t at 4-5);² (2) **breach** (STP alleged in December 2013 that these documents were “defective” because

¹ For example, on three separate occasions, STP claims that its Stoppage Report stated that the cause “may be anything” to support its assertion that it did not know the well casing caused damage. Br. of Resp’t at 8, 18 n.1, 19 n.1. However, STP’s quoted language, “may be anything,” is pulled from a sentence that continues, “such as the mentioned steel well casing.” CP at 943. STP also tellingly relies heavily on emails and communications from *other* parties (most of whom still maintain that TW-2 did not cause significant damage), *see* Br. of Resp’t at 6-7, which are, of course, irrelevant to when *STP* had notice of its claims.

² *See also* CP at 874 (an internal STP email dated December 11, 2013, attaching a portion of the GEDR prepared by Appellants, in which STP indicates that information related to TW-2 is contained in the Geotechnical Environmental Data Report (“GEDR”) and explaining that TW-2 was installed at Shannon & Wilson’s direction).

they did not identify TW-2, CP at 867); (3) **cause** (STP knew in early December 2013 that Bertha mined through TW-2, CP at 861-64; Br. of Resp't at 5-6); and (4) **actual damage** (Bertha stopped forward advancement on December 6, 2013, and on January 15, 2014, STP wrote it had identified "serious damage" to Bertha's cutterteeth, *see* CP at 1269).

In fact, one of the most conclusive demonstrations of STP's actual knowledge is that STP opened a Proposed Change Order claim against WSDOT ("PCO #250") for the express purpose of tracking its damages related to TW-2. *See* CP at 896 (an internal STP email sent on December 10, 2013, opening PCO #250 so STP could track stoppage costs related to "Steel Casing in TBM"). PCO #250 relates explicitly to TW-2; it does not identify any other potential obstruction or cause for Bertha's stoppage. After STP opened this claim, it wrote WSDOT numerous times setting forth with precision the basis of its TW-2 claims, including the fact that the Contract Documents prepared by Petitioners were allegedly "defective" because they failed to disclose TW-2 in the tunnel alignment.³ On December 6, 2013, even STP's Construction Manager sent an internal email, indicating that he believed damage due to the pipe was a "given" at this point. *See* CP at 893. Moreover, on January 15, 2014, STP identified TW-2 as the "primary cause" of "serious damage" to the cutterteeth. *See*

³ *See* CP at 866-67 (an STP letter to WSDOT, dated December 12, 2013, indicating that the Contract Documents issued by WSDOT (and prepared by Appellants) are "defective" in failing to disclose the steel casing); and CP at 876-77 (another STP letter dated December 20, 2013, to WSDOT titled "PCO #250," describing in detail TW-2's installation and the specific "deficient" portions of the GEDR).

CP at 1269. These communications and internal records reflect STP's acute awareness of a potential claim related to TW-2.

Thus, STP's contention that it had no idea whether TW-2 caused damage more than three years before filing suit is remarkably disingenuous. STP knew enough in early December 2013 to set forth with explicit detail the factual basis of its claim. Even if STP had some uncertainty or reservations about whether TW-2 in-fact caused damage, it is undisputed that STP had sufficient notice of its potential claims to commence the running of the three-year statute of limitation.

2. STP fundamentally misapprehends *Vertecs*, which holds the discovery rule tolls the statute of limitation until the plaintiff discovers the latent defect.

With STP's knowledge of the essential elements of its claim undisputed, STP instead seeks to rewrite the discovery rule to argue that any disputed question of fact about "causation" prevents the claim from accruing, claiming that the discovery rule is inapplicable where: "(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." Br. of Resp't at 24. STP's argument is based on a fundamental misreading of *Vertecs*.

Were STP's reimagining of *Vertecs* true, no stale claim could be dismissed on summary judgment unless "cause" was an undisputed issue. Indeed, under STP's articulation of the rule, STP's claim against Petitioners *still* would not have accrued, since the parties continue to

disagree as to the actual cause of the TBM's damage and subsequent stoppage. Clearly, this cannot be the test, as the discovery rule exception would swallow the rule and eliminate the statute of limitation entirely as a threshold defense.

The holding of *Vertecs* is far more straightforward than posited by STP. In *Vertecs*, the court simply held that in cases involving latent defects, the discovery rule tolls the statute of limitation until the plaintiff discovers the existence of the latent defect (the "cause"). *Vertecs*, 158 Wn.2d at 571-72. There, the homeowners knew only that Vertecs was one of several contractors that worked on their home and that their windows were leaking, but the homeowners lacked any basis to know that Vertecs' stucco work was defective. *Vertecs*, 158 Wn.2d at 571-72. Although the homeowners notified Vertecs that they believed Vertecs' work might be defective, they had not yet identified what, if any, specific defect existed. *Id.* The discovery rule applied because the plaintiffs had not yet discovered the cause (*i.e.*, the defective stucco work), and a question of fact remained as to whether the defect *could* have been discovered within the statutory period. *See id.* at 580.

The *Vertecs* court analogized the latent defect in Vertecs' stucco work to a case where a surgeon leaves a surgical sponge inside a patient. The court explained that, under those circumstances, the patient may not know the cause (*i.e.*, the surgical sponge) exists, and therefore, he may lack knowledge that the surgeon breached his duty of care in the first place.

Vertecs, 158 Wn.2d at 579. In such cases, the discovery rule tolls the statutory period until the cause is, or should have been, discovered.

Here, however, it is undisputed that STP discovered the alleged “cause” of its claims—TW-2—in early December 2013, shortly after the TBM mined through it. Using the analogy embraced by the court in *Vertecs*, STP discovered its “surgical sponge” when TW-2 emerged from the ground and STP knew that the TBM had mined through it. STP also knew that the Petitioners were the “surgeons” who allegedly failed to disclose TW-2. But STP argues that discovering the surgical sponge itself is insufficient. In addition to experiencing discomfort and discovering a surgical sponge buried in his abdomen, the patient must also discover physical proof of a causal connection between the sponge and actual damage before his claim accrues. In this sense, STP conflates *Vertecs*’ requirement that the claimant must be aware that the cause exists with an additional requirement that the claimant also understand the causal connection between the identified “cause” and its damages. While such proof of the causal connection might be required to ultimately prove liability, the discovery rule has never required such proof for the limitation period to commence.

Vertecs would be arguably analogous for purposes of tolling the statute of limitation only if STP had not discovered that TW-2 existed within the statutory period. Under those hypothetical circumstances, STP could only allege (similar to the plaintiffs in *Vertecs*) that an obstruction *might* exist in the tunnel path causing the stoppage, and that the Contract

Documents should have, but failed to, identify any obstruction. Then, TW-2 might constitute a latent condition that might entitle STP to tolling under the discovery rule. But those facts do not exist here. STP undisputedly knew that the TBM mined through TW-2 by December 6, 2013. TW-2 was in no way a latent defect under *Vertecs*. Any claim related to TW-2 accrued when STP discovered TW-2.

Similar to *Vertecs*, each of the other cases cited by STP provide that the limitation period tolls until the plaintiff discovers the latent defect or the existence of latent damage. *See North Coast Air Servs., Ltd. V. Grumman Corp.*, 111 Wn.2d 315, 327, 759 P.2d 405 (1988) (noting that plaintiffs had “no [] reason to believe that there was any defect in the aircraft”); *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 513-14, 63 P.3d 153 (2002) (holding that homeowners’ concealed defect claim against their contractor accrued in 1998, when they discovered that the contractor failed to properly flash or seal their windows);⁴ *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) (holding that the action did not accrue until plaintiff discovered the existence of the dry rot); *Nichols v.*

⁴ Additionally, STP misplaces its reliance on *Norris* in arguing that STP must have knowledge of the “true cause” of its damages, implying that the plaintiff must not only identify the cause, but also have some proof regarding the causal connection with its damages. Br. of Resp’t at 17 and 25 (citing *Norris*, 115 Wn. App. at 517). In *Norris*, however, the defendant-contractors repeatedly informed the homeowners that the gutters were defective, despite knowing they had improperly installed the doors and windows. The *Norris* court explained that the statute of limitation tolled until the homeowners discovered that the doors and windows were defective. Thus, the homeowners’ concealed defect claim did not accrue until they discovered the existence of this “true cause.”

Peterson NW, Inc., 197 Wn. App. 491, 500-01, 389 P.3d 617 (2016) (noting that plaintiff knew defendants failed to properly tarp the roof in 2006, but they did not discover any water intrusion *and* did not discover the resulting mold until 2011).⁵ None of these cases support STP’s position that the discovery rule tolls the statute of limitation so that the plaintiff may acquire information and evidence to support a hypothesis regarding a “cause” that it has already expressly identified. Once the cause is discovered, the claim accrues and triggers the statute of limitation.

3. Additionally, STP’s arguments to expand *Vertecs* have been squarely rejected by *Beard* and *Germain*.

Not only would STP’s version of the discovery rule create an intolerable expansion of the law under *Vertecs*, these same arguments have already been rejected in cases that hold the statute of limitation is *not* tolled merely because the plaintiff lacks proof to support its claim. *See Beard v. King Cnty.*, 76 Wn. App. 863, 866, 889 P.2d 501 (1995); *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 835, 980 P.2d 809 (1999).

⁵ And in at least one case, STP simply distorts the facts entirely in order to support its argument that a claimant must discover some evidence or proof of its claim before it accrues. *See e.g.* Br. of Resp’t at 27 (arguing that in *Crisman*, the discovery rule tolled the statute of limitation until 1990, when a witness corroborated the plaintiff’s earlier knowledge that the defendant had stolen property.); *but see, Crisman v. Crisman*, 85 Wn. App. 15, 18, 931 P.2d 163 (1997) *as amended on reconsideration*, (Feb. 14, 1997) (noting that wherein the plaintiff discovered that defendant had stolen some items from her store in 1985, but the defendant *returned* those items after plaintiff wrote a demand letter; plaintiff later learned from a witness in 1990 that defendant had stolen *other* items from her store. Thus, her claim related to those items did not accrue until 1990).

STP is unable to meaningfully distinguish these cases. For example, STP fails to explain the significance of the fact that it expressed its claim for damages related to TW-2 in its PCO #250 letters, instead of through an administrative claim as in *Beard*. See Br. of Resp't at 29. Like the plaintiff in *Beard*, STP had sufficient evidence and information to identify each essential factual element of the cause of action with particularity. As noted by the court in *Beard*, the statute of limitation does not continue to toll so the plaintiff can confirm through evidence the allegations stated therein. See *Beard*, 76 Wn. App. at 867-68. Once the injured party specifically alleges the essential factual elements of its claim, the claim accrues and the statute of limitation attaches. *Id.* at 867.

Similarly, in *Germain* the court held that the claim accrued even though the plaintiffs did not discover a causal connection between their emotional injuries and the defendant's breach. 96 Wn. App. at 835. STP ignores this central holding, and instead argues that unlike the *Germain* plaintiffs, STP conducted a diligent investigation into the stoppage. Br. of Resp't at 31. But this argument neglects the critical second part of a plaintiff's required diligence: once STP had knowledge of the claim, it must timely file it; a plaintiff cannot sleep on its rights. STP, for reasons still unexplained, failed to file its claims against Petitioners despite having knowledge of all the essential elements of its claim, including that Petitioners had prepared the allegedly defective Contract Documents. Like the plaintiffs in *Germain*, STP cannot claim that the statute of limitation lapsed through no fault of its own.

4. STP similarly misrepresents the discovery rule’s requirement of knowledge of the “damages” element.

For purposes of the discovery rule, a claim accrues at the first indication of actual, appreciable damage. *Steele v. Organon, Inc.*, 43 Wn. App. 230, 235, 716 P.2d 920, *review denied*, 106 Wn.2d 1008 (1986). It is irrelevant if other, more significant damage occurs later. “[T]he statute of limitation begins to run when plaintiff is made aware of injury even if he does not know its full extent at that time.” *Id.* at 234 (holding that the patient’s medical malpractice claim accrued when the patient lost sensation in her hands and feet, even though she did not suffer her far more significant injuries, a heart attack and stroke, until several years later).

Here, it is undisputed that STP was aware of actual damage to the SR-99 Project and to the TBM itself more than three years before it filed its claims. First, the TBM stopped forward advancement on December 6, 2013. This alone constitutes appreciable damage. STP’s multimillion-dollar tunneling machine stopped operating. Its stoppage, for even a day on a construction project of this magnitude, constitutes actual, immediate damage. Moreover, STP specifically opened PCO #250 on December 10, 2013 to track and allocate its stoppage damages. *See* CP at 896. By mid-January, the TBM and the entire SR-99 Project had been delayed for over a month. *And* on January 15, 2014, STP identified TW-2 as the “primary cause” of “serious damage” to the TBM’s cutterteeth. CP at 1269.

In its Response, STP implies that it must also have some conclusive proof that TW-2 caused the *entire* two-year stoppage. *See* Br. of Resp’t at

20 (arguing that the investigation did not reveal any damage to the TBM that would prevent it from continuing to mine until it started the TBM in January); *id.* at 22 (“STP did not discover the fundamental damage that gave rise to this litigation until February 4, 2014”). But these arguments misconstrue the true requirements under the discovery rule. “[T]he running of the statute of limitation is not postponed until the specific damages for which the plaintiff seeks recovery actually occur.” *Green v. A.P.C. (American Pharmaceuticals Co.)*, 136 Wn.2d 87, 97, 960 P.2d 912 (1998). Consistent with the discovery rule’s requirement that plaintiff need only “inquiry notice” of a potential claim, the plaintiff need only be aware that *some* appreciable damage occurred.

Because it is undisputed that STP identified the essential elements of its claims against Petitioners related to TW-2 more than three years before it filed suit, Petitioners were entitled to summary judgment relief of these stale claims, as required under RCW 4.16.080.

C. The Trial Court Erred by Failing to Dismiss STP’s Duplicative Claims for “Implied Indemnity” as Time Barred.

This Court should similarly reject STP’s attempt to evade the limitation period imposed by RCW 4.16.080 by recasting its negligence claims as alternative claims for implied indemnity. As a threshold matter, this Court’s Commissioner and its motions panel have already held that the validity of STP’s implied indemnity claim is within the scope of this Court’s appellate review. Allowing STP to avoid operation of a statute of

limitation by dressing a claim for negligence with indemnity terminology would frustrate legislative intent and undermine public policy. This Court should reverse the trial court's refusal to dismiss all of STP's tort-based claims against Petitioners as time barred.

1. This Court has already accepted review of the timeliness of STP's implied indemnity claims.

This Court's Commissioner expressly "accept[ed] review of the issue raised by petitioners as to whether STP's indemnity claims are also fully or partially time barred." Ruling (Mar. 6, 2018) at 14-15. As the Commissioner noted, Petitioners expressly sought dismissal of all of STP's tort-based claims in the trial court, including both its overt tort claims and its implied indemnity claims, pursuant to RCW 4.16.080. *Id.* at 14. CP at 487, CP at 527. Petitioners argued in the trial court that STP's indemnity claims were legally "indistinct" from STP's negligence claim and therefore subject to the same statute of limitation. CP at 1286, CP at 1297. At the summary judgment hearing, STP specifically addressed the timeliness of its implied indemnity claims. Verbatim Report of the Proceedings (Sep. 1, 2017) at 39-41. In any event, this Court could review whether STP's claims assert facts upon which relief can be granted, even if Petitioners had not addressed the issue below. RAP 2.5(a)(2); *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 204, 258 P.3d 70 (2011).

STP also ignores that this Court declined to limit the scope of review when it denied STP's Motion to Modify the Commissioner's Ruling. Order Denying Mot. to Modify (Aug. 20, 2018); *see also* Mot. to

Modify at 2 (arguing that the Commissioner did not adequately address the viability of STP's implied indemnity claims in her analysis). Accordingly, the issue of whether STP's implied indemnity claims are duplicative of its negligence claims is properly before this Court and should be addressed now in order to "secure the fair and orderly review" of this case. RAP 7.3.

2. STP's "implied indemnity" claims are not separate and distinct from its negligence claims.

STP may not avoid dismissal simply because it restyled its negligence claims as separate causes of action for indemnity. The issue before this Court is not whether a party *may* plead implied indemnity separate from its claims of negligence, as STP argues, but whether STP has in this case pleaded viable, distinct implied indemnity claims that may survive application of RCW 4.16.080. The nature of a claim, not the claimant's characterization of it, controls. *See Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 546, 871 P.2d 601 (1994), *abrogated on other grounds by Phillips v. King Cnty.*, 87 Wn. App. 468, 943 P.2d 306 (1997); *see also Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 769-70, 332 P.3d 469 (2014).

STP ignores the nature and elements of an implied indemnity cause of action under established Washington law. A cursory review of the claims pleaded in STP's Amended Complaint dispels any notion that STP has pleaded separate and distinct indemnity claims. The claims are duplicative of STP's negligence claims and therefore time barred under RCW 4.19.080.

- a. *Implied indemnity applies only where the defendant should bear full liability for actualized damages on a third-party claim.*

Implied indemnity, or equitable indemnity, is a cause of action for secondary liability that may lie when a plaintiff incurs liability to a third party that should be borne in its entirety by a defendant who actually caused the injury to the third party. “To maintain an equitable indemnity claim, a plaintiff must establish (1) injury to a party and that party’s right to assert a cause of action against the defendant and (2) settlement of the injured party’s claim by the plaintiff, who itself was legally obligated to pay that claim.” *Donald B. Murphy Contractors, Inc. v. King Cnty.*, 112 Wn. App. 192, 198, 49 P.3d 912 (2002).

Implied indemnity is thus an equitable pass-through fault shifting action applicable only where an innocent plaintiff bears actualized liability for third-party claims for which the defendant is in fairness the liable party. For example, in *Central Washington Refrigeration v. Barbee*, 133 Wn.2d 509, 946 P.2d 760 (1997), our Supreme Court upheld an action for implied indemnity by a refrigeration system installer against a refrigerator coil manufacturer when the installer settled claims against a customer arising from installation of defective coils made by the manufacturer. In that instance, the court held that the implied warranties under the Uniform Commercial Code created a sufficient basis to support an implied indemnity claim that shifted the entire liability from the faultless refrigerator installer to the manufacturer who designed the defective coils. *Id.* at 514. Similarly, in *Fortune View Condominium Ass’n v. Fortune Star*

Dev. Co., 151 Wn.2d 534, 90 P.3d 1062 (2004), the court permitted an implied indemnity claim by a general contractor against a siding materials manufacturer for liability arising from defects in the manufacturer's materials, which the general contractor had installed.

In *Sabey*, Division One of this Court permitted a claim for implied indemnity against an actuarial firm under this same fault shifting scheme. *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 593, 5 P.3d 730 (2000). In that case, the plaintiff and his company were acquiring a target company, and the defendant was assisting the target company to phase out its pension plans. During this process, the defendant misrepresented the adequacy of the funding in those pension plans to the plaintiff, causing the plaintiff to incur liability to a third party for underfunding the plans. The court held it was appropriate to transfer "the entire loss" to the defendant because the defendant was directly responsible for the underlying liability. *Id.* at 588. In *Sabey*, as in *Barbee* and *Fortune View*, a third party brought a claim against the plaintiff for a harm actually caused by the defendant.

STP relies heavily on *Barbee* and *Sabey* for the proposition that implied indemnity is a viable cause of action, but it ignores the courts' articulation of that cause of action. "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."⁶ *Sabey*, 101 Wn.

⁶ To the extent STP seeks to use implied indemnity as a vehicle to recover a proportionate share of liability attributable in tort to Petitioners on any third-party claim, such an action has been superseded by Washington's 1981 and 1986 Tort Reform Acts. *See* RCW

App. at 588 (quoting *Barbee*, 133 Wn.2d at 513). Implied indemnity is not a cause of action for compensatory damages arising from the breach of a tort duty, regardless of whether those damages include payments to third parties. Instead, it is an equitable avenue of secondary liability for damages sustained by a third party. *Barbee*, 133 Wn.2d at 516-17.

In contrast, STP's allegations supporting its claims for "implied indemnity" simply assert that because Petitioners allegedly breached tort duties to STP they must assume all possible costs, liabilities, or other damages allegedly or potentially arising from those alleged breaches. STP does not allege that any specific third-party claims against it for which Petitioners are in fact the liable party.⁷ Thus, STP's claims are not claims for implied indemnity, but claims for negligence.

- b. *STP does not seek pass-through fault shifting for any specific third-party claims; it seeks compensatory damages on the basis of Petitioners' alleged breach of tort duties.*

STP's Amended Complaint does not allege that STP has paid or been adjudicated to owe any damages to third parties on any particular claims. Instead, STP merely alleges that it has incurred costs paid or payable to unspecified third parties, CP at 379-80, ¶ 32, and that other third parties have brought unspecified claims against STP as part of the instant

4.22.040 (generally abolishing indemnity among joint tortfeasors with a right of contribution); RCW 4.22.070 (establishing a comparative fault regime).

⁷ The only "Third Party Claims" STP specifically identifies in its Amended Complaint are those asserted by Hitachi and WSDOT in this litigation. For the reasons discussed *infra*, none of these third-party claims can be viably stated against Petitioners.

litigation, CP at 380, ¶ 33. STP does not allege, because it cannot, that any other party in this litigation has asserted a claim against STP for which Petitioners are the true liable party, much less that STP has paid or been adjudicated to owe any damages for any such claim. STP's allegations do not state a claim for implied indemnity.

Under the guise of implied indemnity claims, STP seeks recovery of “all damages, costs (both direct and indirect), expenses liabilities and claims it has or will incur as a result of [each Appellant’s] breach of its duties owed to STP.” CP at 384, 388, ¶¶ 61, 89. The tort duties underlying STP’s implied indemnity claims arise from an alleged special relationship and allegations that Petitioners owed STP professional duties of care. CP at 380-87, ¶¶ 38-41, 56, 66-69, 84.

Unlike the plaintiff in *Barbee*, STP does not allege that Petitioners’ have made any warranties to STP, implied or express. Rather, STP claims that Petitioners’ alleged breaches of tort duties gave rise to blanket liability for all resulting costs, expenses, and liabilities, including “Incurred Third Party Costs” which are nothing more than STP’s own costs paid to third parties to remedy the damage “associated with the investigation of, access to and/or repair of damage to the TBM (or delays and disruptions)” CP at 379-80, ¶ 32. In short, STP seeks compensatory damages arising from Petitioners’ alleged negligence. As such, STP’s implied indemnity claims are actually just simple negligence claims.

- c. *The “Third Party Claims” for which STP seeks blanket indemnity could not have been brought against Petitioners and have not been settled or adjudicated.*

STP attempts to get around its mischaracterization of its damages by arguing that it also has an implied indemnity claim for the subset of its alleged damages it refers to as “Third Party Claims”—in particular, the claims asserted by WSDOT and Hitachi against STP in this litigation—form the basis for a proper implied indemnity claim. Br. of Resp’t at 45-46. But unless WSDOT and Hitachi could have brought those claims against Petitioners, there can be no vicarious liability on the part of STP that it could seek to shift to Petitioners by way of implied indemnity. *See Donald B. Murphy*, 112 Wn. App. at 198. STP apparently seeks to recast the pass-through fault shifting action recognized in *Barbee* and *Sabey* as one of blanket indemnity for any and all potential liability to third parties. In so doing, it seeks nothing more than compensatory damages for alleged negligence.

In its Amended Complaint, STP identifies the “Third Party Claims” as claims by “WSDOT, Hitachi Zosen U.S.A and multiple STP subcontractors . . . for damages exceeding \$100 million allegedly incurred as a result of the damage to the TBM and delay.”⁸ CP at 379, ¶ 39. Yet STP admits that WSDOT’s and Hitachi’s claims against it “are based solely in contract,” Br. of Resp’t at 49, and have not yet resulted in payment or adjudication of damages. *Id.* at 38.

⁸ STP does not identify any subcontractors that have brought claims against it, and only WSDOT and Hitachi have claims pending against STP in this lawsuit.

WSDOT has sued STP for breach of the Design-Build Contract on grounds that STP “failed to provide and properly operate equipment to complete its work under the Design-Build Contract, including the tunnel, by the substantial completion deadline” CP at 7, ¶ 3.3. Petitioners’ alleged duties in tort have no bearing on the design and operation of STP’s equipment under its contract with WSDOT. WSDOT is not suing STP for liability rising from allegedly defective Contract Documents or the presence of TW-2. In fact, it is central to WSDOT’s claims that “the TBM damage was caused by factors for which STP is responsible, including design and operation, and not by any unanticipated condition” such as TW-2. CP at 5.

Hitachi has sued STP for breach of its supply contract on the basis of STP’s failure to pay Hitachi for repairs and modifications to the TBM, failure to make other payments required by the contract, breach of its covenant of good faith and fair dealing, and related claims. CP at 71-72, 158-80. The costs of repairing the TBM, however, are among what STP is claiming as damages for Petitioners’ alleged negligence. STP’s breach of its contract is not a liability for which Petitioners can in fairness be held responsible.

Because STP faces claims for liability on the basis of its own breaches of contract, rather than liability arising from Petitioners’ fault, implied indemnity cannot lie for those claims. Moreover, because STP has not yet paid or been adjudicated to owe any damages to WSDOT or Hitachi, such damages remain speculative and implied indemnity cannot

have attached.⁹ Despite this, STP alleges that because Petitioners breached tort duties allegedly owed *to STP*, Petitioners are liable to for ***any and all costs incurred by STP*** as a result of those breaches, potentially including damages resulting from STP’s own breaches of contract. These are not proper claims for implied indemnity, these are negligence claims alleging direct and indirect damages. *See Donald B. Murphy*, 112 Wn. App. at 198.

Rather than plead proper implied indemnity claims by alleging that Petitioners are secondarily liable for particular damages to WSDOT, Hitachi, or other third parties, STP simply attempts to include among its compensatory damages any and all damages it may be forced to pay to those parties. CP at 384, 388, ¶¶ 61, 89. STP has not pleaded claims for implied indemnity for third party liabilities, but has restated its negligence claims with reference to still-speculative, open-ended compensatory damages.

3. STP’s duplicative implied indemnity claims must be dismissed as time barred to give proper effect to the statute of limitation applicable to negligence claims.

Just as this Court must not interpret a statute in a manner that “renders meaningless its enactment,” *Kirk v. Moe*, 114 Wn.2d 550, 554,

⁹ STP argues that CR 14 somehow renders accrual of an implied indemnity claim irrelevant, even though STP readily admits it chose not to implead Petitioners pursuant to that Rule. Br. of Resp’t at 48. If STP had attempted to implead Petitioners under CR 14 on the basis of implied indemnity for the various contract claims asserted against it by WSDOT and Hitachi, it would have been clear that Petitioners had no duty to indemnify STP for those claims. Rather than utilize CR 14 and be forced to prove a duty to indemnify, STP simply restated its negligence claims as direct claims for open-ended implied indemnity. In so doing, STP has forced Petitioners to incur extraordinary expenses litigating a complex, multi-party case.

789 P.2d 84 (1990), it must not allow mere tricks of pleading to render a statute of limitation ineffective. To allow STP to maintain its implied indemnity claims despite their duplicative nature would render the limitation period imposed by RCW 4.16.080 effectively null. A plaintiff should not be permitted to revive a negligence claim barred by the three-year statute of limitation by recasting the nature of its injury as payments made to third parties for investigation, repair, or other costs incurred to remedy its actual injury arising from a defendant's alleged negligence. In so doing, a plaintiff could—as STP has here—force a defendant into costly litigation over stale negligence claims.

Consider again the *Vertecs* surgical sponge example. If a careless surgeon leaves a sponge in his patient, the patient may seek recovery of his damages against the surgeon via a negligence cause of action. If the patient must pay another surgeon to remove the sponge, he could seek as compensatory damages any amounts paid to the second surgeon for that operation.¹⁰ But the patient's payments to the second surgeon cannot extend the applicable statute of limitation—if the patient fails to bring an action against the first surgeon within the limitation period, it will be time barred. If an action for tort-based implied indemnity accrued upon payment to the second surgeon, the patient could toll the limitation period for as long as the patient chooses to wait to pay the second surgeon, thereby nullifying the statute of limitation for negligence actions.

¹⁰ Note also that the patient's liability to the second surgeon would be pursuant to contract. There is no direct vector of liability from the first surgeon to the second surgeon.

This is a key reason why negligence claims cannot simply be recast as tort-based implied indemnity claims. Statutes of limitation are intended to “eliminate[e] the fears and burdens of threatened litigation” and protect against the evidentiary difficulties presented by stale claims. *Kittinger v. Boeing Co.*, 21 Wn. App. 484, 486–87, 585 P.2d 812 (1978). But if duplicative indemnity claims like STP’s were allowed, a plaintiff would be able to control when and how the indemnity claims accrue simply by determining when to pay third parties to investigate, repair, or otherwise fix the harm caused by the defendant’s negligence, rendering RCW 4.16.080 fundamentally ineffective as a limitation on negligence claims and defeating the purpose of the statute.

III. CONCLUSION

STP sat on its negligence causes of action against Petitioners and ultimately failed to comply with the applicable three-year statute of limitation despite having actual knowledge of the essential facts giving rise to its claims. STP seeks to avoid the consequences of that decision by proposing an unprecedented expansion of the discovery rule and attempting to distinguish fundamentally duplicative claims for tort-based implied indemnity. These are transparent attempts to rectify STP’s fundamental error in waiting too long to commence its claims against Petitioners.

This Court should not permit STP to salvage its stale claims by expanding the discovery rule in a way that would threaten to swallow the statute of limitation. Nor should this Court permit STP to plead duplicative

implied indemnity claims to execute an end-run around the statute of limitation. Petitioners have already been forced to expend enormous resources in this multi-party, complex dispute to defend against STP's untimely claims. The statute of limitation is supposed to prevent such a result.

The trial court committed obvious error by failing to grant Petitioners' motions for summary judgment and dismiss STP's claims when the undisputed facts establish that STP identified and affirmatively alleged the elements of those claims more than three years before it filed them. On de novo review, this Court should correct this error by giving proper effect to RCW 4.16.080, reversing the trial court, and dismissing all of STP's claims against Petitioners.

Dated this 2nd day of November, 2018.

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

1. I am over the age of 21, am an employee of Skellenger Bender, P.S., and not a party to this action.

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