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No. 53226-3-II

**Court of Appeals, Div. II,
of the State of Washington**

Ed Schumacher,

Appellant,

v.

City of Aberdeen,

Respondent.

Brief of Appellant

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1. Introduction

Ed Schumacher's claims against the City of Aberdeen were erroneously dismissed on summary judgment based on the two-year catch-all statute of limitations, RCW 4.16.130. Because Schumacher's action was commenced within the three-year statute, RCW 4.16.080, it was timely and should not have been dismissed.

Schumacher's claims were for negligent damage to real property and loss of lateral support. The trial court applied the two-year statute based on case law cited by the City, which makes a distinction between direct trespass, subject to the three-year statute, and damage caused indirectly as a result of negligence. However, in *Stenberg v. Pac. Power and Light Co., Inc.*, 104 Wn.2d 710, 709 P.2d 793 (1985), the Washington Supreme Court did away with the direct/indirect distinction and held that the three-year statute applies to both direct and indirect injury.

This Court should follow the binding Washington Supreme Court precedent in *Stenberg* and hold that the three-year statute applies. This Court should reverse the summary judgment, reinstate Schumacher's claims, and remand to the trial court for further proceedings, including a trial on the merits.

2. Assignments of Error

Assignments of Error

1. The trial court erred in dismissing Schumacher's claims on summary judgment.
2. The trial court erred in applying the two-year statute of limitations.

Issues Pertaining to Assignments of Error

1. Under *Zimmer* and *Stenberg*, there is no longer any distinction between direct and indirect property damage for purposes of determining which statute of limitations applies. The three-year statute applies to all actions for negligent damage to real property. Did the trial court err in applying the two-year statute? (assignments of error 1-2)
2. Summary judgment must be denied when material facts are in dispute. Here there were material facts in dispute as to the elements of Schumacher's claims. Should summary judgment be denied? (assignment of error 1)

3. Statement of the Case

3.1 A breach in the City's water main caused a landslide that took away a large portion of Schumacher's property, undermining his house.

Ed Schumacher was awakened by a creaking sound, followed by a loud bang, like a metallic snap, at 6:30am on the morning of January 5, 2015. CP 30. He went outside to investigate but could not see down the hillside in the dark.

CP 30. As he stood next to his hilltop home in Aberdeen, there were no signs of a landslide. CP 30.

Everything had changed by the time Schumacher was awakened again at 8:30am by City officials knocking on his door. CP 30-31. They were there to investigate a landslide that took away a large portion of Schumacher's property, partially undermining his house. CP 1, 6, 31. The City officials advised Schumacher to leave the house immediately. CP 6, 31.

Schumacher later discovered that the cause of the landslide was the City's 24-inch water main located near the foot of the slope below Schumacher's house. CP 43. The water main was an old, cast iron pipe, prone to corrosion, splitting, and leaking joints. CP 36. There was large rainfall that day, but not enough to cause the landslide. CP 37. There were no apparent sources of water at the top of the slope sufficient to cause the landslide. CP 39. The shape of the landslide traced back to two breaches in the water main. CP 38.

The water main was buried in native soils, with fill only partially compacted, leaving a porous trench in which groundwater could flow. CP 40. The pipeline runs continuously downhill from the City's reservoir to a low spot below Schumacher's home and then uphill again. CP 40. As a result of this design, both groundwater and any leaks from the pipeline are intercepted in looser soils of the trench and conveyed down

to this low spot below Schumacher's house. CP 40. From there it is released into the slope, where it softens the soil and weakens the slope. CP 40. This effect is evident from the presence of standing water and water-loving plants on the ground above the pipeline. CP 41.

Dr. McClure, a qualified Geotechnical Engineer, testified that, more likely than not, the water main burst at 6:30am. CP 41-42. The combination of groundwater and water pouring out of the pipe weakened the soil to the point of removing toe support from the slope and causing the landslide that damaged Schumacher's property. CP 41-42.

"In my opinion, it was the weakening of the soil caused by the water in the trench combined with the water from a major pipe leak that caused the flooding and the landslide. Given the topography, it is my opinion, that good construction and/or design should have allowed for the collection of water at the low spot on the pipeline path and routed the collected water away to some place where it could be disposed of without causing erosion or slope stability problems." CP 43.

3.2 The City moved for summary judgment, and the trial court dismissed Schumacher's claims based solely on a two-year statute of limitations.

Schumacher sued the City on March 1, 2018. CP 1. His complaint alleged that the City's water line "contributed to or

caused the failure of the slope, which damaged Plaintiff's home and real property." CP 1-2. The City denied the allegations. *See* CP 9-10.

The City moved for summary judgment. CP 12. The City argued that the Complaint was an action for negligent injury to real property, subject to a two-year statute of limitations, and that Schumacher's action was brought after that limitation period expired, even after accounting for tolling under RCW 4.96.020. CP 14-15. The City presented a number of cases as standing for the proposition that "An action for negligent injury to real property is subject to a two-year statute of limitations." CP 14. The City also argued in the alternative that there was no evidence of negligence (breach of a duty of care), CP 15, and that Schumacher would not be able to establish proximate cause, CP 15-16.

The City presented no expert testimony on causation, relying instead on a declaration from a City official, testifying as a lay fact witness, that the landslide was reported at 7:07am, that an alarm at the reservoir alerted the City of the possible water main breach at 7:24am, and that the City had shut down the water flow by 9:01am. CP 18-19. The City argued from this evidence that the landslide came before the water main break, hoping the court would conclude that the City's water main was not the cause-in-fact of the property damage. CP 16.

Schumacher responded with the declaration of a qualified expert witness and Geotechnical Engineer, Dr. Vince McClure. CP 32-57. Dr. McClure testified, as described above, that the City's water main was the cause-in-fact of the landslide, resulting in damage to Schumacher's property and house. CP 41-43. He also testified that the landslide hazard could have been avoided through the exercise of reasonable care. *E.g.*, CP 43.

On the statute of limitations issue, Schumacher argued that his claims were timely under the three-year statute of limitations. CP 25-26. Schumacher called the trial court's attention to the 1985 case of *Stenberg v. Pac. Power and Light Co., Inc.*, 104 Wn.2d 710, 709 P.2d 793 (1985), in which the Washington Supreme Court overruled prior applications of the two-year statute that were based on a distinction between direct and indirect causes of damage. CP 25. Instead, the court held in *Stenberg*, the three-year statute for "any other injury to the person or rights of another" applies to actions for both direct and indirect or consequential injury. CP 25. Schumacher argued that the post-*Stenberg* cases relied upon by the City were incorrect or distinguishable. CP 26.

The trial court focused in on the statute of limitations issue. RP 9-10. The trial court reasoned, "The Complaint alleges injury to property. It's a two-year statute, and the Complaint

wasn't timely filed." RP 10. The trial court granted the City's motion and dismissed Schumacher's claims. RP 10, CP 70-71. The trial court clarified that its decision was based solely on the statute of limitations. RP 10, CP 71.

4. Argument

The trial court's application of the two-year statute of limitations was error. Under *Stenberg*, the three-year statute applies, regardless of whether the damage was direct or indirect, intentional or negligent. Post-*Stenberg* cases that have applied the two-year statute did so erroneously—an error that this Court has previously recognized. This Court should continue to follow *Stenberg* and should reverse the summary judgment and remand for further proceedings.

In the event this Court chooses to address the City's alternative arguments on the merits of Schumacher's negligence claim, even though the trial court did not, it should be enough at this stage to note that there are genuine issues of material fact as to the elements of the claim, precluding summary judgment. This Court should remand for further proceedings, including a trial on the merits.

4.1 The trial court erred in applying the two-year statute of limitations to dismiss Schumacher's claims.

The City argued that RCW 4.16.130, the two-year “catchall” statute of limitations, applied to Schumacher’s action for negligent property damage. The trial court agreed. Schumacher contends that RCW 4.16.080, the three-year “general torts catchall” statute applies. *See, e.g., Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 37, 384 P.3d 232 (2016) (throughout the opinion, the court refers to RCW 4.16.080 as the “general torts catchall statute of limitations”). There is no dispute that the action was timely if the three-year statute applies. *See* CP 15.¹

The two-year statute provides, “An action for relief not hereinbefore provided for, shall be commenced within two years...” RCW 4.16.130. The three-year general torts catchall statute provides,

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the

¹ The City calculates the two-year statute as expiring in January 2018. If the City’s calculation is correct, the three-year statute would not have expired until January 2019, well after the filing of Schumacher’s complaint in March 2018.

specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

RCW 4.16.080.

Early 20th century cases made a distinction between direct and indirect injuries, applying the two-year statute to actions for indirect injury. *E.g.*, *White v. King County*, 103 Wash. 327, 174 P. 3 (1918) (applying the two-year statute where construction of a county road caused water to flow onto plaintiff's property). The distinction was based on the ancient common-law distinction between forms of action for trespass and trespass on the case. *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 7-8, 76 P. 298 (1904).

However, more modern decisions have abolished the distinction. "The direct-indirect distinction between trespass and case is now rejected by most courts, and would appear to be slowly on its way to oblivion. ... The fine, though oftentimes indiscernible distinctions, between the ancient writs of trespass and trespass on the case should not be unduly preserved in aid of a statute of limitations." *Zimmer v. Stephenson*, 66 Wn.2d 477, 482-83, 403 P.2d 343 (1965). "We hold RCW 4.16.080(2) [the three-year general torts catchall statute] applies to causes of action claiming both direct and indirect injuries to the person or rights of another and overrule the direct/indirect injury

distinction.” *Stenberg v. Pac. Power & Light Co., Inc.*, 104 Wn.2d 710, 711, 709 P.2d 793 (1985).

Under the three-year general torts statute of limitations, which should apply here, Schumacher’s action was timely. The distinction between intentional and negligent property damage claims has been abolished. Both types of claims are covered under the same, three-year statute. Post-*Stenberg* cases applying the two-year statute, relied upon by the City and the trial court, did so in error and should not be followed. This Court has previously recognized this error in *Nelson v. Skamania Cnty.*, No. 44240-0-II, at *10 n.3 (Wash. Ct. App. Jun. 17, 2014).²

This Court should continue to follow the Washington Supreme Court’s binding precedent in *Zimmer* and *Stenberg*. This Court should hold that the three-year statute applies and that Schumacher’s action was timely. This Court should reverse the summary judgment decision and remand to the trial court for further proceedings.

4.1.1 Summary judgment decisions and questions of statutory interpretation are both reviewed de novo.

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Failla v.*

² *Nelson* is an unpublished opinion of the Court of Appeals, cited only as persuasive authority under GR 14.1.

FixtureOne Corp., 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). Summary judgment is only proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). “A material fact is one that affects the outcome of the litigation.” *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). The court views the facts in a light favorable to the nonmoving party. *Failla*, 181 Wn.2d at 649. “[A] court must deny summary judgment when a party raises a material factual dispute.” *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003). Questions of statutory interpretation are also reviewed de novo. *Fast*, 187 Wn.2d at 32.

4.1.2 Under *Zimmer* and *Stenberg*, the three-year statute applies, and Schumacher’s action was timely.

As noted above, there is a history of decisions applying the two-year statute of limitations to actions for negligent damage to real property. This history is the source of the trial court’s error in this case. The Washington Supreme Court explained this history, and overruled it, over 30 years ago in *Stenberg*.

In *Stenberg*, the court squarely addressed the same statute of limitations question that is at issue here: “The sole issue before this court is whether the 2-year or the 3-year

statute of limitation applies to a claim against a tortfeasor who is only an ‘indirect’ cause of the harm.” *Stenberg*, 104 Wn.2d at 713.

The court framed its discussion by noting that courts must give careful scrutiny to the “changing conditions and needs of the times,” as well as the purposes of statutes of limitations, in order to “prevent any application of the common law as an instrument of injustice.” *Stenberg*, 104 Wn.2d at 713-14. “In Washington, the goals of our limitation statutes are to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence.” *Id.* at 714. With this goal in mind, “No sound reason exists to search for a technical distinction” between direct or indirect injuries, where the nature of the evidence and proofs would be the same for either form of action. *Zimmer*, 66 Wn.2d at 481-82.

The direct/indirect distinction overruled in *Zimmer* and *Stenberg* first arose in three early 20th century cases relating to actions for damage to real property. *Stenberg*, 104 Wn.2d at 715 (citing, *e.g.*, *Suter*, 35 Wash. 1 (1904)). The distinction was based in the ancient common law forms of action for trespass (or trespass *vi et armis*), which involved a direct and immediate injury to person or property; and for trespass on the case, in which a culpable omission leads to consequential damages.

Stenberg, 104 Wn.2d at 716 (quoting *Welch v. Seattle M.R.R.*, 56 Wash. 97, 99-100, 105 P. 166 (1909)).

The *Stenberg* court went on to recount ways in which the direct/indirect distinction spread into other contexts and continued for some time to limit actions for negligent damage to real property under the two-year statute. *Stenberg*, 104 Wn.2d at 716-19 (citing, e.g., *Pettigrew v. McCoy-Loggie Timber Co.*, 138 Wash. 619, 245 P. 22 (1926) (applying the two-year statute where a fire on defendant's land was negligently allowed to spread to plaintiff's land)).

In *Zimmer v. Stephenson*, 66 Wn.2d 477 (1965), the court attempted to put an end to the distinction in actions for negligent injury to real property. In doing so, the court reasoned, "The direct-indirect distinction between trespass and case is now rejected by most courts, and would appear to be slowly on its way to oblivion. ... The fine, though oftentimes indiscernible distinctions, between the ancient writs of trespass and trespass on the case should not be unduly preserved in aid of a statute of limitations." *Zimmer*, 66 Wn.2d at 482-83.

In *Zimmer*, the defendant used "an improperly equipped, spark-emitting tractor [to plow a fireguard between his own fields and the plaintiff's fields] on a hot, dry, windy day in close proximity to a field of ripe inflammable wheat." *Zimmer*, 66 Wn.2d at 480-81. Sparks flew onto plaintiff's field, which

caught fire, causing substantial crop loss. *Id.* at 478. The Supreme Court held, contrary to the earlier precedent, that the three-year statute applied to negligent damage to real property. *Id.* at 483.

“By this time, however, the direct/indirect distinction had become so embedded that the next case [a Court of Appeals decision] extended the ... doctrine to include physical injuries to persons.” *Stenberg*, 104 Wn.2d at 719 (citing *Peterick v. State*, 22 Wn. App. 163, 589 P.2d 250 (1977)).

In *Stenberg*, the Supreme Court attempted once again to put the direct/indirect distinction to rest. The court held that the distinction “has been extended beyond contemporary tort doctrine so that whatever utility it may have had in former years has now been exhausted. ... we overrule the direct/indirect injury distinction.” *Stenberg*, 104 Wn.2d at 720.

Under *Zimmer* and *Stenberg*, the latest Washington Supreme Court cases to address this statute of limitations issue,³ the three-year statute applies to any action for damage to real property, regardless of whether the damage results from a direct trespass onto the plaintiff’s land or from negligent

³ The Supreme Court recently took note of *Stenberg*’s elimination of the direct/indirect distinction in *Jongeward v. BNSF Railway Co.*, 174 Wn.2d 586, 597 n.8, 278 P.3d 157 (2012), but the statute of limitations was not at issue in *Jongeward*.

conduct of the defendant that causes consequential damage to plaintiff's land. "An antiquated direct/indirect analysis should not allow a limitation statute alone to deprive plaintiffs of their day in court." *Stenberg*, 104 Wn.2d at 721.

Here, the City's negligence caused the water main to breach, removing lateral support for Schumacher's property and resulting in a landslide that carried away much of Schumacher's land and undermined his house, rendering it uninhabitable and unmarketable. It should make no difference whether the damage was the result of a direct invasion of Schumacher's land or the proximate result of the City's negligence on land it was entitled to use. The distinction has been abolished. The three-year statute of limitations applies to claims for negligent damage to real property. This Court should reverse the summary judgment and remand for further proceedings.

4.1.3 As this Court has previously recognized, post-*Stenberg* decisions applying the two-year statute are in error and should not be followed.

This Court has previously recognized the error in applying the two-year statute after the distinction was overruled in *Zimmer* and *Stenberg*. In *Nelson v. Skamania Cnty.*, No. 44240-0-II, at *10 n.3 (Wash. Ct. App. Jun. 17, 2014), this Court noted,

Contrary to the County’s assertions, both negligent and intentional trespass are recognized as continuing torts in Washington ... **and both are subject to RCW 4.16.080's three-year statute of limitations.** *Zimmer v. Stephenson*, 66 Wn.2d 477, 483, 403 P.2d 343 (1965). Four published appellate decisions since the *Zimmer* decision—*Mayer v. City of Seattle*, 102 Wn. App. 66, 75, 10 P.3d 408 (2000), *review denied*, 142 Wn.2d 1029 (2001); *Will v. Frontier Contractors*, 121 Wn. App. 119, 125, 89 P.3d 242 (2004), *review denied*, 153 Wn.2d 1008 (2005); *Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006), and *Wolfe v. Dep’t of Transp.*, 173 Wn. App. 302, 306, 293 P.3d 1244, *review denied*, 177 Wn.2d 1026 (2013)—have incorrectly stated or implied that negligent trespass claims are subject to RCW 4.16.130's two-year statute of limitations for “relief not hereinbefore provided.” But ***Zimmer* is explicit about the three-year statute of limitations for negligent trespass upon real property and is binding.** *Zimmer*, 66 Wn.2d at 483.

Nelson, No. 44240-0-II, at *10 n.3 (emphasis added).

The error in these four cases, all of which were cited by the City in its summary judgment motion, is apparent upon a review of those cases in light of the Supreme Court’s decisions in *Zimmer* and *Stenberg*.

In *Mayer v. City of Seattle*, the appellate court did not engage in any analysis of which statute of limitations should apply. The court simply stated, “There is no specific statute of limitations governing Mayer's claims; thus, they are subject to the two-year catchall period.” *Mayer*, 102 Wn. App. at 75. The

court cited *White v. King County* for the proposition that the two-year statute applies to negligent injury to real property. *Id.* The court failed to take note that the Supreme Court had overruled the holding and reasoning of *White* when it decided *Zimmer* and *Stenberg*.

The appellate court again failed to analyze the issue in *Will v. Frontier Contractors*. The court simply stated, “The statute of limitations governing a general negligence claim for injury to real property is the two year catchall provision in RCW 4.16.130.” *Will*, 121 Wn. App. at 125. The court cited to *Mayer* and *White* without any further analysis. The court again failed to recognize that *Zimmer* and *Stenberg* had overruled this holding. It is also of note in *Will* that the action would have been untimely even under the three-year statute. *Will*, 121 Wn. App. at 125 (“Will was aware of the flooding on his property in February 1996, but he waited until May 2000, over three years, to assert his [claims]”). The distinction between the two- and three-year statutes was not even at issue.

Wallace v. Lewis County also involved claims that were brought well beyond even the three-year statute. *Wallace*, 134 Wn. App. at 14 (plaintiffs waited 14 years to sue). Again without any analysis, the appellate court stated, “An action for negligent injury to real property is subject to a two-year statute of limitations.” *Id.* at 13. The court cited the familiar suspects:

White, Mayer, and Will. The court again failed to take note of *Zimmer and Stenberg*.

Wolfe v. Dep't of Transp., like *Will* and *Wallace* before it, also involved claims that were brought far too late for even the three-year statute. *Wolfe*, 173 Wn. App. at 305-06 (actions commenced in 2010 based on injury beginning in 1986). Additionally, the plaintiffs acquiesced in the application of the two-year statute and did not even raise the applicability of the three-year statute. *Id.* at 306. The only authority the appellate court cited was *Wallace*, without any analysis. *Id.*

The City also cited an unpublished case, *Ruth 2, LLC v. Sound Transit*, No. 50458-8-II (Wn. App. Sep. 11, 2018), as persuasive authority, but it is not persuasive. Again, without any analysis, the appellate court simply stated, “An action for negligent injury to real property is subject to the catch-all two year statute of limitations.” *Id.* at *6. The court cited *White* and *Wallace*. *Id.* at *6-7. The court failed to take notice of *Zimmer and Stenberg*.

The *Wolfe* and *Ruth 2* courts further failed to take notice of the Supreme Court’s notation in *Jongeward v. BNSF Railway Co.*, 174 Wn.2d 586, 597 n.8, 278 P.3d 157 (2012), that even though the court had once recognized a distinction between the statutes applicable to trespass *vi et armis* (three years) and trespass on the case (two years), “We later eliminated the

direct/indirect distinction in *Stenberg* to ‘return to the original understanding’ of the statutes of limitations.”

The Supreme Court meant what it said in *Zimmer* and *Stenberg*: the three-year statute of limitations applies to both direct and indirect causes of damage to persons or property. The Supreme Court has not retreated from that holding and has even favorably acknowledged it as recently as 2012. *Zimmer* and *Stenberg* are still the law. The failure of other courts to recognize and apply *Zimmer* and *Stenberg* was error and should not be followed. This Court has previously recognized as much in *Nelson*. This Court should continue to follow the Supreme Court’s binding precedent in *Zimmer* and *Stenberg*. This Court should hold that the three-year statute of limitations applies. This Court should reverse the summary judgment and remand for further proceedings, including a trial on the merits.

4.1.4 The three-year statute applies to an action for loss of lateral support.

Schumacher’s Complaint, viewed in the light of the evidence presented by Dr. McClure, arguably presents a claim for damages as a result of loss of lateral support. *See* CP 1-2, 32-43. Schumacher raised the issue of lateral support in answer to the summary judgment motion. CP 27 (citing *Bjorvatn v. Pacific Mechanical Const., Inc.*, 77 Wn.2d 563, 567, 464 P.2d 432 (1970),

for the proposition that a municipality is liable for damages caused by the removal of lateral support).

Historically, lateral support cases followed the direct/indirect distinction. *See, e.g., Island Lime Co. v. City of Seattle*, 122 Wash. 632, 635, 211 P. 285 (1922) (applying the two-year statute under the direct/indirect distinction of *Suter* and *White*). However, when the removal of lateral support was by the act of the “sovereign power,” the constitutional protection against takings was implicated, requiring the three-year statute be applied. *Marshall v. Whatcom County*, 143 Wash. 506, 507, 255 P. 654 (1927).

Because the modern conception of a claim for loss of lateral support is based in part “upon the constitutional right which prohibits the taking or damaging of real property for public or private use without just compensation,” even between private parties, *Bay v. Hein*, 9 Wn. App. 774, 776, 515 P.2d 536 (1973), it follows that the three-year statute should apply to all lateral support claims.

This Court should hold that the three-year statute of limitations applies to Schumacher’s claims. This Court should reverse the summary judgment, reinstate Schumacher’s claims, and remand for further proceedings, including a trial on the merits.

4.2 Genuine issues of material fact preclude summary judgment on the merits of Schumacher's claims.

The trial court did not address the merits of Schumacher's claims. As such, there is no need for this Court to address the merits, either. However, in the event this Court chooses to address the City's alternative arguments for dismissal, this Court should hold that there are genuine issues of material fact precluding summary judgment on the merits.

4.2.1 There are genuine issues of material fact on the issue of the City's breach.

The City argued in its motion that Schumacher must present evidence that the City breached a duty of care. CP 15. Schumacher's response was two-fold: 1) the doctrine of *res ipsa loquitur* applied to prove negligence, CP 27-28; and 2) Dr. McClure provided expert testimony that the City was negligent in not managing the excess water surrounding its water main in a way that would prevent slope instability. CP 43. Viewing the evidence and inferences in favor of Schumacher, the nonmoving party, this response was sufficient to show the existence of genuine issues of material fact precluding summary judgment.

"The doctrine of *res ipsa loquitur* recognizes that an accident may be of such a nature, or may happen under such circumstances, that the occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the

defendant, without further direct proof. Thus, it casts upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part.” *Metro. Mortg. & Secs. Co., Inc. v. Washington Water Power*, 37 Wn. App. 241, 243, 679 P.2d 943 (1984).

There are three elements to establish the applicability of *res ipsa loquitur* in a particular case: “(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone’s negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.” *Metro. Mortg.*, 37 Wn. App. at 244. Schumacher has presented evidence on each of these elements.

The first element is established as a matter of law: “We hold the general experience of mankind teaches us that water mains do not break in the absence of someone’s negligence. Thus, the plaintiff need not present specific evidence to satisfy this element.” *Metro. Mortg.*, 37 Wn. App. at 247.

The water main was in the exclusive control of the City. The pipeline was buried underground. CP 36. It ran directly from the City’s reservoir to the location of the break. CP 40.

There is no evidence that any other entity had any access to the pipes between the reservoir and the location of the break. The City controls the reservoir, where the City has an alarm system that alerts City officials to any hazards that might affect the water system. *See* CP 18-19. Viewing the evidence and inferences favorable to Schumacher, the water main was in the exclusive control of the City, establishing the second element of *res ipsa loquitur*.

The accident was not the result of any contribution on the part of Schumacher. There were no sources of water at the top of the slope sufficient to cause the landslide. CP 39. Besides, Schumacher was asleep at the time of the breach and at the time of the landslide. CP 30-31. He could not have possibly contributed to the accident.

All three elements of *res ipsa loquitur* are established. Thus, Schumacher presented sufficient evidence of the City's breach of a duty.

The City's reliance on *Kempter v. City of Soap Lake*, 132 Wn. App. 155, 130 P.3d 420 (2006), is misplaced. The City's quote from the case says nothing more than the rule that a plaintiff must present either direct evidence of a breach of duty or circumstantial evidence establishing the elements of *res ipsa loquitur*. *See Kempter*, 132 Wn. App. at 160-61. The sewers in *Kempter* are distinguishable from the water mains in this case

and in *Metro. Mortg.*, because, unlike a water main, which is in the exclusive control of the municipality, the public's access to the sewer line defeats *res ipsa loquitur* because "Any number of inappropriate objects may be, and are, forced into a public sewer system at any given time with potentially catastrophic results." *Kempton*, 132 Wn. App. at 160. *Kempton* does not apply here. Schumacher is entitled to rely on *res ipsa loquitur* to establish the City's breach of duty and avoid summary judgment.

4.2.2 There are genuine issues of material fact on the issue of proximate cause.

The City argued in its summary judgment motion that there was no evidence of proximate cause. Schumacher's response presented evidence of proximate cause. Dr. McClure, a qualified expert witness and Geotechnical Engineer, testified to a reasonable engineering certainty, on a more likely than not basis, that the combination of groundwater and water pouring out of the broken water main weakened the soil to the point of removing toe support from the slope and causing the landslide that damaged Schumacher's property. CP 41-42. Dr. McClure explained in detail how this combination of water came about. CP 32-43.

"In my opinion, it was the weakening of the soil caused by the water in the trench combined with the water from a major

pipe leak that caused the flooding and the landslide. Given the topography, it is my opinion, that good construction and/or design should have allowed for the collection of water at the low spot on the pipeline path and routed the collected water away to some place where it could be disposed of without causing erosion or slope stability problems.”⁴ CP 43.

Dr. McClure’s testimony is evidence of proximate cause. The City’s lay evidence, attempting to create an inference that the landslide occurred before the breach in the water main, is insufficient to overcome Schumacher’s expert testimony of causation. On summary judgment, the evidence and inferences must be viewed in a light favorable to Schumacher. There are genuine issues of material fact on the issue of proximate cause.

Because there are genuine issues of material fact as to the elements of Schumacher’s claims, summary judgment dismissal on the merits is improper. Schumacher has presented evidence sufficient to go to trial. This Court should reverse the summary judgment, reinstate Schumacher’s claims, and remand to the trial court for further proceedings, including a trial on the merits.

⁴ The second sentence of this quote is also direct evidence of the City’s breach of duty.

5. Conclusion

The current, binding Supreme Court precedent on the statute of limitations issue is *Zimmer* and *Stenberg*. The ancient direct/indirect distinction upon which the City's position relies has been abolished. The three-year statute of limitations applies to claims of negligent damage to real property. Any cases applying the two-year statute are in error and should not be followed.

This Court should reverse the summary judgment, reinstate Schumacher's claims, and remand to the trial court for further proceedings, including a trial on the merits.

Respectfully submitted this 30th day of September, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on September 30, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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