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Division II
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53226-3-II

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

ED SCHUMACHER,

Appellant,

v.

CITY OF ABERDEEN,

Respondent.

BRIEF OF RESPONDENT

John E. Justice, WSBA No. 23042
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508-1880
(360) 754-3480
Attorneys for Respondent

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I. IDENTITY OF RESPONDENT

The City of Aberdeen, Washington, was the defendant below and is the Respondent in this appeal.

II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. Does the two-year statute of limitations in RCW 4.16.130 apply to plaintiff's claim for negligent injury to real property?**
- B. Did plaintiff assert a claim for failure to maintain lateral support in the trial court?**
- C. Can summary judgment be affirmed based on the alternative grounds of lack of breach of a duty and lack of proximate cause?**

III. COUNTER-STATEMENT OF THE CASE

A. Factual Background.

According to the plaintiff's complaint, he owns real property in Aberdeen that was damaged by soil erosion of the slope below his house sometime on January 5, 2015. CP 1. He claims that he became aware that the damage was due to the City of Aberdeen's nearby storm line in October, 2015. CP 1-2. This lawsuit was commenced on March 1, 2018, more than two years and sixty five days after learning this information. *Id.*

A day prior to the event referenced in plaintiff's complaint, the City of Aberdeen experienced an unusually large rainfall event, dumping nearly 9 inches of rain on some parts of the City in a 24 hour period starting on January 4, 2015. CP 22. The landslide beneath plaintiff's house was reported at 7:07 a.m. on January 5, 2015. The City of Aberdeen then became aware of a potential problem with its water reservoir at approximately 7:24 a.m. on January 5, 2015 because an alarm went off at the Water Department shop indicating abnormal water flows. CP 18-19. The City immediately reviewed other data available and noted that the water reservoir levels were dropping and the 3 flow meters leaving the reservoir had dramatic flow increases. *Id.* Crews were dispatched to the reservoir immediately. Once they arrived, it was discovered that a section of the 24-inch supply main that carries water from the reservoir was missing as a result of a landslide and crews began shutting off the valves to prevent further water flow. *Id.* Shut down was complete at 9:01 a.m.. *Id.* The landslide occurred approximately 15 minutes after the water main break. *Id.* CP 19.

Plaintiff's complaint alleges only the following: "the City of Aberdeen's *storm line* contributed to or caused the failure of the

slope, which damaged Plaintiff's home and real property." CP 1-2. His complaint mentions nothing about the City's water main and identifies no specific cause of action.

B. Procedural Background.

The City of Aberdeen moved for summary judgment. CP 12-17. The Court granted the City's motion based on the statute of limitations. CP 70-71.

IV. SUMMARY OF ARGUMENT

The plaintiff's complaint asserts, at most, a claim for negligent injury to real property. Several Washington Court of Appeals decisions have held that such claim is governed by the two-year statute of limitations of RCW 4.16.130. Plaintiff has not established that those decisions have been overruled or should be overruled in this case. Plaintiff did not amend his complaint to assert a claim of failure to maintain lateral support, nor was it tried by consent. The trial court's summary judgment should be affirmed based on the failure of the plaintiff to commence his cause of action within the statute of limitations. Summary judgment can also be affirmed based on lack of evidence of a breach of duty and lack of proximate cause.

V. ARGUMENT

A. Standard of Review.

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The purpose of summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). Summary judgment should be granted if it appears from the record that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Hudesman*, 73 Wn.2d at 886.

The party moving for summary judgment has the burden of establishing the absence of any issue of material fact. *Wojcik v. Chrysler Corp.*, 50 Wash. App. 849, 854, 751 P.2d 854 (1988). However, once the moving party has presented competent summary judgment proof, the non-moving party may not rest on mere allegations in its pleadings, but must respond by affidavit or other proper method setting forth specific facts showing there is a genuine

issue for trial. *McGough v. Edmonds*, 1 Wash. App. 164, 168, 460 P.2d 302 (1969). Broad generalizations and vague conclusions set forth in an affidavit in opposition to a motion for summary judgment are insufficient to successfully resist the motion. *Island Air, Inc. v. LaBar*, 18 Wash. App. 129, 136, 566 P.2d 972 (1977).

Summary judgment does not alter the applicable burden of proof; a moving party need not disprove an essential element of the nonmoving party's case, and may merely point out for the court the absence of any essential element. *Young v. Key Pharmaceuticals*, 112 Wn. 2d 216, 225-27, 770 P.2d 182 (1989).

B. Plaintiff's Complaint Controls the Applicable Statute of Limitations.

The factual allegations in the complaint "determine the applicable statute of limitations." *Boyles v. City of Kennewick*, 62 Wash. App. 174, 177 (1994).

In his complaint in this matter, Plaintiff alleges his "property was damaged" due to "erosion in [his] yard" and "the City of Aberdeen's storm line contributed to or caused the failure of the slope, which damaged Plaintiff's home and real property." CP 1-2. Real property includes improvements "permanently attached to the

real property.” *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn. 2d 489, 501-02, 210 P.3d 308 (2009). Thus, plaintiff’s case alleges at most injury to his real property caused by the City’s negligence.

The trial court therefore correctly relied on the plaintiff’s complaint in determining the applicable statute of limitations. That complaint, which was never amended, does not support any cause of action other than potential negligent injury to real property.

On appeal, Plaintiff claims his complaint “arguably presents a claim for damages as a result of loss of lateral support.” There was no claim stated for failure to maintain lateral support in the complaint, nor did he amend his complaint to add such a claim.

Plaintiff argues that he cited a case in his summary judgment brief that involved loss of lateral support. CP 27. His summary judgment brief did not claim that he was asserting a failure to maintain lateral support claim, nor was it ever mentioned in the summary judgment hearing. In fact, when Plaintiff’s counsel was asked directly by the trial court what cause of action he was asserting in the complaint, he answered as follows:

THE COURT: Well, what is your cause of action in your complaint? How would you characterize it?

MR. SCUDERI: I would characterize it as you described. There was a – there was a landslide, there was damage to his property, that it was caused by the City . . .”

VRP 7.

Plaintiff did not assert a claim for failure to maintain lateral support in his complaint, in his summary judgment brief, or in argument to the trial court. *See, Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) (“In determining whether the parties impliedly tried an issue, an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issue.” (internal citations omitted)). Plaintiff may not assert this claim for the first time on appeal. RAP 2.5(a).

C. The Applicable Statute of Limitations to a claim for Negligent Injury to Real Property is Two Years.

There is no dispute that if the two-year statute of limitations

in RCW 4.16.130 applies, summary judgment should be affirmed. Mr. Shumacher's complaint was filed on March 1, 2018. CP 1. It alleges he became aware of the possibility that the City's storm line may have contributed to the slope failure in October, 2015 when he received an engineering report. CP 2. Plaintiff submitted a tort claim to the City on May 9, 2016. *Id.*, ¶ 1.6. This tolled the statute of limitations for 65 days under RCW 4.96.020(4). Even assuming the referenced report was received by plaintiff on October 31, 2015, and that triggered the statute of limitations, rather than the date of the slide, and adding 65 days, the two year statute of limitations expired no later than **January 4, 2018**. The lawsuit was not commenced until March 1, 2018, nearly two months later.

Washington courts have repeatedly applied the two-year statute of limitations to claims for negligent injury to real property. For example:

1. *Wolfe v. State Dept. Of Transp.*, 173 Wn. App. 302, 304-306, 293 P.3d 1244 (2013) the Court held that "RCW 4.16.130 prescribes a two-year statute of limitations for actions asserting negligent injury to real property", specifically an allegation that State DOT installed "angled bridge piers were causing the river to

flow toward his property and to erode the bank in that area, causing a loss of at least 32,000 cubic yards of soil since 1986.”

2. *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 125, 89 P.3d 242, 245 (2004), the two-year statute of limitations applies to claims of negligence causing flooding on plaintiff's real property, holding that “[t]he statute of limitations governing a general negligence claim for injury to real property is the two year catchall provision in RCW 4.16.130.”

3. *Wallace v. Lewis County*, 134 Wn.App. 1, 13, 137 P.3d 101, 107 (2006), noting “[a]n action for negligent injury to real property is subject to a two-year statute of limitations.”

4. *Mayer v. City of Seattle*, 102 Wn.App. 66, 10 P.3d 408 (2000), two year statute of limitations applied to plaintiff's claims of “nuisance, strict liability (abnormally dangerous activity), and negligent injury to real property” related to allegations that “the defendants' creation and maintenance of a toxic waste dump in Puget Park and along Puget Way Southwest impacted Mayer's ability to develop his property.”

5. *Ruth 2, LLC v. Sound Transit*, 5 Wash. App.2d 1012,

2018 WL 4348354 (2018)¹, claim that Sound Transit's negligence in carrying out improvements on adjacent property caused flooding that damaged Ruth 2's real property subject to two year statute of limitations for negligent injury to real property.

6. *Lange v. Cebelak*, 188 Wash. App. 1035 (2015)², held that “[s]eparate causes of action arise for negligent injury to real property and nuisance claims, but plaintiffs must file a lawsuit two years from the time either action accrues.”

On appeal, Plaintiff argues that the two-year statute of limitations held applicable in the above referenced cases has been overruled, citing two cases that *pre-date* the aforementioned decisions: *Stenberg v. Pacific Power & Light Co., Inc.*, 104 Wn.2d 710, 718-720, 709 P.2d 793 (1985) and *Zimmer v. Stephenson*, 66 Wn.2d 477, 403 P.2d 343 (1965).

Stenberg involved a vehicle collision in which the plaintiff's vehicle first collided with another vehicle and then left the road and struck a power pole. 104 Wn.2d at 712. The trial court dismissed

¹ This is an unpublished decision issued after March 1, 2013 and thus may be cited as a non-binding authority. See GR 14.1.

² This is an unpublished decision issued after March 1, 2013 and thus may be cited as a non-binding authority. See GR 14.1.

some of the plaintiff's claims based on the two-year statute of limitations. *Id.* at 713. The Supreme Court reversed the trial court and held that the two year "catchall" statute of limitations applied to "any possible cause of action not covered by the other" statutes of limitations and rejected an analysis that applied the two year statute of limitations to "indirect" injuries to the person, such as the collision with the power pole in the case before it. *Id.* at 720-21. *Stenberg* does not discuss claims for negligent injury to real property and the six cases described above, all of which post-date *Stenberg* are not based on a direct/indirect injury analysis. Rather, these cases are not in conflict with *Stenberg* because negligent injury to real property is a "cause of action not covered by the other" statute of limitations.

Zimmer is also not in conflict with the six cases cited above. *Zimmer* involved a fire caused by a piece of equipment operated by the defendant that spread onto the plaintiff's farm and destroyed his wheat crop. 66 Wn.2d at 478. The trial court applied a two-year statute of limitations rather than a three year statute of limitations based on a distinction between "trespass" and "trespass on the case." The distinction being essentially direct vs. indirect trespass onto

another's property. *Id.* at 482. *Zimmer* simply held that a "negligent trespass" claim is subject to a three-year statute of limitations. *Id.* at 483. Again, it did not address the applicable statute of limitations to a claim of negligent injury to real property.

Finally, Plaintiff cites an unreported decision, *Nelson v. Skamania County*, 2014 WL 2796032 (2014) as non-binding authority only under GR 14.1. That case involved a "former landfill operation on adjacent property [that] caused debris to flow onto [plaintiff's] property." *Id.*, pg. 1. *Nelson* is a trespass and inverse condemnation case. The issue regarding the statute of limitations in *Nelson* was whether the trespass was permanent (three years from the date of accrual) or continuing (damages available three years prior to filing and continuing to the time of trial if not abated.) A claim for negligent injury to real property was not at issue.

In a footnote, *Nelson* did reference *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) and stated that they “incorrectly stated or implied” that a two year statute of limitations applied to *negligent trespass* claims. 2014 WL 2796031, n. 1. As noted above, however, each of these cases references a two-year statute of limitations *only* in connection with a claim of negligent injury to real property, *not* negligent trespass. The plaintiff in *Nelson* did not appeal the dismissal of his negligent injury to real property claim and therefore the court did not address it. *Id.*, n. 2.

None of the cases cited by Plaintiff hold that a negligent injury to real property claim is subject to a three-year statute of limitations. In contrast, six court of appeals decisions, four of which are published, hold that such a claim is subject to a two-year statute of limitations. This Court should follow this authority and affirm the trial court’s summary judgment.

Although the trial court granted summary judgment based on the statute of limitations issue, this court can also “affirm [summary judgment] on any basis supported by the record.” *Bavand v. OneWest Bank*, 196 Wash.App. 813, 825, 385 P.3d 233 (2016) The following arguments provide additional reasons to affirm summary judgment.

D. There is no evidence that the City breached a Duty of Care to Plaintiff.

A claim for negligence consists of four elements: duty, breach, causation and damages. *American Commerce Ins. Co. V. Ensley*, 153 Wn. App. 31, 42, 220 P.3d 215 (2009). Plaintiff was required present evidence that the City breached a duty of care to survive summary judgment. *Kempter v. City of Soap Lake*, 132 Wash. App. 155, 160-61, 130 P.3d 420 (1960). As the Court in *Kempter* explained:

Ultimately, a city is not an insurer of the condition of its sewers; to charge it with damage caused by an obstruction in the sewers, negligence must be proved. *Nejin v. City of Seattle*, 40 Wash.App. 414, 419, 698 P.2d 615 (1985) (quoting *Vitucci Importing Co. v. City of Seattle*, 72 Wash. 192, 194, 130 P. 109 (1913)). Because the Kempters failed to present evidence of a breach of duty or of the City's absolute control over the conditions that led to the backflow, reasonable minds could only conclude that there was insufficient evidence of negligence as a matter of law. (Citation omitted). Accordingly, the trial court did not err in dismissing their complaint on summary judgment.

Id.

Plaintiff's theory of liability has shifted from the one stated in his complaint, i.e. from the City's storm line being a cause, to the City's water main. His expert opines that the water main break

preceded the slope failure, rather than the other way around. The City presented evidence that a witness called 911 to report the slide at 7:07 a.m.. CP 18-19. Mr. Randich's declaration goes on to note that an alarm reflecting a water main break did not go off until 15 minutes later. *Id.* No evidence disputed this fact in the trial court.

Plaintiff's expert failed to explain how the City's water main alarm showing a break did not go off until 15 minutes after the 911 call reporting the slide if the break precipitated the slide as he opines. His opinion that the main break preceded the slide amounts to little more speculation about the cause of a noise allegedly heard by Plaintiff in the dark. "Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded." *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wash.2d 50, 103-04, 882 P.2d 703, 891 P.2d 718 (1994).

Plaintiff also references *res ipsa loquitur* and argues that he need not show evidence of a breach of duty by the City. "The applicability of the doctrine of *res ipsa loquitur* involves a question of law." *Jackass Mr. Ranch, Inc. v. South Columbia Basin Irr.*

Dist., 175 Wn. App. 374, 398, 305 P.3d 1108 (2013). “If the defendant provides a completely exculpatory explanation for the cause of the injury in question, then *res ipsa loquitur* is not applicable.” *Id.* In this case, the City has presented evidence that a caller reported the landslide 15 minutes *prior to* the water main break. Obviously, a landslide caused by rain is not the fault of the City. Plaintiff has provided no authority that *res ipsa loquitur* applies to a landslide caused by rain - which obviously can happen even in the absence of someone’s negligence. *Res ipsa loquitur* should not be applied to relieve plaintiff of proving the breach of a duty by the City.

E. The Plaintiff Cannot Establish Proximate Cause.

A claim for negligence requires that the breach of a duty be a proximate cause of the claimed injury or damages. *Hartley v. State*, 103 Wn.2d 768, 777 (1985). The issue of proximate cause can be decided on summary judgment, “where reasonable minds could not differ.” *Bowers v. Marzano*, 170 Wn. App. 498, 506 290 P.3d 134 (2012). There are two elements of proximate cause: cause in fact and legal causation. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 474-75, 656 P.2d 483 (1983).

Cause in fact is lacking if the plaintiff's injury would have occurred without defendant's breach of duty. *Walker v. Transamerica Title Insurance*, 65 Wn. App. 399 (1992). There is "cause-in-fact if a plaintiff's injury would not have occurred "but for" the defendant's negligence." *Estate of Bordon ex rel. Anderson v. State*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). When the connection between a defendant's conduct and the plaintiff's injury is too speculative and indirect, the cause in fact requirement is not met. *Taggart v. State*, 117 Wn.2d 195, 227 (1992). "[P]roximate cause may be a question of law for the court if the facts are undisputed, the inferences are plain and inescapable, and reasonable minds could not differ." *Bordon*, 122 Wn. App. at 239.

In *Walters v. Hampton*, 14 Wn. App. 548, 556, 543 P.2d 648 (1975), the Court explained that factual causation "requires a sufficiently close, actual connection between the complained of conduct and the resulting injuries. Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law."

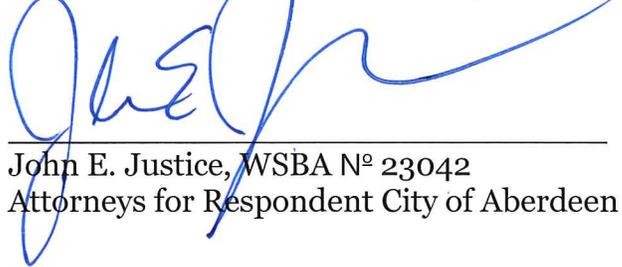
In this case, the City has presented evidence that a landslide caused by rainfall occurred, leading to a break in the water main. As explained above, there is no evidence beyond speculation that the City caused the landslide that led to the water main break. The City also presented evidence that as soon as it learned of the water line break it began shutting off valves immediately to stop the flow of water. In short, there is no evidence that the City's conduct proximately caused plaintiffs' alleged damages.

VI. CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment in favor of the City of Aberdeen should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of October, 2019.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.



John E. Justice, WSBA N^o 23042
Attorneys for Respondent City of Aberdeen

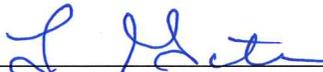
CERTIFICATE OF SERVICE

I certify, under penalty of perjury, under the laws of the State of Washington that on this day 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:

Kevin Hochhalter, WSBA #43124
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503

Joseph Scuderi, WSBA #26623
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

Dated this 30th day of October, 2019 at Tumwater, WA.



Lisa Gates

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

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