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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.

Reply Brief of Appellant

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1. Introduction

The trial court erroneously dismissed Schumacher's claims on the basis of an antiquated distinction between direct and indirect injuries, which was abolished by the Washington Supreme Court over 30 years ago in *Stenberg v. Pac. Power and Light Co., Inc.*, 104 Wn.2d 710, 709 P.2d 793 (1985). The cases upon which the City relies all themselves rely, in a direct line, without any useful analysis, on old cases that were overruled by *Stenberg*.

This Court correctly observed the state of the case law in its unpublished opinion in *Nelson v. Skamania Cnty.*, No. 44240-0-II, at *10 n.3 (Wash. Ct. App. Jun. 17, 2014): cases applying the two-year statute are incorrect and should not be followed. Under the binding precedent of *Stenberg*, the three-year statute applies, and Schumacher's claims were timely.

Schumacher also presented admissible evidence that tends to establish the elements of his claims. Viewing the evidence favorably to Schumacher, material facts are in dispute, making summary judgment improper. This Court should reverse the summary judgment order, reinstate Schumacher's claims, and remand to the trial court for further proceedings, including a trial on the merits.

2. Reply 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, 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.

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

Schumacher's opening brief argued that the trial court applied the incorrect statute of limitations. Br. of App. at 8-20 (citing, *e.g.*, *Zimmer v. Stephenson*, 66 Wn.2d 477, 482-83, 403 P.2d 343 (1965); *Stenberg v. Pac. Power & Light Co., Inc.*, 104 Wn.2d 710, 711, 709 P.2d 793 (1985)).

Schumacher reviewed the history of application of the two- and three-year statutes of limitations to actions for negligent damage to real property. Br. of App. at 11-15. Although early 20th century cases made a distinction between direct injury (or trespass vi et armis), subject to the three-year statute, and indirect or negligent injury (trespass on the case), to which the two-year statute was applied. Br. of App. at 12-13. However, in *Zimmer* and *Stenberg*, the Washington Supreme Court abolished this distinction, holding that the three-year statute applies to both direct and indirect injuries. Br. of App. at 13-15 (quoting *Stenberg*, 104 Wn.2d at 720 (“we overrule the direct/indirect injury distinction”)). Under this binding precedent, the three-year statute of limitations applies to this case. The trial court decision should be reversed.

Schumacher’s brief noted—as has this Court—that despite the Supreme Court’s efforts, the direct/indirect distinction continued to be applied, erroneously, in some post-*Stenberg* cases. Br. of App. at 15-19. Schumacher demonstrated the failure of reasoning in those cases. Br. of App. at 16-18 (citing *Mayer v. City of Seattle*, 102 Wn. App. 66, 10 P.3d 408 (2000); *Will v. Frontier Contractors*, 121 Wn. App. 119, 89 P.3d 242 (2004); *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006); *Wolfe v. Dep’t of Transp.*, 173 Wn. App. 302, 293 P.3d 1244 (2013); and *Ruth 2, LLC v. Sound Transit*, No. 50458-8-II

(Wn. App. Sep. 11, 2018)). The City’s response brief fails to address these errors in any meaningful way. The Washington Supreme Court continues to emphasize that the direct/indirect distinction has been abolished, “to return to the original understanding of the statutes of limitations.” Br. of App. at 18-19 (quoting *Jongeward v. BNSF Railway Co.*, 174 Wn.2d 586, 597 n.8, 278 P.3d 157 (2012)).

The City’s response attempts to draw a distinction that the courts do not. According to the City, there is a difference between a claim for “negligent trespass” and a claim for “negligent injury to real property.” *See* Br. of Resp. at 11-13. The City does not explain the difference, because the only possible explanation for any difference would be the same direct/indirect distinction that was abolished in *Zimmer* and *Stenberg*.

The only reasoned distinction there could be between “negligent trespass” and “negligent injury” would be that “negligent trespass” involves some **direct** invasion of property rights that causes damage, whereas “negligent injury” involves damage that is caused by something other than a direct invasion—*i.e.*, an **indirect** injury.

The City does not provide any reasoned basis for its attempt to resurrect the direct/indirect distinction. Instead it relies on the erroneous post-*Stenberg* cases that Schumacher has already debunked. The City ignores the fact that none of

these cases meaningfully analyzed the question, and that in three out of the five, the difference between the two- and three-year statutes of limitations was not even at issue because the actions would have been barred even if the courts had correctly applied the three-year statute. *See* Br. of App. at 17-18. None of the cases relied on by the City provide any support for the City's position, because each traces back in a direct line to the overruled direct/indirect distinction of *White v. King County*, 103 Wash. 327, 174 P. 3 (1918). *See* Br. of App. at 16-18.

The City is incorrect when it argues that *Stenberg* did not address negligent injury to real property. In recounting the history of the direct/indirect distinction that it was about to abolish, the *Stenberg* court criticized *Welch v. Seattle M.R.R.*, 56 Wash. 97, 105 P. 166 (1909); *Denney v. Everett*, 46 Wash. 342, 89 P. 934 (1907); and *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 P. 298 (1904), for holding that “the 3-year statute governed trespass actions only when the trespass was a direct physical invasion of the property itself [negligent trespass] and not for an action for consequential damages [negligent injury].” *Stenberg*, 104 Wn.2d at 715.

The *Stenberg* court overruled the use of the direct/indirect distinction in all three cases. In *Welch*, the court had applied the two-year statute because the claim for damage to a business resulting from negligent tunneling under the real property on

which the business operated was an indirect injury. *Welch*, 56 Wash. at 100-02. In *Denney*, the court had applied the two-year statute because the claim of damage to plaintiffs' real property resulting from a change in the grade of neighboring property was an indirect injury, not a direct physical invasion of the property itself. *Denney*, 46 Wash. at 343, 345. In *Suter*, the court had applied the two-year statute because the claim of damage to plaintiffs' real property resulting from negligent construction of an otherwise lawful canal was an indirect injury, not a trespass. *Suter*, 35 Wash. at 2-3, 5-6, 9.

Both *Denney* and *Suter* involved negligent injury to real property. *Welch* reached even farther to include negligent injury to a business interest. All three cases, and their direct/indirect distinction, were criticized and overruled by *Stenberg*. The distinction the City attempts to draw between "negligent trespass" and "negligent injury to real property" has already been rejected by *Stenberg's* overruling of *Welch*, *Denney*, and *Suter*. For purposes of the statute of limitations, there is no difference between "negligent trespass" and "negligent injury to real property." There is no more direct/indirect distinction. The three-year general torts catchall statute of limitations applies to all actions for damage to real property "or for any other injury to the person or rights of another." RCW 4.16.080.

There is no question that Schumacher's action was timely if the three-year statute applies. Because the three-year general torts catchall statute applies here, the trial court erred when it dismissed Schumacher's claims under the two-year statute. This Court should reverse the dismissal and remand for further proceedings.

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

Schumacher's opening brief also addressed the City's alternative arguments for summary judgment on the merits, arguing that genuine issues of material fact made summary judgment improper. Br. of App. at 21-25. The City argues that Schumacher cannot establish the elements of 1) breach of duty or 2) proximate cause. Br. of Resp. at 14-18. Schumacher addressed both of these elements in his opening brief, demonstrating genuine issues of material fact.

The City's breach of duty was established on two grounds: 1) the elements of *res ipsa loquitur* are all present, proving the City's negligence, Br. of App. at 21-24, and 2) the expert testimony of Dr. McClure established the City's breach of duty, Br. of App. at 21, 24-25. The element of proximate cause was also established by Dr. McClure's expert testimony. Br. of App. at 24-25.

Schumacher's brief showed that each of the elements of *res ipsa loquitur* was established. As a matter of law, "water mains do not break in the absence of someone's negligence," establishing the first element. Br. of App. at 22 (quoting *Metro. Mortg. & Secs. Co., Inc. v. Washington Water Power*, 37 Wn. App. 241, 247, 679 P.2d 943 (1984)). The water main was under the exclusive control of the City, establishing the second element. Br. of App. at 22-23, 23-24. Schumacher did not contribute to the accident, establishing the third, and final, element. Br. of App. at 23. The City does not argue to the contrary.

Instead the City claims that it has provided "a completely exculpatory explanation" because, it says, the landslide was caused by rain. However, this cause is itself in dispute and therefore cannot serve as a basis for exculpating the City on summary judgment. This dispute of material facts precludes dismissal of Schumacher's claims on summary judgment.

Dr. McClure explained in detail the cause of the landslide: the City's faulty design and construction of the water main negligently allowed ground and surface waters to collect in the improperly filled trench around the water main, weakening the water main itself to the point of rupture, at which point the City's water oversaturated and destabilized the soils, causing the landslide that damaged Schumacher's property. CP 32-43.

The City is grasping at straws when it argues that Dr. McClure's qualified expert testimony has no factual basis. The City did not move in the trial court to strike Dr. McClure's qualified expert testimony. Dr. McClure examined the facts on the ground and applied accepted scientific methods to determine the cause of the landslide. His opinion does not depend on what Schumacher heard on the morning of the slide, but he does reasonably explain it. CP 42. Far from speculation, Dr. McClure's testimony is a well-reasoned, factually-based, qualified expert opinion.

Dr. McClure's declaration is admissible evidence tending to establish both negligence and proximate cause. Viewed in a light most favorable to Schumacher, the nonmoving party, there are genuine issues of material fact on the elements of Schumacher's claims. To put it simply, on one side the City claims to have presented evidence of a landslide caused by rainfall; on the other side Schumacher has presented evidence of a landslide caused by the City's negligence. The cause of the landslide is material to Schumacher's claims. The cause is also in dispute.

In the face of these disputed facts, this Court cannot grant summary judgment in the City's favor. A trial is required to resolve the disputed facts. This Court should reverse the trial court's order and remand for trial.

3. 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 16th day of December, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on December 16, 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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