

64244-8

64244-8

No. 642448

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

---

JAMES H. JACKSON and C.R. HENDRICK,  
a marital community,

Plaintiffs-Appellants,

v.

TRENCHLESS CONSTRUCTION SERVICES, L.L.C., a Washington  
Limited Liability Company, and QPS, INC., a Washington Corporation  
doing business as "QUALITY PLUMBING",

Defendants-Respondents,

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Michael Trickey)

---

APPELLANTS' BRIEF IN REPLY TO QPS, INC.'S RESPONSE BRIEF

---

Larry Setchell, WSBA #4659  
Ben T. Shih, WSBA #39477  
HELSELL FETTERMAN LLP  
1001 Fourth Avenue, Suite 4200  
Seattle, Washington 98154  
(206) 292-1144  
Attorneys for Appellants James H.  
Jackson and C.R. Hendrick

2/28/22 PM 1:05

TABLE OF CONTENTS

I. INTRODUCTION .....1

II. ARGUMENT .....2

    A. Standard of Review Is *De Novo*; Facts Are Presumed in Favor of Appellants.....2

    B. QPS’s Statutory Duty of Care Is Set Forth in the Seattle Municipal Code.....2

    C. QPS’ Common Law Duty of Care Has Been Shown ....3

    D. Public Policy .....4

    E. Causation Was Not an Issue before the Trial Court Because QPS Did Not Argue It in Its Motion for Summary Judgment .....5

    F. The Economic Loss Rule is Inapplicable to This Case Because There Was No Contract and There Were No Economic Losses.....6

III. CONCLUSION.....9

2010 MAR 22 PM 1:05

TABLE OF AUTHORITIES

Cases

*Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007).....4, 5, 7, 8

*Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124  
Wn.2d 816, 881 P.2d 986 (1994).....8

*Brower v. Ackerley*, 88 Wn. App. 87, 943 P.2d 1141 (1997) .....5

*Stuart v. Caldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406,  
745 P.2d 1284 (1987).....4, 5, 8

*White v. Kent Medical Ctr., Inc., P.S.*, 61 Wn. App. 163,  
810 P.2d 4 (1991).....6

Statutes

S.M.C. 22.800.020(A)(1).....4, 5

## **I. INTRODUCTION**

QPS response fails for the same reasons that Trenchless' response fails. Like Trenchless, QPS exposes in its response the numerous outstanding questions of material fact demonstrating that this case must be decided at trial. Further, QPS fails to address the relevant purpose provision in the Seattle Municipal Code that establishes a statutory duty of care. Further, QPS provides no meaningful response to Mr. Jackson and Ms. Hendrick's argument that contractors such as QPS owe a common law duty of care to down slope property owners and all other foreseeable victims when those contractors dig and drill into steep, environmentally-sensitive slopes for which the law requires numerous permits and permission. Instead, QPS resorts to highlighting irrelevant factual distinctions between cases cited by Mr. Jackson and Ms. Hendrick and this case. Finally, QPS resurrects its briefing on the economic loss rule but still fails to overcome the two glaring holes in its argument: (1) there is no contract between the appellants and QPS such that the appellants can be limited to contractual remedies and (2) there are no economic losses in this case, only damages to other property for which tort remedies are available.

Because many of the arguments in QPS' response are identical to those asserted in Trenchless' Response Brief, where possible, Mr. Jackson

and Ms. Hendrick incorporate by reference the relevant sections of their Reply to Trenchless' Response Brief.

## **II. ARGUMENT**

### **A. The Standard of Review Is *De Novo*; Facts Are Presumed in Favor of Appellants**

Mr. Jackson and Ms. Hendrick incorporate by reference Section II.A from their Reply to Trenchless' Response Brief to the extent that the law and arguments are applicable. Appellants' Reply to Trenchless' Response Brief at 3-4.

### **B. QPS' Statutory Duty of Care Is Set Forth In the Seattle Municipal Code**

Mr. Jackson and Ms. Hendrick incorporate by reference Section II.B from their Reply to Trenchless' Response Brief to the extent that the arguments are applicable. Appellants' Reply to Trenchless' Response Brief at 5-10. In addition, QPS incorrectly argues that because Mr. Jackson and Ms. Hendrick did not include any argument concerning QPS' statutory duty of care in its response to QPS' motion for summary judgment that they cannot make such an argument on appeal. Mr. Jackson and Ms. Hendrick did not need to make such an argument in its response to QPS' motion for summary judgment because QPS itself failed to argue lack of duty in its motion. CP 113-33. Because such arguments were made in Trenchless' summary judgment motion, Mr. Jackson and Ms.

Hendrick responded to those arguments in their response to Trenchless' motion, Mr. Jackson and Ms. Hendrick are not precluded from making this argument on appeal. CP. 449-51.

**C. QPS' Common Law Duty of Care Has Been Shown**

Mr. Jackson and Ms. Hendrick incorporate by reference Section II.C from their Reply to Trenchless' Response Brief to the extent that the arguments are applicable. Appellants' Reply to Trenchless' Response Brief at 10-15. In addition, QPS falsely states that Mr. Jackson and Ms. Hendrick failed to raise the issue of duty of care under common law in the trial court. In fact, Mr. Jackson and Ms. Hendrick made such an argument in their response brief opposing QPS' summary judgment motion. CP 468-69.

Further, it is QPS that failed to raise the issue. QPS's summary judgment motion neglected to touch on the issue of duty. Instead, QPS committed itself to argue that Mr. Jackson and Mrs. Hendrick lacked standing to sue and that their claims are barred by the economic loss rule. CP 122. Mr. Jackson and Ms. Hendrick, as the non-moving party on summary judgment, were only obligated to respond to the issues raised in QPS's motion. Further, Mr. Jackson and Ms. Hendrick did argue the issue at length in the trial court, both during oral argument and in their response

in opposition to Trenchless' motion for summary judgment. RP 23-28, CP 452-53.

#### **D. Public Policy**

Mr. Jackson and Ms. Hendrick incorporate by reference Section II.D from their Reply to Trenchless' Response Brief to the extent that the arguments are applicable. Appellants' Reply to Trenchless' Response Brief at 15-17. In addition, Mr. Jackson and Ms. Hendrick quote the following portion from *Alejandre v. Bull* clearly setting forth the relevant and applicable public policy in this case:

'Tort law has traditionally redressed injuries properly classified as physical harm.' It 'is concerned with the obligations imposed by law, rather than by bargain,' and carries out a 'safety-insurance policy' that requires that products and property that are sold do not 'unreasonably endanger the safety and health of the public.'

159 Wn.2d 674, 682, 153 P.3d 864 (2007) (citations omitted). Further, our Supreme Court has stated: "As a matter of public policy, it is entirely reasonable to expect manufacturers of goods for sale to the general public to assume responsibility for the safety of their product." *Stuart v. Caldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 418-19, 745 P.2d 1284 (1987). The public policy behind imposing a duty on contractors such as QPS is simply a matter of public safety. This policy is clearly expressed in S.M.C. 22.800.020(A)(1): "[p]rotect, to the greatest extent

practicable, life, property ... from loss, injury or damage by erosion, flooding, landslides, strong ground motion, soil liquefactions ... and other potential hazards, ... from human activity.”

While the above-quoted portions from *Alejandro* and *Stuart* address the public policy behind protecting consumers from dangerous products, the principle of protecting the public from physical harm is equally applicable to cases where a contractor acts negligently while carrying out a service. The policy behind protecting the public from harm should not be compromised simply because the tortfeasor is negligent in carrying out a service rather than selling a dangerous product.

**E. Causation Was Not An Issue Before The Trial Court Because QPS Did Not Argue It In Its Motion For Summary Judgment**

In its motion for summary judgment, QPS only set forth two arguments before the trial court: (1) plaintiffs’ lacked standing to sue and (2) plaintiffs’ claims were barred by the economic loss rule. CP 122. QPS never argued in its motion or at oral argument that Mr. Jackson and Ms. Hendrick failed to establish proximate cause. CP 122-33. Issues neither briefed nor argued in trial court will not be considered on appeal. *Brower v. Ackerley*, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997). At most, QPS dedicated one sentence in its reply brief to argue causation. CP 510. This sentence does not amount to briefing or arguing before the trial court and

must not be considered. “It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.” *White v. Kent Medical Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). Because QPS never raised the issue of causation in its motion for summary judgment, Mr. Jackson and Ms. Hendrick were not required to respond to the issue in its response in opposition to QPS’ summary judgment motion. Even if they were somehow required to make a showing of causation, Mr. Jackson and Ms. Hendrick argue that the record does provide sufficient evidence of causation to create numerous questions of material fact. For this reason, this argument fails and must be disregarded by the Court.

**F. The Economic Loss Rule Is Inapplicable To This Case Because There Was No Contract and There Were No Economic Losses.**

To the extent there is overlap between the arguments made by Trenchless and QPS, Section II.E of Appellant’s Reply to Trenchless’ Response Brief is incorporated herein by reference. See Reply to Trenchless p. 17-22.

QPS also inaccurately states that the trial court found that Mr. Jackson and Ms. Hendrick’s claim against QPS was barred by the economic loss rule. No such finding was ever made by the trial court during the hearing or in the order. RP 33-34 and CP 512-14. From the

beginning of the hearing on summary judgment, the trial court stated that the issue was whether respondents owed a duty. RP 12. At that time, counsel for QPS agreed, stating: "... I think the ultimate issue [sic] duty". RP 15. In fact, the trial court never made any ruling concerning the economic loss rule; it only ruled that there was no duty owed. RP 33-34.

QPS is also wrong to say that Mr. Jackson and Ms. Hendrick seek recovery for damage to property on which work was performed. The truth is, there was no damage to property that QPS worked on; all of Mr. Jackson and Ms. Hendricks' damages were to property that had nothing to do with QPS' work. These were damages to "other property" and not economic losses. *Alejandre v. Bull*, 159 Wn.2d 674, 684, 153 P.3d 864 (2007) (distinguishing economic losses from personal injury and injury to other property). The scope of QPS' work did not extend beyond the installation and connection of the waterline. QPS' work had nothing to do with the actual house or the personal property items in the house that were damaged during the landslide. Therefore, Mr. Jackson and Ms. Hendrick's losses were not economic loss that would allow for the application of the economic loss rule.

Further, it is irrelevant that QPS was working under contract at the time of its negligent acts because Mr. Jackson and Ms. Hendrick were not a party to that contract. It bears repeating that this is a tort case brought

under tort law, not a contract case. Mr. Jackson and Ms. Hendrick have never made a claim for breach of contract against QPS. The economic loss rule only bars a plaintiff that was party to a contract. *Alejandre*, 159 Wn.2d at 683 (“... the economic loss rule prevents a party to a contract from obtaining through a tort claim benefits that were not part of the bargain.” (Underlining added)). When a plaintiff is not a party to a contract and has no contractual privity with the defendant, that plaintiff may correctly bring her claims in tort against the negligent defendant. Mr. Jackson and Ms. Hendrick were never party to any contract with QPS. They never bargained or allocated risk with QPS. They cannot therefore be barred by the economic loss rule.

Cases cited by QPS, *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007); *Berschauer/Phillips Constr. v. Seattle Sch. Dist.*, 124 Wn.2d 816, 881 P.2d 986 (1994); and *Stuart v. Caldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987), have already been exhaustively discussed and distinguished in Appellants' Reply to Trenchless' Response Brief and in the briefing before the trial court on summary judgment. The Court must look beyond the superficial similarities between these cases and the present case. None of these cases can be intelligently applied to the present case. Each of these cases involves plaintiffs who were in contractual privity with the defendants

and/or each of these cases involves actual economic losses; i.e., losses that were suffered directly to the property that was the subject of the contract. For these two simple reasons, these cases must once and for all be disregarded to the extent that QPS attempts to disfigure the courts' opinions to fit into its argument.

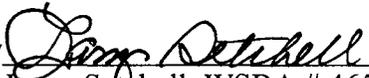
For all of these reasons, QPS' attempt to recycle and reuse its arguments the economic loss rule fail and must be rejected by the Court.

### III. CONCLUSION

QPS joins Trenchless highlighting all of the many material questions of fact which remain in dispute. These questions of material fact show that this case must be decided at trial. Further the Seattle Municipal Code and Washington cases establish that QPS owed a duty of care and QPS cannot continue to try to abuse the economic loss rule where it cannot be applied to the present case. For all of these reasons, this Court should reverse.

Respectfully submitted this 22<sup>nd</sup> day of March, 2010.

HELSELL FETTERMAN LLP

By   
Larry Setchell, WSBA # 4659  
Ben T. Shih, WSBA # 39477  
Attorneys for Appellants James  
H. Jackson and C.R. Hendrick