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No. 66176-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JACK W. EVARONE

Petitioner/Appellant

vs.

LEASE, CRUTCHER, LEWIS, SENECA REAL ESTATE GROUP,
HORIZON HOUSE, NUPRECON, FRUHLING INC., FRUHLING
SAND & TOPSOIL INC.,

Respondent/Appellees.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENTS

Respondents¹ rely on implausible interpretations of Washington law to argue that Appellant Jack W. Evarone’s (“Evarone”) claims against them are time-barred and also fail on their merits. In accepting Respondents’ arguments, and entering summary judgment, the Superior Court disregarded controlling authority and erred several times over. It thereby denied Evarone the chance to put his claims to a jury. This Court should remedy the Superior Court’s errors by reversing its erroneous orders and allowing this matter to proceed to a jury trial.

Respondents’ argument that Evarone’s claims against them are time-barred fails given Washington’s project completion rule, which tolls all causes of action stemming from construction projects on adjacent property until the project is completed. That rule was articulated three decades ago by the Washington State Supreme Court and has never been overruled. Respondents grudgingly concede as much in their Opposition briefing, while nevertheless arguing that this Court should disregard that rule just as the Superior Court appears to have done.

¹ Nuprecon prepared one Opposition (“Nuprecon’s Opposition”); Lease, Crutcher, Lewis, Seneca Real Estate Group, and Horizon House (“LCL Respondents”) prepared a second Opposition (“LCL’s Opposition”); and Fruhling, Inc. and Fruhling Sand and Topsoil, Inc. (“Fruhling Respondents”) prepared a third Opposition (“Fruhling’s Opposition”).

Depending on their roles in the project at issue, the Respondents argue either that the project completion rule has been “superseded,” or that it may still apply—just not to them. Neither of these arguments is plausible given the authority on point. Nor is either congruent with our Supreme Court’s policy of avoiding piecemeal litigation stemming from construction projects. Moreover, the case law Respondents cite about claim accrual supports Evarone’s position rather than their own. This Court should reconfirm that the project completion rule controls. It should therefore find that the Superior Court erred if it granted summary judgment based on the notion that Evarone’s claims were time-barred.

Respondents’ arguments on the merits also crumble under the slightest of scrutiny. The cornerstones for Respondents’ attacks on Evarone’s claims were a pair of motions to strike that were filed in conjunction with their motions for summary judgment. Respondents argued in one motion to strike that Evarone’s invocation of *res ipsa loquitur* in opposition to summary judgment, which both this Court and our Supreme Court have held to be acceptable, was untimely and improper.² In a second motion to strike, Respondents sought to exclude

² With the exception of the LCL Respondents, the Respondents also wrongly asserted in their motion that it was somehow improper for Evarone to argue about Washington’s RCW 4.22.070 without having pled joint and several liability in his complaint. *See* CP 706-8; 831.

the testimony of Evarone's experts by asserting not only that they were unqualified, but also that their declarations in opposition to summary judgment "clearly contradicted" their earlier deposition testimony. The Superior Court erred by granting both motions. This Court should remedy the Superior Court's errors and allow Evarone to use the doctrine of *res ipsa loquitur*, along with the testimony of his experts, to defeat summary judgment and allow him to make his case at trial before a jury.

Finally, and particularly with the benefit of *res ipsa loquitur* and/or the evidence of his expert witnesses properly considered, Evarone met his burden to enable his claims to survive summary judgment.³ In fact, exhibits Respondents submitted in support of summary judgment demonstrate that numerous genuine issues of material fact remain.

Evarone asks the Court to reverse the Superior Court's incorrect and untenable rulings granting Respondents' motions to strike and granting summary judgment for Respondents. Evarone also asks that the Court remand this matter to the Superior Court for proceedings consistent with the foregoing requested rulings.

³ Evarone's trespass and lateral support claims, which are not based in negligence, survive regardless of whether *res ipsa loquitur* is applied.

II. ARGUMENT

A. Washington's Project Completion Rule Tolled the Statutes of Limitations on Evarone's Claims.

1. The *Oja* case controls and tolled the statutes of limitations on Evarone's claims.

The LCL Respondents' argument that while the project completion rule articulated in *Vern J. Oja & Associates v. Washington Park Towers, Inc.*⁴, "***has not been explicitly overturned***, it has been ***superseded by the theory of continuing trespass***" shows an astonishing disregard for how our judicial system functions.⁵ See LCL Opposition, p. 19 (emphasis added). "[O]nce [our Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts ***until it is overruled***["]

⁴ 89 Wn.2d 72, 75-76, 569 P.2d 1141 (1977). The *Oja* Court held that causes of action for damage caused by construction on adjacent property do not begin to accrue, and the applicable statutes of limitations do not begin to run, until *after* the construction project is completed. See *id.* In articulating its construction project completion rule, the *Oja* Court stated that:

"In those cases involving damage to real property arising out of construction or activity on adjacent property, the cause of action accrues at the time the construction is completed if substantial damage has occurred at that time. If the damage has not occurred when the construction is completed, the action accrues when the first substantial injury is sustained thereafter...The respondent was entitled to wait until the completion of the construction project before filing a cause of action so that it might determine the full extent of the damages." *Id.*

The Supreme Court's rationale for establishing the construction project completion rule was that "[a] different rule would force a plaintiff to seek damages in installments in order to comply with the statute of limitations." *Id.* Such a "different rule" is precisely what Respondents would have this Court apply here.

⁵The LCL Respondents never address how subsequent case law addressing the accrual of *continuing* trespass claims could have any bearing on regular trespass, negligence, nuisance or loss of lateral support claims.

State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (emphasis added). Further, our Supreme Court “will not overrule [its own] binding precedent sub silentio.” *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 344, 160 P.3d 1089 (2007), *aff’d*, 166 Wn.2d 264, 208 P.3d 1092 (2009). Lower courts err when they disregard controlling authority from our Supreme Court. *See 1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006).

The Supreme Court did not supersede *Oja*’s binding precedent in *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985).⁶ The *Bradley* Court cited *Oja* only for the length of the trespass statute of limitations, and then proceeded, *in the same paragraph*, to overrule a line of cases that were inconsistent with its holding. *See id.*, 104 Wn.2d at 692-93. If the Supreme Court had wished to overrule *Oja*, and the rule articulated therein, it had the perfect opportunity to do so. But it chose not to overrule *Oja*. *See id.* Accordingly, the *Oja* rule continues to govern in those situations, such as this dispute, where it applies. *See Lunsford*, 139 Wn. App. at 344. Moreover, in situations where the *Oja*

⁶ The LCL Respondents’ argument that the Supreme Court intended the *Oja* rule to be limited to trespass claims is unsupported by any authority. *See* LCL Opposition, p. 19. In fact, a fair reading of the *Oja* rule demonstrates that the Supreme Court had no such intent. *See Oja*, 89 Wn.2d at 75-76. Nor would a rule that tolled only trespass claims, when other causes of action could obviously arise out of a construction project, make any public policy sense.

rule controls, a court errs in applying a different rule. *See 1000 Virginia Limited P'ship*, 158 Wn.2d at 578. To the extent that the Superior Court mistakenly disregarded the *Oja* rule, it must be reversed.

2. The *Bradley* rule has no bearing here.

The LCL Respondents' argument that Evarone's trespass claim is actually a *continuing* trespass claim, implying that *Bradley* should apply on that basis as well, is feeble at best. *See* LCL Opposition, p. 20. After all, it is undisputed that the project at issue here lasted just two years. Given the short duration of the trespasses alleged, accrual for a *continuing* trespass claim would be functionally equivalent to a trespass claim anyway. *See, e.g., Fradkin v. Northshore Utility Dist.*, 96 Wn. App. 118, 124, 977 P.2d 1265 (1999) (discussing accrual for both trespass and continuing trespass). Further, the facts supporting Evarone's trespass claim bear no resemblance to continuing trespass situations. *See, e.g., Bradley*, 104 Wn.2d 680 (ongoing precipitation of particulate matter that continued for nearly a century); *Fradkin*, 96 Wn. App. at 126 (periodic flooding over the course of several years caused by defective construction of drainage system); *Wallace v. Lewis County*, 134 Wn. App 1, 13, 137 P.3d 101 (2006) (intrusion of rats and mosquitos from nearby tire disposal business over 14-year period). Moreover, under the LCL Respondents' logic, the theory of continuing trespass would subsume all forms of

trespass.⁷ That is not the law. While every trespass may be “continuing” while it is happening, not every trespass claim is for *continuing* trespass. *See, e.g., Fradkin*, 96 Wn. App. at 124. Evarone’s trespass claim is not a continuing trespass claim, and the *Bradley* rule is irrelevant here.

Here, the Superior Court erred to the extent it accepted Respondents’ argument that the *Bradley* rule, which deals just with *continuing* trespass, somehow superseded the *Oja* rule governing *all* of Evarone’s claims. *See 1000 Virginia Limited Partnership*, at 578. To the extent the Superior Court did so, its summary judgment ruling must be reversed.

3. The *Pepper* case is consistent with the project completion rule.

The LCL Respondents’ reliance on *Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 871 P.2d 601 (1994) to suggest that the *Oja* rule no longer applies is misplaced.⁸ As a threshold matter, an opinion by an appellate court cannot affect the viability of a binding rule articulated by our Supreme Court. *See, e.g., 1000 Virginia Limited Partnership*, 158 Wn.2d at 578. Moreover, there is nothing in the *Oja* opinion to suggest

⁷ In arguing that the *Oja* rule no longer applies, the LCL Respondents also appear to argue that the *Bradley* continuing trespass rule now governs the accrual of *all* claims arising from construction projects. *See* LCL Opposition, p. 19. There is no support for this argument in the *Bradley* Court’s opinion.

⁸ The *Pepper* Court’s opinion does not even cite *Oja*.

that the project completion rule would toll claims from one completed project until a *subsequent* project, begun after a *four year* lull in construction, was itself completed. This Court's rulings in *Pepper* are completely congruent with the Supreme Court's holding in *Oja*.

4. The project completion rule applies to subcontractors.

Nuprecon and the Fruhling Respondents⁹ assert that the *Oja* rule does not apply to subcontractors like themselves. *See* Nuprecon Opposition, p. 11; Fruhling Opposition, pp. 26-28. They are mistaken. The *Oja* opinion offers no support for Respondents' argument, and they cite no other authority on that issue.

The Nuprecon and Fruhling Respondents are correct that the subcontractors in *Oja* were dismissed on summary judgment for statute of limitations grounds. *See Oja*, 89 Wn.2d at 74. However, it is unclear whether the appropriateness of their dismissal was even addressed on appeal. In fact, the *Oja* opinion mentions only an appeal by Washington Park Towers and a cross-appeal by *Oja*. *See id.* There is no mention of any appellate briefing by the subcontractors, which one would surely

⁹ The Fruhling Respondents' contention that Evarone is precluded from addressing their argument that the *Oja* completion rule does not apply is absurd. *See* Fruhling Opposition, p. 28. Evarone asserted in his opening brief that the project completion rule applies to *all* of the Respondents. He is entitled to address the Fruhling Respondents' unsupported contention to the contrary.

expect if an appealing party had attempted to bring them back into the lawsuit. Further, to the extent the *Oja* Court dealt with the subcontractors' dismissal at all, it apparently did so only in addressing whether the petitioner, Washington Park Towers, could still be held derivatively liable for their actions. *See id.* at 77. There is no discussion in the opinion about whether the subcontractors' dismissal was proper. Therefore, there is nothing in *Oja* to support the notion that its project completion rule should not apply equally to subcontractors.

Moreover, as a policy matter, it seems highly unlikely that the Supreme Court would have intended to limit tolling only to entities who were still involved at the end of a construction project. After all, the rationale for the *Oja* rule was that “[a] different rule would force a plaintiff to seek damages in installments in order to comply with the statute of limitations.” *See id.* at 76. Under the subcontractor Respondents' interpretation, injured parties still would have to identify all subcontractors, parse out the damage they caused, and bring suit against those subcontractors prior to project completion to avoid running afoul of the statute of limitations. That exception would swallow the *Oja* rule, and would run counter to the Supreme Court's stated logic.

The Nuprecon and Fruhling Respondents' unsupported argument that the *Oja* rule exempts subcontractors is unavailing. To the extent that

the Superior Court's entry of summary judgment was based on the notion that the *Oja* rule did not reach subcontractors, it was erroneous and must be reversed.

B. Standard of Review for Motions to Strike.

Respondents suggest that the proper standard of review for orders granting motions to strike brought in conjunction with motions for summary judgment is abuse of discretion rather than de novo. See LCL's Opposition, pp. 13-14, Fruhling Opposition, pp. 14-15. They are mistaken. This Court, citing authority from our Supreme Court, has held that "when a motion to strike is made in conjunction with a motion for summary judgment, [it] review[s] de novo." *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). In fact, even more recently, and quoting the same Supreme Court authority relied upon by the *Southwick* Court, this Court held that "[t]he de novo standard of review is used by an appellate court when reviewing *all trial court rulings made in conjunction with a summary judgment motion.*" *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203, 215-16, 242 P.3d 1 (2010) (emphasis added) (quoting

Folsom, 135 Wn.2d at 663).¹⁰

Here, the Superior Court entered its orders on Respondents' motions to strike in conjunction with Respondents' motions for summary judgment. Accordingly, the appropriate standard of review is de novo. *See id.*, 158 Wn. App. at 215-16. However, even if this Court applied an abuse of discretion standard, it still should reverse the Superior Court's orders granting the motions to strike because both were entered for untenable reasons. *See Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006) ("A trial court abuses its discretion when its decision or order is...exercised for untenable reasons. Untenable reasons include errors of law"). Consequently, regardless of which standard of review this Court applies, reversal of the Superior Court's orders granting Respondents' motions to strike is appropriate.

¹⁰ The LCL Respondents make much of the fact that the 2008 *Southwick* case has not yet been cited in subsequent published decisions, and attempt to brush aside as dicta this Court's application of the *Folsom* rule in that case. *See* LCL Opposition, pp. 13-14. Yet, this Court's application of the same standard of review in *Cornish College* confirms its viability and binding nature. *See Cornish College*, 158 Wn. App. at 215-16.

C. Evarone’s Reliance on *Res Ipsa Loquitur* was Proper, and the Superior Court’s Order Striking His Arguments was Erroneous.

1. Invocation of *res ipsa loquitur* in opposition to summary judgment is proper.

The Superior Court’s order striking Evarone’s *res ipsa loquitur* argument was reversible error regardless of the standard of review. In Washington, *res ipsa loquitur* is not a separate claim, cause of action, or theory of recovery, but a mere rule of evidence. *See Chase v. Beard*, 55 Wn.2d 58, 65, 346 P.2d 315 (1959), *rehearing denied, overruled on other grounds in Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984); *see also Morner v. Union Pac. R. Co.*, 31 Wn.2d 282, 290-91, 196 P.2d 744 (1948); *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 789, 929 P.2d 1209 (1997); *Robison v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 563, 72 P.3d 244 (2003). As such, our courts have consistently held that it is appropriate to invoke *res ipsa loquitur* for the first time in opposing summary judgment. *See, e.g., Curtis v. Lein*, 169 Wn.2d 884, 887, 239 P.3d 1078 (2010); *Ripley v. Lanzer*, 152 Wn. App. 296, 305, 215 P.3d 1020 (2009).¹¹

¹¹ This view is well-entrenched in other persuasive authority. *See, e.g.,* 65A C.J.S. NEGLIGENCE § 854 (2010) (“[r]es ipsa loquitur is a procedural doctrine, tool, or convenience. It is a rule of evidence or method of proof and is not a rule of pleading. *A plaintiff may invoke it though he or she does not plead it*”) (emphasis added).

Respondents' Oppositions essentially ignore the foregoing authority. In fact, Respondents have provided no legitimately distinguishing authority, and Evarone is aware of none. Instead, Respondents fall back on general—and inapplicable—cases about failures to plead causes of action or theories of recovery. *See* Nuprecon Opposition, pp. 8-9; LCL Opposition, pp. 27; and Fruhling Opposition, p. 29. Such cases have no bearing, because *res ipsa loquitur* is neither a cause of action nor a theory of recovery.

The Fruhling Respondents also argue, as they did in passing below, that Evarone should have disclosed in discovery that he might rely on *res ipsa loquitur*. *See* Fruhling Opposition, pp. 29-31. Yet, they have not pointed to a specific discovery request that they assert would have required Evarone to mention *res ipsa loquitur*.¹² The Fruhling Respondents' attempt to distinguish the cases Evarone cited fails because it is predicated on the insinuation that Evarone's discovery conduct was somehow improper. It was not.

Because the Superior Court's order striking Evarone's *res ipsa loquitur* arguments lacked a basis in law, it must be reversed.

¹² In point of fact, a careful review of Fruhling's discovery requests indicates that Fruhling did not propound any discovery requests that would have elicited such a response from Evarone. *See* CP 225-34.

2. *Res ipsa loquitur* applies here.

Res ipsa loquitur applies here and makes a prima facie case for Evarone's negligence-based claims—without requiring him to establish the applicable standards of care and their breach. *See, e.g., Metropolitan Mortg. & Securities Co., Inc. v. Washington Water Power*, 37 Wn. App 241, 243, 679 P.2d 943 (1984) (the doctrine “provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury”); *Ripley*, 152 Wn. App. at 305-6. The doctrine of *res ipsa loquitur* applies when the evidence shows that (1) the occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the occurrence. *See Curtis*, 169 Wn.2d at 889.

Here, all three elements of the doctrine of *res ipsa loquitur* are met. First, there was evidence of *fresh* cracking and *fresh* soil settlement on Evarone's property that occurred during and after the construction project at issue. *See, e.g., CP* 197, 200, 210-12, 309, 451-53. Moreover, a jury could have found that such fresh cracking and settlement on property next to a construction project would not have occurred but for someone's negligence. Respondents argue, but provide no evidence, that the fresh

cracking might have been caused by something other than Respondents' activity. See LCL Opposition, pp. 25-26; Fruhling Opposition, pp. 33-34; Nuprecon Opposition, pp. 10-11. Respondents ignore Evarone's evidence of fresh soil settlement, and offer no evidence that it could have been caused by anything but their own activity. See LCL Opposition, pp. 25-26; Fruhling Opposition, pp. 33-34; Nuprecon Opposition, pp. 10-11. This Court should find that the first prong of *res ipsa loquitur* is met.

Second, Evarone addressed exclusivity by noting that the Respondents were collectively responsible for the project that damaged his property. See Appellant's Opening Brief, p. 30. At a minimum, the LCL Respondents cannot evade a finding of exclusivity when the project was conducted at their behest. See *Curtis*, 169 Wn.2d at 893 fn. 1. Moreover, Respondents' argument that exclusivity is unavailable because Evarone acted to shield his property from further harm is unavailing. The exclusivity prong focuses on the "instrumentality producing the injury," not on the damaged property itself. See *Cusick v. Phillippi*, 42 Wn. App. 147, 155, 709 P.2d 1226 (1985) (addressing damage to apples allegedly resulting from storage conditions prior to sale). In *Cusick*, plaintiffs controlled the duration of storage for their apples, which was the alleged instrumentality of harm. See *id.* at 155-56. Because they controlled when the apples were sold, and thereby removed from the storage they alleged

caused the harm, they could not prove exclusivity. *See id.* Here, the LCL Respondents attempt to twist that logic to penalize Evarone for acting to avoid further harm rather than passively sitting by and watching it occur. *See* LCL Opposition, p. 27. This Court should not allow that argument to prevail, but should find that the exclusivity prong was met.¹³

Third, there is no *evidence* that Evarone's actions (or alleged omissions) were responsible for the harms that arose during the construction project. Moreover, as a case the Fruhling Respondents cite notes, "[w]ith the advent of comparative fault, the third element [of *res ipsa loquitur*] has little relevance and is generally merged into the second element." *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 177, fn. 2, 947 P.2d 1275 (1997). To the extent it considers the third factor of *res ipsa loquitur*, the Court should find that it is met.

Because Evarone has established the elements of *res ipsa loquitur*, this Court should find that he is entitled to rely upon the doctrine when this matter proceeds on remand. As such, Evarone's claims should be revived for the jury to address at trial.¹⁴

¹³ The Fruhling Respondents' argument about exclusivity misses the mark. First, it is merely argument. Fruhling cites no evidence. Second, it addresses only natural forces acting on Evarone's property, not the demolition and construction activity at issue in this dispute. *See* Fruhling Opposition, p. 34.

¹⁴ As Evarone has noted, his trespass and lateral support claims survive with or without *res ipsa loquitur*.

D. Genuine Issues of Material Fact Precluded Summary Judgment.

Evarone met the evidentiary burden for his claims¹⁵ to survive, and summary judgment was improper in the face of numerous genuine issues of material fact. *See* CR 56(c). Regarding Evarone's negligent destruction of property claim, the elements of duty and breach should have been met by the doctrine of *res ipsa loquitur*. *See Curtis*, 169 Wn.2d at 889. Moreover, *inter alia*, there was evidence of new damage to Evarone's property that was first detected *after* the construction project was begun.¹⁶ *See, e.g.*, CP 197, 200, 316. A reasonable jury could have concluded that causation and damages were thereby established, too. Accordingly, there were sufficient genuine issues of material fact to preclude summary judgment on Evarone's negligence claim.

Similarly, Evarone met his burden on his nuisance claim. As with his negligence claim, the elements of duty and breach for Evarone's nuisance claim should have been met by *res ipsa loquitur*. Moreover,

¹⁵ The basis (or bases) for the Superior Court's dismissal with prejudice is unclear. To the extent it dismissed certain claims as duplicative of others, it erred given that the elements and evidence are not the same.

¹⁶ For example, *Respondents* submitted exhibits containing evidence that the damage to Evarone's property was caused by the project. *See, e.g.*, CP 294; 295-99; 309; 377-79; 453, 455, 466. Respondents' exhibits alone created issues of material fact that would preclude summary judgment. This evidence was independent of the declarations of Evarone's experts. Further, Evarone's experts' declarations also provided *factual* observations of what they believed to be fresh cracking and/or the widening of some cracks during the project at issue. *See* CP 621-623, 698-702.

given the evidence of noise, vibration, dust, and overspray emitted by the construction project, it is unclear how the Superior Court could properly have concluded—as a matter of law—that Respondents’ actions *did not* rise to the level of unreasonableness.¹⁷ Given that the emissions that reached Evarone’s property from the construction site were caused by that construction and caused measurable harm, summary judgment would be improper on his nuisance claim, as well.

Evarone met his burden on his trespass claim. It is undisputed that Respondents intended the demolition and construction activity that produced the vibrations and other trespasses complained of here. A reasonable jury could have concluded that the *effects* of those forces were so substantially certain, and by definition also foreseeable, that they were intended.¹⁸ *See, e.g., Bradley*, 104 Wn.2d at 683-84. Moreover, a reasonable jury could have concluded that the fresh cracking and precipitation of both dust and overspray onto Evarone’s property constituted actual and substantial damages. *See, e.g., id.* at 686-87 (noting that trespass liability has been found based on harm caused by soil

¹⁷ *See* Appellant’s Opening Brief, III.A.

¹⁸ Conversely, it is difficult to imagine how the Superior Court could have concluded to the contrary as a matter of law, as required for summary judgment to be appropriate. *See* CR 56(c).

vibrations and that foundation cracking is real damage to a possessor of land).

Sufficient genuine issues of material fact existed to preclude the entry of summary judgment on Evarone's negligence, trespass and nuisance claims. Because the Superior Court entered summary judgment despite these genuine issues of material fact, it erred and should be reversed.

E. Evarone's Lateral Support Claim Should Have Survived Summary Judgment.

Genuine issues of material fact should also have precluded entry of summary judgment on Evarone's lateral support claim. Moreover, the LCL Respondents misinterpret Washington law regarding lateral support. In Washington, lateral support is both a common law and a constitutional right.¹⁹ A defendant who removes support for land "renders himself liable to the landowner for the resulting damage, not only to the land, *but also the improvement.*" See *Bay v. Hein*, 9 Wn. App. 774, 776, 515 P.2d 536 (1973) (emphasis added); see also *Simons v. Tri-State Const. Co.*, 33 Wn. App. 315, 319, 655 P.2d 703 (1982) (provided the shifting of the soil is not caused by the weight of the improvements themselves). Summary judgment is inappropriate when it has not been established whether a

¹⁹ See *Klebs v. Yim*, 54 Wn. App. 41, 46, 772 P.2d 523, fn. 1 (1989) (citing Const. art. 1 §6 (amendment 9)).

landowner's soil (and improvements) settled under its own weight as a result of a loss of lateral support or because of the superimposed weight of the buildings themselves. *See Simons*, 33 Wn. App. at 321.

Here, it is undisputed that Respondents' construction project involved the demolition of existing structures and the excavation of a building site by 30-40 feet within 15 feet of Evarone's property. *See* CP 314. Further, Respondents' own summary judgment papers contained evidence that *new* damage to Evarone's property occurred during and after Respondents began their demolition and excavation work. *See, e.g.*, CP 316. Given this evidence, and viewing all of the inferences in the light most favorable to Evarone, summary judgment on his lateral support claim was inappropriate and should be reversed.

F. The Superior Court Erred In Excluding the Testimony of Evarone's Experts

The Superior Court erred in excluding the testimony of Evarone's experts. This Court should review the Superior Court's erroneous order striking this expert testimony *de novo*. *See Southwick*, 145 Wn. App. at 297. It should reverse the Superior Court's order excluding that testimony.

1. Evarone's experts were qualified to render the opinions they provided.

Evarone's experts were qualified to speak to the *effects* on his property of the forces generated by Respondents' activities, and should have been allowed to testify on those issues.²⁰ Witnesses may qualify as experts based on knowledge, skill, experience, training, or education. *See* ER 702; *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *State v. McPherson*, 111 Wn. App. 747, 762, 46 P.3d 284 (2002). A court looks first to a potential expert's qualifications, and then to whether his testimony would help the fact-finder. *See Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995); ER 702. After the threshold under ER 702 is met, questions about qualifications go to weight, not admissibility. *See, e.g., Keegan v. Grant County Public Utility Dist. No. 2*, 34 Wn. App. 274, 283-84, 661 P.2d 146 (1983).

Here, there should be no reasonable question that Dan Fenton, a structural engineer, was qualified to opine about the *effects on structures* of vibrations and other forces.²¹ CP 612. Nor should there be any

²⁰ The Court's interlineations on the order indicate that only ¶9 of Wentworth's declaration was actually stricken based on lack of foundation. *See* CP 960. Accordingly, Evarone argues here in support of his experts' qualifications simply out of an abundance of caution.

²¹ The LCL Respondents misconstrue this to mean that Evarone has contended that "Fenton's experience as a structural engineer made him qualified to opine about vibration and soil movement." *See* LCL Opposition, p. 34. Fenton's opinions primarily deal

reasonable question that Todd Wentworth, a geotechnical engineer, was qualified to testify about the *effects of* vibration on soil movement and the *effect of* that soil movement on Evarone's property. CP 689-91, 695-96. Respondents' notion that either of these men had to be a vibration, demolition, or construction expert to speak to these *effects* is unsupported by law. To the extent the Superior Court's decision to strike the testimony of Evarone's experts was based on allegations that their qualifications were somehow inadequate, it was erroneous and should be reversed.

2. Evarone's experts' declarations were consistent with their deposition testimony.

In order for a later declaration to be insufficient to create a genuine issue of material fact, it must *clearly* contradict prior testimony presenting "clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact[.]" See *Overton v. Consolidated, Ins., Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002) (citing *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)). Potential inconsistencies "do not rise to the level of *clear contradiction* necessary to invoke the *Marshall* rule." *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 322, 14 P.3d 789 (2000) (emphasis added).

instead with the *effects* of those forces on the structures on Evarone's property, about which he, as a structural engineer, is well-qualified to opine.

Here, Respondents take the statements of Evarone's experts out of context in order to suggest "clear contradictions" where none existed. To the extent Fenton testified during his deposition that he would not opine about earth movement and soil sloughing, he did so as those issues related to a rockery and retaining wall, not generally regarding Evarone's entire property. CP 730-45.²² The LCL Respondents effectively concede the limited scope of Fenton's allegedly contradictory statements before arguing that Fenton "testified that he would not provide *any opinions* about earth movement[.]" LCL Opposition, p. 32 (emphasis added). The allegedly contradictory statements in Fenton's subsequent declaration do not rise to the level of "clear contradiction." *See Berry*, 103 Wn. App. at 322. As such, the Superior Court erred in refusing to consider them.

Respondents also overreach on the alleged contradictions in Wentworth's testimony. Wentworth indicated during his deposition that he did not know *how much* wider the construction project caused cracks in Evarone's property to grow. CP 721-22. That testimony did not preclude an opinion that the cracks nevertheless had been widened by the

²² If the Court nevertheless determines that some of Fenton's later statements contradicted his deposition testimony, Evarone asks that this determination be limited solely to his opinions regarding the rockery, not to the entire affected property.

project.²³ *See id.* Nor did Wentworth’s testimony about cracking in the slab on grade preclude an opinion that those cracks could allow the infiltration of surface water. *Compare* CP 778-78 and 690-91. Finally, despite the LCL Respondents’ attempt to spin Wentworth’s testimony to the contrary, they can point to no statement precluding him from concluding that the construction project significantly increased runoff onto Evarone’s property. There were no clear contradictions in Wentworth’s declaration, and the Superior Court erred in striking it on summary judgment.

Because nothing in the declarations of Evarone’s experts was in “clear contradiction” to their deposition testimony, the *Marshall* rule did not apply, and the Superior Court should not have disregarded the testimony in those declarations. *See Berry*, 103 Wn. App. at 322. It erred in doing so, and this Court should reverse the Superior Court’s order striking that testimony.

²³ In fact, Wentworth’s report, an exhibit to one of the Respondents’ declarations in support of summary judgment, stated that vibrations from the project were the most likely reason for this widening. *See* CP 295-99. He also so testified during his deposition. *See* CP 453; 466. Similarly, Fenton’s Project Memorandum, an exhibit in support of Fruhling’s motion for summary judgment, noted that the fresh damage he observed to Evarone’s property was consistent with structural damage caused by vibration. *See* CP 210-12. Moreover, a declaration submitted by Fruhling included reports from an elevator inspection contractor documenting fresh cracking that spread measurably during the project. *See* CP 197, 200.

G. The Superior Court Erroneously Struck Evarone's Joint and Several Liability Arguments.

The Superior Court also erred in striking Evarone's invocation of joint and several liability. In Washington, a finder of fact must allocate fault when multiple defendants are found liable. *See* RCW 4.22.070. Bafflingly, the Fruhling Respondents assert that *plaintiffs* must plead joint and several liability as a theory or waive it.²⁴ *See* Fruhling Opposition, pp. 36-38. The argument appears to be that, if defendants must invoke their allocation rights, then, out of fairness, courts must also impose a pleading burden on plaintiffs. *See id.* The Fruhling Respondents cite no authority actually standing for that proposition. If the Superior Court ruled based upon the Fruhling Respondents' unsupported argument, its decision was erroneous and must be reversed.

III. CONCLUSION

For the foregoing reasons, Evarone respectfully requests that this Court reverse the Superior Court's erroneous decisions.²⁵ Evarone also asks that this Court remand this matter back to the Superior Court for proceedings consistent with the rulings he has requested.

²⁴ The Fruhling Respondents do not explain how there could be any issues with lack of proper notice such that "trial by ambush" would be a concern when Evarone asserted the same claims against all of the defendants.

²⁵ The Court should also deny the Fruhling Respondents' request for attorneys' fees because Evarone's arguments are meritorious and because reasonable minds can obviously differ on the issues presented in his appeal.

Respectfully submitted this 24th day of June, 2011.

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PROOF OF SERVICE

I caused a copy of the foregoing APPELLANT'S REPLY BRIEF to be served today, on the following via the method indicated:

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DATED this 24th day of June, 2011.

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