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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 OPENING BRIEF

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I. INTRODUCTION

In late 2005, Respondent Horizon House (“Horizon”) retained Respondents Lease Crutcher Lewis (“LCL”) and Seneca Real Estate Group (“Seneca”) as the general contractor and development manager respectively for a large-scale construction project (the “Project”) in Seattle. LCL, in turn, entered into subcontracts with Respondent Fruhling, Inc. (“Fruhling”) for excavation and soil removal, and with Respondent Nuprecon LP (“Nuprecon”) for demolition work on the Project.

The Project comprised the demolition of two existing residential structures and the construction of a new 20-story tower, consisting of an apartment complex and health center, on the site formerly occupied by the two demolished structures. Demolition work commenced in late August of 2005 and construction work on the Project continued until approximately September of 2007.

Appellant Jack Evarone (“Evarone”) is the owner of the Terri Ann Apartments, a residential apartment building located adjacent to the Project site. During the course of the work on the Project, excessive vibrations, dust, overspray, and diverted surface water caused damage to the Terri Ann Apartments, including significant structural cracking, soil erosion, and the deterioration of a retaining wall. Additional damage to the Terri Ann continued to occur after the Project was completed, as the

ground settled under the weight of the new structure, and diverted surface water further undermined the ground around the Terri Ann. Due to the damage caused by the Project, the value of the Terri Ann Apartments has been significantly decreased.

Evarone commenced his lawsuit over the damage the Project had caused to his property in October of 2008, just over a year after construction work on the Project was completed, and just months after the Certificate of Occupancy for the new structure was issued to Horizon by the City of Seattle. Having included several “Doe” defendants in his initial Complaint, Evarone subsequently amended his Complaint in April of 2009 to specifically name Fruhling and its sister company, Respondent Fruhling Sand & Topsoil, Inc. (“FST”) as defendants.

In mid-2010, the Respondents moved separately for summary judgment, alleging, *inter alia*, that the statutes of limitations for Evarone’s claims against them had run and that Evarone’s claims also failed on their merits. Evarone opposed summary judgment, asserting that, pursuant to controlling Washington authority, the statute of limitations for his claims did not begin to run until construction on the Project was completed. Evarone also addressed Respondents’ arguments on the merits, including by making arguments dealing with the doctrine of *res ipsa loquitur* and Washington state law regarding joint and several liability in cases

involving multiple defendants. Evarone also submitted two expert declarations in opposition to Respondents' motions for summary judgment. In addition to providing expert opinions, the declarations of Evarone's experts also contained statements indicating the existence of genuine issues of material fact.

Respondents moved to strike Evarone's arguments regarding *res ipsa loquitur* and joint and several liability on the ground that they had not been pled in Evarone's Complaint. Respondents also moved to have certain portions of Evarone's expert witnesses' declarations stricken on the grounds that Evarone's experts were allegedly unqualified to render their opinions, and that the statements in the experts' declarations allegedly conflicted with their deposition testimony. Prior to hearing oral argument on the Respondents' motions for summary judgment, the Superior Court granted all of Respondents' motions to strike. The Superior Court then entered summary judgment on behalf of all of the Respondents. The Superior Court subsequently denied Evarone's motion for reconsideration of its entry of summary judgment.

The Superior Court erred on each of these rulings. First, summary judgment was improper given controlling Washington authority that tolled the statutes of limitations on Evarone's claims until the Project was actually completed. Second, the Superior Court abused its discretion in

striking Evarone's arguments about *res ipsa loquitur* and joint and several liability because its rulings were contrary to Washington case law and statutory law respectively. Third and finally, the Superior Court erred in striking the testimony of Evarone's experts. Evarone's experts were well qualified to render the opinions in their declarations, and the opinions in those declarations were not directly contradictory of their deposition testimony. Accordingly, those expert declarations should have been considered in opposition to Respondents' motions for summary judgment.

This Court should reverse the Superior Court's orders 1) striking Evarone's *res ipsa loquitur* and joint and several liability arguments; 2) striking the testimony of Evarone's experts; 3) granting summary judgment; and 4) denying reconsideration. This Court should also remand this matter to the Superior Court for proceedings consistent with the foregoing rulings.

II. ASSIGNMENTS OF ERROR

1. **Statutes of limitations.** Should this Court reverse the Superior Court's entry of summary judgment when the Washington State Supreme Court has held that causes of action for damage to real property caused by construction on adjacent property accrue only when such a construction project is actually completed?

2. **Res Ipsa Loquitur.** The doctrine of *res ipsa loquitur* is an evidentiary rule that allows for an inference of negligence where it applies. It is not an independent claim, cause of action, or theory of recovery which must be pled in a complaint. Should this Court reverse the Superior Court's order striking Evarone's arguments regarding the doctrine of *res*

ipsa loquitur when the Superior Court ruled based upon an erroneous interpretation of Washington law?

3. **Joint and Several Liability.** Washington's legislature has determined that in all actions involving the fault of more than one entity, the trier of fact shall determine the percentage of the total fault attributable to every entity that caused the plaintiff's damages. There is no legal basis for concluding that such a statutory requirement could be waived because it was not explicitly pled in a plaintiff's complaint. Should this Court reverse the Superior Court's order striking Evarone's arguments regarding joint and several liability when the Superior Court's ruling disregarded a controlling Washington statute?

4. **Expert Witness Testimony.** Should this Court reverse the Superior Court's order striking the declarations of Evarone's expert witnesses when those experts were qualified to render the opinions they did, and when their declarations were not directly contradictory of their deposition testimony?

III. STATEMENT OF THE CASE

A. The background of the dispute

Respondent Horizon House is a residential retirement community in the City of Seattle. CP 3. Horizon House's property is located in the First Hill neighborhood at 900 University Street, which is bordered by Freeway Park, University Street, and Terry Avenue. CP 312. Until 2005, Horizon House's facility included a multi-story building. *Id.* To the north of that building were the Le Roi Apartments, a parking lot, and the Terri Ann Apartments ("Terri Ann"), respectively. *Id.* Horizon House decided to expand its facility by replacing its existing building with a 20-story tower, comprising an apartment complex and health center, to be built on the land that was then occupied by the Le Roi Apartments and the adjacent

parking lot. *Id.* Horizon House retained Seneca to serve as the development manager for the Project, and LCL to serve as its general contractor. *Id.* LCL hired Fruhling as its subcontractor for excavation and soil removal, and Nuprecon as its subcontractor for demolition work. *Id.*

Work on the Project began on August 29, 2005. CP 312. The first stage of the Project was the demolition of the Le Roi Apartments and the old Horizon House building. CP 313-14. The demolition work of the old Horizon House building, in particular, involved the removal of a reinforced concrete structure followed by work onsite to break up the resulting slabs for transport away from the Project site. CP 676. After demolition was completed, the site of the new Horizon House building was excavated to a depth of 30-40 feet, with the edge of the excavation approximately 15 feet south of the Terri Ann property line. CP 314.

Shortly after work on the Project began, Evarone, the owner of the Terri Ann, notified LCL about his concerns regarding vibrations from heavy equipment that were shaking his building on the adjacent property. CP 314-15. Evarone also expressed concern regarding dust that he believed had drifted from the Project site onto his property, as well as visible cracking occurring in the Terri Ann's building and driveway. *Id.*

Evarone then began retaining engineers and consultants to monitor and report on damage to the Terri Ann. CP 315. In October of 2005,

Evarone hired engineer Dan Fenton (“Fenton”) to monitor structural damage to the building. *Id.* Fenton inspected the Terri Ann on October 28, 2005, and continued to monitor it through 2009. CP 315-16. He also provided Evarone periodic reports regarding his findings. *Id.* at 316. Fenton’s report in February of 2006 noted cracking and loss of support in various concrete components on the Terri Ann site. CP 614-19; 667. A subsequent report, in March of 2006, noted that the Terri Ann had sustained recent damage that Fenton believed was consistent with vibration caused by the adjacent Horizon House construction. CP 621-23.

Evarone also retained Vertical Transportation Services (“VTS”) to inspect the Terri Ann’s elevators. CP 316. VTS inspected the elevators on three occasions between the end of October 2005 and February 2006. *Id.* VTS reported its findings to Evarone after each inspection, including identifying new cracking and the spreading of existing cracking. *Id.*

The Project was completed in approximately September of 2007. CP 593. Fenton continued to visit and inspect the Terri Ann site for damage for two more years. CP 316. He drafted two additional reports to Evarone regarding his findings, on March 10, 2008, and May 6, 2009, respectively. CP 625-6; 629. Each of these reports noted additional damage to the Terri Ann. *See id.*

B. The procedural history prior to appeal

Evarone brought his lawsuit regarding the damage to the Terri Ann Apartments on October 23, 2008, just over a year after the Project was completed. CP 1-8. He subsequently filed a First Amended Complaint on April 7, 2009, adding Respondents Fruhling and FST as defendants.¹ CP 58-65. Evarone asserted five causes of action against all of the defendants, including causes of action for: 1) loss of lateral support; 2) negligent destruction of property; 3) trespass to land; 4) nuisance; and 5) diminished value.² CP 62-64.

The Respondents filed three separate motions for summary judgment against Evarone. CP 130-47; 235-43; 310-33. Fruhling and FST (hereinafter the “Fruhling Respondents”) filed one motion for summary judgment. CP 130-47. Nuprecon LP and Nuprecon GP (hereinafter the “Nuprecon Respondents”) filed a second such motion. CP 235-43. LCL, Seneca, and Horizon House (hereinafter the “LCL Respondents”) filed a third motion for summary judgment. CP 310-33. Each group of defendants asserted, *inter alia*, that the statutes of

¹ FST represented in its motion papers before the Superior Court that it merely received rubble and other materials removed from the Project, and that it never performed work on the Project site. Accordingly, and based upon those representations, Evarone does not appeal the Superior Court’s entry of summary judgment against FST.

² Evarone recognizes that his claim for diminished value is more properly framed as a measure of damages than as a freestanding claim. Accordingly, Evarone continues to seek recovery of damages for the diminished value of his property as part of his remaining claims.

limitations for Evarone's claims against them had run before Evarone commenced his action against them, and that Evarone's claims also failed on their merits. *See* CP 130-47; 235-43; 310-33.

Evarone responded to the three motions for summary judgment by seeking additional time for discovery pursuant to CR 56(f), which was denied. CP 630-33. Evarone also responded substantively to the three summary judgment motions with two opposition briefs. CP 640-61; 664-86. One of Evarone's briefs addressed the Respondents' arguments regarding the statute of limitations, the other addressed causation and related issues. *See id.* In addition to addressing the merits of his claims, and pointing out the existence of numerous genuine issues of material fact, Evarone's opposition on causation included arguments about the applicability of Washington's joint and several liability statute, RCW 4.22.070, and the argument that the doctrine of *res ipsa loquitur* allowed the inference of negligence given the facts of the dispute. CP 684-85. The same opposition included arguments based upon the declarations of Fenton, Evarone's retained structural engineer, and Todd Wentworth ("Wentworth"), a geotechnical expert Evarone retained during the lawsuit. CP 664-86.

The Fruhling Respondents responded to Evarone's arguments regarding *res ipsa loquitur* and joint and several liability by moving to

strike them. CP 706-8. The Fruhling Respondents argued that Evarone had not previously asserted a “cause of action” for *res ipsa loquitur* or a “theory” of joint and several liability, and that he should not be allowed to assert either in opposition to summary judgment or at trial. CP 706. The Nuprecon Respondents joined the Fruhling Respondents’ motion in its entirety, but the LCL Respondents joined the Fruhling Respondents’ motion to strike only on the issue of *res ipsa loquitur*. CP 781-82, 831.

The LCL Respondents also moved to have portions of the declarations of Fenton and Wentworth stricken based on their assertions that those declarations contradicted those experts’ prior deposition testimony and that neither Fenton nor Wentworth was qualified to opine on the issues at stake. CP 712-23. The remaining Respondents joined in this motion to strike as well. CP 826-7; 831-32.

At a hearing conducted on July 30, 2010, the Superior Court ruled from the bench on the Respondents’ motions to strike before it heard oral argument on the motions for summary judgment. RP 5:2-25. First, the Superior Court struck Evarone’s arguments regarding *res ipsa loquitur* and joint and several liability “[b]ased upon the arguments and the case law set forth in the defendants’ briefs[.]” RP 5:2-8. In its written order granting that motion to strike the Superior Court held that “Plaintiff did not plead Res Ipsa Loquiter [*sic*] or Joint and Several Liability,

Defendants did not have reasonable notice, based on the pleadings, assertion of these legal theories is untimely, and the court strikes them and bars their use in this case.” CP 957. Neither at oral argument nor in its written order did the Court address the merits of either *res ipsa loquitur* or joint and several liability.

Regarding the declarations of Evarone’s experts, the Superior Court stated that it would “not consider any portions of the declarations for which exclusion is sought, which in the Court’s view, ultimately do, in fact, contradict clear deposition testimony.” RP 5:22-25; *see also* CP 959-60.

After hearing oral argument on Respondent’s motions for summary judgment, the Superior Court granted summary judgment against Evarone and in favor of all of the Respondents. CP 961-69. Evarone moved for reconsideration of the Superior Court’s entry of summary judgment, but the Superior Court denied that motion on September 30, 2010. CP 970-81; 1775-78. Evarone then brought this appeal on October 29, 2010.

IV. ARGUMENT

A. **Standard of review.**

This Court reviews a Superior Court’s decision granting summary judgment de novo. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 563, 178 P.3d 1054 (2008). Summary judgment is appropriate only if

all the pleadings, depositions and affidavits “show 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). The moving party therefore has the burden to prove that no factual dispute exists that might affect a trial’s outcome. *See Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475-76, 21 P.3d 707 (2001). In reviewing an order granting summary judgment, Washington appellate courts view all facts and reasonable inferences therefrom in the light most favorable to the moving party. *See id.*; *see also Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

A motion to strike is generally reviewed for abuse of discretion. *See Southwick v. Seattle Police Officer John Doe*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008). However, “when a motion to strike is made in conjunction with a motion for summary judgment, [this Court reviews] de novo.” *Id.*

The Superior Court’s denial of a motion for reconsideration is reviewed for abuse of discretion. *See Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637 (1997). This Court has held that “[a] trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.” *Council House v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006) (finding abuse of discretion in

denial of tenant's fees request without legally tenable grounds for decision).

Applying the relevant standards of review, this Court should conclude that the Superior Court erred in granting summary judgment, in granting Respondents' motions to strike, and in denying Evarone's motion for reconsideration. This Court should therefore reverse the Superior Court on those rulings, and remand this matter to the Superior Court for proceedings consistent with this Courts' rulings herein.

B. This Court should reverse the entry of summary judgment because Washington's project completion rule tolled the accrual of the applicable statutes of limitations.

The Superior Court erred to the extent that its entry of summary judgment was based on the conclusion that Evarone's claims were time-barred by the applicable statutes of limitations.^{3,4} To the extent that it so

³ Because the Superior Court did not enter detailed findings of fact or conclusions of law, and did not provide any oral rulings from the Bench on Respondents' summary judgment motions, it is not possible to determine the specific bases on which summary judgment was granted. However, all of the Respondents' summary judgment briefs below relied heavily upon the argument that the statute of limitations had run on all of Evarone's claims against them. See CP 130-47; 235-43; 310-33.

⁴ Evarone's claims are governed by a mix of two and three year statutes of limitations. See *Marshall v. Whatcom County*, 143 Wash. 506, 507, 255 P. 654 (1927) (3 year statute of limitations for loss of lateral support); *Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006) (2 year statute of limitations for negligent damage to real property); *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985) (3 year statute of limitations for intentional trespass); *Id.* at 684 (2 year statute of limitations for nuisance).

ruled, the Superior Court disregarded unequivocal and controlling Washington Supreme Court authority to the contrary.

On a fact pattern nearly identical to the present dispute, our Supreme Court ruled that when a plaintiff suffers damage to his real property caused by construction on adjacent property, his causes of action do not accrue until after the project is completed.⁵ *See Vern J. Oja & Assoc. v. Washington Park Towers, Inc.*, 89 Wn.2d 72, 75-6, 569 P.2d 1141 (1977). In the *Oja* case, a condominium apartment building was built on property adjacent to property owned by the plaintiff. *See id.* at 73-4. The construction project stretched from 1966 through 1969, and involved pile-driving and other heavy construction activity. *See id.* at 74. The plaintiff filed his action approximately two years after the construction of the condominium building was completed. *See id.* At trial, judgment was entered for the plaintiff. *See id.* The defendant appealed, and the plaintiff cross-appealed. *See id.* The central issue on appeal was when the plaintiff's cause of action had accrued. *See id.* The *Oja* court ruled for the plaintiff and held that:

⁵ In establishing this rule as the law of the state, our Supreme Court expressly held that the rule was consistent with a long line of its prior rulings. *See Oja*, 89 Wn.2d at 75 (citing *Gillam v. Centralia*, 14 Wn.2d 523, 128 P.2d 661 (1942); *Papac v. Montesano*, 49 Wn.2d 484, 303 P.2d 654 (1956); *Cheskov v. Port of Seattle*, 55 Wn.2d 416, 348 P.2d 673 (1963); *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975); *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976)). The Supreme Court also held that the fact that some of its earlier cases involved government construction projects was not determinative of the rule's broader application to construction projects on adjacent property. *See id.* at 76.

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. at 75-6 (emphasis added). The policy rationale our Supreme Court stated for this holding was that “[a] different rule would force a plaintiff to seek damages in installments in order to comply with the statute of limitations.” *Id.* at 76.

Although they acknowledged that “*Oja* has not been explicitly overturned,” Respondents nevertheless asserted two creative—and legally untenable—arguments for their view that the project completion rule *Oja* articulated should not be applied to the facts of this dispute. CP 322-324. First, Respondents argued that, despite the broad and explicit language of its ruling, the *Oja* court actually intended to limit the project completion rule solely to trespass claims. CP 323. Respondents cited no authority for that implausible proposition apart from pointing to a single citation to *Oja* for the length of the trespass statute of limitations. *Id.*

Second, Respondents suggested that, even though it had not been expressly overruled, *Oja* had somehow been *implicitly* superseded by

subsequent case law. *Id.* Respondents’ support for that proposition was the absence of subsequent published Washington authority applying the *Oja* rule and the fact that later Washington decisions addressing different legal claims and different fact patterns did not apply the rule.⁶ CP 323-24. However, our Supreme Court does not overrule itself by mere implication, and lower courts are not at liberty to disregard binding Supreme Court authority. “[O]nce [the Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by [the Supreme Court].” *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Lower courts err when they fail to follow such directly controlling authority. *See 1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006); *Green v. Normandy Park*, 137 Wn. App. 665, 692, 151 P.3d 1038 (2007), *as amended on reconsideration in part*. Finally and critically, it is well-established that 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), *affirmed by* *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 208 P.3d 1092 (2009). Absent an express holding to the contrary from the Supreme Court, *Oja* remains controlling authority in cases

⁶ Respondents’ suggestion that *Oja* had been implicitly overruled by the Supreme Court was particularly off the mark when Respondents knew that *Oja* had been cited for the project completion rule in an unpublished Washington appellate case. CP 843-44.

involving damage to real property caused by construction on adjacent property. *See, e.g., Gore*, 101 Wn.2d at 487.

Because the facts of this dispute so closely mirrored the facts in *Oja*, the Superior Court was required to apply the project completion rule the Supreme Court articulated in that case. The Superior Court erred in failing to adhere to that controlling authority. *See 1000 Virginia Limited Partnership*, 158 Wn.2d at 578. Moreover, far from supporting the position that the *Oja* rule should not be applied, the cases Respondents cited in their summary judgment motions were themselves either distinguishable on their facts or entirely congruent with the holding in *Oja*.

1. *Bradley v. American Smelting and Refining Co.* is inapplicable.

The LCL Respondents invoked *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985) for the proposition that the construction project completion rule articulated in *Oja* was somehow implicitly superseded and could not toll the statutes of limitations for Evarone's claims. CP 323. As previously discussed, *supra* at IV.B, our Supreme Court does not overrule its own decisions without explicitly stating that it has done so.⁷ Moreover, the facts and policy underpinnings

⁷ Interestingly, in *Bradley*, the Supreme Court cited *Oja* and then proceeded, in the very same paragraph, to expressly overrule a line of cases that were inconsistent with its holding in the *Bradley* case. *See id.* at 692-93. *Oja* was not among the cases the Supreme Court identifies as overruled in *Bradley*. *See id.* Had the Supreme Court

of *Bradley* are entirely distinguishable and do not apply to Evarone's claims in this dispute. As such, the Supreme Court's holding in *Bradley* had no bearing whatsoever on the dispute that was before the Superior Court.

As a threshold matter, the facts of *Bradley* had no connection to the facts in *Oja*, nor to the facts supporting Evarone's claims against the Respondents. The *Oja* project completion rule expressly applies only to "cases involving damage to real property arising out of construction or activity on *adjacent* property." *See Oja*, 89 Wn.2d at 75 (emphasis added). The affected property in *Bradley* was clearly not adjacent to the property on which the harmful activities originated. *See Bradley*, 104 Wn.2d at 680 ("Plaintiff's property is located some 4 miles north of defendant's smelter"). Nor was the activity on the *Bradley* defendant's property a single construction project, as was the case in both *Oja* and the present dispute. *See id.* Rather, the activity at issue in *Bradley* was ore smelting, which had been ongoing at the same location *since 1890*, nearly a century before the plaintiffs brought suit. *See id.* As such, in *Bradley*, the Supreme Court was addressing a factual scenario far removed from

deemed *Oja* inconsistent with its ruling in *Bradley*, it certainly could have overruled that earlier decision along with the other cases. It chose not to do so.

those which the *Oja* project completion rule was created to address, and its holding in *Bradley* had no application to the facts of Evarone's claims.

Nor did the legal and policy underpinnings of *Bradley* apply to the dispute between Evarone and Respondents. The central claim in *Bradley* was one of intentional *continuing* trespass, based on the precipitation of particulate matter from the defendant's smelter onto the plaintiff's land over the course of many decades. *See id.* at 693-94. Whether such a claim would even be recognized in Washington was a matter of first impression for the *Bradley* court. *See id.* at 692.

In determining that a continuing trespass claim could be brought in Washington, the Supreme Court held that: 1) a three year statute of limitations would apply to continuing trespass claims; 2) the limitations period for such claims would run from the point at which actual and substantial damages had been incurred (*not* from their discovery); but 3) if the trespass continued, additional suits could be brought for damages not previously recovered and occurring within the three years preceding suit. *See id.* at 693-95.

The policy rationale the *Bradley* court articulated for its rulings regarding an intentional continuing trespass was that "it would be improper to expose manufacturers to claims running back for untold years

when the injury many years back may have been inconsequential and the very existence of a cause of action vague and speculative.” *See id.* at 694.

In the construction context, of course, there is no such concern about open-ended claims because Washington law on builders establishes a six-year statute of repose running from the “substantial completion of construction” for claims arising from construction on real property. *See* RCW 4.16.300 and RCW 4.16.310; *see also New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 499, 687 P.2d 212 (1984) (holding that RCW 4.16.310 provides an “absolute limitation on actions”). This statutory period of repose has been on the books in Washington since 1967 in substantially the same form.

Given the factual, legal, and policy distinctions between the situation addressed in *Bradley* and the situations at issue in both *Oja* and Evarone’s dispute with Respondents, the Supreme Court’s holding in *Bradley* had no bearing below. To the extent the Superior Court relied upon arguments based on the rule articulated in *Bradley* exclusively for continuing trespass claims, rather than on the *Oja* construction project completion rule that actually applied, it erred. This Court should reverse the Superior Court to the extent that its entry of summary judgment was based on the erroneous conclusion that the statute of limitations on Evarone’s claims had run.

2. *Pepper v. J. J. Welcome Constr. Co.* is consistent with the Oja project completion rule.

The LCL Respondents also argued that this Court's holding in *Pepper v. J. J. Welcome Constr. Co.*, 73 Wn. App. 523, 871 P.2d 601 (1994), was further support for the proposition that the *Oja* project completion rule was no longer viable. CP 844. Nothing could be further from the truth, as the *Oja* rule would not have saved the first set of claims the plaintiffs brought in *Pepper*.⁸

In *Pepper*, one set of landowners, the defendants, cleared and graded land in 1978 in anticipation of future development. *See Pepper*, 73 Wn. App. at 528-9. Soon afterward, in 1978 and 1980 respectively, other landowners, the plaintiffs, began to observe increased runoff and sediment deposition on their property, which they attributed to the clearing activity on the adjacent property. *See id.* at 528, 539-40.

It was not until some time in 1982, approximately four years after the clearing and grading project on the site was completed, that the short plats for the cleared property were all approved, and a contractor hired to build a road and drainage system. *See id.* at 528. That separate road and

⁸ A ruling by an appellate court in this state could not have any impact on the continued viability of controlling Washington State Supreme Court authority. *See, e.g., 1000 Virginia Limited Partnership*, 158 Wn.2d at 578. Nor is the fact that the Supreme Court denied review of the *Pepper* decision support for the proposition that the Supreme Court had abandoned the *Oja* rule. *See Lunsford*, 139 Wn.App. at 344 (the Supreme Court "will not overrule [its own] binding precedent sub silentio").

drainage system construction project was substantially completed in November 1983. *See id.* There is no indication in the *Pepper* court's opinion that there was any construction or other development activity on the site between 1978 and the initiation of work on the road and drainage system approximately four years later.

Plaintiffs' lawsuit was filed in October of 1986, roughly eight years after the clearing and grading project on the site was completed.^{9,10} *See id.* The trial court dismissed plaintiffs' claims based on damages attributable to the clearing and grading in 1978, but allowed plaintiffs to recover for harms caused in the three years prior to their bringing suit. *See id.* at 538-40. This Court affirmed those rulings. *See id.*

Contrary to what the LCL Respondents argued below, this Court's ruling in *Pepper* is not inconsistent with *Oja*. The clearing and grading project in *Pepper* was completed in 1978, and the harms therefrom noticed soon thereafter. *See id.* at 528. The six-year construction statute of repose, therefore, ran from the completion of that grading project in 1978 until 1984. *See id.* at 538; RCW 4.16.310. Since one of the plaintiffs was already aware of the damage to his property in 1978, when the grading

⁹ A second plaintiff joined the lawsuit in August of 1987, nearly nine years after the completion of the clearing and grading project. *See id.* at 528.

¹⁰ The last lots on the subdivision site were not sold until 1990, and individual lot owners independently continued to conduct clearing and building activities thereafter. *See id.* at 528.

project was completed, he had just two or three years from that point to bring his claims. *See id.* at 538 (citing *Bellevue Sch. Dist. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 118, 691 P.2d 178 (1984)). The second plaintiff appears to have had actual notice of the harm to his property caused by the clearing project some time between 1980 and 1982. *See id.* at 539-40. The subsequent road and drainage system construction project was not even begun until 1982 or 1983, nearly four years after the clearing and grading project was completed.¹¹ *See id.* at 528.

Based on the facts of *Pepper*, the Court could not apply the *Oja* rule, but rather appropriately applied the *Bradley* rule. There is nothing in *Oja* to suggest that its project completion rule would toll the statute of limitations between the completion of one construction project and the initiation of another years later; that the initiation of a subsequent, discrete construction project would reinvigorate time-barred claims; or that the Supreme Court intended its project completion rule to override the builder's statute of repose. This Court's rulings in *Pepper* are, therefore,

¹¹ Applying simple math, by 1982 or 1983, when the subsequent road and drainage construction project began, the first plaintiff's claims based on the 1978 clearing and grading project were already time-barred. *See id.* at 538-39. Moreover, since he had waited until October of 1986 to bring his claims, the statute of repose had also long-since run by the time he brought suit. *See id.*; RCW 4.16.310. The second plaintiff also had notice of the harms caused by the 1978 clearing and grading project before the road and drainage project began, but waited until August of 1987 to join the lawsuit. *See id.* at 528. His claims based on the 1978 grading project would have been time-barred by both the applicable statutes of limitations and likely by the statute of repose, as well. *See id.* at 538-40.

completely congruent with the Supreme Court's holding in *Oja*, and offer no support for Respondents' arguments below on summary judgment.

In summary, the *Oja* rule is still the law in Washington, and that rule applies to the facts of Evarone's dispute with Respondents. Accordingly, the Superior Court erred in failing to apply *Oja* below.

C. This Court should reverse the Superior Court's order striking Evarone's *res ipsa loquitur* argument.

1. Reversal is appropriate because the Superior Court's ruling striking *res ipsa loquitur* was erroneous as a matter of law.

The Superior Court's order striking Evarone's argument regarding the doctrine of *res ipsa loquitur* was based on an erroneous interpretation of the law, and should be reversed. When a motion to strike is made in conjunction with a motion for summary judgment, this Court reviews the resulting order de novo. *See Southwick v. Seattle Police Officer John Doe*, 145 Wn. App. at 297. When a lower court rules based on an error of law, its ruling is untenable, and an abuse of its discretion. *See Council House*, 136 Wn. App. at 159.

In moving for summary judgment, Respondents argued that Evarone's arguments regarding the doctrine of *res ipsa loquitur* in opposition to their motions for summary judgment were somehow improper because that doctrine had not been invoked in Evarone's Complaint. CP 706-8, 781-82, 831. Respondents characterized the

doctrine of *res ipsa loquitur* as either a separate cause of action or a newly asserted theory of recovery. *See id.* The Fruhling Respondents even described its invocation in opposition to their motions as part of “[t]he trial by ambush style of advocacy[.]” CP 707. The LCL Respondents purported to cite authority showing that the Washington Supreme Court had “characterized req [*sic*] ipsa loquitur as a cause of action.”¹² CP 781. Unfortunately, the Superior Court accepted these legally incorrect arguments and granted Respondents’ motions to strike. CP 957. In doing so, the Superior Court erred by disregarding actual and controlling Washington authority that holds to the contrary.

It is well-established in Washington that the doctrine of *res ipsa loquitur* is neither a separate cause of action nor even a theory of recovery distinct from negligence. In fact, its description even as a “doctrine” has been called a “misnomer, for it is a mere rule of evidence, and is not a rule of substantive law...” *Chase v. Beard*, 55 Wn.2d 58, 65, 346 P.2d 315

¹² In fact, the Supreme Court did nothing of the sort. In the passage from *Howell v. Spokane & Inland Empire Blood Bank* cited by the LCL Respondents, the Supreme Court did nothing more than recite the various claims that had been pleaded by the plaintiffs. *See* 114 Wn.2d 42, 45, 785 P.2d 815 (1990). Such a bare recitation of procedural facts, even by the Supreme Court, carries no authoritative weight. *See, e.g., American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 413, fn. 5, 229 P.3d 693 (2010) (“Statements made in passing, taken in isolation, are not holdings of this court”); *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960) (statements of the court not necessary to a decision of the case are *dicta*). The Supreme Court’s approach to the plaintiffs’ *res ipsa loquitur* “claim” later in its opinion demonstrates that it viewed that “claim” simply as another means by which the plaintiffs could potentially have proved up their negligence claim. *See Howell*, 114 Wn.2d at 58.

(1960), *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, 186 P.2d 744 (1948) (“This doctrine constitutes a rule of evidence peculiar to the law of negligence”); *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 789, 929 P.2d 1209 (1997) (“Res ipsa loquitur is a method of proof, not a separate and additional form of negligence”); *Robison v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 563, 72 P.3d 244 (2003) (“res ipsa loquitur is a rule of evidence”).

Moreover, the invocation of *res ipsa loquitur* for the first time in opposition to motions for summary judgment appears to be both routine and perfectly acceptable before the courts of this state. *See, e.g. Curtis v. Lein*, 169 Wn.2d 881, 887, 239 P.3d 1078 (2010) (reversing Court of Appeals and permitting plaintiff to “rely upon *res ipsa loquitur* as evidence of negligence”); *Riley v. Lanzer*, 152 Wn. App. 296, 305, 215 P.3d 1020 (2009). This approach is consistent with persuasive authority, as well. As one such authority has stated, “[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.***” 65A C.J.S. NEGLIGENCE § 854 (2010) (emphasis added; footnote indicators omitted).

Respondents' argument that Evarone's invocation of the doctrine of *res ipsa loquitur* in opposition to summary judgment was somehow improper was baseless, and contradicts the weight of authority to the contrary. The doctrine of *res ipsa loquitur* is nothing more than an evidentiary rule that allows for an inference of negligence when, as here, the right conditions are met. *Res ipsa loquitur* prevents the Superior Court from properly granting summary judgment in favor of Respondents. See *infra* at IV.C.2. Accordingly, the Superior Court's acceptance of Respondents' incorrect legal arguments was error and calls for reversal.

2. The doctrine of *res ipsa loquitur* applies to the dispute below and relieves Evarone of the requirement to provide expert testimony in support of his claims.

Because the Superior Court struck Evarone's arguments regarding *res ipsa loquitur* without any consideration of their merits, the issue of whether the doctrine applies here has not been established. In point of fact, apart from the LCL Respondents, none of the Respondents responded substantively to Evarone's invocation of the doctrine. To the extent that this Court determines that the Superior Court considered this issue on the merits, this Court should reverse the Superior Court by ruling that the doctrine applies and that Evarone is entitled to rely upon it to establish his negligence-based claims at trial. In the alternative, this Court should

remand the issue of the doctrine's applicability for proceedings before the Superior Court.

Whether the doctrine of *res ipsa loquitur* applies to a particular case is a question of law, which this Court reviews de novo. *See Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). The doctrine applies when the evidence shows “(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.” *See id.* (citation omitted). The first element of the doctrine can be established if one of three conditions is met: 1) the act causing the injury is so palpably negligent that it may be inferred as a matter of law; 2) “when the general experience and observation of mankind teaches that the result would not be expected without negligence; and 3) when proof by experts creates an inference that negligence caused the injuries. *See Curtis*, 169 Wn.2d at 891. Where it applies, 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.” *Metropolitan Mortg. & Sec. Co., Inc. v. Washington Water Power*, 37 Wn. App. 241, 243, 679 P.2d 943 (1984);

Curtis, 169 Wn.2d at 892 (“When *res ipsa loquitur* applies, it provides an inference as to the defendant’s breach of duty”). Although the doctrine is ordinarily applied sparingly, its application is appropriate when “the demands of justice make its application essential.” *See Curtis*, 169 Wn.2d at 889-90 (quoting *Tinder v. Nordstrom*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997)). In cases in which the doctrine applies, the plaintiff is generally relieved of the requirement to provide expert testimony. *See, e.g., Ripley*, 152 Wn. App. at 305-6.

Here, had the Superior Court considered Evarone’s *res ipsa loquitur* arguments on their merits, it could and should have ruled that the doctrine applied; this Court should now determine that it does. Only the LCL Respondents opposed the *substance* of Evarone’s *res ipsa loquitur* argument. CP 852-54. Regarding the first element of the doctrine, Evarone put forth evidence that, during the work on the Project and afterward, fresh cracking and soil settlement was detected on the Terri Ann property. *See, e.g., CP 603-29; 689-91*. The LCL Respondents suggested in response just that these harms “could very well have come about through natural processes[.]” CP 853. That argument by the LCL Respondents at best suggests that an issue of fact exists. The Superior Court could and should have found, however, that, based on general experience, fresh cracking and settlement on property adjacent to a

building site would not normally occur in the absence of someone's negligence. *See, e.g., Curtis*, 169 Wn.2d at 891.

The undisputed fact that the Respondents were collectively responsible for the demolition and construction work on the Project could and should have established the second prong of the doctrine, exclusivity of control. *See, e.g., id.* Certainly, there was no evidence put forth by the LCL Respondents that activity by any entities other than those involved in the Project could have caused the damage to the Terri Ann. In response to Evarone's argument on this point, the LCL Respondents, consisting of the site owner, general contractor, and development manager for the Project, merely suggested that the presence of *their subcontractors* on the Project site somehow prevented Evarone from establishing this element. CP 853. However, the fact that other entities worked on the Project site at the LCL Respondents' behest would not have negated the exclusivity element. *See Curtis*, 169 Wn.2d at 893 fn. 1. Further, the LCL Respondents' suggestion that Evarone's steps to mitigate his damages undermined the exclusivity prong is unsupported by law. Evarone should not be denied use of *res ipsa loquitur* because he took necessary steps to avert additional damage to his property. Absent any evidence to the contrary, this Court should find that the exclusivity prong of the *res ipsa loquitur* doctrine is established. Given that there was neither argument nor evidence that

Evarone contributed in any way to the damage to the Terri Ann, the third and final element of *res ipsa loquitur* should be met, as well. *See Curtis*, 169 Wn.2d at 892.

Given that the elements of *res ipsa loquitur* are met, and the demands of justice make its application essential here, this Court should find that Evarone is entitled to rely on the inference of negligence thereby created, and to put his case to a jury.

D. This Court should reverse the Superior Court's order striking Evarone's arguments regarding joint and several liability.

The Superior Court also erred as a matter of law in granting Respondents' motions to strike Evarone's arguments about joint and several liability.¹³ There was no logical or legal basis for the Superior Court's holding that a substantive law enacted by Washington's Legislature could be disregarded merely because a plaintiff did not specifically address joint and several liability in a complaint that named multiple defendants. Accordingly the Superior Court's ruling to that effect was erroneous as a matter of law, whether under the applicable *de novo* standard or as an abuse of its discretion. *See, e.g., Council House*,

¹³ The Fruhling Respondents brought their motion to strike on this basis, and the Nuprecon Respondents joined that motion. CP 706-8; 831 The LCL Respondents declined to join this prong of the Fruhling Respondents' motion to strike.

136 Wn. App. at 159. The Superior Court's order striking Evarone's joint and several liability arguments should be reversed.

Under Washington's legislative scheme, "[i]n *all* actions involving fault of more than one entity, *the trier of fact shall* determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW."¹⁴ RCW 4.22.070(1) (emphasis added). There is no requirement to be found in that statute, or in any other authority cited by Respondents, that a plaintiff must actually *plead* joint and several liability in his complaint in order to avoid waiving his rights under that statute.

Only the Fruhling Respondents actually cited any case law addressing RCW 4.22.070 in arguing that Evarone's arguments about joint and several liability should be stricken. CP 943-44. Neither of the cases the Fruhling Respondents cited actually stands for the proposition that joint and several liability must be pled as a theory of recovery in a plaintiff's complaint, however. The Fruhling Respondents are correct that the cases they cited contain the statement that RCW 4.22.070 "is not self-executing." See *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921(1993); *Henderson v. Tyrrell*, 80 Wn. App.

¹⁴ Title 51 RCW deals with Washington's industrial insurance scheme.

592, 623, 910 P.2d 522 (1996). But both cases made this statement solely in the context of waivers of allocation rights, in procedurally distinguishable situations, *by defendants*. See *Adcox*, 123 Wn.2d at 25-6; *Henderson*, 80 Wn. App. at 623. Neither case has anything to say about a plaintiff's pleading obligations. Nor does either case stand for the proposition that a plaintiff could inadvertently waive his statutory rights under RCW 4.22.070 at the pleading stage.

In order to exercise their statutory allocation rights, defendants, not plaintiffs, must assert the fault of another as a defense and then show the existence of evidence to support that defense. In the *Adcox* case, which involved medical negligence claims, the defendant hospital "failed to claim its right to allocation by producing evidence of the fault of another party" at trial. See *Adcox*, 123 Wn.2d at 25. Instead, the hospital took the position that there had been no negligence, and defended at trial on that basis. See *id.* at 26. It "did not attempt to introduce evidence, or make an offer of proof," that either of the two doctor defendants who settled prior to trial had been negligent. See *id.* at 23. On appeal, the Supreme Court noted that the hospital had had numerous opportunities to make its case for allocation, but had opted not to do so until too late. See *id.* at 26. As such, the hospital was not permitted, after the fact, to complain that it was not afforded allocation. See *id.* Despite the Fruhling Respondents' strained—

and unsupported—argument to the contrary, *Adcox* offers no guidance about what a plaintiff must plead. Moreover, a fair reading of *Adcox* makes it clear that “a claim that more than one party is at fault” coupled with sufficient evidence, is enough to submit the issue of allocation to a jury. *See id.* at 25.

The portion of the *Henderson* case in which that court notes that RCW 4.22.070 “is not self-executing” is nothing more than a discussion of the principle that affirmative defenses, such as fault of a non-party, must generally be set forth in a responsive pleading or be waived. *See Henderson*, 80 Wn. App. at 623-24. The *Henderson* court ultimately affirmed the trial court’s ruling that a defendant who had not asserted the affirmative defense of fault of another, or raised the issue during the first phase of a bifurcated trial, could not introduce evidence of the fault of another as a defense during the second phase of the trial. *Id.* at 624. Like the *Adcox* case, the *Henderson* case offers no guidance on a plaintiff’s pleading obligations. Any suggestion to the contrary regarding either case was merely the Fruhling Respondents’ unsupported gloss.

The Superior Court erred by ruling, without any basis in law, that Evarone waived his rights under RCW 4.22.070 because he did not mention joint and several liability in his Complaint against the various Respondents. This Court should reverse the Superior Court’s order

striking Evarone's arguments under RCW 4.22.070, and should remand this dispute back to the Superior Court.

E. The Superior Court erred in striking the declarations of Evarone's experts.

This Court should reverse the Superior Court's order striking the testimony of Evarone's experts. Because the Superior Court granted Respondents' motions to strike in conjunction with their motions for summary judgment, the standard of review for this order is *de novo*. See *Southwick*, 145 Wn. App. at 297.

1. Evarone's experts were qualified to render the opinions in their declarations in opposition to summary judgment.

Evarone's experts were qualified to render the opinions they did, and the Superior Court should have considered those opinions in opposition to Respondents' motions for summary judgment.¹⁵ Pursuant to ER 702, a witness may qualify as an expert based on his 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). Rule 702 sets forth a two-step inquiry that first examines the potential expert's qualifications, and then looks to whether his testimony would be helpful to

¹⁵ Although Respondents moved to strike Evarone's experts on the basis of both their qualifications and their allegedly contradictory testimony, it is not clear that the Superior Court actually granted their motions to strike on both bases. RP 5:22-25; CP 959-60. Evarone's arguments against this basis for excluding their testimony are therefore offered in an abundance of caution.

the finder of fact. *See Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995). In the appropriate context, practical experience is sufficient to qualify a witness to serve as an expert. *See, e.g., State v. McPherson*, 111 Wn. App 747, 762, 46 P.3d 284 (2002). After the minimum threshold to testify under Rule 702 is met, any questions regarding qualifications go to the weight of an expert's testimony, not its admissibility. *See, e.g., Keegan v. Grant County PUD*, 34 Wn. App. 274, 283-84, 661 P.2d 146 (1983).

Here, Evarone's expert include Fenton, a structural engineer, and Wentworth, a geotechnical engineer. CP 612, 695. Given Fenton's experience, spanning 30 years, he was more than qualified to offer opinions as to the effect of vibration and soil movement during construction on a neighboring structure. CP 612. As a geotechnical engineer, Wentworth was more than qualified to opine on settling caused by vibration and the effects of the resulting loss of support on adjacent structures. CP 689-91, 695-96. Moreover, both men were qualified to consult industry standards and materials; to consult other experts; and to review the opinions of others. To the extent it did so, the Superior Court should not have excluded portions of the declarations of Evarone's experts based on their qualifications.

2. The declarations of Evarone’s experts were not clearly contradictory of prior deposition testimony and should not have been stricken.

The Superior Court erred in concluding that the declarations of Evarone’s experts were in clear contradiction to their deposition testimony, and, moreover, erred in striking portions of those declarations regardless. In Washington, “[w]hen a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given testimony.” *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)). However, mere *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) (citing *Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967 (1998); *see also Safeco, Ins. v. McGrath*, 63 Wn.App. 170, 174-75, 817 P.2d 861 (1991) (reversing summary judgment and finding that subsequent sworn testimony was not in “flat contradiction” with earlier affidavit).

Further, the issue addressed by the *Marshall* rule is whether the information contained in allegedly contradictory declarations is sufficient

to raise a genuine issue of material fact, *not* whether the information may properly be considered by the court at all. *See State Farm Mut. Auto. Ins. Co. v. Treciak*, 117 Wn. App. 402, 408, 71 P.3d 703 (2003); *Schonauer v. DCR Entertainment*, 79 Wn. App. 808, 817-18, 905 P.2d 392 (1995). As such, *Marshall* does not stand for the proposition that declaration statements may not be considered by the Court if the declaration is inconsistent with an earlier deposition; rather, a contradictory declaration *should* be considered in light of other evidence presented to determine whether there is sufficient evidence to raise a factual issue. *See Treciak*, 117 Wn. App. at 408; *Beers v. Ross*, 137 Wn. App. 566, 571, 154 P.3d 277 (2007) (noting widespread misunderstanding that *Marshall* requires exclusion of contradictory declarations). In fact, striking an allegedly contradictory declaration rather than giving it consideration in opposition to summary judgment has been deemed error. *See Treciak*, 117 Wn. App. at 408.

Here, as a threshold matter, there were no “clear contradictions” in the declarations of either Fenton or Wentworth. During his deposition, Fenton was asked whether he would render opinions regarding earth movement and soil sloughing *as they related to a rockery and a retaining wall* south of the Terri Ann, and indicated that he would defer to a geotech’s expertise in those areas. CP 730-45. In his subsequent

declaration in opposition to Respondents' motions for summary judgment, Fenton provided opinions regarding, *inter alia*, the effect of soil settlement on a slab on grade; the settling of new construction and its effect on adjacent soils; his view that Wentworth's report confirmed that construction on the Property damaged the Terri Ann; and that soil settlement caused by vibration led to cracking in a slab on grade. CP 603-8.¹⁶ None of these statements in Fenton's declaration were in "clear contradiction" to anything in his deposition testimony.¹⁷

Regarding Wentworth's declaration, Respondents attempt to leverage an acknowledgment during Wentworth's deposition that he could not say precisely *how much* certain cracks had expanded due to construction to preclude him from attributing *any* of that expansion to construction vibration from the Project.¹⁸ CP 721-22. Respondents also attempt to construe answers Wentworth gave about language in another expert's report to preclude him from opining that the increased surface water flow caused by the Project, and by extension *its effect*, was

¹⁶ At a minimum, some of the excluded statements from Fenton also indicated the existence of genuine issues of material fact. *See, e.g.*, CP 606, ¶¶ 13, 15.

¹⁷ Alternatively, if the Court concludes that some of the statements in Fenton's declaration were in clear contradiction to his deposition testimony, that conclusion should be limited solely to his opinions regarding the rockery, not to the entire Terri Ann site.

¹⁸ Wentworth's original report dated December 2, 2009, which was Exhibit 3 to his deposition, stated unequivocally that the "cracks had opened wider as a result of construction vibration." CP 472-6

significant. CP 722-23. Respondents did not, and cannot, point to any testimony by Wentworth that the cracks at issue had not expanded due to construction vibrations or that the effect of the increased water flow was actually insignificant. Accordingly, neither of these alleged contradictions between Wentworth's deposition and his declaration reaches the level of "clear contradiction" required to invoke the *Marshall* rule. *See Berry*, 103 Wn. App. at 322.

Further, even if there had been "clear contradictions" between the declarations and the experts' deposition testimony, the Superior Court still erred in striking the contents of Fenton's and Wentworth's declarations rather than consider those declarations along with the other evidence. *See, e.g., Treciak*, 117 Wn. App. at 408. This Court should reverse the Superior Court's order striking the testimony of Evarone's experts. Further, because the Superior Court failed to consider the testimony of those experts in opposition to Respondents' motions for summary judgment, this Court should reverse the entry of summary judgment against Evarone, as well.

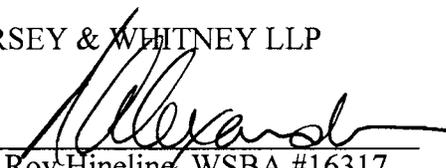
V. CONCLUSION

The Superior Court erred repeatedly below and, in so doing, denied Evarone the opportunity to have his claims tested on their merits. To the extent the Superior Court concluded that the statute of limitations had run

on Evarone's claims, it disregarded controlling Washington Supreme Court precedent. The Superior Court's refusal to consider the merits of Evarone's arguments regarding the applicability of *res ipsa loquitur* was also based on an erroneous view of the law. Although the issue of joint and several liability was not a central one at summary judgment, the Superior Court disregarded the unequivocal directive of the Washington State Legislature in wrongly ruling that that issue must be pled by the plaintiff or be waived. Finally, the Superior Court's decision to strike Evarone's expert testimony was also contrary to Washington law. All of these rulings, along with the Superior Court's refusal to reconsider its entry of summary judgment were erroneous and warrant reversal. Evarone respectfully requests that this Court reverse the Superior Court on all of the foregoing orders, and that it remand this matter back to the Superior Court.

Respectfully submitted this 14th day of March 2011.

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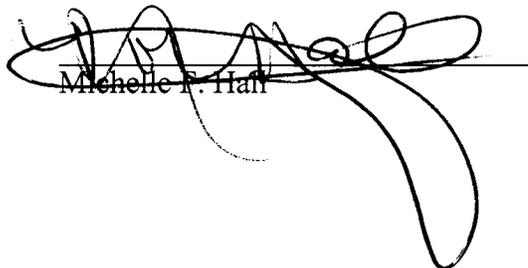
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