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No. 66902-8

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 1

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CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,  
commonly known as "SOUND TRANSIT,"  
a Washington regional transit authority,

Defendant/Appellant,

v.

STEVEN J. CECCHINELLI, a single individual, and CF SALES, INC., a  
Washington corporation,

Plaintiffs/Respondents.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Plaintiffs Steven Cecchinelli and CF Sales, Inc. (“Plaintiffs”) first complained of damage to their warehouse in May of 2004. Sound Transit’s drilled shaft construction activities that allegedly caused the damage began on March 12, 2004 and were completed by August 24, 2004. However, Plaintiffs did not file suit until January 2009.

Plaintiffs ask the Court to excuse this extended delay based on a single-paragraph analysis in Vern J. Oja and Assoc. v. Washington Park Towers, Inc., 89 Wn.2d 72, 569 P.2d 1141 (1977) (“Oja”). To the extent Oja established a broadly-applicable deferred accrual rule for third-party property damage caused by construction activities, that rule should apply only when the entire construction project is adjacent or close to the third-party property that is damaged. Further, if the rule applies, the delayed accrual should start either (a) when the specific construction activity causing the damage (pile driving or drilled shaft installation) ceases or (b) to be consistent with the construction statute of repose, when the construction project of which the specific construction activity is a part is substantially complete. In this particular appeal, the former would be August 24, 2004 and the latter would be May 24, 2006.

Either way, the two-year statute of limitation in RCW 4.16.130 ran before Plaintiffs filed suit in January 2009. But if the Court follows

Plaintiffs argument and allows accrual upon the completion of every single contract requirement on the project, then the **two-year** statute of limitation on this claim would still not have passed, nearly **eight years** after Plaintiffs first complained of the damage, more than seven years after the specific activity that caused the damage was completed, and several years after the light rail has actually been carrying passengers.

## II. ARGUMENT

### A. Plaintiffs' Claims are Subject to the Two-Year Statute of Limitation in RCW 4.16.130.

This Court has unambiguously held that **strict liability** property damage claims are subject to the two-year catch-all statute of limitation in RCW 4.16.130. Mayer v. City of Seattle, 102 Wn.App. 66, 75, 10 P.3d 408 (2000). Plaintiffs fail to cite to even a single case (other than Oja where the parties agreed to a three-year limitation) that holds differently than Mayer. Instead, Plaintiffs provide a brief history of statute of limitation cases in Washington (CF Br. at 13-16), digress into case law interpreting the statute of limitation for **trespass claims** (CF Br. at 16-20), argue that Plaintiffs *could have* proved a **trespass claim** at trial (CF Br. at 20-22), and then summarily conclude that its **strict liability claim** should be subject to the same statute of limitation as a **trespass claim** would have been. The Court should reject this end-run around RCW 4.16.130.

1. **Mayer is the only authority that addresses the statute of limitation applicable to strict liability claims for damage to property, and it held that the applicable limitation is two years.**

Mayer is the only relevant case briefed by either party that addresses the statute of limitation applicable to this case, and it is clear:

Mayer sued in tort for nuisance, strict liability (abnormally dangerous activity), and negligent injury to real property. There is no specific statute of limitations governing Mayer's claims; thus, they are subject to the two-year catchall period. See RCW 4.16.130;

102 Wn.App. at 75.

Further, there is no merit to Plaintiffs' argument that this statement is *dicta*. In order for the Court in Mayer to have held that a "genuine issue of material fact exists regarding when Mayer reasonably should have known that the fill material was toxic" (see id.), it had to determine (a) what the applicable statute of limitation was and then (b) whether there were facts that occurred before and after that period that created an issue of fact as to when and whether the discovery rule should apply. Logic requires that there can be no genuine issue of fact regarding the discovery rule without first determining the statute of limitation. This Court should conclude, as did the trial court and the Mayer court, that the two-year limitation in RCW 4.16.130 applies. See CP 283 (Trial court SJ Order).

**2. The Oja Court applied a three-year statute of limitation, but it did so only because the parties had previously agreed to it.**

Other than citing to Vern J. Oja and Assoc. v. Washington Park Towers, Inc., 89 Wn.2d 72, 569 P.2d 1141 (1977), Plaintiffs do not cite a single case holding that strict liability property damage claims are subject to a 3-year statute of limitation. It is true that the Oja Court applied a three-year statute of limitation to the third party property damage claim in that case arising out of construction activities. But as the Oja decision and the underlying Court of Appeals decision make clear, the courts applied a three-year limitation pursuant to express agreement by the parties. See Id., 89 Wn. 2d at 72 (“the parties agree the 3-year statute of limitations for damages to real property (RCW 4.16.080) applies to respondent’s claim”). The Court of Appeals — casting significant doubt as to whether the parties chose the correct statute of limitations —specifically noted:

It is therefore the law of the case and we do not reach the issue of which statute of limitations is applicable to pile driving in general. *Compare* RCW 4.16.080(1); *Dorsey v. Speelman*, 1 Wn. App. 85, 87, 459 P.2d 416 (1969); *Zimmer v. Stephenson*, 66 Wash.2d 477, 483, 403 P.2d 343 (1965) *with* RCW 4.16.130; W. Prosser, *Law of Torts* s 13 at 65, s 89 at 594-95 (4th ed. 1971).

Vern J. Oja and Associates v. Washington Park Towers, Inc., 15 Wn. App. 356, 358, 549 P.2d 63 (1976).

Regardless of the limitation applied in Oja in 1976 and 1977, this Court clarified in Mayer that claims for “nuisance, strict liability (abnormally dangerous activity), and negligent injury to real property” are all subject to the two year limitation in RCW 4.16.130. See Mayer, 102 Wn. App. at 75.

**3. Plaintiffs asserted and litigated a strict liability claim and cannot now argue a new legal theory for the first time on appeal or ask that the Court apply a limitation period to a claim that differs from the claim Plaintiffs asserted.**

Plaintiffs unambiguously asserted and litigated a strict liability claim. See CP 6 (Plaintiff’s Complaint) (“Pile driving is an abnormally dangerous activity. Sound Transit is *strictly liable* for damage to adjacent property caused by its pile driving activities.”) (emphasis added). See also CP 302 Conclusion of Law No. 2 (“In considering whether an activity is so hazardous as to require strict liability, Washington Courts consider...”) and CP 303 Conclusion of Law No. 3 (“Sound Transit’s installation of the drilled shafts on the C-700 Project was an abnormally dangerous activity and is subject to strict liability.”). The word ‘trespass’ does not appear anywhere in the trial court’s Findings of Fact, Conclusions of Law, and Order. See CP 296-303.

Plaintiffs made a strategic decision to assert only a strict liability claim. Whether this was to avoid having to prove the negligence or intent

elements of a trespass claim (which Plaintiffs gloss over in their brief) or for some other reason, Plaintiffs' strategic decision dictated the evidence that was presented and the manner in which the case was litigated. It is well established that a party cannot raise a new legal theory for the first time on appeal. See RAP 2.5(a).

Similarly, Plaintiffs cannot ask the Court to apply a longer statute of limitation to its strict liability claim just because it could have asserted a trespass claim based on similar underlying facts but chose not to. This is especially true when Plaintiffs ignore other significant implications associated with a trespass claim. In addition to the intent or negligence elements glossed over by Plaintiffs, "Washington recognizes the theory of continuing torts. When a tort is continuing, the statute of limitations runs from the date each successive *cause of action accrues as manifested by actual and substantial damages.*" Pacific Sound Resources v. Burlington Northern Santa Fe Railway Corp., 130 Wn.App. 926, 941, 125 P.3d 981 (2005) (citations and quotes omitted, emphasis in original).

Because continuing trespass claims are not subject to deferred accrual, had Plaintiffs asserted a trespass claim, the latest possible date of accrual would have been the date Sound Transit's subcontractor completed the drilled shafts (August 24, 2004) because damage had already manifested, and Plaintiffs' proposed three-year statute of

limitation applicable to a trespass claim would have run on August 23, 2007, almost a year and a half before Plaintiffs filed suit. Perhaps this is the real reason why Plaintiffs did not assert a trespass claim. Instead, what Plaintiffs really want this Court to do is apply the three-year statute of limitation applicable to trespass claims in combination with a special deferred accrual rule articulated in relation to certain strict liability claims that are subject to a two-year limitation period. The Court should reject this and apply RCW 4.16.130's two-year catch-all provision.

**4. Delay in filing suit in vibration-caused property damage cases significantly affects a trial court's ability to evaluate evidence at trial.**

Longer limitation periods and/or delayed accrual in property damage cases caused by vibrations from construction equipment can dramatically impair a defendant's and a trial court's ability to evaluate evidence. Accordingly, the Court should reject Plaintiffs' arguments that a longer statute of limitation and/or delayed accrual should apply.

In their brief, Plaintiffs acknowledge that statutes of limitation "force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence." CF Br. at 13 citing Stenberg v. Pacific Power & Light Co., 104 Wn.2d 710, 714, 709 P.2d 793 (1985). Plaintiffs also argue that "When there is uncertainty as to which statute of limitation governs, the longer statute will be applied."

Id. Mayer resolved any ambiguity as to the proper statute, but even if it did not, the Court should reject a longer limitation period because it will likely result in the loss of evidence.

This appeal is illustrative. By way of background, Plaintiffs' warehouse had significant structural issues that predated Sound Transit's construction. CP 297 at Findings of Fact No. 3. In 1999, Plaintiffs discovered that (a) there were voids (gaps between the underside of the concrete slab and the soil that was supposed to be supporting it) under the warehouse slab that were up to 3 feet in depth where the soil had previously subsided, (b) the floor slab itself had subsided up to nine inches, and (c) there were cracks in the beams supporting the slab. Id. In 2002, Plaintiffs 'repaired' this by pumping approximately 420 cubic yards (approximately 550 tons) of controlled density fill (CDF) (flowable concrete) below the slab to fill the void. Id. at Finding of Fact No. 3.

Plaintiffs claimed at trial that Sound Transit's construction activities in 2004 caused the soil to subside again. Neither party investigated the underside of the slab until after the lawsuit was filed in 2009 (nearly 5 years after the activities that allegedly caused the subsidence), at which point there was a new void between the underside of the slab and the top of the CDF that was approximately 9-12 inches. At trial, Plaintiffs argued and presented expert and lay testimony that the

subsidence of the soil under the warehouse floor was immediately and almost exclusively caused by the vibrations from Sound Transit's construction activities in 2004. CP 300-301 at Finding of Fact No. 12. Sound Transit argued and presented expert testimony that the construction activities had no effect and that the soil subsided over an extended period of time beginning immediately after the CDF was placed and that it was still subsiding, due to the self-weight of the approximately 550 tons of CDF that Plaintiffs placed on top of the soil that had already settled up to 36 inches by 1999. Id.; see also Finding of Fact No. 5. Thus, the case was essentially a battle of geotechnical experts arguing about the cause of something that occurred nearly five years earlier.

If Plaintiffs hadn't waited nearly five years to file suit, the Court would not have had to rely on expert interpretation of stale evidence. Rather than investigating and opining on a 5-year-old void (which Sound Transit's expert contended was continuing to get larger due to the weight of the CDF), the parties' experts would have been opining on the conditions immediately after the alleged damage occurred.

Damage caused by pile driving and drilled shaft installation activities is almost always due to the vibrations they emit, and if the vibrations cause damage, such damage is almost always settlement. As the expert testimony in this case highlights, the longer the limitation

period that governs such claims, the more likely the possibility that key evidence could be lost or affected by other factors. And similarly, if the accrual of such claims is delayed, there is an even more likely possibility that key evidence could be lost. Both of these are at odds with the primary policy behind statutes of limitation, which is to protect defendants and the courts from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost. See, e.g., Douchette v. Bethel School Dist. No. 403, 117 Wn.2d 805, 813, 818 P.2d 1362, 1366 (1991) (declining to extend discovery rule because relevant evidence may no longer be obtainable). Accordingly, longer statutes of limitation and delayed accrual in vibration-caused property damage cases increase the potential that key evidence is lost or altered by other factors.

**B. If a Deferred Accrual Rule Applies, Plaintiffs' Claim Accrued When the Project Was Substantially Complete.**

For the various reasons stated in Sound Transit's opening brief, accrual of *third-party* property damage claims arising out of construction activities on large-scale horizontal construction projects should occur when (a) the damage occurs, (b) the specific construction activity causing the damage is completed, or, at the latest, (c) when the adjacent construction project is substantially complete. All of these are objectively

discernible by the third party and not subject to the unique provisions of a specific contract.

**1. A critical aspect of the Oja decision is a proximity requirement -- the entire project must be adjacent to the third-party property that is damaged.**

To the extent Oja established a deferred accrual rule, a critical limitation in that rule is a proximity requirement that the entire project must be ‘adjacent’ to the third-party property. “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.” Oja, 89 Wn.2d at 75. The only reasonable interpretation of ‘adjacent’ in this context is that the rule apply only when the entire project is within close proximity to the third-party property. Otherwise, accrual would depend upon activities occurring miles from the property at issue.

Because this particular appeal involved horizontal construction (construction of a 1.3-mile segment of a light rail system), Sound Transit’s opening brief focused on why the Oja deferred accrual rule does not apply to horizontal construction. Generally speaking, that is because the vast majority of large horizontal construction projects like this one are not adjacent to the third-party property. In other words, the project fails the proximity requirement because it is not *adjacent* as required by Oja.

Plaintiffs try to point out problems with the horizontal/vertical distinction (CF Br. at 32), but ultimately the key issue is whether the construction project as a whole is within close proximity to the damaged property. “Adjacent” means next to or adjoining. The New Oxford American Dictionary 20 (2<sup>nd</sup> ed. 2005). Thus, Plaintiff is correct that a 500-acre shopping mall project and a large housing subdivision (with both houses and streets) could confuse the vertical/horizontal distinction. It does not, however, confuse the issue of whether the project as a whole is in close proximity to the property at issue -- in both of Plaintiffs’ examples, Oja’s deferred accrual rule would not apply because the vast majority of the work is simply not close enough to satisfy the proximity requirement. Of course, there are projects of a size as to make even this proximity distinction more case-specific, but a 1.3-mile-long light rail segment is not such a case because it is not ‘adjacent’ as required by Oja.

**2. Oja’s deferred accrual for claims predicated on construction-related activities is inconsistent with the well-established continuing trespass rule.**

Plaintiffs’ detour into the law of trespass revealed yet another flaw with the limited analysis in Oja. 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.” Oja, 89

Wn.2d at 75. As noted in Sound Transit's opening brief, Oja's limited analysis was inferred from condemnation cases where the damage to the adjacent property was due to the fact of the construction itself, as opposed to damage to the property caused by specific construction activities. See ST Br. at 32-34 (analyzing each case relied on in Oja).

The Court also failed to explain why vibrations from *construction activities* that go on for years and damage adjacent property should be treated any differently than heavy metals from the *operation* of a smelter that go on for years and damage adjacent property. The former, if we are to read Oja as Plaintiffs suggest, are subject to a deferred accrual at the completion of the project of which the activity causing them is just a part (the construction project) while the latter accrue from each successive deposit that causes damage rather than the cessation of the activity. Compare, e.g., Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 692, 709 P.2d 782 (1985)(continuing trespass claims not subject to deferred accrual and only damage within the last three years is recoverable). The inconsistency is exposed by simply changing the effect of the smelting plant from the emission of toxic substances to vibrations due to equipment. Under the continuing trespass rule, if a factory caused damage to adjacent property due to vibrations from operating equipment, those claims, though virtually identical in causation to vibrations from pile

driving construction activities, would not be subject to the Oja deferred accrual rule because they do not arise out of construction, despite the virtually identical effect of the activity on the adjacent property.

**3. When third-party property is damaged, the date of accrual of claims should be objectively determinable.**

This case and the Oja case deal with construction damage to adjacent property owned by *third parties*. Third parties, by definition, are not parties to the construction contract governing the construction activities that damage the property. Accordingly, Plaintiffs' citation to Mattingly, Smith v. Showalter, and Glacier Springs<sup>1</sup> for the proposition that accrual should occur at the completion of every single construction task on a project is inapposite.

Plaintiffs' citation to the latter two cases is simply to distinguish between the definition of 'substantial completion' and 'completion' in the context of a construction contract in a dispute between the parties to the contract, which is irrelevant to the present issue on appeal. Similarly, Mattingly holds that when *parties* to a contract say 'completion' in their contract rather than 'substantial completion' as a *contractual* trigger for the commencement of warranties between those parties, courts will enforce the provision as written. CF Br. at 35. Sound Transit doesn't

dispute either of these statements as they affect disputes between parties to a contract.

However, for the reasons stated in Sound Transit's opening brief, when the Oja court stated its brand-new deferred accrual rule for damage to adjacent *third-party* property, accrual when construction is 'completed' occurs when the construction is substantially completed. That is the most objectively reasonable and discernible date of accrual for property owners that are not parties to, and might not even have access to, the actual construction contract and its progress milestones.

#### **4. The relevant project is the C-700 Project.**

Plaintiffs conceded at the trial court that the relevant project was the 1.3-mile long C-700 project. CP 175:5. Plaintiffs now argue that the relevant project should be the entire Link Light Rail System project that opened in July 2009. CF Br. at 38-41. That argument is specious. The Link Light Rail System is a single system that for all practical purposes will be under construction for the next 15 years and will be expanding until approximately 2025, when voter-approved expansion of the Link Light Rail System is constructed to Bellevue, Lynnwood, and south of Seatac airport. CP 41, ¶ 3. For practical reasons, Sound Transit sub-

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<sup>1</sup> Mattingly v. Palmer Ridge Homes, LLC, 157 Wn.App. 376, 238 P.3d 505 (2010); Smith v. Showalter, 47 Wn.App. 245, 734 P.2d 928 (1987); and Glacier Springs Prop. Owners Ass'n v. Glacier Springs Enters., Inc., 41 Wn.App. 829, 706 P.2d 652 (1985).

divided (and still sub-divides) the construction of the Link Light Rail system into smaller segments, each of which is a separate and distinct contract and construction project. CP 41 (Emam decl.) and CP 48-50 (Gildner decl.). Under Plaintiffs' theory, so long as construction is ongoing on any part of the Light Rail System, the claims would not accrue. This argument, conceded below, should be rejected.

**C. Sound Transit is Not Equitably Estopped From Asserting the Two-Year Statute of Limitation.**

Plaintiffs' final argument that Sound Transit is equitably estopped from asserting the statute of limitation is legally, factually, and procedurally flawed.

**1. Facts Regarding the Misplaced Incident Report Form.**

The majority of the facts regarding the Incident Report Form that was submitted by Plaintiffs in October 2005 are undisputed. However, Plaintiffs' brief omits several important facts and critically mischaracterizes the deposition testimony of Mr. Cecchinelli.

In October 2005, Plaintiffs sent a "Sound Transit Incident Report" form to Mr. Pence of Sound Transit. Sound Transit's Br. ("ST Br.") at 8, Plaintiff's Response Br. ("CF Br.") at 6. Unfortunately, Mr. Pence misplaced the form in his office, which he acknowledged in his deposition. CP 210 at 79:23 - 80:1 (Pence Deposition).

Consistent with this misplacement, on December 19, 2005, Plaintiffs sent an email to Mr. Pence stating that they had not heard back from anyone at Sound Transit with respect to the earlier report. ST Br. at 8; CP 52 at ¶ 6 (Pence Decl.). Mr. Pence testified that he had no recollection of the December 19, 2005 email and that he “heard nothing from [Plaintiffs] for more than two years.” CP 210 at 80:24-25; CP 52 at ¶ 7 (Pence Decl.).

Plaintiffs’ brief omits the facts in the previous paragraph. Instead, Plaintiffs cites facts that find no support in the record:

When CF asked about the status of the claim several months after submitting the Incident Report, Pence falsely represented that it was being processed by Sound Transit’s insurance company and that “these things take time.”

CF Br. at 6 citing CP 210-211. CP 210 and 211, however, do not contain the quote “these things take time”; they do not contain any reference to Mr. Pence stating that Sound Transit’s insurance company was processing Plaintiffs’ claim; and in fact, CP 210-211 only supports Sound Transit’s position that Mr. Pence had no contact whatsoever with Plaintiffs after the original submission of the Incident Report Form, which was misplaced.

Plaintiffs made a similar argument in their opposition to Sound Transit’s summary judgment motion and cited a different portion of the Cecchinelli deposition as support. See CP 177 at 5-7 citing CP 221 at

48:21-49:18. But the cited section of the deposition makes it clear that these representations that were made to Mr. Cecchinelli, and in particular the quoted text, were from Plaintiffs' own employee (Jerry Groff), not Mr. Pence of Sound Transit:

Q: Do you know if Roger [Pence] contacted Jerry [Groff] roughly in that time frame after this email was sent?

A: Yes.

Q: How do you know that?

A: Because I was gonna unleash the hound here (indicating [to legal counsel]). I was getting really tired of this at this point, and *he said, "No, again, we have a claim in. These things take time. This is a good guy."* We believe that it's pretty obvious, being what we had just done prior to Sound Transit coming and driving these pilings, that the damage was due to them, and that I think Jerry felt very confident that we didn't need to get Dean [attorney] involved.

Q: Did you talk with Jerry about conversations he was having with Roger?

A: Yes.

Q: What did Jerry tell you that Roger was saying?

A: That they were handling it; they were processing it, and "these things take time."

Q: *When you say "these things take time," that's something that Jerry was telling you?*

A: *Constantly.*

CP 221 at 48:21-49:18 (emphasis added).

Any doubt about the speaker of the quote is resolved in another part of Mr. Cecchinelli's deposition:

A: I know *I was constantly talking to Jerry*, going, "What is going on?" You know. "This has

been a while.” *And I trusted him. He said, “These things take time. We got the right guy on it.”*

CP 217 at 33:12-16 (emphasis added). The actual speaker of the quote and the person telling Mr. Cecchinelli what was allegedly going on and *that getting Plaintiffs’ lawyer involved was unnecessary*, Jerry Groff, is a former employee of Plaintiffs that left the company in summer 2006. CP 217 at 32:3-4 and 32:18-19. And other than during Sound Transit’s first visit to Plaintiffs’ warehouse, which predated Plaintiffs’ submission of the Incident Report Form, Mr. Cecchinelli had no contact with Sound Transit. CP 221 at 49:19-23. Thus, the only representations being made to Mr. Cecchinelli were being made by Mr. Cecchinelli’s employee (Mr. Groff), not Mr. Pence of Sound Transit.

**2. Plaintiffs’ equitable estoppel / equitable tolling argument is legally, factually, and procedurally flawed.**

The legal standard is straight-forward. Equitable estoppel<sup>2</sup> may apply when a defendant's actions have fraudulently, deceptively or in bad faith induced plaintiff to delay commencing suit until the applicable statute of limitations has expired. Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc., 105 Wn. 2d 878, 885, 719 P.2d 120, 124 (1986).

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<sup>2</sup> Equitable tolling, common law tolling, and equitable estoppel are all analyzed under the same analysis. See, e.g., Tegland, Washington Practice Handbook on Civil Procedure §

Before equitable estoppel can apply, a plaintiff must act with due diligence in pursuing the cause of action. Hazel v. Van Beek, 135 Wn. 2d 45, 954 P.2d 1301 (1998). Finally, as this court recently noted, “Equitable estoppel is not favored, and a party asserting it must prove each of its elements by clear, cogent, and convincing evidence.” Cornerstone Equipment Leasing, Inc. v. MacLeod, 159 Wn.App 899, 907, 247 P.3d 790 (2011) (creditor not equitably stopped due to alleged verbal assurances). Here, the record precludes equitable estoppel.

First, Plaintiffs failed to exercise due diligence. Waiting several years to file a lawsuit in 2009 after hearing nothing for several years after submitting an Incident Report form in 2005 cannot possibly satisfy the diligence requirement. Hazel v. Van Beek, 135 Wn. 2d 45, 954 P.2d 1301 (1998) (diligence required).

Second, Plaintiffs base their equitable estoppel argument almost exclusively on the alleged Sound Transit representation that the claim was being processed and “these things take time.” See CF Br. at 6. But this quote and the representations regarding what was allegedly happening were made by Plaintiffs’ own employee (not a Sound Transit representative) to Mr. Cecchinelli. But even if Mr. Pence of Sound

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2(A)(4)(4.12)(Estoppel and Equitable Tolling). Accordingly, reference to “equitable estoppel” applies equally to Plaintiffs’ equitable tolling arguments.

Transit had made any such representations, they were made “several months after [Plaintiffs] submitt[ed] the Incident Report [in October 2005]...” CF Br. at 6. Because ‘several’ must be less than seven months, if Plaintiffs’ claims accrued when the project was substantially complete (May 24, 2006), then any such representations would have been made at least several months prior to the claims accruing in the first place.

Plaintiffs’ also rely on Mr. Pence’s alleged assurance that “Sound Transit would be responsible for repairing any damage *caused by* its construction activities.” CF Br. at 5, 43 (emphasis added). However, Mr. Pence believed *and told Plaintiffs* that he believed all the damage was pre-existing and thus, he never represented that Sound Transit would compensate Plaintiffs for the alleged damage. CP 53 (Pence Decl.) at ¶ 4 (“At the time, and as I indicated to Mr. Groff, the damage appeared to me to consist exclusively of old cracks...that obviously predated any of the construction activities...”); ¶ 5 (“At no point did I view any damage to the CF Resource Property that appeared to have been caused by the C-700 project construction activities, and at no point in time did I advise Mr. Groff or anyone else at CF Resources that Sound Transit would compensate CF Resources for the alleged damage.”). Similarly, Mr. Cecchinelli testified that Mr. Pence never represented that Sound Transit

caused any damage that would require repair or compensation to Plaintiffs. CP 279 (Cecchinelli deposition) at 19:19 -- 20:16.

Third, Plaintiffs' argument confuses or ignores a significant factor. Plaintiffs had no obligation to submit the "Incident Report" form to Sound Transit in the first place; it is not a mandatory process or a prerequisite to anything. The Incident Report form is used by Sound Transit to communicate potential construction-related claims to Sound Transit's risk management department for evaluation. See, e.g., CP 210 at 78:13 - 79:1 (Pence describing Incident Report form). Plaintiffs could have filed an RCW 4.96.020 tort claim notice with Sound Transit's Board Administration at any time and followed that up with a lawsuit. Accordingly, Sound Transit did nothing that "fraudulently, deceptively or in bad faith induced plaintiff to delay commencing suit until the applicable statute of limitations ha[d] expired," (Del Guzzi Const. Co., Inc., 105 Wn.2d at 885), because the Incident Report form had no relation to Plaintiffs' ability to file suit to begin with.

Finally, Plaintiffs' equitable estoppel argument is procedurally flawed. Sound Transit moved for summary judgment on the statute of limitation. Plaintiffs opposed that motion and argued equitable estoppel. Plaintiffs have the burden of proving by clear, cogent, and convincing evidence that equitable estoppel applied. Cornerstone Equipment Leasing,

159 Wn.App at 907. However, Mr. Cecchinelli's hearsay testimony about what his former employee (Mr. Groff) was saying that Mr. Pence was saying is plainly contradicted by Mr. Pence's deposition and declaration testimony that he had no further contact with Plaintiffs between the time they submitted the Incident Report form in October 2005 and when Plaintiffs' counsel contacted him in 2008. CP 53 (Pence Decl.) at ¶ 7.

The trial court never reached the equitable estoppel issue on summary judgment, and Plaintiffs did not assign error to the trial court precluding testimony at trial on the equitable estoppel issue. And because Plaintiffs bear the heightened evidentiary burden of establishing equitable estoppel by clear, cogent and convincing evidence, the disputed facts preclude this Court from finding Sound Transit to be equitably estopped from asserting the statute of limitation on the existing record.

For these reasons, Plaintiffs' equitable estoppel argument must fail, and Sound Transit is entitled to assert the statute of limitation defense.

### **III. CONCLUSION**

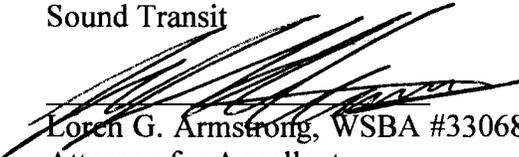
This appeal has significant implications for third-party claims arising out of large-scale construction projects, and in particular, large horizontal public works projects that can go on for years. To the extent Oja established a deferred accrual rule that made sense under the unique facts of that particular case, the same rationale does not apply to the facts

of this case. Sound Transit respectfully requests that this Court reverse the trial court's December 11, 2009 order denying Sound Transit's motion for partial summary judgment and remand for dismissal of the action.

DATED this 14th day of October, 2011.

Respectfully submitted,

Sound Transit



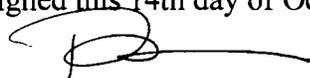
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that I caused a true and correct copy of REPLY BRIEF OF APPELLANT to be delivered by U.S. Mail to the following:

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Signed this 14th day of October 2011 at Seattle, Washington.



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Ruby Fowler, Legal Secretary  
Central Puget Sound Regional Transit Authority

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