

No. 66176-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JACK W. EVARONE,

Petitioner/Appellant,

v.

LEASE CRUTCHER LEWIS, a Washington corporation, SENECA REAL ESTATE GROUP, a Washington corporation, HORIZON HOUSE, a Washington corporation, NUPRECON LP, a Washington corporation, NUPRECON GP, a Washington corporation, FRUHLING, INC., a Washington corporation; FRUHLING SAND AND TOPSOIL, INC., a Washington corporation; JOHN DOE 4-25, Residents of Washington State,

Respondents/Appellees

**RESPONDENT/APPELLEE NUPRECON'S RESPONSE TO
PETITIONER/APPELLANT EVARONE'S OPENING BRIEF**

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I. STATEMENT OF ISSUE

The trial court correctly granted Nuprecon's motion for summary judgment when it determined that there were no genuine issues of material fact, and that Nuprecon was entitled to judgment as a matter of law. The trial court did not commit reversible error, and did not abuse its discretion.

II. STATEMENT OF CASE

A. Basic Facts: This is a property damage case. Evarone and his wife are the owners of the Terri Ann Apartments, an 8 story, 24 unit building located at 1331 Terry Avenue, Seattle. The Terri Ann Apartments is adjacent to and north of Horizon House, a continuing care retirement community located in Seattle's First Hill. (www.horizonhouse.org) Evarone's original and amended complaints seeks property and other alleged damages associated with, and resulting from, a construction project known as Horizon House Tower & Renovation. The construction project involved demolishing two (2) existing buildings and the construction of a new residential tower. Respondent Lease Crutcher Lewis ("LCL") was the general contractor. Respondent Nuprecon LP ("Nuprecon") was the demolition subcontractor. (CP 244 – 282)

Nuprecon's exterior demolition work was completed over 32 days from August 29, 2005 – October 12, 2005. Nuprecon did not perform excavation work. (CP 244 – 282)

B. Procedural Posture. Evarone filed his lawsuit on October 23, 2008. Evarone's original and amended complaints allege five (5) causes of action: 1) loss of lateral support; 2) negligent destruction of property; 3) trespass to land; 4) nuisance; and 5) diminished value. (CP 1 – 8 & 58 – 68) On July 2, 2010, after extensive discovery, Nuprecon moved for summary

judgment on the basis that 1) Evarone's claims were time barred, and 2) Evarone has no evidence to link his alleged damages to Nuprecon's demolition work. (CP 235 – 309)

The trial court granted Nuprecon's motion for summary judgment, stating that there were not issues of material fact, and that Nuprecon was entitled to judgment as a matter of law. (CP 961 – 962)

Evarone moved for reconsideration (CP 984 – 1483) which the trial court also denied. (CP 1743 – 1746) This appeal followed.

III. SUMMARY OF ARGUMENT

1. Summary Judgment Standard: This court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. If the pleadings, depositions, admissions on file and the affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is proper.

2. Evarone's complete failure of proof: The trial court correctly granted Nuprecon's motion for summary judgment. Evarone's arguments on appeal, and his focus on several limited issues, are completely misplaced. Nuprecon was dismissed because there is not a single shred of evidence in the record to support Evarone's allegations that Nuprecon's demolition work caused damage to the Terri Ann Apartments.

3. Striking of portions of Expert's Declarations: The trial court did not abuse its discretion when it struck portions of the declarations of Evaron's experts

4. **Res Ipsa Loquitor:** The trial court did not commit an error of law when it disallowed Evarone from pursuing his case under the doctrine of res ipsa loquitor.

5. **Joint & Several liability:** The trial court did not commit an error or law when it struck Evarone's newly disclosed theory of joint & several liability. Regardless, Evarone has no evidence that Nuprecon was an at fault party in the first place.

6. **Statute of limitations:** Evarone's claims against Nuprecon are governed by either two (2) or (3) year statutes of limitations. As Evarone filed his lawsuit more than three (3) years after Nuprecon completed its work, his claims are time barred. Regardless, as Evarone has not put forth a single shred of evidence to support his claims against Nuprecon, the statute of limitations issue is a red herring,

IV. ARGUMENT

1. **Summary Judgment Standard:** This court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 633 (2000). In a summary judgment proceeding, the reviewing court makes the same inquiry as the trial court. *Hontz v. State*, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). If the pleadings, depositions, admissions on file and the affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is proper. CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A moving defendant may satisfy its burden by showing that there is an absence of evidence to support the non-moving party's

case. The moving party is entitled to summary judgment when the non-moving party fails to make a sufficient showing on an essential element of its case in which it has the burden of proof. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

2. Evarone's Complete Failure of Proof: Evarone's appeal is completely without merit. The trial court correctly dismissed Evarone's case against Nuprecon based on a complete and total failure of proof. There is simply no competent evidence linking Nuprecon's demolition work to any of Evarone's claimed damages.

To establish proximate cause in a negligence action, Evarone must show that Nuprecon's actions were both the cause in fact, "but for" causation, and legal cause of its injuries. *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 357, 961, P.2d 952 (1998). The casual connection between defendant's actions and the alleged injury must not be left to surmise, speculation, or conjecture. *Wilson v. Northern Pacific Railway Co.*, 44 Wn.2d, 122, 127-128, 265 P.2d 815 (1954); *Almquist v. Finely School District*, 114 Wn. App. 395, 57 P.3d 1191 (2002).

Evarone claims that vibrations from Nuprecon's demolition work on the adjacent Horizon House construction site caused his apartment building to sustain damage. Evarone relies on two (2) experts, Dan Fenton ("Fenton"), a structural engineer, and Todd Wentworth ("Wentworth"), a geologist or soils engineer.

Fenton's testimony speaks for itself. "I was not there during the demolition as opposed to the excavation and I did not see when this damage occurred, if it was during the demolition or during the excavation.

Fenton admits he never measured any of the vibrations. He is not aware of any measurement of vibrations that were taken. Most incredible of all, when asked about whether vibrations from the construction of the Horizon House project had any effect on the Terri Ann Apartment building, Fenton responded, "I'm not a vibration expert. I am not a geotech engineer, they can answer that question better." (CP 303 – 309)

Wentworth's testimony is similarly weak. At his deposition, he was asked, "for purposes of this forensic analysis that you've done, investigating and reporting for Mr. Evarone, your opinion is that the construction vibrations generally, without isolating which portion of the construction – the construction vibrations generally could have caused settlement of the fill and cracking of the concrete slab?" "Yes" "But beyond just saying generally the construction, or the construction generally, you are unable to isolate if further as to which specific portion of the construction project. Is that a fair statement?" Wentworth's reply: "Since I don't have a lot of information, certainly not firsthand observations of the construction, and I haven't see any, you know, data measuring vibrations, then I wouldn't – I'd rather keep it general right now." (CP 289 - 294) Just as Fenton says he is not a vibration expert, in his declaration in support of Evarone's Response Brief, Wentworth too says he is not a vibration expert. (CP 689 - 691)

The opinions of Evarone's experts are completely insufficient to prove his case. With two (2) experts explicitly stating that they are not vibration experts, Evarone's claims that vibrations from Nuprecon's demolition work caused damage to the Terri Ann Apartment is complete speculation. Because Evarone put forth **no** evidence, credible or otherwise,

to support the allegation that Nuprecon's demolition activities caused or contributed to any of alleged damage at the Terri Ann Apartment, the trial court correctly dismissed Evarone's claims against Nuprecon. The casual connection between defendant's actions and the alleged injury must not be left to surmise, speculation, or conjecture. *Wilson*, *Supra* and *Almquist*, *Supra*. Evarone's burden is clear. He must have evidence of a causal link between the specific defendant's action, here Nuprecon, and the purported damage. He has no such evidence, and therefore, the trial court did not err when it granted Nuprecon's motion for summary judgment.

3. Striking of Expert Testimony: The trial court did not abuse its discretion when striking portions of the declarations of Fenton and Wentworth, Evarone's two (2) experts. (Declaration of Fenton, CP 603 – 629, Declaration of Wentworth CP 689 – 705, and Order Striking, CP 959 – 960) Any declaration in support of CR 56 must (1) be made on personal knowledge, (2) set forth admissible evidentiary facts, and (3) affirmatively show that the affiant is competent to testify to the matters stated therein. *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 412, 553 P.2d 107 (1976); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878, 431 P.2d 216 (1967). Competency to testify can reasonably be found by the trial court. *Bernal*, at 413. Furthermore, "the qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion." *Bernal*, at 413, quoting *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 642, 453 P.2d 619 (1969). See also *McKee v. American Home Products*, 113 Wn.2d 701; 782 P.2d 1045 (1989) As both Wentworth and Fenton admit they are not vibration experts, the trial court

did not abuse its discretion in striking and/or disregarding any opinions about vibration causing damaged. An expert should confine his opinions to his field of expertise. *Broom v. Orner*, 64 Wn.2d 887, 395 P.2d 95 (1964). Testimony on a subject matter that is beyond the expertise of the expert should be excluded. *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983). A witness without personal knowledge who fails to satisfy the requirements of ER 702 is merely speculating. Such a witness has no relevant admissible evidence and must be excluded. *Safeco Ins. Co. v. McGrath*, 63 Wash. App. 170, 177, 817 P.2d 861 (1991). The trial court will not abuse its discretion by excluding an affidavit because it contains conclusory assertions rather than factual allegations. *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999). Unsupported conclusional statements and legal opinions cannot be considered in a summary judgment motion. *Marks v. Benson*, 62 Wn. App. 178, 813 P.2d 180, review denied, 118 Wn.2d 1001, 822 P.2d 287 (1991). Lastly, self serving declarations will not create an issue of fact when the declarations contradict or do not comport with previous sworn testimony. *Overton v. Consolidated Ins. Co.*, 145 Wn. 2d 417, 430, 38 P.3d (2002); *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

How can Fenton and Wentworth profer opinons that vibrations from Nuprecon's demolition work when 1) neither is a a vibration expert, 2) neither is an expert in demolition work, 3) neither offered any opinion that Nuprecon's demolition activities deviated from an industry standard, and 4) neither has personal or first hand knowledge of Nuprecon's demolition work? The trial court did not abuse its discretion by striking, excluding or otherwise ignoring Fenton & Wentworth's completely

incompetent testimony. Such incompetent testimony is insufficient to create an issue of material fact to defeat a summary judgment motion.

4. Joint & Several Liability: Joint & several liability is a method of recovery. It not a method of proof, and does not relieve Evarone from proving his case against Nuprecon. As with Evarone's other arguments, the entire discussion of joint and several liability is is a red herring. Putting aside the entire issue that Evarone failed to properly plead joint and several liability (see *Dewey v. Tacoma School District No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999)), RCW 4.22.070 (1) states "in all actions involving fault or more than one entity, the trier of fact...." This is precisely the point. Where is Evarone's evidence that Nuprecon is an at "**fault**" party. Evarone has no such evidence. The theory was properly stricken by the trial court, but regardless, because Evarone has put forth a single shred of evidence that Nuprecon is at fault, i.e., that Nuprecon's demolition work caused any damage, the entire discussion of joint and several liability is moot.

5. Res Ipsa Loquitor: By striking Evarone's res ipsa loquitor arguments, the trial court did not commit an error of law. Like Evarone's other arguments on appeal, his argument that the trial court committed error in not allowing his case to go forward under a res ipsa theory, is completely misplaced.

a. Properly stricken as untimely: The court properly struck the doctrine of res ipsa as it was never pled, and because Evarone had never given any notice to Nuprecon that he intended to rely upon it. "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was

in the case all along.” *Dewey v. Tacoma School District No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999).

b. Res ipsa does not apply: The doctrine of res ipsa should be sparingly applied, “in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.” *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997) (quoting *Morner v. Union Pac. R.R.*, 31 Wn.2d 282, 293, 196 P.2d 744 (1948)). The doctrine “spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person.” *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003), page 436.

How is the determining the cause of the alleged damage to his own apartment building inaccessible to Evarone? Evarone could easily have retained vibration or demolition experts at the start of the Horizon House construction project to determine the cause of his purported damage. He chose to retain a soils engineer and a structural engineer instead, neither of whom are not qualified to render opinions about demolition or vibrations.

Just as Evarone’s other arguments fall flat, the notion that res ipsa applies to a straight forward property damage negligence claim is preposterous. With the appropriate experts, the whether Nuprecon’s

demolition work caused damage to his apartment building could easily have been determined.

c. Elements are not met: Assuimg argumendo that the res ipsa doctrine applies, Evarone cannot prove the elements necessary such that he is entitled to rely upon it. Evarone can rely upon the doctrine if he can show that (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence. *Pacheco*, Supra, 149 Wn.2d at 436. The first element is satisfied if one of three conditions is present: " '(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, *i.e.*, leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (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 in an esoteric field creates an inference that negligence caused the injuries.'" *Id.* at 438-39 (quoting *Zukowsky v. Brown*, 79 Wn.2d 586, 488 P.2d 269 (1971) at 595 (quoting *Horner v. N. Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wn.2d 351, 360, 382 P.2d 518 (1963)), quoted in *Curtis v. Lien*, 169 Wn.2d 884, 239 P.3d 1078 (2010).

Evarone's claimed property damage could have been caused by natural causes such as an earthquake, settling, or normal wear and tear. The building is old, and is located on a steep hillside. The property damage being claimed – cracking in the driveway for example – is damage that could easily have been caused by something other than someone's

negligence. Second, Evarone cannot prove exclusive control. Nuprecon was on the Horizon House construction site for 32 days of a 2 year construction project. How is that exclusive control? Even for those 32 days, Nuprecon did not have exclusive control of the Horizon House site, and it certainly did not have control of Evarone's property. The trial court correctly struck the doctrine of *res ipsa loquitur*.

6. Statute of Limitations: Evarone concedes that all his claims are governed by a mix of two (2) and three (3) years statutes of limitations. Nuprecon's exterior demolition work was completed over 32 days from August 29, 2005 – October 12, 2005. Evarone filed his lawsuit on October 23, 2008. Because Evarone did not file his lawsuit by October 12, 2007 (2 years) or October 12, 2008 (3 years), his claims against Nuprecon are time barred.

Evarone's reliance on *Oja v. Washington Park Towers*, 98 Wn.2d 72, 569 P.2d 1141 (1977), at least as to subcontractors like Nuprecon, is misplaced. In *Oja*, *Supra*, the subcontractors who performed the pile driving work (that purportedly caused the damage) had been dismissed on the basis that the shorter statute of limitations had run. The portion of the opinion focuses solely on whether the remaining defendant petitioner could be held responsible to the actions of its subcontracts that had been appropriately dismissed on the basis that the statute of limitations had run. Evarone's reliance on *New Meadows Holding v. Washington Water Power Company*, 104 Wn. 2d 495, 687 P.2d 212 (1984) is likewise misplaced. As the Supreme Court held in *Bellevue Sch. Dist. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 691 P.2d 178 (1984), the builder limitation statute, RCW 4.16.310 creates no new right, but merely defines a limitation period

with which a claim ordinarily must accrue. (*Bellevue Sch. Dist. 405*, Supra, page 118). The statute “enacts such a 2 step procedure: actions founded upon negligenceconcerning improvements to real property must be filed within 2 or 3 years of discovery...” (*Bellevue Sch. Dist. 405*, Supra, at page 119)

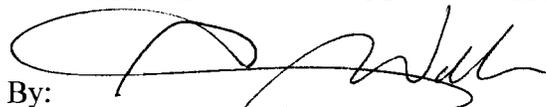
Evarone’s focus on the statute of limitations is completely beside the point. The trial court correctly dismissed Evarone’s case against Nuprecon based on a complete and total failure of proof. There is simply no competent evidence linking Nuprecon’s demolition work to any of Evarone’s claimed damages.

V. CONCLUSION

For the foregoing reasons, the trial court’s dismissal of Evarone’s claims against Nuprecon should be upheld without hesitation. Evarone’s appeal is completely without merit.

Respectfully submitted this 2nd day of May 2011

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No. 66176-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JACK W. EVARONE,

Petitioner/Appellant,

v.

LEASE CRUTCHER LEWIS, a Washington corporation, SENECA REAL ESTATE
GROUP, a Washington corporation, HORIZON HOUSE, a Washington corporation,
NUPRECON LP, a Washington corporation, NUPRECON GP, a Washington
corporation, FRUHLING, INC., a Washington corporation; FRUHLING SAND AND
TOPSOIL, INC., a Washington corporation; JOHN DOE 4-25, Residents of Washington
State,

Respondents/Appellees

CERTIFICATE OF SERVICE

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The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

On the 2nd of May, 2011, I caused to be delivered a true and correct copy of:

1. *Respondent/Appellee Nuprecon's Response to Petitioner/Appellant Evarone's Opening Brief*; and
2. *Certificate of Service.*

to the following counsel of record:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd of May, 2011.



Karen Langridge