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NO. 66902-8

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

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

Defendant/Appellant,

v.

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

Plaintiffs/Respondents.

RESPONDENTS' OPENING BRIEF

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Rules

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I. OVERVIEW OF ARGUMENT

The three year statute of limitations contained in RCW 4.16.080(1) applies to CF Sales, Inc.'s ("CF") claim. Sound Transit concedes that CF timely filed its claim if this statute of limitations applies.

Even if Sound Transit is correct and the two year statute of limitations contained in RCW 4.16.130 applies, CF still timely filed its claim. The Court in *Oja* expressly held that a plaintiff like CF "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." At the earliest, Sound Transit completed the project in July 2007. Sound Transit concedes that CF timely filed its claim if the statute of limitations did not begin to accrue until July 2007.

Sound Transit contends that, notwithstanding the Supreme Court's holding in *Oja*, the statute of limitations for "horizontal projects" such as the light rail line should commence upon the project's "substantial completion." Sound Transit does not cite any legal authority to support this argument. Further, Sound Transit did not issue the final notice of substantial completion for the project until November 22, 2006. Sound Transit concedes that CF timely filed its claim if the statute of limitations commenced on that date.

Even if CF did not timely file its claim, the doctrines of equitable tolling and equitable estoppel bar Sound Transit's statute of limitations defense. Sound Transit's gave false assurances concerning the handling of the claim that lulled CF into delaying the filing of its lawsuit. Justice required that CF's claim be allowed to proceed.

Finally, CF filed a cross-appeal of the trial court's decision. CF hereby withdraws that appeal.

II. STATEMENT OF FACTS

This lawsuit involves a claim concerning Sound Transit's Link Light Rail System. The initial phase of the Link Light Rail System stretches from Tukwila in the south to Westlake in downtown Seattle in the north ("Project"). The Project first began operating and carrying passengers in July 2009.¹

Because of varying construction methods and the need for different construction specialties, Sound Transit constructed the Project by way of a series of separate and independent civil construction contracts. Relevant to this lawsuit is a 1.3 mile long segment of at-grade and elevated trackway between Royal Brougham and Airport Way South in Seattle ("Segment"). Sound Transit entered into a contract

¹ CP 298.

with Kiewit Pacific Company (“Kiewit”) for construction of the Segment.²

The Plaintiff Steven Cecchinelli owns commercial property adjacent to the Segment. Cecchinelli’s company, CF Sales, Inc., leases the property from Cecchinelli for warehouse and office space. Cecchinelli and CF Sales will hereafter be collectively referred to as “CF.”³

Sound Transit’s design required Kiewit to use the drilled shaft method of construction to install the foundations for the elevated sections of the track. As the trial court found, “[d]rilled shaft construction primarily involves (1) vibrating steel casings, including installation of both temporary and permanent steel casings, into the ground; (2) drilling (excavating) the core of these casings; and (3) pouring in-place the concrete foundations.”⁴

Kiewit’s subcontractor, Condon Johnson (“Condon”), installed the drilled shaft foundation casings for the Segment. The casings were made of 1” thick steel, were ten feet in diameter and varied in length

² *Id.*

³ CP 296.

⁴ CP 299. Sound Transit does not question the validity of the trial court’s findings. Unchallenged findings are treated as verities on appeal. *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 906, 246 P.3d 1254 (2011); *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 483, 254 P.3d 835 (2011); *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 253 P.3d 470 (2011).

between 80 and 150 feet. Condon installed 19 steel casings in the vicinity of CF's warehouse.⁵

Condon used a "vibratory pile driver" ("VPD") to install the casings. Essentially, the VPD transmits thousands of vibrations per minute through the steel foundation casing and into the soil. These vibrations cause the soil around the casing to liquefy, allowing the casing to "sink" into the soil under its own weight.⁶

Condon had difficulty installing two of the casings near CF's property. Condon ultimately used a compression impact hammer (*i.e.*, a traditional pile driver) to complete the installation of these two casings.⁷

The trial court found that while a VPD produces less noise than a conventional pile driver, it carries the same risk of harm to adjacent properties:

Sound Transit and its designers chose this method [drilled shaft construction] in part because it is less noisy and they thought it had lesser vibratory impacts than conventional pile driving, however **the vibratory technique**, which relies on a much greater

⁵ CP 299. Condon installed seven casings within 300 feet of CF's property. *Id.*

⁶ *Id.*

⁷ *Id.* Sound Transit claims that "[t]here were, in fact, no piles driven on the C-700 Project." Sound Transit's Opening Brief ("ST Brief"), at 7. However, as the trial court found, Condon's use of the compression impact hammer was "comparable to pile driving except that the force is exerted on a hollow casing instead of a solid piling." *Id.* The trial court also found that use of the impact hammer was "akin to traditional pile driving the only difference being that the casing is a cylinder not filled in the middle until after installation". CP 301.

number of smaller impact vibrations, **poses risks of disturbing the adjacent soil at least as great as installation by direct hammer impact.**⁸

...

While **drilled shaft construction** may reduce noise associated with traditional “pile driving,” it **still creates and transmits vibrations into the ground which are capable of causing soil disturbances and damage to property such as Plaintiff’s warehouse floor.** Such risks are present even with the exercise of reasonable care. Given the potential for soil subsidence triggered by vibratory installation, it is highly likely to cause damage to adjacent soils and to buildings dependent upon the soil for their stability such as the CF warehouse. This activity was not common and was used in the area it was because that was the location of the ST [Sound Transit] elevated rail alignment even though **the method presented an inappropriate risk of damage in a such close proximity to Plaintiff’s building.**⁹

Shortly after Condon began installation of the foundations, CF notified Sound Transit that use of the VPD was causing settling problems on CF’s property.¹⁰ Roger Pence (“Pence”), a Sound Transit “community outreach officer,” visited CF’s property to inspect the damage. After walking through the facility and taking photographs of the damage, Pence assured CF that Sound Transit would be responsible for repairing any damage caused by its construction activities.¹¹

⁸ CP 299 (emphasis added).

⁹ CP 299-300 (emphasis added).

¹⁰ CP 301.

¹¹ CP 279, 301-02.

Pence made two or three other visits to CF's property to observe additional damage caused by Sound Transit's construction activities.¹² In September 2005, CF sent an e-mail to Pence stating that it "had a lot of settling of the warehouse floor due to the construction." CF advised that it was "ready to proceed with the repairs to the building."¹³

Pence explained Sound Transit's claim process to CF and provided CF with an Incident Report.¹⁴ CF followed Pence's instructions, filled out the Incident Report and returned the document to him.¹⁵ Pence told CF that he would take responsibility for submitting the Incident Report "to our Risk Management Office."¹⁶

Pence testified that after receiving the Incident Report from CF, he "misplaced" it in his office. 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." Pence testified he did not find the Incident Report in his office until March 2008, after

¹² CP 208-09.

¹³ CP 209.

¹⁴ In 2006, third-parties having claims against Sound Transit submitted them by filing an Incident Report with Sound Transit. CP 210.

¹⁵ CP 229.

¹⁶ CP 210.

receiving questions from CF's counsel regarding the status of the claim.¹⁷

Sound Transit's Risk Management Office contacted CF in April 2008, apologized for the delay in processing the claim and requested CF to fill out a Claim Report Form.¹⁸ Sound Transit represented that "completion of this form will help expedite the processing of your claim."¹⁹

CF promptly completed the Claim Report Form and returned it to Sound Transit. Several weeks later, CF received a letter from AIG, Sound Transit's insurance carrier. AIG asserted in the letter that the statute of limitations barred CF's claim:

The statute [of limitations] in the state of Washington is 3 years from the date of the alleged property damage. It appears that the earliest date [of accrual] would [be] Mr. Pence's visit of May 19, 2004. The last day to file a claim would have been May 19, 2007.²⁰

In August 2008, CF filed a lawsuit against Sound Transit to recover its damages. Sound Transit asserted that the lawsuit was premature because CF had not complied with RCW 4.96.020.²¹ That statute,

¹⁷ CP 210-11.

¹⁸ CP 212, 233.

¹⁹ CP 231. Between 2006 and 2008, Sound Transit switched to use of the Claim Report Form for third-parties damage claims. CP 212.

²⁰ CP 235

²¹ CP 193.

which concerns tort claims against governmental agencies, requires the claimant to serve its claim upon the agency's appointed agent at least 60 days prior to initiating litigation.

CF believed that its previous filing of two claim forms with Sound Transit constituted substantial compliance with the requirements of RCW 4.96.020. However, to avoid any argument, CF dismissed its lawsuit and, on October 22, 2008, served Sound Transit's appointed agent with the claim.²²

Sound Transit did not respond to CF's claim. On January 8, 2009, which was more than 60 days after it served Sound Transit's agent with the claim, CF filed the present lawsuit.²³

Trial on this matter took place in January 2011 before the Hon. Bruce W. Hilyer. On January 22, 2011, the trial court issued its Findings of Fact and Conclusions of Law.²⁴ The trial court held that Sound Transit's installation of the drilled shaft foundations for the elevated rail line "through both the vibratory method and with an impact hammer presented a high degree of risk of some harm to the adjacent properties".²⁵ The trial court further held that Sound Transit's installa-

²² CP 3-8.

²³ CP 168-70.

²⁴ CP 296-303.

²⁵ CP 303.

tion of the drilled shaft foundations “was an abnormally dangerous activity and is subject to strict liability.”²⁶

The trial court found that the damage to CF’s property “was caused by ST’s [Sound Transit’s] vibration and direct impact casing driving during construction in 2004.”²⁷ The trial court awarded \$154,800.00 to CF “as the cost to restore the property to its prior condition.”²⁸ Sound Trial appeals from this award.

III. LEGAL ARGUMENT

The three year statute of limitations contained in RCW 4.16.080(1) applies to CF’s claim. Even if Sound Transit is correct and the two year statute of limitations contained in RCW 4.16.130 applies, CF still timely filed its claim. Finally, if CF did not timely file its claim, the doctrines of equitable tolling and equitable estoppel bar application of the statute of limitations.

A. **The three year statute of limitations contained in RCW 4.16.080(1) applies to CF’s claim.**

Vern J. Oja & Assocs. v. Wash. Park Towers, Inc.,²⁹ is the leading Washington case concerning pile driving. In *Oja*, the owner of an

²⁶ *Id.*

²⁷ CP 301.

²⁸ CP 303.

²⁹ 15 Wn. App. 356, 549 P.2d 63 (1976); affirmed, 89 Wn.2d 72, 569 P.2d 1141 (1977).

apartment building brought an action to recover damages for injury to his building caused by pile driving for an adjacent structure. Both parties in *Oja* agreed that the 3-year statute of limitations in RCW 4.16.080 applied to the claim. Accordingly, the court of appeals held that application of RCW 4.16.080 was “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.”³⁰ No other Washington court has determined that issue.³¹

Not surprisingly, Sound Transit argues that the two-year statute of limitations contained in RCW 4.16.130 applies.³² According to Sound Transit, “Washington courts have unambiguously held that a strict liability claim for injury to real property is subject to the RCW 4.16.130 “two year catchall period.”³³ The reality is not nearly as unambiguous as Sound Transit suggests.

³⁰ 15 Wn. App. at 358.

³¹ In affirming the Court of Appeal’s decision, the Washington Supreme Court observed that “the parties agree the 3-year statute of limitations for damages to real property (RCW 4.16.080) applies to respondent’s claim”. 89 Wn.2d at 74. The Supreme Court did not decide what statute of limitations applied to pile driving claims.

³² RCW 4.16.130 states that “An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.”

³³ ST Brief, page 12.

*Mayer v. City of Seattle*³⁴ is the **only** Washington decision stating that the two-year statute of limitations in RCW 4.16.130 applies to a strict liability claim for injury to real property. *Mayer* involved an action by a landowner against the City of Seattle and the owner of an adjacent parcel of land (McFarland) for common law nuisance, negligent injury to real property, strict liability for engaging in an abnormally dangerous activity and recovery under the Model Toxics Control Act (MTCA) for damages caused by the creation and maintenance of a toxic waste dump.³⁵

On summary judgment, the trial court dismissed the majority of Mayer's common law tort claims on statute of limitations grounds. The trial court also ruled that the City and McFarland were strictly liable property owners under MTCA and awarded to Mayer remediation costs and attorneys' fees. Mayer appealed the trial court's order dismissing his tort claims on summary judgment, contending that a genuine issue of material fact existed regarding when he reasonably should have discovered that the fill material was toxic.³⁶

The primary issue in *Mayer* was when the statute of limitations accrued. The appellate court held that "[a] landowner's claim for dam-

³⁴ 102 Wn.App. 66, 10 P.3d 408 (2000).

³⁵ 102 Wn.App. at 74.

age from contaminated property accrues when he or she becomes aware, or should have become aware, that the property was contaminated.” The appellate court reversed the summary judgment award, finding that a genuine issue of material fact existed regarding when Mayer “first learned, or should have learned, that the property was contaminated with toxic material.”³⁷

The only relevance *Mayer* has to our present case is the appellate court’s comment concerning the applicable statute of limitations:

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 [in RCW 4.16.130].³⁸

Mayer did not cite any authority for its statement that the two-year “catchall period” applied to claims involving “abnormally dangerous activity.”³⁹ Subsequent cases have only cited *Mayer* as support for ap-

³⁶ *Id.* at 74-75.

³⁷ *Id.* at 78.

³⁸ *Id.* at 70-71.

³⁹ *Mayer* cited to *In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551, 1574 (E.D. Wash. 1991) (Washington’s two-year limitations period governs nuisance claims); and *White v. King County*, 103 Wash. 327, 329, 174 P. 3 (1918) (two-year limitation applies to negligent injury to real property).

plication of the two-year catchall provision in RCW 4.16.130 to general negligence claims for injury to real property.⁴⁰

More importantly, Mayer's statement that RCW 4.16.130 applies to "strict liability" claims is *dicta*, which is language in an opinion that was not necessary to the decision in the case.⁴¹ **What** statute of limitations applied to Mayer's claim was irrelevant to the appellate court's determination of **when** the statute of limitations accrued. Statements which are *dicta* do not control the decision in future cases.⁴²

In *Stenberg v. Pacific Power & Light Co.*,⁴³ the Washington Supreme Court gave a detailed analysis of the history concerning RCW 4.16.130 and its interpretation by Washington's courts. Observing that "[s]tatutes of limitation are in their nature arbitrary," the Court said that their goal was "to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence."⁴⁴ Because statutes of limitation deprive a plaintiff "of

⁴⁰ See *Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006); *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 125, 89 P.3d 242 (2004), review denied, 153 Wn.2d 1008 (2005).

⁴¹ *State v. Louthan*, 158 Wn. App. 732, 752, 242 P.3d 954 (2010); *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 936, 231 P.3d 1282 (2010).

⁴² See *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 172, 883 P.2d 308 (1994); *State v. Pawlyk*, 115 Wn.2d 457, 487, 800 P.2d 338 (1990); *Yeakey v. Hearst Commc'ns, Inc.*, 156 Wn. App. 787, 792-793, 234 P.3d 332 (2010).

⁴³ 104 Wn.2d 710, 709 P.2d 793 (1985).

⁴⁴ 104 Wn.2d at 714 (1985)(citing *Tioga R.R. v. Blossburg & C. R.R.*, 87 U.S. (20 Wall.) 137, 150, 22 L. Ed. 331 (1873)).

the opportunity to invoke the power of the courts in support of an otherwise valid claim,”⁴⁵ careful scrutiny is required to prevent injustice:

However, in applying a limitation statute, this court has insisted on a careful scrutiny of the changing conditions and needs of the times to prevent any application of the common law as an instrument of injustice. **When there is uncertainty as to which statute of limitation governs, the longer statute will be applied.**⁴⁶

Specifically discussing RCW 4.16.130, the Court noted that the statute had not undergone any substantive change since its adoption in 1854.⁴⁷ The statute was originally “intended to cover any action which did not fall into any of the other provisions [statutes of limitations].”⁴⁸ However, in the seminal case of *Northern Grain & Warehouse Co. v. Holst*,⁴⁹ the Court established a “direct/indirect distinction between causes of action.”⁵⁰ Essentially, the *Northern Grain* court held that the three-year statute of limitations contained in RCW 4.16.080 would apply to “direct invasions of personal or property rights,” while

⁴⁵ *Id.* at 714.

⁴⁶ *Id.* at 714-15 (emphasis added and citations omitted).

⁴⁷ *Id.* at 713.

⁴⁸ *Id.* at 715.

⁴⁹ 95 Wash. 312, 163 P. 775 (1917).

⁵⁰ *Stenberg*, 104 Wn.2d at 716.

the two-year statute of limitations in RCW 4.16.130 would apply to “indirect” invasions.⁵¹

By 1937, the *Northern Grain* doctrine had become “settled law”.⁵² Washington courts continued to apply the “direct/indirect” distinction, often in confusing and contradictory manners.⁵³ The *Stenberg* court, finding that the “direct/indirect” distinction “has been extended beyond contemporary tort doctrine so that whatever utility it may have had in former years has now been exhausted,” finally put an end to this confusion by overruling *Northern Grain*.⁵⁴ Returning to the “original understanding” of RCW 4.16.130, the Court held that

The catchall provision serves as a limitation for any cases not fitting into the other limitation provisions. This serves the State's purpose to compel prompt litigation and not leave persons fearful of litigation unlimited by time. An antiquated direct/indirect analysis should not allow a limitation statute alone to deprive plaintiffs of their day in court. If the cause is so indirect as not to appear to be a proximate cause, then the plaintiff probably will not succeed in the lawsuit.⁵⁵

⁵¹ *Northern Grain*, 95 Wash. at 315.

⁵² *Stenberg*, 104 Wn.2d at 718 (citing *Noble v. Martin*, 191 Wash. 39, 46, 70 P.2d 1064 (1937)).

⁵³ See, e.g., *Peterick v. State*, 22 Wn. App. 163, 589 P.2d 250 (1977), where the court held that even though a proximate cause may be factually considered a direct cause of a person's injury, if the cause is indirect under the *Northern Grain* doctrine, the lesser limitation rule would be applied.

⁵⁴ *Stenberg*, 104 Wn.2d at 720

⁵⁵ 104 Wn.2d at 720-721. The Court also observed that “the cases preceding *Northern Grain* viewed the purpose of the catchall provision merely to ensure a limitation provision for any possible cause of action not covered by the other provisions. We believe this early assessment of the statutes to have been correct.” *Id.* at 720 (citation omitted). Accord, *Sorey v. Barton Oldsmobile*, 82 Wn. App. 800,

Put into this historical prospective, RCW 4.16.130 only applies if a plaintiff's cause of action cannot fit under **any** other limitation provision. Further, Washington courts have given expansive readings to other limitation provisions. For example, the *Stenberg* court held that the statutory language of RCW 4.16.080(2) is clear and "should apply to any other injury to the person or rights of another not enumerated in other limitation sections."⁵⁶ In so doing, the Court noted that "[t]he term 'injury to the person', where used in a limitation statute, generally is given a comprehensive meaning and has in most instances been construed as broad enough to cover actions for consequential damages."⁵⁷

RCW 4.16.080(1) establishes a three-year statute of limitations for "[a]n action for waste or trespass upon real property." A person is liable for trespass if he or she intentionally (1) enters or causes another person or a thing to enter land in the possession of another or (2)

806, 919 P.2d 1276 (1996)(the court in *Stenberg* "return[ed] to the original understanding of the statutes: The catchall provision serves as a limitation for any cases not fitting into the other limitation provisions.").

⁵⁶ *Stenberg*, 104 Wn.2d at 720. *Accord*, *Thompson v. Wilson*, 142 Wn. App. 803, 812-813, 175 P.3d 1149 (2008); *French v. Uribe, Inc.*, 132 Wn. App. 1, 13, 130 P.3d 370 (2006); *Sorey*, 82 Wn. App. At 806.

⁵⁷ *Stenberg*, 104 Wn.2d at 720.

remains on the land or (3) fails to remove from the land a thing that he or she is under a duty to remove.⁵⁸

In *Bradley v. American Smelting & Refining Company*,⁵⁹ the plaintiffs, landowners on Vashon Island, sued for damages in trespass and nuisance from the deposit on their property of microscopic, airborne particles of heavy metals which came from the American Smelting and Refining Company (ASARCO) copper smelter at Ruston, Washington. One of the questions in *Bradley* was whether ASARCO had “the requisite intent to commit intentional trespass as a matter of law.”⁶⁰ In deciding this question, the court observed that ASARCO “had to know” its activities would result in the contamination, however slight, of adjoining properties:

The defendant has known for decades that sulfur dioxide and particulates of arsenic, cadmium and other metals were being emitted from the tall smokestack. It had to know that the solids propelled into the air by the warm gases would settle back to earth somewhere. It had to know that a purpose of the tall stack was to disperse the gas, smoke and minute solids over as large an area as possible and as far away as possible, but that while any resulting contamination would be diminished as to any one area or landowner, that nonetheless contamination, though slight, would follow.⁶¹

⁵⁸ *Brutsche v. City of Kent*, 164 Wn.2d 664, 673-674, 193 P.3d 110 (2008).

⁵⁹ 104 Wn.2d 677, 709 P.2d 782 (1985).

⁶⁰ 104 Wn.2d at 681.

⁶¹ *Id.* at 682.

The Court stated that the word “intent” is used “to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”⁶² The Court noted, however, that intent is not “limited to consequences which are desired.” The Court declared that “[i]f the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.”⁶³ Holding that the intent to trespass may include “an act that the actor undertakes realizing that there is a high probability of injury to others and yet the actor behaves with disregard of those likely consequences,” the Court found that ASARCO “had the requisite intent to commit intentional trespass as a matter of law.”⁶⁴

The *Bradley* court next considered whether the “intentional deposit of microscopic particulates, undetectable by the human senses, upon a person's property give rise to a cause of action for trespassory invasion of the person's right to exclusive possession of property as

⁶² *Id.* (citing section 8A of the Restatement (Second) of Torts).

⁶³ *Id.* (quoting comment b to section 8A of the Restatement (Second) of Torts).

⁶⁴ *Id.* at 684.

well as a claim of nuisance?"⁶⁵ Holding that it could, the Court outlined the necessary elements for such a trespass claim:

Under the modern theory of trespass, the law presently allows an action to be maintained in trespass for invasions that, at one time, were considered indirect and, hence, only a nuisance. In order to recover in trespass for this type of invasion [i.e., the asphalt piled in such a way as to run onto plaintiff's property, or the pollution emitting from a defendant's smoke stack, such as in the present case], a plaintiff must show 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the res.⁶⁶

Finally, the *Bradley* court considered what statute of limitations would apply to such a trespass claim. Specifically citing to *Oja*, the court held that the three-year statute of limitations in RCW 4.16.080(1) applied:

We have recognized that the intrusion to land from this kind of an invasion, once thought to be a trifling interference with the actual use of the land, may be very devastating indeed. The former approach, whether arising from the infrequency with which interference occurred, the unsophisticated nature of earlier air pollutants or because of our lack of awareness of their potential for harm, we now abandon. **It is appropriate, therefore, that having recognized this intrusion upon land as a trespass, the 3-year statute of limitations [in RCW 4.16.080(1)] should apply. An action for trespass to land must be brought within 3 years of the invasion to the premises.** We now hold that when the actions of a defendant have (1) invaded the plaintiff's interest in the exclusive possession of his property, (2) been

⁶⁵ *Id.*

⁶⁶ *Id.* at 691. *Accord, Wallace*, 134 Wn. App. at 15.

committed intentionally, (3) been done with the knowledge and reasonable foreseeability that the act would disturb the plaintiff's possession, and (4) caused actual and substantial damages, the 3-year statute of limitations applies.⁶⁷

Bradley directly applies to CF's claim against Sound Transit. First, the vibrations from Sound Transit's pile driving activities invaded CF's exclusive right to its property. The *Bradley* court held that trespass does not require an invasion by a "thing" or an "object", observing that "liability on the theory of trespass has been recognized where the harm was produced by the vibration of the soil or by the concussion of the air which, of course, is nothing more than the movement of molecules one against the other."⁶⁸

Second, Sound Transit intentionally engaged in pile driving with the knowledge and reasonable foreseeability that the act would disturb CF's right to exclusive possession. The trial court specifically found that Sound Transit "had to know" the vibrations from the VPD were capable of damaging adjacent property:

⁶⁷ *Bradley*, 104 Wn.2d at 692-93 (emphasis added and citations omitted). *Accord*, *Woldson v. Woodhead*, 159 Wn.2d 215, 221, 149 P.3d 461 (2006); *Wallace*, 134 Wn. App. at 15.

⁶⁸ *Bradley*, 104 Wn.2d at 686 (quoting *Martin v. Reynolds Metals Co.* 221 Or. 86, 342 P.2d 790 (1959)). *Accord*, *Gill v. LDI*, 19 F. Supp. 2d 1188, 1198 (W.D. Wash. 1998) (if an intangible invasion, such as noise, odors, light, smoke, etc., "causes substantial damage to the plaintiff's property, this damage will be considered to be an infringement on the plaintiff's right to exclusive possession, and an action for trespass may be brought."); *Gaines v. Pierce County*, 66 Wn. App. 715, 719, 834 P.2d 631 (1992)("The distinction between direct and indirect invasions has been

While **drilled shaft construction** may reduce noise associated with traditional “pile driving,” it **still creates and transmits vibrations into the ground which are capable of causing soil disturbances and damage to property such as Plaintiff’s warehouse floor. Such risks are present even with the exercise of reasonable care. Given the potential for soil subsidence triggered by vibratory installation, it is highly likely to cause damage to adjacent soils and to buildings dependent upon the soil for their stability such as the CF warehouse. ... [T]he method presented an inappropriate risk of damage in a such close proximity to Plaintiff’s building.**⁶⁹

Finally, Sound Transit’s pile driving activities caused “actual and substantial damage” to CF’s property. The trial court found that, “based upon all of the expert testimony, the eyewitness accounts, the physical and all of the other evidence, Plaintiffs have carried their burden that the floor deflection and associated damage was caused by ST’s vibration and direct impact casing driving construction activities in 2004.”⁷⁰ The trial court awarded CF the sum of \$154,800.00 as the “cost to restore the property to its prior condition without conferring a windfall.”⁷¹

Sound Transit’s intrusion upon CF’s land constituted a trespass. As mandated by *Bradley*, the three-year statute of limitations contained

abandoned and it no longer matters whether the invading agent is tangible or intangible.”).

⁶⁹ CP 299-300 (emphasis added).

⁷⁰ CP 301.

⁷¹ CP 303.

in RCW 4.16.080(1) applied to CF's claim.⁷² Sound Transit does not dispute that CF filed its claim within three years from the date it accrued. Accordingly, the Court should deny Sound Transit's appeal.

B. CF timely filed its claim even if the two year statute of limitations contained in RCW 4.16.130 applies.

Even if the two year statute of limitations contained in RCW 4.16.130 applies, CF still timely filed its lawsuit. CF's cause of action against Sound Transit arose upon the completion of the Project, not when the damage first occurred. "Completion" of the Project does not mean "substantial completion." Because the Project was not completed until July 2007 or later, CF timely filed its lawsuit.

1. CF's cause of action accrued when Sound Transit completed construction of the Project.

Statutes of limitations do not begin to run until a cause of action accrues.⁷³ In its order denying Sound Transit's motion for summary

⁷² See also, *Zimmer v. Stephenson*, 66 Wn.2d 477, 403 P.2d 343 (1965)("any tortious intrusion of foreign matter onto the property of another" constitutes a trespass that is subject to the three-year statute of limitations in RCW 4.16.080."); *Free Methodist Church Corp. v. Brown*, 66 Wn.2d 164, 165, 401 P.2d 655 (1965)(the removal of the lateral support constituted an actual invasion of the plaintiff's property and was therefore a trespass subject to the 3-year statute of limitations stated in RCW 4.16.080 (1)); *Cheskov v. Port of Seattle*, 55 Wn.2d 416, 419, 348 P.2d 673 (1960)(the three year statute of limitations contained in RCW 4.16.080 applied to plaintiff's claim for damages caused by the noise of airplanes landing, warming up, and taking off from Sea-Tac Airport).

⁷³ RCW 4.16.005; *1000 Virginia Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006).

judgment, the trial court determined that CF's cause of action accrued upon the Project's completion:

The Court concludes that the cause of action accrued when the project was completed, not substantially completed. The Court relies upon the policy articulated in *Oja* and additionally notes that the term "substantial completion" existed in statute prior to *Oja* but was not used by the Court.⁷⁴

Sound Transit argues that the trial court erred in this conclusion and requests this Court to "reverse the trial court's decision and hold that the Plaintiffs' claim accrued when the specific construction activity alleged to have caused the damage was finished (August 24, 2004) or, at the latest, when the adjacent light rail construction project was substantially complete (May 24, 2006)."⁷⁵ CF submits the trial court properly applied the law and requests this Court to deny Sound Transit's appeal.

The general rule in Washington is that claims generally accrue as of the date the plaintiff suffers "some form of injury or damage."⁷⁶ However, as discussed below, third-party property damage claims arising from construction on adjacent property accrue as of the date of completion.

⁷⁴ CP 283.

⁷⁵ ST Brief, at 3.

⁷⁶ See *In re Estate of Hibbard*, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992) (citing *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985)); *Beard v. King County*, 76 Wn. App. 863, 868, 889 P.2d 501 (1995).

*Gilliam v. Centralia*⁷⁷ involved an action to recover compensation for damage to real property, by deprivation of access, light and air, caused by the construction of a bridge to separate the grade of a street in the City of Centralia from the grade of an intersecting railroad. The contractor started work on the project in July 1936 and completed the pouring of all concrete in April 1937. The state highway department resident engineer testified that the bridge was “entirely completed the 7th of May, 1937,” but admitted that the contractor performed finishing work on the bridge in June and July 1937. The resident engineer stated that the contractor finally completed its work on July 2, 1937 and that the state accepted the work on July 21, 1937.⁷⁸

Gilliam filed his lawsuit in June 1940. The city contended that Gilliam’s cause of action accrued in May 1937, when the bridge was substantially complete, and that the applicable three-year statute of limitations barred Gilliam’s claim. Gilliam argued that the statute of limitations did not accrue until July 1937, when work on the bridge was actually completed. The trial court agreed with Gilliam and entered judgment in his favor.

On appeal, the Washington Supreme Court found that “the evidence preponderates in favor of the [trial court’s] finding” that the project was not completed until July 1937.⁷⁹ The Court upheld the trial

⁷⁷ 14 Wn.2d 523, 524, 128 P.2d 661 (1942).

⁷⁸ 14 Wn.2d at 528-29. Another state highway department employee testified that a dozen of the contractor’s employees could have worked on the project after May 7, 1937 and up until July 2, 1937. He further testified that July 2, 1937 was the contract’s completion date “as far as our office was concerned”. *Id.* at 529.

⁷⁹ *Id.*

court's determination that the statute of limitations did not accrue until the completion of the project:

In a number of other jurisdictions, it has been held that, where a municipality, without condemnation proceedings, takes or damages private property for a public improvement, the statute of limitations does not commence to run against the property owner's right of action for compensation until construction of the improvement has been **entirely** completed or until operations thereon have ceased for such a period of time as reasonably to indicate that the project has been abandoned.⁸⁰

In *Oja*, the Court followed *Gilliam* and expressly held that in cases involving damage to real property arising out of construction on adjacent property, the cause of action does not accrue until the completion of the construction. The plaintiff in *Oja* owned a 42-unit apartment building located in Seattle. The defendant, Washington Park Towers, Inc. ("Washington Park"), owned property adjacent to Oja's apartment complex upon which it constructed a condominium apartment building.

As part of the construction process, it was necessary to drive pilings to support the building. Pile driving originally took place on the project from August 1966 to September 1966. After stopping for more than a year, pile driving resumed in November 1967 and continued

⁸⁰ *Id.* (emphasis in original). *Accord, Papac v. Montesano*, 49 Wn.2d 484, 488, 303 P.2d 654 (1956) ("The period of limitation begins to run when the project causing the damage is completed if substantial damage has already occurred or when the first substantial injury is sustained.").

until April 1968. Washington Park completed construction on the project in 1969.⁸¹

Oja filed a lawsuit against Washington Park in March 1971, claiming that the pile driving on Washington Park's construction project damaged its apartment complex. A jury awarded damages to Oja in the amount of \$71,000.00. In a special verdict, the jury attributed 70 percent of Oja's damages to the pile driving that occurred between August and September of 1966 and the remaining 30 percent to the pile driving that occurred between November 1967 and April 1968.⁸²

Washington Park appealed from the judgment, contending that the three-year limitations in RCW 4.16.080 barred Oja's claim. Washington Park argued that Oja's cause of action accrued either: (1) immediately following the commencement of pile driving activities in August of 1966 when the first damage occurred and Oja had a right to apply to the courts for relief; or (2) at the latest in September 1966, when the initial pile driving ceased and the first substantial damage had occurred.⁸³

⁸¹ 15 Wn. App. at 357-58.

⁸² *Id.* at 358-59.

⁸³ *Id.*

The court of appeals rejected Washington Park's argument. Citing to *Gilliam* and *Papac v. Montesano*, the court held that Oja's cause of action did not accrue until completion of the project:

The general rule which emerges from those decisions is that if substantial damage has already occurred at the time the project is completed, the action accrues at that point. However, if the damage has not occurred when the project is completed, the action accrues when the first substantial injury is sustained thereafter. The pile driving activity here was all a part of the construction of the condominium apartment building. **Although the jury found that 100 percent of the damages alleged flowed from the pile driving activity as a whole (even though it assigned percentages to each time period), nothing in the record persuades us that we should deviate here from the general rule that the cause of action accrued when the building was completed.** Thus, since the complaint was filed within 3 years of the 1969 completion date, the statute of limitations does not bar Oja's action.⁸⁴

The Washington Supreme Court accepted review of the case.⁸⁵ Rejecting Washington Park's argument that the statute of limitations commenced in September 1966, when the first substantial damage occurred, the Court affirmed that the statute of limitations did not accrue until the completion of construction on the project:

We agree with the position taken by the Court of Appeals and by the respondent Oja & Associates: **The damages flowed from the pile driving as a whole and the cause of action accrued when the building was completed.** We have reexamined the statute of limitation cases which have been before this court, as urged by respondent, and find this view to be consistent with

⁸⁴ *Oja*, 15 Wn. App. at 359-360 (citations omitted and emphasis added).

⁸⁵ *Vern J. Oja & Assocs. v. Wash. Park Towers*, 89 Wn.2d 72, 569 P.2d 1141 (1977).

these cases. 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. In the instant case, substantial damage had occurred when the project was completed. **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.**⁸⁶

Sound Transit did not complete work on the Segment until July 2007 and did not complete the entire Project until July 2009.⁸⁷ CF filed its lawsuit in January 2009, less than two years after its cause of action accrued. Regardless of what statute of limitations applies, CF timely filed its lawsuit.

2. Oja's "deferred accrual rule" is not *dicta*.

Sound Transit argues that *Oja's* "deferred accrual rule," as articulated by both this Court and the Supreme Court, is *dicta* and lacks precedential value. Sound Transit claims that because the Court found that the damages "flowed from pile driving as a whole," and because *Oja* filed its lawsuit within three years after completion of pile driving, "additional analysis was unnecessary to the disposition of the case."⁸⁸

⁸⁶ 89 Wn.2d at 75-76 (citations omitted and emphasis added).

⁸⁷ CP 48, 248.

⁸⁸ ST Brief, at 30-31. Indeed, Sound Transit asserts that "the real rule announced in *Oja* [is] that pile driving is a single activity". ST Brief, at at 32 (parentheses omitted).

“*Dicta*” is language in an opinion that was not necessary to the decision in the case.⁸⁹ Statements which are *dicta* do not control the outcome in future cases.⁹⁰ Conversely, an interpretation essential to a judicial decision is not *dicta*.⁹¹

One of the specific issues before the *Oja* court was whether the statute of limitations barred the plaintiff’s claim:

The first issue before us is whether respondent Oja & Associates' claim was barred by the statute of limitations. Although the parties agree the 3-year statute of limitations for damages to real property (RCW 4.16.080) applies to respondent's claim, **the question is when the claim "accrued" within the meaning of RCW 4.16.010** which provides in part:

Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued...⁹²

The general rule is that claims accrue as of the date the plaintiff suffers “some form of injury or damage.”⁹³ The first damage to Oja’s property occurred in August 1966. Since Oja did not file its lawsuit until

⁸⁹ *State v. Louthan*, 158 Wn. App. 732, 752, 242 P.3d 954 (2010); *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 936, 231 P.3d 1282 (2010).

⁹⁰ See *Kish*, 125 Wn.2d at 172; *Pawlyk*, 115 Wn.2d at 487; *Yeakey*, 156 Wn. App. at 792-793.

⁹¹ *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 73, 42 P.3d 968 (2002); *Pierson v. Hernandez*, 149 Wn. App. 297, 202 P.3d 1014 (2009); *City of West Richland v. Dep’t of Ecology*, 124 Wn. App. 683, 692, 103 P.3d 818 (2004).

⁹² 82 Wn.2d at 74-75 (emphasis added). RCW § 4.16.005, which superseded RCW § 4.16.010, now provides that “actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.”

⁹³ See *Hibbard*, 118 Wn.2d at 744-45; *Beard*, 76 Wn. App. at 868.

4 ½ years later, in March 1971, application of the standard accrual rule would have barred Oja's claim.

The Court held that 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." Since Washington Park did not complete the project until 1969, the Court held that Oja timely filed its claim. Determining when Oja's claim accrued was therefore "essential to the statute of limitations decision of the case" and the rule announced by the Court was not *dicta*.⁹⁴

3. **Oja is not distinguishable because it involved a "vertical construction" case.**

Sound Transit characterizes *Oja* as a "vertical construction" case. Sound Transit defines vertical construction as "the construction of a building, where the entire construction project is adjacent to the third-party property."⁹⁵ Sound Transit states that our present case involves "horizontal construction," which it defines as the "construction of projects like streets, highways, railroads, water/sewer systems, etc.,

⁹⁴ *Wagg*, 146 Wn.2d at 72.

⁹⁵ ST Brief, at 2.

that are typically miles in length with the majority of work not taking place adjacent to the third-party property.”⁹⁶

Sound Transit claims “[i]t is unclear how, if at all, the deferred accrual rule [announced in *Oja*] applies to horizontal construction projects (streets, highways, railroads, etc.) where projects are miles in length, with only a tiny portion adjacent to the property at issue.”⁹⁷ Sound Transit argues that because there is “no logical reason to base the accrual of third-party damage claims on the completion of construction work that may be miles away from the damaged property,” the deferred accrual rule announced in *Oja* does not apply to horizontal projects:

Because of the unique characteristics of horizontal construction projects, a deferred accrual rule should not apply. Instead, the traditional discovery rule provides adequate protection to the rights of third-party property owners.⁹⁸

Sound Transit does not cite any legal authority in support of its argument that the *Oja* court only intended for the deferred accrual rule to apply to “vertical construction” projects. Indeed, Sound Transit does not cite to any legal authority from any jurisdiction to support its argument that claims on “vertical” and “horizontal” construction projects

⁹⁶ *Id.*

⁹⁷ *Id.* at 30.

⁹⁸ *Id.* at 34.

accrue differently. Appellate courts will generally not consider contentions unsupported by citation to authority in the appellate brief.⁹⁹

Perhaps no authority exists because Sound Transit's argument is unworkable. Sound Transit's definitions of "horizontal" and "vertical" projects are less than precise. Is a block-long road improvement project that only adjoins one or two properties still "horizontal construction?" Is a 500-acre shopping mall project that adjoins numerous properties still "vertical construction?" And how should a court characterize the construction of a large housing subdivision that incorporates both vertical (houses) and horizontal (streets, sewer lines, etc.) elements?

Further, hundreds or thousands of separate properties will likely adjoin "horizontal construction" projects that are "miles in length." Under Sound Transit's theory, a separate statute of limitations would apply to claims involving each adjoining property. Determining what accrual date applied to which property would be a procedural nightmare.

No legal authority or compelling reason exists to distinguish between "horizontal" and "vertical" projects when applying *Oja's* "de-

⁹⁹ RAP 10.3(a)(5). See *State v. Halstien*, 122 Wn.2d 109, 116, 857 P.2d 270 (1993); *State v. Schmuck*, 121 Wn.2d 373, 379, 850 P.2d 1332 (1993); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989); *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 393, 238 P.3d 505 (2010); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008).

ferred accrual rule.” The Court should reject Sound Transit’s request that it recognize such a distinction.

4. **In cases involving damage to real property arising out of construction on adjacent property, the cause of action accrues when the construction is completed, not when it is “substantially complete.”**

Sound Transit acknowledges that under *Oja*’s deferred accrual rule, the cause of action for damages arising out of construction on adjoining property “accrues at the time the construction is **completed** if substantial damage occurred at that time”.¹⁰⁰

Sound Transit suggests that “[a] general rule, such as *Oja*’s deferred accrual, needs to be universally applicable and not subject to varying terms and definitions in different contracts.”¹⁰¹ Sound Transit contends that “[t]o the extent a deferred accrual rule derived from *Oja* governs this case, the appropriate trigger for accrual of third-party claims due to horizontal construction activities on adjacent properties should be when the construction adjacent to the property can be used for its intended purpose—*i.e.*, when it is substantially complete.”¹⁰² Ac-

¹⁰⁰ ST Brief, at 14-15 (emphasis added).

¹⁰¹ *Id.*, at 19.

¹⁰² *Id.*, at 21.

ording to Sound Transit, “there is no logical basis to tie accrual of third-party claims to **contract** completion.”¹⁰³

Based upon its belief that tying accrual of claims to project completion would be “illogical,” Sound Transit argues that “[a]s applied to this appeal, the primary unanswered question is what the Court meant by completion—whether accrual occurs when construction is substantially complete or when everything associated with the construction contract, however minor, is 100% complete.”¹⁰⁴ Sound Transit claims this is “an issue of first impression because the decision in *Oja* would have been resolved the same regardless of the answer.”¹⁰⁵

There is no “unanswered question” regarding what the Supreme Court “meant by completion.” The Court expressly held that that “the cause of action accrued when **the building was completed**” and that “the cause of action accrues at the time **the construction is completed** ...”¹⁰⁶ The Court further held that a plaintiff “was entitled to wait until **the completion of the construction project** before filing a cause of action ...”¹⁰⁷

¹⁰³ *Id.* at 20 (emphasis in original).

¹⁰⁴ *Id.* at 15.

¹⁰⁵ *Id.*

¹⁰⁶ *Oja*, 89 Wn.2d at 75-76 (emphasis added).

¹⁰⁷ *Id.* (emphasis added).

Washington courts distinguish between “completion” and “substantial completion.” Completion of a construction project occurs when all of the work is in its “final or intended condition:”

Completion” is defined as the “act or action of completing, becoming complete, or making complete.” “Complete” is, in turn, defined as “possessing all necessary parts, items, components, or elements”; “brought to an end or to a final or intended condition”; and “fully realized” or “carried to the ultimate.”¹⁰⁸

Conversely, a “substantially complete” project is something less than “complete:”

While the term “completion” does not encompass the incomplete, the definition of “substantial completion” does. The related, but inapplicable, statute of repose for construction claims [RCW 4.16.310] contemplates a lower standard for “substantial completion”: A builder need only complete construction to allow occupancy or use of an improvement for its intended purposes.¹⁰⁹

Sound Transit argues that a project should be considered complete even if “punch list work,” which Sound Transit defines as “minor work,” still remains to be finished.¹¹⁰ However, Washington courts have specifically held that a contract is not complete until all of the work—including punch list work—is finished.¹¹¹ And, notwithstanding

¹⁰⁸ *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 394, 238 P.3d 505 (2010)(quoting Webster's Third New International Dictionary 465 (2002)).

¹⁰⁹ *Id.* (citing *Smith v. Showalter*, 47 Wn. App. 245, 251, 734 P.2d 928 (1987) and *Glacier Springs Prop. Owners Ass'n v. Glacier Springs Enters., Inc.*, 41 Wn. App. 829, 832, 706 P.2d 652 (1985)).

¹¹⁰ ST Brief, at 25-26.

¹¹¹ *Mattingly*, 157 Wn. App. at 394. See also, *Gilliam*, 14 Wn.2d at 528-29 (project is not finished until all of the work under the contract is actually completed).

the argument in its brief, Sound Transit also does not consider work on a contract to be complete until the contractor finishes the punch list work.

Sound Transit does not limit the number of items it can place a punch list.¹¹² For example, when Sound Transit issued Notice of Substantial Completion #1 for the Segment, it also included a punch list containing 604 separate items.¹¹³ Sound Transit informed its contractor (Kiewit) that it had to finish the work on this punch list before Sound Transit would issue the Notice of Acceptance signifying completion of the Segment.¹¹⁴

Kiewit did not promptly perform the work identified on the punch list. In March 2007, Sound Transit informed Kiewit that it would not issue a Notice of Acceptance on the Segment until Kiewit satisfactorily completed the remaining punch list work:

On December 22, 2006 in letter REC-01958, Sound Transit advised Kiewit that the **issuance of an acceptance certificate for the C 700 Contract was being delayed pending satisfactory completion of incomplete and/or nonconforming Work**. The incomplete and/or nonconforming Work was listed in the letter and was recorded in the City of Seattle (COS) punch list, Rev-2, dated 10/30/06, while other items were recorded in Sound Transit punch list, Rev-35, dated 11/30/06.

¹¹² CP 200.

¹¹³ CP 201.

¹¹⁴ *Id.*

[In] REC-01958, Sound Transit requested that KPC [Kiewit Pacific Company] confirm in writing, by January 8, 2007, those work activities for which KPC will be undertaking the necessary action. As of this date, Sound Transit has not received a written response. **In addition to the punch list items listed in Rev-35, dated 11/30/06, a number of defects or incomplete work items have been added to Sound Transit's current punch list, Rev-38, dated March 1, 2007.** This document was transmitted to Kiewit by REC-01997 dated March 2, 2007.¹¹⁵

Sound Transit did not consider the Segment actually completed until July 2007.¹¹⁶ CF filed the present lawsuit against Sound Transit in January 2009, less than two years later.

Oja unambiguously states that the cause of action for damages arising out of construction on adjoining property does not accrue until construction is **completed**. A decision by the Washington Supreme Court is binding on all lower courts in the state.¹¹⁷ As this Court recently noted, “[w]e are bound by the decisions of our state Supreme Court and err when we fail to follow them.”¹¹⁸ Sound Transit has not provided any persuasive reason for the Court to depart from that core principle. The statute of limitations did not bar CF’s claim.

¹¹⁵ CP 254-56.

¹¹⁶ On July 10, 2007, Sound Transit issued a Notice of Acceptance for all of the work on the Segment. CP 248-252.

¹¹⁷ *1000 Virginia Ltd. P'ship*, 158 Wn.2d at 578. *Accord, Edmonson v. Popchoi*, 155 Wn. App. 376, 389, 228 P.3d 780 (2010); *State v. Pedro*, 148 Wn. App. 932, 950, 201 P.3d 398 (2009).

¹¹⁸ *MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 417, 213 P.3d 931 (2009).

5. **Substantial completion of construction occurs when the entire improvement, not merely a component part, may be used for its intended purpose.**

As Sound Transit notes in its brief, “horizontal construction” projects can be “miles in length.” The Project at issue in the present lawsuit fits this description: it runs from downtown Seattle in the north to Sea-Tac Airport in the south. For its own purposes, Sound Transit divided the Project into various segments and awarded separate contracts for each one. The Segment at issue in this lawsuit is a 1.3 mile long section of track south of downtown Seattle.

Sound Transit admits it did not substantially complete the entire Project until July 2009. Sound Transit claims, however, that it substantially completed the work on the Segment in May 2006. Sound Transit argues that the statute of limitations on CF’s claims, which arose from construction activity on the Segment, should therefore accrue in May 2006.¹¹⁹

Sound Transit’s argument ignores that “substantial completion of construction occurs when the **entire improvement**, not merely a com-

¹¹⁹ Sound Transit’s “Notice of Substantial Completion #2, Rev. 1” states that Kiewit substantially completed the Segment’s remaining item of work in May 2006. CP 161-62. However, Sound Transit did not actually sign this Notice until the end of November 2008. Sound Transit testified that there was no time requirement for signing a Notice of Substantial Completion; Sound Transit believes it could wait two or three years and then “retroactively” declare a project substantially complete. CP 204. Sound Transit further testified that the only way a third-party would know that a contract is substantially complete is “[t]hey would have to ask.” *Id.*

ponent part, may be used for its intended purpose.”¹²⁰ For example, *Glacier Springs Property Owners Association v. Glacier Springs Enterprises, Inc.* involved the construction of a water system (a “horizontal construction” project) for a property owner’s association (“Association”). As designed, the system included the installation of water distribution pipes and a water storage tank. Installation of the water pipes occurred in September 1972 and installation of the water storage tank took place in July 1973.¹²¹

Subsequent to installation of the water storage tank, the Association discovered leaks in the water distribution pipes. The Association sued for damages. The contractor argued that RCW 4.16.300 barred the claim because the Association filed the lawsuit more than six years after substantial completion of the water distribution lines. The trial court granted the contractor’s summary judgment motion and the Association appealed.

The appellate court observed that “[t]he parties disagree as to when the ‘substantial completion’ occurred.”¹²² The contractor argued that “since the water distribution system was an ‘improvement’ and

¹²⁰ *Smith v. Showalter*, 47 Wn. App. 245, 251, 734 P.2d 928 (1987)(emphasis in original).

¹²¹ 41 Wn. App. 829, 830-31, 706 P.2d 652, review denied, 105 Wn.2d 1002 (1985).

¹²² 41 Wn. App. at 831.

was in use before the water tank was installed, substantial completion occurred in September 1972 when the pipes distributing the water were installed.”¹²³ The Association contended that substantial completion did not occur until installation of the water tank in July 1973.¹²⁴

The appellate court found that the health department required water storage before it would approve the design. The court also found that the water supply system could not be used for its intended purpose until after the water storage tank was installed and hooked up to the system.¹²⁵ Based upon these findings, the court held that substantial completion of the system did not occur until installation of the water storage tank in July 1973:

[W]e conclude that the water system could not be used for its intended purpose until after the storage tank was installed. Although [the contractor] had finished installing the water distribution system in September 1972, RCW 4.16.310 provides that the statute of limitations begins to run "after substantial completion of construction" or "after the termination of the services . . . whichever is later." (Italics ours.) **Substantial completion of construction occurs when the entire improvement, not merely a component part, may be used for its intended purposes.**¹²⁶

Applying *Oja* and *Glacier Springs*, substantial completion of the Project occurred when Sound Transit completed the entire improve-

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 831-32.

¹²⁶ *Id.* at 832 (emphasis added and citing *Patraka v. Armco Steel Co.*, 495 F. Supp. 1013 (M.D. Pa. 1980)). *Accord, Showalter*, 47 Wn. App. at 251.

ment to the real property; *i.e.* when the whole Project could be used, not merely when Sound Transit “substantially completed” one component portion. Thus, “substantial completion” of the work on the Segment (the section of track nearest to CF’s property) could not be the triggering date to start the running of the applicable statute of limitations because Sound Transit had not substantially completed the Project at that point; *i.e.*, the Project was not ready for use. Since Sound Transit did not “substantially complete” the Project until July 2009, CF timely filed its lawsuit.

C. Even if the statute of limitations bars CF’s claim, the doctrines of equitable tolling and equitable estoppel preclude application of the statute.

As discussed above, CF timely filed its complaint against Sound Transit. However, even if CF’s filing would otherwise be time-barred, application of the doctrines of equitable tolling and equitable estoppel would preclude application of the statute of limitations.

Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires, even though the statutory time period has elapsed.¹²⁷ “In Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the

¹²⁷ *State v. McLean*, 150 Wn.2d 583, 591, 80 P.3d 587 (2003); *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008); *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003); *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998); *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (2009).

cause of action and the purpose of the statute of limitations.”¹²⁸ A statute of limitations may be equitably tolled where there is evidence of “bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff.”¹²⁹

Equitable estoppel is similar to equitable tolling. Application of the estoppel doctrine is appropriate to prohibit a defendant from raising a statute of limitations defense when a defendant has “fraudulently or inequitably invited a plaintiff to delay commencing suit until the applicable statute of limitations has expired.”¹³⁰ “The gravamen of equitable estoppel with respect to the statute of limitations is that the defendant made representations or promises to perform which lulled the plaintiff into delaying timely action.” Courts will apply equitable estoppel where there is evidence the plaintiff exercised due diligence in filing suit after discovering that the promises to perform were false.¹³¹

The doctrines apply to our case. Sound Transit’s representative, Roger Pence, made multiple visits to CF’s warehouse to view the dam-

¹²⁸ *Thompson*, 142 Wn. App. at 814 (quoting *Millay*, 135 Wn.2d at 206).

¹²⁹ *Millay*, 135 Wn.2d at 206; *Accord, Bonds*, 165 Wn.2d at 141; *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009); *Trotzer*, 149 Wn. App. at 607; *City of Bellevue v. Benyaminov*, 144 Wn. App. 755, 758, 183 P.3d 1127 (2008).

¹³⁰ *Teller v. APM Terminals Pac.*, 134 Wn. App. 696, 712-713, 142 P.3d 179 (2006) (quoting *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318 (1992)).

¹³¹ *Peterson v. Groves*, 111 Wn. App. 306, 315-316, 44 P.3d 894 (2002).

age. Pence repeatedly assured CF that Sound Transit would repair any damage it caused to the building.

Pence explained Sound Transit's claim process to CF and provided CF with an Incident Report. CF followed Pence's instructions, filled out the Incident Report and returned the document to him. Pence told CF that he would take responsibility for submitting the Incident Report "to our Risk Management Office."

Rather than transmit the Incident Report to Sound Transit's Risk Management Office, Pence "misplaced" the document in his office. When CF asked about the status of its claim, Pence falsely represented that Sound Transit's insurance company was processing the claim and that "these things take time." Pence did not "rediscover" the Incident Report until March 2008, after receiving questions from CF's counsel regarding the status of the claim.

Pence's false representations and assurances concerning the claim lulled CF into delaying timely action. Once CF learned of Pence's false statements, it filed—after Sound Transit's apology for the delay and at Sound Transit's request—a second claim. Sound Transit then rejected that claim as "untimely."

Sound Transit's misleading assurances lulled CF into delaying the filing of its lawsuit. After learning that Sound Transit's representations

were false, CF diligently pursued its claim. Sound Transit should not be allowed to use the statute of limitations as a shield against its own misconduct. The Court should apply the doctrines of equitable tolling and equitable estoppel to bar Sound Transit's statute of limitations defense.

IV. CONCLUSION

The three year statute of limitations contained in RCW 4.16.080(1) applies to CF's lawsuit. Even if Sound Transit is correct and the two year statute of limitations contained in RCW 4.16.130 applies, CF still timely filed its lawsuit. Finally, if CF did not timely file its claim, the doctrines of equitable tolling and equitable estoppel preclude application of the statute of limitations. For these reasons, the Court should deny Sound Transit's appeal.

DATED this 14th day of September, 2011 at Seattle, Washington.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 15, 2011, a copy of the foregoing **Respondents' Opening Brief** was caused to be served on the following recipient via the method indicated.

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- By Legal Messenger
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DATED this 15th day of September, 2011 at Seattle, Washington.



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