IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JACK W. EVARONE, Appellant, v. LEASE CRUTCHER LEWIS, a Washington Corporation; SENECA REAL ESTATE GROUP, a Washington State Corporation; HORIZON HOUSE, a Washington State Corporation; NUPRECON LP, a Washington State Corporation; FRUHLING, INC., a Washington State Corporation; FRUHLING SAND AND TOPSOIL, INC., Respondents,	)	NO. 66176-1-I DIVISION ONE UNPUBLISHED OPINION FILED: March 12, 2012

Lau, J. — Apartment owner Jack Evarone sued the project owner, development manager, and contractors for property damage to the Terri Ann Apartments arising from their construction activities on neighboring property. Because Evarone presents insufficient evidence to support the essential elements of his negligence, trespass, nuisance, and loss of lateral support claims, we affirm summary judgment dismissal.

FACTS

We view the facts in the light most favorable to Evarone as the nonmoving party. Evarone owns the Terri Ann Apartments[1] (the "Terri Ann") in Seattle. The Terri Ann was built in the 1960s on a steep hillside. According to Evarone's structural engineer Dan Fenton, by late 2005 the Terri Ann was in "average adequate repair" for its age and showed significant preconstruction cracking "not unusual for a 1960s building."

Horizon House is a residential retirement community in Seattle's First Hill neighborhood. The Horizon House property is adjacent to the Terri Ann's southern property line. In 2005, Horizon House planned to expand its facility by building a new tower on land just north of the then-existing Horizon House facility and south of the Terri Ann property.[2] Horizon House retained Seneca Real Estate Group ("Seneca") as the project's development manager and Lease Crutcher Lewis ("LCL") as general contractor. LCL contracted with Nuprecon Inc. to perform demolition work and Fruhling Inc. to perform excavation and soil removal work.

Construction on the project began on August 29, 2005, and was completed in September 2007. Nuprecon commenced demolition work on August 29, 2005, and finished on October 12, 2005. Fruhling commenced mass excavation on October 7, 2005, and finished all mass excavation around March 20, 2006. It completed minor

[1] We use Evarone's spelling for the Terri Ann Apartments in this opinion.

[2] The Le Roi Apartments and a parking lot were situated on the land slated for the new tower.

footing excavation by June 14, 2006. The project site was excavated to a depth of 30 to 40 feet and the edge of the excavation was set back about 15 feet south of the Terri Ann property line.

Seneca retained geotechnical engineering firm Hart Crowser Inc. (HCI) to monitor soil and structural movement during construction at Horizon House. HCI drafted a "Site and Exploration Plan" and prepared a "Geotechnical Engineering Design Study" of the construction site. The study recommended that construction contractors take various steps to avoid soil erosion and earth movement. HCI found that the project's contractors followed recommendations to avoid erosion and soil movement and the project site "appeared free of sediment on final inspection." Seneca also retained surveying and civil engineering firm Bush, Roed, & Hitchings Inc. (BRH) to conduct surveys regarding the Horizon House project. BRH performed "periodic monitoring of the horizontal location and elevation of various points in and around the project site, including the north retention wall and along Terry Avenue." BRH's studies showed negligible soil movement occurred between September 14, 2005 (preexcavation baseline) and May 12, 2006 (postexcavation).

In September 2005, a tree fell from Horizon House's property onto the Terri Ann. LCL offered to repair the damage, but Evarone declined. In early October 2005, Evarone notified LCL about his concerns regarding vibrations from construction activities that he alleged were shaking the Terri Ann. Evarone also expressed concern about dust drifting from the project site onto his property and concrete cracking in the Terri Ann building and driveway.

In October 2005, Evarone hired structural engineer Dan Fenton to monitor damage to the Terri Ann. Fenton first visited the Terri Ann property on October 28, 2005, and periodically monitored it through April 2010. During his site visits, he took photographs of cracks in the concrete on the Terri Ann property, including the apartment building structure and the driveway. Fenton testified by deposition that he took 17 pictures of alleged cracking and damage at the Terri Ann property on January 24, 2006, but the cracks were small and he lacked a camera capable of photographing new cracking. Fenton also testified that many cracks existed on his first site visit and "were likely there prior to the start of construction." Fenton installed no vibration or crack meters when he visited the site in fall 2005. Other than visual site observations, taking photographs, and setting up a crack monitor in August 2009, he conducted no specific tests to measure earth movement or record other property conditions. He obtained no measurements of earth movement or drainage changes caused by the Horizon House project. When questioned about damage, Fenton testified that what he saw in 2008 was basically the same as what he saw in 2005, but it had "aged a little bit."

Fenton provided reports to Evarone evaluating the damage and making recommendations. In his March 20, 2006 report, Fenton wrote:

> During the demolition of the existing structures and the excavation of the construction site, the Terry Ann Apartments incurred miscellaneous damage. The observed damage appears to be recent. The concrete cracks are sharp and the concrete color at the cracks is clean. During our site visits we could feel vibration from equipment movement at the construction site next door. The damage is consistent with what one would expect from vibration – cracking of brittle materials and settlement of the subgrade below a concrete slab-on-grade.

Fenton also noted "fresh cracks" in the stucco that was part of the structured slab in the parking area and "cracks and signs of movement in the street level sidewalk outside the main entry." Fenton returned to the Terri Ann property several times in 2009 and 2010 to check the crack monitor. Each time he found no movement, except for an unexplained 0.5-millimeter movement on October 12, 2009.

Concerned about misaligned elevator shafts due to soil movement, Evarone hired Vertical Transportation Services ("VTS") to monitor the Terri Ann's elevators. VTS inspected the elevators three times. During its first visit on October 26, 2005, VTS observed cracks around the elevators and in the machine room wall. During its November 22, 2005 inspection, VTS noted a new one-half-inch crack on the fourth floor of the elevator and a three-inch crack spread in the machine room wall. During its January 24, 2006 inspection, VTS noted a one-and-one-half-inch crack spread on the seventh floor of the elevator and "a little" additional spread in the machine room wall crack. VTS proffered no opinion on what caused these cracks.

On October 23, 2008, Evarone sued LCL, Seneca, Horizon House, Nuprecon, and several John Doe defendants for negligent destruction of property, trespass to land, nuisance, loss of lateral support, and diminished value[3] stemming from the Horizon House construction project. Evarone filed a first amended complaint on April 9, 2009, naming the John Doe defendants as Nuprecon LP and Nuprecon GP

[3] On appeal, "Evarone recognizes that his claim for diminished value is more properly framed as a measure of damages than as a freestanding claim. Accordingly, Evarone continues to seek recovery of damages for the diminished value of his property as part of his remaining claims." Appellant's Br. at 8 n.2.

(collectively "Nuprecon"), Fruhling, and Fruhling Sand & Topsoil (collectively "Fruhling").[4]

In August 2009—nearly two years after construction ended—Evarone hired Todd Wentworth, a geotechnical engineer at AMEC Earth & Environmental Inc., to assess the damage to the Terri Ann. Wentworth observed large cracks in an area of slab-on-grade concrete at the base of a driveway ramp. As to the cause, he explained, "It is difficult to tell if these are new cracks, but it does appear that the cracks have opened wider recently." Wentworth noted in his report, "[I]t seems likely that construction vibrations could have caused settlement of the fill and cracking of the concrete slab or widening of pre-existing cracks in the concrete." Wentworth also found small cracks in the Terri Ann's parking area and concluded the cracks had opened recently. He attributed the likely cause of cracking to vibrations from the construction. Wentworth also testified that some cracks in the concrete predated the construction project. He could not say whether any increased cracking was due to construction activities. Beyond blaming construction or vibrations generally, Wentworth could not isolate which portion of the construction might have caused fill settlement and concrete cracking. As to the rockery,[5] Wentworth found "accumulation of sand and some small gravel that appears to have fallen or washed out from behind the boulders" and noted that "surface water runoff during construction could have caused this washout." Wentworth testified that any additional surface flow onto the Terri Ann

[4] Except where indicated, we refer to LCL, Horizon House, Seneca, Nuprecon, and Fruhling collectively as "the defendants."

[5] By "rockery" the parties refer to a slope on the Terri Ann property near the southern boundary line that contained landscaping boulders.

property due to the construction project was "negligible."

In July 2010, the defendants moved for summary judgment, arguing that (1) the statute of limitations barred Evarone's claims and (2) Evarone presented no evidence that the defendants caused any of the alleged damage.

Evarone's opposition brief agued material issues of fact defeat summary judgment based on joint and several liability and the res ipsa loquitur doctrine. He also argued under Oja that his claims are timely filed. Vern J. Oja & Assocs. v. Washington Park Towers, Inc., 89 Wn.2d 72, 569 P.2d 1141 (1977). Evarone also submitted opposition declarations from expert witnesses Fenton and Wentworth.

Fruhling moved to strike Evarone's res ipsa loquitur and joint and several liability claims for pleading deficiencies. LCL, Seneca, and Horizon House joined in Fruhling's motion limited to the res ipsa loquitur claim. LCL, Seneca, Fruhling, and Horizon House also moved to strike portions of Fenton and Wentworth's declarations, arguing Marshall[6] violations because the excerpts contradict their prior deposition testimony. Those defendants also argued the witnesses lacked necessary qualifications to express certain opinions.

The trial court (1) granted Fruhling's motion to strike Evarone's res ipsa loquitur and joint and several liability claims for failure to plead, (2) granted LCL, Seneca, and

[6] Marshall v. AC & S Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (holding that "'[w]hen a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.'") (quoting Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc., 736 F.2d 656, 657 (11th Cir. 1984)).

Horizon House's motion to strike portions of Fenton and Wentworth's declarations under the Marshall rule, and (3) granted all defendants' motions for summary judgment and dismissed the case, ruling no material issues of fact remained for trial. The trial court denied Evarone's motion for reconsideration. Evarone appeals.[7]

ANALYSIS

Standard of Review

We review a summary judgment order de novo, performing the same inquiry as the trial court and considering facts and reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). The nonmoving party may not rely on mere allegations, denials, opinions, or conclusory statements but must set forth specific admissible facts indicating a genuine issue for trial. CR 56(e); Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004).[8]

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[7] Evarone does not appeal the trial court's entry of summary judgment in favor of Fruhling Sand & Topsoil Inc. Appellant's Br. at 8 n.1.

[8] Fruhling argues—and Evarone does not dispute—that we should not consider clerk's papers after clerk's papers 969 because they were not before the trial court on summary judgment. In reviewing a summary judgment order entered pursuant to CR 56, we "can review only those matters that have been presented to the trial court for its consideration before entry of the summary judgment." Am. Universal Ins. Co. v. Ranson, 59 Wn.2d 811, 815, 370 P.2d 867 (1962). The clerk's papers after 969 were not before the trial court on summary judgment, and we will not consider them in reviewing the summary judgment order.

We also review de novo[9] all trial court rulings made in conjunction with a summary judgment motion, including rulings excluding portions of declarations. Cornish College of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 215, 242 P.3d 1 (2010).[10]

Insufficiency of the Evidence[11]

A. Negligent Destruction of Property

Evarone contends the defendants breached their duty of reasonable care during construction, leading to "cracks, soil erosion, deterioration of rockery walls, and liquid splatter" on his property. The defendants argue that Evarone presented insufficient evidence to establish a prima facie negligence claim.

To defeat summary judgment in a negligence action, the plaintiff must show that a genuine issue of material fact exists with respect to each element of a negligence claim: duty, breach of duty, causation, and injury/damages. Kennedy v. Sea-Land Serv., Inc., 62 Wn. App. 839, 856, 816 P.2d 75 (1991). Existence of a duty is a

[9] The defendants erroneously assert that an abuse of discretion standard applies even for evidentiary rulings in the course of summary judgment proceedings. But they cite pre-1998 law or cases citing pre-1998 law. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), makes clear that the de novo standard applies.

[10] We also note that "materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus, it is misleading to denominate as a 'motion to strike' what is actually an objection to the admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion." Cameron v. Murray, 151 Wn. App. 646, 658, 214 P.3d 150 (2009).

[11] Even assuming without deciding (1) the claims are timely filed and (2) the admissibility of Fenton and Wentworth's previously stricken declaration testimony, Evarone presents insufficient evidence to support his claims as discussed below.

question of law. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Breach and proximate cause are generally fact questions, but "if reasonable minds could not differ, these factual questions may be determined as a matter of law." Hertog, 138 Wn.2d at 275.

We conclude Evarone presents insufficient evidence to establish a prima facie negligence case.[12] First, Evarone presents no evidence establishing the applicable standard of care or breach of any standard of care. The record shows that Fenton and Wentworth undisputedly testified they would not proffer testimony defining the standard of care or explain how the defendants breached any duty.[13] Wentworth's declaration testimony speculated that "if [vibration] monitoring had occurred, the damages caused to Mr. Evarone's property very well might have been avoided" and stated "it seems reasonable in this case that . . . vibration monitors should have been installed." Fenton made a similar statement in his declaration. This testimony fails to establish the standard of care applicable here. See Seven Gables Corp. v. MGM/UA Entm't Co., 106

[12] Evarone's brief does not address the insufficient evidence issue. Instead, he responds by arguing that the elements of duty and breach are met by the res ipsa loquitur doctrine.

[13] See Clerk's Papers (CP) 174 (Fenton's testimony that he would not be "addressing means and methods . . . of how the Horizon House was constructed"); CP 406-07 (Fenton's testimony that "I don't judge the standard of care for the general contractor . . . or the subcontractors"); CP 438 (Wentworth's testimony that he understood Evarone retained him to assess property damage, not act as an expert at trial); CP 604 (statement in Fenton's declaration that when he was hired, "Mr. Evarone did not retain [him] at that time to be an expert witness in contemplation of litigation"); CP 811 (Fenton's testimony that he was not asked to look at how the Horizon House construction was occurring next door, did not have direct knowledge of what went on there, and "was not reviewing [the contractors'] means and methods").

Wn.2d 1, 13, 721 P.2d 1 (1986) (speculative assertions are insufficient to defeat summary judgment). The record indicates the defendants installed vibration monitors. HCI's unchallenged report concluded that excavation and construction "was accomplished in accordance with the recommendations of [its] geotechnical report, [its] input during construction, and in accordance with the [Department of Planning and Development]-approved project plans and specifications." In HCI's opinion, "excavation was performed in an orderly, thoughtful manner" and the defendants took effective measures to prevent migration of sediment off the Horizon House site. After its final site visit on June 25, 2007, HCI noted that permanent erosion and sediment control measures were in place and concluded that the Horizon House site "appeared free of sediment." Given the record's absence of evidence demonstrating breach of any duty, Evarone's negligence claim fails.

Evarone also fails to create a material issue of fact regarding causation. Proximate cause consists of two elements—cause in fact and legal causation. City of Seattle v. Blume, 134 Wn.2d 243, 251, 947 P.2d 223 (1997). Legal causation involves the question of whether liability should attach as a matter of law. Blume, 134 Wn.2d at 252. Cause in fact is established if the plaintiff's injury would not have occurred but for the defendant's action. Hertog, 138 Wn.2d at 282-83. The question of cause in fact is normally left to the jury, but "if reasonable minds could not differ, [this] factual question[] may be determined as a matter of law." Hertog, 138 Wn.2d at 275.

Our review of the record shows insufficient evidence from which a reasonable jury could conclude that the defendants' activities proximately caused damage to the

Terri Ann. For example, at Wentworth's deposition, the following exchange occurred:

> Q. . . . . So the question, the issue here is you need to have vibrations significant enough to cause damage, correct?
> A. Correct.
> Q. I mean, not all vibration causes damage, correct?
> A. Yes.
> Q. Right. Okay. So then how do you know, or what's the basis upon which you are concluding that the vibrations in this construction project, no matter what aspect of it – the demolition, the building, the soldier piles, whatever – how do you know that those vibrations were significant enough to cause damage that Mr. Evarone is claiming?
> A. Because I observed damage. I observed the damage. I think it's based on soil settling; something had to cause that. And from my experience, there are often vibrations involved with construction and demolition.
> Q. And just so I'm clear, that is the sole basis of your opinion, correct?
> A. That is it.

Wentworth also testified about the limited scope of his work at the Terri Ann site—surface observations and document review. In 2009, long after construction was completed, he inspected the Terri Ann property. He performed no subsurface exploration, laboratory tests, or engineering analysis. He testified that his observations indicated construction vibrations could have caused soil settlement, not that the vibrations did cause settlement.

Similarly, Fenton took no measurements of vibrations or earth movement and performed no drainage studies. At his deposition, he testified "[t]here were lots of cracks when [he] first arrived at the site" and that he did not know what the cracks looked like before the construction began. He testified, "Some vibration does not cause damage necessarily, that is true." When asked at his deposition how he determined that drainage from the Horizon House property caused washout and a toppled retaining wall on the Terri Ann property, Fenton responded, "I did not do any

measurements and it visually looked like that could happen." Fenton speculated in a project report: "During our site visits we could feel vibration from equipment movement at the construction site next door. The damage is consistent with what one would expect from vibration – cracking of brittle materials and settlement of the subgrade below a concrete slab-on-grade." Fenton's declaration testimony explained that certain damages "appeared" to be caused by water drainage from Horizon House. He also made conclusory statements that damage was "consistent with what [he] would expect from vibration associated with construction at the adjacent Horizon House property" and "construction activities at the adjacent Horizon House property caused damage to Mr. Evarone's property." But on summary judgment, the nonmoving party may not rely on speculation, mere allegations, denials, or conclusory statements to establish a genuine issue of material fact. Int'l Ultimate, 122 Wn. App. at 744. A party's own self-serving opinions and conclusions are insufficient to defeat a motion for summary judgment. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988). Even construing their testimony most favorably to Evarone, Fenton and Wentworth speculate that the construction could have damaged Evarone's property. We conclude Evarone presented insufficient evidence to raise material fact issues regarding causation.

Evarone responds that duty and breach are satisfied under the doctrine of res ipsa loquitur.[14] Whether res ipsa loquitur applies in a given context is a question of law

[14] Given our resolution of the res ipsa loquitur claim, we need not address Evarone's assertion that the trial court improperly struck his res ipsa loquitur argument.

reviewed de novo. Curtis v. Lein, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010). The doctrine provides a permissive inference of negligence to be drawn by the fact finder if the plaintiff establishes three elements: (1) the occurrence producing the injury was of a kind that ordinarily does not occur in the absence of negligence, (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing occurrence was not due to any contribution of the injured party. Curtis, 169 Wn.2d at 891. The first element is satisfied if one of three conditions is present:

> "(1) When the act causing the injury is so palpably negligent that is 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."

Curtis, 169 Wn.2d at 891 (quoting Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)). If any of the three elements of res ipsa loquitur is missing, a presumption of negligence is unwarranted. Res ipsa loquitur is "'ordinarily sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'" Curtis, 169 Wn.2d at 889 (quoting Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 792, 929 P.2d 1209 (1997).

As to the first element, Evarone relies only on the second condition. To establish this condition, he contends that general experience shows "fresh cracking and settlement on property adjacent to a building site would not normally occur in the absence of someone's negligence." Appellant's Br. at 29-30. The record shows

evidence of cracks that grew by millimeters. General experience (and the record) shows that concrete often develops cracks in the absence of negligence. Res ipsa loquitur does not apply where, as in this case, there is evidence that the accident "could occur without negligence." Adams v. W. Host, Inc., 55 Wn. App. 601, 606, 779 P.2d 281 (1989) (emphasis added). Long before construction began, the Terri Ann's concrete slab developed many large cracks and the retaining wall on the property's southwest corner had fractured and toppled. Evarone's experts Fenton and Wentworth confirmed that concrete cracking is a normal process. Fenton testified, "[T]he physical properties of concrete are such that once concrete has been cracked, the cracks will continue to widen until the concrete is repaired or replaced." Wentworth also testified, "[C]racking is common in concrete, especially in large slabs." And neither expert offered opinion evidence pointing to which construction activities by numerous contractors on the job caused the alleged damage. If the evidence shows that the event could have easily occurred as a result of more than one cause, res ipsa loquitur is not available as a means of proving negligence. McKinney v. Frodsham, 57 Wn.2d 126, 135, 356 P.2d 100 (1960) (proof that a third person's negligence caused the injury will defeat a res ipsa loquitur claim).

We conclude as a matter of law that the res ipsa loquitur doctrine is

[15] Evarone cites no case and we found none in which any court applied the res ipsa loquitur doctrine under circumstances similar to the ones here. See 16 WAPRAC § 1.54 at 77 (comprehensive list of illustrative cases applying the res ipsa loquitur doctrine). "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193

inapplicable.[15] Because Evarone fails to establish a prima facie case of negligence, summary judgment on this claim was proper.[16]

B. Trespass to Land

Evarone claims the defendants committed intentional trespass premised on (1) construction related dust, soil, sealant overspray, and water and (2) demolition work caused vibrations to travel into nearby fill soils resulting in cracks.

Trespass is an "'interfere[nce] with the right to exclusive possession of property . . . .'" Bradley v. Am. Smelting & Refining Co., 104 Wn.2d 677, 690, 709 P.2d 782 (1985) (quoting Borland v. Sanders Lead Co., 369 So. 2d 523, 529 (Ala. 1979)). To prove intentional trespass under the Bradley test, Evarone must show: (1) an invasion of property affecting an interest in exclusive possession, (2) an intentional[17] act,

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(1962)).

[16] Evarone also claims the trial court erred in striking his joint and several liability argument. He claims defendants have the burden of "assert[ing] the fault of another as a defense and then show[ing] the existence of evidence to support that defense." Appellant's Br. at 33. But in Washington, the burden of apportionment shifts to the defendants only after a plaintiff has established fault, proximate cause, and damage. See Phennah v. Whalen, 28 Wn. App. 19, 29, 621 P.2d 1304 (1980); Cox v. Spangler, 141 Wn.2d 431, 5 P.3d 1265 (2000). Joint and several liability applies only if judgment is entered against more than one defendant. See RCW 4.22.070(1)(b); Gass v. MacPherson's Inc. Realtors, 79 Wn. App. 65, 69, 899 P.2d 1325 (1995). Judgment was not entered against any defendant here; the error, if any, was harmless. See Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 44, 244 P.3d 32 (2010).

[17] In this context, "intent" means desire or knowledge to a substantial certainty that a particular consequence will result from one's act. Bradley, 104 Wn.2d at 682-83. The defendant need not intend the trespass; he need only desire or know to a substantial certainty that the trespass will result from his intentional actions. Brutsche v. City of Kent, 164 Wn.2d 664, 674 n.7, 193 P.3d 110 (2008).

(3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages. Bradley, 104 Wn.2d at 692-93. When considering whether damages rise to the level of "substantial," examples of nonactionable damages include minor water intrusion, occasional debris, and areas of yellowed and dead grass. Grundy v. Brack Family Trust, 151 Wn. App. 557, 568, 213 P.3d 619 (2009).

Evarone fails to show the defendants' construction activities substantially damaged his property. The record shows transitory dust caused no lasting damage.[18] Colorless waterproof sealant overspray drifted onto the Terri Ann's awnings but did not reduce the awnings' useful life. Wentworth testified that the water flow conditions and locations were largely the same before and after construction. As for the concrete cracking, Fenton testified that the cracks grew only by millimeters and Wentworth did not know how much or when the cracks grew. Concerning soil movement, Wentworth

[18] On October 6, 2005, Evarone wrote a letter to LCL requesting compensation of $450 he claimed to have spent cleaning the dust from his building on four occasions. LCL responded,

> It appears that three of the four cleaning charges that you noted were prior to our mobilization date of August 29th [2005] and although I'm not disputing that the work was done, we don't believe we are responsible for the payment of those bills as you have requested. The fourth charge, which apparently occurred on September 15th appears to be reasonable and will be paid.

The record also indicates Evarone made a $12,502.60 payment demand to LCL on May 4, 2006. The demand encompassed cleaning during demolition, elevator inspections and surveys, engineering and consulting services, and construction services. But the record does not contain the bills giving rise to the payment demand and also fails to indicate whether LCL responded or paid the claimed damages. Evarone also fails to specifically argue the $12,502.60 as damages on appeal. We will not consider an inadequately briefed argument. First Am. Title Ins. Co. v. Liberty Capital Starpoint Equity Fund, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

noted that rebar or stakes driven into the ground were out of kilter. He could not attribute that condition to soil movement. He did not identify any soils that traveled from Horizon House onto the Terri Ann property. He also did not know whether construction damaged the fractured retaining wall on the Terri Ann property's southwest corner. Because Evarone presents no evidence to establish substantial damage caused by the defendants, the trial court properly dismissed his trespass claim on summary judgment.[19]

[19] Evarone also fails to establish the intent element. Evarone argued below that the defendants acted with intent because they knew to a substantial certainty that their activity would damage his property. But he cites no evidence showing that any of the defendants knew the construction work would damage the Terri Ann. In Pepper v. J.J. Welcome Construction Co., 73 Wn. App. 523, 871 P.2d 601 (1994), overruled on other grounds by Philips v. King County, 87 Wn. App. 468, 943 P.2d 306 (1997), we held that a trial court properly dismissed on summary judgment a plaintiff's trespass claim for insufficient evidence when the plaintiff presented

> no evidence that [the defendant construction company] intended or was substantially certain that mud, gravel, and silt would be deposited on their properties. In fact there was evidence to the contrary. The only intent shown, on [the defendant's] part, was that of developing the Welcome Wood property and accomplishing activities to that end.

Pepper, 73 Wn. App. at 547. In contrast, in Bradley, the defendant smelting company stipulated that it had been aware for nearly 80 years that its smelting process emitted microscopic, airborne particles of heavy metals that were blown over and deposited on the plaintiffs' land. Bradley, 104 Wn.2d at 681. Our Supreme Court held that under the circumstances, the defendant had the requisite intent to commit intentional trespass as a matter of law and that its conduct constituted a trespass. Bradley, 104 Wn.2d at 684. Here, Evarone cannot prove intent where no evidence shows the defendants desired or knew to a substantial certainty that the construction work would cause invasion or damage to Evarone's property. Like in Pepper, the only intent indicated by the evidence here on the part of the defendants was that of excavating and constructing on the Horizon House property and accomplishing activities to that end.

C. Nuisance

Evarone contends the defendants are liable for private nuisance. He claims: (1) vibrations disturbed residents and caused them to move; (2) vibrations caused soil movement, concrete cracks, and excess water runoff; (3) dust and overspray accumulated on the property; and (4) construction activity caused noise.

Washington defines "nuisance:"

> The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

RCW 7.48.010. In other words, "[a] nuisance is an unreasonable interference with another's use and enjoyment of property . . . ." Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 592, 964 P.2d 1173 (1998). While the plaintiff must show that the interference is "unlawful," that term has been used synonymously with the term "unreasonable." Collinson v. John L. Scott, Inc., 55 Wn. App. 481, 488, 778 P.2d 534 (1989) (quoting Karasek v. Peier, 22 Wash. 419, 427, 61 P. 33 (1900)).

To establish a nuisance claim, Evarone must show that the defendants unlawfully did some act or failed to perform a duty that unreasonably interfered with his use and enjoyment of his property.[20] Kitsap County, 136 Wn.2d at 592. He fails to present evidence that raises a material fact issue on whether the construction activity was unreasonable. See Collinson, 55 Wn. App. at 487-88 (trial court properly granted

[20] The record shows Evarone presented no duty evidence.

summary judgment to defendant where plaintiff alleging nuisance claim could not show construction of adjacent building was unreasonable). HCI's engineering design study of the construction site addressed various aspects of the project, including shoring selection and design, seismic considerations, and environmentally critical areas. This study recommended that the construction contractors take various steps to avoid erosion and soil movement. Throughout and at the project's completion, HCI examined the construction site for conformance with the recommendations in the study. HCI concluded the contractors generally followed those study recommendations. During construction, HCI also monitored the contractors' erosion control measures and determined the contractors' methods conformed with the standard of practice for this type of work.

As to the excavation work, HCI reported to the City of Seattle Department of Planning and Development (DPD), "[HCI] observed and monitored the excavation while on site observing the shoring installation. In our opinion, the excavation was performed in an orderly, thoughtful manner." HCI also reported to DPD that the Horizon House project "was accomplished in accordance with the recommendations of our geotechnical report, our input during construction, and in accordance with the DPD-approved project plans and specifications." Evarone submitted no evidence directly challenging this evidence.

Evarone also fails to show that any of the claimed nuisances described above interfered with his use and enjoyment of the property. He first claims that the construction vibrations disturbed residents and prompted them to move. He cites no

evidence of lost rent or complaints from residents. In his deposition, he discussed only his own perception of vibrations and made no claim that the vibrations unreasonably interfered with his own use of the property. He next claims that construction caused soil movement, cracking, and excess water runoff. He relies on Fenton and Wentworth's declarations, which do not establish unreasonable interference.[21] Evarone also claims the defendants' activity created noise. He cites to former LCL employee Larry Bjork's deposition for this claim. Bjork testified, "A project like this would create noise, yes." This bare statement does not establish that the construction noise constituted a nuisance. Nor does he provide evidence of tenant noise complaints. Citing Bjork's deposition, Evarone also claims that dust traveled onto his property. Bjork testified, "I'm sure there was dust." This brief testimony fails to establish that the dust constituted a nuisance. Finally, Evarone argues that overspray on the Terri Ann's awnings constitutes a nuisance. He testified that the overspray was colorless and had no effect on the useful life of the awnings. Because the record shows no evidence to support his nuisance claim, we conclude the trial court properly granted the defendants' summary judgment motion.[22]

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[21] As discussed above, the record contains insufficient evidence that the defendants' construction activities caused soil movement and cracking.

[22] To the extent Evarone argues that the tree that fell from Horizon House's property onto the Terri Ann constitutes negligence, trespass, or nuisance, we disagree. The tree fell during LCL's tree removal operations and damaged the Terri Ann's exterior. LCL offered to fix the damage and was coordinating repairs with the Terri Ann's apartment manager, but Evarone requested LCL stop the repairs. He claimed in his deposition, "Because of the continuing nature of the project I didn't want to do [repairs] piecemeal." Evarone presents no evidence that the fallen tree was a result of LCL's negligence. As discussed above, he also fails to meet the elements of trespass

D. Loss of Lateral Support

Evarone contends that the defendants' construction activities caused soil erosion and land movement, resulting in loss of lateral and subjacent[23] support to his property.

The right to lateral support of real property is "well established" in Washington. Klebs v. Yim, 54 Wn. App. 41, 44, 772 P.2d 523 (1989). In Klebs, we reasoned that when the plaintiff's land is burdened by heavy structures such as buildings, the plaintiff must show not only that the defendant's acts caused the plaintiff's land to fall in laterally, but also that the land would have fallen in without the weight of the structures or other improvements:

> "An adjoining [land] owner who causes his neighbor's property to slide and slip because of loss of lateral support is liable in damages resulting therefrom under the constitution and law of the state regardless of negligence. However, the sliding and slipping of the soil must occur because of its own weight and not because of the superimposed weight of the buildings or improvements placed thereon."

Klebs, 54 Wn. App. at 44 (alteration in original) (quoting Simons v. Tri-State Constr. Co., 33 Wn. App. 315, 319, 655 P.2d 703 (1982). The plaintiff has the burden of establishing that the land would have subsided even without improvements. Klebs, 54

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or nuisance. Regardless, he waived this claim when he refused to allow LCL to repair the damage soon after it occurred.

[23] While Evarone's complaint alleges loss of both lateral and subjacent support, he made no argument supporting his subjacent support claim below and similarly fails to brief or argue that claim on appeal. We thus decline to consider Evarone's subjacent support claim and address only his claim for loss of lateral support. See In re Disciplinary Proceeding Against Haskell, 136 Wn.2d 300, 310-11, 962 P.2d 813 (1998) (declining to address insufficiently briefed challenges).

Wn. App.

at 47.

> At common law, the right of the owner to damages for loss of lateral support in the absence of negligence extended only to the land in its natural state. However, under the constitution, the owner is entitled to damages not only to the land in its natural state but also to the buildings and improvements on the property once it is demonstrated that additional lateral thrust from the weight of the improvements has not precipitated or caused the damages.

Simons, 33 Wn. App. at 319-20 (emphasis added). Fill is "an artificial structure or condition" to which the right of lateral support does not extend. Bay v. Hein, 9 Wn. App. 774, 776-77, 515 P.2d 536 (1973).

As discussed above, Evarone provides insufficient evidence to show that the defendants' activities caused the alleged soil movement. Evarone also fails to show that his land would have subsided in its natural state—without the weight of the improvements as required under Klebs. Neither Wentworth's final report nor his deposition addresses this issue. Fenton discussed soil movement but failed to address whether the land would have subsided in the absence of its improvements—the apartment building, rockery, retaining wall, and the fill. The trial court properly granted summary judgment dismissing Evarone's loss of lateral support claim.[24]

Fruhling's Motion to Strike and Evarone's Motion for Reconsideration

Evarone moved for reconsideration on August 12, 2010. He submitted several new declarations, but Fruhling moved to strike them.[25] The trial court granted

[24] Given our resolution of the lateral support claim, we need not address Evarone's diminished value contention.

[25] LCL, Seneca, and Horizon House joined Fruhling's motion.

Fruhling's motion, ruling the four documents at issue were not "new evidence" as contemplated by CR 59(a)(4) and Evarone failed to "provide a sufficient reason why any or all of the declarations could not be offered earlier." The court also denied Evarone's motion for reconsideration. Evarone appeals both orders. But he devotes no argument to these issues aside from a single sentence in his introduction stating we should reverse the trial court's denial of his motion for reconsideration and a single statement in his conclusion that "[a]ll of [the trial court's] rulings, along with [its] refusal to reconsider its entry of summary judgment were erroneous and warrant reversal." Appellant's Br. at 41. We need not consider these issues further. See RAP 10.3(a)(4)-(5); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting appellate courts need not consider arguments not supported by reference to the record
or citation of authority); Haskell, 136 Wn.2d at 310-11 (declining to address insufficiently briefed challenges).[26]

Fees and Costs on Appeal

Fruhling contends that Evarone's appeal was frivolous and requests an award of attorney fees and costs on appeal.[27] RAP 18.9(a) allows the appellate court, on its own

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[26] Evarone also appeals the trial court's July 30, 2010 denial of his request for a CR 56(f) continuance. But Evarone neither assigns error to that order nor mentions it in his briefing. For the same reasons discussed above, we need not consider that portion of his appeal.

[27] Fruhling requests an award of fees pursuant to RAP 18.1 and 18.9, CR 11, and RCW 4.84.185.

initiative or on motion of a party, to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). "A frivolous action is one that cannot be supported by any rational argument on the law or facts." Rhinehart v. Seattle Times, 59 Wn. App. 332, 340, 798 P.2d 1155 (1990). We resolve doubts in favor of the appellant. Lutz Tile, 136 Wn. App. at 906.

Resolving all doubts in Evarone's favor, his arguments are not so devoid of merit that sanctions or fees are appropriate. We decline to award Fruhling fees and costs.

CONCLUSION

Because Evarone raises no issues of material fact regarding any of his claims, we affirm the summary judgment dismissal order.

WE CONCUR: