

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

CF SALES, INC., a Washington corporation; STEVEN J. CECCHINELLI, a single individual,)	No. 66902-8-I
)	
Respondents/Cross Appellants,)	
)	
v.)	
)	
CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, commonly known as SOUND TRANSIT, a Washington regional transit authority,)	UNPUBLISHED OPINION
)	
Appellant/Cross Respondent.)	FILED: July 16, 2012
)	

Ellington, J. — This case involves construction of a portion of the Link light rail system. Drilling for shaft foundations to support the elevated trackway caused damage to adjacent property. The question here is whether the damage claim was brought within the statute of limitations. The trial court held it was under the accrual rule announced in Vern J. Oja & Associates v. Washington Park Towers, Inc.¹ We affirm.

BACKGROUND

In October 2003, Sound Transit entered into a contract with Kiewit Pacific Company for construction of the C-700 segment of the Link light rail system. The C-

¹ 89 Wn.2d 72, 569 P.2d 1141 (1977).

700 projected extended about 1.3 miles from Royal Brougham to Airport Way South. Steven Cecchinelli owns property adjacent to the project. His company, CF Sales, Inc., leases warehouses there.

Condon Johnson subcontracted to install drilled shaft foundations for the elevated trackway. Drilled shaft construction involves installing temporary and then permanent steel casings, drilling out the core, and replacing it with concrete. The casings were 1-inch thick steel, 10 feet in diameter and between 80 and 150 feet in length. Beginning in mid-March 2004, Condon installed 19 steel casings in the vicinity of CF's warehouse, 7 of which were within about 300 feet. Condon used a vibratory pile driver (VPD), which transmits vibrations through the steel casings and into the soil, causing the soil around the casings to "liquefy" and allowing the casings to penetrate into the soil under their own weight.² Where the VPD was insufficient, Condon used a traditional compression impact hammer. Installation of the drilled shaft foundations was completed by August 24, 2004.

Shortly after Condon began drilling, CF notified Sound Transit of settling under its warehouse floors. Sound Transit issued a notice of acceptance for the C-700 project on July 10, 2007.² On October 22, 2008, CF served a notice of claim under RCW 4.96.020.³ On January 8, 2009, CF filed this action to recover for damage to its real property caused by the construction. Its theories included strict liability.

² The trial court found that this method "presented an inappropriate risk of damage in such close proximity to [CF's] building." Clerk's Papers at 299-300.

³ In the interim, the parties were in contact at various times. We do not recount these facts as we do not reach the issues to which they are relevant.

Sound Transit moved for partial summary judgment, contending the claim was not filed within two years of substantial completion of the C-700 project, which occurred at the latest May 24, 2006 and was thus barred under RCW 4.16.130, which provides for a two-year limitation period for claims of strict liability.⁴

CF responded that the three-year statute applied.⁵ CF also maintained the limitations period did not begin to run until actual (not substantial) completion of the project,⁶ which occurred at the earliest on July 10, 2007 when Sound Transit issued its last notice of acceptance to Kiewit.⁷

The court ruled the action was governed by the two-year statute of limitation but that under Oja, the cause of action accrued “when the project was completed, not substantially completed.”⁸ The court thus denied the motion. The court and the parties agreed that the record concerning the limitations period was fully developed and ready for appeal without additional testimony or evidence.

Trial was held on the merits, and the court awarded damages to CF. Sound Transit appeals, alleging the cause of action accrued at latest upon substantial, not

⁴ See Mayer v. City of Seattle, 102 Wn. App. 66, 75, 10 P.3d 408 (2000).

⁵ RCW 4.16.080.

⁶ The parties agree that the relevant project is the so-called C-700 project, not the entire Link system.

⁷ CF also contended, and argues here, that Sound Transit’s conduct in the interim equitably estopped it from asserting the limitation statute and that the doctrine of equitable tolling applied. Given our determination as to accrual of the claim, we do not address those issues. For the same reason, we do not address CF’s contention that the three-year statute applies.

⁸ Clerk’s Papers at 283.

final, completion. Our review is de novo.⁹

DISCUSSION

In general, a limitation period begins to run at the time a cause of action accrues. “In most circumstances, a cause of action accrues when its holder has a right to apply to a court for relief.”¹⁰

Where the claim is for damage to real property arising out of construction on adjacent property, however, our Supreme Court has adopted a different rule. In Oja, the court held that such a cause of action accrues when the adjacent construction is complete, or as soon thereafter as substantial injury is sustained.¹¹ This is sometimes called the “project completion rule.”

In Oja, construction of a building on adjacent property involved pile driving, which occurred in the autumn of 1966 and then again from autumn 1967 until spring 1968. The building was completed in 1969. In March 1971, Oja filed an action to recover damages for harm to its building resulting from the pile driving and other construction activities. A three-year statute of limitations applied. The jury attributed 70 percent of the damage to the first period of pile driving and 30 percent to the second. The trial court entered judgment for Oja for all damages. Defendant Washington Park Towers appealed, alleging Oja’s claim was barred because it accrued when the first damage occurred in August 1966 or, at the latest, when the initial pile

⁹ Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

¹⁰ Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 219, 543 P.2d 338 (1975).

¹¹ Oja, 89 Wn.2d. at 75-76.

driving ceased in September 1966. Division One of this court affirmed, holding the cause of action accrued “when the building was completed” in 1969.¹²

The Supreme Court agreed:

The damages flowed from the pile driving as a whole and the cause of action accrued when the building was completed. . . . 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 [or, if no damage has yet been sustained,] when the first substantial injury is sustained thereafter. . . . The respondent was entitled to wait until the completion of the construction project before filing a cause of action so that it might determine the full extent of the damages. A different rule would force a plaintiff to seek damages in installments in order to comply with the statute of limitations.^[13]

The rule serves several purposes. First, because damage may be sustained over time as construction continues, an adjacent property owner is not forced to file a series of lawsuits seeking redress in installments.¹⁴ Further, completion of the project allows appraisal of all construction-related damage so that the parties can determine the most effective remedy and engage in useful negotiations.

Sound Transit contends, however, that the court’s true holding was “that ‘[t]he damages flowed from the pile driving as a whole,’” and since Oja timely filed suit within three years of the cessation of pile driving, the remainder of the opinion is dicta.¹⁵ We reject this contention. The court began its opinion by stating, “The first issue before us is whether [the] claim was barred by the statute of limitations. . . . [T]he question is

¹² Oja & Assocs. v. Washington Park Towers, Inc., 15 Wn. App. 356, 360, 549 P.2d 63 (1976).

¹³ Oja, 89 Wn.2d at 75-76 (citation omitted).

¹⁴ Id. at 76.

¹⁵ Br. of Appellant at 30 (quoting Oja, 89 Wn.2d at 75-76).

when the claim ‘accrued.’”¹⁶ The court went on to state and apply a rule for claims of damage to adjacent property. Its determination was not dicta.

Sound Transit next contends the Oja court held only that the claim accrued upon “completion,” without deciding whether completion must be substantial or final. Sound Transit contends the point of final completion depends upon contract milestones, which for private projects are not available, whereas substantial completion is discernible by observation because a project is substantially complete “when it may be used or occupied for its intended purpose -- in other words, it looks done.”¹⁷ Sound Transit also contends substantial completion is more objectively reasonable, is consistent with the statute of repose, and is consistent with the purposes of Oja.

We reject these arguments. First, the term “substantial completion” existed in statute when Oja was decided, and the court did not employ it.¹⁸ Thus, the court’s use of the term “completion” indicates the court did not mean “substantial completion.”

Second, whether a project is complete or substantially complete is a question of fact. Contract milestones may be relevant to that determination, but they are not the only means of doing so.

Nor are we persuaded that substantial completion is easily discernable by observation. For purposes of the statute of repose, construction is substantially complete when it may be “used or occupied for its intended purpose.”¹⁹ Sound Transit

¹⁶ Oja, 89 Wn.2d at 74.

¹⁷ Br. of Appellant at 23.

¹⁸ See, e.g., RCW 4.16.310.

¹⁹ RCW 4.16.310.

contends this condition can be determined without “any particular expertise” because the project “looks done.”²⁰ But the point at which an improvement is capable of being used for its intended purpose is a frequent subject of litigation.²¹ For owners of adjacent property, substantial completion is not necessarily an obvious moment in time, especially given that long interruptions in construction are not unusual.

Finally, the statute of repose serves as an outer limit on claims and begins to run at substantial completion, regardless of when a claim accrues. No inconsistency results from the Oja accrual rule. Should the statute of repose run before a claim accrues, the claim is barred.²²

We reject Sound Transit’s contentions that stages of completion were left open by Oja and that substantial completion should be the test for accrual of third party claims.

Finally, we reject the contention that the Oja court adopted the full completion test without due consideration or by oversight. The Oja rule is controlling here.

Lastly, Sound Transit argues that even if Oja controls, we should limit its application to vertical construction projects (buildings), and hold that in horizontal construction (streets, water/sewer systems, railways), the statute of limitations begins to run when a potential plaintiff first notices damage. It reasons that the characteristics

²⁰ Br. of Appellant at 23.

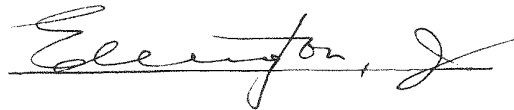
²¹ See, e.g., Glacier Springs Prop. Owners Ass'n v. Glacier Springs Ent's., Inc., 41 Wn. App. 829, 706 P.2d 652 (1985).

²² See New Meadows Holding Co. by Raugust v. Washington Water Power Co., 102 Wn.2d 495, 500, 687 P.2d 212 (1984) (statute of repose applies to claims arising from adjacent property).

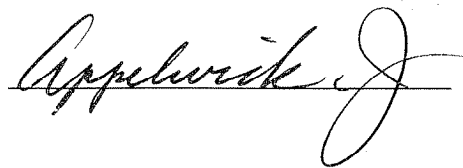
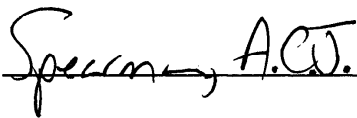
of horizontal projects make the project completion rule inappropriate because third parties may be unable to discern when construction is complete if the project is several miles long.²³ Sound Transit contends that for horizontal projects, claims should accrue at completion of the “specific offending construction activity.”²⁴

But nothing in Oja supports this analysis, and we think it would generate confusion and uncertainty. Projects of mixed character, such as large shopping centers with moving walkways, or sprawling campuses with tunnels and subways, or housing projects involving both buildings and streets might well have different tests for different parts of the project, which would be unworkable. The project completion rule applies, and CF’s claim was timely.

Affirmed.



WE CONCUR:



²³ At oral argument, Sound Transit advanced the argument that for the rule to apply, the adjacent property must border the entire project. We know of no support for such an interpretation and find it implausible.

²⁴ Br. of Appellant at 35. Confusingly, Sound Transit describes this as the “standard discovery rule.”