

Nos. 06-CV-1370 and 06-CV-1371

In the
District of Columbia
Court of Appeals

DAVID CORMIER; ONTARIO ROAD, LLC; TAYLOR, LLC;
EUCLID STREET, LLC; ASHBURN, LLC; HIATT PLACE, LLC;
FLORIDA HOUSE LIMITED PARTNERSHIP; and
EMERSON GARDENS LIMITED PARTNERSHIP,

Appellants/Cross-Appellees,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Appellee/Cross-Appellant.

*On Appeal from the Superior Court of the District of Columbia,
Case No. 03-CA-1254 (Hon. Geoffrey M. Alprin, Judge)*

BRIEF FOR APPELLANTS/CROSS APPELLEES

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Plaintiffs appear in this Court through their counsel Peter T. Enslein.

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Defendant appears in this Court through its counsel Nat N. Polito, Benjamin F. Wilson and Avis M. Russell.

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND PARTNERSHIP MEMBERSHIPS**

Plaintiffs here provide the corporate and partnership information required by D.C. App. Rule 28(a)(2).

Plaintiffs Ontario Road, LLC, Taylor, LLC, Euclid Street, LLC, Ashburn, LLC and Hyatt Place, LLC are limited liability companies. None is a subsidiary or affiliate of a publicly owned company or has stock held by another company.

Plaintiff David R. Cormier is the managing partner and Pihuan Cormier is the limited partner of Emerson Gardens Limited Partnership and Florida House Limited Partnership.

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QUESTIONS PRESENTED

I. Should the trial court's grant of summary judgment be reversed since it failed to consider the declaration of Plaintiffs' expert which established genuine issues of material fact?

II. Should the trial court's grant of summary judgment be reversed since there was sufficient evidence of record to support Plaintiffs' negligence claim?

III. Should the trial court's grant of summary judgment be reversed since it misapplied the law concerning speculative damages?

IV. Should the trial court's grant of summary judgment be reserved since it erred in finding that all claims respecting 1460 Euclid Street and 1300 Harvard Street were time barred?

STATEMENT OF THE CASE

On January 8, 2003, Plaintiffs commenced this property damage action against Defendant District of Columbia Water and Sewer Authority ("WASA"). WASA filed a motion to dismiss which the trial court (Burgess, J.) largely denied on July 29, 2003.¹ WASA moved for summary judgment after discovery closed. On June 12, 2006, the trial court (Alprin, J.) granted partial summary

¹ A 415.

judgment.² Plaintiffs' motion to modify judgment was denied on August 2, 2006. (Alprin, J.).³

Plaintiffs then moved the trial court to dismiss the remaining claims and enter final judgment. The court (Alprin, J.) did so on October 25, 2006.⁴ Plaintiffs timely noted this appeal on October 30, 2006;⁵ WASA cross-appealed on November 9, 2006.⁶

STATEMENT OF FACTS

A. Mr. Cormier's Buildings

In 1983, Plaintiff David R. Cormier began to acquire apartment buildings in the District of Columbia.⁷ By 2003, he owned eight properties: 1325 Emerson Street, N.W., 1327 Emerson Street, N.W., 1460 Euclid Street, N.W., 1300 Harvard Street, N.W., 3228 Hiatt Place, N.W., 2920 Ontario Road, N.W., 4027 13th Street, N.W. and 1909 19th Street, N.W.⁸

² A 426.

³ A 444.

⁴ A 448.

⁵ A 451.

⁶ A 455.

⁷ A 20, ¶¶ 6-7.

⁸ A 20, ¶ 6. The buildings are referred to herein as 1325 Emerson Street, 1327 Emerson Street, 1460 Euclid Street, 1300 Harvard Street, 3228 Hiatt Place, 2920 Ontario Road, 4027 13th Street and 1909 19th Street, respectively. The properties are held by limited liability companies and limited partnerships, which are also plaintiffs to this action.

B. Discovery of Copper Water Pipe Leaks in the Buildings

On July 15, 1998, Mr. Cormier notified WASA by letter that he believed chemicals in the water supply were damaging the copper water pipes and causing leaks at 1460 Euclid Street, and that the leaks were resulting in excessive water bills.⁹

D.C. Code § 34-2305 provides that “[a]ny owner or occupant of a building that receives water and sewer services may contest a water or sanitary sewer service bill[.]” WASA is authorized to investigate such complaints by, *inter alia*, “check[ing] the premises for leaking fixtures, underground invisible leaks, and house-side connection leaks.” D.C. Code § 21-403.2.

WASA did not respond to Mr. Cormier’s letter or otherwise investigate his concerns.¹⁰

Mr. Cormier wrote again to WASA on January 1, 2000 to express his belief that the water supply was damaging 1460 Euclid Street’s copper water pipes, causing leaks and thus resulting in excessive bills.¹¹ WASA did nothing.¹²

⁹ A 21, ¶ 10; 40; 57.

¹⁰ A 21, ¶ 14; 293, ¶ 23.

¹¹ A 316.

¹² A 21, ¶ 14; 293, ¶ 23.

Mr. Cormier wrote again to WASA on February 2, 2000 to complain regarding damage to the copper water pipes in 1300 Harvard Street.¹³ WASA did nothing.¹⁴

At Mr. Cormier's deposition, counsel for WASA established that Mr. Cormier's letters were based solely on his lay opinion that the damage to the pipes of his buildings was somehow caused by the water supply from WASA:

Q: So you saw leaks in your copper pipes and you believed - you just intuitively thought that that could be caused by the water supply?

A: I'm certain everyone - many people have wondered what the problem was.

Q: Yes.

A: These pinhole leak problems and rapid deterioration of copper pipes.

Q: But why did you believe it was the water supply and not some other cause?

A: That was my belief at that time.

Q: Okay. Are you aware of other causes for leaks in copper pipes? I think that's just a yes or no.

A: Someone could take a drill and drill a hole in a copper pipe. That would make a leak. I don't know how to answer your question.

Q: Are you aware that there could be other causes short of somebody intentionally causing a leak?

A: That's why I've got an expert witness.

¹³ A 21, ¶ 12; 43.

¹⁴ A 21, ¶ 14; 293, ¶ 23.

Q: Oh, no, I understand that, but - okay.

A: To answer those questions.

Q: So you don't know sitting here today whether it's caused by the water supply? Is that fair?

A: Well, I'm not the expert on this.

Q: Okay, and so this letter that you wrote where you indicated poor water quality is damaging the water and sewer systems in this building resulting in additional water use - that's what your letter writes?

A: Yes.

Q: That's what your letter reads. You're not qualified to make that statement?

A: I'm not an expert.¹⁵

C. Dr. Marc Edwards

Having heard nothing from WASA, Mr. Cormier, through his counsel, hired Dr. Marc Edwards, Professor of Civil Engineering at Virginia Tech, to investigate the cause of the copper pipe water leaks.¹⁶ Dr. Edwards is internationally recognized for his research on copper corrosion and "pinhole leaks."¹⁷ A pinhole leak is the final breakthrough event in the progressive attack of pitting corrosion on copper water plumbing.¹⁸ Copper water

¹⁵ A 116-17.

¹⁶ A 213.

¹⁷ A 287, ¶ 4; 301, ¶ 45.

¹⁸ A 144-45; 62; 289, ¶ 9.

pipes can have significant damage by corrosion, but not have pinhole leaks.¹⁹

The damage caused with pinhole leaks is costly to repair and time consuming to deal with.²⁰ Moreover, pinholes in copper service lines can allow mold to form, rendering the drinking water dangerous.²¹

On March 16, 2003, Dr. Edwards visited seven of the eight buildings (all but 1327 Emerson Street)²² as part of his "investigation into the possible link between water quality and the corrosion problems experience by . . . Mr. David Cormier."²³ In each building, Dr. Edwards tested the water *in situ* and took water samples later examined at his laboratory.²⁴ In three of the buildings (1325 Emerson Street, 1300 Harvard Street and 1909 19th Street) he examined the copper water pipes damaged by pitting and pinhole leaks.²⁵ Finally, Dr. Edwards examined

¹⁹ A 62; 289, ¶ 9.

²⁰ A 288, ¶ 7.

²¹ A 288, ¶ 8.

²² 1327 Emerson Street is next to 1325 Emerson Street, one of the buildings which Edwards visited.

²³ A 252.

²⁴ *Id.*

²⁵ A 100-101; 289, ¶¶ 9, 10.

copper water pipes with pinhole leaks which Mr. Cormier had removed from each of his other buildings.²⁶

Dr. Edwards announced his findings on May 2, 2003 in a letter to Mr. Cormier's counsel.²⁷ Dr. Edwards concluded that the water entering the buildings was very corrosive and "highly likely to cause copper pitting."²⁸ Multiple factors were at work in causing the pinholes, but not WASA's release of chemicals into the water supply, as Mr. Cormier had initially speculated. It was the combination of three factors that caused the copper water pipes to corrode and the pinhole leaks to form: Elevated water pH, high chlorine levels and aluminum likely released by concrete water mains.²⁹

Dr. Edwards also reported "that many other people . . . living in the Washington, DC area[] are experiencing outbreaks of pinhole leaks" and that this was "not a problem that is isolated to your client."³⁰

Dr. Edwards was already familiar with the pinhole leak problem. He had worked for five years for the Washington Suburban Sanitation Commission assisting in the abatement of

²⁶ A 252-53.

²⁷ A 252.

²⁸ *Id.*

²⁹ *Id.*

³⁰ A 252-53.

pinhole leaks and "conducted hundreds of corrosion experiments using real or simulated versions of Potomac River water."³¹

Following his May 2, 2003 report, Dr. Edwards completed tests and began new ones. In one experiment, Dr. Edwards exposed new copper tubing to the water which he had collected from 1909 19th Street.³² The water ate a hole in the pipe in four months.³³ Dr. Edwards took additional samples from 1909 19th Street on three separate occasions in 2004.³⁴ The tests confirmed his 2003 finding of highly corrosive water, exposure to which could cause rapid development of pinhole leaks in copper pipe.³⁵

D. WASA's Inaction in Dealing with its Corrosive Water

Since 1966, it has been accepted in the water utilities industry that corrosive water causes pitting in copper water pipes which, if unchecked, ripens into pinhole leaks.³⁶ By then, scientists in this field had concluded that the water utilities industry bore the responsibility for preventing the water-borne

³¹ A 288, ¶¶ 5, 6.

³² A 254; 296, ¶ 34.

³³ A 296.

³⁴ A 298, ¶ 38.

³⁵ A 258; 299, ¶ 12.

³⁶ A 303, ¶ 50.

corrosive damage to customer properties.³⁷ In 1991, the EPA recognized that utilities must reduce corrosivity in their water in order to protect public health as well as protect property.³⁸

The Recommended Standards for Water Works (the "Standard")³⁹ was first published in 1953.⁴⁰ In 1982, the Standard included a section about corrosion control.⁴¹ By 1997, the Standard advised water utilities of the need to maintain a system of record keeping and mapping of its internal corrosion problems and to regularly test its water supply for corrosiveness.⁴²

It has been known since the mid-1990s that adding phosphates to the water supply countered the corrosivity of water and stopped pinhole leaks.⁴³

In 1997, the EPA recommended that WASA use phosphates as a means of corrosive control.⁴⁴ Had WASA added phosphates to its

³⁷ A 291, ¶ 15.

³⁸ A 293, ¶ 19.

³⁹ The Standard is published by the Water Supply Committee of the Great Lakes-Upper Mississippi River Board of State and Provincial Public Health and Environmental Managers. The members are Illinois, Indiana, Iowa, Michigan, Missouri, New York, Ohio, Ontario, Pennsylvania and Wisconsin. See Plaintiffs' Opposition to Defendant's Motion for Summary Judgment (filed Jan 9, 2006) at Exhibit M.

⁴⁰ A 292, ¶ 20.

⁴¹ *Id.*

⁴² A 292, ¶ 21.

⁴³ A 303, ¶ 50.

⁴⁴ A 304, ¶ 54.

water, it would have stopped pinhole leaks from occurring in all of Mr. Cormier's buildings.⁴⁵ WASA waited until 2004 to do so.⁴⁶

E. Proceedings in the Trial Court

Plaintiffs filed this action on January 8, 2003. The Complaint asserts several causes: Negligence (Count A), Gross Negligence and Willful Misconduct (Count B), Product Liability (Count C), Nuisance and Trespass (Count D), Violation of CDCR 21-400-01, *et seq.* (Count E), Violation of D.C. Code § 34-1101 (Count F), Unlawful Trade Practices (Count G), Uniform Commercial Code (Count H), Eminent Domain (Count I) and Breach of Contract (Count J).⁴⁷

Plaintiffs alleged, *inter alia*, that WASA "failed to test [its] water for corrosiveness" or "remediate the corrosivity problem in its water."⁴⁸ The Complaint sought compensatory damages for the "property damage" and "interference with the use and enjoyment of real property" sustained by Plaintiffs as a result of WASA's failures to act.⁴⁹ Plaintiffs also sought injunctive relief and a declaratory judgment against WASA.⁵⁰

⁴⁵ A 304, ¶53.

⁴⁶ A 215.

⁴⁷ A 18.

⁴⁸ A 19, ¶ 5.

⁴⁹ A 29, ¶ 59.

⁵⁰ A 29.

WASA filed a motion to dismiss the Complaint on preemption, sovereign immunity and public duty doctrine grounds.⁵¹ It also challenged the pleading sufficiency of Counts E-J.⁵² In a Memorandum and Order entered July 29, 2005 the Court (Burgess, J.) denied the motion except as to Count E (moot) and Count F (not actionable).⁵³

Following discovery, WASA filed a motion for summary judgment, which challenged only Plaintiffs' negligence claim.⁵⁴ The motion made no mention of Plaintiffs' other claims. Plaintiffs' opposed the motion and relied, in part, on a lengthy declaration signed by Dr. Edwards "under penalty of perjury" and dated January 9, 2006 (the "Edwards Declaration").⁵⁵

On June 12, 2006, the trial court granted partial summary judgment (Alprin J.).⁵⁶ In its Memorandum and Order the trial court: (1) dismissed as timed barred all claims respecting 1460 Euclid Street and 1300 Harvard Street; (2) refused to consider the Edwards Declaration because it was not in affidavit form;

⁵¹ A 415-21.

⁵² A 421-22.

⁵³ A 415.

⁵⁴ A 415.

⁵⁵ A 287.

⁵⁶ A 426.

(3) rejected Plaintiffs' negligence claims respecting five buildings (1325 Emerson Street, 1327 Emerson Street, 3228 Hiatt Place and 1460 Euclid Street) because without the Edwards Declaration Plaintiffs could not prove that the pipes in the buildings had pinhole leaks; (4) found Plaintiffs' negligence action damages to be speculative and then dismissed the rest of Plaintiffs' claims for monetary damages -- claims that were not before the court on WASA's motion and (5) permitted only claims for equitable relief to proceed.⁵⁷

Thereafter, Plaintiffs filed a motion to modify judgment. The motion was denied on August 2, 2006 (Alprin, J.).⁵⁸ Thereafter, Plaintiffs moved the trial court to dismiss the equitable claims and enter final judgment.⁵⁹ The court did so on October 25, 2006 (Alprin, J.).⁶⁰

This appeal followed.⁶¹

⁵⁷ *Id.*

⁵⁸ A 444.

⁵⁹ A 448.

⁶⁰ *Id.*

⁶¹ A 451.

STANDARD OF REVIEW

The Court's review of a trial court's grant of summary judgment is *de novo*. *Brown v. George Washington Univ.*, 802 A.2d 382, 385 (D.C. 2002). The Court must assess the record independently and apply the same summary judgment standard as that applied by the trial court. *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005).

A motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c); Weakley, 871 A.2d at 1173.

The Court may not make credibility determinations or weigh the evidence. *3145 Deauville, L.L.C. v. First American Title Ins. Co.*, 881 A.2d 624, 627 (D.C. 2005). Moreover, it must view all the evidence presented in the light most favorable to the non-moving party and likewise make all reasonable inferences from the evidence in that party's favor. *Id.* In short, the Court cannot try issues of fact; it can only determine whether there are issues to be tried. *Id.*

Moreover, any doubt as to whether a genuine issue of material fact has been raised is sufficient to preclude entry of summary judgment. Weakley, 871 A.2d at 1173. Thus, "if an impartial trier of fact, crediting the [plaintiff's] evidence and viewing the record in the light most favorable to the

[plaintiff], may reasonably find in favor of [the plaintiff], then the motion for summary judgment must be denied." *Id.* In sum, "the test for deciding a motion for summary judgment is essentially the same as that for a motion for a directed verdict." *Id.*

SUMMARY OF ARGUMENT

The trial court erred in granting summary judgment in a number of ways which each warrants reversal. First, the trial court wrongly rejected the Declaration of Plaintiffs' key expert witness because it was not notarized. Second, the court ignored Plaintiffs' evidence respecting the harm they sustained as a result of Defendant's negligence. Third, the court misapplied the law of speculative damages. Fourth, the trial court adjudicated claims that were not before it. Fifth, the court dismissed claims as time barred when a genuine issue existed as to when the claims accrued.

ARGUMENT

I.

The Trial Court's Entry Of Summary Judgment Should Be Reversed Since It Failed To Consider The Declaration Of Plaintiffs' Expert Which Established Genuine Issues Of Material Fact.

In his Declaration, Dr. Edwards asserted facts bearing upon every matter at issue in this litigation.⁶² However, the trial court would not consider the merits of the Declaration: "The court, however, need not even decide whether this rebuttal is sufficient to create an issue of fact to survive summary judgment, because the court finds that the Edwards Declaration is not an affidavit."⁶³

The legal viability of the affidavit format that the trial court espouses is indeed entrenched. The problem with the court's restatement of the law, however, is that an "affidavit" for summary judgment purposes includes declarations not notarized, but that are executed under penalty of perjury and dated, like the instant one.

Such a declaration has the "same force and effect" as an affidavit. 28 U.S.C. § 1746. This Court acknowledged this principle in *Matter of Muckelroy*, 609 A.2d 265, 278 (D.C. 1992) when it noted "the growing movement to replace notarized

⁶² A 287.

⁶³ A 439.

affidavits with signed declarations under penalty of perjury." See also *Lanton v. U.S.*, 779 A.2d 895, 905 n.1 (D.C. 2001) (citing 28 U.S.C. § 1746 with approval).

This is not a controversial question. See, e.g., *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (1987) ("Under those circumstances, Celotex would then be obligated to take Hoff's deposition (or otherwise secure a statement from him by affidavit or declaration) in order successfully to move for summary judgment." (Emphasis supplied)); *Bansal v. Washington Metropolitan Area Transit Authority*, 2006 WL 3755236 (D.D.C. 2006) ("Summary judgment may be granted only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits [or declarations], if any . . ." (brackets in the original, emphasis supplied)).

Thus, the trial court committed error when it rejected the Edwards Declaration.⁶⁴

⁶⁴ A notarized version of the Edwards Declaration, executed after the trial court granted summary judgment, was appended to Plaintiffs' Motion to Modify Judgment. The trial court, however, apparently did not consider the substance of the declaration when it ruled on, and denied, the motion. A 386. If Plaintiffs were remiss in not filing a notarized Declaration with their original summary judgment opposition, Plaintiffs' neglect was excusable under Super. Ct. Civ. Rule 6(b). See *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993). The trial court should have vacated its summary judgment ruling in light of the revised Declaration.

II.

The Trial Court's Entry Of Summary Judgment Should Be Reversed Since There Was Sufficient Evidence Of Record To Support Plaintiffs' Negligence Claim.

The trial court's finding that Plaintiffs' negligence claims must fail is erroneous in several respects. The court reasoned, that because Plaintiffs' expert, Dr. Edwards, observed the water-borne corrosion of pipes in only three of the buildings which he visited, he could not state with requisite certainty that the other five buildings were likewise afflicted with pinhole leaks caused by WASA's corrosive water.⁶⁵

In reaching this conclusion, the court (as discussed *supra*) disregarded the Edwards Declaration:

It is not true that I am unable to render an expert opinion as to the existence of pinhole leaks at all of Plaintiffs properties. When I agreed with defense counsel's statement in my deposition that I did not believe I had a reasonable degree of scientific certainty to conclude that there was copper pinhole leak pitting in the properties that I did not personally observe, it was because as a scientist I would not claim 'scientific certainty' as to conditions I did not personally observe, and that was my interpretation of his question.⁶⁶

Dr. Edwards went on to state:

⁶⁵ A 439.

⁶⁶ A 301, ¶ 48.

This is not an admission and does not mean I cannot render an opinion as to the existence of pinhole leaks in the remaining properties. To the contrary, I feel confident offering an expert opinion on the existence of pinhole leaks at the properties at which I did not personally observe them *in situ* based on the observations I made regarding the corrosive qualities of WASA's water, the forensic examination of pipe samples from the properties that I conducted, the pinhole leaks I observed at the Plaintiffs' properties that I did personally view them in.⁶⁷

Dr. Edwards opined:

Given these observations, and given that I have ruled out WASA's purported other causes at Mr. Cormier's properties, there is a high probability that copper pipes present at the other properties would have pinhole leaks. Moreover, based on Mr. Cormier's descriptions of the leaks that he observed at his other properties, my expert opinion is that his descriptions are consistent with pinhole leaks, as supported by my theory, my forensic evaluation of pipe samples, and the water sample results that I took that demonstrate the corrosivity of the WASA water supplied to all of the Plaintiffs' buildings.⁶⁸

Dr. Edwards thus avers with a "reasonable degree of scientific certainty" that there were copper pinholes in all of Plaintiffs' subject premises.

Moreover, even if the Edwards Declaration falls out of the case, there is sufficient record evidence (*i.e.*, Dr. Edwards' reports⁶⁹) to support a jury finding of corrosion-induced damage to the copper water pipes in every building at issue in this litigation. This is because Dr. Edwards found corrosive water

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ A 252, 254 and 259.

flowing in seven of the buildings which he tested -- water capable of creating a pinhole leak after four months of exposure.

Given these facts, it would be reasonable for a jury to conclude that Mr. Cormier's buildings were damaged by WASA's water.⁷⁰ A pinhole leak is the endpoint of the injury to copper pipes caused by corrosive water, not the beginning.⁷¹ The trial court failed to grasp this.

Furthermore, assuming *arguendo* that Plaintiffs were injured only when a pinhole appeared (as the trial court assumed), there was sufficient evidence of record for a jury to conclude that there are pinhole leaks in all buildings. First, Dr. Edwards found highly corrosive water in samples taken from each of the seven buildings he visited. Second, Dr. Edwards saw pinhole leaks in three of those buildings. Third, as to those three buildings, he ruled out all causes of pinhole leaks other than corrosive water. Fourth, Mr. Cormier saw pinhole leaks in each building at issue in this litigation which bore the appearance of pinholes caused by corrosive water.

It is submitted, against this background, that a jury would not have to engage in speculation to infer that the pipes of all

⁷⁰ Dr. Edwards stated: "Based on my water sampling and analysis, forensic analysis, and personal inspection of the properties, I know that there [was] damage[]." A 307 at ¶ 64.

⁷¹ A 100-101; 289, ¶¶ 9, 10.

of these buildings were damaged by WASA's water. See *Rebel Oil Co., Inc. v. Atlantic Richfield Co.* 51 F.3d 1421, 1436 (9th Cir. 1995). (For summary judgment purposes, inquiry respecting expert's opinion is whether inference to be drawn from opinion is reasonable, given substantive law which is foundation for claim or defense.). Moreover, Rule 56 does not permit trial courts "to resolve questions of credibility or conflicting inferences." *Id.* Rather, it requires the trial court to "assess whether the jury, drawing all inferences in favor of the nonmoving party, could reasonably render a verdict in favor of the nonmoving party in light of the substantive law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986).

The trial court committed error when it rejected the Edwards Declaration.

III.

The Trial Court's Grant Of Summary Judgment Should Be Reversed Because It Misapplied The Law Concerning Speculative Damages.

Pleadings, depositions, answers to interrogatories, requests for admissions and affidavits are the entire universe of evidentiary materials that can be considered by the court on a motion for summary judgment. See Super. Ct. Civ. Rule 56(c) ("[S]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.").

In the instant case, WASA failed to put into the record the very evidence it claims would prove a lack of merit respecting Plaintiffs' damages proof. This is the only conclusion that can be reached from WASA's own characterization of the record:

Plaintiffs have produced a myriad of receipts that appear to be materials related to the upkeep of the properties in question. These receipts are too voluminous to be attached as an exhibit to this motion."⁷²

Lacking such record evidence, WASA's motion for summary judgment on damages was simply not before the trial court. The court was apparently not nonplussed by this crucial lack of evidence when it ruled on the motion: "The court understands that Cormier seeks to measure his damages by a collection of bills and receipts that has not been filed with the court."⁷³

⁷² Memorandum of Points and Authorities in Support of Defendant District of Columbia Water and Sewer Authority's Motion for Summary Judgment (filed Nov. 30, 2005) at 30 n.12.

⁷³ A 440.

Moreover, the trial court also misconstrues the meaning of speculative damages:

WASA asserts that the bills and receipts 'do not evidence the actual work, if any, done at the buildings.' Def.'s Mem., at 30. 'It is not enough to show that materials were purchased in order to do repairs or that the repairs were done at all.' *Id.* Dr. Edwards - Cormier's sole expert - has testified he has no expertise on quantifying damages and is not prepared to do so at trial.'⁷⁴

Plaintiffs have adduced record evidence that corrosive water supplied by WASA caused pinholes to form in the pipes of Plaintiffs' buildings. There is nothing speculative about this evidence.

Furthermore, as a term-of-art, "speculative damages" pertains to a flawed theory of recovery. It does not pertain to the quantification of damages.

The law distinguishes between the amount of proof required to establish the fact that the plaintiff has sustained damage and the measure of proof necessary to enable the jury to determine the amount of damage. The uncertainty which prevents a recovery is uncertainty as to the fact of damage and not as to its amount. WASA and the trial court fail to discern this.

"[I]n the District of Columbia, while a plaintiff need not, at [the summary judgment] stage, show the amount of the damages, he is obligated to show that they exist and are not entirely

⁷⁴ *Id.*

speculative." *Rafferty v. NYNEX Corp.*, 744 F.Supp. 324, 330 n.26 (D.D.C. 1990); see also *Aircraft Guar. Corp. v. Strato-Lift, Inc.*, 991 F.Supp. 735, 740 (E.D.Pa. 1998) ("Thus, as there exists no question as to the fact of damages but only a factual question as to the amount of damages, defendants' motion for summary judgment based on the speculative nature of plaintiff's damages is denied.")

Finally, the trial court wholly ignores Mr. Cormier's damages resulting from the loss of use and enjoyment of his property caused by Defendant, alleged in the Complaint and supported by the record evidence.⁷⁵ These damages are, in part, non-economic and flow naturally from the wrongs alleged in Plaintiffs' negligence, product liability, nuisance, trespass and breach of contract claims. See *Federal Ins. Co. v. Conditioned Air, Inc.*, 1991 WL 7163 (D.D.C. 1991) ("In addition to property damage, plaintiffs are entitled to damages for the loss of use of their residences."); *Gamble v. Smith*, 386 A.2d 692, 694-95 (D.C. 1978).

The trial court erred when it dismissed the negligence action and rejected all claims for compensatory damages.

⁷⁵ A 29, ¶ 59(a).

IV.

The Trial Court Erred In Finding That All Claims Respecting 1460 Euclid Street And 1300 Harvard Street Were Time Barred.

The parties agree that the statute of limitations required Mr. Cormier to bring his claims against WASA within three years after the claims accrued. D.C. Code §§ 12-301(3), (7), and (8). The parties disagree, however, as to when Mr. Cormier's claims accrued.

"A claim usually accrues for statute of limitations purposes when injury occurs, but in cases where the relationship between the fact of injury and the alleged tortious conduct is obscure, [D.C. courts] determine[] when the claim accrues through application of the discovery rule." *Brin v. S.E.W. Investors*, 902 A.2d 784, 792 (D.C. 2006) (citations omitted).⁷⁶ "[F]or a cause of action to accrue where the discovery rule is applicable, one must know or by the exercise of reasonable diligence should know (1) of the injury, (2) its cause in fact, and (3) of some evidence of wrongdoing." *Id.* At issue here is the second prong of this analysis -- Mr. Cormier's knowledge of

⁷⁶ The trial court did not have occasion to consider the import of *Brin* before deciding WASA's motion for summary judgment. This is because *Brin* was decided on July 13, 2006, one month after the trial court issued its decision on June 12, 2006.

the causal connection between WASA's wrongdoing and the damage to the copper pipes in his buildings.⁷⁷

Applying the discovery rule, the trial court relied on Mr. Cormier's letters to WASA in 1998 and early 2000 to find that Mr. Cormier *knew* then that the damage to the pipes in his buildings was caused by WASA's wrongdoing. The trial court thus held that the three-year limitations period began to run when the letters were written and expired before this lawsuit was filed on February 21, 2003.⁷⁸ The trial court's ruling was in error.

In *Brin*, an EPA employee sued the owner/manager of the building in which she worked, alleging that she suffered respiratory problems caused by the building's contaminated air. The employee believed as early as 1992 that she was adversely affected by the building's air. *Id.* at 788. However, she did not obtain a medical opinion establishing that causal connection until the summer of 1998, *Id.* at 788, 791. She filed suit on October 2, 1998. *Id.* at 791.

The trial court dismissed the employee's claim as time-barred, reasoning that under the discovery rule, the employee

⁷⁷ Plaintiffs' claims are also timely when viewed as a continuing tort, although the Court need not reach this issue. See *Beard v. Edmondson and Gallagher*, 790 A.2d 541 (D.C. 2002), See also *L'Enfant Plaza East, Inc. v. John McShain, Inc.*, 359 A.2d 5 (D.C. 1976) (continuous trespass).

⁷⁸ A 435-36.

had inquiry notice of her cause of action before October 2, 1995 -- three years before she filed suit. This Court reversed. *Id.*

This Court aptly noted that the causal connection between "a manifest illness and wrongdoing of which there is some evidence . . . will invariably be a question beyond the ken of a layperson." *Id.* at 793. Since the plaintiff in such a case would be required to support her claim with expert medical opinion, the limitations period would not begin running until the plaintiff obtained "a medical opinion that the wrongdoing is a plausible cause of the known injuries[.]" *Id.* at 794. Thus, Mr. Cormier's claims were timely filed.

Brin is dispositive here. The causal connection between pinhole leaks and the water supply is simply beyond the ken of a lay person.

Indeed, counsel for WASA firmly established that, when Mr. Cormier wrote to WASA, he could not have "known" in any real sense that the water supply was damaging the pipes of his buildings:

Q: So you saw leaks in your copper pipes and you believed - you just intuitively thought that that could be caused by the water supply?

A: I'm certain everyone - many people have wondered what the problem was.

Q: Yes.

A: These pinhole leak problems and rapid deterioration of copper pipes.

Q: But why did you believe it was the water supply and not some other cause?

A: That was my belief at that time.

Q: Okay. Are you aware of other causes for leaks in copper pipes? I think that's just a yes or no.

A: Someone could take a drill and drill a hole in a copper pipe. That would make a leak. I don't know how to answer your question.

Q: Are you aware that there could be other causes short of somebody intentionally causing a leak?

A: That's why I've got an expert witness.

Q: Oh, no, I understand that, but - okay.

A: To answer those questions.

Q: So you don't know sitting here today whether it's caused by the water supply? Is that fair?

A: Well, I'm not the expert on this.

Q: Okay, and so this letter that you wrote where you indicated poor water quality is damaging the water and sewer systems in this building resulting in additional water use - that's what your letter writes?

A: Yes.

Q: That's what your letter reads. You're not qualified to make that statement?

A: I'm not an expert.⁷⁹

Mr. Cormier's ignorance was understandable and to be expected:

There is evidence in the record that *the [pinhole leak] failures may have been due to a peculiar water*

⁷⁹ A 116-17.

content which developed in at least some areas of the city of Roswell after the year 1956, but no finding was made or requested relating to the cause or causes of the leaks, but only that the leaks developed. In any event, the cause or causes of leaking pipes in the city of Roswell, and particularly in the pipes in question, are not matters of such common knowledge that the court could properly have taken judicial notice thereof. (Emphasis supplied).

Horton v. Driver-Miller Plumbing, Inc., 76 N.M. 242, 414 P.2d 219, 222 (N.M. 1966).

Mr. Cormier's expert did not opine on the connection between the pipe problem and WASA's water until May 2, 2003.⁸⁰ Dr. Edwards dispelled Mr. Cormier's ignorant notion that WASA had somehow tainted the water by putting "chemicals" into its water. Moreover, Dr. Edwards considered and rejected all five of WASA's own theories for these pinhole leaks: Electrical grounding, stray currents, lightning strikes, galvanic driven electrolysis and oil residue in the tube boring.⁸¹

"Although what constitutes the accrual of a cause of action is a question of law, *when* accrual actually occurred in a particular case is a question of fact to be resolved by the fact-finder." *Brin*, 902 A.2d at 795 (Emphasis supplied). "In all cases to which the discovery rule applies, the inquiry is highly fact-bound and requires an evaluation of all of the

⁸⁰ A 252.

⁸¹ A 109, ¶ 7; 300-301, ¶¶ 43-46.

plaintiff's circumstances." *Id.* "Otherwise put, unless the evidence regarding the commencement of the running of the statute of limitations is so clear that the court can rule on the issue as a matter of law, the jury should decide the issue on appropriate instructions." *Id.* See also *Washington Hospital Center v. District of Columbia Dep't of Employment Servs.*, 859 A.2d 1058 (D.C. 2004).⁸²

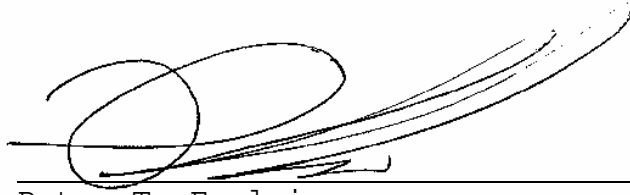
The trial court should have asked a jury to determine when the claims respecting 1460 Euclid Street and 1300 Harvard Street accrued.

⁸² In *Washington Hospital Center*, a mesothelioma victim was informed in 1999 by her doctor that her disease was caused by asbestos exposure possibly in her workplace, but she had no knowledge of such exposure. In 2000, her attorney discovered records demonstrating asbestos at her twenty-three-year place of employment. With this information her doctor was able to conclude that her cancer was asbestos caused. On these facts, this Court stated: "In reviewing the evidence presented at the administrative hearing, we note the evolving nature of the discovery of claimant's condition and the likely cause of it." 859 A.2d at 1062. Here too, Mr. Cormier's knowledge of what afflicted the subject premises "evolved" as it did for the asbestos victim in *Washington Hospital Center*. Mr. Cormier's knowledge did not trigger the running of the statute of limitations until his expert evaluated the cause of the condition in his buildings and issued his report on May 2, 2003.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's grant of summary judgment and remand the case for further proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter T. Enslein", written over a horizontal line.

Peter T. Enslein

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CERTIFICATE OF SERVICE

District of Columbia
Court of Appeals
Nos. 06-CV-1370 and 06-CV-1371

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DAVID CORMIER; ONTARIO ROAD, LLC;
TAYLOR, LLC; EUCLID STREET, LLC;
ASHBURN, LLC; HIATT PLACE, LLC;
FLORIDA HOUSE LIMITED PARTNERSHIP; and
EMERSON GARDENS LIMITED PARTNERSHIP,
Appellants/Cross-Appellees,

v.

DISTRICT OF COLUMBIA WATER AND
SEWER AUTHORITY,
Appellee/Cross-Appellant.

-----)
I, John C. Kruesi, Jr., being duly sworn according to law
and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Peter T. Enslein, Attorney for
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On the 30th day of April 2007, I served the within **Brief for
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Unless otherwise noted, 4 copies have been sent to the Court via
hand delivery on the same date.

April 30, 2007

