Supreme Court No. 101087-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 82468-6-I

DIVISION I OF THE WASHINGTON COURT OF APPEALS

KATHLEEN E. JOHNSON, and STEVEN W. GENTRY,

Petitioners,

v.

JEREMIAH KERK, et al.,

Respondents.

PETITION FOR REVIEW

Linda B. Clapham, WSBA # 16735
Gregory M. Miller, WSBA # 14459

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A. Identity of Petitioners and Decision Below.

Petitioners Kathleen Johnson and Steven Gentry ("Johnson" and "Gentry" or "Petitioners"), plaintiffs and appellants below, ask this Court to accept review of the Court of Appeals unpublished decision terminating review filed April 4, 2022 ("Decision"). App. A-1-15. Johnson and Gentry timely moved for reconsideration, App. A- 16-60, the Court of Appeals called for an answer which Respondents filed, App. 61-91, and Petitioners filed a reply, App. A-92 -106. Reconsideration was denied June 14, 2022. App A-107. Petitioners incorporate the arguments in their reconsideration papers.

Petitioners seek review of the Decision which affirmed the trial court's dismissal, on statute of limitations grounds, of their complaint for damages for injuries from exposure to undisclosed mold and toxic substances in the rental house owned by Respondent Sharon O'Grady. The Decision erroneously ruled that the statute of limitations for Petitioners' claims for damages for injuries from exposure to mold and toxic substances was

triggered ***before*** Johnson and Gentry had evidence from a medical diagnosis of toxicity in their blood from mold and toxic chemicals; and ***before*** they had evidence that the same toxic chemicals and mold were present in the rental house; and thus, ***before*** they knew the causes in fact of their injuries. Although stating the settled rule that no claim accrues until the plaintiff knows all elements of their claim, including the cause in fact of their injuries, the Decision in fact ruled erroneously that Johnson and Gentry's causes of action for toxic exposure from mold and chemicals in the rental house were triggered in December, 2017, ***before*** they knew the cause in fact of their injuries, and thus triggered the three-year statute before service was complete.[1]

This is not a mere appellate court error that needs correcting, but reflects a significant step away from this Court's

[1] The statute of limitations issue arose because of an error by trial counsel in believing that defendants were properly served. On discovery of the error after defendants filed a motion to dismiss, they were served on January 16, 2021, making January 16, 2018, important for the accrual of claim analysis that follows.

settled approach to when a cause of action accrues. It comes from the lack of clear precedent for what constitutes knowledge of the cause in fact for toxic exposures, as alleged here, and the Decision's mis-application of the phrase, "susceptible to proof."

Petitioners contend that to be consistent with this Court's precedents and give meaning to "susceptible to proof" in toxic exposure cases, such knowledge will normally require a medical diagnosis or medical determination the plaintiff's injuries are from specified toxic substances or mold, coupled with some evidence tying exposure from those substances to the defendant or the defendant's property, here the rental house. This approach will clarify murky Washington law on the accrual of causes of action for toxic exposure cases. It also is consistent with decisions in other jurisdictions which have addressed the issue. It will let Washington join those jurisdictions intent on ensuring relief for victims of toxic exposures once they have been able to determine the cause in fact and defendant.

B. Issues Presented for Review.

Settled black-letter law in Washington holds that a cause of action accrues when a claimant knows or should have known all the essential elements of her cause of action, including cause in fact of the injury. *See, e.g., Green v. A.P.C.,* 136 Wn.2d 87, 960 P.2d 912 (1998) and cases at OB, 15-16; Reply, 6-7. The Decision nominally recognized this principle, observing that the right to apply for relief "*requires each element of the action be susceptible to proof*." Decision at 9, App. A-9 (emphasis added). Here, the only basis for the Decision to find that Petitioners' poisoning by mold from the rental house was "susceptible to proof" is by ruling that the requisite knowledge of mold as a cause in fact of their injuries was triggered by the "gossamer strand" of a friend's speculative surmise that he "maybe" smelled mold while helping move furniture and personal effects out of the house, amidst the "vile" stench of the rat infestation, which was viewed as the cause, and for which allergens Johnson was getting treatment.

The Decision's reliance on that offhand, gossamer strand of a suggested possibility as the trigger for the statute of limitations as to any harm caused by exposure to toxic chemicals or mold is inconsistent with this Court's decisions and prior published decisions of the Court of Appeals. This case gives the opportunity to clarify Washington law and join with other jurisdictions which have addressed when a toxic exposure case becomes actionable. It presents these issues:

1. Where a plaintiff is suffering from a toxic exposure and is not aware of the actual cause until receiving 1) a medical evaluation or diagnosis identifying the toxic substance; and 2) some evidence tying exposure to the substance to the defendant or its property, should the statute of limitations be tolled until the plaintiff receives both the medical diagnosis and the tie to exposure from the defendant or its property? Yes.

2. Where settled law requires knowledge of the cause in fact of the claimed injury before a plaintiff has the right to apply to court for relief and trigger the statute of limitations, is the statute necessarily tolled until the plaintiff has knowledge of the cause in fact of the injury sufficient to support a complaint under Rule 11? Yes. *See Green v. A.P.C.,* 136 Wn.2d 87, 95-96, 960 P.2d 912 (1998); *North Coast Air Services Ltd. v. Grumman Corp.,* 111 Wn.2d 315, 759 P.2d 405 (1988); *Winbun v.*

Moore, 143 Wn.2d 206, 18 P.3d 356 (2001); *Ruth v. Dight,* 75 Wn.2d 660, 453 P.2d 631 (1969).

3. Should this Court expressly adopt the rule that a cause of action for a toxic exposure claim does not accrue, and the statute of limitations is not triggered, until the plaintiff receives both a medical evaluation or diagnosis of the specific toxic cause, and also has some evidence tying exposure to that toxic cause to the defendant or its property? Yes.

C. Statement of the Case.

The detailed facts and case context are set out in Petitioners' Opening Brief ("OB") at 4-13, and in their Reply Brief ("Reply") at 1-4. The best recitation of the facts related to Petitioners' medical issues and their search for the cause in fact is in Johnson's January 24, 2018, letter to the Harborview Environmental Occupations Clinic at CP 270-276, App. A-49-55 herein. The details regarding Petitioners' health injuries and search for causation are derived primarily from that letter.

Johnson rented the house in late June, 2017, but was forced to leave after less than four months from serious health problems that manifested shortly after she moved in and she

believed were caused by the manifest rat infestations in the house which O'Grady denied existed, and later proved to be pervasive.

Although O'Grady continued to deny there were any problems from rats (or anything else), she and Respondent Peter Weiner engaged in their own, "DIY" rat remediation efforts while Johnson was out of the house in late October, 2017, which included use of chemicals and heat. Johnson did not return to the house but engaged a lawyer to be released from the lease, who wrote a detailed letter to O'Grady dated November 6, 2017. CP 150-156 and App. 001-007 to the reply brief. The letter focused on the rat infestations since Johnson then believed it was the rats which made the house uninhabitable. O'Grady agreed to release Johnson from the lease.

As recounted in her letter to Harborview, Johnson (and Gentry) had different symptoms from the rat allergen symptoms, which developed during the moving and cleaning of Johnson's clothes and personal property removed from the home, that were different from the allergic symptoms Johnson had previously.

Compare, e.g., CP 273-275, App. 52-54 (describing post-move, December-January symptoms) with CP 270 & 272, App. 49 & 50 (describing initial symptoms attributed to rats).

Johnson's symptoms changed and became worse with Petitioners' continued exposure to the articles and furnishings from the rental and were causing confusion and pain which were mysterious to clinical providers. *Id.* There is no way either Petitioner could have known this in November when Johnson's possessions were moved out because the exposure was from the items that had been in the home. The more they were cleaned, touched, packed or discarded, the more confusion, memory loss, brain fog and physical symptoms grew. *Id.* These continued to worsen continuing until the night Johnson sent a middle of the night message to her primary care provider, Bob Smithing, ARNP, after an unusual allergic reaction. But none of this focus on toxic exposures other than from the rats was possible to know upon moving out of the home because until the move, there was no other suspect. It was only after the problems did not abate,

and after testing was done that Petitioners could know what the causes in fact actually were.

Gentry, meanwhile, never lived in the rental house with Johnson, nor with her after she vacated, though he visited. Gentry made several trips into the rental house in late November, 2017, to help retrieve Johnson's clothes and personal effects, getting exposed to whatever was there and whatever was infused in Johnson's clothes – any rat dander and feces, the chemical remediation substances which had permeated the house and Johnson's clothes and personal effects, and anything else that was not known. *See* CP 273 ¶2, 274¶, 275 ¶3, App. A-52-54 hereto. The only articulated concern in fall 2017, as seen from Johnson's lawyer's letter to O'Grady to extinguish the lease, was infestation from rats. Nevertheless, after retrieving Johnson's effects and being immersed in them, Gentry also began to suffer serious health problems similar to Johnson's new ones. *See* CP 274¶2, 275¶3, App. 53-54 hereto.

By early January, 2018, Johnson found that removing herself from the rental and getting various allergy-focused treatments aimed at the rat exposure was ineffective in stopping or curing her symptoms. Instead, they continued to be triggered on the arrival of her retrieved clothes and personal effects from the rental house. She ultimately disposed of them all, total losses, including family heirlooms.

With no relief, on January 18, 2018, less than three years before service was complete, Johnson was up at 2:30 am writing her primary care provider Bob Smithing, ARNP, about how she now suspected a chemical toxin rather than rats:

> Checking in to say I'm alive and will make follow up appt soon. Steve [Gentry] is seeing Susan [medical provider] in am. Similar symptoms to me. He's at my second house right now w a serious mask and packing up hard china and crystal I may be able to have again one day. The furniture and piano were treated by allergy specialty cleaning company to try to kill anything biological. **I suspect this is chemical/toxin.**

CP 269 (emphasis added). This was the first time Johnson had articulated her belief of the potential that something other than

the rats was the cause of her health problems.

Smithing replied two days later on Saturday, January 20 as follows:

> Hi Kat, Sounding like Harborview's Environmental sensitivity clinic may be the next step. This may be morphing into an environmental sensitivity problem. So, sorry it sounds quite horrible overall.

CP 269. Johnson replied on later that Saturday:

> Good idea! Do I need re[f]erral? I'll make appt. for that. Made two for Steve for you, but not til 1/31. Then two weeks later in case.

CP 269. Smithing replied the next day, Sunday January 21:

> Not sure if apt needed. May be a self-referral clinic but you certainly meet criteria. Give a try. I don't have number but you can find it.

CP 269.

Thus, it was not until the weekend of January 20-21, 2018, that Johnson began to pursue causes beyond the suspected rat allergen problems which ultimately led to the blood tests in February, 2018, and the test results received on March 9, 2018, showing both toxic chemical as well as toxic mold in her blood

and in Gentry's blood. March 9, 2018, thus is the earliest possible date that Petitioners **could know** that the likely causes in fact of their injuries were from mold and toxic chemicals.

And it was not until August, 2018, on receipt of tests of the O'Grady rental house identifying the same mold and chemical toxins found in their blood that Petitioners could say they knew the cause in fact of their injuries was from exposures from O'Grady's rental house, and had a sufficient basis to file a complaint compliant with CR 11.

The Decision ultimately ruled that the statute was triggered in November 2017 when it erroneously focused on the passing reference in Johnson's January 24, 2018, letter that Johnson wrote to Harborview that included the refence to her friend's mere surmise, speculating about mold in November 2017. That reference was made, of course, so that Harborview could include that (and any other) outside possibility in any assessment its clinic might do. CP 270-76.

The Decision thus held the causes of action for toxic exposure to chemicals, and to mold, were triggered when Johnson and Gentry had, at most, a surmise that the DIY chemical remediation was a cause of their problems, rather than the rats, which was long before their blood test results gave them their first ***evidence*** that toxic chemicals were, in fact, a cause. The Decision also necessarily ruled that the informal surmise by Petitioners' friend in November, 2017, who "maybe" smelled mold – in the overwhelming "vile" stench throughout the rental house of the decomposing rats in the walls (CP 271, App. 51) – constituted the basis for a claim because mold was therefore "susceptible to proof" as a cause in fact.

This ruling is based on not even a gossamer strand. It conflicts with settled Washington law which holds that a cause of action does not accrue until the plaintiff ***knows*** not only the injury or harm, but also "its cause." *Green v. A.P.C.*, 136 Wn.2d at 95-96, quoting *North Coast Air Services Ltd. v. Grumman Corp supra*. With respect, an off-hand speculation based on a

"maybe" by a third party does not equate with knowledge of cause in fact for a toxic exposure. At most it triggers a duty to investigate, which Petitioners diligently did. Only when they received the blood test results, then the house test results, did they have genuine knowledge of the "causes in fact" of their injuries sufficient to file suit and trigger the statute of limitations.

Nevertheless, the Decision concluded that Johnson's and Gentry's injuries from exposure to toxic chemicals, and to mold, were "susceptible to proof in November 2017." Decision at 8, App. A-8. With respect, this conclusion is incorrect and impossible on this record. For one thing, Gentry had not been fully manifesting his injuries in November, as noted *supra*. The Decision means that the statute of limitations for the mold claim was triggered by a friend's ***speculative surmise*** on ***possible*** causes of their symptoms based on what he "maybe" smelled along with the stench of the decomposing rats in the walls; or, paraphrasing Judge Learned Hand, by mere "gossamer strands of

speculation and surmise."[2] This hardly qualifies as establishing that all necessary elements of a potential claim were, in fact, known; and that there was evidence of each which was "susceptible to proof." And where the facts as to the plaintiff's knowledge are not certain, the issue is for the jury to decide, as held in *Green*, requiring remand for that issue.

As clearly seen by Johnson's January 24, 2018, letter to Harborview, in *actual fact*, until Johnson and Gentry received the results from their blood tests tying their symptoms to their exposure to chemicals and mold, there was nothing more than suspicion and surmise by them as two laypersons as to the cause of their injuries. In *actual fact*, in getting their March 2019 diagnoses Petitioners were diligently seeking to determine the

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[2] *See Hannon v. Beard*, 645 F.3d 45, 48 (1st Cir., 2011) ("courts must insist that such claims are bound up in facts, not in the gossamer strands of speculation and surmise."); *Miller v. Maryland Casualty Co*., 40 F.2d 463, 465 (2nd Cir. 1930) (per L. Hand, J.) ("To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands").

cause of their injuries, as the law requires. *In actual fact*, until O'Grady's rental house was tested in August, 2018, there was nothing but surmise based on a "maybe" smell that mold was there. The Decision is in error and review should be granted so that future victims of toxic exposures will not have their cases similarly derailed.

D. Why This Court Should Grant Review.

1. Review should be granted per RAP 13.4(b)(1) & (2) because the Decision conflicts with this Court's decisions in *Green v. A.P.C., North Coast Air Services Ltd. v. Grumman Corp., Winbun v. Moore,* and *Ruth v. Dight,* among others, and with the Court of Appeals Decisions of *Nichols v. Peterson NW, Inc.*, which hold a claim is not triggered until the plaintiff knows the cause in fact, even if that knowledge comes a decade or more after the injury.

The law is settled that a claim is not triggered for statute of limitations issues until the plaintiff knows all its elements, including the cause in fact of the injury; knowledge of the injury alone is not enough. *Green v. A.P.C., North Coast Air Services Ltd. v. Grumman Corp.,* and *Ruth v. Dight* are just a few of this Court's decisions which so hold. *See* Petitioners' discussions

discussion at OB 15-16, Reply at 6-13, Mot. For Recon. at 7-14, App. A-23-30, and Recon. Reply at 1, 6, App. A-92, 97.

North Coast and *Ruth v. Dight* are two of this Court's decisions whose facts illustrate the point of the black letter law and the error by the Decision below. In *North Coast,* the personal representative's 1984 suit for the injury from a 1974 airplane crash was allowed by this Court because the plaintiff had only learned of the actual cause of the crash ten years later, in 1984 – though there obviously was knowledge that the injury was from the plane crash. But knowledge of the fact of the injury tied to the air crash was not enough – this Court held that knowledge of the ***cause*** of the injury, in that case the cause of the crash, was required. So too with the cause of the injuries to Petitioners' health from exposure of them or Johnson's clothes and personal effects to the mold, and to the toxic chemicals. Suspicion that the injuries were "caused by the house" is no different than the *North Coast* plaintiff's knowledge the injuries occurred from the airplane crash. Cause of the crash was key.

In *Ruth v. Dight,* the plaintiff was injured during a surgery in 1944, but did not know the cause in fact – the surgical sponge left in her abdomen – until 1967, 23 years after the fact. This Court adopted the discovery rule and held that her claim was not time barred because, while she was aware of the injury and continuing discomfort over the years, she did not learn of the cause in fact until over two decades later and therefore did not know all the elements of her potential claim for injuries, and thus was not precluded from her suit.

Both *North Coast* and *Ruth v. Dight* should have been applied by the Decision here to reverse but were not. What the Decision does in effect, and notwithstanding its verbiage, is to conflate knowledge of injury with knowledge of cause in fact. While knowledge of both can be true in many circumstances, such as car accidents, both *North Coast* and *Ruth v. Dight* illustrate that knowledge of injury is not enough even when related to an aircraft crash or surgical malpractice. *Green,*

Winbun, and Nichols v. Peterson NW., Inc., 197 Wn.App. 491, 500-504, 389 P.3d 617 (2016), all are in accord.

Johnson's and Gentry's case illustrates that distinguishing between the knowledge of an injury and the requisite knowledge of the cause in fact is especially important in toxic exposure cases because the actual cause often is less clear. For instance, the parties believed Johnson's medical problems were caused by the rat infestations, if by anything in the house (given that O'Grady has consistently denied that her rental house played any part in Johnson's failed health), but the blood tests and house test indicate that, in fact, the mold and the toxic chemicals from the rental are the cause in fact of the continuing (though changed) health problems for Johnson, while they are the only basis for the injuries to Gentry who never lived in the rental, but handled Johnson's personal effects and furniture extensively after she relocated.

2. Review should be granted per RAP 13.4(b)(4) because whether the statute of limitations is triggered for toxic torts by a medical evaluation or diagnosis and some evidence tying the exposure to the defendant is an issue of substantial public interest that should be determined by this Court.

For the reasons set out *supra*, this case is an opportunity for the Court to clarify the criteria in the toxic exposure context for what constitutes knowledge of the cause in fact required to trigger a justiciable claim and thus trigger the statute of limitations. Review should be granted because there is no clear statement of that test for toxic torts and, without that test, cases like Petitioners' can be dismissed, denying them their day in court and the opportunity for any relief or justice from a responsible party.

The Decision focused on the imprecise and enigmatic phrase, "susceptible to proof" as the linchpin for when a plaintiff has the knowledge of the cause in fact, concluding that the less than gossamer surmise by a friend based on what he may have smelled through the stench of the decomposing rats in the walls

while helping Gentry remove Johnson's belongings from the house triggered the cause in fact element as to mold. This is wrong and shows precisely why review should be granted.

Petitioners' injuries triggered an obligation to diligently investigate the cause of those injuries. There is no dispute that they did just that. Johnson sought treatment, then removed herself from the rental to try and stop or alleviate what she suspected was the cause of her problems, the rats and their infestations. But when removal and treatment for allergens were of no avail, Johnson's provider suggested testing for toxic environmental substances at Harborview Medical Center's specialized environmental hazards clinic, which Johnson did, along with Gentry. They diligently sought to solve the mystery of their misery in the hopes of getting relief. They did not sit on their hands. But the point is that, after the rats were ruled out as the only culprit, ***Petitioners did not know what was causing their problems and set out to discover what that cause was, or what those causes were***. Until they received the results of the

blood tests on March 9, 2018, neither Johnson nor Gentry could say with any certainty they knew what was the cause in fact of their injuries – until then they had nothing but surmise and suspicion and wonder. And deep frustration.

And what did they learn with those blood tests? Not only that there were toxic chemicals in their blood, apparently from the DIY rat remediation efforts, but something entirely new: toxic mold. Where did that come from? They had zero ***evidence*** that mold was in the rental house until they received the results of the testing of the rental house in August, 2018 which showed both mold and the same toxic chemicals found by the blood tests.

Given these facts, granting review gives the opportunity to clarify the "susceptible to proof" term and state definitively what is required to trigger the knowledge of the cause in fact element of an injury for exposure to toxic substances for statute of limitations purposes or when (at minimum here) fact-finding by a jury is required, as in *Green*. This case lets the Court adopt a clear, bright line rule for toxic exposure claims: normally, a

medical diagnosis or evaluation specifying the toxic substance believed to be causing the harm; and some evidence tying the substance to the defendant or its property.

In addition, this case also presents the opportunity to join the other jurisdictions cited below with well-reasoned decisions holding that the right to bring a claim for a toxic tort does not arise until the plaintiff's medical diagnosis or assessment as to the substance in question so that she has knowledge of the cause in fact of the injury from a exposure to a specific toxic substance; and also some evidence that ties that the exposure the defendant. These include the cases cited in the merits briefing at pp. 17 & fn. 7 regarding the need to have medical proof to trigger the statute of limitations (citing Montana, Illinois, and 9th Circuit decisions), and on reconsideration at pp. 13-18, App. 29-35 (citing to 4 A.L.R.4th 821 and state and federal cases applying Minnesota, Texas, and Montana law), and including the federal *Ambrose* decision applying Montana law, appended to the reconsideration motion at App. 56-59 hereto, which was

discussed in detail at pages 16-18 of the reconsideration motion, App. A-32-34. [3]

Finally, Respondents will undoubtedly argue that the Court should not rescue Petitioners' trial counsel from the malpractice of failing to serve the complaint upon filing. But trial counsel's conduct has nothing to do with when a claim properly accrues. The question for this Court on taking review is not whether it can help a trial lawyer escape liability for his mistake but whether, even given that mistake, it nevertheless was error as a matter of law to dismiss Petitioners' complaint for a recognized mold claim[4] because they are entitled to bring their claims if timely filed and served, which they were. The errors of the attorney should not be visited on the client when, as a practical matter, there is no genuine recourse given the nature of

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[3] *Ambrose v. Tricon Timber, LLC,* 2016 WL 4257333 (U.S.D.C. Mont., 2016).

[4] *See, e.g., Nichols, supra,* 197 Wn.App. at 500-504 (reversing dismissal of mold claim because whether plaintiff exercised reasonable diligence in discovering the cause in fact of water intrusion and mold was a question of fact).

legal malpractice cases, particularly when to do so would be error as a matter of law.

E. Conclusion.

Suffering from symptoms from exposure to "something" in a house or building without determining the cause-in-fact of those symptoms does not, and should not, trigger the statute of limitation for a toxic exposure claim from those substances under the law in Washington. The trial court should be reversed. Petitioners Kathleen Johnson and Steven Gentry ask the Court to grant review and schedule argument at the earliest opportunity.

This document contains 4,503 words, excluding the parts exempted from the word count by RAP 18.17.

Respectfully submitted this 14th day of July, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Gregory M. Miller*
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ E-file and e-serve, to the following:

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DATED this 14th day of July, 2022.

S/ Allie M. Keihn
Allie M. Keihn, Legal Assistant

Appendix A

FILED
4/4/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHLEEN E. JOHNSON and STEVEN W. GENTRY, Appellants, v. SHARON GREICHEN O'GRADY, PETER WEINER, JEREMIAH KERK, and CASSANDRA KERK, Respondents.	DIVISION ONE No. 82468-6-I UNPUBLISHED OPINION

DWYER, J. — Kathleen Johnson and Steven Gentry appeal from the trial court's summary judgment order dismissing their claims. Johnson and Gentry assert that the trial court erred by ruling that the statutory limitation periods had expired with regard to several of the claims that were dismissed. Because the trial court properly ruled that the statutory limitation periods had expired for each of these claims, we affirm.

I

On June 12, 2017, Kathleen Johnson entered into a lease agreement with Sharon O'Grady. The property that Johnson leased from O'Grady was located in the city of Kirkland. Cassandra Kerk was O'Grady's leasing agent with regard to this property. Jeremiah Kerk, Cassandra's assistant, marketed the rental property for O'Grady.

After Johnson moved into the rental house, both she and her boyfriend, Steven Gentry, were ultimately exposed to a rodent infestation, chemicals that were used to address the rodent infestation, and mold. These exposures and the symptoms that followed were detailed in a letter, dated January 24, 2018, that was authored by Johnson and addressed to the "UW/Harborview Environmental Occupations Clinic."

This letter explained that, sometime in June 2017, after Johnson moved into the rental house, she noticed a "rodent hole" located in the garage of the house. In August 2017, Johnson "began complaining of itching and irritated eyes, followed soon after by a rash and itching that could not be explained." Then, in either late August or early September, Johnson heard "scurrying under the vents" located inside the house. Johnson alerted O'Grady of these noises, but O'Grady "denied a problem."

In September 2017, Johnson continued to experience a rash and itchiness. Her symptoms alleviated when she traveled to Hawaii for a week. However, upon her return from Hawaii, Johnson's symptoms became more severe. In late September, Johnson "turned on the heat and had an asthmatic attack like [she]'d never experienced before." Thereafter, O'Grady had the vents inside the house cleaned and Johnson placed "little filters in each vent."

In October 2017, an inspection of the house revealed that "small black hair and debris was caught on the filters even after cleaning." That month, Johnson's medical provider informed her "to remove [her]self from the house if it could be making [her] sick." Johnson acquired a second inspection of the house because

O'Grady "was being slow to respond with a solution." While the inspection was being performed, Johnson stayed in a hotel. Johnson was experiencing "symptoms of itching, chest pain, difficulty breathing, and rash." Because O'Grady "did not agree to" "fix the issues in the home with a company that agreed to be available," Johnson continued to stay in the hotel.

Also in October 2017, Johnson had a third inspection of the house performed. This inspection revealed that "rodents had eaten through the dryer vent, collected dog food and nested" and that "every time the dryer ran it sprayed dust, dander, and fecal material throughout the home." According to Johnson's letter, "[t]he pest inspectors all agreed there was a rodent problem."

Notably, Johnson's letter provided detail regarding the exposure of Johnson and Gentry to both mold and chemicals used to treat the rodent infestation in November 2017:

> November 2017
> November 11 the Landlady scheduled her handiman[1] [sic] to do work with her in the crawlspace. . . . She chose to stuff the dryer vents with steel wool and let [the rodents] be trapped (and die?) in the walls. From the time she began messing with the house November 11 to the time we moved my things to another home [on] 11/25[,] [Gentry] took photos of what he saw daily, I could not breathe in the house without coughing before the landlady's treatments, and do not remember going to the house after she started. *We saw a bucket of unknown agents, deodorizers*, and heat dishes pointed on my furniture, with the house closed up. . . .
>
> I was told by the landlady's real estate representative I could not stop her from taking care of the rodent issue her own way, *but she used deodorizers, chemicals we do not know of*, and applied heat dishes directly onto my furniture, while leaving the house completely closed up. We do not know what combination or types of vapors were created. We do not know if previous chemicals or treatments have been used in the home as well.

[1] In the complaint, Johnson and Gentry asserted that this handyman was Peter Weiner.

When moving, in late November, our friend Keith helped [Gentry] with furniture and he said it smelled vile throughout the house, with maybe decomposing rodents in the walls and some mold in the air (he owns Bellevue Roofing and is experienced with these smells. He told me to tell [O'Grady] in summer that her roof was soft when I asked him to retrieve a toy off the roof…she was not concerned when I told her this information.) He reported that he felt like he had "the flu" the day after helping [Gentry] move furniture from the old rental to the new rental. He also felt similar flu like symptoms after helping [Gentry] move furniture in the new house and accompanying me to see if the treatment done on the furniture worked to eliminate the ["]allergen" or whatever was making me react to it in early January. (It did not work).

[Gentry] took pictures, documenting that the landlady was using various agents to try to treat the rodent issue and clean up her washer/dryer.

When we moved Thanksgiving weekend we assumed that the furniture would need cleaning…*[Gentry] spent time in the house for several days and was exposed to the post-treatment vapors the most*. We washed things in bleach/soap on the porch before entering [the] house that had been in [the] kitchen or near the family/laundry room. We wiped down all furniture multiple times before entering [the] home, storing soft antique couches and chairs in the garage. The soft furniture was moved to a storage unit on December 1 because it was infusing the garage with odor and itchy dust.

When we put my clean hanging clothing (from closets) in the clean Volvo it was thought to be safe…after transporting that and a cedar chest in three trips I was a swollen, itching mess and realized the Volvo was contaminated with something. We soon after removed clothing and sent [it] to a natural C02 cleaners, with me trying to wash what I could. The clothes that returned after cleaning caused me to have a rash and painful itching wherever they touched my body. Even in the dry cleaning bags, after a few days of sitting in the new house closets[,] made me break out in a hot, iitchy [sic] rash being in the same room, but [I] felt the symptoms were more systemic than topical. . . .

Washing clothing/blankets from the house caused the air in the new home to be itchy and difficult for me to breathe, with rashes and welts on my exposed skin. I got a contact dermatitis from washing

> *a blanket and not using gloves to transfer after washing it to the dryer*.

(Emphasis added.)

In December 2017, Gentry experienced chest pain, difficulty breathing, and "numbness in his arm and hand." After going to the emergency room, Gentry's "eyes were red and watery, his skin pale, and he had slightly elevated bilirubin and was borderline anemic." Johnson and Gentry also "discovered that the cabinet from the room where chemicals were used was particularly vile and when [Johnson] leaned over to get something [she] accidentally got a whiff of it." The scent of the cabinet "caused an instant reaction in [Johnson], with redness/swelling in [her] face" and "a cramping tight feeling in [her] neck/tongue."

Also in December 2017, Johnson and Gentry hired "a company that specialize[d] with allergen and mold/mildew cleaning to clean the carpets of [the] new home." Nevertheless, Johnson continued to experience reactions "to the furniture in the house and maybe the allergens that attached to the carpet while moving things around."

On March 9, 2018, Johnson and Gentry received test results that analyzed their blood and urine. These test results revealed that Johnson and Gentry were exposed to mold and toxic chemicals. That month, according to the complaint that was filed by Johnson and Gentry, Johnson was diagnosed by a medical doctor with "Mold Toxicity and Mycoses and Toxic Effects of Fumes, Vapors, or Gas." Additionally, in April 2018, Gentry was diagnosed by the same medical doctor with "Mold Toxicity and Mycoses." Then, on August 22, 2018, Johnson

received test results of her furniture which revealed that toxic chemicals were also located on the furniture.

On June 23, 2020, Johnson and Gentry filed a complaint in King County Superior Court against O'Grady, Weiner, Cassandra Kerk, and Jeremiah Kerk. This complaint alleged various causes of action against these defendants. In particular, the complaint alleged that (1) O'Grady engaged in breach of contract, (2) O'Grady violated the Residential Landlord-Tenant Act of 1973[2] (the RLTA), (3) O'Grady, Weiner, Cassandra, and Jeremiah engaged in negligence, and (4) O'Grady and Jeremiah engaged in fraud.

On January 8, 2021, Cassandra and Jeremiah filed a motion for summary judgment in which they asserted that the statutory limitation periods had expired with regard to each of the claims advanced against them by Johnson and Gentry. In this motion, Cassandra and Jeremiah also averred that "no Defendant has been served as of the date of filing this Motion." On January 11, O'Grady and Weiner filed a motion wherein they joined in the motion for summary judgment. Therein, O'Grady asserted that the statutory limitation period on the breach of contract claim had also expired.[3]

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[2] Ch. 59.18 RCW.

[3] In their motion, O'Grady and Weiner asserted that a three-year statutory limitation period applied to the breach of contract claim:

> Plaintiff's may claim that a 6-year statute of limitations applies to a Breach of Contract claim; however, such a claim in this instance is based on the same facts/allegations and is duplicative of other claims e.g., RLTA and negligence, and instead sounds in tort. As such a three-year statute of limitations should apply. *See e.g.*, *Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 [(2000)], review denied 143 Wn.2d 1006, 21 P.3d 290 [(2001)].

Because Johnson and Gentry do not challenge the trial court's dismissal of their breach of contract claim, we do not express an opinion as to whether a three year or six year statutory limitation period applied to that claim.

On January 16, 2021—after the defendants moved for summary judgment—Johnson and Gentry served summons on each of the defendants. This was approximately seven months after the June 23, 2020 filing of the complaint.

On February 5, 2021, the trial court heard the defendants' motion for summary judgment. On February 8, the trial court entered an order granting the motion and dismissing with prejudice all of the claims advanced by Johnson and Gentry. On February 18, Johnson and Gentry filed a motion for reconsideration. On March 4, the trial court denied this motion.

Johnson and Gentry appeal.

II

On appeal, Johnson and Gentry contest only the trial court's grant of the defendants' motion for summary judgment with regard to their negligence, fraud, and RLTA claims.[4] The court erred, according to Johnson and Gentry, because they did not discover that mold and toxic chemicals were the causes of their injuries until test results of their blood and urine were produced on March 9, 2018.[5] Therefore, they contend, the three-year statutory limitation periods for

---

[4] As noted above, Johnson and Gentry do not challenge the trial court's dismissal of their breach of contract claim. Hence, in the argument section of their opening brief, Johnson and Gentry provide the relevant statutory limitation periods with regard to only their negligence, fraud, and RLTA claims:

> It is undisputed that there is a three-year statute of limitations on Appellants' claims for negligence, fraud and violation of the Landlord Tenant Act, RCW 59.18.280 ("LTA"). . . . RCW 4.16.080(2) provides a three-year statute of limitations for negligence and fraud claims. The same statute of limitations applies to a claim under the LTA.

Br. of Appellants at 15.

[5] In their opening brief, Johnson and Gentry state that they "are not challenging the statute of limitations dismissal of their claims arising from the rat infestations; they knew the elements of their damages claim from the rat infestations by the fall of 2017, and service was not complete until January, 2021." Br. of Appellants at 1.

each of the claims disputed on appeal had not expired when the defendants were served summons in January 2021. Because the causes of the injuries sustained by Johnson and Gentry were susceptible of proof in November 2017, we disagree.

A

We review an order granting summary judgment de novo, performing the same inquiry as the trial court. Nichols v. Peterson Nw., Inc., 197 Wn. App. 491, 498, 389 P.3d 617 (2016). In so doing, we draw "all inferences in favor of the nonmoving party." U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc., 104 Wn. App. 823, 830, 16 P.3d 1278 (2001). Summary judgment is proper 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." CR 56(c).

B

A three-year limitation period applies to any "action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated." RCW 4.16.080(2).[6] The same limitation period applies to "[a]n action for relief upon the ground of fraud, the cause of action in such case not to

[6] The RLTA does not include a statutory limitation period. However, when a cause of action under the RLTA seeks recovery for either personal injury or damage to personal property, the three-year limitation period provided by RCW 4.16.080(2) applies to that action. See Silver v. Rudeen Mgmt. Co., 197 Wn.2d 535, 541-42, 484 P.3d 1251 (2021).

be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." RCW 4.16.080(4).

Our Supreme Court has explained when a cause of action accrues:

> Statutes of limitations do not begin to run until a cause of action accrues. RCW 4.16.005. Usually, a cause of action accrues when the party has the right to apply to a court for relief. Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 219, 543 P.2d 338 (1975); Lybecker v. United Pac. Ins. Co., 67 Wn.2d 11, 15, 406 P.2d 945 (1965). In many instances an action accrues immediately when the wrongful act occurs, but in some circumstances where the plaintiff is unaware of harm sustained, a "literal application of the statute of limitations" could "result in grave injustice." Gazija, 86 Wn.2d at 220. To avoid this injustice, courts have applied a discovery rule of accrual, under which the cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action. Green v. A.P.C., 136 Wn.2d 87, 95, 960 P.2d 912 (1998). This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action. Id.

1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 575-76, 146 P.3d 423 (2006).

Thus, as a general rule, "a cause of action accrues when a party has the right to apply to a court for relief." 1000 Virginia Ltd. P'ship, 158 Wn.2d at 575. "In general terms, the right to apply to a court for relief requires each element of the action be *susceptible* of proof." Haslund v. City of Seattle, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976) (emphasis added).

C

In its order granting the defendants' motion for summary judgment, the trial court concluded "that the statute of limitations ha[d] run on all of Plaintiffs' claims and that they are now time-barred." Johnson and Gentry assert that the

trial court erred by dismissing three categories of claims with regard to injuries that arose from exposure to both mold and toxic chemicals.

First, Johnson and Gentry contend that the trial court erred by dismissing their negligence claim against O'Grady, Weiner, Cassandra, and Jeremiah. This claim alleged that each of the defendants negligently exposed Johnson and Gentry to both mold and toxic chemicals.

Second, Johnson and Gentry assert that the trial court erred by dismissing their claim of fraud against O'Grady and Jeremiah. This claim alleged, in pertinent part, that O'Grady and Jeremiah engaged in fraud by failing to reveal to Johnson that the rental house was infested with mold.

Finally, Johnson and Gentry contend that the trial court erred by dismissing their claim arising under the RLTA. This claim alleged that O'Grady violated the RLTA by "failing to keep her home in a safe, healthy, and habitable condition, and by retaliating against Plaintiff by refusing to remedy the defective conditions in her home until [Johnson] was forced from the home."

The trial court did not err by dismissing any of these claims. The letter that was authored by Johnson and addressed to the Harborview Environmental Occupations Clinic demonstrates that the disputed causes of action accrued in November 2017. Indeed, this letter detailed the exposure to both mold and the chemicals used to treat the rodent infestation that Johnson and Gentry experienced in November 2017. Regarding toxic chemicals, this letter stated that, in November 2017, Johnson and Gentry "saw a bucket of unknown agents, deodorizers" in the house and that Gentry "took pictures, documenting that the

landlady was using various agents to try to treat the rodent issue and clean up her washer/dryer."

Concerning mold, this letter provided:

> When moving, in late November, our friend Keith helped [Gentry] with furniture and he said it smelled vile throughout the house, with maybe decomposing rodents in the walls and some mold in the air (he owns Bellevue Roofing and is experienced with these smells. He told me to tell [O'Grady] in summer that her roof was soft when I asked him to retrieve a toy off the roof…she was not concerned when I told her this information.) He reported that he felt like he had "the flu" the day after helping [Gentry] move furniture from the old rental to the new rental.

Likewise, in an e-mail message authored by Johnson on December 5, 2017, Johnson stated:

> 11/24 Continued moving, Kieth [sic] Arvon, owner of Bellevue Roofing came to help [Gentry] with heaviest items and noted the stench throughout the home. He commented that he may smell mold as well. He had alerted me that the roof was "soft" this summer when retrieving a toy…[O'Grady] was not concerned when I offered his information to her.

Thus, in November 2017, Johnson and Gentry were aware that mold was a potential cause of their injuries. Notably, Johnson and Gentry did not have a mere suspicion that mold was located in the house. Rather, an individual who had personal experience in an industry that encounters mold informed Johnson and Gentry that he perceived what he believed to be mold in the house. Moreover, this individual had, in the summer of 2017, advised Johnson that the "roof was soft" and that Johnson should notify O'Grady of this hazard. On this record, the causes of the injuries that were sustained by Johnson and Gentry were "susceptible of proof" in November 2017. Haslund, 86 Wn.2d at 619. Accordingly, the disputed causes of action accrued at that time.

Johnson and Gentry contend that the discovery rule applies and, in turn, their claims accrued on March 9, 2018. This is so, according to Johnson and Gentry, because the test results that were produced on that date revealed "the identity of the chemical toxins which were causing their physical problems."[7]

However, the discovery rule does not apply in this way. As already explained, the discovery rule applies "where the plaintiff is unaware of harm sustained" and "a 'literal application of the statute of limitations' could 'result in grave injustice.'" 1000 Virginia Ltd. P'ship, 158 Wn.2d at 575 (quoting Gazija, 86 Wn.2d at 220). Put differently, "[i]n certain torts, . . . injured parties do not, or cannot, know they have been injured; in these cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action." White v. Johns-Manville Corp., 103 Wn.2d 344, 348, 693 P.2d 687 (1985).

Johnson's letter to the Harborview Environmental Occupations Clinic makes clear that both Johnson and Gentry were aware, in November 2017, that they had sustained injuries following their exposure to both mold and the chemicals used to treat the rodent infestation. In particular, this letter provided that, sometime in November 2017 and after Johnson's furniture was moved from O'Grady's house to a new house, the furniture "infus[ed]" the garage of the new house with "itchy dust."

[7] Br. of Appellants at 12.

Additionally, the letter provided extensive detail regarding the symptoms that Johnson experienced in November 2017 after she retrieved her clothing from O'Grady's house:

> When we put my clean hanging clothing (from closets) in the clean Volvo it was thought to be safe…after transporting that and a cedar chest in three trips I was a swollen, itching mess and realized the Volvo was contaminated with something. We soon after removed clothing and sent [it] to a natural C02 cleaners, with me trying to wash what I could. The clothes that returned after cleaning caused me to have a rash and painful itching wherever they touched my body. Even in the dry cleaning bags, after a few days of sitting in the new house closets[,] made me break out in a hot, iitchy [sic] rash being in the same room, but [I] felt the symptoms were more systemic than topical. . . .
>
> Washing clothing/blankets from the house caused the air in the new home to be itchy and difficult for me to breathe, with rashes and welts on my exposed skin. I got a contact dermatitis from washing a blanket and not using gloves to transfer after washing it to the dryer.

Finally, with regard to Gentry, the complaint stated that, "[a]fter moving [Johnson's] furniture and cleaning the home Thanksgiving weekend and the following weeks, [Gentry's] symptoms worsened, with skin changes, bruising, increased pain, and shortness of breath."

In light of the symptoms that both Johnson and Gentry experienced in November 2017, they were aware that they had been injured at that time. The test results that were produced on March 9, 2018, merely provided better evidence that mold and the chemicals used to treat the rodent infestation caused

their injuries. But their knowledge of their injuries—and the connection of the injuries to exposure to mold and chemicals—was known to them in November.[8]

Moreover, because the disputed causes of action accrued in November 2017, the statutory limitation periods with regard to these causes of action expired before the lawsuit commenced. Indeed, RCW 4.16.170 clarifies when an action is deemed to have commenced:

> For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 4.16.170.

Our Supreme Court has clarified the meaning of this statute:

> The plain language of the statue clearly states that for the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served. Therefore, service of a summons alone is adequate to toll the statute of limitations conditioned upon the plaintiff filing the

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[8] Johnson and Gentry cite to In re the Estates of Hibbard, 118 Wn.2d 737, 826 P.2d 690 (1992), in support of their argument that the discovery rule delays the accrual of their causes of action until March. In that case, our Supreme Court held:

> Application of the [discovery] rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant. Application of the rule is extended to claims in which plaintiffs could not immediately know of *the cause* of their injuries.

Hibbard, 118 Wn.2d at 749-50 (emphasis added).

However, as already explained, Johnson's letter to the Harborview Environmental Occupations Clinic demonstrates that, in November 2017, both Johnson and Gentry were capable of immediately knowing the causes of their injuries: namely, mold and the chemicals used to treat the rodent infestation. Accordingly, Hibbard is of no aid to Johnson and Gentry.

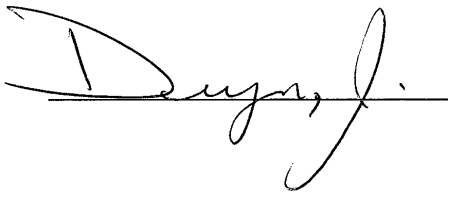
> summons and complaint within 90 days of the service of the summons. If following service of the summons, the complaint and summons are not so filed, *or following filing of the complaint, service of the summons is not so made, then the action is not deemed commenced and the statute of limitations is not deemed to have been tolled.* In effect, the statute provides a 90 day "catch up" or grace period within which to comply with all its requirements.

Nearing v. Golden State Foods Corp., 114 Wn.2d 817, 822, 792 P.2d 500 (1990) (emphasis added).

Johnson and Gentry filed their complaint on June 23, 2020. However, they did not serve summons on each of the defendants until January 16, 2021, which was approximately seven months after the complaint was filed. Because Johnson and Gentry did not serve summons within 90 days of the complaint being filed, the lawsuit commenced on January 16, 2021. See RCW 4.16.170. Furthermore, because more than three years had elapsed since the disputed causes of action accrued in November 2017, the statutory limitation periods for these causes of action had expired before the lawsuit was commenced.

Accordingly, the trial court did not err by granting the defendants' motion for summary judgment.

Affirmed.



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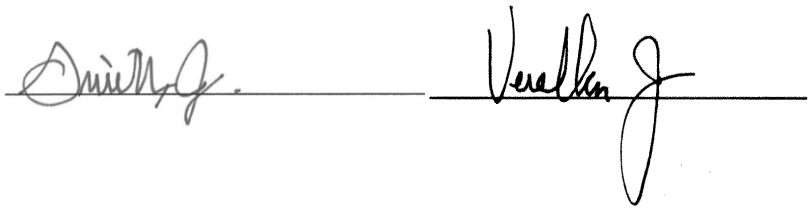

No. 82468-6

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

KATHLEEN E. JOHNSON, and STEVEN W. GENTRY,

Appellants,

v.

JEREMIAH KERK, et al.,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

APPELLANTS' MOTION FOR RECONSIDERATION RAP 12.4

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I. RELIEF REQUESTED

Pursuant to RAP 12.4(c), Appellants Kathleen Johnson and Steven Gentry ask the Court to reconsider its April 4, 2022, decision ("Decision") affirming summary judgment dismissal on statute of limitations grounds of their claims for injuries from exposure to toxic chemicals, and from mold, in Respondent Sharon O'Grady's rental home. It misapprehended the facts.

II. INTRODUCTION AND SUMMARY

The Decision concluded that Johnson's and Gentry's injuries from exposure to toxic chemicals, and to mold, were "susceptible of proof in November 2017." Decision at 8. With respect, this conclusion is incorrect and an impossibility on this record. The Decision means that the statute of limitations for the mold claim was triggered by a friend's ***speculative surmise*** on ***possible*** causes of their symptoms or, paraphrasing Judge Learned Hand, by mere "gossamer strands of speculation and surmise," which hardly qualifies as establishing that all necessary elements of a potential claim were known and that

there was evidence of each which was "susceptible of proof."[1]

In *actual fact*, until Johnson and Gentry received the results from their blood tests tying their symptoms to their exposure to chemicals and mold, there was nothing more than suspicion and surmise by two laypersons as to the cause of their injuries. In *actual fact*, in getting their March 2019 diagnoses Appellants were diligently seeking to determine the cause of their injuries. *In actual fact*, until O'Grady's house was tested in August, 2018, there was nothing but surmise that mold was there.

The Decision should be reconsidered and the trial court reversed. Suffering from symptoms without knowing the cause-in-fact ***does not***, and should not, trigger the statute of limitation for a toxic exposure claim under the law in Washington.

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[1] *See Hannon v. Beard*, 645 F.3d 45, 48 (1st Cir., 2011) ("Because [such] claims are 'easily fabricated[ ]…' courts must insist that such claims are bound up in facts, not in the gossamer strands of speculation and surmise."); *Miller v. Maryland Casualty Co*., 40 F.2d 463, 465 (2nd Cir. 1930) (per L. Hand, J.) ("To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands", discussing appellate review of jury verdict).

III. FACTS RELEVANT TO ARGUMENT

The Decision focuses on Johnson's January 24, 2018 letter to the Harborview Environmental Occupations Clinic, at CP 270-276 ("Harborview letter"), attached hereto as pages App. 1-App. 7 of the appendix.[2] Some key parts showing that Johnson and Gentry did not know with certainty as of that writing or earlier what were the causes of their health problems, and that they were diligently looking for help identifying those causes-in-fact are quoted herein and highlighted in the appendix copy.

> This is a synopsis of what we are experiencing and **challenged with identifying the cause** or appropriate care for symptoms.
>
> # # #
>
> We believe that there is a fine dust that is getting onto papers, into my computer fan so it now makes me react, and in/on anything that was in the home, garage after furniture was stored in there, and the cars that have now been contaminated.
>
> # # #

[2] As noted in footnote 6 of the Opening Brief, the pages of Johnson's Harborview letter were out of order in the record. The assembly of the letter in the appendix herein presents the pages of the letter in the order they were written.

> I hope you will agree to see us both. We feel like this is a toxin or poison that has infused my belongings, …
>
> # # #
>
> We do not know what this is or how to test for it in either us or belongings from the house.

January 24, 2018, letter, CP 270, 274-276, App. 1, 4, 5, & 6.

The letter also is the only place in the record where the possibility of mold was raised, and then only in a passing comment by a friend. But because it was mentioned, and because Johnson and Gentry wanted to find out what was causing the problems that they had believed in the fall 2017 stemmed from the rats and the DIY chemical bomb remediation effort, Johnson added that into the letter so that the lab folks at Harborview had that information of a possibility, if they looked at their case. Thus Johnson wrote:

> When moving, in late November, **our friend Keith** helped Steve with furniture and he **said it smelled vile throughout the house, with <u>maybe</u> decomposing rodents in the walls and some mold in the air** [he owns Bellevue Roofing and is experienced with these smells…

January 24, 2018, letter, CP 271.

The question raised by the Decision's conclusion to affirm is whether this passing, "***maybe***" comment by "Keith" in November, 2017, established a mold claim that was "susceptible to proof"? Could that passing surmise by Keith permit a complaint consistent with CR 11, when there was no evidence other than Keith's surmise that their injuries were due to mold? In the face of Johnson's and Gentry's ongoing concerns over the rat feces and remediation chemicals, where was the ***evidence*** on which to base a case that mold was the culprit of Johnson's and Gentry's long-running health problems?

Or, was the "basis" for the mold claim being "susceptible of proof" in November, 2017, no more than "the gossamer strands of speculation and surmise" by Appellants' friend Keith?

IV. REASONS WHY RECONSIDERATION SHOULD BE GRANTED

A. Reconsideration should be granted per RAP 12.4(c) where an appellate decision overlooks or misapprehends applicable law or operative facts. Here the Decision does both and reconsideration should be granted.

RAP 12.4(c) instructs that motions for reconsideration should focus on the "points of law or fact which the moving party contends the court has overlooked or misapprehended," and thus states the standard for modifying or changing the initial decision. Our appellate courts grant reconsideration where warranted. Both the Court of Appeals[3] and the Supreme Court[4] recognize

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[3] *See, e.g., Behnke v. Ahrens,* 172 Wn.App. 281, 294 ¶¶30-31, 294 P.3d 729 (2012) (discussing grant of reconsideration to consider facts brought to the panel's attention on reconsideration); *State v. Rainey,* 180 Wn.App. 830, 327 P.3d 56 (2014), as noted at 319 P.3d 86 (2014); *State v. Bowen,* 157 Wn.App. 821, 239 P.3d 1114 (2010) (noting the decision was "on reconsideration"). Most recently, *see Copper Creek Homeowners Ass'n. v. Kurtz et al,* ___ Wn. App.2d ___, ___ P.3d ___ (No. 82083-4-I, April 11, 2022), Order Granting Motion For Reconsideration And Withdrawing And Substituting Opinion.

[4] *See, e.g., Washington Water Jet Workers Ass'n v. Yarbrough,* 151 Wn.2d 470, 474, 90 P.3d 42 (2004) (*reversing* prior decision at 148 Wn.2d 403, 61 P.3d 309 (2003), after granting reconsideration and re-argument).

the underlying goal of the appellate courts as stated in RAP 1.2 and the underlying civil rules, to reach the legally correct and just decision on the merits, rather than on the basis of compliance with the appellate rules. *See Keck v. Collins,* 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (referencing CR 1).

With respect, that applies here.

B. The Decision misapprehends the facts and thereby misapplies the law.

The Decision acknowledges the law governing *when* a cause of action accrues. A cause of action accrues when a party has the right to apply to a court for relief. The right to apply to a court for relief "*requires each element of the action be susceptible to proof*." (Decision at 9) (emphasis added). Appellants agree. Opening Brief at pp. 15-16; Reply Brief at pp. 6-7. *See, e.g., Green v. A.P.C.,* 136 Wn.2d 87, 960 P.2d 912 (1998), and the other cases discussed in the briefing. But also implicit in the right to apply to a court for relief is meeting the requirements of CR 11 of a factual and legal basis for the claims asserted after due investigation. A complaint is not proper if

based only on a passing comment, or unfounded and unsupported surmise – they do not make any element of a claim "susceptible to proof". In this case, they do not identify mold as a cause-in-fact of Johnson's or Gentry's medical problems, which were under investigation. Mold was only identified as an issue in their health concerns with the blood test results in March, 2018. It was only positively identified as being in the house in August, 2018, when the house was tested.

Unfortunately, the Decision incorrectly applies the law it cites on page nine to the facts. It relies entirely on Johnson's January 24, 2018, letter to Harborview's Environmental Occupational Clinic for its conclusion:

> *The letter that was authored by Johnson and addressed to the Harborview Environmental Occupations (sic) Clinic demonstrates that the disputed causes of action accrued in November 2017.*

Decision at 10. The Decision necessarily concludes that whatever Johnson wrote in that letter was evidence "susceptible of proof." This is where the Decision fails. The Decision is

entirely conclusory. It overlooks the facts by reaching its decision without a careful examination of actual evidence, of the facts in the letter, and whether those facts meet the requirements of establishing each element of the action as to each claim including mold, as required by *Green* and other cases.

As seen from the quotes *supra,* Johnson's January 24, 2018, letter was so clearly written by Johnson as a summary of ***what possibly could be, but was not known to be***, the cause of the symptoms that she and Gentry were suffering. Indeed, the letter begins with the following:

> *This is a synopsis of what we are experiencing* ***and challenged with <u>identifying the cause</u>*** *or appropriate care for symptoms*.

CP 270. If nothing else, the letter demonstrates that Johnson and Gentry did ***not*** know the ***<u>cause in fact</u>*** of their symptoms. They were befuddled and frustrated – it had started with the rats, but removal from the house and allergy treatment did not work. Then came the chemical bomb remediation and retrieval of clothes and personal effects while the problems continued and

got worse. They did not know the sources of the symptoms – the cause-in-fact – and knew they would not know until they got a diagnosis from testing, turning their hopes to Harborview's expertise.

Johnson's letter concludes with her impassioned plea to Harborview to evaluate her and Gentry to help them understand what was causing their physical symptoms. CP 275. Unfortunately for Johnson and Gentry, the Harborview Clinic focuses on *occupational,* as opposed to residential, exposures and refused to evaluate them. CP 282. They thus had to go elsewhere and got the testing and results in March, 2018.

The Decision thus overlooks that the undisputed record shows that in November, December, and January, 2017-18, Johnson and Gentry ***did not know*** what had caused, or was causing, their suffering – they did not know the cause-in-fact. But if there is any doubt, it becomes a disputed issue of material fact for the jury to determine when it was that they knew the

cause in fact of their health problems associated with O'Grady's house.

The Decision also overlooks that Johnson and Gentry continued to diligently pursue an answer to the question of what was causing their physical problems. Was it exposure to rats? Was it exposure to chemicals? Was it exposure to mold, as Keith first surmised as a mere possibility in November? *They did not know*.

Of course**,** they ***knew*** they were experiencing serious health symptoms in 2017 which they believed were caused by the rental home. But that is not the end of the inquiry. Rather, it is settled that for product liability toxic tort exposure cases, a claim does not accrue until there is a determination of the cause of the affliction, principles equally applicable here, including cases cited in the briefing and post-argument. *See, e.g., Winbun v. Moore,* 143 Wn.2d 206, 215, 217-220, 18 P.3d 356 (2001) (emphasis added) (reversing the Court of Appeals and reinstating special verdict determining the plaintiff neither discovered nor

with due diligence should have discovered the basis for her malpractice claim against one doctor even though she did discover the basis for her claim against other doctors at the same hospital);[5] *Nichols v. Peterson NW, Inc.,* 197 Wn.App. 491, 500-504, 389 P.3d 617 (2016) (emphasis added) (reversing summary judgment dismissal of mold claim because whether plaintiff

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[5] The Supreme Court held (emphasis added):

> The Court of Appeals reasoned that because Winbun testified that she ***suspected*** her injuries were caused by medical malpractice early on, and because Dr. Epstein's negligence could have been easily discovered by an expert reviewing a complete set of Winbun's medical records, her failure to include Epstein in her malpractice suit against the other health care providers until after the statute of limitations had run barred her claim as a matter of law. The appellate court stated that "[***i]t is of absolutely no consequence ... that she reasonably thought that only Drs. Moore and Hill caused her injuries***." *Winbun*, 97 Wn.App. at 612.
>
> … **Reasonable minds could differ as to whether Winbun discovered or should have discovered the factual basis of the elements of her claim** against Epstein more than one year before she filed the action against him. **The Court of Appeals erred in taking this issue from the jury** and in deciding as a matter of law that her cause of action was barred by the statute of limitations….

exercised reasonable diligence in discovering the cause in fact of the water intrusion and mold was a question of fact).[6]

The updated A.L.R. annotation on statutes of limitation highlights and summarizes the applicable principle from an Indiana case, which is entirely in accord with Washington law:

> Under Indiana discovery rule, ***lay person's mere suspicion, even when coupled with start of investigation, does not automatically trigger running of statute of limitations***; rather, where knowledge of causation is at issue, [a] person knows or should have discovered [the] cause of his or her injury when [a] person has or should have discovered some ***evidence*** that there was [a] reasonable possibility that injury was caused by act or product of another; ***reasonable possibility, while less than probability, requires more than mere suspicion possessed by lay person without technical or medical knowledge***.

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[6] The Court of Appeals held:

> ¶18 … A cause of action **accrues when every element of an action is susceptible to proof**. *Woods View II, LLC v. Kitsap County*, 188 Wn.App. 1, 20, 352 P.3d 807, *review denied*, 184 Wn.2d 1015, 360 P.3d 818 (2015)….
>
> ¶19 Under the discovery rule, **a cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the salient facts underlying the cause of action's elements.** *Id.* The diligence element of this test raises a question of fact, unless reasonable *501 minds could reach but one conclusion [citation omitted]….

Annotation, "Statute of limitations: When cause of action arises on action against manufacturer or seller of product causing injury or death," 4 A.L.R.3d 821 (Originally published in 1965, 2022 updated), summarizing *Evenson v Osmose Wood Preserving Co.* 899 F.2d 701 (7th Cir. 1990) (applying Indiana law). [7]

Nothing in the Harborview Clinic letter can be reasonably viewed as Johnson ***knowing*** the cause in fact of her and Gentry's injuries, much less all the elements of each potential exposure claim – from rats; from toxic chemicals; and from mold. Nothing in the Harborview Clinic letter can reasonably be viewed as evidence "susceptible of proof" given the swirl of potential

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[7] *Accord,* as summarized in 4 A.L.R.3rd 821: *Hildebrandt v Allied Corp*., 839 F.2d 396, (8th Cir. 1987) (applying Minn law) (emphasis added) ("in personal injury action against manufacturers of toluene diisocyanate (TDI) by plaintiffs who incurred permanent lung damage by exposure to TDI while using it to create freezer cabinet insulation, **it could not be said as matter of law that plaintiffs had knowledge of cause of their medical problems at time when plaintiffs had <u>suspicions</u> as to cause of injuries, <u>where plaintiffs' suspicions were either unconfirmed or denied by their physicians</u>.**").

causative agents and the lack of any medical evidence of what was causing Johnson's and Gentry's injuries.

C. Without medical evidence tying their symptoms to their exposure to mold and chemicals, Johnson and Gentry had no right to apply to the court for relief for those claims – they were not yet "susceptible of proof." Because the mold exposure could have occurred *after* leaving O'Grady's house, Appellants had no basis to state a claim based on mold until house was tested and found to contain mold in August, 2018.

"[A] diligent plaintiff's mere suspicion or subjective belief that a causal connection exists between the exposure and the symptoms is insufficient to establish accrual as a matter of law." *Childs v. Haussecker*, 974 S.W.2d 31, Prod. Liab. Rep. (CCH) ¶ 15376 (Tex. 1998). 1A AMERICAN LAW OF TORTS § 5:33. Simply stated, without the March 9, 2018 blood tests tying their symptoms to their exposure, Johnson and Gentry had no right to apply to a court for relief. CR 11.

Johnson and Gentry would not *know* the cause in fact of their injuries until March 9, 2018, when test results revealed the identity of the chemical toxins that were causing their physical

symptoms. CP 5-7. The Decision overlooked this point made by Appellants. Opening Brief at 17, n.7.

Johnson and Gentry urge the Court to review *Ambrose v. Tricon Timber, LLC*, No. CV 15-113-M-DWM, 2016 WL 4257333 (U.S.D.C., D. Mont. 8/11/2016) (App. 8-11 hereto). The facts of that case and the federal district court's analysis of the same issue presented here are compelling.

In *Ambrose*, the plaintiff alleged injury arising out of his exposure to toxic chemicals during his employment between July 2011 and March 2012. He knew he was exposed to chemicals, and he knew he was suffering physical symptoms and he shared his complaints about work safety and his health concerns with his friends. It was not until December 9, 2013 that his medical records reflected a potential association between his lung damage and his exposure to the chemical he used during his employment (carbonic acid). It was not until January 4, 2014 that his medical records revealed the cause in fact of his lung condition as the carbonic acid exposure.

The law of Montana is the same as the law of Washington: a cause of action accrues "when all elements of the claim or cause exist or have occurred or the right to maintain an action on the claim or cause is complete." *Id*. at *2. Plaintiff brought suit in August 2015. Defendant moved for summary judgment based on the two-year statute of limitations in Montana. The court denied the motion holding that when there is conflicting evidence as to when a cause of action accrued, the question of whether an action is barred by the statute of limitations is for the jury to decide. *Id*., citing, *Johnston v. Centennial Log Homes & Furnishings, Inc.*, 305 P.3d 781, 788 (Mont. 2013). The Court relied for support on cases where, as here, ***the necessary causal element was not known by the plaintiff until receipt of a medical diagnosis linking plaintiff's ailments to exposure and where failure to learn of the cause in fact of plaintiff's injuries was not due to a lack of due diligence.*** *Hando v. PPG Industries, Inc.*, 771 P.2d 956, 962 (Mont. 1989); *Nelson v. Nelson*, 50 P.3d 139, 143 (Mont. 2002); *Christian v. Atl.*

Richfield Co., 358 P.3d 131, 153 (Mont. 2015). Finally, the Court acknowledged that "the state of [plaintiff's] knowledge is a factual issue which cannot be resolved in summary judgment." *Ambrose*, *supra*, at *3 (2016).

This is precisely the analysis that applies here and should result in reversal and remand for trial. Johnson and Gentry did not know the necessary causal element of their claims until receipt of the medical evidence linking their physical injuries to mold and chemicals. There is no allegation or suggestion that Johnson and Gentry did not act with all deliberate speed and due diligence in seeking to discover the cause in fact of their symptoms. Even so, the state of Johnson and Gentry's knowledge about the cause in fact of their injuries is, at minimum, a question of fact that should not have been decided on summary judgment.

D. "Susceptible of proof" must mean more than speculation about the cause of your injuries.

The Decision rests on its conclusion that Johnson's and Gentry's claims were "susceptible of proof" some time in

November of 2017. But this conclusion is not supported by the law in Washington. The statute of limitations begins to run when a party has a right to apply to a court for relief. *U.S. Oil & Refining Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981), as cited in, *Gausvik v. Abbey*, 126 Wn. App. 868, 880, 107 P.3d 98 (2005). The right to apply to a court for relief requires that all elements of the action be susceptible of proof. *Haslund v. City of Seattle*, 86 Wn. 2d 607, 619, 547 P.2d 1221 (1976); *Davis v. Clark Cty*., 966 F. Supp. 2d 1106, 1138 (W.D. Wash. 2013), on reconsideration in part (Sept. 9, 2013). "Susceptible of proof" has been described as the kind of evidence which in its nature, satisfies an unprejudiced mind. *Union Pac. Ry. Co. v. Novak*, 61 F. 573, 589 (9th Cir. 1894). No reasonable person can conclude that Johnson and Gentry knew their physical suffering was caused by mold and chemical exposure until medical evidence provided the cause-in-fact. The Decision overlooked this when it states:

> The test results that were produced on March 9, 2018, *merely provided better evidence* that mold and the chemicals used to treat the rodent infestation caused their injuries.

(Decision at 13-14). Respectfully, there was ***no evidence***, and certainly no evidence "susceptible of proof," of the cause of their injuries until March 9, 2018. Instead, there was only suspicion based on a friend's comment. The cases outlined *supra* show the test is not just "better evidence" than a gossamer – that gossamer itself, Keith's speculation and surmise is not adequate to get to court, and not adequate to trigger the statute of limitations. In toxic exposure cases, the requirement is a diagnosis by a qualified physician, not suspicion by a layperson.

Though unpublished, a recent case of *Dougherty v. Pohlman*, 16 Wn.App.2d 1008, 2021 WL 100237 (2021), gives a good illustration of how "susceptible of proof" is shown, and is cited for persuasive authority per GR 14.1(a).

Susceptible of proof means the plaintiff can point to – knows or has tangible proof of all the elements of the claim such that a claim could be filed in court. Thus, in *Dougherty* the

plaintiff's unjust enrichment cause of action accrued when he completed his work on the home because, at that point, the appellate court described the elements to the claim he then could have brought: 1) he had conferred a benefit; 2) he did so at his own expense; and 3) it was unjust for the owner to retain the benefit without compensating the plaintiff. *Dougherty v. Pohlman, supra,* 2021 WL 100237 at *4.

Here, Johnson and Gentry knew they had health problems from living in O'Grady's house, causing Johnson to abandon it in October 2017, believing it was due to the rats and their dander and feces. But when vacating the house and getting allergy treatment did not cure the problem, and the chemical bomb was created by O'Grady, they wondered whether the rat remediation efforts were part of the problem. They had two "likely" candidates for what was causing their health problems: the rats and the chemical bomb. They were actively exploring each, as well as the mold issue raised by their friend.

The rule applicable to toxic tort cases recognizes the claim does not accrue until the toxic substance is identified and it is tied to the home, workplace, or other location where the health issue arose. These cases are not like car crashes. A victim may know there is a problem and "suspect" something in the home or building. But until there is testing of the injured party identifying the cause of the physical malaise; and testing or other evidence clearly connecting the harmful substance and the plaintiff's exposure with the defendant's premises, there is no claim susceptible of proof which would trigger the statute of limitations.

Whether it is characterized as the initial accrual of the cause of action, or tolling of the statute per the discovery rule, the same place is reached, as required by settled Washington law: the claim accrues, and the statute begins to run, when the plaintiff know all the elements of her claim -- and each element therefore is susceptible of proof. Here there was no proof of mold in O'Grady's home until August, 2018. There was no proof that

mold might be part of the health issue for J & G until the blood tests results in March, 2018. Both components were needed before the statute began to run on either the toxic chemical claim or the mold claim.

E. Johnson and Gentry had *no* evidence tying mold to O'Grady's House until August, 2018, and therefore could not have had a claim for mold exposure "susceptible of proof" that triggered the statute of limitations until then at the earliest.

While living in the house and after being forced out in 2017, Johnson focused on the rats as the likely cause of Johnson's being forced from the rental house because of their obvious presence from their dander and feces. And after Johnson moved out for her own health in October, 2017, and the chemical bomb was used by O'Grady, she thought it likely that those chemicals – whatever they were – probably were following and infecting her via her clothes and other personal effect that were retrieved from the house in November, 2017.

But neither Johnson nor Gentry focused on mold as the likely or contributing cause until after the blood test results

showed the presence of mold in both Johnson's and Gentry's blood.

Even if the passing comment from Kevin in November, 2017, that he "***might"*** have smelled mold in the air was an initial notice of a potential mold problem,[8] other than his comment, mold was not identified as a possible cause until the March, 2018 blood test results showed mold in their blood. But while the tests identified mold, those tests did not specify where the mold had come from. By the time the blood was drawn in late February, Johnson had been out of the infected house for over four months, since October 2017. The mold could conceivably have been from one of the hotels she took shelter in, or from her new rental that she had to move out of quickly. Indeed, O'Grady's answer

[8] "[C]ourts must insist that such claims are bound up in facts, not in the gossamer strands of speculation and surmise." *Hannon v. Beard, supra*, 645 F.3d at 48, holding that a claimant must allege facts sufficient to show all the elements of his claim, including the causal link, in that case between adverse retaliatory action and earlier protected activity. Learned Hand appears to be the genesis of the phrase "gossamer strands" in our jurisprudence in *Miller v. Maryland Casualty Co*., 40 F.2d at 465.

to the complaint denied that her health problems were due to any mold problems at her home. *See* CP 51, ¶ 3.6 ("3.6 Defendants O'Grady and Weiner deny that Plaintiffs' alleged health problems are due to any alleged 'rodent and mold problems' in Landlord's rental home.").

Thus, as to the mold complaint, it was first susceptible of proof ***as against Defendant O'Grady*** in August, 2018, when the test results showed the presence of mold in O'Grady's house.

F. At a minimum, whether Johnson and Gentry possessed enough evidence susceptible of proof before March 9, 2018, is a question of fact that never should have been decided on summary judgment.

The "discovery rule" is a form of tolling. Under the discovery rule, the statute of limitations does not begin to run until a plaintiff discovers or reasonably could have discovered **all** the essential elements of the cause of action. The discovery rule does not require knowledge of the existence of a legal cause of action itself, but merely knowledge of the facts necessary to establish elements of the claim. *Douchette v. Bethel Sch. Dist. No. 403,* 117 Wn.2d 805, 814, 818 P.2d 1362 (1991); *Anderson*

v. Teck Metals, Ltd., No. CV-13-420-LRS, 2015 WL 59100, at *2 (E.D. Wash. Jan. 5, 2015).

Whether the discovery rule applies to toll the statute of limitations is a question of fact, and can be decided as a matter of law only "if reasonable minds can reach but one conclusion." *Alexander v. Sanford*, 181 Wn. App. 135, 169, 325 P.3d 341 (2014), citing, *Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992). Here, the determination of when Johnson and Gentry discovered or through the exercise of due diligence should have discovered *all the elements* of their claims is a factual question that should be decided by a jury. *Stark v. Celotex Corp.*, 58 Wn. App. 940, 943, 795 P.2d 1165 (1990); *Winbun v. Moore*, 143 Wn. 2d 206, 213, 18 P.3d 576 (2001).

The Decision stands for the proposition that mere suspicion about the cause of injury is enough for the statute of limitations to accrue. This cannot be what the Court intends. The Decision means that a cause of action against a restaurant accrues when one who leaves a restaurant and a short time later suffers a

bellyache has a cause of action against the restaurant without first determining the cause of the bellyache. The Decision means that a cause of action accrues when one expresses concern to a friend about a mark on their arm and the friend suggests it may be cancerous and could be due to household exposure. The Decision cannot stand.

V. CONCLUSION

> Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli v. SEC*, 568 U.S. 442, 133 S.Ct. 1216, 1221, 185 L.Ed.2d 297 (2013).

Pruss v. Bank of Am. NA, No. C13-1447 MJP, 2013 WL 5913431, at *2 (W.D. Wash. Nov. 1, 2013). There is no question that Johnson and Gentry diligently pursued their claims – from first feeling symptomatic to the point where they could prove the cause in fact of their injuries. There is also no question that justice has not been done by preventing these individuals from

the opportunity to prove their claims. Respectfully, reconsideration should be granted.

This document contains 5101, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 25th day of April, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 25th day of April, 2022.

S/ Allie M. Keihn
Allie M. Keihn, Legal Assistant

January 24, 2018

To UW/Harborview Environmental Occupations Clinic:

This is a synopsis of what we are experiencing and challenged with identifying the cause or appropriate care for symptoms. I am discussing how this has affected both myself and boyfriend, Steven Gentry. I am a family nurse practitioner, but the symptoms we are having do not make sense for a pure allergy to rodents or dust. Steve is a retired Army pilot and special operations officer, now civilian airfield manager for JBLM, and has had much experience with some nasty environments and does not believe this is pure allergen as well. We are both experiencing both systemic and topical responses from exposure.

June 2017
I (Kat) moved into a rambler in Kirkland, with 3 kids. Steve is my boyfriend and was an occasional visitor during the summer, and more present in Fall. The older kids went back to college in Mid September and the younger one returned to her dad's in mid August and they have been spared from the exposure or any lasting symptoms.

I told my landlady upon moving in Mid June that I noticed a rodent hole in garage and a week after that there was a nest in something in the garage. She denied previous or present issues, but left mouse traps in case I needed them.

August 2017
I began complaining of itching and irritated eyes, followed soon after by a rash and itching that could not be explained. My nurse practitioner Bob Smithing, FNP from Family Care of Kent put me on Zyrtec,, Zantac for H2 blocking, and hydroxyzine for urticarial.
By late August or early September I was hearing scurrying under the vents in the morning when getting up. I alerted her but she denied a problem. During summer windows were open with many fans blowing.

September 2017
The rash and itching continued, increasing , worse at night at home/in bed, but got a bit better while I was a week in Hawaii. After returning in early September symptoms kept increasing.
The college kids left the home with their belonging for colleges in Mid September. In late September I turned on the heat and had an asthmatic attack like I'd never experienced before. The landlady had the vents re cleaned and I put little filters in each vent. We assumed previous tenants cats were the problem, but small black hair and debris was caught on the filters even after cleaning.(seen in October after inspection of home)
I continued to see my NP and he ordered tests to check liver function, CBC, etc. He saw that I had elevated CRP and ALT. I continued on the same medications, not sure

what was causing the increasing symptoms.

October 2017
October 8 I had a pest inspection (clean crawls) done on the rental house after hearing rodents in the wall, with the cold weather and now quiet kid free house. Was realizing my bizarre symptoms may be due to allergy or exposure.
October 13
By October 13 my NP Bob had me get chest x ray, re drew labs, adding Hanta Virus screening, began Prednisone, added an inhaler and told me to remove myself from the house if it could be making me sick.
I got a second pest inspection (redi national) after landlady was being slow to respond with a solution. I left for a hotel that night when symptoms of itching, chest pain, difficulty breathing, and rash/itching were intolerable. That night I left for hotel and gave the landlady an ultimatum to fix the issues in the home with a company that agreed to be available that Sunday. She did not agree to do so, and I stayed in a hotel for my own safety.

I had a third inspection by BioOne done and they found that rodents had eaten through the dryer vent, collected dog food and nested, but that every time the dryer ran it sprayed dust, dander, and fecal material throughout the home. (the Landlady's inspector did not look behind the dryer after I told them that my symptoms were worse in that room and Steve noticed the room felt itchy as well) The pest inspectors all agreed there was a rodent problem (rat and mouse) and that professional clean out and intervention was needed. Bio One removed my down filled couches and wool rug, cleaning up behind the dryer and around the family room where rodent droppings were found behind furniture. They commented on the condition of heating duct system and advised not using the heat as it was not in good condition. A car battery and paint cans were seen in the crawlspace as well.

I saw Dr Weiss from Northwest Asthma and Allergy in October and was begun on Xolair for urticaria. Skin prick testing showed sensitivities to rats, dust, juniper, and grasses. He increased my Zyrtec to 20mg BID and decreased Zantac to 150 BID. I was given an epipen prescription to bring to the Xolair injections, per protocol. I've now received three injections and am due for another, but having difficulty with new insurance company Premera.

November 2017
November 11 the Landlady scheduled her handiman to do work with her in the crawlspace. We moved the dog to a kennel for his safety, as conditions were worsening. She chose to stuff the dryer vents with steel wool and let them be trapped (and die?) in the walls. From the time she began messing with the house November 11 to the time we moved my things to another home 11/25 Steve took photos of what he saw daily, I could not breathe in the house without coughing before the landlady's treatments, and do not remember going to the house after she started. We saw a bucket of unknown agents, deodorizers, and heat dishes pointed

on my furniture, with the house closed up. Thin plastic covered my furniture and plastic was draped down from the doorways, but not occluding them, and the doors between the kitchen and family/laundry room were left open by her. We could see that she was using a shop vac and dragged her washer/dryer into the middle of the family room, near the kitchen and furniture. Later a board was put to keep rats from entering the family room from the laundry, but her representative had stated that her pest inspector said everything looked good.
I was told by the landlady's real estate representative I could not stop her from taking care of the rodent issue her own way, but she used deodorizers, chemicals we do not know of, and applied heat dishes directly onto my furniture, while leaving the house completely closed up. We do not know what combination or types of vapors were created. We do not know if previous chemicals or treatments have been used in the home as well.

When moving, in late November, our friend Keith helped Steve with furniture and he said it smelled vile throughout the house, with maybe decomposing rodents in the walls and some mold in the air (he owns Bellevue Roofing and is experienced with these smells. He told me to tell her in summer that her roof was soft when I asked him to retrieve a toy off the roof...she was not concerned when I told her this information.) He reported that he felt like he had "the flu" the day after helping Steve move furniture from the old rental to the new rental. He also felt similar flu like symptoms after helping Steve move furniture in the new house and accompanying me to see if the treatment done on the furniture worked to eliminate the 'allergen" or whatever was making me react to it in early January. (It did not work).

Steve took pictures, documenting that the landlady was using various agents to try to treat the rodent issue and clean up her washer/dryer.
When we moved Thanksgiving weekend we assumed that the furniture would need cleaning...Steve spent time in the house for several days and was exposed to the post-treatment vapors the most. We washed things in bleach/soap on the porch before entering house that had been in kitchen or near the family/laundry room. We wiped down all furniture multiple times before entering home, storing soft antique couches and chairs in the garage. The soft furniture was moved to a storage unit on December 1 because it was infusing the garage with odor and itchy dust.

When we put my clean hanging clothing (from closets) in the clean Volvo it was thought to be safe...after transporting that and a cedar chest in three trips I was a swollen, itching mess and realized the Volvo was contaminated with something. We soon after removed clothing and sent to a natural CO2 cleaners, with me trying to wash what I could. The clothes that returned after cleaning caused me to have a rash and painful itching wherever they touched my body. Even in the dry cleaning bags, after a few days of sitting in the new house closets made me break out in a hot, iitchy rash being in the same room, but felt the symptoms were more systemic than topical. The clothing was removed to storage in boxes December 17.

Washing clothing/blankets from the house caused the air in the new home to be itchy and difficult for me to breathe, with rashes and welts on my exposed skin. I got a contact dermatitis from washing a blanket and not using gloves to transfer after washing it to the dryer. A nurse practitioner put me back on Prednisone December 10 for that when I flew to Alaska.

December 12
Steve was driving back from work, bringing the dog in the Volvo from being boarded over the long weekend. He had chest pain, said it was hard to get a deep breath in without pain, and had numbness in his arm and hand. I told him to go straight to Overlake ER as he was on 405 and nearby. I took an UBER over to meet him there. Fortunately, this was not a cardiac even, but he has continued to have symptoms of chest pain with exposure. His eyes were red and watery, his skin pale, and he had slightly elevated bilirubin and was borderline anemic.

I went to a laundrymat after that experience to try to bleach family heirloom linens that had been in the house. I ran loads multiple times with bleach, hot water, and still noticed that I reacted with a nausea and stomach cramp to the fabrics. My stockings/hose were the WORST of the laundry, even after washing on hot several times. I realized that thicker cottons with knots or emboroidery, nylons, synthetic fabrics, etc held onto the substance much more and I would react stronger to them, with nausea, stomach cramps, and my face became bright red while the laundry attendant watched in surprise. Down filled pillows/jackets were completely vile (not to smell, but the way I reacted told me they were not safe) I was so shocked Bleach did not eliminate whatever makes me react.

We discovered that the cabinet from the room where chemicals were used was particularly vile and when I leaned over to get something I accidentally got a whiff of it. It caused an instant reaction in me, with redness/swelling in my face, a cramping tight feeling in my neck/tongue, and I was really frightened by the response. I took a shower with the epipen nearby, fearing I'd have to use it. Steve removed it in the Suburban, which has been used for much of the move.

We tried the dry carpet cleaning (host) to see if allergens had attached to the carpet and could be removed to help the new rental be safer for me, as I was reacting in the house and we had been dragging items in only to remove after discovering their toxicity to me. The dry shampoo made everything worse for me and I had to go back to a hotel 12/22. After arriving that evening, and taking benedryl for the rash and allergic symptoms I felt (and were scaring me) I fell asleep to awaken at 1 am with chest pain, tachycardia, left arm numbness. I was taken by ambulance to the ER at Overlake and my cardiac enzymes were fine, but increased BP, HR, and rashes on my face and neck persisted several hours. Then I started to diurese and voided several times and felt symptoms begin to subside, with my HR and BP returning to normal for me.

We had Pure Clean, a company that specializes with allergen and mold/mildew

cleaning to clean the carpets of new home, but I still reacted we assume to the furniture in the house and maybe the allergens that attached to the carpet while moving things around.

January 2018
Steve has had increasing symptoms of numbness in his feet and hands, increased back, neck, shoulder pain, muscle cramps, chest pain, and foggy thinking (hung over feeling) after exposure. Because cleaning up and throwing away things is a process that we are having to do alone the process has been long and we are trying to limit exposure, use non rebreathing masks and tyvek coveralls to clean up/pack up/ and turn the page on this nightmare.

What we have figured out over time is that every fiber that was inside the house at the old rental was infused with something that makes me woozy, get stomach cramps, nausea, have inflammation and erythema/rashing on my face, and my stomach becomes bloated, with subsequent abdominal distress. I also have edema in my neck and shoulders that makes me very sore. We had to throw out the mattresses, papers, cushions, linens, fabrics, clothing, everything that was soft or porous. Now both vehicles are ruined. The Volvo was professionally detailed/shampooed, and was itchy as soon as it dried. Pure Clean did some treatment to kill anything biologic and it still causes me to react with nausea, rash, itching. My 21 year old son Elias was in the car to pick him up from the airport to college on January 7 and complained of numb lips and hand, with reddened skin on his arms up to the elbow and "feeling something in my eyes and nose". I have not driven the car since and am very afraid if I trade it in for another vehicle that someone will unknowingly put their young child in the car and they will be exposed to something very dangerous.

I continue to have increasing sensitiveties, with a painful skin irritation when I wear anything with spandex or nylon in it. Going into stores is hard because fabrics with polyester or spandex make me nauseous, and wearing socks with too much nylon hurts, causing me to feel woozy.
I am reacting to friends' homes now, such as a polyester pillow causing a large red welt on my back when I sat on a friends' couch. The couch itself is polyester and I felt so sick after watching a tv show with her, that I took benedryl and my stomach literally looked 8 months pregnant, and firm to touch. By morning this had subsided a good bit, but I remain swollen altogether, with frequent flaring of red rashes on my face. My legs, arms, and abdomen are often affected by fabrics and cotton feels comfortable but other fabrics are painful, making my skin more irritated with higher levels of spandex.

We believe that there is a fine dust that is getting onto papers, into my computer fan so it now makes me react, and in/on anything that was in the home, garage after furniture was stored in there, and the cars that have now been contaminated. (I took my computer to be cleaned by Apple after using it in the UW cafeteria and realizing it was the only thing that could be making me react with welts and itching

in that area, and it only happened after turning on the computer and the fans started blowing...I'm perfectly fine with another laptop that was not used in the new house with dust from the other items wafting around.)

The only choice we have at this point is to continue to throw away items (all books, papers, cloth) and small furniture. Expensive antiques and a baby grande antique piano are being removed to storage on January 31 by a moving company, and we will put anything that we believe can be washed in the future such as china or crystal away in storage, or garage items that were in bins and may be savable.
I also think that the neuro type symptoms of numb fingers, hands, lips that several people are experiencing when around this is something that needs identifying for our own health but also to avoid hurting anyone else.

I am in a hotel for the moment, unable to be in the new rental that has been completely ruined for me by the things brought over from the first house, before we knew the complete loss it really is. My current landlady has agreed to release me from my lease due to health issues. Even at the hotel I've had to change rooms several times, go to the Emergency room twice for extreme symptoms that scared me, and have had to pare down to the absolute bare essentials and all NEW clothing, which is thrown out if it is contaminated with the itching substance that really does not wash out.
It clings to Steve, so when he comes in the hotel and showers, shampooing several times, it still somehow wafts off of him as his hair dries, to the point where my exposed skin is covered in itchy welts.

Steve now has become more sensitized as well, and is getting itchy, having rashes with clothing that has been exposed, or even washed together with exposed clothing, and having mysterious bruising, cuts that do not heal for long periods, and numbness in his hands and feet. When his feet come in contact with socks washed in the laundry with other things they have become red, inflamed, hot, and itchy to the point he's been caught at work washing his feet in the sink and going to buy new mostly cotton socks. HE now reacts to high nylon content socks that are new also. His work and home environment in Olympia have been contaminated now, by the action of taking things from my home, sorting them for garbage/taking pictures for my insurance company, and riding in the Suburban daily, that has been completely ruined by exposure, but he doesn't want to ruin his personal vehicle now that we know that everything is being affected.
I'm renting a car, and have had to change cars twice already. The first one was too new and my throat started closing with the "new car smell" and the other was a little older and had leather, but was still smelling very new and causing me to react some. Then steve rode in there with me and had leather shoes he'd wiped down, new clothing, but the car became really itchy and I had to trade it because it made us both have itching, rash, and I felt really ill.

I hope you will agree to see us both. We feel like this is a toxin or poison that has infused my belongings, and that it is on a fine dust or debris that gets into anything

with a vent, like the car or my computer, and then is spit back out. I'm concerned for how it will affect whomever drives my vehicles in the future or has my furniture/piano, or lives in my previous rental. It affected my son with neurologic type symptoms...similar symptoms he got taking Neurontin or Gabapentin for his stomach pain...he has Autism and is sensitive. Kieth feels like he has the flu after exposure, and has seen me blow up and took me to the ER one night after being around too much. He had been at my house to pick up something, wore a polyester/fleece jacket, and I was reacting to it. Then I bought an all cotton sweater from Costco and put it on for dinner, only to have a severe reaction. Steve is more affected than them because of his long term exposure at this point, and he continues to spend more time around it than me due to the moving/cleaning/driving the suburban.

We are hoping to end this saga this weekend, and move me to a more sterile type living environment with wood floors, only cotton, leather rather than polyester seating, etc. Steve is trying to then clean up/eliminate the allergen or substance in his living environment and workplace, maybe having to remove carpets and existing matresses/chairs/couches and throw out affected/exposed clothing, papers, books as well. We do not know what this is or how to test for it in either us or belongings from the house. The toxic china cabinet of my mom's that made us react is stored in an open garage but it probably still pretty infused if there is a test that can be done on that.

Addendum February 3

Steve is covered in light bruising and has a hard lump on his shin that is not from impact/bumping. He has been experiencing lightheadedness/chest pain, and whitening/blisters on his hands while moving my storage items out of the new rental we contaminated by moving household items and wood furniture into it.

2016 WL 4257333
Only the Westlaw citation is currently available.
United States District Court, D. Montana,
Missoula Division.

Mark A. AMBROSE, Plaintiff,
v.
TRICON TIMBER, LLC, Defendant.

CV 15-113-M-DWM
|
Signed 08/11/2016

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ORDER

DONALD W. MOLLOY, DISTRICT, JUDGE

***1** Plaintiff Mark Ambrose ("Ambrose") sued his former employer Defendant Tricon Timber, LLC ("Tricon"), alleging injury arising out of his exposure to toxic chemicals during his employment. (Doc. 1.) Tricon seeks summary judgment on the grounds that Ambrose failed to file his claim within the applicable statute of limitations period. (Doc. 15.) Tricon argues that the applicable statute of limitations period expired by the time Ambrose brought suit in August 2015 because he was aware the chemicals were toxic and he believed he was experiencing harmful health effects during his employment in 2012. Ambrose insists that while he knew the chemicals were harmful and he believed they were causing his health issues, the necessary causal link was missing because the "veracity of his belief" was not known until he received a medical opinion to that effect in September 2013. Genuine issues of material fact prevent a legal determination as to whether Ambrose's condition was self-concealing and whether he acted diligently in seeking the cause of his injury. Having reviewed the briefing and heard argument from the parties, Tricon's motion is denied.

BACKGROUND

Tricon operates a lumber mill in St. Regis, Montana. Ambrose was employed at the mill from July 2011 until March 2012. (Stip. Facts, Doc. 14 at ¶ 4(g), (n).) During his employment, Ambrose operated a grapple loader, chip trucks, and forklift. (Pl.'s SDF, Doc. 23 at ¶ 21.) Near the end of 2011, he also started working in a room known as the "dip tank," (*id.*), where chemicals were used to treat bulk wood product to prevent mold and preserve the wood, (*id.* at ¶ 23). Ambrose mixed the chemical solution using AntiBlu XP64 and, using a forklift to bring the wood into the dip tank room, submerged the wood into the tank to let it soak. (*Id.* at ¶ 24) At the time, Ambrose knew that the chemicals he was working with were toxic and dangerous and he requested safety equipment and a respirator. (*Id.* at ¶¶ 26-28.) Also at the time of his exposure, Ambrose experienced symptoms such as nausea and physical burns on his hands, cheeks, in his nostrils, and in his lungs. (*Id.* at ¶¶ 30, 48.) Ambrose shared his complaints about the safety of the work conditions and his health concerns with friends. (*Id.* at ¶¶ 31, 34, 35, 36.) He also recorded a video of the dip tank room and surrounding facilities, in which he states that he was working in a dangerous situation and felt that he was in harm's way. (*Id.* at ¶ 32.)

In March 2012, Ambrose left Montana and his employment at Tricon and moved to Florida. (*Id.* at ¶ 37.) After leaving Tricon, Ambrose initially felt better and his symptoms appeared to have subsided. (*Id.* at ¶ 49.) In June 2012, he went to the hospital in Florida complaining of chest pain. (*Id.* at ¶ 51.) He had previously had a heart attack around 2005 and had a pre-existing cardiac condition and family history of cardiac issues. (*Id.* at ¶ 51.) He was hospitalized for a few days and his treating physicians attributed his complaints to his cardiac issues, never raising the possibility of lung damage. (*Id.*) He returned to the hospital four times in 2013 (March 18, August 8, August 20, and August 30), experiencing chest pain and shortness of breath. (*Id.* at ¶¶ 52-56.) Until this point, treatment focused on Ambrose's cardiac issues and he was not diagnosed with a lung condition. (*Id.* at ¶ 57.) On September 5, Ambrose went to the hospital again with similar complaints and, for the first time, was diagnosed

with a permanent lung condition, persistent severe asthma exacerbation, or possible Reactive Airways Disease Syndrome. (*Id.* at ¶ 58.) He was placed on pulmonary medication, and on December 9, 2013, his medical records reflect for the first time a potential association between his lung damage and his exposure to carbonic acid. (*Id.* at ¶¶ 59, 60.) Medical records dated January 2, 2014, state, "they are now considering poisoning by Antiblu XP64" as the cause of his condition. (*Id.* at ¶¶ 61, 62.)

STANDARD

***2** A party is entitled to summary judgment if it can demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is warranted where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986). Only disputes over facts that might affect the outcome of the lawsuit will preclude entry of summary judgment; factual disputes that are irrelevant or unnecessary to the outcome are not considered. *Id.* at 248. "[I]n ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, ___ U.S. ____, 134 S. Ct. 1861,1863 (2014) (per curiam) (internal quotation marks and alterations omitted).

ANALYSIS

Ambrose alleges that Tricon committed battery when it intentionally exposed him to harmful chemicals. (Doc. 1 at ¶¶ 51-59.) The applicable period of limitations for a battery claim is two years. Mont. Code Ann. § 27-2-204(3). That two-year period begins when a claim accrues,§ 27-2-102(2), which is "when all elements of the claim or cause exist or have occurred" or "the right to maintain an action on the claim or cause is complete," § 27-2-102(1)(a). A "[l]ack of knowledge of the claim or cause of action, or of its accrual ... does not postpone the beginning of the period of limitation." § 27-2-102(2). However, "when the facts constituting the claim are by their nature concealed or self-concealing, the period of limitations does not commence 'until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party.' " *Kaeding v. W.R. Grace & Co.-Conn.*, 961 P.2d 1256, 1259-60 (Mont. 1998) (quoting § 27-2-102(3)).

The initiation of the limitations period is ordinarily an issue of fact, and disputed issues of material fact as to whether an injury was self-concealing and whether a plaintiff exercised due diligence "must be resolved by the trier of fact." *Christian v. Atl. Richfield Co.*, 358 P.3d 131, 153 (Mont. 2015). "When there is conflicting evidence as to when a cause of action accrued, the question of whether an action is barred by the statute of limitations is for the jury to decide." *Johnston v. Centennial Log Homes & Furnishings, Inc.*, 305 P.3d 781, 788 (Mont. 2013) (internal quotation marks and alteration omitted). That is the case here.

The parties first dispute whether Ambrose's injury was self-concealing. An example of a self-concealing injury is one "where the symptoms of an illness are immediately apparent, but the illness is diagnosed as the result of chemical exposure only years later." *Christian*, 358 P.3d at 153. "This is true even where plaintiffs have asserted long-standing beliefs or suspicions regarding the link between the symptoms and their ultimate cause." *Id.* In *Hando v. PPG Industries, Inc.*, the plaintiff was exposed to paint fumes while working at a coal processing plan in 1981 and 1982. 771 P.2d 956, 958 (Mont. 1989). Hando experienced symptoms at the time of her employment, including losing consciousness, and she suffered from physical, mental, and emotional ailments in the years following her exposure. *Id.* Between 1982 and 1984, none of the physicians who examined Hando attributed her continuing ailments to her previous exposure to the paint. *Id.* at 962. Hando did not commence her tort action until 1985, after she received a medical opinion in early 1984 that her problems were caused by her earlier exposure. *Id.* at 958. The Montana Supreme Court held that the statute of limitations tolled during that time because the necessary causal element was not known until Hando received the diagnosis linking her ailments to her exposure and that her failure to learn the cause of her injuries was not due to a lack of due diligence. *Id.* at 962. The Court reached a similar conclusion in *Nelson v. Nelson.* 50 P.3d 139, 143 (Mont. 2002). There the plaintiff alleged negligence in connection with injuries she sustained as a result of exposure to certain chemicals and an accidental injection of bovine ecthyma vaccine while working at a ranch. *Id.* at 140-41. The Court held that the limitations period tolled until a treating physician stated that the plaintiff's exposure and injection years before resulted in her medical condition. *Id.* at 143; *see also Muller v. Decker Coal Co.*, 87 F.3d 1321 (9th Cir. 1996) (unpublished) (holding that pursuant to *Hando*, the statute of limitations was tolled on the plaintiffs' claim

because their belief that their health problems were caused by a coal mine was not verified until they received a diagnosis years later).

***3** In an attempt to distinguish this case from *Hando* and *Nelson*, Tricon relies on the Montana Supreme Court's decision in *Kaeding*. *See* 961 P.2d 1256. The plaintiff in *Kaeding* was exposed to vermiculite during his employment with W.R. Grace and suffered lung– and heart-related ailments for decades. *Id.* at 1258. The Court explicitly held that a medical diagnosis need not be rendered before the statute of limitations may run so long as other facts establish that the veracity of the plaintiff's belief about the nature of his injury and its cause before a formal diagnosis. *Id.* at 1260. The Court distinguished *Hando*, noting that Kaeding's medical records contained several references to asbestosis prior to his actual diagnosis in the mid-1990s. *Id.* The Court also noted that Kaeding knew his exposure to vermiculite could cause asbestosis and had hired an attorney experienced in asbestos litigation four years prior to his diagnosis. *Id.* at 1261. That attorney also had a doctor review Kaeding's medical records, and he found them consistent with asbestosis. *Id.* The Court concluded: with "the numerous references to asbestosis in his medical records, Kaeding's knowledge of his risk for asbestos-related diseases from exposure at W.R. Grace, and the conclusions [the doctor] rendered in 1992, Kaeding should have discovered that he suffered from asbestosis by September or October of 1992, at the latest." *Id.*

Contrary to Tricon's argument, *Hando* and *Nelson* indicate that the existence of symptoms at the time of exposure does not necessarily prevent an injury from being self-concealing. Like *Hando* and *Nelson*, Ambrose experienced symptoms during his employment that he believed may have been connected to his exposure. Also like *Hando* and *Nelson*, Ambrose continued to experience symptoms after leaving his employment and, despite seeking medical treatment, a connection was not initially made between his exposure and his medical condition. Tricon insists this case is comparable to *Kaeding*, however, because Ambrose was aware of the specific health risks related to AntiBlu XP64. Ambrose admits that he read the Material Safety Data Sheet on AntiBlu XP64, which notes that "[r]epeated inhalation exposure may cause ... permanent lung damage." (Doc. 23-5 at 3; *see also* Ambrose Depo., Doc. 18-1 at 46.) Ambrose also admits that he attended a lecture by a representative from the chemical company and was told that the chemicals were dangerous. (Doc. 23 at ¶ 26.) While this indicates that Ambrose may have been aware of the danger, the "Citation and Notification of Penalty" issued by the Occupational Safety and Health Administration in August 2012 supports Ambrose's argument that he was uninformed of the risks, stating "[o]n or about March 06, 2012 and at times prior thereto, the employer did not ensure employees were trained to recognize the hazards regarding the limitations of the respirator use and respiratory hazards such as, but not limited to ... (ANTIBLU XP64)." (Doc. 23-6 at 2.) "[T]he state of [Ambrose]'s knowledge is a factual issue which cannot be resolved in summary judgment ...." *Muller*, 97 F.3d at *2; *compare with Roybal v. Bank of Am., N.A.*, 2015 WL 1534118, at *6 (D. Mont. Apr. 6, 2015) (Christensen, J.) (holding the discovery doctrine did not apply as to toll the statute of limitations in a loan modification case where there was no evidence that the plaintiff's injuries were concealed or self-concealing).

Tricon further argues that even if the injury was self-concealing, Ambrose was not diligent in informing his treatment providers about his exposure to AntiBlu XP64. *See* § 27-2-102(3). Tricon's argument is a factual one. Competing inferences can be drawn from Ambrose's failure to disclose his exposure at an earlier time. While it may show a lack of diligence, his failure to consider that his current symptoms were related to his exposure at Tricon may also reinforce the self-concealing nature of the injury. In *Hando*, the Court determined the plaintiff's continued attempts to seek medical attention and diagnosis showed sufficient diligence despite medical professionals' failure to make the connection. 771 P.2d at 962. Similarly, Ambrose continually sought a medical diagnosis for his ongoing problems and was repeatedly told they stemmed from his cardiac issues. There are a lot of things Tricon believes Ambrose should and could have done to be more diligent, but whether his failure to do them dooms his case is for the jury to decide.

CONCLUSION

***4** Whether Ambrose's action is barred by the statute of limitations "must be resolved by the trier of fact." *Christian*, 358 P.3d at 153. Accordingly, IT IS ORDERED that Tricon's motion for summary judgment (Doc. 15) is DENIED.

DATED this 11th day of August, 2016.

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CARNEY BADLEY SPELLMAN

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NO. 82468-6

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

KATHLEEN E. JOHNSON, and STEVEN W. GENTRY,

Plaintiff/Appellants,

v.

SHARON GREICHEN O'GRADY, PETER WEINER et al,

Defendants/Respondents.

RESPONDENTS' ANSWER TO MOTION FOR RECONSIDERATION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

A cause of action accrues when plaintiff is on notice of facts giving rise to the claim. Because the Court did not misapprehend or overlook this law or any fact in concluding Johnson and Gentry were aware they had been injured in November 2017 given the symptoms they had experienced allegedly stemming from the O'Grady home and as repeatedly documented to multiple lawyers and medical professionals, the Motion for Reconsideration should be Denied. The Court correctly found their cause of action had accrued by November 2017.[1] Johnson and Gentry admit as much in their Motion for Reconsideration: "Of course, [Johnson and Gentry] knew they were experiencing serious health symptoms in 2017 which they believed were caused by the rental home. But that is not the end of the inquiry." Motion for Reconsideration at 11. In

[1] Johnson and Gentry do not challenge the Court's statute of limitations analysis (Decision at 14-15) or the conclusion that this action commenced on January 16, 2021, with service of the summons.

Washington, *it is the end of the inquiry.* Johnson and Gentry want to change Washington law to require confirmation or diagnosis of the injury – not just knowing *the facts* underlying the potential cause of action. The only misapprehension at this point is their belief that "suffering from symptoms without knowing the cause-in-fact does not, and should not, trigger the statute of limitation for a toxic exposure claim under the law in Washington." Motion for Reconsideration at 2. Johnson and Gentry are wrong. A cause of action accrues when plaintiff knows or should know of some injury sustained as a consequence of the wrongful act of another. The action accrues when plaintiff discovers *the salient facts* underlying the elements of the cause of action. There is no dispute that by November 2017, Johnson and Gentry knew of injury suffered as result of the O'Grady home and the alleged wrong doing of O'Grady and Weiner. They had painstakingly outlined the litany of alleged salient facts they knew as of November 2017 in multiple contemporaneous and subsequent iterations. The statute of limitations began to run

at that time even if Johnson and Gentry did not know if such injury was allegedly due to rat dander, chemicals and/or mold.[2] The fact that "Johnson and Gentry did not know *with certainty* … what were the causes of their health problems, and that they were diligently looking for help identifying those causes-in fact" is of no consequence in the analysis. Motion for Reconsideration at 3 (emphasis added).

Ultimately, Johnson and Gentry concede that claims accrue under Washington State law when *susceptible of proof*; but then erroneously conflate *susceptibility* of proof with *actual* proof. Their Motion for Reconsideration should be Denied.

II. ARGUMENT

Johnson and Gentry urge this Court to conclude that a

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[2] On appeal, Johnson and Gentry did not challenge dismissal of their claims arising from the rat infestation, conceding that those claims accrued by November 2017. Now on Reconsideration, there appears to again be a shift by Johnson and Gentry slightly away from the chemical exposure claim to focus more on the mold claim. And rather than the March 2018 extension, now argue for an even longer extension to August 2018 for such mold claim.

personal injury action does not accrue until an injured person has *conclusive* proof of the cause of injury.[3] But yet there is no dispute that in Washington, "a cause of action accrues when a party has the right to apply to a court for relief." *1000 Virginia Ltd. P'ship v. Vertecs Corp*., 158 Wn.2d 566, 575, 146 P.3d 423 (2006). And, there is no dispute that "[i]n general terms, the right to apply to a court for relief requires each element of the action

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[3] Johnson and Gentry's arguments related to knowing the "cause in fact" of their injuries are misplaced. "Cause in fact refers to the "but for" consequences of an act—the physical connection between an act and an injury. It is a matter of what has in fact occurred." *Hartley v. State*, 103 Wn.2d 768, 777–78, 698 P.2d 77, 82–83 (1985) (citations omitted). There can be no dispute that Johnson and Gentry knew the physical connection between their alleged injuries and the O'Grady home, i.e., they were in the home, and/or had been exposed to belongings that had been in the home and got sick immediately thereafter. They admit it. There is no necessity for blood or test results in such "but for" analysis. This highlights the fallacy of their arguments in conjunction with attempts to manipulate a proper claim accrual and statute of limitations analysis as an initial matter. Moreover, by no means do O'Grady or Weiner agree that any such blood or test results are satisfactory proof of causation in any event and had moved to strike Johnson and Gentry's Exhibit G (Blood and urine, furniture toxicity, and rental home testing) offered in response to summary judgment pursuant to ER 401-403, 602, 701-703, 801-803, 901. CP 344-45.

be *susceptible* of proof." *Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976) (emphasis added).

This Court correctly analyzed the time Johnson and Gentry's cause of action was *susceptible* of proof (November 2017) and aptly outlined why the discovery rule would not operate to extend the date of accrual where Johnson and Gentry were indisputably *aware* in November 2017, that they had sustained injuries following their exposure to both mold and the chemicals used to treat the rodent infestation. Decision at 12.

A. Claims Accrued in November 2017

"The general rule in ordinary personal injury actions is that a cause of action accrues ***at the time the act or omission occurs***." *Matter of Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992) (emphasis added).

The discovery rule, which is an exception to the general rule recognized in *Hibbard*, applies in certain torts when the injured parties do not know they have been injured and literal application of the statute of limitations could result in grave

injustice. *Id*. at 744-45; *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575-76, 146 P.3d 423 (2006). Neither factor applies here. Even where the discovery rule applies, reasonable suspicion, not factual certainty, triggers the running of the limitations period under Washington's discovery rule.

There is no dispute that Johnson and Gentry knew they had been exposed to chemicals and mold and that they experienced negative effects on their health by the time they had completely vacated the premises in November 2017. Their own writings prove as much. Because Johnson and Gentry were aware they had been injured, the discovery rule does not apply. Instead, the statute of limitations began to run "at once" from the alleged act or omission of O'Grady and Weiner in allegedly exposing Johnson and Gentry to mold and chemicals.

With respect to the second factor relevant to application of the discovery rule, no grave injustice would result here from application of the general rule that claims accrue when the act or omission occurs. Johnson and Gentry did, in fact, *file* their

lawsuit timely. It was not for lack of knowing of their right to bring a claim that this case was untimely. Instead, their failure was in not following up the filing of suit with personal service upon any individual defendant.

B. Claims Time Barred Even if the Discovery Rule Applies

Even if the discovery rule applies, however, Johnson and Gentry's claims remain time barred for the reasons set forth in the Decision. Johnson and Gentry concede that they knew they were experiencing health problems in 2017 which they believed were caused by the rental home. Motion for Reconsideration at 11. However, they assert, citing case after case from other jurisdictions, that this was insufficient to trigger the discovery rule. They are incorrect.

Washington case law does not require factual certainty before a claim accrues under the discovery rule.

> [T]he limitation period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist, whether or not the party can then conclusively prove

> the tortious conduct has occurred. A smoking gun is not necessary to commence the limitations period. ***An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that a legal action must be taken.*** At that point, the potential harm with which the discovery rule is concerned – that remedies may expire before the claimant is aware of the cause of action – has evaporated. The claimant has only to file suit within the limitations period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable. ***If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time barred.***
>
> *Beard v. King County*, 76 Wn. App. 863, 868, 889 P.2d 501 (1995) (emphasis added).

Contrary to Johnson and Gentry's assertions, the January 2018 letter attached in their Motion for Reconsideration is not the *only* place mold was mentioned. Motion for Reconsideration at 4. The Court highlighted the December 5, 2017, Email from Johnson to Attorney Poloni. Decision at 11. CP 109. The mold was actually first mentioned in an Email from Johnson to her Attorney Poloni on November 27, 2017. CP 337.

However, the letter written by Johnson in January 2018 undeniably discloses that Johnson and Gentry were aware by November 2017 that they had been exposed to both mold and chemicals in the rental residence. In that letter, Johnson stated that O'Grady began "messing with the house" on November 11, 2017.

> I was told by the landlady's real estate representative I could not stop her from taking care of the rodent issue her own way, but she used deodorizers, **chemicals** we do not know of, and applied heat dishes directly onto my furniture, while leaving the house completely closed up. We do not know what combination or types of vapors were created. We do not know if previous chemicals or treatments have been used in the home as well.
>
> When moving, in late November, our friend Keith helped [Gentry] with furniture and he said it smelled vile throughout the house, with maybe decomposing rodents in the walls and some **mold** in the air (he owns Bellevue Roofing and is experience with these smells. He told me to tell [O'Grady] in summer that her **roof was soft** when I asked him to retrieve a toy off the roof . . . she was not concerned when I told her this information.) He reported that he felt like he had "the flu" the day after helping [Gentry] move furniture from the old rental to the new rental. He also felt similar flu like symptoms after helping [Gentry] move furniture in the new

> house and accompanying me to see if the treatment done on the furniture worked to eliminate the ["]allergen" or whatever was making me react to it in early January. (It did not work).

CP at 270-76.

By the end of November 2017, Johnson and Gentry had seen and smelled chemicals in the rental home, and a professional roofer had informed them that the roof was soft and that he smelled mold in the air. At that point, Johnson and Gentry reasonably suspected that a wrongful act had occurred, i.e., that their injuries were due to exposure to mold and chemicals within the O'Grady home, triggering the statute of limitations. *See Beard v. King County*, 76 Wn. App. at 868 (An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that a legal action must be taken.)

Johnson and Gentry, however, argue that their claims did not accrue until they knew the "cause in fact" of their symptoms, seeking to pin the statute of limitations to the dates of test results *confirming* the presence of specific chemicals or mold in their

blood work. Motion for Reconsideration at 15.

Indeed, Johnson and Gentry allege that the Court "overlooks the facts by reaching its decision without a careful examination of actual evidence, of the facts in the letter, and whether those facts meet the requirements of establishing each element of the action as to each claim including mold, as required by *Green* and other cases." Motion for Reconsideration at 9. The only misapprehension, again, is their mistaken assertion that *susceptible* of proof equates to *actual* proof of *cause in fact. Id.* at 10. No Washington case supports such interpretation.

Washington has never adopted a requirement of actual proof of causation to trigger the running of the limitations period. The standard is susceptibility of proof which equates with reasonable suspicion, not actual proof. *See Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976); *Beard v. King County*, 76 Wn. App. At 868; s*ee also Steele v. Organon, Inc*., 43 Wn. App. 230, 234, 716 P.2d 920 (1986) (once the plaintiff is aware of some injury beyond nominal damage, the statute of

limitation begins to run *even if* he does not know the full extent of his injuries). In fact, the pattern in *Steele* is quite similar to this case—the plaintiff took the problematic substance upon advice of a doctor. It first caused numbness and tingling, which made her aware of some injury from the drug. Much later, it also caused a heart attack and stroke. The cause of action was held to have accrued upon the first occurrence of harm. *See Steele*, 43 Wn. App. at 235. The later occurrence of more harm did not reset the statute or trigger the discovery rule. *Id*.

Plaintiffs' argument that "cause in fact" was necessary before their claims accrued misstates Washington law. The discovery rule requires reasonable suspicion, not proof, for a claim to accrue. *Winbun v. Moore*, 143 Wn.2d 206, 18 P.3d 576 (2001), discussed in the Motion for Reconsideration at 11-12, does not dictate a contrary conclusion. *Winbun* is a medical malpractice case in which plaintiff had brought timely action against several of the physicians who had treated her. The court allowed her to add an additional physician to the suit more than

three years after the malpractice had occurred. In so doing, the court applied the discovery rule and concluded that plaintiff had been diligent in requesting the records that would permit her to identify the physicians involved in her care, but that the providers failed to produce certain records that disclosed potentially actionable negligence by one of the treating physicians. Prior to receiving those records, plaintiff knew that the physician had been on her treatment team, but she had no reason to suspect that he had been negligent. The court concluded that "knowledge of suspected professional negligence as to one health care provider does not of necessity trigger the medical malpractice discovery rule of RCW 4.16.350 as to all other health care providers who also treated the plaintiff." *Id* at. 223. Johnson and Gentry had "knowledge of suspected" exposure to chemicals and mold in November 2017 triggering the limitations period. *Winbun* supports the Court's proper analysis.

Similarly, *Nichols v. Peterson NW, Inc*., 197 Wn. App. 491, 500–01, 389 P.3d 617, 622–23 (2016), is consistent with the

Court's analysis. *Nichols* simply reaffirms that "[u]nder the discovery rule, a cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the *salient facts* underlying the cause of action's elements. *Id.* (Emphasis added). In *Nichols*, the defendant alleged negligent actions that led to water intrusion occurred in 2006 (plaintiffs filed in 2012) and that plaintiffs should have discovered water intrusion earlier because one plaintiff admitted that she observed the roof deck being exposed to rain after defendant failed to tarp the roof. However, plaintiff also stated that she did not witness any water intrusion at the time and believed that a tarp placed over the roof thereafter solved any concern about water intrusion. Plaintiffs provided evidence that it was not until 2011, when one of them went into the attic and observed mold, that they noticed any water intrusion. Their claim was not time barred. *Id.*

This is not a situation where Johnson or Gentry allege that any problem had been remedied, or that symptoms had abated

for that matter. Their injuries and damages were in full swing, they knew it and believed it was because of the house when they completely vacated the O'Grady residence in November 2017. Johnson and Gentry possessed the salient facts of their claims by that time.

C. Non-Persuasive Out of Jurisdiction Case Law Does Not Dictate a Different Result.

Johnson and Gentry cite to Indiana, Minnesota, Texas, and finally Montana law in arguing for a change in Washington law. However, the cases relied upon do not dictate a different result.

The following is the Indiana law quotation from the Motion for Reconsideration at 13; but with different key parts bolded and italicized and a key word underlined:

> Under Indiana discovery rule, lay person's mere suspicion, even when coupled with start of investigation, does not automatically trigger running of statute of limitations; rather, where knowledge of causation is at issue, [a] person knows or should have discovered [the] cause of his or her injury ***when [a] person has or should have discovered some evidence*** that there was [a] ***reasonable possibility*** that injury was caused by act or product of another; reasonable possibility, while less than probability, requires more than mere suspicion possessed

by lay person without technical or medical knowledge.

Only "some" evidence is needed even under Indiana law. Johnson and Gentry ignore the fact they vastly exceeded this threshold via their own writings. Johnson and Gentry now attempt to characterize, indeed minimize, their beliefs (prior to receiving actual test results) as "mere suspicion;" however, even a minimally unsuspecting eye would certainly conclude that Johnson and Gentry's detailed chronicles of events and immediate reactions experienced in November 2017, for which they consulted multiple attorneys and medical providers, constituted "*some"* evidence which was more than "*mere suspicion.*"[4]

[4] Johnson and Gentry argue: "[t]he mold could conceivably have been from one of the hotels she took shelter in, or from her new rental that she had to move out of quickly." Motion for Reconsideration at 24. Certainly, there is no evidence in the record that Johnson sought to conduct mold testing at one of the hotels, or the rental; but rather, only at the O'Grady home. This highlights her *reasonable suspicion* that she believed the O'Grady home was the culprit – and based on the alleged "passing surmise of Keith."

Similarly, Johnson and Gentry cite to *Hildebrandt v Allied Corp*., 839 F.2d 396, (8th Cir. 1987), another out of jurisdiction case in support of their argument for new Washington law. However, they omit the fact that under Minnesota law, two elements must be satisfied under the discovery rule before a cause of action accrues in cases involving injuries caused by a defective product: (1) A cognizable physical manifestation of the disease or injury; and (2) evidence of a causal connection between the injury or disease and the defendant's product, act or omission. *Id.*

This is not the law in Washington, nor is this a case involving a defective product. Moreover, both plaintiffs in that case had been to doctors who expressed that either nothing was wrong with them, or that there was no correlation between the symptoms and the alleged chemical product. As such, the court determined that because physicians had affirmatively rejected plaintiffs' subjective suspicions, it would be unfair to charge them with having such knowledge of causation. *Id.* This is not

the case here. Johnson and Gentry knew the house was the cause of their ailments through a series of detailed events and immediate reactions; no doctor rejected their suspicions. CP 318-320, 323-324, 326.

Johnson and Gentry cite *Childs v. Haussecker*, 974 S.W.2d 31, Prod. Liab. Rep. (CCH) ¶ 15376 (Tex. 1998) which is also inapposite. That is a case articulating the correct formation of the discovery rule in the *latent occupational disease* context. The court recognized that a latent injury or disease is the epitome of the type of injury that is often inherently undiscoverable within the limitations period. *Id.*

This is not a latent injury case. There is absolutely no dispute that Johnson and Gentry believed they had been patently injured due to something in the O'Grady home.

Next, Johnson and Gentry rely upon Montana jurisprudence and *Ambrose v. Tricon Timber, LLC*, No. CV 15-113-M-DWM, 2016 WL 4257333 (U.S.D.C., D. Mont.

8/11/2016). That case turned on Montana law and specifically the following analysis:

> A "[l]ack of knowledge of the claim or cause of action, or of its accrual ... does not postpone the beginning of the period of limitation." (Citation omitted). However, "when the facts constituting the claim are by their nature concealed or self-concealing, the period of limitations does not commence 'until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party.' "

Id. (Citations omitted.)

There, Ambrose left Tricon and the chemical exposure in 2012, he initially felt better and his symptoms appeared to have subsided. A few months later, when he experienced chest pain, physicians attributed complaints to a pre-existing cardiac issue. He returned to the hospital four times in 2013 experiencing chest pain and shortness of breath. Until this point, treatment focused on Ambrose's cardiac issues and he was not diagnosed with a lung condition until later in 2013, with an association of such condition to chemical exposure for the first time in December 2013. *Id.* at *1.

There the court believed it was a question of fact as to whether Ambrose's condition was self-concealing and then shared an example of a self-concealing injury as one "where the symptoms of an illness are immediately apparent, but the illness is diagnosed as the result of chemical exposure only years later." *Id. at *2.*

The court went on to indicate: "This is true even where plaintiffs have asserted long-standing beliefs or suspicions regarding the link between the symptoms and their ultimate cause." Id. And then the court cited to the other cases Johnson and Gentry relied upon in their initial briefings, namely, *Hando v. PPG Industries, Inc.*, 771 P.2d 956, 962 (Mont. 1989) and *Nelson v. Nelson*, 50 P.3d 139, 143 (Mont. 2002).

The distinctions are several. First, Johnson and Gentry's conditions were not "self-concealing." Second, there was medical support for claims as early as October 2017 that there were allergens in the home as a culprit for Johnson's complaints. Third, there is nothing in this record confirming any *diagnosis* as

a result of chemical or mold exposure and there very well may never be in this case. Fourth, as stated repeatedly herein, Johnson and Gentry specifically and repeatedly chronicled their reactions, injuries, damages as an immediate result of exposure within the O'Grady household or to items that had been therein by the end of November 2017, and to an attorney, no less. Fifth, Johnson and O'Grady *actually did file their claims and within* the limitations period. Lastly, the very nature of Johnson and O'Grady's complaints and sequence of events were not such that it was difficult or impossible to learn of the factual elements of their cause of action, unlike the Montana cases.

This is not a case like *Hando* where there was exposure to paint, brief loss of consciousness, and medical examination; but where numerous physicians would not attribute ailments to paint exposure. Similarly, this case is not like *Nelson,* involving a one-time Bovine injection, immediate loss of consciousness, other problems surfacing over time, but no link until years later. Nor is it like *Ambrose* where there was chemical exposure, but where

a pre-existing cardiac condition obscured diagnosis.

This is not the case to change Washington law by arguing for a Montana discovery rule. As the Court correctly concluded, Washington's discovery rule "does not apply in this way." Decision at 1. This is a case where immediate injury was known by Johnson and Gentry in November 2017 following their exposure to both mold and the chemicals used to treat the rodent infestation. *Id*.

D. *Susceptible* of Proof Does Not Mean Actual Proof of Cause in Fact.

Johnson and Gentry encourage the Court to consider *Dougherty v. Pohlman*, 16 Wn.App.2d 1008, 2021 WL 100237 (2021), as persuasive authority on the topic of "susceptible of proof." Motion for Reconsideration at 20.

In *Dougherty*, defendant, a general contractor, helped design and construct a home on plaintiff's property that was completed in 2008. In addition to the Unjust Enrichment claim outlined in the Motion for Reconsideration, there was also a

Quantum Meruit claim that the court similarly found had accrued in affirming summary judgment dismissal based on a statute of limitations violation. The court relied on the same case as this Court, *Virginia Ltd. P'ship v. Vertecs Corp*., 158 Wn.2d 566, 575-76, 590, 146 P.3d 423 (2006), in rejecting plaintiff's argument that he was incapable of pursuing any quantum meruit claim until 2015, when defendant allegedly first refused to convey to him a 50 percent ownership interest in the property under the alleged oral agreement:

> "We reject this argument because an implied contract claim begins to accrue when the *evidence of the claim is sufficiently matured to establish the elements in court*, *not the date when the plaintiff realizes they could bring a claim*. (Citation omitted.) … Even if [plaintiff] believed [defendant] would compensate him at some point with a 50 percent ownership interest in the property, the *salient facts* underlying his implied contract claim *rested on knowledge* [plaintiff] already had in 2008—that he had constructed a house for [defendant] believing he would be compensated, yet he did not receive compensation.

Dougherty v. Pohlman, 16 Wn. App. 2d 1008, *4 (2021)

(emphasis added).

As such, plaintiff's argument that the statute of limitations should have been tolled because he believed until 2015 (when defendant unequivocally refused to give him ½ property interest) that defendant would compensate him for his work on the property, was incorrect. *Id.* at *5.

This is similar to the case at hand. Just like there did not need to be an *actual* refusal to pay in *Dougherty* before the claim accrued, there did not need to be an *actual* test result proving mold or chemicals in the blood or home here. Johnson and Gentry had knowledge in November 2017 that they had suffered significant damages and injuries allegedly stemming from the O'Grady residence. The fact that they did not have actual proof of cause in fact of their injuries and damages is of no consequence under the proper analysis of accrual of their claims.

This is not a one-time belly ache and restaurant case or a mole on the arm and a friend's comment case. *See* Motion for Reconsideration at 26-27. This is a case where Johnson and Gentry:

- Specifically chronicled a sequence of multiple events and immediate reactions, injuries and damages as allegedly occurring in the O'Grady residence and at the hands of O'Grady and/or Weiner by the end of November 2017;

- hired and consulted an attorney by the end of November 2017;

- had medical support for claims regarding allergens in the O'Grady home as the culprit for symptoms by the end of November 2017;

- timely filed a lawsuit in June 2020 within the limitations period; but

- failed to properly serve the complaint until January 2021.

This Court's Decision must stand. To accept Johnson and Gentry's argument and allow construction of the discovery rule to require knowledge of *conclusive proof* of a claim before the limitation period begins to run, would change Washington law and would mean that many claims would never be time barred. This is a result that the courts in Washington have long avoided through consistent application of the law in regard to cause of

action accrual that this Court correctly analyzed and applied on this record.

III. Conclusion

The Court should Deny the Motion for Reconsideration. The Court did not misapprehend or overlook any law or fact in correctly affirming the trial court's order granting summary judgment based on a violation of the statute of limitations.

This document contains 4717 words in accordance with RAP 18.17.

Respectfully submitted this 26th day of May, 2022.

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CERTIFICATE OF SERVICE

JEFF BROWN, hereby declares:

On May 26, 2022, I caused to be served, by electronic service via Washington State Courts – Court of Appeals E-Filing/Service the Respondents' Answer via e-service to the following:

SUNAINA ASWATH, hereby declares:

On May 26, 2022, I caused to be served, by electronic service the Respondents' Answer via e-mail to the following:

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

Dated this 26th day of May, 2022 at Bellingham, Washington

/s/ Jeff Brown
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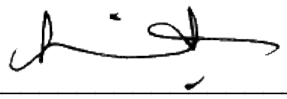
Dated this 26th day of May, 2022 at Bellevue, Washington



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No. 82468-6

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

KATHLEEN E. JOHNSON, and STEVEN W. GENTRY,

Appellants,

v.

JEREMIAH KERK, et al.,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

APPELLANTS' REPLY IN SUPPORT OF RECONSIDERATION PER RAP 12.4

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I. REPLY ARGUMENT

Respondents O'Grady and Weiner's ("O'Grady") answer ("Answer") to Johnson and Gentry's reconsideration motion ("Motion") make several assertions which must be addressed to ensure the Court is not misled and to otherwise assist the Court.

First, Johnson and Gentry are not seeking to change Washington law, but to apply settled law to the facts in the record. That includes, as the Supreme Court held in *Green* and *North Coast,* that a claim accrues when the plaintiff "should have discovered the harm ***and its cause.***" *Green v. A.P.C.,* 136 Wn.2d 87, 95-96, 960 P.2d 912 (1998), quoting *North Coast Air Services Ltd. v. Grumman Corp.,* 111 Wn.2d 315, 759 P.2d 405 (1988). The Answer studiously avoids citing or discussing *Green*, which is settled law and requires reversal, as argued in Johnson and Gentry's reply brief at pp. 7-13. *Green* is a products liability case based on exposure and, thus, similar to the circumstances here involving a toxic tort from exposure to mold, as well as from exposure to chemicals.

It is O'Grady who is seeking to change Washington law by arguing that "Washington has never adopted a requirement of actual proof of causation to trigger" the statute of limitations, Answer at 11; and by arguing the statute was triggered as to the mold claim, and the toxic chemical claim, once Johnson and Gentry "knew they were experiencing serious health symptoms in 2017 which they believed were caused by the rental home." Answer, p. 1. In addition to mischaracterizing Johnson and Gentry's knowledge that "the rental home" was what was causing them harm rather than specific acts or omissions by O'Grady, these assertions are contrary to the holdings of numerous Washington cases including *Green* and *North Coast,* particularly as quoted *supra*, which distinguish the *harm/injury* from the *cause.* O'Grady continues to conflate knowledge of Johnson and Gentry's *injuries* with knowledge of their *causes.*

The "house" was not the cause of the injuries to Johnson and Gentry. There was some evidence in 2017 that the rats and the chemical bomb from O'Grady's various acts and omissions

were potential causes-in-fact. But not until the March 2018 test results did Johnson and Gentry have knowledge that mold was, ***in fact***, one likely cause of their malaise and potentially susceptible to proof – a susceptibility that was confirmed by the August 2018 testing which first showed mold in O'Grady's house. The March results also told them the chemical bomb was a likely cause-in-fact too, and was then susceptible to proof given the already known use of toxic chemicals in the house.

In her Answer, O'Grady once again flees from the distinction between the injury and the ***cause-in-fact*** of the injury, and that knowledge of ***both*** are needed to trigger the statute of limitations. Her argument on page 6 of the Answer – that awareness of the *injury*, without more, suffices to trigger the statute of limitations – shows how she hopes to change Washington law to eliminate the requirement of knowledge of an injury's cause-in-fact to trigger the statute.[1] Not surprisingly,

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[1] The Answer argues:

(Footnote continued next page)

given this position the Answer fails completely to address the Motion's argument at pp. 7-8 that "implicit in the right to apply to a court for relief is meeting the requirements of CR 11 of a factual and legal basis for the claims asserted." By reading out requiring knowledge of the cause-in-fact element to a claim, O'Grady argues for filing complaints in violation of Rule 11. That cannot be the rule.

Second, the Answer argues a blunt instrument form of injury generically caused "by the house" – as though knowledge of being injured by "the house" was all that is required, despite the fact even the Answer acknowledges multiple potential causative forces and that mold exposure was only first suggested as a "maybe", "possible" cause by a friend helping remove

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> Because Johnson and Gentry were aware they had been injured, the discovery rule does not apply. Instead, the statute of limitations began to run "at once" from the alleged act or omission of O'Grady and Weiner in allegedly exposing Johnson and Gentry to mold and chemicals.

This assertion is contrary to *Green* and *North Coast, supra,* and *Winbun* and *Ruth v. Dight, infra,* to name just a few.

personal property, not a professional doing testing or investigation.[2] Thus, the cases argued by the Answer all are older, "blunt causation" cases of injuries with one-time causative factors obvious at the time of the injury – car accidents and the like. None of the cases relied upon by O'Grady involve statute of limitations for toxic tort/environmental exposure.[3]

Product liability and toxic tort cases are the most analogous cases, including those from out of jurisdiction. But

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[2] The Answer's citation at p. 8 to "multiple" references of "mold" in the record by Johnson are all to the same summary of the one, passing and speculative comment from "Keith", simply restated in different places. The context of each confirms Johnson's continued questioning for the cause of her injuries.

[3] *See 1000 Virginia Ltd. P'ship v. Vertecs Corp*., 158 Wn.2d 566, 146 P.3d 423 (2006)(breach of construction contract); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77, 82–83 (1985)(personal injury arising out of automobile collision); *Haslund v. City of Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976)(tort liability for issuance of invalid building permit); *Matter of Estates of Hibbard*, 118 Wn.2d 737, 826 P.2d 690 (1992)(negligence against State for releasing dangerous person from state hospital); *Beard v. King County*, 76 Wn. App. 863, 889 P.2d 501 (1995) (wrongful internal investigation by police department).

Washington courts also recognize that cause-in-fact may not be obvious even in what otherwise would seem to be a "blunt causation" case, such as the *North Coast* air crash case in which the cause-in-fact was determined some 12 years later, despite the fact the plaintiff obviously knew he had been injured "by the plane"; or in the *Winbun v. Moore,* 143 Wn.2d 206, 18 P.3d 356 (2001) case in which a "late" malpractice claim was added to one of the physicians in the team that treated the plaintiffs; or in the *Ruth v. Dight,* 75 Wn.2d 660, 453 P.2d 631 (1969) case, where the surgical sponge that was the cause-in-fact was finally discovered over a decade after the surgery and years of discomfort and knowing there had been an injury.

Third, the Answer's assertion in footnote 2 that Johnson and Gentry did not fully argue the mold claim in the merits briefing is specious. The appeal always focused on the mold claim and that it was distinct from the chemical bomb claim precisely because it was not detected as a likely cause-in-fact until March 2018 and tied to O'Grady's house in August 2018.

"Mold" is in the Opening Brief over 40 times in the text, headings, and footnotes. As for the Reply Brief, while "mold" also appears throughout the brief, the introduction and general reply specifically focused on Johnson and Gentry's hunt for the cause-in-fact when it appeared rats were not the only problem, since leaving the rat-infested house and allergy treatment did not resolve their problems. Reply Brief at 2-3. Only getting the lab test results identifying mold as a causative factor from a separate "wrongful act" of O'Grady was any claim for mold exposure "susceptible to proof" since only then was it found in their blood.[4]

[4] The Reply Brief states at page 3:

> Instead, in January 2018 they sought more thorough and detailed medical evaluation for their continuing health problems. That investigation's blood tests finally revealed on March 9, 2018, two causative factors of their injuries from two other "wrongful acts" by Respondents.

(Footnote continued next page)

Finally, not only does the Answer fail to address *Green* or argue any toxic tort/product liability cases, it wholly fails to address Johnson and Gentry's argument that whether they possessed sufficient knowledge of the cause-in-fact of their injuries from mold (or from chemical exposure) before their March, 2018 diagnoses, is a question of fact for the jury.

Green involved a dispute over the date of discovery of the injury, not the cause-in-fact, which was long known to be from the drug DES. But its principles apply equally to lack of

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> One diagnosed cause in fact of their injuries was mold toxicity from exposure to mold. No one had blamed mold for Johnson's or Gentry's health problems at any time. Respondents failed to disclose or remediate the mold problems. The second was chemical poisoning from Respondents' belated effort after Johnson moved out to fumigate the house to address the rats' dander and droppings, which had been circulated through the house by the heating system.
>
> Neither of those causes, nor the underlying acts, were cited in the November 6 letter – all the blame for Appellants' health issues was placed on the rats. The mold and chemical causes in fact of Appellants' injuries were first known sufficient to state a claim on March 9, 2018, when diagnosed.

knowledge of the cause-in-fact as to knowledge of the injury. And as *Green* reaffirmed, knowledge of all elements of a claim are required to trigger the statute of limitation.

Thus, where there is a question as to when a plaintiff *should* have known an element, that is an issue of fact for trial, which required reversal in *Green* and thus, also requires reversal here. To paraphrase the conclusion in *Green,* 136 Wn.2d at 102-103: "As the moving party on summary judgment, [O'Grady] had the burden of showing there were no genuine issues of material fact necessitating a trial with respect to the time" Johnson and Gentry "should have known about" the cause of their injuries from undisclosed mold in O'Grady's house. Like the defendant in *Green*, O'Grady "failed to carry [her] burden because [she] failed to produce competent evidence to show [Johnson and Gentry] should have known about the mold-based cause-in-fact of their injuries "more than three years from the commencement of the current action", including service. The same applies to the toxic chemical claim.

Accordingly, at a minimum per *Green,* the case must be reversed and remanded to determine the fact issue of when Johnson and Gentry "should have known" that mold was a cause-in-fact of their injuries, and "should have known" that toxic chemicals were a cause-in-fact of their injuries.

II. CONCLUSION

Washington law has long required knowledge of the cause-in-fact of an injury or harm to trigger the statute of limitations. Toxic exposure cases often have a delay between the knowledge of the harm and of the cause-in-fact. That is the case here. Appellants Johnson and Gentry did not have ***any*** evidence that mold, or the chemical bomb, were the cause in fact of their injuries, and thus susceptible to proof, until the lab test results in March, 2018. Since that was the first evidence of any sort as to mold in O'Grady's rental house, they did not have genuine knowledge that mold from O'Grady's house was a cause-in-fact until the test results of the house in August, 2018 confirmed the presence of mold there. Any doubt whether they had sufficient

knowledge of the causes of their injuries earlier must be resolved by a jury. Respectfully, reconsideration should be granted.

This document contains 1,854, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 3rd day of June, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Gregory M. Miller*
Linda B. Clapham, WSBA No. 16735
Gregory M. Miller, WSBA No. 14459
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ E-file and e-serve, to the following:

Co-Counsel for Appellants Kathleen E. Johnson and Steven W. Gentry Dallas William Jolley, JR. WSBA No. 22957 DALLAS W. JOLLEY, JR., ATTORNEY AT LAW 3901 100th St SW Ste 1 Lakewood, WA 98499-4486 dallas@jolleylaw.com	***Attorneys for Defendants O'Grady and Weiner*** Kelley J. Sweeney, WSBA No. 25441 SIMMONS SWEENEY SMITH PS 1223 Commercial St Bellingham, WA 98225-4306 kelley@ssslawgroup.com
Attorneys for Defendants Cassandra and Jeremiah Kerk Michael Jeffrey Kyllo, WSBA No. 51412 Shellie McGaughey, WSBA No. 16809 MCGAUGHEY BRIDGES DUNLAP, PLLC 3131 Western Ave Ste 410 Seattle, WA 98121-1036 mike@mcbdlaw.com shellie@mcbdlaw.com	Cassandra Kerk - cassandrakerk@gmail.com Jeremiah Kerk - jeremiah.kerk@gmail.com Ms. Bonnie Beddall Ms. Lyndal Balliet RE/MAX Metro Realty, Inc. 2312 Eastlake Avenue East Seattle WA 98102 bonnie@bonniebeddall.com; lyndal@metroeastside.com

DATED this 3rd day of June, 2022.

S/ Allie M. Keihn
Allie M. Keihn, Legal Assistant

CARNEY BADLEY SPELLMAN

June 03, 2022 - 3:47 PM

Transmittal Information

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Appellate Court Case Number:	82468-6
Appellate Court Case Title:	Kathleen E. Johnson, et ano, Appellants v. Jeremiah Kerk, et al., Respondents

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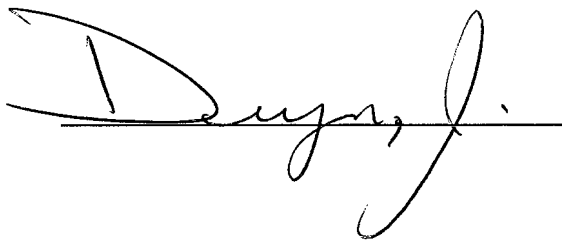
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHLEEN E. JOHNSON and STEVEN W. GENTRY, Appellants, v. SHARON GREICHEN O'GRADY, PETER WEINER, JEREMIAH KERK, and CASSANDRA KERK, Respondents.	DIVISION ONE No. 82468-6-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

For the Court:



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Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Kathleen E. Johnson, et ano, Appellants v. Jeremiah Kerk, et al., Respondents (824686)

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