No. 45250-2-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER LINTH AND THE ESTATE OF CAROLYN LINTH, THE EVELYN PLANT TESTAMENTARY TRUST; AND THE FRANKLIN & EVELYN PLANT GREEN POINT FOUNDATION,

Appellants,

v.

CARL GAY AND ROBIN A. GAY, HUSBAND AND WIFE, AND THE MARITAL COMMUNITY COMPOSED THEREOF; et al.,

Respondents

ON APPEAL FROM CLALLAM COUNTY SUPERIOR COURT

(Hon. Keith Harper)

AMENDED REPLY BRIEF OF APPELLANTS THE EVELYN PLANT TESTAMENTARY TRUST AND THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATION

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I. SUMMARY OF ARGUMENT

Summary judgment should never have been entered against the Trust and the Foundation for at least three reasons. First, and based upon the precedent of *Columbia Gorge*, once the trial court granted the motion to intervene, the issue of whether the statute of limitation had run became moot – especially where the statute of limitations was raised and argued vociferously by both parties as it was here as part of the motion to intervene. Carl Gay never moved for reconsideration of the order granting intervention and the trial court never should have considered Carl Gay's later motion for summary judgment based upon the statute of limitations. Second, the statute of limitations is tolled in Washington where plaintiffs are prevented from immediately knowing of their injuries, or the cause of their injuries, due to fraudulent concealment of material facts by the defendant. The Trust and the Foundation presented ample facts from which a trier of fact could determine that Carl Gay had a duty to disclose material facts and intentionally concealed them. The trial court erred by granting summary judgment in the presence of these facts. And third, the trial court granted Carl Gay's motion for summary judgment primarily upon evidence in Carl Gay's reply declaration submitted three days before the summary judgment hearing. Not only was this reply declaration full of inadmissible hearsay, the trial court refused to permit the Trust and Foundation to rebut it. The trial court abused its discretion in denying the Trust and Foundation's CR 56(f) motion.

II. ARGUMENT

A. Once the Order Granting Intervention Had Been Entered, Any Statute of Limitations Arguments Against the Trust and Foundation Became Moot and Should Never Have Been Entertained by the Trial Court.

1. The Trial Court Has Effectively Ignored the Precedent Set by the *Columbia Gorge* Case.

Once the trial court granted the Trust and the Foundation's motion to intervene, the question of whether the statute of limitations had run on the intervening parties' claims was no longer an issue. As specifically held by Division III in *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn. App. 618, 624, 989 P.2d 1260 (1999): "To interpret CR 24 as permitting intervention only by those with a perfected or perfectible independent cause of action is to render the rule meaningless."

Carl Gay asserts that the *Columbia Gorge* case is not controlling because there the court was analyzing whether the CR 24 motion to intervene by the Yakima Nation was timely filed. But Gay fails to acknowledge that at the time the intervener – Yakima Nation – sought to intervene, *its claims were already time barred.* The Court of Appeals *knew this* and specifically held that the running of the statute of limitations for an intervener on its own cause of action does not bar its attempt to intervene as a matter of right. It would have been absolutely illogical for the Court of Appeals to permit a party whose claim is known to be time-barred to intervene in an action, only to wait for another day to have that party dismissed on summary judgment based on the statute of limitations.

The trial court's ruling, and Carl Gay's arguments supporting it, will only perpetuate a waste of judicial resources.

Carl Gay attempts to distinguish the *Columbia Gorge* case by asserting that motions to intervene look only at limited aspects of an intervener's claim, relying on *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 639 P.2d 240 (1982). Gay is incorrect for several reasons. First, the *Doyle* case analyzed a motion to amend the complaint by a party under CR 15(a), *not* a motion to intervene under CR 24.

Second, because the trial court granted the Trust and the Foundation's motion to intervene, The Trust and the Foundation necessarily satisfied *each* of the following CR 24 requirements: (1) that the application for intervention was timely made; (2) that the Trust and the Foundation each claimed an interest in the subject of the action; (3) that the Trust and the Foundation were situated such that the disposition of the case would impair or impede their ability to protect their interests; and (4) that neither the Trust's nor the Foundation's interests would be adequately represented by the existing parties. *See*, *Westerman v. Cary*, 125 Wn.2d 277, 303, 892 P.2d 1067 (1994)(All four requirements of CR 24 must be satisfied for intervention to be granted.)

And finally, when deciding the CR 24 motion to intervene in *this* case, the trial court was presented with no less than 181 pages of facts, argument and analysis[1] about the legal basis for the claims of the Trust

[1] *See*, CP: 888-912, 674-688, 596-673, 588-595, 565-584, 548-564, 523-547.

and the Foundation, in addition to facts, argument and analysis concerning whether or not the claims of the Trust and the Foundation were time barred; CP: 680-681, 539-541, 555-558; and whether or not permitting intervention by the Trust and the Foundation would be prejudicial to Carl Gay; CP: 558-560, 684-686, 541-543. Based upon the facts, arguments and authorities submitted, the trial court granted the Trust and Foundation's motion to intervene. CP: 520-521. On this record, it cannot be said that the trial court looked at only "limited aspects" of the Trust and Foundation's claims.

2. Carl Gay Has No Competing Authority to Support His Argument That *Columbia Gorge* Is Not Controlling and Dispositive of This Case.

Carl Gay asserts that once an intervener is permitted to join a lawsuit, they are still subject to summary judgment motions. Respondent's Brief at p. 32. On this point, the parties agree. But it does *not* follow that interveners' claims are subject to summary judgment motions based upon the statute of limitations. Based upon the holding in *Columbia Gorge*, once a CR 24 motion to intervene has been granted, statute of limitations arguments against the intervener plaintiffs are moot.

The cases that Carl Gay cites to support his argument to the contrary did *not* involve summary judgment motions against interveners based upon the statute of limitations. Carl Gay simply has no cases that support his argument.

However, there *are* cases that support the Trust and Foundation's argument. Washington courts look to federal decisions and analysis for

guidance on this issue. *See, Columbia Gorge*, n. 2. And federal law is clear: where a case is otherwise timely filed against a defendant, the statute of limitations should be tolled for potential interveners thereby permitting timely motions to intervene even after the statute of limitations has run on their individual claims. "The [Supreme] Court explained that the purposes of the statutes of limitation were satisfied because the defendant was on notice and had the essential information to defend." *Columbia Gorge*, 98 Wn. App. at 625, citing, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-555, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). The fact that the *American Pipe* case was a class action does not detract from the reason for the rule.

Here, the legal malpractice action was timely filed against Carl Gay by Jennifer Linth. He possessed all the essential information he needed to defend against the claims of the Trust and Foundation – a fact that must be accepted as true under the reasoning of the above-referenced case law where the trial court granted the motion to intervene. Indeed, Carl Gay concedes that he was on notice and had all the essential information he needed to defend against the claims of the Trust and the Foundation: the Complaint of the Trust and the Foundation is "essentially identical to the Linths' individual action [timely] commenced in 2009 [and] [t]hese complaints primarily center on allegations of Gay's actions in 2000 and 2001, citing nothing beyond the year 2001." Respondent's Brief at pp. 7-8.

B. Assuming, *Arguendo*, That *Columbia Gorge* Is Not Applicable to These Facts, the Trial Court Erred by Granting Summary Judgment Where Questions of Fact Remain About Carl Gay's Fraudulent Concealment. The Facts Support Tolling the Statute of Limitations as to the Trust and the Foundation.

As argued in the Opening Brief of the Trust and Foundation, Washington courts have extended the application of the discovery rule to toll the statute of limitations in professional malpractice cases, such as this, where plaintiffs could not have immediately known of their injuries, or the cause of their injuries, because the professional concealed material facts from the plaintiffs. *Alexander v. Sanford*, 181 Wn. App. 135, 325 P.3d 341 (2014) (citations omitted); *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 163, *rev. den.* 132 Wn.2d 1008 (1997). Whether the discovery rule applies to toll the statute of limitations is a question of fact, and can only be decided as a matter of law "if reasonable minds can reach but one conclusion." *Alexander*, 181 Wn. App. at 169. The trial court erred in the first instance by deciding the statute of limitations had run on the Trust's and the Foundation's claims, as a matter of law, where the record is replete with questions of fact related to Carl Gay's fraudulent concealment. Carl Gay fails to address this argument in his Brief. RAP 11.2(a); *see also*, *infra*, sec. C.1.a.

As to the Trust, Carl Gay actively concealed, or failed to disclose, his conflict of interest. Appellants refer the Court to Reply Brief of Appellant Jennifer Linth at sec. B.3., and rely upon those arguments as though fully set forth here. When a duty to disclose exists, the suppression of a material fact is tantamount to an affirmative

misrepresentation. *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994).

As to the Foundation, after Mrs. Plant died, Carl Gay represented that *he* alone was responsible for creating and funding the Foundation. CP:386, 878 (par. 12); *see also*, CP:116-117. Less than two months after Mrs. Plant died, Carl Gay wrote: "We are in the process of creating and funding the nonprofit foundation in accordance with Evelyn Plant's revocable trust." CP:386. Yet he never formed the Foundation. Consequently, the Foundation never had the opportunity to assert its rights during the dispute resolution process that resulted in a Non-Judicial Dispute Resolution Agreement (CP:474-502).

The *reason* for his failure to create the Foundation is where Carl Gay's fraud comes into play and the reason why the statute of limitation should be tolled for the Foundation's claims against Carl Gay. Before Mrs. Plant died, the parties agree that Claudia Smith was charged with creating the Foundation. Carl Gay continually asserts that neither he nor the Trustee – Dan Doran – could agree with Claudia Smith's proposed Foundation Plan. Respondent's Brief at p. 21; CP: 470-471. But Dan Doran *did* approve of the Foundation Plan that Claudia Smith had prepared both *before* and *after* Mrs. Plant died. CP: 399-404. After March 1, 2001, Claudia Smith had no further relevant contact with either Dan Doran or Carl Gay. CP:403. The facts reveal that through March 2001 (and contrary to his arguments), Carl Gay appeared to accept the Foundation Plan drafted by Claudia Smith. *See*, CP:385-391. Yet – on

March 30, 2001 – Carl Gay must have started to realize his failure to know about the estate tax consequences of gifting real property to a 501(c)(3) charitable corporation with a life estate attached thereto. This is when Carl Gay started searching for a lawyer to advise him. CP:390-391 It quickly became clear that the estate plan that Carl Gay put in place for Evelyn Plant was unravelling. *See*, CP:351, 363. The estate taxes, for which he did not plan, would likely require that the Green Point property be sold in order to pay them. The charitable beneficiary from the original Trust Declaration – CRISTA Ministries – was making a claim to the Green Point property because there were questions about the validity of the Amendment drafted by Carl Gay and the Foundation had not been formed. *Id.* The lawyer that Carl Gay retained stated, in no uncertain terms, that Carl Gay had a conflict of interest and that the Trustee of the Trust that Carl Gay had drafted, had a viable malpractice action against him. CP:392-395, 338-344 (reconsideration motion). The only way out for Carl Gay was to renounce the validity of the Amendment (which would explain why Carl Gay never formed the Foundation), and push the parties to Non-Judicial Dispute Resolution.

Carl Gay may not agree with this version of the facts, but there are citations to the record for each fact. And, on review of a summary judgment, every reasonable inference from the facts must be indulged in favor of the nonmoving party and all doubts must be resolved in favor of the Trust and the Foundation. *Bohn v. Cody*, 119 Wn. 2d 357, 362, 832

P.2d 71 (1992). The trial court erred in granting summary judgment to Carl Gay with these facts unresolved.

C. Reversal is Required for the Additional Reasons That Carl Gay's Motion for Summary Judgment Was Laden With Procedural Errors and Additional Questions of Fact.

1. The Trial Court Abused Its Discretion When It Refused to Either (1) Strike Portions of the Reply Declaration of Carl Gay or (2) Permit the Trust and Foundation to Respond to the New Arguments and Factual Allegations Contained in the Same Declaration Before Ruling on Summary Judgment. CR 56(e) and (f).

(a) Carl Gay Failed to Address These Critical, and Ultimately Dispositive, Issues.

Carl Gay presents no argument or authorities in response to Appellants' Assignments of Error 3 and 4 and the related Issues Pertaining to Assignments of Error No.'s 1, 2, 3, 5, and 6. On appeal, a respondent who elects not to file an appellate brief, or to present arguments on issues raised, allows his or her opponent to put unanswered arguments before the court, and the court is entitled to make its decision based on argument and the record before it. *Adams v. Dept. of Labor and Industries,* 128 Wn.2d 224, 905 P.2d 1220 (1995). Likewise, here because Carl Gay has failed to respond in writing to the assignments of error and issues set forth above related to CR 56(f), he is prevented from presenting any oral argument on these issues. RAP 11.2(a).

(b) The Trust and the Foundation Had No Opportunity to Respond to the New Evidence and Arguments Submitted Through the Reply Declaration of Carl Gay. This Fact Alone Warrants Reversal and Remand.

The moving party must raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. *White v. Kent Med. Ctr. Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). "Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." *Id.*, at 168. Here, Carl Gay submitted his reply declaration in support of his motion for summary judgment on June 14, 2013. CP:350-380. In this declaration, Carl Gay asserted for the first time that "by the time of the mediation in early 2004," he no longer represented the Trust or the Trustee. CP:351. At the hearing three days later on June 21, 2013, counsel for the Trust and Foundation requested additional time to present evidence to show that Carl Gay continued to represent the Trust and the Trustee well after that date. RP: June 21, 2013 at pp. 24-25. The trial court refused and held: "I accept Gay's declaration that he no longer represented the trust after 2004." RP: June 21, 2013 at p. 37.

CR 56(f) specifically permits a trial court to continue a summary judgment determination when the party opposing the motion cannot, for reasons stated, present affidavit facts essential to justify his opposition. It is sufficient justification for the trial court to have granted a continuance where Carl Gay raised new facts just three days before the hearing – *especially where the trial court based its decision on those new facts.*

Counsel for the Trust and Foundation specifically represented that he would provide evidence showing that Carl Gay continued to represent the Trust and the Trustee after 2004. The trial court abused its discretion in failing to continue the hearing on summary judgment under these circumstances. *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990) (trial court abuses its discretion in denying a motion for continuance of summary judgment proceeding where moving party offers good reason for delay in obtaining evidence and moving party states what evidence would be established through additional discovery, and that the evidence sought will raise a genuine issue of material fact. CR 56(f).)

Finally, Carl Gay takes the essence of the error and ineffectively attempts to use it against Appellants: "[t]he Trust and the Foundation provided no evidence to the contrary to rebut Gay's declaration that he was not involved in trust matters after 2004, nor have the Linths done so on appeal, . . ." Respondent's Brief at p. 26. This assertion is illogical since the trial court prevented the Trust and the Foundation from rebutting Gay's declaration and, new evidence is not permitted on appeal. RAP 9.11.

(c) The Reply Declaration of Carl Gay Was Full of Inadmissible Hearsay Statements That Should Have Been Stricken, and When They Are, the Declaration Is Reduced to Nothing More Than Arguments Without Facts.

Affidavits made in support of a summary judgment motion must meet several requirements. CR 56(e) requires that the affidavits; (1) be made on personal knowledge, (2) set forth such facts as would be

admissible in evidence, and (3) show affirmatively that the affiant is competent to testify to what is in the affidavit. The problem with the Reply Declaration of Carl Gay is that it is replete with inadmissible hearsay statements and should have been stricken, in its entirety.[2] ER 801(c) (Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.); *Charbonneau v. Wilbur Ellis, Co.*, 9 Wn. App. 474, 512 P.2d 1126 (1973) (hearsay evidence within an affidavit is not sufficient to support a summary judgment motion).

In shortened form, following are some of the more glaring hearsay statements from Carl Gay's Declaration:

- "Dan Doran, received a letter dated July 11, 2001" CP: 351
- "All this information (about forming the Foundation) was known to the trustees" CP: 352
- "The trustee, Dan Doran . . . knew the decedent, understood her intent and purposes, and could not agree with the Foundation plan put together by Claudia Smith." CP: 353.
- Trustee Dan Doran retained custody and control of his own files and records, which were turned over by him, to successor trustees, including Jennifer Linth." CP: 354.

[2] Counsel for the Trust and Foundation moved to strike the Reply Declaration of Respondent Gay "because it contains very little factual information." While he did not specifically identify ER 801(c), counsel's motion to strike was sufficient to preserve this error.

Each of these statements are made about contested issues of fact and when they are stricken from the Reply Declaration, the Declaration becomes nothing more than argument of counsel.

2. Carl Gay Fails to Cite to the Record to Support His Position in Violation of RAP 10.3 and 10.4.

In his effort to avoid the obvious problems with the lack of admissible evidence to support his actions *vis a vis* the Trust and Foundation, Gay's "Counterstatement of the Case" contains both sentences and full paragraphs without any citation to the record. RAP 10.3(a)(5), (6) and RAP 10.3(b) require that reference to the relevant parts of the record must be included for each factual statement contained in the sections of the parties' briefs devoted to the statement of the case and to argument. RAP 10.4(f) provides that references to the record should designate the page and part of the record which supports each factual statement contained in the statement of the case and in the argument. "The purpose of these rules is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs and efficiently and expeditiously to review the relevant legal authority." *Hurlbert v. Gordon*, 64 Wn. App. 386, 824 P.2d 1238 (1992); *see*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992) (An appellate court has no obligation to search the record for evidence supporting a party's arguments).

3. There Are Unresolved Questions of Fact Concerning Carl Gay's Representation of the Trust That Require Reversal of the Trial Court's Order and Remand.

There were obvious questions of fact that should have prevented the trial court from entering summary judgment and certainly require reversal of that order now. The following are two examples related to Carl Gay's representation of the Trust:

A. Does Carl Gay represent the Trust?

> I have never represented the Trust or the Foundation.

CP:471.

> . . . I was replaced by S. Brooke Taylor, Esq. as attorney for the trust . . .

CP: 351.

> I've represented the trustee and through that representation have performed tasks on behalf of the Trust.

CP: 352.

B. Did Carl Gay ever stop representing the Trust, and if so, when?

> . . . I was replaced by S. Brooke Taylor, Esq. as attorney for the trust and for Dan Doran, the trustee, by the time of the mediation in early 2004. After that time, I had no further involvement as representative of the trustee or in any other matters related to the estate of Evelyn Plant, the decedent.

CP: 351.

But this is exactly why the trial court abused its discretion when it failed to grant the Trust and Foundation's CR 56(f) motion. Carl Gay has never been deposed and the little discovery that was conducted prior to Carl Gay filing his motion for summary judgment was met with objection.

No Notice of Withdrawal or Notice of Substitution was ever produced in response to discovery requests. This is the very point upon which counsel for the Trust and Foundation sought a continuance.

III. CONCLUSION

Based upon the facts and arguments included herein, and on Appellants' Opening Brief, the Trust and Foundation respectfully request that the Court enter an Order reversing the trial court and remanding this matter to the trial court.

Respectfully submitted this 1st day of May, 2015.

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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. I hereby certify that on May 1, 2015, I caused true and correct copies of the AMENDED REPLY BRIEF OF APPELLANTS, THE EVELYN PLANT TESTAMENTARY TRUST AND THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATION document to be electronically filed with the Clerk of the Court using the JIS -Link system, and which Clerk of Court will send notification of such filing to the following via email:

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