No. 94791-1

SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
JUL 20 2017
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By________

No. 34540-8-III

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

EPIC,

Appellant,

v.

CLIFTONLARSONALLEN,

Respondent.

FILED
JUL 26 2017
WASHINGTON STATE
SUPREME COURT

PETITION FOR REVIEW

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A. Introduction and Identity of Petitioner

EPIC seeks review of the decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

The Court of Appeals, Div. III, issued a decision dated June 20, 2017, terminating review. A copy of the decision is in the Appendix at A-1 through A-24.

C. Issues Presented for Review

1. May a court enforce an auditing accountant's two-year contractual limitations clause against its client's ability to file a lawsuit against it for the accountant's negligent audits when the client did not have any notice of actual and appreciable damage caused by the improper audits?

2. Does a contractual limitation provision in an auditing accountant's contract with a nonprofit start to run prior to the accountant's client receiving any knowledge that the accountant committed any negligence that caused damage to the client?

3. Does a client's malpractice and negligent misrepresentation claims based on deficient work by the accounting firm in 2007-2010 accrue when the client learns of errors by the client's chief financial

officer ("CFO") in 2011 or not until the client learns that the accounting firm committed error in years 2007-2010?

4. Does the application of a contractual limitations period shorter than the statute of limitations, commencing prior to accrual of any claim against accountants, which operates to shield accountants from liability for deficient work, raise an issue of substantial public interest?

D. Statement of the Case

1. EPIC retained CLA to audit its financial practices to assure compliance with grant funding requirements in years 2007-2011.

EPIC is a non-profit corporation that receives Head Start and Migrant Education program funding from the U.S. Department of Health and Human Services ("HHS"). CP 8-9. The grant funding contains restrictions on how it is used. CP 9.

EPIC retained CLA to perform auditing services. *Id.* In CLA's engagement letters for the years 2009-2010, there were provisions expressly providing that CLA was to determine whether EPIC was properly administering federal grant funds, in accordance with OMB Circular A-133. CP 54, 68.

CLA's audit engagement letters provided that any claims arising out of the audits must be brought within two years of delivery of the audit. CP 38, 44, 52, 57, 70, 79. CLA's audits from 2007-2010 did not note any

errors in EPIC's handling of grant funds (violations of OMB Circular A-133) during those years. CP 9. CLA delivered the 2010 audit to EPIC in March 2011. CP 95.

2. <u>HHS discovered financial mismanagement of grant funds by EPIC in 2011, requiring EPIC to return grant funds and decline to seek future grant funds for two years</u>.

In January 2012, HHS notified EPIC of discrepancies in the matching of grant funds for grant year 2011 and expenses incurred in grant year 2011. CP 157-164. The letter stated:

> [EPIC] drew down Head Start funds when expenses were recorded but held invoices in [Accounts Payable] or held back checks, delaying disbursement; therefore, it was not in compliance with the regulation.

CP 162. The letter required EPIC to take corrective action within 90 days, without stating what that corrective action had to be. *Id.* No part of the letter indicated that EPIC's auditors had committed any negligence, nor did the letter address EPIC's handling of grant funds in years prior to 2011. The letter did not request that EPIC repay any funds or warn EPIC that it would have to repay any funds to the federal government.

In February 2013, HHS notified EPIC that due to the failure of EPIC to comply with grant funding rules in 2011, EPIC was asked to refund $1,146,039 of 2011 grant funds. CP 9. EPIC was able to appeal and ultimately reduce the final amount it had to repay to $303,287. CP 9.

3. EPIC diligently attempted to determine whether CLA had breached any duties in performing its audits in years 2007-2010.

When EPIC's senior management found out that EPIC's CFO had been violating grant-funding rules by using grant funds from one time-period to pay expenses incurred in a different time-period, they put a stop to it. CP 146. EPIC terminated its CFO due to his apparent inability to properly manage Head Start funds. *Id.*

In August 2013, after HHS reduced the amount of 2011 funding EPIC would have to repay, EPIC began focusing on (1) how the mismatching occurred, (2) how long it went on, and (3) whether CLA could have uncovered it sooner, alerting EPIC prior to HHS finding out, so EPIC could have corrected the problem without having to either repay grant funds to HHS or decline to seek grant funds in 2013. CP 146.

In September 2013, EPIC retained Tiffany Couch, a forensic accountant, to investigate CLA's work. *Id.* She did not provide a report to EPIC until June 2015. *Id.* That is the only evidence in the record as to when EPIC learned that it did have grounds for a malpractice claim against CLA.

Couch found that there were consistent errors in handling federal grant funds in years 2007-2010 (and 2011) that the auditors should have

detected. CP 149. The failure to identify these errors likely breached the standard of care for auditors. *Id.*

The errors in handling Head Start-related funds in 2011 (comparable to errors going back to 2007) were the basis for Head Start's decision to require EPIC to repay those funds for 2011. *Id.*

Couch opined that the two-year limitation in CLA engagement letters for bringing a claim, commencing upon delivery of the audit, is unreasonably short, as many errors by auditors will not become apparent to the principal within that two-year period. *Id.*

4. EPIC commenced this action in December 2015.

EPIC commenced this action in December 2015. CP 8. It asserted claims for legal malpractice/professional negligence, negligent misrepresentation, and breach of contract, all arising out of CLA's audits of EPIC in years 2007-2010. CP 8-11.

5. The Court of Appeals affirmed the trial court's summary judgment that all of EPIC's claims were barred by the expiration of the two-year contractual limitations period that commenced upon delivery of the audit.

CLA moved to dismiss under CR 12(b)(6) and for judgment under CR 56 on the basis that EPIC's claims were time-barred by the two-year limitations period. CP 12. CLA relied upon CLA's engagement letters from 2007-2011 that contained the limitations clause. *Id.*

The trial court granted CLA's motions. CP 178. This appeal timely followed. CP 184.

The Court of Appeals affirmed the summary judgment. Opinion dated June 20, 2017. In the decision, the Court of Appeals asserted that "EPIC does not identify any material fact which it knew when it filed the lawsuit in December 2015 that it did not know by February 2012." Opinion, p. 20. This statement ignores, at a minimum, (1) HHS' notice in February 2013 seeking to have EPIC repay $1.1 million, (2) HHS' final notice in August 2013 of the final repayment required being $300,000, and (3) Couch's report in June 2015 that indicated that CLA may have violated its standard of care in 2007-2010.

E. Summary of Argument

The published decision below from Division III conflicts with Division I's decisions in *Murphey v. Grass*, 164 Wn.App. 584, 267 P.2d 376 (2011) and *Sabey v. Howard Johnson & Co.*, 101 Wn.App. 575, 5 P.3d 730 (2000), as to when a claim "accrues" in determining whether it is timely commenced. This conflict supports review under RAP 13.4(b)(2).

In *Murphey*, *supra*, the plaintiff's claims were that its accountant negligently prepared tax returns, which, after administrative appeals, ultimately resulted in the government requiring the plaintiff to pay additional amounts in taxes and penalties. The accountant asserted the

claims were time-barred, arguing they "accrued" when the government first requested the plaintiff pay additional taxes and penalties. The Court of Appeals disagreed, determining the claims did not "accrue" until the government issued a final decision requiring the plaintiff to pay. Until that final decision, the plaintiff had not been damaged.

Sabey, supra, addressed accrual of a negligence and negligent misrepresentation claim. A negligence claim "accrues" when a plaintiff has a right to seek relief in the courts, which requires an actual injury. 101 Wn.App. 592-3. The negligent misrepresentation claim does not accrue until the plaintiff also discovers the misrepresentation. *Id.*

Sabey involved the purchase of a corporation with an underfunded pension plan. The issue was when the plaintiff was damaged: "The question here is when Sabey was damaged." 101 Wn.App. 593. The defendant argued the plaintiff was damaged when there was some knowledge of a problem with the pension plan. The Court of Appeals disagreed, ruling the plaintiff was not injured, so the negligence claim had not accrued, until the plaintiff was requested to pay funds. 101 Wn.App. at 594.

The Court of Appeals here ruled that as a matter of law, EPIC was damaged when it became aware of issues with its handling of grant funds, not later when EPIC was asked to repay grant funds. The effect of the

Court of Appeals error was to find that EPIC's malpractice claim accrued within the contractual limitations period, making that limitations period enforceable.

The Court of Appeals did not determine when EPIC learned of CLA's misrepresentations regarding the 2007-2010 audits. If EPIC did not learn (and should not have learned through reasonable diligence) of the misrepresentations until after March 2013, the limitations period would not be enforceable against EPIC's negligent misrepresentation claim.

In addition to misapplying the law on when a party is damaged and its claim accrued, the Court of Appeals decision has the effect of allowing accountants to shield themselves from liability by including unreasonable limitations provisions in contract that require their clients to commence claims prior to the clients being aware that they have a claim. Whether accountants, a highly regulated profession with obligations to clients set forth in RCW 18.04.105 *et seq.*, should be permitted to shield themselves from liability for their negligence that harms clients raises an issue of substantial public interest that should be decided by this court, supporting review under RAP 13.4(b)(4).

F. Argument Why Review Should be Granted

1. Division III's published opinion conflicts with Division I's published opinions on accrual of claims.

Division III's ruling that a claim against an auditor accrues when a client learns of errors by its CFO conflicts with the Division I standard that such a claim does not accrue until the plaintiff is asked to pay money.

The damage necessary for a claim to accrue must be "actual" and "appreciable," not the "mere danger of future harm." *Haslund v. Seattle*, 86 Wn.2d 607, 619-20, 547 P.2d 1221 (1976). A client's malpractice claim against its accountants, where the damages consist of amounts the client has to pay to the government, "accrues" when the government requests an amount to be paid that is attributable to the accountant's malpractice. *Murphey*, 164 Wn.App. at 594-5.

Here, the question of when EPIC's claim against CLA "accrued" arises in the context of the enforceability of the provision in the EPIC-CLA contract that a claim must be commenced within two years of delivery of the audit. Such a contractual limitations period is only enforceable if it is "reasonable." Courts will not enforce a contractual limitation period that is unreasonable. *Yakima Asphalt & Paving Co. v. Dept. of Transportation*, 45 Wn.App. 663, 666, 726 P.2d 1021 (1986).

The effect of CLA's contractual limitations clause, if enforceable, is to shorten the time period in which EPIC must commence an action. Under the applicable statute of limitations of RCW 4.16.080, the time period is three years, not two, and it commences upon EPIC's "discovery" of the basis for its claim, not the earlier delivery of the audit.

In deciding whether a shorter contractual limitations period is reasonable, courts examine the reasons offered by the plaintiff for why the limitations period was not reasonable and whether it left the plaintiff with a reasonable opportunity to bring its claim. In *Syrett v. Reisner McEwin & Assocs.*, 107 Wn.App. 524, 24 P.3d 1070 (2001), the court noted that the plaintiff provided "no explanation why" the contractual limitation period "should not be viewed as reasonable." In contrast, EPIC provided reasons. EPIC was not damaged by CLA's auditing errors until HHS took action against EPIC, which did not occur until more than two years after CLA delivered the audits for the years 2007-2010.

Syrett cited with approval *Sheard v. United States Fid. & Guaranty Co.*, 58 Wn. 29, 107 P. 1024 (1910), where this court noted that a contractual limitation period that required a plaintiff to commence the action prior to being able to ascertain its "pecuniary loss" was "unreasonable." 58 Wn. at 35.

Syrett also cited *Nicodemus v. Milwaukee Mutual Ins. Co.*, 612 N.W.2d 785 (Iowa 2010), striking down a two-year contractual limitations period as unreasonable, as it did not provide the plaintiff sufficient time to ascertain and investigate the claim and prepare for the controversy. It is *per se* unreasonable to require a plaintiff to commence an action prior to the date when "the loss or damage is capable of being ascertained." 612 N.W.2d at 787. A limitations period that in essence abrogates the right of recovery is unenforceable. *Id.* at 788.

The two cases cited in *Syrett* with approval show that a limitations period that expires before or soon after the plaintiff becomes aware it was damaged, such that the plaintiff does not have an opportunity to commence the action before the limitations period expires, is unreasonable and unenforceable.

The Court of Appeals cited *Sheard* in requiring that CLA's two-year limitation period would only be enforced if EPIC had a reasonable opportunity to discover it had a claim against EPIC and to prepare and file that claim by March 2013. The question before the Court of Appeals was how long (if at all) prior to March 2013 had EPIC's claim "accrued," and did that provide EPIC with a reasonable opportunity to commence an action prior to March 2013 arising out of that audit.

EPIC did not have a reasonable opportunity to ascertain that CLA's 2007-2010 audits were deficient, and that EPIC had been damaged by those audits, until HHS issued its final disallowance in August 2013. It was not reasonable to require EPIC to commence a malpractice action prior to EPIC being damaged.

Even if EPIC had notice that it was damaged by HHS' preliminary notice in February 2013, the limitations period is not sufficient. EPIC would have only a month at most to investigate, obtain an expert and determine that CLA had been negligent in not catching the CFO's errors earlier, consult with and retain counsel, and commence an action arising out of the 2010 and earlier audits.

In addition, February 2013 is more than two years after delivery of the 2007-2009 audits, so the two-year contractual limitations period in those audits, if enforced, would have required EPIC to initiate an action arising out of those audits prior to EPIC being aware of any problem.

The Court of Appeals did not provide a reason for why a two-year contractual limitations period, commencing upon delivery of the audit rather than accrual of the cause of action, was necessary for CLA or reasonable for its business. When courts enforce a shorter limitations period than the applicable statute of limitations, the court explained why it was reasonable in those circumstances.

When courts have enforced shorter contractual limitations periods, the limitations period commenced after the plaintiff had suffered some loss or damage, not mere delivery of a document. In *Wothers v. Farmers Ins. Co.*, 101 Wn.App. 75, 5 P.3d 719 (2000), the contractual limitations period commenced upon the date of the plaintiff's loss. 101 Wn.App. at 79. In *Yakima Asphalt, supra*, the plaintiff would be aware of his damage prior to the limitations period commencing. 45 Wn.App. at 766. EPIC had not suffered any loss at the time CLA delivered its audits.

The two-year limitations period, which expired before EPIC sustained any "actual damage" such that the claim accrued, was unreasonable here. The Court of Appeals determination of the accrual date conflicts with *Murphey* and *Sabey*, resulting in the Court of Appeals erroneously affirming that the malpractice claim was time-barred.

The Court of Appeals failure to determine when EPIC should have learned of CLA's misrepresentations conflicts with Sabey on accrual of a negligent misrepresentation claim.

2. The Court of Appeals failed to view the evidence in the most favorable to EPIC in determining whether EPIC had a reasonable opportunity to discover it had a claim prior to the expiration of the contractual limitations period.

As the party opposing summary judgment, EPIC was entitled to all favorable inferences from the evidence in determining whether the

limitations period was reasonable. A party opposing summary judgment is entitled to have the court view the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Roger Crane & Associates v. Felice*, 74 Wn.App. 769, 875 P.2d 705 (1994).

Here, the Court of Appeals sought to determine whether EPIC's claims accrued in time for EPIC to commence its claim with the contractual limitations period that expired in March 2013. In doing so, it applied the rules regarding when a plaintiff's claim has "accrued" for the purpose of the discovery rule for commencing the statute of limitations.

The discovery rule tolls the statute of limitations until the cause of action accrues. *Sabey v. Howard Johnson & Co.*, 101 Wn.App. at 592-3. The discovery rule applies to malpractice actions against accountants. *Hunter v. Knight, Vale and Gregory*, 18 Wn.App. 640, 644, 571 P.2d 212 (1977).

Under the discovery rule, a party's claim is deemed to accrue when a party exercising due diligence would have discovered the facts supporting the claim. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006).

Whether a plaintiff has exercised due diligence is a question of fact. *Mayer v. City of Seattle,* 102 Wn.App. 66, 76, 10 P.3d 408 (2000).

The issue of whether a plaintiff has suffered actual damages, such that its claim accrued, "can be decided as a matter of law if reasonable minds could reach but one conclusion." *Hudson v. Condon,* 101 Wn.App. 866, 875, 6 P.3d 615 (2000). Because the statute of limitations is an affirmative defense, the burden of proof is on the defendant. *Mayer,* 102 Wn.App. at 76.

Whether EPIC, exercising diligence, should have "discovered" its claims within two years of delivery of the audit, such that its claim accrued within time for EPIC to commence its action within the limitations period, is a question of fact. The Court of Appeals erred by ruling as a matter of law that EPIC should have been aware it had a claim and commenced its action within two years of delivery of the audit.

In doing so, the Court of Appeals failed to grant favorable inferences to EPIC. It concluded that EPIC should have known it had a claim against CLA based solely upon HHS' notice in January 2012 that EPIC had mismanaged grant funds in 2011 and that it was necessary for EPIC to take corrective action.

The Court of Appeals failed to view January 2012 notice in the light most favorable to EPIC. That notice did not describe what that "corrective action" would be, with no hint that it would require repayment

of grant funds. That notice also did not question why EPIC's auditors did not discover EPIC's mismanagement of grant funds.

In addition, the January 2012 notice addressed mismanagement of 2011 grant funds, with no reference to prior years. EPIC's claims against CLA were based on CLA's failure to uncover EPIC's mismanagement of grant funds in years prior to 2011, to enable EPIC to address the problem prior to HHS discovering the mismanagement and requiring EPIC to repay funds. The January 2012 notice was not notice of the factual basis for EPIC's claims against CLA, at least when viewed most favorably to EPIC.

In response to this January 2012 notice, rather than pursuing litigation, EPIC attempted to take corrective action as it understood the letter required. EPIC fired the employee responsible for mismanaging the funds. EPIC instituted new procedures to be sure to comply with HHS grant funding rules. EPIC did not go back to examining the years prior to 2011 until August 2013.

At a minimum, reasonable minds could differ on whether the January 2012 notice, which said nothing about CLA's failure to uncover the mismanagement of grant funds, and did not request EPIC to repay any funds, put EPIC on notice that it had a malpractice claim against CLA.

EPIC's negligent misrepresentation claim not only required that EPIC be damaged for it to accrue, it also required that EPIC discover

CLA's misrepresentation. EPIC did not learn about the mismanagement of grant funds in years prior to 2011, which CLA negligently misrepresented in the audits from 2007-2010 had not occurred, until EPIC began looking back to prior years in August 2013, after mitigating its damages. EPIC's negligent misrepresentation claim, viewing the facts most favorable to EPIC, did not accrue until at least August 2013, after the contractual limitations period for claims arising out of the 2010 audit expired.

The denial of summary judgment would not deny CLA the protection of the limitations period in its contract. CLA would still be free to argue at trial that EPIC should have been able to determine, with reasonable diligence, the basis for its claims prior to March 2013, to enable to the court to determine whether the two-year limitations period was enforceable.

3. A substantial public interest exists in whether an auditing accountant, who is required to follow federal accounting standards, may use a contractual limitations period to commence, and possibly expire, on a client's malpractice claim before the client knows the auditing accountant committed any negligence that damaged the client.

There is substantial interest in whether accountants can shield themselves from liability for their wrongdoing. Nothing in the record shows that EPIC had reason to know that CLA did anything wrong in

2007-2010 audits until June 2015, when the forensic auditor that EPIC hired indicated that CLA had done so. Prior to that time, EPIC only knew its CFO had committed error, but did not have any information that CLA should have caught or reported the error.

The Court of Appeals' decision imputes to EPIC knowledge of a malpractice claim against its auditor based upon knowledge that EPIC's CFO engaged in improper accounting of grant funds. Such an obligation is unreasonable and unjust. EPIC and other organizations that obtain federal grant funds retain auditors such as CLA to ensure that they themselves are in compliance with OMB Circular A-133 and other grant funding rules. They rely upon the accuracy of their auditor's work. Due to the importance of their work to organizations such as EPIC and others, accountants such as CLA are a regulated profession under RCW 18.04.015 *et seq.*

Clients of such accountants do not have the expertise to know when their CFO's work has been deficient. That is why they hire auditors. That is shown here, as even when HHS notified EPIC of the mishandling of grant funding rules by EPIC's CFO, EPIC did not immediately ask CLA why CLA had not uncovered the errors. Even when CLA later notified EPIC of mismanagement of grant funds in a later audit, CLA did not notify EPIC that CLA had failed to uncover the mismanagement of

grant funds in prior audits, even though CLA's engagement letters included checking for such compliance as within the scope of CLA's services.

Whether accountants such as CLA, who commit malpractice in performing audits of organizations that receive federal funds, and then are not candid with their unwitting clients regarding the accountants' malpractice, can avoid being accountable (no pun intended) for their malpractice by including limitations periods in their contracts that commence will be before the malpractice claim accrues, presents a question of substantial public interest, justifying review by this court.

G. Conclusion

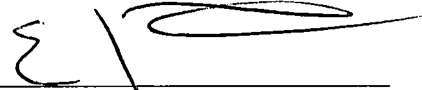
EPIC asserted valid claims against CLA for damages it incurred due to the negligence by CLA. The Court of Appeals wrongly denied EPIC its opportunity to obtain an adjudication on the merits by determining EPIC's claims accrued prior to EPIC suffering any damages, enforcing the 2-year limitations period commencing upon delivery of the audit.

The limitations period in the audit letters, which expired by the time EPIC was damaged by CLA's conduct, was not enforceable. At a minimum, there were issues of fact as to when EPIC's claims accrued. The Court of Appeals erred by ruling they accrued in January 2012 as a

matter of law, instead of permitting fact finder to determine when the claims accrued.

DATED this 19th day of July, 2017.

HULTMAN LAW OFFICE



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, on the 19th day of July, 2017, to:

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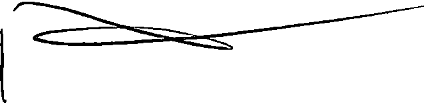
/s/ 

Eric R. Hultman

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

EPIC, a non-profit corporation, Appellant, v. CLIFTONLARSONALLEN LLP, a limited liability partnership, and RALPH CONNER, an individual, Respondents.	)))))))))))	No. 34540-8-III PUBLISHED OPINION

FEARING, C.J. — Is an auditor engagement agreement provision, which imposes a deadline for filing suit, against the auditor, within two years from the date of the last audit report, a reasonable and enforceable stipulation when the auditor's client had one year to file suit after it should have discovered any breach of duty by the auditor and any resulting damages? Plaintiff Enterprise and Progress in the Community (EPIC) appeals from a summary judgment dismissal of its suit against its former auditing firm, CliftonLarsonAllen LLP (CLA), for negligence and breach of contract. We hold the contractual provision to be reasonable under the circumstances and affirm the trial court's dismissal of the suit.

FACTS

Plaintiff EPIC, a nonprofit corporation, operates a Head Start program funded by

the United States Department of Health and Human Services Administration for Children and Families (HHS). Defendant CLA is the successor to EPIC's former auditing firms, Lemaster & Daniels PLLC and LarsonAllen LLP. This statement of facts will refer to all iterations of the auditing firm as CLA.

From 2006-2011, EPIC entered annual engagement agreements with CLA to audit EPIC's financial statements and determine whether EPIC complied with federal grant regulations. Each engagement agreement contained clauses that required EPIC to commence any legal action arising from the audits within two years. The limitations clause pertaining to the 2006-2009 audits stated:

> It is agreed by Client [EPIC] and [Lemaster & Daniels PLLC] [CLA] or any successors in interest that no claim arising out of services rendered pursuant to this agreement by or on behalf of Client shall be asserted more than two years after the date of the *last audit report* issued by [Lemaster & Daniels PLLC].

Clerk's Papers (CP) at 38, 44, 52, 57 (emphasis added). The limitation clauses in the 2010-2011 audit agreements declared:

> Time limitation
>
> The nature of our services makes it difficult, with the passage of time, to gather and present evidence that fully and fairly establishes the facts underlying any Dispute. We both agree that, notwithstanding any statute or law of limitations that might otherwise apply to a Dispute, any action or legal proceeding by you against us must be commenced within twenty-four (24) months ('Limitations Period') after the date when we deliver our *final audit report under this agreement*, regardless of whether we do other services for you relating to the audit report, or you shall be

> forever barred from commencing a lawsuit or obtaining any legal or equitable relief or recovery.
>
> The Limitation Period applies and begins to run even if you have not suffered any damage or loss, or have not become aware of the existence or possible existence of a Dispute.

CP at 70, 79 (emphasis added). All engagement agreements defined "dispute" as "[a]ny disagreement, controversy, or claim that may arise out of any aspect of our services or relationship with you." CP at 70, 79.

Pursuant to the agreements, CLA delivered the following audit reports to EPIC on the following dates:

2006 audit report	May 22, 2007
2007 audit report	March 17, 2008
2008 audit report	June 29, 2009
2009 audit report	May 18, 2010
2010 audit report	March 28, 2011
2011 audit report	September 19, 2012
2012 audit report	June 25, 2013

CLA last prepared an audit for EPIC for the 2012 year. We do not know if EPIC's financial year was the same as the calendar year.

On January 17, 2012, HHS notified EPIC that EPIC violated federal regulations by using 2011 grant money to pay expenses for another year. The disbursements reported to HHS by EPIC for 2011 exceeded the disbursements reflected in EPIC's internal

accounting records. Under federal regulations, a Head Start recipient must expend grant money received on obligations incurred during the funding period to the award, rather than accumulate the money for later payments. Among other untimely payment of bills, EPIC, in January 2011, wrote a check to one vendor but did not deliver the check to the vendor until June because of a cash flow problem. The notification directed EPIC to correct its violation of the HHS regulation within ninety days or such additional time, up to one year, as approved by an HHS official.

Shortly after receiving HHS's notice EPIC confirmed that Walter Abegglen, EPIC's chief financial officer, used grant funds from one grant year to pay expenses incurred in a different grant year. EPIC contends that Abegglen lacked knowledge that the delayed expenditures breached HHS rules. Abegglen claimed that he moved "money around just so accounts balanced." CP at 169. In February 2012, EPIC fired Abegglen due to his inability to lawfully manage Head Start funds.

After terminating Walter Abegglen's employment, EPIC's Executive Director Gary Hudson tasked EPIC's controller to investigate the rule violations alleged by HHS. EPIC's controller learned that Abegglen charged expenses incurred in the last quarter of one year to the first quarter of the next year.

Shortly after receiving the January 2012 notice EPIC began experiencing costs to address the financial problems associated with the misuse of HHS grant funds and the prospect of HHS demanding repayment of misused funds. In April 2012, EPIC borrowed

$620,000 in anticipation of repayment.

On September 19, 2012, CLA delivered the 2011 audit report to EPIC. The 2011 report identified the misuse of grant funds alleged by HHS and warned that the misuse started at least by the 2009 grant year. Note 12 in the 2011 audit report states:

> Net assets at the beginning of 2011 have been adjusted to properly reflect cash receipts on accounts receivable for prior years and to match grant expenditures without reimbursements applicable to prior years. The adjustment resulted in a decrease in net assets and an increase in accrued expenses of $331,095. The effect of the restatement on the previously reported change in net assets for the year ended December 31, 2010 has not been determined.

CP at 111. The audit report also read:

> As described in items 2011-01, 2011-02, and 2011-03 in the accompanying schedule of findings and questioned costs, EPIC did not comply with requirements regarding cash management and period of availability of federal funds that are applicable to its Head Start Cluster. Compliance with such requirements is necessary, in our opinion, for EPIC to comply with the requirements applicable to that program.

CP at 115. CLA further described the misuse of grant funds in the audit's Finding 2011-02 that stated:

> Condition: EPIC drew down funds from current Head Start grants for expenditures incurred in previous grant years.
> Questioned Costs:
> $448,885 related to November 1, 2010 through October 31, 2011 grant year
> $477,320 related to November 1, 2011 through October 31, 2012 grant year
> Context: During the reconciliation process of accounts receivable and grant draw downs, it was noted that the expenses incurred in the last month of the previous grant year were claimed on the current year grant

> draw down. This occurred for at least two consecutive prior grant years. The questioned costs noted above are the amounts dawn down on the respective grants to pay expenses incurred in October 2010 and October 2011.
>
> . . . .
>
> Recommendation: Management and the board of directors should establish policies that prevent management override of internal controls and procedures to ensure that expenditures incurred and reimbursed by Head Start are matched in the appropriate period.
>
> Views of Responsible Officials and Planned Corrective Actions: Management acknowledges finding. During the reconciliation process of accounts receivable, grant draw downs, and preparation of the second quarter 2012 draw down report, management discovered a discrepancy in the expense report from 2009. Management is currently working with the office of Head Start to resolve this issue.

CP at 119.

EPIC contends that Chief Financial Officer Walter Abegglen also mismatched expenses with grant funds in years 2007 to 2010. According to EPIC, if CLA had identified these errors in earlier audits, EPIC would not have repeated the error in 2011, and HHS would not have complained of any errors. HHS never detected any regulation violations before the 2011 grant year. Because the earlier CLA audits exposed no accounting errors, EPIC management concluded that EPIC complied with HHS regulations.

EPIC attempted to cure the deficiencies identified by HHS, in its January 17, 2012 notification, by a department deadline of December 31, 2012. EPIC secured a loan for $350,000 to cover the amount of expenses in dispute. We do not know the relationship between the $350,000 loan and the April 2012 $620,000 loan. Unfortunately, the lender

did not disburse the $350,000 loan until after January 2013. Accordingly, on February 8, 2013, HHS notified EPIC that it must repay $1,146,039 of the 2011 grant within thirty days. In June 2013, EPIC relinquished its 2013 $7,514,963 grant and its 2014 $12,392,427 grant in order to remain eligible for grants after 2014. In August 2013, HHS agreed to reduce EPIC's repayment amount to $303,287.

According to EPIC Executive Director Gary Hudson, when HHS reduced the amount of repayment in August 2013, EPIC focused on learning how the mismatching occurred, calculating the extent of the mismatching, and ascertaining whether CLA should have uncovered errors earlier. In September 2013, EPIC retained Forensic Accountant Tiffany Couch to investigate whether CLA should have unearthed and warned of the misuse of grant funds in the audits for years 2007-2011. According to Hudson, EPIC first suspected it might have a claim against CLA in September 2013.

After being hired by EPIC, Tiffany Couch contacted CLA on multiple occasions to request accounting work papers pertaining to the audits. CLA refused Couch access without a proper release. We do not know the nature of the release demanded.

Tiffany Couch delivered a preliminary report to EPIC on June 1, 2015. The report found consistent error in EPIC's handling of HHS grant funds in years 2007-2011 that CLA should have detected. Couch concluded that CLA likely violated an auditor's standard of care when failing to unearth the HHS regulation violations beginning with 2007. Couch omitted a formal finding because she lacked access to CLA's working

papers. EPIC then filed suit out of frustration from CLA refusing to disclose working papers.

PROCEDURE

On December 17, 2015, EPIC sued CLA. EPIC asserted claims for breach of contract, professional negligence, and negligent misrepresentation. EPIC alleged that CLA's audit reports for 2007-2011 failed to uncover discrepancies involving HHS grant funds and payment of expenses, thereby resulting in EPIC's epic loss of grant funding. On January 22, 2016, EPIC filed an amended complaint that added more detail to EPIC's alleged damages.

CLA filed a motion to dismiss under CR 12(b)(6) or, in the alternative, for summary judgment under CR 56. In support of its motion, the accounting firm filed the declaration of one of its lawyers, which declaration attached the pertinent engagement agreements and audit reports. CLA contended that EPIC's amended complaint failed to state a claim for the following reasons: (1) the two-year time limitation contained in each of the engagement agreements bars EPIC's claims, (2) the *in pari delicto* doctrine bars EPIC's claims, (3) the complaint fails to plausibly allege how any act or omission of the firm caused EPIC to suffer recoverable damages, and (4) the complaint fails to allege that CLA failed to perform its contractual undertaking and failed to identify a breached contractual provision.

When opposing CLA's motions to dismiss and summary judgment, EPIC filed declarations from Executive Director Gary Hudson and Forensic Accountant Tiffany Couch. Couch opined that the two-year limitation in the CLA engagement agreement is unreasonably short because the auditor's principal will not know of many auditing errors within that two-year period.

In response to CLA's summary judgment motion, EPIC argued that (1) CLA's CR 12(b)(6) motion must be treated as a summary judgment motion since the auditing firm relied on documentation outside the pleadings, (2) the *in pari delicto* defense does not apply because EPIC's agents engaged in no misconduct, (3) the two-year suit limitation deadline in the engagement letter is unreasonably short and unenforceable, (4) CLA's failure to earlier uncover the mismatching of grant funds and expenses in the years 2007-2010 caused EPIC damage by precluding EPIC from avoiding adverse action by HHS, and (5) EPIC's malpractice claim against the accounting firm may be pursued as a breach of contract claim and thus the longer contract statute of limitations applies.

In reply to EPIC's motion response, CLA filed a declaration of Ralph Conner, the partner responsible for EPIC's audits, which declaration attached the January 17, 2012 notification letter from HHS to EPIC.

The trial court granted EPIC's summary judgment motion and the motion to dismiss with prejudice. The court enforced the two-year contract limitation period and ruled the period expired before December 2015.

LAW AND ANALYSIS

Motion

EPIC contends the trial court erred when granting CLA's motion to dismiss because the court considered evidence outside the complaint and answer to the complaint. When ruling on a CR 12(b)(6) motion to dismiss, the trial court may generally consider only the allegations contained in the complaint and may not go beyond the face of the pleadings. *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487, *review denied*, 184 Wn.2d 1011, 360 P.3d 817 (2015). When either party submits affidavits, the submittals convert a motion to dismiss into a motion for summary judgment. *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25 (2016).

In support of its motion to dismiss, CLA filed an affidavit of an audit partner. In opposition to the motion, EPIC filed affidavits of its chief executive officer and its expert accountant. Thus, the motion to dismiss metamorphosed into a summary judgment motion. Nevertheless, the trial court committed no harmful error by granting the motion to dismiss. CLA alternatively moved for summary judgment. The trial court considered the submittals and granted summary judgment in addition to the motion to dismiss. On appeal, we treat the dismissal as based solely on a summary judgment motion.

Appellate courts review a trial court's order granting a motion for summary judgment de novo. *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. at 843 (2015);

Briggs v. Nova Services, 166 Wn.2d 794, 801, 213 P.3d 910 (2009). Summary judgment is appropriate 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). A material fact is one on which the outcome of the litigation depends in whole or in part. *Ranger Insurance Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Under summary judgment principles, this court construes all facts and reasonable inferences in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Casualty Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). We conclude that, based on the undisputed facts, the engagement letter's deadline for suit is enforceable and bars both the negligence and breach of contract claims.

Reasonableness of Contract Limitation Period

EPIC employs a circuitous, but astute, argument on appeal. It focuses on CLA's alleged failure to expose the HHS grant and expenditure mismatch in 2007. EPIC notes that it received CLA's 2007 audit report on March 17, 2008, but it lacked knowledge of

any negligence of CLA and damages resulting therefrom until, at the earliest, February 2013 when HHS notified EPIC of the need to return funds. According to EPIC, the two-year limitation period expired for suit based on the 2007 auditing contract on March 17, 2010, two years after the receipt of the report. Since the law refuses to impose a limitation period that expires before the claimant can assert the claim, this court, according to EPIC, must strike the contract provision. In turn, the court must impose the Washington three-year statute of limitations for the professional malpractice claim and the six-year statute of limitations for a breach of contract claim and apply a discovery rule for each cause of action. Under EPIC's contention, it filed suit within three years of its knowledge of damages in February 2013. Presumably EPIC's same argument would apply to CLA's purported negligence in failing to unearth the mismatch in the audits for the 2008, 2009, and 2010 years.

EPIC emphasizes CLA's failure to identify, in the earlier audit years, EPIC's accounting error. This emphasis prompts the argument that, had CLA caught the error in the 2007, 2008, 2009, or 2010 audits, EPIC would not have repeated the mistake during the 2011 grant year. HHS punished EPIC only for the 2011 error. To our knowledge, HHS lacks notice of the earlier grant year mistakes. EPIC may also focus on earlier years' audits because by the time it received CLA's 2011 audit, it lacked time to correct the error before HHS discovered the regulation violation.

We observe that EPIC's argument assumes that a court should strike the entirety

of an unreasonable contractual limitation period, rather than conform the contractual limitation within reasonable constraints. For example, EPIC does not admit that this court could enforce the contractual two-year time limit, but rule that the period commenced when EPIC knew of CLA's violation of the standard of care rather than the date of the receipt of the last audit.

We further note that EPIC's argument assumes that the contractual limitation period for the 2007 to 2011 audits commences to run when it received each of the respective audits. For example, CLA delivered the 2007 audit report on March 17, 2008. EPIC's contention assumes that it needed to file suit for any negligence in preparing the 2007 audit by March 17, 2010. The engagement agreement reads otherwise. For the 2006-2009 audits, any suit needed to be brought within two years of the last audit report issued by the auditing firm. CLA last delivered a report, the 2012 audit report, on June 25, 2013. Therefore, under the audit agreement, EPIC had until June 25, 2015, to file suit based on any audit between 2006 and 2009.

The limitation clauses in the 2010 and 2011 respective audit agreements require suit be brought within two years of the final audit report under that agreement. CLA delivered the 2010 audit report on March 28, 2011, and the 2011 audit report on September 19, 2012. Therefore, as to the 2010 report, EPIC could timely sue by March 28, 2013. EPIC could timely bring any suit based on any error in the 2011 report by September 19, 2014. Note that the limitation period for the 2010 and 2011 audits

expired earlier than the 2006-2009 audits, with the period for the 2010 audit expiring first.

Since EPIC attacks the reasonableness of the engagement letter's two-year deadline for filing suit and since EPIC advocates the application of the statute of limitations discovery rule, we probe the date by which EPIC should have known of any breach of duty by CLA. We then compare that date with the first possible date for a deadline in filing suit. That first possible date is March 28, 2013, the contractual time limit for filing suit based on the 2010 report. We then conclude that EPIC possessed a reasonable amount of time to file suit after it should have discovered any breach by CLA.

Parties may agree to a shorter limitations period than provided in a general statute. *Syrett v. Reisner McEwin & Associates*, 107 Wn. App. 524, 527-28, 24 P.3d 1070 (2001); *Yakima Asphalt Paving Co. v. Department of Transportation*, 45 Wn. App. 663, 665, 726 P.2d 1021 (1986). A stipulated limitation period prevails over the general statute of limitations unless prohibited by statute or public policy, or unless the provision is unreasonable. *Wothers v. Farmers Insurance Co.*, 101 Wn. App. 75, 79, 5 P.3d 719 (2000). EPIC only argues the unreasonableness of the CLA engagement letter limitation provision.

On the one hand, the stipulated limitation period is reasonable if the time allowed affords the plaintiff sufficient opportunity to ascertain and investigate the claim and prepare for the controversy. *Syrett v. Reisner McEwin & Associates*, 107 Wn. App. at

529. Washington courts have found that contractual limitations clauses ranging from three months to a year are reasonable. *City of Seattle v. Kuney*, 50 Wn.2d 299, 302, 311 P.2d 420 (1957); *Absher Construction Co. v. Kent School District No. 415*, 77 Wn. App. 137, 147-48, 890 P.2d 1071 (1995); *Yakima Asphalt Paving Co. v. Department of Transportation*, 45 Wn. App. at 666 (1986); *Ashburn v. Safeco Insurance Co.*, 42 Wn. App. 692, 695, 713 P.2d 742 (1986). On the other hand, the court will not enforce the contractual limitation period when the cause of action does not accrue before the limitation period expires. *Sheard v. United States Fidelity & Guaranty Co.*, 58 Wash. 29, 35-36, 107 P. 1024 (1910). The law will not require that a plaintiff commence action before its pecuniary loss was capable of ascertainment. *Sheard v. United States Fidelity & Guaranty Co.*, 58 Wash. at 36; *Syrett v. Reisner McEwin & Associates*, 107 Wn. App. at 529.

EPIC's challenge to the limitation period found in the auditor's engagement agreement focuses on the date of the accrual of a claim rather than the length of the limitation period. The date of accrual is the date of receipt of an audit report. Subject to the same principles that apply to contractual modification of a statute of limitations, parties may agree to set the time for accrual of causes of action arising under their contracts. *Washington State Major League Baseball Stadium Public Facilities District v. Huber, Hunt & Nichols-Kiewit Construction Co.*, 176 Wn.2d 502, 513, 296 P.3d 821 (2013). The court will enforce such a provision unless it is contrary to statute, public

policy, or it is unreasonable. *Washington State Major League Baseball Stadium Public Facilities District v. Huber, Hunt & Nichols-Kiewit Construction Co.*, 176 Wn.2d at 513. The baseball stadium suit arose from a construction contract, but we see no reason not to apply these principles to an auditing services contract.

CLA argues that, under the language of its auditing contract, its client EPIC's ability to discover its claim is immaterial. CLA emphasizes the language in its later agreements: "The Limitation Period applies and begins to run even if you have not suffered any damage or loss, or have not become aware of the existence or possible existence of a Dispute." CP at 79. We consider such an argument to conflict with *Sheard v. United States Fidelity & Guaranty Co.* CLA cites *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004) in support of its argument. Nevertheless, *Adler v. Fred Lind Manor* merely states the general proposition that parties to a contract shall be bound by its terms. *Adler v. Fred Lind Manor*, 153 Wn.2d at 344. Of course, this general rule engenders many exceptions, and courts refuse to enforce many contractual terms.

CLA may argue that its contractual deadline constitutes a period of repose not a suit limitation period. CLA may further argue that a period of repose may be enforced despite the claimant lacking any knowledge of the claim within the stated window of time. Indeed, statutes of repose bar a suit if the claimant has not been damaged within a time period. RCW 7.72.060(1)-(2). Nevertheless, the CLA engagement letter imposes a

limitation period not a repose period.

Statutes of repose are of a different nature than statutes of limitation. *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 211, 875 P.2d 1213 (1994). A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time. *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 574, 146 P.3d 423 (2006). A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred. *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d at 574-75. Although the CLA auditing agreement reads that the deadline for suit will apply even if the client does not discover the harm within the deadline, the agreement contains no express provision that the client must be harmed within a set time frame. Instead, the agreement imposes a deadline for bringing suit.

EPIC argues that it lacked a reasonable opportunity to ascertain that CLA's audits were deficient until HHS issued its disallowance in August 2013. EPIC further argues that, even if we move the date backward to February 2013 when EPIC received HHS' preliminary notice, the two-year deadline for suit is inadequate based on the earliest deadline of March 2013 for the 2010 report. EPIC would own only a month at most to investigate, obtain an expert's opinion of whether EPIC possessed a claim against CLA, consult with and retain counsel, and commence an action arising out of the 2010 audit. Principles of law emanating from the discovery rule disagree.

Under statute, the limitation period begins to run when the plaintiff's cause of

action accrues. RCW 4.16.005. 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 318 (2015). In many instances, an action accrues immediately when a wrongful act occurs, but, in some circumstances, a plaintiff can be unaware of the harm until a later time. *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d at 575 (2006). 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. *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d at 576. The diligence element of this test is generally a question of fact, but it is proper for the trial court to resolve the issue as a matter of law if reasonable minds cannot differ as to the interpretation of the relevant facts. *Martin v. Dematic*, 178 Wn. App. 646, 653, 315 P.3d 1126 (2013).

HHS notified EPIC of the misuse of Head Start funds on January 17, 2012. The report warned of failing to timely expend grant money and spending one year's grant in another year. EPIC had available then the 2010 audit report in addition to earlier reports. A review of the 2010 report would have confirmed that CLA failed to warn EPIC of its violation of the federal regulations. A review of EPIC's own accounting records would have shown that EPIC violated the regulations in each year beginning in 2007. In January 2012, EPIC still enjoyed fourteen months in which to file suit against CLA.

As a result of the January 2012 letter from HHS, EPIC took immediate action, including terminating the employment of its chief financial officer, that confirms EPIC had reason to question the completeness of CLA's audits. After terminating the financial officer's employment, EPIC's Executive Director Gary Hudson tasked EPIC's new controller to investigate the rule violations alleged by HHS. EPIC's controller learned that her predecessor charged expenses from the last quarter of one year to the first quarter of the next year. EPIC began incurring expenses by February 2012 to address the financial problems associated with the misuse of funds and the prospect of having to repay some portion of the misused funds. In April 2012, EPIC took a loan of $620,000 in anticipation of repayment. Therefore, EPIC knew then that any failure to catch the mistake by CLA was reaping damage. EPIC owned then eleven months, in which to sue CLA. In the September 19, 2012 audit report, CLA disclosed such misuse dating back to at least the end of 2009. Washington enforces a deadline as short as three months.

Based on the declaration of its expert, Tiffany Couch, EPIC promotes the reasonableness of delaying suit until the expert conclusively determined that CLA breached the auditor's standard of care. But EPIC's position conflicts with the facts of the case and Washington law. As to the facts, Couch has yet to conclusively determine CLA breached its duty. This corrected fact does not support a ruling that the cause of action has not accrued, but illustrates that even EPIC knows it need not wait until irrefutable proof of any breach of duty.

As to the law, the court considers whether the plaintiff had knowledge of the factual basis for the cause of action, not the legal basis. *August v. United States Bancorp*, 146 Wn. App. 328, 342, 190 P.3d 86 (2008); *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 832, 980 P.2d 809 (1999). Under the discovery rule, the running of the statute of limitations does not toll until a plaintiff consults an expert or until an attorney tells the plaintiff that a defendant breached the applicable standard of care. *Gevaart v. Metco Construction, Inc.*, 111 Wn.2d 499, 501-02, 760 P.2d 348 (1988). Moreover, EPIC does not explain why it needed to wait for Couch to finish her work or why Couch could not have issued her preliminary report much sooner than she did. EPIC does not identify any material fact which it knew when it filed the lawsuit in December 2015 that it did not know by February 2012.

EPIC contends that it did not know the full extent of its damages until after it negotiated with HHS to lower the penalty. This argument helps none, since a cause of action accrues when the plaintiff knows or should know of some damage. When a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998). The statute of limitations does not toll by the fact that further, more serious harm may flow from the wrongful conduct. *Green v. A.P.C.*, 136 Wn.2d at 96. The claimant need not be aware of the full extent of the damages. *Cashmere Valley Bank v. Brender*, 128 Wn. App. 497,

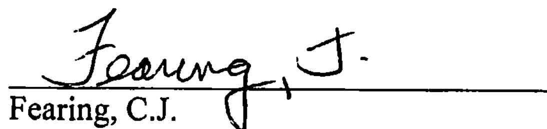
508, 116 P.3d 421 (2005), *aff'd*, 158 Wn.2d 655, 146 P.3d 928 (2006).

EPIC also argues that it needed to minimize its damages before hiring an expert to determine if CLA breached an obligation. Nevertheless, no rule delays the accrual of an action during a time that the plaintiff seeks to minimize damages. EPIC does not illuminate why it cannot minimize damages and hire an expert at the same time.

CLA argues that, even if a contractual limitation period is unreasonable, the court does not strike the entire provision, but strikes the offending portion and enforces the remainder of the contract. CLA states that we could delay the accrual of the claim but enforce the two-year period. Since we hold that the provision as a whole is reasonable under the circumstances, we do not need to address this argument.

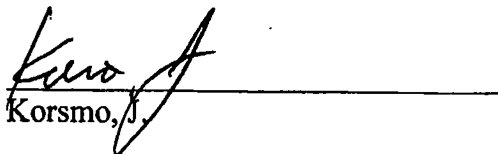
CONCLUSION

We affirm the trial court's dismissal on summary judgment of EPIC's claims against CLA and award CLA costs on appeal.



Fearing, C.J.

I CONCUR:



Korsmo, J.

No. 34540-8-III

SIDDOWAY, J. (concurrence in the result) — We lack information on the magnitude and complexity of the work involved for CliftonLarsonAllen LLP (CLA) to perform the annual Head Start program compliance it promised to perform for Enterprise and Progress in the Community (EPIC).[1] Its base annual audit fee ranged from $23,600 to $29,500 between 2006 and 2011. Depending on the complexity of the compliance work and the aptitudes of EPIC's own employees, timely determining whether CLA committed malpractice might have required EPIC's board of directors to hire an auditor to audit the auditor. If so, I am unwilling to say as a general matter that the contractual limitations period in CLA's engagement letters is reasonable.

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[1] The 2009 engagement letter, for instance, stated in relevant part:

> In addition to our report on Client's financial statements, we will also issue the following types of reports:
>
> . . . .
>
> - Reports on compliance with laws, regulations, and the provisions of contracts or grant agreements. We will report on any noncompliance which could have a material effect on the financial statements and any noncompliance which could have a direct and material effect on each major program.

Clerk's Papers (CP) at 55. The agreement identified "Head Start 93.600" as the only federal financial assistance program that EPIC participated in for purposes of the audit. *Id.* It went on to provide that its report would address "material errors, fraud, abuse, violations of compliance obligations, and other responsibilities imposed by state and federal statutes and regulations." *Id.*

Nor do we need to. The undisputed evidence establishes that EPIC's causes of action against CLA accrued in time for it to have asserted its claims within the contractual limitations period. Where that is the case, there is no need to determine whether the provision should be deemed waived.

Where a limitations provision might unreasonably bar a claim before it can be asserted, the result, announced in our Supreme Court's 1910 decision in *Sheard v. United States Fidelity & Guaranty Co.*, is that the court will infer an intent to waive the provision as to such claims. 58 Wash. 29, 34-35, 107 P. 1024 (1910). In other words, a party cannot attack a contractual limitations period as "facially unreasonable"—instead, the limitation provision is deemed waived in cases where it would be unreasonable as applied. We glean this from *Sheard*'s adoption, as "the correct rule of construction," the rule announced by the Iowa Supreme Court in *Longhurst v. Star Ins. Co.*:

> "If, with reasonable diligence, the value [of the insured interest] cannot be legally ascertained in time to bring an action on the policy within a year from the date of the loss, then it follows (unless you wish to impute a dishonest purpose on the part of the company), that in granting such policy *they intended to waive, in this class of insurable interest, the condition which limits the right of action on the policy to twelve months*. By putting this construction upon the contract of insurance, you preserve the upright intent of the company intact. Whereas, if you put the other construction upon it, you . . . judicially determine, that the company granted a policy for a valuable consideration paid, which at the time they had reason to believe, would be no risk to them and no protection to the insured, and thereby obtained money for themselves under false pretenses. . . . It is the business of the court in construing the contract, to give effect, if possible, to the real intent and expectations of the parties. That can be done only in this case by holding that the fifteenth condition of the policy under discussion, is not

> applicable to this particular class of insurable interest, and that when the defendant consented to take risks of this kind, it *either intended to waive the limitation, or have it to commence running from the date that the value of the mechanic's lien should be judicially ascertained.*"

Sheard, 58 Wash. at 34-35 (quoting *Longhurst*, 19 Iowa 364, 371-72 (1865)) (emphasis added).

"[A] claim [generally] accrues when a party has the right to apply to a court for relief." *Cambridge Townhomes LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 485, 209 P.3d 863 (2009). Generally, if 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. *Steele v. Organon, Inc.*, 43 Wn. App. 230, 234, 716 P.2d 920 (1986).

As the majority illustrates, EPIC had the right to apply to a court for relief many months before the contractual limitation provision barred its claim. Because the provision did not unreasonably bar *this* claim before it could be asserted, there is no need to examine its reasonableness further.

I concur in the result.

Siddoway, J.