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NO. 73206-4-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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AYANNA BROWN, individually and as Personal Representative of the  
Estate of ALAJAWAN S. BROWN, and LOUIS BROWN, individually,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondent.

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APPELLANTS' OPENING BRIEF

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## A. INTRODUCTION

“[U]nder Washington's discovery rule, a cause of action does not accrue until a party knew or should have known the essential elements of the cause of action—duty, breach, causation, and damages.” Green v. A.P.C., 136 Wn.2d 87, 95, 960 P.2d 912 (1998). The discovery rule exists to prevent “the unconscionable result of barring an aggrieved party's right to recovery before a right to judicial relief even arises.” First Maryland Leasecorp. v. Rothstein, 72 Wn. App. 278, 283, 864 P.2d 17 (1993). This appeal presents a gross misapplication of the discovery rule and the summary judgment standard, errors that resulted in dismissal of a meritorious wrongful death case.

In April 2010, Curtis Walker murdered 12-year-old Alajawan Brown. Alajawan’s parents, Ayanna and Louis Brown, were certainly aggrieved. But despite their diligence, the full panoply of facts leading up to their son’s death was slow to surface. The Browns fully participated in the criminal investigation and attended every day of Walker’s criminal trial, eager to learn more about their son’s killer. But it was not until March 2012, when the Browns attended and participated in Walker’s sentencing, that they made the discovery that led to this litigation; it was then that they learned, for the first time, that the Department of

Corrections (“DOC”) had been responsible for supervising Walker and that it had failed in its responsibility to protect the public. They filed this lawsuit less than three years later, yet the trial court dismissed their case based on the statute of limitations.

On appeal, the Browns’ right to relief against DOC hinges upon correcting the trial court’s errors in applying the discovery rule and the standard for summary judgment motions. As set forth in greater detail below, this Court should reverse the trial court’s order of summary judgment and remand this case for trial on the merits.

## **B. ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1**

The trial court erred when it found that “the Browns knew or should have known as early as June of 2010 that Mr. Walker was on probation, and that at that time they had reason to believe that there was a duty, a potential breach of that duty, certainly damages, and certainly causation,” CP at 205, an unnumbered finding made on the record.

### **Assignment of Error No. 2**

The trial court erred when it weighed disputed facts and construed them in the light most favorable to DOC, the nonmoving party on summary judgment, concluding that “the Browns knew or should have known as early as June of 2010 that Mr. Walker was on probation, and

that at that time they had reason to believe that there was a duty, a potential breach of that duty, certainly damages, and certainly causation.” CP at 205.

**Assignment of Error No. 3**

The trial court erred when it granted DOC’s motion for summary judgment.

**Assignment of Error No. 4**

The trial court erred when it denied the Browns’ motion for partial summary judgment.

**Assignment of Error No. 5**

The trial court erred when, without explanation, it denied the Browns’ motion for reconsideration.

**Issues Pertaining to Assignments of Error**

1. In March 2012, Ayanna and Louis Brown discovered that the man who killed their son was on probation at that time and had been selling drugs and carrying firearms—all while under DOC supervision. The Browns filed a lawsuit against DOC in September 2014. However, the trial court concluded that “the Browns knew or should have known as early as June 2010 that [their son’s killer] was on probation, and that at that time they had reason to believe that there was a duty, a potential breach of that duty, certainly damages, and certainly causation.” Did the

trial court err by granting DOC's motion for summary judgment based on the statute of limitations? (Assignments of Error 1, 2, 3, and 5).

2. Ayanna and Louis Brown attended the March 2012 sentencing of the man who killed their 12-year-old son, Alajawan Brown. The Browns learned at this sentencing that their son's killer was on probation, under DOC's supervision, and had been selling drugs and carrying firearms without intervention by DOC. Thereafter, the Browns moved for partial summary judgment to dismiss DOC's statute of limitations defense. Did the trial court err by denying the Browns' motion for partial summary judgment? (Assignments of Error 4 and 5).

### **C. STATEMENT OF THE CASE**

DOC was charged with supervising an extremely dangerous offender, Curtis Walker, who was placed in the community under a Drug Offender Sentencing Alternative ("DOSA"). Walker had a long history with drugs, violence, and gang activity. Walker was properly classified as HV (High-Risk, Violent), the highest risk level in DOC classification system, yet DOC failed to provide even the most basic level of supervision required by its own internal policies and directives. CP 1-8. Shockingly, when DOC received a complaint from a concerned citizen that Walker had physically assaulted his girlfriend and threatened her with a firearm, and

that Walker was selling drugs out of his house, DOC failed to take any action whatsoever. CP 1-8.

Because of DOC's gross negligence, Walker was free to roam the community; he continued to engage in drug- and gang-related violence. On April 29, 2010, he murdered 12-year-old Alajawan Brown by shooting him in the back, mistakenly believing he was a rival gang member. CP 61, 193. Alajawan<sup>1</sup> was a 12-year-old boy who was on his way home from buying football cleats; he had just exited a bus and was walking near a 7-11 store when Walker shot and killed him. CP 4; 63-65, 177-78.

For several weeks, Alajawan's parents, Ayanna and Louis Brown, did not know who killed Alajawan or what may have motivated someone to kill him. CP 21-26. It took another two years for the Browns to learn the full story of the man who killed their son. CP 21-26. Throughout this time they followed the police investigation closely and worked with detectives. CP 21-26. The Browns wanted everyone who was responsible for their son's death to be held accountable. CP 21-26. Eventually, they

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<sup>1</sup> This appeal concerns three members of the Brown family: Alajawan Brown (the deceased), Ayanna Brown (the deceased's mother and personal representative of Alajawan's estate), and Louis Brown (the deceased's father). For clarity, this brief will refer to members of the Brown family by first name when referring to him or her individually. No disrespect is intended.

learned that Walker was their son's killer. CP 21-26, 61-68. On June 17, 2010, Walker was charged with Alajawan's murder.<sup>2</sup> CP 6-68.

On July 1, 2010, the Browns attended Walker's arraignment, but no mention was made of DOC's involvement with Walker. CP 161-70. Walker's probation status was not revealed or alluded to at this time, and no mention was made of the fact that Walker had been engaged in criminal activity prior to shooting Alajawan. CP 161-70. Indeed, after the court announced the two charges against him, Walker waived further formal reading of the criminal Information. CP 167-68. Prior to Walker's criminal trial, the Browns were given only limited information about Walker and his history. CP 21-26. During Walker's trial, which began in January 2012, the Browns followed the proceedings closely. CP 21-26.

Eventually, the investigation and prosecution revealed that Walker was a gang member who had probably mistook Alajawan for a rival. CP 21-23, 67. On the same night that Alajawan was killed, Walker was at the scene of another shooting, one block away from the 7-11 where Alajawan was killed. CP 63-68. Walker was "a 'blood' and . . . may have shot Alajawan because he was wearing blue." CP 22, 25. However, prior to

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<sup>2</sup> For a detailed overview of the criminal case against Walker, see *State v. Walker*, 180 Wn. App. 1013 (2014) (unpublished opinion), review denied, 337 P.3d 325 (2014).

Walker's sentencing in March 2012, the Browns "had no reason to suspect that [DOC] had failed to properly supervise Walker, or that DOC was also responsible for [Alajawan's] death." CP 22, 25.

The jury found Walker guilty of Alajawan's murder. CP 193-94. On March 22, 2012, the Browns attended Walker's sentencing, at which Ayanna spoke on Alajawan's behalf. CP 21-26. During the prosecutor's recommendation for Walker's sentence, they learned that

[Walker was] . . . a rapid recidivist. He was on DOSA at the time that [Alajawan's murder] happened. He squandered the chance to do whatever he thought was the result of drug use, **and in fact was selling drugs when this happened, and carrying two guns in spite of being on probation.**

CP 178 (emphasis added).

This revelation at Walker's sentencing in March 2012 marked the first time that the Browns had any idea that Walker was on probation, in the community under a DOSA, or that he had been violating the terms of his supervision while supposedly under DOC supervision. CP 21-26. It was the first time that the Browns "had any reason to believe that the State of Washington, Department of Corrections had missed an opportunity to arrest Walker and get him off the streets before he had a chance to kill [their] son." CP 22.

The Browns subsequently made their first an appointment with an attorney “to look into the possibility that [DOC] was also responsible for [their] son’s death.” CP 22-23. Through their attorneys, the Browns obtained internal documents from DOC that showed just how careless DOC had been in its supervision of Curtis Walker. CP 23. Ayanna was appointed personal representative of Alajawan’s estate in order to bring a lawsuit on his behalf. CP 1-8, 23. The Browns filed a tort claim for damages with the State of Washington in September 2014, CP 106-11, and a civil complaint against DOC in November 2014 for its failure to supervise Walker. CP 1-8. The lawsuit was filed less than three years from the date of Walker’s sentencing, the time at which the Browns had first learned that Walker was on DOC supervision, and had been carrying guns and selling drugs with impunity prior to Alajawan’s murder.

Ignoring the discovery rule, DOC rejected the tort claim and asserted an affirmative defense based on the statute of limitations. CP 30. The Browns therefore opened the litigation by moving for partial summary judgment on this issue. CP 11-26. The Browns supported their motion with declarations setting forth their involvement in the criminal case and the March 2012 discovery of the facts underlying their claims against DOC. CP 21-26. DOC responded with a cross-motion for summary judgment, seeking dismissal of the case in its entirety based on the fact

that the lawsuit had been filed more than three years from the date of Alajawan's murder. CP 33-111. DOC did not supply any admissible evidence contradicting the Browns' declarations; instead, DOC attempted to buttress its motion with a couple of documents from the criminal case and a few newspaper articles that had been printed from the internet by DOC's counsel. CP 59-104. Importantly, none of the material submitted by DOC served to rebut the statements set forth by the Browns in their declarations. CP 21-26. And there was no evidence whatsoever showing the Browns had actually seen any of the court documents or newspaper accounts relied upon by DOC.

When the trial court ruled on the parties' motions, it stated that it "actually [found] very little in terms of facts." CP 204. The court

[found] in this case that the discovery rule [did] apply[,] [a]nd . . . that the Browns knew or should have known as early as June of 2010 that Mr. Walker was on probation. And that at that time, they had reason to believe that there was a duty, a potential breach of that duty, certainly damages, and certainly causation.

CP 205.

The trial court denied the Browns' motion for partial summary judgment and granted DOC's motion for summary judgment, dismissing the case. CP 205. The Browns moved for reconsideration, CP 150-155, supplying the trial court with transcripts from Walker's arraignment (CP 161-70) and sentencing (CP 172-203). The transcripts supported what was set forth

previously: the Browns' were unaware of the facts giving rise to their claim against DOC until the March 2012 sentencing hearing. The trial court denied the Browns' motion for reconsideration without explanation, and without allowing argument. CP 217-18. The Browns now appeal the trial court orders granting DOC's motion for summary judgment, denying their motion for partial summary judgment, and denying their motion for reconsideration. CP 209-10, 212-13, 215-16.

#### **D. ARGUMENT**

**1. The Trial Court Erred When It Granted DOC's Motion for Summary Judgment Because the Discovery Rule Applied and Disputed Facts Should Have Been Construed in the Light Most Favorable to the Browns.**

The trial court erred when it granted DOC's motion for summary judgment. It is hornbook law that a trial court cannot weigh disputed facts while granting summary judgment; to do so is error, warranting reversal. CR 56; Fleming v. Smith, 64 Wn.2d 181, 185, 390 P.2d 990 (1964). All facts, and reasonable inferences from those facts, must be considered in the light most favorable to the nonmoving party—the Browns, in this case. See Mountain Park Homeowners Ass'n, Inc. v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). On review of a summary judgment ruling, an appellate court “engage[s] in the same inquiry as the trial court, considering all facts submitted and all reasonable inferences therefrom in

the light most favorable to the nonmoving parties.” Taggart v. State, 118 Wn.2d 195, 199, 822 P.2d 243 (1992).

On the other hand, a trial court ruling on a motion for reconsideration is reviewed for abuse of discretion. Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). But “[a] trial court abuses discretion when its decision is based on untenable grounds or reasons.” Id. “A . . . decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” State v. Rafay, 167 Wn. 2d 644, 655, 222 P.3d 86 (2009) as corrected (Dec. 8, 2010) (internal quotations omitted).

In this case, the trial court made factual findings and weighed disputed evidence in favor of DOC in deciding DOC’s own motion—despite the presence of undisputed facts in the Browns’ favor—evidence showing that the Browns’ claim did not accrue until the Walker’s sentencing in March 2012. Thus, under the aforementioned standards, the trial court erred. The decision granting summary judgment in favor of DOC should be reversed.

**a. The Discovery Rule Applied to the Browns' Claim Because Facts Giving Rise to Their Claim Were Not Revealed Until March 22, 2012.**

The discovery rule applied in this case because the Browns were unaware of, and had no reasonable opportunity to learn, the facts giving rise to their claim against DOC before March 2012. While a claim may accrue at the time that a negligent act occurs, there are instances when a plaintiff does not immediately know that he or she has been injured despite acting diligently and attentively. Under these circumstances, Washington law favors “the concepts of fundamental fairness and the common law’s purpose to provide a remedy for every genuine wrong,” rather than a harsh and unwavering application of the statute of limitations. Ruth v. Dight, 75 Wn.2d 660, 665, 453 P.2d 631 (1969); see also Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 220, 543 P.2d 338 (1975) (“In circumstances where some harm is sustained, but the plaintiff is unaware of it, a literal application of the statute of limitations may result in grave injustice.”).

In order to avoid the potential for injustice, Washington courts have held that when an injury or its cause is not immediately apparent, “the cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action, i.e., duty, breach, causation and damages.” Gevaart v. Metco Const., Inc., 111

Wn.2d 449, 501, 760 P.2d 348 (1988). Under the discovery rule, the key consideration is when the plaintiff becomes aware of the facts support *all* elements of a cause of action. Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992).

Notice of these facts must be “sufficient to prompt a person of average prudence to inquire into the presence of an injury.” Mayer v. City of Seattle, 102 Wn. App. 66, 76, 10 P.2d 408 (2000). A plaintiff is required to exercise due diligence in discovering facts, Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 772-73, 733 P.2d 530 (1987), but only when the plaintiff “fails to make any meaningful inquiry” do courts consider this duty of diligence breached. Clare v. Saberhagen Holdings, Inc., 129 Wn. App. 599, 604, 123 P.3d 465 (2005). In this case, the trial court correctly concluded that the discovery rule applied. However, the court erred when it ruled—without any factual basis and in direct contradiction to the Browns’ declarations—that the Browns “knew or should have known” the facts giving rise to all elements of their claim “as early as June 2010.” CP 205.

Despite having maintained constant contact with detectives and attending every day of Walker’s criminal trial, in addition to his arraignment and sentencing, the Browns did not discover DOC’s negligent supervision of Walker until his sentencing. The Browns knew that they

had experienced a grievous loss when Walker killed their son—but under the “average prudence” standard, their diligent efforts could not have revealed facts necessary to trace their loss to DOC (a third party) any sooner than March 2012. Charging the Browns with knowledge of these latent facts “as early as June 2010” was in contravention of summary judgment rules under CR 56, the discovery rule, and fundamental fairness.

**b. The Browns’ Claim Against DOC Did Not Accrue Until March 22, 2012, Because the Browns’ Acted Diligently and Could Not Have Discovered Necessary Facts Any Earlier.**

The legal elements in a case of negligent supervision of a probationer are the same as an ordinary negligence claim: (1) duty, (2) breach, (3) causation, and (4) damages. The factual requirements are (1) a perpetrator’s probation status (gives rise to duty), (2) inadequacy in the supervision by DOC (establishes breach of the duty), (3) sufficient knowledge by DOC of probation violations and sufficient time to act on the violations and arrest the perpetrator (establishes causation), and (4) an injury or death caused by the probationer (establishes damages). See Estate of Bordon ex rel. Anderson v. State, Dep’t of Corr., 122 Wn. App. 227, 235, 95 P.3d 764 (2004).

Moreover, the cause of action for negligent supervision of a probationer is based upon a “take charge” duty described in Restatement (Second) of Torts § 319 (1965) (hereinafter “§ 319”), and applied by the

Washington Supreme Court in Taggart, 118 Wn.2d at 219-20. The Taggart Court held that “a parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him from doing . . . harm.” 118 Wn.2d at 220. Under the § 319 formulation, “[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. Restatement (Second) of Torts § 319 (1965). Understandably, the Browns were not apprised of facts giving rise to their claim until long after their son was killed because their injury was based upon a “take charge” duty of care owed by DOC.

The Browns’ first step in pursuing justice for their son was to find out who was responsible for pulling the trigger. This was done by following the criminal investigation and working with detectives. CP 21-26. Initially, the Browns were unaware of *who* killed their son, let alone the fact that this person was on probation and was likely violating the terms of his probation. CP 21-26. “[T]he justification for the discovery rule as applied to unknown injury applies with equal force to unknown defendants.” Orear v. Int’l Paint Co., 59 Wn. App. 249, 257, 796 P.2d 759 (1990); see also Allyn v. Boe, 87 Wn. App. 722, 736, 943 P.2d 364 (1997) (acknowledging that “the statute does not begin to run until the plaintiff

knows or with reasonable diligence should know that the defendant was the responsible party.”).

The Browns’ second step, once Walker’s identity and the facts surrounding his crimes were known, was to attend trial. CP 25. However, the Browns’ were never told that Walker had been on probation at the time of Alajawan’s murder or that DOC was warned about Walker’s probation violations. CP 25. Moreover, Walker’s arraignment revealed no information about Walker’s probation status or DOC’s involvement. CP 161-70. Thus, the Browns’ third step in pursuing justice for their son—holding DOC accountable for negligently supervising Walker—was an invisible step until March 2012.

In this case, DOC failed to properly supervise Walker while he was on probation, thus allowing Walker to sell drugs and possess a firearm prior to Alajawan Brown’s murder. CP 178. DOC was notified of these facts sufficiently in advance of Alajawan’s murder such that Walker would have been in jail—and unable to murder Alajawan—if DOC had done its job properly. CP 1-8. If Walker had been adequately supervised, his probation violations would have held him to answer before a court, and Alajawan would still be alive today. The cause of action in this case is not based on the sole fact that Walker was on probation at the time of Alajawan’s murder; rather, it is based on the fact that Walker was

violating his probation prior to Alajawan's murder and should have been in jail based on these violations had DOC properly supervised him. There is no evidence in the record—none—supporting the trial court's finding that the Browns "knew or should have known" these facts in June 2010. CP 205. In fact, the record supports the exact opposite conclusion.

**c. Facts Should Have Been Construed in the Light Most Favorable to the Browns, the Non-Moving Party with Regard to DOC's Summary Judgment Motion.**

At summary judgment, the trial court granted DOC's motion after citing Beard v. King Cnty., 76 Wn. App. 863, 868, 889 P.2d 501 (1995). CP 204-05. However, Beard is largely inapposite. This is so because Beard "present[ed] the narrow issue of whether the discovery rule continues to toll the commencement of the limitation period after the injured party has specifically alleged the essential facts but does not yet possess proof of those facts." Beard, 76 Wn. App. at 867. Here, the Browns did not possess the knowledge to allege a cause of action against DOC before March 2012. Perhaps the Browns "reasonably suspect[ed] that a specific wrongful act ha[d] occurred" as to Walker, id. at 868, but there was no evidence to suggest that the Browns should have suspected that a wrongful act was perpetrated by DOC. Moreover, "[s]uspicion is inadequate to support a lawsuit." Nelson v. Schubert, 98 Wn. App. 754, 762, 994 P.2d 225 (2000) (citing CR 11).

In ruling on DOC’s motion for summary judgment, the trial court should not have weighed the evidence or resolved factual issues. Fleming, 64 Wn.2d at 185; Frisino v. Seattle School Dist. No. 1, 160 Wn. App. 765, 784, 249 P.3d 1044 (2011). All facts, and reasonable inferences from those facts, should have been considered in the light most favorable to the nonmoving party—in this case, the Browns. Mountain Park Homeowners, 125 Wn.2d at 341; Larson v. Nelson, 118 Wn. App. 797, 810, 77 P.3d 671 (2003) (summary judgment should not be granted in the face of “competing, apparently competent evidence”).

Importantly, facts giving rise to the Browns’ negligent supervision claim—as opposed to legal elements—were first discoverable on March 2012, Walker’s sentencing. This was when the Browns’ first heard the term “rapid recidivist,” which would prompt one to discover that this means that a defendant “committed the current offense shortly after being released from incarceration.” RCW 9.94A.535(3)(t) This was also when the Browns first heard the term “DOSA,” which would prompt one to discover that DOSA is a sentencing alternative. RCW 9.94A.660, 664.

Even though these terms are parlance found within the Sentencing Reform Act, RCW 9.94A et seq (and outside the understanding of persons of average prudence), the Browns also discovered that Walker was “in fact . . . selling drugs when [Alajawan’s murder] happened, and carrying two

guns in spite of being on probation.” CP 178. A person of average prudence might be alerted to the negligence by DOC upon learning that a probationer was selling drugs and carrying firearms, while on supervision or parole, just as the Browns were in this case. If not for this discovery, the Browns may not have inquired further to determine whether Walker should have been off the streets.

The Washington Supreme Court has stated repeatedly that “[t]he determination of when a plaintiff discovered or through the exercise of due diligence should have discovered the basis for a cause of action is a factual question for the jury.” Winbun v. Moore, 143 Wn.2d 206, 213, 18 P.3d 576 (2001); North Coast Air Services, LTD v. Grumman Corporation, 111 Wn.2d at 319; Green v. A.P.C., 136 Wn.2d at 100 (“whether the claimant knew or should have known will ordinarily be a question of fact”); Adcox Children’s Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993) (“the question of when a patient or representative reasonably should have discovered the injury was caused by medical negligence is normally an issue of fact.”); Lo v. Honda Motor Company, LTD, 73 Wn.App. 455, 448 869 P.2d 1114 (1994) (affirming trial court’s denial of defendants motion for summary judgment on statute of limitations).

Here, the trial court resolved facts in favor of DOC in granting DOC's summary judgment motion. "Summary judgment requires a legal certainty: the material facts must be undisputed, and one side wins as a matter of law." Davis v. Cox, \_\_\_ Wn.2d \_\_\_, 2015 WL 3413375, at \*5 (May 28, 2015). The Browns' claim should not be foreclosed because DOC failed to present undisputed facts. Indeed, the facts supported the opposite conclusion that DOC's statute of limitations defense was invalid. Therefore, the trial court erred when it granted DOC's summary judgment motion.

**2. The Trial Court Erred When It Denied the Browns' Motion for Partial Summary Judgment Because Their Complaint Was Timely Filed Pursuant to the Discovery Rule.**

The trial court erred when it denied the Browns' motion for summary judgment because the undisputed evidence showed that the Browns were first apprised of facts giving rise to the elements of their claim on March 22, 2012. CP 21-26; 161-70; 178. Having learned these facts, the Browns filed a complaint against DOC on November 24, 2014, within the prescribed three-year statute of limitations under RCW 4.16.808 (2, and after filing a prerequisite tort claim required by RCW 4.92.110. CP 106-11. Thus, the trial court's order denying the Browns' motion for partial summary judgment should be reversed. DOC's statute

of limitations defense should be dismissed, allowing the Browns' claim to proceed on its merits.

DOC had an opportunity, in response to the Browns' motion for partial summary judgment, to produce *competent* evidence showing that the Browns knew the essential elements of their cause of action prior to March 2010. Of course, select court records and internet media accounts obtained by DOC's counsel do not suffice when there is no evidence suggesting that the Browns ever knew the contents of those documents. Having failed to come forth with admissible evidence to support the statute of limitations defense, partial summary judgment should have been granted to the Browns on this issue.

**a. DOC Failed to Set Forth Specific Facts to Oppose the Browns' Summary Judgment Motion.**

The order denying the Browns' motion for partial summary judgment should be reversed because the Browns showed that facts giving rise to each element of their claim were discovered (and discoverable) in March 2012. In its summary judgment briefing, DOC failed to demonstrate otherwise. It attempted to show that media reports might have, or could have, supplied relevant knowledge to the Browns before 2012. However, a party opposing summary judgment “may not rely on speculation, [or] argumentative assertions that unresolved factual issues

remain.”” Ranger Ins. Co. v. Pierce Cnty., 164 Wn. 2d 545, 552, 192 P.3d 886 (2008) (quoting Seven Gables Corp. v. MGM/UA Entm’t Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)) (alteration in original). Here, facts giving rise to *each* element of the Browns’ claim were not revealed until March 2012.

Over 30 years ago, the Washington Supreme Court recognized the discovery rule in U.S. Oil & Ref. Co. v. State Dep’t of Ecology, 96 Wn.2d 85, 633 P.2d 1329 (1981), which involved the Washington Department of Ecology’s action to collect penalties against U.S. Oil for submitting inaccurate monitoring reports on the discharge of pollutants. The Court reasoned that, “[w]here self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it.” U.S. Oil, 96 Wn.2d at 93; see also Matter of Estates of Hibbard, 118 Wn.2d 737, 749-50, 826 P.2d 690 (1992) (recognizing the discovery rule where plaintiffs could not have immediately known of their injuries due to self-reporting); Samuelson v. Cmty. Coll. Dist. No. 2 (Grays Harbor Coll.), 75 Wn. App. 340, 346, 877 P.2d 734 (1994) (holding that discovery rule should be applied where employer was required, but failed, to inform employee of his eligibility for certain benefits).

Much like the self-reporting that was required, but neglected, in U.S. Oil, DOC was required, but failed, to investigate and report to law enforcement the fact that Walker possessed firearms. RCW 9.94A.706 (prohibiting offenders in community custody from owning, using, or possessing firearms and mandating report to local law enforcement or prosecution); see also Joyce v. State, Dep't of Corr., 155 Wn.2d 306, 310-11, 119 P.3d 825 (2005) (acknowledging that community corrections officers are authorized under RCW 9.94A.631 to report violations of an offender's conditions of release if appropriate). These facts showed that DOC breached its duties, proximately causing Alajawan's death, which were brought to light only after Walker's March 2012 sentencing.

Because these facts were not brought to light any earlier (and because persons of ordinary prudence could not have discovered them earlier), the discovery rule dictated that the Browns' cause of action accrued in March 2012. A person of average prudence would not have discovered facts to support the essential elements of "duty, breach, causation and damages" any earlier. Gevaart, 111 Wn.2d at 501.

DOC's statute of limitations defense should have failed at summary judgment. The Browns presented facts to show that the essential elements of their cause of action were first present in March 2012, and DOC failed present specific facts in opposition at summary judgment.

Therefore, the trial court erred by denying the Browns' motion for partial summary judgment.

**b. Partial Summary Judgment for the Browns Was Appropriate Because DOC Failed to Create an Issue of Fact Regarding the Browns' Diligence.**

The trial court also erred in denying the Brown's motion for partial summary judgment because DOC failed to demonstrate any lack of diligence by the Browns. "When a motion for summary judgment is supported by evidentiary matter, the adverse party may not rest on mere allegations in the pleadings but must set forth specific facts showing that there is a genuine issue for trial." LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); CR 56(e). Partial summary judgment for the Browns was appropriate in this case because the evidence, even when viewed in the light most favorable to DOC, established that the Browns exercised reasonable diligence following their son's death—yet still did not learn of the facts underlying their claim against DOC until March 2012.

Once the Browns submitted their affidavits, DOC was required to set forth specific facts to rebut the Browns' testimony and show that there was a genuine issue for trial. CR 56(e); Meyer v. University of Washington, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). But DOC failed to do so. It failed to set forth specific facts to show that the Browns knew or

should have known of the essential elements their claim any sooner than March 2012, and it failed to adequately dispute the fact that the Browns acted diligently.

In its summary judgment briefing, DOC asserted that Allen, 118 Wn. 2d 753, controlled the outcome of the discovery rule issue. CP 37. However, Allen is readily distinguished. The Allen court held that Beverly Allen failed to exercise due diligence in discovering facts giving rise to her claim because her “attempts to discover the facts surrounding her husband’s death were minimal.” Id. at 203.

[Allen] kept in touch with the Pierce County Sheriff’s Office for only a few months after her husband’s death in 1979, and even by her own account that contact was not intensive. The record reveal[ed] she made *no* other attempt to discover what happened to her husband until 1985 when the facts were presented to her by her son and his attorney.

Id. (emphasis in original).

The contrast in this case is striking. Here, the Browns attended Walker’s arraignment, trial, and sentencing. CP 21-26. In its summary judgment briefing, DOC collected internet printouts of news stories about Alajawan’s murder, attempting to cast doubt on the Browns’ diligence following their son’s tragic death. However, due diligence is the touchstone of discovery-rule analysis. See Allen, 118 Wn.2d at 758; and Hibbard, 118 Wn.2d at 746. The quality or quantity of media reports is

relevant only when the plaintiff has failed to otherwise exercise due diligence. Allen, 118 Wn.2d at 758-59 (examining newspaper articles *after* “conclud[ing] due diligence was not exercised”). Put another way, “due diligence” does not require that bereaved parents attend every minute of the criminal proceedings and, additionally, come home and scour the newspapers for any additional facts about their son’s case.

Here, the Browns maintained contact with detectives during the investigation of Walker, and attended trial during his prosecution. CP 21-26. In comparison, Beverly Allen did not follow the prosecution of her husband’s killers despite the fact that Allen’s own father and son had information that the murderers had been paroled with previous homicide convictions. Allen, 118 Wn.2d at 755-57, 759. The facts in this case do not come close to Allen.

Unlike Beverly Allen, the Browns fully exercised their rights as survivors of a victim of a violent crime. Art. I, § 35; RCW 7.69.030(11)-(12) (providing survivors of victims with the right to be informed and right to be physically present during trial). Thus, because the Browns were diligent in discovering the facts underlying their claim against DOC, the trial court erred by imputing those facts to the Browns any earlier than when they were actually discovered: March 22, 2012.

DOC failed to show a genuine issue as to whether a person of average prudence would discover—before March 2012—facts giving rise to the claims against it. DOC’s statute of limitations defense should have been dismissed at the summary judgment phase because the Browns’ discovery of Walker’s status, DOC’s supervision of Walker, and DOC’s nonfeasance, was made during Walker’s sentencing.

**E. CONCLUSION**

The facts in this case demonstrate that the Browns’ cause of action accrued in March 2012. The trial court erred when it weighed facts, made findings not supported by the record, and granted summary judgment in favor of DOC. Likewise, it was error for the trial court to deny the Browns’ motion for partial summary judgment on the same statute of limitations issue. The Browns “have been denied a meaningful opportunity to bring a warranted cause of action.” U.S. Oil, 96 Wn.2d at 93. Therefore, the Browns respectfully request reversal of the trial court, reinstatement of their cause of action, and an award of costs on appeal.

DATED this 25<sup>th</sup> day of June, 2015.

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

AYANNA BROWN, individually and as  
Personal Representative of the Estate of  
ALAJAWAN S. BROWN, and LOUIS  
BROWN, individually;

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF CORRECTIONS;

Defendant/Respondent.

No. 73206-4-I

DECLARATION OF SERVICE  
FOR OPENING BRIEF OF APPELLANT

The undersigned declares and states under the penalty of perjury pursuant to the laws of the State of Washington as follows:

I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

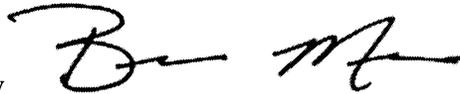
On June 26, 2015, I caused to be filed and served with the Clerk of the Court of Appeals, Division I, the Appellants' Opening Brief in this matter, along with this Declaration of Service, on the following individuals in the manner indicated:

THE COURT OF APPEALS DIVISION I COURT ADMINISTRATOR/CLERK ONE UNION SQUARE 600 UNIVERSITY STREET SEATTLE, WA 98101-1176	<input checked="" type="checkbox"/> VIA LEGAL MESSENGER FOR DELIVERY ON 6/26/15 <input type="checkbox"/> VIA EMAIL <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL
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ATTORNEY FOR DEFENDANT:  PATRICIA C. FETTERLY, ESQ. ATTORNEY GENERAL OF WASHINGTON TORTS DIVISION 7141 CLEANWATER DRIVE SW OLYMPIA, WA 98504-0126	<input checked="" type="checkbox"/> VIA LEGAL MESSENGER FOR DELIVERY ON 6/26/15  <input checked="" type="checkbox"/> VIA EMAIL  <input type="checkbox"/> VIA FACSIMILE  <input type="checkbox"/> VIA U.S. MAIL
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Dated this 25<sup>th</sup> day of June, 2015.

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