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

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.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Alajawan Brown was shot and killed on April 29, 2010. The man who was charged and later convicted of his murder had a lengthy criminal history and was on Department of Corrections supervision at the time of Alajawan's murder. These facts were available for discovery in public records and media accounts of the shooting and its aftermath by mid-June 2010, less than two months following Alajawan's murder. Plaintiffs did not file this wrongful death lawsuit against the Department of Corrections until November 24, 2014, more than four years later. Following a hearing on February 20, 2015, the trial court granted the defense motion for summary judgment and dismissed the case based upon the running of the statute of limitations.

This case is controlled by the holding of the Washington Supreme Court in *Allen v. State of Washington*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). *Allen*, and other cases concerning the application of the discovery rule, hold that accrual of a cause of action for wrongful death under the discovery rule occurs when plaintiffs knew or through the exercise of due diligence should have discovered facts sufficient to form the basis of their cause of action. The trial court held correctly that plaintiffs' claims accrued by the end of June 2010.

II. COUNTERSTATEMENT OF THE CASE

Plaintiffs Ayanna Brown and Louis Brown are the parents of Alajawan Brown. Alajawan was shot and killed in Seattle on April 29, 2010. A police investigation followed. Curtis Walker was arrested and charged with the murder of Alajawan on June 17, 2010. Plaintiffs did not file this lawsuit against the State of Washington until November 24, 2014, more than four years after Alajawan's death and more than four years after Walker was arrested and charged with Alajawan's murder.

On April 29, 2010, Curtis Walker was an offender on Department of Corrections supervision. CP at 62. He had an extensive criminal history. At the time of his arrest for Alajawan's murder, Walker was already in Department of Corrections custody after being arrested for an unrelated parole violation in May 2010, one month after Alajawan's murder. Information charging Walker with Alajawan's murder was filed by King County prosecutors in the King County Superior Court (Cause No. 10-1-04301-9 SEA) on June 17, 2010. CP at 61. In the charging documents, the King County Prosecuting Attorney requested an extraordinary high bail of \$5,000,000.00 because, the deputy prosecuting attorney wrote, Walker had a criminal history "which is lengthy and violent." CP at 62. In this same court document prosecutors stated that Walker shot and killed Alajawan "while on Department of Corrections

probation for his most recent conviction under the Drug Offender Sentencing Alternative (DOSA).” CP at 62. It is undisputed that the charging documents which disclosed this information are public records which are readily accessible by the public.

There was extensive coverage in Seattle area print and television media concerning Alajawan’s murder and the events that led to Walker’s arrest on June 17, 2010, and his arraignment on July 1, 2010. This included coverage of the police investigation which culminated in the arrest, charging, and arraignment of Walker between June 17, 2010, and July 1, 2010. In this time period media reported that Walker had a lengthy criminal history and was on Department of Corrections supervision at the time of his arrest for Alajawan’s murder in June 2010. CP at 7-89. The media also reported that Walker had been in department custody for a probation violation since May 14, 2010. CP at 79. Examples of contemporaneous reports published in the Seattle media gave clear notice of the fact that Walker had an extensive criminal history and that he was in Department of Corrections custody for a probation violation at the time of his arrest for Alajawan’s murder.

- “Walker was arrested in May for a probation violation in an unrelated case and is being held at the State Corrections Center in Shelton.” (KIRO TV Report dated June 17, 2010). CP at 77.

- “Now a felon has been charged with the crime and the family learned this was no accident . . . Walker has previous convictions for assault, drug possession, malicious mischief, reckless endangerment, harassment, obstruction, trespassing, and violation of a protective order according to prosecutors. He has been in custody since May 14 for a probation violation.”

Seattle Times, June 17, 2010. CP at 79. This same news story contains a photograph of Plaintiffs speaking to the press at a news conference following Walker’s arrest on June 17, 2010. CP at 79.

- “Walker has a lengthy criminal history . . . including several convictions for assault, drugs and firearms violations.”

KOMO News, June 17, 2010. CP at 83.

Plaintiffs cooperated with law enforcement and King County prosecutors in the investigation and prosecution of Walker. They attended court hearings in the criminal proceeding. They also cooperated with the media covering the arrest and prosecution of Walker. They freely gave interviews with the press during the time of Walker’s arrest and arraignment between June 17, 2010 and July 1, 2010. Media accounts of Walker’s arraignment on July 1, 2010, reported that Alajawan’s relatives “sat just a few feet away from Walker in court on Thursday waiting to hear his plea in person.” KOMO News, July 1, 2010. CP at 85. At this hearing, the prosecuting attorney requested bail in the extraordinary high amount of \$5,000,000 after noting in documents filed with the court that Walker’s criminal history “is lengthy and violent.” CP at 62. This same

public record states that Walker allegedly shot and killed Alajawan, “*while on Department of Corrections probation* for his most recent conviction under the Drug Offender Sentencing Alternative (DOSA).” CP at 62. (emphasis added).

As well as being present at Walker’s arraignment, Plaintiffs closely followed the trial in which a jury convicted Walker of murder in early 2012. CP at 93. They also attended his sentencing hearing that took place on March 22, 2012. CP at 21-24; CP at 24-26.

Plaintiffs claim that they first actually learned at Walker’s sentencing hearing held on March 22, 2012 that Walker was on Department of Corrections supervision when he shot and killed their son. CP at 22, 25. By this date Plaintiffs still had more than a year left under the three-year statute of limitations to file a tort claim and to file a civil lawsuit against the Department of Corrections.

Plaintiffs did not meet with legal counsel concerning a possible civil lawsuit until March 14, 2014, nearly two years following the sentencing hearing. They state in their declarations that they delayed seeking legal counsel concerning a possible civil lawsuit against the Department of Corrections because “seeing the criminal investigation and trial through to its close took an enormous amount of emotional energy, and by the time it was over we did not have much strength left.” CP at 23;

CP at 25-26. A public records request was made by their attorneys on March 18, 2014. CP at 53. Within five days the Department of Corrections confirmed that Walker was on Department supervision in April 2010. The release of the Department's records concerning Walker's supervision followed. CP at 53.

Plaintiffs filed a tort claim against the State of Washington on September 3, 2014. CP at 106-111. They filed suit on November 24, 2014, just over 60 days later. CP at 1-8.

Both sides moved for summary judgment on issues related to the statute of limitations. The trial court held that the discovery rule applied to Plaintiffs' cause of action for negligent supervision against the Department of Corrections. She went on to rule that Plaintiffs' cause of action accrued in June 2010 when Plaintiffs knew, or should have known had they exercised due diligence, that Curtis Walker was on probation at the time of their son's murder. CP at 205. Plaintiffs then had three years from the end of June 2010 - until the end of June 2013 - to file a claim and commence their lawsuit against the Department of Corrections. Since they failed to file their tort claim until September 3, 2014, and did not file their lawsuit until November 24, 2014, their claims were barred by the statute of limitations. CP at 48-149. Plaintiffs filed a timely notice of appeal of the trial court's order entered on February 20, 2015.

III. COUNTERSTATEMENT OF THE ISSUES

The trial court was correct in holding that Plaintiffs knew, or in the exercise of due diligence should have known, facts sufficient to establish their cause of action by June 2010.

IV. ARGUMENT

A. Standard of Review

This court reviews a summary judgment de novo. *Lunsford v. Saberhagen Holdings, Inc.*, 116 Wn.2d 264, 270, 208 P.3d 1292 (2009). The superior court should grant summary judgment if it determines, after viewing the entire record and drawing all reasonable inferences in favor of the nonmoving party, that there are no genuine issues of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c); *Lyons v. US Bank NA*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). Once the moving party meets its burden to demonstrate the absence of a material fact, the burden shifts to the nonmoving party to submit affidavits to refute the moving party's contention and show that a genuine issue of fact exists for trial. E.g., *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1998). The nonmoving party may not rely on speculation or argumentative asserts to defeat summary judgment. *Vacova v. Farrell*, 62 Wn. App. 386, 394, 814 P.2d 255 (1991).

B. Plaintiffs' Claims Are Time Barred And Should Be Dismissed

“The general rule in ordinary personal injury actions is that a cause of action accrues at the time [of] the act or omission.” *In re the Estate of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992). However, in cases where the discovery rule applies, the statute of limitations will not begin to run until the plaintiff discovers, or should have discovered with the exercise of due diligence, the facts giving rise to the cause of action. *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998). The cause of action accrues under the discovery rule when a party knows, or through the exercise of due diligence should have known, the basis for the cause of action. *Allen*, 118 Wn.2d at 758; *Hibbard*, 118 Wn.2d at 744.

“The discovery rule does not require a plaintiff to understand all the legal consequences of the claim.” *Green*, 136 Wn.2d at 87. The general rule in Washington is that 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. “The plaintiff is charged with what a reasonable inquiry would have discovered.” *Id.* at 96. The injured plaintiff must exercise due diligence to discover the harm and the cause. *Id.* at 95. If the discovery rule applies, the accrual of Plaintiffs’ tort claim is delayed “only until the time when a plaintiff discovers, *or through the exercise of due diligence*

should have discovered, the basis for the cause of action.” *Allen*, 118 Wn.2d at 758 (emphasis added). The discovery rule does not toll the statute of limitations until plaintiff has proof of essential facts. It only delays accrual until an injured party knows, or through due diligence should have discovered, the factual basis of the cause of action. *Beard v. King County*, 76 Wn. App. 863, 867, 889 P.2d 501 (1995).

Unless the discovery rule applies in the present case, Plaintiffs’ cause of action accrued on April 29, 2010, the date of Alajawan’s murder. Plaintiffs would have been required to commence their lawsuit against the State of Washington by filing a tort claim no later than April 28, 2013. Assuming the filing of a timely tort claim, their cause of action would have been tolled for 60 days until June 28, 2013. Plaintiffs would have been required to file suit by this date. RCW 4.92.110. If the discovery rule applies, Plaintiffs were required to file their tort claim by June of 2013, and to file suit no later than August of 2013.

It is undisputed that Plaintiffs did not file suit until November 24, 2014. Under either theory, their claims against the State of Washington related to the supervision of Curtis Walker are time barred.

C. The Trial Court Correctly Held That Under The Discovery Rule Plaintiffs' Claims Accrued In June 2010 When Curtis Walker Was Arrested And Charged With The Murder Of Their Son

The trial court held that the discovery rule applied to issues related to the statute of limitations. Accordingly, the court correctly held that had they exercised due diligence Mr. and Mrs. Brown could have learned sufficient facts to make a preliminary decision concerning whether to pursue a civil lawsuit against the Department of Corrections by June 2010. By that time, Curtis Walker had been charged with their son's murder, and the fact that Walker was on Department of Corrections supervision when Alajawan Brown was murdered was available to the Browns through public records, as well as having been reported in media accounts.

The trial court also noted in her ruling that "[i]f the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time barred." CP at 205. "The claimant has only to file suit within the limitation period and use the civil discovery rules to determine whether the evidence necessary to prove the cause of action is obtainable." CP at 205. As the trial court correctly held, the discovery rule does not require conclusive proof of a claim before the limitations period begins to run. CP at 205.

Instead of exercising due diligence and following up by seeking additional information once they knew that Walker had been arrested and charged, Mr. and Mrs. Brown waited nearly four years until March 2014 to consult legal counsel concerning a possible civil lawsuit. The ruling of the trial court concerning the Plaintiffs' lack of due diligence is sound and should be affirmed by this court.

1. *Allen v. State Controls the Application of the Discovery Rule*

In her ruling the trial court followed Washington Supreme Court precedent established in *Allen*, 118 Wn.2d at 753. Like the Plaintiffs in the present case, the plaintiff in *Allen* alleged that the Department of Corrections was negligent in the supervision of an offender who shot and killed her husband. Just as Plaintiffs did in the present case, Mrs. Allen did not commence her lawsuit until several years after the three-year statute of limitations had run. Also as Plaintiffs argue in the present case, the plaintiff in *Allen* argued that her grief and understandable emotional upset concerning the death of her husband prevented her from performing an investigation of known facts which would have led to discovery that the man who shot and killed her husband was a convicted felon who was being supervised by the Department of Corrections at the time of the shooting. The plaintiff in *Allen* argued that her cause of action did not

accrue for several years after the shooting until she did, in fact, learn information which could support a cause of action for negligent supervision. Similarly, Mr. and Mrs. Brown stated in declarations filed with the court that they delayed consulting legal counsel concerning a possible civil lawsuit because of grief over the loss of their son. CP 23; CP 25-26.

The facts in *Allen* presented to support delay of the accrual of plaintiff's claim were more sympathetic than the facts presented to support delay in the present case. Unlike Mrs. Allen, Plaintiffs knew the identity of the offender and had knowledge of sufficient facts to learn that he had a criminal record and was on supervision within a few weeks of the shooting. The plaintiff in *Allen* was unaware of the identity of the shooter and was unaware that he had a criminal history until several years had passed. In contrast to the Plaintiffs in the present case, family members of the plaintiff in *Allen* deliberately concealed newspaper and other media accounts of the shooting, meaning Mrs. Allen had no actual knowledge of the identity of the shooter or his prior criminal record for many years, even though this information was available had she sought it out.

The Supreme Court in *Allen* rejected the argument made by the plaintiff that the discovery rule applied to toll the accrual of the statute of limitations until three years after she learned that the man who shot and

killed her husband was on Department of Corrections supervision. The Court held that even if the discovery rule applied, plaintiff was required to use due diligence to discover the factual basis for her cause of action. “The discovery rule,” the Court held, “will postpone the running of a statute of limitations only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action . . . even if *actual* discovery did not occur until later.” *Allen*, 118 Wn.2d at 758 (emphasis in original). The Supreme Court held that Mrs. Allen did not exercise due diligence because she failed to keep in contact with law enforcement and ignored media accounts which were available to her, even though she lived in a different location from the shooting. Because the facts relevant to her cause of action could have been known to her through the exercise of due diligence, the Supreme Court held that the discovery rule did not apply to delay accrual of the cause of action for negligent supervision to the point where she did have actual knowledge. The fact that Mrs. Allen had emotional difficulties in dealing with her husband’s death “[did] not excuse her failure to exercise due diligence.” *Allen*, 118 Wn.2d at 759.

In so holding, the Supreme Court recognized the understandable emotions experienced by families of an injured or deceased victim in tort cases who are required to follow up leads to determine the actual cause of

their loved one's death or injury. The Court held, however, that the public policy supporting the protection of defendants from untimely and stale claims justified requiring claimants to make the hard choice of proceeding with such inquiries or risk loss of their possible claims. *Allen*, 118 Wn.2d at 759 (citing *Sexton v. United States*, 832 F.2d 629, 636 (D.C. Cir. 1987)).

Plaintiffs attempt to distinguish *Allen* from the present case by pointing out that, unlike Mrs. Allen, they fully cooperated with law enforcement, took an active part in the prosecution of the offender, and followed the criminal case through the sentencing hearing that took place in March 2012, when they claim they first learned that he was on Department of Corrections supervision at the time of their son's murder. These so called factual distinctions only point out that the Plaintiffs had much more knowledge within the three-year period following the shooting that did the plaintiff in *Allen*.

2. Applying The Discovery Rule, Plaintiffs' Claims Accrued Not Later Than June Of 2010

Unlike Mrs. Allen, Mr. and Mrs. Brown knew the identity of the shooter less than two months after Alajawan's death. They knew from media accounts that he had an extensive criminal record prior to the shooting. They are also charged with knowledge from media coverage and

public records that Curtis Walker was on Department of Corrections supervision when he shot and killed their son. Had they reviewed these media accounts and court filings in the criminal case, they would have known by June of 2010 that Walker was on supervision on April 29, 2010. Moreover, with no more than the identity of the shooter, the Browns could have easily learned that Curtis Walker was on Department of Corrections supervision through a public disclosure request to the Department.

A KIRO TV broadcast on June 17, 2010, that followed Curtis Walker's arrest and indictment for the murder, reported that Walker was a "violent felon" who had been "arrested in May for a probation violation in an unrelated case and is being held at the state Corrections Center in Shelton." CP at 77. On that same date, the Seattle Times reported that Walker had previous convictions for assault, drug possession, and other crimes prior to the shooting of Alajawan Brown. The same article stated that Walker "had been in custody since May 14 for a probation violation." CP at 79. Many other media accounts following the shooting death of Alajawan through the police investigation and prosecution notified the public, including the Brown family, that Curtis Walker had a long criminal history. CP at 83, 85, 88, 91, 95 and 99.

Two years earlier on July 1, 2010, KOMO News reported that following arraignment on the murder charge, a King County Superior

Court judge set Walker's bail at \$5,000,000.00 pursuant to the request of the prosecuting attorney. CP at 62. This broadcast reported that Alajawan's family attended Walker's arraignment and bail hearing held on July 1, 2010, and "sat just a few feet away from Walker in court on Thursday, wanting to hear his plea in person." CP at 85. The Superior Court file contained the prosecuting attorney's Case Summary and Request for Bail and/or Conditions of Release dated June 17, 2010 along with the Information charging Walker with Alajawan's murder. Both are public records maintained by the King County Superior Court Clerk. In the Case Summary the prosecutor described Walker's long criminal history and the fact that he shot and killed Alajawan "*while on Department of Corrections probation* for his most recent conviction under the Drug Offender Sentencing Alternative (DOSA)" as the basis for recommending such a high bail:

The State requests bail of \$5,000,000. *The defendant shot and killed the 12-year old victim while on Department of Corrections probation . . . His history is lengthy and violent. . . . He is currently in Department of Corrections custody for violating the terms of his DOSA.*

CP at 62 (emphasis added).

Mr. and Mrs. Brown were present in court for Walker's arraignment on July 1, 2010. The fact that Curtis Walker was on Department of Corrections supervision at the time of Alajawan's murder

was set forth in the Information filed by the prosecuting attorney dated June 17, 2010, which charged Walker with first degree murder. In this document, a public record contained in the superior court file, the deputy prosecuting attorney stated that shortly after the shooting “Curtis Walker was arrested by the Department of Corrections for violating the conditions of his release” and stated that he remained in Department of Corrections custody. CP at 66.

Mr. and Mrs. Brown could have confirmed the fact that Curtis Walker was on supervision by making a public disclosure request to the Department of Corrections once his identity was known by mid-June 2010. Had they done so, they would have learned that Walker was on Department of Corrections supervision on April 29, 2010, and would have received information maintained by the Department concerning his supervision. CP at 52-54. *See also* RCW 42.56. They failed to do so. Instead, by their own admission, Plaintiffs did not consult legal counsel to learn potential causes of actions against the state for two years after they claimed to have first learned at the time of Walker’s sentencing on March 22, 2012, that he was on Department of Corrections supervision at the time of their son’s murder.

When the factual record is viewed in a light most favorable to Plaintiffs, the trial court ruled correctly that their cause of action accrued

in June 2010, not March 2012. Nothing was concealed from Plaintiffs. Nothing was done to mislead them concerning the status of Mr. Walker at the time of the shooting. No special relationship existed between Plaintiffs and the Department of Corrections that required the Department to notify them that the man charged and later convicted of murdering their son was on Department of Corrections supervision. Plaintiffs simply failed to exercise due diligence prior to the sentencing hearing held in March 2012 to confirm whether Walker was on Department of Corrections supervision. Even after they claim to have actually learned on March 12, 2012, that Walker was on supervision in April 2010, they failed to consult legal counsel concerning a possible civil lawsuit until two years later in March 2014.

Plaintiffs are really arguing that they did not learn of a legal theory to support a civil lawsuit against the Department of Corrections until March 2014. The discovery rule does not postpone accrual of a claim until plaintiffs discover the proper legal theory. E.g., *Allen*, 118 Wn.2d at 758 (and cases cited therein). The trial court held correctly that through the exercise of due diligence, Plaintiffs had sufficient factual information necessary to establish claims of breach of duty, causation and damages against the Defendant, the Washington State Department of Corrections, by the end of March 2010. The fact that they did not discover their legal

theory until March 2014, nearly a year after the three-year statute of limitations ran, is irrelevant. The trial court correctly rejected Plaintiffs' theory that their claims did not accrue until March 2014.

As the Supreme Court noted in *Allen* and has held in many other similar cases, “[t]he key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should have known the relevant facts whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.” *Allen*, 118 Wn.2d at 758 (citing *Reichelt*, 107 Wn.2d at 769, 733 P.2d 530; *Gevaart*, 111 Wn.2d at 502, 760 P.2d 348).

Plaintiffs' cause of action accrued no later than June 17, 2010, the date the information was available to them that Walker was on Department of Corrections supervision on April 29, 2010. Plaintiffs then had three years until June 16, 2013, to file their tort claim against the State of Washington. This would have tolled the statute of limitations for 60 days, meaning Plaintiffs had to file suit on or before August 16, 2013. *See* RCW 4.16.080(2) and RCW 4.92. They then had another 90 days pursuant RCW 4.16.170, to serve the Defendant. Plaintiffs did not file their tort claim until September 3, 2014, and did not file their lawsuit until

November 24, 2014. The claims contained in their lawsuit are untimely. Their complaint for damages must be dismissed because of the running of the statute of limitations.

3. Application Of The Discovery Rule Does Not Mean That Plaintiffs' Lawsuit Was Timely Commenced

Absent an exception to the general rule, a cause of action for personal injury accrues at the time the act or omission occurs. *Hibbard*, 118 Wn.2d at 744; RCW 4.16.080(2). In *Hibbard*, the Supreme Court noted that the “discovery rule” is an exception to this general rule. *Hibbard*, 118 Wn.2d at 745. The Court went on to note that application of the discovery rule is “limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant.” *Hibbard*, 118 Wn.2d at 750. Even when the discovery rule applies in these limited situations, “this court continues to emphasize the [need for] exercise of due diligence by the injured party.” *Hibbard*, 118 Wn.2d at 746. Under the discovery rule the statute of limitations is tolled “only until plaintiff knows an injury exists, unless there is objective evidence that plaintiff could not have discovered a factual element essential to the claim.” *Hibbard*, 118 Wn.2d at 752 (emphasis added).

In the present case, all the essential factual elements of Plaintiffs' claims were known or could have been known by mid-June 2010 when Plaintiffs learned the identity of their son's killer. By this time they had the ability to discover whether or not the slayer was on Department of Corrections supervision at the time of the murder through the review of public records, including court documents in Walker's criminal case file and documents in the custody of the Department of Corrections related to its supervision of Walker. All of these documents and information are and were available to the public under the Washington Public Disclosure Act. RCW 42.56. The fact that the discovery rule applies does not support Plaintiffs' theory that the statute of limitations was tolled until they had actual knowledge that Walker was on supervision.¹

All of the cases cited by Plaintiffs in their brief are cases where recognized exceptions to the general rule have been applied in situations where all essential facts necessary to maintaining a cause of action could not be reasonably determined. None of the authorities cited support Plaintiffs' position that the statute of limitations is tolled in a negligent supervision case until Plaintiffs actually learn that their injuries were

¹ In *Allen* the Supreme Court based its opinion on analysis of the discovery rule because both parties assumed in their briefs that the discovery rule did apply. The Supreme Court expressed no opinion on whether the discovery rule applied to negligent supervision cases. *Allen*, 118 Wn.2d at 458, n.4. No Washington precedent holds that cases alleging negligence in the supervision of offenders by the Washington State Department of Corrections are governed by the discovery rule.

caused by an offender on Department of Corrections supervision. The Plaintiffs in a negligent supervision case have the ability to pursue sufficient information to learn the essential elements of their cause of action against the Department of Corrections once they know the name of the individual who caused them harm. They can then take steps to learn whether or not that individual was on Department of Corrections supervision at the time of the injury and review public records maintained by the Department concerning the offender to determine whether or not a cause of action against the Department of Corrections is viable.

The discovery rule was first formulated by the Supreme Court in *Ruth v. Dwight*, 75 Wn.2d 660, 453 P.2d 631 (1969). In *Ruth*, a medical malpractice case, the Washington Supreme Court held that the discovery rule applied to a case where a plaintiff did not learn until years afterward that the continual pain she was experiencing was caused by a foreign substance left in her body during a surgery performed many years earlier. In formulating the discovery rule as an exception to the general rule that tort claims accrue within three years of the act or omission causing injury, the Washington Supreme Court announced a limited exception to the general rule and held that in medical malpractice cases involving a foreign object left in the body during surgery, the statute of limitations begins to

run when the patient discovers, or in the exercise of reasonable care should have discovered, the foreign substance. *Ruth*, 75 Wn.2d at 636.²

The discovery rule was judicially extended to other situations where the plaintiff, through no fault of his or her own and even with the exercise of due diligence, could not have discovered the cause of injury until after three years had passed following the tortious act that caused injury. In each case, the appellate court stated that these were specific exceptions to the general rule in personal injury actions that a cause of action for negligence accrues at the time of the negligent act. *See, e.g., Gevaart v. Metco Constr.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988) (claims against builders for negligent design and construction); *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975) (cancellation of insurance policy; extension of rule based upon fiduciary relationship between plaintiff and defendant insurance company); *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687 (1985); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 830 (1987) (discovery rule extended to certain product liability claims including asbestos claims where cause of injury not known due to latent nature of occupational

² This rule concerning medical malpractices cases was limited when the Legislature enacted RCW 4.16.350 which states that medical malpractice suits must be commenced within three years of the alleged act of negligence or within one year of the time the patient discovered or reasonable should have discovered the cause of injury, whichever is later.

diseases); *Mayer v. City of Seattle*, 102 Wn. App. 66, 10 P.3d 408 (2000) (discovery rule applied to toxic waste cases where plaintiff could not readily know material is toxic); *Cox v. Oasis Physical Therapy*, 153 Wn. App. 176, 222 P.3d 119 (2009) (rule applied to certain medical malpractice claims where there is evidence of intentional concealment).

In each of these cases where the discovery rule was held to apply as an exception to the general rule, the appellate courts have held that the date of accrual of a cause of action under the discovery rule is extended only to the point where the plaintiff knows, or in the exercise of due diligence should have known, the factual basis for the cause of injury. The time of accrual of the claim does not extend to the time that the claimant discovers the correct legal theory to pursue. E.g., *Cox*, 153 Wn. App. at 190 (and cases cited therein).

The trial court's ruling should not be interpreted to mean that the discovery rule tolls the accrual of the cause of action for negligent supervision beyond the date that the identity of the suspect of the new crime is known. Once the name of the suspect of the new crime is identified, particularly after the suspect is charged with the new crime, the factual basis for a potential claim against the Department of Corrections is no longer concealed. The factual basis for a potential claim against the Department is available to the potential civil litigant through public

records including court records which can be readily accessed by the public and records of the Department of Corrections which can be obtained through public disclosure. Information concerning the criminal history of the person charged with the new crime is often available in charging documents filed with the court in the new criminal proceeding, which are a public record and can be easily accessed by the public.

As in the present case, the charging documents for the new criminal offense often document whether or not the person charged with a new crime is currently on Department of Corrections supervision. Once this information is available and the individual charged with the new crime is clearly identified, further inquiry can be made through a public records request directed to the Department of Corrections. The Department will then respond and either confirm or deny that the subject of the inquiry was on Department supervision at the time of the new offense. Responses will also include information concerning the behavior of the offender while on supervision and the response of community corrections officers. In contrast to cases involving injury from medical malpractice or toxic torts, factual information needed to make a preliminary determination whether to pursue a lawsuit regarding Department of Corrections supervision of an offender who commits a new

crime is readily available, in most cases, within three years of the offender's new criminal actions.

Logic and principles of public policy do not support Plaintiffs' argument that their cause of action for negligent supervision did not accrue until March 2012 when they acquired actual knowledge that Curtis Walker was on Department of Corrections supervision. When a plaintiff is placed on notice of some appreciable harm occasioned by another's wrongful misconduct, the plaintiff "must make further diligent inquiry to ascertain the scope of the actual harm." *Green*, 136 Wn.2d at 96. The plaintiff is then charged with what a reasonable inquiry would have discovered. "[O]ne who has notice of facts sufficient to put him on inquiry is deemed to have notice of all facts which reasonable inquiry would disclose." *Green*, 136 Wn.2d at 96 (citations omitted). In the present case, the trial court held correctly that Plaintiffs had sufficient notice to require them to make further inquiry once they knew the identity of the man who was charged with their son's murder in mid-June 2010. The trial court applied the discovery rule to hold that Plaintiffs' cause of action was delayed under the discovery rule only until the date when the identity of the man charged with their son's murder was known.

V. CONCLUSION

The trial court ruled correctly that Mr. and Mrs. Brown failed to exercise due diligence after June 2010 in seeking additional facts to support a claim of negligence against the State of Washington. They had plenty of reason to know from information contained in public documents and from the extensive media coverage of the arrest and charging of Curtis Walker. Even if they truly did not know sufficient facts to support their claims by the end of June 2010, they had sufficient information by this time that had they acted with due diligence they would have learned sufficient facts to support their cause of action against the State of Washington. The trial court correctly held that their claims were time barred. Plaintiffs' arguments that their cause of action did not accrue until March 2012 cannot be accepted without overturning the Supreme Court's holdings in *Allen v. State*.

The decision of the trial court granting the defense motion for summary judgment and dismissing Plaintiffs' complaint should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of August, 2015.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "Patricia C. Fetterly".

s/Patricia C. Fetterly

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PROOF OF SERVICE

I declare that I caused to be served a copy of this document that has been electronically filed with the Court of Appeals Division I, on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of August 2015, at Tumwater, WA.



Laurel DeForest