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**I. Response to Appellant's Assignment of Error**

The trial court properly dismissed Appellant's complaint because it was filed more than three years after the alleged wrongful act giving rise to Appellant's claim of "outrage." Therefore, Appellant's claim is barred by the statute of limitations. Furthermore, even if the trial court had accepted Appellant's argument that the cause of action did not accrue until he obtained transcripts of 911 tapes on December 11, 2003, dismissal of the complaint was still justified because Appellant failed to serve the Complaint within 90 days after it was filed on December 8, 2006.

**II. Issues Presented**

- A. WHETHER THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT AS BEING BARRED BY THE STATUTE OF LIMITATIONS?
- B. ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE DISCOVERY RULE APPLIED AND THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL DECEMBER 11, 2003, WAS THIS ACTION STILL BARRED BY THE STATUTE OF LIMITATIONS BECAUSE OF APPELLANT'S FAILURE TO SERVE HIS COMPLAINT WITHIN 90 DAYS OF FILING?

### **III. Statement of the Case**

Appellant, Michael Snyder, filed a Complaint against Kelly Parnell and Allison Parnell on December 8, 2006 in the Superior Court of Clark County, Washington, asserting a cause of action for outrage. This cause of action is based upon false statements allegedly made by Ms. Parnell about Mr. Snyder during a 911 call on June 16, 2003. On that date, there was a domestic disturbance between Mr. Snyder and his then-wife, Sara Snyder. (C.P. 4). Police officers responded to the 911 calls received from Mr. Snyder, Ms. Parnell and Sara Snyder that day. After interviewing all of the witnesses, Mr. Snyder was arrested for domestic violence felony harassment. (See Exhibit 4 to Appellant's brief). Mr. Snyder subsequently entered a guilty plea to a charge of misdemeanor harassment.

Allison Parnell was served with a copy of Mr. Snyder's Complaint on March 9, 2007. (C.P. 10). Mr. Snyder took no further action in this case until November 30, 2007, when he requested that the clerk issue a subpoena to allow him to take his ex-wife's deposition in Colorado. (C.P. 6).

On January 15, 2008, the Parnells filed a motion in the trial court to dismiss Mr. Snyder's Complaint because it was barred by the statute of limitations. (C.P. 19). The Parnells also requested sanctions against Mr.

Snyder under CR 11 and RCW 4.84.185. The Parnells' request was based upon the frivolousness of Mr. Snyder's claim, which was advanced without reasonable cause because the three year statute of limitations applicable to the claim had expired before the Complaint was filed. (C.P. 24-25). The trial court granted the Parnells' motion to dismiss under C.R. 12(b)(6) and ordered Mr. Snyder to pay \$900 to the Parnells as a sanction. (C.P. 44).

#### **IV. Summary of Arguments**

The trial court properly dismissed Mr. Snyder's Complaint. For the tort of outrage (also referred to as intentional infliction of emotional distress), the statute of limitations begins to run when the alleged wrongful act has occurred. The statute of limitations for personal injury actions is three years. RCW 4.16.080(2). The alleged wrongful act occurred on June 16, 2003. The Complaint was filed on December 8, 2006. Thus, the claim is clearly barred by the statute of limitations. Mr. Snyder's contention that the discovery rule applies to this case is without merit.

Even accepting Mr. Snyder's assertion that the statute of limitations did not begin to run until he obtained transcripts of Ms. Parnell's 911 call on December 11, 2003, this action is still barred by the statute of limitations. The filing of a complaint in itself does not

commence an action for purposes of tolling the statute of limitations. The Plaintiff must also serve the Complaint within 90 days of filing. Because Mr. Snyder did not serve Ms. Parnell within 90 days after filing his complaint, the action would still be barred by the statute of limitations even if the Court accepted Mr. Snyder's argument that the discovery rule applied to this case.

**V.    Argument**

A.    THE TRIAL COURT CORRECTLY DISMISSED  
PLAINTIFF'S COMPLAINT AS BEING  
BARRED BY THE STATUTE OF  
LIMITATIONS.

The trial court granted the Parnells' motion to dismiss under CR 12(b)(6) because Mr. Snyder's Complaint failed to state a claim upon which relief could be granted since the Complaint was barred by the three year statute of limitations under RCW 4.16.080(2). This dismissal was proper because even if all facts asserted in Mr. Snyder's Complaint are accepted as true, his claim would still be barred. *See Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978).

On appeal, a trial court's dismissal of an action under CR 12(b)(6) is reviewed *de novo*. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 962 P.2d 104 (1988).

The trial court correctly dismissed this case under CR 12(b)(6) because it is barred by the statute of limitations. RCW 4.16.080(2) requires that actions for injury to a person or rights of another must be commenced within three years. The general rule in personal injury actions is that a cause of action accrues at the time that the act or omission occurred. *In re the Matter of Estates of Hibbard*, 118 Wn.2d 737, 826 P.2d 690 (1992). In this case, the alleged wrongful act occurred on June 16, 2003. Plaintiff's complaint was not filed until December 8, 2006. Therefore, Plaintiff's claim is clearly barred by the statute of limitations.

Mr. Snyder argues that the "discovery rule" applies to his case and that his cause of action did not accrue until he obtained the transcript of Ms. Parnell's call to 911 in December 2003. The discovery rule was described in *Estates of Hibbard, supra*, as follows:

In certain torts, ... injured parties do not, or cannot, know that they have been injured; in [those] cases, a cause of action accrues at the time the Plaintiff knew or should have known all the essential elements of a cause of action. This is an exception to the general rule and is known as the "discovery rule." 118 Wn.2d at 744.

In *Estates of Hibbard, supra*, the Court noted that the discovery rule was first applied in a medical malpractice case in which a sponge had been left in a patient's abdomen. The patient suffered pain for years afterward, but did not discover the sponge until exploratory surgery was

performed 22 years later. In medical malpractice cases in which a foreign substance or article is left in the patient's body after surgery, the Court held that the statute of limitations does not begin to run until the patient discovers or, in the exercise of reasonable diligence, should have discovered the presence of the foreign substance or article. *See Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969).

Because of the latent nature of some occupational diseases, the discovery rule has also been applied to products liability actions related to asbestosis. *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687(1985).

The discovery rule has also been applied when there is a fiduciary relationship with the parties. In *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975), the Plaintiff's insurance company had cancelled his coverage without his knowledge. The Plaintiff relied upon his fiduciary relationship with the Defendant and did not know of the cancellation until after the limitation period had expired. Based on these facts, the Court determined that the Plaintiff's cause of action accrued when he first had the opportunity by the exercise of reasonable diligence to discover he had an actionable claim for cancellation of the policy.

In *Estates of Hibbard, supra*, the Court noted that there has been an increased application of the discovery rule. However, the Court noted that application of the rule should be limited as follows:

Application of the rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant. Application of the rule is extended to claims in which plaintiffs could not immediately know the cause of their injuries. 118 Wn.2d at 749-750.

Thus, in *Estates of Hibbard*, the Court determined that the discovery rule did not apply to an action against the State for negligently supervising a convict on probation who murdered the Plaintiff's parents. The Court held that the statute of limitations began to run on the date of the murder.

Mr. Snyder's claim that Ms. Parnell's allegedly false statements during a 911 call constitute "outrage" and that he was damaged due to his subsequent arrest and conviction of a domestic violence crime is factually unique, especially in light of the fact that Mr. Snyder entered a guilty plea to the crime. *Gausvik v. Perez*, 392 F.3d 1006 (9<sup>th</sup> Cir. 2004) and *Doggett v. Perez*, 34 F.Supp. 1169 (E.D.Wa. 2004) are two cases which are somewhat factually similar. These lawsuits were filed by arrestees against public officials alleging false arrest and negligent and intentional infliction

of mental distress, among other claims. In these cases, the courts held that the cause of action accrued when the plaintiffs were arrested because they knew at that time of their alleged injury.

In this case, if the Court accepts Mr. Snyder's factual allegations as true, he knew that he was injured by Ms. Parnell's allegedly false statements to the 911 dispatcher when he was arrested on June 16, 2003. According to Mr. Snyder's own Complaint, Ms. Parnell allegedly told him, "Now you're going to get it – watch this!" before calling 911 (C.P. Complaint, p. 2). According to the June 16, 2003 transcripts of the 911 calls attached to Mr. Snyder's brief, Mr. Snyder stated to the 911 dispatcher that Ms. Parnell came to his house and was "accusing me of things that she doesn't even know what she's talking about." (See Exhibit 3 to Appellant's Brief, p. 7). Mr. Snyder also stated, "I just don't want to get taken down on the ground and arrested because my neighbor decided to make something up that even my wife didn't go to the extent to do." (See Exhibit 3 to Appellant's Brief, p. 15). Mr. Snyder also had the following exchange with the 911 dispatcher concerning Ms. Parnell:

DISPATCHER: So why would your neighbor be trying to do all this?

MICHAEL SNYDER: Because she's a busy-body and my wife is a compulsive liar and a manipulator who has been telling her big fish

stories, which she falls for, and then came in and tried to get involved, and then came in my house telling me all sorts of things about stuff I never did. (See Exhibit 3 to Appellant's Brief, p. 17).

Thus, even accepting all of Mr. Snyder's factual allegations as true, his claim is still barred by the statute of limitations. He knew of his alleged "injury" resulting from Ms. Parnell's allegedly false statements to the 911 dispatcher when he was arrested on June 16, 2003.<sup>1</sup> The fact that Mr. Snyder waited until December 2003 to obtain a transcript of the 911 tapes has nothing to do with the commencement date for the limitation period for his cause of action.

Mr. Snyder's contention that the discovery rule should apply because Ms. Parnell allegedly concealed facts from him, which were not revealed until he obtained the 911 transcripts, is without merit, as his reliance on *Crisman v. Crisman*, 85 Wn.App. 15, 931 P.2d 163 (1997). In *Crisman*, the discovery rule was applied to a lawsuit by a principal against former agents who had concealed misappropriation of property from her jewelry store. The Court noted that due to the fiduciary relationship

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It should be noted that Mr. Snyder's own records do not support his claim that the dispatch of police to his home and his subsequent arrest were the result of Ms. Parnell's statements. According to the transcript of the 911 tape, the police officers were sent to the home as soon as Mr. Snyder told them that Ms. Parnell was at his home and would not leave. (Appellant's Exhibit 3, p. 8). Further, his arrest and subsequent guilty plea to a harassment charge were the result of his domestic violence towards his ex-wife, not the result of any allegedly false statements made by Ms. Parnell.

between the parties, the defendants had an affirmative duty of candor to the Plaintiff and breached that duty by concealing their fraud. Therefore, the discovery rule applied and Plaintiff's cause of action did not accrue until she learned of the facts constituting the fraud. However, the Court noted:

Absent an affirmative duty to disclose material facts, a Defendant's silence does not constitute fraudulent concealment or misrepresentation. When a duty to disclose does exist, however, the suppression of a material fact is tantamount to an affirmative misrepresentation. *Crisman*, 85 Wn.App. at 22 (citations omitted).

Obviously, in this case, there was no fiduciary relationship between the parties. Therefore, even if the Court accepted Mr. Snyder's argument that Ms. Parnell withheld information about her allegedly false statements to the 911 dispatcher, this would not be a basis to apply the discovery rule to this case.

The commencement date for the statute of limitations in this case was the date of the alleged wrongful act on June 16, 2003. Because the Complaint was not filed until December 8, 2006, it is barred by the three year statute of limitations.

**B. EVEN IF THE LIMITATION PERIOD  
DID NOT COMMENCE UNTIL  
APPELLANT OBTAINED TRANSCRIPTS  
OF THE 911 TAPES ON DECEMBER 11,  
2003, THE ACTION IS STILL BARRED**

BY THE STATUTE OF LIMITATIONS  
BECAUSE THE COMPLAINT WAS NOT  
SERVED UPON ALLISON PARNELL  
UNTIL MARCH 9, 2007.

Mr. Snyder asserts that his cause of action did not accrue until he obtained the transcripts of the 911 calls on December 11, 2003. Even if the discovery rule was applied to this case, the commencement date for the statute of limitations under that rule would start when Mr. Snyder knew or should have known the factual basis for his cause of action. This is an objective, not a subjective, inquiry. For example, in *Allen v. State*, 118 Wn.2d 753, 826 P.2d 200 (1992), a widow made minimal efforts to discover the facts surrounding her murdered husband's death. At the time of his death, the identity of the murderers was unknown. The murderers were later apprehended and convicted in May 1982, although the widow did not learn about their conviction at that time. The widow did not file her wrongful death action against the State for negligent supervision of the murderers, who had been on parole, until October 1985. The Court rejected the widow's arguments that her difficulties in dealing with her husband's death should excuse her failure to exercise due diligence and found that her action was barred by the statute of limitations.

In this case, Mr. Snyder offers a variety of excuses for his failure to obtain the 911 transcripts sooner. These excuses are not part of the trial court record and should not be considered on appeal. However, even if they are considered, they have no bearing on the determination of when he should have known the factual basis for his lawsuit. As the Court found in *Allen*, there is no exception to the due diligence requirement of the discovery rule.

Even accepting, for the sake of argument, that the discovery rule applied and the commencement date for the statute of limitations should be December 11, 2003, as asserted by Mr. Snyder, his claim is still barred by the statute of limitations. RCW 4.16.170 governs when an action is commenced for purposes of tolling the statute of limitations. If service of a complaint is not made within 90 days after filing, the action is not deemed to have been commenced for purposes of tolling the statute of limitations. The mere filing of a Complaint does not commence an action. The Complaint must also be served on the Defendant within 90 days of filing for commencement to be complete. *Wothers v. Farmers Ins. Co. of WA*, 101 Wn.App. 75, 5 P.3d 719 (2000).

In this case, Appellant filed his complaint on December 8, 2006. Ms. Parnell was not served until March 9, 2007, 91 days after the

Complaint was filed. Mr. Snyder sets forth a variety of excuses for the late filing of this action and the late service on Ms. Parnell. Again, Mr. Snyder's excuses are not part of the trial court record and should not be considered on appeal. Even if the Court does consider these new factual allegations and accepts them as true, they still do not support his claim that the Defendants "concealed" themselves, thus tolling the statute of limitations.

Mr. Snyder states that he did not file his Complaint until December 2006 because "there would be little point in filing a complaint early if the parties could not be served." He alleges that the difficulty in serving the Parnells occurred over the "entire 3 year period." (Brief of Appellant, p. 14). However, Mr. Snyder also acknowledges that he knew that the Parnells were still residing in Clark County as late as June 2004, when he indicates that Ms. Parnell was at the Clark County Courthouse to deal with an anti-harassment order filed by Mr. Snyder. (Brief of Appellant, p. 15). Mr. Snyder alleges that the Parnells moved frequently before he filed his Complaint, which offers no support for his claim of concealment after the Complaint was filed. Similarly, Mr. Snyder's allegations that his ex-wife avoided service of a subpoena for her deposition adds nothing to his claim that the Parnells concealed themselves to avoid service of process. The

fact that the Parnells happened to move out of state after this incident is insufficient to establish concealment under RCW 4.16.180 and to toll the statute of limitations. In *Patrick v. DeYoung*, 45 Wn.App. 103, 724 P.2d 1064 (1986), the Court wrote:

A clandestine or secret removal from a known address appears necessary for concealment under the statute. Where the record shows no evidence of evasion of process, the case should be dismissed with prejudice if service was not had within the statute of limitations. 45 Wn.App. at 109.

In this case, there is no evidence of evasion of process. Therefore, the Parnells cannot be found to have concealed themselves. The tolling provisions under RCW 4.16.180 are inapplicable to this case.

Mr. Snyder also states that the statute of limitations is “not written in stone and there are numerous reasons why exceptions might be made depending on the circumstances.” (Brief of Appellant, p. 19). However, as the Washington Supreme Court noted in *Broad v. Mannesmann*, 141 Wn.2d 670, 10 P.3d 371 (2000), there is no “good cause” exception to the application of the statute of limitations in Washington. In *Patrick v. DeYoung*, *supra*, the Court of Appeals found that the trial court has no authority to extend the 90-day period within which RCW 4.16.170 requires a summons to be served on a defendant.

Mr. Snyder failed to file his Complaint within the applicable statute of limitations. Even if this Court accepted Mr. Snyder's proposition that the discovery rule should apply and that the cause of action did not accrue until December 11, 2003, his action is still barred because Ms. Parnell was not served with the Summons and Complaint until March 7, 2007, 91 days after it was filed. An action is not commenced for purposes of tolling the statute of limitations unless it is served within 90 days of filing. RCW 4.16.170.

**VI. Request for Attorney Fees**

The Parnells requested and were awarded attorney fees by the trial court under CR 11 and RCW 4.84.185 because the trial court found that the action was frivolous and advanced without reasonable cause. The Parnells seek additional attorney fees for the costs of responding to Mr. Snyder's appeal under RAP 18.9(a) and CR 11.

The Parnells request attorney fees under RAP 18.9(a) because this appeal is frivolous. An appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *In re Marriage of Penry*, 119 Wn.App. 799, 82 P.3d 1231 (2004).

Further, the Parnells request attorney fees under CR 11. RAP 18.7 requires that each paper filed in appellate courts to be dated and signed as required by CR 11. This provision has been held to incorporate the remedies for violation of CR 11 into the appellate rules. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992). CR 11 allows the court to impose sanctions for the assertion of a legally frivolous claim.

## **VII. Conclusion**

For the reasons stated above, the decision of the trial court should be affirmed. Mr. Snyder's cause of action accrued on June 16, 2003, the date when the alleged wrongful act occurred, and the three year statute of limitations began to run at that time. Because his Complaint was not filed until December 8, 2006, the trial court properly dismissed the case as being barred by the statute of limitations. Furthermore, even if the trial court had accepted Appellant's argument that the discovery rule applied and that the statute of limitations was tolled until he obtained a transcript of Ms. Parnell's 911 call on December 11, 2003, the action would still be barred by the statute of limitations under RCW 4.16.170. Although Plaintiff filed his action on December 8, 2006, Allison Parnell was not served with a copy of the Summons and Petition until 91 days later on March 9, 2007.

Dated this 23<sup>rd</sup> day of November, 2008

GREGERSON & LANGSDORF, P.S.

A handwritten signature in cursive script, appearing to read "Lori A. Ferguson". The signature is written in black ink and is positioned above the printed name.

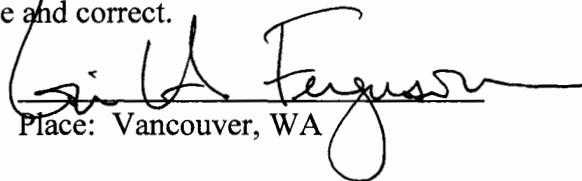
LORI A. FERGUSON, WSB #29018  
Of Attorneys for Respondents

CERTIFICATE OF SERVICE

On the 23<sup>rd</sup> day of November, 2008, I certify that I served the foregoing Respondent's Brief on Appellant by sending a copy by first-class mail to:

Michael Snyder  
P.O. Box 871724  
Vancouver, WA 98687

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

  
Place: Vancouver, WA

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08 NOV 26 AM 11:42  
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