

No. 39330-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WM. DICKSON CO., Appellant,

and

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, Respondent.

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BRIEF OF APPELLANT

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Assignment of Error

The trial court erred in granting Defendant's Motion for Summary Judgment by order dated May 8, 2009, and specifically in finding that there were no material facts in dispute and that Defendant was entitled to judgment as a matter of law.

Issue Pertaining to Assignments of Error

Summary judgment to dismiss a tort claim based on the statute of limitations was inappropriate where the Plaintiff discovered facts sufficient to support a claim against the Defendant less than three years prior to filing of the complaint.

STATEMENT OF FACTS

Appellant Wm. Dickson Co. (“Dickson”) owns and operates an inert landfill and gravel mine at Waller Road in Tacoma. CP 85, 151. Dickson uses the mine to accept inert fill as reclamation material. CP 85, 152. To maintain its landfill activities in accordance with State and Federal law, Dickson holds permits from both the Tacoma-Pierce County Health Department and the Washington State Department of Ecology (“Ecology”). *Id.*

In 2004 and 2005, Ecology was responsible for the oversight and governmental regulation for a Sound Transit light rail construction project located at Beacon Hill. The scope of the Sound Transit project was to excavate and construct an underground transfer station south of Seattle for the new light rail train lines. CP 9-18. Consequently, the project produced significant amounts of liquid and solid waste, which contractors were required to dispose of offsite. *Id.* Some of the waste was deposited at Dickson’s Waller Road landfill from late 2004 to early 2005. CP 152-54. According to the terms of Dickson’s permit, Dickson’s landfill is authorized to accept certain waste, including mud containing bentonite, but cannot accept waste with high pH levels. CP 90, 152.

The contractors responsible for hauling waste to Dickson’s landfill from the Beacon Hill site misrepresented the nature of the waste being

deposited at Dickson's pit. They represented that the waste "drilling mud" containing only water, sand, and bentonite. CP 35. This type of waste would be permitted in Dickson's landfill. CP 88, 152. An Ecology permit manager, Jason Shira, specifically told Dickson it could accept the waste in order to avoid delaying the Beacon Hill project. CP 87-88, 153.

Dickson discovered in February 2005 that the waste received from the Beacon Hill site might also contain cement, which was causing pH levels higher than the authorized limit for Dickson's pit. CP 88, 154. Dickson stopped accepting waste from the Beacon Hill project. CP 154. Ecology asked Dickson to remove the Beacon Hill waste from its landfill in a letter delivered February 23, 2005. CP 89, 154. Dickson received a second letter on March 1, 2005, specifically directing Dickson to remove the bentonite/cement waste. CP 48, 89, 154. Dickson performed significant remediation activities at its own expense. CP 155.

Dickson filed suit against Sound Transit and its contractors in December 2007 under RCW 70.105D, the Model Toxics Controls Act, alleging that the companies excavating at Beacon Hill damaged Dickson by improperly disposing of waste at Dickson's landfill without notifying it of its true chemical compositions. CP 90, 156. The litigation lasted several months and culminated in a settlement of the claims in early 2009. CP 90.

While the Beacon Hill project was progressing, Ecology also monitored the Beacon Hill site itself. CP 90-91. While conducting discovery in its suit against Sound Transit, Dickson uncovered previously unknown information about Ecology's knowledge of the waste being removed from the Beacon Hill site. CP 90-91, 156. Dickson learned that Ecology had knowledge of the chemical composition of the Beacon Hill waste, but failed to properly regulate its disposal or inform Dickson that material exceeding the allowed pH levels was being disposed of at the Dickson pit. CP 3-8.

Initially, Dickson had no reason to suspect that Ecology knew of the harmful substances being hauled to Dickson's landfill. CP 156. Mr. Shira represented to Dickson that the material was benign, composed of "water, sand, and bentonite." *Id.* In fact, upon discovering the true nature of the waste, Dickson wrote numerous letters to Ecology in an effort to persuade Ecology to require Sound Transit to properly dispose of the waste. CP 155.

In preparation for its lawsuit against Sound Transit and its contractors, Dickson had submitted public records requests to Ecology from November 2005 through December 2007. CP 91. Ecology provided some information, but significantly failed to disclose emails proving that Bob Penhale, an Ecology inspector at the Beacon Hill site, was involved in

weekly inspections of the project site and knew the nature of the waste being sent to Dickson's landfill. CP 91, 156-57. These emails were only provided to Dickson after December 2007 via discovery responses from one of the parties in the Sound Transit litigation. CP 90. Prior to this revelation, and consistent with Ecology's responses to Dickson's earlier public records requests, Dickson believed that Ecology and Dickson were learning of the contamination problems concurrently, and Dickson had no reason to suspect otherwise. CP 92-93.

Upon discovering this evidence of Ecology's knowledge that the waste being dumped from the Beacon Hill project contained cement, Dickson submitted a claim to Ecology and subsequently filed suit, alleging negligence and other causes of action. CP 3, 32. Ecology filed a motion for summary judgment to dismiss Dickson's claims based on the statute of limitations, which was granted on May 8, 2009. CP 208-09. Dickson timely filed this appeal. CP 210.

ARGUMENT

Summary judgment in this matter must be reversed because Dickson could not have known the elements of its claim against Ecology until less than three years before it filed suit. Summary judgment is reviewed de novo. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 188, 127 P.3d 5 (2005). A summary judgment motion may be granted under CR 56(c) only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue concerning any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.* at 437.

Summary judgment in this matter was improper because there were genuine issues of material fact as to when Dickson discovered that Ecology knew that the Beacon Hill waste contained cement. The trial court's decision must be reversed.

Summary judgment should not have been granted because Dickson filed suit within three years of discovering the essential facts to support its cause of action against Ecology. Generally, a cause of action for negligence must be brought within three years of accrual. RCW 4.16.080(2). A negligence claim generally accrues when a party has a

right to apply to court for relief, which occurs when each element of the claim is susceptible of proof. *Gausvik v. Abbey*, 126 Wn App. 868, 880, 107 P.3d 98 (2005). However, where a party does not know the elements necessary to establish a claim, it would be unjust to impose a literal application of the statute of limitations, and thus the discovery rule applies to delay accrual of the claim until the plaintiff is able to learn the necessary facts. *Allyn v. Boe*, 87 Wn. App. 722, 736, 943 P.2d 364 (1997).

“Under the discovery rule, the cause of action accrues, and the statute of limitations begins to run, when the plaintiff discovers or reasonably could have discovered all the essential elements of the cause of action.” *Id.* In addition to the facts to establish duty, breach, causation, and harm, the discovery rule also requires knowledge of the defendant’s identity: “And the statute does not begin to run until the plaintiff knows or with reasonable diligence should know that the defendant was the responsible party.” *Id.* (citing *Orear v. Int’l Paint Co.*, 59 Wn. App. 249, 257, 796 P.2d 759 (1990)).

Application of the discovery rule is a question of fact for a jury to decide. *E.g. Webb v. Neuroeducation Inc., PC*, 121 Wn. App. 336, 343, 88 P.3d 417 (2004); *Giraud v. Quicy Farm and Chemical*, 102 Wn. App. 443, 450, 6 P.3d 104 (2000); *Kittinger v. Boeing Co.*, 21 Wn. App. 484,

488-89, 585 P.2d 812 (1978). Where a plaintiff's delay is "not caused by the plaintiff sleeping on his rights, the court may apply the discovery rule." *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997). The discovery rule balances "the policies underlying the statute of limitations against the unfairness of cutting off a valid claim where the plaintiff, due to no fault of her own, could not reasonably have discovered the claim's factual elements until some time after the date of the injury." *Id.* Thus, there are two types of cases where the discovery rule is applied: those where the plaintiff cannot discover the elements of the cause of action within the limitations period due to the nature of the injury and those where the defendant conceals facts and impairs the plaintiff's knowledge of accrual of a cause of action. *Id.* at 20-21; *see also Allyn*, 87 Wn. App. at 737 (regarding the defendant's concealment of facts).

The plaintiff in *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 598 P.2d 1358 (1979), alleged that she had been given too much oxygen as a newborn, resulting in blindness. The Supreme Court reviewed summary judgment dismissal of both her medical malpractice claims against the hospital where she was born and her product liability claims against the manufacturer of the incubator. *Id.* at 508. In its analysis, the Court considered the claims against each defendant separately: when the plaintiff discovered the elements of her cause of action against the hospital

was independent of when the plaintiff discovered the elements of her cause of action against the manufacturer. *Id.* at 509-514. Because there were genuine issues of fact as to when the plaintiff knew she had a cause of action against each defendant, summary judgment for both defendants was reversed. *Id.* at 515.

North Coast Air Services, Ltd. v. Grumman Corp., 111 Wn.2d 315, 759 P.2d 405 (1988), analyzed application of the discovery rule for a products liability claim on certification from the US District Court for Western Washington. The defendant manufacturer argued that the event of injury by itself caused the claim to accrue and the statute of limitations to begin. *Id.* at 322, 328. However, this “proposed rule would require plaintiffs to begin a suit before they either had or should have had any knowledge of a possible legal responsibility of *this defendant*.” *Id.* at 323 (emphasis added). The purpose of the discovery rule would not be served if knowledge of the injury itself was sufficient to trigger the statute of limitations. *Id.* Accordingly, the Court held that the discovery rule did not require merely knowledge of the injury and the immediately apparent cause of the injury, but also knowledge or reason to believe that a defective product was causally connected to the harm. *Id.* at 328.

Orear v. International Paint Co., 59 Wn. App. 249, 257, 796 P.2d 759 (1990), specifically analyzed whether the discovery rule should be

applied where the plaintiff does not know a particular defendant's identity until after discovery of the injury. *Orear* was another products liability case, where several manufacturers were sued after the plaintiff's exposure to epoxy paints and solvents. *Id.* at 250. However, one of the manufacturers was not named in the original complaint because its identity was not known. *Id.* at 251. After the identity was discovered and the complaint amended, the manufacturer moved for summary judgment based on the statute of limitations. *Id.* at 252.

In addressing the issues presented, *Orear* relied heavily on the principles discussed in *Ohler* and *North Coast Air*. *Id.* at 254-55. These and other decisions are based on the principle that the discovery rule is defendant-specific. Accordingly, Division Two held that "knowledge or imputed knowledge of a particular defendant's identity is necessary for the plaintiff's cause of action against that defendant to accrue ... absent countervailing statutory language." *Id.* at 256. "[T]he justification for the discovery rule as applied to unknown injury applies with equal force to unknown defendants." *Id.* at 257. Accordingly, summary judgment was reversed and remanded to determine whether the plaintiff knew or should have known the defendant's identity as a potentially responsible party within three years of the date the claim was filed. *Id.*

Based on *Orear*, the discovery rule was again applied in *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997), to preserve a claim for timber trespass where the defendant concealed his actions from the plaintiff. Although the plaintiff discovered the injury within three years from the date the logging was complete, he did not discover the identity of the trespasser until after the statute of limitations would have run, in part due to the defendant's action to conceal his wrongdoing. *Id.* at 726. The court applied the discovery rule to hold that the action was timely filed where the plaintiff filed within three years of discovering the defendant's identity. *Id.* at 737.

Under *Orear*, the issue is not when Dickson discovered that waste containing cement had been dumped at its landfill. Dickson's cause of action against Ecology did not accrue in March 2005 when Dickson knew of the high pH levels because Dickson had no reason to suspect at that time that Ecology knew the nature of the waste but did not inform Dickson. Ecology's letter in March 2005 to remove the contaminated waste did not give rise to a cause of action against Ecology. Dickson knew in March 2005 that it had a right to apply to court for relief against Sound Transit and the contractors who misrepresented the nature of the waste, but it did not know it had a claim against Ecology.

Thus, the critical question on this appeal is when Dickson discovered that Ecology had knowledge that the waste delivered to Dickson's landfill contained cement. At the time the waste was being delivered, Ecology told Dickson that the waste was benign water, sand, and bentonite. CP 156. After Dickson was made aware of the harmful waste in early 2005, it submitted public records requests to Ecology as part of its lawsuit against Sound Transit and the waste haulers. CP 91. In its responses to these requests, Ecology did not disclose emails establishing that Bob Penhale, an Ecology inspector, knew the harmful nature of the waste being sent to Dickson's landfill. CP 90-91, 136-38. It was not until after the Sound Transit lawsuit was filed in December 2007 that another party in that suit provided the incriminating emails to Dickson. CP 90. Accordingly, Dickson did not know it had a potential claim against Ecology until after December 2007.

Dickson's claim against Ecology did not accrue until Dickson had discovered sufficient facts to know that it had a potential cause of action against Ecology. To hold otherwise would require Dickson to file suit against Ecology before it had any reason to know of a possible legal responsibility of Ecology, exactly the argument that was rejected in *North Coast Air*. Especially in light of Ecology's incomplete responses to Dickson's public records requests, Dickson had no reason to suspect until

after December 2007 that Ecology knew the waste deposited at Dickson's landfill contained cement.

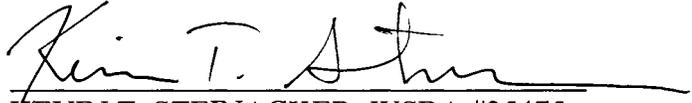
Dickson's claim for damages with the Office of Financial Management was filed September 5, 2008. CP 32-39. The lawsuit against Ecology was filed December 1, 2008. CP 3. Dickson's claim against Ecology could only be barred under the statute of limitations if the cause of action accrued prior to September 5, 2005. Dickson's claim did not accrue until after December 2007, and summary judgment should be reversed.

CONCLUSION

Construing the facts in the light most favorable to Dickson, Ecology knew that harmful waste was being produced at the Beacon Hill site and dumped in Dickson's pit, but did nothing to inform Dickson. Because Ecology failed to disclose significant emails in response to Dickson's public records request, Dickson could not have known of Ecology's knowledge until it received those emails from another party after December 2007. Accordingly, Dickson's suit, filed within three years of the date it learned of Ecology's knowledge, was timely. Dickson respectfully requests that this Court reverse the trial court's grant of summary judgment and remand for trial on Dickson's claim of negligence.

Respectfully submitted this 9th day of September, 2009.

DICKSON STEINACKER PS

A handwritten signature in cursive script, appearing to read "Kevin T. Steinacker", written over a horizontal line.

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Certificate of Service

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Brief of Appellant to be served upon:

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DATED this 9th day of September, 2009 at Tacoma, Washington.

Desiree Jones