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COURT OF APPEALS
DIVISION ONE
BY  DEPUTY
STATE OF WASHINGTON

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

VFW 3348 FOUNDATION, a Washington Nonprofit Organization

Appellant

v.

Albert Brede and Sandy Brede, and the marital community thereof

Respondents

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an appeal by VFW 3348 Foundation (hereinafter "VFW Foundation") from a decision of the Thurston County Superior Court which denied the majority of the claims asserted by VFW Foundation against defendants Albert and Sandra Brede (hereinafter "Brede"). VFW Foundation was the plaintiff in that case and at the conclusion of the plaintiff's case in chief, the trial judge ruled that the majority of VFW Foundation's claims were barred by the statute of limitations. Although the court concluded that Mr. Brede was guilty of theft and that he had concealed this theft in a variety of ways including even deception at trial, the court concluded that VFW Foundation's claims were time barred.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that the majority of the conversation claims of VFW Foundation were time barred.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- No. 1. Did Mr. Brede, who served in the positions of director and treasurer for the VFW Foundation, have a fiduciary duty toward the VFW Foundation to act in good faith, disclose all facts relating to his interest in and actions toward the property of the VFW Foundation, and to avoid interfering

with or depriving the VFW Foundation of its property and interests?

No. 2. Did Mr. Brede's actions in violating his fiduciary duty and concealing those violations toll the statute of limitations?

No. 3. Given Mr. Brede's fiduciary relationship and obligations toward the VFW Foundation, his theft of property from the VFW Foundation, and his extensive efforts to conceal his actions, was the statute of limitations tolled until VFW Foundation and its directors discovered Mr. Brede's pattern of theft and conversion?

III. STATEMENT OF THE CASE

VFW Foundation is a Washington nonprofit organization. CP 387. VFW Foundation was created following the sale of commercial property which had been owned by the VFW 3348 Post. The nonprofit purpose of the VFW Foundation was to benefit children of military veterans who are in need of financial assistance in order to attend or complete post secondary education. VFW Foundation was organized to evaluate potential beneficiaries and issue scholarships to appropriate needy students. CP 388.

Albert Brede had been the quartermaster of the VFW 3348 Post, essentially acting as treasurer for the post. When the VFW

Foundation was created, Mr. Brede transitioned from his role as quartermaster to become the treasurer of the VFW Foundation. He was also a director of the VFW Foundation. Mr. Brede served as treasurer of the VFW Foundation from 2001 through 2008. In his capacity as treasurer, Mr. Brede had access to all of the bank and financial records of the VFW Foundation and was the only person, between 2001 and 2008, who issued checks on behalf of the VFW Foundation. CP 388.

Beginning in 2001, Mr. Brede issued checks totalling \$130,208.99 either directly to himself or to third parties for items that benefited only Mr. and Mrs. Brede. CP 388 and Plaintiff's Exhibit 11. Additionally, Mr. Brede received funds as a result of rebates and refunds from consumer purchases that he had made, which funds belong to VFW Foundation. Mr. Brede did not deposit these funds into the foundation account, but instead kept them for the benefit of Mr. and Mrs. Brede. The funds were deposited either into Mr. Brede's own account or spent for his own benefit. CP 389.

Mr. Brede also negotiated a check belonging to the VFW Foundation into a bank account maintained by the VFW 3348 Post. Mr. Brede knew that this was not the correct depository for the funds and, two days later, Mr. Brede wrote himself a check

converting these funds to his own account. He knew at the time that the funds did not belong to him and that he was not entitled to the funds. CP 388.

Other than minor expenditures for a dinner and a couple of lunch meetings, Mr. Brede was not authorized by the VFW Foundation to issue any of the checks identified above, to keep the rebates and refunds identified above, or to convert a check belonging to the Foundation that he kited through the VFW 3348 Post account. CP 389.

From the inception of the creation of the VFW Foundation, Mr. Brede was the only board member who received copies of bank statements for the VFW Foundation. Mr. Brede never provided copies of those statements or any documentation of his activities to the board of directors of the VFW Foundation. CP 389. Further, Mr. Brede routinely and systematically destroyed the records of the VFW Foundation, making it impossible for the foundation to access information or to oversee his behaviour. These destructions were part of his efforts to conceal his actions. CP 390.

Many of the records which would have been necessary for the VFW Foundation to identify its claims were held by third parties and entities which were unrelated to the VFW Foundation. These

records were not available to the VFW Foundation, but only to Mr. Brede. CP 390.

Time and again, Mr. Brede, without justification and with wilful interference of the property of VFW Foundation, deprived the VFW Foundation of its property and stole its funds. Even through his appearance at trial, Mr. Brede denied his wrongdoing and attempted to conceal his behaviour. CP 389. Expenditures made by Mr. Brede were never approved by the board of directors and, in fact, were never even discussed with the board. CP 389.

In reviewing the 2007 year end statements from Morgan Stanley, an entity with which the VFW Foundation invested money, George Landrum learned that Mr. Brede had taken a substantial amount of money from the foundation in the 2007 calendar year. Mr. Landrum was one of the directors of the VFW Foundation. CP 390. The board of directors confronted Mr. Brede in January, 2008 about his behaviour. Ultimately, Mr. Brede executed a document where he promised to reimburse the foundation for any funds wrongfully taken by him should an audit reveal that the funds were wrongfully taken. At the time that Mr. Brede signed this document, he knew that there could be no audit as he was aware that he had

routinely destroyed all records associated with the VFW Foundation and had gone to great lengths to conceal his behaviour. CP 390.

When the board of directors discovered Mr. Brede's behavior which had occurred during the 2007 calendar year, Mr. Brede was confronted with the documents that were available. Mr. Brede was untruthful with the representatives of VFW Foundation, indicating that he had never taken any funds prior to 2007. At the time that he made this statement, Mr. Brede knew that the statement was untruthful. CP 389 and CP 390. Mr. Landrum and the VFW Foundation board of directors did not know that the statement was untruthful and did not know the full extent of the conversion. CP 390.

Nearly three years later, on October 8, 2010, the board of directors of VFW Foundation were confronted by a representative of the VFW 3348 Post regarding a check that Mr. Brede had converted. Until this confrontation, the VFW Foundation board of directors had no way of knowing and could not have discovered Mr. Brede's conversion of these funds. CP 390. At that point, the VFW Foundation began an investigation as it was clear that Mr. Brede had been untruthful in his representations in 2008 that he had not

taken any funds other than those identified in the 2007 records from Morgan Stanley.

This case proceeded to trial before the honourable Christine Schaller in Thurston County Superior Court. At the conclusion of the plaintiff's case in chief, the attorney for Mr. and Mrs. Brede made a motion pursuant to "12(b)(1) and 12(b)(6)." The parties' presented arguments under CR 12(b), including argument by plaintiff's counsel that CR 12(b) had no application in this context. RP 3.

Following argument, Judge Schaller took a recess and returned to the bench. She then announced that she was making a ruling under CR 41(b), despite the fact that no one had made a motion under this rule or an argument to the court based upon that rule. RP 3. Judge Schaller then issued a ruling under CR 41 which is outlined in her oral decision. RP 3 through RP 15. In simplest terms, Judge Schaller ruled that once Mr. Landrum had access to the 2007 bank statements, this triggered the statute of limitations. Despite the fact that Mr. Brede had concealed his activities, destroyed records, and continued to conceal information even through trial, Judge Schaller concluded that all of the plaintiff's

claims except for two relatively small conversions were time barred. RP 15 and RP 16; CP 391.

VFW Foundation filed this appeal and will address only the issue of the statute of limitations as it relates to the conversion claim that was asserted against Mr. and Mrs. Brede. It will not address the court's decision regarding the contract claim and will focus only on the court's err in rejecting the majority of plaintiff's claims, based upon an incorrect interpretation of the applicable statute of limitations.

IV. ARGUMENT

Standard of Review

First, it is important to note that the trial court's ruling was based upon "an analysis pursuant to CR 41(b)(3)..." RP 3. In ruling on a motion pursuant to CR 41(b)(3), dismissal of a claim or a portion of a claim is proper only if there is no evidence or reasonable inference from the evidence that would support a verdict for the plaintiff. In this setting, the defendant admits the truth of the opposing party's evidence and all reasonable inferences therefrom. All doubts are resolved in favour of the plaintiff and the evidence and inferences from the evidence are interpreted in the light most favourable to the plaintiff and strongly against the

defendant. The motion should be granted only if there is no evidence to support the plaintiff's claim. Brant v. Market Basket Stores, Inc., 72 Wn.2d 446, 433 P.2d 863 (1967).

In ruling on a motion under CR 41(b)(3), the trial court may either weigh the evidence and make a factual determination as to whether the plaintiff has established a prima facie case or it may consider the evidence in the light most favourable to the plaintiff and rule as a matter of law that the plaintiff has failed to establish a prima facie case. N. Fiorito Company v. State, 69 Wn.2d 616, 419 P.2d 586 (1966). If the court rules as a matter of law that the plaintiff has failed to establish a prima facie case, then review is de novo. However, if the trial court acts as a fact finder and enters findings of fact and conclusions of law, the standard for appellate review is whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support its conclusions of law. Nelson Construction Company of Ferndale, Inc. v. Port of Bremerton, 20 Wn.App 321, 582 P.2d 511 (1978); Dependency of Schermer, 161 Wn.2d 927, 169 P.3d 452 (2007). Here, the court entered findings of fact and conclusions of law and acted as a fact finder, but failed to consider those facts and the

reasonable inferences in the light most favourable to the VFW Foundation.

Although Judge Schaller quoted the text of CR 41(b)(3) in her ruling, she did not apply the appropriate standard or acknowledge her obligation to view the evidence and inferences from that evidence in the light most favourable to the plaintiff. Further, it is telling that although the defendant made an oral motion pursuant to CR 12(b)(1) and CR 12(b)(6) at the conclusion of the plaintiff's evidence, the court didn't even consider that rule nor ask for argument under CR 41(b)(3). Instead, Judge Schaller moved on to balance the evidence and issue a ruling as if the case had been concluded. This was inappropriate.

VFW Foundation is entitled to a review of the evidence in the light most favourable to its case and consideration of the inferences in that same light. Judge Schaller entered detailed findings of fact and those findings are not challenged on appeal. This court must, then, consider whether those facts and the inferences arising from those facts, interpreted in the light most favourable to the plaintiff, provide evidence supporting the plaintiff's claim that the statute of limitations did not expire on its claims against Mr. and Mrs. Brede.

Mr. Brede Owed a Fiduciary Duty to the VFW Foundation

A fiduciary relationship exists between an agent and a principal when the agent exercises dominion and control over the principal's property sufficient to alienate the property. Moon v. Phipps, 67 Wn.2d 948, 955-56, 411 P.2d 157 (1966). Once the relationship exists, the agent has a duty to act in the utmost good faith. This includes the obligation to disclose all facts relating to the fiduciaries interest in and his actions involving the principal's property. Moon, id, at 956. It is the defendants' burden to disclose his actions, not the plaintiff's burden to discover those actions. The fiduciary must act with "unparagoned good faith" toward the principal. Manning v. Alcott, 137 Wash.13 (1925).

Although Mr. Brede attempted at times to shift the blame and the burden of proof to the VFW Foundation and its board of directors, Mr. Brede ultimately acknowledged and the court correctly concluded that he had a fiduciary duty to the plaintiff. It is clear that Mr. Brede acted as a fiduciary of the VFW Foundation and his actions must be judged based upon his capacity as a fiduciary.

Mr. Brede's Actions Violated His Fiduciary Duty and Tolloed the
Statute of Limitations

Judge Schaller's findings of fact clearly establish Mr. Brede's violation of his fiduciary duty. Among other things, the court noted that Mr. Brede "time and time again" converted funds from the plaintiff, went to great efforts to conceal his actions, routinely and systematically destroyed records making it impossible for the VFW Foundation to discover his actions, and hid his actions by the use of third party credit card accounts, third party bank accounts, and third party providers who were so far removed from VFW Foundation business that those records would never have been available to the plaintiff. Even to the point of his appearance at trial, Mr. Brede continued to play fast and loose with his "interpretation" and continued to conceal his behavior, never fully disclosing his actions.

Generally, a statute of limitations begins to run when the plaintiff's cause of action accrues. In the general case, this occurs when the plaintiff suffers some form of injury or damage. In Re Estate of Hibbard, 118 Wn.2d 737, 826 P.2d 690 (1992).

Mr. Brede's behavior implicates the so called "discovery rule" with regard to accrual of the cause of action. In some instances where there is a delay between the injurious act and the plaintiff's

discovery of the act, the statute of limitations will be tolled. The discovery rule operates to toll the date of accrual until the plaintiff knew or should have known all of the facts necessary to establish a legal claim. The rule is designed to balance the policies underlying the statute of limitations against the unfairness of cutting off a valid claim where the plaintiff could not reasonably have discovered the claims factual elements until some time after the injury date. Denny's Restaurants, Inc. v. Security Union Title Insurance Company, 71 Wn.App 194, 859 P.2d 619 (1993).

Again, although Mr. Brede initially claimed that the statute of limitations accrued on each date that he stole money from the VFW Foundation, he ultimately conceded and the trial court concluded that the discovery rule applied. Given Mr. Brede's behavior in stealing money, kiting his withdrawals through third party accounts and third party credit agencies, destroying the records of the foundation, and not making those records available to anyone acting on behalf of the foundation, the court could have reached no other conclusion. The ultimate issue, then, is when did the cause of action accrue and for what period of time were the plaintiff's claims tolled.

Given Mr. Brede's Violation of His Fiduciary Relationship, His Theft of Property, and His Detailed Efforts to Conceal His Thefts, the Statute of Limitations was Tolled Until At Least October, 2010

In the context of a fiduciary, the discovery rule has been applied to cases where the defendant fraudulently conceals facts from the plaintiff and therefore deprives the plaintiff of knowledge of the accrual of the cause of action. Under these circumstances, the discovery rule is tolled until such time as the plaintiff knew or should have known of the fraud. Interlake Porsche and Audi, Inc. v. Bucholz, 45 Wn.App 502, 728 P.2d 597 (1986). This discovery rule has now become part of our statutory framework, embodied in RCW 4.16.080 (4).

Our courts have recognized two ways in which the plaintiff may establish fraudulent concealment or misrepresentation, thereby tolling the statute of limitations. First, the plaintiff might affirmatively plead and prove the nine elements of fraud. Second, the plaintiff may simply establish that the defendant has breached an affirmative duty to disclose material facts thereby depriving the plaintiff of knowledge of the accrual of the action. Either method of proof will activate the statutory discovery rule for fraud, RCW

4.16.080(4). Viewcrest Co-op Association v. Deer, 70 Wn.2d 290, 422 P.2d 832 (1967).

VFW Foundation did not plead nor attempt to prove the nine elements of fraud. Rather, it was sufficient for VFW Foundation to prove that Mr. Brede bore a fiduciary duty to VFW Foundation and, as a result, that he had affirmative duty of candor and full disclosure.

In the context of a fiduciary, the fiduciary owes an affirmative duty of full disclosure. Silence alone constitutes an affirmative act of misrepresentation. Crisman v. Crisman, 85 Wn.App 15, 931 P.2d 163 (1997). Mr. Brede's behaviour in concealing his actions and failing to disclose his behaviour certainly provides adequate basis for application of the statutory discovery rule for fraud. RCW 4.16.080(4).

VFW Foundation is not alleging that the findings of fact made by Judge Schaller are inaccurate. However, those findings of fact do not support the conclusion of law which resulted in dismissal of the majority of the claims of VFW Foundation.

Finding of fact 15 entered by Judge Schaller reads, in its entirety, as follows:

15. When Mr. Landrum and the board discovered Mr. Brede's 2007 conversions of property, the board did not know the full extent of the conversion, but a reasonable person in the exercise of diligence would not have taken the word of a thief and would have looked further into the matter at that time. For purposes of this case, that is when the plaintiff discovered the information necessary to trigger the applicable statute of limitations.

The first portion of this finding of fact is clearly a factual finding. That is, that portion of the finding which reads "When Mr. Landrum and the board discovered Mr. Brede's 2007 conversions or property, the board did not know the full extent of the conversion..." is a finding of fact. However, the balance of that paragraph is really a conclusion of law. Although nominally characterized as a finding of fact, there can be no doubt but that the court's conclusion that "a reasonable person" would not have taken the word of a thief and that this triggered the statute of limitations is a conclusion of law. The law is clear in Washington that a trial court's conclusion of law misidentified as a finding of fact will be reviewed as a conclusion of

law. City of Tacoma v. William Rogers Company, Inc., 148 Wn.2d 169, 60 P.3d 79 (2002). Thus, we must determine whether the trial court's conclusion that "a reasonable person in the exercise of diligence" would not have taken the word of a thief and whether discovery of the 2007 acts of Mr. Brede triggered the statute of limitations on all Mr. Brede's behaviour.

In analyzing whether the discovery of Mr. Brede's 2007 acts triggered the statute of limitations on all of the claims of the plaintiff, we should consider the following facts carefully, all of which were found to be true by the trial judge and none of which have been attacked:

1. Mr. Brede had exclusive access to all of the VFW Foundation bank and financial records between 2001 and 2008 and made exclusive use of the bank records. He was the only person who issued checks during this 8 year window. Finding of fact number 4, CP 388.
2. Mr. Brede issued checks either to himself or to third party entities totalling more than \$130,000.00, which checks were identified in plaintiff's Exhibit 11 at trial. CP 388.
3. Mr. Brede received rebates and refunds from consumer purchases belonging to the VFW Foundation which were

deposited into his own account, making it impossible for the VFW Foundation to discover these deposits. Finding of fact number 7, CP 389.

4. Mr. Brede never provided copies of the financial records, statements, nor any documentation of his activities to the board. He was the only member who had access to these records. Finding of fact number 10, CP 389.
5. Mr. Brede routinely and systematically destroyed the records of the VFW Foundation, making it impossible for the VFW Foundation board to access any information. These acts of destroying records were meant by Mr. Brede to conceal his actions. Finding of fact number 14, CP 390.
6. Many of the records that would have been necessary for the VFW Foundation to discover the conversions were held by third party entities who dealt directly with Mr. Brede or with whom Mr. Brede maintained his own account. These records were not available to the VFW Foundation. Finding of fact 14, CP 390.
7. Mr. Brede represented in January of 2008 that he would refund any money and reimburse the VFW Foundation for funds wrongfully taken once an audit had been conducted.

However, he knew full well that there could be no audit as he was fully aware that he had destroyed all of the records to be audited. Mr. Brede knew that his actions could not be discovered by audit. Finding of fact 12, CP 390.

8. On October 8, 2010, the VFW Foundation was confronted by VFW Post 3348 regarding a check that Mr. Brede had converted by use of the VFW 3348 Post account. Until that confrontation, the VFW Foundation had no way of knowing that Mr. Brede had been using third party accounts to convert funds. Finding of fact , CP .

These unchallenged findings of fact are reviewed in the light most favourable to the plaintiff with all reasonable inferences resolved in favour of the plaintiff. Applying this standard and keeping in mind that mere silence alone constitutes fraud in the setting of a fiduciary relationship, it was error for the trial court to conclude that the statute of limitations was triggered when Mr. Brede's 2007 behavior was discovered. Mr. Brede provided a plausible, albeit false, explanation for his calendar year 2007 activities and misrepresented the fact that there had been other conversions. The VFW Foundation had absolutely no records available to suggest that Mr. Brede was being untruthful during the

exchange regarding his 2007 activities. Given the extensive efforts to which Mr. Brede went to conceal his activities and given Mr. Brede's affirmative representation that, he had engaged in no other suspect activity, Judge Schaller's conclusion of law that the discovery of the 2007 activities triggered the statute of limitations is simply not supported. Where, as here, mere silence constitutes an affirmative act of misrepresentation triggering the tolling of statute of limitations, Mr. Brede's silence coupled with his misrepresentation as to the timing of his behaviour certainly must toll the limitation.

The relevant facts in our case are remarkably similar to those detailed in Crisman, id. In Crisman, a manager and an employee of a jewelry store converted a substantial sum of money from the store. Following the conversion, the owner the store stepped back in and took control of the business. All of the conversions predated the owner moving back into the store in 1985. From 1985 forward, the store owner had access to all of the corporate records. Later, in 1990, the manager's estranged wife informed the store owner that the wife had seen the manager burning records in 1982 and in 1985. No legal action was filed until 1992. The court in Crisman concluded that the statute of limitations

was tolled until the store owner's estranged wife confided to the owner that financial records may have been destroyed and jewelry secreted.

The facts in our case are strikingly similar to the pattern in Crisman. In 2008, the board of directors of the VFW Foundation discovered limited activity in 2007 which raised questions, but were reassured by Mr. Brede that no other transactions or accounting periods were implicated. Nearly three years later, the VFW Foundation was contacted by a third party who indicated that Mr. Brede had laundered a check through a third party account and further informing the VFW Foundation that they should be on alert. This triggered the investigation which resulted in the filing of the complaint in superior court some two months later. As in Crisman, the statute was tolled until October, 2010 when information was received from a third party alerting the VFW Foundation to possible theft by Mr. Brede.

V. CONCLUSION

It was error for the trial court to conclude that the applicable statute of limitations was triggered by Mr. Landrum's review of the corporate year end statement in January, 2008. The VFW Foundation requests that this court reverse that portion of the trial

court decision concluding that the plaintiff's claims are time barred and, further, remanding this case to the superior court for entry of judgment in favor of the plaintiff for all moneys claimed or, alternatively, for a new trial.

Date: Nov 17, 2014



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CERTIFICATE OF SERVICE

I certify that on the 17 day of November, 2014, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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