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Division II
State of Washington
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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

PHIL LARSON,
Appellant,
v.
JARRITOS, INC. and TIPP ENTERPRISES, INC.
Respondents.

RESPONDENTS' RESPONSE TO APPELLANT'S BRIEF

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A. INTRODUCTION

Respondent asks this Court to uphold Judge Christopher Lanese's¹ ruling that Appellant's filing of his summons and complaint in the underlying case was untimely and therefore barred by the Statute of Limitations.

B. ASSIGNMENTS OF ERROR

Respondent makes no such assignments.

C. STATEMENT OF THE CASE

Appellant allegedly suffered injury when on June 21, 2015 a bottle of soda exploded at a Winco Foods in Vancouver, WA. CP at 4-6.

Appellant filed suit on June 22, 2018 in Thurston County Superior Court despite the incident occurring in Clark County, Washington. CP at 11. Respondent filed a motion to dismiss based on the fact that Appellant's case was filed after the expiry of the Statute of Limitations due to his failure to comply with the State and Local Court Rules, specifically AR 2. CP at 108-112. In Appellant's opposition to this motion, Appellant never argued that the Statute of Limitations used did not apply because of a claim of products liability and instead argued that the suit was filed correctly because he had "paid the filing

¹ Erroneously referred to as "Ken" Lanese in Appellant's opening brief

fee” on the day prior to the expiry of the Statute and that AR 2 was not applicable. CP at 82-84; RP 1-11. In a declaration from Thurston County Clerk’s Office employee Alisa Everson, she testified that Appellant’s filings were rejected on June 21, 2018 and he was notified that a Case Information Cover Sheet was required to complete filing but that the filing was not completed until the day after the expiry. CP at 250-255. As a result of Respondent’s motion, Judge Lanese ruled that Appellant had not complied with statewide Administrative Rule 2 and that the Statute of Limitations had expired the day prior to the completion of filing and as such, the suit had not been filed in a timely manner. RP at 9-10. Judge Lanese also alternatively based his order on the fact that RCW 4.16.180 was inapplicable in this case. RP at 10. Appellant then filed a Motion for Reconsideration but later withdrew that motion in favor of filing this appeal. CP at 256-259; CP at 263-264; CP at 266-269.

D. SUMMARY OF ARGUMENT

Appellant did not comply with Administrative Rule 2; He did not raise the issue of the “correct” Statute of Limitations until this appeal; and Respondents did not “conceal” themselves for the purposes of RCW 4.16.180. In short, Judge Lanese correctly applied the law to the facts on all of his rulings and those rulings should be left undisturbed.

E. ARGUMENT

1. Standard of Review

The Court of Appeals reviews rulings granting a motion to dismiss under rule governing defenses and objections de novo. *Port of Seattle v. Lexington Ins. Co.* 111 Wn.App. 901, 48 P.3d 334 (2002).

2. Appellant's Filing Was Untimely Because He Did Not Comply With Administrative Rule 2 ("AR 2") and the Clerk Was Entitled to Reject the Filing

Appellant begins his argument to state that Judge Lanese "arbitrarily elevated the Case Information Cover Sheet" from AR 2 as a required document to initiate a civil lawsuit in Washington." This argument is incorrect.

AR 2 requires that a Plaintiff include a case information cover sheet for "[e]ach new civil and domestic case filing. AR 2. Under CR 5(e), a "clerk may refuse to accept for filing any paper presented for that purpose because it is not presented in proper form as required by these rules or any local rules or practices." CR 5(e).

Appellant relies almost exclusively on *Margetan v. Superior Chair Craft Co.* to argue that AR 2 somehow is inapplicable as long as a payment was made. *Margetan v. Superior Chair Craft*

Co., 92 Wn.App. 240, 963 P.2d 907 (1998). Appellant would be correct with his reliance had the facts been the same as *Margetan*: Appellant files his suit according to the Court Rules but does not pay the filing fee. However, Appellant here did not file his suit in accordance with the Court Rules and therefore never gained jurisdiction even with the payment of his filing fee. In fact, *Margetan* is a stronger argument for the Respondents because it stands for the proposition that not filing all of the required documents and fees renders a filing moot until all of the requirements are met – financial and procedural. “RCW 4.16.170 and RCW 36.18.020 and 36.18.060 are not in conflict and they both relate to procedures involved in commencing an action in the superior court. Accordingly, they must be read together.” *Margetan* at 246. RCW 4.16.170 is very clear: “For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is **filed**...” RCW 4.16.170; *Head v. Kommandit-Gesellschaft MS San Alvaro Offen Reederei GMBH & Co.*, W.D.Wash.2014, 17 F.Supp.3d 1099.

Appellant also attempts to argue that Texas’ use of civil cover sheets should somehow have an effect on what Washington, and specifically Thurston County, should do. The Washington Practice

Series specifically discusses this when it alerts practitioners that “[c]ounsel should be alert to the possibility that individual counties may have local rules governing the commencement of actions...” § 7:15. Local rules, forms, 14 Wash. Prac., Civil Procedure § 7:15 (3d ed.) Texas and Washington Courts are unquestionably different and each has its own set of rules and regulations. To compare one to the other is nonsensical and the argument should be dismissed out of hand.

It is anticipated that Appellant will rely on the brand new *Nat'l Parks Conservation Ass'n v. Washington Dep't of Ecology* decision. *Nat'l Parks Conservation Ass'n v. Washington Dep't of Ecology*, 460 P.3d 1107 (Wash. Ct. App. 2020). Appellant will be quick to point out that the Court ruled that the National Parks Conservation Association was ruled to have not been required to comply with AR 2 *however* the Court was very careful to specifically discuss that their ruling was based on the National Parks Conservation Association compliance with the legislatively created **Administrative Procedure Act** (“APA”) and thus did not need to comply with AR 2 because **the APA** had already conferred jurisdiction with the Court. *Id* at 984 (“A court either has jurisdiction or it does not. Here, jurisdiction is conferred by

complying with the APA.”) The Court takes the time to further specially note that “[n]othing in this opinion should be construed as limiting a court clerk from requiring litigants to file additional documents with their pleadings if there is a legal basis.” *Id.*, Footnote 5.

3. Appellant Has Not Raised the Issue of the Application of the “Incorrect” Statute of Limitations Until This Appeal

There has been absolutely no discussion of Appellant’s claim that the Court applied the incorrect Statute of Limitations until his brief was filed. Under the case law, unless the Court directs Appellant to provide such evidence, the Court should not entertain the new argument.

The Appellate court does not accept evidence on appeal that was not before the trial court. RAP 2.5(a); *State v. Curtiss* 161 Wn.App. 673, 250 P.3d 496, review denied 172 Wn.2d 1012, 259 P.3d 1109 (2011); *Boyd v. City of Olympia*, 1 Wn.App.2d 17 (Div. II, 2017); *Meresse v. Stelma*, 100 Wn.App. 857, 999 P.2d 1267 (2000); *Daniels v. Pacific Northwest Bell Tel. Co.* 1 Wn.App. 805, 463 P.2d 795 (1970); *Webley v. Adams Tractor Co.* 1 Wn.App. 948, 465 P.2d 429 (1970); *Felsman v. Kessler* 2 Wn.App. 493, 468 P.2d 691 (1970). The appellate court or trial court may impose sanctions as provided in rule 18.9(a) as a condition to correcting or

supplementing the record on review. RAP 9.10. A party presenting an issue for review has the burden of providing an adequate record to establish error. *State v. Sisouvanh*, 175 Wn.2d 607, 290 P.3d 942 (2012). RAP 9.11(a) permits the taking of new evidence only if all six conditions are met and then only on the Court's own initiative. *Mission Ins. Co. v. Guarantee Ins. Co.* 37 Wn.App. 695, 683 P.2d 215 (1984).

The entire purpose of the Appeals process is to find fault with the decisions made by the lower Courts and allowing Appellant to posit additional theories on appeal is tantamount to allowing the Appellant to try his case again in the Superior Court. Respondents have provided over 100 years of case law which stands for the proposition that raising new issues on appeal is not allowed by the Court except under very specific circumstances. Appellant's failure to raise the issue of the application of the "correct" Statute of Limitations was of his own making. Appellant had ample opportunity to raise this issue in his original response to the Respondents' motion to dismiss (CR at 154-156); his Supplemental Response (CR at 186-188); or at the hearing on the motion itself (RP 1-12). Appellant failed to raise the issue at any level instead choosing to argue that AR 2 was not applicable to his

case and/or his case was filed upon the payment of the filing fee.

He is foreclosed from raising this issue on appeal now.

4. **Arguendo that the Court Allow Appellant to Raise the Issue of the Products Liability Statute of Limitations, Appellant Still Failed to Meet the Deadline**

Appellant argues that the “Discovery” rule should apply to this particular case. That assertion is incorrect and his reliance on *North Coast Air v. Grumman Corp.* is misplaced. There are dozens of examples which are much more applicable to this case than an air disaster in which the Plaintiff’s son had been killed in a plane crash that was initially attributed to pilot error until a subsequent investigation uncovered a defect many years later.

Cases in which courts have applied a discovery rule of accrual (either by statute or common law) include situations where structural defects in the Plaintiffs' home were allegedly caused by improper site preparation and subsequent land settling, *Boghossian v. Ferland Corp.*, 600 A.2d 288 (R.I.1991); where roof trusses were installed that were inadequate to support the load, with resulting settling of a clerestory structure causing damage to roofing and posing a danger of collapse, *McKinley v. Willow Constr. Co.*, 693 P.2d 1023 (Colo.Ct.App.1984); where gas lines leaked and were unsafe, *Matusik v. Dorn*, 157 Ariz. 249, 756 P.2d

346 (Ct.App.1988); where the contractor did not use corrosive resistant nails to install roofing, which began to fail nine years later with the result that shingles began falling off, *Agustin v. Dan Ostrow Constr. Co.*, 64 Haw. 80, 636 P.2d 1348 (1981); and where plaintiffs alleged that improper felt underlayment and faulty roof design led to leaks in the roof, perimeter walls, and foundation, *Black Bear Lodge v. Trillium Corp.*, 136 N.H. 635, 620 A.2d 428 (1993). In each of these cases, the defect was of a kind that the average homeowner would simply never know or have reason to know of the defect or that it would cause detectable damage years later. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn. 2d 566, 579–80, 146 P.3d 423, 430 (2006), *as corrected* (Nov. 15, 2006). A claimant must bring a products liability claim within three years “from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.” RCW 7.72.060(3). A statute of limitations normally begins to run at the time of the accident or injury. *Ruth v. Dight*, 75 Wn.2d 660, 666, 453 P.2d 631 (1969). However, in some cases, the injury may not occur or become apparent until after the statute of limitations period has expired. In such cases, courts have applied what has come to be known as the discovery rule. *U.S. Oil & Refining Co. v.*

Department of Ecology, 96 Wn.2d 85, 92, 633 P.2d 1329 (1981).

The need for a discovery rule does not exist in cases involving a sudden traumatic injury. In those cases, causes of action are apparent. Am Law Prod Liab. 3d § 47.21; see also Comment, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U.Pitt.L.Rev. 501, 501 (1982); *M. Shapo*, *The Law of Products Liability* § 30.05[3][b] (1987).

Appellant's injury was not latent. It was immediate and had to do with a bottle rather than the millions upon millions of moving parts in an airplane requiring an official inquest and an eventual investigation. There was never a need for the Appellant to need to discover his injury's source as there were in many other discovery rule cases: *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 598 P.2d 1358 (1979) (incubator malfunction causing retrorenal fibroplasia); *Sahlie v. Johns-Manville Sales Corp.*, 99 Wn.2d 550, 663 P.2d 473 (1983) (asbestos causing asbestosis); *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687 (1985) (asbestos causing asbestosis); and *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987) (asbestos causing asbestosis).

In the unpublished Division One case *Padilla v. Merchandising Inventives, Inc.* the Court identified a similar situation to the one before the Court here.

Alice Padilla suffered injuries on September 6, 1999, when a display suspended from hooks in the ceiling of a retail craft store fell on her head. She initially sued the retail store. Almost four years after the accident, she sued the manufacturer and retailer of the ceiling hooks, Merchandising Inventives and Display Supply. The trial court dismissed both defendants based on the three-year statute of limitations. Because Padilla's initial focus on the retail store as the cause of her injury should not have blinded her to other possible causes, the discovery rule does not help her and the trial court properly granted summary judgment.

Padilla v. Merch. Inventives, Inc., 126 Wn. App. 1050 (2005).

The Court in *Padilla* specifically analyzed the *North Coast Air Services* case and held that the product liability statute of limitations is intended to give the plaintiff a “fair chance” to ascertain the harm and its cause. *North Coast Air* at 328. Protection to the defendant is afforded by the provision that plaintiff may be barred if plaintiff did not exercise due diligence in discovering the harm and its cause. This standard of reasonable inquiry placed

upon the plaintiff serves the policy reasons underlying statutes of limitation. *Id.*

It has long been held that the discovery rule requires a claimant to use due diligence in discovering the basis for the cause of action. *Reichelt* at 772. The discovery rule will not be invoked where the plaintiff had ready access to information that a wrong occurred but failed to exercise due diligence. *Zaleck v. Everett Clinic*, 60 Wn.App. 107, 113, 802 P.2d 826 (1991).

This Court should find that instead of *North Coast Air* controlling, this case is far more like *Gevaart v. Metco Construction, Inc* in which the Plaintiff lost her balance on a stair that sloped downward and injured herself. *Gevaart v. Metco Construction, Inc*, 111 Wn.2d 499, 760 P.2d 348 (1988). *Gevaart* learned a month after her accident that the stair may have been improperly constructed. *Id.* She eventually retained counsel and obtained an expert's opinion that the stairway was indeed poorly designed and constructed. *Id.* Three years and four days after her accident, she filed suit against the builder. *Id.*

As in the present case, *Gevaart* claimed that the discovery rule should apply because she had no knowledge of a possible cause of action against the defendant until a considerable time had passed

after she was injured. However, the Court concluded that on the date of the accident, Gevaart knew she was injured; she knew the step sloped; and by the exercise of due diligence she could have learned within three years that the stair did not conform to the building code and was defectively designed. Appellant is under the same set of circumstances: Appellant knew he was injured; he knew the bottle exploded; and by the exercise of due diligence he could have learned within three years whether the bottle was not manufactured correctly or defectively designed.

In short, if the Court chooses to hear the Appellant's argument despite it not being raised until appeal, the circumstances in *North Coast Air* are so different from the case at hand that it would be illogical to apply the same to this situation and the Court should view this case through the lens of *Gevaart*.

5. Appellant Failed to Comply with Timely Filing and Service Requirements of this Lawsuit

Should the Court find that arguendo, there is some reason why the Statute of Limitations has not barred this claim for untimeliness, Jarritos further asserts that Appellant did not comply with the requirements of service of process and thus, the claim was

dismissed for failure to comply with statutory limits of service after filing.

In Washington, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint. CR 3(a). Filing of the complaint is but a step in commencement of action, service of summons being necessary to complete it. *Powell v. Nolan*, 27 Wash. 318, 67 P. 712, 68 P. 389 (1902). Where filing of complaint is not followed by service of summons within time required, action is not commenced. *Fuhrman v. Power*, 43 Wash. 533, 86 P. 940 (1906). An action is commenced by the filing of the complaint or service of the summons and complaint, provided that if the action is commenced by filing the complaint only, the defendants shall be served, personally or by publication, within 90 days of the date of the filing in order to complete commencement of the action for purposes of the statute of limitations. *Caouette v. Martinez*, 71 Wn. App. 69, 73, 856 P.2d 725, 728 (1993); RCW 4.16.170.

Jarritos was not served process by personal service, publication, or any other means by which Washington allows for service of process. In fact, Appellant did nothing to effectuate service on Jarritos from the filing of their suit June 22, 2018

through May 24, 2019. Even if *arguendo* the statute of limitations did not run on the day of filing and Plaintiff was granted an *additional* 90 day reprieve, it certainly expired before the 90-day requirement of service under RCW 4.16.170.

a. Tolling of the Statute Under 4.16.170 is Inapplicable

It is anticipated that Appellant will claim that service on one defendant stops the clock for all defendants under RCW 4.16.170. While this is normally true, Winco Foods, one of the original defendants was voluntarily dismissed from this case on March 29, 2019. Jarritos was not actually served until **May 24, 2019** almost a year following the original filing. The statute expired on June 21, 2018 and the deadline to serve ANY party was at its very latest, September 21, 2018. Under *Fox v. Sunmaster*, Winco's dismissal cut the linkage between the Appellant and Jarritos:

Plaintiffs must proceed with their cases in a timely manner as required by court rules, and must serve each defendant in order to proceed with the action against that defendant. A plaintiff who fails to serve each defendant risks losing the right to proceed against unserved defendants if the served defendant is dismissed, as occurred in *Fittro v. Alcombrack*.

Fox v. Sunmaster Products, Inc., 63 Wn.App. 561, 564, 821 P.2d 502, review denied 118 Wn.2d 1029, 828 P.2d 563 (1991)

quoting *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991); *Fittro v. Alcombrack*, 23 Wn.App. 178, 180, 596 P.2d 665, *review denied*, 92 Wn.2d 1029 (1979) Thus, the Statute of Limitations ceased its tolling on March 29, 2019 and as Jarritos was not served via the Secretary of State until May 24, 2019, Appellant's argument is moot and the decision rendered by Judge Lanese should be upheld.

6. The Registration Requirements of RCW 4.16.180 Did Not Preclude the Appellant From Pursuing His Case

Appellant argues that because the Respondents did not register as foreign entities with the Secretary of State, the Court should ignore the fact that the Appellant did not file his suit until after the expiry of the Statute of Limitations. This argument is not only illogical but nugatory and the Court should dismiss it out of hand.

RCW 4.16.180 provides for the tolling of the statute of limitations in two circumstances: (1) when the person to be served is outside of the state (*absence*); and (2) when the person to be served is a resident concealed within the state (*concealment*). RCW 4.16.180. To stop running of statute of limitations, Respondents' absence from state must be such that process cannot be served on him so as to make possible personal judgment against him. *Bethel v. Sturmer*, 3 Wn.App. 862, 479 P.2d 131 (1970); *Summerrise v.*

Stephens, 75 Wn.2d 808, 454 P.2d 224 (1969). “Concealment,” for purposes of RCW 4.16.180 involves willful evasion of process and clandestine or secret removal from known address. *Bethel* at 862.

As to concealment, Appellant produced no evidence to the trial court that Respondents concealed themselves under the meaning elucidated in *Bethel*. Respondent Tipp Enterprises is a wholly-owned subsidiary of Respondent Jarritos, Inc. and Appellant served both Jarritos and Tipp on the same day. Though it is admitted that neither Tipp nor Jarritos are registered with the Washington Secretary of State, pursuant to RCW 23.95.450(4) an unregistered foreign entity can be served through the Secretary of State. RCW 23.95.450(4). The Respondents may not have been registered with Washington as a foreign entity but it certainly did not conceal itself willfully. RCW 23.95.450(4) offered the Appellant the opportunity to perfect service through the Secretary of State had the case been filed properly.

As to the question of “absence,” Appellant will likely attempt to argue that because the Respondents were not properly registered as foreign agents with the Secretary of State, they were somehow “absent” from the State but this is incorrect for a number of reasons. First, the Court in *Rodriguez v. James-Jackson* held that

absent evidence of willful concealment, being “absent” in another state does not toll the statute of limitations. *Rodriguez v. James-Jackson*, 127 Wn.App. 139, 111 P.3d 271 (2005). Assuming *arguendo* that this Court decides that the Respondents were “absent,” the Court in *Bethel* has already made this very clear: the statute is only tolled if there would be no way to serve the party while they were outside the state. *Bethel* at 862. RCW 23.95.450(4) provides the exact mechanism for service on an unregistered foreign corporation and thus, Appellant had an opportunity to serve the Respondents shortly after filing suit.

In conclusion, Appellant’s argument is devoid of any kind of evidence which could lead this Court to toll the Statute of Limitations under RCW 4.16.180.

F. ATTORNEYS’ FEES AND COSTS

Respondents respectfully request that the Court assess costs and fees against the Appellant in connection with the need to respond to Appellant’s brief.

The Court of Appeals has discretion to grant attorney fees on appeal. *MacKenzie v. Barthol*, 142 Wn.App. 235, 173 P.3d 980 (2007); *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383, 161 P.3d 406, *amended on denial of reconsideration, review*

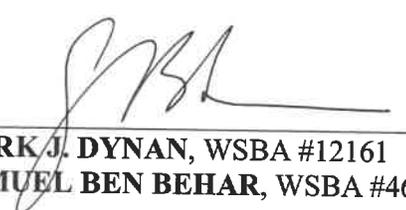
denied 163 Wn.2d 1055, 187 P.3d 752, *on subsequent appeal* 160 Wn.App. 1036 (2007).

G. CONCLUSION

The Court should **UPHOLD** the trial court rulings and dismiss this appeal.

DATED this 25th day of August, 2020.

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DYNAN & ASSOCIATES, P.S.

August 26, 2020 - 1:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53900-4
Appellate Court Case Title: Phil Larson, Appellant v. Jarritos Inc., et al, Respondents
Superior Court Case Number: 18-2-03123-8

The following documents have been uploaded:

- 539004_Affidavit_Declaration_20200826132109D2742404_6036.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was 6683-Declaration of Service.pdf
- 539004_Briefs_20200826132109D2742404_6204.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 6683-Response Brief.pdf

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Address:
2102 North Pearl Street Suite 400-Bldg D
TACOMA, WA, 98406
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FILED
Court of Appeals
Division II
State of Washington
8/26/2020 1:21 PM
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PHIL LARSON,

Plaintiff,

vs.

JARRITOS, INC., TIPP
ENTERPRISES,
INC. dba NOVAMEX and
WINCO FOODS, LLC,

Defendants.

NO: 53900-4-II

DECLARATION OF SERVICE

THURSTON COUNTY SUP. NO:
18-2-03123-34

On this day, the undersigned served pursuant to CR5(b) all parties listed below with copies of:

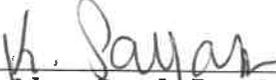
1. Respondents' Response to Appellant's Brief; and
2. Declaration of Service.

The listed pleadings were delivered via ABC Legal Messenger.

I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 26 day of August, 2020.

By:


Kathleen Sayah, Legal Assistant

DYNAN & ASSOCIATES, P.S.

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