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Oct 03, 2016
Court of Appeals
Division III
State of Washington

Appellate Court No. 341518-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

Division III

THOMAS THORN,

Appellant

v.

DEBRA CROMER,

Respondent

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court, sua sponte, found at summary judgment that the statute of limitations ran the day prior to filing.

B. STATEMENT OF THE CASE

1. The parties in this case have a child in common, and resided together continuously from 2008 until July 17, 2012. CP 89. These four years of cohabitation were interrupted only a few days at a time when Dr. Thorn would flee Ms. Cromer's abuse periodically, and stay at the home of a friend in Soap Lake, Washington. CP 89.

2. On July 17, 2012, Ms. Cromer made false allegations against Dr. Thorn, resulting in his incarceration for nearly three months before making bail, loss of employment, and emotional trauma. CP 90. The basis of her allegation was domestic violence, that they were in a committed relationship and that he had abused her. CP 90. When the matter reached trial, Dr. Thorn was not only acquitted, but the jury determined that Ms. Cromer was the primary aggressor against him, and found a special verdict of self defense, resulting in Dr. Thorn's attorneys fees being paid by Grant County in an amount of over \$100,000. CP 90-91, 179-187.

3. The allegations stemmed from a dispute between the parties on July 16, 2012, resulting in Dr. Thorn leaving the home to stay at his friend's home in Soap Lake just after midnight, on July 17, 2012. CP 89-91. While the last daytime hours of Dr. Thorn's

relationship with Ms. Cromer took place on July 16, 2012, he moved out on July 17, 2012. CP 89-91. In fact, he never voluntarily moved out, but was incarcerated on that date due to Ms. Cromer's false accusations. CP 89-91. He had no other physical address during that time other than his home with Ms. Cromer until his release from jail months later, on October 9, 2012.

4. During the pendency of the criminal proceedings, Dr. Thorn was restrained from the City of Moses Lake, and from speaking with Ms. Cromer. CP 91. In addition to this no-contact order, Ms. Cromer obtained a domestic violence protection order. CP 91. Dr. Thorn had no way of contacting Ms. Cromer to obtain his belongings from their home either prior or subsequent to the criminal case proceedings.

5. On July 17, 2015, the plaintiff filed this petition for the division of property. CP 1-12.

C. ARGUMENT

Whether the court properly granted summary judgment is a question of law that is reviewed de novo. *Crownover v. Dep't of Transp.*, 165 Wash.App. 131, 141, 265 P.3d 971 (2011) (citing *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002)), review denied, 173 Wash.2d 1030, 274 P.3d 374 (2012). The court will pass on whether the pleadings, affidavits, depositions, and admissions show genuine issues of material fact. *Vasquez v. Hawthorne*, 145 Wash.2d 103, 106, 33 P.3d 735 (2001). The moving party must show that the court could reach only

one conclusion after considering all the facts and reasonable inferences from those facts. *Id.* A motion for summary judgment based on a statute of limitations "should be granted only if the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced." *Zaleck v. Everett Clinic*, 60 Wash.App. 107, 110, 802 P.2d 826 (1991). See also *In re Kelly and Moesslang*, 287 P. 3d 12, 16, 170 Wash.App. 722 (3rd Div. 2012).

The undisputed statute of limitations in this case is three years. RCW 4.16.080.

1. The Statute of Limitations Commenced on July 17, 2012.

This complaint in this case states, "The parties separated July 17, 2012." CP 4. Dr. Thorn has stated throughout these proceedings that his relationship with Ms. Cromer ended on July 17, 2012, when he was arrested based on her false charges of domestic violence. CP 89. At an administrative hearing child support, Ms. Cromer argued (as she did in these proceedings) that their relationship ended on October 2011. CP 39. The issue at that administrative hearing (as in this summary judgment hearing) was which of those two dates the relationship ended. CP 195-206. The administrative court concluded that Dr. Thorn last supported Ms. Cromer and their child, for purposes of entry of a child support order, on July 16, 2012. CP 200-201. The judge mischaracterized Dr. Thorn's testimony as stating that that was when they separated, although his testimony was consistent throughout that the their separation was on July 17, 2012. CP 202. Because we prevailed

on the issue of separation at that administrative court, we did not correct the court or make an issue of his erroneously citing the date of July 16 v. July 17, since the issue had been July 17, 2012 v. October 2011.

The issue for the December 10, 2015, summary judgment hearing was the same: whether the separation occurred in October 2011 (in which case the statute of limitations would have ran), or did it occur in July 2012 (in which case the statute of limitations would not have ran)? CP 19, 21, 34. The defendant never took the position that the separation occurred on July 16, 2012, or that the statute of limitations ran based on a separation at any time in 2012. CP 20-80.

Judge Estudillo took a different position than everyone and concluded that the relationship terminated on July 16, 2012, based on the erroneous ruling by the administrative court, and granted summary judgment based on the statute of limitations. RP 37, CP 251-253.

On reconsideration, the plaintiff filed a transcript of the administrative court testimony of Dr. Thorn, showing that he consistently stated his separation date of July 17, 2012. CP 258-409. Judge Estudillo concluded that on Page 77 of the administrative court transcript (CP 335), Dr. Thorn "admitted" that he separated on July 16, 2012. That excerpt states:

Q: Um, briefly, Your Honor. Um, Doctor, if you could clarify when -- and (Inaudible) clear it up. Your separation was on July 20 -- or July 17, 2012, is that right? So that was (Inaudible) .

A: On July 16, 2012, we -- I guess I'll say we were fighting, and I got in my

car, and I left, and I drove to - for -- to disengage. And on July -- the morning of July 17th, she got in her car and came after me. Okay? After I had left. So we were together right up to that point. On the morning of July 16th -- and this breaks my heart -- July 16th, I woke up arm-in-arm with the girl in loved. She had my ring on. She (Inaudible) with her daughter. Okay? She kissed me goodbye and told me she loved me. We were together. At least I was. For all her allegations of unfaithfulness, et cetera, none of them (Inaudible). (CP 335).

Clearly his "admission" of July 16, 2012, was that they were fighting on that date. CP 335. If the court reads only to the first comma of the response to the question, then it would be a correction, that his separation was on July 16, 2012. CP 335. Reading the full response, however, shows that Dr. Thorn began his answer by telling of the incident that lead to their separation on July 16, 2012, which continued into July 17, 2012, when they actually separated. CP 335.

This was brought to the court's attention at the hearing for reconsideration, but the court's conclusion at the reconsideration hearings was:

I don't think I take that interpretation from that statement that I'm reviewing and I understand you have a disagreement with that. Um, but that does not seem to be the correct interpretation in my opinion. Um, and so I'm gonna find that the motion was previously entered or the order was previously entered correctly. Um, the three year statute of limitation did apply

and basically it was one day late. And whether its one day or a week or a month or a year it's still one day late or still late um, and so I'm going to deny the motion for reconsideration at this point and um, the order will remain. (RP 52).

Given the above dispute of facts, and the court's attempt to find contradiction in Dr. Thorn's testimony from another proceeding, there is (at the very least) a dispute of facts concerning the commencement date of the statute of limitations in this case.

Considering the findings of *Crownover v. Dep't of Transp.*, *Jones v. Allstate Ins. Co.*, and *Vasquez v. Hawthorne*, cited above, the court should reverse the finding dismissing this case for violation of the statute of limitations.

2. In the alternative to July 17, 2012, the Statute of Limitations Commenced on October 9, 2012.

Generally, a cause of action accrues, and the applicable statute of limitations begins to run, when a party has a right to apply to a court for relief. *U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981). The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim. *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997).

in this case, Dr. Thorn was held at Grant County Jail awaiting trial from July 17, 2012, through October 9, 2012. CP 202. Because Dr. Thorn had not established another residential address other than that of his address with Ms. Cromer, because Dr. Thorn

had no reason to believe that Ms. Cromer would refuse to return his belongings, because Dr. Thorn had no way to move the belongings had he requested them from Ms. Cromer, and because he had no access to a civil attorney in order to began these proceedings, this statute of limitations period should commence when Dr. Thorn was first knew he had a claim, and was able to file a claim against Ms. Cromer. That date, at the earliest, would be October 9, 2012.

Again, considering the findings of *Crownover v. Dep't of Transp.*, *Jones v. Allstate Ins. Co.*, and *Vasquez v. Hawthorne*, cited above, the court should reverse the finding dismissing this case for violation of the statute of limitations

D. CONCLUSION

Based on the above facts and legal argument, the court should reverse the superior court judge's dismissal of this matter, and allow the parties to proceed to trial.

Respectfully submitted this 30th day of September, 2016.



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5 **COURT OF APPEALS, DIVISION THREE**
6 **IN AND FOR THE STATE OF WASHINGTON**

7 **In re the Matter of:**

8 THOMAS THORN,

9 **Appellant,**

10 v.

11 DEBRA CROMER,

12 **Respondent.**

Appeal No. 341518-III

Certificate of Service

13 **CERTIFICATE OF SERVICE**

14 I, Jovita Cantu, certify that on the 30th day of September, 2016, I caused a true and
15 correct copy of this **Amended Brief of Appellant** and **Report of Proceedings** to be
served on the following via US Mail (First Class) on this date:

16 Gary R. Stenzel
17 Gary R. Stenzel PS
1304 W College Ave
Spokane, WA 99201-2006

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

20 SIGNED at Moses Lake, Washington this 30th day of September, 2016.

21 
22 _____
Nathan Albright