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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CINDY ALEXANDER, ET AL.,

Plaintiffs/Petitioners,

vs.

GARY SANFORD, ET UX., ET AL.,

Defendants/Respondents.

Filed *E*
Washington State Supreme Court

APR 14 2015

Ronald R. Carpenter
Clerk *5-7*

BRIEF OF AMICUS CURIAE
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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the proper interpretation and application of the “discovery rule” in determining when claims accrue under various statutes of limitations.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with an opportunity to address the discovery rule, and the basis for its application in any given case. Cindy Alexander and other condominium unit owners (Alexander or unit owners) of the Huckleberry Circle Condominium complex sued Gary Sanford and other former members of the board of directors (Sanford or board members) of the Huckleberry Circle Condominium Owners Association, and others. Alexander brought a number of different claims

against Sanford arising from the alleged failure to timely disclose violations of implied warranties under the Washington Condominium Act, Ch. 64.34 RCW (WCA). See generally RCW 64.34.445-.452.

For purposes of this amicus curiae brief, the following facts are relevant¹: The Huckleberry Circle Condominium Owners Association was created on June 29, 2000. From then until April 24, 2011, Alexander alleges that Sanford concealed and/or failed to disclose latent warranty violations resulting in water damage to the condominium complex, ultimately requiring more than \$2.5 million to repair. On November 6, 2004, the 4-year limitations period expired for breach of warranty claims under the WCA. See RCW 64.34.452.

In September 2011, Alexander filed suit against Sanford alleging breach of the board members' duty of care, violation of the Consumer Protection Act, Ch. 19.86 RCW (CPA), negligent misrepresentation, fraud, and civil conspiracy arising from concealment and/or failure to disclose the construction defects.² At this point in time, all board members

¹ The underlying facts are set forth in the Court of Appeals opinion and the briefing of the parties. See Alexander v. Sanford, 181 Wn. App. 135, 325 P.3d 341, *review granted*, 181 Wn. 2d 1022 (2014); Alexander Br. at 2-21; Sanford et al. Br. at 4-16; Elected Board Members Joinder Br. at 1-3; Alexander Reply Br. at 8-10; Alexander Pet. for Rev. at 2-10; Sanford Joint Pet. for Rev. at 3-5 & Appendix A (reproducing Alexander's 30 page complaint); Sanford Joint Ans. to Alexander Pet. for Rev. at 3-5; Alexander Supp. Br. at 15-16; Sanford Joint Supp. Br. at 4.

² Alexander also brought negligence claims against Lozier Homes Corporation (Lozier), the sole member of the "declarant" of the condominium project. See RCW 64.34.020(12)-(16) (defining relevant terms). The negligence claims allege that the

named in the suit had resigned from the board of directors and been off the board for more than three years. See Alexander 181 Wn. App. at 148-49.

Sanford moved for dismissal under CR 12(b)(6), and the superior court dismissed the action as untimely because Alexander's claims were filed more than three years after the board members resigned from the board of directors. See id. at 148, 152 & n.18. The superior did not apply the discovery rule to Alexander's claims on grounds that the board members could not have been engaged in any continuing fraud or omission following their resignation. See id. at 148 & 152.

Alexander appealed the dismissal, urging that the various claims were timely under the discovery rule. See Alexander Br. at 22-40. In response, Sanford argued that the board members' resignations triggered the statutes of limitations by operation of law, and that, in any event, the discovery rule does not render Alexander's claims timely, because board members' knowledge is imputed to the association and unit owners, and/or because the unit owners did not act with due diligence. See Sanford Br. at 2, 26-27; Sanford Joint Supp. Br. at 6.

The Court of Appeals reversed and remanded, noting Alexander's reliance on the discovery rule and agreeing that "the issue should not have

company "breached its duty of reasonable care 'in undertaking the construction, inspection, condition reporting, and repair'" of the condominium complex. Alexander, 181 Wn. App. at 166 (quoting record). These claims do not implicate any of the board members.

been decided adversely to [the unit owners] as a matter of law on a CR 12(b)(6) motion.” Alexander at 151 (brackets added). The court rejected Sanford’s argument that all claims were untimely because board member resignations triggered the applicable statutes of limitations. See id. at 151-53. Ultimately, the Court of Appeals adopted a form of the “doctrine of adverse domination” as the basis for reversing the dismissal of Alexander’s claims against board members for breach of their duty of care, CPA violation, negligent misrepresentation and fraud. See id. at 153-68.³

Adverse domination suspends operation of the statute of limitations when the governing body of a corporate entity fails to communicate the existence of a claim. See id. at 153-55, 168. In the form adopted by the court, the nondisclosure must involve intentional concealment, but it does not necessarily have to be fraudulent in nature. See id. at 156-57 & n.22. Further, not all board members have to be involved in concealing the claim, only a majority. See id. at 157-59. The doctrine is not limited to derivative actions against for-profit entities, but can also apply to claims brought by individuals such as the unit owners here. See id. at 159-62. The doctrine may be applied to the same types of

³ The doctrine of adverse domination does not appear to have been meaningfully briefed by the parties before the Court of Appeals. See Alexander Br. at 20; Sanford Br. at 33; Sanford Joint Pet. for Rev. at 15.

claims as the discovery rule, and is not limited to fraud claims. See id. at 162-65.

The Court of Appeals recognized Alexander's complaint alleged that board member concealment continued until April 24, 2011, less than six months before Alexander brought suit. See id. at 148, 168-69. It found the doctrine of adverse domination inapplicable to Alexander's conspiracy claim against Sanford because it did not implicate a majority of the board, but stated that application of the discovery rule to this claim "presents a question of fact to be decided on remand." Alexander at 168-69.⁴

Both Alexander and Sanford petitioned for review, and both petitions were granted. Among the issues on review are whether the doctrine of adverse domination was properly adopted and applied by the Court of Appeals, and whether the discovery rule applies to Alexander's claims in any event. See Sanford Joint Pet. at 2, 14-18; Sanford Joint Supp. Br. at 12-15; Alexander Supp. Br. at 9-13.

III. ISSUE PRESENTED FOR REVIEW

Should the discovery rule be applied in determining the timeliness of Alexander's claims against Sanford?

⁴ The court likewise stated that the discovery rule may apply as to negligence claims against Lozier. See Alexander at 168-69.

IV. SUMMARY OF ARGUMENT

The timeliness of Alexander's claims against Sanford can be resolved by application of Washington's discovery rule. As to those claims governed by the three-year statute of limitations, RCW 4.16.080, the claims do not accrue and the limitations period does not begin to run until the plaintiff either has actual knowledge or is deemed to have constructive knowledge of the factual basis for the claim, based on this Court's interpretation of the word "accrued" in RCW 4.16.005. A similar result should follow with respect to the CPA statute of limitations, RCW 19.86.120, because of its use of the term "accrues."

Neither the Court's characterization of the discovery rule as an "exception" to the general rule of accrual, nor its invocation of "judicial policy" to justify the discovery rule should be viewed as independent considerations in applying the discovery rule. These rationales serve to support the Court's interpretation of statutory accrual language, which should control unless the Legislature alters the basis of accrual in a particular statute.

V. ARGUMENT

Introduction

Although there are many issues before the Court on review, this brief only addresses whether the discovery rule applies to Alexander's claims against Sanford. With respect to these claims, Alexander appears to contend that, but for wrongful conduct by Sanford, the owners association or individual unit owners would have timely discovered, pursued and prevailed on the underlying WCA warranty claims, thereby eliminating or minimizing the damages claimed against the board members in this action. This would presumably entail proof that the WCA warranty claims could have been brought in compliance within both the WCA limitations period, see RCW 64.34.452, and the construction statute of repose, see RCW 4.16.310.⁵

For purposes of this brief, it is assumed that: (a) the Court of Appeals correctly determined that Sanford owed statutory and common law duties to the unit owners and that Alexander's complaint otherwise states claims for relief against Sanford under CR 12(b)(6); (b) the statutes of limitations applicable to Alexander's claims against Sanford are RCW

⁵ Sanford portrays Alexander's claims as "loss of a chance to sue" under the WCA, Alexander, 181 Wn. App. at 151 n.16, but they appear to be more akin to the requirement to prove a case-within-a-case in order to establish causation and damages in a legal malpractice action, see e.g. Daugert v. Pappas, 104 Wn. 2d 254, 257-58, 704 P.2d 600 (1985). The current versions of RCW 64.34.452 and RCW 4.16.310 are reproduced in the Appendix to this brief.

4.16.080 and RCW 19.86.120; and (c) the unit owners could have timely commenced an action for breach of warranty under the WCA, but for the wrongful conduct of the board members. See Alexander Reply Br. at 9-10; Alexander, 181 Wn. App. at 148.⁶

A. The Discovery Rule, Which Requires Actual Or Constructive Knowledge Of The Factual Basis For A Claim Before The Applicable Limitations Period Begins To Run, Is Grounded In Interpretation Of Statutory Language Governing Accrual Of Claims, Particularly Former RCW 4.16.010 And RCW 4.16.005.

Washington has adopted and continues to apply the discovery rule, requiring a plaintiff to have actual or constructive knowledge of the factual basis for a claim before the applicable limitations period begins to run. See Ruth v. Dight, 75 Wn. 2d 660, 666-68, 453 P.2d 631 (1969) (adopting discovery rule as an alternate basis for accrual instead of date of wrongful act or omission; involving medical negligence claims formerly subject to the 3-year limitations period for personal injuries, RCW 4.16.080(2)⁷); Gazija v. Nicholas Jerns Co., 86 Wn. 2d 215, 219-23, 543 P.2d 338 (1975) (applying discovery rule to claim against insurance agent for unauthorized cancelation of policy subject to RCW 4.16.080(2) or 2-year catch-all limitations period, RCW 4.16.130); Peters v. Simmons, 87

⁶ The current versions of RCW 4.16.080 and RCW 19.86.120 are reproduced in the Appendix to this brief.

⁷ The Legislature subsequently enacted a medical negligence statute of limitations that includes a form of the discovery rule. See RCW 4.16.350.

Wn. 2d 400, 403-06, 552 P.2d 1053 (1976) (applying rule to legal malpractice claim under 3-year limitations period for unwritten contract or liability, RCW 4.16.080(3)); Ohler v. Tacoma Gen. Hosp., 92 Wn. 2d 507, 513-14, 598 P.2d 1358 (1979) (applying discovery rule to product liability claim under RCW 4.16.080(2), in addition to RCW 4.16.350 discovery rule for medical negligence⁸); U.S. Oil & Refining Co. v. State Dep't of Ecology, 96 Wn. 2d 85, 91-94, 633 P.2d 1329 (1981) (applying discovery rule to claim based on violation of waste discharge permit subject to 2-year statute of limitations, RCW 4.16.100(2)); White v. Johns-Manville Corp., 103 Wn. 2d 344, 348-53, 356-60, 693 P.2d 687 (1985) (applying discovery rule to wrongful death and survival claims subject to RCW 4.16.080(2)); Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn. 2d 406, 413-15, 745 P.2d 1284 (1987) (applying discovery rule to condominium breach of warranty claims formerly subject to RCW 4.16.080(2)⁹); Doe v. Finch, 133 Wn. 2d 96, 100-02, 942 P.2d 359 (1997) (applying discovery rule to outrage claim subject to either RCW 4.16.080(2) or RCW 4.16.100); Green v. A.P.C., 136 Wn. 2d 87, 94-101, 960 P.2d 912 (1998) (applying discovery rule to product liability claim subject to RCW 4.16.080(2) and/or RCW 7.72.060(3)); 1000 Virginia Ltd.

⁸ A later adopted product liability statute of limitations includes a form of the discovery rule. See RCW 7.72.060(3).

⁹ Such claims are now governed by RCW 64.34.452.

Partnership v. Vertecs Corp., 158 Wn. 2d 566, 575-83, 146 P.3d 423 (2006) (applying discovery rule in cases of latent construction defects subject to RCW 4.16.080(3)).¹⁰

The discovery rule is principally grounded in the interpretation of the word “accrued” as it appears in RCW 4.16.005 and a predecessor statute, former RCW 4.16.010. These two general accrual statutes factor prominently in this Court’s discovery rule jurisprudence. The earlier statute provided:

Actions can only be commenced within the periods herein prescribed after the cause of action shall have *accrued*, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer.

RCW 4.16.010 (repealed by Laws of 1984, ch. 76, § 9; emphasis added).

The current statute provides:

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within

¹⁰ But see Tyson v. Tyson, 107 Wn. 2d 72, 727 P.2d 226 (1986) (declining to apply discovery rule to action subject to RCW 4.16.080(2) and/or RCW 4.16.100(1), based solely on alleged recollection of childhood sexual abuse allegedly repressed from plaintiff’s consciousness for a period of years, absent independent verification of the allegations); see also C.J.C. v. Corporation of Catholic Bishop of Yakima, 138 Wn. 2d 699, 706-07 n.4, 985 P.2d 262 (1999) (plurality op.; describing Tyson as “a plurality decision” stating that “the discovery rule did not apply to intentional tort claims where the plaintiff has suppressed the memory of the abuse during the period of the statute of limitations”). Tyson was superseded by RCW 4.16.340, which provides for “a broad and generous application of the discovery rule to civil actions for injuries caused by childhood sexual abuse.” C.J.C., 138 Wn. 2d at 712; see also North Coast Air Servs., Ltd. v. Grumman Corp., 111 Wn. 2d 315, 324, 759 P.2d 405 (1988) (stating the rationale of Tyson is “totally undercut” by the adoption of RCW 4.16.340 in a case involving product liability claims subject to RCW 7.72.060(3)).

the periods provided in this chapter after the cause of action has *accrued*.

RCW 4.16.005 (enacted by Laws of 1989, ch. 14, § 1; emphasis added).

This Court adopted the discovery rule in Ruth as an interpretation of the word “accrued” in former RCW 4.16.010. See 75 Wn. 2d at 666-67; see also DeYoung v. Providence Med. Ctr., 136 Wn. 2d 136, 145 n.2, 960 P.2d 919 (1998) (stating “*Ruth* construed former RCW 4.16.010 and RCW 4.16.080(2), which then provided a three year accrual-based statute of limitations for medical malpractice actions, as providing that a medical malpractice action might accrue upon discovery”); Gunnier v. Yakima Heart Ctr., Inc., P.S., 134 Wn. 2d 854, 861, 953 P.2d 1162 (1998) (stating Ruth “construed former RCW 4.16.010 and RCW 4.16.080(2) to mean that the cause of action might accrue upon discovery of the injury”); Ohler, 92 Wn. 2d at 513 (stating Ruth “interpreted the statutes” at issue, those being former RCW 4.16.010 and RCW 4.16.080(2)); Denison v. Goforth, 75 Wn. 2d 853, 854-55, 454 P.2d 218 (1969) (stating Ruth “reinterpreted the language of RCW 4.16.010 and RCW 4.16.080(2),” in overruling precedent tying accrual to date of wrongful act or omission).

Cases following Ruth have likewise noted that the discovery rule is grounded in the accrual language of former RCW 4.16.010. See Gazija, 86 Wn. 2d at 220 (stating “we are construing a limitations statute and not just

a definition of a cause of action, the word ‘accrued’ should be construed in a manner consistent with a prima facie purpose to compel the exercise of a right within a reasonable time without doing an avoidable injustice”); White, 103 Wn. 2d at 348-51 (emphasizing that the discovery rule inheres in the concept of accrual codified in RCW 4.16.010, and distinguishing cases from Minnesota, North Dakota and Pennsylvania that define accrual of a wrongful death claim in terms of the date of wrongful act or omission or the date of death).

The same interpretation of “accrued” in former RCW 4.16.010 has been carried forward under the current statute, RCW 4.16.005, in applying the discovery rule. See 1000 Virginia Ltd. Partnership, 158 Wn. 2d at 575-76 (stating “[s]tatutes of limitations do not begin to run until a cause of action accrues,” citing RCW 4.16.005 and Gazija, supra, which involved accrual under RCW 4.16.010); Allen v. State, 118 Wn. 2d 753, 757, 826 P.2d 200 (1992) (linking the discovery rule to the accrual language of RCW 4.16.005, and citing White, supra, which involved RCW 4.16.010). The continuity of interpretation between RCW 4.16.005 and former RCW 4.16.010 is proper because, “[w]hen enacting new law, the Legislature is presumed to be aware of judicial construction of prior statutes” and “[a]bsent an express indication otherwise, new legislation will be presumed to be consistent with prior judicial decisions.” Freitag v.

McGhie, 133 Wn. 2d 816, 823, 947 P.2d 1186 (1997) (applying interpretation of discovery rule under the former Uniform Fraudulent Conveyance Act, which was subject to RCW 4.16.080(4), to limitations period under the Uniform Fraudulent Transfer Act, RCW 19.40.091; brackets added).¹¹

The foregoing cases reveal that application of the discovery rule to various statutes of limitations results from the Court performing its interpretive function in reading RCW 4.16.005 and former RCW 4.16.010. However, language in a number of the cases can also be read as suggesting that other considerations influence whether the discovery rule will be applied in any given instance. For example, the discovery rule has been described as an “exception” to the “general rule” of accrual, which is based on the date when a party has the right to apply to court for relief, whether or not the party is aware of that right. In re Estates of Hibbard,

¹¹ In Antonius v. King Cnty., 153 Wn. 2d 256, 268-70, 103 P.3d 729 (2004), the Court held that a discrimination claim based on a hostile work environment is timely if at least one act of harassment occurred within the limitations period, and declined to adopt a discovery rule that would trigger the limitations period upon the occurrence of the first act of harassment. This result follows from the substantive nature of a hostile work environment claim, which is deemed to be a single unlawful employment practice even though it may be comprised of many individual acts of harassment. See id., 153 Wn. 2d at 269. In the course of its discussion, the Court states that, “unless otherwise specified, RCW 4.16.005 bases the running of statutes of limitations on accrual of the cause of action, it does not contain a discovery rule.” Id. at 269. This statement is incorrect, not necessary to the result, and is unsupported by any citation to authority. It is also contrary to the rule that the interpretation of a statute by the Supreme Court is read into the statute as if included in the original enactment. See Bowman v. State, 162 Wn. 2d 325, 335, 172 P.3d 681 (2007) (stating “[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it”; internal quotation omitted).

118 Wn. 2d 737, 744-45, 826 P.2d 690 (1992). Normally, a party has the right to apply to court for relief upon the occurrence of a wrongful act or omission that causes appreciable harm. See Green, 136 Wn. 2d at 91 & 96. The party is typically aware of both the wrongful act and the harm, and the claim accrues at that time. See Ruth, 75 Wn. 2d at 665. The characterization of the discovery rule as an exception seems to relate to the extraordinary nature of the circumstances involved when, for any number of reasons, a plaintiff does not and cannot reasonably know that he or she has a claim. See White, 103 Wn. 2d at 348-59 (noting that a claim may exist, but not have accrued in the absence of discovery). The reference to the discovery rule as an exception should not be viewed as a separate limiting principle on the application of the rule.

In a similar vein, there is language in some decisions seeming to suggest that the discovery rule is limited to particular categories of cases.

In Hibbard, the Court stated:

Although there has been increased application of the discovery rule by this court, we still follow the reasoning of *Ruth v. Dight*. 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 of the cause of their injuries.

118 Wn. 2d at 749-50 (footnote omitted).¹² This language should be read as being descriptive of the circumstances when the discovery rule has been applied, rather than as a categorical limitation on application of the rule. The discovery rule hinges upon the plaintiff's lack of knowledge or ability to know that a claim exists, rather than the type of claim at issue.

There is also language in some decisions indicating that application of the discovery rule involves "a judicial policy determination." Gazija, 86 Wn. 2d at 221; see also C.J.C., 138 Wn. 2d at 749 (citing Gazija); Hibbard, 118 Wn. 2d at 746 (discussing Gazija); U.S. Oil, 96 Wn. 2d at 92 (relying on Gazija); Peters, 87 Wn. 2d at 405 (citing Gazija); but see 1000 Virginia Ltd. Partnership, 158 Wn. 2d at 585-86 (appearing to criticize a Court of Appeals decision to apply the discovery rule as a matter of judicial policy rather than as a matter of statutory interpretation). In a sense this is true, because the Court's interpretation of "accrued" in RCW 4.16.005 and former RCW 4.16.010 is supported by considerations of "fundamental fairness" and "the common law's purpose to provide a remedy for every genuine wrong," which are deemed to

¹² See also Bowles v. Wash. Dep't of Retirement Sys., 121 Wn. 2d 52, 80, 847 P.2d 440 (1993) (stating "[e]ven in tort actions, the rule does not apply beyond a limited range of areas: professional malpractice, occupational diseases, self reporting and concealment"; citing Hibbard).

outweigh the policy against stale claims when plaintiffs are unaware of the factual basis for their claims. Ruth, 75 Wn. 2d at 665-66.¹³

However, there should be no free-floating judicial policy determination that must be made in each case when RCW 4.16.005 applies and the discovery rule is at issue. The cases referencing judicial policy can be traced to the decision in Gazija. In the context of the Gazija decision, the judicial policy determination consists of striking the same balance between fundamental fairness and the common law right to a remedy and the policy against stale claims that informed the Court's interpretation of RCW 4.16.010 in Ruth. See Gazija, 86 Wn. 2d at 222. Ultimately, the Court in Gazija, as in Ruth, performed its interpretive function by construing the accrual statute. See id. at 220.¹⁴

¹³ The Court has recognized the Legislature's authority to enact statutes of limitations, that alter the basis for determining when a statute of limitations begins to run. See Ruth at 666; White, 103 Wn. 2d at 355-56. While the Legislature may devise a different method of accrual, it must still comply with constitutional requirements. See e.g. Schroeder v. Weighall, 179 Wn. 2d 566, 316 P.3d 482 (2014) (holding elimination of tolling for minor victims of medical negligence in RCW 4.16.190 violates Wash. Const. Art. I, § 12); DeYoung v. Providence Med. Ctr., 136 Wn. 2d 136, 960 P.2d 919 (1998) (holding eight-year statute of repose for medical negligence claims violates Art. I, § 12); see generally John H. Bauman, "Remedies Provisions in State Constitutions and the Proper Role of the State Courts," 26 Wake Forest L. Rev. 237, 250-55 (1991) (collecting cases, pro and con, regarding legislative authority to adopt statutes of limitations that eliminate judicially recognized discovery rule).

¹⁴ The majority and dissenting opinions in U.S. Oil illustrate what happens when the discovery rule analysis is unmoored to the language of the accrual statute, former RCW 4.16.010 or RCW 4.16.005. The majority opinion invokes judicial policy in applying the discovery rule, but does not sufficiently explain that this policy is embedded in the Court's interpretation of RCW 4.16.010. See 96 Wn. 2d at 91-94. In response, the dissent accuses the majority of enacting a "common law discovery rule." 95 Wn. 2d at 94 (Dolliver, J., dissenting). The judicial policy analysis of Ch. 4.16 RCW limitation periods reflected in the various opinions in Tyson, supra, should be considered unique because it

Under the discovery rule, the defendant should have the burden to prove actual or constructive knowledge to establish that the plaintiff's claim has accrued.¹⁵ Whether the plaintiff has actual knowledge is not generally the focus of dispute. Factors bearing on constructive knowledge are varied and include, but are not necessarily limited to, a lack of due diligence by the plaintiff,¹⁶ the nature of the plaintiff's injury,¹⁷ the

was decided during the interval between repeal of RCW 4.16.010 in 1984, and enactment of RCW 4.16.005 in 1989.

¹⁵ Alexander notes a conflict in the Court of Appeals regarding the burden of proof on the discovery rule. See Alexander Br. at 32-34 & n.7. Some decisions impose the burden of proving discovery on the defendant, presumably because it relates to accrual and is in keeping with the overall burden of proof on the statute of limitations. See Wallace v. Lewis County, 134 Wn. App. 1, 13, 137 P.3d 101 (2006) (involving 2-year catch-all statute of limitations, RCW 4.16.130); Mayer v. City of Seattle, 102 Wn. App. 66, 76, 10 P.3d 408 (2000) (involving RCW 4.16.130). Others place the burden on plaintiff as an apparent exception to the statute of limitations or a form of tolling the running of an already accrued claim. See Burns v. McClinton, 135 Wn. App. 285, 300, 153 P.3d 630 (2006) (involving the 3-year statute of limitations for oral contracts, RCW 4.16.080(3)); Douglass v. Stanger, 101 Wn. App. 243, 256, 2 P.3d 998 (2000) (involving 3-year statute of limitations for fraud, RCW 4.16.080(4), *review denied*, 161 Wn. 2d 1005 (2007)); Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 518, 728 P.2d 597 (1986) (involving RCW 4.16.080(4)), *review denied*, 107 Wn. 2d 1022 (1987); Clare v. Saberhagen Holdings, Inc., 129 Wn. App. 599, 603 & n.8, 123 P.3d 465, 467 (2005) (involving 3-year statute of limitations for personal injury, RCW 4.16.080(2)); G.W. Constr. Corp. v. Professional Serv. Indus. Inc., 70 Wn. App. 360, 367, 853 P.2d 484 (1993) (involving RCW 4.16.080, but not referencing particular subsection).

The Court should confirm that the burden of proof of discovery rests upon the defendant, and disapprove Court of Appeals cases to the contrary. The statute of limitations is an affirmative defense on which the defendant bears the burden of proof. See CR 8(c) (noting statute of limitations is affirmative defense); Haslund v. City of Seattle, 86 Wn. 2d 607, 621-22, 547 P.2d 1221 (1976) (imposing overall burden of statute of limitations defense on defendant). Proof of discovery is necessary for the defendant to establish when the applicable limitations period began to run. See e.g. 1000 Virginia Ltd. Partnership, 158 Wn. 2d at 566 (describing discovery rule as a basis for accrual). The Court seems to have already imposed the burden on the defendant in Green, 136 Wn. 2d at 99-101.

¹⁶ See e.g. Allen, *supra* (finding a lack of due diligence).

¹⁷ See e.g. White, *supra* (involving latent injury).

relationship between the plaintiff and the defendant,¹⁸ and the conduct of the defendant.¹⁹ While the relationship and conduct of the defendant may be relevant to the constructive knowledge inquiry under the discovery rule, there are also separate and distinct equitable tolling doctrines that impact computation of limitations periods that are based solely on the relationship or conduct of the defendant.²⁰

With the foregoing understanding of the discovery rule as a basis for accrual grounded in the relevant statutory text, it is now possible to address the application of the discovery rule to Alexander's claims against Sanford.

¹⁸ See e.g. Gazija, supra (involving fiduciary relationship). In an agency relationship, constructive knowledge may be imputed from agent to principal. See Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 517-18, 728 P.2d 597 (1986) (involving imputation of knowledge of corporate officer and director to corporation), *review denied*, 107 Wn. 2d 1022 (1987). However, imputation may not occur if the agent's interests are adverse to those of the principal. See Deep Water Brewing, LLC v. Fairway Resources Ltd., 152 Wn. App. 229, 268-69, 215 P.3d 990 (2009), *review denied*, 168 Wn. 2d 1024 (2010); Restatement (Third) of Agency §§ 5.03 & 5.04 (2006). Alexander asserts this principle applies here to defeat any imputation of board members' knowledge for discovery rule purposes.

¹⁹ See e.g. Doe, supra (involving intentional concealment of wrongful conduct).

²⁰ See e.g. Ruth at 667 (stating "[t]here is no claim here ... that the physician did anything to conceal the asserted injury" and distinguishing "cases loosely described as declaring the fraudulent concealment rule"; ellipses added); Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C., 109 Wn. App. 655, 661, 37 P.3d 309 (2001) (tolling limitations period in legal malpractice actions until the end of the relationship, even if the claim would have accrued beforehand under the discovery rule), *review denied*, 146 Wn. 2d 1019 (2002).

B. The Statutes Of Limitations Applicable To Alexander's Claims Are Subject To Accrual Based On Discovery.

Most of Alexander's claims against Sanford appear to be subject to the 3-year statute of limitations, RCW 4.16.080. The claims for breach of the board members' duty of care would appear to fall within subsection (2) or (3) of the statute.²¹ The claims for negligent misrepresentation and conspiracy would appear to fall within subsection (2), and the claims for fraud would appear to fall within subsection (4), which has its own explicit discovery provision. With respect to all of these claims, accrual for purposes of this statute of limitations is governed by RCW 4.16.005, and the discovery rule should apply. See § A, supra.

Alexander has also alleged violations of the CPA that are subject to the 4-year statute of limitations in RCW 19.86.120. While this statute is not subject to Ch. 4.16 and RCW 4.16.005, it has accrual language similar to RCW 4.16.005: “[a]ny action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action *accrues*[.]” (Brackets & emphasis added.) The Court of Appeals has applied the discovery rule under the CPA.²²

²¹ It should not matter which subsection applies. Cf. Gazija at 217, (not resolving whether 4.16.080(2) or RCW 4.16.130 applied to plaintiff's claim); Green at 95 (not resolving whether RCW 4.16.080(2) or RCW 7.72.060(3), which incorporates Ch. 4.16 RCW, applied to plaintiffs' claims).

²² See Mayer v. Sto Indus., Inc., 123 Wn. App. 443, 463, 98 P.3d 116 (2004), *aff'd in part, rev'd in part on other grounds*, 156 Wn. 2d 677, 132 P.3d 115 (2006); Pickett v. Holland Am. Line-Westours, Inc., 101 Wn. App. 901, 913-14, 6 P.3d 63 (2000), *rev'd on*

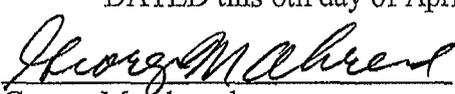
This Court should confirm that the accrual language in the CPA statute of limitations has the same meaning as it does under RCW 4.16.005.²³

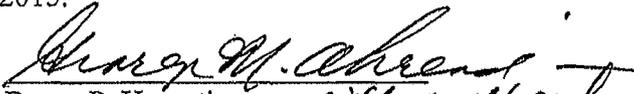
Sanford does not seem to dispute that the discovery rule is applicable to Alexander's claims against Sanford. See supra at 3; cf. Allen, 118 Wn. 2d at 758 n.4 (assuming applicability of discovery rule in the absence of argument to the contrary, citing RAP 12.1(a)). It remains for the parties to argue, and for the Court to determine whether Alexander states claims upon which relief can be granted under CR 12(b)(6). See McCurry v. Chevy Chase Bank, FSB, 169 Wn. 2d 96, 101-03, 233 P.3d 861 (2010) (regarding CR 12(b)(6) standard).²⁴

VI. CONCLUSION

The Court should adopt the analysis of the discovery rule advanced in this brief, and resolve this appeal accordingly.

DATED this 6th day of April, 2015.


George M. Ahrend


For Bryan P. Harnetiaux, with authority

other grounds, 145 Wn. 2d 178, 195-96, 35 P.3d 351 (2001), *cert. denied sub nom.* 536 U.S. 941 (2002).

²³ See Puget Sound Med. Supply v. Washington St. Dep't of Soc. & Health Servs., 156 Wn. App. 364, 370-71, 234 P.3d 246 (2010) (stating "[w]e derive the construction of a statutory phrase from an interpretation given to that phrase in other statutes, provided those other statutes are *in pari materia* with the statute construed").

²⁴ Review of a CR 12(b)(6) dismissal seems problematic when the basis for the motion is an affirmative defense, because the motion is designed to focus on whether the plaintiff has stated a claim upon which relief can be granted. There should be no duty on plaintiffs to rule out potential affirmative defenses in the allegations of the complaint. The defendant has the burden of proof on such defenses. Further, they are not self-executing and may be waived.

APPENDIX

West's Revised Code of Washington Annotated Title 4. Civil Procedure (Refs & Annos) Chapter 4.16. Limitation of Actions (Refs & Annos)
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West's RCWA 4.16.080

4.16.080. Actions limited to three years

Effective: July 22, 2011

Currentness

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

Credits

[2011 c 336 § 83, eff. July 22, 2011; 1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1; Code 1881 § 28; 1869 p 8 § 28; 1854 p 363 § 4; RRS § 159.]

Notes of Decisions (612)

West's RCWA 4.16.080, WA ST 4.16.080

Current through Chapter 4 of the 2015 Regular Session

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.16. Limitation of Actions (Refs & Annos)

West's RCWA 4.16.310

4.16.310. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property--Accrual and limitations of actions or claims

Currentness

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: PROVIDED, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

If a written notice is filed under RCW 64.50.020 within the time prescribed for the filing of an action under this chapter, the period of time during which the filing of an action is barred under RCW 64.50.020 plus sixty days shall not be a part of the period limited for the commencement of an action, nor for the application of this section.

Credits

[2002 c 323 § 9; 1986 c 305 § 702; 1967 c 75 § 2.]

Notes of Decisions (56)

West's RCWA 4.16.310, WA ST 4.16.310
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West's Revised Code of Washington Annotated

Title 19. Business Regulations--Miscellaneous (Refs & Annos)

Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)

West's RCWA 19.86.120

19.86.120. Limitation of actions--Tolling

Currentness

Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues: PROVIDED, That whenever any action is brought by the attorney general for a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, except actions for the recovery of a civil penalty for violation of an injunction or actions under RCW 19.86.090, the running of the foregoing statute of limitations, with respect to every private right of action for damages under RCW 19.86.090 which is based in whole or part on any matter complained of in said action by the attorney general, shall be suspended during the pendency thereof.

Credits

[1970 ex.s. c 26 § 5; 1961 c 216 § 12.]

Notes of Decisions (13)

West's RCWA 19.86.120, WA ST 19.86.120

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West's Revised Code of Washington Annotated
Title 64. Real Property and Conveyances (Refs & Annos)
Chapter 64.34. Condominium Act (Refs & Annos)
Article 4. Protection of Condominium Purchasers

West's RCWA 64.34.452

64.34.452. Warranties of quality--Breach--Actions for construction defect claims

Currentness

(1) A judicial proceeding for breach of any obligations arising under RCW 64.34.443, 64.34.445, and 64.34.450 must be commenced within four years after the cause of action accrues: PROVIDED, That the period for commencing an action for a breach accruing pursuant to subsection (2)(b) of this section shall not expire prior to one year after termination of the period of declarant control, if any, under *RCW 64.34.308(4). Such periods may not be reduced by either oral or written agreement, or through the use of contractual claims or notice procedures that require the filing or service of any claim or notice prior to the expiration of the period specified in this section.

(2) Subject to subsection (3) of this section, a cause of action or [for] breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(a) As to a unit, the date the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or the date of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(b) As to each common element, at the latest of (i) the date the first unit in the condominium was conveyed to a bona fide purchaser, (ii) the date the common element was completed, or (iii) the date the common element was added to the condominium.

(3) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

(4) If a written notice of claim is served under RCW 64.50.020 within the time prescribed for the filing of an action under this chapter, the statutes of limitation in this chapter and any applicable statutes of repose for construction-related claims are tolled until sixty days after the period of time during which the filing of an action is barred under RCW 64.50.020.

(5) Nothing in this section affects the time for filing a claim under chapter 64.35 RCW.

Credits

[2004 c 201 § 7, eff. July 1, 2004; 2002 c 323 § 11; 1990 c 166 § 14.]

Notes of Decisions (1)

West's RCWA 64.34.452, WA ST 64.34.452
Current through Chapter 4 of the 2015 Regular Session

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Dear Mr. Carpenter,

On behalf of the Washington State Association for Justice Foundation, a proposed amicus curiae brief is attached to this email for filing with the Court in the above-referenced case. (The Foundation's letter-application to appear as amicus curia was submitted on April 2, 2015.) Counsel for the parties and amicus are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--
George M. Ahrend
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