

FILED

No. 98024-1

FEB 08 2019

**WASHINGTON STATE COURT OF APPEALS
FOR DIVISION III**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 36165-9-III

THOMAS SILVER,

Appellant,

v.

RUDEEN MANAGEMENT COMPANY, INC.,

Respondent.

BRIEF OF THE RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	1
ARGUMENT	1
I. THE TWO YEAR STATUTE APPLIES.....	2
II. APPELLANT OVERESTIMATES THE EFFECT OF THE RULING IN THE <i>GOODEILL</i> CASE.....	6
III. RESPONDENT IS ENTITLED TO REASONABLE ATTORNEY FEES.....	8
CONCLUSION.....	8

TABLE OF AUTHORITIES

I. CASES

<i>City of Spokane v. County of Spokane</i> , 158 Wash.2d 661	2
<i>Goodeill v. Madison Real Estate</i> , 191 Wn.App. 88, 362 P.3d 302, (Div. 3 2015)	6, 7
<i>Lewis v. Lockheed Shipbuilding and Const. Co.</i> , 36 Wn.App. 607, 676 P.2d 545, (Div. 1 1984)	3, 4
<i>Seattle Professional Engineering Employees Ass'n v. Boeing Co.</i> , 139 Wn.2d 824, 991 P.2d 1126, (2000)	4, 5
<i>Sorey v. Barton Oldsmobile</i> , 82 Wn.App. 800, 806, 919 P.2d 1276, (Div. 3 1996)	5, 6

II. STATUTES

RCW 4.16.130	2, 9
RCW 59.18.280	1, 2, 8

STATEMENT OF THE CASE

The appellant sought review of the dismissal of his complaint based on the statute of limitations. The appellant filed a complaint alleging that the respondent violated the Washington Residential Landlord Tenant Act by failing to provide a complete accounting of his \$300.00 damage deposit within the time limit set by the statute. CP 9-10. Based on this alleged statutory violation, the appellant seeks a remedy in the form of return of his damage deposit and other statutory penalties provided by RCW 59.18.280. CP 10.

SUMMARY OF ARGUMENT

Appellant's entire theory of recovery is based on the remedy provided by RCW 59.18.280. The facts as alleged in the complaint do not support an action for wrongful taking nor breach of contract. The complaint contains no facts which establish that he or any of the putative class members are entitled to return of their respective damage deposits based on accounting, i.e. the damage to the premises was less than the damage deposit. The statutory penalty is the appellant's only theory of liability. Because the Washington Residential Landlord Tenant Act is silent as to the time limitation to bring an action for violations of its provisions, the two-year statute applies.

ARGUMENT

In order to determine if a claim is barred by the statute of limitations, the court must first determine which statute of limitations

applies, then determine when the claim accrued. If the complaint was not filed within the statutory period, it must be dismissed.

The court below determined that the cause of action accrued more than two years prior to the filing of the complaint, August 10, 2017. The appellant did not assign error to the time frame and assigns error only to the application of the two-year statute of limitations. The choice of the proper statute of limitations is a conclusion of law and is subject to *de novo* review. *City of Spokane v. County of Spokane*, 158 Wash.2d 661, 672-73.

Appellant argues strenuously that his complaint states a cause of action for wrongful taking of personal property. However at no point in the complaint does the appellant state: I was due money because the \$300.00 deposit was greater than the damages done to the premises – \$2,300.00. This fact would establish a wrongful taking of money. The bottom line is that the complaint states that an alleged violation of RCW 59.18.280 creates the liability described in the complaint.

I. THE TWO YEAR STATUTE APPLIES.

The narrow issue before this court is application of the appropriate statute of limitations. The Superior Court determined that the two-year provision of RCW 4.16.130 controls. The Superior Court was correct.

The case law relating to statutory rights has evolved a bit over the past years. The pattern that has emerged from these cases is: if the remedy for violation of a statute enhances a legal right which otherwise existed,

the cause of action for the statutory violation will be afforded the longest possible statute of limitations based upon the legal theory to vindicate the right that existed. However, if a statute provides a remedy or a right which did not exist before the violation of that statute, and it is silent with respect to a limitation, the two-year period will apply. This pattern can be seen in several cases.

In *State ex rel. Bond v. State*, 59 Wash.2d 493, 368 P.2d 676 (1962), the plaintiff sought reinstatement to public employment pursuant to a statute granting veterans an employment preference. He alleged that his claim fell within the 3-year statute as being an action upon "any other injury to the person or rights of another". *Bond*, at 495, 368 P.2d 676. See RCW 4.16.080(2). The defendant contended that the catch-all statute applied, because the plaintiff's claim was founded upon a liability created by statute. The court flatly rejected this argument. In the court's view, cases such as *Cannon* held only that actions founded upon purely statutory liabilities do not fall within the 3-year contract statute of limitations --they did not hold that such actions necessarily fall within the catch-all statute.

...

Washington courts have consistently followed *Northern Grain* in holding that the 2-year catch-all statute applies to causes of action arising out of the failure of public officials to perform their official duties. See, e.g., *Constable v. Duke*, 144 Wash. 263, 266-67, 257 P. 637 (1927); *Gates v. Rosen*, 29 Wash.App. 936, 941, 631 P.2d 993 (1981), aff'd sub nom. *Hall v. Niemer*, 97 Wash.2d 574, 649 P.2d 98 (1982); *Peterick v. State*, supra, 22 Wash.App. at 169, 589 P.2d 250. **But where the defendant directly invades a legally protected interest of the plaintiff, the 3-year statute applies.** In *Luellen v. Aberdeen*, 20 Wash.2d 594, 148 P.2d 849 (1944), the plaintiff sought reinstatement to the city police force. **The court held that, because the plaintiff had acquired a property right to his civil service pension, the city invaded that right by firing him.** The court thus applied the 3-year statute, stating that it was intended to cover injury to that kind of property that is intangible in its nature, especially when the injury consists

of some direct, affirmative act which prevents another from securing, having, or enjoying some valuable right or privilege. *Luellen*, at 604, 148 P.2d 849.

Lewis v. Lockheed Shipbuilding and Const. Co., 36 Wn.App. 607, 676 P.2d 545, (Div. 1 1984) (footnote omitted, emphasis added.)

The *Lewis* case demonstrates the pattern. If a person possess a right and that right is in some way invaded by another party, the cause of action will be in the nature of deprivation of that right and subject to the three year limitation period. A violation of a statute supplementing that right is also afforded the three-year limitation period. The *Boeing* case also demonstrates a similar pattern with respect to wages.

We hold the three-year statute of limitations of RCW 4.16.080(3) applies to WMWA claims and take this occasion to overrule *Cannon*. *Cannon* not only failed to address the rights vindication language of RCW 4.16.080(2), it also failed to address the rationale we articulate here. Boeing did not contract with the employees to pay for orientation; therefore, the six-year statute of limitations set forth in RCW 4.16.040(1) for written contracts does not apply. Moreover, RCW 4.16.080(2), the statute the employees contend applies, has generally been applied to torts and tort-like claims, not labor and employment claims. We decline to adopt the employees' suggestion that a claim under the WMWA is akin to a civil rights action or tort action because this approach essentially eviscerates RCW 4.16.130. Any action in court upholds a right of some sort.

But we note that Washington case law has applied a three-year statute of limitations to claims involving unjust enrichment. RCW 4.16.080 (3).[7] See *Dam v. General Elec. Co.*, 265 F.2d 612, 614 (9th Cir.1958) (quoting *Halver v. Welle*, 44 Wash.2d 288, 295, 266 P.2d 1053 (1954)); *Cain v. Source One Mortgage Servs. Corp.*, 1999 WL 674776, 97 Wash.App. 1014 (Wash.App.Div.I, Aug. 30, 1999). The employees' WMWA claims are more

analogous to claims for unjust enrichment than to tort claims. Although Boeing did not contract with the employees to pay for orientation, there is still a legal obligation imposed in law that an employer must pay an employee at least the minimum wage for work. And because its mandatory pre-employment orientation sessions were deemed work, under the WMWA, Boeing is required to pay the employees not less than the minimum wage for that work, which it did not do. See RCW 49.46.020(1).

Thus, in instituting this action, the employees are in essence seeking recovery under an obligation imposed by law, and the WMWA, for Boeing's unjust enrichment (i.e., receiving the benefit of the employees' work without paying for the work.) As such, the employees' claims are subject to the three-year statute of limitations applicable to implied contracts, as provided under RCW 4.16.080(3).

Seattle Professional Engineering Employees Ass'n v. Boeing Co.,

139 Wn.2d 824, 991 P.2d 1126, (2000) (emphasis added.)

As indicated in the *Boeing* case, there is a “legal obligation imposed in law that an employer must pay an employee”. The denial of this right gives rise to a cause of action for unjust enrichment to address the infringement of that right and the cause of action is subject to a three-year limitation period. The statute supplementing that right is subject to the three year limitation as well. *Sorey v. Barton Oldsmobile* represents another example.

The court in *Stenberg* "return[ed] to the original understanding of the statutes: The catchall provision serves as a limitation for any cases not fitting into the other limitation provisions." *Id.* at 721, 709 P.2d 793. Based on this case law, we conclude that *Cannon* stands for no more than the proposition that a claim based upon wage and hour statutes is not a contract claim. That proposition does not in any way diminish the argument that violation of a wage and

hour statute is an invasion of a personal right subject to the three-year statute of limitations and we so hold.

Sorey v. Barton Oldsmobile, 82 Wn.App. 800, 806, 919 P.2d 1276, (Div. 3 1996) (emphasis added.)

In this matter appellant's right to receive any refund of his damage deposit as described in the complaint is based solely on a violation of the Washington Landlord Tenant Act. His right to recover the damage deposit based on the statutory violation is *the only remedy* sought in the complaint. This is the distinction that removes the appellant's claim from all other statutes of limitation, both directly and by analogy. The case law supports this application of the limitation periods.

In the case of the Residential Landlord Tenant Act, a violation of its provisions is actionable. Under the facts in the complaint, the appellant had no independent right to make a claim to his damage deposit. His complaint establishes that the statement of damage done to the premises exceeded the damage deposit over seven fold. An action to enforce the procedural aspects of the Residential Landlord Tenant Act is limited to two years.

II. APPELLANT OVERESTIMATES THE EFFECT OF THE RULING IN THE *GOODEILL* CASE.

The appellant's complaint appears to place a great deal of stock in the use of estimates in the statement of retention of a damage deposit based on this Court's ruling in the case, *Goodeill v. Madison Real Estate*, 191 Wn.App. 88, 362 P.3d 302, (Div. 3 2015).

- 6.1.3 An estimate is not a full and specific statement.
- 6.1.4 An undisclosed charge is not a full and specific statement.
- 6.1.5 An anticipated charge is not a full and specific statement.

CP 9. (Appellant's Complaint.)

The appellant's theory is that anytime a landlord includes an estimated charge in a deposit accounting, it would result in a violation of the Residential Landlord Tenant Act. The ruling in the *Goodeill* case is simply not that broad. In the *Goodeill* case, the landlord estimated cost in order to retain the damage deposit well past the 14-day period in which the refund or statement must be provided.

On September 18, Ms. Goodeill called Madison to dispute the estimated charges. She spoke with an associate named Kirsten, who said that Madison typically sends a high estimate "so tenants would not be surprised" by the final statement. Clerk's Papers (CP) at 3. Kirsten said she had no receipts or documentation to support Madison's estimate, and urged Ms. Goodeill to "wait until the final statement," which could take between two to four additional weeks.

Goodeill v. Madison Real Estate, 191 Wn.App. 88, 93-94 362 P.3d 302, (Div. 3 2015).

After the estimated costs were liquidated, the landlord did in fact owed a refund to the debtor which was wrongfully withheld, without excuse, well past the deadline for refunding the damage deposit. *Goodeill* at 103. Thus the use of estimated charges in a damage deposit accounting which allows a landlord to retain funds past the statutory deadline would be actionable. However, if the landlord includes an estimated charge in

the accounting that does not result in a wrongful withholding of the damage deposit, it would not be actionable. The RLTA requires the landlord to account for the damage deposit, not account for every expense as a result of the tenancy. RCW 59.18.280(1). If he has done so within the appropriate time frame, there is no wrongful taking.

In this matter, appellant's complaint does not state that the use of estimated expenses in the initial damage deposit accounting resulted in a wrongful conversion or taking of the damage deposit. Indeed, the facts in the complaint state that the final accounting resulted in the appellant owing \$2,281.35 to the respondent. CP 6. This does not form the basis of a wrongful taking or conversion.

III. RESPONDENT IS ENTITLED TO REASONABLE ATTORNEY FEES.

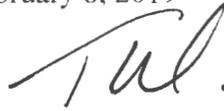
The appellant's action is based on RCW 59.18.280. The trial court awarded attorney fees to the respondent as the prevailing party based on that statute: "In any action brought by the tenant to recover the deposit, the prevailing party shall additionally be entitled to the cost of suit or arbitration including a reasonable attorneys' fee." RCW 59.18.280(2). The statute applies equally on appeal. The respondent requests an award of reasonable attorney fees pursuant to RAP 18.1.

CONCLUSION

The facts as presented in the appellant's complaint support only a statutory remedy for violation of the Washington Residential Landlord

Tenant Act. The Act is silent as to its limitation period. Therefore the two-year period provided by RCW 4.16.130 controls. The decision of the Superior Court should be affirmed.

Respectfully Submitted, on
February 8, 2019

A handwritten signature in black ink, appearing to read 'T.W. Durkop', written over a horizontal line.

Timothy W. Durkop, WSB #22985
Attorney for the Respondent

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
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THOMAS SILVER

Appellant,

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NO. 36165-9-III

DECLARATION OF SERVICE

1. RESPONDENT'S BRIEF

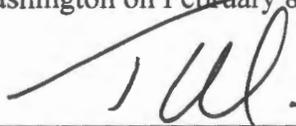
I, Timothy W. Durkop, state the following under penalty of perjury:

1. I am the attorney for the Respondent herein and I make my statements from personal knowledge.
2. On February 8, 2019 I mailed a copy of the following documents to the Attorneys for the Appellant via first-class mail, postage pre-paid at their addresses listed below:
 - a. BRIEF OF THE RESPONDENT



2 BRIAN G. CAMERON
3 KIRK D. MILLER
4 421 W. RIVERSIDE AVE, STE 660
5 SPOKANE, WA 99201
6

7 I certify under penalty of perjury that the foregoing declaration is true. I signed this document
8 in the City of Spokane Valley, Washington on February 8, 2019
9

10 

11 _____
12 Timothy W. Durkop
13

