

NO. 66278-3

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

COUGAR MOUNTAIN PROPERTIES, LLC, a Washington limited liability company; KEN NELSON AND ANDREE NELSON, husband and wife and the marital community composed thereof; JOHN MURPHEY and ELLEN MURPHEY, husband and wife and the marital community composed thereof; J&L ENTERPRISES WA, LLC, a Washington limited liability company,

Appellants/Appellants,

v.

CITY OF BELLEVUE, a municipal corporation,
Defendant/Respondent.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 FEB -7 PM 1:03
15

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Mary Yu)

OPENING BRIEF OF APPELLANTS

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IDENTITY OF MOVING PARTY

Plaintiffs/Appellants¹ Cougar Mountain Properties, LLC, Ken Nelson, Andree Nelson, John Murphey, Ellen Murphy, and J&L Enterprises WA, LLC, file this appeal of the trial court's Order Granting the City of Bellevue's Motion for Summary Judgment, dated October 22, 2010. A copy of the court's Order is appended for the convenience of the Court as *Appendix A*.

INTRODUCTION

The City of Bellevue now admits it was negligent when it failed to disclose to the appellants an obscure density restriction which would have barred the appellants' subdivision application. When, during the subdivision approval process, the City discovered its error, the City required a rezone, and covered up its negligent failure to have timely disclosed the issue by misrepresenting to appellants why the rezone was needed. Despite this misrepresentation – which appellants believed – the City then used the delay in bringing this action caused by that misrepresentation

¹ For ease of reference, all of the appellants in the underlying litigation, when referenced jointly, are referred to in this brief collectively as "appellants". Where reference is made to a specific appellant, that party's name is used.

as the basis to convince the trial court this action was barred by the statute of limitations.

Not only is there a material factual dispute on this record about when the statute of limitations began to run, which requires reversal of the trial court. The undisputed facts here clearly show that 1) appellants did not have any reason to suspect wrongful conduct by the City of Bellevue until well within the limitations period; and 2) no damage occurred which would have allowed appellants to bring an action until well within the limitations period.

ASSIGNMENTS OF ERROR

1. **The Trial Court Erred in Granting the City of Bellevue's Motion for Summary Judgment When Clear Issues of Fact Regarding Mr. Murphy's Knowledge of the City's Potential Tortious Conduct Remained.**

A. Were there material issues of fact with respect to the elements of the discovery rule?

B. Did the City's misleading explanation of the need for a rezone create a question of material fact?

C. Did the City present any proof of Mr. Murphey's knowledge a potential wrongful act may have occurred?

D. Did Mr. Murphey have a duty to investigate the City's requirement of a rezone after being given a misleading explanation by the City?

2. **The Trial Court Erred in Granting the City of Bellevue's Motion for Summary Judgment Despite Unopposed Evidence Appellants Had Suffered No Harm.**

A. For application of the discovery rule, is evidence some meaningful damage has occurred necessary?

B. Did the City present any evidence to rebut appellant's testimony no damage occurred until at least after October 2006?

C. Were there material facts in dispute with respect to whether and when damage had occurred, sufficient to trigger the discovery rule?

STATEMENT OF THE CASE

In 2003, Ken Nelson and John Murphey² identified a parcel of undeveloped land³ in the Cougar Mountain area of the City of

² Andree Nelson and Ellen Murphey are the spouses of Ken Nelson and John Murphey. They had no involvement in the real estate project which is the subject matter of this litigation. They are named parties only because of their potential community property interest in the subject property.

³ The property is approximately 1.89 acres, at the intersection of 16th Avenue SE and SE Cougar Mountain Way. CP 59.

Bellevue (referred to in this brief as 'the City') which they believed, based on their experience developing similar projects, could be subdivided into residential lots, and then sold at a profit. CP 235. On October 28, 2003, Murphey, using money supplied by Nelson, entered into a purchase and sale agreement, which provided for closing of the sale if/when the purchasers received preliminary approval from the City of Bellevue of a short plat subdividing the property into residential lots. CP 235.

The agreement called for periodic payments by the purchasers to the seller while the short plat process was proceeding. For the first 18 months, those payments would be fully credited to the purchase price; thereafter, the amount of the periodic payments increased and was not applicable to the purchase price. CP 235.

Murphey and his engineering consultant had previously looked at the City of Bellevue's published zoning maps and determined that the property was zoned R-3.5, which would allow 1/4 acre residential lots. CP 236. Murphey and Nelson hoped to create five residential lots on this steeply sloped 1.89 acre parcel, well within the 1/4 acre lot R-3.5 minimum. CP 59, CP 236.

On December 17, 2003, Murphey and his engineer attended a pre-application conference with members of the City of Bellevue's Planning and Community Development Department, to discuss Murphey's application for a short plat on the property and identify any potential issues or possible problems with the application. CP 235. Among those present at that meeting was Drew Folsom, an Assistant Land Use Planner employed by the City of Bellevue. Among Folsom's duties were to verify the zoning of the subject property and to determine whether the proposed subdivision complied with the City's zoning for that property. CP 32.

At that pre-application meeting, Folsom confirmed to Murphey and his engineer that a) the property was zoned R-3.5 as Murphey had understood; and b) that the proposed five lot subdivision was allowed under that R-3.5 zoning.⁴ CP 32. Folsom confirmed this information in writing on December 24, 2003. CP 69.

⁴ Because of issues with the slope of the property, the project was eventually scaled back to only 4 residential lots. CP 236.

Murphey and Nelson⁵ then proceeded with the short plat application, including multiple reviews by the City of the application and revisions to it. As the purchasers approached the 18 month point from their purchase and sale agreement on June 1, 2005 (the date after which their periodic payments to the seller would no longer be applied to the purchase price), they were understandably anxious to get preliminary approval of the short plat. CP 247. Murphey telephoned Folsom at the City, inquiring about the status of the application. Folsom told Murphey he expected the short plat approval within a week. CP 237. Relying on that assurance from Folsom, on May 22, 2005, Nelson closed the sale of the property and paid the balance of the \$780,000 purchase price.⁶

⁵ Murphey, a licensed contractor through his business J&L Enterprises, LLC focusing on site improvement and excavation, and Nelson had done a number of similar projects before this Cougar Mountain project. CP 234. Once the two men identified a piece of undeveloped property they believed could be profitably developed, Nelson provided the funds for purchase, and do the development work. CP 234. Murphey would then secure the necessary subdivision approval and other permits necessary to develop the property into residential lots. CP 234. Upon completion, the men would sell the finished lots, splitting any profit after Nelson was repaid the funds he advanced for acquisition and development of the project. CP 234.

⁶ The original purchase and sale agreement listed "John Murphey or assigns" as the purchaser. CP 235. Murphey then assigned his interest to Nelson, who took title in his individual name at closing. CP 235. Shortly after closing Nelson formed Cougar Mountain Properties LLC and quitclaimed his interest in the property to the LLC. CP 237.

The plat approval did not come within that week, and shortly thereafter Folsom "discovered"⁷ that an overlying density restriction applicable to this property, contained in the Newcastle Subarea Comprehensive Plan Policies in effect when the Cougar Mountain area was annexed into the City of Bellevue, had not been fully removed by the City of Bellevue.⁸ That restriction limited development, despite the R-3.5 zoning, to no more than one residential unit per acre. CP 33. After conferring with his superiors in the City, Folsom determined that this restriction was applicable to the Murphey/Nelson property and that as a result of his "oversight" in failing to know about this restriction, the City had "wrongly accepted the Murphey Short Plat Application." CP 33.

Folsom called Murphey. CP 33. Murphey recalls Folsom telling him that a "technicality" had come up "unexpectedly". CP

⁷ CP 33.

⁸ The area where this property sits was annexed into the City in 1989. CP 30. At that time, the City adopted an ordinance provided that in this area, although the R-3.5 zoning was applicable, "overall density shall not exceed one residential unit per acre." CP 30. This density restriction was an extension of an identical restriction contained in the Newcastle Subarea Comprehensive Plan Policies the City had adopted in anticipation of the annexation of this area. CP 31. In 1995, the City adopted a new ordinance amending the Newcastle Subarea Comprehensive Plan Policies. CP 31. Among the amendments was to release this property and other nearby properties from the one lot per acre density restriction. CP 31. Following this amendment, the City did not, however, amend its actual corresponding zoning ordinance. CP 31.

237, CP 238. Murphy recalls Folsom telling him⁹ a new provision of either the Growth Management Act or the Comprehensive Plan had impacted the property's, requiring a rezone. CP 238. The clear message Folsom gave to Murphey was that this impediment to the short plat was something new and unexpected which was being imposed on the City and this property by some agency or land use control system outside the City's control. CP 238. Folsom assured Murphey, however, that the City would "fast track" the rezone application which would be completed in a just a few weeks. CP 238. On August 16, 2005, Folsom wrote to Murphey, informing Murphey that the short plat application could not proceed without the Bellevue City Council approving a rezone removing this density restriction. CP 33, CP 80.

Neither Folsom nor anyone from the City ever told Murphey the truth about this density restriction: that the restriction had been part of the Newcastle Subarea Comprehensive Plan Policies in force in 1989 when the property was annexed, and that in 1995 the City had amended those policies to release this property (among others) from the one acre lot restriction. CP 238. Neither Folsom

⁹ Murphey's recollection of this telephone call is unrebutted by Folsom or the City.

nor anyone from the City ever told Murphey that, despite this 1995 amendment, the City had failed to amend the actual zoning ordinance, effectively leaving the one acre lot restriction incorrectly applicable to this property. CP 238. Neither Folsom nor anyone from City ever told Murphey that all of this information was known to the City in December 2003, when Murphey attended the pre-application meeting. CP 238. Neither Folsom nor anyone from the City ever told (or even suggested) to Murphey that the need now for a rezone was a result of City's failure to inform Murphey of the presence of the one acre lot restriction. CP 238. Had Murphey known then of the one acre lot restriction and that a rezone would be needed to develop the property, he and Nelson would not have purchased the property. CP 240.

The rezone of the property did not take a few weeks. It was finally approved by the Bellevue City Council in May 2006. CP 35, CP 239. As a part of the City's processing of the rezone, Mr. Murphey attended a hearing examiner's hearing on the rezone on March 29, 2006, at which the City's representative presented to the hearing examiner the City's basis for recommending that the rezone be approved. CP 34, CP 239. At that hearing, after the City's representative made her presentation about why the rezone should

be approved, the hearing examiner replied that the situation with the density restriction and need for a rezone was "kinda convoluted, don't you think?" to which the City's representative agreed, "Yes, it is."¹⁰ CP 231-232, CP 239. Nowhere in that hearing did the City's representative explain that the density restriction limiting the development of this property was known to the City well before the Murphey short plat application was made, or that the City failed in any way by not disclosing this restriction to Murphey in 2003. CP 231, CP 239. Murphey testified that the discussion at the hearing by the City's representative of the effect of the Comprehensive Plan and the Newcastle Subarea Land Use Plan was completely consistent with what Folsom had told him, that conditions applicable to this property by these other rules had been imposed after his short plat application and now the City was doing its best to address these new issues. CP 239. The City finally issued its preliminary approval for the short plat on October 19, 2006, which allowed the appellants to finally apply for the necessary grading, drainage and other permits, and to begin work on the subdivision. CP 240.

¹⁰ A CD containing a recording of the entire hearing is at CP 260.

The project progressed very slowly. CP 240. Murphey and Nelson became frustrated with the City's repeated requests for changes in the work. CP 240. Murphey testified that finally, in 2009, when the City asked for yet more changes, and the project was not making progress toward final approval for the short plat, he and Nelson consulted counsel, with a view towards seeking legal relief to force the City to move the stalled subdivision final approval process to conclusion. CP 240. During those discussions with counsel, the City's requirement for the rezone was discussed. CP 240. As a result of further discussions at this time with counsel, Murphey and Nelson learned for the first time that the City knew about the density restriction applicable to the property in 2003 (and before) and should have told Murphey about that restriction at the December, 2003 pre-application meeting. CP 240.

After filing a damage claim against the City on October 16, 2009, this lawsuit was filed on December 18, 2009.¹¹ The City moved for summary judgment on one issue only: that the 3 year statute of limitations applicable to this negligence action¹² had

¹¹ For the purposes of statute of limitations analysis, the effective date of the commencement of this lawsuit is October 16, 2009. RCW 4.96.020; CP 24.

¹² RCW 4.16.080(2).

expired and the action was therefore time-barred. CP 18. Both sides agreed that more than 3 years had passed since the tortious conduct of the City in December 2003 when the City failed to disclose the density restriction applicable to the property. Both parties agreed that the issue with respect to the statute of limitations was whether the discovery rule applied, and if so, when under that rule the appellants knew or should have known of all of the necessary elements of their cause of action against the City such that the discovery rule would commence the running of the 3 year limitations period. CP 25, CP 219. Stated precisely, the issue before the trial judge was whether, under the discovery rule, the statute of limitations began to run before October 16, 2006 (3 years before the lawsuit in this matter was filed). CP 24. The trial court granted the City's motion without findings and dismissed the lawsuit with prejudice. CP 249.

STANDARD OF REVIEW

This Court reviews summary judgment orders *de novo*. *Transalta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn.App. 819, 142 P.3d 209 (2006). This Court therefore engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

ARGUMENT

I. GENERAL RULES APPLICABLE TO THE ISSUES IN THIS CASE.

A. Summary Judgment Standards and Rules

To prevail, the City was required to prove that there was no genuine issue as to any material fact and that the City was entitled to judgment as a matter of law.¹³ All reasonable inferences from the record and materials submitted are to be construed in the light most favorable to the nonmoving party.¹⁴

In an opinion discussing the discovery rule and a statute of limitations defense, Division III described the rules to be applied:

Summary dismissal under a statute of limitations should be granted solely when the pleadings, depositions, interrogatories, admissions and affidavits in the record demonstrate that there is no genuine issue of material fact as to when the statutory period commenced. CR 56(c); Olson v. Siverling, 52 Wash.App. 221, 224, 758 P.2d 991 (1988). The moving party must establish the absence of any material issue of fact. Babcock, 116 Wash.2d at 598-99, 809 P.2d 143. Dismissal must be denied if the plaintiff can establish a right of recovery under any provable set of facts. Judy v. Hanford Env'tl. Health Found., 106 Wash.App. 26, 33-34, 22 P.3d 810 (2001). The question of when the elements of a cause of action should have been discovered to begin the running of the statute of limitations is a question of fact. Green v.

¹³ CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

¹⁴ *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

A.P.C., 136 Wash.2d 87, 100, 960 P.2d 912 (1998).

Webb v. Neuroeducation Inc., P.C., 121 Wash.App.336, 342-343, 88 P.3d 417 (2004).

B. Statute of Limitations

"The statute of limitations, although not an unconscionable defense, is not such a meritorious defense that either the law or the facts should be strained in aid of it." *Rochester v. Tulp*, 54 Wn. 2nd 71, 74, 337 P.2d 1062 (1959) (citations omitted). In this regard, our courts favor resolution of disputes on their merits. *Perrin v. Stensland*, 240 P.2d 1189, 1196 Ct. App. WA, 2010).

C. Burden of Proof

Our courts have consistently held that, "Because the statute of limitations is an affirmative defense, the burden of proof is on the defendant." *August v. U.S. Bancorp*, 146 Wash.App. 328, 343, 190 P.3d 86 (2008).

II. **DISCOVERY RULE**

The discovery rule postpones the running of the statute of limitations such that "a cause of action does not accrue until a party knew or should have known the essential elements of the cause of

action - duty, breach, causation, and damages." *August v. U.S. Bancorp, supra*, at p. 342, citing *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998). Here, the record is clear that none of the appellants knew or should have known of the City's breach of its duty to disclose this density restriction until sometime in 2009. Nothing in the City's motion even suggests otherwise. The record is also clear that, because the value of the involved property continued to appreciate at least past October 2006, appellants had suffered no damage as a result of the City's actions until less than three years prior to the commencement of this lawsuit.

A. Significant Factual Issues Remain About Murphey's Knowledge

While it is not necessary for a party to know he has a cause of action to bring the discovery rule into play, knowledge of the factual basis for a claim must be possessed by a party to start the statute of limitations running:

When applying the discovery rule, the court considers whether the plaintiff had knowledge of the factual basis for the cause of action, not the legal basis. *Gemain v. Pullman Baptist Church*, 96 Wash.App. 826, 832, 980 P.2d 809 (1999). "The action accrues when the plaintiff knows or should know of the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Allen v. State*, 118 Wash.2d 753, 758, 826 P.2d 200 (1992).

August v. U.S. Bancorp, supra, at p. 342. A key component to knowing the "relevant facts" is knowledge that some wrongful conduct has occurred: "The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm **occasioned by another's wrongful conduct**, plaintiff must make further diligent inquiry to ascertain the scope of the actual harm." *Green v. A.P.C., supra*, at p. 96 (Emphasis added). Here, there is no evidence that appellants either knew or should have known that the delay caused by the City's insistence on a rezone was caused by the City's negligent failure to disclose the density limitation at some time prior. At the most, given Murphey's testimony, there is clearly a factual issue on this material fact, making summary judgment impossible.

Nowhere in any of the City's moving papers is there any allegation, let alone any proof, that any of the appellants actually knew of the City's knowledge of the density restriction in 2003 and failure to disclose it then. Therefore, the trial court's dismissal can only be sustained if there was no dispute as to any material fact that the appellants should have known of the City's knowledge and failure prior to October 16, 2006. *Green v. A.P.C.*, 136 Wash.2d

87, 99, 960 P.2d 912 (1998). The failure of the City's motion in this respect is the failure to offer any proof that Murphey or any appellant should have known that the delay to comply with the City's insistence on a rezone was the result of information the City knew back in 2003 and failed to disclose to appellants, rather than the 'new discovery' that Folsom told Murphey was the reason for the delay. CP 238. As the opinions discussed above make clear, until Murphey or any other appellant knew or should have known some wrongful conduct may have occurred by the City, the discovery rule prevents the statute of limitations from running. Murphey knew the City was requiring a rezone; but he did not know the need for that rezone was the result of the City's possible wrongful conduct, and this record contains no proof to the contrary.

The facts on this record are strikingly similar to the seminal Washington Supreme Court opinion on this issue, *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 598 P.2d 1358 (1979). Like the appellants here, the plaintiff in *Ohler* knew she had suffered an 'injury': she knew her blindness since birth was the result of oxygen administered to her as an infant. But her cause of action against the hospital which had administered that oxygen to her "...did not accrue until she discovered or reasonably should have discovered

all of the essential elements of her possible cause of action, *i.e.*, duty, breach, causation and damages.” *Ohler, supra*, 92 Wn.2d at p. 511. Holding that there was a material fact unresolved whether the plaintiff knew her blindness was the result of some breach of duty by the hospital, the Supreme Court reversed summary judgment dismissing the plaintiff’s claim. In the same way, here appellants knew their project had been delayed by the City’s requirement of a rezone. But there is no evidence anywhere in this record that any appellant knew or should have known that the need for that rezone was the result of the negligent or wrongful conduct of any party, let alone any evidence to point to or suggest a possible cause of action against the City.

Construing the facts and reasonable inferences from those facts in favor of the appellants, as the trial court was required to do on this summary judgment motion, the facts applicable to this issue are:

- No one from the City ever suggested or even hinted, let alone directly told, Murphey or any appellant that the City knew of this density restriction in 2003. CP 238.

- No one from the City ever suggested or even hinted, let alone directly told, Murphey or any other appellant that the City

should have told Murphey about this density restriction at the pre-application conference in December 2003. CP 238.

- The only explanation Murphey was given for the need for a rezone was that a newly imposed requirement from some outside agency or planning document had suddenly come up in June of 2005. CP 237-238.

- Rather than suggest or hint that the need for the rezone might be the result of some actionable fault on the part of the City, the City misrepresented the reason for the need for a rezone. Murphy and the other appellants relied on that misrepresentation. CP 238.

- The City's explanation for the need for a rezone to the hearing examiner on March 29, 2006 was completely consistent with the explanation given Murphey. CP 239.

- The City's explanation for the need for a rezone to the hearing examiner confused even the hearing examiner. CP 232, CP 239.

- Murphey and the other appellants first learned in 2009 that the City's knowledge of the density restriction went back to 2003 and before and that the City failed to disclose it at the pre-application meeting. CP 240.

The only evidence offered in support of the City's motion was the declaration of Folsom, the City employee whose responsibility it was to know the zoning and density restrictions applicable to the subject property, and to correctly convey that information to appellants. Folsom's failure in December 2003 to alert appellants to the density restrictions which led to the City requiring a rezone in the summer of 2005 are at the center of this action.

Folsom's declaration and the City's motion used the word "oversight" again and again to characterize Folsom's and the City's failure to alert the appellants to this density restriction.¹⁵ CP 21, CP 26, CP33. And while the City's motion tried to suggest that Murphey was told at some time that the City or Folsom considered this matter to have been an "oversight", there is not one bit of proof to support that suggestion in the record. CP 26. Murphey directly denied that that word (or any word suggesting this problem was something the City knew or should have known) was ever used. CP 238. The City and Folsom had a chance to file a rebuttal declaration from Folsom responding to Murphey's description of

¹⁵ The irony of the use of this word to admit its liability in this matter by the City - unheard by Murphey or any of the appellants until this summary judgment motion was filed - should not go unnoticed. "Oversight" is defined as "an omission or error due to carelessness" (Dictionary.com) and is another word for "negligence".

what he was told, and did not do so. Murphey's declaration describes in detail how Folsom explained away the need for a rezone and that is the only evidence in this record on that point. CP 237-238.

Significantly, Folsom's declaration completely omits any mention of whether Folsom told Murphey anything about why the need for a rezone had arisen, and certainly says nothing to even suggest Murphey was told the problem was a result of the City's "oversight" or any other possibly wrongful act: "Following this discovery, I informed Murphey by telephone that his short plat application could not proceed as proposed without approval by the City Council of a rezone removing the density limitation." CP 33. And the only written communication of a by the City to Murphey is the letter sent on August 16, 2005, which likewise is completely silent on why the need for a rezone had arisen, let alone proof that Murphey knew or should have known of the City's knowledge of the density restriction in 2003 and its failure to disclose it. CP 33-34, CP 80.

The trial court's decision to dismiss this case on summary judgment must be reversed if there is any dispute about any material fact relating to the application of the discovery rule. On

this record there is more than just a dispute about whether Murphey should have known that some wrongful conduct by the City was the reason for the need for a rezone. Murphey's declaration describing how the City misled him about the need for a rezone is unrebutted. Nothing in Folsom's declaration in support of the City's motion disagrees with or rebuts anything said by Murphey in his declaration, and the City and Folsom chose not to file declaration in response rebutting Murphey's declaration. This case goes beyond establishing material facts about what Murphey should have known. There is no dispute on this issue: Murphey's declaration is the only evidence about that issue on this record.

B. No Duty of Investigation in the face of the City's misrepresentation**Error! Bookmark not defined.**

The City's motion suggests the appellants had some obligation here to 'discover the facts constituting their claim". CP 25. Such an obligation only arises after a party has knowledge that some wrongful conduct has occurred. *Green v. A.P.C., supra*, at p. 96. Here, as the record makes clear, appellants did not discover that some wrongful conduct on the part of the City may have occurred until 2009, well within the applicable limitations period. CP 240.

Furthermore, "A plaintiff has no duty to seek out evidence of medical negligence if another 'facially logical explanation for the injury exists." *Webb v. Neuroeducation Inc., P.C.*, 121 Wash.App., 336, 343, 88 P.3d 417 (2004), citing *Winbun v. Moore*, 143 Wn.2d 206, 219-220, 18 P.3d 576 (2001). In *Webb, supra*, a father sued a psychologist for negligently implanting false memories of sexual abuse in his son during a contentious custody dispute. Because Mr. Webb had been told that the false memories were suggested to the son by and encouraged by his ex-wife, he did not bring his action against the psychologist until well after the 3 year limitations period. The Court of Appeals reversed dismissal of the action on the statute of limitations, applied the discovery rule, and held that issues of material fact existed as to when Mr. Webb should have known of the psychologist's role in implanting the false memories:

Dr. Chupurdia contends a party who lacks conclusive evidence of negligence must file suit and invoke the civil discovery rules to force disclosure of information not otherwise available. This is the so-called "shoot first, ask questions later" litigation style, rejected by Washington courts. The rule now is that no action should be filed until specific acts or omissions can be attributed to a particular defendant. Filing on questionable grounds in the hope of using the discovery rules to supply the missing facts is contrary to CR 11.

Winburn, supra, at p. 345 (Citations omitted). See also, *Doe v. Finch*, 133 Wn.2d 96, 942 P.2d 359 (1997) (concealment of psychologist's relationship with patient's wife held a basis to apply the discovery rule to patient's claim against therapist). There is no evidence whatsoever that any of the appellants in this matter knew of "specific acts or omissions ...attributed to a particular defendant" until 2009, well within the limitations period.

Discussing these issues in *Gazija v. Nicholas Jerns Company*, 86 Wn.2d 214, 543 P.2d 338 (1975), the Supreme Court noted the many policy reasons for the discovery rule:

Against the assumptions that stale claims are more likely to be spurious and more likely to be supported by untrustworthy evidence, we must balance the unfairness of cutting off valid claims if, under the circumstances, the plaintiff would probably not know he had been injured until after the limitations period had run.

(A) fair resolution of the dilemma involves both a preservation of limitations on the time in which the action may be brought and a preservation of the remedy, too, where both parties are blameless as to delay in discovery of the asserted wrong.

Gazija, 86 Wn.2d at p. 222, citing to *Ruth v. Dight*, 75 Wn.2d 660, 666, 453 P.2d 631 (1969) (Emphasis added).

The *Gazija* Court cited with approval a number of out of state decisions as it reviewed the various circumstances under which

parties reasonably fail to or are prevented from discovering that a wrong has been committed. Among those opinions is *United States Liability Ins. Co. v. Hadinger-Hayes, Inc.*, 1 Cal.3d 586, 83 Cal.Rptr. 418, 463 P.2d 770 (1970). There, the court relied on the fiduciary duty between an insurance company and its corporate agent as the basis for applying the discovery rule, when information about the potential cause of action was known by one party but not disclosed to the other.

Similarly, in *Henry v. New Jersey Department of Human Services*, 9 A.3d 882 (New Jersey, 2010), the Supreme Court of New Jersey applied the discovery rule to an employee's action against her employer which alleged retaliation and discrimination. The Court based its application of the discovery rule on her employer's misleading explanation for her demotion:

In other words, she was given a reason-albeit an unsatisfactory one-that had nothing to do with racial discrimination. That, in turn, may have led plaintiff not to pursue the issue, thereby requiring the tolling of her cause of action. "(E)quitable tolling of a statute of limitations occurs when a plaintiff is misled as to the real reason for (the job action) and as a result fails to act within the prescribed time limit." *Villalobos v. Fava*, 342 N.J.Super. 38, 50, 775 A.2d 700 (App.Div.), *certif. denied*, 170 N.J. 210, 785 A.2d 438 (2011); *see also, Abboud v. Viscomi*, 111 N.J. 56, 64, 543 A.2d 29 (1988)...

Henry, 9 A.3d at p. 893 (balance of citations omitted).

Murphey's declaration makes it clear not only that the appellants were aware of no facts suggesting any wrongful conduct of any party until 2009. CP 240. What is also clear from that declaration is that the misleading way the need for a rezone was described to appellants suggested just the opposite of there being a potential claim against the City of Bellevue. CP 238. Having misrepresented why a rezone was needed, the City should not now be allowed to avoid its admitted liability by claiming the appellants should have known the City wasn't telling them the truth.

Murphey's declaration is clear that, when he learned of the need for the rezone, Folsom told him something had "just come up" and was the result of some other agency or authority imposing these density restrictions on the City of Bellevue. CP 237-238. So not only did Mr. Murphey not have any facts to suggest some wrongful act; he was given information by the City directly negating a wrongful act. Murphey accepted the explanation he was given by an official of the City. To suggest now that Murphey should have known the City was not telling him the truth and investigated further is nonsensical and unsupported by any legal authority.

Nothing in Folsom's declaration or in the exhibits to that declaration controverts this.

Furthermore, both Folsom's declaration itself and the exhibits attached use language that buttresses Murphey's declaration that he was told this was a recent discovery of some new issue, rather than something the City had known all along and could/should have disclosed to him. There is significantly no mention anywhere by Folsom that he ever told Murphey this was "oversight" or used any similar word to describe the problem. Folsom's declaration does state that he "discovered"¹⁶ the density restriction, using a term that is much more consistent with Murphey's recollection of being told about something new that had just come up. CP 33.

The City's staff report (CP 92ff) also nowhere uses the word "oversight", nor does the report anywhere mention that the City knew or should have known of this density restriction in 2003. That report does line up with Murphy's recollection of this being an item newly arisen and just discovered by the City. See p. 2 of the staff report: "city staff discovered that ...". CP 94. This is consistent with

¹⁶ "Discover": to see, get knowledge of, learn of, find, or find out; gain sight or knowledge of something previously unseen or unknown." (Dictionary.com)

Murphey's recollection that Folsom said this restriction had "just come up" and in no way suggests Murphey was told or even put on notice that this problem wasn't new, but instead was something the City should have known about all along.

The City's motion tries to suggest otherwise that Murphey should have learned of the City's "oversight" at the hearing examiner's hearing, yet nowhere in the entire hearing examiner's hearing does anyone use the term 'oversight' nor does anyone suggest this restriction was something the City could or should have known. CP231. In fact, after the full length of hearing during which the City's representative attempted to explain the situation to the hearing examiner to support the rezone, the hearing examiner replied, "Uhh... Ok, this, this is kinda convoluted, don't you think?" To which the City's representative replied, "Yes it is, it is." CP 231-232. Again, this language certainly does not support the City's claim here that it somehow should have alerted the appellants to the existence of some wrongful act by the City.

The hearing examiner's findings (CP 112ff) repeat the wording in the staff report - 'discovered'. CP 112. Again, the hearing examiner never uses the word "oversight" (or any similar word) in those findings and there is nothing in those findings to suggest City

staff could or should have advised Murphey of this initially and nothing to put Murphey or any reasonable person on notice to require additional investigation.

III. IT IS UNDISPUTED NO DAMAGE OCCURRED UNTIL AFTER OCTOBER 2006

As noted in the authorities cited above discussing the discovery rule, under the discovery rule, a cause of action does not accrue for statute of limitation purposes, until a party knew or should have known the essential elements of the cause of action - duty, breach, causation, and damages:

Actual loss or damage is an essential element in the formulation of the traditional elements necessary for a cause of action in negligence." *Lewis v. Scott*, *supra* 54 Wash.2d at 856, 341 P.2d 488; *Lindquist v. Mullen*, 45 Wash.2d 675, 677, 277 P.2d 724 (1954); Cf. *Restatement (Second of Torts ss 281, 7* (1965). The difficulty in applying this principle to statutes of limitation problems is created by conceptualization of when the damage has occurred. See *Budd v. Nixen*, 6 Cal.3d 195, 200-02, 98 Cal.Rptr. 849, 491 P.2d 433 (1971). The mere danger of future harm, unaccompanied by present damage, will not support a negligence action. *Prosser, Supra s 30, at 143*. Until a plaintiff suffers appreciable harm as a consequence of negligence, he cannot establish a cause of action. Thus, although a right to recover nominal damages will not commence the period of limitation, the infliction of actual and appreciable damage will trigger the running of the statute of limitations. *Davies v. Krasna*, 14 Cal.3d 502, 121 Cal.Rptr. 705, 535 P.2d 1161 (1975).

Gazija v. Nicholas Jerns Company, 86 Wn.2d 215, 219, 543 P.2d 338 (1975).

Here, the evidence from Murphey's declaration is that, because of the continuing escalation of real property values in the Pacific Northwest at the time, the property involved in this action continued to appreciate at least through the end of October 2006 and beyond. CP 240-241. As a result, appellants suffered no damage from the delay caused by the City's failure to properly advise of the density restriction until at least after October 2006. This key element of the appellants' cause of action thus was not and could not have been discovered by the appellants until less than 3 years prior to the commencement of this action.

Again, as discussed above with respect to the City's failure to provide any rebuttal (by Folsom or anyone else) of Murphey's detailed description of why the rezone was needed, on this issue not only did the City fail to rebut Murphey's declaration. On the issue of when damage from the City's negligence first occurred, the City offered no evidence of any kind. As a result, Murphey's declaration is the only evidence in the record on this issue. And Murphey's declaration is unequivocal that the appellants suffered no damage until after October 2006: "As a result, even though our

project was delayed by the City's late requirement of a rezone, we didn't experience any monetary or economic loss as a result of that requirement until after 2006, and certainly after October 2006, when the market to turn negative and we realized the delay in finalizing the project was going to result in a loss to us." CP 241. This un rebutted, unopposed evidence clearly shows that, for purposes of the discovery rule, the appellants' cause of action against the City did not accrue until less than 3 years before this action was filed. The trial court's dismissal was therefore clearly error and must be reversed.

IV. CONCLUSION

The dismissal of the appellants' action against the City should be reversed. The evidence offered in support of the motion fails to show even a suggestion that appellants should or could have known facts to alert them to two key elements of their cause of action against the City. Appellants had no reason to suspect the rezone delay was the result of any wrongful conduct on the part of any entity, let alone the City of Bellevue. In fact, the way City personnel misrepresented what had occurred not only told the appellants that no wrongful act of any kind had occurred. The

City's misrepresentation specifically focused appellants' attention away from the acts of the City of Bellevue.

Second, the record here is clear no damage occurred as a result of the City's failure to disclose the density restrictions until after October 2006, and within the applicable 3 year limitations period.

RESPECTFULLY SUBMITTED, this 7TH day of February, 2011.

A handwritten signature in black ink, appearing to read "Bradford G. Moore". The signature is written in a cursive style with a large, prominent initial 'B'.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing OPENING BRIEF OF APPELLANTS to be served on the following counsel of record via e-mail and legal messenger on this 7th day of February, 2011:

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