

NO. 73206-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AYANNA BROWN, individually and as Personal Representative of the
Estate of ALAJAWAN S. BROWN, and LOUIS BROWN, individually,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondent.

APPELLANTS' REPLY BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ARGUMENT 1

1. The Trial Court Erroneously Weighed Evidence and Resolved Highly Disputed Questions of Material Fact in Contravention of Washington’s Law on Summary Judgment and Due Diligence. 1

a. The Trial Court Erred in Resolving the Factual Dispute of What the Browns Knew or Should Have Known at the July 1, 2010 Arraignment Hearing. 4

b. The Trial Court Erred in Resolving the Factual Dispute of What the Browns Should Have Known from Two News Articles on Walker’s Arrest. 4

c. The Trial Court Erred in Resolving the Factual Dispute of What the Browns Should Have Known from Prosecution Records via a Public Disclosure Request...... 6

2. DOC Fails to State the Correct Discovery Rule Standard Requiring a Definitive Factual Basis Supporting *All* Elements of a Plaintiff’s Cause of Action Before a Cause of Action can Accrue. 7

3. Unlike the Plaintiff in Allen, the Browns Present Well-Established and Uncontested Evidence of Due Diligence Throughout the Entirety of Alajawan’s Case; DOC’s Attempts to Correlate the Browns with the Plaintiff in Allen are Wholly Without Merit...... 10

a. DOC Fails to Provide Any Factual Comparison Between the Browns and the Plaintiff in Allen. 11

III. CONCLUSION.....13

TABLE OF AUTHORITIES

CASES

Allen v. State, 118 Wn.2d 753, 826 P.2d 200 (1992) 5, 10, 11, 12

August v. U.S. Bancorp, 146 Wn. App. 328, 190 P.3d 86 (2008) 3

Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991)..... 3

Diimmel v. Morse, 36 Wn.2d 344, 218 P.2d 344 (1950) 7

Gevaart v. Metco Const., Inc., 111 Wn.2d 449, 760 P.2d 348 (1988) 8

Hipple v. McFadden, 161 Wn. App. 550, 255 P.3d 730 (2011) 2

Hudesman v. Foley, 73 Wn.2d 880, 441 P.2d 532 (1968)..... 2

Morris v. McNicol, 83 Wn.2d 491, 519 P.2d 7 (1974)..... 2

State ex rel. Bond v. State, 62 Wn.2d 487, 383 P.2d 288 (1963) 2

Webb v. Neuroeducation Inc., P.C., 121 Wn. App. 336, 88 P.3d 417
(2004) 3, 8, 9, 10

Winburn v. Moore, 143 Wn.2d 206, 18 P.3d 576 (2001)..... 2, 6, 9

I. INTRODUCTION

The trial court committed reversible error when it evaluated the evidence before it as if it were the trier of fact. Under Washington law, a determination of due diligence is a factual question for the jury. The trial court erred when it weighed evidence and resolved highly disputed issues of material fact regarding when the Browns should have discovered the facts giving rise to all elements underlying their negligence action. As established by the disparate and competing evidence in this case, reasonable minds could reach differing conclusions as to this factual dispute. As such, the trial court erred by granting summary judgment in favor of DOC, and erred again in denying the motion for reconsideration.

II. ARGUMENT

1. The Trial Court Erroneously Weighed Evidence and Resolved Highly Disputed Questions of Material Fact in Contravention of Washington's Law on Summary Judgment and Due Diligence.

Despite nearly thirty pages of briefing, DOC's opposition brief fails to address the issue at the crux of this appeal: namely, that the trial court improperly resolved genuine issues of material fact and weighed disputed evidence in favor of the moving party – here DOC. In particular, DOC fails to raise a single argument rebutting the proposition under Washington law that a determination of due diligence is a factual question

for the jury. Accordingly, the trial court erred when it acted as a trier of fact in deciding DOC's motion.

In determining a motion for summary judgment, the trial court must consider all material evidence and reasonable inferences therefrom in a light most favorable to the nonmoving party. Hudesman v. Foley, 73 Wn.2d 880, 887, 441 P.2d 532 (1968). "Facts asserted by the nonmoving party and supported by affidavits or any other proper evidentiary material must be taken as true." State ex rel. Bond v. State, 62 Wn.2d 487, 491, 383 P.2d 288 (1963). Where there are highly disputed material facts – as in present case – the threshold for summary judgment is stringent and exacting: "[t]he motion should be granted only if, from all the evidence, reasonable [persons] could reach but one conclusion." Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

However, discovery rule cases are commonly plagued with competing and disputed evidence, thus precluding reasonable minds from reaching a single conclusion. Recognizing the inappropriateness of summary judgment under these circumstances, Washington courts have held that "[t]he determination of when a plaintiff discovered or through the exercise of due diligence should have discovered the basis for a cause of action is a factual question for the jury." Winburn v. Moore, 143 Wn.2d 206, 213, 18 P.3d 576 (2001); *see also* Hipple v. McFadden, 161 Wn.

App. 550, 561, 255 P.3d 730 (2011) (“[w]hether the discovery rule applies is a factual question for the jury”); August v. U.S. Bancorp, 146 Wn. App. 328, 343, 190 P.3d 86 (2008), as amended (Sept. 4, 2008) (“[w]hether a plaintiff has exercised due diligence under the discovery rule is a question of fact”); Webb v. Neuroeducation Inc., P.C., 121 Wn. App. 336, 342, 88 P.3d 417 (2004) (citing Babcock v. State, 116 Wn.2d 596, 598–99, 809 P.2d 143 (1991)) (“[w]e do not weigh evidence or resolve factual disputes”).

Despite the numerous material factual disputes in this case, the trial court invaded the province of the jury when it “[found] very little in terms of facts,” CP 204, and

[found] in this case that the discovery rule [did] apply[,] [a]nd . . . that the Browns knew or should have known as early as June of 2010 that Mr. Walker was on probation. And that at that time, they had reason to believe that there was a duty, a potential breach of that duty, certainly damages, and certainly causation.

CP 205. In subsuming the role of the trier of fact, the trial court provided no explanation as to how such clashing evidence could reasonably support a single, definitive conclusion of when, in the exercise of due diligence, the discovery rule should be applied – particularly when considered in favor of the Browns as the nonmoving party. Rather, as evidenced by the numerous factual disputes articulated below, the trial court erroneously

resolved material questions of fact, thus contravening Washington law and encroaching on the delegated decision-making role of the jury.

a. The Trial Court Erred in Resolving the Factual Dispute of What the Browns Knew or Should Have Known at the July 1, 2010 Arraignment Hearing.

A material question of fact exists as to what the Browns knew or should have known at Walker's arraignment hearing on July 1, 2010. In its opposition brief, DOC argues that the Browns knew or should have known about Walker's probation status and probation violations due to their attendance at the hearing. Br. of Respondent at 15-17. However, the hearing transcript from the July 2010 arraignment does not reveal a single reference to Walker's probation status, the fact that he was violating the terms of his probation, or the fact that DOC had been alerted to Walker's violations before Alajawan's preventable death. CP 161-170. The trial court was supplied with the arraignment hearing transcript when it considered and decided, without explanation or argument, the Browns' motion for reconsideration. Based on this conflicting evidence, a material issue of fact clearly exists as to what the Browns knew or should have known at the July 1, 2010 arraignment hearing; the trial court therefore committed reversible error in granting summary judgment.

b. The Trial Court Erred in Resolving the Factual Dispute of What the Browns Should Have Known from Two News Articles on Walker's Arrest.

A material question of fact also exists as to what the Browns should have known from media coverage of Walker's arrest. DOC argues that the Browns should have known about Walker's probation status based on two news articles from June 2010. Br. of Respondent at 15. In each article, Walker's probation violation is mentioned in passing without any explanation as to what the violation was for, when the violation occurred, and whether Walker was even on probation at the time of Alajawan's murder.

DOC also presents no evidence that these two articles, and the fleeting references to Walker's probation violations contained within, were even seen by the Browns or that they compare in any way to the media coverage discussed in Allen. Allen v. State, 118 Wn.2d 753, 759, 826 P.2d 200 (1992). Rather than being a topic widely discussed in "local newspapers," as in Allen, DOC is only able to cite two news articles containing a single brief reference to Walker's probation status out of the entire body of media coverage and publications regarding Alajawan's case. Additionally, unlike Allen, the articles here lack any definitive discussion of whether Walker was on probation at the time of Alajawan's murder. Instead, the references are decidedly brief and vague and provide no concrete evidence for a potential cause of action against DOC.

At a minimum, reasonable minds could easily reach differing conclusions as to whether a single sentence in two multi-paragraph news articles should have led the Browns to discover the basis for a cause of action against DOC. In fact, this factual dispute epitomizes the proposition under Washington law that a determination of due diligence is a factual question for the jury. See Winburn, 143 Wn.2d at 213. Based on the trial court's improper weighing of evidence and resolution of material questions of fact, summary judgment was granted in error.

c. The Trial Court Erred in Resolving the Factual Dispute of What the Browns Should Have Known from Prosecution Records via a Public Disclosure Request.

Finally, a material question of fact exists as to what the Browns should have known from prosecution records accessible via a public disclosure request. DOC contends that the Browns should have filed a public disclosure request for Walker's prosecution file, which contained two documents briefly mentioning his arrest for probation violations. Br. of Respondent at 16-17. In propounding this theory, DOC fails to cite any legal authority holding that due diligence requires an individual to request public records. Moreover, DOC's argument assumes that a reasonable person should be expected to know about – let alone comprehend – esoteric legal records meant primarily for communications between a prosecuting attorney and judge (the two documents in question are the

Prosecuting Attorney's Case Summary and Request for Bail And/Or Conditions of Release and the Prosecuting Attorney's Certification for Determination of Probable Cause). Although technically available to the public, few lawyers, and even fewer people outside of the legal profession, are even aware that such documents exist.

Reasonable minds could therefore differ as to whether the Browns should have requested and reviewed Walker's prosecution file in the exercise of due diligence. Sufficient notice of facts "does not impute notice of every conceivable fact, however remote, that could be learned from inquiry." Diimmel v. Morse, 36 Wn.2d 344, 348, 218 P.2d 344 (1950). In light of the recondite nature of these documents, as well as the Browns' position as the nonmoving party, whether a reasonable person in the exercise of due diligence should have reviewed the prosecuting attorney's request for bail and probable cause memorandums is a genuine issue of material fact requiring a factual determination by a jury. As such, the trial court erred in granting summary judgment.

2. DOC Fails to State the Correct Discovery Rule Standard Requiring a Definitive Factual Basis Supporting All Elements of a Plaintiff's Cause of Action Before a Cause of Action can Accrue.

DOC's analysis of the discovery rule, and its application to the disputed facts of this case, is compromised by the fact that DOC never

fully articulates the correct discovery rule standard: "the cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action, i.e., duty, breach, causation and damages." Gevaart v. Metco Const., Inc., 111 Wn.2d 449, 501, 760 P.2d 348 (1988). Even the trial court, in its oral ruling, recognized this correct statement of the rule under Washington law. CP 205. DOC's omission is compounded by its misstatement of the law, arguing that "[t]he general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm." Br. of Respondent at 8.

DOC's analysis is further discredited due to its reliance on the trial court's erroneous ruling regarding a plaintiff's duty to file: "the claimant has only to file suit within the limitation period and use the civil discovery rules to determine whether the evidence necessary to prove cause of action is obtainable." Br. of Respondent at 10; CP 205. Contrary to the trial court's oral ruling, Washington courts have rejected this "shoot first, ask questions later" litigation style." Webb, 121 Wn. App. at 345. "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.” Id. (citing Winburn, 143 Wn.2d at 221-22).

The Webb case provides a clear demonstration of how the accrual of a plaintiff’s cause of action is delayed until the plaintiff knew, or through the exercise of diligence should have known, of the facts giving rise to *all* elements of a cause of action. In Webb, the Court of Appeals held that a plaintiff’s cause of action for negligence did not accrue until he obtained a definitive factual basis for the elements underlying his claim. To find that the plaintiff “should have known” certain facts supporting a cause of action, the Court articulated that these facts must be so certain that “reasonable minds but reach but one conclusion.” Id. at 345. For example, the Court found that the plaintiff’s speculative and conclusory statements of suspicion were not sufficient to trigger accrual under the reasonable minds standard. Id. at 344-45. Notably, the Court also held that the defendant doctor’s report, which set forth the negligent conclusions and findings at issue, presented, at a minimum, a material question of fact for the jury as to whether the plaintiff should have discovered sufficient facts to support a cause of action upon the report’s publication. Id. at 345-46.

In sum, Webb exemplifies the rigorous summary judgment standard by which evidence in discovery rule cases must be evaluated.

Due to the competing and disputed nature of facts in discovery rule cases, reasonable minds cannot generally reach a single conclusion as to when a plaintiff knew or should have known facts giving rise to all elements of a cause of action – as demonstrated in Webb. Cases such as Webb are a testament to the proposition under Washington law that that a determination of due diligence is a factual question for the jury.

3. Unlike the Plaintiff in Allen, the Browns Present Well-Established and Uncontested Evidence of Due Diligence Throughout the Entirety of Alajawan’s Case; DOC’s Attempts to Correlate the Browns with the Plaintiff in Allen are Wholly Without Merit.

DOC’s opposition brief makes numerous attempts to compare the Browns with the plaintiff in Allen. However, DOC’s analysis overlooks a key distinction between Allen and the present case: the Allen Court held as a matter of law that Beverly Allen was not diligent. After concluding that Beverly Allen failed to act with due diligence, the Court then determined when Ms. Allen should have known of the facts giving rise to her cause of action. Allen, 118 Wn.2d at 759. Here the trial court erred in finding that the Browns’ cause of action for negligence accrued on June 2010: specifically, there is no question that the Browns exercised due diligence with the degree of proactive involvement and inquiry envisioned by the Allen Court. Thus, when the Browns should have known the facts

giving rise to all elements of their cause of action is necessarily a material question of fact for the jury.

To hold that the Browns were not diligent in this case, this Court would need to conclude that staying in routine contact with law enforcement and the prosecutor's office; actively assisting with the investigation of Alajawan's murder; and attending all trial proceedings, including arraignment and sentencing hearings, does not meet the test of diligence under a reasonable person standard. Moreover, the Court must further conclude that when viewing the above facts in a light most favorable to the Browns as the nonmoving party, reasonable minds could reach but one conclusion as to whether the Browns acted with due diligence in the months preceding March 2012. Based on the Browns' attentive and persistent involvement in Alajawan's case, reasonable minds could undoubtedly differ. By embodying characteristics of diligence completely antithetical to the plaintiff in Allen, the Browns, at a minimum, establish a material question of fact solely appropriate for determination by a jury.

a. DOC Fails to Provide Any Factual Comparison Between the Browns and the Plaintiff in Allen.

In Allen, the Court found that the plaintiff failed to exercise due diligence because her "attempts to discover the fact surrounding her

husband's death were *minimal*.” Id. at 758 (emphasis added). Outside of infrequent contact with the Sheriff's Office for a few months, Beverly Allen made no attempt to remain involved with or monitor the investigation or trial of her husband's murderers. Id. In fact, Ms. Allen had essentially no involvement in her husband's case for five years. Id.

The Browns' actions in this case stand in stark contrast to the Allen plaintiff: the Browns engaged in frequent contact with law enforcement, and remained involved with and monitored the investigation and trial of Alajawan's murder without cessation over the course of nearly two years. This later point is particularly important. On numerous occasions, DOC incorrectly alleges that the Browns cite “emotional difficulties” as preventing a thorough inquiry into Alajawan's death. Br. of Respondent at 13-14. DOC grossly misstates the record. As the facts in this case clearly establish, Mr. and Mrs. Brown relentlessly followed and remained actively involved in Alajawan's case until Walker's final sentencing hearing in March 2012 – the day on which Walker's probation status was first made reasonably discoverable. See CP 23-26. The “emotional difficulties” discussed by DOC occurred *after* this discovery, and thus had no bearing on the Browns' diligent involvement in their son's murder investigation and trial. As such, DOC's argument backfires: rather than a

point of comparison, this fact yet again distinguishes the Browns' due diligence from the plaintiff in Allen.

DOC also argues that the Browns' proactive involvement in Alajawan's murder investigation and trial indicates that the Browns had more knowledge of their respective case than the plaintiff in Allen. Br. of Respondent at 14. Strangely, DOC presents this conclusion in an attempt to argue that the Browns had a heightened obligation to discover the factual basis underlying their cause of action. Again, rather than a damaging fact, this conclusion actually solidifies the antithetical characteristics of both plaintiffs: whereas the Allen plaintiff lacked knowledge of her case as a direct result of her lack of due diligence, the Browns' involvement and immersion in Alajawan's case is a testament to their due diligence and only strengthens a finding of fact of March 22, 2012 as the accrual date for their cause of action.

III. CONCLUSION

The trial court committed reversible error in granting DOC's motion for summary judgment. In direct contravention of Washington law, the trial court improperly weighed evidence and resolved highly disputed questions of material fact in favor of DOC on its own motion. The trial court also erroneously ignored the proposition under Washington law that a determination of due diligence is a factual question for the jury.

In light of the foregoing errors and those articulated in the Appellants' Opening Brief, the trial court's order granting summary judgment must be reversed, and this case remanded for trial on the merits.

DATED this 22nd day of September, 2015.

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COURT OF APPEALS, DIVISION I
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DECLARATION OF SERVICE
FOR APPELLANT'S REPLY BRIEF

2015 SEP 24 AM 10:05
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

The undersigned declares and states under the penalty of perjury pursuant to the laws of the State of Washington as follows:

I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

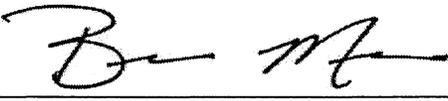
On September 23, 2015, I caused to be filed and served with the Clerk of the Court of Appeals, Division I, the Appellants' Opening Brief in this matter, along with this Declaration of Service, on the following individuals in the manner indicated:

THE COURT OF APPEALS DIVISION I COURT ADMINISTRATOR/CLERK ONE UNION SQUARE 600 UNIVERSITY STREET SEATTLE, WA 98101-1176	<input checked="" type="checkbox"/> VIA LEGAL MESSENGER FOR DELIVERY ON 9/23/15 <input type="checkbox"/> VIA EMAIL <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL
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ATTORNEY FOR DEFENDANT: PATRICIA C. FETTERLY, ESQ. ATTORNEY GENERAL OF WASHINGTON TORTS DIVISION 7141 CLEANWATER DRIVE SW OLYMPIA, WA 98504-0126	<input checked="" type="checkbox"/> VIA LEGAL MESSENGER FOR DELIVERY ON 9/23/15 <input checked="" type="checkbox"/> VIA EMAIL <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL
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