

Court 1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NO. 39776-5-II

Appeal from the Superior Court for Mason County

Cause No. 09-2-00338-0

Christian Doscher,

Appellant,

v.

State of Washington and County,

Respondents

Appellant's Reply To
Respondent State of Washington and
Appellant's Reply to
Respondent Thurston County

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Abbreviations:

AB = Appellant's Brief

CRB = County's Reply Brief

SRB = State's Reply Brief

CP = Clerk's Papers

SOL = Statute of limitations

1. Table of authorities

44 Wn. App. 167, 721 P.2d 553, *Weisert v. University*, 1986
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153 Wn.2d 256, *Antonius v. King County*, 2004
Blanchette v. Barrett, 229 Conn. 256, 275 (1994)
78 Wn. App. 616, *Sundberg v. Evans* (1995).
Vergeson v. Kitsap, 145 Wn. App. 526, 535, 186 P.3d 1140 (2008)
120 Wn. App. 470, *In re Firearm Rights of Nelson* (2003)
42 Wn. App. 675, 713 P.2d 736, *VERN SIMS FORD v. HAGEL* (1986)
126 Wn. App. 34, *Maison de France, Ltd. v. Mais Oui!, Inc.* 2005)
85 Wn. App. 15, *CRISMAN v. CRISMAN* (1997)
Davenport v. A.C. Davenport., 903 F.2d 1139, 1142 (7th Cir.1990)
144 Wn.2d 829, 31 P.3d 1155, *State V. BREAZEALE* (2001)
86 Wn. App. 732, *Goodyear Tire, v. Whiteman Tire*, 1997.
In re 92 Wn.2d 507, 598 P.2d 1358, *Ohler v. Tacoma General* (1979)
77 Wn. App. 588, *CARRAS v. JOHNSON* (1995)

2. Summary Judgment Law

The Court must construe all conflicting evidence on what plaintiff knew in 1990, in favor of Plaintiff, 44 Wn. App. 167, 721 P.2d 553, Weisert v. University, 1986; 164 Wn.2d 261, Rivas v. Overlake, 2008.

Where different inferences may be drawn from evidentiary facts as to ultimate facts such as knowledge, summary judgment is not warranted, Weisert, *supra*.

The Defendant who moves for summary judgment dismissal must not merely prove, but prove **conclusively**, that all of plaintiff's liability theories are false, otherwise jury trial is required,

104 Wn.2d 199, 704 P.2d 584, Zamora v. Mobil Oil (1985).

The failure to rebut a summary judgment declaration is fatal *even if the Declaration is grounded in otherwise inadmissible hearsay*,

44 Wn. App. 654, 722 P.2d 1373, LaMon v. Butler (1986);

110 Wn.2d 216, 751 P.2d 842, LaMon v. Butler (1988).

If there is a disputed factual issue as to the timeliness of the suit, the plaintiff must be allowed to present evidence on this issue in trial,

Yazzie v. Olney, 593 F.2d 100, 103 (9th Cir. 1979).

3. State and County completely avoid most arguments in Doscher's opening brief to this Court.

- a. Neither State nor County rebutted Doscher's timely filed summary judgment Declaration, a fatal error under *LaMon v. Butler* 1988 (Appellant's Brief 22, par. 1 (hereafter "AB")). Neither State nor County address this matter. Respondents' failure to rebut also guarantees that they can never hope to meet the high burden of proving Doscher's liability-theories to be *conclusively* false as required under *Zamora v. Mobil Oil* (supra).
- b. Doscher's opening brief argued that the "false felony" was not the only criminal history error raised at summary judgment, so that even if this Court finds all felony-related damages time-barred, reversal and remand would still be necessary since Doscher neither actually nor constructively knew of these other damages-causing errors until 2008 (AB 23, par. 3). Neither State nor County reply to this.
- c. Doscher's opening brief argued that neither Respondent has immunity (AB 24, par. 5). Neither State nor County attempt to address this argument, except by unedited cut and pastes of their now obsolete immunity-argument from summary judgment.
- d. Doscher's opening brief made extensive argument with citation to numerous relevant authorities that both County and State engaged in a

continuing course of conduct (“ccc”) or continuing tort, of the sort that Washington recognizes as tolling the statute, until July 15, 2008 when some of the tortious conduct ceased (AB 25, par 6). Neither State nor County attempt to address this tolling argument. County (CRB at 10) merely opines that Doscher relies primarily on employment case law here and that it did nothing wrong after 1990, both assertions being materially false.

e. Doscher’s opening brief made extensive argument that the record of PSP3 conviction is strictly and entirely inadmissible under *State v. Breazeale*, 2001. Neither State nor County attempted rebuttal of this point (AB 35, par. 24), and continue to blindly insist that their desperate need to use that evidence is more important than the suppression of same clearly required by the Supreme Court in *State v. Breazeale*, 2001. If the Court suppresses that evidence, only the falsified court order (CP 26), and the disposition document (CP 25) would be at issue for the felony criminal history error. Tolling by fraud would still be appropriate since Doscher did not discover the falsified court order until July 15, 2008 (CP 23, par 31). Tolling by continuing tort would still be appropriate since County remained under a statutory duty to disclose the Court’s true disposition to WSP (RCW 10.97.045), a duty which County obviously continually failed to fulfill until July 15, 2008. Continuing tortious

omissions can create new and repeated injuries just as much as continued commissions or acts, *Blanchette v. Barrett*, 229 Conn. 256, 275 (1994) (quoting *Fichera v. Mine Hill Corp.* 207 Conn. 204, 209-10 (1988)). Since County insists that PSP3 was the original form of the Court order (County's Reply Brief at 14, hereafter "CRB"), this makes the PSP2 appearing in the later photocopy all the more inexplicable except by deliberate intent to defraud, and a jury would have to decide whether County falsified this copy of the order before sending it to WSP, or if WSP falsified the copy given to them, threw away the accurate copy and then archived only the falsified version. County admits that how two different versions of the single original exist (CP 26 and 29) is subject only to speculation, which is just another way of saying reasonable minds could differ, thus forcing reversal here (CP 64, line 6ff) (CRB 10, par. 3).

f. Doscher's opening brief argued that WSP's misleading answers to Doscher's 1990 inquires (CP 21, par. 20), as well as several acts/omissions by County all constituted fraud, that the fraud discovery rule in Washington unambiguously requires nothing less than *actual* discovery to commence the statute, that Doscher did not actually discover any fraud by either Defendant until July 15, 2008, and that therefore, the statute did not begin running until that date (AB 41, par.

38). Neither State nor County attempt to show ambiguity of the fraud discovery rule, therefore this court is bound, under the rules of judicial construction, to reject any argument they give that takes the Court outside the wording of this unambiguous statute. Ambiguity must first be proven from the wording alone, before case law or anything else extrinsic to the statute may be used to construe it (AB 45, par. 49).

g. Doscher's opening brief showed that his timely filed yet wholly un rebutted summary judgment Declaration set forth facts showing that he made the same inquiries about the felony in 1990 that any reasonable person in similar circumstances would do, (AB 54, par. 65). Neither State nor County attempt any rebuttal to this due diligence argument, and in fact, by saying Doscher uncovered enough to know in 1990 that a wrong occurred, they therefore agree that he engaged in acts of due diligence, thus contradicting their other statements that he did "nothing" for 18 years. (CP 62, line 14) (CRB 10, par. 1)

h. Doscher's opening brief argued that because he was harmed by intent, by recklessness, and/or because Defendants had equal opportunity to mitigate, he had no duty to mitigate (AB 62, par. 84). Neither State nor County attempt any response.

i. Doscher's opening brief argued that the frauds of both Respondents in 1990 establish their bad faith, deception or false assurances, and that

when combined with Doscher's acts of due diligence stated in his un rebutted timely filed summary judgment declaration, all predicates for equitable tolling required in Washington are fulfilled (AB 69, par. 94). Neither Defendant attempted any rebuttal.

j. Doscher's opening brief argued that the fraud of Defendants also had estoppel effect, to wit, the delay in filing lawsuit was caused by their deception, not by Doscher's lack of due diligence (AB 70, par. 95). Neither State nor County attempt any rebuttal.

k. Doscher's opening brief argued that because the proof of Defendants' torts in this case largely come from their own official documents generated in 1990, there is no possibility that such proof could be resting on faded memories, lost evidence or unavailable witnesses and thus, such proof fails the 3 standard criteria for staleness (AB 73, par. 98). Neither State nor County attempt rebuttal except to blindly assert that the passing of 18 years is, all by itself, proof of staleness. The Court has absolutely no reason to fear that the proof of Respondent's tortious conduct in the last 18 years is possibly stale.

l. Doscher's opening brief refuted and went far beyond the simplistic disability-tolling arguments given by Respondents in their summary judgment motions (AB 74, par. 99). State and County's reply briefs do nothing more to respond to these more nuanced arguments to justify

disability-tolling, except to merely cut and paste in largely unedited form from their summary judgment motions, and thus wholly fail to engage the specific arguments Doscher gave to this Appellate Court.

Furthermore, a fundamental guide to statutory construction is that the spirit or intention of the law prevails over the letter of the law. *Dept. of Revenue v. Hoppe*, 82 Wn.2d 549, 512 P.2d 1094 (1973). The intention of the legislature was avoid depriving mentally disabled people of their chance to sue. Thus while the letter of the law (here, the requirement for incompetence in 4.16.190) cannot be sacrificed, the spirit or intention of the Legislature nevertheless must still, somehow “prevail”. Thus even if the Court does not believe Doscher’s disabilities conform to the letter of the disability-tolling statutes, they certainly conform to the spirit of the Legislature and should allow tolling anyway.

m. Doscher argued that even if his disabilities did not rise to the level of severity to justify tolling under RCW 4.16.190 and/or 4.16.260, he should still be accorded naiveté-tolling since this is accorded to Washington tort victims who have no mental incapacities whatsoever (AB 79, par. 111). Neither Respondent attempts rebuttal of the point.

n. Doscher supplied the Court with numerous alternative bases for reversal and remand even assuming all damages related to the felony are time-barred, in the conclusion section of his opening brief (AB, 79 ff).

Neither Defendant attempted rebuttal of this and rather blindly insist that Doscher's alleged knowledge of error in 1990 causes anything and everything in this Appeal to come to a grinding halt, forcing affirmation of the trial court. This could hardly be the case when the trial court specified that it was NOT ruling on the other criminal history errors outside the felony error, which Doscher had brought to its attention (VRP 20, lines 2-11).

4. State's denial that it owed Doscher a duty (State's Reply Brief at 5, hereafter "SRB") is materially false. State left Doscher's timely filed summary judgment declaration wholly un rebutted, wherein Doscher said he inquired about the felony with WSP in 1990, and that WSP said they were going by the charging document (CP 21, par. 20). Hearsay in such a Declaration becomes established fact when not rebutted (*LaMon v. Butler*, supra). A government clerk *creates* a duty to an individual to respond truthfully if they choose to answer that person's questions, 78 Wn. App. 616, *Sundberg v. Evans* (1995).

5. *Vergeson v. Kitsap County*, 145 Wn. App. 526, 535, 186 P.3d 1140 (2008) (SRB at 6), does not support State's blind denial of duty owed to Doscher. *Vergeson* was careful to qualify that when the lawsuit characterizes the government tort as intentional (as they are here, i.e.,

fraud and outrage), the need to prove the government owed a specific duty to the injured individual disappears.

6. State's assertion that Doscher in 1990 knew that the court order sent to WSP contained error (SRB at 7), is materially false. State left Doscher's summary judgment declaration wholly un rebutted, a fatal error all on its own (LaMon v. Butler, supra), and therein Doscher testified that he did NOT discover any errant court order until July 15, 2008 (CP 23, par. 31). Whatever any other assertion outside the Declaration may mean, none of them mean that he knew before July 2008 that the court order associated with his misdemeanor (CP 26) contained error. His declaration specifies that in 1990 he read 'PSP3' in County's copy of the order (CP 20, par. 11), giving him further reason not to suspect anything wrong with the copy of same given to WSP.

7. State's assertion that Doscher discovered error and then inexplicably chose to do nothing for 18 years to correct it (SRB at 11), would be impossible for reasonable minds to accept. State commits to the premise that Doscher exercised due diligence by agreeing that his efforts uncovered error in 1990. Reasonable minds could not possibly believe that Doscher was motivated enough in 1990 to make the larger efforts of inquiry, but to then, after allegedly discovering the felony to be error, refuse to engage in the far smaller effort of highlighting the error to

Respondents. Would Doscher, who was concerned enough to make inquiry, have allowed a clearly erroneous felony to negatively impact his constitutional rights and ability gain work and housing for the next 18 years, if he had known it was indeed error? No. Or else reasonable minds could only conclude that such a person has mental disabilities that are sufficiently severe that they did not understand the nature of the proceedings, and tolling under RCW 4.16.190/.260 must occur.

8. State admits that the reasons why Doscher walked away from his inquiries after supposedly ‘discovering error’ and did nothing to correct the ‘discovered’ error, are “unclear”. (Id). State admits it doesn’t know why Doscher would fail to make the tiny effort to correct the felony, when by saying he knew of the error in 1990, it commits to the premise that he did indeed make the more difficult effort of reasonably inquiring enough to uncover such error in 1990. State’s inability to figure out why Doscher would leave the error uncorrected is a factual issue that speaks to the heart of statute of limitations/discovery rule concerns, it leaves the door open to the possibility that he allowed it to persistently impact his rights because he was deceived by Respondents to believe it was not error, and is thereby a factual issue only a jury can resolve, that is, if Respondents’ failures to rebut Doscher’s Declaration do not convert all allegations therein into established fact. To say that the jury could not

differ but only agree with State on this point, is to say the jury could only find that Doscher's reason for leaving the felony uncorrected for 18 years, which simply means reasonable minds would surely differ on the point.

9. State's "reply" to Doscher's disability-tolling arguments (SRB at 12) is nothing more than a largely unedited cut and paste from the text of its previous motions for summary judgment and thus willfully disregards the more nuanced arguments Doscher presented to this Appellate Court. Doscher's opening brief made extensive arguments that refuted and went far beyond State's summary judgment arguments on disability tolling, thus State's cut-and-paste from its previous and refuted summary judgment view on disability tolling is no less than willful disregard of Doscher's newer and more powerful arguments for disability tolling.

10. Statement in Doscher's amended complaint, cited by County (County's Reply Brief at 2, hereafter "CRB"), does not show Doscher knew in 1990 that the felony at WSP was error. The statement in question, that the court clerk falsely reported the misdemeanor to WSP as a felony is merely conclusory, it only manifests a conclusion Doscher reached *at the point of composing that part of the 2009 amended complaint*, it does not make a claim to knowing something in 1990.

Worse, it mentions the misdemeanor, which was dismissed and thus is strictly inadmissible (State v. Breazeale, 2001).

11. None of Doscher's answers to interrogatories, cited by County (CRB at 4 ff), indicate that he knew, in 1990, that the felony was error. First, Doscher's answers to interrogatories involve discussion and disclosure of the dismissed misdemeanor, which is strictly inadmissible under Breazeale, supra, therefore the County is relying only on inadmissible evidence to prove Doscher knew enough in 1990 to set the statute running. County may respond that Doscher placed the misdemeanor at issue making it admissible, but case law is clear not only that a dismissed conviction is strictly inadmissible (i.e., no exceptions), State v. Breazeale, 2001, supra, but that *even when the offender places a dismissed or expunged criminal record at issue, the Court must still treat that person as if they were never convicted*, 120 Wn. App. 470, In re Firearm Rights of Nelson (2003). Second, the first "error" Doscher mentions in this interrogatory is the "SCOMIS" error, and by the chain of identical "this error" phrases in the following paragraphs, proves to be the only single error he was talking about throughout said interrogatory. The problem is that there is no evidence SCOMIS ever did contain said error, which now means the Court clerk who admitted this to Doscher in 1990 thus committed fraud (CP 21, par 19). Third, Doscher's Declaration says

he was deceived by State and County to believe in 1990 that the felony at WSP was not error, thus at worst there is only a conflict of evidence on what Doscher knew before 2008, thus foreclosing possibility of summary judgment (*Weisert v. University, supra*, *Rivas v. Overlake, supra*).

12. County's claim that none of its tortious conduct continued beyond 1990 (CRB at 6), is materially false. One other main criminal history error Doscher has placed at issue during summary judgment appears in County's original docket of the criminal case, allegedly created on "2-19-03", which says "sentencing deferred: no" (CP 17), a clear falsity not reasonably discovered by Doscher until 2008 at earliest. Since this was created in 2003, County's claim that it committed no wrongs after 1990 is untrue, as here it is publicly denying its very own Order of deferred sentence (CP 29), and a jury would have to decide if such denial implies that there was nothing in the County's publicly available criminal history on Doscher showing deferment as late as 2003, which, if true, is a continuing tort, or whether County also verbally denied deferment to all who inquired, which, if true, shows that this error was a continuing tort and not a single breach. Another tort of County is its complete failure to disclose the material fact of Doscher's 1990 dismissal (CP 37) to WSP, and while this omission occurred in 1990, it was a failure to perform a

statutory duty (RCW 10.97.045) that persisted until 2009 according to Respondent State (CP 16)

13. County's assertion that Doscher failed to exercise due diligence (CRB at 6) is proven false by its own reliance on these due diligence claims. County cites to Doscher's answers to interrogatories, where Doscher testified to asking more than 5 different criminal justice officials in 1990 about the SCOMIS error the County clerk mentioned. County is quick to believe these efforts are true when it can use them to show Doscher learned enough to set the statute running. In another place, County flatly and inexplicably asserts that Doscher "did nothing" between 1990 and 2010 (CRB at 10). The best proof that reasonable minds could differ thus precluding summary judgment dismissal, is when Defendant takes contradictory positions on the matter of Plaintiff's due diligence, as is the case here.

14. County's assertion that no reasonable person would suffer the calamities Doscher claims to have suffered before obtaining their WSP rap sheet, falsely assumes that Doscher should have suspected something was wrong, when the facts show he was given facially believable explanations in 1990 for the felony. Doscher explains in his unrebutted summary judgment declaration (CP 18-23) exactly how he was misled by both Defendants and others in 1990 to believe that the

felony at WSP was not error or breach. Having inquired and found it not to be error, there would be no reason to obtain a copy of his WSP rap sheet merely because the felony, which he excusably did not believe was error, began to cause him problems.

15. County's assertion that Doscher failed to act in certain ways that would surely have corrected the felony, falsely assumes he wasn't deceived by County's actions/omissions into believing that the felony at WSP was legitimate. County quotes a lengthy section from law regulating how the public can inspect individual criminal files and challenge for accuracy. This is wholly immaterial where the Declaration of Doscher shows that he was misled by Defendants to believe in 1990 that there was nothing about the WSP felony that needed challenging or correcting in the first place.

16. County's assertion that it is a matter of speculation why WSP has a different version of the Court order than the one held by County, is contradicted by County's belief that PSP3 was the original form of the order. First, County is once again using evidence of the dismissed misdemeanor, which has already been shown to be inadmissible. But even if the Court rejects such suppression argument, compare CP 26 and CP 29. If the original wording was 'PSP3', then the only way the lower curve of the '3' can have disappeared in WSP's later

copy is by someone deliberately blanking it out, as WSP's copy shows no sign that anything was accidentally on the photocopier glass obscuring this lower curve. Unintentional obscuring would surely have left artifacts below the 3, none appear. WSP's copy is super clean, so if County is correct that PSP3 is the original wording, somebody took great care to falsify the copy that was later given to WSP, i.e., intent to defraud.

17. County's assertion that its dissemination of a false court order to WSP in 1990 was a single act for which the statute of limitations has expired (CRB at 10) is in willful disregard of case law that identifies a single breach as a continuing tort. Doscher already argued in his original brief to the Court, quoting federal precedent and several Supreme Court opinions from other states showing that if the tortfeasor who made a single breach, owed a duty to correct it, and the failure to correct persisted into the statutory period the lawsuit was finally filed in, the single breach is, all by itself, a continuing tort with full tolling effect (AB 33, par. 21). This comes from common sense anyway, since where there is a duty, the failure to perform that duty (here, correct a criminal history error) is just as much a continuing wrong as several similar and deliberate acts would be. Torts by continual omission of statutory duty (here, County's continual failure to correct, thus continuing to fail to

notify WSP of the Court's true disposition) can continue to cause repeated and new injuries just as much as continued actual deliberate acts can.

18. County's requirement that fraud be proven by showing fulfillment of the 9 civil elements of fraud (CRB at 11) ignores case law which says the failure to disclose a material fact when under a duty to do so, is also fraud. See 85 Wn. App. 15, CRISMAN v.

CRISMAN (1997). Many of County's torts were identified in Doscher's opening brief as being failures to disclose while under a statutory duty to do so (AB 41, par. 39). Further, County's frauds are clear from its own official records and the PSP2 order held by WSP (CP 26) in spite of the fact that the exact County employee responsible for them cannot be identified. County's liability thus doesn't depend on specifying the name of the actual employee who committed the errors at issue.

19. County's attempt at vicarious immunity by leaning on involvement of the 1990 Judge and Prosecutor (CRB at 12) fails, since other Judges in 2008 and 2009 have specifically denied that these two persons had any responsibility for the felony-error. Doscher already proved the point in his original brief to the Court (AB 24, par. 5).

20. County's insistence that PSP3 was the original uncorrected form of the Court order at issue (CRB at 14) removes its ability to argue for constructive notice, and statute cannot run until *actual* discovery.

First, again, County makes use of the inadmissible PSP3 record. Second, compare CP 26 and CP 29. If PSP3 was the original wording, and if the PSP2 version later given to WSP shows no artifacts under the “2” (it doesn’t), some County employee took very careful steps to falsify the copy later mailed to WSP. If this Court finds the discovery rule for fraud in RCW 4.16.080 (4) to be ambiguous despite failure of both Respondents to show such, the 7th Circuit said that in the case where Defendants took deliberate steps to conceal the truth, they shall be denied the benefit of a constructive notice argument, and the Court can only consider when Plaintiff *actually* discovered the facts constituting the fraud, to determine when the statute began to run.:

[T]he statute of limitations is tolled if the fraud remained undisclosed because the defendant took additional affirmative steps after committing the fraud to keep it concealed. Here the plaintiff is relieved from his obligation to use diligence to discover the fraud. Where active concealment exists, the statute is tolled until there is actual discovery of the fraud.

Davenport v. A.C. Davenport & Son Co., 903 F.2d 1139, 1142 (7th Cir.1990)

The circumstances surrounding County’s dissemination of the falsified court order to WSP loudly bespeak fraud and cover-up too: The “disposition document” (CP 25) also given to WSP, reported no disposition, was left blank in the “amended charge” section and other sections, and said only “PSP1”, giving the deceitful impression to a WSP clerk that “first amended information” alluded to in the court order can only have meant that Doscher was originally charged with PSP1, but was

found guilty of the amended charge PSP2. Worse, the actual first amended information document, which correctly said PSP3 in 1990, was never given to WSP, an omission noted for its significance by State's witness Collinsworth (CP 31). In other words, the other standard documents that would have typically accompanied the court order given to WSP, and which might have caused WSP to note inconsistency and to investigate, were either missing or left inexplicably blank. Reasonable minds could easily find that these other errors too conveniently helped hide the felony-error in the court order to have been accidental. Nothing in Washington case law contradicts the 7th Circuit's view, and the unambiguous wording of the fraud discovery rule in RCW 4.16.080 (4), requiring nothing less than actual discovery to commence the statute anyway, harmonizes with it perfectly.

21. County's citation of Washington case law interpreting the fraud discovery rule (CRB at 15) violates standard rules of judicial construction. Doscher had already proved that Washington's fraud discovery rule was unambiguous, and therefore, the Court is forbidden under the rules of judicial construction from using case law to construe it, indeed, the Court cannot engage in any degree of statutory construction at all and must divine legislative intent from the wording 'alone' (AB 41, par. 38). County appears to be completely oblivious to this argument and

blindly cites case law in a last desperate attempt to make the statute start running by availing itself of the lower standard of “constructive notice”. Case law is not a “free-for-all” where the statute in dispute is unambiguous.

22. County’s “reply” to Doscher concerning disability-tolling (CRB at 16) is little more than a largely unedited cut and paste of text from its summary judgment filings and constitutes a complete failure to engage Appellant Doscher’s more nuanced actual opening-brief arguments on the subject. Like State, County appears oblivious to Doscher’s specific and well-developed arguments showing that his disabilities in 1990 qualified and qualify him for tolling now. Since Doscher’s opening brief arguments refute and go far beyond Defendants’ summary judgment positions, their choice to cut and paste those now-obsolete arguments in “reply” here accomplish nothing beneficial to their position, thus leaving Doscher’s position entirely unrefuted.

23. County continues to blindly insist that the record of the dismissed PSP3 conviction is admissible (CRB at 18) in willful disregard of its strict inadmissibility required under State v. Breazeale, 2001. Doscher already proved with extensive argument based primarily on the Supreme Court ruling in Breazeale 2001, supra, that all evidence of the dismissed PSP3 conviction is strictly inadmissible, making

an epic failure out of Defendants' statute of limitations defense *since they ground that defense in nothing but arguments that require disclosure and discussion of the misdemeanor conviction*. Inadmissible records of dismissed convictions are not "facts", thus both defendants fail their burden under *Rivas v. Overlake*, supra, to prove the "facts" which establish such defense. Not being a fact, the PSP3 record also fails the test of relevancy in ER 401 and 403.

24. State and County fail to show that any statement made by Doscher indicates he had knowledge of breach in 1990.

- a. It wouldn't matter if Doscher knew in 1990 that the felony at WSP was error: the proof for such requires discussion and disclosure of the strictly inadmissible record of the PSP3 guilty plea from 1990.
- b. Even if Doscher admitted knowing in 1990 that the felony was error, the tolling effect of each Respondents' continuing tortious conduct has already been proven so well that Defendants do not even try to refute it, and case law in Washington on "continuing tort" tolls the statute until the tortious conduct ceases *even in cases where Plaintiff knew from the earliest statutory period that the conduct was wrongful or a breach*, 86 Wn. App. 732, *Goodyear Tire, v. Whiteman Tire*, 1997.
- c. It wouldn't matter if Doscher knew in 1990 that the felony was error, this at best would refute his claims of negligence, but would have

nothing to do with his claims of fraud. Knowing that a mistake occurred, clearly is not the same as discovering the facts constituting a fraud, that's why the discovery rule for fraud more stoutly resists a constructive-notice interpretation than the one for negligence does. Those who commit fraud will not be permitted to benefit from a constructive notice argument as might be available to those who commit negligence.

d. It wouldn't matter if certain statements from Doscher could be taken to mean that he knew in 1990 that the felony was error. Since he lost at summary judgment, all such statements must be construed in a light most favorable to him, and all of them are capable of Plaintiff's own interpretation that says none of them are admitting to knowing in 1990 that the felony was error.

e. Even if those statements could only mean he knew of error in 1990, they would merely contradict his assertions in his timely filed wholly un rebutted summary judgment Declaration, where he explains exactly why he was led to believe the felony was NOT error. Case law is clear that where there is conflicting evidence on what a person knew and when, summary judgment is improper, 164 Wn.2d 261, Rivas v. Overlake Hospital, (2008); 44 Wn. App. 167, 721 P.2d 553, Weisert v. University Hospital (1986), so that affirming the trial court here would

be improper even if County's and State's interpretation of the selected statements was correct.

f. Proving knowledge of "error" is not enough to establish an argument for constructive discovery of "breach", and those who knew of error and failed to file suit within the statutory period can still be given their day at trial if they didn't realize for 20 years that the error also constituted breach, 92 Wn.2d 507, 598 P.2d 1358, Ohler v. Tacoma General (1979). Thus even if the Court rules that Doscher knew of error, not even this would foreclose possibility of reversal for trial.

25. Conclusion

State and County are facing a \$33 million dollar lawsuit. If there was a way to refute Doscher's attack on their statute of limitations defense, counsel for State and County would surely have found it by now, yet both of their reply briefs are surprisingly bereft of substantive response to the specific arguments Doscher made to this Appellate Court. For all the foregoing reasons, this Court should reverse and remand for jury trial on all damages caused by the felony and other criminal history errors between 1990 and 2008. First alternative: Plaintiff should be allowed trial to recover felony-related damages that occurred within the 6 years previous to the filing of the lawsuit (6-year SOL for breach of contract damages, (RCW 4.16.040 (1)). Second Alternative: Trial Court should be

reversed and Plaintiff should be allowed to recover for felony-related damages that occurred within the 3 years prior to the filing of the lawsuit (3-year SOL for fraud, RCW 4.16.080 (4)). Third alternative: Trial court should be reversed and Plaintiff allowed trial to recover all damages created by County's errant docket saying "sentencing deferred: no" (CP 17), which he did not reasonably discover between 1990 and 2008, or else the Court should allow Doscher leave to file a second amended complaint alleging facts sufficient to state a claim for damages from that error. Fourth alternative: Trial court should be reversed to allow for damages between 1990 and 2008 for the County's defamatory refusal in that period to disclose the dismissal (CP 37; CP 16) to WSP. Fifth alternative: Trial court should be reversed and Plaintiff allowed to recover for damages stemming from State's AOC website that listed his criminal case docket from 1990, which incorrectly associates the withdrawal of guilty plea to the 2009 vacation instead of the 1990 dismissal, or else the Court should allow Doscher leave to file a second amended complaint alleging facts sufficient to state a claim for damages from that error.

While the Court has power to affirm the trial court even on grounds not considered by the trial court, there is no law or case law saying this power may also trump the handicapping effect on Defendants by reason of estoppel, which Doscher argued on various bases in his opening brief (see

state

Washington State
Office of the Attorney General
Acknowledged Receipt, this 8th day
of July, 2010, Time: _____
In Olympia, Washington.
Signature: Pamela H. Anderson
Print Name: Pamela H. Anderson
Assistant Attorney General

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NO. 39776-5-II

Appeal from the Superior Court for Mason County

Cause No. 09-2-00338-0

Christian Doscher,

Appellant,

v.

State of Washington and County,

Respondents

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Appellant's Reply To
Respondent State of Washington and
Appellant's Reply to
Respondent Thurston County

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OF THE State OF WASHINGTON

Certificate of Service

Court of Appeals No. 39776-5-II

Mason County Superior Court No. 09-2-00338-0
The Honorable Judge Amber Finlay

I, Christian Doscher, certify under penalty of perjury, that I served a copy of Appellant's Reply To Respondent State of Washington and Appellant's Reply to Respondent Thurston County, by personal delivery, to the parties named below, on the date noted below. I also mailed a copy of said brief, on the date given below, to the Court of Appeals, Division 2, postage prepaid, to the Court's Tacoma Washington address:

Date of service: 7-8-10

David V. Klumpp, Respondent
2424 Evergreen Pk Dr. Suite 102
Olympia, WA 98502

Jennifer S. Meyer, Respondent
Assistant Attorney General
Torts Division
7141 Cleanwater Dr SW,
Tumwater, WA 98504

I affirm under penalty of perjury and the laws of the State of Washington that the facts contained in this certificate of service and true and accurate to the best of my knowledge.

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7-8-10
Date