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COURT OF APPEALS
DIVISION 1
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No. 66278-3

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

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,
Plaintiffs/Appellants

v.

CITY OF BELLEVUE, a municipal corporation,
Defendant/Respondent

BRIEF OF RESPONDENT CITY OF BELLEVUE

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERRORS 1

III. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 1. Whether Cougar Mountain knew or should have known of all facts supporting its cause of action on or before October 16, 2006; 2

 2. Whether Cougar Mountain failed to engage in the due diligence required for tolling of the limitations period under the discovery rule; 2

 3. Whether any facts in the record support that the City prevented or concealed discovery of any facts necessary to prompt further inquiry by Cougar Mountain; and..... 2

 4. Whether the discovery rule postpones the limitations period until the specific damage for which Cougar Mountain seeks recovery actually occurs. 2

IV. COUNTERSTATEMENT OF THE CASE..... 3

 A. Zoning history of property..... 3

 B. Application for subdivision of the property by Cougar Mountain. . 4

 C. Discovery of the density restriction by the parties..... 5

 D. Application by Cougar Mountain to rezone the property. 6

 E. Procedural history..... 8

V. ARGUMENT.....9

 A. Standard of review..... 9

 B. Cougar Mountain failed to meet the three-year statute of limitations. 10

C. Application of the discovery rule is not appropriate in this case. ..10

1. Cougar Mountain knew or should have known of all facts supporting its cause of action on or before October 16, 2006..... 11
2. Cougar Mountain failed to engage in due diligence as required for tolling of the limitations period under the discovery rule. 14
3. Nothing in the record supports that the City prevented or concealed discovery of the facts..... 19
4. The discovery rule does not postpone a limitations period until the specific damage for which a plaintiff seeks recovery actually occurs.....21

VI. CONCLUSION23

TABLE OF AUTHORITIES

Washington Cases

<u>Allen v. State</u> , 118 Wn.2d 753, 826 P.2d 200 (1992).....	14, 15
<u>Beard v. King County</u> , 76 Wn. App. 863, 889 P.2d 501 (1995).....	13
<u>Claire v. Saberhagen Holdings, Inc.</u> , 129 Wn. App. 599, 123 P.3d 465 (2005).....	10
<u>Doe v. Finch</u> , 133 Wn.2d 96, 942 P.2d 359 (1997).....	20
<u>Estates of Hibbard v. Gordon, Thomas, Honeywell, Malanca, Peterson, and O’hern</u> , 118 Wn.2d 737, 826 P.2d 690 (1992).....	18, 19
<u>Gazija v. Nicholas Jerns Co.</u> , 86 Wn.2d 215, 543 P.2d 338 (1975).....	18, 19
<u>Gevaart v. Metco Constr.</u> , 111 Wn.2 499, 760 P.2d 348 (1988).....	15, 16, 17
<u>Green v. A.P.C.</u> , 136 Wn.2d 87, 960 P.2d 912 (1998).....	11, 22
<u>Hartley v. State</u> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	12
<u>Hawkes v. Huffman</u> , 56 Wn. 120, 105 P. 156 (1909).....	12
<u>Heller v. City of Bellevue</u> , 147 Wn. App. 46, 194 P.3d (2008).....	15
<u>Malnar v. Carlson</u> , 128 Wn.2d 521, 910 P.2d 455 (1996).....	10

<u>Ohler v. Tacoma General Hospital</u> , 92 Wn.2d 507, 598 P.2d 1358 (1979).....	16, 17
<u>Richardson v. Denend</u> , 59 Wn. App. 92, FN 5, 795 P.2d 1192 (1990).....	17
<u>Ruth v. Dight</u> , 75 Wn.2d 660, 453 P.2d 631 (1969).....	17, 18
<u>State v. Superior Court for Ferry County</u> , 145 Wn. 576, 261 P. 110 (1927).....	22
<u>Teeter v. Lawson</u> , 25 Wn. App. 560, 610 P.2d 925 (1980).....	17
<u>Webb v. Neuroeducation Inc., P.C.</u> , 121 Wn. App. 336, 88 P.3d 417 (2004).....	9, 20
<u>Winbun v. Moore</u> , 143 Wn.2d 206, 18 P.3d 576 (2001).....	12, 14
Other Cases:	
<u>Henry v. New Jersey Department of Human Services</u> , 9A.3d 882 (New Jersey, 2010)	21
<u>US Liability Ins. Co. v. Hadinger-Hayes, Inc.</u> , 1 Cal.3d 586, 83 Cal.Rptr. 418, 463 P.2d 770 (1970)	21
Rules, Statutes, and Others:	
CR 56(c).....	9
RCW 4.16.080(2).....	2, 9, 23
RCW 4.96.020(4).....	10

I. INTRODUCTION

Appellants, Cougar Mountain Properties, LLC, Ken Nelson, Andree Nelson, John Murphey, and J&L Enterprises WA, LCC (collectively referred to as “Cougar Mountain”) brought suit against Respondent, City of Bellevue (“City”) alleging the City acted negligently in communicating certain zoning information related to the development of Cougar Mountain’s property. The City’s oversight in communicating certain zoning information ultimately resulted in the necessity of a rezone, which caused a delay in processing certain permits required to develop the property. The parties now disagree as to whether Cougar Mountain’s claims are time barred by the applicable three-year statute of limitations, which is the sole issue before this Court.¹

I. ASSIGNMENTS OF ERRORS

Respondent, City of Bellevue, assigns no error to the trial court’s order granting the City’s summary judgment motion and dismissing Cougar Mountain’s lawsuit with prejudice.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The City disagrees with the assignments of error set forth by Cougar Mountain. The primary issue before this Court is whether the trial

¹ While Cougar Mountain argues that the City’s actions were improper, issues relating to negligence and application of the Public Duty Doctrine are not currently before this Court.

court properly dismissed Cougar Mountain's claims against the City as a matter of law for its failure to bring this action within the three-year statute of limitations set forth in RCW 4.16.080(2). An alternative question before the Court is whether it is appropriate to toll running of the statute of limitations under the discovery rule. Within that analysis, the following questions are before this Court:

1. Whether Cougar Mountain knew or should have known of all facts supporting its cause of action on or before October 16, 2006;
2. Whether Cougar Mountain failed to engage in the due diligence required for tolling of the limitations period under the discovery rule;
3. Whether any facts in the record support that the City prevented or concealed discovery of any facts necessary to prompt further inquiry by Cougar Mountain; and
4. Whether the discovery rule postpones the limitations period until the specific damage for which Cougar Mountain seeks recovery actually occurs.

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IV. COUNTERSTATEMENT OF THE CASE

A. Zoning history of property.

The subject property consists of approximately 1.89 acres, located at 16523 Cougar Mountain Way, Bellevue, Washington (“Property”). CP 30. Prior to August 1989, the Property resided within King County’s jurisdictional boundaries. In preparation to annex the Property from King County, on October 26, 1987, the Bellevue City Council established pre-annexation zoning for the subject area with Ordinance No. 3480. CP 31, 38-45. The City annexed the Property on August 17, 1989 and with that annexation, the City Council amended the pre-annexation zoning, adopting Ordinance No. 4044. CP 30, 46-52. Ordinance No. 4044 contained the following zoning condition:

development shall follow the dimensional standards of the Residential (“R”) 3.5 zone but overall density shall not exceed one residential unit per acre.

CP 51. R-3.5 zoning, without this density limitation, would generally allow development of 3.5 units per acre provided site conditions supported that maximum development allowance. CP 31. At the time, the density restriction contained in Ordinance No. 4044 was supported by the Newcastle Subarea Comprehensive Plan Policies in effect in 1989. Id.

In 1995, the City Council adopted Ordinance No. 4806 to amend the Newcastle Subarea Comprehensive Plan Policies, which supported release of the Property from the one unit per acre density limitation.² Id. Following amendment to the Newcastle Subarea Comprehensive Plan Policies, the City Council did not, however, amend the actual zoning ordinance (Ordinance No. 4044), which limited any potential development on the Property to one residential unit per acre. Id.

B. Application for subdivision of the property by Cougar Mountain.

On December 12, 2003, Cougar Mountain applied for a pre-application conference to determine the feasibility of subdividing the Property to construct four or five houses. Id., CP 59. On December 17, 2003, Cougar Mountain representatives attended a pre-application meeting with several members of the Planning and Community Development Department (now called the Development Services Department or “DSD”). Drew Folsom, Assistant Land Use Planner (“Folsom”) attended the meeting on behalf of DSD. CP 32. During the pre-application meeting, Folsom overlooked the density restriction contained in Ordinance No. 4044 and described the applicable zoning

² Comprehensive plan policies are not actual development regulations that govern the density of development allowed on a particular property. Rather, comprehensive plan policies provide the policy support and foundation for adoption of future land use and development regulations, which do, in fact, dictate allowed density.

capacity for the Property as R-3.5. Id., CP 235-236. On December 24, 2003, Folsom sent Cougar Mountain (via John Murphey) a follow-up letter summarizing the discussions at the pre-application meeting – again, describing the Property’s zoning as R-3.5. Id., CP 63-71.

On October 27, 2004, Cougar Mountain applied to subdivide the Property into four single-family lots. CP 32, 73-74. The number of units proposed by Cougar Mountain was permissible under R-3.5 zoning but not under the one unit per acre restriction contained in Ordinance No. 4044. CP 32.

C. Discovery of the density restriction by the parties.

In late June of 2005 (prior to DSD approving Cougar Mountain’s application for preliminary plat approval), Folsom discovered that while the City Council amended the Newcastle Subarea Comprehensive Plan Policies, the City Council did not thereafter amend Ordinance No. 4044 which contained the density restriction. CP 33. Because Cougar Mountain’s application included development in excess of the one unit per acre density limitation, DSD should not have accepted and started review of the short-plat application. Id., CP 248.

As Cougar Mountain suggests in its opening brief . . . “something had just come up.” While the zoning restriction had always been in place, Folsom did not, however, discover the limitation within Ordinance

No. 4044 until June of 2005. CP 33, 237-238. After Folsom discovered the density restriction he informed Cougar Mountain by telephone and by letter that its short-plat application could not proceed without a rezone. CP 33-34; 80, 238. In an email dated July 25, 2005, Folsom confirmed with Carol Helland, DSD's Land Use Director, ("Helland") that he informed Murphey of the oversight and inquired of her as to whether DSD could waive the application and review fees associated with the rezone. CP 33, 76-78. Helland agreed to waive the application and review fees, leaving Murphey responsible for just the operational costs incurred with processing the rezone application. Id.

D. Application by Cougar Mountain to rezone the property.

On October 3, 2005, Cougar Mountain submitted a rezone application to remove the density limitation and on March 3, 2006, DSD issued its recommendation of approval to the Hearing Examiner. CP 34-35, 82, 93-101. On March 29, 2006, the Hearing Examiner held a public hearing on the rezone application and Murphey (on behalf of Cougar Mountain) attended and participated in that hearing. CP 35, 103-108, 238-239, 248. During the hearing, land use planner Julia Krueger ("Krueger") described to the Examiner that the City should not have accepted the short plat application because of the density limitation contained in Ordinance No. 4044. Specifically, Krueger stated:

[p]erhaps I should say that ... because this is so unusual and because these conditions don't show up easily in our new mapping system, **the land use division pretty much processed a short plat for Mr. Murphey before realizing that we could not do so and I spell that out in the staff report.** And so this seemed to be ... I was given to understand that this was the way we felt we could best remedy the situation [referring to the rezone application].³

CP 22, 248. (Emphasis added).

On April 17, 2006, the Hearing Examiner issued Findings of Fact, Conclusions of Law, and a Recommendation to approve the rezone. CP 35, 185-189. On May 15, 2006, the City Council approved Ordinance No. 5671, which removed the one unit per acre density limitation and otherwise allowed DSD to continue review of Cougar Mountain's short-plat application. CP 33, 194.

Following approval by the City Council of the rezone, DSD concluded its review of the short plat application and issued preliminary approval. On October 18, 2007, Cougar Mountain submitted an application for final plat approval, which is currently under review by DSD. CP 33, 216-217.

³ The quoted material is verbatim transcript from the audible recording of the public hearing held before the Hearing Examiner on March 29, 2006. A DVD copy of the hearing for the Court's review can be found at CP 248.

E. Procedural history.

On October 16, 2009, Cougar Mountain submitted a damage claim to the City and on December 18, 2009 filed this lawsuit. CP 1-8. Cougar Mountain's complaint alleges the City made negligent misrepresentations about the zoning of the property and thereafter improperly and untimely disclosed such oversights. CP 6-7. As a consequence of this oversight, Cougar Mountain suggests it is damaged and seeks monetary relief. CP 7-8.

The City filed its summary judgment motion on the sole issue of whether Cougar Mountain's claims are time barred under the three-year statute of limitations. CP 17-27, 242-247. The trial court granted the City's motion and dismissed the lawsuit with prejudice. CP 249-251. Before the trial court, the City argued Cougar Mountain, in a required exercise of due diligence, should have known of the elements to bring its cause of action prior to expiration of the three-year limitations period. Specifically, the City argued, at the earliest Cougar Mountain had knowledge of all facts associated with a potential damage claim when Folsom first disclosed his oversight to Cougar Mountain (roughly at the end of June, 2005).

The trial court granted summary judgment based primarily on Murphey's attendance and participation at the March 29, 2006 rezone

hearing, where Krueger described DSD's error in originally accepting and processing the short-plat application. The trial court opined that Cougar Mountain would have needed to bring its claims prior to March 29, 2009 (three years from the date of the hearing) to comport with the statute of limitations contained in RCW 4.16.080(2).

Had the trial court not granted the City's motion or if this Court reverses that ruling and remands the matter back, the City intends to file additional summary judgment motions on issues related to alleged negligent misrepresentation and application of the Public Duty Doctrine. CP 18.

V. ARGUMENT

A. Standard of review.

In reviewing a summary judgment dismissal, this Court engages in the same inquiry as the trial court and considers the evidence and all reasonable inferences from that evidence in the light most favorable to the nonmoving party. Webb v. Neuroeducation Inc., P.C., 121 Wn. App. 336, 342, 88 P.3d 417 (2004) (citations omitted). If no genuine issues of material fact exist, the moving party is entitled to judgment as a matter of law and the Court shall uphold summary judgment. CR 56(c).

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B. Cougar Mountain failed to meet the three-year statute of limitations.

A statute of limitations period begins to run when a cause of action accrues. Malnar v. Carlson, 128 Wn.2d 521, 529, 910 P.2d 455 (1996). On October 16, 2009, Cougar Mountain filed its damage claim with the City pursuant to RCW 4.96.020(4) and on December 18, 2009 filed this lawsuit. CP 1-8.

Actions by the City potentially giving rise to a claim by Cougar Mountain occurred either (1) when the City initially provided incomplete zoning information in December of 2003 and disclosed such in late June of 2005; or (2) at the very latest, on March 29, 2006, when Murphey (on behalf of Cougar Mountain) participated in the rezone hearing.

Cougar Mountain failed to file its lawsuit within three years of the latest of these dates; thus the trial court appropriately dismissed Cougar Mountain's lawsuit as untimely. CP 249-251.

C. Application of the discovery rule is not appropriate in this case.

Cougar Mountain argues that the discovery rule, which postpones the running of the statute of limitations, applies to this case. The discovery rule, however, may not be used by a plaintiff when reasonable minds agree that the plaintiff knew or should have known of his cause of action prior to the running of the applicable limitations period. Claire v.

Saberhagen Holdings, Inc., 129 Wn. App. 599, 123 P.3d 465 (2005) (“the plaintiff is charged with what a reasonable inquiry would have discovered.”). The discovery rule is a tool adopted to prevent injustice where it is impossible for the plaintiff to have learned of the elements of his cause of action prior to the applicable limitations period. While the City contends that the discovery rule is not applicable to the facts of this case, Cougar Mountain’s claims fail even under application of the discovery rule.

1. Cougar Mountain knew or should have known of all facts supporting its cause of action on or before October 16, 2006.

The trial court correctly concluded that Cougar Mountain knew or should have known of its cause of action on or before October 16, 2006. CP 24-251. The Washington Supreme Court in Green v. A.P.C., 136 Wn.2d 87, 96, 960 P.2d 912 (1998) reiterated the general rule in Washington, that when a plaintiff is placed on notice by some appreciable harm occasioned by another’s wrongful conduct, the plaintiff is charged with and must make further diligent and reasonable inquiry to ascertain the scope of the actual harm. The Green court, likewise, stated that “one who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which a reasonable inquiry would disclose.” Green,

136 Wn.2d at 96; citing Hawkes v. Huffman, 56 Wn. 120, 126, 105 P. 156 (1909).

The question of when a party, through the exercise of due diligence reasonably should have discovered harm, is typically a question of fact. Winbun v. Moore, 143 Wn.2d 206, 213, 18 P.3d 576 (2001). However, when reasonable minds can reach only one conclusion from the evidence, summary judgment is appropriate. Winbun, 143 Wn.2d at 213; citing Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

The material facts in this case are not in dispute, are supported by the public records contained in the trial court record, and show that Cougar Mountain reasonably should have discovered any harm created by the City's oversight in communicating zoning information long before October 16, 2009. Cougar Mountain has no factual basis to support its allegation that the City intentionally withheld information, nor that any City employee took measures to conceal zoning information relating to the Property.

What the record does show is that Folsom provided incomplete zoning information to Cougar Mountain from December of 2003 through roughly June of 2005. CP 29-35. The record also shows that in late June or early July of 2005, Folsom verbally informed Cougar Mountain of the

oversight and confirmed the need for a rezone in a letter to Murphey dated August 16, 2005. Id.

After being informed by Folsom that a rezone was necessary, the record also shows that Cougar Mountain performed no due diligence whatsoever to explore the rationale for the rezone or to inquire further of City staff. CP 233-241. On October 3, 2005, Cougar Mountain applied for the rezone and the City waived all review fees for that application because of Folsom's oversight. CP 82, 76-78.

The audible transcript of the March 29, 2006 rezone hearing shows Murphey participated in that hearing and was present for Krueger's description of DSD's error in originally accepting the short-plat application. Specifically, Krueger stated "the land use division pretty much processed a short plat for Mr. Murphey before realizing that we could not do so" CP 248.

A plaintiff who even reasonably suspects that some wrongful act occurred **is on notice that legal action must be taken.** (Emphasis added). Beard v. King County, 76 Wn. App. 863, 868, 889 P.2d 501 (1995). In this case, Krueger expressly conveyed at the rezone hearing that the City committed an error in accepting the short-plat application. CP 248. The trial court, therefore, properly concluded that reasonable minds could reach only one conclusion -- that Cougar Mountain knew or

should have known that some harm had occurred. Winbun, 143 Wn.2d at 213.

2. Cougar Mountain failed to engage in due diligence as required for tolling of the limitations period under the discovery rule.

Cougar Mountain argues it possessed no knowledge of the factual basis to make a claim in 2005 or even in March of 2006. CP 240. Should this Court conclude that Cougar Mountain did not understand that Folsom committed an error in providing incomplete zoning information, the record is clear that Murphey knew that a rezone was required and he, in fact, participated in that process. CP 248. The record is also clear that Cougar Mountain failed to perform any due diligence whatsoever to inquire further as to why the rezone was suddenly required. Murphey's declaration and his opening brief provide that only after discussions with legal counsel in 2009, did he understand the facts giving rise to a legal action. CP 233-241. No new facts arose in 2009 when Cougar Mountain met with legal counsel.

Washington Courts have routinely held that the key consideration under the discovery rule is the factual, **not the legal basis** for the cause of action. (Emphasis added) Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). The Court in Allen recognized that were the rule otherwise,

the discovery rule would postpone accrual in every case until the plaintiff consults an attorney. Allen, 118 Wn.2d at 758.

In Gevaart v. Metco Constr., 111 Wn.2 499, 760 P.2d 348 (1988), a case instructive to the facts before this Court, the Supreme Court held that the plaintiff's negligent design and construction claim was barred by the statute of limitations. In that case, the plaintiff, upon reaching the downward-sloping top step, lost her balance and fell backward. The court concluded that since the plaintiff knew the step sloped, she could by the exercise of due diligence, have determined not only that the step did not conform to code, but that the slope was a construction defect. Gevaart, 111 Wn.2d at 502.

As in Gevaart, all regulations relating to the development of the Property were available for inspection by Cougar Mountain in 2005 and 2006. Had Cougar Mountain performed any due diligence, it would have discovered the City's oversight; similar to the Court's expectation of the plaintiff in Gevaart.⁴

⁴ The Court in Heller v. City of Bellevue, 147 Wn. App. 46, 61, 194 P.3d (2008) unequivocally stated that the duty to comply with land use codes lies with individual permit applicants, builders, and developers rather than local governments and that first and foremost, it is a developer's responsibility to ensure their project meets all code requirements. Plaintiffs, consequently, from initiation of the project had an obligation to understand all applicable code requirements regardless of whether such were conveyed by the City or not.

Cougar Mountain argues that this Court should toll the statute of limitations because the City never used the term “oversight” in its discussions or communications with Murphey. CP 238. Cougar Mountain ignores the fact that in 2005, it was informed that it had to apply for a rezone and that the City would pay all costs related to this rezone application. CP 33-34, 76-78. This was out of the ordinary. Cougar Mountain could have inquired further of Folsom or other DSD employees. Cougar Mountain could have made a public records request, which would have revealed the ordinance containing the zoning restriction.

Cougar Mountain simply did nothing to investigate the issue. Murphey’s declaration confirms his complete lack of due diligence, which precludes tolling the statute of limitations under the discovery rule. CP 233-241. A plaintiff who experiences or knows that harm has occurred but fails to make any meaningful inquiry, as in this instance, has breached their due diligence duty. Gevaart, 111 Wn.2d at 502.

Cougar Mountain’s assertion that the facts in this matter, are strikingly similar to Ohler v. Tacoma General Hospital, 92 Wn.2d 507, 598 P.2d 1358 (1979) is misplaced. The Ohler case involved a plaintiff who knew her blindness since birth was the result of oxygen administered as an infant but did not know the oxygen was administered excessively. Cougar Mountain fails to explain how the medical malpractice facts of

that case have any bearing on the facts before this Court, particularly because that case **did not involve** the question of whether the plaintiff performed reasonable due diligence. Teeter v. Lawson, 25 Wn. App. 560, 562, 610 P.2d 925 (1980) (stating “there was no allegation in *Ohler* that the plaintiff failed to act reasonably by not discovering the cause of her injury at an earlier date, and the court's mention of the reasonable diligence requirement was not necessary to its resolution of the case.”).

Cougar Mountain, as well, fails to address the negative history associated with Ohler and subsequent election by various appellate courts not to apply or further the holding. Richardson v. Denend, 59 Wn. App. 92, 96, FN 5, 795 P.2d 1192 (1990) (“[w]hile we are unable to reconcile the Supreme Court's application of the discovery rule in Ohler with that in Gevaart, we are compelled to conclude that the ruling in Gevaart, as the court's most recent application of the rule, is controlling.”).

The Washington Supreme Court first adopted the discovery rule in Ruth v. Dight, 75 Wn.2d 660, 453 P.2d 631 (1969). In Ruth, a medical malpractice case, the plaintiff alleged her doctor negligently left a surgical sponge in her abdomen and brought an action 23 years after the surgery when the sponge was ultimately found. The Ruth Court held that in medical malpractice cases, the statement of limitations commences to run when the patient discovers, or in the exercise of reasonable for the

patient's own health and welfare should have discovered the presence of the foreign substance or article in the patient's body. Ruth, 75 Wn.2d at 667-668.

After Ruth, the Supreme Court in Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 543 P.2d 338 (1975), extended the discovery rule to an action for negligent cancellation of an insurance policy. In Gazija, the Court justified the extension of the discovery rule beyond certain medical malpractice cases because of the fiduciary relationship between the plaintiff and the insurance company. The Court reasoned that the plaintiff had no possible way of knowing his insurance policy had been canceled; thus, the plaintiff's cause of action accrued when he first suffered actual loss and had the first opportunity by the exercise of reasonable diligence to discover he had an actionable claim. Gazija, 86 Wn.2d at 221.

While the Supreme Court in Estates of Hibbard v. Gordon, Thomas, Honeywell, Malanca, Peterson, and O'hern, 118 Wn.2d 737, 826 P.2d 690 (1992) recognized the Court's extension of the discovery rule in Gazija, it cautioned that application of the rule should continue to emphasize the exercise of due diligence by the injured party. Specifically, the Estates of Hibbard court stated:

Although there has been increased application of the discovery rule by this Court, we still follow the reasoning of Ruth

v. Dight [*supra*]. **Application of the rule is limited to claims in which the plaintiffs could not have immediately known of their injuries** due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant. Application of the rule is extended to claims in which plaintiffs could not immediately know of the cause of their injuries.

(Emphasis added); Estates of Hibbard, 118 Wn.2d at 749.

The facts before this Court show Cougar Mountain engaged in no due diligence whatsoever to investigate the nature of potential claims against the City. The facts before this Court are wholly distinguishable from cases like Gazija, where the plaintiffs had no feasible way to obtain documents necessary to support a legal action. All documents necessary to support Cougar Mountain's claims are public records and available for inspection upon request.

For the reasons stated above, the facts before the Court do not warrant further expansion of the discovery rule to allow Cougar Mountain to bring its claims after the running of the limitations period.

3. Nothing in the record supports that the City prevented or concealed discovery of the facts.

The only way that Cougar Mountain could possibly toll the statute of limitations long enough to make its claim actionable would be to claim that the City concealed or intentionally prevented the disclosure of

material factual information. Nothing in the record, however, supports or even suggests that the City, prevented, in any way, discovery by Cougar Mountain of the facts necessary to bring a claim. All public records relating to the Property, zoning regulations, and comprehensive plan policies are and have been available to Cougar Mountain for inspection. Nothing in the record supports or even suggests that the City failed, upon request of Cougar Mountain to provide information relating to the Property. Cougar Mountain made no requests and did not thing to inquire further.

Cougar Mountain cites Webb v. Neuroeducation Inc., P.C., 121 Wn. App. 336, 88 P.3d 417 (2004) and Doe v. Finch, 133 Wn.2d 96, 942 P.2d 359 (1997) to further its argument that no evidence exists in the record that suggests it could have known or learned of “specific acts or omissions ... attributed to a particular defendant” giving rise to its claim. Both cases are distinguishable from the facts before the Court.

In Webb, the court found questions of fact as to whether a psychologist intentionally concealed information from the father of the patient. In Doe the court found questions of fact involving concealment of a psychologist’s relationship with a patient’s wife. Contrary to both Webb and Doe, the accurate zoning information is and has always been

ascertainable through inspection of public records and available to the public upon request.

Cougar Mountain's reliance on two out of state cases, US Liability Ins. Co. v. Hadinger-Hayes, Inc., 1 Cal.3d 586, 83 Cal.Rptr. 418, 463 P.2d 770 (1970) and Henry v. New Jersey Department of Human Services, 9A.3d 882 (New Jersey, 2010), is as well misplaced. US Liability Ins. Co. involved the breach of a fiduciary duty and Henry involved intentional misrepresentation. The facts here neither involve a fiduciary duty nor does the record support that the City intentionally misrepresented information to Cougar Mountain.

4. The discovery rule does not postpone a limitations period until the specific damage for which a plaintiff seeks recovery actually occurs.

Cougar Mountain argues that its cause of action could not have accrued by March of 2006. CP 240. Cougar Mountain argues that the Property's value "continued to appreciate at least through the end of October 2006 and beyond" and as a result it suffered no damage from the delay caused by the City's oversight until after October of 2006. See Cougar Mountain's Opening Brief, pg. 30. From this statement, it is unclear when Cougar Mountain contends its cause of action actually accrued.

Cougar Mountain's position that the statute of limitations should toll until it has ascertained actual dollar amounts of its alleged damages is contrary to Washington's strong preference for avoiding the splitting of causes of action. Green v. A.P.C., 136 Wn.2d 87, 97, 960 P.2d 912 (1998); citing State v. Superior Court for Ferry County, 145 Wn. 576, 579, 261 P. 110 (1927). The Supreme Court in Green clearly stated that a statute of limitation is not postponed by the fact that further, more serious harm may flow from the wrongful conduct. Green, 136 Wn.2d at 95. Specifically, the Green court said "[t]he running of the statute is not postponed until the specific damages for which the plaintiff seeks recovery actually occur." Id. at 97.

The need for the rezone caused a delay in the City's processing of Cougar Mountain's short plat application. Cougar Mountain's complaint seeks relief for the damage associated with this delay. CP 6-7. The delay began in June of 2005 when Folsom discovered the density restriction contained in Ordinance No. 4044. CP 33. Under the Court's holding in Green, Cougar Mountain may not, therefore, seek to toll the statute of limitations until the specific damage for which it seeks recovery actually occurs.

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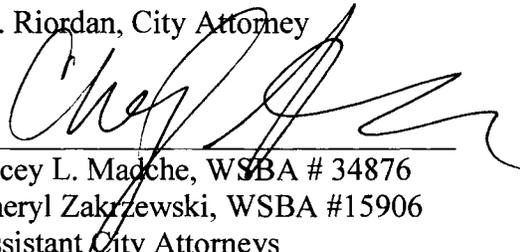
VI. CONCLUSION

The purpose of statute of limitation requirements is to compel the exercise of a right of action within a reasonable time so opposing parties have fair opportunity to defend. Cougar Mountain sat on their rights and now seek recovery from the City for matters which are time barred under RCW 4.16.080(2). Cougar Mountain had actual knowledge of Folsom's oversight not later than March 26, 2006. Cougar Mountain, thus failed to bring this claim within the appropriate limitation period. Accordingly, the trial court properly dismissed Cougar Mountain's lawsuit with prejudice. The City, therefore, respectfully requests that the trial court's dismissal be affirmed.

RESPECTFULLY SUBMITTED this 9th day of March, 2011.

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

By


Lacey L. Madche, WSBA # 34876
Cheryl Zakrzewski, WSBA #15906
Assistant City Attorneys
For Respondent City of Bellevue

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in King County, Washington. I am over the age of 18 years and not a party to the within-entitled action. My business address is 450 110th Avenue NE, Bellevue, WA 98004. On March 9th, 2011, I served via ABC Legal Messenger a copy of the foregoing *Brief of Respondent* on the following:

Bradford G. Moore
1750 112th Avenue NE, Suite D-155
Bellevue, WA 98004

I declare under penalty or perjury under the laws of the State of Washington that the foregoing is true and correct

Dated this 9th day of March, 2011.



Reina McCauley
Legal Secretary