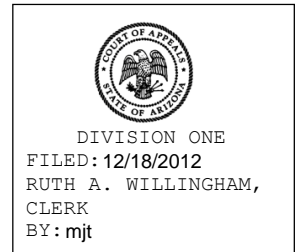


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



RONALD GOBLE, individually and ) 1 CA-CV 11-0565  
as Trustee of THE RONALD L. )  
GOBLE and KATHLEEN K. GOBLE ) DEPARTMENT D  
ESTATE TRUST; WALLACE )  
BUTTERWORTH, a single man; MARK ) **MEMORANDUM DECISION**  
and SUSAN MELKOWSKI, husband and ) (Not for Publication -  
wife; WILLIAM and ROBIN L. BERGH, ) (Rule 28, Arizona Rules of  
husband and wife; GARY and ) Civil Appellate Procedure)  
ROBERTA CHRISTIAN, husband and )  
wife; ROGER and KAY LANCETTE, )  
husband and wife; and HYLAND )  
STOKES and DIANE WHELEN, husband )  
and wife, )  
)  
Plaintiffs/Appellants, )  
)  
v. )  
)  
ARIZONA CORPORATION COMMISSION, )  
an Arizona governmental agency; )  
PAMELA T. JOHNSEN, Commission )  
Senior Counsel, in her personal )  
capacity, and JOHN DOE JOHNSEN, )  
her husband; KRISTIN K. MAYES, )  
Corporation Commissioner, in her )  
official capacity; JEFFREY )  
HATCH-MILLER, former Corporation )  
Commissioner, in his personal )  
capacity, and ANITA HATCH-MILLER, )  
his wife; WILLIAM A. MUNDELL, )  
former Corporation Commissioner, )  
in his personal capacity, )  
BARBARA R. MUNDELL, his wife; )  
MARC SPITZER, former Corporation )  
Commissioner, in his personal )  
capacity, and JACQUELINE RAUB )  
SPITZER, his wife; LOWELL S. )

GLEASON, former Corporation )  
 Commissioner, in his personal )  
 capacity, and JANE DOE GLEASON, )  
 his wife; BOB STUMP, Corporation )  
 Commissioner, in his official )  
 and personal capacities; )  
 PAUL NEWMAN, Corporation )  
 Commissioner, in his official )  
 and personal capacities, and )  
 JANE DOE NEWMAN, his wife; GARY )  
 PIERCE, Corporation Commissioner, )  
 in his official and personal )  
 capacities, and SHERRY PIERCE, )  
 his wife; SANDRA D. KENNEDY, )  
 Corporation Commissioner, in her )  
 official and personal capacities, )  
 and JOHN DOE KENNEDY, her )  
 husband, )  
 )  
 Defendants/Appellees. )  
 )

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Appeal from the Superior Court in Maricopa County

Cause No. CV2010-052110

The Honorable Michael R. McVey

**AFFIRMED**

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Kenneth W. Schutt, Jr., P.L.C.  
 By Kenneth W. Schutt, Jr.  
 Attorneys for Plaintiffs/Appellants

Scottsdale

Thomas C. Horne, Arizona Attorney General  
 By Mark Bookholder, Assistant Attorney General  
 Attorneys for Defendants/Appellees

Phoenix

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**K E S S L E R**, Judge

¶1 The Plaintiffs/Appellants ("Plaintiffs") appeal the dismissal of their 42 U.S.C. § 1983 claim against the Arizona

Corporation Commission and the other Defendants/Appellees (collectively "ACC") as barred by the statute of limitations. For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 The Plaintiffs sold investments based on their legal counsel's opinion that certain business offerings were not securities. The ACC determined that the investments were securities and entered Cease and Desist Orders against the Plaintiffs and others. In 2001, the Plaintiffs entered into Consent Orders with the ACC in which they agreed to pay restitution. The ACC filed the Consent Orders in superior court, reducing the Orders to a transcript judgment in 2002. However, the ACC failed to timely renew that judgment.

¶3 The Plaintiffs sued their attorneys and obtained a settlement. As discussed in more detail below, in 2006, the Plaintiffs entered into an Amended Consent Order with the ACC to pay the settlement amount to the ACC and the State, thus reducing their liability. Upon payment of slightly more than \$2 million from the settlement to the State and the ACC, the ACC agreed to eliminate the Plaintiffs' liabilities connected with two of the offerings, but the Amended Consent Order expressly confirmed the Plaintiffs' continuing liability in connection with a third offering (the "Hotel Connect" offering) under the

original Orders. The Amended Consent Order expressly provided that upon payment of the settlement, the Amended Order would replace and supersede the original Consent Orders.<sup>1</sup> Two years later, in 2008, the ACC filed the Amended Consent Order in superior court to reduce it to a transcript judgment.

¶4 Two years after that, in 2010, the Plaintiffs filed their complaint against the ACC. In their complaint, the Plaintiffs alleged an action under 42 U.S.C. § 1983, claiming that the ACC, acting as part of a conspiracy, denied Plaintiffs' due process rights by assessing excessive restitution from them and from community property for the Plaintiff-husbands' separate

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<sup>1</sup> The Amended Consent Order stated the following:

This Amended Order is intended to, and shall operate to, supercede [sic] and amend [Plaintiffs'] liabilities to the State of Arizona previously set forth in Decisions and Orders in Docket Numbers S-03396A-01-0000, S-03441A-01-0000 and S-03444A-01-0000, wherein these [Plaintiffs] Consented to Entry of Orders Numbered 64185, 64203, 64202, 64040, 64184, 64006 and 63851 . . . The Commission and [Plaintiffs] agree that the Commission's jurisdiction, if any, over [Plaintiffs'] marital communities is governed by the law in effect as of the dates of the original Orders.

The Amended Order also provided that "if the \$2,177,500 is not received directly from the [settlement], this Amended Order shall be of no force or effect and [Plaintiffs] shall remain bound by the original Orders."

debt; that the ACC violated the Eighth Amendment by refusing to limit the fines to the amount of the Plaintiffs' commission; and that the ACC conspired "with intent to deny Plaintiffs equal protection of laws and their rights, privileges, and immunities as guaranteed by the Fifth, Eighth and Fourteenth Amendments."<sup>2</sup>

¶5 The ACC moved to dismiss the § 1983 claim as barred by the statute of limitations. The trial court agreed and dismissed the complaint. The Plaintiffs filed a motion for new trial and an amended motion for new trial. The trial court denied the amended motion for new trial. The Plaintiffs' appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1) and (A)(5)(a) (Supp. 2012).

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<sup>2</sup> Specifically, Plaintiffs complain that: (1) the ACC ordered the Plaintiffs to pay restitution in an amount which far exceeded the commissions they earned in connection with the illegal sales of securities; (2) the ACC failed to consider the Plaintiffs' financial ability to pay the restitution demanded when it set the amount of restitution; (3) the ACC should have released the Plaintiffs from liability for the Hotel Connect offering when they paid the settlement because the amount paid exceeded the gross amount the Plaintiffs received from the sales for all three business offerings, but the ACC refused to release them with respect to the Hotel Connect offering; (4) the ACC's transcript judgment in connection with the Amended Consent Order was only against the Plaintiffs and not their spouses; (5) the wives of the Plaintiffs did not consent to the payment of the settlement to the ACC under the terms of the Amended Consent Order which was improper because the settlement was a community asset used to pay the separate debts of the Plaintiff-husbands; and (6) that in 2010 the Plaintiffs demanded the return of these community assets to no avail.

## DISCUSSION

¶6 We review a dismissal of a complaint under Arizona Rule of Civil Procedure 12(b)(6) *de novo*. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). In reviewing the dismissal of a complaint for failure to state a claim pursuant to Rule 12(b)(6), we accept as true the well-pleaded facts alleged in the complaint and will affirm the dismissal only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fid. Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998); *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4, 121 P.3d 1256, 1259 (App. 2005) (“[W]e review the well-pleaded facts alleged in the complaint as true. However, we do not accept as true allegations consisting of conclusions of law, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts.” (internal citation omitted)).

¶7 Plaintiffs contend that the superior court erred in dismissing their § 1983 claim as time-barred. Section 1983 claims are deemed to be personal injury actions and we apply state law for purposes of the statute of limitations, but federal law for purposes of when a claim accrued. *Wilson v. Garcia*, 471 U.S. 261, 279 (1985) (providing that § 1983 actions

are personal injury actions to identify the state statute of limitations period), *superseded by statute on other grounds as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377-82 (2004); *Madden-Tyler v. Maricopa County*, 189 Ariz. 462, 465-66, 943 P.2d 822, 825-26 (App. 1997) (stating that we look to Arizona law for determining the limitations period); see also *Venegas v. Wagner*, 704 F.2d 1144, 1145 (9th Cir. 1983) (using federal law to determine the time of accrual of the action). The applicable statute of limitations for personal injury claims in Arizona is two years. See A.R.S. § 12-542 (2003); see also *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004).

¶8 Accrual of civil conspiracies for statute of limitations purposes is determined in accordance with the last overt act doctrine, under which "injury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy.'" *Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1986) (internal brackets omitted). The limitation period for conspiracies in violation of § 1983 "accrues when a party knows or has reason to know of the injury which is the basis of the cause of action." *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996) (internal quotation marks omitted). "To determine the timeliness of a claim, a court must

establish whether a plaintiff has alleged 'discrete acts' that would be unconstitutional occurring within the limitations period." *Normandeau v. City of Phoenix*, 516 F. Supp. 2d 1054, 1065 (D. Ariz. 2005) (citing *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002)).

¶9 In the Ninth Circuit the "last overt act" doctrine determines the point of accrual for civil conspiracies, and "the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff." *Gibson*, 781 F.2d at 1340. When determining when an act occurs for statute of limitations purposes, the key inquiry is when the "operative decision" occurred. Courts separate from the operative decisions the inevitable consequences that are not actionable in their own right. See *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981). The Supreme Court, citing *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), explained that the proper focus is on the time of the illegal act, "not the point at which the consequences of the act become painful." *Chardon*, 454 U.S. at 8.

¶10 The parties disagree as to when the Plaintiffs' cause of action accrued. Plaintiffs contend the claim accrued in August of 2008 when the ACC filed the Amended Consent Order with the superior court to convert the Order into a transcript



judgment, making the filing of their complaint in July of 2010 timely. The Plaintiffs characterize ACC's filing of the Amended Consent Order in superior court as the last "overt act" in the ACC's conspiracy against them because, they argue, at that time the prior 2002 transcript judgment had expired so the ACC had no ability to execute against their assets until the Amended Consent Order was filed with the superior court. The ACC maintains that reducing the Amended Consent Order to a transcript judgment was not an overt act which caused any injury to Plaintiffs. Rather, it was a ministerial act which the ACC was entitled to do by law. According to the ACC, the last overt act, if any, would have been the entry of the Amended Consent Order in June of 2006, as this is the act that caused Plaintiffs' alleged injury.

¶11 We agree with the ACC because the filing of the Amended Consent Order in 2008 was not an improper attempt to resurrect the 2002 expired judgment.<sup>3</sup> Thus, it did not qualify as the last overt act in the alleged conspiracy. And, since Plaintiffs knew of the 2006 Amended Consent Order when they

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<sup>3</sup> A civil judgment can only be executed upon for five years after its entry unless it is renewed by action or affidavit under A.R.S. §§ 12-1611 (2003) or -1612 (2003). *State ex rel. Indus. Comm'n v. Word*, 223 Ariz. 353, 357, ¶ 27, 224 P.3d 169, 173 (2010). We assume without deciding that the five-year renewal period applies to the ACC.

entered into it, they knew of any alleged damage to them by any conspiracy as of that date.

¶12 The Plaintiffs entered into the Amended Consent Order in June of 2006. To execute on the Amended Consent Order the ACC filed the Amended Consent Order with the superior court to reduce it to a transcript judgment as authorized by A.R.S. § 44-2036(C) (2003). This filing was not a wrongful or illegal act because it was not an attempt by the ACC to resurrect an expired judgment. Rather, it was merely to permit the ACC to be able to execute on the Amended Consent Order which expressly superseded the original Consent Orders. Since the only alleged last overt act in any conspiracy was the Amended Consent Order in 2006, and Plaintiffs knew of that Order when they consented to it, their action accrued in 2006 and the statute of limitations barred the 2010 complaint.

¶13 To avoid that result, Plaintiffs argue that the following language in the Amended Consent Order shows that the ACC was trying to resurrect the original judgment:

The Commission, in issuing this Amended Order, and [Plaintiffs] in consenting to this Amended Order, further intend that this Amended Order does not, and *shall not be used to, impair, improve or otherwise affect the respective positions of the State and [Plaintiffs]* listed in paragraph 11 with respect to the issues of: (a) any joint and several liability for the liabilities to the

State as reflected in this Amended Order, and (b) *any liability of the individual [Plaintiffs'] marital communities* for the liabilities to the State as reflected in this Amended Order.

(Emphasis added.)

¶14 Plaintiffs characterize the ACC's filing of the Amended Consent Order as an attempt to expand its rights in contravention of the parties' agreement that the Amended Consent Order "shall not be used to[] impair, improve or otherwise affect the respective positions of the [parties]." But Plaintiffs' construction fails to acknowledge the qualifying subsections—that the Amended Order only preserves the status quo for the parties with respect to any legal arguments related to the issues of joint and several liability and community property liability.

¶15 In other words, the parties agreed that, when the ACC attempted to collect the Hotel Connect liabilities<sup>4</sup> from the Plaintiffs, each party's rights as to joint and several liability and community property issues were preserved as those issues would have been determined in 2001 when the parties

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<sup>4</sup> For the reasons set forth below, Plaintiffs are barred by the statute of limitations from raising arguments regarding joint and several liability or community property as to the payment of the settlement because they made the payment in 2006, and failed to raise it within the two-year limitation period.

entered into the original Consent Orders. This must be the case, as the Hotel Connect liabilities are the only liabilities not eliminated under the Amended Consent Order.

¶16 Here, Plaintiffs' § 1983 claim stems directly from the terms of the original 2001 Consent Orders and the 2006 Amended Consent Order. Putting aside the fact that the Plaintiffs voluntarily consented to both the original Consent Orders and the Amended Consent Order, the Plaintiffs knew all of the facts in 2001 and 2006 that they complain of in connection with the § 1983 claim filed in 2010.

¶17 Our conclusion is further supported by *Ricks*. In *Ricks*, a teacher (Ricks) alleged that the college at which he taught denied him tenure for discriminatory reasons. The college notified him that he would not be offered tenure but, as was the college's policy, they offered him a "terminal" contract to teach for one more year. At the end of that one-year contract, Ricks understood that he would be terminated. *Ricks*, 449 U.S. at 252-53. Ricks filed his civil rights lawsuit within three years after the actual date of his termination, but more than three years after he had been informed by the college that he would not be given tenure. The Supreme Court explained that the only alleged discrimination that occurred was at the time the tenure decision was made and communicated to Ricks, so that is

the date on which the limitations period commenced. "That is so even though one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* at 258. The Supreme Court held that Ricks' claim was barred by the statute of limitations because his cause of action accrued when he was given notice of the operative decision that he would not be granted tenure. The refusal of tenure was the alleged discriminatory, illegal act. The university had every legal right to terminate him at the end of his one-year terminal contract. *Id.*

¶18 The same is true here. The ACC's acts which allegedly violated the Plaintiffs' constitutional rights, all took place in 2001 and 2006 with the Plaintiffs' full knowledge. The only act by the ACC that took place within the two years preceding the filing of Plaintiffs' complaint was the filing of the Amended Consent Order to reduce it to a transcript judgment. This was the delayed, but inevitable, *effect* of the ACC's acts. See *id.* at 257-58. For the reasons articulated above, this was a legitimate act which the ACC was authorized to take under A.R.S. § 44-2036.<sup>5</sup>

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<sup>5</sup> The Plaintiffs do not allege it to be an illegal act in their complaint.

¶19 All of the alleged damages Plaintiffs complain of resulted from the pre-limitations acts by the ACC, and no new cause of action accrues for the ACC's subsequent act of reducing the Amended Consent Order to a transcript judgment because this act, which was the only act committed by the ACC during the limitations period, did not injure the Plaintiffs. See *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir. 1979) ("[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period [b]ecause those acts do not injure plaintiff.").

¶20 Because we agree with the trial court that the Plaintiffs' claims are barred by the statute of limitations, we need not reach the other grounds on which the ACC argues that the trial court's dismissal of the Plaintiffs' § 1983 claim was appropriate.

**CONCLUSION**

¶21 For the foregoing reasons, we affirm the trial court's dismissal of the Plaintiffs' claim under 42 U.S.C. § 1983. Because the Plaintiffs are not the successful parties on appeal, we deny their request for attorneys' fees pursuant to 42 U.S.C. § 1988.

/s/  
\_\_\_\_\_  
DONN KESSLER, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
MICHAEL J. BROWN, Presiding Judge

/s/  
\_\_\_\_\_  
ANDREW W. GOULD, Judge