IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Wm. Dickson Co., a Washington Corporation, Appellant, v. THE State of Washington, Department Of Ecology, Respondent.	No. 39330-1-II UNPUBLISHED OPINION

Hunt J. – The WM. Dickson Company appeals the superior court's summary judgment dismissal of its negligence claims[1] against the Washington State Department of Ecology for Ecology's alleged failure to disclose the noncompliant nature of the contaminated slurry waste that Sound Transit sent from its Beacon Hill tunneling project to the Company's landfill. The Company argues that the superior court erroneously ruled that the statute of limitations barred its

[1] The Company's notice of appeal broadly "seek[s] review . . . of the [trial court's] Order Granting Summary Judgment [for Ecology]" and dismissing the Company's tort claims. Clerk's Papers (CP) at 210, 214. But the Company's Brief of Appellant focuses solely on the dismissal of its negligence claims against Ecology; it neither assigns error nor otherwise challenges the trial court's summary judgment dismissal of its trespass claims. Assuming, therefore, that the Company challenges on appeal the summary judgment dismissal of its negligence claims only, we do not address summary judgment dismissal of its trespass claims. *See* RAP 10.3(a)(4).

negligence claims because the discovery rule extended the statute of limitations' tolling. Holding that the statute of limitations bars the Company's negligence claims, we affirm.

FACTS

I. Background

The WM. Dickson Company owns and operates a Pierce County landfill and gravel mine facility under the authority of a National Pollution Discharge Elimination System (NPDES) "Sand and Gravel General Permit," Clerk's Papers (CP) at 162, from the Washington State Department of Ecology, and an "inert waste landfill [permit]," CP at 5, from the Tacoma-Pierce County Health Department.[2] Ecology's sand and gravel permit (1) required the Company to store "concrete/asphalt process water," CP at 163, also called slurry waste, "[in] a lined impoundment," CP at 163, and to monitor "inactive sites with storm water to surface water discharges," CP at 163 (emphasis omitted); and (2) provided that the "pH limit[] for surface water discharges is 6.5-8.5."[3] CP at 163. Ecology's permit contained no information about the disposal of bentonite[4] waste. The Health Department's inert waste permit provided that the Company's landfill (1)

[2] The record on appeal shows that the Company's March 23, 2005 sand and gravel permit remained in effect until its February 5, 2010 expiration date. Although the record contains no information about the effective dates for the Company's inert landfill permit, the 2009 declaration of Company's owner Richard Dickson included an attachment showing that the landfill "is permitted by the Pierce County Health Department," CP at 166; Ecology does not dispute this fact.

[3] The symbol "pH" is "used for convenience in expressing both acidity and alkalinity usu[ally] on a scale of 0 to 14[.]" Webster's II New College Dictionary 1692 (1999).

[4] Bentonite is "a soft porous moisture-absorbing rock composed essentially of clayey minerals often of volcanic origin[.]" Webster's II New College Dictionary 204 (1999).

"shall not contain contaminants in excess of [the] limits listed [under the permit],"[5] CP at 170; (2) "shall develop and implement an approved waste screening program to insure that wastes exceeding these criteria are not accepted," CP at 170, at the landfill; (3) "shall not accept materials," CP at 170, other than those listed under the permit; and (4) "shall comply with the existing NPDES [sand and gravel] permit in accordance with the requirements of Ecology." CP at 172.

On September 14, 2004, the Company began receiving bentonite slurry waste from Sound Transit's Beacon Hill tunneling project. Sound Transit represented that the slurry waste or drilling mud contained only water, sand, and bentonite. On December 16, 20, and 23, Jason Shira, the Sand and Gravel Permit Manager for Ecology's Water Quality Program, conducted standard compliance inspections at the Company's landfill. During these inspections, Shira tested the landfill's slurry waste and determined that it had a pH level of 9.9. Shira advised the Company's owner, Richard Dickson, that (1) the landfill "was [not] permitted to accept [waste] with that pH [level]," CP at 153; (2) the offending slurry waste had come from Sound Transit's Beacon Hill tunneling project; and (3) the Company could "continue accepting the Sound Transit [slurry] waste," CP at 153, on a temporary basis "in order not to stym[i]e [Sound Transit's] Beacon Hill Tunneling Project." CP at 122. In reliance on Shira's permission to accept Sound Transit's non-compliant slurry waste temporarily, the Company continued receiving Sound Transit's slurry waste until February 2005, when it learned that the slurry waste "was contaminated with cement." CP at 6.

[5] The permit listed several types of metals and petroleum hydrocarbons that the Company was prohibited from accepting.

A. Notice of Violation

On January 18, 2005, Shira sent the Company a letter "advis[ing] [ ] that the slurry waste [mud] must be stored in a lined pond," CP at 50, and that constructing a lined pond would require an engineering report for industrial waste treatment. On January 25, Shira conducted a follow-up inspection, during which he noted that the Company had neither built the lined pond nor submitted the engineering report. Shira also tested the slurry waste and noted that it had a pH level of 11.4, which "violated [the Company's] sand and gravel permit." CP at 50.

The Company hired waste management consultant David Kernan to assist with waste treatment. On February 1, Kernan inspected both the Company's landfill and Sound Transit's Beacon Hill project site and, based on these inspections, told Dickson that cement matter from Sound Transit's Beacon Hill slurry waste "was causing the pH [level] above 10" in the Company's landfill. CP at 154. Around this time, the Company also excavated a new retention pond to contain the Sound Transit slurry waste.[6] On February 10, Shira notified the Company in writing that (1) the 11.4 pH level of Sound Transit's Beacon Hill slurry waste violated the Company's sand and gravel permit; and (2) "an engineering firm familiar with [the] treatment of this type of material" was required "to design an appropriate industrial wastewater facility." CP at 56.

The Company accepted no slurry waste from Sound Transit's Beacon Hill project after February 11. On February 14, a truck arrived at the landfill to deposit slurry waste from Sound Transit's Beacon Hill project. The Company tested the slurry waste's pH level, noted that it

[6] The record on appeal indicates that the Company's new retention pond was unlined, contrary to Ecology's advisement. *See* CP at 56, 57.

measured "over 12," and sent a sample of it to Ecology. CP at 154. Although the record provides few details on this point, it indicates that the Company did not accept this February 14 shipment.

On February 28, Steven G. Eberl, Ecology's Supervisor of the Industrial Operations Unit for the Water Quality Program, notified the Company by letter that, although it had created a new pond to contain the Sound Transit slurry waste, "[i]t is Ecology's decision that the bentonite/cement [slurry] waste be removed from the [landfill] facility" because (1) "[i]t is not the intent for facilities covered under the Sand and Gravel General Permit to receive non-solid waste," (2) "[t]he bentonite/cement [slurry] waste was initially received without notifying the Pierce-Tacoma Health Department or [the] Washington Department of Ecology," and (3) "both are violations of the permit held by Wm[.] Dickson Co." CP at 48. The letter also notified the Company that the Health Department "is the lead agency for enforcing mud removal and/or disposal" and that "[a] schedule for removal and/or disposal must be developed and submitted to the [Health Department]." CP at 48.

On March 3, the Company received a notice of violation from the Health Department "concerning the unauthorized acceptance and handling of non-inert solid waste" in the landfill. CP at 186. The notice provided that five permit violations "were noted in recent inspections by [the Health Department] and Department of Ecology," including the Company's acceptance of "bentonite [and] slurry mud that had pH levels above that which would be acceptable for disposal in an unlined inert waste landfill" and the Company's failure to screen incoming waste adequately as part of "an on-going waste screening program to insure that unauthorized waste streams are

not accepted" at the landfill. CP at 186.

B. Remediation; Notice of Continuing Violation

On March 10, after unsuccessfully attempting to treat the contaminated slurry waste, the Company hauled it to a treatment center in Everett. On March 18 and April 27, the Company contacted Ecology with questions about the Company's sand and gravel permit. On May 12, Shira responded in writing, "The waste [the] Dickson [Company] received from the Beacon Hill Tunnel Project is not covered under the Sand and Gravel Permit." CP at 50. According to Shira, "This was the last correspondence between [the Company] and Ecology." CP at 50. The Company performed all remediation of Sound Transit's waste at its own expense.

II. Procedure[7]

On December 1, 2008, the Company filed a complaint for negligence against Ecology in Pierce County Superior Court.[8] The complaint alleged that (1) "Ecology gave approval for disposal of the Sound Transit waste" at the landfill; (2) in "granting the approval to accept the waste, Ecology created a special relationship" with the Company; (3) based on this special relationship, the Dickson Company "had the right to rely on Ecology's approval of the Sound

[7] In December 2007, the Company sued Sound Transit (Pierce County Cause No. 07-2-14983-5) and its contractors for damages under the Model Toxics Control Act, Chapter 70.105D RCW. The Company alleged that Sound Transit had failed to notify the Company about the Beacon Hill excavating project waste's true chemical composition, which waste Sound Transit had improperly delivered for disposal to the Company's landfill. During the discovery process in early 2008, "the defendants [Sound Transit and its contractors] produced numerous documents showing that Ecology knew about the cement contaminated waste before Mr. Shira inspected" the landfill and that Ecology "was requiring Sound Transit to prevent the cement contaminated waste from getting into storm drains." CP at 156. This lawsuit, which ultimately settled, is not at issue in the instant appeal.

[8] Pierce County Superior Court, Cause No. 08-2-15031-9.

Transit waste for disposal"; (4) "Ecology breached its duty of care to [the] Dickson [Company] by ordering [it] to remove the material that Ecology previously approved for disposal" at the landfill; (5) "[a]s a proximate cause of the breach, the [C]ompany incurred remedial action expenses for removal and disposal of the cement-containing material"; and (6) the Company "is entitled to recover its remediation costs and consequential damages caused by Ecology's negligence in an amount to be proven at trial." CP at 7.

On March 11, 2009, the Company filed an amended complaint, in which it added:

> Ecology also breached its duty of care to [the Company] by assuming authority that Ecology did not possess when Ecology granted permission to receive the waste, and when Ecology ordered [the Company] to remove the contaminated material. The only agency that had authority to approve receipt of the waste, or to order its removal, was the issuer of the. . . . Landfill Permit—the . . . Health Department.

CP at 14. The amended complaint further alleged that (1) "Ecology knew, or had reason to know, that the Sound Transit waste was contaminated with cement," CP at 16; (2) "Ecology representatives wrongfully, intentionally, and unreasonably acted while knowing, or having reason to know, that they did not have authority to give permission for the receipt or disposal of contaminated waste at the [Dickson Company's] Landfill in late 2004 and early 2005"; and (3) "Ecology's actions, taken without authority to do so, caused damage to Dickson, including cleanup costs, treble damages, and attorney's fees." CP at 16.[9]

Ecology moved for summary judgment dismissal of the Company's claims, alleging that

[9] The Company's amended complaint also alleged that Ecology had (1) violated the Company's constitutional right to equal protection of the law, (2) caused injury to its property, and (3) subjected it to "[m]alicious [p]rosecution." CP at 17. On appeal, however, the Company challenges only the superior court's summary judgment dismissal of its "negligence" claims. Brief of Appellant at 13.

"they [we]re [time] barred by the statute of limitations." CP at 69. Ecology asserted that (1) "the alleged negligence occurred on February 23, 2005, the date when [the Company] alleges that Ecology ordered [the Company] to remove the waste," CP at 69; (2) the February 28, 2005 letter directing the Company to remove the waste from the landfill "[wa]s not an order," CP at 67, and, thus, Ecology never "ordered" the Company to remove the waste, CP at 67; (3) "Ecology did not initiate an enforcement action"; rather, (4) it "notified [the Company] of the violations at [its] site and informed [the Company] of the actions [it] needed to take to correct the violation." CP at 67.

Ecology's motion included supporting declarations from Eberl and Shira. Eberl declared that (1) he had sent the February 28 letter to the Company to explain that "the [ ] waste . . . had to be removed," CP at 45, because it "was not covered by [the Company's] existing permit," CP at 46; (2) the Company had accepted the non-compliant slurry waste "without notifying," CP at 46, Ecology or the Tacoma Pierce County Health Department; and (3) "Ecology did not send a regulatory order [to the Company] to remove the waste." CP at 46. Shira declared that (1) on January 18, 2005, he had sent the Company a letter "advis[ing] [it] that the slurry waste must be stored in a lined pond"; (2) constructing this pond "required [the Dickson Company] to submit an engineering report for industrial waste water treatment," CP at 49; and (3) on February 10, he had sent the Company notice of its violating the permit's pH-level requirements.

The Company responded that the superior court "must" deny Ecology's summary judgment motion, CP at 83, because (1) "the discovery rule applies to the facts at issue," CP at 74, and, thus, RCW 4.16.080's three-year statute of limitations did not bar its claims; and (2) when the Company discovered the noncompliant nature of its landfill's slurry waste in February

2005, it "believed that Ecology was unaware of the hazardous materials being generated at [Sound Transit's Beacon Hill project site]." CP at 80. The Company supported its response with declarations from Dickson and Kernan.

Dickson declared that (1) although Shira had said that "he [Shira] did not think [the] landfill was permitted to accept mud with [a] pH [level of] . . . 9.9," CP at 153, Shira had also advised the Company to continue accepting Sound Transit's noncompliant slurry waste to avoid stymieing Sound Transit's tunneling project; (2) the Company had incurred over $800,000 in costs for removing Sound Transit's Beacon Hill slurry waste, hiring Kernan, and paying related attorney fees; (3) during discovery in the Company's separate lawsuit against Sound Transit, "the defendants [Sound Transit and its contractors] produced numerous documents showing that Ecology knew about the cement contaminated waste," CP at 156, before Shira's inspections; and (4) "Ecology gave [the Company] false information about the cement contaminated [slurry] waste which Ecology knew was not true." CP at 157.

Kernan declared that (1) although Shira had told the Company that the landfill was not permitted to accept the [Sound Transit] waste, he (Shira) had allowed the Company "to accept the waste '[i]n order to not stym[i]e the Sound Transit [P]roject,' " CP at 87; (2) during discovery in the lawsuit against Sound Transit, "numerous documents surfaced showing evidence [of] Ecology['s] involvement with and knowledge of Sound Transit's high pH [level] waste,"[10]

[10] Kernan's declaration includes the following citation: "*Exhibit J are true and correct copies of an email and summary document for a meeting between Mr. Bob Penhale, Ecology Inspector, and Mr. Mark Menard, Sound Transit Environmental Manager*." CP at 90-91 (Italics in original). The record on appeal includes a copy of the Exhibit J email document, which notes Ecology's schedule of inspections for the Sound Transit project. This document, however, provides no information about Sound Transit's industrial waste. *See* CP at 129, 130.

CP at 90; (3) "based on the evidence obtained during this investigation, [ ] Ecology knew that Sound Transit was producing waste contaminated with cement before December 16, 2004," CP at 92-93; and (4) "if Ecology had followed their own policies, they would have disclosed the cement contamination to [the Company] in December, 2004, and [they] would not have granted [the Company] permission to continue accepting [the non-compliant slurry] waste that Ecology had determined [the Company] was not permitted to accept." CP at 93.

On May 8, the superior court granted Ecology's motion for summary judgment. The written order provides no explanation for the court's decision, noting only that, in granting the motion, it had considered the parties' motions, briefings, and declarations. The Company appeals the superior court's summary judgment dismissal of its negligence action for damages against Ecology.

ANALYSIS

The Company argues that the superior court erred in granting summary judgment and dismissing the Company's negligence claims against Ecology. The Company contends that the discovery rule should apply to toll the statute of limitations and, thus, allow its claims against Ecology because it "filed suit within three years of discovering the essential facts to support its cause of action," namely that "Ecology knew that the [Sound Transit] waste contained cement." Br. of Appellant at 6. The record does not support this argument.

I. Standard of Review

We review de novo a superior court's summary judgment dismissal of a plaintiff's negligence claim, considering the facts and any reasonable inferences drawn from them in the light

most favorable to the plaintiff, as the non-moving party. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 345, 3 P.3d 211 (2000). We will affirm the superior court's grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Ranger Ins. Co. v. Pierce County*, 138 Wn. App. 757, 766, 158 P.3d 1231 (2007), *aff'd*, 164 Wn.2d 545 (2008) (quoting CR 56(c)). "Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted." *Ranger Ins. Co.*, 138 Wn. App. at 766. To defeat a motion for summary judgment, however, the non-moving party "may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain." *Ranger Ins. Co.*, 138 Wn. App. at 766 (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

II. Discovery Rule

RCW 4.16.080 provides that "[a]n action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another . . . shall be commenced within three years." RCW 4.16.080(1) and (2). Although a cause of action usually occurs at the time of injury, a plaintiff may invoke the "discovery rule" "to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim." *Giraud v. Quincy Farm and Chemical*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000).

For the discovery rule to apply, the plaintiff must show that he or she could not have

discovered the relevant facts earlier. *Giraud*, 102 Wn. App. at 449-50. "[W]hen a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of actual harm"; consequently, "[t]he plaintiff is charged with what a reasonable inquiry would have discovered." *Green v. A.P.C. (American Pharmaceutical Co.)*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998). Thus, a plaintiff who reasonably suspects a specific wrongdoing act has occurred is on notice that legal action must be taken. *Giraud*, 102 Wn. App. at 449-50. Unless the facts are susceptible to only one reasonable interpretation, it is for the jury to determine whether the plaintiff has met this burden. *Giraud*, 102 Wn. App. at 450.

A. The Company's Knowledge of Relevant Facts

The Company fails to show that a genuine issue of material fact remains about whether the discovery rule applies. In particular, the Company fails to show that there is a material issue of fact about when it reasonably knew or should have suspected and inquired about (1) the slurry waste from Sound Transit's Beacon Hill project; and (2) Ecology's knowledge that this contaminated slurry waste had a pH level above the maximum allowed under the Company's permits from Ecology and the Health Department.

On the contrary, the record clearly shows that the Company had a factual basis to pursue a cause of action against Ecology in early 2005, more than three years before it filed its lawsuit on December 1, 2008. The Company knew in January 2005 that Ecology required it to build a lined pond to contain Sound Transit's noncompliant slurry waste, and it knew in February 2005 that Ecology had required it to remove the waste at the Company's expense, in spite of Ecology's

inspector Shira's allowing the Company to accept this noncompliant slurry waste temporarily to avoid disrupting Sound Transit's Beacon Hill tunneling project.[11]

The Company also knew in February 2005 that (1) Ecology had determined that disposing of Sound Transit's Beacon Hill "bentonite/cement waste" in the Company's landfill violated its sand and gravel permit, CP at 48; (2) its sand and gravel general permit did not authorize it to receive non-solid slurry waste in the landfill; and (3) Ecology had directed it (the Company) eventually to remove the non-compliant slurry waste from the Company's landfill, to construct a lined pond to contain the waste, and to submit an engineering report, even though Ecology had contradictorily notified the Company that the Health Department—not Ecology—is the agency responsible "for enforcing mud removal and/or disposal." CP at 48. In addition, the Company knew in March 2005 that the Health Department had sent it a notice of violation for its "[f]ailure to adequately screen incoming waste." CP at 186.

The Company contends that it first discovered the noncompliant nature of its landfill slurry waste materials in February 2005, at which time it "believed that Ecology was unaware of the hazardous material[s] being generated at [Sound Transit's Beacon Hill project site]." CP at 80. On the contrary, the above facts demonstrate that the Company knew "the essential facts to support its cause of action against Ecology" in early 2005. Br. of Appellant at 6. Yet, the Company failed to investigate Ecology's involvement in a timely fashion until sometime after December 2007 and to pursue a cause of action against Ecology until more than three years after

[11] The record indicates that Ecology ultimately required the Company to remove the Sound Transit slurry waste from its (the Company's) facility because the Company had not constructed a lined pond to contain the non-compliant waste and/or because the Company's sand and gravel general permit did not cover the disposal of non-solid waste.

Ecology had directed it to remove Sound Transit's noncompliant slurry waste. Thus, the Company fails to show that it "could not have discovered the relevant facts earlier [than 2007]" for purposes of the discovery rule. *Giraud*, 102 Wn. App. at 449.

B. Ecology Did Not Withhold Information

The record also shows that the Company's post-December 2007 effort to investigate a cause of action against Ecology yielded no more than a few inapposite emails; and these emails contained no information suggesting that Ecology withheld discovery-rule-relevant information. Significantly, the Company's argument relies entirely on the identical assertions in Dickson's and Kernan's declarations that "numerous documents show[ed] that Ecology knew about the cement contaminated waste," CP at 156, before Shira inspected the landfill in December 2004 and January 2005. But the Company fails to support this argument with a single document "showing that Ecology knew about the cement contaminated waste," CP at 156, before Shira conducted these inspections.[12]

Instead, as we note above, the only documents that the Dickson Company included in support of its declarations were the emails in "Exhibit J," CP at 129, 130; and those emails provided no information showing that Ecology knew that Sound Transit was depositing cement-contaminated slurry waste before Shira's December 2004 and January 2005 inspections. Because the Dickson Company failed to present evidence to support its contention that the discovery rule should apply in this case, it relies on no more than "speculation, [or] argumentative assertions that

[12] And even if Ecology had prior knowledge, we fail to see how such knowledge would have affected the Company's need to file its lawsuit against Ecology within three years of at least Shira's December 2004 inspection and notice to the Company.

unresolved factual issues remain." *Ranger Ins. Co.*, 138 Wn. App. at 766 (quoting *Seven Gables Corp.*, 106 Wn.2d at 13).[13] And, as we also note above, because the Company "may not rely" on such speculative or argumentative assertions that unresolved factual issues remain to defeat summary judgment, this argument is unpersuasive. *Ranger Ins. Co.*, 138 Wn. App. at 766 (quoting *Seven Gables Corp.*, 106 Wn.2d at 13).

Thus, because the Company fails to show that a genuine issue of material fact remains about whether to apply the discovery rule under the circumstances of this case, we reject its argument. We hold, therefore, that (1) the discovery rule does not apply under the circumstances of this case, (2) the three-year statute of limitations under RCW 4.16.080 precluded the Company's negligence action filed against Ecology in December 2008,[14] and (3) the superior court did not err in granting Ecology's motion for summary judgment and dismissing the Company's negligence action against Ecology.

[13] We also note that although the Dickson Company cites several Washington cases to support its argument that the discovery rule applies in this case, none of these products liability cases supports its argument. *See* Br. of Appellant at 8, 9 (citing *North Coast Air Services, Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 759 P.2d 405 (1988); *Ohler v. Tacoma General Hosp.*, 92 Wn.2d 507, 514, 598 P.2d 1358 (1979); and *Orear v. Int'l Paint Co.*, 59 Wn. App. 249, 796 P.2d 759 (1990)).

[14] Finding the statute of limitations bar dispositive, we do not address the Company's other arguments, including the special relationship exception to the public duty doctrine.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, PJ.

Van Deren, J.