IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHRISTIAN DOSCHER, Appellant, v. STATE OF WASHINGTON and THURSTON COUNTY, Respondents.	No. 39776-5-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — After Christian Doscher filed a complaint against the State of Washington and Thurston County, alleging $33 million in damages because Washington State Patrol (WSP) records incorrectly stated that he had been convicted of a felony rather than a misdemeanor, the trial court granted the defendants' motions for summary judgment. Doscher appeals, arguing that the trial court erred in finding his claims barred by the applicable statutes of limitations. Because the statutes of limitation ran before Doscher filed his claim, we affirm.

Facts

On December 2, 1988, Thurston County charged Doscher with the felony offense of first degree possession of stolen property. On January 24, 1990, an amended information reduced the charge to third degree possession of stolen property, a misdemeanor. In exchange for the State's

agreement to recommend a deferred sentence and credit for time served, Doscher pleaded guilty to the amended charge. The trial court sentenced him in accordance with the State's recommendation. After Doscher complied with the terms of his sentence, the court entered an order of dismissal on April 27, 1990.

Sometime in 1990, Doscher learned that WSP records indicated that he had pleaded guilty to second degree possession of stolen property, a felony. Doscher made several unsuccessful attempts to fix the error that year.

Eighteen years later, apparently after Doscher initiated the statutory process for correcting his criminal history records, Thurston County sent the WSP an order indicating that his 1990 conviction was for the misdemeanor offense of third degree possession of stolen property. After the WSP received the order on July 15, 2008, it corrected its records accordingly. In 2009, Doscher sued the State and Thurston County in tort, alleging $33 million in damages as a result of the "false felony" noted in his criminal history for 18 years.

All parties moved for summary judgment. The trial court granted the State's and the County's motions, ruling that Doscher's claims were barred by the applicable statutes of limitations and that the State and County were entitled to dismissal as a matter of law.

Discussion

Summary Judgment

A. Standard of Review

When reviewing a summary judgment order, we engage in the same inquiry as the trial court. *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). We consider the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party.

Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 198, 943 P.2d 286 (1997). Summary judgment can be granted only if the pleadings, affidavits, depositions, and admissions on file show the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Once the moving party demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence sufficient to support a jury verdict in its favor. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). The nonmoving party's burden is not met by responding with conclusory allegations, speculative statements, or argumentative assertions. *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 36, 991 P.2d 728 (2000); *see also Roger Crane & Assoc., Inc. v. Felice*, 74 Wn. App. 769, 779, 875 P.2d 705 (1994) (bare allegations do not raise genuine issue of material fact). A failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

B. Statute of Limitations

The State and County successfully moved for summary judgment on the ground that Doscher's claims for defamation, invasion of privacy, outrage, fraud, and negligence were barred by the applicable statutes of limitations.[1]

A two-year statute of limitations governs claims for defamation and invasion of privacy.

[1] Doscher also alleges breach of contract in his briefing before this court, but he did not raise this cause of action in his amended complaint. Nor did Doscher's complaint assert a cause of action under RCW 10.97.110, which permits an action to enjoin a violation of the Criminal Records Privacy Act. We do not consider these potential causes of action for the first time on appeal. *See* RAP 9.12 (appellate court considers only issues called to trial court's attention in reviewing summary judgment proceeding).

RCW 4.16.100; *Albright v. State*, 65 Wn. App. 763, 769 n.3, 829 P.2d 1114 (1992) (defamation); *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 474, 722 P.2d 1295 (1986) (invasion of privacy). The three-year limitations period governs Doscher's remaining claims of outrage, fraud, and negligence. RCW 4.16.080(2); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 192, 222 P.3d 119 (2009) (outrage); *In re Marriage of Angelo*, 142 Wn. App. 622, 646 n.22, 175 P.3d 1096 (fraud), *review denied*, 164 Wn.2d 1017 (2008); *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 602, 123 P.3d 465 (negligence), *review denied*, 155 Wn.2d 1012 (2005).

The purpose of such limitation periods is to protect the defendant and the courts from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). A party must exercise reasonable diligence in pursuing a legal claim and, if such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987).

A limitation period begins to run when the plaintiff's cause of action accrues. *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163, *review denied*, 132 Wn.2d 1008 (1997). Generally, this occurs when the plaintiff suffers actual injury or damage and has the right to apply to a court for relief. *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975); *Crisman*, 85 Wn. App. at 20.

The State and County maintain that Doscher knew of his injury and the right to seek relief in 1990. When the County asked Doscher to explain the actions he took to fix the error in his criminal records, Doscher responded as follows:

> After first hearing about this in 1990, I contacted the Thurston Court clerk, who acknowledged that SCOMIS incorrectly showed a felony, but she didn't

> know how to answer the question, told me this [was] not correctable by a Court Clerk, and refused to discuss possible solutions, fearing she'd be giving legal advice.
>
> I then went to Washington State Patrol, also in 1990 and told them to correct this error. They said the charging document shows felony, they cannot do anything about it, and refused to give more advice via fear it would be legal advice.
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> I then consulted my original public defender William Kopp, also in 1990, and he said I was reporting a civil rights violation, and declined to advise on the grounds that this was not the area of law he practiced.
>
> I then inquired of Rodney Franzen in 1990, the original deputy prosecutor on this case, and he said he could not force WSP to change their records, and declined further advice due to the clear conflict of interest.
>
> I then went to Edward Holms, also in 1990, to inquire how to fix this error, and he said the same thing as Franzen: he had no legal authority to change information in Washington State Patrol records.
>
> I then went to private Attorney William W. Messer, in 1991, to inquire about this, and he was unable to supply a solution, except to say that I should keep trying. I hired him later in 1997 to file my chapter 13 bankruptcy in Tacoma. He is now deceased.
>
> I then inquired of an Olympia-based attorney in 1990, whose name I cannot recall, who said the same as Messer.
>
> I made various future attempts through the years to fix this error, with the Thurston County Court clerk giving the same answer they gave in 1990 and with WSP following suit.

Clerk's Papers at 168.

It was not until 2008, however, that Doscher availed himself of the statutory procedure for correcting the inaccurate criminal history reflected in the WSP's records. *See* RCW 10.97.080. The WSP's Identification and Criminal History Section serves as the state repository for criminal history information. RCW 10.97.045; RCW 43.43.745. The Criminal Records Privacy Act allows for the inspection of criminal history records and for written challenges to the accuracy of those records. RCW 10.97.080; WAC 446-20-120. If the WSP refuses any such challenge, it must inform the person of the reasons for its refusal as well as the procedures for reviewing that refusal. *State v. Breazeale*, 144 Wn.2d 829, 843, 31 P.3d 1155 (2001) (citing

WAC 446-20-140). A person may appeal the WSP's refusal to correct inaccurate information to the superior court for a de novo hearing. *Breazale*, 144 Wn.2d at 843 (citing RCW 43.43.730).

Doscher could have employed these procedures in 1990, but he did not do so until 2008, and he did not file his tort action until 2009. Doscher alleges in his amended complaint that on or about February 23, 1990, a Thurston County clerk sent a falsified court order to the WSP and he adds that on or about April 27, 1990, a Thurston County clerk informed the WSP that his 1990 conviction was not only a misdemeanor but had been dismissed. Thus, according to Doscher's own allegations, his injury occurred in 1990. As a result, his actions for defamation and invasion of privacy were due by April 27, 1992, and his actions for outrage, fraud, and negligence were due by April 27, 1993. RCW 4.16.100; RCW 4.16.080(2).

Doscher argues, however, that the discovery rule tolls the applicable limitation periods. *See Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992) (discovery rule postpones running of statute of limitations until plaintiff should have discovered basis for cause of action, but action accrues when plaintiff knows or should know the relevant facts, regardless of whether plaintiff also knows that facts establish cause of action). We disagree, because Doscher knew in 1990 that the WSP records incorrectly listed his conviction as a felony and that the WSP had received this erroneous information from Thurston County.

We also reject Doscher's claim that a continuing fraud or injury, allegedly shown by the County's failure to disclose the dismissal of his misdemeanor conviction to the WSP in 2008, renders his complaint timely filed. *See* RCW 10.97.045 (following disposition of criminal proceeding, court shall furnish disposition data to WSP); *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 747 n.6, 935 P.2d 628 (1997) (where tort involves a

continuing injury, statute of limitations does not begin to run until the date of the last injury or when the tortious acts cease), *review denied*, 133 Wn.2d 1033 (2008). Doscher's amended complaint does not refer to a continuing injury caused by the failure to report or record the dismissal of his misdemeanor conviction in 2008, but is based solely on the erroneous reference to a felony conviction in the WSP records. As the trial court recognized, any cause of action for that false information arose in 1990: "[Y]our cause of action is alleging a defamation, invasion of privacy, outrage, fraud, [and] negligence for the false information provided in . . . 1990, and that's . . . beyond the statute of limitations." Report of Proceedings at 20.

Doscher's claim that the tolling provisions in RCW 4.16.350 apply also lacks merit, as this statute governs actions for injuries resulting from health care or related services. *See Duffy v. King Chiropractic Clinic*, 17 Wn. App. 693, 695-96, 565 P.2d 435 (1977) (RCW 4.16.350 sets forth limitation period for commencing medical malpractice actions), *review denied*, 89 Wn.2d 1021 (1978). Doscher's claim that the limitation periods are tolled by his dual disabilities of borderline personality disorder and functional anxiety disorder similarly fails. When two or more disabilities coexist at the time that a right of action accrues, "the limitation shall not attach until they all be removed." RCW 4.16.260. The disabilities to which this statute refers are the legal disabilities of minority, incompetency, and imprisonment. RCW 4.16.190; 15A Karl B. Tegland and Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure, §4.3 at 81 (2010). To toll the statute of limitations based on incompetency, plaintiffs must show that they cannot understand the nature of the proceedings and that the incompetency exists as determined under the guardianship statutes, ch. 11.88 RCW. RCW 4.16.190; *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 268, 189 P.3d 753 (2008). Doscher makes no such showing.

Finally, we reject Doscher's assertion that the applicable limitation periods toll under the doctrines of equitable estoppel and equitable tolling. *See Finkelstein v. Sec. Props., Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161, *review denied*, 127 Wn.2d 1002 (1995) (equitable tolling requires a showing of bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff); *Peterson v. Groves*, 111 Wn. App. 306, 311, 44 P.3d 894 (2002) (gravamen of equitable estoppel is that the defendant made representations or promises to perform that lulled the plaintiff into delaying timely action).[2] Neither doctrine applies here.

In an additional claim for relief, Doscher contends that the defendants erred in introducing evidence of his dismissed criminal conviction. We agree with the trial court that Doscher could not file a civil suit based on acts or omissions in his criminal case and then prevent the State and County from mentioning his conviction.

Doscher contends further that because the State and County never responded to the supplemental declaration he filed just before the summary judgment hearing, the assertions he makes therein are verities. He fails to recognize, however, that the new factual assertions in that declaration do not undermine the defendants' statute of limitations defense. The trial court considered the declaration and correctly concluded that Doscher's causes of action accrued in 1990, when he knew the WSP records were incorrect.

The trial court did not err in granting the State's and County's motions for summary judgment and in dismissing Doscher's action in its entirety.

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[2] Given our conclusion that Doscher's complaint is untimely, we need not consider the defendants' alternative arguments in support of dismissal (i.e., that Doscher does not satisfy all of the elements of fraud, that the trial judge and prosecuting attorney who participated in his 1990 proceeding are immune from liability, and that the public duty doctrine bars Doscher's negligence claim against the State).

Affirmed.

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.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

WORSWICK, A.C.J.