IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARY BALLARD, M.D., individually, Appellant, v. DENNIS POPP and JANE DOE POPP; NANCY CALDWELL and JOHN DOE CALDWELL; and ENUMCLAW COMMUNITY HOSPITAL, a Washington nonprofit corporation, Respondents.	)	No. 59003-1-I DIVISION ONE PUBLISHED IN PART FILED: December 24, 2007

GROSSE, J. – A hospital administrator who provides information in response to a subpoena issued by the Medical Quality Assurance Commission (MQAC) is immune from civil suit. Further, the three-year statute of limitations applies to claims of tortious interference with business expectancy, and on the facts here, neither the discovery rule nor the continuing violation doctrine is applicable. Documents clearly show that Dr. Mary Ballard knew or should have known of the facts giving rise to her claim against the hospital and its administrators more than three years prior to filing suit. The trial court is affirmed.

FACTS

Dr. Mary Ballard is a physician with courtesy privileges at Enumclaw Community Hospital. She claims tortious interference against three defendants: Enumclaw Regional Hospital (hospital), Dennis Popp (the hospital's

administrator) and Nancy Caldwell (the hospital's Director of Quality and Management Services). Ballard contends that the three defendants interfered with her medical practice and injured her professional reputation by spreading false and disparaging information about her to various third parties.

In May of 1999, MQAC received a complaint alleging that Ballard had engaged in unprofessional conduct. An investigator for MQAC sent a letter accompanied by a subpoena directing Popp to send to MQAC "[copies of all incidents, memos, letters or actions involving Mary Ballard, M.D.]"

Ballard's relationship with the hospital administration included various disagreements over a period of time. In 1997, the nursing staff complained about her failure to control her preschool-aged children whom she brought into the emergency room. Attempts by the hospital's assistant administrator to solve the child care issue were not well taken and Ballard hired an attorney. Two years later, the nursing staff continued to complain about Ballard's failure to control her children when she brought them to the emergency room. Nurses also reported an incident in which Ballard yelled at a patient who subsequently filed a complaint with the hospital.

Popp, the hospital administrator, kept a file about these and other incidents involving Ballard. Additionally, the file included letters from Ballard herself complaining about the very staff that had complained about her behavior. The file also held letters from Ballard's various attorneys regarding Ballard's complaints against the hospital and its administrators dating as far back as

1997.

The trial court held Popp immune from civil liability under both statutory and common law and granted summary judgment to Popp dismissing all claims against him personally. The trial court also dismissed some of Ballard's claims finding they were barred by the three-year statute of limitations. Additionally, the trial court held that evidence of claims and damages that occurred prior to the three-year statute of limitations was inadmissible. The matter was set for trial and the hospital challenged the sufficiency of evidence supporting Ballard's remaining claims. Since the gravaman of Ballard's case was found in the now time-barred claims, the remaining claims were determined to be weak and not supported by the evidence. Noting that trial would be unlikely to proceed if this court affirmed its rulings regarding the statute of limitations and admissibility of evidence, the trial court certified them as final under CR 54(b) and stayed proceedings on the remaining claims.

After the CR 54(b) certification, the parties also sought to include in the present appeal review of a summary judgment order finding Popp immune from civil liability. A commissioner of this court concluded that all issues should be before the court in the interest of judicial economy and passed to the panel the issue of whether this order would be reviewed. We will resolve all the issues.

ANALYSIS

Immunity

A subpoena was issued to Popp under RCW 18.130.050(3)[1] which gives

MQAC the authority to "issue subpoenas and administer oaths in connection with any investigation, hearing, or proceeding held under this chapter." RCW 18.130.070[2] provides:

> (1)(a) The secretary shall adopt rules requiring every license holder to report to the disciplining authority any conviction, determination, or finding that another license holder has committed an act which constitutes unprofessional conduct, or to report information . . . which indicates that the other license holder may not be able to practice his or her profession with reasonable skill and safety to consumers as a result of a mental or physical condition.
>
> . . . .
>
> (3) A person is immune from civil liability, whether direct or derivative, for providing information to the disciplining authority pursuant to the rules adopted under subsection (1) of this section.

The June 14, 1995 subpoena provided:

> On behalf of the Department of Health and pursuant to the authority granted to the MEDICAL QUALITY ASSURANCE COMMISSION, in RCW 18.130.050(3), you are ordered to produce and furnish to Investigator, DIANE GROVES, . . . on or before June 30, 1999, copies of the following documents and/or records:
>
> COPIES OF ALL INCIDENTS, MEMOS, LETTERS OR ACTIONS INVOLVING MARY BALLARD, M.D.
>
> You are hereby given notice and informed that in the case of willful and intentional failure of any person to comply with this subpoena, application to the appropriate court of this or any other jurisdiction, or other suitable administrative action pursuant to the authority granted to the Commission in Chapter 18.130 RCW will be taken.

The subpoena was accompanied by a letter which stated that MQAC was

[1] Chapter 18.130 RCW, Uniform Disciplinary Act.
[2] Former RCW 18.13.070(1) (1995). The former statute's language in effect at the time the subpoena was issued was substantially the same. It provided "[t]he disciplining authority may adopt rules requiring any person . . . ."

investigating "a complaint involving care provided by Dr. Mary Ballard as well as her behavior." Popp transmitted his file on Ballard to MQAC.

Ballard contends that Popp's file did not contain appropriate subject matter covered by RCW 18.130.070(3)'s immunity from civil liability provision because it did not contain information relating to a "conviction, determination, or finding" that Ballard had committed an act amounting to unprofessional conduct.[3] Ballard seems to argue the fact that Popp's file was marked "confidential" somehow morphed it into an illegally kept file. Ballard further argues that the file does not contain information which would amount to a "determination" of such unprofessional conduct. Ballard makes this statement without any reference to the material that is in the file. Mere allegations are not sufficient to demonstrate a genuine issue for trial. A party opposing summary judgment must present specific facts to show a genuine issue for trial.[4] As noted previously, the file primarily consisted of complaints by Ballard, letters sent to Ballard in response to her complaints, and other employee complaints about Ballard's behavior in the hospital. The numerous instances of Dr. Ballard's inappropriate displays of anger and other behavior (such as permitting her children to run unsupervised around the emergency room) that are reported in the file are relevant to the criteria found in RCW 18.130.070.

Because we find that immunity attached under this portion of the statute, we need not address the trial court's additional grounds for finding immunity

[3] RCW 18.130.070(1)(a).
[4] Tiffany Family Trust v. City of Kent, 155 Wn.2d 225, 230, 119 P.3d 325 (2005).

under both RCW 18.130.080 and common law. The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

Statute of Limitations

RCW 4.16.080[5] provides a three-year limitation period for bringing this cause of action.[6] The trial court granted summary dismissal of all pre-May 4, 2001 claims. Ballard argues that her claim of tortious interference with business expectancy is not barred by the statute of limitations because the tortious conduct was not discovered until later, and the conduct was of a continuing nature, subject to an equitable exception to the pertinent statute of limitations.

Discovery Rule

A cause of action accrues when the act or omission occurs.[7] However, there are some causes of action that are held not to accrue until the plaintiff knew or should have known the essential elements of the cause of action.[8] The discovery rule does not, however, apply to every cause of action.

Ballard argues that the statute of limitations did not begin to run until May

[5] RCW 4.16.080. Actions limited to three years

> The following actions shall be commenced within three years:
>
> . . . .
>
> (2) An 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 not hereinafter enumerated.

[6] City of Seattle v. Blume, 134 Wn.2d 243, 251, 947 P.2d 223 (1997).

[7] In re Estates of Hibbard, 118 Wn.2d 737, 744, 826 P.2d 690 (1992).

[8] Green v. A.P.C., 136 Wn.2d 87, 95, 960 P.2d 912 (1998); Hibbard, 118 Wn.2d at 744-45.

of 2003 when she received information from the State of Washington Department of Health in response to a discovery request in a subsequent MQAC hearing. Ballard contends that was the first time she became aware of the contents of the file that Popp provided MQAC pursuant to the subpoena. Ballard relies upon the discovery rule as set forth in White v. Johns-Manville Corporation:[9]

> In certain torts, however, injured parties do not, or cannot, know they have been injured; in these cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action. The rule of law postponing the accrual of the cause of action is known as the "discovery rule."

Ballard argues this discovery rule prevents the statute of limitations from barring her cause of action because she could not have known all of the elements of her cause of action. However, "[t]he general rule in Washington is that when 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. The plaintiff is charged with what a reasonable inquiry would have discovered." [10]

Ballard argues it was only when she received MQAC's court-ordered discovery responses from the Department of Health in the second MQAC hearing that she became aware of the hospital and Popp's file on her. But an injured person who reasonably suspects a wrongful act has occurred is on notice

[9] 103 Wn.2d 344, 348, 693 P.2d 687 (1985).
[10] Green, 136 Wn.2d at 96.

that legal action must be taken. In Beard v. King County,[11] this court held that the discovery rule does not apply when an injured party has alleged the facts, but simply does not yet have proof of those facts. While Ballard may not have been aware of the actual file, she was most certainly aware of the majority of its contents as much of it was comprised of letters either to or from Ballard herself. Furthermore, Ballard does not dispute the authenticity of those letters.

In Allen v. State,[12] the Supreme Court held that the statute of limitations precluded a suit by a widow who waited six years to bring a wrongful death suit against the State for paroling the two men responsible for her husband's murder. The widow argued that she was unaware that the parolees had been convicted as she had not paid attention to news accounts regarding the murder nor had she followed up with law enforcement personnel because of her difficulty in dealing with her husband's death. In holding that the widow had failed to exercise due diligence, the Allen court noted:

> The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney. [13]

Similarly, in Germain v. Pullman Baptist Church,[14] this court held that the three-year statute of limitations barred the claims of three women who failed to

[11] 76 Wn. App. 863, 867, 889 P.2d 501 (1995).
[12] 118 Wn.2d 753, 826 P.2d 200 (1992).
[13] Allen, 118 Wn.2d at 758.
[14] 96 Wn. App. 826, 980 P.2d 809 (1999).

bring an action against their pastor for sexual misconduct. The women argued that they did not know that the pastor's conduct was wrong until they were told that sexual activity between a counselor and patient is never proper. The court found, however, that there was evidence that the women knew that adultery was wrong. In so holding, the court stated:

> It is undisputed that [the women] considered the conduct to be wrong, at least in the sense that it had the potential of damaging their families and their own reputations if it became public knowledge. They also experienced psychological problems during and after the sexual misconduct, and they could have discovered the causal link between it and their injuries had they diligently sought treatment.[15]

Here, Ballard clearly knew of the conduct about which she complained. An August 13, 1998 letter from her previous attorney, Frank Cuthbertson of Gordon, Thomas, Honeywell, to the chair of the hospital's board of directors on behalf of Ballard stated:

> It appears that Dr. Ballard's right to free association and privacy have been violated by recent administrative actions. In addition, Dr. Ballard's ability to work effectively with her colleagues to provide quality patient care has been compromised. This conduct by the Administration is vindictive and intended to blacklist Dr. Ballard because she has been an outspoken advocate on behalf of patients and medical staff for improving quality of care. . . .
>
> The administration's conduct in this case violates the policy as proposed by making inappropriate and possibly defamatory comments regarding physicians as well as by failing to maintain the confidentiality of professional issues between the Administration and Dr. Ballard.

The letter requested a hearing regarding defamation of Ballard. The letter

[15] Germain, 96 Wn. App. at 834.

concludes, “If a hearing cannot be convened, Dr. Ballard will consider the other legal or regulatory remedies available to her.” Further evidence that Ballard knew of the conduct forming the basis of this action can be found in a May 8, 1998 letter written by Dr. Ballard in which she stated:

> It has been brought to my attention that over the course of the past few months, Mr. Dave Edwards has been making derogatory statements regarding my involvement in the Community Memorial Hospital Association. These statements have been made in association with Dr. Bishop while attending surgical patients in the presence of hospital employees.

Further, in 2002, Ballard filed a complaint with the hospital regarding a physician who had allegedly told a patient that Ballard was no longer allowed to treat patients at the hospital. Ballard requested the name, address, and telephone number of the hospital’s legal counsel stating:

> Unfortunately, over the past five years I have too frequently been made aware of derogatory and defamatory comments, initiated by the Administration, that have been stated to members of the Enumclaw Community, Nursing Staff, Medical Colleagues both inside and outside the Enumclaw Community and Administrators of Hospitals in Puget Sound. These comments are meant to discredit my reputation and discourage patients, medical colleagues, hospitals and other healthcare facilities from developing a business and/or collegial working relationships with me.

These documents clearly indicate that Ballard knew or should have known the facts giving rise to her claims now asserted. Even though the application of the discovery rule and whether Ballard exercised due diligence are questions of

---

[16] Mayer v. City of Seattle, 102 Wn. App. 66, 76, 10 P.3d 408 (2000) (citing Pepper v. J.J. Welcome Constr. Co., 73 Wn. App. 523, 539, 871 P.2d 601 (1994)); Matson v. Weidenkopf, 101 Wn. App. 472, 482, 3 P.3d 805 (2000) (application of the discovery rule is a question of fact); Allen, 118 Wn.2d at 758.

fact,[16] here, summary judgment is appropriate as reasonable minds would not differ.

Continuing Violation Doctrine

Ballard next argues that even if the discovery rule is not applicable, her claim survives because the conduct of the hospital and its administrators constituted an ongoing series of events that come within the ambit of the continuing violation doctrine. Washington courts have recognized an equitable exception to the statute of limitations – the continuing violation doctrine – where the wrongful conduct of the defendant is ongoing.[17] The continuing violation doctrine is an equitable exception to the relevant statute of limitations and only applies to systemic violations and not to serial violations.[18]

In Washington, the continuing violation doctrine has been applied in the context of workplace discrimination. A systemic violation is one "rooted in a discriminatory policy or practice."[19] Here, there is no such evidence.

Ballard's reliance on Caughell v. Group Health Cooperative[20] to support her theory of a continuing course of action is misplaced. In Caughell, the court clarified the statute of limitations for medical malpractice actions where a plaintiff alleges continuing negligent treatment. The Caughell court held that the three-

[16] Mayer v. City of Seattle, 102 Wn. App. 66, 76, 10 P.3d 408 (2000) (citing Pepper v. J.J. Welcome Constr. Co., 73 Wn. App. 523, 539, 871 P.2d 601 (1994)); Matson v. Weidenkopf, 101 Wn. App. 472, 482, 3 P.3d 805 (2000) (application of the discovery rule is a question of fact); Allen, 118 Wn.2d at 758.
[17] Milligan v. Thompson, 90 Wn. App. 586, 595, 953 P.2d 112 (1998).
[18] Antonius v. King County, 153 Wn.2d 256, 269, 103 P.3d 729 (2004).
[19] Antonius, 153 Wn.2d at 262.
[20] 124 Wn.2d 217, 876 P.2d 898 (1994).

year statute of limitations does accrue until the date a plaintiff last received negligent medical treatment. In so holding, the court noted that "[m]edical malpractice has not always fit comfortably within the general rules of tort"[21] and that its "unique characteristics" require the adoption of the continuing tort doctrine.[22] No such unique characteristics are present here.

Admissibility of Evidence

The trial court held that "claims and damages occurring before May 5, 2001, are barred by the statute of limitations," but "[c]laims and damages falling within the [three]-year statute of limitations survive summary judgment." Ballard argues that such a ruling categorically prevents her from demonstrating that some actions of the hospital and its administrators constituted an ongoing tort.

The trial court clarified its ruling stating that although Ballard could "not recover damages . . . based upon conduct that occurred prior to May 4, 2001," evidence of acts or events that occurred before May 4, 2001, could, and depending on the circumstances be admissible.

The admission of evidence is a matter generally within the discretion of the trial court. There was no abuse of discretion here. The trial court is affirmed.

[21] Caughell,124 Wn.2d at 222.
[22] Caughell, 124 Wn.2d at 232.

Grosse, J.

WE CONCUR:

Dwyer, J.

Ellington, J.