

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE HANFORD NUCLEAR
RESERVATION LITIGATION

NO. CY-91-3015-WFN

ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT--
STATUTE OF LIMITATIONS

This Order relates to: All Cases

At the eighth status conference on July 15, 2004, The Court reserved ruling on Defendants' Motion for Summary Judgment--Statute of Limitations, filed February 20, 2004 (Ct. Rec. 1433). Argument was presented by William Squires for the Defendants and Louise Roselle and Peter Nordberg for the Plaintiffs.¹

The Court has reviewed the file, all materials submitted on the Motion, and the *Ball v. Union Carbide Corp.*, ___ F.3d ___ 2004 WL 1573172 (6th Cir. 7/15/04) decision presented at the hearing by Defendants; considered the oral arguments of counsel, and is fully informed. For the reasons stated below, the Motion is denied.

¹See Eighth Status Conference Order: July 15, 2004, for listing of additional counsel present at the hearing.

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I. POSITIONS OF PARTIES

2 Defendants assert that five years before Plaintiffs filed suit on
3 August 6, 1990,² there was massive publicity, extensive public disclosure
4 of Department of Energy [DOE] documents, and government investigations
5 that put the Plaintiffs on notice that Hanford I-131 releases caused
6 their alleged thyroid conditions. Defendants identify February 27, 1986,
7 the date of the DOE's disclosure of 18,920 pages, as the date the
8 Plaintiffs had knowledge regarding causation. Defendants assert that
9 Plaintiffs whose diagnosis occurred before August 6, 1987 (three years
10 before filing) did not assert timely claims.

11 The Plaintiffs argue that the DOE withheld information on Hanford
12 emissions from 1944 until February 27, 1986. After the large DOE
13 document disclosure tremendous efforts were needed to determine if the
14 reported emissions had injured off-site residents. There was great
15 uncertainty with many officials, including DOE, stating there was no
16 evidence of harm. The media reported on many investigations and
17 repeatedly stated that studies were needed to determine if harm occurred.
18 Variables that would affect radiation dosage included wind, agricultural
19 areas, type of products, and dietary habits of residents. See
20 Defendants' Media Appendix, THE OREGONIAN, Sept. 12, 1986.³ As of August
21 6, 1987 (three years before filing), a Plaintiff would have concluded
22 that uncertainty was great and the ongoing Hanford Environmental Dose
23

24 ²The Evanson class action was filed August 6, 1990 (CY-90-3067).

25 ³Hereinafter citations to the Defendants' two volume Media Appendix
26 will be to the media source and date of publication.

1 Reconstruction Project [HEDR] and Hanford Thyroid Disease Study [HTDS]
2 might resolve the question of harm. Plaintiffs assert that their cause
3 of action accrued July 11, 1990, when the technical oversight panel for
4 HEDR first stated that Hanford releases were significant enough to cause
5 serious risk of illness. The lawsuit was timely filed less than one
6 month later on August 6, 1990.

7 II. SUMMARY JUDGMENT STANDARD

8 The Defendants have moved for summary judgment. A party is entitled
9 to summary judgment where the documentary evidence produced by the
10 parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*,
11 477 U.S. 242, 250 (1986). The party seeking summary judgment must show
12 that no genuine issue of material fact exists and that he is entitled to
13 judgment as a matter of law by "pointing out" to the Court that there is
14 an absence of evidence to support the non-moving party's case. *Celotex*
15 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the moving party bears
16 the burden of truth at trial, as the Defendants do here on the
17 affirmative defense,⁴ they "must come forward with evidence which would
18 entitle [them] to a directed verdict if the evidence went uncontroverted
19 at trial." *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)
20 (internal quotations omitted). "A material issue of fact is one that
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22 ⁴Washington law provides that the statute of limitations is an
23 affirmative defense and it must be proved by the party asserting it.
24 *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d
25 1547, 1553 (9th Cir. 1994); *Wagg v. Estate of Dunham*, 146 Wash. 2d 63,
26 66 (2002):

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1 affects the outcome of the litigation and requires a trial to resolve the
2 parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677
3 F.2d 1301, 1306 (9th Cir. 1982). The court must construe all facts in
4 favor of the non-moving party and all justifiable inferences are also to
5 be drawn in his/her favor. *Anderson*, 477 U.S. at 255.

6 Once the Defendants have produced the required evidence, the burden
7 shifts to the Plaintiffs. *Houghton*, 965 F.2d at 1537. The Plaintiffs
8 must go beyond the pleadings to designate specific facts establishing a
9 genuine issue for trial. *Celotex*, 477 U.S. at 324; *Marks v. United*
10 *States*, 578 F.2d 261, 263 (9th Cir. 1978) (genuine issues are not raised
11 by mere conclusory allegations). The non-moving party may do this by use
12 of affidavits (including his own), depositions, answers to
13 interrogatories and admissions. *Celotex*, 477 U.S. at 323-24. There is
14 no issue for trial "unless there is sufficient evidence favoring the non-
15 moving party for a jury to return a verdict for that party." *Anderson*,
16 477 U.S. at 249.

17 III. ACCRUAL OF CAUSE OF ACTION

18 Plaintiffs' claims arise under the Price-Anderson Act [P-AA]
19 which directs the Court to look to state law for the substantive
20 rules of decision unless the law is inconsistent with § 2210. 42
21 U.S.C. § 2014(hh). The P-AA does not have its own statute of
22 limitations. A three year statute of limitations under Washington
23 law applies to personal injury claims. WASH. REV. CODE § 4.16.080(2).
24 Here, the law of the case requires that Washington law not only provide
25 the limitations period, but also the accrual principles that determine
26 when the period began to run. *In Re: Hanford Nuclear Reservation*

1 *Litigation*, 780 F. Supp. 1551, 1570-71, 1573-74 (E.D. Wash. 1991).
2 Although the Ninth Circuit has declined to decide whether federal accrual
3 principles or state accrual principles apply to P-AA claims, *O'Connor*
4 *v. Boeing North American, Inc.*, 311 F.3d 1139, 1149 n.4 (9th Cir. 2002),
5 the Sixth Circuit has determined that state accrual principles apply
6 to P-AA claims. *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir.
7 1997).

8 In an ordinary personal injury action, the general rule is that a
9 cause of action accrues when the act or omission occurs. *Estates of*
10 *Hibbard*, 118 Wash. 2d 737, 744 (1992). In Washington, however, the
11 discovery rule is applied to claims where a plaintiff could not
12 reasonably have known of the cause of the injury, e.g., when there has
13 been professional malpractice or concealment of information by the
14 defendant. *Id.* at 749-50. "The very basis of the discovery rule is that
15 there is doubt as to when the statute begins to run." *North Coast Air*
16 *v. Grumman Corp.*, 111 Wash. 2d 315, 328 (1988). The common-law discovery
17 rule applies to all Washington "statutes of limitation, in the absence
18 of legislation limiting the application of the rule." *Funkhouser v.*
19 *Wilson*, 89 Wash. App. 644, 666 (1998), *aff'd in part and remanded C.J.C.*
20 *v. Corp. of Catholic Bishop*, 138 Wash. 2d 699, 729 (1999).

21 Here, the parties concur that under Washington law
22 a cause of action accrues when a claimant knows, or in the
23 exercise of due diligence should have known, all the essential
24 elements of the cause of action, specifically duty, breach,
25 causation and damages. *Estates of Hibbard*, 118 Wash. 2d at 752. The purpose of the discovery
26 rule is "to give the plaintiff a fair chance to ascertain the harm
and its cause." *Grumman*, 111 Wash. 2d at 328. The defendant is

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1 protected from defending against stale claims by the requirement
2 that plaintiff exercise due diligence in discovering the harm and its
3 cause. *Id.*

4 Although Washington law governs, both parties cite federal law and
5 the discussion of the federal discovery rule which is the same as the
6 Washington discovery rule. In a toxic exposure case, the Ninth Circuit
7 set out a two-part analysis to determine whether a plaintiff should have
8 known of their claim:

9 [f]irst, we consider whether a reasonable person in Plaintiffs'
10 situation would have been expected to inquire about the cause
11 of his or her injury. Second, if the plaintiff was on inquiry
12 notice, we must next determine whether an inquiry would have
13 disclosed the nature and cause of plaintiff's injury so as to
14 put him on notice of his claim. The plaintiff will be charged
15 with knowledge of facts that he would have discovered through
16 inquiry.

17 *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1150 (9th Cir.
18 2002) (citations, quotations and brackets omitted).

19 Duty to Inquire. Defendants identify three factors which they
20 maintain establish the Plaintiffs' duty to inquire including: Plaintiffs'
21 diagnosis of illness; the publicity regarding Hanford emissions; and the
22 fact that other suits were timely filed.

23 A. Diagnosis of Illness. Under Washington law simply learning of
24 an injury is not sufficient to place a duty on a plaintiff to inquire.
25 *Grumman*, 111 Wash. 2d at 319 (an action on a product defect did not
26 accrue with knowledge of an airplane crash); *Lo v. Honda Motor Co.*, 73
Wash. App. 448, 460 (Div. I, 1994) (knowledge of birth asphyxia did not
put plaintiff on inquiry notice in action for medical malpractice). A
diagnosis of thyroid cancer would not necessarily place a duty on a
plaintiff to inquire further because there are many causes of cancer so

1 such a diagnosis does not excite investigation for cause. See *O'Connor*,
2 311 F.3d at 1150.

3 Here, Defendants argue that the Plaintiffs have represented in
4 litigation that any radiation is harmful and radiation is the only known
5 cause of thyroid cancer. Under these facts Defendants assert a
6 Plaintiff's diagnosis placed upon him/her a duty to inquire or even gave
7 the person knowledge regarding Hanford's causation of the person's
8 injury. Defendants have presented no facts however, to support that at
9 the time any Plaintiff was diagnosed, he/she knew either that any
10 radiation was harmful or that radiation is the only known cause of
11 thyroid cancer. What Plaintiffs' experts now say is immaterial to what
12 the Plaintiff knew at the time of the diagnosis. Moreover, publicity
13 Defendants cite did not report that radiation was the only cause of
14 thyroid cancer, only that it was a cause of thyroid cancer. Even if the
15 Plaintiffs had known that radiation is the only cause of thyroid cancer,
16 the media reported that radiation exposure came from many sources, not
17 just Hanford emissions. See SEATTLE P-I, 5/14/86 (medical x-rays and
18 flying are also sources of radiation). It is thus disputed whether the
19 diagnosis of thyroid cancer alone would have put the Plaintiffs on notice
20 and given them a duty to inquire.

21 B. Publicity Re: Hanford Emissions. There is no dispute that
22 beginning with Karen Dorn-Steele's *Spokesman-Review* article of July 28,
23 1985 through August 6, 1990 when the *Evanson* case was filed, there was
24 extensive publicity regarding Hanford emissions in Washington state, in
25 Oregon and some sporadic national coverage, as Hanford was being
26 considered as a national nuclear waste site. Persistent themes ran

1 through the media accounts. One theme was that there was a suspicion
2 that Hanford emissions had caused diseases among downwinders. Another
3 theme was that the Hanford emissions, which were large compared to Three
4 Mile Island [TMI] and Chernobyl, presented no health risk even though
5 I-131 was emitted by Hanford and was known to cause thyroid cancer. This
6 later theme was repeated: by DOE because it found no increased risk in
7 Hanford workers; by the state radiation specialists in Washington and
8 Oregon; by Congressman Foley; by the Washington State epidemiologist; by
9 the Benton and Franklin County M.D. Health Director; and by a Walla Walla
10 physician. Of note was the fact that almost every article which included
11 the suspicion that the emissions did cause disease, also made reference
12 to the disclaimers and to a third persistent theme that health studies
13 were needed and investigations would be done.

14 Defendants assert based on *Allen v. State*, 118 Wash. 2d 753 (1992)
15 and *Ball v. Union Carbide Corp.*, ___ F.3d ___, 2004 WL 1573172 (6th Cir.
16 7/15/04) that the publicity was sufficient to create a duty to inquire.
17 Plaintiffs' correctly noted at oral argument that *Allen* stood for a
18 proposition not applicable here, that once a potential plaintiff begins
19 an inquiry, the person cannot cease. *Ball* was also shown by Plaintiffs
20 at oral argument to actually lend support to the Plaintiffs. In *Ball* the
21 court observed that where there was widespread publicity the plaintiffs,
22 living close to the Oak Ridge nuclear site, should have been aware of
23 their potential personal injury claims at the latest when official
24 preliminary reports became available. *Ball*, 2004 WL 1573172, *6. Here,
25 the Plaintiffs filed suit one month after the first preliminary report
26 of HEDR. Under the reasoning of the *Ball* court, the Hanford filing

1 should have been timely. A reasonable person would not necessarily have
2 been expected to inquire based upon these media reports.

3 C. Other Timely Filed Suits. When media attention is given to other
4 similarly situated plaintiffs filing lawsuits, federal courts have held
5 that causes of action accrue at that time. In *Hughes v. Vanderbilt*
6 *Univ.*, 215 F.3d 543, 548 (6th Cir. 2000), a woman who resided in
7 Nashville, Tennessee when press and t.v. coverage was given to lawsuits
8 against the defendant was charged with constructive knowledge of her
9 claim and that her suit filed 4½ years later was untimely. In *Berry*
10 *Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975), a
11 stockholders' fraud action was deemed untimely because the stockholders
12 should have discovered evidence of fraud earlier when the Stock Exchange
13 and the SEC filed actions against the company that were publicized and
14 when another lawsuit was filed against the company.

15 Here, the Defendants assert that two lawsuits were filed that
16 should have put other plaintiffs on notice as well as the fact that the
17 plaintiffs' bar advertised that the statute of limitations would expire
18 February 27, 1988, two years after the release of the DOE documents.
19 However, the determination of the Plaintiffs' bar regarding the statute
20 of limitation was within three years of Plaintiffs' suit being filed and
21 is therefore immaterial.

22 The first lawsuit was filed February 19, 1988, in Oregon federal
23 court by Oregon counsel on behalf of Chuck Seaman, personal
24 representative for Frieda Seaman against DuPont and General Electric.
25 CY-91-3080. Frieda Seaman died of radiation poisoning in 1986. After
26 the Federal Tort Claims Act claim was dismissed against the United States.

1 by Judge Panner, the *Seaman* case was transferred to the Eastern District
2 of Washington on December 2, 1991. This Court could not locate any media
3 reports regarding the *Seaman* case that would have put the Plaintiffs on
4 inquiry notice.

5 The second Hanford related case was filed July 31, 1986, by ten
6 Colville Tribal members in the Eastern District of Washington against the
7 United States, DuPont and GE. SPOKESMAN-REVIEW article, 8/03/86. Less than
8 a year later, on June 25, 1987, the *Spokesman-Review* reported that a
9 stipulated dismissal with a right to refile would be entered in the
10 Colville case. Joint Stipulation filed 7/13/87, C-86-601-JLQ, Ct.
11 Rec. 13. The Court takes judicial notice of the Joint Stipulation which
12 includes the comment "the parties anticipate that the study [dose
13 reconstruction] may provide more definitive data on health effects." *Id.*
14 Thus the case that received publicity did not proceed in part because
15 definitive data on health effects was not yet available. A reasonable
16 person might not have been expected to inquire about the cause of his/her
17 disease based upon this aborted litigation.

18 A review of the above three factors identified by the Defendants
19 lead this Court to conclude that material questions of fact exist as to
20 whether these factors were sufficient alone or in combination to put a
21 Plaintiff on notice that he/she had a duty to inquire as to whether
22 Hanford emissions had caused his/her injury. This conclusion is
23 supported by Washington cases which have held that a plaintiff's duty of
24 due diligence normally raises a factual question that will preclude
25 summary judgment unless reasonable minds can reach but one conclusion.
26 *Estates of Hibbard*, 118 Wash. 2d at 760; *Green v. A.P.C.*, 136 Wash. 2d

