

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

JUL 22 2004

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

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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1

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
21

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

1 87, 100. (1998). Reasonable minds could reach more than one conclusion
2 on this issue.

3 What Would an Inquiry Reveal? Even if there was no material
4 question of fact as to a duty to inquire, to obtain summary judgment the
5 Defendants would still have to show that no material question of fact
6 existed on what an inquiry by Plaintiffs would have revealed. It is
7 undisputed that Washington law provides that a cause of action will
8 accrue when the facts supporting the claim should have been discovered,
9 not when they actually were discovered. *Allen v. State*, 118 Wash. 2d
10 753, 758 (1992). Moreover, it is the knowledge of the factual basis that
11 starts the statute of limitations to run, not knowledge of the legal
12 basis of the cause of action. *Id.* A plaintiff does not need to have
13 "[a] smoking gun" to be required to file suit. *Beard v. King County*, 76
14 Wash. App. 863, 868 (Div. I, 1995). A plaintiff will be charged with
15 constructive knowledge of what a reasonable inquiry would have disclosed.
16 *Green*, 136 Wash. 2d at 96; *Hudson v. Condon*, 101 Wash. App. 866, 875
17 (Div. III, 2000).

18 Before and after the DOE disclosed documents on February 27, 1986
19 (along with its denial that emissions caused health risks), there was
20 significant media coverage in Washington and Oregon. Frequently
21 mentioned was the fact that the Hanford releases were many times larger
22 than TMI and Chernobyl and that one emission, I-131 could cause thyroid
23 cancer. Equally prevalent was the fact that health studies were needed
24 to determine if the Hanford releases caused injuries as there was no
25 proof of that fact and studies were in the planning stages, e.g.,
26 *Spokesman-Review*, 11/03/85 (state representative calls for state study

1 on Hanford's impact on public health); *Spokesman-Review*, 11/16/85
2 (Washington State's Nuclear Waste Board will do investigation of
3 downwinders' health); *Spokesman-Review*, 04/01/86 (Representative Foley
4 supports a congressional investigation of Hanford emissions); *Spokesman-*
5 *Review*, 04/30/86 (CDC and Washington State are working together to
6 estimate doses); Press Release *Washington Nuclear Waste Board*, 09/26/86
7 (Hanford Health Effects Panel [HHEP], a cooperative effort between the
8 CDC and Washington State recommends health effects study and dose
9 reconstruction); *Tri-City Herald*, 03/07/87 (Hanford Historical Document
10 Review Committee [HHDR] made up of state officials from Washington and
11 Oregon recommended dose reconstruction as critical to determination of
12 health effects); and *Seattle PI*, 04/09/87, 06/07/87; *Spokesman-Review*,
13 07/13/87 (The DOE agrees to fund a study on dose reconstruction).

14 Also common in the media reports was the assertion that the Hanford
15 emissions did not or likely did not cause any health risks, e.g.,
16 *Oregonian*, 03/02/86 (DOE states that Hanford emissions presented no
17 health risk); *Oregonian*, 03/12/86 (Washington and Oregon radiation
18 specialists say that there was likely no problem from the Green Run in
19 1949); *Spokesman-Review*, 03/14/86 (Representative Foley doubts that the
20 Green Run caused health problems); *Seattle PI*, 03/15/86 (DOE found no
21 increase in illnesses in Hanford employees) (this study was repeatedly
22 cited in the media); *Yakima Herald-Republic*, 03/16/86 (the DOE says there
23 were no observable impacts on health); *Olympian*, 03/20/86 (Washington
24 State epidemiologist Dr. Sam Millham found no unusual increase in cancer
25 in the people near Hanford) (this study also was repeatedly cited in the
26 media); *Yakima Herald-Republic*, 04/02/86 (Benton County and Franklin

1 County medical health director does not expect the studies to show any
2 abnormal health effects); Seattle PI, 05/12/86 (Walla Walla physician
3 states that the hospital has seen no increase in cancer); Spokesman-
4 Review, 09/11/86 (Washington Office of Radiation Protection expects no
5 real health hazards likely from whole body doses. Dose to thyroid might
6 be enough to increase the incidence of thyroid cancer).

7 The Defendants argue that the Plaintiffs had no right to rely on
8 any DOE denials. When a plaintiff has direct evidence to the contrary,
9 he/she cannot reasonably rely on denials or wait for the defendants
10 to admit causation. *Carey v. Kerr-McGee Chemical Corp.*, 999 F. Supp.
11 1109, 1116 (N.D. Ill. 1998). In numerous Washington cases, however,
12 the courts have considered what effect a defendant's reassurance or
13 third party's explanations regarding causation might have on a plaintiff.
14 *Caughell v. Group Health*, 124 Wash. 2d 217, 238 (1994) (question of
15 fact as to what effect an M.D.'s reassurance had on a patient's knowledge
16 of medical malpractice claim); *Grumman*, 111 Wash. 2d at 324 (the fact
17 that the investigation had ruled out mechanical defect was material to
18 the question of the plaintiff's knowledge in a product liability
19 case); *Price v. State*, 96 Wash. App. 604, 612, 617 (Div. II, 1999)
20 (DSHS's reassurance that they had provided all records was a fact to
21 be considered on when the parents had sufficient knowledge to bring a
22 wrongful adoption action); *Lo v. Honda Motor Corp.*, 73 Wash. App. 448,
23 456 (Div. I, 1994) (M.D.'s explanation regarding causation reduced
24 the patient's duty to inquire when a child is born with severe
25 disabilities). Here, not only the DOE but local, state and national
26 leaders made reassuring statements and expressed doubt that the Hanford

1 emissions had caused health problems. The statements were usually in
2 conjunction with recommendations that more studies were needed.

3 Defendants argue that reasonable minds can reach but one conclusion
4 and that is that the Plaintiffs with a diagnosis of thyroid cancer that
5 predated August 6, 1987 (three years before suit filed), were on notice
6 of facts in support of all of the elements of their claims by
7 February 27, 1986, the time of the DOE document disclosures. Defendants
8 assert that long before the HEDR technical oversight panel said that
9 Hanford emissions were significant enough to cause serious risk of
10 illness on July 11, 1990 (the date after which Plaintiffs filed their
11 suit), that other evidence of radiation doses was available to Plaintiffs
12 in the media, e.g., *Spokesman-Review*, 03/14/86 (the director of the
13 Environmental Policy Institute [EPI] said that by releasing large amounts
14 of radiation you put surrounding people at risk); *Spokesman-Review*,
15 05/03/86 (the EPI estimated that the 1944 through 1969 Hanford releases
16 may have caused 90-140 thyroid cancers); *Oregonian*, 5/11/86 (after two
17 months of its own study the newspaper reports on sources of potential I-
18 131 exposure--milk and vegetation, and that risk is greatest for
19 children); and *Yakima Herald-Republic*, 09/11/86 (Al Conklin of the
20 Washington State Office of Radiation Protection said some residents got
21 significant doses of radiation).

22 All the articles cited by the Defendants, however, indicate that the
23 research findings were preliminary or dealt with potential doses.
24 Moreover, all the articles discussed the fact that future studies would
25 be conducted to answer the question definitively. Here, on Defendants'
26 Summary Judgment Motion all facts must be construed in favor of the

1 non-moving Plaintiffs and all justifiable inferences drawn in their
2 favor. *Anderson*, 477 U.S. at 255. A justifiable inference could be drawn
3 that even a plaintiff with a duty to inquire would have found on inquiry
4 that the Hanford emissions were potentially dangerous but that the actual
5 effect on health was disputed and that official studies of doses and
6 thyroid disease were going to be conducted to give a more definitive
7 answer. It is questionable whether a Plaintiff could have connected all
8 of the dots, as Defendants assert, between his or her injury and Hanford
9 emissions prior to August 7, 1987. Unlike the Oak Ridge plaintiffs, the
10 Hanford Plaintiffs did not wait until final reports were available.
11 *Ball*, ___ F.3d ___, 2004 WL 1573172, *4.

12 The Court concludes that material questions of fact preclude summary
13 judgment. See *Grumman*, 111 Wash. 2d at 319 (that a causal connection
14 exists between the harm and the Defendants' acts or omissions is usually
15 a question of fact); *Ohler v. Tacoma General Hosp.*, 92 Wash. 2d 507, 510
16 (1979) ("The correct formulation of the discovery rules poses a question
17 of law, but the application of the rule presents a question of fact.")
18 As to any given Plaintiff material questions of fact exist as to:
19 (1) whether the Plaintiff's diagnosis, media reports and other lawsuits
20 triggered a duty to inquire; and (2) whether an inquiry would have
21 revealed facts supporting all the elements of the Plaintiff's claim prior
22 to August 6, 1987.

23 IV ACCRUAL OF P-AA CLAIMS

24 As an alternative basis for denying the Defendants' Summary Judgment
25 Motion the Plaintiffs argue that a cause of action could not accrue until
26 the 1988 Amendments to the P-AA created those claims, i.e., no earlier

1 than August 20, 1988. They argue that there are sound policy grounds for
2 giving Plaintiffs whose claims were not yet extinguished the full benefit
3 of the statutory period under the new provisions. Plaintiffs' argument
4 is supported by *O'Donoghue v. State*, 66 Wash. 2d 787 (1965). There the
5 court held that "the limitation of the new statute as applied to pre-
6 existing causes of action commences when the cause of action is first
7 subjected to the operation of the statute, unless the Legislature has
8 otherwise provided." *Id.* at 792.

9 At oral argument Plaintiffs concede that this is an unexplored area
10 of law. While it would support summary judgment for Plaintiffs, the
11 Plaintiffs have not sought summary judgment on this rather unique theory.
12 The Court is equally reluctant to rely on this as a basis for denying
13 Defendants' Summary Judgment Motion.

14 **V. TOLLING OF THE STATUTE OF LIMITATIONS WITH A CLASS ACTION**

15 In *American Pipe & Constr. Co. v. Utah*, the Supreme Court
16 established that "the commencement of a class action suspends the
17 applicable statute of limitations as to all asserted members of the class
18 who would have been parties had the suit been permitted to continue as
19 a class action." 414 U.S. 538, 554 (1974).

20 Once the statute of limitations has been tolled, it remains
21 tolled for all members of the putative class until class
22 certification is denied. At that point class members may
choose to file their own suits or to intervene as plaintiffs
in the pending action.

23 *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983).

24 Here, the *Evanson* class action was filed August 6, 1990. On
25 April 15, 1994, a joint motion was filed to certify a class action (Ct.
26 Rec. 385). Judge McDonald entered a 96 page Order on September 22, 1994,

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1 addressing the Motion for Class Certification (Ct. Rec. 452). In the
2 Order's introduction, the court twice notes that it is "reserving" on the
3 Motion to Certify a Rule 23(b)(3) Opt-Out Class Action (Ct. Rec. 452 at
4 p. 2). In both the introduction and the conclusion of the Order, the
5 court states that it is not denying the Motion (Ct. Rec. 452 at pp. 2,
6 95). Finally, the Order provides

7 Accordingly, **IT IS HEREBY ORDERED** that plaintiffs' motion to
8 certify to this action under Rule 23(b)(3) is **RESERVED**. The
9 issue and motion may be renewed by any party or by the court
10 at a more appropriate time.

11 **IT IS FURTHER ORDERED** that the sub-motion of the Hamilton,
12 Criswell, and Jaros plaintiffs' groups to certify this as a
13 mandatory class action under Rule 23(b)(1)(A), or a mandatory
14 issues class action under Rule 23(b)(1)(A) and 23(c)(4)(A) is
15 **DENIED**.

16 Ct. Rec. 452 at pp. 95-96 (Defendants' Exhibit #29).

17 On remand the Ninth Circuit recognized that the class certification
18 issue was still pending and said "[w]e recommend that the court resolve
19 the pending motions for class certification as soon as possible"

20 *In Re: Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1139 (9th
21 Cir. 2002). At this Court's first case management conference after
22 remand, the Court acknowledged the pending class certification motion.

23 In its Order the Court stated that "Plaintiffs' counsel have advised
24 the Court that all Motions for Class Certification are **WITHDRAWN**,
25 including the Motion in *In Re: Hanford*, CY-91-3015, Ct. Rec. 385." Case
26 Management Order No. 1, May 29-30, 2003, filed 6/03/03 (Ct. Rec. 1289),
p. 9.

Based on the record, the Plaintiffs assert that the statute of
limitations was tolled from the filing of the *Evanson* action on August 6,
1990, until they withdrew their Motion at the case management conference

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1 on May 29-30, 2003. In contrast, Defendants construe Judge McDonald's
2 Order as a denial of class certification and assert that the statute of
3 limitations was tolled only until September 22, 1994, when Judge McDonald
4 entered the Order. Defendants cite *In Re: Copper Market Anti-Trust*
5 *Litigation*, in support of their position. 300 F. Supp. 2d 805 (W.D. Wis.
6 2003). In that case, a lower court had denied class certification
7 "without prejudice," *id.* at 810, while Judge McDonald specifically
8 reserved on certification and the Motion remained pending.

9 There is no material question of fact on this issue. The Court may
10 grant summary judgment for the Plaintiffs ruling as a matter of law that
11 the *Evanson* filing on August 6, 1990, tolled the statute of limitations
12 until May 30, 2003. See *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12
13 (9th Cir. 1982) (court may grant summary judgment for non-moving party
14 provided "moving party against whom summary judgment was rendered had a
15 full and fair opportunity to ventilate the issues involved in the
16 motion."); 10A CHARLES WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2720, pp.
17 345-52 (3d ed. 1998). Defendants had a full and fair opportunity to
18 address the issue of tolling having raised it in their memorandum in
19 support of the Summary Judgment Motion.

20 VI. CONCLUSION

21 Whether any Plaintiff in this case had a duty to inquire and would
22 have discovered facts in support of all elements of his or her personal
23 injury claim, especially causation, prior to August 6, 1987, presents
24 material questions of fact that preclude summary judgment. Although the
25 Plaintiffs' claims might not have accrued until August 20, 1988, when the
26 Amendments Act to the P-AA became effective, the Court is not relying on

1 this basis to deny Defendants' Summary Judgment Motion. Finally, the
 2 Court determines as a matter of law that the statute of limitations was
 3 tolled from August 6, 1990, when the Evanson class action was filed, to
 4 May 30, 2003, when the Motion for Class Certification was withdrawn.
 5 Summary judgment is granted to the Plaintiffs on this issue.

6 Accordingly,

7 **IT IS ORDERED** that:

8 1. Defendants' Motion for Summary Judgment--Statute of Limitations,
 9 filed February 20, 2004, Ct. Rec. 1433, is **DENIED**.

10 2. The Court determines as a matter of law that the statute of
 11 limitations in this action was tolled from August 6, 1990, to May 30,
 12 2003. Summary judgment is **GRANTED** to the Plaintiffs on this issue.

13 The District Court Executive is directed to file this Order and
 14 provide copies to Liaison Counsel; Mediator Gary Bloom; **AND TO pro se**
 15 Plaintiffs Noreen L. Wynne, Carmela M. Destito-Buttice (for late John P.
 16 Destito, Jr.), and Marilyn F. Mlnarik.

17 **DATED** this 22 day of July, 2004.

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 WM. FREMMING NIELSEN
 SENIOR UNITED STATES DISTRICT JUDGE