STATE OF VERMONT
CHITTENDEN SUPERIOR COURT

DOCKET #S 0779-01 CnC

ENTRY REGARDING MOTION

ERIC FRITZEEN, et al. v. JOHN GRAVEL, ESQ.

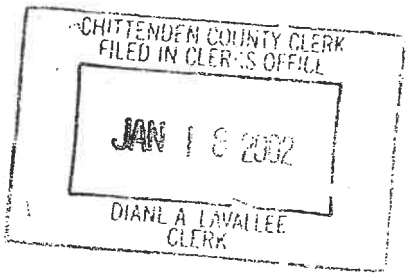
TITLE OF MOTION: **Defendant's Motion for Summary Judgment**

DATE MOTION FILED: September 21, 2001

RESPONSE FILED: November 6, 2001

REPLY TO OPPOSITION: November 30, 2001

SUPP. MEMO: December 5, 2001



Defendant moves for Summary Judgment based on a claim that the action has been commenced beyond the relevant Statute of Limitations, which both parties recognize is a six-year statute of limitations set forth in 12 V.S.A. §511. Plaintiffs argue that the action is timely. The issue is when the statute began to toll under the particular facts of the case.

The facts are undisputed, and are as set forth in Plaintiff's Statement of Undisputed Facts, Defendant's Exhibit A attached to the Motion, and Defendant's Exhibit A attached to Defendant's Reply filed November 30, 2001.

Defendant is an attorney who represented Plaintiffs from August 1993 to June 1994 in connection with a development project that was ongoing when Defendant Attorney Gravel became involved. Plaintiffs' neighbors had opposed their project, and sought revocation of a septic permit that Plaintiffs had obtained. A hearing was held before the ANR's Department of Environmental Conservation. At the time of the hearing, Plaintiffs were represented by Attorney William Robinson, and Plaintiffs prevailed. The neighbors appealed to the Water Resources Board. Attorney Robinson left, and Attorney Gravel assumed representation of Plaintiffs on the appeal. On October 21, 1993, a list of exhibits was circulated to the parties listing the specific exhibits that were being forwarded to the Water Resources Board for consideration on appeal, and giving the parties an opportunity to supplement the record with additional exhibits. This list did not include specific documents that supported Plaintiffs' position from a technical point of view, and that had been relied on by the Agency in its determination. Attorney Gravel, the Defendant in this case, did not take steps to supplement the record on appeal with

the specific documents that supported his clients' position, with the result that those documents were not before the Board when it considered the neighbors' appeal.

On June 1, 1994, the Water Resources Board issued its decision remanding the case to the Agency with the direction that the permit be revoked on the grounds that the Plaintiffs claim that the system functioned in accordance with standards was not supported by the record before the Board. On June 8, 1994, Defendant Attorney Gravel wrote a letter to his clients describing the outcome, and setting forth their alternatives. Four different courses of action were identified, each involving further work to be done in pursuit of changing the outcome, and each entailing expenses. Subsequently, Attorney Liam Murphy began to represent the Plaintiffs, and on June 16, 1994, Attorney Murphy filed with the Board a Motion to Correct Decision, seeking to change the Board's decision.

On July 1, 1994, Plaintiff Eric Fritzeen executed an affidavit stating that he had discovered that the documents that would have supported the Plaintiffs' position had been missing when the matter went before the Water Resources Board. This affidavit was attached to a Motion to Supplement Record of Appeal filed on July 5, 1994 by Attorney Murphy on Plaintiffs' behalf, seeking to have the missing documents included in the record and available to the Board for reconsideration of its decision. On August 24, 1994, a hearing was held on both the Motion to Correct Decision, and the Motion to Supplement Record of Appeal. On September 14, 1994, the Motions were denied in a written decision issued by the Water Resources Board. An appeal of the Board's decision was filed with the Vermont Supreme Court.

On December 9, 1994, Attorney Liam Murphy wrote a letter to Defendant Attorney Gravel on behalf of the Plaintiffs stating that the Plaintiffs were exploring whether or not they had a malpractice action against him. The contents of the letter shows that they had concluded that Attorney Gravel's failure to supplement the exhibits before the Board with the relevant documents constituted negligence, and that the Plaintiffs had incurred unnecessary expenses. The issue being explored in the letter was whether or not causation could be established between the negligence and the consequences to Plaintiffs, presumably of loss of the permit.

On December 6, 1995, the appeal to the Vermont Supreme Court was dismissed by stipulation of the parties, resulting in revocation of the permit.

On June 15, 2001, this action was filed against Defendant Gravel alleging malpractice arising out of his failure to supplement the exhibits before the Board on appeal with the documents from the Agency hearing that supported the Agency decision below.

Discussion

Defendant argues that the statute of limitations began to run on December 9, 1994, the date of the letter on behalf of Plaintiffs to Defendant Gravel concerning a possible malpractice action. Since this case was filed over 6 years after that date, Defendant claims it was filed out of time. Plaintiff argues that the period of measurement should start on the date the Supreme Court appeal was dismissed, since until

such time as the decision to revoke the permit became final, the extent of the damages was not known.

The dispute between the parties concerns the point at which Plaintiffs "discovered" the claim, or could have discovered it with reasonable inquiry. The court agrees that this is the standard for the accrual of the claim. The question is, on these facts, when did that occur? The facts show that the Defendant's failure to supplement the record before the Board with the missing documents was known to the Plaintiffs as of July 5, 1994, the date of the filing by Attorney Murphy of the Motion to Supplement Record of Appeal, as shown by its contents. Thus, the element of breach of the standard of care was known as of that date. Prior to that date, when Mr. Gravel wrote to Plaintiffs on June 8, 1994 to describe the Board's decision and the options available as a consequence, the impact of the missing documents was described to Plaintiffs. That is when Plaintiffs received notice of the situation they were in as a result of the revocation decision by the Board. While this does not show proof of causation, it certainly gave Plaintiffs reasonable notice that the need to engage further attorney services and take additional steps could well have been caused by the fact that the Board did not have the critical supporting documents before it. Thus, the element of causation was known to Plaintiffs by the time of receipt of the letter of June 8, 1994. The same letter also gave Plaintiff notice of damages incurred as a consequence of Defendant's conduct, as each of the four options identified entailed expenses that presumably would not have been incurred if the supporting documents had been before the Board. Thus, it is arguable that the cause of action accrued no later than July 5, 1994, the date by which Plaintiffs had notice of all of the elements of a negligence claim.

Defendant is not relying on that date, however. Instead, he relies on the later date of December 9, 1994, the date of the letter specifically informing Mr. Gravel that a malpractice action against him was under consideration and investigation. Certainly, as of that date, the allegations of breach, causation, and damages were all known.

Plaintiffs argue that the action did not accrue until the conclusion of the Supreme Court appeal, because it was not until then that the extent of damages could be known, since up until then, it was possible that the revocation decision could have been reversed. First, there is no requirement that a claim does not begin to accrue until all damages become discoverable. In fact, in the typical personal injury action arising from an auto tort, the "medical end result," which allows the best information concerning damages to become available, is often not achieved until long after a case is filed, but the case still accrues when the damages are discovered to any extent, even though the full extent may not become known until later.[1] In this case, the facts show that Plaintiff had already discovered the existence of damages as of the December 9, 1994 letter, because by then additional attorneys' fees, at the

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[1] On these facts, using the dismissal date would have the effect of having put into the hands of the Plaintiffs themselves the opportunity to establish the starting date for the six-year statute of limitations as well as the claim itself, since they could control both the existence of a claim and its accrual by agreeing or not agreeing to stipulate to dismissal.

least, had been incurred in order to pursue one or more of the options outlined in the June 8, 1994 letter. For example, Plaintiffs had incurred expenses in having Attorney Murphy file the Motion to Supplement Record of Appeal and the Motion to Correct Decision.

Plaintiff argues that the court should rule as a matter of law that Plaintiffs were required to exhaust their remedies in the underlying appeal before the cause of action accrued, and cite cases from other jurisdictions in support of that approach. The decision and analysis adopted by this court today does not reject the exhaustion doctrine in the appropriate case. It may well be that in some cases, until underlying litigation is completed, it cannot be known whether there is even a negligence claim at all, and/or whether Plaintiffs have suffered any damages, but that depends on the facts and circumstances of the case.

On these facts, assuming them to be true, damages began to develop within 30 days of the Board's decision, because it became immediately necessary for the Plaintiffs to incur expenses to take remedial action that would not have been necessary if the alleged breach had not occurred. Furthermore, as previously noted, the application of the exhaustion doctrine in this case would have put into the hands of the Plaintiffs the ability to prolong the time for bringing the action much longer than the six years established by law as the reasonable and fair length of time to bring a lawsuit once claimant is on notice of its existence.

There is no question that Plaintiffs knew as of December 9, 1994 that they had a prima facie case, and were exploring it further. The policy underlying the law, and the principle of the discovery doctrine, provided them a full six years from that date, if not earlier. Defendant was put on notice as of that date of a possible claim against him. That is the appropriate date for the accrual of the claim. By filing the action more than six years later, Plaintiffs have filed out of time. The facts support Defendant's claim that the action is barred by the statute of limitations.

WHEREFORE,

Defendant's Motion for Summary Judgment is *granted.*

Mary Miles Teachout — 1/18/02

SUPERIOR COURT JUDGE — DATE

COPIES SENT TO:

John F. Evers, Esq.
Robert A. Mello, Esq.

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

ERIC FRITZEEN, et al.	)	
	)	**Chittenden Superior Court**
v.	)	**Docket No. S0779-01 CnC**
	)	
JOHN GRAVEL, ESQ.	)	

JUDGMENT

This action came on for consideration of the Motion of Defendant for Summary Judgment before the Court, Honorable Mary Miles Teachout presiding, and the Court On January 18th, 2001 having granted Defendant's Motion for Summary Judgment,

It is ORDERED and ADJUDGED that judgment is entered for the Defendant, and Plaintiffs shall take nothing on the claim.

Date at Burlington, Vermont this 18th day of January, 2002.

Mary Miles Teachout

Hon. Mary Miles Teachout
Presiding Judge