2003

# Russell Packard Development, Inc., a California Corporation; and Lawrence M. Russell, an individual v. Joel M. Carson, an individual; William Bustos, an individual; and John Thomas, an individual : Reply Brief

Utah Supreme Court


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IN THE UTAH SUPREME COURT

RUSSELL PACKARD DEVELOPMENT, INC., a California Corporation; and LAWRENCE M. RUSSELL, an individual,

Plaintiffs/Appellants/Respondents,

vs.

JOEL M. CARSON, an individual; WILLIAM BUSTOS, an individual; and JOHN THOMAS, an individual,

Defendants/Appellees/Petitioners.

District Court No. 010910854
Appellate Court No. 20020546-CA
Supreme Court No. 20030822-SC

# PETITIONERS CARSON AND BUSTOS REPLY BRIEF

Appeal on Certiorari from the Utah Court of Appeals
Judges Billings, Thorne, and Bench

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## ARGUMENT

### I. RESPONSE TO RUSSELLS' STATEMENT OF FACTS.

Russells' Statement of Facts, at page 8 of their brief, contains two statements that have no support in the record. Initially, Russell states on page 8 "[t]hat investigation concerning the ownership and control of CMT and the circumstances of the CMT contract and PRP Contract took over one year and revealed the true nature of the flip sale and purchase." (R.81-82, ¶¶ 55, 58-60). This statement is not supported by any allegations in the Amended Complaint. Moreover, the statement defies logic. Russell was a party to the PRP-CMT contract, and does not assert he did not have a copy of the contract. Saratoga, with whom Russell admits he was conversing in the Spring of 2000, had a copy of the Saratoga-CMT contract. All Russell had to do was ask Saratoga for their contract, and he could have compared the two contracts in June of 2000, some 5 months before the statute of limitations expired.

Second, Russell states, at page 8, that "[Russell] did not file before [November, 2000] because they did not have an adequate factual basis sufficient to establish any wrongful conduct." Russells' brief does not offer the Court any reference to the record in support of this statement, perhaps because none exists. This statement is not supported by any allegation in the Amended Complaint. (R.72) If the "wrongful conduct" was the concealment, Russell admits that the concealment ended in the Spring of 2000. (R.81, ¶

59) If the "wrongful conduct" was the "flip" sale, the two contracts which were either in Russells' possession or available to it in the Spring of 2000 would have revealed the parties to both transactions.

## II. THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT'S DISMISSAL OF PLAINTIFFS' CLAIMS COVERED BY U.C.A. § 78-12-25(3).

### A. The Court of Appeals confused the standards applicable to statutes with an internal discovery rule, and those without.

Russells' brief (p. 12) acknowledges, citing *Burkholtz v. Joyce,* 972 P.2d 1235 (Utah 1998) and other cases, that if they had knowledge of the facts underlying their claim prior to the expiration of the four year statute of limitations, that their claim should have been asserted before the four years expired.

The decision of the Court of Appeals confuses principles that apply to statutes of limitations with an internal discovery rule (such as U.C.A. § 78-12-26(3)) with those that apply to statutes which do not have an internal discovery rule (such as U.C.A. § 78-12-25(3)). Without question, claims covered by statutes with internal discovery rules are tolled until discovery of, for example, "the facts constituting the fraud . . . ." U.C.A. § 78-12-26(3). Prior decisions of this Court, however, state unequivocally that for claims governed by statutes of limitations with no internal discovery rule, if the plaintiff discovers its claim within the original limitations period, it has to commence its action within the original limitations period. See *Warren v. Provo City Corp.,* 838 P.2d 1125 at

1129-30 (Utah 1992) and *Walker Drug Co. v. LaSal Oil Co.*, 902 P.2d 1229 at 1231 (Utah 1995).

The Court of Appeals has taken the "tolling" concept applicable to cases with the internal discovery rule and applied it to a newly constructed special category of the discovery rule they refer to as "fraudulent concealment." (¶¶ 14, 15, of Court of Appeals decision.) The existing concealment exception already contemplates conduct by a defendant that conceals the claim, and there is no need to create any such special category. See *Spears v. Warr,* 2002 UT 24, ¶ 32, 44 P.3d 742. This confusion of standards is first observable in Judge Billings' comments at oral argument beginning at page 11, lines 9-15 of the transcript of oral argument, where she observes that the statute of limitations would begin to run when Russell and Saratoga talked in the Spring of 2000.

Thus, the first mistake the Court of Appeals made in its analysis under U.C.A. § 78-12-25(3) was in concluding that, under the concealment prong of the judicially created discovery rule, the statute of limitations is tolled and does not begin to run until the claim is discovered. This simply is not the case where the claim is discovered within the limitations period. *Walker, supra; BYU v. Poulsen Constr.,* 744 P.2d 1370 at 1374 (Utah 1987) (a contract case decided under UCA §78-12-23, which has no internal discovery rule)and *Atwood v. Sturm, Ruger & Co.*, 823 P.2d 1064 (Utah 1992). These cases make it clear that discovery of a concealed claim within the initial statute of limitations period requires the plaintiff to file its action before that statute runs.

### B. The Court of Appeals analysis of Russells' "initial showing" focused on the wrong date and not on the allegations in the complaint.

If the plaintiff alleges a safe harbor for late filing under the concealment prong or the exceptional circumstances prong of the discovery rule, ". . . an initial showing must be made that the plaintiff [1] did not know and [2] could not reasonably have discovered the facts underlying the cause of action in time to commence an action within that period." *Walker Drug Co. v. LaSal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995)(bracketed numbers added).

The second error made by the Court of Appeals was its conclusion that Russell only had to make an initial showing that "Russell did not and should not have known of its claims at closing [in November 1996], and therefore the threshold requirement is met for application of the discovery rule." 2003 UT App. 316 at ¶ 20. The threshold showing that Russell had to make should not have been measured as of 1996, when the alleged cause of action first accrued. The threshold showing that Russell had to make was that they "did not and could not reasonably have discovered the facts underlying the cause of action in time to commence an action **within that period**." (Emphasis added.) *Walker, supra,* at 1231. In other words, the inquiry should have been as to whether Russell should reasonably have discovered the allegedly concealed claims before November, 2000.

Russell argues at page 8 and at the end of page 12 of their brief that the Court of Appeals' decision is justified because "[t]he Russell plaintiffs sufficiently pled they did

not discover the facts underlying their claims until after expiration of the limitations period." This is not what the Court of Appeals discussed, but it is the analysis that they should have made.

Whether Russell plead sufficient facts as to its acknowledge is a question of law. Carson and Bustos concede (for purposes of this analysis only) that Russell has alleged concealment as of 1996. However, Russell has pointed to no allegations in its Amended Complaint that support their claim that they "pled they did not discover the facts" prior to the running of the four year statute in November 2000. The closest allegation is in paragraph 62 of Russells' Amended Complaint, R.82, where it is alleged that:

> After the conversation with Saratoga's representative [in the Spring of 2000] concerning CMT's actual status, further inquiry and investigation were made by plaintiff concerning the ownership and control of CMT and the circumstances of the two contracts signed in November 1996 by plaintiffs and Saratoga.

Nowhere in their Amended Complaint does Russell allege, or make an "initial showing," of (a) when they allegedly discovered whatever it was they claim they needed to discover; (b) what they did to discover what they claim they needed to discover; or (c) why the facts were not discovered prior to the November 2000 running of the statute of limitations.

Russell has admitted that by the Spring of 2000, some five months prior to the expiration of the statute of limitations, they knew that CMT was not the agent for or under

the control of Saratoga. (R.81, ¶ 58) Russell also admits (R.82, ¶ 61) that any alleged concealment by Carson and Bustos ended in the Spring of 2000.

Russell was required to make an "initial showing" that it [1] did not have knowledge and [2] could not reasonably have had knowledge of its claims before the statute of limitations otherwise ran in November of 2000. *Walker, supra,* at 1231.

Even if this Court were to give Russell the benefit of the doubt and assume that Russell did not discover all of the facts underlying their claims until after November of 2000 when the statute of limitations expired, Russell has made no allegations whatsoever in support of the second prong of the *Walker* test, i.e., that "it could not reasonably have discovered the facts underlying the cause of action in time to commence an action within that period." *Walker, supra,* at 1231.

Both Russell and the Court of Appeals have ignored the second half of the *Walker* analysis. Russell has not and cannot point to a single allegation in the Amended Complaint which supports the notion that it could not reasonably have discovered prior to November of 2000 the facts which it wants this Court to believe it discovered after November of 2000.

What Russell and the Court of Appeals are doing is asking this Court to modify the standard enunciated in *Warren v. Provo City Corp.*, 838 P.2d 1125 at 1129 (Utah 1992) and in *Walker, supra,* from an objective standard of the reasonable plaintiff and what that reasonable plaintiff could have learned to that of a subjective standard, i.e., what did the

plaintiff actually discover, regardless of its (lack of) effort. Even if this Court were to modify the standard from objective to subjective, Russell has not attempted to make the "initial showing" required by *Walker* of what it did to gain additional information.

At page 16 of its brief, Russell argues that even if it did have the two contracts before it, it might not have known of the fact that CMT and Saratoga were not affiliated. This argument ignores the admission made by Russell in his Amended Complaint that Russell knew in the Spring of 2000, well before the statute of limitations ran, that CMT was not under the control of Saratoga. (R.81, ¶¶ 55, 58 and 59.)

Russell also argues (p. 16) that a lack of knowledge of their injury delayed the statute from being triggered. Neither Russell, in its briefing before the Court of Appeals, nor the Court of Appeals points to any allegation which suggests Russell did not have notice of its injury until after the statute had run. There was no *"prima facie"* showing of this by Russell in its Amended Complaint. This issue was not even raised before the trial court. If Russell had both contracts, which from its own pleadings and admissions were available to it, they would have known there was a $5,000.00 per lot difference in price between the two contracts, which is the injury it allegedly suffered. (See R.77, ¶¶ 22 and 33, R.79, ¶ 44 and R.80, ¶ 50.)

Russells' Amended Complaint fails to make the required *prima facie* showings.

### C. The Court of Appeals decision failed to properly apply rules of inquiry notice.

The Court of Appeals and Russell are not only asking this Court to ignore Russells' duty to make an "initial showing", but also to ignore well established principles of inquiry notice.

The Amended Complaint (R.72) in this case is unusually candid. Russell admits that it was placed on inquiry notice by the Spring of 2000 that CMT and Saratoga were not the same entity. (R.81, ¶¶ 55, 58.) Russell points to no other specific information, either in its Amended Complaint or in any of its briefing, it needed to know before it could initiate this action. Russell also admits that any alleged active concealment by the defendants ended in the Spring of 2000, some five months prior to the running of the statute of limitations. (R.82, ¶¶ 60, 61.)

Russell has made no effort to explain why the general proposition that "the means of knowledge is the equivalent to knowledge" ought not apply in this case. In *Baldwin v. Burton*, 850 P.2d 1188 at 1196 (Utah 1993), a case cited by defendants in their opening brief and ignored by Russell in his reply, this Court stated that "a party who has opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowledge that arose by reason of his own laches and negligence." In *Macris v. Sculptured Software, Inc.*, 2001 UT 43, ¶ 8, 24 P.3d 984, 990, the Court stated that "we have held that all that is required to trigger the statute of

limitations is sufficient information to put plaintiffs on notice to make further inquiry if they harbor doubts or questions." Russells' amended complaint admits that he was on inquiry notice in June of 2000.

Russells' brief (pp. 14-15) attempts to argue that Russell falls within an exception in *Macris* and *Berenda v. Langford,* 914 P.2d 45 (Utah 1996), i.e., that where a plaintiff alleges that a defendant took steps to conceal plaintiff's cause of action, the plaintiff can avoid the full operation of the discovery rule by showing the fraudulent concealment, and then demonstrating that given defendant's actions, a reasonable plaintiff would not have discovered its claim earlier.

This exception does not fit this case. Initially, Russell has admitted (R.81, ¶ 59) that any alleged concealment ended in the Spring of 2000, many months before the statute of limitations ran. *Hill v. Allred,* 2001 UT 16, 28 P.3d 1271 is readily distinguishable on the basis that the claim there was still being concealed even after the statute of limitations had run.

Russell has made no *prima facie* initial showing, by allegation or otherwise, that it could not reasonably have discovered the remaining facts underlying their cause of action in time to commence an action before the statute of limitations expired in November of 2000. *Walker* and *Berenda* mandate that they do so.

Russell argues (bottom of p. 15) that because *Hill v. Allred,* 2001 UT 16, 28 P.3d 1271 suggests that whether a plaintiff has acted reasonably to discover facts is a highly

fact-dependent question, that Russells' dismissal in this action on a 12(b)(6) motion would be inappropriate. What this argument overlooks is that Russell conceded in their pleadings that the concealment had ended and that it was on inquiry notice long before the statute ran. In addition, to fall under this exception, the plaintiff first has to make an initial showing or *prima facie* showing that a reasonable plaintiff could not have discovered the necessary facts in time. Russells' Amended Complaint does not make any such showing. The closest Russell comes is an allegation that "further inquiry and investigation were made by plaintiffs concerning the ownership and control of CMT and the circumstances of the two contracts signed in November 1996 by plaintiffs and Saratoga." (R.82, ¶ 62). There were no facts to weigh.

Russell had the same means of knowledge between June of 2000 and November of 2000 as it did thereafter. Because deeds were recorded on each sale (R.44, 46), Russell also had record constructive notice of the flip sale in the Spring of 2000. *Salt Lake County v. Metro West Ready Mix,* 2004 UT 23, ¶¶ 13, 24. What caused Russells' delay after the Spring of 2000? Not a clue is offered by Russell. Russell has not made *prima facie* showing that would support the conclusion that "a reasonable plaintiff could not have discovered the additional facts in time."

Russell has already amended its Complaint. This Court should be comfortable with the idea that Russell has done its best to allege facts to satisfy these requirements, and

that it simply cannot. Russells' Amended Complaint is fatally defective and should be dismissed as to all claims (except for the fraud claim which is not contested here).

## III. THE COURT OF APPEALS ERRED IN NOT DISMISSING THE COMMERCIAL BRIBERY CLAIM.

Russell concedes in footnote 1 at page 2 of their brief that the commercial bribery claim should have been dismissed by the Court of Appeals. That Court's failure to do so was in error, and should be corrected at this time.

## CONCLUSION

For these reasons, the decision of the Court of Appeals on all of the claims, except the fraud claim, should be reversed, and the case should be remanded for further proceedings solely on the plaintiffs' fraud claim.

DATED this 20 day of April, 2004.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copies of the foregoing were mailed, postage fully prepaid, as required by Rule 26, Utah Rules of Appellate Procedure, on the 20 day of April, 2004, to the following:

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April 26, 2004

***VIA HAND DELIVERY***

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Re: Russell Packard Development, Inc., et al. v. Carson, et al.
District Court No. 010910854
Appellate Court No. 20020546-CA
Supreme Court No. 20030822-SC

Dear Clerk of Court:

This firm represents John Thomas, one of the successful petitioners for Writ of Certiorari before this Court. This letter is to advise the Court and the parties, pursuant to Rule 24(h), Utah Rules of Appellate Procedure, that Thomas joins in the Petitioners Carson And Bustos Reply Brief dated April 20, 2004, which previously was filed on behalf of Carson and Bustos.

Sincerely,

George W. Pratt

GWP:bkp
cc: Keith W. Meade
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