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Utah Supreme Court

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Recommended Citation
Brief of Respondent, *Russell Packard Development v. Carson, Bustos and Thomas*, No. 20030822.00 (Utah Supreme Court, 2003).
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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

BRIEF OF RESPONDENTS

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

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LIST OF PARTIES

All parties involved in this appeal are identified in the caption.

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(a).

STATEMENT OF THE ISSUE

Issue. Did the Utah Court of Appeals correctly conclude as a matter of law that Respondents sufficiently pled facts in their amended complaint that triggered the concealment prong of the discovery rule to toll the four-year statute of limitations on their claims, making them timely for purposes of withstanding Petitioners' motion to dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure? (R. at 64-68 and *Russell/Packard Development, Inc. v. Carson*, 2003 UT App. 316, 78 P.3d 616.)

Standard of Review. A trial court's conclusions of law in civil cases are reviewed for correctness. *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998). Under the correctness standard, no deference is given to the trial court's ruling on questions of law. *Id.*

GOVERNING LAW

Utah Code Ann. § 78-12-25(3) is of central importance to the outcome of this appeal. It states, "An action may be brought within four years . . . for relief not otherwise provided for by law."

STATEMENT OF THE CASE

A. *Nature of the Case, Course of Proceedings and Disposition Below.*

On November 30, 2001, Respondents Russell/Packard Development, Inc. ("Russell/Packard") and Lawrence M. Russell ("Russell") (collectively referred to as the "Russell Plaintiffs") filed a Complaint and Jury Demand against Petitioners Joel Carson ("Carson"), William Bustos ("Bustos") and John Thomas ("Thomas") (collectively

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referred to as the "Carson Defendants") asserting eight separate claims: 1) fraud; 2) breach of fiduciary duty; 3) civil conspiracy to defraud and to breach duties; 4) commercial bribery; 5) unjust enrichment; 6) conversion and misappropriation of proprietary property; 7) breach of principal-agency relationship; and 8) intentional interference with prospective economic relations. (R. at 1-18.) The Carson Defendants each filed motions to dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. (R. at 29-57.) The Russell Plaintiffs filed a First Amended Complaint and Jury Demand in response, delineating more fully when the applicable statutes of limitations were tolled and when they began to run. (R. at 72-91.) They also filed an opposition to the motions to dismiss. (R. at 58-71.)

The district court conducted a hearing on and granted the motions. (R. at 149, 207.) Counsel for Carson prepared a proposed Order of Dismissal, to which the Russell Plaintiffs objected. (R. at 150-152, 193-194.) On June 10, 2002 the district court entered a Minute Entry denying the objection and signed an order dismissing the Russell Plaintiffs' claims with prejudice. (R. at 191-194.) The Russell Plaintiffs appealed the district court's ruling to the Utah Court of Appeals. (R. at 195-197.)

Following briefing and oral argument, the Utah Court of Appeals issued its written and published opinion on September 18, 2002, reversing the district court's dismissal of the Russell Plaintiffs' claims[1] and remanding the case for further proceedings. *Russell/Packard Development, Inc.*, 2003 UT App. 316. The Carson Defendants now

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[1] The Russell Plaintiffs conceded to dismissal of their commercial bribery claims at oral argument before the Utah Court of Appeals

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appeal the court of appeals' decision on all claims except the commercial bribery and fraud claims. (Thomas' Brief, pg. 7 n.3.)

B. *Statement of Facts.*

1. *Governing Factual Standard.*

The district court's dismissal was made pursuant to a Rule 12(b)(6) motion. This Court has ruled that in deciding motions to dismiss, trial courts "must 'accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff.'" *Prows v. State*, 822 P.2d 764, 766 (Utah 1991) (citing *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991)). "[I]f there is any doubt about whether a claim should be dismissed for lack of factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof." *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990) (citing *Baur v. Pac. Fin. Corp.*, 383 P.2d 397, 397 (1963)). Under this standard, the facts set forth below are based upon those pled in the Russell Plaintiffs' amended complaint and must be accepted as true for purposes of this appeal.

2. *Facts Relating to the Transaction.*

Russell/Packard is a real estate development corporation engaged in the development and construction of residential homes. (R. at 75 ¶¶ 15-17.) Russell is its principal shareholder and Chief Executive Officer. (R. at 75 ¶ 15.) Russell/Packard and Russell formed a Utah limited liability company named PRP Development L.C. ("PRP") with Thomas through Thomas' affiliation with Premier Homes, L.C. (R. at 75 ¶ 18.) The purpose of PRP was to develop and construct residential homes for retail sale in the State

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of Utah. (*Id.*) Thomas was the manager of PRP. As such he became an agent and fiduciary of the Russell Plaintiffs. (R. at 75 ¶ 19, 76 ¶ 26.)

Saratoga Springs Development, L.L.C. ("Saratoga") owned 72 undeveloped twin home lots in the city of Saratoga Springs, Utah County ("Saratoga Lots"). Saratoga had retained the brokerage services of Wardley Better Homes and Gardens Real Estate ("Wardley") to market and sell the Saratoga Lots. Dan Cary ("Cary"), an agent with Wardley, was the listing agent for the Saratoga Lots. (R. at 75-76 ¶¶ 20-21.)

Carson and Bustos were also real estate agents with Wardley. (R. at 73 ¶¶ 3-4.) In addition to being fellow Wardley employees, Carson had an independent business relationship with Bustos and had previous dealings with Thomas in the real estate sales, development and construction industry in Utah. At the time the Saratoga Lots were for sale, Thomas owed Bustos significant sums of money from one of their previous business dealings. (R. at 76 ¶¶ 22-26.)

In the summer of 1996, Thomas, Bustos and Carson became aware of the availability of the Saratoga Lots. (R. at 77 ¶ 27.) They conspired and acted to cause what is known as a "flip purchase and sale" of the Saratoga Lots. (R. at 77-80 ¶¶ 28-51.) They used a fictitious entity named CMT, Inc. ("CMT") to purchase the Saratoga Lots for $25,000 a piece and immediately resold them to PRP for $30,000 each, making a profit of $360,000, despite the fact they were fiduciaries of Saratoga and the Russell Plaintiffs. (*Id.*)

The Carson Defendants accomplished their scheme as follows. Thomas approached Cary about PRP purchasing the Saratoga Lots from Saratoga and retained Carson to act as PRP's agent for this purpose. Thomas and Carson negotiated with Cary

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for PRP to purchase the Saratoga Lots directly from Saratoga. (R. at 77 ¶¶ 28-30.) During their negotiations, Carson and Thomas consistently referred to PRP as the builder or buyer and Saratoga as the seller or developer. (R. at 80 ¶ 56, 207 at pgs. 26-27.) Carson and Thomas further lead Saratoga to believe PRP was purchasing the Saratoga Lots directly from Saratoga by presenting to Saratoga, through Thomas' connection with PRP, PRP's proprietary plans and drawings for the development and construction of the Saratoga Lots. (R. at 78 ¶ 41.)

In the fall of 1996, the Carson Defendants, formally offered to purchase the Saratoga Lots from Saratoga for $25,000 each. The offer, however, names CMT as buyer instead of PRP ("CMT Contract"). (R. at 77 ¶¶ 32-33.) Carson told Cary on several prior occasions that CMT was affiliated with, a part of, or owned by PRP. (R. at 7 ¶ 35, 78 ¶ 35.) At the time the statements were made, CMT had no relationship with PRP. In fact, CMT was not even an existing legal entity until its incorporation in California on December 5, 1996, over one month after executing the CMT Contract. CMT has never registered to do business in the State of Utah. CMT was a fictitious entity controlled by the Carson Defendants. (R. at 78 ¶¶ 35-36.)

Believing CMT was affiliated with or a part of PRP, based on the representations by the Carson Defendants, Saratoga agreed to sell the Saratoga Lots to CMT. On November 4, 1996, Saratoga and CMT executed the CMT Contract, which identifies Carson as CMT's agent. (R. at 78-79 ¶¶ 40-42.) That same day, the title company received a $10,000 earnest money wire from an entity known as Poe Investments ("Poe"). Poe's members at that time were Carson and Bustos. (R. at 79 ¶ 43.)

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Also on November 4, 1996, and not coincidentally, Thomas executed a formal offer on behalf of PRP to purchase the Saratoga Lots from CMT for $30,000 each. (R. at 79 ¶ 44.) The Russell Plaintiffs were led by the Carson Defendants to believe that CMT was affiliated with, a part of, or owned by Saratoga and that PRP was purchasing the Saratoga Lots directly from Saratoga, which is the manner in which the negotiations had been conducted. (R. at 78 ¶ 37.)

CMT of course accepted the offer and the deal was memorialized on November 8, 1996 ("PRP Contract"). (R. at 79 ¶ 45.) Carson is listed in the PRP Contract as the agent for both PRP and CMT. (R. at 79 ¶¶ 46-47.) The PRP Contract, like the CMT Contract, references earnest money from PRP of $5,000. Thomas issued a check from PRP to Superior Title for $5,000 dated only "November 1996" which references earnest money. It, however, was never processed by the bank for payment. Instead, the $10,000 earnest money wire under the CMT Contract referencing Poe was distributed at closing by checks to Carson and to Bustos at their direction. (R. at 79-80 ¶ 48.)

The CMT Contract and the PRP Contract had identical closing terms except for the price. (R. 80 ¶ 49.) The Carson Defendants, through CMT, interjected themselves as undisclosed agents and principals for CMT and/or Poe while acting as agents and fiduciaries of the Russell Plaintiffs to cause the flip purchase and sale for their own benefit and at the expense of Saratoga and the Russell Plaintiffs. (R. at 80 ¶¶ 50-51.) Had the Russell Plaintiffs known of the flip sale and purchase, they would not have consented to PRP's purchase of the Saratoga Lots from CMT. (R. at 80-81 ¶ 54.)[2]

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[2] In April 1997, the Russell Plaintiffs sold their interest in PRP to Premier Homes Construction, L.C., a company in which Thomas was also a member. (R. at 39-42.) In

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Because of the actions and statements of the Carson Defendants, neither Russell/Packard nor Russell discovered CMT was not the agent for, under the control of, or otherwise acting for Saratoga until the Spring of 2000 when an accountant working for Saratoga questioned the ownership or control status of CMT and discovered the possibility of the flip sale and purchase while preparing for the closings on the final twelve Saratoga Lots. (R. at 81 ¶ 55.) It was the first time the Russell Plaintiffs discovered CMT was not the agent for, under the control of, or otherwise acting for Saratoga. (R. at 81 ¶ 58.) At all times previous to that, the Carson Defendants furthered their scheme by consistently introducing Saratoga to the Russell Plaintiffs as the builder or buyer and introducing Saratoga and its representatives the Russell Plaintiffs as the seller or developer. Those representations not only lead Saratoga and the Russell Plaintiffs to believe PRP was purchasing the lots directly from Saratoga but resulted in the concealment until the Spring of 2000 of the fact CMT was not affiliated with either PRP or Saratoga. (R. at 81 ¶¶ 56 & 59.)

The Saratoga accountant's question about the ownership and control status of CMT in connection with the closing of the last twelve of the lots led Saratoga to a search to find a link between CMT and PRP or the Russell Plaintiffs. When no link could be found, Saratoga contacted the Russell Plaintiffs to see if the Russell Plaintiffs could explain the situation. (R. at 81 ¶ 55.) This was when the Russell Plaintiffs were first

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exchange, PRP paid Russell/Packard and Russell $5,000 and assigned Russell "all of its right, title and interest in the [PRP] Contract and its right to acquire the Saratoga Property at the time of closing." (R. at 39.) This sale is the basis for Russell's standing to assert his claims, which the court of appeals concluded was sufficient and which the Carson Defendants do not appeal.

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placed on notice that CMT was not affiliated with Saratoga, which led the Russell Plaintiffs to further investigate the true nature of the transactions. (*Id.*) That 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. at 81-82 ¶¶ 55, 58- 60.) After learning these facts, the Russell Plaintiffs filed their Complaint and Jury Demand on November 30, 2001. (R. at 1-18.) They did not file before then because they did not have an adequate factual basis sufficient to establish any wrongful conduct.

SUMMARY OF THE ARGUMENT

The Utah Court of Appeals concluded that the district court erred in dismissing the Russell Plaintiffs' claims because the "[The Russell Plaintiffs'] pleadings . . . clearly allege that the [Carson Defendants] mislead and misinformed [the Russell Plaintiffs] as to CMT's true nature and involvement in the sale of the lots." *Russell/Packard Development, Inc.*, 2003 UT App. at ¶ 28. It explained, "Under our standard of review in a grant of a rule 12(b)(6) dismissal, and in light of the foregoing authority regarding the fact-finder's role in determining the applicability of the discovery rule, we hold the district court erred in granting the [Carson Defendants'] motions to dismiss." *Id.*

The court of appeals' ruling was correct because the Russell Plaintiffs pled facts claiming the Carson Defendants concealed their wrongful conduct, thereby tolling the applicable statutes of limitation until the Russell Plaintiffs learned facts supporting their claims. While the Russell Plaintiffs learned five months prior to expiration of the limitations period that CMT was not associated with Saratoga, that discovery did nothing but alert the Russell Plaintiffs that something might be wrong and led them to further

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investigate the underlying nature of the transactions involving the Saratoga Lots. It was not until they conducted that investigation, and *after expiration* of the limitations period, that they discovered *the facts forming the foundation for their claims*. It is at that point the statutes began to run. There is no dispute that the Russell Plaintiffs filed their claims within the statutes once the discovery rule is applied.

ARGUMENT

THE UTAH COURT OF APPEALS CORRECTLY CONCLUDED THAT THE RUSSELL PLAINTIFFS SUFFICIENTLY PLED FACTS IN THEIR AMENDED COMPLAINT THAT TRIGGERED THE CONCEALMENT PRONG OF THE DISCOVERY RULE TO TOLL THE FOUR-YEAR STATUTES OF LIMITATIONS ON THEIR CLAIMS, MAKING THEM TIMELY FOR PURPOSES OF WITHSTANDING PETITIONERS' MOTION TO DISMISS UNDER RULE 12(B)(6) OF THE UTAH RULES OF CIVIL PROCEDURE.

There is no dispute that absent tolling, the limitations period on the Russell Plaintiffs' claims at issue expired on November 7, 2000. *Russell/Packard Development*, 2003 UT App. 315 at ¶ 11. There is also no dispute that the Russell Plaintiffs learned in the spring of 2000 that CMT was not associated with Saratoga. *Id.* at ¶ 8. The dispute involved in this case is whether, *under the facts pled in the Russell Plaintiffs' amended complaint*, the Russell Plaintiffs "discovered the facts underlying the cause of action in time to commence the action within [the limitations] period" or after the limitations period had run. *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995). The Carson Defendants claim that because the Russell Defendants learned CMT was not associated with Saratoga five months prior to the limitations period, the concealment prong of the discovery rule does not apply to toll the limitations period and the Utah Court of Appeals' decision to the contrary is inconsistent with prior opinions of this Court. (Petition of Carson Defendants, pgs. 8-11.) Their assertion is wrong.

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This Court recently addressed a similar issue involving the concealment prong of the discovery rule in *Hill v. Allred*, 2001 UT 16, 28 P.3d 1271. It reiterated the test applied in determining whether a limitations statute should be tolled based on concealment. It stated:

> Fraudulent concealment under the discovery rule requires determining (i) when a plaintiff would reasonably be on notice to inquire into a defendant's bad acts despite defendant's attempts to hide those acts; and (ii) whether a plaintiff, once on notice, reasonably would have discovered, with due diligence, the facts on which the cause of action is based despite the defendant's efforts to hide those facts.

Id. at ¶ 18 (citing *Berenda v. Langford*, 914 P.2d 45, 52 (Utah 1996)). This is the precise standard the court of appeals applied in this case. It stated:

> Our supreme court has held that application of the concealment prong of the discovery rule to toll a statute of limitations requires the plaintiff to "make a prima facie showing of fraudulent concealment and then demonstrate that, given the defendant's actions, a reasonable plaintiff would not have discovered his or her claim earlier."

Russell/Packard Development, 2003 UT App. at ¶ 21.

It is under that standard that the court of appeals went on to analyze whether the concealment prong of the discovery rule, under the facts the Russell Plaintiffs pled and all reasonable inferences drawn therefrom, required tolling in this case. The Russell Plaintiffs plead in their complaint the following facts:

> At the time the CMT contract, signed on November 4, 1996, and the PRP contract, signed on November 8, 1996, were executed, Carson, Bustos, and Thomas set on a course of conduct through agreement to conceal from plaintiffs and Saratoga CMT's relationship to the defendants and CMT's lack of relationship to the plaintiffs and Saratoga.
>
> []This concealment was a necessary part of the scheme and device to permit the CMT contract to be signed by Saratoga on November 4, 1996, and to "flip the sale" to PRP on November 8, 1996.

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[]This intentional concealment and failure to disclose to plaintiffs the fact that CMT was not owned by or controlled through Saratoga or, as to Saratoga, CMT was not owned by or in the control of plaintiffs, plaintiffs and Saratoga would not have permitted the flip purchase and sale through CMT while Carson and Thomas were acting as agents and fiduciaries of plaintiffs or to benefit Bustos.

[]Plaintiffs did not discover that CMT was not the agent for, under the control of, owned by, or otherwise acting for, Saratoga, in connection with the sale of the lots, until spring of 2000, when an accountant working for Saratoga discovered the possibility of a flip sale and purchase, which prompted discussions between Russell on the one hand, and a representative of Saratoga on the other hand.

[]At all times previous to that, defendants formulated a scheme in which plaintiffs were introduced to Saratoga by the defendants and always referred to as the builder or buyer, and Saratoga's representatives were introduced to plaintiffs by the defendants and always referred to as the seller or developer.

[]On information and belief, in the spring of 2000, an accountant for Saratoga questioned the ownership or control status of CMT, in connection with the "take down" or closing of the last twelve of the lots.

[]Saratoga, on information and belief, was then placed on inquiry notice that CMT may not have been the agent or under the control of plaintiffs and, after discussions with Saratoga's representatives in the spring of 2000, plaintiffs were first placed on inquiry notice of CMT's control status as well.

[]This affirmative conduct and concealment of the defendants constituted a pattern during October and November 1996 during the sale and continued thereafter through spring of 2000 that CMT was known only to plaintiffs as Saratoga's agent or company owned by or under the control of Saratoga. The active concealment continued until spring of 2000 by the defendants.

[]After the conversation with Saratoga's representative concerning CMT's actual status, 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. at 80-82 ¶¶ 52-62.)

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These very facts, cited verbatim in the court of appeals' opinion, "clearly allege that the Appellees mislead and misinformed Russell as to CMT's true nature and involvement in the sale of the lots." *Russell/Packard*, 2003 UT App. at ¶28. It is on that basis that the court of appeals held "the district court erred in granting the [] motions to dismiss." *Id.*

The Carson Defendants argue that the concealment prong of the discovery rule does not, under the law enunciated in prior decisions of this Court, apply because the Russell Plaintiffs had knowledge before expiration of the limitations period that CMT was not affiliated with Saratoga. They cite several cases in support of their assertion: *Hill v. Allred*, 2001 UT 16, 28 P.3d 1271; *Burkholz v. Joyce*, 972 P.2d 1235 (Utah 1998); *Berenda v. Langford*, 914 P.2d 45 (Utah 1996); *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1129 (Utah 1995); *Warren v. Provo City Corp.*, 838 P.2d 1126 (Utah 1992); *Atwood v. Sturm, Ruger & Co.*, 823 P.2d 1064 (Utah 1992); *O'Neal v. Division of Family services*, 821 P.2d 1139 (Utah 1991); *Brigham Young University v. Poulsen Const.*, 744 P.2d 1370 (Utah 1987). However, each of these cases support the court of appeals' decision. They stand for the proposition that a limitations period is not tolled where the plaintiff knows of the facts underlying its claims in time to file an action within that period. Here, the court of appeals concluded that while the Russell Plaintiffs acknowledge being on notice five months before expiration of the limitations period that CMT was not associated with Saratoga, the Russell Plaintiffs sufficiently pled they did not discover the facts underlying their claims until *after* expiration of the limitations period. That ruling is consistent with the decisions cited.

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This Court addressed a similar distinction between discovering one may have been wronged and learning facts forming the basis for a cause of action in *Hill v. Allred*, 2001 UT 16, 28 P.3d 1271. The plaintiff's agents in *Hill* gave the defendants $1.54 million to purchase a ranch. The plaintiff did not learn of the transfer until February 1990 when the agents informed her the defendants had absconded with her money. The plaintiff met with the defendants in March 1990. They told her they did not have her money. *Id.* at ¶¶ 3-6. She, therefore, hired a private investigator to locate it, which he was unable to do. *Id.* at ¶ 7. Four years later and still without her money, the plaintiff hired two new investigators. In December of 1994, two of the defendants admitted to the investigators that another defendant had fled with her money. *Id.* at ¶¶ 8-9. The plaintiff did not learn of these facts until July 1995. *Id.*

The plaintiff filed her complaint in August 1997 asserting claims for, among other things, fraud, unjust enrichment and civil conspiracy. *Id.* at ¶ 11. The defendants filed a motion for summary judgment arguing the statute of limitations barred her claims because the facts supporting them occurred in late 1989. *Id.* at ¶ 13. The plaintiff opposed the motion on the ground the discovery rule tolled the limitations period. The trial court disagreed and granted the motion. The plaintiff appealed. *Id.* at ¶ 1.

This Court reversed summary judgment and remanded the case for trial. *Id.* It ruled the defendants' active concealment of facts giving rise to plaintiffs' claims tolled the statute of limitations until July 1995, when plaintiff first learned of the facts giving rise to her claims and discovered the identities of the defendants. *Id.* at ¶ 19. It explained that operation of the discovery rule "prevents the limitations period from beginning to run

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until the facts forming the foundation for the cause of action are discovered." *Id.* at ¶ 15 (citing *Williams v. Howard*, 970 P.2d 1282, 1285 (Utah 1998)).

Like the plaintiff in *Hill*, the Russell Plaintiffs may have been put on notice they might have been wronged prior to expiration of the statute of limitations, but did not learn "facts forming the foundation for the cause of action" until after expiration of the limitations period due to the necessity of conducting an investigation into what happened. *Id.* at ¶ 15.

In response, the Carson Defendants argue the Russell Plaintiffs' discovery in the Spring of 2000 that CMT was not affiliated with Saratoga was sufficient to trigger the limitations period. They cite *Macris v. Sculptured Software, Inc.*, 2001 UT 43, 24 P.3d 984, for the proposition 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." *Id.* at ¶8. (Brief of Carson and Bustos, pg. 11, citing *Berenda v. Langford*, 914 P.2d 45, 51 (Utah 1996)). They argue, "While *Macris* was an 'exceptional circumstances' case, there is no policy reason why the same reasoning should not apply to cases under the 'concealment' prong of the discovery rule." (Brief of Carson and Bustos, pg. 11.) While the quote from *Macris* is a correct statement of the law relating to exceptional circumstances, it does not apply in this case. The quotation from *Macris* is based on this Court's ruling in *Berenda*. This Court expressly held in *Berenda*:

> [U]nder our case law *the rule is otherwise when a plaintiff alleges that a defendant took affirmative steps to conceal the plaintiff's cause of action, as is the case here*. In such a situation, the plaintiff can avoid the full operation of the discovery rule by making a prima facie showing of fraudulent concealment and then demonstrating that given the defendant's actions, a reasonable plaintiff would not have discovered the claim earlier.

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Id. at 51-52 (citations omitted, emphasis added).

Based on the facts pled and the law set forth by this Court, the court of appeals concluded, "'[U]nder the discovery rule, "it is the knowledge *of injury*' which triggers the statute, "not notice *of probable or possible* injury."'" *Russell/Packard Development*, 2003 UT App. at ¶ 15 (quoting *Seale*, 923 P.2d at 1365) (citation omitted in original, alteration in original, emphasis added). As explained above, the Russell Plaintiffs pled facts permitting the reasonable inference to be drawn that just learning CMT was not associated with or the agent of Saratoga did not put the Russell Plaintiffs on notice of the their alleged injuries in paying $360,000 more for the lots than they otherwise would have paid had the misrepresentation not facilitated the flip purchase and sale.

The Carson Defendants argue that the Russell Plaintiffs should have reasonably known of the facts underlying their claims in June 2000 because when the Russell Plaintiffs learned CMT was not associated with Saratoga:

> The only thing [the Russell Plaintiffs] need to do to become fully aware that they had suffered what they believed was an injury was to ask Saratoga for a copy of the Saratoga/CMT contract and compare it to the CMT/PRP contract . . . These contracts would have disclosed the difference in the purchase price, the fact that Carson was an agent in the transaction, and the fact that Thomas had signed the contracts. [The Russell Plaintiffs] could then have made additional inquiry of the title companies where the closing occurred.

(Brief of Carson and Bustos, pgs. 20-21.) This argument is wrong for two reasons.

First, this Court ruled in *Hill* that once there is an allegation:

> a defendant has concealed a plaintiff's cause of action, the questions of when a plaintiff should reasonably begin inquiring about the defendant's wrongdoing and whether, once on notice, the plaintiff has acted with reasonable diligence to discover the facts forming the basis of the cause of action are all highly fact-dependent legal questions.

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Id. (citing *Berenda*, 914 P.2d at 53-54; *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989) (stating that"close calls" of whether plaintiffs acted reasonably in failing to discover the cause of action "are for juries, not judges, to make"). Therefore, the Carson Defendants' argument requires the Court to weigh facts in determining when the Russell Plaintiffs should have known they suffered a legal injury: in June when they merely discovered CMT was not associated with Saratoga, or after they had investigated the matter further and, through due diligence, discovered the facts supporting their claims after expiration of the limitations period. However, weighing facts under a Rule 12(b)(6) motion is inappropriate. The facts must be accepted as true.

Second, the Russell Plaintiffs explained to the trial court and the court of appeals why these documents did not impart reasonable notice to them of CMT's actual part in the scheme. It is common for developers and builders to create special entities with different names to "own" a project. Therefore, the fact CMT was named as the seller in the closing documents does not give notice to a reasonable person or even a reasonable developer or builder that CMT was not affiliated with Saratoga. (R. at 207 at pg. 28.)

Based on the facts pled and the law set forth by this Court, the court of appeals concluded, "'[U]nder the discovery rule, "it is the knowledge *of injury*' which triggers the statute, "not notice *of probable or possible* injury."'" *Russell/Packard Development*, 2003 UT App. at ¶ 15 (quoting *Seale*, 923 P.2d at 1365) (citation omitted in original, alteration in original, emphasis added). The Russell Plaintiffs pled facts, from which reasonable inferences may be drawn, that they did not obtain that knowledge until after expiration of the limitations period. Therefore, the conclusion of the court of appeals that "concealment prong of the discovery rule applies to toll the statute of limitations on

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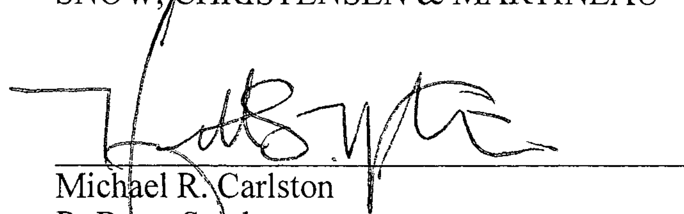
"concealment prong of the discovery rule applies to toll the statute of limitations on Russell's claims such that Russell's complaint was timely" is in correct.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court affirm the ruling of the Utah Court of Appeals.

DATED this 24th day of March, 2004.

SNOW, CHRISTENSEN & MARTINEAU



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CERTIFICATE OF SERVICE

I certify that on the 24th day of March, 2004, I caused two copies of the foregoing Brief of Respondents to be served by first-class mail upon the following:

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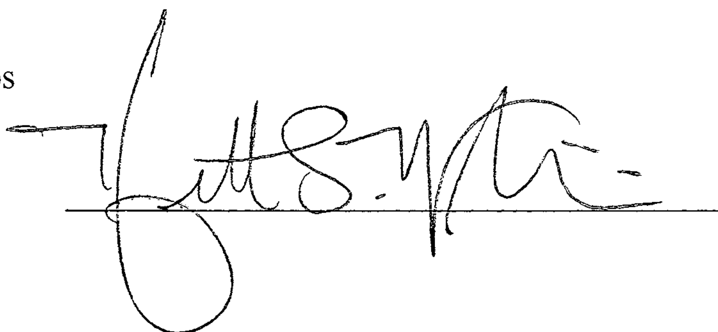

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