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ESTATE OF CHAPPELLE v. SANDERS: DUE DILIGENCE CONFUSION CONTINUES

Generally, courts have strictly adhered to the timeliness standard embodied in statutes of limitations.¹ The purpose of a statute of limitations is to require prosecution of an action within a reasonable time to prevent the damage or loss of available evidence and to discourage delay in the bringing of claims. In addition, requiring that suit be filed within a period of limitations prevents unfairness to the defendant who should reasonably expect at some point to be free from stale claims.²

Exceptions to compliance with statutes of limitations have been granted by the courts of several states only when circumstances warrant departure from the rules. Courts have authorized noncompliance in exceptional cases by implementing the "discovery rule."³ The discovery rule provides that the statute of limitations does not begin to run until the plaintiff learns he or she has a cause of action against the defendant.⁴ Fraudulent concealment of a cause of action by a defendant is an integral part of the rule.⁵

1. See generally *Holmberg v. Armbrrecht*, 327 U.S. 392, 394 (1946), in which the Supreme Court stated that "a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation." A statute of limitations has been defined as "a designated period of time during which a cause of action must be brought or be forever barred." *Guebard v. Jabaay*, 65 Ill. App. 3d 255, 257, 381 N.E.2d 1164, 1166 (1978).

2. *Guebard*, 65 Ill. App. 3d at 257, 260, 381 N.E.2d at 1166, 1168. See *Holmberg*, 327 U.S. at 396 (statutes of limitations determine whether or not plaintiff has slept on his rights; if he has, then decree for plaintiff would be unfair to defendant); *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944) (it is against defendant's interest to be forced to defend a claim when witnesses and evidence are no longer available).

3. The "discovery rule" has been defined as "[t]hat rule [which] provides that the limitations period commences not when the last act giving rise to a cause of action has occurred but when the plaintiff knew or should have known that he was 'injured.'" *Guebard*, 65 Ill. App. 3d at 258, 381 N.E.2d at 1166. See W. PROSSER, *LAW OF TORTS* ch. 5, § 30, at 144-45 (4th ed. 1971).

4. See, e.g., *Traer v. Clews*, 115 U.S. 528 (1885) (if defendant acquired title to property of a bankrupt estate by means of fraud, then the statute of limitations is tolled and purchaser from trustee of bankrupt estate is not barred from bringing suit); *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972) (Union's cause of action against company for refusal to bargain over relocation not barred by statute of limitations where company concealed reasons for relocation); *Searl v. Earll*, 221 F.2d 24 (D.C. Cir. 1954) (if concealment constitutes fraud, statute of limitations will not begin to run until plaintiff discovers fraud).

5. Fraudulent concealment is defined as nondisclosure of information which another party is legally bound to disclose. *Magee v. Manhattan Life Ins. Co.*, 92 U.S. 93, 98 (1875). For such concealment to be fraudulent, there must clearly be an intent to deceive. *Id. But*

For example, courts, including the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, have unanimously held that a defendant who fraudulently conceals the existence of a cause of action from a plaintiff is barred from claiming the running of the period of limitations as a defense.⁶

On the other hand, a majority of jurisdictions have held that the discovery rule does not apply when the defendant's identity is concealed from the plaintiff.⁷ Therefore, the running of the period of limitations is not tolled in fraudulent concealment of identity cases.⁸ Following the example set by

see Note, *Wilson v. Johns-Manville Sales Corp. and Statutes of Limitations in Latent Injury Litigation: An Equitable Expansion of the Discovery Rule*, 32 CATH. U.L. REV. 471 (1983).

6. See, e.g., *Emmett v. Eastern Dispensary & Casualty Hosp.*, 396 F.2d 931 (D.C. Cir. 1967) (hospital withheld records from son who was looking into father's death and to whom, as his father's representative, physician-patient privilege would not apply); *City of Burlington v. Westinghouse Elec. Corp.*, 215 F. Supp. 497 (D.D.C. 1963), *aff'd*, 326 F.2d 691 (D.C. Cir. 1964) (four year statute of limitations under Clayton Act is tolled if defendant fraudulently conceals antitrust violations); *P.H. Sheehy Co. v. Eastern Importing & Mfg. Co.*, 44 App. D.C. 107 (1915) (where defendant concealed from plaintiff that sardines he sold to plaintiff were of inferior quality, statute of limitations does not begin to run until plaintiff discovers breach of warranty); *William J. Davis, Inc. v. Young*, 412 A.2d 1187 (D.C. 1980) (employer fraudulently concealed from an unsuspecting employee a right of action that employee had against employer for back wages); *Roper v. Markle*, 59 Ill. App. 3d 706, 375 N.E.2d 934 (1978) (plaintiff's cause of action for medical malpractice against doctor who negligently performed hysterectomy, resulting in kidney infection requiring removal, did not accrue until plaintiff learned that kidney infection was due to doctor's negligence). See generally 54 C.J.S. *Limitations of Actions* § 206(a)-(e) (1948).

7. As the court stated in *Guebard*, "[w]e are not aware of any case in which the discovery rule has been . . . extended or applied [to fraudulent concealment of identity cases] and we are not convinced that the logic of the rule warrants such an extension by us." *Guebard*, 65 Ill. App. 3d at 258-59, 381 N.E.2d at 1167.

8. See, e.g., *Staples v. Zoph*, 9 Cal. App. 2d 369, 49 P.2d 1131 (1935) (in a libel action where defendants fraudulently concealed their identities, statute of limitations is not tolled because plaintiff knew of existence of cause of action and could have filed against a fictitious defendant within limitations period); *International Bhd. of Carpenters, Local 1765 v. United Ass'n of Journeymen, Local 803*, 341 So. 2d 1005 (Fla. Dist. Ct. App. 1976) (defendant's commission of intentional tort and subsequent concealment of his identity does not bar running of statute of limitations); *Guebard*, 65 Ill. App. 3d 255, 381 N.E.2d 1164 (1978) (statute of limitations was not tolled in medical malpractice action where plaintiff had idea that defendant, though never named by other defendants, may have had a hand in her injury and where burden on defendant to defend himself after long lapse of time outweighed plaintiff's hardship); *Landers v. Evers*, 107 Ind. App. 347, 24 N.E.2d 796 (1940) (where plaintiff was involved in automobile accident at which defendant identified himself to plaintiff's husband as Harold Evers instead of his true name, Howard Evers, statute of limitations is not tolled because plaintiff knew of her injury and could have discerned she had filed suit against the wrong person); *UAW v. Wood*, 337 Mich. 8, 59 N.W.2d 60 (1953) (if plaintiff sued one defendant for libel and later found out defendant had been acting as agent for three other people, withholding the other defendants' identities does not toll the period of limitations); *Morris v. Wise*, 293 P.2d 547 (Okla. 1955) (concealment of driver's identity does not toll

these jurisdictions, the District of Columbia Court of Appeals, in *Estate of Chappelle v. Sanders*,⁹ held that a defendant's concealment of his or her identity does not toll the running of a statute of limitations if the plaintiff has failed to use due diligence in attempting to ascertain the defendant's identity.¹⁰

Courts have justified not tolling statutes of limitations in concealed identity cases out of fairness to the defendant¹¹ and for the purpose of dissuading a plaintiff who is lazy¹² or ignorant of the law.¹³ In *Staples v. Zoph*,¹⁴ the California Court of Appeals held that a defendant's concealment of her identity, in an action for libel, did not toll the running of the statute of limitations. The Court based its decision on earlier California and Illinois cases.¹⁵ The *Staples* court distinguished a California case relied on by the plaintiff involving fraudulent concealment of a cause of action and stated that "[c]oncealment of the identity of the party liable cannot be deemed the same as concealment of a cause of action."¹⁶ The court distinguished concealment of identity from concealment of a cause of action on the basis that requiring the filing of a cause of action within the statute of limitations in a concealment of identity case is not unfair to the plaintiff. Be-

statute of limitations where plaintiff was involved in collision with another automobile and both occupants of other automobile denied having been driving at time of accident). See generally 51 AM. JUR. 2D *Limitations of Actions* § 148 (1970). But see *St. Clair v. Bardstown Transfer Line, Inc.*, 310 Ky. 776, 221 S.W.2d 679 (1949) (extending discovery rule to discovery of a defendant's identity); see *infra* text accompanying notes 26-31.

9. 442 A.2d 157 (D.C. 1982).

10. *Id.* at 159.

11. See *infra* text accompanying note 21.

12. See *infra* text accompanying note 39.

13. See generally 51 AM. JUR. 2D *Limitations of Actions* § 146 (1970), stating that "the mere fact that a person entitled to an action has no knowledge of his right to sue . . . does not prevent the running of the statute . . ."

14. 9 Cal. App. 2d 369, 49 P.2d 1131 (1935).

15. See *Gale v. McDaniel*, 72 Cal. 334, 13 P. 871 (1887) (action for malicious destruction of stable and saloon barred because of expiration of statute of limitations); *Proctor v. Wells Bros. Co.*, 181 Ill. App. 468 (1913) (plaintiff served process on corporation with name similar to true defendant and was barred from serving true defendant by running of statute because plaintiff should have known of mistake and had notice that he had served wrong defendant).

16. 9 Cal. App. 2d at 370, 49 P.2d at 1131. The *Staples* court distinguished *Kimball v. Pacific Gas & Elec. Co.*, 220 Cal. 203, 30 P.2d 39 (1934), where the Pacific Gas & Electric Company (PG&E) withheld information from its injured employee that the worker who had caused him injury had, at the time of the accident, been employed by the General Electric Company and not by PG&E. The *Kimball* court held that "the fraudulent concealment by the defendant of the facts upon the existence of which the cause of action depends tolls the statute, and such statute does not begin to run until the discovery by plaintiff or until by reasonable diligence the plaintiff should have discovered the facts." *Kimball*, 220 Cal. at 215, 30 P.2d at 44.

cause the plaintiff had knowledge of the injury to her character she could have filed an action for libel against a "fictitious defendant" at any time during the one year period of limitations.¹⁷

The Appellate Court of Illinois, in *Guebard v. Jabaay*,¹⁸ cited cases from several jurisdictions as support for its holding that fraudulent concealment of a defendant's identity in a medical malpractice suit does not bar the running of the statute of limitations.¹⁹ Furthermore, the court noted that the plaintiff had known prior to the running of the statute of limitations that the unnamed defendant might have been the surgeon in charge of plaintiff's first operation.²⁰ Based on the facts of the case and on balancing "the hardship on the plaintiff caused by the bar of [her] suit against the increased burden of a defendant to obtain proof of his defense after the passage of time,"²¹ the court refused to extend the discovery rule to cases of fraudulent concealment of identity.

The Arizona Court of Appeals, in *Lim v. Superior Court*,²² consistent with the holdings in California and Illinois, held that in a suit for defamation, where the plaintiffs failed to search diligently for the identities of the defamers, the period of limitations was not tolled. In *Lim* the real party in interest, the defamed party, filed suit against Hughes Aircraft Company, the source of a published defamatory letter. The defamed party initially tried, within the one year period of limitations, to take the deposition of two of the company's employees in order to ascertain the author or authors of the defamatory letter. Because neither employee was furnished with a witness and mileage fee, counsel for one of the employees objected to the deposition. Though one of the employees was renoticed within the one year statute of limitations, it was not until after the running of the statute of limitations that the defamed party renoticed the other employee to take his deposition.²³ By the time the defamed party took the depositions and discovered the identity of the defamer, the period of limitations had run

17. *Staples*, 9 Cal. App. 2d at 370, 49 P.2d at 1131.

18. 65 Ill. App. 3d 255, 381 N.E.2d 1164 (1978).

19. *Guebard*, 65 Ill. App. 3d at 260, 381 N.E.2d at 1168 (citing *Staples v. Zoph*, 9 Cal. App. 2d 369, 49 P.2d 1131 (1935); *International Bhd. of Carpenters, Local 1765 v. United Ass'n of Journeymen, Local 803*, 341 So. 2d 1005 (Fla. Dist. Ct. App. 1976); *Landers v. Evers*, 107 Ind. App. 347, 24 N.E.2d 796 (1940); *UAW v. Wood*, 337 Mich. 8, 59 N.W.2d 60 (1953); *Griffith v. Shannon*, 284 S.W. 598 (Tex. Civ. App. 1926)).

20. *Guebard*, 65 Ill. App. 3d at 259, 381 N.E.2d at 1167. Though plaintiff's complaint made reference only to Dr. Jabaay, to whom plaintiff had gone regarding a knee injury, one of plaintiff's answers to defendant's interrogatories referred to a Dr. Angell as the possible surgeon in plaintiff's June 22, 1971, operation.

21. *Id.*

22. 126 Ariz. 481, 616 P.2d 941 (Ct. App. 1980).

23. *Lim*, 126 Ariz. at 483, 616 P.2d at 943.

and the defendant then raised the statute of limitations as a defense to the defamation suit. The court stated that plaintiff had failed to attempt diligently to discover the defamer's identity or defamers' identities.²⁴ Based on these facts, the court held that in an action for defamation, concealment of a defendant's identity does not toll the statute of limitations.²⁵

In contrast to the holdings of *Staples*, *Guebard* and *Lim*, the Court of Appeals of Kentucky in *St. Clair v. Bardstown Transfer Line, Inc.*,²⁶ held that the concealment of a defendant's identity tolls the running of the period of limitations. In a wrongful death claim filed by the decedent's wife, the defendant, driver of the truck that struck the decedent, failed to comply with a Kentucky statute requiring persons involved in automobile accidents to give notice to the Kentucky State Police.²⁷ The court distinguished this case from other concealment cases because of the existence of the statute and noted that the purpose of the statute was to provide plaintiffs with compensation for injury.²⁸ Because the defendant in *St. Clair* failed to file an accident report, the plaintiff would have to "make a search of possibly the entire Nation to ascertain who, if any one, was negligent in colliding with and killing her husband upon the public streets of Louisville."²⁹ Plaintiff was unable, even through due diligence, to determine the identity of the defendant.³⁰ The court held that the defendant's failure to file an accident report tolled the one year statute of limitations and that the period of limitations would begin to run only after the plaintiff discovered the defendant's identity.³¹

24. *Id.*

25. *Id.*

26. 310 Ky. 776, 221 S.W.2d 679 (1949).

27. KY. REV. STAT. § 189.580 (1942) (current version at KY. REV. STAT. § 189.580 (1980)).

28. *St. Clair*, 310 Ky. at 779, 221 S.W.2d at 680-81.

29. *Id.* at 780, 221 S.W.2d at 681.

30. Plaintiff's reply, in which she sought to avoid the defendant's statute of limitations defense, stated that,

the defendant, through its agents, servants and employees, obstructed the prosecution of this action in that the defendant's agent, who was operating the said truck at the time it ran over and killed the plaintiff's intestate, failed to stop the said vehicle at the scene of the accident, but to the contrary fled therefrom and failed to report the accident and concealed the identity of the owner of the said truck and the operator thereof [and] that by reason of the foregoing she did not have sufficient information upon which to base a claim against the defendant for the death of her decedent until after the expiration of the period of limitations.

Id. at 778, 221 S.W.2d at 680 (quoting plaintiff's reply to defendant's statute of limitations defense).

31. The *St. Clair* court stated:

In the circumstances defendant should not be allowed to superimpose upon plaintiff in an action like this one the labor and efforts to discover the concealed fact of

In *Estate of Chappelle v. Sanders*,³² the District of Columbia Court of Appeals was faced with wrongful death and survival act claims filed after the respective statutes of limitations had run.³³ The plaintiff, administratrix of the estate of Nan Chappelle, filed suit against two defendants following a two-car accident on June 17, 1976. One defendant, Theophilus Sanders, Jr., the driver of one of the automobiles, gave decedent, a passenger in the other car, a false name and address and left the scene before the police arrived. The driver of decedent's car made note of defendant's license plate. On July 5, 1979, plaintiff filed wrongful death and survival act claims against Sanders and the owner of the automobile involved in the accident. At trial, the defendants successfully argued a motion for summary judgment based on the running of the statutes of limitations of both claims.³⁴ On appeal, the appellate court affirmed the judgment of the trial

his . . . identity when it is his statutory and primary duty to furnish that information as directed by the statute imposing it.

Therefore, we conclude that the statutory requirement for notice, 189.580, KRS, dispenses with any other efforts on the part of plaintiff to make the necessary discovery as to who was responsible for negligently producing his death.

Id. at 780, 221 S.W.2d at 681.

32. 442 A.2d 157 (D.C. 1982).

33. A wrongful death act is provided by the D.C. CODE ANN. § 16-2702 (1981) which is a section of the Negligence Causing Death statute. A survival of rights action is provided by D.C. CODE ANN. § 12-101 (1981). In a wrongful death action in the District of Columbia, the statute of limitations for bringing suit is one year. D.C. CODE ANN. § 16-2702 (1981). Under the wrongful death act, a wrongful death action is one brought on behalf of a decedent's beneficiaries when the death is due to the negligence of another individual. It is usually brought by the beneficiaries themselves, though it may be brought for them by the administrator of decedent's estate. Its purpose is to compensate the decedent's beneficiaries for the loss of the decedent. 1 C.J.S. *Abatement and Revival* § 162 (1936). In contrast, the survival of rights action statute, D.C. CODE ANN. § 12-101 (1981), sets no time limit within which to bring the action. D.C. CODE ANN. § 12-301(8) (1981), which provides the statutory limitation for bringing causes of action, states that "[e]xcept as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues: . . . (8) for which a limitation is not otherwise specially prescribed—3 years." Contrary to the common law rule that a person's cause of action dies with him, legislatures have taken it upon themselves to pass survivor statutes allowing decedent's cause of action to remain alive. The survival of rights statute preserves the cause of action vested in the decedent at the time he was injured by the wrongdoer, whether he died immediately or subsequently. The claim is brought by the estate of the decedent on behalf of the decedent's estate and indirectly benefits the decedent's beneficiaries. 1 C.J.S. *Abatement and Revival* § 144 (1936).

34. It is well established in the District of Columbia that "actions for personal injuries accrue from the date of the wrong." *Brewster v. Woodward & Lothrop, Inc.*, 530 F.2d 1016, 1017 (D.C. Cir. 1976); *Bair v. Bryant*, 96 A.2d 508, 510 (D.C. 1953) (with regard to a tort, statute of limitations begins to run on date of injury). The statute of limitations for the plaintiff's survival action began to run on June 17, 1976, and expired on June 17, 1979. As for the wrongful death claim, the period of limitations began to run on the date of Chappelle's death, August 17, 1976, and expired on August 17, 1977. Because the plaintiff filed

court, holding that plaintiff's claims were not timely filed and that the defendants' concealment of identities would not toll the running of the respective statutes of limitations.³⁵

The court in *Chappelle* chose to adopt the holdings in *Staples*,³⁶ *Guebard*,³⁷ and *Lim*.³⁸ The court reasoned that plaintiff could have discovered the defendants' identities from defendant's license plate number if she had used due diligence.³⁹ This same reason, however, was cited by the *Chappelle* court to justify its rejection of the holding in *St. Clair*.⁴⁰ Both *Chappelle* and *St. Clair* are automobile accident cases involving defendants who withheld their identities from the plaintiff in jurisdictions having statutes requiring that accidents be reported to the authorities.⁴¹ The major difference between the two cases is that in *Chappelle* the plaintiff had defendant's license plate number and could easily have tracked down the negligent driver of the vehicle. In *St. Clair*, the plaintiff had no clue with which to begin a search for the defendant.⁴² Though the fact patterns in *Chappelle* and *St. Clair* are similar in many respects, the court in *Chappelle* focused on the plaintiffs' abilities to identify the defendants and used this as the basis for its finding that the holding in *St. Clair* was not applicable.⁴³

The *Chappelle* court did not address the amount of diligence it would require of a plaintiff having no clue as to the defendant's identity or

neither claim until July 5, 1979, the trial court found both claims to be barred by the statutes of limitations.

35. *Chappelle*, 442 A.2d at 159.

36. See *supra* text accompanying note 14.

37. See *supra* text accompanying note 19.

38. See *supra* text accompanying note 22.

39. See generally *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 764 (D.C. Cir. 1965) (defense to claim of fraudulent concealment is that plaintiff knew of his cause of action or by due diligence could have found out about it); *Jackson v. American Credit Bureau, Inc.*, 23 Ariz. App. 199, 203, 531 P.2d 932, 936 (1975) (statute of limitations enacted to limit time within which action must be brought so that plaintiff will use due diligence in bringing suit and not be neglectful of his rights); *Weisberg v. Williams, Connolly & Califano*, 390 A.2d 992 (D.C. 1978) (while concealment of claim normally tolls the statute of limitations, here plaintiffs could and should have known of existence of an attorney malpractice claim against their attorneys as of 1965 when the government first defended itself by claiming the statute of limitations had run on plaintiffs' Federal Tort Claims Act claim, but plaintiffs failed to file against their attorneys until 1976).

40. *Chappelle*, 442 A.2d at 159.

41. Both Kentucky and the District of Columbia have statutes requiring the driver of a vehicle involved in an accident to report the accident to the authorities. D.C. CODE ANN. § 40-426 (1973) (current version at D.C. CODE ANN. § 40-410 (1981)); KY. REV. STAT. § 189.580 (1942) (current version at KY. REV. STAT. § 189.580 (1981)).

42. *St. Clair*, 310 Ky. at 780, 221 S.W.2d at 681.

43. *Chappelle*, 442 A.2d at 158-59.

whether plaintiff's inability to determine the identity of a defendant, after exercising due diligence, would toll the period of limitations as in *St. Clair*.⁴⁴ The court's use of *St. Clair* seems to suggest that the court would apply the discovery rule if, as in *St. Clair*, the plaintiff were totally unable to discover the defendant's identity.⁴⁵ Such precedent would require the plaintiff to file a claim within the period of limitations which would begin to run only after the identity of the defendant had been determined.

On the other hand, the court's reliance on *Staples*, *Guebard*, and *Lim* as precedent seems to suggest that a plaintiff must file a claim within the applicable statutory period from the date the cause of action arises, even though the defendant's identity may not be known. Following this filing, plaintiff then has a duty to use due diligence to attempt to discover the defendant's identity.⁴⁶

The court's narrow holding in *Chappelle* does not make clear the course the court will take in the future. Trial courts still have received no general guidance as to the showing of diligence a plaintiff must make in a case where defendant's identity was fraudulently concealed in order to toll the statute of limitations. In particular, it is unclear whether the court will require plaintiffs to file suit within the period of limitations even if their diligent efforts to identify defendants are unsuccessful. The court's willingness to consider *St. Clair* suggests that there may be cases in which the District of Columbia Court of Appeals would find that fraudulent concealment of a defendant's identity did toll the running of the statute of limitations.

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44. The court in *Chappelle* stated that "[i]n the circumstances here we are inclined to follow the rationale of those jurisdictions which have held generally that concealment of the identity of liable parties, unlike the concealment of the existence of a claim, is insufficient to toll the statute of limitations." *Id.* at 159.

45. *See supra* note 3 and accompanying text.

46. *See supra* text accompanying notes 17, 20-21, 24-25.