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The Discovery Rule – Landers v. Wabash Center (Ind. Ct. App. 2013)

This week’s post is dedicated to one of the most important doctrines of law in existence – the Discovery Rule. We shall examine the concept of the Discovery Rule through the recent Indiana Court of Appeals decision *Landers v. Wabash Center, Inc.* authored by the former longtime Chief Justice of the Indiana Supreme Court, Senior Judge Randall T. Shepard.

At the outset of our discussion, it is important to distinguish the Discovery Rule from rules that govern discovery. Generally speaking, the “discovery” portion of a case is the portion in which the parties exchange documents, answer interrogatories, sit for depositions, acquire experts, and seek documents from non-parties. This discovery portion of litigation is governed, largely, by Indiana Trial Rules 26–37 or Federal Rules 26–37, depending on whether the case is in state or federal court. These rules of discovery are entirely different from the doctrine of law known as the Discovery Rule.

In its simplest form, the Discovery Rule is a mechanism by which a case may be brought after the statute of limitations for the action has passed. To this end, it is a similar mechanism to the doctrine of fraudulent concealment that we discussed two weeks ago, in as much as they both act to remove the statute of limitations as a defense. To further understand the Discovery Rule, let us delve into the *Landers* decision.

The *Landers* case arose from the theft of more than \$4 million by Stephen McAninch from his employer. McAninch's employer was Wabash Center, Inc. "Wabash is a not-for-profit agency in Lafayette[, Indiana] that provides education to children with developmental disabilities and independent living, employment, and community involvement assistance to adults." McAninch was hired by Wabash in 1986 to manage the finances of the agency. Beginning in 1991, and running through the rest of his time with Wabash, McAninch designed a procedure whereby he embezzled millions of dollars. In October 2009, McAninch's scheme began to come to the surface as an outside auditor demanded verification of certain expenditures. On October 30, 2009 McAninch chose to take his own life.

In attempting to recover some of the stolen money, in April 2011, Wabash filed suit against Connie Landers – the ex-wife of McAninch. Miss Landers and McAninch had married in 1984 but divorced in 1998. As part of the divorce settlement, Miss Landers received the house, which they had built in 1994, spousal maintenance to be paid through 2004, and child support that terminated in 2006. Under a theory of law known as unjust enrichment – whereby a plaintiff must show that the defendant came into possession of property or money and that the defendant's retention of such would be unjust – Wabash sought to regain funds from Miss Landers that had been paid to her from the ill-gotten gains McAninch. After trial, Wabash received a judgment plus interest against Miss Landers for \$1,037,489. Miss Landers appealed that judgment.

On appeal, Miss Landers' argued two points: (1) that Wabash's claims were barred by the applicable statutes of limitation and (2) that the evidence did not support the judgment. As our focus is only on the first point, it is sufficient to dispose of the evidence issue by simply noting that the court found the evidence was sufficient. Our focus here is upon how Wabash was able to circumvent the statute of limitation to receive an affirmation of their million-plus dollar judgment. As you have probably guessed, the answer to the method used by Wabash is the Discovery Rule.

Though I pride myself in my writing acumen, I am not so naïve as to think I can summarize Indiana's application of the Discovery Rule more appropriately than the man who led the state's highest court for more than two decades. To that end, let us look to Senior Judge Shepard's distillation.

Under Indiana's discovery rule, a cause of action accrues, and the statute of limitation begins to run, when a claimant knows or in the exercise of ordinary diligence should have known of the injury. The party pleading a statute of limitation bears the burden of proving the suit was commenced beyond the statutory time allowed. Once the

party makes a prima facie case, the burden shifts to the other party to prove such facts as will prevent the running of the statute. Nevertheless, the ultimate burden of persuasion remains on the party asserting the bar. Determining when a cause of action accrues is generally a question of law. However, where, as here, application of a statute of limitation rests on questions of fact, it is an issue for the finder of fact to decide.

While this is an excellent and succinct description of the Discovery Rule, it may need to be unpacked a bit for ease of understanding.

The first sentence describes how a statute of limitation is calculated. In order to illustrate this portion of the discussion, let us look at a specific statute of limitation. Under Indiana law, a claim for personal injury must be brought within two years. That is the limitation provided by Ind. Code section 34-11-2-4. Ordinarily, the triggering event to begin calculating the limitation period – i.e. the two years – is the initial event that causes the injury. This is very easy in the automobile accident context. In that context there is no question when the car crash happened and it is generally pretty easy to discover the physical injuries sustained at that moment – though not always. As Senior Judge Shepard told us, under the Discovery Rule, the statute is triggered one the would-be plaintiff by “the exercise of ordinary diligence should have” discovered the injury.

Sticking with our personal injury car accident scenario, let us examine how the Discovery Rule applies. Scenario 1 – the accident occurs on January 1, 2008 and the plaintiff loses his arm in the collision. Scenario 2 – the accident occurs on January 1, 2008 but the plaintiff suffers an abdominal tear that does not so much as cause him any pain until July 2010. Under Scenario 1 the plaintiff has every reason to know of his injury the date of the accident. He does not need to be very diligent to discover his injury. Thus, the statute of limitations will begin with his accident and he will need to file his suit within two years of the accident. Scenario 2, however, is different. Under this scenario, it is unclear exactly when the man would need to file his claim. I have purposefully given you too few facts to determine whether the man should have discovered his injury earlier than the manifestation of pain. Moreover, just because he feels some semblance of pain does not necessarily mean that he should at that moment know by ordinary diligence that he has an abdominal tear. But, assuming for the point of illustration, if on July 4, 2010 the injured man discovers that he has an abdominal tear, instantly knows that is the result of the accident, and at no point should have discovered the injury prior to July 4, 2010, then the statute of limitations is not triggered until the date of discovery and he must then bring his claims within two years of July 4, 2010.

Let us turn now to the second sentence of Senior Judge Shepard's description – "The party pleading a statute of limitation bears the burden of proving the suit was commenced beyond the statutory time allowed." This sentence may be a bit confusing upon first glance. Most of us are probably used to the verb "pleading" referring to the plaintiff. While it is certainly true that most general references to a person pleading something in a case is a reference to the plaintiff, in this context it refers exclusively to the defendant. Because the statute of limitations is an affirmative defense, it is something that a defendant must specifically assert. Further, the defendant has the burden to prove that the claim by the plaintiff was filed outside of the statutory period.

The third sentence – "Once the party makes a prima facie case, the burden shifts to the other party to prove such facts as will prevent the running of the statute." – provides a major concept of burden shifting. What this says is that once defendant has provided a basic showing that the claim was filed after the statutory period, the burden is now upon the plaintiff to show that there is some exception. Typically this burden shifting would occur by the defendant showing that the date of injury was some specific date and when you add the statutory time period to that date, the date upon which the case was filed is after that. As a side bar, where the date of injury is easily ascertainable, the only way the defendant could make any kind of showing to shift the burden is exactly as I just described. This makes sense if you think about it, because otherwise the claim would obviously have been raised within the statutory period regardless of the Discovery Rule.

The fourth sentence is a rather complicated issue of legal proceedings. Senior Judge Shepard wrote, "Nevertheless, the ultimate burden of persuasion remains on the party asserting the bar." This is a point made by the Judge, largely because he is an adept legal scholar. It is a point often missed by many lawyers. To explain the concept of burden of proof versus the burden of persuasion, I will refer to a recent article by Kenneth Duvall from the Southern Illinois University Law Journal. In that article, Mr. Duvall noted that there are essentially two types of burdens in a case – the burden of production and the burden of persuasion. "[T]he burden of production is often framed as a duty to produce a prima facie case to the judge's satisfaction that the case may survive a pre-verdict adverse judgment." The burden of persuasion, on the other hand, "is simply the burden of persuading a trier of fact that the law and the disputed facts together compel a particular conclusion. The burden of persuasion does not shift; it remains on the party who carries that burden at the beginning of the case."

The final two sentences from Senior Judge Shepard's synopsis, discuss the determination of the application of the statutory period as being generally an issue of law but in this case as an issue of fact to be decided by the trier of fact. The

difference between issues of fact and issues of law could provide fodder for dozens of blog posts. For our purposes I will simply note that if it is an issue of law, the court can decide that issue on its own. If it is an issue of fact, then that decision must be made by a finder of fact – either a jury or a judge at trial if there is no jury.

Now that we have finally unpacked what Senior Judge Shepard so neatly condensed into one paragraph, we can return to the specifics of the *Landers* case. As the application of the Discovery Rule in this case was a question of fact, the Court of Appeals had to look at the decision by the trial court and determine if it had abused its discretion in finding that the case was not barred. In holding that the trial judge did not abuse his discretion, the appellate court noted the elaborate procedure and mechanism utilized by McAninch to steal the money, that McAninch was in charge of overseeing the people who could have detected his malfeasance, that McAninch was the one who created the financial reports reviewed by Wabash's finance committee at regular meetings, McAninch created the financial manual governing Wabash's accounting procedures, the accounting procedures were appropriate, that Wabash hired an outside auditor to review the books each year whose main point of contact was McAninch, after McAninch's suicide the executive director of Wabash consulted with the auditor on whether outside analysis would be necessary and was advised that it would be a waste of time to do so. In short, "This evidence of McAninch's elaborate scheme and Wabash's consistent monitoring of its financial procedures adequately supports the trial court's conclusion that Wabash acted with ordinary diligence in managing its finances and could not have reasonably been expected to discover McAninch's theft prior to his suicide." As such, the court found that the Discovery Rule could apply.

Though the Discovery Rule is vitally important in many contexts, I do not know that I could envision a better example of the need to apply the doctrine. As shown here, McAninch had complete control over all of the mechanism to discover his evil actions. As such, to hold otherwise would be to allow McAninch, and in this specific instance his ex-wife, to benefit by the intricacies of McAninch's scheme. It is for this reason that the Discovery Rule exists. It acts to not deprive a person who has been injured or wronged the opportunity to exercise his or her rights just because the injury/wrongdoing could not have been unearthed at an earlier date.

Join us again next time for further discussion of developments in the law.

Sources

- *Landers v. Wabash Center, Inc.*, ___ N.E.2d ___, No. 79A04-1204-CT-191 (Ind. Ct. App. Feb. 4, 2013).
- Ind. Code § 34-11-2-4.
- Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. Ill. U. L.J. 135 (2012).

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