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Cart v. Marcum: The Discovery Rule as an Exception to the Statute of Limitations in West Virginia

James R. Leach
West Virginia University College of Law

CART v. MARCUM: THE DISCOVERY RULE AS AN EXCEPTION TO THE STATUTE OF LIMITATIONS IN WEST VIRGINIA

The tendency of the law must always be
to narrow the field of uncertainty.

—Oliver Wendell Holmes, Jr.[1]

I. INTRODUCTION

The traditional "discovery rule" provides that the statute of limitations does not begin to run until an injured party knows, or through the exercise of reasonable diligence should know, of an injury and the party responsible for the injury. This is generally true even if the injured party's failure to discover the injury or the identity of the wrongdoer is due to the general circumstances surrounding the activity and does not require that the wrongdoer intentionally play some role in "covering up" the injury. For example, the discovery rule would delay the running of the statute of limitations where a surgeon left a sponge in a patient's abdomen during surgery, even if the surgeon did not realize the sponge had been left there nor take steps to hide that fact from the patient. Although the discovery rule has been long recognized in West Virginia, language in a syllabus point and in the body of a recent decision by the West Virginia Supreme Court of Appeals suggests that the discovery rule will not be triggered unless the wrongdoer intentionally plays some active role in preventing the discovery of the injury.[2] This Comment will review the history of the discovery rule in West Virginia and argue that such a meaning was not intended by the state supreme court and that the traditional discovery rule is alive and well in West Virginia.

1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 127 (1881), *cited in* Cart v. Marcum, 423 S.E.2d 644, 648 (W. Va. 1992).

2. Cart v. Marcum, 423 S.E.2d 644 (W. Va. 1992).

II. DEVELOPMENT OF THE DISCOVERY RULE AS AN EXCEPTION TO THE STATUTE OF LIMITATIONS

A. *An Overview of the Statute of Limitations and Discovery Rule*

As a general rule, statutes of limitations require a plaintiff to bring a lawsuit within a specific time period after a cause of action "accrues."[3] The United States Supreme Court has explained the underlying rationale behind statutes of limitations as follows:

> These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.[4]

A cause of action accrues when all of the facts needed to give a party a right to recover from another have occurred. In an uncomplicated case, such as a personal injury tort case where the injury is immediately recognized, the cause of action accrues and the statute of limitations typically begins to run on the date of the injury.[5] In addition, mere ignorance of the existence of a cause of action or of the identity of the wrongdoer generally does not prevent the running of a statute of limitations.

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3. *See* Steeley v. Funkhouser, 169 S.E.2d 701 (W. Va. 1969); Sansom v. Sansom, 137 S.E.2d 1 (W. Va. 1964); *see also* 54 C.J.S. *Limitation of Actions* § 108.

4. United States v. Kubrick, 444 U.S. 111 (1979); *see also* Romano v. Westinghouse Electric Co., 336 A.2d 555, 560 (R.I. 1975) (explaining that statutes of limitations supply a mechanism to keep plaintiffs from "sleeping on their rights."); Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020, 1026 (Md. 1983) (explaining that statutes of limitations generally promote judicial economy).

5. *See, e.g.*, Jones v. Trustees of Bethany College, 351 S.E.2d 183 (W. Va. 1986). The statute of limitations for personal injury and property damage in West Virginia is set forth in W. VA. CODE § 55-2-12 (1994).

Because a statute of limitations can have potentially harsh results,[6] the rule that the statutory period begins to run at the time of the injury is not absolute. Instead, numerous courts have adopted what has come to be known as the "discovery rule." Under the discovery rule, a cause of action will not accrue in certain circumstances until a claimant knows or should reasonably know of the existence of his claim.[7] A textbook example of the discovery rule would be a case of hidden injury, *e.g.*, a surgeon leaves a sponge inside a patient during the course of an operation and the sponge is discovered by x-ray several years after the fact.[8] In this example, if a discovery rule were applied, the statute of limitations would begin to run when the patient learned of the sponge. Thus, as one court has explained, the discovery rule "was formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action."[9]

B. The Discovery Rule in West Virginia

In 1920, the West Virginia Supreme Court of Appeals adopted the beginnings of a discovery rule for West Virginia. In *Petrelli v. West Virginia-Pittsburgh Coal Co.*,[10] the court held that the statute of limitations in an underground trespass case would run "only from the time of actual discovery of the trespass, or the time when discovery was reasonably possible."[11] The court adopted the rule for subterranean

6. *See* Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983) (explaining that a statute of limitations is a "law arbitrarily making legal remedies contingent on mere lapse of time.").

7. 54 C.J.S. *Limitations of Actions* § 87(a) (1987).

8. *See, e.g.*, Ayers v. Morgan, 154 A.2d 788 (Pa. 1959) (applying the discovery rule and holding that when a surgeon left a sponge inside a patient during the course of an operation, the statute of limitations began to run nine years later when the sponge was discovered by an x-ray).

9. Hammer v. Hammer, 418 N.W.2d 23, 26 (Wis. Ct. App. 1987), *review denied*, 428 N.W.2d 552 (Wis. 1988).

10. Petrelli v. West Virginia-Pittsburgh Coal Co., 104 S.E. 103 (W. Va. 1920). In *Petrelli*, a coal company mined coal from underneath the plaintiff's property, and the plaintiff did not discover the trespass until several years later. The defendant asserted the two year statute of limitations as a defense.

11. *Id.* at 106.

trespass because it is generally within the power of the trespasser, by failing to disclose the trespass, to prevent the injured party from asserting his right to redress within the statutory period. The court reasoned that such action by the trespasser is fraudulent,[12] and the statute of limitations should be tolled until the injured party discovers, or reasonably could have discovered, the trespass.[13]

Over time, the supreme court expanded the discovery rule to cover other types of tort cases. The first expansion came in the area of medical malpractice and concerned injuries that, like the underground trespass in *Petrelli*, were difficult for the injured party to detect.

1. Medical Malpractice

As previously explained, the classic example of an injury that is difficult to detect is a surgeon who leaves a foreign object in a patient during an operation.[14] However, until 1965, the rule in West Virginia was that absent actual knowledge, fraud, or concealment on the part of the surgeon, the cause of action accrued at the time the foreign object was left behind—not when the patient discovered the injury.[15]

Recognizing the harshness of a rule that barred a plaintiff's cause of action before a plaintiff had a reasonable opportunity to discover an injury, the court overruled its earlier decision and adopted a foreign object discovery rule in medical malpractice actions in *Morgan v. Grace Hospital, Inc.*[16] In *Morgan*, a sponge was left in a patient's abdomen and was not discovered until ten years later. The court held that a foreign object negligently left in a patient's body by a surgeon will toll the statute of limitations if the patient is ignorant of the fact,

12. The defendant's fraudulent concealment of the cause of action or of the identity of the wrongdoer also tolls the limitations period by statute in West Virginia. *See* W. VA. CODE § 55-2-17 (1994); *see also* Sattler v. Bailey, 400 S.E.2d 220 (W. Va. 1990).

13. *Petrelli*, 104 S.E. at 106.

14. Morgan v. Grace Hospital, Inc., 144 S.E.2d 156 (W. Va. 1965).

15. *See* Gray v. Wright, 96 S.E.2d 671 (W. Va. 1957) (holding that a patient who did not discover the injury and bring suit during the limitations period was barred by the statute of limitations).

16. 144 S.E.2d 156 (W. Va. 1965).

and consequently, of his right of action for malpractice.[17] In this circumstance, the cause of action does not accrue until the patient learns of or, in the exercise of reasonable care and diligence, should have learned of, the foreign object in his body.[18]

Two years later, in *Hundley v. Martinez*,[19] a case where the defendant physician was accused of fraudulently concealing an injury from a patient, the court noted that while *Morgan* did restrict the discovery rule to cases involving "foreign objects in the body," it did not abrogate the discovery rule as it applied to fraudulent concealment in medical malpractice cases.[20] Therefore, as of 1967, suit could be brought in medical malpractice cases under the discovery rule exception to the statute of limitations if either: (1) a foreign object was left behind, or (2) the cause of action was fraudulently concealed from the defendant. Whether the discovery rule applied to other factual situations under medical malpractice was not clear from the opinion in *Hundley*.

The first indicators that the discovery rule in medical malpractice cases was not limited to foreign objects or fraudulent concealment came in *Bishop v. Byrne*, a case from the United States District Court for the Southern District of West Virginia.[21] In *Bishop*, a negligent sterilization case, the district court utilized a broader form of the *Morgan* rule and held that the period of limitations does not begin to run against the plaintiff's cause of action until he learns of, or by the exercise of reasonable diligence should have learned of, the defendant's negligent act or omission.[22]

Finally, in 1978, the West Virginia Supreme Court of Appeals specifically articulated the traditional discovery rule for medical malpractice in the case of *Hill v. Clarke*.[23] *Hill*, like *Morgan*, involved a foreign object left behind during surgery, and the court applied the

17. *Id.* at 162.
18. *Id.* at 162.
19. 158 S.E.2d 159 (W. Va. 1967).
20. *Id.* at 166.
21. 265 F. Supp. 460 (S.D. W. Va. 1967).
22. *Id.* at 466.
23. 241 S.E.2d 572 (W. Va. 1978).

foreign object discovery rule from *Morgan*. However, in addition to the foreign object discovery rule, the court also held that a plaintiff's cause of action accrues when the plaintiff knows, or in the exercise of reasonable diligence has reason to know, of the alleged malpractice.[24] In addition, the court in *Hill* took the opportunity to clarify the application of the discovery rule by explaining that the rule "applies to all factual questions under the discovery rule and not solely to cases where fraudulent concealment is at issue."[25]

In *Harrison v. Seltzer*,[26] the court again accepted for review a medical malpractice case. In *Harrison*, the court noted that "in malpractice, our discovery rule does not initially rest on a showing of fraudulent concealment, but rather on whether the injured plaintiff was aware of the malpractice or, by the exercise of reasonable care, should have discovered it."[27] Thus, the court in *Harrison* recognized that the focus under the discovery rule properly belonged on the *awareness* of the plaintiff rather than on the actions of the defendant.

Finally, *Jones v. Trustees of Bethany College*[28] involved a plaintiff who settled and released with his insurance company for injuries sustained in an auto accident, only to discover latent back injuries after the limitations period had run. In foreclosing application of the discovery rule in this instance, the court concluded that the applicable two-year limitations period,[29] combined with the normal time-consuming pretrial procedures, should enable a plaintiff to learn of any latent injuries that result from an initial traumatic event. Therefore, the court held that "where a plaintiff sustains a *noticeable* personal injury from a traumatic event, the statute of limitations begins to run and is not tolled because there may also be a latent injury arising from the same traumatic event."[30]

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24. *Id.* at 574. The court also reiterated the rule first set out in *Hundley* that the question of when the plaintiff knew or should have known through the exercise of reasonable diligence of the malpractice is a question for the jury. *Id.* at 573.

25. *Id.*

26. 268 S.E.2d 312, 314 (W. Va. 1980).

27. *Id.* at 314.

28. 351 S.E.2d 183 (W. Va. 1986).

29. W. VA. CODE § 55-2-12 (1994).

30. *Jones*, 351 S.E.2d at 187 (emphasis added).

The West Virginia Legislature codified the medical malpractice discovery rule under the Medical Professional Liability Act of 1986.[31] As a result, the discovery rule still applies to medical malpractice, but is subject to an outside limit of ten years from the date of the injury.[32]

2. Legal Malpractice

Like medical malpractice, the West Virginia Supreme Court of Appeals has also applied the discovery rule to legal malpractice.[33] In *Family Savings & Loan Assoc. v. Ciccarello*,[34] a client hired an attorney to do a title search prior to purchasing property, and the attorney failed to report a special use limitation on the title. More than a year after the work was completed,[35] the client discovered the defect in the

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31. W. VA. CODE § 55-7B-4 (1986) states:

(a) A cause of action for injury to a person alleging medical professional liability against a health care provider arises as of the date of injury, except as provided in subsection (b) of this section, and must be commenced within two years of the date of such injury, *or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs*: Provided, That in no event shall any such action be commenced more than ten years after the date of injury.

(b) A cause of action for injury to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years of the date of such injury, or prior to the minor's twelfth birthday, whichever provides the longer period.

(c) The periods of limitation set forth in this section shall be tolled for any period during which the health care provider or its representative has committed fraud or collusion by concealing or misrepresenting material facts about the injury.

Id. (emphasis added).

Subsection (b), which shortens the extended time period given to infants (to age eighteen) by a general statute of limitations tolling statute, W. VA. CODE § 55-2-15 (1994), is likely unconstitutional under the West Virginia Supreme Court's recent holding in Whitlow v. Bd. of Educ. of Kanawha County, 438 S.E.2d 15 (W. Va. 1993).

32. W. VA. CODE § 55-7B-4 (1986).

33. *See generally* Vincent Paul Cardi, *Determining the Appropriate Time Limitations on Attorney Malpractice Lawsuits in West Virginia: A Brief Overview*, 95 W. VA. L. REV. 913 (1993).

34. 207 S.E.2d 157, 162 (W. Va. 1974), *overruled on other grounds by* Hall v. Nichols, 400 S.E.2d 901 (W. Va. 1990).

35. The applicable statute of limitations period under W. VA. CODE § 55-2-12(c) (1994) is one year.

title. The court applied the discovery rule and held that the cause of action accrued on the date the defect in the title was discovered and not on the date the title work was completed.[36] To justify the expansion of the discovery rule to legal malpractice, the court commented that:

> We adhere to the reasoning employed in *Morgan* and apply it to the instant case. Although, as asserted by the defendant, the *Morgan* decision applying the "discovery rule" was restricted to cases involving foreign objects negligently left in a patient's body, we discern no valid reason why the principle expressed therein should not be extended when such extension is designed to promote justice and right. Morgan extended the rule to escape one which was "unrealistic and cruelly harsh." For the same reason we extend the *Morgan* rule to cover the instant case.[37]

Interestingly, the court in *Ciccarello* explained that the discovery rule was being adopted "not on the theory of fraud but on the basis of the damages having occurred when the defect in title was discovered or by the exercise of reasonable diligence should have been discovered."[38] It seems that the court expressly stated that the discovery rule was not being adopted on a fraud theory in order to make clear that the decisions in *Morgan* and *Hundley*, both of which were decided before *Ciccarello*, were not intended to limit the discovery rule to only those cases involving a fraudulent concealment of the alleged malpractice.[39]

3. Product Liability

The United States District Court for the Southern District of West Virginia first applied the West Virginia discovery rule in a products liability case in *Pauley v. Combustion Engineering, Inc.*[40] In *Pauley*, an asbestosis case, the district court predicted that the West Virginia Supreme Court of Appeals would not follow an earlier decision handed

36. *See Harrison*, 268 S.E.2d at 314.
37. *Ciccarello*, 207 S.E.2d at 162.
38. *Id.* at 163.
39. *See Harrison*, 268 S.E.2d at 314.
40. 528 F. Supp. 759, 764-65 (S.D. W. Va. 1981).

down in the case of *Scott v. Rinehart & Dennis Co.*,[41] which held that the discovery rule did not apply in a silicosis case.[42] The district court reasoned that *Scott* would not be followed because the West Virginia Supreme Court of Appeals had since adopted the discovery rule in the areas of underground trespass, medical malpractice, and legal malpractice and would likely continue this trend.

In adopting the discovery rule, the court noted that the purpose of the statute of limitations is "to encourage promptness in instituting claims and to avoid inconvenience which may result from a delay in asserting claims when it is practicable for plaintiff to assert them."[43] The court then concluded that applying the discovery rule in product liability cases did not defeat the purpose of the statute of limitations because "in cases where the injury to the plaintiff is susceptible to concealment, *through no fraudulent act on the part of the defendant*, it [is] unreasonable, unfair and unjust to require the plaintiff to file his cause of action before he can reasonably discover his injury."[44] Finally, the court held that the "plaintiff's cause of action accrued when he knew, or by the exercise of reasonable diligence should have known, of the existence of his injury and its cause."[45]

The West Virginia Supreme Court of Appeals directly addressed the issue of the discovery rule for product liability in a 1987 case, *Hickman v. Grover*.[46] The court noted that cases dealing with chemicals, drugs, asbestosis, and products like the Dalkon Shield, present common situations where injuries arise only after long exposure to a product or where injuries arise a long time after exposure to a prod-

41. 180 S.E. 276 (W. Va. 1935).

42. In *Scott*, the West Virginia Supreme Court of Appeals found that: (1) the cause of action accrued when the injury was inflicted; (2) that mere ignorance of a cause of action does not suspend the operation of the statute of limitations; and (3) that the statute of limitations therefore barred an action for personal injury by a tunnel worker who had contracted silicosis from tunnel dust even though the plaintiff did not discover that he had silicosis until more than two years after he left the job. *Id.* At that time, the applicable limitations period under W. VA. CODE § 55-2-12 (1923), was one year.

43. *Id.* at 764 (citing *Morgan*, 144 S.E.2d at 161).

44. *Id.* (emphasis added).

45. *Id.* at 765.

46. 358 S.E.2d 810 (W. Va. 1987).

uct.[47] Therefore, the plaintiff's cause of action should arise only when the injury is pronounced enough to put the plaintiff on notice that he has been injured and when the plaintiff can determine the cause of the injury.[48] In its holding, the court refined the test for when the cause of action accrues for product liability by stating that "[t]he statute begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury."[49]

4. Faulty Construction Cases, The Discovery Rule, and Statutes of Repose

Under the architects and builders statute,[50] "[n]o action, whether in contract or in tort, for indemnity or otherwise . . . may be brought more than ten years after the performance or furnishing of such services or construction . . . ."[51] The period of limitations begins when the "improvement to the real property in question has been occupied or accepted by the owner of the real property, whichever occurs first."[52]

Because the architects and builders statute is a statute of repose, once the ten year limitations period runs, all actions are barred. A statute of repose can be distinguished from a statute of limitations in that "[u]nder a statute of repose, a cause of action is foreclosed after a stated time period regardless of when the injury occurred,"[53] whereas, under a statute of limitations, a cause of action is foreclosed within a specific time period of when the action accrues.[54] Thus, the purpose of a statute of repose is to set an arbitrary time period after which no actions, whether contract or tort, may be brought.[55]

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47. *Id.* at 813.
48. *Id.*
49. *Id.*
50. W. VA. CODE § 55-2-6a (1994).
51. Shirkey v. Mackey, 399 S.E.2d 868, 870 (citing W. VA. CODE § 55-2-6a (1994)).
52. *Id.*
53. Gibson v. W. Va. Dep't of Highways, 406 S.E.2d 440, 443 (W. Va. 1991).
54. For an explanation of when a cause of action accrues, *see* part III.A.
55. *Gibson*, 406 S.E.2d at 443.

Therefore, even though faulty construction claims can sound in tort or in contract, the arbitrary ten year time limit set out in the architects and builders statute will not be tolled by the discovery rule.[56] It should also be noted that the pre-existing statutes of limitation for both contract and tort actions will continue to operate within the ten year outside limit set out in West Virginia Code Section 55-2-6a.[57]

5. Invasion of Privacy

Finally, the West Virginia Supreme Court of Appeals continued its expansion of the discovery rule to include the tort of invasion of privacy in *Slack v. Kanawha County Housing and Redevelopment Authority*.[58] *Slack* involved the "bugging" of an employee's office by her superior, and the issue was whether the plaintiff's lawsuit was filed within one year of the date on which the cause of action accrued. The court held that the discovery rule applied and that the statute did not begin to run until the plaintiff knew, or by the exercise of reasonable diligence should have known, that her privacy had been invaded.[59]

III. *CART V. MARCUM*: STATEMENT OF THE CASE

In the case of *Cart v. Marcum*,[60] Cart, a landowner and the original plaintiff, entered into an oral contract in June of 1988 with Jefferson, a logger and one of the defendants. Under the terms of their agreement, Jefferson agreed to bear the expense for cutting, removing, selling, and replanting timber from 65 acres owned by Cart. In return, Jefferson was to receive half the proceeds from the sale of the timber. Although Jefferson produced a written contract reflecting their oral agreement, the contract was never signed.

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56. *Shirkey*, 399 S.E.2d at 870; Basham v. General Shale, 377 S.E.2d 830 (W. Va. 1988).

57. *Shirkey*, 399 S.E.2d at 871.

58. 423 S.E.2d 547 (W. Va. 1992). Again, the applicable statute of limitations is one year under W. VA. CODE § 55-2-12 (1994).

59. *Slack*, 423 S.E.2d at 553.

60. 423 S.E.2d 644 (W. Va. 1992).

According to Cart, because Jefferson stalled for six weeks in executing the written contract, Cart put up a fence and then told Jefferson to sign the contract or stay off his property. Instead, Jefferson entered Cart's property, removed the timber he had already cut, sold it to saw mills for processing, and then disappeared with the money. Cart first noticed that the cut timber had been removed from his property on August 14, 1988. According to the record below, the conversion took place no later than August 9, 1988.[61]

Although Cart could not find Jefferson, he did find out in the fall of 1989 that Jefferson had sold at least some of the timber to defendants Hager and Marcum. Apparently, Jefferson sold the timber to Hager, and then Hager hired Marcum to haul and process the timber at his sawmill. Cart filed suit against Jefferson, Hager, and Marcum on August 10, 1990. The Circuit Court of Cabell County dismissed the case against Marcum and Hager on summary judgment reasoning that Cart had filed his case more than two years after the cause of action accrued and was thus barred from bringing suit by the statute of limitations.[62] The West Virginia Supreme Court of Appeals accepted the case for review, and in an opinion authored by Justice Richard Neely, affirmed the lower court's ruling.

IV. ANALYSIS

A. *Expansion of the Discovery Rule to all Torts in West Virginia*

In *Cart*,[63] the West Virginia Supreme Court of Appeals narrowed the field of uncertainty in the torts area by holding that the discovery rule is "generally applicable to *all torts*, unless there is a clear statutory prohibition of its application."[64] The court gave two reasons to

61. *Id* at 646.

62. The statute of limitations in this case was two years, *see* W. VA. CODE § 55-2-12 (1981), and the lower court found that the statute had expired as of August 9, 1990. *Id.* at 646.

63. 423 S.E.2d 644 (W. Va. 1992).

64. *Id.* at 648 (emphasis added). To explain the expansion of the discovery rule to all torts, the court cited back to the piecemeal expansion of the discovery rule in the areas of

support its decision. First, the court wanted to put an end to the tort-by-tort adoption of the discovery rule and provide a bright line rule in the torts arena. Second, the court felt that the interests of justice and fundamental fairness would best be served by adopting such a rule. Here, the court noted that West Virginia was not the first jurisdiction to expand the discovery rule to all tort claims.[65] Accordingly, after the *Cart* decision, *all* tort claims will accrue on the date the injury is discovered, or with reasonable diligence should be discovered, unless the tort is already controlled by a legislatively created discovery rule.[66]

B. Does Cart *Threaten the Discovery Rule Status Quo?*

The court's opinion in *Cart* inexplicably muddies the clear evolution of the discovery rule, which continued into and through most of the *Cart* decision, by suggesting that the rule might apply only where the defendant takes some action to conceal the injury or the identity of the wrongdoer. Three portions of the opinion create this confusion. These include: (1) the third syllabus point in the opinion, which requires that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury;[67] (2) a portion of the opinion focusing on the "defendant's conduct" rather than the plaintiff's awareness;[68] and (3) a portion of the opinion concerning a requirement that the plaintiff show that he was "prevented from knowing of the claim at the time of the injury."[69]

The court's syllabus in *Cart* contains three points. The first point juxtaposes the statute of limitations and the discovery rule in familiar fashion.[70] The second point expands the discovery rule to all tort cases not governed by statute.[71] The first clause of the third point reit-

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products liability, faulty construction, and invasion of privacy. Then, the Court noted that each expansion of the discovery rule had caused a loss of predictability in bright line rules and revived litigation that should be long dead. *Id.*

65. *Id.* (citing Hansen v. A.H. Robbins, Inc., 335 N.W.2d 578, 583 (Wis. 1983)).

66. *Id.*

67. *Id.* at 645 (Syl. Pt. 3).

68. *Id.* at 648.

69. *Id.*

70. *Id.* at 645 (Syl. Pt. 1). Generally, a cause of action accrues (*i.e.*, the statute of limitations begins to run) when a tort occurs; under the "discovery rule," the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim.

71. 2. The "discovery rule" is generally applicable to all torts, unless there is a clear

erates the general rule that mere ignorance of a cause of action or the identity of a wrongdoer does not prevent the running of the statute of limitations.[72] Notwithstanding the first two-and-a-half syllabus points, the court goes on, in the second clause of Syllabus Point 3, to cast doubt on the application of the discovery rule by stating that the rule "applies *only* when there is a strong showing by the plaintiff that *some action by the defendant* prevented the plaintiff from knowing of the wrong at the time of the injury."[73]

Reinforcing this notion, the court goes on to state in the body of the opinion that "the statute of limitations will apply unless the handicaps to discovery are great and are largely the product of the *defendant's* conduct in concealing either the tort or the wrongdoer's identity."[74] In addition, the court held that "[t]he 'discovery rule,' then, is to be applied with great circumspection on a case-by-case basis only where there is a strong showing by the plaintiff that he was *prevented* from knowing of the claim at the time of the injury."[75]

As a result of this language, one reading of *Cart* is that the court is now requiring the plaintiff to show that some type of fraudulent concealment or other affirmative conduct by the defendant prevented the plaintiff from discovering the cause of action or the identity of the wrongdoer. However, it is highly unlikely that the court intended such a requirement. First, such a requirement would "eviscerate" the discovery rule that the court has been developing for the past twenty years. Second, there is another explanation of why the unfortunate language made it into the opinion. Third, in a subsequent case the court applies the general discovery rule, making no mention of any requirement that the defendant must actively conceal either his identity or the injury.[76]

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statutory prohibition of its application.

72. *Id.* at 645 (Syl. Pt. 3).

73. *Id.* (emphasis added).

74. *Id.* at 648.

75. *Id.*

76. Teter v. Old Colony Co., 441 S.E.2d 728 (W. Va. 1994) (holding that "[w]here a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury . . . .") (quoting Stemple v. Dobson, 400 S.E.2d 561 (W. Va. 1990)).

C. *The Discovery Rule is Alive and Well in West Virginia*

One thing is clear from the *Cart* opinion—the discovery rule is applicable to all torts in West Virginia except where its application is expressly prohibited by statute.[77] On the other hand, determining the circumstances that will allow a plaintiff to toll the statute of limitations under the discovery rule requires a closer reading of both the Cart decision and the other discovery rule cases.

It is well settled that the focus under the discovery rule is on the plaintiff's "awareness"—that is, on whether the plaintiff knew or should have known of his cause of action or of the identity of the wrongdoer.[78] The court in *Cart* acknowledged as much.[79] It seems unlikely that the court would emphasize the focus on the plaintiff's "awareness" in *Cart* and then ignore it by holding that the plaintiff can only invoke the discovery rule in cases where some affirmative action by the defendant prevented discovery of the claim. Moreover, the court has stated in past decisions that it does not intend to limit the discovery rule to fraudulent concealment[80] and that the question of when a plaintiff knows, or by the exercise of reasonable diligence should know, of a cause of action is a "statute of limitations principle . . . [that] applies to all factual questions under the 'discovery rule' and not solely to cases where fraudulent concealment is at issue."[81]

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77. *Id.* at 649. Examples of such prohibition include the architects and builders statute (W. VA. CODE § 55-2-6a (1994)), and the Medical Malpractice Reform Statute of Repose (W. VA. CODE § 55-7b-4 (1986)). Each of the statutes places an outside limit of ten years from the date of the injury, after which any action is barred. This would, of course, include actions that were discovered only after the ten year period had run. *Shirkey*, 399 S.E.2d at 870. Any other result would negate the purpose of the statutes: to end the possibility of litigation after a reasonable, albeit arbitrary, time limit. *Id.* at 871. Therefore, the discovery rule is inapplicable after the statute of repose has run.

78. *Harrison*, 268 S.E.2d 312; *Ciccarello*, 207 S.E.2d 157.

79. The court noted that the discovery rule evolved from the doctrine of fraudulent concealment. As part of that evolution, the primary focus changed from the fraudulent activities of the defendant to the "awareness" of the plaintiff. *Cart*, 423 S.E.2d at 647 n.6.

80. *Harrison*, 268 S.E.2d at 314; *Ciccarello*, 207 S.E.2d at 163.

81. Hill v. Clarke, 241 S.E.2d 572 (W. Va. 1979).

Also noteworthy is language contained in the product liability cases of *Pauley*[82] and *Hickman*.[83] As previously explained, the federal district court in *Pauley* held that "in cases where the injury to the plaintiff is susceptible to concealment, *through no fraudulent act on the part of the defendant*, it [is] unreasonable, unfair and unjust to require the plaintiff to file his cause of action before he can reasonably discover his injury."[84] In *Hickman*, the West Virginia Supreme Court agreed with the decision in *Pauley* and held that the plaintiff's cause of action should arise, and the limitations period begin running, only when the injury is pronounced enough to put the plaintiff on notice that he has been injured and when the plaintiff can determine the cause of the injury.[85]

Considering the wealth of precedent holding that a plaintiff can invoke the discovery rule in situations even where the defendant did not affirmatively act to prevent the plaintiff from discovering his claim, it is very improbable that the supreme court meant to add such a requirement to the traditional discovery rule. Consequently, a more reasonable interpretation of the ambiguous language in *Cart* is that the court is not revising the discovery rule. Instead, the facts of this case, and not the application of the discovery rule generally, prompted the court to conclude that Cart must show that some act by the defendants prevented him from discovering his claim against them.

At this point, it may be helpful to revisit the *Cart* court's guidelines for using the discovery rule to toll the statute of limitations. Two general rules must be considered in applying the discovery rule. First, mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of a statute of limitations.[86] Second, the discovery rule provides that tort claims accrue on the date the injury is discovered or with reasonable diligence

82. 528 F. Supp. 759, 764-65 (S.D. W. Va. 1981).

83. 358 S.E.2d 810 (W. Va. 1987).

84. *Pauley*, 528 F. Supp. at 765 (emphasis added).

85. *Id.* at 813. Justice Brotherton explained that "[t]he United States District Court for the Southern District of West Virginia has predicted that we, if given the opportunity, would embrace the discovery rule in products liability personal injury actions. They were correct." *Id.* (citations omitted).

86. *Cart*, 423 S.E.2d at 648.

should be discovered, whichever occurs first.[87] Thus, to avoid a statute of limitations defense, a plaintiff must be able to point to a factor other than his own ignorance in order to show that he was prevented from discovering his cause of action or the identity of the wrongdoer. These factors include a showing that: (1) the defendant fraudulently concealed the cause of action from the plaintiff;[88] (2) through no fault of his own, the plaintiff could not comprehend his injury;[89] or (3) some other extreme hardship prevented the plaintiff from discovering the cause of action.[90]

Ultimately, the determination of whether a plaintiff was merely ignorant of his claim due to inattention or negligence or whether the plaintiff was unable to discover the claim because it was latent or was actively concealed by the defendant is a factual question. Therefore, the court requires great circumspection on a case-by-case basis. With this understanding of how the discovery rule works, we can now turn back to the facts of the *Cart* decision to explain why the discovery rule did not toll the running of the statute of limitations as to Hager and Marcum.

Consider the somewhat analogous result in *Jones v. Bethany Hospital.*[91] As previously explained, the court in *Jones* held that the discovery rule is inapplicable when there is a noticeable personal injury from a traumatic event.[92] In *Jones*, the court found that the original injury suffered by the plaintiff, combined with the time-consuming pretrial discovery and other procedures, gave the plaintiff ample notice and time to explore the full extent of his injuries. Therefore, when the plaintiff failed to discover his latent injuries until after the limitations period had run, his cause of action was barred by the statute of limitations because he had been on notice to explore the full extent of his injuries.[93]

87. *Id.* (citing Hansen v. A.H. Robins, Inc., 335 N.W.2d 578, 583 (Wis. 1983)).

88. *Cart*, 423 S.E.2d at 649 n.15.

89. Examples of incomprehensible injury include foreign objects left behind during surgery and exposure to toxins that manifest an injury only years later.

90. The opinion did not provide any example of what constitutes extreme hardship.

91. 351 S.E.2d 183.

92. *Id.* at 187.

93. *Id.*

Applying the reasoning from *Jones*, it is possible to conclude that Cart had notice of his injury—*i.e.*, he knew the identity of the wrongdoer and had ample time within the statutory period to fully explore the extent of his injury.[94] In considering all three prongs of the discovery rule, the court in *Cart* analyzed not only the plaintiff's "awareness," but also whether the other defendants, Hager and Marcum, had done anything to *prevent* Cart from discovering their identity.[95] Following their own three point test, the court first had to determine whether there was some extreme hardship preventing Cart's discovery of the theft of the timber or the identity of the thieves. Finding none, the court then had to determine whether the nature and circumstances of the theft prevented Cart from discovering the theft or the identity of the thieves. Finding this was not so, the court finally had to determine whether the defendants took any action to fraudulently conceal the theft or their identities. From the record, there was no indication that Hager or Marcum did anything but conduct themselves in the ordinary course of their businesses. Therefore, the court concluded that Cart was aware of both his injury and of who had injured him.

It follows then that Cart would be on notice to inquire into the full extent of his injury. The responsibility to inquire would include the responsibility to determine whether other parties could be held liable in the action. This explains the confusing language of Syllabus Point 3—Cart could succeed against a statute of limitations defense asserted by Hager and Marcum only if he could make "a strong showing . . . that some action *by the defendant[s]* prevented [him] from knowing of the wrong at the time of the injury."[96] Cart could not make such a showing. This conclusion is further bolstered by previous decisions of the West Virginia Supreme Court of Appeals holding that a statement contained in the court's syllabus should be read in light of the opinion and the facts contained in the opinion.[97]

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94. The court noted that Mr. Cart had nearly a year left of the limitations period when he did discover Mr. Hager and Mr. Marcum's identities, but still failed to file his claim in time. *Marcum* at 649.

95. Recall that the court noted that an action against the hidden Mr. Jefferson.

96. *Cart*, 423 S.E.2d at 645 (Syl. Pt. 3).

97. *See, e.g.*, Summers County Citizens League, Inc., v. Tassos, 367 S.E.2d 217, 221 (W. Va. 1988) (explaining that a syllabus point must be read in light of the facts in the

It is interesting to note that in the part of the opinion where the court discusses the discovery rule in general, no reference is made to a requirement of showing "some action by the defendant" that prevented the plaintiff from discovering his injury.[98] Such a deletion leads to the conclusion that the court does not consider action on the part of the defendant to be a requirement for the tolling of the statute of limitations under the discovery rule. This is the only construction that allows the discovery rule to operate properly when fraud is not involved. Note, for instance, that in the area of incomprehensible injury, the court has not held since *Gray*[99] that a surgeon must have somehow concealed a cause of action from the plaintiff before a plaintiff can avail himself of the discovery rule. In fact, this requirement was specifically eliminated in later cases.[100] Moreover, Justice Neely gives an example of an incomprehensible injury in the *Cart* decision and nowhere does he mention a requirement that the defendant must have prevented the plaintiff from discovering the injury or who caused it.[101]

As to the third prong of the discovery rule, other extreme hardship, the court makes only the vague comment that "special rules apply in a case involving particular hardship or other circumstance."[102] The meaning of this clause is beyond the scope of this comment. Certainly the issue will arise in the future.

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opinion); *see also* State v. Vollner, 259 S.E.2d 839 (W. Va. 1979); State v. Franklin, 79 S.E.2d 692, 700 (W. Va. 1954); Thomas P. Hardman, *The Law—In West Virginia*, 47 W. VA. L.Q. 23 (1940-41) (discussing the function of a syllabus point).

98. *Cart*, 423 S.E.2d. at 645, 648.

99. *Gray*, 96 S.E.2d 671 (W. Va. 1957).

100. *See Morgan*, 144 S.E.2d 156; *see also Harrison*, 268 S.E.2d at 314.

101. *Cart*, 423 S.E.2d at 647. The example merely cited the requirement that the plaintiff have a good reason for not being aware of his injury. The court noted by way of example that if a plaintiff with health insurance experienced pain from a surgical device left behind after an operation, that plaintiff would have been on notice that something was wrong and at least be required to inquire further or be barred after two years. On the other hand, if a plaintiff experienced no pain, but discovered the device during a routine diagnosis five years later, then immediately brought suit, the plaintiff's claim would be protected by the discovery rule.

102. *Id.* at 648.

Under the interpretation of *Cart* set out above, the most significant aspect of the case is that the discovery rule applies to all tort actions not governed by statute. As a corollary, practitioners will want to be careful to argue within the framework of discovery rule's three-pronged test because the court appears to be requiring a hard look at the facts on a case-by-case basis to ensure that the newly-expanded discovery rule does not "eviscerate" the statute of limitations.

V. CONCLUSION

In *Cart v. Marcum*,[103] the plaintiff attempted to invoke the discovery rule to toll the statute of limitations because he filed suit more than two years after an alleged conversion of his timber took place. Cart claimed that, even though he did not file suit within two years of the alleged conversion, he did file within two years of discovering the tort and who committed it, and therefore, the statute of limitations should be tolled by virtue of the discovery rule.

However, the facts indicated that Cart did know his timber was taken and had reason to know it was taken by Jefferson, a logger with whom he had contracted for the sale of the timber. Upon discovering that his timber was gone, Cart attempted to locate Jefferson but could not find him. Within a year of the timber being taken, Cart did locate two other loggers, Marcum and Hager, who had purchased at least part of the timber from Jefferson. Cart filed suit against Jefferson, Hager, and Marcum, but not until more than two years after the injury occurred. Under these facts, the West Virginia Supreme Court of Appeals refused to toll the statute of limitations under the discovery rule.

In the opinion, the court acknowledged that, under certain circumstances, the statute of limitations will be tolled until discovery of the injury or the identity of the wrongdoer. In fact, the court took the opportunity in *Cart* to expand the discovery rule to cover all torts not already controlled by statute. However, the court restated the general rule that the statute of limitations normally begins to run when the injury occurs and will be tolled under the discovery rule only until the

103. 423 S.E.2d 644 (W. Va. 1992).

injured party knows, or by the exercise of reasonable diligence should know, of the injury and the identity of the wrongdoer.

Furthermore, the court explained that mere ignorance of the cause of action or the identity of the wrongdoer will not toll the statute of limitations. Thus, in order to invoke the discovery rule, a plaintiff must make a strong showing that he was prevented from discovering the claim or identity of the wrongdoer because of fraudulent concealment, incomprehensible injury, or other extreme hardship. The determination of whether the plaintiff was prevented from discovering the claim is a factual question, and great circumspection on a case-by-case basis is required to determine whether the discovery rule applies.

Although the court used language in both a syllabus point and the opinion which seemed to suggest that the discovery rule now requires a showing of some action *by the defendant* which prevented the plaintiff from discovering the claim or identity of the wrongdoer, a close reading of the case shows that, in fact, the court was considering only whether defendants Marcum and Hager had done anything to prevent Cart from discovering their identities. The court reached this question in the case only because Cart already knew the identity of Jefferson, the person who was responsible for removing the timber from Cart's land. Because Cart knew Jefferson's identity, he had notice sufficient to start the statute of limitations running. At that point, due diligence required him to explore the full extent of the injury, namely to determine whether any other parties could be held liable in the action. Therefore, the statute of limitations would have been tolled as to the other parties only if they had done something to *prevent* Cart from discovering their identities. The court found that they did not.

James R. Leach