FILED: October 15, 2008

IN THE COURT OF APPEALS OF THE STATE OF OREGON

KATHLEEN M. WORMAN
and JEFFREY WORMAN,

Plaintiffs-Appellants,

v.

COLUMBIA COUNTY, OREGON,
a political subdivision of the State of Oregon,

Defendant-Respondent.

Columbia County Circuit Court
052504
A136006

John B. Lewis, Judge.

Argued and submitted on May 06, 2008.

Thomas M. Christ argued the cause for appellants. With him on the briefs were Julie A. Smith and Cosgrave Vergeer Kester LLP. David C. Lewis argued the cause for respondent. With him on the brief was Miller & Wagner, LLP.

Before Wollheim, Presiding Judge, and Landau, Judge, and Sercombe, Judge.

SERCOMBE, J.

Reversed and remanded on claims for negligence and timber trespass; otherwise affirmed.

SERCOMBE, J.

After discovering damage to the trees and shrubs on their property, plaintiffs Kathleen and Jeffrey Worman brought inverse condemnation, negligence, and timber trespass claims against defendant Columbia County based on allegations that the damage resulted from herbicide sprayed by county personnel. The trial court granted summary judgment in favor of the county, and plaintiffs appeal. We affirm the judgment as to the inverse condemnation claim but reverse and remand as to the negligence and timber trespass claims.

We state the facts in the light most favorable to plaintiffs, the nonmoving parties. ORCP 47 C. Plaintiffs' home sits at the corner of two roads. In mid-February 2004, plaintiffs discovered that their trees, shrubs, and grass near the roads were either dead or dying. At that point, based on the pattern of damage, plaintiffs suspected that someone had sprayed some type of herbicide into their yard, but they were unable to identify the culprit. As part of plaintiffs' investigation of the damage, Kathleen Worman (Kathleen) contacted the county to determine whether it had sprayed herbicide near their home. She spoke with someone

from the county road department who told her that the county had not sprayed in plaintiffs' area for three years and that the county did not keep records of its spraying.

In April 2004, plaintiffs filed a form entitled "Report of Loss Allegedly Caused by Use of Insecticides, Herbicides, Fungicides and Other Pesticides" with the Oregon Department of Agriculture. On that form, plaintiffs reported loss due to an herbicide application in the fall of 2003. They identified damage to "ornamentals" and listed grass and various bushes and trees affected by the herbicide. The form also asked plaintiffs to identify "[w]ho made the pesticide application." In response to that question, plaintiffs marked "Unknown." However, in response to a later question--"Suspected cause or source of damage (mark all appropriate)"--plaintiffs marked boxes for "[g]round application"; "[n]eighbor spraying"; and "[o]ther." Next to "[o]ther," plaintiffs wrote "[m]ay be Columbia County Road Dept." Plaintiffs then offered the following narrative description of the damage: "An unknown person sprayed a mix of Round Up + Cross Bow beginning at our property boundary at front of house and around side of property line * * *. It was a deliberate, malicious use of herbicide."

Two months after filing the "report of loss," Kathleen spoke with a county commissioner about the damage to plaintiffs' yard. She told the commissioner that the county road department had denied spraying in plaintiffs' area and had claimed that the county did not maintain records regarding spraying. The commissioner then contacted Hill, the director of the county road department, regarding plaintiffs' concerns. Plaintiffs subsequently learned that the county not only sprayed the roads in the area of plaintiffs' property in October 2003, but also maintained records that established that fact.

One of the county's employees, Peterson, had sprayed herbicide on the roadside ditches near plaintiffs' property on October 30, 2003. That much is undisputed; the focus of the parties' dispute is what *else* Peterson sprayed on that date. According to Peterson, one of plaintiffs' neighbors, Roth, approached him while he was spraying the ditches. Roth asked Peterson to spray some blackberries that were growing on his property and then told Peterson to spray "everything" on plaintiffs' nearby property as well. Roth told Peterson that he had had problems with Kathleen in the past and that she was a "troublemaker." Peterson, according to his deposition testimony, nevertheless refused to spray plaintiffs' property and told Roth that "the [c]ounty has been sued by her in the past and I don't--you know, I don't want any problem."

By Peterson's account, he sprayed as far onto Roth's property as his truck could spray, which involved turning on all seven heads of his spray equipment. At that point, he had the spray at "kind of full power." Peterson claimed that he drove to the edge of Roth's property and then decided, "well, I better shut it off here, you know." That is, he acknowledged driving past plaintiffs' property but asserted that his spray equipment was off at the time.

Peterson also had an opportunity to view the damage at plaintiffs' property. He concluded that, "with that type of a pattern [of damage], anybody could have made that, whether it be on the road, off the road, you know." He also agreed that "the pattern was consistent with the pattern that a high-pressure sprayer would make." Peterson contended, however, that not only did he not spray plaintiffs' property, but that it would have been *impossible* for his spray truck to have caused that damage. According to Peterson, the damage to the property was in a "wavelike" pattern, whereas the county's truck does not spray in that type of pattern. Moreover, he asserted that the product that he used that day--Garlon 4--does not kill grass. In support of the latter contention, Peterson relied on the "spray report" that he filled out for

October 30, 2003, which listed Garlon 4 as the product that was sprayed.[(1)]

Plaintiffs, on the other hand, dispute Peterson's claim that he skipped over their property. They surmise that, given the timing of the events, the nature of the damage to their property, and the county's initial denial of spray activity in their area, that Peterson either intentionally or accidentally sprayed their yard in the fall of 2003. Their complaint, which they filed in October 2005, alleges three claims against the county--inverse condemnation, negligence, and timber trespass--based on Peterson's intentional or accidental spraying.

In February 2007, the county moved for summary judgment on all three claims. The county argued as follows: (1) plaintiffs' claims were barred by the failure to give timely tort claim notice; (2) plaintiffs could produce no evidence from which a reasonable juror could conclude that the county sprayed plaintiffs' property; and (3) alternatively, plaintiffs failed to state claims for inverse condemnation or timber trespass. The trial court agreed with the county in all respects and granted the motion. Plaintiffs appeal, arguing that the trial court erred on each ground.

Initially, plaintiffs contend that the trial court erred in concluding, as a matter of law, that they failed to provide notice of their claim to the county within 180 days of their injury, as required by ORS 30.275(2)(b).[(2)] The question of timely notice under ORS 30.275(2)(b), as the Supreme Court recently explained in *Johnson v. Mult. Co. Dept. Community Justice*, 344 Or 111, 118, 178 P3d 210 (2008), turns on when plaintiffs "discovered" their injuries:

> "There is no dispute that the 'discovery rule' that this court has applied to many statutory limitations periods since *Berry v. Branner*, 245 Or 307, 421 P2d 996 (1966), also applies to the 180-day notice of claim requirement at ORS 30.275(2)(b). *See* [*Adams v. Oregon State Police*, 289 Or 233, 237-39, 611 P2d 1153 (1980)]. Neither is there any dispute about the parameters of the discovery rule. At least in theory, the parties agree that the discovery rule does not require *actual* discovery or knowledge of the claim but, instead, imputes to the plaintiff the level of knowledge that an exercise of reasonable care would have disclosed. *See, e.g., Forest Grove Brick v. Strickland*, 277 Or 81, 86, 559 P2d 502 (1977) (stating that rule). Finally, the parties agree that 'discovery' of an injury involves actual or imputed knowledge of three separate elements: harm, tortious conduct,[2] and causation. *Gaston v. Parsons*, 318 Or 247, 255, 864 P2d 1319 (1994). In other words, the notice of claim period does not commence to run, under the discovery rule, *until a plaintiff knows or, in the exercise of reasonable care should know, that he or she has been injured and that there is a substantial possibility that the injury was caused by an identified person's tortious conduct*. *Adams*, 289 Or at 239 (so stating)."
>
> ---
>
> "[2] It may be argued that there is a fourth element, *viz*., the probable identity of the tortfeasor. We think that that element inheres in the concept of 'tortious conduct'--someone, after all, must have carried out the 'conduct.'"

(Second emphasis added.)

As was the case in *Johnson*, plaintiffs' knowledge of their injury is not at issue; by February 2004, they were aware that their yard had been damaged. The question in this case is when

plaintiffs knew, or in the exercise of reasonable care should have known, that there was a "substantial possibility" that the injury was caused by an identified person's tortious conduct. (3) That question "is a question of fact for the jury; it may be decided on summary judgment as a matter of law only if the record on summary judgment presents no triable issue of fact." *Johnson*, 344 Or at 118.

The county offers two reasons why, as a matter of law, plaintiffs knew by April 2004 of a "substantial possibility" that the county's spraying activities had injured them. Initially, the county argues that, when Kathleen spoke with the county road department by telephone in early 2004, the woman who answered the phone told her, "that's Jeff Peterson's job. He keeps spray locations in his time cards." According to the county, had plaintiffs followed up on that information, they would have discovered that Peterson had sprayed in their area in October 2003.

The only evidence that the county offers in support of its version of the telephone conversation is an excerpt from Kathleen's deposition testimony. In that excerpt, she responds to questions concerning a letter that she had written, apparently sometime in November 2004:

> "Q: Now, the paragraph above the 'in June' paragraph talks about your call to the Columbia County Road Department. Who is Sherry?
>
> "A: The young woman who answered the telephone.
>
> "Q: Do you know Sherry?
>
> "A: Never met her.
>
> "Q: She identified herself as Sherry?
>
> "A: Yes, she did.
>
> "Q: What do you recall of your conversation with Sherry?
>
> "A: I asked if they had done any roadside spraying in my area. I told her where. She put me on hold, came back on the phone after a few minutes and said, no, they had not. She indicated no spraying had been done out there for something like three years.
>
> "Q: Your letter also says, 'She told me that's Jeff Peterson's job. He keeps spray locations in his timecards.
>
> "A: Yes.
>
> "Q: So was there a suggestion that you contact Jeff Peterson?
>
> "A: No. I never spoke to Jeff Peterson. I wouldn't know him if I saw him."

The letter referenced in that testimony is not part of the summary judgment record, and, without the letter itself, it is impossible to put the testimony in context. In fact, one plausible reading of Kathleen's testimony is that the county's phone operator put her on hold, checked with Peterson about his timecards, and reported back to Kathleen that the county had no