BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE REAL ESTATE COMMISSION

In the Matter of the Surety Fund Claim of:	)	
	)	
RICHARD and BARBARA DYER,	)	
	)	
Claimants,	)	
	)	OAH Case No. 04-0229-RES
v.	)	Commission Case No. S-21-004
	)	
CECIL GARTIN and DUANE HARVEY,	)	
	)	
Respondents.	)	
	)	

DECISION AND ORDER

I. Introduction

This surety fund proceeding originated in May of 2001, growing out of a land purchase consummated during the winter of 1998-99. The Real Estate Commission sustained the claim and made a $10,000 award in 2003. A Superior Court appeal ensued, with the court eventually remanding the matter to consider whether the claim might be blocked by the two-year time limitation on claims found in AS 08.88.460. A reexamination of the case shows that the time limitation does indeed block this claim

II. Factual Background[1]

Richard and Barbara Dyer purchased a thirty-acre parcel near Palmer from Basilio and Elizabeth Galan, with the Galans represented by licensee Duane Harvey and the Dyers by licensees Laura Hamilton and Esther Kluever. The parties entered into a purchase and sale agreement late in 1998. Prior to closing, a title search raised questions about legal access to the property.

In those days, the property was most easily reached over a winding track called the "Million Dollar Road" that traversed the property of Charles and Lillian DeFreest. Responding to the concerns about access, Harvey obtained easements from four adjoining landowners, including the DeFreests. The DeFreest easement apparently described a 30-foot straight-line path along the south boundary of the DeFreest tract, and does not seem to have coincided with the path of the road.[2]

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[1] Except as otherwise indicated, the factual background is drawn from the Superior Court's decision in *Harvey v. State, Real Estate Commission,* No. 3AN-03-10017 CI and from the surety fund complaint.

[2] This is the gist of the affidavit of Hamilton (Claimant's Ex. J) and the testimony of DeFreest and others at the hearing. The claimants did not submit a full copy of the easement document itself for the record. Parts of the document can be viewed attached to the original complaint and at Respondent's Ex. 16, p. 10.

Although Harvey faxed the DeFreest easement to the buyers' agents prior to the closing, there is no evidence that these professionals or their clients independently investigated whether the meandering road coincided with the straight-line easement.

The transaction closed in early February of 1999, with the four easements recorded along with the deed for the tract being sold. The deed from the Galans to the Dyers recited in bold print that

> **said parcel of land is a portion of a larger parcel for which no waiver has been filed with the Mantanuska Susitna Borough and no "legal" access has been determined. (Easements attached hereto and made a part of this deed are not assurances of the grantors that this will eliminate the access issue)**[3]

The escrow instructions recited in bold capitals that "**THE EASEMENTS THAT ARE BEING RECORDED SIMULTANEOUSLY HEREWITH HAVE BEEN REVIEWED AND ACCEPTED BY THE BUYER HOWEVER THE TITLE INSURER HEREIN DOES NOT INSURE THAT THIS IS IN 'FACT' LEGAL ACCESS TO SAID PROPERTY.**"[4]

The Dyers allege that, at various points leading up the closing, Harvey misrepresented the access and led them to believe the Million Dollar Road was covered by the easement, and that they relied on those misrepresentations when they consummated the purchase. They also allege that within a week or two after the closing Mr. DeFreest mentioned to them a need to move the road, whereupon Mrs. Dyer had a conversation with Duane Harvey as follows:

> I called Duane Harvey on the phone and I said to Duane Harvey you told me there was a road, what is the problem, I'm going to get a lawyer and he says no, no, the road is there. I just have to – they don't understand. I will call them and talk to them . . . .[5]

This was the last contact between Mr. Harvey and the Dyers that is relevant to the present claim.[6]

In fact, the deeded access did not coincide with the location of the road to the property, and the road eventually had to be moved. Although it is clear that the Dyers were on notice both at the time of the closing and very shortly thereafter that access was in question, Mrs. Dyer testified at the remand hearing that she did not learn definitively of the discrepancy between the road and the deeded access on June 9, 2000.

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3 Respondent's Ex. 16 at 8.

4 *Id.* at 6.

5 December 3-4, 2001 hearing transcript at 108. *See also id.* at 120; Remand testimony of Barbara Dyer on cross-examination.

6 Finding of Fact No. 6 (March 5, 2003).

III. Procedural Background

The Dyers filed a surety fund complaint in connection with the alleged misrepresentations on May 9, 2001, naming Harvey and his supervising broker as respondents.[7] The Dyers subsequently stipulated that the supervising broker had no involvement in the alleged wrongdoing.[8] As to the claim against Harvey, Harvey preliminarily moved to dismiss on the basis that the claim was filed more than two years after the last of the alleged misrepresentations. The hearing officer assigned to the case at that time, David Stebing, denied the motion. Mr. Stebing subsequently conducted a hearing and recommended that the claim against the surety fund be granted, a recommendation the Real Estate Commission adopted on March 5, 2003. Neither Mr. Stebing nor the Commission gave further consideration to the timeliness issue in reaching this final decision.

Mr. Harvey appealed to the Superior Court. The court held that Mr. Stebing and the Commission should have evaluated—beyond Stebing's preliminary ruling, which came too early to take into account the evidence collected at the hearing—whether the claim had been filed timely under AS 08.88.460. It remanded the case for this evaluation to occur.

Both the Superior Court and Mr. Stebing assumed, without directly addressing the issue, that the two-year limitation in AS 08.88.460 is subject to the "discovery rule," a principle that commonly but not universally applies to statutes of limitation. In essence, when this principle applies it establishes that the time limit to begin a legal action does not start to run until the claimant discovers (or, in some circumstances, reasonably should have discovered) the wrong that gives rise to the claim. Supposing that this principle would govern the case, Mr. Stebing focused the remand proceedings on when the Dyers discovered, or should have discovered, the alleged misrepresentations about access.

Mr. Stebing held a brief evidentiary hearing on the question of timeliness in June of 2006. Mr. Stebing's subsequent resignation from the Office of Administrative Hearings, coupled with various stipulated delays while the parties attempted to negotiate a settlement, delayed further progress toward a final decision on the remanded issue.

In the meantime, the Commission decided *Roe v. Leisek,* OAH No. 05-0323-RES. In that decision, the Commission concluded that the "discovery rule" does not apply to AS 08.88.460. The

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[7] The Dyers do not appear to have found any fault with their own buyers' licensees for failing to identify the access problem.

[8] Findings of Fact, Conclusions of Law and Proposed Decision (adopted March 5, 2003) at 13-14.

administrative law judge assigned to replace Mr. Stebing then solicited and received written argument from the parties on whether the *Roe v. Leisek* holding ought to be honored in this case.

IV. Analysis

The starting point for this case is the text of AS 08.88.460(a). Since 1998 this statute has provided, in relevant part, that

> a person seeking reimbursement for a loss suffered in a real estate transaction as a result of . . . misrepresentation . . . on the part of a licensee licensed under this chapter shall make a claim to the commission for reimbursement on a form furnished by the commission. In order to be eligible for reimbursement by the commission, the claim form must be filed within two years after the occurrence of the . . . misrepresentation . . . claimed as the basis for the reimbursement.

The Real Estate Commission observed in *Roe v. Leisek* that

> AS 08.88.460 does not use the phrase "within two years after the accrual of the cause of action"; the statute also does not use words like "upon discovery of the facts giving rise to a cause of action"; the statute at issue uses the word "occurrence", which means "a thing that occurs; an incident or event".[9]

Accordingly, the commission held that the two years is counted from the date that the misrepresentation or other misconduct at issue occurred, not from the date that the claimant discovered it.[10]

If one applies AS 08.88.460(a) in this case as it was interpreted in *Roe v. Liesek,* the Dyers' surety fund claim is barred. This is because the last alleged misrepresentation by Mr. Harvey occurred in February of 1999, while the Dyers did not file their claim until May of 2001, two years and three months later. Hence, if the Commission holds to the interpretation it reached in *Roe v. Liesek,* it is unnecessary to resolve the disputed factual question of when the Dyers knew of the facts giving rise to their claim, thus triggering the running of the two year limitation even under the traditional "discovery rule."

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[9] *Roe v. Liesek,* OAH No. 05-0323-RES, Decision and Order at 6 (adopted December 14, 2006) (footnotes omitted).

[10] *Id.* The ruling was an alternative holding, in that another, independently sufficient ground existed for the overall outcome of the *Roe v. Liesek* case.

The Attorney General's Office (AGO) has submitted a brief opposing this outcome,[11] and the claimants have filed a short pleading adopting the AGO's arguments by reference. These arguments are twofold: first, the AGO contends that the discovery rule applies to all statute of limitation cases; second, it contends that Harvey is precluded from relying on (and the Commission from applying) the two-year time limit because his Harvey allegedly concealed from the Dyers that they had a claim by, just after the closing, assuring them that the easement was in place and that he would call the DeFreests. Both of these contentions are unpersuasive.

A. Discovery Rule

Most statute of limitations cases in Alaska turn on the general statutes of limitation in AS 09.10, a chapter setting time limits for tort actions, contract actions, and many other general categories of civil actions in the courts. The time limits in AS 09.10 apply unless a more specific statute elsewhere governs a particular situation. Critically, the opening section of chapter 09.10 specifies that the general time limits in the chapter run from the date when a cause of action "has accrued,"[12] that is, from the date it has matured into something on which a party can bring suit.

The discovery rule, as presently conceived by the Alaska Supreme Court, is at bottom an interpretation of the phrase "has accrued" in chapter 09.10.[13] The court has decided that a civil cause of action does not accrue until it is discovered or should have been discovered. The AGO's argument, suggesting that the discovery rule must apply to every time limit case simply because it has

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[11] The participation of the Attorney General's Office is one of the unusual aspects of this case. Ordinarily, surety fund cases do not present a dispute in which an agency staff has a position or stake, and they are litigated between private parties with no participation by a state attorney. Once the Commission makes a decision, a state attorney may defend that decision if there is an appeal to the Superior Court, because at that point an agency decision is under challenge.

In this case, Assistant Attorney General David Brower first became involved at the time of the appeal to the Superior Court, as would normally occur. In the Superior Court Mr. Brower represented the Real Estate Commission. What is unusual is that Mr. Brower continued to participate after the remand to resume the hearing process. It is not clear whom he was representing, since the Commission had returned to its adjudicatory role and required no representation in a case that it was itself adjudicating.

Continuing its unconventional role, the AGO declared in briefing that if the Real Estate Commission reaffirmed its decision in *Roe v. Liesek,* the Commission's view "will not be entitled to deference by a court." AGO closing argument at 10. Since the AGO would have the task of defending the Commission's decision in any future court appeal, it is both odd and regrettable that the AGO would, for no compelling reason, risk hobbling its ability to represent its future client zealously by taking this position. The truth is that a resourceful public attorney could make a strong argument that "some deference" is due the Commission's interpretation of the surety fund statutes, relying on such cases as *Union Oil Co. of California v. Dep't of Revenue,* 560 P.2d 21, 25 n.10 (Alaska 1977).

Should the AGO file any further pleadings in this case, it should identify with specificity the precise division, board, or other agency party it purports to represent.

[12] AS 09.10.010. Later in the chapter, many of the time limits will simply say "within six years" (*e.g.*, AS 09.10.050--trespass) or "within one year" (*e.g.*, AS 09.10.080—escape), without saying what the commencement of the action must be within so many years ***of***. AS 09.10.010 supplies the trigger for these general time limits.

[13] *See Cameron v. State,* 822 P.2d 1362, 1365 n.5 (Alaska 1991).

been applied to various cases governed by AS 09.10,[14] wholly fails to appreciate that these cases interpret specific statutory language.

Alaska Statute 08.88.460 is very different from the Title 9 limitations. Its language does not tie the time limit to accrual of the claim, nor to anything else of which discovery is an element; instead, its literal language sets up a particular type of statute of limitations called a statute of repose.[15]

An ordinary statute of limitations sets a time limit to begin prosecuting a claim once it has accrued.[16] A statute of repose "'terminates any right of action after a specified time has elapsed, regardless of whether or not there has yet been an injury'"[17] or the injury has been discovered. With a statute of repose, it is possible for a right to expire before it has arisen or accrued at all,[18] although that did not occur in the present case. A common example of a statute of repose is the class of statutes that place absolute time limits on suits growing out of negligent construction of a building; under such statutes, one could not sue a carpenter in 2030 for leaving out a joist in 2007, even if the omission remained wholly concealed until the floor collapsed in 2030.[19]

That the legislature intended AS 08.88.460 to be a statute of repose is confirmed by the statute's legislative history. This history begins long before the statute was enacted in its present form, starting with an erroneous action by the Real Estate Commission.

In the 1980s, the surety fund statute contained no time limits at all.[20] The Commission, seeking to place some parameters on the litigation of stale claims, promulgated a regulation, 12 AAC 64.295, which read:

> **DEADLINES:** For a claim to be considered valid for the purposes of reimbursement from the surety fund, the claimant must file a claim . . . within one year after the date the alleged loss was discovered or could have been discovered, but in any event, not later than two years after the transaction is recorded or the transfer of interest date.[21]

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[14] The AGO relies most heavily on *Palmer v. Borg-Warner Corp.*, 838 P.2d 1243 (Alaska 1992), a case applying AS 09.10.070 in conjunction with AS 09.10.010.

[15] *See, e.g., Wenke v. Gehl Co.*, 669 N.W.2d 789, 793 (Wis. App. 2003) ("the term 'statute of repose' is largely a judicial label for a particular type of limitation on actions").

[16] *See, e.g., Albrecht v. General Motors Corp.*, 648 N.W.2d 87, 90-91 (Iowa 2002) (detailed discussion of the different operation of ordinary limitations statutes and statutes of repose); *Turner Constr. Co. v. Scales*, 752 P.2d 467, 469 n.2 (Alaska 1988).

[17] *Albrecht*, 648 N.W.2d at 90 (quoting prior authority).

[18] *Id.* at 91.

[19] *See* AS 09.10.054.

[20] *See Warner v. State, Real Estate Commission*, 819 P.2d 28, 29 (Alaska 1991).

[21] *Id.* at 29-30.

The regulation set up both an ordinary limitations period ("one year after the date the alleged loss was discovered or could have been discovered") and a repose period ("two years after the transaction is recorded"). In 1991, the Alaska Supreme Court struck down this regulation, not because there was anything wrong with it in concept but because the Commission had erred in believing it had received a delegation from the legislature to create a time limit.[22]

In 1997-98, the legislature itself took up the limitations issue. In doing so, the proponents of the legislation made it clear they were responding directly to the Supreme Court's 1991 ruling.[23] The legislature added the following language to AS 08.88.460:

> In order to be eligible for reimbursement by the commission, the claim form must be filed within two years after the occurrence of the fraud, misrepresentation, deceit, or conversion of trust funds . . . claimed as the basis for reimbursement.[24]

By adding this language, the legislature effectively took *one* of the two elements of the old regulation—the longer repose period—and placed it in the statute. The legislature left aside the ordinary limitations period that had been part of the regulation, with its reference to "the date the alleged loss was discovered or could have been discovered," opting instead for the time limit tied to a fixed event. This history suggests a conscious choice to adopt a statute of repose.

It is by no means improper or unfair that the legislature would choose this course. The surety fund is not a traditional common law remedy; it is an extra remedy that the legislature created using government money collected through fees.[25] It is reasonable for the legislature to limit claims against this finite government fund in various ways to direct its resources toward claims for which relief can most efficiently and accurately be disbursed. The legislature's statute of repose is such a limitation: it directs the fund's resources to the claims for with personal recollections and other evidence of the alleged misconduct will be the freshest. Older claims may still be pursued, but they must be pursued in the courts through the traditional tort and breach of contract remedies.

For all of these reasons, the Commission's interpretation of AS 08.88.460 in *Roe v. Liesek* was correct.

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22 *Id.* at 32-33.

23 *See, e.g.*, Summary of proceedings of House Labor & Commerce Committee, March 14, 1997, comments of Eleanor "Grayce" Oakley ("[A] filing deadline for a surety fund claim . . . was done at one time with regulations. This was overturned by a Supreme Court decision and this [proposed legislation] would put it into statute . . . .").

24 Section 37, ch. 45 SLA 1998.

25 *See* AS 08.88.450.

B. Estoppel

The AGO's second argument is that even if the Commission has correctly interpreted AS 08.88.460 as not subject to the discovery rule, Mr. Harvey is nonetheless precluded from relying on the statute because of the doctrine of equitable estoppel. The AGO relies on the Alaska case of *Palmer v. Borg-Warner Corp.*, which explained that estoppel is a rule for "preventing [a party] from taking an inequitable advantage of a predicament in which his [or her] own conduct had placed his [or her] adversary."[26] In general, "a party who fraudulently conceals from a plaintiff the existence of a cause of action may be estopped to plead the statute of limitation if the plaintiff's delay in bringing suit was occasioned by reliance on the false or fraudulent representation."[27]

In advancing this doctrine, the AGO does not contend that Harvey is estopped from asserting the time limitation on misrepresentation claims because of his underlying, pre-closing alleged misrepresentations about the location of the road vis-à-vis the easement. This, of course, would be circular: it would not make sense to have a time limit on misrepresentation claims keyed to the date of the misrepresentation if the misrepresentation itself estopped reliance on the time limit. Instead, the AGO contends that the estoppel arises from Harvey's telephone conversation with Mrs. Dyer just after the closing, when DeFreest had first talked about the need to move the road. According to Mrs. Dyer:

> I called Duane Harvey on the phone and I said to Duane Harvey you told me there was a road, what is the problem, I'm going to get a lawyer and he says no, no, the road is there. I just have to – they don't understand. I will call them and talk to them . . . .[28]

For equitable estoppel to bar reliance on a time limit, however, it is necessary for the claimant to demonstrate that he or she "has exercised due diligence" and was reasonable in relying on the other party's concealing behavior.[29] This is a demonstration the Dyers have wholly failed to make. The very deed the Dyers purchased told them the easements Harvey had procured might not resolve their access problems. Even if it was reasonable for the Dyers to proceed with closing without reviewing the description of the straight-line easement along on the south boundary of the DeFreest land and

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[26] 838 P.2d 1243, 1249 n.9 (Alaska 1992) (quoting *Prosser and Keeton on the Law of Torts*). The AGO erroneously attributes this quotation to *Sharrow v. Archer*, 658 P.2d 1331 (Alaska 1983).

[27] *Sharrow*, 658 P.2d at 1333.

[28] December 3-4, 2001 hearing transcript at 108. *See also id.* at 120; Remand testimony of Barbara Dyer on cross-examination.

[29] *E.g., Waage v. Cutter Biological Div. of Miles Labs., Inc.* 926 P.2d 1145, 1151 (Alaska 1996). In this respect equitable estoppel is quite different from the discovery rule; in the case of the discovery rule, if the party fails to discover the claim because of fraud by the other party, the rule applies even if the party was unreasonable in falling for the fraud. *See Carter v. Hoblit*, 755 P.2d 1084 (Alaska 1988).

determining if it coincided with the road meandering across the DeFreest property, it does not seem reasonable, once Mr. DeFreest indicated that it did *not* coincide, for them to remain so wholly passive. If there was a reason that the Dyers did not, at that point, compare the description to the road on the ground—either on their own or with the assistance of a professional—they have not provided one. Instead, they chose to place their faith in a vague assertion by the seller's agent that "the road is there" and that he would "talk to" the DeFreests. There is no evidence that the Dyers even followed up to the extent of ascertaining that Harvey did talk to the DeFreests. This is not a showing of due diligence that supports a refusal to apply the statutory time limit.

V. Conclusion

Because the Dyers filed their claim after the two-year time limit had run, and because they have not shown that Harvey is estopped from relying on the time limit, their claim against the surety fund is DISMISSED.

DATED this 30th day of July, 2007.

Christopher Kennedy
Administrative Law Judge

THE UNDERSIGNED CERTIFIES THAT ON THIS DATE AN EXACT COPY OF THE FOREGOING WAS PROVIDED TO THE FOLLOWING INDIVIDUALS:

J. Christie
J. Conley
R. Woeffler S. Woosley-REC

SIGNATURE

DATE
7-30-07

Commission Action on Proposed Decision

Because this matter commenced prior to July 1, 2005, further proceedings are governed by AS 44.62.500(b) and (c) and not by AS 44.64. Having reviewed the Proposed Decision of the administrative law judge in **Case No. S21-004, Dyer v. Gartin & Harvey**, the Real Estate Commission hereby

Option 1: adopts the Proposed Decision in its entirety under AS 44.62.500(b).

Date 9/14/07 By: _____
Chairperson

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

Option 2: rejects the Proposed Decision under AS 44.62.500(c) and directs the taking of additional evidence as follows:

Date _____ By: _____
Chairperson

Option 3: rejects the Proposed Decision under AS 44.62.500(c), and orders that the entire record be prepared for commission review and that oral or written argument be scheduled before the commission prior to the final consideration of the decision in this case.

Date:_____ By:_____
Chairperson