S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

COLLETTE[1] BIELAT and EDWARD BIELAT,

Plaintiffs,

and

CALVIN JENNETT and WIESLAWA JENNETT,

Plaintiffs-Appellants,

v

SOUTH MACOMB DISPOSAL AUTHORITY,

Defendant-Appellee,

and

MACOMB TOWNSHIP,

Defendant.

UNPUBLISHED
November 9, 2004

No. 249147
Macomb Circuit Court
LC No. 1984-000612-AA

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Plaintiffs Calvin and Wieslawa Jennett appeal as of right following a final judgment entered in this case on June 3, 2003. Specifically, plaintiffs appeal two pre-judgment orders granting summary disposition to defendant South Macomb Disposal Authority,[2] entered on September 17, 1993, and November 13, 2001. Plaintiffs brought this action in 1983 for injuries they allegedly suffered as a result of the leakage of leachate[3] onto their property and into their

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[1] Also spelled "Colette" in some of the lower court records.

[2] Defendant is also referred to by its acronym, SMDA.

[3] Leachate is formed when waste contained in a landfill mixes with water. *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 643; 572 NW2d 686 (continued…)

groundwater from landfills operated by defendant. Plaintiffs present two issues on appeal: 1) whether the trial court erred in concluding that the statutes of limitations barred plaintiffs' remaining claims and 2) whether the trial court erred in its assessment of the permissible damages regarding their nuisance claim. Because we find a question of fact exists for the jury regarding the temporary or permanent nature of the alleged trespass and nuisance, summary disposition should not have been granted on the ground that plaintiffs' claims are barred by the statutes of limitations. Therefore, we reverse in part, affirm in part, and remand.

I. Background

Plaintiffs are members of a group of property owners whose property is located near land owned by defendant. Defendant is a quasi-municipal corporation that formerly operated two solid waste landfills, sites 9 and 9A, on its parcel of property nearby plaintiffs' property. Defendant began operating site 9 in 1968 and it expanded its landfill operations by adding site 9A in 1971. Defendant closed site 9 in 1975 and site 9A in 1979. *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 645; 572 NW2d 686 (1997). In 1971 and 1976, leachate outbreaks occurred on site 9A. Another occurred in 1980. Numerous problems occurred during the years of its operation. *Id*. at 646.

Plaintiff Calvin Jennett (Calvin) testified at his deposition that in 1968 a flood occurred and during that flood soil came off the landfill and ran into the McBride Drain. The floodwaters left a reddish colored residue on his property that killed the grass and the smell was very bad. He believes that this was the first time his property flooded after the landfill began operating. The sediment coming off the landfill and into the drain raised the bottom of the McBride Drain by five feet. Calvin testified he first noticed in the early 1970s that at times after irrigating his fruit trees, grapes, raspberries and other garden plants he found a black sludge covering the plants. His irrigation system pumped water from the McBride Drain.

Calvin testified that he eventually stopped drinking the water from his well because he became concerned about the quality of the water that came onto his property from the landfill; he was most concerned right after a flood. He began to use bottled water for drinking and cooking and used his well water only for bathing and washing. And he noted that the smell of the water coming out of the faucet was bad. At times, the odor was less offensive than at other times due to the corrections that defendant attempted at the landfill. However, the problem never completely ceased.

Calvin apparently asserted in his answers to defendant's interrogatories that he was exposed to certain chemicals. He explained that ninety-nine percent of the leachate leaving the landfill entered the McBride Drain through drainage pipes leading from the landfill and a sedimentation pond to the drain. He reasoned that whatever was in that landfill ended up on him. According to Calvin, the problems with leachate entering his property from the landfill began in 1971 and continued until he sold his property in 1988. He stated that in 1971 he first became aware that the various substances were allegedly causing him injury.

(…continued)

(1997).

In their complaint[4], plaintiffs' alleged, "Unnatural chemical contaminants have escaped from these landfills, and will continue to do so indefinitely, into the air, groundwater and surface water of other lands, including plaintiffs' property." Plaintiffs raised several claims against defendant: nuisance, trespass, deceit, intentional infliction of emotional distress, and inverse condemnation. Plaintiffs requested $375,000 in damages. As their damages, plaintiffs claimed (1) diminution of property value, (2) loss of the use and enjoyment of property, (3) annoyance, inconvenience and discomfort, including emotional stress and mental anguish, and (4) impairment of health, including pecuniary losses, pain, suffering and discomfort.

Defendant twice moved for summary disposition of all claims asserted against it.[5] In 1993, defendant argued that it was entitled to summary disposition of plaintiffs' claims of trespass, nuisance and inverse condemnation because they filed this action after expiration of the applicable limitations periods. The court noted: (1) the landfills operated from 1968 through 1975; (2) plaintiffs filed this action in August 1983; and (3) plaintiffs' claims arose from continuing problems with the landfills. The court, following *Moore v Pontiac*, 143 Mich App 610, 614; 372 NW2d 627 (1985), determined that the continuing wrongful acts doctrine applied and the claims were not barred by the statutes of limitations.

Before entry of a final judgment in this case, and after this Court decided additional cases addressing the continuing wrongful acts doctrine, defendant filed a second motion for summary disposition in 2001, again arguing that plaintiffs' claims were barred by the statute of limitations. The trial court at this time concluded that the statutes of limitations began to run as to plaintiffs' claims of trespass, nuisance and inverse condemnation by 1975, the year in which defendant stopped placing waste into the landfills. It noted that by 1975, plaintiffs had suffered damages due to leachate outbreaks on their property. The court concluded that the limitations period for plaintiffs' trespass and nuisance claims expired in 1978 and the period applicable to plaintiffs' inverse condemnation claim expired in 1981. Because plaintiffs filed this action in 1983, the court granted defendant's motion for summary disposition on the grounds that these claims were time-barred. The court rejected application of the continuing wrongful acts doctrine, explaining:

> [P]laintiffs seek damages for defendant SMDA's creation and maintenance of the landfills. According to plaintiffs, these landfills were improperly constructed and, in addition, were not properly closed nor [sic] properly maintained after closure. These alleged acts of defendant allowed the leachate to escape from the landfills and cause plaintiffs' claimed damages. These are not continued tortious acts but are instead, continued harmful effects of the alleged tortious acts.

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[4] The Bielat plaintiffs originated this action in Ingham Circuit Court in 1983. The court transferred the case to Macomb Circuit Court in 1994. Over the years, the various plaintiffs have filed several amended complaints, adding many parties, including Wieslawa Jennett after she and Calvin married. For simplification, reference to "plaintiffs" includes only the Jennetts.

[5] This appeal only involves three of plaintiffs' claims. Therefore, the background information and our subsequent analysis is limited to those claims.

In its September 17, 1993 opinion and order the circuit court discussed the second issue involved in this appeal: whether plaintiffs may claim damages for emotional distress based on their nuisance and trespass claims. The court found that most of plaintiffs' claims for emotional distress were based on their fear of loss in the value of their property. It determined that this did not provide a basis for awarding such damages. It also rejected their claim for such damages arising from their fear of contact with the leachate because they did not show that they had a risk of developing medical problems resulting with such contact or that their current medical problems are associated with contact with the leachate. The court concluded, however, that plaintiffs are permitted to recover damages for personal discomfort, inconvenience and annoyance if they can demonstrate an unreasonable and substantial interference with the use and enjoyment of their land.

II. Claims of Trespass and Nuisance

Plaintiffs argue that the statutes of limitations do not bar plaintiffs' claims of trespass or nuisance because they have suffered damages as a result of a continuing and repeated tort: the migration of contaminated water and leachate from the landfills onto plaintiffs' property and into their groundwater.[6] Defendants counter that the doctrine of continuing wrongful acts, which may allow recovery of damages that occur within the limitations period, does not apply to this case because plaintiffs' claims are not based on recurring wrongful conduct, but rather stem from the recurring harmful effects of a completed act.

A. Standard of Review

A decision on a motion for summary disposition is reviewed de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). Where there is no disputed issue of fact, the question whether a statute of limitations bars a cause of action is also reviewed de novo. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

With regard to this issue, defendant moved for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by statute of limitations) and MCR 2.116(C)(10) (no genuine issue of material fact). Reviewing a motion for summary disposition under MCR 2.116(C)(7) requires the court to accept all well-pleaded allegations as true and to construe them most favorably to the plaintiff. *Simmons v Apex Drug Stores*, 201 Mich App 250, 252; 506 NW2d 562 (1993). The court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence submitted and filed by the parties. *Id*. It should not grant summary disposition unless no factual development could provide a basis for recovery. *Id*.

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[6] Plaintiffs also argue that defendant was estopped from re-raising the defense of the statute of limitations by delaying in reasserting the defense until three years after the "newest" case defendant relied on was decided and after defendant had entered into settlement negotiations with all the plaintiffs. We find no merit in this argument because plaintiffs have failed to establish that equitable estoppel is appropriate in this case to prevent defendant from re-raising a statute of limitations defense. See *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270-271; 562 NW2d 648 (1997); *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998).

A motion brought pursuant to MCR 2.116(C)(10) (no genuine issue of material fact) tests the factual support for a claim. *Hazle*, *supra* at 461. To rule on the motion, the trial court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. MCR 2.116(G). And the court must view the evidence and all reasonable inferences drawn from the evidence in favor of the nonmoving party, giving the nonmoving party the benefit of any reasonable doubt. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, the court may grant summary disposition pursuant to MCR 2.116(C)(10). *Hazle*, *supra*.

B. Statute of Limitations

"A trespass is an unauthorized invasion upon the private property of another." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995). The intrusion must be intended and without authorization; it may not be the result of an accident caused by negligence or an abnormally dangerous condition. *Id*. The trial court found that for their nuisance claim, plaintiffs set forth claims for both trespass-nuisance and nuisance per se, noting that any claims for general nuisance would be barred by governmental immunity. A trespass-nuisance is a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988), overruled by *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002)[7]. The elements of a trespass-nuisance are "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Id*. An activity or condition that constitutes a nuisance at all times and under all circumstances, regardless of the care with which it is conducted or maintained is a nuisance per se[8]. *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992), overruled on other grounds by *Pohutski*, *supra*.

The parties do not dispute that the applicable limitation period is three years for both trespass and nuisance. MCL 600.5805(9). The question in this case is when the statute of limitation begins to run. Generally, the applicable limitations period begins to run at the time a claim accrues, and the claim accrues at the time the wrong upon which the claim is based was done, regardless of when damage occurs. MCL 600.5827. "[A] plaintiff's cause of action for tortious injury accrues when all the elements of the cause of action have occurred and can be alleged in a proper complaint." *Horvath v Delida*, 213 Mich App 620, 624; 540 NW2d 760

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[7] Our Supreme Court overruled *Hadfield, supra*, in *Pohutski, supra*, concluding that there exists no trespass-nuisance exception to governmental immunity. However, it held that its decision shall be applied prospectively only. Thus, because plaintiffs initiated this action long before the Supreme Court decided *Pohutski*, they may pursue a claim based on trespass-nuisance.

[8] It is not clear whether nuisance per se is firmly recognized as an exception to governmental immunity. See *Li v Feldt (After Second Remand)*, 439 Mich 457, 477; 487 NW2d 127 (1992), overruled on other grounds by *Pohutski*, *supra*, where the Supreme Court commented that "regardless of whether nuisance per se might qualify as an exception to governmental immunity," the plaintiffs in the cases before it did not present nuisance per se claims.

(1995). The *Horvath* Court explained that where flooding, overflow or seepage results in permanent rather than temporary damage, the cause of action accrues at the time the land is first visibly damaged. *Id*. at 625. The statute of limitations is not tolled by virtue of the fact that the plaintiff was unable to know of or measure its ultimate damages. *Id*. No new cause of action arises from later damages that occur after accrual of the cause of action, and "the statute of limitations [does not] begin to run anew as each item of damage is incurred." *Id*. at 625-626, quoting *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150-151; 200 NW2d 70 (1972).

C. Continuing Wrong Doctrine

Plaintiffs assert, however, that under the continuing wrong doctrine, their claims based on events that occurred within three years before they filed their claim in August 1983 are actionable. Defendant argues that this doctrine is not applicable to this case and that the limitation period expired three years after 1975, the year it stopped placing refuse into the landfills. This Court explained the continuing wrong doctrine in *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 246; 673 NW2d 805 (2003):

> Under the continuing wrong doctrine, "an alleged timely actionable event will allow consideration of and damages for connected conduct that would be otherwise barred." *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 510; 398 NW2d 368 (1986). Thus, in certain cases, the doctrine recognizes that "'[w]here a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that the defendant's tortious conduct continues.'" *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 592 NW2d 112 (1999), quoting *Horvath[, supra* at 626].

To recover under the theory of continuing wrong, the plaintiff must establish that continual tortious acts constitute a continuing wrong. *Id*. Continual harmful effects from an original completed act do not constitute a continuing wrong. *Id*. The doctrine is applied in limited circumstances: trespass, civil rights claims and nuisance. *Id*. at 247.

In the trial court's 2001 opinion, it specifically referenced *Jackson Co Hog Producers, supra*, which relied in part on this Court's analysis in *Horvath, supra*, as to the applicability of the continuing wrong doctrine. *Horvath* involved allegations that activities conducted by the defendants on their lakefront property caused flooding on the plaintiffs' property. In 1982, the defendants dredged material from the bottom of the lake, and, after this dredging, the lake water level rose continuously over the subsequent years. This caused flooding on the plaintiffs' property that eventually reached their home. In July 1992, the plaintiffs brought an action against the defendants for negligence, alleging that the defendants negligently dredged the lake by opening underground springs and causing the lake level to rise and flood the plaintiffs' property. The defendants argued that the plaintiffs' claim was barred by the statute of limitations. *Id*. at 623-624.

The *Horvath* Court rejected the plaintiffs' argument that under the continuing wrongful acts doctrine the limitations period was tolled until the time of the most recent wrong. *Id*. at 626. The Court reasoned that in order for the doctrine to be applicable, there must be continual

tortious *acts*, not continual *harmful effects* of an original, completed act. *Id*. at 627. It found that the plaintiffs alleged a single tortious act—the dredging of the lake—and that the plaintiffs' property suffered noticeable permanent damage, increasing in intensity over the years from its first appearance in 1985. *Id*. at 628. The Court concluded, "[B]ecause plaintiffs have only established aggravated ill effects from a single tortious act, their reliance on the continuing-wrongful-acts doctrine is misplaced." *Id*.

In concluding that the continuing wrongful acts doctrine did not apply in this case, the trial court's reasoning tracked that of the *Horvath* Court. The court held that the statute of limitations began to run in 1975 when defendant stopped landfilling activities at the sites. Addressing plaintiffs' assertion of the continuing wrongful acts doctrine, the court noted that plaintiffs alleged that defendant improperly constructed, closed and maintained the landfills. It reasoned, "These alleged acts of defendant allowed the leachate to escape from the landfills and cause plaintiffs' claimed damages. These are not continued tortious acts but are instead, continued harmful effects of the alleged tortious acts."

Relying on this same reasoning, the Court in *Jackson Co Hog Producers, supra*, which the trial court cited, similarly held that the doctrine was inapplicable to the facts of that case. In 1993, the plaintiffs brought claims of negligence, trespass and nuisance, among others, against the defendant and alleged that the defendant was liable for damages as a result of stray voltage that invaded the plaintiffs' properties negatively affecting their hog production operation. *Id.* at 76. There was evidence that sometime before 1990, the plaintiffs' employees observed the effects of stray voltage and took steps to alleviate the problem. *Id*. at 79. The defendant argued that the plaintiffs' negligence claim was barred by the statute of limitations, and the plaintiffs argued that the continuing wrongful acts doctrine could be applied to avoid the applicability of the statute of limitations. *Id*. at 81. The plaintiffs argued that the stray voltage persisted for years and continued to cause a problem at their facilities. *Id*.

The Court rejected the plaintiffs' argument and found that before October 1990, the defendant installed the connections to provide the plaintiffs with electricity. The Court characterized this as the original, completed and allegedly tortious act, concluding that the stray voltage was simply the harmful effect of that act. Accordingly, citing the *Horvath* Court's reasoning, the Court in *Jackson Co Hog Producers* held that the continuing wrongful acts doctrine did not apply to the plaintiffs' negligence claim. *Id*. at 81-82. The Court also addressed the plaintiffs' trespass and nuisance claims and found that they were simply disguised claims of negligence because the defendant was authorized to supply electricity to the plaintiffs. As such, those claims were barred by the statute of limitations for the same reason as the plaintiffs' negligence claim. *Id*. at 82-83.

The problem with the trial court's reliance on the reasoning employed in *Horvath* and *Jackson Co Hog Producers* is that both cases ultimately involved only negligence claims. And both cases acknowledged that Michigan has not recognized a cause of action for continuing negligence. *Jackson Co Hog Producers*, *supra* at 82; *Horvath, supra* at 627 n 2. In fact, as recently as last year, this Court noted that no such cause of action exists in Michigan. *Blazer Foods, supra* at 247, citing *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 341; 568 NW2d 847 (1997) ("[T]his Court declined to extend the [continuing wrong] doctrine to negligence claims."). We, therefore, turn our attention to a review of several cases that specifically addressed the continuing wrong doctrine in the context of trespass and

nuisance claims.

In *Defnet v Detroit*, 327 Mich 254; 41 NW2d 539 (1950), the defendant constructed a sewer that ran under an alley. The defendant later vacated the alley, but the sewer was not removed or blocked off; it continued to be used. The plaintiffs purchased a home and parcel of property in the vacated alley. Their abstract of title stated that the alley had been vacated, but it did not refer to the sewer. They later acquired the deed, which referenced the sewer, and learned from their grantor that a "blocked off" sewer was under their property. *Id*. at 256. The plaintiffs' home later developed cracks and began to settle. Other damage also occurred, including a cave-in in the back yard and obnoxious fumes leaking from their fireplace. After repeated inquiries to the defendant, a department of public works crew investigated the matter and discovered the operating sewer. At this time, the plaintiffs first learned that the sewer had not been blocked off. *Id*. at 256-257.

The plaintiffs brought a claim for damages based on repairs made to their house. The trial court decided, among other things, that the statute of limitations had run. *Id*. at 257-258. Our Supreme Court determined, however, that the maintenance of the active sewer under the plaintiffs' property constituted a trespass. It viewed the defendant's failure to remove or block off the sewer as a continuing tort. The Court ultimately concluded: "Where there are continuing wrongful acts within the period limited by the statute, recovery is not barred." *Id*. at 258 (citations omitted).

Moore v Pontiac, 143 Mich App 610; 372 NW2d 627 (1985), the case which the trial court originally relied on for determining the continuing wrong doctrine did apply to the instant case, involved the doctrine's applicability in the context of a nuisance claim. In *Moore*, the defendant rezoned the property across the street from the plaintiffs' property and began to use the property for a sanitary landfill. The plaintiffs complained about noxious odors, noise and the intrusion of glass and paper into their yard. In 1977, the landfill began a concrete crushing operation, and in 1979 it began a tire shredding operation. This latter operation produced loud shrill-like noises, noxious odors and soot, particles and fibers of which entered the plaintiffs' home. The plaintiffs alleged that they suffered health problems caused by the activities at the landfill, which dissipated after they sold their home and moved in 1980. *Id*. at 611-612.

The defendant argued in its motion for directed verdict that the plaintiffs' cause of action accrued in the 1960s when the defendant began the landfill operations and thus, the plaintiffs' nuisance claim was barred by the statute of limitations. This Court, following *Hodgeson v Genesee Co Drain Comm'r*, 52 Mich App 411, 413; 217 NW2d 395 (1974)[9], held that the statute of limitations did not bar the plaintiffs' nuisance action because "the wrong suffered by the

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[9] In *Hodgeson*, the plaintiffs alleged that a storm sewer running under their property caused periodic flooding in their basement. *Id*. at 412. The Court held that the trial court erred in concluding that the case was barred by the statute of limitations because the "acts complained of by plaintiffs were continuing in nature," and "the statute of limitations does not bar recovery from a continuing wrong which has subsisted during the limitation period preceding commencement of the action." *Id*. at 413.

plaintiffs was of a continuing nature." *Moore*, *supra* at 614.

Most recently, in *Traver Lakes, supra*, this Court addressed the continuing wrongful acts doctrine with regard to trespass and nuisance claims. There, the defendants were associated with an apartment complex built in the late 1980s near an established community of apartments and townhouses, Traver Lakes. A series of connected ponds provided for storm and groundwater discharge from the Traver Lakes community. The plaintiff was formed to oversee and coordinate the upkeep and maintenance of the community. *Id*. at 338-339.

During and after construction of the new apartment complex, excessive amounts of silt and sediment flowed from the construction site into the Traver Lakes pond system. This caused the build-up of sediment in the ponds and decreased the flow of water through the system. The plaintiff expended large sums of money to clean up the system in 1992 and brought suit against the defendants alleging negligence and trespass. The plaintiff asserted that the defendants installed ineffective or insufficient erosion control measures, causing the plaintiff to incur expenses to clean up its pond system and requiring that the clean up be repeated every five to ten years. The defendants moved for summary disposition based on the expiration of the statute of limitations. The trial court granted the defendants' motion and denied, on grounds of undue delay and futility, the plaintiff's motion to amend its complaint to add a nuisance claim. *Id*. at 339.

On appeal, the plaintiff challenged the trial court's dismissal of its negligence claim based on the statute of limitations, arguing that the continuing wrongful acts doctrine tolled the statute. *Id*. at 340. The Court rejected this argument pursuant to *Horvath, supra*, because Michigan courts do not recognize a continuing negligence cause of action. *Id*. at 341. But the Court also held that the trial court erred in dismissing the plaintiff's trespass claim and in refusing to allow the plaintiff to amend its complaint to include a claim of nuisance. *Id*. at 343-344.

The *Traver Lakes* Court distinguished the application of the continuing wrongful acts doctrine to a claim based on negligence with one based on trespass or nuisance. In contrast to a negligence claim, the defendant's intent to cause a trespass or nuisance is generally not relevant. *Id*. at 345. Another distinction between negligence and nuisance is that "[n]uisance is a condition and not an act or failure to act." *Id*. at 346, quoting *Hobrla v Glass*, 143 Mich App 616, 630; 372 NW2d 630 (1985) (alteration in original). In *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 636; 178 NW2d 476 (1970), our Supreme Court distinguished nuisance from other torts, stating:

> Primarily, nuisance is a condition. Liability is predicated on tortious conduct through action or inaction on the part of those responsible for the condition. Nuisance may result from want of due care (like a hole in a highway), but may still exist as a dangerous, offensive, or hazardous condition even with the best of care. [*Traver Lakes, supra* at 346 n 3.]

Because of this difference, the *Traver Lakes* Court explained: "Thus, in reviewing plaintiff's damages claim for trespass/nuisance, we must focus our inquiry on the reasonableness of the interference with plaintiff's property, not the reasonableness of defendants' conduct in creating or maintaining the interference." *Id*. at 346-347, citing Prosser & Keeton, Torts (5th

ed), § 87, pp 622-623. Noting that claims for a continuing trespass or nuisance occurring within the limitation period are not barred, it stated that damages recoverable under such claims generally depend "upon whether the interference with the plaintiff's property is permanent or temporary." *Id*. at 347.

In making such a determination, the Court adopted the rules delineated in 58 Am Jur 2d, Nuisances, §§ 273-275, pp 875-878:

> An action in damages may be maintained for the creation of a nuisance and a subsequent and separate action may be maintained for the continuance of such nuisance. The determination of whether a single right of action or successive rights are created by a nuisance for damages depends primarily upon whether the cause of injury is permanent or temporary. . . . The question generally is one of fact for the jury.
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> If injuries from a nuisance are of a permanent character and go to the entire value of the estate, there can be but one action, and all damages—past, present, and future—are recoverable therein; in such a case, one recovery is a grant or license to continue the nuisance, and there can be no second recovery for its continuance. . . .
>
> Where the injury from the alleged nuisance is temporary in its nature, or is of a continuing or recurring character, the damages are ordinarily regarded as continuing, and one recovery against the wrongdoer is not a bar to successive actions for damages thereafter accruing from the same wrong. In such a case, every day's continuance is a new nuisance. . . . That is, where a nuisance is temporary, damages to property affected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated. [*Id*. at 347-348.]

Therefore, the *Traver Lakes* Court determined that a question of fact existed as to whether the alleged trespass/nuisance was "temporary, and therefore abatable by reasonable curative or remedial action, or whether it was permanent in nature, and therefore nonabatable." *Id*. at 348. It remanded the matter and directed the issues be considered by a jury. *Id*.

Defnet, supra, and *Moore, supra*, are instructive because they applied the continuing wrong doctrine to a trespass and nuisance claim, respectively. But both of these cases were heard by a jury. This case is more akin to *Traver Lakes, supra*, in which the plaintiff's appeal was taken from the trial court's order granting defendants' motion for summary disposition. Applying the analysis used in *Traver Lakes*, we find that the trial court erred in granting defendant's motion for summary disposition on the basis that plaintiffs' remaining claims were barred by the statute of limitations.

On appeal, defendant argues that plaintiffs' damages were permanent by 1976 and, therefore, the continuing wrongful acts doctrine does not rescue plaintiffs' claims. It states that Calvin described in detail how the flow of contaminants onto his property between 1968 and 1972 caused all his damages and that he experienced a total loss of the use of his water by 1976.

Thus, defendant asserts, as of 1976, seven years before plaintiffs filed this action and after the expiration of the applicable limitations periods, plaintiffs' damages were permanent. However, the evidence defendant submitted in support of its motion for summary disposition does not support its assertions regarding the permanency of plaintiffs' damages. While Calvin testified regarding various flooding episodes that occurred in 1968 and into the 1970s, there is absolutely no discussion regarding the permanency of any damages that occurred as a result of those floods. Therefore, we hold that there exists a question of fact regarding the temporary or permanent nature of defendant's interference with plaintiffs' property and summary disposition was inappropriate.

III. Inverse Condemnation Claim

Summarily, plaintiffs may prevail on an inverse condemnation claim if they can show that governmental action permanently deprived them of possession or use of their property. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994). The parties agree that the limitation period for plaintiffs' inverse condemnation claim is six years. MCL 600.5813. Where a continuous wrong by the condemnor is alleged, "the statute of limitations does not begin to run until the consequences of the condemnor's actions have stabilized. The precise point in time when the running of the limitation period is triggered is determined by the facts and circumstances of each case." *Hart v Detroit*, 416 Mich 488, 504; 331 NW2d 438 (1982) (citations omitted). Generally, it is for the trier of fact to determine if a continuous wrong was involved and, "if so, when the consequences of this wrong had stabilized, thus triggering the statute of limitations." *Id*.

However, in this case, a remand is unnecessary. Last month, this Court decided *Hinojosa v Dep't of Natural Resources*, ___ Mich App ___; ___ NW2d ___ 2004 (Docket No. 248185, issued 9/9/04). The issue was whether the plaintiffs' claim of trespass-nuisance could also constitute a claim for inverse condemnation. In that case, the state acquired an abandoned house through tax delinquency proceedings. The house later caught fire and damaged the homes of the plaintiffs, who filed suit alleging trespass-nuisance and inverse condemnation. The Court concluded that plaintiffs' inverse condemnation claim could not stand because "the state took no affirmative action toward plaintiffs' property." *Id*. at slip op 1.

The *Hinojosa* Court stated that in order to establish a claim for inverse condemnation, the plaintiff must prove that 1) the government's actions were a substantial cause of the decline of the plaintiff's property and 2) the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. *Id*. at 7, citing *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004); *Attorney General v Ankersen*, 148 Mich App 524, 561; 385 NW2d 658 (1986). The Court held that the plaintiffs' had not alleged any overt action by the state specifically directed at their property and, therefore, summary disposition was proper. *Id*. at 7-8. At most, the state "failed to abate a fire-hazard nuisance." *Id*. at 1.

Similarly, in this case, plaintiffs' do not allege that any affirmative action was specifically directed at their property. In their complaint, the only activities alleged are the "transporting and disposing of wastes" at the two landfill sites. And in their appellate brief, plaintiffs admit that "it is not the putting of rubbish into the landfills that is the nuisance here, the tortious acts or omissions are the continuing, uncontrolled escape of the leachate from them." Inactions or omissions by the state cannot constitute a "taking" for purposes of an inverse

condemnation claim. *Id.* at 7, quoting *Ankersen, supra* at 562 (state's alleged misfeasance in licensing and supervising a hazardous waste operation did not constitute affirmative action by the state directly aimed at the counterplaintiffs' property). Accordingly, in this case, we find that plaintiffs' inverse condemnation claim must fail as a matter of law because they alleged and concede on appeal that there was no overt state action specifically directed toward plaintiffs' property. We affirm the trial court's summary disposition ruling regarding plaintiffs' inverse condemnation claim, but for a different reason.

IV. Permissible Damages

Plaintiffs also argue that the trial court erred in ruling that they are limited to recovering damages for personal discomfort, inconvenience, and annoyance resulting from the alleged trespass and nuisance. Plaintiffs assert that the type of damages allowed by the trial court necessarily include mental anguish and emotional stress.[10] The label attached to plaintiffs' alleged damages appears at first blush to be a matter of semantics. However, mental anguish and emotional distress are two separate types of damages, with the latter requiring a showing of physical injury. *McClain v Univ of Michigan Bd of Regents*, 256 Mich App 492, 498; 665 NW2d 484 (2003). Both types of damages are under the umbrella of "emotional damages." *Id.* at 500. Therefore, the trial court was correct to the extent that it ruled that plaintiffs could not recover for "emotional distress" because they had not shown evidence of a resultant physical injury.

The more pertinent question is whether the trial court erred in concluding that plaintiffs could not recover for anxiety over the possibility of a decrease in their property value or fear of contact with the leachate. In Michigan, actual damages in tort claims include mental distress and anguish. *Phillips v Butterball Farms Co*, 448 Mich 239, 251 n 32; 531 NW2d 144 (1995), citing *Veselnak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982). And mental anguish damages are not limited to physical pain and anguish. *Ledbetter v Brown City Savings Bank*, 141 Mich App 692, 703; 368 NW2d 257 (1985). Remembering that one element of a trespass-nuisance claim is a trespass or interference with the use or enjoyment of one's land, *Hadfield, supra* at 169, our Supreme Court stated in *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992), that among the ways to interfere with the use and enjoyment of land includes "interference with the physical condition of the land itself, *disturbance in the comfort or conveniences of the occupant including his peace of mind*, and threat of future injury that is a present menace and interference with enjoyment." Emphasis added. Fears or anxieties that result from a trespass-nuisance are certainly a disturbance in one's peace of mind.

Here, the trial court specifically held that plaintiffs could recover for personal discomfort, inconvenience, and annoyance. And the fears that plaintiffs seek to recover damages for are properly encompassed within damages for personal discomfort and inconvenience. Thus, there is no need to disturb the trial court's ruling. However, on remand, the trial court shall allow plaintiffs to present evidence regarding their fears and anxieties pertaining to the leachate

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[10] Plaintiffs also refer to their damages as "mental anguish," "emotional anguish," and "mental and emotional distress."

without requiring a showing of a physical manifestation.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens