

STATE OF MICHIGAN
COURT OF APPEALS

SHEILA BEAUCHAMP, GARTH
BEAUCHAMP, ROGER BEYER, KAREN
BEYER, BARBARA BISWABIC, KENNETH
BISWABIC, MICHAEL CAHILL, CENTRAL
SUPER MARKET, INC., NANCY L.
CHERESKIN, JEFFREY CHURCH, LORI COX,
JOHN COX, GENE DAVIS, KAREN
FREDRICKSON, DOUGLAS FREDRICKSON,
LINDA GRANQUIST, JANET GUDE, PAUL
GUDE, DEBRA HELGREN, KENNETH
HELGREN, SHARI JULIAN, ALLAN JULIAN,
GINA KOSKI, LORI MACHUS, JAMES
MACHUS, MACHUS RENTALS
PARTNERSHIP, ORA MARTIN, WILLIAM
MARTIN, MARY MARTINUCCI, EUGENE
MARTINUCCI, STEPHANIE MARTINUCCI,
MARK MARTINUCCI, DENISE MORELLI,
JILL NEKHAY, JOHN NEKHAY, DONALD
OKLER, SANDRA ORCHARD, STEVEN
ORCHARD, SHIRLEY PEARSON, ALLAN
PEARSON, JIM PETERSON, LAVERNE
QUICK, LEROY QUICK, MICHAEL QUICK,
MARJORIE SCHIAVO, EUGENE SCHIAVO,
DONNA SLEETER, SHARI SLEETER,
DEBORAH SLEIK, DENNIS SLEIK, LYNN
SORCE, JOSEPH SORCE, CAROL SORENSON,
STEPHEN SORENSON, NICOLE STANCHINA,
SCOTT STANCHINA, CAROL TOBEY,
ALBERT TOBEY, VICKIE VANLAANEN,
JOSEPH VANLAANEN, JUANITA WEBER,
JAMES WEBER, NORA WEINFURTER, and
ROBERT WEINFURTER,

Plaintiffs-Appellants,

v

FORD MOTOR COMPANY and KINGSFORD
PRODUCTS COMPANY,

UNPUBLISHED
May 24, 2005

No. 256175
Dickinson Circuit Court
LC No. 02-012608-CE

Defendants-Appellees.

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants summary disposition under MCR 2.116(C)(7) based on the statute of limitations. We affirm.

Plaintiffs are residents or property owners in Kingsford or Breitung Township, Michigan. From 1921 until 1951, defendant Ford Motor Company owned and operated a manufacturing plant in Kingsford that produced wooden auto parts. The plant also produced charcoal and distilled wood products. Kingsford Products Company acquired the plant from Ford and produced charcoal there from 1951 until 1961. Over the years, waste products produced at the plant by both defendants were disposed of at dumps in Kingsford and Breitung Township. In 1995, a methane gas explosion damaged a home in the area, which led to an environmental investigation of the surrounding area, which included plaintiffs' properties. Preliminary investigations traced groundwater contamination and the presence of methane gas to defendants' earlier dumping of their waste products.

Defendants voluntarily agreed to be bound by an administrative order from the Environmental Protection Agency regarding soil and groundwater contamination in the area of concern. An environmental investigation of the site was conducted between 1997 and 2001, after which a remedial report was prepared to explain the extent of contamination. Regulatory oversight of the project was subsequently transferred to the Michigan Department of Environmental Quality ("DEQ"). Defendants have worked with the local governments to assist in remedying the problems, including proposing ordinances requiring the presence of methane gas detectors in new and existing buildings within the area of concern and prohibiting the use of wells within a restricted area.

Plaintiffs filed this action against defendants on October 8, 2002, alleging various theories of liability related to the contamination. Plaintiffs alleged that, as of February 1998, 1,300 methane detectors were placed in residences and other structures within the area of concern, including plaintiffs' properties. Plaintiffs also alleged that at least twelve residential wells within the area of concern were abandoned to prevent exposure to contaminated groundwater and the escape of methane gas.

Defendants jointly moved for summary disposition, alleging that plaintiffs' action was governed by the three-year statute of limitations for injuries to persons or property, MCL 600.5805(10) [formerly MCL 600.5805(9)], and that plaintiffs' complaint, filed on October 8, 2002, was untimely. The trial court agreed and, through a well-written and reasoned opinion, granted defendants' motion. Plaintiffs moved for reconsideration of that decision and for leave to amend their complaint. The trial court denied both motions. This appeal followed.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court granted summary disposition for defendants under MCR 2.116(C)(7), holding that the action was barred

by the statute of limitations. The standard for reviewing motions under MCR 2.116(C)(7) is as follows:

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). See also *Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002) ("Absent a disputed issue of fact, this Court decides de novo, as a question of law, whether a cause of action is barred by a statute of limitations.")

The parties agree that plaintiffs' claims are subject to the three-year statute of limitations for injuries to persons or property. MCL 600.5805(10) [formerly MCL 600.5805(9)]. MCL 600.5827 addresses when a claim accrues for purposes of the statute of limitations:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

This case is not controlled by MCL 600.5829 to MCL 600.5838, so plaintiffs' claim accrued at the time the wrong was done, regardless of when damages resulted.

"The wrong is done when the plaintiff is harmed rather than when the defendant acted." *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003). A cause of action for tortious injury accrues when all elements of the claim have occurred and can be alleged in a proper complaint. *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995).

The trial court also applied the discovery rule in this case. The discovery rule can apply where an element of a cause of action, such as damages, has occurred, yet is not discoverable by the plaintiff even with reasonable diligence. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 640; 692 NW2d 398 (2004). Under the discovery rule, the statute of limitations "begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action." *Id.* (citation omitted). Whether a plaintiff, through the exercise of reasonable diligence, should have discovered a possible cause of action is determined by an objective standard. *Levinson v Trotsky*, 199 Mich App 110, 112-113; 500 NW2d 762 (1993). The plaintiff need only be aware that a possible cause of action exists, not that a likely cause of action exists. *Gebhardt v*

O'Rourke, 444 Mich 535, 544; 510 NW2d 900 (1994). The plaintiff has a duty to diligently pursue any legal claims. *Moll v Abbott Laboratories*, 444 Mich 1, 29; 506 NW2d 816 (1993). "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843 (1997).

The parties agree that defendants' plant ceased operating in 1961. Defendants' last wrongful acts occurred at that time. Nonetheless, the damages in this case were not apparent until the contaminants began to seep into the soil and harm plaintiffs' property. Defendants argue that the existence of contamination was apparent before October 1999, and, therefore, plaintiffs should have been aware of a possible cause of action more than three years before they filed this action on October 8, 2002. Plaintiffs argue that the extent of the harm from contamination was not apparent until, at the earliest, February 2000, and, therefore, their action is timely.

Plaintiffs attached to their complaint a copy of an information bulletin prepared by the DEQ in February 2000, addressing the ongoing site investigation. According to plaintiffs, they did not have notice of the extent of the problems to their properties until that bulletin was released. In contrast, defendants argue that an earlier bulletin, released in January 1999, as well as many other public events, including several public meetings concerning the contamination, provided plaintiffs with notice of their possible claims well before October 1999.

There is no dispute that the DEQ issued an earlier bulletin in January 1999, which contains much of the same relevant information found in its February 2000 bulletin. The January 1999 bulletin addressed the problems of both groundwater contamination and methane gas. At a minimum, the information in that bulletin should have placed plaintiffs on notice that they had a possible claim related to the contamination. Plaintiffs have failed to show that they could not have known of a possible claim until release of the February 2000 bulletin.

We also agree with the trial court that other events further support the conclusion that plaintiffs should have known of a possible cause of action before October 1999. These events include numerous public meetings, the distribution of methane gas detectors to residents, and the abandonment of wells. Although some plaintiffs may not have had personal knowledge of each of these events, and some plaintiffs did not receive a methane gas detector, the trial court did not conclude that placement of a methane gas detector in plaintiffs' homes was the only means of providing notice of the possible contamination of their properties. Rather, as the trial court observed, the submitted evidence demonstrated that there was sufficient widespread public information about contamination in the surrounding area before October 1999, which, under an objective standard, should have alerted plaintiffs to the existence of a possible cause of action related to the contamination.

We find no merit to plaintiffs' argument that they could not file an action until release of a final report on the remedial investigation. Because the discovery rule is triggered when there is a possible cause of action, not a likely cause of action, the release of a preliminary report is sufficient to trigger the rule and a claim cannot be delayed until a complete investigation is conducted. See *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 584-585; 518 NW2d 508 (1994); *Vector-Springfield Properties, Ltd v Central Illinois Light Co, Inc*, 108

F3d 806, 809-810 (CA 7, 1997); *New West Urban Renewal Co v Viacom, Inc.*, 230 F Supp 2d 568, 573 (D NJ, 2002).¹

The continuing-wrongful-acts doctrine does not support plaintiffs' case.² This Court explained the continuing-wrongful-acts doctrine in *Attorney General v Harkins*, 257 Mich App 564, 572; 669 NW2d 296 (2003):

"The continuing-wrongful-acts doctrine states 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 defendant's tortious conduct continues.'" *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 592 NW2d 112 (1999), quoting *Horvath v Delida*, 213 Mich App 620, 626; 540 NW2d 760 (1995). However, "a continuing wrong is established by continual tortious acts, not by continual harmful effects from an original, completed act." *Horvath*, *supra* at 627 (emphasis in original).

The wrongful acts committed by defendants in this case ceased in approximately 1961. The more recent contamination problems are properly classified as continual harmful effects from defendants' original wrongful acts. It is the harmful effects of the contamination that are ongoing and ever changing. Thus, the continuing-wrongful-acts doctrine does not apply.

Plaintiffs also argue that the trial court erred in denying their motion for reconsideration. We disagree.

MCR 2.119(F)(3) provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the

¹ Plaintiffs' remaining arguments concerning the affidavit of defendants' expert witness, subsequent meetings held by the DEQ, and statements made by defense counsel at oral argument do not compel a different result in this case. Nor is there any merit to plaintiffs' argument that the trial court refused to consider the documentary evidence they submitted in response to defendants' motion, or that the court improperly considered "Exhibit A" attached to defendant's motion.

² We acknowledge that the parties have not had a chance to brief this issue in light of our Supreme Court's recent decision, *Garg v Macomb Co Community Mental Health Services*, ___ Mich ___, ___ NW2d ___ (Docket No. 121361, issued May 11, 2005), slip op at 1-2. However, we note that the *Garg* decision has called into serious doubt plaintiffs' reliance on the continuing-wrongful-acts or continuing violations doctrine. *Id.* (overruling the "continuing violations" doctrine as inconsistent with the language of the statute of limitations, MCL 600.5805(1) and (10)).

parties have been misled and show that a different disposition of the motion must result from correction of the error.

This Court reviews a trial court's decision on a motion for reconsideration under MCR 2.119(F)(3) for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Plaintiffs present numerous arguments in support of their claim that the trial court erred in denying their motion for reconsideration, but we are not persuaded that the court abused its discretion. The trial court properly concluded that even if some plaintiffs were not personally aware of some specific facts or events regarding the contamination and investigation, reconsideration was not warranted because, as the court concluded originally, "dozens of events occurring before October 8, 1999, . . . should have put [plaintiffs] on notice" of a possible cause of action. Because the discovery rule is governed by an objective standard, the subjective knowledge of each individual plaintiff was not enough to avoid the statute of limitations.

Plaintiffs also argue that the trial court prematurely granted summary disposition before discovery was completed. Ordinarily, summary disposition is inappropriate before the completion of discovery on a disputed issue. *Kelly-Nevils v Detroit Receiving Hosp*, 207 Mich App 410, 421; 526 NW2d 15 (1994). But summary disposition may be granted before the close of discovery if further discovery does not stand a fair chance of uncovering any additional factual support for the opposing party's position. *Crawford v State of Michigan*, 208 Mich App 117, 122-123; 527 NW2d 30 (1994). If a party believes that summary disposition is premature because discovery has not been completed, that party must assert that a dispute exists and support the allegation with some independent evidence. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). In this case, plaintiffs have not shown that further discovery would have stood a fair chance of uncovering factual support for plaintiffs' position that they could not have discovered a possible cause of action until after October 1999.

Plaintiffs also argue that they should have been permitted to amend their complaint. We disagree.

When a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), it must give the opposing parties an opportunity to amend their pleading pursuant to MCR 2.118, unless an amendment is not justified or it would be futile to do so. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001); MCR 2.116(I)(5). An amendment is considered futile if it merely restates allegations already made or adds new allegations that fail to state a claim. *Yudashkin, supra*. "The grant or denial of leave to amend is within the trial court's discretion." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000).

Here, plaintiffs sought to amend their complaint to delete the references to many background facts upon which the trial court relied in concluding that plaintiffs should have been aware of a possible cause of action before October 1999. But because those background facts were established by other documentary evidence, the trial court properly determined that plaintiffs' proposed amendment would be futile. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion to amend.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio