

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS HOLZWARTH and ELIZABETH
HOLZWARTH,

UNPUBLISHED
June 21, 2011

Plaintiff-Appellants,

v

No. 295627
Oscoda Circuit Court
LC No. 08-004431 CH

COLDWELL BANKER SCHMIDT REALTORS
d/b/a SCHMIDT REAL ESTATE, INC.,
CHARLOTTE O'NEAL, and VIRGINIA
HOSPODAR,

Defendant-Appellees,

and

THOMAS D. KANN d/b/a REAL ESTATE ONE
OF MIO, MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,

Defendants.

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

In this property case, plaintiffs Thomas and Elizabeth Holzwarth appeal as of right from the trial court's grant of defendants' motion for summary disposition under MCR 2.116(C)(7). We affirm.

In 1998, plaintiffs purchased a parcel of land from defendants O'Neal and Hospodar. Defendant Coldwell Banker acted as defendants' real estate agent and defendant Thomas Kann, working for Real Estate One of Mio¹, acted as plaintiffs' real estate agent. Coldwell listed the property as a "quarter-quarter" section, which both parties presumed to encompass 40 acres of land. The legal description of the property is:

¹ Defendant Thomas Kann has settled with plaintiffs and is not a party to this appeal.

*The Southwest ¼ of the Southwest ¼ of Section 31, Town 27 North, Range 2 East,
Elmer Township, Oscoda County, Michigan.*

Notably, nowhere in this description, or in the purchase agreement, does it state that this quarter-quarter encompasses 40 acres. Plaintiffs purchased the property from defendants, without having a survey conducted, in November, 1998.

The Michigan Department of Natural Resources (MDNR) owns the property adjacent to plaintiffs'. Before 2007, a wire fence existed along what plaintiffs believed to be the border of their 40 acres and the MDNR's property. This fence had been in existence for at least 40 years, and was on the property when plaintiffs purchased the land in 1998.

In the fall of 2007, a wind storm damaged several trees on both the MDNR and plaintiffs' property. The storm also destroyed the fence. At this time, the MDNR informed plaintiffs that 7.5 acres that plaintiffs believed that they owned, in fact, was owned by the MDNR. This was land that had been on "plaintiffs' side" of the wire fence. Plaintiffs paid taxes on 40 acres starting when they purchased the property in 1998 until Elmer Township changed the description from a 40 acre parcel to a 32.5 acre parcel in December 2007.

On September 26, 2008, plaintiffs filed a complaint against the MDNR. Plaintiffs state that they "then had no option other than to purchase the 7.5 acres back from the MDNR." On April 10, 2009, plaintiffs filed a first amended complaint dismissing the MDNR as a party and joining the defendant O'Neal, as well as the real estate agent defendants. Defendant Hospodar was not added until July 10, 2009. Defendants brought a motion for summary disposition under MCR 2.116(C)(7) alleging that the period of limitations had expired. The trial court granted defendants' motion for summary disposition "based on applicable statutes of limitations." Plaintiffs now appeals as of right.

Plaintiffs argue that the trial court erred by granting defendants' motion for summary disposition based on the determination that plaintiffs' claims accrued in 1998 and not in 2007. At the heart of this case is the issue of when plaintiffs' claims against defendants began to accrue. If the claims accrued when the property was sold in 1998, then when plaintiffs added defendants to the suit in April 2009, and July 2009, the suit was barred by the ten year limitations period in MCL 600.5807. However, if, as plaintiffs assert, the claims did not accrue until 2007, when they were informed that the property they believed to be theirs actually belonged to the MDNR, then the suit was timely. We conclude that it was not timely.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004). When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party. *Id.* "Absent a disputed question of fact, the determination whether a cause of action is barred by a statute of limitation is a question of law that this Court reviews de novo." *Id.*

MCL 600.5807 provides, “[t]he period of limitations is 10 years for actions founded upon covenants to deeds and mortgages of real estate.” MCL 600.5827 specifies when a claim “accrues” as follows:

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, 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.

According to *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003), under MCL 600.5827 “[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted.” When all of the elements of a cause of action for personal injury have occurred, including damages, the claim accrues and the statute of limitations begins to run. *Stephens v Dixon*, 449 Mich 531, 538; 536 NW2d 755 (1995) (citation omitted). Even if later damages result, “they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred.” *Stephens*, 449 Mich at 538 (quotation omitted).

Plaintiffs urge us to apply MCL 600.5801, which provides for a 15 year statute of limitations in an action for the recovery or possession of land, and MCL 600.5829, which provides that a claim for entry or recovery of possession of land accrues; “whenever any person is disseised, his right of entry on and claim to recover land accrue at the time of his disseisin.” Here, plaintiffs are not seeking to recover real property from these defendants, only money damages, and as a result, neither of these statutes apply. We find that none of the provisions of MCL 600.5829 through MCL 600.5838 apply to this case, and therefore, under MCL 600.5827, the claim accrued at the time the wrong upon which the claim is based was done regardless of the time when damage resulted. Here, plaintiffs’ claims are for money damages and are based upon the “wrong” of having paid for 40 acres, but having actually only received 32.5, and for having paid taxes starting in 1998 for 40 full acres.

Plaintiffs’ contention that their claims accrued in 2007, when they discovered that the MDNR owned the property, is contrary to Michigan case law. In *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007), our Supreme Court held that an extrastatutory discovery rule could not apply to toll or delay the time of accrual of a plaintiff’s claim. Rather, the Legislature had to expressly carve out an exception in the language of the statute. *Trentadue*, 479 Mich at 390-391. There is no statutory language that creates an exception for the facts of this case.

Plaintiffs also argue that the retroactive application of *Trentadue* deprives them of due process, citing *Peter v Stryker Orthopaedics, Inc*, 581 F Supp 2d 813 (ED Mich 2008). However, our Supreme Court explicitly held that its decision in *Trentadue* was to have retroactive effect. *Trentadue*, 479 Mich at 401. Further, this Court retroactively applied *Trentadue* in *Terlecki v Stewart*, 278 Mich App 644, 652, 754 NW2d 899 (2008). Thus, the discovery rule does not toll the limitations period for plaintiffs’ claims.

In addition, we do not believe that plaintiffs' claim would have fallen within the common law discovery rule as it existed prior to Trentadue since plaintiff's lack of discovery of the harm was due, at least in part, to plaintiff's decision not to have the property surveyed before purchase

Plaintiffs' suit is therefore barred by the 10 year statute of limitations in MCL 600.5807 and the trial court did not err in granting defendants' motion for summary disposition under MCR 2.116(C)(7).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Donald S. Owens