

STATE OF MICHIGAN
COURT OF APPEALS

GERALDINE SEGER,

Plaintiff-Appellant,

v

CMS ENERGY CORPORATION and
CONSUMERS ENERGY COMPANY, d/b/a
CONSUMERS ENERGY,

Defendants-Appellees.

UNPUBLISHED
December 11, 2012

No. 307820
Missaukee Circuit Court
LC No. 2010-007585-NO

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's¹ motion for summary disposition. We affirm.

The facts as alleged in plaintiff's complaint indicate that defendant supplied natural gas to plaintiff's home. Beginning in 2003, plaintiff began smelling natural gas in her home. Defendant's agent came to the home, but determined that there was no gas leak in plaintiff's house. Defendant's agent informed plaintiff that exposure to natural gas would not be harmful to her health. Plaintiff continued to smell natural gas, and defendant sent agents to plaintiff's home on several occasions. In every instance, defendant's agents concluded that there was no gas leak in plaintiff's home, until a 2009 visit uncovered a gas leak in the basement.

Plaintiff filed suit alleging that defendant was negligent in failing to discover the gas leak at an earlier date. Plaintiff alleged that she had suffered deteriorating health since 2004 and that her health problems were directly related to long-term natural gas toxicity and defendant's failure to discover the gas leak in a timely fashion.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's claim was barred by the applicable three-year statute of limitations because the harm complained of occurred in 2004 when plaintiff began experiencing deteriorating health.

¹ In this opinion, the term defendant refers to Consumers Energy Company.

Defendant also argued that the statute of limitation was not tolled because it did not engage in any fraudulent concealment of plaintiff's potential claim.

The trial court granted defendant's motion for summary disposition, holding that plaintiff's claim was untimely because it accrued at the time of the first allegedly negligent inspection in 2003, more than three years prior to the filing of plaintiff's claim. The trial court also held that defendant's subsequent visits to the house did not restart the period of limitations and that the period of limitations was not tolled by any fraudulent concealment on the part of defendant.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

First, plaintiff argues that the trial court erred by determining that her claim was barred by the statute of limitations. We disagree.

The period of limitations for personal injury actions is set out in MCL 600.5805(1) and (10), which provide:

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

* * *

(10) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property.²

A claim is deemed to accrue "at the time the wrong upon which the claim is based was done regardless of the time when the damage results." MCL 600.5827. For purposes of MCL 600.5827, the term "wrong" refers to the date on which the plaintiff was harmed by the defendant's act, not the date on which the defendant acted negligently. *Chase v Sabin*, 445 Mich 190, 195-196; 516 NW2d 60 (1994), overruled in part on other grounds in *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 392; 738 NW2d 664 (2007).

Plaintiff filed suit in 2010, alleging that defendant negligently failed to identify the gas leak in her home as far back as 2003, and that she suffered deteriorating health due to natural gas toxicity as far back as 2004. Accordingly, the wrong alleged in plaintiff's complaint occurred more than three years prior to the filing of her complaint, and the complaint was untimely as a matter of law.

² Our Legislature slightly reworded MCL 600.5805(10) in 2011 PA 162. Prior to the revision, subsection 10 read: "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." The rewording has no effect on our analysis in this case.

Plaintiff attempts to circumvent this reality, however, by arguing that she could not file a complaint until 2009, the year the gas leak was discovered by defendant. In support of this position, defendant cites *Schaendorf v Consumers Energy Co*, 275 Mich App 507; 739 NW2d 402 (2007). In *Schaendorf*, a dairy farmer sued the power company for damages to his herd allegedly caused by stray voltage. The power company had periodically tested the farm for stray voltage and had advised the farmer there was no problem with stray voltage. *Id.* at 509, 513. This Court upheld the trial court's denial of the power company's motion for summary disposition on statute of limitation grounds, but specifically found that a potential source of the stray voltage had been a new building constructed on the farm within the limitations period. *Id.* at 514. This Court also explicitly found that the power company's statements that there was no stray voltage problem did not affect the question of when the farmer's complaint accrued, but rather raised issues of material fact concerning whether there had been any stray voltage at all on the dates of the power company's tests. *Id.* at 515.

There is no potential intervening cause in this case. Defendant's multiple test results of no leaking gas do not go to the question of accrual, but rather to the existence of any leak at all on the dates of those tests. The negligent act alleged by plaintiff occurred in 2003, and the harm alleged to have resulted from that negligence occurred in 2004. Plaintiff's claim accrued more than three years prior to the filing of plaintiff's complaint; plaintiff's action was untimely as a matter of law. MCL 600.5805(10).

Next, plaintiff argues that the trial court erred when it determined that plaintiff's cause of action was not timely under the fraudulent concealment statute. We disagree.

The fraudulent concealment statute, MCL 600.5855, provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

"Fraudulent concealment" is defined as the "employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of the information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Lemson v Gen Motors Corp*, 66 Mich App 94, 97; 238 NW2d 414 (1975), quoting *De Haan v Winter*, 258 Mich 293, 296; 241 NW 923 (1932).

The record shows no fraudulent acts on the part of defendant. No evidence showed that any error by defendant in detecting a gas leak was deliberately made in order to conceal the existence of such a leak from plaintiff. In fact, such fraudulent intent is discredited by the fact that defendant's agents identified a gas leak in plaintiff's home in 2009. Moreover, plaintiff presented no evidence showing that defendant's agents acted with fraudulent intent when informing her that exposure to natural gas was not harmful to her health. Because the record

does not support a finding of intentional, fraudulent concealment on the part of defendant, we hold that the trial court did not err by finding plaintiff's claim to be untimely as a matter of law.

Next, plaintiff argues that the trial court erred by dismissing the entire cause of action when defendant committed additional acts of negligence within the period of limitations. We disagree.

A claim is deemed to accrue "at the time the wrong upon which the claim is based was done regardless of the time when the damage results." MCL 600.5827. The term "wrong" refers to the date on which the plaintiff was harmed by the defendant's act, not the date on which the defendant acted negligently. *Chase*, 445 Mich at 195-196. Additionally, "[s]ubsequent claims of additional harm caused by one act do not restart the claim previously accrued." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 291; 769 NW2d 234 (2009). "For the purposes of accrual, there need only be one wrong and one injury to begin the running of the period of limitations." *Id.*

The statute of limitations began to run when defendant allegedly failed to identify the gas leak in plaintiff's home and plaintiff began to suffer a decline in health allegedly related to the gas leak. The fact that defendant failed to identify the leak on subsequent occasions does not refresh the period of limitations, *Froling Trust*, 283 Mich App at 291, and the trial court did not err by finding plaintiff's claim to be untimely as a matter of law.

Next, plaintiff argues that the trial court erred by failing to find that the period of limitations had been tolled under the common law "discovery rule" and "continuing wrong theory." We disagree.

This issue is unpreserved; therefore, our review is for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The common law rules cited by plaintiff were abrogated by our Supreme Court in 2007 and 2005, respectively. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007); *Garg v Macomb Co Comm Health Servs*, 472 Mich 263; 696 NW2d 646 (2005). However, under MCL 600.5869, causes of actions are governed by "the law under which the right accrued[.]" As the trial court determined that plaintiff's claim accrued no later than 2004, plaintiff asserts that her claim is governed by the law as it stood in 2004 and that she should be able to avail herself of the discovery rule and continuing wrong theory.

MCL 600.5869 does not permit the application of the discovery rule to claims accruing before *Trentadue*, nor does it permit the application of the continuing wrong theory to claims accruing before *Garg*. *Trentadue*, 479 Mich at 382; *Froling Trust*, 283 Mich App at 286-287. MCL 600.5869 does not apply to preserve plaintiff's claim.

Finally, plaintiff argues that the applicable statute of limitations is unreasonable and unconstitutional. We disagree.

Plaintiff did not raise this constitutional issue below; our review is for plain error affecting substantial rights. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007).

Statutes of limitation should be upheld unless “they are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right.” *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978).

Plaintiff argues that application of the three-year statute of limitations divested her of access to the courts. Plaintiff asserts that she did not know and could not have known about the leak until 2009. This assertion is belied by plaintiff’s repeated complaints of leaking gas during the applicable period of limitations. The record shows that plaintiff suspected a gas leak no later than 2004, and that she could have taken additional steps to verify defendant’s negative tests. The fact that plaintiff chose not to take additional steps does not render a presumptively valid statute of limitations unconstitutional. The applicable statute of limitations did not divest plaintiff of her access to the courts and is not unconstitutional.

Affirmed.

/s/ Peter D. O’Connell

/s/ Mark J. Cavanagh

/s/ Pat M. Donofrio