

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTINE TEBO and KATHLEEN CAURDY,
Co-Personal Representatives of the Estate of
ANNA MARIE TURETZKY, Deceased,

UNPUBLISHED
December 15, 2000

Plaintiffs-Appellants,

v

JASUBHAI DESAI and KINGSWAY MEDICAL
CLINIC,

No. 212379
Wayne Circuit Court
LC No. 95-511105 NZ

Defendants-Appellees,

and

STEPHAN ADAMS,

Defendant.

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting, on reconsideration, defendants' motion for summary disposition under MCR 2.116(C)(7). The trial court held that plaintiffs' wrongful death action based on their mother's murder was barred by the period of limitations. We affirm.

The decedent was murdered in November 1983. Plaintiffs alleged that Desai, who was the decedent's business partner, solicited Adams to commit the murder in order to obtain the decedent's share of the business and the proceeds from the decedent's life insurance policies that named Desai as the beneficiary. In 1995, defendants Desai and Adams eventually were charged with the decedent's murder. Although the trial court initially dismissed the criminal charges against Desai and Adams, this Court reversed the trial court and remanded the case for further proceedings. *People v Adams*, 232 Mich App 128; 591 NW2d 44 (1998).

Plaintiffs brought the instant action in 1995, well after the expiration of the three-year wrongful death period of limitations. MCL 600.5805(8); MSA 27A.5805(8). Plaintiffs

maintained that the period of limitations was tolled, however, because defendants fraudulently concealed their involvement in the decedent's murder. MCL 600.5855; MSA 27A.5855. The trial court initially denied defendants' motion for summary disposition, instead allowing plaintiffs to amend their complaint to specifically plead defendants' acts of fraudulent concealment. On reconsideration, the trial court granted defendants' motion for summary disposition, holding that plaintiffs failed to specifically plead any affirmative acts of fraudulent concealment and that plaintiffs had knowledge of defendants' identity and potential liability within the period of limitations, rendering § 5855's tolling provision inapplicable.

We review for an abuse of discretion the trial court's decision on a motion for reconsideration. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). Whether a claim is barred by the statute of limitations, however, is a question of law that we review de novo. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

Section 5855 allows the relevant limitations period to be tolled in cases of fraudulent concealment. It provides as follows:

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.

This tolling provision "is designed to prevent actions which hinder a plaintiff from discovering the existence of a claim." *Stroud v Ward*, 169 Mich App 1, 7-8; 425 NW2d 490 (1988).

To invoke the tolling provision, "there must be concealment by the defendant of the existence of a claim or the identity of a potential defendant." *McCluskey v Womack*, 188 Mich App 465, 472; 470 NW2d 443 (1991). The fraudulent concealment "must be manifested by an affirmative act or misrepresentation." *Witherspoon v Guilford*, 203 Mich App 240, 248; 511 NW2d 720 (1994). A defendant's mere silence is not enough to establish fraudulent concealment. *Dowse v Gaynor*, 155 Mich 38, 43; 118 NW 615 (1908); *Sills v Oakland General Hospital*, 220 Mich App 303, 310; 559 NW2d 348 (1996). "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *De Haan v Winter*, 258 Mich 293, 296; 241 NW 923 (1932). Thus, to avoid summary disposition, the plaintiff "must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Phinney v Perlmutter*, 222 Mich App 513, 562-563; 564 NW2d 532 (1997).

In this case, plaintiffs failed to plead in their complaint any specific acts or misrepresentations of defendants that fraudulently concealed from plaintiffs the existence of the wrongful death claim. Plaintiffs argue that defendants' failure to reveal their involvement in the decedent's death, as well as their affirmative denial of involvement, constitutes fraudulent

concealment. Neither defendants' silence nor defendants' denials of wrongdoing, however, qualify as affirmative fraudulent concealment. *Sills, supra; Lemson v General Motors Corp*, 66 Mich App 94, 98; 238 NW2d 414 (1975). Moreover, defendants did not have an affirmative duty to disclose information because they were not plaintiffs' fiduciaries.¹ *Bradley v Gleason Works*, 175 Mich App 459, 462-463; 438 NW2d 330 (1989). We therefore conclude that the trial court properly determined that plaintiffs failed to plead acts constituting fraudulent concealment.

Furthermore, the tolling provision is not available to a plaintiff who knew or should have known about the existence of the claim and the defendant's potential liability. *McCluskey, supra* at 472-473. The details of the evidence necessary to prove the claim need not be known; all that is required is that the plaintiff know that the claim exists. *Eschenbacher v Hier*, 363 Mich 676, 682; 110 NW2d 731 (1961). In this case, evidence showed that plaintiffs as early as 1984 suspected that defendants killed the decedent, and investigated and collected information about defendants' involvement in the crime. Plaintiffs thus knew or should have known of defendants' potential liability well within the period of limitations, and therefore could not invoke § 5855's tolling provision.²

For the foregoing reasons, the action was barred by the period of limitations. MCL 600.5805(8); MSA 27A.5805(8). Therefore, we conclude that the trial court correctly granted defendants' motion for reconsideration and granted defendants summary disposition pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

¹ Plaintiffs also argue that the "affirmative acts" requirement should not be followed, since it is not contained in the language of the statutory tolling provision. We must, however, follow binding precedent. MCR 7.215(H)(1); *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

² Plaintiffs' argument that they would have been subject to sanctions for filing a frivolous claim had they brought the action in 1984 was not presented to the trial court and is therefore not preserved for our review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).