

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN BELLVILLE and NANCY BELLVILLE,
d/b/a NANSUE DAIRY,

UNPUBLISHED
August 24, 2004

Plaintiffs-Appellees,

v

CONSUMERS ENERGY COMPANY,

No. 243719
Ogemaw Circuit Court
LC No. 01-653444-NZ

Defendant-Appellant.

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's orders denying its motions for summary disposition of plaintiffs' claims for negligence and fraudulent misrepresentation. We reverse.

I

Defendant first argues that the trial court erred by denying its motion for summary disposition of plaintiffs' negligence claim. We agree. Decisions regarding summary disposition are reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). To the extent this issue involves questions of law regarding the applicable limitations period, it is reviewed de novo under MCR 2.116(C)(7), while the existence of a material factual dispute is reviewed de novo under MCR 2.116(C)(10). *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 146-147; 624 NW2d 197 (2000). In reviewing a decision regarding a motion for summary disposition under MCR 2.116(C)(10), we consider the evidence in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

The applicable limitations period for plaintiffs' negligence claim is three years.¹ However, where the discovery rule applies, a claim does not accrue for purposes of the

¹ The pertinent statutory language is presently codified at MCL 600.5805(10) and provides that the limitations period "is 3 years after the time of the death or injury for all other actions to
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limitations period until a plaintiff discovers, or with the exercise of reasonable diligence should have discovered, (1) an injury and (2) the causal connection between a defendant's breach of duty and the injury. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 78; 592 NW2d 112 (1999). The test to be applied in deciding when a cause of action accrues "is an objective one, based on objective facts, and not on what a particular plaintiff subjectively believed." *Id.* Also, under the discovery rule, the limitations period begins to run if the plaintiff is aware that there is a "possible cause of action" against the defendant, i.e., when the plaintiff "is aware of an injury and its possible cause." *Moll v Abbott Laboratories*, 444 Mich 1, 22-24; 506 NW2d 816 (1993). It is not required that a plaintiff be able to prove each element of the cause of action before the limitations period begins to run. *Jackson Co Hog Producers, supra* at 78.

Plaintiff asserts that the discovery rule applies in this case. Assuming, without deciding, that the discovery rule applies to the claim at issue, there is no basis in the evidence to reasonably support a finding that plaintiffs filed their complaint within the three-year period under the discovery rule. In *Jackson Co Hog Producers*, this Court considered whether the plaintiffs knew or should have known more than three years before filing their action involving alleged harm due to "stray voltage" that "they had suffered an injury and the possible causal connection between their injury and [the] defendant's breach." *Jackson Co Hog Producers, supra* at 76, 78. In concluding as a matter of law that the limitations period in that case began to run more than three years before the plaintiffs filed their complaint, this Court stated:

[V]iewing the evidence presented by the parties in the light most favorable to plaintiffs, we conclude that before October 1990 [three years prior to the filing of the plaintiffs' complaint] plaintiffs were aware, or at least should have been aware, that they were suffering damages as a result of stray voltage. Although plaintiffs might not have understood with any degree of specificity the technical aspects of stray voltage, the evidence reveals that they did know, or should have known, *that electricity supplied by defendant was potentially harming their animals* and, in turn, causing their production to suffer. Further, even if plaintiffs believed that the steps that they had taken to alleviate the problem were successful, the continued production problems should have alerted plaintiffs to the possibility that the electrical problem was not entirely corrected. Accordingly, the trial court did not err in concluding that sometime before October 1990, plaintiffs knew, or should have known, that stray voltage was causing them injury. [*Id.* at 80-81 (emphasis added).]

Accordingly, we conclude that, for purposes of the discovery rule, it is sufficient to start the limitations period for a negligence claim based on problems with electricity supplied by a defendant that a plaintiff owner or operator of a livestock operation has a particular reason to believe that problems with electricity supplied by the defendant are harming the plaintiff's livestock. Critically, as applied to this case, this means that whatever differences there are between "stray voltage" and "poor power quality," they are immaterial to the determination of

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recover damages for the death of a person, or for injury to a person or property." This language has been codified in different subsections of MCL 600.5805 at various relevant times.

when the limitations period began to run because the discovery rule would be satisfied by plaintiffs having knowledge from which they should have identified defendant's electricity as a potential cause of harm to their cows, regardless of the specific means by which the electricity may have done so. Indeed, it is reasonable to presume that an investigation of potential harm from defendant's electricity triggered by "stray voltage" concerns should also have uncovered any "poor power quality" problems, so that information suggesting a significant potential for concern about the former problem would provide sufficient notice to plaintiffs of poor power quality problems for purposes of triggering the discovery rule.

Viewing the evidence in the light most favorable to plaintiffs, there is no basis for concluding that the discovery rule would prevent their complaint from being barred by the statute of limitations. Defendant presented uncontradicted evidence that plaintiff Brian Bellville attended a seminar in 1994, considerably more than three years before the filing of plaintiffs' complaint in 2001, and expressed a concern about stray voltage on plaintiffs' farm at that time. This establishes that plaintiffs² had an actual concern about potential harm from defendant's electricity at that point. Plaintiffs also indicated in answers to interrogatories that they first noticed harm to their cows that they attribute to power quality problems, including health problems and loss of production, in the "[e]arly 1990s." Any reasonable consideration of these uncontroverted facts requires a conclusion that, like in *Jackson Co Hog Producers*, *supra*, more than three years elapsed between the point when plaintiffs knew that defendant's electricity was a potential cause of the alleged problems and the filing of their complaint. That defendant may have denied the existence of a stray voltage problem does not negate plaintiffs' knowledge that it was a potential cause of harm to their cows. Thus, assuming that the discovery rule applies to plaintiffs' negligence claim, it would not save that claim from being barred by the statute of limitations.

Likewise, plaintiffs' alternative argument regarding the continuing wrongful acts doctrine does not save their negligence claim from the statute of limitations. This Court rejected the alternative argument of the plaintiffs in *Jackson Co Hog Producers* that the continuing wrongful acts doctrine may be applied to avoid the statute of limitations in that case because the stray voltage had persisted for years and continued to plague the plaintiffs' facilities. *Jackson Co Hog Producers*, *supra* at 81-82. Importantly, this Court noted "that Michigan courts have not recognized a cause of action for continuing negligence." *Id.* at 82, citing *Horvath v Delida*, 213 Mich App 620, 627 n 2; 540 NW2d 760 (1995). This rejection of a cause of action for "continuing negligence" can only be understood to mean that a failure to correct a negligently created condition that has already started to cause recurring problems for a particular plaintiff cannot be considered to involve independent tortious acts so as to provide a separate basis for a negligence claim by the plaintiff or to support application of the continuing wrongful acts doctrine. Thus, plaintiffs' allegations related to defendant failing to maintain or upgrade its

² Plaintiff Nancy Bellville must be deemed to have the relevant notice and knowledge reflected in plaintiff Brian Bellville's expression of concern about stray voltage in 1994. Under MCL 449.12, notice to a partner "of any matter relating to partnership affairs" and knowledge of a partner "acting in the particular matter" operate as "notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner."

equipment resulting in continuing harm to their cows does not prevent their negligence claim from being barred by the statute of limitations because undisputed evidence indicates that the alleged problems began more than three years before the filing of their complaint. Because of this, plaintiffs' suggestion that they are not asserting that there was negligence when the electrical system was originally installed is immaterial.

For the foregoing reasons, we conclude that the trial court erred in denying defendant's motion for summary disposition of plaintiffs' negligence claim.

II

Defendant also argues that the trial court erred by denying its motion for summary disposition of plaintiffs' fraudulent misrepresentation claim. We agree. We review this issue de novo, *Schmalfeldt, supra* at 426, and consider the facts in the light most favorable to plaintiffs as the nonmoving parties. *Dressel, supra* at 561.

A plaintiff must prove the following elements to establish a prima facie claim of fraudulent misrepresentation:

(1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth or falsity, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) *the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage.* [*Campbell v Sullins*, 257 Mich App 179, 195; 667 NW2d 887 (2003) (emphasis added).]

We conclude that defendant was entitled to summary disposition of plaintiffs' fraudulent misrepresentation claim because plaintiffs failed to show a genuine issue of material fact that they acted in reliance on any alleged misrepresentation attributable to defendant. Plaintiffs argue that there was evidence of false representations by defendant in 1994, 1997, and 1998. However, only allegations of fraudulent misrepresentations during and after December 1998 are within the scope of the pertinent count of plaintiffs' complaint, which refers to interactions between plaintiffs and defendant "since December 1998." Moreover, even assuming that alleged misrepresentations that occurred prior to December 1998 are within the scope of plaintiffs' complaint, each plaintiff averred that "[n]o testing was done of which we were made aware for transients, sags, harmonics, swells, or other power quality deficiencies at any time prior to January 27, 1998" (Affidavit of Brian Bellville, 7/29/02, ¶ 4; and Affidavit of Nancy Bellville, 7/29/02). These statements by plaintiffs that they were not aware of testing for power quality problems prior to January 27, 1998, means that plaintiffs cannot establish the existence of a genuine issue of material fact in support of a contention that they acted in reliance on any

representation by defendant before that date regarding whether there were power quality problems at the relevant property.³

From our review of the record and plaintiffs' arguments, the only remaining basis for plaintiffs' fraudulent misrepresentation claim is their assertion that they relied on statements made to them by defendant or its agents during or after December 1998, regarding whether there were power quality problems on their property. Importantly, MCR 2.116(G)(4) provides:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

In its brief in support of its motion for summary disposition, defendant specifically argued that plaintiffs did not cease dairy farming after their alleged experts told them that defendant had falsely advised them regarding electrical problems at the farm, but rather continued their dairy farming for 1-1/2 more years, which, defendant contended, belied a claim that they actually relied on any alleged misrepresentations by defendant. Thus, defendant specifically identified the issue of whether there was evidence of actual reliance by plaintiffs.

In their response to this motion, however, plaintiffs did not refer to any evidence that they relied on representations by defendant in continuing their dairy farming during or after December 1998. Rather, they merely referred to evidence supportive of a conclusion that defendant or its agents made false representations to plaintiffs with the intent that they rely on those representations, and evidence that the statements were knowingly false or made recklessly. Thus, the trial court erred by denying defendant's motion for summary disposition with regard to plaintiffs' fraudulent misrepresentation claim because plaintiffs failed to set forth specific facts showing the existence of evidence that they actually relied on alleged false representations attributable to defendant. See *Karbel v Comerica Bank*, 247 Mich App 90, 103-104; 635 NW2d 69 (2001) (concluding that the plaintiff's proffered evidence failed to raise a factual issue sufficient to withstand summary disposition).

Reversed and remanded for entry of an order of summary disposition in favor of defendant as to plaintiffs' claims for negligence and fraudulent misrepresentation. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin

³ At oral argument, plaintiffs' counsel repeatedly emphasized that plaintiffs were not suing for "stray voltage" but for "poor power quality," only. Defendant's testing in 1994, 1997, and 1998 was for "stray voltage."