STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiff-Appellees,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 24, 2004

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

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

BORRELLO, J. (*dissenting*).

Because I believe that this Court's ruling in *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72; 592 NW2d 112 (1999), does not control the outcome of this case, and that plaintiffs presented a genuine issue of material fact regarding fraudulent concealment, I respectfully dissent.

Before addressing why *Jackson Co Hog Producers* does not dictate the result the majority believes it does, a discussion regarding the applicability of the discovery rule to this case is in order. The majority declines to determine whether the discovery rules applies to this case, despite the fact that its analysis revolves around it. There is no question that the statute of limitations on plaintiffs' claim had expired at the time they filed their complaint, so the only way plaintiffs could prevail is through application of the discovery rule. Thus, rather than merely assuming that the discovery rule applies, I would analyze whether the rule applies and actually decide that it does.[1]

Statutes of limitations are legislative restrictions on the timeframe within which a plaintiff may bring suit for particular claims. Generally, a claim accrues "when all the elements have occurred and can be alleged in a complaint." *Jackson Co Hog Producers*, *supra* at 78, citing *Horvath v Delida*, 213 Mich App 620, 624; 540 NW2d 760 (1995). But our Legislature,

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[1] In a factually similar case, *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 78; 592 NW2d 112 (1999), this Court likewise declined to definitely determine whether the discovery rule applied.

by creating statutes of limitations, did not intend to usurp a plaintiff's right to bring a claim before the plaintiff becomes cognizant of a possible cause of action. *Chase v Sabin*, 445 Mich 190, 196; 516 NW2d 60 (1994). Thus, to avoid depriving a plaintiff of the chance to pursue an otherwise valid claim "because of the latent nature of the injury or the inability to discover the causal connection between the injury and the defendant's breach of duty owed to the plaintiff," we apply the discovery rule. *Lemmerman v Fealk*, 449 Mich 56, 65-66; 534 NW2d 695 (1995). Otherwise, we would be "'declar[ing] the bread stale before it is baked.'" *Chase*, *supra* at 197, quoting *Moll v Abbott Laboratories*, 444 Mich 1, 13; 506 NW2d 816 (1993).

Where our Courts have addressed the preliminary question whether the common-law discovery rule applies to various actions, we have "weighed the benefit of application of the discovery rule to the plaintiff against the harm this exception would visit on the defendant and the important policies underpinning the applicable statute of limitations." *Lemmerman*, *supra* at 66. In *Lemmerman*, our Supreme Court delineated the policy considerations as follows:

> [Statutes of limitation] encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they "afford security against stale demands when the circumstances would be unfavorable to a just examination and decision"; they relieve defendants of the prolonged fear of litigation; they prevent fraudulent claims from being asserted; and they "'remedy . . . the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.'" [*Id.*, quoting *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982) (citations omitted in original).]

The *Lemmerman* Court cautioned against applying the discovery rule where the dispute between the parties is essentially a credibility contest in which there is neither a "factually verifiable consequence of some action by the defendant, [nor] an objective external standard against which to measure the defendant's conduct." *Id.* at 73. Rather, the discovery rule should employ only where "the factfinder's determination of liability [can be] measured against an objective standard of care, such as the standard of care in the relevant profession or industry, at the time of the injury." *Id.* at 68. Thus, "[t]he critical issue in determining whether to allow a plaintiff's claim to survive [] by way of the common-law discovery rule [] becomes whether the overarching policy goals normally protected by the statute of limitations remain inviolate. Stated more succinctly, there must be some indicia of assurance of reliable fact finding." *Id.* at 74.

Here, applying the discovery rule would not degrade the policy reasons behind the statute of limitations because plaintiffs have presented evidence regarding both a "factually verifiable consequence of some action by the defendant," and "an objective external standard against which to measure the defendant's conduct." *Id.* at 73. As will be discussed, plaintiffs were diligent in attempting to discover the nature of their injuries. Defendant is not the victim of unfair delay or surprise, as it was defendant's actions that contributed to plaintiffs' failure to previously bring suit. The objective and factually verifiable evidence in this case obviates a finding that plaintiffs' claims are fraudulent.

As the *Lemmerman* Court noted, we have applied the discovery rule in medical malpractice actions (which is now codified), *Chase*, *supra*, and pharmaceutical and asbestos-

related products liability actions, *Moll*, *supra*, and *Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986), to name a few. Our Supreme Court has refused to apply the rule in repressed memory cases, reasoning that liability could only be determined "by reference to one person's version of what happened as against another's." *Lemmerman*, *supra* at 68. I would hold that where one party prevents or actively participates in preventing another party from discovering the true nature of his or her injuries, as long as there is objective, verifiable evidence from which to assess the claim, the discovery rule should apply. As such, I would hold that the common-law discovery rule applies to the case at hand.

I would next analyze whether plaintiffs in this case, despite the expiration of the statute of limitations, are nonetheless protected by the discovery rule. The majority relies on *Jackson Co Hog Producers* to hold that, assuming the discovery rule applies, the statute of limitations did not toll during the period of time when defendant in this case insisted that problems with plaintiffs' cattle were not the result of an irregular power flow for which defendant was responsible. But there is a critical distinction between *Jackson Co Hog Producers* and this case: there, the defendant did not test for electrical problems or represent to the plaintiffs that no electrical problems existed. Here, though, both those things occurred: plaintiffs requested and obtained defendant's expert opinion regarding the potential electrical problems on plaintiffs' farm, and defendant explicitly denied any culpability.[2]

I fully agree that at the time when a plaintiff knows, or with due diligence, should know that the plaintiff has a potential cause of action, the statute of limitations must begin to run. But the key in this case is the test used to determine whether a plaintiff knew or should have known. While that test, applied in *Jackson Co Hog Producers*, dictated that the statute of limitations had expired as to the plaintiffs there, in this case, it has the opposite effect.

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[2] I do not agree with the majority that the difference between stray voltage and other electrical problems is "immaterial to the determination of when the limitations period began to run . . . ." *Bellville v Consumers Energy Co*, slip op 2-3. Defendant claims that it tested only for stray voltage, so it did not misrepresent that there was no stray voltage on plaintiffs' farm. (Plaintiffs' expert eventually found that there were a variety of electrical problems on plaintiffs' farm.) Yet defendant also argues that plaintiffs cannot claim that they should not have suspected other electrical problems because "stray voltage" is actually a generic term encompassing many types of electrical problems.

To dispose of this claim, it is only logical that one or the other of defendant's assertions must be accepted as to both the statute of limitations matter and the fraudulent concealment claim. If stray voltage is the generic term defendant asserts that it is, then plaintiffs presented a genuine issue of material fact that defendant fraudulently concealed the existence of electrical problems on plaintiffs' farm. But if stray voltage is but one type of electrical problem, and defendant tested only for the specific problem of stray voltage, then I cannot find that plaintiffs had an "actual concern" about other electrical problems in 1994 when they specifically expressed concern about "stray voltage." See *id.* at slip op 3.

In *Jackson Co Hog Producers*, this Court analyzed whether the plaintiffs were entitled to bring a cause of action after the statute of limitations expired where the plaintiffs experienced the ramifications of stray voltage on their cattle for more than three years before filing suit in October 1993. *Id.* at 78-81. The defendant submitted the testimony of several of the plaintiffs' employees who stated that they suspected a stray voltage problem at the farm before May 1988 and that they had taken steps to alleviate the problem such as attempting to ground the electricity. *Id.* at 79. The Court also considered that the defendant had periodically mailed brochures about stray voltage to the plaintiffs' facilities. *Id.* The plaintiffs denied suspecting a stray voltage problem, claiming that the employees' testimony was misconstrued. *Id.* at 80.

This Court assumed that the discovery rule applied and correctly noted that under that rule, a cause of action does not accrue until "a plaintiff discovers, or through the exercise of reasonable diligence should have discovered (1) an injury and (2) the causal connection between the injury and a defendant's breach of duty." *Id.* at 78, citing *Lemmerman*, *supra* at 66. Importantly, this Court recognized that determining whether a cause of action has accrued is an objective test, "based on objective facts, and not on what a particular plaintiff subjectively believed." *Jackson Co Hog Producers*, *supra* at 78. This Court then reasoned as follows:

> [P]laintiffs 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.]

Although the facts here are strikingly similar, the resemblance ends at the measures the current plaintiffs employed to determine the cause of their ailing cattle. In my opinion, this factual difference renders our holding in *Jackson Co Hog Producers* inapplicable to the case at hand. In the present case, plaintiffs actively attempted to discover the nature of their cattle's injuries by summoning defendant to conduct testing on their farm, but defendant, at each testing, consistently denied any problems with the electricity supply. Defendant first visited plaintiffs' farm in February 1994, after plaintiffs requested testing, and reported that no electrical problems existed. Although plaintiffs admittedly had concerns about stray voltage and wondered if the problems they were experiencing were electricity-related, they had no objective evidence implicating defendant, predominantly because defendant, the expert in the field, represented conclusively that there were no electricity problems. In fact, defendant tested again for electrical problems in 1996, 1997, and 1998, and each time, defendant informed plaintiffs that all measurements were within normal limits and that there were no stray voltage problems at the farm. Thus, unlike the plaintiffs in *Jackson Co Hog Producers*, these plaintiffs' ongoing concerns about their cattle's health problems were being systematically alleviated by defendant itself.

We are required to view all evidence in the light most favorable to the nonmoving party. In that light, I would conclude as follows. At all times previous to plaintiffs hiring an independent agency to test for electrical problems in 1998, only isolated questions existed, questions that as likely could have been attributed to general health issues that arise with dairy cattle under normal circumstances. In other words, the evidence demonstrates that early on in plaintiffs' quest to determine what was wrong with their cattle, they had no definitive, objective evidence that defendant's electricity was the culprit; rather, the problems they were experiencing could have just as easily been unrelated to electricity. In fact, plaintiffs explored many other possible causes of their cattle's ailments, consulting with Michigan State University, Purina, North Star, various veterinarians, and other experts. Thus, in the face of defendant's consistent denials, plaintiffs had no objective evidence on which to base a claim.

Because we are required to calculate whether a reasonable person in plaintiff's position had *objective* evidence regarding defendant's potential culpability, I would find that based on defendant's continual denials that its electrical supply or equipment was the source of plaintiffs' problems, the statute of limitations tolled until plaintiffs had objective evidence that would support a cause of action. I fail to see how we can hold a plaintiff to a standard by which if the plaintiff has a completely unsubstantiated suspicion that is consistently assuaged by the party suspected of wrongdoing, the plaintiff should be required to file suit anyway. Requiring a plaintiff to file suit under these circumstances not only encourages a multitude of potentially frivolous lawsuits, but also encourages attorneys to violate MCR 2.114(D)(2) (an attorney signing a pleading certifies that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well-grounded in fact . . ."), and MRPC 3.1 ("A lawyer should not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . .").

The majority's result has far-reaching consequences – consequences that I strongly feel are contrary to precedent and legislative intent. The rule promulgated by the majority today gives defendant and similarly situated companies free license to inform a customer that the company is not the source of the problems the customer is experiencing, while the statute of limitations goes stampeding by. While we are traditionally concerned with preventing the opening of the so-called "floodgates of litigation," see, e.g., *Campbell v Sullins*, 257 Mich App 179, 189; 667 NW2d 887 (2003), *Great Lakes Heating, Cooling, Refrigeration & Sheet Metal Corp v Troy School Dist*, 197 Mich App 312, 315; 494 NW2d 863 (1992), and *Randall v Delta Charter Township*, 121 Mich App 26, 32; 328 NW2d 562 (1982), here the majority encourages it. Now, a plaintiff must – in the face of objective evidence to the contrary – file suit merely on the basis of his or her subjective belief or suspicion that a particular defendant could possibly be the cause of the damage the plaintiff is sustaining.

Now, if a plaintiff – reasonably believing that he or she has no valid claim – logically chooses not file suit, he or she is then robbed of recourse. I cannot accept that a claim accrues when the plaintiff knows of a *potential* cause of action, because the word "potential" has a subjective base and is therefore as expansive as the majority's holding purports. Clearly, a plaintiff must exercise due diligence to discover whether a claim exists, as plaintiffs did here. But the majority's holding permits suit when the plaintiff's belief that a particular party is responsible for an injury is based on mere suspicion and requires suit where the plaintiff's diligent inquiry has uncovered nothing to support a valid claim. Thus, by precluding the

wronged plaintiff from bringing a claim, the majority rewards a defendant for misrepresenting facts, regardless whether the representations were intentionally made.

Moreover, plaintiffs' fraudulent concealment claim is an alternative basis for relief in that it provides grounds for applying the statutory discovery rule found in MCL 600.5855:

> 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.

The majority concludes that plaintiffs presented no genuine issue of material fact regarding fraudulent concealment, reasoning that because plaintiffs failed to conduct outside testing, they cannot show that they relied on defendant's statements. I find the reverse to be true. Plaintiff's choice not to conduct outside testing inarguably demonstrates that they *did* rely on defendant's assertions. At the very least, the fact that we disagree on this issue demonstrates the existence of a material fact. *Lytle v Malady*, 458 Mich 153, 191 n 3; 579 NW2d 906 (1998) (Cavanagh, J., dissenting).

Further, plaintiffs abstained from filing suit against defendant after defendant repeatedly assured them that electricity was not the cause of their problems. I find that fact to be an undeniably obvious example of reliance. And viewing the facts in the light most favorable to plaintiffs, plaintiffs presented a genuine issue of material fact regarding whether defendant's representations were made falsely or recklessly and with the intention that plaintiffs rely on them. *Campbell v Sullins*, 257 Mich App 179, 195; 667 NW2d 887 (2003).

For the reasons stated, I would affirm the trial court's denial of defendant's motion for summary disposition.

/s/ Stephen L. Borrello