STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL CIBOROWSKI and GAIL CIBOROWSKI, Plaintiffs-Appellants,	UNPUBLISHED December 20, 2005
v	No. 257091 Oakland Circuit Court
PELLA WINDOW AND DOOR COMPANY, Defendant-Appellee.	LC No. 03-050500-CK

Before: Whitbeck C.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition to defendant in this action asserting claims of product liability, silent fraud/concealment, violation of the Consumer Protection Act, and fraud. We affirm.

On appeal, plaintiffs first argue that the trial court erroneously dismissed their product liability claim based on the statute of limitations. This Court reviews de novo whether a statute of limitations bars a claim. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005). "A motion under MCR 2.116(C)(7) may be supported by affidavits, admissions, or other documentary evidence and, if submitted, such evidence must be considered by the court." *Travelers Ins Co v Guardian Alarm Co*, 231 Mich App 473, 477; 586 NW2d 760 (1998). "[T]he court must take all well-pleaded allegations as true and construe them in favor of the nonmoving party." *Id.* When a plaintiff should have discovered her claim is a question of law where the facts relevant to determining the issue are undisputed. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997).

MCL 600.5805 provides the limitations period for a product liability claim:

> (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 . . . the action is commenced within the periods prescribed by this section.
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> (13) The period of limitations is 3 years for a products liability action. . . .

A breach of warranty claim accrues "at the time the breach of the warranty is discovered or reasonably should be discovered." MCL 600.5833.

Under this discovery rule, a plaintiff need not have discovered a "likely," but only a "possible," cause of action for the claim to accrue. *Moll v Abbott Laboratories*, 444 Mich 1, 22; 506 NW2d 816 (1993). The claim "accrues when, on the basis of objective facts, the plaintiff should have known of an injury, even if a subjective belief regarding the injury occurs at a later date." *Id.* at 18. Michigan law "compels . . . strict adherence to the general rule that 'subsequent damages do not give rise to a new cause of action,'" i.e., to a new or delayed accrual. *Id.* (citation omitted). A plaintiff's claim accrues when she discovers, or through the exercise of reasonable diligence should have discovered, an injury and the causal connection between the injury and the defendant's breach. *Id.* at 16.

In *Solowy*, the plaintiff's medical malpractice claim accrued when she became aware of a "possible" cause of action, because a "plaintiff need not be able to prove each element of the cause of action before the statute of limitations begins to run." *Solowy, supra* at 224. "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id.* at 223. Once the plaintiff learned that one of two possible diagnoses for her condition was potentially actionable, her claim accrued because she should have discovered a possible cause of action. *Id.* at 216.

Here, plaintiffs discovered or should have discovered a possible cause of action in 1994, 1995, and May 2000. In November 1994, plaintiffs contacted defendant regarding moisture and discoloration on the stairwell windowsill. Plaintiffs found evidence of moisture on the woodwork, and fogging or water vapor between the panes of glass.[1] In December 1994, defendant's service technician informed plaintiffs that if plaintiffs failed to remove the incorrect caulking along the bottom of the windows, "they would experience the same build-up of moisture and discoloration that they were currently experiencing."

In May 1995, while installing a replacement window, defendant's service technician reiterated to plaintiffs "the urgent need to have the window installation remedied before the additional windows experienced the same moisture build-up and discoloration." In November 1995, plaintiffs contacted defendant again, regarding a living room window. Ronald Hanson, who at the time was defendant's service manager, testified that in 1995 he told plaintiffs that there was an issue with the installation of the windows that was causing the failure and that it needed to be changed, and if plaintiffs did not change it, they would have more failures.

In May 2000, plaintiffs again contacted defendant about the same issues. Defendant was surprised to learn that plaintiffs had not done anything to repair the problems, and that plaintiffs were again having problems similar to those that began in 1994. Hanson went to plaintiffs' home and met with plaintiff, Michael Ciborowski, and Dan Raymo of C & R Wood Products, the

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[1] According to plaintiffs' recollection, the next window problem was with a kitchen window, although plaintiffs could not recall when this problem occurred. Plaintiffs again observed evidence of moisture in the kitchen window.

company that had installed plaintiffs' windows. At that meeting, using a "water dam test," Hanson demonstrated how the water was forced into the home.

Plaintiffs filed their complaint on June 16, 2003, more than three years after the foregoing events. Plaintiffs have presented no evidence to dispute the evidence presented by defendant indicating that plaintiffs experienced problems with their windows in 1994, 1995, and May 2000. Plaintiffs failed to act diligently to either fix the problem, investigate a potential claim against defendant, or pursue a claim against defendant for faulty windows. Reasonable minds could not disagree on the conclusion that plaintiffs discovered or should have discovered a possible claim against defendant in 1994, 1995, or May 2000.

Plaintiffs argue that defendant's representatives told them that the window problems were caused by faulty installation, and that plaintiffs therefore could not have known in 1994, 1995, or May 2000 that they had a potential claim against defendant for a design defect. This argument lacks merit. It is not necessary for a plaintiff to know of a likely claim for the claim to accrue, only that he know of a possible claim. *Solowy, supra*. It was not necessary for plaintiffs to know of a definitive cause of the window problems; it was sufficient that they were aware of a possible cause. *Id.* at 223. The fact that plaintiffs continued to contact defendant about the ongoing problems with the windows indicates that plaintiffs knew, or should have known, that a possible cause of the window problems was a defect in the windows provided by defendant. Plaintiffs should have diligently pursued the possible causal connection between the damages and a potential defect in the windows.[2] As the April 2002 report of plaintiffs' expert indicates, had plaintiffs pursued such a possible causal connection, they would have discovered a potential design defect causation issue. Once plaintiffs were aware of the injury and its possible cause, they were required to preserve and diligently pursue the claim. *Id.* Because the evidence indicating plaintiffs' problems with the windows in 1994, 1995, and May 2000 is undisputed, the trial court correctly held, as a matter of law, that plaintiffs' claim accrued more than three years before plaintiffs commenced their action in June 2003.

Plaintiffs next argue that the trial court erred in dismissing their silent fraud/concealment, Consumer Protection Act, and fraud claims under the two-year fraudulent concealment statute of limitations, MCL 600.5855. This Court reviews de novo whether a statute of limitations bars a claim. *Farley, supra* at 570-571. Whether a statute of limitations was tolled and when the limitations period expired are questions of law. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 46; 698 NW2d 900 (2005).

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[2] The fact that defendant always maintained (and still does) that the damage was caused by faulty installation, and the fact that plaintiffs allegedly had no evidence in 1994, 1995, and May 2000 that a design defect caused the damage, can hardly be bases for concluding that plaintiffs' claim did not accrue in 1994, 1995, or May 2000, because defendant may indeed be correct that there was no design defect, and indeed there may never be persuasive evidence that a design defect caused the harm; under plaintiffs' reasoning, the weaker a plaintiff's claim (the greater the lack of evidence of the claim), the longer it would take for the claim to accrue, but there is no authority that this is how the statute of limitations operates in terms of accrual.

Plaintiffs rely exclusively on the fraudulent concealment statute of limitations for their silent fraud/concealment, Consumer Protection Act, and fraud claims. The fraudulent concealment statute 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 be otherwise barred by the period of limitations. [MCL 600.5855.]

Under this statute, the limitations period is tolled when a party conceals the fact that the plaintiff has a cause of action. *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 599 NW2d 348 (1996). The fraudulent concealment must be manifested by an affirmative act or misrepresentation; in other words, "[t]he plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery." *Prentis Family Foundation, Inc*, *supra* at 48 (citation omitted). "Mere silence is insufficient." *Id.* (citation omitted).

Further, "[i]f there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute, and in this behalf a party will be held to know what he out to know . . . ." *Doe v Roman Catholic Archbishop*, 264 Mich App 632, 643; 692 NW2d 398 (2004) (internal quotation marks and citation omitted). "For a plaintiff to be sufficiently apprised of a cause of action, a plaintiff need only be aware of a 'possible cause of action.'" *Id.* (citation omitted).

Under the fraudulent concealment statute the discovery rule still applies because plaintiffs must bring their claim within two years after they discovered or should have discovered the existence of the claim. MCL 600.5855. Thus, plaintiffs must still exercise reasonable diligence to pursue their claim: "The statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known, and the plaintiff must be held chargeable with knowledge of the facts, which it ought, in the exercise of reasonable diligence, to have discovered." *Prentis Family Foundation, Inc*, *supra* at 46 n 2 (internal block quote and citations omitted). It is not necessary that plaintiffs know "the entire theory of the case . . . , nor is certitude required." *Doe*, *supra* at 646. Nor is it "necessary that a party should know the details of the evidence by which to establish his cause of action." *Id.* at 647 (internal block quote, quotation marks, and citations omitted).

Here, the facts known to plaintiffs in 1994, 1995, and May 2000 suggested a possible cause of action for the leaking windows. In November 1994, plaintiffs contacted defendant regarding moisture and discoloration on the stairwell windowsill. In November 1995, plaintiffs contacted defendant again, regarding a living room window. In May 2000, plaintiffs again contacted defendant about the same issues. These facts put plaintiffs on notice of the problem with the windows supplied by defendant, and plaintiffs' actions in repeatedly contacting defendant indicate plaintiffs knew that defendant was potentially responsible. Had plaintiffs investigated the potential causes of the leakage, they would have discovered that an alleged design defect, not faulty installation, was a potential cause, as indicated by the expert report they

received later, in April 2002, after they did investigate.[3] It was only plaintiffs' lack of diligence that prevented plaintiffs from prosecuting a further inquiry into the cause of the window leakage. Plaintiffs should have been aware of a possible cause of action at the latest by May 2000, which was more than two years before plaintiffs commenced their action in June 2003. Therefore, under MCL 600.5855, plaintiffs failed to timely commence their action.

Plaintiffs argue that they could not have discovered their claims earlier than April 2002 because defendant concealed the existence of the claims. This argument lacks merit. Plaintiffs present no evidence that defendant ever hindered in any way any investigation by plaintiffs into the cause of the problems. Defendant merely indicated, based on its inspections, that faulty installation was causing the leakage, and that plaintiffs needed to fix it promptly. There is no authority for the proposition that a party that defends its product and, based on its investigation, denies that its product caused the harm is thereby concealing a claim.

Plaintiffs contend that the fraudulent misrepresentation occurred when defendant told plaintiffs that the leakage was caused by faulty installation, thereby concealing "that the leaking was due to defective windows . . . and further that Defendant knew those windows had been redesigned to remedy the defect." These allegations lack evidentiary support. As defendant argues, "there has been absolutely no proof . . . that Defendant Pella knew that the leaking was due to defective windows." We agree. Plaintiffs lack evidence that defendant knew of a defect in the windows, knew that plaintiffs' problems were caused by a defect, and concealed the defect for the purpose of preventing plaintiffs from discovering a claim.

Furthermore, although plaintiffs contend that defendant had a duty to tell plaintiffs that the window model had been redesigned to remedy a defect, defendant's silence regarding the redesign cannot form the basis for a fraudulent concealment claim. Mere silence is insufficient. *Prentis Family Foundation, Inc, supra* at 48. For these reasons, the trial court correctly concluded that plaintiffs' claims of fraud, silent fraud/concealment, and the Consumer Protection Act claim, were not timely commenced under MCL 600.5855.

Plaintiffs next argue that the trial court abused its discretion in denying plaintiffs' motion for reconsideration. A ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Id.*

A motion for reconsideration is decided by a trial court under the standard provided in the court rule, which does not favor motions that merely rehash issues previously addressed:

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[3]This is not a case in which information later came to light which plaintiffs could not have discovered earlier if they had searched. *Trentadue v Buckler Automotive Lawn Sprinkler Co*, 266 Mich App 297, 302-304; 701 NW2d 756 (2005). The report plaintiffs received in April of 2002 could have been procured earlier by plaintiffs, but plaintiffs failed to investigate.

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration *which merely presents the same issues ruled on* by the court, either expressly or by reasonable implication, will not be granted. [MCR 2.119(F)(3) (emphasis added).]

A motion for reconsideration must show a "palpable error" that has "misled" the court:

> The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. [MCR 2.119(F)(3).]

It is not an abuse of discretion to deny a reconsideration motion premised "on testimony that could have been presented the first time the issue was argued." *Churchman, supra* at 233.

The same reasoning applies here. In their motion for reconsideration, plaintiffs argued that the trial court erroneously determined when plaintiffs' claims accrued, based on when they knew or should have known of a possible claim. This issue had already been decided when the trial court ruled that plaintiffs knew or should have known of a possible cause of action in 1994 or 1995. In addition, as defendant correctly argues, plaintiffs' motion for reconsideration "did not present any new evidence or legal authority which was not, or could not have been, presented at the time the initial dispositive motion was heard." Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration.

Lastly, plaintiffs argue that the trial court erred in denying plaintiffs' motion to disqualify the trial court after defendant disclosed to the court the case evaluation award. "Resolution of this issue requires interpretation and application of a court rule, which this Court reviews de novo." *Bennett v Medical Evaluation Specialists*, 244 Mich App 227, 230; 624 NW2d 492 (2000). The case evaluation court rule provides that, "[i]n a nonjury action . . . the parties may not reveal the amount of the evaluation until the judge has rendered judgment." MCR 2.403(N)(4). MCR 2.403(N)(3) does not state what sanction to apply for a violation. In *Bennett*, the plaintiff revealed the amount of the case evaluation, and the defendant made a motion for involuntary dismissal or a mistrial, and for sanctions for the violation of MCR 2.403(N)(4). This Court held that "a judge's assurance to disregard the information revealed in direct violation of MCR 2.403(N)(4) is inadequate, and thus, we hold that the trial court must declare a mistrial and reassign the case to another judge." *Bennett, supra* at 231. However, *Bennett* does not require new proceedings before a new judge in every case. *Cranbrook Professional Bldg, LLC v Pourcho*, 256 Mich App 140, 144-145; 662 NW2d 94 (2003).

Here, at the hearing on the motion to disqualify, plaintiffs' counsel stated that he would "leave it up to – if the Court wants to disqualify we obviously have no – . . . we have no problem with your Honor staying on." Later plaintiffs' counsel again stated: "Well your honor, we have no objection to your Honor staying on." The trial court then ruled that it would stay on the case. Plaintiffs twice indicated they had no objection to the trial court staying on the case and thereby withdrew their objection to the trial judge doing so. Plaintiffs waived the disqualification issue;

therefore, the trial judge's denial of plaintiffs' motion to disqualify does not require reversal. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989).

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray