STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY D. BEAULIER, SUSAN K. BEAULIER, and BEAULIER'S LUMBER & BUILDING SUPPLY CO., Plaintiffs-Appellants,	UNPUBLISHED September 25, 2008
v	No. 284064 Dickinson Circuit Court
FORD MOTOR CO., and KINGSFORD PRODUCTS CO., Defendants-Appellees.	LC No. 04-013306-CE

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

Plaintiffs appeal as of right the February 15, 2008, trial court order granting defendants summary disposition under MCR 2.116(C)(7) based on statute of limitations grounds. We affirm.

I. Factual Background and Procedural History

From 1921 to 1961, defendant Ford Motor Company and Kingsford Chemical, the predecessor to defendant Kingsford Products Company, owned and operated a manufacturing plant in Kingsford, Michigan that produced charcoal and wooden auto parts. Over the years, waste produced at the plant was disposed of at nearby dumps. Plaintiffs are property owners in Kingsford. Plaintiff Timothy Beaulier is a co-owner, with his father, of plaintiff Beaulier's Lumber & Building Supply Company. In 1986, the company purchased 29 acres of land located less than a mile from the manufacturing plant. There were two monitoring wells and large piles of waste on the property at the time of the purchase. Timothy and his wife, plaintiff Susan Beaulier, built their home on a portion of the land originally purchased by the lumber company. They began building their home in 1994.

In July 1995, a Kingsford home, located only three blocks from the Beaulier's home, exploded as a result of methane gas accumulation. Thereafter, the Environmental Protection Agency (EPA), the Michigan Department of Environmental Quality (DEQ), and defendants launched an environmental contamination investigation into the cause of the explosion. In 1996, defendants installed a third monitoring well on plaintiffs' property in an effort to determine the

extent of the contamination. In September 1997, a local newspaper reported that defendants would provide free methane detectors to everyone living in the area designated by the DEQ as the "area of concern." The area of concern, which included plaintiffs' property, was created when preliminary investigations traced groundwater contamination and the presence of methane gas to defendants' earlier dumping of waste. Timothy later received a free methane detector from defendants and installed it in his home.

Between November 24, 1997 and August 24, 1998, defendants drilled seven new monitoring wells on plaintiffs' property, bringing the total number of wells to 10. Timothy was aware that the wells were associated with the methane investigation and he observed them being tested several times. In December 1998, two of the monitoring wells were fitted with 20-foot flagpoles to allow passive venting of methane gas. Field notes from June 21, 1999 showed methane gas being vented at a concentration of more than 90 percent on plaintiffs' property.

Between January 1999 and February 2000, the DEQ and defendants mailed a series of bulletins to residents living in the area of concern. The bulletins provided detailed information about groundwater contamination and methane gas in the area. The January 1999, bulletin and February 2000, bulletin each included a map of the area of concern as of the date of the bulletin. The maps showed pockets of methane gas directly beneath plaintiffs' property. In January 2000, defendants' environmental consultants inspected the Beaulier's home and recommended that five additional methane detectors be installed. They personally delivered the detectors the following month. In March 2000, Timothy and his father met with the consultants and asked that defendants remove the piles of waste from plaintiffs' property.

In 2001, the DEQ issued a regulation requiring owners of contaminated property to provide downgradient property owners with information about the contamination. Pursuant to the regulation, the current owners of the property where the manufacturing plant was located sent approximately 41 property owners, including plaintiffs, a Notice of Migration of Contamination, dated December 23, 2003. The notice indicated that the recipients' properties had been contaminated and included the results of environmental tests conducted in the area of concern over several years.

On October 8, 2002, plaintiffs' counsel filed a class action complaint against defendants alleging that property owners in the area of concern suffered damages as a result of the contamination. *Beauchamp v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 256175), slip op at 2. The trial court dismissed the action as barred under the applicable three-year statute of limitations. *Id*. This Court subsequently affirmed the trial court, finding that the January 1999 bulletin issued by the DEQ and other widespread public information about the contamination should have, under an objective standard, alerted the plaintiffs to a possible cause of action before October 1999. *Id*., slip op at 4. Plaintiffs chose not to be included in that case.

Plaintiffs filed this action on March 10, 2004, alleging that they suffered permanent contamination of their property, as well as permanent loss of use and enjoyment of their property, diminution in market value of their property, lost profits, and other damages that could become apparent as a result of the contamination. Defendants subsequently filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(10). Following oral arguments, the trial

court issued a written opinion granting defendants' motion on statute of limitations grounds. Plaintiffs now appeal as of right.

II. Analysis

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition. We disagree.

We review a trial court's decision to grant summary disposition under MCR 2.116(C)(7) de novo. *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 509; 739 NW2d 402 (2007). Summary disposition may be granted under subrule (C)(7) when an action is barred by the statute of limitations. *Id*. In deciding a motion under subrule (C)(7), the trial court must accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The court must also consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Id*. "If the pleadings demonstrate that one party is entitled to judgment as a matter of law, or if affidavits and other documentary evidence show that there is no genuine issue of material fact concerning the running of the period of limitations, the trial court must render judgment without delay." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720; 742 NW2d 399 (2007). If no material facts are in dispute, the court must decide as a matter of law whether the claim is statutorily barred. *Id*. at 720-721.

It is undisputed that plaintiffs' claims are subject to the three-year statute of limitations for injuries to persons and property, MCL 600.5805(10). "MCL 600.5827 defines the time of accrual for actions subject to the limitations period in MCL 600.5805(10)." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387 and n 8; 738 NW2d 664 (2007). It provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Because this case is not controlled by any of the sections from MCL 600.5829 to MCL 600.5838, plaintiffs' claims accrued at the time the wrong was done, regardless of when damages resulted. 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. *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995). "Accordingly, a cause of action for a tortious injury accrues when all the elements of the claim have occurred and can be alleged in a proper complaint." *Schaendorf*, *supra* at 512, citing *Stephens*, *supra* at 539.

In cases where an element of a cause of action has occurred, but is not yet discoverable with reasonable diligence, courts of this state have applied the discovery rule. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 640; 692 NW2d 398 (2004). Under the judicially-crafted discovery rule, sometimes described as a common law rule, the statute of limitations "'begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action.'" *Id*., quoting *Moll v Abbott Laboratories*, 444 Mich 1, 5; 506 NW2d 816 (1993). Whether a plaintiff should have

discovered a possible cause of action through the exercise of reasonable diligence is determined by an objective standard. *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993).

In granting defendants' motion for summary disposition, the trial court indicated that our Supreme Court's recent decision in *Trentadue*, *supra*, precludes the application of the discovery rule in this case. In *Trentadue*, the family of a rape and murder victim brought a wrongful death action against the killer and his employer 16 years after the crime. *Id*. at 382-383. The killer's identity was unknown until DNA evidence linking him to the crime became available less than a year before the action was commenced. *Id*. at 383. The defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the plaintiffs' action was time barred under the applicable three-year statute of limitations, MCL 600.5805(10). *Trentadue*, *supra* at 383. Specifically, the defendants argued that under MCL 600.5827, a claim accrues when the plaintiff is harmed and, therefore, that the plaintiffs must have commenced the wrongful death action within three years of the victim's death. *Trentadue*, *supra* at 383-384. In response, the plaintiffs asserted that the discovery rule applied to toll the period of limitations until the identity of the killer was known. *Id*. at 384. Reversing the lower courts' decisions in the case, the Supreme Court held that MCL 600.5827 alone governed the accrual of the plaintiffs' claims, and that "courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827." *Trentadue*, *supra* at 382, 385, 389, 391-392, 407. The Court concluded that under MCL 600.5827, the plaintiffs' claims accrued at the time of the victim's death and the defendants must "not face the threat of litigation 16 years later, merely because [the plaintiffs allege they] could not reasonably discover the facts underlying [the defendants'] potential negligence" until that time. *Trentadue*, *supra* at 407.

In light of the Supreme Court's holding in *Trentadue*, we must agree with the trial court that the discovery rule is inapplicable in this case as a matter of law. Plaintiffs' cursory argument that *Trentadue* is materially distinguishable from this case is without merit. The *Trentadue* Court explicitly held that courts may not employ the discovery rule to toll the accrual date of claims to which MCL 600.5827 applies, and that MCL 600.5827 applies to claims governed by MCL 600.5805(10), as is the claim in this case. See *Trentadue*, *supra* at 387, 391-392, 407.

Because the discovery rule is inapplicable here, the only issue to be considered in determining whether plaintiffs' claims are barred by the statute of limitations is when the alleged harm to plaintiffs' property occurred. See MCL 600.5827; *Stephens*, *supra* at 534-535. In moving for summary disposition, defendants presented evidence that as of December 1998, two of the monitoring wells on plaintiffs' property were fitted with 20-foot flagpoles to allow passive venting of methane gas. Field notes from June 21, 1999 showed methane gas being vented at a concentration of more than 90 percent. Additionally, the January 1999, bulletin and February 2000, bulletin issued by the DEQ included maps of the area of concern as of the date of the bulletins. The maps showed pockets of methane gas directly beneath plaintiffs' property. Considering this evidence, there can be no dispute that plaintiffs' property was contaminated well before March 10, 2001. Because plaintiffs did not file their complaint until March 10, 2004, their claims were untimely under the three-year statute of limitations and the trial court properly granted summary disposition in favor of defendants. See *Adams*, *supra* at 720-721.

Furthermore, even if the discovery rule were applicable in this case, plaintiffs' claims would be statutorily barred. Plaintiffs assert that they did not discover or could not have

reasonably discovered a possible cause of action before March 10, 2001. But, like the *Beauchamp* Court, we find that there were numerous events and sufficient widespread public information about the contamination before that date, "which, under an objective standard, should have alerted plaintiffs to the existence of a possible cause of action related to the contamination." *Id*. slip op at 4. Timothy and his father purchased the property at issue in 1986, despite the presence of monitoring wells and piles of waste on the property. Timothy admitted that he was exposed to the substantial media coverage of the 1995 house explosion and the environmental contamination investigation. Defendants installed a third monitoring well on plaintiffs' property in 1996 and, in 1997, provided residents in the area of concern, including the Beauliers, with methane detectors. Between November 1997 and August 1998, defendants installed seven additional monitoring wells on plaintiffs' property. Timothy was aware that the wells were used to vent methane gas. Timothy also admitted that he probably received the DEQ bulletins showing pockets of methane gas under plaintiffs' property. In 2000, defendants installed five additional methane detectors in the Beaulier's home and Timothy and his father requested that defendants remove the piles of waste from their property. On appeal, plaintiffs claim that the December 23, 2003, Notice of Migration was the first *conclusive* evidence they received that their property was contaminated and that they could not have filed an action until that time. But, the discovery rule is triggered when the plaintiff knew or should have known, under an objective standard, that a possible cause of action existed. *Doe*, *supra* at 640; *Levinson*, *supra* at 112. Here, there can be no dispute that plaintiffs knew or reasonably should have known that a possible cause of action existed before March 10, 2001.

Plaintiffs also argue that the trial court erred in failing to apply the qualitative judgment rule in this case. This Court first applied the qualitative judgment rule in *Davidson v Baker-Vander Veen Constr Co*, 35 Mich App 293; 192 NW2d 312 (1971), stating, in part:

> [E]ven when the evidence and underlying facts are not in dispute, there may still be a qualitative judgment concerning the significance and meaning of the underlying facts. Such questions or judgmental facts are sometimes called "mixed questions of law and fact" or "ultimate facts". If the qualitative judgment is in dispute, then the ultimate fact is generally a disputed question of fact. For example, even if there is no dispute concerning the underlying historical facts, it is ordinarily for the trier of fact to decide a question requiring an appraisal of the reasonableness or quality of a person's behavior or actions – as in negligence, homicide, and many contract cases. Only when all reasonable men must agree may the court properly, and then only in a civil case, decide the question as one of law. [*Id*. at 305-306.]

Plaintiffs assert that the qualitative judgment rule applies in this case because "[i]t is clear that a qualitative judgment exists concerning the significance and meaning of the facts cited by the Trial Court to have put [them] on notice of their claims." In light of *Trentadue*, *supra*, however, when plaintiffs discovered or should have reasonably discovered a possible cause of action is irrelevant. But, even absent *Trentadue*, the qualitative judgment rule would be inapplicable here. Whether a plaintiff should have discovered a possible cause of action through the exercise of reasonable diligence is determined by an objective standard. *Levinson*, *supra* at 112. The evidence in this case, viewed under an objective standard, should have alerted plaintiffs to a possible cause of action. Because there was no genuine factual dispute in that

regard, the trial court could, and did, determine as a matter of law that plaintiffs' claims were statutorily barred. *Adams*, *supra* at 720-721.

We find that there are no genuine issues of material fact concerning the running of the period of limitations in this case and, therefore, that the trial court properly granted defendants' motion for summary disposition under MCR 2.116(C)(7).

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering