STATE OF MICHIGAN

COURT OF APPEALS

LOUIS PAQUETTE and KATHRYN PAQUETTE, Plaintiffs-Appellants, v RON'S MARINE, INC, RON'S CONSTRUCTION, RONALD F. KAHL, FREDERICK COURMIER, MEGAN COURMIER, DAVID GLEASON, and GAYLE PINSONNEAULT, Defendants-Appellees.	UNPUBLISHED May 17, 2016 No. 325605 St. Clair Circuit Court LC No. 13-000914-CK

Before: OWENS, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiffs, Louis and Kathryn Paquette, appeal as of right a November 25, 2014 order of dismissal entered by the trial court, which dismissed plaintiffs' claims of nuisance, trespass, and breach of contract against all defendants[1] with prejudice following a November 5, 2014 opinion in which the trial court granted all defendants' motions for summary disposition. We affirm.

Plaintiffs own a waterfront parcel on Lake Saint Clair in Clay Township, Michigan, which they use as a vacation rental. When facing the lake, the parcel to the right of plaintiffs' property is owned by defendants Frederick (Fred) and Megan Courmier. Plaintiffs filed a complaint against all defendants seeking compensation for damage to their property caused by various unrelated actions of defendants. Specifically, plaintiffs asserted claims for breach of contract, nuisance, and trespass against Ron's Marine, Ron's Construction, and Kahl arising from property damage sustained when they installed a dock for the Courmiers. Plaintiffs alleged that Kahl had to dredge a channel deep enough to float a barge to install the dock, and in doing so, he moved the dredged sand to in front of plaintiffs' waterfront property, causing damage to their shoreline, including, among other things, a sand mound, weed growth and phragmites, and

[1] Gleason and Pinsonneault are not parties to this appeal. Plaintiffs raise no arguments regarding the dismissal of the claims against them.

loss of water depth which eliminated plaintiffs' four boat slips. Plaintiffs alleged that Kahl orally agreed to remedy the situation, and breached the oral contract by failing to do so.

Plaintiffs also asserted claims for breach of contract, nuisance, and trespass against the Courmiers arising from the placement of the Courmiers' downspouts, which plaintiffs alleged caused recurring flooding on their property. Plaintiffs alleged that Fred Courmier orally agreed to connect the downspouts to plaintiffs' underground drain to prevent water runoff on plaintiffs' property, and breached the oral contract by failing to do so. All defendants moved for summary disposition, which the trial court granted.

Plaintiffs first argue on appeal that there was a genuine issue of material fact whether there was an oral agreement between Louis Paquette and Kahl, and therefore, the trial court erred by granting defendants Ron's Marine, Ron's Construction, and Kahl summary disposition on plaintiffs' breach of contract claim pursuant to MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing the motion, we consider "the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, MCR 2.116(G)(4) requires:

> 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.

Additionally, the construction of a contract is a question of law that this Court reviews de novo. *Calhoun Co v Blue Cross Blue Shield Mich*, 297 Mich App 1, 12; 824 NW2d 202 (2012).

A valid contract has five elements: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592, 696 NW2d 742 (2005) (quotation marks and citation omitted). It is imperative that the parties to a contract have "mutual assent or a meeting of the minds on all essential terms of a contract." *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004). If the parties do not have a meeting of the minds, then a contract does not exist. *Calhoun Co*, 297 Mich App at 13. "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Id.* (quotation marks and citation omitted). Further, "Oral conversations relied on to establish contracts must be considered in the light of surrounding circumstances." *Pajalich v Ford Motor Co*, 267 Mich 418, 422; 255 NW2d 219 (1934). The

parties' subsequent conduct is an important factor when determining whether an oral contract was formed. *Id.* at 423. Additionally, mere discussions, negotiations, and expressions of intent do not form a binding contract. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992).

Plaintiffs argue that Kahl orally agreed in 2004 and 2009 to remove the sand and restore the shoreline. With regard to the alleged 2004 oral contract, the record shows that the parties' actions indicate that there was not an oral agreement. The only evidence plaintiffs presented was Louis's testimony that Kahl told him that he would remove the sand free of charge, and this appears to be nothing more than Louis's subjective state of mind. Kahl did not take any action after this meeting and plaintiffs waited five years to contact Kahl. Although plaintiffs were suffering from health problems from 2004 to 2009 and indicated that this was why they did not contact Kahl, Louis testified that they chopped down weeds caused by Kahl's dredging in 2007. If plaintiffs tended to the weeds in 2007, they clearly knew Kahl had not taken care of the problem, yet they waited until 2009 to contact him. These are not the actions of someone who understood that there was an oral agreement. Further, even if plaintiffs were able to show that Kahl did orally agree to remove the sand in 2004, the 2013 action would be barred by the six-year statute of limitations in MCL 600.5807(8).

With regard to the alleged 2009 oral contract, the record shows there was no meeting of the minds. First, we note that plaintiffs correctly argue that where credibility of a party is central to the case, summary disposition is rarely appropriate. *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005). However, even though plaintiffs' claim is based solely on Louis's testimony, his testimony does not create a question of fact. The substance of his testimony, even if believed, does not show an oral contract existed, even though he claims one did. According to Louis's testimony, on March 31, 2009, Kahl offered to remove the sand and restore the shoreline to its original condition, and agreed to obtain a permit from the Michigan Department of Environmental Quality if plaintiffs paid for it. Louis did not testify that he accepted Kahl's offer. Rather, plaintiffs alleged that two months later, on July 25, 2009, Louis called Kahl and agreed to pay for the permit to remove the sand if Kahl was the permit applicant. Louis testified that Kahl refused to be the permit applicant and returned the check that Louis sent for the permit application. Louis also testified that when he sent Kahl a letter reflecting the alleged oral agreement Kahl did not accept the written agreement. Therefore, based on the record, plaintiffs never accepted Kahl's offer, and there was no meeting of the minds regarding the contract terms.

Because there was no oral contract, there can be no breach, and therefore, plaintiffs' argument that Kahl breached the agreement in 2009 is moot. See *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012) (stating that a necessary element of a breach of contract claim is the existence of a contract), rev'd in part on other grounds 495 Mich 161 (2014). Accordingly, the trial court did not err by granting defendants Ron's Marine, Ron's Construction, and Kahl summary disposition.

Plaintiffs next argue that the trial court erred by granting the Courmiers' motion for summary disposition on plaintiffs' breach of contract claim because there was a genuine issue of material fact whether there was an oral agreement between Louis Paquette and Fred Courmier to connect the Courmiers' downspouts to plaintiffs' underground drain. The record reveals, however, that other than Louis's claim that Fred accepted Louis's offer to connect his

downspouts to plaintiffs' underground drain, there are no specific facts indicating there was an oral agreement. Louis's statement that there was an oral agreement appears to be nothing more than his subjective state of mind, particularly where Fred's actions indicate that there was not an oral contract. See *Calhoun Co*, 297 Mich App at 13 (quotation marks and citation omitted) ("A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind."). Fred testified that he never agreed to connect the downspouts to the underground drain, and stated that he could not have done so because he did not have the financial means or the expertise. Fred admitted to telling Louis that he did not have to connect the downspouts to his underground drain, and elaborated that the township provided him with an alternative way to divert the water. Fred even purchased the materials to carry out the township's suggested plan. Plaintiffs have failed to set forth facts showing that there was a meeting of the minds. Accordingly, the trial court correctly determined that no oral agreement existed between plaintiffs and the Courmiers and, therefore, did not err by granting summary disposition for the Courmiers. As such, plaintiffs' argument regarding when the cause of action against the Courmiers for breach of contract accrued is moot.

Plaintiffs next argue that the trial court erred by granting the Courmiers' motion for summary disposition on plaintiffs' nuisance and trespass claims. Specifically, plaintiffs argue that the water draining onto plaintiffs' property from the Courmiers' downspouts was a nuisance, and the claim did not accrue until the water caused substantial and unreasonable harm to the property, which was in 2011. Plaintiffs also argue that the every water intrusion from the downspouts was a new trespass and nuisance that could be the subject of a separate action until the damage became permanent, rather than temporary.

Plaintiffs asserted claims for trespass and nuisance against the Courmiers to recover property damages. An action to recover property damage is subject to a three-year statute of limitations pursuant to MCL 600.5805, which provides in relevant part,

> (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 to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> (10) The period of limitations is 3 years after the time of death or injury for all other actions to recover damages for the death or a person, or for injury to a person or property.

The period of limitations begins to run from the time the claim accrues, which is "the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; see also *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009).

Contrary to plaintiffs' argument, not every new water intrusion is a separate tort. Plaintiffs are essentially trying to invoke the continuing wrongs doctrine, which has been abrogated in Michigan.[2] *Froling Trust*, 283 Mich App at 288. Nuisance and trespass claims begin to accrue "when both the act and the injury first occur, that is when the 'wrong is done.' " *Id.* at 291. In other words, the claim will accrue "when both the last conduct and first, subsequent corresponding injury occurred." *Id.* at 290. " 'Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred.' " *Id.*, quoting *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972).

Plaintiffs alleged that the act was the placement of the downspouts, which were encroaching on plaintiffs' property as early as 2000.[3] Louis testified that he noticed water accumulating on his property in 1986, but that he first noticed the downspouts contributing to the water on his property in 2003. He testified that he first noticed water damage to his house in 2004, but later testified that he first saw damage to the foundation of his house in 2003. While it is unclear whether he first noticed water damage to his house in 2003 or 2004, even if we assume it was the later, the claim is still time barred. The nuisance and trespass claims accrued at the latest in 2004 when the last conduct (downspout placement in 2000) and the first, subsequent corresponding injury (foundation damage in 2004) occurred. While water may continue to drain onto plaintiffs' property from the Courmiers' downspouts, "[s]ubsequent claims of additional harm caused by one act do not restart the claim previously accrued." *Froling Trust*, 283 Mich App at 291. The focus is on when the claim *first* accrued. See *id.* at 291 n 56, citing MCL 600.5805(1). Because the nuisance and trespass claims first accrued in 2004, the trial court correctly concluded that plaintiffs' 2013 action was time barred by the three-year statute of limitations in MCL 600.5805(10).

Nevertheless, plaintiffs argue that a nuisance claim does not occur until the injury becomes substantial or unreasonable. This argument is without merit. The caselaw is clear that a nuisance claim accrues "when both the last conduct and first, subsequent corresponding injury occurred." *Froling Trust*, 283 Mich App at 291. The cases plaintiffs cite to support their argument state that to recover for a nuisance claim, plaintiffs must show that they suffered substantial or unreasonable harm, see, e.g., *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999), but that is merely an element of nuisance and not when the claim accrues.

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[2] The abrogated doctrine provided, "Where a defendant's wrongful acts are of a continuing nature, the period of limitations will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that the defendant's tortious conduct continues." *Horvath v Delida*, 213 Mich App 620, 626; 540 NW2d 760 (1995).

[3] Plaintiffs did allege that the Courmiers installed a fourth downspout in October 2010, but do not indicate whether this resulted in new damage or increased water runoff. Louis's testimony indicated that he first noticed damage from the downspouts in 2003, and did not claim that it became worse.

Plaintiffs also argue that because the damage caused by the water is temporary and repairable each time, every water intrusion constitutes a separate, actionable trespass and nuisance until the damage becomes permanent. The cases plaintiffs cite to support this argument all applied the continuing wrongs doctrine, which has since been abrogated. Plaintiffs rely heavily on *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 347-348; 568 NW2d 847 (1997), which held that where damages to the property affected by the nuisance are temporary or recurrent, a plaintiff may recover from time to time until the nuisance is abated. In referencing a continuing trespass/nuisance claim, this Court held that successive actions for damages accruing from the same wrong were not barred. *Id.* This Court was clearly applying the continuing wrongs doctrine, which has since been abrogated, and as such, plaintiffs erred in relying on *Traver*.

Plaintiffs next argue that Kahl was acting as the Courmiers' agent; however, they fail to explain why this is of significance. "A party may not simply announce a position and leave it to this Court to discover and rationalize the basis for the party's claim." *Conlin v Scio Twp*, 262 Mich App 379, 384; 686 NW2d 16 (2004). Presumably, plaintiffs assert this argument in an attempt to hold the Courmiers responsible for any damage Kahl may have caused. However, plaintiffs' claims against Kahl for property damage are all time barred. In addition to the breach of contract claim discussed *supra*, plaintiffs also asserted claims for nuisance and trespass to recover property damages against defendants Ron's Marine, Ron's Construction, and Kahl, to which the three-year statute of limitations in MCL 600.6805(8) applies. These claims arose out of the dock installation that occurred in 2000, and Louis testified that the first visible sign of damage was also in 2000.[4] Therefore, the 2013 claims are untimely, and thus, it is irrelevant whether Kahl was acting as the Courmiers' agent.

Plaintiffs next argue that the trial court erred by granting defendants Ron's Marine, Ron's Construction, Kahl, and the Courmiers summary disposition on plaintiffs' alternative theory of liability of promissory estoppel. In *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008), this Court explained:

> The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. *Booker v Detroit*, 251 Mich App 167, 174; 650 NW2d 680 (2002), rev'd in part on other grounds 469 Mich 892, 668 NW2d 623 (2003). " 'A promise is a manifestation of intention to act or refrain from acting in a specific way, so made as to justify a promisee in understanding that a commitment has been made.' " *State Bank of Standish v Curry*, 442 Mich

[4] Louis also testified that new weeds and phragmites grew out of control in 2009. The inquiry is when the first visible sign of damage occurred, which was 2000. But even if we were to assume that the damage occurred in 2009 when the new weeds and phragmites grew, the claims are still time barred by the three-year statute of limitations.

> 76, 85; 500 NW2d 104 (1993) (citation omitted). The promise must be definite and clear, and the reliance on it must be reasonable. *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993). . . .

"In determining whether a requisite promise existed, we are to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). Caution must be exercised when "evaluating an estoppel claim and [this Court] should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted." *Id.*

Plaintiffs pursued an alternative theory of liability of promissory estoppel against defendants Ron's Marine, Ron's Construction, Kahl, and the Courmiers. On appeal, however, plaintiffs only argue that there was a question of fact regarding the promissory estoppel claim against defendants Ron's Marine, Ron's Construction, and Kahl. Plaintiffs discuss the trial court's finding with regard to the promissory estoppel claim asserted against the Courmiers, but they do not argue how the trial court erred in dismissing the claim against the Courmiers. While we may decline to address this issue for plaintiffs' failure to properly brief it, we conclude that the trial court properly dismissed plaintiffs' promissory estoppel claim. Plaintiffs failed to allege how they relied on the alleged promise made by Fred Courmier, and Louis Paquette testified that he did not do anything or refrain from doing anything because of Fred Courmier's alleged promise. Reliance is a key element of promissory estoppel. *Zaremba Equip, Inc*, 280 Mich App at 41. Accordingly, plaintiffs claim failed as a matter of law.

With regard to the claim against defendants Ron's Marine, Ron's Construction, and Kahl, the trial court did not err by granting defendants summary disposition. Plaintiffs alleged that in March 2009 Kahl promised to remove the sand, restore the shoreline, and apply for the permit. Plaintiffs alleged that they relied on these promises by delaying repairs to their property, sending Kahl a check for the permit, and delaying in filing a lawsuit. However, the circumstances surrounding the alleged promise preclude an objective finding of an "actual, clear, and definite" promise. *First Security Savings Bank v Aitken*, 226 Mich App 291, 312; 573 NW2d 307 (1997), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). The only evidence plaintiffs put forth to establish such a promise was Louis's testimony, which does not show that Kahl made an "actual, clear, and definite" promise. *Id.* Louis testified that on March 31, 2009, Kahl agreed to remove the sand, restore the shoreline, and apply for the permit if plaintiffs paid for it. There was no discussion of how or when Kahl would conduct the work. Louis subsequently sent Kahl a letter detailing this agreement, but Louis testified that Kahl did not agree to the letter which reflected the alleged promises Louis claims Kahl made. By Louis's own testimony, Kahl did not appear to make the promises alleged. Additionally, Louis admitted that the only way Kahl would apply for the permit was if Louis was the permit applicant, which Louis refused to do. Further, in September 2009, Kahl told plaintiffs that to remove the sand and repair the shoreline, he would have to work from land, which would destroy plaintiffs' property, and plaintiffs indicated that they did not want that. The promissory estoppel doctrine is to be applied only where the facts are unquestionable, and here, they are not. *Novak*, 235 Mich App at 687.

Finally, plaintiffs argue that the trial court erred by denying plaintiffs' motion to amend the complaint. We review a trial court's decision to grant or deny leave to amend a pleading for an abuse of discretion. *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000).

MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." Pursuant to MCR 2.116(I)(5), "If a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (C)(9), or (C)(10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Doyle*, 241 Mich App at 212. "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697, 588 NW2d 715 (1998).

The amended complaint adds allegations that still fail to state a claim, and therefore, the trial court did not err by denying plaintiffs' motion to amend the complaint. First, the fact that plaintiffs alleged in the amended complaint that they did in fact rely on the Courmiers' alleged promise by delaying in filing an action against them is completely contrary to Louis's testimony. Louis testified that he did not do anything or refrain from doing anything because of Fred's alleged promise. Further, plaintiffs are still unable to show that Fred actually promised to connect his downspouts. The only evidence was Louis's claim, which appeared to be his subjective intent. Fred's actions do not show a clear and definite promise, particularly where he purchased supplies to implement the township's plan.

Second, plaintiffs sought to allege that Kahl was the Courmiers' agent, but as discussed *supra*, this fact is irrelevant where plaintiffs' claims for property damage against Ron's Marine, Ron's Construction, and Kahl are all time barred.

Lastly, plaintiffs sought to allege that significant damage did not occur until 2011, and that since 2011, repeated trespass of water continues. However, as discussed *supra*, the nuisance and trespass claims accrued at the very latest in 2004 when the downspouts were in place and the first visible damage occurred. Accordingly, the trial court did not err by denying plaintiffs' motion to amend the complaint.

Affirmed. Defendants, having prevailed in full, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens