

STATE OF MICHIGAN
COURT OF APPEALS

DONALD WETZEL and GLORIA WETZEL,

Plaintiffs-Appellees,

v

CONSUMERS POWER COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 202570
Eaton Circuit Court
LC No. 95-001413 CZ

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for summary disposition under MCR 2.116(C) (10). We reverse.

Plaintiffs alleged in this action that "stray voltage" from defendant's power lines leaked into the ground on plaintiffs' property and damaged plaintiffs' dairy cattle. Plaintiffs' complaint alleged claims for negligence, breach of contract, breach of implied warranty, nuisance, and fraud.

Defendant argues that the trial court erred in denying its motion for summary disposition of plaintiffs' claims for negligence, breach of contract, breach of implied warranty, and nuisance because they were barred by the applicable three-year period of limitations. Defendant also argues that the trial court erred in denying its motion for summary disposition of the fraud claim on the ground that plaintiff failed to demonstrate a material question of fact. We agree with defendant on both issues.

I

The question whether a claim is within the period of limitations is one of law and is therefore reviewed de novo. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997); *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to

determine whether there is a genuine issue of material fact. If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997).¹

The general statute of limitations for tort claims is three years. Plaintiffs concede that the applicable statute of limitations period is three years. MCL 600.5805(8); MSA 27A.5805(8). At issue is when plaintiff's claim accrued and began the running of the three-year period. MCL 600.5827; MSA 27A.5827 provides that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." When the tortious conduct and injury are contemporaneous or in proximity, there is no question as to how this statute applies. However, the appropriate application of this statute is called into question when there is a lengthy period between the tortious conduct and the resultant damage; or when there is a delay between the damage and the plaintiff's discovery of a causal connection between the defendant's conduct and the damage. Our Supreme Court has held that "the term 'wrong,' as used in the accrual statute, specified the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty." *Moll v Abbott Laboratories*, 444 Mich 1, 12; 506 NW2d 816 (citing *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146; 200 NW2d 70 [1972]); *Horvath v Delida*, 213 Mich App 620, 624; 540 NW2d 760 (1995). This interpretation avoids the absurd result of the statute of limitations running before the plaintiff knows that he is injured. *Moll*, 12. Under this rule, a plaintiff's cause of action accrues when all the elements of the claim have occurred and can be alleged in a complaint. *Moll*, 15; *Horvath*, 624.

Our Supreme Court has also adopted the discovery rule to avoid premature barring of a plaintiff's cause of action. *Moll*, 12. Under the discovery rule, a plaintiff's claim accrues when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the injury and the causal connection between the plaintiff's injury and the defendant's breach. *Id.*, 16. It is not necessary that a plaintiff be able to prove each element of the cause of action before the statute of limitations begins to run. *Warren Consolidated Schools v WR Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994). Further, a plaintiff need not be aware of the identity of the person causing the injury. *Brown v Drake-Willock International*, 209 Mich App 136, 142; 530 NW2d 510 (1995). The discovery rule applies to the discovery of a specific injury, not to the discovery of the identities of all the possible parties. *Id.* The test to be applied in determining when a cause accrues is an objective one, based on objective facts, and not on what a particular plaintiff subjectively believes. *Moll, supra* at 18. Application of the test is a matter of law for the court in the absence of any issue of material fact. *Id.* at 26.

Contrary to the trial court's reasoning, the facts of this case demonstrate that plaintiffs were able to discover a causal connection between their claimed damages and the likelihood that stray voltage was a possible cause. Applying an objective standard, the established facts indicate that, by the mid-1980s, plaintiffs knew or should have known that they had an electrical problem on their premises. At least four different persons or groups investigated their problems, including the possibility of stray voltage.

Also, plaintiffs had received electrical shocks while in the milking parlor area. In addition, defendant sent plaintiffs several pamphlets about stray voltage. Plaintiffs also knew that their herd's milk production was down, resulting in financial losses. In sum, even if there is a dispute as to exactly what plaintiffs knew and when they knew it, under an objective test they should have known that they had a possible stray voltage problem by the mid-1980s, at the latest. At that point the period of limitations would have commenced to run under a discovery rule. Thus, plaintiffs' complaint, which was filed in November 1995, was well beyond the limitations period.

We further find that the trial court incorrectly applied the continuing wrong doctrine to this case. Under the continuing wrongful acts doctrine, if a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated. A separate cause of action can accrue each day that the defendant's tortious conduct continues. See *Horvath, supra* at 626-627. The doctrine has been applied only in limited circumstances. *Id.* at 627.²

In *Horvath, supra*, the plaintiffs filed suit against the defendants in 1992 for escalating flood damage allegedly caused by the defendants' dredging of a marsh in 1979. In rejecting the plaintiffs' attempt to invoke the continuing wrong exception, a panel of this Court noted, "[A] continuing wrong is established by continual tortious *acts*, not by the continuous harmful effects from an original, completed act." *Id.* at 627 (emphasis in original). That reasoning is dispositive here. Some time before the early 1980s, defendant hooked up the connections necessary to supply plaintiffs with electricity. In 1985, defendant's representative detected stray voltage on plaintiffs' farm and told them to contact an electrician, and call defendant back to have the farm rechecked. These constitute the original, completed, and allegedly tortious acts, as opposed to the harmful effects of those original acts, i.e., the stray voltage. Accordingly, the continuing wrong exception does not apply, and plaintiffs' claims for negligence, breach of contract, breach of implied warranty, and nuisance were barred by the statute of limitation.

II

When reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings and all documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Summary disposition may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10).

Defendant was entitled to summary disposition of plaintiffs' fraud claim. To establish a cause of action for fraud or misrepresentation, a plaintiff must prove: (1) that the defendant made a material representation; (2) that the representation was false; (3) that when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) that the defendant made the representation with the intention that the plaintiff would act upon it; (5) that the plaintiff acted in reliance upon it; and (6) that the plaintiff

suffered damage. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). A silent fraud claim differs from a traditional fraud claim in that the false representation needed to establish the first three elements of fraud may be shown by the defendant's failure to divulge a fact that the defendant had an affirmative duty to disclose. *M & D, Inc v W B McConkey*, __ Mich App __; __ NW2d __ (1998); *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). In either case, each element must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any element is fatal to a recovery. See *Hord v Environmental Research Institute of Michigan*, 228 Mich App 638, 642; 579 NW2d 133 (1998).

Regardless of defendant's representation or failure to make the alleged necessary representations in 1994, plaintiffs are unable to demonstrate the necessary reliance. In addition, plaintiffs had numerous other persons to consult about stray voltage and those persons could also have performed whatever tests defendant's representatives might have performed. Finally, the record is clear that defendant mailed to plaintiffs information about stray voltage.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Henry William Saad

¹ Defendant moved for summary disposition under MCR 2.116(C)(10), even though the more appropriate subsection was (C)(7). However, this Court may review an order of summary disposition under the correct subrule. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997).

² See, *Defnet v Detroit*, 327 Mich 254, 258; 41 NW2d 539 (1950); *Hodgeson v Drain Comm'r*, 52 Mich App 411; 217 NW2d 395 (1974); *Oakwood Homeowners Ass'n, Inc v Ford Motor Co*, 77 Mich App 197; 258 NW2d 475 (1977); *Moore v City of Pontiac*, 143 Mich App 610; 372 NW2d 627 (1985); and *Difronzo v Port Sanilac*, 166 Mich App 148; 419 NW2d 756 (1988); *Slayton v Michigan Host, Inc*, 144 Mich App 535, 556; 376 NW2d 664 (1985); *Asher v Exxon Co, USA*, 200 Mich App 635; 504 NW2d 728 (1994).