STATE OF MICHIGAN

COURT OF APPEALS

THERMOFIL INC.,

Plaintiff-Appellant,

v

HAIGH INDUSTRIES, INC., HAIGH MANUFACTURING COMPANY, HAIGH INVESTMENT COMPANY, and HENRY A. HAIGH,

Defendants-Appellees.

UNPUBLISHED
November 20, 2001

No. 224704
Livingston Circuit Court
LC No. 99-017271-CE

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff, Thermofil, Inc., appeals as of right the January 3, 2000, order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants ("Haigh") in this action to recover response activity costs for environmental contamination. We affirm in part and reverse in part.

Until 1977, Haigh operated a metal stamping business on a site currently owned by plaintiff. Plaintiff purchased the property in 1982 from International Telephone and Telegraph Corporation. In September 1987, water samples taken from plaintiff's groundwater well established the presence of hazardous substances, including trichloroethene (TCE) and dichloroethene (DCE). Haigh allegedly disposed of TCE and other hazardous substances in its wastewater, which was discharged into an unlined seepage lagoon. Plaintiff, as the current owner and operator of the site, was directed by the Department of Environmental Quality ("DEQ") in June 1988 to conduct response activities at the site. Plaintiff sent correspondence to Haigh dated June 28, 1988, notifying Haigh of the contamination and demanding that Haigh pay for the cost of the remedial investigation and possible remedial action. Haigh did not become involved in the remedial investigation or make any contribution toward the cost of the investigation. Plaintiff conducted an extensive remedial investigation, incurring costs of over $2,000,000. The remedial investigation established the existence of extensive soil and groundwater contamination.

On August 31, 1994, the DEQ approved a remedial action plan for the site. However, due to an amendment to Part 201 of the National Resources and Environmental Protection Act ("NREPA"), MCL 324.20101 *et seq.*, in June 1995 (1994 PA 451, effective March 30, 1995), the

DEQ determined that plaintiff was not responsible for an activity causing a release or threat of release of TCE or other hazardous substances at the site. Therefore, plaintiff did not proceed with installation of the remediation system.

In June 1999, plaintiff filed this lawsuit seeking recovery of the costs incurred in performing environmental investigations under Part 201 of the NREPA. Specifically, plaintiff claimed that Haigh is liable for costs of remediation under MCL 324.20126(1)(b), which holds former owners responsible for spills that occurred while the property was under their control. Plaintiff also sought to recover the costs and damages under the common law theories of nuisance, trespass, negligence, and abnormally dangerous activity.

Defendant answered the complaint and moved for summary disposition under MCR 2.116(C)(7), claiming that plaintiff's claim under the NREPA was barred by the limitations period contained in MCL 324.20140(2). Defendant also claimed that plaintiff's common law claims were barred by the limitations period in MCL 600.5805(9). Plaintiff responded to the motion by stating that MCL 324.20140(2) only applied to response activity costs incurred before July 1, 1991, and that response activity costs incurred after July 1, 1991, were subject to the limitations period in MCL 324.20140(1). Plaintiff argued that, because it never undertook any remedial action approved by the DEQ, the limitations period for response activity costs had not commenced.

The trial court heard oral argument on October 14, 1999. In an opinion and order dated January 3, 2000, the court, relying on *Shields v Shell Oil Co*, 237 Mich App 682; 604 NW2d 719 (1999), found that plaintiff's claim for response activity costs under the NREPA accrued before July 1, 1991, and that under MCL 324.20140(2) plaintiff had until July 1, 1994, to file a complaint. Therefore, the claim was barred by the limitations period. The court also found that plaintiff's common law claims were "governed by a three-year statute of limitations, as extended under the discovery rule." Because plaintiff "knew of the hazardous substance and was certain that Haigh was more than a mere 'potentially responsible party' by at least June 28, 1988," the claims were barred by the limitations period. In addition, the trial court found that the continuing wrongful acts doctrine was inapplicable.

I

Plaintiff first argues that the trial court erred by granting summary disposition of its claim under the NREPA. This Court reviews a circuit court's grant of summary disposition de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). Whether the statute of limitations bars a cause of action is a question of law that we review de novo. *Id.* at 340-341.

At the time the trial court decided the motion for summary disposition in this case, MCL 324.20140 provided:

> (1) Except as provided in subsection (2), the limitation period for filing actions under this part is as follows:
>
> (a) For the recovery of response activity costs and natural resource damages pursuant to section 20126a(1)(a), (b), or (c), within 6 years of initiation

of physical on-site construction activities for the remedial action selected or approved by the department at a facility, except as provided in subdivision (b).

(b) For 1 or more subsequent actions for recovery of response activity costs pursuant to section 20126, at any time during the response activity, if commenced not later than 3 years after the date of completion of all response activity at the facility.

(c) For civil fines under this part, within 3 years after discovery of the violation for which the civil fines are assessed.

(2) For recovery of response activity costs and natural resources damages that accrued prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

In *Shields*, *supra*, a panel of this Court held that MCL 20140(2) acts as a statute of repose rather than as a statute of limitation and, therefore, is not subject to tolling pursuant to the discovery rule and may come into operation even before a plaintiff suffers damages. Therefore, the panel held that the limitation period for actions for recovery of response activity costs and natural resource damages that accrued before July 1, 1991, is July 1, 1994. The panel concluded that any action against Shell for response activity costs accrued in 1987 when Shell sold the property to the plaintiff's predecessor in interest and that subsection 2 was applicable to the proceedings. Because the plaintiff commenced his action after the July 1, 1994, cut-off date contained in subsection 2, the Court held that his action was time-barred by subsection 2.

Following the *Shields* decision, the Legislature amended § 20140. See 2000 PA 254, effective June 29, 2000. As amended, § 20140 provides:

(1) Except as provided in subsections (2) and (3), the limitation period for filing actions under this part is as follows:

(a) For the recovery of response activity costs and natural resources damages pursuant to section 20126(1)(a), (b), or (c), within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility, except as provided in subdivision (b).

(b) For 1 or more subsequent actions for recovery of response activity costs pursuant to section 20126, at any time during the response activity, if commenced not later than 3 years after the date of completion of all response activity at the facility.

(c) For civil fines under this part, within 3 years after discovery of the violation for which the civil fines are assessed.

(2) For recovery of natural resource damages that accrued prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

(3) For recovery of response activity costs that were incurred prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

(4) Subsection (3) is curative and intended to clarify the original intent of the legislature and applies retroactively.

On December 27, 2000, the Supreme Court granted a motion for peremptory reversal of this Court's October 1, 1999, decision in *Shields, supra*. The Court held:

> Under either the former or amended version of MCL 324.20140; MSA 13A.20140, it is clear that only actions for recovery of response activity costs *incurred* before July 1, 1991, were subject to the July 1, 1994, limitation period. (Emphasis in original.) [*Shields v Shell Oil Co,* 463 Mich 939 (2000).]

In light of the Supreme Court's order in *Shields,* and the amendment of § 20140, we conclude that the trial court erred by granting summary disposition of the NREPA claim on the ground that the claim accrued before July 1991 and was therefore time-barred under former subsection (2).

Defendant argues that, even if plaintiff's claims are not barred by the limitations period in former subsection (2), the claims are barred by subsection (1)(a) because initiation of physical on-site construction activities for remedial action occurred as early as 1987 when plaintiff installed an on-site monitoring well. However, the trial court did not decide whether plaintiff conducted any activities on the property that would constitute "physical on-site construction activity for the remedial action selected or approved by the department at a facility." Generally, an issue is not properly preserved if it is not addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Because the trial court found that plaintiff's claim was barred by former subsection (2), the trial court never addressed the limitations period in subsection (1)(a). Hence, we decline to address this argument on appeal.

II

Plaintiff also argues that the trial court erred by granting summary disposition of the common law claims because the statutory period of limitations for injury to property, MCL 600.5805(9), does not apply under the facts of this case.

The statutory period of limitations for injury to property is three years. MCL 600.5805(9). The general accrual statute, MCL 600.5827, 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." In 1972, our Supreme Court interpreted this language to mean that a claim does not accrue until "all of the elements of an action for personal injury, including the element of damage, are present . . .." *Connelly v Paul Ruddy's Equipment Repair & Service* Co, 388 Mich 146, 151; 200 NW2d 70 (1972); *Stephens, supra.*

Thus, a cause of action accrues on the date that the plaintiff was harmed by the defendant's negligent act, as opposed to the date that the defendant acted negligently. *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995); *Forest City Enterprises, Inc v Leemon*

Oil Co, 228 Mich App 57, 74; 577 NW2d 150 (1998); *Horvath v Delida*, 213 Mich App 620, 623-624; 540 NW2d 760 (1995). Stated another way, a plaintiff's cause of action for tortious injury accrues when all the elements of a cause of action have occurred and can be alleged in a proper complaint. *Stephens, supra* at 539.

Where an element of a cause of action, such as damage has occurred, but cannot be pleaded in a proper complaint because it is not yet discoverable with reasonable diligence, Michigan courts have applied the discovery rule. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 479-480; 586 NW2d 760 (1998). Under the discovery 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. *Moll v Abbott Laboratories*, 444 Mich 1, 5; 506 NW2d 816 (1993). The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of an injury. *Id.* at 18.

Where the facts are undisputed, whether a plaintiff's action is barred by the statute of limitations is a question of law to be determined by the trial court. *Moll, supra* at 5-6. In the present case, there is no dispute that plaintiff was aware of the contamination and was aware that Haigh was the likely source of the contamination no later than June 28, 1988. Hence, the statute of limitations, as extended by the discovery rule, expired on June 28, 1991.

To avert this result, plaintiff relies on the continuing-wrongful-acts doctrine, arguing that the continuous presence of the hazardous materials on the property tolled the running of the limitation period for the nuisance, trespass, and abnormally dangerous activity claims.[1]

Where a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated. *Horvath, supra* at 763. In seeking to apply the continuing-wrongful-acts doctrine in this case, however, plaintiff has misapprehended the crux of the doctrine: a continuing wrong is established by continual tortious *acts*, not by continual harmful effects from an original, completed act. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 592 NW2d 112 (1999). See also *Horvath, supra; Defnet v Detroit*, 327 Mich 254; 41 NW2d 539 (1950) (the continuing-wrongful-acts doctrine applied where the defendants' maintenance of an *active sewer* on the plaintiffs' property for nearly thirty years constituted a continuing trespass); *Difronzio, supra* (the defendants' building of a harbor and necessary facilities on Lake Huron bottom land adjacent to the plaintiff's property constituted an

[1] Plaintiff has not presented any arguments regarding the negligence claim. Nonetheless, Michigan courts have not recognized a cause of action for continuing negligence. *Jackson Co, infra,* at 81. With regard to the abnormally dangerous activity, plaintiff cursorily cites to foreign federal law for the proposition that "the doctrine of strict liability for abnormally dangerous activities has been extended to cases involving the disposal of hazardous waste." Plaintiff has failed to discuss the facts of the cases, the rationale for the decisions, or their applicability to the facts of this case. Because plaintiff has failed to argue the merits of this issue or to explain how the reasoning of the foreign cases applies to the present case, plaintiff has failed to properly present this issue. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), after remand 211 Mich App 214; 535 NW2d 568 (1995).

ongoing nuisance); and *Moore, supra* (operation of a sanitary landfill constituted a continuing tort). Here, it is undisputed that Haigh has not committed any acts on the property since 1977. Hence, this case involves a continuing harmful effect and, consequently, the continuing-wrongful-acts doctrine does not act to toll the statute of limitations.

Affirmed in part and reversed in part.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald