

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS GUASTELLO,

Plaintiff-Appellee/Cross-Appellant,

v

JEAN LAFON, JEANNE LAFON, and JEAN A
LAFON REVOCABLE TRUST,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED
September 23, 2014

No. 313725
Macomb Circuit Court
LC No. 2011-000663-CH

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations) and granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) (genuine issue of material fact), finding that plaintiff's trespass and nuisance action was timely and that there was no genuine issue of fact that defendants trespassed on plaintiff's property. Plaintiff cross-appeals from the trial court's subsequent order granting monetary damages and attorney fees, but not ruling on plaintiff's claim for treble damages. Because we conclude that plaintiff's claim was barred by the three-year statute of limitations, we reverse the trial court's order denying summary disposition for defendants and granting summary disposition for plaintiff and the trial court's order granting plaintiff damages, and remand for entry of an order in favor of defendants.

Plaintiff purchased a parcel of real property in 1995 by land contract from defendants, Jean and Jeanne LaFon, prior to which had comprised one contiguous parcel with defendants' property. At the time of purchase, a small, uncovered drainage ditch ran north to south along the eastern portion of defendants' property that drained storm water runoff from a small asphalt parking lot onto plaintiff's property. Plaintiff alleged that in February 2006, defendants requested approval from the city to expand the existing parking lot to cover their remaining 1.67-acre parcel that bordered plaintiff's property. To obtain approval for the asphalt, plaintiff alleged that defendants misrepresented to the city that they owned plaintiff's property by submitting a proposed site plan that required expansion of the existing drainage ditch onto plaintiff's property, as well as installation of permanent drain equipment. It is clear from the record that defendants did in fact expand the drainage ditch and install drain equipment on plaintiff's property sometime in 2006. According to a civil engineer obtained by plaintiff, the drainage ditch expansion

increased the storm water runoff on plaintiff's property from 11,579 gallons per hour to 40,852 gallons per hour.

Plaintiff, however, alleged that he did not become aware of defendants' actions until the summer of 2009. In addition to the drain and equipment, plaintiff alleged that a curb, asphalt, and shed encroached on his property. He also alleged that during construction, defendants drove construction vehicles on his property and removed soil from their land and placed it on plaintiff's land, along with "other debris."¹ Plaintiff alleged that, in September 2009, plaintiff notified defendants of the wrongful trespass and requested that defendants remove the expanded drain, curb, shed, and debris that encroached his property. Due to defendants' failure to remedy the situation, plaintiff filed the instant action in 2011 seeking damages for trespass, nuisance, and waste, and requested that the court order defendants to remove all encroachments from plaintiff's property.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), asserting that plaintiff's claim was barred by the three-year statute of limitations, MCL 600.5805(10), because the alleged acts occurred in 2006, and plaintiff filed the action in 2011. Plaintiff opposed defendants' motion, arguing that the statute of limitations did not bar his claim because defendants' actions constituted a continuing trespass. Defendants relied on *Terlecki v Stewart*, 278 Mich App 644; 754 NW2d 899 (2008), to argue that the trespass and nuisance claims accrued when "the wrong" was committed, which was in 2006 when defendants expanded the parking lot and drain. Defendant further argued that this Court in *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264; 769 NW2d 234 (2009), affirmed that the continuing wrong doctrine as applied to trespass and nuisance claims was "completely abrogated" by *Terlecki*.

Plaintiff, however, argued that *Terlecki* and *Froling Trust* were inapplicable because those cases did not involve an actual physical presence by the defendants on the plaintiffs' lands, as it did here. The trial court agreed with plaintiff, and relying on *Taylor Land Group, LLC v BP Products North America, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2011 (Docket No. 294764), held that the statute of limitations on plaintiff's claim had not run because the expanded drainage ditch and drain equipment remained physically situated on plaintiff's property, which constituted a continuing physical intrusion.

Additionally, the trial court granted plaintiff summary disposition pursuant to MCR 2.116(C)(10), finding that defendants did not deny that they entered onto plaintiff's property and expanded the drainage ditch and installed drain equipment. Although defendants argued that they had plaintiff's consent, the trial court found that the documentary evidence did not support that assertion. The trial court initially denied plaintiff damages because he did not seek them in his summary disposition motion, but after granting plaintiff's motion for reconsideration and holding many conferences, the trial court ultimately awarded plaintiff monetary damages of \$46,040 and \$6,662 in attorney fees. Although plaintiff sought treble damages in his pleadings,

¹ Plaintiff collectively referred to the soil and "other debris" as "debris," but never identified what the other debris was.

he did not request treble damages at the damages hearing, and the trial court's order was silent regarding them.

On appeal, defendants first argue that the trial court erred by denying their motion for summary disposition pursuant to MCR 2.116(C)(7), because plaintiff's action was time barred. We agree. We review de novo a trial court's decision regarding a motion for summary disposition pursuant to MCR 2.116(C)(7). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* at 119.

Claims of property damage are subject to a three-year statute of limitations pursuant to MCL 600.5805, which provides,

(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 claim, the action is commenced within the periods of time prescribed by this section.

* * *

(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 damages results." MCL 600.5827; see also *Froling Trust*, 283 Mich App at 279.

In this case, the parties argue over the applicability of the continuing wrongs doctrine, which provides: "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). "[A] continuing wrong is established by continual tortious acts, not by continual harmful effects from an original, completed act." *Id.* at 627; see also *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 517; 739 NW2d 402 (2007). This Court explicitly stated in *Froling Trust* that "the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases," is "completely and retroactively abrogated." *Froling Trust*, 283 Mich App at 288.

Despite this ruling, another panel of this Court in *Taylor Land Group*, which the trial court relied on, held that the continued presence of a pipeline on the plaintiff's property was a continuing physical intrusion and did not fall within the definition of a continuing wrong, which only applied to continuing effects of a past trespassory act. *Taylor Land Group*, unpub op at 13-

14.² This conclusion, however, was based on an erroneous interpretation of the continuing wrongs doctrine.

As the *Taylor Land Group* panel correctly noted, the *Froling Trust* panel relied substantially on *Terlecki* and *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005).³ In *Terlecki*, the defendants replaced an existing wooden spillway connecting Silver Lake to the Indian River with a concrete spillway. *Terlecki*, 278 Mich App at 647. The plaintiffs argued that the effect of the defendants' actions was to raise the water level of the lake, causing water from the lake to flood the plaintiffs' low-lying wooded property and damage trees. *Id.* The plaintiffs argued that their claim was not barred by the three-year statute of limitations because the recurrent flooding constituted a continuing trespass or nuisance. *Id.* at 653. The *Terlecki* panel noted that the holding in *Garg*, in which our Supreme Court held that the "continuing violations" doctrine was contrary to the plain text of MCL 600.5805 and MCL 600.5827, was not limited to discrimination cases because the Supreme Court applied the plain text of those statutes. *Terlecki*, 278 Mich App at 655. *Garg* reasoned that the continuing wrongs doctrine cannot be used to permit "a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations.'" *Garg*, 472 Mich at 282. Applying *Garg*, the *Terlecki* panel declined to apply the continuing wrongs doctrine and held that the timeliness of plaintiffs' claims is determined by the plain text of MCL 600.5805(1). *Terlecki*, 278 Mich app at 657. The panel further noted that even if the continuing wrongs doctrine were viable, it would not apply because the flooding and tree damage that occurred after 2001 were "merely harmful effects of the completed tortious acts," and not continuing tortious acts that established a continuing wrong. *Id.* at 656. In making this determination, the *Terlecki* panel distinguished the facts in *Terlecki* from previous cases where the continuing wrongs doctrine applied. *Id.* at 656-657. Ultimately, the *Terlecki* panel concluded that regardless of the legal theory employed, i.e., whether the continuing wrongs doctrine applied or not, the plaintiffs' action was time barred. *Id.* at 657.

The *Taylor Land Group* panel placed emphasis on the portion of the *Terlecki* decision that distinguished continued effects and continued acts. *Taylor Land Group*, unpub op at 13-14. Although the *Terlecki* panel distinguished between continued effects and continued acts, the purpose of this illustration was to show that a continued effect does not fall under the continuing wrongs doctrine, as to extend the limitations period if that doctrine was viable in nuisance and trespass cases. It was not to show that the doctrine bars continued effects, but not continued acts. Further, the panel's reliance on previous cases applying the continuing wrong doctrine, for example, *Defnet v Detroit*, 327 Mich 254, 258; 41 NW2d 539 (1950), to show that an action for a continued act could be maintained, is erroneous because that doctrine has since been abolished.

² We note that an unpublished opinion is not precedentially binding on this Court. MCR 7.215(C)(1).

³ *Garg* was a discrimination case in which our Supreme Court held that the continuing violations doctrine was contrary to the plain text of MCL 600.5805 and MCL 600.5827. *Garg*, 472 Mich at 266, 281-284, 290.

Ultimately, the *Taylor Land Group* panel appears to have overlooked the definition of a continuing wrong, which, as stated, is “established by continual tortious acts, not by continual harmful effects from an original, completed act.” *Horvath*, 213 Mich App at 627. Based on this definition, because the continuing wrong doctrine has been abolished, a plaintiff cannot avoid the statute of limitations where the damage consists of continual tortious acts that are characterized as “continuing violations,” in other words, a continuing wrong. *Garg*, 472 Mich at 282.

In this case, the record shows that defendants expanded the drainage ditch and installed the drain equipment on plaintiff’s property in 2006. The expansion of the drainage ditch is what caused the increase of storm water runoff to occur. The “wrongs” “upon which the claim is based,” MCL 600.5827 and *Froling Trust*, 283 Mich App at 279, all relate to events that occurred at the time of construction, such as, construction vehicles that entered his property, soil that was placed on his property, and the drainage ditch expansion and installation of permanent drain equipment. Therefore, the act and the injury first occurred in 2006 with the drainage ditch expansion. Accordingly, the statute of limitation began to accrue in 2006, which would make plaintiff’s 2011 action untimely.

Nevertheless, plaintiff attempts to distinguish a continuing trespass from the continuing wrongs doctrine, by arguing that the increased storm water runoff and the permanent expansion constitute a continuing trespass because of the physical presence on plaintiff’s land. In doing so, plaintiff asserts that *Wiggins v City of Burton*, 291 Mich App 532; 805 NW2d 517 (2011), held that increased storm water runoff is a continuing trespass. However, the statute of limitations was not at issue in *Wiggins*, and that case simply held that substantially increased water flow onto the plaintiffs’ property could be a separate, actionable trespass. *Id.* at 566. Although the increased storm water runoff is a separate trespass from the drainage ditch expansion, it first occurred after defendants’ last act of expanding the drainage ditch in 2006, and has only continued to occur as a result of that expansion. “Subsequent 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). As stated, in this case, it was 2006 when the drainage ditch was expanded.

Moreover, whether the presence of the expanded drainage ditch and increased storm water runoff are viewed as harmful effects of a past act or as continual tortious acts, plaintiff’s claim is still time barred. First, caselaw has made it clear that harmful effects of a past act do not toll the statute of limitations. See, e.g., *Terlecki*, 278 Mich App at 656. Second, the fact that the drainage ditch and storm water runoff have a continual physical presence on the property does not toll the statute. There was a single trespassory act by defendants when they expanded the drainage ditch, and the drainage ditch and storm water runoff amount to continuing violations stemming from one wrong, see *Garg*, 472 Mich at 282, which is the very definition of the continuing wrongs doctrine that *Froling Trust* abolished.

Further, plaintiff’s reliance on MCL 600.5855, fraudulent concealment, is also misplaced. Plaintiff argues the statute of limitations should be tolled because defendants fraudulently misrepresented to the city that they owned plaintiff’s parcel to obtain a site approval. However, the plain language of MCL 600.5855 provides that that provision is only applicable where a defendant conceals the existence of the claim or the identity of any person liable for the claim, and that did not happen here.

Finally, although plaintiff did allege that he did not discover the expanded drainage ditch until 2009, the discovery rule has also been abolished and cannot save plaintiff's claim. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 389, 393; 738 NW2d 664 (2007); see also *Terlecki*, 278 Mich App at 652.

Therefore, we reverse the trial court's order denying summary disposition for defendants and granting summary disposition for plaintiff, and remand for entry of an order in favor of defendants. Because our resolution of this issue is dispositive, we need not address defendants' remaining issue on appeal or plaintiff's cross-appeal regarding his claim for treble damages. Accordingly, we also reverse the trial court's order granting plaintiff damages.

Reversed and remanded. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell