STATE OF MICHIGAN

COURT OF APPEALS

MIKKIE MORLEY, JONATHAN MORLEY, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants/Cross-Appellees,

v

MICHIGAN SUGAR COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 18, 2021

No. 354085
Bay Circuit Court
LC No. 19-003525-NZ

Before: SWARTZLE, P.J., and SAWYER and LETICA, JJ.

PER CURIAM.

Michigan Sugar Company has been processing beets and turning them into sugar since 1901. This process has the unfortunate side effect of creating strong odors that expand to the homes in the surrounding area. Mikkie and Jonathan Morley purchased a home near Michigan Sugar in May 2016; they did not notice any odors when they first moved in, but did notice them in the fall. The Morleys sued Michigan Sugar alleging both nuisance and negligence. The trial court granted summary disposition to Michigan Sugar, concluding that although the Morleys alleged a sufficient injury to sustain their negligence claim, they failed to exhaust their administrative remedies as required to sustain their nuisance claim and the statute of limitations barred the Morleys' negligence claim. As explained below, we affirm dismissal of both claims, albeit for a different reason with respect to the negligence claim.

I. BACKGROUND

Michigan Sugar, previously known as Monitor Sugar Company, began sugar-processing operations in 1901. The 175-acre processing facility is located in Bay City, Michigan, adjacent to residential neighborhoods. Michigan Sugar uses the facility to process sugar beets into "sugar, molasses, and other organic byproducts which it sells for other uses, including animal feed." Michigan Sugar's primary sugar product is sold under the brand labels "Pioneer Sugar" and "Big Chief Sugar."

As alleged by the Morleys in their class-action complaint, Michigan Sugar's processing operation is separated into "campaigns" that start in the fall and end in the spring. During each campaign Michigan Sugar processes beets and turns them into table sugar. This process creates a large amount of waste, and the waste creates noxious odors. Given the size of Michigan Sugar's operation, the noxious odors caused by this process extend to the surrounding area.

In 2003, a group of individuals who lived and owned property near Michigan Sugar's plant filed a class-action lawsuit against Michigan Sugar's predecessor. The parties eventually settled the dispute, and Monitor Sugar agreed to alter its operating procedures in specified ways to mitigate the odors and dust that were invading the relevant properties. So long as Monitor Sugar remained in compliance with the settlement agreement for a period of two years after final court approval of the settlement agreement, all of the plaintiffs in the certified class were precluded from filing a lawsuit related to Monitor Sugar's emissions of air contaminants, odors, or particulates. The plaintiffs, however, were permitted to communicate with Monitor Sugar and the Michigan Department of Environmental Quality[1] regarding any such issues during those two years. The settlement agreement required all of the plaintiffs to release Monitor Sugar from any claims regarding the diminishment in value of their property resulting from Monitor Sugar's actions any time before final approval. The release ran with the property, and all subsequent transfers of ownership of class member real estate required advising the prospective owner "of the existence of this settlement in writing prior to any transfer of the interest."

The company's mitigation efforts worked and the noxious odors lessened for a few years. But a new class-action lawsuit was filed in 2016 against the successor company, Michigan Sugar, by homeowners and residents located within 1 ½ miles of the facility. The plaintiffs in that 2016 action alleged that the number of documented complaints to the EGLE had risen dramatically since 2009, culminating in a seven-fold increase between 2014 and 2015.[2] The plaintiffs alleged that these complaints related to noxious odors from Michigan Sugar's facility and that these odors amounted to a nuisance and negligence. Michigan Sugar moved for summary disposition, arguing that the plaintiffs' claims were time-barred by the applicable three-year statute of limitations and that the plaintiffs failed to allege a physical injury to support their negligence claims. The trial court denied Michigan Sugar's motion, and Michigan Sugar appealed to this Court. This Court reversed, concluding that because the plaintiffs' allegations revealed several complaints occurring before November 7, 2013—the date three years before the plaintiffs filed the complaint—"[a]lthough the record reflects that the number of complaints increased during 2013 and thereafter, plaintiffs' allegations establish that the alleged wrong caused [the] plaintiffs' alleged nuisance injuries long before November 7, 2013." *Burton v Mich Sugar Co*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2019 (Docket No. 341155), p 6. Because this issue was dispositive, this Court declined to address Michigan Sugar's contention that the plaintiffs had

[1] The Department of Environmental Quality was recently renamed the Michigan Department of Environment, Great Lakes, and Energy (EGLE).

[2] There were 3 complaints in 2009, 6 complaints each in 2010 and 2011, 28 complaints in 2012, 84 in 2013, 100 in 2014, and 736 in 2015.

failed to assert a present physical injury to property or person. *Id*. Consistent with this Court's opinion, the circuit court dismissed the *Burton* complaint as time-barred.

The Morleys filed the instant class-action complaint about five months later. The Morleys alleged that a properly operated sugar beet-processing plant would not cause noxious odors. They further alleged that the noxious odors created by Michigan Sugar's plant deprived them of the use and enjoyment of their property and amounted to a nuisance and negligence. According to the Morleys, many residents complained about Michigan Sugar to the EGLE, resulting in the EGLE issuing at least 15 rule violations to Michigan Sugar in 2016 and 2017. The Morleys, however, did not allege that they filed any complaints with the EGLE.

Michigan Sugar responded by moving for summary disposition, arguing that the Morleys' nuisance claim was barred because they failed to exhaust their administrative remedies under the Michigan Agricultural Processing Act, MCL 289.821 *et seq.* Michigan Sugar based this argument, in part, on a memorandum of understanding between the Michigan Department of Agriculture and Rural Development (MDARD) and the EGLE, under which the former department delegated its duty to "[i]nvestigate environmental and nuisance complaints involving agricultural processing operations" to the EGLE. Michigan Sugar additionally argued that the statute of limitations barred the Morleys' negligence and nuisance claims and that the Morleys failed to allege a sufficient physical injury to sustain their negligence claim.

The trial court concluded that the Morleys failed to exhaust their administrative remedies and that it was bound by this Court's prior opinion in *Burton* to conclude that the statute of limitations barred the Morleys' claims, but that the Morleys did allege a physical injury. Thus, the trial court granted summary disposition to Michigan Sugar on exhaustion and statute-of-limitations grounds, but denied summary disposition on the physical-injury ground. This appeal followed.

II. ANALYSIS

A. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Morleys argue that the trial court erred by concluding that they failed to exhaust their administrative remedies under the Michigan Agricultural Processing Act. "We review de novo a trial court's decision to grant or deny a motion for summary disposition." *Sherman v City of St Joseph*, 332 Mich App 626, 632; 957 NW2d 838 (2020) (citations omitted). This Court also reviews de novo questions regarding jurisdiction raised under MCR 2.116(C)(4). *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 713-714; 909 NW2d 890 (2017). "Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust its administrative remedies." *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004).

As explained by this Court in *Meisner Law Group*, 321 Mich App at 714:

> A trial court is duty-bound to recognize the limits of its subject-matter jurisdiction, and it must dismiss an action when subject-matter jurisdiction is not present.

> MCR 2.116(C)(4) permits a trial court to dismiss a complaint when the court lacks jurisdiction of the subject matter. A motion under Subrule (C)(4) may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. When affidavits, depositions, admissions, or other documentary evidence are submitted with a motion under MCR 2.116(C)(4), they must be considered by the court. So, when reviewing a motion for summary disposition brought under MCR 2.116(C)(4) that asserts the court lacks subject-matter jurisdiction, the court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. [Cleaned up.]

A plaintiff need not pursue administrative remedies if doing so would be futile through no fault of the plaintiff. *Manor House Apartments v City of Warren*, 204 Mich App 603, 605; 516 NW2d 530 (1994). It is the plaintiff's burden to show that administrative remedies have been exhausted or doing so would be futile. *Cummins v Robinson Twp*, 283 Mich App 677, 713; 770 NW2d 421 (2009). When construing a statute, we do not defer to the construction adopted by a trial court or administrative agency. *Stirling v County of Leelanau*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 353117), slip op at 2 & n 2. "With respect to statutory interpretation, this Court is required to give effect to the Legislature's intent. The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018) (citation omitted).

The Michigan Agricultural Processing Act addresses when and how a "processing operation shall . . . be found to be a public or private nuisance." MCL 289.823(1). The Morleys argue that the trial court concluded that the act applied to their nuisance and negligence claims. Michigan Sugar moved for summary disposition under MCR 2.116(C)(4) of only the Morleys' nuisance claims for failure to exhaust their administrative remedies under the Michigan Agricultural Processing Act. The trial court stated that it "did not have subject matter jurisdiction" under MCL 289.824(1) and, therefore, that it "shall not proceed with this action until Plaintiffs have exhausted their administrative remedies." The trial court then granted summary disposition to Michigan Sugar under MCR 2.116(C)(4). We read the trial court's order as addressing only Michigan Sugar's nuisance claim under the act. In response to the Morleys' argument that the trial court concluded that the act also applies to their negligence claims, however, we note that by its plain language the act applies to only the Morleys' nuisance claims. Thus, the Morleys are correct that the act applies to only their nuisance claims even though they are incorrect in asserting that that the trial court dismissed their negligence claims for failing to exhaust their administrative remedies under the act.

The Morleys additionally argue that the act does not apply to Michigan Sugar because Michigan Sugar creates sugar, which is not a vegetable. The Michigan Agricultural Processing Act addresses nuisance claims against "processing operations." The act defines "processing operation" as "the operation and management of a business engaged in processing." MCL 289.822(g). It additionally defines "processing," in relevant part, as "the commercial processing or handling of fruit, vegetable, dairy, meat, and grain products for human food consumption and animal feed." MCL 289.822(f). Finally, it defines "fruit and vegetable product" as "those plant items used by human beings for human food consumption including, but not limited to, field crops,

root crops, berries, herbs, fruits, vegetables, flowers, seeds, grasses, tree products, mushrooms, and other similar products, or any other fruit and vegetable product processed for human consumption as determined by the Michigan commission of agriculture." MCL 289.822.

Michigan Sugar takes sugar beets and processes them into table sugar. Given this, it plainly handles vegetables and processes them for human consumption. While the Morleys are correct that table sugar is not a vegetable, Michigan Sugar creates table sugar from a vegetable and, therefore, the Michigan Agricultural Processing Act applies to Michigan Sugar's processing operation. Accordingly, the act controls when and how a party can file a nuisance claim in court regarding Michigan Sugar's processing operation.

Relevant here, the act requires a party to exhaust its administrative remedies before a court can proceed with an action for nuisance against a processing operation:

> The Michigan commission of agriculture shall request the director of the Michigan department of agriculture or his or her designee to investigate all nuisance complaints under this act involving a processing operation. If a person is granted a determination by the director of the department of agriculture under this act, the person is considered to have exhausted his or her administrative remedies with regard to that matter. *A court shall not proceed with an action for nuisance brought against a processing operation until it finds that the complainant exhausted all administrative remedies.* [MCL 289.824(1) (emphasis added).]

The act further provides that "[t]he Michigan commission of agriculture and the director of the Michigan department of agriculture may enter into a memorandum of understanding with the Michigan department of environmental quality. The investigation and resolution of nuisance complaints shall be conducted pursuant to the memorandum of understanding." MCL 289.824(2). But this requirement does not abrogate the requirement that a party exhaust its administrative remedies; rather, it simply changes the investigation-and-resolution process.

The MDARD entered into a memorandum of understanding in 2012 with the EGLE. Under the memorandum's terms, the EGLE became responsible for investigating "environmental and nuisance complaints involving agricultural processing operations" including those complaints related to "[o]dors, dust, or fumes." Thus, the MDARD director designated the EGLE to investigate complaints related to odors. A person complaining about odors from an agricultural-processing plant must now obtain a "determination" from the EGLE in order to exhaust administrative remedies. See MCL 289.824(1) and (2).

The Morleys' nuisance complaint is based on noxious odors emanating from Michigan Sugar's facility. Thus, the Morleys were required to obtain a determination from the EGLE before filing a nuisance complaint with the trial court. The Morleys have not presented any evidence establishing that they obtained a determination from either department. Rather, the Morleys proceeded directly to court without first raising their issues with the applicable governmental agency that the Legislature has directed to address such complaints. Thus, the Morleys cannot establish that they exhausted their administrative remedies.

Similarly, complaints filed by other residents in the area cannot establish that the Morleys exhausted their administrative remedies. The Michigan Agricultural Processing Act plainly requires a "person" to obtain a determination in order to exhaust "his or her" own administrative remedies before that person can file a nuisance claim in court. MCL 289.824(1). If a resident complained to the MDARD or the EGLE about Michigan Sugar and obtained a determination under the act, then that resident would have exhausted administrative remedies only to himself or herself. Stated differently, the fact that one resident exhausted administrative remedies by complying with the Michigan Agricultural Processing Act's requirements does not establish that any other resident exhausted administrative remedies. Thus, the fact that other residents filed complaints with the EGLE has no effect on whether the Morleys exhausted their administrative remedies.

Nevertheless, the Morleys argue that the act does not apply because it "is an unused, inoperative law." The Morleys submitted a Freedom of Information Act, MCL 15.231 *et seq*., request to the MDARD for all documents relating to complaints filed under the Michigan Agricultural Processing Act within the last 10 years. The department responded by telling the Morleys that it "has only received one complaint within the last ten years, and after a phone call was made to the complainant explaining [the] MDARD was not the appropriate department to handle such matters, the complaint was forwarded to the correct agency." Consequently, the Morleys argue, the Michigan Agricultural Processing Act is an unused statute and complying with it would have been futile.

A fundamental canon of statutory interpretation is the desuetude canon, which provides that "[t]he bright-line rule is that a statute has effect until it is repealed." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Thompson/West, 2012), pp 338-339. "[T]he fact that a statute has not been recently enforced does not mean that it has been repealed de facto." *Stopera v DiMarco*, 218 Mich App 565, 569; 554 NW2d 379 (1996). Indeed, "[i]t would be a long overstepping of our role as a court to ignore a statute duly enacted and never repealed by a coequal branch of government." *Id*. at 569-570.

The Michigan Agricultural Processing Act clearly directs "the director of the Michigan department of agriculture or his or her designee to investigate all nuisance complaints under this act involving a processing operation." MCL 289.824(1). While the Morleys have presented evidence that the MDARD has not received many complaints under the act, they failed to present similar evidence about the EGLE. Under the memorandum of understanding, similar complaints may have been sent to the EGLE instead of the MDARD. Thus, the fact that the MDARD has not received many complaints under the act does not establish that it is "unused." Furthermore, the lack of complaints does not establish that filing a complaint would have been futile. Nor have they alleged or attached to their complaint any facts showing that they attempted to file a complaint with the MDARD or the EGLE but were rebuffed, either explicitly or by inaction. Finally, we note that if the departments are not complying with the Michigan Agricultural Processing Act's statutory requirements, then a writ of mandamus may be appropriate, but that issue is not before us here so we will not address it further.

Finally, the Morleys argue that the act does not apply to Michigan Sugar because the company does not comply with the MDARD's "generally accepted fruit, vegetable, dairy product, meat, and grain processing practices." The Morleys may be correct, but we cannot consider

whether Michigan Sugar actually complies with the generally accepted processing practices because the act requires a plaintiff to exhaust administrative remedies before a court can consider a nuisance claim against a processing operation like Michigan Sugar. This jurisdictional question must be answered before we can reach the merits of the Morleys' nuisance claim.

The Morleys failed to show that they exhausted their available administrative remedies. Accordingly, the trial court did not err by dismissing their nuisance claim.

B. NEGLIGENCE

Michigan Sugar argues, on cross appeal, that the trial court erred by concluding that the Morleys alleged a sufficient injury to sustain their negligence claim. MCR 2.116(C)(8) mandates summary disposition if "[t]he opposing party has failed to state a claim on which relief can be granted." *Harbor Watch Condo Ass'n v Emmet Co Treasurer*, 308 Mich App 380, 384; 863 NW2d 745 (2014).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (cleaned up).]

Thus, "[a] party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Dalley v Dykema Gossett*, 287 Mich App 296, 305; 788 NW2d 679 (2010). "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Finally, because a motion under MCR 2.116(C)(8) is based on the pleadings, discovery is not a consideration when a court determines whether to grant the motion. See *Maiden*, 461 Mich at 119-120.

At the trial court level and again before us on appeal, the Morleys argue that Michigan Sugar's actions allegedly amounted to a "severe and unreasonable" interreference with their "right to use and enjoy their property." The Morleys argue that this interference, without more, establishes a sufficient injury to sustain their negligence cause of action. In their briefs, the Morleys do not argue that they or their property have been physically injured or altered by the noxious odors caused by Michigan Sugar's processing operation. Thus, all other arguments to support their negligence claim have arguably been abandoned. See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015). Nevertheless, we will address separately whether the Morleys can sustain a negligence cause of action for personal physical injuries or injuries to their property.

We address personal physical injuries first. The Morleys alleged in paragraph 63 of their complaint that they suffered personal physical injuries—such as exacerbated asthma symptoms—as a result of the noxious odors emanating from Michigan Sugar's facility. The Morleys, however, failed to incorporate this allegation when addressing their negligence cause of action. Instead, the

Morleys' negligence claim incorporated by reference *other* paragraphs from their complaint and addressed only injuries to their property. Thus, although the Morleys alleged personal physical injuries, they failed to connect those injuries to their negligence claim. Accordingly, the Morleys' alleged personal physical injuries cannot sustain their negligence claim.

The Morleys did allege injuries to property to sustain their negligence claim in their complaint. As such, we must address that issue on the merits. "It is usually held that in order to state a negligence claim on which relief may be granted, plaintiffs must prove (1) that defendant owed them a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005) (*Henry I*). In *Henry I*, our Supreme Court specifically addressed what type of injury can sustain a negligence action. The *Henry I* Court concluded "that a plaintiff must demonstrate a present physical injury to person or property *in addition* to economic losses that result from that injury in order to recover under a negligence theory." *Id*. at 75-76. Accordingly, a present financial injury—such as loss of property value—without an accompanying physical injury cannot sustain a negligence claim. *Id*. at 75-78. Indeed, "[a] financial 'injury' is simply not a present physical injury, and thus not cognizable under" a negligence theory. *Id*. at 78.

Despite our Supreme Court's clear statement requiring a present physical injury to sustain a negligence claim, the Morleys argue that their loss of the use and enjoyment of their property even without a present physical injury alleges a sufficient injury to sustain their negligence claim. In doing so, the Morleys rely on *Henry v Dow Chem Co*, 319 Mich App 704; 905 NW2d 422 (2017) (*Henry III*), rev'd in part 501 Mich 965 (2018). The *Henry* cases involved allegations that Dow Chemical allegedly contaminated the Tittabawassee River flood plain with dioxin. *Henry I*, 473 Mich at 69-70. In *Henry I*, the plaintiffs sought damages for medical monitoring based on potential future injuries they would sustain due to the dioxin. *Id*. at 70. But those claims did not allege a present physical injury and, therefore, the *Henry I* Court concluded that the plaintiffs failed to allege a viable negligence claim. *Id*. at 68. *Henry* returned to our Supreme Court to address a class-certification issue in *Henry v Dow Chem Co*, 484 Mich 483, 496-504, 509; 772 NW2d 301 (2009) (*Henry II*). Then, in *Henry III*, this Court addressed the plaintiffs' remaining negligence claims. *Henry III*, 319 Mich App at 712-714.

The plaintiffs' negligence claims at issue in *Henry III* alleged that dioxin contaminated the plaintiffs' property. The *Henry III* Court concluded that the plaintiffs "alleged actual injury in the form of direct contamination and restrictions on the use of their property." *Id*. at 725. Thus, contamination of property fulfilled the actual physical injury requirement in *Henry III*. The injury sustaining the plaintiffs' negligence claims was not, as the Morleys argue, the loss of the use and enjoyment of property. Rather, the *Henry III* Court's discussion of the plaintiffs' loss of the use and enjoyment of their property was limited to the plaintiffs' nuisance claims. *Id*. at 725-727. Consequently, the *Henry III* Court did not alter the bright-line rule created by *Henry I* requiring an actual present physical injury to sustain a negligence claim.

The Morleys argue that the noxious fumes caused by Michigan Sugar's processing operation caused the Morleys to lose the use and enjoyment of their property. But the Morleys fail to allege that their property was damaged in any way by these fumes. The plaintiffs in *Henry III* alleged that dioxin contaminated their property. In contrast, the Morleys have not alleged that the

noxious fumes in this case contaminated their property. Rather, the Morleys allege that the smell changes based on the day and, in large part, on Michigan Sugar's actions. The alleged noxious odors in this case amount to a transitory condition and the Morleys have not alleged that the condition has physically damaged their property. These alleged injuries sound in private nuisance, not negligence. The trial court erred by concluding that the Morleys alleged a sufficient injury to avoid summary disposition of their negligence claim.

Finally, because the Morleys failed to allege a cognizable negligence claim, we need not address whether the statute of limitations also bars their claim.

III. CONCLUSION

For the reasons stated in this opinion, we affirm the trial court's order granting summary disposition to Michigan Sugar. Michigan Sugar, as the prevailing party, may tax costs under MCR 7.219.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Anica Letica