

STATE OF MICHIGAN
COURT OF APPEALS

CHARLOTTE HOLLAND, personal representative of
the estate of GARY LEE FUSON II,

UNPUBLISHED
January 21, 1997

Plaintiff-Appellee,

v

No. 185748
LC No. 93-002939-NP

MODERN BOATS & MOTORS,

Defendant-Appellant,

and

GLASTRON BOAT CO, GLASTRON CONROY,
GENMAR INDUSTRIES, INC, MINSTAR, INC, IJ
HOLDINGS CORP, GLASTRON, INC,
GLASTRON CARLSON and GLASTRON BOATS,

Defendants.

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

In this negligence action, defendant Modern Boats & Motors appeals by leave granted the trial court's orders denying its motion for summary disposition pursuant to MCR 2.116(C)(7), which asserted that plaintiff's claim was barred by the statute of limitations, and denying its motion pursuant to MCR 2.116(C)(8) and (C)(10), which asserted that plaintiff could not establish that defendant's negligence was a proximate cause of his injuries. We reverse.

In the spring of 1989, Richard Van Hevel purchased a used fiberglass boat that was in need of numerous repairs. With the help of friends, he installed a floor, bucket seats, a bench seat, and a new windshield. Van Hevel's attempts to repair a used motor purchased for the boat were unsuccessful, and in early September, he authorized defendant to repair the lower unit of the motor. Van Hevel authorized further repairs to the motor, the extent of which is disputed by the parties. Both parties

agree, however, that Van Hevel last visited defendant's business at approximately 5:30 p.m. on September 22, 1989. At that time he retrieved the boat and motor. At 7:00 p.m. that evening, Van Hevel, plaintiff, and Mark Ciraulo launched the boat and proceeded to fish on Lake St. Clair. The men were four miles from shore when the waves became rough and it started to drizzle. When the storm worsened, the men decided to return to land but Van Hevel's attempts to electronically and manually start the boat's motor failed. The boat sank, and the men lost sight of each other in the storm. Plaintiff was rescued the next morning. Van Hevel and Ciraulo did not survive. Plaintiff commenced this action on September 23, 1992, asserting a claim against defendant for negligently repairing the boat's motor.

Defendant contends that the trial court erroneously denied its motion for summary disposition pursuant to MCR 2.116(C)(7) on the ground that plaintiff's claim was barred by the statute of limitations. We agree. A trial court's denial of summary disposition is reviewed de novo. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994). In reviewing a motion brought pursuant to MCR 2.116(C)(7), the court must consider all affidavits, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(3) and (G)(5). Unless contradicted by the documentary evidence, the contents of the complaint must be accepted as true and the allegations construed favorably to the plaintiff. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994); *Garzia v Sanchez*, 199 Mich App 582, 583-584; 502 NW2d 751 (1993). Summary disposition should be denied if factual development could provide a basis for finding that recovery is not barred. See *Asher v Exxon Co, USA*, 200 Mich App 635, 638, 641; 504 NW2d 728 (1993).

The limitations period for an ordinary negligence action is three years. MCL 600.5805(8); MSA 27A.5805(8). The period runs from the time the claim accrues, MCL 600.5827; MSA 27A.5827; that is, "the date on which the plaintiff was harmed by the defendant's negligent act." *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995). Stated otherwise, the claim accrues "at the moment the plaintiff could first commence a lawsuit upon it." *Lumley v Board of Regents for the University of Michigan*, 215 Mich App 125, 130; 544 NW2d 692 (1996). The elements of plaintiff's negligence claim are: (1) a legal duty, (2) a breach of the duty, (3) causation, and (4) damages. *Id.* Therefore, plaintiff's cause of action for defendant's negligent repair of the motor accrued when the last element of the claim was present, that is, when he suffered damages as the result of defendant's negligence.

Upon review of the documentary evidence, we conclude that further factual development could not provide a basis for finding that the lawsuit was timely filed. Plaintiff's cause of action for the negligent repair of the motor accrued on September 22, 1989, the date upon which the boat capsized and he fell into the water. See *id.* Plaintiff's deposition testimony that the boat capsized at approximately 9:30 or 10:00 p.m. on September 22, 1989, is consistent with his testimony regarding the events of that evening and is further supported by other testimony that the storm hit soon after dark. There is simply no evidence in the record to establish that that the boat sank after 12:00 a.m., September 23, 1989.

Moreover, the trial court's reliance on the continuing-wrongful-acts doctrine to support its determination that the claim accrued on September 23, 1989, was misplaced. "[A] continuing wrong is established by continual tortious *acts*, not by continual harmful effects from an original, completed act." *Horvath v Delida*, 213 Mich App 620, 626-627; 540 NW2d 760 (1995). While the harmful effects from defendant's alleged tortious act continued beyond September 22, 1989, defendants committed no tortious acts after that date.¹ Accordingly, the trial court erred when it denied defendant's motion for summary disposition because the continuing wrong doctrine is inapplicable here and plaintiff commenced this action more than three years after his cause of action accrued.² *Asher, supra* at 638.

Also, even assuming *arguendo* that plaintiff's claim was a properly pleaded maritime tort, a three-year statute of limitations applies, pursuant to 46 USC 763a, and the claim is still barred because it was not commenced within three years from the date the cause of action accrued, i.e., September 22, 1992.

In light of our resolution of the preceding issue, we need not address whether the trial court properly denied defendant's motion for summary disposition on the ground that plaintiff failed to establish that his theory of causation was more likely than other theories.

Reversed and remanded for entry of judgment consistent with this opinion.

/s/ Barbara B. MacKenzie

/s/ Myron H. Wahls

/s/ Jane E. Markey

¹ Indeed, the trial court's statement on the record evidences that the continuing wrong doctrine was misapplied here:

My decision is that I'm finding that the injury and the accident were of a continuing nature, that it did continue through the 23rd and as such I'm not going to dismiss the case based on the statute of limitations problem. Certainly my feelings will not be hurt if you go to the Court of Appeals because I'd be interested to see what they come up with. I just feel it was a continuing nature. He's in the middle of nowhere and it began on the 22nd and it ended on the 23rd and that's my ruling. So, the statute of limitation I don't find as a problem. [Emphasis added.]

² In the lower court, plaintiff argued that his claim was actually an admiralty claim and as such, was not barred by the statute of limitations. Even assuming that plaintiff's claim is for a maritime tort, a three-year limitations period applies and the claim is barred. 46 USC 763a; *Usher v M/V Ocean Wave*, 27 F3d 370, 371-372 (CA 9, 1994).