STATE OF MICHIGAN

COURT OF APPEALS

J. HOWARD CAVIN, Personal Representative of the ESTATE OF DOUGLAS H. CAVIN, Deceased, RICHARD COSTAMAGNA, Personal Representative of the ESTATE OF JOSEPH CONSTANAO COSTAMAGNA, Deceased, PETER DESMOND, SHEILA EBERHARDT, Personal Representative of the ESTATE OF WALLACE D. EBERHARDT, Deceased, WILLIAM B. JOHNSON, Personal Representative of the ESTATE OF DEBRA B. JOHNSON, Deceased, MARIE POWELL, Personal Representative of the ESTATE OF WILLIAM PARRISH, Deceased, WILLIAM F. STURDIVANT, SR. and WILLIAM F. STURDIVANT, JR., Personal Representatives of the ESTATE OF MARTIN H. STURDIVANT, Deceased, MARGARET TIMMERMAN, Personal Representative of the ESTATE OF JOE HENRY TIMMERMAN, Deceased, GRACE TOMPKINS, Personal Representative of the ESTATE OF JEFFREY TOMPKINS, Deceased,

Plaintiffs-Appellants,

v

GENERAL MOTORS CORPORATION, WILLIAM CICHOWSKI, ALEX MCKEEN, CHARLES W. BABCOCK, WILLIAM J. KEMP, JR., EARL STEPP, MAYNARD L. TIMM, ROYAL INSURANCE COMPANY OF AMERICA, f/k/a ROYAL GLOBE INSURANCE COMPANY, EUGENE GRACE, ARTHUR P. GREEMFIELD and JOHN DOES 1-8,

Defendants-Appellees.

UNPUBLISHED
November 4, 1997

No. 190558
Wayne Circuit Court
LC No. 94-407563-NZ

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

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8). We affirm.

I

Most of the plaintiffs are the representatives of individuals who sustained serious or fatal injuries in various automobile crashes; one of the plaintiffs sustained severe injuries himself. Plaintiffs contended that the crashes resulted in post-collision fuel-fed fires, which contributed to the deaths or injuries, and that these fires were caused by a fuel system defect in General Motors (GM) pickup trucks. Plaintiffs sued GM, three of its staff attorneys (defendants Babcock, Kemp and Timm), three of its staff engineers (defendants Cichowski, McKeen and Stepp), and two of GM's outside counsel (defendants Grace and Greenfield). Royal Insurance Company (Royal), GM's product liability insurer, was also named as a defendant.

Plaintiffs' complaint sought damages for the loss of tort actions against GM. Specifically, plaintiffs alleged that they had lost their opportunity to bring and prove product liability claims against GM because of defendants' concealment of information regarding the alleged fuel system defect. In support of this theory, plaintiffs set forth six legal theories: fraudulent concealment, tortious interference with prospective civil litigation, fraud/deceit/misrepresentation, wanton and wilful misconduct, civil conspiracy, and violation of the Michigan Consumer Protection Act, MCL 415.901 *et seq*.; MSA 19.418 *et seq*.

Ultimately, the circuit court dismissed each of plaintiffs' claims pursuant to MCR 2.116(C)(8). The court concluded that, no matter how plaintiffs chose to label their claims, the gravamen of the complaint was a products liability cause of action and that plaintiffs' failure to timely pursue this cause of action barred counts I through IV. Regarding count V, the court held that plaintiffs failed to set forth a valid claim of conspiracy, because GM could not conspire with its own employees and agents. The court also dismissed Count VI, finding that plaintiffs' allegations and requested damages were not within the express or implied intent of the Michigan Consumers Protection Act. Plaintiffs filed motions for reconsideration and for leave to amend their complaint, both of which were denied. This appeal followed.

II

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Mallard v Hoffinger Industries*, 222 Mich App 137, 139-140; 564 NW2d 74 (1997). This Court reviews de novo the grant of summary disposition, and reviews the record to determine whether the moving party is entitled to judgment as a

matter of law. *Garvelink v The Detroit News*, 206 Mich App 604, 607; 522 NW2d 883 (1994). When considering a motion pursuant to MCR 2.116(C)(8), therefore, we must determine whether the plaintiff's pleadings allege a prima facie case. *Garvelink, supra* at 607.

III

Plaintiffs argue that the circuit court recharacterized Counts I, II, and III[1] as product liability claims, and thus erred in determining that these tort claims were barred by the applicable statute of limitations. We disagree.

A

In Count I (fraudulent concealment) plaintiffs alleged that all of the defendants concealed information which was required by law to be disclosed in order to prevent plaintiffs from learning of the allegedly defective fuel system and any cause of action based on the defect. Plaintiffs further alleged that as a result of this concealment plaintiffs failed to learn of the existence of a cause of action and suffered the loss of the opportunity to prove their claims against GM. In Count III (fraud/deceit/misrepresentation), plaintiffs alleged that defendants represented to the public that the vehicles in which the injuries occurred and their fuel systems were safe and met all applicable Federal Motor Vehicle Safety Standards, that there was no defect in the fuel systems, and that all information about the fuel systems had been provided in other civil actions. Plaintiffs further alleged that these representations were false and known to be false at the time they were made, and that these false representations were made with the intent that plaintiffs would rely on them. Plaintiffs alleged that as a result of their reliance on defendants' false representations, plaintiffs did not learn of their potential claims against GM and that they suffered the loss of their opportunity to prove these claims against GM.[2]

On appeal, plaintiffs maintain that their complaint sufficiently pleads a viable cause of action for the loss of their ability to bring a products liability cause of action. We disagree. Where, as here, a product is the instrumentality of death, the fact that the product may have been defective has been manifested as a matter of law. *Reiterman v Westinghouse, Inc*, 106 Mich App 698, 704-705; 308 NW2d 612 (1981). Further, "[o]nce a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993). Accordingly, on the dates of each vehicular accident involving defendants' trucks, plaintiffs were, as a matter of law, aware that they had a possible cause of action against defendant GM.

Armed with the knowledge that a possible products liability action existed, plaintiffs had a duty to investigate their potential claims. *Reiterman, supra* at 705; *Lemson v General Motors Corp*, 66 Mich App 94, 98; 238 NW2d 414 (1975). In *Lemson*, the plaintiff alleged that the defendants concealed material facts of a defect in a 1962 Chevrolet Corvair and deliberately assured the public that the vehicle was safe. In holding that the plaintiff's claim was barred by the applicable statute of limitations, this Court emphasized the difference between the defendants' alleged concealment of facts which would support a products liability cause of action, and those which would suggest that such a cause of action existed. *Id*. at 98. The Court further noted that the plaintiff had not alleged any facts

showing an effort to investigate the cause of his injuries or that the defendants had hindered any such investigation. *Id*.

Likewise, plaintiffs in the present case failed to allege any facts that would demonstrate an effort to investigate their possible causes of action against GM, or an attempt by the defendants to hinder any such investigation. Plaintiffs' failure in this regard is fatal to their claim.[3]

B

In count II, plaintiffs alleged that defendants were liable for tortious interference with prospective civil litigation. This count is essentially a claim of spoliation, the intentional destruction, mutilation or alteration of evidence in order to interfere with one's prospective or actual civil action against another, either against the destroyer of the evidence or a third party. See generally *Annotation: Intentional Spoliation of evidence, interfering with prospective civil action, as actionable*, 70 ALR4th 984. This tort has not been recognized in Michigan. *Panich v Iron Wood Products Corp*, 179 Mich App 136, 143; 445 NW2d 795 (1989). Furthermore, we note that plaintiffs seek to recover for defendants' alleged interference with time-barred claims that had not been pursued. The circuit court properly dismissed this claim.

IV

In Count VI, plaintiffs brought a claim under the Michigan Consumer Protection Act, MCL 445.901 *et seq*; MSA 19.418 *et seq*. The Act prohibits unfair, unconscionable or deceptive methods, acts, or practices in the conduct of trade or commerce. *Nelson v Ho*, 222 Mich App 74, 77; 564 NW2d 482 (1997). "Trade or commerce" is broadly defined:

> "Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. [MCL 445.902(d); MSA 19.418(2)(d).]

The Act was enacted to provide an enlarged remedy for consumers who are "mulcted" by deceptive business practices, *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 417; 415 NW2d 206 (1987), and must be liberally construed to achieve its intended goals. *Smith v Globe Life Ins Co*, 223 Mich App 264, 286; 565 NW2d 877 (1997). Nonetheless, in the present case, plaintiffs' claims against defendant arose not in connection with a consumer transaction, but rather, in the context of potential litigation resulting from vehicular crashes. The circuit court correctly determined that plaintiffs' allegations "are not within the express or implied intent of the Act." Summary disposition was therefore appropriate.

V

We also conclude that the court properly dismissed plaintiffs' conspiracy claim. The complaint alleged that all of the individual defendants conspired with each other to commit counts I through III

(fraudulent concealment, tortious interference with prospective civil litigation, and fraud). This count further alleged that defendants GM and Royal conspired to commit these same torts. The circuit court determined that this claim was barred by the intra corporate conspiracy doctrine.

In affirming the court's dismissal of the conspiracy claim, we need not address the propriety of the trial court's reliance on the intra corporate conspiracy doctrine. It is well settled that "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable, tort." *Early Detection Center, PC, v New York Life Ins Co*, 157 Mich App 618, 623; 403 NW2d 830 (1986). In light of our determination that plaintiffs' tort claims were properly dismissed, we find that plaintiffs' conspiracy claim is insufficient on its face. *Id;* MCR 2.116(C)(8).

VI

Mindful that we must view the allegations in the complaint in a light most favorable to plaintiffs, we find that, under the facts presented here, plaintiffs have failed to state a claim on which relief can be granted. The circuit court did not err in dismissing plaintiffs' complaint in its entirety.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] On appeal, plaintiffs do not challenge the circuit court's dismissal of count IV (wanton and wilful misconduct). Accordingly, we affirm the circuit court's order.

[2] It is undisputed that each of the individual plaintiff's products liability claims are barred by the three-year statute of limitations. MCL 600.5805(9); MSA 27A.5805(9).

[3] On appeal, plaintiffs argue that the circuit court should have granted their motion to amend the complaint to remedy this defect. We disagree. The proposed amendment does not allege specific facts supporting the conclusory statement that plaintiffs "made reasonable efforts, under the circumstances, to determine the legally responsible cause of death of their decedent of their injuries," and thus would have been futile. *Rathbun v Starr Commonwealth For Boys*, 145 Mich App 303, 316; 377 NW2d 812 (1985).