

STATE OF MICHIGAN
COURT OF APPEALS

COCA-COLA ENTERPRISES, INC., and
MICHIGAN CONSULTING &
ENVIRONMENTAL, INC., f/k/a
UNDERGROUND TANK ENVIRONMENTAL
GROUP, INC.,

Plaintiffs-Appellants,

v

DEPARTMENT OF ENVIRONMENTAL
QUALITY, CHIEF OF THE UNDERGROUND
STORAGE TANK DIVISION, and MUSTFA
FUND ADMINISTRATOR,

Defendants-Appellees.

UNPUBLISHED
August 1, 2000

No. 214315
Wayne Circuit Court
LC No. 97-731550-CZ

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiffs filed claims for reimbursement for cleanup costs associated with underground storage tanks under the Michigan Underground Storage Tank Financial Assurance (MUSTFA) section of the Natural Resources and Environmental Protection Act, MCL 324.21501 *et seq.*; MSA 13A.21501 *et seq.* After defendants denied plaintiffs' claims for reimbursement, plaintiffs filed appeals with MUSTFA's board. However, because plaintiffs did not timely file their administrative appeals within the statutory fourteen-day period, MCL 324.21521(1); MSA 13A.21521(1), the claims were denied. Plaintiffs thereafter commenced the present action in circuit court, alleging multiple different theories based upon plaintiffs' alleged arbitrary application and enforcement of the fourteen-day period for filing administrative appeals. Defendants subsequently moved for summary disposition. The trial court granted the motion, concluding that defendants had properly applied the fourteen-day rule and that plaintiffs were on notice that their claims were required to be filed within that period of time. Plaintiffs now appeal as of right. We reverse and remand.

Initially, we reject defendants' challenge to plaintiff Michigan Consulting's standing to act as a party in this case. Although MCL 324.21521(1); MSA 13A.21521(1) states that appeals under the rule may be filed by the "owner or operator" who submitted the claim, MCL 324.21502(q) and (r); MSA 13A.21502(q) and (r) both define the terms "operator" and "owner" as including "a person to whom an approved claim has been assigned or transferred." Thus, an appeal under MCL 324.21521(1); MSA 13A.21521(1) may be brought by an environmental consultant if the property owner or operator assigned or transferred the claim to the consultant. Thus, defendants have not shown that Michigan Consulting was prohibited from filing an appeal.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Here, because the trial court looked beyond the pleadings when granting defendants' motion, we review the trial court's decision under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999); *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiffs do not dispute that they failed to comply with the fourteen-day period prescribed in MCL 324.21521(1); MSA 13A.21521(1). However, they contend that defendants had a long-standing practice of not enforcing the fourteen-day rule, and that they relied on this practice of accepting late appeals.

In *Marshall v D J Jacobetti Veterans Facility (After Remand)*, 447 Mich 544, 548; 526 NW2d 585 (1994), our Supreme Court held that, where an agency had a chaotic history of enforcing its policies, it had "the authority to end this chaos by giving proper notice of its intention to begin adhering to the statutory deadlines." Here, plaintiffs produced evidence showing, as a factual matter, that defendants had not enforced the fourteen-day rule in the past. Despite this past practice, the trial court concluded that an August 10, 1995, letter sent by defendants to affected parties provided fair warning that the fourteen-day deadline would be applied prospectively to plaintiffs' claims.

We disagree with the trial court's determination that the August 10, 1995, letter provided sufficient notice to apprise parties of a change in defendants' past policy regarding enforcement of the fourteen-day rule. While the letter refers to the statutory fourteen-day time period for filing an administrative appeal, nothing in the letter purports to advise affected parties of any change in past practice or policy regarding enforcement of that rule. Thus, the letter does not constitute fair notice of an intention to begin adhering to the fourteen-day deadline, contrary to past practice.

Defendants also contend that fair notice of its intent to begin enforcing the fourteen-day rule was supplied via a telephone information line and Internet site. However, because defendants failed to disclose the content of those messages, we are unable to determine whether they provided fair notice of the change in policy.

Thus, in light of the foregoing, we conclude that defendants failed to establish that there was no genuine issue of material fact on the issue of fair notice of a change in policy regarding enforcement of the fourteen-day rule. Therefore, the trial court erred in granting defendants' motion for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh