

STATE OF MICHIGAN
COURT OF APPEALS

HICKS FAMILY LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

1ST NATIONAL BANK OF HOWELL,

Defendant-Appellee.

UNPUBLISHED

October 3, 2006

No. 268400

Livingston Circuit Court

LC No. 04-021141-CE

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(7), (8), and (10). We affirm in part, reverse in part, and remand for further proceedings.

I

This action arises from the environmental contamination of property located at 4030 Grand River in Howell, Michigan. Before 1983, the property was owned by G&G Paint Developers ("G&G"), subject to a mortgage held by defendant. In 1983, G&G defaulted on the mortgage and defendant foreclosed on the property. Defendant subsequently sold the property to J.D. Hicks and Daphne Hicks in March 1983. J.D. Hicks thereafter died, and Daphne Hicks conveyed her interest in the property to her revocable living trust, which subsequently conveyed the property to plaintiff on December 16, 1996. When defendant acquired the property, it was contaminated with buried drums of paint and paint thinners, presumably left by G&G. The purchase agreement between defendant and the Hickses included the following provision:

Sellers agree to have all equipment inside and out, all stock, debris and residue removed from premises at time of closing, in compliance of E.P.A. Rules & Regulations.

Defendant hired environmental consultants and performed environmental cleanup tasks between 1983 and 1997. In 1997, defendant unsuccessfully applied to the Department of Environmental Quality (DEQ) to have the property "delisted" from a state-maintained list of contaminated sites. Defendant did not resume cleanup efforts after the DEQ rejected its petition.

In 2004, plaintiff began to implement plans to develop the property. Plaintiff discovered that several drums containing hazardous substances were still buried on the property. Plaintiff also discovered that the groundwater and soil remained contaminated. In December 2004, plaintiff brought this action against defendant to recover the costs it incurred in decontaminating the property. Plaintiff asserted claims for recovery of response costs and contribution under Michigan's Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101 *et seq.*, as well as common-law claims for public nuisance, private nuisance, negligent performance of a contract, breach of contract, trespass, and silent fraud.

After discovery was completed, defendant filed two motions for summary disposition, seeking dismissal of plaintiff's claims under MCR 2.116(C)(7), (8), and (10). In the meanwhile, however, plaintiff moved to compel further discovery and to amend the court's scheduling order so that it could continue the deposition of Joseph Sheahan, the chief environmental consultant for defendant's cleanup operations. Plaintiff had been unable to complete Sheahan's deposition within the time period that was scheduled, and underscored the importance of his deposition testimony to establishing a genuine issue of material fact with respect to defendant's liability under the NREPA. Despite defendant's objections, the trial court required Sheahan to appear before defendant's summary disposition motions were due to be heard on November 10, 2005, so that plaintiff could complete his deposition. However, the court required plaintiff to file responsive briefs to defendant's motions by November 3, 2005, before Sheahan's deposition could be rescheduled. Plaintiff filed a supplemental brief on November 7, 2005, and indicated that a transcript of Sheahan's rescheduled deposition could not be obtained before the November 10, 2005, summary disposition hearing.

At the summary disposition hearing on November 10, without objection from defendant, plaintiff was permitted to verbally summarize Sheahan's deposition testimony. Additionally, the trial court gave defendant an opportunity to comment on the accuracy of plaintiff's representations of Sheahan's testimony. Defendant did not contest the accuracy of plaintiff's summary, but instead argued that the testimony was not relevant to establishing a question of fact regarding its liability under the NREPA. The trial court adopted defendant's arguments and granted summary disposition in favor of defendant on all of plaintiff's statutory and common-law claims.

II

We review *de novo* a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002).

Summary disposition is available under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. In determining whether a party is entitled to summary disposition under MCR 2.116(C)(7), the court must consider the plaintiff's well-pleaded factual allegations, as well as any affidavits or other documentary evidence submitted by the parties and construe them in the plaintiff's favor. *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994); *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002). If there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision whether a plaintiff's claim is barred is a question of law. *Id.*

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The reviewing Court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4).

III

Plaintiff first challenges the trial court's dismissal of Count I of its complaint, in which plaintiff sought recovery of response costs under the NREPA. As previously indicated, the trial court granted summary disposition for the reasons argued by defendant. Although the record discloses that defendant argued, and the trial court apparently agreed, that there was no basis for imposing liability under MCL 324.20126(1)(a) (owner or operator of a facility that causes a release or threat of release), neither defendant nor the trial court addressed plaintiff's claims that liability could be imposed under § 20126(1)(b) (owner or operator of a facility at the time of disposal) or § 20126(1)(d) (a person who arranges for the disposal of a hazardous substance). Although we are not suggesting anything on the merits of plaintiff's claims, we remand for further proceedings concerning whether defendant may be liable under §§ 20126(1)(b) or (d).

Plaintiff's Count I arises under part 201 of the NREPA, which governs remediation. MCL 324.20101 *et seq.* MCL 324.20126(1) sets out different classes of persons who may be liable for remediation costs under part 201. Count I of plaintiff's complaint alleged, in part, that defendant was liable for remediation costs as "[t]he owner or operator of a facility if the owner or operator is responsible for an activity causing a release or threat of release," apparently referring to § 20126(1)(a). In its motion for summary disposition, defendant argued that it was not liable under this statutory section because it was an owner only briefly in 1983, after the environmental degradation occurred. By the time defendant filed its renewed motion for summary disposition, plaintiff abandoned its reliance on § 20126(1)(a). Instead, relying on evidence that defendant was involved in conducting cleanup operations on the property, and evidence that a contractor hired by defendant ruptured a barrel during the cleanup operations, causing hazardous substances to contaminate the property, plaintiff argued that liability could be imposed on defendant pursuant to §§ 20126(1)(b) or (d), as

[t]he owner or operator of a facility at the time of disposal of a hazardous substance if the owner or operator is responsible for an activity causing a release or threat of release. [Section 20126(1)(b).]

or

[a] person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of

a hazardous substance owned or possessed by the person, by any other person, at a facility owned or operated by another person and containing the hazardous substance. [Section 20126(1)(d).]

Defendant never addressed the substance of these provisions, but instead argued that plaintiff failed to plead a claim for liability under §§ 20126(1)(b) and (d) in its complaint. Defendant also argued that the ruptured barrel incident was irrelevant because it was not an owner of the property when this incident occurred. Similarly, on appeal, defendant does not address the merits of §§ 20126(1)(b) and (d), but repeats its argument that plaintiff's pleadings did not allege a claim for liability under §§ 20126(1)(b) and (d). Defendant maintains that it is therefore entitled to summary disposition under MCR 2.116(C)(8) with respect to any claim for liability under §§ 20126(1)(b) and (d).

Initially, we are not persuaded that plaintiff's complaint failed to allege a claim for liability under §§ 20126(1)(b) and (d). MCR 2.111(B)(1) provides that a complaint must include

[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]

Plaintiff alleged in its complaint that defendant was "liable as an owner and/or operator of a facility for an activity causing a release or threat of release." Although this language closely parallels the language of § 20126(1)(a), the substance of the allegations in Count I is that defendant was liable because it was responsible for an activity that caused a release of a hazardous substance. Plaintiff also alleged that defendant "assumed the duty to clean up the Property including removal of buried drums by contract and applicable environmental statutes," and breached that duty. These allegations should have alerted defendant that plaintiff was seeking to impose liability under part 201 of the NREPA for acts and omissions during the cleanup operation. Although plaintiff did not expressly cite §§ 20126(1)(b) and (d), it was not required to cite a specific statutory provision in order to state a claim. *Rymal v Baergen*, 262 Mich App 274, 301 n 6; 686 NW2d 241 (2004).

In any event, to the extent that plaintiff's complaint failed to sufficiently allege a claim for liability under §§ 20126(1)(b) and (d), the trial court should have permitted plaintiff to amend its complaint to allege defendant's liability under these subsections. MCR 2.116(I)(5) provides that when summary disposition is granted under MCR 2.116(C)(8), (9), or (10), "the court *shall* give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." The use of the term "shall" indicates that amendment is generally a matter of right, rather than grace. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Accordingly, "[w]hen a trial court grants summary disposition pursuant to MCR 2.116(C)(8), or (C)(10), the opportunity for the nonprevailing party to amend its pleadings pursuant to MCR 2.118 should be freely granted. . . ." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).

On appeal, defendant argues that leave to amend was not justified because any amendment would be futile. An amendment is futile if it merely restates allegations already

made or adds new allegations that fail to state a claim. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001). In this case, however, defendant's argument is not based on a substantive analysis of §§ 20126(1)(b) and (d). Rather, defendant argues that the evidence on which plaintiff relies to support a claim for liability under these subsections is inadmissible.

First, defendant argues that plaintiff may not rely on Sheahan's deposition testimony because it is not part of the lower court record. MCR 7.210(A)(1) provides that this Court's review is limited to the original record, which consists of "the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." Enlargement of the record on appeal is generally not permitted. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

In this case, we disagree with defendant's contention that plaintiff may not rely on Sheahan's deposition testimony. Sheahan's deposition was originally conducted before the discovery deadline, but could not be completed because of a scheduling conflict. The record discloses that the trial court permitted plaintiff to complete Sheahan's deposition after the close of discovery, before the summary disposition hearing. We find no basis for concluding that plaintiff would not be permitted to rely on Sheahan's deposition testimony to argue that summary disposition was not warranted. On the contrary, the trial court's order allowing Sheahan's deposition to be rescheduled expressly provided that if Sheahan could not be redeposed before November 9, 2005, the summary disposition hearing scheduled for November 10 would be rescheduled. Although plaintiff did not submit a transcript of Sheahan's deposition, this was because the deposition was held just days before the summary disposition hearing and a transcript could not be obtained before the hearing. Additionally, the trial court required plaintiff to file its response to defendant's motion before the rescheduled deposition was even conducted. More significantly, the trial court permitted plaintiff to verbally summarize Sheahan's deposition testimony at the summary disposition hearing, without objection by defendant, and gave defendant an opportunity to challenge the accuracy of plaintiff's representations. Under these circumstances, Sheahan's deposition testimony properly may be considered part of the record and plaintiff was not precluded from relying on that testimony.

Defendant also argues that plaintiff's documentary evidence of the barrel rupture is inadmissible hearsay. A party opposing summary disposition under MCR 2.116(C)(10) must establish a question of fact by substantively admissible evidence. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 598; 593 NW2d 565 (1999). In this case, however, defendant never objected to plaintiff's documentary evidence. Defendant's claim that the evidence is inadmissible hearsay is raised for the first time on appeal. Thus, this claim is unpreserved and we consider it only to determine if defendant can establish a plain error affecting its substantial rights. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *Barnett v Hidalgo*, 268 Mich App 157, 163-164; 706 NW2d 869 (2005). Hearsay is not admissible except as provided by the rules of evidence. MRE 802.

Admissions made by a party-opponent are excluded from the definition of hearsay. MRE 801(d)(2); *Barnett, supra* at 164. This includes "a statement by the party's agent or servant

concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” MRE 801(d)(2)(D). A memorandum prepared by Barbara Martin, to defendant’s board of directors, was written in Martin’s capacity as defendant’s vice president and relates to her responsibilities for managing the cleanup. Thus, it qualifies as an admission by a party-opponent under MRE 801(d)(2)(D).

The admissibility and purpose of a Swanson Engineering letter are not as clear. It appears, however, that this letter could qualify for admission as a recorded recollection, MRE 803(5), a record of a regularly conducted business activity, MRE 803(6), or, if the author is unavailable to testify, as a statement against interest, MRE 804(b)(3). Because defendant did not contest the admissibility of this document below, no record was developed regarding its admissibility under these or some other potentially applicable rule. In this circumstance, defendant has not demonstrated that consideration of the document would amount to plain error.

Defendant has not demonstrated any procedural obstacles to the consideration of its liability under §§ 20126(1)(b) and (d). Defendant did not address the merits of any claim for liability under these subsections in its motion for summary disposition, nor were these subsections considered by the trial court, which merely granted summary disposition for the reasons argued by defendant. It is apparent that the short time period between Sheahan’s deposition and the summary disposition hearing contributed to this situation, because it prevented the parties from fully presenting their legal theories, and from developing a complete factual record. Under the circumstances, it would be premature to consider the issue of defendant’s liability under §§ 20126(1)(b) and (d). Instead, plaintiff should be given an opportunity to amend its complaint to more fully identify the factual bases for its claims that defendant may be liable under §§ 20126(1)(b) and (d), and defendant should be given the opportunity to move for summary disposition based on the amended pleadings and appropriate briefing on the merits. Again, although we are not suggesting anything on the merits of plaintiff’s claims, we reverse the dismissal of Count I of plaintiff’s complaint and remand for further proceedings.

IV

Plaintiff next argues that the trial court erred in dismissing Count II of its complaint, involving a claim for contribution under the NREPA. This issue involves a question of statutory interpretation, which we review de novo. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004). Our primary goal in statutory construction is to discern and give effect to the Legislature’s intent. *Id.* at 548-549. We first examine the specific language of the statute, because the Legislature is presumed to have intended the meaning it has plainly expressed. *Dana v American Youth Foundation*, 257 Mich App 208, 212; 668 NW2d 174 (2003). If the language is clear and unambiguous, judicial construction is neither required nor permitted, and the statute must be enforced as written. *Shinholster, supra* at 549; *Dana, supra* at 212.

Defendant argues that the contribution provision in the NREPA should be construed in a manner similar to the United States Supreme Court’s construction of an analogous provision in the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 USC 9601 *et seq.* Courts interpreting the NREPA often look to the CERCLA for guidance, but when the language of the NREPA reflects an intent by the Legislature to

impose a different provision, the plain language of the NREPA prevails. See *Howell Twp v Rooto Corp*, 258 Mich App 470, 488-489; 670 NW2d 713 (2003).

MCL 324.20129(3) provides:

A person may seek contribution from any other person who is liable under section 20126 during or following a civil action brought under this part. This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action by the state under this part. . . .

The analogous CERCLA provision, 42 USC 9613(f)(1), provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. . . . Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

In *Cooper Industries, Inc v Aviall Services, Inc*, 543 US 157; 125 S Ct 577; 160 L Ed 2d 548 (2004), the plaintiff discovered that property it owned was contaminated, and that the contamination was partly caused by the defendant, its predecessor in title. The plaintiff there assumed responsibility for environmental cleanup costs, although neither the Texas Natural Resource Conservation Commission nor the EPA took judicial or administrative measures to compel cleanup. *Id.* at 164. The plaintiff brought a claim for contribution against the defendant under § 113(f)(1). *Id.* The United States Supreme Court held that the CERCLA's contribution provision did not authorize the plaintiff's action, holding:

The first sentence, the enabling clause that establishes the right of contribution, provides: "Any person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under 9607(a) of this title," 42 USC § 9613(f)(1) (emphasis added). The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, "during or following" a specified civil action. [*Id.* at 165-166.]

Defendant argues that this same reasoning applies to § 20129(3). Plaintiff disagrees, noting that the language in the NREPA, "This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action by the state under this part," is different from the language in the CERCLA, "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."

In *Cooper, supra* at 166-167, the United States Supreme Court explained that the last sentence of the CERCLA provision, § 113(f)(1), did not compel a different result:

The last sentence of § 113(f)(1), the saving clause, does not change our conclusion. That sentence provides: “Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.” . . . The sole function of the sentence is to clarify that § 113(f)(1) does nothing to “diminish” any cause(s) of action for contribution that may exist independently of § 113(f)(1). In other words, the sentence rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP. The sentence, however, does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought “during or following” a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside of § 113(f)(1).

Comparing the two saving clauses side by side, the language of the NREPA does not justify a different interpretation. The relevant provisions provide:

This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action *by the state under this part*. . . . [Section 20129(3) of the NREPA.]

Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action *under section 9606 of this title or section 9607 of this title*. [Section 113(f) of the CERCLA.]

The fact that the CERCLA refers to two provisions of the federal act, whereas NREPA refers generally to part 201, is immaterial to the interpretation of these provisions. The sentence in the CERCLA preserves other rights of contribution that might arise when there is no civil action under §§ 9606 and 9607; the sentence in the NREPA preserves other rights of contribution that might arise when there is no civil action under part 201. There is no material difference in the two saving clauses, and the United States Supreme Court’s construction of § 113(f)(1) is consistent with the basic principle that unambiguous statutory language should be enforced as written. *Shinholster, supra* at 549; *Dana, supra* at 212. Accordingly, we conclude that § 20129(3) does not permit a party who is not a defendant in an action under part 201 to bring an action for contribution. The trial court properly granted summary disposition in favor of defendant with respect to Count II.

V

Plaintiff next argues that the trial court erred in determining that each of its common-law claims were barred by the applicable statute of limitations. Plaintiff’s claims of trespass, private and public nuisance, and negligent performance of a contract are subject to the general three-year limitations period for actions to recover damages to property. MCL 600.5805(10); *Traver Lakes Community Maintenance Ass’n v Douglas Co*, 224 Mich App 335, 340, 346; 568 NW2d 847 (1997) (negligence and trespass); *Davis v Chrysler Corp*, 151 Mich App 463, 473 n 10; 391 NW2d 376 (1986) (nuisance). Plaintiff’s breach of contract claims are subject to a six-year limitations period. MCL 600.5807(8); *Steward v Panek*, 251 Mich App 546, 551; 652 NW2d

232 (2002). Actions for fraud are subject to the six-year limitations period prescribed in MCL 600.5813. *Badon v Gen Motors Corp*, 188 Mich App 430, 435; 470 NW2d 436 (1991).

Generally, the limitation period begins to accrue “at the time the wrong upon which the claim is based was done regardless of the time when damage results.” MCL 600.5827; *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917 (2001). Defendant has not had any involvement with the property since 1997. Accordingly, any acts or omissions by defendant that give rise to a legal action occurred more than six years before plaintiff filed its complaint in December 2004, beyond the applicable limitations period for each of plaintiff’s claims. Plaintiff argues, however, that its claims are not time-barred by virtue of the discovery rule, the continuing-wrongful-acts doctrine, and the fraudulent concealment statute, MCL 600.5855.

Plaintiff argues that the discovery rule should be applied to its claims for negligence, nuisance, and trespass, because it had no way of knowing about the remaining barrels before it began its own excavation work in 2004. The discovery rule may be applied to avoid unjust results that could occur when a reasonable and diligent plaintiff cannot bring a claim within the applicable limitations period either because of the latent nature of the injury or the inability of the plaintiff to learn of or identify the causal connection between the injury and the defendant’s breach of duty. *Moll v Abbott Laboratories*, 444 Mich 1, 16; 506 NW2d 816 (1993); *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 301; 701 NW2d 756 (2005). Where the discovery rule is appropriate, the plaintiff’s claim accrues when the plaintiff discovers or, through the exercise of reasonable diligence should discover, the injury and the causal connection between the injury and the defendant’s breach of duty. *Id.* at 301-302. In the absence of disputed facts, the question whether a plaintiff’s action is barred by the statute of limitations is a question of law for the court. *Moll, supra* at 26.

Case law emphasizes that the discovery rule applies only in “appropriate” circumstances. *Trentadue, supra* at 301. See also *Moll, supra* at 16, and *Chase v Sabin*, 445 Mich 190, 196; 516 NW2d 60 (1994). The discovery rule is generally applied where there is some verifiable basis for the plaintiff’s inability to bring the claim within the statutorily proscribed limitation period. *Nelson v Ho*, 222 Mich App 74, 86; 564 NW2d 482 (1997). In *Lemmerman v Fealk*, 449 Mich 56, 66-67; 534 NW2d 695 (1995), our Supreme Court summarized the situations in which application of the discovery rule has been deemed necessary to avoid unjust results:

We have found such situations present, e.g., where there has been a negligence action brought against a hospital and its agent before statutory characterization of such negligence as medical malpractice, . . . in pharmaceutical products liability actions, . . . and in asbestos-related products liability actions In each of those cases, we have weighed the benefit of application of the discovery rule to the plaintiff against the harm this exception would visit on the defendant and the important policies underpinning the applicable statute of limitations. Balancing is facilitated where there is objective evidence of injury and causal connection guarding against the danger of stale claims and a verifiable basis for the plaintiffs’ inability to bring their claims within the statutorily proscribed limitation period. [Citations omitted.]

It is not appropriate to apply the discovery rule in this case, because the evidence shows that plaintiff did not exercise reasonable diligence to discover its claims. Plaintiff was aware of the environmental history when it acquired title to the property on December 16, 1996, and there is no evidence that plaintiff monitored defendant's progress in the cleanup operation. Plaintiff argues that it could not have known about the buried barrels before it began excavation work in 2004, but plaintiff's complaint is also based on allegations that defendant failed to decontaminate the soil and water, and otherwise failed to comply with state and federal environmental requirements. These were matters that plaintiff could have known about in 1997 if it exercised reasonable diligence in monitoring defendant's performance of the cleanup operation. Plaintiff knew, or should have known, that the DEQ rejected defendant's application to have the property delisted as a contaminated site. Plaintiff had ample cause to know by 1997 whether defendant was performing a satisfactory cleanup of the property. Even if it did not know the particular facts concerning the buried drums or the ruptured barrel, it had sufficient grounds for knowing no later than 1997 that defendant may not have been adequately fulfilling its alleged cleanup obligations. In the absence of evidence that plaintiff made reasonable efforts to ascertain the condition of the property, the trial court correctly determined that it was not appropriate to apply the discovery rule in this case.

Plaintiff also argues that the continuing-wrongful-acts doctrine precludes summary disposition for its nuisance and trespass claims. This doctrine recognizes that when a defendant's wrongful acts are of a continuing nature, the period of limitation does not run until the wrong is abated. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 246; 673 NW2d 805 (2003). But a plaintiff invoking the doctrine must establish a continuing wrong by showing continuing tortious *acts*, not merely continual harmful effects from a completed act. *Horvath v Delida*, 213 Mich App 620, 627; 540 NW2d 760 (1995). In *Horvath, supra* at 628, this Court held that the doctrine did not apply where the defendant's past wrongful act of dredging a lake caused continual flooding over several years, because the plaintiffs had "only established aggravated ill effects from a single tortious act" that occurred outside the limitations period, not continuing wrongful acts.

In this case, plaintiff argues that the continued presence of the barrels on the property constitutes a continuing wrongful act. However, the continued presence is only a continuing *effect* of defendant's past failure to remove them. Accordingly, to the extent the continuing-wrongful-acts doctrine remains viable, it is not applicable in this case.

Finally, plaintiff argues that defendant fraudulently concealed its causes of action for silent fraud and breach of contract. MCL 600.5855 provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Fraudulent concealment occurs when a defendant uses an artifice with the intent to prevent inquiry or avoid investigation, and to mislead or hinder discovery of information that would

provide notice of a cause of action. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 642; 692 NW2d 398 (2004). The plaintiff must show that the defendant concealed the existence of a claim or the identity of the actor. *Id.* at 643.

Plaintiff suggests that Sheahan, as defendant's agent, fraudulently concealed the true condition of the property when he informed J.D. Hicks that defendant needed to use monitoring wells on the property to check for bacterial contamination, when, in fact, defendant needed them to monitor non-organic contamination. Plaintiff's documentary evidence consists of Sheahan's typed notes of a telephone call with defense counsel on October 7, 1993. Sheahan noted that Hicks should be informed that the wells were needed to monitor bacteria, and he commented "Doing nothing may arouse Hicks' suspicion." On October 13, 1993, Sheahan wrote to Hicks to inform him that the wells should be kept open in case the bacterial problem reappeared.

Construing these documents in a light most favorable to plaintiff, they do not establish fraudulent concealment. Sheahan's alleged deception in 1993 does not explain or excuse plaintiff's failure to check defendant's progress after it acquired title in 1996. Plaintiff knew, or should have known, that defendant failed to get the property delisted in 1997, five years after Sheahan's alleged concealment of the action. This event should have placed plaintiff on notice that the cleanup efforts were not satisfactory.

In sum, the trial court correctly determined that plaintiff's common-law claims were barred by the applicable statutes of limitation. We affirm the trial court's dismissal of these claims under MCR 2.116(C)(7). In light of our decision, it is unnecessary to consider whether summary disposition of plaintiff's common-law claims was also appropriate under MCR 2.116(C)(10).

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio