STATE OF MICHIGAN

COURT OF APPEALS

RAUL SILVA, PENNY SILVA, STEVEN BIEHL, GRANT C COLTHORP, DOLORES COLTHORP, DENISE M EDGAR, HEATHER DAVIS, and TERI SUE KNIFFIN,

Plaintiff-Appellants,

v

CH2M HILL INC,

Defendant/Cross-Plaintiff-Appellee,

NATIONAL ENVIRONMENTAL SERVICES CORPORATION,

Defendant/Cross-Defendant-Appellee,

CORDES INC, CONTRACTOR'S TRUCKING INC, RON WONSEY d/b/a WONSEY'S TREE SERVICE, FRED A BEST d/b/a FRED A BEST EXCAVATING, CROSSROADS EXCAVATING LLC, DAG EXCAVATING LLC, CHIPPEWA CONTRACTING INC, DWC DIVERSIFIED INC, L&D CAREY & SONS TRUCKING COMPANY, WESLEY KAHKONEN d/b/a WES KAHKONEN TRUCKING, and NATIONAL SALVAGE & SERVICE CORP,

Defendants-Appellees,

SACAL ENVIRONMENTAL & MANAGEMENT CORP,

Defendant/Cross-Defendant,

ENVIRONMENTAL QUALITY & MANAGEMENT INC, LOOMIS TRANSPORT INC, HOWES & HOWES TRUCKING INC, GUS

UNPUBLISHED
October 15, 2013

No. 307699
Gratiot Circuit Court
LC No. 10-011494-CE

MATONEK INC, J&K TRANSPORT LLC, KIM BEBOW, TIMOTHY STRUBLE, KAT EXCAVATING, and JOHN MOGG d/b/a JOHN MOGG TRUCKING LLC,

Not Participating.

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

This case arises from property damage due to chemical contamination. Plaintiffs Raul Silva, Penny Silva, Steven Biehl, Grant C. Colthorp, Dolores Colthorp, Denise M. Edgar, Heather Davis, and Teri Sue Kniffin (collectively, the property owners) appeal as of right the trial court's grants of summary disposition in favor of defendants CH2M Hill, Inc. and National Environmental Services Corporation (collectively, the contractors) and defendants Cordes, Inc., Contractor's Trucking, Inc., Ron Wonsey, Fred A. Best, Crossroads Excavating, LLC, DAG Excavating, LLC, Chippewa Contracting, Inc., DWC Diversified, Inc., L&D Carey & Sons Trucking Company, Wesley Kahkonen, Environmental Quality & Management, Inc., Loomis Transport, Inc., Howes & Howes Trucking, Inc., J & K Transport, LLC, KAT Excavating, John Mogg, LLC, National Salvage and Service Corporation, Gus Matonek, Inc., Kim Bebow, and Timothy Struble (collectively, the truckers).

The property owners allege that the contractors negligently decontaminated a site and that the truckers negligently spilled contaminated materials onto public streets near their homes, damaging their properties. The trial court granted the truckers' motion for summary disposition on the basis that the truckers are immune from suit under the Michigan No-Fault Insurance Act (the No-Fault Act).[1] It granted the contractors' motion for summary disposition on the basis that the statute of limitations barred the property owners' suit. We affirm because the trial court correctly determined that the property owners failed to plead a no-fault exception and that the statute of limitations barred their suit.

I. FACTS

A. BACKGROUND FACTS

The property owners reside in St. Louis, Michigan, where the Velsicol chemical plant was formerly located. From 2000 to 2006, the contractors segregated toxic sediments from the site and loaded them onto trucks for off-site disposal. According to the property owners, the contractors negligently operated a decontamination pad on the site, and the truckers negligently hauled the sediments and failed to prevent chemical waste from spilling onto the streets near the

[1] MCL 500.3101 *et seq.*

property owners' properties. As a result, the toxic sediments were washed onto the property owners' properties.

The Michigan Department of Environmental Quality informed the property owners that their properties were contaminated on July 28, 2008. On January 16, 2009, the plaintiffs learned that the contamination was tied to the Velsicol chemical site.

On January 28, 2010, the property owners filed a complaint against the contractors, alleging counts of nuisance and negligence. After National Environmental Services filed a notice of non-party fault, the property owners filed an amended complaint on October 14, 2010, additionally alleging that the truckers created the nuisance by negligently spilling the contaminated materials from their trucks.

B. THE TRUCKERS' MOTION FOR SUMMARY DISPOSITION

The truckers moved for summary disposition under MCR 2.116(C)(8) and (10), alleging that the property owners' claims arose from the truckers' operations of their motor vehicles and that, because the property owners had not pleaded any no-fault exceptions, they failed to state a cause of action. The property owners asserted that the chemical contamination was not an "accident" within the meaning of the No-Fault Act and that summary disposition was inappropriate because the truckers intentionally damaged their property.

The trial court granted the truckers' motions for summary disposition under MCR 2.116(C)(8) and (10). It ruled that there were no disputed questions of material fact concerning whether the truckers maintained statutory no-fault coverage or were hired for the purposes of transportation. It concluded that any of the property owners' losses arose from the truckers' operations of their trucks as motor vehicles and that the property owners had not pleaded any exceptions to the No-Fault Act. It therefore granted the truckers' motion.

C. THE CONTRACTORS' MOTION FOR SUMMARY DISPOSITION

The contractors moved for summary disposition under MCR 2.116(C)(7) and (8), alleging that a three-year statute of limitations barred the property owners' claims because they accrued more than three years before they filed suit. The property owners asserted that contractors' the removal of the contaminated sediment was an improvement to real property and, therefore, the six-year statute of limitation in MCL 600.5839 applied. The contractors responded that an environmental cleanup was not an improvement within the meaning of that statute.

The trial court determined that the contractors were remediating property, not improving it, and therefore the three-year statute of limitations applied. It granted the contractors' motion.

On October 18, 2011, the property owners filed a motion for reconsideration, asserting in part that the discovery rule in the Comprehensive Environmental Response, Compensation and Liability Act (the Environmental Response Act)[2] preempted Michigan's statute of limitations.

[2] 42 USC 9658.

The trial court denied the property owners' motion for reconsideration, ruling that the grounds in MCR 2.119(F) did not support their motion.

II. THE NO-FAULT ACT

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.[3] A party is entitled to summary disposition under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted."

A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[4] A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.[5]

B. REQUIRED COVERAGE

1. LEGAL STANDARDS

MCL 500.3135(c) abolishes tort liability that arises from the ownership, maintenance, or use of a motor vehicle as long as the owner or registrant has complied with MCL 500.3101, which requires that the owner or registrant of a motor vehicle maintain automobile insurance that includes property protection.[6] "Automobile insurance" is insurance that provides "[p]ersonal protection, property protection, and residual liability insurance for amounts in excess of the amounts required under [MCL 500.3101 *et seq*]."[7]

2. APPLYING THE STANDARDS

The property owners contend that the truckers did not maintain no-fault coverage because their insurance contracts excluded certain types of property damage. We disagree for two reasons.

First, persons involved in no-fault accidents proceed against their own insurers first, and proceed against the other person's insurers only if they do not have no-fault coverage.[8] There is

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[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[5] *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

[6] MCL 500.3101(1).

[7] MCL 500.2102(2); MCL 500.3101(2)(a).

[8] *Husted v Auto-Owners Ins Co*, 459 Mich 500, 512; 591 NW2d 642 (1999).

no evidence in the record that the property owners did not have insurance or that their policies excluded the type of damage at issue in this case, such that the truckers' respective coverages would even have a bearing on the property owners' abilities to recover.

Second, and more importantly, even if the property owners in this case had to proceed against the truckers' insurers, their policy exclusions would not void their policies. To the extent that a contract conflicts with the No-Fault Act, the contract is void.[9] But even if an exclusionary clause in an insurance policy is void, the policy continues to provide coverage through its residual liability clause—the coverage is just limited to the amounts that the No-Fault Act requires.[10] The property owners provide no law supporting their assertion that when a clause in an insured's policy is void, the insured has not complied with MCL 500.3101, and we are unable to find any. We conclude that the trial court did not err by determining that the truckers maintained no-fault insurance under MCL 500.3101.

C. INTENTIONAL DAMAGE EXCEPTION

1. LEGAL STANDARDS

The No-Fault Act does not abolish tort liability for harm that a person intentionally causes to persons or property.[11] However, "the person does not cause or suffer harm intentionally if he or she acts . . . for the purpose of averting damage to tangible property."[12]

2. APPLYING THE STANDARDS

The property owners also contend that the truckers did not accidentally damage their property and, therefore, they are not immune from suit. We disagree and conclude that the trial court properly granted summary disposition because the property owners did not plead or show that the truckers intentionally damaged their properties.

The property owners contended only that the truckers must have known that they were damaging the property since their actions were continuous and occurred frequently. However, willful or wanton conduct is not intentional harm under the No-Fault Act.[13] The No-Fault Act provides its own strict test for intentional conduct, which requires that the actor both intend to cause the act and intend that the act cause harm.[14] Because the property owners failed to plead

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[9] *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 601; 648 NW2d 591 (2002).

[10] *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 229, 234; 531 NW2d 138 (1995); *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 531; 620 NW2d 840 (2001).

[11] MCL 500.3135(3)(a); *Gray v Chrostowski*, 298 Mich App 769, 778; 828 NW2d 435 (2012).

[12] MCL 500.3135(3)(a).

[13] *American Alternative Ins Co, Inc v York*, 470 Mich 28, 32; 679 NW2d 306 (2004).

[14] *Hicks v Vaught*, 162 Mich App 438, 440; 413 NW2d 28 (1987).

or provide any facts that would indicate that the truckers *intended to* cause damage to their property, the trial court properly granted summary disposition.

III. STATUTE OF LIMITATIONS

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.[15] We also review de novo whether a statute of limitations bars a claim.[16]

A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of immunity granted by law.[17] The moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence that would be admissible at trial.[18] We consider the contents of the plaintiff's complaint to be true, unless contradicted by the documentary evidence.[19]

B. MCL 600.5839 DOES NOT APPLY IN THIS CASE

The property owners contend that the trial court erred by granting the contractors' motion under MCR 2.116(C)(7) because a six-year statute of limitations applied. We conclude that the trial court properly determined that the contractors' actions were not improvements and, therefore, a three-year statute of limitations applied.

MCL 600.5805 provides that

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> * * *
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> (10) Except as otherwise provided in this section, the period of limitations is 3 years after . . . for injury to a person or property.
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[15] *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

[16] *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006).

[17] *Odom*, 482 Mich at 466.

[18] *Id.*; MCR 2.116(G)(5), (6).

[19] *Odom*, 482 Mich at 466.

> (15) The periods of limitation under this section are subject to any applicable period of repose established in section 5838a, 5838b, or 5839.

MCL 600.5839 is both a statute of limitations and a statute of repose.[20] This statute provides that

> (1) A person shall not maintain an action to recover damages for injury to property, real or personal . . . *arising out of the defective or unsafe condition of an improvement to real property* . . . against any contractor making the improvement, unless the action is commenced within either of the following periods:
>
> (a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

In *Pendzsu v Beazer East, Inc*, this Court held that for the purposes of this statute, an improvement to real property is

> a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make property more useful or valuable as distinguished from ordinary repairs."[21]

When determining whether something is an improvement, courts should not artificially extract the improvement's components but should instead look at the improvement as a whole.[22]

We conclude that the trial court correctly determined that the removal of contaminated sediments from the Velsicol site was not an improvement within the meaning of MCL 600.5839. The facts of this case are extremely similar to the facts this Court considered in *Pitsch v ESE Michigan, Inc*. In *Pitsch*, defendant Dunbar removed an underground storage tank from the property and released hazardous substances into the soil at some point between 1987 and 1991.[23] The plaintiff filed its suit in 1994, asserting a negligence claim against Dunbar.[24]

The *Pitsch* court considered the definition in *Pendzsu* and reasoned that "the term 'improvement' refers to a product, object, or some other tangible item that remains on the real property after the contractor completes his work."[25] The Court concluded that the six-year

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[20] *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 46; 709 NW2d 598, 594 (2006).

[21] *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 410; 557 NW2d 127 (1996), quoting *Adair v Koppers Co, Inc*, 741 F2d 111 (CA 6, 1984).

[22] *Id*.; *Citizens Ins Co v Scholz*, 268 Mich App 659, 666; 709 NW2d 164 (2005).

[23] *Pitsch v ESE Mich, Inc*, 233 Mich App 578, 585; 593 NW2d 565 (1999).

[24] *Id*.

[25] *Id*. at 601.

limitation period did not apply because "Dunbar did not make an improvement, but rather merely removed an object from the property."[26]

Here, the modification was the removal of contaminated sediment. The modification took place in an area that would normally be covered by water. As in *Pitsch*, the modification in this case cannot be occupied, used, or accepted. Also, as in *Pitsch*, the removal of the contaminated sediments in this case did not add anything to the property. Looking at the project as a whole, no product, object, or tangible item remained on the real property after the contractors completed their work, because even the infrastructure that the contractors built for the project was temporary. We conclude that the trial court correctly determined that the contractors' removal of sediments was not an improvement under MCL 600.5839.

C. CONTINUING WRONG DOCTRINE

The property owners contend that the statute of limitations does not bar their claims because the nuisance is a continuing wrong. We disagree because Michigan has abolished the continuing wrongs doctrine.

The Michigan Supreme Court has held that the "continuing violations" or "continuing wrongs" doctrine is not consistent with MCL 500.5805(1).[27] This doctrine is no longer applicable, including in cases alleging nuisance or trespass.[28] To the extent that the property owners rely on *Dep't of Environmental Quality v Waterous Co*,[29] which holds differently, the case is not binding because the panel in that case failed to declare a conflict and its holding was contrary to this Court's previous decision in *Schaendorf v Consumers Energy Co*.[30] A plaintiff cannot seek damages for the continued harmful effects of a completed act.[31] We conclude that Michigan no longer recognizes a continuing wrongs doctrine and therefore the trial court correctly refused to apply it in the property owners' case.

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[26] *Id*. at 602.

[27] *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 282; 696 NW2d 646 (2005).

[28] *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 285-286; 769 NW2d 234 (2009).

[29] *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 385; 760 NW2d 856 (2008).

[30] *Marilyn Froling Revocable Living Trust*, 283 Mich App at 285-286; *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 517; 739 NW2d 402 (2007).

[31] *Schaendorf*, 275 Mich App at 517.

D. LACHES

The property owners briefly contend that the doctrine of "laches" applies. This doctrine requires a plaintiff to exercise reasonable diligence in vindicating his or her rights.[32] Laches applies when a defendant proves that (1) the plaintiff lacked diligence, and (2) it has been prejudiced.[33] Here, the property owners are the plaintiffs, not the defendants. Therefore, we reject this argument.

IV. THE PROPERTY OWNERS' MOTION FOR RECONSIDERATION

A. STANDARD OF REVIEW

This Court reviews the trial court's decision concerning a motion for reconsideration for an abuse of discretion.[34] The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.[35]

B. THE TRIAL COURT'S DECISION ON RECONSIDERATION

The property owners contend that the trial court abused its discretion by denying their motion for reconsideration because it should have taken "judicial notice" of the federal preemption statute after they raised it in their motion. We disagree.

When moving the trial court for reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."[36] When considering a motion for reconsideration, the trial court need not consider legal theories that a party could have argued before the trial court's original order.[37]

Here, the property owners raised their federal preemption argument for the first time in their motion for reconsideration, but this argument was available to them when they filed their response to the contractors' motion for summary disposition in October 2011. Congress amended 42 USC 9658 in 1986 to add the language on which the property owners rely,[38] and most of the federal cases that they cite are from the late 1990s and early 2000s. We conclude

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[32] *Knight v Northpointe Bank*, 300 Mich App 109, 119; ___ NW2d ___ (2013).

[33] *Regents of the Univ of Mich v State Farm Mutual Ins Co*, 250 Mich App 719, 734; 650 NW2d 129 (2002).

[34] *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

[35] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[36] MCR 2.119(F)(3).

[37] *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008).

[38] PL 499, § 203, 100 Stat 1613.

that the trial court's decision not to address the argument was not an unreasonable outcome because the property owners raised it for the first time on reconsideration and the argument was available to them before that time. Therefore, the trial court did not abuse its discretion.

C. FEDERAL PREEMPTION

This Court is an error-correcting court and we generally decline to address unpreserved issues.[39] An issue is not preserved if a party presents it to the trial court for the first time in a motion for reconsideration.[40] We may review unpreserved issues if they are issues of law for which the relevant facts are available.[41]

Here, as stated in the previous section, the property owners raised whether the Environmental Response Act's discovery rule preempts Michigan's statute of limitations for the first time in their motion for reconsideration. We conclude that this issue is not preserved, and we decline to review it.

V. CONCLUSION

We conclude that the trial court properly granted the truckers' motion for summary disposition under MCR 2.116(C)(8) and (10) because the property owners did not plead or provide facts supporting an exception to the No-Fault Act. We conclude that the trial court also properly granted the contractors' motion for summary disposition under MCR 2.116(C)(7) because the contractors' removal of contaminated soil was not an improvement for the purposes of MCR 600.5839 and, therefore, the three-year statute of limitations in MCL 600.3135 barred the property owners' claims.

We affirm. As the prevailing parties, defendants may tax costs under MCR 7.219.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens

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[39] *Burns v Detroit* (*On Remand*), 253 Mich App 608, 615; 660 NW2d 85 (2002), modified in part on other grounds, 468 Mich 881 (2003).

[40] *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

[41] *Id*.