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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002148-MR

GOLDEN OAK MINING COMPANY APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 02-CI-00457

VINA LUCAS; DANIEL COOK;
SHERRI COOK; DAN LUCAS;
BETTY LUCAS; MACK FULTZ;
OWANA FULTZ; AND TABITHA
FULTZ APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, DIXON AND LAMBERT, JUDGES.

ACREE, JUDGE: The appellant, Golden Oak Mining Company, appeals a judgment of the Letcher Circuit Court. Golden Oak argues that the claims of the

appellees, Vina Lucas, Daniel Cook, Sherri Cook, Dan Lucas, Betty Lucas, Mack Fultz, Owana Fultz, and Tabitha Fultz, are barred by the statute of limitations and that the circuit court erred by denying its motion for summary judgment and subsequent motions for directed verdict presenting that argument.

On appellate review, we must answer two questions. First, when did the appellees' causes of action accrue, initiating the five-year limitations period under Kentucky Revised Statute(s) (KRS) 413.120? Second, if accrual occurred more than five years prior to the filing of the Complaint on February 7, 2003, did any event toll or extend that limitations period? We conclude that the limitations period commenced no later than 1997, and that no event resulted in a tolling or extension of the limitations period. Therefore, it was error for the trial court to deny Golden Oak's motion for summary judgment and its subsequent motions for directed verdict. For the reasons stated herein, we reverse.

Facts and procedure

Interaction among the appellees, Golden Oak, and the Kentucky Natural Resources and Environmental Protection Cabinet, and its Department for Surface Mining Reclamation and Enforcement (Cabinet), began in the mid-1990s. In 1993, the Cabinet issued a permit to Golden Oak to mine the Camp Branch area of Letcher County. In May of 1997, Golden Oak ceased mining operations and reported the mine to state authorities as inactive. However, in that four-year period, there was a pervasive degradation of the area residents' well water.

According to their testimony, each appellee recognized an adverse impact on his or her water supply and each believed Golden Oak was to blame.

Appellee Vina Lucas testified that by 1996 her water quality had diminished; she believed even then that Golden Oak was to blame. Appellees Daniel and Sherri Cook testified that they lost their water on two occasions after Golden Oak began mining; they noticed major changes in the quality of their water in 1996 and 1997. Dan and Betty Lucas also noticed a change in their water quality in 1996 and 1997, and Dan recognized the bad taste from having mined in the past. Mrs. Lucas contacted Golden Oak directly and Golden Oak installed a filter for them in 1996. Mack and Owana Fultz also indicated that their water had changed color and taken on a bad odor by 1997. Mack Fultz indicated that the water changed when Golden Oak began mining in the area and he complained directly to Golden Oak. Tabitha Fultz, Mack and Owana Fultz's daughter, also indicated that her water was bad in 1997 and she believed Golden Oak was responsible.

The problem was not limited to appellees' properties. This was a community problem, and the community problem needed a community solution.

In 1996, a large number of Camp Branch residents met with Tom Fitzgerald, an attorney for the National Citizens' Coal Law Project, to discuss their concerns. Fitzgerald explained to the residents that they had "the opportunity to request an inspection and to participate in enforcement actions of the cabinet[1] as provided in

[1] The "cabinet" refers to the Kentucky Natural Resources and Environmental Protection Cabinet and its Department for Surface Mining Reclamation and Enforcement.

405 Kentucky Administrative Regulations (KAR) 12:030." 405 KAR 12:010 Section 6. He recommended hiring Heim Water Consultants to assist in assessing the problem and its source and they did so.

According to Heim's report, "[a]n extensive field investigation was conducted in the area of Golden Oak's deep mine in the early part of January 1997." Heim documented well-water degradation dating to 1994, one year after Golden Oak commenced mining. After completing its investigation, Heim concluded that "Golden Oak's deep mining operation has directly affected the water quality and quantity of water available for the residents of Camp Branch."

On March 5, 1997, after being informed of the results of the Heim investigation, residents of Camp Branch representing ninety-five households, including the appellees,[2] signed a handwritten petition to federal and state mining officials that stated, "We believe that our water supplies to our homes may have been damaged by mining activity done by Golden Oak Mining Co. . . ."

On March 25, 1997, Fitzgerald wrote a letter to state and federal surface mining reclamation and enforcement agencies on behalf of the appellees and other Camp Branch residents. He attached a copy of Heim's report and a copy of the petition from the ninety-five households.

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[2] Dan and Betty Lucas signed for household #55; Vina Lucas signed for household #61; Mack and Owana Fultz signed for household #62; Daniel Cook signed for household #90. Sherri Cook, who was married to and resided with Daniel Cook, did not sign the petition. Tabitha Fultz, daughter of Mack and Owana Fultz, did not sign the petition but resided on her parents' property and used the same well.

The Cabinet then initiated an investigation and on July 29, 1997, sent a preliminary report to Fitzgerald which stated, “based on the information obtained at this time . . . [l]oss of groundwater quantity and quality in the Camp Branch watershed is related to the underground mining activities of Golden Oak Mining Company.” Fitzgerald shared this information with his clients, including appellees.

As the Cabinet conducted its full scale investigation, newspapers around the region began to publish articles placing the blame on Golden Oak. For example, the Mountain Eagle published an article on May 21, 1997, titled “Resident’s Blame Golden Oak.” On August 6, 1997, citing the July 29, 1997 letter from the Cabinet, the same newspaper published an article titled “Regulators Say Mining Hurt Community’s Water.”

Meanwhile, the Cabinet continued its investigation. On March 4, 1998, one day prior to the one-year anniversary of the Camp Branch residents’ petition, the Cabinet sent a form letter to each person who had signed that petition. In substance, it did not differ from the July 29, 1997 letter in that it identified only the affected *watersheds* but not the affected households. The March 4, 1998 letter stated the Cabinet had “determined that the groundwater for the watersheds of Camp Branch and parts of Stinking Branch have been impacted by the underground mining activities of Golden Oak Mining Company.” Unlike the earlier letter, however, this one indicated that water samples from each Camp Branch household’s water supply would be analyzed and if any failed to comply

with EPA standards, Golden Oak would be "required to treat or replace water to *affected* Camp Branch users . . . ." (Emphasis supplied). It would be more than a year before the Cabinet informed individual Camp Branch households of the results.

On June 30, 1999,[3] the Cabinet sent letters to each of the appellees[4] informing them of its "determin[ation] that your water supply could not be concluded to have been adversely impacted by the underground mining activities of Golden Oak Mining Company in this area."

A few weeks later, on July 13, 1999, a separate letter was sent to Fitzgerald informing him "that 19 citizens in the Camp Branch investigation were impacted by Golden Oak's underground mining." None of the appellees were among the nineteen identified. Soon after receiving this letter, Fitzgerald conducted another meeting. Sixty-six Camp Branch families attended. Fitzgerald recommended filing a civil lawsuit, but he informed the meeting's attendees that they would need new representation for their private cause of action.

Eventually, twenty-nine families hired a private attorney and filed suit against Golden Oak in 1999. Some of the original plaintiffs traveled around the community offering other residents, including appellees, the opportunity to join the suit as parties plaintiff. In 2002, the residents who participated in that lawsuit

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[3] The letter was dated June 30, 1999, and mailed for certified delivery; however, the appellees sometimes refer to this correspondence as the "July 1999" letter since that was when they received it.

[4] *See* footnote 2, *supra*. The same appellees who signed the March 5, 1997 petition received this letter as did the other individuals who signed the petition representing the remaining households.

entered into a settlement agreement with Golden Oak, as a result of which $1.5 million was paid into a trust charged with the responsibility for laying a municipal water line that could be tapped into by all Camp Branch residents.

The appellees did not join the 1999 lawsuit.

On February 7, 2003, soon after the 1999 lawsuit was settled, the appellees instituted a separate civil action against Golden Oak.[5] Golden Oak filed a motion for summary judgment[6] arguing that the claim was barred by the statute of limitations. The circuit court denied the motion because

> the statute [of limitations] did not begin to run against the plaintiffs on their claims for damage to their water supplies until such time as the plaintiffs ***knew*** who caused the damage to those water supplies. *Wiseman v. Alliant Hospitals, Inc.*, Ky., 37 S.W.3d 709 (2000). Because the Commonwealth of Kentucky was investigating the cause of the water damage, it was not until that investigation was concluded that the plaintiffs knew who caused the damage. The agents of the Commonwealth first reported to the residents that the underground mining activities of the defendant had caused widespread damage to the underground water of Camp Branch by letter dated March 4, 1998. The Court holds that this was the earliest date that the statute of limitations could have begun.

(Order entered July 29, 2008; emphasis supplied).

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[5] The initial complaint was filed in November 2002 and named only Cook and Sons. Appellees filed an amended complaint naming Golden Oak for the first time on February 7, 2003. The appellees do not argue that the amended complaint related back to the date of the original complaint.

[6] Golden Oak moved alternatively to dismiss the complaint on the same grounds. However, because it was necessary for the court to consider matters outside the pleadings, we proceed with review from the denial of the summary judgment motion.

The case proceeded to trial and the statute of limitations issue was raised on motion for directed verdict at the close of the appellees' case, and by oral and written motions after the close of the entire case. For the reasons set forth herein, we conclude there was no genuine issue of material fact regarding the accrual of appellees' causes of action and Golden Oak was entitled to summary judgment as a matter of law; therefore, we need only address Golden Oak's arguments, and the appellees' counterarguments, that are related to the statute of limitations.

Standard of review

The standard of review on appeal when a trial court denies a motion for summary judgment is *de novo*. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Id.* at 436 (citing *Steelvest*, 807 S.W.2d at 482). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The word "impossible," as set

forth in the standard for summary judgment, is meant to be “used in a practical sense, not in an absolute sense.” *Lewis*, 56 S.W.3d at 436 (citing *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky.1992)). “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Id.* at 436.

Statute of limitations; accrual of causes of action

The appellees’ causes of action included a statutory claim pursuant to KRS 350.250(3) and common law causes of action for nuisance and trespass. The parties agree that KRS 413.120 provides a five-year statute of limitations applicable to both the statutory and common law claims. KRS 413.120(2), (4).

According to Kentucky caselaw, a cause of action accrues, and the limitations period begins to run, when “the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant’s conduct.” *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979) (quoting *Raymond v. Eli Lily & Co*., 117 N.H. 164, 371 A.2d 170, 174 (N.H. 1977)). Golden Oak argues that appellees knew they had been injured and also that their injury may have been caused by Golden Oak’s conduct more than five

years before their civil suit named it as a defendant, *i.e.*, before February 7, 1998. We agree.

The circuit court found that the appellees did not "kn[o]w who caused the damage to th[eir] water supplies" until the Cabinet "first reported to the residents that the underground mining activities of the defendant had caused widespread damage to the underground water of Camp Branch by letter dated March 4, 1998." This finding is clearly erroneous.

As more completely set forth above, on July 29, 1997, the Cabinet had already reported to appellees through their attorney its conclusion that the loss of water quality and quantity in the Camp Branch watershed was "related to the underground mining activities of Golden Oak Mining Company." Furthermore, the record is replete with evidence that every one of the appellees, even prior to receipt of that letter, had formed a belief that such was the case and had signed a petition saying so. Under *Louisville Trust Co. v. Johns-Manville*, the appellees' causes of action could not have accrued later than 1997. Because they did not file their complaint against Golden Oak until February 7, 2003, their claim was barred by the applicable statute of limitations, KRS 413.120(2) and (4).

The appellees counterargue, however, that the discovery rule, estoppel and other legal principles affected the accrual of the cause of action, or suspended the running of the statute of limitations. Therefore, we address those counterarguments.

Discovery rule inapplicable

In its order denying summary judgment, the circuit court also misinterpreted *Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709 (Ky. 2000), which is inapplicable to the case now before this Court. *Wiseman* was a medical malpractice case in which the Supreme Court said "[t]he nature of the tort and the character of the injury" had much to do with the decision. *Wiseman*, 37 S.W.3d at 713. The patient, Wiseman, was experiencing "medically unexplainable pain following an invasive surgery." *Id.* "[A]ll subsequent medical examiners throughout the [seven] years [following her surgery] were indefinitive as to the origin of her pain and attributed it to a tailbone injury." *Id.* at 711-12. There was never a question that Wiseman was experiencing harm, but "[h]arm could result from a successful operation where a communicated, calculated risk simply turns out poorly for the patient, although the medical treatment met the highest medical standards. . . . In such case, there would be no 'injury,' despite the existence of 'harm.'" *Id.* at 712. Because of "[t]he fiduciary relationship between" Wiseman and her doctor, said the Court, she had "the right to rely on the physician's knowledge and skill" when a non-tortious explanation was offered to explain her harm. *Id.* at 713.

The fact of Wiseman's "injury [as contrasted with her harm] was not readily apparent until the discovery of the piece of uterine probe" that had been left in her body during the surgery. *Id.* The legal error in finding Wiseman's claim barred by the statute of limitations was, in the Supreme Court's opinion, that the trial court "erroneously equated 'harm' with 'injury.'" *Id.* With that determination,

Kentucky joined the "'Discovery of injury' jurisdictions [that] have concluded that the statute of limitations does not begin to run even though a harmful condition is known to a plaintiff so long as its negligent cause and its deleterious effect are not discovered." *Id.* at 712.

The appellees' claim is not one to which the discovery rule concepts of *Wiseman* apply. In *Wiseman*, there was the possibility that the harm visited upon the plaintiff could have resulted from her surgeon's negligence, but it also could have resulted from a successful operation. Not so in the case *sub judice*. To paraphrase *Wiseman* to fit the facts of our case, "[h]arm [to the water supply] could [*not*] result from a successful [mining] operation" and, therefore, unlike *Wiseman*, there is no "distinction between 'discovery of harm' and 'discovery of injury.'" *Id.* at 712.

Our Supreme Court recently revisited the discovery rule in *Fluke Corp. v. LeMaster*, 306 S.W.3d 55 (Ky. 2010), emphasizing the limited circumstances under which the rule may be applied, stating

> We . . . refuse to extend application of the discovery rule to cases not involving latent injuries, latent illnesses, or professional malpractice . . . . [T]he discovery rule is available only in cases where the fact of injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence, such as in cases of medical malpractice or latent injuries or illnesses.

306 S.W.3d at 56, 60; *see also id.* at 60 n.7 (citing cases illustrating the rule's limited application); and *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 613

(Ky. App. 2003)("[O]ur research has not revealed nor have we been cited to any Kentucky case applying the 'discovery rule' in a property damage action."). The appellees' causes of action were not based on latent injuries, latent illnesses, or professional malpractice, thereby making the discovery rule inapplicable.

The trial court should have applied *Louisville Trust Co. v. Johns-Manville* to the uncontroverted facts relating to the accrual of the appellees' causes of action instead of applying *Wiseman*.

Certainty of Golden Oak's conduct as cause unnecessary

The appellees argue, and the circuit court agreed, that they could only suspect that Golden Oak's conduct caused their injury and that was not enough for the accrual of their cause of action. But, indeed, it is. Our Supreme Court recently quoted *McLain v. Dana Corp.*, 16 S.W.3d 320 (Ky. App. 2000), in which we said,

> Under Kentucky law, the discovery rule provides that a cause of action accrues when the injury is, or should have been, discovered. However, the discovery rule does not operate to toll the statute of limitations to allow an injured plaintiff to discover the identity of the wrongdoer unless there is fraudulent concealment or a misrepresentation by the defendant of his role in causing the plaintiff's injuries. A person who has knowledge of an injury is put on 'notice to investigate' and discover, within the statutory time constraints, the identity of the tortfeasor. Application of the discovery rule under circumstances as in the case *sub judice* would defeat the very purpose of the limitations. As one court observed, 'logic dictates that such an exception is capable of swallowing the rule.'

Fluke, 306 S.W.3d at 60 n.7 (quoting *McLain*, 16 S.W.3d at 326 (quoting *Simmons v. South Central Skyworker's, Inc.*, 936 F.2d 268, 269 (6th Cir. 1991))). Under

Kentucky law then, appellees are mistaken that they could rest upon their rights until a governmental agency substantiated their suspicions that Golden Oak's conduct caused their injury.

Furthermore, this argument is illogical and therefore all the more unpersuasive. Appellees assert they could not sue Golden Oak on mere suspicion; rather, they had to *know* Golden Oak was the cause of their injury. Then they assert their cause of action did not accrue until July 1999. But that was the month the Cabinet sent a letter *excluding the appellees* from the list of 19 households whose water supplies had been affected by Golden Oak. If we carry through with the appellees' logic, the government's *failure to conclude* that Golden Oak caused their water quality problems should have made them *less suspicious* of Golden Oak in 1999 than they were in 1997, not more confident that Golden Oak was to blame.

Accrual unaffected by Cabinet's investigation

Citing *Vanhoose v. Commonwealth*, 995 S.W.2d 389 (Ky. App. 1999), appellees argue that the running of the limitations period was tolled until the Cabinet completed its investigation. Appellees misread *Vanhoose*.

In *Vanhoose*, the Cabinet assessed a civil penalty against a mine operator on September 19, 1996. If it had become necessary for the Cabinet to file a civil action to enforce the civil penalty, it would have had five years from that date to do so. KRS 413.120(3) (limitations period applicable to "[a]n action for a penalty or forfeiture when no time is fixed by the statute" is five years); *Vanhoose*, 995

S.W.2d at 392 ("parties . . . agree that any enforcement action filed by the Cabinet would be subject to KRS 413.120(3)").

But *Vanhoose* was not an enforcement action; it was the mine operator's appeal of the assessment of the penalty. Consequently, we properly rejected the mine operator's argument that the limitations period should be measured from "the date of the alleged violation, March 24, 1987, when the notices of non-compliance were issued." That was eight years before the penalty even existed.

Appellees here argue that we should follow *Vanhoose* and measure the limitations period from the date the Cabinet completed its administrative investigation. If this case had been brought to enforce a penalty the Cabinet assessed against Golden Oak, we would do so. But that is not this case.

The claims appellees brought and the Cabinet's regulatory responsibilities under the statute are entirely independent of one another. While it is true the regulatory scheme allows private citizens to participate in the administrative process, KRS 350.465(2)(c) and 405 KAR 12:030, it is also true that KRS 350.250(3) creates a private right of action for any person adversely affected by mine operators violating any provision of Chapter 350, and authorizes "injunctive relief or . . . damages or both (including reasonable attorney and expert witness fees)." KRS 350.250(3). There is no requirement that administrative remedies first be exhausted. Any doubt as to that point is eliminated by considering KRS 350.421(1) which states that

> Nothing in this chapter shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, his interest in water resources affected by . . . an underground coal mine.

KRS 350.421(1). We construe this language as supporting Golden Oak's argument that the Commonwealth's investigation had no effect upon the civil action, either in terms of the liability that may exist, or the point in time the cause of action accrued, or on the running of the statute of limitations.

In summary, we find that the appellees' causes of action (statutory under KRS 350.250(3) and common law nuisance and trespass) accrued in 1997 and were unaffected for any of the reasons argued by appellees.

Statutory and equitable estoppel inapplicable

Appellees next argue that Golden Oak was estopped from asserting the statute of limitations as a defense. The argument relies both on statutory estoppel and equitable estoppel.

Statutory estoppel is provided for in KRS 413.190(2), referred to generally as the "tolling statute" which states:

> [w]hen a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state,[7] and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced.

[7] Golden Oak is a Delaware corporation. While this may present an issue of residency under KRS 413.190(2), Golden Oak does not argue that 413.190(2) is inapplicable to them.

Appellees correctly argue that even if this statute did not require application of estoppel to this case, equitable estoppel would. *See Fluke*, 306 S.W.3d at 61, n.9 (statutory estoppel as set forth in KRS 413.190(2) was not applicable, but the court nonetheless considered the applicability of equitable estoppel). The "tolling statute is simply a recognition in law of an equitable estoppel or estoppel *in pais* to prevent fraudulent or inequitable application of a statute of limitation." *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912, 914 (Ky. 1992). Therefore, in order to better understand the requirements of statutory estoppel, we will consider it in the context of its forebear, equitable estoppel.

"Under Kentucky law, equitable estoppel requires both a material misrepresentation by one party and reliance by the other party." *Fluke*, 306 S.W.2d at 62.

> The essential elements of equitable estoppel are[:] (1) conduct which amounts to a false representation of concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Id. at 63 (quoting *Sebastian-Voor Props., LLC v. Lexington-Fayette Urban County Gov't*, 265 S.W.3d 190, 194-95 (Ky. 2008)).

As with equitable estoppel, the party seeking statutory estoppel must show affirmative acts of fraud or misrepresentations by the defendant. *Munday*, 831 S.W.2d at 914. Under the general rule, "the concealment . . . must represent an 'affirmative act' and 'cannot be assumed'— i.e., it must be active, not passive." *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 573 (Ky. 2009) (quoting *Adams v. Ison*, 249 S.W.2d 791, 793 (Ky. 1952)). For this reason,

> the statute's reference to "other indirect means" of obstruction of an action still requires an act or conduct that remains "affirmatively fraudulent": "The 'other indirect means' of obstruction . . . must consist of some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so."

Emberton, 299 S.W.3d at 573 (quoting *Adams*, 249 S.W.2d at 792).

"[T]he most commonly recognized exception to the affirmative act requirement applies where a party remains silent when *the duty to speak or disclose* is imposed by law upon that person." *Id.* at 574 (internal quotations omitted). However, simply remaining silent is not enough. The silence, or failure to report, must be relied upon by the injured party and prevent them from commencing the action.

In *Munday*, the court considered this exception to determine whether failing to comply with the reporting requirements of the assumed-name statute was sufficient to justify estoppel. *Id.* at 913. The assumed-name statute requires the

filing of a certificate of assumed name when conducting business under that name. *Id.* at 912. The court held that the failure to file a certificate of assumed name was grounds for the application of estoppel under KRS 413.190(2). *Id.* at 913-16. In doing so, the court "reiterat[ed] that the purpose of the assumed[-]name statute is to inform members of the public, including appellants, of the identity of persons doing business under an assumed name." *Id.* at 915. The court reasoned that the violation resulted in the deprivation of information "essential to the commencement of the litigation." *Id.* Therefore, failure to comply was sufficient to justify estoppel under the statute. *Id.*

In *Harralson v. Monger*, the court considered whether a failure to report complete and truthful information regarding vehicle collisions was grounds for estoppel under KRS 413.190(2). 206 S.W.3d 336 (Ky. 2006). Jacobs, one of the drivers in the six-vehicle accident, indicated in his report that Monger was to blame. *Id.* at 337-38. As a result, he was not named as a defendant and Harralson sued Monger instead. *Id.* The court found that "the purpose of [the reporting statute] was to provide a means for injured parties to seek compensation. The duty of Jacobs to provide complete and truthful information for the accident report was highlighted because of the fact that he was the only person who spoke to the officer making the report." *Id.* at 339.[8] His failure to report resulted in Harralson's failure to commence an action against him. *Id.* If he had reported the incident accurately,

[8] Monger was unable to make a report because she was taken to the hospital for a brain injury.

he "would have undoubtedly been named as a defendant within the time limit." *Id.* Therefore, he was estopped from relying on the statute of limitations.

In *Emberton v. GMRI, Inc.*, a restaurant actively concealed from the health department investigators and plaintiff the facts that one of its employees carried the hepatitis A virus and had never received proper hygiene training for food handlers. *Emberton*, 299 S.W.3d at 570. The Supreme Court found such behavior constituted the kind of "affirmatively fraudulent" behavior sufficient to toll the statute of limitations under KRS 413.190(2). Two factors were necessary to the holding in *Emberton*: "GMRI's *active concealment* and the *sparse knowledge available* to Emberton." *Id.* at 575 (emphasis supplied).

The court's reasoning in *Munday*, *Harralson*, and *Emberton* reveals that simply having a duty to report does not mean a party will be estopped from asserting the statute of limitations defense in every case where a failure to report occurs. Instead, a case-by-case determination must be made to determine if the failure to report tips the scale in favor of estoppel. *See Harralson*, 206 S.W.3d at 340 (noting that, under the facts, when the statute of limitations is "weighed against the problems created by either silence, half-truths, or material omissions, the scale clearly favors . . . tolling"). This conclusion is in line with principles of equitable estoppel which require that failure to commence the action is the result from reasonable reliance on the action of the wrongdoer. *See Fluke*, 306 S.W.3d at 65 ("Kentucky law has not previously held that such failure [to report] excuses a plaintiff's duty to exercise due diligence to investigate or constitutes fraudulent

concealment sufficient to invoke equitable estoppel."). That is not the situation here.

With these concepts in mind, we turn to the appellees' assertion that Golden Oak was estopped from asserting the statute of limitations defense. As we do so, however, we remain mindful that an injured person always has a duty to diligently investigate his injury and its possible cause within the statutory timeframe. "Given this duty . . . delaying the accrual of the cause of action or tolling the running of the statute of limitations . . . is reserved for truly exceptional circumstances . . . ." *Fluke*, 306 S.W.3d at 67.

The appellees argue that Golden Oak misled the cabinet on two occasions. First, they allege Golden Oak misrepresented their intentions to the Cabinet on their mining permit application by not indicating that they would engage in the pulling of pillars supporting the ceiling of the mine. Second, they claim a letter from Golden Oak to the Cabinet in 1997 erroneously indicated that "all the complaints from the petition [were] resolved and [new] complaints [were] being handled with equal diligence."

We will presume that the applicable mining statutes imposed a duty upon Golden Oak to include accurate information on its permit application. Yet, if Golden Oak misrepresented the intended nature and scope of its mining activities to the Cabinet, that in no way affected the accrual of appellees' cause of action. The appellees were still aware that Golden Oak was mining under Camp Branch.

If anything, the representations appellees claim were false merely hinder discovery of *how* appellees were injured, but not *who* injured them.

Similarly, Golden Oak's 1997 letter to the Cabinet, which the appellees claim misrepresented that "all the complaints from the [March 5, 1997] petition were] resolved," did nothing to obstruct the appellees' discovery of their claim. Furthermore, presuming the representation to the Cabinet was false, did the appellees not know the truth? If so, how could it be said that appellees relied on the misrepresentation in good faith?

The fact is that the evidence appellees rely on to save them from the operation of the statute of limitations actually highlighted Golden Oak's culpability. In any event, Golden Oak's representations that it had fixed or would fix the problem is insufficient to trigger application of KRS 413.190(2). Addressing this very issue in the context of that statute, our Supreme Court said that "[m]ere statements by a defendant that it would fix the problem does not rise to the level of the statute [KRS 413.190(2)]." *Davis v. All Care Medical, Inc.*, 986 S.W.2d 902, 906 (Ky. 1999).

Considering *Emberton*, the most recent case on the issue and one heavily relied upon by appellees, it is easy to see why the statute is inapplicable to the case *sub judice*. Golden Oak did not "actively conceal" its connection with the loss in water quality and the knowledge available to the appellees was in no way "sparse." Neither statutory estoppel under KRS 413.190(2) nor common law equitable estoppel is applicable to this case.

Continuing trespass or temporary nuisance

Appellees also argue that their common law claims of nuisance and trespass[9] were continuing, or temporary, in nature rather than permanent. Therefore, goes the argument, a new cause of action accrued each day the nuisance or trespass was not abated. We do not agree.

"[L]anguage used in some of our [appellate court] opinions has contributed to the confusion" about continuing versus permanent trespass and nuisance. *Lynn Min. Co. v. Kelly*, 394 S.W.2d 755, 757 n.1 (Ky. 1965). Among the confusing opinions predating *Lynn Mining* is *Fergerson v. Utilities Elkhorn Coal Co*., 313 S.W.2d 395 (Ky. 1958), which identified our "rather unusual rule for defining whether a *structure* is permanent or temporary." *Ferguson*, 313 S.W.2d at 400 (emphasis supplied).

> [I]f the *structure* is one which may not be readily remedied, removed or abated, at reasonable expense, or is of durable character intended to last indefinitely, it is permanent and only one recovery may be had for all damages sustained. If, however, it can be changed or repaired or remedied at reasonable expense, it is temporary, and, if it is temporary, the harm is then a

[9] The only "real and reasonable difference . . . between a nuisance and a continuing trespass [is that o]ne is simply more visible and tangible than the other." *Bartman v. Shobe*, 353 S.W.2d 550, 555 (Ky. 1962). Therefore, our analysis draws from both types of cases and is applicable to both of appellees' common law causes of action.

continuing one and recovery may be had for the injuries as they occur.

Id. (emphasis supplied).

Kentucky has taken various approaches to the lack of clarity in this jurisprudence and the application of the five-year statute of limitations to it. Some cases focus on the cost of the remedy. For example, an oft-quoted explanation is this: "A 'temporary' as opposed to a 'permanent' nuisance is a continuing one which 'results from some improper installation or method of operation *which can be remedied at reasonable expense*.'" *Radcliff Homes, Inc. v. Jackson*, 766 S.W.2d 63, 66 n.3 (Ky. App. 1989) (quoting *Lynn Mining*, 394 S.W.2d at 757, 759) (emphasis in original).[10]

Others, as indicated above, couched the analysis in terms of the nature of the "structure" causing the trespass. However, in *Wimmer v. City of Ft. Thomas*, 733 S.W.2d 759 (Ky. App. 1987), we acknowledged that the "[o]ffending *structures* [referring to a mine operated in violation of regulations] causing continuing trespasses and recurring damages are not susceptible to a simplistic application of the five-year limit." *Wimmer*, 733 S.W.2d at 760 (emphasis supplied).

[10] When it codified "the common law of nuisance as existing in the Commonwealth on May 24, 1991[,]" KRS 411.500, the Legislature included this concept as part of its definition of a permanent nuisance. "A permanent nuisance shall be any private nuisance that: (a) Cannot be corrected or abated at reasonable expense to the owner." KRS 411.530(1)(a). Any private nuisance that was not a permanent nuisance was defined as temporary. KRS 411.540(1). However, we are not bound by these definitions. The Legislature specifically stated that the statutory cause of action "shall not be construed as repealing any of the statutes or common law of the Commonwealth relating to nuisance, nor shall be construed to abridge any other rights or remedies available for personal or property damage, but shall be held and construed as ancillary and supplemental thereto." KRS 411.570. Since the claims were not brought under the statutory scheme and since no party relies in any way on these statutes, we consider only the common law.

Nevertheless in *Wimmer*, we "succinctly put [forth] these [five] guidelines[,]" including the guideline that fits the circumstances of this case: "(4) If the offending structure is permanent but unlawfully built or negligent, only a one-time recovery brought within five years from the date the cause of action accrued is allowed if it be shown that the structure cannot be remedied at an expense reasonable in relation to the damage." *Id.* at 760-61.[11] The offending structure in this case is a mine which appellees claim was unlawfully or negligently built or operated. Applying *Wimmer* then, the appellees' causes of action for nuisance and trespass would not have been timely filed.

However, the focus of the inquiry has sometimes shifted away from the nature of the *structure* in favor of a focus on the tortious *conduct*, particularly when the structure involved is a mine. Sometimes, "[t]he mines themselves do not constitute permanent nuisances, in the sense of an expensive permanent structure, as was the case in *Kentucky West Virginia Gas Company v. Matny*, Ky. 279 S.W.2d 805 [(1955)]." *West Ky. Coal Co. v. Rudd*, 328 S.W.2d 156, 160 (Ky. 1959). In *Rudd*, it was "the method of operation that constitutes the nuisance." *Id.*; *see also Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604 at 611)("Court [in

[11] Each of the five guidelines in *Wimmer* references negligence. We are aware that our Supreme Court, in declining to adopt the tort of continuing negligence and differentiating that tort from nuisance, repeated what it said twenty years before *Wimmer*: "'The injection of the concept of negligence into various aspects of the law of nuisance has caused endless and unnecessary difficulties. . . .' This continues to be an accurate statement of the law and again, we choose not to interject negligence into nuisance cases." *Davis v. All Care Medical, Inc*., 986 S.W.2d 902, 906 (Ky. 1999) (quoting *Lynn Mining*, 394 S.W.2d at 758). However, because *Wimmer*'s guidelines can be read and applied irrespective of those references to negligence, and because we have relied on those guidelines subsequent to *Davis* (*see Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604 at 610 (quoting all five guidelines)), we continue to consider *Wimmer* as providing some precedential authority.

Rudd] pointed out that it was the method of operation that constituted the nuisance rather than the mines themselves."). Because appellees rely heavily on *Rudd*, we carefully consider its applicability to the case before us.

In *Rudd*, the Court determined that the dumping into a stream of coal slack and other deleterious substances by multiple mining companies constituted a continuing nuisance. Focusing on the mining companies' "method of operation," the Court noted two factors that are not present in the case before us. First, the mining companies "continued the condition" of polluting the stream, *Rudd*, 328 S.W.2d at 160, and second, the nuisance would end "if continued pollution by the appellants should cease." *Id.* at 159. These two factors were critical in the determination that the nuisance or trespass was continuing. *Id.* at 160.

These factors are conspicuously absent in the case now before us. Golden Oak ceased mining activity in 1997 – more than five years before appellees asserted a claim against it. This nuisance or trespass was permanent; whatever Golden Oak did that precipitated it, or whatever structure Golden Oak was responsible for creating, was complete in itself when mining ceased. Its effect, however, can only be said to have created a permanent condition.

Other widely accepted authority reinforces this conclusion. "A continuing trespass occurs when there is some *continuing or ongoing tortious* ***activity*** *attributable to the defendant, while a permanent trespass occurs when the defendant's tortious act has been fully accomplished*." 75 Am. Jur. 2d *Trespass* §

19 (2010) (emphases supplied). Any tortious activity attributable to Golden Oak had ended by 1997.

Appellees' various arguments that the nuisance or trespass they suffered was continuing because it was not permanent – *i.e.*, it was a temporary nuisance – are unavailing. We cannot agree that the nuisance or trespass here was temporary.

Conclusion

Our *de novo* review yields the conclusion that there were no genuine issues of material fact regarding when the appellees' causes of action accrued. It could not have been later than 1997, more than five years before they brought their civil action against Golden Oak on February 7, 2003. Furthermore, the discovery rule is inapplicable to the facts of this case as are the concepts of statutory and equitable estoppel. Because the alleged nuisance or trespass committed by Golden Oak was permanent and discovered or discoverable more than five years before appellees brought their civil action against Golden Oak, those claims were also barred by the five-year statute of limitations.

For the reasons stated, the Letcher Circuit Court should have granted Golden Oak's motion for summary judgment on limitations grounds. Therefore, we reverse.

ALL CONCUR.

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