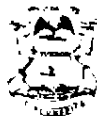


ROBERT B. BURNS
CHIEF JUDGE
ROBERT B. BURNS
JOHN H. GILLIS
S. JEROME BRONSON
THOMAS M. BURNS
GLENN S. ALLEN, JR.
DONALD E. HOLBROOK, JR.
MICHAEL J. KELLY
RICHARD M. MAHER
DANIEL F. WALSH
WILLIAM R. BEASLEY
WALTER P. CYNAR
BARBARA B. MACKENZIE
MYRON H. WAHLS
HAROLD HOGG
ROMAN S. GRIBBS
JOHN W. SHEPHERD
JOSEPH B. SULLIVAN
JUDGES



State of Michigan
Court of Appeals

LANSING

ROBERT B. BURNS
CHIEF CLERK

DETROIT OFFICE
P.O. BOX 10000
DETROIT, MICHIGAN 48202

GRAND RAPIDS OFFICE
350 OTTAWA N.W.
GRAND RAPIDS, MICHIGAN 49503

LANSING OFFICE
500 WASHINGTON SQUARE BLDG.
P.O. BOX 30022
LANSING, MICHIGAN 48905

COMM RECEIVED

DEC 31 1986

TO ATTORNEYS OF RECORD:

Enclosed with this letter is the decision and opinion in the entitled matter. We are releasing this opinion today.

Under MCR 7.215(A), no "per curiam" or "memorandum" opinions are published unless one of the judges of the panel deciding the case directs the reporter to do so. A "for publication" stamp appears on the face of opinions of this type which are going to be published. Opinions not designated for publication at the time of release are printed on pink paper. Note that the official date of the filing of this opinion is the date stamped on it. Under MCR 7.215(E), this opinion is the judgment of the Court of Appeals. All time periods for further action under the rules will run from the date stamped on the opinion. See MCR 7.215(H) and MCR 7.302(C)(2)(b).

I hereby certify that the annexed is a true and correct copy of the opinion filed in the record of the Court of Appeals in the entitled matter and that the date stamped thereon is the actual date of filing.

Yours truly,

Ronald L. Dzierbicki
Chief Clerk

RLD:
Encl.
cc: Trial Judge or Agency

CL172r385

URL 09706

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

KENNETH GRIMM, Personal Representative
of the Estate of Helen Grimm, Deceased,

DEC 1 1984

Plaintiff-Appellant,

v.

No. 85148

FORD MOTOR COMPANY, UNION CARBIDE
CORPORATION, DIAMOND SHAMROCK CORPORATION,
STAUFFER CHEMICAL COMPANY, B. F. GOODRICH
COMPANY, and GOODYEAR TIRE & RUBBER
COMPANY,

Defendants-Appellees.

BEFORE: MacKenzie, P.J., S.J. Bronson and R.A. Benson,* JJ.
PER CURIAM

Plaintiff, as personal representative of the estate of his wife, Helen Grimm, filed a wrongful death action against the defendants in Macomb County Circuit Court on August 15, 1983. Plaintiff claims that his wife contracted breast cancer as a result of exposure to polyvinyl chloride (PVC) products from the Ford Motor Company vinyl plant in Mt. Clemens. The decedent was diagnosed as having breast cancer in 1965, approximately eight years after they moved into the neighborhood near the Ford plant. Plaintiff and his wife moved out of the neighborhood in 1974 and the decedent died of cancer in 1980.

URL 09707

All defendants subsequently moved for summary disposition asserting that the applicable statute of limitations had expired. MCR 2.116(C)(7). The trial court initially ruled that the limitation period applicable to products liability actions applied to plaintiff's action. Since the defendant chemical suppliers had last delivered PVC to the Ford plant in 1976, the court ruled that the statute of limitations expired in 1979 and those defendants were

* Circuit judge, sitting on the Court of Appeals by assignment.

entitled to summary disposition. As to defendant Ford, the court determined that plaintiff's claim accrued at the very latest in 1977, when all the elements of the cause of action were present. Therefore, the statute of limitations expired in 1980 and defendant Ford was also entitled to summary disposition. Plaintiff now appeals as of right challenging the trial court's rulings that his claim is time barred.

Plaintiff initially asserts that a claim under the wrongful death act, MCL 600.2922; MSA 27A.2922, is an independent cause of action which arises at death. Since the decedent died August 16, 1980, under the plaintiff's analysis, the suit filed August 15, 1983 would be timely. We cannot agree.

In Hawkins v Regional Medical Laboratories, P.C., 415 Mich 420; 329 NW2d 729 (1982), our Supreme Court held that an action under the wrongful death act accrued as provided by the statutory provisions governing the underlying liability theory, not at the date of death. Hawkins, supra, at 437. In so ruling, the majority opinion expressly overruled the holding in Coury v General Motors Corp, 376 Mich 249, 251; 137 NW2d 134 (1965), that a cause of action for a wrongful death and damages resulting therefrom accrues when that death occurs. Thus, under Hawkins, courts must look to the wrongful act causing death, or injuries resulting in death, but not to the death itself in determining the applicable limitation period.

However, plaintiff in this case argues that we should not follow Hawkins because the portions of the opinion overruling Coury were allegedly obiter dictum. See Hawkins, supra, at 441 (Levin, J., concurring). Defendants disagree and argue that the holding on the question of accrual of the statute of limitations under the wrongful death act was not dictum because the Court intentionally discussed and decided

UPL 09708

that issue. According to the defendants, the issue was germane to, if not necessarily decisive of, the controversy and therefore should be recognized as a binding decision. We note, however, that since the majority opinion in Hawkins was not signed by four justices, it is technically not binding precedent. See Breckon v Franklin Fuel Co, 383 Mich 251, 278; 174 NW2d 836 (1970); Corporation & Securities Comm v American Motors Corp, 4 Mich App 65, 67; 143 NW2d 767 (1966).

Even if not technically binding precedent, we believe that the majority opinion in Hawkins is strong authority for this Court and should be followed. In fact; the Hawkins decision has been followed by other panels of this Court as binding precedent. See e.g., Cullender v BASF Wyandotte, 146 Mich App 423, 427; 383 NW2d 224 (1985); Hardy v Maxheimer, 149 Mich App 236; _____ NW2d _____ (1986). In this case, plaintiff's claim is a survival-type action under the wrongful death act. The alleged tortious conduct did not result in instantaneous death. Instead, plaintiff is claiming that defendants injured the decedent causing cancer which ultimately resulted in her death. Decedent would have been entitled to bring the action herself during her lifetime. Thus, under Hawkins, we believe that the statute of limitations applicable to the underlying tort theory, in this case, products liability must be applied to plaintiff's claim. Hawkins, supra, at 437.

The applicable statute of limitations for products liability actions is three years. MCL 600.5805(9); MSA 27A.5805(9). The critical question in this case is when did the plaintiff's claim accrue for purposes of the three-year limitations period. Concerning the accrual of claims, MCL 600.5827; MSA 27A.5827 provides:

"Sec. 5827. Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these

sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

In Larson v Johns-Manville Corp., 140 Mich App 254; 365 NW2d 194 (1985), lv qtd 422 Mich 973 (1985), a panel of this Court held that § 5827 was controlling as to when a claim accrues in a wrongful death action based on product liability theories alleging death and latent diseases caused by chemical exposure. Larson, supra, at 267. Defendants assert that we should adopt the Larson holding and find that decedent's claim accrued when the wrong was done. According to the defendants, the statute of limitations in this case certainly commenced running no later than 1976, because by then, the defendants had supplied the chemicals, the decedent had been exposed to them, and there had been a diagnosis of the disease allegedly caused thereby.

However, as plaintiff correctly points out the Michigan courts have, at times, expanded § 5827 to include a discovery rule as a method of defining when a particular claim accrues. Under the discovery rule, a plaintiff's cause of action accrues when he discovers or, through the exercise of reasonable diligence, should have discovered that he has a possible cause of action. Bonney v The Upjohn Co, 129 Mich App 18, 24; 342 NW2d 551 (1983), lv den 419 Mich 868 (1984). In Bonney, this Court, with Judge MacKenzie dissenting, applied the discovery rule to a products liability case against a drug manufacturer. Here, plaintiff asserts based on the discovery rule, that his claim accrued in 1981, when, by reading newspaper articles he became aware of the possibility of a link between the PVC fumes and his wife's cancer. We find plaintiff's argument unpersuasive.

MCL 600.5827, supra, has been interpreted to mean that a personal injury claim accrues when all of the elements, including the element of damages, are present and

URL 09710

can be pleaded in a proper complaint. Connelly v Paul Ruddy's Equipment Repair & Service Co, 388 Mich 146, 150-151; 200 NW2d 70 (1972). More damage may result later, but no new cause of action or limitation period arises. In our opinion, only where the victim is not aware that he has been injured because the damage is not discoverable by due diligence does the discovery rule apply. See Filcek v Utica Building Co, 131 Mich App 396, 399; 345 NW2d 707 (1984). However, once all the elements of a cause of action have manifested themselves, the limitation period begins to run.

In this case, we agree with the defendants' assertion that by at least 1976, and probably earlier, all the elements of plaintiff's cause of action were manifest and could have been pleaded in a proper complaint. The decedent's breast cancer, the exposure and her damages were all apparent by 1976. Therefore, plaintiff's decedent had three years from that date to file a claim. Since plaintiff's claim was filed later than 1979, the trial court properly granted summary disposition to the defendant pursuant to the applicable statute of limitations.

Further, even if we were to apply the discovery rule, we would still find the plaintiff's claim time-barred. The discovery rule does not mean that a cause of action is held in abeyance indefinitely until a plaintiff obtains professional assistance to determine the existence of a cause of action. Stoneman v Collier, 94 Mich App 187, 193; 288 NW2d 405 (1979). A plaintiff must act diligently in discovering his cause of action and cannot simply sit back and wait for others to inform him of his possible claim. Here, the undisputed facts show that plaintiff was aware of a possible connection between the fumes emanating from the Ford plant, and the plaintiff's decedent's injuries as early as 1974. Despite these suspicions, no action was taken to

investigate a possible cause of action. Therefore, even under the discovery rule plaintiff's claim is barred by his failure to diligently investigate his claim in a timely fashion.

Accordingly, the ruling of the trial court dismissing plaintiff's claim is affirmed.

/s/ Barbara B. MacKenzie

/s/ Robert A. Benson

Judge Bronson not participating.

URL 09712