

Court of Appeals Rules Cost Recovery Claim Not Barred Under Amended Part 201 Statute of Limitations

The Michigan Court of Appeals has reversed a trial court's decision that the statute of limitations applicable to private cost recovery actions under Part 201 of the Natural Resources and Environmental Protection Act (NREPA) barred a cost recovery action while affirming the trial court's decision that the common law claims were barred by the applicable statute of limitations.

FACTS

Until 1977, the defendant Haigh Industries, Inc. (Haigh) operated a metal stamping business on a site currently owned by the plaintiff, Thermofil, Inc. (Thermofil). When it owned the property, Haigh allegedly disposed of hazardous substances in its wastewater, which was discharged into an unlined seepage lagoon.

In September 1987, water samples established the presence of hazardous substances in the groundwater at the site. In 1988, Thermofil was directed by the Michigan Department of Environmental Quality (MDEQ) to conduct response activities at the site. Thermofil subsequently sent correspondence to Haigh in June 1988, notifying Haigh of the contamination and demanding that Haigh pay for the cost of remedial investigation and possible remedial action. Haigh refused to pay for such activities. Thermofil nevertheless conducted an extensive remedial investigation, incurring costs of over \$2,000,000. The investigation revealed extensive contamination. Because of an amendment to Part 201, however, the DEQ determined in 1995 that Thermofil was not liable for the contamination at the site. After that determination, Thermofil did not conduct any further remedial action at the site.

In June 1999, Thermofil filed suit against Haigh under Part 201, seeking recovery of the costs Thermofil incurred while conducting remedial investigations. Thermofil also sought to recover those costs, plus damages, under the common law theories of nuisance, trespass, negligence, and abnormally dangerous activity. The trial court ruled that all of Thermofil's claims were barred by the applicable statutes of limitations.

PART 201 STATUTE OF LIMITATIONS

When the trial court rendered its decision, the applicable statute of limitations under Part 201 provided:

For recovery of response activity costs and natural resources damages that *accrued* prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

(Emphasis added). Following a 1999 decision by the Michigan Court of Appeals, the trial court held that Thermofil's cause of action "accrued" when it purchased the property, and thus accrued before July 1, 1991, regardless of whether Thermofil had incurred any costs before that date. Any suit would, therefore, have to be filed before July 1, 1994 to avoid being barred. Because Thermofil did not file its suit until 1999, its claims were barred.

On appeal, the Court of Appeals noted that since the trial court rendered its decision, the statute of limitations had been amended to read:

For recovery of response activity costs that were *incurred* prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

(Emphasis added). The amendment explicitly applies retroactively. In light of this change, the Michigan Supreme Court had reversed the 1999 Court of Appeals decision upon which the trial court had relied on, because the statutory language now clearly indicates that it only applies to suits for costs *incurred*, rather than causes of action that *accrued*, before July 1991. Under the amended statute, Thermofil's suit would not be barred if Thermofil could show both that it had incurred costs on or after July 1, 1991, and that other applicable statutory provisions would not bar the suit. The Court of Appeals reversed the trial court's decision so these arguments could be addressed at trial.

COMMON LAW STATUTE OF LIMITATIONS

Thermofil's common law claims under nuisance, trespass, negligence, and abnormally dangerous activity would be barred unless it had filed suit less than three years after its claims had accrued.

The trial court noted that because the contamination at issue was not readily apparent to Thermofil, the claims would accrue pursuant to the "discovery rule," meaning that Thermofil's claims would accrue "when [it] discovers, or, through the exercise of reasonable diligence, should have discovered" the existence of the contamination and who was probably responsible for it. Because Thermofil had sent a letter to Haigh concerning the contamination in June 1988, the trial court found that Thermofil's cause of action accrued no later than that date. Because Thermofil had not filed its suit until

1999, eleven years later, the trial court ruled that Thermofil's common law claims were barred by the statute of limitations.

On appeal, Thermofil claimed that the "continuing-wrongful-acts doctrine," rather than the "discovery rule," should apply. This doctrine states that when a wrongful act is occurring on an ongoing basis, the statute of limitations does not begin to run until the act has stopped occurring. Thermofil argued that the continuous presence of hazardous materials on its property was a "continuous wrongful act," and, thus, the statute of limitations had not begun to run.

The Court of Appeals rejected Thermofil's argument because "a continuing wrong is established by continual tortious *acts*, not by continual harmful effects from an original, completed act." The latest date that Haigh could have committed any wrongful acts at the site was in 1977, when it had ceased operations on the property. In 1988, when Thermofil discovered that Haigh might be responsible, the lingering contamination was a harmful "effect" from a completed act, and the doctrine did not apply. Thus, the Court of Appeals affirmed the trial court's decision that Thermofil's common law claims were barred by the statute of limitations.

Thermofil, Inc. v. Haigh Indus., Inc., Mich. Ct. App. 2001

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