

Court Dismisses MDEQ Lawsuit Under Statute of Limitations

The Michigan Court of Appeals has upheld a trial court's decision to dismiss a lawsuit filed by the Michigan Department of Environmental Quality (MDEQ) more than 6 years after the alleged wrongful conduct that was the basis of the lawsuit was performed. The appeals court also upheld the same trial court's decision not to require MDEQ to pay the attorney fees and costs of the individual who was sued by MDEQ.

In 1987, Donald Harkins (Harkins) applied for a permit to fill in portions of his lakefront lot in order to create a beachfront. The affected areas were approximately one tenth of an acre. MDEQ denied Harkins' original permit application and Harkins appealed that decision. While the appeal was pending, in 1988, MDEQ issued a more limited permit to allow some filling of the lakefront property. Nonetheless, Harkins continued to appeal the denial of his first permit application until his last appeal was denied by the Michigan Court of Appeals in 1994 and the Michigan Supreme Court did not agree to hear any further appeal.

In 1990, MDEQ investigated a report that Harkins had developed his property in violation of the 1988 permit. In 1991, MDEQ issued an order to Harkins requiring him to cease and desist activities that were allegedly in violation of the 1988 permit. Thereafter, a criminal complaint was filed against Harkins under the Wetland Protection Act and the Inland Lakes and Streams Act, but the criminal complaint was dismissed in 1992.

On March 28, 1996, MDEQ filed a lawsuit against Harkins seeking to impose civil fines and a court order to require Harkins to restore the wetlands and lake bottom that had allegedly been filled or dredged in violation of the 1988 permit. The lawsuit was dismissed by the court on April 12, 2000, on the grounds that MDEQ had not filed the lawsuit within the time period required by the applicable statute of limitations. The court ruled that a six year statute of

limitations applied and, therefore, the MDEQ lawsuit must be dismissed because it was not filed until 8 years after the alleged violations took place in 1988. After the lawsuit was dismissed, Harkins requested the court to order MDEQ to pay his attorney fees and costs, alleging that MDEQ's lawsuit was vexatious, lacked a factual basis, and was filed with the intent to harass Harkins. The trial court denied Harkins' request.

MDEQ appealed the dismissal of its lawsuit and Harkins appealed the denial of his request for attorney fees and costs to the Michigan Court of Appeals.

The statute of limitations states that “[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.” The appeals court held that MDEQ's lawsuit seeking a court order requiring the restoration of wetlands allegedly filled in violation of a permit was a “personal action” within the meaning of this statute because it sought to compel Harkins to repair an alleged loss. Moreover, the court noted that MDEQ and Harkins agree that the Natural Resources and Environmental Protection Act (NREPA) does not contain a different limitation period for actions filed under NREPA. Therefore, the court of appeals ruled that the 6 year statute of limitations for personal actions was, in fact, the correct limitation period for the MDEQ lawsuit.

The court of appeals next turned to the question of when MDEQ's cause of action against Harkins “accrued” – that is, when the six year limitation period started to run. The court of appeals relied on another statute, which provides that a “claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.” The court of appeals noted that the alleged illegal filling activities occurred in 1988 and the MDEQ lawsuit

was not filed until 1996 and, therefore, more than six years had passed before MDEQ filed its lawsuit.

MDEQ argued that the six year period should be “tolled” or suspended because of Harkins’ “continuing wrongful acts.” Michigan courts have previously held that, when wrongful acts of a continuing nature are committed, the period of limitation will not run until the wrongful acts are abated. The court of appeals found, however, that a continuing wrong occurs only when there are continuing wrongful actions, and not merely continuing harmful effects from past actions. In this case, Harkins was alleged to have committed wrongful acts in 1988 in violation of the MDEQ permit. Although the effects from the allegedly illegal fill continued after 1988 (e.g., unlawful filling of wetlands), the beachfront development was completed in 1988 and there were no further wrongful actions that occurred after 1988. Therefore, the court rejected MDEQ’s argument.

MDEQ also argued that Harkins was involved in additional dredging that occurred in 1991, while Harkins was attempting to comply with an order issued by MDEQ in that year. The 1988 permit authorized Harkins to construct a 10 feet wide pathway on his property. By 1989 or 1990, the pathway had eroded to the point that it may have spread as much as two additional feet on either side (i.e., the path expanded to approximately 14 feet wide). In 1991, MDEQ ordered Harkins to remove the excess pathway and return the pathway to a width of 10 feet. In response, Harkins dredged a four feet wide strip, removed the excess sand and allowed wetland reeds to grow back in the previously eroded area. In addition, Harkins installed sod over the remaining sand pathway in order to prevent further erosion, in accordance with MDEQ requirements.

MDEQ argued that, because these activities took place less than six years before the lawsuit was filed against Harkins, the lawsuit should not be dismissed under the statute of

limitations. The court of appeals disagreed, noting that Harkins was doing nothing more or less than complying with MDEQ's order. Therefore, the court of appeals ruled that Harkins' actions in 1991 were not a continuing "wrongful" act that would extend the statute of limitations period.

Finally, MDEQ argued that its lawsuit should not be barred by the statute of limitations because it had not stood idly by from 1988 through 1996. MDEQ noted that, during that 8 year time period, it litigated Harkins' appeal of the denial of the original permit and attempted to enforce the modified 1988 permit and obtain restoration of the wetlands in a criminal prosecution. The court of appeals noted that MDEQ was not required to wait until the litigation over the original permit was completed before filing a lawsuit against Harkins for allegedly violating the modified 1988 permit. In addition, the fact that MDEQ filed a criminal complaint against Harkins for allegedly violating the 1988 permit merely emphasized the fact that MDEQ could have filed a civil lawsuit over the same issue, but simply chose not to do so. Accordingly, the court of appeals found that there was no link between Harkins' attempts to reverse on appeal MDEQ's denial of the original permit application and MDEQ's failure to prosecute the present lawsuit in a timely fashion. Therefore, the court of appeals rejected this argument, as well.

Harkins asked the court of appeals to overturn the trial court's decision not to require MDEQ to pay Harkins' attorney fees and costs as a sanction for pursuing a frivolous lawsuit. The court noted that applicable court rules require an attorney to conduct a "reasonable inquiry" into the factual and legal viability of a case before filing a lawsuit. The reasonableness of the inquiry is determined by an objective standard by focusing on the efforts taken to investigate a claim before filing suit. The attorney's subjective good faith is not relevant to this determination. However, the mere fact that alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry.

The court of appeals noted that the six year statute of limitations for “personal actions” had never before been applied by a court to a case arising under NREPA. In addition, the court of appeals found that MDEQ’s arguments for tolling the statute of limitations, although they were ultimately rejected, were not so lacking in legal merit as to make MDEQ’s lawsuit frivolous. The court held that penalties are not required and should not be imposed merely because the legal argument advanced by one party is rejected by the court. Where there is no prior developed body of precedents mandating a particular result (such as in this case), an award of attorney fees and costs is not appropriate. Therefore, the court of appeals denied Harkins’ appeal.

Accordingly, the court of appeals upheld the trial court’s decisions to dismiss the MDEQ lawsuit and to deny Harkins’ request for an award of attorney fees and costs. *Michigan Department of Environmental Quality v. Harkins*, Mich. App. July 17, 2003.

S. Lee Johnson