STATE OF MICHIGAN

COURT OF APPEALS

LARRY BEARUP,

Plaintiff,

and

DALE PARKER, JAMES WALLACE, CHESTER NETHING, CHERYL SCHUPPLER, SANDRA THEDFORD, Personal Representative of the Estate of RONNIE THEDFORD, WILLIAM SPOHN, DEANATRIS ARMSTRONG, Personal Representative of the Estate of RETINA HARRISTON,[1] and BETTY ROBINSON,

Plaintiffs-Appellants,

V

GENERAL MOTORS CORPORATION, CINCINNATI MILACRON, d/b/a CINCINNATI MILACRON MARKETING, PRODUCTS DIVISION, and CASTROL INDUSTRIAL INC.,

Defendants,

and

QUAKER CHEMICAL CORPORATION,

Defendant-Appellee.

UNPUBLISHED
February 3, 2009

No. 272654
Genesee Circuit court
LC No. 99-066364-NO

ON RECONSIDERATION

LARRY BEARUP, DALE PARKER, JAMES WALLACE, CHESTER NETHING, CHERYL SCHUPPLER, SANDRA THEDFORD, Personal

[1] This plaintiff is also referred to as "Vertina Hairston" and "Vertina Hariston" in the lower court record.

Representative of the Estate of RONNIE THEDFORD, WILLIAM SPOHN, DEANATRIS ARMSTRONG, Personal Representative of the Estate of RETINA HARRISTON,[2] and BETTY ROBINSON,

Plaintiffs-Appellees,

V

GENERAL MOTORS CORPORATION, CINCINNATI MILACRON, d/b/a CINCINNATI MILACRON MARKETING, PRODUCTS DIVISION, and CASTROL INDUSTRIAL INC.,

Defendants,

and

QUAKER CHEMICAL CORPORATION,

Defendant-Appellant.

No. 272666
Genesee Circuit court
LC No. 99-066364-NO

Before: Schuette,[3] P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

In Docket No. 272654, plaintiffs appealed by leave granted[4] the order granting defendant Quaker Industrial Inc.'s motion for summary disposition under MCR 2.116(C)(7) and (10) based on the statute of limitations. In Docket No. 272666, defendant Quaker Chemical Corporation appealed by leave granted[5] the order denying its motion for summary disposition based on the sophisticated user doctrine. On October 23, 2008, we issued our original opinion in this case, affirming in both Docket Nos. 272654 and 272666. Plaintiffs moved for reconsideration of our

(…continued)

[2] This plaintiff is also referred to as "Vertina Hairston" and "Vertina Hariston" in the lower court record.

[3] Schuette, P.J., not participating in the opinion on reconsideration, his term of office having expired on January 1, 2009.

[4] *Parker v Quaker Chemical Corp*, unpublished order of the Court of Appeals, entered March 9, 2007 (Docket No. 272654). In the order granting leave, this Court ordered that the case be consolidated with Docket No. 272666.

[5] *Bearup v General Motors Corp*, unpublished order of the Court of Appeals, entered March 9, 2007 (Docket No. 272666). In the order granting leave, this Court ordered that the case be consolidated with Docket No. 272654.

decision in docket no. 272654, and we granted the motion and vacated our original opinion in both Docket Nos. 272654 and 272666.[6] On reconsideration, we reverse in Docket No. 272654 and remand for proceedings consistent with this opinion. In Docket No. 272666, we reverse the trial court's denial of defendant's motion for summary disposition and remand for entry of an order granting summary disposition of plaintiffs' product liability/failure to warn claims.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs are former employees of defendant General Motors Corporation (GM) at its Metal Fabricating Plant in Flint, Michigan. During the course of their work, plaintiffs worked with and were exposed to draw compounds, which are chemicals that are sprayed or brushed onto metal parts to lubricate the metal and aid in the removal of undesirable particulate debris. Defendant Quaker sold a variety of different draw compounds to GM in bulk quantities. The draw compounds were contained in large totes, which held several hundred gallons of concentrated chemicals. Plaintiffs brought an action against defendant and others, alleging that defendant was liable to plaintiffs for negligence and for failing to warn of the potential adverse health effects associated with exposure to and inhalation of defendant's metalworking fluids (MWFs).[7] According to plaintiffs, defendant's conduct resulted in severe injury to plaintiffs, including, but not limited to, reduced and impaired breathing capacity, respiratory problems, reduced oxygen diffusion capacities, loss of lung function, chemical sensitivity and hypersensitivity, reduced blood oxygen levels, and interstitial lung disease.

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[6] *Bearup v General Motors Corp*, unpublished order of the Court of Appeals, entered December 23, 2008 (Docket Nos. 272654; 272666).

[7] Although plaintiffs' amended complaint alleges that plaintiffs were exposed to metalworking fluids (MWFs), the parties' arguments on appeal refer to plaintiffs' exposure to draw compounds. The parties both appear to use the terms MWFs and draw compounds interchangeably. In fact, while similar in composition, MWFs and draw compounds are not identical, and they are used in different manufacturing processes. The following explains the distinction between MWFs and draw compounds:

> 9. . . . The primary purposes of the draw compounds is to lubricate the metal and to aid in the removal of undesirable particulate debris which can cause scoring of metal body forming parts in forming operations. . . .
>
> 10. Metal working fluids is a generic term to describe chemical compounds used in machining, grinding, boring and honing operations. While similar to draw compounds in their chemical composition, metal working fluids also have a variety of unique chemical compositions and are not identical to draw compounds in their composition. Draw compounds or metal forming fluids are used in stamping, forging, drawing, and cold heading and similar drawing operations. It is generally recognized that while draw compounds and metal working fluids are similar in composition, they are typically different chemical formulations and used in entirely different manufacturing processes. [Affidavit of Katherine N. Coughenour, ¶ ¶ 9-10.]

Defendant Quaker filed multiple motions for summary disposition based on the expiration of the statute of limitations. These motions argued that plaintiffs' claims were barred by the statute of limitations under MCR 2.116(C)(7), (C)(10), or both. According to defendant, plaintiffs' claims were barred because their complaint was filed after the expiration of the three-year statute of limitations. Specifically, defendant contended that under the discovery rule, plaintiffs' cause of action accrued more than three years before plaintiffs filed their complaint. According to defendant, plaintiffs either discovered or should have discovered an injury and a causal connection between the injury and defendant more than three years before they filed their cause of action. Plaintiffs argued that symptoms alone were not sufficient to put them on notice of their injuries or the cause of their injuries. According to plaintiffs, their cause of action did not accrue until they received medical diagnoses. Plaintiffs further argued that the doctrine of equitable estoppel should be invoked to toll the statute of limitations.

Defendant Quaker also moved for summary disposition under MCR 2.116(C)(10), arguing that it was entitled to summary disposition because GM, which purchased draw compounds from defendant in bulk quantities, was a sophisticated user both under the common law and statutory sophisticated user doctrines. Therefore, defendant contended, pursuant to MCL 600.2947(4), it was not liable in a product liability action for failing to provide adequate warnings for its draw compounds. Defendant also argued that plaintiffs failed to establish the proximate cause element of their negligent failure to warn claim. According to defendant, there was no admissible evidence that plaintiffs would have used the draw compounds differently if it had provided additional warnings. In response to defendant's motion for summary disposition, plaintiffs argued, among other arguments, that GM's employees, including plaintiffs, were not sophisticated users under MCL 600.2945(j) and that *Bock v General Motors Corp*, 247 Mich App 705; 637 NW2d 825 (2001), precluded defendant's motion for summary disposition based on the sophisticated user doctrine.

The trial court decided both of defendant's motions in an opinion and order dated August 7, 2006. The trial court "reluctantly" granted defendant's motion for summary disposition based on the statute of limitations, rejecting plaintiffs' argument that plaintiffs could not have been reasonably expected to discover their injuries and the cause of their injuries until they received a medical diagnosis. The trial court also rejected plaintiffs' contention that equitable estoppel should toll the running of the statute of limitations.

The trial court struggled in rendering a decision on defendant's motion based on the sophisticated user doctrine. The trial court concluded that GM was a sophisticated user under MCL 600.2945(j); nevertheless, the trial court determined that it was bound by this Court's decision in *Bock* and denied summary disposition based on *Bock*. The trial court stated:

> The central holding from *Bock* is that a commercial supplier of product to a sophisticated user may nevertheless be held liable to the sophisticated user's employees for injuries suffered from exposure to the product based on an evaluation of the reasonableness of the conduct of the sophisticated user, including the dissemination of information about the product. *Bock*, at 714. The reasonableness of the supplier's conduct may in turn be determined by the relationship between the sophisticated user.

The trial court observed that the "reasonable conduct" rule from *Bock* was not contained in the sophisticated user statute and could not be extrapolated from it. The trial court also observed that defendant's motion for summary disposition was based on the sophisticated user doctrine as enacted by the products liability statute, MCL 600.2945 *et seq*., that plaintiffs' lawsuit was filed after the effective date of MCL 600.2945 *et seq*., and that *Bock* was a common law decision that did not refer to the statutes. The trial court also recognized that its decision regarding whether to rely on the statute or *Bock* would determine whether summary disposition based on the sophisticated user doctrine was appropriate. The trial court summed up its dilemma cogently: "In sum, application of *Bock* would require this court to deny Quaker's motion while application of the statute would require this court to grant Quaker's motion for summary disposition based on the sophisticated user defense." (Footnote omitted.) While the trial court noted that there were "numerous reasons to question *Bock* and rely on the statute for the basis for its decision," it stated that it was not the function of the trial court to "deem that *Bock* has not survived the statute without any such indication from a higher court." Therefore, the court denied defendant Quaker's motion for summary disposition under the sophisticated user doctrine because it was "constrained to follow *Bock*[.]"

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In deciding a motion brought pursuant to MCR 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Holmes*, *supra* at 706.

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362;

547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

This Court reviews equitable issues de novo, although the findings of fact supporting the decision are reviewed for clear error. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999).

III. ANALYSIS

A. Statute of Limitations

Plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition based on the statute of limitations and in failing to invoke the doctrine of equitable estoppel to toll the statute of limitations. In light of the Supreme Court's recent decision in *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007), we agree that the trial court erred by analyzing defendant's motion for summary disposition based on the common law discovery rule.

The statute of limitations in negligence and product liability actions is three years. MCL 600.5805(10); MCL 600.5805(13). In general, "the period of limitations runs from the time the claim accrues." MCL 600.5827. Historically, the discovery rule has governed the date of accrual for certain types of actions in which the defendant's duty and breach predate the plaintiff's awareness of an injury and of its cause. See *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993). Under the discovery rule, the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, an injury and the causal connection between the plaintiff's injury and the defendant's breach. *Id.* at 16. Application of the discovery rule has been deemed proper because of the latent nature of a plaintiff's injury or an inability to discover the causal connection between the injury and the defendant's breach. *Lemmerman v Fealk*, 449 Mich 56, 65-66; 534 NW2d 695 (1995). The rationale for applying the discovery rule is to avoid the extinguishment of a cause of action before the plaintiff is even aware of the possible cause of action. *Id*. at 66.

The discovery doctrine has historically been applied to the determination of when a cause of action accrues for latent injuries in a product liability action. See *Moll*, *supra* at 13 and *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 244; 492 NW2d 512 (1992). However, the Supreme Court's recent decision in *Trentadue* has completely eliminated the common law discovery doctrine in Michigan. In *Trentadue*, the plaintiff's mother was raped and murdered in 1986, but the murder remained unsolved until 2002, when deoxyribonucleic acid (DNA) evidence established the identity of the perpetrator causing the plaintiff to file a negligence action against the perpetrator, his employer, and others. *Trentadue*, *supra* at 383. The defendants, except the perpetrator, moved for summary disposition based on the expiration of the three-year statute of limitations applicable to wrongful death actions, MCL 600.5805(10). *Id.* The plaintiff argued that the common law discovery rule applied to toll the period of limitations. *Id.* at 384. The trial court and this Court agreed, but, the Supreme Court ruled that the common law discovery rule did not apply to toll the period of limitations in MCL 600.5805(10) and reversed the trial court's order denying the defendants' motion for summary disposition under MCR 2.116(C)(7).

The Supreme Court's reasoning and holding in *Trentadue* are as follows:

> The Revised Judicature Act, at MCL 600.5838(2), 600.5838a(2), 600.5839(1), and 600.5855, provides for tolling of the period of limitations in certain specified situations. These are actions alleging professional malpractice, MCL 600.5838(2); actions alleging medical malpractice, MCL 600.5838a(2); actions brought against certain defendants alleging injuries from unsafe property, MCL 600.5839(1); and actions alleging that a person who may be liable for the claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim, MCL 600.5855. Significantly, none of these tolling provisions covers this situation—tolling until the identity of the tortfeasor is discovered.
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> Plaintiff contends, however, that, notwithstanding these statutes, when the claimant was unaware of any basis for an action, the harsh result of barring any lawsuit because the period of limitations has expired can be avoided by the operation of a court-created discovery rule, sometimes described as a common-law rule . . . . We reject this contention because the statutory scheme is exclusive and thus precludes this common law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply.
>
> It is axiomatic that the Legislature has the authority to abrogate the common law. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). Further, if a statutory provision and the common law conflict, the common law must yield. *Pulver v Dundee Cement Co*, 445 Mich 68, 75 n 8; 515 NW2d 728 (1994). . . .
>
> Here, as we have explained, the relevant sections of the Revised Judicature Act comprehensively establish limitations periods, times of accrual, and tolling for civil cases. MCL 600.5827 explicitly states that a limitations period runs from the time a claim accrues "[e]xcept as otherwise expressly provided." Accordingly, the statutes "designate specific limitations and exceptions" for tolling based on discovery, as exemplified by MCL 600.5838, 600.5838a, 600.5839, and 600.5855. . . .
>
> Finally, MCL 600.5855 is a good indication that the Legislature intended the scheme to be comprehensive and exclusive. MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed. If we may simply apply an extrastatutory discovery rule in any case not addressed by the statutory scheme, we will render § 5855 effectively meaningless. For, under a general extrastatutory discovery rule, a plaintiff could toll the limitations period simply by claiming that he reasonably had no knowledge of the tort or the identity of the tortfeasor. He would never need to establish that the claim or tortfeasor had been fraudulently concealed.
>
> Since the Legislature has exercised its power to establish tolling based on discovery under particular circumstances, but has not provided for a general discovery rule that tolls or delays the time of accrual if a plaintiff fails to discover

> the elements of a cause of action during the limitations period, no such tolling is allowed. Therefore, we conclude that courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827 and we reject this Court's contrary conclusion in *Chase v Sabin*, 445 Mich 190, 191-192; 516 NW2d 60 (1994). Because the statutory scheme here is comprehensive, the Legislature has undertaken the necessary task of balancing plaintiffs' and defendants' interests and has allowed for tolling only where it sees fit. . . . [*Trentadue*, *supra* at 388-392.]

After *Trentadue*, the discovery rule only applies if the legislature specifically provides for the discovery rule, which it has done for plaintiffs injured by professional malpractice, MCL 600.5838(2), or medical malpractice, MCL 600.5838a(2), and for actions brought against certain defendants alleging injuries from unsafe property, MCL 600.5839(1), actions alleging breach of warranty, MCL 600.5833, and actions alleging fraudulent concealment of the existence of a claim or the identity of any person who is liable for the claim, MCL 600.5855.[8] *Id.* at 388. Plaintiffs' action against defendant is a negligence and product liability action. Because there is no common law discovery rule after *Trentadue*, and the statute does not include a legislatively created discovery rule that applies to plaintiffs' action, plaintiffs cannot invoke the discovery doctrine to toll the running of the statute of limitations. *Trentadue*, *supra*.[9]

This Court is bound by the Supreme Court's decision in *Trentadue* because a majority of justices sitting on the case were in agreement in concluding that the legislature's enactment of the RJA abrogated the common law discovery doctrine. *People v Anderson*, 389 Mich 155, 170; 205 NW2d 461 (1973), overruled in part on other grounds in *People v Hickman*, 470 Mich 602 (2004). Furthermore, the Supreme Court specifically stated that "prospective-only application is inappropriate" for *Trentadue*. *Trentadue*, *supra* at 401. Therefore, even though the trial court applied the discovery doctrine and granted defendant's motion for summary disposition almost a full year before the Supreme Court decided *Trentadue*, because the Supreme Court explicitly gave *Trentadue* retroactive application, the trial court erred in applying the discovery doctrine.

We are not persuaded by plaintiffs' argument that the doctrine of equitable estoppel should preclude defendant from asserting the statute of limitations defense. The doctrine of equitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption. *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997); *Lothian v Detroit*, 414 Mich 160, 176; 324 NW2d 9 (1982). It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the

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[8] Although plaintiffs argue in their brief on appeal that defendant assured them that the draw compounds were safe and failed to properly warn them of the dangers associated with the draw compounds, plaintiffs did not allege in their complaint that defendant fraudulently concealed plaintiffs' cause of action.

[9] A legislatively created discovery rule applies to plaintiffs' breach of warranty claims, MCL 600.5833. But for the reasons described *infra*, plaintiffs' breach of warranty claims in this case are barred by the sophisticated user doctrine.

defendant from raising the statute of limitations as a defense to the action. *Lothian*, *supra* at 176-177. One who seeks to invoke equitable estoppel generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. *Cincinnati Ins Co*, *supra* at 270. The Supreme Court "has been reluctant to recognize an estoppel absent intentional *or negligent* conduct designed to induce a plaintiff to refrain from bringing a timely action." *Id.* (emphasis in original).

In *Trentadue*, the Supreme Court rejected the argument that equitable estoppel should have tolled the running of the statute of limitations. In so doing, the Supreme Court stated: "if courts are free to cast aside a plain statute in the name of equity, even in such a tragic case as this, then immeasureable damage will be caused to the separation of powers mandated by our constitution." *Trentadue*, *supra* at 406-407. In *Trentadue*, the plaintiff's decedent was raped and murdered and the identity of her killer was not discovered for about sixteen years. Even though the plaintiff's decedent filed a wrongful death action in 2002, the same year the killer's identity was discovered, the Supreme Court ruled that the plaintiff's action was barred by the three-year statute of limitations for wrongful death actions. The equities involved in *Trentadue* are stronger for invoking equitable estoppel than the facts of the instant case because in *Trentadue* there was absolutely no way that the plaintiff could have brought a wrongful death action when the identity of her mother's killer was unknown. The plaintiff's action was barred by the statute of limitations through no fault of her own. As Justice Kelly noted in her dissent: "plaintiff's tort cause of action disappeared before plaintiff could discover the tortfeasor." *Id.* at 449 (Kelly, J., dissenting). If the facts of *Trentadue* did not warrant invoking equitable estoppel, then the facts of this case do not warrant invocation of the doctrine. Moreover, the difficulty in applying equitable estoppel in this case, irrespective of *Trentadue*, is that the doctrine does not apply absent intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action, and the facts of this case do not establish that defendant engaged in such conduct. *Cincinnati Ins Co*, *supra* at 270.

Despite that *Trentadue* precludes plaintiffs from invoking the discovery doctrine to extend the time for filing their claims other than breach of warranty, the trial court erred by granting summary disposition on statute of limitations grounds. The period of limitation in a product liability action is three years. MCL 600.5805(13). This three-year period "runs from the time the acclaim accrues," which is defined as "the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. To determine whether the statute of limitations has expired, the circuit court must first identify both "the wrong upon which the claim is based," and the date the "wrong" was done. Our Supreme Court has explained that this calculation is intended to yield "the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant acted negligently." *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995); see also *Trentadue*, *supra* at 388 ("The wrong is done when the plaintiff is harmed rather than when the defendant acted.") (internal quotation omitted). After determining the date on which the plaintiff sustained the injury underlying a claim, the circuit court must determine whether the plaintiff filed a lawsuit within three years of that date. Because the circuit court employed a discovery rule analysis rather than the plain language of MCL 600.5827, we remand for reconsideration of the applicable date of accrual for each plaintiff, based on proper statutory criteria.

In sum, the trial court erred in applying the discovery doctrine and granting defendant's motion for summary disposition. In granting summary disposition, the trial court did not distinguish between plaintiffs' product liability/failure to warn claims and plaintiffs' claims based on other theories of negligence. To the extent that the trial court granted summary disposition of plaintiffs' negligence claims based on the discovery doctrine, this ruling was erroneous. We therefore remand for the trial court to determine the accrual date for each plaintiff's negligence[10] claim or claims in light of *Trentadue*.[11]

B. Sophisticated User Doctrine

Defendant argues that the trial court erred in denying its motion for summary disposition based on the sophisticated user doctrine. According to defendant, the trial court erred in applying *Bock* rather than the statutory sophisticated user doctrine, MCL 600.2947(4), and if the trial court had applied the statutory sophisticated user doctrine, as it should have, it would have granted defendant's motion for summary disposition.

The trial court relied on *Bock* in denying defendant's motion for summary disposition. In *Bock*, this Court held that "'[a] manufacturer's liability to a purchaser or a user of its product should be assessed with reference to whether its conduct, including the dissemination of information about the product, was reasonable under the circumstances.'" *Bock*, *supra* at 714, quoting *Antcliff v State Employees Credit Union*, 414 Mich 624, 630; 327 NW2d 814 (1982). The facts in *Bock* are similar to the facts of the instant case. The plaintiffs, GM employees at the Flint engine plant, filed suit based on their exposure to MWFs. One of the defendants, Cincinnati Milacron (CM), supplied the MWFs to GM in bulk. Notwithstanding the rule that a commercial enterprise that uses bulk materials is a sophisticated user as a matter of law, this Court in *Bock* held that the trial court properly denied Cincinnati Milacron's motion for summary disposition under the sophisticated user doctrine "where the circumstances surrounding the relationship between defendant GM and defendant CM were not defined by contract, were unclear from the record provided, and were premised on credibility assessments." *Bock*, *supra* at 715.

On March 28, 1996, Michigan enacted tort reform legislation,[12] which included the statutory sophisticated user doctrine. The statutory sophisticated user doctrine provides that "a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user." MCL 600.2947(4). A "sophisticated user" is:

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[10] However, because summary disposition of plaintiffs' product liability/failure to warn claims was proper under the sophisticated user doctrine, see *infra*, we do not remand for the trial court to determine the accrual date for those claims.

[11] In light of *Trentadue*, we would urge the Legislature to enact statutory discovery rules for product liability actions involving latent injuries and other cases in which a plaintiff suffers a latent injury or is otherwise unable to discover the existence of a cause of action.

[12] 1995 PA 249, effective March 28, 1996.

> a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user. [MCL 600.2945(j).]

The trial court erred in relying on *Bock* rather than the statutory sophisticated user doctrine in deciding defendant's sophisticated user motion. Plaintiffs' action was filed in November 1999, well after the March 28, 1996, effective date of Michigan's tort reform legislation. In *Greene v A P Products, Ltd*, 475 Mich 502; 717 NW2d 855 (2006), which was decided about three weeks before the trial court entered its August 7, 2006, opinion and order in this case, the Michigan Supreme Court held that Michigan's tort reform legislation displaced the common law sophisticated user doctrine: "Before 1995, a manufacturer's or seller's duty to warn of material risks in a product-liability action was governed by common-law principles. Tort reform legislation enacted in 1995, however, displaced the common law." *Greene*, *supra* at 507-508 (footnote omitted). Relying on *Greene*, the federal district court for the Eastern District of Michigan also recently concluded that reliance on *Bock* rather than the statutory sophisticated user doctrine is erroneous. *Irrer v Milacron, Inc*, 484 F Supp 2d 677 (ED MI, 2007). According to the *Irrer* court: "As the Michigan Supreme Court recently observed, Michigan's tort reform legislation 'displaced the common law.' . . . Accordingly, Plaintiffs' reliance on common law principles applied in *Bock v General Motors Corporation*, 247 Mich App 705, 637 N.W.2d 825, 830-31 (2001) is misplaced as that action was filed before the March 28, 1996, effective date of Michigan's tort reform legislation." *Irrer*, *supra* at 680 (footnote omitted). Because plaintiffs' action in this case was filed in October 1999, more than three years after the tort reform legislation was enacted on March 28, 1996, the trial court should have relied on the statutory sophisticated user doctrine in deciding defendant's motion for summary disposition. *Greene*, *supra* at 507-508.

In light of *Greene*, the proper inquiry in this case is whether GM is a sophisticated user under MCL 600.2945(j). As stated above, a sophisticated user is "a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential for hazard or adverse effect." MCL 600.2945(j). Although the trial court applied *Bock* rather than the statutory sophisticated user doctrine, the trial court acknowledged that if the statutory sophisticated user doctrine applied, GM was a sophisticated user, and summary disposition in favor of defendant would have been proper. We likewise conclude that GM is a sophisticated user of draw compounds. GM operates the largest stamping and metal forming operations in North America and is the largest automotive manufacturer in the world. As a result of GM's long history of manufacturing automobiles, it has had decades of experience with draw compounds and MWFs. The Flint Metal Fabricating Plant opened its doors in 1954, and employees there have therefore been using draw compounds for decades. Defendant itself has been supplying draw compounds to the Flint Metal Fabricating plant since 1985. GM uses large quantities of draw compounds on a daily basis in the production of automobiles. Based on its position in the automobile industry and its experience using draw compounds and MWFs, GM must generally be expected to be knowledgeable about MWFs and draw compounds and their potential hazardous effects.

The fact that GM purchases the draw compounds from defendant in bulk also supports the conclusion that GM is a sophisticated user. GM purchases the draw compounds from defendant in bulk quantities; defendant delivers the draw compounds to GM in large containers called totes, which contain several hundred gallons of chemical compounds. The draw compounds are then pumped from the totes and applied during the stamping and metal forming process. Commercial users of bulk materials must generally be regarded as sophisticated users as a matter of law. *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 546; 509 NW2d 520 (1993).[13]

GM has also been a leader in studies involving the health effects of exposure to machining fluids. In 1983, the GM-UAW Occupational Health Advisory Board (OHAB) issued a request for proposals concerning the health effects of exposure to machining fluids. The objective was "to determine whether current exposure of GM employees to machining and grinding fluids such as soluble oils, non-soluble cutting oils, semi-synthetic, or synthetic cutting fluids or coolants are associated with adverse health effects." The Harvard School of Public Health was awarded the contract. In the course of the study, the Harvard School of Public Health studied "almost 50,000 workers and an exposure assessment of more than one million jobs" at three GM production facilities. GM's involvement with this groundbreaking study, which is widely known in the industry as the Harvard Study, is evidence of its vast experience with safety issues involving chemicals, such as the draw compounds at issue in the present case.

For all the reasons outlined above, we conclude that GM is a sophisticated user of draw compounds.

Plaintiffs argue that as GM employees, they were not sophisticated users. Under MCL 600.2945(j), "[a]n employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user." Plaintiffs contend that MCL 600.2945(j) carves out an exception to the definition of a sophisticated user and that because they had no actual knowledge of the dangers of draw compounds and defendant failed to warn them of such dangers, they were not sophisticated users. The trial court rejected this argument, stating:

> In analyzing Plaintiffs' contention, this Court must review the wording of the statute itself to discern legislative intent by giving each word in the statute meaning and eschewing extended interpretation absent ambiguity in the wording of the statute. See generally *In re MCI*, 460 Mich 396, 411 (1999). Having considered the foregoing, the Court is left with the belief that the wording of the statute delineates two different, and separate, definitions for sophisticated users. Integral to the definitions is the status of knowledge of the non-employee and

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[13] Although *Aetna* predates the effective date of the tort reform legislation, this Court has recognized the continued validity of the rule that commercial enterprises that use materials in bulk are sophisticated users as a matter of law. See, e.g., *Kitzner v Houghton Fluid Care*, unpublished opinion per curiam of the Court of Appeals, decided January 18, 2007 (Docket No. 265148).

> employee of the hazard and effects of a product. Concerning the employee, to be a sophisticated user the employee must have "actual knowledge" where a lesser standard is called for regarding the non-employee's knowledge. The Court sees no dependency between the definitions. As Quaker does not claim GM's employees are sophisticated users, any claim that the employees did not have actual knowledge is irrelevant to Quaker's claim that GM is a sophisticated user. Accordingly, GM may fit the definition of a sophisticated user even if its employees do not.

The trial court properly analyzed this issue. In moving for summary disposition, defendant argued that GM, not its employees, was a sophisticated user under MCL 600.2945(j). The plain language of MCL 600.2945(j) encompasses two separate definitions of a sophisticated user. The first definition applies to an entity that is not an employee, and the second definition applies specifically to an employee. Under MCL 600.2945(j), an entity that is not an employee is a sophisticated user if it is "generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect." An employee is a sophisticated user only if the employee has "actual knowledge of the product's potential hazard or adverse effect that caused the injury[.]" MCL 600.2945(j).

MCL 600.2947(4) does not require both the employer and its employees to be sophisticated users for the sophisticated user defense to apply. This Court will not read anything into a statute that is not within the manifest intent of the Legislature as gleaned from the language of the statute itself. *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003). MCL 600.2947(4) provides that a manufacturer is not liable for failing to warn "if the product is provided for use by a sophisticated user." In this case, defendant provided the draw compounds to GM for GM's use in producing automobiles.

Furthermore, the rationale for the sophisticated user doctrine also undermines plaintiffs' argument that the sophisticated user defense does not apply unless plaintiffs, employees of GM and the ultimate users of the draw compounds, were sophisticated users. The rationale behind the sophisticated user doctrine is that "where a purchaser is a 'sophisticated user' of a manufacturer' product, the purchaser is in the best position to warn the ultimate user of the dangers associated with the product, thereby relieving the sellers and manufacturers from the duty to warn the ultimate user." *Portelli v I R Constr Products Co, Inc*, 218 Mich App 591, 599; 554 NW2d 591 (1996). Thus, the manufacturer markets a particular product to professionals that are presumed to have experience in using and handling the product, and because of this special knowledge, the sophisticated user will be relied upon by the manufacturer to disseminate information to the ultimate users regarding the dangers associated with the product. *Id.* at 601. Hence, the manufacturer is relieved of the duty to warn. *Id.* Because GM was a sophisticated user and plaintiffs, as GM's employees, were the ultimate users of the draw compounds, GM was in the best position to disseminate information to plaintiffs, the ultimate users of the draw compounds, of the dangers associated with the use of the draw compounds. The status of GM's employees as sophisticated users or not does not impact whether GM itself is a sophisticated user. Therefore, whether plaintiffs are sophisticated users is irrelevant to whether GM is a sophisticated user and to whether summary disposition is appropriate under the sophisticated user doctrine.

Plaintiffs also argue that summary disposition based on the sophisticated user doctrine is improper in light of the actual knowledge exception to the sophisticated user doctrine, MCL 600.2949a, which provides:

> In a product liability action, if the court determines that at the time of manufacture or distribution the defendant had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of the action, and the defendant willfully disregarded that knowledge in the manufacture or distribution of the product, then sections 2946(4), 2946a, 2947(1) to (4), and 2948(2) do not apply. [Footnote omitted.]

According to plaintiffs, the sophisticated user doctrine does not apply to this case because defendant had actual knowledge that the draw compounds at issue were defective and that there was a substantial likelihood that that the defect in the chemicals would cause the injuries that are the basis for plaintiffs' action. The trial court rejected plaintiffs' argument, stating that the record established that the draw compounds were hazardous, but not defective. According to plaintiffs, the deposition testimony of William Skowronek, Katherine Coughenour and Kathryn Strang[14] established defendant's "actual knowledge." In Skowronek's deposition, he asserted that he was aware of a concern in the industry that diethanolamine (DEA), which is found in MWFs and draw compounds, could potentially be a cancer-causing carcinogen and that as a result of that concern, "Quaker and General Motors made a conscientious decision, while we are developing new product, let's not include DEA in it." In the portion of Coughenour's deposition cited by plaintiffs, she asserted that she was aware of a possible association between microbacteria MWFs and hypersensitive pneumonitis. In the portion of Strang's deposition cited by plaintiffs, she asserts that DEA is considered toxic and that DEA can cause eye irritation and be toxic if ingested or absorbed through the skin.

Even accepting Skowronek's, Coughenour's and Strang's statements as true, they establish at most that draw compounds and MWFs are dangerous or hazardous materials, which defendant does not deny. The Supreme Court has recognized that a product is unreasonably dangerous and therefore defective so that its supplier is liable for personal injuries sustained by its use if the product is not reasonably safe for its foreseeable uses. *Fredericks v General Motors Corp*, 411 Mich 712, 720; 311 NW2d 725 (1981). The language used in MCL 600.2949a requires the defendant to have "actual knowledge that the product was defective[.]" Plaintiffs assert that defendant had "actual knowledge . . . regarding the adverse health effects form [sic] its draw compounds" and "actual knowledge about the dangers of its draw compounds." This is not sufficient to establish that plaintiffs had actual knowledge that the draw compounds were defective, however. Furthermore, while inadequate warnings may constitute a defect, plaintiffs have not established an issue of fact regarding whether defendant willfully disregarded any knowledge of the dangers of DEA and MWFs in regards to any failure to warn. Thus, we find that plaintiffs did not establish an issue of fact under MCL 600.2949a regarding whether defendant had actual knowledge that its draw compounds were defective.

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[14] Skowronek, Coughenour and Strang were all employed by defendant.

In sum, for the reasons articulated above, we hold that the trial court erred in applying the common law sophisticated user doctrine under *Bock* rather than the statutory sophisticated user doctrine. Applying the statutory sophisticated user doctrine, GM was a sophisticated user of defendant's draw compounds. Therefore, summary disposition of plaintiffs' product liability/failure to warn claims was proper on this basis. However, in applying the common law sophisticated user doctrine, the trial court did not distinguish between plaintiff's product liability/failure to warn claims and plaintiffs' claims based on other theories of negligence and did not specifically address application of the doctrine to plaintiffs' other negligence claims. According to its own language, application of the sophisticated user doctrine is limited to "product liability action[s] for failure to provide an adequate warning . . . ." MCL 600.2947(4). To the extent that plaintiffs' amended complaint contains negligence claims that do not constitute product liability claims based on a failure to warn, the sophisticated user doctrine does not bar those claims.

C. Other Issues

Defendant argues that the trial court erred in failing to apply MCL 600.2948(2) and analyze whether that statute relieved it of liability. MCL 600.2948(2) provides that "[a] defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action." Although the trial court quoted the language of MCL 600.2948(2) in its opinion, it did not address defendant's MCL 600.2948(2) argument. Therefore, the issue is not preserved for this Court's review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In any event, any error or omission on the part of the trial court in this regard was harmless because summary disposition in favor of defendant is proper based on the statutory sophisticated user doctrine. MCR 2.613(A).

Defendant also argues that the trial court erred in denying its motion for summary disposition because plaintiffs failed to offer evidence that defendant was the proximate cause of plaintiffs' injuries. The trial court's opinion and order did not address this argument, however, and it is therefore not preserved for this Court's review. *Knight*, *supra* at 549.

IV. CONCLUSION

The trial court erred in applying the discovery doctrine and granting defendant's motion for summary disposition based on the statute of limitations. We therefore reverse and remand for the trial court to determine the accrual date for each plaintiff's negligence claim or claims in light of *Trentadue*. The trial court also erred in denying summary disposition of plaintiff's product liability/failure to warn claims based on the sophisticated user doctrine; however, the sophisticated user doctrine does not preclude plaintiffs' negligence claims unrelated to product liability or failure to warn theories. We therefore reverse and remand for entry of an order granting summary disposition of plaintiff's product liability/failure to warn claims based on the sophisticated user doctrine.

Reversed and remanded. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

Schuette, J., not participating, his term of office having expired on January 1, 2009.