STATE OF MICHIGAN

COURT OF APPEALS

TAYLOR LAND GROUP, L.L.C.,

Plaintiff-Appellant,

v

BP PRODUCTS NORTH AMERICA, INC., BP AMERICA, INC., and CDC PROPERTIES, INC.,

Defendants-Appellees,

and

EPIC AVIATION, L.L.C. d/b/a BP AVIATION SERVICES, F X COUGHLIN COMPANY, INC., DHL SPECIALIZED SERVICES USA, INC., and WOLVERINE PIPE LINE COMPANY,

Defendants.

UNPUBLISHED
May 26, 2011

No. 294764
Wayne Circuit Court
LC No. 08-017824-CH

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing all of its claims against defendants BP Products North America, Inc., BP America, Inc.,[1] and CDC Properties, Inc. ("CDC"), pursuant to MCR 2.116(C)(8). We affirm the dismissal of all claims against defendant CDC, and affirm the dismissal of plaintiff's statutory and negligence claims against the BP defendants, but reverse the dismissal of plaintiff's trespass claim against BP and remand for further proceedings on that claim.

I. FACTS AND PROCEEDINGS

This action arises from plaintiff's purchase of industrial property in Taylor, Michigan from defendant CDC in 2007. The property was formerly owned by BP, which sold it to CDC in

[1] This opinion collectively refers to the BP defendants as "BP."

1988, but continued to lease it from CDC. Before purchasing the property, plaintiff conducted phase I and phase II environmental assessments of the property. During the week of September 13-21, 2007, plaintiff submitted a Baseline Environmental Assessment ("BEA") to the Michigan Department of Environmental Quality ("DEQ") in accordance with the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101 *et seq*. Under MCL 324.20126(1)(c), submission of the BEA allowed plaintiff to avoid liability for the cost of remediation of pre-existing conditions declared on the BEA. Plaintiff also requested that BP mark the location of any underground pipeline systems on the property. On September 20, 2007, the same day that plaintiff and CDC closed the sale for the property, BP marked the locations of two underground pipeline systems with flags and paint.

Plaintiff alleges that after it purchased the property, it discovered previously undisclosed underground storage tanks (USTs) and a pipeline system that BP used to transport petroleum to Detroit Metropolitan Airport. Plaintiff alleges that it incurred costs to remove the USTs, and that it ultimately determined that the property was not suitable for its intended purpose as a recycling facility. Plaintiff brought this action against CDC, as the seller of the property, and against BP, as a prior owner and possessor of the property, asserting that both defendants were liable under the NREPA for the cost of removing the USTs, asserting a breach of contract claim against CDC for breach of the purchase agreement, and asserting additional common-law claims for negligence against both defendants, as well as trespass against BP based on the continued presence of BP's allegedly undisclosed pipeline.

Defendants filed separate motions for summary disposition under MCR 2.116(C)(8) and (C)(10). The trial court dismissed all claims pursuant to MCR 2.116(C)(8). The court dismissed plaintiff's NREPA claim because plaintiff failed to allege that it incurred "necessary" response costs under the NREPA. The court dismissed the breach of contract claim against CDC on the basis of an "as is" clause in the purchase agreement. The court agreed that plaintiff failed to state a claim for trespass against BP because the pipeline was installed before plaintiff became the owner of the property. The court also dismissed plaintiff's negligence claims, agreeing that plaintiff failed to allege facts establishing a legal duty with respect to both defendants.

II. STANDARD OF REVIEW

This Court reviews a trial court's summary disposition decision de novo. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). The trial court stated that it was dismissing all claims pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. MCR 2.116(G)(5); *Johnson-McIntosh*, 266 Mich App at 322. Copies of written instruments that are submitted with a complaint are considered part of the pleadings for purposes of reviewing a motion under MCR 2.116(C)(8). *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). Thus, plaintiff's purchase agreement with CDC and the BEA report, which were attached to plaintiff's complaint, properly may be considered in determining whether summary disposition was warranted under MCR 2.116(C)(8). Summary disposition is appropriate under MCR 2.116(C)(8) if no factual development could justify the plaintiff's claim for relief. *Johnson-McIntosh*, 266 Mich App at 322.

Although the trial court stated that it was relying only on MCR 2.116(C)(8) to grant summary disposition, defendants also moved for summary disposition under MCR 2.116(C)(10), and the parties submitted documentary evidence in support of, and in opposition to, defendants' motions. To the extent that summary disposition may have been appropriate under MCR 2.116(C)(10) instead of (C)(8), this Court may affirm an order granting summary disposition if summary disposition would have been correctly granted under a different subrule. *Spiek v Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. A court must consider the documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007).

III. THE NREPA

The NREPA is a recodification of the former Michigan Environmental Response Act (MERA), MCL 299.601 *et seq*. See *Cairns v City of East Lansing*, 275 Mich App 102, 108; 738 NW2d 246 (2007). Part 201 of the NREPA encourages the prompt cleanup of hazardous substances by authorizing administrative and private actions, and assigning financial liability for the cleanup. *Id*. MCL 324.20126 provides, in pertinent part:

> (1) Notwithstanding any other provision or rule of law and except as provided in subsections (2), (3), (4), and (5) and section 20128, the following persons are liable under this part:
>
> (a) The owner or operator of a facility if the owner or operator is responsible for an activity causing a release or threat of release.
>
> (b) The owner or operator of a facility at the time of disposal of a hazardous substance if the owner or operator is responsible for an activity causing a release or threat of release.
>
> (c) An owner or operator of a facility who becomes an owner or operator on or after June 5, 1995, unless the owner or operator complies with both of the following:
>
> (*i*) A baseline environment assessment is conducted prior to or within 45 days after the earlier of the date of purchase, occupancy, or foreclosure. For purposes of this section, assessing property to conduct a baseline environmental assessment does not constitute occupancy.
>
> (*ii*) The owner or operator discloses the results of a baseline environmental assessment to the department and subsequent purchaser or transferee if the baseline environmental assessment confirms that the property is a facility.
>
> * * *

(2) Subject to section 20107a, an owner or operator who complies with subsection (1)(c) is not liable for contamination existing at the facility at the earlier of the date of purchase, occupancy, or foreclosure, unless the person is responsible for an activity causing the contamination existing at the facility. Subsection (1)(c) does not alter a person's liability with regard to a subsequent release or threat of release at a facility if the person is responsible for an activity causing the subsequent release or threat of release.

Before December 14, 2010, MCL 324.20126a provided, in pertinent part:

(1) Except as provided in section 20126(2), a person who is liable under section 20126 is jointly and severally liable for all of the following:

(a) All costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity under this part.

(b) Any other *necessary* costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this part.

* * *

(2) The costs of response activity recoverable under subsection (1) shall also include all of the following:

(a) All costs of response activity reasonably incurred by the state prior to the promulgation of rules relating to the selection and implementation of response activity under this part, excepting those cases where cost recovery actions have been filed before July 12, 1990. A person challenging the recovery of costs under this subdivision has the burden of establishing that the costs were not reasonably incurred under the circumstances that existed at the time the costs were incurred. Recoverable costs include costs incurred reasonably consistent with the rules relating to the selection and implementation of response activity in effect on July 12, 1990.

(b) Any other necessary costs of response activity reasonably incurred by any other person prior to the promulgation of rules relating to the selection and implementation of response activity under this part. A person seeking recovery of these costs has the burden of establishing that the costs were reasonably incurred under the circumstances that existed at the time the costs were incurred. [Emphasis added.]

BP and CDC contend that plaintiff's failure to allege the expenditure of *necessary* costs under §§ 20126 and 20126a, or that the DEQ required plaintiff to remove the USTs, is fatal to plaintiff's claim for reimbursement under the NREPA.

The interpretation and application of a statute is a question of law that this Court reviews de novo. *Adair v State*, 486 Mich 468, 477; 785 NW2d 119 (2010). In interpreting statutory

language, this Court's primary goal is to give effect to the Legislature's intent. *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010). If statutory language is clear and unambiguous, it must be enforced as written. *Id*.; *Mich Deferred Presentment Servs Ass'n v Comm'r of the Office of Fin & Ins Regulation*, 287 Mich App 326, 333; 788 NW2d 842 (2010). This Court will not interpret a statute in a way that renders any statutory language surplusage or nugatory. *Id*.

In *City of Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616; 583 NW2d 215 (1998), this Court addressed a similar issue under the predecessor statute, MERA. In that case, the plaintiff municipality (treated as a private party for purposes of a cost-recovery action), sought compensation from the defendant for voluntary cleanup activities. *Id*. at 620. The pertinent provision in the MERA stated:

> (2) A person described in subsection (1) [defining potentially responsible persons, or "PRPs"] shall be liable for:
>
> (a) All costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity under this act.
>
> (b) *Any other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this act*.
>
> (c) Damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release. [Former MCL 299.612(2) (emphasis added).]

The defendant argued that the plain language of this statute required that a private party seeking recovery of cleanup costs "establish that the private party incurred the costs of remediation consistent with the rules promulgated under the MERA, 1990 AACS, R 299.5101 *et seq*., effective July 12, 1990." *City of Port Huron*, 229 Mich App at 621. This Court observed:

> As defendants point out, the MERA is similar in intent to, and patterned after, the CERCLA, and both acts provide for the identification of environmental contamination and for response activity to remediate it. Further, both acts impose strict liability for cleanup costs on persons who fall within one of the enumerated categories of potentially responsible persons. MCL 299.612; 42 USC § 9607(a). [*Id*. at 621-623 (citations omitted).]

This Court compared former § 12(3)(b), which permitted a right of recovery for private parties who undertook response activities before the implementation of administrative rules under the statute, to former § 12(2)(b). The Court made the same comparison between the provisions of the statute governing the state's right to compensation from a PRP for remediation actions undertaken before and after the implementation of administrative rules. *City of Port Huron*, 229 Mich App at 627-629. The Court explained the difference as follows:

> As for cost recovery actions brought by private parties, § 12(3)(b) applies to response activity undertaken before the promulgation of the rules on July 12, 1990. Under § 12(3)(b), a PRP shall be liable for "[a]ny other *necessary* costs of response activity *reasonably* incurred" (emphasis provided) by a private party before the promulgation of the rules. In contrast to cost recovery actions brought by the state before the promulgation of the rules, a private party has the burden of proving that its "necessary costs of response activity" were reasonably incurred before the promulgation of the rules. However, after the administrative rules became effective on July 12, 1990, recovery of cleanup costs incurred by a private party is governed by the standard set forth in § 12(2)(b), which subjects a PRP to liability for "[a]ny other necessary costs of response activity incurred" by a private party that is "consistent with the rules relating to the selection and implementation of response activity promulgated under this act." [*Id*. at 628.]

This Court then concluded:

> [I]t is clear that the Legislature sought to distinguish the "necessary" from "reasonable" and its cognates, as they are used in subsections 2 and 3. By allowing a private party, under § 12(3)(b), to recover its "necessary costs of response activity reasonably incurred" before the promulgation of the rules, which permitting a private party, under § 12(3)(a) to recover its "necessary costs of response activity incurred" that are consistent with the rules after their promulgation, it is evident that the Legislature intended "necessary" to have a different meaning than "reasonable." . . . *Thus, we construe the phrase "necessary costs of response activity" to mean those response activity costs that are "required" in remediating a contaminated site to protect the public health, safety, or welfare, or the environment, or the natural resources*. As defined by the MERA, then, the kinds or types of response activity costs that are necessary in remediating a contaminated site cover a wide range of activities, including "evaluation, interim response activity, remedial action, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment, or the natural resources." MCL 299.603(aa). [*Id*. at 629-630 (emphasis added).]

Applying the foregoing rationale to this case, we agree with the trial court that any liability by defendants under the NREPA for plaintiff's cleanup costs extends only to remediation activities that were "necessary costs of response activity" under § 20126(2). With respect to this issue, the NREPA and MERA contain identical language. Both statutes impose on a PRP liability for "[a]ny other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this part." In *City of Port Huron*, 229 Mich App at 629, this Court held that "necessary costs of response activity" means "those response activity costs that are 'required' in remediating a contaminated site to protect the public health, safety, or welfare, or the environment, or the natural resources." The costs must be "consistent with the rules relating to the selection and implementation of response activity promulgated under this act." *Id*. at 628. Accordingly, defendants correctly argue that plaintiff is not entitled to reimbursement for the

cost of *any* remediation of environmental hazards, but rather only for remediation that is consistent with the regulations promulgated under the NREPA.

This conclusion is supported by *City of Detroit v Simon*, 247 F3d 619 (CA 6, 2001), in which the Sixth Circuit Court of Appeals held that the municipal plaintiff was not entitled under the NREPA to recover response costs incurred to improve the property's environmental condition beyond that necessary to make the property suitable for its intended use. The Court explained:

> With a few exceptions not relevant here, the types of response costs recoverable under CERCLA are limited to those that are "necessary" in light of the nature and type of property to be cleaned up. See 42 USC § 9607(a)(4)(B). Several federal courts have recognized that recovery of environmental cleanup costs incurred to achieve a higher level than the use of the property necessitates would violate CERCLA's requirement that recoverable response costs be "necessary."
>
> Similarly, NREPA provides that the cleanup proposed should be "appropriate" in light of the facility's categorical criteria, see MCL 324.20120a(1), and it also provides that recoverable costs must be "necessary." See MCL § 324.20126a(1)(b). As NREPA (formerly MERA) was patterned after CERCLA, it should be construed in accordance with the federal statute.
>
> The property at issue in this case has a long history of industrial use. To require former occupants to assume liability for cleanup costs going beyond the level necessary to make the property safe for industrial use would be to provide an unwarranted windfall to the beneficiary of the cleanup. [*Id*. at 630 (citations omitted).]

In this case, plaintiff alleged that it incurred costs and expenses to remove the USTs and other equipment from the property, but did not allege that its response activities were consistent with the DEQ's rules or necessary to protect human health and the environment. Although plaintiff's complaint also contains the conclusory allegation that it "has incurred and will continue into the future to incur necessary 'response costs' as that term is defined by NREPA," plaintiff did not allege any facts in support of that conclusion. "A mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Kloian v Schwartz*, 272 Mich App 232, 241; 725 NW2d 671 (2006), quoting *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 592; 683 NW2d 233 (2004). Plaintiff did not allege that removal of any of the USTs was a remedial measure that was necessary under the NREPA.

On appeal, plaintiff argues that 1999 AC, R 299.5526, authorizes certain "interim responses" before obtaining approval from the DEQ. However, this rule does not provide for compensation of response costs that are not necessary under the NREPA or its regulatory rules.

Accordingly, the trial court did not err in dismissing plaintiff's NREPA claims pursuant to MCR 2.116(C)(8).

IV. BREACH OF CONTRACT

Plaintiff argues that the trial court erred in dismissing its breach of contract claim against CDC because the court erroneously gave the "as is" clause in the purchase agreement precedence over an indemnification clause. This issue raises a question of contract interpretation, which is reviewed de novo by this Court. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009).

The purchase agreement between plaintiff and CDC contains an indemnity clause that provides:

> 15.2 From and after the Closing Date, Seller hereby agrees to indemnify and hold Purchaser . . . harmless from and against any and all claims, penalties, damages, liabilities, actions, causes of action, costs and expenses (including attorneys' fees) arising out of as a result of or consequences of: . . . (iii) clean-up costs and future response costs incurred by Purchaser under the Environmental Laws and relating to the Project, and relating to any violation of the Environmental Laws prior to the Closing Date.

Paragraph 9 of the purchase agreement, labeled Seller's Warranties, sets forth warranties (a) through (g), concerning matters such as pending legal proceedings involving the property. In ¶ 9.1(f), the seller warrants that it had not received notice of any environmental violation on the property. Paragraph 9.3 states, "Except as otherwise provided herein, the Project is being acquired 'as-is,' 'where-is.'"

Although plaintiff now argues that the trial court erred in giving the "as-is" clause precedence over the indemnity clause, plaintiff did not seek indemnity as a remedy in its complaint. Instead, plaintiff sought the remedy of rescission. Plaintiff alleged that CDC failed to disclose conditions that would interfere with plaintiff's intended plans to construct a recycling facility. Plaintiff does not address the remedy of rescission on appeal. Contrary to what plaintiff now argues, the trial court did not apply the "as is" clause in a manner that conflicted with the indemnification provision, but rather determined that the indemnification provision was not applicable in the first instance.

A written contract must be interpreted according to its plain and ordinary meaning. *Woodington v Shokoohi*, 288 Mich App 352, 373-374; 792 NW2d 63 (2010). A contract is ambiguous if it allows two or more reasonable interpretations, or if the provisions cannot be reconciled with each other. *Id*. at 374. If contractual language is clear, its interpretation is a question of law for the court. *Id*. Courts must give "effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Id*.

In this case, the indemnification provision limited CDC's obligation to indemnify plaintiff to losses arising from specific circumstances, including "clean-up costs and future response costs incurred by Purchaser *under the Environmental Laws* and relating to the Project, and *relating to any violation of the Environmental Laws* prior to the Closing Date." As discussed previously, plaintiff failed to plead that it incurred any response costs under the

environmental laws. Accordingly, plaintiff failed to plead a breach of the indemnification provision.

For these reasons, the trial court did not err in dismissing plaintiff's breach of contract claim against CDC.

V. NEGLIGENCE

Plaintiff next argues that the trial court erred in dismissing its negligence claim against both defendants. We disagree.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Violation of a penal statute or a safety statute creates a rebuttable presumption of negligence, but only if the statute is intended to protect against the result of the violation. *Green v Wilson*, 455 Mich 342, 376 n 16; 565 NW2d 813 (1997); *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986). Plaintiff contends that BP breached a statutory duty to register the location and contents of all USTs on the property. Plaintiff relies on MCL 324.21102, which is part of the NREPA and provides, in pertinent part:

> (1) A person who is the owner of an underground storage tank system shall register and annually renew the registration on the underground storage tank system with the department. However, the owner or operator of an underground storage tank closed prior to January 1, 1974 in compliance with the fire prevention code, Act No. 207 of the Public Acts of 1941, being sections 29.1 to 29.33 of the Michigan Compiled Laws, and the rules promulgated under that act, is exempt from the registration requirements of this section.
>
> (2) A person who is the owner of an underground storage tank system shall register the underground storage tank system with the department prior to bringing the underground storage tank system into use. Additionally, an installation registration form containing the information required by the department shall be submitted to the department at least 45 days prior to the installation of the underground storage tank system.
>
> (3) The department shall accept the registration or renewal of registration of an underground storage tank system under this section only if the owner of the underground storage tank system pays the registration fee specified in subsection (8).
>
> (4) Except as otherwise provided in subsections (5) and (6), a person who is the owner of an underground storage tank system registered under subsection (1) or (2) shall notify the department of any change in the information required under section 3 or of the removal of an underground storage tank system from service.

Plaintiff also cites MCL 324.21102, which sets forth the procedure for registering USTs.

Plaintiff relies on *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1; 596 NW2d 620 (1999), as authority for its argument that the NREPA is a statute intended to protect future property owners from the risk of purchasing property containing undisclosed USTs. In *Cipri*, the defendant Bellingham Frozen Foods contracted with the defendant Sherburn "to remove some sweet corn husks to be used as silage for cattle feed." Sherburn's feed bunker was not large enough to fit the entire quantity of corn husks, and the fermenting husks produced leachate that flowed into streams, which in turn flowed into a privately owned lake on the plaintiff's property. The contamination from the leachate killed the lake's aquatic life. *Id*. at 3. In *Cipri*, 235 Mich App at 14, this Court considered the defendant Bellingham's argument on cross appeal that the trial court should have directed a verdict and granted judgment notwithstanding the verdict with regard to the plaintiff's negligence claim. This Court held:

> [T]he fact that defendant's conduct may have been in violation of a statute does not in and of itself shed light on whether defendant owed plaintiff a duty of care; however, once a duty is found, the violation of a statute can be prima facie evidence of negligence. See, e.g., *Beals v Walker*, 416 Mich 469, 481-482; 331 NW2d 700 (1982) (workplace safety regulations); *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 135; 463 NW2d 442 (1990) (city ordinance); *Carney v Dep't of Transportation*, 145 Mich App 690, 699-700; 378 NW2d 574 (1985) (standards for highway design). Rather, whether a plaintiff can use a statute to impose a duty of care on a defendant depends on (1) whether "the purpose of the [statute] was to prevent the type of injury and harm actually suffered" and (2) whether the plaintiff was "within the class of persons which [the statute] was designed to protect." *McKnight v Carter*, 144 Mich App 623, 636; 376 NW2d 170 (1985); see also *Phillips v Deihm*, 213 Mich App 389, 396-398; 541 NW2d 566 (1995) (grandmother with whom child-plaintiff resided had a statutory duty to prevent sexual abuse by grandfather).
>
> There are no published cases discussing whether the MERA or the MEPA imposes a duty of care, actionable in tort, toward the general public. We note initially that the purpose of the statutes is to prevent environmental contamination and to promote compensation for remediation, and that liability flows from anyone fitting the definition of a responsible party any member of the public who incurs response costs or whose natural resources are injured by such contamination. We therefore conclude that the statutes were intended to prevent precisely this type of injury and that plaintiff was within the class of persons intended to be protected by the statutes. [*Cipri*, 235 Mich App at 16-17.]

However, the decision in *Cipri* does not establish that the UST registration provisions of the NREPA were intended to prevent injury to buyers of property containing undisclosed USTs. As a post-contamination purchaser of the property, plaintiff was not liable under the NREPA for recovery costs. As discussed previously, plaintiff failed to plead a valid claim under the NREPA for environmental contamination. Consequently, plaintiff's alleged injury does not arise from environmental contamination, but rather from the unwanted presence of underground structures that interfere with plaintiff's intended use of the property. Thus, this case is distinguishable from *Cipri*, in which the plaintiff's injury arose from a type of environmental contamination expressly prohibited by the MERA.

In *Christy v Prestige Builders, Inc*, 415 Mich 684; 329 NW2d 748 (1982), our Supreme Court held that a seller of real property does not have a duty of care to subvendees with respect to defective conditions on the property. The Court stated:

> Under the common law, a land vendor who surrenders title, possession, and control of property shifts all responsibility for the land's condition to the purchaser. Caveat emptor prevails in land sales, and the vendor, with two exceptions, is not liable for any harm due to defects existing at the time of sale. [*Id*. at 694.]

The Court recognized an exception to this general principle where the vendor fails to disclose an unreasonably dangerous and concealed condition to the original vendee, but stated that "[o]nce the purchaser discovers the defect and has had a reasonable opportunity to take precautions, third parties such as subvendees have no further recourse against the vendor." *Id*. at 694-695.

Plaintiff here argues that there is a question of fact regarding CDC's knowledge of the USTs and the pipeline system. However, the trial court granted summary disposition under MCR 2.116(C)(8), not (C)(10). Plaintiff's second amended complaint fails to identify with specificity any hazard associated with the tanks. Plaintiff alleges only that the tanks should have been registered in accordance with MCL 324.21101 *et seq*. Accordingly, BP was entitled to summary disposition on this count.

Plaintiff argues that the trial court prematurely granted summary disposition for CDC with respect to the negligence claim because further discovery was needed to determine whether CDC knew of the USTs on the property. Any duty owed by CDC to plaintiff necessarily arose from the purchase agreement. If a plaintiff seeks to impose tort liability arising out of a contract, the plaintiff must establish that the defendant owed a duty that was separate and distinct from the obligations contained in the contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). Plaintiff has not identified any duty by CDC, separate and distinct from its contractual duties under the purchase agreement, to take any action with respect to the USTs. Accordingly, CDC also was entitled to summary disposition with respect to plaintiff's negligence claim.

VI. TRESPASS

Plaintiff lastly challenges the trial court's dismissal of its trespass claim against BP. We agree that this claim was improperly dismissed under MCR 2.116(C)(8).

Trespass is an invasion of the plaintiff's interest in the exclusive possession of his land. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 59; 602 NW2d 215 (1999). In *Rogers v Kent Bd of Co Rd Comm'rs*, 319 Mich 661, 666; 30 NW2d 358 (1948), our Supreme Court quoted with approval 1 Restatement Torts, § 160, p 368, which provides:

> A trespass, actionable under the rule stated in § 158, may be committed by the continued presence on the land of a structure, chattel or other thing which the actor or his predecessor in legal interest therein has placed thereon

(a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated, or

(b) pursuant to a privilege conferred on the actor irrespective of the possessor's consent, if the actor fails to remove it after the privilege has been terminated, by the accomplishment of its purpose or otherwise.

Consistent with the 1 Restatement Torts, 2 Restatement Torts, § 160, p 284, provides:

A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land

(a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated, or

(b) pursuant to a privilege conferred on the actor irrespective of the possessor's consent, if the actor fails to remove it after the privilege has been terminated, by the accomplishment of its purpose or otherwise.

Comment (g) provides an example that is analogous to plaintiff's allegations concerning BP's pipeline:

Mistaken belief that license is irrevocable. Even though the actor or his transferor has not agreed to remove the structure, chattel, or other thing from the land upon the termination of the license pursuant to which it was placed there, as where the parties act under a mistaken belief that the license is irrevocable, the termination of the license creates a situation in which the rule stated in this Section applies.

Illustration

2. A executes and delivers to the B Telephone Company a document which both parties believe confers on the B Company an irrevocable license to erect and maintain telephone poles on A's land. A transfers the land to C, who discovers that the document and the acts done under it do not create an irrevocable license. C notifies the B Company to remove its poles from the land. The B Company's failure to remove the poles within a reasonable time is a trespass.

Similarly, Am Jur 2d, Trespass § 77, pp 80-81, provides:

Subject to the privileges of reasonable egress and removal of objects from land, the actor's privilege to enter land created by consent of the possessor is terminated by the doing of any act, or the happening of any event, or the lapse of any specified period of time by which the consent is restricted; by a revocation of the possessor's consent of which the actor knows or has reason to know; or, by a transfer or other termination of the possessor's possessory interest in the land.

> For instance, a complete defense to trespass does not exist if the defendant's only right to be on the land was a privilege under an oral license, which could be terminated by a transfer of the property.

We conclude from these authorities that plaintiff pleaded a valid claim for trespass. Plaintiff alleged that it has the right of exclusive possession of the property, that BP owns the pipeline that runs through the subject property, that the pipeline is not within any easement of record, and that the pipeline intrudes onto plaintiff's property without plaintiff's consent. *Adams*, 237 Mich App at 59. Although the pipeline was placed on the property before plaintiff acquired ownership, plaintiff, as the exclusive possessor of the property, may withdraw its consent to BP's presence. *Rogers*, 319 Mich at 666; 2 Restatement Torts, § 160; Am Jur 2d, Trespass, § 77. Accordingly, the trial court erred in determining that plaintiff failed to state a valid trespass claim.

BP alternatively argues that plaintiff's claim is barred by the applicable statute of limitations. Trespass claims are subject to the three-year limitations period for recovery of damages for injury to property. MCL 600.5805(10); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009). BP contends that the three-year limitations period began to run when it first installed the pipeline, and thus expired long before plaintiff acquired the property, regardless of the continuing nature of the alleged trespass or plaintiff's recent acquisition of the property and discovery of the pipeline.

We disagree with BP's argument that the continuing nature of the trespass is not a basis for finding that plaintiff's trespass action was timely filed. BP relies on *Froling Trust*, 283 Mich App at 285, in which this Court concluded that the Supreme Court's abrogation of the common-law "continuing wrongs" doctrine in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), applied beyond the context of civil rights claims "to completely abrogate the continuing wrongs doctrine in trespass and nuisance actions as well." The Court also noted that the common-law discovery rule, which allowed tolling of the limitations period when a plaintiff could not have reasonably discovered the elements of a cause of action within the limitations period, had also been abrogated, and was no longer valid except where provided by statute. *Id*. at 286-287.

However, the present case does not involve the continuing *effects* of a past trespassory act. Rather, the physical intrusion that constitutes the trespass remains on plaintiff's property. The Court in *Froling Trust* quoted *Defnet v Detroit*, 327 Mich 254, 258; 41 NW2d 539 (1950), for the proposition that "[t]he Michigan Supreme Court . . . has long recognized an exception to the application of a statutory period of limitations '[w]here there are continuing wrongful acts . . . .'" *Froling Trust*, 283 Mich at 280. In *Defnet*, our Supreme Court recognized a continuing wrong where the defendant continued to operate a sewer that ran under the plaintiff's property.

Further, this Court in *Froling Trust* relied substantially on *Terlecki v Stewart*, 278 Mich App 644; 754 NW2d 899 (2008), in which the Court distinguished continuing wrongful effects from a past act from ongoing or continuing acts with respect to the continuing-wrongful-acts doctrine. *Id*. at 655-656. Relying on *Horvath v Delida*, 213 Mich App 620; 540 NW2d 760 (1995), the Court in *Terlecki* held that the plaintiff's claim was untimely because the two distinct tortious acts (replacement of a spillway and capping of a culvert) occurred more than three years

before the plaintiff's claim was filed. The Court explained that the flooding and property damage that formed the basis of the plaintiff's claim were "merely the harmful effects of the completed tortious acts" and, therefore, were not the events that triggered the running of the limitations period. *Id*. at 656. The Court stated:

> The distinctions noted in *Horvath* with respect to the continuous-wrongful-act doctrine apply equally to the present case. Defendants have not physically intruded on or under plaintiffs' property with an active sewer (*Defnet*), nor annually delivered water through a sewer under plaintiffs' property to plaintiffs' basement (*Hodgeson* [*v Ragnone*, 52 Mich App 411; 217 NW2d 395 (1974)]). Neither have defendants constructed a walkway across plaintiffs' property and physically interfered with their riparian rights (*Difronzo* [*v Village of Port Sanilac*, 166 Mich App 148; 419 NW2d 756 (1988)]). [*Terlecki*, 278 Mich App at 656.]

In this case, the continued presence of BP's pipeline on plaintiff's property is not merely the continuing effect of a past intrusive act. Rather, the presence of the pipeline is a continuing physical intrusion that remains on the property, allegedly interfering with plaintiff's use and enjoyment of the property. Consequently, BP was not entitled to summary disposition on the basis of the statute of limitations.

VII. CONCLUSION

We affirm the trial court's dismissal of all claims against defendant CDC. We also affirm the trial court's dismissal of plaintiff's NREPA and negligence claims against BP. However, we reverse the trial court's order to the extent that it dismissed plaintiff's trespass claim against the BP defendants and remand for further proceedings with respect to the trespass claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens