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NO. COA04-1075

NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2005

EARL G. BROWN; EMMA L. BROWN;  
RICHARD B. EVANS; PEGGY F.  
EVANS; CATHERINE ANN EVANS;  
RICHARD TIM EVANS; CLARENCE  
FARRELL; KATHYRN FARRELL; ROBERT POWELL, SR.;  
RUTH MAXINE POWELL; LATTICE CURL,  
and wife EVELYN CURL; LEWIS BOGER  
and wife KATHY BOGER,  
Plaintiffs,

v .

Alamance County  
No. 03 CVS 663 AMERICAN MULTIMEDIA, INC.; AMI;  
A.M.I.,INC.; AMERICAN MEDIA  
INTERNATIONAL, LCC; AMERICAN MEDIA  
INTERNATIONAL, LTD.; BURLINGTON  
PROPERTY, LLC; BILL AND PEGGY  
BRITT LIMITED PARTNERSHIP;  
DAVID J. FORSYTH; BILLY B. BRITT;  
PEGGY G. BRITT; and JERRY C. JONES, JR.,  
Defendants.

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AMERICAN MULTIMEDIA, INC.;  
AMERICAN MEDIA INTERNATIONAL, LLC;  
BURLINGTON PROPERTY, LLC; BILL AND  
PEGGY BRITT LIMITED PARTNERSHIP;  
DAVID J. FORSYTH; BILLY B. BRITT;  
PEGGY G. BRITT; JERRY C. JONES, JR.;  
Third-Party Plaintiffs,

v.

HERITAGE CASKET COMPANY, INC.;  
MARSELLUS CASKET COMPANY, INC.;

SERVICE CORPORATION INTERNATIONAL,  
Third-Party Defendants.

Appeal by defendants and third-party plaintiffs from order entered 27 May 2004 by Judge J. B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 9 March 2005.

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King III, Katherine A. Murphy, and Alexander Elkan, for defendants and third-party plaintiff appellants.*

*Nelson Mullins Riley & Scarborough, L.L.P., by Tracy E. Tomlin and Eric A. Schwanz, for third-party defendant appellees.*

McCULLOUGH, Judge.

This lawsuit arose after plaintiffs discovered that their underground water supply had been contaminated. From 1970 through 2003, various landowners controlled an adjoining seven-acre tract. Between 1970 and 1980, the Heritage Casket Company owned the seven-acre tract. Heritage manufactured caskets and was a wholly owned subsidiary of Marsellus Casket Company, Inc.

In 1980, Heritage sold the seven-acre tract to Bill and Peggy Britt. Subsequently, the Britt's conveyed the land to the Bill and Peggy Britt Partnership. In 1984, American Multimedia, Inc. purchased the property from the Bill and Peggy Britt Partnership. Finally, Burlington Property, LLC, bought the land from American Multimedia in 1994.

Plaintiffs initiated a lawsuit against defendants, the entities who owned the land since 1980. Specifically, plaintiffs alleged that these entities allowed chemicals to contaminate the groundwater supply. Plaintiffs filed nuisance, negligence, and trespass claims. They also asserted that defendants violated the Oil Pollution and Hazardous Substances Control Act ("OPHSCA"). Defendants denied responsibility and claimed that the Heritage Casket Company caused the contamination prior to selling the property in 1980. Defendants filed third-party complaints against Heritage, Marsellus, and Service Corporation International.

The casket company moved for summary judgment on all claims and argued that the ten-year statute of repose barred the third-party action. On 27 July 2004, the trial court entered an order granting the motion for summary judgment. Defendants appeal.

On appeal, defendants argue that the trial court erred by granting the motion for summary judgment. We disagree and affirm the trial court's order.

The standard of review on appeal from a summary judgment ruling is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact, and a party is entitled to judgment as a matter of law. *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). "The moving party may meet its burden by showing that the nonmoving party's action is barred by an affirmative defense[.]" *Id.* at 394, 499 S.E.2d at 775.

Defendants contend that their third-party claims are not time-barred. Pursuant to N.C. Gen. Stat. § 1-52(16) (2003),

for personal injury or *physical damage to claimant's property*, the cause of action, . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. *Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.* (Emphasis added.)

The plain language of the statute indicates that in cases involving property damage, a cause of action may not be brought more than ten years after defendant's last act or omission.

Our Supreme Court considered the application of this statute to third-party claims in *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991). In *Wilson*, plaintiffs sued their adjoining landowners for contamination of their well water. *Id.* at 498, 398 S.E.2d at 588. Defendants filed third-party complaints against the previous owners of the offending properties. *Id.* The Court of Appeals affirmed the trial court's decision to grant summary judgment to all third-party defendants because the third-party complaints were filed more than ten years after third-party defendants sold the properties to third-party plaintiffs. *Id.* at 512-13, 398 S.E.2d at 597.

On discretionary review, the North Carolina Supreme Court upheld the decision to grant summary judgment for third-party defendants based on N.C. Gen. Stat. § 1-52(16). *Wilson*, 327 N.C. at 512-13, 398 S.E.2d 597. The Court explained:

These claims are barred by the statute of repose found in § 1-52(16), which bars an action filed “more than 10 years after the last act or omission of the defendant giving rise to the cause of action.” N.C.G.S. § 1-52(16) (1983).

*Id.* at 513, 398 S.E.2d at 597. The present case is remarkably similar to *Wilson*. As was the case in *Wilson*, plaintiffs sued the adjoining landowners after learning that their water supply was contaminated. Like the defendants in *Wilson*, defendants in this case filed third-party complaints against the previous owners of the offending properties. Finally, as was the case in *Wilson*, the third-party complaints in the present case were untimely. Since third-party defendants sold the property in 1980, it has been twenty-three years since the last possible act or omission. (See footnote 1)

Significantly, defendants do not mention or seek to distinguish *Wilson* in their brief. It is well established that we are bound by rulings of the North Carolina Supreme Court. *Mahoney v. Ronnie's Road Service*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd*, 345 N.C. 631, 481 S.E.2d 85 (1997). Furthermore, “a court should adhere to conclusions deliberately reached in prior cases” to maintain stability and certainty in the law. *Potter v. Water Co.*, 253 N.C. 112, 117, 116 S.E.2d 374, 378 (1960). We believe that the result in *Wilson* controls the outcome of this case.

In an attempt to circumvent our Supreme Court's holding in *Wilson*, defendants have characterized their third-party claims as contribution and fraudulent failure to reveal material information. However, the mere characterization of the third-party complaint does not govern the applicability of the statute of repose. *See generally Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 52, 332 S.E.2d 67, 71-72 (1985). In this case, the

underlying action between plaintiffs and defendants is for damage to real property. The plain language of the statute indicates that in cases involving property damage, “*no cause of action* shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.” N.C. Gen. Stat. § 1-52(16) (emphasis added). This language encompasses the third-party complaints at issue in the present case.

Finally, we note that the statute of repose set forth in § 1- 52(16) establishes a fixed limit as to when entities, such as landowners, can expect to no longer be exposed to lawsuits for damage to property. We decline to allow an end-run around the statute of repose that would ignore a clear mandate to the contrary and undermine the chief virtue of the statute, its certainty.

Based on the plain language of N.C. Gen. Stat. § 1-52(16) and our Supreme Court's decision in *Wilson*, we conclude that the trial court acted appropriately in disposing of the third-party claims in this case. Because the nonmoving party's action is barred by an affirmative defense, the statute of repose, the trial court's order granting summary judgment is

Affirmed.

Judges HUNTER and LEVINSON concur.

Report per Rule 30(e).

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*Footnote: 1*

*Other similarities between Wilson and the present case are striking. Judge Allen was the presiding judge in both cases which occurred in Alamance County. In fact, the contaminated sites and allegedly offending properties in Wilson are located within miles of the alleged contaminated and offending sites in the present case.*