# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**FILED**
**January 25, 2024**
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**Howard Liston,**
**Plaintiff Below, Petitioner**

**vs.) No. 22-0258** (Monongalia County 16-C-279)

**Frontier West Virginia, Inc., a Connecticut corporation, and T.A. Chapman, Inc., a West Virginia corporation,**
**Defendants Below, Respondents**

## MEMORANDUM DECISION

Petitioner Howard Liston appeals the Circuit Court of Monongalia County's March 7, 2022, order granting respondents summary judgment on petitioner's claim that respondents' allegedly negligent removal and replacement of a utility pole resulted in damages to his real property, finding that the claim was time-barred.[1] Petitioner now challenges that conclusion. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21(c).

The undisputed facts are that respondents, no later than 1993, removed and replaced a utility pole adjacent to petitioner's rental property (the "subject property"). Petitioner testified that he observed this work being performed and that the workers "broke off" the old pole approximately fifteen inches above the ground as they "tried to pull [it] up." Petitioner testified that the break was "real jagged[,] and part of it, it went clear down under the ground. You could see down under the sidewalk in the dirt there." The workers placed the replacement pole nearby, and petitioner, dissatisfied with the manner in which the old pole was left, questioned the workers as the project was being completed. The workers reportedly responded that "a crew right behind" them would "come in and jackhammer this sidewalk up, and dig down a couple of feet, and cut that [old] pole off, and . . . pour a new sidewalk. He said you'll never know we were here." That work was not performed, however, so petitioner, "within two weeks or so," began calling the power company to ask when it planned to "come and fix this." Petitioner testified that he "tried and tried to get the power company to come" and fix the area, specifically because he did not want the area "filling

[1] Petitioner appears by counsel Kevin T. Tipton. Respondent Frontier West Virginia, Inc., appears by counsel Charles C. Wise, and Respondent T.A. Chapman, Inc., appears by counsel Jonathan J. Jacks and Victor Flanagan.

up with water and then, eventually, getting over to my building." But, according to petitioner, "nothing ever happened."

In 1999, petitioner testified that, during a hard rain, he received a call from a tenant living in the subject property who "could hear water running and thought maybe there was a [broken] water line."[2] By the time petitioner got to the subject property, it had stopped raining, so he heard no running water, but he "knew it had to be the rainwater that [the tenant] heard running down between the foundation and . . . under the sidewalk." Petitioner testified that "every time it rained, it had water running around the foundation because it didn't have any[]place to go." Petitioner "knew it was running down the gap between the sidewalk and the building and around that pole, but where it was going, I had no idea at that time."

Then, in 2005, petitioner went into the subject property's crawlspace, put his knee against the foundation, and "could feel that [his] knee was wet." Petitioner testified that he "could tell there was moisture starting to get in there." Petitioner also noted that "back at the wall, you could see where water had come in under the foundation." According to petitioner, this finding "prompted" him to resume making calls "and say, hey, you know, somebody's got to come and fix this pole out here." Petitioner testified that he made "dozens" of calls over the years, and he questioned, "Why did Frontier or whoever—why didn't they come out and fix it. You know, I called enough times that it should have been done." Petitioner, however, did not file suit against respondents until May 9, 2016, after, according to him, he discovered mold in the subject property in 2014.[3]

In his complaint, petitioner alleged that, "[r]ather than remove the pole completely and repair the hole," respondents "negligently left the bottom portion of the pole in the ground, open to the elements." "Over time," petitioner continued, "water has infiltrated the area where the bottom portion of the utility pole was left, washing away the sediment and soil underneath the sidewalk that runs adjacent to the [subject property]," and, "[a]s a direct and proximate result, water has infiltrated the [subject property] causing severe structural damage and mold."

Respondents moved for summary judgment, arguing that petitioner's claim was barred under the two-year statute of limitations provided for in West Virginia Code § 55-2-12(a). The court granted those motions, concluding that the evidence showed that petitioner knew, or by the exercise of reasonable diligence should have known, no later than 2005, that water was around the foundation and had infiltrated the crawlspace of the subject property, which petitioner attributed to the manner in which the utility pole was removed. Because petitioner did not file his complaint

[2] In petitioner's written discovery responses, he stated that "in or about 1999, the Plaintiff heard water running along the outside of the foundation of the home." During his deposition, he maintained that it was his tenant who heard the water running and reported it to him.

[3] Petitioner filed suit against Respondent Frontier West Virginia, Inc. ("Frontier"), on May 9, 2016. By second amended complaint, filed May 17, 2019, Respondent T.A. Chapman, Inc., the contractor who performed the removal and replacement of the utility pole on Frontier's behalf, became a named defendant.

until eleven years later, the court found petitioner's claim to be time-barred.[4] It is from the court's March 7, 2022, order granting respondents summary judgment that petitioner appeals.

In his lone assignment of error, petitioner maintains that his suit was timely because the discovery rule tolled the running of the statute of limitations. He argues that neither his tenant hearing running water in 1999 nor his discovery in 2005 of "dampness" in the crawlspace of the subject property "caused [him] much alarm" because "there was no apparent damage from either." As a result, he did not know, nor by the exercise of reasonable diligence could have known, of any injury. He asserts that he did not discover that the subject property was damaged until he found mold in 2014, and following that discovery, he retained experts to discover who and what were responsible for those damages. Because petitioner filed suit within twenty months of that discovery, he contends that his suit is timely.

In our de novo review of the circuit court's order granting respondents summary judgment, Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994), we employ a five-step analysis to determine whether petitioner's claim is barred by the applicable statute of limitations:

> First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. . . . And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine.

Syl. Pt. 5, in part, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009).

An analysis of these five considerations compels the conclusion that petitioner's claim is time-barred. First, the parties agree that the two-year limitation period provided for in West Virginia Code § 55-2-12(a) is applicable here.[5] Second, we find that the requisite elements of

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[4] Respondents also argued that petitioner's claim was barred by the ten-year statute of repose found in West Virginia Code § 55-2-6a. The court did not address that argument due to its conclusion that petitioner's claim was barred under the applicable statute of limitations. Finally, we note that petitioner does not argue or allege that respondents engaged in a continuing tort or injury. *See, e.g.*, Syl. Pts. 3 & 4, *Roberts v. W. Va. Am. Water Co.*, 221 W. Va. 373, 655 S.E.2d 119 (2007).

[5] That statute provides that "[e]very personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property."

petitioner's cause of action occurred no later than 2005. A negligence cause of action arises upon the establishment of "(1) A duty which the defendant owes him; (2) A negligent breach of that duty; (3) injuries received thereby, resulting proximately from the breach of that duty." *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016) (quoting *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 118 S.E.2d 898, 899 (1939)). Here, too, there is no disagreement that the first two elements of petitioner's negligence claim occurred in the early 1990s with the removal and replacement of the utility pole adjacent to the subject property; the parties' disagreement centers, rather, on the third element. We find that the court did not err in concluding that petitioner was damaged, as a proximate result of the breach of a duty owed, no later than 2005, when petitioner found moisture in the crawlspace of the subject property. Water infiltration of the subject property was the very thing he knew would occur as a result of the manner in which the utility pole was removed and replaced, it was the very thing he immediately sought to prevent by making repeated calls to compel remediation of the sidewalk around the removed pole, and it was explicitly alleged by petitioner as proximately resulting from the allegedly negligent removal and replacement. Unquestionably, petitioner discovered the water infiltration in 2005, testifying that he felt and observed water in the crawlspace of the subject property.

Determining whether the discovery rule here applies to salvage petitioner's claim is the third step of the *Dunn* analysis.

> In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

*Gaither*, 199 W. Va. at 708, 487 S.E.2d at 903, Syl. Pt. 4. Having watched the removal and replacement of the utility pole and spoken to the individuals who performed that work, petitioner knew or should have known the identity of those responsible in the early 1990s. Petitioner knew he had been injured by respondents in 2005, as set forth above, and at that same time, he knew precisely what caused his injury as he had been *expecting* and trying to prevent it. Accordingly, to the extent the discovery rule is applicable at all, it only serves to start the running of the appeal clock in 2005, and the limitation period expired long before petitioner ultimately filed the underlying lawsuit.

Finally, as there are no allegations (or evidence) of fraudulent concealment on respondents' part, and there is no other potentially applicable tolling doctrine, it is clear that petitioner's May 9, 2016, lawsuit is time-barred, and respondents were properly granted summary judgment.[6]

[6] We note that the issue of whether a claim is barred by the statute of limitations is typically one for a jury. *McCoy v. Miller*, 213 W. Va. 161, 167, 578 S.E.2d 355, 361 (2003); *see also* Syl. Pt. 5, in part, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009) (providing that only the first step of the *Dunn* analysis is a purely legal question and that the remaining steps will ordinarily involve questions of fact). But the issue can be resolved by a court where "the relevant facts are

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** January 25, 2024

**CONCURRED IN BY:**

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice William R. Wooton
Justice C. Haley Bunn

**DISSENTING:**

Justice John A. Hutchison

Hutchison, Justice, dissenting:

I dissent to the majority's resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted, not a memorandum decision. Accordingly, I respectfully dissent.

undisputed and only one conclusion may be drawn from those facts." *McCoy*, 213 W. Va. at 167, 578 S.E.2d at 361. Such is the case here.