[Cite as *Lottridge v. Gahanna-Creekside Invests., L.L.C.*, 2015-Ohio-2168.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Rebecca Lottridge,	:	
Plaintiff-Appellant,	:	
		No. 14AP-600
v.	:	(C.P.C. No. 11CV-11198)
Gahanna-Creekside Investments, LLC, et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 4, 2015

Schermer Law, LLC, and *Amy K. Schermer*; *Worley Law, LLC,* and *Caroline Z. Worley,* for appellant.

Isaac Wiles Burkholder & Teetor, LLC, and *Brian M. Zets,* for appellee City of Gahanna.

Isaac Wiles Burkholder & Teetor, LLC, William Benson and *Brandon Abshier,* for appellee Dugan & Meyers Construction Services; *Dickie, McCamey & Chilcote, PC, Mary Barley-McBride* and *Mary McWilliams Dengler,* for appellee BBC&M Engineering, Inc. (nka S&ME Inc.); *Reminger Co., L.P.A.,* and *Gregory D. Brunton,* for appellee GEO Solutions, Inc.; *Mazza and Associates, LLC, John Mazza* and *CNA Staff Counsel, Steven K. Kelley,* for appellee George Igel & Co., Inc.; *John Nemeth & Associates,* and *David A. Herd,* for appellees Gahanna-Creekside Investments, LLC, and Stonehenge Company; *Allen, Kuhnle, Stovall & Neuman, LLP, Rick Ashton* and *Steven Vanslyck,* for appellee Stonehenge Company; *Weston Hurd, LLP, David T. Patterson* and *Frederick T. Bills,* for appellee Bird Houk.

Steptoe & Johnson, PLLC, and *James C. Carpenter,* for appellee GGC Engineers, Inc.

APPEAL from the Franklin County Court of Common Pleas

BROGAN, J.

{¶1} Appellant, Rebecca Lottridge, appeals from the judgment of the Franklin County Court of Common Pleas in favor of various appellees identified in the complaint and in the trial court's summary judgment decision. The facts underlying this appeal are not essentially in dispute and are set out in the trial court's decision as follows:

> This case arises from damages to the plaintiff's property allegedly caused by construction performed by the defendants. The construction at issue, which is referred to as the "Creekside Project", began in 2005 and was completed in 2006. Aff. Of Mo Dioun, ¶4. Part of the project required the installation of a "slurry wall" which was intended to eliminate or reduce subsurface water drainage in the construction area, and an Earth Retention System ("ERS") to temporarily stabilize the perimeter of the project site until the concrete foundation was complete. The slurry wall and ERS were adjacent to the property owned by the plaintiff. Apparently, at some point during the construction, the slurry wall failed. However, with some minor adjustments and remedial work to the slurry wall and ERS, the project was completed in January of 2006 without further incident. According to a timeline prepared by the plaintiff herself and discussed by the plaintiff during her deposition, she began noticing the effects of the construction near her property as early as 2005. Def. Ex. 21, p.1. The plaintiff states on her timeline that, at that time, "loud noises began and the building started physically shaking repeatedly...The shaking cracked the pipes....drywall cracked and front awnings shook loose." Id. In the fall of 2005, the plaintiff noted that she "had numerous conversations with GGC about the construction trucks and other heavy equipment coming into our parking lot" and that she "asked them to stop out of concern that it was causing damage" to the parking lot. In spring and summer of 2005, the plaintiff began noticing "minor" horizontal, vertical and stair step cracking all over her building. Id. In August of 2008, the plaintiff was told by engineer Stephen Metz from Shelley, Metz, Bauman, and Hawk that the foundation of the building had "clearly been compromised." Id. In March of 2009, the plaintiff filed with the Franklin County Board of Revision a "Complaint Against the Valuation of Real Property" explaining that, due to the construction, the building's foundation has been compromised which drastically affected its marketability. Def. Ex. 29. In April of 2009, the plaintiff

> met with Sadika White, the Deputy Director of Economic Development with the City of Gahanna to discuss the damage cause by the construction and specifically asked her why the City was not protecting neighboring business owners and helping with the financial burden of repairing damage caused to her building caused by the construction. Id., p.4. Finally, in August of 2011, the plaintiff was informed by Brian Winkler of GGC that BBC&M performed the subsurface investigation and her building's damage was caused by Pile 19 and that the engineer who was drilling had had [sic] hit a boulder close to her building. Id., p.7.
>
> The plaintiff filed her original complaint in September of 2011 against Gahanna Creekside Investment, LLC, The Stonehenge Company, Inc., and the City of Gahanna. In January of 2013, the plaintiff filed a third amended complaint adding as defendants GGC Engineers, Inc., S&ME, Inc., George J. Igel & Co., Inc., McKinney Drilling Company, LLC, Bird Houk, Geo Solutions, Inc., and Dugan and Meyers Construction Services. In her Complaint, the plaintiff asserts claims for removal of support, negligence, and qualified and absolute nuisance against all defendants. She also asserts claims for negligent hiring and trespass against the City of Gahanna, GCI, and Stonehenge.
>
> The defendants each filed motions for summary judgment arguing that, even assuming the defendants' actions did damage the plaintiff's property, the plaintiff's claims are barred by the statute of limitations. Because they all contain significantly similar arguments, they will be discussed together. The plaintiff contends that, because the injury causing conditions are latent as they arise from the movement of underground soil, the earliest time she realized the full extent of the damage to her property was August of 2011.

(Trial Court June 30, 2014 Decision, at 1-3; R. 292.)

{¶2} The trial court determined that Ms. Lottridge's claims against the City of Gahanna were subject to a two-year statute of limitations pursuant to R.C. 2744.04(A) and the claims against the remaining defendants to a four-year statute of limitations under R.C. 2305.09. The court noted, however, that under the discovery rule, the statute of limitations is delayed until the plaintiff discovers or, in the exercise of reasonable care, should have discovered, that he or she was injured by the defendant. Citing *Rosendale v.*

Ohio Dept. of Transp., 10th Dist. No. 08AP-378, 2008-Ohio-4899, the court further noted that Ohio courts have routinely applied the discovery rule to cases involving latent property damage, and it is not necessary for the plaintiff to be aware of the full extent of the damages before the cause of action arises.

{¶3} The trial court then compared the facts in *Rosendale* to the facts in the instant matter. There, the plaintiff filed an action against the Ohio Department of Transportation alleging that:

> [A] bridge demolition project near his home had damaged his property. The plaintiff had indicated that he noticed "a crack in a wall to his home, layers of dust and dirt, broken windows, and damaged siding," in May of 2002. *Rosendale*, 2008-Ohio-4899, at ¶5. However, the plaintiff did not file his original compliant until February of 2006. Under R.C. 2743.16(A), his claims were subject to a two year statute of limitations. The Court explained that the underlying rationale of the discovery rule fits with latent property-damage actions and, under that rule, it is not necessary for the [] plaintiff to be aware of the full extent of the damages before there is a cognizable event that triggers the running of the limitations period. The Court determined that the plaintiff's original action was not timely filed noting that "although appellant may not have known the full extent of the alleged damages to his home, by May 15, 2002, he was aware that his home may have been damaged due to possible negligence of appellee in connection with the construction project near his home." *Id.* at ¶10.

(Trial Court June 30, 2014 Decision, at 5; R. 292.)

{¶4} In holding that there was no genuine issue of material fact that the plaintiff's claims were barred by the statute of limitations, the trial court noted as follows:

> Here, the plaintiff's own timeline clearly states that she began noticing problems as early as the summer of 2005. She notes that the shaking from the construction cracked pipes, cracked the drywall, and shook the front awnings loose. She continued noticing cracks in multiple spots all around the building through 2006 and 2007. She spoke with the contractors completing the construction, so she was at least aware that the construction was probably the cause of the damage. Finally, in August of 2008, she was told that the foundation of her building had clearly been compromised.

The plaintiff argues that the statements on her timeline were taken out of context. However, that does not change that fact that she admits in her timeline that she was aware of cracks, she was aware of shaking, she knew who was responsible for the project as she spoke with the contractors, and she was specifically told that the foundation of her building had been compromised. In fact, the plaintiff's timeline indicates that she spoke with representatives of the defendants as early as fall of 2006 and met with them several times. The plaintiff even met with Sadika White from the City of Gahanna to discuss the damage to her property caused by the construction in April of 2009. Consequently, the plaintiff's assertions that she could not have known about the damage until 2011 are not persuasive. As explained in the relevant case law above, the fact that she did not realize the full extent of the damage is immaterial.

Additionally, the plaintiff's claims for trespass and nuisance also fail because the construction activities that make up those claims were completed in the fall of 2006.

In *Sexton*, the Supreme Court of Ohio upheld the lower Court's grant of summary judgment on the basis that the plaintiff's complaint was not timely, explaining that while flooding of the plaintiff's property continued after the construction was complete, once the defendants completed their work and no longer had control of the property, "the alleged trespass was completed, and the four-year statute of limitations began to run." *Sexton v. City of Mason*, 117 Ohio St.3d 275, 285, 2008-Ohio-858, 883 N.E.2d 1013.

Furthermore, in *Weir*, the Seventh District Court of Appeals of Ohio, relying on the Supreme Court of Ohio's decision in *Franz*, explained that much like trespass, a permanent nuisance is one that occurs "when the wrongdoer's tortious act has been completed" but that plaintiff "continues to experience injury in the absence of any further activity by the defendant." *Weir v. E. Ohio Gas Co.*, 2003-Ohio-1229, ¶30, 2003 Ohio App.LEXIS 1165 (7th Dist. 2003) citing *Valley R. Co. v. Franz*, 43 Ohio St. 613. There, the Court determined that although a leak caused by the defendants left contaminants on the plaintiff's property, it was only responsible for one tortious act, the leak that occurred in 1989, and would, therefore, only be liable for a permanent, not continuous trespass and nuisance. *Id.*

> Though water may continue to run from the ramp that constructed onto plaintiff's property, the completion of the construction of the ramp was the point at which the tortious conduct was fully accomplished and that was the point at which the statute of limitations began to run. The plaintiff also alleges that the defendants and their agents entered her property without permission, but she does not provide any specific dates or indicate that these actions continued after 2006. Accordingly, these claims should have been filed against the city by no later than the fall of 2008 and against all other defendants by no later than the fall of 2010. However, the plaintiff's original complaint was not filed until October of 2011.

(Trial Court June 30, 2014 Decision, at 6-7; R.292.)

{¶5} Ms. Lottridge appeals that decision and she has raised three assignments of error, to wit:

> [I.] THE TRIAL COURT ERRED IN DETERMINING THAT APPELLEES WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW.
>
> [II.] THE TRIAL COURT ERRED IN NOT TIMELY RULING UPON APPELLANT'S MOTION FOR LEAVE TO AMEND THE PLEADINGS PRIOR TO THE SUMMARY JUDGMENT MOTIONS BEING FILED, AND AT THE SAME TIME NOT PERMITTING APPELLANT TO DEPOSE ANY OF APPELLEES, WHILE AT THE SAME TIME PERMITTING APPELLEES TO DEPOSE APPELLANT AND APPELLANT'S EXPERT; THE TRIAL COURT ALTERNATIVELY ERRED IN NOT ALLOWING THE FACTS TO CONFORM TO THE EVIDENCE.
>
> [III.] THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR LEAVE TO AMEND THE PLEADINGS EITHER BECAUSE THE COURT FAILED TO APPLY AN "ACTUAL PREJUDICE" STANDARD OR BECAUSE THERE WAS NO SHOWING OF ACTUAL PREJUDICE.

{¶6} Ms. Lottridge contends the trial court committed reversible error in failing to address the equitable estoppel and fraudulent concealment arguments as they relate to the defendants' statute of limitations defense. Ms. Lottridge argues that, even assuming

that she knew her building and soils had been damaged as a result of the Creekside Project in the summer of 2006, appellees misled her into believing that she suffered no injury as a result of appellees' negligence and instead misled her into believing that her issues were because the building was old and had drainage issues. Ms. Lottridge notes that nowhere in the eight separately filed summary judgment motions or replies did any of the appellees deny that representations were made or if made were not calculated to induce her to forgo filing suit.

{¶7} Ms. Lottridge notes that her engineering expert, William H. Shepherd, stated in his affidavit and deposition that appellees knew they had compromised the lateral support to Ms. Lottridge's building and compromised the soils on which her building sits. Shepherd noted in his affidavit that appellees knew this would take time to develop, making any causal connection difficult for a lay person to make. Ms. Lottridge notes that Shepherd stated in his affidavit, "In my opinion based upon what I have reviewed and given the extensive nature of the damages in this case, that is precisely why Defendants lied to and misled the Plaintiff – all in the hope that she would never learn the truth and never file a suit." (Shepherd Feb. 25, 2014 Affidavit, at 5; R. 279.)

{¶8} Ms. Lottridge argues that her case is precisely the situation and injustice this court recognized in *Welfley v. Vrandenburg*, 10th Dist. No. 95APE11-1409 (Mar. 29, 1996) (the equitable estoppel doctrine may be applicable "where the misrepresentation induced a delay in the filing of the action"). Ms. Lottridge notes that she testified in her deposition that she was affirmatively misled and induced into believing that she had not been injured as a result of any of appellees' wrongdoings. Ms. Lottridge argues that the issue of whether she established that the appellees should be barred from raising the statute of limitations defense is a jury question at this juncture of the litigation.

{¶9} Ms. Lottridge specifies that she testified she was misled into believing that the cracking she was seeing in her building was "very normal," and was due to normal settlement of a building her age and/or was a result of the age and drainage of her building, not any wrongdoing by appellees. (Lottridge Depo., Vol. II, p. 346-47, 350-52, 366-67, 394; R. 287.)

{¶10} Ms. Lottridge notes that when she followed up with Sadicka White, the City's Director of Development, in April 2009, Ms. White still denied that the Creekside

Project had anything to do with the issues Plaintiff was having with her building. (Lottridge Depo., Vol. I, at 194-98, 264, 366-67; R. 287.) The developer, Mo Dioun of Stonehenge/Gahanna-Creekside Investments, said the same thing to her in November of 2009, once again blaming her issues on the age and drainage of her building. Appellant argues that, at the time, she did not know what was being represented to her as true were misrepresentations that were not true. She notes that she did not know that the tuck-pointing she was told would fix her issue would never truly fix it. (Shepherd Feb. 25, 2014 Affidavit, at 5; R. 279.) Her position is that all these repairs would do is serve to stall and delay her learning the truth, especially since she was told it would take three to four applications to correct the problem. (Shepherd Feb. 25, 2014 Affidavit, at 5; R. 279.)

{¶11} Ms. Lottridge notes that in the opinion of both her experts, a structural engineer and a soils engineer, there was no way she could have (or should have) known what she was being told by the City and the Developer, Mo Dioun of Stonehenge/Gahanna Creekside Investments, was not true. (Shepherd Feb. 25, 2014 Affidavit, at 5-6; R. 279.); (Dicks Affidavit, at 1-2; R. 279.) And that this is especially true given that the policing authority for making sure the building codes, local ordinances, and FEMA requirements were being complied with was a partner in the Project. (Shepherd Feb. 25, 2014 Affidavit, at 6-7; R. 279; Lottridge Depo., at 264; R. 287.) She notes that she testified it was not until engineer Brian Winkler of GGC came forward in August of 2011 and told her the truth that she found out what happened to her property. (Lottridge Depo., at 127, 347-50, 380-86; R. 287.)

{¶12} Ms. Lottridge notes it is particularly significant that the appellees' project files identify a meeting on October 6, 2005, in which it was agreed that anything having to do with injury to Ms. Lottridge, her building, her soils and her loss of lateral support was to be "all verbal now." (Shepherd Affidavit, at 4, R. 279.)

{¶13} The City argues that the undisputed evidence is that Ms. Lottridge knew or reasonably should have known there were problems caused by the Project as early as the summer of 2005. In any event, the City argues that there is no doubt Ms. Lottridge was aware by the summer of 2006 that the construction could have caused all the damage to her property.

{¶14} The City argues that in the summer of 2005, Ms. Lottridge saw visible damage to the Property. In a "Summary of Observations" prepared by Ms. Lottridge in connection with the report of her engineering expert Shepherd, she stated that in the summer of 2005, the underground phase of construction was well under way for the Creekside Project. "Loud noises began and the building started physically shaking repeatedly. Light bulbs would break and the windows would vibrate from the construction activity. The shaking also cracked the pipes – for drainage on the roof and for the plumbing. The HVAC unit was also affected as a result of construction dust getting into the system, drywall cracked, and front awnings shook loose." (R. 202, at 1). Ms. Lottridge admits she told GGC, in 2005, that her building had been damaged by the Creekside Construction. By the summer of 2006, Ms. Lotttridge observed "minor horizontal, vertical and stair step cracking in multiple spots all over [her] building." (R. 202, at 1). The City argues that these unmistakable concerns were cognizable events, and when considered together, were enough to alert Ms. Lottridge of the possible existence of a cause of action against the City of Gahanna.

{¶15} The City argues that Ms. Lottridge's claims against it are governed by the two-year statute of limitations set forth in R.C. 2744.04(A). The City cites that pursuant to that statute, an action against a political subdivision to recover damages for loss to property shall be brought within two years after the cause of action accrues and the period of limitation shall be tolled pursuant to R.C. 2305.16. Those two tolling reasons, the City notes, are the plaintiff is within the age of minority or is of unsound mind. *See* R.C. 2305.16.

{¶16} The parties agree that R.C. 2744.04(A) governs the statute of limitations for actions against a city to recover damages for injury to property. The action must be brought within two years after the cause of action accrues and it accrues when the plaintiff discovers, or through reasonable diligence should have discovered, that he or she was injured and that it was caused by the defendant. The parties agree that actions against the other defendants fall under a four-year statute subject to the same discovery rule. *See* R.C. 2305.09.

{¶17} Ms. Lottridge argues that the trial court erred in granting summary judgment when it failed to address her arguments relating to equitable estoppel and

fraudulent concealment. She contends even assuming that the statute of limitations began to run in the summer of 2006 (which the trial court picked as a matter of law) the defendants should be equitably estopped from raising the statute as a defense by their subsequent conduct. Specifically, she argues that the defendants misled her into believing that she suffered no injury as a result of their negligence, but led her to believing that her issues were because her building was old and had drainage issues.

{¶18} In support of her argument, Ms. Lottridge cites this court's opinion in *Welfley v. Vrandenburg*, 10th Dist. No. 95APE11-1409 (March 29, 1996). Judge Lazarus wrote on behalf of this court:

> Equitable estoppel can preclude a defendant from asserting the bar of the statute of limitations. The basis for this principle is that:
>
> " * * * [O]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause the adversary to subject a claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought. * * * " *Markese v. Ellis* (1967), 11 Ohio App.2d 160, 163.
>
> The doctrine may be applicable where the misrepresentation induced a delay in the filing of the action. See *Schrader v. Gillette* (1988), 48 Ohio App.3d 181 (court refused to apply doctrine because there was no evidence of actual reliance on the misrepresentation). To successfully raise a claim of equitable tolling, a party must show a misrepresentation whether made in good faith or not that was calculated to induce a plaintiff to forego the right to sue. *Jones v. General Motors Corp.* (C.A.6, 1991), 939 F.2d 380, 385; accord, *Ott v. Midland-Ross Corp.* (C.A.6, 1979), 600 F.2d 24, 31; *Breda v. Clyde Evans Markets* (June 4, 1993), Allen App. No. 1-93-3, unreported.

Id. at 3.

{¶19} For their part, the defendants argue that the defense of equitable estoppel is not available merely because they continually denied responsibility for plaintiff's damages.

{¶20} The statute can be tolled where the defendant promises to make a better settlement of the claim if the plaintiff did not bring the threatened suit. *See Sabouri v. Ohio Dept. of Job and Family Servs.*, 145 Ohio App.3d 651, 655 (10th Dist.2001), *see also Hoeppner v. Jess Howard Elec. Co.*, 150 Ohio App.3d 216, 2002-Ohio-6167 (10th Dist.) "Equitable tolling is only available in compelling cases which justify a departure from established procedure." *Sharp v. Ohio Civ. Rights Comm.*, 7th Dist. No. 04 MA 116, 2005-Ohio-1119, ¶ 11. Thus, equitable tolling is to be applied sparingly and only in exceptional circumstances. *Byers v. Robinson*, 10th Dist. No. 08AP-204, 2008-Ohio-4833, ¶ 56. A litigant seeking equitable tolling must demonstrate that he or she diligently pursued his or her rights, but some extraordinary circumstance stood in his or her way and prevented timely action. *In re Regency Village Certificate of Need Application*, 10th Dist. No. 11AP-41, 2011-Ohio-5059, ¶ 37.

{¶21} In *Kegg v. Mansfield*, 5th Dist. No. 2000CA00311 (Apr. 30, 2001), the court of appeals rejected the application of equitable estoppel when the alleged representations related to the merits of plaintiff's claims and were "in no way related to misrepresentations concerning the statute of limitations or a promise of settlement." *Id.* at 5.

{¶22} In *Allen v. Andersen Windows, Inc.*, 913 F.Supp.2d 490 (S.D. Ohio 2012), the plaintiff alleged that the defendant sold her defective windows. Andersen refused to replace the windows contending that the mold on her windows was caused by conditions in the plaintiff's home. The plaintiff contended that the defendant's explanation delayed her in filing her lawsuit before the statute of limitations ran. She alleged that the defendant, Andersen, should be equitably estopped due to "acts of fraudulent concealment" including failing to disclose that their windows were defectively manufactured and would deteriorate. Judge Frost wrote as follows in rejecting her claim:

> The problem with these allegations is that they describe a factual basis for certain claims for relief, but *not* a basis for applying *equitable estoppel* related to the statute of limitations. "In order to apply the doctrine to the statute of limitations, a party must show that the misrepresentation 'was calculated to induce a plaintiff to forgo the right to sue.' " *Hoeppner v. Jess Howard Elec. Co.*, 150 Ohio App.3d 216, 2002–Ohio–6167, 780 N.E.2d 290, at ¶ 43 (quoting *Welfley*

> *v. Vrandenburg*, 10th Dist. No. 95APE11–1409, 1996 WL 145467 (Ohio Ct.App. Mar. 29, 1996)); see also *Walburn*, 443 Fed.Appx. at 49 (observing that Ohio courts have "narrowed the kind of misrepresentation that must be alleged in order to invoke equitable estoppel"; the misrepresentation must be of a kind that induces a plaintiff to forgo filing suit). Allen has alleged, at most, that Andersen engaged in acts and omissions that concealed defects in Andersen's windows and that Allen (and others similarly situated to her), as a result, could not detect the latent defects until those defects manifested themselves. (Compl. ¶ 50.) But the Complaint is devoid of any allegation that Andersen made a misrepresentation that induced her to forgo filing suit, which is the sine qua non of equitable estoppel as it relates to estoppel to rely on the statute of limitations as a defense. Doe, 116 Ohio St.3d 538, 2008–Ohio–67, 880 N.E.2d 892, at ¶ 8; see also *Kegg v. Mansfield*, 5th Dist. No. 2000CA311, 2001 WL 474264, at *5 (Ohio Ct.App. Apr. 30, 2001) (rejecting application of equitable estoppel when the alleged misrepresentations related to the merits of plaintiff's claim and were "in no way related to misrepresentations concerning the statute of limitations or a promise of settlement").

(Emphasis sic.) *Id.* at 511.

{¶23} In *Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, the plaintiff brought a negligent and intentional infliction of emotional distress action against the defendant because she claimed she was impregnated by a priest when she was sixteen-years old and was required to give up her child for adoption. The lawsuit was filed in 2004 for defendant's conduct alleged to have happened in 1965. Justice Pfeiffer wrote on the behalf of the court in rejecting the plaintiff's claim that the defendant was equitably estopped from raising the statute of limitations:

> If the Archdiocese is correct that Doe's complaint was filed outside the applicable statute of limitations—and Doe does not claim otherwise—equitable estoppel will benefit Doe only if she has pleaded facts that, if proved, will demonstrate the efforts of the Archdiocese to prevent her from filing a lawsuit. Only those facts are relevant to a resolution of this case. We conclude that, even when viewed in the light most favorable for Doe, the complaint contains no allegation that, if proved, would establish that the Archdiocese did anything that was designed to prevent Doe from filing suit. Thus, equitable

> estoppel cannot save her complaint from dismissal for being untimely filed.
>
> To be sure, Father Heil and Sister Mary Patrick did not want the identity of the father of Doe's baby to become public knowledge, and a lawsuit would have revealed his identity. But to infer from the acts alleged in the complaint an intent to prevent Doe from filing suit requires a leap of logic that we are not prepared to take. The complaint contains many statements attributed to Father Heil and Sister Mary Patrick, but none of them address, even implicitly, the general subject of a lawsuit or litigation, and none of them reflect or imply an effort to discourage Doe from filing a lawsuit. The purpose of equitable estoppel is to prevent fraud, and none of the statements or threats constitute an actual or constructive fraud. See *Frantz*, 51 Ohio St.3d at 145, 555 N.E.2d 630. There is also no allegation in the complaint that Father Heil, Sister Mary Patrick, or anyone else associated with the Archdiocese had any contact with Doe after 1965. See *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, at ¶ 45 (plaintiff asserting equitable estoppel as bar to statute-of-limitations defense must establish subsequent and specific actions by defendants that prevented plaintiff from timely filing suit). In sum, nothing in the complaint suggests that the Archdiocese prevented Doe from filing a lawsuit in a timely manner. We conclude that the Archdiocese cannot be equitably estopped from asserting a defense premised on the expiration of the applicable limitations period.

Id. at ¶ 8-9.

{¶24} If we construe the evidence most favorably to Ms. Lottridge, she was certainly on notice in August 2008 when she learned from her engineer, Stuart Metz, that her building had clearly been "compromised" by the construction activities of the Project. She thus had two years from August 2008 to sue the City of Gahanna and four years to sue the other defendants. There was no evidence to support Ms. Lottridge's claim that the statute was tolled because the defendants were equitably estopped from claiming the defense of the statute. The defendants consistently denied liability and never offered to settle Ms. Lottridge's claim if she would forgo a lawsuit. A general denial of liability does

not create an equitable estoppel to assert a legitimate defense. The statute also was not tolled by the plaintiff's claim of "fraudulent concealment." Judge Frost noted in *Allen*:

> A cognizable claim for "fraudulent concealment" under Ohio law requires a plaintiff to show (1) a concealment of a fact when there is a duty to disclose; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Koyo Corp. of USA v. Comerica Bank*, No. 1:10–cv–2557, 2011 WL 4540957, at *6 (N.D.Ohio Sept. 29, 2011) (citing *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 462 N.E.2d 407, 409 (Ohio 1984)). A party can be liable for any material omissions if it has a duty to speak. Id. (citing *Schulman v. Wolske & Blue Co., L.P.A.*, 125 Ohio App.3d 365, 708 N.E.2d 753, 758 (Ohio Ct.App.1998)). Thus, a claim based on "concealment" must allege an underlying duty to disclose. *See Spears v. Chrysler, LLC*, No. 3:08–cv–331, 2011 WL 540284, at *9 (S.D.Ohio Feb. 8, 2011). "A duty to disclose arises only in limited circumstances, such as where there is relationship in which 'one party imposes confidence in the other because of that person's position, and the other party knows of this confidence.' " Id. (quoting *Central States Stamping Co. v. Terminal Equip. Co., Inc.*, 727 F.2d 1405, 1409 (6th Cir.1984)). Absent an allegation of a duty to disclose, dismissal of a plaintiff's claim for "fraudulent concealment" is appropriate for failure to state a valid claim for relief. *See, e.g., Loyd v. Huntington Nat'l Bank*, No., 1:08–cv–2301, 2009 WL 1767585, at *13 (N.D.Ohio June 18, 2009); *see also Spears* at *9 ("if a complaint alleges concealment, it must also allege an underlying duty to speak").
>
> Allen appears to be alleging a fraud claim, at least in part, based on a "concealment" theory. In paragraph 83 of the Complaint, Allen alleges: "The Defendants actively concealed the fact that the Class Windows caused (or will cause) injury to the property of the Plaintiffs [sic] and Class. The Defendants took active and affirmative steps to prevent Plaintiff from learning about the defective nature of the Class Windows, including keeping their internal knowledge and communications about the windows secret and non-public." Allen does not, however, allege the requisite relationship between her and Andersen that would have given rise to a

> duty to speak. Accordingly, to the extent Allen relies solely on acts of concealment by Andersen as the basis of her Seventh Claim, the claim is dismissed for Allen's failure to state a valid claim for relief.

Id. at 514.

{¶25} Also, at least one appellate district has held that fraudulent concealment must be pled with particularity. *Aluminum Line Prods. Co. v. Brad Smith Roofing Co., Inc.*, 109 Ohio App.3d 246, 259 (8th Dist.1996). Ms. Lottridge admits she did not make a separate claim in her complaint following the dictates of Civ.R. 9(B).

{¶26} A party is entitled to summary judgment if he can meet a three-part test: (1) that there are no genuine issues as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64 (1928). The court is requested to construe the evidence in favor of the non-moving party. *Wooster v. Graines*, 52 Ohio St.3d 180, 184-85 (1990).

{¶27} The trial court properly applied Civ.R. 56 and properly found that reasonable minds could only conclude that Ms. Lottridge filed her lawsuit against defendants outside of the statute of limitations and the time period for filing action was not equitably estopped from asserting the defense of the statute of limitations. Ms. Lottridge's first assignment of error is overruled.

{¶28} In her second assignment of error, Ms. Lottridge contends the trial court did not timely rule upon her motion to amend her pleadings and in not permitting her to depose any of the appellees while at the same time permitting the appellees to depose her and her expert. In her third assignment of error, she contends the trial court erred in denying her motion for leave to amend the pleadings because the court failed to apply an "active prejudice" standard to the motion. We address these together.

{¶29} Ms. Lottridge contends she should have been permitted to amend her complaint to allege a claim for gross negligence in light of a recent report she received from her expert, which refocused the case to a "soil damages case" rather than a "vibration damages case." She contends this amendment seeking to allege "gross negligence" would

have entitled her to recover under a theory of gross negligence and to recover for punitive damages. She also sought to add another party, Strathmore Development Company, as the current owner or manager of the Creekside Development, based on continuing damage from operation of the property.

{¶30} The defendants argue no amendment to her complaint would have altered the course of this litigation. The proposed amendment did not address the threshold question before the court, namely the statute of limitations. We agree with that proposition. Also the plaintiff does not explain how depositions of the appellees would have assisted in the resolution of the limitations question.

{¶31} A reviewing court applies an abuse of discretion standard when it considers a trial court's ruling on a motion for leave to amend pleadings. *Morrison v. Gugle*, 142 Ohio App.3d 244, 262 (10th Dist.2001). An abuse of discretion will only be found where the trial court's decision is not supported by the record or is contrary to law. *In re Estate of Daily*, 12th Dist. No. CA99-03-011 (Nov. 1, 1999). Stated differently, the trial court's decision must lack a reasonable basis, or it must be clearly wrong in order to constitute an abuse of discretion. *McDermott v. Tweel*, 10th Dist. No. 02AP 784, 2003-Ohio-885, at ¶ 86, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 122 (1991).

{¶32} Even though Civ. R. 15(A) provides that "[l]eave of court shall be freely given when justice so requires," and encourages liberal amendment, permission to amend may be properly denied if allowing the amended pleading would cause undue expense, delay or other prejudice to the opposing party, without an adequate reason for tardiness in requesting leave. *Gugle* at 262.

{¶33} Ms. Lottridge sought to amend her complaint for the fourth time in October 2013. In her third amended complaint, filed on January 7, 2013, she added numerous contractors as defendants. Ms. Lottridge sought to amend her complaint yet again two years after her initial complaint was filed. The trial court did not abuse its discretion in denying the motion. The second and third assignments of error are overruled.

{¶34} In summary, appellant's three assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

DORRIAN and LUPER SCHUSTER, JJ., concur.

BROGAN, J., retired, formerly of the Second Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).
