[Cite as *Timbuk Farms, Inc. v. Hortica Ins. & Emp. Benefits*, 2021-Ohio-4141.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TIMBUK FARMS, INC, Plaintiff - Appellant -vs- HORTICA INSURANCE AND EMPLOYEE BENEFITS d/b/a FLORISTS MUTUAL INSURANCE CO., *et al*., Defendant - Appellees	: : : : : : : : : :	JUDGES: Hon. Craig R. Baldwin, P.J. Hon. W. Scott Gwin, J. Hon. John W. Wise, J. Case No. 2021 CA 00017 O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Case No. 2019 CV 00938

JUDGMENT: Affirmed

DATE OF JUDGMENT: November 15, 2021

APPEARANCES:

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Baldwin, P.J.

{¶1} Appellant, Timbuk Farms, Inc., appeals the decision of the Licking County Court of Common Pleas granting summary judgment to appellees, Hortica Insurance and Employee Benefits d/b/a Florists Mutual Insurance Co., Noxious Vegetation, Inc. and Licking Rural Electrification.

STATEMENT OF FACTS AND THE CASE

{¶2} Timbuk Farm's, Inc. (Timbuk) claims that herbicide applied by Noxious Vegetation, Inc. (Noxious) at the behest of Licking Rural Electric (LRE) caused serious damage to its crops resulting in losses of over four hundred thousand dollars. Timbuk also alleged that its insurer, Hortica Insurance and Employee Benefits d/b/a Florists Mutual Insurance Co. (Hortica) wrongly denied coverage for those losses. Timbuk's complaint against Noxious and LRE was dismissed as beyond the statute of limitations and its claim against Hortica was dismissed because it was not filed before the deadline contained within the insurance policy.

{¶3} Timbuk is a commercial greenhouse operation that produces plants for wholesale and retail sales. Timbuk produces a variety of different plants that are sold, primarily, in the wholesale market. (Gibson Deposition, p. 32, 42). The water to irrigate the plants in the greenhouses was drawn from ponds on Timbuk's property. There are two ponds on the property, referenced as the upper pond and the lower pond. The upper pond is the smaller of the two and it drains into the lower, larger pond. Timbuk draws water from the lower pond for the plants that are maintained in the greenhouses on its property. Timbuk has used the water from these ponds for several years without encountering any problems that could be attributed to the water.

{¶4} LRE is an electrical cooperative that provides electrical power to residents and businesses within Licking county. LRE maintains above ground power lines near Timbuk's property, as close as one-third mile from the ponds used by Timbuk for irrigation. The maintenance of those power lines includes the application of an herbicide, presumably to clear access to the lines. A drainage ditch is near the lines, and the water in that ditch flows into the upper pond on Timbuk's property.

{¶5} LRE retained Noxious to apply Garlon 3A and Tordon 101, herbicides, to the land around its power lines near Timbuk's property. Noxious completed application of the herbicides on September 15, 2015.

{¶6} In late 2015, after the application of the herbicide, Timbuk noticed irregular growth problems with poinsettias, but did not take any action to investigate the cause. The poinsettias were sold and the record does not contain any claim for damage to those plants. In April 2016, Timbuk noticed serious widespread damage to plants leading it to begin investigating the cause of the problem. James Gibson, owner of Timbuk, consulted with his colleagues regarding the damage to the plants and asked for their input as to the cause. Concern over possible water contamination led Timbuk to gather water samples and send them Waters Agricultural Lab for analysis and the results, dated May 17, 2016, showed a trace of Triclopyr, the active ingredient of Garlon, one of the herbicides applied by Noxious, in the pond water.

{¶7} Gibson called Hortica on May 18, 2016 advising it of the damage to the plants and his suspicion that the damage was due to herbicides, but, at that time, he was not aware of the source of the herbicide. (Gibson Deposition, p. 398-399). Timbuk forwarded an email from Waters Agricultural Laboratories to Hortica on May 23, 2016,

which appears to have included the report regarding herbicide in the water at Timbuk. Tom Richey, an officer at Hortica, spoke to Jim Gibson and followed the conversation with an email in which Richey advised Timbuk to document its claim "to the fullest extent as dealing with the responsible part can be frustrating." (Gibson Deposition, p. 511, Exhibit 27, p. 6). Hortica recommended that Timbuk:

> Take plenty of photos.
>
> Do a complete inventory.
>
> Rely on a forensic accountant to put together a spread sheet regarding damages.
>
> Be sure that you put on notice all potential negligent parties.
>
> Have your accountant determine the future impact of this loss. (lost customers).
>
> Reports stating the cause is critical. Especially when you are dealing with a chronic issue and one that is not acute.

{¶8} Hortica concluded the email by asking if there was anything else that it could do for Timbuk. The email contains no representation that Hortica would take any action to investigate, that there was coverage for Timbuk's loss or that Timbuk expected Hortica to take further action.

{¶9} Timbuk reported a suspected release of herbicide to the Ohio Department of Agriculture (ODA) in May of 2016 and the ODA requested that Timbuk compile a statement. Timbuk completed a statement describing their observation of the damages to the plants beginning on April 11, 2016, recording its observations of the increasing damage to the plants and its efforts to determine the cause, concluding with filing a

complaint with the ODA. (Gibson Deposition, p. 106, Lines 8-15; Defendant's Exhibit 2). This statement, completed May 25, 2016, does not refer to Timbuk's contact with Hortica, nor does it suggest that Hortica participated in the investigation or that a copy of the statement was delivered to Hortica in May 2016.

{¶10} ODA completed its investigation in June 2016. After inspecting the property and analyzing water and plant samples, the ODA found no evidence of Triclopyr in the water or plant material. (Cochran Deposition, p. 140 and Exhibit 3, p. 2). ODA confirmed that Noxious had sprayed herbicide beneath its lines near Timbuk, but found no evidence that Noxious violated any law, rule or regulation in the application of the herbicide and no enforcement action was taken. (Cochran Deposition, p. 50, 122; Exhibit 3, p. 2). The record lacks evidence that Timbuk forwarded the ODA report to Hortica.

{¶11} Gibson confirmed that Hortica did not visit the property, or conduct any investigation prior to November 2016. (Gibson Deposition, p. 412, lines 16-25). Timbuk does not claim that it had any contact with Hortica between May 23, 2016 and November 18, 2016.

{¶12} On November 18, 2016 counsel for Timbuk delivered a letter to Hortica stating:

> Please be advised that this firm represents Timbuk Farms, Inc. ("Timbuk Farms") with regard to its crop damage claim. Previously, Hortica Insurance ("Hortica") was placed on notice of this loss, and Timbuk Farms is making a demand upon Hortica to reimburse Timbuk Farms for its damages.

> On or about April 11, 2016, Timbuk Farms noticed damage to their crops located at 2030 Timbuk Road, Granville, Ohio (Location 1 on the Hortica policy). Such damage was reported to Hortica. Timbuk Farms had seasonal coverage for crops under its policy, which was $1,800,000 (for April) and $1,500,000 (for May) with a $5,000 deductible. The coverage is afforded on a market value basis, and the damage calculation from Timbuk Farms will reflect such market value. At this time, Timbuk Farms is in the process of preparing its damage calculation based upon the market value of the damaged crops, and we will provide that calculation as soon as it is completed.

(Gibson Deposition, p. 513, Exhibit 27, page 12).

{¶13} Hortica emailed Timbuk on November 18, 2016 to acknowledge that Timbuk retained counsel and to explain that the file was moved from a record only claim to an open claim. Hortica sent a letter to Timbuk's attorney on that same date:

> On May 18, 2016, Jim Gibson, the owner of Timbuk Farms Inc. contacted his agent about a potential crop loss. It was Hortica's understanding that Timbuk Farms Inc was preparing to pursue the responsible party. Our file was therefore closed as record only.
>
> Now that a claim has been presented to Hortica - Florists' Mutual Insurance Company for reimbursement of the crop loss, we will reopen our claim and conduct a thorough investigation under a Reservation of Rights. In other words, we will proceed to investigate, but our activities are not to be construed as an acceptance of coverage for this loss at this time. Your

> assistance and cooperation in the investigation will be appreciated and will help us arrive at a timely decision on the claim.
>
> Please note that this investigation under a Reservation of Rights does not, and is not intended to act as any waiver of any of the conditions, limitations, or exclusions of the policy nor does it waive any of Timbuk Farms Inc.'s continuing obligations under the policy, nor any of the company's defenses now or hereafter; nor Is it an admission or denial of liability. This letter is intended to be and should be considered a complete reservation of all rights.
>
> I will be out of the office beginning Monday, November 21, 2016 returning on Monday November 28, 2016. Upon my return I will assign a local independent adjuster to visit the property and gather all the facts regarding the reported loss.

(Gibson Deposition, p. 514, Exhibit 27, pages 4-5).

{¶14} This letter is the first action taken by Hortica since it sent an email to Timbuk on May 23, 2016 acknowledging Timbuk's suspicion of herbicide damage and recommending that Timbuk act to preserve and document its losses. Timbuk does not contend that it supplied additional information to Hortica any time prior to November 2016 and we have found no evidence of a prior demand for coverage in the record. Further, Timbuk does not claim that Hortica represented that it would investigate the claim prior to the delivery of the November 2016 letter and we found no evidence of such a representation in the record.

{¶15} Timbuk's attorney provided Hortica information regarding the claim and an adjuster from Hortica visited Timbuk's facility. On April 11, 2017, Hortica denied the claim under its pollution exclusion, concluding that Timbuk was claiming damage as a result of "Discharge, dispersal, seepage, migration, release or escape of POLLUTANTS"(SIC). (Gibson Deposition, page 515, lines 4-10; Defendant's Exhibit 27, page 1).

{¶16} Timbuk filed a complaint on September 7, 2017, seeking a declaratory judgment against Hortica that the pollution exclusion did not apply and that Hortica had breached its contract. Timbuk's complaint included allegations against LRE and Noxious seeking compensation for the damages to its plants. Timbuk dismissed the complaint on April 18, 2018, without prejudice.

{¶17} Timbuk refiled an identical complaint on September 6, 2019. After completion of additional discovery, LRE and Noxious moved for summary judgment and, shortly thereafter, Hortica filed a motion for summary judgment. Hortica argued that Timbuk's complaint was barred by the provision of the insurance policy that required Timbuk to file a complaint within one year "after the date on which the direct physical loss occurred." Hortica also argued that the damage claimed by Timbuk was the result of pollution and the policy expressly excluded coverage for such damages. Timbuk claimed that Hortica was estopped from enforcing the one year limit on litigation because it waived that limitation by inducing a belief that it would cover the claim. Further, Timbuk contended the pollution exception was too vague and ambiguous to be enforced.

{¶18} The trial court found that the insurance policy requirement that any claim against Hortica must be filed within one year of the direct physical loss was enforceable and that the direct physical loss occurred no later than May 18, 2016. The deadline for

Timbuk to file a claim against Hortica was May 18, 2017, so Timbuk's September 2017 complaint was filed outside the time limit and the current complaint must be dismissed. The trial court also concluded that the pollution exception was too ambiguous to be successfully enforced in this case and that the damage was not the result of water damage or vandalism.

{¶19} In their motion for summary judgment, Noxious and LRE argued that Timbuk's suit was barred by a two-year statute of limitations for damage to personal property. Timbuk responded that a four-year statute of limitations applied as the plants were part of the real estate subject to a four-year statute of limitations or, in the alternative, its claim sounded in trespass and nuisance and was subject to a four-year statute of limitations. The trial court agreed with Noxious and LRE, finding that the appropriate statute of limitations was two years and that the complaint was barred.

{¶20} Timbuk filed an appeal of both decisions and submitted three assignments of error:

{¶21} "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE HORTICA'S MOTION FOR SUMMARY JUDGMENT."

{¶22} "II. THE TRIAL COURT ERRED IN OPINING, IN DICTA, THAT APPELLANT'S DAMAGES WERE NOT CAUSED BY AN EXCEPTION TO A POLLUTION EXCLUSION."

{¶23} "III. THE TRIAL COURT ERRED BY APPLYING A TWO (2) YEAR STATUTE OF LIMITATIONS TO APPELLANT'S CLAIMS OF TRESPASS, NUISANCE AND NEGLIGENCE IN DAMAGING ITS PROPERTY."

{¶24} Hortica filed a cross appeal and submitted one assignment of error:

{¶25} "I. THE TRIAL COURT ERRED IN REJECTING THE APPLICATION OF THE HORTICA POLICY "POLLUTANT EXCLUSION" (SEE TRIAL COURT 3/1/21 DECISION)."

STANDARD OF REVIEW

{¶26} With regard to summary judgment, this Court applies a de novo standard of review and reviews the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35, 36, 506 N.E.2d 212 (1987). We will not give any deference to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Under Civ.R. 56, a trial court may grant summary judgment if it determines: (1) no genuine issues as to any material fact remain to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267, 274 (1977).

{¶27} The record on summary judgment must be viewed in the light most favorable to the party opposing the motion. *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 151, 309 N.E.2d 924 (1974).

{¶28} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party has met this initial burden, the nonmoving party then has

a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

ANALYSIS

I.

{¶29} Timbuk argues in its first assignment of error that the trial court erred in granting Hortica's Motion for Summary Judgment, focusing on the trial court's interpretation and application of that part of the Hortica Insurance Policy that required Timbuk to file any litigation against Hortica within one year after the date on which the direct physical loss occurred. Timbuk contends that Hortica waived that portion of the policy by acting in such a manner to lead it to believe that Hortica would not reject the claim and that, even though Hortica issued a reservation of rights letter, that letter was issued after the one year deadline had expired and cannot have a retroactive effect.

{¶30} Timbuk does not contend that the policy provision that requires that a lawsuit against Hortica be filed within a one year deadline is unenforceable on its face, but only that it may not be enforced in the context of this case. The relevant portion of the policy states:

> 8. Legal Action Against Us
>
> No one may bring a legal action against US under SECTION I unless:
>
> There has been full compliance with all of the terms and conditions of SECTION I; and

> The action is brought within one year after the date on which the direct physical loss occurred.

(Complaint, Exhibit A, page 19 of 35).

{¶31} Timbuk concludes that the direct physical loss it suffered occurred on September 15, 2015, the date that Noxious applied the herbicide to the area beneath LRE's power lines. Timbuk does not direct us to any evidence that any physical loss occurred on that date, nor does it offer an explanation or factual support for its conclusion that the direct physical loss occurred prior to the damage to its plants becoming evident in April 2016. We reject Timbuk's conclusion and find that Timbuk's complaint and the record support the trial court's conclusion that the direct physical loss occurred in May 2016.

{¶32} Timbuk alleged in its complaint that "[i]n the spring of 2016, Timbuk noticed that a significant number of its plants were dead or dying." (Complaint, p. 3, paragraph 14). The Ohio Department of Agriculture issued a report which reflects a representation by Timbuk that the damages were first noted on April 11, 2016. (Cochran Dep. Ex. 3, p. 5) Timbuk's expert issued a report in which he suggests that the heavy rainfall in December, February and March caused the damage in April 2016. (Jeffrey Derr Report, p. 4, Exhibit C to Hortica Motion for Summary Judgment). Timbuk's counsel sent a letter to Hortica giving notice of his representation of Timbuk in which he describes the date of loss as April 11, 2016. (Gibson Deposition, p. 513, lines 3-19; Exhibit 27, page 12).

{¶33} Timbuk was not motivated by any physical loss to contact Hortica until May 2016, when it determined that the damage it observed beginning in April 2016 may be due to herbicide. Timbuk's theory of the case relies on sufficient time and rainfall to wash

enough of the herbicide through a culvert into an upper pond with more time for the infiltration to move to the lower pond and reach a sufficient level to cause the losses observed by Timbuk. The record does not support that process occurred simultaneously with the application of the herbicide.

{¶34} Timbuk's assertion that the direct physical loss occurred on September 15, 2015 is controverted by the evidence in the record. Instead, the record supports a finding that the direct physical loss occurred within the time period beginning on April 11, 2016 and ending May 18, 2016. The trial court found that the direct physical loss occurred, at the latest, on May 18, 2016 when Timbuk reported the loss to Hortica. While the record might support an earlier date as Timbuk noticed material problems in April 2016, we cannot fault the trial court for using a date that extends the time within which Timbuk was permitted to file a claim against Hortica. And, in the context of this case, the additional time has no material impact on the outcome of the case.

{¶35} Timbuk's blind insistence that the direct physical loss occurred on September 15, 2015 can be interpreted as an attempt to bolster its position that Hortica waived its right to enforce the one year limitation. If the one year limit began on September 15, 2015, it ended September 15, 2016 and according to Timbuk's interpretation of the facts, Hortica acted in such a manner so as to waive the right to enforce the limitation. We reject Timbuk's position as it fails to accurately reflect the facts of this case.

{¶36} Timbuk's argument that it was unfairly robbed of the opportunity to file a claim against Hortica lacks any support in the record. As we have explained, the trial court found that the direct physical loss occurred on May 18, 2016, giving Timbuk until

May 18, 2017 to file any claim against Hortica. This deadline falls after Timbuk, through counsel, notified Hortica it planned to submit a claim, after Hortica acknowledged receipt of that notice and after Hortica denied the claim for lack of coverage. Timbuk had the opportunity to file a complaint during this time period or take other action to protect its right to file a claim, but it neglected to do so.

{¶37} Timbuk claims that it was given false hope that Hortica would honor the claim and that it was misled into complacency, but the record lacks any evidence that Hortica "* * * waived a limitation of action clause in [the] * * * insurance policy by acts or declarations which evidence a recognition of liability, or acts or declarations which hold out a reasonable hope of adjustment and which acts or declarations occasion[ed] the delay by * * * [Timbuk] in filing an action on the insurance contract until after the period of limitation has expired." *Hounshell v. Am. States Ins. Co.,* 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). Timbuk notified Hortica of losses that it experienced and its suspicion that a herbicide may be responsible for the damage and, on May 23, 2016, Hortica responded via email by making recommendations to Timbuk regarding steps to document the loss and asked if there was anything more Hortica could do. Timbuk continued its investigation by filing a report with the Ohio Department of Agriculture, consulting with colleagues in the business and finally retaining an expert. Timbuk and Hortica had no further communication until November 18, 2016 when Timbuk notified Hortica through counsel that it would present a claim in the future. No settlement offers nor any assurances made with respect to the likelihood of future settlement offers. *Am. Family Ins. Co. v. Taylor*, 5th Dist. Muskingum No. CT2010-0014, 2010-Ohio-2756, ¶ 43 quoting *Broadview Sav. & Loan Co. v. Buckeye Union Ins. Co*. (May 12, 1982), 70 Ohio St.2d 47, 51, 434 N.E.2d

1092. Hortica did nothing to recognize liability, nor did it enter into any negotiations, make an offer, make payments on the claim or make any statement that could reasonably be interpreted as an assurance that filing a claim was unnecessary. *Dominish v. Nationwide Ins. Co.,* 129 Ohio St.3d 466, 2011-Ohio-4102, 953 N.E.2d 820, ¶ 10; *Grange Mut. Cas. Co. v. Leading,* 10th Dist. Franklin No. 90AP-115, 1990 WL 198041, *5.

{¶38} Further, as noted by Hortica, "Timbuk has provided no affidavit, or admissible evidence or testimony demonstrating that it was in any way misled, or that the time limitation was waived, or there was a promise to pay, or even that it did not know about the one year contractual statute of limitations." (Hortica Appellant Brief, p. 15). Hortica did nothing to mislead Timbuk and Timbuk had sufficient time to file its complaint prior to the deadline.

{¶39} Timbuk also complains that the rejection of its claim includes only a reference to the pollution exclusion and does not include reliance on the requirement that a claim be filed within one year of the direct physical loss. (Appellant's Brief, p. 7; Appellant's Reply Brief, p. 7). Hortica's denial of the claim was based upon its interpretation of the language of the policy covering losses. The provision regarding the filing of a claim against Hortica has no relation to the coverage provided and cannot serve as a reason to deny coverage for an insured's loss. That provision only became relevant when Timbuk filed its claim five months later, in September 2017. Timbuk was not entitled to a reminder of its obligations under the terms of the contract when Hortica delivered the denial of coverage and Timbuk offers no authority in support of such a duty. The reservation of rights letter, delivered in November 2016, provided sufficient warning to

alert Timbuk and its counsel to review the terms of the contract and take appropriate action to protect its rights.

{¶40} Considering the facts in the record, we cannot agree with Timbuk's assertion that the direct physical loss occurred on September 9, 2015, but, instead, we find that the record supports the trial court's conclusion that the direct physical loss occurred no later than May 18, 2016 and that Timbuk's claim against Hortica was due on or before May 18, 2017, more than six months after the reservation of rights was delivered to Timbuk and several weeks after the claim was denied under the pollution exclusion. Timbuk filed his first complaint in September 2017, well after the deadline of May 2017 and therefore, the trial court correctly issued summary judgment in favor of Hortica as Timbuk's claim was barred by the terms of the insurance policy.

{¶41} Timbuk's first assignment of error is denied.

II.

{¶42} Timbuk's second assignment of error contends that the "trial court erred in opining, in dicta, that Appellant's damages were not caused by an exception to a pollution exclusion." The trial court rejected Hortica's argument that the pollution exclusion language in the policy "unambiguously precludes coverage for "loss, damage, or expense caused by, or resulting from... [d]ischarge, dispersal, seepage, migration, release or escape of POLLUTANTS...." "Triclopyr" used by Noxious is clearly a "chemical" and thus, is considered a "pollutant" under the policy." (Hortica's Motion for Summary Judgment, p. 8). The court found the pollution exclusion inapplicable because the "definition of pollutant is more properly subject to the rule of law finding that if policies are reasonably susceptible to more than one interpretation, that it will be strictly construed against the

insurer, liberally in favor of the insured." (Judgment Entry, Mar. 1, 2021, p. 4). The court next found that Hortica's claim that Timbuk's losses were not caused by vandalism or water damage was supported by the facts of the case and the language of the policy. We interpret this assignment as directed toward this portion of the trial court's decision.

{¶43} The Supreme Court of Ohio "has consistently held that insurance contracts must be construed in accordance with the same rules as other written contracts. *Universal Underwriters Ins. Co. v. Shuff* (1981), 67 Ohio St.2d 172, 21 O.O.3d 108, 423 N.E.2d 417; *Rhoades v. Equitable Life Assur. Soc. of the United States* (1978), 54 Ohio St.2d 45, 8 O.O.3d 39, 374 N.E.2d 643" and that "[i]n applying these rules, [the Court] stated that the most critical rule is that which stops this court from rewriting the contract when the intent of the parties is evident, i.e., if the language of the policy's provisions is clear and unambiguous, this court may not "resort to construction of that language." *Karabin v. State Auto. Mut. Ins. Co*. (1984), 10 Ohio St.3d 163, 167, 462 N.E.2d 403, 406. *Hybud Equip. Corp. v. Sphere Drake Ins. Co*., 64 Ohio St.3d 657, 665, 597 N.E.2d 1096, 1102 (1992). We are bound by these rules in our review of this assignment of error.

{¶44} Timbuk claims its "water system was damaged and broken by the herbicides. The unknowing and accidental application of that water to Timbuk's plants caused water damage in the form of Timbuk's crop loss." (Appellant's Brief, p. 16). Timbuk concludes that the infiltration of herbicide into the water used to irrigate its plants entitles it to coverage under the Water Damage or Sprinkler Leakage provisions of the policy.

{¶45} Water damage is defined on page five, paragraph sixteen of the policy:

> This Cause of Loss means only accidental discharge or leakage of water or steam as the direct result of the breaking or cracking of any part of

> a system or appliance containing water or steam, other than an AUTOMATIC SPRINKLER SYSTEM. If the REAL PROPERTY containing the system or appliance is COVERED PROPERTY, WE will also pay the cost to tear out and replace any part of the REAL PROPERTY to repair damage to the system or appliance from which the water or steam escapes.

{¶46} Sprinkler Leakage is defined as:

> This Cause of Loss means only the leakage or discharge of water or other substance from within an AUTOMATIC SPRINKLER SYSTEM, or direct loss caused by the collapse or fall of a tank forming a part of such system.

{¶47} We find that the language of these exceptions is clear and unambiguous and that the facts of this case do not support a finding of water damage or sprinkler leakage. The policy provisions apply to damage related to a defect in an automatic watering system or “breaking or cracking of a system containing water or steam” and cannot be reasonably interpreted to include contamination of the water within those systems. Timbuk's complaint and its theory of the case relate its loss to the herbicide applied by Noxious that allegedly infiltrated the operating watering system. Timbuk neither alleges nor provides any evidence of an "accidental discharge or leakage of water" leading to damage or a "leakage or discharge of water or other substance from within an automatic sprinkler system" causing a loss. Timbuk described how the watering system operated and never alleged that any part was broken or cracked, or that the loss was related to the leakage or discharge of water or other substance. Timbuk’s claim is related

only to the intentional application of water from a fully functional watering system to plants without the knowledge that the water was tainted with an herbicide.

{¶48} Timbuk's second assignment of error is denied.

III.

{¶49} In the third assignment of error, Timbuk claims the trial court erred by applying a two-year statute of limitations to its claims of trespass, nuisance and negligence. Timbuk argues that it suffered damages to its real property, entitling it to a four-year statute of limitations. In the alternative, Timbuk alleges that its claim sounds in trespass, and is likewise subject to a four-year statute of limitations.

{¶50} The applicable statute of limitations is a question of law that we consider de novo. *Haskins v. 7112 Columbia, Inc.*, 7th Dist. No. 15 MA 0192, 2016-Ohio-5575, 69 N.E.3d 1150, ¶ 15. *See Also Potter v. Cottrill*, 4th Dist. No. 11CA685, 2012-Ohio-2417, 2012 WL 1964921, ¶ 9; *Simmons v. Ohio Rehab. Serv. Comm.,* 10th Dist. No. 09AP–1034, 2010-Ohio-1590, 2010 WL 1408236, ¶ 3. In *Hambleton v. R.G. Barry Corp*. (1984), 12 Ohio St.3d 179, 183, 465 N.E.2d 1298, the Ohio Supreme Court held that "* * * in determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial." *New Artesian v. Stiefel*, 5th Dist. Stark No. 1999CA00163, 2000 WL 222110, 5.

{¶51} The trial court found that the grounds, nature and subject matter of Timbuk's claims against Noxious and LRE is a claim for damage to personal property subject to the statute of limitations described in R.C. 2305.10(A) which provides in relevant part that "an action based on a product liability claim and an action for bodily injury or injuring personal

property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B)(1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs."

{¶52} Timbuk claims that damage to its plants comprises damage to real property subject to a four-year statute of limitations under R.C. 2305.09(D) relying on two older Supreme Court of Ohio cases to support its argument that crops are not personal property. The facts of those cases and the issues resolved therein show that those decisions are inapplicable.

{¶53} In *Jones v. Timmons,* the court focused upon the sale of the property and whether a reservation of interest in the property could be proved by parol evidence. The subject of the dispute was certain trees that spontaneously grew on the land and not raised by the labor of the owner "as in the case of trees grown in a nursery." *Jones v. Timmons,* 21 Ohio St. 596, 605 (1871). The court held that "[t]o allow them to be excepted by parol evidence from the operation of the deed, would be, we think, to recognize a dangerous innovation on the salutary and well established rule of evidence, that treats all parol negotiations and understandings of the parties, in regard to the subject matter of a written instrument, which are not reduced to writing, as abandoned." *Id.*

{¶54} In *Cassilly v. Rhodes*, 12 Ohio 88, 95, 1843 WL 14 (Dec. 1843) the question was whether the purchaser at a judicial sale acquired title to wheat growing on the property. The Supreme Court held that the crop must be treated as personalty in that instance, and was subject to a separate levy.

{¶55} The case before us does not involve the rights of a private purchaser or a purchaser at a judicial sale, but the characterization of property allegedly damaged by an

herbicide. The plants are tended by Timbuk for a short period of time then sold in the wholesale or retail market. We find that the weight of the law in this state supports a finding that the plants in this context are personal property. While decisions in Ohio were issued when more of its citizens where involved in agriculture, the logic of the cases remain sound. The Second District found that "It is well settled in this state that crops which may be raised within the year are personalty and not realty." *Jacks v. Virginia Joint Stock Land Bank,* 17 Ohio Law Abs. 464, 466 (2nd Dist.1934). The Third District relied on a Supreme Court of Ohio decision from 1854 to support its conclusion that a wheat crop was an emblement, or personal property, for purposes of administering an estate. *Matter of Estate of Stemen,* 3rd Dist. Putnam No. 12-87-6, 1988 WL 63953, *3–4. We also find helpful the comment of the court in *Maton Bros. v. Cent. Illinois Pub. Serv. Co.,* 269 Ill.App. 99, 119 (Ill.App.1933) *aff'd,* 356 Ill. 584, 191 N.E. 321 (1934) in the context of addressing damage to roses in a greenhouse. "These rose plants were not attached to the soil but were propagated in greenhouses in benches or troughs raised above the soil, and were, therefore, personal property."

{¶56} We find that Timbuk's loss was comprised of plants that it planned to raise and sell within one year and were planted in containers and not attached to the soil. In the context of this case, the plants were personal property, not real property, and the claim is subject to the two-year statute of limitations of R.C. 2305.10(A).

{¶57} Timbuk attempts to avoid this result by arguing that it has stated a claim in trespass or nuisance. While Timbuk's complaint does contain allegations of trespass and nuisance, to determine which statute of limitations should apply we "must look to the actual nature or subject matter of the case, rather than to the form in which the action is

pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial." (Citations omitted.) *Hambleton v. R.G. Barry Corp*., 12 Ohio St.3d 179, 183, 465 N.E.2d 1298, 1302 (1984). The grounds for bringing this case, the actual subject matter and nature of the case are the damages to the plants, which we have determined are personal property subject to the two-year statute of limitations in R.C. 2305.10(A). That code section "imposes the two-year period of limitation on the cause of action instead of annexing it to the form of action" and "is not confined to any particular type of injury, nor does it concern itself with the circumstances under which an injury was inflicted. On its face, it clearly covers all actions based on a claim respecting" damage to personal property. *Andrianos v. Community Traction Co*., 155 Ohio St. 47, 50–51, 97 N.E.2d 549, 552 (1951). *See Also Lawyers Coop. Publishing Co. v. Muething, 65 Ohio St.3d 273, 279, 603 N.E.2d 969 (1992)* (Nature of the property damaged controls the applicable statute of limitations.)

{¶58} If we were to consider Timbuk's claim as one for trespass or nuisance, its claims would still fail as a matter of law. A "nuisance requires a substantial and unreasonable interference with the plaintiff's use and enjoyment of his or her property." *Williams v. Oeder*, 103 Ohio App.3d 333, 338, 659 N.E.2d 379, 382 (12th Dist.1995). Also, because the trespass that occurred in this case was indirect, "damages are not presumed, and actual damages in the form of "physical damages or interference with use" must be shown before the person suing for trespass can prevail. *Id.* at 26-28. Furthermore, the damages must be "substantial." (Citations omitted.) *Lueke v. Union Oil Co. of California,* 6th Dist. Ottawa No. OT-00-008, 2000 WL 1545077, *7.

{¶59} Timbuk has failed to provide any evidence that would create a question of fact as to whether substantial damages to real property occurred. While Timbuk claims the infiltration of herbicide "broke" its watering system, it presented no evidence of loss related to damage to any part of that system. For a time, Timbuk used an alternative source of water for irrigation of its plants and, when it determined that the water in the ponds was safe, it returned to its practice of drawing water from the ponds to irrigate the plants. Timbuk did not allege nor did it provide any evidence that it suffered substantial losses or incurred any expense as a result of making repairs or modifications to the irrigation system made necessary by the presence of a herbicide. The record shows that any herbicide in Timbuk's water supply was not present in detectable amounts when the ODA tested the water. Timbuk sanitized its water tanks to ensure that any trace of herbicide was removed, but it provided no evidence that the herbicide affected the nature and character of the land or caused substantial damage to it. *Brown v. Scioto Cty. Bd. of Commrs*., 87 Ohio App.3d 704, 716–17, 622 N.E.2d 1153 (4th Dist.1993) quoting *Born v. Exxon Corp*., 388 So.2d 933, 934 (Ala.1980).

{¶60} James Gibson, owner of Timbuk, confirmed that the only losses in addition to the plants described in Exhibit 4 was loss of business and credibility arising from Timbuk's failure to fulfill orders for plants. (Gibson Deposition, p. 340, line 20 to p. 341 line 7). Timbuk alleged a trespass and nuisance related to the herbicide used by Noxious, but it brought the action against appellees only as a result of the damage to the plants and the harm to its business related to that loss. The subject matter of this case is damage to personal property, subject to a two year statute of limitations as found by the trial court.

{¶61} The parties agree that the cause of action accrued on April 11, 2016 when Timbuk first discovered the damage to its plants. Timbuk filed its original complaint on September 7, 2017 well within the two-year statute of limitations and dismissed that complaint on April 18, 2018 without prejudice. Under R.C. 2305.19(A), Timbuk was obligated to refile its complaint on or before April 18, 2019, but did not file until September 2019. Consequently, we find that the statute of limitations expired prior to the filing of the second complaint and that the trial court correctly granted summary judgment to Hortica on those grounds

{¶62} Timbuk's third assignment of error is denied.

{¶63} Our resolution of Timbuk's First Assignment of Error renders Hortica's cross-appeal moot and, therefore, we decline to address Hortica's sole assignment of error.

{¶64} The decision of the Licking County Court of Common Pleas is affirmed.

By: Baldwin, P.J.

Gwin, J. and

Wise, John, J. concur.