Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-394

APRIL TERM, 2005

A. Brooks Brown and Melinda Brown	}	APPEALED FROM:
	}	
	}	
v.	}	Bennington Superior Court
	}	
Lee Spivey and Moira Spivey	}	
	}	DOCKET NO. 180-6-03 Bncv
		Trial Judge: Karen R. Carroll

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal the superior court's order granting summary judgment in favor of defendants with respect to plaintiffs' lawsuit alleging that defendants fraudulently or negligently sold them a house that was later found to have significant moisture problems. We affirm.

Plaintiffs bought the house in question from defendants in 1996. At the time of the purchase, plaintiffs hired a building inspector to inspect the house. His inspection revealed a moisture problem in two areas of the house, and he made several recommendations concerning the problem. Based on the inspector's report, the parties entered into an escrow agreement intended to assure that those recommendations were followed. The closing occurred on April 17, 1996, and the escrow funds were released the next month. In August 2001, plaintiffs noticed moisture problems in their garage and contacted their insurance company. The insurance company sent an expert who determined that the problem was caused by an improperly applied vapor barrier. Upon further investigation, plaintiffs learned that the same problem existed throughout the house.

In June 2003, plaintiffs filed a complaint against defendants, alleging consumer fraud, negligent misrepresentation, negligent nondisclosure, breach of warranty, and fraudulent concealment. In their answer, defendants denied the allegations and claimed that plaintiffs' suit was barred by the applicable statute of limitations. In February 2004, following discovery, defendants filed a motion for summary judgment, arguing that the statute-of-limitations period commenced in 1996 when plaintiffs became aware that the house had moisture problems, and that plaintiffs had failed to file their complaint within the applicable six-year period. See 12 V.S.A. § 511 (civil lawsuit must be commenced within six years after cause of action accrues). Notwithstanding plaintiffs' opposition, the superior court granted defendants' motion, ruling that in 1996 plaintiffs had information sufficient to put a reasonable person on notice to investigate the moisture problem further, which, in turn, would have led them to discover the extent of the problem.

On appeal, plaintiffs argue that they presented credible evidence sufficient to create jury questions as to when the limitations period began to run and whether the limitations period should have been tolled because of defendants' fraudulent concealment. See 12 V.S.A. § 555 ("When a person entitled to bring a personal action is prevented from so doing by the fraudulent concealment of the cause of such action by the person against whom it lies, the period prior to discovery of such cause of action shall be excluded in determining the time limited for the commencement thereof."). According to plaintiffs, they submitted evidence demonstrating that they had not been given fair notice of the hidden defect caused by the defective vapor barrier, and, at minimum, the trial court should have left it for the jury to determine

when their cause of action had begun to accrue and whether it should be tolled by defendants' fraudulent concealment.

We agree with plaintiffs that the trier of fact ordinarily determines when the limitations period commenced and whether it was tolled by fraudulent concealment. See Aube v. O'Brien, 140 Vt. 1, 3, 5 (1981) (issue of whether fraudulent concealment tolled limitations period is question for trier of fact); Monti v. Grantite Sav. Bank & Trust Co., 133 Vt. 204, 209 (1975) (mem.) (whether statute-of-limitations defense had merit and whether there was fraud were both questions for jury). Nevertheless, when there is no dispute as to any material fact, the trial court may resolve these questions as a matter of law. Compare Galfetti v. Berg, Carmolli & Kent Real Estate Corp., 171 Vt. 523, 525-26 (2000) (affirming summary judgment for defendant because undisputed material facts demonstrated that plaintiffs' cause of action began to accrue when plaintiffs received letter informing them that house they purchased was in single-family zoning area); Rodrigue v. VALCO Enter., Inc., 169 Vt. 539, 541-42 (1999) (mem.) (affirming summary judgment for defendant because undisputed material facts demonstrated that limitations period began to accrue shortly after automobile accident when plaintiff learned that he might have dram shop action against defendant) with Earle v. State, 170 Vt. 183, 193-94 (1999) (reversing summary judgment ruling because existing record did not demonstrate, as matter of law, when plaintiff first discovered that his psychological problems were caused by sexual abuse underlying his claim against defendant).

Generally, the limitations period begins to run when the plaintiff has information, or should have obtained information, sufficient to notify a person of ordinary intelligence and prudence that a cause of action exists. Rodrigue, 169 Vt. at 541. When there is an opportunity to obtain information from available sources, "[t]hat is the point from which a plaintiff may use the limitations period to investigate or pursue a cause of action." Id.; see Galfetti, 171 Vt. at 524 (cause of action accrues upon (1) discovery of facts constituting basis of cause of action or (2) existence of facts sufficient to lead reasonable person to discover cause of action). Thus, the plaintiff is ultimately chargeable with notice of all facts that could have been obtained through reasonable diligence. Galfetti, 171 Vt. at 524.

Here, plaintiffs knew in 1996 before the closing that the house had a moisture problem. Indeed, six days before the closing, plaintiffs' attorney sent a letter to defendants' attorney stating that a "major concern" of plaintiffs was the moisture problem, and that plaintiffs questioned whether merely scraping and repainting the damaged areas would resolve the problem. The letter indicates that plaintiffs' attorney spoke to plaintiffs' building inspector, who was not sure what could be done to correct the problem, but suggested that a carpenter remove some of the clapboards and cut a hole to determine the extent of the moisture problem. Thus, the letter plainly states that plaintiffs were aware of both the moisture problem and the means by which the extent of the problem could be determined. Under these circumstances, we agree with the superior court that, as a matter of law, the limitations period began to accrue in April 1996.

We find unavailing plaintiffs' contention that the letter was incorrect because, as evidenced by his report and his later affidavit, the building inspector never recommended cutting a hole in the house to determine the extent of the problem. There is no dispute over any material fact. It is undisputed that plaintiffs' building inspector identified a moisture problem and was unsure of its cause. Further, the statements of plaintiffs' attorney—who informed defendants' attorney that plaintiffs were concerned about the moisture problem, that repainting would probably not resolve the problem, and that the extent of the problem could be determined by removing the clapboards and inspecting the interior walls—are imputed to plaintiffs. Galfetti, 171 Vt. at 525. They cannot now claim that they had no notice of the moisture problem or that they did not possess information giving them an opportunity to discover facts that would have revealed a possible cause of action.

Nor do we find availing plaintiffs' claim that the superior court should have allowed the jury to determine whether defendants' fraudulent concealment tolled the limitations period. Plaintiffs have not presented any facts to support their bald assertion that defendants fraudulently concealed a defect in the house. V.R.C.P. 56(e) (party opposing motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial"). In any event, a limitations period may be tolled when "a person entitled to bring a personal action is prevented from so doing by the fraudulent concealment of the cause of such action by the person against whom it lies." 12 V.S.A. § 555 (emphasis added). Here, we have concluded that plaintiffs knew enough in 1996 to discover their cause of action, and thus any fraudulent concealment on defendants' part did not prevent plaintiffs from bringing that cause of action within

the applicable limitations period. See Rodrigue, 169 Vt. at 542 (affirming summary judgment for defendant notwithstanding any alleged fraudulent concealment on defendant's part because plaintiff still had access to ample information that would have allowed timely filing of claim).

Affirmed

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned