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CIVIL DIVISION
Case No. 1096-12-18 Cncv

Nesti vs. Vermont Agency of Transportation

**DECISION ON MOTION FOR SUMMARY JUDGMENT**

In 2006, the Vermont Agency of Transportation ("VTrans") undertook the expansion of Route 7 in South Burlington and Shelburne. In 2018, Plaintiff Dr. Frances Nesti brought this action, seeking to recover for damage to her property resulting from the rebuilt roadway drainage infrastructure. On VTrans's motion to dismiss this court determined that several of Dr. Nesti's claims were barred by the statute of limitations. VTrans now moves for summary judgment on the remaining claims. The court grants the motion.

**BACKGROUND**

In 2006, VTrans completed reconstruction of Route 7 in South Burlington and Shelburne. As part of the project, VTrans redesigned and reconstructed the stormwater drainage management system that directs water from Route 7 downhill and west toward Lake Champlain. Dr. Nesti owns property located at 2 Pine Haven Shore Lane in Shelburne, downhill and west of Route 7. She claims that the project has substantially increased the volume of stormwater flowing over her property, and that this increased flow has significantly damaged her property.

On December 31, 2018, Dr. Nesti brought this action.[1] She subsequently amended her complaint to allege five claims: nuisance, trespass, takings, ejectment, and removal of lateral support. On VTrans's motion to dismiss, this court dismissed the takings, ejectment, and lateral support claims—the first as time-barred, and the second and third as failing to state a claim. The court declined to dismiss the nuisance or trespass claims as either time-barred or precluded by sovereign immunity. On the statute of limitations, the court concluded that to the extent that the continuing tort doctrine would be recognized in Vermont, it lacked sufficient information to decide whether the alleged tort was "permanent" or "continuing." On sovereign immunity, the court observed that it needed information about who made the stormwater management design decision before it could determine whether the discretionary

[1] Dr. Nesti initially named both VTrans and "Agency of Natural Resources Department of Environmental Conservation." At oral argument on the motion to dismiss, however, she agreed to the dismissal of ANR/DEC.

function exception applies. With the factual record more fully developed, VTrans now renews its statute of limitations and sovereign immunity arguments on those claims.

In her opposition, Dr. Nesti attempts to relitigate legal issues the court previously decided—either explicitly or implicitly—in ruling on the motion to dismiss. Those issues include whether the six- or 15-year statutory limitations period applies, and when the action accrued. To the extent that she raises new arguments now, Dr. Nesti could and should have raised these arguments over two years ago. Nevertheless, for the sake of completeness, this court once again addresses those issues. First, however, the court addresses sovereign immunity.

1. Sovereign Immunity

VTrans asserts that to the extent they seek money damages, the trespass and nuisance claims are barred by the doctrine of sovereign immunity. "Sovereign immunity bars suits against the State unless immunity is expressly waived by statute." *Sabia v. State*, 164 Vt. 293, 298 (1995) (citing *LaShay v. Department of Social & Rehabilitation Servs.*, 160 Vt. 60, 67 (1993)). The State has waived its immunity to certain types of suits under the Vermont Tort Claims Act:

> The state of Vermont shall be liable for injury to persons or property . . . caused by the negligent or wrongful act or omission of an employee of the state while acting within the scope of employment, under the same circumstances, in the same manner and to the same extent as a private person would be liable to the claimant . . . .

12 V.S.A. § 5601(a). The primary purpose of the tort claims act is "to waive sovereign immunity for recognized causes of action, particularly for common law torts." *Zullo v. State*, 2019 VT 1, ¶ 18, 209 Vt. 298 (citing *Kennery v. State*, 2011 VT 121, ¶ 26, 191 Vt. 44). There are, however, exceptions to the waiver. 12 V.S.A. § 5601(e). If an exception applies, then the State remains immune. "In order to bring a tort claim for damages against the State, the plaintiff must demonstrate that . . . no exception to the State's waiver of sovereign immunity applies." *Wool v. Menard*, 2018 VT 23, ¶ 9, 207 Vt. 25 (citing *Mellin v. Flood Brook Union Sch. Dist.*, 173 Vt. 202, 218–19 (2001)). Here, the State argues that the discretionary function exception preserves its immunity.

The discretionary function exception protects the State from any claim "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a State agency or an employee of the State, whether or not the discretion involved is abused." 12 V.S.A. § 5601(e)(1). The purpose of this exception is "to assure that courts do not invade the province of coordinate branches of government through judicial second guessing of legislative or administrative policy judgments." *Lorman v. City of Rutland*, 2018 VT 64, ¶ 13, 207 Vt. 598 (citing *Estate of Gage v. State*, 2005 VT 78, ¶ 4, 178 Vt. 212).

The Vermont Supreme Court has established a two-part test for applying the discretionary function exception, asking whether "the acts involved [were] discretionary in nature, involving an element of judgment or choice" and if so, "whether that judgment involved considerations of public policy which the discretionary function exception was designed to protect." *Id.* ¶ 14 (citing *Estate of Gage*, 2005 VT 78, ¶ 5). When a government agent is authorized to exercise discretion, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Searles v. Agency of Transp.*, 171 Vt. 562, 563 (2000) (mem.) (quoting *United States v. Gaubert*, 499 U.S. 315, 324 (1991)). Thus, a "plaintiff's role in a motion for summary judgment is to allege facts sufficient to support a finding that the challenged act is not the *type of act* protected by the exception," and "[t]he focus of this analysis is on whether the actions taken are 'susceptible to policy analysis,' and not on the employee's subjective intent in exercising the discretion conferred by . . . regulation." *Johnson v. Agency of Transp.*, 2006 VT 37, ¶ 6, 180 Vt. 493 (quotations omitted) (emphasis in original).

In ruling on the motion to dismiss, this court rejected the State's contention that the facts in the Amended Complaint were sufficient to determine that the discretionary function exception applied. Ruling on Mot. to Dismiss at 11. The court noted that to determine whether a decision is "grounded in policy," it "needs to know what decision we are talking about, and who made it." *Id.*; *see also, e.g.*, *Johnson v. Agency of Transp.*, 2006 VT 37, ¶ 13, 180 Vt. 493 (mem.) (quoting *Gaubert*, 499 U.S. at 335–36) (Scalia, J., concurring) ("The dock foreman's decision to store bags of fertilizer in a highly compact fashion is not protected by this exception because, even if he carefully calculated considerations of cost to the Government vs. safety, it was not his responsibility to ponder such things; the Secretary of Agriculture's decision to the same effect is protected, because weighing those considerations is his task.") (emphasis in original). The court observed that it might also be significant whether the decision was guided by mandatory policies. Ruling on Mot. to Dismiss at 11 (citing *Johnson*, 2006 VT 37, ¶ 6).

In moving for summary judgment, VTrans asserts that design of the stormwater management system "involved the exercise of discretion and professional judgment." Def.'s Statement of Undisputed Material Facts ¶ 20. The purpose of the stormwater management system, it asserts, was "to drain the mainline pavement and right-of-way runoff to various outlet locations to protect the roadway and maintain a safe roadway free of standing water or ice." *Id.* ¶ 9. VTrans further asserts that the design of this system "included a thorough review and analysis of existing and proposed drainage within the watershed that drains through Plaintiff's property and concluded that there was adequate capacity within the preexisting drainage channels to accommodate the relatively small increase in

flows attributable to the Project without significant impact." *Id.* ¶ 15. Neither these assertions nor the exhibits upon which they are based, however, reveal who made decisions with respect to the design of the stormwater management system and particularly the water flow on Plaintiff's property. *See* Pl.'s Response to Def.'s Facts ¶ 20; Pl.'s Disputed Facts ¶ 141.

Dr. Nesti asserts that there was no such "thorough analysis," especially with respect to her property, and that the stormwater discharge permit required the State to fix any erosion caused by the Route 7 project. Pl.'s Response to Def.'s Facts ¶¶ 15, 20; Pl.'s Disputed Facts ¶ 141; Discharge Permit at 4 (Ex. E) ("Should any erosional problems occur, the permittee is required to immediately correct any such problems."). She also notes that VTrans was required to follow the 1997 Stormwater Procedures, which provide: "Proper controls shall be included in all stormwater systems to ensure long term erosion and sediment control and site stability." 1997 Stormwater Procedures, ch. 2, § D.5.b (attached to Marshall Aff.); *see also* Pl.'s Opp'n at 40–41. She further asserts that the erosion on her property is the result of mistaken modeling done by a third-party consultant the State hired to design the stormwater system and erosion control on her property. Pl.'s Opp'n at 44. Thus, Dr. Nesti argues, there can be no immunity for a mistaken mandatory analysis of stormwater discharges by a non-government employee. *Id.* at 45–46. Finally, to the extent discretion was involved here, Dr. Nesti contends that it was based on engineering rather than policy judgment, and therefore does not fall within the discretionary function exception. *See Ayala v. United States*, 980 F.2d 1342, 1349 (10th Cir. 1992) (discretionary function immunity does not apply to decisions "governed solely by technical considerations," *i.e.*, "where to connect the light"); *Blair v. Frank W. Whitcomb Const. Corp.*, No. 498-01 CNC, 2005 WL 8150019, at *4 (Vt. Super. Ct. June 28, 2005) (Norton, J.) (observing that "discretion" "based on engineering judgment" "[does] not implicate social, economic, or political choices.") (citing federal cases holding that discretionary function immunity does not apply to situations involving a "mandatory responsibility" with "no room for a policy choice").

The facts on this record do not support the defense of sovereign immunity. Dr. Nesti has presented competent evidence that the decision to increase water flow over her property was either not discretionary or that any discretion related not to a matter of policy but to engineering judgment. Indeed, the facts that VTrans cites strongly suggest that the decision was a matter of engineering design, as distinguished from policy judgment. In the face of this evidence, VTrans still provides no information about who made the decision, relying instead only on vague generalities in asserting that it was a discretionary, policy-based decision. Those generalities, unsupported as they are by any

competent evidence, are insufficient to overcome the clear inference that the stormwater design decision was not one to which discretionary function immunity applies.

2. Applicable Limitations Period

Dr. Nesti again asserts that the 15-year statute of limitations for "action[s] for the recovery of lands" applies to the nuisance, trespass, and takings claims. *See* 12 V.S.A. § 501. This court rejected that argument in ruling on the motion to dismiss, concluding instead that the general six-year statute of limitations applies to all three of those claims. *See* 12 V.S.A. § 511. Dr. Nesti provides no compelling reason to depart from the law of the case doctrine on this point. *See generally Gardner v. Jefferys*, 2005 VT 56, ¶ 14, 178 Vt. 594. In any event, the court reaffirms its earlier reasoning. The caselaw plainly establishes that these three claims are subject to the general six-year limitations period in 12 V.S.A. § 511. *See Dep't of Forests, Parks & Recreation v. Town of Ludlow Zoning Bd.*, 2004 VT 104, ¶ 6, 177 Vt. 623 ("taking" or "inverse condemnation"); *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 512–13 (1979) (nuisance); *State v. Atl. Richfield Co.*, 2016 VT 61, ¶ 26 n.6, 202 Vt. 212 (implicitly recognizing that trespass subject to six-year limitations period); *Wheeler v. Town of St. Johnsbury*, 87 Vt. 46, 51–52 (1913) (trespass); *Bostock v. City of Burlington*, No. S1337-03 CnC, slip copy at 13–14, 2010 WL 2259141 (Vt. Super. Ct. Jan. 27, 2010) (Toor, J.) (nuisance and trespass); *The Nature Conservancy v. Ames*, No. 6-1-05 Excv, at 3, 2006 WL 7089440 (Vt. Super. Ct. Apr. 25, 2006) (Cook, J.) (trespass). As our Supreme Court recognized in *Ludlow*, "states often enact a much *shorter* limitations period for eminent domain and inverse condemnation proceedings than for ordinary civil actions, but when there is no special statute of limitations for such proceedings, the general civil statute of limitations normally applies." *Ludlow*, 2004 VT 104, ¶ 6 (emphasis added). Dr. Nesti's invitation to apply a 15-year limitations period to these claims would rewrite settled law, a venture best left to the Supreme Court or the legislature.

3. Accrual

Dr. Nesti also suggests that her claims did not accrue until within six years of the date she filed this action. While the court's earlier decision implied that the action accrued before that point, it did not address that issue explicitly. As noted above, Dr. Nesti filed suit on December 31, 2018. Therefore, to survive the six-year statute of limitations, the cause of action must have accrued on or after December 31, 2012.

"A cause of action accrues when the plaintiff discovers, or should have discovered, both the injury and its cause." *Estate of Alden v. Dee*, 2011 VT 64, ¶ 20, 190 Vt. 401 (citing *Pike v. Chuck's Willoughby Pub, Inc.*, 2006 VT 54, ¶ 14, 180 Vt. 25; *Univ. of Vermont v. W.R. Grace & Co.*, 152 Vt.

287, 289–90 (1989)); *see also Turner v. Roman Catholic Diocese of Burlington*, 2009 VT 101, ¶ 50, 186 Vt. 396 (applying "discovery rule"). Here, the complaint itself establishes that the claims accrued well before December 2012. Dr. Nesti alleges that "[i]mmediately after VTrans completed construction in . . . 2006, [she] saw a massive increase in stormwater runoff" in the dry depression that ran through her property. Am. Compl. ¶ 53. Her amended complaint also features a photograph of a "torrent of water flowing through her property carrying a huge amount of oil, dirt, road pollutants[,] and sediment" after a "fairly routine rainstorm on May 8, 2012." Am. Compl. ¶¶ 54–55. She further details the erosion of the depression into a ravine over the years, and alleges that she "brought these issues to the attention of the DEC in and around 2010." *Id*. ¶ 80.[2]

Now, in opposing summary judgment, Dr. Nesti asserts that the depression "began to look eroded" in 2012, and that "[f]rom 2012 onward the depression turned into a ravine with steep, unstable[,] and undercut banks." Pl.'s Statement of Disputed Facts ¶¶ 108–09. She also admits, however, that water "began to flow through the depression" in 2008, and that from 2008 through 2010, she "began to see the water starting to erode the depression." *Id*. ¶¶ 57, 64.[3] She also unsuccessfully disputes the State's assertion that her property was damaged by the Route 7 project before December 31, 2012 and that she knew this before then. She claims that much of the harm seen today did not occur before the end of 2012, *e.g.*, certain fallen trees and driveway sinkholes, and that she thought at the time that the State would "possibly" remediate the damage "eventually." Pl.'s Resp. to Defs.' State of Facts ¶¶ 26–27. But her own words in a December 16, 2012 email contradict this claim: "The small slope by my home has become a 30-40 ft gorge with the toppling of 30-40 ft. trees and severe vertical erosion, my driveway has sinkholes and is sloping toward the gorge." Ex. 3 to Def.'s Estoppel Brief at 4. In various communications around the same time, she also expressed her belief that state officials were not doing enough to help, and that the proposed solutions were "nonviable." *See id*.; Nesti Aff. ¶ 50. In any event, it remains undisputed that Dr. Nesti observed water eroding her property long before 2012, that she attributed this to the Route 7 project, and that she was concerned enough to contact State officials about this issue as early as 2009. Plainly, there is no genuine dispute that she discovered the injury and its cause prior to December 31, 2012. Unless an exception to the statute of limitations applies, therefore, her action is time-barred.

4. Equitable Estoppel

[2] It appears that Dr. Nesti first contacted DEC officials in December 2009. *See* Aff. of James Pease ¶ 1 (Ex. 1 to Def.'s Estoppel Br.); Email comm. with James Pease (Ex. 2 to Def.'s Estoppel Br.).

[3] Notably, the affidavits cited to support these statements of fact provide only that the water started to flow through Ms. Nesti's property after VTrans competed the Route 7 expansion; they do not specify that this was in 2008.

The court requested supplemental briefing to explore the possibility that VTrans's communications with Ms. Nesti equitably estopped it from asserting a statute of limitations argument. After reviewing that briefing and the applicable caselaw, however, it is apparent that equitable estoppel does not apply. The doctrine, which is well established in the case law,

> precludes a party from asserting rights which otherwise may have existed as against another party who has in good faith changed his or her position in reliance upon earlier representations. It is based upon the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his or her own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon.

*In re Langlois/Novicki Variance Denial*, 2017 VT 76, ¶ 12, 205 Vt. 340 (citing *My Sister's Place v. City of Burlington*, 139 Vt. 602, 609 (1981); *Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 193 (1973)) (quotations and brackets omitted).

Application of the doctrine requires proof of four elements: (1) the party being estopped must know the relevant facts; (2) the party being estopped must intend that his or her conduct be acted upon; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely to his or her detriment on the estopped party's representations. *Id.* ¶ 13 (citing *Vt. N. Props. v. Vill. of Derby Center*, 2014 VT 73, ¶ 27, 197 Vt. 130). Our Court has "repeatedly acknowledged" that "the doctrine must be applied with great caution when the party against whom estoppel is sought is the government." *Id*. ¶ 12 (citing *Vt. N. Props.*, 2014 VT 73, ¶ 26). Thus, where a party asserts estoppel against the government, the party "must also demonstrate that 'the injustice that would result from denying the estoppel outweighs the negative impact on public policy that would result from applying estoppel.' " *Id*. ¶ 13 (quoting *In re Griffin*, 2006 VT 75, ¶ 18, 180 Vt. 589 (mem.)).

The key communication at issue here is part of a January 23, 2013 email from VTrans "District 5 Technician IV" Rachel Beauregard to Dr. Nesti that reads: "Under the legal doctrine of 'easement by prescription' (analogous to adverse possession), it's also possible for the State or a town to have acquired drainage easements by open, notorious[,] and continuous use which has lasted 15 or more years." Ex. 3 to Def.'s Estoppel Br. at 9. Ms. Beauregard represented that this information came from "our State legal section," that this was the way the law is interpreted, and that she would "try [her] best to work out a solution here." Dr. Nesti apparently interpreted this communication to mean that the State would find a solution, and that she had 15 years to bring a claim. Supp'l Aff. of Frances Nesti ¶¶ 16–21.

Ms. Beauregard's email, however, speaks nothing of trespass or nuisance, the two claims currently pending. Moreover, she states VTrans's belief that "the State is in the clear" and that, while the State would try to work out a solution, "it most likely won't cover all property owners," that they would "definitely need [Dr. Nesti] to work with [them]," and: "I don't think you're going to see a complete elimination of water during storm events. . . . The reality is that development occurred uphill of your property, and as a landowner it's your responsibility to accept that extra water . . . it's just the way the law is written." Ex. 3 to Def.'s Estoppel Br. at 9–10. The entire context of this email reveals that any reliance on Ms. Beauregard's statements to expect an ideal resolution or delay filing suit was not reasonable. *See Sobel v. City of Rutland*, 2012 VT 84, ¶ 20, 192 Vt. 538 ("the reliance asserted must be reasonable"); *see also Beecher v. Stratton Corp.*, 170 Vt. 137, 140 (1999) (estoppel unavailable absent explicit waiver of statute of limitations defense where defendant's adjuster merely "asked plaintiff's attorney to refrain from filing suit until settlement negotiations were completed" and indicated unawareness of limitations period). Dr. Nesti's assertions about Jim Pease at DEC—that he told her he was "working on a solution and expected that VTrans would take responsibility for the runoff[] but that it would take time" and that the State was "engaging a consultant to investigate solutions"—are equally insufficient to establish estoppel.

Indeed, the facts here are a far cry from those of *Langlois/Novicki*, where the Court found estoppel after the town zoning administrator—the official responsible for enforcement of the town's zoning regulations—"had knowledge of ample facts . . . to accurately determine that a zoning permit was necessary," yet explicitly and erroneously told the permit applicant twice that no zoning permit was required. 2017 VT 76, ¶¶ 17–18; *see also id*. ¶ 23 ("There is no sound reason to require a person in [applicant's] position to insist upon filing for a permit after having been told twice by the person in charge of administering the Zoning Regulations that no permit was required."); *In re Lyon*, 2005 VT 63, ¶¶ 19–22, 178 Vt. 232 (agency estopped from revoking wastewater permits where applicants had relied to their detriment on regional engineer's specific erroneous advice on how to avoid violations). Moreover, as noted above, Dr. Nesti expressed that state officials were not doing enough to help, and that the proposed solutions were "nonviable." *See* Ex. 3 to Def.'s Estoppel Brief at 2; Nesti Aff. ¶ 50. Accordingly, any reliance on the vague prospect of a solution was not reasonable, and so falls well short of establishing estoppel.

5. "Continuing Tort Doctrine"

The issue that remains is whether what some courts have called the "continuing tort doctrine" applies to save Dr. Nesti's trespass and nuisance claims from the operation of the statute of limitations. That "doctrine,"[4] which seemingly operates as an exception to the statute of limitations, "allows a plaintiff to support his or her cause of action with events that occurred outside of the limitations period by delaying the accrual of a claim until the date of the last injury or the date the tortious acts cease." *Gettis v. Green Mountain Econ. Dev. Corp.*, 2005 VT 117, ¶ 23, 179 Vt. 117 (quotation omitted). The doctrine generally "requires at least two elements: a continuing wrong, and some action contributing to the wrong that occurred within the limitations period." *Id*. ¶ 25. Our Court has neither adopted nor rejected the continuing tort doctrine. *Id*. ¶ 24; *see also State v. Atl. Richfield Co.*, 2016 VT 61, ¶ 26 n.6, 202 Vt. 212 (declining to address continuing tort doctrine argument raised below and "leav[ing] those issues, not before us in this appeal, for another day").[5] This court discussed the doctrine in *Bostock*, where the plaintiffs claimed that the City of Burlington flooded their property with water, pollutants, and sewage due to construction of a highway connector, wildlife sanctuary, and stormwater project. No. S1337-03 CnC, slip copy at 5–6. The court ruled there that even assuming the doctrine is available, plaintiffs did not meet their burden to produce evidence showing that the doctrine could apply in that case. *Id*. at 17–18.

It is far from certain that our Court would adopt the continuing tort doctrine. "The time limits reflected in statutes of limitation 'represent a balance, affording the opportunity to plaintiffs to develop and present a claim while protecting the legitimate interests of defendants in timely assertion of that claim.' " *Atlantic Richfield*, 2016 VT 61, ¶ 26 (quoting *Inv. Props., Inc. v. Lyttle,* 169 Vt. 487, 492 (1999)); *see also Ord. of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944) (statutes of limitations rest on premise that "the right to be free of stale claims in time comes to prevail over the right to prosecute them"); *City of Rochester v. Marcel A. Payeur, Inc.*, 169 N.H. 502, 508 (2016) (describing purposes behind statutes of limitations). The continuing tort doctrine, as noted, ostensibly operates as an exception to the statute of limitations. The Court has cautioned against "lightly

[4] Webster's Dictionary defines "doctrine," in the legal context, as "a principle of law established through past decisions." As the discussion below reveals, however, perhaps the defining characteristic of the "continuing tort doctrine" is its signal lack of clear, articulable principles to guide future decision. Thus, in most respects, it is the antithesis of legal doctrine, a wild, riderless horse that responds unpredictably, if at all, to any attempt to rein it in through clear doctrinal commands. Hence, the court's use of quotations, which it abandons below only for stylistic reasons.

[5] The Court discussed the concept of "continuing trespass" in *S. L. Garand Co. v. Everlasting Mem'l Works, Inc.*, 128 Vt. 359 (1970) and *Canton v. Graniteville Fire Dist. No. 4*, 171 Vt. 551, 552 (2000) (mem.), although neither the "continuing tort doctrine" nor the statute of limitations were at issue.

infer[ring] a never-before-recognized exception to the statute of limitations," particularly where such an exception "would have [] potentially widespread application." *Atl. Richfield*, 2016 VT 61, ¶ 26; *see also* 51 Am. Jur. 2d Limitation of Actions § 46 ("Judicial exceptions to limitations statutes cannot be undertaken lightly. Although statutes of limitation are not sacrosanct, courts do not craft exceptions to limitations periods without compelling reasons" or "read an exception into a statute of limitations which has not been embodied in the statute . . . .") (footnotes omitted); *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 430 (2007) ("A 'continuing tort' ought not to be a rationale by which the statute of limitations policy can be avoided.").

The continuing tort "doctrine was developed by the federal courts in the context of title VII of the federal Civil Rights Act, and continues to play an important role in federal discrimination law." *Sumner v. Goodyear Tire & Rubber Co.*, 427 Mich. 505, 525 (1986). It arose as a judicial response to the strict 90-day limitations period for filing a discriminatory employment practice complaint with the Equal Employment Opportunity Commission. *Id*. at 525–26. Federal courts expressed concern about three factors:

> First, Title VII is a remedial statute whose purpose is to root out discrimination and make injured parties whole. Second, employees are generally lay people, who do not know that they must act quickly or risk losing their cause of action. An employee may fear reprisal by the employer, or may refer the matter to a union, which may not take any action within the limitations period. Employees may also delay filing their complaints in the hope of internal resolution or simply to give the employer a second chance. Third, and most importantly, many discriminatory acts occur in such a manner that it is difficult to precisely define when they took place. One might say that they unfold rather than occur.

*Id*. Plainly, employment discrimination—generally addressed by remedial statutory frameworks—is a very different context from the common law trespass and nuisance arena. The considerations that underlie application of of the continuing tort doctrine in the Title VII context are, frankly, inapposite to nuisance and trespass law. Perhaps predictably, however, that has not prevented sympathetic courts from attempting to engraft the doctrine into other contexts in which strict application of statutes of limitation can have apparently harsh results.

Also perhaps predictably, these efforts have created a doctrinal muddle. After exhaustive research, this court can find no clear, coherent, organizing principle underlying application of the continuing tort doctrine in the nuisance and trespass context. This, of course calls into question its status as a "doctrine." As one Michigan court has observed, "[t]he law relating to the current viability of the continuing wrongs doctrine in the context of nuisance and trespass claims is hopelessly confused." *Marilyn Froling Revocable Living Tr. v. Bloomfield Hills Country Club*, 283 Mich. App. 264, 282

(2009); *see also*, *e.g.*, *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 427 (2007) ("There is some disagreement as to whether the continuing tort doctrine is a tolling doctrine or a doctrine of accrual . . . ."); *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1430 (11th Cir. 1997) (explaining difference between so-called "pure version of the continuing tort theory," which allows a plaintiff to "recover for all the harm he has suffered, not just that suffered during the limitations period" and the "modified version," which "allows recovery for only that part of the injury the plaintiff suffered during the limitations period"). Indeed, the lack of clarity regarding the very nature of the continuing tort doctrine suggests the absence of compelling reasons to apply it in the nuisance or trespass arena.

Most notable is confusion surrounding the "continuous" or "permanent" distinction. Courts and commentators often describe the key inquiry under the doctrine as whether the alleged trespass or nuisance is "continuous" or "permanent." *See* D. Dobbs, The Law of Torts § 57 (2d ed. June 2019 update) ("If the defendant's trespass or nuisance continues to cause harm to the plaintiff's interests in land, courts usually begin by classifying the invasion as either permanent (completed) or temporary (continuing)."). Professor Dobbs writes:

> In theory, if a nuisance is deemed permanent, there is only one unceasing invasion of the plaintiff's interests and only one cause of action. This necessarily arises when the invasion first began or was first manifest. The statute of limitations on the one cause of action must, then, begin running from the time it became manifest. In contrast, if the nuisance or trespass is "temporary," or "continuous," a new cause of action arises day by day or injury by injury, with the result that the plaintiff in such a case can always recover for such damages as have accrued within the statutory period immediately prior to suit.

D. Dobbs, Remedies § 5.4, at 343 (1973) (footnotes omitted). Courts, however, have reached varying and sometimes conflicting conclusions as to what is "permanent" and what is "temporary." *See* D. Dobbs, The Law of Torts § 57, at 115–16 (2001) ("Conflicting decisions and factual variety make statement of a general rule perilous. . . . It is not easy to find harmony in the case results."). For example, some courts focus on the tortious conduct or act, while others focus on the nature of the incursion. *Compare Carpenter v. Texaco, Inc.*, 419 Mass. 581, 583 (Mass. 1995) ("a continuing trespass or nuisance must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct") *with Jacques v. Pioneer Plastics, Inc.*, 676 A.2d 504, 507 (Me. 1996) ("we have defined a nuisance as continuing when the thing that constitutes the nuisance is not of such a permanent nature that it can not readily be removed and thus abated") (quotation omitted).

The "permanent" versus "temporary" determination often involves a number of factors, including whether the invasion can be terminated or abated, and whether the cost of termination is wasteful or oppressive. D. Dobbs, The Law of Torts § 57 at 117–18. One of the better discussions of this analysis comes from Maine's high court:

> In determining the distinction between "permanent" and "continuing" one commentator has considered the following three factors:
>
> > (1) is the source of the invasion physically permanent, i.e., is it likely in the nature of things, to remain indefinitely? (2) is the source of the invasion the kind of thing an equity court would refuse to abate by injunction because of its value to the community or because of relations between the parties? (3) which party seeks the permanent or prospective measure of damages?
>
> Dan B. Dobbs, Handbook on the Law of Remedies § 5.4, p. 338 (1973). Professor Dobbs goes on to state that "a nuisance or trespass is usually not regarded as a permanent one unless it is physically permanent or likely to continue indefinitely." *Id*. Likewise, many courts have considered the question of abatability to be the deciding factor in their determination of whether a nuisance or trespass is continuous or permanent.

*Jacques*, 676 A.2d at 507–08 (citing *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1122 (D.C. Cir. 1988) (continuing nuisance one which is abatable, or intermittent or periodical); *Reynolds Metals Co. v. Wand*, 308 F.2d 504, 508 (9th Cir. 1962) (aluminum plan's emissions permanent nuisance because unlikely they would be abated or enjoined); *City of Sioux Falls v. Miller*, 492 N.W.2d 116, 119 (S.D. 1992) (periodic flooding from storm sewer system permanent nuisance because unlikely to be enjoined due in part to value to community); *Racine v. Glendale Shooting Club, Inc.*, 755 S.W.2d 369, 374 (Mo. Ct. App. 1988) (recognizing that distinguishing feature between permanent and temporary nuisance is its abatability)).

Professor Dobbs refers to the "source of the invasion." D. Dobbs, Handbook on the Law of Remedies § 5.4, p. 338 (1973). As this court recognized in *Bostock*, however, courts are split on this issue, and even Professor Dobbs is contradictory between his torts and remedies treatises. *See Bostock v. City of Burlington*, No. S1337-03CNC, slip copy at 15–17, 2010 WL 2259141 (Vt. Super. Ct. Jan. 27, 2010). Moreover, many courts have found continuing torts when the impacts were continuing despite the fact that the defendant's actions took place years before. *See Hoery v. United States*, 64 P.3d 214, 221 (Colo. 2003) (citing cases). Indeed, in *Hoery*—the very case VTrans relies upon for the proposition that the abatement question depends exclusively on the defendant's alleged tortious conduct, *i.e.*, the discharge from Route 7, rather than the harm on Plaintiff's property—the Colorado

Supreme Court held that "the contamination" of the plaintiff's property by toxic chemicals from an Air Force base was not permanent because it was "remediable or abatable." *Id*. at 222–23. Importantly, the court relied on the fact that the plaintiff's expert "opined under oath that [plaintiff's] property could be remediated." *Id*. at 223.[6]

The importance placed on the "abatement" concept appears to have some rational basis. In theory, courts require the abatement of "continuing" or "temporary" trespasses or nuisances that are, by definition, easier and more feasible to abate, while declining to do so for "permanent" or "completed" trespasses or nuisances that are harder and less feasible to abate. This makes sense as a policy choice to require defendants to remedy situations that are relatively easy to fix, while avoiding the social cost of requiring significant changes to permanent, entrenched structures. On the other hand, plaintiffs faced with a permanent nuisance might suffer greater damages and be more in need of relief. Furthermore, it is hard to tie the concept of abatement back to the policies underlying the statute of limitations, which it ultimately modifies. What is the purpose or merit to giving plaintiffs a break from an otherwise applicable limitations period merely because the trespass or nuisance is considered to be "abatable"? Relevant authorities provide no clear answer to this query, and the more one reflects, the more evident it becomes that the considerations required to decide the "permanent" versus "continuing" distinction are far attenuated from and bear no rational connection to the concept of a statute of limitations.

Adding further confusion is the observation that, as our Court has recognized, the continuing tort doctrine commonly requires "some action contributing to the wrong that occurred within the limitations period." *Gettis*, 2005 VT 117, ¶ 25; *see also Mix v. Delaware & Hudson Ry. Co.*, 345 F.3d 82, 88–89 (2d Cir. 2003) ("provided that an act contributing to the claim occurs within the filing period"); *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 426 (2007) ("This 'continuing tort doctrine' requires that a tortious act—not simply the continuing ill effects of prior tortious acts—fall within the limitation period."). If so, then the doctrine does not operate as an exception to the statute of limitations after all. "Seen in this light, the 'continuing tort doctrine' is not a separate doctrine, or an exception to the statute of limitations, as much as it is a straightforward application of the statute of limitations: It simply allows claims to the extent that they accrue within the limitations period." *Alston.* 273 Neb. at 429–30.

[6] In a footnote, the Colorado court rejected attempts by other jurisdictions to "clarify the distinctions between continuing and permanent torts by focusing either on the 'cause' of the harm or the 'harm' resulting from that cause." *Hoery*, 64 P.3d 219 n.8. The court did "not find these classifications helpful to [its] analysis, particularly in the context of this case where it is difficult to determine whether the toxic pollution plume is the cause of Hoery's alleged harm or the harm itself." *Id*.

In any event, Dr. Nesti has not met that basic requirement here.[7] It is undisputed that the State completed the Route 7 reconstruction by 2006 at the latest. The summary judgment record does not reflect any tortious acts since then that would support the pending claims. *Id*. at 426–27 ("Nor can the necessary tortious act merely be the failure to right a wrong committed outside the statute of limitations, because if it were, the statute of limitations would never run because a tort-feasor can undo all or part of the harm.") (citing *Gettis,* 2005 VT 117); *see also Urie v. Thompson*, 337 U.S. 163, 170 (1949) (rejecting "theory that each intake of dusty breath is a fresh 'cause of action' "). As discussed above, Dr. Nesti discovered the injury and its cause for purposes of the discovery rule prior to December 31, 2012, more than six years before she filed suit. *Accord Mix v. Delaware & Hudson Ry. Co.*, 345 F.3d 82, 88 (2d Cir. 2003) ("applying this doctrine in an FELA [Federal Employers' Liability Act] case would be inconsistent with the discovery rule, as it would permit plaintiffs to recover for injuries whose existence and cause was known over three years prior to filing suit.").

The court recognizes that many courts have found continuing torts—or at least a fact question as to whether the alleged tort was "continuing"—where the impacts were continuing even though the defendant's actions took place years before, including in cases involving government defendants. *Hoery v. United States*, 64 P.3d 214, 221 (Colo. 2003) (citing cases). Interestingly, however, these cases largely seem to involve toxic torts and latent environmental contaminants, and so are plainly *sui generis*. That type of case is distinguishable from this one on many levels. First, those cases often involve a period of latency, where the contaminant's migration is not easily discovered by anyone. Here, as noted above, Dr. Nesti discovered the increased water and sediment flowing through her property before the end of 2012. Second, toxic torts often have extensive statutory and regulatory overlay that may impose strict liability even for actions that took place decades ago. *See generally State of Vermont Agency of Nat. Res. v. Parkway Cleaners*, 2019 VT 21, ¶ 17, 209 Vt. 620 ("The purpose and statutory scheme of the [Vermont Waste Management Act], and its federal counterpart [CERCLA], indicate that the remedial goals of these statutes were intended to be quite broad and that

[7] In *Bostock*, this court declined to conclude that the *Gettis* requirement that a wrongful act occur within the limitations period was dispositive. *Bostock*, No. S1337-03 CnC, slip copy at 15. The court observed that the *Gettis* Court had not analyzed the continuing tort doctrine in the specific context of trespass and nuisance claims, which was an unsettled area of law, and that the plaintiffs had pointed to differences between negligence claims and trespass and nuisance claims that might obviate the *Gettis* requirement. *Id.* at 15–16 (citing *Traver Lakes Cmty. Maint. Ass'n v. Douglas Co.*, 224 Mich. App. 335, 346 (1997) ("Unlike negligence, [n]uisance is a condition and not an act or failure to act. In addition, unlike in a negligence claim, liability for trespass may be imposed regardless of the defendant's negligence or intentional conduct. Thus, in reviewing plaintiff's damages claim for trespass/nuisance, we must focus our inquiry on the reasonableness of the interference with plaintiff's property, not the reasonableness of defendants' conduct in creating or maintaining the interference") (quotations and citations omitted) (alteration in original)). Notably, here, Dr. Nesti has not raised any such differences that might obviate the *Gettis* requirement. In any event, the "differences" between negligence claims and trespass/nuisance claims observed in *Traver Lakes* do not convince this court that a different approach to the continuing tort doctrine is justified in the trespass/nuisance context.

the exceptions to liability quite narrow.") (quotation omitted) (alterations in original); *id*. ¶ 19 (stating that Waste Management Act "makes current owners strictly liable for the release or threatened release of hazardous materials on their property, whether it occurred under their ownership or not" absent certain limited exceptions); 42 U.S.C. § 9607 (describing liability under CERCLA); 10 V.S.A. § 6615 (describing liability under Vermont's "Waste Management Act," which largely tracks its federal precursor, CERCLA); *Syms v. Olin Corp.*, 408 F.3d 95, 109–10 (2d Cir. 2005) (noting the New York high court's reasoning that "the continuing tort doctrine had grown out of a jurisprudential climate and landscape where there was no discovery rule," and that the legislature "had eliminated the need for the doctrine [in latent exposure cases] by creating a new [statutory] regime that carefully balances plaintiffs' interest in recovering damages for undiscovered latent injuries against defendants' interest in repose").

Moreover, toxic tort scenarios might not even need the continuing tort theory to abate the migration or presence of contaminants. As just discussed, abatement would likely be available through the statutory process and, in any event, a tort action might not accrue until decades later given the latency involved in many such cases. To the extent those cases do need the continuing tort doctrine in order to proceed, the caselaw and statutory overlay provide ample support for such a policy choice. Toxic torts present a wholly different set of legal and societal imperatives than those implicated here, however, and so the court need not address those considerations further.

Ultimately, the court concludes that the continuing tort doctrine does not save Dr. Nesti's nuisance and trespass claims from the operation of the statute of limitations. Considering the doctrinal muddle that surrounds application of the doctrine, it is far from clear that the Vermont Supreme Court would adopt the doctrine in any form; if it did, it most likely would be circumscribed as suggested in *Gettis*. Then, the lack of any allegedly tortious act by VTrans during the limitations period would take this case outside of the doctrine's operation.

Dr. Nesti might understandably complain that this is an unfair result. The same could be said, however, about any case where a defendant prevails on statute of limitations grounds. As noted above, a limitations period represents a legislative policy choice to balance a plaintiff's interest in pursuing relief for some harm with a defendant's interest in limiting stale claims. *See Atlantic Richfield*, 2016 VT 61, ¶ 26; *Ord. of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944). Courts should understandably be extremely reluctant to wade into the policymaking arena. Applying the continuing tort doctrine to avoid the statute of limitations here would upset the careful balance drawn by the legislature, and informed by decades of caselaw. *See generally Golla v. Gen. Motors Corp.*, 167

Ill. 2d 353, 369–70 (1995). Accordingly, the court concludes that the "continuing tort doctrine," to the extent that it would be recognized at all in Vermont, does not save Dr. Nesti's claims from the operation of the statute of limitations.

## ORDER

The court grants VTrans's motion for summary judgment. The court dismisses Dr. Nesti's nuisance and trespass claims. The clerk will enter judgment for VTrans on all claims.

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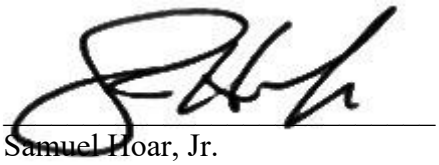

Samuel Hoar, Jr.
Superior Court Judge