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QUESTIONS PRESENTED

I. DID THE TRIAL COURT CORRECTLY RULE THAT THE "CONTINUOUS TORT" DOCTRINE DID NOT APPLY, THE STATUTE OF LIMITATIONS BEGAN TO RUN AT THE TIME OF THE SOLE ALLEGED TORTIOUS ACT AND THAT HEWITT'S CLAIMS WERE TIME-BARRED?

II. DID THE TRIAL COURT CORRECTLY RULE THAT HEWIT'S CLAIMS DID NOT INVOLVE AN "ABATABLE NUISANCE" AND THAT THE CAUSE OF ACTION ACCRUED AT THE TIME OF THE ISOLATED ACT OF REMOVING THE TREES IN 1995?

III. ARE THE PLAINTIFF'S CLAIMS THAT THE DISCOVERY RULE APPLIES TO EXTEND THE STATUTE OF LIMITATIONS IRRELEVANT BECAUSE THE UNDISPUTED FACTS AND HIS OWN ADMISSIONS REVEAL THAT HE KNEW OF THE BASIS FOR HIS CLAIMS MORE THAN THREE YEARS PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS AND, AS A RESULT, HIS CLAIMS WERE NONETHELESS UNTIMELY AND WERE PROPERLY DISMISSED BY THE TRIAL COURT?

RELEVANT STATUTE

R.S.A. 508:4 Personal Actions

I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its casual relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

II. Personal actions for slander or libel, unless otherwise provided by law, may be brought only within 3 years of the time the cause of action accrued.

STATEMENT OF THE CASE

This is an appeal from the June 30, 2009 Order of the Belknap County Superior Court (Hon. J. McGuire) granting a Motion to Dismiss filed by the Defendants/Appellees, Alan W. Tardif and Ann M. Tardif ("the Tardifs") on the grounds that the Petitioner/Appellant, Ricky D. Hewitt ("Hewitt") failed to initiate this civil action within the applicable statute of limitations.

Hewitt initiated this action by way of a "Petition for Temporary and Permanent Injunction and Money Damages." [App. p. 1][1] The Petition was dated September 19, 2008 and filed with the Belknap County Superior Court on September 22, 2008. [App. p. 3] The Tardifs received abode service of the plaintiff's Petition on October 1, 2008.

Hewitt alleged that the Tardifs' removal of trees and blasting activities on the Tardifs' property altered the amount of runoff of surface and subsurface waters from the Tardifs' lot onto Hewitt's lot causing damage to his foundation, lawn and shrubs. [App. p. 2] Hewitt also alleged that the Tardifs' use of salt to melt ice on their driveway resulted in the discharge of salt onto Hewitt's lot causing damage to his trees due to the flow of water from the Tardifs' lot. [App. p. 2] Hewitt's original Petition made numerous bare and conclusory allegations against the Tardifs that failed to identify with any specificity the relevant dates, including the date or dates on which the tree removal and/or blasting activities occurred, or the date that Hewitt first noticed or first became aware of water issues affecting his property.[2] Significantly, Hewitt claimed that the Tardifs' removal of "a substantial number of large mature trees down gradient from the

[1] Citations to "App." refer to the Appendix to Brief of Defendants/Appellants.
[2] Hewitt states in his Brief that the Tardifs began clearing their lot in 1996, and conducted blasting operations in 1997 in order to construct the foundation for their home. [Brief of Plaintiff, p. 2-3] Hewitt also admits that in 2004-2005 he "suffered extensive water flow onto his lot". [Brief of Plaintiff, p. 3]

residential structure for the primary purpose of improving the view from the house" constituted a violation of the Declaration of Easements Covenants and Restrictions of Gunstock Acres, Inc. [App. p. 1] Hewitt alleged that the Tardifs' conduct constituted an ongoing nuisance. [App. p. 2] He sought both injunctive relief and compensatory damages. [App. p. 3]

Following a hearing on November 19, 2008 to address Hewitt's equitable claims, the court temporarily enjoined the Tardifs from using salt to melt snow on their driveway without restricting the Tardifs from using alternative substances such as calcium chloride. [App. p. 5-8] With the equity issues resolved, the only issue remaining was Hewitt's claim for compensatory damages. On January 15, 2009, following a case structuring conference, the court issued a Structuring Conference Order which stated that the only remaining claim was one for "nuisance". [App. p. 8-9]

On April 10, 2009, the Tardifs filed a Motion to Dismiss based on the plaintiff's failure to initiate this civil action prior to expiration of the applicable statute of limitations. [App. p. 10-16] The Motion to Dismiss was supported by affidavits of Alan Tardif and Ann Tardif which verified that they removed trees from their lot in 1995 prior to constructing their home. [App. p. 17-20] The Tardifs stated that they also removed five dead trees from their backyard in 2006 after obtaining permission from the Gunstock Acres Beach Trust.[3] The Tardifs also submitted an affidavit executed by James Fagnant, who stated that he was hired by Hewitt in 2002 to construct a retaining wall and remove ledge from his property, and that at that time he notified Hewitt that he had observed excessive water running onto Hewitt's lot. [App. p. 21-22] The Tardifs argued that they

[3] Hewitt does not allege that the 2006 tree removal caused damage to his lot, rather, his claims are based entirely on the removal occurring in 1995, prior to the construction of the Tardifs' home.

were entitled to dismissal of Hewitt's claim because the applicable statute of limitations expired in 1998, three years after the Tardifs removed trees from their lot. [App. p. 15] The Tardifs also argued, in the alternative, that in the event that the discovery rule applied, Hewitt knew or should have known of the alleged water condition in 2002 when he was notified by Fagnant. [App. p. 15] Hewitt objected based primarily on his position that the "continuous tort" doctrine should apply. [App. p. 23-25] He also argued that he did not discover that the water was likely originating from the Tardifs' lot until 2006 following a site investigation. [App. p. 24]

By Order dated April 28, 2009, the trial judge (Hon. J. McGuire) ruled that the plaintiff should amend his Petition and specify the dates on which the defendants removed trees, blasted the property, or engaged in other conduct alleged to cause the runoff on the plaintiff's property, as well as the dates that the plaintiff "first noticed and/or reasonably discovered any runoff impact on his property from the defendants' activities." [App. p. 29-30] The court noted that the Tardifs were entitled to renew their motion to dismiss after Hewitt had an opportunity to file his amended petition. [App. p. 30]

Hewitt subsequently filed an Amended Petition which continued to omit dates which the trial court specifically ordered him to provide. [App. p. 31-35]

On June 12, 2009, the Tardifs filed a Renewed Motion to Dismiss, in which they renewed the statute of limitation arguments raised in their initial motion and addressed the inapplicability of the "continuous tort" doctrine. [App. p. 36-53] Hewitt objected on June 22, 2009. [App. p. 54-59]

The trial court granted Tardifs' Renewed Motion to Dismiss on June 30, 2009. [App. p. 60] Hewitt filed a Motion to Reconsider, essentially restating the position taken in his original Objection. [App. p. 61-62] The Tardifs filed a timely Objection. [App. p. 63-66]

On August 10, 2009, the trial court (Hon. J. McGuire) denied Hewitt's Motion for Reconsideration for the reasons set forth in the Tardifs' pleadings. [App. p. 67-69] The court ruled that Hewitt's equitable claims had already been resolved through Judge Smuckler's November 24, 2008 Order and the Structuring Conference Order of January 15, 2009 which listed only "nuisance" as a cause of action. [App. p. 68] The court also ruled that this was "not an abatable nuisance case for which successive causes of action will lie." [App. p. 68] The court concluded that while the damage to Hewitt's lot may be ongoing, the tort that allegedly caused the damage was not. [App. p. 68] The court ruled that the cause of action accrued when the alleged tort was completed, and that continual damage would not extend the limitations period. [App. p. 68-69]

This appeal followed.

STATEMENT OF FACTS

Hewitt is the owner of a residential lot in the Gunstock Acres subdivision located at 185 Chestnut Drive in Gilford, New Hampshire. [App. p. 1, 13] The Tardifs live at 186 Chestnut Drive, directly uphill and across the street from Hewitt. [App. p. 1, 15] In 1995, the Tardifs cut and cleared trees from their lot in preparation for the construction of their home. [App. p. 13, 17, 19] In 1996, the foundation was poured. [App. p. 13, 17, 19] In July 1998, the Tardifs received a certificate of occupancy. [App. p. 13, 17, 19] The Tardifs have lived at this address from July 1998 to the present. [App. p. 13, 17, 19]

On May 9, 2002, James E. Fagnant ("Fagnant") of Prime Construction was hired by Hewitt to build a retaining wall and remove rock ledge from plaintiff's property. [App. p. 21] Mr. Fagnant also built a small stone wall with the blasted rock from the plaintiff's property. [App. p. 21] During Prime Construction's activities, Fagnant observed excessive water running on top of the ledge where excavation had taken place. [App. p. 21] In addition, a six inch or less soil overburden would liquefy during excavation attempts. [App. p. 21] At that time, Fagnant reported this condition to Hewitt. [App. p. 21] Fagnant and Hewitt agreed to use one-inch stone instead of soil for backfill behind the retaining wall to address this excessive water condition. [App. p. 21]

Hewitt again noticed "extensive water flow onto his lot which formed a thick layer of ice in his driveway" in the winter of 2004-2005. [Brief of Plaintiff, p. 3; App. p. 24, 26] Suspecting a water line leak, Hewitt contacted the Gilford Public Works Director and the Gunstock Acres Water Commission. [Brief of Plaintiff, p. 3, 27] Site visits by these entities during the summer of 2005 resulted in a determination that there were no water lines leaking in the vicinity of Hewitt's lot. [Brief of Plaintiff, p. 3; App. p. 27]

During the fall of 2006, the Tardifs identified five trees in their backyard that were in danger of falling and damaging their home. [App. p. 17, 19] As a result, the Tardifs secured permission from the Gunstock Acres Beach Trust to remove the five dead trees in order to prevent damage to their home.[4] [App. p. 17, 19]

From 1996 to November 26, 2007, Hewitt did not notify or accuse the Tardifs of creating or contributing to excessive water, water runoff, surface or subsurface water flow or property damage of any kind to his property as a result of the Tardifs' 1995 tree clearing activity and/or blasting activity. [App. p. 18, 20]

On November 27, 2007, Hewitt telephoned Alan Tardif and claimed for the first time that the Tardifs were responsible for excessive water damage to his property. [App. p. 18, 20] Hewitt also threatened legal action. [App. p. 18] Hewitt did not file the pending lawsuit until September of 2008.

[4] Hewitt's claims were based on the original tree removal in 1995, not the subsequent removal of dead trees in 2006.

SUMMARY OF ARGUMENT

The trial court correctly ruled that the applicable statute of limitations began to run at the time of the original alleged tortious act and, therefore, that Hewitt's claims were time-barred. The act which allegedly caused the damages for which Hewitt sought compensation was the Tardifs' open and obvious removal of trees from their property in preparation for the construction of their home thirteen years prior to the filing of this lawsuit. Hewitt claimed that this act not only caused excessive water runoff, but was also a violation of the neighborhood covenants. The court properly rejected Hewitt's claim that the "continuous tort" doctrine applied to extend the statute of limitations period since there was no factual basis for such a claim. It is the continuation of tortious *acts*, not continuation of damage, that triggers the "continuous tort" doctrine. Once the trees were removed, the alleged tortious act was complete and there was no further ongoing action on the part of the Tardifs that caused water runoff to occur.

The court also correctly rejected Hewitt's claims that the tree removal was an "abatable nuisance." The removal of several large trees was an isolated event that resulted in a permanent condition. Once the trees were removed, the Tardifs had nothing further to maintain. The occurrence of rain and resulting water runoff was not within their control and does not constitute an "abatable nuisance".

Finally, even if one construes all of the facts in favor of Hewitt, there is simply no basis for concluding that the claims are saved by application of the discovery rule. Hewitt did not satisfy his burden of demonstrating that he did not discover, or *in the exercise of reasonable diligence could not reasonably have discovered*, the damage and its causal relationship to the tree removal in 1995.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing the trial court's grant of a motion to dismiss, this Court's standard of review is "whether the allegations in the petitioner's pleadings are reasonably susceptible of a construction that would permit recovery." Matter of Lemieux, 155 NH 370, 373, 923 A.2d 208 (2008). The court will "assume the petitioner's pleadings to be true and construe all reasonable inferences in the light most favorable to him." Id. The court must "engage in a threshold inquiry that tests the facts in the petition against the applicable law." Id. If the facts alleged do not constitute a basis for legal relief, this Court must uphold the granting of the motion to dismiss. Farm Family Casualty Ins. Co. v. Town of Rollinsford, 155 N.H. 669, 670, 923 A.2d 1234 (2007).

II. THE TRIAL COURT CORRECTLY RULED THAT THE "CONTINUOUS TORT" DOCTRINE DID NOT APPLY, THE STATUTE OF LIMITATIONS BEGAN TO RUN AT THE TIME OF THE ORIGINAL ALLEGED TORTIOUS ACT AND THAT HEWITT'S CLAIMS WERE TIME-BARRED

In New Hampshire, "all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of."[5] RSA 508:4, I.

[5] Hewitt's argument with respect to application of the discovery rule is addressed in Section IV below.

The primary purpose of the statute of limitations is to "ensure timely notice to an adverse party and to eliminate stale or fraudulent claims." Donnelly v. Eastman, 149 N.H. 631, 634, 826 A.2d 586 (2003). "The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." Id.

Hewitt acknowledges that the Tardifs' tree clearing activities occurred in 1995-1996, and claims that the blasting activities occurred in 1997.[6] [Brief of Plaintiff, p. 2-6] The tree removal activities involved a substantial number of trees and coincided with the construction of the Tardifs' home during that timeframe. These activities were certainly open and obvious to the plaintiff since the Tardifs live directly across the street from Hewitt's house. Hewitt himself claimed that the removal of the trees was not only a violation of the Declaration of Easements Covenants and Restrictions of Gunstock Acres Inc., but even more significantly he alleged that it was the Tardifs' removal of trees that "has greatly altered the amount of runoff of surface and sub-surface waters from Defendants' lot onto Plaintiff's lot." [App. p. 1-2] The alleged violation of the covenants at the time of the tree removal was, in itself, sufficient to trigger the running of the limitations period. Accordingly, Hewitt was required to file his lawsuit against the Tardifs within three years of 1995-1997 – or in 1998-2000. Instead, Hewitt "sat on his rights" and failed to initiate a civil action within this timeframe and, therefore, the trial court correctly concluded that he is now barred from pursuing it by application of the three-year statute of limitations.

[6] Reference in Hewitt's Affidavit and superior court pleadings to tree clearing activities in 1998 are erroneous, as is now acknowledged in Plaintiff's Brief.

The trial court correctly concluded that the "continuous tort" doctrine did not apply to extend the limitations period under the facts of this case.[7] [App. p. 68] Under the "continuing wrong" or "continuing tort" doctrine, "[w]hen a tort is of a continuing nature, although the initial tortious act may have occurred longer than the statutory period prior to the filing of an action, an action will not be barred if it can be based upon the *continuance of that tort* within that period." Thorndike v. Thorndike, 154 N.H. 443, 446, 910 A.2d 1224 (2006) [emphasis added]. However, "[a] claim based on a single tort ordinarily accrues when the tort is completed, and the continuing accrual of injury or damages does not extend the accrual date." Singer Asset Finance Company, LLC v. Wyner, 156 N.H. 468, 478, 937 A.2d 303 (2007), *quoting* McCabe v. Craven, 2007 WL 1229095 at 3 (Idaho Ct.App. 2007), *vacated on other grounds by* 145 Idaho 954, 188 P.3d 896 (2008). In other words, "[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." Id. at 478, *quoting* Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981)[8].

As one court explained, "[a] continuing tort occurs when a *wrongful act* persists over time." Holland v. City of Geddes, 610 N.W.2d 816, 818 (S.D. 2000) [emphasis added]. "On the other hand, a *continual consequence* from a solitary unlawful act is *not* a continuing tort." Id. [emphasis added] The primary rationale for extending the statute of limitations in the case of a continuing tort is that "when no discrete occurrence in continually wrongful conduct can be singled out as the principal cause of

[7] In both its Order on Motion to Dismiss (6/30/09) and its Order on Motion to Reconsider (8/10/09), the trial court adopted the reasoning set forth in the defendants' Renewed Motion to Dismiss. [App. p. 60, 68]
[8] When the "continuing tort" doctrine does apply, damages which accrued prior to the statutory time period are still barred and the plaintiff is only entitled to recover for damages which occur during the statutory period. *See,* Nordic Inn Condominium Owners' Association v. Ventullo, 151 N.H. 571, 582, 864 A.2d 1079 (2004). In this case, the plaintiff would not have been allowed to recover for damages which occurred more than three years prior to the filing of his lawsuit in September of 2008.

damage, the law regards the cumulative effect as actionable, and allows the limitations period to begin when the wrongful conduct ends." Id. In Holland, the court held that the city's breach of duty in failing to repair a broken valve was ongoing and caused ongoing damage to the plaintiff's soil and house. Id. at 819. Thus, there was *both* continuing breach of duty *and* continuing damage. Id. According to the court, "[t]his is distinguishable from cases where the wrong flows from a single tortious event." Id.

Thus, when repeated flooding or water drainage is caused by a single discrete act, such as tree removal or excavation of soil, for example, the cause of action accrues at the time of the original act and the statute of limitations begins to run. *See, e.g.,* Sexton v. City of Mason, 117 Ohio St.3d 275, 883 N.E.2d 1013 (2008) (repeated water problems created by developer's work on adjacent property was a permanent trespass subject to statute of limitations). When repeated flooding or water drainage is due to the construction or installation of a building or fixture that is not properly maintained, however, the nuisance may be deemed a "temporary nuisance" and the "continuing tort" doctrine applied the as the result of the ongoing failure to maintain. *See, e.g.* City of Atlanta v. Kleber, 285 Ga. 413, 677 S.E.2d 134 (2009) (to the extent homeowners complained that the mere presence of the culvert and pipe created a nuisance due to improper installation the claim is permanent in nature and barred by statute of limitations, however, to the extent that they claim that the culvert and pipe were not properly maintained, the nuisance claim is continuing in nature).

The following cases upon which Hewitt relies are readily distinguishable because they involve claims for ongoing damage caused by the presence of a condition constructed *and* thereafter maintained by the defendants. The ongoing inadequate

maintenance or failure to remove the artificial condition constituted the "continuous tort".

In Handley v. Town of Shinnston, 169 W.Va. 617, 289 S.E.2d 201 (1982), the defendant installed a water transmission line in 1971. 289 S.E.2d at 202. The water line leaked from 1971 until 1976, when it ruptured, causing a crack to appear on the surface of the plaintiff's yard. Id. The town was notified and repaired the crack, however, the water line continued to leak until it was removed in 1978. Id. After the water line was removed, the crack in the plaintiff's yard continued to expand, causing additional damage on the plaintiff's property. Id. The plaintiff filed suit in 1979. Id. The court simply held that if the tortious act ceased, it was not until 1978 when the leaking water line was removed from the property. Id. Since the plaintiff filed suit within two years of that date, the action was timely. Id. at 202-203.

In Eppling v. Seuntjens, 117 N.W.2d 820 (Iowa 1962), the plaintiff alleged that a ditch constructed, altered and maintained by the defendant caused damage to his crops and pasture by directing a flow of water on his property. The plaintiff claimed that the defendant placed obstructions in the ditch such as rocks, fencing and other debris that impeded the natural flow of surface waters. Id. at 822. Although the court found that there was no evidence that the defendant had placed the obstructions in the ditch, it did recognize that the defendant did not have the right to direct water onto the plaintiff's land and that the owner of land through which a ditch runs has a duty to keep it open and free from destruction. Id. at 823-24. The court held that claims for damages that occurred outside limitations period were barred, and that the remaining damages – which all occurred while the defendant continued to have a duty to maintain the ditch – were allowed. Id. at 825.

In this case, the Tardifs' removal of trees in 1995 is the single, isolated act which is alleged to be the cause of the water drainage on Hewitt's property. Once the trees were removed, there was no continuous *conduct* on the part of the Tardifs that caused water to drain onto Hewitt's property. There were no artificial conditions to be maintained or removed. The act was complete.

Hewitt's allegations that the water continues to drain on his property does not render the "continuous tort" doctrine applicable because that is simply the claimed ongoing result of the alleged wrongful tree removal in 1995 – a single discrete occurrence. There is simply no ongoing tortious conduct alleged in this case. Furthermore, Hewitt's allegation that the Tardifs used salt to melt snow and ice on their driveway does not save him from the application of the statute of limitations. The use of salt in and of itself was not the crux of the plaintiff's claims, rather, it was the alleged flow of water that happened to carry the salt onto his property upon which Hewitt based his claim. Thus, the statute of limitations began to run in 1995 when the Tardifs removed the trees, or, at the very latest, on the date that Hewitt discovered or reasonably should have discovered that the Tardifs' removal of trees in 1995 was causing water to drain from the Tardifs' land onto his property – certainly no later than 2002 when Fagnant told Hewitt that excessive water was running onto his property. *See*, Section IV below.

III. THE TRIAL COURT CORRECTLY RULED THAT HEWITT'S CLAIMS DID NOT INVOLVE AN "ABATABLE NUISANCE" AND, THEREFORE, THE STATUTE OF LIMITATIONS BEGAN TO RUN AT THE TIME OF THE ALLEGED TORTIOUS ACT, THE REMOVAL OF TREES IN 1995

"The nature of a nuisance as permanent or temporary has an important bearing on the running of the statute of limitations." 58 *Am.Jur.2d Limitation of Actions* §296. "Where a nuisance is permanent in character, and its construction and continuance necessarily result in an injury, all damages are recoverable in only one action, and the statute commences to run immediately upon the creation of the nuisance or on the completion of the structure or thing which constitutes or causes the nuisance." Id. The applicable statute of limitations will bar a claim based on a permanent nuisance when the action is not brought within the prescribed period after the first actionable injury. 58 *Am.Jur.2d Limitation of Actions* §295.

According to some authorities, the distinguishing feature between a permanent nuisance which triggers the statute of limitations upon the occurrence of the alleged tortious act, and a temporary nuisance to which the "continuing tort" doctrine applies, is the "abatability" of the nuisance. 58 *Am.Jur.2d Nuisances* §27. A nuisance is temporary or continuing where it is remediable, removable, or abatable, or if abatement is reasonably or practicably possible at a reasonable cost. Id. A nuisance is permanent if abatement is impracticable or impossible. Id. "Injuries to land are incapable of repair and thus permanent in nature when things attached to land, such as *timber, trees,* soil, and buildings, are removed or destroyed." Id.

The New Hampshire Supreme Court has explained the difference between a temporary or abatable nuisance and a private nuisance for purposes of applying the statute of limitations. Where the injury is temporary or intermittent, depending upon

uncertain future conditions, the nuisance is characterized as temporary or abatable and the plaintiff must bring successive actions to recover for successive injuries as they occur. Sundell v. Town of New London, 119 N.H. 839, 848, 409 A.2d 1315 (1979). A permanent nuisance, on the other hand, is once which "exists under circumstances that give rise to the presumption that it will continue indefinitely or affect the value of the property permanently." Id. at 849. When a nuisance is characterized as permanent, the plaintiff must recover his damages in one action brought within the applicable limitations period. Id.

Hewitt argues that his claim is one for "an ongoing abatable nuisance that causes new injury every time it rains." [Brief of the Plaintiff, p. 4] The fatal flaw in this position is that an abatable nuisance is based not on the existence of ongoing injury, but rather on ongoing tortious conduct that causes the injury. This distinction is clearly illustrated by the Alabama Supreme Court's decision in Reichert v. City of Mobile, 776 So.2d 761 (Ala. 2000). In Reichert, the plaintiffs were homeowners whose properties flooded as the result of the city's construction and maintenance of a storm-drainage system. The plaintiffs filed suit against the city alleging negligent design and construction, negligent maintenance, continuing trespass and continuing nuisance. The city had undertaken construction to widen and elevate a road in 1973 and 1974, causing the road to act as a dam and prevent floodwater from flowing away from the plaintiffs' homes. Id. at 764. The court held that the construction work was a "permanent condition" and since the plaintiffs' filed suit more than two years after they experienced flooding of their properties, their claims based on negligent construction and design were barred. Id. at 765. The claims based on the city's ongoing negligent maintenance of the

storm-drainage system were not barred provided that the plaintiffs presented "substantial evidence of negligent maintenance" by the city – in other words, that the flooding was caused by the city's "failure to provide appropriate upkeep for the storm-drainage system in its existing condition." Id. at 765-66. If the plaintiffs met their burden with respect to the negligent maintenance claims, then the "continuing nuisance" doctrine would apply and each flood would give rise to a new claim for purposes of the statute of limitations. Id. at 766. The plaintiffs established that the storm drains were "stopped up" and were not adequately maintained, and that additional development approved by the city caused an increased discharge of water onto the plaintiffs' property. Id. The court concluded that although the city was not entitled to summary judgment as to the negligent maintenance claims, summary judgment was properly granted in favor of the city on the claims for negligent design and construction based on the statute of limitations. Id. *See, also*, Carpenter v. Texaco, Inc., 419 Mass. 581, 646 N.E.2d 398, 399 (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").

Similarly, in City of Atlanta v. Kleber, 2009 WL 1174285 (Ga. 5/4/09), homeowners who sustained repeated flood damage to their homes during heavy rains due to inadequate drainage brought negligence and nuisance claims against the city alleging that a culvert and drainage pipe were improperly installed, and also alleging that they were not properly maintained. The Supreme Court of Georgia held that "to the extent that the homeowners complain that the *mere presence* creates a nuisance due to improper installation, their nuisance claim is permanent in nature and barred by the statute of

limitations." Id. at p. 2. On the other hand, "to the extent that the homeowners contend that the culvert and drainage pipe have not been properly maintained, their nuisance claim is continuing in nature." Id.

In this case, there was no ongoing conduct on the part of the Tardifs that caused repeated injury to Hewitt's property. The Tardifs did nothing after removing trees from their lot in 1995 – a single isolated act. Once the trees were permanently removed, there was nothing to maintain. The only ongoing condition – rain – was not something within the Tardif's control. *Compare,* Dunlop v. Daigle, 122 N.H. 295, 444 A.2d 519 (1982) (barking and offensive odors emanating from defendant's kennel located in close proximity to plaintiff's property constituted a temporary and abatable nuisance supporting award of damages to plaintiff for resulting loss of business profits); Sundell v. Town of New London, 119 N.H. 839, 409 A.2d 1315 (1979) (defendant's continual discharge of effluent into brook constituted an abatable nuisance). The removal of the trees was a permanent condition and the statute of limitations commenced to run in 1995.

IV. EVEN IF THE DISCOVERY RULE APPLIES TO EXTEND THE STATUTE OF LIMITATIONS, HEWITT'S CLAIMS ARE NONETHELESS UNTIMELY AND WERE PROPERLY DISMISSED BY THE TRIAL COURT

The statute of limitations constitutes an affirmative defense. Glines v. Bruk, 140 N.H. 180, 181, 664 A.2d 208 (1995). However, once the defendant establishes that the cause of action was not brought within three years of the alleged act, *the burden shifts to the plaintiff* to raise and prove the applicability of the discovery rule exception under the particular facts of the case. Id. The defendant does not have the burden of proving that the discovery rule does not apply.

Although the trial court has the discretionary power in appropriate cases to decide that the applicability of the discovery rule should be decided by a jury, this Court has cautioned that "it is often most economical and equitable to rule on this issue at an earlier point in time, 'thereby eliminating the need for a lengthy trial.'" Kelleher v. Marvin Lumber and Cedar Company, 152 N.H. 813, 825, 891 A.2d 477 (2006).[9]

In order for the discovery rule to apply, Hewitt had the burden of demonstrating that he did not discover, or *in the exercise of reasonable diligence could not reasonably have discovered*, the injury and its causal relationship to the Tardifs' act(s) or omission(s). Hewitt's ongoing vague allegations regarding when the alleged damage first occurred, what actions he took to investigate the source of the harm, and when he first suspected that the 1995 tree removal was the cause or a contributing cause of the harm, were not sufficient to meet his burden of demonstrating that the discovery rule applies.

This Court has held that where a plaintiff's own failure to investigate is the cause of his inability to attribute his injury to the conduct of the defendant, the discovery rule does not serve to toll the statute of limitations. Perez v. Pike Industries, Inc., 153 N.H. 158 (2005) (discovery rule exception to statute of limitations was not applicable to negligence claim by plaintiff who failed to investigate and identify subcontractor who paved highway which allegedly caused his injury). *See, also,* Glines v. Bruk, 140 N.H. at 182 (discovery rule did not apply where any reasonable review of the circumstances surrounding the accident would have caused him to include the defendants as possible wrongdoers). In addition, this Court has explained that the plaintiff need not be certain that there is a causal connection between his injury and his conduct, rather "the

[9] Although the plaintiff states that the trial court did not specifically address the applicability of the discovery rule in its Order, the court did adopt the reasoning set forth in Defendants' Renewed Motion to Dismiss, which included argument on the discovery rule issue. [App. p. 42-43]

possibility that the causal connection exist[s] suffice[s]." Pichowicz v. Watson Insurance Agency, Inc., 146 N.H. 166, 168, 768 A.2d 1048 (2001) [emphasis added].

Although Hewitt claimed that he did not discover and could not reasonably have discovered the causal connection between the removal of trees and his water problems and/or property damage, at the time of the act or omission (at the time of or shortly after the tree removal in 1995), he certainly knew or should have known of the causal relationship as a result of his conversation with James Fagnant of Prime Construction in 2002, *at the very latest*. At that time – now seven years after the Tardifs' tree removal - an open and obvious excessive water condition existed on Hewitt's property. At best, Hewitt would have had three years from that date, or until 2005, to initiate a civil action against the Tardifs, yet failed to do so.

Even if the trial court gave every conceivable benefit of the doubt to Hewitt, and disregarded the fact that Hewitt unreasonably and inexplicably allowed a period of *ten years* to pass after the Tardifs' tree removal before undertaking any formal investigation of the alleged ongoing water runoff problem, it was obligated to find, based on Hewitt's own allegations, that certainly in August of 2005, when Hewitt was informed by the Town that the water problems were not due to leakage in the water distribution system, the statute of limitations was triggered, requiring Hewitt to file suit by August of 2008. There is no credible set of circumstances which supports Hewitt's filing of the Petition on September 19, 2008 – thirteen years after the Tardifs removed the trees from their property.

Significantly, the factual information contained within Hewitt's argument with respect to the discovery rule under Section III of his brief does not contain a *single*

citation to the record before the trial court. [Brief of Plaintiff, p. 8-9] The reason for the absence of any citation to the record is that the vast majority of these "facts" and arguments were never raised in any pleading filed on behalf of Hewitt. For example, the information offered by Hewitt regarding the manner and method by which water flowed onto his property was not submitted in any pleading before the trial court despite the fact that the applicability of the discovery rule was directly at issue before the court.

This Court has consistently held that it will not consider issues raised on appeal that were not presented before the trial court. LaMontagne Builders v. Bowman Brook Purchase Group, 150 N.H. 270, 274, 910 A.2d 1162 (2003). As the appellant, Hewitt bears the burden not only of providing a record sufficient for this Court's review, but also of demonstrating that issues raised on appeal were first raised before the trial court. Id. at 274, *citing* Sup.Ct.R. 16(3)(b). *See, also,* Thorndike v. Thorndike, 154 N.H. 443, 447, 910 A.2d 1224 (2006) ("It is the burden of the appealing party to provide this court with a record sufficient to decide the issues raised on appeal and to demonstrate that the appellant raised those issues before the trial court"). Failure of the appealing party to comply with the requirement that a sufficient record be presented for review may be considered by this Court even when the opposing party does not object on these grounds.[10] 74 Cox Street, LLC v. City of Nashua, 156 N.H. 228, 232, 931 A.2d 1194 (2007). In the absence of a sufficient record of the proceedings below, this Court should assume that the facts support the trial court's ruling and review the decision for errors of law. Silverstein v. Town of Alexandria, 150 N.H. 679, 681, 843 A.2d 963 (2004). *See, also,* Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 641, 795 A.2d 833 (2002) (the

[10] Hewitt did not submit to this Court any portion of the record below other than the trial court's two orders on the Renewed Motion to Dismiss and Motion to Reconsider.

appealing party is responsible for presenting a record sufficient to allow the court to decide the issue presented on appeal and, absent such a record, the court will limit its review to the "legal errors apparent on the face of the record"). Because Hewitt has failed to show that the facts and issues addressed in his appeal were first raised before the trial court, this Court should conclude that the facts and issues were not preserved for appeal and decline to review them. *See* McKenzie v. Town of Eaton Zoning Board of Adjustment, 154 N.H. 773, 776, 917 A.2d 193 (2007).

Based on the facts as pled by Hewitt, the trial court properly dismissed the Amended Petition due to Hewitt's failure to bring his civil action within New Hampshire's applicable statute of limitations and/or in compliance with New Hampshire's discovery rule.

REQUEST FOR ORAL ARGUMENT

The defendants, Alan W. Tardif and Ann M. Tardif respectfully request that their attorney, Christopher J. Poulin, Esq., be afforded an opportunity to present a fifteen minute oral argument.

CONCLUSION

For the foregoing reasons, the Defendants, Alan W. Tardif and Ann M. Tardif respectfully request that this Honorable Court:

A. Affirm the trial court's order dismissing the Petition for Temporary and Permanent Injunction and Money Damages (6/30/09) and its order denying Hewitt's Motion for Reconsideration (8/10/09); and

B. Grant such other and further relief as is just and equitable.

Respectfully submitted,

ALAN W. TARDIF and ANN M. TARDIF

By their Attorneys,

GETMAN, SCHULTHESS & STEERE, P.A.

Dated: January , 2010

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief on Behalf of Defendants/Appellants have been mailed first class to Steven M. Latici, Esquire, counsel for the plaintiff.

Dated: January , 2010

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Christopher J. Poulin (NH Bar #12525)