lagoons into Peggs Run, all in violation of its mine operator's permit. Although the trial court found insufficient evidence to sustain a permit violation, the Superior Court reversed, holding that there was sufficient evidence to find, beyond a reasonable doubt, that the defendant was responsible for the unlawful presence of silt in the waters of the Commonwealth. That evidence consisted of:

1. Inspection samples of water.

2. Testimony that defendant's lagoons were completely full.

3. Testimony that at the alleged point of discharge the water was very black.

4. Admissions by a company official that the defendant was discharging silt from the lagoons into the creek.

In our judgment the *Sonneborn,* supra, and *Peggs Run Coal Co.,* supra, decisions reinforce our conclusion that criminal liability may not be imposed upon a defendant under the Clean Stream law without proof beyond a reasonable doubt that it was responsible for the unlawful presence of industrial waste or other contaminants in the waters of the Commonwealth.

ORDER OF COURT

NOW, this 12th day of December, 1984, we find the defendant, Baumgardner Oil Company, Inc. not guilty of violating Sections 307(c), 602(a), or 611 of the Clean Streams Law, 35 P.S. §691.1 et seq.

FELMLEE V. ALFA LAVAL, INC., ET AL, C.P. Franklin County Branch, No. 1982 - 307

Assumpsit and Trespass - Statute of Limitations - Discovery - Exception - Amendment of Complaint

1. The Statute of Limitation will not begin to run until the plaintiff knows of the injury, of the operative cause of the injury, and of the causative relationship between the injury and the operative conduct.

2. Mere lack of knowledge will not toll the Statute of Limitations, a party must use all reasonable diligence to be properly informed of the facts upon which a potential recovery is based.

3. A factual determination as to whether due diligence was exercised is a question for the jury and summary judgment is inappropriate.

4. Where plaintiff incorrectly names a corporation as defendant when proper party is a partnership, amendment of the complaint is permissible despite the running of the Statute of Limitations.

William F. Donovan, Esq., Counsel for Plaintiff

John L. McIntyre, Esq., Counsel for Defendant, Alfa Laval, Inc.

Denis M. DiLoreto, Esq., Counsel for Defendants, Robert Witmer and Richard Martin, Jr., partners trading as Witmer Implement Service

Steven R. Anderson, Esq., Counsel for Defendant, Alfa Laval, Inc.

George S. Glen, Esq. Counsel for Defendant, Witmer Implement Service

OPINION AND ORDER

EPPINGER, P.J., December 18, 1984:

Matthew Felmlee is a dairy farmer. He purchased a DeLaval automatic milking machine from defendant Witmer Implement Service in December, 1978. The machine was manufactured by the defendant Alfa Laval. In this suit, Felmlee claims the milking machine malfunctioned and that as a result his herd lost milk production, and he suffered other damages.

On October 12, 1981, Felmlee issued a writ of summons in assumpsit against Alfa Laval and Witmer Implement Company. As it turns out the defendant designated as Witmer Implement Company is Robert Witmer and Richard Martin, Jr., partners doing business as Witmer Implement Service. On February 28, 1983, a complaint in assumpsit and trespass was served upon the defendants Alfa Laval and the partners doing business as Witmer Implement Service. The complaint was marked as filed on March 3, 1983.

Both defendants have filed motions for summary judgment on the trespass claims, claiming the statute of limitations, a two-year statute, ran before the trespass action was filed. Witmer further asks for summary judgment on the assumpsit claim because it was filed after the running of a four-year statute of limitations.

In determining whether a motion for summary judgment is appropriate, we must examine the entire record in the light most favorable to the non-moving party, here Felmlee. *Pa. P.U.C. Bar Association v. Thornburgh,* 62 Pa. Cmwlth. 88, 93, 434 A. 2d 1327, 1330 (1981). We will examine the running of the two-year period in trespass found in 42 Pa. C.S.A. §5524(3).

From the spring of 1978 to the discovery of a defect in a timer-converter on the milking machine on March 12, 1981 by Witmer, the herd continued its low yield milk production. The record upon which we are to act shows the following calendar of events:

May, 1978 - the equipment was ordered by Felmlee from Witmer.

December, 1978 - the equipment was installed by Witmer, and Felmlee began using it.

Spring, 1979 - there was a drop in milk production; problems with the milking machine were suspected; transparent lines appeared to be cloudy from milkfat accretions.

Fall, 1979 - it was discovered that liners were responsible for incomplete milkout and that the liners being used had been recalled.

February, 1980 - veterinarian's inspection of the herd ruled out disease factors, and food specialist ruled out diet as a cause of low milk production.

June, 1980 - the low useable life of the liners was discussed with Witmer.

December, 1980 - Felmlee consulted an attorney.

January, 1981 - Witmer flushed the system and installed new heaters.

February 4, 1981 - veterinarian examined the herd and Felmlee's milking procedures, took cultures from the teats, did not do any testing of the milk equipment, and made a report of his findings six or seven days later.

March 3, 1981 - veterinarian completed his study.

March 12, 1981 - Witmer discovered defects in the timer-converter.

April 16, 1981 - veterinarian filed report with the conclusion that lesions were caused by abnormal vacuum levels in the milking machine.

October 12, 1981 - writ of summons in assumpsit issued.

February 28, 1983 - complaint in assumpsit and trespass served.

March 1, 1983 - complaint in assumpsit and trespass filed.

As a general rule, a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right to recovery is based. Therefore, the statute of limitations will normally begin to run as soon as the right to institute and maintain a suit arises. Mere lack of knowledge will not toll the running of the statutory period. *Pocono International Raceway v. Pocono Produce,* Pa. , 468 A.2d 468, 471 (1983). However, situations do arise where the party, despite due diligence, is unable to identify the injury or its exact cause. *Id.* In those situations the statute of limitations will not begin to run until the party can or should discover the injury. *Id.* Under the discovery standard, the statutory period will begin to run when the potential plaintiff has knowledge of the injury, of the operative cause of the injury, and of the causative relationship between the injury and the operative conduct. *Hunsicker v. Conner,* Pa. Super. , 465 A.2d 24, 26 (1981). In *Pocono* the court said:

> "We hold . . .that the 'discovery rule' exceptions arise from the inability, despite the exercise of due diligence, to determine the injury or its cause, now upon a retrospective view of whether the facts were actually ascertained within the period." *Pocono*, supra, at 471-2.

Felmlee was faced with the overwhelming problem of an underproducing dairy herd. The fact that he has been damaged does not mean that he may go forward in trespass, for even though a person may not discover his injury until it is too late to take advantage of the appropriate remedy, the statute of limitations is an arbitrary law, making legal remedies contingent on mere lapse of time. *Id.,* at 471.

Generally, the statute of limitations does not begin to run until Felmlee, by the exercise of reasonable diligence, could have discovered that his problems were caused by the milking machine. *Daniels v. Beryllium Corporation,* 227 F. Supp. 501 (E.D.Pa. 1964). As in *Beryllium,* we conclude that this is a factual determination to be left for the jury's determination and therefore deny summary judgment. Summary judgment may be granted only when the case is clear and free of doubt. *Pa.P.U.C. Bar Association v. Thornburgh,* 62 Pa. Cmwlth. 88, 93, 434 A.2d 1327, 1329-30 aff. 498 Pa. 589, 450 A.2d 613 (1981).

Witmer also claims the assumpsit action for breach of warranty was not started in the entity's proper name soon enough under a four-year statute of limitations found in 42 Pa.C.S.A. §5525(2). We agree with Witmer that this cause of action accrued in December, 1978, when the milking system was sold to Felmlee. The statute rejects a discovery rule as developed for tort and strict liability claims. See *O'Brien v. Eli Lilly Co.,* 668 F.2d 704, 711 (3rd Cir. 1981).

Witmer does not argue the claim was filed late. The writ of summons was filed October 12, 1982, and that tolled the statute of limitations. Pa.R.C.P. 1007; *Benn v. Linden Crane Corp.* 370 F. Supp. 1269, 1278 (E.D. Pa. 1973). Witmer's argument is that the wrong party was named in the summons. Witmer was named as Witmer Implement Company, a corporation, and it now appears that the correct name is Richard Witmer and Richard Martin, Jr., trading and doing business as Witmer Implement Service. Witmer contends that this change occurred in the pleadings on April 25, 1984, which was after the running of the four-year period. Witmer concedes that pursuant to Pa. R.C.P. 1033, a complaint may be amended to correct the name of a party but argues that Felmlee is adding an altogether different party.

Witmer relies in support of his position on *Diffenderfer v. Sixeas, et al.,* 4 Adams L.J. 125 (Franklin 1961). In that case, plaintiff brought a suit against Gayman's Garage, a proprietorship, and attempted after the expiration of the statute of limitations, to amend the name to Gayman Chevrolet Corporation, a corporation. In dismissing the claim against the corporation, the Court held it was plaintiff's duty to determine the status of the defendant.

"The party whose name it is sought to amend must be in court before an amendment can be allowed. If the effect of the amendment will be to correct the name under which the right party was sued, it should be allowed. If the effect will be to bring a new party on the record, after running of the statute of limitations, it should be refused." *Id.*, at 127-28.

The holding of *Diffenderfer* is no longer valid. In *Powell v. Sutliff,* 410 Pa. 436, 189 A.2d 864 (1963), the Pennsylvania Supreme Court permitted the amendment of a complaint after the expiration of the statute of limitations where a corporation was improperly identified as a partnership. The court in *Powell* relied upon the earlier case of *Gozdonovic v. Pleasant Hills Realty Company,* 357 Pa. 23, 53 A.2d 73 (1947), a case nearly identical to our present situation. In *Gozdonovic,* after the statute of limitations had run, plaintiff attempted to change the description of the identity from a corporation to a partnership. The test adopted was whether "the right party was sued but under the wrong designation", in which case the amendment is permissible. *Powell v. Sutliff,* supra, at 438, 865; *Bloom v. B'Nai Emmanuel,* 56 D.&C.2d 639, 644 (Allegheny, 1971).

We, therefore, think it is proper for Felmlee to amend the complaint to amend the designation from Witmer Implement Company, to the correct name, even though the statute of limitations has expired. The amendment will impose no new liability, the assets to be subject to liability are the same before and after the amendment, *Powell,* supra, at 438, 865, and no parties will be misled or prejudiced thereby. *Bloom v. B'Nai Emmanuel,* supra, at 644.

In addition, while it is true Felmlee had a duty to determine the facts in his own case, if Witmer causes the plaintiff to relax vigilence by some form of concealment, the defendant may not invoke the statute of limitations. *Schaffer v. Larzelere,* 410 Pa. 402, 405, 189 A.2d 267, 269 (1963). Accepting service of the improperly captioned complaint and filing preliminary objections on October 3, 1983, in the name of Witmer Implement Company are the sort of concealment which may prevent a defendant from asserting the statute as a defense. This does not intimate that defendant's actions were intentional. This concealment may be unintentional, *Walters v. Ditzler,* 424 Pa. 445, 449, 227 A.2d 833, 835 (1967). The court will look to the effect upon the other party, not the intent of

LEGAL NOTICES, cont.

Law of the Commonwealth of Pennsylvania as amended, and that the said incorporation is winding up its affairs in the manner prescribed by said law, so that its corporate existence shall be ended upon the issuance of a Certificate of Dissolution by the Department of State of the Commonwealth of Pennsylvania.

John McD. Sharpe, Jr.
Sharpe, Wenger & Townsend
257 Lincoln Way East
Chambersburg, PA 17201

9-20-85

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing with the Department of State of the Commonwealth of Pennsylvania on September 5, 1985, an application for a certificate for the conducting of a business under the assumed or ficititous name of Legal Support Services, with its principal place of business at Chambersburg Trust Building, 14 North Main Street, Chambersburg, Pennsylvania 17201. The name and address of the person owning or interested in said business is George A. Keller, 32 Kensington Drive, Chambersburg, Pennsylvania 17201.

Denis M. DiLoreto
DILORETO AND CONSENTINO
326 Trust Company Building
Chambersburg, PA 17201

9-20-85

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on August 30, 1985, an application for a certificate for the conducting of a business under the assumed or fictitious name of Mattress Outlet, with its principal place of business at 1502 Lincoln Way East, Chambersburg, PA 17201. The name and address of the person owning or interested in said business is Carl A. Patterson, 57 Midland Drive, Chambersburg, PA 17201.

SHARPE, WENGER & TOWNSEND
257 Lincoln Way East
Chambersburg, PA 17201

9-20-85

the estopped party. *Nesbitt v. Erie Coach Co.,* 416 Pa. 89, 96, 204 A.2d 473, 477 (1964). So we deny Witmer's motion for summary judgment on Count II, the assumpsit claim.

ORDER OF COURT

December 18, 1984, the motions for summary judgment are denied.

LONE STAR CORPORATION V. TRINDEL, C.P., Franklin County Branch, A.D. 1983 - 225

Corporation - Sole Shareholder - Ratification of Acts of Officers

1. A corporation through its shareholders may ratify the unauthorized acts performed by its officers.

2. Shareholders may not ratify acts of its officers which are fraudulent, illegal, offensive to the charter governing statutes or rules of common law.

3. A sole shareholder may not ratify his own misconduct and thereby destroy the corporation's cause of action.

George E. Wenger, Jr., Esq. Counsel for Plaintiff

Patrick J. Redding, Esq., Counsel for Defendants

John R. Purcell, Jr., Esq., Counsel for Defendants

OPINION AND ORDER

EPPINGER, P.J., December 28, 1984:

Plaintiff, Lone Star Corporation, filed a thirteen-count complaint in trespass against John and Barbara Trindel.

From February 1 to December 23, 1982, John Trindel was the sole shareholder of the Lone Star Corporation, was himself the board of directors, and held all of the offices of the corporation. Sometime in May, 1982, the Trindels secured a personal loan from the Commonwealth National Bank for $875,000 and another loan for the corporation for $150,000.