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STEVE A. OLTMAN AND DIANE OLTMAN, APPELLANTS, V. DOUG PARDE AND CINDY PARDE, APPELLEES.

___ N.W.3d ___

Filed March 26, 2024. No. A-23-353.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. In cases in which the plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
3. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
4. **Motions to Dismiss: Pleadings.** As a general rule, when a court grants a motion to dismiss, a party should be given leave to amend absent undue delay, bad faith, unfair prejudice, or futility.
5. **Pleadings.** Leave to amend should not be granted when it is clear that the defect cannot be cured by amendment.
6. **Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Because a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss.
7. **Motions to Dismiss: Pleadings.** A motion to dismiss should be granted only in the unusual case in which a plaintiff includes allegations that

show on the face of the complaint that there is some insuperable bar to relief.

8. **Limitations of Actions: Statutes.** Limitations are created by statute and derive their authority therefrom.
9. **Limitations of Actions: Presumptions.** The statute of limitations is enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if that person has the right to proceed.
10. **Limitations of Actions.** The mischief which statutes of limitations are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which is practicable to assert.
11. **Conversion: Property: Words and Phrases.** Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.
12. **Fraud: Estoppel: Limitations of Actions: Proof.** In order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show that the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the misconduct.
13. **Motions to Dismiss: Fraud: Pleadings: Proof.** In order to survive a motion to dismiss, a complaint alleging fraudulent concealment must plead with particularity how material facts were concealed to prevent the plaintiff from discovering the misconduct and how, through due diligence, the plaintiff failed to discover the injury.

Appeal from the District Court for Gage County: Ricky A. Schreiner, Judge. Affirmed.

Lyle Joseph Koenig, of Koenig Law Firm, for appellants.

J.L. Spray and Jacob C. Garbison, of Mattson Ricketts Law Firm, for appellees.

Riedmann, Arterburn, and Welch, Judges.

Riedmann, Judge.

INTRODUCTION

Steve A. Oltman and Diane Oltman appeal the Gage County District Court's order dismissing their complaint with prejudice. We conclude that the statute of limitations bars their claims; thus, we affirm.

BACKGROUND

On October 5, 2022, the Oltmans sued Doug Parde and Cindy Parde for conversion, fraudulent concealment, breach of contract, and spoilation, and they sought common-law indemnification, punitive damages, and attorney fees. In their complaint, the Oltmans alleged that in 2003, they began renting 320 acres of land to the Pardes. In 2007, the Oltmans sold a 40-acre tract to the Pardes, and the Pardes began renting a 250-acre tract. The Pardes rented the 250-acre tract until the 2017 crop year, after which they bought the tract from the Oltmans. The Oltmans alleged that "[t]he farm ground was originally leased by [the Oltmans] to [the Pardes] on a cash rent basis at the rate of $150.00 an acre, which was increased to $175.00 an acre in 2007, for the 2008 crop year." During the 2008-17 crop years, the Pardes paid rent on 227 acres, with the remaining 23 acres consisting of pasture and grass waterways.

While the Pardes rented the land, they made various improvements to the property. The Oltmans estimate that they received construction invoices totaling $36,000 during the Pardes' rental period. The complaint does not describe what improvements these construction invoices addressed. The Oltmans claim that they never approved any improvements on the land. Furthermore, the Oltmans claim that the Pardes never informed them or the U.S. Department of Agriculture (USDA) that they put additional acres into production beyond the 227 acres.

The basis of the Oltmans' claims is their allegation that "as early as 2004" the Pardes "converted some of the land that had previously been pasture and waterways, into tillable acres" and failed to pay rent on those additional acres. The Oltmans confronted Doug in October 2021 with information that the Pardes had not paid the correct amount of rent, because the Pardes were able to produce crops on the additional acres of pasture and grass waterways by tilling them. The Oltmans alleged in their complaint that Doug admitted

to not paying the full amount of rent based on the acreage he tilled. The Oltmans estimate that the Pardes did not pay rent on a total of 423 acres—totaling $74,025 in back rent, but do not show how they calculated the 423 acres.

The Oltmans claimed they sold the land to the Pardes in April 2018 because they were not making enough money from the rental agreement with the Pardes to pay the maintenance and taxes on the property. They claim that if the Pardes had paid the accurate rental price, then they would not have needed to sell the land. Additionally, the Oltmans claim the Pardes knew this, so they fraudulently concealed the fact that they converted additional acres. The Oltmans alleged that they could not have discovered the additional converted acreage with reasonable diligence, in part because they trusted the Pardes.

The Oltmans requested that the district court vacate, set aside, and declare null and void the contract of sale from April 2018, in which the Oltmans sold the subject land to the Pardes. They also asked, in the alternative, that the Pardes pay unpaid rent and other damages to be proved at trial, as well as punitive damages, attorney fees, and costs.

On November 7, 2022, the Pardes filed a motion to dismiss. They cited various reasons for why the suit should be dismissed, including that the Oltmans failed to state a claim upon which relief could be granted, the statute of limitations barred the Oltmans' claims, and the Oltmans' claims were not stated with particularity.

The district court granted the Pardes' motion to dismiss and dismissed the Oltmans' complaint with prejudice. The district court held that the Oltmans' "allegations deal with a lease contract for real property," so "any theory of 'conversion' is inapplicable and should be dismissed with prejudice." Alternatively, it held that even if the conversion claim applied to the Oltmans' allegations, the claim would be barred by the statute of limitations. It explained that the face of the complaint shows that more than 4 years elapsed between the last

alleged "conversion," which had to have occurred prior to the sale of the land in April 2018. Because the Oltmans filed suit in October 2022, the statute of limitations barred the claim.

The district court found that the Oltmans had failed to allege facts to support a finding that there was a valid contract to establish a breach of contract claim. The Oltmans had alleged only the amount of rent due on a per acre basis; they did not allege whether the 250-acre lease was to be completed within 1 year and renewed yearly or whether it was a long-term lease. There were no allegations in the Oltmans' complaint to indicate whether the lease was written or oral. The district court concluded that the Oltmans merely raised conclusory allegations without supporting lease contract terms.

The district court also concluded that any breach of contract claim was barred by the statute of limitations. Because the pleadings did not allege any facts to indicate the contract was written, the district court applied the statute of limitations for oral contracts, which is 4 years. The latest the breach of contract could have occurred was prior to the sale of the land in April 2018. The Oltmans filed suit in October 2022, which is outside the statute of limitations period.

Lastly, the district court concluded that the Oltmans failed to allege sufficiently particular facts to establish a claim for fraudulent concealment. It explained that the Oltmans failed to allege any facts that the Pardes owed a duty to notify them of changes to the land. The Oltmans also alleged that the Pardes owed them $74,025, which they calculated to be 423 acres times $175. But the Oltmans failed to explain where the 423 acres came from. The Oltmans did not allege any facts to show how the Pardes concealed their actions from the Oltmans, especially because the Pardes submitted $36,000 in improvement invoices to the Oltmans. The Oltmans appeal.

ASSIGNMENTS OF ERROR

The Oltmans assign six errors. They assign the district court erred in (1) finding the Oltmans failed to state a claim

for conversion within the statute of limitations, (2) finding the Oltmans had failed to state a claim for breach of contract within the statute of limitations, (3) finding that the Oltmans had failed to state a claim for fraudulent concealment within the statute of limitations, (4) failing to find the Pardes were equitably estopped from asserting the statute of limitations applied to the breach of oral contract claim, (5) failing to apply the discovery rule to the statute of limitations based on fraudulent concealment, and (6) failing to permit the Oltmans to amend their complaint.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Chaney v. Evnen*, 307 Neb. 512, 949 N.W.2d 761 (2020).

ANALYSIS

The Oltmans assign that the district court erred in dismissing their complaint with prejudice. The district court held that the Oltmans had not alleged a prima facie case for either breach of contract or conversion and that both claims were barred by the statute of limitations. Although the Oltmans identified fraudulent concealment as a cause of action in their complaint, we address that doctrine later in our analysis of the statute of limitations. We find it unnecessary to address the sufficiency of the Oltmans' claims for breach of contract and conversion, because we agree with the district court that the statute of limitations bars these claims. Accordingly, the district court did not err in dismissing the Oltmans' complaint with prejudice.

Motion to Dismiss.

[2,3] As a preliminary matter, to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its

face. *Chaney v. Evnen, supra*. In cases in which the plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id*. When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion. *Id*. For purposes of a motion to dismiss, a court is not obliged to accept as true a legal conclusion couched as a factual allegation, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id*.

[4-7] As a general rule, when a court grants a motion to dismiss, a party should be given leave to amend absent undue delay, bad faith, unfair prejudice, or futility. *Trausch v. Hagemeier*, 313 Neb. 538, 985 N.W.2d 402 (2023). Leave to amend should not be granted when it is clear that the defect cannot be cured by amendment. *Id*. Because a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. *Trausch v. Hagemeier, supra*. A motion to dismiss should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Id*. Because the district court dismissed with prejudice and held the statute of limitations bars the Oltmans' claims, the question before us is whether the statute of limitations poses an insuperable bar to relief. We hold that it does.

Statute of Limitations.

[8-10] The Oltmans seek recovery under both breach of contract and conversion. Each is subject to its own 4-year statute of limitations. Limitations are created by statute and

derive their authority therefrom. *Susman v. Kearney Towing & Repair Ctr.*, 310 Neb. 910, 970 N.W.2d 82 (2022). While the Oltmans did not plead whether their contract was written or oral, on appeal, both parties agree it was an oral contract. For a breach of an oral contract claim, the statute of limitations is 4 years. See Neb. Rev. Stat. § 25-206 (Reissue 2016). For a conversion claim, the relevant statute provides:

> The following actions can be brought within four years: (1) An action for trespass upon real property; (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud . . . .

Neb. Rev. Stat. § 25-207 (Reissue 2016). The statute of limitations is enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if that person has the right to proceed. *Susman v. Kearney Towing & Repair Ctr., supra*. The mischief which statutes of limitations are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which is practicable to assert. *Id.*

Here, the heart of the Oltmans' claims is that the Pardes tilled additional acres of brome pasture and various grass waterways, which in turn allowed them to grow crops on the additional acres for which they did not pay rent. The Oltmans argue this breached their oral contract because rent was to be paid on a per acre basis, at $175 per acre. The Oltmans argue that the district court misconstrued their claim, in that the district court construed it as a conversion of real property; however, they clarify on appeal that the Pardes converted the money that was due the Oltmans by failing to pay them for the additional land the Pardes tilled.

Assuming without deciding that rental payments can be converted for purposes of a conversion claim, the Oltmans allege the Pardes tilled the additional acres "as early as 2004," which means the initial statute of limitations would begin to run when the Pardes failed to pay the 2004 rent. Even if a new statute of limitations period begins each year in which the additional rent was due but not paid, the latest date of payment would be prior to April 2018, the date on which the Oltmans sold the land to the Pardes. Because the Oltmans did not file their complaint until October 2022, the 4-year statute of limitations bars their suit. However, the Oltmans argue that their claims are not untimely due to two exceptions that delayed or tolled the date on which the statute of limitations began to run: the discovery rule and the doctrine of fraudulent concealment.

Discovery Rule.

The discovery rule tolls a statute of limitations when the plaintiff did not discover the injury and could not have discovered the injury within the applicable statute of limitations. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). The reasoning behind the discovery rule is that, in some cases, the injury is not obvious, and it would be unfair to allow the statute of limitations on a claim to run out before an injured party had a chance to seek relief. *Id.*

Determining that the discovery rule applies in a products liability case, the Nebraska Supreme Court observed that a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. See *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984). It recognized that in tort cases, damages are a necessary element of the cause of action. See *id.* It concluded that because a plaintiff must assert and prove damages, it would be "a Hobson's choice" to suggest, on the one hand, that an action cannot be brought without a showing of injury and to suggest, on the other hand, that the time for

bringing that action could begin and end before that person could be aware of the injury or able to establish its existence. *Id*. at 64, 349 N.W.2d at 625.

Conversely, in *Mandolfo v. Mandolfo, supra*, the Supreme Court held that a discovery rule did not apply to an action for conversion of a negotiable instrument brought under the Uniform Commercial Code. It noted that the cause of action accrues and the limitations period begins running when the instrument is converted, regardless of when the plaintiff actually learns of the conversion. *Mandolfo v. Mandolfo, supra*. It reasoned that not applying a discovery rule advances the Uniform Commercial Code's purpose of promoting swift resolution of commercial disputes. *Mandolfo v. Mandolfo, supra.* And it further observed that watchful victims of conversion should be able to quickly realize when they have been wronged. *Id*.

Likewise, it appears that the discovery rule does not apply to a breach of contract claim. See *Cavanaugh v. City of Omaha*, 254 Neb. 897, 580 N.W.2d 541 (1998). In *Cavanaugh*, the court stated that a cause of action in contract accrues at the time of the breach or failure to do the thing that was the subject of the agreement, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned to them. This is so even though the nature and extent of damages may not be known. *Id*. See, also, *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979), *overruled on other grounds, Susman v. Kearney Towing & Repair Ctr.*, 310 Neb. 910, 970 N.W.2d 82 (2022) (recognizing absence of case law applying discovery rule, without statutory directive, to statute of limitations in causes of action not involving physical injury).

Although the Supreme Court did not address the discovery rule in *Cavanaugh v. City of Omaha, supra*, the propositions of law it articulated, as set forth above, lead us to conclude the discovery rule is inapplicable to a breach of contract claim. In *Morgan v. State Farm Mutual Auto. Ins. Co.*, 2021

OK 27, 488 P.3d 743 (2021), the Oklahoma Supreme Court explained why the discovery rule does not apply to breach of contract claims, and we find its rationale instructive.

In *Morgan v. State Farm Mutual Auto. Ins. Co., supra*, the Oklahoma court was presented with certified questions from the 10th Circuit Court of Appeals that required it to determine whether "the tort-based discovery rule appl[ies] to a breach of contract action and toll[s] the running of the statute of limitations until the plaintiff knows, or in the exercise of reasonable diligence, should have known of the breach." *Id*. at ¶26, 488 P.3d at 750. It explained the discovery rule did not apply for several reasons. First, while the Oklahoma Legislature had enacted laws making the discovery rule applicable in certain actions, it had not done so in breach of contract actions. See *Morgan v. State Farm Mutual Auto. Ins. Co., supra*. Second, although some negligence or malpractice actions involve inherently undiscoverable types of injuries, most contract actions presume that the parties to the contract know the terms of their agreement and a breach is generally obvious and detectable with reasonable diligence. *Id*. Third, unlike a tort claim, a breach of contract is a legal wrong independent of the existence of actual damages. A plaintiff acquires the legal right to sue when there has been formation of a contract and a breach thereof. At that point, the cause is actionable and the plaintiff is entitled to nominal damages. In a tort action, a plaintiff must allege and prove damages to be successful, thus requiring that the person have knowledge of the injury, or the ability to discover the injury with reasonable diligence. *Id*.

Here, we reach the same conclusion as the Oklahoma Supreme Court and determine that the discovery rule does not apply to a breach of contract claim. Our conclusion is supported by the lack of statutory support for imputing the discovery rule into breach of contract claims. In Nebraska, the Legislature has enacted statutes that delay accrual of the statute of limitations until discovery or include a tolling provision for certain causes of action, yet the statute governing

the limitation of actions for a breach of an oral contract contains no such language. Compare § 25-207(4) (accrual upon discovery for actions based on fraud), Neb. Rev. Stat. § 25-222 (Reissue 2016) (tolling provision for professional negligence suits), and Neb. Rev. Stat. § 25-223 (Cum. Supp. 2022) (tolling provision for actions on breach of warranty on improvements to real property), with § 25-206 (no discovery or tolling provision included for breach of oral contract). The Legislature has not created a discovery exception for an action on an oral contract as it has for other actions.

Case law further supports our conclusion. As in Oklahoma, a breach of contract claim accrues at the time of the breach, regardless of the plaintiff's knowledge of the injury, or the nature and extent of the damages. See *Cavanaugh v. City of Omaha*, 254 Neb. 897, 580 N.W.2d 541 (1998). Furthermore, when a contract is breached, the nonbreaching party can sue the breaching party for nominal damages. See *O'Connor v. Aetna Life Ins. Co.*, 67 Neb. 122, 93 N.W. 137 (1903).

> Whoever breaks a contract makes himself liable for at least nominal damages by his failure to perform, and the right to recover nominal damages gives the other party a right of action, and from the time the right of action accrues the statute [of limitations] is put in operation. Even where the breach is not known to the complaining party, the statute is not tolled unless the defendant fraudulently conceals the facts.

Id. at 126-27, 93 N.W. at 139.

The discovery rule applies in tort actions when the plaintiffs could not have with reasonable diligence discovered their injury, a necessary element of their claim, yet breach of contract causes of action are not contingent upon injury; thus, we determine that the discovery rule does not apply to the Oltmans' breach of contract cause of action.

The Oltmans also argue that their conversion claim is not barred by the statute of limitations because the newly tilled acres were not within the Oltmans' "reasonably diligent

attention, observation, and judgment." The Oltmans' argument on appeal is that they could not have reasonably discovered the additional tilled acres until they confronted Doug with their suspicions and he acknowledged their accusation. However, we do not need to address this factual issue, because the discovery rule does not apply to conversion claims.

In *Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr. Co., Inc.*, 193 Neb. 848, 230 N.W.2d 87 (1975), the plaintiff's warehouse was destroyed by fire. It was later discovered that a break in an underground water line prevented water from flowing into the sprinkler system. The warehouse owner sued the company that laid the sewer, which had settled and broken the water line. The court dismissed the action based on the statute of limitations. The warehouse owner argued that the statute of limitations contained in an earlier version of § 25-207(3) did not begin to run until it discovered the cause of its injury. The Nebraska Supreme Court rejected this argument, explaining that only subsection (4) of § 25-207 contained a discovery rule and that was limited to a cause of action based on fraud. *Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr. Co., Inc., supra*. It explained:

> It is the statute that makes the discovery rule applicable in fraud cases. It is true, this court has made it applicable in cases involving medical malpractice. However, this was done because of strong public policy considerations which set those cases apart from other torts. This is sufficiently noted in Spath v. Morrow (1962), 174 Neb. 38, 115 N.W.2d 581 [superseded by statute]. Those same public policy considerations are not present here. To apply the discovery rule to a situation such as this would effectively defeat the purpose which is responsible for limitation of actions. An action for an injury to the rights of the plaintiff accrues under section 25-207, R. R. S. 1943, when the damage occurs and not when plaintiff discovers the cause of the damage.

Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr. Co., Inc., 193 Neb. at 851, 230 N.W.2d at 90.

Here, we conclude that the discovery rule does not apply to the Oltmans' conversion claim. Section 25-207(2) provides a 4-year statute of limitations for "an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property." It is only § 25-207(4), actions for fraud, that identifies discovery as the date for accrual of a cause of action. Because the Oltmans' conversion claim is not based on fraud, their cause of action accrued on the date of conversion.

[11] Conversion is "'any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 164, 825 N.W.2d 779, 786 (2013) (emphasis omitted) (quoting *Polley v. Shoemaker*, 201 Neb. 91, 266 N.W.2d 222 (1978)). The Oltmans did not allege fraud in their cause of action for conversion; instead, they allege the conversion occurred when the Pardes failed to pay rent for the additional acres tilled. Since the Oltmans' conversion claim does not allege fraud, it suffers the same flaw as the tort claim in *Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr. Co., Inc., supra*, and the discovery rule does not apply.

Fraudulent Concealment.

As stated previously, the Oltmans included a cause of action for fraudulent concealment in their complaint. They argue that the district court erred in finding that they failed to state a claim for fraudulent concealment. They explain that the Pardes' failure to disclose the additional crop production to the USDA evinces their intent to deceive. And the Oltmans accuse Doug of burning his crop maps that would show how much of the 250-acre plot he farmed. Furthermore, they allege the Pardes' "concealment was intended obviously to prevent the [Oltmans] from demanding additional rent." Brief for appellant at 17.

As a point of clarification, the Oltmans identified fraudulent concealment as a cause of action in their complaint and, on appeal, argue that the statute of limitations should not apply to their claims because both the discovery rule and fraudulent concealment apply. The doctrine of fraudulent concealment is distinct from the discovery rule, albeit both exceptions overlap to a great extent. See John P. Lenich, Nebraska Civil Procedure § 5:28 (2024). Both fraudulent concealment and the discovery rule serve as exceptions to the statute of limitations. See *id*., §§ 5:27 and 5:28. Although both exceptions apply in Nebraska, each exception applies to different causes of action and different facts. This is in part due to the elements necessary to prove each exception. Compare *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997) (discovery rule tolls statute of limitations until party discovers or should have discovered injury), with *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005) (fraudulent concealment requires concealment of material facts by defendant).

Our research has not disclosed a Nebraska case that explains the interplay of fraudulent concealment and the discovery rule, despite the overlap between the two exceptions. We find case law from other jurisdictions persuasive in describing their relationship. Unlike the discovery rule, which tolls the running of the statute of limitations until a plaintiff discovers, or reasonably could have discovered, their injury, the doctrine of fraudulent concealment suspends the statute of limitations because the defendant concealed facts necessary for the plaintiff to discover a claim existed. See *Booker v. Real Homes, Inc*., 103 S.W.3d 487 (Tex. App. 2003). Essentially the difference is that the discovery rule is contingent on the plaintiff's lack of knowledge, while fraudulent concealment is contingent on the defendant's conduct. See *Gustine Uniontown v. Anthony Crane Rental*, 892 A.2d 830 (Pa. Super. 2006).

[12] In order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show that

the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the misconduct. *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018). Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired. *Id*.

[13] The Nebraska Supreme Court held in *Chafin v. Wisconsin Province Society of Jesus, supra*, that the allegations of fraudulent concealment for tolling purposes must be pleaded with particularity. In order to survive a motion to dismiss, a complaint alleging fraudulent concealment must plead with particularity how material facts were concealed to prevent the plaintiff from discovering the misconduct and how, through due diligence, the plaintiff failed to discover the injury. *Id*. The complaint should tell us the who, what, when, where, and how. See *id*.

Here, the Oltmans made five statements in their complaint to support their fraudulent concealment claim. These were:

- The Pardes had a duty to disclose that they converted the property to tillable acres and concealed the fact that they did.
- Tilling the additional acres was not within the Oltmans' reasonably diligent attention, observation, and judgment.
- The Pardes concealed tilling the acres with the intention the Oltmans would act in response.
- The Pardes did not report the additional acres of production to the USDA.
- The Pardes burned the maps that would identify the amount of ground put into production.

The Oltmans' first three allegations are legal conclusions couched as factual allegations. The statements do not allege the source of any duty to disclose, how the Oltmans performed their reasonable diligence to discover the injury, or how the Pardes concealed from them the tilling of additional acres. The only facts alleged addressed the maps and the

failure to report the additional acres to the USDA, but neither fact constitutes concealment from the Oltmans. Because the Oltmans failed to particularly allege facts supporting fraudulent concealment, the statute of limitations did not toll.

In *Chafin v. Wisconsin Province Society of Jesus, supra*, the Nebraska Supreme Court determined that the pleading requirements of Neb. Ct. R. Pldg. § 6-1109(b) (rev. 2008) apply to claims for fraudulent concealment and that failure to comply with those requirements subjects a complaint to dismissal with prejudice. Accordingly, we conclude that the district court did not err in dismissing the Oltmans' claim for fraudulent concealment with prejudice. As stated above, the statute of limitations presented an insuperable bar to recovery on the Oltmans' breach of contract and conversion claims. Therefore, dismissal of the complaint with prejudice was proper.

CONCLUSION

The Oltmans' causes of action are barred by the statute of limitations. The discovery rule does not apply to either their breach of contract claim or their conversion claim, and they failed to particularly allege fraudulent concealment. We therefore affirm the order of the district court granting the motion to dismiss their complaint with prejudice.

AFFIRMED.