COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 96-0936

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

HONEYCREST FARMS, INC.,

Plaintiff-Appellant,

v.

BRAVE HARVESTORE SYSTEMS, INC.,

Defendant-Respondent,

A.O. SMITH HARVESTORE PRODUCTS, INC.,

Defendant.

APPEAL from a judgment of the circuit court for Dunn County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Honeycrest Farms, Inc., commenced an action against Brave Harvestore Systems, Inc., alleging misrepresentations by Brave

about design defects in the breather system of its silos.[1] Brave moved for summary judgment because the applicable statutes of limitation had expired, and the trial court granted the motion. Honeycrest now appeals the judgment.

The sole issue on appeal is whether Honeycrest filed its complaint within the applicable statutes of limitations periods. Honeycrest advances the discovery rule to explain its failure to timely file suit, and argues that the trial court erred by granting summary judgment because the date of discovery is a question of fact for the jury. Honeycrest claims that it did not discover the nature and cause of its injury until discussing the matter with its attorney at a social gathering in 1991.

Brave contends that the discovery rule did not toll the running of the statutes of limitations, and summary judgment was appropriate. We conclude that the discovery rule does not toll the statute of limitations for the advertising fraud cause of action, the record fails to show a negligence or strict liability claim on which Honeycrest can recover its economic damages, Honeycrest did not exercise due diligence as a matter of law, and Brave is not estopped from asserting the statute of limitations as a defense. Therefore, we affirm the judgment.

Honeycrest is a three-farm dairy operation co-owned and operated by Victor Traynor and his family in Pierce County. Between 1967 and 1981, Honeycrest purchased six Harvestore silos from Brave, a distributor of Harvestore silos.[2] Honeycrest first detected an air leakage problem in June 1967, when feed stored in its Harvestore was warm and moldy, and the cows would not eat it. Honeycrest reported the problem to Brave, and Brave came out to the farm and sealed the leaks. Between 1967 and 1991, there was a continuing series of complaints about the Harvestores by Honeycrest and repairs by Brave. Although Honeycrest does not deny that it knew of the

[1] Because Honeycrest's claims against A.O. Smith Harvestore Products, Inc., were resolved by settlement, this case proceeds against Brave alone.

[2] The first two purchases were made from a company called Shrank Sealed Storage, which was taken over by Brave in 1970. The remaining four silos were purchased from Brave. Although the issue of which silos were sold by whom was raised at summary judgment, we determine that the resolution of that issue is unnecessary because the sole issue on appeal is the statutes of limitations.

shortcomings of the silos, it insists that Brave explained the shortcomings as the result of repairable problems or operator error.

On March 11, 1995, Honeycrest filed suit against Brave, asserting causes of action in strict liability, negligent misrepresentation, fraud, and advertising fraud. The basis for the complaint was that the silos were sold to Honeycrest as essentially airtight structures that would preserve the feed stored in them better than other silos, provide better feed for the livestock, need no maintenance, and "pay for themselves" because less feed would spoil and the farm operation would be more profitable. Honeycrest argued that Brave made these representations with the knowledge that they were false.

In its decision to grant summary judgment, the trial court noted the following: the Traynors knew as early as 1967 that air leaked into the silos and resulted in warm and moldy feed, the silos were not maintenance free, the Traynors had to add protein and minerals to the stored feed, and the silos did not achieve increased milk production.

We review summary judgments de novo by applying the same criteria as the trial court. ***Universal Die & Stampings, Inc. v. Justus***, 174 Wis.2d 556, 560, 497 N.W.2d 797, 799 (Ct. App. 1993). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS. A complaint should be dismissed as legally insufficient only if it is clear that under no circumstances can the plaintiff recover. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 317, 401 N.W.2d 816, 821 (1987).

Honeycrest alleged causes of action in strict liability, negligent misrepresentation, fraud, and advertising fraud, all arising out of misrepresentations Brave made regarding design defects of its Harvestore silos. The statutes of limitations for strict liability misrepresentation, negligent misrepresentation, and common law fraud claims are six years. Sections 893.52 and 893.93(1)(b) STATS. The statute of limitations for advertising fraud is three years. Section 100.18(11)(b)(3), STATS.

Statutes of limitations "ensure prompt litigation of claims and ... protect defendants from fraudulent or stale claims brought after memories have faded or evidence has been lost." ***Korkow v. General Cas. Co.***, 117 Wis.2d 187, 198, 344 N.W.2d 108, 114 (1984). As stated by our supreme court,

> It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it. A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has occurred or is reasonably certain to occur in the future.

Pritzlaff v. Archdiocese of Milwaukee, 194 Wis.2d 302, 315, 533 N.W.2d 780, 785 (1995) (citations omitted).

In some cases, the discovery rule allows for the tolling of an otherwise applicable statute of limitations. ***Hansen v. A.H. Robins, Inc.***, 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983). Wisconsin adopted the discovery rule "for all tort actions other than those already governed by a legislatively created discovery rule." ***Id.*** The discovery rule provides that a cause of action will not accrue "until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of the injury but also that the injury was probably caused by the defendant's conduct or product." ***Borello v. United States Oil Co.***, 130 Wis.2d 397, 411, 388 N.W.2d 140, 146 (1986) (citing ***Hansen***, 113 Wis.2d at 560, 335 N.W.2d at 583).

The reasonable diligence requirement means that the plaintiff must exercise "such diligence as the great majority of persons would use in the same or similar circumstances" to discover their injuries. ***Spitler v. Dean***, 148 Wis.2d 630, 638, 436 N.W.2d 308, 311 (1989). "Plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars which may be inferred to be within their reach." ***Id.***

Brave argues that because the alleged misrepresentations forming the basis for Honeycrest's cause of action for deceptive advertising occurred more than three years before the lawsuit was filed, Honeycrest's claim was

beyond the statute of limitations. We agree. The discovery rule does not apply to Honeycrest's claim of advertising fraud, pursuant to § 100.18, STATS.[3] *See* ***Skrupky v. Elbert***, 189 Wis.2d 31, 56, 526 N.W.2d 264, 274 (Ct. App. 1994).

As to the remaining claims, we consider Honeycrest's argument that because it did not discover the "causal link" between its problems and the structural defects of the silos until 1991, Brave is liable for damages. However, Honeycrest cannot recover its asserted damages through its strict liability and negligence causes of action. *See* ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis.2d 306, 325-26, 475 N.W.2d 587, 594 (Ct. App. 1991).

The facts of ***D'Huyvetter*** are strikingly similar to this case. In ***D'Huyvetter***, plaintiff farmers who purchased an allegedly defective Harvestore sued the distributor and manufacturer, alleging claims of strict responsibility for misrepresentation, negligent and intentional misrepresentation, breach of express and implied warranties, breach of contract, strict liability, negligence and advertising fraud. ***Id.*** at 318, 475 N.W.2d at 591. The ***D'Huyvetter*** plaintiffs appealed the trial court's grant of summary judgment on the negligence and strict liability claims. ***Id.*** at 325, 475 N.W.2d at 594.

As did Honeycrest in its complaint, the ***D'Huyvetter*** plaintiffs sought recovery for the following:

> [T]he expense of purchasing the Harvestore; interest expenses; the expense of converting their farm operation for use of the Harvestore; the costs of numerous repairs on the Harvestore; reduced milk production; reduced production of young stock; costs of purchasing additional protein to supplement their cattle's diet; loss of profit associated with sale of calves and cattle; death and illness of their livestock; costs of purchasing additional equipment; and electrical costs ....

[3] Section 100.18(11)(b)3, STATS., provides that "[n]o action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of the action."

Id. at 326, 475 N.W.2d at 594. Based on these asserted damages, the court decided that the plaintiffs had suffered a purely economic loss, not compensable under negligence or strict liability theories, and upheld summary judgment. ***Id.*** (citing ***Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.***, 148 Wis.2d 910, 921, 437 N.W.2d 213, 217-18 (1989)). The court then confined the plaintiffs' recovery to the warranties in the sales contract and stated, "[W]e agree ... that the legislative protections granted by the Uniform Commercial Code are not to be buttressed by tort principles and recovery." ***Id.*** at 326-27, 475 N.W.2d at 594 (citations omitted). Because Honeycrest alleged only tort claims against Brave, purely economic damages are not available.

Honeycrest's only remaining claim is for fraud, which we interpret as a claim for fraudulent misrepresentation. In its complaint, Honeycrest alleged that Brave made numerous oral and written misrepresentations about the performance and capabilities of the Harvestores. In ***Miles v. A.O. Smith Harvestore Products, Inc.***, 992 F.2d 813 (8th Cir. 1993), the federal court of appeals affirmed summary judgment on a farmer's fraud claims against the Harvestore manufacturer because the applicable statute of limitations had expired. The court found no dispute of material fact, and concluded that the limitations period began to run when the appellant knew, from the time she put the Harvestores into service, that they did not operate as represented. ***Id.*** at 817.

We recognize that the general concept of misrepresentation can be separated into three torts: fraudulent or intentional misrepresentation, negligent misrepresentation, and strict liability. ***Ollerman v. O'Rourke Co.,*** 94 Wis.2d 17, 24-25, 288 N.W.2d 95, 99 (1980). A cause of action for intentional misrepresentation requires proof of the following: (1) the defendant made a representation of fact, (2) the representation was untrue, (3) the plaintiff believed the representation to be true and relied on it to his or her detriment, and (4) the defendant either knew the representation was untrue or made the representation recklessly without caring whether it was true and with intent to induce the plaintiff to act upon it to the plaintiff's pecuniary detriment. ***Id.***

As we stated earlier, the discovery rule provides that a cause of action will not accrue "until the plaintiff discovers, *or in the exercise of reasonable diligence should have discovered*, not only the fact of the injury but also that the injury was probably caused by the defendant's conduct or product." ***Borello***,

130 Wis.2d at 411, 388 N.W.2d at 146 (citing ***Hansen***, 113 Wis.2d at 560, 335 N.W.2d at 583) (emphasis added).

When the "material facts are undisputed, and only one inference can reasonably be drawn from them, whether a plaintiff exercised reasonable diligence in discovering her injury is a question of law," which the court may decide. ***Groom v. Professionals Ins. Co.***, 179 Wis.2d 241, 249, 507 N.W.2d 121, 124 (Ct. App. 1993). Here, because the underlying facts are undisputed and only one reasonable inference can be drawn, a question of law is presented.

Although Brave's representations to Honeycrest turned out to be untrue shortly after Honeycrest's first Harvestore was installed, Honeycrest accepted for nearly three decades Brave's explanation that the shortcomings of the Harvestores were the result of repairable problems or operator error. In fact, Victor Traynor testified that Honeycrest thought as early as the mid-1970s that there might be a structural problem with the Harvestores. Nevertheless, Honeycrest did not file suit against Brave until 1995. We conclude as a matter of law that Honeycrest cannot benefit from the discovery rule because Honeycrest should have realized by the exercise of reasonable diligence that Brave had misrepresented the qualities of its Harvestores. *See* ***id.***

Finally, Honeycrest contends that Brave should be estopped from asserting the statute of limitations defense because it relied to its detriment on Brave's statements that the defects were repairable, Honeycrest mismanaged the silos, and the moldy feed was expected and beneficial. Honeycrest, therefore, reasons that it is a question of fact for the jury to determine whether Brave's actions should estop it from asserting the statute of limitations defense. We are not persuaded.

The test of whether a party should be estopped from asserting the statute of limitations is "whether the conduct and representations of the defendant were so unfair and misleading as to out-balance the public's interest in setting a limitation on bringing actions." ***Hester v. Williams***, 117 Wis.2d 634, 645, 345 N.W.2d 426, 431 (1984) (citation omitted). Equitable estoppel is appropriate only when a party's reliance on another party's conduct is reasonable. ***Id.*** (citation omitted). Whether, under the undisputed facts of this case, Brave should be estopped from asserting the statute of limitations is a

question of law. *See* ***id.*** at 644-45, 345 N.W.2d at 431-32. Although Honeycrest was aware of its silo problems and did not believe Brave's explanations for the problems as early as the mid-1970s, it waited until 1995 to file its complaint. Therefore, we conclude that Honeycrest did not reasonably rely to its detriment on Brave's representations and equitable estoppel does not apply.

Because no issue of material fact remained and the applicable statutes of limitations had expired, the court properly granted summary judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.