COURT OF APPEALS
DECISION
DATED AND FILED

December 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0005 **Cir. Ct. No. 99-CV-1029**

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

DARREL ALIX,

PLAINTIFF-APPELLANT,

LARRY BRAATZ, NORB BRAUN, FIDEL CASTILLO, JAMES DEY, GREGORY EBEL, LAWRENCE FERGE, LEON FUERST, CAROL GUYETTE, ESTATE OF RAY GUYETTE, LAVERNE HAASE, DAVID HAMILTON, FLOYD HANSON, JERALD HEUER, DANIEL JANIAK, RICK KNUDSEN, JAMES MOHRMAN, JAMES MORONEY, TERRY OLEJNIK, ROBERT PARRY, DONALD QUAINTANCE, DELORES RADTKE, ESTATE OF MARVIN RADTKE, CANDELARIO RODRIGUEZ, DALE SITTMAN, ALOIS STEGER, JOHN STILP, WILLIAM SURPRISE, JACOB VERTZ, RICHARD WEBER AND ARTHUR ZINKEL,

PLAINTIFFS,

V.

BADGER MINING CORPORATION, MINE SAFETY APPLIANCES COMPANY, MINNESOTA MINING & MANUFACTURING, NORTH SAFETY PRODUCTS COMPANY, THE NORTON COMPANY, TEXTRON, INC., LIBERTY MUTUAL INSURANCE CO., TRAVELERS CASUALTY AND SURETY, AMERICAN OPTICAL CORPORATION, DALLOZ SAFETY INC. AND EMPLOYERS INSURANCE COMPANY OF WAUSAU

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 DYKMAN, J. Darrel Alix appeals from a summary judgment in defendants' favor concluding that his claims were barred by WIS. STAT. § 893.54 (1999-2000),[1] a statute of limitations. Alix argues that his claims were timely because, though he exercised reasonable diligence, he did not discover that the defendants caused his silicosis until shortly before he filed this action. We affirm the grant of summary judgment as to defendant Badger Mining Corporation, a supplier of silica sand, but reverse as to the defendants who produced the respirators Alix used, and their insurers.

BACKGROUND

¶2 The following undisputed facts are taken from the parties' summary judgment affidavits. Alix began working in the Neenah foundry in 1964. He wore respirators for protection from the dusty conditions. In late 1989, Alix learned that two of his co-workers had been diagnosed with silicosis, a lung disease caused by the inhalation of silica. Believing that the disease was caused by conditions at the foundry, Alix went to his doctor to determine if he had contracted silicosis. In early 1990, Dr. Garrett diagnosed Alix with the disease. Dr. Garrett suggested that

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Alix change jobs, but that if he did remain at the foundry he must "fastidiously" wear his respirator. Alix continued to work at the foundry.

¶3 Alix's silicosis continued to worsen as years of work at the foundry passed. He did not pursue a cause of action, however, because he attributed his declining health to his failure to wear his masks at every moment while he was inside the factory. He noted that he did not wear the mask while entering and leaving the "dirty" work area and also removed his mask from time to time to talk with co-workers.

¶4 In 1999, Alix saw a message posted on the union bulletin board by out-of-state attorneys claiming that the respirators he wore were defective. Alix attended a meeting held by the attorneys where he was informed that his respirators were known to be ineffective in hot and humid conditions. On November 23, 1999, Alix commenced the current action against the manufacturers of the respirators, their insurers and Badger Mining, the company that supplied silica to the foundry.

¶5 In separate motions, the defendants moved for summary judgment arguing that Alix's claims were barred by the statute of limitations. Alix argued that the claims were timely under Wisconsin's discovery rule because, though he exercised reasonable diligence, he did not discover the defects in the respirators until shortly before he sued. The trial court concluded that Alix's claims were barred by the statute of limitations and granted summary judgment to all defendants. Alix appeals.

ANALYSIS

¶6 In tort actions the statute of limitations begins to run when "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. U.S. Oil Co.***, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986).

¶7 Reasonable diligence is defined as "such diligence as the great majority of persons would use in the same or similar circumstances." ***Spitler v. Dean***, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989). Therefore, the dispositive issue here is whether a reasonably diligent person would have discovered the causes of Alix's illness in 1990. If there is a genuine issue of material fact whether a person exercising reasonable diligence would have failed to discover the causes of the illness until 1999, summary judgment is improper.

¶8 We apply the same summary judgment methodology as the trial court. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 115-116, 334 N.W.2d 580 (Ct. App. 1983). We first examine the pleading to determine if a claim has been stated and a material factual issue presented. ***Id.*** at 116. If the complaint states a claim and the pleadings show the existence of factual issues, we determine if the moving parties' affidavits contain admissible evidentiary facts that establish a prima facie case for summary judgment. ***Id.*** A prima facie case is made when the moving party shows a defense that would defeat the claim. ***Id.*** If the moving party has made a prima facie case, we examine the opposing party's affidavits to determine if a genuine issue of material fact exists requiring a trial. ***Id.***

¶9 Here, Alix's complaint states a claim and the pleadings show the existence of factual issues. We now must look at the affidavits to determine if there is a genuine issue of material fact.

SUMMARY JUDGMENT AS TO RESPIRATOR DEFENDANTS

¶10 The respirator defendants, which are the companies that produced the respirators, and the respirator defendants' insurers, formed into groups and submitted three separate motions for summary judgment. We will look at each motion to determine if the affidavits make a prima facie case for summary judgment.

¶11 American Optical Corporation (American) submitted an affidavit incorporating a portion of Alix's deposition. Alix's testimony shows that in 1990 Alix knew that he had silicosis and that it was caused by the conditions at the foundry. While the testimony does not clearly indicate that Alix knew silicosis was caused by inhalation of dust particles, a person exercising reasonable diligence would have learned the medical cause of the illness. Further, Alix testified that he wore a respirator at all times when working and that he understood that the respirators were meant to protect him from exposure to the dust in the foundry. From such evidence, a reasonable inference exists that a "reasonably diligent" person should have discovered in 1990 that the respirators probably caused the illness.

¶12 Dalloz Safety (Dalloz) and Employers' Insurance of Wausau (Wausau) submitted an affidavit incorporating excerpts from Alix's deposition and the deposition of Dr. Garrett, the physician who diagnosed Alix's silicosis. The substance of this evidence is similar to that put forth by American. It shows that in 1990 Alix knew that he had silicosis and that the illness was caused by exposure

to dust at the foundry. It also contains Alix's statement that he always wore his respirators and understood the respirators were meant to prevent exposure to contaminates in the air. We conclude that Dalloz and Wausau have established a prima facie case for summary judgment.

¶13 The remaining respirator producers and insurance companies filed a consolidated motion for summary judgment.[2] Attached to the motion are copies of a number of depositions. However, there is no affidavit authenticating or incorporating these transcripts. These documents are therefore nonevidentiary, and we do not consider them. *See* ***E.S. v. Seitz***, 141 Wis. 2d 180, 186, 413 N.W.2d 670 (Ct. App. 1987) (holding that failing to identify or authenticate by affidavits documents included in a motion in opposition to summary judgment requires the court to "ignore [such documents]"). The only affidavit included with these defendants' motion sets out the dates when one of the respirator producers produced a particular respirator. This information is not relevant to the arguments these defendants make.

¶14 We now examine Alix's affidavit to determine if it raises a genuine issue of fact whether a person exercising reasonable diligence would have discovered that the respirators were a cause of the injury until 1999.

¶15 Alix's affidavit incorporates portions of deposition testimony given by Alix, Dr. Garrett and a number of current and past Neenah foundry workers, as well as other materials and affidavits. This evidence shows that Dr. Garrett told

[2] The respondents who were part of this motion are North Safety Products Company, The Norton Company, Textron, Inc., Liberty Mutual Insurance Co. and Travelers Casualty & Surety.

Alix that if he chose to go back to work, he should wear his respirator "fastidiously." A reasonable inference from this advice is that Dr. Garrett was indicating that failing respirators were not the cause of Alix's silicosis. Dr. Garrett's deposition testimony shows that he did not believe that faulty respirators played a role in Alix's illness. During his deposition, Alix testified that he accepted the doctor's implicit conclusion that the respirators did not contribute to his silicosis.

¶16 While there are circumstances where accepting a doctor's conclusions may not be an exercise in reasonable diligence, that is not the case here. Had Alix always worn a respirator while working, it would have been unreasonable for him to accept Dr. Garrett's implicit conclusion that the respirators provided proper protection. Alix's affidavit, however, incorporates portions of his deposition where he clarified his statements about his respirator use. He said that while he wore the respirators "most of the time" he would take them off when he changed the filter and when he spoke to co-workers or supervisors. He would also take the respirator off at the end of his shift and leave it at his work area. Therefore, it was reasonable for Alix to accept the doctor's conclusion because Alix knew that he had been exposed to dust while he was not wearing a respirator.

¶17 Further, none of the moving parties point to any information Alix possessed or received that would require a reasonable person to question the correctness of the doctor's conclusion. There is no evidence that Alix was ever told by a co-worker, supervisor, union head or for that matter anyone, that there were problems with the respirators until 1999 when he saw the union bulletin.

¶18 Respondents rely on ***Claypool v. Levin***, 209 Wis. 2d 284, 562 N.W.2d 584 (1997), claiming that the statute of limitations begins to run when the injured party discovers any cause of his injury, be it actionable or not. ***Claypool***, 209 Wis. 2d at 300. This interpretation of ***Claypool*** is taken out of context, however, as the ***Claypool*** court was clear in explaining: "The discovery rule is so named because it tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person." ***Id.*** at 298-99 n.4 (quoting ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 315-16, 533 N.W.2d 780 (1995)). By specifying "wrongs," ***Pritzlaff*** separates actionable causes of injury, which start the statute of limitations running, from non-actionable causes, which do not. In the case at hand, the cause discovered by Alix, silica sand inhalation due to his failure to constantly wear his mask, was not an actionable wrong, and therefore does not start the statute of limitations clock ticking.

¶19 While the record is unclear as to details, it shows that after being diagnosed with silicosis, Alix hired an attorney to assist him in filing a worker's compensation claim against Neenah foundry. Though Alix asserts that no claim was ever filed, he does say that workers compensation paid for his doctor visits. Defendants correctly assert that once a reasonably diligent person should have discovered the cause of an illness, "nothing, including a misleading legal opinion, can cause the injury to become 'undiscovered.'" ***Claypool***, 209 Wis. 2d at 301. This statement confuses the issue at hand and warrants further inquiry. ***Claypool***'s holding that a lawyer's poor work cannot save his or her client served two purposes: First, the court avoided protecting bad lawyers from liability for their mistakes and therefore encouraged the careful practice of law. Second, the court

implicitly applied a reasonable person standard to the injured party by suggesting that she should have known that she was injured by the fact that she was blind, and the cause of the injury was without doubt her physician. *See* ***id.*** at 302-03.

¶20 Under that lens, Alix's case is distinguishable from the holding in ***Claypool*** on both bases. First, the court has a much lesser duty to monitor the medical profession than it does the legal profession, which it is charged with overseeing. Second, Alix clearly understood the fact that he was injured and even took some steps to ascertain the responsible parties by seeing a physician and an attorney. Unlike Mrs. Claypool, Alix did not find the true cause of his injury because his doctor's advice could suggest to a reasonable person that Alix's own failure to constantly wear his mask was the cause of his silicosis. In contrast, Mrs. Claypool dealt with an attorney who responded to her queries only after a chance meeting between the attorney and her husband while he was on jury duty, which would lead a reasonable person to conclude that a second opinion would be beneficial. Additionally, Mrs. Claypool received no reimbursement for her loss of vision, giving her significant motivation and need to pursue a claim. As he stated in his deposition, Alix received worker's compensation benefits for his injury, leading him to believe that his injury had been adequately addressed by the legal system. Believing he had a non-actionable cause based on a medical opinion, Alix reasonably took no further action until he discovered the wrong that also caused his disease.

¶21 The respirator defendants argue that Alix's failure to bring suit in 1990 against the silica provider, Badger, shows that Alix did not exercise reasonable diligence as to the claims against them. We disagree. As we have discussed, a reasonably diligent person in Alix's place may not have discovered the respirators' defects. A reasonable person also may not have considered suing

Badger merely because it produced silica sand. And a reasonable person may not have ferreted out the idea that Badger should have warned of defective respirators when a doctor did not come to the conclusion that the respirators played a role in Alix's disease.

¶22 Defendants argue that ***Borello*** and ***Jacobs v. Nor-Lake, Inc.***, 217 Wis. 2d 625, 579 N.W.2d 254 (Ct. App. 1998), instruct that Alix's actions were not sufficient to constitute reasonable diligence. In ***Borello*** and ***Jacobs***, the court reversed grants of summary judgment because the court could not say as a matter of law that the plaintiffs were not reasonably diligent. We agree that the plaintiffs in ***Borello*** and ***Jacobs*** took more action than Alix. However, our conclusion does not conflict with either case. First, neither ***Borello*** nor ***Jacobs*** indicate that their facts constituted the "minimum" amount of action a plaintiff must take. Second, in ***Borello*** and ***Jacobs*** there were facts that drove the plaintiffs' continual action. In ***Borello***, the plaintiff had a subjective belief that her injuries were caused by a furnace, and she was not satisfied with opinions she received to the contrary. ***Borello***, 130 Wis. 2d at 401. Similarly, in ***Jacobs***, even a DNR investigation failed to determine the cause of groundwater pollution. ***Jacobs***, 217 Wis. 2d at 631. By contrast, Alix could reasonably believe that he knew the cause of his illness and therefore had no need for further inquiry.

¶23 Finally, defendants note that prior to 1990 lawsuits had been brought against the respirator companies in Louisiana. It does not necessarily fall short of the standard for reasonableness, however, for a factory worker to fail to research the laws of foreign states pertaining to equipment that he did not know was defective. Even Alix's worker's compensation attorney could be seen to have gone beyond the minimum required were he to do an extensive search of respirator law after successfully securing additional benefits for his client. We conclude that

there was a disputed issue of material fact as to whether Alix exercised reasonable diligence in discovering the cause of his silicosis. Accordingly, we conclude that the trial court erred by granting summary judgment to the respirator defendants.

SUMMARY JUDGMENT AS TO BADGER MINING

¶24 Badger is the company that supplied silica sand to Neenah foundry. In an affidavit in support of its motion for summary judgment, Badger incorporated excerpts of Alix's deposition testimony. In his deposition, Alix stated that in 1990 he knew he had silicosis and that it was caused by the dusty conditions at the foundry. In the excerpts, Alix claims that he did not know that it was the sand present in the dust that caused his illness. Even accepting this subjective belief, we conclude that Badger made a prima facie case for summary judgment. A reasonably diligent person would have asked what caused his or her ailment and would have discovered that it was silica sand. Alix testified that he knew that Badger was Neenah's sand provider. Badger has made a prima facie case for summary judgment.

¶25 We see nothing in Alix's affidavits that rebuts Badger's prima facie case. The discovery rule provides that a cause of action accrues when a reasonably diligent person "should have discovered … that the injury was probably caused by the defendant's conduct or *product*." ***Borello***, 130 Wis. 2d at 411 (emphasis added). A reasonably diligent person would have discovered in 1990 that the silica sand, Badger's product, was a cause of his or her illness. The trial court correctly granted summary judgment to Badger Mining.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.