COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0606

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

STEPHEN V. SZTUKOWSKI,

PLAINTIFF-APPELLANT,

JOHN ALDEN LIFE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

SOUTH HILLS GOLF & COUNTRY CLUB AND CIGNA PROPERTY & CASUALTY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Stephen V. Sztukowski appeals from a judgment granting summary judgment to South Hills Golf & Country Club and Cigna Property & Casualty Insurance Company. The court determined as a matter of law that the action was barred by the statute of limitations. The court further determined that the statute of limitations was not tolled by certain payments made by Cigna. We conclude that, as a matter of law, the action was barred by the statute of limitations. We affirm.

¶2 Sztukowski brought this action against South Hills as a result of an injury he suffered while participating in a golf tournament on June 24, 1995. Sztukowski went into the rough looking for a golf ball. He stepped into an unmarked irrigation trench and fell, twisting his knee. The circuit court found that Sztukowski had testified at his deposition that he felt some momentary discomfort at the time he fell and that, although he continued to play golf, he may have felt a little discomfort or soreness. Moreover, at some point that day he felt that "the potential existed" that he had hurt his knee. As he was getting ready for bed, he noticed that his knee had stiffened up. Further, he admitted that he knew on June 24 that he had hurt his knee at least a little bit but that he did not know how badly he had hurt it.

¶3 The next day, June 25, 1995, Sztukowski's knee was swollen and painful so that he was unable to finish his round of golf. In August 1995, Sztukowski wrote to South Hills explaining that he had hurt himself during the tournament. Eventually, Sztukowski's medical bills were submitted to South Hills's insurer, Cigna, for payment. Cigna made payments to Sztukowski under the medical payment provision of the policy until the $5000 limit was reached.

¶4 Sztukowski filed this action on June 25, 1998. South Hills and Cigna moved for summary judgment on the grounds that the complaint was filed beyond the three-year statute of limitations. Sztukowski claimed that under the discovery rule, the claim did not accrue until June 25, 1995, and therefore was timely. Sztukowski further asserted that even if the statute of limitations applied, the payments made by Cigna tolled the statute of limitations. The court rejected both of these arguments and granted summary judgment to South Hills and Cigna. Sztukowski appeals.

¶5 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *See* ***M&I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known, and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.*** at 496-97.

¶6 Sztukowski first argues that his claim for relief did not accrue until June 25, 1995, which he asserts is the first time he knew or, in the exercise of reasonable diligence, should have discovered his injury and its nature. In most cases, a cause of action will accrue when the injury occurs. *See* ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 555, 335 N.W.2d 578 (1983). "[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 already 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 (1995).

¶7 Sometimes an injury will be latent and the injury itself will not be discovered "until it is manifested at a later date." ***Hansen***, 113 Wis. 2d at 555. The discovery rule "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." ***Pritzlaff***, 194 Wis. 2d at 315. The discovery rule does not mean that a plaintiff "can delay action until the extent of the injury is known, but only ... that the statute of limitations does not begin to run until the plaintiff has sufficient evidence that a wrong has been committed by an identified person." ***Id.*** at 320-21.

¶8 This is not a case in which the discovery rule tolls the statute of limitations. Sztukowski knew of all the elements of his claim on the day he was injured. He testified at his deposition that he fell, he knew why he had fallen, he suffered some discomfort on that same day, and he reported the accident to a golf pro at South Hills on that day. He knew that the potential existed that he had hurt his knee; he just was not aware of the extent of his injury until the following day.

¶9 Sztukowski argues that there is an issue of material fact because he submitted an affidavit which stated that if his knee had remained in the same condition it was on June 24, he would not have filed a claim against South Hills, and that June 25 was the first day that there was "an objective basis ... as to the fact that [he] had sustained an injury which was the basis of [his] claim against the defendants." The first statement, however, does not affect his earlier deposition testimony that he was aware the potential existed that his knee had been injured on June 24. It merely shows that he was not aware of the extent of his injury until June 25. Under ***Pritzlaff***, this does not toll the statute of limitations. *See* ***id.*** at 315.

¶10 The second statement in his affidavit contradicts his earlier deposition testimony that he was aware the potential existed on June 24. As such, the affidavit is a "sham affidavit." *See* ***Yahnke v. Carson***, 2000 WI 74, ¶20, 236 Wis. 2d 257, 613 N.W.2d 102. "[T]he ability to create trial issues by submitting affidavits in direct contradiction of deposition testimony reduces the effectiveness of summary judgment as a tool for separating the genuine factual disputes from the ones that are not, and undermines summary judgment's purpose of avoiding unnecessary trials." ***Id.*** at ¶11. "[A]n affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained." ***Id.*** at ¶21. In this case, Sztukowski did not offer any explanation for the contradiction. Therefore, the statement does not create a genuine issue of fact sufficient to defeat the motion for summary judgment.

¶11 Sztukowski also argues that the statute of limitations was tolled by the payments Cigna made to him. Specifically, Sztukowski argues that his action was timely under the provisions of WIS. STAT. §§ 893.12 and 885.285 (1997-98).[1] "[I]n order to toll or extend the statute of limitations, the 'payment' specified in § 885.285(1), STATS., must be related to considerations of fault or liability. If it is not fault- or liability-related, it does not extend the limitation period." ***Gurney v. Heritage Mut. Ins. Co.***, 188 Wis. 2d 68, 73, 523 N.W.2d 193 (Ct. App. 1994).

¶12 The circuit court concluded that the payments made by Cigna were made under the medical payments provision of the insurance policy. The policy provided that Cigna would pay medical expenses for bodily injury on South Hills

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

property regardless of fault. Since the payments to Sztukowski were made under this provision, the circuit court concluded that the statute of limitations was not tolled. We agree with the circuit court's conclusion.

¶13 Sztukowski asserts that the payments were not made under the medical payments provision because the policy contained an exclusion for persons injured while taking part in athletics. However, it is obvious that the payments were made under the medical payments provision, regardless of the athletic exception, because Cigna stopped paying Sztukowski once it had paid him $5000, the maximum allowed under the medical payments provision. The payments were not related to considerations of fault or liability but were medical payments made regardless of fault. Thus, Cigna's payments did not toll the statute the limitations.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.