

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2010

David R. Schanker
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. 2009AP828

Cir. Ct. No. 2007CV653

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RYAN C. TEWS,

PLAINTIFF-APPELLANT,

V.

**NHI, LLC, J-STAR BODCO, INC. N/K/A 1234 WISCONSIN, INC.,
NASCO HOLDINGS, INC., NASCO EXPORTS, INC., THE ARISTOTLE
CORPORATION, GENEVE HOLDINGS, INC., INDUSTRIE BODCO, INC.,
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA AND
WESTCHESTER SURPLUS LINES INSURANCE COMPANY,**

DEFENDANTS,

WISCONSIN ELECTRIC POWER COMPANY D/B/A WE ENERGIES,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Ryan Tews appeals a judgment dismissing his complaint against Wisconsin Electric Power Company. The court dismissed the complaint as untimely, under the applicable statute of limitations. We affirm.

¶2 In December 2004 Tews was severely injured in an electrical accident. He commenced this action in September 2007, naming “WE Energies” and other parties as defendants. In December 2007 he filed an amended complaint naming as a defendant “Wisconsin Energy Corporation d/b/a WE Energies.”

¶3 Wisconsin Energy subsequently moved to dismiss the amended complaint, asserting that the proper party to the action was its subsidiary, Wisconsin Electric Power Company (WEPCO). The court granted that motion in October 2008, with Tews granted leave to file a second amended complaint, adding WEPCO as a defendant, which Tews promptly did.

¶4 In December 2008 WEPCO filed what it entitled a motion for summary judgment, which in effect asked the circuit court to dismiss the second amended complaint as untimely under the three year statute of limitations contained in WIS. STAT. § 893.54 (2007-08).¹ WEPCO did not attach any affidavits or proof to its motion. Tews responded with a brief contending that his second amended complaint was timely because it related back to his original September 2007 complaint, under the relation back provisions of WIS. STAT. § 802.09(3). He attached documents to his brief purporting to show WEPCO’s

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

corporate relationship with Wisconsin Energy. He did not, however, accompany those documents with an affidavit.

¶5 Five business days before the hearing scheduled on WEPCO's motion, WEPCO filed a reply brief, with a supporting affidavit, arguing that Tews had failed to present facts by affidavit, and therefore failed to meet his burden with regard to his relation back argument. Tews responded two days later with a by-then untimely counter affidavit, and moved the court to strike the reply brief and to consider his counter affidavit.

¶6 The circuit court refused to consider the untimely proof, deemed the documents that were previously submitted without affidavit inadmissible and insufficient in any event, and granted summary judgment because Tews failed to create a material issue of fact regarding his relation back defense. On appeal Tews contends that the court erroneously exercised its discretion by refusing to consider his affidavit, and erred by concluding that there were no disputes of material fact concerning the relation back defense.

¶7 WISCONSIN STAT. § 802.06(2)(a) provides that a defendant may raise a statute of limitations defense by motion, and § 802.06(2)(b) provides that the motion shall become one for summary judgment only if matters outside the pleadings are presented. Here, WEPCO's motion raising the statute of limitations was not a motion for summary judgment because it relied exclusively on the allegation in Tews' complaint concerning the date of his accident, and the filing date of the complaint, without reference to any facts outside that pleading. In that regard WEPCO's labeling of its motion is irrelevant. *See Buckley v. Park Building Corp.*, 27 Wis. 2d 425, 431, 134 N.W.2d 666 (1965) (nature of motion determined from its substance, and not its label). Consequently, the proceeding

did not become one for summary judgment until Tews introduced matters outside the pleadings on his relation back argument. Having raised factual issues outside the pleadings, it therefore became Tews' burden to set forth his evidence as required by WIS. STAT. § 802.08(3), and to do so no later than five days before the scheduled hearing. § 802.08(2). This Tews failed to do, without showing excusable neglect. The circuit court therefore reasonably exercised its discretion when it refused to excuse his delinquency and consider the untimely affidavit. *See* § 801.15(2)(a) (after time for performing act has expired, court may extend the deadline to perform the act only on showing of excusable neglect).

¶8 Tews conceded that it was his burden to introduce evidence to show that his amended pleading should relate back to his original complaint. Without his excluded proof, Tews did not meet that burden. An amended pleading relates back to the original pleading if it arises out of the same transaction or occurrence, the party named in the amended pleading received notice of the claim before the statute of limitations expired, and knew or should have known that but for a mistake concerning identity it would have been a party to the original action before the statute of limitations expired. WIS. STAT. § 802.09(3). The documents submitted as proof on this question were either unaccompanied by affidavit or untimely. Additionally, even if we held that an affidavit was not necessary to permit consideration of the documents Tews initially submitted, those documents merely provided information on the corporate relationship between Wisconsin Energy and WEPCO. They did not provide evidence to satisfy the § 802.09(3) criteria such that Tews could reasonably contend that he met his burden of proof on his relation back claim.

By the Court.—Judgment affirmed.

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

