COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 4, 1997

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

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

No. 96-1931

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

GOODMAN FOREST INDUSTRIES, LTD.,

Plaintiff-Appellant,

v.

LOUISIANA-PACIFIC CORPORATION,

Defendant,

ALLIEDSIGNAL, INC. and
EM SECTOR HOLDINGS, INC.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Reversed and cause remanded.*

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

LaROCQUE, J. Goodman Forest Industries, Ltd., appeals a summary judgment in favor of AlliedSignal, Inc., and EM Sector Holdings, Inc. (collectively, "respondents") dismissing them as defendants in Goodman's suit for damages because the complaint was filed outside the six-year statute of

limitations, § 893.52, STATS.[1] Goodman asserts that a genuine issue of material fact remains whether Goodman used reasonable diligence to discover environmental contamination existing on property purchased from defendant Louisiana-Pacific.[2] We agree and therefore reverse.

Goodman purchased a sawmill operation consisting of almost 200 acres of real estate and personal property from Louisiana-Pacific in October 1983. In 1986, Goodman learned that three fuel oil tanks on the property were leaking contaminants into the surrounding soil. The Wisconsin Department of Natural Resources advised Goodman to take remedial action to clean up the resulting contamination. In a letter, the DNR stated that "The Department recommends that you contact a consulting firm .... The investigative work should begin as soon as possible due to the short time remaining during the present construction season." The tanks were removed in 1986. The same letter refers to additional underground storage tanks and advises Goodman to contact the DNR when it removes the tanks, which Goodman indicated would be "in the near future." These tanks were removed in 1988.

In 1987, the DNR ordered Goodman to close an unlicensed landfill on the property. Due to environmental concerns, the DNR also advised Goodman to take remedial action to clean up the landfill and to monitor the landfill.

In "late 1993 or early 1994," Goodman initiated an Environmental Site Assessment (ESA) on the entire property, the results of which were received in March 1994. The ESA revealed a number of additional areas of environmental concern, including contamination surrounding the underground tanks removed in 1988, a contaminated area used for equipment maintenance, a contaminated area used to treat lumber, and a highly contaminated former chemical manufacturing plant.

---

[1] The parties do not dispute that § 893.52, STATS., is the relevant statute of limitations in this action. That section states as follows: "An action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed."

[2] Louisiana-Pacific is not a party to this appeal.

Goodman initiated this lawsuit in 1992, before the ESA was performed, demanding reimbursement from Louisiana-Pacific for the costs of environmental remediation and monitoring. An amended complaint was filed on January 16, 1995, naming AlliedSignal and EM Sector's predecessors in interest as defendants and including the areas identified in the ESA. On March 20, 1995, the parties stipulated that Louisiana-Pacific, AlliedSignal and EM Sector were the proper defendants.

The respondents filed a motion to dismiss them as defendants, asserting that the amended complaint was untimely under § 893.52, STATS. In their motion, respondents argued that because the complaint naming them as defendants was filed on January 16, 1995, Goodman's cause of action against them must have arisen within the six-year period immediately prior to that date. If the cause of action arose prior to January 16, 1989, they argued, the suit would be barred. Respondents asserted that Goodman either discovered, or with reasonable diligence should have discovered, the existence of the cause of action before January 16, 1989.

The trial court accepted additional evidentiary materials from the parties, treating the motion as one for summary judgment. The trial court granted the motion, finding that as a matter of law Goodman either discovered or should have discovered the contamination before January 16, 1989. The court stated:

> It's clear to the Court that the plaintiff did discover or, in the exercise of reasonable diligence, should have discovered that they had a contamination problem before January 16, 1989, which is six years prior to the time that the amended complaint was filed bringing in [the Respondents]. The most recent event is the removal of the three underground storage tanks in 1988. That certainly would give the plaintiff cause for concern, especially in light of the history of this site when, as [Goodman's counsel] said, the DNR was all over this property and sent the plaintiff that letter back in 1986 ... outlining the contamination found around the leaky fuel oil tanks.

> So given the history of this site and how they found the underground gasoline storage tanks and they moved them in 1988, the cause of action accrued at that time and [Respondents] were not brought into the case until January of 1995. So the action against them is barred by the statute of limitations.

In reviewing the grant of a summary judgment motion, we are required to apply the standards set forth in § 802.08, STATS., in the same manner as the trial court. ***Voss v. City of Middleton***, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991). Those standards have been described numerous times by this court, including in ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. However we do note that when reviewing the parties' submissions, we must draw every inference in favor of the party opposing the motion. ***Id***. at 339, 294 N.W.2d at 477. If those submissions are subject to conflicting interpretations or if reasonable people may differ as to their significance, summary judgment is inappropriate. ***Id.***

Pursuant to § 893.52, STATS., a party must file its complaint seeking recovery for damages for injury to real property "within 6 years after the cause of action accrues or be barred ...." A cause of action for environmental contamination of real property accrues when the plaintiff discovered or should have discovered the contamination. *See* ***Stroh Die Casting Co. v. Monsanto Co.***, 177 Wis.2d 91, 103, 502 N.W.2d 132, 136 (Ct. App. 1993). Our supreme court has determined that plaintiffs must use reasonable diligence in investigating and discovering contamination and its causes:

> the rule is settled in this state that the expansion of the discovery rule carries with it the requirement that the plaintiff exercise reasonable diligence, which means such diligence as the great majority of persons would use in the same or similar circumstances. 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. (quoting ***Spitler v. Dean***, 148 Wis.2d 630, 638, 436 N.W.2d 308, 311 (1989) (citation omitted)).

We conclude that there remain genuine issues of material fact for trial.[3] Specifically, there is a legitimate factual dispute as to whether Goodman used reasonable diligence in discovering the contamination identified in the ESA. Ordinarily, the date of discovery is a question of fact for the jury. ***Stroh Die Casting***, 177 Wis.2d at 104, 502 N.W.2d at 137.

Goodman discovered contamination around the buried fuel oil tanks in 1986 and around the unlicensed landfill in 1987. The DNR advised Goodman to investigate, remedy and monitor the contamination around those particular sites. In addition, Goodman was aware of the additional underground storage tanks in 1986, and was advised by the DNR to notify it when it removed those tanks. Goodman concedes that recovery from respondents for these claims is barred.

However, whether Goodman used reasonable diligence in discovering those areas identified in the ESA that are unrelated to the above contaminated sites is a factual dispute remaining for the jury. The property in question is a very large tract consisting of almost 200 acres. Although Goodman undeniably was aware of the buried fuel oil tanks, the unlicensed landfill and the additional underground storage tanks prior to January 16, 1989, there are competing reasonable inferences whether it had reason to suspect *additional* areas of contamination prior to that date, particularly areas located in different parts of the property. The DNR advised Goodman to investigate, remedy and monitor only the areas surrounding the buried fuel oil tanks and the unlicensed landfill. It did not advise Goodman to investigate the remaining portions of its property for contamination. Under these circumstances, a question of fact remains whether initiating this investigation in late 1993 or early 1994 was consistent with reasonable diligence.

Drawing every inference in favor of Goodman, as we must when reviewing a summary judgment, there is conflicting evidence as to whether Goodman used reasonable diligence in discovering the areas of contamination

[3] Whether there remain genuine material facts in dispute is a question of law this court decides de novo. ***Oney v. Schrauth***, 197 Wis.2d 891, 897, 541 N.W.2d 228, 230-31 (Ct. App. 1995).

identified by the ESA. For this reason summary judgment was inappropriate in this case.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.