COURT OF APPEALS
DECISION
DATED AND RELEASED

May 14, 1997

NOTICE

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, STATS.

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

No. 96-2298

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

REBECCA LUNDE-ROSS, INDIVIDUALLY AND AS GUARDIAN FOR ROZALIN ROSS, ELIZABETH ROSS, AND EDWARD ROSS III,

PLAINTIFF-APPELLANT,

V.

FEDERATED INSURANCE COMPANY, O'CONNOR OIL COMPANY AND JOSEPH WINTER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Fond du Lac County: JOHN W. MICKIEWICZ, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

BROWN, J. In July 1995, Rebecca Lunde-Ross[1] filed a claim against the owners and the insurer of the neighboring gasoline service station, alleging that petroleum discharges from the station had contaminated her property, a duplex residence. The circuit court subsequently awarded summary judgment to the station owners[2] and the insurer[3] after it determined that the six-year statute of limitations had expired. The circuit court found that Lunde-Ross discovered the cause of the contamination in November 1988 when she saw a worker at the station pumping liquid out of an underground storage tank (UST) and later dumping it onto the surface of the station property. We hold, however, that Lunde-Ross did not discover the cause of her damage until October 1989 when the Department of Natural Resources notified her that a UST at the station had been leaking and recommended that her property be tested for possible contamination. Accordingly, we further hold that Lunde-Ross filed her claim within the six-year window. We remand for further proceedings.

We begin with the background facts relating to the issue of when Lunde-Ross discovered the injury to her property. While the facts concerning liability have not been resolved, we observe that there is no dispute about these background matters.

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[1] Lunde-Ross has filed this suit as an individual and as the guardian for her three children.

[2] Lunde-Ross alleged that the station was jointly operated by Joseph Winter and O'Connor Oil Company. Winter and O'Connor Oil each responded by disputing the amount of control that the other had over the operation. Because the circuit court dismissed the claims against both, the factual questions relating to each party's degree of involvement were never resolved. As this matter remains unresolved, and for our convenience, we have collectively referred to these two parties as "the station owners."

[3] Federated Insurance Company is the liability carrier for O'Connor Oil.

Lunde-Ross purchased her property in January 1987. The station owners operated a retail gasoline station next door to her home from 1947 to 1989.

In August 1987, Lunde-Ross and her children received medical attention when they all became ill after digging in the backyard of their home. Then in October 1988, Lunde-Ross's husband filed a complaint with the local fire department alleging that the station owners had pumped liquid out of a UST and had disposed of it on the surface of the station property.

Lunde-Ross followed up on this complaint the next month. The fire department records reveal that Lunde-Ross made the following statements. She told the department that in October she had twice witnessed a worker draw liquid from a UST and dump it on the surface of the station property. Moreover, Lunde-Ross stated that she and her husband had previously noticed a "gasoline odor" at their property. Further, Lunde-Ross told the department that she pursued the complaint because an attorney had told her that the station owners' actions may be detrimental to her property.

In April 1989, the station owners removed two USTs from their property. They filed a claims report with their insurer[4] explaining that their eighteen-year-old premium gas tank was found to have three holes. The other tank, a seven-year-old 1000 gallon tank, was reported to "look fine but the lines appeared to be leaking." The station owners also told their insurer that the DNR had been contacted.

[4] See *supra* n.3.

In a letter dated October 30, 1989, the DNR wrote to the station owners to confirm that they had received a report about their USTs. In this letter, the DNR explained that "[t]he recommendation for contaminated soil removal on the property is an acceptable beginning and should be implemented as soon as possible." The DNR also made further recommendations for monitoring the clean-up, including that borings be taken "along the south side of the Ross driveway and one in their backyard." In addition, the DNR told the station owners that they had received complaints from Lunde-Ross about "gasoline vapors" in her home and that the DNR had advised Lunde-Ross and her husband to get air monitoring if they continued to notice the fumes. The DNR letter further indicated that the agency was providing a copy to Lunde-Ross and her husband.

As part of the clean-up process, in December 1990, the station owners complied with the DNR's recommendations and performed soil testing at Lunde-Ross's home. Although the results confirmed that her property was contaminated, and although Lunde-Ross had requested the results much earlier, the reports were not made available to Lunde-Ross until sometime in the fall of 1991.

Presented with these facts, the circuit court ruled that Lunde-Ross's claim was untimely under the six-year statute of limitations applicable to claims for property damage. *See* § 893.52, STATS. The court reasoned that Lunde-Ross's complaints to the fire department in October and November 1988 conclusively demonstrated that she had "sufficient knowledge" that the station owners' property "was the probable cause" of the injury to her property. Because Lunde-Ross did not file her suit until July 1995, almost seven years later, the court awarded

summary judgment to the station owners and the insurer.[5] On appeal, Lunde-Ross alleges that the circuit court erred in its analysis.

Both parties correctly identify the issue in this case—on what date did Lunde-Ross know (or when should she have known) that there was a relationship between the station and the contamination at her property? *See* ***Borello v. U.S. Oil Co.***, 130 Wis.2d 397, 406-07, 411, 388 N.W.2d 140, 144, 146 (1986); *see also* ***Stroh Die Casting Co., Inc. v. Monsanto Co.***, 177 Wis.2d 91, 102-03, 502 N.W.2d 132, 136 (Ct. App. 1993) (applying ***Borello*** to claim of environmental contamination). To establish this relationship, the plaintiff must one, know the fact of his or her injury, and two, know that the injury was probably caused by the defendant. *See* ***Borello***, 130 Wis.2d at 411, 388 N.W.2d at 146. Although this matter concerning the "date of discovery" of the injury to Lunde-Ross's property is a question of fact, when the relevant facts are undisputed, as they are in this case, it is a question of law that we address without deference to the circuit court. *See* ***Stroh Die Casting***, 177 Wis.2d at 104, 502 N.W.2d at 137.

Lunde-Ross maintains that she did not make (and could not have made) the connection between the contamination at the station and the contamination at her property until the "Fall of 1991" when she learned that "her property was in fact contaminated." Lunde-Ross concedes that her seeing the

[5] The circuit court's order specifically states that it was dismissing the claims against the insurer after determining that it was entitled to "summary judgment." *See* § 802.08, STATS. The order also states that the court was dismissing the claims against the station owners, noting that it was granting their "motion to dismiss." *See* § 802.06(2), STATS. The circuit court's analysis, however, reveals that it considered evidence contained in affidavits to reach its conclusion to grant the station owners' motion to dismiss. Hence, although the court used the "motion to dismiss" label when referring to the station owners, it actually granted them summary judgment. *See* ***Radlein v. Industrial Fire & Cas. Ins. Co***, 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984).

workers take liquid out of the USTs and dump it on the surface may have given her a "hunch" that the problems at the station had affected her property, thereby providing an explanation for why she got sick after digging in her backyard. She nonetheless maintains that until she received the reports on the actual test results on her property, she could not reach the objectively supportable conclusions that her property was contaminated, that it was contaminated by petroleum and that the cause was the station next door.

On the other side, the station owners and the insurer contend that the circuit court correctly determined that Lunde-Ross had all the necessary knowledge in the fall of 1988, as evidenced by her complaints to the fire department. Indeed, they note that Lunde-Ross was so suspicious that the station had contaminated her property that she sought advice from an attorney.

Applying the two-pronged ***Borello*** standard, we reject the station owners' assertion that Lunde-Ross discovered her claim in the fall of 1988. At that point, she could meet the first ***Borello*** prong—the illness which occurred after she was digging in her yard established that her property was probably contaminated. However, her seeing the worker dump liquid *on the surface* of the station property did not, or could not, inform her of the cause of the injury, *under the surface* leaking from the damaged USTs. All she could have reasonably gathered from seeing the surface dumping was that the station owners might not be following safe environmental practices and that she should therefore remain more alert in the future, as her attorney advised.

Still, while we conclude that the circuit court erred in its determination to award summary judgment, we disagree with Lunde-Ross's explanation that she could have only discovered the injury after she received the

test results in the fall of 1991. Instead, we hold that Lunde-Ross should have discovered her injury in October 1989 when she received a copy of the letter from the DNR which not only informed her that the station was contaminated from the leaking USTs, but indeed recommended that her property be tested for contamination.

Once Lunde-Ross received the DNR letter, she had the following information in her grasp, all of which was relevant to her discovery of this property damage claim: She became ill after digging in her yard. She smelled gasoline fumes at her property. And she knew that the station next door had leaking USTs which contaminated that property.

Taken together, this information supported the following two conclusions. Lunde-Ross's earlier illness resulting from digging in her yard and the smell of gasoline indicated the nature of her injury—her property was contaminated with gasoline. *See* ***Borello***, 130 Wis.2d at 406, 388 N.W.2d at 144. The leaking USTs and the contamination next door objectively supplied the probable cause of this injury—underground seepage from the station property to her property. *See* ***id.*** at 406-07, 388 N.W.2d at 144.

Having concluded that Lunde-Ross discovered the cause of her injury in the fall of 1989, not the fall of 1991, we nonetheless hold that the circuit court erred when it found her claim to be time barred. Lunde-Ross filed her claim in July 1995, within six years of October 1989. We therefore reverse the order dismissing Lunde-Ross's claims against the station owners (and the insurer) and remand this matter for further proceedings.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.