COURT OF APPEALS
DECISION
DATED AND FILED

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Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 98-1611

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

LEE NEERHOF,

PLAINTIFF-APPELLANT,

V.

R.J. ALBRIGHT, INC., ABC INSURANCE COMPANY, CENTRAL HEATING SERVICE, INC., DEF INSURANCE COMPANY, TEMPERATURE SYSTEMS, INC., AND GHI INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

LIBERTY MUTUAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS S. WILLIAMS, Judge. *Affirmed.*

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

PER CURIAM. Lee Neerhof appeals from a summary judgment in favor of R.J. Albright, Inc., Central Heating Service, Inc. and Temperature Systems, Inc., dismissing his personal injury action because it was filed after the statute of limitations expired. Because we agree that Neerhof's action was not timely commenced, we affirm.

We review decisions on summary judgment by applying the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. That methodology has been recited often and we need not repeat it here except to observe that 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* ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182. Summary judgment cannot be granted if different inferences might be drawn from the facts. *See* ***Leverence v. United States Fidelity & Guar.***, 158 Wis.2d 64, 74, 462 N.W.2d 218, 222 (Ct. App. 1990).

Neerhof was a general manager for Velvet Products, Inc., a stain and varnish producer. Velvet moved into a newly constructed building in 1990. R.J. Albright was the general contractor on the construction of the building. Central Heating installed the building's heating, ventilating and air conditioning (HVAC) system which was designed by Temperature Systems.

Neerhof began suffering from respiratory and other problems which he suspected were due to the new building's faulty furnace and ventilation system. Neerhof commenced his personal injury action on March 4, 1997. He alleged that the HVAC system was negligently completed and was unsafe for occupants of the building because it emitted unsafe gases.

R.J. Albright, Central Heating and Temperature Systems sought summary judgment on the grounds that Neerhof discovered, or in the exercise of reasonable diligence should have discovered, his alleged injury three years prior to his March 1997 complaint, or before March 4, 1994.

In its decision on summary judgment, the trial court concluded that the defendants established a defense based on the statute of limitations. After detecting an odor problem in the workplace, Neerhof contacted the gas company, which inspected the premises in November 1992 and advised that there were serious ventilation problems. Modifications were made to the HVAC system in 1993, but the odor problem persisted. In November 1992, Neerhof consulted his physician, Dr. Lauderdale, regarding the possibility that some of his health problems were attributable to the HVAC system, although the physician stated that while this was possible, it was difficult to be confident. Neerhof continued to complain through 1996 of difficulties with concentration and memory and other physical problems and to attribute those problems to carbon monoxide exposure at work.

The court concluded that Neerhof's action was barred by the statute of limitations.

> [A]t least as early as November 1992, [Neerhof] had a strong suspicion that the pollution problem at work was causing injury to his health, his concentration and memory which triggered an obligation to exercise reasonable diligence to verify that suspicion. I further conclude that he failed to do so.
>
> Plaintiff knew since 1990 that there was an air pollution problem at the plant. He did get information in 1992 that the situation was dangerous. He questioned several doctors about the effect on his health and memory, and was told that it was possibly a factor. He knew of complaints of other employees and, as general manager, had the power

> and probably the duty to investigate. I conclude that the information was certainly within his reach, and existed from early 1993.
>
> His investigation of the presence of carbon monoxide or "nerve gas" was minimal, and attempts at correction ineffective.

Summary judgment was granted because Neerhof's complaint was filed after the statute of limitations expired. Personal injury actions must be commenced within three years of the date the cause of action accrues. *See* § 893.54(1), STATS. The discovery rule applies to "all tort actions other than those already governed by a legislatively created discovery rule." ***Hansen v. A.H. Robins Co.***, 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983). The discovery rule provides that a cause of action accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, that he or she was injured and the cause of that injury. *See* ***Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 340, 565 N.W.2d 94, 105 (1997).

A plaintiff has a duty to inquire into the injury that results from tortious activity, may not ignore means of information reasonably available, and must in good faith address those particulars which may be inferred to be within the plaintiff's reach. *See* ***id.*** It is not required that the plaintiff "officially be informed by an expert witness of his or her injury, its cause or the relation between the injury and its cause." ***Id.*** at 341, 565 N.W.2d at 105 (quoting ***Clark v. Erdmann***, 161 Wis.2d 428, 448, 468 N.W.2d 18, 26 (1991)). "If the plaintiff has information providing the basis for an objective belief as to his or her injury and its cause, he or she has discovered the injury and its cause." ***Doe***, 211 Wis.2d at 341, 565 N.W.2d at 105.

Ordinarily, reasonable diligence is a question of fact. However, when the facts and reasonable inferences therefrom are undisputed, whether a

plaintiff has exercised reasonable diligence becomes a question of law. *See* ***id.*** Whether an inference is reasonable also presents a question of law. *See* ***id.***

We have independently reviewed the summary judgment record to determine whether there are disputed facts or reasonable inferences which may be drawn. In November 1992, Neerhof consulted Dr. Lauderdale and complained that his workplace had a faulty furnace and ventilation system. Dr. Lauderdale's treatment note states that Neerhof wondered whether some of his respiratory and other symptoms over the previous few winters were due to this problem. Dr. Lauderdale indicated in his note that "I think it is possible." Over the next several years, Neerhof visited numerous physicians, including specialists, in pursuit of his contention that his memory problems and other problems were related to carbon monoxide levels in his workplace. Neerhof expressed this belief and concern to the physicians he saw.

In November 1992, Neerhof also had the gas company come to the workplace to check for carbon monoxide. The gas company technician advised Neerhof that there was an open space between the chimney and the furnace, and that every time the furnace engaged the exhaust blew back into the building. The technician's exhaust reading was at a "danger level," and he recommended that Velvet Products either close down or operate with a door open eight inches.

The summary judgment record also reveals that Neerhof made a worker's compensation claim in which he claimed February 1, 1994, as his injury date and carbon monoxide poisoning as his injury. The claim was denied in December 1996.

Neerhof complained to his physician, Dr. Lauderdale, about health problems which he believed were attributable to the HVAC system, which

Neerhof had been told was defective. Dr. Lauderdale credited Neerhof's suspicions to indoor pollution. These facts are undisputed, do not admit of competing inferences and present a question of law as to Neerhof's reasonable diligence in pursuing his claim. We conclude that in November 1992, Neerhof had an objective basis for believing that he had been injured by the faulty HVAC system. In any event, Neerhof certainly knew of his injury and its cause no later than February 1, 1994, when he filed a worker's compensation claim on those grounds. We agree with the trial court's assessment of Neerhof's efforts to address his concerns regarding the ventilation system. We conclude that Neerhof was not reasonably diligent in pursuing his claim. Neerhof's March 4, 1997, action was commenced outside of the three-year statute of limitations period and was properly dismissed.

By the Court.—Judgment affirmed.

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