

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 30, 2008**

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. 2007AP144**

**Cir. Ct. No. 2005CV1428**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**CHICAGO-KENOSHA COMPANY,**

**PLAINTIFF-APPELLANT,**

**V.**

**WEST BEND MUTUAL INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Kenosha County:  
WILBUR W. WARREN III, Judge. *Affirmed.*

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

¶1 PER CURIAM. Chicago-Kenosha Company appeals from summary judgment in favor of West Bend Mutual Insurance Company. The circuit court dismissed Chicago-Kenosha's complaint because it was not filed

prior to the expiration of the statute of limitations. We agree with the circuit court that the complaint was not timely filed, and we affirm the judgment.

¶2 The following facts are undisputed. Chicago-Kenosha owns and operates a manufactured-home development, Timber Ridge Manufactured Homes. Chicago-Kenosha contracted with Hoover Well Drilling Company, West Bend's insured, to provide a water system for Timber Ridge (water main, shut-off valves and lateral water laterals). Hoover subcontracted the underground directional boring for the water system to R.J. Underground, Inc. During the boring, R.J. Underground hit and punctured sewer laterals at Timber Ridge. The underground boring was completed on or before August 25, 1999. In 2004, problems arose in Timber Ridge's water system which Chicago-Kenosha attributed to the punctured sewer laterals.

¶3 On September 30, 2005, Chicago-Kenosha sued West Bend<sup>1</sup> alleging that its insured, Hoover, and Hoover's subcontractor negligently performed the underground boring and damaged sewer laterals.<sup>2</sup> Chicago-Kenosha sought damages for property damage, repair, replacement and restoration costs, and additional municipal sewer charges incurred due to the damaged sewer laterals.

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<sup>1</sup> By the time Chicago-Kenosha commenced this action, Hoover had ceased doing business. Therefore, Chicago-Kenosha sued West Bend under the direct action statute, WIS. STAT. § 632.24 (2005-06). All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

<sup>2</sup> In 2001, Hoover released R.J. Underground from claims arising from the underground boring at Timber Ridge.

¶4 West Bend sought summary judgment because the six-year statute of limitations for Chicago-Kenosha's action had expired.<sup>3</sup> West Bend argued that at the latest possible date, the claim arose on August 25, 1999, when the underground boring was completed. Therefore, Chicago-Kenosha's September 30, 2005 complaint was not timely filed.

¶5 Chicago-Kenosha opposed West Bend's summary judgment motion and argued that the limitations period had not expired. Chicago-Kenosha believed that the damage caused by Hoover's subcontractor had been repaired in 1999 and there were no problems with Timber Ridge's water system until 2004 when municipal sewer charges increased markedly. Chicago-Kenosha's investigation of the increased sewer charges revealed that ground water had infiltrated the sewer system through breaches caused by the underground boring. Chicago-Kenosha repaired the sewer system and then sought redress from West Bend, Hoover's insurer. Applying the discovery rule, Chicago-Kenosha argued that the limitations period did not expire before it filed its complaint in September 2005.

¶6 The circuit court concluded that Chicago-Kenosha's complaint asserted a negligence claim, not a contract claim. After reviewing the summary judgment record, the court concluded that it was undisputed that Chicago-Kenosha knew by August 1999 of the damage caused by Hoover's subcontractor. In support, the court cited three 1999 letters sent by Chicago-Kenosha to Hoover asserting damage to the sewer system.

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<sup>3</sup> The statute of limitations for claims alleging breach of contract or tortious damage to property is six years. WIS. STAT. §§ 893.43 and 893.52.

¶7 In a May 1999 letter to Hoover, Timber Ridge’s principal, Dean Trafelet, acknowledged being informed by Hoover that some of Timber Ridge’s sewer laterals had been breached. In a June 1999 letter to Hoover, Trafelet acknowledged that an engineering company hired by Chicago-Kenosha to evaluate the condition of the sewer system found evidence of damage to the sewer laterals. On August 21, 1999, Trafelet wrote to Hoover asking for identification of the areas with damaged sewer laterals and to develop a plan for verifying damage in the future.

¶8 Hoover’s August 25, 1999 letter to Timber Ridge identified the lots on which punctured sewer laterals had been repaired. Hoover also noted that during the course of the project, it had never been able to verify the depth of the laterals throughout the development. Therefore, Hoover offered to remain available in the future to monitor potential boring-related problems.

¶9 Applying the discovery rule governing torts,<sup>4</sup> the circuit court found that Chicago-Kenosha knew that the sewer laterals had been damaged prior to August 25, 1999. Chicago-Kenosha’s September 2005 suit was not timely in relation to the August 1999 discovery. Chicago-Kenosha appeals.

¶10 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe

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<sup>4</sup> Under the discovery rule, “a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury but also that the injury was probably caused by the defendant’s conduct or product.” *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986).

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. *Id.* at 496-97.

¶11 In addition to independently determining the propriety of summary judgment, we also independently decide the legal question of whether the statute of limitations applies to the facts. *Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 18, 469 N.W.2d 595 (1991). “Whether a statutory limitations period requires dismissal of an action where the underlying facts are not in dispute is also a question of law.” *State v. Hamilton*, 2003 WI 50, ¶14, 261 Wis. 2d 458, 661 N.W.2d 832.

¶12 On appeal, Chicago-Kenosha identifies the following factual disputes as sufficient to preclude summary judgment: whether Chicago-Kenosha knew of its injuries on or before August 25, 1999; whether Chicago-Kenosha, through the exercise of reasonable diligence, should have known of its injuries before August 25, 1999; and whether Chicago-Kenosha knew of the causal connection between Hoover’s negligence and its injuries on or before August 25, 1999. These issues are resolved in the summary judgment record against Chicago-Kenosha.

¶13 The 1999 letters from Chicago-Kenosha to Hoover indicate that as of August 25, 1999, Chicago-Kenosha knew of its injuries and of the causal connection between the boring activities of Hoover’s subcontractor and the damage to Timber Ridge’s sewer system. The June 1999 letter expresses Chicago-Kenosha’s concern that damaged laterals might not have been properly repaired or that damage to laterals might not be detected. The letter notes that such damage “could be the points of both present and future infiltration, as well as a starting source of future clogging.” Chicago-Kenosha’s August 21 letter to Hoover demands identification and repair of disrupted sewer laterals. Hoover’s August 25 letter to Chicago-Kenosha disclosed the lots where sewer laterals had to be repaired and asserted that in the course of

construction, Hoover had been unable to verify the actual depths of the existing sewer laterals in the development. The letter recognized that there could be future problems with the water system arising from the work performed.

¶14 Chicago-Kenosha argues that it did not discover damage related to underground boring until it had the sewer system videotaped in 2004 after Timber Ridge's municipal sewer charges rose inexplicably. Therefore, the limitations period began to run at that time, and the 2005 complaint was timely. We disagree. This inspection technology was known to and employed by Chicago-Kenosha in 1998 to confirm the integrity of the sewer system before Hoover began its work in April 1999. This inspection option was suggested to Timber Ridge in June 1999 by a sewer evaluator, but Timber Ridge declined to employ the technology at that time. The condition of the sewer system was clearly an ongoing subject of concern in August 1999.

¶15 In light of Chicago-Kenosha's knowledge in the summer of 1999 of damage to the laterals and the cause of the damage, and its concern that not all repairs would be made, it was not reasonable to wait until 2004 to investigate the integrity of Timber Ridge's sewer system. The discovery rule required Chicago-Kenosha to exercise reasonable diligence to discover its injuries and their cause. *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986).

¶16 Even if Chicago-Kenosha's claim sounded in contract, Chicago-Kenosha did not timely sue West Bend. The damage was known to Chicago-

Kenosha no later than August 25, 1999. Chicago-Kenosha's September 30, 2005 suit was not timely in relation to the six-year limitation period for contract actions.<sup>5</sup>

¶17 In conclusion, no matter whether Chicago-Kenosha's claim sounded in contract or tort, the complaint was not filed before the six-year statute of limitations expired. The circuit court correctly granted summary judgment to West Bend and dismissed Chicago-Kenosha's complaint.

*By the Court.*—Judgment affirmed.

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

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<sup>5</sup> The summary judgment record reveals that Dean Trafelet, Chicago-Kenosha's principal, was aware of the contract statute of limitations. In a July 25, 2005 letter to a West Bend representative, Trafelet mentioned the limitations issue and noted that the contract limitations period "will toll in the fall of this year."

