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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/II

February 12, 2014

To:

Hon. Lisa K. Stark
Circuit Court Judge
Eau Claire County Courthouse
721 Oxford Avenue
Eau Claire, WI 54703

Kristina Aschenbrenner
Clerk of Circuit Court
Eau Claire County Courthouse
721 Oxford Avenue
Eau Claire, WI 54703-5496

Richard Alexander
Alexander Law Group
111 W. Saint John St., Ste. 700
San Jose, CA 95113

Matthew A. Biegert
Michael J. Brose
Doar Drill & Skow, S.C.
P. O. Box 388
New Richmond, WI 54017-0388

Larry Chilton
Chilton Yambert & Porter
303 W. Madison, Ste. 2300
Chicago, IL 60606

Heather Aline Davis
Gonzalez, Saggio & Harlan, LLP
111 E. Wisconsin Ave., Ste. 1000
Milwaukee, WI 53202

Amanda Hawes
Law Offices of Amanda Hawes
760 N. First Street, Ste. 1
San Jose, CA 95112

Dennis M. Sullivan
Michael Hughes
Chilton Yambert & Porter LLP
103 N. Hamilton St.
Madison, WI 53703

Michael R. Sieben
Sieben Polk, P.A.
1640 S. Frontage Road; Ste. 200
Hastings, MN 55033

You are hereby notified that the Court has entered the following opinion and order:

2012AP1493 Donald Christ v. Exxon Mobil Corporation (L.C. #2006CV420)

Before Brown, C.J., Reilly and Gundrum, JJ.

Donald Christ et al. (hereafter Christ et al.) appeal from a circuit court judgment dismissing their wrongful death and survival claims as time barred. The respondents, Exxon

Mobil Corp. et al. (hereafter Exxon et al.), cross-appeal from the same judgment and challenge the circuit court's denial of their motion to sever the claims of Christ et al. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).[1] We conclude that the discovery rule applies to the claims of Christ et al. Therefore, we reverse the judgment of dismissal and remand for further proceedings on the question of whether the claims of Christ et al. are time barred after application of the discovery rule. On the cross-appeal, we affirm the circuit court's denial of the motion to sever.

Christ et al., former Uniroyal employees and special administrators of deceased employees' estates, brought wrongful death and survival claims against Exxon et al., companies that allegedly contributed to the presence of benzene-containing petroleum products in the workplace. Christ et al. alleged injury from benzene exposure. It is undisputed that a three-year statute of limitations applies to wrongful death and survival claims. WIS. STAT. § 893.54(2) (an action to recover damages for injury to a person and an action to recover damages for death caused by a wrongful act "shall be commenced within 3 years or be barred"). It is further undisputed that Christ et al. filed their claims more than three years after the death of the former employees.[2]

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

[2] Certain Christ et al. plaintiffs filed the original complaint in July 2006. Additional Christ et al. plaintiffs filed an amended complaint in December 2007. The provisions of WIS. STAT. § 893.54(2) were the same at the time both complaints were filed and at the time of our decision in this appeal.

Exxon et al. sought dismissal on the ground that the claims were time barred under WIS. STAT. § 893.54(2). Christ et al. countered that the discovery rule applied to their claims, and the claims were timely brought. The circuit court concluded that the discovery rule did not apply and dismissed the claims. Christ et al. appeal.

The parties agree that the circuit court dismissed Christ et al.'s claims on summary judgment. ***Dakin v. Marciniak***, 2005 WI App 67, ¶4, 280 Wis. 2d 491, 695 N.W.2d 867. We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. ***Id.*** We independently review whether the statute of limitations has run on a particular claim. *See* ***State v. Slaughter***, 200 Wis. 2d 190, 196, 546 N.W.2d 490 (Ct. App. 1996).

In ***Beaver v. Exxon Mobil Corp.***, No. 2012AP542, unpublished slip op. (WI App May 9, 2013), *review denied*, 2014 WI 3, __ Wis. 2d __, __ N.W.2d __ (2013), we held that wrongful death and survival claims alleging the same basis for liability as set forth in this appeal were subject to the discovery rule. ***Id.***, ¶27. The discovery rule provides that the statute of limitations begins to run when the plaintiff discovers or should have discovered the injury and that the injury may have been caused by the defendant. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 335, 565 N.W.2d 94 (1997).

We are persuaded by the analysis and decision in ***Beaver***. Accordingly, we hold that the wrongful death and survival claims of Christ et al. are subject to the discovery rule, and we reverse the circuit court's judgment dismissing the claims of Christ et al. and remand for further proceedings. We do not determine whether, under the discovery rule, the claims of Christ et al.

were timely, and we do not reach any issue pertaining to the merits of these claims. We leave these determinations for the circuit court on remand.

In their cross-appeal, Exxon et al. argue that the circuit court erroneously denied their WIS. STAT. § 803.06(1) motion to sever due to misjoinder of parties. Whether to grant such a motion was within the circuit court's discretion. ***Fuchs v. Kupper***, 22 Wis. 2d 107, 112, 125 N.W.2d 360 (1963). We will affirm a circuit court's discretionary decision if the decision had a reasonable basis. ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

In addressing the severance motion, the circuit court reasoned that severance implicates whether parties were permissibly joined under WIS. STAT. § 803.04. Section 803.04(1) provides in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

The circuit court concluded that joinder was appropriate when Christ et al. commenced their case. All of the plaintiffs' claims arose from employment with the same employer from approximately 1945 to 1992; all of the plaintiffs claimed that the employees developed cancer after being exposed to benzene products in the workplace; the employees came into contact with benzene either directly or in the ambient air; and all of the defendants allegedly produced, manufactured, and delivered benzene products to the employer. The court concluded that at the

outset of the case, there were common legal and factual questions warranting joinder. WIS. STAT. § 803.04.

As the court considered the possibility of severance, it expressed concerns regarding delay, inconvenience, and added expense to the parties and the court. The court noted the delay in seeking severance. The complaint was filed in 2006, proceedings were stayed for twenty-seven months due to the bankruptcy of one of the defendants, and Exxon et al. did not seek severance until December 2011. The delay in seeking severance undermined any claim that Exxon et al. would be prejudiced if the plaintiffs remained joined. The court noted the efficiencies generated by its case management orders and the cooperation of the lawyers (one set of counsel for the plaintiffs and one set of counsel for the defendants), and the court expressed concern about the logistics of case management if the plaintiffs were severed. The court further noted that it did not have sufficient information about the nature of the employees' benzene exposure and whether that exposure caused their illnesses to determine if the claims should be severed. Finally, the court observed that pending dispositive motions could change the complexion of the case. The court declined to sever but conceded that it would be appropriate to revisit the question of severance or separate trials in future pretrial proceedings.

We are not persuaded by Exxon et al.'s individual arguments challenging the circuit court's refusal to sever. The court took a global view of this complex litigation, as do we. The court considered the WIS. STAT. § 803.04 requirements for joinder, the allegations in the complaints, the lack of information regarding the precise nature of the plaintiffs' benzene exposure and illnesses to counter what it concluded was proper joinder of parties at the commencement of the case, the current case management model and its attendant efficiencies, and the lack of prejudice arising from the status quo. The court considered that severance could

be revisited after further discovery, development of the facts, and dispositive motions. Under the circumstances of this case, the court weighed and balanced appropriate factors and reached a reasonable decision. The court did not misuse its discretion when it declined to sever.

We are also not persuaded by Exxon et al.'s argument that the circuit court erroneously considered prejudice because prejudice is not a factor in the severance analysis. During the motion hearing, the court remarked that the defendants raised the issue of prejudice in their severance motion. The defendants did not argue during the hearing that the court could not consider prejudice. Furthermore, during the hearing, the defendants conceded that the work of preparing the claims for trial would not change if the parties remained joined, and the defendants would not be prejudiced by the status quo until severance or separate trials could be considered at a later date. In light of these remarks during the motion hearing, Exxon et al. cannot take what we believe to be an inconsistent position on appeal that the court erroneously considered prejudice. ***Siegel v. Leer, Inc.***, 156 Wis. 2d 621, 628, 457 N.W.2d 533 (Ct. App. 1990).

We reverse the judgment of dismissal and remand for further proceedings on the question of whether the claims of Christ et al. are time barred. We affirm the circuit court's denial of the motion to sever. Having prevailed in the appeal and the cross-appeal, Christ et al. may seek WIS. STAT. RULE 809.25(1) costs for the appeal and cross-appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is affirmed in part and reversed in part, and the cause is remanded for further proceedings.

IT IS FURTHER ORDERED that Christ et al. may seek WIS. STAT. RULE 809.25(1) costs for the appeal and cross-appeal.

Diane M. Fremgen
Clerk of Court of Appeals