**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 27, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP2618** **Cir. Ct. No. 2014CV2292**

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

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**DOROTHY THILL,**

**PLAINTIFF-APPELLANT,**

**MARILYN TAVENNER, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,**

**SUBROGATED-PLAINTIFF,**

**V.**

**PREMIER REAL ESTATE MANAGEMENT, LLC AND SUMMIT LAKES APARTMENTS, LLC,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Dorothy Thill appeals from an order granting the motion of Premier Real Estate Management, LLC and Summit Lakes Apartments, LLC, for summary judgment dismissing her complaint as barred by the statute of limitations. Thill contends that the circuit court misapplied the discovery rule. We disagree and affirm.

¶2 On May 20, 2014, Thill commenced this action against Summit and Premier (collectively Summit), the owner and manager, respectively, of an apartment complex. Thill alleged that she lived in an apartment at that complex between 2005 and 2012, and that on May 23, 2011, she discovered that toxic mold existed in the apartment building. She later discovered that the toxic mold had caused her serious injuries. Summit, Thill claimed, was negligent in that it knew or should have known of the toxic mold in the building but did not warn her or remove it.

¶3 After some discovery was conducted, Summit moved for summary judgment dismissing the complaint as barred by the statute of limitations, arguing that Thill discovered that toxic mold caused her injuries, at the very latest, by April 2011.

¶4 Thill opposed the motion, contending that while she suspected that toxic mold had caused her injuries prior to May 2011, it was not until, at the earliest, May 23, 2011, that she "might have been convinced that the mold was, in fact, the cause of her" injuries.

¶5 The circuit court granted Summit's motion for summary judgment and dismissed the complaint.

¶6 Review of an award of summary judgment is de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is warranted where there are no genuine issues of material fact, and a party is entitled to judgment as a matter of law. ***Hoida, Inc. v. M & I Midstate Bank***, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. The application of a statute of limitations presents a question of law subject to de novo review. ***Schmidt v. Northern States Power Co.***, 2006 WI App 201, ¶15, 296 Wis. 2d 813, 724 N.W.2d 354.

¶7 An action to recover damages for personal injuries is governed by a three-year statute of limitations. WIS. STAT. § 893.54(1) (2013-14).[1] Under the discovery rule, the statute begins to run when "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). Knowledge of an injury combined with a layperson's mere "suspicion or a hunch" that the defendant's conduct caused the injury is insufficient to start the running of the statute of limitations. ***Id.*** at 414; *see* ***S.J.D. v. Mentor Corp.***, 159 Wis. 2d 261, 266, 463 N.W.2d 873 (Ct. App. 1990). Rather, there must be information available to the claimant that would form the basis for an objective belief as to the nature of the injury and its cause. ***Claypool v. Levin***, 209 Wis. 2d 284, 300, 562 N.W.2d 584 (1997) (stating that the cause of injury is discovered "when a potential plaintiff has information that would give a reasonable person notice of her injury and its cause"); ***Borello***, 130 Wis. 2d at 414. "This does not mean that

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

if there is more than one reasonable cause of the injury that discovery cannot occur." ***Claypool***, 209 Wis. 2d at 300. It "does not require that the potential plaintiff know with certainty the cause of her injury," and it does not require a "formalistic approach," such as an opinion from an expert. ***Id.*** (citation omitted).

¶8 Since Thill commenced this action on May 20, 2014, if she knew or should have known the nature of her injury, the cause of her injury, and Summit's part in that cause prior to May 2011, then her action is time barred. The evidence Summit submitted showed that as early as September 23, 2009, Thill complained to Randall Melchert, an optometrist, of dryness in her eyes, which she attributed "probably" to mold in her apartment. He recommended that Thill get a "deep cleaning" of her apartment.

¶9 Between July 27, 2010, and October 5, 2010, Thill complained five times to Summit about mold in her apartment. In response, Summit took some action such as spraying Moldex and painting over the mold.

¶10 On November 23, 2010, Thill reported to Melchert that the dryness in her eyes had improved since the time Summit had "painted over" the "black mold" in her apartment.

¶11 On January 18, 2011, Thill visited Dr. Jordan Fink, an allergist, informing him that in the summer of 2010 mold was found in her home, but that once the mold had been remediated, some of the symptoms she had experienced in her eyes and ears as far back as 2009 had "significantly improved." She did not notice "any particular triggers other than the recent mold," Fink related. Skin testing was done which was negative for mold.

¶12 On March 24, 2011, during a visit with Dr. Subbanna Jayaprakash, Thill reported having "been considerably affected by … some exposure to mold at home." Jayaprakash suggested that Thill "discuss the matters with her rental company, perhaps to see if she can move to a different apartment in the local area."

¶13 On March 30, 2011, during a visit with Dr. Maribeth Sadie, Thill recounted that she has allergic conjunctivitis and that her doctor had suggested she move since November 2009 because of mold.

¶14 In April 2011, Thill asked Summit to contact a mold specialist and have her apartment tested. Summit requested, in response, medical documentation that Thill's apartment was causing her allergy and not her cat because testing her apartment would "be very expensive." On April 13, 2011, Fink's office issued a letter to Thill indicating that she did not have an allergy to cats. Thill forwarded the letter to Summit.

¶15 On April 22, 2011, Dr. William Shultz, an ophthalmologist, gave Thill a letter, which she forwarded to Summit, stating that she had "a mild amount of allergic conjunctivitis" in both eyes. Six days later, during an office visit with Shultz, Thill reported that over the past four weeks she had noticed that her eyes seemed to become swollen, red, and painful when she was in the basement, which had mold. On that same day, Shultz added to his letter of April 22, 2011, a handwritten notation that "[a]llergic conjunctivitis can be a result of mold exposure." Thill subsequently provided this letter to Summit in late April 2011.

¶16 On May 19, 2011, Duraclean Fire & Water Restoration completed a mold remediation of Thill's apartment.[2] Insulation in Thill's apartment was black with mold. It was removed. A few days later, Thill developed a sinus infection. On May 24, 2011, Duraclean treated the air ducts in Thill's apartment with Microban spray.

¶17 On May 31, 2011, Fink drafted a letter stating that Thill had indicated that her home was contaminated with mold and that "[s]uch contamination may adversely affect her health and so she should not be in that home." Thill forwarded this letter to Summit.

¶18 This evidence establishes as a matter of law that Thill had the type of objective information that would give a reasonable person notice of the cause of the injuries.[3] The very impetus for the remediation of Thill's apartment for mold on May 19, 2011, was her belief that her apartment had mold and that it was causing her injuries. When Thill requested that Summit clean her apartment, it asked her to obtain medical proof that her apartment was causing her allergy, leading Thill to solicit opinions from two of her doctors in order to rule out other causes such as Thill's cat. Shultz issued one such letter in April 2011, stating that Thill has "a mild amount of allergic conjunctivitis" and that it "can be a result of

[2] The record contains photos of Thill's apartment and the basement underneath her apartment depicting mold. During discovery, Thill's attorney said that Thill took the photos on May 23, 2011, but, as Summit points out, this date contradicts the fact that the mold remediation was completed on May 19, 2011. Thill does not argue that she did not discover the mold or the defendant's role vis-à-vis the mold prior to May 23, 2011.

[3] While Thill did not identify any specific injury in her complaint, her medical records indicate she identified eye irritation, sore throat, headaches, coughing, dizziness and nasal irritation/congestion. Thill does not argue that she did not discover the nature of her injuries until after May 31, 2011—she argues only that she had not discovered the cause.

mold exposure." Thill argues that this is "no definitive diagnosis," but a definitive diagnosis is not required. *See* ***Clark v. Erdmann***, 161 Wis. 2d 428, 446-48, 468 N.W.2d 18 (1991). In any case, Shultz's statement is at least as definitive as the statement Fink made in his letter of May 31, 2011, which Thill concedes "was the earliest possible date that … Thill could be charged with knowledge that mold existing in the apartment building was in fact probably causing some of her illness." *See* ***Claypool***, 209 Wis. 2d 284 at 300.

¶19 Even prior to when Shultz issued his letter, Thill had noticed a cause and effect relationship between the removal of the mold and an improvement in her symptoms. As Thill related to Fink in January 2011, she noticed her symptoms had improved after the mold in her apartment had been remediated and that she did not notice "any particular triggers other than recent mold."[4] When Thill's observations are considered in connection with the letter Shultz issued at Thill's request so that Summit might remediate her apartment for mold, it is clear that a reasonable person with the objective information known to Thill would discover the cause of the injuries, or at least should have discovered it, no later

[4] Thill argues that the circuit court failed to consider that during a visit with Jayaprakash on September 22, 2011, Jayaprakash wrote that "the exact causation of the current problems remains an unknown mystery." The record of this entry, however, is incomplete, and the problems Jayaprakash mentioned seemed to have something to do with Thill having trouble sleeping. In any case, Thill never highlighted this portion of the record in arguing that a summary judgment should be denied, a fact Thill concedes. Instead, Thill blithely offers that she "assumed that the trial court would consider the doctor's uncertainty and that no argument was necessary since the statement speaks for itself." Thill also appears to fault Summit for submitting only a part of this entry. This partial entry, however, immediately preceded the March 24, 2011 entry that Summit was relying on.

than April 28, 2011, which was more than three years prior to Thill's commencement of this action, rendering it time barred.[5]

¶20 In opposition to Summit's establishment of a prima facie case of summary judgment on the basis of the statute of limitations, Thill failed to raise a triable issue of material fact. *See* ***Board of Regents v. Mussallem***, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980). Therefore, the circuit court properly granted Summit's motion, and its order is affirmed.

*By the Court.*—Order affirmed.

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

[5] Thill also relies on a report from Dr. Keith Berndtson who first evaluated Thill on March 24, 2014, and then issued a report after this action was commenced, stating that when Thill was evaluated "[s]he presented with a chronic multi-symptom, multi-system illness that was unexplained despite prior evaluations." Based on this opinion, Thill states she "would have a very strong argument that the statute of limitations would not begin to run until March 24, 2014." To the extent Thill is actually making such an argument, it contradicts her concession that she had discovered her injury by May 31, 2011. How Berndtson came to the conclusion that "prior evaluations" had not explained Thill's illness is not explained itself, and, in any event, a definitive diagnosis is not required under the discovery rule.