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## Delay in stating cause of action ends case

A recent case from a federal court in Texas clarified when a cause of action accrues for purposes of the discovery rule under Texas law.

In *Jones v. Anderson*, No. 4:14CV366, 2016 WL 4543551 (E.D. Texas 2016), the plaintiff's employer rented a commercial building from the defendants. Plaintiff Wanda Jones claimed that during the course of her employment, she suffered personal injuries from being exposed to asbestos, mold and dead animals.

Her lawsuit sought damages for her personal injuries as well as loss of earning capacity and the cost of medical treatment.

The defendants moved for summary judgment arguing that the plaintiff's claims were barred by the statute of limitations. In response, the plaintiff argued that her claims were saved by the discovery rule.

U.S. Magistrate Judge Don Bush's order focused on the sole issue of when the plaintiff's claims had accrued.

In Texas, causes of action based on personal injury must be brought within two years of accrual, which is the day the person sustains the injury. However, the discovery rule allows the accrual of a cause of action to be deferred if the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable.

As the 5th U.S. Circuit Court of Appeals has explained of the discovery rule under Texas law, "The rule delays the statute of limitations only until the claimant knows or should know the facts that could support a cause of action, not until she realizes that the facts do support a cause of action.

"It does not operate to toll the running of the limitations period until such time as plaintiff discovers all of the elements of a cause of action. Once a claimant

learns that she has been injured, the burden is on her to determine whether she should file suit."

The court also noted that under *Childs v. Haussecker*, 974 S.W.2d 31 (Texas 1998), "the accrual of a cause of action is not dependent on a confirmed medical diagnosis; a plaintiff whose condition has not yet been affirmatively diagnosed by a physician can have or, in the exercise of reasonable diligence could have, access to information that requires or would require a reasonable person to conclude he likely suffers from a work-related illness."

Jones filed suit on June 6, 2014. Therefore, if the plaintiff's claims accrued prior to June 6, 2012, they would be time barred.

In evaluating the defendants' limitations arguments, the court reviewed the summary judgment evidence for anything occurring prior to June 6, 2012. For example, the court highlighted the plaintiff's sworn summary judgment affidavit, wherein the plaintiff claimed that she sought medical treatment in the emergency room for stress in January 2012.

In the plaintiff's interrogatory responses, she expressed concerns regarding the condition of the building in May and on June 1, 2012. The court did note, however, that the plaintiff did not receive test results regarding asbestos until June 14, 2012, or the tests results regarding mold until June 19, 2012. Even so, the court noted that her interrogatories clearly state that she first discovered bird feces and rotting and dead animals in May 2012.

"In isolation," the court said, "plaintiff's interrogatory responses and affidavit may evidence nothing more than a suspicion by plaintiff such that reasonable minds might differ as to whether a reasonable person

### TOXIC TORT TALK



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in plaintiff's position would have been on notice that she suffers from some injury and she knows, or in the exercise of reasonable diligence should have known, that the injury is likely work-related."

However, the court also reviewed documents offered by the defendants dated in May

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2012, in which the plaintiff complained about the condition of the building including references to mold, possible asbestos and bird poop, stating that the employees were getting "extremely sick from breathing it."

The defendants also introduced a document titled "Request for Approval," also

dated May 2012, wherein the plaintiff requested that the building be tested for mold and asbestos, and that the vents be cleaned "ASAP!" stating "We are sick — for our health we need this done" and "our health is at risk!"

The plaintiff neither challenged the authenticity of the documents nor argued that the documents were not created on the dates stated. The plaintiff argued that her claims did not accrue until she was diagnosed by her doctor. The documents the defendants set forth, the plaintiff argued, evidenced nothing more than "mere suspicion," which is not enough to trigger limitations.

The court disagreed, again citing the holding in *Childs*, and reasoned that the documents the defendants produced established that there was no fact issue that, prior to June 6, 2012, the plaintiff concluded that her work conditions were causing her to be sick; therefore, the limitations period had run.

In addition to the aforementioned evidence, the court noted that the plaintiff reported to her physician that she suspected her symptoms were work-related as early as 2011. Furthermore, the plaintiff's own expert report indicates that by 2011, her symptoms would improve when she left work and then would worsen when she returned to work and that she clearly felt better at home than at work.

In examining all of the evidence, the court concluded that the record establishes more than a mere suspicion, and reasonable minds could not differ that prior to June 6, 2012, the plaintiff had discovered that there was a causal connection between her health symptoms and her working conditions.

Therefore, her claims were barred by the statute of limitations.