UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7371
Summary Calendar

WILLIAM H. WARD, JR., ET AL.,

Plaintiffs,

DANIEL THOMPSON and
WILLIAM CROSS, JR.,

Intervenors-Plaintiffs-Appellants,

VERSUS

MONSANTO COMPANY and
NATIONAL INDUSTRIAL CONTRACTORS, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(G-90-CV-302)

(October 22, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

William Cross, Jr. and Daniel Thompson challenge the summary judgment granted Monsanto and National Industrial Contractors. We **AFFIRM.**

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

During October 1988, Cross and Thompson were performing construction work at a Monsanto chemical plant in Texas. Both were employed by a subcontractor to National Industrial Contractors, Inc. (NIC), Monsanto's general contractor at the plant.

Cross and Thompson allege that they were "sprayed by toxic materials at the construction site" on October 5 and October 7, 1988. Less than one year later, both filed claims for workers' compensation. Cross' claim stated that he inhaled fumes "to [the] point of near unconsciousness" and that the exposure to the toxic materials had damaged his "lungs, heart, esophagus, the muscles over most of my body, and other parts of my body." On the claim form, Cross stated that he was injured on October 5 and October 7, 1988. Thompson's claim alleged that the exposure damaged his "lungs and esophagus and other parts of my body." He represented that his injury occurred on October 5, 1988.

On October 14, 1992, four years after the alleged injury causing incident, Cross and Thompson filed motions to intervene as plaintiffs in an action filed in 1990 by four of their co-workers (they are represented by the same attorney who prepared Cross and Thompson's workers' compensation claims and represents them now). After permitting intervention, the district court awarded summary judgment in favor of Monsanto and NIC, determining that Cross and Thompson's claims were time barred. Subsequently, it severed their claims, and entered a final judgment dismissing them.

II.

A summary judgment is reviewed *de novo*. *E.g.*, ***Amburgey v. Corhart Refractories Corp.***, 936 F.2d 805, 809 (5th Cir. 1991). It is appropriate when, viewing the evidence in a light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** (citing and quoting Fed. R. Civ. P. 56(c)). When a defendant relies on a statute of limitation as a basis for summary judgment, the defendant must show that the suit is barred as a matter of law. *E.g.*, ***Albertson v. T.J. Stevenson & Co.***, 749 F.2d 223, 228 (5th Cir. 1984).

Texas law, which governs this action, provides that an action for personal injury must be brought "not later than two years after the day the cause of action accrues." Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West 1986). Generally, a cause of action accrues "when facts come into existence which authorize a claimant to seek a judicial remedy". ***Robinson v. Weaver***, 550 S.W.2d 18, 19 (Tex. 1977). In personal injury cases, accrual occurs "when the wrongful act effects an injury, regardless of when the claimant learned of such injury." ***Id.*** If, however, "a claimant was unable to know of his injury at the time of actual accrual", Texas employs a discovery rule exception. ***Id.*** Under the discovery rule, "the limitations period is tolled until the plaintiff either does discover [injury] or should discover them." ***American Medical Elect. v. Korn***, 819 S.W.2d 573, 577 (Tex. Ct. App. 1991), *writ denied* (Jan. 22, 1992).

Cross and Thompson seek shelter under the discovery rule. Unlike injury resulting from continuous exposure to toxic chemicals, to which the discovery rule might apply, they were "sprayed" on two days -- October 5 and 7, 1988. But, even assuming that they are entitled to the benefit of the discovery rule, we still conclude that they are barred, as a matter of law, from asserting their claims. In August and September, 1989, they submitted workers' compensation claims for injuries arising out of the alleged exposure. The injuries alleged were not trivial; both claimed damage to their lungs and esophagi. The two-year statute of limitations period expired long before they submitted their claims (as intervenors) in October, 1992.

Cross and Thompson assert that the filing of workers' compensation claims was "strictly a precautionary measure designed to protect the rights of Cross and Thompson under the workers' compensation law." To say the least, we are troubled by this position. Either Cross and Thompson did not think they were injured,[2] in which case their compensation claims were arguably

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[2] We have serious doubts that this is so. For example, Thompson admits before this court that he went to a doctor on the day of the alleged spraying and was diagnosed with laryngitis; thus, he knew of an injury. It matters not if he was aware of a less severe injury than that about which he subsequently complains; "[t]he limitations period begins to run as soon as the plaintiff discovers or should discover *any* harm, however slight, resulting from the negligence of the defendant." *American Medical*, 819 S.W.2d at 577 (citation omitted). "If the plaintiff does not sue within two years of the discovery of minor injury but waits until the injury becomes substantial, the suit will be time barred." *Id.* (citation omitted) Cross' only contention before this court is that he did not see a doctor prior to the submission of the workers' compensation claim. Of course, the fact that Cross had not seen a doctor prior to filing the compensation claim does not refute that

fraudulent, or, more likely, they were aware of *some* injury, in which case their claims in this case are time barred. *See* ***American Medical***, 819 S.W.2d at 577 (noting that limitations period begins to run as soon as "*any* harm, however slight" is discovered). We cannot infer from the record the intent necessary to support the former proposition; thus, we think the latter conclusion, for which there is support in the record, is correct. Cross and Thompson unquestionably had discovered their injuries by September 1989. Accordingly, their claims were barred as a matter of law.

III.

For the foregoing reasons, the dismissal of Cross and Thompson's complaints is

AFFIRMED.

Cross knew he was injured.