Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANTS:

JACK E. MORRIS
Benson, Pantello, Morris, James & Logan
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEES:

JEFFREY P. SMITH
DAVID K. HAWK
Hawk, Haynie, Kammeyer & Chickedantz LLP
Fort Wayne, Indiana

PHILIP E. KALAMAROS
Hunt Suedhoff Kalamaros LLP
St. Joe, Michigan

IN THE COURT OF APPEALS OF INDIANA

ACE RADIATOR WORKS, JOHN WOOD, PENNY WOOD, and ACE RADIATOR, INC.,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 02A04-0703-CV-157
DENNIS RUNKLE and DAVENPORT INSURANCE AGENCY, INC.,	)	
Appellees-Defendants.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0406-PL-271

August 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Ace Radiator Works, John Wood, Penny Wood, and Ace Radiator, Inc. (collectively "Ace") appeal the trial court's grant of summary judgment to Dennis Runkle and Davenport Insurance Agency, Inc. (collectively "Runkle"). Ace raises the following dispositive issue: whether the trial court erred in granting summary judgment on the basis that its claims against Runkle were barred by the statute of limitations.

We affirm.

FACTS AND PROCEDURAL HISTORY

In February 1990, Runkle provided Ace with a written proposal ("the Plan") regarding the use of a life insurance policy with annual premiums to provide a fund Ace could use to pay its obligations under a deferred compensation agreement it had with Jeff Reinhart ("Reinhart"), a key employee of Ace. Specifically, the Plan proposed purchasing a Cincinnati Life Insurance Universal Life II policy with a $250,000 death benefit ("the Policy"). Ace could use the Policy's accumulated cash value or death benefit to pay Reinhart or his spouse the benefits required under the deferred compensation agreement. The amount of accumulated cash value available to Ace to fund the deferred compensation agreement was based upon certain assumptions relating to the Policy, which included a premium of $2,500 per year and current interest rates. The first page of the Plan contained the following language: "Accumulation of cash value is not guaranteed. Rather, cash accumulation is a projection based on the current interest rate." *Appellees' App*. at 3.

The Plan contained a proposal from Cincinnati Life that showed minimum cash values for the Policy based on a minimum guaranteed interest rate of five percent. *Id*. at 6. It also showed projected cash values based upon the then current interest rate of nine percent. *Id*.

The Plan also stated that the minimum values were "based on the guaranteed interest rate of 5.00% and the guaranteed cost of insurance," and the current values were "based on the current interest rate of 9.00% and the current cost of insurance, *which is subject to change*." *Id*. at 9 (emphasis added). The following language also appeared:

> This is an illustration only and is not part of an insurance contract. *The projected results of your insurance program may change with variations in the interest rate, mortality rates (risk changes), expenses, and the frequency, timing, and amount of your premium payments.* The policy contains the exact details.

Id. (emphasis added). The Plan also assumed that Ace would pay a $2,500 premium per year.

Ace purchased the Policy in March 1990. However, Ace did not pay the $2,500 annual premiums as originally quoted in the Plan. Instead, it only paid premiums in quarterly installments of $500, which totaled $2,000 per year. Sometimes Ace did not even make all of the quarterly payments each year. After the Policy had been issued, Cincinnati Life began sending annual reports to Ace. The first report was sent on March 22, 1991, and subsequent reports were sent each March thereafter. Each annual report stated the Policy's current value and the then current interest rate. The annual reports for 1991 through 1998 contained the following language:

> This statement gives the current status of your policy including current cash values. *You should compare these actual values to the projection of values you received when you purchased your policy.* If the values differ, you may request a free projection based on actual past history and currently assumed values for the future. Call your agent or the company if you have any questions.

Appellants' App. at 75-82 (emphasis added).

In December 2002, Ace's accountant examined the Plan and the Policy and determined that the Policy might not be adequate to meet Ace's commitments to Reinhart under the deferred compensation agreement. After determining that the Policy was not adequate to fund its commitments to Reinhart, Ace filed a complaint against Runkle on June 29, 2004 alleging breach of contract, fraud, and negligence claims. On July 20, 2006, Runkle filed a motion for summary judgment, contending that Ace's claims were barred by the applicable statute of limitations. The trial court entered its order granting summary judgment to Runkle on February 16, 2007. Ace now appeals.

DISCUSSION AND DECISION

When reviewing a grant or denial of summary judgment, we apply the same standard as the trial court: summary judgment is only appropriate when the designated evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Jacobs v. Hilliard*, 829 N.E.2d 629, 632 (Ind. Ct. App. 2005), *trans. denied*. The burden is on the moving party to designate sufficient evidence to eliminate any genuine issues of material fact, and when this requirement is fulfilled, the burden shifts to the nonmoving party to come forth with contrary evidence. *Jacobs*, 829 N.E.2d at 632. We construe all facts and reasonable inferences to be drawn from those facts in favor of the nonmoving party. *Id*.

Ace argues that the trial court erred in entering summary judgment in favor of Runkle because Ace's claims are not barred by the statute of limitations. Ace contends that it was not aware of Runkle's breach until December 2002 at the earliest and that the filing of its complaint on June 29, 2004 was timely. Ace denies that it gained any information prior to

December 2002 that would have allowed it to discover that the Policy would not cover Ace's commitments to Reinhart under the deferred compensation agreement. Ace also claims that because it raised both contract and negligence claims, its claims were subject to both a two-year statute of limitations and a ten-year statute of limitations.

"In determining when either a claim of breach of a written contract or tort claim accrues, Indiana follows the 'discovery rule.'" *Strauser v. Westfield Ins. Co.*, 827 N.E.2d 1181, 1185 (Ind. Ct. App. 2005). Under this rule, a cause of action accrues, and the statute of limitations begins to run, when the plaintiff knew or in the exercise of ordinary diligence could have discovered that an injury had been sustained as a result of a tortious act of another or that the contract had been breached. *Id.*; *Del Vecchio v. Conseco, Inc.*, 788 N.E.2d 446, 449 (Ind. Ct. App. 2003), *trans. denied*. The exercise of reasonable diligence means that "an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 689 (Ind. Ct. App. 2006).

Here, Ace purchased the Policy in 1990, and at that time, was shown a projection of how the cash value of the Policy could be used to fund Ace's deferred compensation agreement with Reinhart. This projection assumed that Ace would pay $2,500 per year in premiums and used the then current interest rate of nine percent. From the outset, Ace did not fund the Policy at the $2,500 level, and instead only paid $2,000 in premiums per year, sometimes paying even less. The insurance company sent Ace its first annual report on March 22, 1991 and continued to send one every March thereafter. These reports contained

the current value of the Policy and the current interest rate. They additionally advised Ace that it should compare the reports against the projection. Ace did not take any action against Runkle until June 29, 2004. Assuming a duty by Runkle and a breach of that duty, we conclude that the information contained in these annual statements was sufficient to put Ace on notice that a claim existed against Runkle. When Ace began receiving annual reports from Cincinnati Life that did not conform to the original projection by Runkle, it knew of or, in the exercise of ordinary diligence, could have discovered the alleged breach by Runkle. Therefore, under either a two-year or a ten-year statute of limitations, Ace's claims were barred because they were not raised within the limitations period. The trial court did not err when it granted summary judgment in favor of Runkle.

Affirmed.

ROBB, J., and BARNES, J., concur.