COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2861 **Cir. Ct. No. 2010CV516**

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

JAMES C. BOURNE AND MADISON HOMES, INC.,

PLAINTIFFS-APPELLANTS,

V.

MELLI LAW, S.C. AND PHILIP J. BRADBURY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. James Bourne and Madison Homes, Inc. (collectively "Bourne"), appeal the circuit court's judgment dismissing Bourne's legal malpractice claim against Attorney Philip Bradbury and Melli Law, S.C.

(collectively "Bradbury"). Bourne argues that the circuit court erred by granting summary judgment to Bradbury based on the applicable six-year statute of limitations. The dispositive question pertains to the statute of limitations discovery rule and, more specifically, to whether Bourne discovered his claim against Bradbury by November 3, 2003. We express no opinion on the merits of Bourne's claim. Rather, we simply hold, based on the record before us, that this case is not appropriate for summary judgment based on the statute of limitations. With respect to the statute of limitations time period and the discovery rule, there is a factual dispute that precludes summary judgment. Accordingly, we reverse and remand for further proceedings.

Background

¶2 Bourne's legal malpractice claim against Bradbury arose out of a dispute involving Bourne and other members of an LLC called Four Empty Milk Cans. The other three members of the LLC were two men named Heinrichs and a man named Sweeney. Bourne retained Bradbury to represent him in negotiating and drafting a settlement agreement to resolve the dispute. Bourne signed the final agreement in July 2003 and, as part of that agreement, transferred his interest in the LLC to one of the Heinrichs.

¶3 According to Bourne, he entered into the settlement agreement based on representations by Vernon Jesse, an attorney for the LLC. Specifically, Bourne claimed that Jesse represented to Bourne through Bradbury that Sweeney wanted Bourne "out" of the LLC and that Sweeney would vote with the Heinrichs to out-vote Bourne 3-1 on any issue relating to the LLC.

¶4 In the fall of 2003, Bourne received information suggesting that, in fact, Sweeney did not want Bourne out of the LLC and that Sweeney would not

have voted with the Heinrichs against Bourne. This information included an April 2003 document that Sweeney gave Bourne showing what appeared to be communications between Jesse, the Heinrichs, and Sweeney. In addition, on November 3, 2003, Bourne and Bradbury met with Sweeney and, according to Bourne, Sweeney confirmed during this meeting that he did not want Bourne out of the LLC and did not want to be a minority partner against the Heinrichs.[1]

¶5 Bourne commenced his legal malpractice claim against Bradbury on December 17, 2009. Bourne's allegations included that Bradbury was negligent in the negotiation, drafting, and approval of the settlement agreement. Bradbury moved for summary judgment, relying on the applicable six-year statute of limitations and arguing that Bourne discovered his claim against Bradbury by November 3, 2003, based on the information Bourne had at that time. The circuit court initially denied Bradbury's motion, and did so, in our view, for the correct reason. However, after Bradbury moved for reconsideration, the court revisited its analysis, changed course, and granted summary judgment to Bradbury.

Discussion

¶6 As a preliminary matter, we note that Bourne raises an issue we need not address, namely, whether the circuit court erred by failing to apply the correct legal standard to Bradbury's motion for reconsideration. Because we agree with Bourne that the circuit court erred when it changed course on summary judgment

[1] We see a lack of clarity in the briefing and parts of the record as to the exact date of the meeting, but the parties appear to agree that the meeting occurred on November 3 or 4, 2003. Regardless, our analysis does not depend on the exact date of the meeting.

and because we reverse on that basis, we need not decide whether the court also erred by applying an incorrect reconsideration standard.

¶7 We review summary judgment de novo, applying the same standards as the circuit court. ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294. We need not repeat all of those standards here. Suffice it to say that the moving party, here Bradbury, has the burden of establishing that summary judgment is appropriate. *See* ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 565-66, 278 N.W.2d 857 (1979).

¶8 There is no dispute that a six-year statute of limitations applies to Bourne's legal malpractice claim and that the limitations period began to run when Bourne's claim accrued. Further, the parties agree that the dispositive issue relates to the discovery rule, which determines the accrual date. *See* ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 147-48, 160, 465 N.W.2d 812 (1991) (applying the rule in a legal malpractice action).

¶9 Before summarizing the discovery rule, we point out that Bradbury's arguments largely assume that we will apply the rule as summarized in federal case law, particularly ***Winskunas v. Birnbaum***, 23 F.3d 1264 (7th Cir. 1994), instead of applying the rule as summarized in Wisconsin case law, such as our supreme court's ***Schmidt*** decision. ***Winskunas*** arguably sets the bar more favorably toward defendants than Wisconsin cases, including ***Schmidt***. Bradbury argues that we should apply ***Winskunas*** because ***Winskunas*** is a legal malpractice case and because ***Schmidt*** is "entirely distinguishable" as a different type of case, namely, stray voltage. However, nothing in ***Schmidt*** suggests that ***Schmidt***'s description of the discovery rule is limited to the stray voltage context. On the contrary, the court in ***Schmidt*** summarized the rule by drawing from cases across a

variety of substantive areas. *See* ***Schmidt***, 305 Wis. 2d 538, ¶¶27-29. We are bound by ***Schmidt***, not ***Winskunas***. As we shall see, when we apply ***Schmidt***, there is little to Bradbury's summary judgment arguments.[2]

¶10 Under the discovery rule, a claim does not accrue until the plaintiff "discover[s], or with reasonable diligence should have discovered, 'not only the fact of injury but also that the injury was probably caused by the defendant's conduct.'" ***Gumz v. Northern States Power Co.***, 2007 WI 135, ¶26, 305 Wis. 2d 263, 742 N.W.2d 271 (quoted source omitted). As to the "discovers" alternative, "[d]iscovery occurs when the plaintiff has information that would constitute the basis for an objective belief as to his or her injury and its cause." *See* ***Schmidt***, 305 Wis. 2d 538, ¶27. "[A] plaintiff's subjective or unsubstantiated lay belief does not [by itself] constitute discovery." ***Id.***, ¶28. That is, "[e]ven if the plaintiff knew of his or her injury and had a 'suspicion or a hunch' as to its cause, discovery does not occur until the plaintiff has an objective basis regardless of whether her hunch later proves to be correct." ***Id.*** (quoted source omitted). "Where the cause and effect relationship is not readily apparent, a layperson's subjective belief of the cause is not sufficient to start the statute of limitations running." ***Id.***

¶11 This case turns on whether more than one reasonable inference can be drawn from the undisputed facts. "[W]here the undisputed facts lead to more than one reasonable inference about when discovery occurred, summary judgment is not proper." ***Id.***, ¶3. Bradbury argues, in effect, that the only reasonable

[2] We acknowledge that ***Winskunas v. Birnbaum***, 23 F.3d 1264 (7th Cir. 1994), purports to apply Wisconsin law, *see* ***id.*** at 1266, but a Westlaw search reveals no examples of Wisconsin courts looking to ***Winskunas*** for guidance.

inference that can be drawn is that Bourne "discovered" his claim no later than November 3, 2003. As explained below, the main flaw in Bradbury's argument is that it fails to meaningfully address the part of the discovery rule requiring an objective basis for a belief as to the *cause* of an injury.

¶12 Bradbury relies on the document prepared in April 2003 that Bourne obtained by November 3, 2003, and on Bourne's deposition testimony, including testimony in which Bourne described his state of mind at the November 3, 2003 meeting referenced above.

¶13 As to the information available to Bourne on or before November 3, 2003, as shown by the April 2003 document and Bourne's deposition testimony, there appears to be no dispute that this information provided Bourne with an objective basis to believe that he had suffered injury. More specifically, Jesse's alleged misrepresentations about Sweeney's position induced Bourne to enter into the allegedly unfavorable July 2003 settlement agreement. Bradbury's argument, however, fails to go the next step and explain why this information additionally provided an objective basis to believe that *Bradbury's* acts or omissions *were a cause* of the injury. That is, we are given no explanation as to why the only reasonable inference is that, by November 3, 2003, Bourne had a basis to believe that *Bradbury's* negligence may have played a role in whatever harm Bourne suffered.

¶14 We turn to Bradbury's reliance on a part of Bourne's deposition testimony in which Bourne explained why, at the November 3, 2003 meeting, Bourne did not question Bradbury about Bradbury's failure to uncover Jesse's alleged misrepresentations before Bourne entered into the settlement agreement. Specifically, Bourne was asked: "[D]id you at that meeting ask Phil Bradbury

how come he hadn't learned prior to [the settlement agreement date] that Bob Sweeney wasn't on board?" and Bourne responded:

> No, I don't believe I did at that meeting because I wasn't going to humiliate [Bradbury] in front of [a fourth man at the meeting], who's another fellow attorney, and Bob Sweeney. I don't think it was the time to bring that up.

¶15 It is true that one reasonable inference from Bourne's deposition testimony is that Bourne subjectively believed, at the time of the meeting, that Bradbury had made an error. However, another reasonable inference is that Bourne simply suspected that Bradbury may have played a role in Bourne receiving incorrect information, with nothing in particular to back up the suspicion. Viewed this way, the testimony suggests that Bourne refrained from asking Bradbury about Bourne's mere suspicion to avoid embarrassing Bradbury in front of the others based on mere suspicion. This latter inference finds support in another part of Bourne's deposition testimony in which Bourne clearly stated that he did not begin to believe that Bradbury had "let [him] down" until a later point in time, after Bourne had been questioned as part of an ethics investigation into Jesse.

¶16 Moreover, regardless of Bourne's *subjective* belief, an objective basis is still lacking. Under the discovery rule we have summarized, a subjective belief must have an *objectively* reasonable basis in the record. As we have explained, Bradbury does not point to evidence compelling the inference that Bourne had information supporting an *objective* belief as of November 3, 2003, that Bradbury's negligence may have contributed to harm to Bourne. Bourne's mere subjective belief, no matter how strongly held, amounts to nothing more than the type of suspicion or hunch that ***Schmidt*** teaches is not enough to show that discovery occurred.

Conclusion

¶17 For the reasons stated above, we reverse the judgment dismissing Bourne's claim against Bradbury, and we remand for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).