COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP542 **Cir. Ct. No. 2009CV621**

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

DOROTHY BEAVER, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ARTHUR BEAVER, DECEASED, GERALDINE GOULET, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CLAYTON W. GOULET, DECEASED, ADELE OTTO, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF BEN OTTO, DECEASED AND LYNN FOX, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ORVIL M. SMITH, DECEASED,

PLAINTIFFS-APPELLANTS,

V.

EXXON MOBIL CORPORATION, SUNOCO, INC., TEXACO DOWNSTREAM PROPERTIES, INC., FOUR STAR OIL AND GAS CO., BP PRODUCTS NORTH AMERICA, INC. AND ASHLAND CHEMICAL CO., DIVISION OF ASHLAND, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER SR., Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 SHERMAN, J. Dorothy Beaver, individually and as special administrator for the Estate of Arthur Beaver, Geraldine Goulet, individually and as special administrator for the Estate of Clayton W. Goulet, Adele Otto, individually and as special administrator for the Estate of Ben Otto, and Lynn Fox, individually and as special administrator for the Estate of Orvil M. Smith (collectively, the appellants), appeal an order of the circuit court denying their motion to vacate a stipulation that an untimely answer filed by two respondents in this action would be treated as timely. They also appeal judgments entered following the circuit court's orders dismissing on summary judgment their wrongful death and survival claims against Exxon Mobil Corporation, Sunoco, Inc., Texaco Downstream Properties, Inc., Four Star Oil and Gas Company, BP Products North America, Inc. and Ashland Chemical Company (collectively, the respondents), which the court concluded were time barred. We affirm the circuit court's denial of the appellants' motion to vacate the stipulation of counsel, but reverse the circuit court's judgments dismissing the appellants' claims on summary judgment.

BACKGROUND

¶2 In July 2009, the appellants filed a complaint against the respondents on behalf of themselves individually and as special administrators of the Estates of

Arthur Beaver, Clayton W. Goulet, Ben Otto, and Orvil M. Smith. The appellants asserted, *inter alia*, claims for wrongful death and survival.[1] The appellants alleged that Arthur Beaver, Clayton Goulet, Ben Otto and Orvil Smith, who died between 1982 and 1995, "were employed as rubber workers, tire builders, and final finish laborers at a tire manufacturing facility" and that during the course of their employment, they were "exposed to toxicologically significant levels of benzene [], benzene derivatives, rubber solvents, and other toxic and hazardous chemicals." The appellants alleged that the respondents: (1) produced and/or manufactured benzene and/or benzene-containing materials, which were placed into the stream of commerce; (2) distributed, sold and/or placed into the stream of commerce benzene and/or benzene containing materials; or (3) "distributed, sold, installed, designed or maintained mechanical heating, venting, filtrating or air conditioning systems" at the facility where the four men had been employed. The appellants further alleged that as a result of their exposure to benzene and benzene-containing materials at the tire manufacturing facility, the four men suffered personal injuries and died.

¶3 In their complaint, the appellants listed as their counsel the following attorneys and law firms: Matthew Biegert and Michael Brose of the law firm Doar, Drill & Skow, S.C., which is located in New Richmond, Wisconsin;

[1] The appellants also asserted claims for strict liability and failure to warn; however, those claims are not at issue on appeal.

The supreme court has explained that a wrongful death claim is a claim brought by or on behalf of a statutorily named beneficiary for post-death loss of society and companionship. ***Bartholomew v. Wisconsin Patients Comp. Fund and Compcare Health Servs. Ins. Corp.***, 2006 WI 91, ¶¶59, 64, 293 Wis. 2d 38, 717 N.W.2d 216. A survival claim, in contrast, is a claim brought by the personal representative of the victim's estate to recover for a victim's pre-death pain and suffering. ***Id.***

Michael Sieben of the law firm Sieben Polk, P.A., which is located in Hastings, Minnesota; and Richard Alexander and Amanda Hawes, of the law firm Alexander Hawes, LLP, which is located in San Jose, California.

¶4 On August 26, 2009, BP Products North America and Sunoco were properly served with the summons and complaint. It is undisputed that their answer was due within forty-five days,[2] or on or before October 12, but that their answer was not served until October 21. On or about October 21, Dennis Sullivan, counsel for BP Products and Sunoco, left a voice mail message for Jeff Rickard, an attorney with Alexander Hawes, at Rickard's law office requesting a stipulation to treat BP Products' and Sunoco's untimely answers as being timely. It is undisputed that prior to filing this action, the law firm of Doar, Drill & Skow commenced another action in Wisconsin against many of the same defendants in this suit on behalf of other individual plaintiffs alleging claims similar to those asserted here. Attorney Rickard was admitted pro hac vice in that litigation and was known to Attorney Sullivan. Attorney Rickard responded to Attorney Sullivan's voicemail on October 23, advising Attorney Sullivan in an e-mail: "Yes, extension to cover the 3 days is fine." Attorney Sullivan responded that he would "prep[are] a stipulation." Attorney Rickard received the stipulation on October 26, and signed and returned it to Attorney Sullivan the next day. The stipulation was submitted to the circuit court, and was entered by the circuit court on October 30.

[2] *See* WIS. STAT. § 801.09(2)(a)3.b. (2011-12) (providing that where a complaint is founded in tort, the answer must be served within 45 days).

All references to the Wisconsin statutes are to the 2011-12 version unless otherwise noted.

¶5 In November 2009, the appellants moved the circuit court to strike the stipulation and order, and to enter default judgment against BP Products and Sunoco. The appellants claimed that the respondents did not advise appellants' local counsel of the respondents' request for a time extension, that Attorney Rickard was not admitted pro hac vice in this case and had not consulted with appellants' local counsel prior to agreeing to the time extension, and that appellants were unaware of the stipulation until November 9, when they received a copy of the signed stipulation from the court. The circuit court denied the appellants' motion. In a written decision, the court determined that at the time Attorney Rickard signed the stipulation, Attorney Rickard "had the implied authority to waive any defects" in BP Products' and Sunoco's answers in light of the other action referenced above in the immediately preceding paragraph, and the fact that the appellants had denominated Attorney Rickard's law firm as their co-counsel in this action.

¶6 In September 2011, the respondents moved the circuit court to dismiss the appellants' claims as time barred under the applicable three-year statute of limitations. The respondents argued that a wrongful death claim must be brought within three years of a decedent's death and because the appellants' claims were filed more than three years after the deaths of the four men, their wrongful death claims are time barred. The respondents argued that the appellants' survival claims are also time barred because those claims were filed more than three years after the alleged victims died.

¶7 The circuit court treated the respondents' motion as one for summary judgment and granted the motion and entered summary judgment in favor of the respondents. The appellants appeal.

DISCUSSION

¶8 The appellants challenge the circuit court's order denying their motion to vacate the October 30, 2009 stipulation. The appellants also challenge the judgments entered following the court's orders dismissing on summary judgment their wrongful death and survival claims on the basis that those claims are time barred. We address each of these challenges in turn below.

A. Stipulation

¶9 The appellants contend that the circuit court erred in denying their motion to vacate the stipulation treating BP Products' and Sunoco's answer as timely because Attorney Rickard was not licensed to practice law in Wisconsin and did not have pro hoc vice admission, and therefore could not enter into a binding stipulation on their behalf. The appellants argue that under Wisconsin Supreme Court Rule 10.01,[3] Attorney Rickard could not legally practice law in Wisconsin and that "[u]nder the Tenth Judicial Administrative District Rules, [Attorney] Rickard could not sign pleadings" in this matter. We do not agree.

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[3] Wisconsin Supreme Court Rule 10.01 (2012) provides:

> SCR 10.01 State bar of Wisconsin. (1) There shall be an association to be known as the "state bar of Wisconsin" composed of persons licensed to practice law in this state, and membership in the association shall be a condition precedent to the right to practice law in Wisconsin.
>
> (2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that the association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice.

¶10 Wisconsin Supreme Court Rule 20:5.5(c)(2) (2012), which addresses the unauthorized practice of law, provides in relevant part:

> (c) Except as authorized by this rule, a lawyer who is not admitted to practice in this jurisdiction but who is admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or for medical incapacity, may not provide legal services in this jurisdiction except when providing services on an occasional basis in this jurisdiction that:
>
> ….
>
> (2) are in, or reasonably related to, a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or *reasonably expects to be so authorized*[.] (Emphasis added.)

¶11 The circuit court found that in another pending case in Eau Claire County, 2004CV420, which the court found is factually similar to the present case, Attorney Rickard was admitted pro hac vice and "took a very active role in pursuing relief for the plaintiffs." The court found that although Rickard was not admitted pro hac vice at the time he signed the stipulation, he "fully expected that he would eventually be so admitted." The appellants have not developed an argument that the court's finding that Attorney Rickard had a reasonable expectation that he would be admitted to practice law in Wisconsin pro hac vice was clearly erroneous.

¶12 The appellants also argue that regardless of Attorney Rickard's admission status, Attorney Rickard's signature on the stipulation was not binding on them because Attorney Rickard did not have their implied or apparent authority to enter into a binding stipulation on their behalf. We do not address whether the appellants are correct that Attorney Rickard did not have implied or apparent

authority to sign the stipulation because we conclude that he had *actual* authority to do so since the appellants' complaint identified Attorney Rickard's law firm, Alexander Hawes, LLP, as their counsel.

¶13 Because we conclude that Attorney Rickard had actual authority to enter into a stipulation on the appellants' behalf and because the circuit court was not clearly erroneous in finding that Attorney Rickard had a reasonable expectation that he would be admitted pro hac vice in this matter and was thus not engaging in the unauthorized practice of law at the time, we affirm the court's order denying the appellants' motion to vacate the stipulation.

B. Summary Judgment

¶14 The appellants contend that the circuit court erred in dismissing on summary judgment their wrongful death claims and their survival claims on the basis that those claims are time barred. We read the circuit court's order as determining that the statute of limitations commenced for both claims at the latest on the dates of death of the decedents and that the complaint, which was filed more than three years after those dates, was therefore untimely.

¶15 We review summary judgment de novo. ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. Summary judgment is appropriate when no material factual dispute exists and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2).

¶16 The parties agree that the statute of limitations for both the appellants' wrongful death claims and survival claims is governed by WIS. STAT. § 893.54(2). Section 893.54(2) provides that an action to recover damages for injury to a person and an action to recover damages for death caused by a

wrongful act "shall be commenced within 3 years or be barred." The parties disagree as to *when* the actions must have commenced in order to be timely. The appellants argue that the statute of limitations for both their wrongful death claims and their survival claims did not begin to run on the date of the alleged victims' deaths, as determined by the circuit court, which the appellants concede was more than three years before they filed their complaint. Rather, they assert that their claims are governed by the discovery rule and that under the discovery rule the statute of limitations did not begin to run on their claims until the decedents' injuries and causes of those injuries were discovered or in the exercise of reasonable diligence should have been discovered, which remains a genuine issue of material fact for the circuit court.

¶17 Whether the statute of limitations has run on a particular claim is a question of law which we review de novo. *See* ***State v. Slaughter***, 200 Wis. 2d 190, 196, 546 N.W.2d 490 (Ct. App. 1996). To determine whether a plaintiff has filed suit within the applicable statute of limitations period, a court must first determine when the plaintiff's claims accrued. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 333, 565 N.W.2d 94 (1997). It is only after the date of accrual is determined that the court "can assess whether the plaintiff[] filed suit within the applicable statutory limitations period." ***Id.***

¶18 Prior to 1983, it was well established that the accrual date for personal actions was the date of the tort causing the injury. ***Id.*** at 334. However, in order "to avoid the harsh results produced by commencing running the statute of limitations before the plaintiff [is] aware of any basis for an action," the supreme court in ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 335 N.W.2d 578 (1983), reversed the "long line of cases" establishing the accrual date for tort actions as the date of injury and adopted instead the "discovery rule," under which

tort claims "'accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first.'"[4] ***Doe***, 211 Wis. 2d at 334-35 (quoting ***Hansen***, 113 Wis. 2d at 560).

¶19 At dispute here is whether the appellants' wrongful death and survival claims are governed by the discovery rule for determining when their causes of action accrued. The supreme court stated in ***Hansen***, and has restated on multiple occasions since then, that it adopted the discovery rule "*for all tort actions* other than those already governed by a legislatively created discovery rule." ***Hansen***, 113 Wis. 2d at 560 (emphasis added); *see, e.g.*, ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 22, ¶¶18-19, 308 Wis. 2d 103, 746 N.W.2d 762 (applying discovery rule to allegations of fraud and misrepresentation); ***Doe***, 211 Wis. 2d at 334 (applying discovery rule to allegations of sexual assault); and ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis. 2d 1, 19, 24-25, 469 N.W.2d 595 (1991) (applying discovery rule to alleged negligent use of electrical distribution system which allowed stray voltage to reach the plaintiff's cows); ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 388 N.W.2d 140 (1986) (applying discovery rule to personal injury action alleging illness caused by defective furnace).

¶20 The respondents argue that the discovery rule does not apply to wrongful death and survival actions because: (1) the discovery rule is limited to medical malpractice actions; (2) WIS. STAT. § 893.22 is a legislatively created

[4] Following ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 335 N.W.2d 578 (1983), the supreme court stated in ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986), that the discovery rule requires not only the discovery of the injury, but also discovery of the cause of the injury. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 335, 565 N.W.2d 94 (1997).

discovery rule that bars the application of the common law discovery rule to survival claims; (3) public policy supports the dismissal of the appellants' wrongful death claims; and (4) the appellants have the burden of proving that the discovery rule applies, but have proffered no relevant evidence to show when they discovered or should have discovered the decedents' injuries and the causes of those injuries, and the appellants are not special administrators qualified to provide such evidence. None of the respondents' arguments support the granting of summary judgment dismissing the appellants' claims based on whether the discovery rule applies to those claims.

¶21 First, as the cases cited in ¶19 demonstrate, the courts have not limited the application of the discovery rule to any certain subset of tort actions. And, this court has not been presented with any legal authority or arguments that would lead us to conclude that despite its pronouncement that the discovery rule applies to "*all tort actions*," save those governed by a statutory discovery rule, the supreme court did not mean to apply the discovery rule to wrongful death claims or survival claims. We are thus bound by the supreme court's language.[5] *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (the court of appeals may not overrule, modify, or withdraw language from a previous supreme court case).

[5] Respondents also argue that survival and wrongful death actions accrue at the time of death, citing ***Estate of Merrill v. Jerrick***, 231 Wis. 2d 546, 550 n.2, 605 N.W.2d 645 (Ct. App. 1999). Respondents do not develop their argument, and so we will not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-67, 492 N.W.2d 633 (Ct. App. 1992). However, we note that nothing in ***Merrill*** precludes the application of the discovery rule to determine accrual based on the discovery of the injury and its cause.

¶22 Second, it is undisputed that neither the appellants' wrongful death claims nor their survival claims are governed by a legislatively created discovery rule. However, with respect to appellants' survival claims, we read the respondents' brief as arguing that the discovery rule does not apply because survival claims are subject to WIS. STAT. § 893.22, which provides that a survival claim can accrue no later than the death of the victim. We disagree.

¶23 WISCONSIN STAT. § 893.22 provides in part:

> If a person entitled to bring an action dies before the expiration of the time limited for the commencement of the action and the cause of action survives, an action may be commenced by the person's representatives after the expiration of that time and within one year from the person's death.

¶24 The supreme court has stated that WIS. STAT. § 893.22 is not a statute of limitation, but instead "acts as a saving statute" in that it "provides an opportunity for the representatives of any deceased person to evaluate the potential claims and complete the procedures necessary to commence an action within a period of one year following the death of the potential claimant." ***Walberg v. St. Francis Home, Inc.***, 2005 WI 64, ¶18, 281 Wis. 2d 99, 697 N.W.2d 36. The supreme court has explained that in order for § 893.22 to apply, when the decedent dies, there must be less than one year remaining on the statute of limitations of his or her claim. ***Id.***, ¶¶15-17. When that is the case, the decedent's personal representative is provided one additional year to file suit. However, in those situations where there is more than one year remaining on the statute of limitations of a decedent's claim, § 893.22 does not apply. ***Id.***, ¶19. Instead, the personal representative must file suit within the regular statutory limitations period. Thus, for example, if a tort claim had not yet accrued because the cause of the injury had not yet been discovered and should not have been discovered through reasonable

diligence, § 893.22 would not apply and the personal representative must file suit within the applicable statutory limitations period.

¶25 Third, respondents' public policy argument in this context is unavailing. The supreme court in ***Hansen*** decided that public policy favors applying the discovery rule to all tort actions. ***Hansen***, 113 Wis. 2d at 558. Thus, there is no public policy against application of the discovery rule to appellants' claims.

¶26 Finally, the evidentiary defenses raised by respondents are to be resolved on remand. On this topic, the parties dispute the burden of proof. The respondents have the burden of proving the affirmative defense that the appellants' claims are barred by the statute of limitations. *See* ***Doe***, 303 Wis. 2d 34, ¶62. Upon making that showing, the burden shifts to the appellants to prove a different date of accrual based on application of the discovery rule—when the decedents knew or should have known of their injuries and the causes of those injuries. ***Id.***, ¶117 (Bradley, J., concurring and dissenting); *see* ***Borello***, 130 Wis. 2d at 411 (claim accrues when "'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[]'") (quoted source omitted).

¶27 In summary, we conclude that the discovery rule applies to the appellants' claims and therefore reverse the circuit court's order of summary judgment in favor of the respondents. Our review of the court's order dismissing the appellants' complaint on summary judgment is limited to the question of whether the discovery rule applies to the appellants' tort claims. We do not reach the question of whether, under the discovery rule, the appellants' claims were

timely, nor do we reach any issue pertaining to the merits of the appellants' claims. Those remain issues for the circuit court on remand.

CONCLUSION

¶28 For the reasons discussed above, we affirm the circuit court's denial of the appellants' motion to vacate the stipulation of counsel, but reverse the circuit court's judgments dismissing the appellants' claims on summary judgment and remand for further proceedings.

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.