COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1846 **Cir. Ct. No. 2011CV3428**

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

STATE OF WISCONSIN EX REL. JOHN A. SCOCOS,

PLAINTIFF-RESPONDENT,

V.

STATE OF WISCONSIN DEPARTMENT OF VETERANS AFFAIRS,

DEFENDANT,

MARVIN J. FREEDMAN, MARCIA M. ANDERSON, DAVID F. BOETCHER, JACQUELINE A. GUTHRIE, RODNEY C. MOEN, PETER J. MORAN AND DANIEL J. NAYLOR,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Kloppenburg and Neubauer, JJ.

¶1 PER CURIAM. Former board members of the Wisconsin Department of Veterans Affairs appeal an order dismissing a complaint against them without prejudice. They argue that the dismissal should instead be with prejudice because the statute of limitations had expired. The primary question is whether an earlier complaint alleging open meetings law violations by the board members, brought in the name of the individual John Scocos, rather than as State ex rel. John Scocos, tolled the statute of limitations. We conclude that the statute of limitations was not tolled. We reverse the order, and remand with directions to dismiss the complaint against the board members with prejudice.

¶2 In late 2009, Scocos filed a complaint with multiple claims. Pertinent here, the open meetings claims against the board members were dismissed without prejudice because Scocos filed as an individual, not on behalf of the State. In an attempt to remedy that failing, and litigate his open meetings claims, Scocos filed the current action using "State ex rel. Scocos" to denote that the action was filed by Scocos on behalf of the State.[1] The circuit court again dismissed the open meetings claims against the board members without prejudice, this time on the ground of lack of personal jurisdiction because of improper service.

¶3 The parties agree that improper service required dismissal of the current open meetings claims. However, the failure of service may mean that Scocos now has a statute of limitations problem. The applicable statute of

[1] In this opinion, we refer to the plaintiff-respondent "State ex rel. Scocos" as simply "Scocos," even though, so far as the current case goes, Scocos is not acting in his individual capacity.

limitations is WIS. STAT. § 893.93(2) (2011-12), a two-year time limit.[2] Absent tolling, this two-year period ran out sometime prior to dismissal based on improper service. Thus, the dispute here is whether Scocos is still able to commence an action with proper service within the two-year time limit.

¶4 In essence, the parties have stipulated that the question we should answer is whether commencing another "State ex rel." action, this time with proper service, would be timely, or, instead, be barred by the two-year statute of limitations. If the time bar applies, the board members argue, dismissal should be with prejudice. The answer turns on whether Scocos's filing of the prior action in his own name tolled the two-year statute of limitations that applies to the open meetings claims.

¶5 The board members correctly explain that, under WIS. STAT. § 19.97(4), an action by a private person to enforce the open meetings law must be brought "on his or her relation in the name, and on behalf, of the state." We have previously held that, if an open meetings action is brought in the name of a private person, rather than as "State ex rel.," the court lacks competency to proceed. ***Fabyan v. Achtenhagen***, 2002 WI App 214, ¶¶5-8, 257 Wis. 2d 310, 652 N.W.2d 649.

¶6 The board members argue that, because the prior Scocos action did not comply with the "State ex rel." requirement, the court in that prior case lacked competency to proceed with respect to the open meetings claims and, therefore, the filing of that action did not toll the statute of limitations under WIS. STAT.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

§ 893.13(2). In support of this proposition, the board members rely on ***Colby v. Columbia County***, 202 Wis. 2d 342, 550 N.W.2d 124 (1996), a case holding that the statute of limitations is not tolled when a plaintiff files an action without first filing a required notice of injury. The court in ***Colby*** stated that "[c]ommencement of an action, where commencement is barred by statute, cannot toll a statute of limitations." ***Id.*** at 362. The board members argue that, as in ***Colby***, the prior action here was barred by statute and, therefore, the prior action did not toll the statute of limitations.

¶7 Scocos argues that ***Colby*** can be distinguished because there the plaintiff failed to satisfy a condition precedent (the notice of injury), while here Scocos satisfied a similar condition precedent by first asking the district attorney to prosecute the matter. However, this response misses the broader point of ***Colby***. The *reason* the prior action was barred was not the key to the ***Colby*** decision. Rather, the lesson ***Colby*** teaches is that an action "barred by statute" does not toll the statute of limitations. Here, the prior open meetings claims were barred by statute because Scocos brought them as an individual and not on behalf of the State.

¶8 Accordingly, we agree with the board members that, under ***Colby***, the attempt to bring open meetings claims in the prior action did *not* toll the statute of limitations. It follows that the current action is untimely and a future attempt to restart the action with proper service would similarly be untimely.

¶9 Scocos also argues that the current complaint was properly dismissed without prejudice because the board members should have been equitably estopped from asserting a statute of limitations defense. The argument is based on the assertion that, although Scocos used the same service method in

the first case, the board members did not allege defective service then, and waited to raise that defense in this case until after the statute of limitations had arguably expired.

¶10 We reject this equitable estoppel argument for two reasons. First, it is inadequately developed. Scocos's brief makes only a passing reference to relevant case law, and does not identify the elements of equitable estoppel or meaningfully explain how the facts of this case relate to each element. This is reason enough not to address equitable estoppel on appeal. But we also note that the argument is made for the first time on appeal, and we usually do not address issues that are raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).[3]

¶11 In summary, we conclude that, at the time the circuit court dismissed the claims against the board member defendants, the statute of limitations had already expired, and those defendants could not be timely re-served. This being true, the dismissal should have been with prejudice. We reverse and remand with directions for the circuit court to dismiss the complaint against the board members with prejudice.

By the Court.—Order reversed and cause remanded with directions.

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

[3] In the circuit court, Scocos raised *judicial* estoppel. Although related, equitable estoppel is a different doctrine with different considerations.