COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP611 **Cir. Ct. No. 2011CV426**

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

LANE M. MCINTYRE, CHRISTOPHER MCINTYRE AND ESTATE OF MARILYN MCINTYRE,

PLAINTIFFS-APPELLANTS,

V.

CURTIS E. FORBES AND DEBRA J. FORBES,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. Lane McIntyre appeals dismissal of this civil action against Curtis Forbes, alleging that Forbes was responsible for the wrongful

death of McIntyre's wife, Marilyn McIntyre, in 1980.[1] The circuit court dismissed the complaint with prejudice, after concluding that McIntyre failed to file the complaint within the two-year statute of limitations set forth in WIS. STAT. § 893.57 (2007–08).[2] The circuit court determined that McIntyre's cause of action against Forbes accrued on March 30, 2009, the day the State of Wisconsin filed a criminal complaint against Forbes charging him with first-degree intentional homicide in the death of Marilyn McIntyre, and, thus, McIntyre's civil lawsuit, which was filed on July 12, 2011, was not timely filed under § 893.57. On appeal, McIntyre argues that the statute of limitations does not bar his claims because, under the discovery rule, a criminal complaint cannot provide a sufficient basis for a potential plaintiff acting with due diligence to know, to a reasonable probability, that the person charged was responsible for conduct alleged in the criminal

[1] The plaintiffs-appellants in this action, which also alleged intentional infliction of emotional distress, are Lane McIntyre, his son, Christopher McIntyre, and the Estate of Marilyn McIntyre. For ease of reference, we will refer to the plaintiffs-appellants collectively as "McIntyre" and to Lane McIntyre's deceased wife by her full name.

Turning to the defense side, McIntyre named not only Curtis Forbes but also his wife, Debra Forbes in the action at issue here. The circuit court dismissed McIntyre's action as to both Curtis and Debra Forbes, and McIntyre's notice of appeal purports to appeal from the entire decision of the circuit court. However, by failing even to refer to Debra Forbes in his briefing on appeal, McIntyre has forfeited any argument he might have made that the statute of limitations had not run at the time he filed the civil complaint as to Debra Forbes, in contrast to Curtis Forbes. For these reasons we affirm dismissal of McIntyre's civil suit as to Debra Forbes.

[2] The 2007–08 version of WIS. STAT. § 893.57 provided a two-year statute of limitations for "[a]n action to recover damages for libel, slander, assault, battery, invasion of privacy, false imprisonment or other intentional tort." While the limitations period for these types of actions was lengthened to three years by 2009 Wis. Act 120, the new three-year statute of limitations "first applies to injuries occurring on the effective date of this subsection," which was February 26, 2010, and the injury alleged here occurred in 1980. *See* 2009 Wis. Act 120. McIntyre does not argue that the three-year statute of limitations applies to this action. Because the parties agree that this action is controlled by the 2007-08 version of § 893.57, our references to that statute throughout this opinion are to the 2007-08 version. All other references to the Wisconsin Statutes are to the 2011-12 version.

complaint. Instead, McIntyre argues, given the presumption of innocence and heavy burden of proof placed on the State in our criminal justice system, this civil action could not have accrued until Forbes was convicted of first-degree intentional homicide in November 2010.

¶2 We conclude that there is no merit to McIntyre's argument that, as a matter of law, under no circumstances could allegations contained in a criminal complaint alert a potential plaintiff to a reasonable probability that a particular person committed an act that could be the subject of a tort action. Therefore, we affirm the decision of the circuit court dismissing McIntyre's complaint with prejudice as barred by the statute of limitations.

BACKGROUND

¶3 There are no material factual disputes in this appeal. Marilyn McIntyre died in 1980. On March 30, 2009, the State of Wisconsin filed a criminal complaint charging Forbes with first-degree intentional homicide in her death. Shortly after it was filed, the criminal complaint was available to McIntyre. On November 15, 2010, Forbes was convicted of the charged crime.

¶4 On July 12, 2011, McIntyre filed the civil complaint at issue. He alleged that Forbes was liable for wrongful death and intentional infliction of emotional distress because he killed Marilyn McIntyre. Forbes moved for summary judgment, based on the statute of limitations found at WIS. STAT. § 893.57.

¶5 The circuit court determined that WIS. STAT. § 893.57 is the applicable statute of limitations and further that the discovery rule applies here. This required the court to make a finding as to whether McIntyre knew or should

have known to a reasonable probability that Forbes killed Marilyn McIntyre more than two years before McIntyre filed this action. The court examined the criminal complaint filed against Forbes on March 30, 2009, and determined that McIntyre knew or should have known to a reasonable probability that Forbes killed Marilyn McIntyre based on the allegations in the criminal complaint. In reaching this conclusion, the court rejected McIntyre's position that the criminal complaint could not serve as the basis for sufficient knowledge that Forbes was the killer. Thus, under the circuit court's view, the statute of limitations began running on March 30, 2009, and McIntyre's filing of the civil action in July 2011 came too late. On this basis, the court dismissed the civil action with prejudice. McIntyre now appeals.

DISCUSSION

¶6 We begin by noting two areas of agreement between the parties on appeal. First, McIntyre does not dispute that the filing of this action needed to be timely under the two-year statute of limitations provided in WIS. STAT. § 893.57. Second, Forbes does not dispute that McIntyre has the benefit of the discovery rule in determining when the statute of limitations was triggered (or, in a common usage, when McIntyre's causes of action accrued). *See* ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 559-60, 335 N.W.2d 578 (1983). Thus, all of the arguments presented on appeal assume, correctly we believe, that dismissal with prejudice was merited under § 893.57 if we conclude that McIntyre discovered his causes of action, or should have discovered them while acting with reasonable diligence, more than two years before filing suit.

¶7 Under the discovery rule, the statute of limitations period does not commence

> until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person. Until that time, plaintiffs are not capable of enforcing their claims either because they do not know that they have been wronged, or because they do not know the identity of the person who has wronged them.

Pritzlaff v. Archdiocese of Milwaukee, 194 Wis. 2d 302, 315-16, 533 N.W.2d 780 (1995) (citations omitted). Reasonable diligence in this context "means such diligence as the great majority of persons would use in the same or similar circumstances." ***Spitler v. Dean***, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989). A potential plaintiff "may not close [his or her] eyes to means of information reasonably accessible to [him or her] and must in good faith apply [his or her] attention to those particulars which may be inferred to be within [his or her] reach." ***Id.*** Under the discovery rule, once a plaintiff, acting with reasonable diligence, knows or should have known the injury and the identity of the responsible party "to a reasonable probability," the statute of limitations period is triggered. ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 420, 388 N.W.2d 140 (1986).

¶8 In this tragic case, of course, the question is not when McIntyre discovered that he had been wronged, or when he discovered the nature of the injury. Those discoveries indisputably occurred in 1980. The question is when he knew or should have known to a reasonable probability, acting with reasonable diligence, that Forbes was responsible for his wife's death.

¶9 The "date of discovery" is, generally, a question of fact reserved for the jury. ***Stroh Die Casting Co. v. Monsanto Co.***, 177 Wis. 2d 91, 104, 502 N.W.2d 132 (Ct. App. 1993). "Where the facts are undisputed, however, the determination of the date of discovery is a question of law which we will review de novo." ***Id.***

¶10 As summarized above, the circuit court in this case reached the following conclusions: (1) the allegations contained in the criminal complaint provided sufficient information upon which McIntyre knew or should have known to a reasonable probability that Forbes killed Marilyn McIntyre;[3] and (2) the criminal complaint was available to McIntyre.

¶11 McIntyre's narrow argument makes no reference to the particulars of the criminal complaint. Thus, we understand McIntyre to exclusively argue that *no* criminal complaint, regardless how thoroughly incriminating its allegations, could be sufficient to trigger the running of the statute of limitations period. McIntyre bases this argument on the fundamental legal principle that a person charged with a crime cannot be adjudged guilty of a charged offense until he or she has been convicted, either by way of a jury trial or entry of a plea that includes a voluntary, knowing, and intelligent waiver of trial rights. Based on this legal principle, McIntyre argues, unless and until the homicide allegation contained in the criminal complaint was confirmed through a criminal conviction, McIntyre could not have known to a degree of "reasonable probability" that it was Forbes who killed his wife.[4] Under this theory of the discovery rule, if the criminal

[3] The circuit court used the language "reasonable likelihood of an objective belief" in analyzing whether McIntyre's cause of action had accrued. McIntyre argues that because the circuit court used this phrase, rather than the phrase "knows [or should have known] to a reasonable probability," the court applied the incorrect legal standard. However, reviewing the circuit court's discussion as a whole, it is obvious that the court's analysis was consistent with the standards set forth in ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 411, 420, 388 N.W.2d 140 (1986).

[4] While not clear from the single brief he has filed on appeal, McIntyre may also intend to argue that the statute of limitations may have begun to run on a date earlier than the date of conviction, but still within the two-year period, namely, on July 14, 2009, when probable cause was found to bind Forbes over at the close of the preliminary examination hearing in the criminal case. However, as explained in the text of this opinion, McIntyre's argument that his cause of action could not, as a matter of law, have accrued when he became aware of the allegations in the criminal complaint fails. Therefore, we need not address McIntyre's possible argument regarding (continued)

complaint is the basis of the potential plaintiff's knowledge, then the statute of limitations is not triggered unless and until the State proves the identity of the killer in court under criminal law standards, which did not occur here until November 15, 2010.

¶12 The criminal complaint is not part of the record on appeal. This does not matter, under the logic of McIntyre's argument, because the filing of a criminal complaint "represent[s] nothing more than an accusation" that has not been determined by a court to reflect any level of proof supporting a conclusion that a crime was committed by the accused person. According to McIntyre, a plaintiff contemplating a potential civil suit where there is a parallel criminal action will always lack "information sufficient to determine with any degree of probability" the correct defendant or defendants "until all of the information is made available" to the plaintiff, which "will not ordinarily occur" until after there is a conviction.

¶13 For authority, McIntyre relies heavily on ***Borello***, but as explained below we see nothing in that case that supports his argument and only propositions that undermine it.

¶14 ***Borello*** involved information available to a plaintiff in a potential tort action that was initially refuted by multiple, seemingly reliable sources of information. The defendant in the civil action at issue had installed a furnace in the plaintiff's home. 130 Wis. 2d at 400. Shortly thereafter, the plaintiff noticed

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his awareness of proof from the preliminary examination hearing separately from his argument regarding the fact of conviction. We merely observe that any such alternative argument along these lines seems to undermine his main argument: that he was obligated as a potential civil suit plaintiff to honor the presumption of innocence until after Forbes was convicted.

that the furnace had problems, including that it omitted an odor, and seemed to cause the plaintiff respiratory trouble and headaches. ***Id.*** The plaintiff consulted multiple physicians, all of whom told her that her complaints could not clearly be attributed to the new furnace. ***Id.*** at 401. After she was briefly hospitalized, she returned home to discover red dust on surfaces in her house, seeming to confirm that the furnace was generating dust that was causing her ailments. ***Id.*** at 402. Yet, when she consulted another doctor, he also rendered the opinion that her symptoms were not related to the furnace. ***Id.*** Finally, she consulted a specialist who concluded that her symptoms were caused by the furnace. ***Id.*** at 402-03. She filed suit, but only after the running of the applicable statute of limitations, if measured from the time she first came to the subjective conclusion that the furnace was causing her injuries. ***Id.*** at 403-04.

¶15 On these facts, the court in ***Borello*** concluded that the plaintiff had "used reasonable diligence to secure medical advice" and therefore "should be given the protection of one who is 'blamelessly ignorant.'" ***Id.*** at 414 (citation omitted). It could not be said that the plaintiff knew, or that she ought to have known, the nature of the injury and the cause, given the contrary information coming from people who appeared to be experts on the topic. ***Id.*** at 406-07. In particular, McIntyre points to the proposition in ***Borello*** that, under the discovery rule, a "suspicion or a hunch" is insufficient to trigger the running of a limitations period. ***Id.*** at 414.

¶16 As best we can tell, McIntyre's analogy to ***Borello*** is the following. Reliable sources available to McIntyre after he read the criminal complaint, that is to say legal authorities, would have established that Forbes was presumed innocent of the homicide, and this means that, as a matter of law, McIntyre was obligated to view the criminal complaint naming Forbes as no more than "a suspicion or a

hunch." McIntyre contends that he is therefore like the plaintiff in ***Borello***, prior to her consultation with the specialist, and that, like her, he should be considered "blamelessly ignorant" of the full truth, which could only be confirmed by a conviction (or, perhaps, some subsequent, court event in the criminal case; see footnote 4 above).

¶17 McIntyre's argument fails, first, because there is no logic behind his proposal to categorically exclude criminal complaints as sources of information for potential plaintiffs. He does not explain why the allegations in a criminal complaint are not entitled to the same weight as would be given to allegations contained in any other type of document purporting to reflect reliable information that a potential plaintiff knows about or through reasonable diligence should know about. McIntyre's argument seems premised on the incorrect notion that, by definition, criminal complaints are limited to the identification of criminal statutes violated by accused persons, and contain no information that could support the reasonable belief that charged persons committed the crimes charged. In fact, however, criminal complaints are to allege "facts that would lead a reasonable person to conclude a crime had probably been committed and the defendant named in the complaint was probably the culpable party." ***State v. Stoehr***, 134 Wis. 2d 66, 74, 396 N.W.2d 177 (1986); *see* WIS. STAT. §§ 968.01(2), 968.03(1). And, for all we know, the complaint here contained references to weighty, corroborated evidence. In any case, what matters is not the medium of publicizing allegations, here a criminal complaint, but rather the significance and quality of relevant evidence available to the reasonably diligent potential plaintiff.

¶18 Second, we see nothing in ***Borello*** that even vaguely supports the presumption-of-innocence discovery rule theory advanced by McIntyre. The initial, contrary medical opinions in ***Borello*** bear no resemblance to the

presumption of innocence in a criminal case. That is, McIntyre's apparent attempt to equate the ***Borello*** plaintiff's subjective suspicions prior to her consultation with the final specialist with his own position at all times prior to a criminal conviction is unconvincing. This is because, under the standards articulated in ***Borello***, McIntyre did not need to know that a jury had found beyond a reasonable doubt that Forbes was guilty of the charged homicide in order to trigger the statute of limitations. He needed only to know to a "reasonable probability" that Forbes was a proper defendant in this civil lawsuit. *See* ***Borello***, 130 Wis. 2d at 420.

¶19 We understand McIntyre to attempt to make the following related argument. Forbes, having availed himself in the criminal case of the benefits of the presumption of innocence, cannot now argue that McIntyre should have known that Forbes was the proper defendant in this civil action prior to Forbes's criminal conviction. We reject this argument for at least two reasons. First, McIntyre fails to fully develop this argument. He does not explain why Forbes could not have invoked the legal presumption that he is innocent until proven guilty in the criminal context and now argue in the civil context that McIntyre knew or should have known Forbes was a proper defendant. We need not address arguments that are not fully developed or unsupported by legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Second, this argument ignores the firmly established distinct burdens of proof in criminal and civil cases. While it is true that Forbes could be found guilty in a criminal court of the homicide of Marilyn McIntyre only if the jury unanimously agreed that the State presented proof beyond a reasonable doubt (assuming no entry of a valid plea), Forbes could have been held liable for McIntyre's tort claims in a civil action based on a lower burden of proof. *See* ***Marquez v. Mercedes-Benz USA, LLC***, 2012 WI 57, ¶¶36–37, 341 Wis. 2d 119, 815 N.W.2d 314 (explaining burdens of

proof). Thus, McIntyre fails to persuade us that the fact that Forbes was presumed innocent for purposes of the criminal case matters in determining what triggered the running of the statute of limitations here.

¶20 McIntyre separately suggests that filing his civil suit within the limitations period triggered by the filing of the criminal complaint would have been complicated by the ongoing criminal action. In particular, he points to potential obstacles created by Forbes's Fifth Amendment right against compelled self-incrimination. This suggestion fails as an argument on several levels. First, McIntyre fails to explain how potential complications in an earlier-filed civil suit would matter to the statute of limitations question as a matter of law. The authority we are aware of is to the contrary. *See* ***Dakin v. Marciniak***, 2005 WI App 67, ¶15, 280 Wis. 2d 491, 695 N.W.2d 867 (discovery rule "is not a promise to suspend limitations until optimal litigation conditions are established"). Second, on the Fifth Amendment-related issue, McIntyre fails to provide any response to Forbes's argument that McIntyre would have had potential remedies if Forbes had invoked this right in the context of a civil action. The civil action possibly could have been stayed, or other steps could have been considered. *See, e.g.*, WIS. STAT. § 905.13(4); ***State v. Heft***, 178 Wis. 2d 823, 832-33, 505 N.W.2d 437 (Ct. App. 1993) (in a civil case, jury may be instructed that it may draw a negative inference from invocation of the right against self-incrimination).

¶21 In sum, we conclude that, under the discovery rule, a civil cause of action can accrue based on information contained in a criminal complaint, defeating the only argument presented on appeal.

CONCLUSION

¶22 For these reasons, we affirm the circuit court's conclusion that McIntyre's claim is barred by the statute of limitations under WIS. STAT. § 893.57, and the circuit court's dismissal of McIntyre's lawsuit as to both defendants, on the merits and with prejudice.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.