COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP468 **Cir. Ct. No. 2011CV32**

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

WISCONSIN PHARMACAL COMPANY, LLC,

PLAINTIFF,

V.

NEBRASKA CULTURES OF CALIFORNIA, INC.,

DEFENDANT-APPELLANT,

JENEIL BIOTECH, INC.,

DEFENDANT-RESPONDENT,

EVANSTON INSURANCE COMPANY AND THE NETHERLANDS INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Reversed and cause remanded.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Nebraska Cultures of California, Inc. appeals a judgment dismissing its cross-claim against Jeneil Biotech, Inc. after the circuit court denied Nebraska's motion to amend its cross-claim against Jeneil. We conclude Nebraska's proposed cross-claim relates back to its original one, does not prejudice Jeneil, and so avoids the statute of limitations. We therefore reverse.

¶2 In 2011, Wisconsin Pharmacal Company, LLC brought this misrepresentation action against Nebraska and Jeneil and various contract claims against only Nebraska for allegedly providing Lactobacillus acidophilus (acidophilus) instead of Lactobacillus rhamnosus A (rhamnosus) for incorporation into probiotic tablets Pharmacal supplies to a retailer. In 2008, Pharmacal had enlisted Nutritional Manufacturing Services, LLC (NMS) to locate a rhamnosus supplier and to manufacture the tablets; NMS contracted with Nebraska to supply the rhamnosus; and Nebraska contracted with Jeneil to supply it. Nebraska then sold NMS what Jeneil allegedly supplied; NMS manufactured and supplied the tablets to Pharmacal; and Pharmacal packaged and labeled the tablets as containing rhamnosus and sold them to the retailer. The chain seemed complete.

¶3 The retailer then notified Pharmacal, however, that the supplement actually contained acidophilus, not rhamnosus. Independent testing confirmed the claim. The retailer recalled the supplements and cancelled future orders. NMS assigned its claims to Pharmacal, which sued Nebraska and Jeneil. This appeal stems from Nebraska's and Jeneil's efforts to ascribe blame to the other.

¶4 Nebraska admitted in its answer that it contracted with Jeneil to manufacture and supply rhamnosus to fill NMS's orders, forwarded certificates of analysis generated by Jeneil, and paid Jeneil for its services. It also asserted that any damages Pharmacal may have suffered were caused by Jeneil's "negligence or other wrongful conduct." Nebraska's cross-claim and answer to Jeneil's cross-claim realleged and incorporated the allegations of the complaint, expressly alleged negligence, denied that its contract with Jeneil supported Jeneil's claim for contribution or indemnification from Nebraska, and alleged that Jeneil caused Pharmacal's alleged damages.

¶5 Insurance coverage disputes caused years of delay. Once resolved, Nebraska sought leave, by motion and supporting documents, to file an amended cross-claim for breach of contract, fraud, and negligence under WIS. STAT. § 802.09 (1) and (3) (2015-16).[1] The court set a hearing on the motion for October 31, 2016. On October 24, Jeneil filed a brief opposing the amendment.

¶6 On October 27, four days before the scheduled hearing, the court filed a decision in favor of Jeneil and cancelled the hearing, effectively precluding any reply from Nebraska either orally or in writing. The court found that Nebraska's original cross-claim alleged only negligence against Jeneil; that, per their contract, Nebraska and Jeneil had agreed that California law governed; that Nebraska failed to show that California had a relation-back statute; and that, even under Wisconsin's relation-back statute, Nebraska's proposed cross-claim did not relate back to its original one.

[1] Nebraska pursues only the breach-of-contract claim on appeal. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶7 Jeneil then filed a motion to dismiss or, alternatively, for summary judgment. The court concluded that California's four-year statute of limitations for contract actions barred Nebraska's 2016 attempt to allege a contract claim in the 2008 transaction. *See* Cal. Civ. Proc. Code § 337 (2018). Nearly three months later, the circuit court granted Jeneil's motions to dismiss Nebraska's cross-claim and, alternatively, for summary judgment. Nebraska appeals.

¶8 Jeneil first contends the appeal must fail because, instead of opposing Jeneil's motion to dismiss, Nebraska challenges only the earlier denial of Nebraska's motion to amend its cross-claim. Jeneil argues that once Nebraska's cross-claim was dismissed with prejudice, there is no pleading left for an amended cross-claim to relate back to.

¶9 We are not troubled by the appeal's posture. We review a circuit court's dismissal of an action de novo. *See* ***Paskiet v. Quality State Oil Co.***, 164 Wis. 2d 800, 805, 476 N.W.2d 871 (1991). If Jeneil's contention that Nebraska cannot argue relation back to a pleading that no longer exists were correct, there would be no appellate recourse when a motion to dismiss is granted.

¶10 We likewise reject Jeneil's contention that Nebraska's appeal does not challenge the circuit court's dismissal of its original cross-claim. The notice of appeal plainly states that Nebraska appeals from the January 30, 2017 judgment dismissing its claims against Jeneil. An appeal from a final order brings before us all prior nonfinal rulings adverse to the appellant and favorable to the respondent not previously appealed and ruled upon. WIS. STAT. RULE 809.10(4). The reasons the cross-claim was dismissed include those in the underlying nonfinal order.

¶11 Jeneil next asserts that Nebraska's contract claim, and thus its appeal, is futile because it is barred by California's statute of limitations. For its

part, Nebraska contends the statute of limitations does not apply because the breach-of-contract claim in the amended pleading relates back to the original cross-claim, as everything arose from the same transactional facts. Jeneil rightly points out, however, that Nebraska does not identify a California relation-back statute that permits introducing a new cause of action.[2]

¶12 California instead looks to common-law relation-back doctrine. *See, e.g.*, ***Quiroz v. Seventh Ave. Ctr.***, 45 Cal. Rptr. 3d 222, 238 (Cal. Ct. App. 2006). "[F]or the relation-back doctrine to apply, 'the amended [pleading] must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality, as the original one.'" ***Id.*** (citation omitted). "[I]t is the sameness of the facts rather than the rights or obligations arising from those facts that is determinative." ***Lamont v. Wolfe***, 190 Cal. Rptr. 874, 875 (Cal. Ct. App. 1983). The policy behind statutes of limitations—to reasonably put defendants on notice of a claim in time to prepare a fair defense on the merits—is satisfied even after the statute of limitations has expired if an amendment to an original complaint relates back to the date of the filing of the original complaint. ***Garrison v. Board of Dirs.***, 43 Cal. Rptr. 2d 214, 218 (Cal. Ct. App. 1995).

¶13 "In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, the critical

[2] Nebraska asserts that "California has a relation-back statute," but does not provide a citation. The sole one we have located permits amending a pleading only to substitute a party's true name for a fictitious one. Cal. Civ. Proc. § 474.

Jeneil also argues that, because Nebraska did not argue California common law below, it has forfeited or waived any argument that its breach-of-contract claim may relate back under California law. The waiver rule is a rule of judicial administration; in our discretion, we may decide to disregard a waiver and address the merits of an unpreserved issue. ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶17, 273 Wis. 2d 76, 681 N.W.2d 190.

inquiry is whether the defendant had adequate notice of the claim based on the original pleading." ***Pointe San Diego Residential Cmty. L.P. v. Procipio, Cory, Hargreaves & Savitch, LLP***, 125 Cal. Rptr. 3d 540, 549 (Cal. Ct. App. 2011). Where additional facts do not set forth a wholly distinct and different obligation and do no more than express a change of legal theory underlying the original pleading, that is all it is: a change in legal theory. ***Grudt v. City of Los Angeles***, 468 P.2d 825, 828 (Cal. 1970).

¶14 Wisconsin's relation-back statute, WIS. STAT. § 802.09(3),[3] likewise fulfills the purpose of a statute of limitations. "If a party is given fair notice within the statutory time limit of the facts out of which the claim arises ... it is not deprived of any protections the statute of limitations was designed to afford." ***Korkow v. General Cas. Co.***, 117 Wis. 2d 187, 199, 344 N.W.2d 108 (1984). "The basic test for whether an amendment should be deemed to relate back is the identity of transaction test, i.e., did the claim or defense asserted in the amended pleading arise out of the same transaction[,] occurrence[,] or event set forth in the original pleading." ***Id.*** at 196. If so, "relation back is presumptively appropriate." ***Id.*** The issue, therefore, is whether the amended pleading relates back to the initial cross-claim. *See* ***Wussow v. Commercial Mechanisms, Inc.***, 97 Wis. 2d 136, 144-45, 293 N.W.2d 897 (1980). We conclude it does under either state's law.

[3] WISCONSIN STAT. § 802.09(3) provides in relevant part: "If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading."

¶15 A review of the original and proposed amended cross-claims persuades us that Nebraska's original allegations are broad enough to include a contract claim against Jeneil. Nebraska's answer admitted that it contracted with Jeneil to deliver on a contract with Pharmacal and forwarded certificates of analysis Jeneil generated pursuant to that contract. Jeneil's cross-claim against Nebraska sought contribution and/or indemnification "pursuant to the terms of the November 1, 2007 agreement between" the parties. Nebraska denied Jeneil's claim and asserted that any damages to Pharmacal were caused by Jeneil's negligence "and other wrongful conduct."

¶16 Even without the phrase "breach of contract," we read the original cross-claim to encompass Jeneil's performance of contractual obligations, which arose from the transactions, occurrences, or events in the original cross-claim. *See* WIS. STAT. § 802.09(3). Viewed as a reasonably prudent party, Jeneil "ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question." *See* ***Biggart v. Barstad***, 182 Wis. 2d 421, 434 n.5, 513 N.W.2d 681 (Ct. App. 1994) (citation omitted).

¶17 We next examine Jeneil's assertion that it is prejudiced by the belatedness of Nebraska's contract claim because Nebraska knew of the factual allegations relating to the parties' contract when the case was filed. *See* ***Korkow***, 117 Wis. 2d at 197; *see also* ***Pointe San Diego Residential Cmty. L.P.***, 125 Cal. Rptr. 3d at 549. We miss Jeneil's point. The contract was a two-way street. The suggestion that Jeneil was unaware of the operative facts relating to contract performance such that it could not prepare a defense rings hollow.

¶18 We also disagree that, despite timeline similarities, ***Drehmel v. Radandt***, 75 Wis. 2d 223, 249 N.W.2d 274 (1977), compels a conclusion that Nebraska's amendment must be denied. Drehmel was seriously injured at work and filed suit against his employer and the employer's insurer. ***Id.*** at 224, 226. Eight years after the accident, five years after the statute of limitations expired, and two years after Drehmel gave notice of readiness for trial, he sought to file an amended complaint to add two coemployees as defendants. *See* ***id.*** at 224-26. The circuit court refused to permit the amendment. ***Id.*** at 224.

¶19 Here, over a comparable time frame, Nebraska sought to amend its cross-claim eight years after the alleged conduct giving rise to this lawsuit, five years after it filed its original cross-claim, and four or two years after the California and Wisconsin, respectively, statutes of limitations had run on a contract claim. *See* Cal. Code Civ. Proc. § 337 subd. 1; WIS. STAT. § 893.43(1). The similarities end there.

¶20 In ***Drehmel***, the circuit court explained that allowing the amendment would be "patently unfair" to the defendant insurer, which could be required to "assume financial responsibility for two additional participants without any prior warning permitting a timely investigation or utilization of discovery procedures." ***Drehmel***, 75 Wis. 2d at 227. The supreme court affirmed, as the circuit court's decision reflected a "carefully stated" exercise of discretion. ***Id.*** at 229. The court in no way ruled that a like time lapse requires denial of a motion to amend as a matter of law.

¶21 In our view, the proposed amendment here arises from the same transactional facts set forth in the original pleading, relates back to the original cross-claim, does not defeat the policy underpinning the statute of limitations, and

does not prejudice Jeneil. Accordingly, regardless of which state's law is applied, the statute of limitations does not erect a bar.

¶22 Having reversed based on the first two issues, we need not reach Nebraska's contention that the circuit court denied it due process by deciding the motion to amend without giving it a chance to respond to Jeneil's response.

By the Court.—Judgment reversed and cause remanded.

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