COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2008

David R. Schanker
Clerk of Court of Appeals

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Appeal No. 2007AP1414 **Cir. Ct. No. 2005CV860**

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

BETTY ANDREWS REVOCABLE TRUST, DONALD DERR, WILLIAM E. TORREY, RALPH BENJAMIN, JAMES OESTMANN, JAMO TRUST NUMBER 2 AND GERALD J. & ARLENE B. STORMS LIVING TRUST,

PLAINTIFFS-APPELLANTS,

WINDSOR HOMES, INC. N/K/A WHI LIQUIDATION, INC.,

PLAINTIFF,

V.

VRAKAS/BLUM, S.C., VRAKAS/BLUM MERGERS AND ACQUISITIONS, INC. AND KARIN M. GALE, CPA,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Dykman, Vergeront and Bridge, JJ.

¶1 DYKMAN, J. The minority shareholders of Windsor Homes, Inc., appeal from a summary judgment limiting trial to their derivative claims for breach of contract and misrepresentation in their action against Vrakas/Blum for its activities in connection with marketing Windsor Homes' assets. The shareholders argue that they have stated separate claims in their individual capacities, and that issue preclusion does not bar their direct and derivative claims for conspiracy. We conclude that the shareholders cannot recover in their individual capacities under any of their pled theories, and that they did not preserve the argument they now raise as to issue preclusion. We therefore affirm the summary judgment order limiting trial to the shareholders' derivative claims for breach of contract and misrepresentation.[1]

Background

¶2 The following undisputed facts are taken from the parties' pleadings and summary judgment submissions.[2] In 1998, Windsor Homes, Inc., entered into

[1] Vrakas/Blum argues that the shareholders submitted depositions that the parties had stipulated not to use on summary judgment. We do not consider the depositions in our decision and thus need not reach this argument. Additionally, the shareholders appeal from an order denying their motion for reconsideration, which we do not consider separately.

[2] The shareholders assert that summary judgment is improper because the material facts surrounding the claims are in dispute. *See* WIS. STAT. § 802.08(2) (2005-06). However, in their summary judgment submissions and on appeal, the parties dispute only issues of law. Because this case is resolved on the first step of summary judgment methodology, that is, on whether the parties have stated a claim in their complaint, we need not reach the issue of whether there are any genuine issues of fact remaining. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

a contract with Vrakas/Blum[3] to market the sale of Windsor Homes' assets or stock to potential buyers.[4] Len Linzmeier and James Ballweg, the president and vice-president of Windsor Homes, signed the contract on behalf of Windsor Homes. Karin Gale signed on behalf of Vrakas/Blum.[5]

¶3 At the time Windsor Homes and Vrakas/Blum entered into the marketing contract, Windsor Homes had nine shareholders. Linzmeier owned 43.75% of the shares and Ballweg owned 18.75% of the shares. The remaining minority shareholders owned, collectively, 37.5% of the shares. However, in March 1999, Linzmeier obtained Ballweg's shares, making him the majority shareholder of Windsor Homes.

¶4 Linzmeier then sold his majority interest to Camberwell Companies, Inc.[6] In connection with Linzmeier's sale to Camberwell, Windsor Homes entered into a Credit & Security Agreement with Wells Fargo Business Credit, Inc. The agreement provided for a $2.3 million loan to Camberwell, secured by the assets of Windsor Homes, to fund the purchase of Linzmeier's shares.[7]

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[3] There are two Vrakas/Blum entities as parties to this case. The distinction is not pertinent to this appeal, and we thus do not distinguish between the two.

[4] The 1998 contract superseded a contract the parties signed in 1997.

[5] While Karin Gale and Vrakas/Blum are individual defendants, the focus of this appeal is actions taken by Gale on behalf of Vrakas/Blum. Thus, we refer to Gale and Vrakas/Blum collectively as "Vrakas/Blum," unless the actions of Gale need be distinguished.

[6] The parties refer to the actions of the "Minnesota Buyers," a group including Camberwell and its affiliates, as well as individual actions by those buyers. Because any distinction between the parties is unimportant to this appeal, we refer to the group collectively as "Camberwell."

[7] Vrakas/Blum describes the transaction as Windsor Homes obtaining a loan from Wells Fargo and then loaning the money to Camberwell to use to purchase Linzmeier's shares. We do not find this distinction significant.

¶5 Following Linzmeier's sale to Camberwell, Windsor Homes and its business deteriorated to the point where Windsor Homes had no value. In March 2005, the minority shareholders brought this action against Vrakas/Blum for breach of contract, intentional, negligent and strict responsibility misrepresentation, and civil conspiracy, both derivatively and in their personal capacities. The shareholders' complaint alleged the following: (1) that Vrakas/Blum originally marketed all of Windsor Homes' assets or stock to Camberwell, but secretly advised Linzmeier to sell only a controlling interest to Camberwell; (2) that Linzmeier obtained Ballweg's shares and negotiated with Camberwell to sell only his majority shares, represented by Vrakas/Blum; (3) that Gale suggested to Camberwell that it was to its financial advantage to purchase only Linzmeier's majority shares, rather than all of the assets or stock of Windsor Homes; (4) that Vrakas/Blum, Linzmeier and Camberwell arranged for Windsor Homes to enter into the Credit & Security Agreement to finance Camberwell's purchase of Linzmeier's shares, secured by Windsor Homes' assets, thus jeopardizing the financial integrity of Windsor Homes; and (5) that Vrakas/Blum withheld all of this information from the minority shareholders to induce their inaction, so that the Linzmeier sale would proceed and Vrakas/Blum could collect a commission.

¶6 Vrakas/Blum moved for summary judgment, arguing, in part, that the shareholders had not stated any direct or derivative claims entitling them to relief. *See* WIS. STAT. § 802.06(2)(a)(6) and (b). Vrakas/Blum also argued that issue preclusion barred the shareholders' direct and derivative claims for conspiracy based on the shareholders' earlier action against Linzmeier and Camberwell for breach of fiduciary duty and conspiracy. As part of the summary judgment proceedings, Vrakas/Blum moved the court to take judicial notice of the

proceedings in the earlier action, and submitted certified copies of the records from the trial court and this court.

¶7 The trial court granted in part and denied in part Vrakas/Blum's motion for summary judgment. It dismissed the shareholders' direct claims for breach of contract and misrepresentation, but allowed their derivative claims on breach of contract and misrepresentation to proceed to trial. Then, after reviewing the material from the earlier action, it dismissed the shareholders' direct and derivative claims for conspiracy. It explained that the conspiracy claim arose out of the same conduct that was the basis for the earlier action against Linzmeier and Camberwell. In the earlier action, the trial court granted summary judgment to the defendants because the tort claims were barred by the two-year statute of limitations. The earlier court explained that it was undisputed that the shareholders had notice of a shareholders meeting in January 2000 which provided them the opportunity to discover the facts underlying their complaint. Because the shareholders had the opportunity to discover those facts more than two years before commencing their action against Linzmeier and Camberwell in February 2002, the trial court in the earlier action dismissed their claims as untimely.[8] Thus, in this case, the trial court applied issue preclusion to the conspiracy claims which relied on the same alleged civil wrongs by Linzmeier and Camberwell, and decided the statute of limitations had run on these claims against Vrakas/Blum. The shareholders appeal.

[8] The shareholders appealed, but we dismissed the appeal as untimely.

Standard of Review

¶8 We review an order granting summary judgment de novo, applying the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The first step in our summary judgment methodology is to determine whether the complaint states a claim, taking as true the facts as pled. ***Id.*** at 317. If the complaint states a claim, we examine the parties' submissions to determine whether there are any issues of material fact precluding summary judgment. ***Id.*** at 315. If there are no issues of material fact, we must determine whether either party is entitled to judgment as a matter of law. ***Id.***

¶9 This case presents three specific issues for review: (1) whether the shareholders have stated a claim for breach of contract under the contract between Windsor Homes and Vrakas/Blum in their individual capacities; (2) whether the shareholders have stated a claim for intentional, negligent or strict responsibility misrepresentation in their individual capacities; and (3) whether the shareholders have preserved their argument as to issue preclusion. Contract interpretation is a question of law that we review de novo. ***Milwaukee Area Technical College v. Frontier Adjusters of Milwaukee***, 2008 WI App 76, ¶6, _Wis. 2d_, 752 N.W.2d 396. Similarly, whether a complaint has stated a claim is a question of law that we review independently. ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998). Finally, we review the record to determine whether an argument was raised in the trial court, and generally will not review an issue raised for the first time on appeal. *See* ***State v. Anderson***, 215 Wis. 2d 673, 683, 573 N.W.2d 872 (Ct. App. 1997).

Discussion

¶10 The shareholders argue that the trial court erred in dismissing their direct claims for breach of contract and misrepresentation, and in dismissing the conspiracy claim in its entirety. We disagree with each of the shareholders' contentions, and address each in turn.

Breach of Contract

¶11 The shareholders assert that they have stated a claim for breach of contract in their individual capacities based on Vrakas/Blum's breach of its contract with Windsor Homes.[9] The shareholders argue that they are direct parties to the contract, or at least third-party beneficiaries to it, because the contract concerns the sale of Windsor Homes' assets, stock, or a portion thereof. The shareholders argue that they are necessary parties to the contract because shareholders, not corporations, own stock. Thus, the shareholders point out, sale of the corporation's stock required their participation.

¶12 First, we reject the shareholders' argument that they are direct parties to the contract. As the shareholders concede, the contract was entered into by Windsor Homes, through Linzmeier and Ballweg, and Vrakas/Blum, through Gale. Thus, the shareholders are not in privity to the contract and cannot sue for

[9] The argument between the parties over whether the shareholders' claim for breach of contract was appropriately dismissed on summary judgment focuses on the language in the complaint and the contract itself. Neither party points to any other materials as pertinent to this argument.

breach of contract as direct parties.[10] *See* ***State ex rel. Journel/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 709, 456 N.W.2d 359 (1990). We turn, then, to their argument that they may nonetheless sue under the contract as third-party beneficiaries. *See* ***id.***

¶13 In order to state a claim for breach of contract based on third-party beneficiary status, a complaint must allege that "the parties to the contract intentionally entered their agreement directly and primarily for [the plaintiffs'] benefit." ***Schell v. Knickelbein***, 77 Wis. 2d 344, 348, 252 N.W.2d 921 (1977) (citation omitted). Thus, "[a] third party cannot maintain an action as a third[-] party beneficiary if under the contract his [or hers] was only an indirect benefit, merely incidental to the contract between the parties." ***Id.*** at 349 (citation omitted).

¶14 It is undisputed that Windsor Homes and Vrakas/Blum entered into a contract for Vrakas/Blum to represent Windsor Homes in the sale of Windsor Homes' assets, stock, or a portion thereof. We do not agree that the contract was therefore entered into for the direct benefit of any of the shareholders in their individual capacities. To the contrary, as the shareholders concede, the contract was entered into for the benefit of Windsor Homes rather than any individual

[10] In support of this argument, the shareholders assert that Linzmeier was also a minority shareholder when Windsor Homes and Vrakas/Blum entered into the contract, and thus if he was entitled to any benefit under the contract, then so were they. We agree that Linzmeier was not a party to the contract. Whether or not Linzmeier received benefits from Vrakas/Blum to which he was not entitled is not before us on this appeal, and does not affect our analysis.

shareholder.[11] Indeed, this is the basis for the shareholders' breach of contract claim: that Vrakas/Blum breached its contract by benefitting Linzmeier rather than Windsor Homes. Accordingly, we conclude that any benefit to the shareholders in their individual capacities under the contract was merely incidental to the primary intended benefit to Windsor Homes, and that they therefore have not stated a direct claim as individual third-party beneficiaries under the contract.

Misrepresentation

¶15 The shareholders argue that they have stated claims for intentional, strict responsibility, and negligent misrepresentation in their individual capacities. They contend that Vrakas/Blum had a duty to disclose to them personally the facts leading up to and including the use of Windsor Homes' assets to secure a loan for Camberwell to purchase Linzmeier's shares, and its failure to disclose amounted to a misrepresentation. We disagree.

¶16 All three forms of misrepresentation—intentional, negligent, and strict responsibility—share the following elements: "(1) The representation must be of a fact and made by the defendant; (2) the representation of fact must be untrue; and (3) the plaintiff must believe such representation to be true and rely thereon to his [or her] damage." ***Ollerman v. O'Rourke Co., Inc.***, 94 Wis. 2d 17, 24-25, 288 N.W.2d 95 (1980) (citation omitted). Thus, as a basis for any of the

[11] We recognize the shareholders' argument that only they, and not Windsor Homes, own stock. However, the fact that the contract includes the possibility of the sale of stock or a portion of stock does not lead to the conclusion that the minority shareholders are direct beneficiaries of the contract. The plain terms of the contract provide that Vrakas/Blum was to represent Windsor Homes in the sale of its assets to potential buyers. Thus, we agree with the trial court that the shareholders may pursue this claim derivatively on behalf of Windsor Homes.

three causes of action for misrepresentation, the plaintiff must allege a *representation of fact* made by the defendant.

¶17 "The general rule is that silence, a failure to disclose a fact, is not an intentional misrepresentation unless the [defendant] has a duty to disclose." ***Id.*** at 26. However, "[i]f there is a duty to disclose a fact, failure to disclose that fact is treated in the law as equivalent to a representation of the nonexistence of the fact." ***Id.*** Thus, in order to state a claim for any of the three misrepresentation claims, the shareholders were required to state general facts establishing that Vrakas/Blum had a duty to disclose to them its dealings with Linzmeier and Camberwell, such that failure to disclose amounted to an affirmative representation that those acts did not take place. We begin, then, with an analysis of whether Vrakas/Blum had a "duty to disclose" under the facts pled in the complaint to give rise to any of the three misrepresentation claims.[12]

¶18 As an initial matter, we clarify that the "duty to disclose" that converts silence to a representation of fact is distinct from the "duty" element of an ordinary negligence claim. We have recognized that "[t]he tort of negligent misrepresentation in Wisconsin is a specific development of the common law of negligence," and requires elements different from ordinary negligence claims. ***Chevron Chemical Co. v. Deloitte & Touche***, 168 Wis. 2d 323, 332 n.12, 483 N.W.2d 314 (Ct. App. 1992). An action for negligent misrepresentation requires

[12] The supreme court recently said that it "has[s] never held that a claim for strict responsibility for misrepresentation or negligent misrepresentation can arise from a failure to disclose. Therefore, it remains an open question." ***Kaloti Enterprises, Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶13 n.3, 283 Wis. 2d 555, 699 N.W.2d 205. Because we conclude that the shareholders have not set forth facts establishing that Vrakas/Blum had a duty to disclose to the shareholders its actions with Linzmeier and Camberwell, we need not reach the question of whether silence ever gives rise to claims for negligent or strict responsibility misrepresentation.

the three common elements of any misrepresentation claim (the defendant made a representation of fact that is untrue, which the plaintiff believes is true and relies upon to his or her detriment) plus the additional element that the defendant was negligent in making the untrue representation of fact.[13] *See* ***id.*** at 331-32; WIS JI—CIVIL 2403. The elements have also been stated as

> (1) a duty of care or voluntary assumption of a duty on the part of the defendant; (2) a breach of that duty, i.e., failure to exercise ordinary care in making the representation or in ascertaining the facts; (3) a causal link between the conduct and the injury; and (4) actual loss or damage as a result of the injury.

Hatleberg v. Norwest Bank Wisconsin, 2005 WI 109, ¶40, 283 Wis. 2d 234, 700 N.W.2d 15 (citation omitted). Significantly, this formulation of the elements also relies on the defendant's making a representation of fact to the plaintiff.[14]

¶19 The shareholders cite ***Ollerman*** in support of their argument that Vrakas/Blum had a duty to disclose the Linzmeier and Camberwell developments to them. In ***Ollerman***, 94 Wis. 2d at 21-22, the parties entered into a contract for

[13] The shareholders argue, in part, that Vrakas/Blum's duty to disclose arises from its duty to exercise ordinary care, citing to ordinary negligence cases. Whether Vrakas/Blum was negligent in making a misrepresentation goes to the additional element of negligence under a negligent misrepresentation claim, not to whether there was a duty to disclose that turns silence into a representation of fact.

[14] Intentional misrepresentation has two additional elements: that the defendant knew the representation of fact was untrue or was reckless in making the misrepresentation, and that the defendant intended to deceive the plaintiff to the plaintiff's pecuniary damage. ***Ollerman v. O'Rourke Co., Inc.***, 94 Wis. 2d 17, 25, 288 N.W.2d 95 (1980). Strict responsibility misrepresentation also has two additional elements: that the misrepresentation was made on personal knowledge of the defendant or under circumstances in which the defendant necessarily should have known the representation was untrue, and that the defendant had an economic interest in the transaction. ***Id.*** Because we conclude that the first common element of misrepresentation claims—a representation of fact—has not been established, we need not reach the additional elements under these causes of action.

the buyer to purchase a vacant lot from the seller, and the seller failed to disclose a well on the property that reduced the value of the lot. The seller was an experienced real estate sales corporation and the buyer was inexperienced in real estate transactions. ***Id.*** at 21. The supreme court concluded that the buyer had stated a claim for intentional misrepresentation based on the seller's failure to disclose. ***Id.*** at 42. In analyzing whether the seller had a duty to disclose, the court recognized that the question of the existence of a legal duty is based on "shifting sands, and no fit foundation. There is a duty if the court says there is a duty …. The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall" influence the court's determination. ***Id.*** at 28 (citation omitted). The court said:

> The traditional legal rule that there is no duty to disclose in an arm's-length transaction is part of the common law doctrine of caveat emptor which is traced to the attitude of rugged individualism reflected in the business economy and the law of the 19th century. The law of misrepresentation has traditionally been closely aligned with the mores of the commercial world because the type of interest protected by the law of misrepresentation in business transactions is the interest in formulating business judgments without being misled by others—that is, an interest in not being cheated.

Id. at 29-30 (footnotes omitted). The court recognized that "[c]ourts have departed from or relaxed the 'no duty to disclose' rule by carving out exceptions to the rule and by refusing to adhere to the rule when it works an injustice." ***Id.*** at 30. The court then cited the RESTATEMENT (SECOND) OF TORTS § 551 (1977) as "attempt[ing] to formulate a rule embodying this trend in the cases toward a more frequent recognition of a duty to disclose." ***Id.*** at 36. The court said that § 551(1)

> sets forth the traditional rule that one who fails to disclose a fact that he knows may induce reliance in a business transaction is subject to the same liability as if he had represented the nonexistence of the matter that he failed to

> disclose if, and only if, he is under a duty to exercise reasonable care to disclose the matter in question.

Id. The court also cited § 551(2)(e) as requiring a party to a business transaction to disclose to the other party

> facts basic to the transaction, if he [or she] knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Id. at 37. The court thus concluded that under the facts of the case the law imposed a duty on the seller to disclose defects in the property which were not readily discernible. ***Id.*** at 41-42.

¶20 The court then turned to the buyer's claim for negligent misrepresentation. ***Id.*** at 44. The court concluded that it did not need to resolve whether the complaint stated a claim for negligent misrepresentation, because it had already determined that it stated an alternative claim for intentional misrepresentation. ***Id.*** at 51. The court also said that it could not determine from the record whether any of the traditional policy reasons for denying negligence liability would preclude liability in that case. ***Id.*** at 48-52.

¶21 ***Ollerman*** is distinguishable from this case. There, the plaintiff and defendant were parties to a business transaction and the seller withheld information that would have allowed the seller to decline to enter the transaction. Indeed, the court's deviation from the general rule that failure to disclose is not a misrepresentation was founded on the Restatement rule that parties to a business transaction have a duty to disclose information to one another that are material to

the transaction. ***Id.*** at 37. Here, the shareholders were not a party to any business transaction.[15] The shareholders allege no other basis in Wisconsin law for imposing a duty on Vrakas/Blum to disclose its dealings with Linzmeier to the shareholders.

¶22 Finally, we note that the facts in the shareholders' complaint could be read as raising a claim for negligence, even though it is not so titled. *See* ***id.*** at 22 n.3 ("A plaintiff need not state the theory of law under which he or she is pleading. If a pleaded statement of facts may permit recovery on two different theories, it is not required to indicate the theory or theories."). The parties discuss ordinary negligence cases in disputing Vrakas/Blum's duty to disclose. Thus, while the shareholders' complaint and briefs categorize their tort claims as the three misrepresentation torts, we will address whether the shareholders can recover under an ordinary negligence claim.

¶23 We conclude that, assuming negligence, the shareholders' claim is precluded by public policy. *See* ***id.*** at 47-48 (even when action is causally negligent, courts may preclude liability based on public policy considerations). There are six enumerated public policy reasons for courts to deny liability following negligence:

> (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the

[15] Other jurisdictions have specifically held that a plaintiff who is not a party to a business transaction may not rely on the RESTATEMENT (SECOND) OF TORTS § 551 (1977) to establish a duty to disclose. *See, e.g.*, ***Taggart v. Ford Motor Credit Co.***, 462 N.W.2d 493, 501 (S.D. 1990).

> negligent tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

Id. at 48 (citation omitted). Here, policy reason six applies. Vrakas/Blum failed to disclose to the minority shareholders the facts behind the transaction between Linzmeier and Camberwell, which damaged the corporation. To hold that Vrakas/Blum is liable in negligence to the shareholders individually for their personal losses, as opposed to their liability in a derivative action for damage to the corporation, opens the way for negligence cases by any individual harmed by a professional's services to a corporation that would foreseeably cause harm to individuals. We fail to see where the line could be drawn. Because allowing recovery here would enter a field with no sensible or just stopping point, the shareholders cannot recover under an ordinary negligence theory.[16]

Conspiracy

¶24 In their complaint, the shareholders allege that Vrakas/Blum conspired with Linzmeier and Camberwell to breach the contract between Vrakas/Blum and Windsor Homes, to misrepresent facts to the shareholders and to breach the fiduciary duty owed to them. The trial court dismissed the direct and derivative conspiracy claims on issue preclusion grounds, explaining that the civil wrongs underlying the conspiracy claims had been the subject of a previous action against Linzmeier and Camberwell. *See* ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶37, 300 Wis. 2d 1, 728 N.W.2d 693 (issue preclusion applies when

[16] Although "it is usually better practice to have a full factual resolution at trial before we evaluate the policy considerations involved," here there are no further facts to develop at trial that would alter our analysis. *See* ***Ollerman***, 94 Wis. 2d at 51.

"the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment … and … the determination was essential to the judgment"). The court explained that the same actions claimed to amount to an actionable conspiracy in the instant case had been found to be time-barred in the previous action, and thus the shareholders were precluded from pursuing their conspiracy claims here.

¶25 The shareholders argue that the statute of limitations determination in the earlier action does not apply to the instant claims. The shareholders assert that the issue in the prior case was the tortious conduct of Linzmeier and Camberwell, and did not address the involvement of Vrakas/Blum. Thus, assert the shareholders, their claim against Vrakas/Blum did not accrue until they discovered or should have discovered Vrakas/Blum's involvement, which is an issue of fact that has yet to be determined by a fact finder. *See* ***Hansen v. A.H. Robins Co., Inc.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983) (tort claims accrue when they are discovered or when they reasonably should have been discovered). Vrakas/Blum responds that the shareholders have raised the discovery rule argument for the first time on appeal, and we should therefore decline to address it. *See* ***Anderson***, 215 Wis. 2d at 683.

¶26 The shareholders reply that they did raise this issue, citing to the summary judgment oral arguments. There, the trial court asked the shareholders' counsel: "Are your conspiracy claims that were dismissed on statute of limitations grounds the same—in that case are they the same as the ones you are asserting here, except against different parties to the conspiracy?" Counsel responded:

> The way I foresee the claims in this case is the conspiracy is the conspiracy to commit fraud, not for breach of fiduciary duty….

> …. Obviously, based on Judge Sumi's ruling, the conspiracy and the breaching of fiduciary duty would no longer exist. We are not disputing that. But the issues with fraud that were committed by the accountant and the other parties, and the injury to the business, which is a separate claim under conspiracy under [WIS. STAT. §] 134.01, conspiracy to injure the business, those are separate and distinct claims different from the claims brought in the other case.

The trial court then asked Vrakas/Blum's counsel: "What claims do you say … are foreclosed if I accept the two-year statute of limitations apply to the breach of fiduciary obligation?" To which counsel replied: "[S]pecifically the conspiracy …. [A]s a matter of record, Judge Sumi has determined that the defendants knew or should have known…. [and] that plaintiffs' direct claims for conspiracy … were barred by the running of the two-year statute of limitations."

¶27 In its order, the trial court stated that the instant claim for conspiracy is not distinct from the previous conspiracy claim. Because the prior and current conspiracy claims are both premised on the tortious conduct of Linzmeier and Camberwell, and an action for that underlying tortious conduct was found to be time-barred in the previous action, the court applied issue preclusion to the conspiracy claim. The shareholders did not raise this issue in their motion for reconsideration to the trial court.

¶28 Thus, the shareholders' argument on appeal has taken a different form than it had in the trial court. In the trial court, the shareholders argued that different claims underlay the conspiracy action, not that a factual dispute existed as to when they discovered or should have discovered Vrakas/Blum's involvement. On appeal, the shareholders do not argue that the difference in the underlying wrongful conduct matters, but argue only that there is a factual dispute as to when they discovered or should have discovered Vrakas/Blum's

involvement. Because they did not adequately raise this issue in the trial court, we decline to address it. *See* ***id.*** Accordingly, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.