COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1708 **Cir. Ct. No. 2009CV1073**

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

PAUL A. BUTLER,

PLAINTIFF-APPELLANT,

V.

RYAN J. SCHRIEBER, ANGEL SOTO, GENESIS GROUP, CENTRAL PROTECTIVE SERVICES AND CEC ENTERTAINMENT, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. The circuit court dismissed a complaint brought by Paul A. Butler because it was filed after the two-year statute of limitations of

WIS. STAT. § 893.57 (2005-06)[1] expired. Butler appeals, and argues that application of the discovery rule should save his lawsuit. We disagree and, therefore, affirm the order of dismissal.

BACKGROUND

¶2 For purposes of appellate review of the motions to dismiss, the factual allegations of the complaint, and all reasonable inferences from those allegations, are taken as true. *See* ***John BBB Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 320, 565 N.W.2d 94 (1997). Accordingly, we set forth the following facts, taken from Butler's complaint.

¶3 On December 17, 2006, Ryan Schrieber, an employee of Central Protective Services (CPS), a private security firm employed by a Chuck E. Cheese restaurant, observed a car driving recklessly through the restaurant's parking lot. Schrieber stopped the car which was being driven by Butler. Schrieber, who was wearing a police-style uniform, "ordered" Butler out of the car, by "us[ing] intimidation … [and] placing his hand on his firearm." Schrieber handcuffed Butler and searched him. Schrieber "radioed something," and "[m]oments later," two persons, identified in the complaint as John Doe 101 and John Doe 102, "both wearing uniforms and handguns, came running from" the restaurant. Butler denied driving recklessly and "demanded to be released."

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

¶4 Another CPS security officer, Angel Soto,[2] and the manager of the restaurant, John Doe 104, "called the police and falsified a complaint to get the police to … arrest" Butler. The transcript of the police dispatch, attached to Butler's complaint, recites:

> Caller and manager were having trouble with a man at Chuck [E.] Cheese. They chased him into the parking lot where the security guard is not [sic] holding him. The man is wearing a holster for a gun, but they cannot find the gun, need help ASAP. Still in parking lot.
>
> …
>
> The security guard did not say why they chased this man out of Chucky [sic] Cheese into the parking lot. The man is in custody. That would make me believe that the man is cuffed. The main concern the security guard has is the gun. Could it be still in Chucky [sic] Cheese, could it be laying in the parking lot, could it be in the person[']s car[?] If believe that there is some concern. How would you like to take your child to Chucky [sic] Cheese and have your child find a loaded gun. (Some uppercasing omitted).

¶5 In the complaint, Butler denied being "chased out" of the restaurant or having "any confrontations" with security guards inside the restaurant. He also denied driving recklessly in the parking lot. Butler alleged that the security guards held him in "unlawful custody for approximately 30 minutes before the police arrived." Butler alleged that his car was searched twice by the police. After nothing incriminating was found in the first search, "Schrieber told [the officer] to search inside the glove compartment," and then Schrieber gave a key to the glove compartment to the officer. The officer found a firearm in the glove compartment.

[2] In his motion to dismiss, Soto advised the court that his correct name was Angel Silva. Because the allegations of the complaint are taken as true when a motion to dismiss is filed, we will refer to this defendant as Soto, the name ascribed to him by Butler.

¶6 The incident in the parking lot led to an extended supervision revocation hearing held on February 6, 2007. The two police officers who responded to the parking lot and Schrieber testified. At the hearing, Schrieber testified that "he was given authority for his actions by his employer." A transcript of the revocation hearing was attached to Butler's complaint.

¶7 Based on the above factual allegations, Butler alleged fifteen causes of action against several defendants. Butler alleged causes of action for false imprisonment, invasion of privacy, and the intentional infliction of emotional distress against Schrieber. Butler alleged causes of action for "falsifying a complaint" and the intentional infliction of emotional distress against Soto and John Doe 104, the manager of the Chuck E. Cheese restaurant. Butler alleged causes of action for false imprisonment and the intentional infliction of emotional distress against John Doe 101 and John Doe 102, the other CPS security guards. Butler alleged "vicarious liability" claims against a John Doe 103; CPS; the Genesis Group,[3] an alleged employer of the four security guards; and CEC Entertainment, Inc., as the "utilize[r]" of CPS and its employees. Butler filed his complaint on January 22, 2009.

¶8 All defendants moved to dismiss Butler's complaint, arguing that it was barred by the two-year statute of limitations for intentional torts set forth in WIS. STAT. § 893.57. In opposition to the motion to dismiss, Butler argued that the discovery rule should be applied, and that under that rule, the statute of limitations did not begin to run until February 6, 2007, the date of his revocation

[3] In its motion to dismiss, the Genesis Group informed the court that its correct corporate name is Genesis 2K, Inc. As with Soto, we will use the name ascribed to the defendant by Butler.

hearing. The circuit court rejected Butler's arguments and granted the defendants' motion to dismiss.

DISCUSSION

¶9 We first must determine the controlling limitation period for the conduct alleged in Butler's complaint. Choosing the correct statute of limitations is a question of law. *See* ***Estate of Hegarty v. Beauchaine***, 2001 WI App 300, ¶14, 249 Wis. 2d 142, 638 N.W.2d 355. WISCONSIN STAT. § 893.57 sets forth the controlling statute of limitations for intentional torts. That statute states: "An action to recover damages for libel, slander, assault, battery, invasion of privacy, false imprisonment or other intentional tort to the person shall be commenced within 2 years after the cause of action accrues or be barred."[4] All of the causes of action alleged by Butler are either expressly mentioned in § 893.57—false imprisonment and invasion of privacy—or clearly intentional torts—intentional infliction of emotional distress and falsifying a complaint. Therefore, we hold that the applicable statute of limitations was two years.[5]

[4] In 2010, WIS. STAT. § 893.57 was amended to provide for a three-year limitation period. *See* 2009 Wis. Act 120, § 1 (eff. Feb. 26, 2010). The amendment, however, does not apply to Butler's action. *See* ***id.***, § 2 ("This act first applies to the injuries occurring on the effective date of this subsection.").

[5] In his appellate brief, Butler contends that his complaint "should have been liberally construed" to allege actions "brought to recover damages caused by the wrongful act, neglect or default of another" so that the three-year statute of limitation in WIS. STAT. § 893.54 would apply. We reject Butler's argument. Butler did not make that argument to the circuit court and, therefore, he cannot raise the issue for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). More importantly, the liberal construction sought by Butler would require this court to ignore the plain language of the complaint that expressly denominates the causes of action as "false imprisonment," "invasion of privacy," and other plainly intentional torts.

¶10 The incident in the Chuck E. Cheese parking lot took place on December 17, 2006, and Butler filed his complaint on January 22, 2009, more than two years later. Unless the discovery rule applies to delay the start of the limitations period, Butler's complaint must be dismissed.

¶11 Under the discovery rule, a cause of action accrues on the date that the injury was discovered or with reasonable diligence should have been discovered, not on the date of the act that resulted in the injury. *See* ***Hansen v. A. H. Robins, Inc.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983). The discovery rule

> tolls the statute of limitations 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 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) (citation omitted). Therefore, the question then becomes when Butler "discovered or, in the exercise of reasonable diligence, should have discovered that [he was] injured, and the cause of [his] injury." ***John Doe 1 v. Archdiocese of Milwaukee***, 2007 WI 95, ¶13, 303 Wis. 2d 34, 734 N.W.2d 827 (internal quotation marks and citation omitted). Although "[r]easonable diligence is ordinarily a question of fact … when the facts and reasonable inferences that can be drawn from them are undisputed, whether a plaintiff has exercised reasonable diligence in discovering his or her cause of action is a question of law." ***Id.*** (internal quotation marks and citations omitted).

¶12 Butler contends that he did not know the extent or cause of his injuries, or the identity of the tortfeasors until the February 6, 2007 revocation hearing at which Schrieber testified. The law and undisputed facts defeat Butler's contention.

¶13 The "discovery rule carries with it the requirement that the plaintiff exercise reasonable diligence, which 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). Butler "may not close [his] eyes to means of information reasonably accessible to [him] and must in good faith apply [his] attention to those particulars which may be inferred to be within [his] reach." ***Id.*** Moreover, "the fact that a claim does not accrue until the plaintiff has knowledge of a suable party does not necessarily mean that it does not accrue until all suable parties are known." ***Dakin v. Marciniak***, 2005 WI App 67, ¶15, 280 Wis. 2d 491, 695 N.W.2d 867. The discovery rule "is not a promise to suspend limitations until optimal litigation conditions are established." ***Id.***

¶14 As a result of the incident in the parking lot, Butler was charged with being a felon in possession of a firearm. The textual portion of the criminal complaint stated that "Security guard Ryan Schrieber said he observed the defendant driving very recklessly, endangering the parking lot people and others outside that Chucky [sic] Cheese and he saw the defendant move a dark object from waistband to glove compartment," and that "Schrieber stated that the holster the defendant [was] wearing matches the gun and that the holster and gun are sold as a set." At the defendants' request, the circuit court properly took judicial notice of the criminal file, circuit court case No. 2006CF6730. *See* WIS. STAT. § 902.01(2)(b) (2007-08) (A court may take judicial notice of "[a] fact capable of accurate and ready determination by resort to sources whose accuracy cannot

reasonably be questioned."). We do the same. *See* ***Teacher Ret. of Texas v. Badger XVI, Ltd. P'ship***, 205 Wis. 2d 532, 540 n.3, 556 N.W.2d 415 (Ct. App. 1996) (appellate court may take judicial notice of files of the circuit court for Milwaukee County). That file shows that the criminal complaint was filed on December 20, 2006, and that Butler was given a copy of the complaint at the December 21, 2006 initial appearance. Thus, it is undisputed that Butler knew the identity of Schrieber within days of the incident.

¶15 Moreover, Butler obviously was present throughout the incident and, accordingly, he knew what occurred in the parking lot of the Chuck E. Cheese restaurant. In his complaint, Butler acknowledges that John Doe 101 and John Doe 102, the additional security guards "came running from Chuck E. Cheese's Restaurant." Therefore, Butler knew, or with the exercise of reasonable diligence should have known, that the security guards were employed by Chuck E. Cheese. At that point, even if Butler did not know the name of the legal entity that operated the restaurant, a reasonably diligent person could have filed suit against Chuck E. Cheese or ABC Corporation, d/b/a Chuck E. Cheese, within the two-year limitation period, and subsequently learned of the correct corporate name during discovery. As we noted in ***Dakin***, a cause of action accrues when the plaintiff has knowledge of a suable party even if the plaintiff does not have actual knowledge of all suable parties. ***Dakin***, 280 Wis. 2d at 505-06.

¶16 Lastly, Butler relies on the fact that he was incarcerated, and he contends that he should not be held to the same standards of diligence that might be ascribed to a non-incarcerated person. Butler expressly relies on WIS. STAT. § 893.16, which operates to toll statutes of limitations under certain circumstances. Such reliance is misplaced, however, because the portion of § 893.16(1) which

made imprisonment a disability that tolled a limitation period was repealed in 1998 as part of the Prison Litigation Reform Act. *See* 1997 Wis. Act 133, § 37.[6]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[6] WISCONSIN STAT. § 893.16(1) (1995-96) provided that "[i]f a person entitled to bring an action is, at the time the cause of action accrues … insane, or imprisoned on a criminal charge the action may be commenced within 2 years after the disability ceases, except that where the disability is due to insanity or imprisonment, the period of limitation ... may not be extended for more than 5 years." 1997 Wis. Act 133, § 37 deleted imprisonment as a disabling condition under § 893.16(1).