COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2556 **Cir. Ct. No. 2008CV2578**

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

ALAN J. DELSART, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF MILLARD A. DELSART,

PLAINTIFF-APPELLANT,

V.

ALBANY FELT COMPANY, INC., A.W. CHESTERTON COMPANY, AZCO, INC., BUILDING SERVICE INDUSTRIAL SUPPLY, INC., CBS CORPORATION, CRANE COMPANY, GENERAL ELECTRIC COMPANY, GOODRICH CORPORATION, HONEYWELL INTERNATIONAL, INC., INGERSOLL-RAND COMPANY, PAPER CONVERTING MACHINE COMPANY, TAYLOR INSULATION COMPANY, INC., GARLOCK SEALING TECHNOLOGIES, GENERAL MOTORS CORPORATION, ITT CORPORATION AND MOTION INDUSTRIES, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Alan Delsart appeals an order granting Honeywell International, Inc.'s motion to reconsider. That order disposed of the entire matter in litigation by reversing an earlier order granting Delsart's motions for leave to amend his complaint and to reconsider a summary judgment order, which had originally disposed of the entire matter.[1] Delsart contends the court erroneously granted the second motion to reconsider. We conclude the circuit court properly exercised its discretion in granting the second reconsideration motion, and therefore affirm.

BACKGROUND

¶2 Alan Delsart filed this personal injury and wrongful death lawsuit, individually and as special administrator of Millard Delsart's estate. Millard, Delsart's father, had developed mesothelioma, allegedly due to asbestos exposure in the workplace. While Millard was still alive, Delsart was granted both a durable power of attorney authorizing Delsart to take general legal action on Millard's behalf and a special power of attorney explicitly authorizing Delsart to bring a mesothelioma-related action. Delsart was listed as the second alternate personal representative in Millard's will. Millard died before this action was filed. His wife survived him by a little more than the three-year statute of limitations applicable to wrongful death actions.

¶3 Following extensive discovery, Honeywell moved for summary judgment arguing Delsart lacked the capacity to sue individually or as a special

[1] The Honorable Kendall M. Kelley entered the order granting summary judgment, and the order granting the motion for leave to amend and to reconsider. Following judicial rotation, the Honorable Marc A. Hammer entered the order granting the second motion to reconsider.

administrator. Following a hearing, the court agreed and dismissed the entire action. The court concluded Delsart could not sue in his individual capacity because the wrongful death claim belonged to his mother until it was extinguished by the running of the statute of limitations. Therefore, only Delsart's mother or the estate could pursue that claim. The court concluded Delsart could not sue on behalf of the estate because, not only had Delsart not been appointed "special administrator" when the complaint was filed, but no estate had ever been opened. Indeed, as of the summary judgment hearing date, no paperwork had even been filed with the probate court.

¶4 Delsart's counsel explained that he had taken Delsart at his word that he had been appointed to act on the estate's behalf to prosecute the action, and that Delsart believed he had such authority based on the power of attorney documents. Delsart sought a stay of the proceedings so that he could complete the process of opening the estate and being appointed the personal representative. Although the statute of limitations had already run, Delsart argued he could cure the lack of capacity to sue by being appointed the personal representative, and that his authority should relate back to the filing of the original complaint.

¶5 Delsart relied on WIS. STAT. §§ 802.09, 803.01, and 865.09 as authority for relating back a capacity to sue, asserting each statute afforded independent grounds.[2] Honeywell, however, presented a case holding that a lack of capacity to sue cannot be corrected after a statute of limitations has run. *See* ***Schilling v. Chicago, N. Shore, & Milwaukee R.R. Co.***, 245 Wis. 173, 13 N.W.2d

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

594 (1944). Delsart emphasized that the statutes he relied on were not enacted until decades after ***Schilling***. The circuit court concluded it was mere speculation as to whether Delsart would ever be appointed personal representative and that, regardless, the original complaint was a nullity under ***Schilling***.

¶6 The court's oral ruling dismissing the case was rendered July 8, 2010, and reduced to writing on July 23. Delsart was appointed personal representative of the estate on August 24. On September 1, he moved for reconsideration of the dismissal and for leave to amend the complaint to change his title from special administrator to personal representative.

¶7 In his motion, Delsart provided more recent authority, relying on WIS. STAT. § 802.09(3), that rejected the nullity rationale adopted in ***Schilling***.[3] *See* ***Estate of Kitzman v. Kitzman***, 163 Wis. 2d 399, 401-04, 471 N.W.2d 293 (Ct. App. 1991) (complaint by party lacking capacity is not a nullity; relation back is allowed even after statute of limitations has run); ***Korkow v. General Cas. Co.***, 117 Wis. 2d 187, 193-98, 344 N.W.2d 108 (1984) (liberal notice pleading civil procedure code adopted in 1976 requires that defendants have fair notice of the claim).

¶8 The circuit court reluctantly granted Delsart's motions. It faulted Delsart's counsel for not acting with reasonable diligence in the first place by not investigating Delsart's capacity to sue and by not acting promptly to remedy the situation after Honeywell alerted him to the issue by filing for summary judgment

[3] We observe that, although it appears ***Schilling v. Chicago, N. Shore, & Milwaukee R.R. Co.***, 245 Wis. 173, 13 N.W.2d 594 (1944), no longer accurately sets forth the law as to the issue here, the case has not been expressly identified and rejected in subsequent cases.

in May of 2010. Nonetheless, based on the new authority Delsart provided, the court concluded it "must grant" leave to amend because WIS. STAT. § 802.09(1) provides that "leave shall be freely given at any stage of the action when justice so requires."

¶9 Subsequently, the case was transferred to a new judge due to judicial rotation. Honeywell moved for reconsideration, arguing the court erroneously exercised its discretion in granting Delsart's motion for reconsideration and leave to amend. The court agreed that the earlier decision applied an improper legal standard, and granted Honeywell's motion. Thus, the court dismissed the case. Delsart now appeals.

DISCUSSION

¶10 Our review is limited to the order granting the second reconsideration motion, which disposed of the entire matter in litigation. That order vacated the earlier reconsideration order that had reinstated the dismissed action and granted Delsart leave to amend. A trial court's decisions on motions for leave to amend a complaint and for reconsideration are discretionary. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853; ***Mach v. Allison***, 2003 WI App 11, ¶20, 259 Wis. 2d 686, 656 N.W.2d 766 (WI App 2002). We uphold discretionary decisions if the court applied the correct legal standard to the facts of record in a reasonable manner. ***Mach***, 259 Wis. 2d 686, ¶20. A movant may prevail on a motion for reconsideration by establishing a manifest error of law. ***Koepsell's***, 275 Wis. 2d 397, ¶44. A manifest error "is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" ***Id.***

¶11 In its second reconsideration order, the court determined it had previously failed to recognize and apply controlling precedent, namely, ***Mach***. ***Mach*** provides that, when leave to amend is sought after a case has been resolved on summary judgment, there is no presumption to allow for amendments. ***Mach***, 259 Wis. 2d 686, ¶27. "Rather, the party seeking leave to amend must present a reason for granting the motion that is sufficient, when considered by the trial court in the sound exercise of its discretion, to overcome the value of the finality of judgment." ***Id.***

¶12 We conclude the court properly exercised its discretion in granting Honeywell's motion to reconsider. The court correctly observed it had improperly relied on the prejudgment standard for granting leave to amend. Indeed, that was a substantial basis for the initial ruling. In that decision, the court repeatedly observed that it "must grant" Delsart's motion despite being "dismayed" by Delsart's lack of urgency.

¶13 Because the court initially overlooked ***Mach*** and instead applied the "freely-given" standard, it was within the court's discretion to correct that manifest error of law. ***Mach*** requires that, in determining whether the movant has "overcome the value of the finality of the judgment," a court should consider the reasons why the party has not acted sooner, the length of time since the filing of the original complaint, the number and nature of prior amendments, the nature of the proposed amendment, and the effect on the defendant. ***Id.*** "However, the absence of specific prejudice to the defendant is not a sufficient reason, in itself, for allowing amendment, because that does not give appropriate weight to the value of the finality of judgment." ***Id.***

¶14 In the second reconsideration decision, the court set forth the standard and factors set forth in ***Mach*** and proceeded to discuss those factors. It noted that Delsart apparently failed to act sooner because he was mistaken about his legal status as representative of the estate. It faulted counsel for not investigating the matter initially, and even more so for not acting promptly to correct the mistake after receiving notice via the summary judgment motion. The court observed, "The lack of urgency to correct a fatal flaw in Delsart's case in the face of dispositive motions is disturbing."

¶15 The court further recognized that the proposed amendment was sought nearly two years after the original complaint was filed and after the statute of limitations had run. Finally, the court considered that Delsart had not even filed the amended complaint after the initial decision allowing him to do so, and only did so seven months later, after Honeywell moved for reconsideration. The court concluded:

> This case has reached a point where allowing Delsart to continue papering over fatal flaws in his case would deprive the defendants of their right to a fair judicial process. In fact, the circumstances of this case lead the Court to conclude that Delsart's actions cannot even rise to the level of excusable neglect. [Footnote omitted.]

¶16 Delsart first argues the court erroneously granted Honeywell's reconsideration motion because we must presume the court knew the law and properly considered ***Mach*** in its initial determination, despite not mentioning the case. That argument has no merit. We cannot presume the court applied ***Mach*** when the court applied a standard that conflicts with that set forth in ***Mach***.

¶17 Delsart next argues ***Mach*** does not apply because here the summary judgment decision was "nonfinal." After the court issued its written summary

judgment decision dismissing the action, it entered a subsequent order stating the decision was nonfinal, apparently because the court anticipated considering a motion to reconsider. Regardless whether the deadline for appeal can be circumvented in such a manner, the subsequent order in no way affected the substance and effect of the summary judgment decision. The ***Mach*** rule clearly applies.

¶18 Delsart also argues the second judge on the case erroneously granted Honeywell's reconsideration motion because the first judge's initial reconsideration determination in Delsart's favor was a discretionary ruling. Delsart likens the situation to the court of appeals exercising independent discretion to reverse a trial court's exercise of discretion. The flaw in Delsart's argument, however, is that the same court issued both decisions. Judicial rotation does not deprive a court of the opportunity to correct prior mistakes in a pending case. Indeed, given the language of the initial reconsideration decision, that judge likely would have come to the same conclusion as the second judge had he been apprised of the ***Mach*** decision.

¶19 Next, Delsart argues the court erred because ***Mach*** addresses the standard set forth in WIS. STAT. § 802.09 and the court failed to consider the other statutes Delsart previously proffered as authority for amending his complaint and relating back his authority to commence the action. Delsart did not, however, present this argument in his opposition to Honeywell's motion. He therefore forfeited the argument. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Regardless, Delsart develops no argument addressing the other statutes in the context of the ***Mach*** decision. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (We will not decide issues that are not, or inadequately, briefed.).

¶20 Finally, Delsart argues the court erroneously applied the ***Mach*** factors because the decision did not detail the steps required to commence a probate proceeding and the court was therefore in no position to determine whether counsel acted diligently after Honeywell moved for summary judgment. It was Delsart's counsel, however, who filed a vague affidavit that failed to detail the complexity of the procedure or the specific steps he had taken. In light of Delsart's failure to adequately present the issue, it was not unreasonable for either judge to determine Delsart's counsel failed to act with reasonable diligence. His general assertions of fact, lacking record citation, get him no further on appeal. Moreover, Delsart forfeited this argument because he failed to raise the issue in his response to Honeywell's reconsideration motion. *See* ***Huebner***, 235 Wis. 2d 486, ¶¶10-12.

By the Court.—Order affirmed.

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