COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1817 **Cir. Ct. No. 2008CV931**

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

IN THE MATTER OF THE GERHARD G. POEHLING FAMILY TRUST U/A DATED DECEMBER 29, 1975:

JOHN POEHLING, SR. AND JOHN POEHLING, JR.,

OBJECTORS-APPELLANTS,

V.

TRUST POINT, INC.,

TRUSTEE-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed.*

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

¶1 KLOPPENBURG, J. This case concerns a dispute about the administration of the Gerhard G. Poehling Family Trust, in particular the alleged

actions or inactions of its corporate trustee, Trust Point, Inc. John Poehling, Sr. and John Poehling, Jr. appeal a circuit court's order approving the accounts and administration of the Trust, and dismissing the objections of John Poehling, Sr. and John Poehling, Jr. We affirm the circuit court's partial grant of summary judgment in favor of Trust Point and the circuit court's ruling, after a court trial, that the objectors failed to demonstrate that Trust Point breached its duty of loyalty to the Trust's beneficiaries. We elaborate below.

BACKGROUND

A. Establishment and Terms of the Trust

¶2 In 1975, Gerhard Poehling executed the Gerhard G. Poehling Family Trust Agreement, thereby creating the Gerhard G. Poehling Family Trust. The Agreement named LaCrosse Trust Company (now known as Trust Point, Inc.) as trustee. At the time of its establishment, the sole asset funding the Trust was 302-5/12 shares of common stock in the Poehling family business, then known as LaCrosse Plumbing Supply Company, now Prometheus Group, Inc., commonly doing business as First Supply.[1]

¶3 Article I of the Trust Agreement states that the "Grantor has executed this Trust Agreement for the purpose of establishing a trust for the benefit of all eight of his children, and their issue by right of representation." Article III of the Trust provides in part that "the Trustee shall distribute all net income annually to my eight children equally, or their issue by right of

[1] First Supply is a wholesale distributor of plumbing, heating, air conditioning, and other products to industrial customers and building contractors.

representation" and that upon termination of the Trust (upon the death of his last surviving child), the proceeds shall be distributed to the grandchildren. In other words, Gerhard's eight children are the Trust's lifetime income beneficiaries and Gerhard's grandchildren are the contingent remainder beneficiaries.[2]

¶4 Article IV explicitly lists Gerhard's reasons for creating the trust:

> 1. To provide financial security for my children and grandchildren, and a secure source of income.
>
> 2. To avoid constant acquisitions and reacquisitions of common stock of various plumbing supply companies owned by members of the family caused by deaths.
>
> 3. To assure continuous and smooth management and operation of the various plumbing supply companies.

¶5 Article V outlines the trustee's powers, which include certain expressly discretionary powers, such as the power to "retain original investments and to invest and reinvest assets in any type of real estate and personal property, all irrespective of trust fund investment laws and regardless of non-productivity or lack of diversification, and to permit available funds to remain temporarily uninvested." Under the Agreement, the trustee has further discretion to "engage in or discontinue any business or commercial enterprise; to delegate management thereof; and to do all things appropriate in the prosecution of any such business or enterprise ... subject to the provisions of Paragraph 19 herein." Paragraph 19 limits the trustee's role in the governance of First Supply by making Trust Point only one of three voters of the common shares of stock contained in the Trust, the other two voters being son Robert E. Poehling and son-in-law Edward J. Felten.

[2] Since establishment of the Trust, two of Gerhard's sons have renounced their interest in the trust, leaving six of Gerhard's eight children as the lifetime income beneficiaries, including John Poehling, Sr.

B. Relevant History of the Trust's Administration and First Supply's Management

¶6 At the time of the Trust's creation, the shares of stock in First Supply that funded the Trust represented a minority interest in First Supply. In 1980, First Supply's shareholders and board of directors approved a plan of recapitalization, which ultimately resulted in the stock owned by the Trust to constitute all of First Supply's common stock. From the time of the recapitalization in 1980 to 1994, First Supply's board of directors included all family members who were also active in the business, including four of Gerhard's sons and Gerhard's three sons-in-law.[3] Gerhard retired in approximately 1983, shortly before having a stroke that rendered him fully incapacitated.

¶7 While Gerhard was still actively employed with First Supply, he and Edward Felten met annually with a Trust Point representative to review financial statements, discuss the performance and business of First Supply, and respond to questions. From 1983 to 1988, Edward Felten (accompanied also by Robert Poehling, the other family voter of stock held by the Trust) continued to meet annually with Trust Point to discuss the performance of First Supply, review the financial statements, and respond to questions from Trust Point. In 1988, son Joseph Poehling assumed the role of Chief Financial Officer of First Supply and took over Felten's responsibilities communicating with Trust Point.

¶8 Gerhard's children, their spouses, and other extended family members received a salary for their work at First Supply. In addition, until the early 1990s, First Supply paid an annual bonus to Gerhard's children. A

[3] Prior to the 1980s, First Supply's board of directors consisted of both family and non-family members.

percentage of First Supply's net income was placed in a bonus pool that was distributed equally to each family unit (each of Gerhard's children was considered a unit). The parties agree that distributing income through a "family bonus" was more tax efficient than having First Supply pay a portion of its profits to the Trust as dividends, and then having the Trust distribute that money to the income beneficiaries, Gerhard's children.

¶9 In 1992, First Supply's board of directors discussed a number of issues relating to the future of First Supply. By 1994, these discussions gave rise to conflicts within the board. In July 1994, the board passed a proposal that, among other changes, promoted Joseph Poehling to Chief Executive Officer, increased his compensation, established an executive committee, and authorized the addition of non-family members to the board. John Poehling, Sr. voted against the proposal.

¶10 In 1994 and 1995, the board voted to add two non-family members to the board of directors. In 1995 and 1996, two of Gerhard's sons resigned from the board. One of the resigning sons also relinquished his role as one of the voters of First Supply's stock owned by the Trust, and Joseph Poehling replaced him as a voter.

¶11 Later in 1996, John Poehling, Sr. and First Supply entered into a compensation agreement under which John Poehling, Sr. resigned from the board of directors and all other positions he had with First Supply. Since his resignation, John Poehling, Sr. has asked on several occasions to return to work at First Supply. However, Joseph Poehling always declined, because he "[d]idn't see that it would be in the best interest of the company."

¶12 On March 23, 2000, John Poehling, Sr. sent a letter to Trust Point, Edward Felten, and Joseph Poehling (the three voters of the First Supply stock) in which he stated his concerns with the Trust's administration, including "the trustees' failure to produce income that may be distributed to the beneficiaries of the trust" and that such failure "constitutes a gross dereliction and abandonment of [their] fiduciary duties to all of the income beneficiaries." John Poehling, Sr. also voiced concerns about First Supply's amount of debt, the lack of diversification of Trust assets, and conflicts of interest for the individuals who voted the common stock held by the Trust. He demanded that the existing trustees[4] immediately resign and if they failed to do so, he would "commence suit seeking [their] removal and damages."

¶13 On April 25, 2000, Attorney David Baker, on behalf of Trust Point, responded to John Poehling, Sr.'s letter, stating that Trust Point would not resign and that the Trust has been managed with the purposes of the Trust in mind – stability, continued family ownership, and management of the company by the Trust.

¶14 On August 1, 2000, Attorney Daniel Hardy, on behalf of John Poehling, Sr., wrote to First Supply's attorney with a copy to Attorney Baker (Trust Point's attorney). Attorney Hardy's letter contained numerous allegations about the Trust's management of First Supply's stock, including its failure to make the Trust's assets productive, its use of the Trust's assets for the fiduciaries'

[4] As noted in Attorney David Baker's response dated April 25, 2000, John Poehling, Sr.'s characterization of Edward Felten and Joseph Poehling as trustees was incorrect; Trust Point is the only trustee, while Felten and Joseph Poehling share with Trust Point the right to vote the stock of First Supply (the assets in the Trust).

financial benefit and at the expense of the beneficiaries, and its excessive debt levels. Attorney Hardy wrote: "John is committed to pursuing this matter to a conclusion; we are sorry an amicable solution could not have been attained short of litigation which we expect John to commence shortly."

¶15 In 1991, 1992, 1995, and 1997-2001, Trust Point sent letters to First Supply requesting financial statements for the prior year. In 2001, Trust Point began reviewing First Supply with more scrutiny as a result of a sale and leaseback transaction proposed by First Supply's management in 2001, which Trust Point ultimately concluded was not in the Trust's best interest, because it was not at arm's length and on market terms. Since that time, Trust Point has requested and received detailed financial information from First Supply, including unaudited and audited financial statements and memoranda containing income statements and specific product line information. Since 2001, Trust Point met once or twice per year with First Supply's management, including CEO Joseph Poehling. First Supply notified Trust Point of the annual First Supply shareholder meetings but Trust Point did not attend until 2008 or 2009. According to Trust Point, First Supply would notify Trust Point that the other voters would be voting without disagreement, and Trust Point considered itself to be only a "tie-breaker."

¶16 In addition to being the CEO of First Supply, Joseph Poehling was on Trust Point's board of directors from approximately 1999 to fall of 2008. Trust Point did not tell the beneficiaries that Joseph Poehling was on the board. Joseph Poehling resigned from the board in 2008 due to a potential conflict, after John Poehling, Sr. questioned his presence on Trust Point's board.

¶17 In December 2002, the Trust organized Parkk Real Estate, LLC. The Trust is Parkk's sole member. Parkk purchased several parcels of real estate

from First Supply, and then leased the parcels back to First Supply at market rental rates. As previously discussed, Trust Point initially declined to enter into a sale and leaseback transaction involving real property with First Supply. However, Trust Point ultimately agreed to form Parkk, because it considered the terms to be at arm's length and on market terms. Trust Point concluded that the transactions would be in the best interests of the Trust beneficiaries because they provided a stream of income to the income beneficiaries, accumulated equity for the remainder beneficiaries, and provided diversification of the Trust assets. The beneficiaries have received distributions from the Trust as a result of Parkk's creation.

¶18 In 2003, certain members of First Supply's board of directors, including Joseph Poehling, formed a company known as First Supply Equipment, LLC. This company purchased computer equipment and then leased that equipment to First Supply from January 2003 through June 2006.

¶19 Pursuant to a vote by First Supply's board in 2002, Joseph Poehling has received fees for personally guaranteeing First Supply's debt if it defaulted. In 2010, Joseph Poehling agreed to personally guarantee Parkk's debt, with guarantee fees paid by First Supply.

¶20 In 2009, First Supply informed Trust Point that it might default on a loan covenant that required First Supply to show "breakeven net operating income" on a twelve-month rolling period. If First Supply failed the loan covenant, Wells Fargo would require First Supply to buy out its interest-rate swap agreement for $2.1 million. First Supply initially proposed that Parkk pay First Supply a retroactive four-percent "management fee" of approximately $500,000 relating to First Supply's leased real estate. Trust Point rejected that proposal in

part because of the ongoing expense that Parkk, and thus the Trust, would incur. First Supply then proposed a $500,000 retroactive reduction in the rent that First Supply paid to Parkk. Trust Point determined that the rent reduction was in the best interests of the Trust and its beneficiaries, because First Supply's reduction of other costs in 2009 had been substantial, the business climate and rental market conditions warranted a rent reduction, and the consequences of not reducing the rent would be more detrimental to the Trust and its beneficiaries than the rent reduction.

¶21 The equity in the trust grew from $2,250,000 in 1980 (based on an appraisal of First Supply at that time) to a net equity of $20,588,366 in 2011 (based on an appraisal of First Supply plus the net equity in Parkk).

C. Trust Point's Petition and Subsequent Proceedings

¶22 In October 2008, Trust Point filed this action seeking approval of its accounts and actions in administering the Trust under the terms of the Trust Agreement. Twenty-one of the twenty-five beneficiaries signed Waiver and Consent forms, consenting to the Trust's requested relief. John Poehling, Sr. and John Poehling, Jr. filed a response and objections to the Trust's petition, which included counterclaims for alleged breaches by Trust Point of its fiduciary duties and removal of Trust Point as trustee.

¶23 Trust Point moved for summary judgment, seeking approval of its accounts and administration and dismissal of the objectors' counterclaims. Specifically, Trust Point argued that the statute of limitations and the laches doctrine barred the allegations raised in the objectors' counterclaims. In their

reply, the objectors raised ten duties that Trust Point allegedly breached[5] and argued that Trust Point's breaches constituted a continuing course of conduct that would not be barred by the statute of limitations.

¶24 In an oral ruling, the circuit court granted partial summary judgment on all claims except the claim alleging breach of the duty of loyalty. The court found that as of August 1, 2000, John Poehling, Sr., "had expressed the belief that the trust company had violated its fiduciary duties to the beneficiaries, that some had been enriched at the expense of others, and expressed a determination to pursue litigation ... that's the posture that we're now in with the filings eight and nine years later."

¶25 The court addressed two sets of claims. Relying on ***Zastrow v. Journal Communications, Inc.***, 2006 WI 72, 291 Wis. 2d 426, 718 N.W.2d 51, the circuit court ruled that the breach of fiduciary duty claims based on negligence were subject to a six-year statute of limitation, and that the breach of the duty of loyalty claims were subject to a two-year statute of limitation. The court dismissed the first set of claims entirely. The court held that the breach of fiduciary duty claims before 2003 were barred by the six-year statute of limitation, and that the undisputed facts did not give rise to the breach of fiduciary duties alleged after 2002. The court therefore granted summary judgment on the first set of claims in favor of Trust Point.

[5] Specifically, the objectors alleged that Trust Point breached the following duties: duty to determine Gerhard Poehling's intent and purposes of the Trust in light of that intent; duty to administer the Trust in accordance with its terms and applicable law; duty to protect the Trust's property; duty to apply and distribute the Trust's income and principal consistent with the terms and purposes of the Trust; duty of prudent investment and administration; duty of loyalty; duty of impartiality; duty regarding personal management and delegation; duty to provide information to beneficiaries; and duty to keep records and provide reports and accountings.

¶26 As for the second set of claims alleging breach of the duty of loyalty, the court dismissed only those claims barred by the two-year statute of limitation. The court concluded that a factual dispute existed as to the claim of breach of the duty of loyalty occurring after 2006, and denied summary judgment as to that claim.

¶27 In a written order, the circuit court granted in part the motion for summary judgment, incorporating by reference its reasons stated on the record during both its oral ruling and a subsequent hearing (addressing the parties' requests for clarification as to the scope of the remaining triable issue). The court denied the motion for summary judgment with respect to "whether Trust Point breached its duty of loyalty and impartiality relating to Joseph Poehling's presence on Trust Point, Inc.'s Board of Directors and whether, because of his presence on the Board, Trust Point engaged in action or inaction that resulted in damage to the Gerhard G. Poehling Family Trust." The court reserved ruling on the approval of the Trust's accounts and the removal of Trust Point as trustee until after trial was held on that remaining triable issue. The parties stipulated to the accuracy of the accounts before trial.

¶28 The circuit court issued an oral ruling after trial. The circuit court noted that "[t]here may be decisions made which promote the strength of First Supply or Parkk which by strengthening those companies, increasing the equity in those companies, may benefit the remainder beneficiaries but inhibit the ability of the trust to produce income." The court further noted that Trust Point's decision-making process required a balancing of those interests. The court also stated that "it might have been better had Mr. Poehling not been placed on the board" of Trust Point but that did not "resolve the issue as to whether there's been a breach

of the duty of loyalty if, in fact, Trust Point was making independent-mind decisions designed to serve the interests of the beneficiaries."

¶29 The court then addressed the objectors' specific allegations. With regard to the 2009 rent reduction, the court found that it "[c]ertainly ... had the effect of decreasing the income distributions that could have been offered to the income beneficiaries" but was "not satisfied … that the decisions that were made by Trust Point had anything to do with Mr. Poehling's presence on the board." Rather, the court found the 2009 rent reduction to be a "result of the economic conditions that existed at the time."

¶30 The court found that the guarantee fees, generally speaking, were "something that was demanded by the lending institution" and "common practice," according to testimony that the court found credible. With regard to the duty of loyalty, the court found that the fees were authorized and paid for by First Supply, not Trust Point, pursuant to First Supply's business judgment. The court found that in 2004 or 2005, and again in 2008, "Trust Point took the position that Parkk would not pay the fee [and] prevailed," even though Joseph Poehling disagreed and was on Trust Point's board at that time.

¶31 Next, as to the objectors' claim that Trust Point failed to diversify the Trust's assets, the court found that the objectors failed to show that any alleged failure to diversify was due to Joseph Poehling's "position on the board as opposed to an independent business decision" by Trust Point, and that "Trust Point used reasonable business judgment under the circumstances as they then existed." Specifically, the court cited Trust Point's decision to use money generated from refinancing to pay down debt owed by Parkk to First Supply, rather than to create an investment account.

¶32 With respect to the computer lease agreement, the court found there was no showing that the agreement was unreasonable, given the business conditions at the time (i.e. credit was tight and the company needed the equipment and software). Citing a nine percent profit, the court noted that "it hasn't been shown that Trust Point made decisions in that regard that operated to the detriment of the beneficiaries."

¶33 In sum, the court found:

> [T]he objectors have not met the burden of showing that Trust Point made decisions out of a desire to please [Joseph] Poehling as a member of the board of directors of Trust Point, that their actions were reasonable business decisions made in an effort to serve the interests of the beneficiaries again recognizing the tension that exists between the income beneficiaries and the remainder beneficiaries when it comes to individual decisions.
>
> For those reasons then the objections are denied.

¶34 The circuit court did not explicitly rule on the objectors' request for removal of trustee during its oral ruling. The court entered a final order finding that Trust Point did not breach its duty of loyalty and impartiality owed to the beneficiaries of the Trust, approving the administration and accounts of the Trust through May 3, 2010, and dismissing the objections. The objectors, John Poehling, Sr. and John Poehling, Jr., now appeal.

DISCUSSION

¶35 On appeal, the objectors argue that: (1) the "continuing course of conduct doctrine" applies in this case and thus the statute of limitations did not bar the objectors' claims for breach of fiduciary duty; (2) the circuit court erred by placing the burden of proof on the objectors to show that Joseph Poehling's position on Trust Point's board of directors influenced Trust Point's actions; and

(3) the circuit court improperly exercised its discretion by failing to rule on the objectors' request to remove Trust Point as trustee. We will address each argument in turn.

A. The "Continuing Course of Conduct Doctrine"

¶36 The objectors appeal the circuit court's summary judgment ruling only with respect to the court's failure to apply the continuing course of conduct doctrine.[6] The objectors argue that the statute of limitations does not bar their breach of fiduciary duty claims, because the trustee's actions amounted to "a continuous course of action that accrues when the entirety of the violation is complete." The objectors assert that although they first questioned Trust Point's actions (or inactions) starting in 1996 and culminating in 2000 with John Poehling, Sr.'s letter threatening litigation, Trust Point "continuously breached its fiduciary duties" and thus the "statute of limitations period should not begin to run until Trust Point ceased its passive management of the Trust ... in 2008." Whether the statute of limitations has run on a claim is a question of law that we review de novo. ***Cianciola, LLP v. Milwaukee Metropolitan Sewerage Dist.***, 2011 WI App 35, ¶19, 331 Wis. 2d 740, 796 N.W.2d 806; *see also* ***Production Credit Ass'n of West Cent. Wisconsin v. Vodak***, 150 Wis. 2d 294, 304, 441 N.W.2d 338 (Ct. App. 1989) (noting that when the dispute concerns when the applicable limitation

[6] The objectors do not challenge on appeal the circuit court's ruling that the undisputed facts did not give rise to claims for breach of fiduciary duties (except for the claim for breach of the duty of loyalty). In addition, we note that the circuit court made a general statement that laches barred the objectors' claims. The objectors do not develop any argument attacking that finding, and we could therefore affirm the dismissal of their claims (except for the claim for breach of the duty of loyalty) on that basis alone. However, based on our reading of the circuit court's ruling, we are uncertain precisely which claims were covered by the reference to laches, and so we affirm for the reasons set forth in the text.

period began, the appellate court is not bound by the trial court's finding because it reviews the record de novo).

¶37 Originating in the medical malpractice context, the concept of a "continuum of negligent medical treatment occurs where an initial negligent act is followed by a chain of negligent medical care related to a single condition." ***Wiegert v. Goldberg***, 2004 WI App 28, ¶14, 269 Wis. 2d 695, 676 N.W.2d 522. If "'negligent acts of malpractice were continuous, the cause of action is not complete until the last date on which the malpractice occurred [and] [i]f an action is timely brought in relationship to that last date, the entire cause of action is within the jurisdiction of the court.'" ***Id.***, ¶16 (quoting ***Tamminen v. Aetna Cas. & Sur. Co***., 109 Wis. 2d 536, 559, 327 N.W.2d 55 (1982)).

¶38 The objectors argue that ***Kolpin v. Pioneer Power & Light Company***, 162 Wis. 2d 1, 469 N.W.2d 595 (1991) extended this doctrine from medical malpractice cases to ordinary negligence claims. In ***Kolpin***, dairy farmers brought a negligence claim against their electric company, claiming that the company negligently allowed stray voltage to damage their dairy herd. ***Id.*** at 7-8. A jury found that the statute of limitations barred their action because the farmers knew, or with reasonable care should have known, that the company's negligence was a cause of damage to their herd over six years prior to commencing their action. ***Id.*** at 8. On motions after verdict, the circuit court found that the company's negligence was "'continuing'" and that the suit was not barred by the six-year statute of limitations. ***Id.*** On review, the supreme court rejected the parties' arguments that the discovery rule and the "'continuum of negligent acts'"

doctrine were two distinct theories. ***Id.*** at 23-24.[7] Rather, the court explained that the two doctrines "stand for the proposition that in order for a cause of action to accrue, it must be complete," and "[i]t is complete when the negligent act occurs, or the last act occurs in a continuum of negligent acts, *and* when the plaintiff has a basis for objectively concluding that the defendant was the cause of the plaintiff's injuries and damages." ***Kolpin***, 162 Wis. 2d at 24 (emphasis in original). Because the farmers only alleged one act of negligence – that the company's use of a distribution system allowed stray voltage to harm the dairy herd – the supreme court found that, unlike in the medical malpractice cases cited by the parties, the injury to the herd was not the result of a series of negligent acts in a continuum, and thus the "'continuum of negligent acts'" doctrine did not apply. ***Id.*** at 24-25. However, the court held that the discovery rule did not bar their action, because the farmers could not have reasonably discovered the cause of the harm to their herd until within six years before commencing their action. ***Id.*** at 25-27.

¶39 While the broad dicta set forth in ***Kolpin*** suggests that the "continuing course of conduct" doctrine may extend beyond the medical malpractice context to ordinary negligence claims, our research did not reveal any published case law that cites ***Kolpin*** for such an extension. However, we need not determine whether the doctrine may apply in ordinary negligence cases, because

[7] *See* ***Hansen v. A.H. Robin Co.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983) (setting forth the discovery rule which states that tort claims, other than those already governed by a legislatively created discovery rule, shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first) *and* ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 556, 327 N.W.2d 55 (1982) (holding that, where it is alleged and affidavits on summary judgment state that there is a continuing course of negligent treatment, but one cause of action or claim is stated, if any portion of continuing course of negligent treatment falls within period of limitations, the entire cause of action is timely brought).

we conclude that, even if it did, the facts in this case do not comprise a "continuum" of negligent acts.

¶40 The objectors' argument that "Trust Point's continued passive approach ... constitute[s] a continuous course of action and inaction" is conclusory and undeveloped. To the contrary, Trust Point's alleged negligent acts were separate, discrete acts that occurred in the context of a relationship across many decades and not as a continuing tort. *See* ***Vodak***, 150 Wis. 2d at 306 (holding that additional loans subsequent to initiation of a lender's farm-operation plan were separate transactions and not part of a continuum begun by the initial plan); *see also* ***Walker v. The Northern Trust Co.***, No. 06-C-4901, 2008 WL 191182, at *6 (N.D. Ill. Jan. 22, 2008) (finding that Illinois's "continuing violation" doctrine did not apply to a series of discrete events – e.g., the separate denials of different requests for discretionary distributions or the annual incurring of new tax liability – taking place in the context of a long relationship). In other words, the alleged injuries to the objectors were not the result of a series of indivisible and indistinguishable alleged negligent acts. Rather, Trust Point's allegedly negligent acts were discrete, in that they occurred independently, could be distinguished on an individual basis, and had corresponding, ascertainable injuries. *See* AMERICAN HERITAGE COLLEGE DICTIONARY 302 (3rd ed. 1993) (defining continuum as a "continuous extent, succession, or whole, no part of which can be distinguished from neighboring parts except by arbitrary division").

¶41 In 2000, John Poehling, Sr. voiced complaints regarding the Trust's failure to produce income, the Trust's assets (i.e. First Supply) being funded by debt, First Supply's failure to pay dividends, and use of the Trust's assets for personal financial benefit. The August 1, 2000 letter sent by John Poehling, Sr.'s attorney to Trust Point's attorney alleges various negligent acts – such as

excessive debt levels, inappropriate related-party dealings, poor operating results of First Supply, unanswered requests for additional information, disproportionate benefit to certain family members, and the inability of management at First Supply to make the Trust assets productive – that were enforceable through litigation (as threatened in the letter) at that time. Subsequent transactions, such as Trust Point's efforts to diversify and denials of distributions, were new transactions or decisions separate from those complained of in 2000.

¶42 The objectors assert that "[a]s long as Trust Point's deficient conduct continued, Objectors' cause of action remained incomplete." We disagree. The mere fact that Trust Point continued to serve as trustee since that time does not mean that the objectors could sit on their fiduciary claims on the grounds that more allegedly negligent acts may follow, despite having a viable claim capable of present enforcement. *See* ***Vodak***, 150 Wis. 2d at 304 ("[w]e have found no authority that the mere existence of a fiduciary relationship tolls the running of a statute of limitations"). To hold otherwise would render the statute of limitations for breaches of fiduciary duties (two years for intentional torts and six years for negligence claims) effectively meaningless.

B. Burden of Proof

¶43 After summary judgment, the case proceeded to trial on the remaining claim, breach of the duty of loyalty after 2006. At trial, the circuit court put the burden of proving that claim on the objectors. The objectors contend that the court erred because (1) the burden should have shifted to the trustee after the objectors survived summary judgment, and (2) the burden should have shifted after the objectors made a prima facie showing at trial. The objectors' arguments are not supported by Wisconsin law.

¶44 The circuit court's allocation of the burden of proof and its determination whether a party has met the burden of proof are questions of law that we review de novo. ***Wolfe v. Wolfe***, 2000 WI App 93, ¶14, 234 Wis. 2d 449, 610 N.W.2d 222. "An objection that questions the propriety of an action on an account item in the context of the [trustee's] fiduciary duty requires the objector to assume the burden of proof." ***Wolf v. McAuliffe***, 71 Wis. 2d 581, 589, 239 N.W.2d 52 (1976). The elements of a claim for breach of fiduciary duty are: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the breach of duty caused the plaintiff's damage. ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800 (citing ***Reget v. Paige***, 2001 WI App 73, ¶12, 242 Wis. 2d 278, 626 N.W.2d 302).

¶45 The objectors first argue that "if a plaintiff survives summary judgment, the plaintiff has made a prima facie case" and the circuit court "should have mandated that at trial Trust Point would have the burden to demonstrate that Joe Poehling's influence could not have caused the harm that inherently results from the Trust assets being wholly dependent on the success of First Supply." To the extent the objectors suggest that survival of summary judgment shifts the burden of proof to the trustee at trial, the argument reflects a fundamental misunderstanding of summary judgment methodology. There is burden shifting within summary judgment methodology. A defendant, for example, might make a prima facie case for dismissal at the summary judgment stage and then the burden shifts to the plaintiff to demonstrate that material factual disputes require taking the case to trial. However, if a defendant's motion to dismiss on summary judgment is denied, then the parties are where they started, typically with the plaintiff having the burden to prove his or her case. We said as much in ***Berna-Mork v. Jones***, 173 Wis. 2d 733, 496 N.W.2d 637 (Ct. App. 1992):

> [O]nce the court determines that there is a genuine issue of material fact, the non-moving party is entitled to a trial and the motion for summary judgment must be denied. At that point, all factual issues must be tried; summary judgment methodology has run its course. The purpose of the proof filed in support of, and in opposition to, summary judgment is solely to allow the trial court to determine whether there exists a genuine issue of material fact which precludes summary judgment. When the court identifies such an issue, summary judgment proof gives way to trial proof.

Id., at 741 (internal citation omitted).

¶46 The objectors' second argument addresses solely the burden at trial. The objectors argue that the court failed to shift the burden to Trust Point to justify its breach and cause of harm to the Trust once the objectors made a prima facie showing at trial that Trust Point breached its fiduciary duties of loyalty and impartiality. The objectors cite a treatise for the proposition that once a beneficiary makes a prima facie case of the three elements of a breach-of-fiduciary-duty claim, the burden of proof shifts to the trustee to contradict the prima facie case or show a defense. See BOGERT & BOGERT, THE LAW OF TRUSTS & TRUSTEES § 871 (Rev. 3d. 2012). However, we are not at liberty to adopt this rule of law. As noted above, in ***Wolf***, the court addressed the burden of proof with respect to proof of a breach of a fiduciary duty and stated that "the objector … assume[s] the burden of proof." 71 Wis. 2d at 589. Here, the circuit court properly weighed all the evidence presented by both parties in determining whether the objectors met their burden under ***Wolf*** in proving the elements of their breach-of-fiduciary-duty claim.

C. Removal of Trustee

¶47 The objectors argue that the circuit court erred in failing to exercise its discretion by ruling on their request to remove Trust Point as the trustee. We

agree that the circuit court did not explicitly address the objectors' request for removal of Trust Point in its oral decision or in its final order. However, the objectors did not raise that omission during the oral ruling after trial, when the court stated, "[f]or those reasons then the objections are denied," and asked the objectors' counsel, "[a]nything further on your part ...?" And after issuance of the written order dismissing the objections, the objectors did not file a motion for reconsideration pursuant to WIS. STAT. § 805.17(3) (2011-12),[8] nor did they seek relief pursuant to WIS. STAT. § 806.07.

¶48 Due to the objectors' failure to file any form of post-trial motion, the circuit court was not afforded an opportunity to cure this alleged manifest error. *See* ***Schinner v. Schinner***, 143 Wis. 2d 81, 92, 420 N.W.2d 381 (Ct. App. 1988) ("'manifest error' contemplates that self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation"). Failure to bring a motion to correct such manifest errors constitutes a waiver of the right to have such an issue considered on appeal. ***Id.*** at 93. Therefore, the objectors have waived, or more accurately, forfeited, their removal argument.[9]

[8] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[9] Our supreme court has clarified that "waiver" in this instance is more accurately "forfeiture."

> "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotation marks and citation omitted).

(continued)

CONCLUSION

¶49 For the reasons stated above, we affirm the circuit court's order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

> ... In other words, some rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review. The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

State v. Ndina, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (footnotes omitted).