COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. **2010AP2148**
2010AP2149
2010AP2150
2011AP117

Cir. Ct. Nos. 2009CV391
2010CV872

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

2010AP2148:

CHARLES A. JOYCE AND JAMES R. VOIGT,

PLAINTIFFS-APPELLANTS,

V.

PEPSICO, INC. AND WIS-PAK,

DEFENDANTS,

CAROLINA CANNERS, INC. AND THOMAS M. HILES,

DEFENDANTS-RESPONDENTS.

2010AP2149:

CHARLES A. JOYCE AND JAMES R. VOIGT,

PLAINTIFFS-APPELLANTS,

V.

PEPSICO, INC., CAROLINA CANNERS, INC. AND THOMAS M. HILES,
DEFENDANTS,

WIS-PAK, INC.,

DEFENDANT-RESPONDENT.

2010AP2150:

CHARLES A. JOYCE AND JAMES R. VOIGT,

PLAINTIFFS-APPELLANTS,

V.

PEPSICO, INC.,

DEFENDANT-RESPONDENT,

CAROLINA CANNERS, INC., WIS-PAK, INC. AND THOMAS M. HILES,

DEFENDANTS.

2011AP117:

CHARLES A. JOYCE AND JAMES R. VOIGT,

PLAINTIFFS-APPELLANTS,

V.

PEPSICO, INC.,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Charles Joyce and James Voigt (collectively, the appellants) appeal orders of the circuit court dismissing their complaints against Wis-Pak, Inc., Thomas Hiles, Carolina Canners, Inc., and PepsiCo, Inc. with prejudice.[1] We affirm.

BACKGROUND

¶2 In 2009, the appellants brought suit against Wis-Pak, whose principal place of business is located in Watertown, Wisconsin; Carolina Canners, whose principal place of business is located in South Carolina; Thomas Hiles, a former employee of Carolina Canners and resident of North Carolina; and PepsiCo, whose principal place of business is located in North Carolina. The complaint alleged that Wis-Pak, Carolina Canners and Hiles breached the terms and conditions of confidentiality agreements executed in 1981 between them and the appellants, and that Wis-Pak, Carolina Canners, Hiles, and PepsiCo misappropriated the appellants' trade secret. The appellants alleged damages "in an amount in excess of $75,000" for each claim.

[1] This appeal is comprised of four separate cases, 2010AP2148, 2010AP2149, 2010AP2150 and 2011AP117, which have been consolidated for purposes of appeal.

¶3 In 1981, the appellants met with representatives of Wis-Pak and Carolina Canners, licensed manufacturers and distributors of PepsiCo products, to discuss an idea for a purified water product they referred to as Ultra-Pure. Arnold Forbes, a representative of Wis-Pak, and Hiles, a representative of Carolina Canners, executed confidentiality agreements regarding Ultra-Pure. Although there was some initial interest, nothing ultimately came of the appellants' discussions with Wis-Pak, Carolina Canners, and Hiles regarding Ultra-Pure.

¶4 The appellants averred that in the summer of 2007, Joyce purchased for the first time a bottle of Aquafina water, which had been sold in other states since 1994 and in Wisconsin since 1996. The appellants averred that after tasting Aquafina, Joyce "remembered the unique taste of Ultra-Pure" and that upon reading the label on the bottle, discovered that the information set forth on it was the same "product sales and marketing concept" as the Ultra-Pure product idea he and Voigt had discussed with Forbes and Hiles. Believing that Aquafina was created by utilizing the same technology they utilized to create Ultra-Pure, the appellants eventually brought the present suit against the respondents.

¶5 Wis-Pak, Carolina Canners and Hiles timely responded to the appellants' complaint. PepsiCo, however, did not. In June 2009, the appellants served a summons and complaint on F. Blackwell Stith, PepsiCo's registered agent in North Carolina, which was forwarded on to Tom Tamoney, an attorney for PepsiCo at its New York headquarters. This information was received by Tamoney's administrative assistance, who averred that she did not recollect receiving them and did not follow her ordinary practice of receiving and processing documents with respect to those documents. Tamoney's assistant

averred that the first documents she recollected receiving relating to the present litigation was a copy of a letter from Carolina Canner's attorney to the court requesting an adjournment of a scheduling conference because PepsiCo had not yet filed its appearance, a letter which Stith forwarded to Tamoney in mid-September 2009. Tamoney's assistant averred, however, that she was busy at the time and forgot that she had received that letter, and no action was immediately taken.

¶6 On September 29, 2009, Joyce and Voigt moved the circuit court for a default judgment against PepsiCo in the amount of $1.26 billion. The court granted their motion on September 30, 2009, and entered default judgment against PepsiCo in the amount of $1.26 billion. On October 13, 2009, PepsiCo moved the court to vacate the default judgment. The court granted PepsiCo's motion on the basis that notice regarding the default judgment to PepsiCo under WIS. STAT. § 806.02 was deficient, and on the basis that "there's a deficiency in the complaint to support the judgment."

¶7 Each of the respondents separately moved the circuit court to dismiss the appellants' claims against them. The motions were based, *inter alia*, on assertions that the appellants' claims were time barred and personal jurisdiction was lacking with respect to Carolina Canners and Hiles.

¶8 The circuit court dismissed the appellants' claims against each of the respondents. The court determined that the appellants' breach of contract and misappropriation of trade secret claims were time barred, that it lacked personal jurisdiction over Carolina Canners and Hiles because they had insufficient contacts with Wisconsin to permit the court to exercise personal jurisdiction under

WIS. STAT. § 801.05(4)(a), and that service of the complaint and summons upon PepsiCo was improper. As to the service deficiency on PepsiCo, the court stated that the appellants were free to "seek leave to amend and properly serve within thirty days." The court subsequently entered orders and judgments dismissing the appellants' claims against Wis Pak, Carolina Canners and Hiles with prejudice, and dismissing PepsiCo without prejudice.

¶9 The appellants moved the circuit court to amend their complaint against PepsiCo, "primarily to clarify their claims and present additional factual allegations to address the [d]efendants' desire for more specificity than in the original Complaint." The court denied the motion on the basis that the claims were time barred and amendment of the complaint would not cure that problem. Following the denial of the appellants' motion to amend their complaint, judgment was entered in favor of PepsiCo, and the appellants filed a notice of appeal.

¶10 Following the entry of judgment in favor of PepsiCo and the filing of their notice of appeal, the appellants filed a new suit against PepsiCo, again alleging trade secret misappropriation, and adding the new claim of tortious interference with the confidentiality agreements with Wis-Pak, Carolina Canners, and Hiles. On PepsiCo's motion, the circuit court dismissed these claims on the basis that they were time barred, and judgment was entered in PepsiCo's favor. The appellants appeal the order dismissing this suit as well.

DISCUSSION

¶11 The appellants contend that the circuit court erred in the following four respects: (1) in concluding that their claims for breach of contract and

misappropriation were time barred;[2] (2) in concluding that the court did not have personal jurisdiction over Hiles and Carolina Canners; (3) in vacating the default judgment against PepsiCo; and (4) in denying their motion to amend the complaints against the respondents after those complaints were dismissed by the court. We address their arguments in turn below.

A. Timeliness of Claims

¶12 The appellants contend the circuit court erred in determining that their claims for breach of contract and misappropriation of trade secrets are barred by the statute of limitations. Whether the statute of limitations has run on the appellants' claims present questions of law subject to our independent review. *See* ***Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.***, 2011 WI App 35, ¶19, 331 Wis. 2d 740, 796 N.W.2d 806.

¶13 "A motion to dismiss for failure to meet a statute of limitations can be decided on the sufficiency of the facts alleged in the petition when combined with those facts asserted by the response when there is no conflict." ***State ex rel. Johnson v. Litscher***, 2001 WI App 47, ¶4, 241 Wis. 2d 407, 625 N.W.2d 887. However, "[w]hen a circuit court decides a motion to dismiss for failure to comply with a statute of limitations by considering matters outside the four square corners of the pleadings, it is actually deciding a motion for summary judgment." ***Id.***; WIS. STAT. § 802.06(2)(b) (2009-10).[3] A party is entitled to summary judgment

[2] The appellants do not raise any challenges to the circuit court's dismissal of their tortious interference claim against PepsiCo, which they raised in their second suit against PepsiCo.

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

when there are no disputed issues of material fact and the party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The grant or denial of summary judgment is an issue of law that we review independently of the circuit court. ***Litscher***, 241 Wis. 2d 407, ¶4.

1. Breach of Contract

¶14 Under WIS. STAT. § 893.43, a breach of contract claim must be commenced "within 6 years after the cause of action accrues or be barred." A cause of action for contract accrues at the moment the contract is breached, regardless of whether the injured party knew or should have known the breach occurred. ***CLL Assocs. Ltd. P'ship V. Arrowhead Pac. Corp.***, 174 Wis. 2d 604, 607, 497 N.W.2d 115 (1993).

¶15 It is undisputed that PepsiCo began distributing Aquafina in 1994. Assuming for purposes of this appeal that Wis-Pak, Carolina Canners and/or Hiles breached their confidentiality agreements with the appellants by informing PepsiCo of the appellants' purified water product idea, Ultra-Pure, which PepsiCo then used to manufacture Aquafina, any breach of the confidentiality agreements necessarily occurred prior to 1994. The appellants' breach of contract claim thus accrued sometime prior to 1994, more than six years before they filed their breach of contract claim against Wis-Pak, Carolina Canners and Hiles in 2009. The appellants have not developed any arguments which could lead us to reach a different conclusion. Accordingly, we conclude that the appellants' breach of contract claims are time barred.

2. Misappropriation

¶16 Under WIS. STAT. § 893.51(2), a plaintiff must commence an action for the misappropriation of a trade secret within three years from the date of the misappropriation is discovered or three years from the date the misappropriation "should have been discovered by the exercise of reasonable diligence."

¶17 The appellants filed their action for misappropriation of their trade secret in 2009, two years after they claim to have discovered the misappropriation of their trade secret when Joyce took his first drink of Aquafina in 2007. The circuit court concluded that the appellants' claim was time barred because the discovery rule expanding the time limitations for their claim did not apply because, based on the undisputed facts, the appellants failed to exercise any diligence to discover the misappropriation of their trade secret between 1981 and 2007. The court observed that the appellants "did not review Pepsi products, made no inquiry of industry events, made no inquiries of [the respondents], did no scientific analyses and made no label investigations."

¶18 Where the material facts are not in dispute and only one inference may be drawn from those facts, the circuit court can determine as a matter of law that a plaintiff did or did not use reasonable diligence. *See, e.g.*, ***Gumz v. Northern States Power Co.***, 2007 WI 135, ¶55, 305 Wis. 2d 263, 742 N.W.2d 271; ***Jacobs v. Nor-Lake, Inc.***, 217 Wis. 2d 625, 634, 579 N.W.2d 254 (Ct. App. 1998). The issue then becomes a question of law, subject to our independent review. ***Awve v. Physicians Ins. Co. of Wisconsin, Inc.***, 181 Wis. 2d 815, 823, 512 N.W.2d 216 (Ct. App. 1994).

¶19 The appellants dispute the circuit court's conclusion that their conduct, or lack thereof, between 1981 and 2007, constituted a lack of reasonable diligence which bars the application of the discovery rule in this case. They argue that the burden to discover the misappropriation of their trade secret placed on them by the court called for them to be "persistently paranoid," essentially imposing on them:

> an ongoing continuous duty … for decades and decades to see if someone might possibly have stolen their idea at any point in that timeline, including investigating all products put out by any company who could use the idea, any industry events and any industry magazines, send letters to anyone whom the idea was shared with, with constant investigations, asking 'have you stolen my idea, lately?" and actually buying and experimenting on products to see if they include the stolen idea.

We disagree.

¶20 Reasonable diligence 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); ***Awve***, 181 Wis. 2d at 823. As noted by the appellants, reasonable diligence "'does not require superhuman effort'" or "'extraordinary steps,'" and mistakes by the plaintiff may prolong investigation. ***Jacobs***, 217 Wis. 2d at 635-36 (citations omitted). However, a plaintiff "'may not close [his or her] eyes to means of information reasonably accessible to them and must in good faith apply [his or her] attention to those particulars which may be inferred to be within [his or her] reach.'" ***Awve***, 181 Wis. 2d at 824 (quoting ***Spitler***, 148 Wis. 2d at 638). A plaintiff must take "those actions a reasonable person, under the same circumstances as the plaintiff, would have taken to discover" the misappropriation. ***Jacobs***, 217 Wis. 2d at 635. If a plaintiff does

not satisfy the reasonable diligence requirement, the discovery rule does not apply. *See* ***Awve***, 181 Wis. 2d at 819-20.

¶21 We conclude that here, the undisputed facts show the appellants closed their eyes to information reasonably accessible to them and did not give good faith attention to information within their reach, and thus did not exercise reasonable diligence. PepsiCo began distributing Aquafina in Wisconsin in 1996. Anytime between then and 2007, the appellants could have investigated the water product to determine whether it resembled their Ultra-Pure idea. However, there is no evidence that they did anything until Joyce, by happenstance, purchased a bottle of Aquafina eight years after PepsiCo began distributing it in Wisconsin. As noted by the circuit court, there were many things the appellants could have done to investigate their trade secret. For example, they could have researched new water products released by PepsiCo or its competitors, or read trade magazines. However, it is undisputed that they instead did nothing, and would have continued on that path if Joyce hadn't been particularly thirsty on that day in 2007 when he purchased a bottle of Aquafina by chance. Accordingly, we conclude, based on the undisputed facts, that the appellants did not exercise reasonable diligence and the discovery rule does not apply.

¶22 The appellants argue that PepsiCo should be equitably estopped from asserting the statute of limitations as a defense because it "engaged in systemic and systematic deception to disguise the stolen nature of their product." The appellants, however, have set forth no facts to support this claim, and we will not further address this argument. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we need not decide undeveloped arguments).

B. Default Judgment Against PepsiCo

¶23 The appellants challenge the circuit court's decision to vacate the default judgment entered against PepsiCo. Whether to grant relief from default judgment is a decision within the discretion of the circuit court. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. "'We will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision.'" ***Id.***, ¶30 (citation omitted). We will generally look for reasons to sustain a circuit court's discretionary decision. ***Id.*** The supreme court has explained,

> In exercising its discretion in deciding whether to vacate a default judgment, the circuit court must be cognizant of three general considerations. First, § 806.07(1) is remedial in nature and should be liberally construed. Second, "the law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." Third, "default judgments are regarded with particular disfavor." Indeed, on this last point we have stated that "default judgment is the ultimate sanction." Consequently, default judgments ought to attract close scrutiny on appellate review.

Id., ¶31 (citation omitted).

¶24 WISCONSIN STAT. § 806.07(1) sets forth a list of conditions under which the circuit court may exercise its discretion and vacate a default judgment. ***Id.*** Those conditions are:

> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

Section 806.07(1). In the present case, the circuit court granted PepsiCo relief on the basis that the judgment was void because notice to PepsiCo regarding the default judgment under WIS. STAT. § 806.02, was deficient and because there was a deficiency in the complaint to support the judgment.

¶25 WISCONSIN STAT. § 806.02(2) requires that a plaintiff "specify the amount of money claimed and provide that information to the court and to the other parties prior to the court rendering judgment." The language of § 806.02(2) is "plain, clear, and concise in meaning." ***Stein v. Illinois State Assistance Comm'n***, 194 Wis. 2d 775, 782, 535 N.W.2d 101 (Ct. App. 1995). Section 806.02(2) obligates a plaintiff seeking default judgment to inform the other parties the specific sum of damages he or she seeks *before* the circuit court may enter default judgment for the prayed amount. ***Id.*** If a party does not, the judgment is void and must be set aside. ***Id.*** at 785.

¶26 In their complaint, the appellants specified that they sought "judgment against Defendants, Carolina Canners, Inc., Wis-Pak, Inc., and

Thomas M. Hiles, in an amount in excess of $75,000" on their claim for misappropriation of their trade secret. They did not, however, specify the amount of damages they sought from PepsiCo. When PepsiCo failed to timely file a responsive pleading, the appellants sought a default judgment in the amount of $1.26 billion. Nothing in the record indicates that PepsiCo received any notice of the precise amount of damages claimed by the appellants. As stated by this court in ***Stein***, WIS. STAT. § 806.02(2) "required [the appellants] to serve [PepsiCo] with notice of the specific amount of money [they were] seeking *prior to judgment.* Because the requirement of this statute was not satisfied, the judgment is void and must be set aside." ***Id.*** Accordingly, we conclude that the circuit court properly acted within its discretion when it vacated the default judgment against PepsiCo.

C. Right to Amend Complaint

¶27 The appellants contend that, rather than dismissing their complaint, the circuit court should have given them the opportunity to amend it.

¶28 Pursuant to WIS. STAT. § 802.09(1), leave to amend a complaint "shall be freely given at any stage of the action when justice so requires." A circuit court's decision whether to grant leave to amend a complaint is discretionary. ***Finley v. Culligan***, 201 Wis. 2d 611, 626, 548 N.W.2d 854 (Ct. App. 1996). This court "'will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision.'" ***Brown v. Mosser Lee Co***., 164 Wis. 2d 612, 617, 476 N.W.2d 294 (Ct. App. 1991) (citation omitted).

¶29 The circuit court denied the appellants' motion to amend their complaint on the basis that such amendment would not cure the statute of

limitations problems faced by each of their claims. The appellants do not explain why the court's determination was erroneous, nor do they explain how amendment of their complaint would cure their statute of limitations problems. Accordingly, we affirm the circuit court's denial of their motion to amend their complaint.

D. Remaining Issues

¶30 Because we have concluded that the appellants' claims for breach of contract and misappropriation of trade secrets are time barred, we do not reach the appellants' contention that the circuit court erred in concluding that it did not have personal jurisdiction over Carolina Canners and Hiles. *See* ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶2, 311 Wis. 2d 158, 752 N.W.2d 687 (noting that when resolution of one issue is dispositive, we need not reach other issues raised by the parties). For the same reason, we do not reach the question of whether service of the complaint and summons upon PepsiCo's registered agent in North Carolina was proper. ***Id.***

CONCLUSION

¶31 For the reasons discussed above, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.