COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 No. 2011AP1560 **Cir. Ct. No. 2008CV1082**

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

JAHN TRANSFER, INC.,

PLAINTIFF-RESPONDENT,

V.

HORIZON (H&S) FREIGHTWAYS, INC. AND ROBERT SCASNY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

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

¶1 LUNDSTEN, P.J. This appeal concerns an agreement between two trucking companies, Jahn Transfer and Horizon (H&S) Freightways.[1] The companies ship goods for customers along different routes. Under the agreement, Horizon could use Jahn to ship to locations not otherwise serviced by Horizon, and vice versa. When one company shipped for the other, the parties agreed to split the customer payments according to set percentages. After operating this way for over a decade, Jahn sued Horizon, alleging that Horizon had been improperly taking a cut off the top of customer payments before splitting those payments with Jahn. Jahn brought a claim for breach of contract and a tort claim for intentional misrepresentation. A jury returned a verdict in favor of Jahn on both claims, and awarded damages.

¶2 The circuit court denied Horizon's post-verdict motions challenging the verdict. Horizon appeals, arguing, among other things, that the claims are barred by statutes of limitations and that there was insufficient evidence of intent for the tort claim. We disagree, and affirm the circuit court.

Background

¶3 Horizon and Jahn are trucking companies that transport goods for customers along limited routes. In 1996, Horizon and Jahn entered into an agreement under which each company could use the other to ship when the need arose, and they would then split the customer's payment according to a set percentage. For example, the agreement provided that Horizon could use Jahn to

[1] Appellant Robert Scasny is a co-owner of Horizon. The jury returned verdicts against both Horizon and Scasny. Horizon gives us no reason to separately discuss Scasny. In this opinion, we refer to Horizon and Scasny collectively as Horizon.

transport loads when a Horizon customer needed to ship to a location serviced by Jahn but not by Horizon.

¶4 The agreement provided that, when Jahn would perform shipping duties for a Horizon customer, the customer would pay Horizon and then Horizon would pass along a percentage of that payment to Jahn. Jahn did not receive the original Horizon customer bills, but rather relied on the information summarized in Horizon's revenue reports. The parties entered into a second agreement in 2007 that altered some terms, but those differences do not matter here. The parties operated under the revenue-splitting agreements until September 2008, when Jahn inadvertently came into possession of a Horizon customer bill.

¶5 On December 2, 2008, Jahn sued Horizon, alleging that Horizon had breached their agreement by repeatedly underpaying Jahn. Jahn also brought an intentional misrepresentation claim. As damages, Jahn sought to recoup the amount allegedly underpaid for the six years preceding the suit.

¶6 Jahn's specific allegation was that Horizon had improperly taken a cut off the top of customer payments before applying the agreed-to percentage split. Jahn alleged that, in September 2008, Jahn inadvertently came into possession of a Horizon customer bill that revealed an improper off-the-top cut. Horizon did not deny that it took the cut, but offered a competing version of events in which the parties had agreed to the cut. A jury returned a verdict in favor of Jahn, awarding $113,763 for breach of contract and $1,137,627.22 for intentional

misrepresentation.[2] The circuit court denied Horizon's post-verdict motions challenging the verdict.

Discussion

A. Breach Of Contract Statute Of Limitations

¶7 Horizon argues that Jahn's contract claim is barred by the six-year statute of limitations in WIS. STAT. § 893.43.[3] Under that statute, a breach action must be commenced within six years of accrual. *See* ***id.*** A breach accrues when the breach occurs. *See* ***CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.***, 174 Wis. 2d 604, 609, 497 N.W.2d 115 (1993) ("'[i]n an action for breach of contract, the cause of action accrues and the statute of limitations begins to run from the moment the breach occurs. This is true whether or not the facts of the breach are known by the party having the right to the action.'" (citation omitted)).

¶8 The only damages sought by Jahn were for underpayments occurring within the six-year limitations period. Horizon nonetheless asserts that Jahn's claim is time barred. We understand Horizon to be arguing that Horizon breached the parties' agreement in 1996, well outside the six-year time limit, and that all subsequent underpayments were a part of the same time-barred breach. Horizon, however, fails to back up this contention with legal authority or reasoned argument.

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[2] At trial, Jahn argued that it was entitled to damages of $1,137,627.22, and the jury awarded that amount for the misrepresentation claim. Because Horizon does not argue that the separate $113,763 award for the breach of contract claim is duplicative, we have not examined the record to determine whether there is evidence of distinct damages to support that award.

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

¶9 Horizon relies on ***Messner Manor Associates v. WHEDA***, 204 Wis. 2d 492, 555 N.W.2d 156 (Ct. App. 1996), for the proposition that a mortgagor's breach of contract claim for excessive interest arose at the start of the parties' agreement, more than six years prior to the time the mortgagor filed suit, and, therefore, was barred by the six-year statute of limitations applicable to contracts. Horizon contends that the situation here is "highly analogous." Horizon, however, misreads ***Messner Manor***.

¶10 It appears that the defendant in ***Messner Manor*** argued that the breach of contract claim was properly dismissed as time barred. Regardless, we affirmed dismissal of the breach of contract claim on the basis that there was no breach. *See* ***id.*** at 498-500; *see also* ***id.*** at 500 ("[The present] situation does not involve a repudiation or a breach of the agreement ...."). We admit that our opinion states that the claim was time barred, ***id.*** at 500, but that statement is an obvious drafting error. The preceding discussion makes clear that we affirmed dismissal on the ground that there was no breach.

¶11 Horizon contends it is significant that in ***Messner Manor*** we distinguished ***Jensen v. Janesville Sand & Gravel Co.***, 141 Wis. 2d 521, 415 N.W.2d 559 (Ct. App. 1987). We disagree. We distinguished ***Jensen***, which involved a series of breaches, by explaining that in ***Messner Manor*** there was no breach. ***Messner Manor***, 204 Wis. 2d at 500. Thus, ***Messner Manor*** contains no meaningful discussion of the application of the contract statute of limitations to an arguably ongoing series of individual breaches relating to the same agreement.

¶12 Instead, we agree with Jahn that ***Jensen*** supports the circuit court's decision to allow Jahn to pursue damages for underpayments within six years of the time Jahn filed suit. As in ***Jensen***, the agreement here was breached each time

there was a failure to make contractually required payments. In ***Jensen***, we repeated:

> "[I]f the promisor has a continuing duty to perform, generally a new claim accrues for each separate breach. The injured party may assert a claim for damages from the date of the first breach within the period of limitation."
>
> ...
>
> A continuing contract is capable not only of a series of partial breaches but also of a single total breach by repudiation or a material failure of performance. If a single total breach occurs, the right to bring an action accrues at that time and the statute of limitations begins to run.

Jensen, 141 Wis. 2d at 527 (quoting ***Segall v. Hurwitz***, 114 Wis. 2d 471, 491-92, 339 N.W.2d 333 (Ct. App. 1983)). We then applied these principles to a situation in which a company stopped making pension payments. *See* ***id.*** at 527-29. We concluded that the company's repudiation of its obligation to make pension payments was not a "total breach" and, thus, the contract statute of limitations did not bar a suit for missed payments within six years of the time the plaintiff filed suit. ***Id.*** at 529. The same is true here. Each of Horizon's failures to pay Jahn according to the contractual agreement was a distinct actionable breach.

¶13 In sum, we reject Horizon's argument that the contract statute of limitations barred Jahn's contract claim.

B. Intentional Misrepresentation

1. Statute Of Limitations

¶14 Horizon asserts that Jahn's intentional misrepresentation claim is time barred by a two-year statute of limitations.[4] *See* WIS. STAT. § 893.57 (2007-08). This two-year period is triggered by the earlier of two dates: "the date the injury is discovered," or the date that "with reasonable diligence [the injury] should be discovered." ***Hansen v. A.H. Robins Co.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983). There is no dispute that Jahn first discovered its injury in September 2008, within two years of filing its suit on December 2, 2008. Horizon argues, however, that, exercising reasonable diligence, Jahn should have discovered its injury before the two-year period preceding the filing of its suit. Horizon's argument fails because it is not fully developed and, in any event, has no apparent merit.

¶15 Horizon's argument is undeveloped because Horizon does not fully explain its premise. On appeal, Horizon argues that we should vacate the verdict because Jahn was not reasonably diligent and, thus, the claim is time barred. However, Horizon does not provide us with a starting point for addressing this topic. Rather, Horizon merely directs us to the general proposition that "[o]rdinarily, reasonable diligence is a question of fact," but that it is a question of law "when the facts and reasonable inferences that can be drawn from them are undisputed." *See* ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 341, 565

[4] Horizon notes that a longer statute of limitations might apply to the intentional misrepresentation claim, but that Jahn has forfeited any argument that this longer period applies. Jahn does not argue to the contrary. Because our rejection of Horizon's argument does not depend on which limitations period applies, we need not address this issue.

N.W.2d 94 (1997). Having cited this framework, Horizon does not meaningfully apply it.

¶16 The jury was not asked a reasonable diligence question, and Horizon does not argue on appeal that this is a reason to reverse. To the contrary, Horizon raised the reasonable diligence topic post-verdict, and asked the circuit court to decide it. Similarly, on appeal, Horizon now asks this court to decide the issue and, thus, seemingly thinks the issue should be decided in Horizon's favor as a matter of law. However, for this to be a viable appellate argument, Horizon would need to identify facts that we may assume are true for purposes of appeal, something Horizon has not done.[5] *See* ***id.*** This lack of development is reason alone to reject Horizon's argument.

¶17 Further, even if we were to make assumptions in Horizon's favor, Horizon's argument still falls short. For example, Horizon may believe that a source of facts is the trial evidence viewed in the light most favorable to the verdict. But, even if we assumed this was a viable starting point, Horizon's argument fails because Horizon does not identify with meaningful specificity any evidence that favors Horizon's view.

¶18 Our supreme court has explained "reasonable diligence" as follows:

> [Reasonable diligence] is such diligence as the great majority of persons would use in the same or similar circumstances. Plaintiffs may not ignore means of information reasonably available to them, but must in good faith apply their attention to those particulars which may be

[5] For example, in support of its argument, Horizon baldly asserts that "[h]ad Jahn undertaken any reasonable follow up with Horizon, it would have discovered the fact that it was being paid a split percentage of an amount that was less than its understanding of gross revenue." Horizon does not explain why we must accept this factual assertion as undisputed.

> inferred to be within their reach.… If the plaintiff has information providing the basis for an objective belief as to his or her injury and its cause, he or she has discovered the injury and its cause.

Id. at 340-41 (citation omitted). Horizon's argument applying this standard falls short.

¶19 Jahn discovered Horizon's underpayments in September 2008, when Jahn inadvertently came into possession of a Horizon customer bill. By comparing this customer bill to Horizon's actual payments, Jahn was able to determine that Horizon was taking a cut off the top before splitting the revenue. Prior to this, Jahn had never had the customer bills—indeed, Horizon's co-owner agreed in his testimony that he had "never given copies of customer bill information to any carrier [Horizon] work[ed] with." Thus, prior to September 2008, Jahn was not able to compare Horizon's customer bills with the amount Horizon split with Jahn.

¶20 Horizon's "reasonable diligence" argument is that Jahn should have been suspicious all along that Horizon was underpaying and that Jahn should have acted on those suspicions to obtain customer bills from Horizon and, thus, learned of Horizon's practice far sooner. Horizon asserts: "Jahn Transfer would have expected to receive over $300,000 annually from Horizon. Receiving (at a minimum) ten percent less than that amount, year after year, is a significant amount to miss." Horizon also vaguely suggests that Jahn should have compared what Horizon paid Jahn with what other shippers paid: "Jahn knew what Horizon paid it, knew how many miles it drove for Horizon's customers and [knew] how much freight was hauled. Jahn also knew what it was paid by other shippers with whom it had similar arrangements."

¶21 These assertions fall short. For example, Horizon does not explain why the only reasonable view of the evidence is that Jahn should have known, by merely viewing total actual payments, that Jahn was entitled to more. Similarly, Horizon's vague comparison with other companies goes nowhere. Horizon does not point to evidence showing that Jahn had access to customer billing rates for various companies, including Horizon, and that, in turn, Jahn should have been able to compare those rates to reveal the underpayments. For that matter, Horizon does not show that the only reasonable view of the evidence is that a reasonable company in Jahn's position would have taken the time to make the comparison.

¶22 At bottom, the problem here is that Horizon makes general assertions; Horizon does not provide a detailed argument showing why the facts we must accept as true for purposes of appeal lead to the conclusion that Jahn was not reasonably diligent in discovering the underpayments.

2. Sufficiency Of The Evidence

¶23 Horizon argues that the evidence was insufficient to support the intent element of intentional misrepresentation. We apply the following principles when addressing sufficiency of the evidence:

> Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding.
>
> In applying this narrow standard of review, this court considers the evidence in a light most favorable to the jury's determination. We do so because it is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses.

Morden v. Continental AG, 2000 WI 51, ¶¶38-39, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). Further: "This court will uphold the jury verdict 'even though [the evidence] be contradicted ….'" ***Id.***, ¶39 (citation omitted).

¶24 Horizon contends that the evidence was insufficient with respect to the element requiring proof that "the defendant made the representation with the intent to deceive the plaintiff in order to induce the plaintiff to act on it to plaintiff's pecuniary damage." *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156. Specifically, Horizon asserts that "there was little to no evidence of fraudulent intent" and that it matters that "there was evidence that Horizon had provided a letter [to Jahn] which clearly explained that 'gross revenue' as used by Horizon included a deduction of 10%." Horizon acknowledges that there was a dispute about whether Jahn received a letter explaining a 10% deduction, but argues that the presentation of contradictory testimony on this topic means that Jahn failed to present clear and convincing evidence.

¶25 Horizon's reliance on disputed evidence relating to the letter shows that it misapprehends the legal standard. Assuming for argument's sake that the letter supports the proposition that Horizon did not intend to deceive, our task is not to look for evidence that supports Horizon; our task is to look for evidence that supports the verdict. We do not further address Horizon's assertions that rely on evidence or inferences that the jury necessarily rejected.

¶26 What remains of Horizon's argument is little more than bare assertions. For example, in asserting that there was "little to no evidence of fraudulent intent," Horizon does not meaningfully address the evidence and inferences from that evidence in a light most favorable to the verdict. At most,

Horizon identifies factors that might be relevant to *a jury's* determinations as to credibility and weight, but not to a reviewing court's assessment of the sufficiency of the evidence.[6]

¶27 Given the flaws in Horizon's argument, we need not discuss the topic further. Nonetheless, we provide an example of how the evidence, properly viewed, supports the verdict. The evidence included testimony that Jahn never agreed to a deduction, that Jahn at no time received a letter or any other communication from Horizon about the deduction, and that the deduction was not disclosed on any of the reports Horizon provided to Jahn over the course of the approximately 12 years of their business relationship. This evidence plainly supports a jury finding that Horizon intended to deceive Jahn and pay less than the agreement required.[7]

3. Economic Loss Doctrine

¶28 Horizon argues that we should apply the economic loss doctrine to bar Jahn's intentional misrepresentation claim, even though the Jahn-Horizon agreement was solely for services. As explained below, this argument fails because we are bound by supreme court precedent that forecloses it.

[6] In an apparent attempt to support its argument, Horizon cites cases, but Horizon fails to show that any of the cases it cites matter here. For example, Horizon cites several contract reformation cases, but whether there was sufficient evidence to reform a contract in a particular case does not tell us whether there was sufficient evidence of intentional misrepresentation here.

[7] In reply, and for the first time on appeal, Horizon asserts that the evidence was insufficient as to another intentional misrepresentation element—"the plaintiff believed that the representation was true and relied on it." *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156. This argument appears to suffer the same weaknesses as the one we have addressed, but we need not examine it closely because it comes too late. *See* ***State v. Smalley***, 2007 WI App 219, ¶7 n.3, 305 Wis. 2d 709, 741 N.W.2d 286 ("[A]rguments advanced for the first time in a reply brief are waived.").

¶29 Horizon does not dispute that the Jahn-Horizon agreement was solely for services. Horizon further recognizes that our supreme court held in ***Insurance Co. of North America v. Cease Electric Inc.***, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462, that the economic loss doctrine does not apply when a contract is for services. *See* ***id.***, ¶53 (stating the rule that "the economic loss doctrine does not apply to contracts for services"); *see also* ***1325 N. Van Buren, LLC v. T-3 Group, Ltd.***, 2006 WI 94, ¶29, 293 Wis. 2d 410, 716 N.W.2d 822 (citing ***Cease Electric*** for the proposition that, "[i]f the contract is purely a service contract, the economic loss doctrine does not apply"). Nonetheless, Horizon argues that, for policy reasons, this rule should be narrowed so that the doctrine may apply to some types of service contracts, such as the Jahn-Horizon agreement here. However, we need not address these policy arguments because carving out the sort of exception Horizon proposes would have the effect of overruling, in part, precedent. We have no such power. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

Conclusion

¶30 For the reasons discussed, we affirm the circuit court.

By the Court.—Judgment affirmed.

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