

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2014

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 No. 2013AP518

Cir. Ct. No. 2011CV342

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**CHAD T. BECK, CHRISTOPHER T. FLECK, HEIDI SHEFF,
JENNIFER R. SKANRON, PETER J. FLECK AND TRACY L. NEWMAN,**

PLAINTIFFS-RESPONDENTS,

v.

GORDON J. MUELLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waushara County:
MARK T. SLATE, Judge. *Reversed and cause remanded with directions.*

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

¶1 SHERMAN, J. In this interlocutory appeal, Gordon Mueller appeals an order of the circuit court denying his motion for summary judgment on two claims brought against him by the beneficiaries of six trusts for which he previously served as trustee. The beneficiaries of the trusts brought suit against

Mueller for breach of fiduciary duties and for intentional fraud. Mueller contends that summary judgment should have been entered in his favor because the claims against him are time barred. Mueller also contends that summary judgment should have been entered in his favor with respect to the beneficiaries' intentional fraud claim because that claim was not pled with sufficient specificity and because it is not a valid claim. However, we do not reach this issue because we resolve the statute of limitations issue in favor of Mueller for the reasons discussed below. Accordingly, we reverse the order denying Mueller's motion for summary judgment and remand with directions.

BACKGROUND

¶2 Norma Beck died testate in 1984. Under the terms of Norma's will, six separate, equally funded trusts were created, one for each of her grandchildren then living: Peter Fleck, Christopher Fleck, Heidi Sheff, Tracy Newman, Chad Beck and Jennifer Skanron. Norma's will identified Mueller as the trustee of the trusts and provided that he had the discretionary authority to use the income and principal of each trust for the support, maintenance, and education of that trust's beneficiary. The will also specified three specific partial distribution dates for each of the trusts at ages 23, 28 and 35 for each beneficiary:

When the beneficiary of a trust fund created hereunder reaches the age of twenty-three (23) years, the trustee shall pay to such trust beneficiary one-third (1/3) of the total balance of such principal and accumulated income then remaining in said trust fund; a further one-half (1/2) of the then balance of the trust fund shall be paid to a beneficiary at age twenty-eight (28) years; and the remainder of said trust fund shall be paid to a beneficiary when the beneficiary of that trust fund attains the age of thirty-five (35) years. Each of the trust funds created hereunder shall terminate upon the payment of the balance remaining in that fund as herein provided, unless previously terminated as hereinafter provided.

¶3 On December 12, 2011, the six trust beneficiaries brought a single suit against Mueller for intentional breach of fiduciary duties and intentional fraud. The complaint alleged that under the terms of the will, the trusts mandated the following distribution dates for each of the six beneficiaries:

<u>Plaintiff Beneficiary</u>	<u>Date of Birth</u>	<u>Year of Distribution at Age:</u>		
		<u>23</u>	<u>28</u>	<u>35</u>
Peter	11/03/1963	1986	1991	1998
Chris	12/23/1964	1987	1992	1999
Heidi	03/03/1967	1990	1995	2002
Tracy	11/15/1969	1992	1997	2004
Chad	11/03/1971	1994	1999	2006
Jennifer	04/11/1972	1995	2000	2007

¶4 The beneficiaries alleged that Mueller had intentionally breached his fiduciary duties under each of the trusts by: failing to file annual and final accounts for each of the trusts; failing to make the required distributions, including the final distributions when each of the beneficiaries reached the age of thirty-five; failing to wind up the administration of each of the trusts in a timely manner; failing to prudently invest assets of each trust; and converting assets of the Trusts for his own benefit. The beneficiaries further alleged that Mueller's actions constituted an intentional fraud against each of the beneficiaries.

¶5 In his answer, Mueller asserted as an affirmative defense that the beneficiaries' claims are barred by the applicable statute of limitations. Then, in August 2012, Mueller moved for summary judgment on the basis that the

beneficiaries' claims are time barred under WIS. STAT. § 893.57.¹ The beneficiaries, relying on the discovery rule, responded that none of their separate claims against Mueller accrued until June 20, 2010, when each received a final accounting of his or her respective trust, which is less than two years before the beneficiaries filed their complaint against Mueller. The beneficiaries argued that prior to receiving the final accountings for the trusts, they had “neither knowledge of the extent or value of trust property, nor knowledge of whether they received the proper amounts when funds were distributed from the trust.” The beneficiaries argued alternatively that the statutes of limitations on their claims were tolled from the time of first injury until Mueller was removed as trustee of the trusts by the probate court, which is also less than two years before they filed this complaint.

¶6 The circuit court denied Beck's motion for summary judgment. Following the denial of Mueller's motion for summary judgment, we granted Mueller's petition for leave to appeal.

DISCUSSION

¶7 Mueller contends that the circuit court erred in denying his motion for summary judgment. Mueller argues that the beneficiaries' claims are time barred. Mueller further argues that the beneficiaries' claim for intentional fraud was not pled with particularity, as required by WIS. STAT. § 802.03(2) and that such a claim is not actionable in the present context.

¹ WISCONSIN STAT. § 893.57 provides: “An action to recover damages for libel, slander, assault, battery, invasion of privacy, false imprisonment or other intentional tort to the person shall be commenced within 3 years after the cause of action accrues.” Section 893.57 was amended in February 2010 to change the statute of limitations under that section from two years to three years. *See* 2009 Wis. Act 120. It is undisputed that the applicable statute of limitations in this case is two years.

A. Standard of Review

¶8 Our review on summary judgment is de novo. *Hardy v. Hoeflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The party moving for summary judgment bears the burden of proving that there are no issues of material fact in dispute that require a trial. *AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24, ¶26, 308 Wis. 2d 258, 746 N.W.2d 447. We draw all reasonable inferences from the summary judgment materials in the light most favorable to the non-moving party. *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

B. Statute of Limitations

¶9 Mueller contends that he is entitled to summary judgment because the applicable two-year statute of limitations has run on the beneficiaries' tort claims against him. See WIS. STAT. § 893.57. The beneficiaries respond that under Wisconsin's discovery rule, their claims did not accrue on the date their injuries first manifested, but rather on the date when "the *nature* of the injury was, or reasonably ought to have been, known to [them]." See *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 408-09, 388 N.W.2d 140 (1986).

¶10 The parties agree that in order for the beneficiaries' claims to have been timely filed, the discovery rule must have tolled the statute of limitations on their claims until two years or less within the filing of their complaint, which was filed on December 12, 2011. Thus, in order for the complaint to have been timely filed, the beneficiaries' claims must not have accrued until sometime after December 11, 2009, two years prior to the December 12, 2011 filing date.

¶11 Under the discovery rule, which applies to all tort actions, “a cause of action accrues when the plaintiff discovered or, in the exercise of reasonable diligence, should have discovered his [or her] injury, its nature, its cause and the identity of the allegedly responsible defendant.” *Estate of Merrill v. Jerrick*, 231 Wis. 2d 546, 552, 605 N.W.2d 645 (Ct. App. 1999) (quoted source omitted); *see also Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983). Our supreme court has explained in this context:

Ordinarily, reasonable diligence is a question of fact for the fact-finder. However, when the facts and reasonable inferences that can be drawn from them are undisputed, whether a plaintiff has exercised reasonable diligence in discovering his or her cause of action is a question of law. In addition, whether an inference is reasonable is a question of law.

John BBB Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 341, 565 N.W.2d 94 (1997) (internal citations omitted).

¶12 The beneficiaries assert that they did not discover their alleged separate injuries until June 20, 2010, when they received a verified accounting of each of the trusts and that they exercised reasonable diligence in discovering their injuries. Based on the undisputed facts in the record before the circuit court, and for the reasons explained below, we conclude that reasonable persons in the same or similar circumstances as the beneficiaries should have discovered their injuries and the cause of those injuries, no later than December 11, 2009, in other words, more than two years prior to the filing of the complaint.

¶13 Whether a plaintiff exercised reasonable diligence is an objective standard. *See id.* The supreme court has explained that reasonable diligence:

means such diligence as the great majority of persons would use in the same or similar circumstances. Plaintiffs may not close their eyes to means of information

reasonably accessible to them and must in good faith apply their attention to those particulars which may be inferred to be within their reach.

Stroh Die Casting Co. v. Monsanto Co., 177 Wis. 2d 91, 103, 502 N.W.2d 132 (Ct. App. 1993) (quoted source and emphasis omitted).

¶14 As previously summarized, it is undisputed that Norma's will created six separate trusts, one for each of the beneficiaries, and that each of the grandchildren was provided a copy of Norma's will, either directly, in the case of the two grandchildren who had reached the age of majority at the time of Norma's death, or via a guardian for the children who were minors at the time. It is undisputed that Norma's will specified three specific disbursement dates for each of the trust's funds, and that the will provided that when the beneficiary of each trust reached the age of thirty-five, any funds remaining in the trust would be paid to the beneficiary and the trust would be terminated. It is also undisputed that the oldest beneficiary turned thirty-five in 1998 and that the youngest beneficiary turned thirty-five in April 2007. Thus, no later than April 2007, all trusts created by Norma's will should have been exhausted of funds and terminated. However, the complaint in this case against Mueller was not filed until December 2011.

¶15 We conclude that in this case, a reasonable person in positions of each of the beneficiaries, exercising reasonable diligence, would have discovered his or her injuries with respect to his or her trust, which should have been terminated between 1998 and April 2007, sometime prior to December 2009. To reach this conclusion, we consider each beneficiary and that beneficiary's trust individually. Thus, when considering Peter, it is undisputed that he was twenty-one years old at the time of Norma's death, personally (rather than constructively) received a copy of Norma's will, and he turned thirty-five years old thirteen years

prior to the filing of the complaint. Similarly, Chris was twenty years old at the time of Norma's death, personally received a copy of Norma's will, and turned thirty-five years old twelve years prior to the filing of the complaint. The remainder of the beneficiaries, Heidi, Tracy, Chad and Jennifer, were minors at the time of Norma's death and received their copies of the will constructively. Those beneficiaries each turned thirty-five years old nine, seven, five and two and one-half years prior to the filing of the complaint, respectively.

¶16 When reviewing summary judgment, we must draw all reasonable inferences from the evidence in favor of the non-moving party. *Burbank Grease Servs., LLC*, 294 Wis. 2d 274, ¶40. In this case, it is not reasonable to infer that there was no communication between the beneficiaries regarding their individual trusts, considering undisputed facts that include, by the beneficiaries' own admission, that the oldest of them, Peter, acted as their collective representative during pertinent time periods. It is also not reasonable to infer that the beneficiaries were not aware that they were each due to receive a final distribution of their separate trust at age thirty-five, since all the beneficiaries received a copy of the will, either personally, as in the case of Peter and Chris, or constructively.

¶17 The beneficiaries have not provided any explanation as to what they did to exercise their obligations of reasonable diligence to discover their separate claims. They focus instead on what prevented them from discovering their separate claims at earlier dates. They claim that Mueller failed to provide them with any accounting of the trusts, which prevented them from obtaining any evidence of his alleged breach of fiduciary duties, and that their relationship with him and the fact that he made cash disbursements to them from their separate trusts "lulled them into a false sense of security." The beneficiaries argue that it was not until Peter was contacted by Mueller in 2008 regarding the sale of some

property owned collectively by the trusts and Peter's unsuccessful attempts to communicate with Mueller regarding that transaction that they were led to petition the probate court to require Mueller to produce accountings for the separate trusts, which, in November 2009, the probate court ordered Mueller to produce.

¶18 However, when Mueller contacted Peter regarding the sale of the property, Peter's trust should have been fully distributed approximately ten years previously and even Jennifer, the youngest beneficiary, should have received full disbursement of her trust the previous year. It would not have taken a verified accounting for the beneficiaries to know that the trusts retained property years after they should have been fully distributed and terminated. To the contrary, Mueller's failure to provide the verified final accounting when each trust was to be terminated under the will, as required by WIS. STAT. § 701.16(5),² was itself an act that gave notice to the beneficiaries that Mueller was not complying with the terms of their separate trusts.

¶19 In order for an action to accrue, an injured party does not need to have full and complete knowledge of everything necessary to carry out a lawsuit. What is necessary is for the injured party to discover, or exercise reasonable diligence to discover, the nature and cause of the injury and who caused it. The beneficiaries do not allege that they took any action to discover why they did not receive their distributions, or their final accountings, at the latest, when the youngest beneficiary turned 35, and all trusts were to have been terminated. If at that time, April 2007, the beneficiaries had demanded the verified final

² Effective July 1, 2014, WIS. STAT. § 701.16(5) is repealed. See 2013 Wis. Act 92, § 198.

accounting, even had Mueller “actively obstructed the Beneficiaries’ attempts to diligently discover” their injuries, as he allegedly did for one and one-half years between fall 2008 and June 2010, the beneficiaries would still have obtained the final accounting before December 2009. Alternatively, even without the final accounting, Mueller’s 2008 communication regarding the property sale should have confirmed to a reasonable person, if any doubt existed, that the final distributions from the trusts had not been made since trust property remained in the hands of the trustee, thereby triggering the start of the two-year limitations period substantially prior to December 12, 2009.

¶20 Accordingly, we conclude that each of the beneficiaries’ causes of actions against Mueller accrued prior to December 2009. Because the beneficiaries’ claims were filed more than two years after December 2009, those claims are time barred, and Mueller was entitled to summary judgment dismissing the complaint.³

CONCLUSION

¶21 For the reasons discussed above, we reverse the order denying Mueller’s motion for summary judgment and remand with directions that Mueller’s motion for summary judgment be granted.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

³ Because our conclusion that the beneficiaries’ claims are time barred and that Mueller’s motion for summary judgment should have been granted is dispositive, we do not address Mueller’s additional arguments that the claim for intentional fraud was not pled with sufficient specificity and is not actionable.

