COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2246 **Cir. Ct. No. 2012CV239**

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

WHITE KNIGHT COMMERCIAL FUNDING, LLC,

PLAINTIFF-RESPONDENT,

FIRST NATIONAL BANK,

PLAINTIFF,

V.

MICHAEL G. TREWIN,

DEFENDANT-APPELLANT,

DARRYEL E. HEARLEY AND MARY T. HEARLEY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oconto County: JAY N. CONLEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Michael Trewin appeals a judgment granting Darryel and Mary Hearley rescission of a 2005 conveyance of real property to Trewin based on Trewin's breach of his fiduciary duties as the Hearleys' attorney. We agree with Trewin that the circuit court erred when it determined the applicable statute of limitations for the Hearleys' claim was WIS. STAT. § 893.33, which establishes a thirty-year limitations period for actions affecting real property.[1] The substance of the Hearleys' allegations was that Trewin breached his fiduciary duties; accordingly, we conclude WIS. STAT. § 893.57 is the applicable statute of limitations, which establishes either a two- or three-year limitations period for intentional torts. We therefore reverse the judgment, but we remand to the circuit court to determine whether the applicable limitations period—whether two or three years—has not yet expired, or should not be enforced, by virtue of the discovery rule, the continuing violation theory, or equitable estoppel.

¶2 The judgment also dismissed Trewin's counterclaims for eviction and replevin and awarded the Hearleys their reasonable attorney's fees. Trewin asserts both of these aspects of the judgment were erroneous. We affirm the dismissal of Trewin's counterclaim for replevin, but reverse the dismissal of Trewin's counterclaim for eviction and remand for further proceedings. We also reverse the circuit court's award of attorney's fees.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND

¶3 This action began as a foreclosure action by First National Bank involving real property owned by Trewin. First National alleged Trewin was in default of a note in the amount of approximately $151,000, and it sought to foreclose on the real estate by virtue of a mortgage it recorded in 2008. First National also named the Hearleys as defendants on the belief they had a potential interest in the property.

¶4 Trewin waived the statutory redemption period and consented to a sale of the mortgaged premises upon entry of the mortgage foreclosure judgment. The circuit court granted First National a judgment of foreclosure. The Hearleys appeared at the hearing and represented they were still in possession of the property. The court concluded the property could not be sold without injury to the Hearleys' interests, and it set a six-month redemption period at the Hearleys' request, commencing on October 23, 2012. The sheriff's sale was scheduled for April 23, 2013.[2]

¶5 On April 16, 2013, the Hearleys filed a motion for a temporary injunction enjoining the sale of the foreclosed real estate. At the same time, the Hearleys filed a cross claim against Trewin. The cross claim alleged that Trewin, who was then a licensed attorney, had represented the Hearleys in numerous legal matters between 1991 and 2010. According to the cross claim, beginning in 2004, Trewin entered into various business transactions with the Hearleys, including a

[2] The judgment of foreclosure was later assigned to White Knight Commercial Funding, LLC, which was joined as a party plaintiff on August 23, 2013. White Knight is not a named defendant to the Hearleys' cross claim at issue in this appeal. However, it is on the record as "equitably in support of" the Hearleys, and has filed a brief supporting their positions on appeal.

series of loans from Trewin to the Hearleys. The real estate at issue in the foreclosure was previously the Hearleys' farm and homestead; on May 12, 2005, Trewin purchased it and other land for $275,000, an amount considerably less than the fair market value of the property.[3] The Hearleys alleged that throughout the various transactions, Trewin took advantage of his attorney-client relationship with them, thereby breaching his fiduciary duties to them and his ethical obligations as an attorney. In addition to injunctive relief, the Hearleys sought rescission of the conveyance to Trewin and/or imposition of a constructive trust over the property.

¶6 As it relates to Trewin's ethical duties, attached to the cross claim was an Office of Lawyer Regulation (OLR) complaint filed against Trewin on September 4, 2012.[4] The fifteen-count complaint sought revocation of Trewin's law license for numerous rules violations arising out of real estate and other business transactions with three financially unsophisticated client couples, including the Hearleys. The complaint chronicled various loans to the Hearleys from Trewin beginning in 2004; the new loans would often include a combination of "new money" and money to "pay off prior debt owed to Trewin." OLR alleged that in 2005, Trewin proposed to the Hearleys that they deed their farm to him in order to avoid a tax lien related to an Internal Revenue Service claim for $70,000. However, OLR alleged the Hearleys' farm was not subject to any tax liens or the

[3] Trewin subsequently sold a portion of the land he obtained from the Hearleys in March 2009 for $432,500.

[4] The complaint appears to have been filed based in part upon a grievance form filed by the Hearleys with OLR on July 9, 2010. In the grievance, the Hearleys sought an accounting, representing that they "feel we have paid enough to Mr[.] Trewin to have the remaining property deeded back to us," and that Trewin had been unresponsive to their previous requests for an accounting.

imminent filing of any tax liens. Nonetheless, Trewin obtained title to the Hearleys' property, and he continued to issue new loans to the Hearleys. Following a three-day evidentiary hearing, the referee determined Trewin had committed fourteen counts of professional misconduct and recommended revocation of Trewin's license to practice law in Wisconsin. *See* ***Office of Lawyer Regulation v. Trewin***, 2014 WI 111, ¶¶1-2, 358 Wis. 2d 310, 854 N.W.2d 357.

¶7 The OLR referee found that each client couple had retained Trewin when they were facing legal issues related to their debts. Trewin had then taken advantage of the couples' inability to obtain loans from traditional sources, making each couple a series of personal loans, often at high interest rates, with ever-increasing dollar amounts and substandard or nonexistent documentation. ***Id.***, ¶¶8-11. This left the clients "confused about which loans were outstanding, what payments they had made toward which loans, and the balances of their loans." ***Id.***, ¶12. When the client couples fell behind on their payments, Trewin would not notify them of such deficiencies because he wished to avoid judicial scrutiny. ***Id.***, ¶14. Instead of attempting to enforce the notes and mortgages, Trewin preferred to create another loan to the clients, often consisting of "a mixture of existing indebtedness and new money. When prior loans were paid off or replaced by a new loan, … Trewin did not return the promissory notes for the prior loans." ***Id.*** Ultimately Trewin would persuade the couple to transfer their real property to him, with the promise that he would lease the property back to them and they could reacquire the property if they were current on their payments and could pay a specified amount. ***Id.***, ¶15. However, the couples were never in a financial position where they could regain ownership of their property, although some held the mistaken belief that they retained ownership or control of the property even after transferring it to Trewin. ***Id.*** The supreme court concluded

this course of conduct warranted revocation of Trewin's law license, although its order did not include a restitution award because the amounts that would make the client couples whole was not readily ascertainable. ***Id.***, ¶¶41-42.

¶8 As the disciplinary proceedings were ongoing, Trewin, in 2013, filed an answer to the Hearleys' cross claim. Trewin asserted the Hearleys' claim was time barred under WIS. STAT. § 893.57 (2005-06), which imposed a limitations period of two years for intentional torts, such as breach of fiduciary duty. Trewin asserted the Hearleys "knew of the potential claim in July or August of 2010 at the latest, yet waited until April 16, 2013 to file" their cross claim.

¶9 Trewin also filed two counterclaims. The first requested eviction and a sum exceeding $30,000 as damages for payments allegedly due under a lease agreement wherein Trewin leased the Hearleys' former land back to them. Trewin also filed a counterclaim for replevin, in which he sought to enforce a promissory note and security agreement allegedly executed by the Hearleys on June 11, 2008, under which note $148,766.39 was allegedly outstanding.

¶10 The circuit court conducted a two-day trial on February 11 and 14, 2014. Following post-trial briefing, the circuit court entered a memorandum decision on April 7, 2014. The circuit court concluded the applicable statute of limitations governing the Hearleys' cross claim was WIS. STAT. § 893.33(2), which provides a thirty-year limitations period for actions concerning real property. The court reasoned this statute was applicable by virtue of WIS. STAT. § 840.03(1), which authorizes any person having an interest in real property to bring an action "relating to that interest," in which the person may demand certain remedies, including judicial rescission of the contract. The court determined rescission was warranted in this case, finding that the Hearleys were "[ignorant] of

all the wheelings and dealing with Trewin and [had] complete trust in the man they considered their attorney." Because Trewin was acting as the Hearleys' attorney on the date of the property transfer, Trewin owed fiduciary duties to the Hearleys, which he breached by acting in his self-interest and failing to procure a valid conflict waiver from the Hearleys. The court also stated it would award the Hearleys "costs and disbursements as well as reasonable attorney[']s fees."

¶11 The circuit court requested that the Hearleys' counsel prepare a judgment consistent with its memorandum decision, which was to include costs and attorney's fees. A written judgment with detailed findings of fact and conclusions of law was entered on August 4, 2014. The court described each of the loan and business transactions that took place between the Hearleys and Trewin between 1997 and July 2010. Consistent with its memorandum decision, the court determined that Trewin breached his fiduciary duties to the Hearleys and ordered rescission of the May 12, 2005, conveyance to Trewin, retaining authority to impose a constructive trust in the future to protect other parties or non-parties. The judgment awarded the Hearleys their actual and reasonable attorney's fees in the amount of $36,095, and the circuit court dismissed Trewin's counterclaims for eviction and replevin. Trewin appeals.

DISCUSSION

I. Statute of Limitations

¶12 The primary issue in this case concerns the statute of limitations applicable to the Hearleys' cross claim. "Choosing the correct statute of limitations involves a question of law that we independently review." ***Zastrow v. Journal Commc'ns, Inc.***, 2006 WI 72, ¶12, 291 Wis. 2d 426, 718 N.W.2d 51; ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2001 WI App 300, ¶14, 249

Wis. 2d 142, 638 N.W.2d 355. Trewin argues the circuit court erroneously concluded that the thirty-year limitations period under WIS. STAT. § 893.33(2) applies to the cross claim.

¶13 WISCONSIN STAT. § 893.33(2) provides for a thirty-year limitations period to actions "affecting the possession or title of any real estate." The circuit court concluded § 893.33(2) applied to the Hearleys' cross claim by virtue of WIS. STAT. § 840.03. As pertinent here, § 840.03(1) authorizes "[a]ny person having an interest in real property" to bring "an action relating to that interest, in which the person may demand" an enumerated list of remedies that includes judicial rescission of contract. The circuit court apparently determined that since the Hearleys sought rescission of the May 12, 2005, conveyance, theirs was an action "relating to" their interest in the conveyed property, and consequently the cross claim "affect[ed] the possession or title" of the real estate.

¶14 The problem with this conclusion is that WIS. STAT. § 840.03(1) does not create a claim for rescission independent of other legal theories of liability. The statute, by its plain language, recognizes that rescission is a remedy for a wrong. *See* ***id.*** ("the person may demand the following *remedies* …"). This framing is consistent with longstanding Wisconsin case law on the matter, which identifies rescission of contract as a remedy for, among other things, various forms of wrongdoing, typically some species of fraud. *See, e.g.*, ***Oneida Seven Generations Corp. v. City of Green Bay***, 2015 WI 50, ¶99 n.6, 362 Wis. 2d 290, 865 N.W.2d 162 ("Rescission is an equitable remedy."); ***Groshek v. Trewin***, 2010 WI 51, ¶21, 325 Wis. 2d 250, 784 N.W.2d 163 ("Rescission is an appropriate remedy when property is acquired in connection with a breach of fiduciary duty."); ***Rueter v. Lawe***, 86 Wis. 106, 109, 56 N.W. 472 (1893) (without an element of fraud in a transaction, there can be no rescission); ***Mueller v. Harry***

Kaufmann Motorcars, Inc., 2015 WI App 8, ¶41, 359 Wis. 2d 597, 859 N.W.2d 451 ("It is well established in our case law that rescission is a remedy for intentional misrepresentation claims."), *review denied sub nom.* ***Mueller v. Harry Kaufmann Motorcars***, 2015 WI 47, __ Wis. 2d __, 862 N.W.2d 899. Thus, although § 840.03(1) creates a cause of action in which the plaintiff may seek rescission, *see* ***SJ Props. Suites v. Specialty Fin. Grp., LLC***, 864 F. Supp. 2d 776, 805 (E.D. Wis. 2012), it does not establish rescission itself as a stand-alone theory of liability.

¶15 In this case, the express legal theory under which the Hearleys sought rescission of the real estate transaction was Trewin's breach of his fiduciary duties to them. The Hearleys' own pleading claims only a breach of Trewin's fiduciary duties as a basis for liability. All of their arguments throughout this case regarding "equity" between the parties and the inequitable nature of what has occurred invariably derive from this breach. Significantly, this breach formed the basis for Trewin's liability in this case, as the circuit court found, based upon the record, that Trewin had grossly abused his fiduciary relationship with the Hearleys. Put another way, but for the fiduciary relationship, there was no basis alleged in the cross claim, or stated in the circuit court's decisions, for Trewin otherwise to be liable to the Hearleys as to the real estate transaction.[5]

[5] The circuit court's April 7, 2014, memorandum decision states, "As an aside, the Court believes there are other grounds to rescind the May 12, 2005[,] conveyance, but I see no need to further address the subject given my findings." On remand, the circuit court may elaborate upon this statement, which must include identification of the particular legal bases upon which rescission was otherwise warranted, specific factual findings establishing those bases, and an explanation of the grounds for rejecting any argued defenses, including any asserted statutes of limitation. *See* WIS. STAT. § 802.09(2) (Issues not raised by the pleadings, but tried by express or implied consent by the parties, shall be treated in all respects as though they had been raised by the pleadings.).

¶16 Breach of fiduciary duty is an intentional tort subject to the limitations period contained in WIS. STAT. § 893.57. *See* ***American Trust & Sav. Bank v. Philadelphia Indem. Ins. Co.***, 678 F. Supp. 2d 820, 825 (W.D. Wis. 2010); ***Zastrow***, 291 Wis. 2d 426, ¶¶38-40. When another statute of limitations provides for a shorter limitations period, the thirty-year period under WIS. STAT. § 893.33 is inapplicable. *See* § 893.33(4) ("This section does not extend the right to commence any action … beyond the date at which the right would be extinguished by any other statute."). The limitations period under § 893.57—which, as we shall explain, is either two or three years—is shorter than § 893.33's thirty-year period.

¶17 The Hearleys alternatively argue that, because their cross claim is rooted in equity, the timeliness of their claim is governed only by the doctrine of laches and there is no applicable statute of limitations.[6] The Hearleys cite ***Elkhorn Area School District v. East Troy Community School District***, 127 Wis. 2d 25, 337 N.W.2d 627 (Ct App. 1985), which stated that "the statute of limitations is not applicable to equitable actions." ***Id.*** at 31. However, the "unspoken premise of [***Elkhorn***] was that the legislature had not prescribed a statute of limitations to the particular equitable action at issue." ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶11, 246 Wis. 2d 385, 630 N.W.2d 772. The correct framing of the rule is as follows: "*In the absence of a*

[6] As authority for the proposition, White Knight cites an order by the Wisconsin Supreme Court denying a petition for review in the unpublished but authored case of ***Tyler v. Schoenherr***, No. 2011AP2075, unpublished slip op. (WI App July 12, 2012). The order denying the petition for review contains no substantive analysis of any kind, let alone any analysis applicable to the issues in this case.

We note the circuit court in this case cited the equitable nature of the Hearleys' claim as an alternative basis for rejecting Trewin's statute of limitations defense.

controlling statute, the only time limitation is the equitable doctrine of laches." ***Id.*** (quoting ***Crosby v. Mills***, 413 F.2d 1273, 1276 (10th Cir. 1969) (emphasis in ***Schwittay***)).

¶18 Here, as we have explained, the Hearleys' cause of action was based on Trewin's breach of his fiduciary duties in connection with the 2005 land conveyance and other transactions between the parties. While the Hearleys are correct that their claim has some equitable aspects, most notably the relief sought, *see* ***Little v. Roundy's, Inc.***, 152 Wis. 2d 715, 722, 449 N.W.2d 78 (Ct. App. 1989) ("An action to rescind a contract is equitable in nature."), this alone is insufficient to establish that no statute of limitations controls their claim, *see* ***Schwittay***, 246 Wis. 2d 385, ¶11. Rather, the substance of the Hearleys' allegations demonstrates that their claim is, at its core, one for breach of fiduciary duty.

¶19 Another wrinkle in this case is that the statute of limitations for intentional torts was extended from two to three years effective February 26, 2010. *See* 2009 Wis. Act 120, § 1. Trewin contends the two-year limitations period applies, while the Hearleys seek the benefit of the amended three-year limitations period. When a statute of limitations is amended, a cause of action that has accrued prior to the effective date of the amendment is governed by the prior statute, unless the legislature specifies otherwise. ***State v. Hamilton***, 2002 WI App 89, ¶11, 253 Wis. 2d 805, 644 N.W.2d 243, *aff'd sub nom.* ***Hamilton v. Hamilton***, 2003 WI 50, 261 Wis. 2d 458, 661 N.W.2d 832. Conversely, a cause of action that has not yet accrued prior to the effective date of the amendment is governed by the new language, unless otherwise specified. ***Id.*** In this case, the legislature provided that the three-year limitations period is first applicable to

"injuries occurring on the effective date of this subsection." *See* 2009 Wis. Act 120, § 2.

¶20 We do not address which of the two- or three-year statutes of limitations applies to the Hearleys' claim, because this determination may be interwoven with several of the Hearleys' other arguments regarding the timeliness of their cross claim. Specifically, the Hearleys argue that even if the statute of limitations for intentional torts does apply to their claim, the applicable limitations period had not yet expired before they asserted their claim, or it should not be enforced, for three reasons: the discovery rule, the continuing violation theory, and equitable estoppel.

¶21 First, the Hearleys contend the "discovery rule" applies to their cross claim. The discovery rule "tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person." ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995). The Hearleys assert the earliest point their claim could have accrued is July 8, 2010, when they signed the OLR grievance form against Trewin. Even then, it is not clear the Hearleys were aware or should have been aware that they suffered an injury as a result of Trewin's breach of fiduciary duty; their grievance only sought an accounting of the amounts they owed to Trewin, with the Hearleys stating, "[we] feel we have paid enough to Mr[.] Trewin to have the remaining property deeded back to us."

¶22 Second, the Hearleys argue, albeit briefly, that the "continuing violation theory" applies to their claim. This theory is often employed in the context of an action based on certain discriminatory practices; where such

practices are "alleged to be continuing in nature, the issue [of whether the claim is timely] could be driven by when the last violation occurred." ***Barry v. Maple Bluff Country Club***, 221 Wis. 2d 707, 726, 586 N.W.2d 182 (Ct. App. 1998). However, the continuing violation theory is not restricted to the discrimination context. *See* ***Production Credit Ass'n of W. Cent. Wis. v. Vodak***, 150 Wis. 2d 294, 305-06, 441 N.W.2d 338 (Ct. App. 1989). "Where the tort is continuing, the right of action is continuing." ***Id.*** (quoting ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 554, 327 N.W.2d 55 (1982)). The Hearleys assert the May 12, 2005, transaction was not a separate act, but rather was part of a "long-term scheme" by Trewin to take advantage of the Hearleys that continued well beyond 2005. Indeed, that their claim was framed as a breach of fiduciary duty in the context of a longstanding attorney-client relationship suggests the "wrong" at issue goes beyond the discrete sale of real estate on May 12, 2005.[7]

¶23 Third and finally, the Hearleys contend Trewin is equitably estopped from raising a statute of limitations defense. "By definition, equitable estoppel is based upon the fraudulent or other wrongful conduct on the part of the party asserting the statute of limitations and upon the detrimental reliance on such fraudulent or wrongful conduct by the aggrieved party." ***Hester v. Williams***, 117 Wis. 2d 634, 644, 345 N.W.2d 426 (1984). There are six general rules used to determine whether the application of equitable estoppel is appropriate, but, in

[7] In this sense, we note that Trewin may have continued to take advantage of his fiduciary relationship with the Hearleys even after they filed a grievance against him. When Trewin became aware of the grievance, he telephoned the Hearleys and requested that they sign a document Trewin drafted. ***Office of Lawyer Regulation v. Trewin***, 2014 WI 111, ¶17, 358 Wis. 2d 310, 854 N.W.2d 357. The document stated that $109,643.25 was owed under an unspecified note and that the Hearleys had an option to purchase their former real property back for $50,000. ***Id.*** The Hearleys signed the document, even though they did not know whether it was accurate, because they felt sorry for Trewin. ***Id.***

general, the test is "whether the conduct and representations of [the party asserting the defense] were so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions." ***Id.*** at 644-45 (quoting ***State ex rel. Susedik v. Knutson***, 52 Wis. 2d 593, 598, 191 N.W.2d 23 (1971)). The Hearleys contend that under the circumstances of this case, and given the facts as found by the circuit court, equity prevents Trewin from asserting the statute of limitations as a defense because his conduct was sufficiently egregious to outbalance the public interest in the established limitations period.

¶24 The circuit court did not consider whether the discovery rule or the continuing violation theory prevented the expiration of the statute of limitations, nor did it consider whether Trewin was equitably estopped from asserting the statute of limitations as a defense. The circuit court also did not consider whether the two- or three-year statutes of limitations for intentional torts applies to the Hearleys' claim, a determination that may turn on the circuit court's conclusions regarding the discovery rule or the continuing violation theory. The circuit court's analysis was restricted to its determination that WIS. STAT. § 893.33 established the applicable statute of limitations, a conclusion we have already determined was erroneous. Under the circumstances of this case, we believe the circuit court should be given the first opportunity to determine whether the Hearleys' cross claim was timely filed under any of these theories and to make a record regarding such determinations.

¶25 We therefore reverse and remand this matter to the circuit court for further proceedings. On remand, the circuit court shall determine whether the discovery rule, the continuing violation theory, or equitable estoppel apply so as to render the Hearleys' cross claim timely filed. If the circuit court concludes that none of these doctrine apply, it shall dismiss the Hearleys' cross claim as untimely

and proceed to determine whether Trewin is entitled to a judgment of eviction, as set forth below. *See infra* ¶28. If, however, the circuit court concludes the cross claim is timely under any of the three enumerated doctrines (which necessarily includes determining which of the two- or three-year statutes of limitations for intentional torts is applicable and how it applies under each specific doctrine deemed to render the Hearleys' cross claim timely), the court shall enter a judgment in favor of the Hearleys in accordance with its findings of fact and conclusions of law entered following the trial.

II. Counterclaims

¶26 Trewin also asserts the circuit court erred in denying his counterclaims for eviction and for money damages under a theory of replevin. He argues that the circuit court ignored two pieces of trial evidence: (1) Exhibit C, a spreadsheet that Trewin prepared and that was introduced at trial, which supposedly represented an accounting of a nearly $125,000 loan from Trewin to the Hearleys in 2008; and (2) Trewin's testimony that the Hearleys were delinquent in rent in the amount of $16,866.68 as of February 2014. At trial, Trewin asked the court to order eviction and grant judgment on his counterclaims in a total amount of $157,985.91, consisting of $141,119.23 in unpaid principal and interest on the promissory note and $16,866.68 in unpaid rent.

¶27 Trewin's argument on appeal, in which he asserts he is entitled to a money judgment, is not limited to the unpaid rent allegedly due under his eviction counterclaim. Indeed, the vast majority of the $157,985.91 Trewin seeks is an amount allegedly due under the 2008 promissory note associated with Trewin's replevin counterclaim. However, the circuit court concluded Trewin had withdrawn the replevin counterclaim, and although the circuit court did not

indicate the basis for this conclusion, Trewin does not argue otherwise on appeal or even address this aspect of the circuit court's decision. "Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity." ***West Capitol, Inc. v. Village of Sister Bay***, 2014 WI App 52, ¶49, 354 Wis. 2d 130, 848 N.W.2d 875, *review denied*, 2014 WI 122, 855 N.W.2d 696. Moreover, the circuit court, like the supreme court in the disciplinary action, was highly critical of Trewin's bookkeeping, and as such it seems apparent the circuit court found Exhibit C was entitled to no weight. When the circuit court sits as factfinder, it is the ultimate arbiter of the weight and credibility afforded to the evidence. ***State v. Going Places Travel Corp.***, 2015 WI App 42, ¶27, 362 Wis. 2d 414, 864 N.W.2d 885. We therefore affirm the portion of the judgment dismissing Trewin's replevin counterclaim.

¶28 This brings us to Trewin's counterclaim for eviction, which includes Trewin's request for damages for unpaid rent. The circuit court denied this counterclaim because it concluded any lease was extinguished by virtue of the rescission of the Hearleys' May 12, 2005, conveyance to Trewin. However, given our resolution of the statute of limitations issue, it is not yet clear that the Hearleys are entitled to rescission as a remedy on their breach of fiduciary duty claim. On remand, if the circuit court determines that the Hearleys' cross claim was timely filed, it shall enter a judgment ordering rescission, in accordance with its findings of fact and conclusions of law, and dismiss Trewin's counterclaim for eviction. If, however, the court concludes the Hearleys' cross claim for breach of fiduciary duty was untimely, it will need to determine whether Trewin is entitled to relief on

his eviction claim.[8] In the latter case, we conclude such relief is limited only to eviction of the overstaying tenants. Trewin is not entitled to damages for unpaid rent, as we again observe that the circuit court found Trewin's bookkeeping "utterly unreliable and inaccurate." We therefore reverse and remand for further proceedings on that portion of the order dismissing Trewin's counterclaim for eviction.

III. Attorney's Fees

¶29 The circuit court's August 4, 2014, decision granted the Hearleys costs and disbursements as well as reasonable attorney's fees. Trewin correctly observes that the circuit court did not identify the basis for awarding the Hearleys attorney's fees. "The American Rule provides that parties to litigation typically are responsible for their own attorney fees." ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶72, 342 Wis. 2d 29, 816 N.W.2d 853. However, there is a narrow exception to the American Rule that provides that "an innocent party, wrongfully drawn into litigation with a third party, may recover those fees reasonably incurred in defending against such action. ***Id.***, ¶73 (citing ***Weinhagen v. Hayes***, 179 Wis. 62, 63-66, 190 N.W. 1002 (1922)).

¶30 White Knight appears to argue this exception to the American Rule applies because the Hearleys were not made whole in Trewin's disciplinary proceedings (in the sense of ordered restitution), and hence Trewin's misconduct

[8] As a component of this determination, the circuit court will need to address whether a valid lease existed. The findings of fact are unclear in this regard. The circuit court observed the testimony was unclear about when such a lease was signed; the purported lease named a third party as landlord, which third party never signed the document; and an amended lease Trewin claimed to exist was never produced.

required them to prosecute this action. The Hearleys urge us to affirm the award of attorney's fees as a component of the equitable remedies ordered by the circuit court. However their arguments are framed, ultimately neither White Knight nor the Hearleys provide any authority that would support the circuit court's attorney fees award in this case, all of which fees were apparently incurred in *prosecuting* the cross claim against Trewin.[9]

¶31 While the Hearleys may be entitled to attorney fees "arising from the defense of the initial litigation," *see* ***Meas v. Young***, 142 Wis. 2d 95, 98, 417 N.W.2d 55 (Ct. App. 1987), it is not clear that the circuit court confined its award only to such fees, and the Hearleys do not defend the award on that ground, *see* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (court of appeals will not abandon neutrality to develop arguments for the parties); ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (court of appeals will not consider issues not briefed). Rather, it appears the Hearleys take an "all-or-nothing" approach to defending the award of attorney's fees. Because there is no authority provided for the seemingly expansive award in this case, we must reverse the entire award.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

[9] There does not appear to be any accounting in the record (by affidavit or otherwise) of the approximately $36,000 attorney's fees award in this case.