STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

SCOTT J. BRAUER, ADAM KILGAS, DUANE A. MCVANE, MATT J. VANDEHEY, and PAUL WEYERS,
Plaintiffs–Appellants,

Appeal No. 2018AP000761
v. Circuit Court Case No. 2014CV001664

VERIPURE, LLC, BADGER SHEET METAL WORKS OF GREEN BAY, INC. AND GREGORY A. DECASTER,
Defendants,

GREG A. DECASTER AND JUDITH A. DECASTER REVOCABLE TRUST, GADJAD PROPERTIES LLC, RICHARD CHERNICK, BADGER CAPITAL INVESTMENTS, LLC AND DAVID CONARD,
Defendants-Respondents.

ON APPEAL FROM THE MARCH 2, 2018 ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY
THE HONORABLE THOMAS J. WALSH, PRESIDING

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. Response to Defendants' Statement of Facts.

To fully appreciate the issues in this appeal, clarifications of Defendants-Respondents David J. Conard, Gregory A. DeCaster and Judith A. DeCaster Revocable Trust, GADJAG Properties, LLC, Richard J. Chernick, and Badger Capital Investments, LLC's (collectively, "Defendants") statement of facts will aid the Court's analysis.

First, the Defendants repeatedly treat the following comment contained in Plaintiffs' Brief in Opposition To Defendants' Joint Motion For Partial Summary Judgment ("Opposition Brief") as a concession or admission: "[T]he earliest date Plaintiffs' [sic] *could* have suspected a problem was in after [sic] 2013 when they received IRS Form 5498 showing an 80% drop in the fair market value of their investment." (R.76, p. 6; App. P. 193) (emphasis added). However, as noted in Plaintiffs' opening brief, this was not an admission but rather an observation. The term "could" would not imply that Plaintiffs "should" have suspected a problem or that inquiry notice had been triggered. The comment was an observation that receipt of IRS Form 5498 was the earliest point at which an individual could have had an

inkling that something was amiss, not that receipt of the form would be enough to trigger inquiry notice or investigative requirement.

Second, with respect to the circuit court relying on the statement regarding IRS Form 5498, Defendants claim that the trial court "made no inferences" in reaching its summary judgment decision. (Defendants-Respondents' Response Brief, p. 36). "Rather," Defendants claim, "[the trial court] simply took Appellants' own words as true." *Id*. This assertion is illogical. In rendering its decision on summary judgment, the trial court necessarily attached aspects of veracity and weight to Plaintiffs' potential observation regarding IRS Form 5498. This in-and-of itself is part of the reasoning process that results in an inference. Taking the observation as true weighs *against* the non-moving party in this matter, and so Defendants' assertion that the trial court "made no inferences" is incorrect.

II. The Circuit Court Erred in Granting Partial Summary Judgment as to the Securities Fraud Claims Because it Made an Inference Against the Non-Moving Party and Made an Error of Law Finding that Receipt of IRS Form 5498 Alone Triggered the Statute of Limitations.

The Court of Appeals reviews the grant or denial of summary judgment *de novo* and applies the same summary judgment standard as the trial court. *Mach v. Allison*, 2003 WI App 11, ¶ 14, 259 Wis. 2d 686, 656

N.W.2d 766. "Whether facts fulfill a particular legal standard is a question of law to which [the Court of Appeals] give *de novo* review." *Bantz v. Montgomery Estates*, 163 Wis. 973, 978, 473 N.W.2d 506 (Ct. App. 1991).

a. The Circuit Court Erred in Granting Partial Summary Judgment by Making an Inference Against the Plaintiffs as the Non-Moving Party.

"Summary judgment is appropriate only when material facts are not in dispute and when the only inferences that may reasonably be drawn from those facts are not doubtful and lead to only one conclusion." *Fuller v. Riedel*, 159 Wis. 2d 323, 329, 464 N.W.2d 97, 100 (Ct. App. 1990) (*citing Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 609, 345 N.W.2d 874, 877 (1984); Wis. Stat. § 802.08(2)). Courts *must* draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. *Acuity v. Society Ins.*, 2012 WI App 13, ¶ 11, 339 Wis. 2d 217, 810 N.W.2d 812 (*citing Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶ 40, 294 Wis. 2d 274, 717 N.W.2d 781) (emphasis added).

In rendering its decision on summary judgment, the circuit court determined that a two-year statute of limitations applied to Plaintiffs' claims, noting that under Wis. Stat. § 551.509(10)(b), "an action under section 551.501 must be 'instituted within the earlier of 2 years after discovery of

the facts constituting the violation or 5 years after the violation.'" (R. 119, p. 6; App. p. 318). The circuit court next construed a statement made in Plaintiffs' Opposition Brief as an admission that Plaintiffs should have discovered facts constituting the Wis. Stat. § 551.501 violation by May 31, 2013 through the IRS Form 5498. (*Id*. at p. 7; 319). The alleged admission reads as follows: "[T]he earliest date Plaintiffs' [sic] *could* have suspected a problem was in after [sic] 2013 when they received IRS Form 5498 showing an 80% drop in the fair market value of their investment." (R. 76, p. 6; App. p. 193) (emphasis added).

As noted in Plaintiffs' opening brief, this statement regarding the earliest date the Plaintiffs could have suspected a problem was an observation. The comment was hypothetical, illustrative, and part of a larger argument; it was not intended to be construed as or denote fact. Further, the circuit court should not have taken this comment as fact in rendering its decision on summary judgment if for no other reason than doing so makes an inference *against* the non-moving party rather than taking all inferences in *favor* of the non-moving party.

b. The Trial Court Erred in Granting Partial Summary Judgment as it Relied on the Receipt of IRS Form 5498 Alone.

Wisconsin courts may look to federal case law when interpreting Wisconsin's version of the federal Securities Act because "the federal courts are experienced in securities litigation, [appellate courts] view their decisions as persuasive authority." *Gygi v. Gust*, 117 Wis. 2d 464, 467, 344 N.W.2d 214, 216 (Ct. App. 1984) (citing *Wisconsin's Environmental Decade, Inc. v. PSC*, 79 Wis. 2d 161, 174, 225 N.W.2d 917, 925 (1977)).

A decline in a company's value is not, in and of itself, enough to trigger the statute of limitations under federal law. "A steep decline in the price of a stock cannot without more be considered evidence of fraud sufficient to start a statute of limitations running. ("Most losses occur without fraud of any kind."[)]." *LaSalle v. Medco Research, Inc.*, 54 F.3d 443, 446 (7th Cir. 1995) (citing *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1128 (7th Cir. 1993)) (finding that over fifty-percent decline in share price and FDA recall would not cause a reasonable investor to suspect fraud). Accordingly, the IRS Form 5498 cannot by itself trigger the statute of limitations running on Plaintiffs' securities fraud claim.

The Defendants argue that the circuit court relied not just on IRS Form 5498 but also on the Plaintiffs' alleged admission, referring to the observation made in Plaintiffs' brief in opposition to summary judgment. The Defendants also argue that Plaintiffs "conveniently ignore the entirety of *Lasalle*" and then proceed to cite a passage from the case cited in Plaintiffs' opening brief. (Defendants-Respondents' Response Brief, p. 38). However, as fully explained above, that statement should not have been taken as an admission or concession but rather as an observation, and as such does not constitute additional information on which the court should have relied. The Plaintiffs did not ignore the entirety of *Lasalle*, but rather entirely disagree with Defendants' conclusion that an observation constitutes "more" within the meaning of the case.

c. The Discovery Rule Should Apply in This Case.

In response to Defendants' contention that the applicability of the discovery rule is "a non starter" and statement without legal authority that the "general discovery rule is inapplicable to securities fraud claims," (Defendant-Respondents' Response Brief, p. 40), Plaintiffs reiterate the recent federal court decision in *American Trust & Savings Bank*:

> Wisconsin applies the "discovery rule" to tort actions, including claims subject to § 893.57…Under this rule, "a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the act of injury but also that the injury was probably caused by the defendant's conduct or product."…
>
> In its opposition brief, plaintiff contends that because defendant Bremser was engaged in a complicated fraudulent accounting scheme, the cause of the Creamery's injury was not readily apparent in 2005 or even 2007. Thus, plaintiff argues, the statute of limitations has not run on the fiduciary breach claim.
>
> In their reply brief, defendants contend that because the Creamery discovery discrepancies in its financial statements in March 2005, the Creamery would have discovered the cause of its injuries in 2005, had it exercised reasonable diligence. Also, defendants contend that plaintiff filed suit against defendants in state court on April 6, 2007, asserting identical claims…The state suit was filed more than two years before this suit. Thus, defendants argue, plaintiff cannot invoke the discovery rule.
>
> ***Without further factual development of the record, I cannot determine whether the Creamery exercised reasonable diligence in discovering the cause of its injury***. Plaintiff contends that defendants' fraud was not obvious, and even defendants argue that several people and economic circumstances caused the Creamery's downfall. ***Because facts are disputed, whether plaintiff exercised reasonable diligence is a question of fact for the factfinder…***

American Trust & Savings Bank v. Philadelphia Indem. Ins. Co., 678 F.Supp.2d 820, 826 (W.D. Wis. 2010) (citations omitted) (emphasis added).

The Wisconsin Supreme Court "first adopted the discovery rule in *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 559, 335 N.W.2d 578 (1983). The *Hansen* court explained it would be "manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury. *Id*. The Court in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶ 16, 308 Wis. 2d 103, 117, 746 N.W.2d 762 further iterated the reasoning behind the discovery rule: "Without the discovery rule, there could be instances where claims would be time barred before a harm was, or even could be, discovered, which would make it impossible for an injured party to seek redress."

In *Stuart*, the Court applied the discovery rule to a statue of limitations that read "An action for relief on the ground of fraud. The cause of action in such case[s] is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." *Id.* at 118. (citing) Wis. Stat. § 893.93(1)(b). In reading the statute of limitations the Defendants hide behind, there is an invitation for a similar application of the discovery rule here: "[a person may not obtain relief] unless the action is instituted within the earlier of 2 years after ***discovery*** of the facts constituting the violation or 5 years after the violation." Wis. Stat. § 551.509(10)(b) (emphasis added).

III. The Court Should Reverse the Circuit Court's Order Denying Plaintiffs' Motion to Permit the Pleadings to be Amended to Conform to the Evidence if it Reverses the Circuit Court's Decision As To Plaintiffs' Securities Fraud Claim.

In connection with their motion for reconsideration before the circuit court, the Plaintiffs also moved the circuit court to permit the pleadings to be amended to conform to the evidence. (R. 123, pp. 1-2; App. pp. 332-333). The circuit court denied the motion. (R. 172, pp. 1-10). In its decision to deny Plaintiffs the opportunity to amend the pleadings, the circuit court held that there is not a presumption in favor of amendment after a motion for summary judgment is granted. (R. 172, p. 8). The circuit court then commented that there had otherwise been no valid reason set forth for granting the amendment. (*Id*. at pp. 8-9). Should this Court reverse the circuit court's decision as to the application of the statute of limitations to Plaintiffs' securities fraud claims, the presumption in favor of amendment would be reinstated as Defendants would be back in the case.

An appellate court can reverse a circuit court's decision denying a motion for leave to amend after summary judgment has been granted when that appellate court reverses the underlying summary judgment decision. *Aon Risk Services, Inc. v. Liebenstein*, 2006 WI App 4, 289 Wis. 2d 127, 710 N.W.2d 175, *abrogated on other grounds*, *Burbank Grease Services, LLC v.*

Sokolowski, 294 Wis. 2d 274, 717 N.W.2d 781 (2006). As the liberality applied to motions to amend outweighs any annoyance the Defendants may claim to suffer, the denial of Plaintiffs' motion to amend should be reversed and the motion granted by this Court.

Defendants claim that the Court of Appeals cannot address the issue because it was never raised at the circuit court level. This position is flawed. Because the circuit court did not grant the motion to reconsider summary judgment, the issue of reinstating the lower burden was never ripe to be raised at the circuit court level. The issue is ripe before this Court on this posture.

CONCLUSION

For the reasons discussed herein, Plaintiffs respectfully request that the Court of Appeals reverse the Decision and Order filed on April 4, 2017 to the extent it grants Defendants' Joint Motion for Summary Judgment as to Plaintiffs' securities fraud claims and reverse the Decision and Order filed on January 26, 2018 to the extent it denies Plaintiffs' Motion to Permit the Pleadings to be Amended to Conform to the Evidence with instructions that the circuit court consider the pleadings so amended (or alternatively, to remand the issue to the circuit court to determine whether amendment is proper without the lack of presumption in favor of amendment).

Respectfully submitted this 10th day of September, 2018.

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CERTIFICATION IN COMPLIANCE WITH WIS. STAT. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,184 words.

Respectfully submitted this 10th day of September, 2018.

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CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO WIS. STAT. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Wis. Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully submitted this 10th day of September, 2018.

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CERTIFICATION OF DELIVERY

I certify that this brief was deposited in the mail via Federal Express for delivery to the Clerk of the Court of Appeals via overnight delivery on September 10, 2018. I further certify that the brief was correctly addressed.

Respectfully submitted this 10th day of September, 2018.

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