COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 5, 1996

NOTICE

No. 96-1145-FT

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

DEBORAH A. BUSS,

Plaintiff-Appellant,

v.

CLIFFORD E. ROSENOW and ALICE ROSENOW, his wife,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Deborah Buss appeals a summary judgment dismissing her unjust enrichment and misrepresentation claims against Clifford and Alice Rosenow as time barred under the doctrine of laches as well as under a six-year statute of limitations.[1] Because issues of fact exist with respect to the date that Buss's claims accrued, we reverse the summary judgment and remand for further proceedings.

[1] This is an expedited appeal under RULE 809.17, STATS.

On July 10, 1995, Buss filed her complaint against the Rosenows, the parents of her late husband, Randall Rosenow. The complaint alleges that the Rosenows own and operate a large dairy farm where Randall worked. Randall and Buss were married in 1975, and together with their three children lived in a house on the Rosenow farm. In 1986, the house was partially destroyed by fire and was later demolished.

The complaint alleges that in 1987, Buss and Randall built a new house where the old one stood. It alleges that the Rosenows contributed proceeds from their fire insurance policy and Buss contributed approximately $28,000 to help pay for the construction. When the house was being built, Buss asked the Rosenows for a deed to the one-acre parcel on which the house stood. The complaint further alleges that

> the Defendant, Clifford E. Rosenow, stated to the Plaintiff that it would not be necessary, nor would it be in any of the party's (sic) best interests, for real estate tax reasons, for the Defendant to give a deed to the Plaintiff and Randall.

In 1994, Randall died and subsequently the Rosenows denied Buss access to the house.

Buss pled four theories of recovery: unjust enrichment, intentional misrepresentation, strict responsibility misrepresentation and negligent misrepresentation. The Rosenows answered, denying Buss's contributions and also denying that she had requested a deed or that Clifford ever made the alleged statement. They further alleged that in 1993, Buss had moved out of the home voluntarily when she and Randall were in the process of divorce.

The Rosenows admitted that they were living in the home, but alleged that after Randall's death, they permitted Buss access to remove her stored belongings. The answer raised several affirmative defenses, including the statute of limitations. The Rosenows moved to dismiss relying on the expiration of the six-year statute of limitation for contract actions, § 893.43, STATS.

The trial court treated the motion as one for summary judgment and agreed that the six-year statute of limitation, as well as laches, barred her claim.[2] The court concluded that Buss "knew since 1988 (and perhaps before) that the defendants did not intend to give a deed to the property to the plaintiff." It also concluded that "[t]he plaintiff certainly cannot claim that there was any justifiable reliance after that point and they had to know that they were not going to be reimbursed for any contribution they made to they (sic) house." The court entered an order of dismissal.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead only to one conclusion. ***Radlein v. Industrial Fire & Cas. Ins. Co.,*** 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984). The court does not make findings of fact on summary judgment, but determines whether material facts are disputed. ***State Bank of La Crosse v. Elsen,*** 128 Wis.2d 508, 515-16, 383 N.W.2d 916, 919 (Ct. App. 1986).

Buss argues that the trial court erroneously determined as a matter of law that her claim accrued in 1988. We agree. "It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." ***Pritzlaff v. Archdiocese of Milwaukee,*** 194 Wis.2d 302, 315, 533 N.W.2d 780, 785 (1995). A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future. ***Id.*** "[U]ntil 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," the statute of limitations is tolled. ***Id.*** "Generally, the 'date of discovery' is a question of fact for the jury." ***Stroh Die Casting Co. v. Monsanto Co.,*** 177 Wis.2d 91, 104, 502 N.W.2d 132, 137 (Ct. App. 1993).

[2] A motion to dismiss may be treated as a motion for summary judgment when the trial court considers matters outside the pleadings. Section 802.06(3), STATS.

We conclude that the record is insufficient to support the legal conclusion that the statute of limitations was triggered in 1988. In 1988, Buss and her late husband were in the process of building the home on the Rosenow farm. Buss and Randall continued to live together on the property until 1993. Although Buss alleged that the Rosenows declined to deed them the property at that time, a variety of inferences can be drawn from that alleged conversation. As Buss points out, the conversation could be interpreted to recognize her interest in the property, because the reason given was not that she had made no contribution, but that all parties would save real estate taxes by not dividing the land.[3]

Buss also contends that her conversation with Clifford was not about reimbursement for money invested in the property, but only about a deed to the real estate. She claims that the record fails to demonstrate that the Rosenows ever said or did anything to notify her that she would eventually be denied use of the home or reimbursement for her contribution. This is a reasonable inference. Because Buss lived in the home until 1993, she had use of her financial contributions until that time. She was not denied access to the property until some time after her husband's death in 1994. *Cf.* ***Watts v. Watts,*** 152 Wis.2d 370, 384, 448 N.W.2d 292, 298 (Ct. App. 1989) (In a claim based upon unjust enrichment between cohabitants, "termination of the relationship without disgorgement of the benefit conferred and improperly retained *is* the injury ....").

We conclude that Buss's alleged 1988 conversation with Clifford was too ambiguous to find as a matter of law that it notified Buss of her economic injury. Therefore, the trial court erroneously concluded that laches and the six-year statute of limitations barred her claim.

While the parties' briefs agree that the dispositive issue is the determination of the date of Buss's injury, their briefs also suggest that Wisconsin case law provides no firm guidance on the question whether the doctrine of laches, and not a statute of limitations, applies to Buss's unjust equitable enrichment claim. We agree that conflicting case law exists, but because no date of injury has been yet determined, the resolution of this conflict

[3] Also, we note that the Rosenows deny that the conversation even took place.

is not required at this juncture. *Cf.* ***Watts,*** 152 Wis.2d at 383 n.10, 448 N.W.2d at 297 n.10 (actions at law are governed by statutes of limitations and actions in equity are governed by considerations of laches) and ***Meyer v. Ludwig,*** 65 Wis.2d 280, 290 n.18, 222 N.W.2d 679, 684 n.18 (1974) (citing ***In re Estate of Demos,*** 50 Wis.2d 262, 269, 184 N.W.2d 117, 121 (1971)) ("It is well established that provisions limiting the time in which an action may be brought are applicable to suits seeking equitable as well as legal remedies ....").[4]

Also, in ***Boldt v. State,*** 101 Wis.2d 566, 578, 305 N.W.2d 133, 141 (1981), our supreme court stated: "As a claim based on quasi-contract, Boldt's lawsuit was subject to the six-year statute of limitations of sec. 893.19(3), STATS., [1977]."[5] Courts have applied both a doctrine of laches, as well as a statute of limitations, to the same claim. *See* ***Schafer v. Wegner,*** 78 Wis.2d 127, 254 N.W.2d 193 (1977). However, we do not resolve this conflicting case law because the date that Buss's claim accrued is not yet determined. If the date her claim accrued is found to be less than six years before her filing, the issue is immaterial.

Finally, Buss argues that the Rosenows are estopped from enforcing a statute of limitation based upon Clifford's allegedly misleading comment. Because this issue is nondispositive, we address it only to say that here it involves factual determinations inappropriate for summary judgment.

By the Court.—Judgment reversed and cause remanded.

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[4] In ***Meyer v. Ludwig,*** 65 Wis.2d 280, 222 N.W.2d 679 (1974), a case containing remarkable parallels, the court prevented unjust enrichment by imposing a constructive trust on a house rebuilt after a fire by a daughter with her own funds and her mother's insurance proceeds, on land owned by her mother. The court concluded that § 893.18(4), STATS., 1969, a 10-year statute of limitation, applied. ***Id.*** at 290, 222 N.W.2d at 684. ("Within 10 years: ... (4) An action which, on and before February 28, 1857, was cognizable by the court of chancery, when no other limitation is prescribed in this chapter.").

[5] *See also* ***Hartford Fire Ins. Co. v. Osborn Plumb. & Heat., Inc.,*** 66 Wis.2d 454, 464-65, 225 N.W.2d 628, 633 (1975); ***Arjay Inv. Co. v. Kohlmetz,*** 9 Wis.2d 535, 538-39, 101 N.W.2d 700, 702 (1960).

This opinion will not be published. RULE 809.23(1)(b)5, STATS.