COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1262 **Cir. Ct. No. 2003CV628**

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

DAVID SCHAUER,

PLAINTIFF-APPELLANT,

V.

DIOCESE OF GREEN BAY,

DEFENDANT-RESPONDENT,

SS. PETER AND PAUL SCHOOL, HAWKEYE SECURITY INSURANCE COMPANY AND DONALD BUZANOWSKI,

DEFENDANTS.

APPEAL from an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. This is our second opinion in this case involving David Schauer's claims against the defendants, including the Diocese of Green Bay (collectively, the Diocese). In our first opinion, we concluded the statute of limitations on Schauer's claims ran out in 2001, two years before he filed this suit. *See* ***Schauer v. Diocese of Green Bay***, 2004 WI App 180, ¶¶7, 26, 276 Wis. 2d 141, 687 N.W.2d 766 (***Schauer I***). However, we remanded the case for a circuit court determination on whether the Diocese was equitably estopped from asserting the statute. On remand, the circuit court, after submitting certain factual disputes to a jury, concluded the Diocese was not equitably estopped from asserting the statute and dismissed Schauer's claims.

¶2 In this appeal, Schauer alleges several circuit court errors in the proceedings following remand. He argues the court erred in limiting discovery and the evidence presented to the jury and should have submitted different questions to the jury. He also argues the judge should have recused himself. Finally, he argues we should revisit our holding on one of the issues in ***Schauer I*** in light of cases decided after that opinion was released. We reject Schauer's arguments and affirm the order.

BACKGROUND

¶3 In ***Schauer I***, we described Schauer's allegations in this suit:

> Donald Buzanowski was ordained as a priest in 1968 and served at several parishes in the Diocese of Green Bay. He also served as a teacher and counselor at Saints Peter and Paul School in Green Bay. He has admitted to molesting fourteen boys between 1969 and 1988. At the time of the incident, Buzanowski was employed and supervised by the diocese and the school.
>
> Schauer attended Saints Peter and Paul School. All students were required to have a counseling session with Buzanowski. Buzanowski then requested additional

> counseling with children he thought needed it. During one of these additional counseling sessions in 1988, when Schauer was ten years old, Buzanowski had sexual contact with Schauer.
>
> Schauer reported the sexual contact to the Green Bay police in 1990. Ultimately, prosecutors chose not to pursue any action against Buzanowski. An official of the diocese, Father David Kiefer, agreed that the diocese would pay for therapy for Schauer. However, Kiefer warned Schauer not to discuss the allegations with anyone or Schauer and his family could be sued for defamation.

Id., ¶¶2-4.

¶4 We affirmed the circuit court's determination that the statute of limitations expired in 2001, approximately two years before Schauer filed this suit. ***Id.***, ¶7. We agreed with Schauer, however, that the Diocese might be equitably estopped from asserting the statute of limitations as a defense. We noted that equitable estoppel may preclude a defendant who has been guilty of fraudulent or inequitable conduct from asserting the statute of limitations. ***Id.***, ¶17. We remanded for factual development of this issue:

> In his complaint, Schauer asserted that the diocese and the school acted inequitably by threatening Schauer with a defamation suit if he told anyone about the alleged sexual contact. He alleged that the diocese and the school knew or should have known that Buzanowski had sexually abused children before and failed to disclose this fact. Schauer maintains that if the diocese and the school had disclosed it, he would have known earlier that he had an action against them.
>
> … Facts need to be developed to ascertain whether the diocese knew of Buzanowski's prior sexual assaults. In addition, there are questions of whether the diocese and the school actually made the threat, what caused the inducement to delay to cease, and whether the delay was reasonable. We therefore remand so the trial court may find facts and exercise its discretion to determine whether

> the diocese and school should be equitably estopped from raising the statute of limitations as a defense.

Id., ¶¶17-18.

¶5 On remand, factual disputes underlying the equitable estoppel issue were tried to a jury. At the jury trial, Schauer argued he had not filed suit on time because of threats and promises made by a Diocese priest, Father Kiefer. Schauer's mother, Judith Schauer, learned he had been abused sometime in early 1990. She testified that she asked the Diocese for help in paying for Schauer's counseling, and a diocese employee set up a March 5, 1990 meeting between herself, Schauer, and Kiefer.[1] She said during the meeting, Schauer told Kiefer about the abuse. Judith said she told Kiefer she wanted to be sure Buzanowski would not be allowed near children in the future. She also told Kiefer she wanted to go to parish council meetings and explain what had happened to other parents whose children could potentially also have been abused.

¶6 Judith testified that when she mentioned telling other parents about the abuse, Kiefer's demeanor changed, and he told her she did not want to do that because she would be sued for defamation of character. He told Judith they "weren't to talk about it … to anybody," but in the future Buzanowski would not be around children because he was leaving the priesthood. Kiefer also agreed to pay for Schauer's counseling. Judith testified she told her husband about the meeting and the lawsuit threat, and the two of them told everyone they had already discussed the abuse with to keep quiet to avoid a lawsuit. Judith said she learned in 2003 that Buzanowski had in fact continued to counsel other children after her

[1] At the time, Kiefer was employed by the Diocese as a vicar for clergy, a position that included supervisory authority over all priests and lay employees of the Diocese.

meeting with Kiefer. Schauer testified as well, and agreed with Judith's account of the meeting. He testified Kiefer specifically promised him that Buzanowski would not be allowed near children in the future unless he was accompanied by another adult.

¶7 Kiefer testified that only Judith, not Schauer, was present at the meeting. He said he did not have a full recollection of everything that had happened at the meeting, but that he would not have told Judith and Schauer they would be sued for defamation. Kiefer's notes did not mention any threat that the Diocese might bring a lawsuit. The Diocese also cross-examined Judith about her continued contacts with law enforcement after the March 5 meeting. Judith admitted on cross-examination that despite the meeting she had told friends about the abuse, seen a civil attorney, and kept papers that might be used in a civil suit. Judith also admitted that although she kept a regular journal, she had not recorded anything in it about any threats from Kiefer. She said Schauer was "watching and waiting over the years" for another victim to come forward.[2]

¶8 The jury was given a verdict form with six questions. The first question asked, "Did David Schauer attend a meeting with Father Kiefer in March of 1990?" The jury answered that question, "No." The jury was instructed to answer the remaining questions only if they answered the first question in the affirmative. As a result, the jury did not answer the remaining five questions.

[2] Both sides also produced expert testimony on Catholic doctrine involving fear and reverence for priests and how that doctrine might have influenced Schauer's decision not to file suit earlier.

¶9 In motions after the verdict, Schauer argued the jury findings were binding, and a new trial was required because of various errors in the pretrial proceedings and the trial itself. He argued a new trial should be held in which the jury would determine only ultimate issues, such as whether the Diocese had engaged in fraudulent or inequitable conduct, rather than specific facts, such as who was present at the March 5 meeting. In the alternative, Schauer argued that if the verdict was advisory, the jury's finding was irrelevant and the court should find equitable estoppel based on the trial evidence.

¶10 In a written decision, the court rejected Schauer's arguments, although it did agree to be bound by the jury's finding that Schauer had not been present at the meeting. The court then concluded equitable estoppel did not apply. The court reasoned:

> The Jury … concluded that Schauer failed to present clear, satisfactory and convincing evidence that he had attended the meeting with Fr. Kiefer in March of 1990. This Court is satisfied that the Jury's conclusion in that regard is appropriate. … [Keifer's] version of what happened appeared to be more credible and reliable than Schauer's version and [Judith's] version of what happened….
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> ….
>
> We know from the Jury's verdict that Schauer was not present at the meeting in which the alleged threat was made. Therefore, a threat was not made directly [to] Schauer. This Court is also satisfied that at the meeting … no threat of a defamation suit was made.
>
> Furthermore, this Court is satisfied that the Diocese promised to [Judith] that it would pay for Schauer's therapy. The Diocese kept that promise. Likewise, the Diocese promised that it would not allow Buzanowski to counsel children and to perform priestly functions.… [T]he Diocese kept that promise to the extent that it could.
>
> ….

> This Court is satisfied … that the Diocese … did not engage in inequitable conduct. Rather, this Court finds that [Schauer] was waiting for another victim to come forward to corroborate his sexual assault claim.

The court therefore dismissed Schauer's claims as time barred.

DISCUSSION

I. The scope of remand

¶11 Schauer first argues the circuit court construed our remand instructions too narrowly when it limited proceedings on remand to Kiefer's knowledge of prior abuse. In ***Schauer I***, we stated that Schauer "maintains that if the diocese and the school had disclosed [prior sexual assaults], he would have known earlier that he had an action against them," and therefore facts needed to be developed on remand "to ascertain whether the diocese knew of Buzanowski's prior sexual assaults." ***Schauer I***, 276 Wis. 2d 141, ¶¶17-18. He argues this language allowed him to make a complete inquiry into what the Diocese knew about other assaults by Buzanowski.

¶12 Schauer reads our instructions too broadly. Our remand instructions were to develop the facts necessary to decide whether the Diocese was equitably estopped from asserting the statute. We noted that Schauer argued one of those facts was the Diocese's knowledge of prior assaults. In other words, our instructions were that Schauer could inquire into the Diocese's knowledge *to the extent such knowledge established equitable estoppel*.

¶13 In his brief, Schauer includes only one theory linking the Diocese's knowledge of Buzanowski's prior assaults to equitable estoppel. He argues if the Diocese knew of prior assaults and did not disclose that knowledge, it

"fraudulently concealed Schauer's [claims] against it from Schauer." He relies on ***John Doe 1 v. Archdiocese of Milwaukee***, 2007 WI 95, ¶¶41-44, 303 Wis. 2d 34, 734 N.W.2d 827.

¶14 However, Schauer's claims accrued when he knew the nature of the injury and the identity of the perpetrator—that is, in 1988, when he was assaulted. ***Schauer I***, 276 Wis. 2d 141, ¶26. Because Schauer knew about his claims in 1988, the Diocese could not and did not conceal his claims from him—fraudulently or otherwise. Schauer does not develop any argument suggesting concealing evidence relevant to claims he was aware of—as opposed to concealing evidence that would have revealed he had a claim in the first place—can be grounds for equitable estoppel.

¶15 Nothing in ***John Doe 1*** suggests otherwise. That case involved claims that the Archdiocese's fraud caused the plaintiffs to be molested by a priest. ***John Doe 1***, 303 Wis. 2d 34, ¶¶44-47. The fraud in ***John Doe 1*** was a false representation by the Archdiocese that priests did not have any history of sexually abusing children or otherwise pose a danger to children. ***Id.***, ¶41. The court held that the claims accrued when the victims came to "be in possession of such essential facts as will, if diligently investigated, disclose the fraud." ***Id.***, ¶51. Because the claims were based on the fraud, rather than the assault itself, they accrued when the plaintiffs learned or should have learned the Archdiocese made false representations, not at the time of the assault. ***Id.***, ¶¶51, 62.

¶16 In ***John Doe 1***, then, the question before the court was when the fraud claims accrued. Here, by contrast, we know Schauer's claims accrued in 1988, and the only question is whether equitable estoppel applies. Even assuming fraud concepts from ***John Doe 1*** can be grafted onto equitable estoppel as Schauer

argues, the fact remains that Schauer knew he had a claim despite the alleged fraudulent concealment. Nothing in ***John Doe 1*** suggests a defendant can fraudulently conceal a claim the plaintiff is already aware of.

¶17 Absent some other theory connecting the Diocese's knowledge and equitable estoppel, we agree with the circuit court that the Diocese's knowledge of prior assaults was relevant on remand only to the extent the knowledge was connected with Kiefer's alleged threat. The circuit court correctly limited the scope of the proceedings on remand.

II. Alleged trial errors

¶18 Schauer next alleges the court made a series of errors during the trial, including evidentiary errors and errors in the special verdict. As a threshold matter, the parties disagree on the jury's role in this case. The Diocese argues the jury was an advisory jury under WIS. STAT. § 805.02(1).[3] Schauer argues the parties consented to a binding jury trial on equitable estoppel under § 805.02(2).

¶19 As a general rule, an equitable action is tried to the court. ***Dombrowski v. Tomasino***, 27 Wis. 2d 378, 385-86, 134 N.W.2d 420 (1965). There are two exceptions to this rule, both found in WIS. STAT. § 805.02:

> (1) In all actions not triable of right by a jury, the court upon motion or on its own initiative may try any issue with an advisory jury.
>
> (2) With the consent of both parties, the court may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

An advisory jury under subsection (1) may be called on to decide any issue, including a dispute as to a historical fact. ***Dombrowski***, 27 Wis. 2d at 385-86. When the jury returns its verdict, the court may choose to accept the finding, retry the issue to a new jury, or substitute its own finding for the jury's finding. ***Id.*** When the circuit court makes its finding, the jury verdict effectively "drops out" of the case, and we review the circuit court's finding. ***Galvan v. Peters***, 22 Wis. 2d 598, 608, 126 N.W.2d 590 (1964). In a jury trial under subsection (2), on the other hand, the jury decides all disputes in the case in the same way as if there had been a right to a jury trial. WIS. STAT. § 805.02(2).

¶20 Here, the court described the procedure it followed this way:

> Schauer asserts that the Jury's verdict should be binding and not advisory. This Court agrees that to the extent that the Jury answered question number One on the verdict that this Court will be bound by that factual determination.
>
> There is some confusion on Schauer's part regarding the Court's comments about the function of the Jury in this case. This Court is aware that it must exercise its discretion regarding the issue of equitable estoppel. The Jury was empaneled to find facts to assist the Court in the exercise of that discretion. To the extent that additional facts needed to be developed during the trial to assist in that exercise of discretion, this Court asked questions of various witnesses pertinent to the issues in this case.

In other words, the court bound itself to the jury's findings of historical facts but realized it might need to find additional facts and that it would independently decide whether the facts established equitable estoppel.

¶21 Were this the court's only statement on this issue, we would agree with Schauer that the court erred. Under WIS. STAT. § 805.02, the court had three options in this case: (1) a trial to the court; (2) a trial of some or all issues to an advisory jury, followed by an independent fact finding by the court; or (3) a trial

by consent in which the jury decided all disputes in the case. Combining an advisory and mandatory jury trial is not one of the options permitted under the statute.

¶22 However, in the equitable estoppel section of the court's written opinion, the court did state its own opinion on the evidence:

> The Jury … concluded that Schauer failed to [prove] he had attended the meeting with Fr. Kiefer in March of 1990. This court is satisfied that the Jury's conclusion in that regard is appropriate. The court is so satisfied having heard the testimony of Fr. Kiefer in open court, that his version of what happened appeared to be more credible and reliable than Schauer's version and [Judith's] version of what happened [during the meeting.]

The court repeated this assessment again further on in its opinion:

> It is not illogical to conclude that the Jury found Fr. Kiefer's testimony to be more credible by answering Special Verdict Question No. 1 "***No***." This Court is satisfied that such a conclusion is warranted based upon its review of Fr. Kiefer's demeanor and the consistency of his testimony compared to that of Schauer and [Judith]….
>
> We know from the Jury's verdict that Schauer was not present at the meeting in which the alleged threat was made. Therefore, a threat was not made directly [to] Schauer. This Court is also satisfied that at the meeting … no threat of a defamation suit was made.

The court went on to note the other evidence supporting Kiefer's testimony, including Judith's failure to disclose the threat to a priest who was a personal friend, her failure to record the threat in her journal, and Schauer's failure to mention the threat in his therapy journal.

¶23 Based on this portion of the court's written decision, we are satisfied the court made an independent fact finding that Schauer failed to prove any threat was made. As a result, we will review the circuit court's findings, not the jury

verdict, following the procedure for reviewing an advisory verdict. ***Galvan***, 22 Wis. 2d at 608.

¶24 As noted above, the advisory verdict drops out of the case when the circuit court makes its findings. ***Id.*** Challenges to the instructions or the verdict of the advisory jury are not appealable. *See* ***id.*** As a result, Schauer's challenges to the form of the special verdict given to the advisory jury are not grounds for reversal.

¶25 Schauer's evidentiary challenges fail for the same reason. Schauer argues the jury should have been allowed to hear more evidence that the Diocese broke a promise to Schauer that Buzanowski would no longer be allowed to counsel children, as well as testimony from Buzanowski. However, the circuit court had the authority to limit the issues tried to the advisory jury as it saw fit. WIS. STAT. § 805.02(1). The circuit court heard all of the excluded evidence, and made a fact finding that the Diocese kept its promise to keep Buzanowski away from children "to the extent that it could." Schauer does not argue the circuit court's finding is clearly erroneous.

III. Recusal

¶26 Schauer also argues the judge should have recused himself because of the appearance of bias. Schauer cites an affidavit by one of his attorneys listing "long-standing ties" between the judge and the Diocese. *See* WIS. STAT. § 757.19(2)(f) (recusal required where judge has "a significant financial or personal interest in the outcome of the matter"). However, the judge stated in his written decision that the allegations in the affidavit were baseless or distorted. Schauer does not address, much less refute, the judge's statement. Schauer also does not respond to the Diocese's arguments on this subject, including its assertion

that his recusal argument amounts to no more than a generalized disagreement with the court's rulings. Arguments not refuted are deemed admitted. ***State v. Alexander***, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191.

IV. The fiduciary fraud claim

¶27 Finally, Schauer asks us to revisit our holding in ***Schauer I*** dismissing his fiduciary fraud claim. He relies on the supreme court's subsequent decision in ***John Doe 1***, 303 Wis. 2d 34, ¶62, where the court held claims for fraud are not derivative of the original sexual assault, and therefore may accrue at a later time than claims based on the assault itself. ***Id.*** We reached the opposite conclusion in ***Schauer I***. *See* ***Schauer I***, 276 Wis. 2d 141, ¶28.

¶28 Whether we can revisit this issue is governed by the "law of the case" doctrine:

> A decision of a legal issue or issues by an appellate court establishes the law of the case and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, or controlling authority has since made a contrary decision of the law applicable to such issues.
>
> … Because the law of the case is a question of court practice, and not an inexorable rule, it requires the exercise of judicial discretion.

State v. Brady, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986) (citations and various punctuation omitted). Whether to depart from the law of the case is a discretionary decision which may be made by circuit courts or appellate courts. ***Id.***

¶29 Here, the Diocese does not develop any argument that we should not exercise our discretion to reach the merits of this issue. Changes in controlling

case law are often grounds for departing from an earlier appellate holding. *See, e.g.*, ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 470 n.1, 543 N.W.2d 277 (1996); ***Mullen v. Coolong***, 153 Wis. 2d 401, 410-11, 451 N.W.2d 412 (1990); ***Brady***, 130 Wis. 2d at 448. The Diocese instead argues Schauer did not plead fraud with the specificity required under WIS. STAT. § 802.03(2). We therefore exercise our discretion to revisit this issue. We conclude Schauer has not pled fraud with the required specificity and therefore reaffirm our earlier holding, although for a different reason.

¶30 In pleadings alleging fraud, "the circumstances constituting fraud … shall be stated with particularity." WIS. STAT. § 802.03(2). This means the pleading "must specify the particular individuals involved, where and when misrepresentations occurred, and to whom misrepresentations were made." ***John Doe 1***, 303 Wis. 2d 34, ¶39.

¶31 In ***John Doe 1***, the complaint satisfied this standard. It alleged that when the Archdiocese placed the priest at a church, the Archdiocese

> affirmatively represented to minor children and their families at the parish, including [the plaintiffs] and their families, that [the priest] did not have a history of molesting children, that Defendant Archdiocese did not know that [the priest] had a history of molesting children and that Defendant Archdiocese did not know that [the priest] was a danger to children.

Id., ¶41. The complaint also alleged the Archdiocese knew that in fact the priest had molested children in the past and was a danger to children. ***Id.***

¶32 Here, Schauer does not allege any similar representation. He alleges only that: (1) the Diocese "knew or should … have known of defendant Buzanowski's dangerous and exploitative propensities as a child sexual exploiter"; and (2) the Diocese "misrepresented, concealed and/or failed to disclose their

knowledge of information relating to sexual misconduct and other inappropriate behavior of defendant Buzanowski." Schauer's complaint does not allege any affirmative representation by the Diocese stemming from its placement of Buzanowski.[4] Schauer's complaint therefore does not state "the circumstances constituting fraud … with particularity." WIS. STAT. § 802.03(2).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[4] In his reply brief, Schauer states his complaint alleged the Diocese "affirmatively held Buzanowski out as a fit and competent person to serve as a parish priest with unsupervised access to minor children by continually placing him … in various parishes…." Schauer's complaint does not support this assertion. The paragraph of the complaint he cites to states only the dates that Buzanowski was assigned to various parishes.