

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2009

David R. Schanker
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. 2008AP512

Cir. Ct. No. 2007CV407

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TIMOTHY VAN DER PUY,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

**DAVID VAN DER PUY, REBECCA ROOKS, THOMAS VAN DER PUY AND
VAN DER PUY LLC,**

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL from orders of the circuit court for Sheboygan County:
JAMES J. BOLGERT, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Timothy Van Der Puy (Timothy) appeals an order granting summary judgment in favor of his siblings, David Van Der Puy, Rebecca

Rooks and Thomas Van Der Puy, and Van Der Puy, LLC (the Van Der Puy). The summary judgment dismissed Timothy's action to dissolve Van Der Puy, LLC, as well as Timothy's claim that David breached his fiduciary duties as personal representative of their father's estate. Timothy insists numerous facts are in dispute, which typically disqualifies a case from resolution by summary judgment. We conclude, however, that no genuine issues of material facts remain. At bottom, this really is a contract matter. The Van Der Puy cross-appeal an order denying their motion for frivolous costs. We affirm both orders.

¶2 Gerhardt Van Der Puy founded Paper Box and Specialty Company. Gerhardt passed ownership to his son, Gerald, who passed it to his four children, Timothy, David, Rebecca and Thomas. Gerald formed Van Der Puy, LLC, a limited liability company whose sole asset is a warehouse. In March 2003, the LLC and Paper Box entered into an eight-year lease. Rental payments from Paper Box to the LLC were suspended sometime in 2004.

¶3 Timothy began working at Paper Box in 1976. In 1987 he became sales manager, corporate secretary and a vice president. In September 2003, Timothy, Thomas and David—Paper Box's vice presidents and president, respectively—signed a Small Business Administration note as guarantors and a real estate mortgage giving Associated Bank a security interest in Paper Box. Timothy resigned in July 2004. Pursuant to a Stock Purchase and Redemption Agreement (Redemption Agreement), Paper Box agreed to buy out Timothy's shares of stock for \$400,000. The Redemption Agreement released Timothy from the loan guarantees he made as an officer of Paper Box.

¶4 When Gerald died in April 2005, Timothy consented to David being named personal representative of the estate. Gerald had personally guaranteed

loans from Associated Bank, Paper Box's principal lender. In August 2005, Associated Bank called due the notes and filed a claim against Gerald's estate for the approximately \$1.3 million outstanding debt. Paper Box could not repay the loans. To save Paper Box from liquidation and to preserve estate assets, the four siblings each entered into a forbearance agreement,¹ essentially a loan to Paper

¹ The forbearance agreement Timothy signed provides in relevant part:

WHEREAS, Paper Box is in default to Associated Bank ... pursuant to certain terms and conditions of a Loan Agreement, and Associated Bank ... has demanded payment of the indebtedness owing thereunder and is entitled to exercise all remedies available to it under the Loan Agreement and has advised it will pursue a liquidation of Paper Box to satisfy the loans; and

....

WHEREAS, Timothy, being a beneficiary of the Trust and the Estate of Gerald Van Der Puy, in the event the claims will be satisfied, will receive as his distribution cash, promissory notes of Paper Box and an interest as a member in the ... LLC, which has entered into a lease with Paper Box requiring a rental payment and possibly other assets; and

WHEREAS, Paper Box, under a loan agreement with Oostburg State Bank intends to acquire sufficient cash, together with the lending of monies of Timothy and [Rebecca Rooks, David Van Der Puy and Thomas Van Der Puy], as beneficiaries of the Trust and Estate of Gerald Van Der Puy to allow Paper Box to continue to operate as a going business and pay off the indebtedness of Associated Bank, National Association.

NOW, THEREFORE, in consideration of the mutual promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

....

(continued)

2. Payment to Timothy. The Personal Representative of the Estate of Gerald Van Der Puy shall make a partial distribution of the assets as to Timothy's distributive share in the amount of \$55,000.00 cash upon Associated Bank satisfying its claims filed in the Estate of Gerald Van Der Puy and [Rebecca Rooks, David Van Der Puy and Thomas Van Der Puy] will receive no cash distributions from the Trust or Estate of Gerald Van Der Puy.

3. Forebearance. Timothy agrees that he shall forebear from exercising any default remedies under all documents as follows:

A. As to the obligations under the [July 12, 2004 Stock Purchase and] Redemption Agreement and [the July 12, 2004 Stock Escrow and Collateral] Pledge Agreement, no interest shall accrue on the amount owing until such date that Oostburg State Bank ... allows payments on principal and interest ...;

B. That interest shall not accrue on any unpaid balance on all promissory notes assigned to Timothy from the Trust and Estate of Gerald Van Der Puy or held by him with a due date of January 1, 2020, at which time the interest rate shall accrue at five (5%) percent per annum and the principal shall be due.

C. Rental Payments as to Timothy's interest under the Van Der Puy, LLC as a result of a Lease between Paper Box and Van Der Puy, LLC dated March 28, 2003 until [Oostburg State] Bank allows the rental payment to be paid.

D. Timothy shall, upon the request of Oostburg State Bank, upon Paper box obtaining the loan from Oostburg State Bank[,] execute a copy of the Debt Subordination Agreement according to the terms and conditions of the Debt Subordination Agreement attached to this instrument and marked Appendix "A." If the Debt Subordination Agreement is inconsistent as to its terms and conditions with this Agreement, the Debt Subordination Agreement's terms and conditions shall apply.

(continued)

Box from their respective inheritances. The forbearance agreement, which incorporated a debt subordination agreement and a promissory note, allowed Paper Box to continue operating and to pay down its outstanding debt to Associated Bank through the loans from the heirs and refinancing from Oostburg State Bank. By signing, Timothy agreed to forbear pursuing claims against Paper Box in regard to collecting on the Redemption Agreement and gave Oostburg State Bank discretion as to when payments to him and rental payments from Paper Box to the LLC could resume. Timothy also demanded a partial distribution of \$55,000 from his \$132,000 share of the estate. His siblings took no cash distribution. Oostburg State Bank required Thomas and David to take a two-year pay freeze as part of the refinancing agreement.

¶5 Timothy filed suit in 2007 alleging that David, Thomas and Rebecca were operating the LLC in an illegal, oppressive and fraudulent manner and were

4. Assignment of Interest of Trust and Estate of Gerald Van Der Puy.

A. Timothy assigns forever all of his interest in the Trust as to cash distributable to Paper Box as a loan to Paper Box as a loan according to the terms and conditions of the Promissory Note ... and that the successor trustee be authorized to pay the amount directly to Paper Box in return for the Promissory Note, which shall have Timothy as payee.

B. Assignment of Legacy and Trust Beneficiary. Timothy hereby assigns to Paper Box all cash excepting \$55,000.00 distributed to Timothy as to his distributive share of the Estate of Gerald Van Der Puy and the Trust and shall authorize the Personal Representative and successor Trustee respectively to distribute such monies belonging to Timothy as a loan to Paper Box according to the terms and conditions of the Promissory Note ... which shall have Timothy as payee.

wasting the LLC's assets. He sought to have a receiver appointed to oversee a judicial dissolution of the LLC. Timothy also claimed that David breached his fiduciary duty to the estate because he did not disclose the conflicts inherent in his various roles and failed to act in the estate's best interest.

¶6 The Van Der Puys responded by filing a motion for frivolous sanctions. The court denied the motion without a hearing. The Van Der Puys then moved for summary judgment on grounds that Timothy agreed to the manner in which the LLC was being managed; knew that David was both president of Paper Box and personal representative of their father's estate; and, fully advised by counsel, signed documents agreeing to loan a portion of his inheritance to Paper Box to preserve the estate's assets. The court granted summary judgment to the Van Der Puys. It concluded that the dissolution claim failed the statutory grounds under WIS. STAT. ch. 183 (2005-06),² and that Timothy, without objection and with benefit of counsel, entered into agreements knowing David was "wearing four hats." Timothy appeals.

APPEAL

¶7 When reviewing a grant of summary judgment, we apply the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We need not repeat that well-established methodology here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. We state only that summary judgment is appropriate if there are no genuine issues of material fact and the

² All references to the Wisconsin Statutes are to the 2005-06 version unless noted.

moving party is entitled to judgment as a matter of law. *Green Spring Farms*, 136 Wis. 2d at 315. The “mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment,” however. *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991). A disputed fact must be *material* and the issue *genuine*. See *id.* A material fact is one that is “of consequence to the merits of the litigation.” *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294 (citation omitted). A factual issue is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Id.*

Alleged Breach of Fiduciary Duties

¶8 Timothy contends several factual disputes remain in regard to David’s fiduciary obligations. The elements of a claim for breach of fiduciary duty are: (1) the defendant owed the plaintiff a fiduciary duty that (2) the defendant breached (3) causing the plaintiff damage. *Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶40, ___ Wis. 2d ___, 752 N.W.2d 800. A trustee who fails to make a full disclosure of material facts to a beneficiary or who personally profits from his or her role as a trustee breaches the trustee’s duty of loyalty. *Zastrow v. Journal Commc’ns, Inc.*, 2006 WI 72, ¶35, 291 Wis. 2d 426, 718 N.W.2d 51. Whether one breached a fiduciary duty is a question of law that we review independently. *Id.*, ¶12.

¶9 The issues Timothy raises largely concern his claims that he entered into agreements without full information due to David’s failure to provide it or to disclose his various roles and the conflicts of interest they posed. Timothy points to his counsel’s affidavit that counsel did not know David and Thomas were co-guarantors on Paper Box’s loan obligations to Associated Bank. But the record is

clear that *Timothy* knew they were co-guarantors as early as September 2003 because he, too, was a co-guarantor of the Associated Bank loan and they signed in each other's presence.

¶10 Timothy also contends David failed to disclose potential conflicts of interest resulting from his roles as guarantor, president of Paper Box, the personal representative of the estate, and an heir to Gerald's estate. Timothy alleges that the estate had claims for contribution against its guarantors, and asserts that David failed to pursue that claim against himself and Thomas, as guarantors, or an indemnification action against Paper Box, of which he was president. Timothy argues that David's simultaneous roles posed an irreconcilable conflict of interest that he did not disclose.

¶11 Whether or not explained to him using the phrase "conflict of interest," the forbearance agreement clearly advised Timothy, as we paraphrase below, that:

1. he was forbearing exercising any remedies under the Redemption Agreement, promissory notes of Paper Box assigned to him, and all other obligations of Paper Box;
2. no interest would accrue on the amount owed to him under the Redemption Agreement until Oostburg State Bank permitted payments to resume;
3. no interest would accrue on any unpaid balance on the promissory notes assigned to him from the estate;
4. he would receive no rental payments as to his interest in the LLC until Oostburg State Bank permitted them to resume;
5. he would execute a debt subordination agreement; and
6. he would execute a promissory note assigning forever all of his distributable cash interest in the estate as a loan to Paper Box.

¶12 Timothy's affidavit avers that he was advised in 2005 that Paper Box "was in financial difficulties" and was presented with "a structured deal that would save Paper Box from going out of business." To make it work, Timothy had to execute the forbearance agreement, debt subordination agreement and promissory note. These requirements and the reasons for them are set forth in a series of "Whereas" clauses and elsewhere in the forbearance agreement. The document corroborates his testimony: that he wanted to help save Paper Box.

¶13 In addition, Timothy's deposition testimony and the documents he signed demonstrate that he knew that David wore each of these hats. A seasoned businessman, a seventeen-year officer of Paper Box, a former co-guarantor and an heir himself, any conflicts of interest David might have had were self-evident to Timothy. Moreover, Timothy was advised by the same counsel throughout the probating of the estate and before signing the agreements at issue here. Indeed, his counsel testified that he carefully went over the forbearance agreement with Timothy, advised Timothy that he did not think the terms were favorable, yet Timothy signed out of loyalty to the company and its employees.

¶14 Timothy's allegations of David's wrongdoing take on a note of regret for having made the bargain he did. Timothy contends he was assured that payments from Paper Box would resume within two years but they have not and he doubts they ever will, that the loan has terms "not close to being commercially reasonable," and that no interest accrues on the promissory note. The forbearance agreement expressly states, however, that "interest shall not accrue on any unpaid balance on all promissory notes assigned to Timothy," and that Timothy "assigns forever all of his interest in the [estate] as to cash distributable to Paper Box as a loan to Paper Box" according to the terms of the promissory note he signed. Timothy claims David and his counsel presented the agreement as a "take-it-or-

leave-it” proposition. He could have left it. If the terms of a contract are plain and unambiguous, we must construe the contract according to its plain meaning. *Woodward Commc’ns, Inc. v. Shockley Commc’ns Corp.*, 2001 WI App 30, ¶9, 240 Wis. 2d 492, 622 N.W.2d 756 (Ct. App. 2000). He may now rue what very well might have been a difficult decision, but we are powerless to undo his choice.

¶15 Therefore, having failed to object before, Timothy has waived any objection now because he acted intentionally and with actual or constructive knowledge of the material facts. *See Nugent v. Slaght*, 2001 WI App 282, ¶13, 249 Wis. 2d 220, 638 N.W.2d 594. “[T]he intent to waive may be inferred as a matter of law from the conduct of the parties.” *Milas v. Labor Ass’n of Wis., Inc.*, 214 Wis. 2d 1, 10, 571 N.W.2d 656 (1997) (citation omitted). Knowing David’s various responsibilities, Timothy also ratified David’s actions by consenting to loan a portion of his inheritance proceeds to Paper Box through the promissory note and forbearance agreement. *See Estate of Bydalek v. Metropolitan Life Ins. Co.*, 220 Wis. 2d 739, 746-47, 584 N.W.2d 164 (Ct. App. 1998).

¶16 Timothy contends that *Zastrow* forecloses a waiver argument because it imposes a duty of full disclosure regardless of what a beneficiary knows or should know. *See Zastrow*, 291 Wis. 2d 426, ¶35. We are not persuaded. The plaintiffs in *Zastrow* had not been given complete and necessary retirement information. *See id.*, ¶41. Accordingly, *Zastrow* did not address whether disclosure still is required when the recipient already possesses the desired information. We decline to extend the holding here.

Dissolution Claim

¶17 Timothy holds a 25% membership interest in the LLC. He sought dissolution pursuant to WIS. STAT. § 183.0902, which permits a court to dissolve an LLC if any one of five scenarios is shown to exist, among them that a manager or controlling member is acting in an illegal, oppressive or fraudulent manner or that the LLC's assets are being misapplied or wasted. *See id.* Timothy asserts that allowing Paper Box rent-free use of the LLC's warehouse and failing to seek a new tenant results in a windfall to David and Thomas. Even if true, that does not defeat summary judgment.

¶18 As Timothy acknowledged at deposition, matters are proceeding according to the forbearance agreement he signed. As for failing to seek another tenant, the eight-year lease between the LLC and Paper Box runs until 2011. We agree with the trial court that there is nothing illegal or fraudulent in permitting the LLC to not receive rental payments until, per the forbearance agreement, Oostburg State Bank authorizes their resumption. Thus, when compared to the documentary record, none of the points of disharmony presents an issue of fact such that a reasonable jury could return a verdict in Timothy's favor.

CROSS-APPEAL

¶19 The sole issue on the cross-appeal is whether Timothy filed and maintained a lawsuit either for an improper purpose or which was unsupportable by the law or the facts. *See* WIS. STAT. § 802.05(2). In early 2007, Timothy's attorney advised Paper Box and David that Timothy believed Paper Box had defaulted on its payment obligations under the Redemption Agreement. Through several written and telephone communications, counsel for Paper Box reminded Timothy's counsel of the agreements Timothy entered into which gave Oostburg

State Bank the discretion to determine the manner and method of payment. Timothy formally persisted by filing suit. When, despite notice, Timothy pursued his claims, the Van Der Puys filed a frivolousness motion. *See* § 802.05(3)(a).

¶20 The inquiry into whether a claim is without basis in law or fact or taken for an improper purpose involves a mixed question of fact and law. *See Brunson v. Ward*, 2001 WI 89, ¶27, 245 Wis. 2d 163, 629 N.W.2d 140 (addressing the prior frivolous claim statute, WIS. STAT. § 814.025 (2003-04)).³ Ascertaining the claimant's motive and factual basis is a question of fact left undisturbed if not clearly erroneous. *See id.* Whether those underpinnings support a finding of no basis in law or fact, however, presents a question of law which we review independently of the circuit court. *See id.*

¶21 An attorney's obligation to represent his or her client's interests zealously may include making some claims that, at the outset, are not entirely clear in the law or on the facts. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 235, 517 N.W.2d 658 (1994). Thus, when a frivolous action claim is made, all doubts are resolved in favor of finding the claim nonfrivolous. *Id.*

¶22 Here, the trial court concluded that the statutory dissolution claim survived based on the factual allegations. It also concluded that the claim for breach of fiduciary duties survived the closing of the estate, *see Hammes v. First Nat'l Bank & Trust Co.*, 79 Wis. 2d 355, 359, 255 N.W.2d 555 (1977), and David's various roles might yet reveal conflicts of interest. The court also deemed

³ WISCONSIN STAT. RULE 802.05 and WIS. STAT. § 814.025 (2003-04) were repealed and RULE 802.05 was recreated, effective July 1, 2005. *See Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶3, 302 Wis. 2d 299, 735 N.W.2d 1.

Timothy's knowledge regarding his brothers' roles as guarantors "a little more ambiguous than [the Van Der Puys' attorneys] do."

¶23 Timothy filed suit in May 2007. The Van Der Puys moved for sanctions just three months later. The parties had not yet conducted discovery. We cannot say that, at that juncture, the trial court's findings were clearly erroneous. The nascent lawsuit's allegations might have borne fruit. Although ultimately unsuccessful, we conclude that Timothy's claims were not wholly without basis in law or fact, and we see no evidence to support a conclusion that the action was taken for any improper purpose. Timothy's claims do not survive summary judgment, but they are not frivolous.

MOTION FOR FRIVOLOUS COSTS

¶24 The Van Der Puys also contend that Timothy's appeal is frivolous and seek costs and fees pursuant to WIS. STAT. RULE 809.25(3)(c). We decide as a matter of law whether an appeal is frivolous. *Rogers v. Rogers*, 2007 WI App 50, ¶23, 300 Wis. 2d 532, 731 N.W.2d 347. To find an appeal to be frivolous under RULE 809.25(3)(c), we must find one or more of the following:

1. The appeal ... was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
2. The party or the party's attorney knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶25 The Van Der Puys assert that Timothy's appeal is part of a "campaign" to make good on his "threat to take 'drastic steps' in an effort to intimidate [his siblings] into giving in to his demands." They refer to no factual

findings from which we could determine that Timothy proceeded in bad faith, or that his sole motive in appealing was to harass or maliciously injure them. As an appellate court, we must have before us sufficient facts to determine intent as a matter of law before we can make a determination under WIS. STAT. RULE 809.25(3)(c)1. See *Dane County v. Dane County Union Local 65*, 210 Wis. 2d 267, 565 N.W.2d 540 (Ct. App. 1997).

¶26 Similarly, we cannot find on the record before us that Timothy or his attorney knew that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. See WIS. STAT. RULE 809.25(3)(c)2. While we are permitted to find that Timothy or his attorney should have known that his claim of trial court error was without any reasonable basis in law or equity, see *Tomah-Mauston Broadcasting Co. v. Eklund*, 143 Wis. 2d 648, 659, 422 N.W.2d 169 (Ct. App. 1988), we conclude that Timothy's assertions are not without any reasonable basis. He tried mightily, but unsuccessfully, to fit the facts under the umbrella of *Zastrow's* fiduciary duty definition and his claim for dissolution of the LLC within the requirements of WIS. STAT. § 183.0902. That the facts do not fit does not render the arguments frivolous. We deny the motion for frivolous costs.

By the Court.—Orders affirmed.

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

