COURT OF APPEALS DECISION DATED AND FILED

November 27, 2002

Cornelia G. Clark
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. 02-0217 **Cir. Ct. No. 97-PR-17**

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

IN RE THE ESTATE OF MARY GASPARAC, DECEASED:

JACK GASPARAC AND KATHERINE RATKOVICH,

APPELLANTS,

V.

MAE SCHUNK,

RESPONDENT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 VERGERONT, P.J. The estate of Mary Gasparac appeals summary judgment dismissing its claims of conversion and breach of fiduciary duty against Mae Schunk, Gasparac's daughter. We conclude that the trial court correctly

decided that the breach of fiduciary duty claim was barred by the statute of limitation, and we therefore affirm the dismissal of that claim. With respect to the conversion claim, we conclude the trial court correctly decided that the statute of limitation barred that claim insofar as it arose prior to October 4, 1994. However, we also conclude that Schunk did not make a prima facie showing of a defense to that claim and, accordingly, she was not entitled to summary judgment. We therefore reverse the dismissal of the conversion claim and remand for a trial on that claim insofar as it arose on or after October 4, 1994.

BACKGROUND

¶2 Gasparac resided with her daughter, Mae Schunk, and Schunk's husband at their home in Minnesota from 1987 until her death on September 12, 1996. Gasparac was eighty-six years old at the time of her death. She executed her will on February 21, 1988, naming Schunk as her personal representative, and on March 4, 1989, she executed a durable power of attorney designating Schunk as her attorney-in-fact.

¶3 Upon her mother's death, Schunk filed an application for informal administration, and letters were issued by the Clark County Probate Court appointing her as personal representative. She filed an inventory listing her mother's net value of property as $17,665.80. On September 9, 1997, Schunk's sister, Katherine Ratkovich, and her brother, Jack Gasparac, demanded a formal proceeding, and Schunk stipulated to convert the matter to a formal probate proceeding.

¶4 On July 20, 1998, Schunk's siblings moved for Schunk's removal as personal representative. They alleged that she had converted assets of their mother while their mother was alive. During proceedings on that motion, the

court appointed a special master to investigate the allegations against Schunk. The special master's report concluded that between August 1, 1987 and December 12, 1996, Schunk received at least $181,473.88 from her mother's funds, spent $23,536.45 for her mother's benefit, and provided her mother with room and board for 113 months. The report also concluded that documents filed by Schunk in Dakota County, Minnesota, which allowed Gasparac to receive aid, were materially inaccurate. The report concluded that Schunk must either resign or be removed as personal representative of her mother's estate. Schunk subsequently resigned as personal representative. The court accepted the special master's report, but stayed Schunk's siblings' motion for "adoption and judgment" of the report because Schunk had requested a jury trial on the conversion claim the estate intended to file against her.

¶5 On October 9, 2000, the estate filed a complaint against Schunk that alleged she had intentionally transferred her mother's funds exceeding $181,000 to herself or to third parties, wrongfully converting these funds and thereby breaching her fiduciary duty to her mother. Schunk moved for summary judgment on the grounds that the statute of limitation had expired for the claim of breach of fiduciary duty, that any claim for conversion arising prior to October 4, 1994, was time-barred, and that under the power of attorney all of Schunk's actions regarding her mother's financial affairs had been ratified. In support of the motion, Schunk filed an affidavit averring that no court had ever judged Gasparac incompetent nor had any proceedings been instituted to have her declared incompetent. In paragraph 7, Schunk's affidavit stated that, based on her personal knowledge and experience, Gasparac "approved and/or ratified all financial matters that [Schunk]

handled on her behalf." In response, the estate moved to strike paragraph 7 on the ground that under the dead man's statute, WIS. STAT. § 885.16 (1999-2000),[1] Schunk was incompetent to testify as to any transaction or communication with her mother. The estate also opposed summary judgment and submitted the affidavit of Schunk's brother, which averred that in a telephone conversation in February 1997 Schunk had told him that she had taken money from their mother, and on March 1, 1997, Schunk provided him with an incomplete and inconsistent accounting of their mother's finances.[2]

¶6 In reply, Schunk submitted the affidavits of her husband, William Schunk, and of Mary Preston, Gasparac's home health aide from the spring of 1991 until Gasparac's death. William's affidavit averred that Gasparac lived with him and Schunk from August 1, 1987, until the time of her death on December 12, 1996, and, based on his personal knowledge and experience, Gasparac "on numerous occasions approved the financial matters that Mae Schunk handled on her behalf." Preston's affidavit averred that based on her personal knowledge and experience, Gasparac "had on numerous occasions, stated to your affiant that she was satisfied with and approved all financial matters that Mae Schunk had been doing on her behalf."

¶7 At the hearing on the motion for summary judgment, Schunk did not dispute that her testimony was barred under the dead man's statute, but she contended that William's was not.

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The estate also submitted the affidavit of Schunk's sister, but the contents of that are not relevant to a resolution of this appeal.

¶8 The trial court granted Schunk's motion for summary judgment on both the breach of fiduciary duty and the conversion claims and dismissed both claims. The court determined that the breach of fiduciary duty was discovered in March 1997, and any claim filed after March of 1999 was barred by the statute of limitation. With respect to the conversion claim, the court concluded that the six-year statute of limitation under WIS. STAT. § 893.51 applied, and therefore any conversion alleged to have occurred prior to October 4, 1994, was time barred. The court concluded that Preston's affidavit was not subject to the dead man's statute and neither was William's affidavit. However, the court stated, even if it were to disregard William's affidavit, based on Preston's affidavit there was no dispute that Gasparac expressed her approval and therefore ratified Schunk's acts. The court reasoned that it was undisputed that Gasparac had knowledge of the power of attorney and chose to delegate management of her affairs to Schunk; Gasparac was competent at all times prior to her death; she never withdrew the authority given to Schunk, which she could have done if she did not like something Schunk was doing; and there was nothing in the record to establish that Schunk was hiding anything from Gasparac. The court therefore concluded that Schunk was entitled to judgment as a matter of law that Gasparac had either authorized all of her actions regarding her financial affairs or, if she had not authorized them, she had ratified them. Although the court did not expressly state in its written decision that Schunk's affidavit was inadmissible under the dead man's statute, the court did state in its oral decision that her affidavit was excluded under the dead man's statute.

¶9 The estate moved for reconsideration, contending that Preston's affidavit was hearsay. The court denied the motion on the ground that Preston's statements concerning what Gasparac told her came within the hearsay exceptions

for then-existing mental condition, WIS. STAT. § 908.03(3), and statement of recent perception, WIS. STAT. § 908.045(2). The court reasoned that Preston was relating Gasparac's perceptions of the events taking place under the power of attorney and her reaction to them. The court also ruled that the general exception based on trustworthiness in § 908.045(6) was applicable.

DISCUSSION

¶10 We review the grant or denial of a summary judgment de novo, and we apply the same standard as does the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). A party is entitled to summary judgment if there are no disputed issues of fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In evaluating whether a defendant is entitled to summary judgment, we examine the defendant's submissions to determine whether they establish a prima facie defense to the claim; if they do, we then determine whether the plaintiff's submissions in response create a genuine issue of material fact that defeat the motion for summary judgment and entitled the plaintiff to a trial. ***In re Cherokee Park Plat***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983).

Tolling of the Statutes of Limitation

¶11 The estate contends that the demand the siblings filed in September 1997 for a formal proceeding, also asserted by motion, tolled the statutes of limitation on both the conversion and the breach of fiduciary duty claims. The affidavit of the siblings' counsel accompanying that motion stated that they had a claim against Schunk for a misapplication and conversion of their mother's funds during her lifetime. According to the estate, that motion constitutes the

"commencement of an action" within the meaning of the statutes of limitation that govern claims for conversion and breach of fiduciary duty.[3]

¶12 The construction and application of a statute to a given set of facts presents a question of law, which we review de novo. ***State v. Setagord***, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997). Our aim is to discern the intent of the legislature, and we begin by examining the statutory language. ***Id.*** If that plainly sets forth the intent of the legislature, we apply that language to the facts at hand. ***Id.***

¶13 The estate's argument overlooks WIS. STAT. § 893.02, which provides:

> **Action, when commenced**. An action is commenced, within the meaning of any provision of law which limits the

[3] The estate argues that Schunk did not make this challenge to the statutes of limitation in the trial court and therefore we should not address it. However, since we review the grant or denial of a summary judgment de novo, since the issue presented is one of law, and since the parties have briefed it, we choose to address it.

The parties agree that the six-year statute of limitation, WIS. STAT. § 893.51(1), applies to the conversion claim, and the two-year statute of limitation in WIS. STAT. § 893.57 applies to the breach of fiduciary duty claim.

WISCONSIN STAT. § 893.51(1) provides:

> **Action for wrongful taking of personal property. (1)** Except as provided in sub. (2), an action to recover damages for the wrongful taking, conversion or detention of personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins.

WISCONSIN STAT. § 893.57 provides:

> **Intentional torts**. An action to recover damages for libel, slander, assault, battery, invasion of privacy, false imprisonment or other intentional tort to the person shall be commenced within 2 years after the cause of action accrues or be barred.

> time for the commencement of an action, as to each defendant, when the summons naming the defendant and the complaint are filed with the court, but no action shall be deemed commenced as to any defendant upon whom service of authenticated copies of the summons and complaint has not been made within 90 days after filing.

This statute plainly specifies the type of filing that tolls a statute of limitation:[4] a summons and complaint must be filed with service within ninety days of filing on each defendant of authenticated copies of the summons and complaint. The demand and motion for formal proceedings[5] is not a summons and complaint, nor is the motion the siblings filed in July 1998 for removal of Schunk as the estate's personal representative.

¶14 Schunk relies in her argument on ***Estate of Ruediger***, 83 Wis. 2d 109, 264 N.W.2d 604 (1978). However, that case was concerned with personal jurisdiction when an objection to the inventory is filed; it did not address either WIS. STAT. § 893.02 or any issue related to the tolling of a statute of limitation.

¶15 Accordingly we conclude, as did the trial court, that the claim for breach of fiduciary duty is barred by WIS. STAT. § 893.57, and the claim for conversion is limited under WIS. STAT. § 893.51(1) to acts occurring on or after October 4, 1994.

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[4] Under WIS. STAT. § 893.13(2), a statute of limitation is tolled "by the commencement of the action to enforce the cause of action to which the period of limitation applies…."

[5] Under WIS. STAT. § 865.03, formal proceedings, either as to a particular issue or as to the entire subsequent administration of the estate, are initiated by a written demand, which must be served on the personal representative, if any, and filed with the court.

Schunk's Submissions

¶16 Schunk frames her defense to the conversion claim[6] in terms of the doctrine of ratification, while the estate argues it does not apply because Schunk had the authority to act for Gasparac under the power of attorney. Ratification is "the affirmance by a person of a prior act which did not bind him, but which was done or professedly done on his account, whereby the act, as to some or all persons is given effect as if originally authorized by him." (Citations omitted.) ***Estate of Bydalek v. Metropolitan Life Ins. Co.***, 220 Wis. 2d 739, 746, 584 N.W.2d 164 (Ct. App. 1998). However, the power of attorney did not give Schunk the authority to dispose of Gasparac's assets for Schunk's own purposes. ***Alexopoulos v. Dakouras***, 48 Wis. 2d 32, 41, 179 N.W.2d 836 (1970). Therefore, if Gasparac did not consent to Schunk's use of her funds for the benefit of Schunk or third parties, then Schunk converted those funds; conversely, if Gasparac consented to the use of her funds for the benefit of Schunk or third parties, either before or after Schunk used Gasparac's funds for those purposes, then there was no conversion. We see no reason why the doctrine of ratification does not properly describe the legal effect of any approval by Gasparac of Schunk's use of her funds which were not authorized by the power of attorney.

¶17 However, the real dispute between the parties is whether the affidavits submitted by Schunk meet the requirements for summary judgment submissions under WIS. STAT. § 802.08(3),[7] and whether they show that Gasparac

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[6] The elements of tortious conversion are: (1) intentionally controlling or taking property belonging to another, (2) doing so without the owner's consent, and (3) those acts resulting in serious interference with the rights of the owner to possess the property. ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999).

[7] WISCONSIN STAT. § 802.08(3) provides:

(continued)

did consent to Schunk's use of her funds for Schunk's own benefit or the benefit of third parties, either before or after Schunk used the funds for those purposes. We turn to these issues now.

¶18 As we have noted above, although the trial court did not expressly state in its written decision that Schunk's affidavit was barred by the dead man's statute, it did expressly so rule in its oral decision and that is implicit in its written decision. Schunk does not present any argument on appeal in opposition to that ruling and appears to implicitly concede that in deciding whether she is entitled to summary judgment, we should disregard her affidavit.

¶19 We next consider Preston's affidavit. We need not decide whether the court properly ruled that her testimony of Gasparac's statements came within exceptions to the rule against hearsay, because we conclude that, even if it did, Preston's testimony does not establish a prima facie defense to the conversion claim. Preston's affidavit does not indicate what Gasparac knew about Schunk's use of her funds for Schunk's own benefit or the benefit of third parties; it does not indicate that she knew anything at all of that use of her funds. Therefore, Gasparac's statements to Preston "on numerous occasions" that she "was satisfied with and approved all financial matters that Mae Schunk had been doing on her behalf" is not evidence that she approved of Schunk's use of her funds for Schunk's own benefit or the benefit of third parties. Logic dictates that Gasparac could not approve of Schunk's use of Gasparac's funds for Schunk's own benefit or the benefit of third parties unless Gasparac knew that it had occurred or was

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> **(3)** SUPPORTING PAPERS. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.

occurring, and there is nothing in Preston's affidavit indicating that Gasparac had such knowledge. While express knowledge of the voidable act is not required, ***Bydalek***, 220 Wis. 2d at 747, there must be evidence from which such knowledge may be inferred. *See* ***id.*** at 748. Preston's affidavit presents no evidence from which such knowledge may be inferred.

¶20 The same is true of William's affidavit. He avers that "Gasparac on numerous occasions approved the financial matters that Mae Schunk handled on her behalf," but does not indicate what those financial matters were. In particular, he does not state that Gasparac knew Schunk was using her funds for Schunk's own benefit or the benefit of third parties, nor does he present evidence from which that knowledge might be inferred. Therefore, even if Schunk is correct that William's testimony is not barred by the dead man's statute, an issue we do not decide, his affidavit does not establish a prima facie defense to the conversion claim.

¶21 Since Schunk's submissions do not establish a prima facie defense to the conversion claim, she is not entitled to summary judgment on that claim. ***In re Cherokee Park Plat***, 113 Wis. 2d at 116. Accordingly the trial court erred in granting her summary judgment. We therefore reverse and remand to the trial court for a trial on the conversion claim insofar as it arose on or after October 4, 1994.[8]

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[8] Schunk moved to strike the estate's reply brief's discussion of ***Alexopoulos v. Dakouras***, 48 Wis. 2d 32, 179 N.W.2d 836 (1970), because she cited that case for the first time in the reply brief. We deny the motion. The estate's discussion of this case does not raise a new issue that was not raised in its first brief, and the estate cited this case in the trial court.

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

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