

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2011

A. John Voelker
Acting 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. 2009AP2931

Cir. Ct. No. 2007CV471

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**WITTENBERG FORD-MERCURY, INC., RODNEY ROSENOW, VICTORIA
ROSENOW, ROSENOW FARMS, INC. AND ROSENOW LAND COMPANY, LLC,**

PLAINTIFFS-APPELLANTS,

v.

**ROGER ROSENOW, SR., SUSAN ROSENOW, JAMES HARTLEBEN, RHONDA
HARTLEBEN, BANNER BANK AND PETER HITTNER,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Reversed and cause remanded for further
proceedings.*

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

¶1 PER CURIAM. Wittenberg Ford-Mercury, Inc., Rodney Rosenow,
Victoria Rosenow, Rosenow Farms, Inc., and Rosenow Land Company, LLC,

(collectively, the Rosenows) appeal a judgment dismissing their claims against Roger Rosenow, Sr., Susan Rosenow, James Hartleben, Rhonda Hartleben, Banner Bank and Peter Hittner.¹ The circuit court concluded that all of the claims were time-barred. It also determined that two specific claims, conspiracy to defraud and conspiracy to injure business, were insufficiently pled. We reverse and remand the cause for further proceedings.

BACKGROUND²

¶2 In 1999, James Hartleben, the sole shareholder of a struggling Ford dealership, suggested to Roger that Rodney, Roger's brother, buy the franchise.³ Roger proposed the deal in January 1999, and Rodney made an initial investment of \$130,000 at that time.

¶3 That January, Rodney and his wife Victoria consulted Banner Bank about their plans to purchase the dealership. The bank agreed to finance the transaction and recommended that Rodney and Victoria obtain representation from attorney Peter Hittner. Neither Banner Bank nor Hittner disclosed that Hittner frequently represented the bank in lending transactions, and previously represented the dealership in a foreclosure action.

¶4 On October 24, 2000, Hartleben sold all of his stock in the dealership to Rodney and Victoria, their corporation, Wittenberg Ford-Mercury,

¹ To avoid confusion, we will refer to all parties with the surname "Rosenow" by their first names.

² When reviewing a motion to dismiss, we accept the facts stated in the complaint as true. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 683, 271 N.W.2d 368 (1978).

³ Roger was the vice-president of the dealership at the time.

and Roger. The parties used a stock purchase agreement drafted by Hittner. On November 2, Banner Bank finalized a loan to Rodney and Victoria for over \$1 million.⁴ Hartleben, who still owned the real estate, agreed to lease the business premises to Wittenberg Ford-Mercury.

¶5 Ford Motor Company's acquiescence to the transfer was a key issue left unresolved by the stock purchase agreement. Article 10 of the agreement provided that the parties "agree to fully, timely and diligently cooperate and do all things reasonable and necessary to obtain the written consent and approval of the [Ford Motor Company] to the new ownership of [Wittenberg Ford-Mercury, Inc.] by the Buyers" However, Roger and Hartleben reassured Rodney and Victoria that Ford had informally approved the sale, that the language in the stock purchase agreement was merely a formality, and that Ford would formally approve Rodney and Victoria as the new owners of the dealership after they demonstrated successful operation of the franchise.

¶6 As of 2003, Rodney and Victoria were still awaiting Ford's approval. On December 11, Rodney wrote Hartleben:

I am contacting you again in regards to getting the Ford franchise changed from your name to ours. Banner Bank is insisting that we get this done. We have been in here for three years now, that you said was necessary to satisfy Ford. Again, [p]lease contact Ford or whoever you have to, to get this under way.

Hartleben responded that Ford would not accept the transfer unless Hartleben had an ownership interest in the dealership. Hartleben requested 100 shares of

⁴ Rodney and Victoria, along with Roger and his wife, personally guaranteed the debt, but Roger and his wife were later inexplicably removed from their personal guarantees by the Bank.

preferred stock to complete the transfer. Hittner prepared a board resolution and stock certificate, and Wittenberg Ford-Mercury issued the shares.

¶7 Rodney was still awaiting Ford's approval in March 2004, and again wrote to Hartleben expressing concern for the delay:

I am wondering why we have not gotten the Ford Franchise changed from your name to ours yet. We have done everything you said was necessary to satisfy Ford including giving you the 100 shares of preferred stock to Wittenberg Ford Mercury Inc., which you said you needed to be able to transfer the names. What is going on? If I need to remind you of the purchase agreement that was signed back in October of 2000, you are required to work with us in a timely manner. It seems that you keep putting us off and giving us the run around. You need to get this matter cleared up as soon as possible.

¶8 In June 2007, Hartleben notified Rodney and Victoria that he wanted to repurchase the dealership. The parties were unable to reach an agreement. On September 7, 2007, Hartleben changed the locks on the property, only allowing Wittenberg Ford-Mercury's employees on the premises to retrieve personal property. Hartleben began operating under the Wittenberg Ford-Mercury name, declaring that the dealership was under "new ownership."

¶9 Ford learned of the dealership sale in October 2007, contrary to Roger's and Hartleben's assertions that Ford had informally approved the transaction beforehand. Ford requested documentation of the sale several times in 2007 and 2008. Hartleben never responded. On August 1, 2008, Ford provided Hartleben a twenty-day notice that it was terminating the franchise for noncompliance with the franchise agreement. Specifically, Ford cited Hartleben's unauthorized transfer of ownership, failure to keep the business open during customary hours, and failure to pay for company products.

¶10 Wittenberg Ford-Mercury commenced this action on November 30, 2007, against James and Rhonda Hartleben and their business. The complaint was amended on April 13, 2009, to add Rodney and Victoria and their other business entities as plaintiffs, and Roger and Susan, Banner Bank, and Peter Hittner as defendants. With the circuit court’s permission, the Rosenows filed a second amended complaint on September 23, 2009.

¶11 Against all defendants, the second amended complaint asserted claims for conspiracy to defraud and conspiracy to injure business under WIS. STAT. § 134.01.⁵ The Rosenows alleged that the defendants, motivated solely by economic interests, induced the Rosenows to “borrow vast amounts of money to purchase a franchise that [they] never acquired” They further alleged that acts in furtherance of the conspiracy included Roger’s and Hartleben’s misrepresentations, Banner Bank’s referral to Hittner, and the bank’s and Hittner’s “blanket endorsements” of Roger’s and Hartleben’s misrepresentations. The Rosenows also asserted that, pursuant to the conspiracy, all the defendants failed to obtain Ford’s approval of the ownership transfer.

⁵ WISCONSIN STAT. § 134.01 makes it unlawful for

[a]ny 2 or more persons [to] combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his or her will, or preventing or hindering another from doing or performing any lawful act

Although § 134.01 is a criminal statute, any person injured by a violation accrues a civil claim for damages. *Segall v. Hurwitz*, 114 Wis. 2d 471, 485, 339 N.W.2d 333 (Ct. App. 1983).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶12 The second amended complaint also included claims against the defendants individually. Against Hartleben, the complaint included six claims: two for fraud, and one each for conversion, unfair competition, an accounting, and declaratory judgment determining rights under the franchise agreement. Against Roger and Susan, the complaint included a single claim for fraud. Against Hittner, the complaint included two claims for legal malpractice and a claim for breach of fiduciary duty. Finally, against Banner Bank, the complaint included claims for negligence and breach of fiduciary duty.

¶13 Banner Bank filed a motion to dismiss all claims against it as barred by the applicable statutes of limitations. The bank argued that all claims accrued on or before November 2, 2000, when the transactions related to the sale of the dealership were complete. Roger and Susan Rosenow filed a similar motion seeking dismissal of all claims against them.

¶14 The circuit court held a hearing on both motions. It concluded, without explanation, that the Rosenows' claim for conspiracy to defraud was "insufficient," and their claim for conspiracy to injure business was "conclusory." However, it stated that the timeliness of the Rosenows' claims was "by far the most important [issue]." On that point, the court concluded the case "really boils down to when the Court starts the discovery period running." The court determined that the limitations periods began running at some point after the sale, but did not identify a particular time:

I would have to say that looking at the [stock purchase] agreement, [article] 10, it very clearly indicates they had to follow through with getting that franchise transferred over, that the original corporation had it and they had to take further steps to do it You had to start soon. I suppose you could argue a month ... would be too soon to say somebody's negligent if they don't follow through and nothing's done. But, essentially, that's when ... the statute

of limitations started running. That being the case ... everything's gone. In my view, the statute of limitations has wiped out the case.

The court then dismissed all claims against all defendants. The Rosenows appeal, asserting their claims were improperly dismissed.

DISCUSSION

¶15 As an initial matter, we note that neither James Hartleben nor Rhonda Hartleben has filed an appellate brief.⁶ As a result, they have not responded to the Rosenows' contention that the circuit court improperly dismissed the eight claims against them. Unrefuted appellate arguments are deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, we reverse that portion of the judgment dismissing the claims against James and Rhonda Hartleben.

¶16 A motion to dismiss tests the legal sufficiency of the complaint. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 683, 271 N.W.2d 368 (1978). The complaint is to be construed liberally in favor of a conclusion that a claim has been stated if such a conclusion is reasonably possible. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981). A motion to dismiss will be granted "only when it is quite clear that under no conditions can the plaintiff recover." *Anderson*, 85 Wis. 2d at 683.

¶17 The Rosenows argue the circuit court improperly dismissed their claims for two reasons. First, they argue their claims were timely filed within the

⁶ By order dated May 27, 2010, we noted James Hartleben had not filed a brief, and ordered the appeal to be taken under submission without further briefing. Rhonda Hartleben had not filed a brief at the time, either.

applicable statutes of limitations. Second, they contend their claims for conspiracy to defraud and conspiracy to injure business were sufficiently pled.

I. Statutes of Limitations

¶18 The Rosenows assert the circuit court improperly dismissed their claims against Banner Bank, Roger and Susan, and Hittner. Determining which statute of limitations applies to an action is a question of law, which we review de novo. *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 2001 WI App 300, ¶14, 249 Wis. 2d 142, 638 N.W.2d 355. Whether the statute of limitations has run on a particular claim is also a question of law. *Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 35, ¶19.

¶19 “[A] cause of action accrues [for limitations purposes] 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 (1995); see also *Meracle v. Children’s Serv. Soc’y*, 149 Wis. 2d 19, 26, 437 N.W.2d 532 (1989). A party has a present right to enforce a claim when it has suffered a harm that has already occurred, or when harm is reasonably certain to occur in the future. *Pritzlaff*, 194 Wis. 2d at 315. The mere possibility of future harm is insufficient. *Hennekens v. Hoerl*, 160 Wis. 2d 144, 153, 465 N.W.2d 812 (1991). The “discovery rule” tolls statutes of limitations “until 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.” *Pritzlaff*, 194 Wis. 2d at 315. Accordingly, we are not concerned with when the tortious acts occurred; our focus is on the date on which the Rosenows were actually or reasonably certain to be injured, or when they should have discovered their injury, by each defendant.

A. Banner Bank

¶20 The Rosenows' second amended complaint includes four claims against Banner Bank. Those claims, and the applicable statutes of limitations, are as follows: (1) negligence in providing banking services, subject to a six-year limitations period under WIS. STAT. § 893.52; (2) breach of fiduciary duty, subject to a two-year statute of limitations under WIS. STAT. § 893.57 (2007-08); (3) conspiracy to defraud, subject to a six-year limitations period under WIS. STAT. § 893.93(1)(b); and conspiracy to injure business under WIS. STAT. § 134.01, subject to a six-year statute of limitations under WIS. STAT. § 893.93(1)(a). The four claims all involve allegations that the bank failed to ensure or verify that Ford consented to a transfer of the dealership.

¶21 The bank contends that all of the Rosenows' four claims against it are time-barred because the Rosenows knew or should have known of their injury at some point in 2000: either on October 24, the date the Rosenows executed the stock purchase agreement, or, at the latest, by the loan closing on November 2. The bank reasons that the Rosenows proceeded at their own peril by purchasing dealership stock and taking out a loan with knowledge that Ford had not yet approved the ownership transfer. The Rosenows counter that they were not injured until August 2008, when they were told that Ford was terminating the franchise.

¶22 With respect to the Rosenows' negligence and breach of fiduciary duty claims, we conclude the Rosenows did not suffer actual injury until August 2008, when Ford notified Hartleben that it was terminating the franchise. Both claims allege that the bank, in violation of the standard of care and its fiduciary duties, failed to verify that Ford would authorize the sale of the dealership before

closing. The statute of limitations on the Rosenows' claim for the bank's alleged omission began running in August 2008, when Ford notified Hartleben that it was terminating the franchise agreement. Before then, the dealership was an active Ford franchise, even though Hartleben's lockout in 2007 prevented Rodney and Victoria from operating it.⁷ Only after Ford issued the twenty-day notice did the Rosenows' injury become reasonably certain to occur. Accordingly, any damage resulting from the bank's omission before August 2008 was merely speculative.

¶23 With respect to the Rosenows' two claims for conspiracy, however, we conclude the Rosenows were injured when Hartleben changed the locks on the business premises on September 7, 2007. A claim for civil conspiracy accrues on the date that the conspiracy produces an injury. *Segall v. Hurwitz*, 114 Wis. 2d 471, 481-82, 339 N.W.2d 333 (Ct. App. 1983). Here, that was on September 7, when Hartleben restricted Rodney and Victoria's access to the business property.⁸ That is also the date the Rosenows' claim for a violation of WIS. STAT. § 134.01 accrued. Under § 134.01, a conspiracy claim accrues when the conspiracy produces damage. *Segall*, 114 Wis. 2d at 486.

¶24 Accordingly, all of the Rosenows' claims against Banner Bank were filed within the applicable statutes of limitations. The claims are therefore timely.

⁷ The Rosenows' negligence and fiduciary duty claims against Banner Bank did not accrue in 2007 because those allegations against the Bank are independent of any of Hartleben's alleged wrongful acts.

⁸ Not all claims for injuries arising out of conspiracy accrue when the plaintiff is first injured; each tort produced by a conspiracy carries its own limitations period, and the date of the first injury from each tortious act is the date on which the cause of action accrues as to that tort. *Segall*, 114 Wis. 2d at 482. Here, the Rosenows seek relief only for a conspiracy to defraud. They were first injured by the alleged conspiracy when they were locked out of the business premises by Hartleben.

¶25 The bank, however, argues that the Rosenows suffered actual damage in 2000 because the Rosenows, with knowledge that Ford had not yet authorized the dealership's sale, obligated themselves to purchase the dealership and repay the substantial loan from Banner Bank. This argument defies logic. The Rosenows' consideration for receiving the dealership was not harm for tort purposes; it was merely what they had to give up to receive the benefit of the deal. The Rosenows agreed to pay for the stock and loan in exchange for what they believed was an authorized Ford dealership. There was no injury for tort purposes in 2000.

B. Susan and Roger Rosenow

¶26 The Rosenows' claims against Roger and Susan are also timely. The second amended complaint includes a fraud claim against Roger and Susan, subject to a six-year statute of limitations under WIS. STAT. § 893.93(1)(b), as well as the same conspiracy claims advanced against Banner Bank. We have already concluded that the Rosenows' conspiracy claims were timely filed. Thus, we will address only the timeliness of the fraud claim.

¶27 In relevant part, the Rosenows' fraud claim against Roger and Susan alleges they falsely represented that Ford had approved the sale of the dealership and that Hartleben was working with Ford to formalize the transfer of the franchise. Assuming such misrepresentations were made, the Rosenows were not damaged until Ford gave notice that it was terminating the franchise agreement. Accordingly, the Rosenows' fraud claim against Roger and Susan was timely filed.

C. Attorney Hittner

¶28 In addition to the two conspiracy claims, the second amended complaint advanced three claims against attorney Hittner: two legal malpractice claims, subject to six-year statutes of limitations under WIS. STAT. § 893.53, and a claim for breach of fiduciary duty, subject to a two-year statute of limitations under WIS. STAT. § 893.57 (2007-08). Both legal malpractice claims involve allegations that Hittner negligently drafted the stock purchase agreement and failed to confirm, or seek approval for, the transfer with Ford.⁹ The breach of fiduciary duty claim alleges multiple conflicts of interest that precluded Hittner from representing the Rosenows without written waivers.

¶29 The Rosenows sought timely relief on their claims for conspiracy, legal malpractice, and breach of fiduciary duty. As we have already determined, the Rosenows' claims for conspiracy are timely. Their claims for legal malpractice are also timely because any negligence arising from the stock purchase agreement's drafting or Hittner's failure to contact Ford produced injury only when Ford gave notice that it was terminating the franchise. The Rosenows' breach of fiduciary duty claim is timely for the same reason.

¶30 Hittner argues that the Rosenows' "very purchase of the stock ... began the limitations period because [the Rosenows] knew full well that they have not received with that purchase the full value of the stock[, which] would not be realized until [the Rosenows] received authorization from Ford to act as a

⁹ The claims differ only in terms of the injured party; the first count of legal malpractice alleges damage to Rodney and Victoria, while the second alleges damage to Wittenberg Ford-Mercury, Inc.

franchisee.” Hittner fails to recognize that the Rosenows never owned the stock at what Hittner perceives as its “full value,” and that any reduction in value would presumably have been reflected in the purchase price of the dealership. Hittner’s argument amounts to an assertion that the Rosenows negotiated a bad deal. The Rosenows do not seek to invalidate the contract; instead, they present a variety of claims arising from alleged negligent and intentional acts. The allocation of risk in the contract has little bearing on whether the Rosenows may recover in tort for the alleged acts and omissions.

¶31 Hittner also claims, in a line of argument similar to that of Banner Bank, that the Rosenows “cannot claim that their injuries occurred when the dealership agreement with Ford was terminated because [the Rosenows] never had been approved as a franchisee in the first instance and they knew it.” However, Hittner concedes that “[t]he only way [the Rosenows] could have been injured ... beginning in 2008 is if they believed prior to 2008 that they had Ford’s approval to act as a franchisee and subsequently learned in 2008 that the franchise agreement had been terminated.” Hittner’s argument disregards allegations that Rodney and Victoria were repeatedly told that Ford’s approval was a mere formality and would be forthcoming.

II. Insufficient Pleading

¶32 The Rosenows also claim that the circuit court improperly rejected their conspiracy claims as conclusory and insufficiently pled. They contend the court misapplied Wisconsin’s pleading statute, which requires only “[a] short and plain statement of the claim, identifying the ... series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.” *See* WIS. STAT. § 802.02(1)(a).

¶33 Banner Bank is the only respondent to address these assertions. With respect to the conspiracy to defraud claim, it contends, in conclusory fashion, that the Rosenows “fail[ed] to state a valid claim upon which relief can be granted” We need not entertain such undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We therefore reverse the dismissal of the Rosenows’ conspiracy to defraud claim.

¶34 Banner Bank does develop an argument supporting the dismissal of the Rosenows’ conspiracy to injure business claim as insufficiently pled. Malice is an essential element of an action under WIS. STAT. § 134.01, one the bank contends has not been established by the second amended complaint’s allegations. *See Maleki v. Fine-Lando Clinic Chartered, S.C.*, 162 Wis. 2d 73, 86, 469 N.W.2d 629 (1991). Malice, as used in § 134.01, means “an intent to do a wrongful harm and injury.” *Id.* at 87.

¶35 The Rosenows’ business injury claim alleges that “the ... defendants combined, associated, mutually undertook or acted in concert together for the purpose [of] willfully injuring [Rodney and Victoria] in their business.” The claim realleges and incorporates the other allegations in the second amended complaint, the gist of which are that the defendants schemed to induce Rodney and Victoria to purchase, at great economic risk, a franchise that Rodney and Victoria never acquired. The complaint alleges that the defendants were motivated solely by their greed. We conclude the Rosenows have sufficiently pled malice and have stated a claim for business injury under WIS. STAT. § 134.01.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

