COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2610 **Cir. Ct. No. 2006CV188**

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

EAU CLAIRE COUNTY,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

SOFTSCAPE, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed in part*; *reversed in part and cause remanded for proceedings consistent with this opinion.*

Before Vergeront, P.J., Sherman, and Blanchard, JJ.

¶1 BLANCHARD, J. This appeal presents a "new claim" relation-back issue under WIS. STAT. § 802.09(3) (2009-10).[1] The question is whether a claim made for the first time in an amended complaint filed after expiration of the applicable statute of limitations period relates back to factual allegations made in an earlier complaint that was filed within the limitations period. If so, the new claim in the later filed complaint is deemed to have been filed within the limitations period only when the earlier complaint contained sufficient notice of potential claims.

¶2 Eau Claire County (the County) initially sued Softscape, Inc., on contract claims only, and then filed a series of amended complaints. The County's Third Amended Complaint alleged, for the first time, a claim of fraudulent advertising in violation of WIS. STAT. § 100.18. The Third Amended Complaint was filed after the three-year statute of limitations period had lapsed. The circuit court concluded that the Third Amended Complaint did not relate back to allegations contained in the original complaint. As result of the court's relation-back decision, the court determined that the County is not entitled to recover statutory fees and costs on its § 100.18 claim, on which the County had prevailed in a jury trial.

¶3 We conclude that our standard of review on this issue is de novo, because the trial court did not grant Softscape's motion on the grounds that the amended complaint was untimely. Instead, the court granted the motion on the basis of a legal determination that in order for the WIS. STAT. § 100.18 claim in the

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

amended complaint to relate back to the original complaint, the County needed to have alleged in its original complaint specific misrepresentations inducing the County to enter into a contract. We conclude that the circuit court erred, because the original complaint need only allege a "transaction, occurrence, or event" out of which the § 100.18 claim "arose," and the County made such an allegation in its original complaint.

¶4 In addition, we conclude that: (1) because of our resolution of the relation-back issue summarized above, we need not address the County's additional argument that Softscape waived its statute of limitations defense; (2) the court did not erroneously exercise its discretion in allowing taxable costs and disbursements to Softscape on both its defense against the County's claims and its pursuit of a counterclaim against the County; and (3) Softscape's argument on cross-appeal that the County's statutory offer of settlement was ambiguous and unenforceable is untimely, and therefore we do not address it.

¶5 Accordingly, we: reverse those portions of the Supplemental Order Regarding Motions After Verdict challenged by the County ordering that the Third Amended Complaint does not relate back to the original complaint and that the County may not recover actual attorneys' fees and costs under WIS. STAT. § 100.18; affirm that portion of the court's amended judgment challenged by the County awarding costs and disbursements to Softscape; and remand for proceedings consistent with this opinion.

BACKGROUND FACTS REGARDING RELATION BACK

¶6 The County contracted with Softscape to develop a computer information system, a project which was to involve converting pre-existing data of the County's human services department to a new system for that department.

Disputes arose between the two parties. This lawsuit was ultimately tried to a jury. In the following paragraphs we summarize the allegations made by the County in its original and amended complaints, which were filed over the course of thirty-three months. A focus of this appeal is the County's Third Amended Complaint, filed four months in advance of jury trial.

Original Complaint

¶7 The original complaint, filed March 30, 2006, demanded a judgment terminating the contract between the parties, and returning to the County the money it had paid to date. As grounds, the County alleged that there had been no meeting of the minds and therefore rescission or equitable relief was appropriate. In the alternative, the County alleged that Softscape had repudiated the contract. The original complaint included the following allegations of fact.

¶8 On December 31, 2003, the County and Softscape entered into a written contract, a "Master Software Development, License and Service Agreement" (hereafter "the agreement"). The agreement addressed "professional services to be carried out by Softscape on behalf of the County." The parties contracted in the agreement for Softscape to develop and implement "a comprehensive, state-of-the-art Human Services Information System," which was to include, among other things, software sufficient to meet requirements of the Health Insurance Portability and Accountability Act of 1996, interface with other systems, and integrate case management software with the County, all at a flat fee to the County. The agreement contained a pricing schedule that "did not limit the amount of time to be offered" by Softscape "for data conversion and interface of the software" for the County.

¶9 The County further alleged in the original complaint that Softscape had "changed or attempted to change the rules of the agreement," by offering the County "Scope documents," under which the terms of the agreement would change. The County alleged that Softscape had refused to deliver the software as agreed. As examples, the County alleged that Softscape used "Scope documents" to limit its work on HIPAA compliance, on system functionality, and on necessary interfaces that had been included in the agreement. Softscape had also used "Scope documents" to "place hourly limits on time necessary for Softscape to make the system function" for the County, despite the fact that the agreement, which had an attached pricing schedule, called for a flat fee bid, with an hourly rate for "additional consulting beyond initial project scope." Attached to the complaint was a purported fifth iteration of the "Scope documents," dated January 7, 2005.

¶10 Softscape responded to the original complaint with a counterclaim alleging breach of the agreement by the County. Softscape alleged that the County had repeatedly attempted to change the agreement even after Softscape had made substantial efforts to perform under the agreement. Softscape alleged that the County had added "purported obligations that were not previously contemplated by the parties and not consistent with the original agreement."

First and Second Amended Complaints

¶11 On May 18, 2007, the County filed the first of its amended complaints, merely adding a cause of action and an additional prayer for relief not relevant to this appeal, without alleging any additional facts. On December 21, 2007, the County filed a Second Amended Complaint, again alleging no new facts, but specifically alleging that Softscape "made representations of fact," both under

a strict liability theory and a negligence theory, "about its ability to deliver an integrated social service system" for the County, which were "not true," "in circumstances in which it necessarily ought to have known the untruth of the representation[s]," and that the County relied on the false representations to its detriment.

Third Amended Complaint

¶12 On December 31, 2008, the County filed a Third Amended Complaint, re-alleging and incorporating by reference the allegations and claims made in its prior complaints, and this time adding a claim that Softscape violated the fraudulent advertising statute, WIS. STAT. § 100.18. By incorporating the contents of the Second Amended Complaint, the Third Amended Complaint realleged the strict responsibility and negligent misrepresentations referenced above.

¶13 In its answer to this complaint, Softscape alleged as an affirmative defense that the Third Amended Complaint was barred by the statute of limitations.[2]

Trial Events Related to WIS. STAT. § 100.18 Claim

¶14 In advance of trial, Softscape made no effort before the circuit court to pursue its affirmative defense that the WIS. STAT. § 100.18 claim was first alleged by the County after the statute of limitations had lapsed. Softscape did not

[2] It is uncontested that the applicable statute of limitations is three years, pursuant to WIS. STAT. § 100.18(11)(b)3., and begins to run at the time of "the occurrence of the unlawful act or practice which is the subject of the action."

raise with the court the issue of whether the § 100.18 claim was viable until the five-day jury trial was underway. At that time, Softscape argued that § 100.18 requires proof of a statement intended to induce the plaintiff to enter into a contractual relationship, and the County had failed to file a complaint alleging such inducement-through-deception by December 31, 2006, three years after formation of the agreement, December 31, 2003.[3] Therefore, Softscape argued, the necessary allegation of fraudulent inducement to enter into the agreement on December 31, 2003, was not made before the statute of limitations had expired on December 31, 2006.

¶15 The County argued that the statute of limitations did not apply, and also noted that it was highly significant to the parties whether the WIS. STAT. § 100.18 claim was viable, because prevailing parties receive attorneys' fees under that statute. *See* § 100.18(11)(b)2.

¶16 The circuit court invited discussion by the attorneys on the relation-back question, but did not resolve the issue during trial. The court decided to allow the WIS. STAT. § 100.18 claim to go to the jury. The court decided to address the question in the context of whether attorneys' fees would be due the

[3] For context, we briefly summarize here the elements of a WIS. STAT. § 100.18 claim, which are not contested by the parties. A plaintiff must prove: (1) "that with the intent to induce an obligation, the defendant made a representation to 'the public'"; (2) "that the representation was untrue, deceptive or misleading"; and (3) that "the representation caused the plaintiff a pecuniary loss." ***K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.***, 301 Wis. 2d 109, 121-22, 732 N.W.2d 792 (2007) (citations omitted); ***Kailin v. Armstrong***, 2002 WI App 70, ¶44, 252 Wis. 2d 676, 643 N.W.2d 132 (the representation must be either "with intent to sell or with intent to induce the public to enter into a contract or obligation relating to a purchase or sale"). A statement made to one person may constitute a statement made to "the public." ***Bonn v. Haubrich***, 123 Wis. 2d 168, 173 n.4, 366 N.W.2d 503 (Ct. App. 1985).

County under § 100.18, but only after trial in the event that the County prevailed on this issue.[4]

¶17 The jury returned a verdict in favor of the County on the WIS. STAT. § 100.18 claim. The jury answered "yes" to each of three questions regarding this claim, which we summarize as follows: did Softscape make a representation to the County relating to the purchase, sale, or use of its software development services or the terms thereof; did any such representation, if made, contain any assertion of fact that was deceptive or misleading; and, if there was any such deceptive or misleading representation, did the County suffer a pecuniary loss as a result?

¶18 In motions after verdict, Softscape renewed its position that the WIS. STAT. § 100.18 claim, which was without question filed outside the three-year limitations period, was not saved by the relation-back statute. The court agreed with Softscape, concluding that the § 100.18 claim did not relate back to any prior complaint filed within the limitations period, because no misrepresentation cognizable under § 100.18 had been alleged within three years of the making of the misrepresentation. The court stated that any such misrepresentations made in December 2003 (when the contract was entered into), or in March 2004 (when the parties discussed a "project charter document") were alleged by the County only in

[4] We construe the court to have taken under advisement Softscape's argument that the County's WIS. STAT. § 100.18 claim was barred as a matter of law by the statute of limitations. However, as discussed below, in allowing the claim to go to the jury, the court implicitly found that the County was not precluded from amending the complaint on the grounds that the County had unduly delayed in filing it, resulting in prejudice to Softscape. That is, the court would not have allowed the § 100.18 claim to proceed to trial if the court believed that it was filed so late that Softscape did not have sufficient time to defend itself against the claim.

a complaint filed "well outside of the statute of limitations."[5] In other words, the court concluded that a complaint filed within the limitations period needed to have alleged specific misrepresentations that induced the County to enter into the agreement, and this had not occurred.[6]

STANDARD OF REVIEW REGARDING RELATION BACK

¶19 We first address the standard of review on the relation-back issue. Both parties invite us to apply the erroneous exercise of discretion standard, but we conclude that the circuit court's relation-back decision is subject to de novo review. The de novo standard is appropriate because Softscape disavowed objection to the Third Amended Complaint on the grounds that the County violated the court's scheduling order by filing this amended complaint so late in

[5] The court stated the following on this issue:

> First of all, I do not think there's a relation back. [Counsel for Softscape], I think, has raised a very cogent argument relative to what misrepresentations really means and that any misrepresentations that induced Eau Claire County to enter into either the contract of December 31st of 2003 or the March 17th, 2004, ... project charter document, were [alleged by the County] well outside of the statute of limitations, which would have [lapsed on] March 17th of 2007 if we go from the charter document.

[6] In briefly resolving the statute of limitations issue post-trial, the court made a separate factual finding involving events surrounding the "project charter document" in March 2004, but we conclude that this finding is irrelevant to this appeal. The court found that the evidence at trial showed that Softscape did not induce the County "to do anything" in March 2004, because at that time the County steadfastly refused to modify the agreement that the parties entered into on December 31, 2003, and therefore the limitations period could not have commenced in or around March 2004. However, the court did not suggest that there was not a jury question as to whether Softscape had improperly induced the County to enter into the contract in December 2003. As discussed below in the text, we conclude that the original complaint filed in March 2006 sufficiently identified the transaction, occurrence, or event out of which the WIS. STAT. § 100.18 claim arose in or about December 2003. Therefore, we conclude that the court's finding regarding conduct of the parties in March 2004 is not relevant to our decision.

the litigation process that it unfairly prejudiced Softscape. Instead, Softscape asked the court only to reach a purely legal conclusion, namely, that the statute of limitations applied to bar the WIS. STAT. § 100.18 claim.

¶20 The parties cite to the standard of review used when the trial court is presented with an argument to *disallow amendment* of a pleading that purports to relate back to an earlier filed complaint in advance of trial, on the grounds that it would be unfair to require the party or parties opposing amendment to be required to defend against the tardy amended pleading. ***Thom v. OneBeacon Ins. Co.***, 2007 WI App 123, ¶8 n.5, 300 Wis. 2d 607, 731 N.W.2d 657. This standard, as applied to a relation-back case, is a subset of the standard of review for all decisions on motions for leave to amend pleadings, which is that a trial court's decision to grant leave to amend involves discretionary balancing of "the interests of the party benefiting by the amendment and those of the party objecting to the amendment." *See* ***State v. Peterson***, 104 Wis. 2d 616, 634, 312 N.W.2d 784 (1981). Thus, in ***Drehmel v. Radandt***, 75 Wis. 2d 223, 229, 249 N.W.2d 274 (1977), the supreme court concluded that "the trial court correctly interpreted" the predecessor statute to WIS. STAT. § 802.09(3) when it "held that, *as a matter of discretion*, an amendment should not *in fairness* be allowed eight years after the accident, five years beyond the statute of limitations and the time of the original filing." ***Id.*** (emphasis added). ***Drehmel*** cited ***Wipfli v. Martin***, 34 Wis. 2d 169, 148 N.W.2d 674 (1967), in which the court held that circuit courts should freely grant leave to amend pleadings, "so as to present the entire controversy[,] providing the amendment does not unfairly deprive the opposing party of timely opportunity to meet the issue created by the amendment." ***Wipfli***, 34 Wis. 2d at 174.

¶21 However, where the circuit court, as here, decides a relation-back issue as a matter of statutory interpretation, a lesser standard of deference applies. *See* ***Thom***, 300 Wis. 2d 607, ¶8 n.5. While some opinions refer to the discretionary standard as applicable to relation-back cases, this is because the issue often arises in connection with a motion for leave to amend. When the question does not involve the question of timely amendment, but instead solely the question of whether allegations in one complaint relate back to allegations in a prior complaint, there is no reason for a deferential standard of review. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶68, 330 Wis. 2d 389, 793 N.W.2d 860.

¶22 In ***Tews,*** our supreme court favorably cited a recent United States Supreme Court case, ***Krupski v. Costa Crociere S.P.A.***, ___ U.S. ___, 130 S. Ct. 2485 (2010),[7] which stated that "relation back is not left to the 'equitable discretion' of a district court, but rather [FED. R. CIV. P. 15] 'mandates relation back once the Rule's requirements are satisfied.'" ***Tews***, 330 Wis. 2d 389, ¶68 (quoting ***Krupski***, 130 S. Ct. at 2496). The court majority in ***Tews*** further favorably quoted ***Krupski*** for its statement that, because the focus of relation-back analysis is on what the party objecting to the relation-back "knew or should have known, not on the plaintiff's knowledge or timeliness in seeking to amend the pleading[,] [t]he speed with which the moving party moves to amend the

[7] Federal court interpretation of the "very nearly identical" language of FED. R. CIV. P. 15(c) can inform Wisconsin court interpretation of WIS. STAT. § 802.09(3). *See* ***Biggart v. Barstad***, 182 Wis. 2d 421, 429, 513 N.W.2d 681 (Ct. App. 1994). "Like Wisconsin's statute, the purpose of the federal rule is to ensure that the statute of limitations is not 'used mechanically to prevent adjudication of a claim where the real parties in interest were sufficiently alerted to the proceedings or were involved in them unofficially from an early stage.'" ***Tews v. NHI, LLC***, 2010 WI 137, ¶63, 330 Wis. 2d 389, 793 N.W.2d 860 (quoting ***Galion v. Conmaco Int'l, Inc.***, 658 P.2d 1130, 1133 (1983)), quoting in turn 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶15.15[4.–1] (2d ed. 1982)).

complaint after receiving leave to do so has no bearing on whether the amended complaint relates back." ***Tews***, 330 Wis. 2d 389, ¶68.[8]

¶23 Here, the County did not move for leave to file its Third Amended Complaint, but by the same token Softscape did not move the court to deny the County leave to file.[9] In fact, Softscape waived the objection of untimely amendment. It acknowledged that it "didn't raise a motion on the issue" of the late filing of the Third Amended Complaint, even though amendment "was in violation of the court's scheduling order with regard to amendment of pleadings. *But that's not the issue I'm bringing*." Instead, before the trial court, and now on appeal, Softscape has consistently made only the argument, accepted by the trial court, that the Third Amended Complaint could not relate back to the original

[8] We recognize that both ***Krupski*** and ***Tews*** involved amendments bringing *new defendants* into an action, not new plaintiffs or new claims. *See* ***Krupski v. Costa Crociere S.P.A.***, ___ U.S. ___, 130 S. Ct. 2485, 2491-93 (2010) (interpreting FED. R. CIV. P. 15(c)(1)(C), which addresses amendments to add defendants, not FED. R. CIV. P. 15(c)(1)(B), under which an amendment relates back when it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out ... in the original pleading"); ***Tews***, 330 Wis. 2d 389, ¶¶2, 3 (interpreting the provisions in WIS. STAT. § 802.09(3) that address added defendants). However, the discussion in ***Tews*** addressing the standard of review broadly addresses relation back under § 802.09(3), and is not limited to "new defendant" or even "new party" cases. *See* ***Tews***, 330 Wis. 2d 389, ¶¶61-69. We see nothing in the discussion in ***Tews*** regarding the standard of review that would limit its application to new defendant or new party amendments, and therefore we conclude that it applies to this new claim case.

[9] After six months from the time of the filing, a party may amend a pleading only by written consent of the adverse party or by leave of court, which should be freely given when justice so requires. WIS. STAT. § 802.09(1). None of that occurred here, and Softscape does not cite this rule or argue on appeal that the circuit court should be affirmed based on a failure of the County to have sought leave to amend. In its written motion after verdicts, Softscape alleged that the County had filed the Third Amended Complaint more than one year after the deadline had passed for amended pleadings under the circuit court's scheduling order. However, Softscape did not argue that the court should disallow amendment because the County unduly delayed in filing, resulting in unfair prejudice to Softscape.

complaint because the original complaint did not allege misrepresentations of the type cognizable under WIS. STAT. § 100.18.

¶24 Moreover, even if Softscape were deemed to have objected on grounds of untimely amendment, such a contention would have been implicitly rejected by the court, because the court allowed the claim to go to the jury and treated the issue as one solely involving the question of whether the County would be entitled to its attorneys' fees if it prevailed on the WIS. STAT. § 100.18 claim at trial. The court did not make reference to undue delay in disallowing the jury's verdict on the § 100.18 claim to stand. Thus, the only question the court reserved on this topic for post-trial motions was whether, assuming no unfair prejudice to Softscape through the filing of the Third Amended Complaint, it "related back" to a prior complaint filed within the limitations period as a matter of law.[10] As discussed above, the circuit court implicitly made the assumption that amendment was not unfairly prejudicial to Softscape.

DISCUSSION OF RELATION BACK

¶25 As relevant to a "new claim" relation-back issue, as opposed to amendment to include a "new plaintiff" or "new defendant," WIS. STAT. § 802.09(3) provides, "If the claim asserted in the amended pleading *arose out of the transaction, occurrence, or event set forth or attempted to be set forth* in the original pleading, the amendment relates back to the date of the filing of the original pleading." (Emphasis added.) Our supreme court has summarized the

[10] We assume without deciding that Softscape did not waive the statute of limitations defense, as the County contends. Because we conclude that the Third Amended Complaint did relate back to the original complaint, we need not resolve the waiver issue.

allegations that must be contained in the timely filed pleading, to provide fair notice for the filing of the later pleading, as being "facts out of which the claim arises." ***Korkow v. General Cas. Co. of Wis.***, 117 Wis. 2d 187, 199, 344 N.W.2d 108 (1984).

¶26 The approach is described in the following passage from a treatise, addressing the analogous federal rule and quoted by this court:

> Rule 15(c) is based on the notion that once litigation *involving particular conduct or a given transaction or occurrence* has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims *that arise out of the same conduct, transaction, or occurrence* as set forth in the original pleading.
>
> ....
>
> [I]f the alteration of the original statement is so substantial that it cannot be said that defendant was given adequate notice of the conduct, transaction or occurrence that forms the basis of the claim or defense, then the amendment will not relate back and will be time barred if the limitations period has expired.

Biggart v. Barstad, 182 Wis. 2d 421, 429-30, 513 N.W.2d 681 (Ct. App. 1994) (emphasis added) (quoting 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1496 at 64, § 1497 at 76-79 (2d ed. 1990)); *see also* 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1497 at 97 (3d ed. 2010) ("the search under Rule 15(c) is for a common core of operative facts in the two pleadings").

¶27 The court explained in ***Korkow*** that the relation-back statute is a "fair notice" provision, which helps fulfill the purpose of statutes of limitation:

> The purpose of statutes of limitations is to ensure prompt litigation of claims and to protect defendants from fraudulent or stale claims brought after memories have

> faded or evidence has been lost. This purpose is accomplished by requiring that parties be given formal and seasonable notice that a claim is being asserted against them. If a party is given fair notice within the statutory time limit *of the facts out of which the claim arises*, ... it is not deprived of any protections the statute of limitations was designed to afford.... The purposes of the statute of limitations are not offended [in such a case].

Korkow, 117 Wis. 2d at 198-99 (emphasis added; citations omitted).[11]

¶28 In considering the sufficiency of notice in this context, courts are to bear in mind Wisconsin's notice pleading rule, which requires plaintiffs to allege only those facts which, if proven true, show entitlement to relief. *See* ***Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis.***, 2005 WI App 217, ¶52 n.10, 287 Wis. 2d 560, 706 N.W.2d 667; *see also* WIS. STAT. §§ 802.02(1)(a), 802.02(6). As the court explained in ***Korkow***, "the rules governing the relation back of amended pleadings must be made in light of the underlying aims and philosophy of Wisconsin's liberal civil procedure rules," patterned after the federal rules of civil procedure. ***Korkow***, 117 Wis. 2d at 192-93. Under this "functional approach to pleading," courts are to avoid rulings that have the effect of treating pleading as a "'game of skill in which one misstep by counsel may be decisive of the outcome.'" ***Id.*** (quoting ***Canadian Pacific Ltd. v. Omark-Prentice Hydraulics, Inc.***, 86 Wis. 2d 369, 373, 272 N.W.2d 407 (Ct. App. 1978)), quoting in turn ***Conley v. Gibson***, 355 U.S. 41, 48 (1957)).

¶29 We recently cited notice as the touchstone in a "new plaintiffs" relation-back case. ***Barnes v. WISCO Hotel Group***, 2009 WI App 72, ¶13, 318

[11] The federal courts, in interpreting the analogous FED. R. CIV. P. 15(c), also "recognize this emphasis on notice" in "relation back" analysis. ***Biggart v. Barstad***, 182 Wis. 2d 421, 430, 513 N.W.2d 681 (Ct. App. 1994).

Wis. 2d 537, 767 N.W.2d 352 (circuit court properly determined that amended complaint in multiple-victim case did not satisfy the relation-back statute when the original complaint failed to provide defendant with notice that particular potential plaintiffs would be making claims against defendant based on same general incident set forth in original complaint). In that case, although the two victims made the same legal claims against the same defendant arising out of the same general incident, the defendant lacked "sufficient notice as to the specific factual occurrences with respect to the additional victims *or* any notice that these victims would even be making a claim for their injuries." ***Id.***, ¶15.

¶30 Turning to the nature of notice, notice that is merely constructive, such as that arising from an employer's vicarious liability, will "rarely be sufficient to identify an underlying transaction for the purposes of investigation and defense." ***Dakin v. Marciniak***, 2005 WI App 67, ¶11, 280 Wis. 2d 491, 695 N.W.2d 867 (amending complaint to add new plaintiff did not give defendant "adequate notice that it would have to investigate and defend against her claims.").

¶31 In contrast, actual and sufficient notice for relation back has been found for an insurance carrier regarding negligent acts of one of its insureds, not named in the timely complaint, when the complaint alleged injuries arising from a vehicle it insured under the same policy. ***Biggart***, 182 Wis. 2d at 433-34. Likewise, notice was sufficient when an insurance carrier was presented with a new claim by a different plaintiff involving the same tavern, same fire, and same insurance policy as in the original claim. ***Korkow***, 117 Wis. 2d at 198-99. As we observed in ***Dakin***, "In both ***Biggart*** and ***Korkow***, defendant insurers had *actual knowledge of the underlying transaction out of which their potential liability arose* and that knowledge was held to be sufficient notice that potential liability might

extend to other claims arising out of the known transaction." ***Dakin***, 280 Wis. 2d 491, ¶9 (emphasis added).

¶32 Applying the terms of WIS. STAT. § 802.09(3), as illuminated by the authority summarized above, we conclude that the County's original complaint provided adequate notice to Softscape of allegations regarding the transaction, occurrence, or event out of which a WIS. STAT. § 100.18 claim could arise, namely, significant disagreements with Softscape about Softscape's obligations under the specified agreement.[12] From these allegations of significant disagreements a claim could readily arise that the alleged disagreements resulted from misleading statements by Softscape that induced the County to enter into the agreement. The terms "transaction," "occurrence," and "event" would each apply to the course of dealing between the parties that resulted in the agreement. Thus, the Third Amended Complaint merely added a new legal theory that "arose out of" factual claims made in the original complaint.

¶33 This conclusion is supported by the underlying aims and philosophy of liberalized notice pleading. The original complaint placed Softscape on notice of the identities of the parties and the nature of the dispute. The original complaint described the gravamen of the complaint as being Softscape's systematic failure, through alleged use of the "Scope documents," to live up to the terms of the agreement. The agreement was described as one under which Softscape was to provide professional services sufficient to operate a "comprehensive, state-of-the-

[12] We compare the Third Amended Complaint only to the original complaint for relation-back analysis. Both the First Amended Complaint and the Second Amended Complaint were filed more than three years after the December 2003 inducement to enter into the agreement that is at issue in the WIS. STAT. § 100.18 claim.

art" information system, with specific capabilities, and convert data as necessary to accomplish this, all for a flat fee. The core allegation was that Softscape, in agreeing to undertake this professional services project, had promised to provide software that it now refused to provide under the billing arrangement agreed to, and that it was avoiding its obligations by producing "Scope documents" in an attempt to redefine what it had promised to do. As in such cases as ***Biggart*** and ***Korkow***, Softscape was aware of the underlying transaction, occurrence, or event at issue.

¶34 Softscape contends that the original complaint alleged only a breach of contract, which is "not a similar event or occurrence" to untrue or deceptive statements. At most, Softscape argues, the original complaint alleges only a "misunderstanding as to the terms of the contract."

¶35 It is true that the allegations in the original complaint did not explicitly attribute to Softscape untrue, deceptive, or misleading representations with intent to sell or to induce the County to enter into the agreement. This is the "missing element" that caused the circuit court to conclude that the original complaint did not place Softscape on notice of the potential for a WIS. STAT. § 100.18 claim.

¶36 However, WIS. STAT. § 802.09(3) requires only a description of the transaction, occurrence, or event *out of which the claim at issue could arise.* The County's WIS. STAT. § 100.18 claim was one that could arise out of "misunderstandings," to use Softscape's characterization of what the original complaint alleged. Both the original complaint and Softscape's counterclaim filed in response (alleging that the County had added "purported obligations that were not previously contemplated by the parties and not consistent with the original

agreement") suggested that the County and Softscape had significantly different views of what the obligations of the parties were under the agreement, and this immediately raised questions about what Softscape had represented to the County in order to win the contract. As a conceptual matter, the Third Amended Complaint merely filled in a blank regarding alleged intentions of Softscape.

¶37 We find particularly striking the allegation in the original complaint that, after the agreement was signed, Softscape produced "Scope documents" that purported to establish hourly fees for services that the County asserted the parties had agreed to treat as being covered by a flat fee. An obvious claim that could arise from this allegation—depending on the results of informal and formal discovery by the County after filing the original complaint—was that Softscape misled the County about how Softscape intended to bill the County, in order to induce the County to enter into a flat fee agreement.

¶38 We observe that the County took a risk in waiting until December 2007 to allege misrepresentations, and then waiting until December 2008 to allege a violation of WIS. STAT. § 100.18. It risked that the court might not grant it *leave to amend* with either of these late-filed complaints. As discussed above, in that case it would have been within the discretion of the trial court to weigh factors that included potential prejudice to Softscape to determine whether amendment was fair. However, Softscape's approach was to litigate the § 100.18 claim through trial, objecting only that the Third Amended Complaint did not relate back to the original complaint. When viewed as a relation-back issue only, the original complaint provided sufficient notice.

¶39 This case echoes an older United States Supreme Court case, in which the plaintiff amended her complaint, after the statute of limitations had

lapsed, to add a legal theory not stated in the original complaint and relying on specific facts not originally asserted, but involving a common core of operative facts. ***Tiller v. Atlantic Coast Line R. Co***., 323 U.S. 574, 581 (1945) (adding a claim under the Federal Boiler Inspection Act to the original claim under the Federal Employers' Liability Act).[13] This was allowed because there was a single "occurrence," namely, the death of the petitioner's husband in an allegedly unsafe workplace under circumstances described in the original complaint. ***Id.*** In the same way in this case, Softscape had notice from the beginning that the County was trying to enforce a claim against it because of the course of dealing and performance of the parties involving the agreement. *See also* ***Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.***, 690 F.2d 1240, 1246, 1259 n.29 (9th Cir. 1982) (amended complaint adding claim that defendant filed administrative rate protests for fraudulent purposes related back to the original complaint, which asserted that defendant filed rate protests for a different purpose, to restrict competition; new fraud theory, based on the same operative facts regarding the rate protests, provided adequate notice to defendant to support relation back).

¶40 For these reasons, a concern we expressed in ***Barnes*** is not present here. The concern was that too readily allowing relation-back would "open the door to potentially unlimited amendments," effectively nullifying statutes of limitations. ***Barnes***, 318 Wis. 2d 537, ¶12 (expressing fear that victims in multiple-victim cases could essentially ignore applicable statutes of limitations, so long as one victim filed a timely complaint). Here, the original complaint went beyond simply referring to a relationship between the parties in a general or vague

[13] As noted above in footnote 7, Wisconsin courts treat federal interpretations of FED. R. CIV. P. 15(c) as persuasive.

manner, potentially leaving Softscape in the dark about the potential for a claim of fraudulent advertising. The original complaint notified Softscape of conduct involving disputes over Softscape's obligations under the agreement. A claim that could (and did) arise from this conduct was in the nature of a "bait and switch" or "Trojan horse"—in which a seller intentionally draws in the buyer with a false or misleading promise of available benefits, and then, after the buyer commits to the deal, makes available to the buyer less than what was promised. The "bait" portion of a "bait and switch" would have occurred in or about December 2003, when agreement was reached. Pertinent facts regarding the agreement and the parties were contained in the County's original complaint and its attachments.

REMAINING ISSUES

Waiver

¶41 As referenced above, because of our resolution of the relation-back issue, we need not address the County's additional argument that Softscape waived its statute of limitations defense by, for example, failing to request a jury instruction that would have established the timing of the misrepresentations found by the jury under the WIS. STAT. § 100.18 claim. Assuming without deciding that there was no waiver, relation-back brings the Third Amended Complaint within the statute of limitations period as discussed above, and therefore we need not reach this issue.

Taxable Costs on Softscape's Counterclaim

¶42 The County raises an issue on appeal involving the finding by the jury, on Softscape's counterclaim, that the County breached the agreement with Softscape, resulting in damages to Softscape of $36,000. The circuit court entered

a judgment on this counterclaim in the amount of $36,000, plus costs and disbursements of $15,107.47. The County's objection is that the costs arose from both Softscape's pursuit of its counterclaim and also its defense against the County's claims, without differentiation. The County argues that it was "unreasonable" of the court "not to apply discretion" to the award of costs and disbursements, which is governed by WIS. STAT. § 814.035.[14] The County asserts that the court failed to take into account that pursuit of the case against it was a simple matter, in that the only breaches alleged against it involved its stopping payment on the agreement, which the County admitted, and its failure to come to agreement on a proposed "Scope document," which the County suggests was not a contested issue.

¶43 However, Softscape is persuasive in contending that, under the discretionary standard reflected in WIS. STAT. § 814.035, the court did not erroneously exercise its discretion in allowing taxable costs and disbursements to Softscape. The two sets of costs incurred by Softscape in attempting to show both that the County breached the agreement and that Softscape did not breach the agreement appear to have overlapped to a large degree. The court appears to have considered the pertinent facts, applied the correct law, and reached a reasonable

[14] WISCONSIN STAT. § 814.035 provides in relevant part:

> **Costs upon counterclaims and cross complaints.** **(1)** Except as otherwise provided in this section, costs shall be allowed on counterclaims and cross complaints as if separate actions had been brought thereon.
>
> **(2)** When the causes of action stated in the complaint and counterclaim and cross complaint arose out of the same transaction or occurrence, costs in favor of the successful party upon the complaint and counterclaim and cross complaint so arising shall be in the discretion of the court.

determination on this issue. As the circuit court had occasion to observe during trial, both the history of communications between the parties and this extended litigation became a complex "disaster," which undermines the County's assertion that Softscape's costs are a simple issue on which the court erroneously exercised its discretion. Therefore, we affirm the circuit court on this issue.

Statutory Offer of Settlement

¶44 On cross-appeal, Softscape makes an argument related to the fact that the County filed an offer of settlement approximately one year before trial, which Softscape argues the circuit court should have found to be unenforceable. However, as set forth in the order of this court dated December 22, 2009, this cross-appeal is untimely, except as to the determination of costs and fees, and therefore does not include this issue.

CONCLUSION

¶45 We review de novo the legal determination of the circuit court regarding relation back, and conclude that the claim in the Third Amended Complaint "arose out of the transaction, occurrence, or event" set forth in the original complaint, and therefore related back for purposes of the statute of limitations. The court did not erroneously exercise its discretion in allowing taxable costs and disbursements to Softscape. The only arguments raised on cross-appeal regarding the offer of settlement are untimely.

¶46 Accordingly, we affirm the award in the Amended Judgment of costs and disbursements to Softscape, reverse the Supplemental Order Regarding Motions After Verdict to the extent that it orders that the Third Amended Complaint does not relate back to the original complaint and that the County may

not recover actual attorneys' fees and costs under WIS. STAT. § 100.18, and remand for proceedings consistent with this opinion.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded for proceedings consistent with this opinion.

Not recommended for publication in the official reports.