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DISTRICT IV

July 31, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP1927

Randal A. Jones v. William S. Guldán and Loreen Guldán
(L.C. #2015CV103)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Randal Jones appeals the circuit court's order granting summary judgment in favor of William and Loreen Guldán in his action to recover damages for converted dairy heifers. Jones alleged that the Guldáns stole, sold, or disposed of at least 49 heifers that he had left in their care between 2003 and 2009. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ Because Jones's complaint is barred by the statute of limitations, we affirm.

On March 9, 2015, Jones filed a civil action alleging that he had hired the Guldans to provide care for dairy heifers between 2003 and 2009. Under their arrangement, Jones paid the Guldans to feed and care for young heifers, then reclaimed them when they were mature and ready to be used for dairy purposes. According to the complaint, Jones discovered that cows were missing in 2007 and, suspecting theft, alerted authorities. All told, Jones alleges that the Guldans stole and sold at least 49 animals valued at \$92,610.

The Guldans filed a motion for summary judgment, arguing that Jones's complaint was barred by the 6-year statute of limitations for actions involving the wrongful taking of personal property. They pointed to deposition testimony from Jones stating that he stopped delivering heifers to the Guldans in 2007 due to his belief that the Guldans were stealing his heifers. Jones further testified that he reported the theft to the sheriff but that there was no further action he could take. The Guldans argued that the uncontroverted evidence established that the statute of limitations on any possible claim expired in 2013, and therefore Jones's complaint was untimely.

During a hearing on the motion for summary judgment, the circuit court granted the motion in part, concluding that the statute of limitations had expired for any heifers converted prior to March 9, 2009. However, the court denied summary judgment as to any heifers delivered by Jones after March 30, 2007. The court's reasoning was that claims for any heifers already in the Guldans' possession as of March 30, 2007, had accrued in 2007, but a jury could

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

consider conversion claims that were based on later deliveries of heifers. After further discovery, the Guldans filed a second motion for summary judgment, arguing that the uncontroverted evidence established that Jones had not delivered any heifers to them after March 30, 2007. The court granted this second motion, and dismissed Jones's complaint with prejudice. Jones appeals.

Jones first appears to suggest that his action is governed by the statute of limitations applicable to an action for injury to property, WIS. STAT. § 893.52. To the extent Jones is arguing that the court committed legal error in relying on WIS. STAT. § 893.51, which applies to actions for wrongful taking of personal property, we disagree. Count 1 of Jones's complaint is entitled "Tort; Conversion, Wrongful taking of personal property," and he alleges that the Guldans "stole, sold, and or disposed of" the heifers. This is plainly a claim based on a wrongful taking, so § 893.51 applies. In his briefing to this court, Jones suggests that some heifers may have died in the Guldans' care, which arguably would give rise to a claim for injury to property that would be governed by § 893.52. However, that was not the basis on which he filed this lawsuit, nor is it an argument that he made below. We therefore decline to consider it. *See State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 ("Arguments raised for the first time on appeal are generally deemed forfeited,'" (quoted source omitted)).

Next, Jones argues that the circuit court's first summary judgment order misapplied the statute of limitations to the facts. In that first order, the court determined that Jones was barred from recovering for cattle delivered to the Guldans before March 30, 2007. Jones argues that this ruling was in error, and that the court should have allowed him to recover in full based on evidence that Jones continued to pay the Guldans to care for his heifers until October 2009. He

contends that the Guldans' actions are akin to continuing negligence and that, because Jones brought his action within 6 years of October 2009, his entire action is timely. *See Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 21, 469 N.W.2d 595 (1991) (describing the continuing negligence doctrine).²

The construction of a statute presents a question of law, which we review de novo. *State v. Setagord*, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997). The applicable statute of limitations expressly provides: "The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins." WIS. STAT. § 893.51. Here, it seems clear to us that Jones's cause of action for conversion of any heifers in the Guldans' possession as of March 30, 2007, accrued in 2007. Specifically, in his deposition, Jones stated that he stopped delivering and picking up heifers in 2007 because that was when "[t]he Guldans decided to take the cattle and do whatever they wanted to do with them." Jones confirmed this version of events during the hearing on the Guldans' first motion for summary judgment, when he told the court that he stopped bringing heifers to the Guldans in 2007 because he suspected theft, and that no heifers came back to him after that point. Even his brief to this court underscores the conclusion that his cause of action accrued in 2007, as he states: "In 2007 Randal A. Jones was not receiving calls to come get heifers and sought redress and assistance from the Marathon County Sheriff."

² Jones also cites *Banc One Building Management Corp. v. W.R. Grace Co.-Conn.*, 210 Wis. 2d 62, 72-73, 565 N.W.2d 154 (Ct. App. 1997), for the proposition that the Guldans' wrongful actions are a continuing harm to him and are therefore actionable. However, he is citing an allegation in the *Banc One* plaintiff's complaint that the court rejected when the court concluded that the plaintiff's earlier knowledge of the presence of asbestos meant that the plaintiff's claims were barred as a matter of law, even if the extent of its damages was not fully known. *See id.* at 73-76. As such, *Banc One* helps the Guldans more than it helps Jones.

Jones's reliance on the continuing negligence doctrine articulated in *Kolpin* is misplaced. In *Kolpin*, our supreme court was reconciling two lines of cases involving causes of action based on negligence. Under the first line of cases, "if a defendant engages in a continuum of separate negligent acts which cause the plaintiff damage, the cause of action is not complete until the last act of negligence occurs. Once the cause of action is complete, then the cause of action accrues." *Kolpin*, 162 Wis. 2d at 24. Under the second line of cases, "if a defendant engages in a negligent act (or a continuum of negligent acts) ... which causes the plaintiff damage, the cause of action is not complete until the plaintiff knows, objectively, the cause of the injury and the defendant's part in that cause. Once the cause of action is complete, then the cause of action accrues." *Id.*

There are three reasons why *Kolpin* does not help Jones. First, we understand Jones to be alleging the intentional tort of conversion and not a continuing act of negligence and, therefore, *Kolpin* is distinguishable. Second, *Kolpin* also involves a different statute of limitations, WIS. STAT. § 893.52, governing injury to property. *See id.* at 8 n.1. As explained above, this action is governed by WIS. STAT. § 893.51, governing a wrongful taking of personal property. Third, *Kolpin* involved a complex claim of negligence that was based on stray voltage that was harming dairy cows. The court concluded that there was insufficient evidence to establish that the plaintiffs objectively knew that the stray voltage was the cause of their injury more than 6 years before filing suit. However, the court distinguished the outcome in *Kolpin* from "the typical tort claim, *e.g.*, an automobile accident case, where the cause and effect of a plaintiff's injuries are readily apparent." *See id.* at 26-27. In contrast, Jones is alleging a more typical tort, and it is beyond dispute that the cause of Jones's injury was readily apparent when the Guldans stopped returning his cows in 2007 and Jones reported it to law enforcement. Because Jones has presented no legal authority to support his argument that the statute of limitations for the

wrongful taking of heifers should be applied the same way as the statute of limitations for continuing negligence, we reject his argument.

Jones also argues that the circuit court erred in its second summary judgment order granting the Guldans summary judgment on all claims when Jones was unable to present evidence that Jones delivered any cattle to the Guldans after March 2007. We understand Jones to be making two arguments here.

First, Jones argues that this second order is inconsistent with the court's first order partly denying summary judgment. Specifically, he argues that the court's first order said that the 2009 checks presented material issues of fact for trial. Jones does not support this assertion with any citation to the record, and our own review of the record indicates that Jones has incorrectly characterized the circuit court's views. The court expressly disagreed with Jones's assertion that the checks, standing alone, established that any conversion occurred within the 6-year statute of limitations. Instead, the court agreed with the Guldans that the canceled checks might be a basis for a breach of contract action, but explained that this was a different legal theory than the theory set forth in Jones's complaint.³

Jones's second argument is that the court should have found a triable issue based on the evidence that the Guldans accepted payment for the feeding and care of his cows up until October 2009. We review an order granting summary judgment de novo. *Chapman v. B.C. Ziegler & Co.*, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. If the movant makes

³ Jones's complaint does set forth a claim for unjust enrichment. However, Jones does not make any argument about this claim on appeal. Issues raised in the circuit court but not raised on appeal are deemed abandoned. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

out a prima facie case for summary judgment, the nonmoving party “must set forth specific evidentiary facts that are admissible in evidence showing that there is a genuine issue for trial.” See *Buckett v. Jante*, 2009 WI App 55, ¶29, 316 Wis. 2d 804, 767 N.W.2d 376. In reviewing a summary judgment order, “we search the Record to see if the evidentiary material that the parties set out in support or in opposition to summary judgment supports reasonable inferences that require the ... denial of summary judgment, giving every reasonable inference to the party opposing summary judgment.” *Chapman*, 351 Wis. 2d 123, ¶2.

Jones does not explain how canceled 2009 checks payable to the Guldans help him create a triable issue as to whether the Guldans converted any heifers within the 6-year limitations period. Moreover, on this record, we do not believe that any inferences helpful to Jones can reasonably be drawn from these checks. This is because Jones admitted to the court that he has “no idea how many cattle were there for that period of time.” The court responded that this was a big problem for Jones, and Jones agreed. The court explained that, under its order for partial summary judgment, Jones would have the burden of proving that an actionable conversion occurred within the 6-year statute of limitations. Jones is trying to satisfy that burden by asking us to speculate that the payments he made in 2009 meant that the Guldans were still caring for at least some of his heifers and had not yet converted them. But speculation is insufficient to create a material issue of fact. See *Buckett*, 316 Wis. 2d 804, ¶29 (in opposing summary judgment, a party needs facts, and cannot rely upon allegation, speculation, or conjecture). Because Jones failed to present facts to show that the Guldans converted heifers within the 6-year limitations period, summary judgment was proper.

Finally, Jones calls our attention to a letter from the district attorney that he attached to his complaint. We cannot discern any argument by Jones relating to this letter and, in any event,

conclude that the letter has no bearing on the circuit court's decision to grant summary judgment based on the statute of limitations. To the extent that Jones may believe that he had to pursue criminal charges before filing a civil action, that is incorrect. Jones could have pursued civil claims against the Guldans as soon as his cause of action for conversion accrued in 2007. The fact that Jones waited more than 6 years to file his complaint means that these claims are barred as a matter of law.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals