

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2647

Cir. Ct. No. 2004CV1530

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

THOMAS P. JASIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL BEST & FRIEDRICH LLP,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
MARK R. GEMPELER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Thomas P. Jasin appeals from an order dismissing his legal malpractice action against Michael Best & Friedrich (MBF). The issue is whether the cause of action is time barred under the applicable statutes of limitation. Without addressing whether Wisconsin would adopt an exoneration or

two-track rule in determining when a criminal malpractice action accrues, we affirm the order of the circuit court based on the application of Pennsylvania law.

¶2 Jasin retained the services of Attorney Gaar W. Steiner, a partner at MBF, for legal representation at Jasin's 1992 trial of criminal charges in federal court in Pennsylvania. Jasin was found guilty of participating in a conspiracy to export and import missile components to and from South Africa in violation of federal arms prohibitions. Jasin was not sentenced until July 16, 1998. On January 23, 2001, Jasin filed for habeas corpus relief on the ground of ineffective assistance of counsel. His conviction was vacated on August 8, 2002. On June 25, 2004, Jasin filed this action with tort and contract malpractice claims alleging that despite his representations to Jasin, Steiner had not contacted or interviewed key witnesses for the criminal trial.¹

¶3 Early in the action, MBF moved to dismiss the action on the ground that it is barred by Pennsylvania's two- and four-year statutes of limitation.² The motion was withdrawn for the completion of discovery. Jasin moved for partial summary judgment declaring that the action is not time barred. MBF responded with a motion for summary judgment on the limitation defense. The circuit court concluded that the Pennsylvania statutes apply but that Wisconsin law defines

¹ Attorney Steiner died in October 2003. Jasin's action was first filed January 2, 2004, in the United States District Court for the Eastern District of Wisconsin. Although the parties agree that for limitation purposes the filing date relates back to January 2, 2004, we question whether WIS. STAT. § 893.15(3) (2005-06), which tolls a Wisconsin limitation period on a Wisconsin cause of action, applies.

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

² See 42 Pa. CONS. STAT. ANN. § 5524 (two-year limitation period on tort claim); 42 Pa. CONS. STAT. ANN. § 5525 (four-year limitation period on oral contract claim).

whether or not the limitation periods were tolled. The court rejected Jasin’s argument that he could not file his legal malpractice claim until he was exonerated. It held that the statute of limitation began to run at the completion of Steiner’s legal services because Jasin then had reasonable knowledge of the probable existence of his claim. The court adopted the “two-track” approach which required Jasin to file his legal malpractice claim within the applicable period of limitation commencing with the completion of legal services and then request a stay of the claims until postconviction relief has been obtained.³ The action was dismissed because the Pennsylvania periods of limitation had long expired before Jasin filed his action in Wisconsin.

¶4 We start with the premise that Jasin’s legal malpractice claims are foreign causes of action under Wisconsin’s borrowing statute, WIS. STAT. § 893.07(1).⁴ Jasin concedes that the circuit court correctly found that his tort claim was a foreign cause of action. Both parties suggest the circuit court did not address whether the contract claim is also a foreign cause of action. We disagree.

¶5 The circuit court recognized that Jasin’s complaint states a mix of tort and contract claims. It cited as controlling *Abraham v. General Casualty Co.*, 217 Wis. 2d 294, 300, 576 N.W.2d 46 (1998), a case addressing how WIS. STAT.

³ The circuit court observed that the determination of whether the statute of limitation in criminal legal malpractice cases commences under the exoneration rule or the “two-track” (discovery) rule is an issue of first impression in Wisconsin. It considered public policy and the need to balance fairness to both plaintiffs and defendants. To address that issue amicus curiae briefs have been filed by The Innocence Network and the Wisconsin Association of Criminal Defense Lawyers.

⁴ WISCONSIN STAT. § 893.07(1) provides: “If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies has expired, no action may be maintained in this state.”

§ 893.07 applies to a contract cause of action. It specifically found that the contract was performed in both Pennsylvania and Wisconsin but that the trial in Pennsylvania was ultimately the most significant event of the alleged malpractice. Thus, the court concluded that the contract claim was also a foreign cause of action. See *Abraham*, 217 Wis. 2d at 311 (“a claim sounding in contract is a ‘foreign cause of action’ when the final significant event giving rise to a suable claim occurs outside the state of Wisconsin”). We reject Jasin’s proposition that whether or not the contract claim is a foreign cause of action depends on the legal determination of whether the cause of action accrued when Steiner failed to properly prepare for trial and concealed that fact or when Jasin was exonerated.⁵ *Abraham* holds that the final significant event is controlling. *Id.* We agree that the conclusion of the trial, when Jasin was found guilty, was the final significant event giving rise to the malpractice claim and, since it occurred in Pennsylvania, the contract claim is a foreign cause of action.

¶6 Under the borrowing statute, WIS. STAT. § 893.07(1), the Pennsylvania statutes of limitation apply. We now come to the crux of this case—what determines when the statute of limitation begins to run. Citing *Scott v. First State Insurance Co.*, 155 Wis. 2d 608, 456 N.W.2d 152 (1990), the circuit court held that the defining moment is determined under Wisconsin law. On this point we diverge from the circuit court’s holding.⁶

⁵ Jasin claims that if the cause of action accrued when Steiner failed to properly prepare for trial and concealed that fact those events occurred in Wisconsin and the contract claim is not a foreign cause of action. He concedes that if the cause of action did not accrue until his conviction was overturned, that occurred in Pennsylvania and his contract claim is a foreign cause of action.

⁶ We may affirm a circuit court’s decision even if the lower court reached its result for different reasons. See *Lecander v. Billmeyer*, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992).

¶7 *Central Mutual Insurance Co. v. H.O., Inc.*, 63 Wis. 2d 54, 55-56, 216 N.W.2d 239 (1974), involved a claim for personal injury that occurred in North Carolina as a result of the explosion of a gas cylinder manufactured in Wisconsin. It was necessary to borrow the North Carolina statute of limitation which required the action to be brought within three years of accrual. *Id.* at 57-58. To determine when the action accrued, the court looked to North Carolina judicial decisions construing the applicable statute of limitation. *Id.* at 58-59. Applying North Carolina law, the court determined that the claim for personal injury was not barred by the North Carolina statute of limitation. *Id.* at 62.

¶8 *Central Mutual* controls here and requires that we apply Pennsylvania law to determine when the Pennsylvania statutes of limitation began to run on Jasin's malpractice claims. *Scott*, the case cited by the circuit court, does not apply. *Scott* determined that Wisconsin statutes tolling a statute of limitation for certain disabilities apply even to a foreign cause of action. *Scott*, 155 Wis. 2d at 615-16. *Wenke v. Gehl Co.*, 2004 WI 103, ¶66, 274 Wis. 2d 220, 682 N.W.2d 405, explains that the holding in *Scott* has no application in determining the applicable limitation period because "[t]olling provisions operate to stall the running of an applicable limitation period. They are not properly understood as limitation periods themselves." *Wenke* further explains that a tolling provision is applied only after borrowing the applicable statute of limitation. *Wenke*, 274 Wis. 2d 220, ¶66. To do otherwise "puts the cart before the horse."⁷ *Id.* Recognizing

⁷ For this reason Jasin's argument that tolling and accrual law are two sides of the same coin is misplaced. As MBF writes, the statute of limitation cannot be tolled unless the cause of action has already accrued and *Scott v. First State Insurance Co.*, 155 Wis. 2d 608, 619, 456 N.W.2d 152 (1990), implicitly recognizes that a tolling law can only extend the limitation period for a viable cause of action.

that the borrowing statute contemplates that foreign jurisdictions will follow limitation periods that vary from those recognized in Wisconsin, the *Wenke* court concluded that WIS. STAT. § 893.07 “simply instructs that Wisconsin courts adhere to the policy reflected in the shortest applicable limitations period,” whether it be from Wisconsin or the borrowing state. *Wenke*, 274 Wis. 2d 220, ¶67. The borrowing statute includes the law of the borrowing state as to when the cause of action accrues or the statute of limitation begins to run.

¶9 We reject Jasin’s argument that *Central Mutual* is no longer good law because the borrowing statute has been amended. *Wenke*, 274 Wis. 2d 220, ¶40, cited *Central Mutual* as a guidepost on the interpretation of the present borrowing statute. *Central Mutual*’s reliance on the accrual law of the borrowing statute remains consistent with the purpose of the borrowing statute to adopt the shortest possible limitation period for actions litigated in this state and “to eliminate difficult choice of law questions, thereby promoting certainty and reducing forum shopping.” *Wenke*, 274 Wis. 2d 220, ¶¶42, 44. We are bound by *Central Mutual* in the absence of it being expressly overruled. See *Alswager v. Roundy’s Inc.*, 2005 WI App 3, ¶13, 278 Wis. 2d 598, 692 N.W.2d 333.

¶10 In Pennsylvania, periods of limitation in a criminal malpractice action begin to run at the time the attorney-client relationship is terminated. *Bailey v. Tucker*, 621 A.2d 108, 116 (1993). Although Pennsylvania makes actual innocence an element of proof for recovery, it does not make exoneration a prerequisite to the accrual of the malpractice action and the limitation period may expire before the defendant has obtained postconviction relief. *Id.* at 115 n.12, 13. Jasin’s claims are time-barred under Pennsylvania law. Because we borrow

Pennsylvania law regarding limitations, we need not address whether Wisconsin would adopt the exoneration or two-track rule of accrual.⁸

¶11 Jasin argues that MBF is equitably estopped from asserting a statute-of-limitation defense because Steiner fraudulently concealed his malpractice by repeated assurances that he had spoken to the key defense witnesses. The circuit court's decision does not address this issue. Jasin should have brought the omission of the issue to the attention of the circuit court and the failure to do so constitutes a waiver of the right to have such an issue considered on appeal. *See State v. Gilles*, 173 Wis. 2d 101, 115, 496 N.W.2d 133 (Ct. App. 1992) (we properly decline to review an issue where an appellant has failed to give the circuit court fair notice that he or she objects to a particular issue); *Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (it is the party's responsibility to direct the family court's attention to issues that are being submitted for determination). This is particularly true here because the doctrine of equitable estoppel to preclude a statute of limitation defense requires consideration of six factors. *See State ex rel. Susedik v. Knutson*, 52 Wis. 2d 593, 596-98, 191 N.W.2d 23 (1971). We are without findings of fact and conclusions of law on the

⁸ As previously stated, Jasin's attempt to equate accrual determinations with tolling considerations is misplaced.

six factors.⁹ We do not address the issue of whether MBF should be estopped from asserting a statute of limitation defense.

¶12 Jasin’s appellate counsel has filed a false certification that the appellant’s appendix meets the requirements in WIS. STAT. RULE 809.19(2)(a). The appendix does not include the written decision of the circuit court, a document essential to this court’s review. *See State v. Bons*, 2007 WI App 124, ¶23, 301 Wis. 2d 227, 731 N.W.2d 376 (it is essential that the appendix include the record items truly relevant and essential to the understanding the issues raised, particularly the circuit court’s ruling). Counsel is sanctioned \$150 for providing a false appendix certification and providing a deficient appendix. *See id.*, ¶25. Counsel shall pay \$150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Order affirmed.

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

⁹ Even if we deem the circuit court to have implicitly rejected Jasin’s estoppel claim, we would look to the circuit court’s finding that upon the termination of Steiner’s services, Jasin had reasonable knowledge of the probable existence of his claim. We also note that in 1999 Jasin’s pro se claims for postconviction relief included the allegation that, except for one person, Steiner had not interviewed anyone. We would affirm the circuit court’s rejection of Jasin’s estoppel claim because the inducement for delay ceased to operate long before the filing of his malpractice action and Jasin’s delay thereafter was unreasonable. *See State ex rel. Susedik v. Knutson*, 52 Wis. 2d 593, 597, 191 N.W.2d 23 (1971) (“After the inducement for delay has ceased to operate the aggrieved party may not unreasonably delay.”).

