STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0525

Tioga Apartments LLC, et al.,
Appellants,

vs.

Cole Group Architects LLC,
Respondent,

Larson Engineering, Inc.,
Respondent.

Filed December 16, 2024
Affirmed
Jesson, Judge[*]

Stearns County District Court
File No. 73-CV-23-6205

Brandon R. Underwood, Devin T. Driscoll, Sarah Theisen, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for appellants)

Christopher L. Goodman, Thompson, Coe, Cousins & Irons, LLP, St. Paul, Minnesota (for respondent Cole Group Architects, LLC)

Steven J. Sheridan, Matthew P. Lawlyes, Fisher Bren & Sheridan, LLP, Minneapolis, Minnesota (for respondent Larson Engineering, Inc.)

Considered and decided by Bjorkman, Presiding Judge; Wheelock, Judge; and Jesson, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

JESSON, Judge

Over two years after appellants Tioga Apartments LLC and Roers Investments LLC learned of possible structural defects in their recently built North Dakota apartment complex, they sued the architectural and engineering firms, respondents Cole Group Architects LLC and Larson Engineering, Inc., in Minnesota. The district court granted summary judgment to Cole Group and Larson, holding in part that the claims were time-barred. Tioga and Roers challenge the district court's grant of summary judgment, asserting that the district court failed to apply North Dakota's equitable tolling doctrine to their negligence claims and, therefore, erred in concluding that these claims were time-barred. Because we conclude that these negligence claims are time-barred under both North Dakota and Minnesota law, we affirm.

FACTS

In August 2012, Roers retained HDC Development Companies LLC to serve as the general contractor for the construction of an apartment complex in Tioga, North Dakota. That same month, Roers hired Cole Group to provide architectural and engineering services for the project, including the development of plans for the project's footings and foundation. Cole Group, in turn, entered into an agreement with Larson under which Larson agreed to provide structural engineering services for the project.

In April 2013, construction on the project was completed after which Tioga became the owner of the apartment complex. Almost seven years later, Tioga claimed to notice cracks along the walls, ceilings, and floors of the apartment complex. Tioga retained Guy

Engineering Corporation to evaluate the condition of the property and to make general recommendations for repairs. On February 12, 2021, Guy Engineering issued a report on the causes of damage to the property, concluding that the foundation of the structure had settled and shifted, which resulted in dislocation of the exterior walls.

To seek a remedy for these alleged structural defects, Tioga initiated arbitration proceedings against HDC, Cole Group, and Larson in January 2023 pursuant to the arbitration and joinder provisions found in the contract between Roers and HDC. The arbitration provision requires that any dispute arising under the contract be subject to arbitration. In turn, the contract's joinder provision allows for the joinder of certain entities to the arbitration so long as those entities consent to the joinder in writing. Cole Group and Larson are not parties to the contract between Roers and HDC, and thus, could only be brought into arbitration if they consented to do so. On February 8 and 9, 2023, Cole Group and Larson objected in writing to their joinder, asserting a lack of jurisdiction.

Over two months later, on April 18, 2023, Tioga and Roers filed an amended demand for arbitration that dropped Cole Group and Larson from the proceeding. On that same day, Tioga and Roers sued Cole Group and Larson in Minnesota district court because all parties are from Minnesota. Tioga and Roers asserted claims against Cole Group and Larson for breach of contract, breach of implied warranty of workmanlike performance, negligence, and unjust enrichment. By the time Tioga and Roers commenced this suit, over two years had passed since Guy Engineering had informed them of the damage to the apartment complex and its possible causes.

Cole Group and Larson moved for summary judgment on all of Tioga's and Roers' claims, arguing, in part, that these claims were time-barred under both Minnesota and North Dakota law. In response, Tioga and Roers argued that North Dakota law applied to their claims, and that under North Dakota law, their claims were both timely and otherwise able to survive summary judgment.

The district court granted Cole Group and Larson's motions in their entirety, concluding, in part, that Tioga's and Roers' claims were time-barred by the applicable two-year statute of limitations under both Minnesota and North Dakota law. This appeal follows.

DECISION

On appeal, Tioga and Roers specifically challenge the district court's dismissal of their negligence claims. The parties agree that Tioga and Roers failed to commence an action against Cole Group and Larson within the applicable two-year statute of limitations period under both Minnesota and North Dakota law. *See* Minn. Stat. § 541.051, subd. 1(a) (2022) (imposing a two-year statute of limitations period on actions brought to recover damages arising out of the defective and unsafe condition of an improvement to real property); N.D. Cent. Code § 28-01-18(3) (2022) (imposing a two-year statute of limitations period on actions to recover damages arising out of professional malpractice). Moreover, Tioga and Roers concede that their negligence claims cannot survive under Minnesota law because they cannot meet Minnesota's standard for equitable tolling, which would allow a court to toll the limitations period and thus consider the merits of a claim

that would otherwise be time-barred. *See Ochs v. Streater, Inc.*, 568 N.W.2d 858, 860 (Minn. App. 1997).

Consequently, the issue before us is narrow: whether Tioga's and Roers' negligence claims are time-barred under North Dakota law. Tioga and Roers contend that the claims are not time-barred because North Dakota courts would adopt and apply the doctrine of equitable tolling to the circumstances of this case, which the district court failed to recognize. This choice-of-law issue presents a question of law, which we review de novo. *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. App. 2004) (quotation omitted).

A choice-of-law issue exists when "a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify . . . application of the law of more than one jurisdiction." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981); *see also Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994). When analyzing a choice-of-law question, we first determine whether an "actual conflict" exists, such that the outcome of the case will be different depending on which state's law applies. *Jepson*, 513 N.W.2d at 469. If there is no conflict, there is no choice-of-law issue. *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521-22 (Minn. 1997).

Accordingly, we begin our analysis by considering whether an actual conflict exists between Minnesota and North Dakota equitable tolling doctrines. On this point, Tioga and Roers contend that an actual conflict exists between these states' equitable tolling doctrine because North Dakota has consistently referred to a "looser" understanding of the doctrine.

We turn first to the equitable tolling doctrine adopted by Minnesota. *See Jones v. Consol. Freightways Corp.*, 364 N.W.2d 426, 429 (Minn. App. 1985) (applying

equitable tolling). Under this doctrine, courts consider both whether the defendant would be prejudiced by tolling and the conduct of the plaintiff in determining when to apply this doctrine. *Ochs*, 568 N.W.2d at 860 (citation omitted). Generally, "innocent inadvertence" is *not* sufficient to toll a limitations period, but circumstances beyond the control of the plaintiff may provide a basis for equitable tolling. *Jones*, 364 N.W.2d at 429.

On the other hand, when discussing the equitable tolling doctrine, the North Dakota Supreme Court has described it as operating "to protect the claim of a plaintiff who has several legal remedies and pursues one of those remedies reasonably and in good faith, thereby tolling the limitation for the other remedies." *Superior, Inc. v. Behlen Mfg. Co.*, 738 N.W.2d 19, 28 (N.D. 2007). In these discussions, the North Dakota Supreme Court has consistently cited to the California equitable tolling standard, concluding that for this doctrine to apply, the plaintiff must establish: "(1) timely notice, (2) lack of prejudice to the defendant, and (3) reasonable and good-faith conduct on the part of the plaintiff." *Reid v. Cuprum SA, de C.U.*, 611 N.W.2d 187, 189 (N.D. 2000) (citing *Addison v. State*, 578 P.2d 941, 943-44 (Cal. 1978)); *see Braaten v. Deer & Co.*, 569 N.W.2d 563, 566 (N.D. 1997).

But even if we were to accept Tioga's and Roers' argument that this definition provides a broader, more forgiving standard for equitable tolling, North Dakota has never adopted this doctrine. *See Opp v. Off. of N. Dakota Att'y Gen. – BCI CWL Unit*, 993 N.W.2d 498, 505 (N.D. 2023) (noting that the court has not adopted equitable tolling).

The North Dakota Supreme Court first considered whether to adopt equitable tolling in *Burr v. Trinity Medical Center*, 492 N.W.2d 904 (N.D. 1992). In *Burr*, the plaintiff

argued that North Dakota should adopt equitable tolling as an exception to the state's malpractice statute of limitations. *Id.* at 907. In response, the supreme court recognized that district courts have the "power to fashion equitable remedies" but cautioned against fashioning such remedies unless "directed to do so by statutes or court rules, when there is no adequate legal remedy, or when the equitable remedy is better adjusted to render complete justice." *Id.* at 907-08 (citations omitted). The supreme court concluded that the legislature stated its intent that there be a statute of limitations that controlled in malpractice cases and declined to adopt the equitable tolling doctrine in light of this specific statute and the circumstances of the case. *Id*. at 909-10.

Since *Burr*, the North Dakota Supreme Court has considered whether to adopt and apply the equitable tolling doctrine in more than eight cases. *See, e.g.*, *Oakland v. Bowman*, 840 N.W.2d 88, 91-92 (N.D. 2013); *Superior, Inc.*, 738 N.W.2d at 28; *Kimball v. Landeis*, 652 N.W.2d 330, 338-40 (N.D. 2002). In each of these cases, the supreme court refrained from adopting the doctrine. *See, e.g.*, *Oakland*, 840 N.W.2d at 91-92 (declining to adopt equitable tolling because the legislature stated its intent that there be a controlling statute of limitations); *Superior, Inc.*, 738 N.W.2d at 28 (declining to adopt equitable tolling); *Kimball*, 652 N.W.2d at 338-40 (declining to decide whether to adopt equitable tolling because the plaintiff did not meet the requirements for its application). In *Oakland*, the supreme court recognized that a hierarchy exists which favors statutory law over common law and, therefore, declined to apply equitable tolling because the statute of limitations clearly established a time limit for commencement of the action in question. 840 N.W.2d

at 91-92; *see also* N.D. Cent. Code § 1-01-06 (2022). As recently as 2023, the supreme court noted that it had not adopted equitable tolling. *Opp*, 993 N.W.2d at 505. [1]

In sum, the survival of Tioga's and Roers' claims hinge on North Dakota adopting and applying equitable tolling. But over the last 30 years, the North Dakota Supreme Court has refrained from doing so. *See, e.g.*, *Oakland*, 840 N.W.2d at 91-92; *Burr*, 492 N.W.2d at 908-10. As of now, North Dakota courts have not formally adopted this doctrine, and it is not the law in North Dakota.[2] Speculation that North Dakota courts may adopt this doctrine under the circumstances of this case does not present an actual outcome determinative conflict pursuant to this court's choice-of-law analysis.[3] *See Jepson*, 513

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[1] Even if North Dakota courts were to adopt the California equitable tolling doctrine, Tioga and Roers fail to satisfy the requirements for its application. In reaching this conclusion, we are guided by *Braaten*. In *Braaten*, the North Dakota Supreme Court concluded that it was not reasonable conduct for the plaintiff to file an action in federal court when there was no arguable basis for federal jurisdiction over the action, nor was it good-faith conduct for the plaintiff to wait to file in state court after being made aware of these severe jurisdictional problems. 569 N.W.2d at 566. Here, as in *Braaten*, the conduct of Tioga and Roers is neither reasonable nor in good faith. Tioga waited to pursue arbitration against Cole Group and Larson until there was less than a month left in the statute of limitations period; Tioga chose to pursue its claims in a forum without clear jurisdiction; and Tioga and Roers received notice of these jurisdictional defects before the expiration of the statute of limitations period but waited until after the limitations period had expired to commence this suit. These circumstances do not support Tioga's and Roers' assertion that their conduct was reasonable and in good faith, and therefore would be saved if North Dakota were to adopt equitable tolling. *Reid*, 611 N.W.2d at 190-91.

[2] By concluding that North Dakota has not adopted the equitable tolling doctrine, we do not imply that North Dakota never will do so. We simply hold that, at the time of this writing, North Dakota courts have not formally adopted this doctrine.

[3] Tioga and Roers argue in the alternative that we should certify the question of whether a North Dakota court would apply equitable tolling under the circumstances of this case to the North Dakota Supreme Court. A Minnesota appellate court may certify a question of law to the highest court of another state if three requirements are met:

> (1) The pending litigation involves a question to be decided under the law of the other jurisdiction;

N.W.2d at 469. As a result, this case does not present an actual conflict. As all parties acknowledge, Tioga's and Roers' claims do not meet the requirements for the application of Minnesota's equitable tolling doctrine. Consequently, the district court did not err by dismissing Tioga's and Roers' negligence claims after determining that these claims are time-barred under both Minnesota and North Dakota law.[4] Therefore, we affirm.

Affirmed.

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(2) The answer to the question may be determinative of an issue in the pending litigation; and

(3) The question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

Minn. Stat. § 480.065, subd. 2 (2022). Here, all three requirements are not satisfied because there are numerous controlling appellate decisions that answer Tioga's and Roers' question. *See, e.g.*, *Riemers v. Omdahl*, 687 N.W.2d 445, 454 (N.D. 2004); *Kimball*, 652 N.W.2d at 338-40; *Reid*, 611 N.W.2d at 189-91; *Braaten*, 569 N.W.2d at 565-67.

[4] Tioga and Roers assert two additional arguments. First, they argue that the district court erred by dismissing their professional negligence claims for failure to comply with the expert-affidavit requirement under Minn. Stat. § 544.42, subd. 2 (2022). Second, Tioga and Roers argue that the district court erred by granting summary judgment on their negligence claims because under North Dakota law, Cole Group and Larson breached their duty to exercise ordinary care and skill in designing a foundation system and performing geotechnical engineering services. Because we conclude that Tioga's and Roers' claims are time-barred under both Minnesota and North Dakota law, and that there is no choice-of-law issue in this case, we need not address these two arguments.