IN THE

Indiana Supreme Court

Supreme Court Case No. 20S-MI-00567

City of Marion,
Appellant/Cross-Appellee (Plaintiff below),

–v–

London Witte Group, LLC, Chad Seybold, Estate of Michael Y. An, Global Investment Consulting, Inc., and World Enterprise Group, Inc.,
Appellees/Cross-Appellants (Defendants below).

Argued: November 19, 2020 | Decided: June 17, 2021

Appeal from the Grant Superior Court
No. 27D03-1612-MI-000168
The Honorable Warren Haas, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 19A-MI-01762

Opinion by Justice Massa

Chief Justice Rush and Justices David, Slaughter, and Goff concur.

Massa, Justice.

The City of Marion sued London Witte Group, LLC, an advisor to the City's former mayor, Wayne Seybold. The new City administration alleged corruption in the old, aided and abetted by London Witte. London Witte moved for summary judgment based on the statute of limitations. The City argued the doctrine of adverse domination tolled the statute of limitations until Mayor Seybold left office. The trial court granted partial summary judgment for London Witte. An appellate panel found all the City's claims were time-barred.

We now adopt and apply the adverse domination doctrine. And we conclude summary judgment was inappropriate for all the City's claims because there are genuine issues of material fact as to whether Mayor Seybold adversely dominated the City, and whether London Witte helped him do so. Therefore, we reverse in part, affirm in part, and remand.

Facts and Procedural History[1]

I. Background

Mayor Seybold was sworn in as mayor on January 1, 2004 and remained mayor until his successor was sworn in on January 1, 2016. During his first few years in office, he met Michael An, a developer from California. An was president and owner of two companies: Global Investment Consulting, Inc., and World Enterprise Group, Inc. An was interested in potential redevelopment of abandoned buildings in Marion and visited several times to review prospective sites. An also hired the Mayor's brother, Chad Seybold, and the Seybolds' father. An proposed redeveloping Marion's old YMCA building into a combination of hotel, restaurant, retail, and recreational spaces. The total project was estimated to cost approximately $5.5 million; the City was willing to provide $2.5

[1] It is important to note the procedural posture of this case—an appeal of a ruling on summary judgment. The "facts" as recited herein come from designated evidence developed in discovery in civil litigation *alleging* public corruption, and thus are not conclusive at this stage.

million of tax increment bond financing (TIF), meaning An had to come up with the remaining $3 million.

Mayor Seybold convened a project team, with the "core" members including himself, the City's Director of Development Darren Reese, Attorney Bruce Donaldson as bond counsel, and Robert Swintz of London Witte Group, LLC. London Witte is an accounting firm with a municipal advising department. Mayor Seybold had the "final say" in hiring London Witte as bond accountant and financial advisor for the project.[2] Appellant's App. Vol. IV, p.120. Swintz, a lawyer, certified public accountant, SEC-registered municipal advisor, and Mayor Seybold's good friend, started working at London Witte in 2003. Swintz worked for the City throughout Mayor Seybold's entire administration, and at times, the City was Swintz's biggest client.

During Mayor Seybold's administration, Swintz never had to bid on a project for the City, and London Witte earned approximately $1,840,825 from his work. London Witte was also involved in Mayor Seybold's political pursuits, donating more than $25,000 to his various campaigns and hosting a fundraiser. In 2012, Swintz served as treasurer for Mayor Seybold's congressional campaign, while another London Witte employee did the same for his 2014 state treasurer campaign.

II. The YMCA Project

An purchased the YMCA building. In August of 2009, he hired Timothy Chambers to clean up the property after a flood. Chambers then received a "very angry" call from Chad telling him to leave and give Chad his key because Chad was An's only representative. Appellant's App. Vol. VI, p.151. Chad made "several threats" to Chambers, and "wanted to

[2] Throughout these proceedings, London Witte has taken multiple positions on Swintz's role, arguing at times that Swintz was a financial advisor and at others that he was an accountant. London Witte explained that financial advising or consulting work is an example of accounting services per Indiana Code section 25-2.1-1-10(a). Based on these various admissions and the record, this Court assumes that Swintz's work involved both accounting and financial advising services. Whether the nature of Swintz's work created a fiduciary duty is an issue for the trial court.

know if [Chambers] knew who his brother was and what he could do to our business." *Id.* Chambers and An met to discuss the incident, and An told Chambers that he was only going to be working with Chad because "he had been told that the only way he could pursue the TIF was if . . . Chad worked on the project." *Id.*, p.152.

In October, First Farmers Bank & Trust Co., which was buying the City's bonds and lending the proceeds to An, began asking whether An actually had $3 million to cover his share of the project's financing. The Bank informed the City's Director of Development that its approval was contingent on An having the funds. Still, no such proof had been provided by December 1, the date on which the City entered into a loan agreement with An, and a corresponding trust indenture with the Bank. Under the loan agreement, Global agreed to use all the bond proceeds for the costs of construction, to pay back the principal sum of $2.5 million—along with any interest—and cover all additional costs. An provided a personal guaranty of the promissory note, and the Bank held the mortgage on the YMCA property as security for the loan.

Two days later, on December 3, An sent Chad his personal finance statement, Global's finance statement, a memorandum of understanding (MOU) with a previously-unknown individual named Se Kwon Cho, and Cho's bank balance. An's personal finance statement showed only $32,356.66 in current assets, while Global's balance sheet showed $40,922.04 in current assets. And while the MOU stated that "Mr. Choi" agreed to make $3 million available for An to complete the project, it explicitly said "this MOU is not intended to be a legally binding agreement."[3] *Id.*, p.177. Cho's bank balance, as of August 24, was $7,679,353.56 New Zealand dollars. The next day, Chad sent Swintz the documents, which Swintz forwarded only to the bond counsel, without converting from New Zealand dollars. Swintz then emailed the Bank, saying "I just spoke with [Reese] and the mayor and the City has received

[3] The MOU is between Global and "Mr. Cho" but several key provisions, including the agreement to make $3 million available for the YMCA project, reference a "Mr. Choi." Appellant's App. Vol. VI, pp.176–77.

documentation providing the comfort they need for the YMCA project." Appellant's App. Vol. III, p.231.

On December 8, the Bank again asked when it would receive An's proof of funds. Bond counsel Donaldson told Swintz the Bank would not want to close if An could not prove that he had $3 million. Swintz replied, "[the Bank] doesn't get a choice on funding the $2.5 million. If [it] backs on [sic] now, [it] is F (you know the rest)." *Id*., p.233. Swintz then told the Bank the developer had provided written documentation to the City of funding sufficient to complete the project. Swintz further told the Bank, "I am not sure I understand the [B]ank's need to know the other funds are available." *Id.*, p.237. Swintz said it was the City's risk to assure that the project was completed, and the City would address that risk in the loan agreement with An. But the loan agreement had already been signed and did not address the risk of incompletion.

The Bank had also asked Swintz on December 8 what the requirements were for its trust department, for the distributions, and for inspections. Chad had already asked Swintz how the distribution of funds would work and whether funding would be based off the completed stages of the project, and Swintz told him the "Trustee will not monitor project completion/stages." Appellant's App. Vol. VI, p.174. So even though the trust indenture required the draw requests be reimbursements for completed work, Swintz responded, "I guess I generally don't understand the need for an inspection for the Bank." Appellant's App. Vol. III, p.237.

On December 16, the day before the bonds closed, Swintz reviewed the draw request from bond proceeds for $481,097 that Chad and An were going to submit the next day. Even though construction had not yet begun, the draw request listed reimbursements for $383,000 worth of construction work. The trust indenture required the Bank's Trustee to receive a signed written request, stating that the costs were *already* incurred and necessary for the project before disbursements were to be made. And while the draw request did not comply with the trust indenture, neither Swintz nor the Trustee raised any objections. The Trustee did not obtain the documentation or invoices necessary to support the distributions because Mayor Seybold had told him to "treat this as a

special account" and to "work directly with Mr. An and have all distributions go through them." Appellant's App. Vol. IV, pp. 27, 29. And Swintz told Chad and An that he did not "see anything on here that would cause a problem," even though there was a $20,120 attorney fee listed, about which Swintz could not explain what services were rendered or by whom. Appellant's App. Vol. V, p.128. When the bonds closed the next day, London Witte's contingent fee of $25,000 was paid out of the bond proceeds. Global submitted the $481,097 draw request later that day and received the funds.

In February of 2010, An signed a Global check to Mayor Seybold's wife for $1,000. The next month, Global submitted a distribution request for $1,154,518. The request included an itemized list of the amounts allegedly payable to World Enterprise, including $31,600 for the elevator and $104,941 for HVAC work. Neither were ever installed. An then signed another check to Mayor Seybold's wife from World Enterprise. In September, Global made a distribution request for $403,400, and received the funds. The request again itemized amounts allegedly payable, including another $60,000 for HVAC and $63,400 for the elevator.

In late 2010, and into 2011, Mayor Seybold moved to refinance the 2009 bonds. London Witte was retained to help. As part of the refinancing, Global was to be released from the loan agreement and its promissory note. All the security An and Global had provided in support of the 2009 bonds, such as the mortgage and guaranty, would also be cancelled. Swintz appeared before the City Council to recommend the refinancing of the 2009 bonds by issuing the 2011 bonds. Swintz only spoke of the refinancing in favorable terms; he did not mention that An would be released from all financial responsibility nor that Swintz would receive a contingent fee of $25,000 if the 2011 bonds were issued. On December 30, 2010, London Witte gave Mayor Seybold a $5,000 campaign contribution.

In February of 2011, Swintz received Global's balances from the Bank, which showed more than $352,000 left in the construction account from the 2009 bonds. Swintz told bond counsel that if Chad and An were still submitting invoices on the project, he was going to have them take out the remaining money. Swintz told Chad and An that if "they didn't draw the

money by Monday, they would basically lose it to the refunding." Appellant's App. Vol. V, p.25. Global then made a distribution request for $352,543, which included another itemized amount for $85,000 for HVAC work that was never performed. London Witte received its contingent fee from closing on the 2011 refinancing bonds.

Soon after he was released from financial responsibility on the project, An hosted a political fundraiser in California for Mayor Seybold. In April, World Enterprise, An's personal lawyer, and An's girlfriend, each gave Mayor Seybold campaign contributions. In May, Mayor Seybold applied for a $1,000,000 life insurance policy, with An listed as the premium payor. Under "reason for insurance," Mayor Seybold wrote "for family & city." Appellant's App. Vol. VI, p.110. But only his wife and children were listed as beneficiaries. An signed a check from World Enterprise to the insurance company for $764.26, with "Wayne Seybold" written near the "For" line. *Id.*, p.125. In November, London Witte gave Mayor Seybold another $5,000 campaign contribution. By 2012, An had stopped working on the project during the winter months "due to the cost of having to heat the building with an alternative source of energy." *Id.*, p.88. An told Swintz he was expecting delivery of a heating and cooling system from Korea in the spring, but An had already submitted reimbursement requests for $249,941 worth of HVAC work which was never performed.

In April of 2013, Lisa Dominisse replaced Reese as the City's Director of Development. Dominisse's first involvement in the controversy came in December, after the *Marion-Chronicle Tribune* published several articles critical of the YMCA project, and the newspaper and a City Council member began submitting public information requests about it. Dominisse suggested an audit to Mayor Seybold. He took her advice. In 2014, the City retained KPMG to perform a forensic audit of the project. Ultimately, KPMG was unable to prepare a report because they were "unable to get receipts out of Chad Seybold," meaning they were unable to track how the money was spent. Appellant's App. Vol. IV, p.153. Mayor Seybold never asked Chad to provide this information to KPMG.

In December of 2015, An died. The project was never completed, and only the City had ever put money into it. A new mayor took office on

January 1, 2016 and began looking into the unfinished YMCA project. The City's expert "identified approximately $686,000 [from the 2009 bonds] that were not spent on construction costs for the renovation of the old YMCA building." Appellant's App. Vol. VI, p.7. And the expert identified an additional $159,000 where it was unclear how the money was spent.

The expert identified a fee agreement between Global and Cho, in which Global agreed to—and did—pay Cho three $50,000 installments, each within five days of Global's receipt of bond proceed payments from the Bank.[4] The expert identified $136,318 worth of bond funds paid to An's girlfriend. The expert identified $244,408 worth of bond proceeds spent on the purchase of five other properties, which An planned to develop into a used car dealership. Chad also testified that the properties were purchased with bond proceeds. The expert found $197,262 worth of payment receipts and invoices related to unidentified properties. However, Chad's accounting printout for An titled the "Old YMCA Hotel Project" shows $7,533 spent for "Michael," $6,998 for "Global Business – Car Dealership," $10,123 spent for an apartment complex owned by An's girlfriend, and $21,026 spent for "Chad–House." *Id.*, p.22. The expert also identified an additional $1,057 spent on Chad's house. An agreed to pay for the remodeling of Chad's house when Chad came to work for him.

III. Procedural History

On December 8, 2016, the City sued An's estate, and his two companies: Global and World Enterprise. On February 16, 2017, the City entered into a Tolling Agreement with London Witte regarding the YMCA renovation project. In September, the City added London Witte and Chad Seybold as defendants. It alleged three claims against London Witte: negligence, breach of fiduciary duty, and constructive fraud/unjust enrichment.[5]

[4] The third payment was for $50,018, but the first two were for exactly $50,000.

[5] London Witte is potentially liable for Swintz's actions under basic agency principles. *See Barnett v. Clark*, 889 N.E.2d 281, 283 (Ind. 2008); *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450, 453 (Ind. 2000). London Witte here does not even argue that Swintz's conduct was outside the scope of employment, thus it can be held liable.

London Witte moved for summary judgment, arguing, among other things, that the City's claims were barred by the statute of limitations. It argued that "[a]t the absolute latest, the City was on notice of a potential claim in 2014, when the YMCA Project—still unfinished—attracted the attention of the press and the city council." Appellant's App. Vol. II, p.141. Claims for negligence and breach of fiduciary duty are generally subject to a two-year limitations period. Since the constructive fraud claim "arises out of the same conduct," London Witte argued that "all three claims are subject to the two-year limitations period." *Id.*, p.140. Moreover, London Witte argued that because "[t]his case arises out of [its] provision of accounting services," any claims not barred by the general statute of limitations "are barred by the special one-year limitations period . . . applicable to claims against accountants." *Id.*, pp. 169, 141; *see* Ind. Code § 25-2.1-15-1 to -2.

The City opposed summary judgment. It first argued the statute of limitations did not begin to run until late December of 2015, because the City had no reason to believe or even suspect before then that London Witte "had withheld material information from it at the time the bonds were issued, and subsequently refunded, nor that [London Witte] had caused any injury to the City." Appellant's App. Vol. IV, p.74. The City also argued the doctrines of continuous representation and adverse domination tolled the statute of limitations until December 31, 2015. Finally, the City argued London Witte fraudulently concealed its misconduct.

The trial court granted summary judgment for counts one and two after finding the two-year statute of limitations contained in Indiana Code section 34-11-2-4(a) had expired "long before February 16, 2017 when London Witte signed a tolling agreement with the City." Appellant's App. Vol. II, p.53. It found the City could not rely upon the doctrines of adverse domination or continuous representation to extend the start date for the statute of limitations. But it found the six-year statute of limitations contained in Indiana Code section 34-11-2-7(4) applied to the third count, and the six years had not begun to run until London Witte's work on the 2011 refinancing was completed. So, it denied summary judgment for count three.

The Court of Appeals affirmed summary judgment in London Witte's favor on the first two counts and reversed the denial of summary judgment for the third count. *City of Marion v. London Witte Grp., LLC*, 147 N.E.3d 362 (Ind. Ct. App. 2020), *trans. granted*. The panel concluded that a two-year statute of limitations governed the third count because the substance of the claim was of the same ilk as the other two claims. *Id.* at 373. The City sought transfer, which we granted. *See* Ind. App. R. 58(A).

Standard of Review

We review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quotation marks omitted). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.* (internal citations and quotations omitted).

Statute of limitations defenses are "particularly appropriate for summary judgment determination." *Stickhorn v. Zook*, 957 N.E.2d 1014, 1021 (Ind. Ct. App. 2011), *trans. denied*. The party asserting it must make a prima facie showing that the action was commenced outside the statutory period by identifying "(1) the nature of the plaintiff's action, so that the relevant statute of limitations period may be identified; (2) the date the plaintiff's cause of action accrued; and (3) the date the cause of action was brought, being beyond the relevant statutory period." *McMahan v. Snap On Tool Corp.*, 478 N.E.2d 116, 120 (Ind. Ct. App. 1985). If the moving party demonstrates these matters properly, the burden shifts to the opponent "to establish facts in avoidance of the statute of limitations defense." *Id.*

Discussion and Decision

The City urges this Court to adopt the equitable tolling doctrine of adverse domination, which would toll the statute of limitations until Mayor Seybold left office. Because the doctrine, which has been significantly developed over time in other jurisdictions, is a logical corollary of our discovery rule, we now adopt it. Applying the doctrine here, we conclude summary judgment was inappropriate because there is a genuine issue of material fact as to whether Mayor Seybold dominated the City of Marion while serving as mayor, and whether London Witte helped him do so. London Witte has not met our heightened standard of affirmatively negating the City's claims. Because the adverse domination doctrine is dispositive, we decline to reach the City's other arguments.

I. We adopt the equitable tolling doctrine of adverse domination as a logical corollary of Indiana's discovery rule.

Under the discovery rule, the statute of limitations does not begin to run until the plaintiff knows, or in the exercise of ordinary diligence could have discovered, that it has been injured from tortious conduct. *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 843 (Ind. 1992). "[W]hen a cause of action accrues is generally a question of law." *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274, 1280 (Ind. 2009).

"Adverse domination is an equitable doctrine that tolls statutes of limitations for claims by corporations against its officers, directors, lawyers and accountants for so long as the corporation is controlled by those acting against its interests." *Clark v. Milam,* 452 S.E.2d 714, 718 (W. Va. 1994) (adopting the adverse domination doctrine). It "applies to causes of action against the wrongdoing directors . . . [and] against co-conspirators of the wrongdoers." *Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 936 (7th Cir. 2012) (citing *Lease Resol. Corp. v. Larney*, 719 N.E.2d 165, 172 (Ill. App. Ct. 1999)). The doctrine has been adopted by many state and federal courts. *See, e.g.*, *F.D.I.C. v. Smith*, 980 P.2d 141, 148 (Or. 1999) (adopting the doctrine); *Wilson v. Paine*, 288 S.W.3d 284, 289 (Ky. 2009) (same); *Resol. Tr. Corp. v. Scaletty*, 891 P.2d 1110, 1116 (Kan. 1995) (same); *Farmers & Merchs. Nat'l Bank v. Bryan*, 902 F.2d 1520, 1522–23

(10th Cir. 1990) (adopting the doctrine as part of federal common law). And the doctrine "has been generally accepted by federal courts to be the law of states that have not yet explicitly ruled on the subject themselves." *Clark*, 452 S.E.2d at 718 (citing *Resol. Tr. Corp. v. Farmer,* 865 F. Supp. 1143 (E.D. Pa. 1994)). Indeed, an Indiana federal court applied the doctrine nearly three decades ago, believing an Indiana court, if faced with the same facts, would have done so. *Resol. Tr. Corp. v. O'Bear, Overholser, Smith & Huffer*, 840 F. Supp. 1270, 1284 (N.D. Ind. 1993).

The doctrine has been described as a "corollary" of the discovery rule. *Farmer,* 865 F. Supp. at 1154 n.11. "Generally, a corporation 'knows,' or 'discovers,' what its officers and directors know." *Clark*, 452 S.E.2d at 718. "But when officers and directors act against the interests of the corporation, their knowledge, like that of any agent acting adversely to his principal, is *not* imputed to the corporation." *Id.*; *see also Am. Heritage Banco, Inc. v. McNaughton,* 879 N.E.2d 1110, 1116 (Ind. Ct. App. 2008) (exception to the general rule of imputed knowledge when an agent acts adversely to the principal). A corporate plaintiff cannot "have 'knowledge' of an injury to itself until those individuals who control it know of the injury and are *willing to act on that knowledge*." *Farmer*, 865 F. Supp. at 1155 (emphasis added). In other words, where an "entity is dominated by those whose own malfeasance might be revealed in the course of litigating a complaint, it follows the entity has not 'discovered' the injury to its interests in any meaningful way." *Resol. Tr. Corp*., 840 F. Supp. at 1284. The doctrine is based "on the theory that it is impossible for the corporation to bring the action while it is controlled, or 'dominated,' by culpable officers and directors." *Smith*, 980 P.2d at 144. Wrongdoing officers and directors "cannot be expected to sue themselves or to initiate any action contrary to their own interests." *Id.* Thus, the statute of limitations is tolled as long as a corporate plaintiff is controlled by the alleged wrongdoers. *Id.*

a. Intentional wrongdoing of some kind must be alleged for the doctrine to apply.

Courts have "almost uniformly embraced" the adverse domination doctrine. *Wilson*, 288 S.W.3d at 288. But there is some variation in its application, with courts differing on the "degree of domination of the board required . . . as well as the degree of culpability that the plaintiff must allege against the directors." *Id.* Since we are dealing with a unitary executive, not a corporate board, we need not decide whether we adopt the "disinterested majority test" followed by a majority of jurisdictions, or the more stringent "complete domination" test. *Id.* at 288–89; *see also Smith*, 980 P.2d at 148 (adopting the adverse domination doctrine and the "disinterested majority" approach); *Bryan*, 902 F.2d at 1522–23 (adopting the complete domination test). We must decide, however, what level of culpability the plaintiff must allege against those adversely dominating the entity. Several theories have emerged on this question. The first holds that "negligent conduct, without more, is sufficient to toll the statute of limitations." *Wilson*, 288 S.W.3d at 290 (citing *F.D.I.C. v. Carlson*, 698 F. Supp. 178, 180 (D. Minn. 1988)). The second holds that negligent conduct alone is not enough. *See F.D.I.C. v. Dawson*, 4 F.3d 1303, 1312 (5th Cir. 1993). And the third holds that "the degree of culpability was irrelevant." *Wilson*, 288 S.W.3d at 290 (citing *Clark*, 452 S.E.2d at 719).

We find the second approach "best reflects the fundamental concerns that adverse domination was designed to address." *Id*. "The doctrine is founded on the presumption that those who engage in fraudulent activity likely will make it difficult for others to discover their misconduct." *Id*. The danger of fraudulent concealment by corporate insiders seems small if only negligent behavior is involved. *Dawson*, 4 F.3d at 1312–13. To allow a negligence standard would "effectively eliminate the statute of limitations in all cases involving a corporation's claims against its own directors" because it could almost always be said that when at least one director "actively injure[s] the corporation, or profit[s] at the corporation's expense, the remaining directors are at least negligent for failing to exercise 'every precaution or investigation.'" *Id.* at 1312 (quoting *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 580 (Tex. 1963)). By limiting the doctrine to cases in which intentional wrongdoing is involved, it will not "overthrow the statute of limitations completely in

the corporate context." *Id.* We therefore hold that intentional wrongdoing of some kind is required for the doctrine to apply.

b. The adverse domination doctrine applies to both private and municipal corporations.

We also must address the application of this doctrine to a municipal corporation. The City is undisputedly a municipal corporation. *See* I. C. § 34-6-2-86. Adverse domination is typically applied to financial corporations, but in extending it to municipal corporations, "we break very little new ground." *Alldredge v. Good Samaritan Home, Inc*., 9 N.E.3d 1257, 1264 (Ind. 2014). Appellees raise no particular argument for treating municipal corporations differently, and we see no reason to do so here, as these "two species of 'body politic and corporate,' [are] treated alike in terms of their legal status as persons capable of suing and being sued." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 126 (2003). The rationale behind the doctrine appears to apply equally to private and municipal corporations. Whether an entity is adversely dominated by board members or a mayor, the effect is the same: the entity cannot discover its injuries nor sue to redress them.

c. The doctrine also applies to co-conspirators of the controlling wrongdoers.

Finally, we must address the applicability of the doctrine to "outside" defendants, that is, defendants who do not directly control a corporation. It is well established that the doctrine also applies to causes of action against co-conspirators of the wrongdoers who adversely dominate the entity. *See Indep. Tr. Corp.,* 665 F.3d at 936; *see also Resol. Tr. Corp. v. Gardner*, 798 F. Supp. 790, 795 (D. D.C. 1992) (applying doctrine to a lawyer); *Bornstein v. Poulos,* 793 F.2d 444, 447–49 (1st Cir. 1986) (same); *Fed. Sav. and Loan Ins. Corp. v. Williams,* 599 F. Supp. 1184, 1194 (D. Md. 1984) (applying doctrine to a lower-level employee); *Farmer*, 865 F. Supp. at 1158 (applying doctrine to lawyers); *Clark*, 452 S.E.2d at 718–19 (applying doctrine to lawyers and accountants); *In re Am. Cont'l*

Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1453 (D. Ariz. 1992) (applying doctrine to outside law firm).

The rationale behind the adverse domination doctrine "applies equally to causes of action against co-conspirators." *Larney*, 719 N.E.2d at 172. Just as a board comprised of wrongdoers could not be expected to file suit against itself, "such a board could not be expected to file suit against a non-board-member co-conspirator because such action would necessarily bring to light its own wrongdoing and would be adverse to its own interests." *Id.* Tolling is warranted because controlling wrongdoers are "unlikely to initiate actions or investigations for fear that such actions will reveal their own wrongdoing." *Gardner*, 798 F. Supp. at 795. While a formal *claim* of conspiracy is not necessary, at the motion to dismiss stage, "a plaintiff's *allegations* must establish that the defendant was complicit in the wrongdoing of the directors." *Indep. Tr. Corp.*, 665 F.3d at 937. And at trial, the plaintiff must prove complicity by a preponderance of the evidence, in order for the doctrine to fairly be applied against outside defendants.

II. Summary judgment was inappropriate because there are genuine issues of material fact as to whether Mayor Seybold adversely dominated the City, and whether London Witte contributed to it.

Although London Witte met its prima facie burden for a statute of limitations defense on summary judgment, we conclude that after the burden shifted, the City established facts to avoid the defense. *McMahan*, 478 N.E.2d at 120. Construing all reasonable inferences in favor of the City, we find that summary judgment was inappropriate because genuine issues of material fact remain as to whether Mayor Seybold adversely dominated the City, and whether London Witte was complicit.

a. London Witte met its prima facie burden of showing the City's claims were untimely.

To meet its prima facie burden for the statute of limitations defense, London Witte had to identify the relevant statute of limitations, the date the City's cause of action accrued, and the date the suit was brought. *Id.* London Witte identified the two-year statute of limitations for negligence and breach of fiduciary claims. *See* I.C. § 34-11-2-4. And London Witte argued the constructive fraud/unjust enrichment claim should be subject to this same two-year limitation period since the claim arose out of the same conduct: "the alleged failure of London Witte to perform properly in the professional relationship." Appellant's App. Vol. II, p.140.

We ascertain the applicable statute of limitations "by identifying the nature or substance of the cause of action and not of the form of the pleadings." *Whitehouse v. Quinn*, 477 N.E.2d 270, 273 (Ind. 1985). The City's complaint alleges that London Witte's breach of its fiduciary duties amounted to constructive fraud and resulted in continued business and substantial fees, constituting unjust enrichment. Based on the substance of this claim, we agree with London Witte that it should be subject to the same two-year statute of limitations as the negligence and breach of fiduciary duty claims. *See Keystone Distrib. Park v. Kennerk, Dumas, Burke, Backs, Long, and Salin*, 461 N.E.2d 749, 751–52 (Ind. Ct. App. 1984) (applying two-year limitations period to constructive fraud claim because "[t]he event precipitating the alleged fraud is the failure to perform properly within the attorney-client relationship").

London Witte argued that all the City's claims accrued no later than February of 2011, or at the "absolute latest, . . . by 2014." Appellant's App. Vol. II, pp. 151, 161. We need not decide the exact date, since either satisfies London Witte's prima facie burden. Finally, London Witte identified September 29, 2017, as the date when the City sued, which was beyond the relevant statute of limitations. However, on February 13, 2017, the City and London Witte entered into a valid tolling agreement that tolled the statute of limitations for all the City's claims through September 30, 2017. Even though London Witte pointed to September 29, instead of the correct date of February 13, we find it immaterial, as either date would be beyond the statute of limitations. Thus, London Witte met its prima facie burden for asserting a statute of limitations defense on summary judgment, which shifted the burden to the City.

b. The City established facts to avoid the statute of limitations defense and created genuine issues of material fact as to whether Mayor Seybold adversely dominated the City, and whether London Witte helped him do so.

Once the burden shifted to the City, it needed to show that the statute of limitations began running after February 16, 2015. The City argued that the doctrine of adverse domination tolled the statute of limitations until Mayor Seybold was no longer mayor. By statute, Mayor Seybold was no longer mayor as of noon on January 1, 2016. *See* I.C. § 36-4-5-2(e). The City argued there is "ample evidence showing that Mayor Seybold could not 'be expected to redress the [City's] interest.'" Appellant's App. Vol. IV, p.79 (quoting *Resol. Tr. Corp*., 840 F. Supp. at 1284). Moreover, the City alleged that London Witte was complicit in Mayor Seybold's alleged wrongdoing. *See Indep. Tr. Corp.*, 665 F.3d at 937.

The City designated significant evidence of misused bond proceeds for Mayor Seybold's benefit, such as the life insurance policy, campaign contributions, and payments to his wife. The City argued this evidence demonstrated that Mayor Seybold would have been unlikely to pursue legal action on its behalf that would have brought these payments to light. The City also designated evidence that Mayor Seybold conditioned the bond funding on An hiring his brother, and that he instructed the Trustee to "treat this as a special account." Appellant's App. Vol. IV, pp. 27, 29. It is reasonable to infer that Mayor Seybold would not pursue legal action that would uncover his alleged wrongdoing, which can be summarized as the misuse of bond proceeds by himself and those he awarded the contract to, the conditioning of the bond funds on An hiring his brother, and the efforts taken to ensure this wrongdoing would not be uncovered by others. Again, the rationale of the adverse domination doctrine is that when wrongdoers control a corporation, they are "unlikely to initiate actions or investigations for fear that such actions will reveal their own wrongdoing." *Gardner*, 798 F. Supp. at 795.

Here, the KPMG investigation was initiated by Mayor Seybold's office. But it never came close to revealing any wrongdoing because Mayor

Seybold's own brother refused to give KPMG the receipts necessary to perform an investigation. And Mayor Seybold never asked Chad to turn over the receipts, further establishing a genuine issue of material fact as to Mayor Seybold's willingness to redress the City's injures. The reasonable inference to draw here is that Mayor Seybold would not allow an investigation into the project, and his alleged wrongdoing, to succeed. This inference is bolstered by the designated evidence of Mayor Seybold's instructions to the Trustee, and by London Witte's communications to the Bank and the City Council on behalf of Mayor Seybold.

Swintz testified it was the Bank's job to perform due diligence on An's finances, but he actively discouraged the Bank from doing so, per the designated evidence. Swintz never sent the Bank the non-binding MOU or proof of millions of New Zealand dollars, an amount he did not convert to American dollars. Instead, Swintz just told the Bank that he spoke to Mayor Seybold and "the City has received documentation providing the comfort they need for the YMCA project." Appellant's App. Vol. III, p.231. And when it later appeared that the Bank was uncomfortable closing without proof of the remaining $3 million, Swintz said it "doesn't get a choice on funding the $2.5 million. If [the Bank] backs on [sic] now, [it] is F (you know the rest)." *Id.*, p.233. Instead of showing the Bank the MOU, Swintz told it that he "generally d[id not] understand the need for an inspection for the Bank." *Id*., p.237. The reasonable inferences are that Mayor Seybold did not want the Bank to investigate the deal, and Swintz was helping Mayor Seybold prevent it from doing so.

The reasonable inferences can be drawn from Swintz's communication with the City Council, notably that he never informed the member that An would be released from all of his repayment obligations to the City upon the refinancing, or that London Witte was receiving another $25,000 contingent on the deal closing. Swintz only spoke in favorable terms, even though he personally had approved draw requests that did not comply with the trust indenture. The remaining $352,000 of bond proceeds was taken out only after Swintz told Chad "they would basically lose it to the refunding." Appellant's App. Vol. V, p.25. These communications, along with evidence regarding Mayor Seybold's relationship with London

Witte, create genuine issues of material fact as to London Witte's complicity with Mayor Seybold.

In sum, we conclude the City sufficiently established facts to avoid the statute of limitations defense on summary judgment. Drawing all reasonable inferences in favor of the City, there are genuine issues of material fact as to whether knowledge of the injury was available to the City while Mayor Seybold was in office. Moreover, there are genuine issues of material fact as to whether London Witte was complicit in Mayor Seybold's wrongdoing. Summary judgment "should not be granted when it is necessary to weigh the evidence." *Bochnowski v. Peoples Fed. Sav. & Loan Ass'n*, 571 N.E.2d 282, 285 (Ind. 1991). After weighing the evidence, a factfinder ultimately may not conclude that the City proved Mayor Seybold's adverse domination and London Witte's complicity, but that is a matter for trial, not summary judgment.

III. At trial, the City will have to prove that Mayor Seybold adversely dominated the City, and that London Witte was complicit.

At trial, proving the adverse domination doctrine will look different depending on whether the plaintiff is a corporation or a municipal corporation. Typically, for corporations, when a plaintiff proves the doctrine, it "creates a rebuttable presumption that knowledge of the injury will not be available to the corporation as long as the corporation is controlled by wrongdoing officers and directors." *In re Emerald Casino, Inc.*, 530 B.R. 44, 172 (N.D. Ill. 2014) (applying Illinois law). The presumption can be overcome "by evidence that someone other than the wrongdoing directors had knowledge of the cause of action and both the ability and the motivation to bring suit." *Id.* at 172–73.

This stems from the assumption that if a company's board of directors is the "only body which can bring a lawsuit on behalf of the company, and the board of directors are the only members of the company with the knowledge the company has a cause of action, and the members of the board of directors are the potential defendants in that cause of action, it is simply unreasonable to expect those individuals to sue themselves."

Larney, 719 N.E.2d at 170 (quoting *Resol. Tr. Corp. v. Chapman*, 895 F.Supp. 1072, 1078 (C.D. Ill. 1995). In the typical corporate situation, this rebuttable presumption makes sense because there are many individuals potentially controlling the ability to bring suit. For example, a corporate plaintiff could show its board's complete domination over the entity, creating the rebuttable presumption. But if the defendant showed that there was a trustee appointed, who also had the ability to bring suit, the doctrine would no longer apply. *See In re Mollie Enters., Inc.*, 559 B.R. 501, 506 (E.D. Ill. 2016) ("the adverse domination rule applies and tolls the statute of limitations until the Trustee was appointed").

However, a municipal corporation with a unitary executive is structurally different from the typical corporation with a board of directors, and potential trustees. We start with a similar assumption that the mayor of a municipal corporation with a unitary executive has the ultimate say in whether a suit can be filed on behalf of the entity. Thus, requiring the opposing party prove that someone else could and would sue on behalf of the City, if the mayor were opposed, would be unfair and illogical. But this assumption does not mean adverse domination would automatically be found any time a mayor is shown to have adverse interests to a particular suit. A city still needs to make an affirmative showing of domination to the factfinder if the doctrine is to apply.

London Witte argued that "several individuals could have discovered and pursued claims against [it]," such as the two Directors of Development, the City Attorney, and a member of the City Council. Appellee's Br. at 43. But London Witte presented no evidence or authority that these individuals could actually sue on behalf of the City. London Witte pointed to Indiana Code section 36-4-9-12(7), which provides that the head of the department of law (and not the mayor) shall "promptly commence all proceedings necessary or advisable for the protection or enforcement of the rights of the city or the public." But in Marion, the City Attorney is also the head of the department of law, and the mayor gets to appoint all department heads. I.C. § 36-4-9-11(b) (city attorney is the head of the department of law); I.C. § 36-4-9-2 (city executive appoints department heads). Mayor Seybold appointed not only the City Attorney, but also both Directors of Development. I.C. § 36-4-9-2. And the City

Attorney and both Directors of Development were under Mayor Seybold's supervision. *See* I.C. § 36-4-9-4(b); I.C. § 36-4-5-3(6). Finally, London Witte presented no authority or evidence for how a City Council member could bring suit on behalf of the City. The powers of a city are divided between the executive and legislative branches, and a power belonging to one branch "may not be exercised by the other branch." I.C. § 36-4-4-2(a).

To be sure, a city council is not powerless against possible corruption or malfeasance within a city's executive branch. A city's legislative body possesses the statutory authority to investigate "the departments, officers, and employees of the city" and "any charges against a department, officer, or employee of the city." I.C. § 36-4-6-21. Our precedent suggests this power to investigate also includes the power to remove. *See State ex rel. Town of Cedar Lake v. Lake Superior Ct.*, 431 N.E.2d 81, 82–83 (Ind. 1982); *see also Muhler v. Hedekin*, 119 Ind. 481, 20 N.E. 700, 701 (Ind. 1889) ("a common council possesses the incidental power, for just cause, and under proper regulations, to remove a corporate officer, whether elected by it or by the people"). However, this power to investigate and remove differs from the inquiry here: whether someone other than the wrongdoing officer can *bring suit* on behalf of a city.

The adverse domination doctrine extends the discovery rule to situations in which a corporation is prevented from discovering a cause of action because "there is no one who has the knowledge, ability, and motivation to act for the corporation." *Larney*, 19 N.E.2d at 173 (citing *Hecht v. Resol. Tr. Corp.*, 635 A.2d 394, 408 (Md. Ct. App. 1994)). Thus, "the ability to act on knowledge of the wrong is as important as the knowledge itself." *Id.* We are unpersuaded that a city council member or Director of Development could sue on behalf of a city. A City Attorney, of course, can bring suit on behalf of a city. An affirmative showing of domination would require a city to show that its mayor was exercising its ability to supervise and control the City Attorney, and others who could investigate the mayor's own wrongdoing. To this end, the designated evidence of the failed KPMG investigation satisfies the City's required showing of affirmative domination on summary judgment. That is, the reasonable inference would be that Mayor Seybold would not let an investigation into

the bond funds be successful, which creates a genuine issue of material fact as to whether he would have allowed a suit to be filed.

Conclusion

Summary judgment on all counts is inappropriate as the City established facts in avoidance of the statute of limitations defense at this stage. There are genuine issues of material fact as to whether Mayor Seybold could have been expected to redress the City's injuries by filing suit over the project during his administration, and whether London Witte was complicit in his alleged wrongdoing. The judgment of the trial court is reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion.

Rush, C.J., and David, Slaughter, and Goff, JJ., concur.

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