COURT OF APPEALS
DECISION
DATED AND RELEASED

February 11, 1997

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

NOTICE

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

No. 96-1675-FT

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

ROBIN R. DASKO,

Plaintiff-Appellant,

v.

PAULA J. KENDZIORSKI,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

CURLEY, J. Robin R. Dasko appeals from a dismissal order. The trial court determined that the action was barred by the statute of limitations. Dasko had filed an earlier case against the same defendant dealing with the same transaction which was dismissed for failure to state a claim and affirmed by the court of appeals on the same grounds. Because we agree a subsequently filed new action arising out of the same transaction as a previous case but

seeking relief on different causes of action is not subject to the tolling provisions of § 893.13, STATS., we affirm.

I. BACKGROUND.

The facts are undisputed. Dasko alleged that she and Paula J. Kendziorski entered into an agreement to pool their funds, purchase Illinois lottery tickets, and split the winnings, with Dasko receiving ten percent of the proceeds. In her suit, Dasko sought to recover that portion of the proceeds paid to or to be paid to Kendziorski as a result of a winning ticket redeemed on or about April 28, 1988. Dasko had previously filed an action against Kendziorski on April 27, 1994, one day before the statute of limitations was to run. That case was transferred to Washington County Circuit Court and ultimately was dismissed by the trial court for failure to state a claim. Rather than filing an amended complaint, Dasko elected to appeal the trial court's decision. The court of appeals affirmed the trial court's ruling on November 8, 1995. On December 6, 1995, Dasko filed this action against Kendziorski in Milwaukee County Circuit Court.

In the new action, Kendziorski brought a motion to dismiss Dasko's complaint, alleging the statute of limitations had run. On April 8, 1996, the trial court granted Kendziorski's motion, reasoning that because the trial court in the original case determined there was no cause of action, § 893.13, STATS.,[1] the tolling statute, did not apply. In determining that without a cause

[1] Section 893.13, STATS., provides:

> **Tolling of statutes of limitation.** **(1)** In this section and ss. 893.14 and 893.15 "final disposition" means the end of the period in which an appeal may be taken from a final order or judgment of the trial court, the end of the period within which an order for rehearing can be made in the highest appellate court to which an appeal is taken, or the final order or judgment of the court to which remand from an appellate court is made, whichever is latest.
>
> **(2)** A law limiting the time for commencement of an action is tolled by the commencement of the action to enforce the cause of action to which the period of limitation applies. The law limiting the time for commencement of the action is tolled for the period from the commencement of the action until the final disposition of the action.

of action the statute does not come into operation, the trial court relied on the language of § 893.13(2), STATS., which provides: "A law limiting the time for commencement of an action is tolled by the commencement of the action *to enforce the cause of action to which the period of limitation applies.*" (Emphasis added.)

II. ANALYSIS.

Dasko concedes that the statute of limitations has now run. She contends, however, that her earlier case against Kendziorski effectively tolled the statute for thirty days after the court of appeals decision affirmed the trial court. She relies on § 893.13 as authority for the tolling of the statute of limitations. Under her interpretation, the decision of the court of appeals dated November 8, 1995, gave her thirty additional days within which to petition the Wisconsin Supreme Court in that action. Given that fact, she reasons, the wording of § 893.13(3) dictates that the statute of limitations also be tolled for thirty days during which an amended complaint may be filed. Thus, according to Dasko, the commencement of this action on December 6, 1995, was well within the acceptable time period.

Kendziorski responds that the action was properly dismissed because § 893.13(2), STATS., refers only to "the action." She concludes that a reasonable interpretation of "the action" means only the original action filed in Washington County Circuit Court is tolled—not the new action brought in Milwaukee County Circuit Court. Additionally, she submits that § 893.13 operates to extend the statute of limitations only when there actually is an earlier cause of action. She argues that, inasmuch as both the trial court and court of appeals determined that the case filed in Washington County Circuit Court did not state a cause of action, § 893.13 does not apply at all to the present case. Finally, she points out that the case law underpinning Dasko's arguments has recently been overruled by the Wisconsin Supreme Court.

(..continued)

> **(3)** If a period of limitation is tolled under sub. (2) by the commencement of an action and the time remaining after final disposition in which an action may be commenced is less than 30 days, the period within which the action may be commenced is extended to 30 days from the date of final disposition.

Our analysis in this case turns on the interpretation of § 893.13, STATS. "The interpretation of a statute and the application of that statute to a set of facts presents a question of law which we review *de novo*." ***Madison Reprographics, Inc. v. Cook's Reprographics, Inc.***, 203 Wis.2d 226, 246, 552 N.W.2d 440, 449-50 (Ct. App. 1996).

We first look at the language of the statute, § 893.13(2), STATS. The language of the statute does not explicitly state whether it was intended to cover the situation at issue here, nor does the Judicial Council commentary following the statute. However, while there are no cases directly on point, several cases do provide guidance for resolving this issue.

In ***Wurtzler v. Miller***, 31 Wis.2d 310, 143 N.W.2d 27 (1966), the supreme court, when dealing with the sustaining of a demurrer, determined that an amendment to a time-barred suit was permissible when the amendment:

> [S]ets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point.

Id. at 317, 143 N.W.2d at 30 (citation omitted). The court, however, went on to distinguish the above situation from one where an amendment does make a new demand and sets up a new cause of action or claim:

> [A]n amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but it is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the [second cause of action arose] out of the same transaction.

Id. (citation omitted). Accordingly, when one applies the logic from ***Wurtzler*** to the fact situation in the present case—that is, when the new suit states a different cause of action than the original suit—the tolling of the statute of limitations does not come into operation.

A review of a line of cases cited by both parties also provides guidance to this court. We first note that the cases cited by the parties in support of their positions construe the interplay between § 893.80, STATS., the mandatory notice of claim provision, and § 893.13, STATS., the tolling statute. *See* ***Fox v. Smith***, 159 Wis.2d 581, 464 N.W.2d 845 (Ct. App. 1990), *overruled by*, ***Colby v. Columbia County***, 202 Wis.2d 342, 550 N.W.2d 124 (1996) [***Colby II***]; ***Colby v. Columbia County***, 192 Wis.2d 397, 531 N.W.2d 404 (Ct. App. 1995) [“***Colby I***”], *rev'd*, 202 Wis.2d 342, 550 N.W.2d 124 (1996); ***Johnson v. County v. Crawford***, 195 Wis.2d 374, 536 N.W.2d 167 (Ct. App. 1995). The present case does not involve § 893.80, but the rationale applied by the courts in the context of a prematurely brought action is helpful. As noted by Dasko, ***Fox*** was the first case to hold that the premature commencement of an action, a suit brought prior to complying with the notice of claim provisions, tolled the statute of limitations. *See* ***Fox***, 159 Wis.2d at 582, 464 N.W.2d at 846. The crux of ***Fox*** is located in the following language: “[The notice of claim statute] does not override the clear language of § 893.13(3) and § 893.02, STATS., which combine to toll the statute of limitations whenever an action is commenced—that is, whenever there is the physical act of filing with the court a `summons naming the defendant and the complaint,' provided there is proper service within 60 days.” ***Id***. at 586-87, 464 N.W.2d at 848 (citation omitted).

Later, in ***Colby I***, the court of appeals adopted the reasoning of ***Fox*** by determining that an earlier action dismissed without prejudice by the trial court because the notice of claim provision was unsatisfied survived a statute of limitations challenge. ***Colby I***, 192 Wis.2d at 399-400, 531 N.W.2d at 404-05. In ***Johnson***, which dealt with slightly different facts as the parties stipulated to dismiss the first case, whereas in ***Fox*** and ***Colby*** the trial court dismissed the action, the court of appeals reached the same conclusion as ***Fox*** with respect to the tolling issue. ***Johnson***, 195 Wis.2d at 384, 536 N.W.2d at 170.

However, the supreme court, in ***Colby II***, reversed the court of appeals decision in ***Colby I*** and expressly overruled the rule of law espoused in

Fox and its progeny, ***Johnson*** and ***Colby I***. ***Colby II***, 202 Wis.2d at 363, 550 N.W.2d at 133. ***Colby II*** held:

> [I]n a case involving § 893.80, where a claim has not been properly filed, a court need not reach the issue of whether ... § 893.13 tolls the running of the statute of limitations, because the operation of § 893.13 applies only to commenced actions, and under § 893.80, an action cannot be commenced if a claim has not been properly filed.

Id. at 362, 550 N.W.2d at 132. Accordingly, although Dasko argues that ***Fox*** and its progeny support her argument that the statute of limitations is tolled, ***Colby II*** rejects the holdings of these earlier cases.

Further, a critical examination of ***Colby II*** tends to support Kendziorski's view. Utilizing the ***Colby II*** concept of "commence," if there is no cause of action, then the case has never commenced, and if no commencement, then no tolling of the statute of limitations. In ***Colby II***, the case was not properly filed because it was brought prematurely. Extrapolating from the language of ***Colby II***, Dasko did not commence her earlier action because her claim was not properly filed; the earlier case was not properly filed because it contained no valid cause of action. Without a validly commenced action in the earlier case, Dasko cannot now avail herself of § 893.13, STATS., as the statute operates to toll the statute of limitations only when a cause of action has been properly commenced.

In sum, we conclude that the "the action" language found in § 893.13, STATS., refers only to an action already in existence and not an entirely new action. As a consequence, the statute of limitations was not tolled by the earlier dismissed action. Also, using the logic of ***Colby II***, we conclude that Dasko cannot rely on the earlier action to toll the statute of limitations because ***Colby II*** suggests that a suit lacking a valid cause of action will be treated as if it were a premature suit and premature suits do not toll the statute of limitations. Hence, we agree with the trial court's decision that the statute of limitations had run; therefore, the action was properly dismissed.

By the Court.—Order affirmed.

Recommended for publication in the official reports.