COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP167 **Cir. Ct. No. 2009CV4252**

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

LANCE ELLIOTT,

PLAINTIFF-APPELLANT,

V.

GENERAL CASUALTY COMPANY OF WISCONSIN, A/K/A GENERAL CASUALTY INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Reversed and cause remanded*.

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

¶1 VERGERONT, J. This action arises out of a dispute between an insured and his insurer over a claim for storm damage to the insured's property. The circuit court granted summary judgment dismissing the insured's complaint on the ground that it is barred by the one-year statute of limitation set forth in WIS.

STAT. § 631.83(1) (2009-10)[1] and the corresponding limitation provision in the insurance policy. The insured contends that there are material issues of fact regarding his assertion that the insurer is equitably estopped from raising the limitation period as a defense. We agree with the insured that there are material issues of fact and that summary judgment was therefore improper. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 On March 19, 2006, a storm damaged Lance Elliott's residential property. At that time, the property was insured by General Casualty Insurance Company under a standard homeowner's policy, which contained the following provision:

> Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of the loss.

This provision sets forth the same limitation period as that in the applicable statute of limitation, WIS. STAT. § 631.83(1)(a), which provides that "[a]n action on a fire insurance policy must be commenced within 12 months after the inception of the loss."[2] Both parties agree that, according to the policy provision and the statute, an action under the policy for the damages caused by the storm had to be filed on or before March 19, 2007.

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The term "fire insurance," as used in the statute, includes all types of property damage indemnity insurance. ***Bronsteatter & Sons, Inc. v. Am. Growers Ins. Co.***, 2005 WI App 192, ¶7 n.5, 286 Wis. 2d 782, 703 N.W.2d 757 (citation omitted).

¶3 Elliott was out of town at the time of the storm and did not know there was damage until early May. He reported the loss to Julie Ulset, the insurance agent who sold him the policy, on May 8, 2006. Elliott was told that David Brown would adjust the loss. During the first year following the loss, Elliott had contact with Ulset, Brown, and Joshua Gill, a claims representative of General Casualty, regarding his claim.[3] During this time Brown worked with Elliott to settle the claim, and Brown reviewed an estimate to repair the damage prepared by William Zimney of Zimwood Custom Homes. Further details regarding these contacts are discussed later in this opinion.

¶4 In addition to the above undisputed facts, Elliott avers that during the one-year period after the storm he asked Ulset and Brown whether benefits would be paid for his losses, and both repeatedly advised him that he would receive benefits after the property repairs were completed and he had replaced his damaged personal property. Brown acknowledged in his deposition that he communicated to Elliott that he should not begin the repairs until an estimate was approved by General Casualty because, if he began repairs before approval of the estimate, he might have to pay "out of [his] own pocket." It is undisputed that Brown completed his final estimate on March 22, 2007, one year and three days after the property was damaged.

¶5 General Casualty's submissions show both that Brown conveyed to Elliott that Brown believed Elliott was taking too long in getting estimates to him

[3] General Casualty does not argue that these three persons are not its representatives or agents for purposes of this appeal and we therefore treat them as such.

so that Brown could prepare his own estimate and that Brown understood there was difficulty at that time in finding contractors.

¶6 In April 2007, General Casualty issued a check to Elliott for $38,040.33. The check was accompanied by a letter from Gill, which stated that the payment was for "water damage repairs." At this time, repairs had not yet begun.

¶7 In January 2009, once all repairs were complete, Ulset submitted a request to General Casualty for final payment on Elliott's claim. Ulset enclosed Elliott's final bills and stated that Elliott wanted to settle his claim as soon as possible. General Casualty never made additional payments and there is no evidence of any further contact between Elliott and General Casualty after that letter.

¶8 It is undisputed that Elliott did not know about the one-year limitation in either the policy or the statute and that no one associated with General Casualty mentioned anything to Elliott about a one-year limitation.

¶9 Elliott filed this action in August 2009, alleging General Casualty's failure to pay his claim under the policy and bad faith in failing to pay the claim. General Casualty moved for summary judgment on the ground that the suit was barred by the one-year statute of limitation in WIS. STAT. § 631.83 and the one-year limitation provision in the policy. The circuit court granted the motion and dismissed both claims.

DISCUSSION

¶10 On appeal Elliott contends that the circuit court erred in granting summary judgment because, when the correct legal standards are applied, there are

issues of fact regarding whether General Casualty should be estopped from raising the limitation period defenses.

¶11 We review the grant of summary judgment de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). Summary judgment is proper when the submissions show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). In determining if there are any factual disputes, we view the factual submissions in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See* ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶19, 291 Wis. 2d 259, 715 N.W.2d 620.

¶12 In the following paragraphs we discuss the correct equitable estoppel standard and then apply it to the factual submissions. We conclude there are genuine issues of material fact and that summary judgment was improper on both the contract claim and the bad faith claim.

I. Equitable Estoppel Standard

¶13 Generally, equitable estoppel requires proof of the following elements: (1) an action or an inaction that induces (2) reasonable reliance by another (3) to his or her detriment. *See* ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶26, 270 Wis. 2d 384, 677 N.W.2d 630; *see also* ***Affordable Erecting***, 291 Wis. 2d 259, ¶33 (reliance must be reasonable). In ***State ex rel. Susedik v. Knutson***, 52 Wis. 2d 593, 596-97, 191 N.W.2d 23 (1971), the court addressed the more specific equitable estoppel standard to be employed when a party argues that the defendant should be equitably estopped from asserting a statute of limitation

defense. The court in ***Knutson*** identified six "rules" that are more specific statements of the general standard:

> 1. The doctrine of [equitable estoppel] may be applied to preclude a defendant who had been guilty of fraudulent or inequitable conduct from asserting the statute of limitation.
>
> ….
>
> 2. The aggrieved party must have relied on the representation or acts of the defendant, and as a result of such reliance failed to commence action within the statutory period.[4]
>
> ….
>
> 3. The acts, promises or representations must have occurred before the expiration of the limitation period.
>
> ….
>
> 4. After the inducement for delay has ceased to operate the aggrieved party may not unreasonably delay.
>
> ….
>
> 5. Affirmative conduct of defendant may be equivalent to representation upon which the plaintiff may to her disadvantage rely.
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> ….
>
> 6. Actual fraud, in a technical sense, is not required to find [equitable estoppel].

Id. at 596-97 (footnote added).

[4] As with the reliance element in the general equitable estoppel standard, the detrimental reliance in the statute of limitation context must be reasonable. *See* ***Hester v. Williams***, 117 Wis. 2d 634, 644-45, 345 N.W.2d 426 (1984) (applying the ***Knutson*** rules and stating that the reliance must be reasonable).

¶14 The ***Knutson*** court applied these rules and concluded that a father of a child who had lived with the mother and child for seven years, supported them, and repeatedly told the mother that he would eventually marry her was estopped from raising the statute of limitation in a paternity action after he left the home. ***Id.*** at 594-95, 597-98. The court explained the ultimate inquiry in this way: "The issue is whether the conduct and representations of [the father] were so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions." ***Id.*** at 598.

¶15 In this case, the one-year limitation provision is contained in both a statute and the insurance policy. To the extent Elliott may be suggesting that ***Knutson*** does not apply because, in addition to the statutory limitation, there is a limitation in the insurance policy, we conclude this argument is foreclosed by ***Wieting Funeral Home v. Meridian Mutual Insurance Co.***, 2004 WI App 218, 277 Wis. 2d 274, 690 N.W.2d 442. In ***Wieting*** we applied the ***Knutson*** standard when, in addition to the limitation in WIS. STAT. § 631.83(1), there was a limitation in the insurance policy. *See* ***id.***, ¶¶16, 23. The cases on which Elliott apparently relies as an alternative to the ***Knutson*** standard involve cases applying equitable estoppel only against an insurance policy limitation for bringing an action; they do not involve a statute of limitation in addition. *See* ***Dishno v. Home Mut. Ins. Co.***, 256 Wis. 448, 41 N.W.2d 375 (1950); ***Fischer v. Harmony Town Ins. Co.***, 249 Wis. 438, 24 N.W.2d 887 (1946); ***Killips v. Putnam Fire Ins. Co.***, 28 Wis. 472 (1871).

¶16 We conclude we are bound by ***Wieting*** and must apply the standard established in ***Knutson*** when we determine whether an insurer is equitably estopped from asserting against an insured a limitation that is based both on a statute and on the policy terms. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560

N.W.2d 246 (1997). Thus, the ultimate ***Knutson*** inquiry—whether the defendant's conduct is so unfair and misleading as to outweigh the public interest in the statute of limitation—is applicable when, as here, there is an insurance policy limitation in addition to a statute of limitation.

¶17 Similarly, even if Elliott is correct that ***Fischer***, 249 Wis. 438, permits consideration of the insurer's conduct after the limitation period has expired, ***Knutson*** controls: "[t]he acts, promises or representations [relied upon] must have occurred *before* the expiration of the limitation period." ***Knutson***, 52 Wis. 2d at 597 (emphasis added). However, the fact that the conduct that induces reliance must occur before the expiration of the limitation period does not mean, as General Casualty may be suggesting, that all conduct of the defendant occurring after that date is irrelevant. For example, in this case conduct by General Casualty occurring after the one-year period may be relevant in resolving a credibility dispute over what was said or done before that date. In addition, such later conduct by the defendant may be relevant to the ***Knutson*** requirement that "[a]fter the inducement for delay has ceased to operate the aggrieved party may not unreasonably delay." ***Id.***

¶18 In summary, in order for Elliott to establish that General Casualty is equitably estopped from asserting the one-year limitation in WIS. STAT. § 631.83(1) and in the policy, he must establish the following: (1) General Casualty engaged in particular conduct—whether action or inaction or representations—prior to the expiration of the limitation period; (2) he reasonably relied on that conduct; (3) as a result of his reliance, he did not commence an action within the one-year period; (4) after the inducement for delay ceased, he did not unreasonably delay in bringing the action; and (5) General Casualty's conduct was so unfair and misleading as to outweigh the public's interest in setting a

limitation on bringing actions. On this appeal, we do not address the "no unreasonable delay" requirement for the reasons we explain in the accompanying footnote.[5]

II. Application of Equitable Estoppel Standard

A. General Casualty's Conduct Prior to the Expiration of the Limitation Period

¶19 Elliott argues that General Casualty led him to believe that it would pay the claim and that construction delays would not prevent this payment. In the following two paragraphs, we summarize the evidence of General Casualty's conduct, viewed most favorably to Elliott.

¶20 Elliott avers that he told Brown he was having difficulty finding a contractor, and, even after Zimwood Custom Homes agreed to serve as the contractor, Elliott had trouble having Zimwood Custom Homes begin the project due to scheduling difficulties. Elliott further avers that, despite having knowledge of the construction delays, Brown and Ulset informed him that he was entitled to benefits under the policy and these would be paid after the property repairs were completed. Elliott was never told there was a deadline that he had to meet in order to receive payment.

[5] Elliott's position, as expressed in his main brief, is that he filed this action within twelve months of the time General Casualty's inducing behavior ceased, and this, he appears to believe, is the requirement he must meet. This is not the correct requirement under ***Knutson***: the ***Knutson*** requirement is that, after the inducement for delay has ceased, the aggrieved party may not unreasonably delay. ***State ex rel. Susedik v. Knutson***, 52 Wis. 2d 593, 597, 191 N.W.2d 23 (1971). However, General Casualty does not respond that Elliott is incorrect on the law on this point and does not argue that the undisputed facts show the correct requirement is not fulfilled. Therefore, we do not address this issue on appeal, except to bring to the parties' attention that ***Knutson*** states the applicable test.

¶21 It is a reasonable inference from the evidence that Elliott understood he should not start repairs until he had approval of the estimate from Brown and understood that, in order to prepare an estimate, Brown needed an estimate from Elliott's contractor. It is also reasonable to infer that in November and December 2006 Elliott was attempting to get information to Brown that Brown was requesting. In mid-January 2007, Zimwood Custom Homes faxed an estimate to Brown; and thereafter in January and February Elliott had conversations with Brown concerning more information Brown needed, which Elliott supplied or attempted to supply. At the time the one-year period expired on March 19, 2007, Elliott was waiting for Brown's estimate to be completed, and it was prepared three days after the expiration date. In his deposition testimony, Gill agreed that, as of the date he received a copy of Brown's estimate, he was "still accepting [Elliott's] claim."

B. Reasonable Reliance Resulting in Failure to Timely File Suit

¶22 We consider the second and third elements of equitable estoppel together because they are related to each other and many of the facts relevant to each element are the same. Thus, we examine whether Elliott was induced not to commence an action within the one-year period because of his reasonable reliance on General Casualty's conduct. *See* ***Knutson***, 52 Wis. 2d at 596-97. As with our analysis of the evidence on General Casualty's conduct, we view the evidence on these elements in a manner most favorable to Elliott.

¶23 The circuit court's decision was based primarily, if not exclusively, on its conclusion that, because it is undisputed that Elliott did not know about the one-year limitation period, he cannot, as a matter of law, prove that he was induced by General Casualty not to file suit within that time period. General

Casualty advances this position on appeal, while Elliott contends it is an incorrect view of the law.

¶24 We do not agree with the circuit court and General Casualty that, in order to prevail on an assertion of equitable estoppel against a time limitation for bringing suit, a party must establish that he or she knew of the limitation. We find no such requirement—either explicit or implicit—in ***Knutson***. That is, not only is this not one of the express ***Knutson*** "rules," but nothing in the court's opinion suggests that the court considered the plaintiff's knowledge of the statute of limitation in deciding that the plaintiff "relied on the representation or the acts of defendant, and as a result of such reliance, failed to commence action within the statutory period." ***Id.*** The ***Knutson*** court concluded the reliance requirement was satisfied because

> [a] paternity action was not brought prior to the running of the statute because respondent believed that appellant would marry her and because he was supporting [the child] all along. It was because of the representations of appellant and his supporting the child that no action was brought until he abandoned them.

Id. at 597.

¶25 ***Poeske v. Estreen***, 55 Wis. 2d 238, 198 N.W.2d 625 (1972), a case relying on ***Knutson***, supports our conclusion. In ***Poeske*** the expiration of the statute of limitation was disputed, and the court concluded that, even if the defendant was correct that expiration occurred earlier, he was equitably estopped under ***Knutson*** from asserting a limitation defense. ***Id.*** at 243-45. What the plaintiff understood about the expiration date of the statute of limitation was, neither explicitly nor implicitly, part of the court's analysis.

¶26 It is true that a party's knowledge of the limitation period may be relevant in deciding whether the plaintiff relied on the defendant's conduct in not filing an action within a particular limitation period. ***Johnson v. Johnson***, 179 Wis. 2d 574, 584, 508 N.W.2d 19 (Ct. App. 1993), is an example of this. In ***Johnson*** there were two potentially applicable statutes of limitation: a Wisconsin three-year statute and a Tennessee one-year statute. ***Id***. at 578. The plaintiff sued the day before three years expired, but, by the time of the appeal, the parties had apparently agreed that the one-year statute applied. ***Id.*** at 578-79. The defendant raised a statute of limitation defense and the plaintiff contended the defendant should be equitably estopped from asserting the one-year statute of limitation because, among other reasons, a statement was made by the defendant that the plaintiff had "plenty of time" to file the action. ***Id.*** at 581-82. After concluding that there was no evidence on when this statement was made, thus precluding a determination that it was misleading, we stated:

> Furthermore, we cannot conclude that Allstate's "plenty of time" statement induced Donald to forgo filing the lawsuit within the one-year limitation. The record clearly indicates that Donald was unaware of the one-year limitation to begin with. If Donald were relying on Allstate's conduct in not filing within one year, he would have filed suit as soon as the settlement negotiations proved fruitless. Instead, Donald waited until one day prior to the running of Wisconsin's three-year statute of limitations. The logical inference is that Donald was mistaken, not that he was induced to forgo filing within the one-year limitation.

Id. at 584.

¶27 ***Johnson*** teaches that a plaintiff's reliance on his or her own mistaken understanding of the statute of limitation logically suggests that the plaintiff was not induced by the defendant's conduct to forgo filing before expiration of the correct limitation. However, it does not establish the principle

that a plaintiff can never prove inducement to forgo filing before expiration of the limitation period unless the plaintiff is aware of the limitation.

¶28 The issue of inducement in this case is not resolved by ***Johnson*** because there is no evidence that Elliott was relying on a mistaken view that the limitation period was longer than one year. Instead, if the evidence and reasonable inferences are viewed most favorably to Elliott, he did not file the action on or before March 19, 2007, because Brown and Ulset informed him that he was entitled to benefits under the policy and these would be paid after the property repairs were completed, and Elliott was waiting for Brown to approve the estimate so he could start the repairs. Elliott did not need to know that there was a one-year statute of limitation expiring on March 19, 2007, in order to be induced by General Casualty's conduct not to file an action by that date. The implicit reasoning in ***Knutson*** and ***Poeske*** is that it is reasonable to infer that, had a plaintiff not been led to believe that a matter would be taken care of, he or she would have investigated options for filing a timely action. Applying that reasoning here, it is reasonable to infer that Elliott would have made inquiries leading to a timely filing of an action.

¶29 General Casualty contends that, even if there is evidence that Elliott did rely on General Casualty's conduct and was induced thereby not to file an action on or before March 19, 2007, his reliance was unreasonable. According to General Casualty, Elliott should have known that his claim might not be paid because General Casualty questioned the extent of his claimed damages. Elliott argues that there are factual disputes on this point, and we agree.

¶30 As General Casualty points out, it is undisputed that three months before the limitation period expired, Brown asked Elliott for additional detail

about the Zimwood Custom Homes estimate because it appeared different than Brown's estimate at the time. Brown also informed Elliott that he questioned the reasonableness of Elliott's ongoing claim for additional living expenses. However, Elliott avers that no one told him, during the one-year period after his property was damaged, that General Casualty was denying "any of the claims," and that he was repeatedly advised that he would "receive the benefits once the repairs were actually completed." Accepting these averments as true, we conclude that a reasonable fact finder could decide that Brown's inquiries were not sufficient to put Elliott on notice that his claims could or would be denied, and that Elliott's reliance on the statements that the claims would be paid was reasonable.

C. Balancing Unfairness of General Casualty's Conduct Against Policy of WIS. STAT. § 631.83(1)

¶31 Having concluded that there are factual disputes about whether Elliott's reasonable reliance on General Casualty's conduct induced him not to file an action on or before March 19, 2007, we turn to the final inquiry: does the evidence, viewed most favorably to Elliott, support a determination that General Casualty's conduct was so unfair and misleading as to outweigh the public's interest in the one-year limitation in WIS. STAT. § 631.83(1)(a)? If it does not, then there is no need to resolve the factual disputes, and summary judgment was properly granted in General Casualty's favor. However, if the evidence viewed most favorably to Elliott does support such a determination, then there are material factual disputes that prevent summary judgment.

¶32 Before we undertake this inquiry, there is a threshold issue: is the determination whether General Casualty's conduct was so unfair and misleading as to outweigh the public interest in the one-year statute of limitation a discretionary decision for the circuit court or a question of law? If discretionary,

then we would decide whether a reasonable court applying the correct law could conclude that General Casualty's conduct, viewed most favorably to Elliott, is sufficiently unfair and misleading. *See* ***Rodak v. Rodak***, 150 Wis. 2d 624, 631, 442 N.W.2d 489 (Ct. App. 1989) (a circuit court properly exercises its discretion when it applies the correct law to the facts of record and reaches a reasonable result). On the other hand, if the inquiry presents a question of law, then we would answer the question ourselves. In either case, there would need to be a remand for fact finding, but the circuit court's role on remand would differ. We therefore address this issue even though the parties have not done so.

¶33 We conclude the inquiry whether General Casualty's conduct is so unfair and misleading as to outweigh the public interest in the one-year statute of limitation is a discretionary decision for the circuit court. In ***Nugent v. Slaght***, 2001 WI App 282, ¶¶29-30, 249 Wis. 2d 220, 638 N.W.2d 594, we held, in the context of the general equitable estoppel standard, that once the elements of equitable estoppel (action/inaction upon which the other party reasonably relied to its detriment) are established, the ultimate decision whether to apply the doctrine is committed to the circuit court's discretion. We explained that equitable estoppel is an equitable doctrine and that the decision whether to apply it involves taking into account considerations other than the three elements that affect the equities. ***Id.*** Accordingly, although we determined that the undisputed facts established the three elements, we reversed (because the circuit court had concluded they did not) and remanded for the circuit court to exercise its discretion whether to apply the doctrine. ***Id.***, ¶¶35-36.

¶34 After we decided ***Nugent***, the supreme court took what appears to be a different approach in ***Randy A.J.*** The ***Randy A.J.*** court stated that, when the material facts are uncontested, the determination whether equitable estoppel

applies is reviewed de novo. ***Randy A.J.***, 270 Wis. 2d 389, ¶12. The court applied the ***Knutson*** inquiry, asking whether the actions and inaction of the two defendants were so unfair as to preclude them from overcoming the public's interest in the statutory marital presumption of paternity, and recognized that this inquiry invoked the court's equitable powers. ***Id.***, ¶¶28-29. The ***Randy A.J***. court then apparently made its own assessment that the equities favored applying equitable estoppel against both defendants, rather than reviewing as a matter of discretion the circuit court's decision to apply equitable estoppel against one defendant but not the other. ***Id.***, ¶¶30-31.

¶35 However, after ***Randy A.J.***, the supreme court decided ***Affordable Erecting,*** which took an approach that appears inconsistent with ***Randy A.J.*** and consistent with ***Nugent***. In ***Affordable Erecting***, the court reviewed the circuit court's decision on summary judgment to apply equitable estoppel against the defendant's invocation of the statutory requirements for a binding settlement. ***Affordable Erecting***, 291 Wis. 2d 259, ¶¶17, 19, 32. While citing ***Randy A.J.*** and its standard of de novo review, the court also stated: "if undisputed facts in the record lead to the conclusion that the elements of equitable estoppel are present, and no alternative view of the facts supports a contrary conclusion, the decision to apply the doctrine of equitable estoppel is within the circuit court's discretion." ***Id.***, ¶21. Concluding that the undisputed facts established the elements of equitable estoppel, the court in ***Affordable Erecting*** then considered whether the circuit court had properly exercised its discretion applying the doctrine and concluded that it had. ***Id.***, ¶49.

¶36 Because ***Affordable Erecting*** was decided after ***Randy A.J.***, we follow ***Affordable Erecting*** on this point. *See* ***Bruns Volkswagen, Inc. v. DILHR***, 110 Wis. 2d 319, 324, 328 N.W.2d 886 (Ct. App. 1982) ("If the decisions

of the supreme court are inconsistent, we should follow that court's practice of relying on its most recent pronouncement." (citation omitted)). We recognize that in this case there are factual disputes on whether the three elements are met, whereas in ***Affordable Erecting*** (as well as in ***Nugent*** and ***Randy A.J.***) there were none. However, whether or not there are factual disputes, once the facts are established, the nature of the circuit court's decision is the same: do all the circumstances warrant estopping the defendant for reasons of equity? We follow ***Affordable Erecting*** in concluding this is a discretionary decision for the circuit court.

¶37 In the context of this case, because a statute of limitation is at issue, the particular equitable decision for the circuit court, after the factual disputes are resolved, is whether General Casualty's conduct was so unfair and misleading as to outweigh the public's interest in the one-year statute of limitation. *See* ***Knutson***, 52 Wis. 2d at 598. Because this equitable balancing inquiry is committed to the circuit court's discretion, the question before us is whether a circuit court properly exercising its discretion could conclude, based on the evidence viewed most favorably to Elliott, that General Casualty's conduct was so unfair and misleading as to outweigh the public's interest in the one-year statute of limitation. For the following reasons, we conclude it could.

¶38 General Casualty argues that the facts in this case are "strikingly similar" to those in ***Johnson***, 179 Wis. 2d 574, in which the conclusion was that the defendant's conduct was not so unfair or misleading as to estop it from asserting a statute of limitation defense. In ***Johnson***, the plaintiff was injured in an accident while a passenger in a vehicle driven by a person who was insured by Allstate Insurance Company. ***Id.*** at 578. The plaintiff had discussions with Allstate about his claim but they were not able to reach a settlement. ***Id.*** at 579.

In arguing that Allstate should be equitably estopped from asserting a statute of limitation defense, the plaintiff pointed to three types of conduct that, the plaintiff asserted, were inequitable. ***Id.*** at 582-85.

¶39 The first instance of allegedly inequitable conduct in ***Johnson*** was Allstate's statement to the plaintiff that he had "plenty of time" to file a lawsuit. ***Id.*** at 582-83. As we have already mentioned, we stated that this was insufficient to show inequitable conduct because there was no evidence on when the plaintiff was told this. ***Id.*** at 583-84. We explained that, if the statement was made shortly after the accident, it would have been accurate; but if it was made a few days or weeks before the statute of limitation ran, it would arguably be misleading. ***Id.*** at 584. However, we stated, there was no evidence that Allstate "strung [the plaintiff] along and then hastily terminated negotiations at the zero hour, leaving him insufficient time to commence an action." ***Id.***

¶40 Second, the plaintiff in ***Johnson*** pointed to the fact that Allstate negotiated with the plaintiff before and after the one-year period expired. ***Id.*** at 583. We stated that Allstate's continued negotiations with plaintiff were "good faith negotiations toward an amicable settlement," and there was nothing fraudulent or inequitable about engaging in settlement discussions. ***Id.*** at 585. We also stated that the negotiations after the one-year statute of limitation did not indicate inequitable conduct but instead were explained by a mistaken view on the proper statute of limitation. ***Id.***

¶41 Third, the plaintiff in ***Johnson*** pointed to the fact that Allstate sent plaintiff a medical authorization form to sign just before the one-year limitation expired. ***Id.*** at 583. We stated that such a request is not inequitable conduct but is

routine "in every case such as this both prior to and after a claimant files an action." ***Id.*** at 585.

¶42 We do not agree with General Casualty that the facts in ***Johnson*** are similar to those in this case, let alone "strikingly similar." In ***Johnson*** there was no evidence comparable to Elliott's averments that he was told by his insurer that his claims would be paid when the repairs were made and that he should not begin the repairs until the estimate was approved, which he was still waiting for when the one-year period expired. ***Johnson*** does, however, provide some guidance in that it suggests that conduct that strings the plaintiff along in a way that leaves insufficient time to file an action would be inequitable.

¶43 We find additional guidance in ***Wieting***, another case in which the determination was that the defendant's conduct was not so inequitable as to warrant estopping a statute of limitation defense. ***Wieting***, like this case and unlike ***Johnson***, involved an insured's claim against his property insurer. That policy extended the one-year limitation of WIS. STAT. § 631.83(1) to two years, and the insured filed the action two years and eleven months after a storm caused the loss.[6] ***Wieting***, 277 Wis. 2d 274, ¶¶2-5.

¶44 The undisputed facts in ***Wieting*** were that in the first year after the loss the insurer made payments for a portion of the claim, but it determined that a portion of the claimed damage was not covered under the policy and informed the

[6] WISCONSIN STAT. § 631.83(3)(a) provides: "No insurance policy may … [l]imit the time for beginning an action on the policy to a time less than that authorized by the statutes." There is no statutory prohibition on a policy provision that lengthens a statutory limitation. In ***Wieting Funeral Home v. Meridian Mutual Insurance Co.***, 2004 WI App 218, ¶9, 277 Wis. 2d 274, 690 N.W.2d 442, we treated the two-year limitation period in the policy as lengthening the statutory limitation without addressing the issue whether this was a permissible policy provision.

insured that it was denying this portion of the claim approximately one year after the loss—when there was still a year remaining under the policy limitation. ***Id.***, ¶3. Thereafter the parties continued to discuss the disputed portion of the insured's claim, but in all these discussions the insurer repeatedly denied this portion of the claim and reserved its rights and defenses under the policy. ***Id.***, ¶4.

¶45 In ***Wieting*** we upheld the circuit court's ruling that the insurer had not engaged in any unfair or misleading conduct or any misrepresentation. ***Id.***, ¶¶26-28. We explained that the insurer was "up front" about the denial of the disputed portion of the claim and, while offering to reconsider if provided with adequate proof, the insurer "never wavered" from the denial. ***Id.***, ¶26. We also noted that in every letter the insurer expressly reserved its rights and defenses under the policy. ***Id.***

¶46 ***Wieting*** does not hold that an insurer's conduct is inequitable as a matter of law if it negotiates with its insured without expressly reserving its policy defenses. However, the contrast between the facts in ***Wieting*** and those in Elliott's submissions in this case are instructive. According to Elliott's submissions, not only did General Casualty not communicate to Elliott that denial of his claim or part of his claim was a possibility, it assured him he would be paid.

¶47 Elliott emphasizes the significance of the insurer/insured relationship in assessing the fairness of the insurer's conduct. He relies on ***Dishno***, 256 Wis. 448, as well as more generally on cases regarding an insurer's relationship with its insured, *see*, *e.g.*, ***Danner v. Auto-Owners Insurance***, 2001 WI 90, ¶49, 245 Wis. 2d 49, 629 N.W.2d 159, to argue that General Casualty had a duty to inform him of the one-year limitation.

¶48 We do not agree with Elliott that ***Dishno*** supports the imposition of such a duty upon the insurer as a matter of law. The quotation from ***Dishno*** on which Elliott relies indicates that, in the circumstances of that case, it was relevant that the insurer did not tell the insured about the twelve-month limitation in the insurance policy.[7] ***Dishno*** does not suggest that, regardless of the facts of the particular case, the insurer has a duty to do so as a matter of law.

¶49 As for Elliott's argument based on the general principle that there is a special duty or a fiduciary duty implied from the covenant of good faith and fair dealing in every insurance contract, *see* ***Danner***, 245 Wis. 2d 49, ¶49 & n.3, this argument is not sufficiently developed to persuade us that this special or fiduciary duty includes a duty to inform an insured of a policy limitation on bringing an action. Significantly, this argument does not take into account our decision in ***Wieting***, in which we quoted this statement from ***Johnson***:

> Underlying Donald's argument is the notion that Allstate had a duty to advise him of the proper statute of limitations. However, litigants must inform themselves of applicable legal requirements and procedures, and they cannot rely solely on their perception of how to commence an action. "Ignorance of one's rights does not suspend the operation of a statute of limitations."

[7] The quoted statement is:

> In view of those facts and circumstances, plaintiffs' failure to commence their action within the twelve months' limitation period can be deemed the direct result of defendant's acts and conduct in continuing the negotiations without any mention of the limitation in that respect under the policy.

Dishno v. Home Mut. Ins. Co., 256 Wis. 448, 452, 41 N.W.2d 375 (1950).

Wieting, 277 Wis. 2d 274, ¶25 (quoting ***Johnson***, 179 Wis. 2d at 584 (citations omitted)). In ***Wieting***, as we have already noted, the conclusion was that the insurer's conduct was not unfair to its insured despite the fact that the insurer did not advise its insured of the limitation in the insurance policy (although the insurer did repeatedly state it was reserving its policy defenses). ***Id.***, ¶26.

¶50 Although we do not agree with Elliott that General Casualty had a duty as a matter of law to inform Elliott of the policy limitation because of the insurer/insured relationship, we do agree with Elliott that the insurer/insured relationship is relevant in this case in determining whether the insurer's conduct is so unfair and misleading as to outweigh the public's interest in the one-year limitation in WIS. STAT. § 631.83(1). Because of the fiduciary relationship between an insurer and its insured, which arises from the duty of good faith and fair dealing implied in every contract, "a person [who] contracts with an insurance company for coverage in case of particular losses … has a right to expect to be treated fairly and to have legitimate claims paid promptly." ***Kranzush v. Badger State Mut. Cas. Co.***, 103 Wis. 2d 56, 64, 307 N.W.2d 256 (1981). In contrast, an insurer owes no such duty to a third party claiming under the policy of the alleged tortfeasor, as in ***Johnson***, nor can a third-party claimant reasonably expect the insurer to have such a duty to him or her. ***Id.*** at 73-74. Similarly, outside the insurance context, as a general rule the negotiations between a plaintiff and a defendant prior to suit are not governed by a duty comparable to an insurer's special or fiduciary duty to its insured. We conclude the insurer/insured relationship is a relevant consideration in assessing the fairness of the insurer's conduct that induces an insured not to file an action on the claim within the one-

year limitation in WIS. STAT. § 631.83(1).[8] This is another reason we reject General Casualty's argument that ***Johnson*** is dispositive.

¶51 The circuit court's balancing of the equities must also, of course, take into account the interests served by the one-year statute of limitation in WIS. STAT. § 631.83(1)(a). The interest served by statutes of limitation generally is to ensure prompt litigation of claims and to protect defendants from fraudulent or stale claims brought after memories have faded or evidence has been lost. ***Korkow v. General Cas. Co***., 117 Wis. 2d 187, 198, 344 N.W.2d 108 (1984) (citations omitted). The one-year limitation in § 631.83(1)(a) is "a comparatively short period of limitation" and was adopted in order to "protect the insurer from stale or fraudulent fire [and property] claims which could not be adequately investigated because of the passage of time." ***Borgen v. Economy Preferred Ins. Co***., 176 Wis. 2d 498, 508, 500 N.W.2d 419 (Ct. App. 1993).

¶52 When we consider the evidence viewed most favorably to Elliott in light of ***Johnson***, ***Wieting***, the insurer/insured relationship, and the purposes served by WIS. STAT. § 631.83(1)(a), we conclude a reasonable court applying the correct law could decide that equitable estoppel should apply here. Accepting this evidence, a reasonable court could conclude that General Casualty's representatives misled Elliott by assuring him that it would pay his claim when the repairs were complete, while also telling him that he should not begin repairs until an estimate was approved and that his problems in obtaining the information for the estimate were understandable. A reasonable court could conclude that it

[8] An insured's reasonable expectation of being treated fairly by his or her insurer when making a claim is also relevant to the reasonableness of Elliott's reliance on statements by the insurer that it will pay the claim, if the fact finder determines such statements were made.

would be unfair to permit an insurer to benefit from this misleading conduct at the expense of its insured and that this unfairness outweighs the interests served by § 631.83(1)(a).

III. Bad Faith Claim

¶53 The circuit court concluded that, because General Casualty "cannot be liable on the underlying policy claim, there necessarily cannot be a bad faith claim in refusing to pay that which the plaintiff believed to be owing …." Given this rationale for the dismissal of the bad faith claim, our reversal and remand on Elliott's claim under the policy requires a reversal and remand on the bad faith claim.

¶54 However, we point out that the court's rationale appears to be based on an error of law regarding the relationship between Elliott's policy claim and his bad faith claim. When the reason for no liability on a claim under the policy is the statute of limitation, an insured is not necessarily barred from pursuing a bad faith claim. *See* ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶39, 249 Wis. 2d 623, 638 N.W.2d 575 (holding that "even though the one-year statute of limitations on the [insured's] contract claim passed" before the insured filed suit, the insured was "not barred from pursuing and recovering damages on [the] bad faith claim"); *see also* ***Brethorst v. Allstate Prop. & Cas. Ins. Co.***, 2011 WI 41, ¶56, 334 Wis. 2d 23, 798 N.W.2d 467 (opining that a first-party bad faith claim still requires some wrongful denial of a benefit under the insurance contract, even though a bad faith claim may be brought without also bringing a breach of contract claim). Thus, even if, after proceedings on remand, Elliott's policy claim is dismissed because of the statute of limitation, his bad faith claim must be considered in light of the foregoing authority.

CONCLUSION

¶55 We conclude there are material factual disputes whether the doctrine of equitable estoppel precludes General Casualty from raising the statute of limitation and the limitation provision in the policy. We reverse the order of the circuit court dismissing both the claim under the policy and the bad faith claim, and we remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and caused remanded.

Not recommended for publication in the official reports.