COURT OF APPEALS
DECISION
DATED AND RELEASED

July 2, 1996

NOTICE

No. 95-2095

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

ROBIN W. HANCOCK and KAREN HANCOCK,

Plaintiffs-Appellants,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed.*

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

WEDEMEYER, P.J. Robin W. and Karen Hancock appeal from a summary judgment entered in favor of Liberty Mutual Insurance Company. The Hancocks claim the trial court erred in concluding that their amended complaint naming Liberty Mutual as the liability insurer for alleged tort-feasor, Die Mold, did not relate back to the original complaint and therefore was time-

barred. Because the Hancocks failed to comply with the time requirements associated with the fictitious name statute, the relation back statute does not save their time-barred claim against Liberty Mutual. Accordingly, we affirm.

I. BACKGROUND

This case arises from a personal injury action stemming from Robin Hancock's work-related injuries. On August 16, 1991, Hancock severely injured his foot and ankle while working at Interstate Forging Industries when a die-set exploded and a 600 pound piece of steel fell on his foot. On August 11, 1994, Hancock filed a products liability and negligence action against Die Mold, a fictitious insurer of Die Mold, Interstate, Liberty Mutual as Interstate's worker's compensation and liability insurer, and others.

The statute of limitations expired on August 16, 1994. Liberty Mutual was served in its capacity as Interstate's insurer on October 5, 1994. On October 10, 1994, the sixty-day time limit within which service must be accomplished expired. Die Mold was not served within the sixty-day time period. On March 29, 1995, the Hancocks filed an amended complaint naming Liberty Mutual as the insurer of Die Mold.

Liberty Mutual filed a motion to dismiss the complaint against it as Die Mold's insurer on the basis that the action was barred by the statute of limitations. The motion was treated as one for summary judgment because affidavits were submitted in conjunction with the motion. The Hancocks argued that the amended complaint was not time-barred because it related back to the timely filed original complaint. The trial court determined that the relation back statute did not apply under the facts of this case and granted the motion. The Hancocks now appeal.

II. DISCUSSION

The Hancocks contend that the amended complaint relates back to the timely filed original complaint because both requirements under the relation

back statute, § 802.09(3), STATS., are satisfied.[1] The trial court determined that this case is governed by ***Biggart v. Barstad***, 182 Wis.2d 421, 513 N.W.2d 681 (Ct. App. 1994), and ***Lak v. Richardson-Merrell, Inc.***, 100 Wis.2d 641, 302 N.W.2d 483 (1981). It ruled in pertinent part:

> In the original complaint filed August 11, 1994, five days before the three-year statute of limitations period ran, the plaintiffs did name Die Mold and ABC Insurance Company No. 1 as its insured under fictitious name statute as party defendants. Die-Mold, however, was dismissed by stipulation of April 10, 1995. Liberty Mutual was also named as a defendant in the original complaint but that was as Interstate Forge's insurer, not as Die Mold's insurer. The plaintiffs failed to substitute Liberty Mutual for ABC Insurance Company within the sixty-day time period. Having failed to substitute Liberty Mutual for the fictitiously named insurer of Die Mold, they cannot accomplish that same purpose under the relation back statute.
>
> The case of ***Biggart v. Barstad*** is factually similar to the facts in this case, and I find it controls the issues here....
>
> In this case, as in ***Biggart***, a party made claims against an insurance company for one person's negligence and later, after the limitations period ran, amended its claims to assert a direct action against the same insurer for the negligence of a different person. In this case, the original complaint alleged

[1] The Hancocks raise additional arguments for the first time on appeal: (1) Liberty Mutual should have known about its potential liability as an insurer for Die Mold because it investigated the accident; (2) Liberty Mutual should have known about its potential liability as an insurer for Die Mold because the Hancocks' counsel informed Liberty Mutual of his intent to pursue third-party liability against Die Mold; and (3) that Liberty Mutual had a statutory obligation pursuant to § 102.29(4), STATS., to inform the Hancocks that it also insured Die Mold. We decline to address these newly raised arguments. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

> Liberty Mutual was liable for Interstate Forging's negligence. In the amended complaint, plaintiffs allege Liberty Mutual is liable for the negligence of Die Mold. There are separate and distinct claims that under the holding in ***Biggart*** do not relate back to the original complaint.
>
> The question is whether the original pleadings gave notice to Liberty Mutual that it may have been liable for claims against Die Mold. They did not because the claims against Liberty Mutual were made as to Interstate Forging's negligence and not that of Die Mold. As in the ***Biggart*** case, it is only a coincidence that Liberty Mutual insured both Die Mold and Interstate Forging. Under the Court's holding in the ***Lak*** and ***Biggart*** cases and the cases cited therein, the plaintiffs' claims against Liberty Mutual and its insured, Die Mold, are time barred as a matter of law.

On the basis of these cases, the trial court granted the motion for summary judgment.

We review grants of summary judgment *de novo*. ***McCarty v. Covelli***, 182 Wis.2d 342, 345, 514 N.W.2d 45, 46 (Ct. App. 1994). Summary judgment methodology is well known and we will not repeat it here. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980).

After an independent review of the record, we conclude that the trial court properly granted summary judgment. Our conclusion is based on two factors. First, the Hancocks cannot use the relation back statute to remedy the fact that they failed to comply with the time requirements associated with the fictitious name statute. *See* ***Lak***, 100 Wis.2d at 644, 302 N.W.2d at 485; *see also* ***Lavine v. Hartford Accident & Indem. Co.***, 140 Wis.2d 434, 443, 410 N.W.2d 623, 627 (Ct. App. 1987) (applying ***Lak***'s analysis that "the relation back statute [does] not apply to an amendment that simply identified a fictitious defendant"). The fictitious name statute allows a party to file a complaint against a defendant using a fictitious name. *See* § 807.12(1), STATS. In order to

timely substitute the actual name of the party, however, the plaintiffs need to amend their complaint and serve the correct party within sixty days of the expiration of the statute of limitations. ***Lak***, 100 Wis.2d at 649, 302 N.W.2d at 487. The Hancocks failed to do so. They did not file their amended complaint until seven months after the expiration of the statute of limitations.[2]

Second, ***Biggart*** addressed the issue of whether an amended complaint that is filed after the statute of limitations, alleging a direct action against an insurer for the negligence of an insured covered under a different and separate policy from that alleged in the original complaint, relates back to the original complaint. ***Biggart***, 182 Wis.2d at 431, 513 N.W.2d at 684. In ***Biggart***, this court concluded that the relation back statute does not save an untimely claim under this factual scenario. ***Id.*** The instant case presents a similar factual scenario. The original complaint named Liberty Mutual in its capacity as insurer for Interstate. The amended complaint named Liberty Mutual in its capacity as insurer for another insured, Die Hard, who is covered under a different and separate policy. According to ***Biggart***, this amendment does not relate back. We are bound by ***Biggart***.

[2] The analysis contained in the dissent would be more persuasive if this case did not also involve the interplay of the fictitious name statute, which was pivotal in the majority's decision. The dissent, however, entirely overlooks the fact that the Hancocks failed to comply with the fictitious name statute.

For the foregoing reasons, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 95-2095 (D)

SCHUDSON, J. (*dissenting*). It is undisputed that Die Mold was not served within the statute of limitations. The Hancocks argue, however, that because Interstate was served within the statute of limitations, and because Liberty also was the insurer for Interstate, Liberty had constructive notice as insurer for Die Mold. For a number of reasons, I agree.

A chronological summary will assist the analysis:

08/16/91	While working at Interstate Forging Industries, Robin Hancock allegedly was injured when a die-set exploded causing a 600 lb. piece of steel to fall on his foot.
08/11/94	Robin and Karen Hancock file a complaint naming Interstate, Liberty (insurer for Interstate), Die Mold (manufacturer of the die-set), and a fictitious insurer of Die Mold.
08/16/94	The statute of limitations expires.
10/05/94	Liberty, as insurer for Interstate, is served.
10/10/94	The sixty day time period for service expires.
10/11/94	Die Mold is served.
03/09/95	The trial court enters an order dismissing Interstate from the case, and allowing Liberty to remain in the case as Interstate's subrogated party.
03/29/95	The Hancocks file an amended complaint against Liberty, as insurer for Die Mold.
04/10/95	The parties stipulate to dismissal of Die Mold.
06/19/95	The trial court enters the judgment dismissing the case.

The majority correctly identifies the influential authority of ***Biggart v. Barstad***, 182 Wis.2d 421, 513 N.W.2d 681 (Ct. App. 1994), in which this court stated:

> We reject the argument that anytime an insurer receives a complaint alleging that it is liable for the negligence of one insured it is, as a matter of law, put on notice of separate claims against it for the negligence of other insureds covered under different policies who happen to also have been involved in the same accident.

Id., 182 Wis.2d at 431, 513 N.W.2d at 684. ***Biggart***, however, may be read to support the arguments of *both* parties in this appeal and, when carefully studied, it appears to provide greater support for the Hancocks.

Although ***Biggart*** explains that an insurer will not be deemed to have received notice for one insured "anytime" it has received notice for another insured, ***id.***, it also explains that an insurer will be deemed to have received such notice *sometimes*. In ***Biggart***, the plaintiffs had failed to name two insured parties as defendants in their original complaint. Then, after the statute of limitations deadline, they added those two parties in their amended complaint. One insurance company was the insurer for the original defendant as well as the two additional defendants. This court concluded that the amended action must be dismissed against one of the newly added defendants, *but not against the other*. ***Id.***, 182 Wis.2d at 430-431, 513 N.W.2d at 684.

In ***Biggart***, despite the fact that the plaintiffs originally had named neither of the added defendants, this court concluded that one of those two new defendants still was within the reach of the amended action. ***Id.*** Here, by

contrast, both Die Mold and Liberty were named in the original complaint, thus leaving the Hancocks in a stronger position than that of the plaintiffs in ***Biggart***, *even with respect to the defendant against which the plaintiffs' argument in* ***Biggart*** *prevailed*.

Moreover, as ***Biggart*** states:

> When unfairness, prejudice or injustice is asserted [by the party objecting to the amended complaint], the question for the trial court is whether the party opposing the amendment has been given such notice of the operative facts forming the basis for the claim so that the party may adequately prepare a defense or response.

Id. at 434, 513 N.W.2d at 686. Here, although Liberty claims unfairness, it does not assert that it was ignorant "of the operative facts forming the basis for the claim" thus preventing adequate preparation of a defense or response.

Section 102.29, STATS., provides additional support for the Hancock's argument.[3] In relevant part it provides:

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[3] The majority declines to address the Hancocks's argument under § 102.29, STATS., because they did not invoke that statute in the trial court. Majority slip op. at 3 n.1. I, however, agree with the Hancocks's argument to this court:

> [R]eference to that statute does not create a new argument. It merely adds force to a prior argument. Section 102.29(4) is nothing less than legislative confirmation of what appellants specifically argued in

> (4) If the employer [Interstate Forging] and the 3rd party [Die Mold] are insured by the same insurer [Liberty], ... the employer's insurer [Liberty] shall promptly notify the parties in interest ....
>
> (5) An insurer subject to sub. (4) which fails to comply with the notice provision of that subsection and which fails to commence a 3rd party action, within the 3 years allowed by s. 893.54, may not plead that s. 893.54 is a bar in any action commenced by the injured employe under this section against any such 3rd party subsequent to 3 years from the date of injury, but prior to 6 years from such date of injury....

(Bracketed portions added.) Therefore, on October 5, 1994, when Liberty was served in its capacity as insurer for Interstate, the requirements of § 102.29 applied. Liberty necessarily knew that Die Mold was a named defendant in the original and, of course, Liberty was in a position to know that it was Die Mold's insurer.[4] Under the statute, Liberty was required to "promptly notify" regardless of whether the third party had been served. Clearly, Liberty had constructive notice with respect to Die Mold. Accordingly, the three year

(..continued)

> the court below: that under these circumstances it is fair to impute notice to Liberty.

[4] As the Hancocks note, Liberty was in a position to know that it was the insurer for Die Mold for several reasons, including that it was the worker's compensation insurance carrier for Interstate and, therefore, certainly would have had an obvious incentive to determine the insurer for Die Mold.

statute of limitation extension under § 102.29(5) applied and, therefore, the October 11, 1994 service of Die Mold was timely.[5]

Section 802.09(3), STATS., allows an amended pleading changing the party against which a claim is asserted to relate back to the original pleading if: (1) "the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading;" and (2) within the statute of limitations, the added party "has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party." Both criteria were satisfied. As the supreme court has declared, "Constructive notice is neither notice nor knowledge but is a policy determination that under certain circumstances a person should be treated as if he had actual notice." ***Thompson v. Dairyland Mutual Ins. Co.***, 30 Wis.2d 187, 192, 140 N.W.2d 200, 202-203 (1966). Under the unusual circumstances of this case, I conclude that Liberty clearly had constructive notice. Accordingly, I respectfully dissent.

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[5] If this statute were the only basis on which to conclude that Liberty had notice, then remand would be required for a factual determination of whether Liberty complied with § 102.29, STATS. If Liberty complied, then the statute of limitations did not extend three years and, therefore, service of Die Mold was not timely. If, however, Liberty did not comply, the statute of limitations extended for three years and service of Die Mold was timely.

Because I have concluded that, even exclusive of § 102.29, STATS., Liberty had constructive notice, I do not believe that a further factual determination by the trial court is needed. If, however, § 102.29 would prove dispositive of the issue in this appeal, Liberty's compliance would have to be determined.