COURT OF APPEALS DECISION DATED AND RELEASED

June 4, 1996

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. 95-2670

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

SYLVESTER RAKOWSKI and
BONNIE RAKOWSKI,

Plaintiffs-Appellants,

v.

MILWAUKEE MUTUAL INSURANCE COMPANY,
a Wisconsin corporation and
TIMOTHY SAM MURATORE, alias,
K-LINE TRUCKING, INC.,
a Wisconsin corporation,

Defendants-Respondents,

PROGRESSIVE CASUALTY INSURANCE COMPANY,
a foreign corporation,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

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

PER CURIAM. Sylvester and Bonnie Rakowski appeal from a summary judgment entered in favor of Milwaukee Mutual Insurance Company, Timothy Sam Muratore and K-Line Trucking, Inc. The Rakowskis claim the trial court erred in granting summary judgment on the basis of the statute of limitations because material issues of fact existed regarding their claim that Milwaukee Mutual was equitably estopped from asserting the statute of limitations defense. Because the pleadings submitted raise issues of material fact on the equitable estoppel issue, we reverse and remand for further proceedings.

I. BACKGROUND

On March 15, 1992, Mr. Rakowski was involved in an automobile accident in Chicago, Illinois. For the next several years, Mr. Rakowski communicated with a claims adjustor, Linda Castro, at Milwaukee Mutual in an attempt to settle his claim. Mr. Rakowski and Castro have very different recollections as to the substance of those conversations. No settlement agreement was ever reached.

In February 1995, Rakowski retained an attorney and filed suit on March 13, 1995. Milwaukee Mutual filed an answer on March 22, 1995. Three months later, Milwaukee Mutual filed a motion to dismiss the complaint on the basis that the statute of limitations had expired.[1] The basis for the motion was that the Illinois two-year personal injury statute applied rather than the three-year Wisconsin personal injury statute. In opposition to the motion, the Rakowskis filed an amended complaint, alleging that Milwaukee Mutual should be equitably estopped from asserting the two-year statute of limitations because Castro had made certain representations to Mr. Rakowski which unfairly caused him to forego filing the action earlier. In addition, Mr. Rakowski filed an affidavit, alleging in pertinent part: that shortly after the accident he received a phone call from Castro, who took his statement and told

[1] The motion was properly treated as a motion for summary judgment. *See* § 802.08(2), STATS.; ***Johnson v. Johnson***, 179 Wis.2d 574, 580, 508 N.W.2d 19, 21 (Ct. App. 1993).

him she would periodically check on his progress; that Rakowski complied with all of Castro's requests to sign medical and employment authorizations; that during 1992, Castro called Rakowski from time to time and told him that the bills were being paid; that during 1993, Castro called Rakowski on numerous occasions, and told him not to "rush his recovery" but to keep going to the doctor as needed and that the bills would be paid; that during the two years following the accident, Rakowski had several phone conversations with Castro during which she indicated that settlement could not occur until she received all of his medical and employment information; and that in 1993, Castro had Rakowski sign additional medical releases.

The trial court ruled that although there were clearly disputed issues of fact, that the disputed issues were not *material* and granted Milwaukee Mutual's motion and entered judgment dismissing the complaint. The Rakowskis now appeal.

II. DISCUSSION

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 Rakowski's submissions do raise issues of material fact regarding the doctrine of equitable estoppel. The doctrine of equitable estoppel can operate as a bar to asserting the statute of limitations defense. ***Susedik v. Knutson***, 52 Wis.2d 593, 594-96, 191 N.W.2d 23, 24 (1971). It applies in circumstances where the party asserting the statute of limitations had engaged in some wrongful conduct, which causes the injured party to rely on such conduct so that a lawsuit is not filed within the limitations period. ***Id.*** at 596-98, 191 N.W.2d at 24-26.

The Wisconsin Supreme Court has set forth six factors to apply with respect to equitable estoppel claims: (1) the doctrine may be applied to preclude a defendant who has been guilty of fraudulent or inequitable conduct from asserting the statute of limitations; (2) the aggrieved party must have

failed to commence an action within the statutory period because of his or her reliance on the defendant's representations or act; (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 the defendant may be equivalent to a representation upon which the plaintiff may rely to his or her disadvantage; and (6) actual fraud, in a technical sense, is not required. ***Id.*** at 596-97, 191 N.W.2d at 24-26.

Milwaukee Mutual argues that Rakowski's submissions were insufficient to raise a material fact as to: whether "acts, promises or representations ... occurred before the expiration of the limitation period" and whether it was reasonable for Rakowski to rely on anything that Castro may have said. Milwaukee Mutual claims that the only representations Castro made during the limitations period involved solely "everyday claims discussions." Rakowski's submissions, however, characterize the representations much differently. Rakowski claims that within the two years following the accident, Castro represented that his bills were being paid and that Rakowski should not worry about the claim.

We believe that Rakowski's submissions raise a material issue of fact as to: (1) whether Rakowski did in fact reasonably rely on Castro's statements, and (2) whether Castro actually made statements that led Rakowski to believe his claim would be resolved without having to file a lawsuit. Both of these are material issues of fact that a fact-finder must resolve.

Accordingly, we reverse and remand that portion of the judgment that granted summary judgment in favor of Milwaukee Mutual.[2] A jury should decide the issue of whether Milwaukee Mutual has waived the statute of limitations defense.

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[2] Because the material issues of fact on the equitable estoppel issue were only raised with respect to Milwaukee Mutual Insurance Company, we affirm that portion of the judgment dismissing the Rakowskis' claim against Timothy Sam Muratore and K-Line Trucking, Inc.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.