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DISTRICT II

April 29, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1761 Artisan and Truckers Casualty Co. v. State Farm Mutual Ins. Co. (L.C. #2013CV2096)

Before Brown, C.J., Reilly and Gundrum, JJ.

In this subrogation case, Artisan and Truckers Casualty Company and Perry Simonis, its insured, appeal a judgment denying Artisan's motion for summary judgment and granting summary judgment in favor of State Farm Mutual Insurance Company. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).[1] As we agree that Artisan's subrogation claim is barred by the statute of limitations, we affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The facts are undisputed. Kari Burns collided with a semi-truck operated by Simonis. State Farm insured Burns for liability with a $250,000 policy limit. Simonis's policy of truckers insurance from Artisan included underinsured motorist (UIM) coverage. State Farm offered to settle Simonis's claims against it and Burns in exchange for the $250,000 policy limit. Pursuant to ***Vogt v. Schroeder***, 129 Wis. 2d 3, 383 N.W.2d 876 (1986), Artisan opted to substitute its own funds for the $250,000 State Farm liability policy. Artisan thus potentially obtained a subrogated interest in the case, which would carry all the rights and limitations in Simonis's claim.

Artisan filed suit against State Farm three years and nine months after the accident, demanding that State Farm pay its $250,000 policy limit in exchange for a release of it and Burns. State Farm refused on grounds that the three-year statute of limitations had run. Looking to WIS. STAT. § 893.12, Artisan contended its payment to Simonis was "a payment … made as described in [WIS. STAT. §] 885.285(1)," and thus extended the statute of limitations.

Both parties moved for summary judgment. The circuit court ruled that the action was time-barred because WIS. STAT. § 893.12 did not apply, and granted judgment in favor of State Farm. Artisan and Simonis appeal.

We independently review a circuit court's grant or denial of summary judgment, applying the same methodology as the circuit court. ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, ¶14, 296 Wis. 2d 1, 717 N.W.2d 835. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

Artisan tries mightily, but unsuccessfully, to cast this case as an assignment. It is a subrogation case. A subrogated UIM carrier steps into the shoes of its insured. ***Patients Comp. Fund v. Lutheran Hosp.-LaCrosse, Inc.***, 223 Wis. 2d 439, 451, 588 N.W.2d 35 (1999). Simonis's original rights measure the extent of subrogee Artisan's rights. *See* ***American Standard Ins. Co. v. Cleveland***, 124 Wis. 2d 258, 262, 369 N.W.2d 168 (Ct. App. 1985).

Simonis's claim expired when he allowed the statute of limitations to lapse. The running of a statute of limitations in Wisconsin "absolutely extinguishes the cause of action." ***Heifetz v. Johnson***, 61 Wis. 2d 111, 115, 211 N.W.2d 834 (1973) (citation omitted). There no longer was a cause of action to give, assign to, or hold for Artisan.

We could end there, but for the sake of completeness, we also will examine WIS. STAT. §§ 893.12 and 885.285(1). "Statutory interpretation is a question of law that we review de novo." ***Rocker v. USAA Cas. Ins. Co.***, 2006 WI 26, ¶23, 289 Wis. 2d 294, 711 N.W.2d 634 (citation omitted).

WISCONSIN STAT. § 893.12 provides:

> The period fixed for the limitation for the commencement of actions, if a payment is made as described in [WIS. STAT. §] 885.285(1), shall be either the period of time remaining under the original statute of limitations or 3 years from the date of the last payment made under [§] 885.285(1), whichever is greater.

Section 885.285(1) provides in relevant part:

> **(1)** No admission of liability shall be inferred from the following:
>
> (a) A settlement with or any payment made to an injured person, or to another on behalf of any injured person, or any person entitled to recover damages on account of injury or death of such person.

Artisan argues that "a payment" and "any payment" mean just that. We reject so literal an interpretation. WISCONSIN STAT. §§ 893.12 and 885.285(1) "are *in pari materia* and must be construed together." ***Riley v. Doe***, 152 Wis. 2d 766, 770-71, 449 N.W.2d 83 (Ct. App. 1989). "The legislature intended that sec. 885.285 apply to a settlement or advance payment *between parties*." ***Riley***, 152 Wis. 2d at 771 (emphasis added). It would make no sense to allow a UIM insurer's payments to its insured, perhaps stretched out over time, to extend the statute of limitations for filing a suit against the other party, a stranger to the payments. Statutes of limitation exist to insure prompt litigation of claims and to protect defendants against fraudulent or stale claims. ***Id.*** at 770.

State Farm's mere offer to settle does not change our conclusion. "'[P]ayment' requires an acceptance of a tendered check in order to extend the three-year statute [of limitations]." ***Parr v. Milwaukee Bldg. & Constr. Trades***, 177 Wis. 2d 140, 148, 501 N.W.2d 858 (Ct. App. 1993). There was no tendered check, let alone an acceptance.

Further, "to toll or extend the statute of limitations, the 'payment' specified in [WIS. STAT.] § 885.285(1) … must be related to considerations of fault or liability. If it is not fault- or liability-related, it does not extend the limitation period." ***Gurney v. Heritage Mut. Ins. Co.***, 188 Wis. 2d 68, 73, 523 N.W.2d 193 (Ct. App. 1994). UIM coverage is indemnity, not liability, coverage. *See* ***Progressive N. Ins. Co. v. Hall***, 2006 WI 13, ¶22, 288 Wis. 2d 282, 709 N.W.2d 46. The payment to Simonis from his UIM carrier was unrelated to fault or liability.

In addition, "the reference to 'liability' in [WIS. STAT.] § 885.285(1) indicates that 'this statute may not apply to a first-party coverage payment.'" ***Gurney***, 188 Wis. 2d at 72 (quoting ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW § 10.10, at 298 (3d ed. 1990)). A UIM claim is a first-party contract claim. ***Anderson v. MSI Preferred Ins. Co.***, 2005 WI 62, ¶44, 281 Wis. 2d 66, 697 N.W.2d 73.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals