COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP160 **Cir. Ct. No. 2012CV1**

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

SHEILA A. KWICK,

PLAINTIFF-APPELLANT,

V.

CITIES AND VILLAGES MUTUAL INSURANCE COMPANY AND CITY OF ANTIGO,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Reilly, JJ.

¶1 PER CURIAM. Sheila Kwick filed her personal injury lawsuit against the City of Antigo and its insurer before the expiration of the 120-day

disallowance period set by the notice-of-claim statute, WIS. STAT. § 893.80(1g).[1] Because the action was filed too soon, and the limitations period had lapsed, the circuit court properly dismissed the action with prejudice. Kwick argues the City should be estopped from raising the notice-of-claim statute or the statute of limitations as a defense, but she has failed to demonstrate inequitable or fraudulent conduct. Accordingly, we affirm.

BACKGROUND

¶2 When an individual seeks to make a claim against a government subdivision, he or she must follow the procedure outlined in WIS. STAT. § 893.80, which requires that the individual notify the subdivision of the claim. The government then has 120 days to respond to the claim before it is deemed disallowed. WIS. STAT. § 893.80(1g). A suit may not be commenced until the claim is disallowed.

¶3 Kwick was allegedly injured in an accident with a City of Antigo vehicle on October 24, 2008. She filed a notice of claim on September 28, 2011. The City acknowledged receipt on September 29, 2011, and informed Kwick that her claim would be investigated and either paid, disallowed, or compromised. The letter further stated that claims for a "specific dollar amount will be submitted to the City of Antigo Insurance Review Committee for review," with notice of a meeting to follow. However, the letter did not indicate what dollar amount triggered committee review[,] or whether Kwick's claim satisfied that criterion. In

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

fact, Kwick's claim could not be acted on by the committee, which cannot consider claims in excess of $10,000. No notice of disallowance was served.

¶4 Kwick filed a summons and complaint on January 6, 2012, before the 120-day disallowance period had expired. The statute of limitations on her claim expired on February 21, 2012.[2] On February 22, the City filed an answer and motion to dismiss, asserting Kwick's summons and complaint were premature and her suit was barred by the statute of limitations. The circuit court agreed and, after converting the motion to one for summary judgment, dismissed Kwick's suit with prejudice. Kwick appeals.

DISCUSSION

¶5 We review a grant of summary judgment de novo. ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶34, 309 Wis. 2d 365, 749 N.W.2d 211. "A party is entitled to summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Id.***; *see also* WIS. STAT. § 802.08(2).

¶6 To bring or maintain an action against a governmental subdivision, a person must follow the notice-of-claim procedure set forth in WIS. STAT. § 893.80. The plaintiff must first notify the subdivision of the circumstances of the claim, and then file a claim with an itemized statement of the relief sought. WIS. STAT. § 893.80(1). No action may be brought until the claim is disallowed by the

[2] Although the statute of limitations on personal injury actions is usually three years, *see* WIS. STAT. § 893.34, that period is extended for 120 days in cases involving claims under WIS. STAT. § 893.80, ***Colby v. Columbia County***, 202 Wis. 2d 342, 357, 550 N.W.2d 124 (1996).

subdivision. WIS. STAT. § 893.80(1)(b). If the subdivision fails to act within 120 days, the claim is deemed disallowed. WIS. STAT. § 893.80(1g).

¶7 A summons and complaint filed prematurely, before a claim is disallowed or the 120-day disallowance period has expired, is defective and does not validly commence an action. ***Colby v. Columbia Cnty.***, 202 Wis. 2d 342, 358, 550 N.W.2d 124 (1996). And a summons and complaint filed too late, after the statute of limitations has run, is not saved by the earlier filing. ***Id.*** Because Kwick's filing was premature, and the statute of limitations had run, dismissal with prejudice was appropriate.

¶8 Kwick argues ***Colby*** does not apply, but her argument is based on a misreading of that case. Kwick argues, just as Colby did, that WIS. STAT. § 893.13(2) tolled the statute of limitations at the moment she filed her summons and complaint. In a nutshell, subsection 893.13(2) states that a limitations period applicable to a cause of action is tolled by the commencement of that action. However, "a cause of action is not properly commenced when a plaintiff prematurely files a summons and complaint, without first complying with notice requirements [of WIS. STAT. § 893.80]." ***Colby***, 202 Wis. 2d at 361. Because the action is never validly commenced, the limitations period is not tolled under § 893.13(2).

¶9 To argue around ***Colby***, Kwick seizes on language that had no bearing on the outcome of that case. ***Colby*** states, "[WIS. STAT. §] 893.80 prohibited the commencement of the original action by Colby in this case, where suit was filed only two days after the statutory claim was filed with Columbia County, precluding the County from undertaking a thorough investigation of the claim." ***Colby***, 202 Wis. 2d at 361-62. Kwick argues that, unlike the county in

Colby, here the City had "ample notice of the claim and refused to investigate it …." We reject this manufactured distinction. What was important in ***Colby*** was that the plaintiff had prematurely filed a summons and complaint. In 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 § 893.30, an action cannot be commenced if a claim has not been properly filed." ***Colby***, 202 Wis. 2d at 362.

¶10 Kwick also argues that ***Colby*** was wrongly decided and should be overruled. She asks that we certify the case to the supreme court. We have no authority to overrule supreme court decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We also see no need for certification; ***Colby*** has been settled law since 1996, and this case does not raise any novel issues requiring its reexamination.

¶11 Finally, Kwick asserts the City should be equitably estopped from raising the notice-of-claim statute or statute of limitations as defenses. Equitable estoppel may be applied when the following elements are satisfied: "(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). Whether equitable estoppel may be applied to a set of uncontested facts is a question of law. ***May v. May***, 2012 WI 35, ¶14, 339 Wis. 2d 626, 813 N.W.2d 179.

¶12 Kwick does not directly address these equitable estoppel elements in her brief-in-chief, nor does she do so in her reply brief, despite the City pointing

them out.[3] Instead, she would have us apply six rules announced in ***State ex rel. Susedik v. Knutson***, 52 Wis. 2d 593, 596-97, 191 N.W.2d 23 (1971), which somewhat overlap and elaborate on the traditional elements of equitable estoppel in a statute of limitations context. Under ***Knutson***, equitable estoppel precludes a defendant "who had been guilty of fraudulent or inequitable conduct from asserting the statute of limitations." ***Id.*** at 596.

¶13 Even if we apply the ***Knutson*** formulation of equitable estoppel, Kwick has failed to supply any evidence of fraudulent or inequitable conduct. She asserts the "City misrepresented the status of [her] claim" and "misled [her] by informing her that the claim would be sent to an insurance review committee" when in fact her claim could not be acted upon by that committee. This is a misreading of the City's September 29, 2011 letter, which merely indicated that claims meeting a "specific dollar amount" would be submitted to the committee. The letter did not promise Kwick that her claim would be referred to the committee, and as such did not misrepresent the procedure for her claim or mislead her.

¶14 Kwick also suggests the City employed a "lie-in-wait stratagem" to ensure that Kwick could not re-plead her claim after the 120-day disallowance period expired. This assumes the City had a duty to inform Kwick that her summons and complaint were prematurely filed before the statute of limitations expired. *See* ***Lecic v. Lane Co.***, 104 Wis. 2d 592, 604, 312 N.W.2d 773 (1981)

[3] We remind counsel that unrefuted arguments are generally deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). We decline to apply the rule here because Kwick indirectly addresses some of the elements.

("The general rule is that silence, a failure to disclose a fact, is not misrepresentation unless the nondisclosing party has a duty to disclose that fact."); ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 26, 288 N.W.2d 95 (1980) (same). The City had no such duty. *See* ***Lord v. Hubbell, Inc.***, 210 Wis. 2d 150, 161, 563 N.W.2d 913 (Ct. App. 1997). Likewise, we see nothing in the record that absolves Kwick of the duty to protect her interests by determining and meeting filing deadlines.

¶15 Kwick also argues we should not strictly apply the statute of limitations because it would cause injustice. We understand Kwick suffered serious injuries that will now go uncompensated, at least by the City. However, the law governing this case was clear from the outset. If the courts are to be an effective vehicle for resolving disputes, litigants are obligated to follow the rules established by the legislature and judiciary.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).