COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1800

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

DEFENDANT-RESPONDENT,

PROGRESSIVE CASUALTY INSURANCE COMPANY,
A FOREIGN CORPORATION,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

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

SCHUDSON, J. Sylvester and Bonnie Rakowski appeal from the trial court judgment dismissing their action against Milwaukee Mutual Insurance Company, following a jury trial. They argue that the trial court "abused its discretion and/or exceeded its authority by not effectuating the court of appeals mandate on remand consistent with the decision of the court of appeals as to questions presented and settled by such decision." We affirm.

The background of this case is summarized in this court's June 4, 1996 decision and need not be repeated here. In that decision, we reversed the grant of summary judgment in favor of Milwaukee Mutual, concluding:

> 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. A jury should decide the issue of whether Milwaukee Mutual has waived the statute of limitations defense.

(footnote omitted).

Upon remand, a jury trial was held. Initially, the trial court submitted three special verdict questions to the jury—the first two with the agreement of the parties; the third over the objection of the Rakowskis. The three questions were:

> QUESTION 1: Did Linda Castro make statements that led Sylvester Rakowski to believe his claim would be resolved without having to file a lawsuit?
>
> QUESTION 2: If you answer Question No. 1 "yes," then answer this question: Did Sylvester Rakowski reasonably rely on Linda Castro's statements?

> QUESTION 3: Did the plaintiffs, Sylvester Rakowski & Bonnie Rakowski, fail to take reasonable steps to inform themselves about the statute of limitations that controlled their cause of action?

The jury answered "yes" to all three questions.

After receiving the jury's answers to the first three questions, the trial court, *sua sponte*, and over the objection of Milwaukee Mutual, submitted a fourth question to the jury:

> QUESTION 4: Based on the evidence presented to you in this case, and based on the special verdict, is it the intent of the jury to allow the Plaintiffs to pursue their cause of action under the two-year Illinois statute of limitations?

The jury answered question four, "no."

The Rakowskis contend that the first two questions were the only ones the jury should have been asked, consistent with this court's decision. The Rakowskis further contend that, given the affirmative answers to those questions, the trial court then, as a matter of law, should have concluded that the doctrine of equitable estoppel precluded Milwaukee Mutual from invoking the statute of limitations defense. Thus, the Rakowskis maintain, the matter then should have been tried on issues of liability and damages.

Focusing on the first of the two paragraphs of our decision quoted above, the Rakowskis' contention is understandable—only the first two questions follow directly from our statement of the material factual issues the fact finder needed to resolve. But this court's previous decision said more: "A jury should decide the issue of whether Milwaukee Mutual has waived the statute of limitations defense." Thus, we acknowledge the uncertainty resulting from what the trial court termed "the awkwardness in the appellate court decision."

Now, however, we need not determine whether the jury should have been limited to the first two questions. After all, on appeal, the Rakowskis maintain that whether the doctrine of equitable estoppel precludes invocation of a statute of limitations defense was a legal issue for the trial court to determine. Therefore, if undisputed trial evidence enables this court to resolve that issue, no further trial court action would be needed. Having reviewed the record, we conclude, as a matter of law under ***Johnson v. Johnson***, 179 Wis.2d 574, 508 N.W.2d 19 (Ct. App. 1993), that undisputed evidence established that equitable estoppel did not preclude Milwaukee Mutual's statute of limitations defense.

In ***Johnson***, a case consisting of facts strikingly similar to those of the instant case, this court reiterated the standards for determining whether an insurance company "should be estopped from asserting the … statute of limitations as a defense based upon its conduct and representations to [an insured] after [an automobile] accident." ***Id.*** at 581-82, 508 N.W.2d at 21. We explained:

> The test of whether a party should be estopped from asserting the statute of limitations is "whether the conduct and representations of [the insurer] were so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions." Additionally, our supreme court has stated that the elements necessary to apply equitable estoppel include fraud or inequitable conduct by the party asserting the statute of limitations and that the aggrieved party failed to commence an action within the statutory period because of reliance on the wrongful conduct.

Id. at 582, 508 N.W.2d at 21-22 (citations omitted). Additionally, ***Johnson*** clarified that "[p]roof of estoppel must be clear, satisfactory and convincing and is not to rest on mere inference or conjecture." ***Id.*** at 583, 508 N.W.2d at 22.

Further, of particular significance given the facts of the instant case, in ***Johnson***, this court was "unable to conclude" that the insurance agent's

statement that the insured had "'plenty of time' to file a lawsuit" reached "the level of unconscionable or inequitable conduct" precluding the statute of limitations defense, where the insured "was unaware of the … limitation to begin with." ***Id.*** at 582-84, 508 N.W.2d at 22. That is, the insurer's conduct was not unconscionable or inequitable given that "there [was] nothing in the record that would indicate that such discussions were anything but good faith negotiations toward an amicable settlement." ***Id.*** at 585, 508 N.W.2d at 23. Moreover, because the insured was unaware of the statute of limitations, he had not "failed to commence an action within the statutory period because of reliance on" the agent's comment. *See* ***id.*** at 582, 508 N.W.2d at 22.

Granted, two factors distinguish ***Johnson*** from the instant case. The first is slight, the second is more substantial; neither, however, carries this case outside the parameters of ***Johnson***.

First, in ***Johnson***, the plaintiff argued that he had filed his lawsuit late because the agent misled him by telling him that he had "'plenty of time' to file a lawsuit," whereas here the Rakowskis contend that the agent assured them that all claims would be paid, so that filing would not be necessary. This slight difference in wording, however, is immaterial given that, in the instant case, there was absolutely no evidence to suggest that Ms. Castro's discussions with the Rakowskis were anything other than "good faith negotiations toward an amicable settlement." *See* ***id.*** at 585, 508 N.W.2d at 23.

Second, in ***Johnson***, the plaintiff failed to establish that either the misrepresentations or his reliance occurred within the period preceding the deadline for filing, whereas here the agent's assurances came before the deadline. Under many circumstances, this distinction could be significant given that, as we

explained in our earlier decision, an element of equitable estoppel is that "[t]he acts, promises or representations must have occurred before the expiration of the limitation period." *See* ***State ex rel. Susedik v. Knutson***, 52 Wis.2d 593, 597, 191 N.W.2d 23, 25 (1971). Under the undisputed facts of the instant case, however, whether the representations occurred before or after the expiration of the limitation period could have made no difference.

Mr. Rakowski testified that he was unaware of the statute of limitations:

> Q: … Mr. Rakowski …. You didn't know the statute of limitations in Illinois until after the two years ran?
>
> A: No, sir, I didn't.
>
> Q: You never found out, never went to a statutes book to find that out, did you?
>
> A: No, sir, I didn't.

He further clarified that he had never asked his lawyer about a statute of limitations, never discussed the statute of limitations with Ms. Castro, and simply "didn't know there was a statute of limitations." Additionally, Mrs. Rakowski, on cross-examination, was asked, "And I take it you didn't look into the statute of limitations either, correct?" She answered, "No, I did not." Unfortunately for the Rakowskis, in ***Johnson***, this court reiterated: "[L]itigants 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.'" ***Johnson***, 179 Wis.2d at 584, 508 N.W.2d at 23 (citation omitted).

Therefore, because the undisputed trial evidence established neither "unconscionable or inequitable conduct" by Ms. Castro, nor reliance by the Rakowskis, we conclude, under ***Johnson***, that the Rakowskis failed to prove

estoppel by "clear, satisfactory and convincing" evidence. *See* ***id.*** at 583, 508 N.W.2d at 22. Accordingly, dismissal was appropriate.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 98-1800(C)

CURLEY, J. *(concurring)*. I concur with the result reached by the majority, but I write separately because I disagree with the majority's analysis.

Initially, I agree with the majority that the earlier mandate was inartfully worded. The majority properly acknowledges that the "awkwardness" of our earlier decision resulted in a measure of uncertainty in the trial court on remand. However, I am satisfied that despite the apparent confusion, the trial court's approach does not constitute error. The trial court may inquire about issues left open by this court's mandate as long as the inquiry is consistent with that mandate. *See* ***Fullerton Lumber Co. v. Torborg***, 274 Wis. 478, 483, 80 N.W.2d 461, 464 (1957). I am satisfied that the trial court's inquiry was consistent with our mandate.

I do not agree with the majority's reliance on the ***Johnson*** case to decide the appeal. The majority opinion essentially ignores the jury verdicts and decides the legal issue pursuant to ***Johnson***, a case decided on a summary judgment motion. Under ***Johnson***, the majority concludes as a matter of law, "that undisputed evidence established that equitable estoppel did not preclude Milwaukee Mutual's statute of limitations defense." I find fault with this approach for two reasons: (1) the ***Johnson*** case itself is not dispositive because it contains significant factual distinctions that, despite the majority's efforts to the contrary, cannot be reconciled; and (2) by independently reviewing the record to determine whether undisputed trial evidence enables this court to determine whether equitable estoppel precludes Milwaukee Mutual's statute of limitations defense, the majority has assumed an improper role.

First, the majority concludes that the facts that distinguish this case from the ***Johnson*** case do not "[carry] this case outside the parameters of ***Johnson***." I disagree. The majority recognizes two factual distinctions between ***Johnson*** and this case: (1) in ***Johnson***, the insurance agent mislead the plaintiff by assuring him that there was "plenty of time to file a lawsuit," whereas the Rakowskis maintain that the agent led them to believe that all claims would be paid and a lawsuit would not be necessary; and (2) in ***Johnson***, the insurance agent's representations occurred after the statute of limitations expired, whereas here, the agent's representations were made before the statute of limitations expired. These two distinguishing facts, particularly the latter, speak directly to the criteria recognized by this court in our original decision to be applied in equitable estoppel claims.[1] Although the majority downplays the significance, I find the differences to be substantial. Therefore, I conclude that ***Johnson*** is not dispositive and I suggest that the majority, by relying on ***Johnson***, has attempted to fit the proverbial square peg into the round hole.

Second, the majority's approach ignores the jury's verdict and forces this court to assume an improper role in deciding this appeal. This court should begin from the premise that the trial court implicitly adopted the jury's verdict by

[1] In our original decision, we asserted:

> 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.

granting Milwaukee Mutual's motion to dismiss. From this premise we are obligated to review the jury's decision to determine whether it is supported by the evidence. This court must review a jury verdict in the light most favorable to the verdict. *See* ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996) ("Special deference is given to a jury verdict that is approved by the trial court."). The jury determined that: (1) Milwaukee Mutual's agent made certain representations regarding Rakowski's claim; (2) Rakowski reasonably relied on those representations; but (3) the Rakowskis did not take reasonable steps to inform themselves about the applicable statute of limitations; and (4) the two-year statute of limitations bars the Rakowskis' action. I am satisfied that there is sufficient evidence in the record to support each of the jury's findings, as well as the proposition that the trial court adopted these findings.

I do think that it is unclear from the jury's verdict and the trial court's judgment exactly which factor or factors the jury relied on in reaching its decision. In addition to the four special verdict questions, I note that the trial court instructed the jury on the six factors applicable to equitable estoppel, the absence of an obligation on the part of an insurance company to inform a litigant of a controlling statute of limitations, and a litigant's duty to make a reasonable effort to inform himself of his rights because ignorance of those rights does not suspend the operation of the statute of limitations. I am satisfied that the jury could reasonably conclude, on several grounds, that equitable estoppel did not preclude Milwaukee Mutual's statute of limitations defense. For example, the jury could have concluded and, as evidenced by the answer to special verdict question three, apparently did conclude, that Rakowski failed to inform himself of his rights and, therefore, he could not assert an equitable estoppel defense to the statute of limitations argument. In addition, the jury could have found that the Rakowskis

unreasonably delayed filing the lawsuit; or, that the agent's conduct, while inequitable, was not "so unfair or misleading as to outweigh the public interest in setting a limitation on bringing actions."[2] Therefore, I remain convinced that there is sufficient evidence in the record to support the jury's factual determinations.

For the foregoing reasons, I cannot support the majority's analysis, and I write separately. However, I concur with the result reached by the majority.

[2] The trial court informed the jury that:

> You are also instructed that Milwaukee Insurance cannot be estopped from asserting the statute of limitations defense unless the representations made were so unfair or misleading as to outweigh the public interest in setting a limitation on bringing actions. Mere error or mistake does not satisfy the test.