

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1204

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ELIZABETH GRISSMEYER,

PLAINTIFF-APPELLANT,

**DONNA SHALALA, SECRETARY FOR U.S. DEPT. OF
HEALTH AND HUMAN SERVICES, AND BLUE CROSS &
BLUE SHIELD UNITED OF WISCONSIN,**

INVOLUNTARY-PLAINTIFFS,

v.

**SPIEGELHOFF'S SUPER FOODS MARKET, INC., AND
SOCIETY INSURANCE, A MUTUAL COMPANY,**

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-RESPONDENTS,**

v.

**TARTAN SUPPLY Co., INC., CNA INSURANCE COMPANY,
VANDIJK CARPET, INC., AND ABC INSURANCE
COMPANY,**

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Walworth County:
MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Elizabeth Grissmeyer appeals from the judgment dismissing her action. Grissmeyer argues on appeal that the respondents should be barred by the doctrine of equitable estoppel from asserting that the statute of limitations had run on her claim. Because we conclude that the circuit court properly determined that the doctrine of equitable estoppel does not prevent the respondents from asserting the statute of limitations, we affirm.

¶2 On April 25, 1995, Grissmeyer fell while shopping in Spiegelhoff's Super Foods Market store in Waukesha. At the time of her fall, she filled out a customer injury report which listed the correct date of her injury. Shortly after the accident, an insurance investigator working for Spiegelhoff's insurer interviewed Grissmeyer and asked her if the injury occurred on May 1, 1995. Grissmeyer responded that she did not remember. From then on, May 1 was used by all of the parties as the date of her injury. Grissmeyer began this action on April 29, 1998, two days before the statute of limitations would have run on the incorrect date, and four days after it had run on the correct date.

¶3 The respondents brought a motion for summary judgment asserting that the statute of limitations had run. Grissmeyer argued that the respondents should be barred by the doctrine of equitable estoppel from asserting the statute of limitations defense. Grissmeyer asserted to the circuit court and to this court that the respondents repeatedly and consistently used the May 1, 1995 date in correspondence as the date of injury and therefore should be prohibited from claiming that her action is barred by the statute of limitations. The circuit court

rejected this argument, finding that equitable estoppel was not appropriate under these facts. The court noted that Grissmeyer, as the injured person, was in the best position to know the date of the accident, and that she could have discovered the date of the accident. The court granted summary judgment and dismissed Grissmeyer's action. Grissmeyer appeals.

¶4 There are no issues of material fact involved in this appeal. The only issue is whether the doctrine of equitable estoppel applies. A party may be estopped from asserting a statute of limitations defense when the conduct and representations are so unfair or misleading as to outweigh the public's interest in setting a limitation on bringing an action. *See Schwetz v. Employers Ins. of Wausau*, 126 Wis. 2d 32, 37, 374 N.W.2d 241 (Ct. App. 1985), *overruled on other grounds by Colby v. Columbia County*, 202 Wis. 2d 342, 363 n.11, 550 N.W.2d 124 (1996). The party asserting estoppel must demonstrate "fraudulent or other wrongful conduct on the part of the party asserting the statute of limitations and ... the detrimental reliance on such fraudulent or wrongful conduct by the aggrieved party." *Hester v. Williams*, 117 Wis. 2d 634, 644, 345 N.W.2d 426 (1984). Further, a party's reliance on another's conduct must be reasonable. *See Schwetz*, 126 Wis. 2d at 37-38. The party asserting estoppel need not show actual fraud. *See Hester*, 117 Wis. 2d at 645. However, he or she must demonstrate that the act relied upon was done knowingly or with intent that it be relied upon. *See Variance, Inc. v. Losinske*, 71 Wis. 2d 31, 39, 237 N.W.2d 22 (1976).

¶5 Grissmeyer asserts that it was inequitable for the respondents to "repeatedly mislead and misrepresent" the date of the accident to Grissmeyer and her attorneys. Yet, as the circuit court found, Grissmeyer was in an equal, if not better, position than the respondents to determine the date of the accident.

¶6 Moreover, it would have been as easy for Grissmeyer as for the respondents to ask for the accident report and discover the correct date of the accident. Grissmeyer argues that she did not recall the date of the accident and that she told the insurance investigator that she did not remember. The fact that she did not remember did not create an affirmative duty for the respondents to inform her of the correct date. In fact, it establishes that she was aware of an uncertainty about the date and did not take the appropriate steps to discover the correct date. She argues that there was no police report, ambulance report or emergency room report on which she could rely, and therefore she was justified in relying on the dates in the correspondence with the insurance company. There was, however, an accident report. For all of these reasons, we conclude that Grissmeyer's reliance on these statements was not reasonable.

¶7 In *Schwetz*, the court concluded that equitable estoppel did not bar the statute of limitations when the insurance company had told the plaintiffs' counsel that it would be premature to file a relief statement. *See Schwetz*, 126 Wis. 2d at 38. The court concluded that this conduct was not so unfair or misleading as to invoke equitable estoppel. *See id.* Grissmeyer asserts that the factual differences in *Schwetz* render its ruling inapplicable to her case. However, the principle behind the court's determination in that case is that the injured party must take steps to inform himself or herself of the applicable legal requirements and procedures and cannot transfer that responsibility to the insurer or the defendant. That same principle applies in this case.

¶8 Grissmeyer also asserts that the circuit court erred by misapplying the law to require a showing of actual fraud. Grissmeyer bases this argument on the circuit court's statement that "there's no showing that there's anything unconscionable, inequitable or fraudulently done by the insurance representative."

This statement does not establish, as Grissmeyer argues, that the court required a showing of actual fraud. The court was merely explaining the law of equitable estoppel as it applies to this case and concluding that Grissmeyer had not established any conduct by the respondents which would require the court to invoke the doctrine.

¶9 We agree with the circuit court's conclusion that Grissmeyer has not established conduct by the respondents which would invoke equitable estoppel. Grissmeyer was in as good a position as the respondents to determine the actual date of the injury. Further, it was Grissmeyer's choice to wait until the very last minute to file the action. She cannot transfer responsibility for her failure to file within the statute of limitations to the respondents. We affirm the judgment of the circuit court.¹

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

¹ The respondents previously moved to amend the caption to include the third-party defendants in this appeal. By order dated February 23, 2000, this court held the motion in abeyance. Because we have affirmed the decision of the circuit court, we now deny the motion to amend the caption as unnecessary.

