COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP841 **Cir. Ct. No. 2007CV266**

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

GERALD D. VIEBROCK, GERALD D. VIEBROCK , TRUSTEE AND GERALD AND NANCY VIEBROCK LIVING TRUST,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: ROBERT RASMUSSEN, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Wisconsin Mutual Insurance Company appeals a judgment awarding Gerald Viebrock, Gerald Viebrock, Trustee, and Gerald and Nancy Viebrock Living Trust (collectively, Viebrock) $124,766.24 for property damage sustained during a fire on May 2, 2005. Wisconsin Mutual asserts

Viebrock's suit, filed two years after the fire, is untimely under WIS. STAT. § 631.83(1)(a), which provides a one-year statute of limitations.[1] We agree. We also reject Viebrock's waiver, tolling, and estoppel arguments. Accordingly, we reverse and, on remand, direct the circuit court to enter judgment for Wisconsin Mutual.

BACKGROUND[2]

¶2 On May 5, 2005, a fire damaged Viebrock's rental property, a duplex, in Osceola, Wisconsin. One unit was severely damaged, while the second sustained only smoke damage. At the time, Wisconsin Mutual insured Viebrock for up to $315,000 in damage to the rental property, and up to $63,000 in lost income. Viebrock submitted a claim to Wisconsin Mutual.

¶3 Gary Krumenauer, a Wisconsin Mutual field claims representative, requested an estimate from Clean-Works, a property restoration company. Clean-Works estimated it would cost $151,899.39 to repair the heavily damaged unit, and $15,818.37 for the smoke-damaged unit. Viebrock, believing Clean-Works' bid underestimated the amount of damage, submitted a bid from his own construction company for $199,450, which he later reduced to $164,229.60.

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Both parties' submissions take a rather careless approach to record citations, sometimes citing whole record entries of thirty or more pages, plus dozens of pages in exhibits, for one specific proposition. Searching through that volume of materials severely burdens this court, and we ordinarily will not do it. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964) ("[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]."). We remind counsel of their obligation to provide appropriate references to the record under WIS. STAT. RULE 809.19(1)(d), (e), and (3)(a)2. Future violations may result in sanctions.

¶4 On August 17, 2005, Krumenauer accepted the lower of Viebrock's bids and requested repairs begin immediately. On September 9, 2005, Krumenauer sent Viebrock a check for $151,899, explaining the amount would allow Viebrock to begin repairs.[3] Krumenauer requested notice of any repair costs exceeding that amount, as well as receipts for material and labor charges.

¶5 Viebrock refused to accept the check and retained counsel, who notified Krumenauer the building was a complete loss and demanded Wisconsin Mutual pay the policy limits. Krumenauer objected, noting, "In my conversations with your client and [Clean-Works], it was never a consideration that the damage to the duplex could render it a total loss." Krumenauer again asked that Viebrock accept the $151,899 and provide a detailed repair estimate, stating, "We understand that repair/restoration is significant and that some costs may vary. If there are additional damages found[,] … we will take care of them as repair/restoration proceeds."

¶6 Krumenauer contacted Viebrock's attorney on February 6, 2006, for an update. Krumenauer was told Viebrock had not cashed the September 9 check and had not started repairing the duplex. Krumenauer reissued the check, which Viebrock then cashed.

¶7 In March, Viebrock obtained an estimate from another contractor, Archer Cleaning and Restoration, for $224,458.67. Krumenauer rejected Archer's

[3] The amount of the check reflected Clean-Works' detailed estimate for the more severely damaged unit. Wisconsin Mutual did not provide the full amount of Viebrock's bid because it was waiting for him to supply detailed repair estimates reflecting material and labor costs. At some point, Wisconsin Mutual apparently made another payment to Viebrock for $26,500.50 to repair the smoke-damaged unit.

estimate, explaining he had approved Viebrock's earlier bid and believed Viebrock's company would be doing the work.

¶8 Viebrock nonetheless hired Archer to restore the duplex. On April 24, 2006, Archer sent Krumenauer a copy of its agreement with Viebrock, and requested Krumenauer sign off on payment amounts. Krumenauer did not sign the agreement. Archer ultimately invoiced Viebrock $292,110.54 for the repairs.

¶9 On June 14, 2006, Krumenauer informed Viebrock he was closing the claim file. Krumenauer included a check for six months' lost income and a repair estimate from another local contractor, which he described as "almost identical" to the original Clean-Works estimate. Based on the estimates, and noting Viebrock's failure to justify a higher repair cost, Krumenauer stated no further payments would be forthcoming.

¶10 On May 2, 2007—the second anniversary of the fire—Viebrock sued Wisconsin Mutual, alleging breach of contract and bad faith and seeking the difference between Wisconsin Mutual's payments and Archer's $292,110.54 invoice. Wisconsin Mutual filed a motion for partial summary judgment, asserting Viebrock's breach of contract claim was time-barred under the insurance policy and WIS. STAT. § 631.83(1)(a). Viebrock argued his suit was timely, claiming inconsistent limitation periods in the policy rendered the contract ambiguous. The circuit court accepted Viebrock's argument and denied Wisconsin Mutual's motion.

¶11 Following our denial of Wisconsin Mutual's petition for leave to appeal, the parties stipulated to determine the amount of the loss using an appraisal process in the insurance policy. The appraisers awarded Viebrock $308,051. The

circuit court approved the award and entered judgment in Viebrock's favor for $124,766.24, representing the award less the amounts previously paid by Wisconsin Mutual.

DISCUSSION

¶12 Before reaching the merits of Wisconsin Mutual's appeal, we must first address Viebrock's claim that Wisconsin Mutual waived its right to appeal by stipulating to the appraisal process outlined in the insurance policy. The primary rule when construing stipulations is to ascertain and give effect to the parties' intention. ***Milwaukee & Suburban Transp. Corp. v. Milwaukee County***, 82 Wis. 2d 420, 442, 263 N.W.2d 503 (1978). "In seeking the intent of the parties, the language of the stipulation should not be construed so as to effect the waiver of a right not plainly intended to be relinquished." ***Id.*** An agreement to forfeit the right of appeal ought to be clearly established, and not made out by way of inference. ***Dillon v. Dillon***, 244 Wis. 122, 130, 11 N.W.2d 628 (1943).

¶13 Viebrock argues Wisconsin Mutual's intent to waive its right to appeal is evident from the stipulation's plain language. In its entirety, the stipulation provides:

> The parties, by their respective attorneys, hereby stipulate and agree that they shall follow the appraisal/umpire process with [sic] is set forth in the Wisconsin Mutual Insurance Company policy. The parties hereby stipulate and agree to be bound by the decision reached by the umpire.

We discern no intent to waive appeal rights from this agreement.

¶14 Instead, it does not appear the parties contemplated the stipulation's effect on Wisconsin Mutual's right to appeal. The appraisal process is designed to

establish the amount of the loss, over which Viebrock and Wisconsin Mutual have tussled since the fire.[4] In e-mail messages, the circuit court repeatedly stated its understanding that the appraisal process was limited to determining damages.[5] In a final message on February 6, 2009, the circuit court confirmed that, even though the parties stipulated to damages, "[t]he defendant does intend to appeal … this court's previous ruling on a contractual statute of limitations issue." The record demonstrates Wisconsin Mutual did not intend to waive its right to appeal by agreeing to the appraisal process.

¶15 Alternatively, Viebrock claims Wisconsin Mutual forfeited its appeal by consenting to entry of the judgment. While "[a] party cannot complain about an act to which he or she deliberately consents," ***Cascade Mountain, Inc. v. Capitol Indemnity Corp.***, 212 Wis. 2d 265, 269, 569 N.W.2d 45 (Ct. App. 1997), we disagree with Viebrock's characterization of the manner in which the judgment was entered. Early in the litigation, Wisconsin Mutual consistently asserted Viebrock's breach of contract claim was time barred. After the circuit court rejected that argument, and we denied its petition for leave to appeal, the circuit court's decision was final for the remainder of the lower court proceedings. Wisconsin Mutual was not required to raise this issue again to preserve review. We therefore reach the merits of Wisconsin Mutual's appeal.

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[4] The appraisal provision begins, "If 'you' and 'we' do not agree on the amount of the loss, either party may demand that the amount be determined by appraisal."

[5] On August 8, 2008, the circuit court understood the parties to be "in the process of working out an agreement to utilize an appraisal process set forth in the insurance contract to *determine damages*." (Emphasis added.) Similarly, on September 9, 2008, the court confirmed the parties had agreed "to an appraisal process to *resolve the damages issue*." (Emphasis added.) On December 10, 2008, the court stated, "The *damages determined by the appraisal process* will be binding on both parties and there will be no need for further litigation regarding the damages issue or any other issue." (Emphasis added.)

¶16 Wisconsin Mutual's sole contention on appeal is that Viebrock's suit was time-barred. The circuit court effectively granted summary judgment to Viebrock, and we review that decision de novo.[6] *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Kersten***, 136 Wis. 2d at 315.

¶17 WISCONSIN STAT. § 631.83(1)(a) requires that an action on a fire insurance policy be commenced within twelve months after the inception of the loss. "Inception of the loss" means the date on which the loss occurs. ***Borgen v. Economy Preferred Ins. Co.***, 176 Wis. 2d 498, 504-05, 500 N.W.2d 419 (Ct. App. 1993). Here, the loss occurred on May 2, 2005, and Viebrock did not file suit until May 2, 2007. His action was therefore untimely under § 631.83(1)(a).

¶18 In the circuit court's view, Viebrock's suit was timely filed because ambiguous language in the policy extended the limitation period. The circuit court observed the main body of the policy establishes a two-year limitation period, while an amendatory endorsement deletes this language and establishes a one-year limitation period. A policy is not ambiguous simply because an endorsement withdraws and replaces original policy language. Rather, we look to whether "the policy is reasonably susceptible to more than one construction from the viewpoint of a reasonable person of ordinary intelligence in the position of the insured …." ***Filing v. Commercial Union Midwest Ins. Co.***, 217 Wis. 2d 640, 648, 579

[6] Viebrock also perceives the circuit court's action to be the equivalent of summary judgment, as he argues that issues of material fact remain even if we conclude his suit was time-barred.

N.W.2d 65 (Ct. App. 1998). The policy here is not ambiguous. The endorsement clearly states the original policy's "Suit Against Us" provision is deleted and replaced by the one-year limitation period. Contrary to Viebrock's suggestion, the endorsement is not "bewildering, confusing [or] befuddling." A reasonable insured could not construe the endorsement in any other way.

¶19 The rules governing the relationship between an insurance policy and its endorsements are well-settled:

> In construing an endorsement to an insurance policy, the endorsement and policy must be read together, and the policy remains in full force and effect except as altered by the words of the endorsement. Where the endorsement expressly provides that it is subject to all terms, limitations, and conditions of the policy, it does not abrogate or nullify any provision of the policy unless it is so stated in the endorsement.
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> ….
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> Endorsements or riders on a policy become a part of the policy, and must be construed with it. Such provisions in the body of the policy are not to be abrogated, waived, limited, or modified by the provisions of an endorsement or rider unless expressly stated therein that such provisions are substituted for those in the body of the policy, or unless the provisions in the policy proper and in the rider or endorsement are conflicting. But where the provisions are inconsistent, those of the rider or endorsement must prevail. And where several such documents appear, the last in point of time is controlling.

Inter-Insurance Exch. of Chi. Motor Club v. Westchester Fire Ins. Co., 25 Wis. 2d 100, 105, 130 N.W.2d 185 (1964) (quotations and citations omitted). The endorsement's one-year period must be given effect. Viebrock's suit was therefore time-barred even under the policy.

¶20 Viebrock next claims his action should be allowed to proceed because (1) the statute of limitations was tolled while Viebrock and Wisconsin

Mutual exchanged estimates; and (2) Wisconsin Mutual is estopped from asserting the statute of limitations as a defense. Where the relevant facts are undisputed, as they are here, both are questions of law which we decide independently of the circuit court. ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997); ***Lord v. Hubbell, Inc.***, 210 Wis. 2d 150, 163, 563 N.W.2d 913 (Ct. App. 1997).

¶21 Viebrock first invokes the tolling provision of WIS. STAT. § 631.83. WISCONSIN STAT. § 631.83(5) tolls the statute "during the period in which the parties conducted an appraisal or arbitration procedure prescribed by the insurance policy or by law or agreed to by the parties." Viebrock claims the process of obtaining and comparing cost estimates was the equivalent of an appraisal procedure agreed to by the parties, and tolled the statute until Krumenauer notified Viebrock of the final cost estimate in June 2006. We rejected a similar argument in ***Wieting Funeral Home of Chilton, Inc. v. Meridian Mutual Insurance Co.***, 2004 WI App 218, ¶32, 277 Wis. 2d 274, 690 N.W.2d 442, when we noted these informal discussions are not the type of agreement envisioned by § 631.83(5). As in ***Wieting***, even assuming Viebrock and Wisconsin Mutual viewed their experts as appraisers, we conclude their efforts never ripened into a formal agreement.

¶22 We next consider Viebrock's estoppel claim. "The test of whether a party should be estopped from asserting the statute of limitations is whether the conduct and representations of the party against whom estoppel is sought were so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions." ***Wieting***, 277 Wis. 2d 274, ¶23. Equitable estoppel also requires that the party asserting the statute of limitations engaged in fraud or other inequitable conduct, and that the aggrieved party failed to commence an action because of reliance on that conduct. ***Id.***

¶23 We see nothing unfair, misleading or inequitable in Wisconsin Mutual's conduct during the limitations period. Wisconsin Mutual obtained a repair estimate with which Viebrock disagreed. Wisconsin Mutual claimed it would not rigidly adhere to this estimate, but required Viebrock to submit proper documentation of any costs exceeding that amount. While Wisconsin Mutual waited for Viebrock to substantiate his claim for higher damages, it sent a check for the lower estimate so Viebrock could begin repairs. And in March 2006—nearly six months after Wisconsin Mutual first sent a check and requested prompt repairs—Viebrock presented an estimate from Archer claiming, for the first time, that restoration costs would exceed $200,000. Wisconsin Mutual, having already obtained lower estimates from another restoration company and from Viebrock himself, refused to honor Archer's estimate. Viebrock hired Archer anyway, even after Wisconsin Mutual informed him it rejected Archer's estimate. Proof of estoppel must be clear, satisfactory and convincing. ***Wieting***, 277 Wis. 2d 274, ¶23. Viebrock has failed to make the requisite showing.

By the Court.—Judgment reversed and cause remanded with directions.

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