COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2631

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

KIMBERLY K. LARSEN,

PLAINTIFF-RESPONDENT,

V.

SCHOOL DISTRICT OF RHINELANDER AND WAUSAU INSURANCE COMPANIES,

DEFENDANTS-APPELLANTS,

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,

DEFENDANT.

APPEAL from an order of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. The Rhinelander School District and its insurer, Wausau Insurance Companies (hereafter "the school district"), appeal the trial court's denial of their motion to dismiss Kimberly Larsen's personal injury complaint.[1] The school district argues that Larsen failed to meet the requirements of § 893.80, STATS., before bringing this claim, and that any attempt to comply with the statute and bring a new claim would be time barred by the statute of limitations. Larsen contends that the trial court properly concluded that the school district is estopped from arguing her failure to meet the requirements of § 893.80, that the statute of limitations argument is not properly before this court, and that the statute of limitations does not bar her claim. Because we conclude that the school district did not induce Larsen's failure to file a notice of claim with the school district, we reverse the trial court's decision estopping the school district from invoking § 893.80 to defeat this action. We also conclude that the statute of limitations argument is not ripe for adjudication because it relies on hypothetical facts. The trial court's order is reversed, and this matter is remanded with directions to dismiss Larsen's complaint.

The facts underlying this appeal are undisputed and not complex. In 1983, six-year-old Kimberly Larsen was injured after falling from a merry-go-round during recess at school. Shortly thereafter she served the school district with a notice of claim of injuries and a categorized list of damages, but she did not include an itemized claim for damages. In 1989 and again in 1990, the school district's insurer sent a letter to Larsen's attorney inviting settlement negotiations on this injury claim. No response was made to either of these letters, although Larsen contends that "settlement was discussed by both parties." Larsen filed this

[1] Petition for leave to appeal was granted September 26, 1997.

lawsuit in 1997, three days prior to the expiration of the statute of limitations.[2] The defendants moved for summary judgment, and the trial court denied the motion.

In reviewing a summary judgment, we apply the same methodology as the trial court and our review is de novo. ***Fritsch v. St. Croix Central School Dist.***, 183 Wis.2d 336, 342, 515 N.W.2d 328, 330 (Ct. App. 1994). The summary judgment methodology has been repeated often, and we need not repeat it here. ***Id***. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits … show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS.

The school district argues that this claim should be dismissed because Larsen has not complied with requirements of § 893.80, STATS. That section:

> provides a condition precedent to bringing an action against the school district. No action may be brought or maintained against the school district unless two requirements are met: service upon the school district of a notice of the circumstances of the claim, *see* § 893.80(1)(a), STATS., and a subsequent claim containing claimant's address and an itemized statement of relief sought. Upon receipt of such claim, the school district has 120 days to accept or disallow the claim. *See* § 893.80(1)(b), STATS.

Fritsch, 183 Wis.2d at 343, 515 N.W.2d at 331. The school district argues that this lawsuit is improper because the undisputed facts show that it has not yet received an itemized statement of the relief sought by Larsen.

[2] Because Larsen was a minor when the injury occurred, the statute of limitations on her claim was extended until her twentieth birthday. *See* § 893.16(1), STATS.

Larsen does not dispute that she failed to meet the requirements of § 893.80, STATS., as it has been interpreted in case law.[3] Instead, relying on ***Fritsch***, she contends that the school district is estopped from asserting her failure to meet those requirements. Larsen argues that she was induced to believe that her dealings with the school district were over because its insurer began to send her settlement offers. We conclude that estoppel does not apply in this case.

Estoppel "may be available as a defense against the government if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel." ***Fritsch***, 183 Wis.2d at 345, 515 N.W.2d at 331 (citations omitted). For estoppel to apply, there must be "action or nonaction that induces another's reliance thereon, either in the form of action or nonaction, to his or her detriment." ***Id***.

We conclude that estoppel does not apply because the school district did not induce Larsen to believe that her dealings with the school district were over. Although it is true that a school district can be estopped from asserting the requirements of § 893.80, STATS., when it induces a claimant to believe her dealings with it are over, ***Fritsch***, 183 Wis.2d at 345-46, 515 N.W.2d at 332, Larsen has not shown that she was induced to believe that she need not follow the statutory notice requirement. Unlike ***Fritsch***, where the claimant's supervisor told the claimant to deal directly with the insurer, no agent of the school district made such a statement to Larsen. The absence of this critical fact is dispositive in our analysis. Larsen could not reasonably rely on any action or inaction by the school

[3] She does appear to argue, however, that this case law is outdated. This court cannot overrule prior published opinions. ***Hemberger v. Bitzer***, No. 96-2973, 1998 WL 107981, at *5 (Wis. March 13, 1998).

district in concluding that her dealings with the school district were over. While we acknowledge that Larsen's father, like the claimant in ***Fritsch***, was an employee of the school board, this similarity alone is insufficient to invoke the doctrine of estoppel. Because the requirements of estoppel have not been met, the school district may defend against this suit under § 893.80.[4]

Larsen next argues that the school district waived the provisions of § 893.80, STATS., by the insurance company's invitation to negotiate. We disagree. The invitations to negotiate were not sent by the school district. The school district never suggested that its insurer was taking over Larsen's case, and never itself invited Larsen to negotiate. Further, the letters sent to Larsen did not suggest that she no longer was required to follow the statutory requirements. The sole suggestion in the letters was that the insurance company was prepared to discuss the nature and value of Larsen's claim against the school board. Such an invitation does not waive the notice requirements of the statute.

The school district also argues that any future lawsuit brought by Larsen after she complies with § 893.80, STATS., would be time barred by the statute of limitations. Whether Larsen will actually bring such a case is a hypothetical matter, however, and is not ripe for judicial determination. *See* ***Estate of Schultz v. Schultz***, 194 Wis.2d 799, 809-10, 535 N.W.2d 116, 120 (Ct. App. 1995). Further, we are reluctant to address an issue that has not been addressed by the trial court.

[4] We also note that Larsen does not allege that the school district appointed its insurer to act as its exclusive agent in handling personal injury negotiations. We therefore do not address whether such an appointment would constitute sufficient action for estoppel to apply.

We conclude that the undisputed facts show that Larsen failed to comply with § 893.80, STATS. Because the government cannot be estopped from defending on this basis, the judgment is reversed and the court is directed to dismiss Larsen's complaint.

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

Not recommended for publication in the official reports.