COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3395

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

MILWAUKEE MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: RAYMOND THUMS, Judge. *Affirmed.*

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

PER CURIAM. Milwaukee Mutual Insurance Company appeals a summary judgment that dismissed its subrogation claims against State Farm Mutual Automobile Insurance Company. Milwaukee Mutual insured the tort victim with underinsured motorist coverage (UIM). State Farm insured the

tortfeasor with liability coverage and tendered $50,000, the policy's liability limit, to Milwaukee Mutual's UIM insured. Under ***Vogt v. Schroeder***, 129 Wis.2d 3, 383 N.W.2d 876 (1986), Milwaukee Mutual elected to pay its UIM insured the $50,000, and then brought a subrogation lawsuit against State Farm. It initiated the lawsuit outside the three-year statute of limitations for the underlying tort action. *See* § 893.54, STATS. The trial court dismissed the lawsuit as untimely on stipulated facts, granting State Farm summary judgment and denying Milwaukee Mutual summary judgment. It ruled that the three-year limitation from the underlying tort action, running from the date of the underlying tort, applied to Milwaukee Mutual's ***Vogt***-based subrogation lawsuit.

On appeal, Milwaukee Mutual makes three basic arguments: (1) its ***Vogt***-based subrogation claim is a unique brand of subrogation, and such a claim should not accrue under the three-year statute of limitations until Milwaukee Mutual paid its UIM insured the $50,000; (2) § 893.43, STATS., sets a six-year limitations period for certain kinds of "implied liabilities," and these "implied liabilities" include ***Vogt***-based claims, thereby giving Milwaukee Mutual a six-year limitation against State Farm; and (3) Milwaukee Mutual's ***Vogt***-based lawsuit could qualify as one for equitable subrogation, and lawsuits for equitable subrogation, as distinguished from conventional subrogation, should fall outside the three-year statute of limitations under some equitable circumstances. The trial court correctly granted summary judgment if State Farm deserved judgment as a matter of law. *See* ***Powalka v. State Life Mut. Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). We reject these arguments and affirm the trial court's summary judgment.

None of Milwaukee Mutual's arguments are sustainable. First, we have already held that a subrogation claim accrues the same date as the underlying

tort victim's claim. *See* ***Jones v. General Cas. Co.***, 218 Wis.2d 790, 796, 582 N.W.2d 110, 112-13 (Ct. App. 1998). We discern no reason to apply a different rule for ***Vogt***-based subrogation claims. Statutes of limitations seek to insure prompt litigation and protect parties from stale claims. *See* ***Korkow v. General Cas. Co.***, 117 Wis.2d 187, 198, 344 N.W.2d 108, 114 (1984). From the standpoint of statutes of limitations, we see no difference between ***Vogt***-based subrogation claims and other kinds of subrogation claims. All subrogation claims can face the twin problems of delayed litigation and stale allegations. We perceive no reason why ***Vogt***-based subrogation defendants, but not other such defendants, must endure untimely litigation and stale allegations. In short, Milwaukee Mutual has not shown that ***Vogt***-based subrogation claims present anything unique that should take them outside the general rule favoring prompt litigation and disfavoring stale claims.

We discern nothing in three Wisconsin cases Milwaukee Mutual cites that would act to delay the starting date for the three-year statute of limitations. First, we held in ***Jones***, 218 Wis.2d 790, 582 N.W.2d 110, that UIM providers could not recover under an equitable indemnity theory against tortfeasors. We ruled that Wisconsin law did not recognize such a cause of action. We did not rule on the starting date for the statute of limitations. Second, the Wisconsin Supreme Court dealt with several issues in ***Jindra v. Diederich Flooring***, 181 Wis.2d 579, 511 N.W.2d 855 (1994), ruling among other things that UIM providers have three options in the face of a tender by the tortfeasor's liability insurer. ***Jindra*** did not deal with the starting date for the statute of limitations. Last, the supreme court ruled in ***Voge v. Anderson***, 181 Wis.2d 726, 512 N.W.2d 749 (1994), that tortfeasors could remain liable to tort victims under the collateral source rule in spite of the fact that UIM providers paid a UIM claim

and waived their subrogation rights against the tortfeasor. In none of these cases did Wisconsin courts create a way for Milwaukee Mutual to avoid the three-year statute of limitations for ***Vogt***-based subrogation claims.[1]

Second, § 893.43, STATS.', six-year limitation does not apply to Milwaukee Mutual's ***Vogt***-based subrogation claim. According to Milwaukee Mutual, the statute covers "implied liabilities." We must apply the statute's plain meaning. *See* ***State v. Szarkowitz***, 157 Wis.2d 740, 748, 460 N.W.2d 819, 822 (Ct. App. 1990). Section 893.43 sets a six-year limitation period for contract actions, whether the action rests on express or implied contracts. While the statute refers to "implied liabilities," it does not deal with "implied liabilities" per se. Rather, it deals with only those that arise within the realm of express or implied contracts. Milwaukee Mutual's ***Vogt***-based claim against State Farm is not an implied contract lawsuit. Milwaukee Mutual has identified no business dealings with State Farm that would qualify as an implied contract. Rather, Milwaukee Mutual's claim rests on the doctrine of subrogation, a body of law that arises outside the parties' mutual business dealings, unlike the legal principles governing implied contracts. *See* ***Wisconsin Patients Comp. Fund v. Wisconsin Health Care Liab. Ins. Plan***, 200 Wis.2d 599, 620, 547 N.W.2d 578, 586 (1996). As such, Milwaukee Mutual's claim falls outside the bounds of § 893.43.

Third, the fact that Milwaukee Mutual's ***Vogt***-based subrogation lawsuit might qualify as one for equitable subrogation did not relieve Milwaukee Mutual of its duty to meet the three-year statute of limitations. As a general rule,

[1] Milwaukee Mutual points out that ***Sargent v. State Farm Mutual Auto. Ins. Co.***, 486 N.W.2d 14 (Minn. App. 1992), ruled that the statute of limitations started on the date of the UIM payment. We perceive no reason to follow ***Sargent*** in lieu of the Wisconsin rule.

all subrogation claims, whether conventional or equitable subrogation, must abide by the statute of limitations covering the underlying tort claim. Although courts of equity jurisdiction have the residual power to relieve litigants of strict legal requirements in narrow, carefully defined circumstances, *see* ***First Federated Sav. v. McDonah***, 143 Wis.2d 429, 434-35, 422 N.W.2d 113, 115 (Ct. App. 1988), we perceive no such circumstances here. The accident took place on September 2, 1994, and Milwaukee Mutual paid its UIM insured on June 10, 1996. At that time, Milwaukee Mutual still had over one year left under the three-year limitation to bring suit against State Farm. Milwaukee Mutual makes no claim that State Farm, the tortfeasor, or its UIM insured caused the delay. In short, Milwaukee Mutual was itself responsible for the delay and has shown no inequity. *See* ***Kenosha County v. Town of Paris***, 148 Wis.2d 175, 188, 434 N.W.2d 801, 807 (Ct. App. 1988) (equity aids the vigilant, not those who sleep on their rights). We reserve judgment on whether another state of facts might merit equitable relief to a late ***Vogt***-based subrogation lawsuit.

Last, we reject Milwaukee Mutual's reliance on ***Sahloff v. Western Casualty & Sur. Co.***, 45 Wis.2d 60, 171 N.W.2d 914 (1969), for equitable relief. Milwaukee Mutual reads ***Sahloff*** as giving a UIM insured six years to bring a UIM lawsuit against a UIM provider. Milwaukee Mutual claims that without equitable relief against the three-year limitation, the UIM provider's subrogation claim can lapse before the UIM insured even brings its UIM claim. ***Sahloff*** does not help Milwaukee Mutual. ***Sahloff*** dealt with uninsured motorist (UM) coverage and the limitations period for a UM insured's lawsuit against the UM provider. The UM provider sought a three-year limitation, the same that would apply to a UM provider's subrogation lawsuit. The ***Sahloff*** court saw no unfairness in holding that UM insureds may meet merely the six-year limitation

governing contract lawsuits while UM providers must meet the three-year limitation for the underlying torts. The court noted that UM providers could protect themselves with specific policy provisions. *See* ***id***. at 67, 70-71, 171 N.W.2d at 917, 918-19. We likewise perceive no inequity to Milwaukee Mutual in the present UIM setting. Milwaukee Mutual caused its own delay and cannot call on the aid of equity. *See* ***Kenosha***, 148 Wis.2d at 188, 434 N.W.2d at 807. Again, we reserve judgment on whether another state of facts would merit equitable relief to UIM providers against the three-year limitation period.

By the Court—Order affirmed.

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