

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 00-0944

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

KAREN R. YOCHERER AND LANCE H. YOCHERER,

PLAINTIFFS-RESPONDENTS,

v.

FARMERS INSURANCE EXCHANGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 NETTESHEIM, J. The issue in this case is whether Karen R. Yocherer's¹ breach of contract action against her insurer, Farmers Insurance

¹ Karen's husband, Lance, also joined in the action as a co-plaintiff.

Exchange (Farmers), was commenced within the six-year limitations period prescribed by WIS. STAT. § 893.43 (1997-98).² Under the Wisconsin Supreme Court's decision in *Abraham v. General Casualty Co.*, 217 Wis. 2d 294, 576 N.W.2d 46 (1998), we affirm the trial court's ruling that Yocherer's action was timely commenced.

FACTS

¶2 The controlling facts are brief and undisputed. Farmers issued an automobile insurance policy which covered Yocherer. The policy had an underinsurance provision. On October 22, 1987, Yocherer was injured in an automobile accident caused by the alleged negligence of Jeffrey S. Barnes and Katherine Noyes. Coincidentally, Farmers also insured Barnes. On February 16, 1995, Yocherer settled her claims against Barnes and Noyes and reserved any claims she had under her own policy with Farmers. Yocherer and Farmers then conducted settlement negotiations that proved unsuccessful. The parties then commenced arbitration proceedings. However, on February 12, 1997, Farmers terminated the arbitration process, advising Yocherer that the statute of limitations had expired on her claim.

¶3 Slightly more than ninety days later, on May 16, 1997, Yocherer responded with this action against Farmers. She alleged claims of bad faith, breach of contract, declaratory relief and estoppel. Farmers affirmatively defended on statute of limitations, estoppel and laches grounds. As to the statute of limitations, Farmers argued that the statute commenced running on the date of the accident, October 22, 1987. Yocherer argued that the statute commenced

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

running on February 12, 1997, when Farmers terminated the arbitration process. Relying on *Abraham*, the trial court agreed with Yocherer. The court also rejected Farmers' estoppel and laches arguments. The court ordered the parties to proceed with arbitration.

¶4 In due course, the arbitrators ruled for Yocherer. The trial court confirmed the award and entered judgment in favor of Yocherer. Farmers appeals.

DISCUSSION

¶5 The parties agree that the applicable statute of limitations is WIS. STAT. § 893.43, which states that “[a]n action upon any contract ... shall be commenced within 6 years after the cause of action accrues or be barred.” The issue is when the limitations period commenced.

¶6 Yocherer relies on *Abraham*. There, the insured was injured in an accident in October 1988. He settled with the tortfeasor's insurer in 1989 and then made an underinsurance claim against his own insurer. The insurer rejected the claim in October 1990. *Abraham*, 217 Wis. 2d at 298-99. The insured commenced an action against his insurer in September 1994. This action was timely under Wisconsin's six-year statute of limitations, but was untimely under the Florida statute of limitations. *Id.* at 299. The trial court ruled that the Florida statute of limitations applied and dismissed the action. *See id.* at 299-300. The insured appealed, and the supreme court accepted the case on certification from the court of appeals. *See id.* at 296.

¶7 The bulk of the supreme court's opinion addressed two issues not directly related to the statute of limitations issue: whether Wisconsin's borrowing statute, WIS. STAT. § 893.07(1), extended to contract actions, *see Abraham*, 217 Wis. 2d at 300-02; and, if so, whether the insured's contract action constituted a

“foreign cause of action” under the borrowing statute, *see id.* at 302-12. The court concluded that the borrowing statute did embrace a contract action. *See id.* at 301-02. But the court further concluded that the insured’s contract action was not a “foreign cause of action” because the “final significant event giving rise to a suable claim” was the insurer’s denial of underinsurance benefits. *See id.* at 311-12.

¶8 This latter holding brought the statute of limitations question under Wisconsin law. And on that question, the supreme court’s ultimate holding was expressed in one paragraph at the conclusion of the opinion:

As mentioned above, the alleged breach of contract by General Casualty occurred at the earliest in October 1990. Abraham subsequently filed his claim on September 30, 1994. Therefore, Abraham’s action falls well within the six-year period provided under Wisconsin law, *see CLL Assocs. Ltd. Partnership v. Arrowhead Pacific Corp.*, 174 Wis. 2d 604, 607, 497 N.W.2d 115 (1993) (holding that a contract cause of action under Wis. STAT. § 893.43 accrues at the moment the contract is breached), and his cause of action for breach of contract may proceed accordingly.

Abraham, 217 Wis. 2d at 313. The trial court relied on this language in holding that Yocherer’s action was timely.

¶9 Farmers acknowledges the *Abraham* ruling, but argues that it does not apply in this case. Instead, Farmers contends that in a breach of contract action by an insured against his or her insurer, the statute of limitations commences on the date of the loss, not the date of the breach. As an example, Farmers points to *Gamma Tau Educational Foundation v. Ohio Casualty Insurance Co.*, 41 Wis. 2d 675, 165 N.W.2d 135 (1969). There, an employee of the insured stole monies from the insured during November 1961. The insured discovered the loss in January 1962, but did not learn of the existence of the

insurance policy covering the loss until June 1967.³ The insured made a claim on the policy, but the insurer refused to pay. *Id.* at 678. In January 1968, more than six years after the date of the loss, the insured commenced an action against the insurer. The insurer moved to dismiss on statute of limitations grounds. The trial court denied the motion. The insurer appealed. *Id.*

¶10 The insured argued that its action was timely because under existing case law and the provisions of WIS. STAT. § 893.19(7) (1967), a cause of action premised on fraud did not accrue until the aggrieved party discovered the loss. *See Gamma Tau*, 41 Wis. 2d at 680. However, the supreme court said that this rule applied only to an action against the perpetrator of the fraud. *See id.* The court held that the action against the insurer was grounded in contract, not fraud. *See id.* at 681. Thus, the court measured the statute of limitations from the date of the loss pursuant to the general rule and § 893.19(3), the statute of limitations governing contract actions. *See Gamma Tau*, 41 Wis. 2d at 680-84. In rejecting the insured's argument, the court said:

If the plaintiff's contention were correct, a claimant against an insurance company could choose the time at which it elects to have the statute commence running by deferring the performance of conditions precedent until it appeared to be propitious to proceed. A rule that would permit such delay at the volition of a plaintiff would be contrary to the general policy considerations that require the prompt commencement of actions and the rapid disposition of litigation.

³ The policy insured against "loss of money, securities and other property which the insured shall sustain through any fraudulent or dishonest act or acts committed by any of the employees." *Gamma Tau Educ. Found. v. Ohio Cas. Ins. Co.*, 41 Wis. 2d 675, 678, 165 N.W.2d 135 (1969).

Id. at 681-82. To the same effect is *Rock County Savings & Trust Co. v. London Assurance Co.*, 17 Wis. 2d 618, 620, 117 N.W.2d 676 (1962) (general rule is that the right of action of the insured accrues against the insurer on the date of loss).

¶11 In arguing that *Abraham* did not alter this general rule, Farmers correctly notes that *Abraham* “does not overrule or reverse longstanding Wisconsin case law.” Farmers also correctly observes that the *Abraham* case reached the supreme court via certification from the court of appeals on the “foreign cause of action” issue. *See Abraham*, 217 Wis. 2d at 296. Nonetheless, *Abraham* unequivocally states that “the alleged breach of contract occurred in Wisconsin when General Casualty denied the underinsured motorist benefits requested by Abraham.” *Id.* at 312. Furthermore, *Abraham* unequivocally concludes that “Abraham’s action falls well within the six-year period provided under Wisconsin law”⁴ *Id.* at 313.

¶12 The court of appeals was intended as a high-volume, error-correcting court. *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986). We previously tendered this case by certification to the supreme court in its law-declaring capacity. In that certification, we functionally asked the supreme court if its ultimate holding in *Abraham* was intended as a substantive statement of controlling law on the statute of limitations issue. The supreme court denied our certification. While that action, standing alone, does not control the issue

⁴ We also note that *Effert v. Heritage Mutual Insurance Co.*, 160 Wis. 2d 520, 466 N.W.2d 660 (Ct. App. 1990), lends support to our holding in this case. In *Effert*, the court of appeals held that the insurer’s refusal to arbitrate the insured’s claim, not the date of the loss, triggered the running of the statute of limitations. *Id.* at 524-27. The court stated that its holding was in keeping with *Gamma Tau* because “[w]e read that case to mean that the cause of action accrued when the insured first had a claim against the insurer.” *Effert*, 160 Wis. 2d at 527. Thus, *Effert* has limited the reach of *Gamma Tau*.

before us, our error-correcting function does not permit us to issue a holding contrary to an explicit statement of our supreme court.

¶13 Moreover, Farmers' argument functionally asks us to reduce the supreme court's statement in *Abraham* to dicta. We decline to do so. Although the court's ultimate holding was brief, it nonetheless decided the crucial issue in the case—whether Abraham's action was timely.⁵

CONCLUSION

¶14 Pursuant to *Abraham*, Farmers breached its contract of insurance with Yocherer when it advised Yocherer on February 12, 1997, that it would not further consider her claim because the statute of limitations had expired. The statute of limitations commenced running on that date. Therefore, Yocherer's May 16, 1997 breach of contract action against Farmers was commenced within the six-year statute of limitations under WIS. STAT. § 893.43.⁶

⁵ We also observe that if *Gamma Tau* and *Abraham* are in conflict, we properly follow the later decision of the supreme court. *See Bruns Volkswagen, Inc. v. DILHR*, 110 Wis. 2d 319, 324, 328 N.W.2d 886 (Ct. App. 1982).

⁶ Farmers also contends that Yocherer's action is barred by principles of estoppel and laches. This argument is premised on the fact that Yocherer had earlier settled her claims against the two tortfeasors who were responsible for the accident. Farmers argues that Yocherer's delay in commencing this action has prejudiced its ability to now proceed against the responsible tortfeasors. However, Farmers insured one of the tortfeasors, and the settlement agreement reserved Yocherer's rights to proceed against Farmers. Thus, Farmers knew that it was at risk regarding future claims that Yocherer might assert. Therefore, as to estoppel, any reliance Farmers placed on Yocherer's actions cannot, as a matter of law, be deemed reasonable. *See Milas v. Labor Ass'n of Wis., Inc.*, 214 Wis. 2d 1, 11, 571 N.W.2d 656 (1997). And as to laches, Farmers cannot show that it lacked knowledge that Yocherer could assert future claims. *See Smart v. Dane County Bd. of Adjustment*, 177 Wis. 2d 445, 458, 501 N.W.2d 782 (1993).

(continued)

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

Yocherer also makes an alternative argument that even if the statute of limitations is measured from the date of loss, her action was timely because the statute was tolled during the arbitration process. We need not answer this question since we have ruled that the statute of limitations did not commence on the date of the loss. Nonetheless, we question Yocherer's argument because, by our count, even if the period devoted to arbitration were tolled, Yocherer's action was not commenced within six years from the date of the loss.

