COURT OF APPEALS
DECISION
DATED AND RELEASED

November 19, 1996

NOTICE

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

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

No. 95-3238

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

Estate of Glenn F. Plautz By Charlotte Pagel, Personal Representative, and Allyson Plautz,

Plaintiffs-Appellants-Cross Respondents,

v.

Time Insurance Company,

Defendant-Respondent-Cross Appellant.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Fine, Schudson and Curley, JJ.

PER CURIAM. The Estate of Glenn F. Plautz appeals from the trial court's dismissal on summary judgment of its bad-faith action against Time Insurance Company. We affirm. Time Insurance cross-appeals. It asserts that

the Estate of Glenn Plautz's bad-faith claim is barred by the applicable statute of limitations. In light of our affirmance of the trial court's grant of summary judgment to Time Insurance on other grounds, we do not reach this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). Time Insurance also contends that the trial court erred in not granting it costs under RULE 814.03, STATS., as the prevailing party. We agree and reverse on that issue.

Appeal

I.

This case was here once before. ***Estate of Plautz v. Time Ins. Co.***, 189 Wis.2d 136, 525 N.W.2d 342 (Ct. App. 1994). It has its beginnings in a $2,000 whole-life insurance policy that Lois Plautz, Glenn Plautz's wife, purchased from Time Insurance. ***Id.***, 189 Wis.2d at 140, 525 N.W.2d at 344. Mrs. Plautz defaulted on the policy in November of 1977 because she did not pay the premiums. ***Ibid.*** Nevertheless, under its "extended term" provision, the policy did not lapse; there was enough of a cash value to pay the premiums on the policy through 1996. ***Ibid.***

Mrs. Plautz converted the policy back to whole life from its "extended term" status in September of 1986. ***Ibid.*** At that time, Time Insurance calculated that the policy had $162.06 in remaining cash value, and applied part of that money to premiums for the first two years. ***Ibid.*** The balance of the money was refunded to Mrs. Plautz. Mrs. Plautz did not pay subsequent premiums, and, in April of 1988, Time Insurance informed her that the policy had lapsed (apparently as of March 1, 1988). ***Id.***, 189 Wis.2d at 140–141, 525 N.W.2d at 344–345. She died in December of 1988. ***Id.***, 189 Wis.2d at 140, 525 N.W.2d at 344.

Following his wife's death, Mr. Plautz took the Time Insurance policy to a lawyer, who investigated whether there was coverage. ***Id.***, 189 Wis.2d at 141, 525 N.W.2d at 345. After much inquiry and checking, Time Insurance ultimately discovered that a "computer programming glitch" had caused Mrs. Plautz's policy to lapse prematurely; in fact, the policy was in effect

when she died. ***Id.***, 189 Wis.2d at 141–142, 525 N.W.2d at 345. On September 15, 1989, Time Insurance paid the $2,000 plus interest. ***Id.***, 189 Wis.2d at 142, 525 N.W.2d at 345. Mr. Plautz died on November 6, 1989. ***Ibid.*** He had not cashed the check. ***Ibid.*** Mr. Plautz's estate then brought this action against Time Insurance, alleging that the insurance company had acted in "bad faith." ***Ibid.***

After a trial, a jury found that Time Insurance had acted in bad faith, and awarded the Estate $255,000 in compensatory damages and $2,000,000 in punitive damages. ***Id.***, 189 Wis.2d at 143, 525 N.W.2d at 345. The trial court vacated the award, and dismissed the Estate's bad-faith claim, holding that a beneficiary of a life insurance policy could not maintain a bad-faith action against the insurance company. ***Ibid.*** We reversed, holding that a beneficiary of a life insurance policy could maintain a cause of action against an insurer for bad faith in settling his or her claim. ***Id.***, 189 Wis.2d at 143–148, 525 N.W.2d at 345–347.

We also held that the trial court erred when it did not instruct the jury that an essential element to the successful prosecution of a bad-faith claim against an insurance company is that not only that the plaintiff suffer "emotional distress" but that the "emotional distress" be "severe." ***Id.***, 189 Wis.2d at 151–153, 525 N.W.2d at 349. We explained that ***Anderson v. Continental Insurance Co.***, 85 Wis.2d 675, 694–696, 271 N.W.2d 368, 378 (1978), required that the "emotional distress" be "`an extreme disabling emotional response'" that can be characterized as "`*severe*.'" ***Plautz***, 189 Wis.2d at 152, 525 N.W.2d at 349 (quoting ***Anderson***, emphasis by ***Plautz***). Further, we recognized that ***Anderson***'s reliance on ***Alsteen v. Gehl***, 21 Wis.2d 349, 124 N.W.2d 312 (1963), meant that the severe-emotional-distress predicate to recovery required proof that the plaintiff "`was unable to function in his other relationships because of the emotional distress caused by the defendant's conduct,'" and that mere "`[t]emporary discomfort cannot be the basis of recovery.'" ***Plautz***, 189 Wis.2d at 152, 525 N.W.2d at 349 (quoting ***Alsteen***, 21 Wis.2d at 360–361, 124 N.W.2d at 318). Noting that "[a]lthough certain portions of the testimony related to Glenn Plautz's emotional distress, it is anything but clear that the testimony established that Plautz's stress was `extreme,' `disabling' and `left him unable to function in his other relationships,'" we could not "conclude that a different result would not have occurred had the jury been properly instructed." ***Id.***, 189 Wis.2d at 158, 525 N.W.2d at 351. For this and another

reason that we do not discuss in this opinion, we reversed and remanded for a new trial. ***Id.***, 189 Wis.2d at 158–161, 525 N.W.2d at 351–353.

After remand, a new complaint was filed on behalf of not only Mr. Plautz's estate, but also Mrs. Plautz's estate. Time Insurance countered with a motion for summary judgment, which sought dismissal of the complaint. Although the motion raised many issues with respect to the plaintiffs' claims, the issue that is dispositive of this appeal concerns Time Insurance's contention that there was no genuine issue of material fact for trial concerning whether Mr. Plautz's emotional distress over the late payment of his wife's death benefit was sufficiently "severe" to let the issue go to a jury. The trial court, in a carefully reasoned opinion, found that it was not, and dismissed the claims asserted by Mr. Plautz's estate.[1]

II.

Summary judgment is used to determine whether there are any disputed facts that require a trial. RULE 802.08(2), STATS.; ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Summary judgment must be entered if an evaluation of evidentiary material submitted by the parties demonstrates "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." RULE 802.08(2), STATS. The party with the burden of proof on an element in the case must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material "set[ting] forth specific facts," RULE 802.08(3), STATS., material to that element. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 290-292, 507 N.W.2d 136, 139 (Ct. App. 1993). As we noted in ***Hunzinger***, "once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial `to make a showing sufficient to establish the existence of an element essential to that party's case.'" ***Id.***, 179 Wis.2d at 292, 507 N.W.2d at 140 (quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)). Although assisted greatly by a lucid and tightly reasoned written decision by the trial

[1] The trial court also dismissed the claims asserted by Mrs. Plautz's estate. There is no appeal from that aspect of the trial court's determinations.

court, our review of a trial court's grant of summary judgment is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

In its decision on summary judgment, the trial court explained why there was an insufficient showing that Mr. Plautz had suffered the requisite severe emotional distress to permit trial of that issue:

> Had the jury been properly instructed, it could not have found severe emotional distress as a matter of law. Some testimony was produced that Glenn Plautz was upset by Time's conduct, and that he was concerned enough to consult an attorney. However, this `emotional distress' is more typical of a temporary discomfort or minor annoyance than it is of an `extreme disabling response.' There was no testimony at trial that Glenn Plautz was unable to function in his other relationships because of any emotional distress allegedly caused by Time's delay in paying the life insurance benefits. No testimony was produced that Glenn received any type of treatment for emotional distress. Even [Mr. Plautz's physician]'s recounting of his five-minute conversation on the streets of Horicon with Glenn contradicts Glenn's claim; clearly, Glenn was able on that day, to walk, converse, and so conduct himself, exhibiting no more than the normal reaction to one of life's trying circumstances.

As an initial matter, the Estate of Glenn Plautz argues that the "law of the case" doctrine precludes Time Insurance from arguing on summary judgment after our remand in our earlier decision in this case, ***Estate of Plautz v. Time Ins. Co.***, 189 Wis.2d 136, 525 N.W.2d 342 (Ct. App. 1994), that Mr. Plautz's suffering was not sufficiently severe to support this bad-faith action. We disagree. Under that doctrine, "a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in the trial court or on later appeal." ***Univest Corp. v. General Split Corp.***, 148 Wis.2d 29, 38, 435 N.W.2d 234, 238 (1989). In ***Estate of Plautz*** we determined that Time Insurance had failed to adequately "brief the issue of whether the trial court erred in

failing to grant its motion for a directed verdict" on the emotional-distress issue. ***Id.***, 189 Wis.2d at 158 n.8, 525 N.W.2d at 351 n.8. We did not decide that there was sufficient evidence to go to trial on that issue; indeed, we stated quite clearly that "[a]lthough certain portions of the testimony related to Glenn Plautz's emotional distress, it is anything but clear that the testimony established that Plautz's stress was `extreme,' `disabling' and `left him unable to function in his other relationships,'" we could not "conclude that a different result would not have occurred had the jury been properly instructed." ***Id.***, 189 Wis.2d at 158, 525 N.W.2d at 351. Accordingly, we remanded the case "for a new trial." ***Id.***, 189 Wis.2d at 161, 525 N.W.2d at 353. A "trial," however, is not required when there "is no genuine issue as to any material fact" proof of which is an essential element of a plaintiff's claim. Section 802.08(2), STATS. Summary judgment after remand is well-recognized. *See* ***United States v. United States Gypsum Co.***, 340 U.S. 76, 86 (1950); ***Rohrbaugh v. Celotex Corp.***, 53 F.3d 1181, 1183–1184 (10th Cir. 1995); ***Hinojosa v. City of Terrell***, 864 F.2d 401, 402 (5th Cir. 1989) (*per curiam*). The trial court properly considered Time Insurance's motion for summary judgment.

In its brief before this court, the Estate of Glenn Plautz contends that its burden was satisfied by the trial testimony of Mr. Plautz's physician that stress stemming from Time Insurance's failure to pay timely the $2,000 death benefit was, as phrased by the lawyer for Mr. Plautz's estate in his question, "a substantial factor in causing or aggravating [Mr. Plautz's] physical condition leading to his death." The physician opined that had Mr. Plautz not "had that unusual experience of stress and anxiety if you will, he might be alive today." Yet, the physician admitted on his direct-examination by the lawyer representing Mr. Plautz's estate that Mr. Plautz never mentioned Time Insurance to him; that although he discussed Mr. Plautz's financial problems with him, he did so only once and then in general terms when he and Mr. Plautz met on the street. He recounted for the jury what Mr. Plautz told him at the time: "`Dr. Fred, I can hardly look anybody in the eye anymore because I owe them so much money. And when I get these benefits, I'm going to get that out of the way.'" Yet, as noted, Mr. Plautz had not cashed the Time Insurance check when he died more than two months after it was sent to him, and the physician admitted that he never saw Mr. Plautz "crying or tearing." There were other significant stresses in Mr. Plautz's life—his wife had died, he had a poor relationship with one of his daughters, he drank too much, and he had financial problems that were unrelated to the $2,000 death benefit. Moreover, as the physician called by Time Insurance testified, Mr. Plautz died more than two months after he received (but did not cash) the belated death-benefit payment,

and, therefore, "that stress would have been very far in his past, relatively speaking."

The circumstances surrounding and underlying the opinion by Mr. Plautz's physician that Time Insurance's failure to pay timely the death benefit do not support the physician's conclusory opinion that stress resulting from that delayed payment caused Mr. Plautz's death. Furthermore, there is no evidence that Mr. Plautz suffered "`an extreme disabling emotional response'" and was "`unable to function in his other relationships.'" ***Estate of Plautz***, 189 Wis.2d at 152, 525 N.W.2d at 349 (citation omitted). Accordingly, the conclusory opinion by Mr. Plautz's physician is not enough to preclude the grant of summary judgment to Time Insurance.[2] We affirm the trial court's grant of summary judgment dismissing the bad-faith claim asserted against Time Insurance by the Estate of Glenn Plautz.[3]

Cross-Appeal

As noted above, in light of our affirmance of the trial court's grant of summary judgment to Time Insurance dismissing the bad-faith claim asserted by the Estate of Glenn Plautz, we do not reach the statute-of-limitations issue raised by Time Insurance on its cross-appeal. We do, however, address its second issue.

---

[2] It is a paradigm of summary-judgment methodology that an expert's bare opinion that has no factual basis will not defeat a motion for summary judgment. *See* ***Merit Motors, Inc. v. Chrysler Corp.***, 569 F.2d 666, 673 (D.C. Cir. 1977); *see also* ***Monks v. General Elec. Co.***, 919 F.2d 1189, 1192–1193 (6th Cir. 1990). Although both ***Merit Motors*** and ***Monks*** applied summary-judgment methodology under Rule 56 of the Federal Rules of Civil Procedure, that rule "is identical in pertinent respects" to RULE 802.08, STATS. ***Fortier v. Flambeau Plastics Co.***, 164 Wis.2d 639, 664, 476 N.W.2d 593, 603 (Ct. App. 1991).

[3] In light of our conclusion that the trial court did not err in granting summary judgment on the emotional-distress issue, we do not analyze the other grounds for the trial court's grant of Time Insurance's motion. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

Time Insurance prevailed before the trial court. Nevertheless, the trial court's order dismissing both the original and amended complaints provided that the dismissal was "without costs." This was error. As Time Insurance points out, RULE 814.03, STATS., costs to a successful defendant "shall be allowed." The Estate of Glenn Plautz's response brief does not dispute Time Insurance's contention. Accordingly, that contention is admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed to be admitted). The trial court's order is reversed and remanded with directions that costs be allowed to Time Insurance.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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