

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 00-0394

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**AMERICAN FAMILY LIFE INSURANCE COMPANY, A
WISCONSIN INSURANCE CORPORATION,**

PLAINTIFF-RESPONDENT,

v.

MICHAEL S. BUSJAHN,

**DEFENDANT-THIRD-
PARTY PLAINTIFF-APPELLANT,**

BRYCE BUSJAHN, A MINOR,

DEFENDANT,

v.

**WARREN BUSJAHN, INDIVIDUALLY AND D/B/A BUSJAHN
INSURANCE AGENCY AND AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, A WISCONSIN INSURANCE
CORPORATION,**

**THIRD-PARTY DEFENDANTS-
RESPONDENTS.**

APPEAL from a judgment and an order of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Busjahn brought this action against Warren Busjahn, his father and insurance agent, claiming that Warren was negligent as a matter of law in procuring and maintaining a policy insuring the life of Cassandra Busjahn, Michael's deceased former wife, resulting in damages in the amount of half of the life insurance proceeds. Michael now appeals a summary judgment granted in favor of American Family Life Insurance Company, American Family Mutual Insurance Company and Warren. In the same order, the circuit court denied Michael's cross-motion for summary judgment and dismissed his claim with prejudice. Michael disputes the circuit court's legal interpretation of cause. He claims that the judgment divorcing him from Cassandra was not an intervening cause of his damages. He further contends that Cassandra waived her rights to the policy after the divorce judgment or at least that there are disputes in material facts that preclude a determination of this issue on summary judgment. He argues that summary judgment was therefore improperly granted and should be reversed. We disagree and affirm the judgment.

BACKGROUND

¶2 A whole life policy for \$160,000 was purchased on Cassandra's life naming Michael, Cassandra's husband at the time, as the primary beneficiary. Warren, Michael's father, sold the policy. American Family Life employed

Warren as a life insurance agent. American Family Mutual insured Warren for errors and omissions made in the course of his employment as an agent.

¶3 The life insurance policy named Michael and Cassandra's son, Bryce, as the contingent beneficiary. The policy provided that the owner was the applicant or the insured.¹ An alternate owner was not designated. Cassandra signed a policy change form on July 23, 1994, as the owner of the policy. This form modified the policy from whole life to a term life policy.

¶4 About one month before her divorce from Michael was final, Cassandra informed American Family Life that she wanted to change the beneficiary on her life insurance policy. The insurance company sent her the proper form to sign. Her mother, Joann Graves, testified that Cassandra intended to name Bryce as the primary beneficiary. Graves testified that Cassandra mailed the form to Warren. However, Warren testified that he never received it. No copy of this signed beneficiary change form was entered into the record, nor was any other written evidence of Cassandra's intentions introduced.

¶5 The November 26, 1997, divorce judgment, provided: “[E]ach party is awarded sole interest in and to any and all life insurance policies on their own lives, including any cash values, free and clear of any claim or interest in the other party.” The parties agree that although the divorce judgment was entered in Minnesota, the Wisconsin courts are required to give it full faith and credit. *See* WIS. STAT. 767.21(1)(a).

¹ The application form provides the option to designate someone other than the insured as the policy owner. That person or firm signs the form as an "applicant." This is the mechanism by which Michael could have been named as the policy owner for a policy insuring Cassandra's life. However, the parties agree that he did not sign the application form as either the insured or the applicant.

¶6 Cassandra died in June 1998. Graves made a claim to the life insurance proceeds on Bryce's behalf. Michael also made a claim to the proceeds. American Family Life filed an interpleader claim asking the court to determine Michael and Bryce's rights. Michael filed a counterclaim and third-party complaint against American Family Life, American Family Mutual and his father, Warren, alleging that Warren had been negligent in procuring and maintaining the policy. Michael claimed that Warren breached his duty "to the extent [Michael] Busjahn is not awarded the proceeds of the policy as the primary beneficiary"

¶7 Bryce's guardian ad litem and Michael agreed to settle the interpleader claim by dividing the proceeds, including interest, equally between Michael and Bryce. Although the settlement terminated the interpleader claim, Michael specifically reserved the right to pursue his counterclaim and third-party complaint.

¶8 American Family Life, American Family Mutual, Warren and Michael filed motions for summary judgment. In an order dated November 24, 1999, the trial court granted in part and denied in part summary judgment for American Family Life, Warren, American Family Mutual, and Michael. It concluded that Warren was negligent as a matter of law "in acting as an insurance agent" with respect to the challenged policy and that Michael was damaged by not receiving the full proceeds of the policy. However, the court also concluded that the divorce judgment was an intervening cause of Michael's damages. The court found a dispute of material fact regarding whether Cassandra waived her rights to own the policy after the divorce thereby losing the authority to change beneficiaries. It reserved that issue for trial and dismissed the other issues.

¶9 All parties moved for reconsideration. Upon reconsideration, the court granted in full American Family Life, Warren and American Family Mutual's motions for summary judgment. It denied Michael's motion for summary judgment, dismissed his claims with prejudice and assessed costs against him.

¶10 For purposes of the motions, the court assumed that Warren had acted negligently and that Michael was damaged, but determined that the two were not causally linked. The court explained that Michael and Cassandra "would have found themselves in exactly the same situation at the divorce and at the moment of divorce whether or not Warren Busjahn had ever been negligent." The court concluded that the divorce judgment clarified ownership of the policy. It ruled that Cassandra was not required to take any affirmative action to claim ownership and had not waived her rights to the policy after the divorce judgment. The court held that the divorce judgment was an intervening cause of Michael's harm. Michael now appeals the summary judgment.

STANDARD OF REVIEW

¶11 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). When reviewing summary judgments, we utilize the same analysis as the circuit court and must apply the standards set forth in WIS. STAT. § 802.08(2). *See State v. Dunn*, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *See id.* If we conclude that the pleadings are sufficient to join an issue of law or fact, we next examine the moving party's affidavits to determine whether they establish a prima facie case

for summary judgment. *See id.* “Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).

DISCUSSION

¶12 Michael claimed that Warren was negligent because he should have written the policy listing Michael as the owner, which would have given him the right to name or modify the beneficiaries. Further, he argued that Warren led him to believe that the policy was in his name when Warren advised Michael to pay the premiums and failed to inform Michael that Cassandra was listed as the owner.

¶13 Michael now contends that the divorce judgment did not act as an intervening cause of his damages and further Cassandra waived her rights to the policy. Warren and the two insurance companies respond that the divorce judgment and, further, the settlement with Bryce, both intervened to cause Michael's damages. They conclude that summary judgment was properly granted in their favor and that Michael's summary judgment motion was properly denied. We conclude that the trial court's decision should be affirmed.

a. Law of the Forum

¶14 As a preliminary matter, the parties refer to both Wisconsin and Minnesota case law. Michael argues that Minnesota law should apply because the divorce judgment was entered in Minnesota and the policy was issued to a Minnesota resident. However, no party argues that the law relevant to this case conflicts between these states. The parties have not identified a true conflict of law and, therefore, we apply Wisconsin law. *See Wilcox v. Wilcox*, 26 Wis. 2d

617, 634, 133 N.W.2d 408 (1965) ("the law of the forum should presumptively apply"); *Gavers v. Federal Life Ins. Co.*, 118 Wis. 2d 113, 115, 345 N.W.2d 900 (Ct. App. 1984) ("The threshold determination in a conflict of laws case is whether a genuine conflict exists.").

b. Divorce Judgment as Intervening (Superceding) Cause²

¶15 Michael claims that Warren "negligently failed to procure and maintain insurance coverage requested by Michael Busjahn, before, during and after Michael Busjahn's divorce proceedings." He contends that Warren negligently failed to name Michael as the policy owner from the beginning. He asserts that Warren advised him after the divorce judgment to continue paying the premiums and failed to tell Michael that Cassandra was the owner on American Family Life records. He maintains that the divorce judgment was not an intervening cause of his harm as the circuit court concluded as a matter of law. Michael asserts that the divorce was not an intervening cause because an "intervening cause" is one that "occur[s] after the defendant's negligence, and operat[es] as an independent force to produce the plaintiff's injury." *Henkel v. Holm*, 411 N.W.2d 1, 4 (Minn. Ct. App. 1987); *see also Stewart v. Wulf*, 85 Wis. 2d 461, 475, 271 N.W.2d 79 (1978) (superseding cause requires an intervening force that "actively operates in producing harm to another after the

² Intervening cause is defined as a force that "actively operates in producing the harm to another after the actor's negligent act or omission has been committed." *Stewart v. Wulf*, 85 Wis. 2d 461, 475, 271 N.W.2d 79 (1978) (quoting RESTATEMENT (SECOND) OF TORTS § 441(1) (1965)). "A superseding cause is an intervening force which relieves an actor from liability for harm which his negligence was a substantial factor in producing." *Id.* (citing RESTATEMENT, *supra* at § 440). Determining whether a negligent act is a superceding cause is a question of law. *Id.* Although the circuit court employed the term "intervening," we interpret the court to mean "superceding" because this interpretation supports the judgment. *See Bence v. Spinato*, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995) (this court may affirm the trial court's holding on a theory or reasoning different from that relied upon).

actor's negligent act or omission has been committed") (citation omitted). He claims both that Warren's negligence occurred after the divorce judgment and that the divorce judgment was "not an independent force but at most was a contemporaneous cause."

¶16 The parties do not dispute that the divorce judgment awards the policy at issue to Cassandra.³ Further, the parties agree that a policy owner has the right to change beneficiaries. Warren and both insurers respond that any failure on Michael's part to understand the divorce judgment's contents is not grounds to set it aside. See *Kroeplin v. Haugen*, 390 N.W.2d 872 (Minn. App. 1986). They assert that Michael should be charged with understanding the judgment because "[j]udgments are to be construed like other written instruments." *In re Estate of Boyd*, 18 Wis. 2d 379, 382, 118 N.W.2d 705 (1963). We agree.

¶17 We conclude that even if Warren negligently failed to name Michael as the owner and therefore improperly gave Cassandra the right to change beneficiaries before the divorce, Michael, represented by counsel, negotiated the divorce settlement that awarded life insurance policies to the insured person. Therefore, the circuit court properly determined, as a matter of law, that Cassandra was the owner of the life insurance policy as of the divorce effective date. Because the judgment awarded the policy to her, she had the right to change beneficiaries.

¶18 We also conclude that even if Warren advised Michael to continue paying the premiums after the divorce and even if he failed to inform Michael that

³ Michael concedes that the divorce judgment "arguably awarded ownership of the Policy to Cassandra."

Cassandra was the owner on American Family Life records, the divorce judgment notified Michael that Cassandra owned the policy. Again, as the owner, she had the authority to change beneficiaries. As the written beneficiary, Michael would have received value from a valid policy. Therefore, a beneficiary may want to pay the premium even if not the owner. The divorce judgment clarified the parties' positions with regard to the policy and Warren's alleged actions after the judgment did not alter those positions. Consequently, the divorce judgment, then, superseded Warren's alleged negligent acts. *See Stewart*, 85 Wis. 2d at 475 (citing RESTATEMENT (SECOND) OF TORTS § 440 (1965)).

c. Waiver

¶19 Michael also contends that Cassandra waived her rights to the policy after the divorce. He asserts that Cassandra "express[ed] ... an intention not to assist upon what the law affords." *Seavey v. Erickson*, 69 N.W.2d 889, 895 (Minn. 1955). Specifically, Michael argues that Cassandra waived policy ownership when she did not pay the premiums and otherwise failed to take affirmative steps to gain ownership. He states, without authority, that "at a minimum, she had to pay the premiums after the Divorce Judgment, if she was the owner." He further claims that Cassandra ignored the policy award in the divorce judgment because she "allowed Michael Busjahn, in **reliance upon her actions** ... to continue as the beneficiary of the policy" and that this behavior is "inconsistent with a claim of ownership of the Policy." He claims that Cassandra took affirmative action to transfer her auto insurance policy from Warren's agency to another and that she paid premiums on that policy. Therefore, he contends, her failure to do the same for the life insurance policy indicates her voluntary waiver of ownership. Finally, he argues that there is a genuine issue of material fact with regard to Cassandra's waiver.

¶20 Michael's waiver arguments are without merit. He presumes, without citing any evidence, that Cassandra did not know the provisions of the divorce judgment, specifically that the divorce judgment awarded the policy to her. He fails to show any authority for the proposition that paying premiums indicates ownership.⁴ Michael provides no authority for his proposition that Cassandra had to affirmatively do anything to claim ownership of the policy. She was already listed as the policy owner. Finally, Michael fails to identify what material facts are disputed. We therefore reject Michael's argument that Cassandra waived ownership of the policy after the divorce. *See State v. Shaffer*, 96 Wis. 2d 531, 546, 292 N.W.2d 370 (Ct. App. 1980) (inadequate argument will not be considered).

d. Settlement as Further Intervening (Superceding) Cause

¶21 Warren, American Family Life and American Family Mutual contend that Michael's agreement to settle American Family Life's interpleader action and divide the proceeds with his son, Bryce, superceded any negligence by Warren. Because we resolve the case in favor of Warren and the insurance companies on other grounds, we need not address this issue. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a case is resolved on one issue, we need not address others raised).

e. Michael's Motion for Summary Judgment

⁴ In fact, he retracts this argument in his reply brief and instead contends that he means only that the evidence as a whole including nonpayment of premiums indicates that she did not assume ownership of the policy.

¶22 Michael contends that he should have been granted summary judgment because indisputable facts show that Warren acted negligently even after the divorce judgment. Further, he claims that indisputable facts show that Cassandra waived ownership rights to the policy after the divorce decree.⁵ He concludes that the divorce judgment cannot, as a matter of law, be an intervening cause of his harm.

¶23 Michael's arguments in support of his motion for summary judgment are merely a reiteration of those he advanced in opposing the other parties' motions. As discussed above, we conclude that the circuit court properly found that no causal link existed between Warren's alleged negligence and the harm Michael claimed. Therefore, Michael's motion for summary judgment was properly denied.

By the Court.—Judgment and order affirmed.

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

⁵ Although in opposition to the others' summary judgment motions Michael argues that material disputes in fact preclude resolution of his waiver argument, he contends on his summary judgment motion that the facts are "indisputable." "Because a motion for summary judgment amounts to an explicit assertion that the material facts are undisputed, a party who moves for summary judgment is precluded from later asserting that the disputed material facts entitle it to a jury trial." *Fore Way Express v. Bast*, 178 Wis. 2d 693, 702, 505 N.W.2d 408 (1993). Therefore, Michael waives his claim that the facts are disputed.

