COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2064 **Cir. Ct. No. 2004CV420**

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

SHERRI MARTINEZ,

PLAINTIFF-APPELLANT,

V.

PEKIN INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Sherri Martinez appeals an order granting Pekin Insurance Company's motion for summary judgment. Martinez challenges the circuit court's denial of life insurance benefits to her as the beneficiary of a policy once held by Ricardo Saldana. The issues on appeal are whether Pekin was

legally obligated to continue Saldana's policy as a result of cashing a money order for payment of one month's coverage and whether Pekin ineffectively cancelled Saldana's policy because of noncompliance with the ten-day cancellation notice requirement of WIS. STAT. § 631.36(2)(b) (2003-04).[1]

¶2 We conclude that the theory of accord and satisfaction does not apply under the undisputed facts of record; therefore Pekin had no obligation to continue life insurance coverage for Saldana after receiving and keeping the late premium payment. We also conclude that Pekin gave adequate notice of the policy cancellation. We therefore affirm the summary judgment.

BACKGROUND

¶3 The material facts are undisputed. This appeal involves a dispute between Pekin Insurance Company and Sherri Martinez, the former live-in girlfriend of the late Ricardo Saldana and mother of his children; she is also the beneficiary of Saldana's life insurance policy. On January 20, 2000, Saldana purchased a $50,000 "ten year level term" life insurance policy from Pekin. The policy provided that premium payments of $12.56 were due on the twentieth of each month. The policy also contains a grace period provision, which states: "GRACE PERIOD We allow a grace period for paying each premium except the first. If a premium has not been paid by its due date, the policy will stay in force for 31 days. If a premium is still unpaid after 31 days, this policy will lapse."

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Pekin did not receive the October 20, 2003 premium payment. On October 20, Pekin sent Saldana a notice that the policy had lapsed due to nonpayment; the notice also required Saldana to submit a completed application to reinstate the policy by December 4, 2003.[2] On or around December 4, Martinez sent Pekin $13.00 on Saldana's behalf to reinstate the policy.[3] Pekin received the money order on December 11, 2003, and cashed it on December 15, 2003. Pekin sent Saldana another letter dated December 12, 2003, informing him that it had received the $13.00 payment for the premium due on October 20. Pekin also said, however, that because the payment was not received until after the grace period had expired, it was necessary for Saldana to submit a completed reinstatement application along with $24.68 payment for premiums that were past due, "as soon as possible."

¶5 Martinez has not denied that Saldana received the December 12, 2003 letter from Pekin. In addition, in her affidavit submitted with her summary judgment materials, Martinez made the following averments: (1) that the reinstatement application was not included with the $13.00 December 4, 2003 payment; (2) that Saldana completed the reinstatement application, but he did not

[2] At the hearing on Pekin's motion for summary judgment there was some confusion regarding when Pekin sent the notice of lapse to Saldana. This confusion is related to an affidavit submitted by Erma Cooksey, an employee of Pekin's and supervisor of Life Policy Owner Services, in which she averred that the notice was mailed on November 20, 2003. Then, in a second affidavit, Cooksey averred that the notice of lapse was mailed to Saldana on October 20, 2003. However, at the summary judgment hearing, Martinez's counsel conceded that the notice was mailed on October 20.

[3] In her affidavit, Martinez averred that the $13.00 payment was for the December 2003 premium. However, Erma Cooksey averred that the $13.00 payment was for the premium due on October 20, 2003. As we noted above, the parties agreed at the summary judgment hearing that Pekin sent a notice of lapse on October 20, 2003, for premiums due on that date. Also, the parties appear to agree in their respective briefs that the $13.00 payment was for the October 20 premium.

mail the application before he died on December 28, 2003; (3) that after Martinez found the form among other household papers the day after his death, she mailed it, along with a check for "all past due premiums"; and (4) that after sending in the application and checks, she spoke to a Pekin underwriter who told her the application would be accepted because it was signed before Saldana's death. However, a different underwriter later told Martinez that the application would not be accepted because it arrived after Saldana's death and because his weight information was omitted from the form. On January 6, 2004, Pekin returned the $24.68 check along with the previously remitted $13.00 check. With the returned checks, Pekin sent a letter explaining that it was denying Saldana's reinstatement application because (1) it was not mailed to or accepted by Pekin before Saldana's death; (2) the application form was incomplete since it failed to include Saldana's weight; and (3) "Pekin Life Insurance Company reserves the right to verify the authenticity of the signature on the reinstatement application since it was mailed after the death of the applicant."

¶6 Martinez sued Pekin, demanding judgment "[f]or the death benefit payable under [Saldana's] Policy, together with interest and any late payment penalties applicable thereto." Martinez alleged that prior to Saldana's death, Pekin had "failed and neglected to cancel such life insurance policy or to properly notify the insured thereof."

¶7 Pekin moved for summary judgment, arguing that since Saldana's policy had lapsed, there was no policy in force at the time of his death and consequently it owed no money to his beneficiary. Martinez countered that Pekin illegally denied coverage since it had already accepted partial payment, and that Pekin violated WIS. STAT. §§ 631.36 and 632.44 by cancelling Saldana's policy

without the required notice and prior to the expiration of the grace period. The circuit court granted Pekin's motion for summary judgment. Martinez appeals.

DISCUSSION

¶8 Martinez contends that she, not Pekin, is entitled to summary judgment. She argues that Pekin was legally bound to continue Saldana's life insurance coverage as a result of accepting Saldana's December 4, 2003 payment; she asserts the theory of accord and satisfaction applies to the present facts and therefore coverage should have been continued. Martinez also argues that, by sending the notice of lapse and reinstatement application prior to the expiration of the grace period, Pekin breached the insurance policy and violated WIS. STAT. § 632.44(2), which requires that each life insurance policy contain a thirty-one day grace period provision. Finally, Martinez argues that Pekin violated WIS. STAT. § 631.36(2)(b) by cancelling Saldana's policy midterm without providing the statutorily required ten-day precancellation notice. We reject each argument.

STANDARD OF REVIEW

¶9 We review summary judgment de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We first determine whether the complaint states a claim. ***Id.*** at 317. We then determine whether there is a material factual dispute and whether the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2); ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App 1984). We view the facts contained in the moving party's supporting papers in the light most favorable to the party opposing the motion. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶10 The application of a statute to undisputed facts is a question of law. ***DOT v. Commissioner of Transp.***, 135 Wis. 2d 195, 198, 400 N.W.2d 15 (Ct. App. 1986). This case requires us to review a circuit court's construction of a statute, which we do de novo. ***Binsfield v. Conrad***, 2004 WI App 77, ¶8, 272 Wis. 2d 341, 679 N.W.2d 851. We are also required to interpret the terms of an insurance policy. The interpretation of an insurance policy is a question of law, which we review de novo. ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶13, 275 Wis. 2d 35, 683 N.W.2d 75. "We construe insurance policies to give effect to the intent of the parties." ***Id***. To that end, "we give the words in the insurance policy their common and ordinary meaning, that is, the meaning a reasonable person in the position of the insured would have understood the words to mean." ***Id.***, ¶14.

Accord and Satisfaction

¶11 Martinez argues that once Pekin received the payment for the late premium, it was obligated to continue the life insurance policy in full force. More specifically, Martinez contends that once Pekin accepted Martinez's premium payment, Pekin retained the risk to insure Saldana. In Martinez's view, the fact Pekin cashed and retained the premium entitles her to coverage on the theory of accord and satisfaction.

¶12 We have explained that "[a]ccord and satisfaction is a complete defense to an action to enforce a claim. It bars further liability when an offer of performance in exchange for full satisfaction of a disputed claim is accepted and the promised performance occurs." ***State v. Walters***, 224 Wis. 2d 897, 904, 591 N.W.2d 874 (Ct. App. 1999). Martinez cites to three cases in support of her contention that, by accepting payment for the October premium, Pekin was

required to continue coverage under the theory of accord and satisfaction: ***Jones v. Preferred Ins. Co.***, 232 Wis. 102, 286 N.W. 598 (1939); ***Von Uhl v. Trempealeau Mutual Ins. Co.***, 33 Wis. 2d 32, 146 N.W.2d 516 (1966); and ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 273 N.W.2d 214 (1979). None of these cases apply to the present facts. Therefore, this argument is without merit.

¶13 The facts in ***Jones*** are distinguishable. In ***Jones***, the supreme court ruled that a company which accepted insurance payments after a default was obligated to reinstate the policy. ***Jones***, 232 Wis. at 105-06, 110. The issue in ***Jones*** was whether a late payment made by an accident insurance policyholder should be applied retroactively to cover months prior to the payment, or proactively, beginning with the date the insurance policy was reinstated. ***Id.*** at 105-06. Unlike this case, there was no question in ***Jones*** that the policy was reinstated, because the policyholder was alive at the time the reinstatement payment was made, and the reinstatement transpired in accordance with the explicit terms of the policy, which provided that "on default of payment of a premium under the policy 'the subsequent acceptance of a premium by the company … shall *reinstate* the policy ….'" ***Id.*** at 104-05. Here, the Pekin policy contained no such clause. In addition, Saldana did not meet the reinstatement requirements before his death and Pekin refunded his payment.

¶14 In ***Von Uhl***, the insured made a late partial payment on a fire and wind damage insurance policy. ***Von Uhl***, 33 Wis. 2d at 33, 39. After a wind storm destroyed the insured's barn, he filed a claim. ***Id.*** at 34. The insurer denied the claim on the ground that the premium had not been fully paid. ***Id.*** at 34-35. The supreme court, applying waiver and equitable estoppel rules, held in favor of the insured, noting that the insurer accepted the partial payment "without limitation, condition, or notice" to the insured that the policy had been suspended.

Id. at 37, 40-41. The court also observed that the insurer's actions were inconsistent with its assertion that the policy was suspended, thereby waiving its right to assert suspension as a basis for denying coverage. ***Id.*** at 40-41. The court concluded that the insurer had "accepted without comment the balance of the 1963 assessment after the loss occurred and the subsequent 1994 assessment made during the period of claim suspension," and therefore the insured had a right to assume and rely on that assumption that his policy remained in full force when he suffered the loss. ***Id.***

¶15 In the instant case, Pekin sent Saldana two notices that the policy had lapsed because of nonpayment. In the October 20, 2003 notice, Pekin informed Saldana that his policy could be reinstated, but only on condition that he submit full payment and complete a reinstatement application that was on the back of the notice of lapse. After Pekin received the premium payment on December 11, 2003, it sent a second notice to Saldana, dated December 12, 2003, explaining that it had received the payment, but reminding Saldana that he must submit a completed reinstatement application before Pekin could reinstate the policy. Saldana passed away prior to submitting the application and the additional premium payments. Thus, unlike the insurance company in ***Von Uhl***, Pekin accepted payment for the October premium, but conditioned reinstatement on Saldana submitting a completed reinstatement application along with payment for premiums then due. Pekin also expressly notified Saldana that the policy had lapsed.

¶16 Finally, in ***Hoffman***, the issue was whether a party to a tort action had in fact accepted a settlement offer by receiving and retaining an uncashed check for more than seven months without communicating to the other party

regarding his intentions to accept or reject the offer of settlement. ***Hoffman***, 86 Wis. 2d at 448-49, 457-58. The supreme court concluded that

> under these circumstances, where David Hoffman retained the check and credit memorandum for an unreasonable length of time with the knowledge that both instruments were offered in full settlement of the disputed claim, such retention in itself constituted an acceptance of the settlement offer.

Id. at 448-49.

¶17 The facts in this case are distinguishable from ***Hoffman***. Martinez points to no evidence indicating Pekin intended anything other than to enforce the terms of the insurance policy. To that end, the only reasonable inference we can derive from Pekin retaining the December 4, 2003 payment and reminding Saldana about the condition that he submit a reinstatement application is that Pekin intended to allow Saldana to reinstate the lapsed policy if Saldana completed the application process. Moreover, based on the undisputed facts, we conclude Pekin retained the December 4 and the December 29, 2003 payments for a reasonable period of time. The record shows Pekin returned both payments on January 6, 2004, along with a letter informing Martinez that it would not reinstate the policy. Martinez fails to explain why, under ***Hoffman***, retention of these checks for this short period of time is unreasonable. Martinez also offers no other theories supporting her contention that Pekin was obligated to continue coverage after receipt of the late payments. Thus, we conclude Pekin's acceptance of both checks did not constitute an accord and satisfaction.

The October 20, 2003 Notice of Lapse Breached the Grace Period Clause in the Insurance Policy; But the December 12, 2003 Letter was Adequate Notice of Termination Under WIS. STAT. § 631.36(2)(b)

¶18 Martinez next argues that Pekin violated WIS. STAT. § 631.36(2)(b) and WIS. STAT. § 632.44, as well as the terms of the insurance policy, by cancelling the life insurance policy without proper notice and prior to the expiration of the thirty-one day grace period. More specifically, she contends that the October 20 notice of lapse was a cancellation notice. Because of that fact, Martinez asserts, the cancellation was ineffective because it was sent prior to the expiration of the grace period and without adequate notice under § 631.36(2)(b) that Pekin was cancelling the policy.

¶19 Pekin counters that Saldana was given the thirty-one day grace period to "reinstate his policy," and that the policy was not cancelled; rather, the policy had lapsed for failure to pay the premium due. According to Pekin, the October premium, along with a reinstatement application, was due on December 4, 2003 "so as to prevent the policy from lapsing." Consequently, according to Pekin, WIS. STAT. § 631.36 does not apply to the October 20, 2003 notice. We conclude, based on the undisputed facts, that the December 12, 2003 letter was adequate notice under the statute that the policy had been cancelled, but not for the reasons offered by Pekin.

¶20 We turn first to consider whether Pekin violated the grace period provision in the insurance policy and WIS. STAT. § 632.44. Pekin asserts that Saldana was granted a thirty-one day grace period because the October 20, 2003 notice of lapse required payment, along with a reinstatement application, by December 4, 2003, and thus afforded Saldana a forty-four day grace period. Pekin misses the point.

¶21 We repeat the language of the insurance policy providing a thirty-one day grace period for late premiums. The policy reads:

> We will allow a grace period for paying each premium except the first. If a premium has not been paid by its due date, the policy will stay in force for thirty-one days. If a premium is still unpaid after thirty-one days, this policy will lapse.

Thus, according to the plain language of the policy, an insured is given thirty-one days from the premium due date to pay that premium before the policy lapses. Furthermore, under this language, if that premium is not paid, then the policy will lapse.

¶22 Applying this interpretation to the instant facts, Saldana had until November 20, 2003, to pay his October 20, 2003 premium to prevent the policy from lapsing. However, under the policy, because the premium was not paid prior to November 20, the policy had lapsed. The procedure Pekin followed is inconsistent with the process provided by the policy. The notice of lapse was premature and was not in keeping with giving Saldana a thirty-one day grace period. According to the policy, the policy does not lapse until after the grace period has expired. Thus, when Pekin sent the October 20 notice of lapse, the grace period had not expired. In short, the policy had not lapsed when Pekin sent the October 20 notice of lapse. Therefore, it appears that Pekin's October 20 notice failed to comply with this requirement of the insurance policy.

¶23 However, Martinez has not established that the notice prevented Saldana from making a timely payment before the expiration of the grace period on November 20, or that Pekin otherwise deprived Saldana of his grace period. Martinez contends that she and Saldana were "deceived … into missing their grace period" by the October 20 notice of lapse in violation of WIS. STAT. § 632.44, and

the terms of Saldana's policy.[4] She asserts that "Pekin misled the Saldanas into bypassing the grace period and into believing that there was nothing they could do to reinstate their policy except send a premium payment by December 4." This argument suffers from several fatal flaws.

¶24 First, we observe that Saldana waited until December 4, 2003, to mail the October premium to Pekin. Martinez points to nothing in the record indicating that she and Saldana attempted to take advantage of the thirty-one day grace period or took prudent steps to comply with the October 20, 2003 notice. Neither has Martinez presented any evidence that Pekin failed to provide coverage during the grace period. In addition, there is no evidence that Saldana or Martinez attempted to communicate with Pekin to clarify any confusion they may have had about the alleged deceptive notice. More importantly, Martinez points to no evidence in the summary judgment record supporting her assertion that she and Saldana were misled by the October 20 notice. Finally, Martinez fails to explain why she and Saldana failed to fully comply with the October 20 notice requiring Saldana to submit a reinstatement application along with the $13.00 premium payment in order to reinstate the policy. In sum, she has not established that Pekin deprived Saldana of his grace period rights.

[4] We observe that there is much to be confused about. As the circuit court noted, Pekin's practices of notifying its customers of lapses in policy due to nonpayment are less than "artful." For example, the contents of the October 20, 2003 notice of lapse may be viewed as vague and ambiguous. In addition, as we have noted, Pekin violated the grace period provision of the insurance policy by mailing the October 20 notice of lapse prior to the expiration of the grace period. We easily can understand how a reasonable insured would wonder why he or she is receiving such a notice when the grace period has not lapsed, especially when under the terms of the policy it specifically provides that the policy will lapse only at the expiration of the grace period if payment has not been received. We also observe that the term "lapse" has a legal meaning, but a reasonable insured may not understand that. The better practice may be to use precise terminology when an insurer intends to notify an insured that the policy will be lapsed, cancelled, or terminated or to define these terms in the policy.

¶25 We turn next to consider Martinez's argument that Pekin violated WIS. STAT. § 631.36(2)(b). Section 631.36(2)(b) imposes the following condition on insurers prior to cancelling an insurance policy: "*Notice*. No cancellation under par. (a) is effective until at least 10 days after the 1st class mailing or delivery of a written notice to the policyholder." The purpose underlying notice requirements in insurance policies is to give the delinquent insured opportunity to secure other insurance prior to the cancellation of the present policy. *See* ***Seeburger v. Citizens Mut. Fire Ins. Co.***, 267 Wis. 213, 219, 64 N.W.2d 879 (1954).

¶26 As we noted, Pekin argues that the policy was not cancelled but merely lapsed according to its terms. Consequently, according to Pekin, no notice of any kind was required. We need not reach that question to resolve this dispute. We assume for argument's sake that the ten-day notice requirement under WIS. STAT. § 631.36(2)(b) applies to Saldana's life insurance policy. Thus, we analyze the undisputed facts, assuming that Pekin was required to give Saldana ten days' notice that it was cancelling the policy, to determine whether in fact it did. Based on the undisputed facts, viewed in the light most favorable to Martinez, we conclude that Pekin's December 12, 2003 letter to Saldana provided adequate notice under the statute.

¶27 We look to ***Seeburger*** in support of the above conclusion. In ***Seeburger***, Edmund Seeburger, a farmer, and his mortgagee, Farmers State Bank of Pound, sued Citizens Mutual Fire Insurance Company to recover damages upon a policy of fire insurance after sustaining a loss of cattle and a barn due to fire. ***Seeburger***, 267 Wis. at 213-14. The fire insurance policy contained a cancellation clause that read as follows:

> This policy may be cancelled at any time by this company by giving to the insured a five days' written notice of

> cancellation with or without tender of the excess paid premium above the *pro rata* premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Id. at 216.

¶28 On January 9, 1950, the insurance company mailed to Seeburger a notice that his annual premium was due and requested him to submit payment accordingly. ***Id.*** at 216-17. The notice also said that the premium would become delinquent on February 7, 1950, and that the policy would be automatically suspended beginning at noon on that day until the policy was reinstated by payment of the premium due. ***Id.*** at 217. The company sent Seeburger a second notice on January 30, 1950, identical in all material respects to the first notice, except that it was labeled "Final Notice." ***Id.*** Then on February 9, 1950, the insurance company sent letters to both Seeburger and the bank, stating that the policy had lapsed due to failure to make a timely payment of the annual premium, but that the policy may be reinstated upon receipt of the premium due. ***Id.***

¶29 The supreme court concluded that the first two notices were effective to terminate Seeburger's rights under the policy because they were mailed to him. ***Id.*** at 218-19. However, neither notice affected the bank's rights under the policy because neither notice was mailed to the bank. ***Id.*** The court did conclude that the February 9, 1950 letter effectively informed the bank that the policy had been terminated. ***Id.*** at 219. But the court also concluded that under the cancellation clause of the policy, the bank was entitled to five days' notice prior to cancellation. ***Id.*** Accordingly, the court ruled that the February 9 notice of termination was not effective until five days from February 9, observing that "[t]he authorities generally hold that where a policy of insurance requires an

advance notice of cancellation of a certain specified number of days, and the notice of cancellation given fails to comply therewith, nevertheless, the same is effective after the lapse of the full time stipulated in the policy." ***Id.*** The court reasoned that

> If the purpose of the five-day-notice provision is to afford the insured … a reasonable opportunity to obtain other insurance, then the extending of the coverage for such required period, after receipt of a notice of termination which failed to comply with such time requirement, will provide such reasonable opportunity to procure other insurance.

Id. at 219-20.

¶30 Although the court in ***Seeburger*** was addressing a notice provision in a policy, and pre-dated the enactment of WIS. STAT. § 631.36, it framed the issue as, "[w]hat is the legal effect of a notice of cancellation which fails to comply with a policy or statutory requirement that it be given a certain specified number of days in advance of the cancellation date?" ***Id.*** at 219. We therefore conclude the court's reasoning in ***Seeburger*** is applicable in this case. *See also* ***Benefit Trust v. Commission of Ins.***, 142 Wis. 2d 582, 592-93, 419 N.W.2d 265 (Ct. App. 1987) (applying WIS. STAT. § 631.36(2)(b) to a similar issue as in ***Seeburger***). Applying that reasoning, we conclude that Pekin's December 12, 2003 letter to Saldana was adequate notice that the policy had lapsed. The December 12 letter informed Saldana that the policy had lapsed because he failed to submit payment for the October premium prior to the expiration of the thirty-one day grace period. Pekin also stated in that letter that before the policy could be reinstated, Saldana had to pay for the premiums that were due and submit a reinstatement application. There is nothing ambiguous about this notice. However, as in ***Seeburger***, the December 12 letter did not effectively terminate

coverage until ten days after Pekin mailed the letter—it is undisputed that the letter was mailed on December 12. Accordingly, coverage had terminated as of December 22, 2003. Consequently, Martinez is not entitled to recover from Pekin because Saldana's death occurred six days after the extended period of coverage terminated. *See* ***Seeburger***, 267 Wis. at 220.

¶31 In sum, we conclude that Martinez is not entitled to summary judgment and that the court properly granted summary judgment in favor of Pekin. We therefore affirm the circuit court order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.