

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP2864

Cir. Ct. No. 2006CV485

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DIANE M. GODSON,

PLAINTIFF-APPELLANT,

V.

**CLARENDON AMERICAN INSURANCE COMPANY, WISCONSIN PHYSICIANS
SERVICE INSURANCE CORPORATION AND DEAN DORNFELD, D/B/A
DORNFELD FINANCIAL SERVICES,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Fond du Lac County:
PETER L. GRIMM, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Diane M. Godson appeals from an order granting summary judgment in favor of Wisconsin Physicians Service Insurance

Corporation (WPS) and independent insurance agent Dean Dornfeld.¹ We agree with the circuit court that Godson received the coverage she contracted for under the first policy; that she knew the policies were nonrenewable and excluded preexisting conditions; and that Dornfeld's actions were nonnegligent as to the first policy and irrelevant as to the second. We affirm.

¶2 In April 2005, Godson sought short-term health insurance because she was between jobs. She met with Dornfeld and selected an Instant Protection Plan (IPP) through WPS because of its price, six months (185 days) of coverage for \$592. Godson told Dornfeld she hoped to be reemployed within three months at a job that would provide insurance benefits. Although the WPS application offered only two payment options, in full or by a monthly automatic bank withdrawal, Godson gave Dornfeld a check for \$296. WPS accepted Godson's partial payment and issued the IPP policy for a 185-day term from April 21, 2005 through October 24, 2005. Godson testified at her deposition that she "forgot" to pay the remaining \$296. WPS never billed Godson for the unpaid amount or notified her that it was providing anything less than 185 days' coverage.

¶3 On October 17, still unemployed, Godson returned to Dornfeld's office and completed another application for six more months of the same type of coverage and again paid \$296, half the premium amount. Both IPP applications stated directly above the line where Godson signed: "I understand the Instant Protection Plan will not provide benefits for any illness or injury occurring before the effective date of the policy. I understand the policy is not renewable." The

¹ Summary judgment also was granted to Clarendon American Insurance Company, Dornfeld's errors-and-omissions insurance carrier.

face page of each of the two policies also states in bold capital letters: **“THIS POLICY IS NOT RENEWABLE”** and **“PRE-EXISTING ILLNESS OR INJURY IS NOT COVERED.”**

¶4 On October 22, with two days left on the first policy, Godson suffered a subarachnoid hemorrhage. On October 26, WPS applied the \$296 payment Godson tendered with her second application to satisfy the \$296 still outstanding from the first policy. Godson’s ex-husband gave Dornfeld a \$592 check made out to WPS. WPS issued a second policy with effective dates of coverage from October 27, 2005 through April 30, 2006.

¶5 WPS paid benefits for all claims through October 24, 2005, per the terms of the first IPP policy. It denied claims for all service between October 24 and October 26, 2005, because no policy was in effect, and for all claims after October 24 on relating to Godson’s brain hemorrhage because it occurred while the first IPP policy was in effect, making it a preexisting condition precluding coverage under the second IPP policy.

¶6 Godson commenced this action, alleging negligence against Dornfeld and breach of contract and bad faith against WPS. Dornfeld and WPS moved for summary judgment. The circuit court concluded that among the undisputed facts were that Godson’s October 22, 2005, loss fell within the coverage term of the first IPP policy; coverage under the first policy ended on October 24, 2005; the clear language of the policy indicated it was not renewable; each policy was a separate entity and contained an exclusion for preexisting conditions; Godson applied for a policy of 185 days and received coverage for that length; WPS honored its contractual obligations when it paid approximately \$30,000 in claims under the first contract; Dornfeld’s errors, if any, in failing to

get full payment on the first policy were rendered irrelevant by WPS' issuance of the policy; and because Godson's loss occurred under the first policy, any errors Dornfeld made relative to the second also were irrelevant. The court granted summary judgment to WPS and Dornfeld. Godson appeals.

¶7 In reviewing the grant or denial of a summary judgment, we apply 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 draw all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Pum v. Wisconsin Physicians Serv. Ins. Corp.*, 2007 WI App 10, ¶6, 298 Wis. 2d 497, 727 N.W.2d 346, *review denied*, 2007 WI 61, 300 Wis. 2d 194, 732 N.W.2d 859. Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law. *Id.* Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶8 Godson contends summary judgment was wrongly granted because facts remain in dispute regarding whether Dornfeld negligently failed to procure the three-month coverage she now claims she requested, to inform her about renewability and preexisting conditions when she "renewed" the policy in October, or to make further inquiry about her particular insurance needs. As to the breach of contract claims against WPS, she highlights discrepancies ranging from the policies' effective dates to whether the first policy issued at all.

¶9 Although certain facts are in dispute, they are not material facts, and we agree with the trial court that summary judgment is warranted. The April policy application Godson signed, Godson's deposition testimony and her answers to requests for admission establish that she applied for 185 days of coverage on

April 18, 2005, that the envelope mailing the application to WPS was postmarked April 20, 2005, making April 21, 2005 the first day of coverage.² WPS issued Godson a policy and an insurance card showing an end date of October 24, 2005.³

¶10 It is undisputed that Godson tendered a partial payment of \$296 and that WPS accepted it yet issued a 185-day policy of insurance. WPS agrees it should not have issued the policy on these terms. But it did, and under Wisconsin law it then had to honor it. *See Von Uhl v. Trempealeau County Mut. Ins. Co.*, 33 Wis. 2d 32, 40-41, 146 N.W.2d 516 (1966) (holding that an insurer that accepts partial payment without limitation, condition or notice to the insured and treats the policy after the loss as though it had been in force, cannot post-loss assert a suspension). This eviscerates Godson's claim that the first policy did not become effective until it was paid in full on October 17, the date she tendered a \$296 payment with her application for the second policy.

¶11 It also is clear that the policies were nonrenewable and did not cover preexisting conditions. The application itself stated so, directly above where Godson signed, and the policies likewise announced those limitations in bold capital letters. Godson's later claim that she did not read what she signed or was given does not create an issue of fact.

¶12 As a result, Godson undisputedly was covered on October 22, 2005, the date of her brain hemorrhage. Its occurrence during the term of the first policy

² The application indicated a requested effective date of "Day following postmark date."

³ WPS' internal records and communications with Godson state various dates. The record satisfies us, however, that the first contract ran from April 21 to October 24, 2005, and both parties treated this as the contract term.

made the event a preexisting condition in regards to the second policy. By her choice Godson paid only a three-month premium, apparently hedging her bets that she would find full-time employment and not need the remaining three months. We reject Godson's contention that the April policy is a nullity and her further contention that her second application, postmarked October 19, 2005, thus established the beginning of coverage to be October 20—two days before her brain hemorrhage.

¶13 We also agree with the trial court that no material issue exists regarding Godson's intent. Although she now asserts that there is "ample evidence" that she wanted only a three-month policy, she herself acknowledges in her brief that, "in case that failed, she wanted the option to continue coverage for the entire six months. In short, Godson wanted to be able to pay for no more than necessary." She may have hoped she would need only three months' coverage, but the application plainly requested 185 days' coverage. Her deposition testimony also makes clear that 185 days was her intent. Godson got precisely the insurance coverage she requested.

¶14 We also agree that Dornfeld's actions became irrelevant in the face of WPS' issuance of the first policy and Godson's own knowledge. Godson knew the application requested 185 days' coverage because she signed it. She testified that she knew the full premium was \$592, that it was her own idea to pay half, and that she intended, but forgot, to pay the remainder. Godson's signature demonstrates that she also understood the IPP did not cover preexisting conditions and was not renewable. Godson's assertion that Dornfeld was negligent for failing to collect the full premium from her or insist on automatic bank withdrawals, as the application requires, is of no consequence because WPS issued the first policy. Also, our examination of the record does not support Godson's claim that, toward

the end of the first term of coverage, she told Dornfeld about an upcoming diagnostic test which should have raised a red flag requiring him to make sure she understood the policies' nonrenewability and preexisting condition clauses. Even so, Dornfeld had no independent affirmative duty to inform her about the adequacy of her coverage or the availability of any other. *See Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc.*, 181 Wis. 2d 565, 572, 511 N.W.2d 849 (1994).

¶15 Godson also claims that WPS should have gotten her authorization to apply her October 17 \$296 payment to the outstanding balance on the first contract. If it instead had considered it partial payment on the new application, she argues, the second policy would have taken effect on October 20. She is mistaken. The applications state that if an applicant has any other unexpired hospital, major medical or medical insurance, “[t]his policy cannot be issued.”

¶16 Godson also argues that the policies, and various corrected versions of them, bear so many different dates that coverage dates must be decided by a jury. WPS's documentation, while somewhat slipshod, does not affect our decision. As the trial court said, the various dates are a red herring. The record establishes that the first policy was in force on October 22, 2005, the date of her brain hemorrhage. On October 22, conditions relating to the brain hemorrhage became “preexisting.” The policies are nonrenewable. Any factual disputes are not material. It is simple misfortune that the timing played out as it did here.

By the Court.—Order affirmed.

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

