COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1392 **Cir. Ct. No. 00CV44**

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

THOMAS CLEEREMAN AND SARA CLEEREMAN,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

FEDERATED MUTUAL INSURANCE COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

SHERRY THOME-CROTTEAU,

DEFENDANT,

V.

SHERRY THOME-CROTTEAU,

THIRD-PARTY DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Affirmed in part; reversed in part*.

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

¶1 PETERSON, J. Thomas and Sara Cleereman contend that Federated Mutual Insurance Company sold them a health insurance policy and they claim damages under state common law theories. Federated denies it sold a policy but that if there was a policy it is governed by the Employment Retirement Income Security Act of 1974[1] (ERISA), not state common law.

¶2 The circuit court concluded that all but one of the Cleeremans' common law claims are preempted by ERISA. The court dismissed those claims on summary judgment. The court then granted summary judgment to the Cleeremans on the remaining claim of reformation, awarded damages, and granted the Cleeremans attorney fees under ERISA.

¶3 We conclude all the Cleeremans' claims are preempted by ERISA and must be dismissed. Further, because the claims were not brought under ERISA, the Cleeremans are not entitled to attorney fees under ERISA. Thus, we affirm in part and reverse in part.

BACKGROUND

¶4 The Cleeremans had group health insurance through Federated as part of Thomas Cleereman's employment with Hudson Manufacturing. His

[1] 29 U.S.C. § 1000 *et seq.*

employment terminated in April 1998, and he sought to purchase health insurance from Federated. He contacted Sherry Thome-Crotteau, a Federated insurance agent.

¶5 The Cleeremans testified in depositions that they wanted coverage similar to what they had through Hudson Manufacturing. Thome-Crotteau agreed to provide insurance. However, she pocketed the $300 premium the Cleeremans gave her and issued them fraudulent identification cards and policy materials.

¶6 The Cleeremans became suspicious when medical bills were unpaid and when Federated sent them letters stating that their coverage terminated when Thomas Cleereman left Hudson Manufacturing. However, Thome-Crotteau continued to assure them that they were covered.

¶7 The Cleeremans eventually commenced this action, alleging six common law claims: negligence, misrepresentation, breach of contract, bad faith, negligent supervision, and reformation. Federated sought dismissal of all the claims, arguing that ERISA preempted the claims. The trial court granted summary judgment in favor of Federated on all but the reformation claim. The court granted summary judgment in favor of the Cleeremans on the reformation claim and awarded them damages of $5,035.15 plus attorney fees under ERISA.

DISCUSSION

I. Standard of Review

¶8 When reviewing a summary judgment, we perform the same function as the trial court and our review is independent of the trial court's decision. ***Green Spring Farms v. Kersten,*** 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). On summary judgment, a court must view the facts in the light most

favorable to the non-moving party. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986). We will reverse a summary judgment if the trial court incorrectly decided a legal issue or if material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

II. The Cleeremans' appeal

¶9 The Cleeremans argue that Federated is bound by Thome-Crotteau's fraudulent conduct because she had apparent authority to sell insurance on behalf of Federated. They maintain that they purchased an individual insurance policy and that individual policies are not governed by ERISA. Federated argues that no insurance contract of any sort was formed. Alternatively, if an insurance contract was formed, Federated maintains the contract derived from the group health insurance policy and is governed by ERISA.

¶10 Assuming without deciding that there was an insurance contract between the Cleeremans and Federated, we agree with Federated that the policy was governed by ERISA. Jeanne Hankerson, a Federated employee, testified by deposition regarding the types of policies Federated offers when an employee leaves employment. One option is a continuation policy. Hankerson stated that with a continuation policy the employee continues

> to be a part of the group policy by paying the premium themselves to their employer. You're considered to be continuing as part of the group under the employer's plan and you pay your premiums through the employer, but you have to pay the full amount as opposed to the subsidized amount that the employer previously put in, and that continuation right is something that you're to be offered by your employer because the employer is the plan administrator for ERISA purposes, and then you continue through that way.

¶11 The second type of policy Federated offers is an individual conversion policy. Hankerson stated that with this type of policy the employee "would go to an individual policy instead of continuing in the group policy. But Federated does not sell individual health insurance other than as part of the conversion process when you lose your employment …." An individual conversion policy "has lesser coverages, it has a reduced lifetime limit. It doesn't include prescription drug coverage." Premiums are paid to Federated directly rather than through the employer.

¶12 The Cleeremans contend they purchased neither a continuation nor a conversion policy, but instead an individual policy. The distinction is important because it is undisputed that continuation and conversion policies are governed by ERISA, s*ee, e.g.*, ***Painter v. Golden Rule Ins. Co.***, 121 F.3d 436, 439-40 (8th Cir. 1997), while an individual policy is not.

¶13 We conclude the Cleeremans' argument is based on an erroneous interpretation of the testimony. The Cleeremans maintain Hankerson stated Federated sold either continuation policies, covered by ERISA, or individual policies, not covered by ERISA. What Hankerson in fact stated was that Federated sold either continuation policies or individual *conversion* policies. Both types of policies derive from an employment policy. She stated that Federated does not sell individual policies.

¶14 Further, the testimony of the Cleeremans as well as Thome-Crotteau establishes that the Cleeremans were seeking an extension of the policy they had through Hudson. They asked for a continuation of coverage and Thome-Crotteau said she could provide that, albeit in a somewhat different form. There is no

evidence that they asked for an individual policy or that Thome-Crotteau represented to them that she was selling them an individual policy.

¶15 The Cleeremans argue they could not have purchased a continuation policy because they did not pay the premium through Hudson, but to Federated directly. Further, they argue that their coverage was different from what they had through Hudson. Even if we accept both these arguments, the result would be that they had a conversion policy, the other type of policy that Federated sells. Either way, the policy is governed by ERISA.

¶16 The ERISA preemption clause states in relevant part that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). A law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan." ***Hubbard v. Blue Cross & Blue Shield Ass'n***, 42 F.3d 942, 945 (5th Cir. 1995).

¶17 All of the Cleeremans' claims are derivative of the employee plan Thomas Cleereman had through Hudson. Neither a continuation nor conversion policy would be available to the Cleeremans through Federated absent the initial employment policy because Federated does not issue any other type of health insurance to individuals. No one at Federated represented otherwise to the Cleeremans. Thus, the policy relates to the employee plan and ERISA preempts all the Cleeremans' claims.

III. Federated's cross-appeal

¶18 The circuit court granted summary judgment in favor of the Cleeremans on their common law reformation claim. Federated contends this was

error. Indeed, the Cleeremans acknowledge that the circuit court may have erred. The court granted summary judgment in favor of Federated on all claims except reformation because ERISA preempted the claims. Then, the court granted summary judgment in favor of the Cleeremans for reformation, basing its decision on state common law. Thus, part of the court's decision was based on ERISA and part on state common law. As the Cleeremans put it, "it is either one or the other, but not some combination of both." We agree. We explained in the previous portion of this opinion why ERISA preempts the Cleeremans' claims. The same reasoning applies to their reformation claim.

¶19 Curiously, the circuit court also awarded the Cleeremans attorney fees under ERISA. Federated argues that this too was error. Again, the Cleeremans seem to agree, stating that they were "more than a little surprised to be awarded attorney fees" because they never asked for them or offered anything in support of what an award should be.

¶20 In order to receive attorney fees under ERISA, a party must bring an action under ERISA. ***Davis v. Chicago Mun. Emp. Credit Union***, 891 F.2d 182, 184 (7th Cir. 1989). The Cleeremans never alleged their action was brought under ERISA. In fact, they argued the exact opposite: that the claims were brought under common law, not under ERISA. The fact that a claim was dismissed due to ERISA preemption does not mean the case arose under ERISA. ***McDorman v. Sierra Auto Center***, 770 F. Supp. 551, 552 (D. Nev. 1991). Thus, the Cleeremans are not entitled to attorney fees and we reverse that part of the judgment.

By the Court.—Judgment affirmed in part; and reversed in part.

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