

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-0099

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TERRY L. ENNEY,

PLAINTIFF,

V.

RICKY R. PAULSON,

DEFENDANT-RESPONDENT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County:
JAMES R. ERICKSON, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. American Family Mutual Insurance Company appeals a judgment awarding Terry Enney \$1,093 for injuries he suffered while working for American Family's insured, Ricky Paulson. American Family denied

coverage on the ground that Paulson failed to promptly notify American Family of the accident. The jury, however, found that Paulson had promptly notified American Family. American Family argues that there is no credible evidence to support that verdict, that the court should have also submitted special verdict questions regarding Paulson's failure to cooperate, and that the court erroneously permitted late affidavits to be filed opposing American Family's motion for summary judgment. We conclude that there is no credible evidence supporting the jury's finding that Paulson promptly notified American Family.¹ We also conclude that American Family has not established that it suffered any prejudice from the late affidavits filed in opposition to American Family's summary judgment motion. Therefore, we reverse the judgment and remand the cause for trial on whether American Family was prejudiced by the late notice.

¶2 Enney injured his hand in a farm accident in late November 1994. He immediately informed Paulson who instructed him to seek medical attention. When Enney returned to the farm, he told Paulson that doctors found a hairline crack in one of the bones in his hand. Rather than report the accident to American Family, Paulson personally paid Enney's medical bills, intending to avoid cancellation of his policy. Construing the evidence in the light most favorable to the jury's verdict, Paulson first told an American Family agent about the accident in the spring of 1995, at least four months after the accident.

¶3 The American Family policy required Paulson to "give prompt notice" in the event of an accident or occurrence. Paulson's argument that he did

¹ Because we reverse on this issue and American Family has not identified any failure to cooperate or prejudice other than Paulson's delay in reporting the accident, we will not further review the argument that the court should have submitted Paulson's lack of cooperation to the jury.

not know a claim would be made is irrelevant. The policy unequivocally requires prompt notice of “an accident or occurrence which this insurance may cover.” The court properly instructed the jury that the word “prompt” meant “as soon as reasonably possible.” Because Paulson provided no evidence justifying the four month delay in reporting the accident, the jury’s finding that Paulson promptly notified American Family must be overturned. *See Yelk v. Seefeldt*, 35 Wis. 2d 271, 277, 151 N.W.2d 4 (1967). On remand, the jury must determine whether American Family was prejudiced by Paulson’s delay in reporting the accident. *See WIS. STAT. § 632.26(2) (1997-98)*.²

¶4 The trial court properly exercised its discretion when it allowed Enney to file affidavits along with his memorandum of law in opposition to the motion for summary judgment moments before the hearing began because American Family was not prejudiced by the late filings. *See WIS. STAT. § 805.18(2)*. The court offered a recess for counsel to review the affidavits. American Family’s counsel has not identified any facts in the affidavits that she could not respond to on short notice. American Family argues that its attorney had no chance to consult with her clients to determine whether there were facts that would contradict Enney’s affidavits. However, had the attorney consulted with her clients and witnesses and found facts that would contradict Enney’s affidavits, summary judgment would still be denied based on the conflicting facts. *See Bank of La Crosse v. Elson*, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986).

¶5 In addition, American Family was not prejudiced by the lack of affidavits because it was not entitled to summary judgment based on its own

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

affidavits. Relying on statistics regarding settlement and the nature of Enney's injuries, American Family argued that "it is reasonable to assume that such a settlement would have occurred." Summary judgment cannot be based on such speculation. See *Helland v. Kurtis A. Foredtert Mem'l Luth. Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999).

¶6 American Family also argues that the equipment that injured Enney had been sold and Enney's employment records were gone, making it difficult for American Family to recreate the accident and impossible to calculate Enney's wage loss with accuracy. Nothing in the record suggests that the accident was caused by any defect in the machine or that owning the machine was necessary to recreate the accident. American Family's supporting papers did not establish prejudice as a matter of law from the lack of employment records. Therefore, any error in considering Enney's late affidavits was harmless. See WIS. STAT. § 805.18.

By the Court.—Judgment reversed and cause remanded.

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

