COURT OF APPEALS DECISION DATED AND FILED

November 29, 2007

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. 2007AP791

Cir. Ct. No. 2005CV245

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

RONALD COOK AND LUCY COOK,

PLAINTIFFS-RESPONDENTS,

V.

AUTO-OWNERS INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Juneau County: JOHN P. ROEMER, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Auto-Owners Insurance Company appeals a non-final order denying its motion for summary judgment in a suit filed by its former

policy holders Ronald and Lucy Cook.[1] For the reasons discussed below, we reverse the order and remand with directions for the trial court to enter summary judgment in Auto-Owners' favor.

¶2 The Cooks' amended complaint raises claims of: (1) breach of an insurance contract; (2) breach of express warranty; (3) breach of implied warranty; and (4) negligent performance under the insurance contract. All four claims were premised on the allegation that Auto-Owners had failed to provide the Cooks with proper notice that it was cancelling and/or not renewing their policy. According to Ronald's deposition, the damages the Cooks sought were those arising from a fire that occurred at their home during the month following the policy's cancellation date.

¶3 Auto-Owners moved for summary judgment on the grounds that the first three claims were barred by the one-year statute of limitations on fire insurance claims set forth in WIS. STAT. § 631.83 (2005-06),[2] the Cooks had never filed a proof of loss form, and the fourth claim was barred by the economic loss doctrine as well as the actual terms of the policy. The trial court denied summary judgment on the theory that the time for the Cooks to file a proof of loss or initiate a law suit should not begin to run until the Cooks first knew whether their policy was in effect.

¶4 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court.

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[1] This court granted leave to appeal by order dated May 11, 2007.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Brownelli v. McCaughtry, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23.

¶5 According to their deposition testimony and the affidavit of their attorney, the facts most favorable to the Cooks are that they had a homeowner's policy with Auto-Owners in effect until sometime in April of 2003; that they never received notice of cancellation or nonrenewal of the policy; that they suffered the loss of personal property in a home fire on May 20, 2003;[3] that Ronald notified Auto-Owner's agent of the Cooks' claim by telephone on the day of the fire; that the agent made a statement that could be construed as effectively denying any coverage; and that Ronald filed a proof of loss with another insurance company which he thought he sent to Auto-Owners as well. The Cooks first filed suit on February 25, 2005, before dismissing and refiling.[4]

¶6 The key facts disputed by the parties were whether the Cooks did or did not receive a notice of cancellation or nonrenewal, and whether they ever actually filed a proof of loss with Auto-Owners. However, we agree with Auto-

[3] The house was also destroyed, but it was separately insured by the Cooks' mortgage provider, CUNA. The Cooks received the surplus from that policy after their mortgage loan was satisfied.

[4] The Cooks claim that the first action tolled the statute of limitations, and we will accept that premise for the purposes of this appeal.

Owners that these disputes were not material to the outcome of the case because the Cooks could not prevail in either event. The Cooks themselves do not dispute that if they had properly received notice, there would have been no policy in effect at the time of the fire, and thus no possible basis for the recovery of damages. The Cooks nonetheless maintain that they were damaged under various legal theories—by the amount of personal property they lost in the fire—as the result of Auto-Owners' alleged breach of the notice of cancellation or nonrenewal provisions in the insurance policy. Their damage claims are unsupported by either legal authority or simple logic.

¶7 As a threshold matter, we note that the appellate record does not appear to contain a copy of the insurance policy which the Cooks contend was breached, and the court did not list the policy as one of the items it had before it on summary judgment. Therefore, we do not have the exact language of the notice provision at issue before us and cannot tell whether it was properly before the trial court. However, it appears likely from both parties' arguments that the policy's notice provisions for cancellation or nonrenewal conform with the statutory notice provisions for cancellation or nonrenewal set forth in WIS. STAT. § 631.36, and we will assume that to be the case for the purpose of this appeal since the statutory provisions would be in effect anyway.

¶8 An insurer's failure to provide adequate notice of the nonrenewal of an insurance policy under WIS. STAT. § 631.36 results in the continuation of the policy beyond the policy expiration date, for up to one renewal period. ***Sausen v. American Family Mut. Ins. Co.***, 121 Wis. 2d 653, 655-56, 360 N.W.2d 565 (Ct. App. 1984); ***Magyar v. Wisconsin Health Care Liab. Ins. Plan***, 2001 WI 41, ¶16, 242 Wis. 2d 491, 625 N.W.2d 291. Assuming the Cooks' allegation that they did not receive a cancellation or nonrenewal notice from Auto-Owners to be true, it

follows that the Cooks' homeowner's policy was still in effect on the date of the fire by operation of law. In short, the Cooks cannot claim damages resulting from any lapse of their policy or breach of contract for failure to provide coverage because their policy would still have been in effect at the time of the fire under their own allegations of fact.

¶9 The Cooks also cannot claim damages from Auto-Owners' failure to pay on a claim under the policy itself because the Cooks did not file their action within twelve months of their fire loss as required by WIS. STAT. § 631.83(1). We do not share the trial court's view that the statute of limitations was tolled because the Cooks were claiming that they had not received notice of cancellation. That contention simply presented a dispute over whether coverage existed; it did not affect the deadline for filing suit to have the coverage issue resolved.

¶10 Finally, we also reject the Cooks' attempt to construe their fourth claim as a bad faith claim subject to a two-year rather than one-year statute of limitations. The Cooks acknowledge that they have no factual basis to dispute Auto-Owners' contention that it sent them a notification of cancellation or nonrenewal, and that the other two parties to whom Auto-Owners also said it sent the notification actually received it. Even if it were ultimately shown that the Cooks did not receive the notice that Auto-Owners sent, Auto-Owners still had a factual basis for believing that it had cancelled or refused to renew the policy. Therefore, it had a good faith basis for initially refusing coverage.

¶11 In sum, we conclude that there was nothing in the summary judgment materials that would establish that the Cooks could recover damages for losses they had suffered in a fire more than a year before they filed suit—whether or not they had actually received notice of the cancellation or nonrenewal of their

policy. We therefore reverse the order of the circuit court and remand with directions to enter summary judgment in Auto-Owners' favor.

By the Court.—Order reversed and cause remanded with directions.

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