COURT OF APPEALS
DECISION
DATED AND RELEASED

July 1, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-0986

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

ROBERT A. NOVOTNY, WILLIAM J. NOVOTNY, RICHARD J. NOVOTNY, JEANINE M. PACKETT, MELVIN J. NOVOTNY AND MARGARET NOVOTNY,

PLAINTIFFS-RESPONDENTS-CROSS APPELLANTS,

V.

NATIONAL WESTERN LIFE INSURANCE COMPANY, A FOREIGN INSURANCE CORPORATION,

DEFENDANT-APPELLANT-CROSS RESPONDENT,

CAPITOL BANKERS LIFE INSURANCE COMPANY, A FOREIGN INSURANCE CORPORATION,

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

V.

KENNETH G. FISCHER,

**THIRD PARTY DEFENDANT-
RESPONDENT-CROSS RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Madden, JJ.

PER CURIAM. This is an appeal by all parties from a grant of summary judgment in favor of Alvyn Novotny, the successors to his claim, and Melvin Novotny against Capitol Bankers Life Insurance Company and National Western Life Insurance Company for breach of contract. The Novotnys argue that the trial court erred by dismissing their breach of fiduciary duty claims against Capitol and National and that the court erred in assessing damages. Capitol contends that the trial court erred by concluding the Capitol policies with the Novotnys included an automatic premium loan provision (APL) and that damages and costs were incorrectly assessed. National contends that the trial court failed to recognize that ERISA preempts the Novotnys claims, erred by ruling the doctrine of mitigation did not apply, by denying any subrogation or indemnity claims against Capitol, and by assessing the amount of damages.

Because we conclude the trial court did not err by dismissing the Novotny's breach of fiduciary duty claims, by denying subrogation or indemnification between National and Capitol, by denying application the doctrine of mitigation, and by not applying ERISA, we affirm those parts of the judgment. Because we conclude that the Capitol policies did not have an APL provision, we reverse that part of the judgment and remand for a new determination of damages.

The Novotnys owned and managed the Consolidated Construction Company. Consolidated sponsored a pension plan which the Novotnys served as trustees and participated as beneficiaries. In 1980, Consolidated terminated the pension plan and the Pension Benefit Guaranty Corporation issued a Notice of Sufficiency setting the effective "Date of Termination" to be November 1, 1981. All plan participants elected to have their interests distributed to them, except the Novotnys who elected to have their interests retained in accounts in their names in trust of the terminated plan. When the plan was terminated, the Novotnys each signed a document acknowledging that ERISA no longer applied as well as releasing and discharging the plan from all liabilities.

Through their participation in the plan, the Novotnys had accumulated several life insurance policies and they sought to reduce that number to one life insurance plan for each of them. Because Consolidated would no longer be making contributions to the terminated plan, the Novotnys also sought a means for paying the premiums on the new policies. The Novotnys applied for and received life insurance policies from Capitol for $200,000 and the initial premiums were paid for directly from the Novotnys' pension accounts. The application for insurance contained the following provision: "If available, automatic premium loan provision?" The Novotnys checked the "yes" response. The Novotnys then set up an annuity with National to pay the Capitol premiums thereafter every March.

National paid the premiums for the Capitol polices for the first three years this system was in place, 1983, 1984 and 1985. In 1985, the Novotnys sold their interest in Consolidated to family members and retired to Florida. After their retirement, the ownership of the policies was changed from the trustee account to the Novotnys and their families. National did not pay the 1986 premium on the

Capitol policies. Capitol asserts bills were sent to Consolidated and to the Novotnys when the premiums were not paid. The Novotnys contend they did not receive these bills but eventually learned of the missed payment and contacted their insurance agent who directed Capitol to seek payment from National. National did not pay this second premium and the Capitol policies lapsed. Under the terms of its policies with the Novotnys, Capitol used the cash surrender value of the Novotnys' policies to buy term life insurance for each of the Novotnys.

Numerous contacts were made between several agents on the Novotnys' behalf to reinstate the policies. Originally in 1987, Capitol agreed to reinstate the policies with payment of the outstanding premium, but then changed its position and required full medical underwriting and a payment of about half the policies' value. The Novotnys also attempted to purchase replacement coverage, but no other company would issue a policy. Alvyn Novotny died in June 1988 without the reinstatement of his policy and the Novotnys then filed suit.

The Novotnys pled claims in both tort and contract. The trial court granted summary judgment in favor of the Novotnys against both Capitol and National for breach of contract claims and dismissed the tort claims. The court ordered National and Capitol to pay money damages to the beneficiaries of Alvyn and to reinstate Melvin's policy.

When reviewing summary judgment, we apply the standards set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.***, 138 Wis. 2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Our review is de novo. ***Green Springs Farms v. Kersten***, 136 Wis2d. 304, 314-15, 401 N.W.2d 816, 820 (1987). Under § 802.08(2), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Novotnys argue that the trial court erred by dismissing their claims for breach of a fiduciary duty. The basis of the fiduciary duty claims stems from the contracts. The Novotnys assert that National had a contract to pay on their behalf the Capitol premiums and that Capitol agreed to implement the APL provision if payment was not received from National. The Novotnys contend the companies' failure to follow these contracts rises to a breach of a fiduciary duty for which punitive damages are available. We disagree.

In insurance cases, the tort of bad faith arises out of the breach of a fiduciary duty owed by the insurer to its insured resulting from the contractual relationship. "The tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract." ***Kranzush v. Badger State Mut. Cas. Co.***, 103 Wis.2d 56, 62, 307 N.W.2d 256, 260 (1981). Every breach of contract is not a tort, "there must be a duty existing independently of the performance of the contract for a cause of action in tort to exist." ***Landwehr v. Citizens Trust Co.***, 110 Wis.2d 716, 723, 329 N.W.2d 411, 414 (1983). The Novotnys contend that their breach of fiduciary duty claims are not bad faith claims. A survey of case law in the insurance context shows that the claim for bad faith is a claim for breach of a fiduciary duty. *See* ***Kranzush***, 103 Wis.2d at 62, 307 N.W.2d at 260.

Here, the Novotnys allege that the very conduct giving rise to the breach of fiduciary duty is the failure to fulfill the obligations set forth in the

contract. They assert no "duty existing independently of the contract" to provide the basis of their claim, rather they contend that National and Capitol contractually agreed to act on their behalf but failed to do so as the basis of their fiduciary claims. This conduct amounts to a breach of contract but does not provide for a tort recovery.

The Novotnys cite to ***In re Estate of Plautz v. Time Ins. Co.***, 189 Wis.2d 136, 525 N.W.2d 342 (Ct. App. 1994), as support for the proposition that a bad faith claim is appropriate in this case. We are not persuaded. Plautz dealt primarily with the question whether a beneficiary under a life insurance policy could bring a bad faith claim for breach of the duty of good faith and fair dealing. ***Id.*** In that case, we held a beneficiary could bring such an action. The basis for the claim in that case was the miscalculation of the policy's cash value. ***Id.*** No such circumstances exist in this case. The Novotnys' claim is for a breach of the very action they contracted for, rather than for a breach of a duty independent of that contract.

Capitol argues that the trial court erred by finding the APL provision was part of the contract. Capitol argues that it was not offering an APL in the polices for the Novotnys notwithstanding the option on the application for insurance allowing the brothers to check whether they wanted an APL "if available." The Novotnys argue that the contract is ambiguous and because any ambiguity is construed against Capitol as the scrivener, the APL provision is part of the contract.

The interpretation of insurance policy provisions in the context of undisputed facts presents a question of law which we review de novo. ***Novak v. American Family Mut. Ins. Co.***, 183 Wis.2d 133, 136, 515 N.W.2d 504, 505 (Ct.

App. 1994). Whether an ambiguity exists in a contract is a question of law. ***Smith v. State Farm Fire & Cas. Co.***, 192 Wis.2d 322, 329, 531 N.W.2d 376, 379 (Ct. App. 1995). "Ambiguities in a contract of insurance are resolved in favor of coverage." ***Id.*** Language is ambiguous if "when read in context [it] is fairly susceptible to more than one meaning." ***Id.*** "The mere fact that a word has more than one dictionary meaning, or that the parties disagree about the meaning, does not necessarily make the word ambiguous if the court concludes that only one meaning applies in the context and comports with the parties objectively reasonable expectations." ***Spangers v. Greatway Ins. Co.***, 182 Wis.2d 521, 537, 514 N.W.2d 1, 7 (1994). "An insurance policy should not be construed so as to render any part of it useless." ***Smith***, 192 Wis.2d at 330, 531 N.W.2d at 379

Capitol contends its policy does not contain an APL provision. The Novotnys argue that the application must be read as part of the insurance contract and that the application creates an ambiguity. We conclude that the Capitol insurance policies did not contain an APL provision.

The Novotnys' application with Capitol contained the following question: "If available, automatic premium loan provision: Yes __ No __." The Novotnys checked yes. Applications for insurance are offers for insurance. *See* 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE, § 11:7, 11-17 (3d ed. 1996). The delivery of a policy of insurance that does not match the application creates a counteroffer which can be accepted or rejected by the insured. *See* ***Erickson v. Mid-Century Ins. Co.***, 63 Wis.2d 746, 751, 218 N.W.2d 497, 500 (1974); *see also* COUCH ON INSURANCE, § 11:7, 11-17.

In this case, we need not decide whether "if available" is ambiguous as part of the application because the delivered policy made no mention of an APL

and unambiguously provided for term life insurance if a premium is missed and the policy lapses. The delivered policy was a counteroffer for insurance accepted by the Novotnys. The policy expressly states: "If any premium is not paid within 31 days after its due date, this policy will lapse as of the due date of that premium." The policy also describes that after lapse, two types of insurance are still available if there is a cash surrender value in the policy, extended term or paid-up life. The policy reads that Capitol will "automatically provide extended term insurance" except in a few enumerated circumstances where it will provide another form of insurance. Also included is the procedure to reinstate a policy after a missed premium within a certain grace period. An automatic premium loan provision is not mentioned in the policy, nor is there any description of how an APL would operate. The policy is silent in all regards to any APL possibility. The Novotnys testified that they made it a point to read and understand the entire policy and specifically recall discussing the lapse provisions. Under these facts, the Novotnys, having dealt with insurance for thirty years, accepted the policy as silent to an APL but referring to term life insurance in case of lapse.

The Novotnys argue that this silence is unimportant and the provisions pertaining to lapse and extended term insurance are irrelevant because the APL provision was designed to prevent lapse of the policy. We do not agree. The contract details what occurs if a premium is missed and if the policy lapses. If a premium was missed and Capitol was to remove money from the policies cash surrender value to make the payment or loan the premium amount with interest to the insureds, some documentation as to the administration of such a payment would have been provided. We cannot read an APL provision as consistent with the terms of the policy which unambiguously states the course of action following

a missed premium. We conclude that the Capitol policies were accepted by the Novotnys without an APL provision.

We next turn to National's contentions. National argues that the life insurance policies were owned by the pension plan and that ERISA preempts the Novotnys' claims. We conclude ERISA has no application to this case.

A prerequisite for ERISA applicability is for there to be a plan. ***Fort Halifax Packing Co. v. Coyne***, 482 U.S. 1, 16 (1987). National argues that because the Novotnys left their interests in an account in trust of the Consolidated plan after the plan's termination in 1981, ERISA applies and preempts their claims. We disagree. ERISA has no application because the plan terminated in 1981, two years before the insurance policies at issue here were purchased. Additionally, the Novotnys signed documents acknowledging that ERISA no longer applied as well as releasing and discharging the plan from all liabilities.

Further, even if we were to consider the plan as somehow extending past its termination date in 1981, the Novotnys had no fiduciary duty under ERISA. ERISA does not apply to the owner of retirement funds managing his own account. 29 U.S.C. § 1104(c). After the termination of the plan, the Novotnys were the only members who did not take their interests out of the plan's trust account. The accounts had their names on them along with the terminated plan's. They used funds from that account to purchase the Capitol and National policies. In essence, they were managing their own accounts. The insurance policies were belatedly changed to reflect the Novotnys', rather than the terminated plan's, ownership. This is not a suit for benefits under a plan, it is a suit for enforcement of a contract. Therefore, we conclude ERISA does not apply.

National also argues that the Novotnys failed to establish causation as a matter of law because National's breach occurred after Capitol's policies had already lapsed. National asserts that each of its annuities contained a provision allowing National six months to process withdrawal requests. National contends the Novotnys' April 1983 withdrawal request for a March payment allowed National to pay the request until September, well after the Capitol policies lapse date. The Novotnys argue that the six-month period had been subsequently modified in writing to provide for payment on every March 1 and that National's subsequent performance under the contracts counters National's argument.

We conclude that National and the Novotnys modified the six month period for withdrawals. National understood that the Novotnys were using this annuity to pay the Capitol premiums and would be doing so well into the future. To assist the Novotnys, National explained what type of request would meet the Novotnys' needs in this regard. In response to the Novotnys' correspondence, National drafted a letter in April 1983 stating that National would pay the premium on the Capitol policies "immediately, and on every March 1, thereafter." This note also included a handwritten notation from a National employee stating "I believe this letter will take care of each year to follow." Executory contracts and partially performed contracts are modifiable without consideration upon agreement of the parties. ***Everlite Mfg. Co. v. Grand Valley Machine & Tool Co.***, 44 Wis.2d 404, 408, 171 N.W.2d 188, 190 (1969). The evidence demonstrates that National modified the contract to match the Novotnys' needs, i.e., to dispense with the six- month allowance for withdrawals. In fact, National performed under the modified agreement paying the Capitol premiums timely in 1983, 1984 and 1985.

Next, National argues that the trial court erred by not applying the doctrine of mitigation. Because National rests this argument on the Novotnys' duties under ERISA, our previous ruling that ERISA does not apply disposes of this argument.

National also contends the trial court erred by denying National any subrogation or indemnity claims against Capitol. Because we have ruled that the Capitol policies did not contain the APL provision, Capitol did not breach the contract and is not liable. Because Capitol has no liability either in tort or contract, we conclude National has no claims against Capitol for equitable subrogation or indemnity.

Because we conclude the trial court did not err by dismissing the Novotnys' breach of fiduciary duty claims, by denying subrogation or indemnification between National and Capitol, by denying application of the doctrine of mitigation, and by not applying ERISA, we affirm those parts of the judgment. However, because we conclude that the Capitol policies did not have an APL provision and did not breach its contract with the Novotnys, we reverse that part of the judgment. We also remand the case back to trial court for a new determination of damages and attorney fees in favor of the Novotnys against National.

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

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