COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2014

Diane M. Fremgen
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. 2013AP1387 Cir. Ct. No. 2011CV261

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

OWNERS INSURANCE COMPANY,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

DRAGA SIKANOVSKI AND AGARD ENTERPRISES, INC.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS-CROSS-RESPONDENTS,

V.

LENA INSURANCE SERVICES, LLC,

THIRD-PARTY DEFENDANT,

ROBERT C. BEMIS D/B/A BOB BEMIS INSURANCE, WISCONSIN MICHIGAN INSURANCE AGENCY, INC. AND RYAN L. POLZIN, INDIVIDUALLY AND D/B/A WISCONSIN MICHIGAN INSURANCE AGENCY,

THIRD-PARTY DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Owners Insurance Company appeals an order applying equitable estoppel to bar it from denying coverage for a fire loss sustained at a commercial property owned by Draga Sikanovski and Agard Enterprises, Inc. (Sikanovski). Owners asserts that its post-loss cancellation, retroactive to two days before the loss occurred, was proper because Sikanovski failed to make timely and sufficient premium payments. We agree with the circuit court that Owners' pattern of regularly accepting insufficient payments and threatening cancellation without ever cancelling the policy, at least to Sikanovski's knowledge, was sufficient to establish reasonable reliance. Accordingly, we affirm the circuit court's application of equitable estoppel to bar Owners' denial of coverage.

BACKGROUND

¶2 On July 11, 2005, Owners issued Businessowners Policy 46-427-909-00 to insure an apartment building in Crivitz, Wisconsin.[1] Sikanovski elected to pay the yearly premium of $4,390.42 pursuant to a monthly payment schedule. Under the schedule, two-twelfths of the annual amount was due as a down payment, and the remainder was paid in ten equal monthly payments. As a result, the premium, which an Owners representative testified is due immediately

[1] Sikanovski testified she succeeded as the insured under this policy when she bought out her partner in 2006.

upon policy inception but financed internally if an insured elects to make incremental payments, would be fully paid before the termination date of the policy.

¶3 After repeated cancellation notices and reinstatements, the policy was cancelled in 2006 for non-payment. Sikanovski determined the problem was that she had insufficient time between her receipt of the premium bill and its due date, with the bill sometimes arriving after it was due. After the policy was reinstated, Sikanovski established "padded" monthly payments of $379.[2] A "padded" amount, according to Sikanovski, accounted for future premium increases. Sikanovski did not direct her bank to pay the actual amount of her invoice; rather, she instructed her bank to send the "padded" amount of $379 directly to Owners on a monthly basis.

¶4 Sikanovski was aware the yearly premium could increase such that the "padded" amount would at some point become insufficient, so she would "spot check the initial invoices that would come in around the renewal dates." To determine whether $379 was still sufficient, Sikanovski would look at the minimum amount due and determine if the monthly payments would cover that amount. Sikanovski would not review every document Owners sent her each month, however. She testified:

> It would make no sense for me to [review] since I already knew that we stood in this position of when you mail it out to me and the time I receive it, I don't have really a window of payment in there. So I would just review one or two …

[2] Sikanovski testified that she consulted her agent, Robert Bemis, when determining the amount of payments. Bemis denied those conversations happened. This factual dispute is not germane to our decision.

> and if those looked good, I knew I was good for the policy term.

¶5 Between July 2007 and July 2010, the automatic payments were more than sufficient to cover the premium owed. Sikanovski testified she was aware there were no financial problems with her account during this time. The total annual premium for the July 11, 2009 to July 11, 2010 policy year was $4,438.04, or approximately $369.84 per month. After a $5.00 monthly service fee, there was an annual surplus of $54.96, which Owners returned to Sikanovski by check on May 4, 2010.

¶6 The annual premium increased to $4,823.62 during the policy year between July 11, 2010 and July 11, 2011. The new premium amount was disclosed in renewal documents, but Sikanovski testified she paid no attention to the annual premium amount, stating "$4,800 could be my previous year premium. I don't really know, to be honest with you. It doesn't have a comparison and I don't hold those figures in memory from year to year." Sikanovski continued making monthly automatic payments of $379.

¶7 A payment of $379 was applied to Sikanovski's account on June 3, 2010.[3] On June 21, 2010, Owners sent a bill for $429.29, due on July 11, 2010. Another $379 automatic payment was applied on July 6, 2010. On July 22, 2010, Owners sent the first notice of cancellation and a cancellation invoice requesting payment of $472.89 by September 8, 2010. Sikanovski testified she received the notice, but disregarded it:

[3] Although this payment was made before the inception of the 2010-2011 policy term, it was applied to the new balance because the 2009-2010 policy was paid in full on May 3, 2010.

> I opened it up, and I see $472 and that it's due in two months and I know I've got two [$379 automatic] payments going in there. And I know that's going to give me that padded amount, so I determine I'm padded, and I don't probably give the policy further consideration from that point forward.

Owners does not dispute that the two intervening automatic $379 payments in August and September were sufficient to cover the outstanding amount contained in the July 22, 2010 notice.

¶8 Sikanovski made her next automatic $379 payment on August 3, 2010. That amount was insufficient to cover the outstanding amount due, and Owners issued a revised cancellation notice that same day. The notice indicated $93.89 was due on September 8, 2010, or the policy would be cancelled.

¶9 By August 2010, Sikanovski still had not cashed her refund check from the previous policy year. Owners therefore canceled the check and applied the $54.96 to the outstanding balance. Owners notified Sikanovski of the additional "payment" on August 6, 2010, in a second revised cancellation notice.[4] The notice indicated $38.93 remained outstanding and due on September 8, 2010.

¶10 Sikanovski testified she recalled receiving and opening the August 6, 2010 notice. She again looked at the minimum amount due and the due date. Sikanovski knew she would make an automatic $379 payment before September 8, 2010, so she disregarded the notice. Sikanovski thought Owners made a mistake because she received two bills on August 3 and August 6 with different amounts due, but to her knowledge had not made a payment.

[4] The notice did not indicate the source of the "payment" as the cancelled refund check.

¶11 Sikanovski's next automatic payment was made on September 3, 2010. This was sufficient to cover the outstanding balance of $38.93, and Owners reinstated Sikanovski's account immediately.[5] Sikanovski received the notice and confirmed her policy had not lapsed because the minimum was paid by September 8, 2010. On September 21, 2010, Owners sent Sikanovski a new bill for $414.70, due on October 11, 2010.

¶12 Sikanovski's $379 automatic payment on October 4, 2010 was insufficient to cover the entire amount due. Owners issued a second notice of cancellation on October 22, 2010, indicating the policy would cancel unless $465.40 was paid by December 6, 2010. Sikanovski received the mailing and testified she "knew [she] was going to have a payment in [early November] and [early December], [which] would be sufficient."

¶13 Indeed, that amount was paid by Sikanovski's two monthly automatic payments on November 3, 2010, and December 3, 2010.[6] Owners reinstated Sikanovski's account on December 3, 2010. The notice of reinstatement provided to Sikanovski confirmed her math. This appears to be the last mailing from Owners that Sikanovski opened and read until after the loss.

¶14 Owners sent a new bill on December 22, 2010. It required a minimum payment of $438.13 by January 11, 2011. Sikanovski testified she did not open this bill because it was Christmas time, she was busy, and she set up

[5] Owners appears to have applied the remainder of the payment to reduce the annual premium balance.

[6] Owners again appears to have applied the excess to reduce the annual premium balance.

automatic payment for her convenience. Sikanovski made an automatic $379 payment on January 4, 2011, and Owners issued a third cancellation invoice on January 25, 2011. The notice indicated Sikanovski's policy would be cancelled unless $512.26 was paid by February 28, 2011. Sikanovski did not open this mailing either. She testified she "had … already determined" based on the past invoices and notices of cancellation and reinstatement that "we are good on their billing."

¶15 Sikanovski made her next $379 automatic payment on February 3, 2011. The same day, Owners notified Sikanovski that $133.26 remained outstanding. The policy was cancelled on March 4, 2011. Owners received Sikanovski's next $379 automatic payment later that day.

¶16 Despite Sikanovski's repeated failure to make sufficient timely payments, Owners reinstated Sikanovski's policy on March 9, 2011.[7] A new bill was generated on March 22, 2011, requiring payment of $531.83 by April 11, 2011. Sikanovski's next $379 payment occurred on April 4, 2011. On April 21, 2011, Owners sent a fourth cancellation notice requiring payment of $699.66 by May 23, 2011.

¶17 On May 5, 2011, Sikanovski made a $379 automatic payment. Owners sent a notice that day indicating Sikanovski's policy would be cancelled if

[7] Owners argues the term "reinstatement" is only proper when a policy is resurrected after cancellation, and contends that under this definition, Sikanovski's policy was "reinstated" only once after it was cancelled on March 4, 2011. While we recognize the distinction Owners seeks to draw—namely, that keeping a policy in force after an insured has brought the account current is not the same as bringing the policy back to life after cancellation—Owners does not indicate what other terminology is appropriate for its failure to cancel at all times prior to March 4, 2011. Owners' record submissions use the term "reinstatement" to apply to both circumstances, and we do the same.

the remaining $320.66 was not paid by May 23, 2011. There was not another automatic monthly payment scheduled before May 23. On May 25, 2011, the Crivitz property sustained a fire loss. On May 27, 2011, Owners notified Sikanovski that it had cancelled her policy, effective May 23, 2011.

¶18 Sikanovski made two $379 payments after the loss, including another automatic payment on June 3, 2011, both of which were refunded. In addition, after the loss Owners refunded $325.71 in unearned premium.[8] Of the $4,823.62 premium for the 2010-2011 policy period, Owners had been paid $4,502.96, with an additional $100 in payments allocated to fees. Thus, the total unpaid premium for the policy year was $320.66.

¶19 Owners received a property loss notice from Sikanovski's insurance agent shortly after the fire. On June 6, 2011, Sikanovski contacted Owners, asserting "there was a long standing practice of … Owners to routinely send [cancellation] notices … and then … to accept the auto payment amount, $379.00 to keep the policy in force." The letter continued:

> [T]he notice sent on May 3, 2011 was not adequate to cancel the policy nor to give my client notice that this time [Owners] really intended to cancel the policy … when the company had routinely and consistently accepted what it considered to be inadequate minimum payments and in fact had done so the month before.

[8] "Earned premium" refers to the "portion of an insurance premium applicable to the coverage period that has already expired." BLACK'S LAW DICTIONARY 1372 (10th ed. 2014). As an example, for a policy with a total annual premium of $1,200, the earned premium after three months is $300. ***Id.*** "Unearned premium" refers to the "portion of an insurance premium applicable to the coverage period that has not yet occurred." ***Id.*** We understand the issuance of the refund check to indicate that had Owners not cancelled Sikanovski's policy, her premium payments through May 5, 2011 would have been sufficient to secure coverage on the date of the loss.

¶20 Owners commenced this action seeking a declaration that its policy was not in force on the date of the fire loss. Owners asserted Sikanovski was not entitled to any payment or benefits under the Owners policy as a result of that loss. Sikanovski counterclaimed for breach of contract, estoppel, breach of oral contract, and bad faith. Both Owners and Sikanovski, for different reasons, filed third-party actions against Bemis and Wisconsin Michigan Insurance Agency.[9] All parties moved for summary judgment.

¶21 Owners representatives provided inconsistent statements about the procedures leading to policy cancellation and reinstatement.[10] One Owners employee, Mary Bartz, testified that if a minimum payment is not received, someone has to request reinstatement, and the policy has to be reviewed by underwriting to ensure there had been no loss. Bartz testified that in this case, Sikanovski's policy was not reinstated in June 2011 in part because of the fire.

¶22 Owners subsequently provided notice that Bartz's testimony had been in error. Owners submitted an affidavit from Douglas Eveleth, an Owners business analyst, who stated that when an insured is late paying his or her premium, Owners will send a notice of cancellation indicating the policy will cancel if payment is not received by a certain date.[11] If payment is not received by

[9] Sikanovski's complaint advanced claims for negligence and breach of fiduciary duty. Owners' complaint advanced claims for common law contribution and indemnity and contractual indemnity. Owners' third-party complaint also added Ryan Polzin and Lena Insurance Services, LLC as parties.

[10] The inconsistent statements do not create a genuine factual dispute precluding summary judgment. There is no evidence Sikanovski was aware of Owners' internal processes governing cancellation and reinstatement. We merely set forth the testimony of Owners representatives as background.

[11] Eveleth's affidavit was the subject of a motion to strike, which was ultimately denied by the circuit court as moot.

the designated date, the policy will cancel. However, the billing system is designed to accept and automatically reinstate a policy if payment is received within ten days of cancellation. The automatic system can be overridden if the underwriting department places a "Do Not Reinstate" hold on the policy. As a result, the system would not reinstate the policy even if sufficient funds were provided within ten days of cancellation.

¶23 Eveleth averred that because an additional payment was not received by February 28, 2011, Sikanovski's policy was cancelled as of March 4, 2011. However, Owners received a payment on March 7, 2011, which was more than sufficient to cover the outstanding balance. Because underwriting had not yet placed a hold on Sikanovski's account, it was automatically reinstated. After the policy was reinstated, Owners placed a "Do Not Reinstate" hold on the policy. There is no evidence Sikanovski was advised of the hold. Thus, it was Eveleth's assertion that the policy cancelled on May 23, 2011, not because of the fire, but because of the hold placed on the account by underwriting.

¶24 The circuit court heard argument on the summary judgment motions on April 12, 2013. It rendered an oral decision at the conclusion of the hearing, indicating it would grant summary judgment for Sikanovski against Owners and dismiss Bemis and the other third-party defendants from the case.

¶25 The circuit court first determined Owners was equitably estopped from denying coverage for the loss:

> I find that coverage is based on Owners' pattern of accepting these short payments, [issuing] these cancellation notices, sometimes the cancellation, acceptance of the next automatic payment, and then reinstatement and you repeat all this. Almost all of the premium had been received. In fact, there was unearned premium on the policy as of May 23rd. [The balance] would easily have been covered

> by the June payment. Frankly, based on this pattern, I think one can easily surmise that that June 3rd payment would have been accepted but for the fact that this claim had come in in the meantime, but the pattern was clearly there and I think that's what establishes the estoppel and indicates that there should be coverage here on an equitable basis ….

The court clarified the pattern consisted of the receipt of automatic payments in an insufficient amount, cancellation notices sent, and payments again accepted. The court deemed it important that no money was returned to Sikanovski until after the loss, despite Sikanovski being behind on payments for nearly the entire term. The court stated Owners "kept taking the money and kept reinstating the policy and they are going to be estopped from [denying coverage] at the tail end of this policy."

¶26 The court also concluded the success of Sikanovski's estoppel claim did not depend in any way on the actions or inactions of Bemis and the other third-party defendants. The court's estoppel conclusion was based solely on the conduct of Owners that occurred with Sikanovski's knowledge. Accordingly, Bemis and the other third-party defendants were dismissed from the case. Owners now appeals.

DISCUSSION

¶27 The sole issue on appeal is whether the circuit court correctly concluded Sikanovski was entitled to summary judgment on her equitable estoppel claim.[12] "The doctrine of equitable estoppel can apply to insurance coverage."

[12] Owners briefs two secondary issues: (1) whether it was entitled to declaratory judgment and dismissal of Sikanovski's claims for breach of contract and bad faith because the policy was effectively canceled on May 23, 2012; and (2) whether the court should have specifically dismissed Sikanovski's claim that Owners waived denial of coverage. In light of our conclusion that Sikanovski is entitled to coverage based on estoppel, we need not address these alternative arguments.

(continued)

Mercado v. Mitchell, 83 Wis. 2d 17, 26, 264 N.W.2d 532 (1978). Equitable estoppel has four elements: (1) action or non-action (2) on the part of one against whom estoppel is asserted (3) which induces reasonable reliance by the other, either in action or non-action, (4) to his or her detriment. ***Nugent v. Slaght***, 2001 WI App 282, ¶29, 249 Wis. 2d 220, 638 N.W.2d 594. Estoppel must be demonstrated by "clear, satisfactory, and convincing" evidence and must not rest on mere inference or conjecture. ***Id.***

¶28 We apply a two-tier standard of review to a circuit court's decision to apply equitable estoppel. "When the facts and inferences therefrom are not disputed, it is a question of law whether equitable estoppel has been established." ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997). We independently decide questions of law. ***Id.*** However, once the elements of equitable estoppel have been established as a matter of law, the decision whether to apply the doctrine lies in the circuit court's discretion. ***Nugent***, 249 Wis. 2d 220, ¶30. A court must weigh the equities and "has the power to apply an equitable remedy as necessary to meet the needs of the particular case." ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984).

¶29 Here, the only element Owners disputes is reliance. Owners appears to agree that the pattern identified by the circuit court existed; that is, Owners repeatedly accepted payments that were insufficient to satisfy the minimum payment due, issued notices of cancellation, and reinstated the policy when a

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Bemis has filed a cross-appeal. The only issue presented by the cross-appeal is whether the portion of the circuit court's May 9, 2013 order denying Bemis's motion for summary judgment as moot should be reversed if this court reverses the order. Because we affirm, we have no need to reach the issue presented by the cross-appeal, and we order the cross-appeal dismissed.

sufficient partial payment was received, all but once without formally cancelling the policy.[13] However, Owners argues that no person could reasonably rely on this pattern to indicate Owners would keep the policy in force despite the insured's failure to make a sufficient required payment. Further, Owners argues no one can establish reliance at all "when, like Ms. Sikanovski, they failed to open and read those notices or, when they did open the notice, failed to read it closely."

¶30 Owners paints with too broad a brush. It is undisputed that Sikanovski did open some mail from Owners. During the first few months of the policy period, she observed the amount due and the due dates on the notices, calculated when her automatic payments would be made, and concluded those payments would be sufficient and timely.

¶31 By early December, it appears Sikanovski had concluded that despite the constant flurry of cancellation notices, her automatic payments were sufficient to cover the premium payments. She was not aware she was falling further behind in her payments as new monthly premiums were added to the past due amounts. Even the circuit court found Owners' notices "confusing at best" in

[13] Owners claims it could not cancel the policy before May 2011 because it was required to accept all prior payments and keep the policy in force. Other than the language of its own notices, however, Owners does not explain why it was obligated to continue providing coverage despite Sikanovski's history of insufficient payments. Under WIS. STAT. § 631.36(2)(b), an insurer's cancellation for nonpayment of premiums becomes effective ten days after notice is delivered or mailed to the policyholder.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

light of their varying due dates and amounts due.[14] Accordingly, we reject Owners' characterization of the facts regarding Sikanovski's mail practices.

¶32 By Owners' own admission, Sikanovski "fell behind on [her] payments nearly immediately," and as a result, she was in default for nearly the entire 2010-2011 policy term. As far as Sikanovski was aware, Owners never carried through with its threat to cancel the policy, though it could have done so many times. *See* ***Nugent***, 249 Wis. 2d 220, ¶27 ("[A]n insurance company may, at its discretion, by action or inaction, enforce policy termination or, instead, act inconsistently with termination, thereby opening the door to the possible application of equitable estoppel."). Owners does not adequately explain why a reasonable insured in Sikanovski's position, having read most of Owners' correspondence through December 2010, could not reasonably conclude her automatic payment would keep the policy in force. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (court need not consider undeveloped arguments).

¶33 Instead, Owners relies on ***Von Uhl v. Trempealeau County Mutual Insurance Co.***, 33 Wis. 2d 32, 40-41, 146 N.W.2d 516 (1966), for the proposition that an insurer can be estopped from denying coverage for nonpayment of premiums only when post-loss premium payments are "accepted without comment." A proper reading of ***Von Uhl*** reveals no such limitation.

[14] By "varying due dates," we do not simply mean the actual dates payments were due. Instead, we are referring to the time between the date of the notice and date required for payment. For example, on July 22, 2010, Owners mailed a notice requesting payment by September 8, 2010, giving Sikanovski forty-eight days to pay the outstanding balance. That period progressively shortened to thirty-two days between Owners' April 21, 2011 notice and the May 23, 2011 due date.

¶34 In ***Von Uhl***, the plaintiff purchased a three-year policy providing coverage against wind and fire loss to a barn. ***Id.*** at 34. The insurer levied annual assessments on the policy, the first of which Von Uhl paid late, but which the insurer accepted. ***Id.*** Von Uhl made no timely payments on the second assessment but did make a partial payment well after the due date. ***Id.*** The insurer accepted and retained that partial payment. ***Id.*** Before Von Uhl paid the balance of the assessment, the barn was destroyed by a windstorm. ***Id.*** The insurer denied coverage because the assessment was not fully paid, but it nonetheless accepted further payments after the loss. ***Id.*** at 34-35. Von Uhl then suffered a second loss, which the insurer paid for in accordance with the policy. ***Id.*** at 35.

¶35 In resolving the coverage dispute regarding the first loss, our supreme court did not state that estoppel would only be applied when the insurer accepts post-loss payments. Rather, the court stated, "It is almost a universal principle that the law does not favor forfeiture in insurance policy cases." ***Id.*** at 39. The fact that a post-loss payment had been accepted by the insurer was just one among a series of acts on the part of the insurer "consistent with a waiver of any right" to suspend the policy; those acts were also sufficient to provide the insured "a right to assume and rely on the assumption that his policy was in force at the time of the loss." ***Id.*** at 41.

¶36 Thus, rather than supporting Owners' argument, ***Von Uhl*** cuts against it. This case simply requires application of the long-settled rule, applied in ***Von Uhl*** and many other cases, that

> "[a]ny agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company

> from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

Id. (quoting ***Knoebel v. North Am. Acc. Ins. Co.***, 135 Wis. 424, 428, 115 N.W.2d 1094 (1908)). By routinely accepting Sikanovski's late, partial payments without exercising its right to cancel the policy, despite repeated threats to do so, Owners established a practice or custom such that it is now estopped from denying coverage. *See* 5 STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS, & JORDAN R. PLITT, COUCH ON INSURANCE § 78:27 (3d ed. 2008) (where insured has been led to believe that prompt payment of premiums is not required, custom may result in the insurer being estopped from declaring a forfeiture).

By the Court.—Order affirmed.

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