

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2002

Cornelia G. Clark
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. 01-2582

Cir. Ct. No. 00-CV-142

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**SUSAN H. RIPPLE, INDIVIDUALLY AND AS GUARDIAN
OF MICHAEL F. RIPPLE AND MATTHEW E. RIPPLE,
HER MINOR CHILDREN, AND AS ADMINISTRATOR OF
THE ESTATE OF MICHAEL J. RIPPLE, AND THE ESTATE
OF MICHAEL J. RIPPLE,**

PLAINTIFFS-APPELLANTS,

V.

R.F. TECHNOLOGIES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
DONALD J. HASSIN, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Susan H. Ripple, individually, as guardian of her children, and as administrator of her husband's estate, appeals from the judgment dismissing her complaint and granting R.F. Technologies, Inc.'s motion for summary judgment. We conclude that there are genuine issues of material fact as to some of the issues raised by Ripple. Therefore, we affirm in part, reverse in part, and remand for a trial.

¶2 Susan Ripple, the widow of Michael J. Ripple, brought this action against R.F. Technologies (RFT) seeking the benefit of an employee life and accidental death insurance benefits program. Michael was employed by RFT in February 1996. After working for RFT for about a month, Michael was diagnosed with leukemia. He then went on an extended unpaid medical leave, during which time he received treatment for his illness.

¶3 While Michael was on medical leave, RFT negotiated with American United Life Insurance Company (AUL) to provide voluntary, employee paid, optional life and accidental death insurance to RFT employees. Under the agreement, AUL offered \$50,000 basic life insurance and \$50,000 accidental death coverage to all eligible employees who chose to participate. Pursuant to the agreement, AUL received medical information from the RFT employees. AUL was not allowed to decline coverage to a particular employee for medical reasons; however, it retained the right to cancel the whole arrangement. RFT did not contribute to this benefit, but it distributed AUL forms to its employees, collected the premiums and forwarded them to AUL.

¶4 Michael returned to work at RFT in March 1997. His compensation was changed from salary to an hourly basis. When he returned to work, he was given a packet of benefits forms. The record is uncertain about whether he

received information about the new AUL insurance benefit. Susan Ripple stated that she did not remember any AUL form. In any event, Michael never signed up for the benefit.

¶5 Michael's condition worsened. He died in October 1997 after he fell in his home and hit his head. Susan, individually, as guardian of her children, and as administrator of Michael's estate, brought this action against RFT for the benefits. Since AUL never provided coverage to Michael, she could not sue AUL. RFT moved for summary judgment and the circuit court granted the motion.

¶6 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

Applying the summary judgment methodology just as the trial courts are obliged to do, our first task is to determine whether plaintiffs have stated a claim for relief. In testing the sufficiency of a complaint, we take all facts pleaded by plaintiffs and all inferences which can reasonably be derived from those facts as true. Pleadings are to be liberally construed, with a view toward substantial justice to the parties. Section 802.02(6), Stats. The complaint should be dismissed as legally insufficient only if it is quite clear that under no circumstances can plaintiffs recover.

Green Spring Farms v. Kersten, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987) (citation omitted).

¶7 Susan's first argument is that Michael was contractually entitled to participate in the AUL benefit program. She asserts that there was a contract

between Michael and RFT based on a letter of employment issued to Michael which set out the terms of Michael's employment and referenced the employee handbook. RFT answers that neither of these documents referenced the AUL life insurance benefits because that potential benefit was not in existence at the time Michael was hired. Susan responds that it is, in essence, irrelevant that the program was not offered at the time Michael was first hired because the AUL program became part of RFT's employee benefits once the arrangement between RFT and AUL was finalized. While we tend to agree with Susan's response, we believe that this is not the essential issue presented by this case.

¶8 In *Atkinson v. Everbrite, Inc.*, 224 Wis. 2d 724, 732-33, 592 N.W.2d 299 (Ct. App. 1999), this court stated that any benefit the employer provided to the at-will employee was compensation for the employee's service to the employer and therefore derived from the contractual employment relationship. Further, an at-will employee is entitled to enforce the contractual promises made by his or her employer. See *Reimer v. Badger Wholesale Co.*, 147 Wis. 2d 389, 393, 433 N.W.2d 592 (Ct. App. 1988). We conclude that the issues presented are, assuming an at-will relationship, was RFT contractually obligated to offer Michael the accidental death and life insurance benefits at issue in this case, and if so, did RFT breach its contractual obligations.

¶9 We further conclude that these issues are fact driven. For example, one material fact is whether Michael received the application forms which contained the AUL benefits. The parties offer conflicting stories and theories about whether Michael actually received the forms. Whether, in fact, he received the forms would affect RFT's contractual obligations. Another factual issue which may be of some importance is whether Michael's return to work was a continuation of his former employment or was an entirely new or different

employment. If he was a new employee, additional issues would be whether there was a change in the terms of his agreement and what were the benefits to which he was entitled. Since it is necessary to resolve these factual issues to determine the legal ones, summary judgment is not appropriate.

¶10 We also conclude that RFT is not entitled to summary judgment on the issue of third-party beneficiaries. RFT first asserts that Susan may not recover as a third-party beneficiary because she did not plead this issue. We disagree. Susan alleged the existence of a contract to provide benefits for RFT's employees and that Michael was an RFT employee who was not offered the benefit. Under Wisconsin's liberal pleading rules, this is sufficient to establish the claim that Michael was a third-party beneficiary of the contract.

¶11 RFT next argues that there was not a contract between it and AUL, but merely an application to provide insurance. We reject this argument out of hand. While the process may have begun with an application, RFT and AUL eventually reached an agreement whereby AUL would provide the requested insurance to RFT employees.

¶12 RFT also argues that Michael was not a third-party beneficiary because the contract between RFT and AUL was not entered into directly and primarily for his benefit because he was not an eligible employee. *See Winnebago Homes, Inc. v. Sheldon*, 29 Wis. 2d 692, 699, 139 N.W.2d 606 (1966). RFT bases its argument on its assertion that Michael did not work the minimum number of hours necessary to be an eligible employee. Susan, however, counters with evidence from the record which shows that he did work the minimum number of hours. There is an issue of fact as to whether Michael worked the required number of hours.

¶13 RFT also argues that Michael cannot be a third-party beneficiary because the contract was not intended for the benefit of the employees. RFT asserts that the employees were not the direct and primary beneficiaries because the contract between AUL and RFT was intended for their mutual benefit. We are not convinced, however, that as a matter of law the employees were not the intended beneficiaries of this contract.

¶14 We also conclude that there is a genuine issue of material fact as to whether RFT breached a duty of good faith. Susan argues that RFT had a good faith duty based on its contractual relationship with Michael to provide Michael with notice of the AUL benefits and the opportunity to enroll, as well as to avoid injuring Michael's ability to obtain the benefits. Viewing the facts in the light most favorable to Susan, it is reasonable to conclude that RFT knew that Michael was seriously ill and that RFT also knew that AUL might decide not to go forward with the agreement if Michael opted to participate. This is sufficient to raise a question as to whether RFT breached a duty of good faith.

¶15 As to the other issues, we affirm the granting of summary judgment. Susan argues that RFT owed Michael a fiduciary duty to make sure that he was aware of the AUL benefit plan. First, an employer/employee relationship does not generally create a fiduciary relationship as a matter of law. *Hale v. Stoughton Hosp. Ass'n, Inc.*, 126 Wis. 2d 267, 274, 376 N.W.2d 89 (Ct. App. 1985). Susan argues, however, that the fiduciary relationship in this case was not created by the employment contract, but rather by RFT's knowledge of Michael's health and family circumstances. Susan does not cite to any authority to support this specific proposition and we are not persuaded that RFT's knowledge of Michael's illness created a special fiduciary relationship.

¶16 Susan also argues that RFT's role in creating and offering the AUL plan gave rise to a fiduciary relationship. Susan asserts that RFT acted as Michael's agent and that this agency relationship created a fiduciary relationship. Again, we are not persuaded. The cases upon which Susan relies support the proposition that in some jurisdictions an employer acts as the agent of the employee, as opposed to the agent of the insurer, in the process of providing insurance benefits. *See, e.g., Boseman v. Conn. Gen. Life Ins. Co.*, 301 U.S. 196, 204-05 (1936); *Hale v. Am. Home Assur. Co.*, 461 S.W.2d 384, 386 (Tenn. 1970).¹ Susan cites to one Wisconsin case which states that:

when the employer pays the premiums to the Insurance Company, and the employee makes no pecuniary contribution for such purpose, reason and justice may well require that the employer be not deemed the agent of the insurer with respect to ordinary matters involved in the administering of the policy such as paying premiums, reporting changes in the insured group, and the like.

Kaiser v. Prudential Ins. Co., 272 Wis. 527, 534, 76 N.W.2d 311 (1956) (emphasis added). In this case, however, the employees paid the premiums and RFT did not contribute. We are not persuaded that, even assuming an agency relationship was created in this case, it gave rise to the fiduciary duties asserted by Susan here. We conclude that summary judgment was appropriately granted to RFT on Susan's claims for breach of fiduciary duty.

¶17 Summary judgment was also appropriately granted on Susan's allegations of misrepresentation and failure to disclose. The Wisconsin Supreme

¹ The appellant did not provide pinpoint cites to identify the specific page where the proposition was stated. This omission requires the court to expend scarce judicial resources doing counsel's work. Counsel is reminded that in future filings in this court, pinpoint citations must be included.

Court has rejected these types of claims in the employment relationship context. *See, e.g., Mackenzie v. Miller Brewing Co.*, 2001 WI 23, ¶17, 241 Wis. 2d 700, 623 N.W.2d 739. Such grievances are generally contractual in nature. *Id.* at ¶¶24-25. We conclude that, as in *Mackenzie*, Susan's claim is based on the contractual relationship between Michael and his employer, and she does not have a valid tort claim.

¶18 Susan also alleges that RFT breached its contract with Michael by reducing his salary at the time he returned to work from his extended medical leave. The record shows, however, that at the time Michael returned to work, the nature of his job changed as did his salary. We again are not persuaded that Susan has a cause of action based on the reduction in salary.

¶19 The parties also argue about the applicability of the dead man's statute to this case. WIS. STAT. § 885.16 (1999-2000). It does not appear, however, that the trial court ruled on this issue. RFT asserts that the statute prevents Susan from relying on conversations she had with Michael to support her claims because she stands to benefit from that evidence. Susan responds that RFT itself relied on conversations it had with Michael to establish that it was entitled to summary judgment, and, consequently, may not assert the statute as a bar against her. RFT responds that it never referred to or relied on conversations Susan had with Michael.

¶20 The dead man's statute is strongly disfavored and must, whenever possible, "be strictly interpreted to prevent [its] use." *Hunzinger Constr. Co. v. Granite Resources Corp.*, 196 Wis. 2d 327, 333, 538 N.W.2d 804 (Ct. App. 1995) (citation omitted). A review of the deposition transcripts submitted in support of the summary judgment motion shows that RFT did, in fact, ask Susan about

conversations she had with Michael, as well as about conversations she heard Michael have with other RFT employees. While as a general rule, deposition questions about transactions with a decedent will not waive the statutory protection of the dead man's statute, *Miller v. Vorel*, 105 Wis. 2d 112, 115, 312 N.W.2d 850 (Ct. App. 1981), the protection is waived for deposition testimony offered into evidence. *Id.*² In this case, RFT offered the deposition testimony into evidence by attaching the transcripts to counsel's affidavit in support of its motion for summary judgment. We conclude, therefore, that RFT has waived the protection of the dead man's statute.

¶21 For the reasons stated, we affirm the judgment in part, reverse in part, and remand to the circuit court for a trial.

¶22 Costs are awarded to the appellant.

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

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

² RFT says in its brief: "Any statements in affidavits or depositions that are not admissible cannot defeat summary judgment," and cites to *Hunzinger Construction Co. v. Granite Resources Corp.*, 196 Wis. 2d 327, 335, 538 N.W.2d 804 (Ct. App. 1995). Not only is there no mention of that proposition at that page cite, the court has not found any mention of affidavits or depositions in that entire case. Further, this does not appear to be a correct statement of the law. Counsel is admonished to be more careful in future filings in this court.

