COURT OF APPEALS
DECISION
DATED AND RELEASED

July 5, 1995

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2578

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

GREGORY L. SCHULZ,

Plaintiff-Appellant,

v.

TIME INSURANCE COMPANY,
AMERICAN FAMILY INSURANCE COMPANY,
and KELLY KARCZ,

Defendants-Respondents.

APPEAL from judgments and an order of the circuit court for Milwaukee County: LOUISE M. TESMER,, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Gregory L. Schulz appeals from the trial court's grant of summary judgment to Time Insurance Company, American Family Insurance Company, and Kelly Karcz. We affirm.

I.

Schulz, a physician with training in oncology, the diagnosis and treatment of cancer, and his wife applied for health insurance coverage from American Family on October 22, 1991. Kelly Karcz, an American Family sales agent, took their application. On January 2, 1992, American Family denied coverage to the Schulzes based on Schulz's history of possible alcohol abuse and domestic abuse, and on nonreceipt of Mrs. Schulz's health records. Schulz was then re-examined, and American Family received a letter from his doctor on February 25, 1992, indicating that Schulz had no problems with his liver. On March 5, 1992, American Family notified the Schulzes that it would "be willing to reconsider your application for health insurance," and advised them to submit a new application. They did so on March 16, 1992, through Kelly Karcz. Mrs. Schulz testified that Karcz assured them "in effect, that no, you didn't need to do anything and this should go through just fine." When Mrs. Schulz called Karcz to ask about the status of their application, Karcz advised that they needed to complete a "hypertension form." The Schulzes did not submit the form, and American Family rejected the Schulzes' second application on May 21, 1992.

On May 4, 1992, the Schulzes applied for health insurance through Time Insurance, which approved their application with an effective date for coverage of May 4. The policy contained the following exclusions:

> **EXPENSES NOT COVERED BY THIS POLICY:** This policy does not provide benefits for the following:
>
> a)Pre-existing Conditions during the first two years coverage is in force; except as provided by the policy;
>
> b)expense incurred during the first two years of coverage for a Sickness which manifests itself during the first 15 days after a Covered Person's Effective Date of Coverage.
>
> ....

PRE-EXISTING CONDITIONS: A Pre-Existing Condition is a condition not fully disclosed on the application for insurance:

1)for which the Covered Person received medical treatment or advice from a Physician within the 2 year period immediately preceding that Covered Person's Effective Date of Coverage; or

2)which produced signs or symptoms within the 2 year period immediately preceding that Covered Person's Effective Date of Coverage which should have caused an ordinarily prudent person to seek diagnosis or treatment.

....

SICKNESS: Sickness means an illness, disease or condition of a Covered Person which manifests itself more than 15 days after the Covered Person's Effective Date of Coverage.

On May 19, 1992, Schulz consulted a doctor for symptoms of possible illness. On May 20, 1992, doctors conducted a biopsy on a lymph node, and Schulz was diagnosed with testicular cancer. Time Insurance denied coverage for his cancer treatment expenses based on the pre-existing condition exclusion and the clause excluding from coverage any illness manifesting itself within fifteen days of the effective date of coverage.

Schulz sued American Family, Karcz, and Time Insurance. The trial court granted summary judgment to American Family on the grounds that it did not intentionally, recklessly, or negligently defer acting on his application for insurance. The trial court also granted summary judgment to Karcz on the ground that her promise to obtain insurance coverage for the Schulzes was not a binding contract. Finally, the trial court determined that Schulz's illness manifested itself within the 15-day exclusion period, and granted summary judgment to Time Insurance; it did not address the pre-existing condition exclusion. Schulz appeals.

II.

Summary judgment is used to determine whether there are any disputed issues for trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Appellate courts and trial courts follow the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). First, we examine the pleadings to determine whether the complaint states a claim for relief. ***Id.*** If the complaint states a claim and the answer joins issue, we then examine the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. ***Id.*** If the summary judgment materials indicate that there is no material issue of fact and if the moving party is entitled to judgment as a matter of law, summary judgment must be entered. Section 802.08(2), STATS.

A. Claim against American Family

Schulz claims that American Family unreasonably delayed processing his application for health insurance. This states a cause of action, so we examine the evidentiary material to determine whether a genuine issue of material fact remains.

First, Schulz concedes that "up to the time of its initial rejection of Mr. Schulz on January 2, 1992, the conduct of American Family and its underwriting personnel was entirely proper," and that "it certainly had the right to reject him on the basis of a perceived health risk and did so within a reasonable time." Schulz further concedes that he "did not financially impair himself from securing other coverage and the circumstances at the time did not indicate the need for haste," referring to the criteria for unreasonable delay liability in Wisconsin as discussed in ***Kukuska v. Home Mut. Hail-Tornado Ins. Co.***, 204 Wis. 166, 235 N.W. 403 (1931), and ***Wallace v. Metropolitan Life Ins. Co.***, 212 Wis. 346, 248 N.W. 435 (1933). Instead, Schulz argues that the submission of both applications was one long process that was unreasonably delayed.

We note, however, that Schulz did not complete the application process the second time. We have previously held that failure to complete an

application precludes a person from obtaining insurance coverage. *See* ***Tourtillott v. Ormson Corp.***, 190 Wis.2d 292, 298, 526 N.W.2d 515, 518 (Ct. App. 1994) (widow denied life insurance benefits because her husband never completed an application before his death). He argues that his failure to complete the application is irrelevant because American Family invited him to reapply for insurance even though "the company knew the application would ultimately be rejected." Although Schulz has submitted a note by an American Family supervisor that reveals that the supervisor was uneasy about the risk to American Family, Schulz has provided no evidence suggesting that American Family's invitation to Schulz to reapply was a sham or that it intended to reject his application a second time.[1] He has not, therefore, established that there is a genuine issue of material fact for trial. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 290-292, 507 N.W.2d 136, 139 (Ct. App. 1993). We affirm.

B. Claim against Kelly Karcz

Schulz claims that Karcz promised him and his wife that American Family would grant them insurance coverage. This states a claim for misrepresentation. Schulz has not, however, established that there is a genuine issue of material fact for trial.

Schulz argues that Karcz's promise "could be found by a jury to have induced a temporary reliance ... that a policy would be issued, thereby preventing [Schulz] from seeking alternative coverage in a timely fashion."

For a cause of action for misrepresentation in Wisconsin, whether of intentional misrepresentation, negligent misrepresentation, or strict responsibility, at least three elements must be proven: "(1) [t]he representation must be of a fact and made by the defendant; (2) the representation of fact must be untrue; and (3) the plaintiff must believe such representation to be true and

[1] The supervisor's note was in response to another employee's query as to whether American Family should issue the policy in light of an examining physician's report that Schulz did not have an enlarged liver. The note read: "Yes! But I don't like it." As noted, American Family then sought additional information from Schulz that he did not supply.

rely thereon to his damage." ***Whipp v. Iverson***, 43 Wis.2d 166, 169, 168 N.W.2d 201, 203 (1969).

Here, Schulz concedes that he did not complete the application process; instead, he applied for insurance from Time Insurance seventeen days before the date of American Family's letter to him denying his application. Thus, he has not demonstrated any reliance on the alleged promise. *See* ***id.*** There is no genuine issue of material fact concerning Karcz's alleged misrepresentation, and we affirm on this claim.

C. Claim against Time Insurance

Schulz claims that the trial court erroneously concluded that his symptoms manifested themselves during the 15-day exclusion period in his policy. Schulz's claim is one of breach of contract by his insurer, and we conclude that he has stated a cause of action. There is no genuine issue of material fact for trial, however, because Schulz conceded in his evidentiary materials that he had a "pre-existing condition" as defined in his policy. His deposition, submitted on motions for summary judgment, contained the following exchange:

QIf you want to look at page 7, at Time Insurance's definition of pre-existing?

A Um-hum.

QIn your opinion, does the sequence of your illness fall within the definition of preexisting condition?

A Yes.

Schulz's attorney did not object to this question during the examination.

Other evidence submitted on the motions for summary judgment supports Schulz's admission. Schulz's physician testified at a deposition that, when he examined Schulz on May 19, 1992:

> I think what I was looking at here were just signs in his muscles and his face that would tell me that it just wasn't something that had happened within a few days or a week or something like this. It had been going on for at least a month or so.

Both Schulz's deposition testimony and his medical records indicate that he had multiple symptoms of illness before consulting a physician on May 19, 1992, including an enlarged lymph node existing for "some weeks," "drenching" night sweats, low-grade fever, "progressive" fatigue, and a thirty-pound weight loss; in addition, his right testicle contained a "lesion." Schulz indicated that he had consulted a physician friend about his symptoms "[a] couple weeks before" May 19, 1992, and that he conducted a CBC diagnostic test on himself to check for "an infectious process."

We conclude that Schulz admitted that his illness constituted a pre-existing condition under his health insurance policy with Time Insurance, and, accordingly, we do not reach the issue of whether Schulz's symptoms manifested themselves within the 15-day exclusion period.[2] We affirm on this claim. *See* ***Transportation Ins. Co.***, 179 Wis.2d at 295 n.6, 507 N.W.2d at 141 n.6 (appellate court may affirm trial court on reasons other than those relied upon by the trial court).

By the Court.—Judgments and order affirmed.

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

[2] *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).