

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 29, 2008

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. 2007AP811

Cir. Ct. No. 2006CV5162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

SUSANNAH Q. CAREY,

PLAINTIFF-APPELLANT,

V.

PAULINO LOPEZ-MARTINEZ,

DEFENDANT,

AMERICAN FAMILY INSURANCE GROUP,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County:
FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Susannah Q. Carey appeals *pro se* from circuit court orders granting summary judgment to American Standard Insurance

Company¹ and dismissing all of Carey's claims against both defendants for damages and uninsured motorist benefits. We affirm.

Background

¶2 Carey insured her automobile with American Standard. On April 15, 2003, American Standard sent Carey an invoice stating that a premium payment of \$98.03 was due by May 11, 2003. Carey did not pay anything in response to this invoice. On May 19, 2003, American Standard sent Carey a past-due notice, reflecting the premium amount past due, the additional premium that had accrued since the April invoice, and a \$3.00 handling fee. The notice directed Carey to pay \$368.66 by the due date of May 25, 2003. Carey did not pay anything in response to this notice.

¶3 On May 23, 2003, American Standard sent Carey a cancellation notice requiring her to pay \$365.66 before June 5, 2003, in order to maintain coverage. The notice provided:

We must cancel your policy because we have not received your payment for the amount past due as of the date of this notice. The cancellation date is 06/05/2003 at 12:01 a.m. Standard Time Your coverage may continue with no interruption if you pay in full the amount shown above before the cancellation date.

Carey did not pay anything before June 5, 2003.

¹ American Standard Insurance Company has been denominated "American Family Insurance Group" in the caption of this matter throughout the litigation. In the circuit court, American Standard's counsel stated that the two companies are under the same corporate umbrella and that "the formality [in the caption] doesn't matter to the company." In this court, American Standard did not object to the caption in this regard. (*See* Letter from Attorney McDaniel to Clerk of the Court of Appeals of 4/30/07.)

¶4 On June 7, 2003, Carey was struck as a pedestrian by Paulino Lopez-Martinez, an uninsured motorist. American Standard denied Carey’s claim for uninsured motorist benefits on the ground that her policy had been cancelled prior to the date of the accident.

¶5 Carey filed a contract claim for uninsured motorist benefits against American Standard and a tort claim for damages against Lopez-Martinez. The circuit court granted American Standard’s motion for summary judgment and denied Carey’s motion to reconsider, finding that Carey lacked insurance coverage on the date of the accident. The court additionally determined that Carey failed to serve Lopez-Martinez with a summons and complaint and dismissed Carey’s lawsuit in its entirety.² This appeal followed.

Discussion

¶6 Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2005-06).³ We review *de novo* the grant or denial of summary judgment, applying the same methodology as the circuit court. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

² The circuit court signed two dismissal orders, one dismissing all of Carey’s claims, and one dismissing only Carey’s claim against American Standard. Carey appealed from both orders, but her appellate briefs do not touch on the dismissal of her tort claim against Lopez-Martinez. Carey’s decision to forgo any objection to the dismissal of her tort claim appears well-considered. The record shows that Lopez-Martinez was never served with a summons and complaint. “Failure to obtain personal jurisdiction over the defendant by statutorily proper service of process is a fundamental defect fatal to the action” *Hagen v. City of Milwaukee Employee’s Ret. Sys. Annuity & Pension Bd.*, 2003 WI 56, ¶13, 262 Wis. 2d 113, 663 N.W.2d 268.

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶7 Summary judgment methodology is well-known. We first determine whether the pleadings set forth a claim for relief. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1. If the pleadings state a claim, we next examine the moving party's affidavits and other proof to determine whether the moving party has established a case for judgment. *Id.* If the moving party has done so, we must then determine whether the opposing party has demonstrated any genuine dispute as to any material fact. *See Green Spring Farms*, 136 Wis. 2d at 315. "A factual [dispute] is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A 'material fact' is one that impacts the resolution of the controversy." *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 2000 WI 87, ¶32, 236 Wis. 2d 435, 613 N.W.2d 142 (citations omitted).

¶8 Neither party contests that Carey's complaint stated a claim against American Standard for uninsured motorist benefits. We therefore turn to the second step in our summary judgment analysis.

¶9 American Standard's submissions established a colorable defense to Carey's claim. It showed that Carey's insurance policy had lapsed at the time of the accident with Lopez-Martinez due to Carey's failure to pay premiums. American Standard submitted copies of its bills, proof that those bills were not paid, and a cancellation notice that complied with the statutory mandates of WIS. STAT. § 631.36(4)(a) and (2)(b).

¶10 WISCONSIN STAT. § 631.36(4)(a) provides:

[A] policyholder has a right to have the policy renewed ... unless ... with respect to failure timely to pay a renewal premium a notice is given, not more than 75 days nor less than 10 days prior to the due date of the premium, which

states clearly the effect of nonpayment of premium by the due date.

On May 23, 2003, American Standard mailed a notice to Carey in compliance with § 631.36(4)(a). The notice stated, with the requisite clarity, that if Carey failed to pay her insurance premium before June 5, 2003, the company would cancel her policy at 12:01 a.m. on June 5, 2003. The notice preceded the due date for Carey's premium by more than ten days.

¶11 WISCONSIN STAT. § 631.36(2)(b) provides that cancellation is not effective “until at least 10 days after the 1st class mailing or delivery of a written notice to the policyholder.” *Id.* We have previously held that this language measures the effective date of cancellation from the date of mailing. *See Schmitz v. Fire Ins. Exch.*, 2005 WI App 76, ¶¶3, 17, 280 Wis. 2d 560, 696 N.W.2d 238 (interpreting identical language in § 631.36(2)(c)). American Standard showed that it cancelled Carey's policy more than ten days after mailing Carey a policy cancellation notice on May 23, 2003. Accordingly, American Standard demonstrated that it cancelled Carey's policy in compliance with § 631.36(2)(b).

¶12 Carey claims that American Standard sent her a second cancellation notice, with a cancellation date of June 11, 2003. However, she failed to produce a copy of any such notice. Accordingly, she did not satisfy her burden of proof. *See Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) (burden of demonstrating sufficient evidence to go to trial is on party who has the burden of proof on issue).

¶13 Carey also claims that American Standard's billings created confusion and ambiguity as to what she needed to do to maintain insurance coverage. She first points to the different due dates on the April and May billings

to suggest that American Standard did not clearly disclose the policy cancellation date. In fact, the April and May billings merely set due dates for Carey's ongoing payment obligations. Carey made no payments. In response to Carey's failure to pay, American Standard sent Carey a single cancellation notice. That notice provided an unambiguous statement of the date by which Carey was required to pay her premium in order to maintain coverage.

¶14 Carey next points to the differences in the amounts due reflected on her bills, and asserts that it was "not fair" for American Standard to demand a higher payment in May than was reflected on the April invoice. We disagree. Carey's payment obligations continued to accrue after American Standard sent its April invoice. Insurance companies accept risk in exchange for premiums. *See National Motorists Ass'n v. OCI*, 2002 WI App 308, ¶14, 259 Wis. 2d 240, 655 N.W.2d 179. American Standard did not act unfairly in demanding its premiums and fees in exchange for providing the coverage that Carey wanted.

¶15 Carey offered no evidence or argument sufficient to defeat American Standard's motion for summary judgment. The circuit court appropriately granted the motion and dismissed her claims.

By the Court.—Orders affirmed.

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

