COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP183 **Cir. Ct. No. 2010CV9**

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

RURAL MUTUAL INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

KENNETH G. DENZINE AND SALLY J. DENZINE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kenneth and Sally Denzine appeal a summary judgment declaring that pursuant to a "tendered for settlement" endorsement, Rural Mutual Insurance Company is relieved of any further duty to defend the Denzines after tendering its policy limits to them. The Denzines contend the

circuit court erred by granting summary judgment because there are genuine issues of material fact regarding whether they received notice of the endorsement. We reject the Denzines' argument and affirm the judgment.

BACKGROUND

¶2 In 1991, Rural Mutual issued a personal automobile policy to the Denzines. In 1998, the policy was amended to include a "tendered for settlement" clause which provided "'we' will not defend any suit after 'our' limit of liability has been offered or paid." In December 2008, vehicles driven by Kenneth Denzine and Mark Musolf were in a head-on collision. Musolf died in the crash and his passenger, Jocelyn Jacobs, suffered severe injuries. Jacobs, on behalf of herself and as personal representative for the Estate of Mark Musolf, filed suit against the Denzines.

¶3 Rural Mutual advised the Denzines that Jacobs' claim could exceed their $300,000 policy liability limits; Rural Mutual would make reasonable efforts to settle Jacobs' claim within the policy limits; and if liability was established against them in an amount over their policy limits, they would be personally responsible for the excess amount. Rural Mutual also referred the Denzines to the tendered for settlement endorsement, noting that its duty to defend them against Jacobs' claim would cease upon payment of the policy limits.

¶4 Rural Mutual ultimately filed the underlying suit seeking a declaration that (1) it provided adequate notice of the tendered for settlement endorsement; and (2) pursuant to that endorsement, it is relieved of any further duty to defend the Denzines after tendering its policy limits. The circuit court granted summary judgment in Rural Mutual's favor and this appeal follows.

DISCUSSION

¶5 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶6 The Denzines do not challenge the form or substance of the tendered for settlement endorsement. Rather, they argue they cannot be bound by the endorsement because they never received notice of it. Our supreme court has recognized that "[n]otice by mail is usually considered complete not upon proof of receipt, but upon mailing." ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶35, 319 Wis. 2d 397, 768 N.W.2d 729.

> Accordingly, evidence of mailing a letter raises a rebuttable presumption that the addressee received the letter. Once the presumption of mailing has been established, the burden shifts to the party challenging receipt to present credible evidence of non-receipt. The presumption may not be overcome without a denial of receipt. If receipt is denied, the issue is a credibility question to be resolved by the factfinder. Mere non-remembrance of receipt is not enough; the presumption of receipt cannot be overcome without denial.

Id., ¶36 (internal citations and parentheticals omitted).

¶7 Further, evidence that an insurer followed its customary mailing procedures is sufficient to establish that a document was mailed to a policyholder, as long as evidence of the custom is corroborated by evidence that the activity on a particular occasion conformed with the custom. *See* ***Olson v. Sentry Ins. Co.***, 38

Wis. 2d 175, 181, 156 N.W.2d 429 (1968); *see also* ***French v. Sorano***, 74 Wis. 2d 460, 465, 247 N.W.2d 182 (1976).

¶8 Here, Theresa Bollig, a director of customer service who is in charge of Rural Mutual's mail center, averred that she has personal knowledge of the process of mailing policy forms to insureds and has access to the records relating to these mailings. Bollig indicated that the tendered for settlement endorsement would have been mailed to the Denzines upon the next renewal "in 1998 or 1999." Because those records had been destroyed consistent with Rural Mutual's document retention policy, the exact date of that initial mailing could not be verified. Bollig noted, however, that in 2005, all insureds were mailed a complete copy of their respective policies as part of the conversion to a new mailing system. Rural Mutual retained an electronic record of exactly what was printed for mailing and, based on that record, Bollig averred that a complete copy of the Denzines' policy, including the subject endorsement, was mailed to them on June 15 or 16, 2005.[1]

¶9 Bollig further averred that at the time of the June 2005 mailing, Rural Mutual manually counted the number of policies printed on a particular day and compared it to the number of sealed envelopes that were mailed to ensure that all printed materials were mailed. Rural Mutual also tracked items returned by the post office as undeliverable, noting any such returns in its electronic filing system. Bollig indicated that she checked the electronic filing system and there was no record to indicate that the 2005 mailing was returned.

[1] Bollig explained during her deposition testimony that the policy included a transaction date of June 15, 2005, which indicates the date it was printed. Bollig further testified that the mailing date is dependent on what time of day the policy is printed.

¶10 Although the Denzines argue that Rural Mutual offered no information from anyone personally involved in this particular mailing, an insurer need not present testimony from the individual who actually mailed the document, as "no one can be expected to have independent recall of all the correspondence mailed out by a business of any size." ***Olson***, 38 Wis. 2d at 181. Based on Bollig's averments in combination with the electronic record, the circuit court properly concluded that Rural Mutual mailed the endorsement.

¶11 Once the presumption of mailing was established, the burden shifted to the Denzines to present credible evidence of nonreceipt. To that end, Sally Denzine averred that she handles the "family and business insurance matters" and had "no record or recollection of receiving" the endorsement. As noted above, mere nonremembrance of receipt is not enough to rebut the presumption. Citing ***Scalzo v. Marsh***, 13 Wis. 2d 126, 139, 108 N.W.2d 163 (1961), the Denzines nevertheless contend that negative evidence such as the absence of records is sufficient to make such issue one of fact for the jury. ***Scalzo***, however, is distinguishable on its facts.

¶12 In ***Scalzo***, the "records" consisted of books of account kept in the usual course of business. ***Id.*** at 139. In that context, the ***Scalzo*** court determined that "the established absence of any record in [the business]'s books of account, which showed the furnishing of any materials or labor for the installation in question, was sufficient to make the question of whether [the business] made either or both of such installations a jury issue." ***Id.*** In the present case, there is no indication that the Denzines kept similar records—that they may not presently have a copy of the endorsement does not mean that they never received it. Because there is no genuine issue of material fact regarding whether Rural Mutual

mailed the endorsement or whether the Denzines received it, the circuit court properly granted summary judgment in Rural Mutual's favor.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).