

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2012

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. 2011AP2443

Cir. Ct. No. 2010CV546

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SHERYL BRUSKIEWICZ,

PLAINTIFF-APPELLANT,

V.

AMBER BRUSKIEWICZ,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oconto County:
JAY N. CONLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sheryl Bruskwicz appeals a summary judgment dismissing her claim to recover a portion of life insurance proceeds paid to Amber Bruskwicz following the death of James Bruskwicz. Amber, who is James's adult daughter from a previous marriage, was named the sole beneficiary of

James's term life insurance. Sheryl, who is James's second wife, argues the life insurance proceeds are marital property under either WIS. STAT. § 766.62 or § 766.61.¹ We conclude neither WIS. STAT. § 766.62 nor § 766.61 apply to the life insurance proceeds, and we therefore affirm.

BACKGROUND

¶2 Amber is James's only child. James divorced Amber's mother in 1998. In September 2001, James began working at Georgia-Pacific, and he subsequently received certain employee benefits. One benefit was participation in the Georgia-Pacific Life Choices Benefits Program for Salaried and Salaried Benefits Eligible Employees ("Plan"). The Plan is a comprehensive employee welfare benefit plan that includes term life insurance. Employees who enroll in the term life insurance use pre-tax dollars that are deducted from their paychecks to pay for premiums.

¶3 Since becoming eligible in 2002, James continuously participated in the Plan. On August 13, 2002, James named Amber the primary beneficiary of his life insurance policy.

¶4 James married Sheryl on May 19, 2007. While married, James increased his life insurance coverage from \$250,000 to \$300,000. Premium payments continued to be deducted from his paycheck.

¶5 James passed away in July 2010. Following his death, Amber applied for and received the \$300,000 life insurance proceeds.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶6 Sheryl brought suit against Amber, alleging the life insurance proceeds were marital property. Both parties moved for summary judgment. Amber argued the beneficiary designation controlled. Sheryl argued the proceeds were marital property under WIS. STAT. § 766.62 or § 766.61. The circuit court determined neither section applied to the proceeds and granted summary judgment in favor of Amber.

DISCUSSION

¶7 We review summary judgment independently, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). That methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2); *see also Johnson v. Rogers Mem’l Hosp., Inc.*, 2005 WI 114, ¶30, 283 Wis. 2d 384, 700 N.W.2d 27.

¶8 Sheryl first argues the life insurance proceeds are a deferred employment benefit under WIS. STAT. § 766.62. She asserts that, because the deferred employment benefit occurred after her marriage to James, the proceeds are marital property. However, § 766.62, which classifies the marital component of a deferred employment benefit, is inapplicable because the proceeds here are not a deferred employment benefit. WISCONSIN STAT. § 766.01(3m) defines a deferred employment benefit as “a benefit held by a deferred employment benefit plan.” A deferred employment benefit plan, in turn, explicitly excludes from its

definition “*life, health, accident or other insurance or a plan, fund, program or other arrangement providing benefits similar to insurance benefits, except to the extent that benefits under the plan ... [h]ave a present value that is immediately realizable in cash at the option of the employee*” WIS. STAT. § 766.01(4)(b) (emphasis added).

¶9 Both parties agree the term life insurance did not have a present value immediately realizable in cash. Without a present value, the life insurance cannot be a deferred employment benefit plan. *See* WIS. STAT. § 766.01(4)(b). If the life insurance is not a deferred employment benefit plan, the proceeds cannot be a deferred employment benefit. *See* WIS. STAT. § 766.01(3m). Therefore, WIS. STAT. § 766.62 does not apply to the proceeds.

¶10 Sheryl argues that the marital property statutes are to be “liberally construed” and there is a presumption that spousal property is marital property. *See* WIS. STAT. §§ 766.01, 766.31(2). These arguments, however, do not change the statutory definition of a deferred employment benefit. We must apply the plain words of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶11 Sheryl also asserts we should apply WIS. STAT. § 766.62 because WIS. STAT. § 766.61, which classifies the marital property component of life insurance policies and proceeds, provides in subsection (8): “This section does not apply to a policy held by a deferred employment benefit plan. Classification of a deferred employment benefit, regardless of the nature of the assets held by the deferred employment benefit plan, is determined under s. 766.62.” She argues that, because the insurance policy is held by an employee benefit plan, we must apply § 766.62.

¶12 Although we agree with Sheryl that, due to the nature of the benefit plan that holds the life insurance policy, WIS. STAT. § 766.61(8) makes § 766.61 inapplicable to the proceeds, we disagree that § 766.61's inapplicability makes WIS. STAT. § 766.62 applicable. WISCONSIN STAT. § 766.61(8)'s directive that § 766.61 does not apply to the policy because it is held by a deferred employment benefit plan does not turn the policy itself, which lacks an immediate cash value, into a deferred employment benefit plan such that the proceeds become a deferred employment benefit. Section 766.62 still does not apply.

¶13 Sheryl next argues that, if WIS. STAT. § 766.62 does not apply to the life insurance proceeds, WIS. STAT. § 766.61 applies because the policy insured the life of a spouse. We, however, have already established that § 766.61(8) makes § 766.61 inapplicable to the life insurance proceeds.

¶14 Finally, Sheryl argues in her reply brief that, if neither WIS. STAT. § 766.62 nor § 766.61 apply to the proceeds, the proceeds are nevertheless marital property because WIS. STAT. § 766.31(1) provides: "All property of spouses is marital property except that which is classified otherwise by this chapter" Sheryl, however, failed to raise this argument in her brief-in-chief. Given that the circuit court determined the proceeds were nonmarital because neither section applied,² Sheryl could have raised this argument in her brief-in-chief. We therefore decline to address this argument. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (appellate court will not address arguments raised for first time in reply brief).

² The circuit court found WIS. STAT. § 766.62 did not apply because the proceeds were not a deferred employment benefit. It found WIS. STAT. § 766.61 did not apply because the policy did not insure the life of a spouse.

By the Court.—Judgment affirmed.

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

