STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA FRAZIER,

Plaintiff-Appellant,

v

WESTERN-SOUTHERN LIFE ASSURANCE COMPANY and HOOPER HOLMES, INC., d/b/a PORTAMEDIC,

Defendants-Appellees.

UNPUBLISHED
February 8, 2002

No. 222570
Wayne Circuit Court
LC No. 98-821413-NZ

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motions for summary disposition in favor of defendants in this action to recover the proceeds of a life insurance policy. We affirm.

Sixty-two days before his death, the decedent applied for a life insurance policy and paid the first month's premium. However, he did not receive the required physical examination. After the applicant's death, Western-Southern Life Assurance Company (Western-Southern) denied coverage, claiming that the application was rejected by its terms sixty days after the application date. Plaintiff is the decedent's intended beneficiary.

Plaintiff first challenges the trial court's decision to grant summary disposition under the theory that Western-Southern's actions constituted an implied acceptance of the life insurance application. According to plaintiff, the law implies acceptance of an insurance application, notwithstanding the language of the application and of the receipt for the premium stating that non-acceptance within sixty days constitutes rejection of the application, where the insurance company retains the premium deposit without accepting or rejecting the application for an unreasonably long time.

We review summary disposition decisions de novo. *Singer v American States Ins*, 245 Mich App 370, 373; 631 NW2d 34 (2001). In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether a factual question exists that is material to the disposition of the action. *Ritchie-*

Gamester v City of Berkley, 461 Mich 73, 76; 597 NW2d 517 (1999). Further, the interpretation of contractual language is an issue of law that is reviewed de novo. *Singer*, *supra*.

In the present case, the insurance application that the decedent signed expressly and unambiguously states in relevant part:

> Except as provided in the receipt included with this application, no insurance will take effect: (1) before this application is approved; and (2) before a policy is delivered and the first premium (minimum premium for Flexible Premium Adjustable Life) paid while each person to be insured is alive and in good health. I (we) will accept your failure to approve the application within 60 days from its date as a rejection of it.

The receipt states, in part:

> We will insure each person to be insured from the date of the application, if all of them are in good health on that date. Each of them will be insured to the same extent as if the policy as applied for had been delivered. However, the amount and duration of this insurance are limited. These limitations are:
>
> * * *
>
> (3) If we reject the application, the insurance will cease on the date we reject it. We reserve the right to reject it at any time without giving notice to any applicant or person to be insured. *Our failure to approve the application within 60 days from its date is the same as a rejection*. Approval of the application for a policy other than as applied for is also a rejection of it.
>
> (4) The amount paid with the receipt for insurance will be applied to the first premium for any policy we issue. If we reject the application, we will refund the amount paid in exchange for this receipt. [Emphasis supplied.]
>
> * * *
>
> No one except our Chairman, President or Secretary has the power to make or modify any contract of insurance or bind us in any way. No statement made to our agent or anyone else or by our agent or anyone else to any applicant or person to be insured will bind us unless stated in the application, nor will the knowledge of our agent or any other person bind us unless stated in the application.

By the express terms of the application and receipt, the application was deemed rejected sixty days after the application date; in this case, two days before the decedent's death. Where no ambiguity exists in the terms of an insurance contract, this Court must enforce those terms as written. *Farm Bureau Mutual Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). We will not find acceptance implied when such is contrary to the contract provision. Moreover, the contract did not predicate rejection on refund of the premium. An insurance

company will not be held liable for a risk it did not assume. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Summary disposition was proper in this case.

To the extent that plaintiff contends that waiver and estoppel preclude reliance on the automatic rejection clause, alleging that Western-Southern's employees stated that the automatic termination clause was not strictly applied and that there was coverage until the premium was refunded, we find her argument without merit. Plaintiff presents no cogent argument in support of his position, nor are we persuaded that statements after-the-fact by defendant's employees can support either argument. There is no indication that the decedent ever believed or was led to believe that the application would not be automatically rejected at sixty days if it had not been approved by then.

Plaintiff next argues, in essence, that Western-Southern had a duty to process the decedent's application in a timely matter, and that it was negligent in failing to do so. In other words, plaintiff asserts that Western-Southern is liable in tort for its undue delay in acting on the decedent's life insurance application. Because the trial court made no specific ruling on this issue, or the next issue, it is unclear whether the trial court dismissed plaintiff's negligence claims based on MCR 2.116(C)(8) or (10). However, by granting summary disposition, the trial court necessarily determined that there was no negligence as a matter of law on the part of either Western-Southern or Hooper Holmes. Where a court determines that a party was not negligent as a matter of law, dismissal pursuant to MCR 2.116(C)(8) is appropriate. See *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997); *Schmidt v Youngs*, 215 Mich App 222, 224-225; 544 NW2d 743 (1996). This Court reviews de novo a trial court's order granting summary disposition under MCR 2.116(C)(8) to determine if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223; 608 NW2d 833 (1999).

In her appellate brief, plaintiff asserts that she found no Michigan appellate decision that holds that an insurer may be liable in tort, as distinguished from being liable in implied contract, for unreasonable delay in acting on a life insurance policy. In this case, we need not determine if in these circumstances an action in negligence is provided under Michigan law. Here, the express terms of the contract supersede any common law duty to process the application with reasonable promptness.

Important rights can be waived by contract. *Snepp v United States*, 444 US 507; 100 S Ct 763; 62 L Ed 2d 704 (1980) (First Amendment right to speak or write about information gained in course of government employment may be waived by contract); *Whispering Pines AFC, Home, Inc v Dep't of Treasury*, 212 Mich App 545, 550; 538 NW2d 452 (1995) (due process right to an evidentiary hearing to resolve a dispute may be waived by contract). Just as with other legal rights, a party to a contract can waive the right to have an insurer process an application within a "reasonable" time, instead contracting for a date certain by which the insurer must act or the application is deemed rejected. In the present case, the automatic rejection term is unambiguous, and we find that the application demonstrates a clear and unmistakable waiver of any right to have the application processed within a "reasonable" time. Therefore, Western-Southern had no duty. "[I]t is well settled that in the absence of a legal duty there is no actionable negligence." *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 14; 506

NW2d 231 (1993). Accordingly, although the trial court did not specifically rule on this issue, summary disposition was proper.

Finally, plaintiff contends that Hooper Holmes, the company that Western-Southern hired to conduct the decedent's physical examination, is liable for negligence because of its alleged delay in attempting to conduct the examination.

In *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667-668; 593 NW2d 578 (1999), this Court explained:

> To establish a prima facie case of negligence, the plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages.

"A duty arises from the relationship of the parties and involves a determination of whether the defendant has any obligation to avoid negligent conduct for the benefit of the plaintiff." *Duvall v Goldin*, 139 Mich App 342, 347; 362 NW2d 275 (1984); see also *Krass, supra* at 668.

Plaintiff cites no Michigan case addressing whether a company in Hooper Holmes' position has a duty to act with reasonable promptness in conducting a physical examination, nor are we aware of any. Nor does plaintiff cite authority for her assertion that there was a relationship between Hooper Holmes and the decedent sufficient to create a duty; rather, plaintiff relies on the language in the Hooper Holmes training manual.

Here, there was no relationship between Hooper Holmes and the decedent giving rise to a duty to conduct the decedent's physical examination with reasonable promptness. There was no contract between the decedent and Hooper Holmes. Cf *Page v Klein Tools, Inc*, 461 Mich 703, 729; 610 NW2d 900 (2000) (Kelly, J., dissenting), citing *Clark v Dahlman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Plaintiff cites no express promises or misrepresentations to the decedent by Hooper Holmes. See *Harts v Farmers Ins Exchange*, 461 Mich 1, 10-11; 597 NW2d 47 (1999). Moreover, Hooper Holmes was not acting for the benefit of the insured; rather, the purpose of the medical examination was to protect the insurer and to determine the risk and insurability of the proposed insured. See *Smith v Allendale Mutual Ins Co*, 410 Mich 685, 718-719; 303 NW2d 702 (1981). On this record, we conclude that Hooper Holmes owed no duty to the decedent to act with reasonable promptness in performing his physical examination. Accordingly, although the trial court did not specifically rule on this issue, summary disposition was proper.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck