COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 10, 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. 95-1019

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

CINDY DYKEMA and JAYSON DYKEMA, by his Guardian ad Litem, PAUL E. DAVID,

Plaintiffs-Appellants,

v.

LORNEY J. BENDEL and ALLSTATE INSURANCE COMPANY,

Defendants-Third-Party Plaintiffs,

WOOD MANUFACTURING COMPANY, INC., MERCURY MARINE, a division of the BRUNSWICK CORPORATION, THE INSTITUTE OF LONDON UNDERWRITERS, DEF INSURANCE COMPANY, GERMANTOWN MARINE, INC., and GRE INSURANCE COMPANY,

Defendants,

MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES, PRIMECARE HEALTH PLAN, INC.,

Defendants-Subrogees,

ALAN D. MILLIN,

Third-Party Defendant,

AMERICAN FAMILY INSURANCE COMPANY,

Third-Party Defendant-Respondent.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Cindy and Jayson Dykema, plaintiffs in a personal injury action arising out of a boating accident, appeal a judgment dismissing a third-party complaint against the boat owner's insurer, American Family Insurance Company. The trial court dismissed the claim for lack of coverage after a jury found that American Family mailed a notice to the owner, Alan Millin, as required by § 631.36(4), STATS., clearly advising Millin of the effect of nonpayment of the premium by the due date.[1] The Dykemas

[1] Section 631.36(4), STATS., provides:

Termination of insurance contracts by insurers.

....

(4) Nonrenewal. (a) Notice required. Subject to subs. (2) and (3), a policyholder has a right to have the policy renewed, on the terms then being applied by the insurer to similar risks, for an additional period of time equivalent to the expiring term if the agreed term is one year or less, or for one year if the agreed term is longer than one year, unless at least 60 days prior to the date of expiration provided in the policy a notice of intention not to renew the policy beyond the agreed expiration date is mailed or delivered to the policyholder, or 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

contend: (1) The evidence was insufficient as a matter of law to show compliance with the notice requirements of § 631.36(4); (2) the insurance policy required proof of notice beyond that required by the statute; (3) the court admitted irrelevant prejudicial evidence of Millin's conduct to prove he received a notice of premium due.

American Family first raised the coverage issue by a summary judgment motion, contending its policy had lapsed for nonpayment of premium. There was no dispute that Millin's renewal premium on his boat owner's policy with American Family was due on July 11, 1991, that the premium went unpaid, that the grace period expired August 10, and that the accident occurred on August 11, 1991. The parties also agree that if the statutory notice is not given as required, coverage continues beyond the policy term, and that the insurance company bears the burden of proving compliance with termination requirements. Millin denied receipt of a notice contemplated by § 631.36(4), STATS. Because American Family could not establish direct proof that the notice was mailed, and relied upon an inference of mailing drawn from its business custom and practice, and because Millin denied receipt of the notice, the trial court denied the summary judgment motion. The court reasoned that there were competing factual inferences to be drawn from the evidence: American Family's conduct in this instance comported with its customary practice of mailing notice, or that Millin did not receive the notice because the insurer failed to follow its customary practice.

At trial, American Family produced extensive evidence of its custom and practice in generating and mailing premium due notices, including testimony from the manager of business mail entry at the Madison, Wisconsin, post office, attesting to the high quality of the American Family mail operation.

The Dykemas maintain that American Family's evidence was insufficient as a matter of law, and that the insurer is in an identical position in this case as the insurer in ***Frank v. Metropolitan Life Ins. Co.***, 227 Wis. 613, 277 N.W. 643 (1938). The Dykemas refer to the holding in ***Frank***:

(..continued)

nonpayment of premium by the due date.

> [P]roof of the dictation of a letter, coupled only with proof of the custom of the office with reference to the mailing of letters, *without any proof from which it may be inferred that in the particular instance the custom was complied with, does not constitute proof of mailing*.

Id. at 616, 277 N.W. at 645 (quoting ***Federal Asbestos Co. v. Zimmermann***, 171 Wis. 594, 600, 177 N.W. 881, 884 (1920) (emphasis added).

Frank is distinguished on its facts. In that case, the insurer produced only testimony from employees in its renewal department that a usual letter of nonrenewal directed to the plaintiff at his address was dictated and signed, placed in an envelope and given to the mail boy to take to the mail division to go out in the usual way. There was no testimony whatsoever by either the mail boy or any employee in the insurer's mail division. ***Id***. In contrast, American Family carefully established through testimony as well as exhibits the custom and practice from generation to delivery to the post office. There was documentary evidence of generation of a notice to Millin on June 4, 1991, and again on July 16, 1991. There was also testimony and documentation from the mail processing supervisor describing the mailing process in great detail, including the method of comparing the count of generated notices with those prepared for mailing. She also identified the record showing the number of pieces mailed on the dates in question, together with the Madison post office stamp demonstrating its receipt of the first-class presorted mail and payment of postage on the dates in question. While it is true that the post office did not count or identify each piece of mail, we conclude that this record demonstrates adequate evidence of compliance with the insurer's customary practice of giving the required notice to the policyholder so as to permit the issue to go to the jury.

The Dykemas next contend that the court allowed American Family to introduce irrelevant prejudicial evidence concerning Millin's conduct in its attempt to prove notice was in fact given. Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Section 904.01, STATS. The fact at issue was whether American Family mailed the notice.

The challenged evidence included a statement from Millin to the person who operated the boat at the time of the accident to the effect that "he was ruined and that he didn't have any insurance." As American Family notes, this statement is consistent with Millin's receipt of a notice that his premium was due and that his coverage would not be renewed if the premium were not paid. It is not rendered irrelevant merely because Millin's knowledge of lack of insurance could have come from a source other than the required notice of premium due. The jury is entitled to choose from competing reasonable inferences.

Other challenged evidence bore on Millin's financial condition. This evidence similarly raised an inference from which the jury could reasonably find that Millin's failure to pay the boat insurance premium was attributable to a reason other than a failure to receive a notice of premium due.

Finally, the Dykemas contend that the insurance policy itself includes a term relating to notice of premium due more stringent than the provisions of the statute. They refer to the terms in the Wisconsin Amendatory Endorsement under the "Cancellation" provisions: "A proof of mailing will be sufficient proof of notice [of cancellation]." The trial court adopted American Family's position that this provision did not apply to the "lapse" of insurance for nonpayment of a renewal premium, but applied only to a "cancellation."

We will assume for the sake of discussion that the policy provision applies. We reject the Dykemas' contention, unsupported by authority, that "proof of mailing" requires "the insurer to follow a particular process whereby the mailing of the notice is verified by a third party ...." Proof of mailing as sufficient proof of notice is not a specific method of proof. The reference to proof does not suggest verification by a third party, such as registered or certified mail. Rather, the provision means that proof of mailing as opposed to proof of receipt is sufficient. ***Frank*** contemplated proof of mailing from the insurer's employees, and rejected the proof in that case only because it was incomplete. The evidence was sufficient in this case to permit the issue to go to a jury. This court will sustain a jury verdict if, when the evidence is viewed in a light most favorable to the verdict, there is credible evidence to support it. ***Stewart v. Wulf***, 85 Wis.2d 461, 470, 271 N.W.2d 79, 83 (1978). We therefore affirm the judgment dismissing American Family from the action.

By the Court. – Judgment affirmed.

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