COURT OF APPEALS
DECISION
DATED AND RELEASED

April 16, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1037

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

SANDRA PERSINGER,

Plaintiff-Appellant,

v.

CHUBB GROUP OF INSURANCE COMPANIES,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Sandra Persinger appeals from a trial court judgment in favor of the Chubb Group of Insurance Companies. In response to the Chubb Group's motion for summary judgment, the trial court concluded that Persinger was not entitled to recover under the uninsured motorists policy issued by the Chubb Group because she did not timely notify it of the accident from which the claim arose. She contends that she notified the company within

the required time period and that the company was not prejudiced by any delay. We reject her contentions and affirm the judgment.

Persinger, a deputy sheriff, was injured in July 1985, when a suspect she was pursuing drove his car into her squad car. Persinger was treated at a hospital immediately after the accident, and she did not work for three weeks. After returning to work, Persinger continued to experience headaches and vision problems. She frequently missed work because of headaches. In July 1988, she resigned as a deputy sheriff based on her belief that the headaches interfered with her ability to perform her job.

Persinger's unreimbursed medical expenses prior to her resignation totaled less than $2,000. Because the other driver's automobile insurance company was being liquidated, Persinger filed a claim with her employer's insurance company. As a result of her resignation, Persinger also claimed lost earnings potentially in excess of the limits of the employer's policy.[1] In June 1989, her attorney wrote to the Chubb Group asking if it provided liability coverage for vehicles owned by Persinger or her husband on July 27, 1985. The letter referred only to "an incident which occurred back on" that date. In April 1991, Persinger filed an action against the Chubb Group to compel arbitration of her uninsured motorists claim.

After investigation and a physical examination of Persinger by a neuropsychologist, the Chubb Group filed a motion for summary judgment claiming that Persinger's notice to it was untimely and that the company was prejudiced by the delay. The Chubb Group contended that Persinger's duty to notify it arose in 1985 at the time of the accident. Persinger contended that the duty did not arise until she quit her job in 1988. The trial court agreed with the Chubb Group's argument and granted the company summary judgment.

When reviewing a grant of summary judgment, we apply the same methodology as the trial court. ***Leverence v. United States Fidelity & Guar.,*** 158 Wis.2d 64, 73, 462 N.W.2d 218, 222 (Ct. App. 1990). We will reverse

[1] Persinger ultimately settled with her employer's insurance company for the policy limits of $50,000.

the trial court's decision only if the court incorrectly decided a legal issue or if material facts were in dispute. ***Hammer v. Hammer,*** 142 Wis.2d 257, 263, 418 N.W.2d 23, 25 (Ct. App. 1987). All doubts on factual matters are resolved against the party moving for summary judgment. ***Grams v. Boss,*** 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980).

The issue in this appeal is whether Persinger breached her duty to the Chubb Group by failing to give timely notice as required by the policy. The purpose of this duty is to allow the insurer to investigate while witnesses are available and memories are clearer. ***Gerrard Realty Corp. v. American States Ins. Co.***, 89 Wis.2d 130, 140, 277 N.W.2d 863, 869 (1979). Compliance with the duty is a precondition to the insurer's duty to provide coverage for the claim. ***Id.***

Whether notice is timely depends upon the language of the policy, ***RTE Corp. v. Maryland Casualty Co.***, 74 Wis.2d 614, 622, 247 N.W.2d 171, 175 (1976), and the circumstances of the case, ***Gerrard Realty***, 89 Wis.2d at 143, 277 N.W.2d at 870. Additionally, § 631.81, STATS., creates a one-year grace period. The grace period applies if the notice was given as soon as reasonably possible and the insurer is not prejudiced by the delay. Section 631.81(1). Where notice is given beyond the one-year grace period, a rebuttable presumption of prejudice arises, and the burden shifts to the insured to disprove the presumption. ***Gerrard Realty***, 89 Wis.2d at 146-47, 277 N.W.2d at 872.

Generally, whether an insured gave timely notice is a question of fact. ***RTE Corp.***, 74 Wis.2d at 628, 247 N.W.2d at 178. Noncompliance may be found as a matter of law, however, where there is no dispute as to when notice was given, there is no dispute as to when the duty to give notice arose, and no jury could reasonably find the delay was reasonably necessary under the circumstances. ***Id.***

Assuming the facts in the light most favorable to Persinger, the accident occurred in 1985, Persinger became aware of the need to seek coverage in July 1988, and she gave notice in June 1989, within eleven months of her resignation.[2] Thus, the question is whether the duty to provide notice arose in

[2] We note that the Chubb Group contests when Persinger first became aware that her claimed

1985 or 1988. To the extent resolution of this question involves an interpretation of the insurance policy, a question of law is presented. *See* ***Kaun v. Industrial Fire & Casualty Ins. Co.,*** 148 Wis.2d 662, 667, 436 N.W.2d 321, 323 (1989) (interpretation of insurance policy is question of law, subject to appellate *de novo* review).

Part E of the policy, identified as "DUTIES AFTER AN ACCIDENT OR LOSS," contains the following language:

> We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.
>
> A person seeking any coverage must:
> 1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
> 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.
> 3. Submit, at our expense and as often as we reasonably require, to physical examinations by physicians we select.
> 4. Authorize us to obtain medical reports and other pertinent records.
> 5. Submit a proof of loss when required by us.
>
> A person seeking Uninsured Motorists Coverage must also:
> 1. Promptly notify the police if a hit-and-run driver is involved.
> 2. Promptly send us copies of the legal papers if a suit is brought.
>
> A person seeking Coverage for Damage to Your Auto must also:
> 1. Take reasonable steps after loss, at our expense, to protect your covered auto and its equipment from further loss.
> 2. Promptly notify the police if your covered auto is stolen.

(..continued)
damages might exceed the $50,000 policy limits of her employer's policy. Additionally, the adequacy of the notice provided to the Chubb Group in June 1989 is also disputed.

3.Permit us to inspect and appraise the damaged property before its repair or disposal.

(Emphasis omitted.) Part E has four separate provisions. The first sentence requires prompt notice of the details after an accident or loss. The second sentence sets forth conditions required of a "person seeking any coverage." The third and fourth sentences impose additional conditions that apply if the person is seeking uninsured motorist coverage or coverage for property damage to his or her automobile. Thus, the notice requirement, which is separate from the conditions for a person seeking coverage, is not limited to those that apply only to a person seeking coverage.

Additionally, notice that an "accident **or** loss happened" (emphasis added) is in the disjunctive. Either event triggers the duty to give notice. Since the notice is to be given "promptly" after the triggering event, it follows that the earlier of the two events controls. In the present case, the accident occurred first, before Persinger was aware of the extent of her loss; therefore, the accident triggered the duty to notify the insurance company.

This conclusion is consistent with ***Gerrard Realty***, which while not strictly on point, is instructive. In ***Gerrard Realty***, the insured did not give notice to its errors and omissions insurance provider when a lawsuit was filed alleging fraud. At the trial of the suit against the insured, the plaintiff argued fraud and negligence, and the insured was found to have been negligent. ***Gerrard Realty,*** 89 Wis.2d at 135-36, 277 N.W.2d at 866-67. Notice was given to the insurance company after the trial, and the insured justified the delay by arguing that the complaint did not allege covered acts, i.e., negligence. ***Id.*** at 136-37, 277 N.W.2d at 867. The supreme court rejected the insured's argument. It held that the contractual right to determine coverage rests with the insurer, and the service of the complaint on the insured triggered the duty to give notice. ***Id.*** at 142, 277 N.W.2d at 869-70. An insured who delays notice based on his or her own assessment of coverage assumes authority that he or she does not have. ***Id.***

In the present case, Persinger's involvement in the accident in 1985 triggered her duty to give notice to the Chubb Group. She did not do so until well beyond the grace period of § 631.81, STATS. Under the analysis in ***Gerrard***

Realty, Persinger's reason for the delay was not reasonable; therefore the notice was not timely as a matter of law.

Further, the delay created a statutory presumption of prejudice to the Chubb Group. Persinger's assertions that the Chubb Group had access to all information available to her employer's insurance carrier does not negate the presumption that the Chubb Group was prejudiced. The Chubb Group could not promptly conduct its own investigation of the incident and possible claim, and Persinger did not show that the other company's information provided an adequate substitute.

By the Court.—Judgment affirmed.

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