

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 22, 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. 95-3151

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MARY K. FISCHER,

Plaintiff-Respondent,

v.

THE AMPACIS COMPANY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
GEORGE A. BURNS, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. The AmPacis Company, a Minnesota-based corporation conducting business audits in Wisconsin, appeals from an order granting summary judgment to Mary K. Fischer and awarding her \$25,000 plus costs and fees in her third-party beneficiary, breach-of-contract action against AmPacis. AmPacis argues that the trial court erred in interpreting an employment contract between AmPacis and Mary's deceased son, Scott Fischer,

and concluding that as a matter of law: (1) the employment contract required AmPacis to provide \$25,000 in life insurance coverage for Scott; and (2) Mary as beneficiary for the insurance coverage was entitled to \$25,000 in damages because AmPacis breached the employment contract when it failed to provide such insurance coverage. The trial court also found that there were no genuine issues of material fact. After our *de novo* review of the summary judgment materials, we agree with the trial court's conclusions; accordingly we affirm.

I. BACKGROUND.

The facts are not disputed. AmPacis hired Scott Fischer as a full-time trainee employee on December 2, 1991. He died unexpectedly on March 1, 1992. Mary was listed as the sole beneficiary on his application for a \$25,000 life insurance policy through AmPacis. AmPacis's Policies and Procedures Employee Handbook indicated that for new full-time trainee employees such as Scott, the first eligibility date for corporate insurance programs "will be the first day of month following completion of ninety (90) days continuous service as a full-time employee."

AmPacis contracted with Fortis Benefits for the life insurance coverage it provided its employees.¹ Under the specific language of this contract, AmPacis full-time employees were not eligible for coverage until the completion of a "three-month service requirement." As the trial court noted, the problem in this case is that the three-month requirement in the coverage contract is not the same as the ninety-day requirement in the AmPacis employee handbook. Because 1992 was a leap year, Scott's ninetieth day of employment was actually February 29, 1992; thereby, making March 1, 1992, the day he died, the "first day of [the] month following completion of ninety (90) days continuous service." Hence, when Scott died he had satisfied the ninety-day requirement, but not the three month requirement.

It is undisputed that Scott filled out an application for life insurance on the day he was employed, December 2, 1991, and that a certificate

¹ Fortis Benefits contracted with AmPacis to provide the benefits. Mutual Benefit Life Insurance Company was the actual life insurance company involved.

of insurance was issued to Scott by the Mutual Benefit Life Insurance Company with the policy becoming effective on March 2, 1992—the day after he died. Thus, no insurance was available from Mutual Benefit on the date he died.

Mary filed suit as third-party beneficiary to Scott's employment contract with AmPacis. She alleged that AmPacis breached its contract of employment with Scott, because it had “refused to pay to [her] the \$25,000 death benefit promised under the contract of employment between” AmPacis and Scott.

In the summary judgment materials, AmPacis admitted that it employed Scott for ninety days and that his death occurred the first day of the month following the ninety days. AmPacis argued, however, that it promised to pay only policy premiums for full-time employees who met outlined requirements. Specifically, AmPacis argued that Scott failed to: (1) meet minimum billing requirements that qualified Scott for a full-time employee status; and (2) furnish evidence of insurability to the insurer. Thus, AmPacis sought summary judgment dismissal of Mary's complaint.

The trial court rejected AmPacis's arguments and concluded in a memorandum decision that AmPacis:

[B]reached its contract with Scott Fischer when it did not provide the benefit of insurance coverage on the date that he became eligible. [Mary's] measure of damages, as third-party beneficiary, is the dollar amount that she would have received had the life insurance been in full force and effect as promised.

Later, the trial court issued an order adopting the above reasoning, granting Mary's cross-motion for summary judgment, and awarding her \$25,000, plus costs and fees. This appeal follows.

II. ANALYSIS.

AmPacis argues that Mary's right to any death benefits was subject to conditions precedent into the employee contract between Scott and AmPacis. It argues that these conditions precedent were not satisfied by Scott, and that no binding contract regarding life insurance existed. AmPacis also contends that the trial court erred because it did not enforce the employment contract as written, but created a new contract by disregarding the conditions precedent. We reject AmPacis's arguments.

In summary judgment cases, we employ the same methodology used by the trial court; this methodology has been repeated many times and we need not do so here. *E.g., Grams v. Boss*, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980). Further, we review the trial court's ruling *de novo*. *Bay View Packing Co. v. Taff*, 198 Wis.2d 654, 673, 543 N.W.2d 522, 528 (Ct. App. 1995).

The trial court concluded that AmPacis's employee handbook unambiguously provided that Scott was eligible for insurance on the first day of the month after he had been employed ninety days. The court also concluded that AmPacis's promise of insurance benefits as provided in the handbook, by operation of law, became part of the employment contract between AmPacis and Scott. We address each of these conclusions separately.

The interpretation of a contract is a question of law that we review *de novo*. *Berg-Zimmer & Assoc., Inc. v. Central Mfg. Corp.*, 148 Wis.2d 341, 345, 434 N.W.2d 834, 836 (Ct. App. 1988). We first must determine, as a matter of law, whether the language of the contract is ambiguous; where no ambiguity exists, we need only apply the contract terms as written. *See Kremers-Urban Co. v. American Employers Ins. Co.*, 119 Wis.2d 722, 736, 351 N.W.2d 156, 163 (1984).

We agree with the trial court that the employee handbook was unambiguous on its face. Scott was eligible on March 1, 1992, for the insurance coverage promised to AmPacis employees. Further, we agree that this promise for benefits, by operation of law, became part of the employment contract between AmPacis and Scott. *See, e.g., Jensen v. Janesville Sand & Gravel Co.*, 141 Wis.2d 521, 526, 415 N.W.2d 559, 561 (Ct. App. 1987) (stating promised pension plan is "part of a contract of employment"). Accordingly, Mary, as

third-party beneficiary to these promised benefits could maintain an action against AmPacis for its alleged breach of the employment contract. *See id.*

AmPacis argues that it did not breach the employment contract because Scott did not satisfy all of the conditions precedent necessary for him to receive insurance coverage through AmPacis. AmPacis claims that in order to be eligible for insurance he had to maintain full-time status by billing a minimum of 25 hours a week and have an average productivity level of at least \$750 per week.

The trial court rejected this claim, concluding that the summary judgment materials conclusively showed that AmPacis applied for Scott's life insurance, and that this insurance was set to become effective on March 2, 1992. We agree with the trial court on this point. Although AmPacis argues that the conditions precedent were not fulfilled, it is clear that AmPacis had already arranged to cover Scott regardless of his fulfillment of the productivity standards. The trial court noted that the productivity requirements were "illusory at best." We agree. The Employee Handbook acknowledges that full-time trainee employees "are usually not able to produce an adequate volume of completed work during their initial work weeks." Thus, AmPacis acknowledges that the productivity requirements are difficult to obtain for trainee employees; these standards as conditions precedent to the employment contract are illusory. *Cf. Hoglund v. Secura Ins.*, 176 Wis.2d 265, 270, 500 N.W.2d 354, 356 (Ct. App. 1993) (discussing illusory contracts). Finally, the issue of whether Scott had to provide evidence of insurability as a condition precedent was never adequately addressed in his argument to this court and, further, was rejected by the trial court as meritless. We agree with the trial court.

In sum, we conclude that AmPacis breached the employment contract with Scott when it failed to provide him with life insurance coverage on March 1, 1992. Mary, as third-party beneficiary to this contract was entitled as a matter of law to \$25,000 in damages, that amount of the life insurance to be provided to Scott. The trial court properly granted summary judgment to Mary.

By the Court.—Order affirmed.

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