COURT OF APPEALS DECISION DATED AND FILED

October 9, 2008

David R. Schanker
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. 2006AP2395

Cir. Ct. No. 2004CV218

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

ESTATE OF DARRIN J. PULDA BY ITS PERSONAL REPRESENTATIVE, GORDON PULDA, ESTATE OF KATRINA PULDA BY ITS CO-PERSONAL REPRESENTATIVES LARRY E. KLEPPS AND BONNIE BRICCO, ESTATE OF MAYA PULDA BY ITS CO-PERSONAL REPRESENTATIVES BONNIE BRICCO, LARRY E. KLEPPS AND GORDON PULDA, BONNIE BRICCO AND LARRY E. KLEPPS,

PLAINTIFFS,

GORDON PULDA,

PLAINTIFF-RESPONDENT,

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE & CASUALTY COMPANY AND ESTATE OF MARVIN W. PIES,

DEFENDANTS-APPELLANTS,

WAUPACA COUNTY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Reversed*.

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. State Farm Mutual Automobile Insurance Company, State Farm Fire & Casualty Company, and the Estate of Marvin W. Pies (collectively, State Farm) appeal a judgment awarding interest under WIS. STAT § 628.46 (2005-06)[1] to Gordon Pulda. The issue is whether Pulda satisfied the criteria for an interest award, as set forth in ***Kontowicz v. American Standard Ins. Co. of Wis.***, 2006 WI 48, 290 Wis. 2d 302, 714 N.W.2d 105. We conclude that he did not satisfy those criteria, and reverse.

¶2 Marvin Pies drove westbound in the eastbound lane of a highway and caused an automobile accident that resulted in his death, and the deaths of Darrin and Katrina Pulda, and their child, Maya Pulda. Pies was intoxicated at the time and his liability for the accident was never disputed.

¶3 Gordon Pulda is Darrin's father. In August 2002, Gordon, the estates of Darrin, Katrina and Maya, and Katrina's parents, gave State Farm Mutual Auto Insurance Company written notice of a joint claim for $1,500,000, the maximum coverage that State Farm provided to Pies. Gordon claimed damages for the loss of his son's society and companionship, for which the maximum award available is $350,000. *See* WIS. STAT. § 895.04(4). When his claim was not resolved, Gordon, along with the other injured parties, sued State

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Farm Auto and State Farm Fire & Casualty Company, and Pies' estate, in June 2004.

¶4 State Farm ultimately settled Gordon's claim by paying him the maximum $350,000. In subsequent proceedings, Gordon claimed WIS. STAT. § 628.46 interest between the date State Farm should have paid the claim, in his view, and the date State Farm ultimately paid it. Under § 628.46, insurers must pay an insurance claim within thirty days of receiving written notice of the claim, unless the insurer has "reasonable proof" that it is not liable. The insurer's failure to timely pay a claim under this section renders it liable for 12% annual interest from the date the claim was due until paid, where the insurer has clear liability, the claimant is due a "sum certain" amount, and the insurer receives written notice of the claim and its amount. ***Kontowicz***, 290 Wis. 2d 302, ¶2.

¶5 In ***Kontowicz*** the insurer conceded liability, and the supreme court considered the plaintiff's damages for pain and suffering as "sum certain" because, even absent a precise measure of the damages, they clearly exceeded the defendant insurer's maximum liability under the policy. In effect, ***Kontowicz*** stands for the proposition that the category of "sum certain" claims may include claims that clearly equal or exceed the insurer's maximum liability under law or contract, even if the claim is not subject to precise measurement.

¶6 In presenting his interest claim, Gordon contended that $350,000 was a sum certain measure of his damages because, as in ***Kontowicz***, his claim clearly equaled or exceeded that amount. State Farm contended that it was fairly debatable whether Gordon's claim clearly amounted to $350,000 or more, because there was evidence that Gordon and Darrin were estranged during the last year and one-half of Darrin's life, dating from a bar fight between the two of them.

However, the trial court concluded that State Farm should have clearly recognized that the claim was worth at least $350,000 because “quite frankly it’s the rare case where such arguments [for a lesser award] can be made.” The court added:

> I think the case here is very similar [to ***Kontowicz***]…. I think it’s reasonable to expect almost, of a jury under these circumstances, an award at least $350,000 or greater amount. So it’s a sum certain to State Farm; and I will award interest.

State Farm appeals that determination, which resulted in an award of approximately $94,000 in interest on the delayed $350,000 payment.

¶7 As noted, WIS. STAT. § 628.46 imposes liability for interest if an insurer’s payment of an insurance claim is not timely, unless there is “reasonable proof to establish that the insurer is not responsible for the payment.” The “reasonable proof” standard is met if the claim is, at least in part, “fairly debatable.” ***Kontowicz***, 290 Wis. 2d 302, ¶¶48, 54. The trial court concluded that the minimum value of Gordon’s claim was not fairly debatable because a jury would rarely, in the court’s view, award less than $350,000 on a parent’s claim for the loss of an adult child’s society and companionship.

¶8 In effect, the trial court held that claims for the loss of an adult child are, as a matter of law, presumptively worth at least $350,000. However, that is not the law in Wisconsin. *See* ***Chang v. State Farm Mut. Auto. Ins. Co.***, 182 Wis. 2d 549, 561, 514 N.W.2d 399 (1994) (Neither the existence nor amount of damages under the wrongful death statute is predetermined, but must be decided by jury). Unlike in ***Kontowicz***, where the insurer’s investigation revealed no reason to believe that a jury would award less than the maximum damages, the evidence of estrangement between Gordon and Darrin provided a reasonably debatable defense to a claim for maximum damages. Consequently, Gordon did

not present a sum certain claim. The available information showed a reasonable possibility that a jury might award less than $350,000, if the matter went to trial.

¶9 Our decision makes it unnecessary to address the other grounds for reversal argued by State Farm.

By the Court.—Judgment reversed.

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