COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2010

A. John Voelker
Acting 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. 2009AP925

Cir. Ct. Nos. 2005CV338
2006CV400

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

JEAN GEORGE,

PLAINTIFF-RESPONDENT,

V.

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

GENERAL CASUALTY COMPANY OF WISCONSIN AND DOUGLAS J. MOORE, D/B/A MOORE CHIMNEY SERVICE,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

JEAN M. GEORGE,

DEFENDANT.

APPEAL from judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Wisconsin Mutual Insurance Company appeals a judgment estopping it from denying coverage for Jean George's automobile accident based on her failure to pay the premium. Wisconsin Mutual claims her husband's testimony that a Wisconsin Mutual employee assured the premium had been paid was insufficient to establish estoppel and incredible. We affirm.

BACKGROUND

¶2 Jean George was involved in an accident in New Richmond, Wisconsin on October 28, 2003. Wisconsin Mutual denied coverage, asserting George's policy had lapsed on October 22, 2003 for nonpayment.

¶3 George's Wisconsin Mutual policy required monthly renewal. Several months before the October 28 accident, George elected to make her premium payments by electronic transfer from her and her husband's bank account. On October 10, 2003, Wisconsin Mutual sent George a policy renewal form, which stated that $178.60 would be withdrawn through an electronic funds transfer on October 22. The renewal form also contained a nonpayment clause: "If this notice is for premium due and not paid, the insurance coverage shall lapse at 12:01 a.m. central time on the due date or withdrawal date. The policy will not lapse if paid by the due date or withdrawal date or within 10 days thereof." On October 22, Wisconsin Mutual initiated an electronic transfer from

George's bank account. There were insufficient funds to cover the transaction and the premium was not paid.

¶4 The day after the accident, George's husband, John, contacted Wisconsin Mutual to inquire about the premium payment. A Wisconsin Mutual employee told him that the premium payment had been received and that George was covered for the accident. George took no further action and the ten-day grace period passed on November 1, 2003.

¶5 Wisconsin Mutual again unsuccessfully attempted an electronic transfer on November 5. Wisconsin Mutual's electronic transfer account manager testified that if the November 5 transaction had been successful, Wisconsin Mutual would have provided coverage for the accident despite the grace period's expiration.

¶6 George filed suit against Wisconsin Mutual after it denied her claim. Following a trial, the circuit court found that George relied on the Wisconsin Mutual employee's assurance that the premium had been paid. Accordingly, the circuit court estopped Wisconsin Mutual from denying coverage.[1] Wisconsin Mutual appeals.

DISCUSSION

¶7 Equitable estoppel is established by proof of the following elements: "(1) action or non-action, (2) on the part of one against whom estoppel

[1] The circuit court also concluded Wisconsin Mutual failed to provide a statutory notice of cancellation. Wisconsin Mutual contends the notice was not required. Because we conclude Wisconsin Mutual is estopped from denying coverage, we need not reach this issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 11, 571 N.W.2d 656 (1997). We will not overturn the circuit court's factual findings unless they are clearly erroneous, but review the application of equitable estoppels de novo. *See* ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶21, 291 Wis. 2d 259, 715 N.W.2d 620.

¶8 Here, the circuit court's findings of fact were sufficient to establish equitable estoppel. A representative of Wisconsin Mutual assured George's husband that it withdrew the premium payment from their account. George's husband testified that he would have made the payment within the ten-day grace period if he had been told the electronic transaction was unsuccessful. He further stated that, because of Wisconsin Mutual's representation, he made no further efforts to determine whether it had received the premium payment. George relied on Wisconsin Mutual's statement to her detriment, because the payment had not, in fact, been timely made. The circuit court's estoppel conclusion was supported by "clear, satisfactory and convincing" evidence. *See* ***Gonzalez v. Teskey***, 160 Wis. 2d 1, 13, 465 N.W.2d 525 (Ct. App. 1990).

¶9 To the extent Wisconsin Mutual attacks the credibility of George's husband, we reject its argument. "The trial court is the ultimate arbiter of both the credibility of the witnesses and the weight to be given to each witness' testimony." ***Pries v. McMillon***, 2008 WI App 167, ¶13, 314 Wis. 2d 706, 760 N.W.2d 174 (citation omitted), *aff'd on other grounds*, 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 64. The circuit court specifically found John George's testimony credible, and we will not overturn that finding.

¶10 Further, the circuit court's findings of fact are not clearly erroneous. Phone records admitted at trial indicate that on October 29, John George placed two short calls to directory assistance and one call to his insurance agent. John George explained he asked directory assistance to transfer him to Wisconsin Mutual, and spoke briefly with a Wisconsin Mutual representative:

> Just trying to get the number for Wisconsin Mutual, their head office. First time I called they connected me to a number that wasn't the right number. It was something else. So I called back. And the second call was where they gave me—put me through to the right number finally.
>
> ….
>
> When I called Wisconsin Mutual, I just explained that my wife—My money came out of my money transfer. My wife had been in an accident, and I wanted to make sure my payment had been made, the wire transfer had been made, I was covered, everything was fine, well, and good. She said, just a minute, Mr. George, I will look it up. She must have had a computer in front of her or some way to look it up. She came back on and said, yes, the wire transfer had been made on the 22nd. And I did not have it billed again until the 22nd of the following month.
>
> ….
>
> That was it, yeah, short and sweet.

The circuit court could properly find, based on the phone records and the above testimony, that a Wisconsin Mutual employee represented that George's premium had been paid.

¶11 Wisconsin Mutual nonetheless emphasizes the fact that John George could not recall the name of the employee with whom he spoke. Citing ***Kamikawa v. Keskinen***, 44 Wis. 2d 705, 172 N.W.2d 24 (1969), and ***Wisconsin Natural Gas Co. v. Employers Mutual Liability Ins. Co.***, 263 Wis. 633, 58 N.W.2d 424 (1953), Wisconsin Mutual contends that coverage by estoppel cannot

be established when the witness cannot identify the person to whom he or she spoke and can offer only his or her account of the conversation.

¶12 While our supreme court rejected estoppel arguments in both cases, neither is on point. For example, in ***Kamikawa***, the insured failed to pay a renewal premium before the due date. ***Id.*** at 708. Four days later, the insured's agent told him he would be covered if payment was sent that day. ***Id.*** The insured was involved in an accident before the insurer received the premium. ***Id.*** Our supreme court concluded that "[t]he sending of the premium constituted a new offer … [which] was acted upon and accepted by the insurance company … the day after the accident." ***Id.*** at 710. The court declined to apply the equitable estoppel doctrine, concluding that estoppel cannot be used to establish the elements of a binding contract. ***Id.*** at 711.

¶13 The issue in this case is not whether Wisconsin Mutual was estopped from denying the existence of a valid contract. After George permitted Wisconsin Mutual to automatically withdraw the premium from her joint account, no further act of acceptance was necessary on her part. All the elements of a valid contract—offer, acceptance, and consideration—were present before Wisconsin Mutual represented it received George's premium payment. The issue is whether that policy lapsed as a consequence of George's failure to perform. ***Kamikawa*** does not preclude application of the equitable estoppel doctrine to this issue.

¶14 ***Wisconsin Natural Gas*** is similarly inapposite. There, our supreme court concluded coverage by estoppel was not established by testimony that the insured was told his policy was in force one day prior to the policy's cancellation date. ***Wisconsin Nat. Gas Co.***, 263 Wis. at 643-44. The court concluded the insured did not reasonably rely on the insurer's statement because "[t]he fact that

he may have had coverage on May 9, 1949, should not have misled him into thinking that the policy would continue indefinitely without … paying the premium." ***Id.*** Here, again, Wisconsin Mutual represented that it received George's payment when in fact it did not. George was entitled to rely on Wisconsin Mutual's statement.

¶15 In any event, neither case stands for the proposition that a witness must identify, and secure the testimony of, the insurer's representative. In both cases, the witness happened to know the name of the individual with whom he or she spoke, but lack of this knowledge is not fatal to George's estoppel argument. Our supreme court has held that

> when one calls up a person's place of business by phone … and some one there answers and undertakes to accept the communication, this is prima facie evidence that the message was delivered to someone authorized to receive it on behalf of that person, even though the voice of the person is not identified.

Kiviniemi v. Hildenbrand, 201 Wis. 619, 626-27, 231 N.W. 252 (1930). In that case, the court held that the jury was entitled to find that the witness had spoken with a representative of the insurer, who promised to "attend to the coverage, notwithstanding the testimony of [another employee] that she did not recollect the transaction and found no record thereof …." ***Id.*** Here, the circuit court could permissibly find, based on the evidence presented, that George's husband had called Wisconsin Mutual and been assured the premium was paid. Accordingly, Wisconsin Mutual is estopped from denying coverage based on nonpayment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).