COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2172 **Cir. Ct. No. 2014CV47**

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

TERRY SULLIVAN,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN FAMILY LIFE INSURANCE COMPANY AND AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Terry Sullivan appeals an order of the circuit court granting summary judgment in favor of American Family Mutual Insurance Company, American Family Life Insurance Company, and American Standard

Insurance Company of Wisconsin (collectively, American Family). Sullivan, who was at all relevant times affiliated with American Family as an agent or an employee, brought suit against American Family alleging claims of breach of contract, breach of duty of good faith and fair dealing, and misrepresentation. The circuit court granted summary judgment in favor of American Family and dismissed Sullivan's claims on the basis that Sullivan had waived his claims against American Family. For the reasons discussed below, we affirm.

BACKGROUND

¶2 The following facts are undisputed in the materials submitted to the circuit court on summary judgment.

¶3 At all times material hereto, Sullivan was an agent or employee of American Family. Sullivan began working as an agent for American Family in 1985. As an agent, Sullivan was an independent contractor and was not an employee of American Family. In 1988, Sullivan was hired as a district manager for American Family and at that time became an employee of American Family. In 2000, Sullivan became the American Family sales director for the State of Ohio and worked in that capacity until June 30, 2004, when he resigned and returned to being an agent of American Family.

¶4 In April 2004, Sullivan's supervisor, Jeff Bosco, asked Sullivan whether Sullivan would consider resigning his position as sales director for Ohio and returning to work as an independent agent for American Family. Sullivan responded that if he did so, he would want to receive an income that was comparable to or greater than the compensation package that he was then receiving.

¶5 In May 2004, Bosco advised Sullivan that American Family was terminating the agency of Keith Wenberg in La Crosse, Wisconsin. At the time, Wenberg's agency had 6,260 "non-life" policies on its book of business. Sullivan was told that if he would open his own agency, those policies, which were held by American Family in a status known as "banked," would be transferred to Sullivan's new agency.

¶6 Both American Family and Sullivan understood that the actual number of policies transferred from the Wenberg agency would be somewhat less than the 6,260 that the Wenberg agency had when that agency was terminated. Both parties agree that there is a natural loss or attrition of policies when an agent is terminated, because inevitably some policyholders request that a different agent be assigned to them and some policyholders allow their policies to lapse.

¶7 Shortly thereafter, at Bosco's request, Sullivan prepared and provided Bosco with a proposed budget indicating that he would need a monthly income of $21,000 in order to pay for business and personal expenses. In order for Sullivan to reach his income goal, Sullivan and American Family, through Bosco, agreed that Sullivan would receive a monthly subsidy that equaled the difference between actual policy renewal fees in any month and $17,700.[1]

¶8 Consistent with their agreement, American Family paid subsidies to Sullivan every month from 2004 through 2013. By December 2012, Sullivan determined that the policy renewal commissions paid to his agency in 2013 would be sufficient to allow American Family to cease paying subsidies to him at some

[1] This amount was based upon Sullivan's $21,000 income goal. Sullivan agreed to be responsible for generating $3,400 per month ($40,000 per year) in commissions on new business.

point during 2013. American Family paid Sullivan an additional $8,000 subsidy in 2013.

¶9 In January 2014, Sullivan sued American Family, alleging breach of contract, breach of duty of good faith and fair dealing, and two claims of misrepresentation. Sullivan alleged claims for breach of contract, which were based upon American Family's alleged failure to provide Sullivan with 6,260 non-life policies, as agreed in 2004 when Sullivan agreed to resume working as an agent. As to the two claims of misrepresentation, the allegations are described in paragraph 18, below. Sullivan's claims all related to his agreement with American Family for returning to work as an independent agent.

¶10 American Family moved for summary judgment. The circuit court granted American Family's motion and dismissed all of Sullivan's claims.[2]

DISCUSSION

¶11 Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2015-16). We review summary judgments de novo, ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843, drawing all reasonable inferences from the summary judgment materials in the light most favorable to the non-moving party. ***Burbank Grease Servs., LLC v. Sokolowski***,

[2] We note that Sullivan includes in his appendix the circuit court's two-page written order, but neglects to include a transcript of the court's oral ruling, contrary to WIS. STAT. § 809.19(2)(a) (2015-16) ("The appellant's brief shall include a short appendix containing, at a minimum, the findings or opinion of the circuit court, limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.").

2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the non-moving party to a trial. ***Id.***, ¶24.

¶12 In granting American Family's motion for summary judgment, the circuit court determined, as a matter of law, that Sullivan had waived his claims against American Family by his conduct over a period of ten years, as set forth below. Sullivan argues, however, that there remain disputes of material fact that preclude summary judgment. For the reasons explained below, we disagree with Sullivan. In the discussion that follows, we address first our conclusion that when the elements of waiver are applied to the undisputed facts, waiver is established as a matter of law. We then address and reject the factual disputes that Sullivan argues are material and preclude summary judgment.

A. Summary Judgment Based on the Undisputed Facts

¶13 Waiver is the "voluntary and intentional relinquishment of a known right." ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 681, 237 N.W.2d 279 (1979). Sullivan urges us to rely on WIS JI—CIVIL 3057 "Waiver" to guide our analysis of the waiver issue, and American Family does not contest that this provides the pertinent legal standards. We, thus, assume without deciding that the jury instruction accurately sets forth the appropriate legal standards.

¶14 The instruction states in its entirety:

> Waiver means that a person is precluded from asserting a right, a claim or privilege because he or she has previously knowingly, voluntarily, and intentionally relinquished or given up that right, claim, or privilege.

> Waiver must be a voluntary act and implies a knowing choice by a person to dispense with something of value or to forego a right or advantage which the person might have demanded and insisted upon. It only involves the conduct of the party against whom the waiver is asserted and consideration is not necessary for the doctrine to apply; nor need there be a detriment or harm to the party claiming the waiver.
>
> The following elements must appear before the doctrine of waiver can apply:
>
> 1. That the person had a right, claim, or privilege in existence at the time of the claimed waiver.
>
> 2. That the person who is alleged to have waived such a right had knowledge, actual or constructive, of the existence of his or her rights or of the important or material facts which were the basis of his or her right.
>
> 3. That the person waiving such right did so intentionally and voluntarily.
>
> Constructive knowledge is knowledge which one has the opportunity to acquire by the exercise of ordinary care and diligence. If a person is ignorant of a material or important fact, that is, if he or she lacks actual or constructive knowledge, a waiver is not possible.
>
> The intent to waive can be inferred from the conduct of the party against whom the waiver is claimed. However, the conduct or act out of which the waiver is sought to be established must have been done intentionally and with present knowledge of the rights involved, or of the material or important facts which are the basis of those rights.
>
> Unreasonable delay in taking or not taking action may be taken into account in considering whether there has been conduct amounting to a waiver.

WIS JI—CIVIL 3057.

¶15 As noted above, Sullivan alleged claims for breach of contract, which were based upon American Family's alleged failure to provide Sullivan

with 6,260 non-life policies, as agreed in 2004 when Sullivan agreed to resume working as an agent.

¶16 It is well established that a party cannot accept the benefits of a contract while aware of the breach and then later claim damages for the breach. *See, e.g.*, ***Milaeger Well Drilling Co., Inc. v. Muskego Rendering Co.***, 1 Wis. 2d 573, 580, 85 N.W.2d 331 (1957).[3]

¶17 Specifically, Sullivan alleged that American Family failed to transfer to Sullivan policies from Wenberg upon Sullivan's opening of his agency in July 2004, and to assign policies from other agents after July 2006 if the number of assigned policies fell below 6,260. The parties do not dispute that Sullivan was aware from the inception of the agreement that he would become American Family's agent in 2004 that he would not be transferred all of the 6,260 policies that had been held by Wenberg. Sullivan nonetheless accepted the agency and continued in that capacity for another ten years. During that time, Sullivan not only accepted commissions from the policies that were transferred to him, along with any additional policies that he sold himself, Sullivan also received substantial monthly subsidies, which underwrote the cost of maintaining the agency and supplemented Sullivan's personal income. Using the terms of the jury instruction,

[3] In ***Milaeger***, a landowner hired Milaeger Well Drilling to drill a well on the landowner's property. The landowner knew that the well Milaeger drilled did not produce sufficient water to meet the purpose of the well, but made partial payment for the well to Milaeger anyway. Later, when Milaeger tried to collect from the landowner the balance of the amount due for the well, the landowner refused to pay, asserting breach of contract based upon the insufficiency of the well. Our supreme court held, citing its own earlier precedent, that by making partial payment on the well without reserving any rights and with knowledge that the well did not produce sufficient water, the landowner had waived its right to defend against Milaeger's claim on the basis of breach of contract. ***Milaeger Well Drilling Co., Inc. v. Muskego Rendering Co.***, 1 Wis. 2d 573, 580, 85 N.W.2d 331 (1957).

Sullivan's "intent to waive [any breach] can be inferred" from his having accepted the benefit of the contract for all of those years, when he had "present knowledge of the rights involved, or of the material or important facts which are the basis of those rights." *See* WIS JI—CIVIL 3057. As a result, Sullivan has waived any claim of breach.

¶18 In addition to his contract claims, Sullivan also alleged claims for misrepresentation. Sullivan's misrepresentation claims are based upon the following three alleged misrepresentations of fact, which are set forth in Sullivan's amended complaint:

> a. That American Family would assign to Sullivan's insurance agency to be located in La Crosse, Wisconsin, the banked policies of the former Keith Wenberg Agency; and
>
> b. That commencing July 1, 2004, and continuing thereafter, American Family would assign to Sullivan's insurance agency 6,260 non-[life] policies; and
>
> c. That, after 24 months from the establishment of Sullivan's insurance agency, if the number of non-life policies assigned to Sullivan's agency at any time fell below 6,260, American Family guaranteed Sullivan that American Family would transfer additional policies to Sullivan's agency so that, at all times, Sullivan's agency would have not less than 6,260 non-life policies.

¶19 In concluding that Sullivan waived his misrepresentation claims, the circuit court relied upon ***Thompson v. Village of Hales Corners***, 115 Wis. 2d 289, 319, 340 N.W.2d 704 (1983), wherein the court stated:

> Ordinarily questions of waiver are questions of fact for the jury. However, this court has held that where the facts relating to the conduct of the parties after discovery of the fraud or mistake are "practically undisputed," the question of waiver is one of law….
>
> A party's right to rescind for fraud or mistake is waived if he unreasonably delays in asserting that right or

> affirms the agreement after learning of the fraud or mistake giving rise to the right of rescission….

In ***Thompson***, the delay giving rise to the waiver was six months. ***Id.***

¶20 The first two of Sullivan's claims of misrepresentation are based upon the same facts as his claims for breach of contract, and his awareness of those facts and his rights under those facts have already been discussed above.

¶21 We now address Sullivan's third claim of misrepresentation, that American Family promised to transfer additional policies to Sullivan whenever his total number of polices fell below 6,260. It is undisputed that Sullivan knew that the number of policies transferred to him remained below 6,260 for 10 years. It is, therefore, necessarily true that Sullivan knew that American Family had not transferred a sufficient number of policies to him after twenty-four months to bring the total number of policies to 6,260. Accordingly, we conclude that it is undisputed that, to use the terms of ***Thompson***, Sullivan knew "the facts relating to the conduct of the parties after discovery of" the misrepresentation. ***Id.***

¶22 Sullivan remained an agent of American Family, receiving payments for that performance, for at least eight years after the duty to transfer policies arose twenty-four months after he began, and ten years after the other two claimed misrepresentations arose, which far exceeds the six-month time period that was sufficient to show waiver in ***Thompson***. We conclude that, just as with the contract claims, Sullivan's waiver of his misrepresentation claims is established by the undisputed facts. *See* WIS JI—CIVIL 3057 ("the conduct or act out of which the waiver is sought to be established must have been done intentionally and with present knowledge of the rights involved").

B. There are no Disputed Issues of Material Facts

¶23 Sullivan does not dispute the legal basis upon which summary judgment is granted as to either his contract claims or his tort claims. Instead, Sullivan asserts that in the present case, three "facts relating to the conduct of the parties" are disputed, and that waiver is therefore not established. *See* ***Thompson***, 115 Wis. 2d at 319.

¶24 The first fact that Sullivan asserts is disputed involves the $8,000 final subsidy payment made by American Family in 2013. Sullivan is correct that the circumstances surrounding that payment are in dispute. American Family points to evidence that Sullivan asked for the payment, characterizing it as an alteration or extension of the agreement. At the core of its assertion that this amounted to an extension or alteration of the agreement, American Family argues that it was under no obligation to make this additional payment to Sullivan.

¶25 Sullivan describes the circumstances of the payment differently. According to Sullivan, Keith Ryniak, who was then a sales director for American Family, had no personal knowledge of the background of the subsidy payments and that Ryniak determined that he would no longer approve the payments after December 2012. When Sullivan protested, Ryniak reconsidered and advised Sullivan that he would approve a lump sum payment of $8,000, which was the amount that Ryniak believed would be due Sullivan during 2013, assuming that the payments would otherwise be made monthly. Sullivan accepted the offer.

¶26 While the reason for the $8,000 payment in 2013 is certainly in dispute, it is not a material dispute. One way of demonstrating waiver through conduct is to show that the allegedly waiving party reaffirmed the contract by accepting an alteration or extension of the contract during a period in which the

fraud or breach is known.[4] *See* ***id.***, 115 Wis. 2d at 319 ("or affirms the agreement after learning of the fraud or mistake giving rise to the right of rescission.") However, that is not the only manner in which waiver is demonstrated through conduct. In ***Thompson***, it was shown through "unreasonabl[e] delay[] in asserting th[e] right." ***Id.*** That is also what occurred here. For both the contract claims and the tort claims, the undisputed facts show that Sullivan was aware of the facts upon which his claims rely for ten years for the contract claims and for eight years for the tort claims, without asserting the claims. Whether or not the $8,000 payment was a contract alteration or extension is not material to the question of whether Sullivan waived his breach of contract and misrepresentation claims.

¶27 Second, Sullivan argues that a factual dispute exists as to whether he was aware that American Family transferred approximately 200 policies of the 6,200 that were formerly held by Wenberg to another agency three days before Sullivan began to operate his agency. Sullivan asserts that he became aware of this transfer only during discovery for this lawsuit, and that his lack of knowledge until discovery means that he lacked knowledge of the claimed misrepresentation and, therefore, his misrepresentation claims cannot be waived. Sullivan does not convince us that this is a dispute that matters.

¶28 As stated above, it is undisputed that Sullivan was aware when he began his agency in 2004 that there is an inevitable loss or attrition of policies when any agency is terminated, because some policyholders request that a new agent be assigned to them and some allow their policies to lapse. For the transfer

[4] The circuit court relied in part on this ground for its decision. However, our review of summary judgment is de novo.

of these 200 policies to constitute a misrepresentation by American Family, they would have to have been transferred for some reason other than the "natural loss or attrition of policies when an agent is terminated." However, Sullivan does not point to evidence in the summary judgment record from which one could draw a reasonable inference that the transfers of those policies was for some reason *other* than natural loss or attrition. For example, Sullivan does not point to evidence that policyholders of those 200 transferred polices might not have requested that the policies be transferred to agents other than him. Instead, he makes an argument that we quote in full:

> First, American Family represented to Sullivan that all of the "banked" policies of the former Keith Wenberg agency, excepting those lost as a result of normal attrition between May 9, 2004 and July 1, 2005 would be assigned to Sullivan's agency.
>
> In response to discovery requests, American Family produced a list of 200 "banked" Wenberg policies which were transferred to other agents in the La Crosse, Wisconsin area. Those transfers occurred on June 28, 2004, a mere three days before Sullivan began operating his agency in La Crosse….
>
> The transfer of these "banked" policyholders to other American Family agents not only breached the contractual commitment which American Family made to Sullivan, but also constituted a misrepresentation of fact which American Family made to Sullivan and which induced Sullivan to resign his position as a State Sales Director of the State of Ohio and assume the La Crosse agency.
>
> Second, when it became apparent to Sullivan in September in 2004 that the number of policies assigned to his agency was less than what had been anticipated, Sullivan was told by his District Manager (Hetzel) that the result was because of a "run" on Wenberg's former agency. While there may have been a run on the former Wenberg policies, the result was exacerbated because American Family transferred 200 policies to other American Family agents in the La Crosse area, and then lied to Sullivan about its actions and conduct. (Emphasis omitted.)

¶29 These are merely conclusions, not arguments based on evidence from which it could be reasonably inferred that the transfer of the 200 policies in 2004 was for any reason *other* than the request by the policyholders that their policies be transferred. Because, even under Sullivan's own argument, the date of transfer, June 28, 2004, is within the timeframe when policies would be transferred due to normal attrition, which was May 9, 2004 through June 1, 2005. There would need to be some factual basis for a fact finder to infer that the transfer of the policies occurred outside of the process that American Family represented to Sullivan. Sullivan does not offer any such facts.

¶30 Finally, Sullivan disputes that the agreement can be interpreted to mean that the subsidies were compensation for American Family's failure to assign 6,260 policies to Sullivan as promised. Sullivan argues that the obligation to provide 6,260 policies was separate and independent from the obligation to provide monthly subsidy payments. There are two reasons why we are not persuaded that Sullivan has identified a genuine issue of material fact.

¶31 First, Sullivan's interpretation of the agreement is based upon an underlying premise that Sullivan must have received something in addition to what he would have ordinarily been entitled to receive in order for there to be waiver. However, as quoted above, the jury instruction states that waiver "only involves the conduct of the party against whom the waiver is asserted and consideration is not necessary for the doctrine to apply; nor need there be a detriment or harm to the party claiming the waiver." WIS JI—CIVIL 3057. Under the terms of the jury instruction, Sullivan's mere acceptance of the normal benefits of the agreement over a reasonable period of time *with the knowledge of the breach or fraud* is sufficient. Thus, whether the agreement to pay the subsidies and the agreement to transfer 6,260 policies to Sullivan's agency are mutually

dependent parts of the same agreement, or separate agreements, even if disputed, is not material to whether Sullivan waived his claims.

¶32 In addition, Sullivan's assertion that the two sets of obligations are unrelated defies logic, given Sullivan's own argument that "[i]f 5,000 policies assigned to Sullivan's agency in 2013 would have generated an average renewal commission of $17,700 per month, then 6,260 policies assigned to his agency would generate substantially greater income for Sullivan's agency." In other words, if the 6,260 policies were available from the start, there was apparently little need for American Family to make the subsidies in the first place.

¶33 For these reasons, we conclude any dispute regarding the reason for the subsidy and American Family's promise to provide Sullivan with 6,260 policies is not material and, therefore, does not preclude summary judgment.

CONCLUSION

¶34 For all of the reasons set forth above, we affirm the decision of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited under RULE 809.23(3)(b).