IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30041

Summary Calendar

ANDY CHIASSON, SR. and
HOPE CHIASSON,

Plaintiffs-Appellants,

v.

GOLDEN RULE INSURANCE
COMPANY

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-1554-G)

(July 13, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Andy Chiasson, Sr., and Hope Chiasson appeal from the district court's grant of summary judgment to Golden Rule Insurance Company ("Golden Rule") in a suit for benefits provided by a health insurance policy issued by Golden Rule to Andy Chiasson. We affirm.

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Hope Chiasson became insured under a Golden Rule health insurance policy on March 1, 1988. The policy covers Andy Chiasson as the primary insured and also covers Hope as Andy's "lawful spouse." The policy expressly excludes payment of benefits for any charges incurred "as a result from any injury or illness arising out of, or in the course of, employment for wage or profit . . . ."

At the time Hope sustained the back injury that is the basis for her claim against Golden Rule, she was employed as a clerk at Clinic Drug Store. Her responsibilities included pricing and storing merchandise, putting up displays, and checking out customers. On July 18, 1991, as she was moving a box of merchandise to the back of the store, Hope, according to her own affidavit, "felt something release, like something gave way in [her] back." She reported her injury to her employer, and she later had to quit her job because of the extreme pain she was experiencing in her lower back. She has since had several operations to try to alleviate the pain and has been in rehabilitation therapy, but she is still experiencing problems. Her doctor has assessed her as having ten to fifteen percent "total permanent partial body medical impairments" and has advised her to avoid lifting, pushing, or pulling more than thirty-five pounds on a permanent basis.

The Chiassons have filed an action in Louisiana state court against Highland Insurance Company ("Highland"), the worker's

compensation insurer for Clinic Drug Store. In that action the Chiassons contend that Hope's back injury occurred on July 18, 1991, while she was at work, thus entitling her to worker's compensation benefits. Highland, in its answer, denied, among other things, that at the time of the alleged injury Hope was "performing service arising out of and in the course of [her] employment."

The Chiassons also filed the current action in state court, asserting that the Golden Rule policy covers expenses for treatment of Hope's back injury. The case was removed to federal court based on diversity jurisdiction. Following discovery, Golden Rule filed a motion for summary judgment on the grounds that Hope's injury occurred in the course and scope of her employment, and, thus, is excluded from coverage under the policy. Finding that the Chiassons had established no genuine dispute of fact, the district court granted the motion for summary judgment. The Chiassons filed a timely notice of appeal.

II.

We review a summary judgment de novo, applying the same criteria used by the district court. Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

FED. R. CIV. P. 56(c). We review the facts drawing all inferences in the light most favorable to the non-moving party, Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994), but if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue of material fact to be resolved at trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Under Federal Rule of Civil Procedure 56(c), the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once this burden is met, the burden shifts to the non-moving party to establish the existence of a genuine issue for trial. Matsushita, 475 U.S. at 585-87. The burden on the non-moving party is to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

III.

The Chiassons argue that although they, too, believe the injury occurred in the course of employment, the fact that Highland is prepared to argue the opposite in the worker's compensation proceeding creates enough of a genuine dispute of fact to defeat a motion for summary judgment. We disagree.

Golden Rule's burden at trial would be to show that the alleged injury arose or occurred in the course of Hope's employment. In support of its motion for summary judgment, Golden Rule submitted deposition testimony from the state court worker's compensation suit including a claim settlement statement submitted by Hope to Golden Rule, Hope's deposition, and the deposition of Hope's physician, Dr. Kenneth Vogel.

On the claim settlement form, Hope wrote that her condition began on July 18, 1991, when she "lifted [a] heavy box at work," and from that moment she had "severe lower back pain that never went away." She also answered affirmatively a question about whether her condition was the result of an accident or illness related to employment.

Then, in her deposition testimony, Hope stated that she was moving a box to the back of the store on July 18, 1991, when she "felt something release, like something gave way in her back." She went to several different doctors for treatment and was eventually referred to Dr. Kenneth Vogel, a neurologic surgeon.

Finally, in Dr. Vogel's deposition testimony, he stated that Hope was referred to him for an evaluation of "lumbosacral pain." He began treating her on January 30, 1992, and diagnosed her as having a herniated lumbar disc with nerve impingement. Dr. Vogel testified that Hope told him she was "in good health until 7/18/91 while at work lifting a heavy box she noted a . . . release of pressure feeling in the low back region and subsequently the onset of lumbosacral pain." According to the

deposition, Hope "denied all other injuries." Although Hope had been diagnosed with myofibrositis, a "vague muscle injury-type ache," in 1984, Dr. Vogel testified that it was not possible to confuse the symptoms of that disease with an impinged nerve or herniated disk. He further testified that "in all medical probability there [was] a causal relationship between the 7/18/91 incident and [Hope's] lumbosacral pain . . . ."

The above evidence is certainly enough to prove the prima facie case that Hope was injured in the course of employment and shift the burden of proof to the Chiassons. Once the party moving for summary judgment has sufficiently supported its motion, the opposing party "may not rest upon the mere allegations or denials in his pleadings," but must by affidavits or other evidence "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). The evidence the Chiassons set forth failed to create a genuine issue for trial. The only evidence they produced was a copy of Highland's answer in the worker's compensation proceeding and an affidavit of Daniel Dazet, the attorney currently representing the Chiassons in the worker's compensation proceeding.

Highland's answer was merely a form that required the company to admit or deny various allegations. The company denied that Hope was injured on the date alleged, denied that the injury arose out of the course of employment, and denied that Hope was temporarily disabled. The company also circled several possible affirmative defenses listed on the form, among them one that Hope

had a willful intent to injure herself, one that she failed to use safety devices, and one alleging that there are other matters in dispute. The Chiassons acknowledge the fact that evidence is yet to come forth to support these claims, but they argue that they intend to call witnesses from the worker's compensation proceeding to testify that Hope's injury was not work related "should evidence be adduced at the worker's compensation trial to that effect."

The Chiassons also rely on the Dazet affidavit. In his affidavit, Dazet stated that it was his "impression that the employer/defendant in [the worker's compensation proceeding] is alleging that Ms. Chiasson's injuries are not related to her employment, or alternatively, that her injuries are the result of a pre-existing condition and as such, are not compensable under the workers' compensation laws of Louisiana."

Before an affidavit opposing a motion for summary judgment can be given any weight, Rule 56(e) requires that it be made on personal knowledge, that it set forth such facts as would be admissible in evidence, and that it show affirmatively that the affiant is competent to testify on the matters stated therein. FED. R. CIV. P. 56(e). Affidavits which do little more than deny the movant's allegations without setting forth any evidentiary support on which to predicate a factual dispute do not create a genuine issue of material fact. Bros, Inc. v. W.E. Grace Manufacturing Co., 261 F.2d 428, 431-33 (5th Cir. 1958). Dazet's affidavit consists of no more than Dazet's own mental impression

of what Hope's former employer, Clinic Drug Store, is alleging in the worker's compensation proceeding that is still pending and sets forth no specific facts showing that a genuine issue for trial exists in the instant case.

The evidence put forth by the Chiassons in the instant case is insufficient to overcome their own admissions and other evidence offered by Golden Rule or to create a dispute of fact as to how and when Hope Chiasson's injury occurred. Because Golden Rule has established that no genuine dispute of fact exists, the district court did not err in granting Golden Rule's motion for summary judgment.

IV.

For the foregoing reasons, the grant of summary judgment to Golden Rule by the district court is AFFIRMED.