COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-2813

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

SHIRLEY KROENING, AS TRUSTEE OF BEATRICE H. BORKENHAGEN REVOCABLE TRUST,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed in part and reversed in part.*

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

¶1 WEDEMEYER, P.J. Blue Cross & Blue Shield United of Wisconsin appeals from a judgment entered after a jury found that it breached a health insurance contract relative to its denial of reimbursement for skilled nursing care under a Medicare supplement insurance policy that Beatrice H. Borkenhagen purchased from Blue Cross. Shirley Kroening, as trustee for the Borkenhagen trust, sued Blue Cross for the breach. Blue Cross claims: (1) the trial court erroneously exercised its discretion when it instructed the jury without including a proper definition of skilled nursing care; (2) the trial court erroneously exercised its discretion when it formulated the special verdict; and (3) the trial court erred in awarding pre-verdict interest on the $10,000 portion of the award over and above the $34,000 Kroening paid to Heritage Square Health Care Center, the provider of the nursing care services. Because the trial court did not erroneously exercise its discretion when it instructed the jury or when it formulated the special verdict, we affirm on those issues. However, because the trial court erred when it awarded pre-verdict interest on the $10,000 that had not yet been paid to Heritage Square, we reverse that part of the judgment.

¶2 Kroening cross-appeals. She claims the trial court erred when it: (1) denied her request for attorney's fees; and (2) failed to grant default judgment for Blue Cross's failure to file its answer on time. Because the trial court did not err in either respect, we affirm on the cross-appeal.

I. BACKGROUND

¶3 In 1987, Borkenhagen purchased a Medicare supplemental insurance policy from Blue Cross which was effective March 1, 1987, through December 14, 1995. The policy defined skilled nursing care as "continued care for the same condition, for which you were in the hospital." The original policy excluded

coverage for, but did not define, custodial care. Custodial care was subsequently defined in a 1994 amendment to the policy. In 1994, Borkenhagen was hospitalized for breast cancer and rheumatoid arthritis. In August 1994, she was admitted to Heritage Square, a skilled nursing facility. Medicare paid for the first 100 days at Heritage Square, noting that the payment was for "skilled nursing facility care." Blue Cross made supplemental payments to Heritage Square for the care that Borkenhagen received during this 100 days for amounts over and above what Medicare paid. Starting with the 101st day on February 15, 1995, Blue Cross refused to pay, maintaining that the services constituted custodial care, rather than skilled nursing care. Borkenhagen remained at Heritage Square until November 1995. She died in December 1995.

¶4 Kroening requested that Blue Cross reconsider its denial. Blue Cross processed the request through its administrative appeals procedure, after which it again denied the claim relying on the "custodial care" exclusion within the amendment to the policy. Kroening filed this action against Blue Cross alleging breach of contract for Blue Cross's refusal to pay. Prior to trial, Kroening filed a motion in limine excluding the reference to the 1994 amendment, based on its belief that the amendment violated Wisconsin administrative regulations governing Medicare supplemental insurance policies. Specifically, Kroening argued that the administrative regulations required the insured to acknowledge, by signature, any significant amendment. It is undisputed that Blue Cross never had Borkenhagen acknowledge the amendment, which added the definition of custodial care. The trial court granted the motion and Blue Cross does not appeal that issue.

¶5 The trial consisted of Blue Cross presenting witnesses who testified that Borkenhagen did not receive skilled nursing care at Heritage Square, and

Kroening presenting witnesses who testified that the care at Heritage Square did constitute skilled nursing care. The jury found for Kroening. Judgment was entered in favor of Kroening in the amount of $44,880. Blue Cross filed motions after verdict seeking a new trial and other relief. The trial court denied the motions. Kroening filed motions after verdict asking the trial court to award attorney's fees, pre-verdict interest, and penalties under WIS. STAT. § 807.01 (1997-98).[1] The trial court declined to award attorney's fees, but granted the motion seeking pre-verdict interest, pre-judgment interest, and double taxation of costs. Both parties appeal.

II. DISCUSSION

A. Appeal.

1. Jury Instruction.

¶6 Blue Cross contends the trial court erroneously instructed the jury. It argues that the trial court left out two of the seven parts for the definition of skilled nursing care found in the federal regulations, rendering the instructions inadequate. We are not persuaded. Trial courts are afforded wide discretion when instructing the jury, provided the instruction adequately covers the law applicable to the facts. *See* ***Vogel v. Grant-Lafayette Elec. Coop.***, 201 Wis. 2d 416, 422, 548 N.W.2d 829 (1996). We will not disturb the trial court's decision unless it erroneously exercises that discretion to the prejudice of one of the parties. *See* ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 344-45, 564 N.W.2d 788 (Ct. App. 1997).

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶7 Blue Cross contends that the jury instruction given, defining skilled nursing care, was inadequate because the trial court excluded two of the necessary components of the definition. The trial court used the Medicare regulations as a guide to draft the instruction at issue here. The Medicare regulations define skilled nursing care as services that are:

> (1) ordered by a physician; (2) so inherently complex that they can only be performed safely and effectively by or under the supervision of technical or professional personnel; (3) furnished directly by or under the supervision of technical or professional personnel; (4) rendered for the same condition for which the patient received inpatient treatment or a condition that arose while the patient was in a skilled nursing facility after inpatient treatment; (5) only performed in a skilled nursing care facility on an inpatient basis; (6) require the skill of technical or professional personnel; and (7) provided on a daily basis.

See 42 C.F.R. §§ 409.31(a)(1) and (3); 409.31(b)(3) and 409.32(a). Blue Cross argues that the instruction crafted by the trial court did not contain parts (2) and (4). The trial court did not include (2), reasoning that this part was subsumed by the remainder of the definition, and did not include (4) because this was not disputed. The instruction given to the jury provided:

> This is the definition of skilled nursing care. Skilled nursing services means services that are, No. 1, ordered by a physician; No. 2, require the skills of technical or professional personnel; and No. 3, are furnished directly by or under the supervision of such personnel. In addition, the beneficiary must require skilled nursing services on a daily basis.
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> To meet the daily basis requirements, skilled nursing services must be needed and provided seven days a week. Examples of technical or professional personnel who provide skilled nursing services -- now, these are examples not listed. Registered nurses, licensed practical vocational nurses, physical therapists, occupational therapists, and speech pathologists, or audiologists.

Personal care services which do not require the skills of qualified technical or professional personnel are generally not skilled services. A condition does not require skilled services may still require them because of a patient's special medical complications under those circumstances.

A service that is usually nonskilled may be considered skilled because it must be performed or supervised by skilled technical or professional personnel. In situations of this type, the complications and skilled services they require must be documented by a physician's orders and nursing or therapy notes.

Services that could qualify as skilled nursing services are No. 1, the overall management and evaluation of a care plan or, 2, the observation and assessment of the patient's changing condition.

No. 1, the overall management and evaluation of a care plan. The development, management, and evaluation of a patient care plan based on the physician's orders constitute skilled services when, because of the patient's physical or mental condition, those activities require the involvement of technical or professional personnel in order to meet the patient's needs, promote recovery, and ensure medical safety.

This would include the management of a plan involving only a variety of personal care services when, in light of the patient's condition, the aggregate or totality of the services requires the involvement of technical or professional personnel.

….

Although any of the required services could be performed by a properly instructed person, such a person would not have the ability to understand the relationship between the services and evaluate the ultimate effect of one service on the other. Since the nature of the patient's condition, age, and immobility create a high potential for serious complications, such an understanding is essential to ensure the patient's recovery and safety.

Under these circumstances, the management of the plan of care would require the skills of a nurse, even though the individual services would not usually be classified as skilled.

The second circumstances under which such services would be considered skilled services would be pursuant to observation and assessment of the patient's changing condition. Observation and assessment constitute skilled services when the skills of a technical or professional

> person are required to identify and evaluate the patient's need for modification of treatment for additional medical procedures until his or her condition is stabilized.
>
> The need for services of this type must be documented by the physicians and/or nursing or therapy notes….
>
> Skilled planning and management activities are not always specifically identified in the patient's clinical record. Therefore, if the patient's overall condition would support a finding that recovery and safety can be assured only if the total care is planned, managed, and evaluated by technical or professional personnel, the patient requires skilled nursing services.

¶8 We conclude that this instruction adequately sets forth the law based on the Medicare regulations as to what constitutes skilled nursing care. As stated by the trial court: "By requiring the skills of technical or professional personnel, [the services] must be inherently complex; otherwise they wouldn't have them provided by technical or professional personnel and are furnished directly by or under the supervision of such personnel." A separate explicit reference using the "inherently complex" language of subpart (2) was not required, nor does its absence render the instruction insufficient to convey the law. Further, failure to specifically reference subpart (4)'s requirement that the patient receive treatment for the same condition for which he or she was previously hospitalized does not render the instruction inaccurate or prejudicial. Blue Cross never requested that this subpart be included in the instruction, and it never contested this subpart's requirement during the trial. Based on the foregoing, we cannot conclude that the trial court's instructions were erroneous. The instruction crafted by the trial court adequately covered the law pertinent to the issue.

2. Special Verdict Form.

¶9 Next, Blue Cross contends the trial court erroneously exercised its discretion when it drafted the special verdict question. We cannot agree. A trial

court has wide discretion in framing the special verdict. *See* ***Maci v. State Farm Fire & Cas. Co.***, 105 Wis. 2d 710, 719, 314 N.W.2d 914 (Ct. App. 1981). The form of a special verdict may not be interfered with if the question, taken with the applicable jury instruction, fairly presents the material issues of fact to the jury for determination. *See* ***Murray v. Holiday Rambler, Inc.***, 83 Wis. 2d 406, 425, 265 N.W.2d 513 (1978).

¶10 Here, the special verdict question asked: "Was it medically necessary for Beatrice Borkenhagen to receive skilled nursing services either because she required an overall management and care plan, or because she required observation and assessment of her changing condition throughout the period at issue …?" Blue Cross argues that the trial court should not have used the language *was it medically necessary for Beatrice Borkenhagen to receive skilled nursing services*. Instead, Blue Cross contends the question should have asked whether she actually did receive skilled nursing services. Blue Cross says the poorly worded question confused the jurors, as evidenced by the question the trial court received from the jurors, and the response that the trial court offered.[2]

¶11 However, as Kroening points out, the coverage grant in the policy at issue states that Blue Cross "will provide skilled nursing care." Therefore, if Borkenhagen required skilled nursing care, then Blue Cross was obligated to provide it and the technical issue is not whether the patient received it, but whether it was provided. In construing the coverage grant "broadly so as to afford the greatest protection to the insured," ***Tasker by Carson v. Larson***, 149 Wis. 2d 756,

[2] The record reflects the following note from the jury when the question was sent to the trial court: "One Juror is asking this Question – We have 10 votes together – 2 dissenters right now."

760, 439 N.W.2d 159 (Ct. App. 1989), the special verdict question was appropriate, particularly when it is read together with the jury instructions. The instructions did address Blue Cross's concern; they defined skilled nursing services as those "*furnished* directly or under the supervision of technical or professional personnel." (Emphasis added). Therefore, we cannot conclude that the trial court erroneously exercised its discretion when it formulated the special verdict.

3. Pre-verdict Interest.

¶12 Finally, Blue Cross contends that the trial court should not have awarded pre-verdict interest on the approximately $10,000 that the trust did not pay to Heritage Square. Blue Cross argues that because the trust did not pay this amount to Heritage Square, it never lost the use of the money and, therefore, should not be entitled to pre-verdict interest. We agree.

¶13 Whether pre-verdict interest may be awarded is a question of law. *See* ***Loehrke v. Wanta Builders, Inc.***, 151 Wis. 2d 695, 706, 445 N.W.2d 717 (Ct. App. 1989). We review questions of law de novo without deference to the trial court. *See* ***First Nat'l Leasing Corp. v. Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977). "Preverdict interest is available when damages are fixed and determinable or may be measured according to a reasonably certain standard." ***Loehrke***, 151 Wis. 2d at 706. However, the purpose of pre-verdict interest is to compensate the plaintiff for "the value of the use of the money—a value which should be accruing for the benefit of the plaintiff …." ***Johnson v. Pearson Agri-Sys., Inc.***, 119 Wis. 2d 766, 772, 350 N.W.2d 127 (1984).

¶14 Here, the trust is not entitled to pre-verdict interest on the $10,000 because it did not pay that amount to Heritage Square. In other words, it was not

deprived of the use of that amount. *See* ***Milwaukee Cheese Wisconsin, Inc. v. Straus***, 112 F. 3d 845 (7th Cir. 1997). Heritage Square was deprived of the use of the $10,000, but it is not a party to this action. Accordingly, the trial court erred when it included the $10,000 in the pre-verdict interest calculation.

B. Cross-Appeal.

1. Attorney's Fees.

¶15 Kroening asserts that the trial court should have granted its motion seeking attorney's fees. We disagree. "Whether an insured can recover attorney's fees as damages is a question of law which this court decides independently and without deference to the lower courts." ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 568, 547 N.W.2d 592 (1996) (citation omitted).

¶16 In denying the motion, the trial court explained that Wisconsin adheres to the American Rule with respect to attorney's fees; that is, each party pays its own attorney. *See* ***Wisconsin Retired Teachers Ass'n, Inc. v. Employees Trust Funds Bd.***, 207 Wis. 2d 1, 36, 558 N.W.2d 83 (1997). An exception is made only when authorized by statute or contract. *See* ***id.*** Further, when an insurer acts in bad faith, actual attorney's fees are recoverable as an item of damages. *See* ***Elliott v. Donahue***, 169 Wis. 2d 310, 323-25, 485 N.W.2d 403 (1992).

¶17 None of these circumstances is present in the instant case. There is no statute or contract which would authorize shifting the payment of the prevailing party's attorney's fees to the losing party. In addition, although this case could have involved a bad faith cause of action, such claim was not pled or pursued.

Accordingly, the American Rule applies and the trial court did not err when it denied Kroening's motion seeking attorney's fees.

2. Motion for Default Judgment.

¶18 Kroening also contends that the trial court erroneously exercised its discretion when it denied the motion seeking default judgment after Blue Cross failed to file an answer within the required time period. The decision to grant a default judgment is addressed to the discretion of the trial court, *see* ***Willing v. Porter***, 266 Wis. 428, 429-30, 63 N.W.2d 729 (1954), and should be reversed only if the trial court erroneously exercised its discretion. The trial court should bear in mind that the law views default judgments with disfavor. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468-69, 326 N.W.2d 727 (1982). The exercise of discretion requires a record of the trial court's "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Id.*** at 471.

¶19 The standard in these cases is whether the defendant's failure to file a timely answer was due to an honest mistake or excusable neglect, which would allow relief from judgment. *See* WIS. STAT. § 806.07(1)(a) (1997-98). Therefore, the issue is whether Blue Cross's conduct was excusable under the circumstances, "since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect." ***Hansher v. Kaishian***, 79 Wis. 2d 374, 391, 255 N.W.2d 564 (1977). Excusable neglect is defined as "'that neglect which might have been the act of a reasonably prudent person under the same circumstances'" but is not synonymous with neglect, carelessness or inattentiveness. *See* ***Hedtcke***, 109 Wis. 2d at 468 (citation omitted). The burden to show excusable neglect is on Blue Cross. *See* ***Hansher***, 79 Wis. 2d at 389.

¶20 It is not disputed that Blue Cross failed to timely file an answer in this case. The summons and complaint were served on Blue Cross on January 22, 1997, which made the answer due on February 11. The answer was not filed by February 11. The record established that on the last day the answer was due, a Blue Cross legal secretary, who was rushing to get to a counseling session, forgot to affix postage to the letter enclosing the answer. The trial court concluded that it would be a "manifest injustice to allow a clerical error to resolve the merits of this case."

¶21 Although forgetting to affix postage could certainly be termed "carelessness," the trial court here did not so find. The trial court found that the conduct here satisfied the excusable neglect standard and, under the circumstances, determined that Blue Cross should be allowed to file an answer. The trial court is afforded considerable discretion to relieve a party from its failure to answer within the required time frame. *See* ***Hedtcke***, 109 Wis. 2d at 468. Even if we would reach a different conclusion, we are bound by the deferential standard of review. After considering the pertinent law and the particular circumstances presented to it, the trial court denied Kroening's motion seeking default. We cannot conclude that that decision constituted an erroneous exercise of discretion.

III. CONCLUSION

¶22 In sum, on the appeal, we affirm the judgment in part and reverse only that part of the judgment awarding pre-verdict interest on the $10,000 that had not yet been paid to Heritage Square. On the cross-appeal, we affirm.

By the Court.—Judgment affirmed in part and reversed in part.

Not recommended for publication in the official reports.

¶23 SCHUDSON, J. *(concurring).* I write separately to express disagreement with the majority opinion in one area. At ¶11, the majority states, "Therefore, if Borkenhagen required skilled nursing care, then Blue Cross was obligated to provide it and *the technical issue is not whether the patient received it, but whether it was provided*." (Emphasis added.) This, rather obviously I think, makes no sense. As more accurately expressed in Kroening's brief to this court:

> Blue Cross' promise to "provide skilled nursing care" to Beatrice Borkenhagen must be interpreted as broadly as possible to afford the greatest protection to Beatrice Borkenhagen. It is clear, therefore, that asking the jury whether Beatrice Borkenhagen "required" skilled nursing care was the appropriate formulation of the special verdict question.
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> If Beatrice Borkenhagen needed skilled nursing care, but Blue Cross did not provide such care or see that it was provided, Blue Cross breached its obligations to Beatrice Borkenhagen just as surely as if Beatrice Borkenhagen received skilled nursing care but Blue Cross refused to pay for it. Blue Cross' misfounded attempt to distinguish between care required and care received is a distinction without a difference.

Accordingly, I respectfully concur.