COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-0338

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

EUGENE C. WIEDMEYER,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

V.

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Eugene C. Wiedmeyer commenced an action against Blue Cross & Blue Shield United of Wisconsin alleging breach of contract, negligent misrepresentation, and bad faith in the administering and handling of

Wiedmeyer's health care coverage with Blue Cross. The trial court granted summary judgment dismissing Wiedmeyer's bad faith claim. Trial was held to a jury on the remaining claims, and judgment was entered in Wiedmeyer's favor for breach of contract. The judgment awarded Wiedmeyer $19,749 in damages, plus costs.

¶2 Wiedmeyer appeals from the judgment, challenging the trial court's grant of summary judgment and its refusal to include a special verdict question on bad faith, or to order a new trial on that issue. Blue Cross cross-appeals, challenging the award of judgment for breach of contract. We affirm the judgment in its entirety.

¶3 Wiedmeyer was employed by Kruepke Trucking, Inc., until his retirement in April 1994. While employed at Kruepke, Wiedmeyer received health care coverage through a group insurance plan with Blue Cross. Upon retirement, Wiedmeyer received continued coverage for a period of eighteen months (COBRA coverage). The group health plan provided by Blue Cross further provided that:

> You may enroll in our Conversion Medical Plan (CMP 250) instead of extending Your coverage or after You exhaust Your extended benefits.… CMP 250 provides fewer benefits than this plan. See the Group's Personnel Office for details. You must apply for conversion coverage within 30 days of losing Group eligibility. If you elected federal continuation, You must elect conversion within the last 180 days of Your continuation.

¶4 Wiedmeyer's COBRA coverage terminated on December 1, 1995, eighteen months after he retired. On November 2, 1995, he contacted Blue Cross at the Regional Service Center number provided by Blue Cross in a booklet detailing the group policy. He requested information about what to do when his

COBRA coverage expired. In addition, on October 20, 1995, an agent for the group contacted Blue Cross to inquire about what insurance was available for Wiedmeyer from Blue Cross until Wiedmeyer became Medicare eligible, and whether Blue Cross offered a conversion policy. In response, Blue Cross provided both Wiedmeyer and the group agent with the same telephone number. The number connected Wiedmeyer to Christopher Uhlir, an employee selling individual policies, not conversions of group policies. Uhlir described two types of individual policies to Wiedmeyer, including a Temporary Plan (Temp Plan), which is what Wiedmeyer ultimately purchased, effective December 1, 1995.

¶5 The Temp Plan policy excluded preexisting conditions, which a conversion policy would have covered. On February 7, 1996, Wiedmeyer was diagnosed with prostate cancer. Blue Cross denied coverage for his treatment on the ground that his prostate cancer was a preexisting condition.

¶6 Wiedmeyer contends that Blue Cross breached its duty of good faith and fair dealing when it failed to offer him an opportunity to purchase a conversion policy or to fully inform him of this option.[1] The trial court dismissed this claim pursuant to Blue Cross's motion for summary judgment. When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). An order granting summary judgment must be reversed if the

[1] Blue Cross contends that it did not act in bad faith because it offered to convert the Temp Plan policy to a conversion policy. However, it did not make that offer until after Wiedmeyer retained counsel. The offer therefore is irrelevant to the issue of whether Blue Cross acted in bad faith when it failed to offer the policy at the time Wiedmeyer's COBRA coverage ended.

trial court incorrectly decided legal issues or if material facts were in dispute. *See* ***id.*** The trial court may not decide an issue of fact and is limited to deciding whether a material factual issue exists. *See* ***id.***

¶7 Nothing in the summary judgment record permits a determination that Blue Cross acted in bad faith in failing to inform Wiedmeyer of the conversion policy option.[2] Absent a statutory duty or special circumstances, an insurance agent has no duty to inform an insured about the availability or adequacy of insurance coverage. *See* ***Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc.***, 181 Wis. 2d 565, 572, 511 N.W.2d 849 (1994). Wiedmeyer contends that special circumstances exist here because Blue Cross had a contractual duty to direct Wiedmeyer to a person in its company who could have given Wiedmeyer the information necessary to obtain a conversion policy if he so chose. He relies upon an instruction manual given by Blue Cross to group health plan administrators. In a section labeled "Termination of Coverage," the manual provided that "[a]fter the period of continued coverage expires …, the terminated Member may convert to individual coverage. He or she will be offered the conversion option in the 180 day period that ends on the date the continuation of coverage ends."

¶8 Assuming arguendo that the manual required Blue Cross to inform Wiedmeyer of the conversion option, the record does not permit a determination that Blue Cross acted in bad faith in failing to do so. "[T]he tort of bad faith is an

[2] In his brief on appeal, Wiedmeyer erroneously refers to the trial testimony and exhibits in challenging the dismissal of his bad faith claim. Because the claim was dismissed on summary judgment, our review is of the pleadings, the motion for summary judgment, and the affidavit and attachments filed in opposition to the motion. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

intentional one." ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). To establish that an insurance company acted in bad faith in denying a claim, a plaintiff must show the absence of a reasonable basis for denying benefits and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *See* ***id.*** "[T]he knowing failure to exercise an honest and informed judgment constitutes the tort of bad faith." ***Id.*** at 692. In assessing whether an insurer acted in bad faith, a court must consider whether it was recklessly indifferent to facts or proofs submitted by an insured. *See* ***id.*** at 693.

¶9 Nothing in the record provides a basis to determine that Blue Cross acted knowingly and intentionally in failing to inform Wiedmeyer of the availability of a conversion policy or to direct him to the proper person to purchase such a policy. In addition, nothing permits an inference that it recklessly disregarded or was recklessly indifferent to Wiedmeyer's rights. While the record could support a finding that Blue Cross referred Wiedmeyer to a person who did not sell conversion policies or who incompletely advised him concerning his options, the summary judgment record does not indicate that either Wiedmeyer or the group representative told any Blue Cross representative that the group policy entitled Wiedmeyer to a conversion policy, or raised the issue in any specific and meaningful way.[3] It would be pure speculation based upon the record to infer that Blue Cross's actions were anything more than an honest mistake. Neither an intentional disregard of its duties by Blue Cross nor a reckless indifference to

[3] Merely asking whether a conversion policy was available, as the group representative was alleged to have done, would not have clearly informed Blue Cross that Wiedmeyer claimed to be entitled to such a policy under his prior group health plan.

information and facts provided by Wiedmeyer is shown. Consequently, summary judgment dismissing the bad faith claim was properly granted.[4]

¶10 Turning to the cross-appeal, we reject Blue Cross's claim that the trial court was required to grant summary judgment or a directed verdict dismissing Wiedmeyer's breach of contract claim. Essentially, Blue Cross argues that Wiedmeyer's prostate cancer was a preexisting condition as a matter of law under the terms of the insurance policy. We disagree. We conclude that the issue was properly submitted to the jury and that the evidence supports its determination that Wiedmeyer's prostate cancer was not a preexisting condition.

¶11 The Temp Plan policy became effective on December 1, 1995. It excluded coverage for preexisting conditions, which were defined as:

> any condition which first manifests itself before Your effective date. A condition manifests itself if:
>
> (a) A diagnosis is made;
>
> (b) You receive, or a health care provider recommends You receive, care or treatment; or
>
> (c) You do not receive care or treatment and You have symptoms which would cause a prudent person to seek care.

¶12 Blue Cross argues that Wiedmeyer's prostate cancer was a preexisting condition because he received "care" for it, and his treating physician recommended that he receive care for it, prior to December 1, 1995. Blue Cross contends that Wiedmeyer was under the supervision and management of two

[4] Because summary judgment was properly granted dismissing the bad faith claim, Wiedmeyer's contention that the trial court should have included a special verdict question on bad faith or ordered a new trial on that issue must also fail. In making this determination, we also note that the trial testimony provided no additional facts which would have permitted a finding of bad faith.

doctors and thus received care for prostate cancer from August 1994 until March 1996. It contends that the doctors' care consisted of monitoring Wiedmeyer's symptoms and conducting several physical examinations, PSA level testing, biopsies, a cystoscopy with ultrasound, and digital examinations. It contends that there were no material facts in dispute and that Wiedmeyer's prostate cancer manifested itself prior to the effective date of the policy when he received "care" for his prostate.

¶13 We conclude that the trial court properly denied summary judgment and submitted the issue to the jury. The condition for which Blue Cross denied coverage was prostate cancer. The question of whether Wiedmeyer received care for that condition prior to December 1, 1995, was a factual question for the jury. In deposition testimony presented in opposition to Blue Cross's motion for summary judgment and in his trial testimony, Dr. David Kornhauser testified that Wiedmeyer did not receive care for prostate cancer prior to December 1, 1995.

¶14 Kornhauser testified that Wiedmeyer had been his patient for approximately ten years. He testified that Wiedmeyer first developed a mildly enlarged prostate gland in 1992, which caused urinary symptoms. He testified that as part of a general physical examination in 1994, Wiedmeyer had a PSA level test, which is a marker for changes in a patient's prostate, which can enlarge for either benign reasons or because of cancer. Because Wiedmeyer's PSA level had risen since 1992 and because his prostate gland was enlarged, Kornhauser referred Wiedmeyer to a urologist in 1994. The urologist conducted several tests, including an ultrasound and cystoscopy, and biopsied the gland. No evidence of cancer was found.

¶15 Kornhauser testified that he next saw Wiedmeyer for a general physical examination on October 31, 1995. He testified that Wiedmeyer had increased urinary symptoms, the prostate remained slightly enlarged, and his PSA level had risen since 1994. However, he further testified that as in 1992 and 1994, the prostate revealed no nodularity, which would be associated with cancer. He also testified that a rise in the PSA level can be attributable to things other than cancer.

¶16 Kornhauser testified that because of the rise in the PSA level and the increased urinary symptoms, he recommended to Wiedmeyer on November 14, 1995, that he follow up with a urologist. However, he also testified that he did not view the situation as urgent and did not suspect that Wiedmeyer had cancer at that time. In addition, he testified that Wiedmeyer did not have prostate cancer prior to December 1, 1995, or symptoms of it. He testified that he did not treat Wiedmeyer for prostate cancer prior to that date, did not recommend that Wiedmeyer receive treatment for cancer, and did not tell Wiedmeyer that he was exhibiting symptoms of prostate cancer.

¶17 Kornhauser's testimony and medical opinions permitted a finding that Wiedmeyer did not receive care for prostate cancer prior to December 1, 1995.[5] Although his opinions were disputed, based upon his testimony the trial court properly denied Blue Cross's motion for summary judgment on this issue

[5] Blue Cross argues that the application of the policy language to the facts of this case presented a question of law because the facts were undisputed as to when Wiedmeyer was examined, what tests were conducted, and what the results were. We reject this argument because the issue of when he first received care for prostate cancer, as opposed to benign prostatic hypertrophy, was a factual issue which was disputed by the medical experts.

and properly submitted to the jury the question of whether Wiedmeyer had a preexisting condition.

¶18 Because the judgment is affirmed on both the appeal and the cross-appeal, costs are denied to both parties.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).