COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 30, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-0934

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

LEAH SALAMONE,
A MINOR, BY HER GUARDIAN AD LITEM, MICHAEL L. BERTLING, AND JAMES SALAMONE AND BARBARA SALAMONE,

PLAINTIFFS-RESPONDENTS-CROSS APPELLANTS,

V.

WEA INSURANCE CORPORATION,

DEFENDANT-APPELLANT-CROSS RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

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

ANDERSON, J. WEA Insurance Corporation (WEA) appeals from a jury verdict finding that WEA acted in bad faith when it breached its contract by denying coverage for either physical or occupational therapy for Leah Salamone, an insured. WEA argues that the trial court committed reversible error by allowing the jury to determine the scope of mandated benefits for newborns and by denying WEA's motions to dismiss the bad faith claim. James and Barbara Salamone (the Salamones) and Leah, by her guardian ad litem, cross-appeal the trial court's refusal to submit the issue of punitive damages to the jury. For the reasons set forth below, we affirm.

The following facts are undisputed. James, a public school teacher, is employed by the Northern Ozaukee School District which maintains a group health insurance policy with WEA. At all times relevant to this appeal, James was a subscriber to the WEA group health policy with family coverage.

On February 17, 1993, Barbara gave birth to their daughter Leah. According to the hospital records, Leah was born with congenital hydranencephaly, a condition in which "[t]here is a small mantle of cerebral tissue, [however] [t]he majority of the cranial vault is occupied by a large fluid collection."[1] The next day, a ventricular peritoneal shunt was inserted to facilitate the draining of excess cerebrospinal fluid. Leah was discharged on February 26, 1993. WEA provided coverage for all surgical procedures, related hospital expenses and medical care that were required to address Leah's congenital condition which totaled $93,804.65 from Leah's date of birth through September 13, 1995.

[1] During an April 1994 hospitalization, Leah's diagnosis was changed to alobar holoprosencephaly with a posterior fossa cyst. This condition involves the failure of the formation of the paired cerebral hemispheres and the lateral ventricle is represented by a single mid-line cavity. This diagnosis is equally disabling.

Shortly after Leah's birth, Dr. David Dunn conducted an examination and noted that "[t]he tone of the lower extremities does not appear to be inordinately increased." The discharge summary also remarked that Leah's tone was normal and her "[h]ips were normal on Ortolani maneuver and there was no obvious neurologic deficit." However, at approximately three months of age, Leah began to exhibit increased muscle tone which if left unchecked "would develop into contractures or more significant tightening of the joints that could potentially be permanent requiring surgical intervention." In June 1993, the Salamones contacted WEA for preauthorization of physical therapy designed to restore Leah's hips and extremities to their condition during the first three months. The therapy was approved by WEA. Then in September, Leah started manifesting some tightness of her shoulders and her pediatrician recommended occupational therapy twice a week for six months.

Upon the Salamones' request for preauthorization, WEA began to reevaluate Leah's file. On October 5, 1993, Pauline Krall, a claims representative, was directed to send a letter to M.J. Care, Leah's therapy provider, for information about the restorative nature of and duration of Leah's therapies. Krall was also directed to "flag" the Salamones' file. After receiving M.J. Care's response, Krall was directed to deny the services based on limitation 30. In the denial letter, dated October 18, 1993, Krall explained that "Leah's therapy appears to be primarily for developmental purposes and is not primarily directed toward restoring a specific bodily function or condition to its status prior to an illness or injury."

The Salamones sought supervisory review of the file. Letters from Leah's therapists and pediatrician were provided to WEA in support of the Salamones' position. Susan Pollow, Claims Service Coordinator, then reviewed the file. Based on her review, Pollow concluded that the charges for Leah's therapies were not eligible for benefit reimbursement. Pollow indicated in a November 16, 1993 letter that Leah's "therapy is

not producing prompt, demonstrable, and significant rehabilitation or restoration of a functional deficit or impairment caused by an illness or injury. There are no specific bodily functions which Leah's therapy is trying to restore to the status prior to the illness or injury."

The Salamones filed their appeal with the WEA appeals committee. Attached to the appeal was a November 26, 1993 letter from Leah's pediatrician, Dr. David Lautz, wherein he attempted to explain that Leah's therapy was in fact providing prompt, demonstrable and significant restoration of the full range of motion to her upper and lower extremities. On December 29, 1993, Pollow wrote to the Salamones advising them that Lautz's letter did not change the company's decision to deny their claims. Pollow concluded that Leah's therapy "was directed at assisting her in progressing through physical or motor development milestones, not at recuperation or restoration." The Salamones reactivated their appeal. Michael Stoll, General Counsel for WEA, prepared a memorandum for the appeals committee outlining the parties' positions and his conclusion that "the decision of the company to deny the physical and occupational therapy claims of Leah … was reasonable." After a hearing, the appeals committee also concluded that WEA's decision was a reasonable interpretation of the insurance policy and sustained WEA's decision to deny further claims for therapy benefits.

In May 1994, the Salamones filed suit alleging breach of contract, bad faith, and seeking damages. The parties filed opposing motions for summary judgment. The court granted partial summary judgment regarding WEA's appeal process, granted summary judgment regarding permanent injury to Leah[2] and denied summary judgment as to the remaining issues.

[2] In the Salamones' motion, they agreed that their fourth cause of action did not include a claim of permanent disability and loss of function; rather, the claim only involved "past disability and loss of function due to the defendant's wrongful conduct."

A jury trial was held from October 30, 1995, through November 3, 1995. During the trial, the defense moved for a directed verdict on the bad faith and personal injury claims. The trial court denied the motion; however, it ruled that the question of punitive damages would not go to the jury. The jury returned a verdict in favor of the Salamones, finding that: WEA had breached its health insurance policy by denying Leah's claim for physical or occupational therapy, the denial constituted bad faith, and awarded $6000 to compensate the Salamones for damages caused by the breach and $55,000 for the bad faith denial. WEA filed postverdict motions which were denied. Judgment was entered against WEA in the amount of $66,446.36 on February 16, 1996. WEA appeals the judgment. The Salamones cross-appeal the trial court's determination that the issue of punitive damages would not be submitted to the jury. Additional facts will be included within the body of the decision as necessary.

Breach of Contract

WEA argues that the trial "court committed reversible error by allowing the jury to determine the scope of mandated benefits for newborns under [§ 632.895(5), STATS.] and administrative regulations." WEA contends that as a matter of law, under the statute and the terms of its policy, it is not required to provide greater reimbursement for infants than for other insured children and the trial court erred when it submitted this question to the jury.

This argument is a red herring. The issue in this case is not the appropriate interpretation of § 632.895(5), STATS.; rather, the issue is whether Leah's physical and occupational therapy were restorative in nature (and covered under the policy), as argued by the Salamones, or preventative (and excluded), as contended by WEA. This is a basic breach of contract case and whether WEA breached its contract is a factual question for the jury. *See* ***DeChant v. Monarch Life Ins. Co.***, 204 Wis.2d 137, 145, 554 N.W.2d 225, 229 (Ct. App. 1996). The trial court discerned this as well; it

instructed the jury to determine whether WEA's insurance policy required reimbursement for Leah's physical or occupational therapy. The trial court correctly submitted this factual determination to the jury.

The jury, in turn, found that WEA breached its health insurance policy by denying Leah's claim for physical and occupational therapy.[3] When reviewing a jury verdict, we determine only whether there is any credible evidence on which the jury *could* have based its decision. *See* ***Nelson v. McLaughlin***, 205 Wis.2d 460, 464, 556 N.W.2d 130, 131 (Ct. App. 1996). The credibility of the witnesses and the weight to be afforded their individual testimony are also left to the jury. *See* ***Finley v. Culligan***, 201 Wis.2d 611, 631, 548 N.W.2d 854, 862 (Ct. App. 1996). The evidence is to be viewed in the light most favorable to sustain the verdict, and where more than one inference can be drawn from the evidence, we must accept the inference drawn by the jury. *See* ***Nelson***, 205 Wis.2d at 464, 556 N.W.2d at 131.

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[3] The relevant portions of WEA's policy provide:

> VII. COVERED MISCELLANEOUS EXPENSES.
> ….
> Other Covered Miscellaneous Expenses include:
> ….
> (4)(b) Physical, speech, or occupational therapy which is rendered by an appropriately licensed therapist and which provides prompt, demonstrable, and significant rehabilitation or restoration of a functional deficit or impairment caused by an illness or injury. Preauthorization is recommended for any long-term therapy or treatment. Covered Expenses will not include charges for preventative or maintenance therapy or treatment.
>
> XI. EXCLUSIONS, LIMITATIONS AND PREAUTHORIZATION REQUIREMENTS
> ….
> B) NO Benefit shall be payable for any procedure, treatment, service, supply, drug or medication which is:
> ….
> 30) Primarily preventative or maintenance in nature, including any type of therapy, care, or treatment that is not primarily directed at or towards a restoration of a specific bodily function or condition to its status prior to the injury or illness ….

After review of the record, we conclude that there was evidence on which the jury could have based its determination. The jury was provided with a consultation summary performed by Dunn shortly after Leah's birth, which noted that "[t]he tone of the lower extremities does not appear to be inordinately increased." Similarly, Leah's discharge summary described her tone as "normal." At her two-month physical, Leah did not exhibit increased tone or spasticity of the lower extremities. However, as Leah's physician explained to WEA in a November 26, 1993 letter:

> At three months of age, on June 1, 1993, I noted increased *tightness and tone* of her lower extremities. I referred her for physical therapy to prevent and avoid contractures of her lower extremities. Over the next couple months, she also developed *tightness* of her upper extremities, and occupational therapy was also recommended.
>
> ….
>
> However, because of the issue related to insurance reimbursement for her therapy, this was discontinued one month ago.
>
> ….
>
> … [C]learly without therapy she is *now developing contractures* of both her upper and lower extremities.
>
> ….
>
> … Thus, retrospectively, we have proven that physical and occupational therapy have *provided prompt demonstrable and significant restoration of function* in this child. … [Emphasis added.]

Although the jury was presented with extensive evidence on both sides of the breach of contract issue, our role is not to retry the case. Rather, this court's duty is to search for credible evidence to sustain the jury's verdict—not search for evidence to sustain a verdict that the jury could have, but did not reach. *See* ***id***. The jury was entitled to find that the evidence presented by the Salamones demonstrated that the physical and occupational therapy were intended to *restore* Leah to her condition from birth to three months of age and were therefore covered under WEA's policy. Accordingly, we affirm.

Bad Faith

WEA further argues that the Salamones' bad faith claim must fail as a matter of law because its "administration of its policy in accordance with the regulations and interpretations of the office of the commissioner of insurance [OCI] cannot constitute bad faith." WEA protests that "[u]nder no circumstances is it correct to say that WEA Insurance's position is without reasonable basis or that OCI's regulations and interpretations of § 632.895(5), Stats., don't even constitute an 'arguable' or 'fairly debatable' basis for WEA Insurance's denial of the claims at issue—OCI's regulations *are law*."

To establish a claim for bad faith, the insured "'must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'" ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 377, 541 N.W.2d 753, 757 (1995) (quoting ***Anderson v. Continental Ins. Co.***, 85 Wis.2d 675, 691, 271 N.W.2d 368, 376 (1978)). The first prong of this test is objective, while the second prong is subjective. *See* ***id.*** Whether WEA denied the claim in bad faith is a factual question for the jury. *See* ***DeChant***, 204 Wis.2d at 145, 554 N.W.2d at 229.

> The trial court instructed the jury to:
>
> > [C]onsider whether [Leah's] claim was properly investigated and whether the results of the investigation were given a reasonable evaluation and review. If you find that [WEA] either refused to consider [Leah's] claim for damages, made no investigation, or conducted its investigation in such a way as to prevent it from learning the true facts upon which [Leah's] claim is based, then the insurance company can be found to have exercised bad faith. …
> >
> > If, on the other hand, you find that the insurance company, after conducting a thorough investigation of the facts and circumstances giving rise to [Leah's] claim, reasonably concluded that the claim is debatable or questionable, then

> there is no bad faith even though it refused to pay the claim.

WIS J I—CIVIL 2761; *see also* ***Weiss***, 197 Wis.2d at 378, 541 N.W.2d at 757.

We are not convinced that the jury's finding of bad faith stems from WEA's interpretation of § 632.895, STATS.[4] Rather, the evidence reveals that WEA provided different reasons for the denial of Leah's claims, depending on the information submitted by the Salamones. The jury could infer from the evidence that WEA was predisposed to deny the claim for physical or occupational therapy because of Leah's "chronic" condition and that its various reasons for denial were contrived. The contrivance is shown by the following evidence.

First, when contacted in June 1993, WEA preauthorized the initial evaluation. After receiving the initial evaluation plan from M.J. Care in July 1993, Krall, a claims representative, determined that the plan was appropriate and she approved the physical therapy.

Then in September, the Salamones sought authorization for occupational therapy as recommended by Lautz. In the first denial letter, dated October 18, 1993, Krall stated that "[t]he notes [from M.J. Care] indicate the goals of … therapy are to develop head, arm and leg control and to feed herself. Leah's therapy appears to be primarily for *developmental purposes* … [and] is not a covered expense." (Emphasis added.)

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[4] Section 632.895(5), STATS., provide

> (a) Every disability insurance policy shall provide coverage for a newly born child of the insured from the moment of birth.
> (b) Coverage for newly born children required under this subsection shall consider congenital defects and birth abnormalities as an injury or sickness under the policy and shall cover functional repair or restoration of any body part when necessary to achieve normal body functioning, but shall not cover cosmetic surgery performed only to improve appearance.

Next, the Salamones sought supervisory review of the denial which was conducted by Pollow, a claims service coordinator. Pollow questioned Lautz and M.J. Care about the medical necessity of the therapy—both indicated that it was.medically necessary.

Pollow then denied the claim on different grounds. Her denial letter, dated November 16, 1993, indicated that "[w]hile Leah may need therapy," Lautz "did not address what prompt, demonstrable, and significant rehabilitation or restoration of a functional deficit was occurring from the therapy." Pollow denied the claim on this basis.

Subsequently, the Salamones appealed Pollow's determination. Included with the appeal was a November 26, 1993 letter from Lautz intended to address Pollow's denial. WEA reconsidered its previous denial, but the new information did not change WEA's previous decision to deny charges for Leah's therapy. Pollow concluded that "Leah's therapy seems to be directed at assisting her in progressing through physical or motor developmental milestones, not at recuperation or restoration … [and] can not reasonably be expected to produce prompt, demonstrable, and significant rehabilitation or restoration of a functional deficit or impairment caused by an illness or injury."

Accordingly, the Salamones reactivated their appeal. The minutes from the appeals committee hearing indicate that:

> [A]s to the requirement that the therapy be expected to produce prompt and significant improvement, Mr. Stoll responded that no particular weight was given to those criteria in Leah's situation because the policy requires that the therapy be directed at restoration and not at prevention. *The company found that Leah's therapy did not pass the restoration test, so the claims staff didn't have to decide whether the therapy could be expected to produce prompt and significant improvement*. … The company concluded that Leah's therapy was not directed at bringing or putting a function back to its former position or condition; it was directed at treating developmental delays and at preventing a relapse or deterioration. [Emphasis added.]

The appeals committee agreed that this was a reasonable interpretation and implementation of the relevant provisions of WEA's policy.

Implicit in the jury's finding of bad faith is its conclusion that WEA either refused to consider Leah's claim for damages, made no investigation, or conducted its investigation in such a way as to prevent it from learning the true facts upon which Leah's claim is based. Throughout the appeals process, WEA consistently modified its reasons for denial. We conclude that the evidence supports a finding that WEA was unreasonable in its consideration of Leah's claim.

The evidence also supports a conclusion that WEA conducted its investigation in such a way as to prevent it from learning the true facts upon which Leah's claim is based. The record establishes that WEA conducted the following investigation: (1) the initial approval was based on an evaluation plan submitted by M.J. Care; (2) the therapy was later denied because of M.J. Care's response to WEA's letter; (3) Pollow "reviewed the processing and handling of Sarah's [sic] claims and … examined all the information provided to [WEA] regarding this matter"; and (4) Pollow later requested Leah's medical records from Lautz and interviewed Lautz and M.J. Care. Clearly, WEA only looked to the medical opinions of Leah's physician and therapist. Yet those opinions were consistently disregarded by WEA's claim representatives. Not once did WEA seek an independent medical review of the files or its insured.[5] Based on this evidence, the jury could reasonably conclude that WEA's investigation was insufficient to learn the true facts. Accordingly, we affirm the jury's finding of bad faith.

[5] We note that WEA's policy provides that "[t]he Company shall determine if a … treatment … is medically necessary and appropriate for the care and treatment of an illness or injury. Medical necessity will be determined based on current medical criteria and technology, and upon the recommendations of *the Company's licensed medical consultants and advisors*." [Emphasis added.]

Cross-Appeal on Punitive Damages

On cross appeal, the Salamones argue that the trial court should have submitted the issue of punitive damages to the jury. The Salamones first contend that the trial court improperly relied on language in ***Anderson***, 85 Wis.2d at 697, 271 N.W.2d at 379, in rejecting their punitive damages claim. Instead, the Salamones insist that "there was sufficient evidence to support a conclusion that a jury in this case may very well have awarded punitive damages." We disagree on both counts.

First, we are unconvinced that the supreme court in ***Weiss***, 197 Wis.2d at 397, 541 N.W.2d at 765, intended to overrule its previous ruling in ***Anderson***. As WEA points out in its brief, Chief Justice Shirley Abrahamson, who authored ***Weiss***, more recently wrote a concurrence in ***DeChant v. Monarch Life Ins. Co.***, 200 Wis.2d 559, 580-82, 547 N.W.2d 592, 600-01 (1996), that addresses punitive damages. In ***DeChant***, Chief Justice Abrahamson quoted the very language from ***Anderson*** that the Salamones argue is no longer applicable:

> Punitive damages are "awarded in addition to compensatory damages for the tort." ***Anderson v. Continental Ins. Co.***, 85 Wis.2d 675, 697, 271 N.W.2d 368 (1978). To assess punitive damages, then, "something must be shown over and above the mere breach of duty for which compensatory damages can be given." ***Wangen v. Ford Motor Co.***, 97 Wis.2d 260, 268, 294 N.W.2d 437 (1980) (quoting ***Meshane v. Second Street Co.***, 197 Wis. 382, 387, 222 N.W. 320 (1928)). To recover punitive damages in bad faith tort cases, "there must be a showing of an evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct." ***Anderson***, 85 Wis.2d at 697.

DeChant, 200 Wis.2d at 580-81, 547 N.W.2d at 600. The majority also cited to ***Anderson*** in reference to a claim for bad faith. *See* ***DeChant***, 200 Wis.2d at 569, 578, 547 N.W.2d at 596, 599. When decisions of our supreme court appear to be inconsistent,

we follow the court's most recent pronouncement. *See* ***State v. Clark***, 179 Wis.2d 484, 493, 507 N.W.2d 172, 175 (Ct. App. 1993). We conclude that the supreme court did not intend to overrule ***Anderson***; rather, it is still good law.

The Salamones further argue that there is ample evidence to support the submission of punitive damages to the jury. The supreme court has directed that "the circuit court initially determines whether the evidence establishes a proper case for allowance of punitive damages and for the submission of the issue to the jury." ***Bank of Sun Prairie v. Esser***, 155 Wis.2d 724, 735, 456 N.W.2d 585, 590 (1990). The plaintiff must prove by clear and convincing evidence that the conduct complained of was "'willful or wanton, in a reckless disregard of [another's] rights or interests'" or "'[o]utrageous.'" ***Bank of Sun Prairie v. Esser***, 151 Wis.2d 11, 26, 442 N.W.2d 560, 565 (Ct. App. 1989) (quoted source omitted). To answer that question in the affirmative, there must be "'evidence … show[ing] that the defendant acted maliciously or in willful or reckless disregard of the plaintiff's rights'" ***Id.*** at 26, 442 N.W.2d at 566 (quoted source omitted). We independently review the record to determine whether as a matter of law the evidence justified submitting the issue to the jury. *See* ***Bank of Sun Prairie***, 155 Wis.2d at 736, 456 N.W.2d at 590.

Based on our review of the record, much of it covered in the discussion just completed, we do not agree that a jury could have determined that WEA's actions were malicious or undertaken in willful or reckless disregard of the Salamones' rights. Even where bad faith can be proved, punitive damages are not always appropriate. *See* ***State Farm Fire & Cas. Ins. Co. v. Walker***, 157 Wis.2d 459, 465, 459 N.W.2d 605, 608 (Ct. App. 1990). Although there is evidence that WEA failed to reasonably consider or investigate Leah's claim, there is no evidence that WEA acted with an evil intent or in an outrageous manner when it denied her claim. We conclude that the evidence is not

sufficient to submit to the jury; the trial court did not err in refusing to give the jury instruction on punitive damages. The Salamones' cross-appeal is dismissed.

No costs to either party.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.