

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2013AP870

Cir. Ct. No. 2012CV1962

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KRISTINE STELLMACH,

PLAINTIFF-APPELLANT,

v.

WISCONSIN HEALTH INSURANCE RISK-SHARING PLAN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kristine Stellmach appeals a summary judgment dismissing Stellmach's action against Wisconsin Health Insurance Risk-Sharing Plan Authority (HIRSP). Stellmach argues that HIRSP was not entitled to

summary judgment on statutory immunity grounds. We conclude that the circuit court properly granted summary judgment to HIRSP. Accordingly, we affirm.

¶2 In 2006, Stellmach obtained health insurance coverage under HIRSP's risk-sharing plan. In December 2010, HIRSP denied Stellmach pre-authorization for a spinal fusion procedure based on HIRSP's determination that the procedure was not "medically necessary" as required under HIRSP's insurance policy. Stellmach pursued HIRSP's procedure for obtaining review internally and then by an independent review organization (IRO), all of which upheld HIRSP's decision. Stellmach then filed this action against HIRSP, seeking damages for breach of contract and a declaration that HIRSP was required to cover the requested procedure under the contract.

¶3 HIRSP moved for summary judgment, asserting two types of statutory immunity and that the IRO decision was binding. Stellmach opposed the motion, contending that HIRSP was not entitled to statutory immunity; that HIRSP waived one of its immunity defenses by failing to raise that defense in its answer; and that the IRO decision was not binding on Stellmach. The circuit court granted summary judgment to HIRSP, determining that HIRSP was entitled to summary judgment for each of the reasons it argued. Stellmach appeals.

¶4 We review summary judgment de novo, applying the same methodology as the circuit court. *Lentz v. Young*, 195 Wis. 2d 457, 468, 536 N.W.2d 451 (Ct. App. 1995). Summary judgment is proper where 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 (2011-12).¹

¶5 Stellmach argues that HIRSP is not immune from this action under WIS. STAT. § 149.105.² She contends that § 149.105 provides HIRSP with immunity from actions in negligence, but does not bar this action seeking review of HIRSP’s insurance coverage decision. We disagree.

¶6 WISCONSIN STAT. § 149.105 provides that, as to HIRSP:

No cause of action of any nature may arise against, and no liability may be imposed upon, the authority, plan, or board; or any agent, employee, or director of any of them; or participating insurers; or the commissioner; or any of the commissioner’s agents, employees, or representatives, for any act or omission by any of them in the performance of their powers and duties under this chapter, unless the person asserting liability proves that the act or omission constitutes willful misconduct.

Under the plain terms of the statute, then, “no cause of action of any nature” may be pursued against HIRSP for its official acts, absent an allegation of willful misconduct.

¶7 Stellmach does not contend that HIRSP’s actions amounted to willful misconduct. Rather, Stellmach argues that the immunity granted by WIS.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Stellmach argues in her brief-in-chief that HIRSP waived immunity under WIS. STAT. § 149.105 by failing to raise that defense in its answer. HIRSP responds that Stellmach has failed to challenge the circuit court’s exercise of discretion in permitting HIRSP to amend its pleading to include that defense, and thus Stellmach may not pursue this argument on appeal. Stellmach does not reply to that argument, and we therefore take this point as conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

STAT. § 149.105 is limited to actions “asserting liability,” which Stellmach interprets as negligence actions. Thus, according to Stellmach, HIRSP is not entitled to immunity from this action seeking review of HIRSP’s decision to deny coverage under the insurance contract.

¶8 We do not share Stellmach’s reading of WIS. STAT. § 149.105. Nothing in the statute limits the immunity granted to HIRSP to negligence actions. Rather, the statute grants HIRSP immunity from actions “of any nature,” which would by definition include this action. Additionally, the term “asserting liability” does not support a reasonable inference that the action must sound in tort; clearly, this action for a declaration of coverage and breach of contract asserts liability against HIRSP.³ See BLACK’S LAW DICTIONARY 997 (9th ed. 2009) (defining liability as “[t]he quality or state of being legally obligated or accountable; legal responsibility to another ... enforceable by civil remedy ...); see also *Maxwell v. Hartford Union High Sch. Dist.*, 2012 WI 58, ¶¶34, 58, 341 Wis. 2d 238, 814 N.W.2d 484 (discussing an insurer’s liability under an insurance contract). Because HIRSP is entitled to statutory immunity from this action, we affirm the summary judgment dismissing Stellmach’s claims.⁴

³ Indeed, Stellmach’s complaint seeks monetary compensation.

⁴ Because we conclude that HIRSP is immune from this action under WIS. STAT. § 149.105, we need not address the parties’ other arguments. We decline HIRSP’s invitation to address additional issues in this appeal. Additionally, we do not reach Stellmach’s policy arguments against granting immunity to HIRSP. Such arguments may be addressed to the legislature, but in any case we cannot entertain them.

By the Court.—Judgment affirmed.

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

