COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-3215

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

BETTY BUTLER,

PLAINTIFF-APPELLANT,

v.

AAA LIFE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Betty L. Butler appeals from the judgment of the trial court granting summary judgment to AAA Life Insurance Company (AAA). Butler contends that summary judgment was improper because: (1) AAA waived its right to contest the validity of the policy under which she was a beneficiary;

and (2) there exist genuine issues of material fact as to whether AAA had a reasonable basis to deny Butler's claim for benefits. We conclude that AAA did not waive its right to contest the policy. We also determine that there are no genuine issues of material fact precluding an award of summary judgment in favor of AAA. Consequently, we are satisfied that all of Butler's claims, including those seeking punitive damages, were properly dismissed. Accordingly, we affirm.

I. BACKGROUND.

¶2 Butler's claims arise from her status as the named beneficiary under a life insurance policy purchased from AAA by her deceased husband, James Butler. When applying for the policy on January 23, 1995, James Butler acknowledged a physician's diagnosis of hypertension, but he failed to disclose additional diagnoses of cirrhosis, alcoholism, and viral infections from hepatitis B and C. After James Butler's death on May 23, 1997, Butler filed a claim with AAA for benefits under the policy. AAA acknowledged Butler's claim by letter, but it questioned whether the policy had been in force less than two years. As a consequence, it advised Butler that it intended to undertake an investigation of the claim. The subsequent investigation substantiated that the policy had been in force for more than two years, but it also revealed that James Butler had misrepresented his health when applying for the policy. Consequently, AAA denied Butler's claim on the basis of the misrepresentation.

¶3 Butler then filed suit against AAA. Shortly thereafter, Butler amended her complaint seeking both the proceeds of the life insurance policy and punitive damages for AAA's "bad faith." Subsequently, she filed a second

amended complaint, which sought additional compensatory damages for interest on certain loans, legal expenses, emotional distress, and medical expenses.

¶4 Before filing an answer to Butler's second amended complaint, AAA attempted to tender the policy limits with interest to Butler to settle her claim for compensatory damages. Butler refused this tender, which was subsequently offered and refused again. AAA then filed an answer to Butler's second amended complaint. In it, AAA affirmatively asserted that it acted in "good faith" when it investigated her claim for benefits, and that it had twice attempted to tender the policy limits. AAA contends that this tender should not only dispose of Butler's initial claim for the proceeds of the life insurance policy, but also defeat any claims for additional damages, including punitive damages that might have been obviated by acceptance of the tender.

¶5 At the summary judgment hearing, AAA advanced the argument that, despite the two-year incontestability clause contained in WIS. STAT. § 632.46(2), which outlines limitations on an insurer's right to contest policies, it was not precluded from contesting the policy because of the operation of WIS. STAT. § 600.01(1)(b)3, which delineates what types of insurance coverage are subject to the requirements of Chs. 600 to 646.[1] AAA argued that it is a "group" insurer within the meaning of § 600.01 and, thus, it was relieved of the incontestability requirements of § 632.46, pursuant to the statute's exemption. The trial court agreed, determining that AAA was not barred by the statute from raising the issue of misrepresentation, and it dismissed Butler's claim for punitive damages, concluding that no "bad faith" on AAA's part had been substantiated.

[1] All references to the Wisconsin Statutes are to the 1997-1998 version unless otherwise specified.

The trial court did, however, order that Butler receive the limits of the policy. Inasmuch as AAA had made a previous statutory offer in excess of these limits, AAA was awarded its statutory costs. Butler appeals.

II. ANALYSIS.

¶6 On appeal, Butler raises eleven issues. As AAA suggests, all of the issues fall into two primary groups. Essentially, Butler argues that the trial court erred when it decided that: (1) AAA had not waived its right to contest the validity of the policy; and (2) there were no genuine issues of material fact preventing summary judgment on AAA's contention that it had a reasonable basis to deny Butler's claim for benefits.

¶7 Our review of a trial court's grant of summary judgment is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). We use the same summary judgment methodology as the trial court. *See* ***id.*** That methodology has been described in many cases, *see, e.g.*, ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), and need not be repeated here, save to observe that summary judgment must be granted if the evidentiary material demonstrates "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law," WIS. STAT. § 802.08(2). Moreover, because our consideration of this matter involves the trial court's interpretation of the Wisconsin Statutes, we also review such statutory construction independently. *See* ***Church v. Chrysler Corp.***, 221 Wis. 2d 460, 466, 585 N.W.2d 685 (Ct. App. 1998).[2]

[2] Although we undertake independent review of the issues in this case, as they concern matters of law, we value the trial court's decisions on such questions. *See* ***M&I First Nat'l Bank v. Episcopal Homes Management Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶8 We determine that the trial court properly interpreted the operation of WIS. STAT. §§ 600.01 and 632.46 in support of its finding that AAA did not waive the right to contest the validity of the policy. We also determine that the trial court correctly found that no genuine issues of material fact existed. Thus, the trial court's finding that AAA had a reasonable basis to deny Butler's claim for benefits was appropriate. Consequently, we are satisfied that the trial court properly granted summary judgment on all of Butler's claims, and therefore, we affirm its order.

A. *AAA did not waive its right to contest the policy.*

¶9 Butler contends that AAA has waived its right to contest the policy under operation of Wisconsin's insurance law. Butler primarily disputes the trial court's holding that AAA is exempt from WIS. STAT. § 632.46 by virtue of WIS. STAT. § 600.01(1)(b)3.[3] In support of her contention, Butler points to the specific

[3] WISCONSIN STAT. § 632.46(2) provides:

> **Incontestability and misstated age.**
> ….
> (2) INCONTESTABILITY OF GROUP POLICIES. Except under sub. (3) or (4) or for nonpayment of premiums, no group life insurance policy may be contested after it has been in force for 2 years from its date of issue and no coverage of any insured thereunder may be contested on the basis of a statement made by the insured relative to his or her insurability after the coverage has been in force on the insured for 2 years during the lifetime of the insured. No such statement may be used to contest coverage unless contained in a written instrument signed by the insured person.

WISCONSIN STAT. § 600.01(1)(b)3 provides:

> (1) General. (a) Chapters 600 to 655 restrict otherwise legitimate business activity and what chs. 600 to 655 do not prohibit is permitted unless contrary to other provisions of the law of this state.
> (b) Unless otherwise expressly provided, chs. 600 to 646 do not apply to:

(continued)

text of Chapter 600 to demonstrate that AAA is not exempted from its requirements. Butler argues that the trial court incorrectly determined the interplay between §§ 600.01 and 632.46. Butler contends that it was error for the trial court to find that the plain language of § 600.01 unambiguously relieves AAA of the requirements of § 632.46 because it qualifies as a "group" insurer under the statute. Based on our independent review, we determine that the trial court's construction of Chapter 600, which found AAA exempt from the operation of § 632.46 because of § 600.01(1)(b)3, was correct.

¶10 Butler contends that the phrase "[u]nless otherwise expressly provided, chs. 600 to 646 do not apply to…[g]roup or blanket insurance," contained in WIS. STAT. § 600.01 should be read in such a way as to find WIS. STAT. § 632.46(2), INCONTESTABILITY OF GROUP POLICIES, as such an "express" provision. We disagree. The trial court held, and we conclude, that because Butler chose to argue the law concerning the applicability of § 600.01(1)(b)3, rather than challenge the predicate facts establishing that AAA

> ….
> 3. Group or blanket insurance covering risks in this state if:
> a. Both the policyholder and the group exist primarily for purposes other than to procure insurance; am. The relationship or association between the policyholder and the group was not created for purposes of procuring insurance;
> b. The policyholder is not a Wisconsin corporation or other resident and does not have its principal office in Wisconsin;
> c. No more than 25% of the certificate holders or insureds are resident in this state;
> cm. Exemption from the operation of chs. 600 to 646 is not determined by rule or order of the commissioner to be contrary to the public interest;
> d. On request of the commissioner, the insurer files with the commissioner a copy of the policy and a copy of each form of certificate; and e. The insurer agrees to pay taxes on the Wisconsin portion of the business on the same basis it would do if authorized to do business in this state, and provides the commissioner with such security as the commissioner deems necessary for the payment of such taxes.

qualified as a "group" insurer under that section, she had, in effect, stipulated to those predicate facts. Thus, we are satisfied that AAA was a "group" insurer. Further, the statute, in clear, unambiguous language, states that "group" insurers are exempt from § 632.46's uncontestability provision. Therefore, we conclude that AAA was not precluded from contesting the policy by operation of Wisconsin insurance law.

¶11 In further support for her claim that AAA has waived its right to contest the policy, Butler invokes the "mend the hold" doctrine. This doctrine, viewed broadly, stands for the proposition that a party is barred from changing its position in litigation, and is, as Butler notes, similar to the doctrine of judicial estoppel.[4] Butler claims that AAA's investigation of her claim on the erroneous belief that the policy had been in force less than two years now estops AAA from contesting the validity of the policy on other grounds. Butler asserts, in effect, that AAA's initial investigation of her claim based on the amount of time the policy had been in force serves as a denial of coverage for that reason and, therefore, constitutes an admission of liability under the incontestability clause of WIS. STAT. § 632.46(2) that precludes AAA from contesting the validity of the policy on other grounds as a matter of law. We are not persuaded by Butler's argument.

[4] The "mend the hold" doctrine, first articulated by the United States Supreme Court in ***Ohio & Mississippi Railway Co. v. McCarthy***, 96 U.S. 258, 268 (1877), is noted by Judge Posner as being substantively a corollary to the duty of good faith and ethical obligations in contract relations. *See* ***Harbor Ins. Co. v. Continental Bank Corp***., 922 F.2d 357, 362-65, (7th Cir. 1990). Judge Posner additionally notes that the "mend the hold" doctrine is a cousin to the doctrine of judicial estoppel. *See* ***id.*** at 364. Posner says that in contrast to the doctrine of judicial estoppel, which bars a party from changing position in successive suits, the "mend the hold" doctrine applies within a single suit. *See* ***id.*** Thus, according to Posner, each doctrine serves a separate purpose. *See* ***id***.

¶12 First, Butler has cited no authority demonstrating that the "mend the hold" doctrine is applicable Wisconsin law in an insurance context. Next, the doctrine is not relevant to the facts of this case. The "mend the hold" doctrine, as it relates to insurance law, regards shifting positions for denying coverage. Here, it is inapplicable as we agree with the trial court's holding that AAA did not deny coverage on the grounds of its initial belief that the insured's policy had been in force less than two years; rather, it only formed the basis of its investigation on these grounds. Thus, even if the "mend the hold" doctrine does apply in Wisconsin, it would not be germane here.

¶13 Citing WIS. STAT. § 802.03(2), Butler next asserts that AAA waived its right to contest the policy because it did not plead misrepresentation as an affirmative defense in its answer to her second amended complaint. We disagree. Our review of the record supports the trial court's conclusion that the pleadings sufficiently informed Butler of its affirmative defense.

¶14 Notice-giving is the principal function of pleading under the Federal Rules of Civil Procedure, as adopted by the Wisconsin Supreme Court in WIS. STAT. Chapters 801-803.[5] Under our system of notice pleading, one need only give the opposing party "fair notice" of what the claim is and "the grounds upon which it rests." ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986). AAA averred in its answer that it investigated Butler's claim for benefits in "good faith." The averment was made in specific response to

[5] WISCONSIN STAT. §802.02, which adopts notice pleading, is based on FED. R. CIV. 8(a). *See* ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986). Rule 8(a) has been characterized as a "liberal" rule that allows litigants to "'plead generally and discover the precise factual basis for [the] claim through equally liberal … discovery procedures.'" ***Id.*** (citation omitted).

paragraph five of Butler's second amended complaint, which lays the foundation for her claim of "bad faith." We conclude that AAA's averment of "good faith" in its answer provided Butler with "fair notice" of its position concerning James Butler's misrepresentation, as well as its initial investigation of Mrs. Butler's claim. *See* ***id.*** Furthermore, we are satisfied that AAA's averment of "good faith" accords with Wisconsin law as a proper defense to Butler's bad faith claim for punitive damages and, therefore, we determine that AAA did not waive its right to contest the policy because it failed to use the word "misrepresentation" in its pleading. *See* ***Norwest Bank Wisconsin Eau Claire, N.A. v. Plourde***, 185 Wis. 2d 377, 388, 518 N.W.2d 265 (Ct. App. 1994) ("Wisconsin has a notice pleading statute that does not require 'magic words' except in limited circumstances.").

¶15 Next, Butler contends that AAA waived its right to contest the policy because it ratified and affirmed the policy by retaining the policy premiums. For support, Butler relies on ***Williams v. National Casualty Co.,*** 190 Wis. 442, 209 N.W.2d 597 (1926). We conclude that this authority is inapposite to the facts of this case.

¶16 ***Williams*** deals specifically with insurance companies retaining premiums *after* obtaining knowledge of an insured's misrepresentation, thereby ratifying the subject policy. *See* ***id.*** at 443-44. Here, AAA had no knowledge that the insured had misrepresented his health on his application for the life insurance policy until after James Butler's death when AAA conducted an investigation of the claim prompted by AAA's mistaken belief that the policy had been in effect less than two years. Because AAA did not collect or retain any premiums on the policy after learning of the insured's misrepresentation, there was no ratification under ***Williams***. Furthermore, Butler has not offered any authority, and we have found none, barring an insurance company from contesting a policy because it

failed to return previously received premiums while there is a legitimate dispute as to the payment of the policy proceeds. Absent this authority, we conclude that AAA is not barred from contesting the policy by its retention of the policy premiums.

¶17 Next, Butler argues that AAA waived its right to contest the validity of the policy because it tendered the entire policy proceeds and applicable interest before filing an answer. It is Butler's position that AAA's tender of the policy limits serves as a judicial admission that such amount was owed. We disagree. A judicial admission must be "clear, deliberate, and unequivocal." ***Fletcher v. Eagle River Mem'l Hosp***., 156 Wis. 2d 165, 174, 456 N.W.2d 788 (1990). We are satisfied that AAA's tender was an effort to settle Butler's claims, and not a clear, deliberate, and unequivocal admission of liability. Consequently, we conclude that AAA is not barred from contesting the validity of the policy due to its tender.

¶18 Thus, we conclude that AAA did not, by operation of law or otherwise, waive the right to contest the validity of the subject policy.[6]

B. *AAA had a reasonable basis for denying Butler's claim.*

¶19 Butler contends that the trial court erred when it found in favor of AAA on her claim of bad faith because she believes that genuine issues of material fact exist as to whether AAA had a reasonable basis to deny her claim for benefits.

[6] We note that Butler also argues that AAA waived the right to contest the validity of the policy because it failed to verify the insured's health condition at the time of application. We decline to address this issue because it was not raised to the trial court. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (generally, this court will not address issues raised for the first time on appeal).

¶20 Bad faith is an intentional tort. *See* ***Anderson v. Continental Ins. Co.,*** 85 Wis. 2d, 675, 697, 271 N.W.2d 368 (1978*)*. "Bad faith" generally implies dishonesty in dealing between parties. *See* ***id.*** at 692. The term refers to willfulness on the part of one party to trick another. *See* ***id.*** "Bad faith" is not the same as negligence or mistake, and may or may not constitute fraud. In the context of an insurance policy, "bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim." ***Id.*** at 692.

¶21 In order to maintain a bad faith claim, Butler must show that AAA had no reasonable basis on which to deny her claim, and that AAA intentionally or recklessly disregarded her interests by its conduct. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 376, 541 N.W.2d 753 (1995); ***Anderson,*** 85 Wis. 2d at 691. In other words, maintenance of Butler's claim for bad faith requires her to show not merely negligence on the part of AAA, but an intentional or reckless disregard for her interest. *See* ***Warren v. American Family Mut. Ins. Co.***, 122 Wis. 2d 381, 385, 361 N.W.2d 724 (Ct. App. 1984).

¶22 First, Butler argues that AAA had no reasonable basis to deny her claim for benefits. She claims the deposition testimony of AAA's employees supports her position. We disagree. The depositions of AAA's employees included questions specifically regarding Butler's claim for benefits, information relating to the company's claim practice in general, and the operation of Wisconsin Statutes. Butler claims that the deposition testimony of AAA's employees establishes that AAA had no reasonable basis on which to deny her claim. We are satisfied that the testimony Butler points to does not supply a factual basis for such a determination. Further, it is apparent that the trial court gave this evidence due consideration, but decided that certain portions of the

testimony had to be excised because they did not comport with the Wisconsin Rules of Evidence.[7]

¶23 Next, Butler contends that the trial court improperly excluded an affidavit of Attorney Marjan Kmiec. Attorney Kmiec's affidavit criticized AAA's handling of Butler's claim. Attorney Kmiec came to this conclusion after reviewing the claim file, the policy itself, and several letters sent to Butler by AAA regarding the policy. Butler argues that Kmiec's testimony is that of an expert, and established not only that AAA had no reasonable basis on which to deny her claim for benefits, but also that AAA's denial of Butler's claim was in reckless disregard of her rights.

¶24 The trial court found that the affidavit testimony of Attorney Kmiec was not properly submitted and, therefore, did not consider it with respect to AAA's motion for summary judgment. The trial court reasoned that "the affidavit itself [was] not helpful on any of the issues of this case," and that it [the trial court] was "in a [sic] good position as [Kmiec] … to determine the principles of law which he [asserted] in this affidavit." Based on our review of the affidavit, we, too, determine that the substance of Attorney Kmiec's affidavit does not qualify as "expert" testimony and was, thus, properly excluded from consideration. *See* WIS. STAT. § 907.02. Implicit in the trial court's statements is its determination that Attorney Kmiec does not meet the minimum requirements that would qualify him as being able to offer expert testimony in this matter. Kmiec had no special knowledge about insurance company practices. He had only been involved in

[7] Portions of the depositions of AAA employees were excluded by the trial court after AAA objected that the questioning improperly called for legal conclusions. The trial court agreed.

suits with insurance companies as a party. Possessing a law degree, coupled with litigation experience, does not necessarily transform one into an expert on the inner workings and operation of AAA, especially when the bulk of such experience was gained in the context of subrogation and recovery.

¶25 In sum, we conclude that AAA could lawfully contest the validity of the policy, and that the record of this case reflects no genuine issues of material fact concerning whether AAA had a reasonable basis to deny Butler's claim under the subject policy. Thus, summary judgment was appropriate. It is uncontroverted that Mr. Butler misrepresented his health condition to AAA when applying for the policy and this was a legal basis for AAA to deny coverage.[8] We also conclude that AAA and its agents did not act in an intentional or reckless disregard of Butler's interest. Furthermore, we note that punitive damages are to be awarded only when a wrong is inflicted under "'circumstances of aggravation, insult or cruelty, with vindictiveness or malice.'" ***Mid-Continent Refrigerator Co. v. Straka***, 47 Wis. 2d 739, 747, 178 N.W.2d 28 (1970) (citation omitted). We are satisfied that no such circumstances are reflected in the record of this case. Therefore, because AAA did have a reasonable basis to deny Butler coverage, we determine that it did not engage in conduct that intentionally or recklessly disregarded her interest. Thus, the trial court properly disposed of Butler's bad faith claim for punitive damages.[9]

[8] Indeed, the record reflects that Mr. Butler applied for the policy one month after receiving the diagnosis of cirrhosis and hepatitis, neither of which was disclosed to AAA.

[9] The trial court's ruling on Butler's bad faith claim effectively disposed of the matter because Butler's claims for compensatory damages and additional compensatory damages were resolved with AAA's tender of the policy's proceeds, which the trial court awarded her.

¶26 For all the above reasons, we conclude that the circuit court properly determined that AAA was entitled to summary judgment.

By the Court.—Judgment affirmed.

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