COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1075

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

ROSE LANNOYE AND GLENN L. LANNOYE AND WAYNE J. LANNOYE, INDIVIDUALLY AND AS LEGAL GUARDIAN OF ROSE A. LANNOYE,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Rose Lannoye, through her legal guardian, Wayne Lannoye, appeals a summary judgment dismissing two claims against her insurance carrier, Wisconsin Physicians Service Insurance Corporation (WPS).[1] Lannoye argues that the circuit court erred by granting summary judgment in favor of WPS on her claim of bad faith because there were genuine issues of material fact. Lannoye also argues that the circuit court erred by granting summary judgment in favor of WPS on her claim for benefits from May 1, 1998, through May 31, 1999, because WPS is estopped from asserting a proof of claim defense. We conclude that summary judgment was improperly granted on Lannoye's claim of bad faith because issues of material fact exist and, therefore, we reverse that judgment. We affirm the circuit court's grant of summary judgment on Lannoye's claim for benefits from May 1, 1998, through May 31, 1999.

BACKGROUND

¶2 Lannoye purchased a Medicare Supplement Insurance policy from WPS in 1992. The policy covered various medical expenses, including care in a skilled nursing facility, but did not cover custodial care. Lannoye was admitted by her physician, Dr. Richardson, to the Odd Fellows Nursing Home, a skilled nursing facility, on May 25, 1997, to receive care for a diabetic condition. At the time of her admission, Medicare was the primary payer and WPS was the secondary payer.

¶3 Medicare continued as the primary payer until September 5, 1997. WPS then became the primary payer. Following a review of claims by WPS medical personnel, WPS continued primary payment through November 1997.

[1] This court granted Lannoye's leave to appeal on May 16, 2000.

¶4 After November 1997, WPS forwarded Lannoye's medical records to the Medical Review Institute of America (MRI) in Salt Lake City, Utah, for a determination of whether Lannoye was receiving custodial or skilled care. MRI's opinion was inconclusive.

¶5 WPS then sought the opinion of Dr. Kate Templeton, an independent medical consultant. Templeton concluded that Lannoye's condition did not require skilled service. As a result, WPS denied Lannoye's claims for December 1, 1997, through April 30, 1998.

¶6 Lannoye appealed the denial of her claims to the WPS Claims Appeal Committee. The committee forwarded the record to Dr. Alfred Dally, an outside medical advisor. Dally concluded that Lannoye's condition did not require care from a professionally trained person. The committee concluded that Lannoye's care was custodial in nature and denied all benefits under the policy.

¶7 Lannoye filed an action in circuit court against WPS, claiming breach of contract and bad faith denial of her insurance coverage. WPS moved for summary judgment seeking dismissal of the bad faith claim and dismissal of any claim for charges incurred during the period of May 1, 1998, through May 31, 1999.

¶8 While the motion was pending, Lannoye submitted a claim for benefits to WPS for expenses incurred from May 1, 1998, through May 31, 1999. WPS denied the claim.

¶9 The circuit court then granted partial summary judgment in favor of WPS, dismissing Lannoye's bad faith claim and her claim for benefits from

May 1, 1998, through May 31, 1999. Lannoye petitioned this court for leave to appeal, and we granted the petition.

STANDARD OF REVIEW

¶10 We review summary judgments independently, employing the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).[2]

¶11 Courts examine summary judgment motions in a three-step process. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). First, we must determine whether the pleadings set forth a claim for relief as well as a material issue of fact. *See* ***id.*** Second, we must decide whether the moving party's affidavit and other proofs present a prima facie case for summary judgment. *See* ***id.*** Finally, the court examines the affidavits and proofs of the opposing party to determine whether any disputed material fact exists, or whether any undisputed material facts are sufficient to allow for reasonable alternative inferences. *See* ***id.***

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

DISCUSSION

I. BAD FAITH

¶12 Lannoye's insurance policy covers care received in a skilled nursing facility. The relevant language in the policy reads as follows:

> SECTION II - BENEFITS
>
> B. SKILLED NURSING FACILITIES: 1. For confinement in a skilled nursing facility participating in Medicare:
>
> …
>
> b) Benefit
>
> (1) You were a hospital impatient for at least 3 days. Then you were admitted to a Medicare participating skilled nursing facility within 30 days after being discharged from the hospital. The hospital had treated you for an illness. If this is the case, we'll pay the Medicare Part A coinsurance for services during the 21st to the 100th day. The services had to be covered by Medicare. We pay no benefits for custodial care.
>
> (2) In the same benefit period, you may stay confined in the skilled nursing facility after we've paid the above benefits. If so, we'll pay the charges for each day you stay in. We pay no benefits for custodial care.

¶13 The specific exclusion of "custodial care" in the policy states as follows:

> SECTION IV - EXCLUSIONS
>
> We won't pay for items or services:
>
> H. When the charges are for custodial care. This is care that could be provided by persons without professional medical skills and training; it's primarily to help you meet the needs of daily living.

¶14 Lannoye argues that summary judgment was improperly granted in favor of WPS because: (1) Lannoye is entitled to coverage under the policy as a

matter of law; (2) WPS failed to make a prima facie case for summary judgment; and (3) even if WPS made a prima facie showing, there are factual issues in dispute. We agree that there are factual issues in dispute. Because our resolution of this issue is dispositive of this part of the appeal, we need not address the other issues Lannoye raises. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¶15 WPS argues that to be entitled to summary judgment on a claim of bad faith, it must only show that the claim was "fairly debatable." ***Red Arrow Prods. Co. v. Employers Ins.***, 2000 WI App 36, ¶17, 233 Wis. 2d 114, 607 N.W.2d 294. We disagree.

¶16 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." ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). The insurer's conduct is to be measured against what a reasonable insurer would have done. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 378, 541 N.W.2d 753 (1995).

¶17 In this case, Lannoye submitted an affidavit by Grant Hubbard who gave his expert opinion that: (1) WPS failed to act as a reasonable insurer by failing to perform a complete, thorough and neutral investigation and by ignoring evidence and information concerning Lannoye's treatment; (2) WPS failed to exercise good faith and fair dealing when it chose to equate Lannoye's diabetic condition with the usual care required for diabetic patients; and (3) WPS denied Lannoye's claim based upon flawed investigation and without a reasonable basis for disputing coverage.

¶18 WPS argues that Hubbard's affidavit offers only conclusions, not disputed facts. WPS contends that it is necessary to set forth specific evidentiary facts that are actually disputed. *See* ***Helland v. Froedert Mem'l Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). Additionally, WPS argues that expert witness opinions are not to be considered at summary judgment. *See* ***Safe Water Ass'n v. City of Fond du Lac***, 184 Wis. 2d 365, 374, 516 N.W.2d 13 (Ct. App. 1994). We disagree.

¶19 An affidavit supporting a motion for summary judgment is sufficient if the affidavit sets forth an expert opinion on an issue for which expert testimony must be offered. *See* ***Dean Med. Ctr. v. Frye***, 149 Wis. 2d 727, 733-34, 439 N.W.2d 633 (Ct. App. 1989). Our supreme court has held that, while not a categorical requirement on every bad faith claim, an insured should be required to introduce expert witness testimony if the circuit court finds that an insurer's alleged breach of its good faith duty is "unusually complex." ***Weiss***, 197 Wis. 2d at 379.

¶20 WPS's reliance on ***Safe Water*** is misplaced. ***Safe Water*** does not bar the use of an expert witness's opinion at the summary judgment level. Rather, ***Safe Water*** refers to the general rule that a summary judgment affidavit is usually insufficient if it sets forth only opinion. *See* ***Safe Water***, 184 Wis. 2d at 374.

¶21 Here, Hubbard's affidavit states underlying facts, not just bare opinions. Hubbard relies on the fact that Richardson, Lannoye's original physician, stated that Lannoye needed constant skilled nursing services and was not a candidate for custodial care. Hubbard also relies on the statements of Lannoye's current physician, Dr. Walburn, and Lannoye's current nurse, Deb Parrot. Both stated that Lannoye received skilled nursing care on a daily basis.

¶22 At a minimum, differing inferences can be drawn regarding the type of care Lannoye was receiving. It is for the jury to decide whether WPS properly investigated Lannoye's condition to determine whether she was receiving skilled care or custodial care. It is for the jury to measure WPS's conduct against what a reasonable insurer would have done under the particular facts and circumstances to conduct a fair and neutral evaluation of the claim. *See* ***Weiss***, 197 Wis. 2d at 378. As a result, we conclude that the circuit court improperly granted summary judgment in favor of WPS because genuine issues of material fact exist.

II. CLAIMS FOR BENEFITS FROM MAY 1, 1998, THROUGH MAY 31, 1999

¶23 Next, Lannoye argues that summary judgment is inappropriate on the claims for May 1, 1998, through May 31, 1999, because: (1) circumstances beyond Lannoye's control created an issue of fact for the jury to decide; (2) WPS denied the claims as custodial and is therefore estopped from asserting proof of claim as a defense; (3) the trial court went beyond WPS's summary judgment motion and granted summary judgment on a basis not argued by WPS; and (4) WPS breached the policy by wrongfully denying benefits to Lannoye thereby waiving any right to assert the proof of claim provision as a defense. We disagree.

¶24 The relevant policy language is as follows:

> SECTION VII - MISCELLANEOUS PROVISIONS
>
> B. PROOF OF CLAIM. You must submit proof of claim within 120 days of occurrence. If circumstances beyond your control make this time limit unreasonable, you must file claim as soon as possible: but it can't be later than 1 year and 120 days after occurrence unless you're legally incapacitated.

A. Circumstances Beyond Lannoye's Control

¶25 Lannoye argues that the policy language "circumstances beyond your control" is a built in factual issue to be decided by the jury. We disagree.

¶26 Before a court may find noncompliance with the notice provision as a matter of law, the court must be able to say that: (1) there is no material issue of fact as to when notice was given, and when, under the policy, the duty to give it arose; and (2) no jury could reasonably find the delay "reasonably necessary" under the circumstances. ***Garcia v. Regent Ins. Co.***, 167 Wis. 2d 287, 303-04, 481 N.W.2d 660 (Ct. App. 1992).

¶27 Under the first element, the date notice of the proof of claim is to be given is clear. An insured must submit a proof of claim within 120 days of the occurrence. If circumstances beyond an insured's control arise, the period to submit a proof of claim is one-year and 120-days. The time period can be extended only in the event of a legal incapacity. Here Lannoye did not submit the proof of claims for May 1, 1998, through May 31, 1999, until December 17, 1999.

¶28 Lannoye has not submitted any disputed evidentiary facts about circumstances beyond her control. It is undisputed that Wayne was Rose's legal guardian for all relevant time periods. Wayne does not claim he was unable to act. Absent facts to support "circumstances beyond your control," notice was required within 120 days of the occurrence.

¶29 The second element is whether any jury could reasonably find that the delay was reasonable and necessary under the circumstances. The claims submitted for May 1, 1998, through May 31, 1999, did not include any explanation of circumstances beyond Lannoye's control that made the 120-day

time limit unreasonable. There are no evidentiary facts to infer that Lannoye's filing a proof of claim after the 120-day deadline was reasonable and necessary under the circumstances.

¶30 Lannoye has failed to set forth specific facts showing that there is a genuine issue for trial. *See* ***Maynard v. Port Pub'ls, Inc.***, 98 Wis. 2d 555, 561, 297 N.W.2d 500 (1980).

¶31 Lannoye additionally argues that the circuit court erroneously concluded that the proof of claim language in the policy allows for filing within one year and 120 days only if there is a legal incapacity.

¶32 While the ruling of the circuit court may be beneficial, we reach a conclusion without deference to the circuit court. *See* ***Green Spring Farms***, 136 Wis. 2d at 315. The policy clearly does not allow filing proof of claim beyond one year and 120 days unless there is a legal incapacity.

¶33 It is undisputed that Wayne Lannoye was the court appointed legal guardian for Rose Lannoye throughout all relevant time periods. Lannoye's counsel submitted an affidavit by Wayne Lannoye that stated he has handled all of the insurance claims for nursing home benefits which are the subject of the case. As a legal guardian, he stands in the shoes of Rose Lannoye on financial matters. *See* WIS. STAT. ch. 880. As a result, we reject this argument.

B. Estoppel

¶34 Lannoye argues that WPS is estopped from asserting its proof of claim defense because a letter dated February 7, 2000, determined that Lannoye's care was custodial. Lannoye bases her argument on the holding in ***Liner v. Mittelstadt***, 257 Wis. 70, 42 N.W.2d 504 (1950). Lannoye contends that ***Liner***

stands for the general proposition that an insurer's denial of coverage excuses the insured from compliance with the contract. *See* ***id.*** at 80.

¶35 However, in ***Ehlers v. Colonial Penn Ins. Co.***, 81 Wis. 2d 64, 72, 259 N.W.2d 718 (1977), our supreme court clarified the circumstances under which an insurer waives proof of loss. The court held:

> It is generally held that a denial of liability by an insurer, made during the period prescribed by the policy for the presentation of proofs of loss, will ordinarily be considered as a waiver of the provision requiring the proofs to be submitted. [citations omitted]. Therefore, to determine whether the defendant's denial of liability constituted a waiver of the proofs of loss requirement, it is necessary to determine whether the denial of liability occurred during the period in which the proofs could have been timely submitted.

In essence, an insurer only waives proof of loss if it denies liability during the contractual notice of loss time period.

¶36 In the present case, WPS denied liability on February 7, 2000, on the claims from May 1, 1998, through May 31, 1999. This denial of liability occurred outside the 120-day proof of claim period following the last occurrence on May 31, 1999. Lannoye has not shown circumstances beyond her control or a legal incapacity. As a result, the 120-day limit applies. Under ***Ehlers***, WPS is not estopped from asserting the proof of claim defense.

¶37 Lannoye additionally contends that it is inequitable to allow summary judgment because WPS did not notify her on February 7, 2000, that the policy defense was not being waived. We reject that argument because Lannoye was fully aware that WPS was asserting a proof of claim defense when it moved for summary judgment.

C. Proof of Claim

¶38 Lannoye argues that the trial court went beyond WPS's motion for summary judgment and granted the motion based upon the proof of claim provision. Lannoye contends that WPS's basis for the motion was that the claims had not been received or adjudicated. Prior to oral argument in the circuit court, WPS received the claims and denied them. Lannoye argues that the grounds for summary judgment were thus eliminated.

¶39 Lannoye's argument ignores the plain language of WPS's summary judgment motion. A review of the record reveals that WPS moved for summary judgment because, in addition to the claims not having been received, Lannoye had not performed a condition precedent which invoked WPS's duty to act with regard to claims for dates of service. In other words, Lannoye had not submitted proof of claim within 120 days of the occurrence. Because timely notice of claim is a condition precedent to liability under an insurance policy, the untimeliness of Lannoye's claims were before the trial court. *See* ***Gerrard Realty Corp. v. American States Ins. Co.***, 89 Wis. 2d 130, 140-41, 277 N.W.2d 863 (1979).

¶40 Lannoye also argues that WPS first raised the proof of claim issue at oral argument in circuit court. The record reflects otherwise. Both WPS's summary judgment brief and reply brief specifically address the proof of claim language and Lannoye's failure to satisfy the 120-day requirement.

D. Breach of Contract

¶41 Finally, Lannoye argues that summary judgment is inappropriate because WPS wrongfully denied the underlying benefit claims. We choose not to address this argument because it is not properly before us. WPS never sought

summary judgment on the issue whether WPS breached the insurance contract. To decide Lannoye's argument would be to decide the underlying breach of contract action. Because Lannoye did not appeal the denial of WPS's motion for summary judgment on this issue, we do not address the argument. *See* WIS. STAT. § 808.03(2).

By the Court.—Order affirmed in part; reversed in part and cause remanded. No costs awarded to either party.

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