COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2013

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. 2011AP2551 **Cir. Ct. No. 2009CV111**

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

DAVID R. EVERS,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

APPLETON MEDICAL CENTER, INC.,

INVOLUNTARY-PLAINTIFF,

V.

ORTHOPEDIC CLINIC OF APPLETON, INC. AND PROASSURANCE WISCONSIN INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed in part; reversed in part, and cause remanded with directions*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Orthopedic Clinic of Appleton, Inc., and ProAssurance Wisconsin Insurance Company appeal a judgment awarding damages to David Evers and his health insurer for the Clinic's failure to obtain precertification of insurance coverage for two surgeries. The Clinic[1] argues the circuit court erroneously granted summary judgment for multiple reasons, and further argues the court erred with respect to the award of attorney fees and prejudgment interest. We reject the Clinic's arguments.

¶2 Evers cross-appeals, arguing that prejudgment interest should have commenced accruing earlier and that the court erroneously determined the amount awarded for Evers's medical bills. We hold that the court did not err with respect to prejudgment interest, but erred with respect to the award for medical bills. Accordingly, we affirm in part; reverse in part, and remand for the circuit court to modify the judgment amount.

BACKGROUND

¶3 Evers was a patient of the Clinic and Dr. Robert Hausserman, who performed a left hip surgery on March 30, 2007 and a right hip surgery on May 4,

[1] References to the Clinic include ProAssurance.

2007. The Clinic assured Evers, prior to the surgeries, that it would obtain precertification of coverage from his health insurer, Wisconsin Physicians Service Insurance Corporation (WPS).

¶4 After WPS denied coverage for both of the surgeries and subsequent care, litigation ensued. Before any depositions were taken, the Clinic moved for summary judgment dismissing Evers's complaint. In both its brief and subsequent third-party complaint against WPS, the Clinic represented it had obtained precertification from WPS, but WPS had then called during the first procedure and revoked its approval. The Clinic further asserted in those same documents that, with respect to the second procedure, it obtained precertification for a "right hip replacement," and "Hausserman completed the right hip arthroplasty per the certification of WPS." The Clinic supported its motion with affidavits from Hausserman and employees Bonnie Dobbert and Linda Mack, all of whom averred that WPS precertified the first surgery via telephone conversations with Dobbert and Mack.

¶5 Evers responded to the Clinic's summary judgment dismissal motion with an affidavit from Kathleen Rust, the WPS employee who had been in contact with the Clinic prior to the first surgery regarding precertification. Rust asserted that she had never given Dobbert, Mack, or any other Clinic employee verbal authorization for Evers's first surgery. The circuit court denied the Clinic's motion because material facts were in dispute.

¶6 The Clinic subsequently learned that WPS had maintained audio recordings of the telephone calls between them concerning the precertification of Evers's first surgery. Dobbert and Mack conceded in their depositions that, in fact, no verbal precertification was ever granted. Dobbert further acknowledged

that, contrary to her affidavit, she could not have received a phone call revoking authorization during the procedure because she was acting as the surgical nurse at that time. Additionally, she testified that Evers was not told that WPS had not precertified the surgery. Hausserman and another Clinic employee, Bridget Plamann, also both testified that there was no precertification granted prior to the first surgery.

¶7 The circuit court granted Evers summary judgment on his promissory estoppel claim with respect to the first surgery, explaining:

> The [C]linic attempted to obtain pre-approval for the March 30 surgery through a number of calls between the clinic and WPS on March 28 and 29th. Fortunately, those calls are all transcribed and in the record. They are clear.
>
> WPS never explicitly or implicitly authorized the surgery and, in fact, on March 29 a [WPS] employee contacted … Dobbert at the clinic to inform her that the doctor who was to review this issue of approval from WPS was going to be out of the office until Monday, April 2.
>
> ….
>
> It cannot be assumed, it cannot be presumed, it cannot be inferred in any way that if the doctor is not going to review the case until Monday, April 2, that there is any approval prior to that time. The Clinic here did not follow its own procedure and either cancel the March 30 surgery or inform Mr. Evers that it had not gained approval. Rather, Dr. Hausserman performed the surgery as planned.

¶8 Following the first surgery, WPS informed the Clinic and Evers that it was denying coverage. One of the reasons given was that the procedure, a hip resurfacing utilizing a Biomet implant, was not approved by the FDA. Hausserman acknowledged in his deposition that there is a distinction in the industry and the literature between a hip resurfacing arthroplasty versus a total hip arthroplasty, which involves replacement.

¶9 The medical history documents the Clinic faxed to WPS in support of the precertification request for the second surgery did not state which procedure would be performed. The "code" for precertifying and billing the two types of hip arthroplasty was the same. Thus, WPS called and asked which procedure would be used. Plamann confirmed the request was for "a total hip arthroplasty, not a hip resurfacing." That same day, WPS issued the Clinic a written precertification for a "right total hip arthroplasty." However, when Hausserman conducted the surgery approximately three weeks later, he again performed a resurfacing procedure with a Biomet implant. Again, WPS denied coverage.

¶10 Evers subsequently fractured his right hip at the site of the resurfacing, requiring a total hip arthroplasty. That hip subsequently became infected, leading to additional surgeries. WPS denied coverage for all of this care because it resulted from a noncovered procedure. Additional facts and holdings are discussed as necessary below.

DISCUSSION

The Clinic's challenges to summary judgment

¶11 The Clinic first argues the circuit court erroneously granted summary judgment to Evers regarding the first surgery. Summary judgment "shall be rendered if 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] The first step of the

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

summary judgment methodology requires the court to examine the pleadings to determine whether a claim for relief has been stated. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). In testing the sufficiency of a complaint, we take all facts pleaded by plaintiffs and all inferences which can reasonably be derived from those facts as true. ***Id.*** at 317. A complaint is to be liberally construed and is legally insufficient only if it is quite clear that under no circumstances can plaintiffs recover. ***Id.*** If a claim for relief has been stated, the inquiry then shifts to whether any factual issues exist. ***Id.*** at 315.

¶12 The Clinic contends both that a claim was not stated and that there is a material dispute of fact. A claim of promissory estoppel involves three elements: (1) whether the promise is one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) whether the promise induced such action or forbearance; and (3) whether injustice can be avoided only by enforcement of the promise. ***Bicknese v. Sutula***, 2003 WI 31, ¶12, 260 Wis. 2d 713, 660 N.W.2d 289.

¶13 The Clinic concedes the first two elements were sufficiently pled, but argues the third is lacking. It asserts there was no injustice because "Evers has not established the WPS policy denies coverage if a surgery is performed prior to certification of the procedure." The Clinic further argues there was no allegation that the hip resurfacing using a Biomet device was not the equivalent of using an FDA-approved device or that Evers "would have been unsuccessful in enforcement of the terms of the insurance contract." It then argues that the WPS policy language is ambiguous and should be construed to cover the use of a Biomet device. The Clinic concludes, "After examining [Evers's] complaint, it should be clear under no set of circumstances did the plaintiff demonstrate the

claim of promissory estoppel and the relief he requests in the light most favorable to the Clinic."

¶14 The Clinic's argument is largely undecipherable; it appears to conflate multiple legal standards and arguments. We may reject arguments that are not properly developed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). In any event, we observe that, had the Clinic told Evers it failed to obtain precertification, Evers could have declined the procedure and the injustice of incurring bills for uncovered procedures could have been avoided. Further, regardless of whether WPS *could* have still covered the procedure despite the lack of precertification, it did not. Finally, any argument here concerning interpretation of the WPS policy language is misplaced. Evers's complaint need not establish that the claim would prevail; rather, the Clinic must show that it could not.

¶15 The Clinic next argues there is a dispute of material fact with regard to the first surgery. It asserts there is a dispute as to whether the surgery was precertified because its affidavits from Dobbert, Mack, Plamann, and Hausserman conflict with the WPS affidavit to the contrary. This argument is without merit. All of the Clinic's witnesses subsequently testified at deposition that no precertification was ever granted. The Clinic also suggests that because WPS did not explicitly deny precertification prior to the surgery date, it was reasonable to infer that precertification was merely a "formality based on additional record review by the physician on [the following] Monday." We agree with the circuit court's determination that any such inference would be unreasonable.

¶16 The Clinic next argues that, with respect to the second surgery, there was a material factual dispute "as to whether … Evers had clean hands enabling

him to assert a claim for promissory estoppel." The Clinic contends Evers did not have clean hands "because he did not act in 'reasonable reliance' on the Clinic's promise to pre-certify the surgery." Again, the Clinic appears to be conflating distinct legal issues in a single analysis. In any event, as Evers asserts, the Clinic never raised its clean-hands defense in the circuit court. Issues that are not preserved at the circuit court generally will not be considered on appeal. ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Further, the Clinic does not reply to Evers's response. Unrefuted arguments are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶17 Moreover, the Clinic fails to identify any disputed facts regarding reasonable reliance, and it omits highly relevant facts. We may reject arguments that are not properly developed. *See* ***Flynn***, 190 Wis. 2d at 39 n.2. The Clinic emphasizes that, after receiving a copy of the precertification letter referencing a total hip arthroscopy, Evers called the Clinic several days before the second surgery and inquired whether a hip resurfacing would be covered and was informed that it would not. The Clinic fails to mention, however, that Evers testified he *subsequently* conferred with Hausserman, who reassured Evers that the procedure would be covered. Additionally, Evers had told Hausserman that the second surgery should not take place if it was not preapproved. Evers testified, "Dr. Hausserman told me he would get it straight, and it was coded wrong. And I told Dr. Hausserman not to operate on the second one if it wasn't covered."

¶18 Next, we address the Clinic's argument that there was an issue of material fact precluding summary judgment on its promissory estoppel claim

against WPS.[3] Following the first surgery, Hausserman spoke with a Dr. Bussan from WPS concerning the Biomet resurfacing procedure and insurance coverage. According to Hausserman, Bussan told him, "Well, you know, maybe it's just better if you just bill it out as a total hip and then you won't have that problem." Bussan, on the other hand, denied telling Hausserman this. The Clinic argues this dispute of fact is material to whether it reasonably relied on WPS's precertification certificate.

¶19 In denying the Clinic's argument below, the circuit court explained:

> The clinic knowingly submitted a request for preapproval for a surgery it never intended to perform. It is not reasonable for—to rely on WPS's original approval of the May 4 surgery because that approval was based on false pretenses as pointed out in the evidence in this case and the briefing, that the clinic went to great lengths to disguise what actually was going to happen here.
>
> When it was found out what actually happened, this is essentially not anything that can be relied on in a court of equity because in a court of equity you have to have clean hands. As was pointed out in the briefing done by WPS, the clinic's hands were filthy in this case. You cannot submit something under false pretenses to an insurance company and expect it to be covered.

We agree with the circuit court. Indeed, regardless of what was said in the earlier phone conversation between Bussan and Hausserman, on the day WPS issued the precertification certificate, WPS inquired which procedure was going to be

[3] The Clinic also states in passing that it pled a claim for breach of contract against WPS. The Clinic does not, however, present any argument based on such a claim. "We will not decide issues that are not, or inadequately, briefed." ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). We therefore need not address WPS's response that the Clinic did not plead a contract claim.

performed and the Clinic employee represented that it would be "a total hip arthroplasty not a hip resurfacing."

The Clinic's challenges to damages, attorney fees, and interest

¶20 The Clinic argues Evers's "judgment for an award of cash amounts for medical expenses should be denied [sic] as a matter of law … [because a] court of equity attempts to place the party who prevails on his [or her] equitable claim back into the position he [or she] would have been in but for the wrongful acts." This assertion lacks supporting legal authority. *See* ***Flynn***, 190 Wis. 2d at 39 n.2 (we may reject arguments that are not supported by legal authority).

¶21 Regardless, even if we accept the Clinic's premise as true, the damages award merely placed Evers in the same position he would have been in if his surgeries were covered by his health insurance. Receiving both the benefit of the surgeries and damages for the cost of the care was not a windfall—the medical bills were still unpaid.

¶22 The Clinic further argues that the damages award was excessive because other providers with outstanding bills would accept less than the amount awarded because they would have received contractually discounted payments from WPS. The Clinic's argument fails because it provided no evidence that the providers would still accept discounted payments in the absence of insurance coverage. To the contrary, the undisputed evidence submitted by Evers demonstrated that once these providers discovered that the procedure was not covered by WPS, the discounts were withdrawn and Evers was charged the full amount.

¶23 The Clinic next argues it was erroneous to award any damages arising from the third surgery—a total hip arthroscopy—and other subsequent care. It argues the need for that procedure did not result from or arise from complications of the prior surgeries because that procedure would have been appropriate all along. The Clinic's argument fails because it conceded below that the subsequent care was all due to complications from the May 4 surgery. We will not address issues first raised on appeal. ***Huebner***, 235 Wis. 2d 486, ¶¶10-12. Moreover, there is no dispute that WPS denied coverage because it determined the subsequent care arose from noncovered procedures. Thus, Evers's loss of coverage for that care flows directly from the Clinic's failure to obtain precertification as it had promised.

¶24 Next, the Clinic argues the circuit court erroneously awarded attorney fees to Evers. The Clinic's argument is muddled, lacks legal authority with regard to its claim that intentional wrongful conduct or bad faith is required, and improperly relies upon an unpublished appellate decision. Thus, we may reject its argument. *See* ***Flynn***, 190 Wis. 2d at 39 n.2. We may also reject its argument because the Clinic fails to reply in any meaningful manner to Evers's arguments in response. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109. In any event, as the Clinic acknowledges, attorney fees may be awarded in equitable actions. "[A] court of equity has a great deal of flexibility in fashioning its remedy. … [T]his includes the awarding of attorney fees." ***White v. Ruditys***, 117 Wis. 2d 130, 142, 343 N.W.2d 421 (Ct. App. 1983).[4] Further, contrary to the

[4] The Clinic cites an unpublished decision of this court decided prior to 2009 that purportedly overruled ***White v. Ruditys***, 117 Wis. 2d 130, 343 N.W.2d 421 (Ct. App. 1983). The Clinic's citation is prohibited by WIS. STAT. RULE 809.23(3). Moreover, we cannot overrule our prior decisions, *see* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), and certainly not in an unpublished opinion.

Clinic's argument, the cases it cites do not limit the authority to award attorney fees to only third-party situations, and, regardless, this case fits that category. As discussed in Evers's response brief, he was forced into litigation with Appleton Medical Center, which was brought into this case as an involuntary plaintiff due to the lack of coverage from WPS.

¶25 The Clinic next argues it was improper to award prejudgment interest pursuant to WIS. STAT. § 628.46. In less than two pages of its brief, the Clinic proffers not less than seven distinct rationales as to why the award was improper. These arguments are all undeveloped and lack sufficient legal authority, and we therefore reject them. *See* ***Flynn***, 190 Wis. 2d at 39 n.2. Further, the Clinic fails to adequately reply, if at all, to Evers's arguments in response, and concedes it failed to adequately set forth its position in its initial brief. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109; ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981) (we generally do not address issues raised for the first time in a reply brief).

Evers's cross-appeal

¶26 Evers presents two issues on his cross-appeal. We reject Evers's argument that WIS. STAT. § 628.46 prejudgment interest should have accrued earlier. However, we agree the court erroneously determined the amount of his damages for medical expenses.

¶27 Prior to commencing this action, Evers's counsel sent a letter to the Clinic on June 4, 2008, giving notice of liability and damages. The letter explained why Evers believed liability was clear and demanded payment of medical expenses in the amount of $252,109. The letter also explained that more

denials from WPS for related treatments would likely be forthcoming, thereby increasing the demand amount. The Clinic's insurer declined payment.

¶28 Evers sought prejudgment interest on the amount set forth in his letter, calculated from the date of the letter. The circuit court determined that Evers was entitled to prejudgment interest, but that it did not begin accruing until after the oral summary judgment ruling.

¶29 Prejudgment interest pursuant to WIS. STAT. § 628.46 is proper only when three conditions are satisfied: the insurer has clear liability; the amount of damages is a sum certain; and the insurer has written notice of liability and the sum certain. *See* ***Kontowicz v. American Standard Ins. Co. of Wis.***, 2006 WI 48, ¶48, 290 Wis. 2d 302, 714 N.W.2d 105. Thus, interest will not accrue under the statute if the insurer has reasonable proof it is not responsible. ***Id.*** "'Reasonable proof' means that amount of information which is sufficient to allow a reasonable insurer to conclude that it may not be responsible for payment of a claim." ***Id.***

¶30 Evers observes that clear liability can exist well in advance of a judgment or settlement. *See* ***id.***, ¶¶51-52. Thus, he argues clear liability has existed since the time he sent his notice letter—before he commenced his lawsuit—because the true facts never changed. We disagree. The Clinic's various employees initially represented in their respective affidavits that they had, in fact, obtained precertification. While their stories eventually changed, the Clinic's

insurer had reasonable proof at least until that occurred.[5] This is unlike the situation in ***Kontowicz***, where the defendant conceded liability. *See* ***id.***, ¶53.[6]

¶31 Evers next argues the circuit court erroneously determined the amount of his medical expenses. We agree. The court held, "The remedy required is to relieve Evers of the debts the Clinic has imposed upon him. Therefore, an award of the full amount of medical expenses is appropriate." The court's intent was clear. However, without stating reasons, the court subsequently awarded only the amount set forth in Evers's demand letter, rather than the undisputed amount of medical bills Evers ultimately presented. Accordingly, on remand the circuit court is directed to modify the medical expenses award in the judgment to the verifiable hard number of $257,827.56.

¶32 Evers and WPS shall be allowed WIS. STAT. RULE 809.25 costs related to the Clinic's appeal. No costs allowed with regard to Evers's cross-appeal.

[5] Evers does not offer a compromise argument proffering a date of interest accrual after, for example, the date of the Clinic employees' depositions. We therefore do not address whether interest should have commenced accruing at some other point prior to the court's summary judgment ruling.

[6] Although we reject Evers's argument that his prejudgment interest should have accrued from the date of his letter, we do not accept the Clinic's assertion that, because the final amount of medical expenses ultimately claimed was higher than the to-date number specified in the initial demand, there was no "sum certain." Rather, that is precisely the situation that existed in ***Kontowicz***. *See* ***Kontowicz v. American Standard Ins. Co. of Wis.***, 2006 WI 48, ¶¶5, 10 & n.3, 53, 290 Wis. 2d 302, 714 N.W.2d 105.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions.

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