NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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APR 29 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY NUMBER PI0545075009,

Plaintiff/Appellee,

v.

PAYSON PREMIER, LLC d/b/a RIM COUNTRY HEALTH & RETIREMENT COMMUNITY,

Defendants/Appellants.

2 CA-CV 2008-0169
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV20070346

Honorable Peter J. Cahill, Judge

AFFIRMED

Jones, Skelton & Hochuli, P.L.C.
By Robert R. Berk and Eileen Dennis GilBride — Phoenix
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Gust Rosenfeld P.L.C.
By Richard A. Segal — Phoenix
Attorneys for Defendant/Appellant

B R A M M E R, Judge

¶1 Appellant Payson Premier, LLC (Payson) appeals from the trial court's grant of summary judgment in favor of appellee Certain Underwriters at Lloyds, London (Underwriters) in Underwriters' declaratory judgment action concerning an insurance policy it had issued Payson. Underwriters asserted, and the court found, the policy did not provide Payson coverage and Underwriters owed no duty to defend or indemnify Payson concerning an incident that had occurred during the policy period. Finding no error, we affirm.

Factual and Procedural Background

¶2 Although the relevant facts are uncontested, we view them in the light most favorable to the party opposing summary judgment and draw all reasonable inferences arising from the evidence in favor of that party. *See Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). In January 2005, Payson, which operates a long-term care nursing facility, purchased from Underwriters a one-year professional and general liability insurance policy for that facility.

¶3 The policy covered incidents occurring during the policy period, provided that a claim arising out of an incident was made against Payson and Payson notified Underwriters of the claim within thirty days after the policy's expiration. The policy defined a "claim" as an "oral or written demand against [Payson] for 'Damages,'" meaning any demand for money.

¶4 In July 2005, Payson received a "Notice of Enforcement" from the Arizona Department of Health Services (ADHS) notifying Payson of alleged violations of statutes and rules in the discharge and subsequent death in May 2005 of Arthur Savage, a resident of Payson's facility. The letter informed Payson that ADHS had referred the incident to its "Enforcement Team." When Underwriters' third-party claim administrator, Professional Claims Managers, Inc., (PCM) became aware of the ADHS notice, PCM contacted Payson and informed it that coverage had not yet been triggered because no claim on Savage's behalf had been made. Approximately two months after the policy expired, PCM informed Payson that it was closing its file on the incident because no claim had been made.

¶5 In April 2006, the representative of Savage's estate sued Payson and other defendants for negligence, vulnerable adult abuse, and wrongful death. Through an attorney, Payson contacted PCM and demanded that Underwriters provide a defense. PCM advised Payson it was reviewing the matter to determine whether the policy provided Payson with coverage for Savage's estate's claims but noted "it would appear as though no claim was first made during the applicable Policy Period." Underwriters then filed an action seeking a declaration the policy did not cover Savage's estate's claim, and Underwriters had no duty to defend or indemnify Payson concerning that incident.

¶6 Underwriters filed a motion for summary judgment pursuant to Rule 56(c), Ariz. R. Civ. P., arguing that, based on the unambiguous terms of the policy, the policy provided no coverage for the Savage claims because no claim had been made within thirty

days of the end of the policy period. Payson agreed that, based on the policy's terms, Underwriters could deny there was coverage, but asserted those terms should not be enforced because Payson had a reasonable expectation the policy provided coverage for these claims. Payson asserted that its general manager and administrator, Harvey Pelovsky, had not been "advised . . . there would be no coverage unless somebody asked for money during the year the policy was in force," and that Pelovsky was unaware "that demands for money or lawsuits do not happen until many months after the incident."

¶7 The trial court found the language of the Underwriters policy was clear and unambiguous, there was "no dispute about just what is required for this claim to be covered by the Policy," and the claim "was made after the policy period." The court concluded Payson could not have had a reasonable expectation that it was covered by the policy because it had received adequate notice of the policy's terms based on the policy's plain language and an explanatory letter Underwriters had sent Payson with the policy binder. The court noted that Underwriters had done nothing that reasonably could have given Payson the impression it would have covered claims not made during the policy period. Thus, the court granted Underwriters' summary judgment motion and request for attorney fees, and entered judgment in its favor; the judgment included an award of $37,676 in attorney fees and $386.85 in costs. This appeal followed.

Discussion

¶8 Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

¶9 Payson agrees the policy language is unambiguous and, by its terms, did not provide coverage for the Savage claims. Payson argues, however, there remains a question of fact as to whether it had a reasonable expectation that it was covered by the policy, notwithstanding the policy's plain language to the contrary. Under the reasonable expectations doctrine, a court will not enforce standardized insurance policy language in the following, limited, situations:

> 1. Where the contract terms, although not ambiguous to the court, cannot be understood by the reasonably intelligent consumer who might check on his or her rights, the court will interpret them in light of the objective, reasonable expectations of the average insured; [or]

> 2. Where the insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage; [or]
>
> 3. Where some activity which can be reasonably attributed to the insurer would create an objective impression of coverage in the mind of a reasonable insured; [or]
>
> 4. Where some activity reasonably attributable to the insurer has induced a particular insured reasonably to believe that he has coverage, although such coverage is expressly and unambiguously denied by the policy.

Gordinier v. Aetna Cas. & Sur. Co., 154 Ariz. 266, 272-73, 742 P.2d 277, 283-84 (1987) (citations omitted).

¶10 Payson asserts the second *Gordinier* scenario is present here. It neither disputes that Underwriters sent it the insurance policy binder and a letter explaining the relevant terms in detail, nor asserts the policy terms or the explanatory letter were unclear. Instead, as we understand its argument, Payson contends it did not have adequate notice of the effect of the policy's notice-of-claim provision because Underwriters failed to inform Payson that "the time that elapses from the time of the injury until the making of a monetary demand is an average of 6 to 12 months."[1] Thus, Payson argues the later an incident

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[1]An Underwriters representative testified that this was the average time it took injured parties to file claims. This suggests the claims-made provision reduces the probability a claim would be covered by the policy. But Payson has presented no evidence to support its argument that the claims-made provision emasculated the policy's apparent coverage. *See Gordinier*, 154 Ariz. at 273, 742 P.2d at 284. And, as we explain, we need not decide this question because Payson had adequate notice of the provision. *See id.* To the extent Payson contends this fact provides a basis for relief independent of the second *Gordinier* scenario, it did not raise this argument until oral argument before this court. Arguments raised for the

occurred during the policy period, the less likely the policy would cover any claim arising out of that incident because the claim might not be made within thirty days following the end of the policy's one-year term.

¶11 We find no authority suggesting an insurer must explain all possible implications of unambiguous policy terms, nor has Payson cited any such authority. An insurer gives adequate notice of a policy's clear and unambiguous terms if it gives a copy of the policy to the insured and takes reasonable steps to make sure any exclusions or limitations are made apparent to the insured. *See, e.g., Averett v. Farmers Ins. Co.*, 177 Ariz. 531, 534, 869 P.2d 505, 508 (1994) (question of fact whether insured received adequate notice of exclusions when insured not provided copy of policy and declarations page failed to note coverage exclusions); *Am. Family Mut. Ins. Co. v. White*, 204 Ariz. 500, ¶ 19, 65 P.3d 449, 456 (App. 2003) (adequate notice where "exclusion is not lengthy, confusing, complex, or buried in the policy"); *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 165-66, 840 P.2d 1024, 1030-31 (App. 1992) (question of fact whether notice inadequate where insured did not have opportunity to read terms and conditions before signing contract); *Do by Minker v. Farmers Ins. Co.*, 171 Ariz. 113, 117, 828 P.2d 1254, 1258 (App. 1991) (boilerplate exclusions reducing coverage described on declarations page "must be called to the insured's attention"). Again, Payson does not dispute that Underwriters sent it the policy binder and

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first time at oral argument are waived. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004).

an explanatory letter. Nor does Payson assert that it did not review the policy or explanatory letter, or that the letter did not clearly explain the notice-of-claim requirement.[2] Indeed, the letter emphasized both the importance of complying with that requirement and the distinction between "an actual claim made against [Payson]" and "circumstances likely to give rise to a claim."

¶12 Payson argues, however, that Underwriters' failure to explain there could be a delay between an incident and the assertion of a claim was a "[m]aterial [o]mission" it had a duty to disclose due to its "fiduciary or . . . quasi-fiduciary" relationship with Payson. Payson is correct that an insurer must deal fairly and honestly with its insured, *see Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶ 17, 63 P.3d 282, 286 (2003), but there is no true fiduciary relationship between insurer and insured. *See Rawlings v. Apodaca*, 151 Ariz. 149, 155, 726 P.2d 565, 571 (1986). And, even if there were such a relationship, Underwriters would not have been obligated to explain there could be significant delays between incidents and claims, and that those delays might result in a lack of coverage. A party owing a fiduciary duty to another must disclose any information "that he knows may justifiably induce the other to act or refrain from acting in a business transaction." Restatement

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[2]Pelovsky stated in a signed declaration that "[a]t the time the policy was purchased, [he] had not been told that even if the incident was reported to the insurer, there would be no coverage unless somebody asked for money or sued during that year." But Payson does not argue on appeal that it had insufficient notice of the policy's terms or that those terms were unclear. Payson only contends that Underwriters had an obligation to further explain the effect of those terms and failed to do so. Accordingly, we do not consider this statement as a basis for reversing the trial court's grant of summary judgment in favor of Underwriters.

(Second) of Torts § 551 (1977); *see also Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395*, 201 Ariz. 474, n.22, 38 P.3d 12, 34 n.22 (2002). Nothing in the record suggests Payson would not have purchased the policy had it understood there could be a significant delay between when an incident occurs and when a claim is made, much less that Underwriters would have been aware of that information. Moreover, there is no evidence that Underwriters knew Payson was unaware that significant time could elapse between an incident and a claim. *See Lombardo v. Albu*, 199 Ariz. 97, ¶ 8, 14 P.3d 288, 290 (2000) ("[W]here a seller knows of facts materially affecting the value of the property and knows that the facts are not known to the buyer, the seller has a legal duty to disclose such facts.").

¶13 Thus, even assuming, arguendo, that the notice-of-claim policy provision was unusual, unexpected, or emasculated apparent coverage,[3] Payson had no reasonable expectation of coverage in these circumstances because it had adequate notice of the

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[3]Payson devotes a significant portion of its appellate briefs to discussion of several cases that examine insurance policies containing a requirement that the insured notify the insurer of an incident or injury during the policy period but lacking the notice-of-claim requirement present here. *See, e.g., Resolution Trust Corp. v. Ayo*, 31 F.3d 285, 288 (5th Cir. 1994); *Nat'l Union Fire Ins. Co. v. Willis*, 139 F. Supp. 2d 827, 831 (S.D. Tex. 2001); *Thoracic Cardiovascular Assocs. v. St. Paul Fire & Marine Ins. Co.*, 181 Ariz. 449, 451, 891 P.2d 916, 918 (App. 1994); *Pac. Employers Ins. Co. v. Superior Court*, 270 Cal. Rptr. 779, 781-82 (Cal. Ct. App. 1990); *Gulf Ins. Co. v. Dolan, Fertig & Curtis,* 433 S.2d 512, 513 (Fla. 1983). Payson asserts that, had the Underwriters policy contained language similar to that in the policies in those cases, the Savage claim would have been covered. Payson seems to be suggesting these cases demonstrate that Underwriters' notice-of-claim policy provision is not normal industry practice, and is therefore unusual or unexpected. Because we conclude Payson had adequate notice of the policy's terms, we need not reach that argument.

provision. *See Gordinier*, 154 Ariz. at 273, 742 P.2d at 284 (reasonable expectation of coverage if "insured did not receive full and adequate notice of the term in question, *and* the provision is either unusual or unexpected, or one that emasculates apparent coverage") (emphasis added).

Disposition

¶14 Because we agree with the trial court's conclusion, based on the absence of any material question of fact, that the Underwriters policy did not cover Payson for the claim asserted by Savage's estate outside the policy period, we affirm the court's grant of summary judgment in favor of Underwriters and grant its request for attorney fees on appeal made pursuant to A.R.S. § 12-341.01, pending its compliance with Rule 21(c), Ariz. R. Civ. App. P.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge