COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 17, 1996

No. 96-0908

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

ANGELA M. MCEVOY, by her Guardian ad Litem, STEPHANIE L. FINN, and SUSAN MCEVOY,

Plaintiffs-Appellants,

v.

GROUP HEALTH COOPERATIVE OF EAU CLAIRE,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Angela M. McEvoy and Susan McEvoy (McEvoy) appeal a summary judgment granted to Group Health Cooperative of Eau Claire (Group Health) dismissing McEvoy's lawsuit because its complaint stated a cause of action in medical malpractice, subject to ch. 655, STATS., and

McEvoy had failed to follow the relevant statutory procedures.[1] On appeal, McEvoy argues that because its claim against Group Health is a cause of action for bad faith, rather than malpractice, the court erred when it granted summary judgment. Group Health argues that McEvoy states a claim for malpractice because its medical director, Stuart R. Lancer, M.D., made medical decisions as to how to best treat Angela's condition.[2] Because we conclude that McEvoy's complaint states a valid cause of action for bad faith, we reverse the judgment and remand for further proceedings.

The relevant facts of this case are not disputed. Group Health is a health maintenance organization (HMO) that provides group policy insurance coverage to its subscribers. Group Health also employs its own staff physicians who work at Group Health clinics in Eau Claire. In order for medical expenses to be covered, subscribers must receive care from Group Health clinics and physicians. However, if Group Health physicians cannot sufficiently treat a patient, Lancer may approve a health care plan developed by Group Health physicians that requires treatment by physicians outside the Group Health network. If treatment is provided by outside physicians at Group Health's

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[1] Specifically, Group Health asserts that McEvoy did not comply with § 655.445, STATS.:

> **Request for mediation in conjunction with court action. (1)** COMMENCING ACTION, REQUEST AND FEE. Beginning September 1, 1986, any person listed in s. 655.007 having a claim or a derivative claim under this chapter for bodily injury or death because of a tort or breach of contract based on professional services rendered or that should have been rendered by a health care provider shall, within 15 days after the date of filing an action in court, file a request for mediation. ...
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> ....
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> **(3)** NO COURT PROCEEDINGS BEFORE MEDIATION. For actions filed under sub (1), no discovery may be made and no trial, pretrial conference or scheduling conference may be held until the expiration of the mediation period under s. 655.465(7).

[2] Group Health also argues that McEvoy is trying to frame its claim as a bad faith claim to circumvent the prohibition of punitive damages in medical malpractice actions. We agree that punitive damages are not available in an action for medical malpractice. *See* ***Lund v. Kokemoor***, 195 Wis.2d 727, 734, 537 N.W.2d 21, 23 (Ct. App. 1995). However, because McEvoy's recovery of punitive damages is not the dispositive issue in this case, we do not address it.

direction, medical expenses are covered by Group Health up to the policy limits.

On or about September 9, 1991, thirteen-year-old Angela M. McEvoy was treated by Lawrence McFarlane, M.D., a Group Health physician.[3] Because McFarlane believed Angela suffered from an eating disorder, he referred her to Systems Counseling, an Eau Claire clinic under contract to provide services for Group Health, for evaluation and counseling. He also admitted Angela to Sacred Heart Hospital for an evaluation by a psychiatrist. Angela was Group Health's first insured to require treatment for anorexia nervosa, and Group Health had no protocol for the treatment of anorexia.

Treatment in Eau Claire was unsuccessful. After speaking with Systems Counseling and the psychiatrist, McFarlane consulted with Lancer regarding Angela's treatment, and Lancer agreed to hospitalize Angela as an inpatient for acute care. Lancer approved a two-week hospitalization at the University of Minnesota Hospital, a non-Group Health provider, and decided to review the plan at the end of the two weeks. Angela was admitted to the University of Minnesota eating disorders program on November 15, 1991.

At the end of the two weeks, Lancer approved coverage for a seven-day extension of Angela's stay at the hospital. He continued to monitor Angela's progress by speaking with her doctors, and having his subordinates speak with her doctors. Lancer approved insurance coverage several times for extensions of Angela's inpatient care. After six weeks of inpatient care, Lancer, whose primary duties were medical management and administration, decided to discontinue coverage for Angela's treatment at the University of Minnesota Hospital. Against the recommendations of Angela's treating physicians, Angela was discharged from the hospital on December 31, 1991. At this time, Angela had seventy days of insurance coverage remaining for inpatient care.

Angela relapsed during her outpatient treatment at Systems Counseling. After Group Health approved coverage for Angela to see an eating

[3] Angela was covered by The Group Health insurance policy issued to her mother, Susan McEvoy.

disorder specialist who recommended inpatient treatment, Lancer decided to readmit her to the University of Minnesota Hospital. She was readmitted on February 27, 1992, and discharged on May 6, 1992, into the Midelfort Clinic's eating disorders program.

We review a summary judgment according to the standard of review set forth in § 802.08, STATS. ***Millers Nat'l Ins. Co. v. City of Milwaukee***, 184 Wis.2d 155, 164, 516 N.W.2d 376, 378 (1994). According to § 802.08(2), 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."

We reverse the trial court if we determine that the trial court incorrectly decided a legal issue. ***Millers,*** 184 Wis.2d at 164, 516 N.W.2d at 378. The dispositive issue on appeal is whether Group Health's decision to deny insurance benefits to McEvoy formed the basis for a bad faith claim. Whether the trial court correctly read McEvoy's pleadings as a medical malpractice claim is a question of law which we review de novo. *See* ***United Capitol Ins. Co. v. Bartolotta's Fireworks Co.,*** 200 Wis.2d 284, 297, 546 N.W.2d 198, 203 (Ct. App. 1996).

The court decided that McEvoy's claim was a malpractice claim subject to the provisions of ch. 655, STATS. According to the relevant statute, "[A]ny patient or the patient's representative having a claim or any spouse, parent or child of the patient having a derivative claim for injury or death *on account of malpractice* is subject to this chapter." Section 655.007, STATS. (emphasis added). Because the language of the statute is unambiguous, we interpret this statute for its plain meaning. *See* ***In re P.A.K.***, 119 Wis.2d 871, 878-79, 350 N.W.2d 677, 681-82 (1984). Section 655.007 says that ch. 655 is applicable to all claims for medical malpractice. However, we are not persuaded that ch. 655 applies to bad faith claims against health insurers.

The issue in this case is Group Health's failure to authorize and pay for Angela's treatment pursuant to her mother's health insurance plan. Group Health asserts that Lancer's decisions regarding Angela's treatment were medical and, therefore, subject to ch. 655, STATS. However, the fact that Lancer

has a medical background does not mean that any and all legal challenges to his insurance coverage decisions constitute medical malpractice claims. Lancer neither met nor treated Angela as a physician. During the time that the bad faith is alleged to have occurred, Angela was not even being treated by Group Health physicians. Instead, she was treated at the University of Minnesota Hospital and at Systems Counseling by non-Group Health physicians.

Although Lancer is a medical doctor, and Group Health does employ a staff of physicians, the decisions Lancer made with regard to Angela's treatment were administrative insurance coverage decisions, rather than medical decisions. The following notation concerning Group Health's dealings with the University reflects Lancer's role in the administrative decision to deny insurance coverage:

> 12/27/91 [Lancer] OK'ed [coverage] thru Wed. Jan 1st 1992 will be Angela's last day. ... NO MORE EXTENSIONS. [Lancer] doesn't want to talk to them anymore. No excuses. Discharge, or no payment.

We interpret these remarks as those of an HMO administrator, rather than a treating physician. Lancer acted in a purely administrative or case management capacity for Group Health when he decided to deny insurance coverage to Angela for further inpatient treatment at the University of Minnesota Hospital. Therefore, the court erred when it decided, as a matter of law, that McEvoy's bad faith claim against Group Health was a malpractice action, subject to ch. 655, STATS.

McEvoy argues that its claim against Group Health is for the HMO's bad faith in denying coverage for Angela's inpatient hospitalization. A cause of action for bad faith against an insurer is recognized in Wisconsin. *See* ***Anderson v. Continental Ins. Co.***, 85 Wis.2d 675, 685-86, 271 N.W.2d 368, 374 (1978). To prove a claim for bad faith, the plaintiff "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." ***Id.*** at 691, 271 N.W.2d at 376. We have reviewed the complaint and are satisfied that McEvoy asserted a bad faith claim against Group Health.

We conclude that McEvoy's complaint stated a bad faith claim against Group Health, and the court erred when it granted summary judgment. We therefore reverse and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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