COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1607-FT **Cir. Ct. No. 00-CV-917**

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

KELLY ENDL,

PLAINTIFF-APPELLANT,

V.

SCHOOL DISTRICT OF BELOIT, A MUNICIPAL SCHOOL DISTRICT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Kelly Endl appeals the trial court's judgment dismissing her claim against the School District of Beloit. Endl argues: (1) that the School District breached its voluntary agreement to settle her federal discrimination claim; (2) that the School District violated the principles of equity

when it denied her claim for medical coverage; and (3) that the trial court improperly granted judgment on the pleadings on the issue of whether in vitro fertilization was covered under the health plan. Pursuant to our order of July 6, 2001, we placed this case on the expedited appeals calendar. *See* WIS. STAT. RULE 809.17 (1999-2000).[1] We affirm.

¶2 Kelly Endl is a kindergarten teacher for the Beloit School District. The School District has a self-insured medical employee benefit plan that reimburses participants and beneficiaries for covered medical expenses. Endl suffers from bilateral hydrosalpinges, a condition that causes infertility. Endl underwent in vitro fertilization in an attempt to become pregnant and submitted a claim to the plan seeking reimbursement of her costs. The plan denied Endl's request for reimbursement on the basis that the plan specifically excluded reimbursement for artificial means to achieve pregnancy, including, but not limited to, in vitro fertilization.

¶3 Endl filed a charge of disability discrimination with the Federal Equal Employment Opportunity Commission (EEOC). Before the EEOC resolved the claim, the School District and Endl entered into a confidential Settlement Agreement. The Settlement Agreement provided:

> 2. In consideration for the representations and undertakings Ms. Endl makes in this Agreement, the School District agrees to the following:
>
> A. Ms. Endl has submitted a claim for coverage under the School District's Employee Health Plan ("Health Plan") for coverage for infertility treatments she received in 1998.

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

> The School District will allow Ms. Endl to re-submit all claims for coverage for infertility treatments she received in 1998 or 1999 within thirty days of the date of the execution of this Agreement.
>
> B. The School District will direct First Choice Benefits Management ("First Choice"), the Health Plan's third party administrator, to process all claims submitted pursuant to paragraph 2A of this Agreement as if they were timely and without regard to any fertility specific exclusions in the Health Plan.

¶4 Endl resubmitted her claim, but the plan administrator again denied it concluding that in vitro fertilization was not a covered expense because it was not medically necessary to treat a "sickness." Endl appealed this determination through the plan's administrative review procedure, but to no avail. Endl then brought this action in the trial court against the School District, asserting that it had breached the Settlement Agreement, had violated principles of equity in denying the claim and had erred in concluding that in vitro fertilization was not a covered expense. The trial court granted judgment in favor of the School District dismissing the claim.

¶5 Endl first argues that the School District violated the Settlement Agreement. The Settlement Agreement is a contract between Endl and the School District and, as such, its interpretation presents a question of law that we review de novo. ***Woodward Communications, Inc. v. Schockley Communications Corp.***, 2001 WI App 30, ¶9, 240 Wis. 2d 492, 622 N.W.2d 756. "If the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning even though a party may have construed it differently." ***Id.***

¶6 We conclude that the Agreement is unambiguous. Nowhere in the Agreement does the School District agree to actually pay or require the plan administrator to pay the claims submitted. Instead, the Agreement expressly provides that Endl is allowed to "resubmit" her claim and that the claim will be processed "without regard to any fertility specific exclusions." Nothing in the language of the Settlement Agreement prohibited the plan administrator from denying the claim for other reasons.

¶7 Endl contends that the School District breached the implied covenant of good faith and fair dealing by failing "to live up to the spirit of its bargain." *See* ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 793, 541 N.W.2d 203 (Ct. App. 1995) (every contract has an implied covenant of good faith and fair dealing). This premise, however, is based on *Endl's* reading of the agreement. She believed that it meant that her claims would automatically be paid. The plain language of the agreement, however, states otherwise.

¶8 Endl next contends that the School District is estopped for equitable reasons from denying her claim. Judicial estoppel prevents a party from taking inconsisent positions in different judicial or administrative tribunals. ***Insolia v. Philip Morris Inc.***, 53 F. Supp. 2d 1032, 1043 (W.D. Wis. 1999), *aff'd in part, rev'd in part on other grounds*, 216 F.3d 596 (7th Cir. 2000). Judicial estoppel is not applicable here because the School District did not take a different position before the EEOC, and the EEOC never made a decision.

¶9 Endl also contends that the equitable doctrine of "mend the hold" prevents the School District from denying her claim. Mend the hold is "a common law doctrine that limits the right of a party to a contract suit to change his litigating position." ***Governmental Interinsurance Exch. v. City of Angola***, 8 F. Supp. 2d

1120, 1129 (N.D. Ind. 1998). First, we note that no Wisconsin case has adopted this doctrine. Even if the doctrine were part of Wisconsin's common law, however, the School District has not asserted inconsistent claims. Rather, it has asserted an *additional* reason the loss is not covered, much like the insurer in ***Governmental Interinsurance***. We therefore reject this argument as well.

¶10 Finally, Endl contends that judgment on the pleadings was not appropriate on the issue of whether her expenses were covered under the plan, with the fertility specific exclusions disregarded. She contends the trial court erred in concluding that her condition was not a "sickness."[2] This argument misses the mark. The School District *conceded* that Endl's infertility resulted from a "sickness" as that term is used in the plan. The treatments were not covered because they were not medically necessary to treat Endl's condition that caused the infertility. Rather, in vitro fertilization allowed Endl to become pregnant *despite* her condition. Therefore, the plan does not cover in vitro fertilization.

By the Court.—Judgment affirmed.

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

[2] We note that the trial court made "findings of fact." When judgment is rendered on the pleadings, the facts pled by the plaintiff, and all reasonable inferences there from, are accepted as true. *See* ***Prah v. Maretti***, 108 Wis. 2d 223, 229, 321 N.W.2d 182 (1982). Because the trial court's "findings of fact" do nothing more than take the facts pled in the complaint as true, this error does not affect the disposition of this case.