COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2293 **Cir. Ct. No. 01CV006878**

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

AMY M. KORDUS,

PLAINTIFF-RESPONDENT,

UNITED HEALTHCARE OF WISCONSIN, INC.,

SUBROGATED-PLAINTIFF,

V.

MSI PREFERRED INSURANCE COMPANY,

DEFENDANT-APPELLANT,

JOHN MILLER CARROLL AND ABC INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Reversed and cause remanded with directions*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. MSI Preferred Insurance Company, the uninsured and underinsured motorist insurer for Amy M. Kordus, appeals from a "judgment and bill of costs" confirming a $200,000 arbitration award to Kordus. MSI argues that the arbitration award should not have been confirmed because the circuit court erred in denying its motion to dismiss at summary judgment. MSI contends that the circuit court erred in concluding that: (1) it was not prejudiced by the five-year delay in receiving notice of the car accident in which Kordus was injured; and (2) it could not simultaneously argue that Kordus failed to exhaust the primary insurance. Because we conclude that the court erroneously found that Kordus had rebutted the presumption of prejudice, we reverse the judgment confirming the award and remand to the circuit court to grant MSI's motion for summary judgment.[1]

I. BACKGROUND

¶2 The factual background is somewhat complicated. On August 18, 1995, Kordus was injured while riding in a car driven by Kathryn Parks when it was struck by a car driven by Bobbie Jean Benton, an uninsured motorist. Kordus retained Attorney John Miller Carroll to represent her in her personal injury action against Parks, Parks's insurer (American Standard Insurance Company), and Benton.

[1] Because this issue is dispositive, we need not address the exhaustion of primary insurance issue. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).

¶3 At the time of the accident, Kordus was an insured under her stepfather's automobile insurance policy with MSI. The policy required that the limits of liability of applicable policies be exhausted prior to MSI's policy providing payment. Specifically, the underinsured-motorist-coverage provision stated: "We will pay under this coverage *only* after the limits of liability under any applicable bodily injury bonds or policies have been exhausted by payment of judgments or settlements." (Emphasis added.) The policy required that MSI be "notified promptly of how, when and where the accident or loss happened," and further provided that "[n]o legal action may be brought against us until there has been full compliance with all the terms of the policy."

¶4 Kordus filed her lawsuit on December 20, 1995. On June 9, 1999, after Kordus's counsel failed to appear at a pretrial conference, the circuit court dismissed the lawsuit with prejudice. Two years later, on July 27, 2001, Kordus filed a complaint against Carroll, Carroll's professional liability insurer, and MSI, alleging professional malpractice against Carroll and setting forth a claim for uninsured and/or underinsured motorist coverage under her stepfather's MSI policy.

¶5 MSI moved for summary judgment, seeking dismissal of Kordus's claims. According to the summary judgment submissions, MSI was not notified of the accident until sometime in November of 2000, and was never named as a party in Kordus's original lawsuit. The court determined, however, that MSI suffered no prejudice by the lack of notice and further concluded that the exhaustion-of-limits argument essentially conflicted with MSI's argument that it was prejudiced by Kordus's failure to provide notice of the accident.

¶6 Pursuant to MSI's uninsured/underinsured policy provisions, MSI proceeded to arbitration. At the time of the arbitration, Kordus's damages were $200,000, and the uninsured motorist, Benton, was found to be 85% liable. On May 12, 2003, Kordus moved to confirm the award. MSI objected, arguing that recovery under the MSI policy was precluded because MSI was prejudiced by the lack of notice of the accident. MSI explained that prejudice resulted when it lost the opportunity to seek contribution and/or subrogation from the tortfeasors and American Standard when the first lawsuit was dismissed due to Attorney Carroll's inaction. The circuit court disagreed and confirmed the award.

II. ANALYSIS

¶7 We review an order granting summary judgment *de novo* using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate 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) (2001-02).[2]

¶8 MSI claims the circuit court erred in concluding that it was not prejudiced by Kordus's delayed notification of the accident. We agree. Wisconsin law has long recognized an insured's duty to give timely notice to his or her insurer. ***Kolbeck v. Rural Mut. Ins. Co.***, 70 Wis. 2d 655, 659, 235 N.W.2d

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

466 (1975); *see also* WIS. STAT. § 631.81 and WIS. STAT § 632.86 (1993-94).[3] The timely-notice requirement affords the insurer an opportunity to investigate possible claims and defenses while witnesses are available and memories are fresh. ***Kolbeck***, 70 Wis. 2d at 659. Indeed, Wisconsin courts have found that where the insurer is prejudiced by untimely notice, invalidation of coverage or reduction of the claim may follow. ***Neff v. Pierzina***, 2001 WI 95, ¶44, 245 Wis. 2d 285, 629 N.W.2d 177. Generally, whether notice to the insurer was timely is a question of fact. ***Id.***, ¶34. Here, however, Kordus implicitly concedes that MSI did not receive timely notice of the accident. Hence, the issue that remains is whether MSI was prejudiced by the late notice. ***Id.***, ¶43.

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[3] WISCONSIN STAT. § 631.81 provides in relevant part:

> **Notice and proof of loss (1).** TIMELINESS OF NOTICE. Provided notice or proof of loss is furnished as soon as reasonably possible and within one year after the time it was required by the policy, failure to furnish such notice or proof within the time required by the policy does not invalidate or reduce a claim unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limit.

WISCONSIN STAT. § 632.26 (1993-94), provides in relevant part:

> **Notice provisions. (1)** REQUIRED PROVISIONS. Every liability insurance policy shall provide:
>
> **….**
>
> (b) That failure to give any notice required by the policy within the time specified does not invalidate a claim made by the insured if the insured shows that it was not reasonably possible to give the notice within the prescribed time and that notice was given as soon as reasonably possible.
>
> **(2)** EFFECT OF FAILURE TO GIVE NOTICE. Failure to give notice as required by the policy as modified by sub. (1) (b) does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice.

¶9 In ***Neff***, the Wisconsin Supreme Court, addressing this very issue, explained:

> When a determination has been made that the insured's notice to the insurer was untimely, the court must decide whether the insurer was prejudiced by the insured's breach of duty. Under Wis. Stat. § 632.26(2), late notice is not prejudicial per se, "but the risk of non-persuasion is upon the person claiming there was no prejudice."
>
> The decisions interpreting Wis. Stat. § 631.81(1) hold that when the insured fails to give notice within one year after the time required by the policy, "there is a rebuttable presumption of prejudice and the burden of proof shifts to the claimant to prove that the insurer was not prejudiced by the untimely notice."

Id., ¶¶42-43 (citations omitted). The court observed that whether an insurer has been prejudiced is governed by the facts and circumstances in each case. ***Id.***, ¶44. Prejudice in this context, the court explained, means a serious impairment of the insurer's ability to investigate, evaluate, or settle a claim, determine coverage, or present an effective defense. ***Id.***

¶10 Here, the parties debate whether Kordus rebutted the presumption of prejudice. While Kordus contends that the circuit court applied ***Neff*** and ultimately ruled that the presumption of prejudice was rebutted, the record does not support her contention. To the contrary, the record establishes that the court clearly departed from the legal standards by concluding that the mere lapse of time did not give rise to a presumption of prejudice. The court was incorrect.

¶11 Under ***Neff***, a presumption of prejudice exists when an "insured fails to give notice [of an insurable event] within one year after the time required by the policy." ***Id.***, ¶43. The court apparently ignored this standard. And although whether prejudice has occurred generally is a factual issue, on which we defer to a

circuit court's determination, *see* ***id.***, ¶40, here, the court's implicit factual finding was clearly erroneous, and its corresponding legal conclusion was clearly wrong.

¶12 Never having been named as a party to the underlying personal injury action and never having notice of the action, MSI was unable to protect its interests before the matter was dismissed in 1999. Kordus's claim that Benton's filing for bankruptcy would have precluded any recovery from her is specious. Benton filed for bankruptcy more than six months after the accident. If MSI had received timely notice, it would have had the option of pursuing early settlement and contribution prior to Benton's bankruptcy. Thus, Kordus's contention that MSI's position would have been no different is simply wrong.

¶13 The dismissal with prejudice in the underlying lawsuit effectively precluded MSI from pursuing subrogation and/or contribution. Clearly, this was prejudicial; Kordus's arguments are unconvincing, and the circuit court's reliance on them defies law and logic. Consequently, we reverse and remand for the circuit court to grant MSI's motion for summary judgment.

By the Court.—Judgment reversed and cause remanded with directions.

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