

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2004

Cornelia G. Clark
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. 04-0137

Cir. Ct. No. 03CV301

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DAVID JANSSEN, MONICA JANSSEN AND KRISTIN
JANSSEN,**

PLAINTIFFS-APPELLANTS,

v.

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Janssens appeal a summary judgment denying coverage under their Blue Cross Blue Shield United of Wisconsin group health insurance policy for medical treatment Kristin Janssen received in Arizona and

dismissing their bad faith claim. Because the Blue Cross policy unambiguously excludes coverage of the Janssens' claim, we affirm the judgment.

BACKGROUND

¶2 In the spring of 1999, Kristin Janssen developed anorexia and bulimia. For the next three years, Kristin sought a variety of treatments for her eating disorders. In January 2001, she began an inpatient program at Rogers Memorial Hospital in Oconomowoc. None of her treatment was successful.

¶3 From May 15, 2002, through June 29, 2002, Kristin received treatment at the Remuda Ranch Center for Anorexia and Bulimia located in Arizona. Remuda is licensed in Arizona as a "Level 1 Behavioral Health Facility." Kristin's Remuda treatment cost exceeded \$60,000.

¶4 During Kristin's treatment at Remuda, she was insured under a Blue Cross group health insurance policy issued to her father, David Janssen. The Blue Cross policy included coverage for this type of inpatient treatment when provided at a "hospital" as that term was defined in the policy. Blue Cross denied the Janssens' claim for the Remuda treatment.

¶5 The Janssens appealed to Blue Cross's Claim Appeal Committee, which denied the claim based on its conclusion that Remuda was not a "hospital" as defined in the policy. On March 5, 2003, the Janssens filed this action contesting Blue Cross's denial of benefits. The parties filed cross-motions for summary judgment.

¶6 The circuit court granted Blue Cross's motion for summary judgment and denied the Janssens' motion for partial summary judgment. It

concluded that the policy language was not ambiguous and that Remuda was not a “hospital” under the policy.

STANDARD OF REVIEW

¶7 We review the grant or denial of a summary judgment independently, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). The interpretation of an insurance policy in the context of undisputed facts is a question of law to which we owe no deference to the circuit court. *State v. City of Rhineland*, 2003 WI App 87, ¶5, 263 Wis. 2d 311, 661 N.W.2d 509. “Where the language of the policy is plain and unambiguous, we enforce it as written, without resort to rules of construction or principles in case law.” *Danbeck v. American Fam. Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. Policy language is ambiguous if, when read in context, it is reasonably or fairly susceptible to more than one interpretation. *Garriguenc v. Love*, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975). We construe ambiguous language in favor of coverage. *Danbeck*, 245 Wis. 2d 186, ¶10.

DISCUSSION

¶8 The Janssens contend that the policy’s definition of “hospital” is ambiguous and therefore must be construed in favor of coverage. The policy defines “hospital” as follows:

HOSPITAL means a facility for the care and treatment of an Illness or Injury, which:

1. Is licensed and/or accredited as a Hospital in the jurisdiction in which it is located;
2. Is under the supervision of a staff of one or more Physicians;

3. Provides 24 hour nursing care by or under the supervision of registered graduate nurses (R.N.); and
4. Is equipped for diagnosis and treatment, and major Surgery, for which a charge is made that the Member is legally obligated to pay.

A facility which provides for care and treatment of mentally ill or mentally retarded persons is not required to have major Surgery facilities on its premises if it otherwise satisfies this definition of "Hospital."

Except where provided for elsewhere in this Contract, "Hospital" does not include an institution that is principally for: transitional care or subacute care, rest, nursing, long-term, extended, or Custodial Care; convalescence, care of the aged; alcoholics; drug addicts; or rehabilitation.

At its core, the parties' dispute revolves around the form of license that a facility must hold in order to be considered a "hospital" under the Blue Cross policy. The Janssens claim that the facility must be licensed as a facility that meets the substantive requirements of paragraphs two through four of the definition. Blue Cross contends that a facility must carry a license that includes the term "hospital" in order to be considered a "hospital" under the policy.

¶9 First, the Janssens argue that the first numbered paragraph of the definition is circular and, therefore, ambiguous. The policy uses capitalized words to denote those terms that are defined in the policy. The policy defines "hospital" as a facility that "[i]s licensed and/or accredited as a Hospital" The Janssens argue that because the definition of "hospital" refers the reader back to "hospital," this definition is circular and creates ambiguity in the policy.

¶10 However, the Janssens' argument ignores the policy's plain language. The contested definition is not merely a "hospital is a hospital." Rather, a "hospital" is a facility "licensed and/or accredited as a Hospital in the

jurisdiction in which it is located.” On its face, the language requires that for a facility to be deemed a “hospital,” it must be licensed or accredited as a “hospital” by the jurisdiction where it is located. Remuda is licensed in Arizona as a “Level 1 Behavioral Health Facility,” not a “hospital.” Accordingly, the plain language of the policy precludes Remuda from qualifying as a “hospital,” and therefore the policy unambiguously provides no coverage of Kristin’s treatment there.

¶11 Second, the Janssens rely on the last paragraph of the definition, which lists facilities that are generally excluded as “hospitals” under the policy, to support their argument that a reasonable insured would expect coverage here. They claim that since that list does not identify any facilities similar in type to Remuda, a reasonable insured would expect that Remuda is a “hospital.” However, a policy need not deny coverage by virtue of an exclusion when the policy does not include coverage in the first instance. *See Smith v. Atlantic Mut. Ins. Co.*, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990). The clear language of the policy provides no coverage for treatment at Remuda since Remuda’s Arizona license does not include the term “hospital.” Therefore, it does not matter that the policy fails to specifically list “behavior health facility” as a type of facility that is not a “hospital.”

¶12 Third, the Janssens contend that Blue Cross’s interpretation of “hospital” would render coverage for mental illness treatment illusory. The policy includes as “hospitals” facilities for the treatment of the mentally ill even if those facilities do not meet the “surgery” requirement of the fourth numbered paragraph. The Janssens posit that such facilities would seldom carry the word “hospital” on their licenses and therefore Blue Cross’s interpretation of “hospital” renders its purported mental illness coverage meaningless. However, the Janssens’ argument

is predicated on hypothetical facts that are not before this court. *See id.* at 814. “We do not reach decisions based on hypothetical facts.” *Id.*

¶13 We also reject the Janssens’ remaining arguments that Blue Cross’s interpretation of the policy language frustrates the reasonable expectations of the insured. The Janssens contend that a reasonable insured would expect coverage for the Remuda treatment because: (1) Blue Cross previously provided coverage for similar treatment provided at Rogers Memorial Hospital in Oconomowoc; (2) a reasonable person would not distinguish between Rogers Memorial *Hospital* and Remuda *Ranch*, when the facilities were providing similar treatment; and (3) Blue Cross’s customer service representatives indicated only that Remuda needed to be licensed in Arizona, not licensed as a “hospital.” An insured’s reasonable expectations of coverage may not be satisfied when those expectations are contrary to the policy’s plain language. *City of Rhinelander*, 263 Wis. 2d 311, ¶15. Regardless of whether the Janssens’ expectations of coverage are reasonable, they are contrary to policy language that unambiguously denies coverage.

¶14 Finally, the Janssens argue that Blue Cross’s interpretation of “hospital” frustrates the purpose of the insurance contract since it denies coverage for essential, life-saving treatment. Ambiguities in the policy must be construed in accordance with the policy’s predominant purpose. *See Capital Invests., Inc. v. Whitehall Pkg. Co.*, 91 Wis. 2d 178, 190, 280 N.W.2d 254 (1979). However, we have already concluded that no ambiguity exists here.

¶15 Because we have concluded that the policy unambiguously provides no coverage for Kristin’s treatment at Remuda, we also affirm the circuit court’s dismissal of the Janssens’ claim that coverage was denied by Blue Cross in bad faith.

By the Court.—Judgment affirmed.

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

