

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 25, 2017

Diane M. Fremgen
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. 2016AP846

Cir. Ct. No. 2015CV10

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MICHAEL J. SHEFFIELD,

PLAINTIFF-APPELLANT,

V.

**DARWIN NATIONAL ASSURANCE COMPANY N/K/A
ALLIED WORLD SPECIALTY INSURANCE COMPANY,**

DEFENDANT-RESPONDENT,

WILLIAM G. SKEMP AND WILLIAM SKEMP LAW FIRM, S.C.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Rusk County:
STEVEN P. ANDERSON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Michael Sheffield appeals a judgment declaring no coverage for a legal malpractice claim not reported within the policy period. We affirm.

¶2 This matter arises from Sheffield’s legal malpractice claim against William G. Skemp and William Skemp Law Firm, S.C., alleging a failure to timely file a long-term disability claim within the statute of limitations. The Skemp firm had a lawyers professional liability insurance policy with Darwin National Assurance Company n/k/a Allied World Specialty Insurance Company (Allied World). Allied World was also named as a defendant in Sheffield’s lawsuit. The policy was a “claims made and reported” contract with a term from January 11, 2012, to January 11, 2013. However, William Skemp left his firm and joined another practice, and the policy was cancelled at the request of the Skemp firm effective September 4, 2012. In the same communication seeking to cancel the policy, the Skemp firm asked to purchase “a 2 year tail.”¹

¶3 Allied World denied the Sheffield claim because it was reported after September 4, 2014, which it asserted was the termination date for the two-year extended reporting period (ERP). Allied World sought a declaratory judgment on the basis of no coverage, and Sheffield sought partial summary judgment on the coverage issue. The circuit court declared the policy a

¹ Allied World advised the Skemp firm that it needed to pay for the optional two-year extended reporting period within sixty days of the cancellation date of September 4, 2012. Allied World sent an invoice on September 10, 2012 and it was paid on October 2, 2012.

“claims-made-and-reported” policy and “the reporting had to be done by September 4th 2014, and it was not.” As a result, the court held the insuring agreement of the policy was not triggered, and the court also determined Wisconsin’s notice-prejudice statutes did not apply.² The court dismissed Allied World from the action. Sheffield now appeals.

¶4 The construction of an insurance policy and the determination of rights and obligations under the policy are issues of law that we review independently. *J.G. v. Wangard*, 2008 WI 99, ¶¶18-19, 313 Wis. 2d 329, 753 N.W.2d 475. Insurance policies are governed by the same rules of construction that apply to other contracts. *Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. We are guided by the principle that the words of the policy should be given the meaning that a reasonable person in the position of the insured would have given them. *Id.*, ¶25. If the words in an insurance policy are plain and unambiguous, we will afford them their plain, ordinary meaning and apply them as written. *See Garringuenc v. Love*, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975). We will not search for ambiguity where there is none. *See Smith v. Atlantic Mut. Ins. Co.*, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990).

¶5 In the present case, there is no ambiguity in the relevant terms of the insurance contract. The nature of the coverage available under the Allied World policy was plainly stated in bolded, all-capitalized language located both on its Declarations Page and at the top of the first coverage form. This language informed that Allied World’s policy applied “only to claims first made during the

² Referring to WIS. STAT. §§ 631.81(1); 632.26(2) (2015-16).

policy period or any extended reporting period, and reported in accordance with Section IV.I of the policy.” In turn, section IV.I. of the policy included language that plainly required the insured to provide Allied World with notice of any claim made against the insured during an ERP “as soon as practicable and no later than the termination of the Extended Reporting Period.”

¶6 This policy language clearly indicates that it is a claims-made-and-reported policy, which requires a claim to be reported within the inception and expiration dates of the contract. *See Anderson v. Aul*, 2015 WI 19, ¶26, 361 Wis. 2d 63, 862 N.W.2d 304. Claims-made-and-reported policies pervade the legal malpractice insurance industry. As the court stated in *Aul*, “[m]ost recent forms [for legal malpractice insurance] are ‘claims-made-and-reported,’ requiring that the claim first be made against the insured and reported to the insurer within the policy term.” *Id.*, ¶33. So is the nature of the Allied World policy issued to the Skemp firm.

¶7 Allied World’s policy endorsement No. 5 also clearly stated the ERP “shall begin on September 4, 2012 and shall end on September 4, 2014.” Here, the claim was not reported until September 9, 2014. Accordingly, the circuit court correctly observed “the reporting had to be done by September 4, 2014, and it was not. So there is no coverage under the Allied World Insurance.” Moreover, the court properly determined claims-made-and-reported policies permit an insurer to deny coverage without a showing of prejudice when an insured fails to report a claim within the policy period. *See id.*, ¶98.

¶8 Sheffield insists “[t]he record does not support the claim that endorsement no. 5 was emailed by Allied World or that anyone at Skemp’s firm received it.” Sheffield concedes that Lawrence Gonzalez, a senior underwriter at

Allied World and underwriter on this policy, averred in an affidavit supporting the motion for declaratory judgment that “Endorsement number 5 was emailed to representatives of the Skemp firm on or shortly after October 2, 2012, as we had received payment in full for the Extended Reporting Period by that time.” Sheffield also acknowledges Gonzalez’s “recitation of facts was based on his personal knowledge and his ‘familiarity with the practices of the Allied World group of insurance companies.’” However, Sheffield contends Gonzalez’s affidavit “did not establish that the endorsement was sent,” as “there is an assertion with no supporting evidence” and Gonzalez “does not set forth the basis for his knowledge”

¶9 We need not decide whether the Skemp firm received endorsement No. 5. Even if we assume the Skemp firm failed to receive the endorsement, the remainder of the policy clearly informed the Skemp firm that the optional ERP it purchased expired two years after the policy was cancelled on September 4, 2012, requiring any claim to be reported by September 4, 2014.

¶10 The policy defined “Policy Period” as follows:

POLICY PERIOD means the period of time between the Inception Date to the Expiration Date as shown in Item 2 of the Declaration, or from the Inception Date to any earlier cancellation or termination date, if applicable.

¶11 Item 2 of the Declaration stated a policy period inception date of January 11, 2012, and an expiration date of January 11, 2013. On August 1, 2012, however, William Skemp joined another law practice. On September 4, 2012, a Skemp firm paralegal emailed Allied World and requested cancellation of the policy. At the same time it cancelled the policy, the Skemp firm also asked “to add a 2 year tail to the policy.” In an email to the paralegal, Allied World

responded that upon the Skemp firm's request, "we have cancelled your policy as of September 4th, and added a two-year ERP in order to activate the tail" Payment of the premium for that optional ERP was made on October 10, 2012.

¶12 The circuit court correctly recognized that an ERP is not a new insurance policy. Rather, it extends the time to report a claim after the policy is cancelled. The ERP in the present case did not cover malpractice committed after September 4, 2012, but only malpractice committed before that date giving rise to claims made and reported within two years after that date. Quite simply, the Skemp firm ceased operating in August 2012. Therefore, it could not have committed malpractice after September 4, 2012.³ However, to deal with potential claims based on malpractice occurring before the Allied World policy was cancelled on September 4, 2012, but for which claims had not yet made—and which the Skemp firm therefore could not report until after September 4, 2012—the Skemp firm needed tail coverage, and it therefore purchased a two-year ERP.

¶13 As the circuit court also correctly observed, an optional extended reporting period for those who cancel a policy protects those insureds against gaps in coverage. In addition, Gonzalez also averred, "Under no circumstances does our company issue Extended Reporting Periods that commence following a gap in time after the termination of the policy to which they relate."⁴

³ If the malpractice had occurred between September 4, 2012, and September 4, 2014, it would have occurred at the new law firm, which had an insurance policy with a different insurer.

⁴ The invoice Allied World sent to the Skemp firm also reiterated a transaction effective date of September 4, 2012, and the Skemp firm admitted it received the ERP invoice.

¶14 Sheffield insists the two-year ERP did not begin until after a sixty-day “Automatic Extended Reporting Period ran.” This argument is also premised on the supposition that the Skemp firm did not receive endorsement No. 5, stating the ERP “shall begin on September 4, 2012 and shall end on September 4, 2014.” Regardless, under the plain terms of the policy in Section IV.G., an insured had two alternative “extended reporting period *options*” (emphasis added) for extending the time to report claims past the expiration (here, due to the policy’s cancellation) of the policy period. First, if the policy had been in force for at least six months, or the insurer consented, the insured could simply opt to do nothing and receive a courtesy sixty-day “automatic extended reporting period,” immediately following the effective date of the cancellation or refusal to renew, in which to give notice of claims first made against the insured during the sixty days for any wrongful act committed prior to the cancellation date. Second, irrespective of the length of time the policy had been in effect, the insured could purchase an “optional extended reporting period.”

¶15 The Skemp firm chose the latter option and purchased a two-year ERP, one of five ERPs of varying duration that were available. The optional ERP extended the period for reporting claims “first made against the insured after the termination of the Policy Period.” Again, here, the termination of the policy occurred upon its cancellation on September 4, 2012. The Skemp firm was aware of the cancellation date when it received the emails from Allied World informing it of that fact in September 2012. Accordingly, the two-year optional ERP commenced upon cancellation of the policy on September 4, 2012, and ended on September 4, 2014.

¶16 The optional, premium-based extended reporting period the Skemp firm purchased did not provide for an additional, courtesy sixty-day automatic

extended reporting period. The automatic ERP and the premium-based ERPs were clearly mutually exclusive options. Beyond the language in Section IV.G. itself, the exclusiveness of the options is supported by other policy language. Notably, the very provision discussed above (Section IV.I.) refers to notice of claims being made “no later than the termination of the **Extended Reporting Period.**” The phrase “Extended Reporting Period,” in turn, is defined in the policy as “*the extended reporting period elected by an **Insured**, pursuant to the terms and conditions described in Part IV – Conditions, Subsection G. of the Policy.*” (Emphasis added.)

¶17 Given the Allied World policy’s language, the Skemp firm paid for an optional two-year ERP, and a reasonable insured would not expect that it paid for an optional extended reporting period of two years plus sixty days. The circuit court correctly determined the Allied World policy did not provide coverage for the Sheffield claim because the claim was not reported within the two-year ERP.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

