COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2002

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. 01-2105 **Cir. Ct. No. 99 CV 212**

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

RICHARD P. YATSO, PEGGY LYNN YATSO, RACHEL KRISTINE YATSO AND MITCHELL RICHARD YATSO,

PLAINTIFFS-APPELLANTS,

V.

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, BADGER STATE SECURITY TRUST, AND HEARTLAND TRUST,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Reversed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Richard P. Yatso, his wife, Peggy Lynn, and their children, Rachel Kristine and Mitchell Richard, appeal from the order dismissing, with prejudice, their complaint and granting summary judgment to Blue Cross & Blue Shield United of Wisconsin, Badger State Security Trust, and Heartland Trust (collectively, "Blue Cross").[1] The Yatsos argue that material issues of fact preclude summary judgment on their breach-of-contract and bad-faith claims. We agree and, therefore, reverse.

I. BACKGROUND

¶2 In November 1993, Richard, a thirty-eight-year-old farmer, was diagnosed with small lymphocytic lymphoma, a form of cancer.[2] After several years of observation and intermittent chemotherapy, Richard's treating physician, Dr. David Mertens, referred him to Dr. David Vesole, the clinical director of the bone marrow transplant program at the Medical College of Wisconsin, for consultation regarding treatment options.

¶3 In January 1997, Dr. Vesole concluded that an allogeneic bone marrow transplant (in which the patient receives a bone marrow/stem cell transplant from a living compatible donor) would be the only curative option for Richard, whose lymphoma was then at stage IV B. Dr. Vesole provided Richard's pertinent

[1] According to the appellants' brief-in-chief to this court, discovery conducted after the filing of the complaint suggests that Badger State Security Trust and Heartland Trust should be voluntarily dismissed from the action. In its responsive brief, Blue Cross & Blue Shield United of Wisconsin asserts that Badger State Security Trust and Heartland Trust "were improperly named as defendants and are simply legal entities ('trusts') set up to hold contracts for the benefit of insured members."

[2] Small lymphocytic lymphoma is a "low-grade non-Hodgkin's lymphoma" that is categorized as "well differentiated lymphocytic lymphoma." Blue Cross and Blue Shield Association Technology Evaluation Center, *HDC with AlloBMT or AuSCS in the Treatment of CLL or SLL*, *in* TEC ASSESSMENT PROGRAM, Apr. 1996, at 1, 3.

medical history, physical examination data, and additional clinical information (including citations to three articles published in medical journals) to Blue Cross and requested written authorization for payment for the procedure and associated charges. On February 17, 1997, Nancy Kotajarvi, a transplant coordinator/case manager, responded in writing to Dr. Vesole's request, explaining that "under the terms of [Richard's] contract, no benefits are available" because "[a]fter careful review by [Dr. Howard Travers,] our Associate Medical Director[,] of the medical information submitted, we have determined that this allogeneic bone marrow transplant would be considered 'experimental-investigational' for the diagnosis of small lymphocytic lymphoma."

¶4 Blue Cross's denial was based on certain provisions of Richard's policy, summarized in the benefit booklet.[3] As relevant to this appeal, the booklet stated:

> 3. Organ Transplants
>
> Surgical Covered Services include the following Medically Necessary transplants:
>
> ….
>
> c. Non-Experimental/Investigational bone marrow, including hematopoietic stem cell support;
>
> ….
>
> The Physician must certify and it must be true that the transplant is Medically Necessary.…
>
> ….
>
> Pre-authorization of benefits is required for any transplant procedure.

[3] The appellate record contains no copy of the actual insurance contract, and the parties' briefs to this court rely on the language contained in the benefit booklet. As a subscriber, Richard had not received a copy of the actual insurance contract; he had, however, received a copy of the benefit booklet outlining the essential terms of the insurance coverage provided under the contract.

Further, the booklet explained:

> EXPERIMENTAL/INVESTIGATIONAL means devices, drugs, biologic products, procedures, programs of diagnosis or treatment, and facilities for which there is a lack of scientific evidence permitting conclusions:
>
> 1. As to effect on health outcome;
> 2. That the net health outcome is beneficial;
> 3. That the beneficial outcome is better than that achieved under established alternatives; and
> 4. That the effect is attainable under the usual conditions of medical practice.
>
> We determine whether a treatment, service or supply is Experimental/Investigational. Among the factors We consider are:
>
> 1. Current medical literature;
> 2. Recommendation of the Blue Cross & Blue Shield Association;
> 3. Recommendation of Our medical director; and
> 4. Where applicable, approval by the appropriate government regulatory body to commercially market the treatment, service, or supply.

¶5 On March 3, 1997, Dr. Vesole responded to Nancy Kotajarvi's letter. He explained that Richard's type of lymphoma was "analogous to chronic lymphocytic leukemia based upon its immunophenotypic characteristics, disease characteristics, response characteristics and natural history," and he summarized "peer review clinical studies" he described as "support[ing] the efficacy of allogeneic transplantation for patients with disease characteristics similar to [those of Richard]." Regarding the allogeneic bone marrow transplant proposed for Richard, he concluded: "Again, there is no other therapy which is potentially curative for the treatment of this disease. Therefore, this treatment is accepted in the medical oncologic community, appropriate for the treatment of this disease and medically necessary for this patient."

¶6 On March 24, 1997, Nancy Kotajarvi sent another letter to Dr. Vesole, informing him of the second denial for preauthorization of benefits related to the proposed transplant. She explained that a second review of Richard's case had been completed by a "Medical Oncology Consultant" (Dr. Charles Tiber), and she summarized Dr. Tiber's review:

> The recent literature submitted regarding the value of bone marrow transplants for low grade lymphomas was reviewed. [Although] there are a number of papers that describe this procedure being performed and [it] is capable of producing remissions in some patients, it is not established as standard therapy and although it appears that some patients do benefit from a bone marrow transplant, it is difficult to establish if these patients are cured. Dr. Vesole states in his letter he feels that allogeneic transplants are a potentially curative therapy. This is not a standard therapy and [I] would consider this experimental or investigational type therapy.

¶7 In the months that followed, in response to a series of appeal requests, Blue Cross continued to refuse to preauthorize benefits related to the proposed transplant. Finally, on August 11, 1997, Dr. Travers wrote to Richard, notifying him that "a physician oncologist consultant and the Claim Appeal Committee" had determined that the original denial was correct. Neither the Yatsos nor Dr. Vesole made further attempts to appeal the denial.

¶8 Richard's condition worsened, and he became eligible for social security disability benefits in 1996.[4] On January 11, 1999, the Yatsos filed the complaint underlying this appeal. Alleging that Richard's condition had deteriorated to the point where he was no longer a candidate for the allogeneic bone marrow transplant procedure, they claimed bad faith, intentional infliction of emotional

[4] Due to Richard's continued eligibility for social security disability benefits, he became eligible for coverage under Medicare parts A and B effective July 1, 1998. *See Medicare Basics: Who is Eligible for Medicare?*, *at* http://www.medicare.gov/Basics/Eligibility.asp.

distress, and breach of contract. The Yatsos alleged that as a direct and proximate result of Blue Cross's denial of preauthorization for the transplant, they had experienced devastating effects, some of which would continue or worsen: for Richard—diminished quality of life, "substantial pain and suffering, including psychological injuries, anxiety and the fear of dying and death," loss of income, and medical expenses; for his wife—loss of his consortium, services, and support; for his children—loss of his society and companionship; and for all of them—"the highest degree of severe emotional distress, shock, horror, grief, anger, disappointment, worry, physical disability, injury and illness."

¶9 On April 30, 1999, Lawrence LaSusa, counsel for Blue Cross, wrote to Thomas Schwaba, counsel for the Yatsos. The letter stated, in relevant part:

> I received and reviewed Dr. Vesole's records.... I noticed in the records that some of Mr. Yatso's doctors recommended waiting on a bone marrow transplant until his disease advanced to [a] later stage.
>
> As you know, the efficacy of a bone marrow transplant depends on the stage, grade and type of lymphoma. While[] an allogeneic bone marrow transplant was considered experimental under the terms of Mr. Yatso's policy given his stage, grade and type of lymphoma at the time of his request, I think it[']s important that you know that the policy later changed to include allogeneic bone marrow transplants for aggressive low grade lymphoma.
>
> In the event that Mr. Yatso's stage, grade or type of lymphoma has changed since the diagnoses under which he applied for a bone marrow transplant, I strongly encourage you and Mr. Yatso and his doctors to explore this development at your first convenient opportunity.

¶10 In a June 29, 1999 letter, Blue Cross notified Dr. Vesole that it had preauthorized an allogeneic bone marrow transplant for Richard and that the preauthorization was valid for 180 days. Richard received the transplant in

December 1999 though, for reasons the parties do not explain, coverage was provided under Medicare, not Blue Cross.

¶11 Richard's lymphoma went into remission. As he summarized in his affidavit of April 26, 2001, however:

> In January, 1997, I was a candidate for a bone marrow transplant …. At that time, my brother[,] Paul, was found to be a compatible bone marrow donor and agreed to be my donor. Dr. David Vesole … applied to Blue Cross for pre-approval and authorization for the procedure.…
>
> Blue Cross denied our application, and our appeals, on the basis that the bone marrow transplant for me and my condition was experimental in nature.
>
> When Peggy and I heard the decisions from Blue Cross, we were very disappointed. She became sad and then angry. I was angry and then afraid. For me there was nothing left to do for the cancer. It was clear to me that I was going to die in a short period of time unless I was able to get the bone marrow transplant. Both of us became very depressed.
>
> I was in a state of despair. I was still receiving the chemotherapy because the bone marrow transplant was denied, but the chemotherapy wasn't doing me much good any more. Physically I felt very weak. I felt I didn't have long to live. I began to drink heavily. I refused to do what little work I could on the farm and Peggy felt she was responsible for everything. Peggy became angry at me for not doing more, and I became angry at her for not understanding how I felt.
>
> We retained an attorney to help us and we filed a lawsuit against Blue Cross in January, 1999.…
>
> Since the time in 1997 when my brother was a willing donor, he became reluctant and fearful of health problems. It became necessary to look for another donor, but this time outside the family. By the time Froedtert Hospital found a match, I had been found disabled due to my condition by the Social Security Administration and was eligible for Medicare.
>
> Even though I had the transplant in December, 1999 through the Medicare program, and am now in remission, we were not able to carry on the farming business sufficiently during the almost two and a half year delay in

> my obtaining and recuperating from the transplant, and the farm was foreclosed and sold.

II. DISCUSSION

A. Standards of Review

¶12 Summary judgment methodology is used to determine whether a legal dispute requires a trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). A circuit court must enter summary judgment when "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) (1999-2000).[5] As our supreme court has recently explained:

> An appellate court reviews a decision granting summary judgment independently of the circuit court, benefiting from its analysis. The appellate court applies the same two-step analysis the circuit court applies pursuant to Wis. Stat. § 802.08(2). Specifically, a court first examines the pleadings to determine whether a claim for relief is stated and whether a genuine issue of material fact is presented.
>
> If the pleadings state a claim and demonstrate the existence of factual issues, a court considers the moving party's proof to determine whether the moving party has made a prima facie case for summary judgment. If the defendant is the moving party the defendant must establish a defense that defeats the plaintiff's cause of action. If a moving party has made a prima facie defense, the opposing party must show, by affidavit or other proof, the existence of disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn that are sufficient to entitle the opposing party to a trial.

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

> The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party. The court takes evidentiary facts in the record as true if not contradicted by opposing proof.

Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, ¶¶21-23, 241 Wis. 2d 804, 623 N.W.2d 751 (footnotes omitted).

¶13 The interpretation of an insurance contract presents a question of law which we review *de novo*. ***Tower Ins. Co. v. Chang***, 230 Wis. 2d 667, 672, 601 N.W.2d 848 (Ct. App. 1999), *review denied*, 2000 WI 36, 234 Wis. 2d 177, 612 N.W.2d 733. Our primary objective is to construe the policy language "to mean what a reasonable person in the position of the insured would have understood the words to mean." ***Sprangers v. Greatway Ins. Co.***, 182 Wis. 2d 521, 536, 514 N.W.2d 1 (1994). Although we have no authority to modify unambiguous policy language, ***Schroeder v. Blue Cross & Blue Shield United of Wis.***, 153 Wis. 2d 165, 173, 450 N.W.2d 470 (Ct. App. 1989), "[a]ny ambiguity in exclusionary clauses or exceptions is to be strictly construed against the insurer," ***Sprangers***, 182 Wis. 2d at 536. "An ambiguity exists when the policy is reasonably susceptible of more than one construction from the viewpoint of a reasonable person of ordinary intelligence in the position of the insured." ***Schroeder***, 153 Wis. 2d at 174.

¶14 The supreme court summarized the standards governing a bad-faith claim in the context of the denial of insurance benefits:

> To establish a claim for bad faith, the insured "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." The first prong of this test is objective, while the second prong is subjective.
>
> Under the first prong, the insured must establish that, under the facts and circumstances, a reasonable insurer

> would not have denied or delayed payment of the claim. In applying this test, it is appropriate for the trier of fact to determine whether the insurer properly investigated the claim and whether the results of the investigation were subjected to reasonable evaluation and review. In other words, under the first prong …, to determine whether the insurer acted in bad faith the trier of fact measures the insurer's conduct against what a reasonable insurer would have done under the particular facts and circumstances to conduct a fair and neutral evaluation of the claim.

Weiss v. United Fire & Cas. Co., 197 Wis. 2d 365, 377-78, 541 N.W.2d 753 (1995) (citations omitted).

B. Analysis

¶15 The Yatsos contend that the Blue Cross policy language defining "experimental/investigational" is vague and ambiguous and must therefore be "construed in favor of the insured and against the insurer so that the insured's reasonable expectations of coverage are advanced." They argue that Blue Cross breached its insurance contract with Richard "when it arbitrarily and capriciously construed the definitions narrowly in its favor and against its insured." Blue Cross responds that the terms "experimental" and "investigational" are not ambiguous, and that it followed a reasonable process in making its coverage determination. We conclude that, regardless of any arguable ambiguity in the terms of the contract, a material factual issue remains: whether Blue Cross's denial of benefits was reasonable and in good faith.

¶16 According to the benefit booklet, the policy at issue in this appeal clearly provides that the determination of whether a bone marrow transplant is experimental/investigational will be made by the insurer, and the booklet enumerates some of the factors to be considered in reaching that determination. The issue, however, is not whether Blue Cross had the virtually unfettered authority to make that determination, but rather, whether it exercised that authority reasonably and in

good faith. The summary judgment submissions establish that summary judgment was not appropriate.

¶17 Blue Cross's summary judgment submissions include Dr. Travers' affidavit in which he states that the February 17, 1997 denial letter from Nancy Kotajarvi was based upon his recommendation as stated in a note dated February 12, 1997. The note explains, in relevant part:

> A literature search was performed and the articles referenced by Dr. Vesole in his 1/20/97 letter were included in this review. The literature contains reports of allogeneic B.M.T. in the treatment of low grade lymphoma (which this is) for only a handful of patients studied in a non [-]randomized, uncontrolled fashion. There are no randomized controlled studies reported that demonstrate that this form of therapy results in a beneficial outcome that is better than that achieved under established alternatives.
>
> In addition, this case was discussed with Charles Tiber, M.D.—consultant medical oncologist. He indicated that some ongoing studies are in progress but that, in his opinion, B.M.T. is experimental/investigational at this time for low grade lymphoma.

Dr. Travers' affidavit also states that although bone marrow transplants for *intermediate or high grade* non-Hodgkin's lymphoma were authorized by Blue Cross's internal policy guidelines in effect at the time of the initial denial, those guidelines did not "cover" such transplants for *low grade* non-Hodgkin's lymphoma.[6]

[6] The record contains a document entitled "BONE MARROW TRANSPLANTATION" (noting that its contents were "[t]aken from the BCBS Association TEC Evaluation of 1994 as well as policies published in 1996") which was offered to substantiate this statement. The document does, indeed, list *intermediate or high grade*, but not *low grade*, non-Hodgkin's lymphoma as an indication for allogeneic bone marrow transplant. Perhaps significantly, however, only sickle call anemia and polycythemia vera are listed under the "Experimental/Investigational" heading for allogeneic bone marrow transplant.

(continued)

Supporting documentation for Dr. Travers' affidavit also includes an excerpt from the Blue Cross and Blue Shield Association Uniform Medical Policy Manual that was in effect at the time of the original denial. The excerpt (from the oncology section of the manual) indicates that it contains the bone marrow transplantation policy guidelines for all cancers, except that guidelines for allogeneic transplants addressing only primary bone marrow diseases are contained in the surgery section of the manual. The excerpt addresses high-dose chemotherapy with hematopoietic stem cell support, and the included policy provides, in relevant part:

> High-dose chemotherapy is considered eligible for coverage on a prior-approval basis in the treatment of the following malignancies when supported by stem cells:
>
> 1. Autologous bone marrow stem cell support refers to harvesting bone marrow, which contains stem cells, by needle aspiration …. The harvested bone marrow is infused after high-dose chemotherapy. This technique is considered eligible for coverage for patients: a) who have not experienced marrow disease (i.e., marrow cancer cell invasion documented by light microscopy) or marrow hypocellularity caused by prior therapy; and b) who are being treated for one of the following malignancies:
>
>   ° *Non-Hodgkin's lymphoma, intermediate or high grade stage III, or stage IV*;
>
>   ….
>
> 2. Allogeneic bone marrow stem cell support refers to needle aspiration harvesting of bone marrow from a healthy donor who is HLA compatible with the patient. The harvested marrow is infused into the patient after chemotherapy.
>
> HLA compatibility between a patient and a potential donor is established by serologic tissue typing of HLA loci and the outcome of mixed leukocyte cultures. HLA loci refers to the tissue type expressed at the HLA A, B and DR loci on each leg of chromosome 6. Depending upon the disease, an acceptable donor will match the patient at all six HLA loci or will be mismatched at one or two antigens. In all cases, donor and recipient leukocytes must be nonreactive in mixed leukocyte culture.
>
> This procedure is considered eligible for coverage for patients who: a) cannot donate their own marrow because of diseased or hypocellular marrow; and b) are otherwise candidates for high dose chemotherapy; and c) are being treated for one of the indications below, using the specified donor match.…
>
>   a. Acceptable donor is related or unrelated to patient with matches at all six HLA loci; patient and donor cells are nonreactive in mixed leukocyte culture:

(continued)

¶18 Additionally, supporting documentation for Dr. Travers' affidavit includes a copy of a 1996 document concluding that "allogeneic bone marrow transplantation and high-dose chemotherapy with autologous stem-cell support do not meet the Blue Cross and Blue Shield Association Technology Evaluation Center (TEC) criteria for treatment of … small lymphocytic lymphoma."[7] Blue Cross and

---

> ° *Non-Hodgkin's lymphoma, intermediate or high grade, stage III or stage IV*;
>
> ….
>
> 3. Autologous peripheral blood stem cell support refers to collection of stem cells from the blood by repeated blood phereses. Harvesting may be carried out during the cellular rebound phase that follows induction chemotherapy, or in conjunction with the administration of growth stimulating factors.
>
> This technique is considered eligible for coverage for patients who are being treated for the cancers listed under 1 above (autologous bone marrow stem cell support), but who: a) cannot undergo autologous bone marrow stem cell support because of diseased or hypocellular marrow[]; or b) cannot undergo allogeneic bone marrow stem cell support because an HLA-compatible donor is not available; or c) have contraindication(s) to general anesthesia.
>
> In addition, to be eligible for high-dose chemotherapy with hematopoietic stem cell support, the patient must satisfy both of the following:
>
> 1. The patient's disease characteristics and treatment history suggest that the probability of achieving a durable complete remission are greater with high-dose chemotherapy compared to standard-dose chemotherapy.
>
> and
>
> 2. The patient does not have a concurrent condition which would seriously jeopardize the achievement of a durable complete remission with high-dose chemotherapy with hematopoietic stem cell support.

(Italics added.)

[7] We note that this document cites numerous references, including the same three noted by Dr. Vesole in his January 1997 letter to Blue Cross.

Blue Shield Association Technology Evaluation Center, *HDC with AlloBMT or AuSCS in the Treatment of CLL or SLL*, *in* TEC ASSESSMENT PROGRAM, Apr. 1996, at 1, 2. The reasons for this conclusion include: (1) "Since it is not possible to reliably estimate the long-term survival of … SLL [small lymphocytic lymphoma] patients after allo-BMT [allogeneic bone marrow transplantation] or HDC/AuSCS [high-dose chemotherapy with autologous stem-cell support], it is not possible to conclude whether the net health outcome is improved"; (2) "The existing evidence is not sufficient to draw conclusions about the relative effectiveness of allo-BMT or HDC/AuSCS compared with the available alternatives"; and (3) "Whether allo-BMT or HDC/AuSCS improves health outcomes for patients being treated for … SLL has not yet been demonstrated in the investigational setting." ***Id.***

¶19 Also included in support of Dr. Travers' affidavit is a copy of section III – C.10.1 of a "general medical policy compendium"—a Blue Cross & Blue Shield United of Wisconsin policy regarding bone marrow/stem cell transplantation criteria, indicating that the policy became effective on October 25, 1996, was re-evaluated in October 1997, April 1998, and November 1998, and was revised and reissued in November 1998. *The policy lists allogeneic bone marrow transplantation as appropriate for* "*Non-Hodgkin's Lymphoma*, intermediate grade, high grade, or *aggressive low grade*," but it notes that "[*c*]*overage is available on an individual consideration basis*" which is used "in determining medical necessity," and that "[p]rior authorization" is required. (Emphasis added.) Notably, the policy does not define the various grades of non-Hodgkin's lymphoma to which it refers.

¶20 The Yatsos' summary judgment submissions include an affidavit from Thomas R. Spitzer, M.D., the director of the bone marrow transplant program at Massachusetts General Hospital in Boston, Massachusetts, stating:

> In January 1997, an allogeneic bone marrow transplant for a patient with stage IV small cell lymphocytic lymphoma, Mr. Yatso's disease, was not experimental or investigational in nature. In January 1997, an allogeneic bone marrow transplant was recognized in the Oncology community as a recommended treatment option for patients with small cell lymphocytic lymphoma ….
>
> In January, 1997, there was not a lack of scientific evidence permitting conclusions as to the effect of an allogeneic bone marrow transplant for a patient with small cell lymphocytic lymphoma.… Pilot studies … showed a high probability of obtaining a complete remission.…
>
> The scientific evidence existing in January, 1997 showed that the beneficial outcome Mr. Yatso probably would have received from an allogeneic bone marrow transplant was better than that achieved under established alternatives. Given the progressive nature of his disease and the lack of a durable response to multiple alternative therapies, to a reasonable degree of medical probability in oncology, an allogeneic bone marrow transplant was the only treatment that could have offered durable control of his disease.…
>
> … A review of medical literature in January, 1997 and proper interpretation of the same would have shown that the effect of an allogeneic bone marrow transplant would have been beneficial and attainable by usual conditions of medical practice.
>
> ….
>
> … An allogeneic bone marrow transplant for Mr. Yatso in January, 1997 was not "experimental/investigational" according to the "experimental/investigational" definition contained in Mr. Yatso's Blue Cross/Blue Shield insurance policy.

¶21 The Yatsos' submissions also include an affidavit from Steven D. Gore, M.D., an associate professor of oncology at the Johns Hopkins University School of Medicine in Baltimore, Maryland, stating:

> In January 1997, an allogeneic bone marrow transplant for a patient with stage IV small cell lymphocytic lymphoma, Mr. Yatso's disease, was not experimental or investigational. Bone marrow transplantation for low grade lymphomas had been going on actively since the 1980's and in January, 1997, an allogeneic bone marrow transplant was recognized in the

> oncology medical community as a standard treatment option for select patients with small lymphocytic lymphoma, and was generally accepted as appropriate care, particularly for patients such as Mr. Yatso who had recurrent disease.
>
> … The scientific evidence, as it existed in January, 1997, showed that the net health outcome of an allogeneic bone marrow transplant was beneficial to select patients with small cell lymphocytic lymphoma. Studies existing in January, 1997 showed a high probability of obtaining a complete remission. The studies of allogeneic bone marrow transplants for small lymphocytic lymphoma were comparable from series to series and showed high complete remission rates and durable disease control.
>
> The scientific evidence existing in January, 1997 showed that the beneficial outcome Mr. Yatso probably would have received from an allogeneic bone marrow transplant was better than that achieved under established alternatives. Given the progressive nature of his disease and the lack of a durable response to multiple alternative therapies, to a reasonable degree of medical probability in oncology, an allogeneic bone marrow transplant was the only treatment that could have offered durable control of his disease.…
>
> … A review of medical literature in January, 1997 and proper interpretation of the same would have shown that the effect of an allogeneic bone marrow transplant would have been beneficial and attainable by usual conditions of medical practice.
>
> … An allogeneic bone marrow transplant for Mr. Yatso was not "experimental/investigational" according to the "experimental/investigational" definition contained in Mr. Yatso's Blue Cross/Blue Shield insurance policy in January, 1997.

¶22 Thus, the summary judgment submissions established what may have been legitimate differing professional views of whether an allogeneic bone marrow transplant for Richard was "experimental/investigational." Under such circumstances, whether the denial of benefits was reasonable and in good faith

remained a material factual issue.[8] Accordingly, we cannot conclude that summary judgment was appropriate.[9] *See* ***Park Bancorporation v. Sletteland***, 182 Wis. 2d 131, 141, 513 N.W.2d 609 (Ct. App. 1994) ("If the material presented is subject to conflicting interpretations or reasonable people might differ as to the significance, it is improper to grant summary judgment."); *see also* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993) ("[Summary judgment] methodology prohibits a court from deciding an issue of fact; it must only determine whether a factual issue exists.").

By the Court.—Order reversed.

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

[8] In framing the issue in these terms, we do not mean to preclude the possibility that evidence of alleged bad faith may include post-denial conduct. Here, the Yatsos maintain that Blue Cross waited seven months after the policy change before informing them that it would cover the transplant. Depending on the facts and circumstances, such conduct may be relevant.

[9] Resolving the case on this basis obviates the need to address the parties' dispute over the manner in which the circuit court considered certain affidavits. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).