

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2003

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 Nos. 02-0819
02-0823**

Cir. Ct. No. 01-CV-60

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 02-0819

WILLIAM BIEWER, KAREN BIEWER, AND CHERIE BIEWER,

PLAINTIFFS-APPELLANTS,

v.

**PROGRESSIVE NORTHERN INSURANCE COMPANY AND
THE RICHARDS AGENCY, INC.,**

DEFENDANTS-RESPONDENTS.

No. 02-0823

WILLIAM BIEWER, KAREN BIEWER, AND CHERIE BIEWER,

PLAINTIFFS-APPELLANTS,

v.

PROGRESSIVE NORTHERN INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
THE RICHARDS AGENCY, INC.,
DEFENDANT.

APPEAL from orders of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. William, Karen, and Cherie Biewer appeal from summary judgments dismissing their complaint against Progressive Northern Insurance Company and The Richards Agency, Inc. Progressive, through The Richards Agency, sold the Biewers an auto insurance policy. Karen and Cherie were subsequently injured by a negligent driver with minimal liability coverage. The Biewers sued The Richards Agency for its allegedly negligent failure to explain to them the availability and purpose of underinsured motorists (UIM) coverage. They also sued Progressive for The Richards Agency's alleged omission, and separately for its alleged bad faith delay in paying medical coverage. The circuit court dismissed all claims against both defendants. We affirm.

¶2 When the Biewers purchased the policy through The Richards Agency, the application form requested an acknowledgment that an agent had explained UIM coverage. The Biewers did not provide that acknowledgment, however, because no agent did, in fact, explain it to them. The Biewers did not

request UIM coverage, and Progressive issued the policy without it. The Biewers did, however, request and pay for medical expense coverage.

¶3 After the accident that injured Karen and Cherie, the Biewers' medical provider submitted medical bills to Progressive. Progressive initially denied payment, but eventually paid \$1000 toward the bills of both Karen and Cherie Biewer after the Biewers provided proof of their medical payments coverage.

¶4 The Biewers' complaint alleged that The Richards Agency voluntarily assumed a duty to advise them about UIM coverage and its availability. The Richards Agency's failure to do so was, in the Biewers' view, actionable negligence. The Biewers further alleged that Progressive was liable for The Richards Agency's negligence under the doctrine of respondeat superior, and because Progressive ratified The Richards Agency's omission when it issued the policy. Additionally, they alleged that Progressive's delay in satisfying the medical payments claim showed bad faith.

¶5 The circuit court concluded that there were no material facts in dispute, and it dismissed the claims against both parties as a matter of law. The issues on appeal are: (1) whether there are facts of record to show that The Richards Agency accepted a voluntary duty to explain UIM; (2) whether The Richards Agency's failure to explain UIM violated WIS. STAT. § 632.32(4m) (1999-2000)¹; (3) whether § 632.32(4m)(b) is constitutional; (4) whether there are material facts that place the Biewers' bad faith claim in dispute; and (5) whether

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

the circuit court erred by denying discovery of certain documents from Progressive.

¶6 We review summary judgment decisions *de novo*, applying the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). That methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶7 We conclude that the summary judgment submissions establish as a matter of law that The Richards Agency did not assume a voluntary duty to provide UIM information to the Biewers. Except for their reliance on WIS. STAT. § 632.32(4m), discussed below, the Biewers concede that insurance agencies have no common law or statutory duty to offer or explain UIM coverage. Here, the Biewers contend that The Richards Agency assumed a duty it otherwise did not have because it customarily offered UIM information to customers, and asked customers to acknowledge receiving that information. However, an agency has no duty to explain a particular insurance coverage unless: (1) the agent has expressly agreed to provide advice to the particular client; (2) there is a long-established relationship of entrustment showing that the agent understood the duty to give advice and would receive compensation for it beyond a standard commission; or (3) the agency has held itself out as a highly skilled insurance expert, and the customer detrimentally relied on that expertise. *Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc.*, 181 Wis. 2d 565, 572, 511 N.W.2d 849 (1994). There are no facts of record here that would satisfy any of these criteria.

¶8 WISCONSIN STAT. § 632.32(4m) also imposed no duty on The Richards Agency. The statute requires written notice of the availability of UIM

coverage. Under its plain language, however, it applies only to an “insurer writing policies.” The Richards Agency, as an agency, is not an insurer. Although the Biewers argue that Progressive delegated its duty under § 632.32(4m) to The Richards Agency, the record provides no support for that assertion.

¶9 We decline to address the merits of the Biewers’ challenge to the constitutionality of WIS. STAT. § 632.32(4m)(b) because the Biewers were not damaged by its provisions. *See Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (1979) (constitutional challenge to statute requires injury from its provisions). Section 632.32(4m)(b) defines what constitutes rejection of UIM coverage after the insurer provides notice of its availability. That section simply has no bearing on this case because The Richards Agency, as held in paragraph 8 of this opinion, had no duty to provide notice of UIM availability. That fact, and not whether the Biewers were deemed to have subsequently rejected coverage, is what defeats their claim.

¶10 We turn now to the question of whether the circuit court properly granted summary judgment on the Biewers’ bad faith claim. The parties agree that Progressive received a bill from a medical provider in April 2000. Progressive refused payment because the declarations page of the Biewers’ policy mistakenly showed no medical payments coverage. Nothing further happened until June 15, 2000, when the Biewers’ attorney informed Progressive’s counsel that the Biewers had paid for medical payments coverage and that the declarations page of the policy was in error. Progressive responded the same day with a letter indicating that it would investigate the matter. Progressive subsequently paid the claim on July 25, 2000, upon confirming that the Biewers had in fact paid for medical payments coverage.

¶11 The Biewers concede that the delay in paying between June 15 and July 25 is not evidence of bad faith. Their claim rests on Progressive's failure to investigate beyond the policy declaration page when the provider submitted bills in April 2000. Bad faith requires proof of no reasonable basis to deny an insurance claim, and the insurer's knowledge or reckless disregard of that fact. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). We agree with the circuit court that no reasonable fact finder could determine that Progressive acted in bad faith by relying on the terms of the written policy to refuse payment to a third party or by failing to investigate until the Biewers first asserted their claim on June 15, 2000.

¶12 Finally, we conclude that the circuit court properly denied the Biewers' motion to compel discovery. The documents sought were those showing Progressive's activity on the medical payment issue before June 14, 2000, and communications between its litigating counsel and its claims representatives handling the Biewers' case. The Biewers also sought further questioning of the claims representatives. There is no evidence, however, that Progressive withheld any relevant pre-June 14, 2000, documents. The Biewers only offer speculation that such documents exist. As for the otherwise privileged communications, the Biewers had the burden of showing a substantial need for the materials. WIS. STAT. § 804.01(2)(c)1. They failed to make this showing, relying again on speculation. The circuit court relied on the speculative nature of the Biewers'

discovery requests to deny the motion to compel. That was a reasonable exercise of its discretion in the matter.²

By the Court.—Orders affirmed.

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

² In connection with the discovery issue, the Biewers also moved to disqualify Progressive's attorney because of his alleged involvement in Progressive's handling of the medical payments claim. Not only did counsel deny any involvement in the claim processing, but the Biewers present no authority for disqualifying him even if he was involved.

