COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3387 **Cir. Ct. No. 99-CV-65**

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

HEATHER R. NUGENT,

PLAINTIFF-APPELLANT,

UNITY HEALTH PLANS INSURANCE CORPORATION,

INVOLUNTARY-PLAINTIFF,

V.

CHARLES A. SLAGHT AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Crawford County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Heather Nugent appeals from an order dismissing her claim against American Family Mutual Insurance Company. She contends that the trial court erroneously exercised its discretion when it decided not to apply equitable estoppel to bar American Family from raising a cancellation of policy defense. We disagree and affirm for the reasons discussed below.

¶2 The following facts are undisputed for the purpose of this appeal. Nugent was injured in an automobile accident with Charles Slaght on July 19, 1996. Slaght had at one time been insured by American Family. However, Slaght had been notified on June 27, 1996, that his American Family auto policy would be cancelled on July 16, 1996, if a premium payment had not been received by that date. American Family did not receive the premium payment, and on July 22, 1996, it recorded in its computer system a cancellation of the policy effective July 16, 1996.

¶3 Due to American Family's delay in recording the cancellation of the policy in its computer system, its claims representatives were initially unaware that the policy had been cancelled, and they dealt with Nugent as if Slaght were their insured. They negotiated with her, made payments to her for property loss, settled with a passenger in Nugent's car, obtained Nugent's medical records, and made her a settlement offer. It was not until settlement negotiations had fallen through and Nugent filed suit that American Family reviewed its file, discovered that the policy had been cancelled, and first raised a cancellation defense.

¶4 On summary judgment, Nugent argued that American Family should be barred by the doctrine of equitable estoppel from raising a cancellation defense. The trial court disagreed, and dismissed American Family from the suit. On appeal, this court determined that the elements of equitable estoppel had been

satisfied as a matter of law. ***Nugent v. Slaght***, 2001 WI App 282, ¶35, 249 Wis. 2d 220, 638 N.W.2d 594. We noted, however, that once the estoppel elements have been established as a matter of law, the ultimate decision whether to provide relief under the doctrine is still a matter of discretion. ***Id.*** at ¶30. Accordingly, we remanded to have the trial court exercise its discretion. ***Id.*** at ¶35. On remand, the trial court again determined that it would not apply the doctrine, and Nugent again appeals.

¶5 In the opinion currently under review, the trial court acknowledged that the elements of equitable estoppel had been met, then went on to apply "a balancing test after considering the totality of the circumstances." It noted that Nugent "has received both benefits and detriments due to American Family's mistake." Among the detriments to Nugent the trial court listed her litigation fees and the disclosure of her medical records. The trial court considered those factors to be outweighed, however, by the facts that American Family had already paid Nugent $9,600, and that Nugent retained the right to make a claim under her own uninsured motorist policy, which would be facilitated by the discovery which had already occurred.

¶6 Nugent first argues that the trial court's consideration of her remaining right to claim uninsured motorist benefits as a factor weighing against the application of estoppel is inconsistent with this court's finding that Nugent had suffered detriment in the form of three unnecessary years of litigation, since the former implies no prejudice to Nugent's position while the latter implies prejudice. While we agree that the term "detriment" may be equated with the term "prejudice," in the sense that both suggest an injury or damage—*see* ***Nugent*** at ¶31—we do not agree that the fact that a litigant has been prejudiced in one

respect precludes a finding that he or she has not been prejudiced in another respect.

¶7 Here, Nugent's unnecessary investment of time and resources was a distinct issue from her remaining ability to bring an uninsured motorist claim, even if both considerations might fall under the general category of prejudice to her position. If American Family had not notified Nugent of its cancellation defense until after her time to bring a claim for uninsured motorist benefits had expired, the trial court could properly have considered that a significant factor in favor of applying estoppel. Conversely, the trial court could properly consider the remaining availability of an uninsured motorist claim as a major factor against applying estoppel.

¶8 In a related argument, Nugent claims the trial court erroneously found that she "was not denied of the opportunity of choosing her best option." Nugent asserts that she was, in fact, denied the opportunity to pursue her best option, not only during the three years during which American Family was acting as Slaght's insurer, but also during the pendency of this litigation to resolve the estoppel issue. We do not agree with Nugent's assertion that she could not have brought an uninsured motorist claim until this litigation was resolved, however. Once she had been notified of the policy cancellation and further had a trial court ruling dismissing American Family, Nugent could in good faith have chosen to file an uninsured motorist claim. We therefore agree with the trial court that, although Nugent's ability to choose her best option was initially impeded, it was not lost altogether.

¶9 Nugent next claims that American Family's payments to her were not a benefit because she would otherwise have been able to recover that amount

under her own policy. We are not persuaded that a payment needs to be a "windfall" in order to be considered a benefit, however. The timing of a payment may also be beneficial. Here, the trial court could properly give weight to the fact that Nugent had the use of the $9,600 paid by American Family during the settlement negotiations against other harms Nugent suffered throughout the settlement process.

¶10 Finally, Nugent contends that the trial court ignored the injury she suffered by having to release her medical information to American Family. We disagree with her characterization of the trial court's decision. The trial court did not ignore the injury; it merely accorded less weight to it than Nugent would have liked because it noted she would have had to disclose the information to her own insurer anyway. Quite simply, we will not substitute our judgment for that of the trial court as to the weight to be accorded various factors in applying a discretionary balancing test.

By the Court.—Order affirmed.

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