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DISTRICT II

June 12, 2024

To:

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Circuit Court Judge
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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1222 Renee T. Cahill v. State Farm Mutual Automobile Insurance Company (L.C. #2018CV1006)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders 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).

Renee T. Cahill appeals from an order of the circuit court granting summary judgment in favor of State Farm Mutual Automobile Insurance Company and dismissing her claims against that company. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] For the following reasons, we affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Cahill alleges that she was injured when her car was rear-ended on January 9, 2016. After a visit to an urgent care center, Cahill received physical therapy (through May 2016) and chiropractic therapy (through September 2016) for these injuries. Over a year after her last chiropractic treatment, on November 8, 2017, Cahill returned to her doctor and reported that her shoulder pain was "getting progressively worse." She had an MRI followed by rotator cuff repair surgery on January 11, 2018.

Cahill submitted claims for medical expenses exceeding $60,000 to State Farm, her insurer at the time of the accident. Cahill's insurance policy included a "cooperation clause" which provided that "[t]he insured must cooperate with [State Farm] and, when asked, assist [State Farm] in … securing and giving evidence …." The policy also stated that the insured had the duty to "be examined as reasonably often as [State Farm] may require by physicians chosen and paid by [State Farm.]" On January 12, 2016, three days after the accident, State Farm sent a letter to Cahill stating:

> Please note, as stated in your policy, we may submit your medical bills and records to an independent medical professional for review in order to obtain an opinion with regard to appropriate treatment to assist us in determining if treatment is reasonable and necessary in relationship to the accident. We may also ask you to attend an independent medical examination by doctors of our choosing.

State Farm sent additional correspondence and requests for medical records and bills in the twenty months following the accident. Prior to Cahill's surgery, it issued payments of $6,305.47 on her behalf. On October 26, 2018, State Farm sent a letter to Cahill "requesting that [she] participate in an examination by a physician of [its] choice" to "clarify the necessity of [her] treatment and/or its relation to the automobile accident of January 9, 2016."

Cahill refused this examination, citing State Farm's chosen doctor's "reputation for denying or minimizing an injured person's claim" and a concern that the examination would "compromise State Farm's subrogation position" against the at-fault driver. Based on this refusal, State Farm moved for summary judgment on Cahill's claims against it. The circuit court granted State Farm's motion, concluding that Cahill's refusal to be examined by the doctor of State Farm's choice was a material breach of the cooperation clause of the insurance contract that prejudiced State Farm.

Cahill appeals, arguing that State Farm's request for examination was unreasonable and that her refusal was neither a material breach nor prejudicial to State Farm. We review a circuit court's grant of summary judgment de novo. ***Phoenix Contractors, Inc. v. Affiliated Cap. Corp.***, 2004 WI App 103, ¶9, 273 Wis. 2d 736, 681 N.W.2d 310. Summary judgment is appropriately granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2).

Cahill admitted in a deposition that the insurance policy at issue "obligate[d] [her] to cooperate with State Farm's requests for things like participating in an independent medical evaluation" and that she "chose not to attend" that evaluation because she "didn't feel like that doctor was going to see things [her] way."[2] She nevertheless argues that she cooperated sufficiently because State Farm's request for examination by a "physician with a reputation for de-valuing claims and minimizing injuries" to be undertaken after her "surgery and recovery

[2] Part of the transcript from this deposition, including some of the quoted language, was apparently not included in the Record. Cahill neither disputed nor objected to the inclusion of this language in State Farm's brief supporting its motion for summary judgment.

were already complete" was not reasonable. In her view, she provided the "fair, frank and truthful disclosure of the information reasonably demanded by the insurer" necessary to fulfill her contractual duty of cooperation. *See* ***Dietz v. Hardware Dealers Mut. Fire Ins. Co.***, 88 Wis. 2d 496, 503, 276 N.W.2d 808 (1979) (quoting ***Buckner v. Buckner***, 207 Wis. 303, 309, 241 N.W. 342 (1932)).

State Farm points out several flaws in Cahill's argument. One is that she has provided no evidence that would suggest State Farm's chosen physician's report would be biased or unreliable; she relies on only bald assertions regarding this doctor's reputation. Similarly, she has not supported her contention with any evidence that the timing of the requested examination made it unreasonable. State Farm is correct that argument unsupported by evidence is insufficient to defeat summary judgment. *See, e.g.*, ***Moulas v. PBC Prods. Inc.***, 213 Wis. 2d 406, 411, 570 N.W.2d 739 (Ct. App. 1997) ("[T]he opponent [of a motion for summary judgment] does not have the luxury of resting upon its mere allegation or denials of the pleadings, but must advance specific facts showing the presence of a genuine issue for trial."), *aff'd by an equally divided court*, 217 Wis. 2d 449, 576 N.W.2d 929 (mem.). Cahill did not file a reply brief in this appeal to attempt to refute State Farm's arguments. *See* ***Apple Hill Farms Dev., LLP v. Price***, 2012 WI App 69, ¶14, 342 Wis. 2d 162, 816 N.W.2d 914 (failure to file a reply brief deemed a concession to respondent's argument).

Cahill also argues that, to the extent her refusal constituted a breach, it was not prejudicial or material; she points out that State Farm's chosen doctor was able to provide an opinion based on the medical records she produced. Citing ***Schaefer v. Northern Assurance Company of America***, 182 Wis. 2d 148, 159-60, 513 N.W.2d 615 (Ct. App. 1994), State Farm persuasively argues that prejudice is not a necessary component to the defense of lack of

cooperation. Again, Cahill's failure to file a reply is deemed a concession on this point. *See* ***Apple Hills Farms Dev., LLP***, 342 Wis. 2d 162, ¶14.

We conclude that Cahill raised no issues of material fact for trial and that State Farm is entitled to judgment as a matter of law.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals