IN THE COURT OF APPEALS OF IOWA

No. 0-944 / 10-0241
Filed March 21, 2011

DALE A. LAMB,
Plaintiff-Appellant,

vs.

TIME INSURANCE COMPANY, f/k/a FORTIS INSURANCE COMPANY d/b under the Brand Name, ASSURANT HEALTH,
Defendant-Appellee.

Appeal from the Iowa District Court for Poweshiek County, Gary D. McKenrick, Judge.

An insured appeals the district court's decision granting summary judgment to the insurer because the insured failed to seek judicial review of an external review decision under Iowa Code chapter 514J (2007). **AFFIRMED.**

Gail E. Boliver of Boliver & Bidwell Law Firm, Marshalltown, for appellant.

Michael W. Thrall and Christian P. Walk of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

In this case, a father challenges an insurer's denial of coverage for an intravenous antibiotic treatment for his son's Lyme disease. The father pursued the remedies afforded by Iowa Code chapter 514J (2007), "External Review of Health Care Coverage Decisions," but after receiving an adverse decision from the independent review entity attempted to start over in court—rather than seeking judicial review of the decision under section 514J.13. We conclude the father failed to exhaust the final stage of his administrative remedies, namely judicial review, and therefore affirm the district court's grant of summary judgment to the insurer.

I. Background Facts & Proceedings

Dale Lamb purchased a health insurance policy from Time Insurance Company, doing business as Assurant Health, for his son. The policy provided coverage for health care expenses that were "medically necessary." The term "medically necessary" is defined in the policy as follows:

> Treatment that we determine:
> - is appropriate and consistent with the diagnosis and is in accordance with accepted United States medical practice and federal government guidelines;
> - can reasonably be expected to contribute substantially to the improvement of a condition resulting from an illness or injury;
> - is not for Experimental or Investigational Services;
> - is provided in the least intense setting without adversely affecting the condition or the quality of medical care provided; and
> - is not primarily for the convenience of you, your family, your Health Care Practitioner, or provider.

In 2004, Lamb's child was diagnosed with Lyme disease. Time provided coverage for the child's medical expenses. Eventually, Lamb sought treatment

for the child with Dr. Charles Crist in Springfield, Missouri. Dr. Crist treated the child with intravenous antibiotics. Time refused to reimburse Lamb for this treatment, stating it was not medically necessary because the treatment was experimental or investigational for Lyme disease.[1]

Lamb exhausted the internal appeal process with Time. Iowa Code chapter 514J provides "a mechanism for the appeal of a denial of coverage based on medical necessity," for a person who has exhausted all internal appeal mechanisms with an insurance carrier. Iowa Code §§ 514J.1, .5(1)(c). A person who "receives health care benefits coverage through a carrier or organized delivery system," may file a written request for external review of a coverage decision with the Insurance Commissioner. *Id.* §§ 514J.2(2), (4), .4(1). The request for review must be accompanied by a twenty-five dollar filing fee, unless the fee is waived. *Id*. § 514J.4(2).

The commissioner keeps a list of certified independent review entities, and the insurance carrier must select an independent review entity from this list. *Id.* §§ 514J.6(3), .7(1)(a). "The independent review entity shall be an expert in the treatment of the medical condition under review." *Id.* § 514J.7(1)(a). The

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[1] The term "Experimental or Investigational Services" is defined in the health insurance policy as follows:

> Treatment that, at the time the charges were incurred, we determine was:
> - not proven to be of benefit for the diagnosis or treatment of the illness or injury; or
> - not generally used or recognized by the United States medical community as safe, effective, or appropriate for the illness or injury; or
> - in the research or investigational stage; or
> - not generally accepted throughout the United States as we determine by reference to English language peer review literature, consultation with physicians, authoritative medical compendia, the American Medical Association, and other pertinent professional medical organizations or governmental agencies.

independent review entity, in turn, has three business days to select an individual to actually perform the review and provide the insured and the carrier with a brief description of this person including the reasons why he or she is an expert in the treatment of the medical condition under review. *Id*. § 514J.7(2). The review entity does not need to disclose the name of the person. *Id.* The insured or the insured's treating health care provider

> may object to the independent review entity selected by the carrier . . . or to the person selected as the reviewer by the independent review entity by notifying the commissioner and carrier or organized delivery system within ten days of the mailing of the notice by the independent review entity.

Id. § 514J.7(3). The commissioner approves or denies any such objection. *Id.* If the objection is sustained, the commissioner selects an independent review entity. *Id.*

The insurance carrier must provide the independent review entity with any information previously submitted by the insured or his/her health care provider, as well as any relevant documents previously considered by the insurer. *Id.* § 514J.7(4). The insured or his/her health care provider may provide any information submitted under the internal appeal mechanisms and any "other newly discovered relevant information." *Id.* § 514J.7(5).

The independent review entity reviews this information de novo. *Id.* § 514J.12. Treatment recommended by a treating health care provider "shall be upheld upon review so long as it is found to be medically necessary and consistent with clinical standards of medical practice." *Id.*

Lamb availed himself of this process and on September 6, 2007, filed a request with the commissioner for an external review of Time's decision denying

coverage. On September 11, 2007, Time provided notice that the independent review entity it had chosen from the commissioner's list was Medical Review Institute of America, Inc. (MRIoA). On September 18, 2007, MRIoA indicated it would be using a reviewer who was board certified by the American Board of Pediatrics in Pediatrics and Pediatric Infectious Disease who had been in active practice since 2000. Lamb made some additional inquiries about the reviewer's qualifications and experience with Lyme disease, which the commissioner requested MRIoA answer. These inquiries were forwarded to the reviewer, but there is no indication in the record that he ever responded or that Lamb objected to the selected reviewer.

On October 9, 2007, the reviewer, Dr. Andres Ramgoolam, provided an eight-page letter concluding the intravenous antibiotic treatment was not "medically necessary." The reviewer added, "[T]his form of treatment should not be considered standard of care and should be deemed as not necessary or investigational and may very well be harmful." The letter set forth reasons for this conclusion and noted the materials considered by the reviewer.

The decision of the independent review entity is binding upon the insurance carrier. *Id.* § 514J.13(1). On the other hand, an insured "may appeal the review decision by the independent review entity . . . by filing a petition for judicial review" within fifteen business days of the review decision. *Id.* § 514J.13(2). In such an appeal, "[t]he findings of fact by the independent review entity conducting the review are conclusive and binding." *Id.* § 514J.13(2). Also, the external review process is not considered a contested case under chapter 17A. *Id.* § 514J.13(1).

Dr. Ramgoolam's October 9, 2007 letter detailed these rights of appeal. Lamb, however, did not seek judicial review of the external review decision. Instead, on May 6, 2008, Lamb filed a separate petition against Time raising claims of breach of contract, breach of fiduciary duty, negligence,[2] and constructive misrepresentation. In July 2009, Lamb moved to compel certain discovery. While that motion was pending, Time filed a motion for summary judgment urging the following grounds: (1) Lamb had failed to seek judicial review of the external review decision as required by chapter 514J; (2) the claims were barred by the doctrine of res judicata; and (3) as to the claims of breach of fiduciary duty and constructive misrepresentation, Lamb had failed to allege any facts giving rise to a fiduciary relationship.

The court granted Time's request to stay proceedings on the discovery motion until its motion for summary judgment had been decided. Lamb then resisted Time's summary judgment motion, arguing he was not required to seek judicial review of the external review decision because "[t]he external review had no judicial or constitutional process." Lamb also asserted res judicata did not apply to the MRIoA's external review determination. In addition, Lamb maintained he was unable to respond to the motion for summary judgment on the fiduciary duty and misrepresentation claims because of a lack of discovery.

Following a telephonic hearing, the district court on January 27, 2010, granted Time's motion for summary judgment on all claims. As to the breach of contract claim, the court concluded:

[2] The negligence claim was dismissed by the district court on November 14, 2008. Lamb does not appeal the dismissal of that claim.

> In reviewing this statutory framework [chapter 514J], the Court concludes that the legislature intended to supplant, not supplement, the common law remedies available to an insured in the context of the denial of coverage based on medical necessity. To hold otherwise would negate and make ineffectual the statutory provisions for judicial review of the external review process. An insured seeking judicial review under § 514J.13(2) would be bound by the factual determinations of the external review while a common law claimant would not.
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> Because the plaintiff failed to seek judicial review of the external review decision, the determination of that review that the medical treatment at issue was not medically necessary is binding on the plaintiff in this action. Therefore, the plaintiff is unable to prove that the defendant breached its contract with the plaintiff by failing to provide coverage for the treatment at issue. The defendant is entitled to summary judgment on the breach of contract claim.

On the breach of fiduciary duty claim, the court found, "The mere allegations of the petition, which are all the plaintiff has submitted on this issue, are insufficient to sustain the claim in light of the facts set forth in the defendant's appendix on this issue." Also, as to misrepresentation, the court concluded that "the plaintiff has presented no affidavits or documents from which this Court could infer that the defendant engaged in any misrepresentation concerning the coverage which its policy of insurance provided." Having granted the motion for summary judgment in its entirety, the court denied Lamb's motion to compel as moot.

Lamb now appeals the district court's decision.

II. Standard of Review

We review the district court's ruling on a motion for summary judgment for the correction of errors at law. *See* Iowa R. App. P. 6.907. Summary judgment is appropriate only when there are no genuine issues of material fact and the

moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the non-moving party. *Frontier Leasing Corp. v. Links Eng'g, L.L.C.*, 781 N.W.2d 772, 775 (Iowa 2010). In determining whether there is a genuine issue of material fact, the court affords the non-moving party every legitimate inference the record will bear. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008).

III. Breach of Contract

The district court dismissed Lamb's breach of contract claim because he had not sought judicial review of the external review decision. The court also found chapter 514J the exclusive means of challenging an insurer's denial of coverage based on medical necessity. The court concluded, "[T]he legislature intended to supplant, not supplement, the common law remedies available to an insured in the context of the denial of coverage based on medical necessity."

Chapter 514J does not expressly state whether its remedies are exclusive or nonexclusive. To answer this question, we must examine the statutory scheme as a whole. *See Charles Gabus Ford, Inc. v. Iowa State Highway Comm'n*, 224 N.W.2d 639, 647 (Iowa 1974).

"The fact that the statute creates an administrative remedy does not indicate such a remedy is exclusive." *George v. D.W. Zinser Co.*, 762 N.W.2d 865, 872 (Iowa 2009). On the other hand, silence in a statute "does not indicate the legislature intended for the chapter's remedy to be nonexclusive." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 155 (Iowa 1996).

The issue of whether a statutory remedy is exclusive or merely cumulative is a question of legislative intent. *Walthart v. Bd. of Dirs. of Edgewood-Colesburg Cmty. Sch. Dist.*, 667 N.W.2d 873, 877 (Iowa 2003). "[W]hen a statute grants a new right and creates a corresponding liability unknown at common law, and at the same time points to a specific method for enforcement of the new right, this method must be pursued exclusively." *Van Baale*, 550 N.W.2d at 155. Also, "'[w]here the legislature has provided a comprehensive scheme for dealing with a specified kind of dispute, the statutory remedy provided is generally exclusive.'" *Id.* at 156 (quoting 1A C.J.S. *Actions* § 14 n.55 (1985)).

We have already outlined the statutory scheme for the external review process. In chapter 514J the legislature has created a comprehensive scheme for dealing with the denial of coverage by an insurance carrier based on medical necessity. *See* Iowa Code § 514J.1 ("It is the intent of the general assembly to provide a mechanism for the appeal of a denial of coverage based on medical necessity."); Iowa Admin. Code r. 191-76.1 ("This chapter is intended to implement Iowa Code chapter 514J to provide a *uniform process* for enrollees of carriers and organized delivery systems providing health insurance coverage to request an external review of a coverage decision based upon medical necessity." (emphasis added)). The process applies to "any sickness or accident plan and any plan of health insurance, health care benefits or health care services delivered or issued in [Iowa] by an insurance company, a health maintenance organization, or a nonprofit health service corporation." Iowa Admin. Code r. 191-76.2.

Yet in the end, we need not decide whether chapter 514J displaces the common law whenever a health insurer denies an insured's claim based on medical necessity. This is not a case where the insured directly filed a breach of contract case in court. Rather, the insured availed himself of *part* of the administrative process, but stopped going further when he did not like the outcome. In this case, we believe it is appropriate to apply the doctrine of exhaustion of administrative remedies, an alternative ground for summary judgment that was raised by Time below. *See IES Utils., Inc. v. Iowa Dep't of Revenue & Fin.*, 545 N.W.2d 536, 538-39 (Iowa 1996) (discussing exhaustion doctrine); *Jones v. Griffith*, 870 F.2d 1363, 1368 (7th Cir. 1989) ("Exhaustion includes any judicial review of the administrative decision.") (Posner, J.).

Lamb points to the language of section 514J.13(2), which provides a person "*may* appeal the review decision by the independent review entity conducting the review by filing a petition for judicial review." (Emphasis added.) He claims that the use of the word "may" means that a party has the option of filing a petition for judicial review to challenge an external review decision, but is not required to do so, and therefore he could bring an independent action. We disagree.

The use of the word "may" in section 514J.13(2) does not mean the legislature intended the filing of a petition for judicial review to be permissive, rather than mandatory. *See Riley v. Boxa*, 542 N.W.2d 519, 522 (Iowa 1996) (finding use of the word "may" rather than "shall" in section 414.10 did not indicate the legislature intended the appeal to be permissive); *Pruess Elevator, Inc. v. Iowa Dep't of Natural Res.*, 477 N.W.2d 675, 677 (Iowa 1991) (noting that

where section 455B.392(1)(b) provided a party "may" appeal to the commission, this required the plaintiff to appeal before resorting to the courts); *Price v. Fred Carlson Co.*, 254 Iowa 296, 302, 117 N.W.2d 439, 442 (1962) (finding no merit to the contention that the provision in section 86.26 that a party "may" appeal to the district court was merely permissive).

Lamb argues that his administrative remedy was inadequate because he did not receive an evidentiary hearing with rights of cross-examination. He asserts, "A mandatory petition for judicial review of an already completely worthless, inadequate independent review is the definition of an exercise in futility." Again, we do not decide whether the administrative remedy is *exclusive*—i.e., whether Lamb could have chosen to go to court instead of requesting external review of the decision through the commissioner. However, having started down the road of administrative review, Lamb had to continue that path to its conclusion, including judicial review. Lamb's complaints about the adequacy of the independent review process do not demonstrate that judicial review of that review would have been inadequate, or that he would have been unable to press his procedural arguments in such a judicial review proceeding. We agree with the district court's observation: "The plaintiff's objections to perceived deficiencies in the external review of the defendant's denial of coverage had to be raised in the context of a petition for judicial review of the external review decision."[3]

[3] We of course do not decide today whether those objections would have had merit if properly raised.

Lamb also argues that judicial review would have been pointless because the fact findings of the independent review entity are "conclusive and binding." Iowa Code § 514J.13(2). Yet Time conceded at oral argument, and we agree, that these "fact findings" do not include the ultimate determination that the procedure was not "medically necessary." That is a medical opinion—not a fact. It is clear the legislature did not intend to preclude an insurer from obtaining judicial reversal of the external review decision under some circumstances; otherwise, it would have simply said the independent review entity's decision is binding on the insured, as it so stated with respect to the insurance carrier. *Id*. § 514J.13(1).

In effect, Lamb urges us to adopt a "heads I win, tails you lose" construction of the statute. According to section 514J.13(1), the insurance carrier is bound by the independent review entity's decision and has no right of appeal. Thus, Lamb's view of the law would lead to an incongruous situation where the outcome of the independent review would bind the insurer if it lost, but could be ignored entirely by the insured if the insured lost. Lamb's view of the law would also render irrelevant the detailed provisions for judicial review set forth in section 514J.13(2), because an insured who lost would have no reason to seek such judicial review, since it could simply file a direct action. *See* Iowa Code § 4.4(2), (3) (stating that in enacting a statute, it is presumed the "entire statute is intended to be effective" and a "just and reasonable result is intended"); *Naumann v. Iowa Prop. Assessment Appeal Bd.*, 791 N.W.2d 258, 262 (Iowa 2010) (stating statutes should be interpreted to "avoid strained, impractical or absurd results").

Because Lamb exhausted part but not all of chapter 514J, and hence cannot bring a new lawsuit for breach of contract, we also need not reach Time's argument that Lamb's breach of contract claim would be barred by res judicata (i.e., claim preclusion). Here, Time asserts that the decision of the independent review entity under the auspices of the Insurance Commissioner had the essential elements of adjudication entitling it to preclusive effect. *See* Restatement (Second) of Judgments § 83(1) (1982) (quoted with approval in *George*, 762 N.W.2d at 868-69). We do not reach that argument.

We therefore affirm the district court's grant of summary judgment to Time on Lamb's claim of breach of contract.

IV. Breach of Fiduciary Duty

In his petition, Lamb alleged the existence of a fiduciary duty and that he "relied upon [Time] to advise him of a health insurance contract that would provide for reimbursement for medical expenses for diagnosed medical conditions and treatments for his minor son." In its motion for summary judgment, Time maintained there was no fiduciary relationship between the parties.

"'A fiduciary relation exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation.'" *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986) (quoting Restatement (Second) of Torts § 874 cmt. a, at 300 (1979)). There must be evidence of "domination and influence" and a "reposing of faith, confidence and trust" by one party and reliance by the other party on the advice of that party. *Weltzin v. Cobank, ACB*, 633 N.W.2d 290, 294 (Iowa 2001). Lamb

did not specifically respond to Time's motion for summary judgment on this claim, instead stating he could not respond because of a lack of discovery.

"When a motion for summary judgment is properly supported, the nonmoving party is required to respond with specific facts that show a genuine issue for trial." *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 245 (Iowa 2006). A party may not merely rest upon the allegations in the pleadings, but must set forth specific facts showing there is a genuine issue of material fact. Iowa R. Civ. P. 1.981(5); *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005). Lamb has failed to set forth any specific facts showing there is a genuine issue of material fact on this issue. Beyond the allegation of a fiduciary relationship in the petition, Lamb has not set forth any facts that would tend to establish the existence of such a relationship.

Lamb's complaints about lack of discovery are generalized and do not satisfy the requirements of rule 1.981(6). Lamb did not provide an affidavit, or even inform the court, how the discovery he sought might enable him to defeat the motion for summary judgment. *See Good v. Tyson Foods, Inc*., 756 N.W.2d 42, 46 (Iowa Ct. App. 2008) (noting that a party must set forth by affidavit the reasons why it cannot proffer evidentiary affidavits and what additional factual information is needed to resist the motion). Instead, Lamb just complained generally about the defendant having been "successful in stonewalling document production" and alleged he had made "numerous requests for production which should show the misrepresentation, fiduciary duty and other facts supporting his cause of action." We conclude the district court properly granted summary judgment to Time on the breach of fiduciary duty claim.

V. Misrepresentation

Lamb's misrepresentation claim also centered on an allegation that he had a fiduciary or confidential relationship with Time. He said the insurer had a duty to fully and accurately disclose all relevant information about Lyme disease treatment, that the company had failed to disclose its research and investigation, and that this failure amounted to constructive misrepresentation. But again, when confronted with Time's motion, Lamb did not include any specific facts in his resistance to the motion, instead arguing he was unable to respond.

As with the claim of breach of fiduciary duty, we conclude the district court properly granted summary judgment to Time on the misrepresentation claim because Lamb did not set forth any specific facts showing there was a genuine issue for trial. *See* Iowa R. Civ. P. 1.981(5).

We affirm the decision of the district court.

AFFIRMED.