

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2007

David R. Schanker
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. 2005AP2784

Cir. Ct. No. 2004CV107

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ST. JOSEPH'S HOSPITAL,

PLAINTIFF-RESPONDENT,

V.

JOHN W. KILTY,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

FAMILY HEALTH CENTER OF MARSHFIELD, INC.,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Price County:
DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Kilty appeals a summary judgment granted in favor of St. Joseph’s Hospital for \$26,350 in medical services provided to him. Kilty also appeals the summary judgment dismissal of his third-party complaint against Family Health Center of Marshfield, Inc. Kilty argues that the pleadings demonstrate a genuine issue of material fact, precluding summary judgment. Kilty also contends the subject contract was ambiguous and should, therefore, be interpreted to provide coverage. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 The summary judgment record contains the following facts. After experiencing chest pain, Kilty consulted a physician who determined that Kilty likely suffered a myocardial infarction. Kilty was consequently referred to a cardiologist at the Marshfield Clinic for a catheterization procedure. As a result of the stenting, performed at St. Joseph’s Hospital in Marshfield, Kilty incurred \$26,350 in charges. When Kilty failed to pay, St. Joseph’s brought the underlying action to collect on the account. Kilty answered the complaint, denying that he owed the amount charged. He alleged that he was a member of Family Health Center of Marshfield, Inc., and Family Health Center should be responsible for the charges.

¶3 Kilty claimed that Family Health Center would have covered the hospital charges associated with the procedure if the procedure had been done on an outpatient basis. Kilty further alleged that although doctors and St. Joseph’s staff told him the procedure would be outpatient, the staff “for some unexplained reason” kept him overnight and “reclassified him as an inpatient.” Kilty subsequently filed a third-party complaint against Family Health Center, claiming

Family Health Center “refused to pay” for the procedure performed at St. Joseph’s Hospital. Both St. Joseph’s Hospital and Family Health Center filed motions for summary judgment. The circuit court granted the respective motions, concluding that no genuine issue of material fact exists with respect to either motion. This appeal follows.

DISCUSSION

¶4 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

Summary Judgment Motion of Family Health Center

¶5 In support of its summary judgment motion, Family Health Center submitted evidence that it is a grant program for low-income individuals, funded in part by the federal government, which covers certain primary and preventive health care services. Family Health Center’s supporting documentation additionally established that the procedure Kilty underwent is not within the scope of its grant and would not be covered, whether performed inpatient or outpatient. The Family Health Center Member Handbook Benefits Summary indicates that there is “no coverage” for inpatient hospital services. With respect to outpatient services, the Benefits Summary indicates there is coverage for “approved ambulatory procedures done at an affiliated hospital.” The benefits coordinator, however, submitted an affidavit averring that Family Health Center has never provided coverage for stenting.

¶6 Although Kilty submitted an affidavit in opposition to the summary judgment motion, the court determined that Kilty's affidavit did not raise any factual issue concerning the nature of his contract with Family Health Center or the fact that the procedure was not covered, whether performed on an inpatient or outpatient basis.

¶7 On appeal, Kilty nevertheless argues that his allegations did raise a genuine issue of material fact, thus precluding summary judgment. We are not persuaded. Kilty contends that contrary to Family Health Center's allegations, Kilty was told his procedure would be covered and he was never given any materials pertaining to approved outpatient procedures. What Kilty may have been told or what materials may have been withheld regarding approved outpatient procedures does not, ultimately, affect coverage under the clear terms of the contract. In the final analysis, the only issue is whether the contract provided coverage. To that end, Kilty claims he personally knows that procedures identical to his were performed on an outpatient basis and covered by Family Health Center's contract. It takes more than allegation, however, to create a factual dispute.

¶8 In the realm of summary judgment, "[s]upporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3) (2005-06). Kilty's allegation is conclusory and otherwise lacking in foundation or support and would, therefore, be inadmissible in evidence. Moreover, what procedures may have been covered for "other patients" is immaterial to the coverage afforded Kilty under his contract with Family Health Center.

¶9 Kilty alternatively argues the contract was ambiguous and should, therefore, be interpreted to provide coverage. The interpretation of a written contract is a question of law that we review independently. *Jones v. Jenkins*, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). Although we review questions of law independently, we benefit from the circuit court’s analysis. *Northern States Power Co. v. National Gas Co.*, 232 Wis. 2d 541, 545, 606 N.W.2d 613 (Ct. App. 1999). “Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation.” *Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. “When the terms of a contract are plain and unambiguous, we will construe the contract as it stands.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. If the terms of a contract are ambiguous, we must consider extrinsic evidence to arrive at the parties’ intent. *Farm Credit Servs. v. Wysocki*, 2001 WI 51, ¶12, 243 Wis. 2d 305, 627 N.W.2d 444.

¶10 Here, Kilty argues the contract is “ambiguous on its face” because no list of approved ambulatory outpatient procedures was ever provided to Kilty, nor was he ever told that his procedure would not be covered. We disagree. What Kilty was or was not given or told has no logical relationship to whether the contract is facially ambiguous. Kilty also argues that Family Health Center’s failure to support its summary judgment motion with “any list which states that the procedure [Kilty] received was not covered” necessitates consideration of the circumstances surrounding Kilty’s admittance to the hospital and the statements he heard regarding his coverage under the contract. Again, neither the inclusion of any “list” nor consideration of the circumstances surrounding Kilty’s admission inform on the contract’s clarity.

¶11 Finally, for the first time on appeal, Kilty raises an agency/principal claim. Specifically, he contends he reasonably relied “on the authority, actual or apparent, of employees of Ministry Health Care, which owns St. Joseph’s Hospital to the extent he was assured his procedure would be outpatient and therefore covered under his health care plan.” He further contends that to his detriment, he reasonably relied “on the ovations made by [Family Health Center] or Marshfield Clinic staff that his procedure would be covered as an ambulatory outpatient surgery.” We decline to address arguments raised for the first time on appeal. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). In any event, Kilty fails to specify the “ovations” made by Family Health Center—he identifies no pre-surgery statements made by Family Health Center in connection with his surgery. Additionally, Kilty provides no legal analysis for how the hospital staff, by their alleged comments, could bind Family Health Center, a separate entity. Because the “disputed facts” Kilty raises are either inadmissible or immaterial, and the contract is clear on its face, the circuit court properly granted summary judgment dismissal in favor of Family Health Center.

Summary Judgment Motion of St. Joseph’s Hospital

¶12 St. Joseph’s supported its summary judgment motion with evidence that the hospital charges were reasonable, customary and necessary. Because Kilty alleges that the cost of the procedure was inflated and the services provided were “not necessary, not ordinary, not customary, and not reasonable,” he claims there is a dispute of material fact precluding summary judgment. We disagree. Kilty is not a medical expert and therefore lacks the foundation to opine whether the services were necessary. Likewise, Kilty’s conclusory averments that the services were neither ordinary, customary, nor reasonable are unfounded and unsupported. Because Kilty’s allegations would be inadmissible in evidence, they

do not create a dispute of material fact. To the extent Kilty argues that identical care provided to individuals covered under Medicare, Medicaid and other third-party payer programs costs substantially less than the care Kilty received, such comparisons are immaterial. While a health insurance provider may negotiate discounted rates with a health care provider, that negotiated rate is not evidence of the reasonable value of those medical services. *See e.g. Koffman v. Leichtfuss*, 2001 WI 111, ¶52, 246 Wis. 2d 31, 630 N.W.2d 201; *Leitinger v. Van Buren Mgmt, Inc.*, 2006 WI App 146, ¶18, 295 Wis. 2d 372, 720 N.W.2d 152.

¶13 Kilty nevertheless argues that he does not remember signing the “Conditions of Admission and General Authorization.” He consequently claims St. Joseph’s improperly “reclassified” him as an inpatient, depriving him of coverage under the Family Health Center contract. Regardless whether he signed the form, it is undisputed that Kilty consented to the procedure. Moreover, as noted above, the procedure would not have been covered, whether performed on an inpatient or outpatient basis. Because the “disputed facts” Kilty raises are either inadmissible or immaterial, the circuit court properly granted St. Joseph’s summary judgment motion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

