COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2007

A. John Voelker
Acting 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. 2006AP426 **Cir. Ct. No. 2001CV5713**

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

NICHOLAS A. MURPHY, LORI A. MURPHY,
JOSHUA A. MURPHY, A MINOR, SEAN M. MURPHY,
A MINOR, AND JOSEPHINE J. MURPHY, A MINOR,
BY THEIR GUARDIAN AD LITEM, RICHARD H. SCHULZ,

PLAINTIFFS-APPELLANTS,

V.

THE CINCINNATI INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 WEDEMEYER, P.J. Nicholas A. and Lori A. Murphy, and their three minor children appeal from a judgment dismissing their complaint against their homeowner's insurer, Cincinnati Insurance Company. The Murphys claim: (1) the trial court erred in granting summary judgment to Cincinnati because there were disputed issues of material fact as to the bad faith claim; (2) the trial court should not have permitted Cincinnati to offset one element of the appraisal award against other elements; and (3) they are entitled to twelve percent postjudgment interest. Because the record demonstrates disputed issues of material fact with respect to the Murphys' bad faith claim, we reverse the trial court's decision on that issue and remand for further proceedings; because the trial court did not err in permitting Cincinnati to offset the different coverages paid, we affirm that portion of the trial court's decision; and because the trial court failed to make findings with respect to statutory interest, we reverse that portion of the judgment and remand for further proceedings.

BACKGROUND

¶2 On July 2, 2000, a storm damaged the Murphys' home. On or about July 5, 2000, Joe Jacques, a claims representative from Cincinnati, received the claim. Jacques then contacted Lori to view the home. Lori averred that Jacques insisted that Paul Davis Restoration evaluate the damages done to the Murphys' home. Paul Davis missed the first two appointments. Between July 13 and July 25, 2000, Paul Davis evaluated the residence on two occasions. Paul Davis and Joe Jacques then decided a structural engineer should evaluate the damage done to the residence. As a result of the damage from the storm, the home developed a mold condition.

¶3 Cincinnati hired Alan Ash from Strauss & McGuire, a licensed engineer, to assess any structural damages. In a report dated July 31, 2000, Ash recommended that the siding be removed and replaced, that the insulation and fascia be removed, and a few other things be checked. The report stated that there was not any shifting of the roof. A copy of the report was provided to the Murphys. In early August 2000, the Murphys obtained estimates from contractors for repair of the siding.

¶4 On August 4, 2000, the Murphys took a ten-day vacation that had been scheduled for a year. The Murphys aver that the mold which had developed in the home was causing illness in the family.

¶5 The Murphys allege that Cincinnati refused to confirm that it would pay to replace the damaged siding until on or about August 21, 2000. Cincinnati alleges that despite the estimates from the contractors, the Murphys failed to hire any contractor. On August 21, 2000, the Murphys advised one of the contractors, T. Fisher, that Cincinnati had agreed to pay for replacement of the siding on the Murphys' home. T. Fisher then refused to do the job because the Ash report demonstrated that it was a more comprehensive task than simply replacing the siding.

¶6 Between August 22 and August 28, 2000, the Murphys had additional siding contractors evaluate the damages. On August 22, 2000, the Murphys called Robidoux Brothers and Maier Construction. Robidoux refused to do the work because of the presence of mold.

¶7 Based on the presence of mold, the Murphys decided to vacate the residence and hired a mold inspector, John Melvan. The test samples confirmed the presence of mold in the Murphys' home. Maier Construction agreed to do the

restoration and siding work but, according to the Murphys, Cincinnati refused to authorize payment for repairs to Maier because its charges were higher than the other contractors.

¶8 The Murphys allege that they wanted to rent a neighbor's home, which was for sale. The neighbor indicated if they would commit to renting for one year, he would remove the home from the market. Cincinnati insisted on a month-to-month payment arrangement. The Murphys lived in the home for one month and it was then sold. Cincinnati asserts that the Murphys "chose" to live in hotels. The Murphys allege that as of October 2000, Cincinnati refused to pay the hotel directly and, as a result, the Murphys incurred $35,000 in additional living expenses, for which Cincinnati did not reimburse them.

¶9 On September 18, 2000, Cincinnati sent the Murphys a letter, noting its continuing right to investigate and reservation of rights. Cincinnati then hired Micro Air, Inc. to do a mold evaluation, which took place on or about September 20, 2000. Micro Air concluded that all areas of water entry needed to be repaired prior to, or in conjunction with, restoration and repair efforts. O.T. Construction was then hired to do the work.

¶10 The Murphys aver that Cincinnati delayed the commencement of the work by requiring that O.T. Construction hold off until it had the final report from Micro Air, which was not complete until October 2, 2000. The Murphys signed a work authorization for O.T. Construction, but stated that price and scope of repairs were decided between O.T. Construction and Cincinnati. The Murphys requested an estimate of the work from O.T. Construction, but never received it. The Murphys aver they also requested an estimate from Cincinnati, but did not receive

it from the insurer either. Eventually, in January 2001, they received the estimate from their mortgage company.

¶11 Cincinnati points out that it "advanced" the Murphys $5,000 on August 15, 2000. It also states that it paid $30,000 on November 1, 2000; $69,924.26 on November 16, 2000; and $26,983.78 on January 9, 2001, all to pay for the mold remediation work being performed by O.T. Construction. The project was estimated to be completed in three to five months.

¶12 O.T. Construction stopped work in March 2001 because of a dispute between O.T. Construction and the Murphys. The Murphys then continued as general contractors themselves and consulted Maier Construction as to how to complete the restoration. In May 2001, the Murphys had John Melvan conduct a mold assessment. Melvan ultimately recommended that the restoration be halted due to additional mold accumulation as a result of water penetration. In July 2001, the Wisconsin Department of Health and Family Services declared the home a health hazard.

¶13 The Murphys also contend that there were problems pertaining to the contents of their home and all their personal property. The personal property was evaluated by Cincinnati on July 6, 2000; it was photographed and payment for the damaged personal property was requested. Other items were removed from the home by O.T. Construction for storage and cleaning during the construction process. The items were placed in a storage locker and the Murphys were denied access to the items. When the property was eventually returned in May 2001, it was left in unopened boxes because Cincinnati demanded it not be touched until it was appraised. The Murphys paid for this property to be put in storage. The appraisal was done in the spring of 2002. When the Murphys went to view the

stored property after the appraisal, some of their property was missing, including a stove, refrigerator, washer, dryer and clothing. These items were not included in the appraisal and the Murphys have not been compensated for them.

¶14 The Murphys allege that as a result of Cincinnati's handling of this claim, they were forced to file bankruptcy, the home was foreclosed upon, and their credit rating was destroyed. The home was eventually razed.

¶15 Cincinnati states that after O.T. Construction stopped working, it attempted to negotiate a voluntary settlement of any outstanding claims. On April 17, 2001, Cincinnati offered the Murphys $92,837.11 to settle all remaining claims. The Murphys state that they refused to accept the offer because it would have required them to waive their bad faith claim against Cincinnati.

¶16 The Murphys then filed this lawsuit alleging breach of contract and bad faith. Cincinnati filed a response and demanded appraisal arbitration pursuant to the terms of the contract. The trial court granted that motion. The arbiters set the Murphys' total insured loss and damages at $214,049.49. After arbitration, Cincinnati offered to pay the Murphys $19,684.40, which was the difference between the appraisers' sum and what Cincinnati had already paid. Cincinnati then moved the court to accept and confirm the appraisers' award. The court did so and ordered Cincinnati to pay the Murphys $19,684.40.

¶17 In May 2004, Cincinnati moved the court to dismiss the Murphys' bad faith claim. The Murphys filed a brief in opposition to the motion, submitting an affidavit from insurance expert Clinton Miller. Miller's affidavit averred that Cincinnati was neither fair nor equitable with the insureds, that it practiced "economic duress" with its own first party insureds, that Cincinnati's conduct was malicious, and that the mold damages, caused by a covered peril

(rainstorm/windstorm) was therefore an insured expense, which should have been promptly paid. Miller also averred that it is clearly bad faith to withhold undisputed policy benefits and that an undisputed amount of loss is not subject to appraisal.

¶18 The trial court granted Cincinnati's motion for summary judgment and dismissed the Murphys' claim. The trial court ruled that there were no facts to support the Murphys' bad faith claim. Judgment was entered. The Murphys now appeal.

DISCUSSION

¶19 This case arises from the grant of summary judgment; standards governing summary judgment are well known and will not be repeated herein. ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 536-37, 563 N.W.2d 472 (1997). We review summary judgment decisions independently. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987).

A. Material Issues of Disputed Fact.

¶20 The Murphys' first contention is that the trial court erred in granting summary judgment because there are material issues of disputed facts regarding the bad faith claim. We agree.

¶21 In order to prevail on a bad faith claim, the Murphys need to establish that Cincinnati did not have a reasonable basis for denying the benefits of their policy, and that Cincinnati either knew it lacked a reasonable basis, or recklessly disregarded whether or not it had a reasonable basis. ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). When there is evidence which, under any reasonable view, "'will either support or admit of an

inference in support or in denial of a claim of either party, it is for the jury to draw the proper inference and not for the court to determine which of two or more permissible inferences should prevail.'" ***Foryan v. Firemen's Fund Ins. Co.***, 27 Wis. 2d 133, 138, 133 N.W.2d 724 (1965) (citation omitted).

¶22 Here, the record is replete with disputed issues of material fact pertinent to the bad faith claim and multiple inferences which can be drawn from the various allegations. The Murphys' contentions as to what Cincinnati did or did not do, the timing relating to its conduct and its payments, its offers to pay, and other actions are very different from what Cincinnati claims happened in this case. As is evident from the recitation of some of the facts set forth in the background section of this opinion, what happened in processing this claim is clearly disputed. The Murphys aver that Cincinnati delayed the repair, delayed paying for items of damage that were not fairly debatable, failed to adequately safeguard the Murphys' personal property, and then tried to pressure them to accept final payment and release their bad faith claim. Cincinnati, on the other hand, offers a very different assessment of the factual development in this case. It points out all the payments it did make, argues that all the delays were the fault of the Murphys, and that all of the claims were "fairly debatable."

¶23 Based on the foregoing, we cannot conclude as a matter of law that there was no bad faith in this case. The factual disputes related to this claim need to be presented to a jury for resolution. Accordingly, we reverse that portion of the trial court's ruling and remand for further proceedings consistent with this opinion.

B. Offset of Payments.

¶24 The next issues raised by the Murphys relate to the trial court's ruling regarding the payments Cincinnati made on the three separate coverages under the policy—dwelling, personal property and additional living expenses.

¶25 During the appraisal arbitration, the amounts pertinent to each coverage were determined. The appraisers set the dwelling coverage loss at $138,159, the personal property coverage loss at $56,173.32, and the additional living expense coverage loss at $19,717.67. The appraisers noted that Cincinnati had paid a sum exceeding $40,000 for the additional living expense claim, but had underpaid on the dwelling coverage in the amount of $6,250.96 and had underpaid on the personal property coverage in the amount of $37,895.77.

¶26 Cincinnati, however, pointed to the total sums—comparing the total appraisers' net loss figure of $214,049.49 with the total amount it had paid under all the coverages of $194,365.09. It then subtracted the two sums to reach the figure of $19,684.40 and paid that amount to the Murphys. The Murphys contend that this approach was impermissible and that Cincinnati's voluntary overpayment on one coverage should not offset its underpayment on a separate coverage.

¶27 The trial court ruled that the offset analysis was permissible:

> Therefore, that does not preclude me from applying the principles of unjust enrichment and equitable relief. And, quite frankly, the ultimate element of common sense. All three of these different coverages were decided in the arbitration decision, and the process that was contractually agreed to by the parties, and was followed.
>
> I am satisfied, based upon that, it would be unjust enrichment and would be unfair [not to allow the offset]. And especially the fact that if there is bad faith there is a recovery that is possible in the future. So I am not denying plaintiffs' remedy and I am ordering an offset and I am

> ordering a judgment -- I am using the numbers counsel provided for me.
>
> I am awarding on the contract cause of action in favor of the Murphy's as opposed to Cincinnati a net judgment of $19,684.40.

¶28 We agree with the trial court that in the particular circumstances of this case, not to allow the offset would result in a windfall to the Murphys and constitute unjust enrichment. Requiring Cincinnati to make the full payment on the dwelling and personal property coverages, but not recover what it overpaid on the additional living expenses, would be inequitable. *See* ***Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of Am. v. Danielson***, 24 Wis. 2d 33, 128 N.W.2d 9 (1964); ***McCune v. Industrial Comm'n***, 260 Wis. 499, 50 N.W.2d 683 (1952); ***Schmidt v. Prudential Ins. Co.***, 235 Wis. 503, 292 N.W. 447 (1940). Accordingly, we affirm the trial court's decision with regard to this issue.

C. Interest.

¶29 The Murphys' final contention is that the trial court erred in denying its request for twelve percent statutory interest. The Murphys contend that based on WIS. STAT. § 628.46 (2003-04),[1] Cincinnati is obligated to pay interest on the dwelling and content losses beginning in November 2001. Cincinnati responds that it made all payments timely and offered to settle the claim for more than it was ultimately determined was due and owing.

¶30 WISCONSIN STAT. § 628.46 provides, as material:

> **Timely payment of claims. (1)** Unless otherwise provided by law, an insurer shall promptly pay every insurance

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss.… Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer…. All overdue payments shall bear simple interest at the rate of 12% per year.

¶31 The statute permits an award of twelve percent interest under certain circumstances. That is, interest will accrue if an insurer has not paid a covered loss within thirty days of being notified of the loss and the amount of the loss. The exception to the rule is that interest will not be due if the insurer "has reasonable proof to establish" that it is not responsible for the payment. In looking at what happened in this case, clearly Cincinnati did not pay within thirty days of being notified by the Murphys of their losses. This was not a simple or problem-free case. The record demonstrates that Cincinnati both made payments and contested certain coverages throughout the entire process until the appraisal arbitration, after which it promptly paid the balance due.

¶32 The issue, therefore, is whether Cincinnati had "reasonable proof to establish" that it was not responsible for payment. We are unable to ascertain from the record whether the trial court made this factual determination. We are precluded from finding whether the insurer had reasonable proof. ***United States Fire Ins. Co. v. Good Humor Corp.***, 173 Wis. 2d 804, 835, 496 N.W.2d 730 (Ct. App. 1993). Accordingly, we reverse and remand for further factual determination on this issue as well. On remand, the trial court shall conduct such proceedings necessary to determine whether the facts support the imposition of interest pursuant to WIS. STAT. § 628.46.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

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