

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 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. 2005AP3001

Cir. Ct. No. 2003CV279

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LARRY HISLE,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed; cross-appeal dismissed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Larry Hisle has appealed from a judgment dismissing his complaint against Allstate Insurance Co. for damages arising from a fire at a residence owned by Hisle in a rural area in Ohio. The trial court granted

summary judgment dismissing the complaint on the ground that Hisle failed to timely notify Allstate of the fire, and Allstate was prejudiced by the delay. Allstate has cross-appealed from the portion of the judgment determining that Wisconsin law, rather than Ohio law, governs this action.

¶2 We affirm the trial court’s judgment dismissing Hisle’s complaint based upon lack of timely notice and prejudice. In light of this disposition, the issue of whether the trial court correctly determined that Wisconsin law governs this action is moot. *See City of Racine v. J-T Enterprises of America, Inc.*, 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974) (a matter is moot if a determination is sought which cannot have an effect on an existing controversy). We therefore dismiss the cross-appeal.

¶3 When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *Coopman v. State Farm Fire & Cas. Co.*, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Summary judgment is warranted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2) (2005-06).¹ In our review we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. *Coopman*, 179 Wis. 2d at 555. However, merely alleging a factual dispute will not defeat an otherwise properly supported motion for summary judgment. *Helland v. Kurtis A. Froedtert Memorial Lutheran*

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

Hosp., 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). The party that opposes a summary judgment motion must set forth specific evidentiary facts showing that a genuine issue exists for trial. *See id.* “It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge.” *Id.*

¶4 It is undisputed that the date of the fire at Hisle’s property is unknown, that the property was unoccupied at the time of the fire, and that no one had lived in it since 1997. In his complaint, Hisle acknowledged that no one reported the fire when it occurred and that a report related to the loss was never prepared by the local fire department. These allegations were consistent with affidavits submitted by Allstate from a local fire department chief and a 911 dispatcher, indicating that they received no notice or report of a fire at this property in June or July 2003.

¶5 The burned residence was discovered by Hisle’s friend, Larry Bass, in July 2003. Bass submitted an affidavit stating that the house had been completely burned to the ground and that there was nothing left except the basement, which was filled with water.

¶6 Hisle’s deposition indicates that after learning of the fire and of neighbors’ concerns that the burn site was a health and safety hazard, he hired a contractor, Jerry Woodson, to make the property safe. Woodson’s affidavit indicates that when he arrived at the site, the only items that remained were the foundation and the remnants of a chimney, and that the basement was filled with approximately three feet of water. Woodson attested that he did not remove any material except perhaps a water heater that was partially submerged. He stated that he filled the basement with a mixture of topsoil and sand. Woodson also

opined that it would be possible for someone to excavate the sand and topsoil and investigate whatever materials or remains were left in the basement.

¶7 In his deposition, Hisle admitted that he did not notify Allstate of the fire until after Woodson performed the work at the site. He indicated that he failed to notify Allstate sooner because he was unaware that he had a policy insuring the property. He testified that he notified Allstate promptly when his wife informed him that they had a policy.

¶8 Hisle's policy with Allstate provided that, in the event of a loss to any property, the insured must "promptly give us or our agent written notice." The policy excluded loss due to "vandalism or malicious mischief" if the "dwelling has been vacant for more than 30 consecutive days immediately prior to the loss."

¶9 WISCONSIN STAT. § 631.81(1) states:

TIMELINESS OF NOTICE. Provided notice or proof of loss is furnished as soon as reasonably possible and within one year after the time it was required by the policy, failure to furnish such notice or proof within the time required by the policy does not invalidate or reduce a claim unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limit.

¶10 It is undisputed that Hisle notified Allstate of the fire within one year. However, the parties dispute whether he gave notice as soon as reasonably possible and whether Allstate was prejudiced by his failure to give notice promptly.

¶11 The trial court determined that the notice given by Hisle was untimely and that Allstate suffered prejudice as a result of the untimely notice. Hisle contends that material issues of fact exist for trial as to timeliness of notice

and prejudice and that summary judgment therefore must be reversed. Based upon our review of the summary judgment record, we disagree.

¶12 Generally, the issue of whether an insured gave timely notice of a loss is a question of fact. *Neff v. Pierzina*, 2001 WI 95, ¶35, 245 Wis. 2d 285, 629 N.W.2d 177. However, in some circumstances, notice may be deemed untimely as a matter of law. See *id.*, ¶40; *Gerrard Realty Corp. v. American States Ins. Co.*, 89 Wis. 2d 130, 144, 277 N.W.2d 863 (1979). Similarly, the determination of whether an insurer has been prejudiced by the lack of timely notice is generally a question of fact, but may be determined as a matter of law when material facts are not in dispute. See *Neff*, 245 Wis. 2d 285, ¶¶47-48.

¶13 We agree with the trial court that the summary judgment record establishes that, as a matter of law, Hisle failed to give Allstate notice of the fire promptly or as soon as reasonably possible. Hisle could have and should have notified Allstate when he first learned of the fire. His lack of awareness that he owned a policy did not relieve him of his obligation to timely notify Allstate of the fire or create a material issue of fact for trial.

¶14 The summary judgment record also establishes that Allstate was prejudiced by the delay. “Prejudice to the insurer ... is a serious impairment of the insurer’s ability to investigate, evaluate, or settle a claim, determine coverage, or present an effective defense, resulting from the unexcused failure of the insured to provide timely notice. Whether an insurer has been prejudiced is governed by the facts and circumstances in each case.” *Id.*, ¶44.

¶15 As noted above, the Allstate policy excluded losses caused by vandalism or malicious mischief if the residence was vacant for more than thirty consecutive days prior to the loss. In addition, it was undisputed that the property

had not been resided in since 1997 and that Hisle had had problems with trespassers on the property prior to the fire.

¶16 Hisle's actions in hiring a contractor to fill and level the site before notifying Allstate of the fire prevented Allstate from investigating the property to determine if the cause and origin of the fire was due to vandalism or malicious mischief, or fell within some other exclusion.² Allstate submitted the affidavit of Lawrence Eastman, a certified fire investigator, in support of its motion for summary judgment. Eastman attested that he had reviewed the pleadings, motion papers, briefs and affidavits, and concluded to a reasonable degree of certainty that it would have been impossible to determine the origin and cause of the fire without completing a proper investigation under National Fire Protection Agency Guidelines for Fire and Explosion Investigations prior to the property being bulldozed over.³ Eastman also concluded to a reasonable degree of certainty that if Allstate had excavated the property at the time it was called to investigate, it would not have yielded determinative results as to the origin and cause of the fire.

¶17 Eastman based his opinion on his knowledge and expertise in determining the origins and causes of fires, and the fact that the fire was not reported to the police or fire departments, resulting in no investigation by a fire

² Hisle contends that the policy required him to protect the property from further loss and make reasonable and necessary repairs to protect it. However, this did not mean that he was entitled to fill and level the property before notifying Allstate.

³ Hisle objects to the use of the word "bulldozed." However, in his complaint, Hisle stated that in response to the complaints of neighbors, he "made arrangements to mitigate the problem by having the burned structure bulldozed." In any event, the word is merely a description of the work that was done, which involved filling the basement and leveling the property.

chief or fire marshal.⁴ Eastman stated that because Hisle bulldozed the site and filled the basement before allowing an investigation, an investigator could not examine the exterior of the property to look for signs of accidental or incendiary fire causes; could not examine the status of live or abandoned gas or electric utilities, heating systems, or other potential ignition sources; and could not check the water and fire debris in the basement for evidence of hydrocarbon accelerants that could have indicated a potential fuel source for the fire.

¶18 Eastman's affidavit clearly establishes that Hisle's failure to notify Allstate of the fire before filling the basement and leveling the site prevented Allstate from being able to conduct a proper investigation into the cause and origin of the fire, including determining whether the fire was caused by vandalism and identifying any third-party liability. Because there is no material issue of fact as to whether Hisle's actions precluded Allstate from adequately investigating the fire, the lack of timely notice prejudiced Allstate as a matter of law.⁵ The trial court therefore properly granted summary judgment dismissing Hisle's complaint.

¶19 Because Allstate has prevailed on its argument that the trial court properly dismissed Hisle's complaint, the issue of whether the trial court should

⁴ Hisle argues that the failure to report the fire to local authorities should not be considered in assessing prejudice to Allstate because he had no control over it. However, he could have reported the fire to the authorities when he first learned of it and before permitting Woodson to alter the site.

⁵ In contending that issues of fact exist for trial, Hisle relies on the affidavits of Bass and Woodson, and alternatively contends that no investigation could have been conducted because the property was completely destroyed, or that it would have been possible to conduct an investigation by excavating the sand and topsoil from the basement. However, neither Bass nor Woodson have any expertise in fire investigation, and their opinions as to whether and how a fire investigation could have been conducted are insufficient to give rise to a material issue of fact for trial.

have applied Ohio law, rather than Wisconsin law, is moot. *See City of Racine*, 64 Wis. 2d at 700. We therefore dismiss Allstate's cross-appeal.

By the Court.—Judgment affirmed; cross-appeal dismissed.

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

