

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2021

Sheila T. Reiff
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. 2020AP1173

Cir. Ct. No. 2019CV8160

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

TJW PROPERTIES, LLC AND FLEX AUTOMATION, LLC,

PLAINTIFFS-APPELLANTS,

V.

CINCINNATI INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MARSHALL B. MURRAY, Judge. *Reversed and cause remanded for further
proceedings.*

Before Brash, P.J., Dugan and White, JJ.

**Per curiam opinions 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).**

¶1 PER CURIAM. TJW Properties, LLC and Flex Automation, LLC (collectively Flex) appeal from a nonfinal order of the circuit court that held “that the breach of insurance claim be bifurcated from the bad faith claim” against Cincinnati Insurance Company (Cincinnati) and that “the bad faith claim, including discovery, will be stayed until the breach of insurance claim is resolved.”¹ We conclude that the circuit court did not consider our supreme court’s decision in *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, 334 Wis. 2d 23, 798 N.W.2d 467, and therefore, it did not apply *Brethorst’s* holding to the facts in this case. Therefore, we reverse the circuit court’s order and remand the matter for the circuit court to properly analyze Flex and Cincinnati’s motions.

BACKGROUND

¶2 The case arises out of Cincinnati’s denial of coverage for Flex’s claim for damage to a building covered under its commercial property coverage insurance policy (the Policy). The following facts are drawn from the parties’ pleadings and the documentation in the record.

¶3 The properties insured in Flex’s Policy included Building 4, the subject of this claim. After an extreme cold spell in late January 2019, on or about February 2, 2019, a leak was discovered on the first floor of Building 4. Flex investigated the leak and found water damage from broken pipes in the boiler-heated baseboards on the second floor. Additionally, portions of the fire suppression system were also damaged, resulting in water damage to both levels of the building. The boiler serving Building 4 had stopped working and stopped

¹ This court granted Flex’s petition for leave to appeal the nonfinal order. See WIS. STAT. § 809.50(3).

providing heat to the building, resulting in frozen pipes, which subsequently burst. Flex filed a claim with Cincinnati for property damage caused by the frozen pipes.

¶4 Cincinnati does not dispute that Flex’s claim based on the freezing of the pipes that occurred in Building 4 was a direct cause under the definition of covered causes of loss in the Policy. However, the parties dispute whether the freezing pipes means that coverage was excluded or limited. We review the relevant language in the Policy.

We will not pay for “loss” caused by or resulting from any of the following:

....

Freezing of Plumbing Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protection systems) caused by or resulting from freezing, unless:

- 1) You did your best to maintain heat in the building or structure; or
- 2) You drained the equipment and shut off the supply if the heat was not maintained.

(Some formatting altered.)

¶5 Upon receipt of Flex’s claim, Cincinnati undertook an investigation of the claim. On April 23, 2019, Cincinnati denied Flex’s claim based on the exclusion in the Policy for loss caused by the freezing of plumbing, and Flex’s failure to satisfy the exception to that exclusion, that the insured is denied coverage unless “[y]ou do your best to maintain heat in the building or structure.”

¶6 In October 2019, Flex filed a complaint and subsequently an amended complaint against Cincinnati, alleging one count of bad faith and one count of punitive damages; it did not allege a separate breach of contract claim.

Flex alleged that Cincinnati breached the terms of the Policy by failing to investigate Flex's property damage claim with reasonable diligence. Flex asserted that had Cincinnati reasonably investigated the claim, it would have known there was no evidence that Flex had notice of a potential problem with the boiler and no evidence of when the boiler stopped working prior to the freezing event. Flex served its first set of written interrogatories and requests for production to Cincinnati along with the complaint in November 2019.

¶7 In January 2020, Cincinnati returned its answers to interrogatories, but objected to many of Flex's discovery requests on the basis of work-product privilege, but it produced non-privileged portions of Flex's claim file. On April 21, 2020, Cincinnati filed a motion "to bifurcate and stay the bad faith claim from the breach of contract claim," which would stay discovery and proceedings on the bad faith claim. (Some capitalization omitted.) Cincinnati also filed a motion for a protective order to prevent Flex from seeking discovery that was privileged or not reasonably calculated to lead to the discovery of admissible evidence. Simultaneously, Flex filed a motion to compel written discovery and for sanctions.

¶8 The circuit court issued an order setting a briefing schedule and setting the matter on for hearing and decision on June 29, 2020.² Both parties submitted briefs on the motions. Without oral argument, the circuit court entered an order on June 29, 2020, deciding their motions. The circuit court granted Cincinnati's motion to bifurcate and stay and its motion for protective order; the

² On June 4, 2020, the circuit court entered an order based on a May 2020 telephonic status hearing that granted the parties' requests to exceed page limits and set deadlines to file reply briefs on each motion. The order stated that the motions were scheduled for oral argument and decision by the court on June 29, 2020.

court denied Flex’s motion to compel written discovery and for sanctions. The circuit court order stated:

After considering the parties’ briefs, the record, and the applicable law, the [c]ourt finds as follows:

1. Discovery of privileged material in the bad faith claim is only allowed to proceed if Plaintiffs are able to establish in the breach of contract claim that the claim is covered. At this juncture, Plaintiffs have not established that.
2. That this [c]ourt is not making a judgment as to whether Plaintiffs have made a bad faith showing.
3. That the breach of insurance claim be bifurcated from the bad faith claim.
4. That the bad faith claim, including discovery, will be stayed until the breach of insurance claim is resolved.
5. That the discovery sought by Plaintiffs in their motion to compel is privileged and/or not reasonably calculated to lead to the discovery of admissible evidence.

¶9 Flex petitioned this court for leave to appeal the June 29, 2020 nonfinal order. On August 5, 2020, we granted Flex’s petition. This appeal follows.

DISCUSSION

¶10 Flex argues that the circuit court erroneously granted Cincinnati’s motion to bifurcate claims for breach of contract and bad faith and stay discovery on the bad faith claim because it did not plead a separate breach of contract claim and it was not required to plead a separate claim under *Brethorst*. Cincinnati argues that the circuit court properly stayed discovery on the bad faith claim because Flex cannot obtain that discovery, unless Flex shows that it had a valid claim covered by the Policy and that the coverage issues are not fairly debatable.

¶11 The decisions whether to bifurcate claims into separate trials and whether to stay discovery on bifurcated claims are each committed to the circuit court’s discretion. *Dahmen v. American Fam. Mut. Ins. Co.*, 2001 WI App 198, ¶11, 247 Wis. 2d 541, 635 N.W.2d 1. “We will not reverse the [circuit] court’s decision unless it is clearly shown that the [circuit] court failed to consider the relevant facts, apply the proper standard of law and reach a conclusion a reasonable judge could reach.” *Id.* “Whether the [circuit] court applied the proper legal standard is a question of law we review *de novo*.” *Ullerich v. Sentry Ins.*, 2012 WI App 127, ¶13, 344 Wis. 2d 708, 824 N.W.2d 876.

¶12 We conclude that *Brethorst* controls this case because Flex only pled a bad faith claim without pleading a separate breach of contract claim, a situation expressly allowed by *Brethorst*, 334 Wis. 2d 23, ¶5 (“We conclude ... [a]n insured may file a bad faith claim without also filing a breach of contract claim.”) The court went on to explain that where the insured only pleads a bad faith claim “the circuit court must fashion means to protect the insurer from unwarranted discovery of the insurer’s ‘work product and attorney/client material.’” *Id.*, ¶75. The court then explained that:

Given our analysis of the requirements for a first-party bad faith claim, we conclude that the insured may not proceed with discovery on a first-party bad faith claim until it has pleaded a breach of contract by the insurer as part of a separate bad faith claim and satisfied the court that the insured has established such a breach or will be able to prove such a breach in the future. Stated differently, an insured must plead, in part, that she was entitled to payment under the insurance contract and allege facts to show that her claim under the contract was not fairly debatable. To go forward in discovery, these allegations must withstand the insurer’s rebuttal.

The insurer, in turn, must be permitted to challenge the elements of the claim, not only by a responsive pleading, but also by motion. It must be permitted to show

that it did not breach the contract or that there was a reasonable basis for its conduct in denying, paying, or processing a claim....

An insured choosing to pursue only a claim for bad faith must plead facts which, if proven, would demonstrate not only that the insurer breached its contract with the insured but also that there was no reasonable basis for not honoring the terms of the contract.

Id., ¶¶76-78 (citation omitted). If an insured fails to make a preliminary showing that the insurer breached the contract and the claim was not fairly debatable, there would be grounds for the circuit court to grant a motion for summary judgment under WIS. STAT. § 802.08(2) (2019-20)³ or to grant a motion to dismiss under WIS. STAT. § 802.06(2)(a)6. See *Brethorst*, 334 Wis. 2d 23, ¶79.

¶13 Here, the circuit court’s exercise of discretion was erroneous. It did not recognize that Flex could—and in fact did—only plead a bad faith claim and was not required to file a breach of contract claim pursuant to *Brethorst*. Moreover, the record does not reflect that the circuit court engaged in the analysis required under *Brethorst*. The court’s order did not address whether Flex’s pleadings satisfied the standards in *Brethorst*. Because the circuit court did not set forth any findings of facts or the applicable standard of law upon which it relied in making this decision, we conclude that the circuit court erroneously exercised its discretion in its nonfinal order.⁴ See *Dahman*, 247 Wis. 2d 541, ¶11. Therefore,

³ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

⁴ We note that in its order the circuit court does state “[a]t this juncture, Plaintiffs have not established [a breach of contract].” However, where the circuit court fails to make a record of the facts and the law it relies upon in exercising its discretion we cannot conclude that it examined all the relevant facts and applied the proper standard of law.

we reverse the circuit court's order and remand the matter for the circuit court to properly analyze Flex and Cincinnati's motions.

By the Court.—Order reversed and cause remanded for further proceedings.

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

