COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1596 **Cir. Ct. No. 01 CV 5052**

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

BEVERLY JOHNSON,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Beverly Johnson appeals from the trial court's grant of summary judgment in favor of the American Family Mutual Insurance Company. Johnson sued American Family after it denied her insurance claim because she failed to appear for an examination under oath and produce requested documents. The trial court concluded that American Family properly denied

Johnson's claim because Johnson did not, as a matter of law, comply with the terms of the insurance contract. Johnson claims that the trial court erred when it granted summary judgment because, she argues, there is an issue of fact whether American Family can require her to undergo an examination under oath. We affirm.

I.

¶2 This case began when Beverly Johnson reported to the American Family Mutual Insurance Company that her house was burglarized on September 5, 2000. Johnson had a Wisconsin Custom Value Homeowners Policy of insurance with American Family. The policy provided, as relevant:

> **What you Must Do in Case of Loss.** In the event of a loss to property that this insurance may cover, **you** and any person claiming coverage under this policy must:
>
> ….
>
> d. As often as **we** reasonably require:
>
> ….
>
> (2) provide **us** with records and documents **we** request and permit **us** to make copies; and
>
> (3) let **us** record **your** statements and submit to examinations under oath by any person named by **us**, while not in the presence of any other **insured**, and sign the transcript of the statements and examinations.

(Emphasis in original.) Johnson submitted a Sworn Statement in Proof of Loss on January 15, 2001. On the proof of loss, she claimed that the value of property stolen from her house was $14,827.14.

¶3 An American Family property-claim analyst subsequently requested a special investigation into Johnson's claim.[1] The claim analyst pointed to several "red flags": (1) the investigating police officer opined that the loss was '"bullshit"' because the reported property "was not there or not taken"; (2) American Family had questions about the ownership of the property that was allegedly stolen; (3) debris surrounding the area where burglar(s) allegedly entered the house appeared to be undisturbed; (4) a VCR was allegedly stolen from a location that would have required the burglar(s) to move two soda cans, remove the VCR, and replace the soda cans; (5) Johnson told the claim analyst that a large amount of property was stolen, even though she had "hardly any furniture or belongings," because the burglar(s) "found all her secret hiding spots"; and (6) a property-claim specialist received an anonymous phone call from an alleged co-worker of Johnson reporting that Johnson's claim was fraudulent.

¶4 As part of its investigation, one of American Family's attorneys sent a letter to Johnson on February 23, 2001, requesting that Johnson undergo an examination under oath on March 9, 2001, and produce documents related to her claim:

> I am attempting to complete the investigation and evaluation of your claim in conjunction with the claims staff that previously worked on this matter.
>
> Please take notice that under the terms and conditions of the above-referenced policy of insurance, you are hereby required to submit to an Examination Under Oath with respect to your claim for the loss above mentioned. You are to appear for the examination which will take place on

[1] In its brief on appeal, American Family contends that we may not consider the property-claim analyst's deposition testimony because, American Family argues, the only version of it in the record is Johnson's attorney's affidavit "abridging" the testimony. The deposition transcript, however, *is* in the record.

> March 9, 2001, starting at 9:00 o'clock A.M.…. If you are planning on having counsel present, please have him or her contact me before the date of the examination.

According to the affidavit of Elizabeth Kocol, an attorney for American Family, Johnson did not respond to the letter and did not show up for the examination under oath.

¶5 On March 19, 2001, American Family sent a letter to Johnson informing her that it was denying her claim because she had breached the terms of the insurance contract when she failed to attend the examination under oath:

> On February 23, 2001 we notified you that an Examination Under Oath was required by us and the date was scheduled for March 9, 2001 at 9:00 A.M. at our office…. You failed to appear on March 9, 2001 at 9:00 A.M. and we received no call from you requesting other arrangements….
>
> Due to the fact that you have failed to fulfill the policy conditions which has hampered our further investigation in this claim and for other good and valuable reasons, we have no choice but to deny this claim in its entirety.

¶6 Johnson retained an attorney, who sent a letter to American Family on March 19, 2001. In the letter, Johnson's attorney agreed to "produce" Johnson for an examination under oath if American Family would substitute the examination for a deposition:

> I will agree to produce Beverly Johnson for an examination under oath at a mutually convenient time if you will agree that the examination under oath will substitute for her deposition in the event litigation becomes necessary. Otherwise, I will commence an action against American Family and you may take her deposition in that case.

¶7 American Family responded in a letter dated March 26, 2001. It declined to waive its right to depose Johnson in exchange for an examination under oath. It told Johnson's attorney, however, that it would "reconsider its

denial position if your client submits to an Examination Under Oath as was previously demanded." When American Family did not receive a response from Johnson, Kocol sent a letter on April 27, 2001, confirming its denial of Johnson's claim: "This is a follow-up to my letter to you dated March 26, 2001. In that I did not hear from you within the time frame specified therein, please be advised that American Family retains its denial position as set forth in the letter of March 19, 2001."

¶8 Johnson sued American Family for breach of contract and bad faith. As relevant, Johnson alleged that American Family breached the insurance contract when, "despite the fact that plaintiff had complied with all of the terms and conditions of her homeowner's insurance policy, … the defendant … denied her claim 'in its entirety.'"

¶9 American Family sought summary judgment. It alleged, among other things, that Johnson's claim was precluded because she breached the insurance contract when she failed to attend the examination under oath. American Family further claimed that Johnson did not remedy the breach when she sent the March 19, 2001, letter because the letter was an attempt to modify the terms of the contract by requiring American Family to waive its right to depose Johnson.

¶10 Johnson asserted that summary judgment was inappropriate because the record was "rife" with issues of fact. At a hearing on the motion, she claimed that there were "all sorts of material issues as to the police investigation, as to the anonymous phone caller, [and] as to the manner in which the examination under oath was set up." Johnson thus claimed that summary judgment should have been

denied because American Family "made up some suspicious circumstances" in order to "arbitrar[ily]" deny her claim.

¶11 As noted, the trial court granted the motion for summary judgment. It determined that the case was "essentially a contract interpretation case" and that Johnson breached the insurance contract when she failed to attend the examination under oath. It thus concluded that summary judgment was appropriate because, when Johnson refused to submit to the examination under oath, she failed to "fulfill conditions precedent to suit."

II.

¶12 Our review of the trial court's grant of summary judgment is *de novo*, and we apply the same standards as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). First, we examine the pleadings to determine whether a proper claim for relief has been stated. ***Id.***, 136 Wis. 2d at 315, 401 N.W.2d at 820. If the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** WISCONSIN STAT. RULE 802.08(2) (2001–2002) sets forth the standard by which summary judgment motions are to be judged:[2]

> The judgment sought shall be rendered if 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.

[2] All references to the Wisconsin Statutes are to the 2001–2002 version unless otherwise indicated.

¶13 Johnson alleges that the trial court erred because it "did not follow any particular methodology in pronouncing summary judgment." As noted, Johnson claims that "[t]here are a great number of material issues in dispute," including the issue of whether or not American Family had the "right" to require an examination under oath when such an examination would have been a "duplication of examinations." We agree with the trial court that the issues in this case can be decided as a matter of law.

¶14 The ultimate issue in this case involves the interpretation of Johnson's insurance contract with American Family. Neither party claims that the terms of the insurance contract are ambiguous. When a contract is unambiguous, its construction is a matter of law that we review *de novo*. ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 366, 377 N.W.2d 593, 602 (1985).

¶15 As we have seen, the insurance contract in this case clearly states that American Family may require an insured to undergo an examination under oath as part of the claim process.[3] Johnson does not refute American Family's contention that she did not attend the March 9, 2001, examination under oath. She claims, however, that she did not breach the examination-under-oath provision of the contract because she "merely tried to adjust the schedule and obtain a stipulation that there would be no duplication of examinations." We disagree.

[3] In her reply brief, Johnson alleges that an examination under oath "appears to be optional under the insurance contract in that respondent can decide to hold one or not." We disagree. The policy clearly provides: "In the event of a loss … **you** … must: [a]s often as **we** reasonably require … submit to examinations under oath." (Emphasis in original.) There is nothing "optional" in this language.

¶16 The "failure to submit to [an] examination under oath is a material breach of the policy terms and a condition precedent to an insured's right to recover and/or bring suit under the policy." ***Goldman v. State Farm Fire Gen. Ins. Co.***, 660 So. 2d 300, 303 (Fla. Dist. Ct. App. 1995); *see also* ***Ellis v. Safety Ins. Co.***, 672 N.E.2d 979, 985 (Mass. App. Ct. 1996) ("The insured's failure to comply with a condition requiring an examination under oath constitutes a material and substantial breach of the insurance contract as a matter of law."). In this case, Johnson materially breached the contract when she did not attend the March 9, 2001, examination.

¶17 Further, Johnson's subsequent offer to undergo an examination only if American Family waived its right to depose her also did not comply with the terms of the contract. Depositions and examinations under oath serve different purposes. An investigation under oath is contractual in nature and designed to seek information during the claim-investigation process. A deposition, by contrast, is governed by the Wisconsin Rules of Civil Procedure and is designed to obtain information, as applicable here, after the insurer has denied the claim. *See* WIS. STAT. ch. 804 (depositions and discovery); ***Goldman***, 660 So. 2d at 305 (differences between an examination under oath provided under an insurance contract and a post-suit deposition).

¶18 Accordingly, Johnson failed to comply with a condition precedent to recovery under the contract—that she undergo an examination under oath. Thus, American Family was entitled to deny her claim and the trial court correctly concluded that Johnson failed to fulfill a condition precedent to suit. *See* ***United States Fid. & Guar. Co. v. Wigginton***, 964 F.2d 487, 491–492 (5th Cir. 1992)

(insurance company entitled to reject offer to submit to examination under oath conditioned on company's waiver of its right to void the policy).[4]

By the Court.—Judgment affirmed.

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

[4] Although Johnson raises many other issues concerning her alleged loss, those issues are not material because she did not fulfill her responsibilities under the insurance policy and, therefore, the insurance company was entitled to deny her claim. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").