COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP42 **Cir. Ct. No. 2005CV77**

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

JEFFREY WINTER AND RITA WINTER,

PLAINTIFFS-APPELLANTS,

V.

SENECA, SIGEL MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jeffrey and Rita Winter appeal a judgment dismissing their bad faith claim against Seneca, Sigel Mutual Insurance Company. The Winters raise three arguments on appeal: (1) the trial court's bad faith analysis improperly relied on Seneca's consultations with third parties regarding

the Winters' claim; (2) the trial court's bad faith analysis was incomplete; and (3) the Winters proved bad faith as a matter of law. We conclude third-party advice to an insurer is a relevant factor when assessing bad faith, the circuit court conducted a thorough bad faith analysis, and the Winters have not shown bad faith as a matter of law. Accordingly, we affirm.

BACKGROUND

¶2 The Winters' home was destroyed by fire on March 30, 2004. At the time, the Winters were insured by Seneca under a policy that provided several types of coverage, including Coverage C for household personal property. Coverage C required payment of the replacement value of personal property losses, subject to a limit of $106,500.[1] If replacement value of the loss exceeded $500, Seneca specified it would not be liable for more than the actual cash value unless actual repair or replacement was completed. The policy established a 180-day claim period from the date of loss for amounts exceeding the actual cash value.

¶3 The policy included an appraisal provision, which Seneca invoked on September 27, 2004. The appraisal panel was tasked with determining actual cash value and replacement value of the Winters' personal property. It consisted of three members: one appraiser selected by each party and one umpire selected by the appraisers. However, Seneca's appraiser was vacationing for the winter, and the parties agreed to attempt an informal resolution of the dispute in the

[1] "Replacement value" was defined as "the cost to repair or replace the property with new property of equivalent kind and quality to the extent practical, without deduction for depreciation."

meantime. By February 25, 2005, Seneca had paid $68,000 to the Winters under Coverage C.

¶4 The Winters ultimately filed suit on March 23, 2005, alleging breach of contract and bad faith. On March 28, the Winters formally demanded their Coverage C limit from Seneca. The Winters' correspondence included sales orders and copies of cancelled checks to Bassett Furniture totaling $37,267.02 for replacement furniture. Seneca renewed its demand for an appraisal on April 14, 2005, and the parties agreed to stay the litigation until the appraisal was completed.

¶5 The appraisal process was lengthy and complex. The appraisers did more than simply establish values; the circuit court found that, to some degree, they became part of the adjustment process. Seneca's appraiser, James Fox, submitted a total of twenty-seven reports to Seneca during the appraisal. In his final report on December 8, 2005, Fox observed that the Winter file was the most correspondence-laden file he had handled in his thirty-seven-year career. He stated that the Winters' inventory proved to be notably inflated, questioned the circumstances surrounding replacement of the Bassett furniture, and suggested categorizing the approximately 2,500 entries in the 135-page inventory.

¶6 The appraisal was finalized on November 29, 2005. The actual cash value of the lost property was established at $76,584.67 and the replacement value at $132,411.93. The latter amount was well in excess of the Winters' Coverage C limit of $106,500. As of November 29, Seneca had paid $83,625.21 under Coverage C, and made additional payments of $7,843.60 after it received the appraisal results on December 27, 2005. Thus, at the time of trial, Seneca had paid a total of $91,468.81 under Coverage C: the total actual cash value of

$76,584.67 and $14,884.14 in replacement value. This left a remaining replacement value holdback of $15,031.19.

¶7 The issues of breach and bad faith were tried separately to the court. The court first found that Seneca had breached the insurance agreement. The undisputed testimony at trial established that Seneca had not made any replacement payments for the Bassett furniture. The court concluded that the Winters' sales orders and cancelled checks totaling $37,267.02 constituted satisfactory proof of replacement. The court calculated the percentage of that amount attributable to replacement value holdback, and concluded that Seneca owed $15,726.68 in replacement value for the Bassett furniture. Because that amount exceeded the remaining replacement value holdback of $15,031.19, the court concluded Seneca was obligated to pay the Coverage C limit. In assessing Seneca's proffered justification for its refusal to pay, the court determined that Seneca "failed to appropriately match receipts to the property replaced."

¶8 The court then conducted a bad faith trial. The issue was limited by stipulation to whether Seneca acted in bad faith subsequent to the Winters' March 28, 2005 correspondence. The court took judicial notice of its findings at the breach trial and found, in addition, that Seneca relied on advice from both its appraiser and attorney, and Seneca and the Winters exchanged spread sheets, correspondence, inventory sheets, adding machine tapes, and receipts subsequent to the appraisal determination. Seneca's appraiser reported multiple concerns regarding the adjustment process, and informed Seneca that the inventory would require categorization. Despite concerns that the Winters were not following the appropriate replacement process, and advice from Seneca's attorney that fraud may have been committed, Seneca completed the categorization and sent additional payments between January 10 and June 30, 2006.

¶9 The court ultimately found Seneca had not acted in bad faith in failing to pay the additional $15,031.19. It determined that Seneca's demand for an appraisal was a contractual right and therefore not an act of bad faith. Citing the favored status of appraisals as an alternative forum for dispute resolution, the court concluded that Seneca had no obligation to investigate or make further payments until the panel had established values. The court found that following the appraisal, Seneca "did not sit idly by and ignore the appraisal or … the Winters." The court determined Seneca properly investigated the Winters' claim and reasonably evaluated and reviewed the results. The court further concluded:

> This was a difficult, complex and unique matter for the Winters and for Seneca. Seneca retained an attorney and an appraiser and considered their advice. Substantial disputes and suspicions arose throughout the adjusting and appraisal processes. Any reasonable insurer would have concluded that the balance of the personal property claims ($15,031.19) was debatable or questionable. … The Winters have not proven by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that Seneca acted in bad faith by failing to pay the remaining limits under Coverage C at any time after it received the March 28, 2005 letter from Dr. Winter.

DISCUSSION

¶10 The Winters raise three issues on appeal. First, they contend the circuit court, in finding a lack of bad faith, improperly relied on Seneca's consultations with its attorney and appraiser. Second, they assert that the circuit court's bad faith analysis was inadequate. Finally, they claim that they have established bad faith as a matter of law.

I. Third-party advice to an insurer as a component of a bad faith analysis

¶11 The Winters first argue that the circuit court relied on an improper factor when rejecting their bad faith claim. The circuit court determined the

Winters' claim presented a "difficult, complex and unique matter" for both parties, to the extent that Seneca "retained an attorney and an appraiser and considered their advice." The Winters maintain that an insurer's consideration of third-party advice in adjusting an insured's claim has no bearing on a bad faith claim.

¶12 An insurer must deal in good faith and cannot refuse, without proper cause, to compensate the insured for losses covered by the policy. ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 569, 547 N.W.2d 592 (1996). A bad faith claim requires proof that the insurer lacked a "reasonable basis for denying benefits of the policy and the [insurer's] knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). The first prong of the ***Anderson*** test is objective, while the second prong is subjective. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 377, 541 N.W.2d 753 (1995).

¶13 The ***Anderson*** court derived the objective prong, in part, from the supreme court's discussion of insurer bad faith in ***Hilker v. Western Automobile Insurance Co.***, 204 Wis. 1, 14, 231 N.W. 257 (1930), summarizing that discussion as follows:

> In addition, the Hilker court emphasized that it was the duty of an insurer to assess claims as a result of an appropriate and careful investigation and that its conclusions should be the result of the weighing of probabilities in a fair and honest way. The Hilker court emphasized that, for an insurance company's decision on a claim to be one made in good faith, it must be based upon a knowledge of the facts and circumstances upon which liability is predicated. The lack of reasonable diligence and the insurer's refusal to determine the nature and extent of the liability evidenced bad faith.

Anderson, 85 Wis. 2d at 688.

¶14 In adopting an objective bad-faith standard, the supreme court was careful to strike a balance between the interests of the insured and the insurer. *See* ***id.*** at 693. An insurer cannot be found liable for bad faith when it, in the exercise of ordinary care, "makes an investigation of the facts and law and concludes on a reasonable basis that the claim is at least debatable." ***Id.*** Accordingly, it is appropriate, in applying the ***Anderson*** bad faith standard, "to determine whether a claim was properly investigated and whether the results of the investigation were subjected to a reasonable evaluation and review." ***Id.*** at 692.

¶15 The ***Anderson*** standard therefore requires an analysis of the insurer's actions after a claim has been submitted. Did the insurer properly investigate and develop the facts necessary to evaluate the claim or were the facts "recklessly ignored and disregarded?" *See* ***id.*** at 691. The Winters overlook that the opinion of outside experts may be necessary for the insurer to conduct an adequate investigation and determine whether the insured's claim has a sufficient basis in law and fact. *Cf.* ***Benke v. Mukwonago-Vernon Mut. Ins. Co.***, 110 Wis. 2d 356, 366, 329 N.W.2d 243 (Ct. App. 1982) ("Insurers have the right to litigate a claim when they feel there is a question of law or fact which needs to be decided before they, in good faith, are required to pay."). To prohibit a court from considering third-party advice received by an insurer during the pendency of an

insured's claim would hamstring the insurer and upset the delicate balance crafted by our supreme court.[2]

¶16 Nothing in Wisconsin's bad faith case law suggests an insurer must go it alone; indeed, many authorities suggest otherwise. *See* ***DeChant***, 200 Wis. 2d at 579 (expert testimony not required to analyze the insurer's conduct, in part because the jury heard testimony from a disability claims consultant retained by the insurer); ***Weiss***, 197 Wis. 2d at 390-91 (fire chief's report constituted "credible evidence" from which the jury could conclude that the insurer had failed to properly investigate the insured's claim); ***Berk v. Milwaukee Auto. Ins. Co.***, 245 Wis. 597, 608-09, 15 N.W.2d 834 (1944) ("It was reasonable and natural that [the insurer] should rely … on the judgment and advice of its attorney.").

¶17 Perhaps the most compelling proof that an insurer may consider the advice of third-party experts was our decision in ***Benke***. There, the insureds filed a claim following the collapse of their arena. ***Benke***, 110 Wis. 2d at 358-59. The insurer immediately concluded the collapse was due to a noncovered event, excessive snow, and dismissed as speculative the opinion of an architect it hired that the collapse was caused by wind. ***Id.*** at 359, 363. In concluding that credible evidence supported the jury's bad faith award, we determined, without apparent difficulty, that the architect's opinion, and the sources from which it was derived, were admissible at trial. ***Id.*** at 359. But more than that, we encouraged the use of

[2] A rule barring consideration of third-party advice could work against an insured, too. For example, in ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 384, 541 N.W.2d 753 (1995), the insurer suspected that its insured had intentionally burned down his home, but ignored the conclusions of the Iron River fire chief that the fire was electrical and not caused by arson. As the supreme court recognized, the fire chief's report was "credible evidence that United Fire acted unreasonably in ignoring information that the fire might have been accidental in origin, that the fire might be electrical in origin, and that the fire was not caused by arson." ***Id.*** at 390-91.

multiple experts when the insurer "believes prior investigation has yielded a debatable issue and the expert may have rendered a report not in keeping with the facts." ***Id.*** at 364-65.

¶18 The Winters emphasize that an insurer's duty of good faith is generally nondelegable. *See* ***Majorowicz v. Allied Mut. Ins. Co.***, 212 Wis. 2d 513, 528, 569 N.W.2d 471 (Ct. App. 1997). In ***Majorowicz***, we concluded that, under the facts of that case, the insurer's duty to act in good faith could not be delegated to its attorney: "The ultimate responsibility to act in good faith remained with Allied, even when Allied relied on its attorney's litigation decisions." ***Id.*** at 528-29. ***Majorowicz*** does not help the Winters because this case does not present a delegation issue. Seneca has not argued that another individual bore its duty of good faith. Rather, Seneca contends that the opinions of third-party experts may permissibly influence an insurer's adjustment decisions. We agree.

¶19 Given the prior case law and our understanding of the delicate balance struck by ***Anderson***, we conclude that, in determining whether an insured has presented a "fairly debatable" claim, the insurer may be guided by third-party advice. While the opinions of third-party experts are not dispositive, *see* ***Benke***, 110 Wis. 2d at 364-65, they may be properly considered as one factor in determining whether an insurer possessed a reasonable basis for denying benefits.

II. Adequacy of the circuit court's bad faith analysis

¶20 The Winters next claim the circuit court's bad faith analysis was incomplete. They first argue that the trial court failed to analyze the facts giving rise to Seneca's breach of contract. In essence, the Winters contend that, because

the circuit court concluded Seneca breached by failing to pay the Winters' valid claim for Bassett furniture, Seneca was also guilty of bad faith.

¶21 The Winters' effort to bootstrap their bad faith claim to the favorable decision on their breach claim is a strategy unsupported by Wisconsin law. Breach of contract and bad faith are separate claims which require proof of different elements. As in this case, an insurer may be legally wrong to deny benefits without also being guilty of bad faith; in other words, an insurer might reasonably conclude that the insured's claim is fairly debatable even if the insurer is ultimately determined liable.

¶22 The Winters also argue the circuit court erred by failing to consider that Seneca never rejected, or even responded to, the Winters' claim for the Coverage C limit. This argument is meritless and contrary to the circuit court's findings of fact. Formal rejection of the Winters' claim was unnecessary because the adjustment process had not been completed by the time the Winters filed suit; the circuit court found that within approximately five weeks of the appraisal results, "activities to pursue the litigation were scheduled. … Clearly, by the end of March 2006, the adjustment process was being superseded by breach of contract and bad faith litigation." The contention that Seneca never responded to the Winters' demand for the Coverage C limit is belied by Seneca's multiple payments and the circuit court's finding that, following the appraisal, Seneca and the Winters "exchanged spread sheets, correspondence, inventory sheets, adding machine tapes, and receipts."

¶23 A judgment rendered following a trial to the court is reviewed using several standards. When the trial judge acts as fact-finder, it is the ultimate arbiter of the credibility of witnesses. ***State v. Bailey***, 2009 WI App 140, ¶15, 321

Wis. 2d 350, 773 N.W.2d 488. The trial court's factual findings are reviewed under a "clearly erroneous" standard. WIS. STAT. § 805.17(2).[3] Application of those facts to a particular legal standard, however, presents a question of law. ***Halverson v. River Falls Youth Hockey Ass'n***, 226 Wis. 2d 105, 115, 593 N.W.2d 895 (Ct. App. 1999).

¶24 The circuit court's fifteen-page written decision reflects a well-reasoned and thorough analysis of the bad faith issue. The court, citing ***Anderson***, ***DeChant***, and numerous other authorities, correctly identified the applicable legal standard and allocated the burden of proof. By agreement of the parties, the trial was limited to determining whether Seneca acted in bad faith subsequent to the Winters' March 28, 2005 letter.

¶25 Numerous adjustment events preceded Seneca's receipt of the March 28, 2005 letter. Seneca had made several payments to the Winters, both parties had hired attorneys, Seneca had invoked the appraisal process to resolve valuation issues, and the Winters had filed suit. The appraisal process was suspended during late 2004 and early 2005 because Seneca's appraiser was gone for the winter.

¶26 On April 14, 2005, Seneca renewed its request for an appraisal. As the circuit court correctly noted, the appraisal process was a contractual right that either the Winters or Seneca could exercise. Exercise of a contractual right is not an act of bad faith. Seneca believed the appraisal process would bring a fast resolution to the remaining claim issues. The circuit court correctly noted that the

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

appraisal process is a "fair and efficient tool for resolving disputes" and is favored as a means of alternative dispute resolution in Wisconsin. *See* ***Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.***, 2009 WI 73, ¶43, 319 Wis. 2d 52, 768 N.W.2d 596. The circuit court found that, contrary to Seneca's expectations, the appraisal process turned out to be extremely lengthy and complex.

¶27 A report sent by Seneca's appraiser on December 8, 2005 revealed, at least partially, the reasons for the lengthy delay. The appraiser stated his file was "the most heavily correspondence laden file he had handled in his 37 year career," and noted that the contents inventory was 135 pages long with approximately 2,500 entries. Seneca's appraiser found the Winters' inventory to be "notably inflated," and questioned the circumstances surrounding the replacement of furniture. The appraiser noted that verification of furniture replacement was met with "suspicious resistance at the furniture store."

¶28 Seneca received the results of the appraisal on December 27, 2005. The court determined that, once it received the appraisal, Seneca "did not sit idly by and ignore the appraisal or the Winters." Seneca prepared a spread sheet and issued a check for $3,744 within two weeks. After that, Seneca continued to communicate with its appraiser and the Winters. At some point, Seneca, concerned that the Winters were not properly following the replacement process, discussed the matter with its attorney. Seneca's attorney advised it of the possibility of fraud having been committed. The circuit court determined that by the end of March 2006, "the adjustment process was being superseded by breach of contract and bad faith litigation." Yet between April 4, 2006 and June 30, 2006, Seneca paid another $4,099.60 to the Winters.

¶29 The circuit court determined that, based on the facts before it, Seneca properly investigated the claim and reasonably evaluated the results. It determined Seneca did not act with deceit, trickery or deliberate deception, and found that the disputes and suspicions that arose during the adjustment process gave rise to a reasonable belief that the Winters' claim was fairly debatable. We agree with the circuit court's thorough analysis.

III. Bad faith as a matter of law

¶30 The Winters maintain they have proven bad faith as a matter of law by showing that Seneca's appraiser was not "independent." The policy's appraisal provision required that each party select "a competent independent appraiser." The Winters perceive a lacuna in Wisconsin law regarding the meaning of an "independent" appraiser, and urge us to fill the void. They assert that Seneca improperly used its appraiser as an "information gatherer, advisor and advocate …."

¶31 There are multiple problems with the Winters' argument. For one, it was not sufficiently presented to the circuit court; the Winters concede the issue "took a back burner at the bad faith trial." An appellant must raise an issue with "sufficient prominence to appraise the circuit court of it;" by failing to do so, the Winters have forfeited the issue. *See* ***Bilda v. Milwaukee Cnty.***, 2006 WI App 159, ¶46, 295 Wis. 2d 673, 722 N.W.2d 116. Second, as we have noted, breach of contract and bad faith are separate claims. Assuming for a moment that Seneca's appraiser was not "independent," it does not follow that Seneca is guilty of bad

faith. Finally, we have equitable reservations about the Winters' argument, as the circuit court found their appraiser was engaged in similar conduct.[4]

¶32 The Winters also renew a version of their earlier argument, this time asserting that it was bad faith as a matter of law for Seneca to fail to pay, or respond to, their March 28, 2005 claim. We rejected the earlier version of this argument as contrary to the circuit court's findings of fact. *See supra*, ¶22.

By the Court.—Judgment affirmed.

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

[4] The circuit court observed, "It appears to the Court that the appraisers may have done more than establish values, and to some degree became part of the adjustment process," later adding, "It is evident the appraisers, Mr. Olbrantz and Mr. Fox, continued their involvement after the appraisal award had been completed and tendered to Seneca, and continued their communications with Seneca and the Winters."