COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP352 **Cir. Ct. No. 2008CV54**

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

AUTO-OWNERS INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

ROBERT H. HOLMES, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Robert Holmes, pro se, appeals a summary judgment dismissing his bad faith claim against his homeowners insurer, Auto-Owners Insurance Company, and declaring that Auto-Owners did not have to provide coverage for losses stemming from a fire at Holmes' property. The circuit

court concluded Auto-Owners' policy was void because Holmes failed to comply with a policy provision requiring him to cooperate with Auto-Owners' investigation of the fire. On appeal, Holmes contends: (1) that he cooperated with Auto-Owners' investigation; and (2) that the policy provision requiring him to cooperate was ambiguous. We reject Holmes' arguments and affirm.

BACKGROUND

¶2 A residence Holmes owned in Mellen, Wisconsin, was damaged by a fire on April 18, 2007. The property was insured under a homeowners policy issued by Auto-Owners. Auto-Owners hired Gregory St. Onge to investigate the cause of the fire. St. Onge determined the fire originated in a basement bedroom. He found ignitable liquid in the bedroom and concluded, "No other cause was found that would have ignited a fire there other than an intentional ignition." St. Onge also noted that the doors to the home were locked, limiting access to the building, that there was "no history of vandalism," and that "Mr. Holmes was untruthful and evasive throughout the investigation." St. Onge concluded that Holmes had intentionally set the fire to destroy the Mellen property.

¶3 Holmes subsequently filed a proof of loss with Auto-Owners seeking $312,827 in damages. Auto-Owners denied Holmes' claim, alleging that Holmes had caused or arranged to set the fire and that he had committed fraud in connection with the claim. Auto-Owners also alleged Holmes had failed to cooperate with its investigation of the claim by refusing to comply with the following policy provisions:

> **WHAT TO DO IN CASE OF LOSS**
>
> **1. PROPERTY**
>
> If a covered loss occurs, the **insured** must:

> ….
>
> f. submit to statements and examinations under oath while not in the presence of any other **insured**, and sign the transcripts of the statements and examinations.
>
> g. provide **us** with records and documents **we** require and permit **us** to make copies.

¶4 Shortly after denying Holmes' claim, Auto-Owners sued Holmes, seeking a declaratory judgment that it had no duty to provide coverage. Holmes counterclaimed, alleging a bad faith denial of insurance coverage. The circuit court stayed litigation of the bad faith claim pending resolution of the coverage issue.

¶5 Auto-Owners then moved for summary judgment, arguing, among other things, that the policy was void because Holmes had failed to cooperate with Auto-Owners' investigation. Auto-Owners asserted that, in a letter dated August 23, 2007, it had asked Holmes to submit to an examination under oath on September 5, 2007. Auto-Owners also asked Holmes to bring certain documents to the examination, including: (1) copies of his state and federal tax returns for the past five years; (2) copies of his checking and savings account statements for the past three years; (3) copies of his credit card statements for the past three years; and (4) copies of corporate tax returns, W-2's, payroll tax returns, and profit and loss statements for Holmes' business, Holmes Manufacturing Corporation, for the past five years.[1]

[1] Information about an insured's financial situation is relevant to the insurer's claim investigation when the insurer suspects that the insured has committed arson in order to collect under the policy. *See* ***State Farm Fire & Cas. Ins. Co. v. Walker***, 157 Wis. 2d 459, 469, 459 N.W.2d 605 (Ct. App. 1990).

¶6 Holmes initially responded to Auto-Owners' request by refusing to be examined. He later changed his mind and agreed to submit to an examination under oath on October 11, 2007. However, at the October 11 examination, Holmes refused to produce the documents requested in Auto-Owners' August 23 letter, and refused to answer questions regarding his personal financial status. Holmes also refused to answer any questions about Holmes Manufacturing Corporation. Finally, after Holmes refused to answer questions about his alibi in the days leading up to the fire, he walked out of the examination.

¶7 Auto-Owners alleged that it gave Holmes a second opportunity to answer questions under oath on January 22, 2008, but he continued to refuse to provide the requested information. Specifically, Holmes refused to provide any financial information about Holmes Manufacturing and refused to provide his personal tax returns.

¶8 Auto-Owners conceded Holmes eventually agreed to sign an authorization for release of his personal checking, savings, and credit card account information. However, after submitting the authorizations to Holmes' financial institutions, Auto-Owners did not receive the requested statements. Some of these financial institutions reported to Auto-Owners that Holmes had contacted them and demanded they not release his financial information, despite the signed authorizations. On February 21, 2008, Auto-Owners' attorney sent Holmes another written request for documents, including his checking and savings account statements for the year preceding the fire. In response, Holmes produced checking account statements, but only those generated from June 2006 through April 2007. Auto-Owners alleged that Holmes did not provide his complete tax returns, checking account statements, or credit card statements at any point during Auto-Owners' investigation of the fire.

¶9 Auto-Owners supported the factual contentions in its motion for summary judgment with affidavits, examination transcripts, and other evidentiary materials. In response, Holmes filed a brief arguing that he had cooperated with Auto-Owners' investigation and that the policy provisions requiring him to submit to an examination and provide documents were ambiguous. However, Holmes did not file any affidavits or other evidentiary materials in support of his contention that he cooperated with Auto-Owners' investigation. Following a hearing, the circuit court granted summary judgment in favor of Auto-Owners and dismissed Holmes' counterclaim, concluding that Holmes had "breached the insurance contract … by failing to provide documentation required under the terms of the contract."

DISCUSSION

¶10 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2).[2]

¶11 Holmes first argues summary judgment was improper because there is a genuine dispute of material fact about whether he cooperated with Auto-Owners' investigation. We disagree. When we review a grant of summary judgment, we first determine whether the moving party made a prima facie case for summary judgment. ***Paul v. Skemp***, 2001 WI 42, ¶9, 242 Wis. 2d 507, 625

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

N.W.2d 860 (citing ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 550, 327 N.W.2d 55 (1982)).

> To make a prima facie case for summary judgment, a moving defendant must show a defense that would defeat the plaintiff. If the moving party has made a prima facie case for summary judgment, the court must examine the affidavits and other proof of the opposing party [to determine whether summary judgment is appropriate].

Tews v. NHI, LLC, 2010 WI 137, ¶41, 330 Wis. 2d 389, 793 N.W.2d 860 (quoting 3 GRENIG, WISCONSIN PRACTICE SERIES: CIVIL PROCEDURE § 208.3 at 336 (3d ed. 2003)).

¶12 Here, Auto-Owners made a prima facie case for summary judgment. Auto-Owners alleged that Holmes failed to cooperate with Auto-Owners' investigation, as required by the policy, by failing to answer questions during an examination under oath and failing to provide financial documents Auto-Owners requested. Auto-Owners supported these factual allegations with affidavits and other proof. If an insured fails to comply with policy provisions requiring cooperation with the insurer's investigation, the policy is void and the insurer no longer has an obligation to provide coverage for the insured's claim. *See* ***Kisting v. Westchester Fire Ins. Co.***, 290 F. Supp. 141, 147-49 (W.D. Wis. 1968), *aff'd*, 416 F.2d 967 (7th Cir. 1969); ***State Farm Fire & Cas. Ins. Co. v. Walker***, 157 Wis. 2d 459, 467-69, 459 N.W.2d 605 (Ct. App. 1990). Based on the factual allegations in Auto-Owners' motion for summary judgment, Holmes failed to cooperate with Auto-Owners' investigation. Thus, Auto-Owners stated a prima facie case for summary judgment on the coverage issue.

¶13 In response to Auto-Owners' motion, Holmes filed a brief in which he argued that he had cooperated with Auto-Owners' investigation. However, he

did not submit any affidavits or other evidentiary materials in support of his contention. To defeat a properly supported motion for summary judgment, "the opposing party [must] by affidavit or other proof … show facts which the court shall deem sufficient to entitle him to a trial." ***Leszczynski v. Surges***, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966). Because Holmes failed to submit any affidavits or other proof showing a genuine dispute of material fact about his cooperation with Auto-Owners' investigation, the circuit court properly granted summary judgment in favor of Auto-Owners.[3]

¶14 Holmes next contends that the policy provisions requiring an insured to submit to an examination and to provide Auto-Owners with records and documents are ambiguous because they do not state the time frame during which the insured must comply. "An ambiguity exists when the policy is reasonably susceptible of more than one construction from the viewpoint of a reasonable person of ordinary intelligence in the position of the insured." ***Walker***, 157 Wis. 2d at 470. A construction is not reasonable if it would lead to absurd results. ***Ennis v. Western Nat'l Mut. Ins. Co.***, 225 Wis. 2d 824, 834-35, 593 N.W.2d 890

[3] Our supreme court recently clarified that a party opposing summary judgment need not always file an affidavit in order to prevail. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶44, 330 Wis. 2d 389, 793 N.W.2d 860. In ***Tews***, the court concluded that "[i]n the rare case," affidavits are not necessary because "the pleadings will establish something beyond 'mere allegations'—the pleadings will establish the existence of undisputed facts that preclude entry of summary judgment." ***Id.***, ¶82. For instance, in ***Tews***, the pleadings established undisputed facts that raised competing inferences about whether the requirements of the relation-back statute had been satisfied. ***Id.***, ¶80.

Here, the pleadings do not establish undisputed facts giving rise to competing inferences that preclude summary judgment. Instead, they contain "mere allegations" about whether or not Holmes cooperated with Auto-Owners' investigation. In support of its summary judgment motion, Auto-Owners submitted affidavits and other proof showing that Holmes failed to cooperate. To rebut Auto-Owners' prima facie that Holmes failed to cooperate, Holmes needed to submit affidavits or other proof of his own, and he failed to do so.

(Ct. App. 1999). Furthermore, "[t]he language of a policy should not be made ambiguous by isolating a small part from the context of the whole." ***Folkman v. Quamme***, 2003 WI 116, ¶21, 264 Wis. 2d 617, 665 N.W.2d 857. Instead, to determine whether a policy provision is ambiguous we must read that provision in the context of the entire policy. *See* ***id.***

¶15 Applying these principles, we conclude the policy provisions requiring Holmes to submit to an examination and to provide Auto-Owners with documents are not ambiguous. Although the provisions do not expressly state dates by which the insured must comply, another provision in the policy put Holmes on notice that Auto-Owners was contractually required to pay Holmes' claim within sixty days after Holmes filed a proof of loss and the amount of the loss was determined. For Auto-Owners to complete its investigation so as to comply with the sixty-day time frame, Holmes obviously needed to cooperate promptly with Auto-Owners' requests for information. Accordingly, the only reasonable reading of the policy is that an insured must comply with Auto-Owners' requests to submit to an examination and produce documents promptly during the claim investigation—not at some unspecified point in the future after Auto-Owners has already denied the claim and suit has been commenced. Thus, even though the policy provisions do not specify time frames for compliance, a reasonable insured would not conclude that he or she could refuse to comply with Auto-Owners' requests for an indeterminate period of time without any adverse consequence. Such a conclusion would be absurd and would frustrate the very purpose of the insurer's claim investigation.

¶16 Moreover, after Auto-Owners initiated its investigation, it instructed Holmes in writing on multiple occasions what he needed to do to cooperate with the investigation and when he needed to do it. Auto-Owners sent Holmes a letter

on August 23, 2007 asking him to submit to an examination on September 5, 2007 and to produce certain documents at that time. After Holmes refused to appear at the September 5 examination, a second examination was scheduled for October 11. Holmes refused to provide the requested documents on October 11, even after Auto-Owners' counsel twice warned him that failure to do so would jeopardize his coverage. Holmes eventually walked out of the examination. Another examination was scheduled for January 22, 2008, but Holmes again refused to produce the requested documents on that date. Auto-Owners' counsel sent a follow-up letter to Holmes on February 21, 2008, setting forth another list of documents Auto-Owners required from Holmes. The February 21 letter specifically stated, "We would request you provide this documentation/information as soon as possible." Thus, it is disingenuous for Holmes to argue that he did not understand the time frame in which he was required to comply with Auto-Owners' requests for information.

By the Court.—Judgment affirmed.

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