

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 2014

Diane M. Fremgen
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. 2013AP272

Cir. Ct. No. 2010CV1435

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LAURANCE J. CHMIELEWSKI AND JESSICA M. CHMIELEWSKI,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

WELLS FARGO AND COMPANY,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Pro se appellants Laurance and Jessica Chmielewski suffered a house fire in 2009. The jury determined the actual cash value (ACV) of their damaged personal property to be \$148,000.00 and concluded that the \$142,486.72 in ACV payments American Family Mutual Insurance Company made did not breach the contract. American Family obtained a judgment for costs against the Chmielewskis because the approximately \$5500.00 difference between the two amounts was less favorable to the Chmielewskis than American Family's offer of settlement. *See* WIS. STAT. § 807.01(1) (2011-12).¹ The two judgments offset and American Family paid the Chmielewskis \$141.00 to satisfy the jury's verdict. The Chmielewskis appeal from the money judgment entered in their favor. We affirm.

¶2 Besides the payments for personal property damage, American Family also had paid \$124,793.42 for damage to the dwelling and a sum, not at issue here, for additional living expenses. After a few years of wrangling, the Chmielewskis filed suit, alleging that American Family breached the insurance contract by undervaluing the ACV or refusing to pay the replacement cost value (RCV) of the damages to the dwelling and personal property. An amended complaint alleged bad faith.

¶3 In a series of rulings, the trial court dismissed the Chmielewskis' claims for the RCV of the dwelling because they did not complete the repairs within a year as required by their policy; the ACV of the dwelling because the Chmielewskis supported the claim only with evidence of RCV damages; and the RCV of the personal property because the Chmielewskis did not oppose American

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

Family's motion in limine to preclude RCV evidence. The court bifurcated the remaining personal property ACV claim from the bad-faith claim.

¶4 Two weeks before trial, the Chmielewskis unsuccessfully moved to reconsider the ACV and RCV rulings. The matter proceeded to trial. As noted, the jury determined that the ACV of the Chmielewskis' fire-damaged personal property was \$148,000.00—\$5513.28 higher than what American Family paid them—and that American Family had not breached the contract. After post-trial set-offs, American Family was ordered to pay the Chmielewskis \$141.00 to satisfy the jury's verdict. The bad-faith claim was dismissed. The Chmielewskis appeal.

¶5 The Chmielewskis once again seem to want to revisit most of the trial court's rulings. They also challenge the jury's valuation of the ACV of their personal property and contend the bad-faith claim should remain viable. Their arguments are unpersuasive.

¶6 We deal only briefly with the pretrial rulings. The insurance contract language required that an insured could make an RCV claim "provided repairs to the damaged portion of the building are completed within one year of the date of loss." When an insurance contract contains unambiguous terms, we give them the meaning they would have in the mind of a reasonable insured lay person and simply apply them to the facts. *Grotelueschen v. American Family Mut. Ins. Co.*, 171 Wis. 2d 437, 447, 492 N.W.2d 131 (1992). Laurance confirmed at deposition that the Chmielewskis did not do so. RCV coverage for the dwelling was properly barred.

¶7 As to their ACV claim for damages to the dwelling, the Chmielewskis opposed American Family's partial summary judgment motion with evidence only of the dwelling's RCV—a claim already dismissed. Beyond that,

the trial court was persuaded, as are we, that a claim for ACV cannot be supported by evidence of RCV alone. *See American Family Mut. Ins. Co. v. Matusiak*, 878 N.E.2d 529, 532 n.4 (Ind. Ct. App. 2007) (rejecting using RCV without deduction for depreciation as appropriate measure of “cash value loss,” or would make latter term a nullity). Without proof of ACV damages, the Chmielewskis raised no genuine issue of material fact, entitling American Family to judgment as matter of law. *See* WIS. STAT. § 802.08(2).

¶8 The Chmielewskis’ claim for the RCV of their personal property also was properly kept from the jury. Pursuant to an order requiring them to supplement their discovery responses and provide any evidence supporting unpaid RCV claims for their personal property, the Chmielewskis submitted receipts to American Family. American Family issued an additional check, and invited the Chmielewskis to review the spreadsheet it prepared and identify any disputed entries or amounts. The Chmielewskis did not challenge the calculations or oppose the American Family’s motion in limine. With this RCV claim no longer in contention, the trial court granted American Family’s motion in limine to preclude evidence regarding it. Questions regarding the admissibility of evidence are within the trial court’s discretion. *Grube v. Daun*, 213 Wis. 2d 533, 541-42, 570 N.W.2d 851 (1997). The ruling reflects a proper exercise of discretion.

¶9 Having found no error in the court’s rulings, we also conclude it did not err in denying the Chmielewskis’ motion to reconsider them, as they did not present either newly discovered evidence or establish a manifest error of law or fact. *See Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853.

¶10 This left the jury with two tasks. The first was to determine the ACV of the Chmielewskis’ personal property. ACV is difficult to ascertain with mathematical precision. *See Doelger & Kirsten, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 42 Wis. 2d 518, 522-23, 167 N.W.2d 198 (1969). The trier of fact therefore must set the damages at a reasonable amount using an acceptable measuring stick. *Id.* at 523. Here, the jury was instructed to use the “Broad Evidence Rule.”² That rule permits consideration of anything that logically and reasonably would “tend to the formation of a correct estimate of the loss.” *Id.* (citation omitted).

¶11 The jury heard the testimonies of American Family’s witnesses: the national service manager of a company that specializes in determining the value of personal property, the property claims adjuster who adjusted the Chmielewskis’ loss, and its expert, an independent insurance adjuster. They testified about the methods employed to determine the ACV of the personal property, to adjust their loss, and to evaluate the reasonableness of the amount American Family paid. The expert concluded that a reasonable ACV for the personal property damage was

² The jury was instructed:

The Broad Evidence Rule allows you to consider any and all facts that reasonably bear upon the value of [the] property at the time of the loss. The factors you may consider include, but are not limited to, the cost of restoration or replacement less depreciation, the age of the property, the condition of the property, the degree of obsolescence, and the material of which the property is composed.

The Chmielewskis argue that the Broad Evidence Rule required the court to allow in “all external evidence” regarding their property, including, judging by their brief, many facts not germane to the issues before the jury. The Broad Evidence Rule does not override the rule that evidence that is not relevant is not admissible. *See* WIS. STAT. § 904.02.

between \$130,000.00 and \$150,000.00. The jury also heard the Chmielewskis' expert testify that he did not personally view, or see photos of or receipts for any of the property items the Chmielewskis asked him to value but went only by what the Chmielewskis told him or information they downloaded from the internet. He also agreed that American Family acted fairly and reasonably in trying to resolve the claim. The jury put the ACV at \$148,000.00.

¶12 Next the jury had to determine whether American Family breached the contract, which is a question of fact. *See Koenings v. Joseph Schlitz Brewing Co.*, 126 Wis. 2d 349, 358, 377 N.W.2d 593 (1985). The jury reasonably could conclude that American Family's \$5513.28 underpayment approximated its \$148,000.00 figure, such that the less-than-four-percent difference did not amount to a breach of contract. As the jury verdict is supported by credible evidence, and given our narrow review of it, we must sustain it. *Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659.

¶13 Accordingly, the trial court properly dismissed the bad-faith claim. “[S]ome breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured.” *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, ¶65, 334 Wis. 2d 23, 798 N.W.2d 467.

By the Court.—Judgment affirmed.

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

