

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2834

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JENNIE K. VASEN,

PLAINTIFF-APPELLANT,

V.

**PROGRESSIVE INSURANCE COMPANIES, AND
JEFFREY BUCHANAN,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT R. PEKOWSKY, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Jennie K. Vasen, pro se, appeals a judgment dismissing her negligence, bad faith and gender discrimination claims against Jeffrey Buchanan and his liability insurer, Progressive Insurance Company. On

cross-motions for summary judgment, the trial court denied Vasen's motion and granted Progressive's. Vasen contends the trial court erred by concluding there were no disputed issues of material fact that certain damages to Vasen's car were not caused by the accident, that Vasen lacked standing to assert a bad-faith claim against Progressive, and that she had failed to establish a prima facie claim of gender discrimination. We conclude that the trial court properly dismissed Vasen's claims and, therefore, affirm.

¶2 Vasen and Buchanan were involved in a motor vehicle accident when Buchanan rear-ended Vasen's vehicle causing damage to Vasen's bumper and injuring a passenger in Vasen's car. Vasen pulled the car over to another street, as instructed by police, parked, and exited the vehicle. The car, however, began to roll backwards. An unidentified individual jumped into the car and tried to stop the car from rolling backwards by putting the car back into park. Vasen maintains that the next day when she tried to put the car in reverse, the gear shifting mechanism would not engage. She attributes the faulty gear mechanism to the rear-end collision.

¶3 Buchanan's car was insured by Progressive. A Progressive claims representative examined the vehicle and observed that the car had sustained damage to the rear bumper. He appraised the damage associated with the accident at \$161.26, which included one day of car rental.¹ Vasen accepted and subsequently cashed Progressive's check for that amount.

¹ According to the claims representative's affidavit, the car exhibited additional damages that Vasen advised were unrelated to this accident, including evidence of a side impact to the rear door and damage to the left fender and front bumper.

¶4 Vasen indicated to the representative that the gear-shifting mechanism was not working. Vasen alleged in her complaint that she subsequently had the vehicle examined by a mechanic who informed her that a grommet, which enabled the shifter to engage the gears, was missing and that the lock to the shifter, which prevents the car from moving out of gear, was broken. Vasen also alleged that the mechanic concluded that the missing grommet was caused by the collision.

¶5 The claims representative conducted a further investigation into the accident and consulted with Progressive's property damage specialists. As a result of the investigation, he concluded that the missing grommet and shift linkage problems could not have been caused by the accident. Vasen disagreed with this conclusion. Although the parties engaged in subsequent negotiations to settle this matter, no agreement was reached and Vasen filed suit.

¶6 We review a summary judgment order de novo, applying the same methodology as the trial court. *See Smith v. Katz*, 226 Wis.2d 798, 805, 595 N.W.2d 345 (1999). If a genuine dispute of material fact exists or if the evidence presented is subject to conflicting inferences of factual interpretations, summary judgment must be denied. *See State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986). Questions of law are appropriate for summary judgment, however. *See Jones v. Sears Roebuck & Co.*, 80 Wis. 2d 321, 327, 259 N.W.2d 70 (1977).

¶7 We first consider Vasen's summary judgment motion. Vasen, as moving plaintiff, must show a prima facie case for recovery against Buchanan and Progressive. *See Jones*, 80 Wis. 2d at 327. Vasen's summary judgment motion

cannot be granted if she fails to establish all elements of her claims or if competing inferences flow from her evidentiary submissions. *See id.*

¶8 Vasen first appears to contend that she is entitled to summary judgment because Progressive made a settlement offer pursuant to WIS. STAT. § 807.01 (1997-98),² and she counter-offered. She cites *Anderson v. Onsager*, 155 Wis. 2d 504, 512-13, 455 N.W.2d 885 (1990) for the proposition that, “when a party seeks equitable and compensatory damages the court is required to give such order as a matter of course unless factual or legal considerations are revealed that make such order unreasonable, unfair or impossible.” Vasen misstates the court’s holding in *Anderson* and her reliance on this case is misplaced. *Anderson* held that specific performance of a contract for the sale of land should be ordered as a matter of course unless factual or legal considerations make specific performance of the contract unfair. *See id.* *Anderson*’s holding has no application to the matter before this court.

¶9 Next, Vasen contends that Progressive acted in bad faith by breaching its contract with Buchanan by failing to pay Buchanan’s insurance benefits. Because Vasen is not Progressive’s insured, she is a third party asserting a claim against Progressive’s insured, Buchanan. Under Wisconsin law, a third-party claimant does not have standing to bring a bad-faith claim against an insurer. *See Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 73-74, 307 N.W.2d 256 (1981). Because Vasen lacks standing to assert a bad-faith claim, she is not entitled to punitive damages. Furthermore, Vasen has no basis for maintaining a

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

punitive damages claim in the absence of an award of actual damages. See *Tucker v. Marcus*, 142 Wis. 2d 425, 438-39, 418 N.W.2d 818 (1988).

¶10 Finally, Vasen contends that Progressive's conduct was motivated by gender discrimination. She claims that Progressive refused to pay her for damage to the shifting mechanism in her car because she is a woman. Vasen supports this claim by asserting that the adjuster, upon seeing her, obviously identified her as being a female. Vasen reasons that Progressive's subsequent denial of her claim must have been gender motivated. However, the mere fact that the adjuster observed that Vasen was a female does not permit a reasonable inference that Progressive's subsequent denial of her claim was gender motivated. Vasen offers no evidentiary facts to connect her gender with the denial of her damage claim. Factual issues in summary judgment proceedings must be established by affidavit or other evidentiary proof. See *Southern Wisconsin Cattle Credit Co. v. Lemkau*, 140 Wis. 2d 830, 839, 412 N.W.2d 159 (Ct. App. 1987). Consequently, Vasen has not carried her burden of establishing a prima facie case of gender discrimination.

¶11 In sum, Vasen's summary judgment motion fails because she failed to establish a prima facie case for her negligence, bad-faith and gender discrimination claims.

¶12 We next turn to Progressive's motion for summary judgment. To prevail on summary judgment, a moving defendant must prove facts which establish a defense that would defeat plaintiff's claims as a matter of law. See *Krezinski v. Hay*, 77 Wis. 2d 569, 572-73, 253 N.W.2d 522 (1977). Progressive claims as a defense that because there is no evidence of causation, Vasen failed to

establish a prima facie case of negligence and, therefore, a summary judgment of dismissal was required as a matter of law.

¶13 In support of its summary judgment motion, Progressive relies on the affidavits of its claims representative, and another Progressive damage appraiser and trainer. The latter averred that the accident did not cause damage to the shift linkage in Vasen's car. He based his conclusion on the age and mileage of the vehicle, the additional damage to the vehicle unrelated to the accident, and his discussion with Vasen's auto mechanic. He further stated that Vasen's mechanic, who inspected the car after the accident, informed him that he could not say whether the shift linkage damage had been caused by the accident and that the damage could have been the result of overall wear and tear. The claims representative also averred that the accident did not cause damage to the grommet or shift linkage. He based his conclusion upon the car's age, mileage, the evidence of unrelated damage and his knowledge that these parts degrade with age.

¶14 By contrast, Vasen relies solely on Progressive's response to a request to admit that the claims representative told Vasen that he had a hard time believing, even after talking with the mechanic, that the damage referenced in the complaint was caused by the collision. Vasen contends that this statement proves that the damage to the shifting mechanism was caused by the collision. Contrary to Vasen's assertion, this statement is not direct evidence establishing that the grommet and shift linkage were damaged by the accident. Rather, the statement is only an admission of what the representative told Vasen. It is not evidence of the truth of what the mechanic told the representative or told Vasen. Vasen did not submit an affidavit or statement from the mechanic supporting her contention that the mechanic believed the accident caused the damages at issue. Consequently,

Vasen has not offered admissible evidence to raise a disputed issue of material fact on an essential element of her negligence claim: the causal connection between the collision and the damage to her car's gear shifting mechanism.³

¶15 We recognize that causation is generally a question of fact and that summary judgment is inappropriate in the vast majority of cases where causation is an issue. *See Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 82, 211 N.W.2d 810 (1973). Nevertheless, because Vasen did not make a sufficient evidentiary showing creating a disputed issue of fact in response to Progressive's evidentiary submissions on the question of causation, Progressive has succeeded in establishing a defense that defeats Vasen's negligence claim. *See Transportation Ins. Co., Inc. v. Hunzinger Const. Co.*, 179 Wis. 2d 281, 290-91, 507 N.W.2d 136 (Ct. App. 1993). Accordingly, we conclude that summary judgment dismissing Vasen's claims is proper and we affirm.

By the Court.—Judgment affirmed.

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

³ Four elements must be present to sustain a cause of action for negligence: (1) a duty of care; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result. *See Nieuwendorp v. American Family Ins. Co.*, 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995).

