COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
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. 2004AP3058

Cir. Ct. Nos. 2002CV3770
2003CV0306

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

EDLEY H. STEWART AND LURLINE E. STEWART,

PLAINTIFFS-APPELLANTS,

V.

FARMERS INSURANCE GROUP D/B/A
FIRE INSURANCE EXCHANGE, D/B/A
FARMERS INSURANCE EXCHANGE,

DEFENDANT-RESPONDENT.

EDLEY STEWART AND LURLINE STEWART,

PLAINTIFFS,

V.

MENARDS, INC. AND DONALD F. MUSIAL,

DEFENDANTS,

BLUE CROSS BLUE SHIELD AND MEDICARE,

SUBROGATED DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Reversed and cause remanded with directions*.

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

¶1 WEDEMEYER, P.J. Edley H. and Lurline E. Stewart appeal from a judgment dismissing their complaint against Farmers Insurance Group, *et. al*. The Stewarts contend that the trial court erred in granting summary judgment because genuine issues of material fact exist. Because we agree that this case presents disputed issues of material fact, we reverse the judgment and remand with directions.

BACKGROUND

¶2 On January 10, 2000, the Stewarts were in the living room of their home when a Menards' truck, driven by an employee, Donald Musial, crashed through their living room wall. Lurline Stewart jumped to move out of the way and injured her back and shoulder. Edley was not physically struck upon immediate impact, but subsequently ended up hospitalized due to the cold exposure from the damages to the home.

¶3 At the time of the accident, Musial had no personal automobile insurance, as he did not have a valid driver's license. Menards was insured by Reliance Insurance Company. The Stewarts carried both automobile and

homeowner's insurance policies with Farmers. The Stewarts sought recovery from Farmers for the structural damage to their home and the personal property damage. Farmers paid the Stewarts $17,804.38 for the structural repair of the home, which was completed in late April 2000. Farmers reached an agreement for reimbursement from Reliance. The Stewarts and Farmers were not able to reach an agreement as to the cost of the personal property claim. Farmers sent the Stewarts a check for $805.97, which the Stewarts returned via their attorney, advising Farmers that the personal property claim greatly exceeded that amount. Farmers denied the claim. Sometime after Reliance paid Farmers on the property damage claim, Reliance became insolvent.

¶4 On April 15, 2002, the Stewarts commenced a lawsuit against Farmers for breach of contract, bad faith, and tortious interference.[1] The case was set for trial on January 12, 2004. On January 9, 2003, the Stewarts filed a separate action against Menards and its employee, the driver of the truck, Musial. Menards appeared and answered on behalf of Menards and Musial. Musial sent a handwritten letter to the court on February 15, 2003, advising that the accident occurred because he had a seizure while driving. He also indicated that he had no insurance and no assets. Blue Cross/Blue Shield and Medicare were included as subrogated parties in this lawsuit based on the medical expenses each had paid on behalf of the Stewarts for treatment related to the accident. Blue Cross asserted a claim in the amount of $2217 and Medicare asserted that it had a lien in the

[1] Farmers filed a motion for summary judgment, which was denied. The trial court did, however, dismiss the three individual defendants, who were Farmers' employees, on the tortious interference claim.

amount of $7874. The Stewarts asserted that the damages they suffered as a result of their personal injury claim were approximately $47,575.32.

¶5 In late 2003, Farmers moved to adjourn the January 2004 trial date and to consolidate the Farmers and Menards lawsuits. The trial court granted the motions on November 10, 2003. Attempts at conducting mediation failed. On May 24, 2004, the Stewarts reached an agreement with Menards, which agreed to pay $57,000 to the Stewarts from its corporate funds in exchange for release and indemnification of Menards and its former employee, Musial. The release expressly provided that the Stewarts were not relinquishing their right to pursue further damages in excess of the $57,000 on their claim against Farmers. Farmers did not object to the settlement.

¶6 The trial court held a pretrial conference on May 25, 2004. Farmers argued that the release, by virtue of the indemnification clause, eliminated any subrogation rights Farmers would have, and therefore should prohibit any additional claims the Stewarts continued to assert against Farmers. The trial court determined that this argument presented new issues and would need to be pursued via a summary judgment motion. Farmers filed a summary judgment motion, which was heard on September 27, 2004. The trial court granted the motion, stating:

> In essence, what this case boils down to is it's a bar to the rights of Farmers to subrogate by entering into the release and the nature of the release which plaintiff signed with Menards. The purpose of subrogation, again, is to place the loss on the wrongdoer or, in essence, the tortfeasor, and also to avoid a potential windfall to the plaintiff or injured party to receive a double recovery. That is, in essence, what is occurring here if I allow the plaintiffs' claim to proceed any further.

¶7 The trial court granted the motion and dismissed all of the Stewarts' claims against Farmers, including the claim asserting bad faith. Judgment was entered. The Stewarts now appeal.

DISCUSSION

¶8 This case arose from the grant of summary judgment. Our standard of review in these cases is well known. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Our review is *de novo*. ***Id.*** at 315-17. Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits … 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." WIS. STAT. § 802.08(2). Because our review demonstrates that there are material issues of disputed fact which need to be resolved by a fact-finder, we reverse and remand for further proceedings.

¶9 This case can be broken down into two distinct issues: (1) whether the release bars the Stewarts from pursuing their breach of contract claim against Farmers; and (2) whether there are any disputed issues of fact on the bad faith claim, necessitating a trial. We address each in turn.

¶10 In reviewing motions for summary judgment, we look at all the pleadings on file and submissions. Courts examine summary judgment motions in a three-step process. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶11 First, it must be determined that the pleadings set forth a claim for relief as well as a material issue of fact. ***Id.*** The second step in the process requires the court to determine whether the moving party's affidavits and other

proofs present a *prima facie* case for summary judgment. ***Id.*** In the third step of the summary judgment process, the court examines the affidavits and proofs of the opposing party to determine whether any disputed material facts exist, or whether any undisputed material facts are sufficient to allow for reasonable alternative inferences. ***Id.***

A. Breach of Contract.

¶12 Despite the trial court's attempt to resolve the entire case based solely on the language of the release, it is not that simple. It is undisputed that the release contains contradictory provisions. The language of the release expressly asserts that the Stewarts "will indemnify and hold harmless MENARD, INC., and DONALD MUSIAL from and against any and all liabilities, claims, demands and expenses arising out of or in connection with the aforementioned January 10, 2000 occurrence" and "from any and all claims, demands, and judgments made by or on behalf of the other parties in the lawsuit" and "against any claims which Farmers may hereafter assert arising out of the January 10, 2000 accident." At the same time, the Stewarts included language in the release expressly "reserv[ing] their right to proceed against any others who may be liable to them for injuries, losses and damages, including but not limited to Farmers Insurance Group, Fire Insurance Exchange and Farmers Insurance Exchange, in excess of the $57,000 paid herein."

¶13 Based on the former language, Farmers asserts that the release effectively ends all litigation against it because by entering into this settlement agreement, the Stewarts have breached the insurance contract with Farmers by eliminating its potential subrogation rights. The Stewarts respond that their settlement with Menards should not constitute a breach of their duties under the

contract. In support of this contention, they point out that Farmers denied that there was coverage under the insurance policy, failed to fairly assess its personal property damage claim or attempt to adjust the outstanding losses, "pushed" them to settle with Menards, and failed to object to the settlement based on loss of its subrogation rights. The Stewarts contend, therefore, that Farmers' conduct indicated to them that they should settle with Menards. The Stewarts argue that, based on this conduct, Farmers should be estopped from claiming now that the Stewarts breached the policy's subrogation provision and that Farmers should not be allowed to claim that it is released as a result of the Stewarts' settlement with Menards. *See* ***Liner v. Mittelstadt***, 257 Wis. 70, 80, 42 N.W.2d 504 (1950) ("[T]he Insurance Company denied all liability under the policy and we agree with the trial court that the assured was excused from compliance with the contract which the insurer repudiated."); *see also* 16 LEE R. RUSS, COUCH ON INSURANCE, §§ 224:148, 224:152 (3d ed. 2000).

¶14 This case contains factual disputes that need to be sorted out by a fact-finder. Farmers claims it acted one way and the Stewarts claim it acted another way. Farmers asserts that it complied with its duties under the insurance contract and that the Stewarts breached the contract. The Stewarts claim that Farmers' conduct breached the insurance contract, while they made every attempt to satisfy their duties under the contract. The Stewarts assert that Farmers failed to keep them advised of the status of their claim or respond to letters making a claim. They suggest that Farmers simply sat on the claim and/or closed the file without any communication to them. This case, therefore, cannot and should not be resolved in a motion for summary judgment. A fact-finder needs to sort through all the allegations and evidence to determine what happened and who did what.

Until that happens, the impact of the contradicting language of the release cannot be determined.[2]

¶15 In addition to asserting that the release itself resolved this entire matter, Farmers also argued that the Stewarts' claim that Farmers breached the contract could not be sustained because the uninsured motorist provision of its policy was never triggered. It based this assertion on its belief that Menards was self-insured.

¶16 It is undisputed that at the time the accident occurred, the Menards' truck was insured by Reliance. However, it is also undisputed that sometime after payment on the structural property damages claim, but before the personal injury claims were resolved, Reliance became insolvent. Farmers' policy contained a provision defining an uninsured motor vehicle as "a motor vehicle which is: … d. Insured by a bodily injury liability bond or policy at the time of the accident but the Company denies coverage or is or becomes insolvent."

¶17 Farmers claims that this provision was not triggered because Menards agreed to become, in essence, a "self-insured" entity after Reliance became insolvent. In support of this argument, it directs us to a letter from Menards' attorney explaining that the Wisconsin Insurance Security Fund would not provide Menards with coverage for claims made against Reliance. The attorney then stated that, as a result, Menards became self-insured as of the Reliance liquidation date. Relying on this statement, Farmers asserts that the

[2] Based on our disposition, we need not specifically address the impact of ***Vogt v. Schroeder***, 129 Wis. 2d 3, 11, 383 N.W.2d 876 (1986). We do conclude from our review, however, that this issue was raised by the Stewarts in the trial court and therefore was not waived.

vehicle was not an uninsured motor vehicle, but rather was *self-insured* by Menards itself.

¶18 The Stewarts respond that one does not simply become self-insured because one is willing to pay, out of one's own pocket, claims made against one. Rather, the Stewarts assert that self-insured status must be that "contemplated by any financial responsibility law, motor carrier law, or similar law." The Stewarts point to the policy language stating that an uninsured motor vehicle "does not mean a vehicle: … b. Owned or operated by a self-insured as contemplated by any financial responsibility law, motor carrier law, or similar law."

¶19 Our resolution of this issue is guided by a similar case, ***Fritsche v. Ford Motor Credit Co.***, 171 Wis. 2d 280, 491 N.W.2d 119 (Ct. App. 1992). In that case, the court found that a corporation cannot simply become self-insured, as that term is used in the language of the policy, without evidence that the corporation had obtained a certificate of self-insurance in Wisconsin. ***Id.*** at 291-92. In the instant case, there is no evidence that Menards obtained a certificate of self-insurance in Wisconsin.

¶20 Farmers attempts to distinguish this case on the basis of differences in attitudes of the corporations with respect to payment. In ***Fritsche***, Ford was attempting to avoid payment and disavow self-insured status, whereas in the instant case, Menards was agreeing to make payment and asserting self-insured status. We are not persuaded that the difference in intentions alters the trial court's conclusion and the pertinent law. It would be unwise for this court to conclude that a corporation could become self-insured merely by declaring to a single party in a particular action that it is so. Based on the foregoing, we are not persuaded that Menards was "self-insured as contemplated by any financial

responsibility law, motor carrier law, or similar law" as that phrase is used in the uninsured motor vehicle definition of Farmers' insurance policy with the Stewarts.

¶21 As a result, there can be only one conclusion and that is, that the Menards' truck, for the purposes of the Farmers' insurance policy, constitutes an uninsured motor vehicle. Accordingly, Farmers' claim that its policy does not provide coverage because the vehicle was not an uninsured motor vehicle was incorrect.

B. Bad Faith.

¶22 The second claim is that Farmers breached the contract by acting in bad faith. Clearly, the trial court found that the pleadings set forth a claim for relief as well as a material issue of fact on the bad faith claim. An earlier motion for summary judgment filed by Farmers was denied. Here, the moving party was Farmers, who filed a second summary judgment motion, primarily focusing on the breach of contract claim. Its submissions alleged that its policies did not provide coverage for the Stewarts' claim and, therefore, there could be no breach of contract claim. Farmers also asserted that there was no bad faith because it had an objectively reasonable basis for its actions.

¶23 During the summary judgment hearing, the trial court's entire analysis on the bad faith claim was: "There's nonsufficient counteraffidavits to support those claims, so summary judgment is granted with regard to those as well." We conclude that the trial court erred in reaching this summary conclusion. Assuming, without deciding, that the first two steps of the summary judgment procedure were satisfied, we hold that there was sufficient evidence presented by the Stewarts to defeat Farmers' summary judgment on the bad faith claim.

¶24 Farmers' bad faith defense was that it presented an objectively reasonable basis for denying the personal injury claim and for limiting the personal property damage claim to the $805.97 check, which the Stewarts rejected and returned. Farmers also argues that the Stewarts failed to demonstrate any facts to defeat its assertion. We disagree.

¶25 "To establish a claim for bad faith, the insured 'must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'" *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 377, 541 N.W.2d 753 (1995) (citation omitted). The first part of the test is objective and the second is subjective. ***Id.*** Farmers contends that the Stewarts cannot satisfy the objective prong because it had a reasonable basis to deny the claim. It asserts that its reasonable basis was the existence of other insurance, *i.e.*, either Reliance, or Menards as a self-insurer.

¶26 Because there are disputed issues under the facts and circumstances of this case, we cannot conclude as a matter of law that Farmers had a reasonable basis to deny the Stewarts' claims. First, as discussed above, Menards' assertion as to its self-insured status is insufficient to make it so. Thus, under the terms of the policy, the truck was an uninsured motor vehicle, which triggers Farmers' duty to investigate and assess the Stewarts' claims. The Stewarts allege that Farmers did nothing to investigate—instead "pushing" them to Menards for recovery.

¶27 Second, Farmers contends that there was no coverage under the medical payments provision of the automobile policy because the Stewarts were neither occupying a motor vehicle nor directly struck by the uninsured motor vehicle. Therefore, Farmers argues that they cannot recover for any medical

payments claimed for injuries caused as a result of the accident. We are not persuaded by Farmers' contentions.

¶28 Uninsured motorist coverage is person oriented—not vehicle oriented. ***St. Paul Mercury Ins. Co. v. Zastrow***, 166 Wis. 2d 423, 433, 480 N.W.2d 8 (1992). It is "'personal and portable.'" ***Id.*** at 432 (citation omitted). It protects an insured person no matter where that person is, *see* ***id.***, including sitting on his or her living room couch. Moreover, an uninsured motorist policy must include medical payments coverage pursuant to WIS. STAT. § 632.32(4). Thus, if the Stewarts can demonstrate that the uninsured motor vehicle was a substantial factor in causing the injuries, for which medical payments were incurred, then the fact that the vehicle itself did not physically strike them cannot operate to preclude this claim. These are factual disputes that should be resolved by a fact-finder.

¶29 Third, Farmers contends that it investigated the personal property loss under the homeowners policy and assessed damages to be $805.97. They then sent a check in that amount, which the Stewarts returned to Farmers as an unfair assessment of the loss. Farmers' adjustor asserted that after receiving the returned check, he advised the Stewarts to obtain their own appraisals for his review. He claimed that he never heard back from them and that he advised them on February 26, 2000, that he completed the processing of their claim.

¶30 The Stewarts dispute this. Lurline Stewart submitted an affidavit stating that the adjustor never advised her to obtain estimates or appraisals. The record contains a letter from the Stewarts' attorney to the adjustor, dated April 5, 2000, advising that the $805.97 was not a fair settlement and that the adjustor should contact her to resolve the matter. Then, in October 2001, another letter was sent to the adjustor listing damaged personal property items, including an invoice

for the repair of drapes in the amount of $1624.25, and an estimate of $785 for the repair of windows. When questioned why he did not respond to the letters, the adjustor stated that the correspondent did not request a reply.

¶31 Clearly, the record presented issues of material fact as to whether Farmers had a reasonable basis to deny the claim. Accordingly, the trial court's grant of summary judgment was improvident and must be reversed for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶32 FINE, J. (*concurring/dissenting*). In my view, the Stewarts' right to recover from Farmers Insurance Group is partially governed by the release they gave to Menards, Inc. Accordingly, I respectfully dissent from part of the Majority opinion.

¶33 In return for payment by Menards to them, the Stewarts promised to "indemnify and hold harmless" both Menards and Menards's driver, Donald F. Musial, "from any and all claims, demands, and judgments made by or on behalf of the other parties in the lawsuit" and "against any claims which Farmers may hereafter assert arising out of the January 10, 2000 accident." Thus, if Farmers were to seek money from either Menards or Musial based on Musial's causal negligence (and Menards's responsibility for what Musial did), then the Stewarts undertook to reimburse Menards and Musial for whatever Farmers might recover from Menards and Musial as a result of the accident. Accordingly, insofar as part of the Stewarts purported "reservation of rights" against Farmers is concerned, that reservation of rights is illusory to the Stewarts for any money that Farmers might owe them because of Musial's alleged negligence—Farmers would have a right of subrogation-recovery from the tortfeasor, Menards, and Menards has the right to be indemnified by the Stewarts; the money would make a full-circle trip.

¶34 The Stewarts' reservation of rights is not wholly illusory, however. As the Majority points out, there are fact issues to be determined in connection with the Stewarts' bad-faith claim against Farmers. Certainly, the Stewarts' promise to indemnify Menards "against any claims which Farmers may hereafter assert arising out of the January 10, 2000 accident" would not encompass any bad-

faith liability of Farmers to the Stewarts. With that, to borrow from the colloquy between Richard, then Duke of Gloucester, with Sir Robert Brackenbury, the Tower of London's jailer, Menards and Musial "have nought to do to." WILLIAM SHAKESPEARE, RICHARD III act 1, sc. 1.

¶35 Although I agree with the Majority that a remand is necessary to flesh out the bad-faith issues, I respectfully dissent from the Majority's decision to not give effect to the Stewarts' indemnification agreement with Menards.