COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP832 **Cir. Ct. No. 2006CV3411**

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

GENERAL CASUALTY COMPANY OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE CHOLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Reversed and cause remanded for further proceedings*.

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. George Choles was injured when he was struck by a car as he walked across a street. Choles appeals the circuit court's grant of summary judgment in favor of his company's insurer, General Casualty. The

question is whether General Casualty engaged in bad faith when it failed initially to investigate reformation of the policy or when it later sought summary judgment declaring that it was not required to reform the policy. We conclude, based on the undisputed facts, that General Casualty did not engage in bad faith by failing initially to investigate reformation, but did engage in bad faith when it later sought summary judgment on reformation. Accordingly, we reverse the circuit court's judgment, and remand for further proceedings consistent with this opinion.

Background

¶2 George Choles is the owner of George's Flowers, Inc. George's Flowers had a commercial automobile policy with General Casualty. The policy covered a number of vehicles, including a Buick Park Avenue that served as both Choles' personal and business vehicle.

¶3 Choles' son, Constantine (Con), was in charge of obtaining insurance for George's Flowers. Con had purchased insurance for George's for about fifteen years, using the same agent most or all of the time. Regarding the Buick Park Avenue, Con told the agent that his parents needed "full coverage just like … if it's their own."

¶4 After Choles was injured while crossing the street, it was determined that his damages exceeded the car driver's coverage limits. Consequently, Choles filed an underinsured motorist claim with General Casualty under the commercial automobile policy.

¶5 General Casualty denied Choles' claim. The commercial automobile policy included only a limited form of uninsured and underinsured motorist coverage that did not cover Choles unless he was occupying an "out of service"

covered vehicle. In the parlance used by the parties, there was no "pedestrian coverage."

¶6 General Casualty sought a declaratory judgment that Choles was not covered under the commercial automobile policy. Choles initially admitted the basic allegations in General Casualty's complaint and asked the court to determine whether he was covered under the policy. Several months later, Choles counterclaimed, alleging that there had been a mutual mistake when the policy was purchased and that reformation of the policy to provide coverage was required. Choles alleged that both Con and his agent had intended there be coverage on the Park Avenue in the same manner as under a personal automobile insurance policy, which would have included the disputed pedestrian coverage. Choles further alleged that General Casualty engaged in bad faith.

¶7 Both parties moved for summary judgment on the reformation issue. The circuit court granted summary judgment in Choles' favor on reformation, concluding that reformation to provide pedestrian coverage was required.

¶8 Both parties subsequently moved for summary judgment on the bad faith claim. The court granted summary judgment to General Casualty, concluding that the undisputed facts showed that General Casualty had not engaged in bad faith. Choles appealed.

Discussion

¶9 We review a grant of summary judgment *de novo*, applying the same methodology as the circuit court. ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (Ct. App. 2007), *review denied*, 2010 WI 5, __ Wis. 2d __, __ N.W.2d __ (No. 2006AP1210). A party is entitled

to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. ***Id.*** In deciding whether there are factual disputes, the court considers whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. ***Id.*** We draw all reasonable inferences from the evidence in favor of the nonmoving party. ***Id.***

¶10 Because this case involves whether General Casualty engaged in bad faith in relation to the reformation of Choles' insurance policy, we first set forth some basic principles regarding reformation and bad faith. We then turn to the parties' more specific arguments.

¶11 In the insurance context, the party seeking reformation based on mutual mistake must prove that, because of a mutual mistake, the insurance policy does not contain provisions desired or intended to be included. ***Trible v. Tower Ins. Co.***, 43 Wis. 2d 172, 182, 168 N.W.2d 148 (1969). "'[L]ess is required [in the insurance context] to make out a cause of action for reformation than in ordinary contract disputes.'" ***Gilbert v. United States Fire Ins. Co.***, 49 Wis. 2d 193, 204, 181 N.W.2d 527 (1970) (citation omitted). One reason for this reduced standard is that it is common practice for the insured to "inform[] the agent of his coverage necessities and leave[] it entirely to the agent to provide therefor. The average individual accepts the policy tendered relying upon the assurance on the part of the insurer, express or implied, that the policy affords him the coverage desired." ***Id.*** (citations omitted).

¶12 The circuit court determined that reformation was required because of a mutual mistake between Con and the insurance agent, and General Casualty has not appealed that ruling. The question that remains is whether General

Casualty engaged in bad faith by failing initially to investigate reformation or by later seeking summary judgment on the issue of reformation. Thus, we turn to the law governing bad faith.

¶13 As applied to insurance providers, bad faith requires that an insurer (1) lacks a reasonable basis for denying benefits of the policy and (2) has "'knowledge [of] or reckless disregard'" for that lack of a reasonable basis. ***Poling v. Wisconsin Physicians Serv.***, 120 Wis. 2d 603, 607, 357 N.W.2d 293 (Ct. App. 1984) (citation omitted). Absence of a reasonable basis for denying a claim exists when the claim is not "'fairly debatable.'" ***Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.***, 2003 WI 46, ¶33, 261 Wis. 2d 333, 661 N.W.2d 789 (citation omitted). The insurer's conduct is measured against what a reasonable insurer would have done under the particular facts and circumstances to conduct a fair and neutral evaluation of the claim. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 378, 541 N.W.2d 753 (1995).

¶14 Choles argues, in essence, that there are two points in time at which General Casualty began engaging in bad faith. First, Choles contends that General Casualty had notice that it should investigate reformation when the agent telephoned a claims attorney for General Casualty on October 12, 2006, or, at the latest, when the agent telephoned again on January 31, 2007, and that the failure to investigate reformation based on these two telephone calls constituted bad faith. Second, Choles argues that General Casualty engaged in bad faith by filing its motion for summary judgment on reformation in November 2007 because, by that time, General Casualty was aware that there had been a mutual mistake regarding coverage. In both instances, Choles contends that the undisputed facts show bad faith and that he is entitled to summary judgment. General Casualty responds that the circuit court correctly determined that the undisputed facts show that General

Casualty did not engage in bad faith. We address Choles' two bad faith arguments below.

A. General Casualty's Initial Failure To Investigate Reformation

¶15 Choles' first argument assumes that bad faith on the part of an insurer can be deemed to commence when the insurer unreasonably fails to investigate the need to reform coverage. We will assume without deciding that this is correct. *Cf.* ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 692, 271 N.W.2d 368 (1978) ("It is appropriate, in applying the [bad faith] test, to determine whether a claim was properly investigated and whether the results of the investigation were subjected to a reasonable evaluation and review.").

¶16 It is undisputed that General Casualty did not initiate an investigation into the reformation issue until Choles filed his counterclaim seeking reformation in March 2007. Also undisputed is that the agent and a General Casualty claims attorney spoke on the telephone twice before that, on October 12, 2006, and on January 31, 2007. During the October 12 conversation, the agent expressed surprise to the claims attorney that Choles was not covered. During the January 31 conversation, the agent asked the claims attorney if the policy could be changed. During one or both of these conversations, the agent told the claims attorney that he had intended for Choles to have coverage.[1]

¶17 As indicated, Choles argues that General Casualty unreasonably failed to investigate the need for reformation based on the two telephone

[1] The claims attorney recalled the agent telling her some, but not all, of these things. Regardless whether this creates a factual dispute, we accept the agent's testimony as true for purposes of whether summary judgment should have been granted in General Casualty's favor.

conversations between the insurance agent and a General Casualty claims attorney. According to Choles, these conversations should have spurred General Casualty to investigate reformation, and the failure to do so satisfies the bad faith test. We disagree.

¶18 First, Choles points to no evidence that the insurance agent informed General Casualty during either conversation that the insured had requested the disputed coverage, either generally in the form of "full coverage" or more specifically in terms of uninsured/underinsured motorist coverage or pedestrian coverage. Second, even if the telephone conversations between the agent and the claims attorney might, if viewed in isolation, suggest to a reasonable insurer that reformation should be investigated, these conversations must be considered in light of the timing and contents of Choles' demand letter and his initial pleading, neither of which provided any suggestion to General Casualty that Choles was seeking reformation.

¶19 More specifically, on August 31, 2006, Choles' counsel wrote a demand letter to an adjuster General Casualty had hired. The letter read:

> I have received a copy of the General Casualty policy issued to George's Flowers, Inc. It is my understanding that General Casualty is denying the underinsured claim based on the theory that Mr. Choles was not an insured. *I have reviewed the policy* that was issued to Mr. Choles by General Casualty *and I see absolutely no basis of any sort for them to deny this claim*. You can let General Casualty know that if they deny this claim, I will not only file a lawsuit against them, but I will be filing a bad faith claim as well.

(Emphasis added.) Counsel did not demand reformation or allege any basis for reformation.

¶20 In response, General Casualty's claims attorney wrote to Choles' attorney on September 28, 2006, explaining in detail why General Casualty was denying Choles' claim based on the terms of the policy and inviting counsel to provide any additional information he believed was relevant to coverage. And, on October 3, 2006, General Casualty filed its suit seeking a declaratory judgment that Choles' policy did not provide coverage. On October 19, 2006, Choles filed his answer in which he admitted the basic allegations in General Casualty's complaint and requested that the court determine whether he was covered "under his policy with General Casualty." The answer did not, however, assert any affirmative defenses, counterclaims, or otherwise allege reformation.

¶21 Thus, by the date of the October 12 telephone conversation, Choles had already framed the parties' dispute in his demand letter in terms of whether the policy, *as issued*, provided coverage. By the date of the second telephone conversation, January 31, 2007, Choles had answered General Casualty's complaint without giving any indication that he might be seeking reformation. Although an insurer undoubtedly has an obligation to its insureds to fully and fairly investigate a claim, the insurer cannot be expected to follow every possible trail, no matter how faintly marked.

¶22 Choles points to evidence showing that the claims attorney was unaware of the law of reformation. We acknowledge that, had Choles been making a clearer case for reformation at the time of the telephone conversations, this evidence might be relevant to bad faith. Given Choles' demand letter and initial pleading, however, the evidence does not change our conclusion. Regardless whether the claims attorney was able to recognize a reformation issue when she saw one, Choles' letter and pleading made it reasonable for General Casualty not to investigate reformation at the time.

¶23 Finally, in the September 28, 2006, letter, counsel for General Casualty invited Choles' counsel to provide any additional information he believed was relevant to coverage and, apart from the telephone calls which we have already discussed, there was no effort to provide further details suggesting there was a mutual mistake.

¶24 Under these undisputed facts, we conclude that the only reasonable inference is that General Casualty did not engage in bad faith by failing to investigate reformation in response to the two telephone calls.

B. General Casualty's Motion For Summary Judgment On Reformation

¶25 We turn our attention to whether General Casualty engaged in bad faith by filing its motion for summary judgment on the reformation issue. According to Choles, the only reasonable inference is that General Casualty's pursuit of its motion constituted bad faith because, by this time, General Casualty was aware that there had been a "mutual mistake" regarding coverage as that term is used in reformation law. Choles relies on the following facts.

¶26 Con was deposed on June 28, 2007, and the insurance agent was deposed on September 27, 2007. Con averred that:

- He told the agent that the Buick Park Avenue was the car his parents would be using and that they needed "full coverage just like … if it's their own."
- By "full coverage," Con meant "[c]omprehensive coverage, liability, … underinsured, the works." Before the accident, Con had a specific communication with the agent regarding the need for underinsured and uninsured motorist coverage on the Park Avenue.
- He believed that an accident like his father's would be covered by uninsured or underinsured motorist coverage.

- Although he did not specifically request a business policy that would cover his father as a pedestrian, he believed, based on a conversation with his agent sometime during the previous ten years, that automobile insurance on a non-business vehicle would cover a pedestrian struck by an underinsured motorist.

The insurance agent averred that:

- He knew George Choles used the Buick Park Avenue as a private vehicle.
- Con told him that Con wanted "full coverage" for his parents.
- He intended that the policy provide "full coverage."
- He believed that the business policy he procured from General Casualty would provide the same uninsured and underinsured motorist coverage on the Park Avenue as if it had been a private vehicle.
- Under a privately owned vehicle policy, there would normally have been coverage, and he was surprised to learn about the gap in coverage.
- Had he known about the gap in coverage, he would have had the policy changed.
- As to pedestrian coverage specifically, he did not discuss it with Con and did not think about it.

¶27 In addition, General Casualty's claims counsel, Dan Seymour, was deposed. Seymour testified that he received a summary of both Con's and the agent's depositions and, therefore, he knew what both men said about their conversations and their intent. Seymour further testified that he was acquainted with the legal theory of mutual mistake and knew that reformation was a remedy. He agreed that the intent of an agent and an insured is material to what an insurance policy would cover, and he was familiar with reformation case law such as ***Trinity*** and ***Trible***.

¶28 Despite what Con's and the agent's depositions showed, General Casualty moved for summary judgment on the reformation issue. The circuit court granted summary judgment in favor of Choles—thereby granting reformation—on May 27, 2008. The circuit court wrote:

> To succeed in his reformation claim, Choles must demonstrate, by clear and convincing evidence[,] that he informed [the agent] of the coverage he desired and that [the agent] understood that request, but failed to obtain the coverage. The evidence before the court does exactly that; Con[] asked for "full coverage" on the Park Avenue. Both Con[] and [the agent] understood this to be a request for underinsured motorist coverage. Neither realized that the policy in question did not provide the mutually intended coverage. That the policy at issue failed to provide the requested coverage was the result of [the agent]'s mistaken belief that the *commercial* policy would provide the same coverage as a *private passenger* policy. This misunderstanding arises from a mutual mistake as to the coverage of a commercial policy, not any misunderstanding as to whether the Choles owned another automobile

¶29 We agree with the circuit court's reformation analysis. Indeed, the only reasonable reading of the averments is that Con requested "full coverage," that both Con and the agent believed that full coverage included uninsured and underinsured motorist coverage comparable to insurance on a non-business vehicle, and that both Con and the agent mistakenly believed that the business policy's uninsured and underinsured motorist clause would cover a pedestrian in Choles' situation.

¶30 General Casualty focuses on the part of the agent's testimony in which he said he did not think specifically about pedestrian coverage. Elsewhere, however, the agent makes clear that he shared Con's mistaken belief that the business policy *did* provide pedestrian coverage. The only reasonable reading of the agent's testimony is that he believed the policy would provide the same

uninsured and underinsured motorist coverage as if Choles' vehicle was a private vehicle and that, under a privately owned vehicle policy, Choles would have had pedestrian coverage.

¶31 General Casualty argues that it was at least debatable whether there was a "mutual mistake" because Con did not specifically discuss pedestrian coverage with the agent. According to General Casualty, showing a mutual mistake over coverage requires evidence of a specific discussion between the parties about the desired coverage. General Casualty cites ***Trinity***; ***Trible***; ***Frohna v. Continental Insurance Cos.***, 62 Wis. 2d 650, 215 N.W.2d 1 (1974); ***Samuels Recycling Co. v. CNA Insurance Cos.***, 223 Wis. 2d 233, 588 N.W.2d 385 (Ct. App. 1998); and ***Scheideler v. Smith & Associates, Inc.***, 206 Wis. 2d 480, 557 N.W.2d 445 (Ct. App. 1996), and argues that these cases can "reasonably be interpreted to require a specific conversation about the desired coverage between the insured and the agent" to show a mutual mistake.

¶32 General Casualty's discussion of case law inexplicably ignores ***Vandenberg v. Continental Insurance Co.***, 2001 WI 85, 244 Wis. 2d 802, 628 N.W.2d 876.[2] In ***Vandenberg***, our supreme court expressly rejected General Casualty's reading of ***Trible*** and, necessarily, General Casualty's corollary interpretations of other cases issued prior to ***Vandenberg***.

> In granting [the insurer]'s motion for summary judgment denying reformation, the circuit court focused on the following language in ***Trible*** that a mutual mistake must be proven for reformation:

[2] We note that neither party brought ***Vandenberg v. Continental Insurance Co.***, 2001 WI 85, 244 Wis. 2d 802, 628 N.W.2d 876, to the circuit court's attention.

> When a policy of insurance is involved, mutual mistake is proven when the party applying for insurance proves that he made certain statements to the agent concerning the coverage desired, but the policy as issued does not provide the coverage desired.

... The circuit court concluded that because the [insured and her husband] did not establish that they had made statements to [the agent] requesting [the disputed] coverage ..., they were not entitled to reformation.

The order of the circuit court makes clear that the circuit court was treating the express request described in ***Trible*** as the only type of evidence that would justify reformation of the insurance contract. *However, the conclusion in* ***Trible*** *that reformation was justified when there was an express request for coverage does not compel the conclusion that there can be no reformation without an express request.*

....

In ***Artmar, Inc. v. United Fire & Cas. Co.***, 34 Wis. 2d 181, 148 N.W.2d 641 (1967), the court stated that "[a] mistake due to the negligence of an agent ... is satisfactory ground for reformation, since the insured ordinarily relies upon the agent to set out properly the facts in the application." An action for reformation is permitted, stated the ***Artmar*** court, *when there is a mistake by an agent even though the mistake is not technically mutual.*

In ***Artmar*** *the insured could not positively assert that he had requested coverage for outbuildings. However, the insured alleged that he had always intended and believed that the insurance policy provided coverage for the outbuildings and that the policy did not provide coverage because of the mistake or neglect of the insurance agent.* This court affirmed the trial court's denial of the insurance company's motion for summary judgment. This court noted that the insurance agent had previously issued a policy that covered the outbuildings and that because the same agent drafted the earlier policy providing coverage, the agent knew that the insured wanted insurance coverage on the outbuildings. The ***Artmar*** decision makes clear that *reformation may be justified when the insured can demonstrate that there was an understanding regarding the desired coverage based on prior dealings, even in the absence of an express request for coverage.*

Vandenberg, 244 Wis. 2d 802, ¶¶50-55 (emphasis added; citation and footnotes omitted). Accordingly, ***Vandenberg*** makes clear that a specific request for the disputed coverage is not required.

¶33 We acknowledge that the supreme court had yet to decide ***Trinity*** at the time of the ***Vandenberg*** decision. But that fact does not help General Casualty because ***Vandenberg***'s discussion of ***Trible*** applies equally to ***Trinity***. As with ***Trible***, the conclusion in ***Trinity*** that reformation was justified when there was an express request for coverage "does not compel the conclusion that there can be no reformation without an express request." ***Vandenberg***, 244 Wis. 2d 802, ¶52.

¶34 We discern no other developed argument by General Casualty as to why it could have reasonably believed that "mutual mistake" was fairly debatable. In contrast, Choles' argument on this point is straightforward—mutual mistake was obviously present because Con requested "full coverage" comparable to coverage for a non-business vehicle, both Con and the agent believed the policy would provide the same uninsured and underinsured motorist coverage as if Choles' vehicle was a private vehicle, and both Con and the agent believed that under a privately owned vehicle policy Choles would have had pedestrian coverage. However, because of the mistake or neglect of the agent in failing to know or understand that a commercial policy would not provide the intended coverage, Choles did not obtain the intended coverage. In the absence of some additional developed argument to the contrary, we conclude that the undisputed

facts show that General Casualty lacked a reasonable basis for pursuing summary judgment on the issue of reformation.[3]

¶35 Moreover, we conclude that the only reasonable inference is that General Casualty pursued its summary judgment motion while either knowing or recklessly disregarding that it lacked a reasonable basis for doing so. This conclusion is supported in particular by Seymour's testimony. His testimony made clear that he was familiar with the pertinent facts demonstrating mutual mistake and that he knew or should have known of the pertinent law on the topic, yet General Casualty filed its summary judgment motion anyway.

Conclusion

¶36 In sum, for the reasons stated, we conclude that the only reasonable inference based on the undisputed facts is that General Casualty did not engage in bad faith by failing initially to investigate reformation, but did engage in bad faith when it later sought summary judgment on reformation. Accordingly, we reverse the circuit court's judgment, and remand for further proceedings consistent with this opinion.

[3] General Casualty offers an alternative ground for seeking summary judgment on reformation. It points to evidence that Con never read the policy and argues that, under ***Taylor v. Greatway Insurance Co.***, 2001 WI 93, 245 Wis. 2d 134, 628 N.W.2d 916, and ***Lenz Sales & Services, Inc. v. Wilson Mutual Insurance Co.***, 175 Wis. 2d 249, 258, 499 N.W.2d 229 (Ct. App. 1993), an insured's failure to read a policy may raise a defense to reformation. We reject this argument. ***Taylor***, which is not a reformation case, does not contain or suggest the proposition. To the extent ***Lenz*** does, *see* ***Lenz***, 175 Wis. 2d at 258, ***Lenz*** is inconsistent with longstanding supreme court case law. *See* ***Jewell v. United Fire & Cas. Co.***, 25 Wis. 2d 509, 516, 131 N.W.2d 276 (1964); ***Jeske v. General Accident Fire & Life Assurance Corp.***, 1 Wis. 2d 70, 90-92, 83 N.W.2d 167 (1957). General Casualty's attempt to distinguish ***Jewell*** and ***Jeske*** is undeveloped, superficial, and unpersuasive.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.